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ABATEMENT AND REVIVAL
TO
INDIANS

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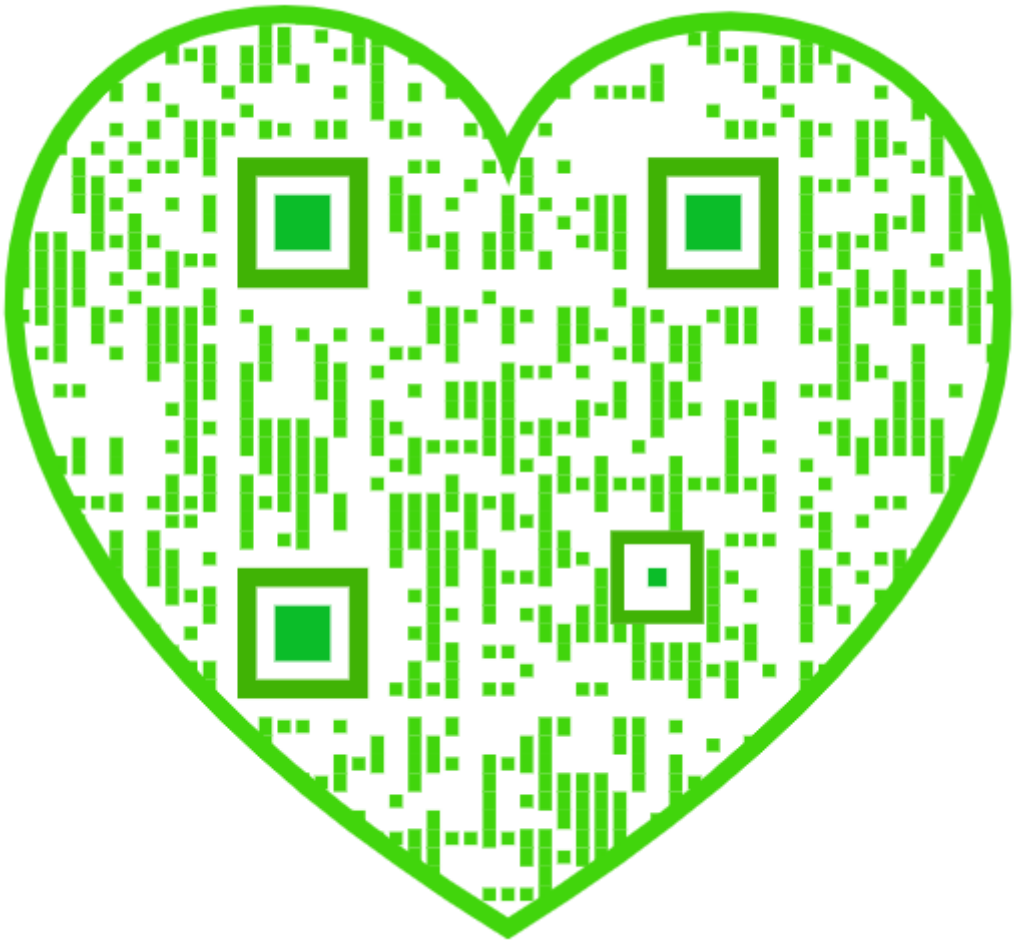

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CURRENT LAW.

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VOLUME III. SEPTEMBER, 1904. NUMBER 1.

ABATEMENT AND REVIVAL.

§ 1. Causes for Abatement (1).
§ 2. Raising Objections; Waiver (8).
§ 3. Survivability of Causes of Action (10).
§ 4. Revival and Continuation (10).

Scope.—It is not attempted here to treat of criminal prosecutions,[1] nor of bills of revivor,[2] or revival of judgments,[3] or of statute barred causes of action.[4] Various writs are abatable for defects, which matters are not germane to this title.[5]

§ 1. *Causes for abatement.*[6]—*The pendency of another action* between the same parties,[7] and for the same cause,[8] and prior in time,[9] is ground for abatement.

1. Indictment and Prosecution, 2 Curr. L. 307.
2. Equity, 1 Curr. L. 1066, et seq.
3. Judgments, 2 Curr. L. 598.
4. Limitation of Actions, 2 Curr. L. 757.
5. Attachment and like titles.
6. See 1 Curr. L. 1.

7. Where a party is plaintiff in one action and defendant in a subsequent one relating to the same subject-matter in which she sets up in defense the same matters she alleged in her complaint, a plea of prior action pending is not available as against the defense. Rodney v. Gibbs [Mo.] 82 S. W. 187. The pendency of a prior action between the same parties is ground for abatement. Cahill v. Cahill [Conn.] 57 A. 284. It is between the same parties when the defendant is the successor in interest of the defendant in the former suit. Wetzstein v. Boston & M. Consol. Copper & Silver Min. Co., 28 Mont. 451, 72 P. 865. The issues in a suit in partition were identical and the real parties in interest the same, though in the later case the plaintiff had joined some nominal parties. Guinn v. Elliott [Iowa] 98 N. W. 625. The pendency of an appeal by a creditor from a judgment in favor of a garnishee is not ground for abatement of an action brought in the same court against the garnishee by the debtor, but such action should be postponed until the appeal is decided (Rieden v. Kothman [Tex. Civ. App.] 73 S. W. 425); nor can a suit by an administrator be pleaded in abatement to a suit by the heirs under circumstances of this case (Row v. Johnson, 25 Ky. L. R. 1799, 78 S. W. 906).

8. Where one had filed an intervening petition asking to have claims allowed out of the assets in the hands of a receiver, and after an order of the court so directing, creditors brought suit in a state court therefor, and then filed a supplemental intervening petition asking that their claim be declared a preferential one, one suit could not be pleaded in abatement to the other. Trimble v. Kansas City P. & G. R. Co. [Mo.] 79 S. W. 678. Pendency of a suit by an executrix on a benefit insurance policy, claiming that children of the insured were entitled to all the insurance and making defendants others named as beneficiaries, and claiming part of the insurance, does not prevent such others from maintaining an original bill, especially where after the death of the insured they had assigned a part of their claim to a third party not made a party defendant by the testatrix. Clement v. Clement [Tenn.] 81 S. W. 1249. The pendency of a suit to enjoin the removal of ore from a mining claim as ancillary to an action of ejectment to recover possession of the part from which the ore was being taken is not a bar to a suit to quiet title to the entire claim, including extralateral rights not in controversy in the prior action. Empire State-Idaho Min. & D. Co. v. Bunker Hill & S. M. & C. Co. [C. C. A.] 121 F. 973. Administratrix sued for a lien, and the heirs to be adjudged the owners, not the same cause. Row v. Johnson, 25 Ky. L. R. 1799, 78 S. W. 906. An action for libel pending against a party for a publication on a certain day will not abate the entire action against another for the same publication on the same and other days. Holmes v. Clisby, 118 Ga. 820, 45 S. E. 684. Action to foreclose a mortgage and an action in ejectment. Howard v. Hewitt, 139 Cal. 614, 73 P. 414. Action by an agent for value of services no bar to an action by the principal for an accounting. Jordan v. Underhill, 91 App. Div. 124, 86 N. Y. S. 620. An action for unexcused neglect to present a will to probate no bar to an action for unexcused neglect to accept the trust or give notice of his refusal to accept. Richardson v. Fletcher [Vt.] 56 A. 981. Where misconduct is set up as a counterclaim in an action for services, it cannot be used again as to different items in a subsequent action on the judgment rendered therein. Newman v. Gates [Ind. App.] 67 N. E. 468. The pendency of an action commenced by a testator to enjoin the operation of an elevated railroad in front of his premises is no bar to a suit by a testator's devisee for injunctive relief and the recovery of damages sustained since he acquired title. Hirsh v. Manhattan R. Co., 84 App. Div. [N. Y.] 374, 13 N. Y. Ann. Cas. 158, 82 N. Y. S. 754. An action by a minor to

They must be so far identical that a recovery in one action would bar a recovery in the other,[10] or the proof in one would sustain the other.[11]

In Oregon, an action is pending after the complaint is filed.[12] The mere fact that a summons has been served,[13] or that an action has been begun in which there are several co-defendants,[14] does not show a pendency,[15] but an action is still pending, though appealed.[16] Real actions are pending, though a party has died.[17] If discontinued or otherwise terminated, the suit or action is no longer pending,[18] but

recover his homestead interest is not abated because of an action pending by his mother to recover her rights. Upton v. Gerber [Mich.] 98 N. W. 854. A pending suit against legatees and creditors of an estate for settlement of the estate in which deceased's agent is made a party in order to dispose of a claim due the agent by the estate cannot be pleaded in bar of a suit by the personal representative of the estate against such agent for an accounting. Causes of action are not identical. Botto's Ex'r v. Botto, 26 Ky. L. R. 2130, 80 S. W. 174. A rule to open judgment held under advisement is a bar to a bill in equity for the same relief. Freeman v. Lafferty, 207 Pa. 32, 66 A. 230. A plea of pendency of an appeal from the vacation of an attachment is no defense to an action on the attachment bond unless coupled with an allegation that there was also a stay of proceedings. Powell v. Bursky, 39 Misc. 633, 39 N. Y. S. 480. Where rights of an insured's children and his executor could not be determined in an action at law brought by the widow on the policy, they having no present right of action, such action was no bar to a suit to cancel the policy for fraud. Mutual Life Ins. Co. v. Blair, 130 F. 971. Where equity has obtained jurisdiction of parties and subject-matter to cancel an insurance policy for fraud, the fact that the insured died before answer, and that an action at law was then commenced on the policy in which all the company's defenses in the equity suit were available, did not deprive equity of jurisdiction to proceed with the controversy. Id. Where insured died after commencement of an action to cancel the policy for fraud but before answer, whereupon an action on the policy was brought, a plea in bar alleging the insured's death and the pendency of such action at law was not available to present the objection that the bill was not sustainable for want of equity. Id. In an action by the administrator de bonis non against the sureties on the bond of the administrator, the defendants by pleading in bar and not in abatement admit the plaintiff's capacity to sue. Romy v. State [Ind. App.] 67 N. E. 998. The pendency of an appeal from a judgment against a principal will not abate an action against the surety if the amount of the default could not be found at the time the judgment was rendered. Frazer v. Frazer, 25 Ky. L. R. 473, 76 S. W. 13.

9. The plea of pendency of another action can only be supported by a showing that the former action was pending when the second action was begun. Hirsh v. Manhattan R. Co., 84 App. Div. 374, 13 N. Y. Ann. Cas. 158, 82 N. Y. S. 754.

Where a plea of abatement was filed in each of two actions pending and the suits were each first in point of time as to some of the parties, the last on the docket should be abated (Guinn v. Elliott [Iowa] 98 N. W. 625), or if jurisdiction had not been obtained in one, it should be abated. Where two actions in partition were pending at the same time, but in one of them no jurisdiction had been obtained over a party who had an interest in the land, the plea in abatement in the other suit should have been overruled (Id.).

10. Action on a supersedeas bond not defeated by the pendency of an action in which the damages recoverable on the supersedeas bond were expressly reserved and deducted. Metcalf v. Bockoven [Neb.] 96 N. W. 406. An action is for the same cause if one could have obtained in the former all the relief he claims in this, though extra relief is asked in the latter but the pleading does not state a cause of action therefor. Wetzstein v. Boston & M. Consol. Copper & Silver Min. Co., 28 Mont. 461, 72 P. 866. An accounting was asked in the second but not in the first. Id. See Former Adjudication, 2 Curr. L. 64, § 3.

11. One filed an application for a patent for a mining claim, the survey of which conflicted with two locations of another who filed an adverse claim on behalf of each and brought a suit in support of each. The survey in the later application conflicted at different points with the two claims. The proof in each case would be different as would the relief. Not pending. Mares v. Dillon [Mont.] 75 P. 963. Where two suits were brought for failure to deliver different messages, a plea in abatement to the latter on the ground of prior action pending was properly overruled. Western Union Tel. Co. v. Crumpton, 138 Ala. 632, 36 So. 517.

12. In Oregon, pending when complaint is filed with clerk of court [B. & C. Comp. §§ 51, 396]. Posson v. Guaranty, S. & L. Ass'n [Or.] 74 P. 923.

13. A mere showing that a summons in another action has been served is not sufficient to support the plea of the pendency of another action. Hirsh v. Manhattan R. Co., 84 App. Div. 374, 13 N. Y. Ann. Cas. 158, 82 N. Y. S. 754.

14. Action not pending against a defendant in a partition suit of real estate, not yet served with process, nor against his grantee. Hart v. Hart, 86 App. Div. 236, 83 N. Y. S. 897.

15. As to when an action is commenced, see Actions, and especially Limitations, 2 Curr. L. 755.

16. Tinker v. Babcock, 204 Ill. 671, 68 N. E. 445. An action is pending where it is before the supreme court undetermined. Code Civ. Proc. § 1895, providing that it is pending from commencement until final determination. Wetzstein v. Boston & M. Consol. Copper & Silver Min. Co., 28 Mont. 451, 72 P. 865.

17. An action for land continues in force as a pending suit after the death of the defendant until lost by the laches of the litigants in failing to make new parties. Jones v. Robb [Tex. Civ. App.] 80 S. W. 395.

18. Johnson v. Central of Georgia R. Co.,

failure to prosecute an action during the period of the Civil War did not destroy its pendency.[19] The plea is good as to one of several counts.[20]

The pendency of a suit in a state court is not a bar to one on the same cause of action in a Federal court,[21] and diversity of citizenship does not change this rule

119 Ga. 185, 45 S. E. 988. Where a statute gave a creditor the election to charge a stockholder with the amount of the judgment recovered against the corporation on a debt, or to proceed against the stockholder on the debt, a reversal of the judgment after proceedings have been commenced thereon leaves the creditor free to proceed on the debt. Thomas v. Remington Paper Co., 67 Kan. 599, 73 P. 909. Where a bill to foreclose a mortgage was dismissed without prejudice to plaintiff's right to try the validity of a deed, a plea of former suit pending in a subsequent action to set aside the deed cannot be sustained. Parlin & Orendorff Co. v. Hutson, 198 Ill. 389, 65 N. E. 93. A supplementary intervening petition was an abandonment of the first intervening petition, so it was not pending. Trimble v. Kansas City, P. & G. R. Co. [Mo.] 79 S. W. 678. While an appeal was pending, a new one was taken and thereafter a motion to dismiss was served by the respondent, but on oral argument the appellant's counsel stated that they abandoned the first appeal: the prosecution of the later appeal was not prevented. Noble v. Whitten [Wash.] 76 P. 95.

19. Failure to press suit between 1866 and 1870 was, in view of the disturbed conditions then existing, not such negligence as to destroy the force of the action as a pending suit. Jones v. Robb [Tex. Civ. App.] 80 S. W. 395.

20. Where a cause of action set out in a plea in abatement as a bar to an action pending was identical to that part of the case at bar to which the plea was applicable, the plea was sustained. Cornick v. Arthur, 31 Tex. Civ. App. 579, 73 S. W. 410. Where a plea of former action pending is sustained as to one count in a declaration, a review of the order quashing the count may be had after final judgment by writ of error. Upton v. Gerber [Mich.] 98 N. W. 854.

21. Action to enjoin one from making brick in violation of his contract not to do so. Robinson v. Suburban Brick Co. [C. C. A.] 127 F. 804. Action under a state statute to wind up a banking corporation does not operate to dissolve the corporation at once, so as to prevent the rendition of a judgment against it in a Federal court Anglo-American Land M. & A. Co. v. Cheshire Provident Institution, 124 F. 464.

NOTE: Although there is undoubtedly some conflict, the decided weight of authority, as well as the trend of all modern adjudication, is unquestionably in favor of the doctrine stated in the text. Under the great majority of the authorities, it seems to make no difference whether the two courts are sitting in different states, or whether they are held for the same state and within the same territory, or whether such courts are to be considered foreign to each other or not. Among the cases from the national courts which hold that the pendency of proceedings in a state court cannot be pleaded in abatement of an action in a national court, we cite the following: Mercantile Trust Co. v. Lamoille Val. R. Co., 16 Blatchf. 324, Fed. Cas. No. 9,432; Andrews v. Smith, 19 Blatchf. 100, 5 F. 833; Chamberlain v. Eckert, 2 Biss. 124, Fed. Cas. No. 2,576; Scottish-American Mortg. Co. v. Follansbee, 9 Biss. 432, 14 F. 125; Union Mut. Life Ins. Co. v. University of Chicago, 10 Biss. 191, 6 F. 443; In re Bininger, 7 Blatchf. 168, Fed. Cas. No. 1,419; Campbell v. Emmerson, 2 McLean, 30, Fed. Cas. No. 2,357; Certain Logs of Mahogany, 2 Sumn. 589, Fed. Cas. No. 2,559; Wadleigh v. Veazie, 3 Sumn. 165, Fed. Cas. No. 17,031; Weaver v. Field, 4 Woods, 152, 16 F. 22; Loring v. Marsh, 2 Cliff. 311, Fed. Cas. No. 8,514; Stewart v. Chesapeake & O. Canal Co., 4 Hughes, 41, 1 F. 361; Sharon v. Hill, 10 Sawy. 394, 22 F. 28; Parsons v. Greenville & C. R. Co., 1 Hughes, 279, Fed. Cas. No. 10,776; Greenwood v. Rector, Hempst. 708, Fed. Cas. No. 5,792; Union Bank v. Jolly's Adm'rs, 18 How. [U. S.] 503; Hyde v. Stone, 20 How. [U. S.] 170; Wallace v. McConnell, 13 Pet. [U. S.] 136; The Kalorama, 10 Wall. [U. S.] 204; Cook v. Burnley, 11 Wall. [U. S.] 659; Stanton v. Embrey, 93 U. S. 548-554; Gordon v. Gilfoil, 99 U. S. 168; Rio Grande R. Co. v. Gomila, 132 U. S. 478; Hughes v. Elsher, 5 F. 263; Latham v. Chafee, 7 F. 520; Crescent City Live Stock, L. & S. H. Co. v. Butcher's Union Live Stock, L. & S. H. Co., 12 F. 225; Currie v. Lewiston, 15 F. 377; Weaver v. Field, 16 F. 22; Claflin v. Lisso, 16 F. 897; Chewett v. Moran, 17 F. 820; Hurst v. Everett, 21 F. 218; Brooks v. Vermont Cent. R. Co., 22 F. 211; Washburn & M. Mfg. Co. v. Scutt, 22 F. 710; Hauf v. Wilson, 31 F. 384; Beckman v. Hudson River W. S. R. Co., 35 F. 3; Pierce v. Feagans, 39 F. 587; Rawitzer v. Wyatt, 40 F. 609; Converse v. Michigan Dairy Co., 45 F. 18; Coe v. Aiken, 50 F. 640; Gilmour v. Ewing, 50 F. 656; Briggs v. Stroud, 58 F. 717; Blydenstein v. New York Security & T. Co., 59 F. 12; Rejall v. Greenhood, 60 F. 784; Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co., 61 F. 199; Short v. Hepburn, 75 F. 113; Compton v. Jesup [C. C. A.] 68 F. 263; Hughes v. Green, 75 F. 691; Holton v. Guinn, 76 F. 96; Wonderly v. Lafayette County, 77 F. 665; Zimmerman v. So Relle [C. C. A.] 80 F. 417; Brendel v. Charch, 82 F. 262; Hughes v. Green [C. C. A.] 84 F. 833; Railroad & Telephone Cos. v. Board of Equalizers, 85 F. 302, 318; Green v. Underwood, 86 F. 427. Similar rulings have been made in many of the state courts, when the pendency of proceedings in a national court has been set up as a defense or in abatement of an action. The following cases hold that the pendency of such proceedings is not a bar: People v. Judge of Wayne Circuit Court, 27 Mich. 406, 15 Am. Rep. 195; Mitchell v. Bunch, 2 Paige [N. Y.] 606, 22 Am. Dec. 669; International & G. N. R. Co. v. Barton, 24 Tex. Civ. App. 122, 57 S. W. 292; State v. New Orleans & N. E. R. Co., 42 La. Ann. 11, 7 So. 84; Nichols v. Marsh, 61 Mich. 509, 28 N. W. 699; Utica Clothes Dryer Mfg. Co. v. Otis, 37 Hun, 301; Kilpatrick v. Kansas City & B. R. Co., 38 Neb. 620, 57 N. W. 664, 41 Am. St. Rep. 741; Caine v. Seattle & N. R. Co., 12 Wash. 596, 41 P. 904; Checkley v. Providence & S. S. Co., 60 How. Pr. [N. Y.] 510; Clark v. Comford, 45 La. Ann. 502, 12 So. 763; Hampton's Heirs v. Barrett, 12 La. 159; Loyd v. Reynolds, 29 Ind. 299; McGeorge v.

where the state court is without jurisdiction to enforce the remedy demanded;[22] but where a prior action involving the same issues has been removed to a Federal

Hancock Steel & Iron Co., 11 Phila. [Pa.] 602; McRee v. Brown, 45 Tex. 503; Oneida County Bank v. Bonney, 101 N. Y. 173, 4 N. E. 332; Russell v. Alvarez, 5 Cal. 48; Seymour v. Bailey, 66 Ill. 288; Sullings v. Goodyear Dental Vulcanite Co., 36 Mich. 313; Villavaso v. Barthet, 39 La. Ann. 247, 1 So. 599; Wood v. Lake, 13 Wis. 84; Wurtz v. Hart, 13 Iowa, 515. Some cases have put their decision upon the ground that such courts were foreign to each other: Wood v. Lake, 13 Wis. 84; Hampton's Heirs v. Barrett, 12 La. 159; Latham v. Chafee, 7 F. 520; Wadleigh v. Veazie, 3 Sumn. 165, Fed. Cas. No. 17,031; Lynch v. Hartford Fire Ins. Co., 17 F. 627. While other courts maintaining the same doctrine contend that such courts are not foreign to each other: Brooks v. Mills County, 4 Dill. 524, Fed. Cas. No. 1,955; Pierce v. Feagans, 39 F. 587; Coe v. Aiken, 50 F. 640; Marshall v. Otto, 59 F. 249. Other courts decide that the pendency of a prior suit in a state court is not a bar to a suit in a national court on the same cause of action, without any discussion of the relation of such courts to each other: Crescent City Live Stock, L. & S. H. Co. v. Butchers' Union Live Stock, L. & S. H. Co., 12 F. 225; Stanton v. Embrey, 93 U. S. 548; Latham v. Chafee, 7 F. 520; Rawitzer v. Wyatt, 40 F. 609; Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co., 61 F. 199. It has also been held that state and national courts are entirely independent of each other, and that the United States circuit courts cannot be called upon to close their doors to suitors because the questions which they seek to litigate are also involved in another action in the state court: Currie v. Lewiston, 15 F. 377; Gordon v. Gilfoil, 99 U. S. 168; Sharon v. Hill, 22 F. 28, 10 Sawy. 394. And it has also been held that the pendency of the same action in a state court is not a good plea in abatement in a national court, though it has concurrent jurisdiction with the state court: City of North Muskegon v. Clark, 62 F. 694. The pendency of a suit in equity in a state court cannot be pleaded in abatement or bar of a similar suit involving the same subject-matter, and between the same parties in a national court: Latham v. Chafee, 7 F. 520. And that the pendency of an equity action in a state court cannot be pleaded as a defense to a common-law action in a national court has been held in some cases: Andrews v. Smith, 19 Blatchf. 100, 5 F. 833; Loring v. Marsh, 2 Cliff. 311, Fed. Cas. No. 8,514; Green v. Underwood, 86 F. 427; Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co., 61 F. 199. Some consideration is due those cases which hold that the pendency of an action is a defense to another proceeding if one is in the national court and the other is in the state court of the same territorial jurisdiction, and if in both suits the cause of action and the parties are the same or the parties in one are privies to the other. It will be noticed that nearly all of the cases maintaining this doctrine are of early date, and their effect is certainly weakened, if not destroyed, by the later decisions in both state and national courts, which have been heretofore cited, particularly Gordon v. Gilfoil, 99 U. S. 168. The following cases support the rule under consideration, maintaining that an action pending in one court may be pleaded in abatement of a suit in another: Smith v. Atlantic Mut. Fire Ins. Co., 22 N. H. 21; Radford v. Folsom, 14 F. 97; Mallett v. Dexter, 1 Curt. 178, Fed. Cas. No. 8,988; Memphis City v. Dean, 8 Wall. [U. S.] 64; Central R. Co. v. New Jersey West Line R. Co., 32 N. J. Eq. 67; Martin v. Baldwin, 19 F. 340; Nelson v. Foster, 5 Biss. 44, Fed. Cas. No. 10,105; Lawrence v. Remington, 6 Biss. 44, Fed. Cas. No. 8,141; Ex parte Balch, 3 McLean, 221, Fed. Cas. No. 790; Earl v. Raymond, 4 McLean, 233, Fed. Cas. No. 4,243. In several late cases the practice has been followed of suspending action in the second suit until the first is determined. See Zimmerman v. So Relle [C. C. A.] 80 F. 417; Hughes v. Green [C. C. A.] 84 F. 833. In Green v. Underwood [C. C. A.] 86 F. 427-429, it was said that "no rule of practice is better settled than that in an action at law in personam pending in the United States court, the plea of lis pendens between the same parties in a suit brought in the state court is no bar to the prosecution of an action in the United States court. This court has, in an equity proceeding, held that where there was pending in a state court, between the same parties, a proceeding in equity involving the same matters, such as the possession of specific real or personal property, or to quiet the title to real estate, in which it might become necessary to appoint a receiver pendente lite, or in which it might become necessary to grant an injunction, or to take some other preservative auxiliary action, the court which first acquires jurisdiction of the parties of the subject-matter ought to be permitted to proceed to final judgment. But even in a court of chancery, where the rules of equity possess such flexibility as to permit the court to proceed ex aequo et bono, with large discretion, to preserve the rights of the parties, it will not, upon the plea of lis pendens, dismiss the suit in the Federal court, but will simply postpone the hearing thereof until the hearing and determination of the suit in the state court." And in Zimmerman v. So Relle [C. C. A.] 80 F. 420, the court said: "Indeed, considering the numerous reasons which may render it advisable and not improper to commence a second suit, although a prior suit is pending in which the plaintiff's rights may be fully adjudicated, we think it is the better practice in all cases to pursue the course last indicated when a plea of lis pendens is interposed and sustained. The mere pendency of a second suit, if no action is taken therein, does not affect the orderly prosecution of the first suit, and the court is much better able to determine after the first suit is ended, whether it is necessary or proper to grant further relief in the action which was last brought."

Foreclosure proceedings: The cases are agreed that the pendency of a suit in a state court for the foreclosure of a mortgage is not a bar to a suit in a national court between the same parties for the foreclosure of the same mortgage: Weaver v. Field, 4 Woods, 152, 16 F. 22; Mercantile Trust Co. v. Lamoille Val. R. Co., 16 Blatchf. 324, Fed. Cas. No. 9,432. Thus the pendency in the state courts of a suit by the trustees of a railroad mortgage to foreclose is not a bar to a similar suit in a national court by a bondholder secured thereby: Beekman v.

court and is there pending, a state court will suspend trial pending its termination.[23] The pendency of an action in which the right sought to be determined can-

Hudson River W. S. R. Co., 35 F. 3. If a mortgagee sues to foreclose in a national court, and makes judgment creditors of the mortgagor's grantor parties defendant, the suit will not be postponed until the termination of proceedings instituted by these creditors in a state court to establish their liens on the land, to which proceedings the mortgagee is not a party: Converse v. Michigan Dairy Co., 45 F. 18. And the pendency in a state court of a suit to settle priorities between lienholders upon property, even though the bill prays the appointment of a receiver, does not defeat the jurisdiction of the United States court in a suit brought for the foreclosure of a trust and sale of the property, especially when the proceeding in the state court has been pending for several years, and its object is practically accomplished: Stewart v. Chesapeake & O. C. R. Co., 4 Hughes, 41, 1 F. 361. Pendency of a former suit in a state court brought by the mortgagors against the trustee in a deed of trust and others, to restrain such trustees from selling the property under a power of sale, is no defense to a suit to foreclose the mortgage in a national court, especially when the parties are not identical: Pierce v. Feagans, 39 F. 587. In this case the court said: "Again, the suit in the state court is pending in a different jurisdiction. It is now well settled that the pendency of a suit in a state court cannot be taken advantage of by way of a plea of lis pendens to defeat a suit of the same nature, and between the same parties, in the Federal courts. The two courts, though not foreign to each other, belong to different jurisdictions in such sense that the doctrine of lis pendens is inapplicable:" Pierce v. Feagans, 39 F. 587; and to the same effect is the case of Wood v. Lake, 13 Wis. 84, and Seymour v. Bailey, 66 Ill. 288.

Different parties: A suit pending in a state court between parties not the same as in a suit in a national court cannot be pleaded in abatement in the latter court: Cook v. Burnley, 11 Wall [U. S.] 659; Hay v. Alexandria & W. R. R. Co., 4 Hughes, 331, Fed. Cas. No. 6,254a; Brooks v. Mills County, 4 Dill. 524, Fed. Cas. No. 1,955. State and national courts are entirely independent of each other, and the national courts cannot be called upon to close their doors to suitors simply on the ground that the questions which they seek to litigate are also involved in other actions between different parties in the courts of the state: Currie v. Lewiston, 15 F. 377. The pendency of other proceedings by other parties in a state court is not a defense to an action in the national court where the object of the second suit is not to affect the possession of the other court in respect to the matter in litigation: Parsons v. Greenville & C. R. Co., 1 Hughes, 279, Fed. Cas. No. 10,776; Loyd v. Reynolds, 29 Ind. 299; Andrews v. Smith, 19 Blatchf. 100, 5 F. 833; Washburn & M. Mfg. Co. v. Scutt, 22 F. 710. Some courts have gone so far as to hold that the reversal of the names of the parties plaintiff and defendant in the two actions make the parties different: Certain Logs of Mahogany, 2 Sumn. 589, Fed. Cas. No. 2,559; Barr v. Chapman, 5 Ohio Circ. R. 69. In the latter case the court said: "It seems to be the established doctrine of the law that the pendency of one suit cannot be successfully pleaded in abatement or in bar of a second suit between the same parties unless it appear that the second suit was by the same plaintiff, against the same defendant, and for substantially the same cause of action, which cannot be the case when the parties are reversed." In many cases, however, first cited in this note, no attention was paid to the fact that the parties plaintiff and defendant were reversed in the two actions, and the courts seem to have deemed them the same parties when deciding that the pendency of an action in one court was no cause for the abatement of the action in the other.

Attachment and garnishment: In an action on a debt in a national court, it is no defense that the debtor has been garnished in a state court in a pending action by a creditor of the plaintiff: McRee v. Brown, 45 Tex. 503. A suit brought in a national court on a note is not ground for a plea in abatement of a subsequent suit in a state court by attachment against the defendant garnishing money in his hands: Campbell v. Emerson, 2 McLean, 30, Fed. Cas. No. 2,357. In a suit in a national court by the holder of a note against the maker, it is no defense that a creditor of the original payee has endeavored to attach the same note by bill in equity in the state court, making the payee a party by publication, and has afterward filed a supplemental bill in the state court endeavoring to enjoin the attorneys in the national court from collecting it: Hauf v. Wilson, 31 F. 384. The defendant in a national court in an action of assumpsit cannot plead in abatement that a writ of garnishment was afterward sued out of the state court and is still pending: Greenwood v. Rector, Hempst. 708, Fed. Cas. No. 5,792; Freeman, Executions (3d Ed.) 826. In the suit on an insurance policy in a national court a plea that the money has been previously attached or garnished in a state court in an action yet pending is not a good plea in abatement. In such case the two courts are foreign to each other: Lynch v. Hartford Fire Ins. Co., 17 F. 627. The jurisdiction of a national court having attached in an action on a note cannot be arrested or taken away by any subsequent garnishment in a state court: Wallace v. McConnell, 13 Pet. 136; Certain Logs of Mahogany, 2 Sumn. 589, Fed. Cas. No. 2,559.

Creditors' bills: The pendency of a general creditor's bill against a defendant in a state court, accompanied by the usual orders of injunction, does not necessarily forbid a creditor who is not a party to the bill from suing the defendant in a national court, especially when the prosecution of the latter suit is merely for obtaining judgment, and is by proceeding not affecting the property of the defendant: Parsons v. Greenville & C. R. Co., 1 Hughes, 279, Fed. Cas. No. 10,776. In Rejall v. Greenhood, 60 F. 784, it appeared that a creditor's bill filed in a national court alleged that one of the defendants therein had made an assignment, in which the plaintiff was a preferred creditor, and that the other defendants, though having notice of this assignment, had taken possession of the property and had converted a part of it. The defendants filed a plea alleging that they had sued in the state court to have the as-

not be litigated and which must be dismissed for want of jurisdiction is not a bar to a subsequent action.[24] An action in a state court against receivers appointed by a Federal court will not abate by the transfer of the property and discharge of the receivers.[25] An action by stockholders on behalf of themselves and other stockholders against the corporation for an accounting and to set aside a mortgage is not dismissible because a director had commenced an action for the same relief;[26] but the trial should have been deferred until a determination of the other action.[27] A suit by a receiver against a stockholder for an assessment is not a bar to a suit by the stockholder as a depositor to recover the amount of a deposit.[28] The rule of lis pendens has no application where it is sought to abate the prior suit.[29]

signment set aside as fraudulent, and that a receiver had been appointed in such suit. The court held that the pendency of this suit was no bar to the bill in the national court, especially as the plaintiff was not a party in the state court. A bill in equity in a state court to prevent creditors from obtaining more than their share under a general assignment, by reason of their having securities, is not abated by a suit pending by the same plaintiffs in the district court of the United States, to set aside the assignment as fraudulent and void: Wurtz v. Hart, 13 Iowa, 515. In a suit in a national court by a nonresident creditor to set aside a trust deed made by his debtor, it is no defense that prior proceedings are pending in a state court under an assignment for creditors made by the debtor: Gould v. Mullanphy Planing-Mill Co., 32 F. 181. And the jurisdiction of a national court, previously acquired, cannot be ousted by proceedings in insolvency in state courts, if the parties invoking such jurisdiction have not participated in the insolvency proceedings: Claflin v. Lisso, 16 F. 897.

Admiralty cases: Pendency of a libel in admiralty against a vessel is no bar to an attachment suit at law in a state court against the owners for the same cause of action: Wolf v. Cook, 40 F. 432. In an action for freight money brought in a state court, it is not a sufficient answer to allege that the vessel has been libeled for the nondelivery of freight in a national court, as both actions may proceed at the same time without danger of a clash of jurisdiction: Russell v. Alvarez, 5 Cal. 48. In an action in a state court for services in fitting out a vessel, defendant cannot plead in abatement the pendency of an action in rem for the same matter in a national court: People v. Judges of Wayne County, 27 Mich. 406, 15 Am. Rep. 195. A suit in a state court by replevin or attachment against a vessel cannot supersede the right of a court of admiralty to proceed by a suit in rem to enforce a right or lien against such vessel: Certain Logs of Mahogany, 2 Sumn. 589, Fed. Cas. No. 2,559; The Kalorama, 10 Wall. [U. S.] 204; Caine v. Seattle & N. R. Co., 12 Wash. 596, 41 P. 904.

Probate matters: The pendency of a suit in a state court for the construction of a will cannot be pleaded in abatement or bar of a similar suit involving the same will in a national court: Loring v. Marsh, 2 Cliff. 311, Fed. Cas. No. 8,514. The pendency of administration proceedings in a state probate court does not bar proceedings in national courts involving the same issues: Holton v. Guinn, 76 F. 96. Pending the settlement of an estate in a state probate court, a citizen of another state, who is a legatee under the will, may maintain a suit in a national court against the resident executor and other legatees and heirs to recover such legacy: Brendel v. Charch, 82 F. 262. In a suit in a national court to subject land in the hands of heirs to the payment of their ancestor's debt, it was held that proceedings in a state court to settle the estate, limiting the time within which creditors should present their claims and the discharge of the administrator before the filing of the bill, did not bar the action in the national court, if the complainant did not prove his claim in the state court, and allowed the time limited for the proof of claims to expire. The court also held that the jurisdiction of the national court could not be affected by any provision of the state law requiring creditors to appear before the state court and present their claims: Chewett v. Moran, 17 F. 820. If a bill is brought in a national court to set aside an alleged fraudulent appointment under a will, and to enforce the rights of a distributee in the estate, a plea in abatement merely alleging the pendency of prior proceedings in the probate court of another state, without distinctly showing that that court has possession of the res, cannot be sustained: Briggs v. Stroud, 58 F. 717.

Judgments: The fact that one is suing in a state court upon a judgment of a national court does not prevent him from proceeding at the same time in a national court to revive the judgment by scire facias. This results from the rule that the pendency of another suit between the same parties respecting the same subject-matter in a state court is no bar to a proceeding in a United States court: Wonderly v. Lafayette County, 77 F. 665.

—From note to Wilson v. Milliken [Ky.] 82 Am. St. Rep. 578. And see, also, the same case annotated in 42 L. R. A. 449.

22. Treble damages under the Sherman Anti Trust Act. D. E. Loewe & Co. v. Lawlor, 130 F. 633.

23. Suit pending in Federal court at time later case was noticed for trial. City of Ashland v. Wis. Cent. R. Co. [Wis.] 98 N. W. 532.

24. A gas company brought suit in a Federal court on two grounds, one of which was constitutional and which was determined adversely to it and the case dismissed without prejudice to try the other question in the proper forum. They took an appeal from such dismissal, pending which a stockholder brought this action. Mills v. Chicago, 127 F. 731.

25. Baer v. McCullough, 176 N. Y. 97, 68 N. E. 129.

26. Loewenstein v. Diamond Soda Water Mfg. Co., 94 App. Div. 383, 88 N. Y. S. 313.

27. Loewenstein v. Diamond Soda Water

If the subject-matter of the controversy has ceased to exist, the suit will be dismissed;[30] but mandamus to enforce an officer's personal duty does not abate by expiration of his term,[31] though the contrary is true of an official duty unless expressly prevented by statute.[32] An action against a public administrator which is in its nature purely personal abates with his resignation,[33] nor can his successor be substituted,[34] and the discharge or removal of an administrator or executor acting as party plaintiff does not abate the action.[35] Under statutes providing that no action shall abate by the transfer of any interest therein, bankruptcy proceedings do not operate to abate an action.[36] The appointment of a receiver does not abate a suit,[37] but a suit by a receiver under leave of court is abated by the annulment of his authority to sue, and no continuation by his successor is possible.[38] An action by a guardian for sale of a minor's real estate does not abate by his resignation and failure of his successor to be substituted.[39] The objection that he is not the real party in interest cannot be raised against an unconditional assignee, though his assignors may be shown to retain an interest in the cause of action.[40]

Death of a party[41] before judgment[42] abates the action, but the death of a co-plaintiff does not,[43] and a suit in equity is not abated, but merely suspended.[44] The death of a principal in an action for a penalty abates the action as to sureties on his bond,[45] but a criminal prosecution does not abate on the death of the prosecuting witness.[46]

Mfg. Co., 94 App. Div. 383, 88 N. Y. S. 313. Compare Stay of Proceedings, 2 Curr. L. 1736.

28. It was set up that the deposit was used to pay the depositor's subscription, which subscription was denied. Somerset Nat. Banking Co.'s Receiver v. Adams, 24 Ky. L. R. 2083, 72 S. W. 1125.

29. An action brought under the landlord and tenant act to recover rent and the possession of premises will not be abated by the institution of a subsequent action of forcible entry and detainer for the recovery of the same premises. Walter Comm. Co. v. Gilleland, 98 Mo. App. 584, 73 S. W. 295.

30. Election contest and the term of office had expired. Lindsey v. Kerr [Iowa] 97 N. W. 1000.

31. To compel a probate judge to report and turn in fees in excess of maximum salary allowed by law. Finley v. Ter., 12 Okl. 621, 73 P. 273. A writ of mandamus by an employe of a city to procure his reinstatement by the head of the department does not abate because the head of the department goes out of office. Supervising engineer of department of correction of New York City. People v. Lantry, 40 Misc. 428, 82 N. Y. S. 261.

32. Code Civ. Proc. § 1930. People v. Lantry, 88 App. Div. 583, 85 N. Y. S. 193. Action against State Board of Barber Examiners to compel the issuance of a license, pending which the act creating the board was repealed. Porco v. State Board of Barber Examiners, 139 Cal. xix, 73 P. 168.

33. After refusal of an application for letters of administration on an estate by a public administrator and from an order denying a motion for a new trial, he appealed, pending the determination of which he resigned. In re Lermond's Estate, 142 Cal. 585, 76 P. 488.

34. The causes actuating a court in refusing letters to one might or might not exist in the case of a successor. In re Lermond's Estate, 142 Cal. 585, 76 P. 488.

35. Edney v. Baum, 2 Neb. Unoff. 173, 96 N. W. 167.

36. Wilsey v. Jewett Bros. & Co. [Iowa] 98 N. W. 114.

37. Except on dissolution, the fact that a receiver has been appointed for a corporation does not abate a suit pending in its name. Rooney v. Southern B. & L. Ass'n [Ga.] 47 S. E. 345.

38. If any suit is thereafter begun, it is a new action. Hubert v. New Orleans [C. C. A.] 130 F. 21.

39. The purchaser takes good title where copies of proceedings as to resignation and appointment were filed in the action and the court approves the new guardian's bond. McVaw v. Shelby, 25 Ky. L. R. 309, 75 S. W. 227.

40. Huddleson v. Polk [Neb.] 97 N. W. 624.

41. Causes a mistrial, and no further proceedings can be had until parties have been made, when the case must be tried de novo. This rule applies to a case pending before an auditor. Carroll v. Barber [Ga.] 47 S. E. 181.

42. After an action for tort has passed into judgment, an appeal being suspensive merely, does not subject the action to abatement. Heald v. Wallace, 109 Tenn. 346, 71 S. W. 80.

43. A suit was brought by one in a representative capacity on behalf of all others similarly situated; before his death another was permitted to intervene and was made a party plaintiff with his consent. Edwards v. Mercantile Trust Co., 121 F. 203.

44. By death of the mortgagor a few hours before the sale in foreclosure proceedings. Kronenberger v. Heinemann, 104 Ill. App. 156.

45. For selling liquor to minors. Johnson v. Rolls [Tex.] 79 S. W. 513.

46. That a private individual instituting criminal complaint against a person for nonsupport of his family is required to give surety for the costs does not render the case any the less a state case. State v. Peabody [R. I.] 55 A. 323.

The *dissolution of a corporation* does not abate an action brought by it.[47] In Alaska, an action to determine adverse claims to mining property does not abate on the death of one of several parties plaintiff or defendant.[48] Under Maryland statutes, an action to annul a fraudulent conveyance does not abate on the death of the vendor, though the vendee was her only heir.[49] An action by a trustee to preserve the estate does not abate by the death of the cestui que trust where the corpus of the estate was to go on his death to remaindermen.[50]

A *misjoinder* is ground for abatement,[51] as is nonjoinder.[52] There is no misjoinder of causes when the plaintiff has one connected interest centering in the point in issue.[53]

Jurisdiction.—Lack of jurisdiction is ground for abatement,[54] unless a party has submitted thereto,[55] but where it must be established by evidence aliunde, a plea thereof may be united with other defenses without waiving the right to insist on lack of jurisdiction;[56] but this rule does not extend to cases where such plea is joined with a cross petition or counterclaim which necessitates a trial on the merits of the issues tendered.[57] Where the reversal of a judgment upon appeal will cause an action to abate, an appellate court has no power to impose terms by which the judgment may stand as security for any future recovery.[58] Some jurisdictions require the payment of costs as a condition precedent to maintaining a new suit.[59]

§ 2. *Raising objection; waiver.*[60]—It is no defense that the former action was abatable if the right to raise that objection has been waived.[61] Appearance waives defects in process,[62] and an objection that does not go to the jurisdiction of the court, if not made by demurrer or answer, is deemed to have been waived.[63] A misjoinder

47. P. L. 1896, p. 295, § 53, continuing corporations after their dissolution as bodies corporate for purpose of prosecuting or defending suits against them. L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. [C. C. A.] 128 F. 332.

48. Rev. St. § 956 (U. S. Comp. St. 1901, p. 679) and Hill's Ann. Laws Or. §§ 369, 370, providing that such action survived the death of a party thereto. Mackay v. Fox [C. C. A.] 121 F. 487.

49. The action was brought by a creditor of the vendor against both vendor and vendee. Sinclair v. Auxiliary Realty Co. [Md.] 57 A. 664.

50. People's Nat. Bank v. Cleveland, 117 Ga. 908, 44 S. E. 20.

51. Tootle v. Kent, 12 Okl. 674, 73 P. 310. Action to determine adverse claims to mining property not subject to dismissal because parties joined as plaintiffs had parted with their interests in the subject-matter. Mackay v. Fox [C. C. A.] 121 F. 487.

52. In New York, demurrer will lie for nonjoinder, but not for misjoinder [Code Civ. Proc. § 488]. Adams v. Slingerland, 87 App. Div. 312, 84 N. Y. S. 323. Action to determine adverse claim to mining property not subject to dismissal because a person who acquired an interest two years after the action was commenced was not joined as plaintiff. Mackay v. Fox [C. C. A.] 121 F. 487. An answer pleading a defect of parties without specifying the defect is ineffectual. Hawkins v. Mapes-Reeve Const. Co., 82 App. Div. 72, 81 N. Y. S. 794.

53. Equitable petition against a foreign and domestic corporation in the latter of which plaintiffs owned shares of stock which the former held as transferee. People's Nat. Bank v. Cleveland, 117 Ga. 908, 44 S. E. 20. And see Parties, 2 Curr. L. 1092.

54. Where defendant's domicile is in a county other than that in which he is sued, and the cause of action arose in such county, his plea of privilege to be sued in the county of his domicile is well founded. Pearson v. West [Tex. Civ. App.] 75 S. W. 334.

And see Jurisdiction, 2 Curr. L. 604.

55. Where a plea of privilege failed to negative charges in the petition that they acted with other defendants in converting certain goods, they must be held to have consented to litigate the questions thereby raised in the court where the suit was brought, and having submitted to the jurisdiction in those respects were in for all purposes. Gulf, C. & S. F. R. Co. v. North Tex. Grain Co. [Tex. Civ. App.] 74 S. W. 567.

56, 57. Linton v. Heye [Neb.] 95 N. W. 1040.

58. Judgment for plaintiff in an action for slander, defendant appeals and then dies. Irvine v. Gibson, 25 Ky. L. R. 1418, 77 S. W. 1106. It survives, though an order granting a new trial has been granted if an appeal has been taken therefrom. Crawford v. Chicago, R. I. & P. R. Co., 171 Mo. 68, 66 S. W. 350.

59. Civ. Code 1895, § 5043. But by acts of 1901, p. 80, a pauper affidavit may be filed as a substitute. Johnson v. Cent. of Ga. R. Co., 119 Ga. 186, 45 S. E. 988. Dismissal on demurrer. Hadwin v. Southern R. Co. [S. C.] 45 S. E. 1019.

60. See 1 Curr. L. 2.

61. Romaine v. New York, etc., R. Co., 87 App. Div. 569, 84 N. Y. S. 491.

62. See Appearance, 1 Curr. L. 201; Process, 2 Curr. L. 1259.

63. The answer set up the pendency of another action, but it was stricken therefrom on defendant's own motion. Kiddell v. Bristow [S. C.] 45 S. E. 174. Appearing and agreeing to a continuance waives all de-

either of actions[64] or parties[65] must be taken advantage of by plea in abatement, or where it appears from the face of the pleading, by special exception, which must be filed prior to the answer to the merits,[66] as a plea in abatement is waived by first pleading to the merits,[67] and though pleas in abatement and bar may be filed at the same time, the former should be first tried, as they are waived by proceeding to trial on the merits.[68] Where a plea in abatement is interposed, the party must stand on the plea and review the adverse judgment on error or the point will be waived.[69] Issues on the merits can be raised only by pleadings in bar, not by pleas in abatement.[70] A plea of nonjoinder of proper parties defendant must point out the defect or show that a complete determination could not be had without the presence of an additional party.[71]

The plea in abatement must be promptly filed[72] within the time allowed by rule of court,[73] verified,[74] and relied upon,[75] though by reserving its plea to the jurisdiction in an answer to the merits, rights in abatement are not waived.[76] A plea in abatement is not defective for failing to state that another action pending was for the same relief.[77] The matter of abatement relied on must be specifically alleged.[78] Mandamus will not lie to compel a circuit judge to reinstate a plea of

fects in the process or service thereof. Snyder v. Phila. Co. [W. Va.] 46 S. E. 366.

64. Action for personal injuries and libel. Brooks v. Galveston City R. Co. [Tex. Civ. App.] 74 S. W. 330.

65. A street railway company and its president. Brooks v. Galveston City R. Co. [Tex. Civ. App.] 74 S. W. 330. Misjoinder of parties is not a ground of demurrer. Frankel v. Garrard, 160 Ind. 209, 66 N. E. 687.

66. If it is filed out of its regular order and one of the parties would be prejudiced by it, it will not be sustained. Statutes of limitation had run in this case. Brooks v. Galveston City R. Co. [Tex. Civ. App.] 74 S. W. 330.

67. Price v. Garvin [Tex. Civ. App.] 69 S. W. 985. Filing a demurrer to a bill for want of equity waives the right to object to jurisdiction of the court because of nonresidence of defendant. Bottom v. Nat. R., B. & L. Ass'n, 123 F. 744. An objection for nonjoinder or misjoinder must be made before trial. Mackay v. Fox [C. C. A.] 121 F. 487.

68. Code, c. 125, § 21. Maupin v. Scottish U. & N. Ins. Co., 53 W. Va. 557, 45 S. E. 1003. In a suit for money had and received, the objection that ownership of the fund is in plaintiff and a third person jointly must be raised by plea in abatement or will be held to have been waived. Motion to dismiss complaint on that ground denied. Meinhardt v. Excelsior Brew. Co., 82 App. Div. 627, 81 N. Y. S. 1042. Where the record does not show the nonresidence of a defendant, he may join a plea to the merits with a plea to the jurisdiction, and an appeal from a county court's adverse decision does not waive the plea to the jurisdiction. Stull Bros. v. Powell [Neb.] 97 N. W. 249.

69. Steel v. Clinton Circuit Judge [Mich.] 95 N. W. 993.

70. Right of mother to sue for wrongful death of minor child, the husband having deserted the family, can be put in issue only by answer in bar, not by plea in abatement. Chicago & B. Stone Co. v. Nelson [Ind. App.] 69 N. E. 705. A plea to a scire facias to revive a judgment alleging that an agent of the judgment debtor purchased, with money furnished by said debtor, the judgment for an amount far less than its value, is not good as a plea in bar, but at most tends to plead a payment pro tanto. Dickerson v. Campbell [Fla.] 35 So. 986.

71. Hawkins v. Mapes-Reeve Const. Co. [N. Y.] 70 N. E. 783.

72. Where a corporation plaintiff was dissolved before the action was tried, the defendant after trial and after judgment in his favor has been reversed and the cause remanded cannot file it. L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. [C. C. A.] 128 F. 332. That one has split an indivisible cause of action. Judgment rendered June 17, 1902, and pleaded July 26, 1902, held with sufficient promptness. Mallory v. Dawson Cotton Oil Co. [Tex. Civ. App.] 74 S. W. 953.

73. Rule required the plea to be filed five days before the cause stands for trial. In this case it was not filed until five days later. Collier v. Grey, 105 Ill. App. 485.

74. Plea in abatement properly overruled because unverified as to positive statements of fact filed out of order and unsupported by evidence. Gulf & B. V. R. Co. v. Weddington, 31 Tex. Civ. App. 235, 71 S. W. 780.

75. A plea deemed waived where a reliance thereon was in no way indicated during the trial. Hirsh v. Manhattan R. Co., 84 App. Div. 374, 13 Ann. Cas. 158, 82 N. Y. S. 754.

76. Where a defendant pleaded in abatement to the jurisdiction because of illegality of service and moved to quash the writ and return, and after the plea and motion were overruled, incorporated in its answer to the merits a like plea in abatement, to the striking out of which it duly excepted, it did not by answering and proceeding to trial on its merits waive its rights in abatement. Jordan v. Chicago & A. R. Co. [Mo. App.] 79 S. W. 1155.

77. Where it followed the form in the practice book, alleging that there was another action pending for the same cause between the same parties and in the same court. Cahill v. Cahill [Conn.] 57 A. 284.

78. A plea of lack of authority in the person served with process must show that such lack existed at the time of service. Ohio Oil Co. v. Griest, 30 Ind. App. 84, 65 N. E. 534. If another pending action is one that may lie with leave of court, the plea should allege that it has not been had. Ac-

abatement stricken from the files on the ground that the right to maintain it was waived.[79]

§ 3. *Survivability of causes of action.*[80]—The rule being general that only those causes of action survive which are assignable, the reader should note also the cases cited in dealing with the law of assignability.[81] The law of the place where the cause of action arose governs.[82]

Personal actions[83] in tort do not survive at common law.[84] Hence the right to maintain such an action after the death of the injured party depends upon statutory authority, and its scope and effect are questions of legislative intention.[85] A statute providing that certain "actions at law" shall survive does not include causes of action.[86] A cause of action for wrongful death does not accrue to the personal representative or next of kin unless the deceased could have maintained an action for the wrongful act or neglect, had death not ensued.[87] A cause of action for a penalty[88] or for unlawfully keeping intoxicating liquors,[89] or for breach of promise of marriage,[90] does not survive the death of the defendant. A cause of action for the mutilation of the dead body of the husband does not survive the widow.[91] An action on a cause which does not survive will not be retained for the determination of the question of costs.[92]

Real actions, such as for the recovery of land,[93] or for injury to land,[94] or for trespass when the benefit of the trespass accrues to the estate of the trespasser,[95] survive. If any part of the promises made in consideration of a contract to convey land have been performed, an interest is created which is a survivable cause of action.[96] An action to foreclose a mechanic's lien survives and may be continued against the successors in interest of a deceased owner, since the successors take subject to the lien and cause of actions and proceedings had to enforce the same prior to the owner's death.[97]

A *partnership cause of action*[98] survives the dissolution of the partnership.[99]

§ 4. *Revival and continuation.*[1]—The trial court during term may of its own

tion on mortgage note. Schleck v. Donohue, 77 App. Div. 321, 79 N. Y. S. 233.

See, also, Pleading, 2 Curr. L. 1201.

79. The court's action can be reviewed by appeal or writ of error. Steel v. Clinton Circuit Judge [Mich.] 95 N. W. 993.

80. See 1 Curr. L. 3.

81. See Assignments, 1 Curr. L. 222.

82. Stratton's Independence v. Dines, 126 F. 968.

83. See 1 Curr. L. 3, n. 51-67.

84. State v. Chesapeake Beach R. Co. [Md.] 56 A. 385.

85. The limitation of time in such a statute is a part of the right which the statute created. Poff v. New England Tel. & T. Co. [N. H.] 55 A. 891.

86. Mills' Ann. St. Colo., § 4810. Stratton's Independence v. Dines, 126 F. 968.

87. Code Civ. Proc. § 1902. Action for seduction and criminal operation, woman consenting, did not accrue to father. Larocque v. Conheim, 42 Misc. 613, 87 N. Y. S. 625.

88. For selling liquors to minors. Johnson v. Rolls [Tex.] 79 S. W. 513.

89. The action being a public one based on individual acts, his personal representatives could not be brought in. State v. McMaster [N. D.] 99 N. W. 58. So judgment cannot be rendered for the destruction of the property unlawfully kept, nor for the closing of the place, such remedies being incidental to the main remedy, the abatement of the nuisance, which was abated by the death. Id.

90. Nor is the complaint therefor aided by an allegation that the promise was made fraudulently and that he seduced the woman and caused her to submit to a criminal operation. Larocque v. Conheim, 42 Misc. 613, 87 N. Y. S. 625.

91. Under Ball. Ann. St. p. 5695. Jones v. Miller [Wash.] 77 P. 811.

92. Jones v. Miller [Wash.] 77 P. 811.

93. An action for land is not abated by the death of the defendant. Jones v. Robb [Tex. Civ. App.] 80 S. W. 395.

94. A cause of action for injury to realty survives the death of the owner and passes to the heirs. Tex. & N. O. R. Co. v. Smith [Tex. Civ. App.] 80 S. W. 247.

95. Action by United States against executor of Marcus Daly for value of lumber taken from United States lands. U. S. v. Bean, 120 F. 719. The right existing outside of state statutee, it was not necessary for the United States to present its claim for allowance to the executor before bringing suit as required by the statute. Id.

96. Cone v. Cone, 118 Iowa, 458, 92 N. W. 665.

97. Code Civ. Proc. §§ 757, 3401. Perry v. Levenson, 82 App. Div. 94, 81 N. Y. S. 586.

98. Compare 1 Curr. L. 4, n. 68-73.

99. Newman v. Gates [Ind. App.] 67 N. E. 468. Surviving partners presented their bill of exceptions. Id.

1. See 1 Curr. L. 4.

motion revive an action when appellant dies after a short transcript has been signed, but before the bill of exceptions is filed.[2] A revivor is not necessary in a partition suit where a co-plaintiff acquires all the deceased plaintiff's interest by devise.[3] A foreclosure is not a money judgment within the meaning of a statute providing for the enforcement of a decree for the payment of money, when rendered before defendant's death, without reviving such decree.[4] Upon the death of one of several defendants, the action does not stand for trial as to the others, until revived against his representatives or abated as to them.[5] Under the Federal statutes, where there are two or more plaintiffs or defendants in a suit where the cause of action survives, and one dies, the action does not abate, but the death being suggested upon the record, it will proceed at the suit of the surviving plaintiff against the surviving defendant.[6] The right to a scire facias from a Federal court to revive an action is subject to the limitation of time imposed by state statutes.[7] Motions to intervene must be filed before judgment.[8] A cause of action which does not survive cannot be continued for the benefit of one who might have a cause of action for the same act.[9] A party cannot obtain a continuance on the ground that a receiver has been appointed for the plaintiff.[10] To continue an action brought by the injured party under a statute giving survivability "for personal injuries other than those resulting in death," it must be alleged and shown that the injuries did not result in death.[11] For purposes of revival, parties plaintiff and defendant are not changed by pleading a set-off.[12]

Substitution of parties.[13]—The practice by which substitution or amendment of parties is effected pertains to the law of parties,[14] and to appeal where the cause has been or is in process of being sent up.[15] In case of the death of a party defendant, it devolves on the plaintiff to cause a substitution of the proper representative,[16] and the substitution should be made in the trial, not in the appellate court.[17] An action cannot be dismissed on motion for failure to substitute the proper party for a deceased party to the action,[18] though an order may be obtained on proper notice, requiring the suit to be revived within a time fixed, or be dismissed.[19] Actions should be revived and prosecuted in the name of the

2. Crawford v. Chicago, R. I. & P. R. Co., 171 Mo. 68, 66 S. W. 350.

3. Larrabee v. Larrabee, 24 Ky. L. R. 1423, 71 S. W. 645.

4. Rev. St. c. 77, § 39. Kronenberger v. Heinemann, 104 Ill. App. 156.

5. Ewell v. Tye, 25 Ky. L. R. 976, 76 S. W. 875.

6. Rev. St. § 956 (U. S. Comp. St. 1901, p. 697). Applied in case of an action to determine adverse claims to mining property, where one of two defendants died. Mackay v. Fox [C. C. A.] 121 F. 487.

7. To revive an action against the executor of a deceased defendant in an action for infringement of patent. Green v. Barrett, 123 F. 349.

8. Motion to be substituted as curator for a plaintiff on a fraternal benefit policy. Morton v. Supreme Council of Royal League, 100 Mo. App. 76, 73 S. W. 259.

9. Action by widow for mutilation of body of her dead husband cannot be continued for benefit of her child. Jones v. Miller [Wash.] 77 P. 811.

10. Rooney v. Southern B. & L. Ass'n, 119 Ga. 941, 47 S. E. 345.

11. Sayles' Ann. Civ. St. 1897, art. 3353a. Ellyson v. International & G. N. R. Co. [Tex. Civ. App.] 75 S. W. 868.

12. Pleading a set-off does not transpose the parties so that the original plaintiff's personal representatives are prevented from reviving the action by motion. The statute declaring that such a defendant shall be deemed to have brought an action against plaintiff does not make plaintiff a defendant [Code, §§ 3303, 3308]. Kinzie v. Riely's Ex'rs, 100 Va. 709, 42 S. E. 872.

13. See 1 Curr. L. 5, n. 81-91.

14. Parties, 2 Curr. L. 1092.

15. See Appeal and Review, 1 Curr. L. 91, § 3.

16, 17. Wilkinson v. Vordermark [Ind. App.] 70 N. E. 538. If a party who obtains a final decree in equity dies before the other party has taken his appeal, the decree must be revived in the trial court by making the proper representatives parties before an appeal can be taken, and the revivor may be had on his application to enable him to take his appeal. Ropes v. McCabe [Fla.] 36 So. 715.

18. Clark's Code (3d Ed.) § 188. Rowe v. Cape Fear Lumber Co., 133 N. C. 433, 45 S. E. 830.

19. Dillard's Adm'r v. Cent. Va. Iron Co., 125 F. 157.

executor or administrator and not of a devisee,[20] nor of the heirs,[21] unless the action is in reference to rights in realty only.[22] In Minnesota, an action for damages for personal injuries, commenced by the person injured, may at his death be continued by the personal representative as an action for wrongful death for the benefit of the widow and next of kin.[23] Heirs at law cannot be substituted in a cause of action in reference to personal property.[24] But in a controversy involving the title to real estate, the heirs are necessary parties.[25] In many states substitution of a pendente lite transferee[26] or assignee[27] is unnecessary. An action against a husband and wife, abated by death of the husband, cannot be revived by joining the wife and administrator, but a separate suit must be brought against the administrator.[28] If the object of an ejectment action is a homestead, it should not be revived against the administrator of the occupant, but against persons who succeed to the homestead.[29]

ABDUCTION.

The statute of Missouri provides a punishment for any person who shall take away any female under the age of 18 years, from any person having legal charge of her person, either for the purpose of prostitution or concubinage.[30] This statute is held to define two distinct crimes which cannot be charged in a single count in an indictment.[31] The gravamen of the offense is the intent with which the female

20. Tharp v. Paige, 71 Ark. 342, 74 S. W. 296. The fact that a person is a devisee of a deceased plaintiff will not entitle such person to be substituted instead of the executor. Id. Revival of an action in tort by widow for wrongful death of her husband. Fitzgerald v. Edison Elec. Illuminating Co., 207 Pa. 118. 56 A. 350. In trespass (to real estate) the administrator must continue. Rowe v. Cape Fear Lumber Co., 133 N. C. 433, 45 S. E. 830. In New York, a tenant in common who by devise takes his deceased co-tenant's share and is made sole executor may, on motion, continue an action in his own name relating to the estate for the full amount of the injuries to both interests. McPhillips v. Fitzgerald, 76 App. Div. 15, 78 N. Y. S. 631.

21. Friese v. Friese [N. D.] 95 N. W. 446.

22. In an action against one to determine rights to an easement where no damages were asked, his administrators were not proper parties to the suit on his death pendente lite. Stolts v. Tuska, 83 App. Div. 426, 82 N. Y. S. 93.

23. Under St. 1894, § 5913 and Laws 1897, c. 261, providing for the survival of causes of action for personal injuries. Anderson v. Fielding [Minn.] 99 N. W. 357.

24. Action to recover money due or to have a mortgage executed securing the payment thereof as per prior contract. Friese v. Friese [N. D.] 95 N. W. 446. Under statute providing that actions shall not abate by death, but may be continued against the successor in interest, in supplementary proceedings to subject personal property fraudulently transferred to the payment of alimony, where the defendants had died, personal representatives and not heirs should have been substituted. Wilkinson v. Vordermark [Ind. App.] 70 N. E. 538. Action contesting a will covering personal property. In re Wiltsey's Will [Iowa] 98 N. W. 294.

25. Brooks v. Fithian, 67 Kan. 850, 73 P. 903. An action to recover possession of real estate cannot be maintained after the death of the defendant, without amending the petition substituting the widow and heirs. Douglass v. Galend [Kan.] 76 P. 395.

26. The court may allow it. Sykes v. Beck [N. D.] 96 N. W. 844. In New York, under Code Civ. Proc. § 756, where the interest of a party is assigned after commencement of the action, it may be continued in the name of the original party. Perry v. Levenson, 82 App. Div. 94, 81 N. Y. S. 586. In such case, the assignee for whose benefit the action is continued will be bound by the judgment and entitled to the recovery. Hawkins v. Mapes-Reeve Const. Co., 82 App. Div. 72, 81 N. Y. S. 794. In California, an action for an injunction may be continued in the name of the original plaintiff after the transfer of his interest. Code Civ. Proc. § 385. Sears v. Ackerman, 138 Cal. 583, 72 P. 171. The transferee of real estate damaged by a public nuisance may continue an action to restrain the continuance thereof. Baker v. N. W. Bldg. & Inv. Co., 33 Wash. 677, 74 P. 825. Transferee of a receiver appointed by a Federal court need not be substituted in an action against the receiver in a state court. Baer v. McCullough, 176 N. Y. 97, 68 N. E. 129. A grantee may continue an action for unlawful detainer. Anderson v. Ferguson, 12 Okl. 307, 71 P. 225.

27. Where a party to an action makes an assignment pending litigation, it is not necessary to have his assignee substituted nor has the opposite party a right to insist on such substitution. Kringle v. Rhomberg, 120 Iowa, 472, 94 N. W. 1115.

28. Under Code Pub. Gen. Laws, art. 50, § 4. Wolfe v. Murray, 96 Md. 727, 54 A. 876.

29. Finlayson v. Love [Fla.] 33 So. 306.

30. Rev. St. Mo. 1899, § 1842.

31. State v. Adams [Mo.] 78 S. W. 588.

NOTE: To the contrary under statutes of other states, see People v. Parshall, 6 Park. Cr. R. [N. Y.] 129; Slocum v. People, 90 Ill. 274; State v. Overstreet, 43 Kan. 299, 23 P.

is taken,[32] which intent may be gathered from the facts and circumstances connected with the taking.[33] The California statute makes punishable the act of taking away any female under the age of 18 years from her father for the purpose of prostitution.[34] The crime is committed where the criminal intent is formed, though the taking of the female originally may have been for a proper purpose.[35] Under the Iowa statute against forcible defilement, the taking of the person for such purpose must be unlawful and against the woman's will, and the indictment must so allege.[36]

ABORTION.

The one furnishing the instrument or prescribing the medicine to procure miscarriage is guilty as principal, though not present when the instrument was used or medicine taken.[37] One who employs another to perform an operation to produce an abortion and arranges for it and otherwise assists, is an accessory and may be punished as though he were the principal offender.[38] The victim of an attempt to produce an abortion is not strictly an accomplice of the one accused of the crime.[39]

Evidence.[40]—Illicit relations between defendant and the victim may be shown,[41] but not his acquittal of seducing her.[42] Dying declarations of the victim are admissible,[43] and her statements to a physician have been held not to be privileged;[44] but a statement that a certain drug caused her miscarriage has been excluded as a mere conclusion.[45] Previous abortions attempted by the victim herself,[46] or by others not connected with defendant,[47] or similar offenses by defendant upon other women, are inadmissible.[48] Physical appearances after the miscarriage, together with statements of the victim before the alleged abortion, have been held sufficient to establish the corpus delicti.[49]

ABSENTEES.[50]

In Indiana, a statute[51] provides for the appointment by the probate court[52]

572; People v. Powell, 4 N. Y. Cr. R. 586. And see 1 Curr. L. 6, n. 99.

32. State v. Adams [Mo.] 78 S. W. 688; People v. Lewis, 141 Cal. 643, 75 P. 189. Conviction for abduction reversed and new trial granted where defendant testified that he thought the girl was going to the place where he sent her as a domestic servant, and the testimony against him was that of the girl, who was actuated by revenge for her arrest by defendant, and was abandoned, vicious and a self-confessed perjurer, and a woman-keeper of a bawdy house, who testified to protect herself. People v. Masterson, 88 N. Y. S. 747.

33. State v. Adams [Mo.] 78 S. W. 688. The criminal intent being shown, the defense of a common-law marriage failed. Id.

34. Pen. Code, § 267. People v. Lewis, 141 Cal. 643, 75 P. 189.

35. People v. Lewis, 141 Cal. 643, 75 P. 189.

36. State v. Hromadko [Iowa] 99 N. W. 560.

37. Seifert v. State, 160 Ind. 464, 67 N. E. 100. Acts Gen. Assem. 1883, p. 547, entitled "An act to amend the criminal law by providing for the punishment of abortion," is unconstitutional so far as it provides a punishment for persons who shall advise the commission of the crime, because not expressed in the title. State v. Fields [S. C.] 46 S. E. 771.

38. Gen. St. 1902, § 1583. State v. Carey [Conn.] 56 A. 632.

39. She is liable for other crimes [Gen. St. 1902, §§ 1155, 1156, 1157]. State v. Carey [Conn.] 56 A. 632.

40. See 1 Curr. L. 7, n. 15-21.

41. To show a motive. State v. Carey [Conn.] 56 A. 632.

42. State v. Carey [Conn.] 56 A. 632.

43. Dying declaration of the victim as to acts and words of the accused when he was alleged to have brought the instrument, and when told of her pregnancy, held admissible. Seifert v. State, 160 Ind. 464, 67 N. E. 100.

44. Statements by victim to a physician, tending to show innocence of accused, held, under the circumstances of this case, to be not privileged. Seifert v. State, 160 Ind. 464, 67 N. E. 100.

45. Stanley v. State [Tex. Cr. App.] 73 S. W. 400.

46. State v. Carey [Conn.] 56 A. 632.

47. State v. Crofford, 121 Iowa, 395, 96 N. W. 889. Evidence of a request by defendant's co-conspirator to another physician to commit a prior abortion. Id.

48. State v. Crofford, 121 Iowa, 395, 96 N. W. 889.

49. Seifert v. State, 160 Ind. 464, 67 N. E. 100.

50. No matter for this title was found during the period covered by Vol. 1. Pro-

of an administrator, and on his death of an administrator de bonis non[53] for persons absent from the state for a specified period,[54] having the same powers and subject to the same duties and liabilities as an administrator of the estate of a decedent.[55]

ABSTRACTS OF TITLE.

In some jurisdictions an abstract of title is required as auxiliary to the petition in certain real actions.[56]

The duty of furnishing abstracts may by terms of contract become condition precedent to sale of land.[57]

An abstractor is not a guarantor of the title, but is liable for errors caused by failure to exercise ordinary care;[58] but only in case such errors result in loss.[59] The measure of damages is the difference between what the purchaser paid for the property and the present worth of what he actually received.[60] In a suit by an abstractor for compensation, the following elements of value enter: First, the use of the capital invested; second, the services of the abstractor in preparing the abstract; third, the liability of the abstractor to the purchaser of the abstract for damages resulting from defects therein.[61] Records of judgments are usually open to the inspection of abstractors,[62] and mandamus will lie to compel a clerk of court to

ceedings against nonresidents generally are treated in such topics as Attachment, 1 Curr. L. 239; Process, etc., 1 Curr. L. 1259. See, also, Foreign Corporations, 1 Curr. L. 40.

51. Burns' Rev. St. 1901, § 2385 et seq.

52. In order to give the probate court jurisdiction to appoint such administrator, it is not necessary that the absentee should at any time have been a resident of the county where the proceedings are instituted, but it is sufficient if he has been a resident of the state and has left property in the county. Romy v. State [Ind. App.] 67 N. E. 998.

53. In case of the death of such administrator, an administrator de bonis non may be appointed who has authority to collect the personal assets of the absentee, whether he is living or dead, and can maintain an action against the sureties on the administrator's bond for money wrongfully converted by him. Romy v. State [Ind. App.] 67 N. E. 998.

54. The validity of a proceeding to appoint an administrator of the estate of an absentee is not affected by the fact that he is still alive. Romy v. State [Ind. App.] 67 N. E. 998. The sureties on the bond of such administrator, in an action thereon to recover for the conversion of money received by him in his official capacity, are estopped to assert, against the recitals of the bond, that the absentee was not deceased or that th administrator was not in fact the administrator of his estate, or that his appointment was invalid, or that he was not subject to all the liabilities and duties of an administrator of a decedent's estate, in relation to the personal property that came into his hands as such administrator, by reason of his appointment as such, and the execution of such bond. Id.

55. Romy v. State [Ind. App.] 67 N. E. 998. The acts of such administrator are made binding on such absentee, should he return, as if they were his own acts, if they are performed in good faith and without fraud. Id.

56. See Trespass, 2 Curr. L. 1891 (trespass to try title).

57. Hutchinson v. Coonley, 209 Ill. 437, 70 N. E. 686.

58. Kenthan v. St. Louis Trust Co. [Mo. App.] 73 S. W. 334. Negligence not to note a judgment lien in the abstract. Benkert v. Title G. T. Co., 102 Mo. App. 267, 76 S. W. 641. Not negligence in examining a transfer by tax deed not to make inquiries dehors the record for a possible defect in the proceedings or error in the name or description of the parties, if the record showed jurisdiction in the court to render the judgment and the parties to the judgment and the title claimed under it were identical in name and description. Keuthan v. St. Louis Trust Co. [Mo. App.] 73 S. W. 334.

59. An abstractor is not liable for failure to note judgments in an abstract if such failure is the cause of no loss to one relying thereon. The purchaser's loss resulted from the tax title he purchased being void and being overthrown at the suit of one having an unrecorded mortgage on the land. Denton v. Nashville Title Co. [Tenn.] 79 S. W. 799.

60. Keuthan v. St. Louis Trust Co. [Mo. App.] 73 S. W. 334.

61. A verdict of $500 for an abstract and 400 certified printed copies thereof set aside as excessive. Kenyon v. Charlevoix Imp. Co. [Mich.] 97 N. W. 407.

62. Under U. S. Rev. St. § 828 and 25 Stat. 357, providing that indices and records of judgments, etc., in district and circuit courts shall be open to inspection without charge, a title insurance company may examine current and depending transactions, as long as it does not interfere with the clerk and his assistants, notwithstanding the fact that the clerk's fees for searches are being greatly reduced by the advent of such title insurance companies. Bell v. Com. T. Ins. & T. Co., 189 U. S. 131, 23 S. Ct. 569.

A valuable note collecting the cases on this subject is found in 27 L. R. A. 82.

deliver transcripts of judgments on his docket to any abstractor for use in his business upon tender of the fees prescribed by law.[63] An abstract cannot be assumed to be false from the fact that it does not recite that it was made by a bonded abstractor.[64]

ACCESSION AND CONFUSION OF PROPERTY.

Confusion of goods, if committed with fraudulent motive, subjects the transaction to an inflexible rule, rigorously enforced, that the wrongdoer shall not profit by, nor the innocent party suffer from, the wrong,[65] and where one mingles property of another with his own, he is estopped to assert title to any particular part of such mixture,[66] and the burden of identifying his own is cast upon him;[67] but if the

63. State v. Scow [Minn.] 100 N. W. 382.

64. An unauthenticated abstract was the only evidence to show privity between a grantor and one holding under mortgage foreclosure. It was admitted without objection and assumed to be regular. It was held sufficient to show privity. Goddard v. Clarke [Neb.] 96 N. W. 350.

NOTE.—Liability of examiner of abstract: Where an examiner of titles has received special instructions as to how the examination is to be made, he is liable for any loss resulting from his failure to carry them out. Gilbert v. Williams, 8 Mass. 51, 57. Apart from instructions, the examiner is liable to the client for any misfeasance or unreasonable neglect. He must act in good faith and to the best of his skill and knowledge (Id.; Varnum v. Martin, 15 Pick. [Mass.] 440; Wilson v. Coffin, 2 Cush. [Mass.] 316; Holman v. King, 7 Metc. [Mass.] 384), and he must employ all usual and proper methods to effect his commission, and mere good faith will not excuse lack of ordinary skill and prudence. Dearborn v. Dearborn, 15 Mass. 316; Thomas v. Schee, 80 Iowa, 237, 45 N. W. 539; Sav. Bank v. Ward, 100 U. S. 195; Bowman v. Tallman, 27 How. Pr. [N. Y.] 212, 264; Byrnes v. Palmer, 18 App. Div. 1, 45 N. Y. S. 479; Fay v. McGuire, 20 App. Div. 569, 47 N. Y. S. 286; Lawall v. Groman, 180 Pa. 532, 37 A. 98. An abstract of title is presumed to cover suits as well as conveyances. Thomas v. Schee, 80 Iowa, 237, 45 N. W. 539. It is not every error, however, for which the attorney is liable. Thus, an error of judgment upon a doubtful question in the construction of statutes would not be regarded as evidence of negligence or want of skill (Gilbert v. Williams, 8 Mass. 51, 57; Morrill v. Graham, 27 Tex. 646; Sav. Bank v. Ward, 100 U. S. 195, 199), while a disregard of a plain statute provision (Caverly v. McOwen, 123 Mass. 574); of well defined rules of law or practice (Goodman v. Walker, 30 Ala. 482; Hillegass v. Bender, 78 Ind. 225; Citizens' L., F. & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N. E. 1075; Breedlove v. Turner, 9 Mart. [O. S.; La.] 353; In re Estate of A. B., 1 Tuck. [N. Y.] 247), would be such evidence. It seems that the attorney may accept and rely upon the law as it is at the date of his report, although a later decision or statute declares the law to be otherwise. Marsh v. Whitmore, 21 Wall. [U. S.] 178; Poucher v. Blanchard, 86 N. Y. 256. Where an examiner certifies that a title is good, he warrants that it will prove good at the end of any contested litigation, and that it is free from any grave doubt or serious question of validity. Page v. Trutch, 5 Am. Law Rec. 155, Fed. Cas. No. 10,668. In one case in New York it was held that one employed to examine a title and procure a fee to be conveyed to the plaintiff was not liable where a fee was conveyed, but was incumbered. Elder v. Bogardus, Hill & D. [N. Y.] 116. It is doubtful if this decision would be followed. He is not, however, obliged to advise his client as to the value of the security from a pecuniary point of view. Cohn v. Heusner, 9 Misc. 482, 30 N. Y. S. 244. If the examiner undertakes to record papers, and delays so that other claims of record intervene, he will be liable for such delay. Miller v. Wilson, 24 Pa. 114. If the examiner does his work so negligently that it is of no value, of course he cannot recover compensation (Caverly v. McOwen, 123 Mass. 574; Varnum v. Martin, 15 Pick. [Mass.] 440), and, in an action for services, evidence is admissible that he reported a clear title, and the owner was later obliged to redeem from a tax lien (Hinckley v. Krug [Cal.] 34 Pac. 118). The examiner is not liable, however, to one not in privity with him who relies upon his abstract (Sav. Bank v. Ward, 100 U. S. 195), and he cannot be made liable by custom (Id.). See Hall, Examination of Land Titles, § 100.

65. A natural gas company which fraudulently mingles with its own gas other gas in the profits of which the plaintiff has a fourth interest and keeps no account of it is liable to the plaintiff for one-fourth of the profits of all gas so mingled. Stone v. Marshall Oil Co. [Pa.] 57 A. 183.

Where an agent mixed his own goods with those of his principal, the title of his principal attached to the entire stock until the value of the goods was returned to him or properly accounted for. A stock of merchandise and store fixtures sent to an agent to sell. Lance v. Butler [N. C.] 47 S. E. 488. Such agent's mortgagee acquired no title. After an agent mixed his own and his principal's stock of goods, he executed a chattel mortgage on the whole. Id.

66. Where a landlord mingled bales of cotton belonging to a tenant and subject to a trust deed on his tenant's crop, and one bale of cotton was seized under a writ of replevin by the trustee in the deed. Alexander v. Zeigler [Miss.] 36 So. 536.

67. This principle applies to ore of a certain value taken from a mine in so far that where it has been proved that a large amount was taken and the other party does not introduce evidence to show the true

other party appropriates the whole, he is liable to the extent to which this burden can be sustained.[68] There is no confusion within this rule as long as the property is capable of easy identification.[69]

A form of accession[70] results from giving the character of fixtures to improvements on land;[71] but one entering land under color of title and in good faith, and making improvements[72] is entitled, when dispossessed by the holder, of a superior title to recover their value, and the right is the same whether the remedy is sought in law or equity;[73] but recovery cannot be had for the value of improvements placed on the land during a period when the title was in dispute,[74] or one was not in possession under color of title,[75] or where by statute it is only allowed as a set-off against damages.[76]

amount, he cannot complain that a verdict is too large, it being presumed that the party taking the ore knew the exact amount. An instruction that one was entitled to recover the value of the entire mixture was erroneous. Maloney v. King [Mont.] 76 P. 4.

68. Where a mortgagor of logs confuses them with logs of a third party and the latter converts them into cash, he is liable to the mortgagee as for money had and received to the extent of the mortgage indebtedness. Illinois Trust & Sav. Bank v. Alexander Stewart L. Co., 119 Wis. 54, 94 N. W. 777.

69. Not in case of branded cattle. McKnight v. U. S. [C. C. A.] 130 F. 659.

70. See 1 Curr. L. 7, n. 29-34.

71. See Fixtures, 2 Curr. L. 9.

72. Darnell v. Jones' Ex'rs, 24 Ky. L. R. 2090, 72 S. W. 1108. One who in good faith makes valuable improvements on land of which he is in possession, under the belief that he is the owner, may recover the value of such improvements when he is dispossessed by one holding the better title [Rev. St. (Mo.) 1899, § 3072]. Kelly v. Gebhart [Mo.] 79 S. W. 427. Taxes, insurance, improvements, necessary repairs and agents' commissions deducted from the rent collected in an assessment of mesne profits in an action of ejectment (Muthersbaugh v. McCabe, 22 Pa. Super. Ct. 587), or clearing the land and paying the taxes thereon (George v. Delaney, 111 La. 760, 35 So. 894).

73. Darnall v. Jones' Ex'rs, 24 Ky. L. R. 2090, 72 S. W. 1108.

74. After commencement of a suit to set aside a conveyance made in consideration of future support, the husband of the grantee added improvements. Keister v. Cubine, 101 Va. 768, 45 S. E. 285.

75. Value of improvements refused to defendant in an action to recover real estate where he was not a bona fide "holder of the premises under a color of title believed by him to be good," under Clark's Code N. C. § 473. Hallyburton v. Slagle, 132 N. C. 957, 44 S. E. 659.

76. On setting aside a void administrator's deed, purchasers in good faith may recover the purchase price and have a lien for taxes paid, but cannot be allowed for permanent improvements, since under Ball. Ann. St. § 5511, they are allowed only as a set-off against damages. Ball v. Clothier [Wash.] 75 P. 1099.

Note: A trespasser can acquire no right to property on the principle of accession, but the true owner may recover it in whatever form he finds it (Peirce v. Goddard, 22 Pick. [Mass.] 559, 33 Am. Dec. 764); it matters not whether the property be movable or immovable, the true owner has the right to that which is united to it. Mitchell v. Stetson, 7 Cush. [Mass.] 435. A wrongdoer cannot by changing the form change the title (Single v. Schneider, 24 Wis. 299), nor can a trespasser acquire title to crops which he has planted (Freeman v. McLennan, 26 Kan. 151); but it is held otherwise if he plant on railroad right of way (Lindsay v. Winona & St. Peter R. Co., 29 Minn. 411). If a trespasser convert the property into a different species, he may claim title. Silsbury v. McCoon, 3 N. Y. 379. But the modern cases which hold that there has been a change of species are few and it seems impossible to work such a change so far as logs are concerned; thus where logs were sawed into shingles (Betts v. Lee, 5 Johns. [N. Y.] 349), or boards (Ricketts v. Dorrell, 55 Ind. 470; Davis v. Easley, 13 Ill. 192), or where wood was converted into charcoal (Curtis v. Groat, 6 Johns. [N. Y.] 168). And in no event is the species changed if the owner can identify his property (Bolles Wooden-Ware Co. v. U. S., 106 U. S. 432; Snyder v. Vaux, 2 Rawle [Pa.] 423; Potter v. Mardre, 74 N. C. 36). If, however, one take property innocently, believing he had a right to do so, the owner is confined to a recovery of its value at the time it was converted. Carpenter v. Lingenfelter, 42 Neb. 728. The party so taking acquires title if he bestows labor thereon greatly disproportionate to its value when taken. Murphy v. Sioux City & P. R. Co., 55 Iowa, 473; Eastman v. Harris, 4 La. Ann. 193. So one in possession of land under color of title is entitled to the crops sown. Martin v. Thompson, 62 Cal. 618. The doctrine that an innocent trespasser acquires title has also been questioned (Kimball v. Lohmas, 31 Cal. 154), especially when the owner is willing to indemnify him (Weymouth v. Chicago & N. W. R. Co., 17 Wis. 550). A purchaser acquires no better title than his vendor had. Tuttle v. White, 46 Mich. 485; Newton v. Porter, 69 N. Y. 133. Note to Carpenter v. Lingenfelter [Neb.] 32 L. R. A. 422.

There is some conflict as to whether the owner may recover the chattel, in its changed form, from an innocent purchaser of the trespasser. That he may, see Strubbee v. Cincinnati R., 78 Ky. 481; Railway Co. v. Hutchins, 32 Ohio St. 571; Nesbitt v. Lumber Co., 21 Minn. 491; Wooden Ware Co. v. U. S., 106 U. S. 432. That he cannot, see Wetherbee v. Green, 22 Mich. 311; Silsbury v. McCoon, 3 N. Y. 379; Baker v. Meisch, 29 Neb. 224.—Note to Gaskins v. Davis, 44 A. S. R. 439.

ACCORD AND SATISFACTION.

§ 1. **The Accord (17).**
A. In General (17).
B. The Consideration (20).
C. Fraud, Mistake and Duress (22).
§ 2. **Satisfaction or Discharge (23).**
§ 3. **Pleading, Issues, and Proof (23).**

§ 1. *The accord. A. In general.*[77]—Accord and satisfaction is the acceptance of something agreed upon in settlement of a debt or obligation,[78] or the adjustment of a disagreement as to what is due from one party to another, and the payment of the amount so agreed upon.[79]

Where a note is accepted from one who is substituted for the original debtor, the transaction is a novation, and the original debt is abrogated.[80] The acceptance of a new note from one of two obligors will not of itself work a novation in the absence of an understanding of the parties that the original obligation is to be thereby extinguished.[81] An oral contract of novation is not void within the statute of frauds, because the original debt is abrogated.[82]

The effect of an accord and satisfaction, when executed, is to extinguish the antecedent liability.[83] It does not become operative until made so by its terms.[84] It can only be repudiated or rescinded by mutual consent.[85] Substantial compliance with the terms of such an agreement by the debtor will enable him to enforce it against his creditor,[86] or the creditor may be estopped by accepting proffered payments to claim noncompliance by the debtor.[87] It has all the force of

77. See 1 Curr. L. 8.

78. Mintzer v. Supreme Council A. L. H., 41 Misc. 512, 85 N. Y. S. 23.

79. Mere payment of an amount called a "balance" upon an account rendered and its retention by the creditor is not an accord and satisfaction. Harrison v. Henderson, 67 Kan. 194, 72 P. 875. Execution of lease by defendant to plaintiff of mining property, with provision that royalties should be credited on plaintiff's claim against defendant, held not an accord and satisfaction. Boston Newmarket Gold Min. Co. v. Orme [Colo. App.] 71 P. 885. A written acknowledgment of the payment of a definite sum in settlement of a contract, with salary, interest and allowance, is not conclusive evidence of an accord and satisfaction. It is nothing more than a receipt. Komp v. Raymond, 175 N. Y. 102, 67 N. E. 113. Signing receipt for weekly salary, before dismissal but after notice thereof, was not a release of damages for breach of contract. Evesson v. Ziegfeld, 22 Pa. Super. Ct. 79.

80. That the amount of the note was greater than the original liability would not wholly defeat recovery thereon. Dillard v. Dillard, 118 Ga. 97, 44 S. E. 885.

81. Cutting v. Whittemore [N. H.] 54 A. 1098.

82. Griffin v. Cunningham, 183 Mass. 505, 67 N. E. 660.

83. Boston Newmarket Gold Min. Co. v. Orme [Colo. App.] 71 P. 885. A settlement of pending litigation, freely made, after competent advice, is binding and bars further action on the claim. Middlesex Banking Co. v. Field [Miss.] 37 So. 139. Where D. paid S. money to support him, and becoming dissatisfied, demanded the money back and thereupon a settlement was made, D. receiving a certain sum and releasing S. from liability, D. has no claim against S. Downer v. Sassman [Wis.] 99 N. W. 430. Compromise between debtor and creditor held a complete defense as showing that suit was brought before terms of the settlement had been complied with. W. F. Taylor Co. v. Baines Grocery Co. [Tex. Civ. App.] 72 S. W. 260. Composition agreement held a good defense. But recovery permitted to stand in this case, because verdict of jury was only for amount to which plaintiff was entitled by agreement. Talcott v. Janasson, 85 N. Y. S. 833. Where, before trial of a suit to reform a contract, the parties execute a new contract embodying the desired provisions, there is no occasion for the court to act. Daugherty v. Curtis [Iowa] 97 N. W. 67. The court does not wholly lose jurisdiction of a suit which is voluntarily settled, but should enter judgment dismissing the action. Dr. Shoop Family Medicine Co. v. Schowalter [Wis.] 98 N. W. 940.

84. A release executed to take effect at a date subsequent to the time of trial is inadmissible in evidence to affect the matters in controversy. Rosenthal v. Rudnick, 84 App. Div. 611, 82 N. Y. S. 1004.

85. One party to a compromise cannot repudiate it merely because a contract with a third party, which was the reason for his entering into the compromise, is rescinded by mutual consent. Pryor v. Newbold [S. C.] 48 S. E. 275. Where a carrier agreed to the appointment of an agent to agree on damages suffered by a consignee, and paid the agent's expenses, and the agent reported the result, an executed contract of settlement resulted and the carrier was bound to pay the damages agreed upon. Cleveland, etc., R. Co. v. C. & A. Potts & Co. [Ind. App.] 71 N. E. 685.

86. Instead of payments monthly on day specified, the debtor paid every two months within a few days of the date when the first payment was due, and the creditor accepted payments so made. Hanson v. McCann [Colo.] 76 P. 983.

87. Hanson v. McCann [Colo.] 76 P. 983.

an adjudication and cannot be attacked collaterally, or for error of law or lesion, in a direct action,[88] but if a collateral attack be met, the court will decide questions of its validity and effect in order to end litigation.[89]

A release of one of two joint tort feasors releases the other.[90] The discharge of all joint debtors is commensurate with that of any.[91]

A writing is not necessary.[92] An accord and satisfaction is implied from acceptance and retention of a sum tendered in full,[93] notwithstanding the protest of the creditor that he does not accept it in full.[94] But if it be shown that such tender and acceptance is not in full, there is no accord and satisfaction.[95]

88. Written release of claim for injury held valid and enforced. Russ v. Union Oil Co. [La.] 36 So. 937. An executed agreement of settlement confirming title in persons according to the terms of certain deeds effectually settles the title, regardless of fraud or want of consideration as to the original deeds. Hence the question of fraud or consideration need not be considered, where such settlement has been made. Adams v. Hopkins [Cal.] 77 P. 712.

89. Russ v. Union Oil Co. [La.] 36 So. 937.

90. Plaintiff was injured in a collision between a street car and an express company's wagon. Held, a release of the express company released the street car company also. Hubbard v. St. Louis & M. R. Co., 173 Mo. 249, 72 S. W. 1073. A release of two defendants in a suit for damages for malicious interference with plaintiff's business held a bar to an action against the others. Dulaney v. Buffum, 173 Mo. 1, 73 S. W. 125.

NOTE. Effect of release of one joint tort feasor on liability of the other: The general rule that a technical release of one joint tort feasor releases the other was laid down by Littleton (2 Co. Litt, § 376), and followed by the early English cases (Patridge v. Emson, Noy, 62, Kiffin v. Willis, 4 Mod. 380), and in the United States (Urton v. Price, 57 Cal. 270). And it is said that an accord and satisfaction with one joint tort feasor has the same effect as a technical release. Bailey v. Berry, 8 Am. Law Reg. 270; Snyder v. Witt, 99 Tenn. 618, 42 S. W. 441. But the courts are coming to hold that when a release given to one joint tort feasor is not under seal, it may be treated as any other written instrument not under seal, and the consideration may be inquired into, though the body of the instrument may not be varied or contradicted by parol; and when the damages are capable of proof or computation, and are not fully satisfied by the consideration, such a release is held a bar only pro tanto to the liability of the other joint tort feasor. Ellis v. Esson, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830. The court will seek for the intention of the parties from the words used and give effect to the instrument accordingly. Bloss v. Plymale, 3 W. Va. 393, 100 Am. Dec. 752; Irvine v. Millbank, 56 N. Y. 635. But if the release, though not under seal, is given in full discharge, and the damages are mere matter of opinion or incapable of computation, it is generally held conclusive. Eastman v. Grant, 34 Vt. 390; Long v. Long, 57 Iowa, 497, 10 N. W. 875; Stanley v. Leahy, 87 Ill. App. 465. See note to Abb v. Northern Pac. R. Co. [Wash.] 58 L. R. A. 293.

91. A release in terms of one of two partners of his share of a partnership debt operates as a release of both as to one-half the debt. Hatzel v. Moore, 120 F. 1015.

92. Upton v. Adeline Sugar Co., 109 La. 670, 33 So. 725. A rule requiring agreements or consents "in respect to the proceedings in a cause" to be in writing, held not to apply to an agreement in settlement of a controversy. Smith v. Bach, 82 App. Div. 608, 81 N. Y. S. 1057.

93. But a part payment must rest on an independent consideration. See post, § 1B. Acceptance of an amount with knowledge that it was tendered in full. Laroe v. Sugar Loaf Dairy Co., 87 App. Div. 585, 84 N. Y. S. 609. Evidence held insufficient to show acceptance in full of sum less than that due so as to bring debtor within terms of a statute, burden of proof being on the debtor. Standard Sewing Mach. Co. v. Gunter [Va.] 46 S. E. 690. Where money is tendered under circumstances which show that the tender is in full satisfaction, an acceptance of such tender constitutes an accord and satisfaction. Neely v. Thompson [Kan.] 75 P. 117; Harrison v. Henderson, 67 Kan. 194, 72 P. 875. After a dispute as to the amount due, vendee sent vendor a check for amount less than that claimed, with a letter stating check to be in full, which check vendor accepted. Held, an accord and satisfaction. Jones v. Keeler, 40 Misc. 221, 81 N. Y. S. 648. Check in letter stating remittance to be "balance in full of account as per attached statements," held an accord and satisfaction. Andrews v. W. R. Stubbs Contracting Co., 100 Mo. App. 599, 75 S. W. 178. Acceptance, without protest, of a check which was sent with instructions to return it unless accepted in full, amounts prima facie to an accord and satisfaction. Jackson v. Volkening, 81 App. Div. 36, 80 N. Y. S. 1102. Acceptance of check tendered in full payment of disputed claim is sufficient. Mich. Leather Co. v. Foyer, 104 Ill. App. 268. If a check is tendered, it must recite the condition that acceptance thereof must be in full. Hillestad v. Lee [Minn.] 97 N. W. 1055. Cashing check and appropriating proceeds held accord and satisfaction. Creighton v. Gregory, 142 Cal. 34, 75 P. 569.

94. De Lovenzo v. Hughes, 84 N. Y. S. 857; Goss v. Rishel, 85 N. Y. S. 1045. Citing De Lovenzo v. Hughes, 84 N. Y. S. 857. Written acceptance of offer of satisfaction good, though creditor protests that payment is not accepted in full. Cooper & Rock v. Yazoo & M. V. R. Co. [Miss.] 35 So. 162.

Contra: Receipt of money on insurance policy, "under protest" will not support a plea of accord and satisfaction. Mitterwall-

Acceptance of a sum due under a contract does not amount to a settlement of a claim for damages for breach of the contract.[96]

The general rules of construction of contracts apply to contracts of accord and satisfaction.[97]

Only parties in interest may make binding contracts of accord and satisfaction.[98] A settlement reached between a guardian and ward, after the ward has become of age, in the absence of fraud and misrepresentation, is valid.[99] A sole beneficiary of a suit, under no disability, may settle.[1] One of several joint creditors may lawfully enter into an accord and satisfaction with the debtor, and thus discharge the debt.[2] Parties to an action may make a binding and valid settlement of the matters in dispute, without consulting the attorneys on either side.[3]

An attorney cannot settle or compromise a suit or claim without special authority,[4] and the client will not be bound by a ratification, without full knowledge of the facts.[5] A compromise of a claim by an executor, administrator or guardian, without an order of the court, where the statute requires it, is without authority and void.[6] A contract of accord and satisfaction signed by a wife, after being signed and approved by her husband, is binding upon her, so far as her coverture is concerned.[7]

Satisfaction is only effective as to the parties to the accord.[8] The discharge

ner v. Supreme Lodge K. and L. of the Golden Star, 86 N. Y. S. 786.

95. Mere tender and acceptance of a check, with no declaration that acceptance must be in full, does not constitute accord and satisfaction. Asher v. Greenleaf [Kan.] 74 P. 633. Payment of a draft, without knowledge of the amount actually due, does not constitute a settlement of an account, so as to preclude recovery of overcharges. D. Sullivan & Co. v. Owens [Tex. Civ. App.] 78 S. W. 373. Acceptance of a check for a less amount than that claimed, with notice to the debtor that it was not accepted in full settlement, held no accord and satisfaction. Mack v. Miller, 87 App. Div. 359, 84 N. Y. S. 440.

96. Marr v. Burlington, C. R. & N. R. Co., 121 Iowa, 117, 96 N. W. 716. Tender and acceptance of a sum admittedly earned is no satisfaction of a breach of contract of employment. Walston v. Calkins Co., 119 Iowa, 150, 93 N. W. 49. Whether plaintiff waived his right to additional pay by accepting, with objection, part payment, held a question for jury. Stevens v. Mich. Soap Works [Mich.] 96 N. W. 435.

97. When the evidence as to a release is uncontroverted, the construction thereof is for the court. Tuebe v. Gulf, C. & S. F. R. Co. [Tex. Civ. App.] 77 S. W. 442. The intention of the parties will govern. Contract of accord and satisfaction by attorneys construed. Sweeny v. Kellogg, 90 App. Div. 604, 85 N. Y. S. 683. Contracts construed as not operating as an accord and satisfaction of a decree, and sale under decree permitted, payments made being credited. Tabor Mines & Mills Co. v. Newell [Colo. App.] 72 P. 804. Family settlement construed, holding that the posterior clause determined the amount of interest assigned. Lasley v. Preston [Mich.] 93 N. W. 253. An agreement by judgment creditors not to enforce a judgment until a claim of a third party against them was settled, held too indefinite for enforcement and lacking in consideration. Burton v. Kipp [Mont.] 76 P. 563.

98. There is no consideration in such case. House v. Callicott [Miss.] 35 So. 761. A discharged administratrix has no power to authorize a settlement of a claim against the estate. Upton v. Dennis [Mich.] 94 N. W. 728.

99. Norris v. Norris, 85 App. Div. 113, 83 N. Y. S. 77.

1. Widow settled suit for damages for husband's death, administrator not joining. Mattoon G. L. & C. Co. v. Dolan, 105 Ill. App. 1.

2. Ely v. Ely [N. J. Law] 56 A. 246.

3. Nielsen v. Albert Lea [Minn.] 98 N. W. 195. Where such a settlement is made in good faith and without prejudice to the attorneys' claims, the attorneys cannot continue the action merely to enforce their liens. Cohn v. Polstein, 41 Misc. 431, 84 N. Y. S. 1072.

4. Danziger v. Pittsfield Shoe Co., 204 Ill. 145, 68 N. E. 534. A subagent told to use his own judgment in regard to settlement has authority to make binding settlement. Russell Co. v. Stevenson [Wash.] 75 P. 627. Authorization to have matter settled as soon as possible by the court did not give attorney power to compromise suit. Timm v. Timm [Wash.] 75 P. 879. Question of attorney's authority submitted to jury. Fosha v. Prosser [Wis.] 97 N. W. 924.

5. Danziger v. Pittsfield Shoe Co., 204 Ill. 145, 68 N. E. 534.

6. The common law permitted such compromise without a judicial order. But this is changed by statute [Rev. St. 1895, §§ 1987, 2558]. Browne v. Fidelity & Deposit Co. [Tex.] 80 S. W. 593.

7. Brundige v. Nashville, C. & St. L. R. [Tenn.] 79 S. W. 1027; Id., 81 S. W. 1248.

8. Where there are two separate causes of action against two defendants, a release of the cause of action against one does not affect the other. Shannon v. Swanson, 208 Ill. 52, 69 N. E. 869. Compromise of claim of one interpleader does not dispose of the claim of another interpleader. Miller v. Campbell Comm. Co., 13 Okl. 75, 74 P. 507.

or release of one joint debtor does not release the right of action against the others, unless such an intent affirmatively appears.[9]

(§ 1) *B. The consideration.*[10]—The accord must rest upon a sufficient consideration or be under seal.[11] The consideration must be something in the nature of a benefit to the creditor or party relinquishing the claim or a detriment to the other party.[12] Thus an agreement to forbear suit,[13] or extend time of payment,[14] the compromise of doubtful claims, asserted in good faith,[15] without regard to the final decision as to the validity of such claims,[16] unless absolutely unsustainable at law or in equity,[17] or an agreement not to go into bankruptcy or make an assign-

A compromise in a suit to enforce liability on stock will not release a subsequent transferee of the stock from liability thereon. People's Home Sav. Bank v. Rickard, 139 Cal. 285, 73 P. 858. A compromise between a plaintiff and defendant whereby plaintiff took a sum of money and dismissed his appeal did not affect or benefit an intervener whose rights were concluded by the judgment. Kline v. Mohr, 142 Cal. 673, 76 P. 650.

9. Code Civ. Proc. N. Y. § 1942. Booth Bros. & H. I. Granite Co. v. Baird, 83 App. Div. 495, 82 N. Y. S. 432. One partner and joint debtor released by compromise after judgment recovered against him; held, other partner not released from residue of demand. Siefke v. Minden, 40 Misc. 631, 83 N. Y. S. 71.

10. See 1 Curr. L. 9.

11. Release of claim held invalid, because no consideration, etc. Muschel v. Austern, 84 N. Y. S. 956. Where a settlement is made by a debtor with a certain creditor, separate from any general settlement with other creditors, the burden is on the debtor to show a new agreement upon a sufficient consideration. Weinberg v. Novick, 88 N. Y. S. 168.

12. A compromise agreement by which each party absolutely undertakes to do certain things for the benefit of the other. New Haven Mfg. Co. v. New Haven P. & B. Co. [Conn.] 55 A. 604. One dollar and an agreement to employ for a definite time held sufficient. Quebe v. Guif, etc., R. Co. [Tex. Civ. App.] 77 S. W. 442. Agreement to supply all broken parts and settle all accounts and by other party to pay on agreed terms for machinery, held to have consideration. New Haven Mfg. Co. v. New Haven P. & B. Co. [Conn.] 55 A. 604.

13. An agreement to forbear to sue on a claim on the debtor's promising to pay, and paying part of the claim at once, and the balance when convenient. Samuel Cupples Woodenware Co. v. Dreyfus, 102 Mo. App. 463, 76 S. W. 734.

14. Extension of time of payment is sufficient consideration to support a release of claims for damages. William Deering & Co. v. Walker [Neb.] 96 N. W. 517.

15. Note: "As a result of the authorities, a doubtful or disputed claim, sufficient to constitute a good consideration for an executory contract of compromise, is one honestly and in good faith asserted, arising from a state of facts upon which a cause of action can be predicated, with the reasonable belief on the part of the party asserting it that he had a fair chance of sustaining his claim, and concerning which an honest controversy may arise, although in fact the claim may be wholly unfounded." Beach, Cont. § 175. Quoted in Sharp v. Bowie, 142 Cal. 462, 76 P. 62. Settlement of a suit is a sufficient consideration to support a note. Powers v. Hambrick, 25 Ky. L. R. 30, 74 S. W. 660. A compromise of a bona fide controversy as to legal rights is based on a sufficient consideration. Albin Co. v. Firth Carpet Co., 24 Ky. L. R. 2432, 74 S. W. 212. A compromise proposition made by insolvent firm to creditors, held a sufficient moral obligation to support a subsequent promise. Taylor v. Hotchkiss, 81 App. Div. 470, 80 N. Y. S. 1042. The fact that it is uncertain which of two parties, both of whom deny liability, is liable for a certain debt, is sufficient consideration to support a settlement between one of such parties and the creditor. Chicago, R. I. & P. R. Co. v. Brown [Neb.] 97 N. W. 1038. A compromise of really existing differences embodied in a supplemental agreement cannot be repudiated by one who has benefited thereby. Moorman v. Plummer Lumber Co. [La.] 37 So. 17. Compromise of suit involving scandal. Bunel v. O'Day, 125 F. 303.

16. Voluntary settlements of disputes are favored by the courts and upheld without inquiry as to the merits of the original contentions of the parties. Sing On v. Brown [Or.] 74 P. 207. Where there is a bona fide controversy between parties as to the usurious nature of a contract, a compromise of the dispute will be upheld. Gray v. U. S. S. & L. Co., 25 Ky. L. R. 1120, 77 S. W. 200. An agreement to release an asserted claim is based upon sufficient consideration, whether the claim be valid or invalid. Cowen v. Rouss, 40 Misc. 105, 81 N. Y. S. 276. An agreement to compromise doubtful claims, asserted in good faith, is sufficient consideration for a note, even though the claims are found groundless in a subsequent suit. Sharp v. Bowie, 142 Cal. 462, 76 P. 62. The compromise of a doubtful claim is a sufficient and valid consideration for a promise to pay money for the settlement of such claim. Immaterial which side ultimately proves to be right. Melcher v. Ins. Co. of Pa., 97 Me. 512, 55 A. 411. The law favoring the compromise of doubtful claims and avoidance of litigation is a sufficient consideration, though there could have been no recovery if the matter had been litigated. Daly v. Busk Tunnel R. Co. [C. C. A.] 129 F. 513. Where defendants refused to carry out an agreement to compromise claims by paying notes, recovery on the notes was not barred by plaintiff's prosecuting the compromised suit to judgment, or by the fact that such judgment was adverse to her. Sharp v. Bowie, 142 Cal. 462, 76 P. 62.

17. But if the claim sued on is absolutely unsustainable at law or in equity, its

ment,[18] have been held sufficient consideration to support some form of accord and satisfaction. The settlement of a liquidated, undisputed liability, by payment of a sum less than that due, lacks consideration, and is void,[19] unless there be a new, binding agreement upon a sufficient consideration.[20] This general rule, however, is confined strictly to the cases falling within it,[21] and even small circumstances of variation have been held sufficient to prevent its application.[22] Thus, a payment in advance, no matter how short the time,[23] or acceptance from an insolvent debtor of part payment in full satisfaction of a claim, is founded on such consid-

compromise is void for want of consideration. Ivy Coal & C. Co. v. Long [Ala.] 36 So. 722.

18. Debtor agreed not to go into voluntary bankruptcy and creditor knew debtor would have to borrow at a higher rate of interest to pay in full. Held sufficient consideration for a release, debtor paying less than sum due. Rotan Grocery Co. v. Noble [Tex. Civ. App.] 81 S. W. 586. An agreement to accept a less sum in satisfaction of a judgment, the debtor agreeing not to take advantage of the bankrupt law, is upon a sufficient consideration. Hanson v. McCann [Colo. App.] 76 P. 983.

19. Hatzel v. Moore, 120 F. 1015; Standard Sewing Mach. Co. v. Gunter [Va.] 46 S. E. 690. Part payment of liquidated, undisputed liability lacks consideration. Shanley v. Koehler, 80 App. Div. 566, 80 N. Y. S. 679. Settlement of a judgment for less than amount. Upton v. Dennis [Mich.] 94 N. W. 728. Payment of draft for less than agreed price held not a settlement. Withers v. Moore, 140 Cal. 591, 74 P. 159. Payment by insurance company of amount less than adjusted loss. C. H. Brown Banking Co. v. Baker, 99 Mo. App. 660, 74 S. W. 454. Payment of part of an obligation, without release under seal, will not have the effect of releasing the whole. Evesson v. Ziegfeld, 22 Pa. Super. Ct. 79. Acceptance of portion of face of note, with refusal of settlement on terms of sender, is not accord and satisfaction, since indebtedness is liquidated. Kelley v. Lawrence Bros., 78 App. Div. 484, 79 N. Y. S. 914. The surrender of a policy and acceptance of a sum less than the amount of a liquidated and lawful demand against an insurance company does not amount to an accord and satisfaction. Simons v. Supreme Council, A. L. H., 82 App. Div. 617, 81 N. Y. S. 1014. Where sum due for goods was not in dispute, the acceptance of part payment in cash and rejection of an assigned claim for balance was not a compromise. U. S. Water & Steam Supply Co. v. Dreyfus [Mo. App.] 79 S. W. 184. Payment by a debtor of a liquidated amount, presently due, and to which he has no bona fide defense, is no consideration for a release of other unliquidated claims. Woodall v. Pac. M. L. Ins. Co. [Tex. Civ. App.] 79 S. W. 1090. The acceptance of a sum of money, less than what is due from guarantors and an agreement not to proceed against them for any further sum, such agreement not being under seal, and being based on no other consideration is nudum pactum as to the balance due. Commercial & Farmers' Nat. Bank v. McCormick, 97 Md. 703, 55 A. 439.

20. Payment of part of an indebtedness does not extinguish the entire debt without a new binding agreement. Weinberg v. Novick, 88 N. Y. S. 168.

21. Jackson v. Volkening, 81 App. Div. 36, 80 N. Y. S. 1102. The general rule that payment of a sum less than the amount of a liquidated claim is not a satisfaction does not apply to an agreement as to satisfaction of a judgment which has been acted upon by both parties, especially where the judgment creditor has received other benefits. Judgment debtor, having no property, agreed to pay a sum less than judgment, in monthly instalments out of salary, and carried out the agreement, receiving a satisfaction. Held, creditor could not recover the balance. Meeker v. Requa, 87 N. Y. S. 959.

22. Weiss v. Marks, 206 Pa. 513, 56 A. 69; Ebert v. Johns, 206 Pa. 395, 55 A. 1064.

NOTE. Accord and satisfaction by part payment. The general rule has been severely criticized, and in Mississippi the court declined to follow it, holding that the acceptance from a debtor of a sum of money less than is actually due on a distinct agreement that it shall extinguish the whole debt may operate as a discharge, although it is not paid at any different time or place than that agreed upon. The rule is said to be absurd and unreasonable. Clayton v. Clark (74 Miss. 499, 21 So. 565, 22 So. 189) 37 L. R. A. 771.

Many other courts have taken a similar view, and in consequence, slight circumstances of variation from the original agreement have been construed as a sufficient consideration for the new agreement, so as to take the case out from the operation of the rule. Thus a part payment before the debt is due (see text and citation, post), or a payment at a different place (Grant v. Hughes, 96 N. C. 177, 2 S. E. 339), or in a different mode, whereby a new benefit may be conferred or a new burden may be imposed (Rose v. Hall, 26 Conn. 392, 68 Am. Dec. 402), or payment of costs and expenses, in addition to the smaller sum (Harper v. Graham, 20 Ohio, 105), or the giving of a note (Jaffray v. Davis, 11 L. R. A. 710, 124 N. Y. 164, 26 N. E. 351, reversing 48 Hun, 500, 1 N. Y. S. 814), or further security (Boyd v. Hitchcock, 20 Johns. [N. Y.] 76, 11 Am. Dec. 247), or the surrender and cancellation of a note (Ellsworth v. Fogg, 35 Vt. 355), or payment in property other than money (Bull v. Bull, 43 Conn. 455), or payment or security by a third party (Varney v. Conery, 77 Me. 527, 1 A. 683), have been held to bar further recovery on the original claim. See note to Fuller v. Kemp (138 N. Y. 231, 33 N. E. 1034) in 20 L. R. A. 785, from which the above citations are taken.

23. Weiss v. Marks, 206 Pa. 513, 56 A. 69. Whole amount not due. Part payment sufficient consideration. Russell v. Stevenson [Wash.] 75 P. 627.

eration that the entire debt is thereby satisfied.[24] The rule has no application to payments by a third party.[25] An agreement to discharge an indebtedness by payment of a less sum than is actually due is governed by the same rules as other contracts, when based on a sufficient consideration.[26]

If the sum due is in dispute or unliquidated, the payment of a sum less than that claimed, upon condition that it is to operate as full payment, is a good accord and satisfaction.[27]

If there be a sufficient consideration, it is immaterial that it moves to[28] or from[29] a third party, if at the request of a party to the accord.[30]

Payments made under an agreement void for want of consideration (or for other reasons) may be applied on the debt.[31]

(§ 1) *C. Fraud, mistake and duress.*[32]—An accord and satisfaction may, in a court of law or in equity, be set aside for fraud or misrepresentation in the execution or in the inducement to the execution of the contract.[33] A misrepresentation as to the legal effect of a release,[34] or as to its contents amounting to a mere

24. Engbretson v. Seiberling [Iowa] 98 N. W. 319.

25. Ebert v. Johns, 206 Pa. 395, 55 A. 1064. And see 1 Curr. L. 9, n. 57.

26. Hanson v. McCann [Colo. App.] 76 P. 983.

27. Fogil v. Boody [Conn.] 56 A. 526. Evidence held insufficient to support a finding that defendant accepted a sum less than that due as full redemption from execution sale. Wilson v. Eddy [Iowa] 98 N. W. 150. The settlement of an unliquidated demand is not rendered void by an agreement at the time that the amount of the demand exceeded the amount to be paid in satisfaction thereof. Wheeler v. Baker [Mich.] 93 N. W. 1069. And see 1 Curr. L. 10, n. 71.

NOTE. Disputed claim: Where the claim is not a money demand or, if so, is unliquidated, or if liquidated is doubtful in fact or law, any sum, no matter how small, given and received in satisfaction of any demand, no matter how large, will legally satisfy that demand as a compromise. Bull v. Bull, 43 Conn. 455; Tuttle v. Tuttle, 12 Metc. [Mass.] 554, 46 Am. Dec. 701; Pierce v. Pierce, 25 Barb. [N. Y.] 243; U. S. v. Child, 79 U. S. (12 Wall.) 232, 20 Law. Ed. 360; Roach v. Gilmer, 3 Utah, 389. The adequacy of the consideration will not in such case be inquired into by a court of equity. Reed v. Bartlett, 19 Pick. [Mass.] 273; Union Bank of Georgetown v. Geary, 30 U. S. (5 Pet.) 114, 8 Law. Ed. 66. From note to Fuller v. Kemp (138 N. Y. 231, 33 N. E. 1034) in 20 L. R. A. 785.

NOTE. Payment on compromise: Money voluntarily paid on the compromise of a doubtful, disputed or litigated claim cannot be recovered back. Troy v. Bland, 58 Ala. 197; Stuart v. Lears, 119 Mass. 143; Brown v. Rich, 40 Barb. [N. Y.] 28; Gould v. McFall, 118 Pa. 455, 12 A. 336, 4 Am. St. Rep. 606. From note on "Recovery of Voluntary Payments," 94 Am. St. Rep. 424.

28. Headley v. Leavitt [N. J. Err. & App.] 55 A. 731. See 1 Curr. L. 9, n. 57.

29. An agreement is not invalid because stockholders in one of the parties are to give their notes. W. F. Taylor Co. v. Baines Grocery Co. [Tex. Civ. App.] 72 S. W. 260. Where one accepts, as satisfaction of a claim for damages, money from a third person, it is immaterial whether such person was at the time his agent. Wagoner v. Silva, 139 Cal. 559, 73 P. 433.

30. An accord between plaintiff and a third party, and a satisfaction moving from the third party to the plaintiff, are a bar to an action, if the defendant authorized or ratified the settlement. A plea interposing such a defense is in itself a ratification. Chicago, etc., R. Co. v. Brown [Neb.] 97 N. W. 1038.

31. Payment of a less sum than is due on a promise to release entire claim, discharges the indebtedness to the amount of the sum paid only. Rotan Grocery Co. v. Noble [Tex. Civ. App.] 81 S. W. 586. A payment on a compromised claim discharges the debtor from liability pro tanto, though the compromise is void. Browne v. Fidelity & Deposit Co. [Tex.] 80 S. W. 593. See also 1 Curr. L. 11, n. 92, 93.

32. See 1 Curr. L. 10.

33. Brundige v. Nashville, etc., R. [Tenn.] 79 S. W. 1027; Id., 81 S. W. 1248. A release obtained by fraud is voidable. Wheeler v. Metropolitan Stock Exch. [N. H.] 56 A. 754. Agent of company secured release by fraud and misrepresentation; jury's verdict sustained by the evidence. Clayton v. Consol. Traction Co., 204 Pa. 536, 54 A. 332. A fraudulent agreement between a debtor and a single creditor renders a composition voidable at the instance of the other creditors. Batchelder, etc., Co. v. Whitmore [C. C. A.] 122 F. 355. Where a release of damages for injuries was obtained by fraud, the party giving the release was not estopped to set up the fraud by accepting employment and wages for services, such employment and wages not being part of the agreement for a release, though mentioned when the release was given. Coles v. Union Terminal R. Co. [Iowa] 99 N. W. 108. A compromise of a claim for damages for injury secured from the injured man while still under the influence of opiates and in great pain, after the amputation of both legs, was set aside as not the free act of the claimant. Davenport v. Dubach Lumber Co. [La.] 36 So. 812. False representations as to the extent of injuries, made for the purpose of inducing the injured person to execute a release, constitute grounds for having the release set aside. Jones v. Gulf, etc., R. Co. [Tex. Civ. App.] 73 S. W. 1082.

promise,[35] will not render it void. If a release has been procured by fraud, it is not necessary for the plaintiff to pay into court the money received for its execution in order to have it set aside.[36] If a release is not supported by a consideration, it is immaterial whether it was fraudulently obtained, or whether the one giving it knew its contents.[37]

If parties act under a mistake[38] or misconception of rights,[39] the accord and satisfaction may be set aside. But a mutual mistake,[40] or one induced by negligence,[41] or a failure to draw a proper inference from facts communicated,[42] is no ground for relief.

Restitution is necessary when an accord and satisfaction is sought to be rescinded on the ground of fraud or bad faith.[43]

§ 2. *Satisfaction or discharge.*[44]—The satisfaction consists in the performance of the agreement by one party and its acceptance by the other. An agreement for an accord and satisfaction, which has never been executed, is ineffectual as an accord and satisfaction.[45] But though an accord, without performance according to its terms, is nonenforceable,[46] it may in a proper case become available as an equitable defense.[47] A tender of satisfaction is not sufficient.[48] Prior claims are presumed to be included in a settlement.[49] But claims not sued on and not included in a settlement may be subsequently sued on.[50] A release in general terms of all claims for personal injuries will include an injury not known to exist when the release was given.[51]

§ 3. *Pleading, issues, and proof.*[52]—An accord and satisfaction cannot be proven under a general denial, but must be specially pleaded.[53] Where, after suit

34, 35. Jackson v. Pa. R. Co., 69 N. J. Law, 79, 54 A. 532.

36. Jones v. Gulf, etc., R. Co. [Tex. Civ. App.] 73 S. W. 1082.

37. Woodall v. Pac. M. L. Ins. Co. [Tex. Civ. App.] 79 S. W. 1090.

38. Mistake of law and fact—Surprise. Order of United Commercial Travelers v. McAdam [C. C. A.] 125 F. 358.

39. A compromise agreement in a mortgage foreclosure suit, vacated because entered into owing to a mutual mistake or misconception of the rights of the parties. N. Y. Security & T. Co. v. Shoenberg, 89 N. Y. S. 14.

40. Russell v. Stevenson [Wash.] 75 P. 627. A settlement made in ignorance of the existence of certain assets, held to bar a party to the settlement from participation in those assets. Dorman v. Dorman [Mass.] 69 N. E. 1043.

41. One who signs a written release, without reading it when he might have done so, will be held to have executed it with full knowledge of its contents. Atchison, T. & S. F. R. Co. v. Vanordstrand, 67 Kan. 386, 73 P. 113.

42. Daly v. Busk Tunnel R. Co. [C. C. A.] 129 F. 513.

43. Johnson v. Shreveport Waterworks Co., 109 La. 268, 33 So. 309. In an action to set aside an agreement of settlement, it is necessary to restore or offer to restore what has been received thereunder; not so where one party has secured an unwarranted credit by fraud. Price v. Stout, 84 App. Div. 334, 82 N. Y. S. 935.

44. See 1 Curr. L. 11.

45. Prest v. Cole, 183 Mass. 283, 67 N. E. 246. Evidence held to show that an agreement to settle was abandoned, and hence defense was not good. Seattle Brew. & Malt. Co. v. Donofrio [Wash.] 74 P. 823. Settlement null if abandoned. Magee v. Verity, 97 Mo. App. 486, 71 S. W. 472.

46. Zucca v. Kuhne, 84 N. Y. S. 181.

47. Headley v. Leavitt [N. J. Err. & App.] 55 A. 731.

48. Prest v. Cole, 183 Mass. 283, 67 N. E. 246.

49. Upton v. Adeline Sugar Factory Co., 109 La. 670, 33 So. 725; Mullins v. Vanarsdall, 25 Ky. L. R. 1979, 79 S. W. 224. In an action by an assignee to recover for work done under a contract, defendant could not set up alleged defects in the work, after having made a settlement with the contractor subsequent to the assignment of the claim, the defects being apparent when the settlement was made. Pisani v. Jordan, 85 N. Y. S. 375.

50. Vanuxem v. N. Y. Life Ins. Co., 122 F. 107. Equitable title to land, in a son, under a trust deed from his father, held not to be released by an agreement whereby the son released all claims or demands against his father. Suit v. Sult, 97 Md. 539, 55 A. 382.

51. Quebe v. Gulf, etc., R. Co. [Tex. Civ. App.] 77 S. W. 442.

52. See 1 Curr. L. 12.

53. Fogil v. Boody [Conn.] 56 A. 526; Ely v. Ely [N. J. Law] 56 A. 246. Release offered in evidence—not pleaded in answer. Rosenthal v. Rudnick, 84 App. Div. 611, 82 N. Y. S. 1004. Evidence of a release admitted under general issue; but this was before the adoption of a rule requiring all affirmative defenses to be set forth in a notice attached to the plea. Cleveland v. Rothschild [Mich.] 94 N. W. 184. Defense to an action of trespass that plaintiff settled with

is brought, a settlement is arranged, which defendant refuses to carry out, plaintiff cannot set up the settlement in a supplemental complaint.[54] Fraud cannot be pleaded generally. Facts sufficient to constitute it must be set out.[55]

The defense of accord and satisfaction must be clearly established,[56] but when shown to have been made, the burden is upon the party seeking to avoid its effect, and have it set aside, to show the necessary facts.[57] Fraud[58] or mistake[59] must be established by "clear and satisfactory" proof.

Parol evidence is admissible to show the inducements offered to secure the execution of a release,[60] but not to vary or contradict its terms by showing an oral contemporaneous agreement.[61] A written instrument which is a mere receipt and not a release may be modified, explained or contradicted by parol evidence.[62]

Fraud and knowledge are questions for the jury.[63]

ACCOUNTING, ACTION FOR.

§ 1. Nature of Remedy and Jurisdiction of Courts (24).
§ 2. Persons Liable and Entitled to Accounting (26).
§ 3. Procedure Before Reference or Without Reference (26).
§ 4. Reference and Proceedings Thereon (27).
§ 5. Proceedings on Coming in of Report (27).

§ 1. *Nature of remedy and jurisdiction of courts.*[64]—The complexity of the accounts between the plaintiff and defendant,[65] the plaintiff's need of a dis-

defendant's co-trespaseer is inadmissible under the general issue. Sunlin v. Skutt [Mich.] 94 N. W. 733. Leave to file supplemental answer setting up accord and satisfaction granted on condition of payment of costs. Pickrell v. Mendel, 87 App. Div. 163, 84 N. Y. S. 70. Where a compromise agreement in a former ejectment suit is relied on as equitable estoppel, it should be pleaded in the answer and passed on by the court. Tarpey v. Madsen, 26 Utah, 294, 73 P. 411.

54. The reason is that the settlement is a different and subsequent cause of action. Smith v. Bach, 82 App. Div. 608, 81 N. Y. S. 1057.

55. Reply held demurrable. Zeller v. Zeller [Ind. App.] 69 N. E. 468.

56. Evidence held not to establish accord and satisfaction. Terry & T. Const. Co. v. Leeson, 84 N. Y. S. 267. Evidence held insufficient to show an accord and satisfaction. Headley v. Leavitt [N. J. Eq.] 57 A. 510. Evidence held to show a voluntary settlement of a suit. Dr. Shoop Family Medicine Co. v. Schowalter [Wis.] 98 N. W. 940. Evidence held to show a compromise of differences and settlement. Huntington Malleable Iron Co. v. Bills, 21 Pa. Super. Ct. 556. Evidence in a building association foreclosure suit held to show a complete accord and satisfaction after the decree. Daily v. Saginaw B. & L. Ass'n [Mich.] 95 N. W. 326. Directive verdict for defendant on issue of accord and satisfaction held error, as a conditional receipt in full, and evidence in regard thereto did not establish an accord and satisfaction. Marshall-Wells Hardware Co. v. Moody [Minn.] 99 N. W. 356. Where it was claimed that a maker had been released from liability on notes by forfeiting a sum paid for stock, the release was not established by a declaration of the payee that he was ahead $300 while the maker "was out of the mill business," there being no surrender of the notes or consideration for the alleged release. Furber v. Fogler, 97 Me. 585, 55 A. 514.

57. Linton v. Cathers [Neb.] 97 N. W. 799.

58. Nothing short of clear and satisfactory evidence of fraud or mistake will justify setting aside an executed settlement of differences between parties. Fletcher v. Whitlow, Lake & Co. [Ark.] 79 S. W. 773. Evidence held not to support finding of fraud. Burnham v. Burnham, 119 Wis. 509, 97 N. W. 176. Mere kindness towards the debtor is not of itself evidence of fraud. Ely v. Ely [N. J. Law] 56 A. 246. Evidence sufficient to show compromise fairly made. Johnson v. Shreveport Waterworks Co., 109 La. 268, 33 So. 309. Evidence held to sustain claim that release was obtained by fraud and collusion. Mullaney v. Mullaney [N. J. Err. & App.] 54 A. 1086. Where fraud in the execution of a release is alleged, evidence that the one executing it did not understand its contents, and of the maker's physical and mental condition, is admissible. Galloway v. San Antonio & G. R. Co. [Tex. Civ. App.] 78 S. W. 32.

59. The burden of showing a material mistake rests upon the party who asserts it and it must be made out by clear and satisfactory proof. Reimer v. Green Room Club, 84 N. Y. S. 561.

60. Jones v. Gulf, etc., R. Co. [Tex. Civ. App.] 73 S. W. 1082.

61. Atchison, etc., R. Co. v. Vanordstrand, 67 Kan. 386, 73 P. 113.

62. Kamp v. Raymond, 175 N. Y. 102, 67 N. E. 113.

63. Ind., D. & W. R. Co. v. Fowler, 201 Ill. 152, 66 N. E. 394. Question of good faith in making settlement for the jury. City of N. Y. v. Baird, 176 N. Y. 269, 68 N. E. 364. Fraud alleged in procuring a release in personal injury suit. Court refused to pass on question. Griffin v. Southern R., 66 S. C. 77, 44 S. E. 562.

64. See 1 Curr. L. 13.

covery and the mutuality of their accounts,[66] and the existence of a fiduciary or partnership relation, are given as grounds for a bill in equity for an accounting, although the validity of the first two grounds mentioned has been much impaired by the modern practice of reference for the examination of accounts.[67] No right to maintain a bill in equity for an accounting results from the fact that a claim contains many items,[68] that the plaintiff does not know how much he is entitled to,[69] that there are set-offs,[70] or that the claim is for a share of profits in a case where there was no complication or fiduciary obligation,[71] or where the accounts are all on one side and no discovery is sought.[72] A claim for a definite sum as the price of an interest in a business sold by one partner to another cannot be recovered by a bill for an accounting.[73] A bill for the sole purpose of redeeming a pledge,[74] or of obtaining a discovery,[75] cannot be maintained, nor will it be allowed where there is an adequate remedy at law.[76] Delay in bringing a suit to settle a partnership business may result in an equal division of the costs,[77] or, in some cases, cause the claim to be barred by the statute of limitations.[78] The right to a bill for an accounting may also be lost by an acceptance and settlement of an account rendered in the absence of fraud, accident or mistake,[79] or, in

65. Ellison v. Dunlap, 25 Ky. L. R. 1495, 78 S. W. 155. The jurisdiction of equity over matters of account is based on the complicated character of the account, the need of discovery and the existence of a fiduciary or trust relation. Graham v. Cummings, 208 Pa. 516, 57 A. 943; Alexander v. Mason, 125 F. 830. Defendant had received many promissory notes for collection which were for the most part paid in kind, which had to be converted by him into cash. Irvine v. Epstein [Fla.] 33 So. 1003. Debts were sums received for the sale of land, and the credits payments for land, taxes and other purposes. McClintock v. Thweatt, 71 Ark. 323, 73 S. W. 1093.

66. Sprigg v. Com. Title Ins. & Trust Co., 206 Pa. 548, 56 A. 33.

67. Lee v. Washburn, 80 App. Div. 410, 80 N. Y. S. 1040.

See Reference, 2 Curr. Law, 1484. Although the modern practice in law courts of referring complicated cases to referees and of allowing interrogatories to the opposing party before trial obviates the necessity of a bill in equity on the first two grounds. Lee v. Washburn, 80 App. Div. 410, 80 N. Y. S. 1040.

Note: An accounting may be had in equity by one partner against the other without a final winding up or dissolution (Miller v. Freeman, 51 L. R. A. 504, 111 Ga. 654, 36 S. E. 961), and creditors for whose benefit an assignment has been made are entitled at all times to be informed of the progress of affairs (State v. Johnson, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33), and upon the voluntary dissolution of a building association, the principle of accounting with members is the same whether the association be solvent or insolvent (People's Bldg. & L. Ass'n v. McPhilamy, 81 Miss. 61, 32 So. 1001, 59 L. R. A. 743).

68. American Spirits Mfg. Co. v. Easton, 120 F. 440. Where a president of a corporation was to receive 25 per cent of the net profits as a part of his salary after dividends had been set aside, alleged that in ascertaining such profits the inventory was improperly taken, a bill for an accounting did not state a cause of action therefor, the items being neither numerous nor technical. De Bevoise v. H. & W. Co. [N. J. Eq.] 58 A. 91.

69. Com. Trust Co. v. Frick, 120 F. 688.

70. Pollak v. H. B. Claflin Co., 138 Ala. 644, 35 So. 645.

71. Oden v. Lockwood, 136 Ala. 514, 33 So. 895; Hart v. Garrett Co., 87 App. Div. 536, 84 N. Y. S. 774.

Contra. McMurtie v. Guller, 183 Mass. 451, 67 N. E. 358.

72. A bill in equity for an account was not the appropriate remedy, and an action was properly brought at law for money had and received. Graham v. Cummings, 208 Pa. 516, 57 A. 943.

73. Robinson v. McGinty, 84 App. Div. 639, 82 N. Y. S. 736.

74. A president of a corporation had pledged stock thereto as security for a loan. He claimed salary due to the amount of the loan, on account of error in determining it because of the inventory being improperly taken. De Bevoise v. H. & W. Co. [N. J. Eq.] 58 A. 91.

75. De Bevoise v. H. & W. Co. [N. J. Eq.] 58 A. 91.

76. An insurance company insured employers against liability to their employes; the premiums to be determined from the pay roll. An estimate was made in the beginning and premiums paid thereon, differences to be adjusted at the end of the year by rebate or additional payment. The employers refused to make a statement in regard to their pay roll at the end of the year, claiming they were no greater than the estimated amount. A bill for an accounting would not lie because under statutes they could be compelled to produce their books. London G. & A. Co. v. Doyle, 130 F. 719.

77. Dyer v. Ballinger, 24 Ky. L. R. 1918, 72 S. W. 738.

78. Statute begins to run from last item of a mutual account (Wagener v. Steele, 117 Ga. 145, 43 S. E. 403), or against a suit for partnership accounting, from the time the business was closed up (Weber v. Zacharias, 105 Ill. App. 640).

79. Ranald S. S. Co. v. Wesenberg & Co., 122 F. 969.

Louisiana, by an "authentic act."[80] The right cannot be used as a defense to an action upon a promissory note,[81] or in an equitable proceeding as basis for a cross bill by a person not a necessary party to the suit.[82] Statutory actions of account between officers of corporations do not apply to foreign corporations in the absence of special provision to that effect.[83] In Alaska, as in Missouri and Maine, when a partner dies the probate court has exclusive jurisdiction of an action for an accounting against his estate.[84]

§ 2. *Persons liable and entitled to accounting.*[85]—Liability of particular classes of persons to account is specifically treated in appropriate titles.[86] Trustees and other fiduciaries may be compelled to account by a bill in equity.[87] Partners have the same remedy against each other[88] after the cessation of the dealings in which they were jointly interested,[89] and before their account has been stated.[90] A person by fraudulent conspiracy with one partner getting possession of the assets of the firm may, together with the fraudulent co-partner, be compelled to account.[91]

§ 3. *Procedure before reference or without reference.*[92] *Parties.*[93]—A bill for an account against different parties on different causes of action is demurrable,[94] as is a bill seeking to review a consent decree for alimony.[95] A bill for an accounting for the removal of a trustee appointed in a suit for divorce and seeking to review a consent decree for alimony and for adjustment of certain partnership matters between the parties is multifarious.[96]

Pleading and evidence.[97]—Complainant in a bill for an accounting must allege that something is due him.[98] If the bill demands an account on the ground of a partnership only, it cannot be maintained on any other theory.[99] Debts due from plaintiff to defendant in an action on an alleged mutual account need not be pleaded with the same particularity as debts due from defendant to plaintiff for which recovery is sought.[1] An account rendered, not objected to within a reasonable time, is prima facie correct.[2] The report of a corporation expert, incorporated in the records of the corporation, is not competent evidence of the value of its stock.[3]

80. Glennon v. Vatter, 109 La. 942, 33 So. 930.

81. Herbert Kraft Co. v. Bryan, 140 Cal. 73, 73 P. 746.

82. Memphis News Pub. Co. v. Southern R. Co., 110 Tenn. 684, 75 S. W. 941.

83. Miller v. Quincy, 88 App. Div. 629, 85 N. Y. S. 310.

84. Esterly v. Rua [C. C. A.] 122 F. 609.

85. See 1 Curr. L. 314.

86. See Estates of Decedents, 1 Curr. L. 1090; Guardianship, 2 Curr. L. 148; Trusts, 2 Curr. L. 1924, etc.

87. Decell v. Hazlehurst O. M. & F. Co. [Miss.] 35 So. 761; Jordan v. Underhill, 91 App. Div. 124, 86 N. Y. S. 620; Hotel Register Co. v. Osborne, 84 App. Div. 307, 82 N. Y. S. 609. Pretended joint-purchaser getting secret commission. Gates v. Paul, 117 Wis. 170, 94 N. W. 55. Defendant received a fund to invest in business turning over part of profit. Rogers v. Wheeler, 89 App. Div. 435, 85 N. Y. S. 981.

88. Adams v. Elwood, 176 N. Y. 106, 68 N. E. 126; Tregea v. Mills [Wyo.] 72 P. 578.

89. Bluntzer v. Hirsch [Tex. Civ. App.] 75 S. W. 326.

90. Schulsinger v. Blau, 84 App. Div. 390, 82 N. Y. S. 686.

91. Green v. Tuchner, 87 App. Div. 314, 84 N. Y. S. 345. Where a patentee gave a manufacturer the right to manufacture the article, he to receive a royalty, and a large number of the articles had been manufactured and an accounting for the royalties refused, held, the contract did not create a partnership or joint adventure or any relation which justified an application to require the manufacturer to account in equity. Henderson v. Dougherty, 88 N. Y. S. 665.

92, 93. See 1 Curr. L. 14.

94. Case v. N. Y. Mut. S. & L. Ass'n, 88 App. Div. 538, 86 N. Y. S. 104.

95. A bill for an accounting, for the removal of a trustee appointed in a suit for divorce and seeking to review a consent decree for alimony, is demurrable as the consent decree was not subject to attack. Bonney v. Lamb [Ill.] 71 N. E. 375.

96. Bonney v. Lamb [Ill.] 71 N. E. 375.

97. See 1 Curr. L. 14.

98. Gould v. Barrow, 117 Ga. 458, 43 S. E. 702.

99. Kirkwood v. Smith, 82 App. Div. 411, 81 N. Y. S. 891.

1, 2. Wagener v. Steele, 117 Ga. 145, 43 S. E. 403.

3. Reilly v. Freeman, 84 App. Div. 433, 82 N. Y. S. 929

Judgment or decree.[4]—After stating the account, a court of equity will enforce a settlement without requiring the prevailing party to bring suit,[5] and, besides distributing a fund in court, may order a partner to account for commissions he has received for the firm.[6] Where the bill of complaint and the evidence indicate that there were no profits, it is error to order the defendant to account.[7] Instead of appointing a receiver, the court may accept a bond with sureties from defendant, conditioned to comply with any order of the court.[8]

§ 4. *Reference and proceedings thereon.*—If the defendant denies the right to an accounting, one should not be ordered except after hearing by an interlocutory decree.[9]

Stating the account; items.[10]—The time of the final accounting in the suit is the time up to which the accounting should be made.[11] In an accounting of the holder of land, the respondent should be allowed interest upon money rightfully expended by him to take up prior mortgages.[12] If a partner contributes to the firm the use of real property, taxes upon that property are not chargeable to the firm.[13]

§ 5. *Proceedings on coming in of report.*[14] Where the reference to a master for an accounting, the investigation, his report, and the confirmation thereof, all occurred within two hours, while the dealings covered more than six years, the case will be sent back for a proper trial.[15]

ACCOUNTS STATED AND OPEN ACCOUNTS.

§ 1. Nature and Elements of the Several Kinds of Accounts (27).
§ 2. Binding Effect, Rights and Liabilities (29).
§ 3. Remedies on Account Stated (29).
§ 4. Remedies on Open Accounts (31).

§ 1. *Nature and elements of the several kinds of accounts.*[16]—To make an account stated, there must be a mutual agreement between parties and an assent to the account as rendered,[17] based on previous dealings and transactions between

4. See 1 Curr. L. 15.
5. Yarwood v. Billings, 31 Wash. 542, 72 P. 104.
6. McGinn v. Benner, 22 Pa. Super. Ct. 134.
7. Merrill v. Miller, 28 Mont. 134, 72 P. 423.
8. Cary Bros. v. Dalhoff Const. Co., 126 F. 584.
Auditor's fee may, under statute, be apportioned between the parties. Moore v. Dickenson, 117 Ga. 887, 45 S. E. 241. Where one owned patents for the manufacture of powder and induced another to furnish capital for manufacturing, and each party kept the property invested in their respective names, and the party who furnished the capital sold the entire assets to a new corporation, in an action for an accounting, evidence held insufficient to show that the one who negotiated the sale had by false representations deceived the other as to the consideration he was to receive for the patents. Volney v. Nixon [N. J. Eq.] 58 A. 75. In an action for an accounting for broker's commissions, evidence held to show that the broker was entitled to recover a certain amount. James Stewart & Co. v. Clark [La.] 36 So. 340.
9. Diehl v. Dreyer, 84 App. Div. 247, 82 N. Y. S. 770; Weldon v. Brown, 84 App. Div. 482, 82 N. Y. S. 1051.
10. See 1 Curr. L. 15.
11. Standard Fireproofing Co. v. St. Louis E. M. F. P. Co., 177 Mo. 559, 76 S. W. 1008.
12. Natter v. Turner [N. J. Eq.] 55 A. 650.
13. Hart v. Hart, 117 Wis. 639, 94 N. W. 890.
14. See 1 Curr. L. 15.
15. Diggs v. Ingersoll [Miss.] 34 So. 225.
16. See 1 Curr. L. 15.
17. Moore v. E. Holdoway & Co., 138 Ala. 448, 35 So. 453. To constitute an account stated, there must be a mutual agreement as to the balance struck upon a final adjustment of the whole account. Hall v. New York Brick & Pav. Co., 88 N. Y. S. 582. In order to constitute an account stated, there must be either an express or implied admission of a balance due. Statement of balance due in presence of debtor without objection by him constitutes admission. Forbes v. Wheeler, 39 Misc. 538, 80 N. Y. S. 373; Harrison v. Henderson, 67 Kan. 202, 72 P. 878. In stating an account the minds of the parties must meet and the account be understood to be a final adjustment. Haish v. Dillon [Neb.] 98 N. W. 818. An account stated must be agreed upon by the parties as correct. Wheeler v. Baher [Mich.] 93 N. W. 1069. In an action to recover commissions for sale of packed salmon, evidence, correspondence relative thereto, held sufficient to show an account stated. Gorman v. McGowan [Or.] 76 P. 769. In an action by an as-

the parties,[18] and upon a sufficient consideration.[19] It need not be in writing in the absence of statute.[20] Accounts in a bank pass book with vouchers returned is an account stated.[21] The failure to object to an account rendered within a reasonable time is an admission of its correctness,[22] as where a depositor receives his bank book duly balanced and canceled checks,[23] unless sent to one who has never had any dealings with the sender,[24] or the party sought to be charged is not made a party to the account.[25] A party to whom an account is sent is given a reasonable time in which to examine and object thereto, and what is a reasonable time depends on the usual course of business between the parties and is a question of law.[26] The mere silence of an administrator, when an account against his intestate is presented, does not authorize an inference that he has thereby stated the account and relieve the claimant from establishing it in the usual way or put upon the estate the burden of affirmatively establishing mistake or error.[27] A statement of a sum which will be accepted in compromise is not an

signee of an account for labor and materials, testimony by the assignor that he presented the bill and the defendant said he would send a check, which was denied by the defendant, is insufficient. Muller v. S. Aronson & Co., 88 N. Y. S. 1006.

Note: Primarily and originally an account stated was an agreement between persons who had had previous transactions, fixing the amount due in respect thereto, and promising payment (Zacarino v. Pallotti, 49 Conn. 36), but the courts have drifted away from the original standard and it is held that an express promise of payment is not necessary (Claire v. Claire, 10 Neb. 54); otherwise where one partner rendered account to another on dissolution (Killam v. Preston, 4 Watts & S. [Pa.] 15). There must, however, be an absolute acknowledgment of a certain sum due (Stenton v. Jerome, 54 N. Y. 480, and cases cited in note to Lockwood v. Thorne, 11 N. Y. 170, 62 Am. Dec. 81). A promise by a landlord to repay a tenant out of the next month's rent, moneys expended for repairs is an account stated (Seago v. Deane, 4 Bing. 459). For an exhaustive collection of illustrations see note to Vanbebber v. Plunkett [Or.] 27 L. R. A. 811. The balance must be definitely fixed (State v. Hartman Steel Co., 51 N. J. Law, 446). An account stated may be oral (Watkins v. Ford, 69 Mich. 357; James v. Fellowes, 20 La. Ann. 116. Contra, Wood v. Gault, 2 Md. Ch. 433). There may be an account stated between banker and depositor (Weisser's Adm'rs v. Denison, 10 N. Y. 76. Partners (Cochrane v. Allen, 58 N. H. 250). Broker and customer (Lawson v. Douglass, 43 N. Y. St. Rep. 356). Attorney and client (Wharton v. Cain, 50 Ala. 408; Gruby v. Smith, 13 Ill. App. 43). Public officers (Milwaukee County Sup'rs v. Hackett, 21 Wis. 613. Contra. Lott v. Mobile County, 79 Ala. 69). Trustee and cestui que trust (Roper v. Holland, 3 Adol. & El. 99). Guardian and ward (Driggs v. Garretson, 25 N. J. Eq. 178); for work and labor done (McFarland v. Cutter, 1 Mont. 383). Retention of rendered account for an unreasonable time (Greene v. Harris, 11 R. I. 5; Freeland v. Heron, 7 Cranch [U. S.] 147; Wiggins v. Burkham, 10 Wall. [U. S.] 129), and what constitutes an unreasonable time depends on the circumstances or the previous dealings between the parties (Bruen v. Hone, 2 Barb. [N. Y.] 586; Freas v. Truitt, 2 Colo. 489). Whether a conversation is sufficient to constitute is a question for the court (Bishop v. Chambre, 3 Car. & P. 55; Fleischner v. Kubli, 20 Or. 328; Davis v. Tiernan, 2 How. [Miss.] 786; Moran v. Gordan, 33 Ill. App. 46), and note to Vanbebber v. Plunkett [Or.] 27 L. R. A. 811, where an exhaustive treatment of the entire subject is found.

18. Daytona Bridge Co. v. Bond [Fla.] 36 So. 445.

19. An account stated involves a promise to pay a real indebtedness, and a promise to pay a claim not founded on such an obligation is not conclusive. Ivy Coal & Coke Co. v. Long [Ala.] 36 So. 722.

20. Converse v. Scott, 137 Cal. 239, 70 P. 13.

21. In action by a depositor for an accounting of transactions covering several years, where it appeared that accounts were balanced several times each year and vouchers returned for all items charged, the account had been overdrawn several times. Farry v. Farmers' & M. Bank of Matawan [N. J. Eq.] 58 A. 305.

22. Vanuxem v. New York Life Ins. Co., 122 F. 107. Where a party sends by mail a statement of account which is not replied to within a reasonable time, the acquiescence of the party is taken as an admission that the account is correctly stated. Estimates of railroad grading at a certain price per cubic yard. Lewis v. Utah Const. Co. [Idaho] 77 P. 336.

23. Kenneth Inv. Co. v. National Bank, 96 Mo. App. 125, 70 S. W. 173.

24. Lumber and building material was sent to a contractor and the statement to a lumber dealer. Daytona Bridge Co. v. Bond [Fla.] 36 So. 445.

25. Where the presentation of an account is by mail, the person sought to be charged must in terms be a party to the account or the grounds on which he is sought to be held clearly made known to him and payment demanded, otherwise no presumption arises from his silence. A statement for building materials did not contain the debtor's name. Daytona Bridge Co. v. Bond [Fla.] 36 So. 445.

26. Daytona Bridge Co. v. Bond [Fla.] 36 So. 445.

27. Withers v. Sandlin [Fla.] 32 So. 829.

account stated,[28] nor is a confession of an amount due,[29] nor the mere furnishing of an account not given with a view to ascertaining the balance due,[30] nor the mere sending of statements.[31] An account charged in one item is not subject for a judgment as a book account.[32] Where there was no promise to pay in consideration of an extension of time, an instruction based upon such promise is erroneous.[33] An assignor of an account cannot settle after the transfer of which the debtor has notice.[34]

§ 2. *Binding effect, rights and liabilities.*[35]—A stated account never gives one claiming under it the benefit of an absolute estoppel, but it may be impeached for fraud, mistake or error,[36] the burden of which is on the party impeaching,[37] and the evidence must be clear and satisfactory,[38] and can only be opened to the extent that fraud or mistake is clearly shown,[39] and an express exception of errors makes no difference, as that is always implied.[40] One rendering an account stated is bound thereby until a defect is specifically pointed out and objected to.[41] Though an account stated be proved, yet if it appear that it is wholly unfounded, there can be no recovery,[42] and where a claim is absolutely unsustainable, its compromise will constitute no sufficient consideration.[43] An account stated may be settled by payment of a smaller sum than that agreed upon.[44] Failure of an administrator to object to an account stated which is presented against the estate will not excuse establishment in the usual way.[45] An administrator's or executor's account when approved is a stated account, within rule as to surcharging and falsifying.[46]

§ 3. *Remedies on account stated.*[47]—An action on a stated account is based on a new promise to pay into which all prior transactions are merged.[48] The

28. Coons v. Sanguinetti, 86 N. Y. S. 367

29. Wheeler v. Baker [Mich.] 93 N. W. 1069.

30. Harrison v. Henderson, 67 Kan. 202, 72 P. 878.

31. The sending of statements of account to a president of a corporation for goods sold him before the incorporation could not make him liable for the indebtedness. William Allen & Co. v. Somerset Hotel Co., 88 N. Y. S. 944. A promise to pay an indebtedness made by a debtor after he became president of a corporation which succeeded to his business, even if made by him as president, is not binding on the corporation. Id.

32. Fee for legal services. Taylor v. Addicks [Del. Super.] 55 A. 1010.

A charge for money loaned may be properly included in an open account for board, washing and attendance during a sickness. Miller v. Armstrong [Iowa] 98 N. W. 561.

An account which may be proved by affidavit, under art. 2266 of Tex. R. S. of 1879 must be for the value of personal property sold and delivered. Oden & Co. v. Vaughn Grocery Co. [Tex. Civ. App.] 77 S. W. 967.

33. Where a general manager said that the directors would have to act upon the matter, it was merely the expression of a strong opinion that the directors would pay. Daytona Bridge Co. v. Bond [Fla.] 36 So. 445.

34. An instruction assuming this is erroneous. Ivy Coal & Coke Co. v. Long [Ala.] 36 So. 722.

35. 1 Curr. L. 16.

36. Daytona Bridge Co. v. Bond [Fla.] 36 So. 445; Batson v. Findley, 52 W. Va. 343, 43 S. E. 142; Wonderly v. Christian, 91 Mo. App. 158; Leidigh v. Keever [Neb.] 96 N. W. 106. Inventory. Mine & Smelter Supply Co. v. Creel [Tex. Civ. App.] 79 S. W. 67; Noyes v. Smith [Tex. Civ. App.] 77 S. W. 649.

37. Daytona Bridge Co. v. Bond [Fla.] 36 So. 445.

38. Where parties have made a settlement of their dealings and adjusted balances on the basis of such settlement, nothing short of clear and satisfactory evidence of fraud or mistake will justify the falsifying or surcharging of such settlement. Fletcher v. Whitlow, Lake & Co. [Ark.] 79 S. W. 773.

39. In an action by a depositor against a banker for an accounting of transactions covering a number of years, during which time statements had been tendered from time to time, evidence held insufficient to show fraud or mistake. Farry v. Farmers' & Mechanics' Bank [N. J. Eq.] 58 A. 305.

40. Wonderly v. Christian, 91 Mo. App. 158.

41. Tate v. Gairdner, 119 Ga. 133, 46 S. E. 73.

42. Withers v. Sandlin [Fla.] 32 So. 829.

43. Ivy Coal & Coke Co. v. Long [Ala.] 36 So. 722. In an action for commissions for selling land, it was not error to instruct that the performance of the contract was a prerequisite to the right to compensation. Id.

44. Wheeler v. Baker [Mich.] 93 N. W. 1069.

45. Withers v. Sandlin [Fla.] 32 So. 829.

46. Tate v. Gairdner, 119 Ga. 133, 46 S. E. 73.

47. 1 Curr. L. 16.

48. Columbia Brewing Co. v. Berney, 90 Mo. App. 96; Harrison v. Henderson, 67 Kan. 202, 72 P. 878.

three years' limitation applies to accounts stated and verbally or tacitly acknowledged, as well as open accounts.[49]

Pleading.[50]—A bill to reform an account for error must allege the mistakes distinctly.[51] An itemized copy need not be set forth in the pleadings.[52] One who objects to a stated account must allege an omission or deny the correctness of its items.[53] It is sufficient to require an affidavit of defense if the substance of the claim is set forth.[54] Payment as a defense must be specially pleaded.[55] Refusal by the judge to strike out credits and disputed items in plaintiff's account is not error.[56] Where the issue is one of balancing of opposing accounts, one may have a special exception if the items of an account are not specific enough.[57] Where a cause of action is on an account which one claims as assignee, an amendment declaring on an account stated immediately between the parties is a departure.[58]

Evidence and questions of fact.[59]—The proof must show that there was a meeting of the minds as to the balance due.[60] The account stated and unqualified approval of defendant must be shown.[61] It is not error to admit in evidence an account signed by both parties.[62] In an action on account stated, evidence of an arrangement between plaintiffs and defendants to pay plaintiff a certain sum and of certain payments made constitutes a prima facie case.[63] Where issue raised is as to the existence of a settlement, the defendant cannot surcharge and falsify it,[64] but any facts tending to show its improbability are competent.[65] Evidence of an account rendered by a third party to the defendant is not sufficient proof of the allegations of the complaint.[66] Evidence of a stenographer to whom was dictated a memoradum of a balance due in the presence of both parties is competent.[67] Where an issue arises as to an account, the best evidence is the books of account.[68] A statement of account in which a purchaser lists articles at what seller claims to be the agreed price is, in the absence of mistake, conclusive evidence that the prices had been agreed upon.[69] An ex parte statement of an account with an affidavit attached is not admissible in evidence against the other party.[70] In an action

49. Acts La. 1888, No. 78, amending and re-enacting Rev. Civ. Code, Ala. art. 3538. Sleet v. Sleet, 109 La. 302, 33 So. 322; Moore v. Crosthwait, 135 Ala. 272, 33 So. 28.

50. See 1 Curr. L. 16.

51. Batson v. Findley, 52 W. Va. 343, 43 S. E. 142.

52. Code Civ. Proc. § 743, providing that it is not necessary for a party to set forth in his pleadings items of an account, but must on demand furnish the adverse party with a copy of the account, does not apply to actions on accounts stated, but only to open accounts. Martin v. Heinze [Mont.] 77 P. 427.

53. Tate v. Gairdner, 119 Ga. 113, 46 S. E. 73.

54. Bridgeman Bros. Co. v. Swing, 205 Pa. 479, 55 A. 26.

55. Action on an account. Lord v. Graveson, 4 Ohio C. C. (N. S.) 268.

56. Stagg v. St. Jean [Mont.] 74 P. 740.

57. Malin v. McCutcheon [Tex. Civ. App.] 76 S. W. 586.

58. Ivy Coal & Coke Co. v. Long [Ala.] 36 So. 722.

59. See 1 Curr. L. 16.

60. Upon dissolution of a partnership, the evidence failed to show that there had been an accounting and a balance found due. Hall v. New York Brick & Pav. Co., 88 N. Y. S. 582.

61. Cahill-Swift Mfg. Co. v. Morrissey Plumbing Co. [Neb.] 93 N. W. 204.

62. Miller v. Campbell Comm. Co., 13 Okl. 75, 74 P. 507.

63. Sturgeon v. Wightman, 32 Wash. 195, 72 P. 1045.

64. Wonderly v. Christian, 91 Mo. App. 158; Columbia Brewing Co. v. Berney, 90 Mo. App. 96.

65. Baker v. Griffin, 86 N. Y. S. 579.

66. Kauffmann v. Judah, 78 App. Div. 632, 79 N. Y. S. 494.

67. Converse v. Scott, 137 Cal. 239, 70 P. 13.

68. Rogers v. O'Barr [Tex. Civ. App.] 76 S. W. 593.

69. Ketchum v. Stetson & P. Mill Co., 33 Wash. 92, 73 P. 1127.

70. Withers v. Sandlin [Fla.] 32 So. 829. But in some states in action upon an account, if an affidavit of its correctness is attached, and it is not denied under oath, such affidavit is sufficient to establish the account. Boone v. Goodlett, 71 Ark. 577, 76 S. W. 1059. In an action on a verified account which is not denied by a verified affidavit of defendant, the defendant may prove any defense stated in his answer which does not involve a denial of the reasonableness of the amounts charged in the verified account. Defense by way of confession and avoidance. Lucas v. Board of County Com'rs of Ford County, 67

for balance due on an account stated, evidence of a witness that defendant fully understood that he was to pay the balance is objectionable as a conclusion.[71] In an action on a guaranty, an account between principal and obligee made before suit brought is admissible in evidence against the guarantor, if the latter failed to deny its correctness.[72]

§ 4. *Remedies on open accounts.*[73]—It is error for court to instruct the jury in an action upon an open account that the plaintiff might recover such sum as the services rendered were reasonably worth.[74] In an action to recover balance due on an open account, a credit sheet which is ambiguous as to whether items are credits or debits will not justify the court in directing a verdict for defendant.[75] An action on a book account for goods sold would not lie to recover upon an implied liability.[76] The mode of proof provided by statute in a suit upon an open account does not apply to an action for damages, although an itemized list with values of damaged articles is attached to the summons and sworn to as correct.[77] Interest will be allowed from the time the account is due,[78] or from time of bringing suit.[79] An action is not barred where there has been a partial payment within the statutory period.[80] Entries to be admissible need not be made in a regular account book,[81] and non-entry is admissible to rebut evidence of payment.[82] In an action on an account for commissions for selling land transferred to plaintiff, it was proper to cross-examine the assignor relative to the negotiations.[83]

ACKNOWLEDGMENTS.

§ 1. Nature, Office and Neecessity (31).
§ 2. Officers Who May Take (32).
§ 3. Taking Acknowledgments (33).
§ 4. Certificate of Acknowledgment (33).
§ 5. Authentication of Officer's Authority (34).
§ 6. Operation and Effect (34).
§ 7. Defects and Invalidities (34).

§ 1. *Nature, office and necessity.*[84]—Acknowledgment is not necessary as between the parties,[85] or to constitute a grantee a bona fide purchaser as to third

Kan. 418, 73 P. 56. Code 1896, § 1804, providing that in suits on accounts an itemized statement verified by affidavit is competent evidence if indorsed by the plaintiff on the summons, and complaint has no application to a suit in which the complaint alleges a sum due from defendant by account stated between plaintiff and defendant, for goods sold at an agreed price. Moore v. E. Holdoway & Co., 138 Ala. 448, 35 So. 453.

71. Plano Mfg. Co. v. Kautenberger, 121 Iowa, 213, 96 N. W. 743.

72. Swisher v. Deering, 209 Ill. 203, 68 N. E. 517.

73. See 1 Curr. L. 17.

74. Miller v. Armstrong [Iowa] 98 N. W. 561.

75. Plano Mfg. Co. v. Kautenberger, 121 Iowa, 213, 96 N. W. 743.

76. Goods received and used. A. H. Davenport Co. v. Addicks [Del. Super.] 57 A. 532.

77. Action against common carrier for goods damaged. Candell v. Southern R. Co., 119 Ga. 21, 45 S. E. 712.

78. Mills' Ann. St. § 2251 provides that creditors shall be allowed interest on money due on account from the date it became due. Held, where the amount of the goods delivered was disputed, interest should be allowed on the amount found due. Florence & C. C. R. Co. v. Tennant [Colo.] 75 P. 410.

79. Hefferlin v. Karlman [Mont.] 74 P. 201.

80. Florence & C. C. R. Co. v. Tennant [Colo.] 75 P. 410.

81. Entries in a book relating to deliveries of merchandise, although containing memorandum in reference to other matter, are admissible as entries in book account, it being the only book kept and the entries being made at the time of deliveries. Handy & Co. v. Smith [Conn.] 58 A. 694.

82. In an action on book account, in rebuttal of evidence of payment, the books, showing no credits for such payment, are admissible in connection with evidence that the usual course of business at the store was that the payments if made would probably have been credited on the book. Handy & Co. v. Smith [Conn.] 58 A. 694. Exclusion of books to show that certain payments claimed to have been made were not credited therein is harmless, the fact being otherwise proved and admitted. Id.

83. Ivy Coal & Coke Co. v. Long [Ala.] 36 So. 722. Evidence as to what induced defendant to make the sale is admissible. Id.

84. See 1 Curr. L. 17.

85. Title passes as between the parties and as to all having notice thereof. Deed of settlement between heirs. Slattery v. Slattery, 120 Iowa, 717, 95 N. W. 201. An unacknowledged chattel mortgage. Brown v. Koenig, 99 Mo. App. 653, 74 S. W. 407. Made before an interested party. Schwartz v.

parties;[86] but it is necessary to make a deed admissible as evidence,[87] or to entitle an instrument to be recorded,[88] or to convey,[89] or incumber the homestead,[90] which fact must appear from the instrument itself in the form of a certificate of the officer before whom it was taken,[91] and cannot be proven by parol.[92] A contract not acknowledged as required by law is unenforceable,[93] and an unacknowledged plat does not constitute a dedication, either common law or statutory.[94] A chattel mortgage need not be acknowledged by both husband and wife.[95] Where justice requires, equity will aid want of acknowledgment by its decree.[96]

§ 2. *Officers who may take.*[97]—Some courts hold that the taking of an acknowledgment is a ministerial act and may be performed by any one qualified to act as notary,[98] and an interested person may take it,[99] but the rule that an interested party cannot take obtains in Alabama,[1] Iowa,[2] Illinois[3] and Nebraska,[4] but

Woodruff [Mich.] 93 N. W. 1067. A deed of water rights unacknowledged and unrecorded. Whalon v. No. Platte Canal & C. Co. [Wyo.] 71 P. 995.

86. As to third persons, acknowledgment taken by an interested party. Derrett v. Britton [Tex. Civ. App.] 80 S. W. 562.

87. Schwartz v. Woodruff [Mich.] 93 N. W. 1067. A defective acknowledgment. Edwards v. Simms [Ariz.] 71 P. 902.

88. An unacknowledged mortgage is not entitled to record and is not constructive notice if recorded. Acknowledgment of a chattel mortgage taken before one of the partnership mortgagees. Farmers' & Merchants' Bank v. Stockdale, 121 Iowa, 748, 96 N. W. 732. Forged acknowledgment to a deed. Finley v. Babb, 173 Mo. 257, 73 S. W. 180. A statute providing that a deed of record should be constructive notice whether acknowledged or not has no application to a deed void because the acknowledgment was forged. Finley v. Babb, 173 Mo. 257, 73 S. W. 180. A separate instrument acknowledging satisfaction of a mortgage and payment of the debt, but which is not acknowledged, is not entitled to record and the recording thereof is not constructive notice. First Nat. Bank v. National Live Stock Bank [Okl.] 76 P. 130.

89. In **Alabama,** a deed to the homestead without the voluntary signature and assent of the wife shown by her privy examination, before an officer authorized to take acknowledgments, is void. Slappy v. Hanners, 137 Ala. 199, 33 So. 900. A deed to a homestead must be executed and acknowledged by husband and wife. Teske v. Dittberner [Neb.] 98 N. W. 57.

90. Contract to convey the homestead. Solt v. Anderson [Neb.] 99 N. W. 678.

91, 92. No certificate of acknowledgment. Solt v. Anderson [Neb.] 99 N. W. 678.

93. A married woman executed a contract to convey land. Held, the purchaser could not compel conveyance from a subsequent grantee who took with notice of his contract. Ten Eyck v. Saville, 64 N. J. Eq. 611, 54 A. 810.

94. Plat of a tract of land showing lots, blocks and streets. The city was restrained from opening the streets. Nodine v. Union, 42 Or. 613, 72 P. 582.

95. An **Iowa** statute requiring husband and wife to sign a chattel mortgage. Brown v. Koenig, 99 Mo. App. 653, 74 S. W. 407.

96. A trustee had power to convey the property by deed duly acknowledged. He leased to one and gave him a right to purchase. The lessee had made valuable improvements. A witness saw the trustee sign, seal and deliver the instrument. The want of acknowledgment was not allowed to defeat the contract. Connely v. Haggarty [N. J. Eq.] 56 A. 371.

97. See 1 Curr. L. 18.

98. Acknowledgment of mortgage taken by president and chief executive of mortgagee company. Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572, 73 P. 680.

Note.—There is a conflict of authority whether the act of taking an acknowledgment is ministerial or judicial. The courts of Arkansas, Georgia, Kentucky, Maine, Massachusetts, Minnesota, New Hampshire, New York, Maryland and Ohio, holding that it is ministerial and an interested party may take, while in California, Alabama, Iowa, Missouri, North Carolina, Pennsylvania, Virginia, West Virginia and Mississippi, it is held to be a judicial act and in Tennessee a quasi judicial act. But aside from this it is contrary to public policy that an interested officer should take. Cooper v. Hamilton Perpetual Bldg. & Loan Ass'n [Tenn.] 33 L. R. A. 338.

Note.—As a general rule, parties to the instrument or parties in interest, not parties to the instrument, cannot take an acknowledgment, but agents, attorneys, officers of corporations and relatives of the parties can. Havemeyer v. Dahn [Neb.] 33 L. R. A. 332 and note thereto.

99. Notary public who was a stockholder in a corporation taking a mortgage. Read v. Toledo Loan Co., 68 Ohio St. 280, 67 N. E. 729. A justice of the peace who executed a deed to a person and accepts a mortgage from another to secure the purchase price is not incompetent to take acknowledgment of such third person of his deed to the one who gave the mortgage. Joines v. Johnson, 133 N. C. 487, 45 S. E. 828.

1. Mortgage of homestead acknowledged before stockholder and officer in corporation mortgagee is void. Jenkins v. Jonas Schwab Co., 138 Ala. 664, 35 So. 649.

2. One of the partners in a banking firm took an acknowledgment of a chattel mortgage executed to a trustee for the benefit of the bank. Farmers' & Merchants' Bank v. Stockdale, 121 Iowa, 748, 96 N. W. 732.

3. An acknowledgment of a trust deed containing a release of the homestead before a notary who is a stockholder in the beneficiary corporation is void and creates no lien on the homestead. Fugman v. Jiri Washington Bldg. & Loan Ass'n, 209 Ill. 176, 70 N. E. 644.

even here the notary must have a beneficial interest in upholding the transaction after it is made.[5] An acknowledgment and certificate thereof taken by a de facto officer before removal are valid.[6] A United States consul,[7] or a deputy clerk of court,[8] may take.

§ 3. *Taking acknowledgments.*[9]—In the absence of statutory provisions, the law does not permit an officer to take the acknowledgment of a stranger without satisfactory proof of his identity.[10] An officer cannot lawfully take the acknowledgment of a person whose name is not at the time affixed to the instrument.[11] No particular form of acknowledgment is necessary.[12]

§ 4. *Certificate of acknowledgment.*[13]—The contents of a certificate are prescribed by statute.[14] It is a presumption that officers perform their duty so a certificate not made in strict conformity with a statute is liberally construed,[15] and a substantial compliance is all that is required.[16] A mere clerical error in a certificate will not destroy its validity.[17] The certificate of acknowledgment of a writing not required to be recorded is no evidence of its execution.[18] Words

4. A mortgage on a homestead acknowledged before a notary who was an officer and stockholder of the corporation mortgagee. Chadron Loan & Bldg. Ass'n v. O'Linn [Neb.] 95 N. W. 368.

5. An officer for a loan company which was agent for the loaner has not such interest. Gilbert v. Garber [Neb.] 95 N. W. 1030. A cashier who owns no stock in the bank may take an acknowledgment of a mortgage to the bank. Banking House of A. Castetter v. Stewart [Neb.] 98 N. W. 34.

6. A certificate made by a notary after he had forfeited his office by accepting the office of judge of a criminal court. Old Dominion Bldg. & Loan Ass'n v. Sohn [W. Va.] 46 S. E. 222.

7. A consul of the United States is authorized to take at his consulate an acknowledgment of a deed to realty situated in this state, and his certificate under official seal is evidence of his acknowledgment [Civ. Code 1895, § 3621]. Long v. Powell [Ga.] 48 S. E. 185.

8. Under statute providing that clerks of court shall have power to appoint deputies, the privy examination of a married woman annexed to a deed is sufficient to convey her interests, though made by a deputy in the absence of his principal, but purporting to have been taken and signed by the principal officially in his own person. Wilkerson v. Dennison [Tenn.] 80 S. W. 765.

9. See 1 Curr. L. 19.

10. The certificate did not state that the person making it was known to the officer taking. Deseret Nat. Bank v. Kidman, 25 Utah, 379, 71 P. 873. An acknowledgment in which the notary certifies "Personally appeared before me the within named ——— to me known and acknowledged the," etc., is defective. Freedman v. Oppenheim, 80 App. Div. 487, 81 N. Y. S. 110. A certificate of authentication in which the clerk of court instead of certifying that he is well acquainted with the notary's handwriting, but verily believes his signature to be genuine is defective. Id. The oath of a subscribing witness "that he saw the grantor who executed the foregoing acknowledged in his presence" is insufficient to prove the deed for record, as not stating that he saw him perform the necessary acts and that he signed at grantor's request. Johnson v. Franklin [Tex. Civ. App.] 76 S. W. 611.

11. A signature by mark not witnessed is sufficient if the person acknowledges it. First Nat. Bank v. Glenn [Idaho] 77 P. 623.

12. A notary explained to a woman whose mark was affixed to a mortgage, what the instrument was, its nature and contents, and the property incumbered, and she said that whatever her husband did or said was all right and she would do whatever he did, such facts constitute an acknowledgment and a notary is justified in affixing his certificate. First Nat. Bank v. Glenn [Idaho] 77 P. 623.

13. See 1 Curr. L. 19.

14. Texas statute relative to acknowledgments does not require the officers' certificate to state that the subscribing witnesses were known to him. Wren v. Howland [Tex. Civ. App.] 75 S. W. 894.

15. A certificate of acknowledgment to a mortgage read "The mortgagor who executed the foregoing mortgage," instead of "To me known," etc. Held to comply with the statute. Deseret Nat. Bank v. Kidman, 25 Utah, 379, 71 P. 873.

16. The words "and voluntary" between the words "free" and "act" and "for the uses and purposes therein set forth" after the word "deed" were omitted. Held substantial compliance. Mosier v. Momsen, 13 Okl. 41, 74 P. 905.

17. A certificate was dated earlier than the deed, but reference to the deed would show that the date was erroneous and that the acknowledgment was made at the time of execution of the deed. Id.

Note: The omission of the words "Notary Public" in a certificate does not render it invalid (Lake Erie & W. R. Co. v. Whitham, 155 Ill. 514, 40 N. E. 1014, 28 L. R. A. 612), nor does the omission of the name of the county in the caption (Chiniquy v. Catholic Bishop of Chicago, 41 Ill. 149), and where it is not so stated, it will be presumed that an acknowledgment was taken by a notary in and for the county where it was taken (Douglass v. Bishop, 45 Kan. 200, 25 P. 628, 10 L. R. A. 857), but it was otherwise held in Willard v. Cramer, 36 Iowa, 22. Note, Douglass v. Bishop [Kan.] 10 L. R. A. 857.

18. A release. Rutherford v. Rutherford [W. Va.] 47 S. E. 240.

added to the certificate detract nothing from the effect of the instrument properly acknowledged.[19]

§ 5. *Authentication of officer's authority.*[20]

§ 6. *Operation and effect.*[21]—It is the policy of the law to uphold certificates and they will be liberally construed if the substance be found and the statute has been substantially followed.[22] The certificate of acknowledgment cannot be impeached except for fraud, collusion or imposition,[23] and the evidence must be clear, convincing and satisfactory.[24] The testimony of interested witnesses unsupported by other positive and credible evidence will not be allowed to overcome the certificate.[25] A notary who takes an acknowledgment cannot give testimony impeaching it.[26] An officer's certificate is more to be relied on than his memory after several years.[27] The burden of impeaching a certificate is on the party claiming that it is false and fraudulent.[28] An acknowledgment to the execution of an instrument carries with it the adoption of the signature thereto.[29]

§ 7. *Defects and invalidities.*[30]—A defect in an acknowledgment may be fatal to the title.[31] A legislative act curing defective acknowledgments is not retroactive,[32] and cannot affect the rights of third parties, vested at the time it takes

19. Mortgage on homestead property acknowledged, added to the certificate was "Homestead and dower being relinquished" by the wife. Burnside v. Mealer [Ky.] 80 S. W. 785.

20. A foreign acknowledgment stating the venue as of a canton and city of Switzerland and the officer as consular agent of the United States at that place, held to comply with the real property law of New York. Jordan v. Underhill, 91 App. Div. 124, 86 N. Y. S. 620. See 1 Curr. L. 19.

21. See 1 Curr. L. 19.

22. A certificate stated that the deed was fully explained to the wife and a privy examination had; it was held that the code directing that a married woman personally appear, be examined apart from her husband and acknowledge the deed to be her willing act, was complied with. Geil v. Geil, 101 Va. 773, 45 S. E. 325. A certificate stating that the married woman declared that she willingly executed the deed and did not wish to retract it, the acknowledgment is not vitiated by the fact that the certificate does not expressly state that she acknowledged the deed to be her free act. Id. In the body of a certificate of acknowledgment of a deed the officer taking was declared to be the county clerk. The certificate was signed by such officer with "Clk. H. Co." appended to his signature. Held, that the official character of the office was sufficiently indicated. Riviere v. Wilkins, 31 Tex. Civ. App. 454, 72 S. W. 608.

23. Grantors claimed they did not understand the nature of the instrument they were signing, though it had been explained to them in their language. Boldt v. Becker [Neb.] 95 N. W. 509.

24. Testimony by the mortgagor that she had not been at the place where the acknowledgment was taken for a year held insufficient where the notary and another testified that she made the acknowledgment. Banking House of A. Castetter v. Stewart [Neb.] 98 N. W. 34. Not disproved by testimony of the grantor that he did not execute the deed, nor by slight corroboration of that testimony. Gritten v. Dickerson, 202 Ill. 372, 66 N. E. 1090. Testimony of one asserting her claim 33 years after execution of a deed when her husband and the notary were dead held insufficient to impeach a certificate. Swett v. Large [Iowa] 97 N. W. 1104. When mortgagors of a homestead denied that the wife acknowledged, while the notary and mortgagee testified that she did, evidence held insufficient. McGuire v. Wilson [Neb.] 99 N. W. 244.

25. Testimony of the mortgagors that one of them never appeared before the notary, and testimony of another that he knew the notary had certified acknowledgments when the parties did not appear before him. Western Loan & Sav. Co. v. Waisman, 32 Wash. 644, 73 P. 703.

26. A notary testified that there was no acknowledgment. First Nat. Bank v. Glenn [Idaho] 77 P. 623.

27. It constituting his official statement made at the time of the act as to the truth and accuracy thereof. First Nat. Bank v. Glenn [Idaho] 77 P. 623.

28. A finding by the lower court, that an acknowledgment was duly made, against the numerical preponderance of witnesses, was not disturbed. Langenbeck v. Louis, 140 Cal. 406, 73 P. 1086. Where execution and delivery of a deed were established by evidence not objected to, the erroneous admission of a certificate of acknowledgment was harmless error. Wren v. Howland [Tex. Civ. App.] 75 S. W. 894.

29. That it is the name and signature of a person acknowledging, where an unwitnessed mark of such person constitutes the signature. First Nat. Bank v. Glenn [Idaho] 77 P. 623.

30. See 1 Curr. L. 19.

31. Defect in certificate of acknowledgment and authentication of a foreign power of attorney to sell land. Freedman v. Oppenheim, 80 App. Div. 487, 81 N. Y. S. 110.

32. A trust deed of a homestead acknowledged before a stockholder in the corporation which advanced the loan was void, and before the curative act was passed a subsequent deed of trust was made to another. Held, the later deed was the prior lien. Steger v. Traveling Men's Bldg. & Loan Ass'n, 208 Ill. 236, 70 N. E. 236. A curative act has no retrospective operation as against

effect.[33] Whether a seal is necessary depends on statute.[34] An acknowledgment by a married woman that it was her own act and deed is void under a statute requiring that she acknowledge that she signed willingly.[35]

ACTIONS.

Only general questions relating strictly to Actions are treated. Causes of Action and Defenses and Forms of Action are distinct matters which are treated elsewhere.[36] The word "action" is used in statutes with varied meanings.[37] Motions have been held to come within the purview of that term,[38] as have special proceedings,[39] though for most purposes it is otherwise, but proceedings before a county board of supervisors are not actions.[40]

a lien acquired before it was passed. Fugman v. Jiri Washington Bldg. & Loan Ass'n, 209 Ill. 176, 70 N. E. 644.

33. A trust deed to a homestead was void because the notary who took the acknowledgment was interested; a subsequent trust deed to another party was valid; a curative act made the first deed valid when the homestead was subsequently abandoned. Held, the second trust deed was the prior lien. Id.

34. The fact that the certificate of acknowledgment of a deed in 1843 was without a seal was immaterial, no seal being required prior to 1846. Riviere v. Wilkens. 31 Tex. Civ. App. 454. 72 S. W. 608. Statutes requiring a probate judge to affix his seal to the certificate of acknowledgment of a husband and wife who conveyed land in a county other than his residence has no application to the deed of an unmarried man. Westfeldt v. Adams [N. C.] 47 S. E. 816. A commissioner of deeds for North Carolina, residing in another state, is not required to affix his seal to the certificate acknowledging the execution of a deed conveying land in North Carolina. Johnson v. Duvall [N. C.] 47 S. E. 611.

35. Tiemann v. Cobb [Tex. Civ. App.] 80 S. W. 250. The absence of certificate of official character of notary who purported to have taken the acknowledgment of the execution of a receiver's bond which was admitted in evidence is not cause for reversal of judgment of foreclosure at the suit of such receiver. Livingston v. Eaton, 90 App. Div. 251, 85 N. Y. S. 500. Evidence in regard to a second acknowledgment to a deed held inadmissible to show when the deed was executed. Bogart v. Moody [Tex. Civ. App.] 79 S. W. 633.

36. See those titles.

37. See Equity, 1 Curr. L. 1048; Limitation of Actions, 2 Curr. L. 746; Jurisdiction, 2 Curr. L. 604.

38. Crissey v. Morrill [C. C. A.] 125 F. 878. Under statutes where a notice takes the place of the writ and declaration, a motion for a judgment for money is an action at law. Reed v. Gold [Va.] 45 S. E. 868. A proceeding for leave to issue execution on a judgment charging lands with owelty in partition is an "action," as the term "action" is used in the North Carolina statute of limitations, Code, § 136. Ex parte Smith, 134 N. C. 719, 47 S. E. 16.

39. Mandamus is a "civil action." People v. Deneen, 201 Ill. 452, 66 N. E. 368. See topics dealing with various special proceedings, such as Certiorari, 1 Curr. L. 499; Quo Warranto, 2 Curr. L. 1377, and the like.

NOTE. What are special proceedings under the codes: In addition to the proceedings expressly designated by statute as special proceedings may be mentioned condemnation and like proceedings. In re Waverly Water-Works Co., 16 Hun, 57; In re Board of Education of City of Brooklyn, 19 Civ. Proc. R. (Browne) 420; In re Broadway & Seventh Ave. R. Co., 69 Hun, 275; In re City of Brooklyn, 143 N. Y. 107, 42 N. E. 413; In re Grade Crossing Com'rs, 20 App. Div. 271, 46 N. Y. S. 1070. Proceedings by N. Y. City under consolidation act. In re City of N. Y., 22 App. Div. 124, 127, 47 N. Y. S. 965. Proceedings by street surface railroad company to extend its lines. Hornellsville El. R. Co. v. New York, L. E. & W. R. Co., 83 Hun, 407, 412, 31 N. Y. S. 745; In re Cortland & Homer Horse R. Co., 98 N. Y. 336, 341. Proceedings to open a street. In re One Hundred & Sixty-Third Street, 61 Hun, 365, 366, 16 N. Y. S. 120. Proceedings to extend a street. In re City of N. Y., 27 N. Y. St. Rep. 188, 7 N. Y. S. 476; In re South Market St., 80 Hun, 246, 29 N. Y. S. 1030. Local improvement proceedings. King v. City of New York, 36 N. Y. 182, 186; In re Manhattan Sav. Inst., 82 N. Y. 142; In re Jetter, 78 N. Y. 601; In re Fowler, 53 N. Y. 60; In re Protestant Episcopal Public School, 86 N. Y. 396. Proceedings to assess damages under General Railroad Act. In re New York Cent. R. Co. v. Marvin, 11 N. Y. (1 Kern.) 276; In re Rensselaer & Saratoga R. Co., 55 N. Y. 145; Id., 43 N. Y. 137, 147. Application by railroad company for authority to construct its road on street in incorporated village. In re Lima & H. F. R. Co., 68 Hun, 252, 22 N. Y. S. 967. Proceedings to compel assignee to deliver property. Potter v. Durfee, 8 N. Y. St. Rep. 261, 264. Proceedings on appeal to referees in highway litigations (People v. Albright, 23 How. Pr. 306), which, though not specifically so deciding, in effect overrules (People v. Heath, 20 How. Pr. 304), which holds the proceeding not a special proceeding. Application by attorney for admission to the bar. In re Cooper, 22 N. Y. 67, 86. Proceeding to enforce attorney's lien. Peri v. New York Cent. & H. R. R. Co., 152 N. Y. 521, 526, 41 N. E. 849; In re Fitzsimons, 174 N. Y. 15, 66 N. E. 554. Probate proceedings. In re Gates, 26 Hun, 179, 181. Proceeding for settlement of accounts of trustee. In re Simpson, 26 Hun, 459; In re Livingston, 34 N. Y. 555. Special guardian. Spelman v. Terry, 74 N. Y. 448, 451. Executor. In re Lewis, 36 Misc. 741, 74 N. Y. S. 469. Proceeding by trustee under a will for leave to resign and for ap-

The manner of commencing[41] an action varies in the different states; in some it is commenced by the issuance of a summons,[42] in others by the service of the summons,[43] when the original notice therefor is given to the sheriff, not from the time of filing amendments to supply omissions in the original petition,[44] and in others by the filing of the complaint.[45] The right of action must be complete when the action is commenced.[46] An appellant is in court by the appeal, no other service being required.[47] *An action may be terminated*[48] by consolidation.[49]

ADJOINING OWNERS.

Rights in respect to party walls are treated in a separate title.[50] An adjoining owner is not liable for damages caused in the use of his property unless it is the

pointment of a new trustee. In re Holden, 126 N. Y. 589, 592, 27 N. E. 1063. Proceedings for removal of testamentary guardian. In re King, 42 Hun, 607, 608. Proceedings under the Election Law. In re Mitchell, 81 Hun, 401, 402, 30 N. Y. S. 962; In re Ward, 48 N. Y. St. Rep. 613, 615, 20 N. Y. S. 506 (dicta); Emmet v. Ennis, 150 N. Y. 538, 541, 44 N. E. 1102. Application for an order requiring a receiver to pay out money. People v. City Bank of Rochester, 96 N. Y. 32, 37. Application to enforce the statutory liability for costs of an assignee of a cause of action, or one beneficially interested in the recovery. Marvin v. Marvin, 78 N. Y. 541. Reference to determine rights in surplus after foreclosure (In re Gibbs, 58 How. Pr. 502, 504), or reference after judgment in foreclosure (Elwell v. Robbins, 43 How. Pr. 108). Proceeding to establish mortgage lien on shares on part of defendants in partition after interlocutory judgment for a sale of the premises. Byrnes v. Labagh, 12 Civ. Proc. R. (Browne) 417. Motion to set aside confession of judgment for defect in statement. Belknap v. Waters, 11 N. Y. (1 Kern.) 477. Proceedings to enforce a judgment by attachment as for contempt. Holstein v. Rice, 15 Abb. Pr. 307, 312; Gray v. Cook, 15 Abb. Pr. 308 note. Proceeding to compel an attorney to pay over surplus moneys arising from a foreclosure sale. In re Silvernail, 45 Hun, 675. Proceedings for leave to mortgage trust lands. In re Clarke, 27 Abb. N. C. 144, 15 N. Y. S. 867. Contest as to leave to issue judgment on an execution. Ithaca Agricultural Works v. Eggleston, 107 N. Y. 272, 276, 14 N. E. 312. Petition for leave to sue a lunatic to recover a debt. Williams v. Estate of Cameron, 26 Barb. 172, 175. Application by overseers of the poor to compel the support of poor relations. Haviland v. White, 7 How. Pr. 154, 157. Proceedings to remove a justice of the peace. In re King, 130 N. Y. 602, 606, 29 N. E. 1096. Proceedings under the "General Municipal Law" by resident freeholders of a village, who claim that its officers are unlawfully expending the moneys raised by taxation therein, and ask for an investigation. People v. Kellogg, 22 App. Div. 176, 47 N. Y. S. 1023; In re Town of Hempstead, 32 App. Div. 6, 52 N. Y. S. 518. Petition to compel a specific performance by infant heirs, of a contract for sale of land. Hyatt v. Seeley, 11 N. Y. (1 Kern.) 52, 55. Proceeding to change the place of trial of a criminal action. People v. McLaughlin, 2 App. Div. 408, 37 N. Y. S. 998. It would seem, however, that special proceedings apply only to civil suits. Application in surrogate court to assess transfer tax. In re Babcock's Estate, 86 App. Div. 563, 83 N. Y. S. 1020. On the other hand, the following have been held not special proceedings: Application to direct the permanent receiver of a corporation appointed by final judgment, to pay the claim of a creditor. People v. American Loan & Trust Co., 150 N. Y. 117, 125, 44 N. E. 949. Proceeding for order for the examination of witnesses before trial, after action has been brought. In re Attorney General, 155 N. Y. 441, 444, 50 N. E. 57. Application to revoke an approval of an order of the state commission in lunacy. In re Board of Charities, 76 Hun, 74, 27 N. Y. S. 856. Scire facias proceedings. Cameron v. Young, 6 How. Pr. 372. Submission of controversy on agreed facts. Code Civ. Proc., § 1280. Application to appoint a successor to a deceased testamentary trustee. Losey v. Stanley, 83 Hun, 420, 31 N. Y. S. 950. See 1 Nichols N. Y. Prac. § 5.

40. "Special proceedings" under New York Code Civ. Proc. §§ 3333, 3334. Perry v. Myer, 89 N. Y. S. 347.

41. See 1 Curr. L. 20, n. 80-90.

42. Ferrell v. Ferrell, 53 W. Va. 515, 44 S. E. 187.

43. Laws 1902, p. 1498, c. 580. Goldman v. Tobias, 88 N. Y. S. 991.

44. Kidd v. New Hampshire Traction Co. [N. H.] 56 A. 455; State v. Chesapeake Beach R. Co. [Md.] 56 A. 385.

45. Under Mills' Ann. Code, §§ 32, 44. Flint v. Powell [Colo. App.] 72 P. 60. And see Limitation of Actions, 2 Curr. L. 746.

46. Release of all liens condition precedent to final payment on house, release must be tendered before action is brought. Titus v. Gunn, 69 N. J. Law, 410, 55 A. 735. An action to specifically enforce a contract for the assignment of an interest in property should not be brought while an action is pending to determine what that interest is. Cowles v. Rochester Folding Box Co. [N. Y.] 71 N. E. 468.

47. Louisville Tobacco Warehouse Co. v. Gist, 25 Ky. L. R. 387, 75 S. W. 243. A summons being served upon a minor, and a guardian ad litem being appointed for her who answered and prosecuted an appeal, held no further process was necessary on the return of the case to the trial court. Norman v. Central Kentucky Asylum [Ky.] 80 S. W. 781. And see Appeal and Review, 1 Curr. L. 83.

48. See 1 Curr. L. 21, n. 91, et seq.

49. Pritchard v. Edison Elec. Illuminating Co., 92 App. Div. 178, 87 N. Y. S. 225.

result of negligence,[51] but he must use his own land with reference to the rights of others,[52] and an offensive occupation cannot be carried on to the very great annoyance of one dwelling immediately near.[53] He may enjoin the maintenance of a bawdy house,[54] though the premises were so used before he purchased his property,[55] and was tolerated by the municipal authorities,[56] and was a public nuisance.[57] An owner who is specially damaged by a nuisance may recover therefor.[58]

He may divert percolating waters.[59]

If one maintains proper eave troughs, no right of action accrues to an adjoining owner if injury results from extraordinary rainfall.[60]

He may cut off overhanging branches of trees at the line and dig out the roots penetrating his soil, but he may go no farther,[61] unless the adjoining owner consents,[62] trees standing on the line being common property.[63] He is liable for damages by the fall of a dangerous structure maintained on his premises.[64]

The fact that a railroad company piled ties on its right of way so as to obstruct the view of an abutting owner was not an infringement of his rights,[65] but where water seeped through, gathered in pools underneath and emitted noxious odors causing malaria, it was.[66]

A contract between adjoining owners for an easement must be in writing.[67]

Lateral support.[68]—An adjoining owner may be restrained from depriving land in its natural state from lateral support,[69] but where an owner had deprived his own land of its cohesive force and on being deprived of its lateral support by an adjoining owner it fell, he was not entitled to recover for damage so caused,[70] therefore unless provided by statute, an owner making excavations is only required

50. Party Walls, 2 Curr. L. 1134.

51. A railroad company bought a tenement and in tearing it down the doors in a partition wall were left unprotected and the adjoining owner's property was damaged. Fisher v. Seaboard Air Line R. Co. [Va.] 46 S. E. 381. Persons owning lots adjoining a railroad cannot recover damages for annoyance consisting of noise and smoke unless it is the result of negligence. Id.

52. Froelicher v. Oswald Ironworks, 111 La. 705, 35 So. 821.

53. Boiler making. Froelicher v. Oswald Ironworks, 111 La. 705, 35 So. 821.

54. Ingersoll v. Rousseau [Wash.] 76 P. 513.

55. Such right being a property right running with the land and the injury being a continuing one. Ingersoll v. Rousseau [Wash.] 76 P. 513. A change in the construction was no defense because it did not do away with the injury. Id.

56. Ingersoll v. Rousseau [Wash.] 76 P. 513.

57. He was compelled to witness indecent conduct and listen to indecent noises and thereby suffered a special injury. Ingersoll v. Rousseau [Wash.] 76 P. 513. See also Nuisance, 2 Curr. L. 1062.

58. The fact that adjoining lot owners, similarly situated, have not joined in nor brought suit on their own account for damages for the erection of a fire tower in a public square does not prejudice the rights of one who does bring action. Fessler v. Union [N. J. Eq.] 56 A. 272.

59. The digging of a well which destroyed the well of an adjoining owner. Houston & T. Cent. R. Co. v. East [Tex.] 81 S. W. 279.

60. Extraordinary rainstorms causing large quantities of water to be precipitated on premises from an adjoining owner's roof. All reasonable precautions had been taken, no recovery. Philips v. Taylor [Minn.] 100 N. W. 649.

61. Harndon v. Stultz [Iowa] 100 N. W. 329.

62. In an action to compel one to dig up a line hedge, such party disclaimed ownership and expressed a willingness that it be removed. Held, the other party who had set it out could remove it at his own expense. Harndon v. Stultz [Iowa] 100 N. W. 329.

63. Where one owner set out a hedge on the line, the care and maintenance of which was assumed by the adjoining owner, the one setting it out could not compel the other to dig it up on its becoming a nuisance. Harndon v. Stultz [Iowa] 100 N. W. 329.

64. Walls of burned building. Beidler v. King, 209 Ill. 302, 70 N. E. 763.

65. Houston, E. & W. T. R. Co. v. Simpson [Tex. Civ. App.] 81 S. W. 353.

66. Damages for sickness caused thereby allowed. Houston, E. & W. T. R. Co. v. Simpson [Tex. Civ. App.] 81 S. W. 353.

67. In selling an adjoining lot an owner promised to sink deeper a well which was on the line and allow the purchaser to use the same. Plunkett v. Meredith [Ark.] 77 S. W. 600. Where husband and wife owned adjoining premises, the husband could not acquire an easement in her premises by adverse use in maintaining a projecting wall. Graves v. Broughton [Mass.] 69 N. E. 1083.

68. See 1 Curr. L. 21, n. 93-98.

69. Gillies v. Eckerson, 89 N. Y. S. 609.

70. Adjoining owners making brick on their respective lots. Gillies v. Eckerson, 89 N. Y. S. 609.

to support the land of an adjoining owner in its natural state and not to support the buildings thereon,[71] and is not liable for injuries thereto,[72] or persons thereon[73] in the absence of negligence, and the mere fact that the wall cracked while the excavating was being done raises no presumption of negligence.[74] If he is negligent, the fact that an independent contractor performed the work will not relieve him,[75] though it has been otherwise held;[76] but an independent contractor who is negligent is not liable.[77]

The owner of an unimproved lot has the right to excavate by using reasonable care and giving timely notice to the owner of adjacent buildings,[78] who must assume responsibility to protect his buildings,[79] and the cost of shoving up or underpinning falls on him,[80] unless otherwise provided by statute. The New York statute does not admit of conditions being annexed which are otherwise than incident to the duty to protect the building,[81] and a party by an unnecessary compliance with such statute may deprive himself of his common-law rights.[82]

Overleaning walls.[83]—A property owner may enjoin the continued maintenance by an adjoining owner of a structure projecting over his land,[84] or recover damages therefor,[85] providing the evidence shows an encroachment.[86]

71. A statute providing that an owner desiring to excavate more than 10 feet must protect the wall of an adjoining structure at his own expense and that the section shall not apply to buildings now erected, or to dwelling houses, applies only to buildings other than dwelling houses erected after the passage of the act. Wadasz v. Arcade Real Estate Co., 206 Pa. 539, 56 A. 46. St. Louis Charter does not authorize an ordinance limiting the depth a lot owner can excavate without protecting contiguous buildings. Carpenter v. Reliance Realty Co. [Mo. App.] 77 S. W. 1004. A lot owner called the attention of an adjoining owner to an ordinance when notifying him to protect his buildings against an excavation. Held, he was not estopped to attack the validity of the ordinance. Id. A building was injured by the making of excavations on the adjeining lot. Held, in view of a statute that an instruction that ordinary care to sustain "the land" without an instruction as to the duty of the owner to protect the superincumbent weight of the building was not error. Wilkins v. Grant, 118 Ga. 522, 45 S. E. 415. Damage caused a building by excavating on an adjoining lot. Carpenter v. Reliance Realty Co. [Mo. App.] 77 S. W. 1004.

72. Evidence held insufficient to show negligence. Serio v. Murphy [Md.] 58 Atl. 435. One under whose supervision the excavating is being done is bound to exercise only ordinary care. Id.

73. Where an owner permits land of an adjacent owner to be deprived of its lateral support, he is not liable to such adjacent owner for personal injuries sustained by the giving way of the soil under his weight, unless the removal of the lateral support was in a negligent manner. Pullan v. Stallman [N. J. Law] 56 A. 116.

74. Serio v. Murphy [Md.] 58 A. 436.

75. An owner excavated below the foundation of an adjoining wall and failed to exercise ordinary precautions. He was held liable, though the work was done by an independent contractor. Davis v. Summerfield, 133 N. C. 325, 45 S. E. 654. The employment of an independent contractor to make an excavation adjacent to an abutting owner's wall does not relieve the proprietor from the duty to give the adjacent owner timely notice of the nature and extent of the intended excavation. Id.

76. A building being erected for an express company by an independent contractor, for injuries caused by such contractor the company was not liable. Korn v. Weir, 88 N. Y. S. 976.

77. Adjoining owners agreed that during the erection of a line wall the one erecting the building should do certain things to protect the property of the other. Held, that no action would lie against a contractor who performed this work negligently. Cobb v. C. Everett Clark Co. [Ga.] 45 S. E. 305. A contract between a lot owner and a construction company provided that the construction company should protect adjacent walls. Held, that the adjoining owner could not enforce this provision against the construction company. Carpenter v. Reliance Realty Co. [Mo. App.] 77 S. W. 1004. Where an adjoining owner gave notice to his neighbor to protect his house as required by ordinance, he is not liable for injuries to the house, the work having been done with ordinary care. Serio v. Murphy [Md.] 58 A. 435.

78, 79, 80. Carpenter v. Reliance Realty Co. [Mo. App.] 77 S. W. 1004.

81. Under statute imposing on lot owners about to excavate the duty of protecting adjacent walls "if afforded license to enter and not otherwise," the adjoining owner could not impose as a condition of the license to enter and shore up, that the licensee protect certain plumbing from freezing. Korn v. Weir, 88 N. Y. S. 976.

82. Under New York statute one intending to excavate more than 10 feet must on receiving license from the adjoining owner shore up his building. Where one did not intend to go 10 feet, but got a license to shore up the adjoining building, and did it so that it fell, he was liable for the damages and was estopped to say that he did not intend to go down 10 feet. Blanchard v. Savarese, 89 N. Y. S. 664.

83. See 1 Curr. L. 21, n. 1.

84. A wooden structure resting on beams projecting from the foundation over the land

Common ways and appurtenances.[87]—One may not interfere with an easement obtained from a common grantor,[88] nor construct a stairway leading to his basement so as to make a landing place of the sidewalk in front of an adjoining owner.[89] A tenant may maintain an action for obstructing a common way.[90]

Spite fences.[91]—An unnecessary and unreasonable use of land to the injury of another is not a property right,[92] but that a fence was erected to annoy and from motives of malice is not sufficient to give an adjoining owner a cause of action.[93]

Line fences.—Where a boundary line between adjoining owners is disputed, the proprietors may by verbal agreement fix the line which if acted on by them

of an adjoining owner. Norwalk Heating & Lighting Co. v. Vernam, 75 Conn. 662, 55 A. 168. The possession and occupancy of a structure projecting over the land of another, but not touching it, is not an ouster within the meaning of a statute, declaring conveyances of land of which the vendor is ousted to be void. Id.

85. For the unlawful construction of a wall on his premises. Graves v. Broughton [Mass.] 69 N. E. 1083.

86. Where surveyors for one owner testified that a wall did not extend over the line and surveyors for the other party testified that it extended over three-fourths of an inch, evidence held insufficient to show an encroachment. Ipser v. Rosenbaum, 25 Ky. L. R. 2202, 80 S. W. 187.

87. See 1 Curr. L. 22, n. 8, 9.

88. Where adjoining owners have an easement over an alley, one of them cannot excavate the alley to obtain access to his building and light and air for his basement, unless the excavation can be used so as not to substantially interfere with the right of passage. Mershon v. Fidelity Ins. Trust & Safe Deposit Co., 208 Pa. 292, 57 A. 569.

89. One caused an opening to be made in the sidewalk in front of his building, which extended to within 10 inches of his line, and the railing guarding it to within 23 inches of the line. The view to an adjoining owner's windows was obstructed by people stopping at the head of the stairs. Perry v. Castner [Iowa] 100 N. W. 84.

90. A common hallway affording entrance to two hotels on separate lots had been used in common by the proprietors under an agreement. One of them constructed fire proof shutters in the hallway and prevented the tenant of the other from using it. Held, under a statute relative to the construction of any structure intended to spite or annoy an adjoining owner, the tenant could maintain an action without joining his landlord. Winsor v. German S. & L. Soc., 31 Wash. 365, 72 P. 66. A contract for joint use of a hallway between two hotel buildings provided that all matters in dispute should be left to arbitration. Held, that where one had placed obstructions in the hallway which had been repeatedly removed by the other, he was estopped to set up against a petition to enjoin such act that arbitration had not been proposed and refused. Id.

91. See 1 Curr. L. 22, n. 11.

92. A statute declaring any fence exceeding five feet in height and erected to annoy an adjoining owner to be a private nuisance, and giving the injured person damages was held constitutional. Horan v. Byrnes [N. H.] 54 A. 945.

93. Where a lot was used for gardening and there was an unobstructed view therefrom across an adjacent lot to a side street, the owner had no cause of action against the owner of the adjacent lot for erecting a high board fence along the boundary, though it was done for malice and injured her lot for the purpose named. Giller v. West [Ind.] 69 N. E. 648. The erection of a fence 12 feet high, on one's own property, shutting off the view of the public and the view, light and air of a neighbor, does not constitute a public nuisance, nor an infraction of a statute imposing a penalty for maintaining an obstruction so as to injure the property of another, though erected through motives of malice. Russell v. State [Ind. App.] 69 N. E. 482. A conclusion that a fence was maliciously erected held supported by a finding that it was of tight boards 5½ feet high and set on top of a picket fence 3½ feet high, and that it was erected to annoy an adjoining owner, though by other findings it appeared that defendant intended the inclosure for the purpose of exercising his horses, and that he had erected the fence to placate his wife, whose personal motive was to spite her neighbor. Whitlock v. Uhle, 75 Conn. 423, 53 A. 891.

NOTE.—By the weight of authority, it is held that in the absence of statute a structure maliciously erected by one on his own land to cut off light or air from an adjoining owner gives no right of action to the person aggrieved. By the authorities so holding it is argued that the maxim sic utere, etc., requires only abstention from legal injury, and that unless an easement is established by prescription or contract, such a structure infringes no legal right. Pickard v. Collins, 23 Barb. [N. Y.] 458; Paine v. Chandler, 134 N. Y. 385, 32 N. E. 18. And there being no legal wrong the motive becomes immaterial. Pickard v. Collins, 23 Barb. [N. Y.] 458; Jenkins v. Fowler, 24 Pa. 308; Phelps v. Nowlen, 72 N. Y. 39; Falloon v. Schilling, 29 Kan. 295; Rideout v. Knox, 148 Mass. 368, 19 N. E. 390; Dawson v. Kemper, 32 Wkly. Law Bul. 16; Guest v. Reynolds, 68 Ill. 478; Ward v. Neal, 35 Ala. 602; Letts v. Kessler, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177; Metzger v. Hochrein, 107 Wis. 267, 83 N. W. 308, 50 L. R. A. 305. The contrary doctrine has been held in Burke v. Smith, 69 Mich. 380, 37 N. W. 838, 8 L. R. A. 184 [with note]; Flaherty v. Moran, 81 Mich. 52, 45 N. W. 381, 8 L. R. A. 183; Sankey v. St. Mary's Female Academy, 8 Mont. 265, 21 P. 23. **Statutes** have been passed in several states regulating the height of boundary fences, and such statutes are held constitutional. Smith v. Morse, 148 Mass. 407, 19 N. E. 393. Some of these, like the California act (Act March 9, 1895), inhibit fences over a certain height irrespective of motive. Western Granite & Marble Co. v.

will be enforced by the courts.[94] At common law an adjoining owner has no right to build his fence beyond his own land,[95] and if he builds it within his line, adjacent owners may not encroach on his property.[96] The burden is on an adjoining owner to show that a line fence built partly on his land is unreasonable for the purposes intended.[97]

Measure of damages.[98]—Speculative damages cannot be recovered for an encroachment,[99] but compensatory,[1] and in case malice is shown, punitive damages may be recovered.[2]

ADMIRALTY.

§ 1. **Jurisdiction and Courts (40). Maritime Contracts (41). Maritime Torts (41).**
§ 2. **Remedies and Remedial Rights (42).**
§ 3. **Practice and Procedure (42).**
A. Pleading, Process, etc. (42).
B. Evidence, Proof and Hearing, and Decree (43). Interrogatories (43). Findings of a Commissioner (44). Costs (44). Interest (44).
§ 4. **Appeals and Subsequent Proceedings. Practice on Appeal (44).**

This topic includes only admiralty jurisdiction and practice. The law of maritime traffic and of navigation is treated elsewhere.[3]

§ 1. *Jurisdiction and courts.*[4]—Courts of admiralty of the United States take cognizance of any case within the general martime law whenever the res or person to be affected is within the reach of its process.[5] Hence they have jurisdiction of an action in personam against the owner of a foreign ship to recover for injuries sustained by an American passenger on the high seas,[6] and may, in their discretion, entertain a suit by an alien seaman against a foreign ship to recover damages for the

Knickerbocker, 103 Cal. 111, 37 P. 192. Under the Connecticut act, however, malice is essential [Gen. St. § 1277]. Harbison v. White, 46 Conn. 106; Gallagher v. Dodge, 48 Conn. 387. And the same is true under the Maine statute (Lord v. Langdon, 91 Me. 221, 39 A. 552) and that of Massachusetts (Rideout v. Knox, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81), and New Hampshire (Hunt v. Coggin, 66 N. H. 140, 50 Atl. 250, in which it was said that defendant need not have been actuated solely by malice). Such statutes have been sustained as applying to fences erected before their passage. Smith v. Morse, 148 Mass. 407, 19 N. E. 393.

From note to Letts v. Kessler [Ohio] 40 L. R. A. 177. See, also, briefs in Metzger v. Hochrein [Wis.] 50 L. R. A. 305.

94, 95. Hoar v. Hennessy [Mont.] 74 P. 452.

96. Where an owner's fence is built an inch within his line an adjoining owner may not in raising the grade of his lot pile dirt on such inch of land. Berry v. Fleming, 87 App. Div. 53, 83 N. Y. S. 1066. Montana statute providing that if one owner use the line fence of his neighbor he must share the cost of construction contemplates that the fence shall lie one-half on the land of each. Hoar v. Hennessy [Mont.] 74 P. 452.

97. To prevent the washing down of the earth from the lot on the higher level. Hoar v. Hennessy [Mont.] 74 P. 452. Adjoining owners entered into an agreement that only a fence of a certain kind was to be erected on a vacant strip between their lots. Held that the erection of a high board fence would be enjoined since it would violate the contract. Silverfield v. Frank, 43 Or. 502, 73 P. 1032.

98. See 1 Curr. L. 22, n. 12-14.

99. A building leaned over an adjoining lot so as to obstruct the erection of a factory. The adjoining owner erected a temporary structure and continued his manufacture. Held, that he was not entitled to recover for loss of profits which it was set up would inevitably occur and which would be due to the overleaning wall. Barnes v. Berendes, 139 Cal. 32, 72 P. 406.

1. But he was entitled to recover loss of profits sustained by reason of the obstruction, and the cost of the erection of the temporary structure and the expense of setting up machinery therein and of removing it to the permanent building (Barnes v. Berendes, 139 Cal. 32, 72 P. 406), also the amount paid a watchman to guard the temporary structure during such delay (Id.), and the difference between the contract price of lumber and the price he was subsequently required to pay, the sellers having refused to hold the contract open (Id.). Where an owner of adjoining lots contracts with the vendee of one of them to deepen a well on the line until it affords a sufficient supply of water, and fails to do so the measure of damages is the cost of sinking it to such depth. Plunkett v. Meredith [Ark.] 77 S. W. 600. And if such vendor prevents the vendee from sinking it she can recover the cost of sinking a well on her own premises. Id.

2. And punitive damages if the defendant maliciously and for the purpose of harassing him refused to remove the wall. Plunkett v. Meredith [Ark.] 77 S. W. 600.

3. Shipping and Water Traffic, 2 Curr. L. 1648.

4. See 1 Curr. L. 22.

5. Pouppirt v. Elder Dempster Shipping, 122 F. 983.

6. Action governed by general maritime law as administered in this country. Pouppirt v. Elder Dempster Shipping, 122 F. 983; Elder Dempster Shipping Co. v. Poupirt [C. C. A.] 125 F. 732.

failure of the master to provide him with proper care, nursing and medical treatment after his accidental injury while in the service of the ship.[7]

That a vessel is engaged in commerce wholly within a state does not exclude it from admiralty jurisdiction.[8]

State statutes cannot extend or restrict the admiralty jurisdiction exclusively vested in the Federal courts, but can only operate to furnish an additional remedy.[9] A canal forming part of a continuous highway for interstate and foreign commerce, though wholly within a state, is a navigable water of the United States and its canal boats are ships within the maritime law.[10]

Maritime contracts.[11]—In order that a court of admiralty may have jurisdiction over a contract, it must be essentially and wholly maritime in its character. It must relate to the trade and business of the sea, and must provide for maritime services, maritime transactions, or maritime casualties,[12] but it is immaterial whether it is to be performed on land or water.[13]

Maritime torts.[14]—The fact of locality alone does not give the court jurisdiction of an action for tort, committed on the high seas or other navigable waters, but it must further appear that the tort was maritime in character.[15]

There is jurisdiction in rem of a libel for negligent towage in the absence of a contract, for the liability is founded in tort.[16]

Where the injury to a vessel is done upon the land, though it originated upon the water, the damage is not a subject of admiralty jurisdiction,[17] but the fact that

7. The Troop [C. C. A.] 128 F. 856.

8. Perry v. Haines, 191 U. S. 17, 24 S. Ct. 8.

9. Lien given by state statutes not test of jurisdiction. Rev. St. Me. c. 93, § 7, giving lien on vessels for use of wharf, does not give court of admiralty jurisdiction of suit in rem to recover for rent of wharf. The James T. Furber, 129 F. 808. Remedy may be enforced by Federal courts only when contract is maritime. The Mary F. Chisholm, 129 F. 814.

10. Proceedings in rem to enforce a lien for repairs are within exclusive jurisdiction of admiralty, though had under state statute. Perry v. Haines, 191 U. S. 17, 24 S. Ct. 8.

11. See 1 Curr. L. 23, n. 22-26.

12. Lease of space at a wharf for use of vessel at fixed annual rental is lease of realty and not maritime contract. The James T. Furber, 129 F. 808. The test to be applied is, does the suit arise from the necessities of navigation or from any matters relating to the commerce of the sea? Sale to fishermen of tobacco, clothing, and other articles of personal use held not maritime in character. The Mary F. Chisholm, 129 F. 814. A mere contract to procure insurance is not maritime. Reliance Lumber Co. v. Rothschild, 127 F. 745.

Contract to furnish material to build a floating dock, retaining a lien thereon (Arnold v. Eastin's Trustee, 25 Ky. L. R. 895, 76 S. W. 855), and claims for a stipulated commission for obtaining a charter and for an attendance fee, are not maritime (Richard v. Holman, 123 F. 734).

A contract by master of steamboat to collect and transport certain cotton seed from one port to another within a reasonable time, for freight specified, is a maritime contract, and shipper is entitled to recover in admiralty for breach thereof. Florence Cotton Oil Co. v. Alabama Towboat Co. [C. C. A.] 128 F. 915. Has jurisdiction of suits on contracts of maritime insurance, and hence of a suit on an accepted application for such insurance, or binding slip. Kerr v. Union Marine Ins. Co., 124 F. 835. To bring a case whether of contract or tort, within the jurisdiction of a court of admiralty, maritime relations of some sort must exist. Campbell v. Hackfeld [C. C. A.] 125 F. 696.

13. Libelant chartered scow to city to carry street sweepings, etc., to island, which city was filling in. It grounded on island when tide receded, through charterer's negligence. In action on contract for failure to return vessel, held, admiralty had jurisdiction. Dailey v. City of New York, 128 F. 796. Contract for repairs on vessel in dry dock is maritime. Perry v. Haines, 191 U. S. 17, 24 S. Ct. 8.

14. See 1 Curr. L. 23, n. 29-31.

15. Action for injury to stevedore through negligence of contracting stevedore not within jurisdiction of admiralty court. Campbell v. Hackfeld [C. C. A.] 125 F. 696. A statute imposing on the agent of a foreign insurance company doing business without complying with the requirements of the state, the penalty of "being personally liable on such contract" imposes a tort, not a contract liability, and since it is not maritime admiralty has no jurisdiction. Reliance Lumber Co. v. Rothschild, 127 F. 745.

16. The Temple Emery, 122 F. 180.

17. Dailey v. City of New York, 128 F. 796. The locus of the damage and not of the origin of the tort is the test of admiralty jurisdiction in tort. No libel can be maintained for injuries to a permanent structure resting upon land. Collision of a ship with a beacon resting on piles in a river channel. The Blackheath, 122 F. 112. Falling between a wharf and vessel in the dark owing to negligent withdrawal of the gang-plank by officers and crew of the vessel was held not a maritime tort. The Albion, 123 F. 189.

the vessel takes ground with the recession of the tide does not oust the admiralty jurisdiction.[18]

A statute authorizing submission to a district court of the claim of a British steamer sunk by a war vessel of the United States to hear, determine and render judgment in compliance with the rules of admiralty, confers jurisdiction to render a decree against the United States for damage caused by violation of the navigation rules, though due to the exigencies of war.[19]

Apart from statute, there is no right of action in admiralty for wrongful death.[20]

§ 2. *Remedies and remedial rights.*[21]—There is a sharp distinction between an action in personam with concurrent attachment and a proceeding in rem. The latter is distinctively maritime.[22] Fault on the part of those in control must be imputed to the ship to give jurisdiction in rem.[23]

Statutes of limitation, as such, are not enforced by courts of admiralty, but, in the absence of exceptional circumstances, they will generally be followed by analogy.[24] Failure of one having a claim in rem against a foreign ship to seek other property of its owners to attach and waiting till her second trip to the port is not laches.[25]

§ 3. *Practice and procedure. A. Pleading, process, etc.*[26]—Courts of admiralty are liberal in their treatment of pleadings, and averse to sustaining technical objections calculated to prevent the determination of causes according to their essential merits, but this liberality should not be so exercised as to prejudice either party.[27]

Claims for demurrage should be specific,[28] and damages resulting to the owners from the cancellation of a charter party cannot be recovered in a libel by the master of the vessel, unless the same are alleged.[29]

If a libellant has a good cause of action on one or the other of two theories practically inconsistent, and is doubtful which is correct, he may with proper allegations plead in the alternative.[30]

A set-off is not cognizable in admiralty except in so far as it relates to the particular transaction which is the subject of the libel, and goes to reduce or overcome the original demand.[31]

18. Vessel stranded by ebbing of tide within cribwork and embankments built for filling up island in East River, New York. Held, that court had jurisdiction, the water being navigable. Dailey v. City of New York, 128 F. 796.

19. Watts v. U. S., 123 F. 105.

20. Williams v. Quebec S. S. Co., 126 F. 591.

21. See 1 Curr. L. 23.

22. Perry v. Haines, 191 U. S. 17, 24 S. Ct. 8.

23. Where the liability sought to be enforced arose out of a contract obligation of the master to return a tug in as good condition as when hired, a libel in rem was dismissed. The Ville de St. Nazaire, 124 F. 1008.

24. Not allowed to amend libel so as to bring in shipowner and add cause of action in personam, after the action would be barred by the local statute, on ground that damages and interest had increased to amount in excess of the stipulation given for the release of the vessel, since owner could have been joined at any time and increase was apparent. The Southwark, 128 F. 149.

25. Within the jurisdiction, 41 days between injury and libel. Not laches. The Slingsby [C. C. A.] 120 F. 748.

26. See 1 Curr. L. 24.

27. Harrison v. Hughes, 119 F. 997. Libel held to show a maritime contract within the admiralty jurisdiction of the court, a breach thereof, and a right to damages. Florence Cotton Oil Co. v. Alabama Towboat Co. [C. C. A.] 128 F. 915. Where the libel sets out the facts and the answer and evidence meet the real issues and the assignments of error point out the questions for the appellate court, recovery will not be denied. Libel on a charter party to which libellee not a party. W. S. Keyser & Co. v. Jurvelius [C. C. A.] 122 F. 218. An allegation that a vessel was enrolled in Boston and that her owner had its principal place of business in Boston is not a sufficient allegation that her home port was in Massachusetts. The New Brunswick, 125 F. 567.

28. Neither what days nor how many were alleged. The Cargo of The Joseph W. Brooks, 122 F. 881.

29. An interlocutory decree on a master's libel may be amended and referred, to bring up his right to recover for the owner's loss after cancellation of a charter party. Harrison v. Hughes, 119 F. 997.

30. The New Brunswick, 125 F. 567.

31. Hastorf v. Degnon-McLean Contracting Co., 128 F. 982. An independent set-off or counterclaim cannot be considered to

Parties other than intervening claimants are not entitled to file exceptions to a libel for breach of a maritime contract.[32]

After seizure under process, earnings of a vessel prior to the sale under an agreement between the charterer and the marshal approved by the court should be paid into court and applied on the libellant's claim.[33]

On the death of a libellant in prize who applies on behalf of himself and others of the navy, another interested person who is present by counsel may be substituted.[34]

(§ 3) *B. Evidence, proof and hearing, and decree.*[35]—The mere fact that libellant, who instituted a suit in forma pauperis, purchased the vessel for a certain sum is insufficient to establish the fact that he possessed property at the time the suit was instituted, or had acquired any since that time, justifying the court in requiring him to give security for costs, there being no proof that his affidavit of poverty is false.[36]

Interrogatories may be addressed to officers of a corporation libellee not only as to their personal knowledge, but their official information. They must not unduly pry into an opponent's case.[37] The only ground of objection that can be interposed to them when they tend to elicit facts bearing on the case is that the answers may expose the party making them to prosecution or punishment for crime, or for a penalty, or forfeiture of his property for a penal offense.[38]

The *defense* of contributory negligence on the part of libellants, when relied upon, must be affimatively proved by a preponderance of evidence.[39]

Foreign laws relied on, when different from our own, must be pleaded and proved,[40] and greater weight will be given to affirmative than to negative testimony.[41] Where the trial is before the court, all testimony offered should be admitted, subject to objection, unless so clearly irrelevant or immaterial that there can be no doubt of its inadmissibility.[42]

Hearsay evidence will be treated as of no probative force, though no objection is taken thereto until exceptions are filed to the report of the commissioner before whom it was introduced.[43]

Parties who have *deposited a fund* in the registry of the district court, in admiralty, will not be allowed to withdraw a portion thereof and substitute a bond therefor.[44]

Where, pending cross actions for collision, the parties have stipulated that

diminish or reduce a claim for maritime services, unless the damages upon which it is based arise out of the same transaction. In suit to recover for extra repairs not specified in contract, but contemplated therein, held, that the owner could set off claims for damages resulting from failure to complete the contract in the manner required by the contract. Davidson v. Green, 127 F. 999.

32. Florence Cotton Oil Co. v. Ala. Towboat Co. [C. C. A.] 128 F. 915.

33. The C. W. Cowles, 124 F. 458.

34. Rear Admiral Taylor substituted for Rear Admiral Sampson who died pending appeal from the condemnation. U. S. v. Sampson, 187 U. S. 436, 23 S. Ct. 216, 47 Law. Ed. 248.

35. See 1 Curr. L. 24.

36. The "Our Friend," 131 F. 395.

37. Under rule 23. Bock v. International Nav. Co., 124 F. 711.

38. Libellants are entitled to the production of such facts as will prove their case, notwithstanding the fact that it may divulge the business of other shippers engaged in the same business. Dana v. Cosmopolitan Shipping Co., 131 F. 158.

39. The Nellie, 130 F. 213.

40. British law in regard to liability of ship for care of seaman injured in ship's service. The Matterhorn [C. C. A.] 128 F. 863.

41. Paauhau Sugar Plantation Co. v. Palapala [C. C. A.] 127 F. 920.

42. For benefit of appellate court. Minnesota S. S. Co. v. Lehigh Valley Transp. Co. [C. C. A.] 129 F. 22. A full stenographic report of the evidence should be taken under the sanction of the court if an appellate court is to review the facts. Neilson v. Coal, Cement & Supply Co. [C. C. A.] 122 F. 617.

43. The Anson M. Bangs [C. C. A.] 129 F. 103.

44. Practice in such cases being to distribute the fund in registry in accordance with admiralty rules 57 and 58 (E. D. Pa.). The R. C. Veit, 131 F. 400.

damages recovered against either by third persons, in actions arising out of such collision, shall be assessed as damages in the collision suit, the court will not enter a decree while actions for damages are still pending and undetermined.[45]

Findings of a commissioner[46] as to matters of fact will not be disturbed when based upon doubtful or conflicting evidence, unless error or mistake is clearly apparent;[47] but are not conclusive if not sustained by the testimony.[48]

General exceptions to a commissioner's report, without reference to the pertinent evidence, will not be considered.[49]

Costs[50] will not be allowed where the suit is dismissed for want of jurisdiction of the subject-matter.[51]

The respondent to a cross libel may be required to give security for costs under Rule 53, though his libel is in personam, but this will not be done when it seems to the court unjust.[52]

Where the court divides the total costs, they include the statutory fee of the libellant's proctor, but not that allowed respondent's proctor against his own client.[53]

Interest[54] may, in the discretion of the court, be allowed as part of the damages for the detention of a vessel for repairs, and should be allowed in the absence of special circumstances rendering it inequitable to do so;[55] but it will not be allowed against the United States in a suit, under a special act of congress, for damages resulting from the collision of a foreign ship with a naval vessel, where the special act is silent on the subject.[56] When the decree of the lower court, making no provision for interest, is affirmed by a mandate which is also silent on the point, the lower court has no power to allow interest.[57] A claimant who contests a suit in rem to recover damages for a maritime tort or a breach of contract of carriage is liable for interest and costs, although the damages may thereby be made to exceed the amount of the stipulation given for the vessel's release.[58]

§ 4. *Appeals and subsequent proceedings. Practice on appeal.*[59]—Admiralty cases are tried de novo on appeal to the circuit court of appeals,[60] but where the testimony is taken orally in the presence of the lower court, and the evidence is conflicting, its decision will not be reversed unless it clearly appears that it is against the evidence.[61]

45. The N. & W. 2, 127 F. 613.
46. See 1 Curr. L. 25, n. 61-64.
47. Conclusion of commissioner based on conflicting evidence. Watts v. U. S., 129 F. 222. Where evidence doubtful or inferences uncertain. Appeal of Cahill [C. C. A.] 124 F. 63.
48. The Ida G. Farren, 127 F. 766.
49. The Waiontha, 122 F. 719.
50. See 1 Curr. L. 25, n. 70-75.
51. The Mary F. Chisholm, 129 F. 814; Reliance Lumber Co. v. Rothschild, 127 F. 745.
52. Cross libel appeared not to entitle to an affirmative judgment. Morse Iron Works & Dry Dock Co. v. Luckenbach, 123 F. 332.
53. Rev. St. § 824. The L. F. Munson, 127 F. 767.
54. See Interest, 2 Curr. L. 547.
55. No such delay in bringing cause to hearing as to make it unjust. Harrison v. Hughes, 119 F. 997.
56. Interest not recoverable under general rule or under statutory rule governing suits in court of claims. Watts v. U. S., 129 F. 222.
57. The district court cannot allow interest on a final decree wherein damages and costs are equally divided, and which on appeal is simply "affirmed with costs," by the circuit court of appeals, and no interest can be recovered unless the appellate court so modifies or amends its affirmatory decree as to include it. Interest not "specially directed" pursuant to Rule 30, C. C. A. Third Circuit (90 Fed. clxviii, 31 C. C. A. clxviii). The Glenochil, 128 F. 963.
58. Decree in such case to be entered against stipulators for the amount of their contract liability, and against claimant for the remainder of the interest and costs. The libellant, in such case, is not precluded from asserting his right to such interest and costs by the fact that his application for leave to amend his libel by inserting a claim in personam for the damages sued for was denied on the ground of laches. The Southwark, 129 F. 171.
59. See 1 Curr. L. 25.
60. Paauhau Sugar Plantation Co. v. Palapala [C. C. A.] 127 F. 920.
61. Paauhau Sugar Plantation Co. v. Palapala [C. C. A.] 127 F. 920; Baker-Whiteley Coal Co. v. Neptune Nav. Co. [C. C. A.] 120 F. 247; The Oscar B. [C. C. A.] 121 F. 978; Memphis & N. Packet Co. v. Hill [C. C. A.]

The point that libellant is a minor and hence not entitled to sue cannot be first raised on appeal.[62]

The appellate court will not review the action of the lower court in assuming jurisdiction of a suit by an alien seaman against a foreign vessel for damages for failure to furnish care and medical attendance, unless it appears that such court has exercised its discretion on wrong principles, or that it has acted so absolutely different from the views of the appellate court that the latter is justified in saying that discretion has been wrongly exercised.[63]

One of two defendants who failed to appeal from a judgment against both and was not served with notice of severance cannot, by appearing after the time for appeal has expired and waiving service of citation, perfect the otherwise defective appeal.[64]

A motion for a rehearing on the ground of new evidence must be supported either in the court below or under the admiralty rule in the appellate court by an affidavit as to what that evidence would be.[65]

ADOPTION OF CHILDREN.

§ 1. Adoptive Acts and Proceedings (45). § 2. Consequences of Adoption (46).

§ 1. *Adoptive acts and proceedings.*[1]—The decree in adoption proceedings has the force of a judgment and will be sustained where there has been a substantial compliance with the requirements of the statute.[2] Orders of adoption are for the benefit of the child, affect his status, are in the nature of judgments in rem, and cannot be collaterally attacked.[3] Proceedings wherein the record shows on its face that the stattute was not complied with are void.[4] The parent's consent must be obtained,[5] or he must be given notice of the proceedings.[6]

122 F. 246; The Matterhorn [C. C. A.] 128 F. 863. Finding by district judge that time contract was made for employment of pilot will not be set aside as contrary to weight of evidence. Baton Rouge & B. S. Packet Co. v. George [C. C. A.] 128 F. 914.

62. If apparent on the face of the complaint, respondent may demur. If not, he must take advantage of it by pleading in bar or by answer. Paauhau Sugar Plantation Co. v. Palapala [C. C. A.] 127 F. 920.

63. Not abuse of discretion where libellant, who was left in this country without money, and permanently injured, would probably have been without any effective remedy. The Troop [C. C. A.] 128 F. 858.

64. Consumers' Cotton Oil Co. v. Nichol [C. C. A.] 120 F. 818.

65. Kenney v. Blake [C. C. A.] 125 F. 672.

1. See 1 Curr. L. 26.

2. Under Rev. St. Neb. 1866, c. 2, tit. 25, an adopted child will not lose his rights of inheritance in a collateral proceeding many years later on the ground that the statement filed by adoptive parents did not say specifically that adopted child should have equal rights with the other children. Ferguson v. Herr [Neb.] 94 N. W. 542.

3. All presumptions are in favor of the regularity of the proceedings and the jurisdiction of the court. Jossey v. Brown, 119 Ga. 758, 47 S. E. 350. So it will be presumed in the absence of proof to the contrary that the judge was satisfied as to the truth of the facts stated in the petition and that the parents of the adopted child had notice of the proceedings, though the record does not show the residence of the child of the petitioner, or the child's parents. Id. In a collateral attack on the order of adoption, a recital that "all persons whose consent is necessary have appeared" is sufficient to show that the father appeared, nor will the failure to examine the father affect its validity. In re McKeag's Estate, 141 Cal. 403, 74 P. 1039.

4. Under the Alabama statute (Code 1896, § 367), providing for the adoption of children by the making of a declaration to be acknowledged before the judge of probate, filed and recorded, in the county where the declarant resides, if such declaration shows on its face that it was acknowledged, filed and recorded in a county other than that of declarant's residence, the adoption proceedings are void. Monk v. McDaniel [Ga.] 47 S. E. 931. The probate judge in such proceedings acts in a ministerial capacity and his statement that the declarant's place of residence is immaterial will not make the proceedings valid. Id.

5. In Revision of 1860, c. 107, § 2601, providing that on adoption of minor where parents were divorced, written consent must be given by parent entitled to custody of child, is not complied with by the mother's merely signing and acknowledging the deed of adoption which contains no express words indicating consent. Hopkins v. Antrobus, 120 Iowa, 21, 94 N. W. 251.

6. Under Mass. Pub. St. 1882, c. 148, the court has jurisdiction where the mother sur-

Contracts of adoption.[7]—Oral contracts to adopt children and make them heirs will be specifically enforced when sustained by clear and convincing proof, after performance by one party, and when to refuse specific performance would perpetuate a fraud.[8] A contract to adopt not executed or recorded in accordance with the statute will not confer on child the right of inheritance,[9] but may affect its custody.[10]

§ 2. *Consequences of adoption.*[11]—The custody of a child properly belongs to the adoptive parents.[12]

Heirship by adoption being unknown to the common law,[13] it can be created only by a constitutional law by which relations of "paternity and affiliation are recognized as legally existing between persons not so related by nature."[14] Under some statutes, the adopted child may inherit directly from the person adopting it, but not from the kindred of such person by right of representation.[15] But it was held, under the Massachusetts statute, that an adopted child may inherit from a brother by adoption,[16] and, in Maine, though the right of inheritance is denied by statute, such child may collect life insurance payable to a "child" of the deceased.[17]

rendered her child born in Massachusetts to a charitable institution, for adoption, and notice was given by publication, to the father, a resident of Scotland, who did not consent to the adoption. Stearns v. Allen, 183 Mass. 404, 67 N. E. 349.

7. See 1 Curr. L. 27, n. 13-15.

8. Evidence considered and held insufficient to warrant specific enforcement. Grantham v. Gossett [Mo.] 81 S. W. 895. Void articles of adoption are not of themselves evidence of a contract by which the adopted person is to inherit property. Albring v. Ward [Mich.] 100 N. W. 609.

9. Where the written contract of adoption was never signed or recorded, but the parties acted as if there were a valid contract, the child cannot inherit as heir. McColpin v. McColpin's Estate [Tex. Civ. App.] 75 S. W. 824. The mere contract to adopt, followed by assumption of the relation, but not by filing of papers, is not a sufficient compliance with statute to establish right of inheritance. Jordan v. Abney [Tex.] 78 S. W. 486.

10. Parent may confer on another the right to custody of child without execution of adoption papers, but it will be presumed that the right is temporary. Miller v. Miller [Iowa] 98 N. W. 631.

Note: Except as sanctioned by statute, contracts for the transfer of parental authority and responsibility are deemed against public policy. State v. Baldwin, 5 N. J. Eq. 454; State v. Clover, 16 N. J. Law, 419; Weir v. Marley, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672; In re Scarritt, 76 Mo. 565, 43 Am. Rep. 768; Chapsky v. Wood, 26 Kan. 650; Washaw v. Gimble, 50 Ark. 351, 7 S. W. 389; Johnson v. Terry, 34 Conn. 259), though a few cases seem to tend to the contrary doctrine (Ellis v. Jesup, 11 Bush [Ky.] 403; Coffee v. Black, 82 Va. 567; Bonnett v. Bonnett, 61 Iowa, 199, 16 N. W. 91). And in New Hampshire (State v. Libbey, 44 N. H. 321) it has been held that such a transfer might be made by deed, but not by parol. Where such a transfer is void, it may be revoked by the parent. McGlennan v. Margowski, 90 Ind. 150; State v. Reuff, 29 W. Va. 751; De Jarnett v. Harper, 45 Mo. App. 415. But it has been held that the parent may estop himself to revoke. Verser v. Ford, 37 Ark. 27; Cunningham v. Barnes, 37 W. Va. 746, 17 S. E. 308; Richards v. Collins, 45 N. J. Eq. 283, 17 Atl. 831; Chapsky v. Wood, 26 Kan. 650. The welfare of the child is to be regarded, and courts will not aid a parent in revoking his agreement if such revocation would not be for the best interests of the child. McKenzie v. State, 80 Ind. 547; Jones v. Darnell, 103 Ind. 569, 2 N. E. 229; Sturtevant v. State, 15 Neb. 459; People v. Porter, 23 Ill. App. 196; Washaw v. Gimble, 50 Ark. 351, 7 S. W. 389; Merritt v. Swimley, 82 Va. 433; Sheers v. Stein, 75 Wis. 44, 43 N. W. 728, 5 L. R. A. 781; Hoxsie v. Potter, 16 R. I. 374, 17 A. 129.

From note to Enders v. Enders [Pa.] 27 L. R. A. 56.

11. See 1 Curr. L. 27.

12. Notwithstanding the natural affection of those who had her in temporary custody. Miller v. Miller [Iowa] 98 N. W. 631.

13. Albring v. Ward [Mich.] 100 N. W. 609.

14. Adoption under an unconstitutional law, in the absence of any contract, will not make the person so adopted the heir of the adopting parent. Albring v. Ward [Mich.] 100 N. W. 609. Adopted children are by statute entitled to inherit from their adoptive parents in Georgia. Jossey v. Brown, 119 Ga. 758, 47 S. E. 350.

15. Under Comp. Laws 1897, § 8780, subsec. 5, providing that an adopted child shall become the heir at law of the person adopting it, an adopted child could not inherit from the brother of her deceased mother. Van Derlyn v. Mack [Mich.] 100 N. W. 278.

16. Under Mass. Pub. St. 1882, c. 148, § 7, providing that an adopted child "shall stand in regard to the legal descendants" of the adopting "parent in the same position as if so born to him," an adopted child can inherit from her brother. Stearns v. Allen, 183 Mass. 404, 67 N. E. 349.

17. Life insurance for benefit of widow, if any, otherwise for benefit of surviving children, belongs to an adoptive child, where there was no widow or other children, and though the child was adopted after the in-

The right to inherit may be defeated by a testamentary provision, unless there was an agreement to the contrary,[18] and the right of inheritance will be recognized in other states than the one where the adoption took place.[19]

The creditors of a parent cannot reach the property of an adopted child on the ground that the child's maintenance has been provided for by the parents.[20]

ADULTERATION.

§ 1. Legislation and Regulation (47).
§ 2. The Offense (47).
§ 3. Enforcement and Prosecution (48).

§ 1. *Legislation and regulation.*[21]—Laws to prevent the manufacture or sale of adulterated food products, where there is no discrimination in favor of particular persons,[22] are constitutional,[23] though they provide for inspection fees,[24] or apply to imported articles,[25] or discriminate in favor of a certain article,[26] and present no question under the Federal constitution.[27] The scope of such laws cannot be enlarged under the guise of making regulations to enforce them.[28]

§ 2. *The offense.*[29]—Coloring lemon,[30] or vanilla extract,[31] or oleomargarine, by addition of any foreign ingredient,[32] to conceal damage, or to make the article

surance was taken out, and Me. Rev. St. 1871, c. 67, § 30 provided that an adopted child shall be the child of the adopters for all purposes except as to the right of inheritance. Virgin v. Marwick, 97 Me. 578, 55 A. 520.

18. Agreement to adopt, unless there was also an agreement to provide for child by will, confers no right in deceased's property, under Texas Rev. St. 1895, art. 2, conferring on adopted children the status of legal heirs. Clark v. West, 96 Tex. 437, 73 S. W. 797. Declarations of a deceased person bound by contract of adoption to leave all his property to adopted child, to the effect that he was only guardian of child, are inadmissible, as they were not against interest. Rulofson v. Billings, 140 Cal. 452, 74 P. 35.

19. The adoption of a child in one state in accordance with the laws thereof will entitle such child to inherit property in another state. McColpin v. McColpin's Estate [Tex. Civ. App.] 77 S. W. 238.

20. Under Ky. St. § 2072, placing the person, adopting a child "under the same responsibilities as if the person so adopted were his own child." Anderson v. Mundo, 25 Ky. L. R. 1644, 77 S. W. 926.

21. See 1 Curr. L. 27.

22. N. Y. Laws 1893, p. 667, c. 338, defining adulterated vinegar, but declaring that cider vinegar made by farmer in state should not be deemed adulterated, though not up to standard, is unconstitutional as an unlawful discrimination. People v. Windholz, 86 N. Y. S. 1015.

23. Law requiring linseed oil to meet a certain test held a valid exercise of the police power. State v. Williams [Minn.] 100 N. W. 641. See 1 Curr. L. 27, n. 16.

24. Ordinance prohibiting sale of impure milk is a proper exercise of state's police power, and requiring every one who brings milk to city, or sells, to have a license and pay fees which were to be used to pay salary and expenses of milk inspector, is valid. City of Norfolk v. Flynn, 101 Va. 473, 44 S. E. 717.

25. N. Y. Laws 1893, c. 661, § 41, prohibiting the sale of adulterated food products, does not violate the commerce clause of the U. S. Constitution, though applied to articles imported from abroad; nor is it rendered inoperative by Act Cong. Aug. 30, 1890, against importation of adulterated food. Crossman v. Lurman, 192 U. S. 189, 24 S. Ct. 234. See 1 Curr. L. 28, n. 19.

26. Mich. Pub. Acts 1895, No. 193, as amended by Pub. Acts 1897, No. 118, prohibiting adulteration of foods, is constitutional, though there is a proviso allowing the coloring of pure butter. People v. Hinshaw [Mich.] 97 N. W. 758.

27. A suit to enjoin a state officer from charging that coffee coated with sugar and egg comes within prohibition of Ohio pure food law (2 Bates' Stat. 1897, p. 2229), against coating an article, does not present a case under Federal constitution. Arbuckle v. Blackburn, 191 U. S. 406, 24 S. Ct. 148.

28. A regulation, under Act Cong. May 9, 1902, relating to the inspection and marking of renovated butter at the place of manufacture, which prohibits a dealer from obliterating the marks, finde no warrant in the statute. U. S. v. Bohl, 125 F. 625.

29. See 1 Curr. L. 28.

30. Where pure food law contains no formula for lemon extract, it is proper to resort to the U. S. Pharmacopoeia formule. People v. Jennings [Mich.] 94 N. W. 216.

31. Though coal-tar dye is harmless and merely makes vanilla extract appear stronger, it is a violation of pure food law (Mich. Pub. Acts 1895, No. 193; Pub. Acts 1897, No. 118), prohibiting adulteration of food by coloring in order to make it appear better. People v. Hinshaw [Mich.] 97 N. W. 758.

32. Mich. Pub. Acts 1901, p. 37, No. 22, § 1, prohibiting the manufacturing of any product in imitation of yellow butter, but allowing the manufacture of oleomargarine free from coloration or ingredient that causes it to look like butter, does not prevent the manufacture of an article where the ingredients themselves naturally produce the yellow color. Bennett v. Carr [Mich.] 96 N. W. 26. See 1 Curr. L. 28, n. 24.

appear of greater value, is an adulteration,[33] and in the case of spirits, an offense against the Federal revenue laws.[34] Milk is adulterated by the addition of water,[35] but vinegar is not, as it is not rendered deleterious thereby.[36] A statute providing a penalty for the sale of linseed oil which would not sustain a certain test applies to boiled as well as raw oil.[37] A regulation against holding, keeping or offering for sale does not forbid the mere possession of adulterated commodities.[38] The laws as to adulteration are not designed to prevent improvements in manufacture,[39] nor do they require the use of prejudicial words on labels, so long as the ingredients are truthfully described.[40]

§ 3. *Enforcement and prosecution.*[41]—The complaint is sufficient if it uses terms which have been defined by statute,[42] and will be held to charge a first offense, unless otherwise indicated.[43] The sale of a number of packages may be charged as one offense.[44]

ADULTERY.

§ 1. The Offense (48).
§ 2. The Indictment (49).
§ 3. Evidence (49).
§ 4. Practice and Trial (51).

Only the criminal offense is included.[45]

§ 1. *The offense.*[46]—Adultery was not a crime at common law.[47] The statutory offense is regarded as primarily against the family, and is generally regarded as the sexual violation of the marriage relation, regardless of the sex of the offender.[48] Cohabitation or habitual intercourse is required in most states.[49] Adul-

33. Mich. Comp. Laws, § 6012 does not preclude use of harmless coloring matter. People v. Jennings [Mich.] 94 N. W. 216.

34. The addition of coloring matter, such as caramel, to spirits after barrels have been stamped, is a violation of U. S. Rev. St. § 3465, which subjects to forfeiture every barrel that contains "anything else" than the contents which were therein when it was stamped. U. S. v. Three Packages of Distilled Spirits, 126 F. 52.

35. Sale of milk containing no more than 10.61 per cent of solids is an offense under 86 Ohio Laws, p. 229, which provides that milk containing less than 12 per cent of solids shall be deemed to be adulterated. State v. Smith [Ohio] 68 N. E. 1044. See 1 Curr. L. 28, n. 20, 33.

36. The addition of water to vinegar is not in violation of N. Y. Laws 1893, p. 667 (§§ 50-52), penalizing the manufacture of vinegar not made from pure apple juice. People v. Heinz, 90 App. Div. 408, 86 N. Y. S. 141.

37. Both terms were used in the original act, but "boiled" was omitted in an amendment. State v. Williams [Minn.] 100 N. W. 641.

38. People v. Timmerman, 79 App. Div. 565, 80 N. Y. S. 285. N. Y. City Sanitary Code, § 63.

39. Mich. Comp. Laws, § 6012, providing an article should be deemed adulterated "if any valuable or necessary ingredient has been wholly or in part abstracted from it," is not meant to prevent improvement in manufacture, nor does it apply to an ingredient which may be dispensed with, without injury to the food. People v. Jennings [Mich.] 94 N. W. 216.

40. Mich. Pub. Acts 1903, No. 123 forbids sale of syrup mixed with glucose unless package is branded "Glucose Mixture" or "Corn Syrup," with the name and amount of each ingredient therein, and is complied with where one of the ingredients is truthfully described as "pure corn syrup," which is synonymous with glucose. People v. Harris [Mich.] 97 N. W. 402.

41. See 1 Curr. L. 28.

42. An affidavit which charges a person with selling and delivering "oleomargarine, a substance not pure butter," which was colored, sufficiently charges a violation of Bates' Ohio Ann. St. 4200-16, 19, 20, as the statute defines the meaning of oleomargarine. State v. Arata [Ohio] 68 N. E. 1046.

43. Unless affidavit charges the sale to be a second or subsequent offense, imprisonment cannot be imposed, and a justice of peace may, and by mandamus will, be compelled to try the accused without the intervention of a jury. State v. Smith [Ohio] 68 N. E. 1044.

44. Complaint that defendant sold to one person at same time and place adulterated milk, to wit, five cans of milk, alleges but one sale, though N. Y. Laws 1893, p. 666 declares the sale of each one of several packages to constitute a separate offense. People v. Buell, 85 App. Div. 141, 83 N. Y. S. 143.

45. As ground for divorce, see Divorce, 1 Curr. L. 945.

46. See 1 Curr. L. 29.

47. State v. Hasty, 121 Iowa, 507, 96 N. W. 1116; Ex parte Richards, 63 W. Va. 656, 46 S. E. 341.

48. State v. Hasty, 121 Iowa, 607, 96 N. W. 1115. To be guilty of the crime of adultery under the laws of Vermont (V. S. 5056, 5057), a man must have sexual connection with a married woman other than his wife, or a married man must have such connection with an unmarried woman. State v. Bisbee, 75 Vt. 293, 54 A. 1081. A married man hav-

tery is a felony, and an offense against the state as well as against the innocent spouse, notwithstanding the statutory requirement that the prosecution therefor can only be commenced on the complaint of the innocent spouse.[50] The acquittal of one of two defendants, charged with having committed adultery together, does not preclude the conviction of the other.[51] The consent of the female is not necessary to constitute the crime.[52] One may aid and abet in adultery without participating in the act,[53] and there is such a crime as conspiracy to commit adultery.[54] Illicit cohabitation is a crime at common law, and is generally made so by statute.[55]

§ 2. *The indictment.*[56]—An indictment for adultery which fails to state that the particeps criminis was a married woman,[57] or that does not state that she was an unmarried woman, is insufficient.[58] Such defect is not cured by the verdict, and is available on motion in arrest of judgment, it not being implied or inferable from the finding of facts whether she was married or unmarried.[59] It is sufficient if the indictment charges defendant with having unlawfully committed the crime by having unlawful intercourse.[60] An indictment for conspiracy to commit adultery need not allege that defendant knew that the female in the case was a married woman.[61]

§ 3. *Evidence.*[62]—The fact of illicit intercourse need not be established by direct proof, but may become a legitimate inference or conclusion to be drawn

ing sexual intercourse with an unmarried woman is guilty of adultery under the Laws of Iowa (Code 1897, § 4932). State v. Hasty, 121 Iowa, 507, 96 N. W. 1115.

Note: In general, it is sufficient if either party is married; and the crime of the married party will be adultery, while that of the unmarried party will be fornication. Republica v. Roberts, 1 Yeates [Pa.] 6; Id., 2 Dall. [Pa.] 124; State v. Parham, 50 N. C. (5 Jones, Law) 416; Smitherman v. State, 27 Ala. 23; State v. Thurstin, 35 Me. 205; Com. v. Cregor, 7 Grat. [Va.] 591; Morrissett v. Com., 6 Grat. [Va.] 673; Hunter v. U. S., 1 Pin. [Wis.] 91. In some of the states, if the woman be married, though the man be unmarried, he is guilty of adultery. Com. v. Call, 21 Pick. [Mass.] 509; State v. Pearce, 2 Blackf. [Ind.] 318; Wasden v. State, 18 Ga. 264; State v. Wallace, 9 N. H. 515. And see State v. Lash, 16 N. J. Law, 380; Mosser v. Mosser, 29 Ala. 313. In other states, it seems that to constitute the offense of adultery it is necessary that the woman should be married; that if the man only is married, it is not the crime of adultery at common law or under the statute, so that an indictment for adultery could be sustained against either party; though, within the meaning of the law respecting divorces, it is adultery in the man. Hood v. State, 56 Ind. 263; Woods v. Dennett, 9 N. H. 55; State v. Armstrong, 4 Minn. 335; Ohio v. Connoway, Tappan [Ohio] 90.

49. Five acts of intercourse in a month by persons not living together does not constitute "habitual carnal intercourse." Collins v. State [Tex. Cr. App.] 80 S. W. 372.

50. Such provision pertains to the procedure only, and is not an element of the offense. State v. Clemenson [Iowa] 99 N. W. 139. Under the Code of West Virginia (Code 1899, c. 149, § 6), adultery is punishable only by fine, and no imprisonment can be imposed. Ex parte Richards, 53 W. Va. 555, 45 S. E. 341.

51. Under Code North Carolina § 1041, providing that the testimony of one shall not be competent against the other. State v. Simpson, 133 N. C. 676, 45 S. E. 567.

52, 53. State v. Clemenson [Iowa] 99 N. W. 139.

54. Under the laws of Iowa, providing that if two or more persons conspire to commit a felony they shall be guilty of a conspiracy (Iowa Code, § 5059), and making adultery a felony (section 5093). State v. Clemenson [Iowa] 99 N. W. 139.

55. Defined by the statutes of Kansas (Gen. St. 1901, § 2221) as follows: "Every man and woman (one or both of whom are married, and not to each other) who shall lewdly and lasciviously abide and cohabit with each other," etc. State v. Cassida, 67 Kan. 171, 72 P. 522.

56. See 1 Curr. L. 29.

57. Under Vermont Statutes (section 5057), providing that to constitute the crime a man must have sexual intercourse with a married woman other than his wife. State v. Bisbee, 75 Vt. 293, 54 A. 1081.

58. Under Vermont Statutes (section 5056), making it adultery for a married man to have sexual connection with an unmarried woman. State v. Bisbee, 75 Vt. 293, 54 A. 1081.

59. State v. Bisbee, 75 Vt. 293, 54 A. 1081.

60. An indictment for adultery under the laws of the United States (U. S. Comp. St. 1901, p. 3636), charging that the defendant "did unlawfully commit the crime of adultery by then and there having unlawful intercourse," and further charging that defendant was a married man, is sufficient, notwithstanding the omission of the words "sexual" or "carnal." United States v. Griego [N. M.] 72 P. 20.

61. Such knowledge is necessarily included in the allegation of a conspiracy to commit that particular crime. State v. Clemenson [Iowa] 99 N. W. 139.

62. See 1 Curr. L. 29.

from circumstantial evidence.[63] Whenever an act of illicit intercourse is shown by the evidence within the period of time covered by the indictment, evidence of facts or circumstances which tend to show cohabitation between the parties anterior or subsequent to such period of time is relevant and admissible.[64] Sufficiency of the evidence to sustain a conviction.[65] Defendant may show his purpose in taking the woman to the place where the crime is alleged to have been committed.[66] In a criminal prosecution of another for adultery with his wife, the husband may testify as to the fact of their marriage and as to incriminating circumstances,[67] and the fact of marriage may be proved by general reputation and the declarations of the parties.[68] Defendant cannot be convicted of a conspiracy to commit adultery unless it appears that his co-conspirators knew that the woman in question was married.[69] It is not sufficient to show a single, or even occasional acts of sexual intercourse, in order to sustain a conviction for lewd or lascivious cohabitation, but the commission of such act or acts must be shown under such circumstances as to indicate an abiding or cohabiting together in a relationship like that of husband and wife.[70] The relationship of mistress and hired

63. Hill v. State, 137 Ala. 66, 34 So. 406. Direct proof of sexual intercourse is not necessary to justify a conviction for adultery, but it is sufficient to show circumstances from which the guilt of the parties may be inferred, such as sleeping in the same room, acting apparently as if they were husband and wife, being frequently in each other's company, and such circumstances as would show opportunities for an adulterous relation to exist, etc. United States v. Griego [N. M.] 72 P. 20.

64. In a prosecution for living in a state of adultery or fornication it was proper to show that defendant's paramour was still living in the place where the offense was alleged to have been committed, and that defendant had furnished her with groceries and provisions. Hill v. State, 137 Ala. 66, 34 So. 406. Evidence of acts tending to show adulterous connection, and anterior to the statute of limitations, is admissible in support of evidence of the commission of the act charged. Nearness of time is a circumstance affecting the effect of the evidence and not its competency. United States v. Griego [N. M.] 72 P. 20. On prosecution for adultery, a photograph of defendant's paramour was admissible to identify her as the woman with whom defendant lived in another state, although it was taken several years before the trial. State v. Hasty, 121 Iowa, 507, 96 N. W. 1115. Letters written to the father of the woman by persons residing in the locality where defendant is alleged to have lived with her, which state that they lived together as man and wife, and had had a child born to them, are admissible in connection with the father's testimony that he had read them to defendant, who admitted certain of the statements therein. Id. Evidence that defendant attended the burial of the woman with whom it was alleged he had been living in adultery, and that he caused a tombstone to be erected over her grave with a description thereon in which she was described as his wife, is admissible. Id. That defendant's alleged paramour gave birth to a child outside of the county where he was prosecuted for adultery might be considered by the jury in determining whether the crime was committed in the county, in view of the testimony of one witness that she had detected them in the act in said county about nine months before such child was born, and evidence tending to show that defendant had recognized such child as his own. Id.

65. There being a substantial conflict in the evidence, which was competent and tended to sustain the charge, it was not error for the court to refuse to instruct the jury to find for defendant. United States v. Griego [N. M.] 72 P. 20. Testimony of the husband of the woman that he had seen her and defendant and defendant's sister lying on the same bed in a half-dressed condition, and of another witness that he had seen defendant, in a room a few feet distant from quite a crowd of people on the gallery, stoop over her as if in the act of kissing her, is not sufficient to sustain a conviction of adultery. Manuel v. State [Tex. Cr. App.] 74 S. W. 30.

66. It was error to refuse to allow defendant to show that his alleged paramour was staying at the place where the offense was alleged to have been committed under a contract to work for his father, the evidence for the state tending to show that he had taken her there for illicit intercourse. Hill v. State, 137 Ala. 66, 34 So. 406.

67. The rule that neither husband nor wife can testify for or against the other is confined to cases where the testimony would be by one directly for or against the other in a suit to which such other is a party. State v. West, 118 Wis. 469, 95 N. W. 521.

68. State v. Still [S. C.] 46 S. E. 524.

69. State v. Clemenson [Iowa] 99 N. W. 139. Evidence in a prosecution for conspiracy to commit adultery held sufficient to support a finding that the female in question was married. Id.

70. Evidence held sufficient to sustain a conviction. State v. Cassida, 67 Kan. 171, 72 P. 522. The testimony of defendant given in his own behalf, on an examination before a justice of the peace on a charge of burglary, and reduced to writing and signed by him, was admissible against him on a subsequent prosecution for adultery, which crime it tended to prove, and he having been

man between the parties does not necessarily exclude the relationship of lewd and lascivious cohabitation, but both may exist at the same time.[71]

§ 4. *Practice and trial.*[72] *Instructions.*[73]—In a prosecution for adultery, it was not error to refuse to require the state to elect the transaction it would rely on, where the only direct evidence of the crime was the testimony of one witness that she had once detected defendant in the act, at a time within the statute of limitations.[74] Counsel should not be permitted to refer to defendant in his argument in a manner calculated to prejudice the jury against him.[75]

ADVERSE POSSESSION.

§ 1. Estates and Property Subject to Adverse Possession (51).
§ 2. Against Whom Available (52).
§ 3. To Whom Available (53).
§ 4. Definition and Essential Elements (54).
§ 5. Hostility (55).
§ 6. Continuity (56).
§ 7. Duration (57).
§ 8. Color of Title (58).
§ 9. Payment of Taxes (60).
§ 10. Area of Possession (60).
§ 11. Sufficiency of Possession (61).
§ 12. Pleading, Evidence and Instructions (63).
§ 13. Nature of Title Acquired (64).

§ 1. *Estates and property subject to adverse possession.*[76]—As a general rule, all private estates in land are subject to adverse possession; thus a dower right[77] or an easement may be lost[78] or acquired,[79] and one may hold adversely to the surface and not as to underlying minerals;[80] but adverse possession does not operate against public property, federal[81] or state,[82] nor property held for public use.[83] Thus title cannot be acquired to a street[84] or highway,[85] nor of a railroad right of way,[86] nor lands reserved for depot grounds;[87] but it has been held that an

warned on the examination that he need not criminate himself. State v. Simpson, 133 N. C. 676, 45 S. E. 567. Testimony given by defendant in a prosecution for assault instituted by him against the husband of his co-defendant, in which he admitted acts of illicit intercourse with such co-defendant, is admissible against him in a subsequent prosecution for adultery, it appearing that he was warned at the time that he need not criminate himself. Id.

71. State v. Cassida, 67 Kan. 171, 72 P. 522.

72. See 1 Curr. L. 30.

73. An instruction to the effect that if the jury found that defendants occupied a sleeping apartment alone, as a sleeping room, "that circumstance alone raises a presumption of guilt," is error, as tending to take from defendant the presumption of innocence. United States v. Griego [N. M.] 75 P. 30. See 1 Curr. L. 30, n. 62-64.

74. State v. Hasty, 121 Iowa, 507, 96 N. W. 1115.

75. Argument of counsel in a prosecution for adultery, in which he condemned the defendant for having seduced the woman with whom the crime was committed, and stated that her father would be justified in shooting him, held not prejudicial. State v. Hasty, 121 Iowa, 507, 96 N. W. 1115.

76. See 1 Curr. L. 30.

77. Butcher v. Butcher [Mich.] 100 N. W. 604.

78. One who had right of free passage over a toll bridge had notice that no such right would be recognized and she was required to pay toll for the statutory period. Dupont v. Charleston Bridge Co., 65 S. C. 524, 44 S. E. 86. Possession of alley under void deed barred easement of abutting owner. Peden v. Crenshaw [Tex. Civ. App.] 81 S. W. 369.

79. Cavanaugh v. Wholey [Cal.] 76 P. 979. One in adverse possession of land may acquire an easement over the same by prescription. Id.

80. Where minerals in land are reserved by a grantee. Manning v. Kansas & T. Coal Co. [Mo.] 81 S. W. 140.

81. Galloway v. Doe, 136 Ala. 315, 34 So. 957. Occupation while government owned cannot be tacked. Topping v. Cohn [Neb.] 99 N. W. 372. Reinvested title to unearned railroad lands. Doe v. Pugh [Ala.] 34 So. 377.

82. Possession while title was in state cannot be tacked. Topping v. Cohn [Neb.] 99 N. W. 372. Land bid in by the state at tax sale. Slattery v. Heilperin & Leonard, 110 La. 86, 34 So. 139.

83. Owen v. Village of Brookport, 208 Ill. 35. 69 N. E. 952; City of Port Townsend v. Lewis [Wash.] 75 P. 982. Land owned by a county and used for the site of public buildings. Foley v. Doddridge County Court [W. Va.] 46 S. E. 246.

84. Village of Lee v. Harris, 206 Ill. 428. 69 N. E. 230; Hall v. Breyfogle [Ind.] 70 N. E. 883; City of Columbia v. Bright [Mo.] 79 S. W. 151.

85. Board of Control of New Basin Canal & Shell Road v. H. Weston Lumber Co., 109 La. 925, 33 So. 923.

86. Land granted by Act of Congress to Northern Pacific Railroad Company. Northern Pac. R. Co. v. Townsend, 190 U. S. 267, 23 S. Ct. 671, 47 Law. Ed. 1044. North Carolina code provides that no railroad company shall be barred by limitation of its title or right in any right of way by reason of its occupation by another. Possession

estoppel may arise,[88] but not by a mere failure to assert a right.[89] Though the statute applies only to suits, and the issuance of a tax deed is not a suit, yet the tax certificate will be void where a deed would fail because of lapse of time.[90]

§ 2. *Against whom available.*[91]—Adverse possession may give good title against a city,[92] or against an entryman[93] or one holding under the Federal government by grant before patent has issued;[94] especially if a confirmatory grant relates the patent back.[95] Adverse possession runs against a grantee of the Federal government from the date of the grant,[96] and is not interrupted by a controversy before the Department of the Interior which it had no jurisdiction to entertain.[97] While a dower right may be barred,[98] adverse possession of land as against a husband does not operate to extinguish it.[99] Adverse possession runs against a cotenant who has been ousted,[1] if there has been an assertion of ownership[2] of such a nature as to impart notice that disseizin is intended.[3] Occupancy of the premises, appropriation of the rents and profits and payment of taxes is not sufficient.[4] Occupation by one claiming whole under husband, held adverse to wife who had been awarded part as alimony.[5] Possession by a purchaser, under an executory contract of sale, made by the husband alone of land owned in joint tenancy by husband and wife is not adverse to the wife,[6] nor as against her children until the husband's death.[7] The statute of limitations does not begin to run against a cestui que trust in favor of a trustee in possession until the cestui que trust has learned or from the circumstances should have learned that the trustee asserted a claim adverse to his.[8] Adverse possession against a trustee[9] may bar the cestui que trustents.[10] It is not available against a remainderman during the life of the life

by a city of right of way under a dedication made by the lessee of the road. City of Durham v. Southern R. Co., 121 F. 894.

87. Kansas City & N. Connecting R. Co. v. Baker [Mo.] 82 S. W. 85.

88. By reason of improvements extending into the street. Markham v. City of Anamosa [Iowa] 98 N. W. 493; Crigler v. City of Mexico, 101 Mo. App. 624, 74 S. W. 384. See, also, Estoppel, 1 Curr. L. 1130.

89. City of Columbia v. Bright [Mo.] 79 S. W. 151.

90. Crocker v. Dougherty, 139 Cal. 521, 73 P. 429.

91. See 1 Curr. L. 31.

92. Schneider v. City of Detroit [Mich.] 98 N. W 258. In **Kentucky**, limitations run against the right of a city to recover streets in possession of another after notice to the council that the possession is adverse. Davis v. City of Clinton, 25 Ky. L. R. 2021, 79 S. W. 259.

93. Burton's Heirs v. Carroll, 96 Tex. 320, 72 S. W. 581.

94. Toltec Ranch Co. v. Cook, 191 U. S. 532, 24 S. Ct. 166. Claim based on occupancy and settlement confirmed by act of Congress. Joplin v. Chachere, 192 U. S. 94, 24 S. Ct. 214.

95. Cockran Oil & Development Co. v. Arnaudet, 111 La. 663, 35 So. 747.

96, 97. Sage v. Rudnick [Minn.] 100 N. W. 106.

98. Butcher v. Butcher [Mich.] 100 N. W. 604.

99. Lucas v. Whitacre, 121 Iowa, 251, 96 N. W. 776.

1. Entering under a bond for a deed to all the land from one co-tenant is an ouster. Rose v. Ware, 24 Ky. L. R. 2321, 74 S. W. 188. Occupation under deed from another. Blankenhorn v. Lenox [Iowa] 98 N. W. 656.

2. Conflicting evidence as to possession, payment of taxes, mortgaging the premises, held insufficient to show an ouster. Golden v. Tyer [Mo.] 79 S. W. 143.

3. Brumback v. Brumback, 198 Ill. 66, 64 N. E. 741; Ashford v. Ashford, 136 Ala. 631, 34 So. 10.

4. Brumback v. Brumback, 198 Ill. 66, 64 N. E. 741. Notorious exclusive occupation. Cochran v. Cochran [W. Va.] 46 S. E. 924.

5. Butcher v. Butcher [Mich.] 100 N. W. 604. Where one holding land in trust for herself and children gave a mortgage which was foreclosed, the purchaser at the sale became a tenant in common of an equitable estate on the death of the mortgagor, and limitations did not then commence to run against the children. Deans v. Gay, 132 N. C. 227, 43 S. E. 643. Where one co-tenant conveyed all the land embraced within the boundaries, but intended to convey only his share which was all his grantee expected to acquire, there was not an ouster. Catron v. Laughlin [N. M.] 72 P. 26.

6, 7. McNeeley v. South Penn Oil Co., 52 W. Va. 616, 44 S. E. 508.

8. Crowley v. Crowley [N. H.] 56 A. 190. A tenant by the curtesy, who in his wife's lifetime occupied as her trustee, is presumed to hold in the same capacity after her death and not adversely to her heir. Williams v. Williams' Ex'r, 25 Ky. L. R. 836, 76 S. W. 413.

9. Wiess v. Goodhue [Tex. Civ. App.] 79 S. W. 873.

10. Where a will of the testatrix constituted her husband trustee of property for the benefit of her children, but he was vested with the legal estate and had power to alienate, held, that title was acquired against the cestui que trust by adverse possession.

tenant,[11] but this rule supposes an uninterrupted continuation of the relation of life tenant and remainderman, and under statutes giving to a remainderman, who knows that his rights are disputed, a right of action, the bar of the statute may be invoked.[12] It is available against one having a tax certificate and entitled to a deed thereon[13] or the issue of a tenant in tail.[14]

Title by adverse possession cannot be acquired against a minor,[15] but he must assert his right within the period allowed, after the disability is removed,[16] and a minor heir is barred by limitations by failure of his guardian to sue within the period.[17] In Kentucky, adverse possession commences to run against a wife from the date of her husband's deed.[18] The statute begins to run against heirs at law at the death of the ancestor where there is no intervening life estate.[19] The death of one holding the legal title to property, but out of possession, does not stop the running of limitations as against his interest.[20]

§ 3. *To whom available.*[21]—The public[22] or a municipality[23] or the Federal government may acquire title by adverse possession.[24] Title divested by judgment may be acquired by the judgment debtor who remains in possession.[25] Adverse possession is not available to a lessee[26] or a sublessee[27] during the continuation of the lease, and to be available thereafter, there must have been a disclaimer of the paper title.[28] An agent cannot acquire title as against his principal,[29] nor a life tenant as against the reversioner.[30] A widow may hold adversely against the heirs of her husband,[31] even though she be executrix of his estate;[32] but possession

Wiess v. Goodhue [Tex. Civ. App.] 79 S. W. 873.

11. Porter v. Osmun [Mich.] 97 N. W. 756; Beaty v. Clymer [Tex. Civ. App.] 75 S. W. 540. The life tenant conveyed to one who had put up valuable improvements. Hauser v. Craft, 134 N. C. 319, 46 S. E. 756. A widow cannot enlarge her estate in the homestead by adverse possession as to heirs or purchasers at administration sale. Meddis v. Kenney, 176 Mo. 200, 75 S. W. 633. Where the widow remarried and the husband lived on the premises, and after her death conveyed them. Dewitt v. Shea, 203 Ill. 393, 67 N. E. 761.

12. Crawford v. Meis [Iowa] 99 N. W. 186.

13. Where the one under whom the land was sold gave a deed thereto and his grantee entered and had possession for 14 years. Crocker v. Dougherty, 139 Cal. 521, 73 P. 429.

14. Wickes v. Wickes [Md.] 56 A. 1017. Where entailed property was sold in partition proceedings, possession of the same under the sale constitutes an ouster of the title of the tenant in tail. Id.

15. Albers v. Kozeluh [Neb.] 97 N. W. 646.

16. Mason v. Odum [Ill.] 71 N. E. 386.

17. Dignan v. Nelson, 26 Utah, 186, 72 P. 936.

18. Under the 30 year limitation. Rose v. Ware, 24 Ky. L. R. 2321, 74 S. W. 188.

19, 20. Baumeister v. Silver [Md.] 56 A. 825.

21. See 1 Curr. L. 31.

22. Easement for highway. Postal v. Martin [Neb.] 95 N. W. 8.

23. Evidence held to show that a city had acquired title to lands by use for a street. Sheridan v. Empire City [Or.] 77 P. 393.

24. Land used as cemetery for burial place of soldiers. City of El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 S. W. 21.

25. The judgment debtor remained in possession for more than the statutory period. Pendleton v. McMains [Tex. Civ. App.] 75 S. W. 349. One claiming under foreclosure where no writ of possession had been issued sued for the land within 15 years from order for deed. Held, that widow of mortgagor's heir who had remained in possession could not plead adverse possession, the heir having been a party to the foreclosure. Stovall v. Haynes, 25 Ky. L. R. 1789, 78 S. W. 895.

26. Possession under a tax or assessment lease. Miller v. Warren, 87 N. Y. S. 1011. Where a corporation owning a railroad bridge conveyed an approach to the bridge to a railroad company which was using the bridge by agreement. The conveyance was ultra vires. The railroad company was in effect a tenant and limitation was no defense to an action to recover the approach. Pittsburg, C. C. & St. L. R. Co. v. Dodd, 24 Ky. L. R. 2057, 72 S. W. 822. Lessee claimed that the lease was without consideration. Martin v. Martin [Iowa] 94 N. W. 493.

27. Johnson v. Sherman County Irrigation Water Power & Improvement Co. [Neb.] 98 N. W. 1096.

28. Miller v. Warren, 87 N. Y. S. 1011. A wife occupying land with her husband who was tenant of the owner cannot hold adversely without actual notice to the owner that her possession is in opposition to him and to her husband. Sizemore v. Trimble [Ky.] 80 S. W. 477.

29. Some evidence that he asserted a claim to the land, but none that he repudiated his agency or tenancy. Richardson v. Bruce [Tex. Civ. App.] 75 S. W. 835.

30. Buying up outstanding incumbrances. Downing v Hartshorn [Neb.] 95 N. W. 801.

31. Where a widow occupied land of her husband under a destroyed will which could not be established and held adversely, claim-

of an administrator is not adverse to the heirs,[33] and a repudiation, in order to give it an adverse character, must be brought to the knowledge of the heirs; mere notice is not sufficient;[34] but where an administratrix purchased land at her own sale, adverse possession by her for the statutory period was a bar to a bill for partition.[35] A dowress cannot hold adversely to the heirs of her deceased husband,[36] until she has divested herself of such right.[37] Where husband and wife are in possession, one cannot acquire title as against the other,[38] nor can a wife acquire title to the community property by adverse possession, though her husband has abandoned her without cause.[39] Limitations do not run in favor of one not in possession.[40] The possession by a railroad company of a right of way is not adverse to rights remaining in the owner of the fee.[41]

§ 4. *Definition and essential elements.*[42]—Possession to be adverse must be actual, continued, visible, notorious, distinct and hostile[43] for the statutory period.[44] Mere possession is not enough,[45] nor is mere claim of title,[46] nor continuous possession.[47] In Federal courts the possession must be continued and uninterrupted, open, notorious, actual, exclusive and adverse.[48] Whether one in adverse possession makes his claim in good faith or bad faith is immaterial,[49] as good faith is not an element,[50] though some courts hold that possession must be begun in good faith.[51] Good faith is always presumed in matters of prescription,[52]

ing the land in fee and not as homestead, she acquired title as against the heirs. Reno v. Blackburn, 24 Ky. L. R. 1976, 72 S. W. 775.

32. Where a testator made no disposition of after-acquired property, and his executrix sold such land under an order of the probate court to one who conveyed it to her individually and she held adverse possession thereof under such deed for the statutory period, she acquired title. Hysmith v. Patton [Ark.] 80 S. W. 151.

33. Ashford v. Ashford, 136 Ala. 631, 34 So. 10. Petition for an order to sell lands and orders and proceedings thereunder were admissible to show that one was an administrator. Id.

34. Ashford v. Ashford, 136 Ala. 631, 34 So. 10.

35. Mason v. Odum [Ill.] 71 N. E. 386.

36. Roberts v. Thomason, 174 Mo. 378, 74 S. W. 624. Where a husband during his life conveyed land by deed in which his wife did not join, and she, after his death, married the grantee and they lived on this land the possession of the grantee could not draw to it the possession of an adjoining strip, left in possession of the widow so as to acquire title by adverse possession. Reed v. Hackney, 69 N. J. Law, 27, 54 A. 229. Where one marries a widow entitled to dower in land, and lives on such land with her, his possession is not adverse to the heirs of the husband until dower is assigned. Id.

37. Allison v. Robinson, 136 Ala. 434, 34 So. 966.

38. The legal title was in the wife. The title was awarded to the husband in a suit to which she was not a party. Hays v. Marsh [Iowa] 98 N. W. 604.

39. Cervantes v. Cervantes [Tex. Civ. App.] 76 S. W. 790.

40. Row v. Johnston, 25 Ky. L. R. 1799, 78 S. W. 906. One in possession for 10 years under just title is not barred from invoking limitations by the fact that at the date of his purchase there stood registered on the books of the parish a prior sale of the same property to another. Wells v. Goss, 110 La. 347, 34 So. 470.

41. Right to a crossing. Cincinnati, H. & D. R. Co. v. Wachter [Ohio] 70 N. E. 974.

42. See 1 Curr. L. 31.

43. One who secretly enters on coal land through an opening on other land cannot acquire title even by continuous possession. Pierce v. Barney [Pa.] 58 A. 152. Evidence by one claiming title by adverse possession must show the possession to have been hostile, actual, visible, notorious and exclusive, continuous and under a claim of ownership. Illinois Cent. R. Co. v. Hatter, 207 Ill. 88, 69 N. E. 751; Johnston v. Albuquerque [N. M.] 72 P. 9; Hindley v. Metropolitan El. R. Co., 42 Misc. 56, 85 N. Y. S. 561.

44. In Pennsylvania, twenty-one years. Snowdon v. Loree, 122 F. 494.

45. Illinois Cent. R. Co. v. Hatter, 207 Ill. 88, 69 N. E. 751.

46. To vacant land by adjoining owner. Snowdon v. Loree, 122 F. 493.

47. Where one secretly entered a coal mine through a shaft which opened on other land. Pierce v. Barney [Pa.] 58 A. 152.

48. Tyee Consol. Min. Co. v. Langstedt [C. C. A.] 121 F. 709. Under Code Civ. Proc. § 48 defining adverse possession, consisting among other things, in use of property for supply of fuel and fencing timber, the cutting of fire wood for use of his family by an agent having care of the property is an act of possession under the statute. Murphy v. Dafoe [S. D.] 99 N. W. 86.

49. One who took an assignment of a certificate of entry as security, and entered thereunder. Pitman v. Hill, 117 Wis. 318, 94 N. W. 40.

50. It was error to charge that one claiming title must have been in possession in good faith. Dawson v. Falls City Boat Club [Mich.] 99 N. W. 17. Code, § 155, providing that a cause of action on ground of fraud shall not be deemed to have accrued until the discovery of the fraud, does not apply

and whether a purchase was bona fide is a question for the jury.[53] Mere lapse of time unaccompanied by adverse possession will not bar a right to recover.[54]

§ 5. *Hostility.*[55]—Possession must be hostile[56] and exclusive,[57] and inconsistent with the right of the holder of the paper title,[58] and there must be an intention to hold in hostility to the true owner.[59] Naked possession must be adverse as to the whole world, including the supposed owner.[60] A son who resides with his mother on land in which she has a dower right, under an agreement that she is to make her home with him, is not in possession adverse to her rights.[61] Where a party claims to own and hold possession up to a certain line, his possession is adverse;[62] but if he disclaims ownership except to the true line, wherever that may be, it is not.[63] Holding under a mistake as to the true boundary may be adverse.[64] It is not necessary for one in possession claiming adversely to know in whom the true title is,[65] and the fact that an owner does not know that another is in adverse possession is immaterial.[66] One claiming title by adverse possession may purchase a tax deed to the premises before the statute has run without ac-

to a case of adverse possession. Pittman v. Weeks, 132 N. C. 81, 43 S. E. 582.

51. Brewster v. Hewes [La.] 36 So. 883.

52. He who alleges bad faith must prove it. Brewster v. Hewes [La.] 36 So. 883. Exclusion of warranty is not fact affecting good faith. Id.

53. Sledge v. Singley [Ala.] 37 So. 98. Code 1896, § 1797, providing that one who, without color of title or bona fide claim, enters and asserts adverse possession, must file written notice in probate court, has no application where entry is under bona fide claim of purchase. Id.

54. One claiming under a purchase of a land certificate from the original grantee against the heirs of the grantor. Lochridge v. Corbett, 31 Tex. Civ. App. 676, 73 S. W. 96.

55. See 1 Curr. L. 32.

56. Where a city erected a fire engine house on its own lot and on a small fraction of an adjoining lot, and maintained it there for 20 years, but in the meantime assessed said fractional part of the adjoining lot to the owner thereof, is estopped from asserting title by adverse possession. Hesse v. Strode [Idaho] 77 P. 634. Where a father furnished money to his son to purchase realty under an agreement that the title should be taken in the son's name and that it should be understood that the land belonged to the son, occupancy by the father was not adverse to the son. Field's Heirs v. Napier [Ky.] 80 S. W. 1110.

57. A finding in an action of ejectment to recover a portion of a mining claim that one had been in actual, open, continuous and notorious possession, is insufficient to sustain. Tyee Consol. Min. Co. v. Langstedt [C. C. A.] 121 F. 709.

58. Continuing to hold after a tax lease expired is not. Miller v. Warren, 87 N. Y. S. 1011. The fact that one party placed his boat on land claimed adversely by another was not inconsistent with the claim of adverse possession. Layton v. Bailey [Conn.] 58 A. 355. The fact that one occupying a disputed tract piled lumber thereon so as not to annoy one not in possession, but who claimed under a grant, was not inconsistent with adverse possession. Id. The making of improvements on adjoining land under a mistaken belief that he is making them on his own is not adverse possession. Brownlee v. Williams [Colo.] 77 P. 250. That one who has a bond for a deed makes improvements on the land is not notice to the owner that he is claiming adversely, he having a right to make them. Id. The fact that one on cross-examination answered that he had no intention of holding adversely so as to acquire title from one to whom it rightly belonged, but that he occupied, claiming his father's deed gave him title to the land, did not determine the question of adverse user and conclude him from setting up title by adverse possession. Layton v. Bailey [Conn.] 58 A. 355.

59. One in possession contesting a preference right to purchase the lands is not in adverse possession. City of Port Townsend v. Lewis [Wash.] 75 P. 982.

60. One claimed adversely to the state but not against one to whom the land had been patented. Flewellen v. Randall [Tex. Civ. App.] 74 S. W. 49.

61. Brumback v. Brumback, 198 Ill. 66, 64 N. E. 741.

62. Logsdon v. Dingg [Ind. App.] 69 N. E. 409. Where a party had had continuous and exclusive possession and had cultivated up to a certain fence for 40 years, evidence held to show adverse possession. Helton v. Fastnow [Ind. App.] 71 N. E. 230. Where adjoining owners agreed to the construction of a line fence and occupied up to it for the statutory period, they acquired title by adverse possession to such land and to accretions during such period. English v. Craford [Iowa] 94 N. W. 276; Baty v. Elrod [Neb.] 97 N. W. 343. Where the adjoining owners agree on a line of trees as the boundary and for the statutory period live up to it. Handorf v. Hoes, 121 Iowa, 79, 95 N. W. 226, and citing other recent cases.

63. Logsdon v. Dingg [Ind. App.] 69 N. E. 409.

64. Location of the corner stones had been lost. Williams v. Shepherdson [Neb.] 95 N. W. 827.

65. Entry with intention of acquiring title by preemption. Price v. Eardley [Tex. Civ. App.] 77 S. W. 416.

66. Owner did not know where the boundary was. Pittman v. Weeks, 132 N. C. 81, 43 S. E. 582.

knowledging a superior title;[67] but if he accept payment of the same from the second owner, such act is a recognition of the superior title.[68] Adverse possession of the land of one is not adverse as to the land of another on the theory that possession of part is possession of all.[69] Where a grantor remains in possession,[70] especially where he reserves a license to cultivate the land,[71] or where a mortgagor holds after foreclosure,[72] it is presumed subservient to the rights of the purchaser, until knowledge of his intent to hold adversely is brought home to his grantee by some unequivocal act.[73] The possession by a party entering under a verbal contract to purchase is not adverse to his vendor.[74] A permissive entry cannot ripen into title.[75]

§ 6. *Continuity.*[76]—Possession must be continuous and uninterrupted[77] to toll the right of entry of the owner of the legal title,[78] and whether possession has been continuous, open and notorious for the statutory period is a question for the jury.[79]

Various circumstances have been held sufficient to break the continuity, thus, litigating the right to the title,[80] joining in a petition for vacation of a street,[81] acknowledging a superior title,[82] admission that it was liable in damages for maintaining its right of way;[83] but vacating for a short period will not destroy continuity,[84] nor will a temporary interruption of the use of an easement.[85]

67. Zweibel v. Meyers [Neb.] 95 N. W. 597.

68. One who had purchased a tax certificate when notified of the redemption therefrom took the money from the county treasurer and receipted in the redemption book, where the name of the owner claiming to redeem was before his eyes. Zweibel v. Meyers [Neb.] 95 N. W. 597.

69. Where an occupant's boundary covers adjoining lands of separate owners. McNeeley v. South Penn Oil Co., 52 W. Va. 616, 44 S. E. 508.

70. A railroad company did not disturb a dooryard over which their right of way passed. Chicago, M. & St. P. R. Co. v. Snyder, 120 Iowa, 632, 95 N. W. 183; Kelly v. Palmer [Minn.] 97 N. W. 578. Where a father conveyed to his son but remained in possession and improved the land, evidence held insufficient to show that he held adversely. Luckhart v. Luckhart, 120 Iowa, 248, 94 N. W. 461.

71. In a grant of a railroad right of way. Chicago & S. E. R. Co. v. Wood, 30 Ind. App. 650, 66 N. E. 923.

72. Under an alleged agreement that the foreclosure purchaser held title by their consent, subject to their right to a reconveyance when he was reimbursed. Martin v. Martin [Iowa] 94 N. W. 493.

73. If he asserts claim to title in himself and his claim is made known to his grantee. The assertion may be by acts. Kelly v. Palmer [Minn.] 97 N. W. 578. Nothing in the evidence showing such act. Pierce v. Barney [Pa.] 58 A. 152; Hindley v. Metropolitan El. R. Co., 42 Misc. 56, 85 N. Y. S. 561.

74. A deed was not to be executed until the purchase price was paid. Manning v. Kansas & T. Coal Co. [Mo.] 81 S. W. 140.

75. To hide the unsightly appearance of the side of a wall, adjoining owners mutually agreed that the owner of the wall should veneer it, which he did, covering four inches of the ground of his neighbor. The wall has stood for the statutory period. Subsequent grantees claim title to such strip by adverse possession. Held insufficient. Munger v. Curley [N. J. Eq.] 57 A. 306. One entering land under permission cannot afterwards claim that his occupancy is adverse. Oregon City v. Oregon & C. R. Co. [Or.] 74 P. 924.

76. See 1 Curr. L. 35.

77. One entered under a void tax deed and was in possession for two years, then the land was vacant for 12 years and they paid no taxes during this period; they got some wood from the land and tried but failed to rent it; subsequently they rented it for five years. Held to show sufficient possession. Brown v. Hartford, 173 Mo. 183, 73 S. W. 140. A widow conveyed the homestead, but the evidence showed that the purchaser resided on it only spasmodically, held that there had been no bona fide possession for the statutory period. Rowland v. Wadly, 71 Ark. 273, 72 S. W. 994.

78. Owsley v. Owsley, 25 Ky. L. R. 1186, 77 S. W. 397; Giddings v. Fischer [Tex.] 77 S. W. 209.

79. Johnson v. Brown, 33 Wash. 588, 74 P. 677.

80. Sage v. Rudnick [Minn.] 98 N. W. 89. An action which suspends the statute as to one tenant in common suspends it as to all. Locklear v. Bullard, 133 N. C. 260, 45 S. E. 580.

81. One was in possession of a street which had never been improved. City of Lake City v. Fulkerson, 122 Iowa, 569, 98 N. W. 376.

82. By one in possession under a deed running to another. Weisman v. Thompson [Tex. Civ. App.] 78 S. W. 728; Hindley v. Metropolitan El. R. Co., 42 Misc. 56, 85 N. Y. S. 561.

83. Engines filling air with smoke. Hindley v. Metropolitan El. R. Co., 42 Misc. 56, 85 N. Y. S. 561.

84. One held adverse possession of land which he had enclosed. A tenant in possession left before his lease expired and the premises were vacant for a short period. No one else entered during such period.

Continuous occupancy for the statutory period raises a presumption that its commencement was under a claim of right.[86] A purchaser of the interest of one who has not been in adverse possession for the statutory period does not acquire a title superior to the holder of the paper title.[87]

Tacking.[88]—A privity must be shown between adverse claimants before the possession of one can be tacked to that of the other,[89] but it is immaterial whether any valid titles were created by the transfers,[90] and this privity may exist by descent;[91] thus possession of the ancestor inures at his death to the benefit of his heirs at law,[92] and the possession of the widow can be tacked to that of the husband in order to complete title in the heirs;[93] but possession under a perfect title cannot be tacked to possession continuing after such title has been divested.[94]

§ 7. *Duration.*[95]—The possession must have been for the statutory period,[96] but it is not necessary that it be the one next before bringing the suit.[97] The period is fixed by statute in the several states.[98]

The period may be extended for those under disability,[99] or lessened if an entry is under color of title. In Washington it must be actual paper title.[1] That the *Texas* three or five-year statute may apply, there must be possession under color of title,[2] but any instrument in the form of a deed, not void on its face,

Richards v. Haskins [Neb.] 100 N. W. 151.

85. A third party placed obstructions in the road, there was no intention to abandon the way. Cavanaugh v. Wholey [Cal.] 76 P. 979.

86. Parties had been in possession for 20 years; they had no paper title. Illinois Steel Co. v. Jeka, 119 Wis. 122, 95 N. W. 97.

87. United New Jersey R. & Canal Co. v. Consolidated Fruit Jar Co. [N. J. Eq.] 65 A. 46.

88. See 1 Curr. L. 36, n. 74-81.

89. There is no privity between ancestor and heir where there is no contract, deed or devise. Zweibel v. Meyers [Neb.] 95 N. W. 597. The possession of several successors cannot be tacked together unless there have been conveyances by deed, or possession has been delivered by each grantor to his grantee. Illinois Cent. R. Co. v. Hatter, 207 Ill. 88, 69 N. E. 751.

90. Possession of vendee under executory contract of sale from one having color of title is taken as that of his vendor for purpose of tacking thereto the possession of persons subsequently taking possession under and claiming through such vendor. Oldig v. Fisk [Neb.] 95 N. W. 492. Evidence of various successive holdings held insufficient to show adverse possession. Maxwell v. Odell [Neb.] 95 N. W. 840.

91. Where widow and heirs of an intestate continued in possession. Montague v. Marunda [Neb.] 99 N. W. 663.

92. Wickes v. Wickes [Md.] 56 A. 1017. The possession of an heir may be tacked to that of his ancestor. Kilgore v. Kirkland [S. C.] 48 S. E. 44.

93. No dower having been assigned. Atwell v. Shook, 133 N. C. 387, 45 S. E. 777.

94. A judgment debtor remained in possession after sheriff's sale. Wilson v. Brown, 134 N. C. 400, 46 S. E. 762.

95. See 1 Curr. L. 35.

96. Hindley v. Metropolitan El. R. Co., 42 Misc. 56, 85 N. Y. S. 561.

97. Summerfield v. White [W. Va.] 46 S. E. 154.

98. In Kentucky 30 years from the time the right of action accrued regardless of disability of claimants. Rose v. Ware, 25 Ky. L. R. 947, 76 S. W. 505. In South Dakota, claim and color of title and payment of taxes for 10 years. Murphy v. Pierce [S. D.] 95 N. W. 926. Evidence held to show that accretions made to an island had not been acquired by adverse possession, but title was in the owner of the shore who claimed to the thread of the stream. McKee v. Grand Rapids [Mich.] 95 N. W. 85. Under Maryland statutes, giving parties under disability 10 years after the disability is removed in which to make entry, this 10 years runs concurrently with the regular statutory period of 20 years. Wickes v. Wickes [Md.] 56 A. 1017. Under Civ. Proc. Code, Alaska, which provides that no action for the recovery of real property shall be maintained unless the owner or his predecessor was seized or possessed of property within 10 years, the legal title is sufficient to establish seizin unless an ouster by actual adverse possession be shown. Tyee Consol. Min. Co. v. Langstedt [C. C. A.] 121 F. 709.

99. Adverse possession of a married woman's land, not her separate estate, beginning during coverture and continuing for the statutory term, will bar the husband's and wife's rights during coverture; but though the wife's rights during coverture are barred, she or those claiming under her have five years after coverture to sue for the land. Waldron v. Harvey [W. Va.] 46 S. E. 603.

1. Ball. Ann. Code, §§ 5503-4, giving title to one in possession and paying taxes for seven years. Hesser v. Siepmann [Wash.] 76 P. 295. Ball. Ann. Code, § 5503, giving title to persons in actual possession, under color of title and payment of taxes for 7 years, does not apply where there is no color of title. City of Port Townsend v. Lewis [Wash.] 75 P. 982.

2. A portion of one party's land occupied by another was not included in the boundaries of such occupant's deed. Giddings v. Winfree [Tex. Civ. App.] 73 S. W. 1066. Where one inclosed land to which he had no color of title, the 5-year statute does

is sufficient.[3] The Texas five-year statute does not apply to one holding under a void tax sale.[4] In *Louisiana* one who acquires color of title in good faith may have the benefit of the 10 year statute;[5] but an entry under a void tax sale is insufficient for the application of the three or five-year statute.[6] Under *Wisconsin* 10-year statute, it matters not how invalid the instrument may be or how complete the claimant's knowledge of its invalidity.[7] An assignment of a certificate of entry in terms conveying the land is sufficient.[8] Under *Arkansas* two-year statute, a tax sale for the manifest purpose of defrauding the heirs is insufficient.[9] In *South Dakota,* the possession must have been for the full statutory period.[10] The *Mississippi* three-year statute does not apply to a sale of land which was exempt,[11] but the 10-year statute applies to one who enters in good faith.[12] Laches will not defeat a suit for land when the adverse claimant is not in actual possession and the statute applicable has not run.[13]

§ 8. *Color of title.*[14]—Color of title is anything in writing connected with the title which serves to define the extent of the claim, it matters not how defective the writing may be, considered as a conveyance.[15] Thus a void deed,[16]

not apply. Nolan v. Mundine [Tex. Civ. App.] 79 S. W. 638. Where before one went into possession of land he had purchased, another had acquired title by adverse possession for 10 years, the 3 or 5 year limitations does not apply. Smith v. Bunch, 31 Tex. Civ. App. 541, 73 S. W. 559.

3. A **deed from a partnership** signed by the firm name by one of the members as agent does not disclose on its face that it is void; it might have been executed by a corporation. Harris v. Bryson [Tex. Civ. App.] 80 S. W. 105. A **deed by a city** conveying an alley to which it had no title did not appear on its face to be void; it was a sufficient basis for a plea of limitations of five years. Peden v. Crenshaw [Tex. Civ. App.] 81 S. W. 369. Exclusive and continuous possession of an enclosed tract of half a million acres, used as pasture for 12 years, on which taxes were paid each year for that period, satisfies the five-year statute, though there were no improvements except the fence. Harris v. Bryson [Tex. Civ. App.] 80 S. W. 105.

4. A purchaser holding under a void sale for taxes does not acquire title by adverse possession under a statute limiting the action to recover to five years after a judicial sale or two years as tax purchaser. Caldwell v. Barrett, 71 Ark. 310, 74 S. W. 748.

5. The law gives the purchaser in good faith the benefit of the 10 year prescription. Boagni v. Pacific Imp. Co. [La.] 36 So. 129. One who acquires title from one whom he believes to be the true owner, by a title which would be sufficient to transfer ownership if acquired from the true owner may have the benefit of the 10 year statute. Brewster v. Hewes [La.] 36 So. 883.

6. Neither the prescription of five nor three years bars the action of the owner of property, adverse title to which is claimed under conveyances from the state based on alleged forfeitures which were void. George v. Cole, 109 La. 816, 33 So. 784.

7. Administrator's deed, void for irregularities in proceedings of sale in that it included the homestead. Hatch v. Lusignan, 117 Wis. 428, 94 N. W. 332.

8. Under Wisconsin statute providing occupancy of land for 10 years under claim of title based on a written instrument. Pitman v. Hill, 117 Wis. 318, 94 N. W. 40. Where one entered under an assignment of a certificate of entry, which was given as security, evidence held to show he had acquired title by adverse possession. Id.

9. A widow having minor children permitted the homestead to be sold for taxes and procured another to purchase at the tax sale. She reimbursed him and had him assign the certificates to one to whom she sold the homestead. Held, the two-year possession under a tax title did not apply. Rowland v. Wadly, 71 Ark. 273, 72 S. W. 994.

10. Under Code Civ. Proc. § 55, providing that one who has entered under color of title and paid taxes for 10 years shall be adjudged the owner, a payment of taxes for 10 years with possession for but 9 years is insufficient. Bennett v. Moore [S. D.] 99 N. W. 855.

11. Code 1892, § 2735, providing that three years' actual occupation of land under a tax title shall bar a recovery, does not apply to a sale of land which was exempt from taxation. Mitchell v. Bond [Miss.] 36 So. 148.

12. Where a deed purported to convey the west half, but the grantor owned only the north half and the grantee went into possession of the north half and remained for 10 years, he had title by adverse possession. Moore v. Crump [Miss.] 37 So. 109. Code Civ. Proc. § 401, relative to entering under a claim of right founded on a written instrument has no application to possession by virtue of a tax assessment lease executed for a term of years, or to a holding over after such lease has expired. Miller v. Warren, 87 N. Y. S. 1011.

13. Statute giving certain time after disability was removed to recover. Waldron v. Harvey [W. Va.] 46 S. E. 603.

14. See 1 Curr. L. 36.

15. A deed by one purporting to act as attorney in fact without authority in writing. Street v. Collier, 118 Ga. 470, 45 S. E. 294.

16. Deed to homestead not signed by both husband and wife. Montague v. Marunda [Neb.] 99 N. W. 653.

or a deed to adjacent land which does not describe the tract in controversy,[17] or a deed under a void judicial decree,[18] or a deed from husband to wife, or a void administrator's,[19] or tax deed,[20] a contract of sale,[21] even if it be oral,[22] is sufficient; but a contract giving an option to purchase is not color of title so as to give constructive adverse possession coextensive with the description in the conveyance,[23] and one entering under a bond for a title must give notice.[24] A deed conveying title to one, does not constitute color of title after his estate has been divested.[25]

It may be contained in several instruments,[26] but the occupant must rely on his color of title in good faith,[27] and the boundaries must be recited.[28]

Color of title is not essential,[29] but where one enters without color of title, his possession is limited to the land actually occupied;[30] but in Texas, may be extended to include 160 acres,[31] which must be described in the pleading.[32]

Color of title may be proved by parol evidence.[33]

17. Where one purchased a lot which had not been staked out but it was the intention of both parties that the lot should extend to the street, a deed to such lot was color of title to a strip intervening between the boundary of the lot and the street, as described in the deed. Hesser v. Seipmann [Wash.] 76 P. 295.

18. Decree void because the court is without jurisdiction, and no sufficient description. Waldron v. Harvey [W. Va.] 46 S. E. 603.

19. A deed by husband to wife, executed prior to the married woman's act, before he had possession. An administrator's deed which does not purport on its face to have been executed under order of a court. Street v. Collier, 118 Ga. 470, 45 S. E. 294. Proceeding for sale included a homestead. Hatch v. Lusignan, 117 Wis. 428, 94 N. W. 332.

20. A tax deed void because the tax collector proceeded under a repealed statute. Treece v. American Ass'n [C. C. A.] 122 F. 598. Code Civ. Proc. § 47, providing that when entry is made under claim of title founded on a written instrument, the property shall be deemed to be held adversely. Murphy v. Dafoe [S. D.] 99 N. W. 86. Deed from heirs of a homesteader and a tax deed executed within five years of issuance of patent. Murphy v. Pierce [S. D.] 95 N. W. 925.

21. The purchase price not having been paid. Chesterman v. Bolling [Va.] 46 S. E. 470. An executory contract of sale from one co-tenant. McNeeley v. South Penn. Oil Co., 52 W. Va. 616, 44 S. E. 508.

22. Where on an exchange of land between father and daughter, the daughter failed to make a deed, but the father went into possession and held for 15 years. Miller v. Wireman [Ky.] 80 S. W. 517.

23. A railroad company had an option to purchase land. It entered a part and acquired title by adverse possession, and claimed the rest of the tract, though they never had possession. Louisville & N. R. Co. v. Gulf of Mexico Land & Imp. Co. [Miss.] 33 So. 845.

24. One entering land under bond for a title does not hold adversely until by stipulation he agrees to quitclaim to the owner the premises described in the title bond. Brownlee v. Williams [Colo.] 77 P. 250.

25. A judgment debtor continued in possession after his title had been divested. Wilson v. Brown, 134 N. C. 400, 46 S. E. 762.

26. Possession under several deeds, the description in which taken together covers all the land. Hamilton v. Flourney [Or.] 74 P. 483.

27. A deed under which an administrator conveys property of the estate at his own sale is not. Miller v. Rich, 204 Ill. 444, 68 N. E. 488.

28. Possession of land not within the boundaries recited in a deed is not. Slatton v. Tennessee C., I. & R. Co., 109 Tenn. 415, 75 S. W. 926.

29. Hesser v. Siepmann [Wash.] 76 P. 295; Owsley v. Owsley, 25 Ky. L. R. 1186, 77 S. W. 397. A father orally distributed his lands to his children. Bonner v. Bonner [Tex. Civ. App.] 78 S. W. 535. Father remained on the premises with his son after he had made him a parol gift of the land. Held not a breach of the son's possession. Owsley v. Owsley, 25 Ky. L. R. 1186, 77 S. W. 397.

30. Where parties entered a continuation of a street which the city claimed had been dedicated, but which it offered no proof to establish. City of South Omaha v. Meehan [Neb.] 98 N. W. 691. It was error to decree title to an entire tract where actual possession of only a part was shown. City of South Omaha v. Ford [Neb.] 98 N. W. 665. A title to a right of way acquired by prescription does not extend beyond the fence on each side of its roadway. The company relied on a grant from one co-tenant of a strip 66 feet wide. Floyd v. Louisville & N. R. Co. [Ky.] 80 S. W. 204.

31. Rev. St. 1895, § 3344 provides that adverse possession shall not embrace more than 160 acres or the number enclosed should the same exceed 160. Held, a trespasser can acquire title only to the land actually occupied, or if he occupies less than 160 acres, he may have his boundaries extended to include that amount. Doom v. Taylor [Tex. Civ. App.] 79 S. W. 1086.

32. In Texas, where one claims title to 160 acres by adverse possession under the statute, his pleading must sufficiently describe the tract so as to enable the court to render judgment therefor. Doom v. Taylor [Tex. Civ. App.] 79 S. W. 1086.

33. Parol evidence of sale by one in possession and of various transfers until pos-

§ 9. *Payment of taxes.*[34]—When payment of taxes will constitute adverse possession is regulated by statute.[35] Payment of taxes alone is insufficient.[36]

§ 10. *Area of possession.*[37]—Actual possession of a part of a tract under color of title to all gives constructive possession to the extent of the boundaries of the deed,[38] except such part as may be in the actual adverse possession of another,[39] but to avail the possession must be continued for the statutory period,[40] and in Texas the instrument containing color of title must be recorded.[41] Possession of a tract of land with title to a part and usufruct as to the rest carries possession of the whole.[42] Where one's title had been divested by sheriff's sale, his subsequent possession of a portion of the land could not be extended to the boundaries described in the deed under which he claimed prior to the sale.[43] Where a title is void as to part of the land conveyed, but the grantee occupies a portion thereof to which he actually has title, such fact does not give him constructive possession of the other part.[44] Where two patents lap, actual possession of part of the lap by the senior patentee is adverse as to the whole of it as against the junior patentee,[45] but where the holder of the junior patent takes actual possession of part of the interference, his possession is limited to his actual enclosure.[46] Adverse possession of one lot in a platted tract will not constitute adverse possession as to the others.[47]

session was vested in claimant. Blankenhorn v. Lenox [Iowa] 98 N. W. 566.

34. See 1 Curr. L. 38.

35. In Illinois, payment for seven successive years on wild land by a person having color of title and provided claimant takes possession after such period. White v. Harris, 206 Ill. 384, 69 N. E. 519. In Washington, payment of taxes on wild land for seven years under color of title. Philadelphia Mortgages & Trust Co. v. Palmer, 32 Wash. 455, 73 P. 501. Under South Dakota statute, providing that actual possession under color of title, and payment of taxes for 10 years, vests title in the occupant, a payment of all legal taxes for the 10 successive years is sufficient, and a failure to pay for one year, though such payment was made the year following, is not fatal to the claim. Murphy v. Redeker [S. D.] 94 N. W. 697.

36. Where one had been on premises that he supposed he owned under a tax deed, but had done nothing except to pay taxes for 10 years, it was insufficient to establish adverse possession. Seaverns v. Costello [Ariz.] 71 P. 930.

37. See 1 Curr. L. 38.

38. Deed by a city of an alley to which it had no title. Peden v. Crenshaw [Tex. Civ. App.] 81 S. W. 369. The true owner having no actual possession of any part. Crill v. Hudson, 71 Ark. 390, 74 S. W. 299. Possession of five acres inclosed, with claim of one hundred and sixty acres. Fischer v. Giddings [Tex. Civ. App.] 74 S. W. 85. Possession of part under bond for a deed to all. Ellis v. Le Bow, 96 Tex. 532, 74 S. W. 528. Land patented to "A" was afterward patented to "B" who went into possession of part of it; later "A" entered peaceably on it and persons in possession of parts of it took leases from him. Held, that the possession of all the land embraced in the patent was restored to "A" so as to stop the running of limitations as to any. Schlossnagle v. Kolb, 97 Md. 285, 54 A. 1006. An entry of a part of a tract under a deed containing specific metes and bounds. Scott v. Mineral Development Co. [C. C. A.] 30 F. 497. One holding two adjoining tracts under separate patents, improved one and sold all the land as a single tract to one who leased it and the tenant took possession of the improved part. Held, the possession of the tenant was of the whole tract and a conveyance by an adverse claimant was void under the Kentucky champerty statute. Id.

39. Actual adverse possession will not be construed to attach to the claim of tenancy under a junior grant where the land is not enclosed. Kentucky Land & Immigration Co. v. Sloan, 25 Ky. L. R. 1515, 78 S. W. 175.

40. Rev. St. 1899, § 4266, providing that possession of part of a tract under color of title of an entire tract is deemed possession of the whole tract, has no application where the claimant has not had possession of any part for the necessary period. Brown v. Hartford, 173 Mo. 183, 73 S. W. 140.

41. Doom v. Taylor [Tex. Civ. App.] 79 S. W. 1086.

42. George v. Cole, 109 La. 816, 33 So. 784.

43. Doom v. Taylor [Tex. Civ. App.] 79 S. W. 1086.

44. Mitchell v. Bond [Miss.] 36 So. 148.

45. Hall v. Blanton, 25 Ky. L. R. 1400, 77 S. W. 1110.

46. Grazing cattle on land is not actual possession. Hall v. Blanton, 25 Ky. L. R. 1400, 77 S. W. 1110. Part of a tract included in one patent was leased by a party that claimed title under various patents, some of which were junior and some senior to the large survey; the lessee enclosed part of the land held by virtue of one of the junior patents. Held, that by so doing he gave notice of his adverse possession to so much thereof as was included in his lease. Kirby v. Scott, 24 Ky. L. R. 2175, 73 S. W. 749. Evidence held sufficient to go to the jury on the area of land held adversely. Chew v. Zweib, 29 Tex. Civ. App. 311, 69 S. W. 207.

If a tenant be placed in possession of a tract of land and no boundaries are inserted limiting the possession to a prescribed part of the tract claimed by the landlord, his possession would be of the whole tract, though he occupied but a part thereof;[48] but if the lease be to a defined part of the larger tract, the possession will not avail the landlord beyond the boundaries of the parcel claimed and held by the tenant.[49] Kentucky statute of limitations in respect to adverse possession is liberally construed in favor of actual settlers on account of the loose practice of the state in issuing patents for conflicting grants.[50]

§ 11. *Sufficiency of possession.*[51]—In order that adverse possession be effective, there must be a claim of title hostile to the real owner,[52] and ownership in the claimant.[53] Naked possession without color of title is sufficient.[54] Mere occupancy by the legal owner of the land is sufficient as against one having a tax certificate entitling him to a deed thereon.[55] One can have no constructive possession under a void deed,[56] and in some states is regulated by statute,[57] and it may be presumed from circumstances.[58]

47. Missouri, K. & T. R. Co. v. Allen, 67 Kan. 838, 73 P. 98.

48. Treece v. American Ass'n [C. C. A.] 122 F. 598.

49. A tenant enclosed land beyond his boundaries. The terms of the lease were not clear. Treece v. American Ass'n [C. C. A.] 122 F. 598.

50. Relative to area of possession, etc. Scott v. Mineral Development Co. [C. C. A.] 130 F. 497.

51. See 1 Curr. L. 34.

52. Beer v. Plant [Neb.] 96 N. W. 348. Possession by the widow for the statutory period of premises formerly occupied by her husband as a homestead is presumed to be an election by her to take a life interest therein and therefore not adverse to the heirs. Huit v. Huit [Iowa] 98 N. W. 123. Where a husband purchases a mortgage given by his wife on her separate estate, she has no adverse possession while they have possession in common and she does not deny his rights under the mortgage. Skinner v. Hale [Conn.] 56 A. 524.

53. One cannot acquire title to land by adverse possession while acknowledging the title to it in another. Truman v. Raybuck, 207 Pa. 357, 56 A. 944.

54. Evidence, that one claimed title, held sufficient. Abner v. Creech, 25 Ky. L. R. 1981, 79 S. W. 247.

55. Where the owner of the legal title conveyed to another who had possession for the statutory period. Crocker v. Dougherty, 139 Cal. 521, 73 P. 429.

56. Judicial sale void because without jurisdiction; the purchaser did not take possession. Waldron v. Harvey [W. Va.] 46 S. E. 603.

Held sufficient: Surveying wild land, warning trespassers, cutting firewood. Protecting the birds and fish is sufficient. Boagni v. Pacific Imp. Co., 111 La. 1063, 36 So. 129. A company purchased a line of road under judicial sale, and took possession. There was a mortgage on the road which the purchasers never recognized. Held, under Wisconsin 10-year statute the purchaser had held adversely to the mortgage and the action to enforce it was barred. Gunnison v. Chicago, M. & St. P. R. Co. [C. C. A.] 130 F. 259. Where one took possession under a contract of sale which reserved the mineral rights, and though he told the lessor thereafter that he repudiated the contract, he afterwards made a payment under it, he could not acquire title by adverse possession to the mineral rights. Louisville & N. R. Co. v. Massey, 136 Ala. 156, 33 So. 896. Evidence held to show that one who had taken possession of land under a contract of sale occupied the land openly as his own, claiming title thereto, had acquired title, though the contract and conveyance thereof under court decree did not cover the land. Chesterman v. Bolling [Va.] 46 S. E. 470. Raking and hauling straw off from land for one or two years and cultivating an acre or two occasionally is insufficient. Prevatt v. Harrelson, 132 N. C. 250, 43 S. E. 800. Entry and erection of buildings which were shortly afterward abandoned, insufficient. Johnston v. Albuquerque [N. M.] 72 P. 9. Entry under a void deed, followed by actual occupancy, tilling the soil, fencing the land and paying the taxes for the statutory period. Pierson v. McClintock [Tex. Civ. App.] 78 S. W. 706. Acts of exclusive use and continuous occupation for the statutory period when such use and occupation are accompanied by a claim of ownership. Legal presumption of ownership is not dispelled by slight evidence that the claimant went into possession by consent of the record owner. Flanagan v. Mathieson [Neb.] 97 N. W. 287. Maintaining a cemetery on land by United States is sufficient. City of El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 S. W. 21. Possession by a mortgagee of mortgaged premises to the exclusion of the mortgagor and in denial of his rights for the statutory period bars the mortgagor's right of redemption. Munro v. Barton, 98 Me. 250, 56 A. 844. One who has used a right of way in common with the owners of the land, continuously and adversely for the statutory period, has acquired an easement. Pennington v. Lewis [Del. Super.] 56 A. 378. Evidence held to show that one who had taken title by parol conveyance had acquired title by adverse possession. City of South Omaha v. Ford [Neb.] 98 N. W. 665. Enclosure of land by the United States, burying soldiers thereon and marking the graves with monuments, is adverse possession. City of El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 S. W. 21. Evidence

Enclosure is not necessary,[59] but where the boundary is a stream, to constitute it such within the meaning of the statute, it must be of such depth as to constitute a barrier.[60] That one in adverse possession allows another to use the premises does not

held to show that one had been in open, notorious and uninterrupted possession for the statutory period. Southworth v. Brownlow [Miss.] 36 So. 522. Evidence held to show that one who had been in possession of a tract under well marked boundaries for 40 years had acquired title. Levy v. Gause [La.] 36 So. 684. Evidence held to show that one had a perfect chain of title, but having been in possession for the statutory period, his plea of prescription was good. Ours v. Gray [La.] 36 So. 326. Evidence held to show that one who entered a part of a street which had never been dedicated had acquired title. City of South Omaha v. Meehan [Neb.] 98 N. W. 691. Evidence held to show that one had been in possession and had acquired prescriptive title. Waters v. Durrence, 119 Ga. 934, 47 S. E. 216. Evidence held to show that land in controversy had been subject of a Spanish grant to private individuals prior to the time it had been ceded to the United States, that other parties had acquired title by prescription and a patent of the United States passed no title. Wilson v. Knight [Fla.] 37 So. 186.

Held insufficient: Where one had cut some timber on land and built a house thereon, evidence held insufficient to show that he had been in adverse possession for the statutory period. Greer & Co. v. Raney [Ga.] 47 S. E. 939. Evidence that one had been in possession of land under color of title many years ago held insufficient to show that such possession had ripened into a prescriptive title. Waters v. Durrence, 119 Ga. 934, 47 S. E. 216. A sheriff's deed is of itself no evidence of adverse possession. Prevatt v. Harrelson, 132 N. C. 250, 43 S. E. 800. Mere claim of ownership of vacant land by an adjoining owner and the driving away of trespassers not sufficient (Snowden v. Loree, 122 F. 493), nor is the mere act of requesting a third person to go on the land and keep off intruders (Jackson Lumber Co. v. McCreary, 137 Ala. 278, 34 So. 850), and adverse possession of wild land is not shown by evidence that one had it surveyed, paid taxes on it for a few years and at times cut timber on it (White v. Harris, 206 Ill. 384 69 N. E. 519). Where one went on land, fenced 30 out of 240 acres, built a house and other improvements thereon which remained six or seven years, but it was not shown who occupied the premises during the time the improvements were there, held insufficient to show adverse possession under the five-year statute. Buster v. Warren [Tex. Civ. App.] 80 S. W. 1063. Where one inclosed land in controversy together with a large tract of other land to which he did not claim title, and there was nothing to show the extent of the land he did claim, such possession was insufficient. Nolan v. Mundine [Tex. Civ. App.] 79 S. W. 638. One entered under a void tax deed, was in possession two years, then the land was vacant 12 years, during which time he paid no taxes, but occasionally cut some wood on the land and once tried but failed to rent it. Held, possession insufficient. Brown v. Hartford, 173 Mo. 183, 73 S. W. 140. One had fenced part of a timber tract but knew others came there and cut timber, and had told them to tear down his fence. Held insufficient. Mitchell v. Bond [Miss.] 36 So. 148. Evidence of pasturing on land and selling [illegible]e therefrom considered in connection with acts apparently acknowledging a superior title, held insufficient. Zweibel v. Meyers [Neb.] 95 N. W. 597. Evidence held insufficient to show adverse possession. South Chicago Brewing Co. v. Taylor, 205 Ill. 132, 68 N. E. 732; Hays v. Earls, 25 Ky. L. R. 1299, 77 S. W. 706. Evidence held insufficient to show that title had been acquired to a party wall. Mayer v. Martin [Miss.] 35 So. 218. Conflicting evidence as to nature of possession held sufficient to sustain a finding of adverse possession by a court. Hall v. Roberts, 24 Ky. L. R. 2362, 74 S. W. 199.

57. Soper v. Lawrence Bros. Co., 98 Me. 268, 56 A. 908. In Washington, actual, open and notorious possession of land under color of title for several years and payment of taxes under color of title of vacant land for seven years will give good title by adverse possession. Under this statute, occupancy for a part of the time and payment of taxes for the remainder of the period is sufficient. Philadelphia Mortgages & Trust Co. v. Palmer, 32 Wash. 455, 73 P. 501. In Utah, adverse possession is established only where it is shown that the land has been occupied and claimed for seven years by one who has paid all the taxes and has been in actual, open and notorious possession. Dignan v. Nelson, 26 Utah, 186, 72 P. 936. In New York, occupation must be taken and continued under claim of title, exclusive of any other right. Fortier v. Delaware, L. & W. R. Co., 86 N. Y. S. 896. In New York, adverse possession based on no color of title must be by enclosure, cultivation or improvement. Driving piles, marking out a space which he did not otherwise occupy is not sufficient. Id. Possession may be adverse without enclosure, cultivation or residence, but it must be by acts calculated to notify the true owner of the nature of the holding. Removal of two houses, filling in of ditches on two occasions and payment of taxes is not sufficient. Bynum v. Hewlett, 137 Ala. 333, 34 So. 391. Code Civ. Proc. § 369, provides that to constitute title by adverse possession there must be an entry under a claim of title founded on a written instrument, and land is deemed to have been occupied where it is fenced. It appeared that land had been fenced, but by whom was not disclosed; a cellar had been dug, fruit trees were growing and taxes had been paid. Held not sufficient to create title by adverse possession, entry not having been made under a written instrument. Freedman v. Oppenheim, 80 App. Div. 487, 81 N. Y. S. 110.

58. Possession of a strip of land not described in the deed of conveyance but which was necessary to the enjoyment of the tract conveyed. Wishart v. McKnight, 184 Mass. 283, 68 N. E. 237.

59. One by mistake entered the land of another beyond his own boundaries and cultivated it for the statutory period. Brownfield v. Bleekman [Neb.] 94 N. W. 714.

60. Under Texas 10-year limitation, land

affect his possession.[61] One who owns and lives upon a tract cannot be in actual possession of another tract.[62] Possession with intent to acquire title must, at least in the beginning, be actual; mere paper title without such possession is insufficient.[63] Whether title has been lost by adverse possession is a question for the jury,[64] even where there is evidence tending to show possession of a portion of the lot in controversy.[65]

Possession without color of title must be actual as contradistinguished from constructive.[66]

§ 12. *Pleading, evidence and instructions.*[67] *Pleading.*[68]—The statute of limitations is a defense and must be pleaded,[69] as must a fact relied on to remove the bar of limitations.[70] An allegation that one "is now and she and her grantors have been in the actual, open, notorious and adverse possession, under claim of right for more than 10 years past" is sufficient.[71] The term "openly" shows that the use was notorious and not clandestine.[72] The term "adverse" implies hostility.[73] It is not necessary to use the term "exclusively."[74] The term "under claim of right and adversely" implies that the use was under claim of title as their own.[75] Alleging that the land was "occupied" is an allegation of "actual possession."[76] Whether possession of land is hostile and adverse is not a conclusion of law but an ultimate fact,[77] and is a question for the jury.[78]

was fenced on three sides with a stream on the fourth. There was no evidence relative to the size of the stream and it was held that an inclosure was not shown. Cochran v. Moerer, 31 Tex. Civ. App. 495, 72 S. W. 1031.

61. One in possession of an alley under a void deed sought to inclose the entire alley. An action to prevent the obstruction was compromised by the claimant allowing it to remain open. Held, this did not affect his constructive possession. Peden v. Crenshaw [Tex. Civ. App.] 81 S. W. 369.

62. Where an adjoining owner acted as agent for one and kept trespassers off the land, etc., it did not constitute actual possession for the owner. Chenault v. Quisenberry [Ky.] 81 S. W. 690.

63. Under void tax sale. George v. Cole, 109 La. 816, 33 So. 784.

64. When use has been made of a railroad right of way inconsistent with the easement therein. Hill v. Southern R. [S. C.] 46 S. E. 486.

65. Haigler v. Pope [Tex. Civ. App.] 77 S. W. 1039.

66. Hamilton v. Flournoy [Or.] 74 P. 483. One who claims by adverse possession without color of title must show actual possession of a part of a tract definitely described in his pleading. Giddings v. Fischer [Tex.] 77 S. W. 209. Where an illiterate negro entered on land under a parol gift from his employer and cultivated it for 30 years, though there was some evidence that there was an entry at times by the owner of the record title, it was held he had acquired title. Dvorsky v. Watkins [Neb.] 98 N. W. 1039.

67. See 1 Curr. L. 39.

68. See 1 Curr. L. 39. n. 56-62.

69. Roberts v. Decker [Wis.] 97 N. W. 519; Shirey v. Clark [Ark.] 81 S. W. 1057. Answer held to plead the statute jointly and severally as to each of several defendants. Henning v. Wren [Tex. Civ. App.] 75 S. W. 905. Answer alleging that one had been in possession for 6 years past was bad on demurrer. Johns v. Cumberland Tel. & T. Co. [Ky.] 80 S. W. 165.

70. Shirey v. Clark [Ark.] 81 S. W. 1057.

71. Exclusiveness and hostility are implied. Hesser v. Siepman [Wash.] 76 P. 295.

72. In pleading adverse possession to an easement in a ditch. Abbott v. Pond, 142 Cal. 393, 76 P. 60.

73. It was not necessary to use the term "hostile." Abbott v. Pond, 142 Cal. 393, 76 P. 60.

74. Pleading title by prescription to an easement in ditch. The ditch might have been used as a waste waterway by the other party also, so long as claimant's right was not interfered with. Abbott v. Pond, 142 Cal. 393, 76 P. 60.

75. In pleading adverse possession to an easement in a ditch. Abbott v. Pond, 142 Cal. 393, 76 P. 60.

76. Hall v. Roberts, 24 Ky. L. R. 2362, 74 S. W. 199.

77. Logsdon v. Dingg [Ind. App.] 69 N. E. 409.

78. Illinois Steel Co. v. Budzizs, 119 Wis. 580, 97 N. W. 166. In an action for injuries to land where plaintiffs had proved title by adverse possession and there was evidence that no person had claimed against them, a prayer that the evidence was insufficient to show title was properly refused. Bullock v. Lake Drummond Canal & Water Co., 132 N. C. 179, 43 S. E. 593. Where a plaintiff set up title by legal conveyances, and a defendant by adverse possession, the question as to the superiority of their rights under the evidence submitted was for the jury. Altschul v. Casey [Or.] 76 P. 1083. Use of a ditch to acquire an easement. Abbott v. Pond, 142 Cal. 393, 76 P. 60. Evidence as to whether one who transferred by bill of sale instead of deed held adversely was a question for the jury. Illinois Steel Co. v. Jeka, 119 Wis. 122, 95 N. W. 97. Testimony relative to adverse possession properly submitted to the jury. Patton v. Fox [Mo.] 78 S. W. 804.

The burden of proving all elements of adverse possession is on him who asserts the claim.[79]

What is admissible.[80]—Evidence that the land was generally reputed to belong to one claiming title by adverse possession and that he used it under claim of ownership is admissible.[81] A deed though ineffectual, except as between the parties to pass title, is evidence of the nature of the use in reference to the right claimed to be exercised thereunder.[82] Deeds from those under whom one claims are admissible to show adverse possession.[83]

Instructions.[84]—The question of adverse possession being for the jury, an instruction that a possession is not adverse is erroneous,[85] as is also a charge that adverse possession in order to give title must show facts that will satisfy the legal definition;[86] but when the facts clearly show adverse possession, the court may direct a verdict.[87] It is not necessary to restate all the elements of adverse possession where they have been set forth in a previous instruction.[88] Where one claimed title by 20 years' adverse possession, an instruction as to color of title and possession for 7 years was not prejudicial, though there was no such issue in the case.[89] An instruction that possession must be such as "will bring to the knowledge of the real owner the fact that one is claiming adversely" is not proper.[90]

Adverse possession cannot be relied on on appeal where there was no plea thereof in the court below.[91]

§ 13. *Nature of title acquired.*[92]—A title acquired by adverse possession is indefeasible,[93] wholly independent of any other title,[94] and is not divested except by the usual formalities of conveyancing.[95] It is not lost by a subsequent survey.[96]

79. Dignan v. Nelson, 26 Utah, 186, 72 P. 936; Pittman v. Weeks, 132 N. C. 81, 43 S. E. 682.

The burden of proof is on the claimant to show that his possession has been adverse for the statutory period. Altschul v. Casey [Or.] 76 P. 1083; Clifton v. Weston [W. Va.] 46 S. E. 360. Where a husband's heirs claimed that a widow occupied property of her husband as a homestead and not adversely, they had the burden of proof to establish it. Reno v. Blackburn, 24 Ky. L. R. 1976, 72 S. W. 775.

80. See 1 Curr. L. 40, n. 76-80.

81. Lusk v. Pelter, 101 Va. 970, 45 S. E. 333.

82. Phillips v. Watuppa Reservoir Co., 184 Mass. 404, 68 N. E. 848.

83. A deed from one who never owned the land. Crawford v. Arnold [Tex. Civ. App.] 78 S. W. 244. Where title of land was put in issue, evidence that a party and his wife went into possession 30 years prior to the action, under a deed to the wife, was admissible. Bullock v. Lake Drummond Canal & Water Co., 132 N. C. 179, 43 S. E. 593.

84. See 1 Curr. L. 41.

85. Rabbermann v. Carroll, 207 Ill. 263, 69 N. E. 759.

86. Abstract and misleading. Sherrard v. Cudney [Mich.] 96 N. W. 15.

87. Where one had been in possession by tenants under leases for forty years of a part of an island and in actual possession for twenty years of another portion, and nineteen years before suit was brought, and had sold a right of way to a railroad company. McKee v. Grand Rapids [Mich.] 95 N. W. 85. Eight witnesses testify without contradiction or questioning of their credibility to claimant's adverse possession for the statutory period. Owens v. Merideth, 25 Ky. L. R. 1485, 78 S. W. 145.

88. In charging as to a possession to be tacked. Williams v. Shepherdson [Neb.] 95 N. W. 827.

89. Pittman v. Weeks, 132 N. C. 81, 43 S. E. 682.

90. It is sufficient if it be such as should be presumed to do so. Williams v. Shepherdson [Neb.] 95 N. W. 827.

91. Shirey v. Clark [Ark.] 81 S. W. 1057.

92. See 1 Curr. L. 39.

93. Holcomb v. Combs, 25 Ky. L. R. 957, 76 S. W. 847. Evidence held to show a prima facie title against subsequent grantees with notice. Myers v. Schuchmann [Mo.] 81 S. W. 618. Adverse possession for the statutory period gives a title in fee simple. If the adverse claimant has been ousted, he can maintain ejectment against the holder of the paper title. Wickes v. Wickes [Md.] 56 A. 1017; Hamilton v. Flourney [Or.] 74 P. 483. Where land was patented to an entryman's heirs, the fact that the heirs had possession for 3 years after title had been acquired by adverse possession against the entryman did not affect the title so acquired. Burton's Heirs v. Carrol, 96 Tex. 320, 72 S. W. 681.

94. Grantor's actual title or prior conveyances. Scott v. Mineral Development Co. [C. C. A.] 130 F. 497.

95. Surveys subsequently made by agreement between the adverse claimant and the one whose title had been divested. Logsden v. Dingg [Ind. App.] 69 N. E. 409. An entryman devised land and his devisees remained in possession for the statutory period; they acquired title superior to that acquired by the entryman's heirs to whom pat-

The statute of limitations with reference to real property is neither a statute of presumptions nor of repose, but the adverse possession of land for the statutory period operates as a grant.[97] Statutes of limitations, as a general rule, are not given a retroactive effect.[98]

AFFIDAVITS.

Who may make.—A public officer may make an affidavit showing the reason for his act.[1]

Who may take.[2]—A notary public[3] or judge[4] generally has authority to take affdavits. In some states the principal on a bond may as a notary public take the affidavits of his sureties.[5]

Form and requisites.[6]—By the law of comity,[7] and by statutory provisions,[8] affidavits taken before the proper officers of one state receive faith and credit in other states; but, in the absence of a statute authorizing it, a foreign notary cannot administer a pauper's oath to one desiring to sue in forma pauperis.[9] In order to be available, such foreign affidavits must be properly authenticated by certificate showing such authority.[10] It is not essential that the jurat state that the affidavit was sworn to in the presence of or before the notary who verifies the fact by his certificate,[11] or by whom the affidavit was signed and sworn to.[12] The court will take judicial notice that the person whose name appears to a jurat was a notary public in and for the county named,[13] and will presume that he acted within the county of his jurisdiction.[14] Under a statute requiring a notary public to "designate in writing in any certificate signed by him, the date of the expiration of his commission," failure to so do does not invalidate an affidavit for a change of venue.[15] The signature of the affiant is necessary to the validity of an affidavit,[16] but a different name being used in the body of the affidavit from that with which it is signed, it is presumptively the affidavit of the party signing.[17] The venue and jurat are generally deemed indispensable.[18]

ent was issued after his death. Burton's Heirs v. Carroll, 96 Tex. 320, 72 S. W. 681.

96. An adjoining owner had a survey which established a new line. Helton v. Fastnow [Ind. App.] 71 N. E. 230.

97. Easement for a highway acquired by the public. Postal v. Martin [Neb.] 95 N. W. 8. In Wisconsin, 10 years' entry having been made under claim of title founded on a written instrument. Hatch v. Lusignan, 117 Wis. 428, 94 N. W. 332.

98. Arizona statutes providing for the recovery of land in the adverse possession of another, being the first statute enacted relative to such action, does not apply to an action begun before the statute took effect. Curtis v. Boquillas Land & Cattle Co. [Ariz.] 76 P. 612.

1. Affidavit by state's attorney that he instituted suit uninfluenced by private interests or motives. People v. People's Gaslight & Coke Co., 206 Ill. 482, 68 N. E. 950.

2. See 1 Curr. L. 42, n. 7-12.

3. People v. Martin, 175 N. Y. 315, 67 N. E. 589.

4. The judge of the city court has authority to administer oaths and take the necessary affidavits from persons entitled to apply for warrants to dispossess tenants holding over, as well as authority to issue such warrants. Stephenson v. Warren, 119 Ga. 504, 46 S. E. 647.

5. Ballinger's Ann. Codes & St. § 248. McLean v. Roller, 33 Wash. 166, 73 P. 1123.

6. See 1 Curr L. 42, n. 13-16.

7. People v. Martin, 175 N. Y. 315, 67 N. E. 589.

8. Jackson v. State, 161 Ind. 36, 67 N. E. 690.

9. Fawcett v. Chicago, etc., R. Co. [Tenn.] 81 S. W. 839.

10. Burns' Rev. St. 1901, §§ 483, 1865. Jackson v. State, 161 Ind. 36, 67 N. E. 690. In Michigan by statute. Metcalfe v. Carr [Mich.] 94 N. W. 734. See 1 Curr. L. 42, n. 11.

11, 12, 13, 14. The fact is presumed from the official statement that the affidavit was sworn to. Black v. Minneapolis & St. L. R. Co. [Iowa] 96 N. W. 984.

15. Baskowitz v. Guthrie, 99 Mo. App. 304, 73 S. W. 227.

16. Raley v. Town of Warrington [Ga.] 47 S. E. 972.

17. The body of an affidavit recited "Personally comes Mrs. Joseph Raley" and was signed "M. N. Raley," held the affidavit of "M. N. Raley" who was presumptively the person referred to therein as Mrs. Joseph Raley. Raley v. Town of Warrington [Ga.] 47 S. E. 972.

18. **NOTE. Venue and jurat should appear in the affidavit:** The venue is generally essential to every affidavit and is prima facie evidence of the place where it was taken. Belden v. Devoe, 12 Wend. [N. Y.] 225, note; Manufacturers' & M. Bank v. Cowden, 3 Hill [N. Y.] 461; Lane v. Morse, 6 How. Pr. [N. Y.]

Admissibility of affidavit in evidence and effect thereof.[19]—An affidavit is not admissible in proof until its execution is proved.[20] That part of an affidavit which is hearsay will be excluded.[21] Where an affidavit does not state whether it is based on personal knowledge or information, where the affiant could not lawfully have personal knowledge, it will be presumed to be based on information alone.[22] Numerical preponderance has like weight as in case of other evidence.[23] Affidavit purporting to have been made by a father is incompetent for the purpose of proving age of son.[24] Affidavit alleging citizenship has no probative force in establishing naturalization of an alien.[25] Affidavits are proper mode of taking proof upon motions or petitions.[26]

AFFIDAVITS OF MERITS OF CLAIM OR DEFENSE.

An affidavit of defense may be used to support a motion to open judgment,[27] to obtain an extension of time to answer or demur,[28] and to throw the burden of proof on the opposite party;[29] but it cannot be used to assert technical objections to the pleadings.[30] The ordinary rules of courts requiring affidavits of defense do not vio-

394. The necessity of stating a venue at all is reluctantly confessed by the authorities (Bean v. Ayers, 67 Me. 487; Briggs v. Nantucket Bank, 5 Mass. 95; Sullivan v. Hall, 86 Mich. 7, 48 N. W. 646, 13 L. R. A. 556), it having been held that the omission of venue from a notary public's jurat does not render it invalid, he being a state officer the record of whose appointment is required to be kept in the office of the secretary of state (Sullivan v. Hall, 86 Mich. 7, 48 N. W. 646, 13 L. R. A. 551), but the omission of venue in a landlord's affidavit in summary proceedings is fatal (People v. De Camp, 12 Hun [N. Y.] 378; Cook v. Staats, 18 Barb. [N. Y.] 407; Lane v. Morse, 6 How. Pr. [N. Y.] 394). The objection to the omission of venue can be cured by amendment (Clement v. Ferenback, 1 City Ct. R. [N. Y.] 57), and under the strict rules of the common law might be taken advantage of by demurrer (Sullivan v. Hall, 86 Mich. 7, 48 N. W. 646, 13 L. R. A. 556).

Jurisdiction frequently depends upon the affidavit, and if it is lacking in an essential requisite, all subsequent proceedings founded upon it are void unless the defect is waived. People v. De Camp, 12 Hun [N. Y.] 378.

The jurat, when the deposition is taken by a notary acting out of his home county, should have attached to it the name of the county for which the notary was appointed and in which he resides, and also a statement that his certificate is filed in the county in which the venue is laid and the act performed, though an omission to make such designation will not render the verification void. Produce Bank v. Baldwin, 49 How. Pr. [N. Y.] 277; Estate of King, 2 Civ. Proc. R. [N. Y.] 71; Sullivan v. Hall, 86 Mich. 7, 46 N. W. 646, 13 L. R. A. 556; Sny. Not. Man. p. 57. The jurat should be in proper form and subscribed by the officer before whom it is made. If the jurat be all right in the original, it is immaterial as to the copy served (Barker v. Cook, 40 Barb. [N. Y.] 254; Livingston v. Cheetham, 2 Johns. [N. Y.] 479; Union Furnace Co. v. Shepherd, 2 Hill [N. Y.] 414), though the case of Graham v. McCoun, 5 How. Pr. [N. Y.] 353, seems to hold the contrary. Wait, Pr. p. 580.

—From the case of Sullivan v. Hall, 86 Mich. 7, 48 N. W. 646, and the note thereto as found in 13 L. R. A. 556.

19. See 1 Curr. L. 43, n. 17, and see Evidence, 1 Curr. L. 1136.

20. Locklayer v. Locklayer [Ala.] 35 So. 1008.

21. Exclusion of an affidavit, the larger part of which is hearsay, is not error, there being no offer to omit the objectionable part. City of Ft. Scott v. Elliott [Kan.] 74 P. 609.

22. Affidavit as to deliberations of jury. Groves & S. R. R. Co. v. Herman, 206 Ill. 34, 69 N. E. 36.

23. Where six out of eight jurors filed affidavits that the verdict was not reached by chance, the court properly refused to regard the verdict as so reached as against one affidavit on mere belief and not from a juror. Groves & S. R. R. Co. v. Herman, 206 Ill. 34, 69 N. E. 36.

24. Action on insurance policy. Bowen v. Preferred Acc. Ins. Co., 82 App. Div. 458, 81 N. Y. S. 840.

25. An affidavit attached to a deposition, wherein deponent stated that an alien "took up his citizenship in the United States," was of no probative force in establishing the naturalization of the alien. Richardson v. Amsdon, 85 N. Y. S. 342.

26. Where a writ of quo warranto was issued, with leave to respondent to move to set it aside, it was proper, on presentation of a petition to vacate the same and the appearance of respondent for the court to hear affidavits and counter-affidavits as to the facts relied on. People v. People's Gaslight & Coke Co., 205 Ill. 482, 68 N. E. 950.

27. Hunter v. Forsyth, 205 Pa. 466, 55 A. 26.

28. Under general practice act rule 24, providing that no order extending defendant's time to answer or demur shall be granted unless the party applying therefor shall present to the judge an affidavit of merits, an order granted without such affidavit having been filed will be reversed. Donovan v. Cunard S. S. Co., 85 N. Y. S. 1114.

29. An affidavit that a deed relied on by the opposite party is a forgery puts such party on proof of its genuineness. Williamson v. Work [Tex. Civ. App.] 77 S. W. 266.

30. In an action upon a promissory note

late the right of trial by jury,[31] nor is a rule requiring administrators and executors, guardians and others sued in a representative capacity to file affidavits of defense invalid.[32] An affidavit of defense should set forth fully and fairly facts sufficient to show prima facie a good defense;[33] stating that a person has been "duly notified" is insufficient.[34] Stating facts substantially in the language of the statute is generally sufficient,[35] but if it fails to state a defense, either from omission of essential facts or from manifest evasiveness in the mode of statement, it will be insufficient to prevent judgment.[36] In some states a rule judgment may be taken against a defendant for that portion of the affidavit of defense which is insufficient;[37] but the court cannot make the rule absolute without an adjudication as to what portions of the affidavit are insufficient.[38] Where an officer of a corporation makes an affidavit of defense for the latter, it is unnecessary for him to set forth his information and belief.[39] Failure of the prothonotary to sign the jurat does not generally vitiate the affidavit.[40] For the purpose of determining its sufficiency the allegations in an affidavit of defense must be taken to be true.[41] But where the affidavit is not filed in time and comes before the court on a rule to open a judgment regularly entered, the court may examine the averments and require further evidence as to facts, as in other cases of application to open

on a motion to open judgment, an affidavit of defense was filed stating "that it does not appear from the plaintiff's statement of claim that the note was stamped." Held an argumentative denial and a technical objection to the pleading. Hunter v. Forsyth, 205 Pa. 466, 55 A. 26.

31. A rule authorizing judgment for plaintiff for want of a sufficient affidavit of defense in actions ex contractu in which plaintiff has filed a supporting affidavit, action against principal and surety on a bond is an action ex contractu within the meaning of above rule. Fidelity & Deposit Co. v. U. S., 187 U. S. 315, 23 S. Ct. 120.

32. Helffrich v. Greenberg, 206 Pa. 516, 56 A. 45.

33. Andrews v. Blue Ridge Packing Co., 206 Pa. 370, 55 A. 1059. See 1 Curr. L. 43, n. 20-26. Under rule 73 of the supreme court of the District of Columbia. Fidelity & Deposit Co. v. U. S., 187 U. S. 315, 23 S. Ct. 120. Under Baltimore City Charter, § 312, if the whole claim sworn to by plaintiff is disputed, then it must be distinctly stated in defendant's affidavit that it was disputed; it need not state what is due nor that defendant will be able to produce evidence to sustain his contention. E. J. Codd Co. v. Parker, 97 Md. 319, 55 A. 623.

Assumpsit: Andrews v. Blue Ridge Packing Co., 206 Pa. 370, 55 A. 1059; Krimm v. Devlin, 206 Pa. 508, 56 A. 23. Money advanced. Chase v. Provident L. & T. Co., 207 Pa. 24, 56 A. 231. Action against indorser. Second Nat. Bank v. Guarantee T. & S. Deposit Co., 206 Pa. 615, 56 A. 72. Action on a note, affidavit set up parol agreement inadmissible under rules of evidence. Held, affidavit insufficient. Homewood People's Bank v. Heckert, 207 Pa. 231, 56 A. 431. An affidavit of defense to an action on a premissory note stating that the note is owned by another against whom the defendant has a good counterclaim is sufficient. Long v. Long, 208 Pa. 368, 57 A. 759. Action for money had and received. Tranter v. Porter, 207 Pa. 279, 56 A. 539. Action for money loaned, denial of plaintiff's title thereto and asserting ownership in defendant, held sufficient. Knight v. Somerton Hills Cemetery, 205 Pa. 552, 55 A. 535. In an action against a married woman on her contract of suretyship, the statement of claim averring that the contract was made in New York, where it was valid, and the affidavit of defense not denying such statement, judgment will be entered for plaintiff. Peter Adams Paper Co. v. Cassard, 208 Pa. 267, 57 A. 564. On a scire facias sur recognizance and certiorari, where an affidavit of defense is filed, the court can only look to the writ and affidavit, and if it appears from those papers that the recognizance was not taken before the proper officer, a judgment for want of a sufficient affidavit of defense cannot be entered. Wesley v. Sharpe, 19 Pa. Super. Ct. 600.

34. The affidavit must set forth how he was notified. Stephenson v. Supreme Council A. L. H., 127 F. 379.

35. An affidavit charging a trespass substantially in the language of the statute is not objectionable for lack of a particular description of the premises alleged to have been trespassed on. Holland v. State [Ala.] 35 So. 1009.

36. Andrews v. Blue Ridge Packing Co., 206 Pa. 370, 55 A. 1059.

37, 38. Pierson v. Krause, 208 Pa. 115, 57 A. 348.

39. Andrews v. Blue Ridge Packing Co., 206 Pa. 370, 55 A. 1059.

40. **NOTE. Necessity of prothonotary's signature:** A clerical omission on the part of the prothonotary to put his signature to the jurat after swearing the defendant, does not vitiate the affidavit, the defendant appearing personally in court and declaring his willingness to be again sworn. Maples v. Hicks, Brightly N. P. [Pa.] 56; End. Affid. Defense, § 340.—From note to Sullivan v. Hall [Mich.] 13 L. R. A. 556.

41. Long v. Long, 208 Pa. 368, 57 A. 759; Hunter v. Forsyth, 205 Pa. 466, 55 A. 26. If setting forth a good defense, it is not to be subjected to close technical examination as if it were a special plea demurred to. Andrews v. Blue Ridge Packing Co., 206 Pa. 370, 55 A. 1059.

judgment.[42] The sufficiency of an affidavit of defense depending upon the construction of other instruments, the court will not construe the instruments but will allow the case to proceed to trial.[43] Where the defense set up in an affidavit of defense is probably good, but is insufficiently stated, a supplemental affidavit is properly allowed.[44] Generally, amendments to the affidavit may be allowed,[45] it lying in the discretion of the court to permit an extension of time in order to amend.[46] Objections to allowing amendments to[47] or to defects in[48] affidavits cannot be taken for the first time on appeal.[49]

AFFRAY.

An affray is the mutual fighting of two or more persons by consent, in a public place.[50] It consists of mutual assaults, of which one person may be convicted, where the other may be acquitted or not put on trial.[51] The use of profane and violent language by two persons, each to the other, although in a public place, is not sufficient to constitute an affray.[52] Self-defense is available as a defense in a prosecution for an affray.[53]

AGENCY.

[Includes Special Article on Agency from Relation of Parties.]

§ 1. The Relation between the parties (69).
A. Competency to Act as Agent or to Employ Agents (69).
B. Creation and Existence of the Relation (69); also Special Article, Agency from Relation of Parties (101).
C. Implied Agency (71).
D. Evidence of Agency (72).
E. Estoppel to Assert or Deny Agency (74).
F. Termination of Relation (75).
§ 2. Rights and Liabilities of Principal as to Third Persons (76).
A. Actual or Implied Authority to Bind Principal (76). Evidence and Proofs (78).
B. Apparent Authority and Unauthorized or Wrongful Acts of Agent; Torts (79). Evidence and Questions of Fact (81).
C. Particular Kinds of Agencies (83).
D. Ratification by Principal (84).
E. Undisclosed Agency (88).
F. Notice to Agent (89).
G. Remedies, Pleading, Procedure, and Proof (90). The Principal (91).
§ 3. Rights and Liabilities of Agent as to Third Persons (92).
§ 4. Mutual Rights, Duties, and Liabilities (94).
A. In General; Contract of Agency; Diligence and Good Faith (94).
B. Accounting, Settlement, and Reimbursement (96).
C. Compensation of Agent (97).
D. Remedies, Pleading, Procedure, and Proof (99).

A partner is the agent of the firm.[54] The relation between a real estate

42. Hunter v. Forsyth, 205 Pa. 466, 55 A. 261.

43. As to whether a bond was conditional or not. Kerr v. Culver [Pa.] 57 A. 1106.

44. Andrews v. Blue Ridge Packing Co., 206 Pa. 370, 55 A. 1059.

45. Prosecution begun by affidavit. Holland v. State [Ala.] 35 So. 1009.

46. Where an insufficient affidavit has been filed, it is not an abuse of discretion to refuse to allow two days' time in which to file a sufficient one. Blizzard v. Epkens, 105 Ill. App. 117.

47. Holland v. State [Ala.] 36 So. 1009.

48. Headings v. Gavette, 86 App. Div. 692, 83 N. Y. S. 1017.

49. For estoppel by affidavit, see Ward v. Cameron [Tex. Civ. App.] 76 S. W. 240; Marchand v. Ronaghan [Idaho] 72 P. 731.

50. The fighting of two persons in the presence of seven others is an affray, the seven others making the place a public one. State v. Fritz, 133 N. C. 725, 45 S. E. 957.

51. Defendant may be convicted therefor, though indicted for challenging to a duel, where the evidence shows a challenge to a fair fight with fists. Under Laws N. C. 1885, p. 118, c. 68. State v. Fritz, 133 N. C. 725, 45 S. E. 957. The superior court of North Carolina, having jurisdiction of a charge of challenging to fight a duel, it retains jurisdiction, though the evidence shows an affray. Id.

52. It is sufficient when accompanied by such acts as drawing a razor, and making threatening gestures with a plank, and taking hold of each other, by which conduct citizens are terrorized and disturbed; it not appearing that either party was justified in what he did. Evidence held sufficient to sustain a conviction. Blackwell v. State, 119 Ga. 314, 46 S. E. 432.

53. Held error to refuse to instruct on the issue of self-defense, in a prosecution for an affray, where evidence was introduced showing that prosecutor advanced on defendant, who picked up a stick to defend himself, and prosecutor struck him on the head before defendant did anything. Coyle v. State [Tex. Cr. App.] 72 S. W. 847.

54. Rosenthal v. Hasberg, 84 N. Y. S. 290.

broker and the owner of property who employs him is primarily that of principal and agent.[55] The principles especially applicable to these and other particular kinds of agencies are treated under other titles.[56]

§ 1. *The relation between the parties. A. Competency to act as agent or to employ agents.*[57]—The marriage relation does not disqualify one of the parties to it from acting as agent of the other.[58] But a married woman cannot appoint an agent for real estate owned by her in fee, nor have such agent in her husband.[59] An executrix may employ an agent to buy land on commission.[60] One conducting a sale under a trust deed as agent of the trustee may buy as agent of the beneficiary.[61] The governor of New Hampshire may appoint an agent to prosecute claims against the United States for public defense or payment of troops.[62]

(§ 1) *B. Creation and existence of the relation.*[63]—The contract of agency must have the elements essential to the validity of all contracts,[64] must be consistent with public policy,[65] and properly executed.[66] In most states an agency relating to realty must be in writing,[67] in which the particular land is identified;[68] in North Carolina, it seems, written authority is unnecessary.[69] An offer to sell, accepted by the attorney of the buyer, is a valid contract as against the seller, though the attorney's authority was not in writing.[70] Some statutes re-

55. Cadigan v. Crabtree [Mass.] 70 N. E. 1038.

56. See Brokers, 1 Curr. L. 360; Factors, 1 Curr. L. 1200; Insurance, 2 Curr. L. 479; Partnership, 2 Curr. L. 1106; Corporations, 2 Curr. L. 710.

57. See 1 Curr. L. 43.

58. Greenberg v. Palmieri [N. J. Law] 58 A. 297. A husband may be the agent of his wife. Johnson v. Jones [Miss.] 34 So. 83.

59. Spurlock v. Dornan [Mo.] 81 S. W. 412.

60. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227.

61. Union Planters' Bank v. Edgell [Miss.] 33 So. 409.

62. Laws 1861, p. 2435, c. 2479, § 3 and Laws 1865, p. 3120, c. 4076, § 1. Opinion of the Justices [N. H.] 54 A. 950.

63. See 1 Curr. L. 44.

64. Contract of agency held not invalid for want of consideration, mutuality or definite term of existence. Albany Land Co. v. Rickel [Ind.] 70 N. E. 158. A contract signed by both parties, by which the obligees are appointed exclusive agents for a certain stone in a certain territory, is not void for lack of mutuality, though the obligees do not expressly bind themselves to purchase stone or to do any particular thing. Taylor Co. v. Bannerman [Wis.] 97 N. W. 918. A written offer to employ an agent to sell realty signed by the principal and accepted by the agent, though not signed by him, is a binding contract of agency, enforceable against both as a bilateral mutual contract. Rowan & Co. v. Hull [W. Va.] 47 S. E. 92.

65. A contract for employment of an agent to continue as long as he did not associate with a woman of bad repute is not against public policy. Gould v. Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896. That a contract by the state with an agent to prosecute claims provided for a contingent fee does not render it against public policy. Opinion of the Justices [N. H.] 54 A. 950.

66. Authority under seal is necessary to execution of an instrument under seal in Delaware. Hartnett v. Baker [Del. Super.] 56 A. 672.

67. An agreement for extension of a lease and for conveyance held invalid because made by one lessor for others, without written authority as required by Civ. Code, § 2185, subd. 5. Landt v. Schneider [Mont.] 77 P. 307. An agency to sell land must be in writing, signed by the parties, and set forth the compensation [Comp. St. § 74, c. 73]. Danielson v. Goebel [Neb.] 98 N. W. 819. Written authority to broker to effect an exchange of lands, within Pen. Code, § 540d (Laws 1901, p. 312, c. 128). But this statute is unconstitutional because by making it a misdemeanor to sell lands without written authority in cities of the first or second class, it abridges the right of contract of a portion of the state. Cody v. Dempsey, 86 App. Div. 335, 83 N. Y. S. 899. Letters in which an owner states that he has land to sell and its price, and intimating that he has a friend to whom he will intrust the sale, do not constitute authority or power of attorney to the addressee to sell, within a statute requiring an instrument in writing [Civ. Code, §§ 1624, 2309]. Lambert v. Gerner, 142 Cal. 399, 76 P. 53. An agent not authorized in writing cannot fill in a grantee's name in a deed executed in blank, and thereby pass title to the grantee, he knowing that the deed was executed in blank under statute of frauds, Civ. Code, § 938. Lund v. Thackery [S. D.] 99 N. W. 856.

68. Danielson v. Goebel [Neb.] 98 N. W. 819. Sufficiency of identity of land and authority of agent as shown by power of attorney, construing act of Congress, May 20, 1862 (Chapter 75, 12 St. 392). Finnegan v. Brown, 90 Minn. 396, 97 N. W. 144.

69. Smith v. Browne, 132 N. C. 365, 43 S. E. 915.

70. Since the statute of frauds requires a writing signed by the party to be charged, the seller in this case. Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414.

quire a power of attorney respecting realty to be properly acknowledged[71] or recorded in the county where the land is situated.[72]

Agency is a mixed question of law and fact,[73] to be determined by the jury under proper instructions,[74] when the agent's authority is not in writing.[75] Where there is no conflict in the evidence, the question of the existence of the relation is for the court.[76] Whether the relation created is that of principal and agent,[77] or vendor and purchaser,[78] must be determined from the entire contract and

71. Sufficiency of foreign acknowledgment of power of attorney under Real Prop. Law, § 250, subd. 2 (Laws 1901, p. 1476, c. 611). Jordan v. Underhill, 91 App. Div. 124, 86 N. Y. S. 620.

72. A power of attorney concerning a sale of land cannot be recorded in a county where none of the land is situated; a copy of the record in the land office of such a county is not an archive of the office. Wren v. Howland [Tex. Civ. App.] 75 S. W. 894. In California, a power of attorney to execute a mortgage must be recorded, but a power of attorney to release a mortgage need not be [Civ. Code, § 2933]. Adams v. Hopkins [Cal.] 77 P. 712.

73. Gough v. Loomis [Iowa] 99 N. W. 295.

74. Palmour v. Roper, 119 Ga. 10, 45 S. E. 790. Wife's agency for her husband. Martin v. Oakes, 42 Misc. 201, 85 N. Y. S. 387. Existence of agency submitted to jury. Cooper Wagon & Buggy Co. v. Barnt [Iowa] 98 N. W. 366. Evidence sufficient to carry to jury the question of agency in collection of a debt for lumber. Southern Pine Lumber Co. v. Fries [Neb.] 96 N. W. 71. Evidence of subcontractor's agency to purchase on credit of the contractor sufficient to carry the question of agency to jury. Jewell v. Posey, 119 Iowa, 412, 93 N. W. 379. Where a contract was within apparent authority of an agent and the principal received the benefit of it, the question of agency was for the jury. Booth & Co. v. Bethel, 25 Ky. L. R. 1747, 78 S. W. 868. Held, that question whether one was an agent for the letting of premises should have been submitted to the jury. Crossley v. Kenny [N. J. Law] 58 A. 395. Evidence as to agency held to require the submission of the issue to the jury. Brittain v. Westhall [N. C.] 47 S. E. 616. Question of agency to purchase on credit of a subcontractor submitted to jury. Jewell v. Posey, 119 Iowa, 412, 93 N. W. 379. The clerk of a hotel directed by a guest to forward telegrams received to him is the agent of the guest to receive messages. Western Union Tel. Co. v. Barefoot [Tex.] 76 S. W. 914. An arrangement by an owner with a land broker that the latter should wire the owner when he procured a buyer did not make the telegraph company the owner's agent and notice of a purchaser procured was not notice to the owner until the telegram was received. Johnson Bros. v. Wright [Iowa] 99 N. W. 103. A trust deed by a liquor dealer to secure payment of license, under which the dealer continues to manage the business, held not to constitute the dealer the agent of the trustee, so as to make the latter liable for the dealer's debts. Massachusetts Breweries Co. v. Hills [Mass.] 70 N. E. 1013. Held, that a husband who fraudulently induced his wife to join in a trust deed was not the agent of the bank to which it was given so as to charge the bank with the fraud. Hyatt v. Zion [Va.] 48 S. E. 1.

75. Lough v. John Davis & Co. [Wash.] 77 P. 732.

76. Whether goods were bought from another as principal or agent cannot be submitted to the jury where the evidence shows agency only. New Orleans Coffee Co. v. Cady [Neb.] 95 N. W. 1017. Where the evidence is conclusive that the principal signed a contract making another his agent, that issue cannot be left to the jury. Commonwealth Title, Ins. & Trust Co. v. Dakko, 89 Minn. 386, 94 N. W. 1088. Facts set out in complaint held not to show an agency and hence plaintiff could not sue on contract made by alleged agent. Mills v. Abbeville Southern R. Co., 137 Ala. 505, 34 So. 815.

77. Construed as creating relation of principal and agent for sale of machines in certain territory, and held that a warranty was not a part of such contract. Osborne & Co. v. Josselyn [Minn.] 99 N. W. 890. Contract between wholesalers and retailers of machinery, whereby title to goods shipped remained in wholesalers, and retailers paid a certain price, retaining as profits what they could get in advance of that price, and receiving five per cent. on cash remitted within a certain time, was a contract of agency. Com. v. Parlin [Ky.] 80 S. W. 791. A contract whereby the owner delivered certain goods to another, retaining title in himself, the one receiving them agreeing to turn over a certain portion of the price received, is a contract of agency, not a conditional sale. Lance v. Butler [N. C.] 47 S. E. 488. An agreement whereby one person is to purchase land for another and pay advances therefor while the other is to pay for such services and repay advances is a contract of agency. Jackson v. Pleasanton, 101 Va. 282, 43 S. E. 573. A contract whereby a locator of mining claims, for a consideration of $1 and money and labor to be expended on said claims, sold them on condition that the plaintiff should pay to the locator $45,000 and one-eighth of any amount in excess of that figure, when he should sell the mines, each party to aid the other in the negotiation and sale of the property, held to be a naked power of attorney to sell, revocable at will. Taylor v. Burns [Ariz.] 76 P. 623.

78. Where buggy dealers gave notes for goods shipped, and agreed to hold goods on hand and proceeds as agents for the seller until all obligations were paid, the contract was construed as a sale and not an agency. In re Carpenter, 125 F. 831. An agreement to fill orders for engines secured by certain persons at certain discounts, and to refer inquiries for engines from a certain locality to such persons, is not a contract of agency, but merely gives rights of purchase and sale in that locality. Russell & Co. v. McSwegan, 84 N. Y. S. 614.

from the surrounding circumstances and situation of the parties.[79] The exclusive right of sale in certain territory[80] may properly be considered as a condition subsequent in a contract of sale.[81]

Intermediaries.[82]—A mere intermediary is not an agent,[83] and cannot be held liable as such when the capacity in which he acts is disclosed.[84] Dual agencies are void only when the fact of representation of both parties is not known to each.[85] Where ship materials are left with an agent to be sold and he uses them in building a vessel of which he is also agent, the owner is entitled to a lien on the vessel.[86]

(§ 1) *C. Implied agency.*[87]—The fact of agency or its extent may be presumed[88] from the conduct of the parties,[89] or their usual course of business,[90] or from lapse of time,[91] so as to protect a third party acting in good faith and with reasonable prudence.[92] The presumption does not arise from conduct of the parties when the interests of the alleged principal and agent are adverse.[93]

79. Osborne & Co. v. Josselyn [Minn.] 99 N. W. 890.

80. Sutton v. Baker [Minn.] 97 N. W. 420.

81. See Sales, 1 Curr. L. 1527.

82. See 1 Curr. L. 44.

83. A friend of an agent who agreed to send the principal the agent's note after surety was secured and to vouch for its genuineness in completion of an agreement of the agent to give the note for money wrongfully used by him was not the agent of the principal so as to bind the latter with knowledge of false representations of the agent in the friend's presence to secure the surety. Hardin v. Chenault, 25 Ky. L. R. 1083, 77 S. W. 192. An insurance agent receiving an application and taking it to the agent of another company, who writes the policy and divides the commissions with him, is not an agent of the insurer so as to bind the latter by knowledge of erroneous recitals in the application. Parrish v. Rosebud Min. & Mill. Co., 140 Cal. 635, 74 P. 312.

84. Klay v. Bank of Dallas Center, 122 Iowa, 506, 98 N. W. 315.

85. Red Cypress Lumber Co. v. Perry, 118 Ga. 876, 45 S. E. 674. Where one acts as agent for both parties to a transaction, all circumstances connected with his employment by each must be communicated to the other in order to relieve him from the suspicion of inconsistent duties. Jones v. Draper, 4 Ohio C. C. (N. S.) 105. A contract for sale of land by an agent for both parties without notice to the seller that he is acting for the purchaser is against public policy. McClure v. Ullman, 102 Mo. App. 697, 77 S. W. 325. A contract for exchange of property made by an agent is not enforceable where the agent acted for both parties without knowledge of one. Harper v. Fidler [Mo. App.] 78 S. W. 1034.

86. Under a maritime lien statute making a builder, contractor or person in charge of construction the agent of the owner, for purposes of the lien law [Pierce's Code, § 6077]. Callahan v. Aetna Indemnity Co. [Wash.] 74 P. 693.

87. See 1 Curr. L. 45.

88. See post, p. 72. Evidence of Agency. Booker v. Booker, 208 Ill. 529, 70 N. E. 709.

89. An administrator who persuaded a sister of the decedent to allow him to represent her interests in the estate was her agent, strictly accountable for her share in the property. Schneider v. Schneider [Iowa] 98 N. W. 159. Workman had express authority to receive one payment; he received and accounted for a second without authority. Authority to accept a third presumed from acts and conduct of the parties. Grant v. Humerick [Iowa] 94 N. W. 510. Acts of one who has been acting as business agent of a corporation with its knowledge and without consideration will bind it; he was a large stockholder, a director, and member of the executive committee, and was recognized in contracts made by it as to building operations. Culver v. Pocono Spring Water Ice Co., 206 Pa. 481, 56 A. 29. Where a wife is known to be a principal, and credit is given her for goods bought by her husband, as agent, she may by her conduct render herself liable for supplies sold him while in charge of her plantation [Code 1892, § 2293]. Johnson v. Jones [Miss.] 34 So. 83. The principal's assent with knowledge to assignment of the agency is an acceptance of the assignee as agent. Albany Land Co. v. Rickel [Ind.] 70 N. E. 158. Where a surviving husband takes possession of his wife's estate and conducts a business belonging thereto without authority, and opens a bank account as "agent," he is presumed to act as agent of the owners of the estate. Succession of Labat, 110 La. 986, 35 So. 257.

90. Authority of insurance agent to receive premiums. Globe & R. Fire Ins. Co. v. Robbins, 86 N. Y. S. 493. Street commissioner held to have been authorized by city by its course of dealing, to accept assignments of future earnings in his department. Lamoreux v. Morin [N. H.] 54 A. 1023.

91. A power of attorney to convey land presumed to have existed at the time of the conveyance in 1856, when the former owner, to the time of his death in 1899, never claimed it or paid taxes. Bean v. Bennett [Tex. Civ. App.] 80 S. W. 662. After 60 years, authority of an assumed agent in conveying land will be presumed, the principal never having repudiated the act. Tarvin v. Walker's Creek & Coal & Coke Co., 25 Ky. L. R. 2246, 80 S. W. 504.

92. Grant v. Humerick [Iowa] 94 N. W. 510.

93. Where the relation of payee and maker of promissory note exists between alleged principal and agent, payment to the maker

It will not be presumed from the mere existence of the marital relation,[94] though that fact may go to the jury on the issue of agency.[95] Once the agency is shown, the relation is presumed to continue.[96] See also a special article in this number on agency implied from relation of parties.[97]

(§ 1) *D. Evidence of agency.*[98]—Parol evidence is admissible to prove an agent's authority,[99] unless in writing.[1] Neither the extent,[2] nor the fact of agency, can be shown by declarations or admissions of the alleged agent,[3] not brought home to or ratified by the principal.[4] But it is not error to admit declarations,[5] or other testimony by the agent,[6] when the agency has already been shown or is admitted, when such evidence is admitted for purposes of corroboration only,[7] and testimony by the agent as to previous conduct is competent on the issue of due care by a person dealing with him.[8] Statements and declarations of the alleged principal are evidence of the most satisfactory character.[9] A witness may testify to his own appointment to an agency or the appointment of the company with which he is connected.[10] Evidence of actual transactions between the parties,[11] or tending to show a course of dealing,[12] or letters between

by a surety will not be presumed to have been for the payee as principal. Judkins v. Burr, 1 Neb. Unoff. 267, 95 N. W. 475.

94. Agency of the husband in management of the wife's separate property. Wagoner v. Silva, 139 Cal. 559, 73 P. 433.

95. Brown v. Woodward, 75 Conn. 254, 53 A. 112.

96. Where a tenant was not notified to pay rent to any other than the landlord's janitress, who is shown to have had authority to take rent "from some tenants when they first moved in," payment to the janitress will bind the landlord. Gross v. Owen, 86 N. Y. S. 265.

97. Post, p. 101.

98. See 1 Curr. L. 45.

99. Lough v. John Davis & Co. [Wash.] 77 P. 732.

1. A letter of appointment submitted to the agent for alterations and by him returned to the principal with desired changes, on being again sent to the agent, is the contract and cannot be changed by parol evidence of prior negotiations. Davis v. Fidelity Fire Ins. Co., 208 Ill. 375, 70 N. E. 359. Lack of terms as to duration will not make a written contract of agency so uncertain as to admit parol evidence. Id.

2. Grant v. Humerick [Iowa] 94 N. W. 510. Incompetent to show authority or its extent. Walmsley v. Quigley [C. C. A.] 129 F. 583. Error to admit agent's declarations that he was state agent, other evidence tending to show he was a traveling salesman with limited powers. Aultman & Taylor Mach. Co. v. Cappleman [Tex. Civ. App.] 81 S. W. 1243.

3. Burson v. Bogart [Colo. App.] 72 P. 605; Waters-Pierce Oil Co. v. Jackson Junior Zinc Co., 98 Mo. App. 324, 73 S. W. 272; Dieckman v. Weirich, 24 Ky. L. R. 2340, 73 S. W. 1119; Tabet v. Powell [Tex. Civ. App.] 78 S. W. 997; Smith v. Browne, 132 N. C. 365, 43 S. E. 915; Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227; Eastland v. Maney [Tex. Civ. App.] 81 S. W. 574. As against the principal. Chiles v. Southern R. [S. C.] 48 S. E. 252. Conversation had by a third person with an alleged agent is hearsay and inadmissible on the issue of agency. Broadstreet v. Hall [Ind. App.] 69 N. E. 415. Statements of a servant in absence of his master cannot be admitted to show that a tort of the servant was committed while in the master's business. Clark v. Folscroft, 67 Kan. 446, 73 P. 86. The mere statement of a husband that he has authority to pledge his wife's property for his debt is insufficient to prove such authority. Just v. State Sav. Bank [Mich.] 94 N. W. 200.

4. Orange Belt R. Co. v. Cox [Fla.] 33 So. 403; Blanke Tea & Coffee Co. v. Rees Printing Co. [Neb.] 97 N. W. 627; Cooper & Co. v. Sawyer, 31 Tex. Civ. App. 620, 73 S. W. 992.

5. Bay City Irr. Co. v. Sweeney [Tex. Civ. App.] 81 S. W. 545.

6. Union Hosiery Co. v. Hodgson [N. H.] 57 A. 384.

7. On the question whether a note was given in consideration of a promise of plaintiff's agent to refrain from prosecution of another criminally, the agent could testify that he had no such authority, in corroboration of other testimony. Gilliland v. R. G. Dun & Co., 136 Ala. 327, 34 So. 25. Testimony of a broker that he acted for a wife in a certain transaction is admissible in an action against her husband on a contract made by her, where considered only on other proof that she was his agent. Brown v. Woodward, 75 Conn. 254, 53 A. 112.

8. Grant v. Humerick [Iowa] 94 N. W. 510.

9. Evidence held sufficient to establish a sales agency. Blanke Tea & Coffee Co. v. Graham [Neb.] 99 N. W. 257.

10. A general passenger agent of one railroad may testify that in sale of certain tickets his road acted as the agent of another. Chiles v. Southern R. [S. C.] 48 S. E. 252.

11. Brown v. Cone, 80 App. Div. 413, 81 N. Y. S. 89. Payment of commissions. Slaughter v. Coke County [Tex. Civ. App.] 79 S. W. 863. A contract between an alleged principal and agent was admissible on the issue of agency in an action against the alleged principal to recover for lumber sold the agent. Brittain v. Westhall [N. C.] 47 S. E. 616. Where a contract of agency for a particular purpose was a continuing one, a limit being applied only to the terms on which the agent might deal with third

the parties,[13] tending to show agency, are competent, but proof of general reputation is inadmissible.[14]

Proof of the agency, whether express or implied, must be clear and satisfactory in order to bind the principal.[15] Cases dealing with admissibility[16] or sufficiency[17] of evidence as to agency in particular instances are grouped in the notes.[18]

persons, in an action for fraud against the agent, negotiations between the parties may be proved to show existence of the agency at a later period. Barbar v. Martin [Neb.] 93 N. W. 722.

12. Smith v. Bank of New England [N. H.] 54 A. 385. Between principal and agent, and between the agent and third persons. Standley v. Clay, Robinson & Co. [Neb.] 94 N. W. 140. That a person had handled plaintiff's machines, taking notes payable to plaintiff in settlement. McCormick Harvesting Mach. Co. v. Lambert, 120 Iowa, 181, 94 N. W. 497. Evidence held to warrant conclusion that defendant bought goods through an agent. Crosno v. Bowser Mill. Co. [Mo. App.] 80 S. W. 275.

13. To show whether a manager of a corporation was the agent of a stockholder to sell stock. Barbar v. Martin [Neb.] 93 N. W. 722.

14. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227.

15. Booker v. Booker, 208 Ill. 529, 70 N. E. 709. Agency of a husband for his wife. Brown v. Daugherty, 120 F. 526. An agency alleged in a pleading and not denied under oath will be taken as proven. Watkins Land Mortg. Co. v. Campbell [Tex. Civ. App.] 81 S. W. 560.

16. Agency of a general manager of a corporation to sell stock for an individual stockholder. Barbar v. Martin [Neb.] 93 N. W. 722. Evidence tending to prove that an attorney was acting for one under bond and that a bondsman had confidence in him is admissible on the question of his agency for his client in receiving back from the bondsman money deposited as security by the client for the signature on the bond. Spor v. Grau, 89 App. Div. 365, 85 N. Y. S. 876. Where it appeared in an action by a mortgagee to recover a balance that insurance due on the mortgaged property payable to the mortgagee was obtained by one claiming to be his agent and paid by him to the mortgagee in part without inquiry from the latter, a receipt for the insurance signed by the agent as the mortgagee's attorney and a check drawn to the latter's order, purporting to have been indorsed by her and the assumed agent are admissible to show the assumed agency in making payment. Ballard v. Nye, 138 Cal. 588, 71 P. 156. A certificate under seal, executed by a corporation, reciting that one who signed it as president was president and that certain persons were thereby appointed corporate agents in another state to receive process, is admissible to show the position of the president as such. Owyhee Land & Irrigation Co. v. Tautphas [C. C. A.] 121 F. 343.

17. Evidence held sufficient to show agency, in suit for commissions. Albin Co. v. Kuttner, 25 Ky. L. R. 1100, 77 S. W. 181. To deliver notes. Barton v. Hughes, 117 Ga. 867, 45 S. E. 232. To sell timber. Limestone Min. & Mfg. Co. v. Lehman, 25 Ky. L. R. 703, 76 S. W. 328. Receiving payment on note. Cheshire Provident Inst. v. Vandergrift, 1 Neb. Unoff. 339, 95 N. W. 615. To show that an agent for sale of realty acted for the purchaser and not the owner. Callaway v. Wilson, 141 Cal. 421, 74 P. 1035. Authority of agent to list land with real estate agent for sale at a certain net price to the principal. Jenkins v. Dewey [Iowa] 98 N. W. 313. Where principal negotiations for a contract regarding live stock were conducted by the owner's son, representing his father, who testified that his son acted for him more than he did himself, a finding of the agency was justified. Durfee v. Seale, 139 Cal. 603, 73 P. 435. Return of goods, on abandonment of a contract of sale, to a nephew of the seller, who had charge of the latter's business just before the transfer and from whom the purchaser received the goods shows the nephew's agency for the seller, so that redelivery to him was delivery to the seller. Seattle Brew. & Malt. Co. v. Donofrio [Wash.] 74 P. 823. Evidence in bankruptcy proceedings showed that bankrupt was mere agent of assignors to forward goods not their factor so that the goods were not assets of his estate. Bills v. Schliep [C. C. A.] 127 F. 103. Evidence showed defendants to be agents for sale of land, not owners. Jackson v. McNatt [Neb.] 93 N. W. 425. Evidence sufficient to show son not authorized to sell land for his parents. Sherlock v. Van Asseit [Wash.] 75 P. 639. That "agency" did not extend to certain property, for which defendant was accountable. Rose v. Durant, 86 App. Div. 623, 83 N. Y. S. 503.

Held insufficient: To show agency to sell lands. Darr v. Darrow, 120 Iowa, 29, 94 N. W. 245. No agency to receive and sell goods. Chicago Cottage Organ Co. v. Stone [Ark.] 73 S. W. 392. Agency of husband of one of joint owners of realty, to sell. Warren v. Goodwyn, 110 La. 198, 34 So. 411. To show authority of alleged agent to make a loan for plaintiff to defendant, or his part in an usurious agreement of the plaintiff. Hare v. Winterer, 1 Neb. Unoff. 854, 96 N. W. 179. To show agency to receive money so that it could be recovered from the payee on the money counts as money received to the payor's use. Rhode v. Marquis [Mich.] 97 N. W. 53. To show that one who cut trees on plaintiff's land was defendant's agent under rule that declarations of the agent cannot prove the agency. Therrell v. Ellis [Miss.] 35 So. 826. To show agency to receive payment of mortgage debt. Thompson v. Buehler, 1 Neb. Unoff. 590, 95 N. W. 854. Correspondence as giving one addressed authority to sell lands for owner. Riley v. Grant [S. D.] 94 N. W. 427. Letter from husband to wife, giving her agency did not give her authority to agree to pay a penalty for failure to fulfill a sale of realty. Michael v. Hoffstead [Neb.] 98 N. W. 1078. Evidence to show tenant to be agent of landlord or render declarations of the tenant admissible in respect to the agency. Burson v. Bogart [Colo. App.] 72 P. 605.

18. Effect of certain evidence in establishing agency. An execution against

(§ 1) *E. Estoppel to assert or deny agency.*[19]—The principal's admission,[20] or his acquiescence and acceptance of benefits from the agent's acts,[21] will estop him to deny the agency, if the other party has acted in reliance on the acts creating the estoppel.[22] Acceptance by the principal of one contract of an unauthorized agent will not estop the principal from denying his authority to make a similar

"James E. Leps, agent for A. Co." is against Leps alone, the words "agent for" being merely descriptive. Armour Packing Co. v. Lovell, 118 Ga. 164, 44 S. E. 990. Assignment of a mortgage by a general corporate officer, with corporate seal attached, is prima facie evidence of his authority. Wilson v. Neu, 1 Neb. Unoff. 42, 95 N. W. 502. That one addressed an envelope will not show him to be bound by the letter contained giving authority to an agent where he denies knowledge of the contents. Darr v. Darrow, 120 Iowa, 29, 94 N. W. 245. A power of attorney "to release a mortgage * * * for $40,000" does not make the payment of $40,000 a condition, but the mention of that sum simply describes the mortgage. Adams v. Hopkins [Cal.] 77 P. 712. The acceptance by one road of a ticket sold by another is some evidence that the latter acted as the agent of the former in the sale. Chiles v. Southern R. [S. C.] 48 S. E. 252. Where an agent signs a memorandum of payment for realty as agent, describing it as "belonging to" one of his two principals, the words were part of the description and did not limit the agency, so that the two owners may be sued as principals of the one mentioned. Tobin v. Larkin, 183 Mass. 389, 67 N. E. 340. Where an offer to sell machinery was made to G. & Co. "(for the N. Umbrella Co.)" and G. & Co. and others signed the acceptance, such signature bound the signers personally and not as agents of the umbrella company. Gill v. General Elec. Co. [C. C. A.] 129 F. 349. Evidence as to existence of undisclosed principals liable for agent's purchase of railroad property at mortgage sale. Ranger v. Thalmann, 39 Misc. 420, 80 N. Y. S. 19. That an agent was a del credere factor cannot be inferred from the mere fact that the names of customers were not disclosed to the principal. See Factors, 1 Curr. L. 1200. Cushman v. Snow [Mass.] 71 N. E. 529.

19. See 1 Curr. L. 47.

20. Where the principal admits that negotiations with a representative were with him, and that a valid bond was delivered, he cannot deny the agency. Stearns v. Shepard & M. Lumber Co., 91 App. Div. 49, 86 N. Y. S. 391. Where an exporter made a consular declaration that his consignee was a purchaser and recited the purchase in an invoice accompanying such declaration and the goods were entered in the custom house in the consignee's name, the exporter was estopped to assert, as against a purchaser from the consignee, in reliance on the custom house title and consular declaration, that the latter was only his agent; the estoppel extended to the consignee's agent acting under the exporter's orders. Simar v. Shea, 89 App. Div. 84, 85 N. Y. S. 457. The brother of the owner of stock pledged it as security for his debt, and when notified by the corporation, the owner said it was all right. The stock was sold to a bona fide purchaser to satisfy the debt. Held, the owner was estopped to deny his brother's agency [Civ. Code (ostensible agency) §§ 2307, 2317, 3515, 3519]. Dover v. Pittsburg Oil Co., [Cal.] 77 P. 405. Admission by the legal owner of land that he verbally authorized another to sell amounts to an estoppel in favor of one claiming under the person given such authority. Northington v. Granade, 118 Ga. 584, 45 S. E. 447.

21. Acceptance of benefits. Rosenthal v. Hasberg, 84 N. Y. S. 290. Where a contract of agency held by a firm was assigned to one member who continued the business, acquiescence of the principal in his acts and acceptance of the benefits, ratified the assignment. Albany Land Co. v. Rickel [Ind.] 70 N. E. 158. Acceptance of payments on drafts and acquiescence for several years will prevent one of two payees from questioning the authority of the other to indorse the drafts as against the bank paying them. Allen v. Corn Exch. Bank, 87 App. Div. 335, 84 N. Y. S. 1001. Acceptance of benefits under and repeated recognition by a corporation by payment of consideration will estop the corporation to deny authority of its president to execute the contract after full performance by the other party. Owyhee Land & Irr. Co. v. Tautphas [C. C. A.] 121 F. 343. Where corporate officers and stockholders had knowledge of the terms and consideration of a deed executed by officers of the corporation for many years and acquiesced in the act, they were estopped to deny the authority of the officers to execute the deed. West Seattle Land & Imp. Co. v. Novelty Mill Co., 31 Wash. 435, 72 P. 69. One suing a carrier in tort for damages to live stock from negligence in shipment may show that delivery to the carrier by him was made through his agent, though the agency was not disclosed when the contract was made; but the predication of his action on the agency will bind him by the terms of carriage made by the agent regardless of the question of authority. Central of Georgia Ry. Co. v. James, 117 Ga. 832, 45 S. E. 223.

22. That a husband has been doing business in his wife's name and handling her money without her objection will not raise an estoppel against her in favor of one without knowledge of such facts or who did not act on faith of the husband's general agency. Brown v. Daugherty, 120 F. 526. That a city and Federal license as a wholesale liquor dealer had been issued in name of a principal will not estop him from denying the authority of an agent employed to buy and sell beer, to buy whisky on his credit, where the seller never saw the license and sold part of the goods before the government license was issued. Action for price. Hackett v. Van Frank [Mo. App.] 79 S. W. 1013.

Evidence of estoppel: Sufficiency and admissibility of evidence to carry to the jury the question of estoppel of an alleged principal to deny authority of agent to purchase on his credit. Hackett v. Van Frank [Mo. App.] 79 S. W. 1013.

subsequent contract.[23] The principal may be estopped to deny a subagency by acts of his general agent[24] if such acts are brought home to him.[25] The agent, in like manner, may be estopped by his own acts from denying his representative capacity.[26]

(§ 1) *F. Termination of relation.*[27]—An agency for an indefinite time is terminable at will.[28] If the contract of agency be for a fixed period,[29] or the agency be coupled with an interest,[30] it is revocable, but the principal will be liable for the damages caused by wrongful revocation.[31] In this sense an agency coupled with an interest given for a valuable consideration or as part of a security is called irrevocable.[32] While it is the general rule of law that the death of the principal revokes the agency, when not coupled with an interest,[33] this rule is held not to apply as against those dealing in good faith with the agent, without knowledge of such revocation and within the scope of his actual and ostensible authority.[34] Commission or reward to be given an agent for his services does not alone make his employment an agency coupled with an interest.[35] Violation of his contract,[36] or disregard of instructions[37] by the agent, is sufficient ground for his discharge by the principal. The withdrawal[38] or disposal[39] of the sub-

23. Purchase of lumber by one falsely pretending to act as agent. Owens v. Hughes [Tex. Civ. App.] 71 S. W. 783.

24. Where a general agent accepted a bond by advancements made under it, his principal could not deny the authority of a subordinate agent to execute it. Pacific Nat. Bank v. Aetna Indemnity Co. [Wash.] 74 P. 590.

25. That barrels of whisky in an alleged principal's name were found in his warehouse will not estop him from denying, in an action for the price of whisky, that the agent had authority to purchase. Hackett v. Van Frank [Mo. App.] 79 S. W. 1013.

26. One who has conveyed land as attorney in fact of another is estopped from denying the agency. Walters v. Brav [Tex. Civ. App.] 70 S. W. 443. Where an agent has held possession of personalty for three years in such capacity for his principal to whom it was sold, he cannot claim it as his own on the ground that the sale was in furtherance of restraint of trade or void as against public policy, he being estopped to deny the title of his principal. Gilbert v. American Surety Co. [C. C. A.] 121 F. 499. The same rule applies to corporate officers who have managed property of the corporation as its agents after their discharge as managers. Star Brewery v. United Breweries Co. [C. C. A.] 121 F. 713.

27. See 1 Curr. L. 47.

28. New York agent for sale of Texas products on commission. Outerbridge v. Campbell, 87 App. Div. 597, 84 N. Y. S. 537. An agency for sale of a ranch. Loving Co. v. Hesperian Cattle Co., 176 Mo. 330, 75 S. W. 1095. There was no exclusive agency; plaintiff or any one else could find purchaser before a certain date; agency revocable. Milligan v. Owen [Iowa] 98 N. W. 792. Though a letter appointing an agent for an insurance company stated that the object was to make a permanent agency and expressed a hope that relations would be of long duration, the agency might be terminated at will of either party. Davis v. Fidelity Fire Ins. Co., 208 Ill. 375, 70 N. E. 359.

29. Rowan & Co. v. Hull [W. Va.] 47 S. E. 92.

30. Milligan v. Owen [Iowa] 98 N. W. 792; Miller v. Home Ins. Co. [N. J. Law] 58 A. 98.

31. Milligan v. Owen [Iowa] 98 N. W. 792; Rowan & Co. v. Hull [W. Va.] 47 S. E. 92.

32. Insurance broker holding a policy as security for premium advanced and given certain powers in reference thereto is an agent with an interest. Miller v. Home Ins. Co. [N. J. Law] 58 A. 98. A power of attorney is revocable at will of the principal when not coupled with an interest, or based on a consideration, or where it is part of a security, in which cases it cannot be revoked regardless of its terms as to revocation. Buffalo Land & Exploration Co. v. Strong [Minn.] 97 N. W. 575.

33. Brown v. Skotland [N. D.] 97 N. W. 543.

34. Conduct of administrater held to have estopped the heirs and representatives of a deceased to set up a revocation of an agency by death. Meinhardt v. Newman [Neb.] 99 N. W. 261.

35. Rowan & Co. v. Hull [W. Va.] 47 S. E. 92.

36. Discharge of sales agent for breach of condition in contract of employment that he would not associate with women of bad repute. Gould v. Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896.

37. Failure to carry out instructions merely because he thought the acts unnecessary or of no avail. Shute v. McVitie [Tex. Civ. App.] 72 S. W. 433.

38. Agency to sell ranch revoked by letters withdrawing property from market. Loving Co. v. Hesperian Cattle Co., 176 Mo. 330, 75 S. W. 1095. Where the principal, who has delivered money to an agent for a certain purpose, demanded its return before it was applied, the demand revoked the agent's authority. Flaherty v. O'Connor, 24 R. I. 587, 54 A. 376.

39. Sale of land by the principal, who had reserved that right, revokes the authority of the broker with whom the land was listed. Johnson Bros. v. Wright [Iowa] 99 N. W. 103; White v. Benton, 121 Iowa, 354, 96 N. W. 876.

ject of the agency by the principal revokes the agency, and the record of a deed given by the principal is notice to an agent and persons dealing with him that the power to sell has been revoked.[40] An agency ceases with the death of the agent.[41]

§ 2. *Rights and liabilities of principal as to third persons.*[42] *A. Actual or implied authority to bind principal.*[43]—An agent has no implied authority to appoint subagents or delegate his powers[44] without his principal's consent. A general agent of a corporation may employ a subagent.[45]

The principal cannot repudiate acts within the agent's authority,[46] even though done without his knowledge.[47] The extent of an agent's authority, under power conferred, is a question of law,[48] but when the authority is not in writing, its extent may be a question of fact,[49] as when the evidence is conflicting.[50] When an agent acts under special authority conferred by a formal instrument, his powers must be ascertained from the instrument itself,[51] which will be strictly construed,[52] and if capable of two constructions, will be construed most favorably to one dealing with the agent.[53] An express limitation of a special power will control over general powers conferred in a power of attorney.[54] One of three persons appointed attorneys in fact by a power of attorney may act for the principal if the power contains no provision requiring joint action.[55] The principal is bound by the apparent and visible interpretation which he has put upon the

40. Donnan v. Adams, 30 Tex. Civ. App. 615, 71 S. W. 580.

41. Bristol Sav. Bank v. Holley [Conn.] 58 A. 591.

42. Liability on agent's bonds, see Indemnity, 2 Curr. L. 298.

43. See 1 Curr. L. 48.

44. People's Bank of Pratt v. Frick Co. [Okl.] 73 P. 949. And see 1 Curr. L. 47. That the seller of lumber used reasonable care in selecting persons to inspect the lumber, on disagreement as to reduction for defects discovered on delivery to the purchaser's customers, will not bind the purchaser, though he had appointed the seller his agent to settle. Williamson v. North Pac. Lumber Co., 43 Or. 337, 73 P. 7.

A special agent to inspect lumber cannot delegate his authority. Campbellsville Lumber Co. v. Spotswood, 24 Ky. L. R. 2430, 74 S. W. 235.

An executrix cannot delegate to her agent to buy land, discretion as to the terms of sale or as to the amount of commission to be paid subagents; she may authorize employment of the subagent at a commission fixed by her. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227.

45. Where a director of a corporation was employed to manage its stores by a vote of directors, who also authorized a sale of realty through him, a vote of directors was not necessary to his employment of brokers to effect the sale, the president testifying that no formal votes were made as to business done by the managers. Henderson v. Raymond Syndicate, 183 Mass. 443, 67 N. E. 427.

46. A contract made and completely executed by an agent on Sunday within his authority cannot be repudiated by the principal as without such authority. Rickards v. Rickards [Md.] 56 A. 397. Waiver of a crop lien by the landlord's agent with actual authority will bind the principal, though without consideration. Wimp v. Early [Mo. App.] 78 S. W. 343.

47. Authority of insurance agent to deny liability on policy. Indian River State Bank v. Hartford Fire Ins. Co. [Fla.] 35 So. 228.

48. Anderson v. Adams, 43 Or. 621, 74 P. 215.

49. Evidence sufficient to carry to the jury the question of an agent's authority to rescind a sale. Osborne & Co. v. Ringland & Co., 122 Iowa, 329, 98 N. W. 116. Whether an agent is authorized by a bank depositor to settle with a correspondent and whether the settlement included a deposit withdrawn by the latter. Heath v. New Bedford Safe Deposit & Trust Co. [Mass.] 69 N. E. 215. Question of selling agent's authority to accept something besides money properly submitted to jury, there being some evidence to support it. New Orleans Coffee Co. v. Cady [Neb.] 95 N. W. 1017.

50. Palmour v. Roper, 119 Ga. 10, 45 S. E. 790. Where evidence as to an agent's authority to make a contract did not justify one inference only, its existence is a question of fact. Parr v. Northern Electrical Mfg. Co., 117 Wis. 278, 93 N. W. 1099.

51. Power of attorney for sale of land providing for giving of notes payable in one, two and three years, did not authorize agent to make contract permitting payment of notes at option of purchaser, and such contract did not bind principal. Henry v. Lane [C. C. A.] 128 F. 243.

52. Letter of attorney to execute oil lease will not be extended to include authority to recognize an outstanding title by a third person. MacDonald v. O'Neil, 21 Pa. Super. Ct. 364.

53. Osborne & Co. v. Ringland & Co. [Iowa] 98 N. W. 116.

54. First Nat. Bank v. Kirkby [Fla.] 32 So. 881.

55. U. S. Fidelity & Guaranty Co. v. Ettenheimer [Neb.] 99 N. W. 652.

written authority.[55] When the agent's powers are not conferred by a writing, they must be ascertained from the scope and character of the business which he is authorized to transact,[57] but cannot include illegal acts.[58] Implied powers may arise from a course of dealing[59] or conduct of the parties,[60] who may be estopped to deny that an act was without the authority of the agent.[61] Implied agency of a wife to purchase necessaries does not extend to articles not necessary to the household.[62] Third persons may rely on the principal's statements as to the agent's authority.[63] Under a statute requiring signature of the writing by the party to be charged, a signature by his agent is insufficient.[64] Termination of the agency terminates the authority,[65] except as to third persons without notice.[66]

Declarations or admissions of the agent made without authority,[67] or as to matters outside the scope of his authority,[68] or after termination of the agency,[69]

56. Osborne & Co. v. Ringland & Co., 122 Iowa, 329, 98 N. W. 116.

57. Whether agents of an indemnity company who took shipbuilding plant to finish a contract on default of the builder had power to borrow money to complete it, held to be for the jury. Ladd v. Aetna Indemnity Co., 128 F. 298. Authority to borrow money must be expressly given or necessarily implied from the nature of the agent's duties. Held, that an employe of a state insurance agent termed a "cashier," had no implied authority to indorse and discount drafts for his principal. Exchange Bank v. Thrower, 118 Ga. 433, 46 S. E. 316. Where a clerk had admitted authority to act as agent for his employers in chartering vessels for their trade, if he did not make known to third persons with whom he was dealing that he was not acting for his employers in signing a memorandum of charter at their place of business in his own name, they are bound. Rainey v. Potter [C. C. A.] 120 F. 651.

58. The agent of the owner of premises is not presumed to have authority to lease for an illegal purpose. Stover v. Flower, 120 Iowa, 614, 94 N. W. 1100.

59. Authority of corporate agents to contract. Smith v. Bank of New England [N. H.] 54 A. 385. The course of dealing between the principal and his agent may be shown on the issue of his general agency to represent the principal as to sales. Continental Tobacco Co. v. Campbell, 25 Ky. L. R. 569, 76 S. W. 125. A corporation cannot be bound by acts of agents or officers without express authority or such a course of dealing as to clearly imply authority. The directors only can otherwise bind the corporation. Bradford Belting Co. v. Gibson, 68 Ohio St. 442, 67 N. E. 888.

60. A finding that an agent for a nonresident owner of rented property had authority to repair held sustained by the evidence. Lough v. John Davis & Co. [Wash.] 77 P. 732.

61. A principal who knows the terms of a contract made by his agent, and accepts and performs it, is estopped to object on any grounds that might arise from lack of knowledge. Hale Elevator Co. v. Hale, 201 Ill. 131, 66 N. E. 249. Where an agent agreed to replace a machine or return notes and cash paid on the price, if it was not as warranted, and the principal knew of the agent's agreement, and received and kept a payment on the price, the principal was estopped to deny the agent's authority to make such a contract. Kenney Co. v. Anderson [Ky.] 81 S. W. 663.

62. As jewelry. McBride v. Adams, 84 N. Y. S. 1060.

63. Restrictions on an agent's authority will not limit the principal's liability for the agent's acts where the principal represented that the agent had greater authority. Phipps v. Mallory Commission Co. [Mo. App.] 78 S. W. 1097.

64. Gen. St. p. 1976, § 10. De Raismes v. De Raismes [N. J. Law] 56 A. 170.

65. To render rescission of a sale conducted wholly through an agent effectual, the latter must acquiesce therein while still representing his principal. Parsons Band Cutter & Self Feeder Co. v. Mallinger, 122 Iowa, 703, 98 N. W. 580.

66. One in the habit of dealing with an agent may deal with him after revocation of the agency and bind the principal where he has no knowledge of such revocation. Grasselli Chemical Co. v. Biddle Purchasing Co., 22 Pa. Super. Ct. 426. A principal is liable for goods bought by his agent, after termination of the relation, from one who had been dealing through the agent and had no knowledge of the revocation of the agency. Waters-Pierce Oil Co. v. Jackson Junior Zinc. Co., 98 Mo. App. 324, 73 S. W. 272.

67. Declarations of a husband as to ownership of cattle claimed by his wife as separate property are not binding on her in her absence. Word v. Kennon [Tex. Civ. App.] 75 S. W. 365. Evidence of declarations of a husband are inadmissible in an action against his wife to reform a deed given her, where made long after conveyance and his authority to speak for her does not appear. Montgomery v. Mann, 120 Iowa, 609, 94 N. W. 1109. Statements of agent as creating trust in land bought by him for the principal. New York University v. Loomis Laboratory [N. Y.] 70 N. E. 413. Conversations with an agent cannot be given as against the principal in an action by him for breach of contract, where the agent had no authority as to the contract and was not present when it was made. Wallingford v. Aitkins, 24 Ky. L. R. 1995, 72 S. W. 794. An advertisement inserted in a newspaper by an agent is inadmissible against the principal when it does not appear that the publication was authorized or ratified. National Bldg. Ass'n v. Quin [Ga.] 47 S. E. 962.

68. Wimmer v. Metropolitan St. R. Co., 86 N. Y. S. 1052. Corporate agent. Harper v. Western Union Tel. Co., 92 Mo. App. 304.

do not bind the principal, but declarations and admissions within the scope of the agent's authority are binding.[70]

Evidence and proofs.[71]—The admissions or declarations of the agent are received in evidence against the principal, not as admissions or declarations merely, but as parts of the res gestae,[72] and only such as accompany the transaction in which the agent acted can be proved.[73] Declarations of the alleged agent are inadmissible to show the extent of his authority,[74] but a general agent of a

The principal is bound only by acts and declarations of his agent as to matters within the scope of his general employment or specially intrusted to him. Huebner v. Erie R. Co., 69 N. J. Law, 327, 55 A. 273. Statements of corporate officers that the corporation had agreed to pay obligations of another corporation whose assets it took over cannot be shown to prove the agreement, there being no evidence of authority. Central Elec. Co. v. Sprague Elec. Co. [C. C. A.] 120 F. 925. The superintendent of a prune ranch, whose duties are general management and preparation of the fruit for market, but who cannot sell, cannot bind his employer by admissions as to the condition of fruit sold [Civ. Code, § 2295 and § 1870. subd. 5]. Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 P. 162. The hired manager of a hotel cannot bind his employer by admissions concerning a trespass by a servant on a guest after its commission. Clancy v. Barker [Neb.] 98 N. W. 440.

69. Admissions of an agent, made two or three weeks after termination of the agency, as to a transaction, are inadmissible to prove it. Small v. McGovern, 117 Wis. 608, 94 N. W. 651. Statements of an agent after termination of the relation will not bind the principal where the person to whom they were made knew the agency had terminated. Hill Bros. v. Bank of Seneca, 100 Mo. App. 230, 73 S. W. 307.

70. Tabet v. Powell [Tex. Civ. App.] 78 S. W. 997. Sufficiency of evidence of authority. Hill Bros. v. Bank of Seneca, 100 Mo. App. 230, 73 S. W. 307. Admissions and representations of a corporate agent, acting within the scope of his authority, as to matters in his care, will bind the corporation. White Hall Co. v. Hall [Va.] 46 S. E. 290. Managers and solicitors of packing houses to transact all their business of selling in the state may bind their principals by statements while engaged in making a combination to control prices, so that such statements may be shown in quo warranto proceedings for violation of their corporate privileges [Rev. St. 1899, §§ 8965, 8966]. State v. Armour Packing Co., 173 Mo. 356, 73 S. W. 645. Declarations of an attorney's son, employed as a clerk in his office in actual charge of collection of an account, and who drew attachment papers afterward filed with the attorney's approval, are admissible against the client in a suit for wrongful attachment. Lord, Owen & Co. v. Wood, 120 Iowa, 303, 94 N. W. 842. In an action on a contract for balance on right to manufacture machinery, evidence of a statement of an employe of defendant in charge of the machines that they worked nicely and were satisfactory is admissible as made by an agent within the scope of his authority. Stecher Lithographic Co. v. Inman, 175 N. Y. 124, 67 N. E. 213. Report by agent on condition of work performed by principal under a contract is admissible to show failure of latter to comply with a contract. Lipscomb v. South Bound R. Co. 65 S. C. 148, 43 S. E. 388. There being evidence tending to show that the agent was engaged in execution of his duties as such, his declarations were admitted, though made a week or more after the transaction in suit. Cooper Grocer Co. v. Britton [Tex. Civ. App.] 74 S. W. 91.

71. See 1 Curr. L. 49.

72. Admissions of corporate director as to matters not part of the res gestae will not bind the principal. Allington & C. Mfg. Co. v. Detroit Reduction Co. [Mich.] 95 N. W. 562. Admissions of an agent a day after the event and remotely connected therewith are not admissible as a part of the res gestae. Clancy v. Barker [Neb.] 98 N. W. 440.

73. National Bldg. Ass'n v. Quin [Ga.] 47 S. E. 962. To admit declarations of an agent against his principal, they must be made during the agency and as a part of a transaction then taking place. King v. Phoenix Ins. Co., 101 Mo. App. 163, 76 S. W. 55. Where the defense in an action for the price of goods is rescission of the contract, defendant may prove conversations with plaintiff's agent at time of the rescission and giving of another order for goods as a consideration therefor. Osborne & Co. v. Ringland & Co., 122 Iowa, 329, 98 N. W. 116. After answers filed in an action against a corporation for services, the officers cannot bind the corporation by admission or declaration as to the cause of action. McEntire v. Levi Cotton Mills Co., 132 N. C. 598, 44 S. E. 109. Declarations of a bank president, made long after the transaction and without his official duties, are inadmissible against the bank. National Bank of Rondout v. Byrnes, 84 App. Div. 100, 82 N. Y. S. 497. In an action against a warehouseman for loss of goods by fire, a declaration of his agent made a few days after the fire is inadmissible. Lyman v. Southern R. Co., 132 N. C. 721, 44 S. E. 550. In an action against a telegraph company for failure to deliver a telegram delivered to its agent, his statement that it had been delivered, made on inquiry by the sender is admissible as part of the pending transaction and to rebut a defense of contributory negligence in that the sender had not made further effort to communicate with the addressee. Western Union Tel. Co. v. Barefoot [Tex. Civ. App.] 74 S. W. 560.

74. Burson v. Bogart [Colo. App.] 72 P. 605. To show his authority to sell realty. Smith v. Browne, 132 N. C. 365, 43 S. E. 915. On the question of authority to buy on the principal's credit. Hackett v. Van Frank [Mo. App.] 79 S. W. 1013. Statements to enlarge authority are inadmissible without previous showing that the authority did in fact come from the principal. Bradford Belting Co. v. Gibson [Ohio] 67 N. E. 888. The opinion of an agent as to extent of au-

machine company, whose authority is not in writing, is a competent witness as to what authority he has.[75]. Where evidence was offered in an action against a principal on a contract made by an agent, to show that the principal's officers knew or should have known of the agent's acts, the defendant could prove the agent's actual authority and its ignorance of the contract.[76] As to the admissibility,[77] sufficiency,[78] insufficiency,[79] or effect[80] of certain evidence in particular cases, see the notes.

(§ 2) *B. Apparent authority and unauthorized or wrongful acts of agent; torts.*[81]—Acts of an agent within the apparent scope of his authority are binding on the principal,[82] and limitations of the agent's authority not brought to the

thority is not conclusive on the question whether certain acts operate as a waiver or a defense by the principal. Getchell & M. Lumber & Mfg. Co. v. Peterson [Iowa] 100 N. W. 550.

75. Reeves & Co. v. Bruening [N. D.] 100 N. W. 241.

76. This may include evidence showing that the superintendent gave no information regarding modification of the contract alleged while dealing with his principal. Parr v. Northern Electrical Mfg. Co., 117 Wis. 278, 93 N. W. 1099.

77. A statement of account rendered by agents after discharge is admissible to prove their authority to make a settlement for the principal with a third person. Hill Bros. v. Bank of Seneca, 100 Mo. App. 230, 73 S. W. 307. On the issue whether an agent to buy and sell beer could buy whisky on credit, evidence of a sale of beer by him is inadmissible. Hackett v. Van Frank [Mo. App.] 79 S. W. 1013. A note indorsed by a corporation by its secretary is not admissible in evidence in an action against the corporation without proof of the secretary's authority. Karsch v. Pottier & S. Mfg. & Imp. Co., 82 App. Div. 230, 81 N. Y. S. 782. A cablegram from one who gave a power of attorney to the attorney in fact is admissible to explain the written power where it tended only to define the duties of the attorney and not to change the written power. Muir v. Westcott [Wash.] 75 P. 1107. Where insured contends in an action on a policy that the company's agents waived a requirement therein, evidence by them that they had no other authority than that given in their commissions was admissible. Robinson v. Aetna Fire Ins. Co., 135 Ala. 650, 34 So. 18. The act of showing a letter containing false representations as to realty to be sold to the vendee, written by the vendor to the agent for that purpose, is binding on the vendor and the letter is admissible in evidence on the issue of fraud. Ettlinger v. Weil, 87 N. Y. S. 1049. Where it appears that an agent has a written commission, a blank commission, identified by the agent as "like" the commission held by her, is incompetent evidence on the question of her authority. Getchell & M. L. & Mfg. Co. v. Peterson [Iowa] 100 N. W. 550.

78. Authority of son signing father's name to guaranty. Peterson v. Wolf, 1 Neb. Unoff. 242, 95 N. W. 332. Authority of agent to request a bid by a third person at an execution sale for his principal. Cassidy v. Taylor Brew. & Malt. Co., 79 App. Div. 242, 79 N. Y. S. 595. To show not only apparent but actual authority to receive insurance premiums. Globe & R. Fire Ins. Co. v. Robbins & Myers Co., 86 N. Y. S. 493. Authority to sell grain on which a seed lien was held by the principal and to release the lien. Winter v. Atlantic Elevator Co., 88 Minn. 196, 92 N. W. 955. Sufficient to show power to waive principal's right to a mechanic's lien. Day & F. Lumber Co. v. Bixby [Neb.] 93 N. W. 688. Sufficiency to carry to jury the question of authority of agent to purchase on credit. Hackett v. Van Frank [Mo. App.] 79 S. W. 1013. Sufficient to show authority of corporate president to authorize delivery of a corporate deed which had been placed in escrow, though no express authority appeared in the minutes of the company. Ruble Combination Gold Min. Co. v. Princess Alice Gold Min. Co., 31 Colo. 158, 71 P. 1121. Sufficient to show that a brother of one injured in a railroad collision had "full charge" of his claim and was not limited merely to a settlement with the company. Tabet v. Powell [Tex. Civ. App.] 78 S. W. 997.

79. Evidence did not show authority of agent to contract to furnish water for irrigation. Anderson v. Adams, 43 Or. 621, 74 P. 215. Evidence insufficient to show authority of agent sent to get mortgaged goods, to settle or compromise mortgage debt. First Nat. Bank v. Wright [Mo. App.] 78 S. W. 686. Insufficient to show that machine shop superintendent had authority to bind the owner by waiver of limitation on amount of contract liability. Parr v. Northern Electrical Mfg. Co., 117 Wis. 278, 93 N. W. 1099.

80. The fact that one is a treasurer of a corporation does not give him authority to bind its successor to pay a debt. Rider & Driver Pub. Co. v. Rough Rider Horseshoe Co., 84 App. Div. 283, 82 N. Y. S. 765. That a letter from a bank was given another by its authorized agent is prima facie evidence that the bank executed it. First Nat. Bank v. Wright [Mo. App.] 78 S. W. 686. A letter to a real estate agent indicating receipt of the agent's letter regarding a prospective sale and asking further information does not show the agent's authority to sell. Smith v. Browne, 132 N. C. 365, 43 S. E. 915. There was a conclusive presumption that corporate officers had authority to execute a deed for the corporation, where the act was not repudiated until long after benefits received. West Seattle Land & Imp. Co. v. Novelty Mill Co., 31 Wash. 435, 72 P. 69. That experts came to repair machines in response to application to plaintiff's agent is prima facie evidence of authority from the principal. McCormick Harvesting Mach. Co. v. Lambert, 120 Iowa, 181, 94 N. W. 497.

81. See 1 Curr. L. 49.

82. The public is not bound to inquire into the agent's special powers in absence of

knowledge of third persons do not affect them,[83] though binding as between principal and agent.[84] The rule extends to a subagent, properly employed, though paid by the agent.[85] But if such limitations are known to the third party, the principal is not bound beyond the authority actually conferred,[86] and persons dealing with agents of limited powers must generally inquire as to the extent

facts putting it on inquiry. Indian River State Bank v. Hartford Fire Ins. Co. [Fla.] 35 So. 228. Waiver of a crop lien within the apparent authority of the landlord's agent will bind the latter, though without consideration. Wimp v. Early [Mo. App.] 78 S. W. 343. The master of a vessel was justified in relying on representations of a dock owner's agent as to the berth at a wharf, though his vessel was injured on a rock by reason thereof, where the owner had no other representative on the dock and the statements of the agent were within his apparent authority. Garfield & Proctor Coal Co. v. Rockland-Rockport Lime Co., 184 Mass. 60, 67 N. E. 863. A contract for shipment of freight made by a traveling freight agent with general authority to solicit freight business and special authority to contract for shipment on special conditions as to movement of trains, without disclosing the limitations on his authority will bind the carrier as within the apparent authority of the agent. Baker v. Chicago G. W. R. Co. [Minn.] 97 N. W. 650. A judgment creditor is bound by payment to his agent if the agent had actual or apparent authority to receive it. Osborne & Co. v. Gatewood [Tex. Civ. App.] 74 S. W. 72. Attorney having been given authority to revoke an offer, it was immaterial whether that authority was given directly by the principal or by another for him. Ratterman v. Campbell [Ky.] 80 S. W. 1155.

83. Fidelity Mut. F. Ins. Co. v. Lowe [Neb.] 93 N. W. 749; Day & Frees Lumber Co. v. Bixby [Neb.] 93 N. W. 588; Getchell & M. Lumber & Mfg Co. v. Peterson [Iowa] 100 N. W. 550; Dreyfus v. Goss, 67 Kan. 57, 72 P. 537; Chaffe v. Barataria Canning Co. [La.] 35 So. 943. Apparent authority of trainmaster to issue an order to conductor of freight train to carry a physician where neither conductor nor physician knew or had reasonable cause to believe that such order was issued without authority of the superintendent. Dysart v. Missouri, K. & T. R. Co. [C. C. A.] 122 F. 228. Declarations by the principal to his agent, not communicated to a third party, are not binding on such third party. Gough v. Loomis [Iowa] 99 N. W. 295. One dealing with an officer of a corporation is not bound to know the limits of the officer's authority as to a matter where the corporation has power to act. Groeltz v. Armstrong [Iowa] 99 N. W. 123. Where a bookkeeper had authority to indorse certain checks in blank payable by a bank and coming monthly to his employer, in order that they might be deposited to the latter's credit, a bank paying such checks without knowledge of the limitation is not liable for the amount of a check negotiated to others by the bookkeeper after indorsing it in blank, the fact that it contained the additional indorsements of such third persons not amounting to a fact putting the bank on inquiry. Wedge Mines Co. v. Denver Nat. Bank [Colo. App.] 73 P. 873. Where a tenant had no notice that contractors had exceeded their authority in making improvements without the tenant's consent, and their acts were within their apparent authority, the landlord was liable. Wusthoff v. Schwartz, 32 Wash. 337, 73 P. 407. That an agent acted contrary to his instructions in agreeing that goods proving unsatisfactory may be returned for credit is immaterial where he had apparent authority to make the agreement. Eastern Mfg. Co. v. Brenk [Tex. Civ. App.] 73 S. W. 538. By-laws of a corporation limiting the authority of its officers are not admissible as against one dealing with them within their apparent authority without knowledge of such limitations. Rosenbaum v. Gilliam, 101 Mo. App. 126, 74 S. W. 507. Dealings with a corporate officer within the scope of his apparent authority will bind the corporation as to matters really without his authority where the third person has no knowledge of the limitations on his authority. Rosenbaum v. Gilliam, 101 Mo. App. 126, 74 S. W. 507. Evidence of instructions to an agent unknown to a third person is not admissible in an action against the latter by the principal to recover for sales alleged to have been made by the agent without authority. Continental Tobacco Co. v. Campbell, 25 Ky. L. R. 569, 76 S. W. 125. A general manager of a corporate business has authority to employ labor. Forked Deer Pants Co. v. Shipley, 25 Ky. L. R. 2299, 80 S. W. 475. Third persons cannot be affected by a private understanding between principal and agent, unknown to them. Bay City Irr. Co. v. Sweeney [Tex. Civ. App.] 81 S. W. 545. A provision in a contract restricting the powers of local agents, and salesmen was not notice of a limitation of the power of a general agent and collector. Kenney Co. v. Anderson [Ky.] 81 S. W. 663. Authority in writing to a special agent, without stating terms, to sell personalty to a particular person, gives authority to fix the price so that the purchaser is not bound by secret instructions. Bass Dry Goods Co. v. Granite City Mfg. Co., 119 Ga. 124, 45 S. E. 980.

84. Chaffe v. Barataria Canning Co. [La.] 35 So. 943.

85. Insurance canvasser employed by agent. Otte v. Hartford Life Ins. Co., 88 Minn. 423, 93 N. W. 608.

86. Forked Deer Pants Co. v. Shipley, 25 Ky. L. R. 2299, 80 S. W. 476. One dealing with an agent of limited powers is bound by knowledge of such limitations. David Bradley & Co. v. Basta [Neb.] 98 N. W. 597. A party making a contract with an agent and knowing that the agent had no authority to enter into it cannot hold the principal thereon. Seven Hills Chautauqua Co. v. Chase Bros. Co. [Ky.] 81 S. W. 238. Where a third person signs a written contract which expressly forbids the agent from altering its terms he cannot urge, as a defense to an action for the price of goods, an alteration written on the back of the contract by the agent. Flower City Plant Food Co. v. Roberts, 81 App. Div. 249, 80 N. Y. S. 1050.

of their authority.[87] Persons dealing with agents are warranted in deducing the scope of the agent's apparent authority from the business he is permitted to conduct,[88] or the manner in which he is permitted to conduct it,[89] or from the nature of the agency.[90] The possession of the evidences of indebtedness may invest one with apparent authority to receive payment.[91] Possession of property may[92] or may not[93] confer apparent authority according to circumstances.

Evidence and questions of fact.[94]—Apparent authority may be shown by showing a custom,[95] or other similar acts,[96] but proof of general reputation is inadmissible.[97] Apparent authority is usually a question of fact,[98] if there is any

87. Brittain v. Westhall [N. C.] 47 S. E. 615. One dealing with an agent is bound at his peril to inquire as to the agent's authority. Sexsmith v. Siegel-Cooper Co., 88 N. Y. S. 925. Those dealing with a bank cashier who obligated the bank as surety on a replevin undertaking are required to ascertain his authority to so act, it not being within his apparent authority. Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank [Neb.] 95 N. W. 819. A special power must be strictly pursued so that one dealing with such special agent risks any results from unauthorized acts. MacDonald v. O'Neil, 21 Pa. Super. Ct. 364.

88. Wimp v. Early [Mo. App.] 78 S. W. 343. Apparent authority to indorse checks. National Park Bank v. American Exch. Nat. Bank, 40 Misc. 672, 83 N. Y. S. 249. Ostensible or apparent authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency. Blanke Tea & Coffee Co. v. Trade Exhibit Co. [Neb.] 98 N. W. 714. Recognition by the principal of acts of the agent similar to those in controversy. Held, that agent had apparent authority to receive payment on a judgment. Osborne & Co. v. Gatewood [Tex. Civ. App.] 74 S. W. 72. That an undisclosed principal of a loan agent, who was directed to make the loan, taking notes, coupons and mortgage in his own name, allowed the agent to collect interest, tends strongly to show his authority to receive and receipt for payment of the note and to satisfy the mortgage. Cheshire Provident Inst. v. Vandergrift, 1 Neb. Unoff. 339, 95 N. W. 615.

89. An agent placed in entire charge of a lumber yard had power to endorse checks given in payment for lumber. Morris v. Hofferberth, 81 App. Div. 512, 81 N. Y. S. 403. A sales agent carrying samples has apparent authority to warrant that goods sold will conform to the samples (Dreyfus v. Goss, 67 Kan. 57, 72 P. 537); but not to collect payment for goods (Id.). Evidence as to whether the scope of the agency was sufficient to give apparent authority to waive a crop lien for the principal should be admitted where the powers of the agent did not necessarily go beyond leasing of the land. Wimp v. Early [Mo. App.] 78 S. W. 343.

90. An agent of a purchaser of land has apparent authority to state the identity and character of the purchaser. Thompson v. Barry, 184 Mass. 429, 68 N. E. 674. The cashier of a banking corporation has no apparent authority to obligate the bank as surety on a replevin undertaking. Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank [Neb.] 95 N. W. 819. An agent with authority to sell in a certain locality has presumed authority to sell according to local customs, as to persons ignorant of limitations on his authority. Mallory Commission Co. v. Elwood, 120 Iowa, 632, 95 N. W. 176. A sales agent has apparent authority to stipulate that if the goods are unsatisfactory they may be returned for credit, and it is immaterial whether the seller knows of such agreement. Eastern Mfg. Co. v. Brenk [Tex. Civ. App.] 73 S. W. 538. If a conditional sale of goods to a retailer is construed as a contract of agency only, the retailer has apparent authority to borrow money to pay freight and give a mortgage therefor as a valid lien against the property. Rankin v. McFarlane Carriage Co., 25 Ky. L. R. 258, 75 S. W. 221.

91. Bond and mortgage in possession of mortgagee's attorney. O'Loughlin v. Billy, 88 N. Y. S. 567. The execution and delivery of a satisfaction to an attorney is strong, and in the absence of satisfactory explanation, conclusive proof of actual authority of the attorney to receive payment. O'Loughlin v. Billy, 88 N. Y. S. 567. The debtor must secure surrender of his obligation or show agent's authority to receive payment without it. City Nat. Bank v. Goodloe-McClelland Commission Co., 93 Mo. App. 123. That an alleged agent for collection of a note did not have possession of the note is not conclusive evidence that he had no apparent authority to collect. Union Trust Co. v. McKeon [Conn.] 57 A. 109.

92. That machinery was shipped to the purchaser after making an oral contract with an agent, a prior written contract having been rejected by the seller, sufficiently shows apparent authority of the agent to make the contract. Dowagiac Mfg. Co. v. Watson, 90 Minn. 100, 95 N. W. 884.

93. The bare fact that the owner of property intrusts its custody to another does not give that other any apparent authority to sell to a third party and pass title. Ball-Barnhart-Putman Co. v. Lane [Mich.] 97 N. W. 727.

94. See 1 Curr. L. 51.

95. When it was the custom for agents to take notes payable to themselves, taking such notes was within the apparent authority of one selling pianos. Baldwin & Co. v. Tucker, 27 Ky. L. R. 222, 75 S. W. 196.

96. On the issue of authority of an agent to make a particular contract, evidence that he made other similar contracts which the principal accepted and performed, and that the latter referred to him as having authority to make like contracts, is admissible. Kent v. Addicks [C. C. A.] 126 F. 112.

97. Testimony that one was known generally in the community as the business and

evidence of agency.[99] Knowledge of the agent's authority by one dealing with him is usually a question for the jury.[1]

Unauthorized and tortious acts.[2]—Acts of an agent without the scope of his authority will not bind his principal unless ratified by him;[3] especially wrongful acts done deliberately to expose the principal to liability,[4] or for the agent's own benefit,[5] and where the third person participates in the fraud,[6] or the act

financial agent of the payee of a note is irrelevant on the issue of his authority to collect the note. Union Trust Co. v. McKeon [Conn.] 57 A. 109.

98. Union Trust Co. v. McKeon [Conn.] 57 A. 109. Identity of agent and his authority. Williams v. Brandt, 86 N. Y. S. 389. Whether one receiving payments on a note was the apparent agent of the payee. Union Trust Co. v. McKeon [Conn.] 57 A. 109. The question whether an examining physician for a railroad relief department had authority to employ another physician to treat an injured employe is a question for the jury in an action by the employe for negligent treatment. Haggerty v. St. Louis, K. & N. W. R. Co., 100 Mo. App. 424, 74 S. W. 456.

99. The issue of ostensible agency cannot be submitted to the jury without evidence of agency. Wendel v. Mallory Commission Co. [Iowa] 98 N. W. 612.

1. Held to be for jury whether transaction whereby a trader took pianos on credit from an agent was with knowledge and fraudulent. Kops Bros. Co. v. Smith & Co. [Mich.] 100 N. W. 169.

2. See 1 Curr. L. 51.

3. Heath v. New Bedford Safe Deposit & Trust Co., 184 Mass. 481, 69 N. E. 215. Alteration of a contract of sale made by a traveling salesman before transmission to the principal is the act of a stranger which will not invalidate it as between the parties. Equitable Mfg. Co. v. Allen [Vt.] 56 A. 87. A clerk who makes contracts for his employer as an agent without authority with one having knowledge of his employment cannot bind his principal by acceptance of the contract for his principal in the course of his clerical duties. Bartlett v. Bartlett & Son Co., 116 Wis. 450, 93 N. W. 473. A promise of an agent to repay rent where he had rented the premises for an illegal purpose without authority will not bind the owner. Stover v. Flower, 120 Iowa, 514, 94 N. W. 1100. An agreement for settlement made by an agent for collection of a claim held by estate after having prosecuted it to judgment in a larger amount was without consideration as to the amount remitted. Upton v. Dennis [Mich.] 94 N. W. 728. In an action by the principal to recover goods attached in hands of the agent owing to false representations of the agent that he represented another principal to whom the goods belonged, the acts and representations of the agent cannot be shown against the real principal, without a showing that he knew of or acquiesced in such false representations. Spies v. Stein [Neb.] 97 N. W. 752. The unauthorized act of a vendor's agent in renting land sold is no defense to specific performance by the vendor. Hawes v. Swanzey [Iowa] 98 N. W. 586. Where a deed executed in blank is left with an agent to be delivered when title should be accepted and money deposited in bank the principal is not bound by the act of the agent filling in and delivering the deed before acceptance of title and deposit of price, the grantee knowing that deed was executed in blank. Lund v. Thackery [S. D.] 99 N. W. 856. The promise of a traveling agent to pay commissions on sales to third persons assisting therein will not bind his corporate principal. Jones v. Keeler, 40 Misc. 221, 81 N. Y. S. 648. Where an agent to rent land contracted for its sale without authority, and, after the purchaser entered and made improvements without the owner's knowledge, the latter repudiated the contract, he was not liable for the improvements. Topliff v. Shadwell [Kan.] 74 P. 1120. Payment of part of purchase money for land to an agent not authorized to receive it and taking possession after notice that the owner had sold to another will not effect a sale. Chandler v. Franklin, 65 S. C. 544, 44 S. E. 70. Taking of clothing by a fire insurance agent in part payment of a premium was a fraud on the company and it was not bound. Folb v. Firemen's Ins. Co., 133 N. C. 179, 45 S. E. 547. But a deed executed by one purporting to be attorney in fact but without authority constitutes color of title. Street v. Collier, 118 Ga. 470, 45 S. E. 294. An unauthorized option given on realty will not bind the owner, without ratification. Tibbs v. Zirkle [W. Va.] 46 S. E. 701. Delivery of policy to insurance agent for cancellation under unauthorized terms is cancellation without such terms. Miller v. Fireman's Ins. Co. [W. Va.] 46 S. E. 181. A principal may recover from the buyer property sold by an agent who without authority received payment by cancellation of his own debt owed to the buyer. Low v. Moore, 31 Tex. Civ. App. 460, 72 S. W. 421. A person, totally unauthorized to act as agent for another, cannot bind him by a purchase of goods without his knowledge. Waters-Pierce Oil Co. v. Jackson Junior Zinc Co., 98 Mo. App. 324, 73 S. W. 272. Where timber on land was sold through an agent, the principal was not liable for the agent's act in going on the land and cutting timber included in the contract of sale. Ayer & L. Tie Co. v. Davenport [Ky.] 82 S. W. 177. A principal is not bound by a guarantee of the agent, beyond the scope of his authority. Mahler-Wolf Produce Co. v. Meyers, 4 Ohio C. C. (N. S.) 264.

4. As a sale of liquor by agent contrary to law. Cullinan v. Burkhard, 86 N. Y. S. 1003.

5. An illegal unauthorized act of an agent solely for his own benefit without knowledge of the principal who receives no benefit therefrom will not bind the latter. Commonwealth Title Ins. & Trust Co. v. Dakko, 89 Minn. 386, 94 N. W. 1088. Where the treasurer of a corporation, who was also president of a bank, executed notes of the corporation to obtain additional credit at the bank and conceal defalcations as treasurer, without authority of the corporation and without any receipt of benefit by it, the bank could not charge such notes against it in a settlement. Van Buren County Sav. Bank v.

is for an illegal purpose.[7] But fraud, misrepresentation or concealment by the agent may be imputed to the principal,[8] so as to affect his rights[9] or liability,[10] and the principal may be held for his agent's default.[11] The principal is liable for an agent's fraud in which he participates.[12] A commercial agency is responsible in libel for acts of its agents in the course of its business.[13] Negligence of a compulsory pilot cannot be imputed to a ship owner, nor a charterer, where the pilot is his agent.[14]

(§ 2) *C. Particular kinds of agencies.*[15]—The powers of a general agent are to be determined by the scope of his agency,[16] while a special agent has only such power as is expressly conferred,[17] or necessarily implied from authority expressly given.[18] The general principles are further illustrated by the cases grouped in the notes.[19]

Stirling Woolen Mills Co. [Iowa] 94 N. W. 945.

6. Fraudulent acts of a corporate president in executing a mortgage on corporate property, in which the mortgagee participated are not binding on the corporation. Lamb v. McIntire, 183 Mass. 367, 67 N. E. 320.

7. Payment of rent to an agent of the owner of premises for an illegal purpose gives no right of recovery against the owner for failure to make a lease. Stover v. Flower, 120 Iowa, 514, 94 N. W. 1100.

8. Fraud of an insurance agent in writing false answers instead of the true ones given by an applicant for insurance will be imputed to the company and it will be estopped by his acts. Fidelity Mut. F. Ins. Co. v. Lowe [Neb.] 93 N. W. 749; Otte v. Hartford Life Ins. Co., 88 Minn. 423, 93 N. W. 608. One inducing another to purchase from his agent is liable for the agent's fraud, though not authorizing it. Phipps v. Mallory Commission Co. [Mo. App.] 78 S. W. 1097.

9. Hyatt v. Zion [Va.] 48 S. E. 1.

10. Vendor could rescind when the agent of the purchaser represented the latter to be a man of means, with small family, when in fact it was a Catholic corporation. Thompson v. Barry, 184 Mass. 429, 68 N. E. 674.

11. Where a mortgagor delivered a bond and mortgage and funds to a broker to pay off a prior mortgage, he was liable to the new holder of the mortgage for the entire loan on appropriation by the broker to his own use. Henken v. Schwicker, 174 N. Y. 298, 66 N. E. 971.

12. Evidence showed participation of principals in frauds by agent in making a sale of patents. Felt v. Bell, 205 Ill. 213, 68 N. E. 794.

13. Minter v. Bradstreet Co., 174 Mo. 444, 73 S. W. 668.

14. Crisp v. United States & A. S. S. Co., 124 F. 748.

15. See 1 Curr. L. 52.

16. Payment to a local agent of a foreign loan association is payment to it. Hoskins v. Rochester Sav. & Loan Ass'n [Mich.] 95 N. W. 566. Where a general agent was acting within the scope of his authority, his consent to execution of a bond for his principal by a subordinate agent must be deemed to have been made with the principal's knowledge and consent. Pacific Nat. Bank v. Aetna Indemnity Co., 33 Wash. 428, 74 P. 590. Authority by power of attorney to take charge of bank property and do all things necessary to the business gives power to dispose of bank furniture for benefit of creditors whether so specified or not. Muir v. Westcott [Wash.] 75 P. 1107. An agent having general supervision of a farm and under directions to drain off surface waters can render his principal liable by cutting a drain through a highway so that crops of another land owner were damaged. Ogle v. Hudson, 30 Ind. App. 539, 66 N. E. 702. An agent employed to manage a department of his principal's business beginning on a certain date had authority, in the absence of contrary facts, to employ assistants before that date. Wanamaker v. Megraw, 87 N. Y. S. 331. The "general manager" of a retail drug store may bind his principal by renting a store telephone. His authority was not affected by a contract with the owner making the manager liable for merchandise after a certain date and giving the owner the right to cancel the contract and discharge the manager. New York Telephone Co. v. Barnes, 85 N. Y. S. 327. The signature of an employe of an express company to a receipt of freight filled out and tendered by the shipper, on a blank printed by the express company, is binding on both the shipper and company. Bernstein v. Weir, 40 Misc. 635, 83 N. Y. S. 48. The solicitor and collector of a gas company has actual, if not ostensible, authority to bind the company by a contract to furnish gas at a certain price [Civ. Code, §§ 2316, 2317, 2330]. Gallagher v. Equitable Gas Light Co., 141 Cal. 699, 75 P. 329. A superintendent of a department of a manufacturing company with authority to employ and discharge workmen has no authority to bind the company to pay for hospital treatment of injured employes. King v. Forbes Lithograph Mfg. Co., 183 Mass. 301, 67 N. E. 330. A creditman, acting as general manager, was a general agent of the firm with authority to enter payment on margin of a mortgage, and rendered the firm liable for his failure to do so [Code, § 1065]. Long Bros. v. Jennings, 137 Ala. 190, 33 So. 857.

17. Authority to buy for cash will not allow an agent to give credit. Chapman v. Americus Oil Co., 117 Ga. 881, 45 S. E. 268. An attorney for collection of a claim cannot compromise it without special authority. Danziger v. Pittsfield Shoe Co., 204 Ill. 145, 68 N. E. 534. An agent to sell land for a sum certain cannot agree to deferred payments. Edwards v. Davidson [Tex. Civ. App.] 79 S. W. 48.

18. Authority of a special agent includes all necessary and usual means for effectual execution. Bass Dry Goods Co. v. Granite City Mfg. Co., 119 Ga. 124, 45 S. E. 980. Au-

(§ 2) *D. Ratification by principal.*[20]—One may ratify a previously unauthorized act, done in his behalf, which he himself might have and may still

thority to employ an agent necessarily implies authority to agree with him as to compensation. Opinion of the Justices [N. H.] 54 A. 950. A brother given full authority to settle a claim for personal injuries against a railroad had authority to employ an attorney to collect the claim for a contingent fee of half the amount of recovery, assigning half the cause of action as security. Tabet v. Powell [Tex. Civ. App.] 78 S. W. 997. One in charge of goods to tender them to the buyer for inspection had presumptive authority to bind the seller by a refusal to do so in absence of contrary evidence. Pittsburgh Plate Glass Co. v. Kerlin Bros. Co. [C. C. A.] 122 F. 414.

19. Power to sell realty: An agent of a vendor of realty cannot accept other than cash payment of part of the price contrary to the contract. Wilkin v. Voss, 120 Iowa, 600, 94 N. W. 1123. The word "his" in a power of attorney by husband and wife authorizing conveyance of any and all lands which may come into "his" possession by reason of additional homestead entry refers to the husband. Finnegan v. Brown, 90 Minn. 396, 97 N. W. 144. An attorney in fact to sell, convey and mortgage may execute a trust deed of the principal's individual property to secure a debt of a firm of which he is a member. Muth v. Goddard, 28 Mont. 237, 72 P. 621. Instructions by an owner of realty to his agent to sell at a certain price, "it being understood that this year's rents will come to us," will not allow a sale at such price without reservation of rent. Philadelphia Mortg. & Trust Co. v. Hardesty [Kan.] 76 P. 1115. Parol authority to find a purchaser of real estate does not give authority to sell or to receive payment. Smith v. Browne, 132 N. C. 365, 43 S. E. 916. Letter from owner to agent asking further information as to a prospective sale and when deed should be made out, held not to be evidence of authority to sell. Smith v. Browne, 132 N. C. 365, 43 S. E. 916. A written power to sell land does not include the power to give an option unless so expressed. Tibbs v. Zirkle [W. Va.] 46 S. E. 701. A power to sell property does not confer the power to bind the principal by a contract of sale in writing. Giving agent a signed memorandum, with description of land and a price does not confer such power. Donnan v. Adams, 30 Tex. Civ. App. 615, 71 S. W. 580. A power of attorney construed as not conferring the power to sell land. Bean v. Bennett [Tex. Civ. App.] 80 S. W. 662. A sale of land by a donee of a power of attorney for an unauthorized purpose does not pass title. Hunter v. Eastham [Tex. Civ. App.] 81 S. W. 336.

Power to lease: Power to lease any of principal's property wherever situated, includes power to extend a lease. Pittsburg Mfg. Co. v. Fidelity Title & Trust Co., 207 Pa. 223, 56 A. 436. Authority to lease premises and collect rents does not imply authority to accept surrender of a lease. Barkley v. Holt, 84 N. Y. S. 957. A lessor's subagent, with authority to secure prospective tenants and submit their names to the agent, has no implied authority to collect rent for the lessor. McGowan v. Treacy, 84 N. Y. S. 497. The janitor of a flat building authorized by the owner to exhibit the premises, execute leases, give possession, and collect the first month's rent, has authority to make representations as to the fireproof condition of the building so as to bind the owner, and such representations, made in good faith, bound his principal, though in fact false. Matteson v. Rice, 116 Wis. 328, 92 N. W. 1109.

Power to buy or sell personalty: In the absence of authority conferred, or a valid usage, an agent cannot sell on credit. Kops Bros. Co. v. Stephen B. Smith & Co. [Mich.] 100 N. W. 169. An instruction to sell goods for net cash is not violated by an agent who informed a buyer that he might pay on actual delivery. Bristol v. Mente, 79 App. Div. 67, 80 N. Y. S. 52. That a selling agent could not procure an order without taking goods in exchange will not authorize him to sell where he was to sell on cash or credit and collect accounts. Block v. Dundon, 83 App. Div. 539, 81 N. Y. S. 1114. An agent with authority only to purchase, pay for and ship potatoes to his principal, has no authority to sell. Hogue v. Simonson, 87 N. Y. S. 1065. In the absence of custom or proof of authority, an agent cannot warrant the quality of goods sold. Ellner v. Priestley, 39 Misc. 535, 80 N. Y. S. 371. Authority to a corporate manager to buy an engine is not authority to suspend payment and arrange for unlawful interest on the debt. Sanford Cattle Co. v. Williams [Colo. App.] 71 P. 889. Authority to take orders for fish will not necessarily authorize an agent to warrant their keeping qualities. Troy Grocery Co. v. Potter [Ala.] 36 So. 12. An agent selling machinery cannot accept lumber in payment without special authority. J. A. Fay & Eagan Co. v. Causey, 131 N. C. 350, 42 S. E. 827. Where a principal is bound by an authorized express warranty of goods sold, made by an agent, he is not bound by a warranty as to other qualities expressly reciting that it is made on the agent's individual responsibility unless he ratifies it. Holcombe v. Cable Co., 119 Ga. 466, 46 S. E. 671. Authority only to solicit orders subject to principal's approval does not give authority to make a binding contract of sale. Kelley & L. Mill. Co. v. Adams [Ark.] 78 S. W. 49. Authority to sell goods and collect gives no real or apparent authority to open a bank account or borrow money, nor will the agent's checks, signed in his own name, give his principal, who receives them, notice that the agent has opened a bank account in his name. Case v. Hammond Packing Co. [Mo. App.] 79 S. W. 732. That one is an agent to buy and sell beer will not give authority, as incident to the business, to buy whiskey on the principal's credit. Hackett v. Van Frank [Mo. App.] 79 S. W. 1013. One sending orders liable to acceptance or rejection for goods from stock lists without receiving other compensation than a commission on accepted orders is not an agent of the seller to sell goods or guarantee their quality. Illinois Moulding Co. v. Page & L. Mfg. Co., 104 Ill. App. 1.

General sales agents: A sales agent of a machine company has implied authority to waive stipulations in a contract of sale. McCormick Harvesting Mach. Co. v. Machmuller, 1 Neb. Unoff. 80, 95 N. W. 507. Where all negotiations for sale of a machine were conducted by a sales agent, he had authority

lawfully do, or might and may still lawfully delegate to another.[21] Ratification is usually established by implication from the conduct or acts of the party

to bind the principal by a tender of the machine to the buyer on the latter's rescission of the sale. Parsons Band Cutter & Self Feeder Co. v. Mallinger, 122 Iowa, 703, 98 N. W. 580. When the contract of sale so stipulates, the sales agent has no power to materially change the terms of the contract without ratification by the principal. Larson v. Minneapolis Threshing Mach. Co. [Minn.] 99 N. W. 623. Promoting contracts for erection of buildings is within the scope of the authority of a salesman whose sale of machinery depends on the erection of the buildings. D. June & Co. v. Doke [Tex. Civ. App.] 80 S. W. 402.

Authority to receive payments or collect money:. Authority to receive payment does not authorize its receipt before maturity. City Nat. Bank v. Goodloe-McClelland Commission Co., 93 Mo. App. 123. Authority to receive interest does not imply authority to receive principal. Thompson v. Buehler, 1 Neb. Unoff. 590, 95 N. W. 854. A land agent cannot accept part payment by check unless his principal has acquiesced therein. Ormsby v. Graham [Iowa] 98 N. W. 724. Authority to collect rents for a landlord does not imply authority to make rental contracts. Dieckman v. Weirich, 24 Ky. L. R. 2340, 73 S. W. 1119. An agent authorized to take a certain amount as part payment on land cannot accept Mexican money. Edwards v. Davidson [Tex. Civ. App.] 79 S. W. 48. Authority to collect moneys for a principal gives no authority to relinquish rights or recognize adverse claims in property mortgaged to the principal without express direction. Johnson v. Wilson & Co., 137 Ala. 468, 34 So. 392.

Power to make or obtain loans:. Proof of authority to make a loan is not evidence of authority to collect either principal or interest. Evidence held not to show that a broker was the agent of a lender in receiving payments on the loan. Ortmeier v. Ivory, 208 Ill. 577, 70 N. E. 665. That one obtained a loan as agent for the borrower will not raise a presumption of his agency in making payment, though it is evidence to be considered with other appropriate circumstances. Ballard v. Nye, 138 Cal. 588, 72 P. 156.

Powers with reference to commercial paper: Indorsement of a draft payable to two, not partners, cannot be made by one in names of both without extraneous authority. Allen v. Corn Exch. Bank, 87 App. Div. 335, 84 N. Y. S. 1001. Authority to make, draw, sign and issue promissory notes payable at a certain bank, is a power of attorney to make promissory notes. Rosenthal v. Hasberg, 84 N. Y. S. 290. Authority to make restricted indorsements of drafts for the principal will not authorize a general indorsement in blank. Exchange Bank v. Thrower, 118 Ga. 433, 45 S. E. 316. An agent with authority to draw for timber bought and received cannot make the principal liable to the transferee of a draft drawn for timber which had no existence. Gray Tie & Lumber Co. v. Farmers' Bank, 25 Ky. L. R. 1596, 78 S. W. 207.

Corporate and insurance agents: The president and general manager of a corporation may bind it for services of a physician to an employe injured through its negligence. Evans v. Marion Min. Co., 100 Mo. App. 670, 75 S. W. 178. In absence of other evidence, the president and secretary of a corporation are presumed to have had authority to execute a chattel mortgage purporting to be the obligation of the corporation. Burkamp v. Healey, 24 Ky. L. R. 1926, 72 S. W. 759. Manager had authority to make a contract indemnifying one for possible loss on crop of sugar beets. Constantine v. Kalamazoo Beet Sugar Co. [Mich.] 93 N. W. 1088. A corporate officer cannot execute accommodation paper in name of the corporation without special authority. Pelton v. Spider Lake Sawmill & Lumber Co., 117 Wis. 569, 94 N. W. 293. The treasurer of a corporation cannot bind it to pay a debt merely by reason of his official position. Rider & Driver Pub. Co. v. Rough Rider Horseshoe Co., 84 App. Div. 283, 82 N. Y. S. 765. A general power as managing agent of a corporation does not confer the power to mortgage corporate property. First Nat. Bank v. Kirkley, 43 Fla. 376, 32 So. 881. By-law held to give authority to corporate president to determine when bankruptcy proceedings should be begun against its debtor. In re Winston, 122 F. 187. The vice president of a corporation, to whom the secretary, who had been delegated power to sell property of the corporation, had delegated his powers by power of attorney, had no authority to disaffirm the secretary's previous sale of property for the corporation and commence suit for its recovery. Alaska & C. Commercial Co. v. Solner [C. C. A.] 123 F. 855. A corporate secretary has no authority to accept anything but money in satisfaction of a judgment held by the corporation. Good Hope Bldg. Ass'n v. Amweg, 22 Pa. Super. Ct. 145. A corporation president cannot bind the corporation by a note shown to have been made for his own personal benefit. Wheeler v. Mineral Farm Consol. Min. Co., 31 Colo. 110, 71 P. 1101. The general manager of a live stock corporation cannot give corporate notes without special authority. Sanford Cattle Co. v. Williams [Colo. App.] 71 P. 889. An **insurance** agent with full power to make contracts of insurance may make a valid oral contract. King v. Phoenix Ins. Co., 101 Mo. App. 163, 76 S. W. 55. An insurance agent directed to take up a policy for cancellation cannot do so on condition that another policy should be gotten for the holder in another company. Miller v. Firemen's Ins. Co. [W. Va.] 46 S. E. 181. Authority to an insurance agent to deny liability on a policy does not imply authority to adjust the loss or to accept proofs of loss. Indian River State Bank v. Hartford Fire Ins. Co. [Fla.] 35 So. 228. A local insurance agent with authority to make contracts of insurance, collect premiums, and sign policies, may waive proofs of loss by parol or in writing or by acts amounting to estoppel. Indian River State Bank v. Hartford Fire Ins. Co. [Fla.] 35 So. 228.

Miscellaneous special agencies: Authority to deposit the principal's money in a bank does not imply authority to check it out. Heath v. New Bedford Safe Deposit & Trust Co., 184 Mass. 481, 69 N. E. 215. Bank cashier held under circumstances to have no authority to accept check. Van Buren County Sav. Bank v. Stirling Woolen Mills Co. [Iowa]

in whose behalf the agency is assumed, inconsistent with an intention not to ratify.[22] It may be by mere acquiescence or failure to act,[23] for a considerable length of time,[24] or by positive acts, such as the adoption,[25] acceptance,[26] or

94 N. W. 945. One sent by a seller of goods to repair defects therein has no authority to vary conditions of the sale as to acceptance. Massilon Engine & Thresher Co. v. Schirmer [Iowa] 93 N. W. 599. An authorization and request by mortgagees to haul mortgaged goods to a warehouse will not give authority to ship and take a shipping receipt for the goods, nor are the mortgagees bound by notice to one so authorized. Zorn v. Livesley [Or.] 75 P. 1057. Authority to contract for a supply of steam from a boiler does not imply authority to buy and pay for coal to heat the boiler. Union Hosiery Co. v. Hodgson [N. H.] 57 A. 384. An inspector appointed by a purchaser of lumber to tally and inspect it has no authority in his special agency to waive inspection or delegate his authority to another. Campbellsville Lumber Co. v. E. R. Spotswood & Son, 24 Ky. L. R. 2430, 74 S. W. 235. Letters from principal construed as not giving agent authority to agree to furnish water for irrigation purposes. Anderson v. Adams, 43 Or. 621, 74 P. 215. A letter of attorney authorizing execution of bonds for "performance of contracts other than insurance policies" authorizes execution of a bond for performance of a contract to repay money advanced to a building contractor. Pacific Nat. Bank v. Aetna Indemnity Co., 33 Wash. 428, 74 P. 590.

20. See 1 Curr. L. 56.

21. Commercial creditors held to have ratified the contract made by a purchaser with the debtor requiring him to deposit money sufficient to meet their claims. Alexander v. Wade [Mo. App.] 80 S. W. 19. If the unauthorized act involved a crime, or was a transaction opposed to public policy, it cannot be ratified. Daughters of American Revolution v. Schenley, 204 Pa. 572, 54 A. 366. An executrix may ratify the contract of one assuming to act as her agent for commissions to another in the purchase of lands. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227.

22. Mortgagee held to have ratified agency to receive payments on mortgage debt. Ballard v. Nye, 138 Cal. 588, 72 P. 156. The act of the lessor in accepting a tenant was not inconsistent with an intention not to ratify the act of a subagent, securing the tenant, in retaining a deposit made on the rent. McGowan v. Treacy, 84 N. Y. S. 497.

23. Directors of a corporation by failing to take any action regarding a sale of its property by the secretary, who had authority to sell, must be presumed to have ratified his acts. Alaska & C. Commercial Co. v. Solner [C. C. A.] 123 F. 855. Failure of a principal, on learning the facts of a fraudulent sale by his agent, to return the proceeds to the purchaser, amounts to a ratification of the fraudulent act. Evidence showed principal had knowledge that agent received proceeds in course of the agency. Russ v. Hansen, 119 Iowa, 375, 93 N. W. 502. A vendor of realty, who consents to an extension of time for payment with knowledge that his co-vendor has received a part payment, thereby ratifies the latter's act in endorsing and cashing drafts for both for the purchase price, though he did not know the manner of payment. Allen v. Corn Exch. Bank, 87 App. Div. 335, 84 N. Y. S. 1001. Evidence held sufficient to show a knowledge of and acquiescence in payments to another, and ratification of the act of receiving payment. Platt v. Schmitt, 117 Wis. 489, 94 N. W. 345.

24. Silence of stockholders for two years, with knowledge of an illegal contract made by directors, is not a ratification. The time is insufficient regardless of the application of the general rule of ratification to such acts of corporate agents. Oliver v. Rahway Ice Co., 64 N. J. Eq. 596, 54 A. 460. Silence for a long time, during which goods bought by an agent were seized in his principal's hands for the latter's debts, amounts to ratification of the agent's unauthorized purchase. Owens Pottery Co. v. Turnbull Co., 75 Conn. 628, 54 A. 1122. Where an agreement as to settlement of a debt due a bank, made by the cashier with the debtor, was not fulfilled by the bank, acquiescence of the debtor in another arrangement effected by the cashier for two years was a ratification of the latter's acts. Pease v. Francis [R. I.] 55 A. 686. Acquiescence of an infant in a transaction made for him, with full knowledge of facts for three years after coming of age was a ratification. Manson v. Simplot, 119 Iowa, 94, 93 N. W. 75. Retention of obligations for a loan for more than two years, with knowledge of facts and without objection, amounts to ratification of an agent's acts in giving his own obligations instead of those of the borrower and receiving payment thereon. Day v. Miller [Neb.] 95 N. W. 359. Acquiescence of an undisclosed principal for three years with knowledge of an act of his agent tends to show full authority to act. Cheshire Provident Inst. v. Vandergrift [Neb.] 95 N. W. 615. Silence of a principal for over two years after his agent orally rescinded a contract of purchase, held an acquiescence in the agent's act. Henderson v. Beatty [Iowa] 99 N. W. 716. Where one of two brothers, copayees on drafts, received proceeds of the sale on indorsements of such drafts made by his brother in names of both and did not question the authority to indorse for him until several years after payment and after the brother's death, he will be held to have granted original authority to make the indorsement. Allen v. Corn Exch. Bank, 87 App. Div. 335, 84 N. Y. S. 1001.

25. Plaintiff secured a purchaser, on request of an agent, and the principal carried out the contract made with the purchaser so secured. Hunt v. Jones [Mo. App.] 79 S. W. 486. Ratification by directors of corporation of indorsement of note by president. Beacon Trust Co. v. Souther, 183 Mass. 413, 67 N. E. 345. Employment of a broker by a managing director of a corporation to sell corporate realty is ratified by a vote of directors ratifying the sale. Henderson v. Raymond Syndicate, 183 Mass. 443, 67 N. E. 427.

26. Agent's act in taking old machine in part payment for new, ratified by accepting

execution of a contract made through the alleged agent,[27] or the acceptance of benefits resulting from the unauthorized act.[28] The presumption of ratification may be negatived by express declarations of the principal.[29] There may be a ratification regardless of former limitations of the agent's authority.[30] The principal must have full knowledge of all material facts at the time of ratification,[31] but if the situation is such as to put him upon inquiry, he will be pre-

the order for the new machine, with knowledge. Schull v. New Birdsall Co. [S. D.] 95 N. W. 276.

27. Execution by the principal of a contract made by the agent in excess of his authority amounts to ratification. Short v. Stephens, 92 Mo. App. 151. Subsequent execution by a wife of a contract for exchange of realty with full knowledge of arrangements by her husband with a broker for the exchange was a ratification of the broker's acts in securing the contract of exchange. Charles v. Cook, 88 App. Div. 81, 84 N. Y. S. 867.

28. Where a lease for more than a year is made by an agent without authority in writing as required by statute, receipt of rents by the owner with knowledge of the facts will give original validity to the transaction. Kriz v. Peege, 119 Wis. 105, 95 N. W. 108. Acceptance of results with knowledge. First Nat. Bank v. Bower [Neb.] 98 N. W. 834. Principal bound by contract for labor made by agent, after receiving benefits thereunder. Budd v. Howard Thomas Co., 40 Misc. 52, 81 N. Y. S. 152. Acceptance of bicycle received for repairs by agent, and making repairs under the contract made by the agent will render the principal liable for its breach. Rollins v. Sidney B. Bowman Cycle Co., 84 App. Div. 287, 82 N. Y. S. 781. Acceptance of payments on drafts will prevent one of two payees from questioning the authority of the other to indorse them for payment. Allen v. Corn Exch. Bank, 87 App. Div. 335, 84 N. Y. S. 1001. Though a collection agency had no authority to compromise a claim in its hands, the act of the creditor five years later, on learning of the settlement, in receiving the proceeds of the settlement from the agency, ratified the settlement. Cobb v. Edson, 84 N. Y. S. 916. Acceptance of benefits by a partnership of acts of one who purports to act as its agent in drawing a note is a ratification. Rosenthal v. Hasberg, 84 N. Y. S. 290. Acceptance of benefits of a transaction brought about by an attorney and taking part in the final negotiations will bind a principal for the attorney's fees, though he was employed by her agent. Sultan v. Bailey, 85 N. Y. S. 332. Acceptance of benefits under settlement by attorney. Collins v. Fidelity Trust Co., 33 Wash. 136, 73 P. 1121. Where a corporation received and retained the proceeds of all checks drawn and deposited by its agent with knowledge of the circumstances, it was liable therefor, though he may have exceeded his authority. Stotts City Bank v. T. A. Miller Lumber Co., 102 Mo. App. 75, 74 S. W. 472.

29. Where an agent exceeded his authority in warranting goods sold, declarations of the seller's officers on receiving a memorandum of the contract that they would not accept the order and ratify the warranty are admissible on the question of ratification in the buyer's action for breach. Reid v. Alaska Packing Co., 43 Or. 429, 73 P. 337. Where a collector of a brewing company was warned that if he procured a bond for a customer it would be at his own expense, the subsequent action of the receivers of the company accepting the customer and availing themselves of the collector's act was held not a ratification. Offerman v. Reich, 88 N. Y. S. 936.

30. Bradford v. Smith [Iowa] 98 N. W. 377.

31. Ludden & B. Southern Music House v. McDonald, 117 Ga. 60, 43 S. E. 425; First Nat. Bank v. Bower [Neb.] 98 N. W. 834; Kriz v. Peege, 119 Wis. 105, 95 N. W. 108; Danziger v. Pittsfield Shoe Co., 204 Ill. 145, 68 N. E. 534; Collins v. Fidelity Trust Co., 33 Wash. 136, 73 P. 1121; Beacon Trust Co. v. Souther, 183 Mass. 413, 67 N. E. 345; Bank of Commerce v. Miller, 105 Ill. App. 224. Ratification of a contract made by a corporate manager with a broker for sale of property, at a meeting of directors, the manager participating, is made with knowledge of facts known by him at that time, so as to amount to original authority. Hartford & N. Y. Transp. Co. v. Plymer [C. C. A.] 120 F. 624. Telegram held not to be a ratification of a contract of sale of land, where principal had requested but had not received information concerning same. Henry v. Lane [C. C. A.] 128 F. 243. Settlement by agent for collection of claim held by estate is not ratified by administratrix after her discharge where she did not know existing facts. Upton v. Dennis [Mich.] 94 N. W. 728. Held, that principals had not such knowledge that the receipt of proceeds and their statement that they would investigate an alleged breach of warranty in an unauthorized sale by their agent and settle "if all right" was a ratification. Hogue v. Simonson, 87 N. Y. S. 1065. Under express provision of the code in California [Civ. Code, § 2310]. Lambert v. Gerner, 142 Cal. 399, 76 P. 53. A mortgage executed by a general agent of a corporation cannot be impliedly ratified by the corporation without knowledge of the mortgage. First Nat. Bank v. Kirkby, 43 Fla. 376, 32 So. 881. Retention of money by a seller of land is not ratification of the sale, even after knowledge that the agent procuring the sale acted secretly for the purchaser, where the seller did not know who furnished the money. McClure v. Ullmann, 102 Mo. App. 697, 77 S. W. 325. Receipt and retention of money, by a principal on an overdraft by an agent on a bank account kept by the agent in the principal's name is not a ratification of the overdraft where the principal did not know of the account. Case v. Hammond Packing Co. [Mo. App.] 79 S. W. 732. Execution of a deed by owner in ignorance of terms of sale made by his agent not a ratification of the sale. Edwards v. Davidson [Tex. Civ. App.] 79 S. W. 48.

sumed to have knowledge of facts which a reasonably diligent investigation would have disclosed.[32] It is immaterial that he was ignorant of such facts at the time of the unauthorized act.[33] Ratification cannot be partial[34] or conditional.[35] Acceptance of benefits of a contract of the agent must be subject to the agent's representations inducing the contract.[36] The acts must have been performed as agent,[37] and there can be no ratification without some evidence that there was an agency.[38] Ratification must come from the principal and not the unauthorized agent.[39] After ratification by the principal, the agent's authority cannot be questioned by a third party.[40] Subsequent ratification of an unauthorized act is equivalent to precedent authority.[41] Ratification is usually a question of fact.[42]

(§ 2) *E. Undisclosed agency.*[43]—An undisclosed principal may avail himself of a contract made by his agent,[44] but must do so subject to existing equities between the apparent principals.[45] He is liable, when disclosed, on simple contracts,[46] but not on negotiable instruments,[47] nor on contracts under seal,[48] ex-

32. Ballard v. Nye, 138 Cal. 688, 72 P. 156.

33. Ratification of the purchase of lands by an attorney in fact under authority of a power duly signed and acknowledged will bind the owner, though he was ignorant of the terms of the contract when made. Rank v. Garvey [Neb.] 92 N. W. 1025.

34. A principal cannot partially ratify his agent's unauthorized act excluding burdens as to himself; acceptance of benefits must impose complete liability. Warder, Bushnell & Glessner Co. v. Myers [Neb.] 96 N. W. 992.

35. Execution of a deed promised if another party's consent was obtained. Held no ratification. Riley v. Grant [S. D.] 94 N. W. 427.

36. Bank president securing fidelity bond for bank. Warren Deposit Bank v. Fidelity & Deposit Co., 25 Ky. L. R. 289, 74 S. W. 1111.

37. Where an agent of a buyer of a crop of hops gave the seller an advancement of the price on his own liability and not as agent, the buyer could not ratify the advancement so as to be entitled to possession of the property on the seller's failure to repay the advancement to the agent. Backhaus v. Buells, 43 Or. 658, 73 P. 342.

38. Woodman v. Wicker, 88 N. Y. S. 411. No ratification where the acts alleged to have been ratified were supposed to be the acts of the regular agent, and not of the alleged agent. Chicago Cottage Organ Co. v. Stone [Ark.] 73 S. W. 392.

39. A board of corporate directors cannot ratify an illegal contract made by a former board where a majority of those present were members of the former board. Oliver v. Rahway Ice Co., 64 N. J. Eq. 596, 54 A. 460.

40. Where an owner of land, who conveyed it reserving the right to represent the property in street vacation proceedings, ratified acts of his attorney in fact in the proceedings previously unauthorized, the grantee cannot question the attorney's authority. Daughters of American Revolution v. Schenley, 204 Pa. 572, 54 A. 366.

41. Daughters of American Revolution v. Schenley, 204 Pa. 572, 54 A. 366; Alexander v. Wade [Mo. App.] 80 S. W. 19. A vote by directors of a corporation ratifying indorsement of a note by its president was equivalent to original authority to indorse. Beacon Trust Co. v. Souther, 183 Mass. 413, 67 N. E. 345. Subsequent ratification by stockholders of an unauthorized transfer of property by corporate directors unaffected by actual fraud will bind the corporation. Metcalf v. American School Furniture Co., 122 F. 115.

42. Evidence in action by one payee in draft against indorsee of his co-payee to recover his share of the proceeds as requiring submission of question of ratification by plaintiff of his co-payee's indorsement and personal realization of the proceeds to the jury. Allen v. Corn Exch. Bank, 87 App. Div. 335, 84 N. Y. S. 1001. Evidence in action by obligee in bond for conveyance of realty to compel specific performance insufficient to show ratification of her husband's unauthorized assignment of the bond in her name. Hawley v. Hawley, 43 Or. 352, 73 P. 3. Sufficiency of evidence in action for goods bought by alleged agent to carry to the jury the issue of ratification of the sale. Hackett v. Van Frank [Mo. App.] 79 S. W. 1013.

43. See 1 Curr. L. 68.

44. Morris v. Chesapeake & O. S. S. Co., 125 F. 62. An undisclosed principal may ordinarily take advantage of his agent's contracts. Temple v. Pennell [Iowa] 99 N. W. 567. The addressee of a telegram may recover for breach of the contract to transmit, though the sender did not disclose his agency for the addressee. Manker v. Western Union Tel. Co., 137 Ala. 292, 34 So. 839. Sufficiency of evidence to show disclosure of agency in sale of cattle. Johnston v. Parrott, 92 Mo. App. 199.

45. Claim for demurrage against agent of shipper. Morris v. Chesapeake & O. S. S. Co., 125 F. 62.

46. Complaint held sufficient as stating a cause of action for goods bought by a mortgagor in management as mortgagee's agent. Patrick & Co. v. Grand Forks Mercantile Co. [N. D.] 99 N. W. 65. For debts created by his agent in the management of business for him. Wasserman v. Bacon, 80 App. Div. 505, 81 N. Y. S. 193. Liability extends to amount of judgment, costs of trial and appeal. City Trust, Safe Deposit & Surety Co. v. American Brewing Co., 88 App. Div. 383, 84 N. Y. S. 771. Delivery of goods on premises of defendant on order of her son makes her liable where she had long been con-

cept in jurisdictions where the distinction between sealed and unsealed instruments is abolished by statute.[49] A bank receiving money of a principal in the name of his agent without notice of the agency may apply it to a past due debt of the agent, on authorization of the latter expressly or impliedly.[50] By statute in Mississippi, where a person conducts a business of another without disclosing his principal, all property used or acquired in the business becomes liable for his debts.[51] Third persons are bound to the principal of an undisclosed agent for damages resulting from negligence.[52]

(§ 2) *F. Notice to agent.*[53]—Notice to an agent in the course of his employment is notice to the principal.[54] But knowledge or notice not gained in the

ducting a business in his name. Ernst v. Harrison, 86 N. Y. S. 247. That a purchaser of corporate stock from an agent who acted within the scope of his agency did not know of the agency will not affect the sale in the absence of fraud. Jones v. Western Mfg. Co., 32 Wash. 375, 73 P. 359. An undisclosed principal is liable to a surety of his agent for an amount the surety was compelled to pay as penalty for violation of the bond. City Trust, Safe-Deposit & Surety Co. v. American Brewing Co., 174 N. Y. 486, 67 N. E. 62.

47. Ranger v. Thalmann, 84 App. Div. 341, 82 N. Y. S. 846. The rule applies except as to banks under certain circumstances. Lewis v. First Nat. Bank, 1 Neb. Unoff. 177, 95 N. W. 355.

48. An owner of land is not bound by a contract relating thereto by an agent individually under his own seal. Blanchard v. Archer, 87 N. Y. S. 665. Lease under seal executed by agent in individual name and not purporting to be executed for the principal will not bind him, though the agent is his general agent; use and occupation cannot be maintained against him while he, or his agent for him, is occupying the premises. Lenney v. Finley, 118 Ga. 718, 45 S. E. 593.

49. Laws 1899, p. 88, c. 86. Streeter, Jr., Co. v. Janu, 90 Minn. 393, 96 N. W. 1128.

50. Implied authority to so apply a deposit when the depositor has overdrawn his account. Kimmel v. Bean [Kan.] 75 P. 1118.

51. A policy of insurance on goods was liable for debts [Rev. Code 1892, § 4234]. Meridian Land & Industrial Co. v. Ormond & Co. [Miss.] 35 So. 179.

52. Carrier is liable to employer of commercial traveler for destruction of trunks containing samples. Talcott v. Wabash R. Co., 39 Misc. 443, 80 N. Y. S. 149.

53. See 1 Curr. L. 58.

54. Camden Safe Deposit & Trust Co. v. Lord [N. J. Eq.] 58 A. 607, The rule rests upon the conclusive presumption, as to third persons, that the agent has performed his duty of informing the principal of all facts that have come to his knowledge when in the service of the principal. Modern Woodmen of America v. Colman [Neb.] 94 N. W. 814. Notice to an agent authorized to buy land, of rights of another therein, is notice to the principal. Schreckhise v. Wiseman [Va.] 45 S. E. 745; Blair v. Whitaker, 31 Ind. App. 664, 69 N. E. 182. A corporation is bound by knowledge of its manager where he participated as a director in ratification of his own acts as manager in employing a broker to sell corporate property. Hartford & N. Y. Transp. Co. v. Plymer [C. C. A.] 120 F. 624. Where indorsement of a note by the president of a corporation was ratified by the directors, that such act was unauthorized under its by-laws, and that the treasurer and secretary, who were directors, failed to inform the other directors, did not prevent constructive notice to them of application of the proceeds of the note to debts of the corporation. Beacon Trust Co. v. Souther, 183 Mass. 413, 67 N. E. 345. Where the son of a creditor knew all the circumstances of a loan, was present when the loan was solicited, and the creditor drew a check payable to the son with instructions to examine the papers and deliver the check to the borrower, which the son did and received the securities, the son was the creditor's agent, so that the latter was chargeable with his knowledge. Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800. Notice of the source of money from funds in hands of a guardian to an agent authorized to receive payment is notice to his principal. Manson v. Simplot, 119 Iowa, 94, 93 N. W. 75. Regarding defects in machinery, under contract of sale. McCormick Harvesting Mach. Co. v. Lambert, 120 Iowa, 181, 94 N. W. 497. Actual observation by an agent of failure of a machine to meet requirements of a warranty was notice to the principal. McCormick Harvesting Mach. Co. v. Machmuller [Neb.] 95 N. W. 507. The acts and knowledge of an agent of a surety company, authorized to issue bonds, as to the risk assumed under a bond, are the acts and knowledge of the company. Getchell & M. Lumber & Mfg. Co. v. Peterson [Iowa] 100 N. W. 550. Where the solicitor of a gas company inserted a provision in a contract on a blank form binding the company to furnish gas at a certain price, and gave the contract to the secretary, who filed it without noticing the provision, the company is chargeable with notice of it [Civ. Code, §§ 2330, 2332]. Gallagher v. Equitable Gas-Light Co., 141 Cal. 699, 75 P. 329. Notice to an agent for purchase of lumber of liens of third persons thereon. Helfrech Lumber & Mfg. Co. v. Honaker, 25 Ky. L. R. 717, 76 S. W. 342. Where a representative of sureties on a bail bond executes it under a power of attorney, with knowledge that one surety had not properly executed the power, the other sureties cannot claim a release because he was not bound. Com. v. Roark, 25 Ky. L. R. 603, 76 S. W. 140. Notice or actual knowledge of bankruptcy proceedings. Atkinson v. Elmore [Mo. App.] 77 S. W. 492. Notice of a mechanic's lien to a salesman, promot-

course of his employment,[55] or gained before creation of the agency,[56] or relating to matters outside the scope of the agency,[57] or to unauthorized acts,[58] cannot be imputed to the principal; nor is there a presumption that the agent has communicated to the principal facts coming to his knowledge as agent, when he has interests in the transaction adverse to those of his principal.[59] Fraud practiced on the agent may prevent the imputation of knowledge of facts to the principal.[60] Notice cannot be imputed to one for whom the agent has no authority to act.[61] The rule does not apply to a merely nominal agent, or one acting in a ministerial capacity only.[62] When it is sought to prove notice to a principal by his agent, he need offer only the agent who is alleged to have received the notice and need not prove lack of notice to other agents.[63]

(§ 2) *G. Remedies, pleading, procedure and proof.*[64] *Third persons*[65] contracting with the agent of an undisclosed principal may, on discovery of the real principal, elect to pursue either principal or agent,[66] but cannot hold both,[67] and

ing the contract for construction in order to sell machinery, is notice to his principal. June & Co. v. Doke [Tex. Civ. App.] 80 S. W. 402. An attorney applying for a loan which was obtained from a corporation, and executing the papers for the borrower, was the agent of both the borrower and the corporation so as to bind the latter by notice of facts in an abstract of title prepared under his direction. Blackwell v. British-American Mortgage Co., 65 S. C. 105, 43 S. E. 395. Evidence of notice to an insurance agent that insured had hernia is admissible to meet a plea of fraudulent concealment, though not to show waiver of terms of the policy. Travelers' Ins. Co. v. Thornton, 119 Ga. 455, 46 S. E. 678.

55. Merrill v. Southwestern Tel. & T. Co., 31 Tex. Civ. App. 614, 73 S. W. 422. An agency to sell land is not general, so that only knowledge gained by the agent in the course of his own employment can be imputed to the principal. Kyle v. Goff [Mo. App.] 78 S. W. 1047.

56. Kyle v. Gaff [Mo. App.] 78 S. W. 1047. Even though knowledge so gained concerns contracts made by the agent after his employment. Samuelson v. Gale Mfg. Co., 1 Neb. Unoff. 815, 95 N. W. 809. While knowledge of a bank's impaired condition obtained by an agent while buying stock will be imputed to his principal so as to start limitations against an action for fraud in the sale, similar knowledge obtained years later, where the agent resold the stock to third persons, will not be imputed, the transactions being distinct. Day v. Exchange Bank of Kentucky, 25 Ky. L. R. 1449, 78 S. W. 132.

57. Topliff v. Shadwell [Kan.] 74 P. 1120. As to personal habits of employe under bond given by principals. Aetna Indemnity Co. v. Schroeder [N. D.] 95 N. W. 436. It must be the agent's duty to communicate it to his principal or it must directly relate to the matter of his agency. Hargadine-McKittrick Dry Goods Co. v. Krug [Neb.] 96 N. W. 286.

58. Knowledge of a director and manager of a corporation of his own unauthorized act in giving a note in the name of the corporation is not notice to the corporation. Sanford Cattle Co. v. Williams [Colo. App.] 71 P. 889.

59. Central Coal & Coke Co. v. Good & Co. [C. C. A.] 120 F. 793; Aetna Indemnity Co. v. Schroeder [N. D.] 95 N. W. 436. Knowledge of fraudulent transaction by officers of a trust company not imputed to the corporation. Camden Safe Deposit & Trust Co. v. Lord [N. J. Eq.] 58 A. 607. Agent had adverse interest and motive for concealing facts. Booker v. Booker, 208 Ill. 529, 70 N. E. 709.

60. Fraudulent representations as to property mortgaged, the agent having knowledge of facts, which if known to the principal would disclose the fraud, but being deceived himself. Lee v. Tarplin, 183 Mass. 52, 66 N. E. 431.

61. Notice to loan broker acting for borrower, receiving notice of secret equity in land on which the loan was made, is not notice to the lender. Goodwynne v. Bellerby, 116 Ga. 901, 43 S. E. 275. One to whom certificates of deposit were indorsed by a mortgagee on a building loan, who had placed money in a bank to pay the mortgagor, to enable him to draw money for the mortgagor, was the agent of the mortgagor after the building was completed and turned over to the mortgagor and the mortgage executed, so as not to charge the mortgagee with such agent's knowledge that the mortgagor had no title to the property. Roderick v. McMeekin, 204 Ill. 625, 68 N. E. 473. The husband though vested by law with the control of the wife's separate estate, is not, in the absence of special authority, her agent, such that notice to him will bind her. Where husband was not shown to be wife's agent in accepting deed of trust from son, his knowledge of fraud as against creditors did not bind her. Cooper & Co. v. Sawyer, 31 Tex. Civ. App. 620, 73 S. W. 992.

62. Aetna Indemnity Co. v. Schroeder [N. D.] 95 N. W. 436.

63. Travelers' Ins. Co. v. Thornton, 119 Ga. 455, 46 S. E. 678.

64. See 1 Curr. L. 60.

65. See 1 Curr. L. 60, n. 21-23.

66. Bringing suit against agent is an election. Barrell v. Newby [C. C. A.] 127 F. 656; Greenberg v. Palmieri [N. J. Law] 58 A. 297.

67, 68. Barrell v. Newby [C. C. A.] 127 F. 656. If a seller elects to sue the principal for goods after discovering him, judgment therein will prevent suit against the

an election to pursue one is binding and will bar a subsequent suit against the other.[68] But proceeding against the agent is not binding as an election, when the third person had no knowledge of the agency or the name of the principal.[69] Fraudulent representations of a purchaser's agent is ground for rescission by the seller of a contract to sell land,[70] and the right to rescind is not affected by the fact that the seller paid part of the agent's commission.[71] Where a principal represented an agent as having authority to make a sale, the vendee may recover from the principal a sum fraudulently exacted by the agent in excess of the principal's price.[72] Where an agent, authorized to buy for cash only, buys on credit, and the principal receives and appropriates the goods, he is liable for the price, unless he can show that he furnished the cash to his agent, and had no notice of the agent's violation of his authority.[73] A third person performing a contract made by an agent was not estopped from holding the principal liable by delay in presenting his claim, where the principal received his voucher from the agent and gave the latter credit for the amount, though it was in fact not paid.[74]

The principal[75] may rescind a contract for fraud of the agent and the other party,[76] or sue for negligence[77] of a third person with whom his agent deals, and may, in his own name, maintain suit for specific performance of a contract made for him by his agent, whether he was disclosed as principal or not.[78] Where a factor receives proceeds of goods sent him to sell, his principal may equitably follow the money into hands of any one receiving it with knowledge of its trust character.[79] Where a lease of realty for more than a year is executed by the owner's agent without authority in writing, possession by the lessee will render him liable for rent as long as he enjoys the property.[80] A principal, though not bound by false statements of an agent, in the course of his employment, will not be permitted to profit by the fraud.[81] Though an agent is liable for the difference between the price he obtained for goods and a larger price he might have obtained, the purchaser is not liable therefor where he had no part in securing the appointment of the agent.[82]

Cases dealing with pleading,[83] procedure,[84] evidence[85] and proof,[86] are grouped in the notes.

agent. Codd Co. v. Parker, 97 Md. 319, 55 A. 623.

69. Where in such case a judgment was recovered against the agent, the agency being unknown, an action will lie against the principal unless he discharges the judgment against the agent. Greenberg v. Palmieri [N. J. Law] 58 A. 297. A suit against the agent of an undisclosed principal is not an election to hold the agent liable so that judgment therein will release the principal. Ranger v. Thalmann, 39 Misc. 420, 80 N. Y. S. 19.

70, 71. Representations as to identity of purchaser. Thompson v. Barry, 181 Mass. 429, 68 N. E. 674.

72. That the agent had previously bought the cattle on his own account was no defense. Phipps v. Mallory Commission Co. [Mo. App.] 78 S. W. 1097.

73. Brittain v. Westhall [N. C.] 47 S. E. 616.

74. McKeen v. Providence County Sav. Bank, 24 R. I. 542, 54 A. 49.

75. See 1 Curr. L. 60, n. 32-34.

76. False representations by an agent for sale of property, as to value of distant property for which he induced his principal to exchange, together with a secret agreement between the agent and the owner of the other property whereby the agent was to profit by the trade is ground for rescission of the contract. White v. Leech [Iowa] 96 N. W. 709.

77. Purchase of goods and their delivery to a warehouse by an agent, receipts being issued to the agent and delivered to the principal without indorsement, passes title to the principal so that he may sue for negligent destruction. Alabama Great Southern R. Co. v. Clark, 136 Ala. 450, 34 So. 917.

78. In this case, the contract disclosed that it was made by the agent of the owner, whose name appeared therein. Randolph v. Wheeler [Mo.] 81 S. W. 419.

79. Bills v. Schliep [C. C. A.] 127 F. 103.

80. Kriz v. Peege, 119 Wis. 105, 95 N. W. 108.

81. Contract limited authority of salesmen, who made false statements as to extent of sales. No recovery on sale induced by fraud. Wilson, Close & Co. v. Pritchett [Md.] 58 A. 360.

82. Willson v. Imperial Fertilizer Co. [S C.] 46 S. E. 279.

83. An answer of estoppel by conduct of plaintiff's agent must show the scope of the agent's authority. Porter Lumber Co.

§ 3. *Rights and liabilities of agent as to third persons.*[87]—An agent acting within his authority and disclosing his principal is not personally liable.[88] An agent who undertakes to bind his principal but fails to do so because of want of

v. Hill [Ark.] 77 S. W. 905. A defense that an agent had apparent authority to act for his principal in a sale and that the principal ratified such acts may be made by answer in an action by the principal to collect the proceeds from the buyer who had paid the agent and the latter had failed to account. Continental Tobacco Co. v. Campbell, 25 Ky. L. R. 569, 76 S. W. 125. A bill for specific performance of a contract made by complainant's attorney is not liable to demurrer for failure to allege that his authority was in writing. Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414. Allegation of an agreement as made by a party will admit proof that it was made by his agent in absence of special circumstances. Hare v. Winterer [Neb.] 96 N. W. 179.

Plea in suit against principal and agent held to put agency in issue without replication and to require its submission if warranted by the evidence. McCabe v. Farrell [Tex. Civ. App.] 77 S. W. 1049.

84. Where both the agency and the making of a contract by the agent are denied, either allegation may be proved first. Rainey v. Potter [C. C. A.] 120 F. 651. In an action against both principal and agent on a contract made by the agent, the principal is not estopped to deny the agent's authority by failure to object to admission of the contract in evidence, it being admissible as against the agent. Tabet v. Powell [Tex. Civ. App.] 78 S. W. 997. Testimony by the principal, sued on a contract made by an agent, as to fraud of the other party, will not prevent him from urging the defense that the agent acted for the other party without his knowledge or consent. Harper v. Fidler [Mo. App.] 78 S. W. 1034. Where an answer in an action on contract urged as a defense that plaintiff elected to hold defendant's agent who made the contract in his own name, and set out facts relied on as showing election, the court may settle the issue on demurrer to the answer. Barrell v. Newby [C. C. A.] 127 F. 656.

85. Statements of a representative of a principal to one purchasing goods from the agent, while engaged in securing evidence against the agent who had sold the goods and appropriated the proceeds, are admissible in replevin against the purchaser by the principal. Baldwin & Co. v. Tucker, 25 Ky. L. R. 222, 75 S. W. 196. Books of agent not kept under direction of the principal are inadmissible against the principal, or against a third person suing the principal on a contract made with him by the agent. McKeen v. Providence County Sav. Bank, 24 R. I. 542, 54 A. 49.

86. One suing a principal on a contract made by an agent has the burden of proving the agency and the authority to make the particular contract. Parr v. Northern Electrical Mfg. Co., 117 Wis. 278, 93 N. W. 1099. Wife's agency in action against husband. Brown v. Woodward, 75 Conn. 254, 53 A. 112; McBride v. Adams, 84 N. Y. S. 1060. A vendee suing a landowner to recover money paid on land to an unauthorized agent must prove the owner's ratification. Edwards v. Davidson [Tex. Civ. App.] 79 S. W. 48. One setting up a compromise by an attorney must show the attorney's authority or ratification by the principal. Danziger v. Pittsfield Shoe Co., 204 Ill. 145, 68 N. E. 534. One paying money to an alleged agent of the payee of a note assumes the burden of proving his authority to receive payment. Thompson v. Buehler [Neb.] 95 N. W. 854. Where execution of a note sued on is denied, the burden of proof is upon plaintiff to show agency or ratification by the one sued. Sears v. Daly, 43 Or. 346, 73 P. 5. The burden is on one denying authority of a general corporate officer to assign a mortgage for the corporation where prima facie evidence thereof is shown by the officer's signature and the corporate seal. Wilson v. Neu [Neb.] 95 N. W. 502.

87. See 1 Curr. L. 60.

88. A bank cashier agreeing, on purchase of property for himself from a debtor of the bank, that the price shall be applied in a certain way on the debt, acts therein as official agent of the bank and is not individually liable for a breach of the agreement. In so far as he volunteers to make the arrangements for the debtor, he is the latter's agent. Pease v. Francis [R. I.] 55 A. 686. An agent is not properly joined as defendant with his principal in a suit for infringement of a patent for acts done in his capacity as agent. Westinghouse Elec. & Mfg. Co. v. Mutual Life Ins. Co., 129 F 213. Payment of earnest money to attorneys acting as agents of a seller of realty will not make them personally liable on his failure to complete the contract. Middleworth v. Blackwell, 85 App. Div. 613, 82 N. Y. S. 704. One signing a note as agent, with knowledge of the payee that he was so acting. Crandall v. Rollins, 83 App. Div. 618, 82 N. Y. S. 317. An agent is not liable for defaults of his disclosed principal. Broker could not collect commission for securing tenant from the agent who acted for the owner. Hayman Co. v. Knepper, 88 N. Y. S. 930. Evidence given by agent of owner of ship materials as not supporting contention that materials were sold the agent on his individual credit. Callahan v. Aetna Indemnity Co., 33 Wash. 583, 74 P. 693. One signing a contract as attorney in fact for another. Largey v. Leggat [Mont.] 75 P. 950. An agent not liable for commissions of a broker employed by him to sell the principal's land. Scottish-American Mortg. Co. v. Davis [Tex. Civ. App.] 72 S. W. 217. The agent of the grantor in a trust deed to collect rents on the land conveyed, who continued to collect and pay to the grantor after sale under the deed to a third person until the purchaser was awarded possession, was not liable to the latter for rents paid over after the sale; agents having no notice of the sale. Embry v. Galbreath, 116 Tenn. 297, 76 S. W. 1016. Where a summons in account was directed to defendant and the attached account charged him as agent, a demurrer will lie for defect of parties. Danforth v. Timmerman, 66 S. C. 259, 43 S. E. 678.

authority binds himself,[89] and is liable to the other party for damage resulting from his misrepresentation of authority,[90] not on the contract which he attempts to make, but for breach of implied warranty or in tort.[91] To fix the individual liability of such person, purporting to act as agent, it need not be shown that his express or implied representations were intentionally false,[92] but it must appear that the contract would have been enforceable against the principal, if authorized, and that the other party thereto could perform.[93] The agent is personally liable when he purports to act as principal, the other party having no knowledge of the agency,[94] or when, purporting to act as agent, he does not disclose the name of his principal,[95] or when he makes the contract in his own interest, treating the property, the subject of the contract, as his own.[96] He is personally liable to persons injured by his negligence[97] or misfeasance, but not ordinarily for mere nonfeasance,[98] nor for negligence of his principal.[99] An agent of a grantor in a trust deed to collect rents, who continued to collect rents after sale of the premises under the trust deed to a third person, was not a trespasser as

89. Danforth v. Timmerman, 65 S. C. 259, 43 S. E. 678. But does not become liable when he discloses the extent of his authority. Klay v. Bank of Dallas Center, 122 Iowa, 506, 98 N. W. 315. Though he did not misrepresent his authority, since there was an implied warranty of authority. Anderson v. Adams, 43 Or. 621, 74 P. 215. An option on land, not binding as to owners who are principals of the agent giving the same, is nevertheless binding on the latter as to his own land included therein. Tibbs v. Zirkle [W. Va.] 46 S. E. 701. Defendant fraudulently releasing a mortgage by use of power of attorney from mortgagee, held liable for debt. Persons v. Persons [N. D.] 97 N. W. 551. In North Dakota, an agent executing a contract in the name of a principal without authority and without a bona fide belief that he has authority, is liable on the contract as principal [Rev. Codes 1899, § 4343, subd. 2]. Kennedy v. Stonehouse [N. D.] 100 N. W. 258.

90. The principle is applicable to an officer of a corporation acting in excess of his authority. Groeltz v. Armstrong [Iowa] 99 N. W. 128. The damages recoverable are those which could have been recovered against the principal had the warrant of authority been complied with, together with expenses of proceedings against the principal [Rev. Codes 1899, § 4995]. Kennedy v. Stonehouse [N. D.] 100 N. W. 258.

91. Groeltz v. Armstrong [Iowa] 99 N. W. 128. He is liable on a contract signed for a supposed principal only on the implied warranty that he had authority to make it. Kent v. Addicks [C. C. A.] 126 F. 112. Where it is not alleged in suing agent on a contract in excess of his authority that he falsely represented his authority, the action is in contract for breach of implied warranty of authority and not in tort for deceit. Anderson v. Adams, 43 Or. 621, 74 P. 215.

92. Groeltz v. Armstrong [Iowa] 99 N. W. 128.

93. Admissibility of evidence to show ability to perform. Kent v. Addicks [C. C. A.] 126 F. 112.

94. Jackson v. McNatt [Neb.] 93 N. W. 425; Rathbun v. Allen [Mich.] 98 N. W. 735; Danforth v. Timmerman, 65 S. C. 259, 43 S. E. 678. Defendant liable for price of horse, where agency not disclosed and check drawn by third party, real purchaser, was not paid. Fritz v. Kennedy, 119 Iowa, 628, 93 N. W. 603. A purchase of property at judicial sale by an undisclosed agent, paying partly in cash and remainder in his individual notes, is executed by the agent so that his principal is not bound. Ranger v. Thallman, 84 App. Div. 341, 82 N. Y. S. 846. An agent signing an acceptance held to be a party to the contract and liable thereon, though his name did not appear in the body of the instrument. General Elec. Co. v. Gill, 127 F. 241. Contract reciting it was between J. W. D. "of a" certain company and signed by him individually was his personal contract. Railway Speed Recorder Co. v. Chicago Pneumatic Tool Co., 126 F. 223. An agent who makes an unauthorized contract, using apt words to bind himself, is liable as principal. McKown v. Gettys, 25 Ky. L. R. 2070, 80 S. W. 169.

95. Pope v. Harter, 66 S. C. 54, 44 S. E. 407. When one sued on contract defends on the ground that he was acting as agent, he must prove that he disclosed the name of the principal. Without such proof, the fact that he was acting as agent and that the other party supposed he was so acting, is insufficient. Horan v. Hughes, 129 F. 248. To exempt an agent from liability on an instrument executed by him within the scope of his agency, he must name his principal and show clearly that the act, though done by the hand of the agent, is the act of the principal. Western Wheeled Scraper Co. v. McMillen [Neb.] 99 N. W. 512.

96. Held that alleged agent in fact made a contract in regard to redemption and sale of land as principal. Temple v. Pennell [Iowa] 99 N. W. 567.

97. Kimbrough v. Boswell, 119 Ga. 201, 45 S. E. 977. The agent of a nonresident owner of rented property, having authority to make repairs, is liable for injuries caused by his negligence in making necessary repairs. Lough v. John Davis & Co. [Wash.] 77 P. 732.

98. Kimbrough v. Boswell, 119 Ga. 201, 45 S. E. 977.

99. That an agent took up cattle trespassing on his principal's property will not make him liable for injury to them while in custody of the principal. Id.

against the latter,[1] record of the deed not being notice to him.[2] An unauthorized option given on realty by one of two agents will not bind his co-agent unless ratified by him.[3] The question of adverse possession cannot arise in favor of one who took possession as agent and never repudiated his agency.[4]

Evidence, proof and procedure.[5]—In an action against the agent, his declarations against his own interest are admissible.[6] In an action against an agent personally for goods sold him as agent, the burden is on him to show another exclusively liable.[7] Third persons, in an action on a settlement against them by an agent, do not have the burden of showing that the latter exceeded his instructions.[8] A complaint which, attempting to state a cause of action against an agent who had not disclosed his principal, alleges that the agent acted for a certain named principal, is demurrable.[9] In an action on a contract made by an agent on behalf of the principal and as his surety, where the principal denied the agent's authority and it was found that the agent signed as surety only, judgment could not be rendered against the agent on reversal of the judgment against the principal, since before final determination of the issue of his authority his liability could not be fixed.[10] Where an agent made a contract for his principal and as the latter's surety, and it appeared, in an action thereon, that the agent had full control of the subject-matter, that both principal and agent testified that he did not have authority to make the contract was not an abandonment of his plea of suretyship so as to warrant a judgment against him because personally liable in exceeding his authority.[11]

§ 4. *Mutual rights, duties and liabilities. A. In general; contract of agency; diligence and good faith.*[12]—An agent cannot delegate his duties to a subagent without express or implied authority.[13] He may represent both parties to a transaction with consent of his principal.[14] Where there is an express contract, the rights and liabilities of principal[15] and agent[16] are controlled by its

1, 2. Embry v. Galbreath, 110 Tenn. 297, 75 S. W. 1016.

3. Tibbs v. Zirkle [W. Va.] 46 S. E. 701.

4. Richardson v. Bruce [Tex. Civ. App.] 75 S. W. 835.

5. See 1 Curr. L. 61, n. 45-48.

6. Former testimony that a contract was unauthorized. Anderson v. Adams. 43 Or. 621, 74 P. 215.

7. Danforth v. Timmerman, 65 S. C. 259, 43 S. E. 678.

8. This on the ground that the agent cannot repudiate the contract because of his unauthorized acts in absence of fraud by the third person. Yetter v. Van Patten, 103 Ill. App. 59.

9. Pope v. Harter, 66 S. C. 54, 44 S. E. 407.

10, 11. Tabet v. Powell [Tex. Civ. App.] 78 S. W. 997.

12. See 1 Curr. L. 61.

13. A nonresident agent to sell land appointed by a nonresident owner has implied power to appoint a resident subagent. Eastland v. Maney [Tex. Civ. App.] 81 S. W. 574.

14. Reed v. Hayward, 82 App. Div. 416, 81 N. Y. S. 608.

15. Sales by the principal in the exclusive territory of his agent with the agent's written consent is not a breach of contract by the principal. Taylor Co. v. Bannerman [Wis.] 97 N. W. 918. An agent employed for an indefinite term may be discharged by the principal at any time. Harrington v. Brockman Commission Co. [Mo. App.] 81 S. W. 629. A principal having broken the contract of agency and rendered performance by the agent impossible cannot recover for agent's failure to perform. Arbaugh v. Shockney [Ind. App.] 71 N. E. 232. A sales agency not being exclusive, the principal was not liable for failing to supply the agent, being able to sell all the goods it manufactured. Dodge v. Reynolds [Mich.] 98 N. W. 737. Sale of goods by an agent to whom they were provided to sell, at less than the price agreed upon, is a breach of his contract warranting rescission by the principal. Id.

16. Contract of employment as making agent liable for one-third of losses on business done by him for principal. Raynor v. Buttlar, 87 N. Y. S. 119. An obligation in power of attorney to recover land and clear title to same did not obligate attorney to pay taxes or other debts which might constitute liens on the land. Garner v. Boyle [Tex. Civ. App.] 77 S. W. 987. Where a firm of two members contracted to manage and sell lots of a corporation at another town than that of their residence, the carrying on of the business there by one partner only was not a breach of the contract. Albany Land Co. v. Rickel [Ind.] 70 N. E. 158. Agency for sale of three kinds of road machines in certain territory as giving exclusive agency for one kind only and to begin on sale of one machine of that kind. Indiana Road Mach. Co. v. Lebanon Carriage & Implement Co., 25 Ky. L. R. 1763, 78 S. W. 861. Evidence sufficient to show extension of

terms and the construction placed thereon. Construction of an unambiguous written contract is for the court.[17] The agent must use reasonable care and diligence in the business of his principal,[18] act in good faith,[19] and keep his principal informed as to facts regarding the subject of his agency,[20] and is liable for damages resulting from default in either respect.[21] An agent cannot make a

time of agency. Johnson Bros. v. Wright [Iowa] 99 N. W. 103.

17. Russell & Co. v. McSwegan, 84 N. Y. S. 614. But failure to instruct as to the written contract is not reversible error when there were full instructions on the issues generally and counsel requested none on the contract. McCormick Harvesting Mach. Co. v. Carpenter [Neb.] 95 N. W. 617.

18. Taylor Co. v. Bannerman [Wis.] 97 N. W. 918. An agent under power of attorney to manage a business of selling fertilizers showed reasonable care and prudence in disposing of them in bulk at good profit, where prices had advanced, without waiting for country trade which would have been involved with a certain amount of loss, and in view of the fact that a certain customer had the right to cease using the goods. Willson v. Imperial Fertilizer Co. [S. C.] 46 S. E. 279.

19. The California statute imposes upon an agent the same duty of good faith toward his principal as is imposed on a trustee toward a beneficiary [Civ. Code, §§ 2322, 2228-2239]. Calmon v. Sarraille, 142 Cal. 638, 76 P. 486. The trustee of an unincorporated company, authorized to sell its shares on which payments had been defaulted by members, could properly buy the share of a member, though requested by the latter to sell as his agent and need not account for a later increase in value. Swan v. Davenport, 119 Iowa, 46, 93 N. W. 66. An agent in charge of land whose principal took its management from his hands and allowed it to be sold under a tax sale of which the agent had given him notice may properly purchase the land under the tax deed after his discharge. Bemis v. Plato, 119 Iowa, 127, 93 N. W. 83. Where authority was given an agent to sell ice at a certain price and he, after receiving an offer of a larger price, bought it himself at a lower price without informing the principal, the latter was not bound. Rogers v. French [Iowa] 96 N. W. 767. Where a selling agent sent an offer to his principal purporting to come from third persons, their acceptance did not apply to a purchase by the agent and no contract was effected binding the principal as to his agent. Rogers v. French [Iowa] 96 N. W. 767. One receiving assignment of an outstanding certificate of purchase while acting as agent for the mortgagor under a written agreement with him to buy it cannot set up that the mortgagor's title was destroyed by foreclosure and claim the property in his own name. Mason v. Hartgrove, 103 Ill. App. 163. Evidence as to services of an agent in consummating a contract secured by him for his principal is admissible on the question of good faith and diligence. Misrepresentation was charged against the agent whereby he secured a larger commission than the principal would have given had he known the facts. Hale Elevator Co. v. Hale, 201 Ill. 131, 66 N. E. 249. Whether a principal has been deceived by his agent as to a contract to be made by the agent, and has entered into it without fully understanding all material facts, is a question for the jury. Id. An agent sued by his principal for recovery of land alleged to have been conveyed through fraud of the agent cannot defend on the ground that the principal neglected to read the deed before signing (Calmon v. Sarraille, 142 Cal. 638, 76 P. 486), or on the ground that the principal willingly parted with the land, though they supposed it was part consideration for another conveyance to them (Id.).

20. And his failure to do so amounts in law to fraud. Holmes v. Cathcart, 88 Minn. 213, 92 N. W. 956. Where an agent for the sale of property learns that more advantageous terms can be obtained, which fact is unknown to the principal, he is legally bound to inform the latter before making the sale. Snell v. Goodlander, 90 Minn. 533, 97 N. W. 421. An agent to sell realty to any purchaser he may secure is not guilty of fraud in failing to disclose the identity of a purchaser where the vendor neither asked nor sought to learn his identity. Rank v. Garvey [Neb.] 92 N. W. 1025. An agent in any capacity cannot withhold knowledge gained in the course of his employment from his principal and use it to obtain increased compensation from the latter. Dorr v. Camden [W. Va.] 46 S. E. 1014.

21. An agent of limited authority must make good losses resulting from violation, excess or neglect of instructions. Northern Assur. Co. v. Borgelt [Neb.] 93 N. W. 226. Surrender of goods in transit to the consignor without authority of his principal renders him liable to his principal for any loss sustained. Williams & Co. v. Dotterer [La.] 35 So. 921. A collector accepting a draft in payment when he might have had money is liable on dishonor of the draft, his authority extending only to payment in money. Gowling v. American Exp. Co., 102 Mo. App. 366, 76 S. W. 712. An express company collecting moneys cannot limit its liability for failure to take money instead of a draft by stipulations in a receipt given for the draft. Id. An agent directed to loan money on trust deed security is liable to his principal for damages for including in the trust deed a note owed by the borrower to himself without knowledge or consent of the principal. Marshall v. Ferguson, 101 Mo. App. 653, 74 S. W. 393. An agent who induces his principal, by concealment, to accept a smaller sum for property sold by him than he received, is liable for the difference. Instruction. Barbar v. Martin [Neb.] 93 N. W. 722. An agent required by his contract to insure his principal's property in his possession was liable for its loss from failure to insure while the contract was still in force, though negotiations were pending for a new contract. Prichard v. Deering Harvester Co., 117 Wis. 97, 93 N. W. 827. Where a principal relied on his agent's representations as to the least

profit for himself in the business of his agency.[22] If faulty or ambiguous instructions are followed in good faith and diligently, he is not liable for damages from erroneous interpretation.[23] If care has been exercised in selection, an agent authorized to employ a subagent is not liable for the latter's negligence.[24] A sales agent not prohibited from selling on credit is not liable to arrest and bail for bad sales where they are not affected by his misappropriation or embezzlement.[25] A bond given by an insurance agent for faithful performance of duties is a contract of indemnity as to a loss arising from his failure to obey instructions in cancelling a policy.[26] An agent owing money to his principal is not a fiduciary debtor within the meaning of the bankruptcy act.[27] A principal directing his agent to address messages to him in care of a certain firm may nevertheless, as against the agent, authorize another to receive and forward messages.[28]

(§ 4) *B. Accounting, settlement and reimbursement.*[29]—All profits and benefits resulting from acts of an agent whether in accordance with, or in violation of, his authority belong to the principal.[30] Revocation of his authority before the application of funds placed in his hands for a certain purpose, renders him liable to the principal for such funds.[31] He must be able to account regularly whenever a reasonable request is made,[32] and is liable for interest on funds he has mingled with his own and used.[33] That contracts of an agent are void will not excuse his liability for misappropriation of funds.[34] An agent who induces his principal to believe that funds in his hands are profitably invested, thereby preventing their withdrawal, cannot urge on accounting that they were in bank all the time and that he was not required to invest them.[35] The proceeds of sales made by an agent are trust funds held for the principal, except as to commissions;[36] and where the agent mixes his principal's goods with his own, title to the whole vests in the principal until his goods are returned or accounted for.[37] An agent charged with the purchase price of personal property wrongfully withheld from his principal cannot be charged for the use of the property.[38] If he wrong-

sum for which land could be bought and paid him that sum, he could recover the difference between such amount and a less sum which the agent paid for the land. Hindle v. Holcomb [Wash.] 75 P. 873.

22. Farmers' Warehouse Ass'n v. Montgomery [Minn.] 99 N. W. 776.

23. Falksen v. Falls City State Bank [Neb.] 98 N. W. 425.

24. Morris v. Warlick, 118 Ga. 421, 45 S. E. 407.

25. Southern Grocery Co. v. Davis, 132 N. C. 96, 43 S. E. 591.

26. Northern Assur. Co. v. Borgett [Neb.] 93 N. W. 226.

27. Hence the agent's discharge in bankruptcy releases his debt to the principal. Boyd v. Agricultural Ins. Co. [Colo. App.] 76 P. 986.

28. Western Union Tel. Co. v. Barefoot [Tex.] 76 S. W. 914.

29. See 1 Curr. L. 63, with annotation "Accounting in illegal transactions."

30. Snell v. Goodlander, 90 Minn. 533, 97 N. W. 421. Secret cash payment to one acting for himself and others in sale of stock could be recovered in separate, but not in joint actions, such stock being owned in severalty. Graham v. Cummings, 208 Pa. 516, 57 A. 943. An agent loaning principal's money collected 2 per cent. interest for himself and took notes at 8 per cent. Held, agent liable to principal for interest retained. Whitehead v. Lynn [Colo. App.] 76 P. 1119.

31. Flaherty v. O'Connor, 24 R. I. 587, 54 A. 376.

32. Dodge v. Hatchett, 118 Ga. 883, 45 S. E. 667. He must show his disposition of money he admits having received for his principal. Laporte v. Laporte, 109 La. 958, 34 So. 38. Evidence sufficient to show one under power of attorney to manage an interest in an estate to be liable to account for certain property claimed to be part of the estate. Rose v. Durant, 86 App. Div. 623, 83 N. Y. S. 503.

33. An agent in full control of funds of his principal, a nonresident, who confuses them with funds of his own in bank and uses them for his own purposes, is chargeable with interest, though the amount in bank at all times is sufficient to meet an accounting. Beugnot v. Tremoulet, 111 La. 1, 35 So. 362.

34. Invalidity because in regard to a business conducted in violation of the privilege tax. Decell v. Hazlehurst Oil Mill & F. Co. [Miss.] 35 So. 761.

35. Beugnot v. Tremoulet, 111 La. 1, 35 So. 362.

36, 37. Lance v. Butler [N. C.] 47 S. E. 488.

38, 39, 40. Jackson v. Pleasanton, 101 Va. 282, 43 S. E. 573.

fully retains possession of property purchased with the principal's money, he may be charged with rent less taxes paid, and the principal may be charged with interest on the money.[39] If he refuses possession to his principal, though the latter offers to reimburse him for advances, and takes title in his own name, he is liable for the fair rental value.[40] He cannot be charged for rent during such possession on delivery to the principal.[41] An indorsement of checks by the principal to enable his agent to collect them when they were in danger of becoming worthless, though done with knowledge of the agent's claim for excessive commissions, is not a voluntary payment thereof so that the principal could not recover an excessive amount retained by the agent.[42] An agent employed to procure title to land for his principal who gets title in himself and takes possession is entitled to have his expenditures repaid, and may have a lien on the premises for their amount when judgment for possession is rendered against him.[43]

(§ 4) *C. Compensation of agent.*[44]—That an agent represented the other party with knowledge of the principal will not prevent his recovery of commissions.[45] The right to compensation and the amount thereof is usually determinable from the contract between the parties.[46] Where the agency is modified by the prin-

41. The amount of the rent was much smaller than the value of the growing crops claimed. Jackson v. Pleasanton, 101 Va. 282, 43 S. E. 573.

42. Reed v. Hayward, 82 App. Div. 416, 81 N. Y. S. 608.

43. Johnston v. Gerry [Wash.] 76 P. 258.

44. See 1 Curr. L. 64.

45. Reed v. Hayward, 82 App. Div. 416, 81 N. Y. S. 608. Where the defense in an action for realty commissions was dual agency, defendant must prove that fact and that it was not known to both parties. Red Cypress Lumber Co. v. Perry, 118 Ga. 876, 45 S. E. 674.

46. Under a contract for commissions on orders procured by him, an agent cannot recover for services in installing goods sold by another, but must show a contract for a certain sum or a promise to pay and reasonable value of the services. Taylor v. Pullman Automatic Ventilating Co., 87 N. Y. S. 404. That the services of an agent have not been profitable to his principal will not affect the amount of his compensation under his contract. Shute v. McVitie [Tex. Civ. App.] 72 S. W. 433. A contract describing a tract of land and stipulating that when it was purchased defendant was to pay plaintiff a certain amount is evidence of an agreement to pay commission to plaintiff in that amount. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227.

Particular contracts construed as to compensation: Held, as to contract between insurance company and its agent, that the company could offset against claims for commissions only debts for advances during the subsistence of the relation of principal and agent. Campbell v. Equitable Life Assur. Soc., 130 F. 786. Held that agent was not entitled to compensation on business done partly by principal's efforts and partly by agent, but not consummated until after expiration of time limit. Magoun v. Bruck, 183 Mass. 370, 67 N. E. 319. Contract between insurance company and agent construed as providing compensation from commissions, and that certain weekly advancements were to constitute a part of such compensation and not additional pay. Arbaugh v. Shockney [Ind. App.] 71 N. E. 232. Agent held not entitled to commissions on sale made at principal office, under the terms of the contract of agency. Gaar, Scott & Co. v. Brundage, 89 Minn. 412, 94 N. W. 1091. An agent's contract for commissions only on orders accepted and shipped by the principal is valid unless fraud or bad faith of the principal is shown. Wolfson v. Allen Bros. Co., 120 Iowa, 455, 94 N. W. 910. Compensation being contingent could not be recovered, the contingency not having occurred. Smith v. Philip B. Hunt Co., 90 Minn. 255, 95 N. W. 907. An agreement by an owner to pay commission for sale of realty, to be retained from the price paid, or if payment was not made directly to the agent, to be received directly from the owner, requires the sale to be complete before the right to commission accrues. Ormsby v. Graham [Iowa] 98 N. W. 724. Contract could not be so construed that nothing should become due until the expiration of a year. Bair v. Hilbert, 84 App. Div. 621, 82 N. Y. S. 1010. Where an agent's advances are "to be deducted from commissions" at the end of his employment, there is no personal liability on his part to repay advances in excess of commissions earned. Schlesinger v. Burland, 42 Misc. 206, 85 N. Y. S. 350. An agreement to sell consigned goods and account at invoice prices entitles the agent to the excess over proceeds at invoice prices as commissions. Southern Grocery Co. v. Davis, 132 N. C. 96, 43 S. E. 591. Where notes given an agent for commissions on a sale of machinery were to be paid when the purchase notes of the sale were paid and the latter notes were transferred to another who surrendered them and took back the machinery, the principal was liable to the agent for commissions if he received the full amount on sale of the notes and was no longer liable thereon; otherwise if he still remained liable on such notes. Blassingame v. Keating Implement & Mach. Co. [Tex. Civ. App.] 74 S. W. 344. The agent could not recover on the notes

cipal by another contract directly referring to the first, the agent is entitled to commissions under conditions of the later agreement.[47] Performance by the agent is a condition precedent to the right to compensation,[48] but modification of a contract, made by the agent,[49] or groundless refusal of the principal[50] or third party[51] to carry it out, will not defeat the agent's right to commissions. Violation of law,[52] undisclosed personal interest in the transaction,[53] and fraud of the agent,[54] destroys his right to commissions, and entitles the principal to recover past compensation paid.[55] But fraud may not prevent recovery on the contract.[56] The receipt of benefits of the agent's services by the principal renders him liable to the agent for compensation,[57] though he himself closed the transaction,[58]

held by him from the subsequent holder of the purchase money notes, in the absence of fraud or special circumstances. Id.

Sales agency, not exclusive: Contract between realty broker and owner construed as not giving exclusive agency for sale of land for a certain period entitling him to commission where the land was sold in the meantime by the owner. White v. Benton, 121 Iowa, 354, 96 N. W. 876. Under an agency to sell machinery for commission of all amounts over the net list price at the factory, an agent is not entitled to commission for a sale at a price beneath the net list price, made by the principal in the territory, the agency not being exclusive. Indiana Road Mach. Co. v. Lebanon Carriage & Implement Co., 25 Ky. L. R. 1763, 78 S. W. 861.

47. Agency for sale of patent rights. Leopuld v. Weeks, 96 Md. 280, 53 A. 937.

48. One employed to obtain a loan is entitled to compensation only in case he procures the loan. Demarest v. Spiral Riveted Tube Co. [N. J. Law] 58 A. 161. Where a sale of realty by an agent was not completed he could claim no commission unless the failure was the fault of the principal. Owen v. Kuhn, Loab & Co. [Tex. Civ. App.] 72 S. W. 432. Compensation for services in buying land will not be forfeited because the agent falsely represented the price paid and received a note for that amount from his principal where he immediately gave the latter possession of the land; but if he refuses to give possession, though the principal offered to reimburse him for advances, he is not entitled to compensation. Jackson v. Pleasanton, 101 Va. 282, 43 S. E. 573.

49. Modification by the principal of a contract made by an agent within his authority will not destroy the agent's right to commission. Contract for sale of land by broker. Huntemer v. Arent [S. D.] 93 N. W. 653. Where a broker secured contract for exchange of his principal's property, agreeing to waive his commission if the contract was not consummated, on modification of the original contract by the parties and consummation of the modified contract, he was entitled to his commissions. Cody v. Dempsey, 86 App. Div. 336, 83 N. Y. S. 899.

50. Johnson Bros. v. Wright [Iowa] 99 N. W. 103.

51. A broker, employed to secure an exchange of realty, who secured a contract with a third person for exchange is entitled to commissions where his principal accepted, but the third person refused to complete the contract. Charles v. Cook, 88 App. Div. 81, 84 N. Y. S. 867.

52. No recovery. Adler v. Schaumberger, 84 N. Y. S. 235.

Contra: A law making it a misdemeanor to offer for sale any realty without written authority will not prevent recovery of commissions for a sale completed without written authority [Pen. Code, § 640d, Laws 1901, p. 312, c. 128]. Cody v. Dempsey, 86 App. Div. 336, 83 N. Y. S. 899.

53. A servant cannot recover commissions for inducing his employer to enter a contract with another where the personal interest of the servant in the contract was not disclosed to the employer. Labinsks v. Holst, 84 N. Y. S. 991.

54. Sufficiency of misrepresentations by real estate broker as to land to deprive the latter of commissions on rejection of the land by the prospective purchaser. Scottish-American Mortgage Co. v. Davis [Tex. Civ. App.] 72 S. W. 217. A claim for a contingent fee by an attorney must be established by a showing of good faith and full information to his client before his consent. Dorr v. Camden [W. Va.] 46 S. E. 1014.

55. Under a contract whereby the compensation of an agent for all services past and future was to be half the profits of the business, fraud of the agent in past transactions will entitle the principal to recover remuneration paid for such services. Hindle v. Holcomb [Wash.] 75 P. 873.

56. An agent who has secured a larger commission for securing a contract through misrepresentation to the principal as to the amount of the contract may nevertheless recover the commission agreed upon under the actual amount of the contract. Hale Elevator Co. v. Hale, 201 Ill. 131, 66 N. E. 249.

57. Evidence sufficient to carry to jury the question whether a broker was the procuring cause of a sale of personalty in an action for commissions. Morton v. Case Threshing Mach. Co., 99 Mo. App. 630, 74 S. W. 434. Rights of a sales agent for a corporation under a contract for commissions are not destroyed by appointment of receivers for the corporation where they affirmed the contract and received benefits therefrom though at time of their appointment the contract was executory merely. Leopuld v. Weeks, 96 Md. 280, 53 A. 937.

58. A broker for sale of personalty is entitled to commissions where he secured a purchaser though the sale was actually made by the owner. Morton v. Case Threshing Mach. Co., 99 Mo. App. 630, 74 S. W. 434.

unless the agency had terminated before the rendition of services.[59] Where an agent is discharged for good cause before expiration of his term, he is not entitled to full commission,[60] but may recover remaining compensation less damages from breach of his contract.[61] Where the agent's compensation depends on collection of notes by the principal, the latter owes the former the duty of reasonable diligence in making the collection.[62] The principal is liable for the compensation of a subagent, when the agent had authority to appoint him,[63] or the principal accepts the results of work of the subagent employed by his agent with knowledge of the commission claimed.[64] The subagent, claiming compensation, must show the agent's authority to appoint him.[65] A credit rating of customers, to bind a principal to accept orders secured by his agent, must have been known to the principal.[66] An instrument executed by a corporation giving its agent a ten per cent. commission on sales and directing payment thereof by a banker was an equitable assignment of so much of the purchase price and gave the agent a lien on funds of the sales, enforceable in equity.[67]

(§ 4) *D. Remedies, pleading, procedure, and proof.*[68]—A bill in equity for an accounting will not lie where there is an adequate remedy at law,[69] but if the agent's duties are such, under the contract of agency, that a confidential relation exists between principal and agent, a suit in equity for an accounting is proper.[70] That an agent has rendered an account will not prevent maintenance of a suit for an accounting on the ground that it would be vexatious.[71] Where an agent was paid a certain sum in excess of the real price of land bought for his principal, because of his fraud in stating the price, the principal may recover the

59. Subsequent sale of a ranch to a purchaser secured by an agent for the sale after termination of his authority is not a ratification of his acts so as to entitle him to commissions. George B. Loring Co. v. Hesperian Cattle Co., 176 Mo. 330, 75 S. W. 1095. In an action for commissions for a sale of land evidence of a conversation between the agent and the purchaser after termination of the agency is not admissible. Id.

60, 61. Shute v. McVitie [Tex. Civ. App.] 72 S. W. 433.

62. Westinghouse v. Tilden [Neb.] 96 N. W. 74.

63. Eastland v. Maney [Tex. Civ. App.] 81 S. W. 574. A special agent employing another to assist in the business of his principal with the latter's knowledge and approval binds the principal to pay the subagent's agreed fee. Hornbeck v. Gilmer, 110 La. 500, 34 So. 651. If the principal knew the terms for commission under which his special agent employed another to aid him, payment to the agent was not payment to the subagent. Id.

64. Hornbeck v. Gilmer, 110 La. 500, 34 So. 651.

65. Instruction in action to recover commissions for securing a tenant for property under contract with one assuming to act for the owner. Burger v. Allen, 24 Ky. L. R. 1418, 71 S. W. 641.

66. Private information obtained by the agent as to responsibility of customers and of which the principal had no notice was not evidence of the latter's bad faith in rejecting orders. Wolfson v. Allen Bros. Co., 120 Iowa, 455, 94 N. W. 910.

67. Leopuld v. Weeks, 96 Md. 280, 53 A. 937.

68. See 1 Curr. L. 65, 66.

69. Bill sought no relief which could not be obtained at law. American Spirits Mfg. Co. v. Easton, 120 F. 440.

70. Agent to invest principal's money in land sold for taxes. Rogers v. Wheeler, 89 App. Div. 435, 85 N. Y. S. 931. Relation declared fiduciary on former appeal. Accounting proper. Jordan v. Underhill, 91 App. Div. 124, 86 N. Y. S. 620. Pendency of an action by an agent after termination of the agency to determine his compensation and declare a lien therefor on property of the principal in his hands, is not a bar to a later suit by the principal for an accounting. Id. Agent had control and management of realty. Bill in equity proper and stated cause of action. Coffin v. Craig, 89 Minn. 226, 94 N. W. 680. A bill in equity against an agent for misappropriation of funds, for an accounting, is not demurrable on the ground that there is an adequate remedy at law. Decell v. Hazlehurst Oil Mill & Fertilizer Co. [Miss.] 35 So. 761. In an action against an agent for wrongfully taking a conveyance of his principal's land in his own name, where the agent by answer conceded the principal's right to the land and asked merely an accounting, judgment for a specific sum claimed against the principal, and a lien on the land, it was proper to direct a conveyance of the land to the principal and retain the accounting for future adjudication. Hoskins v. Morton, 25 Ky. L. R. 1089, 77 S. W. 195.

71. The facts in regard to such account may be shown in the action. Jordan v. Underhill, 91 App. Div. 124, 86 N. Y. S. 620.

excess without first securing a rescission of the settlement made with him.[72] Default of a general agent is no defense in an action against a subagent to recover money embezzled by the latter.[73] Where an agent to purchase property sold his own property to the principal for a fair sum, with no other fraud than concealing his ownership, the principal's only remedy is to rescind the contract.[74] Among other available remedies, as between principal and agent, illustrated in the notes, is an action on account,[75] for money had and received,[76] for conversion of property of the principal,[77] for breach of the contract of agency,[78] or on the agent's bond.[79] Where an agent, acting in good faith, under instructions from his principal, committed a tort, he may recover from the principal the amount of a judgment recovered against him for the tort and his expenses in the suit.[80]

Pleading.[81]—Where several persons have succeeded to and performed duties of one originally appointed agent, a suit for an accounting against those finally acting as agents presents a single cause of action;[82] the entire course of the agency may be considered a single "transaction" within the meaning of the statute permitting joinder of causes of action.[83] Where, in an action to recover from an agent excessive commissions, the declaration and special counts set out the contracts and their modifications, on which such commissions were obtained, common counts were unnecessary to sustain a verdict for the excess demanded.[84]

72. Hindle v. Holcomb [Wash.] 76 P. 873. Where an agent was guilty of fraud in buying land for his principal, having made a contract for its purchase for the purpose of selling it to his principal, it is immaterial whether such contract was made before or after the principal agreed to purchase, in an action by the latter to recover excess of price paid because of the fraud. Id.

73. Insurance agents. Foster v. Franklin Ins. Co. [Tex. Civ. App.] 72 S. W. 91.

74. Whitehead v. Lynn [Colo. App.] 76 P. 1119. He cannot retain the property and also recover the difference between the price paid by him and that paid by the agent. Id.

75. Evidence insufficient to support two items of agent's counterclaim in action by principal on account. New Orleans Coffee Co. v. Hutchinson [Neb.] 96 N. W. 1017. A sales agent, whose commission is due when sale notes are paid or at option of the principal in sale notes, may sue for his commission before collection of the notes where the principal has failed to enforce collection for an unreasonable length of time. Westinghouse Co. v. Tilden [Neb.] 96 N. W. 74. Evidence as to the motive in employing a traveling salesman is inadmissible in his action for commissions. Admissibility of other evidence considered. Pepper v. Pepper & Co., 24 Ky. L. R. 2403, 74 S. W. 739.

76. Money of a principal misappropriated by an agent may be recovered in an action for money had and received. Limitations will not run against the action until the principal learns of the tort. Guernsey v. Davis, 67 Kan. 378, 73 P. 101.

77. Lahr v. Kraemer [Minn.] 97 N. W. 418. An agent is not liable to the principal in conversion for the sale of property authorized by the principal. Twogood v. Allee [Iowa] 99 N. W. 288.

78. Taylor Co. v. Bannerman [Wis.] 97 N. W. 918. The measure of damages for breach of a contract of agency giving an agent the exclusive right to sell in a certain territory is the profits the agent would have made by the sale. The agent must show actual damage. Id. Nominal damages only can be recovered by an agent for revocation of his authority where he does not show ability to perform. Agency for sale of realty. Milligan v. Owen [Iowa] 98 N. W. 792. Where the agent's authority has been revoked, the question of whether he afterward performed is immaterial in an action for damages for the revocation, unless on the issue of damages. Id.

79. In an action on an agent's bond, the fact that he covenanted for good faith only if he acted as agent is immaterial where the business of the agency was actually transacted in his name. Norwich Union Fire Ins. Ass'n v. Buchalter, 102 Mo. App. 332, 76 S. W. 484. An action for breach of an indemnity bond given by an agent to his principal will not bar an action for a subsequent breach. Northern Assur. Co. v. Borgelt [Neb.] 93 N. W. 226. A cause of action by an insurance company for breach of an agent's bond by violation of instructions to cancel a policy is not barred until five years after the loss ensues to the company. Id.

80. The rule that one joint tort feasor cannot have redress against another does not apply in such case. Hoggan v. Cahoon, 26 Utah, 444, 73 P. 612.

81. Complaint sufficient to state a cause of action against agent for money had and received. Reed v. Hayward, 82 App. Div. 416, 81 N. Y. S. 608. To recover from a salesman an amount alleged to have been advanced in excess of commissions, his contract allowing commissions and traveling expenses, the complaint must show the amounts advanced for compensation and for traveling expenses. Tausig v. Drucker, 88 N. Y. S. 391. See 1 Curr. L. 66.

82. Even though such successors acted under individual agreements with the principal. Rogers v. Wheeler, 89 App. Div. 435, 85 N. Y. S. 981.

83. Code Civ. Proc. § 484, subd. 9. Rogers

Evidence.[85]—The rule excluding evidence of transactions with a decedent by a party to an action against the estate does not apply to an action by a principal against the estate of his agent to set aside a deed procured by fraud.[88] Evidence of usual and customary commissions may be given to prove reasonable value for services of an agent in selling land.[87] In an action for an accounting against an agent, the burden is on the agent to show that he has paid to or for his principal all moneys of the principal coming into his hands.[88] In an action by an agent for commissions on sales, the burden is on him to show compliance with his contract and alleged bad faith on the part of the principal.[89] To support an allegation of conversion by an agent, the plaintiff must show generally the amount of property received by the agent and failure to return or account for it on demand;[90] such a showing shifts the burden upon the agent to make a specific accounting.[91]

v. Wheeler, 89 App. Div. 435, 85 N. Y. S. 981.

84. Hale Elevator Co. v. Hale, 201 Ill. 131, 66 N. E. 249.

85. Evidence of the value of land bought by an agent is not admissible in an action by his principal to recover the excess of the price fraudulently represented above that actually paid by the agent. Hindle v. Holcomb [Wash.] 75 P. 873. Evidence showing what a purchaser would have paid for part of stock in hands of an agent for sale cannot be given in an action by the principal against the agent for misrepresentation as to the amount he received, where it appears that he had authority only to sell all the stock. Barbar v. Martin [Neb.] 93 N. W. 722. In an action by an alleged agent for breach of a contract for sale of the principal's goods, evidence that the principal knew that plaintiff claimed to be his general agent is admissible to show why the principal published a notice that he had no agents after plaintiff had proved such notice. Dodge v. Reynolds [Mich.] 98 N. W. 737. In an action by a principal against an agent for breach of duty, an allegation of specific direction to an agent is established by showing that the agent's duty in all cases covered the transaction in suit. Instruction based on such showing proper. Guernsey v. Davis, 67 Kan. 378, 73 P. 101. See 1 Curr. L. 68.

86. Calmon v. Sarraille, 142 Cal. 638, 76 P. 486.

87. Hurt v. Jones [Mo. App.] 79 S. W. 486.

88. Farmers' Warehouse Ass'n v. Montgomery [Minn.] 99 N. W. 776.

89. Admissibility of certain evidence considered on issue of bad faith. Wolfson v. Allen Bros. Co., 120 Iowa, 455, 94 N. W. 910.

90, 91. Lahr v. Kraemer [Minn.] 97 N. W. 418. Where an agent has sold property delivered to him, the burden is on him in a suit for accounting to show that he has accounted, or to excuse failure to account. Dodge v. Hatchett, 118 Ga. 883, 45 S. E. 687.

AGENCY IN THE CASE OF PERSONS OCCUPYING PARTICULAR RELATIONS.

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§ 1. *In general.*—Questions as to the existence of the relation of principal and agent frequently arise in the case of persons occupying particular relations, as in the case of husband and wife, parent and child, partners, tenants in common, etc., and the relationship is sometimes, although not necessarily, a circumstance which gives rise to special rules. In this article we shall consider the relation of principal and agent in such cases and ascertain when it exists, and more particularly, the circumstances under which it may or will be implied, either as a matter of fact or as a matter of law.

§ 2. *Implication and presumption of agency from relationship of the parties.*—As we shall presently see, agency on the part of a wife to bind her husband is under some circumstances, and to a certain extent, implied as a matter of law, and irrespective of the husband's consent; and under some circumstances it is implied or presumed as a matter of fact, in the absence of evidence to the contrary. An agency is also implied as a matter of law, under certain circumstances, in the case of parent and child. With these exceptions, however, the general rule is that agency will not be implied or presumed, either as a matter of law or fact, from the mere fact that the parties are related, however nearly.[92] The relationship of the parties, however, may be shown and considered as a circumstance, in determining whether there was agency in fact in a particular case, and may be sufficient with other circumstances to establish an agency, where the other circumstances would not be sufficient in the absence of such relationship.[93] Thus where one insured had been injured and rendered utterly helpless in a distant country, with no friend or relative near him except his brother, and it being important to close up the business relating to the insurance before he was taken home, the agency of the brother to act for him in the matter might be implied from the circumstances.[94]

§ 3. *Agency of parent for child.*—The mere relationship of parent and child does not of itself make the parent the agent of the child to manage or dispose of his property or for any other purpose, whether the child is a minor or of full age.[95] But a son or daughter, being sui juris, may expressly appoint his or her father or mother as agent, or such agency may be implied from the conduct of the parties.[96] Or there may be an estoppel by holding out or other conduct, as in the case of other persons.[97] Thus if a son sends one who desires to purchase lands of him to his father to make a bargain, with a statement that whatever bargain they should make he would agree to, the person thus sent would be authorized to regard the father as the son's agent for the purpose of making a bargain, and the statements of the father while negotiating the sale would bind the son.[98]

92. Johnson v. Stone, 40 N. H. 197, 77 Am. Dec. 706; McNamara v. McNamara, 62 Ga. 200; Walsh v. Curley, 42 N. Y. St. Rep. 470; Le Count v. Greenley, 6 N. Y. St. Rep. 91, and other cases more specifically cited in the notes following. And see Gibson v. Snow Hardware Co., 94 Ala. 346.

93. Sheanon v. Pacific Mut. Life Ins. Co., 83 Wis. 507; Ford v. Linehan, 146 Mass. 283. And see Abeel v. Seymour, 6 Hun [N. Y.] 656; Shimmel v. Erie R. Co., 5 Daly [N. Y.] 396; Foster v. Fleishans, 69 Mich. 543.

94. Sheanon v. Pacific Mut. Life Ins. Co., 83 Wis. 507.

95. Le Count v. Greenley, 6 N. Y. St. Rep. 91. The fact that one as father or friend merely gives information or advice in reference to a land trade does not make him an agent. McNamara v. McNamara, 62 Ga. 200.

96. Helps v. Clayton, 17 C. B. [N. S.] 553.

Of course, where a child is a minor, the general rules as to agency for infants apply to an appointment of his parent as his agent.

§ 4. *Duty to support parent. Liability for necessaries.*—At common law, a child is under no legal obligation to support his parents, although they may be destitute and helpless, and in the absence of a statute, therefore, a child cannot be made liable for necessaries furnished his parents without his consent.[99] In some jurisdictions, a legal duty to support their helpless and destitute parents is imposed upon children by statute, and if they fail to perform such duty, they can be held liable for necessaries furnished, unless some special mode of enforcing the duty is prescribed by the statute.[1] Thus if a statute imposes the duty upon "the children of any poor person, who is unable to maintain himself by work, to maintain such person to the extent of their ability," a county which has, under the direction of the law, furnished necessaries to an indigent and helpless father, may recover therefor in an action against the children whose duty it was to furnish the same, and whose neglect or refusal so to do made it necessary for the county to furnish such necessaries.[2] But even under such a statute, a court would have no authority to render a judgment requiring the children to undertake the future support of their parents, where the statute is silent as to the means of enforcing such duty as to future maintenance.[3]

§ 5. *Agency of child for parent. In general.*—Ordinarily a child has no implied authority to act as agent for his parent, to manage or dispose of the latter's property, make contracts or for any other purpose, and authority will not be presumed from the mere fact of relationship.[4] "A son has no authority, as such, to lend his father's property, and there is no presumption that such authority has been given to a son. It may be shown that authority to lend tools and the like has been given to a son expressly, or such an authority may be inferred from the conduct of the father, tending to show that he reposed such confidence and intrusted such discretion to the son, as by showing that on other occasions the son had lent the father's property of a similar kind, and the father, upon the facts coming to his knowledge, approved what he had done; but without such proof the son stands in the same position as a stranger."[5] But of course, as stated in the above quotation, a parent may expressly authorize his or her child to act as agent, and such authority may be inferred from circumstances. Or the parent may be estopped, by a holding out or other conduct, from denying such authority.[6] Thus where a son had in several instances used the name of his father by signing it as surety to notes given by the son, and the father, with knowledge of the fact that such use had been made of his name, directed the holder of a

97, 98. Reeves v. Kelly, 30 Mich. 132.

99. Rex v. Munden, 1 Strange, 190; Edwards v. Davis, 16 Johns. [N. Y.] 281; Becker v. Gibson, 70 Ind. 239; Stone v. Stone, 32 Conn. 142; Lebanon v. Griffin, 45 N. H. 558; Gray v. Spalding, 58 N. H. 345.

1. McCook County v. Kammoss, 7 S. D. 558, 58 Am. St. Rep. 854; Howe v. Hyde, 88 Mich. 91. It is otherwise if the statute prescribes a particular mode of enforcing the duty which it imposes. Edwards v. Davis, 16 Johns. [N. Y.] 281.

2, 3. McCook County v. Kammoss, 7 S. D. 558, 58 Am. St. Rep. 854.

4. Owen v. White, 5 Port. [Ala.] 435, 30 Am. Dec. 572; Paul v. Hummel, 43 Mo. 122; Holt v. Baldwin, 46 Mo. 265, 2 Am. Rep. 515; Johnson v. Stone, 40 N. H. 197, 77 Am. Dec. 706; Walsh v. Curley, 42 N. Y. St. Rep. 470; Ritch v. Smith, 82 N. Y. 627; Schaefer v. Osterbrink, 67 Wis. 495; Kumba v. Gilham, 103 Wis. 312. And see article by Prof. W. R. Vance, in 6 Va. Law Reg. 585.

5. Johnson v. Stone, 40 N. H. 197, 77 Am. Dec. 706.

6. Bryan v. Jackson, 4 Conn. 288; Weaver v. Ogletree, 39 Ga. 586; Harper v. Lemon, 38 Ga. 227; Murphy v. Ottenheimer, 84 Ill. 39; Thurber v. Anderson, 88 Ill. 167; Commonwealth v. Holmes, 119 Mass. 195; Thayer v. White, 12 Metc. [Mass.] 343; Bennett v. Gillette, 3 Minn. 423, 74 Am. Dec. 774; Holt v. Baldwin, 46 Mo. 265, 2 Am. Rep. 515; Johnson v. Stone, 40 N. H. 197, 77 Am. Dec. 706; Abeel v. Seymour, 6 Hun [N. Y.] 656; Center v. Rush, 35 Misc. [N. Y.] 294; Fowlkes v. Bakor, 29 Tex. 139; Chase v. Snow, 52 Vt. 525. Compare Greenfield Bank v. Crafts, 2 Allen [Mass.] 269.

note so signed to see the son about it, and the latter agreed to have it arranged as desired, and smaller notes were accepted by the holder, in place of the larger one, in the belief that the new notes had been signed by the father, as he made no objection to the genuineness of the note presented to him, the facts were such as to authorize the jury to presume and find that the son was the agent of the father to sign the note, or that the father ratified the act done by the son.[7] If a son has been accustomed to sign his father's name as indorser of notes, and the father has recognized the indorsements as binding, authority on the part of the son to bind the father by such indorsements in other instances will be implied.[8] So if the parent has formerly paid for goods purchased on credit by his child, and does not forbid such sales, it will be inferred that the parent authorizes further purchases on credit.[9]

Contracts for necessaries.—A father is not bound by the contract of his son even for articles which are suitable and necessary, in the absence of elements of estoppel, unless an express authority is shown, or the circumstances are such that authority in fact may be inferred. A son has no implied authority to purchase necessaries on his father's credit merely by virtue of the relationship.[10] When a child continues under the direction and control of his father, it is left to the father's discretion to determine what is necessary for him, unless it clearly appears that the father has failed to perform his duty to provide for the child's maintenance.[11] But an implied authority on the part of the child may arise if such an omission on the part of the father is shown. By statute in many jurisdictions, and by the weight of authority even at common law, and independently of any statute, a father is under a legal obligation to support and maintain his minor children, just as a husband is under a legal obligation to support and maintain his wife, as will be hereafter shown. And it follows that if a father drives his minor child from home, or causes him to leave by personal violence or abuse, or otherwise neglects without cause to perform this parental duty, the law will imply or create an agency on the part of the child, as it does on the part of a wife, to purchase necessaries on the father's credit,[12] such as food, clothing, shelter, medical attendance, etc.[13]

7. Weaver v. Ogletree, 39 Ga. 586.

8. Abeel v. Seymour, 6 Hun [N. Y.] 656.

9. Plotts v. Rosebury, 28 N. J. Law, 146; Fowlkes v. Baker, 29 Tex. 135.

10. Owen v. White, 5 Port. [Ala.] 435, 30 Am. Dec. 572; Van Valkinburgh v. Watson, 13 Johns. [N. Y.] 480, 7 Am. Dec. 395; and other cases cited in the notes following.

11. Owen v. White, 5 Port. [Ala.] 435, 30 Am. Dec. 572.

12. 2 Kent, Comm. 190; Reeve, Dom. Rel. 285.

England: Rawlyns v. Vandyke, 3 Esp. 252. But see the English cases to the contrary cited below in this note.

Alabama: Owen v. White, 5 Port. 435, 30 Am. Dec. 572.

Arkansas: Holt v. Holt, 42 Ark. 495; Jordan v. Wright, 45 Ark. 237.

Connecticut: Stanton v. Willson, 3 Day, 37, 3 Am. Dec. 255. And see Finch v. Finch, 22 Conn. 421.

District of Columbia: Holtzman v. Castleman, 2 MacArthur, 555.

Georgia: Keaton v. Davis, 18 Ga. 457.

Iowa: Porter v. Powell, 79 Iowa, 151, 18 Am. St. Rep. 353. And see Dawson v. Dawson, 12 Iowa, 513; Johnson v. Barnes, 69 Iowa, 641.

Maine: Weeks v. Merrow, 40 Me. 151; Gilley v. Gilley, 79 Me. 292, 1 Am. St. Rep. 307.

Massachusetts: Dennis v. Clark, 2 Cush. 347, 352, 48 Am. Dec. 671, 675; Reynolds v. Sweetser, 15 Gray, 78.

Michigan: Courtright v. Courtright, 40 Mich. 633; Hyde v. Leisenring, 107 Mich. 490; Tyler v. Arnold, 47 Mich. 554.

New York: Van Valkinburgh v. Watson, 13 Johns. 480, 7 Am. Dec. 395; Manning v. Wells, 8 Misc. 646, 85 Hun, 27; Edwards v. Davis, 16 Johns. 281, 285; Cromwell v. Benjamin, 41 Barb. 558; In re Ryder, 11 Paige, 188. And see Furman v. Van Sise, 56 N. Y. 435, 15 Am. Rep. 441. Compare Raymond v. Loyl, 10 Barb. 483; Chilcott v. Trimble, 13 Barb. 502.

Ohio: Pretzinger v. Pretzinger, 45 Ohio St. 452, 4 Am. St. Rep. 542.

Pennsylvania: Fitler v. Fitler, 33 Pa. 50.

Tennessee: Maguinay v. Saudek, 5 Sneed, 146.

Virginia: Evans v. Pearce, 15 Grat. 513, 78 Am. Dec. 635. In some decisions, however, it has been held that there is no legal obligation on a parent, independent of statute, to maintain his child, and that no action can be maintained against a father for necessaries furnished to his minor child, un-

It will be seen from the cases cited in the last preceding note, that, although they all agree in holding a parent liable for necessaries furnished to a child, where he has neglected or refused to do so, yet this liability is placed on different grounds. In the cases first cited, it is held that there is a legal obligation on a father to maintain his infant child and that if he fails or refuses to do so, there is an agency by implication of law on the part of the child to purchase such necessaries on the credit of the parent. On the other hand, the other cases cited hold that there is no such legal obligation on the parent, independent of statutory enactment, and that there is no agency in the child, in such cases, to procure necessaries on the credit of the parent, unless he is expressly authorized to do so, or unless the circumstances are such as to create an agency by implication of fact. This implied authority on the part of a child to bind his father for necessaries only arises in the case of neglect of duty on the part of the father, which must be affirmatively shown.[14] If a father abandons his minor child or drives him from home, the child carries with him such an implied authority, but it is otherwise where the child, being of the age of discretion, voluntarily leaves his father's house.[15] Nor is a father liable for necessaries

less the father has expressly or impliedly authorized the purchase on his credit, or has expressly or impliedly promised to pay therefor, but slight evidence is held to be sufficient to show this authority or promise.

England: Mortimore v. Wright, 6 Mees. & W. 482; Shelton v. Springett, 11 C. B. 452; Law v. Wilkins, 1 Nev. & P. 697; Baker v. Keen, 2 Starkie, 501.

Illinois: In this state it is a well established rule that "an express promise, or circumstances from which a promise by the father can be inferred, are indispensably necessary to bind the parent for necessaries furnished his infant child by a third person." Hunt v. Thompson, 3 Scam. 179; Miller v. McKinney, 45 Ill. App. 447; Allen v. Jacobi, 14 Ill. App. 277; Schnuckle v. Bierman, 89 Ill. 454; Gotts v. Clark, 78 Ill. 229; McMillen v. Lee, 78 Ill. 443; Johnson v. Smallwood, 88 Ill. 73; Murphy v. Ottenheimer, 84 Ill. 39. Under this rule it has been held that, if a father neglects or refuses his natural or moral duty to furnish his child with necessary and suitable wearing apparel, any one can supply the child therewith, and the law in such case will imply a promise on the part of the father to pay for them, and he will not be heard to allege the contrary; but it would be otherwise if he had not been derelict in his duty. Allen v. Jacobi, 14 Ill. App. 277; Hunt v. Thompson, 3 Scam. 179; Miller v. McKinney, 46 Ill. App. 447.

Indiana: Hollingsworth v. Swedenborg, 49 Ind. 378, 19 Am. Rep. 687; White v. Mann, 110 Ind. 74; Watkins v. De Armond, 89 Ind. 553. Compare Conn v. Conn, 57 Ind. 323.

New Hampshire: French v. Benton, 44 N. H. 30; Kelley v. Davis, 49 N. H. 187, 6 Am. Rep. 499; Town of Farmington v. Jones, 36 N. H. 271. Compare, however, Hillsborough v. Deering, 4 N. H. 86; Pidgin v. Cram, 8 N. H. 352.

New Jersey: Freeman v. Robinson, 38 N. J. Law, 383, 20 Am. Rep. 399. Compare Tomkins v. Tomkins, 11 N. J. Eq. 512.

Oregon: Carney v. Barrett, 4 Or. 171.

Vermont: Gordon v. Potter, 17 Vt. 348; Varney v. Young, 11 Vt. 258. But see Buckminster v. Buckminster, 38 Vt. 248, 88 Am. Dec. 652.

13. What are necessaries must be determined by the condition in life and means of the father as well as the character of the articles. Stanton v. Willson, 3 Day [Conn.] 37, 3 Am. Dec. 265; Freeman v. Robinson, 38 N. J. Law, 383, 20 Am. Rep. 399. Education has been held a necessary. Stanton v. Willson, 3 Day [Conn.] 37, 3 Am. Dec. 255. But compare Hodges v. Hodges, Peake Add. Cas. 79; Bailey v. Calcott, 4 Jur. 699. But not tutoring in vacation. Peacock v. Linton, 22 R. I. 328.

14. Van Valkinburgh v. Watson, 13 Johns. [N. Y.] 480, 7 Am. Dec. 396; Owen v. White, 5 Port. [Ala.] 435, 30 Am. Dec. 572; Hunt v. Thompson, 3 Scam. [Ill.] 179, 36 Am. Dec. 538; Glynn v. Glynn, 94 Me. 465. A person who furnishes a child with necessaries acts at his peril, and will have the burden of showing that the articles furnished were necessaries, and that the father neglected his duty in the matter (Van Valkinburgh v. Watson, 13 Johns. [N. Y.] 480, 7 Am. Dec. 396; Hunt v. Thompson, 3 Scam. [Ill.] 179, 36 Am. Dec. 538; Judge v. Barrows, 59 Wis. 115; Townsend v. Burnham, 33 N. H. 270; Rogers v. Turner, 59 Mo. 116; Chilcott v. Trimble, 13 Barb. [N. Y.] 502; Smith v. Church, 5 Hun [N. Y.] 109; Miller v. Davis, 46 Ill. App. 447), or of showing authority or assent of the father. Rolfe v. Abbott, 6 Car. & P. 286.

15. Angel v. McLellan, 16 Mass. 28, 8 Am. Dec. 118; Owen v. White, 5 Port. [Ala.] 435, 30 Am. Dec. 572; Hunt v. Thompson, 3 Scam. [Ill.] 179, 36 Am. Dec. 538; Hyde v. Leisenring, 107 Mich. 490; Raymond v. Loyl, 10 Barb. [N. Y.] 483; Goodman v. Alexander, 28 App. Div. [N. Y.] 227; Weeks v. Merrow, 40 Me. 151; Glynn v. Glynn, 94 Me. 465; Miller v. Davis, 49 Ill. App. 377. But not where the child is of tender years, as between eight and nine years old. Bradley v. Keen, 101 Ill. App. 519. As to the effect of a limited emancipation, see Porter v. Powell, 79 Iowa, 151, 18 Am. St. Rep. 353. But when a father permits his minor son to buy goods on his credit, the fact that the son has left the father

furnished a child while in the custody of the mother, who has left him without cause.[18] Nor does the above rule apply to adult children; and a father is not liable for necessaries furnished an adult child, in the absence of contract or authority, although the child be at the home of the father when the necessaries are furnished, and although the father fails to supply them himself.[17] There is some conflict of authority as to whether a mother who is a widow is under an obligation to support her minor children, where they are not able to support themselves, but the better opinion is that she is under such an obligation, and that she is liable, therefore, for necessaries furnished to them, on her failure to support them.[18] It would be otherwise, however, if the children have sufficient means of their own, or can maintain themselves, or provision has been made for their support.[19] If a wife obtains a divorce, and is given the custody of minor children, and alimony for herself, but not specifically for the support of the children also, this does not relieve the husband of his duty to support the children, and he may nevertheless be liable for necessaries furnished them.[20] In some cases, however, the contrary is held.[21]

The duty of a father to support his children does not extend to the children of a wife by a former marriage, so as to render a step-father liable for necessaries furnished his step-children,[22] unless he so receives them and treats them as to raise the presumption that he intends to create the relation of parent and child.[23]

§ 6. *Agency of servant for master.*—There is nothing in the relation of a master and his domestic or other servant to give the latter any authority to bind the

will not prevent a recovery against the latter for goods sold to the son, by a party acting on the faith of the agency of the son, and without notice of the change of relation, or circumstances to put him on inquiry. Murphy v. Ottenheimer, 84 Ill. 39. Where a father permits his son to contract for a year's tuition, the father is liable to the instructor for the whole fee in case the son leaves the school of his own motion before the end of the year. Center v. Rush, 35 Misc. [N. Y.] 294.

16. Hyde v. Leisenring, 107 Mich. 490; Glynn v. Glynn, 94 Me. 465.

17. Blachley v. Laba, 63 Iowa, 22, 50 Am. Rep. 724; Vorass v. Rosenberry, 85 Ill. App. 623; Norris v. Dodge's Adm'r, 23 Ind. 190; Kernodle v. Caldwell, 46 Ind. 153; Mills v. Wyman, 3 Pick. [Mass.] 207; Townsend v. Burnham, 33 N. H. 270; Wood v. Gill's Ex'rs, 1 N. J. Law, 449; Crane v. Baudouine, 55 N. Y. 256; Patton's Ex'r v. Hassinger, 69 Pa. 311; Hawkins v. Hyde, 55 Vt. 55. But a father is liable for necessaries furnished to an invalid daughter, unable to support herself and dependent on the father, notwithstanding she is over age. Cromwell v. Benjamin, 41 Barb. [N. Y.] 558. And where a child, living with its parent, has been accustomed to purchase on the credit of the parent such articles as were for his own personal use, he deals as the known agent of the parent and the child is not personally liable therefor, though the purchase is made after his majority. Emery-Bird-Thayer Dry Goods Co. v. Coomer, 87 Mo. App. 404.

18. Furman v. Van Sise, 56 N. Y. 435, 15 Am. Rep. 441; Gray v. Durland, 50 Barb. [N. Y.] 100, 211; Girls' Industrial Home v. Fritchey, 10 Mo. App. 344; Mowbry v. Mowbry, 64 Ill. 383.

But see Whipple v. Dow, 2 Mass. 415; Dawes v. Howard, 4 Mass. 97; Englehardt v. Yung's Heirs, 76 Ala. 534; In re Besondy, 32 Minn. 385, 50 Am. Rep. 579. Compare Inhabitants of Dedham v. Inhabitants of Natick, 16 Mass. 135.

19. Mowbry v. Mowbry, 64 Ill. 383; Whipple v. Dow, 2 Mass. 415; Dawes v. Howard, 4 Mass. 97; Englehardt v. Yung's Heirs, 76 Ala. 534.

20. Pretzinger v. Pretzinger, 45 Ohio St. 452, 4 Am. St. Rep. 542 (allowing the wife to recover from the husband for support furnished the child). Holt v. Holt, 42 Ark. 495; Courtright v. Courtright, 40 Mich. 633; Thomas v. Thomas, 41 Wis. 229; Conn v. Conn, 57 Ind. 323.

21. Burritt v. Burritt, 29 Barb. [N. Y.] 124; Brow v. Brightman, 136 Mass. 187; Finch v. Finch, 22 Conn. 411. In Burritt v. Burritt, supra, it was held that, where a divorce has been decreed and the care and custody of the child awarded to the mother and alimony to the wife, it must be presumed to carry with it the obligation of support, in the absence of evidence to the contrary; or at least, to relieve the father from the obligation to furnish such support upon the call of the mother; and to make the father liable in such a case, there must be special circumstances averred in the complaint or appearing in the evidence, from which the obligation must arise or may be reasonably inferred.

22. Tubb v. Harrison, 4 Term R. 118; Mowbry v. Mowbry, 64 Ill. 383; Bond v. Lockwood, 33 Ill. 212; In re Besondy, 32 Minn. 385, 50 Am. Rep. 579; In re Ackerman, 116 N. Y. 654.

23. Mowbry v. Mowbry, 64 Ill. 383; Bond v. Lockwood, 33 Ill. 212; Ela v. Brand, 63 N. H. 14.

former. A servant is the agent of his master for the purpose of managing or disposing of his property, binding him by contracts for the purchase of supplies and otherwise, or for any other purpose, in so far only as authority may have been expressly or impliedly conferred upon him by the master.[24] Of course, as in any other case, agency on the part of a servant to bind his master may be implied from circumstances, and the master may be estopped by his conduct clothing the servant with apparent authority. But properly speaking in so far as the servant becomes an agent for his master he loses the character of servant.

§ 7. *Agency of husband for wife. In general.*—At common law, a married woman cannot appoint an agent, and therefore she cannot be bound by contracts or acts of her husband as her agent, even though she may have expressly authorized the same. But this doctrine no longer obtains in all its strictness in any jurisdiction. In some states, statutes have been enacted, allowing married women to hold a separate estate, and to convey or contract with reference to the same; and in some states the common law disabilities of coverture have been removed altogether, so that she may contract in all respects as a feme sole. And in so far as her disabilities have been thus removed, a married woman may appoint an agent to act for her. And, subject to any special statutory provisions, she may appoint her husband as well as a third person. There is nothing in the marriage relation to prevent a husband from acting as the agent of his wife under an appointment by her.[25] And the same is true of any other contract or act which under the statutes a wife may make or do. The general rule is that she may authorize her husband to do for her whatever she has the capacity to do herself.[26] A husband may act as agent for his

24. Haluptzok v. Great Northern R. Co., 55 Minn. 446.

25. Alabama: Jones v. Chenault, 124 Ala. 610, 82 Am. St. Rep. 211; Louisville Coffin Co. v. Stokes, 78 Ala. 372.

Arkansas: Humphrey v. McCauley, 55 Ark. 143; Hoffman v. McFadden, 56 Ark. 217, 35 Am. St. Rep. 101.

California: Quarg v. Scher, 136 Cal. 406.

Florida: Prentiss v. Paisley, 25 Fla. 927.

Illinois: Haight v. McVeagh, 69 Ill. 624; Patten v. Patten, 75 Ill. 446; Walker v. Carrington, 74 Ill. 446; Wortman v. Price, 47 Ill. 22; Nigh v. Dovel, 84 Ill. App. 228.

Indiana: Barnett v. Gluting, 3 Ind. App. 415; Rowell v. Klein, 44 Ind. 290; Griffin v. Ransdell, 71 Ind. 440.

Iowa: Hamilton v. Hooper, 46 Iowa, 515, 26 Am. Rep. 161. See Sawyer v. Biggart, 114 Iowa, 489.

Kansas: Wilkinson v. Elliott, 43 Kan. 590, 19 Am. St. Rep. 158.

Louisiana: Jones v. Read, 1 La. Ann. 200.

Maine: Verrill v. Parker, 65 Me. 573; Roberts v. Hartford, 86 Me. 460; Maxcy Mfg. Co. v. Burnham, 89 Me. 538, 56 Am. St. Rep. 436.

Massachusetts: Arnold v. Spurr, 130 Mass. 347; Wheaton v. Trimble, 145 Mass. 345, 1 Am. St. Rep. 463; Duggan v. Wright, 157 Mass. 228.

Michigan: Rankin v. West, 25 Mich. 195; Luebe v. Thorpe, 94 Mich. 268; McBain v. Seligman, 58 Mich. 294; First Commercial Bank v. Newton, 117 Mich. 433.

Missouri: Rodgers v. Pike County Bank, 69 Mo. 562; Eystra v. Capelle, 61 Mo. 578; Long v. Martin, 152 Mo. 668.

Nebraska: McMurtry v. Brown, 6 Neb. 368. A husband may act as the agent of his wife in the management of her separate business. Harris v. Weir-Shugart Co., 51 Neb. 483.

New Jersey: Elliott v. Bodine, 59 N. J. Law, 567; Talcott v. Arnold, 54 N. J. Eq. 570; Taylor v. Wands, 55 N. J. Eq. 491, 62 Am. St. Rep. 818; Tresch v. Wirtz, 34 N. J. Eq. 124, 36 N. J. Eq. 356.

New York: Wronkow v. Oakley, 133 N. Y. 505, 28 Am. St. Rep. 661; Third Nat. Bank v. Guenther, 123 N. Y. 568, 20 Am. St. Rep. 780.

North Carolina: Bazemore v. Mountain, 121 N. C. 59.

Ohio: Manhattan L. Ins. Co. v. Smith, 44 Ohio St. 156.

Pennsylvania: Bodey v. Thackara, 143 Pa. 171, 24 Am. St. Rep. 526; Baxter v. Maxwell, 115 Pa. 469.

South Carolina: Brown v. Thomson, 31 S. C. 436, 17 Am. St. Rep. 40; Scottish American Mortg. Co. v. Deas, 35 S. C. 42, 28 Am. St. Rep. 832.

Washington: Richmond v. Voorhees, 10 Wash. 316.

West Virginia: Camden v. Hiteshew, 23 W. Va. 236; Trapnell v. Conklyn, 37 W. Va. 242, 38 Am. St. Rep. 30.

Wisconsin: Weisbrod v. Chicago & N. W. R. Co., 18 Wis. 40, 86 Am. Dec. 743; Austin v. Austin, 45 Wis. 523; Lavassar v. Washburne, 50 Wis. 200; Wood v. Armour, 88 Wis. 488, 43 Am. St. Rep. 918.

26. Under a statute authorizing the personal property of a wife to be disposed of by the husband and wife by parol, a married woman may by parol authorize her husband to vote corporate stock owned by her at corporate meetings, and to consent for her to a transfer of all the corporate property to another corporation for its capital stock to be issued to the stockholders of the former corporation. Hoene v. Pollak, 118 Ala. 617, 72 Am. St. Rep. 189.

wife in making a contract for the purchase of land, and if he makes such contract in his own name the fact that he acted as agent for his wife may be shown by parol evidence.[27]

Where a married woman's disabilities are only partially removed, her capacity to authorize her husband to act as her agent is limited. The rule is that she may authorize him to act as her agent in making any contract or doing any other act which she has the capacity to do herself, unless there is some statute requiring her to act personally in the particular matter; but she cannot authorize him to bind her by any contract or act, by which she cannot bind herself.[28] Where a married woman is empowered by statute to contract with reference to her separate property, she may appoint her husband her agent to contract for its improvement or repair, so as to enable him to subject it to a mechanic's lien.[29]

Implication or presumption of husband's agency for wife.—Although a wife may have the capacity to authorize her husband to act as her agent, as explained above, the husband cannot bind her in the absence of authority in fact from her, or an estoppel by her conduct to deny such authority. A husband has no implied authority, merely by reason of the marriage relation, to act as the agent of his wife in managing or disposing of her separate estate, or binding her by contracts with respect thereto; nor will the appointment of a husband by his wife as her agent be presumed merely from the marriage relation, without other evidence, or from circumstances which ordinarily owe their existence solely to the marriage relation,[30] unless by some express statutory provision.[31] It follows that a husband's knowledge of defects in the title of real estate or illegality

27. Brodhead v. Reinbold, 200 Pa. 618, 86 Am. St. Rep. 736.

28. Macfarland v. Heim, 127 Mo. 327, 48 Am. St. Rep. 629; Hall v. Callahan, 66 Mo. 316; Bowles v. Trapp, 139 Ind. 55; Ingram v. Nedd, 44 Vt. 462. Where a statute gives a wife capacity to contract in writing with the written consent of her husband, she has no power to confer authority upon her husband by parol to make a contract in her name. First Nat. Bank v. Leland, 122 Ala. 289.

29. Hoffman v. McFadden, 56 Ark. 217, 35 Am. St. Rep. 101; Wheaton v. Trimble, 145 Mass. 346, 1 Am. St. Rep. 463; Bodey v. Thackara, 143 Pa. 171, 24 Am. St. Rep. 526.

30. United States: Dodge v. Knowles 114 U. S. 435.

Arkansas: Hoffman v. McFadden, 56 Ark. 217, 36 Am. St. Rep. 101.

Colorado: Vescelius v. Martin, 11 Colo. 391.

District of Columbia: Weightman v. Washington Critic Co., 4 App. D. C. 136.

Georgia: Stilwell v. Woodruff, 76 Ga. 347; Byne v. Corker, 100 Ga. 445; Axson v. Belt, 103 Ga. 678; Jones v. Harrell, 110 Ga. 373.

Indiana: Runyon v. Snell, 116 Ind. 164, 9 Am. St. Rep. 839; Barnett v. Gluting, 3 Ind. App. 415; Russell v. Stoner, 18 Ind. App. 643.

Iowa: McLaren v. Hall, 26 Iowa, 297; Miller v. Hollingsworth, 33 Iowa, 224; Price v. Seydel, 46 Iowa, 696. See Trimble v. Thoreon, 30 Iowa, 246.

Maine: Ferguson v. Spear, 65 Me. 277; Verrill v. Parker, 65 Me. 578.

Massachusetts: Merrill v. Parker, 112 Mass. 253; Hunt v. Poole, 139 Mass. 224.

Mississippi: Anderson v. Gregg, 44 Miss. 170; Crawford v. Redue, 54 Miss. 700.

Missouri: Mead v. Spalding, 94 Mo. 43; Garnett v. Berry, 3 Mo. App. 197; Henry v. Sneed, 99 Mo. 407, 17 Am. St. Rep. 580.

Nebraska: Rust-Owen Lumber Co. v. Holt, 60 Neb. 80, 83 Am. St. Rep. 512.

New Hampshire: Cate v. Rollins, 69 N. H. 426.

New Jersey: Elliott v. Bodine, 59 N. J. Law, 567.

New York: Jones v. Walker, 63 N. Y. 612; Bates v. First Nat. Bank, 89 N. Y. 286; Gilbert v. Deshon, 107 N. Y. 324; Gates v. Williams, 3 Misc. (N. Y.) 376; Speiss v. Weinberg, 27 Misc. (N. Y.) 774.

Pennsylvania: Dearie v. Martin, 78 Pa. 55.

Tennessee: Knott v. Carpenter, 3 Head (Tenn.) 642, 76 Am. Dec. 779.

Texas: Cushman v. Masterson (Tex. Civ. App.) 64 S. W. 1031.

Vermont: Johnson v. Valido Marble Co., 64 Vt. 348.

Wisconsin: Ladd v. Hilderbrant, 27 Wis. 135, 9 Am. Rep. 445. A husband's cultivation of his wife's land does not raise a presumption that he is her agent, with authority to sign notes on her behalf. Jones v. Harrell, 110 Ga. 373. Nor does the fact that she permitted him to manage land conveyed by him to her, dispose of the products thereof, and handle the proceeds as he saw fit, authorize him to sell the land. Saunders v. King, 119 Iowa, 291.

31. In some jurisdictions, by express statutory provision, a husband having the custody and control of his wife's separate property is presumed to be her agent. American Exp. Co. v. Lankford, 2 Ired. L. 18; Gross v. Pigg, 73 Miss. 286; Porter v. Staten, 64 Miss. 421.

in the consideration of a negotiable instrument purchased by his wife, or other matters, is no more imputable to her than knowledge of a stranger would be, where it is not shown that he was acting as her agent in the transaction.

While authority on the part of a husband to act as agent for his wife will not be implied or presumed from the marriage relation alone, an agency in fact may, as in the case of other persons, be implied from the conduct of the wife in allowing the husband to act for her or other circumstances tending to show authority in fact, and the relation between them may be taken into consideration, in connection with the other circumstances, in determining whether there was authority in fact.[32] A finding that a husband acted as the duly authorized agent of his wife in employing a person to perform labor upon her house is warranted, in a proceeding to enforce a mechanic's lien therefor, by evidence that the husband had general management of the property, that he employed such person to perform the labor, that the wife knew the work was being done, and that she personally gave directions as to parts of the work, or otherwise showed her assent thereto.[33] But authority on the part of a husband to make a contract for the improvement of his wife's real property, so as to subject it to a mechanic's lien, is not implied from the marriage relation, nor from the mere fact that the husband occupied, or managed and controlled, the property.[34] The mere fact that a wife has knowledge of the construction of a building by her husband on her property does not, of itself, necessarily establish the agency of her husband to charge such property with a lien for material used thereon; and she may contest the validity of such a lien,[35] unless there is a statute creating a liability against her under such circumstances.[36]

It has been held that if a conveyance of land to a married woman is delivered to her husband and accepted by him for her, acceptance by her will be presumed on the ground that, since the conveyance is for her benefit, authority on the part of the husband to accept the same for her may be presumed from their relation.[37]

It has been said that stronger and more satisfactory evidence is necessary

32. Wheaton v. Trimble, 145 Mass. 345; 1 Am. St. Rep. 463; Carroll v. O'Shea, 19 N. Y. Supp. 374; Bodey v. Thackara, 143 Pa. 171, 24 Am. St. Rep. 526; Minard v. Stillman, 31 Or. 164, 65 Am. St. Rep. 815; Laycock v. Parker, 103 Wis. 161; Barnett v. Gluting, 3 Ind. App. 415; Shafer v. Archbold, 116 Ind. 29; Arnold v. Spurr, 130 Mass. 347; Hunt v. Mercantile Ins. Co., 22 Fed. 503.

33. Richards v. John Spry Lumber Co., 169 Ill. 238; Bumgartner v. Hall, 163 Ill. 136; McNichols v. Kettner, 22 Ill. App. 493; Anderson v. Armstead, 69 Ill. 452; Interstate Bldg. & Loan Ass'n v. Ayres, 71 Ill. App. 530; Thompson v. Shepard, 85 Ind. 352; Burdick v. Moon, 24 Iowa, 418; Kidd v. Wilson, 23 Iowa, 464; Bethell v. Chicago Lumber Co., 39 Kan. 230; Maxcy Mfg. Co. v. Burnham, 89 Me. 538, 56 Am. St. Rep. 436; Wheaton v. Trimble, 145 Mass. 345, 1 Am. St. Rep. 463; Tuttle v. Howe, 14 Minn. 145, 100 Am. Dec. 205; Farley v. Stroeh, 68 Mo. App. 85; Collins v. Megraw, 47 Mo. 495; Bradford v. Peterson, 30 Neb. 96; McCormick v. Lawton, 3 Neb. 449; Howell v. Hathaway, 28 Neb. 807; Scales v. Paine, 13 Neb. 521; Elliott v. Bodine, 59 N. J. Law, 567; Holden v. Kutscher, 17 Misc. (N. Y.) 540; Bodey v. Thackara, 143 Pa. 171, 24 Am. St. Rep. 526; Bevan v. Thackara, 143 Pa. 182 24 Am. St. Rep. 529; Bankard v. Shaw, 199 Pa. 623; Jobe v. Hunter, 165 Pa. 5, 44 Am. St. Rep. 639; Spears v. Lawrence, 10 Wash. 368, 45 Am. St. Rep. 789; Laycock v. Parker, 103 Wis. 161. See also Tarr v. Muir, 21 Ky. L. R. 988, 53 S. W. 663. Compare, however, Cate v. Rollins, 69 N. H. 426; Johnson v. Parker, 27 N. J. Law, 239.

If the wife has authorized her husband to act as her agent in contracting for the building of a house upon her separate real estate, the law will give a mechanic's lien thereon, although she may not have intended to charge the property therewith. Jones v. Pothast, 72 Ind. 158 (overruling Dame v. Coffman, 58 Ind. 345, on this point).

34. Hoffman v. McFadden, 56 Ark. 217, 35 Am. St. Rep. 101; Duross v. Broderick, 78 Mo. App. 260; Lyon v. Champion, 62 Conn. 75.

35. Rust-Owen Lumber Co. v. Holt, 60 Neb. 80, 83 Am. St. Rep. 512; Alexander v. Perkins, 71 Mo. App. 286.

36. Santa Cruz Rock Pavement Co. v. Lyons, 117 Cal. 212, 59 Am. St. Rep. 174. And see Heath v. Solles, 73 Wis. 217; North v. La Flesh, 73 Wis. 520; Smith v. Gill, 37 Minn. 455.

37. McGehee v. White, 31 Miss. 46; Pool v. Phillips, 167 Ill. 432.

to establish a husband's agency for his wife than would be required as between persons not occupying such a relation.[38]

Estoppel of wife to deny authority of husband.—When a wife has authority to appoint her husband as her agent with respect to a particular matter or business, she is subject, to the same extent as any other person, to the principles of law in relation to agency by estoppel. If by her conduct she holds him out as her agent or allows him to act as such, she will be bound by his acts within the scope of his apparent authority, whether there was any actual authority or not.[39]

Ratification.—A wife, in so far as she has the capacity to authorize her husband to act as her agent, may expressly or impliedly ratify, and thereby render binding, contracts made or other acts done by her husband on her behalf without authority.[40]

§ 8. *Agency of wife for husband. In general.*—It is well settled that a married woman is competent to act as agent for another, even though her common-law disabilities have not been removed, so that she could not contract for herself in the matter, for persons who are not sui juris may act as agents and there is nothing in the marriage relation to prevent a wife from acting as the agent of her husband. The present consideration is appointment of a wife as the agent of her husband, and the circumstances under which such an agency will be implied. If a husband allows his wife to purchase goods on his credit, or otherwise holds her out as having authority, and then separates from her and makes her an adequate allowance, and she afterwards continues to purchase on his credit as before, he will be estopped to deny her authority as against tradesmen who supply her in reliance on her apparent authority and without notice of the change of circumstances.[41] The fact

38. Rowell v. Klein, 44 Ind. 290; Louisville Coffin Co. v. Stokes, 78 Ala. 372; Eystra v. Capelle, 61 Mo. 578; McLaren v. Hall, 26 Iowa, 297; Sanford v. Pollock, 105 N. Y. 450; Kansas City Planing Mill Co. v. Brundage, 25 Mo. App. 268; Carthage Marble & W. L. Co. v. Bauman, 44 Mo. App. 386, 392; Thompson v. Kehrmann, 60 Mo. App. 488; Mead v. Spalding, 94 Mo. 43; Farley v. Stroeh, 68 Mo. App. 85; Lane v. Lockridge, 17 Ky. L. R. 1032, 33 S. W. 730. See Long v. Martin, 71 Mo. App. 569, where the authority of the husband to act as the agent of his wife was shown by the weight of the testimony. It was held sufficient to establish such authority. Authority on the part of a husband to declare that his wife is his partner in business cannot be implied from his authority to attend to her business generally. First Nat. Bank of Tuscaloosa v. Leland, 122 Ala. 239.

Where the husband has contracted in his own name for improvements on the wife's land, it has been held that the evidence to establish his agency, in the face of his express contract, must be so clear, cogent, and persuasive as to leave no reasonable doubt of the agency in the mind of the trier of facts. Carthage Marble & W. L. Co. v. Bauman, 44 Mo. App. 386, 392; Thompson v. Kehrmann, 60 Mo. App. 488; Farley v. Stroeh, 68 Mo. App. 85.

39. American Mortg. Co. v. Owens, 64 F. 249; First Nat. Bank of Montgomery v. Nelson, 106 Ala. 535; Santa Cruz Rock Pavement Co. v. Lyons, 133 Cal. 114; Bull v. Coe, 77 Cal. 54, 11 Am. St. Rep. 235; Parker v. Freeman, 11 Colo. 576; Foster v. Jones, 78 Ga. 150; Richards v. John Spry Lumber Co., 169 Ill. 238; McNichols v. Kettner, 22 Ill. App. 493; Anderson v. Armstead, 69 Ill. 452; Maxcy Mfg. Co. v. Burnham, 89 Me. 538, 56 Am. St. Rep. 436; Arnold v. Spurr, 130 Mass. 347; Bodine v. Killeen, 53 N. Y. 93; Bankard v. Shaw, 199 Pa. 623; McManus v. Laughlin, 186 Pa. 498; Brown v. Thomson, 31 S. C. 436, 17 Am. St. Rep. 40; City Bldg. & Loan Ass'n v. Jones, 32 S. C. 308; Whitaker v. Lee (Tenn.) 57 S. W. 348; Anderson v. Waco State Bank, 92 Tex. 506; Allen v. Garrison, 92 Tex. 546; Horr v. Hollis, 20 Wash. 424; Curtis v. Janzen, 7 Wash. 58; Lavassar v. Washburne, 50 Wis. 200. And see Bank of Ravenna v. Dobbins, 96 Mo. App. 693. Where a married woman owning a herd of cattle intrusted her husband with the entire management and control of the same, and allowed him to conduct the business and make sales of cattle, it was held that she was bound by a sale made by a herder under authority from the husband. Parker v. Freeman, 11 Colo. 576. Where a wife joins with her husband in selling and conveying land, understanding the terms of the contract, and then leaves the office, supposing that her husband will receive the consideration, and he does receive it, she cannot avoid the agreement on the ground that she did not receive a consideration. Downing v. Lewis, 59 Neb. 38.

40. Hoene v. Pollak, 118 Ala. 617, 72 Am. St. Rep. 189.

41. Wallis v. Biddick, 22 Wkly. Rep. 76; Cany v. Patton, 2 Ashm. (Pa.) 145; Anthony v. Phillips, 17 R. I. 188; Anon., 21 Misc. (N. Y.) 656; Raymond v. Cowdrey, 19 Misc. (N.

that a husband is insane and confined in an asylum gives his wife no implied authority to bind him by contract, except for necessaries.[42]

§ 9. *Agency of wife ordinarily requires appointment by or assent of husband.* —As shall be hereafter seen, where a husband wrongfully neglects to supply his wife and children with necessaries, the wife has implied authority, even without his assent, to bind him to pay for necessaries, purchased by her on his credit. And where husband and wife are living together, authority to act as his agent in matters pertaining to the ordinary affairs of the household will be implied or presumed in the absence of proof to the contrary. In other matters, however, the general rule is that a wife has no authority to act as agent for her husband without his assent, evidenced either by an express appointment by him or by his conduct. No authority can be implied merely from the fact of their relation as husband and wife.[43] Thus a wife has no authority, merely by virtue of the marriage relation, to sign contracts generally on behalf of her husband,[44] or to bind him by borrowing money, even though it is borrowed to purchase necessaries,[45] accepting a deposit of money,[46] to receive payments on debts due to her husband,[47] to receive a delivery of property from a bailee,[48] to sell, exchange, or otherwise dispose of her husband's property,[49] pay his debts,[50] or grant an easement or license with respect to his property;[51] to rescind, release, or modify contracts made by the husband.[52] A wife has no authority to bind the husband by contracts, or to dispose of his property, merely because of his absence, even though he may have deserted her,[53] or because of his incapacity to attend to business by rea-

Y.) 34; Hartjen v. Ruebsamen, 19 Misc. (N. Y.) 149.

42. Richardson v. Du Bois, L. R. 5 Q. B. 51; Chappell v. Nunn, 41 Law T. (N. S.) 287.

43. Freestone v. Butcher, 9 Car. & P. 643; Debenham v. Mellon, 6 App. Cas. 24; Phillipson v. Hayter, L. R. 6 C. P. 41; Atkins v. Curwood, 7 Car. & P. 756; Manby v. Scott, 1 Mod. 125; Krebs v. O'Grady, 23 Ala. 726, 58 Am. Dec. 312; Colby v. Thompson (Colo. App.) 64 P. 1053; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384; Brown v. Woodward, 75 Conn. 254; Black v. Clements, 2 Pen. (Del.) 499; Phillips v. Sanchez, 35 Fla. 187; Compton v. Bates, 10 Ill. App. 78; Jones v. Wocher, 90 Ky. 230; Jones v. Gutman, 88 Md. 355; Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362; Tuttle v. Hoag, 46 Mo. 38, 2 Am. Rep. 481; Chamberlain v. Davis, 33 N. H. 121; Beckwith v. Baxter, 3 N. H. 67; Berwick v. Dusenburry. 2 Daly (N. Y.) 107; Goodwin v. Kelly, 42 Barb. (N. Y.) 194; Mackinley v. McGregor, 3 Whart. (Pa.) 369, 31 Am. Dec. 522; Segelbaum v. Ensminger, 117 Pa. 248, 2 Am. St. Rep. 662; National Fire Ins. Co. v. Wagley (Tex. Civ. App.) 68 S. W. 819; Western Union Tel. Co. v. Moseley, 28 Tex. Civ. App. 562; Meader v. Page, 39 Vt. 306; Sanborn v. Cole, 63 Vt. 590.

44. Manby v. Scott, 1 Mod. 125; Shaw v. Emery, 38 Me. 484; Bates v. Enright, 42 Me. 118.

45. Knox v. Bushell, 3 C. B. (N. S.) 334; Brown v. Woodward, 75 Conn. 254; Gilbert's Ex'r v. Plant, 18 Ind. 309; Skinner v. Tirrell, 159 Mass. 474, 38 Am. St. Rep. 447; Schwarting v. Bisland, 4 Misc. (N. Y.) 534; Anderson v. Cullen, 16 Daly (N. Y.) 15; Walker v. Simpson, 7 Watts & S. (Pa.) 88, 42 Am. Dec. 215; Marshall v. Perkins, 20 R. I. 34, 78 Am. St. Rep. 341; Meader v. Page, 39 Vt. 306.

46. Gilbert's Ex'r v. Plant, 18 Ind. 308.

47. Offley v. Clay, 2 Man. & G. 172; Husche v. Sass, 67 Ill. App. 245; Thrasher v. Tuttle, 22 Me. 335; Allen v. Williamsburgh Sav. Bank, 2 Abb. N. C. (N. Y.) 342, 69 N. Y. 314; Walker v. Simpson, 7 Watts & S. (Pa.) 83, 42 Am. Dec. 216. See, also, Cheney v. Pierce, 38 Vt. 515.

48. Kowing v. Manly, 49 N. Y. 192.

49. Alexander v. Miller, 16 Pa. 215; Dresel v. Jordan, 104 Mass. 407; Wheeler & W. Mfg. Co. v. Morgan, 29 Kan. 519; Edwards v. Tyler, 141 Ill. 454; Brown v. Hannibal & St. J. R. Co., 33 Mo. 309; Ness v. Singer Mfg. Co., 68 Minn. 237; Presnall v. McLeary (Tex. Civ. App.) 50 S. W. 1066; Dunnahoe v. Williams, 24 Ark. 264. It was held, however, in a Vermont case, that the wife has a legal right to make reasonable and moderate gifts of her husband's property and clothing to a relative, by way of charity, and that he cannot annul the gift by compelling its return, or by changing it into a debt against the donee. Spencer v. Storrs, 38 Vt. 156.

50. Butts v. Newton, 29 Wis. 632. The fact that a wife is authorized to sell her husband's property gives her no authority to transfer the same in payment of his debt. Id.

51. Nelson v. Garey, 114 Mass. 418.

52. Goodrich v. Tracy, 43 Vt. 314, 5 Am. Rep. 281; Vaught v. Wellborn, 16 Ala. 377; Kellogg v. Robinson, 32 Conn. 335. And see Gray v. Otis, 11 Vt. 628.

53. Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384; Krebs v. O'Grady, 23 Ala. 725, 58 Am. Dec. 312; Savage v. Davis, 18 Wis. 608; Butts v. Newton, 29 Wis. 632; Wheeler & W. Mfg. Co. v. Morgan, 29 Kan. 519; Richelieu Wine Co. v. Ragland, 43 Ill. App. 257. But the wife of an absent debtor has power as his general agent to bind him by her consent that hay attached on his

son of sickness or insanity,[54] unless the contracts are for the purchase of necessaries, or the property is disposed of for the purpose of procuring necessaries, as will be hereafter explained.

§ 10. *Express authority of wife and authority implied from circumstances.*— Agency on the part of a wife to act for her husband may be created by a formal power of attorney or other express authority, verbal or in writing.[55] And there may be circumstances under which authority in fact will be implied. As in the case of agency between other persons, her authority may be implied from circumstances, or he may be estopped to deny her authority by having allowed her to act for him in the particular transaction or in similar previous dealings, or otherwise clothed her with apparent authority.[56] When the husband is absent from home, and his property is left in charge of the wife, there is an implied agency on her part to exercise the usual and ordinary control and protection over the property thus left in her possession, unless the presumption of this authority is rebutted by proof that he had constituted another his agent for that purpose.[57] If a husband authorizes or allows his wife to act as his agent in particular matters, and thus holds her out as having authority, a private agreement or understanding between him and his wife revoking her authority, will have no effect as against third persons afterwards dealing with her in good faith and without notice of the revocation.[58] "If a tradesman has had dealings with the wife upon the credit of the husband, and the husband has paid him without demurrer in respect of such dealings, the tradesman has the right to assume, in the absence of notice to the contrary, that the authority of the wife which the husband has recognized continues. The husband's quiescence is in such cases tantamount to acquiescence, and forbids his denying an authority which his own conduct has invited the tradesman to assume."[59] The burden of proving the wife's agency for her hus-

farm may be fed to his cattle, also attached where he has left her at home on the farm with several minor children, giving no other person charge of his affairs, and has been absent several months before the attachment. Felker v. Emerson, 16 Vt. 653, 42 Am. Dec. 532. Temporary absence of a husband gives his wife no implied authority to hire out his horse left in her care. Savage v. Davis, 18 Wis. 608. Compare, however, Church v. Landers, 10 Wend. (N. Y.) 79.

54. Alexander v. Miller, 16 Pa. 215; Sawyer v. Cutting, 23 Vt. 486.

55. Goodrich v. Tracy, 43 Vt. 314, 5 Am. Rep. 281; Goodwin v. Kelly, 42 Barb. (N. Y.) 194.

56. England: Phillipson v. Hayter, L. R. 6 C. P. 38; Filmer v. Lynn, 4 Nev. & M. 559; Plimmer v. Sells, 3 Nev. & M. 422; Ryan v. Sams, 12 Q. B. 460 (although they are not married if they live together as man and wife); Debenham v. Mellon, 6 App. Cas. 24; Stevenson v. Hardie, 2 W. Bl. 872.
California: Heney v. Sargent, 54 Cal. 396.
Connecticut: Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384.
Florida: Phillips v. Sanchez, 35 Fla. 187.
Illinois: Hudson v. Sholem, 65 Ill. App. 61; Compton v. Bates, 10 Ill. App. 78; Stotts v. Bates, 73 Ill. App. 640.
Indiana: Mickelberry v. Harvey, 58 Ind. 523; Watts v. Moffett, 12 Ind. App. 399.
Kentucky: Jones v. Wocher, 90 Ky. 230.
Louisiana: Cousins v. Kelsey, 33 La. Ann. 880.
Maryland: Jones v. Gutman, 88 Md. 355.
Michigan: Harris v. Smith, 79 Mich. 54.
Missouri: Tuttle v. Hoag, 46 Mo. 38, 2 Am. Rep. 481; Sauter v. Scrutchfield, 28 Mo. App. 155.
New Jersey: Gulick v. Grover, 33 N. J. Law, 463.
New York: Howe v. Finnegan, 61 App. Div. 610; Fenner v. Lewis, 10 Johns. 38; Gates v. Brower, 9 N. Y. 205, 59 Am. Dec. 530.
North Carolina: Sibley v. Gilmer, 124 N. C. 631; Cox v. Hoffman, 20 N. C. (3 Dev. & B.) 319.
Oregon: Snell v. Stone, 23 Or. 327.
Rhode Island: Anthony v. Phillips, 17 R. I. 188.
Vermont: Gilman v. Andrus, 28 Vt. 241, 67 Am. Dec. 713.

57. Krebs v. O'Grady, 23 Ala. 726, 58 Am. Dec. 312; Benjamin v. Benjamin, 15 Conn. 347, 39 Am. Dec. 384; Rotch v. Miles, 2 Conn. 638; Casteel v. Casteel, 8 Blackf. (Ind.) 240, 44 Am. Dec. 763; Buford v. Speed, 11 Bush (Ky.) 338; Church v. Landers, 10 Wend. (N. Y.) 79; Spencer v. Tisue, Add. (Pa.) 316; Stall v. Meek, 70 Pa. 181; Cantrell v. Colwell, 3 Head (Tenn.) 471; McAfee v. Robertson, 41 Tex. 355; Sawyer v. Cutting, 23 Vt. 486; Chunot v. Larson, 43 Wis. 539.

58. Debenham v. Mellon, 5 Q. B. Div. 403, 6 App. Cas. 32; Watts v. Moffett, 12 Ind. App. 399; Anthony v. Phillips, 17 R. I. 188; Snell v. Stone, 23 Or. 327; Sibley v. Gilmer, 124 N. C. 631.

band is on the person relying upon the alleged authority,[60] and the question whether or not there was such an agency is one of fact for the jury.[61]

§ 11. *Married woman doing business in her own name.*—At common law, if a married woman carries on a business in her own name with her husband's consent, it is considered that the business is his and the wife his agent, and he is presumptively bound by her contracts in reference thereto,[62] unless it appears that the credit was given exclusively to her.[63] But in most jurisdictions this doctrine has been changed by statute, so that a husband is not liable for debts contracted by his wife in carrying on a business on her own account,[64] unless contracted upon his credit, with his knowledge and consent.[65] In some jurisdictions in order that the husband may be relieved from liability on contracts in relation to her separate business, it is required that a certificate shall be filed, setting forth the name of her husband, the nature of the business proposed to be done, and the place where it is to be done.[66]

§ 12. *Implied agency of wife in matters pertaining to the household.*—In the absence of evidence to the contrary, if husband and wife are living together and maintaining a home, or if they are living under the same roof, although they may be living separate,[67] it is presumed that the management of the ordinary domestic affairs of the household is intrusted to the wife, and she has implied authority to purchase on his credit, such provisions, clothing, and other articles, as may be necessary or suitable for the family, taking into consideration their style of living sanctioned by him.[68] And in like manner, the husband is bound.

59. Debenham v. Mellon, 5 Q. B. Div. 403, 6 App. Cas. 24.

60. Phillips v. Sanchez, 35 Fla. 187; Compton v. Bates, 10 Ill. App. 78.

61. Debenham v. Mellon, 6 App. Cas. 31; Lane v. Ironmonger, 13 Mees. & W. 368; Reid v. Teakle, 13 C. B. 627; Freestone v. Butcher, 9 Car. & P. 643; Phillips v. Sanchez, 35 Fla. 187; Casteel v. Casteel, 8 Blackf. (Ind.) 240, 44 Am. Dec. 763; Jones v. Wocher, 90 Ky. 230; Roberts v. Hartford, 86 Me. 460; Jones v. Gutman, 88 Md. 355; Hart v. Young, 1 Lans. (N. Y.) 417.

62. Phillipson v. Hayter, L. R. 6 C. P. 38; Petty v. Anderson, 3 Bing. 170; Godfrey v. Brooks, 5 Har. (Del.) 396; Jenkins v. Flinn, 37 Ind. 352; Jones v. Wocher, 90 Ky. 230; Knowles v. Hull, 99 Mass. 562; Curtis v. Engel, 2 Sandf. Ch. (N. Y.) 287; Cropsey v. McKinney, 30 Barb. (N. Y.) 47; Boas v. Malone, 140 Pa. 572; Mackinley v. McGregor, 3 Whart. (Pa.) 369, 31 Am. Dec. 522; Foulds v. Curtelett, 21 U. C. C. P. 368; Halpenny v. Pennock, 33 U. C. Q. B. 229. See, also, Palen v. Lent, 5 Bosw. (N. Y.) 713; Rotch v. Miles, 2 Conn. 638.

63. Bentley v. Griffin, 5 Taunt, 356; Ex parte Shepherd, 10 Ch. Div. 573; Jenkins v. Flinn, 37 Ind. 352; Weisker v. Lowenthal, 31 Md. 413; Tuttle v. Hoag, 46 Mo. 42, 2 Am. Rep. 481; Swett v. Penrice, 24 Miss. 416; Mackinley v. McGregor, 3 Whart. (Pa.) 369, 31 Am. Dec. 522; Noble v. Kreuzkamp, 111 Pa. 68; Thompson v. Hibberd, 14 Phila. (Pa.) 190; Moses v. Fogartie, 2 Hill, Law (S. C.) 335; Hoppek v. Hartby, 7 Baxt. (Tenn.) 411. Compare Krouskop v. Shontz, 51 Wis. 204, 37 Am. Rep. 817; Carreau v. Chapotel, 45 La. Ann. 850.

64. See Laws N. Y. 1896, c. 272, § 25 (former provision Laws 1860, c. 90, § 8); Gillies v. Lent, 2 Abb. Pr. (N. S.; N. Y.) 455; Trieber v. Stover, 30 Ark. 727; Haight v. McVeagh, 69 Ill. 624; Jaycox v. Wing, 66 Ill. 182; Colby v. Lamson, 39 Me. 119; Oxnard v. Swanton, 39 Me. 125; Dunbar v. Meyer, 43 Miss. 679.

65. Oxnard v. Swanton, 39 Me. 125.

66. Mass. St. 1862, c. 198. As to the construction and effect of this statute, see Knowles v. Hull, 99 Mass. 562; Feran v. Rudolphsen, 106 Mass. 471; Ridley v. Knox, 138 Mass. 83; Browning v. Carson, 163 Mass. 255. Under this statute, it is held that if neither of them has filed the certificate as provided, the husband will be liable upon a contract made by his wife in the prosecution of business on her separate account, whether or not the person contracting with the wife did so upon her sole and exclusive credit. Feran v. Rudolphsen, supra. But this statute does not apply to a husband domiciled in another state, whose wife does business in Massachusetts. Hill v. Wright, 129 Mass. 296.

67. Harrison v. Grady, 12 Jur. (N. S.) 140. And see Hentze v. Marjenhoff, 42 S. C. 427.

68. **England:** Debenham v. Mellon, 6 App. Cas. 24; Phillipson v. Hayter, L. R. 6 C. P. 38; Etherington v. Parrot, 1 Salk. 118; Emmett v. Norton, 8 Car. & P. 506; Clifford v. Laton, 3 Car. & P. 15; Freestone v. Butcher, 9 Car. & P. 643; Harrison v. Grady, 12 Jur. (N. S.) 140.

Alabama: Hughes v. Chadwick, 6 Ala. 651.

Colorado: Hardenbrook v. Harrison, 11 Colo. 9.

Connecticut: Benjamin v. Benjamin, 15 Conn. 357, 39 Am. Dec. 384.

Illinois: Compton v. Bates, 10 Ill. App. 78; Gotts v. Clark, 78 Ill. 229; Warrington

on the ground of agency, by the declarations of the wife in relation to the ordinary affairs of the household.[69] It would seem clear, however, from the reason on which this rule is based, that it does not apply where husband and wife, although they may cohabit, do not maintain a house.[70] But the common law, as to the agency of the wife binding the husband in ordinary domestic affairs becomes unimportant when by statute both husband and wife are made responsible for family expenses.[71]

The implied authority of the wife under this doctrine extends to the purchase of such articles only as are necessary or suitable for herself and the family, taking into consideration their station in life and their style of living. It does not extend to the purchase of articles which have no relation to the household, or are unsuitable to the husband's style of living, or to purchases which are clearly extravagant or excessive.[72] A wife has no implied authority to bind her husband by a purchase of jewelry which is unsuitable to their station in life,[73] if, indeed, she has implied authority to purchase jewelry at all on his credit.[74] The presumption that a wife has authority to bind her husband by the purchase of articles for domestic use, and in other matters pertaining to the affairs of the household, is a presumption of fact and not a conclusive presumption of law, and may be rebutted by showing that there was no authority in fact,[75] provided, of course. the husband is not estopped by having clothed the wife with apparent authority. The husband is certainly not liable for articles purchased by his wife on his

v. Anable, 84 Ill. App. 693; Hibler v. Thomas, 99 Ill. App. 355.

Indiana: Litson v. Brown, 26 Ind. 489; Watts v. Moffett, 12 Ind. App. 399.

Maine: Furlong v. Hysom, 35 Me. 332; Baker v. Carter, 83 Me. 132, 23 Am. St. Rep. 764.

Minnesota: Flynn v. Messenger, 28 Minn. 208, 41 Am. Rep. 279; Wagner v. Nagel, 33 Minn. 348; Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362; S. E. Olson Co. v. Youngquist, 76 Minn. 26.

Missouri: Sauter v. Scrutchfield, 28 Mo. App. 150; Steinhauser v. Spraul, 127 Mo. 541.

New Hampshire: Tebbets v. Hapgood, 34 N. H. 420.

New Jersey: Vusler v. Cox, 53 N. J. Law, 516.

New York: Lindholm v. Kane, 92 Hun, 369; McCutchen v. McGahay, 11 Johns. 281, 6 Am. Dec. 373; Keller v. Phillips, 39 N. Y. 351; Cromwell v. Benjamin, 41 Barb. 558.

Ohio: McMillan v. Auerback, 7 Ohio N. P. 376.

Pennsylvania: Moore v. Copley, 165 Pa. 294, 44 Am. St. Rep. 664.

Vermont: Gilman v. Andrus, 28 Vt. 241, 67 Am. Dec. 713.

Wisconsin: Haberman v. Gasser, 104 Wis. 98.

An order by the wife to a third party, in whose care and custody her husband had left their vacant residence, directing such party to allow an upholsterer to take curtains and furniture therefrom and to do work therein as ordered by her, is within her general agency to act for him in all matters connected with the domestic economy of the house and family, and will bind the husband. Tyler v. Mutual District Messenger Co., 17 App. D. C. 85.

69. Anon., 1 Strange, 527. See, also, Anderson v. Sanderson, 2 Starkie, 204; Emerson v. Blonden, 1 Esp. 142; Casteel v. Casteel, 8 Blackf. (Ind.) 240, 44 Am. Dec. 763; Pickering v. Pickering, 6 N. H. 120; Chamberlain v. Davis, 33 N. H. 122.

70. It was so held in Debenham v. Mellon, 6 App. Cas. 32.

71. Gaffield v. Scott, 40 Ill. App. 380.

The term "expenses of the family," as used in the statute (Rev. St. Ill. 1874, c. 68, § 15.) making such expenses chargeable upon the property of both husband and wife, is not synonymous with "necessaries," which may be personal and individual, and does not include an article which in no way conduces to the welfare of the family generally, although at times it is used or displayed in the family by the one for whom it was purchased. Hyman v. Harding, 162 Ill. 357.

72. Debenham v. Mellon, 6 App. Cas. 24; Montague v. Benedict, 3 Barn. & C. 631; Harrison v. Grady, 13 Law T. (N. S.) 369, 12 Jur. (N. S.) 140; Lane v. Ironmonger, 13 Mees. & W. 368; Phillipson v. Hayter, L. R. 6 C. P. 38; Freestone v. Butcher, 9 Car. & P. 643; Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362: Raynes v. Bennett, 114 Mass. 424; Cany v. Patton, 2 Ashm. (Pa.) 140.

73. Montague v. Benedict, 3 Barn. & C. 631. Diamond earrings, a watch for the wife's daughter by a former marriage and not a member of the husband's family, and a chain given to the lover of a servant, are not necessaries. Otto v. Matthie, 70 Ill. App. 54. And see Hyman v. Harding, 162 Ill. 357.

74. See Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362.

75. Etherington v. Parrot, 1 Salk. 118; Keller v. Phillips. 39 N. Y. 351; Cromwell v., Benjamin, 41 Barb. (N. Y.) 560; Sauter v. Scrutchfield, 28 Mo. App. 155.

credit contrary to his prohibition, if the person dealing with her had notice of the prohibition,[76] unless the articles are necessaries and he has neglected his duty to provide them, as will be hereafter explained, the burden of proving which is on the person furnishing the articles. The mere fact that a husband's prohibition to his wife to deal on his account is not communicated to persons with whom she subsequently deals does not render the husband liable to such persons.[77] But it is otherwise if he has previously permitted her to purchase goods on his credit, and tradesmen deal with her without notice that her authority has been revoked.[78] The husband is not liable, in the absence of authority in fact, and in the absence of elements of estoppel, if he has supplied his wife with all necessary and suitable articles, or with sufficient money to purchase them.[79] Nor can the husband be held personally liable for necessaries which she has expressly bought on her own credit, although they are such as she might have bought on his credit, and charged him with.

§ 13. *Wife's implied authority to procure necessaries on husband's failure to supply them. In general.*—To the rule that a wife is not the agent of her husband merely by virtue of the marriage relation, so as to have implied authority to bind him by contract, there is a well settled exception with respect to the purchase of necessaries in case of the husband's neglect to support the wife. If a husband deserts his wife or turns her away without cause, or drives her away by his ill-treatment or misconduct, or if, although they may be living separate by mutual consent or may be living together, he fails to provide her with necessaries for herself and her children by him, she has implied authority to procure the same on his credit, and to bind him to pay for them. Her agency in this respect is said to arise from necessity, and is not at all dependent upon the husband's consent. It exists even though he may forbid her to purchase, and though the persons from whom she purchases may know of his want of consent, because of the fact that a husband is under a legal duty to support his wife, and the law implies authority on the part of the wife, and imposes liability on the part of the husband, by reason of this duty.[80] The husband cannot escape liability under such

76. Etherington v. Parrot, 1 Salk. 118; Cromwell v. Benjamin, 41 Barb. (N. Y.) 560; Keller v. Phillips, 39 N. Y. 351; Hibler v. Thomas, 99 Ill. App. 355; Sauter v. Scrutchfield, 28 Mo. App. 155. A wife's authority to order goods on her husband's credit is not affected by a mere complaint on his part as to her extravagance, or by a statement that he would not be responsible if it should be continued. There must have been a direct, present, positive, absolute prohibition. Morgan v. Chetwynd, 4 Fost. & F. 451.

77. Debenham v. Mellon, 6 App. Cas. 31; Jolly v. Rees, 15 C. B. (N. S.) 628; Compton v. Bates, 10 Ill. App. 78.

78. Debenham v. Mellon, 6 App. Cas. 36; Jolly v. Rees, 15 C. B. (N. S.) 628; Watts v. Moffett, 12 Ind. App. 399; Wallis v. Biddick, 22 Wkly. Rep. 76; Cothran v. Lee, 24 Ala. 380.

79. Holt v. Brien, 4 Barn. & Ald. 252; Morgan v. Chetwynd, 4 Fost. & F. 451; Montague v. Benedict, 3 Barn. & C. 631; Debenham v. Mellon, 6 App. Cas. 24; Seaton v. Benedict, 5 Bing. 28; Reid v. Teakle, 13 C. B. 627; Reneaux v. Teakle, 8 Exch. 680; Cromwell v. Benjamin, 41 Barb. (N. Y.) 558; Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362; Clark v. Cox, 32 Mich. 204; Sauter v. Scrutchfield, 28 Mo. App. 155. Compare Ruddock v. Marsh, 1 Hurl. & N. 601, where it was held that the husband was liable for the price of provisions ordered for the house by his wife, though he had supplied his wife with sufficient money to keep house, where the person supplying the goods had no notice of that fact.

80. England: Eastland v. Burchell, 3 Q. B. Div. 436; Montague v. Benedict, 3 Barn. & C. 636; Atkins v. Curwood, 7 Car. & P. 756; Seaton v. Benedict, 5 Bing. 28; Johnston v. Sumner, 3 Hurl. & N. 261; Debenham v. Mellon, 6 App. Cas. 31; Deare v. Soutten, L. R. 9 Eq. 151; Emmett v. Norton, 8 Car. & P. 506.

Alabama: Zeigler v. David, 23 Ala. 127; Pearson v. Darrington, 32 Ala. 228.

California: St. Vincent's Inst. for Insane v. Davis, 129 Cal. 20.

Connecticut: Pierpont v. Wilson, 49 Conn. 450; Ahern v. Easterby, 42 Conn. 546 (where the husband was in prison).

Delaware: Kemp v. Downham, 5 Har. 417; Biddle v. Frazier, 3 Houst. 258.

Florida: Phillips v. Sanchez, 35 Fla. 187.

Georgia: Mitchell v. Treanor, 11 Ga. 324, 56 Am. Dec. 421.

Illinois: Seybold v. Morgan, 43 Ill. App. 39; McClary v. Warner, 69 Ill. App. 223; Ross v. Ross, 69 Ill. 569; Wilcoxon v. Read, 95 Ill. App. 33; Brinckerhoff v. Briggs, 92

circumstances by showing that he gave to the person furnishing the necessaries notice that he would not be responsible.[81] And if he refuses to permit his wife to live with him, he cannot relieve himself from liability for her maintenance and support by showing that he procured board and lodging for her with a person with whom she refused to live, as where she is thus turned away she may procure necessaries from whomsoever she pleases, so long as the place selected by her is respectable and the expense thereof does not exceed proper limits, considering the husband's financial condition.[82]

This implied authority of the wife to bind the husband for necessaries exists notwithstanding the fact that the wife has a separate estate, for this does not make it any the less the duty of the husband to support her.[83] In some decisions, however, it is held that if the wife has an adequate means of support, or receives an adequate maintenance from some source, she cannot procure necessaries on the credit of her husband though she is living separate from him for a justifiable cause, and he neglects to support her.[84] The husband is liable for necessaries so furnished to a wife, notwithstanding statutes giving a married woman the capacity to contract generally or in reference to her separate estate,[85] unless the wife in fact contracts for herself. And the principle applies although the husband is a minor,

Ill. App. 537; Hibler v. Thomas, 99 Ill. App. 355.

Indiana: Watkins v. De Armond, 89 Ind. 553; Eiler v. Crull, 99 Ind. 375; Arnold v. Brandt, 16 Ind. App. 169.

Iowa: Tibbetts v. Wadden, 94 Iowa, 173; Descelles v. Kadmus, 8 Iowa, 51. And see Devendorf v. Emerson, 66 Iowa, 698.

Kentucky: Billing v. Pilcher, 7 B. Mon. 458, 46 Am. Dec. 523.

Massachusetts: Benjamin v. Dockham, 134 Mass. 418; Eames v. Sweetser, 101 Mass. 78; Prescott v. Webster, 175 Mass. 316; Raynes v. Bennett, 114 Mass. 428; Cartwright v. Bate, 1 Allen, 514, 79 Am. Dec. 759; Hall v. Weir, 1 Allen, 261; Mayhew v. Thayer, 8 Gray, 172.

Minnesota: Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362; Oltman v. Yost, 62 Minn. 261; Kirk v. Chinstrand, 85 Minn. 108; S. E. Olson Co. v. Youngquist, 76 Minn. 26.

Mississippi: East v. King, 77 Miss. 738.

Missouri: Sauter v. Scrutchfield, 28 Mo. App. 150; McKinney v. Guhman, 38 Mo. App. 344; Reed v. Crissey, 63 Mo. App. 185.

Nebraska: Belknap v. Stewart, 38 Neb. 304, 41 Am. St. Rep. 729.

New Hampshire: Ferren v. Moore, 59 N. H. 106; Allen v. Aldrich, 29 N. H. 63; Rumney v. Keyes, 7 N. H. 571; Morrison v. Holt, 42 N. H. 478, 80 Am. Dec. 120; Ott v. Hentall, 70 N. H. 231.

New Jersey: Vusler v. Cox, 53 N. J. Law, 516; Snover v. Blair, 25 N. J. Law, 94.

New York: Baker v. Barney, 8 Johns. 72, 5 Am. Dec. 326; Lockwood v. Thomas, 12 Johns. 248; Cromwell v. Benjamin, 41 Barb. 558; Comstock v. Green, 88 Hun, 64; Raymond v. Cowdrey, 19 Misc. 34; Hardy v. Eagle, 23 Misc. 441.

Pennsylvania: Cany v. Patton, 2 Ashm. 140; Hultz v. Gibbs, 66 Pa. 360; Llewellyn v. Levy, 163 Pa. 647; Moore v. Copley, 165 Pa. 294, 44 Am. St. Rep. 664.

Rhode Island: Anthony v. Phillips, 17 R. I. 188.

South Carolina: Clement v. Mattison, 3 Rich. Law, 93.

Texas: Black v. Bryan, 18 Tex. 453.

Vermont: Roberts v. Kelley, 51 Vt. 97; Frost v. Willis, 13 Vt. 202.

Canada: Tait v. Lindsay, 12 U. C. C. P. 414; Griffith v. Paterson, 20 Grant Ch. 615.

81. Harris v. Morris, 4 Esp. 41; Pierpont v. Wilson, 49 Conn. 450; Sykes v. Halstead, 1 Sandf. (N. Y.) 483; Watkins v. De Armond, 89 Ind. 553; Morrison v. Holt, 42 N. H. 478, 80 Am. Dec. 120, and other cases cited in the note preceding.

82. Kirk v. Chinstrand, 85 Minn. 108; Waxmuth v. McDonald, 96 Ill. App. 242.

83. Ewers v. Hutton, 3 Esp. 256; Ott v. Hentall, 70 N. H. 231; Callahan v. Patterson, 4 Tex. 61, 51 Am. Dec. 712; Rushing v. Clancy, 92 Ga. 769; Poole v. People, 24 Colo. 510; Prescott v. Webster, 175 Mass. 316.

84. Hunt v. Hayes, 64 Vt. 89, 33 Am. St. Rep. 917; Liddlow v. Wilmot, 2 Stark. 86; War v. Huntly, 1 Salk. 118; Johnston v. Sumner, 3 Hurl. & N. 261; Clifford v. Laton, 3 Car. & P. 15; Dixon v. Hurrell, 8 Car. & P. 717; Bazeley v. Forder, 9 Best & S. 599; Litson v. Brown, 26 Ind. 489; Arnold v. Brandt, 16 Ind. App. 171; Archibald v. Flynn, 32 U. C. Q. B. 523; Fredd v. Eves, 4 Har. (Del.) 385. But a precarious income is not sufficient, Thompson v. Hervey, 4 Burrow, 2177. And see Lockwood v. Thomas, 12 Johns. (N. Y.) 248; Anderson v. McLeod, 2 P. E. Island Rep. 142. "In this connection it is worthy of remark, if the husband's liability when he turns his wife away is put upon the ground of agency arising from necessity, as many of the cases do put it, it logically follows that when there is no necessity there can be no agency, for cessante ratione legis, cessat ipse lex; and there can be no necessity when the wife has means of her own with which she can supply herself." Hunt v. Hayes, supra.

85. Graham v. Schleimer, 28 Misc. (N. Y.) 535; Wilson v. Herbert, 41 N. J. Law, 454, 32 Am. Rep. 243; Dunbar v. Meyer, 43 Miss. 684; Cook v. Ligon, 54 Miss. 358; Ott v. Hentall, 70 N. H. 231; McMillan v. Auerback, 7 Ohio N. P. 376.

for a minor may bind himself by a contract to pay for necessaries furnished to himself or his wife and children.[86] The principle applies only when necessaries are in fact furnished the wife. He is not liable, unless agency in fact on the part of the wife is shown, for breach of a contract to purchase necessaries.[87] In order that a husband may be bound by his wife's purchase of necessaries, she must act for him in making the purchase. He is not bound if the credit is given to her individually. Where a wife lives with and is supported by her father, the law will not imply a promise on the part of the husband to pay the father for the support, unless there is something to show that payment was expected and intended, for the relationship of parent and child excludes the ordinary implication.[88] But a husband has been held liable for necessaries furnished his wife, after her desertion by him, by her son by a former marriage,[89] or by her mother.[90]

Effect of separation of husband and wife, abandonment, desertion, etc. Separation by agreement. Allowance.—The fact that a husband and wife are living separate and apart by mutual consent or agreement does not take away her implied authority to bind him for necessaries, if he fails to provide them, and has not made her an adequate allowance for her support.[91] He is not liable, however, if he makes her an adequate allowance, and pays the same, and tradesmen who furnish her with articles after the separation act at their peril.[92] Some of the courts, but not all, have held that the husband is not liable in such a case, even though the person furnishing the necessaries may have had no notice of the separation and allowance.[93]

86. Chapple v. Cooper, 13 Mees. & W. 252; Turner v. Trisby, 1 Strange, 168; Cantine v. Phillips' Adm'r, 5 Har. (Del.) 428; People v. Moores, 4 Denio (N. Y.) 520; Chapman v. Hughes, 61 Miss. 339; Dunbar v. Meyer, 43 Miss. 684; Price v. Sanders, 60 Ind. 310.

87. Sulter v. Mustin, 50 Ga. 242.

88. Cantine v. Phillips' Adm'r, 5 Har. (Del.) 428. Compare Biddle v. Frazier, 3 Houst. (Del.) 258; Watkins v. De Armond, 89 Ind. 553; Griffith v. Paterson, 20 Grant Ch. 615. Where a husband took his wife to her father's house and left her there till she obtained a divorce, he was held liable to her father for her board while there, without any express contract between them, notwithstanding the fact that the defendant paid his wife an agreed sum, in lieu of alimony, upon her proceedings for divorce. Burkett v. Trowbridge, 61 Me. 251.

89. Eiler v. Crull, 99 Ind. 375.

90. East v. King, 77 Miss. 738.

91. Dixon v. Hurrell, 8 Car. & P. 717; Emmett v. Norton, 8 Car. & P. 506; Johnston v. Sumner, 3 Hurl. & N. 261; Pearson v. Darrington, 32 Ala. 243; Seybold v. Morgan, 43 Ill. App. 39; McClary v. Warner, 69 Ill. App. 223; Schnuckle v. Bierman, 89 Ill. 464; Mayhew v. Thayer, 8 Gray (Mass.) 172; Oltman v. Yost, 62 Minn. 261; McKinney v. Guhman, 38 Mo. App. 344; Belknap v. Stewart, 38 Neb. 304, 41 Am. St. Rep. 729; Town of Rumney v. Keyes, 7 N. H. 571; Vusler v. Cox, 53 N. J. Law, 516; Baker v. Barney, 8 Johns. (N. Y.) 72, 5 Am. Dec. 326; Lockwood v. Thomas, 12 Johns. (N. Y.) 248; Raymond v. Cowdrey, 19 Misc. (N. Y.) 34; Cany v. Patton, 2 Ashm. (Pa.) 140; Frost v. Willis, 13 Vt. 202; Tait v. Lindsay, 12 U. C. C. P. 414.

92. Rawlyns v. Vandyke, 3 Esp. 250; Hodgkinson v. Fletcher, 4 Camp. 70; Holder v. Cope, 2 Car. & K. 437; Emmett v. Norton, 8 Car. & P. 506; Mizen v. Pick, 3 Mees. & W. 481; Negus v. Forster, 46 Law T. (N. S.) 675; Burrett v. Booty, 8 Taunt. 343; Mallalieu v. Lyon, 1 Fost. & F. 431; Baker v. Barney, 8 Johns. (N. Y.) 73, 5 Am. Dec. 326; Mott v. Comstock, 8 Wend. (N. Y.) 544; Kimball v. Keyes, 11 Wend. (N. Y.) 34; Le Boutillier v. Fiske, 47 Hun (N. Y.) 324; Raymond v. Cowdrey, 19 Misc. (N. Y.) 34; Hatch v. Leonard, 71 App. Div. (N. Y.) 32; Fredd v. Eves, 4 Har. (Del.) 385; Reese v. Chilton, 26 Mo. 598; Zealand v. Dewhurst, 23 U. C. C. P. 117. Compare, however, Rennick v. Ficklin, 3 B. Mon. (Ky.) 166, where, though husband and wife separate, and provision be made for her maintenance, yet if during the separation the wife buys necessaries and the parties become reconciled and the necessaries come to the possession of the wife and family, the husband is liable therefor. A contract between the husband and a third person to maintain the wife will not relieve him from liability for necessaries furnished her if she is driven away by the ill usage of such third person, or if he otherwise fails to perform the contract; but it is otherwise if the wife leaves or refuses to accept such maintenance, without cause. Pidgin v. Cram, 8 N. H. 350. The fact that the husband had conveyed property to trustees for the wife does not relieve him from liability, unless it is shown that the trustees accepted the trust and took possession of the property. Burrett v. Booty, 8 Taunt. 343.

93. Reeve v. Conyngham, 2 Car. & K. 444; Mizen v. Pick, 3 Mees. & W. 481; Wallis v. Biddick, 22 Wkly. Rep. 76; Cany v. Patton, 2 Ashm. (Pa.) 144. Contra, Rawlyns v. Vandyke, 3 Esp. 250; Lawrence v. Brown, 91 Iowa, 342. The general reputation of the separation has been held to be sufficient no-

In order that a husband may be relieved from liability for necessaries furnished his wife because of having made her an allowance, the allowance must have been paid. A mere unperformed agreement to pay is not enough.[94] And the allowance must have been adequate, taking into consideration the station in life of the parties, and the means of the husband,[95] unless the wife has agreed to accept the allowance as sufficient, in which case she must repudiate the agreement, and offer to return to him, before she can bind him by purchase of necessaries.[96]

Husband's desertion of wife.—If a husband deserts or turns away his wife without sufficient cause, and without an adequate provision for her support, she clearly has implied authority to purchase necessaries on his credit and bind him to pay for them. But this does not apply where a husband leaves his wife or turns her away for sufficient cause, as because of adultery[97] or extreme cruelty.[98] Nor does the rule apply where the husband, after deserting or driving away the wife without sufficient cause, offers to return or take her back, and she rejects the offer,[99] unless it appears that the offer was not made in good faith, or was accompanied by conditions which he had no right to impose, or that the wife had sufficient cause for rejecting it.[1]

Husband's insanity.—The fact that a husband is insane, and confined in an asylum or elsewhere, does not affect the wife's right to support, and if no provision is made for her support out of his estate, she has the same implied authority to bind him for necessaries as if he were sane and failed to furnish her adequate support.[2]

Wife's abandonment of husband.—If a wife leaves her husband without his consent and without sufficient cause, she has no implied authority to bind him even for necessaries, for under such conditions there is no duty on the part of the husband to support her.[3] By the weight of authority, a tradesman who supplies

tice. Tod v. Stokes, 12 Mod. 244; Baker v. Barney, 8 Johns. (N. Y.) 72, 5 Am. Dec. 326; Le Boutillier v. Fiske, 47 Hun (N. Y.) 324. As we shall see in another section, where a husband allows his wife to purchase goods on his credit, or otherwise holds her out as having authority, and then separates from her and makes her an allowance, he will be estopped to deny the continuance of her authority as against tradesmen who continue to supply her on his credit without notice of the changed conditions. "But if, though a tradesman, he had never been so authorized to give credit to the wife, but merely knew, as any one else knew, that the two were living together as man and wife, then there is no duty on the husband to give notice to him of the separation." Wallis v. Biddick, 22 Wkly. Rep. 76.

94. Hodgkinson v. Fletcher, 4 Camp. 70; Nurse v. Craig, 2 Bos. & P. 148; Beale v. Arabin, 36 Law T. (N. S.) 249; Baker v. Barney, 8 Johns. (N. Y.) 72, 5 Am. Dec. 326; McKinney v. Guhman, 38 Mo. App. 347.

95. Dixon v. Hurrell, 8 Car. & P. 717; Holder v. Cope, 2 Car. & K. 437; Hodgkinson v. Fletcher, 4 Camp. 70; Baker v. Sampson, 14 C. B. (N. S.) 385; Mayhew v. Thayer, 8 Gray (Mass.) 172, and other cases cited in note, supra.

96. Biffin v. Bignell, 7 Hurl. & N. 877; Eastland v. Burchell, 3 Q. B. Div. 432; Alley v. Winn, 134 Mass. 77, 45 Am. Rep. 297.

97. Gill v. Read, 5 R. I. 344, 73 Am. Dec. 73. A bigamous marriage by a wife, and her conviction therefor, does not justify her husband in casting her off, or relieve him from liability for necessaries afterwards furnished her, where she acted in good faith, after having been turned away by him without cause, and in the belief, intentionally induced by him, that he was dead. Cartwright v. Bate, 1 Allen (Mass.) 514, 79 Am. Dec. 759.

98. Sawyer v. Richards, 65 N. H. 186. A husband is none the less liable for necessaries furnished his wife after a separation through his fault, because she and the person furnishing the same conspired to abduct his minor child with a view to compelling him to settle a separate maintenance on her. Burlen v. Shannon, 14 Gray (Mass.) 433.

99. Walker v. Laighton, 31 N. H. 111.

1. Walker v. Laighton, 31 N. H. 111; Waxmuth v. McDonald, 96 Ill. App. 242. The fact that the husband requires that the wife shall change her place of residence does not excuse her rejection of his offer to live with her, for he has a right to fix their residence at any suitable place. Walker v. Laighton, 31 N. H. 111.

2. Read v. Legard, 6 Exch. 636; Richardson v. Du Bois, L. R. 5 Q. B. 51; Shaw v. Thompson, 16 Pick. (Mass.) 198, 26 Am. Dec. 655; Booth v. Cottingham, 126 Ind. 431; Thedford v. Reade, 25 Misc. (N. Y.) 490.

3. Mainwaring v. Leslie, 2 Car. & P. 507; Clifford v. Laton, 3 Car. & P. 15; Johnston v. Sumner, 3 Hurl. & N. 261; Collins v. Mitchell, 6 Har. (Del.) 369; Schnuckle v. Bierman, 89 Ill. 464; Bevier v. Galloway, 71 Ill. 617; Rea v. Durkee, 25 Ill. 503; Oinson v. Heritage, 45 Ind. 73, 16 Am. Rep.

the wife with necessaries under such circumstances cannot hold the husband liable, even though he may have had no notice of the separation,[4] unless he can make out an estoppel against the husband by showing that he had allowed the wife to make such purchases before the separation, and thus clothed her with apparent authority to make the purchase in question.[5]

A wife does not abandon her husband, so as to render this rule applicable, where she has sufficient cause for leaving him, as in the case of adultery on his part,[6] or conduct amounting to what the law regards as cruel treatment.[7] And in such cases the husband is liable for necessaries furnished her, even though he may have given notice before they were furnished that he would not be responsible.[8] The wife must have left the husband because of his misconduct, and not from some other and insufficient cause.[9] She is not justified in leaving, so as to carry with her implied authority to bind him for necessaries, merely because of quarrels, disagreements, and difficulties, not amounting to cruel treatment.[10]

258; Harttmann v. Tegart, 12 Kan. 177; Peaks v. Mayhew, 94 Me. 571; Benjamin v. Dockham, 132 Mass. 181; Inhabitants of Sturbridge v. Franklin, 160 Mass. 149; Reese v. Chilton, 26 Mo. 598; Rutherford v. Coxe, 11 Mo. 349; Belknap v. Stewart, 38 Neb. 304, 41 Am. St. Rep. 729; Allen v. Aldrich, 29 N. H. 63; Blowers v. Sturtevant, 4 Denio (N. Y.) 46; Catlin v. Martin, 69 N. Y. 393; Bostwick v. Brower, 22 Misc. (N. Y.) 709; Monroe County Sup'rs v. Budlong, 51 Barb. (N. Y.) 493; Lippincott's Estate, 12 Phila. (Pa.) 142; Williams v. Prince, 3 Strob. (S. C.) 490; Brown v. Patton, 3 Humph. (Tenn.) 135; Morgan v. Hughes, 20 Tex. 141; Cline v. Hackbarth, 27 Tex. Civ. App. 391; Thorne v. Kathan, 51 Vt. 520; Brown v. Mudgett, 40 Vt. 68; Sturtevant v. Starin, 19 Wis. 269. But the husband may be liable by reason of an express promise, or by reason of a promise implied from acts on his part warranting the inference of agreement in fact. Brown v. Patton, 3 Humph. (Tenn.) 135; Catlin v. Martin, 69 N. Y. 393, and see other cases cited supra this note. Where a person furnishes necessaries, during divorce proceedings, to her niece who secured a divorce on the ground of extreme cruelty, and it appeared from letters that the niece left her husband for the purpose of procuring a divorce and marrying another man, it was held that the wife left without justification and the former husband was not liable for the necessaries so furnished. Corry v. Lackey, 105 Mich. 363.

4. McCutchen v. McGahay, 11 Johns. (N. Y.) 281, 6 Am. Dec. 373; Vusler v. Cox, 53 N. J. Law, 518; Reese v. Chilton, 26 Mo. 598; Sturtevant v. Starin, 19 Wis. 269. And see Day v. Wamsley, 33 Ind. 145.

5. Hartjen v. Ruebsamen, 19 Misc. (N. Y.) 149; Anthony v. Phillips, 17 R. I. 188.

6. Sykes v. Halstead, 1 Sandf. (N. Y.) 483.

7. Forristall v. Lawson, 34 Law T. (N. S.) 903; Harrison v. Grady, 13 Law T. 369, 12 Jur. (N. S.) 140; Emmett v. Norton, 8 Car. & P. 506; Johnston v. Sumner, 3 Hurl. & N. 261; Zeigler v. David, 23 Ala. 127; Kemp v. Downham, 5 Har. (Del.) 417; Biddle v. Frazier, 3 Houst. (Del.) 258; Mitchell v. Treanor, 11 Ga. 324, 56 Am. Dec. 421; Ross v. Ross, 69 Ill. 569; Seybold v. Morgan, 43 Ill. App. 39; Wilson v. Bishop, 10 Ill. App. 588; Descelles v. Kadmus, 8 Iowa, 51; Billing v. Pilcher, 7 B. Mon. (Ky.) 458, 46 Am. Dec. 523; Thorpe v. Shapleigh, 67 Me. 235; Hancock v. Merrick, 10 Cush. (Mass.) 41; Reynolds v. Sweetser, 15 Gray (Mass.) 78; Mayhew v. Thayer, 8 Gray (Mass.) 172; Ott v. Hentall, 70 N. H. 231; Allen v. Aldrich, 29 N. H. 63; Snover v. Blair, 25 N. J. Law, 94; Comstock v. Green, 88 Hun (N. Y.) 64; Pomeroy v. Wells, 8 Paige (N. Y.) 406; Hultz v. Gibbs, 66 Pa. 360; Com. v. Wall, 4 Pa. Dist. R. 326; Clement v. Mattison, 3 Rich. Law (S. C.) 93; Griffith v. Patterson, 20 Grant Ch. 615; Hughes v. Rees, 10 Ont. Pr. Rep. 301. Bringing a prostitute into the house, or threatening to confine the wife in a madhouse, is equivalent to turning her away, and justifies her in leaving. Houliston v. Smyth, 2 Car. & P. 22, 3 Bing. 127; Tempany v. Hakewill, 1 Fost. & F. 438; Descelles v. Kadmus, 8 Iowa, 51. She has implied authority to pledge his credit for necessaries, if he connives at or condones his wife's adultery, and then turns her away, although he has expressly forbidden the person supplying them to trust her, Wilson v. Glossop, 20 Q. B. Div. 354, 57 Law J. Q. B. Div. 161; Harris v. Morris, 4 Esp. 41.

8. Wilson v. Glossop, 20 Q. B. Div. 354, 57 Law J. Q. B. Div. 161; Harris v. Morris, 4 Esp. 41; Sykes v. Halstead, 1 Sandf. (N. Y.) 483; Watkins v. De Armond, 89 Ind. 553.

9. Therefore, where it appeared that the husband had used violence towards the wife on an occasion five months before their separation, and there had been other difficulties and quarrels, but when she left his house it was not from any apprehension of ill-treatment, but in order to make a visit, and she refused to return unless his relatives, who lived with him, would go away,—it was held that he was not liable for board furnished her during such separation. Blowers v. Sturtevant, 4 Denio (N. Y.) 46.

10. Reed v. Moore, 5 Car. & P. 200; Biddle v. Frazier, 3 Houst. (Del.) 258, 263; Blowers v. Sturtevant, 4 Denio (N. Y.) 46; Breinig v. Meitzler, 23 Pa. 161. No amount of ill-treatment, short of personal violence, or such as to induce a reasonable fear of personal violence, it has been held would entitle a wife to pledge her husband's credit after leaving his house without his consent.

The rule that a wife who has left her husband without cause and without his consent cannot bind him for necessaries does not apply where the separation is involuntary on the part of the wife, and without her fault, or even where it is due to her fault, if it is through operation of the law, as in case of her conviction and imprisonment for a crime.[11] Nor does the rule apply, even where the separation was voluntary on the part of the wife, and without sufficient cause, where she has returned to her husband, or has in good faith offered to return and been refused.[12]

Wife's adultery.—A husband is not liable for necessaries furnished his wife after she has committed adultery and eloped, whether the person supplying her with necessaries knows of the circumstances of the separation or not.[13] And the same is true where the wife has been left or turned away by the husband for adultery,[14] or where she has committed adultery after having been turned away or deserted by the husband without cause, or after having separated from him with his consent, or for sufficient cause.[15] But if the husband condones the adultery and receives the wife back, and afterwards turns her away or leaves her without new cause, he will be liable for necessaries subsequently furnished her.[16]

Necessity for a valid marriage.—This rule applies, not only where the parties are legally husband and wife, but also where a man has lived with a woman and held her out as his wife, without being legally married to her, or without having gone through any form of marriage at all, provided the person furnishing the necessaries relies on the express or implied representation of the man, and believes that the woman is his wife.[17] But the rule does not apply where the person furnishing the necessaries knows that there has been no marriage, or where although he may not know this, he has not been misled by any conduct on the part of the man.[18] Of course a man may make such woman his agent for the purpose of purchasing necessaries, by expressly authorizing her to do so or by holding her out as having such authority, even though the tradesman knows that there is no valid marriage. In such case the same rules would apply as in the appointment of any other agent.

Effect of annulment of marriage or divorce.—A husband is under no duty to provide for his wife after a valid divorce a vinculo matrimonii, or after an

Horwood v. Heffer, 3 Taunt. 421; Emery v. Emery, 1 Younge & J. 501; Brown v. Ackroyd, 5 El. & Bl. 819; Breinig v. Meitzler, 23 Pa. 156. A wife is not justified in leaving because of the husband's refusal to send away relatives who are living with him. Blowers v. Sturtevant, 4 Denio (N. Y.) 46. Utter indifference and neglect upon the part of a husband, not accompanied by proof of physical violence, threats or specific misconduct of any kind towards his wife, do not justify her in abandoning him, nor render him liable to third persons who thereafter supply her with necessaries. Bostwick v. Brower, 22 Misc. (N. Y.) 709.

11. Bates v. Enright, 42 Me. 113.

12. Cunningham v. Irwin, 7 Serg. & R. (Pa.) 247, 10 Am. Dec. 458; Henderson v. Stringer, 2 Dana (Ky.) 291; McCutchen v. McGahay, 11 Johns. (N. Y.) 281, 6 Am. Dec. 373; McGahay v. Williams, 12 Johns. (N. Y.) 293; Blowers v. Sturtevant, 4 Denio (N. Y.) 46. But see Child v. Hardyman, 2 Strange, 875. That the offer to return may be made through a third person, see McGahay v. Williams, 12 Johns. (N. Y.) 293. The return or offer to return imposes no liability for necessaries previously supplied. Oinson v. Heritage, 45 Ind. 73, 15 Am. Rep. 258; Williams v. Prince, 3 Strobh. L. (S. C.) 490; Reese v. Chilton, 26 Mo. 598.

13. Morris v. Martin, 1 Strange, 647; Govier v. Hancock, 6 Term R. 603; Gill v. Read, 5 R. I. 344, 73 Am. Dec. 73.

14. Ham v. Toovey, 1 Selw. N. P. 228; Gill v. Read, 5 R. I. 344, 73 Am. Dec. 73; Peaks v. Mayhew, 94 Me. 571.

15. Govier v. Hancock, 6 Term R. 603; Cooper v. Lloyd, 6 C. B. (N. S.) 519; Gill v. Read, 5 R. I. 343, 73 Am. Dec. 73; Almy v. Wilcox, 110 Mass. 443. This does not apply where the husband consented to the adultery (Wilson v. Glossop, 19 Q. B. Div. 379; Ferren v. Moore, 59 N. H. 106) nor does it apply where the husband turns away the wife without cause, and intentionally leads her into the belief that he is dead, and she afterwards, in good faith, contracts a bigamous marriage. Cartwright v. Bate, 1 Allen (Mass.) 514, 79 Am. Dec. 759.

16. Harris v. Morris, 4 Esp. 41.

17. Paule v. Goding, 2 Fost. & F. 585; Robinson v. Nahon, 1 Camp. 245.

18. Munro v. De Chemant, 4 Camp. 215; Gomme v. Franklin, 1 Fost. & F. 465.

annulment of the marriage, and cannot be held liable for necessaries furnished to her thereafter.[19] But of course, a liability for necessaries furnished cannot be affected by a subsequent divorce or annulment of the marriage. When a wife is granted a divorce a mensa et thoro, with a provision for alimony, and the husband fails to pay the alimony, he will be liable for necessaries furnished her during the period of such neglect.[20]

Pendency of proceedings for a divorce.—The mere pendency of proceedings for a divorce, either by the husband or by the wife, does not relieve the husband from his duty to support the wife, and he will be liable, as in other cases, for necessaries furnished her pending such proceedings,[21] unless the court has made an allowance of alimony to the wife for her maintenance pending the suit, and it is paid by the husband.[22] The allowance of alimony, either temporary or permanent to the wife, does not relieve the husband from liability for necessaries furnished before such allowance, although after commencement of the suit.[23]

What are "necessaries" for which the husband is liable.—The term "necessaries," within the meaning of the rule under consideration, includes necessary food, drink, and clothing,[24] medicines, and medical attendance or advice, and nursing,[25] a suitable lodging or other place of residence,[26] services of domestics suitable to the husband's and wife's condition in life,[27] etc. The term is not limited to such things as are absolutely essential to sustain life, but includes such as are necessary and proper to support the wife in accordance with the rank or position in life and the estate of the husband, and the style of living and position in society into which he has introduced her, or which he has allowed her to assume.[28] It follows that for the purpose of determining whether particular articles

19. Anstey v. Manners, Gow, 10.

20. Hunt v. De Blaquiere, 5 Bing. 550.

21. Keegan v. Smith, 5 Barn. & C. 375; Houliston v. Smyth, 3 Bing. 127; Johnston v. Allen, 39 How. Pr. (N. Y.) 506; Minck v. Martin, 54 N. Y. Super. Ct. 136; Sykes v. Halstead, 1 Sandf. (N. Y.) 484; Hancock v. Merrick, 10 Cush. (Mass.) 41; Dowe v. Smith, 11 Allen (Mass.) 107; Burkett v. Trowbridge, 61 Me. 251. The wife is not bound to accept board and a separate apartment, in the house where her husband resides, while prosecuting a suit against him for divorce; and an offer of the same will not exempt him from liability for necessaries supplied to her. Sykes v. Halstead, 1 Sandf. (N. Y.) 483.

22. Willson v. Smyth, 1 Barn. & Ad. 801; Hare v. Gibson, 32 Ohio St. 33, 30 Am. Rep. 568; Crittenden v. Schermerhorn, 39 Mich. 661, 33 Am. Rep. 440; Bennett v. O'Fallon, 2 Mo. 69, 22 Am. Dec. 440; Johnston v. Allen, 39 How. Pr. (N. Y.) 506.

23. Keegan v. Smith, 5 Barn. & C. 375; Dowe v. Smith, 11 Allen (Mass.) 107. And see Burkett v. Trowbridge, 61 Me. 252.

24. Wallis v. Biddick, 22 Wkly. Rep. 76; Reed v. Crissey, 63 Mo. App. 184; Sauter v. Scrutchfield, 28 Mo. App. 157; Dolan v. Brooks, 168 Mass. 350. As defined in Reed v. Crissey, supra, necessaries for which the husband is liable when furnished the wife, consist of food, drink, clothing, washing, physic, medical attendance, instruction and suitable residence.

25. Beale v. Arabin, 36 Law T. (N. S.) 249; Forristall v. Lawson, 34 Law T. (N. S.) 903; Harrison v. Grady, 12 Jur. (N. S.) 140; Anon., 1 Strange, 527; Cothran v. Lee, 24 Ala. 380; Black v. Clements, 2 Pen. (Del.) 499; Bevier v. Galloway, 71 Ill. 517; Wilcoxon v. Read, 95 Ill. App. 33; Seybold v. Morgan, 43 Ill. App. 39; Towery v. McGaw, 22 Ky. L. R. 155, 56 S. W. 727; Long v. Beard, 20 Ky. L. R. 1036, 48 S. W. 158; Carpenter v. Hazelrigg, 20 Ky. L. R. 231, 45 S. W. 666; State v. Housekeeper, 70 Md. 162, 14 Am. St. Rep. 340; Carstens v. Hanselman, 61 Mich. 426, 1 Am. St. Rep. 606; Reed v. Crissey, 63 Mo. App. 184; Tebbets v. Hapgood, 34 N. H. 420; Ott v. Hentall, 70 N. H. 231; Comstock v. Green, 88 Hun (N. Y.) 64; Hardy v. Eagle, 23 Misc. (N. Y.) 441; Dixon v. Chapman, 56 App. Div. (N. Y.) 542. See, also, Peaks v. Mayhew, 94 Me. 571. But the husband is not liable for medicines and advice furnished to his wife in his absence, by a party not professing to be a physician, or to have any medical skill or knowledge of diseases or their remedies. Wood v. O'Kelley, 8 Cush. (Mass.) 406. Medical attendance for an ordinary hired servant is not a necessary. Baker v. Witten, 1 Okl. 160.

26. Oltman v. Yost, 62 Minn. 261; Kirk v. Chinstrand, 85 Minn. 108; Waxmuth v. McDonald, 96 Ill. App. 242; Ott v. Hentall, 70 N. H. 231; Reed v. Crissey, 63 Mo. App. 184; Sauter v. Scrutchfield, 28 Mo. App. 157.

27. Flynn v. Messenger, 28 Minn. 208, 41 Am. Rep. 279; Wagner v. Nagel, 33 Minn. 348; Phillips v. Sanchez, 35 Fla. 187. But the labor and services of slaves applied to the support and maintenance of the wife cannot be regarded as necessaries, though their value was not more than sufficient for her necessary support and maintenance. Zeigler v. David, 23 Ala. 127.

28. Phillipson v. Hayter, L. R. 6 C. P. 42; Morgan v. Chetwynd, 4 Fost. & F. 451; Raynes v Bennett, 114 Mass. 428; Shelton

or a particular residence furnished to a wife were necessaries, it is proper to prove and to take into consideration the husband's style of living,[29] his wealth and income, or capacity to earn money,[30] the character and cost of clothing which he had previously allowed the wife to purchase on his credit,[31] the style of living in the society in which he has introduced her or allowed her to appear,[32] etc. In some of the cases it has been said that the question depends upon the condition in life and position of the wife.[33] But the better opinion and weight of authority is that it depends upon the condition of the husband, as well as the wife,—upon the condition in life of both.[34]

The term "necessaries" does not include a pew in a place of worship, and a wife cannot bind her husband to pay rent for the same without his consent.[35]

Nor does the term include money, as such, loaned to the wife. At common law, the husband cannot be held liable therefor, even though it may be shown that the money was intended and in fact used for the purchase of necessaries.[36] In equity, however, according to the weight of authority, where money is advanced to a wife for the purchase of necessaries, on her husband's credit, and under such conditions that she would be authorized to purchase necessaries on his credit, and is properly applied for such purpose, the lender, by application of the equitable doctrine of subrogation, may recover from the husband to the extent to which the money is so applied.[37]

v. Hoadley, 15 Conn. 535; Ray v. Adden, 50 N. H. 82, 9 Am. Rep. 175; Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362; Sauter v. Scrutchfield, 28 Mo. App. 150; Keller v. Phillips, 39 N. Y. 351; Clark v. Cox, 32 Mich. 204. A horse purchased by a wife to be used by her in a business conducted on her own account is not a "necessary" for which the husband can be held liable. Palmer v. Coghlan (Tex. Civ. App.) 55 S. W. 1122.

29. As that he wore diamonds and kept fast horses. Raynes v. Bennett, 114 Mass. 428.

30. Clark v. Cox, 32 Mich. 204. The public records, showing the amount of property on which taxes are assessed against the husband, are not admissible for this purpose. Raynes v. Bennett, 114 Mass. 427.

31. Raynes v. Bennett, 114 Mass. 428.

32. Clark v. Cox, 32 Mich. 204.

33. Ray v. Adden, 50 N. H. 82, 9 Am. Rep. 175; Thorpe v. Shapleigh, 67 Me. 238.

34. Compton v. Bates, 10 Ill. App. 78; Wilcoxon v. Read, 95 Ill. App. 33; Keller v. Phillips, 39 N. Y. 354; Clark v. Cox, 32 Mich. 204; Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362; Barr v. Armstrong, 56 Mo. 577; Ott v. Hentall, 70 N. H. 231.

In Compton v. Bates, 10 Ill. App. 85, Pillsbury, J., in deciding upon an instruction given in the lower court says: "This instruction only requires the goods purchased to be of a character necessary and suitable to the position in life of the wife. If, as it would seem, this instruction was intended to state the rule of the liability of the husband growing out of the necessities of the wife, then it extends the liability of the husband beyond what we had supposed it to be. If the wife has been provided with necessaries suitable to the condition in life of the parties and the estate of the husband, then, as we have seen, the husband is not liable for other goods that may be purchased by the wife, although of the same character of necessaries. To make him liable upon this ground, the goods actually purchased must be needed by the wife for her present use. Besides, the jury, by this instruction, were to determine whether the goods were necessary and suitable by the standard alone of the wife's position in life. It was held in Manby v. Scott, 1 Sid. 109, that 'the estate and degree of the husband' should be considered upon this question, a rule which has not, so far as we are advised, ever been departed from."

35. St. John's Parish v. Bronson, 40 Conn. 75, 16 Am Rep. 17.

36. Knox v. Bushell, 3 C. B. (N. S.) 334; Paule v. Goding, 2 Fost. & F. 585; Zeigler v. David, 23 Ala. 127; Brown v. Woodard, 75 Conn. 254; Gilbert's Ex'r v. Plant, 18 Ind. 308; Skinner v. Tirrell, 159 Mass. 474, 38 Am. St. Rep. 447; Anderson v. Cullen, 16 Daly (N. Y.) 15; Schwarting v. Bisland, 4 Misc. (N. Y.) 534; Walker v. Simpson, 7 Watts & S. (Pa.) 83, 42 Am. Dec. 216; Gill v. Read, 5 R. I. 347, 73 Am. Dec. 73; Marshall v. Perkins, 20 R. I. 34, 78 Am. St. Rep. 841.

37. Harris v. Lee, 1 P. Wms. 482; Marlow v. Pitfeild, 1 P. Wms. 558; Deare v. Soutten, L. R. 9 Eq. 151; Jenner v. Morris, 3 DeGex, F. & J. 45; Walker v. Simpson, 7 Watts & S. (Pa.) 83, 42 Am. Dec. 216; Kenyon v. Farris, 47 Conn. 510, 36 Am. Rep. 86; Kenny v. Meislahn, 69 App. Div. (N. Y.) 572; Reed v. Crissey, 63 Mo. App. 184.

In a late New Jersey case, however, it was held that there could be no such recovery where the husband was merely ill, and had not deserted the wife. Leuppie v. Osborn's Ex'rs, 52 N. J. Eq. 637. And in Massachusetts the doctrine has been repudiated altogether. In that state, a husband is not liable, even in equity, in the absence of consent or ratification, for money borrowed by his wife and applied in the purchase of necessaries, although she may be living sepa-

Under a statute making both husband and wife liable for expenses of the family, the term "expenses of the family" is not synonymous with "necessaries," which may be personal and individual, and does not include an article which in no way conduces to the welfare of the family.[38]

Whether a husband is liable for legal services rendered for his wife on his credit, on the ground that they were necessaries, depends upon the circumstances. Legal services rendered at the request of a married woman in relation to her estate are certainly not necessaries, and the husband cannot be made liable therefor without his consent. It is otherwise, however, in the case of services of an attorney or counsellor at law which are necessary to procure for a wife such sustenance or protection as the husband is under a legal duty to afford her, or which are necessary to protect her against wrongs on the part of the husband. Thus it has been held that a husband is liable for legal services rendered in defending a criminal prosecution against his wife,[39] particularly when the services are in defending a groundless charge made against her by the husband,[40] or a charge based upon acts done by her with the concurrence of her husband.[41] It has also been held that a husband is liable for legal services rendered for his wife, in order to protect her against him, by having him bound over to keep the peace, etc.,[42] unless there is no ground for the proceedings;[43] for services in prosecuting proceedings by the wife against the husband for restitution of conjugal rights, or to compel him to support her;[44] or in prosecuting against the husband a suit for a divorce a mensa et thoro, if there were seasonable grounds therefor,[45] but not otherwise.[46] It is held in England that a wife may bind her husband to pay the fees and disbursements of her solicitor in a suit for a dissolution of the marriage.[47] In this country, however, the decided weight of authority is to the effect that the services of an attorney or solicitor for a wife in a suit for annulment of the marriage or for a divorce a vinculo matrimonii are not necessaries, and that the wife cannot bind the husband to pay therefor, whether the suit is brought by the wife,[48] or by the

rate from him. Skinner v. Tirrell, 159 Mass. 474, 38 Am. St. Rep. 447.

38. Hyman v. Harding, 162 Ill. 357.

39. Artz v. Robertson, 50 Ill. App. 27; and cases in the notes following.

40. Conant v. Burnham, 133 Mass. 503, 43 Am. Rep. 532; Warner v. Heiden, 28 Wis. 517, 9 Am. Rep. 515.

41. See Shepherd v. Mackoul, 3 Camp. 326.

42. Shepherd v. Mackoul, 3 Camp. 326; Turner v. Rookes, 10 Adol. & E. 47; Williams v. Monroe, 18 B. Mon. (Ky.) 514; Morris v. Palmer, 39 N. H. 123. But not for services in prosecuting an indictment against the husband to punish him for an assault upon her. Grindell v. Godmond, 5 Adol. & E. 755; Conant v. Burnham, 133 Mass. 503, 43 Am. Rep. 532.

43. Smith v. Davis, 45 N. H. 566.

44. Wilson v. Ford, L. R. 3 Exch. 63. But not for services of an attorney, rendered on behalf of his wife in proceedings prosecuted by the people against the husband for nonsupport. McQuhae v. Rey, 2 Misc. (N. Y.) 476, 3 Misc. 550.

45. Rice v. Shepherd, 12 C. B. (N. S.) 332; Brown v. Ackroyd, 5 El. & Bl. 819; McCurley v. Stockbridge, 62 Md. 422, 50 Am. Rep. 229; Peck v. Marling's Adm'r, 22 W. Va. 708; Langbein v. Schneider, 27 Abb. N. C. (N. Y.) 228; Naumer v. Gray, 28 App. Div. (N. Y.) 529, 32 App. Div. 627; Hahn v. Rogers, 34 Misc. (N. Y.) 549.

46. Brown v. Ackroyd, 5 El. & Bl. 819; Baylis v. Watkins, 33 Law J. Ch. 300.

47. Ottaway v. Hamilton, L. R. 3 C. P. Div. 393; Stocken v. Pattrick, 29 Law T. (N. S.) 507.

48. Pearson v. Darrington, 32 Ala. 227; Shelton v. Pendleton, 18 Conn. 417; Dow v. Eyster, 79 Ill. 254; Williams v. Monroe, 18 B. Mon. (Ky.) 518; Isbell v. Weiss, 60 Mo. App. 54; Yelser v. Lowe, 50 Neb. 310; Morrison v. Holt, 42 N. H. 478, 80 Am. Dec. 120; Dorsey v. Goodenow, Wright (Ohio) 120; Wing v. Huriburt, 15 Vt. 607, 40 Am. Dec. 695; Peck v. Marling's Adm'r, 22 W. Va. 708.

In Iowa, it was held contra in Preston v. Johnson, 65 Iowa, 285, and Clyde v. Peavy, 74 Iowa, 47. But compare Johnson v. Williams, 3 G. Greene (Iowa) 97, 54 Am. Dec. 491, where it was held that the husband was not liable, and Sherwin v. Maben, 78 Iowa, 467, where it was held that the husband was not liable for the reason that it appeared that there was no ground for divorce as alleged in the complaint. And see opinion of the court in this case for review of cases in this state on this subject. In Sprayberry v. Merk, 30 Ga. 81, 76 Am. Dec. 637, Stephens, J., says: "As to this one matter of a suit for a divorce the wife is sui juris, having a clear right to institute and conduct that kind of a suit independently of her husband's consent. But this right is practically denied to her, if

husband.[49] But certainly the husband would not be liable for legal services rendered to his wife, where she is living apart from him by reason of her own adultery.[50]

Where a wife purchases on her husband's credit some goods which are necessaries, and others which are not, either by reason of their character or quantity, the husband is liable for the former.[51] But where the articles furnished are not necessaries, the husband cannot be held liable for the whole, or for a fractional part thereof, on the ground that they might have answered the purpose of other articles which would have been necessaries.[52]

Wife's funeral expenses.—A husband is liable at common law, on implied contract, for his wife's burial expenses,[53] but this, of course, is not on the theory of the wife's agency for the husband.

Presumption and burden of proof as to necessaries.—When a husband has forbidden tradesmen to supply his wife with articles on his credit, this, as we have seen, does not prevent a tradesman from furnishing her with necessaries, if the husband fails to perform his duty in supplying them. But a tradesman who furnishes her with articles after such prohibition acts at his peril, and in order to hold the husband liable, he has the burden of proving not only that the articles furnished were properly necessaries, but also that the husband had neglected his duty, so as to give the wife the implied authority to purchase on his credit without his consent.[54] As we have seen, where a husband and wife are living together there is a presumption that she has implied authority, as a matter of fact, to purchase on his credit necessaries for the household, unless he has forbidden it, and the prohibition is brought to the notice of tradesmen. But there is no such presumption where the wife is living separate from her husband. In such a case tradesmen supplying her with necessaries have the burden of proving that the circumstances were such as to authorize her to bind him.[55] They have the burden

she can command no means of paying the agents who are necessary to the conduct of the suit. Therefore, it is that, quoad hoc, she may charge the common funds of herself and husband in his hands. But as this power on her part is founded on the necessity of the case, so its extent does not exceed the demand of the necessity; and therefore she can charge the common funds (or her husband, which is the same thing in effect) only with the real value of such services as she may procure, and not with the price which she may fix on them by her contract. Upon these views is founded the constant practice of the court in granting alimony to the wife during the pending of her suit for divorce, and in embracing her counsel fees in the allowance. It is worthy of remark that her counsel fees are allowed as a part of her necessary maintenance, and are allowed before it is ascertained whether she has a valid ground for a divorce or not." And see Glenn v. Hill, 50 Ga. 94. In Texas, it is held that the husband is liable for reasonable attorney's fees incurred by his wife in the prosecution of a suit for divorce, only where it is shown that the suit was instigated by the wife in good faith and upon reasonable grounds. Dodd v. Hein, 26 Tex. Civ. App. 164, 62 S. W. 811; Ceccato v. Deutschman, 19 Tex. Civ. App. 434.

49. Cooke v. Newell, 40 Conn. 596; McCullough v. Robinson, 2 Ind. 630; Coffin v. Dunham, 8 Cush. (Mass.) 404, 54 Am. Dec. 769; Ray v. Adden, 50 N. H. 82, 9 Am. Rep. 175; Wing v. Hurlburt, 15 Vt. 607, 40 Am. Dec. 695. Contra, Porter v. Briggs, 38 Iowa, 166, 18 Am. Rep. 27; Gossett v. Patten, 23 Kan. 340.

50. Peaks v. Mayhew, 94 Me. 571.

51. Eames v. Sweetser, 101 Mass. 78; Roberts v. Kelley, 51 Vt. 97.

52. Thorpe v. Shapleigh, 67 Me. 235.

53. See 15 Am. & Eng. Enc. Law, 880; Cunningham v. Reardon, 98 Mass. 538, 96 Am. Dec. 670; Gleason v. Warner, 78 Minn. 405.

54. Etherington v. Parrot, 1 Salk. 118; Hibler v. Thomas, 99 Ill. App. 355; Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362; Woodward v. Barnes, 43 Vt. 330; Barr v. Armstrong, 56 Mo. 577; Mott v. Comstock, 8 Wend. (N. Y.) 544; Keller v. Phillips, 39 N. Y. 351; Theriott v. Bagioli, 9 Bosw. (N. Y.) 578. And see McGrath v. Donnelly, 131 Pa. 551. Where a husband notifies a merchant not to sell goods on credit to his wife and he is subsequently sued for goods sold to her after such notice, the burden is upon the husband, first, to establish his notice, and having done so, it shifts upon the merchant to show that the husband failed to furnish the necessary and suitable support to his wife and family. Hibler v. Thomas, 99 Ill. App. 355.

55. Johnston v. Sumner, 3 Hurl. & N. 261; Walker v. Simpson, 7 Watts & S. (Pa.) 83, 42 Am. Dec. 216; Gill v. Read, 5 R. I. 343, 73 Am. Dec. 73; Sturbridge v. Franklin, 160

of proving, when the wife has left the husband, that she left him with his consent or for sufficient cause.[56] Where the husband has made his wife an allowance, one who furnishes her with necessaries has the burden of proving that it was not paid, or was inadequate.[57]

Province of court and jury.—There has been some difficulty in determining when it is for the court, and when for the jury, to say whether particular things furnished to a wife are necessaries, but the following rule may be laid down as established by the weight of authority, and as in accordance with the general doctrine as to the respective provinces of the court and jury:[58]

Whether articles of a certain kind, as clothing, food, jewelry, pew-rent, etc., are or are not of such a character that they can be necessaries, is a question of law, which the court must decide, and upon which it must instruct the jury.[59] But whether any particular thing falls within the classes of articles which may be necessaries, taking into consideration the condition in life of the husband and wife, and whether the quantity or amount furnished were excessive under the circumstances, are questions of fact for the jury.[60] If there is no question as to the character of the articles furnished, and they are such as could not under any circumstances, or under the undisputed circumstances of the particular case, fall within any class of necessaries, according to the established law on the subject, the court need not submit the question to the jury.[61] Whether an allowance made by a husband to his wife, when living separate, was adequate, is a question for the jury.[62]

Agency to use or dispose of husband's property for maintenance.—If a husband deserts his wife, or is in prison, leaving her without the means of support, she has implied authority to use his real or personal estate, or to dispose of his money or other personal property, for the purpose of maintaining herself and family, and procuring necessaries.[63] She may receive and apply the earnings of

Mass. 149; S. E. Olson Co. v. Youngquist, 76 Minn. 26; Peaks v. Mayhew, 94 Me. 571; St. Vincent's Inst. for Insane v. Davis, 129 Cal. 17; Vusler v. Cox, 53 N. J. Law, 516.

56. Mainwaring v. Leslie, 2 Car. & P. 507; Clifford v. Laton, 3 Car. & P. 15; Blowers v. Sturtevant, 4 Denio (N. Y.) 46; Sturbridge v. Franklin, 150 Mass. 149; Rea v. Durkee, 25 Ill. 503; Billing v. Pilcher, 7 B. Mon. (Ky.) 458, 45 Am. Dec. 523; Harttmann v. Tegart, 12 Kan. 177; Peaks v. Mayhew, 94 Me. 571; Reese v. Chilton, 26 Mo. 598; Hultz v. Gibbs, 65 Pa. 360. Compare Emmett v. Norton, 8 Car. & P. 505.

But it has been held that where the marriage has been proven, and it has been shown that the articles furnished were necessaries for the wife's support, it is prima facie evidence of the liability of the husband, and of his promise to pay, and the burden of proof rests upon the husband to show that her separate residence, and want of means of support, was through no fault of his. Rumney v. Keyes, 7 N. H. 571; Allen v. Aldrich, 29 N. H. 73.

57. Bloomingdale v. Brinckerhoff, 2 Misc. (N. Y.) 49; McKinney v. Guhman, 38 Mo. App. 344; Johnston v. Sumner, 3 Hurl. & N. 261.

Other cases, however, hold that the burden is on the husband to show that he has made her a proper allowance or that she has it from some fund of her own. Dixon v. Hurrell, 8 Car. & P. 717; Mayhew v. Thayer, 8 Gray (Mass.) 172; Pidgin v. Cram, 8 N. H. 352; Baker v. Barney, 8 Johns. (N. Y.) 57, 5 Am. Dec. 326.

58. Hammon Cont. § 165.

59. Phillipson v. Hayter, L. R. 6 C. P. 41; Raynes v. Bennett, 114 Mass. 428; St. John's Parish v. Bronson, 40 Conn. 75, 16 Am. Rep. 17; Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362; Sulter v. Mustin, 50 Ga. 242; Sauter v. Scrutchfield, 28 Mo. App. 157.

60. Hunt v. De Blaquiere, 5 Bing. 550; Compton v. Bates, 10 Ill. App. 84; Rea v. Durkee, 25 Ill. 503; Vercier v. Jansen, 96 Ill. App. 328; Tupper v. Cadwell, 12 Metc. (Mass.) 559, 45 Am. Dec. 704; Merriam v. Cunningham, 11 Cush. (Mass.) 40; Raynes v. Bennett, 114 Mass. 424; Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362; Sauter v. Scrutchfield, 28 Mo. App. 157; Graham v. Schleimer, 28 Misc. (N. Y.) 535; McGrath v. Donnelly, 131 Pa. 551.

61. Phillipson v. Hayter, L. R. 6 C. P. 41; Raynes v. Bennett, 114 Mass. 428; Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 362; Sulter v. Mustin, 50 Ga. 242.

62. Holder v. Cope, 2 Car. & K. 437; Hodgkinson v. Fletcher, 4 Camp. 70.

63. Abern v. Easterby, 42 Conn. 545 (where the husband was in prison); Loy v. Loy, 128 Ind. 150; Rawson v. Spangler, 52 Iowa, 59; Camerlin v. Palmer Co., 10 Allen (Mass.) 539; Preston v. Bancroft, 62 Vt. 85.

her minor children for such purpose,[64] and in Texas it has been held that she may, under such circumstances, manage and dispose of community property for such purpose.[65]

§ 14. *Wife's implied authority to procure necessaries for children.*—If a husband deserts his wife or turns her away, or if they are living separate by mutual consent, and he allows his child to remain with her without providing for the child's support, the wife has implied authority to procure necessaries for the child on his credit.[66] And such authority is not affected by the fact that the wife commits adultery, so that she would have no authority to procure necessaries on his credit for herself.[67] The husband is not liable where he makes and pays the wife an adequate allowance for the support of his children, or makes other suitable and adequate provision therefor.[68] Nor is a husband liable where his wife leaves him without sufficient cause and takes a child with her, knowing that he is able and willing to support the child,[69] or even where the wife leaves for sufficient cause and takes and keeps the child with her contrary to his expressed wishes.[70] A wife has no implied authority to bind her husband for necessaries for her children by a former husband.[71]

§ 15. *Contracts by wife on her own credit.*—Even when a wife has authority, express or implied, to bind her husband by purchase of goods or other contracts, the husband will not be bound unless she assumes or undertakes to bind him. If she acts on her own account, and credit is given to her, and not to her husband, the latter is not liable on the contract. This rule applies to contracts for necessaries as well as to other contracts, and it can make no difference that the circumstances were such that the wife could have bound the husband.[72] But under a

64. Camerlin v. Palmer Co., 10 Allen (Mass.) 539.

65. Wright v. Hays' Adm'r, 10 Tex. 133; Cheek v. Bellows, 17 Tex. 613; Fullerton v. Doyle, 18 Tex. 12; Carothers v. McNese, 43 Tex. 221; Zimpelman v. Robb, 53 Tex. 274.

66. Rawlyns v. Vandyke, 3 Esp. 252; McMilien v. Lee, 78 Ill. 443; Peck v. Gibeson, 83 Ill. App. 92; Reynolds v. Sweetser, 15 Gray (Mass.) 78; Camerlin v. Palmer Co., 10 Allen (Mass.) 540; East v. King, 77 Miss. 738; Rumney v. Keyes, 7 N. H. 571; Walker v. Laighton, 31 N. H. 111; Hardy v. Eagle, 23 Misc. (N. Y.) 441; Dixon v. Chapman, 56 App. Div. (N. Y.). 542; Gill v. Read, 5 R. I. 343, 73 Am. Dec. 73. See, also, Bazeley v. Forder, 9 Best & S. 599. It has been held that the education of children is not within the rule. Hodges v. Hodges, Peake Add. Cas. 79; Bailey v. Calcott, 4 Jur. 699. Compare, however, Stanton v. Willson, 3 Day (Conn.) 37, 3 Am. Dec. 255. Where the custody of a minor child is given to the mother by a decree of court, under the statute of 1874, c. 205, the father is not liable for the support of such child. Brow v. Brightman, 136 Mass. 187.

67. Gill v. Read, 5 R. I. 343, 73 Am. Dec. 73. Compare Atkyns v. Pearce, 2 C. B. (N. S.) 763. But a man who has received into his house and supported a woman and children compelled to leave home by the cruelty of her husband cannot recover from the husband the expense of supporting the children, if one of his motives for receiving them was that he might maintain an adulterous intercourse with the woman. Almy v. Wilcox, 110 Mass. 443.

68. Atkyns v. Pearce, 2 C. B. (N. S.) 763; Kimball v. Keyes, 11 Wend. (N. Y.) 34.

69. Baldwin v. Foster, 138 Mass. 449; Hyde v. Leisenring, 107 Mich. 490.

70. Hancock v. Merrick, 10 Cush. (Mass.) 41. It is otherwise where there is an order or decree of the court giving the wife the custody of the child. Bazeley v. Forder, 9 Best & S. 599.

71. Tubb v. Harrison, 4 Term R. 118. And see Com. v. Hamilton, 6 Mass. 273; Bond v. Lockwood, 33 Ill. 212; McMahill v. McMahill's Estate, 113 Ill. 461; In re Besondy, 32 Minn. 385, 50 Am. Rep. 579. The children of a wife by a former husband are not a part of the family of a second husband from whom she has separated, so as to render him liable for their support, under the Iowa Code making the expenses of the family chargeable on the property of either husband or wife. Menefee v. Chesley, 98 Iowa, 55. If, however, a step-father assumes the relation of a parent to his infant step-son, he accepts the parental obligation of supporting him. Ela v. Brand, 63 N. H. 14.

72. England: Metcalfe v. Shaw, 3 Camp. 22; Bentley v. Griffin, 5 Taunt. 356; Holt v. Brien, 4 Barn. & Ald. 252.

Alabama: Pearson v. Darrington, 32 Ala. 228; Gayle's Adm'r v. Marshall, 70 Ala. 522; Gafford v. Dunham, 111 Ala. 551.

Connecticut: Shelton v. Pendleton, 18 Conn. 417; Taylor v. Shelton, 30 Conn. 122.

Delaware: Black v. Clements, 2 Pen. 499.

Florida: Haile v. Einstein, 34 Fla. 589.

Georgia: Connerat v. Goldsmith, 6 Ga. 14; Mitchell v. Treanor, 11 Ga. 324, 56 Am. Dec. 421; Morris v. Root, 65 Ga. 686.

Maryland: Maulsby v. Byers, 67 Md. 440.

Michigan: Franklin v. Foster, 20 Mich. 75.

Mississippi: Swett v. Penrice, 24 Miss. 416.

statute making both husband and wife liable for the "family expenses," the husband may be held liable therefor, notwithstanding credit may have been extended to the wife alone.[73] Purchases of necessaries, while living with the husband, are never presumed to have been made on the credit of the wife; such fact must be shown affirmatively.[74]

A husband cannot be held liable for goods sold to his wife on her own credit, or on any other contract made with her on her own credit, because he knew of and assented to the transaction, or acted for her in the matter,[75] or because he is personally benefited by the contract,[76] or because, by reason of legal disability, the contract is not binding upon the wife.[77]

Where the credit is given to the wife, the contract, not being made by her as agent of her husband, cannot be ratified by him. A promise by him to pay the debt would be a promise to answer for the debt of another, and subject to all the rules governing such a promise.

Whether credit was given to the husband or to the wife must be determined from the evidence, and is a question of fact for the jury.[78] If a person lends money or sells goods to a wife with the understanding that the transaction shall be concealed from the husband, it may properly be inferred that the credit was given to the wife.[79] If a tradesman, in supplying a wife with such goods as she has implied authority to purchase on her husband's credit, in fact furnishes them on the husband's credit, he is not precluded from holding the husband liable by the fact that he charged the goods to the wife on his books.[80]

§ 16. *Husband's ratification of wife's acts.*—If a wife acts as agent of her husband without authority, the husband may ratify her acts and thus render them binding upon him to the same extent as if originally authorized, and a ratification by him may be either express or implied from his conduct.

§ 17. *Agency of woman held out or passing as wife.*—Where a man lives with a woman, allowing her to assume his name and pass as his wife, she has implied authority to pledge his credit for necessaries during the continuance of the cohabitation, in like manner and to the same extent as if she were in fact his wife,[81] and this is true although the person who furnished the necessaries knew at the time that they were not married.[82] But if there is no cohabitation, the mere fact

Missouri: Tuttle v. Hoag, 46 Mo. 38, 2 Am. Rep. 481.

New Hampshire: Hill v. Goodrich, 46 N. H. 41.

New York: Stammers v. Macomb, 2 Wend. 454; Simmons v. McElwain, 26 Barb. 419; Ehrich v. Bucki, 7 Misc. 118; Byrnes v. Rayner, 84 Hun, 199; Lindholm v. Kane, 92 Hun, 369.

Ohio: Dorsey v. Goodenow, Wright, 120; McMillan v. Auerback, 7 Ohio N. P. 376.

Oklahoma: Baker v. Witten, 1 Okl. 160.

Pennsylvania: Moore v. Copley, 165 Pa. 294, 44 Am. St. Rep. 664.

South Carolina: Moses v. Fogartie, 2 Hill Law, 335.

Tennessee: Catron v. Warren, 1 Cold. 358.

Vermont: Carter v. Howard, 39 Vt. 106; Bugbee v. Blood, 48 Vt. 497; Roberts v. Kelley, 51 Vt. 97. Compare Black v. Bryan, 18 Tex. 453.

73. Warrington v. Anable, 84 Ill. App. 593.

74. Moore v. Copley, 165 Pa. 294, 44 Am. St. Rep. 664.

75. Taylor v. Shelton, 30 Conn. 122; Swett v. Penrice, 24 Miss. 416; Maulsby v. Byers, 67 Md. 440; Roberts v. Kelley, 51 Vt. 97.

76. Carter v. Howard, 39 Vt. 106. But see Roberts v. Kelley, 51 Vt. 97.

77. Taylor v. Shelton, 30 Conn. 122.

78. Bentley v. Griffin, 5 Taunt. 356; Mitchell v. Treanor, 11 Ga. 324, 56 Am. Dec. 421.

79. Franklin v. Foster, 20 Mich. 75. But the request of a feme covert to a merchant not to call on her husband for pay for necessaries that she purchased on her husband's credit, as she wished to pay for them herself, will not be presumed to have been made with a fraudulent intent, and the husband will be liable for them. Day v. Burnham, 36 Vt. 37.

80. Baker v. Carter, 83 Me. 132, 23 Am. St. Rep. 764; Furlong v. Hysom, 35 Me. 332; Jawsbury v. Newbold, 26 Law J. Exch. 247; Sibley v. Gilmer, 124 N. C. 631. See, also, Lauck v. Rohde, 20 Misc. (N. Y.) 346. In order that the husband may render a contract made by the wife binding upon him by ratification, the credit must have been given to him and not to the wife.

81. Paule v. Goding, 2 Fost. & F. 585.

82. Ryan v. Sams, 12 Q. B. 460; Watson v. Threlkeld, 2 Esp. 637.

that a man allows a woman to use his name is not sufficient to raise this presumption of authority to pledge his credit.[83] And although they cohabited, if not actually married, a subsequent separation terminates the presumed authority to pledge his credit and he will not be liable for necessaries furnished the woman thereafter,[84] unless held so on the ground of estoppel.[85]

§ 18. *Agency of partner.*—In an ordinary partnership, each partner is not only a principal, but he is also an agent in the management of the business of the firm. In the absence of provision or agreement to the contrary, he is the general agent of his co-partners with implied authority to bind them as members of the firm in all matters which are properly within the scope of the partnership business.[86] And as agent for his co-partners he has implied authority, unless there is some provision or agreement to the contrary, not only to act himself in the conduct of the partnership business, but also to appoint agents to represent the firm, where such an appointment is within the partnership business.[87] It has been suggested that the power of a partner to bind the firm results directly from the contract of

83. Gomme v. Franklin, 1 Fost. & F. 465.

84. Munro v. De Chemant, 4 Camp. 215.

85. Ryan v. Sams, 12 Q. B. 460.

86. 1 Bates, Partn. § 461.

England: Hawken v. Bourne, 8 Mees. & W. 703.

United States: Wheeler v. Sage, 1 Wall. 518; Kimbro v. Bullitt, 22 How. 256.

Alabama: Rovelsky v. Brown, 92 Ala. 522, 25 Am. St. Rep. 83.

California: Forbes v. Scannell, 13 Cal. 288.

Connecticut: Usher v. Waddingham, 62 Conn. 412.

Dakota: Pearson v. Post, 2 Dak. 220.

Illinois: Raymond v. Vaughn, 128 Ill. 256, 16 Am. St. Rep. 112; Edwards v. Dillon, 147 Ill. 14, 37 Am. St. Rep. 199.

Indiana: Hess v. Lowrey, 122 Ind. 225, 17 Am. St. Rep. 355.

Iowa: Western Stage Co. v. Walker, 2 Iowa, 504, 65 Am. Dec. 789.

Kentucky: Montjoy v. Holden, Litt. Sel. Cas. (Ky.) 447, 12 Am. Dec. 331; Warder v. Newdigate, 11 B. Mon. (Ky.) 174, 52 Am. Dec. 567.

Massachusetts: Smith v. Collins, 115 Mass. 388.

Minnesota: Flarsheim v. Brestrup, 43 Minn. 298.

Missouri: Eau Claire-St. Louis Lumber Co. v. Gray, 81 Mo. App. 337.

New Hampshire: National State Capital Bank v. Noyes, 62 N. H. 35.

New Jersey: Gerli v. Poidebard Silk Mfg. Co., 57 N. J. Law, 432, 51 Am. St. Rep. 611.

New York: Cookingham v. Lasher, 38 Barb. (N. Y.) 658; Comstock v. Buchanan, 57 Barb. (N. Y.) 127; Johnston v. Trask, 116 N. Y. 136, 15 Am. St. Rep. 394.

Pennsylvania: Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. 498, 78 Am. Dec. 390; Wilkins v. Boyce, 3 Watts, 39; Robertson v. Wood, 10 Kulp, 76.

South Carolina: Kinsler v. McCants, 4 Rich. Law, 46, 53 Am. Dec. 711.

Tennessee: Whiteman Bros. v. American Central Ins. Co., 14 Lea, 327; Pooley v. Whitmore, 10 Heisk. 629, 27 Am. Rep. 733.

Wisconsin: Tucker v. Cole, 54 Wis. 539; Fletcher v. Ingram, 46 Wis. 191. "When then a partnership is formed for a particular purpose," said Chief Justice Marshall, in Winship v. Bank of United States, 5 Pet. 561, "it is understood to be in itself a grant of power to the acting members of the company to transact its business in the usual way. If that business be to buy and sell, then the individual buys and sells for the company, and every person with whom he trades in the way of its business, has a right to consider him as the company, whoever may compose it. * * * The articles of copartnership are perhaps never published. They are rarely if ever seen, except by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the parties, as between themselves. The trading world, with whom the company is in perpetual intercourse, cannot individually examine these articles, but must trust to the general powers contained in all partnerships. The acting parties are identified with the company, and have power to conduct its usual business, in the usual way."

87. England: Beckham v. Drake, 9 Mees. & W. 79; Hawken v. Bourne, 8 Mees. & W. 703.

Alabama: Lucae v. Bank of Darien, 2 Stew. 280.

Colorado: Charles v. Eshleman, 5 Colo. 107.

Illinois: Bartlett v. Powell, 90 Ill. 331.

Indiana: Froun v. Davis, 97 Ind. 401.

Iowa: Paton v. Baker, 62 Iowa, 704; Boyd v. Watson, 101 Iowa, 214.

Kansas: Frye v. Sanders, 21 Kan. 26, 30 Am. Rep. 421; Wheatley v. Tutt, 4 Kan. 240.

Louisiana: Johnston's Ex'r v. Brown, 18 La. Ann. 330.

Maryland: Holloway v. Turner, 61 Md. 217.

Massachusetts: Durgin v. Somers, 117 Mass. 55.

Michigan: Burgan v. Lyell, 2 Mich. 102, 55 Am. Dec. 53; Harvey v. McAdams, 32 Mich. 472; Banner Tobacco Co. v. Jenison, 48 Mich. 459.

New Hampshire: Wills v. Cutler, 61 N. H. 405.

Pennsylvania: Tillier v. Whitehead, 1 Dall. 269.

Texas: Coons v. Renick, 11 Tex. 134, 60 Am. Dec. 230.

Vermont: Carley v. Jenkins, 46 Vt. 721.

the parties rather than by operation of law. Whether this be so depends somewhat on the question whether a partnership be regarded as a contract or a status established by contract.

The implied power of a partner is not without limit. He has no authority, unless express authority or an estoppel is shown, to bind his co-partners in a matter which is beyond the scope of the partnership business.[88] And as he cannot appoint an agent to do for the firm what he cannot do himself, he cannot, without special authority, appoint an agent to bind the other partners by a conveyance or other transaction which is not within the scope of the partnership business.[89]

§ 19. *Unincorporated clubs and societies as principals.*—When a number of persons form a club or society for social, political, religious, or charitable purposes, etc., without becoming incorporated, the law does not regard them as a legal entity or artificial person, like a corporation, but merely as a collection of individuals, and it necessarily follows that the club or association, as such, cannot appoint or have an agent.[90] The members may appoint an agent, but in such a case he is the agent of the members as individuals. They are joint principals.[91] Such an association is not a partnership, and to render a member liable as a principal on contracts made by the persons or committees who manage and assume to act for the association, it must be shown that he expressly or impliedly authorized them to represent and bind him.[92] Members of such bodies are not chargeable with debts on its behalf, unless the relation of principal and agent is established between the representative of the association and person sought to be made liable. It must be shown that the party assuming to act for the association, was the agent of the member upon whom liability is sought to be fastened, and is authorized by him to enter into the contract as his representative.[93] But mere member-

88. United States: Bowen v. Clark, 1 Biss. 128, Fed. Cas. No. 1,721; Winship v. Bank of United States, 5 Pet. 561.
Alabama: Lang's Heirs v. Waring, 17 Ala. 145.
Colorado: Lewin v. Barry, 15 Colo. App. 461.
Connecticut: New York Firemen Ins. Co. v. Bennett, 6 Conn. 574, 13 Am. Dec. 109.
Georgia: Davis v. Dodson, 95 Ga. 718, 51 Am. St. Rep. 108.
Illinois: Ruffner v. McConnel, 17 Ill. 212.
Iowa: Western Stage Co. v. Walker, 2 Iowa, 604, 65 Am. Dec. 789; Seeberger v. Wyman, 108 Iowa, 527.
Kansas: Shattuck v. Chandler, 40 Kan. 616, 10 Am. St. Rep. 227.
Kentucky: Brooks-Waterfield Co. v. Jackson, 21 Ky. L. R. 854, 53 S. W. 41.
Maine: Rollins v. Stevens, 31 Me. 454.
Michigan: Van Kleeck v. McCabe, 87 Mich. 599, 24 Am. St. Rep. 182.
Minnesota: Maurin v. Lyon, 59 Minn. 257, 65 Am. St. Rep. 568.
New York: Hitchcock v. Peterson, 14 Hun, 390; Laverty v. Burr, 1 Wend. 529; Stall v. Catskill Bank, 18 Wend. 466; Palliser v. Erhardt, 46 App. Div. 222.
North Dakota: Clarke v. Wallace, 1 N. D. 404, 26 Am. St. Rep. 636.
Pennsylvania: Sutton v. Irwine, 12 Serg. & R. 13; Tanner v. Hall, 1 Pa. 417.
Tennessee: Bank of Tennessee v. Saffarrans, 3 Humph. 597; Crosthwait v. Ross, 1 Humph. 23, 34 Am. Dec. 613.
Utah: Peterson v. Armstrong, 24 Utah, 96; Gutheil v. Gilmer, 23 Utah, 84; Cavanaugh v. Salisbury, 22 Utah, 465.

89. Charles v. Eshleman, 5 Colo. 107; Palliser v. Erhardt, 46 App. Div. (N. Y.) 222.

90. Clark & M. Corp. 48.

91. Ray v. Powers, 134 Mass. 22; Willcox v. Arnold, 162 Mass. 577; Reding v. Anderson, 72 Iowa, 498.

92. Flemyng v. Hector, 2 Mees. & W. 172; Todd v. Emly, 7 Mees. & W. 427; Hawke v. Cole, 62 Law T. (N. S.) 658; Wilson v. Henderson, 123 Cal. 262; Lewis v. Tilton, 64 Iowa, 220, 52 Am. Rep. 436; Burt v. Lathrop, 52 Mich. 106; Newell v. Borden, 128 Mass. 31; Richmond v. Judy, 6 Mo. App. 465; Lafond v. Deems, 81 N. Y. 507; McCabe v. Goodfellow, 133 N. Y. 89; Devoss v. Gray, 22 Ohio St. 159; Ash v. Gule, 97 Pa. 493, 39 Am. Rep. 818.

It has been held that where persons join for social and recreative purposes, and assume a name under which they incur liabilities, they become jointly liable for the indebtedness incurred, and each member continues liable so long as he remains a member, and until he gives notice of his withdrawal to creditors. Park v. Spaulding, 10 Hun (N. Y.) 128, and see Ebbinghousen v. Worth Club, 4 Abb. N. C. (N. Y.) 300.

93. Flemyng v. Hector, 2 Mees. & W. 172; Wood v. Finch, 2 Fost. & F. 447; Delouney v. Strickland, 2 Stark. 416; Luckombe v. Ashton, 2 Fost. & F. 707; Lewis v. Tilton,

ship is not sufficient to fix the liability of a member for indebtedness contracted on behalf of such an association or society.[94] A member can only be made liable by his personal acts or participation in the transaction in question,[95] or where the business is conducted through the medium of officers or agents, by agreeing, at the time of becoming a member, to the exercise of defined powers by the representatives of the associations, as by expressly or impliedly consenting to abide by the provisions of its constitution, by-laws, or corresponding rules of guidance, respecting their appointments and powers,[96] or by sanctioning or acquiescing in an appointment or delegation of authority, either by voting therefor, by assenting to the action taken, or by subsequently ratifying it.[97] In the absence of an agreement to abide by the action of a majority of the members, or of the action of a committee or officer of the association, the liability is limited to those only who agreed to be bound by such actions.[98] The assent need not be express, but may be made out by acts and conduct.[99] Neither need it be proved by former records; but may be established by parol proof.[1] There may be cases, however, in which the objects for which the association is organized are so clear, and the

64 Iowa, 220, 52 Am. Rep. 436; Ray v. Powers, 134 Mass. 22; Newell v. Borden, 128 Mass. 31; Volger v. Ray, 131 Mass. 439; Burt v. Lathrop, 52 Mich. 106; Rice v. Peninsular Club, 52 Mich. 87; Heath v. Goslin, 80 Mo. 310, 50 Am. Rep. 505; Richmond v. Judy, 6 Mo. App. 465; Sizer v. Daniels, 66 Barb. (N. Y.) 426; Devoss v. Gray, 22 Ohio St. 169; Ash v. Guie, 97 Pa. 493, 39 Am. Rep. 818; Ridgely v. Dobson, 3 Watts & S. (Pa.) 118.

In Eichbaum v. Irons, 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540, it was held that the liability of the members or committees appointed by a political meeting to provide a free public dinner for the members of a political party was not determinable by the law of principal and agent, nor by the law of partnership, but by the question of concurrence in giving the order—their action being joint, and not several.

And see Davison v. Holden, 55 Conn. 102, 3 Am. St. Rep. 40, wherein it is said that persons associating for commercial purposes for their pecuniary advantage, and who for convenience transact business and assume associate name, are liable upon the principle of the law of agency. Bennett v. Lathrop, 71 Conn. 613, 71 Am. St. Rep. 222.

94. Flemyng v. Hector, 2 Mees. & W. 172; Caldicott v. Griffiths, 8 Exch. 898; Hawke v. Cole, 62 Law T. (N. S.) 658; Ash v. Guie, 97 Pa. 493, 39 Am. Rep. 818; McCabe v. Goodfellow, 133 N. Y. 89. And the mere fact that a person is a member of the managing committee is not of itself evidence of authority to pledge his credit. Wood v. Finch, 2 Fost. & F. 447; Draper v. Manvers, 9 Times Law R. 73; Steele v. Gourley, 9 Times Law R. 772; Overton v. Hewett, 3 Times Law R. 246. A member is not liable for rent under a lease executed by the association before he became a member, on a count framed on the contract originally made. Barry v. Nuckolls, 2 Humph. (Tenn.) 324.

95. Reding v. Anderson, 72 Iowa, 498; Ash v. Guie, 97 Pa. 493, 39 Am. Rep. 818; In re St. James Club, 16 Jur. 1075.

96. Flemyng v. Hector, 2 Mees. & W. 172; Todd v. Emly, 7 Mees. & W. 427; Bennett v. Lathrop, 71 Conn. 613, 71 Am. St. Rep. 222. By-laws providing that a number less than the whole constitute a quorum, which, or a majority thereof, may act for the whole body, are binding on those who agree to them. Cohn v. Borst, 36 Hun (N. Y.) 562.

97. Flemyng v. Hector, 2 Mees. & W. 172; Todd v. Emly, 7 Mees. & W. 427; The St. James Club, 2 De Gex, M. & G. 983; Delauney v. Strickland, 2 Stark. 416; Braithwaite v. Skofield, 9 Barn. & C. 401; Cockerell v. Aucompte, 2 C. B. (N. S.) 440; Reding v. Anderson, 72 Iowa, 498; Lewis v. Tilton, 64 Iowa, 220, 52 Am. Rep. 436; Wells v. Turner, 16 Md. 133; Willcox v. Arnold, 162 Mass. 577; Volger v. Ray, 131 Mass. 439; Newell v. Borden, 128 Mass. 31; Ray v. Powers, 134 Mass. 22; Heath v. Goslin, 80 Mo. 310, 50 Am. Rep. 505; Ferris v. Thaw, 72 Mo. 446; Richmond v. Judy, 6 Mo. App. 469; Devoss v. Gray, 22 Ohio St. 159, 169; Eichbaum v. Irons, 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540; Ridgely v. Dobson, 3 Watts & S. (Pa.) 118; Ash v. Guie, 97 Pa. 493, 39 Am. Rep. 818; Fredenthal v. Taylor, 28 Wis. 286. See, also, Keller v. Tracy, 11 Iowa, 530; Drake v. Normal School Trustees, 11 Iowa, 54. Where persons associated and raised funds to erect a building, and appointed one of their members as their agent to employ workmen and purchase materials, it was held that he had authority to bind the subscribers, including himself, and that all might be sued jointly. Robinson v. Robinson, 10 Me. 240.

98. Todd v. Emly, 7 Mees. & W. 427; Flemyng v. Hector, 2 Mees. & W. 172; Newell v. Borden, 128 Mass. 31; Devoss v. Gray, 22 Ohio St. 159. Every member present at a meeting assents beforehand to whatever the majority may do, and becomes a party to acts done, though against his will. If he would escape responsibility he must protest and throw up his membership on the spot. Eichbaum v. Irons, 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540.

99. Heath v. Goslin, 80 Mo. 310, 50 Am. Rep. 505.

1. Newell v. Borden, 128 Mass. 31; Ray v. Powers, 134 Mass. 22.

acts done are so essentially necessary to the furtherance of those objects, that the members will be presumptively bound by them, without evidence of consent or ratification.[2]

§ 20. *Agency as between tenants in common and co-owners.*—In order that one tenant in common of real property or co-owner of personal property may bind the other with respect to such property, consent on the part of the other is essential. There is no implied agency, as in the case of a partnership, merely by virtue of their relation.[3] "One tenant in common has no power as such to convey or dispose of the lands of his co-tenant, and cannot execute a deed of the lands of his co-tenant in any other manner than can a stranger."[4] So the mere relation of co-tenancy between joint mine owners does not empower one of them to render his co-tenants liable on any contracts or for any expenditures he may make as their agent.[5] But where the act is such that it is manifestly for the benefit of all the co-tenants, as the filing of a notice of an adverse claim to a mine, it may be done by one on behalf of the others without a power of attorney from them.[6] The appointment of an agent by one co-tenant, to act in reference to the common property, will bind that one only,[7] unless his co-owner joins in or subsequently ratifies such appointment.[8] But the majority owner of a vessel acts as the agent of his co-owners in managing the ship, and acts done by him in the course of such management are binding on them, unless they expressly dissent.[9]

§ 21. *Agency between joint obligors—Joint obligees.*—It sometimes becomes necessary that the relation of principal and agent should exist between persons having a joint interest or joint liability in certain matters. Such persons have a common interest and at times it is necessary that one of them should represent his co-obligors in matters in which they are all concerned. In accordance with this principle, the joint debtor may act as the agent of his co-debtors in paying the joint debt and, when he has done so, may compel contribution from them; and if, after satisfying the debt, he is discharged therefrom, it redounds to the benefit of all and will operate to discharge them all.[10] As has been said, "Each represents the others in matters relating to the payment and discharge of their joint liability.[11] This agency of a joint obligor, however, should not be extended

2. Sizer v. Daniels, 66 Barb. (N. Y.) 426; Richmond v. Judy, 6 Mo. App. 465; McCabe v. Goodfellow, 133 N. Y. 89.

3. Blood v. Goodrich, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; Metzger v. Huntington, 139 Ind. 501; Barton v. Williams, 5 Barn. & Ald. 395; Dunham v. Loverock, 158 Pa. 197, 38 Am. St. Rep. 838; Butler Sav. Bank v. Osborne, 159 Pa. 10, 39 Am. St. Rep. 665; Burt & Brabb Lumber Co. v. Clay City Lumber Co., 23 Ky. L. R. 1019, 64 S. W. 652.

4. Blood v. Goodrich, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; McElroy v. McLeay, 71 Vt. 396.

5. Rico Reduction & Min. Co. v. Musgrave, 14 Colo. 79; Chase v. Savage Silver Min. Co., 2 Nev. 9; Paul v. Cragnaz, 25 Nev. 295; Mercur v. State Line & S. R. Co., 171 Pa. 12.

6. Nesbitt v. Delamar's Nev. Gold Min. Co., 24 Nev. 273, 77 Am. St. Rep. 807.

7. Keay v. Fenwick, 1 C. P. Div. 745; Perminter v. Kelly, 18 Ala. 716, 54 Am. Dec. 177; Noe v. Christie, 51 N. Y. 270; Omaha & Grant Smelting & Refining Co. v. Tabor, 13 Colo. 41, 16 Am. St. Rep. 185; Mayfield v. McKnight (Tenn.) 56 S. W. 42.

8. Keay v. Fenwick, 1 C. P. Div. 745; Noe v. Christie, 51 N. Y. 270.

9. Swift v. Tatner, 89 Ga. 660, 32 Am. St. Rep. 101; Gray's Adm'r v. Allen, 14 Ohio, 58, 45 Am. Dec. 523; Thoms v. Southard, 2 Dana (Ky.) 475, 26 Am. Dec. 467. But a part owner of a vessel is not an agent of his co-owners when he takes it to sail on shares, agreeing out of its earnings to pay all expenses, and to give the others a certain proportion of the net proceeds. Williams v. Hays, 143 N. Y. 442, 42 Am. St. Rep. 743.

10. Whitcomb v. Whiting, 2 Doug. 652; Chetwood v. California Nat. Bank, 113 Cal. 414; Fitch v. Hammer, 17 Colo. 591; Scofield v. Clark, 48 Neb. 711; Green v. Rick, 121 Pa. 130, 6 Am. St. Rep. 760; Mills v. Hyde, 19 Vt. 59, 46 Am. Dec. 177; Maslin's Ex'rs v. Hiett, 37 W. Va. 15. A receipt under seal, given by an obligee to a joint obligor, "in full satisfaction for his liability" upon the obligation, releases the co-obligors, if the receipt itself does not show a contrary intention. Hale v. Spaulding, 145 Mass. 482, 1 Am. St. Rep. 475.

11. Green v. Rick, 121 Pa. 130, 6 Am. St. Rep. 760.

beyond what is necessary to perform or complete the original contract.[12] It is doubtless the law that joint debtors, in matters respecting their joint indebtedness, may, to a certain extent, bind each other by their admissions,[13] but this can only be as to facts affecting rights or remedies then existing. The admissions must relate to matters showing what are the terms of the contract already made, or whether it has been performed or otherwise discharged. The idea, however, cannot be sanctioned, that a co-debtor, merely because he is such, has authority to bind his associates to a new contract, although it may be in regard to an old debt.[14] A partial payment by a joint debtor, therefore, without the knowledge or assent or subsequent ratification of his co-debtors, will not bind the latter so as to authorize the inference of a new promise on their part, and therefore will not affect the defense of the statute of limitations as to them.[15] Of course the joint obligors may expressly authorize one of their number to make a partial payment on a joint obligation or to make a new promise; or such authority may result from the relation of the parties; or the acts may be subsequently ratified, in either of which cases the co-obligors would all be estopped to plead the statute of limitations.[16] In some of the cases, the acknowledgment or partial payment relied upon to take the case out of the statute was made before the bar of the statute had become complete; but in principle, there is no distinction between the legal effect of the acknowledgment or payment made before or after the bar of the statute has attached; and a new promise or part payment by one of two or more joint debtors, whether made before or after the debt is barred by statute, takes the case out of the statute only as to the party so promising or paying, unless his co-debtors assent to or subsequently ratify such promise or payment.[17] But notwithstanding this, there is much conflict in the cases as to the right of one joint debtor to act as the agent of his co-debtors in extending the bar of the statute, before it has attached. It has been held in a number of cases, following Lord Mansfield's decision, that, where the bar of the statute has not attached, the joint relationship of the co-debtors makes one of them the agent of the other to the extent that he may, by payment or new promise, represent his co-debtors in extending the bar of the statute as to the joint debt.[18] But the better con-

12. Wolf v. Fink, 1 Pa. 435, 44 Am. Dec. 141; Smith v. United States, 2 Wall. (U. S.) 219. One co-surety is not an agent of the others for the purpose of extending the time of payment of a promissory note. Wolf v. Fink, 1 Pa. 435, 44 Am. Dec. 141.

13. Kallenbach v. Dickinson, 100 Ill. 427, 39 Am. Rep. 47.

14. Kallenbach v. Dickinson, 100 Ill. 427, 39 Am. Rep. 47; and see cases hereafter cited.

15. Lowther v. Chappell, 8 Ala. 353; Kallenbach v. Dickinson, 100 Ill. 427, 39 Am. Rep. 47; Waughop v. Bartlett, 165 Ill. 124; Boynton v. Spafford, 162 Ill. 113, 53 Am. St. Rep. 274; Willoughby v. Irish, 35 Minn. 63, 59 Am. Rep. 297; Oleson v. Wilson, 20 Mont. 544, 63 Am. St. Rep. 639; Bender v. Blossing, 82 Hun, (N. Y.) 320; McMullen v. Rafferty, 24 Hun (N. Y.) 363; Coleman v. Fobes, 22 Pa. 156, 60 Am. Dec. 75; Cowhick v. Shingle, 5 Wyo. 87, 63 Am. St. Rep. 17.

16. Bergman v. Bly, 66 Fed. 40; McCarthy v. White, 21 Cal. 495, 82 Am. Dec. 754; Kallenbach v. Dickinson, 100 Ill. 427, 39 Am. Rep. 47; Boynton v. Spafford, 162 Ill. 113, 53 Am. St. Rep. 274; Waughop v. Bartlett, 165 Ill. 124; Mainzinger v. Mohr, 41 Mich. 685; Pfenninger v. Kokesch, 68 Minn. 81; Oleson v. Wilson, 20 Mont. 544, 63 Am. St. Rep. 639; Pitts v. Hunt, 6 Lans. (N. Y.) 146; Halght v. Avery, 16 Hun (N. Y.) 252; Munro v. Potter, 34 Barb. (N. Y.) 358; In re Petrie, 82 Hun (N. Y.) 62; Whipple v. Stevens, 22 N. H. 219; Harper v. Edwards, 115 N. C. 246; Glick v. Crist, 37 Ohio St. 388; Wesner v. Stein, 97 Pa. 322; Bailey v. Corliss, 51 Vt. 366.

17. Cowhick v. Shingle, 5 Wyo. 87, 63 Am. St. Rep. 17.

18. England: In Whitcomb v. Whiting, 2 Doug. 652, Lord Mansfield, in reference to joint debtors, says: "Payment by one is payment for all, the one acting virtually as agent for the rest; and in the same manner, an admission by one, is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due." And to the same effect, see, in cases of partnership:

Connecticut: Coit v. Tracy, 8 Conn. 286, 20 Am. Dec. 110; Austin v. Bostwick, 9 Conn. 496, 25 Am. Dec. 42; Beardsley v. Hall, 36 Conn. 270, 4 Am. Rep. 74; Bissell v. Adams, 35 Conn. 299.

Georgia: Cox v. Bailey, 9 Ga. 467, 54 Am. Dec. 358.

sidered cases hold otherwise; that one joint debtor cannot act as the agent of his co-debtors in such cases, in extending the bar of the statute by payment or new promise without their consent, save in the case of existing partnerships.[19] But although many of the decisions recognize the rule in Whitcomb v. Whiting, as to a payment or new promise made by a joint debtor before the claim is barred by statute, yet they nearly all adhere to the rule that one joint debtor cannot, after the bar of the statute has attached, act as the agent of the other without his assent, in removing the bar of the statute by payment or acknowledgment.[20]

Louisiana: Boullt v. Sarpy, 30 La. Ann. 494.

Maine: Shepley v. Waterhouse, 22 Me. 497; Dinsmore v. Dinsmore, 21 Me. 433 (but see later cases in following note).

Maryland: Burgoon v. Bixler, 55 Md. 384, 39 Am. Rep. 417; Schindel v. Gates, 46 Md. 604, 24 Am. Rep. 526.

Massachusetts: Sigourney v. Drury, 14 Pick. 387; Hunt v. Bridgham, 2 Pick. 581, 13 Am. Dec. 458; Frye v. Barker, 4 Pick. 381.

Minnesota: Whitaker v. Rice, 9 Minn. 13, 86 Am. Dec. 78 (but see later cases).

Missouri: McClurg v. Howard, 45 Mo. 365, 100 Am. Dec. 378; Lawrence County v. Dunkle, 35 Mo. 395.

New Jersey: Casebolt v. Ackerman, 46 N. J. Law, 169; Merritt v. Day, 38 N. J. Law, 32, 20 Am. Rep. 362.

New York: Reid v. McNaughton, 15 Barb. 168.

North Carolina: Davis v. Coleman, 7 Ired. Law, 424; Moore v. Beaman, 111 N. C. 328; Green v. Greensboro Female College, 83 N. C. 449, 35 Am. Rep. 579.

Pennsylvania: Zent's Ex'rs v. Heart, 8 Pa. 337.

Rhode Island: Woonsocket Inst. v. Ballou, 15 R. I. 351; Perkins v. Barstow, 5 R. I. 505.

South Carolina: Beitz v. Fuller, 1 McCord, 541, 10 Am. Dec. 593; Smith v. Caldwell, 15 Rich. 365.

Wisconsin: National Bank v. Cotton, 53 Wis. 31.

And this principle applies to a payment or acknowledgment made by an administrator or executor of one of the joint obligors. County of Vernon v. Stewart, 64 Mo. 408, 27 Am. Rep. 250; Briggs v. Starke, 2 Mill, Const. (S. C.) 111, 12 Am. Dec. 659; Hord's Adm'rs v. Lee, 4 T. B. Mon. (Ky.) 35; Heath v. Grenell, 61 Barb. (N. Y.) 190.

19. United States: Bell v. Morrison, 1 Pet. 352; Bergman v. Bly, 66 Fed. 40.

Alabama: Knight v. Clements, 45 Ala. 89, 6 Am. Rep. 693; Lowther v. Chappell, 8 Ala. 353, 42 Am. Dec. 643; Caruthers v. Mardis' Adm'rs, 3 Ala. 599; Wyatts v. Bell, 41 Ala. 222.

District Columbia: Miller v. Miller, MacArthur & M. (D. C.) 109, 48 Am. Rep. 738.

Florida: Tate v. Clements, 16 Fla. 339, 26 Am. Rep. 709.

Georgia: Hunter v. Robertson, 30 Ga. 479.

Illinois: Kallenbach v. Dickinson, 100 Ill. 427, 39 Am. Rep. 47; Davis v. Mann, 43 Ill. App. 301; Waughop v. Bartlett, 165 Ill. 124.

Indiana: Bottles v. Miller, 112 Ind. 584; Meitzler v. Todd, 12 Ind. App. 381, 54 Am. St. Rep. 531; Yandes v. Lefavour, 2 Blackf. (Ind.) 371.

Kansas: Davis v. Clark, 58 Kan. 459; Steele v. Souder, 20 Kan. 39.

Louisiana: Reynolds v. Rowley, 2 La. Ann. 890.

Maine: Wellman v. Southard, 30 Me. 425; Odell v. Dana, 33 Me. 182.

Massachusetts: Faulkner v. Bailey, 123 Mass. 588.

Michigan: Rogers v. Anderson, 40 Mich. 290; Thompson v. Richards, 14 Mich. 172.

Minnesota: Willoughby v. Irish, 35 Minn. 63, 59 Am. Rep. 297.

Mississippi: Briscoe v. Anketell, 28 Miss. 361, 61 Am. Dec. 553; Foute v. Bacon, 24 Miss. 156.

New Hampshire: Whipple v. Stevens, 22 N. H. 219; Exeter Bank v. Sullivan, 6 N. H. 124; Kelley v. Sanborn, 9 N. H. 46.

New York: Van Keuren v. Parmelee, 2 N. Y. (2 Comst.) 523, 51 Am. Dec. 322; Gould v. Cayuga County Nat. Bank, 86 N. Y. 75; Shoemaker v. Benedict, 11 N. Y. 176, 62 Am. Dec. 95; Bender v. Blessing, 82 Hun, 320 (compare Johnson v. Beardslee, 15 Johns. 3).

North Carolina: Campbell v. Brown, 86 N. C. 376, 41 Am. Rep. 464; Le Duc v. Butler, 112 N. C. 458.

Ohio: Hance v. Hair, 25 Ohio St. 349; Palmer v. Dodge, 4 Ohio St. 21, 62 Am. Dec. 271.

Pennsylvania: Clark v. Burn, 85 Pa. 502; Levy v. Cadet, 17 Serg. & R. 126, 17 Am. Dec. 650; Bush v. Stowell, 71 Pa. 208, 10 Am. Rep. 694; Coleman v. Fobes, 22 Pa. 156, 60 Am. Dec. 75.

South Carolina: Walters v. Kraft, 23 S. C. 578, 55 Am. Rep. 44.

Tennessee: Muse v. Donelson, 2 Humph. 166, 36 Am. Dec. 309; Belote's Ex'rs v. Wynne, 7 Yerg. 533.

Wyoming: Cowhick v. Shingle, 5 Wyo. 87, 63 Am. St. Rep. 17.

20. United States: Allen v. O'Donald, 28 Fed. 17.

Arkansas: Biscoe v. Jenkins, 10 Ark. 108; Biscoe v. James, 10 Ark. 163; Borden v. Peay, 20 Ark. 293.

Georgia: Cox v. Bailey, 9 Ga. 467, 54 Am. Dec. 358.

Kentucky: Cochran v. Walker, 82 Ky. 220, 56 Am. Rep. 891.

Maine: True v. Andrews, 35 Me. 183; Pike v. Warren, 15 Me. 390.

Maryland: Schindel v. Gates, 46 Md. 604, 24 Am. Rep. 526; Ellicott v. Nichols, 7 Gill, 85, 48 Am. Dec. 546; Burgoon v. Bixler, 55 Md. 384, 39 Am. Rep. 417.

Missouri: McClurg v. Howard, 45 Mo. 365, 100 Am. Dec. 378.

Nebraska: Mayberry v. Willoughby, 5 Neb. 368.

New Jersey: Parker v. Butterworth, 46 N. J. Law, 244. 50 Am. Rep. 407.

New York: Van Keuren v. Parmelee, 2 N. Y. (2 Comst.) 523, 51 Am. Dec. 322; Bogert v. Vermilya, 10 Barb. (N. Y.) 32.

It is also true in reference to joint obligees that in some respects each may act as the agent of the others in matters pertaining to their joint interest. Thus, one of two or more joint obligees to a contract has the right to receive payment thereon, and such payment discharges the obligation to the amount paid, whether in whole or in part.[21]

§ 22. *Implied agency of master of ship.*—The master of a vessel, by reason of the peculiar relation he bears to his employers and to all concerned in the voyage, and the necessities of the case, may impliedly act as the agent of such parties when it becomes necessary that he should do so, in order to successfully carry on the voyage, or protect the cargo.[22] He may appoint another as master in his stead and delegate his powers as master to such other, in cases of necessity or sudden emergency in a foreign port, in the absence of the owner and employer or his authorized agent, whenever it may be necessary and proper for the welfare of the ship, and the due accomplishment of the voyage.[23] So in cases of necessity, he may act as agent in contracting for repairs and supplies to the ship,[24] or in hypothecating the vessel;[25] but his agency in this respect is strictly limited to the necessities of the ship.[26] But the authority of a master in a foreign port to procure supplies and repairs necessary for the safety of the ship and the due performance of the voyage is not confined to procuring only such supplies as are absolutely or indispensably necessary, but includes all such as are reasonably fit and proper for the ship and voyage.[27]

He may sell the cargo in a perishable or damaged condition, which he is unable to save or transmit, if he acts bona fide and under a stringent necessity.[28] He may, when his vessel becomes disabled and unable to proceed, and

North Carolina: Long v. Miller, 93 N. C. 227; Green v. Greensboro Female College, 83 N. C. 449, 35 Am. Rep. 579.

South Carolina: Walters v. Kraft, 23 S. C. 578, 55 Am. Rep. 44; Smith v. Caldwell, 15 Rich. 365.

Tennessee: Cocke v. Hoffman, 5 Lea, 105, 40 Am. Rep. 23.

Vermont: Phelps v. Stewart, 12 Vt. 256.

Wyoming: Cowhick v. Shingle, 5 Wyo. 87, 63 Am. St. Rep. 17. As was said in Biscoe v. Jenkins, 10 Ark. 108: "In our opinion, a part payment made by a compromisor after the bar has attached, unless with the consent and authority of the other, given after the bar has attached, or given before with express reference to such a state of things, cannot take from the other his right of defense to an action for recovery of the debt."

21. Moore v. Bevier, 60 Minn. 240; Voss v. Murray, 50 Ohio St. 19.

22. Harrison v. Fortlage, 161 U. S. 57; Jordan v. Warren Ins. Co., 1 Story, 342, Fed. Cas. No. 7,524; The Sarah Ann, 2 Sumn. 206, Fed. Cas. No. 12,342; Duncan v. Reed, 39 Me. 415, 63 Am. Dec. 635; McGilvery v. Stackpole, 38 Me. 283, 61 Am. Dec. 245.

Where the master of a vessel in distress employs a person to extinguish a fire on board and protect the cargo, with knowledge of and contracting in reference to a reasonable custom of port to charge custody, commission, and reasonable attendance fees, the owner of the vessel will be bound thereby. Horan v. Strachan, 86 Ga. 408, 22 Am. St. Rep. 471; The Ripon City, 102 F. 176.

23. See Gernon v. Cochran, Bee, 209, Fed. Cas. No. 5,368.

24. The Fortitude, 3 Sumn. 228, Fed. Cas. No. 4,953; Naylor v. Baltzell, Taney, 55, Fed. Cas. No. 10,061; The Aurora, 1 Wheat. [U. S.] 96; Thomas v. Osborn, 19 How. [U. S.] 22; Ross v. Active, 2 Wash. C. C. 226, Fed. Cas. No. 12,071; Calef v. Steamer Bonaparte, 1 Rob. [La.] 463, 38 Am. Dec. 190; Black Diamond Coal Min. Co. v. Grady, 87 F. 232.

25. Skrine v. Hope, Bee, 2, Fed. Cas. No. 12,927; Naylor v. Baltzell, Taney, 55, Fed. Cas. No. 10,061; Duncan v. Reed, 39 Me. 415, 63 Am. Dec. 635.

26. Carrington v. Ann C. Pratt, 10 N. Y. Leg. Obs. 193, and cases cited above.

27. The Fortitude, 3 Sumn. 228, Fed. Cas. No. 4,953; The Medora, 1 Sprague, 138, Fed. Cas. No. 9,391; The Grapeshot, 9 Wall. [N. Y.] 130.

28. Vlierboom v. Chapman, 13 Mees. & W. 230; The Maria White, 1 Hask. 204, Fed. Cas. No. 9,083; Jordan v. Warren Ins. Co., 1 Story, 342, Fed. Cas. No. 7,524; Pope v. Nickerson, 3 Story, 465, Fed. Cas. No. 11,274; The Velona, 3 Ware, 139, Fed. Cas. No. 16,912; Myers v. Baymore, 10 Pa. 114, 49 Am. Dec. 586; Rugely v. Sun Mut. Ins. Co., 7 La. Ann. 279, 56 Am. Dec. 603; Saltus v. Everett, 20 Wend. [N. Y.] 267, 32 Am. Dec. 541.

Master of a vessel may sell damaged cargo, but only in case of extreme necessity, or where it cannot be carried to its port of destination, or would be worthless on its arrival there. Myers v. Baymore, 10 Pa. 114, 49 Am. Dec. 586. But it has been held that the master of the ship is not an agent of the consignor, to judge for him when the goods are so damaged as to make a sale necessary before they reach their destination. Halwerson v. Cole, 1 Speers [S. C.] 321, 40 Am. Dec. 603.

acting as an agent of necessity for the owners of the cargo, transship it, or if expedient retain it until his own ship is put in repair, or if necessary may sell part of it or hypothecate the whole, or he may abandon the voyage and notify the owners.[29] To justify a sale of the cargo in such a case, however, the necessity must be absolute and unequivocal, and is only permissible after the exhaustion of the ship's credit.[30] It is also clearly established that the master, as such, may sell a wrecked vessel, when he proceeds in good faith exercising his best discretion for the benefit of all concerned, and in view either of existing peril or of peril likely to ensue, from which, in the opinion of persons competent to judge, she cannot be rescued;[31] but the sale, to be binding on the owners, must be one of necessity.[32]

If a vessel or its cargo is abandoned to the underwriters during a voyage for a total loss, the master then becomes, by operation of law, the agent of the under-

29. Cammell v. Sewell, 5 Hurl. & N. 728; Naylor v. Baltzell, Taney, 55, Fed. Cas. No. 10,061; The Bridgewater, 11 Chi. Leg. N. 327; Rugely v. Sun Mut. Ins. Co., 7 La. Ann. 279, 56 Am. Dec. 603; Hassam v. St. Louis Perp. Ins. Co., 7 La. Ann. 11, 56 Am. Dec. 591; Graham v. Underwood, 15 La. Ann. 402; Gaither v. Myrick, 9 Md. 118, 66 Am. Dec. 316; Fontaine v. Columbian Ins. Co., 9 Johns. [N. Y.] 30. And see Englehart v. Pedro, Fed. Cas. No. 4,489.

30. Freeman v. East India Co., 5 Barn. & Ald. 617; Cannan v. Meaburn, 1 Bing. 243; Tronson v. Dent, 8 Moore P. C. 419; The Packet, 3 Mason, 255, Fed. Cas. No. 10,654; The Harriet, Fed. Cas. No. 6,094; Gaither v. Myrick, 9 Md. 118, 66 Am. Dec. 316; Bryant v. Commonwealth Ins. Co., 13 Pick. [Mass.] 543; Butler v. Murray, 30 N. Y. 88, 86 Am. Dec. 355; American Ins. Co. v. Center, 4 Wend. [N. Y.] 45; Stillman v. Hurd, 10 Tex. 109.

31. Hunter v. Parker, 7 Mees. & W. 322; Tanner v. Bennett, Ryan & M. 182; Idle v. Royal Exch. Assur. Co., 8 Taunt. 755; The Lucinda Snow, Abb. Adm. 305, Fed. Cas. No. 8,591; Fitz v. Amelie, 2 Cliff. 440, Fed. Cas. No. 4,838; The Herald, 8 Ben. 409, Fed. Cas. No. 6,393; Scull v. Briddle, 2 Wash. C. C. 150, Fed. Cas. No. 12,569; The William Carey, 3 Ware, 313, Fed. Cas. No. 17,689; The Sarah Ann, 13 Pet. [U. S.] 387, 2 Sumn. 206, Fed. Cas. No. 12,342; The Bridgewater, 11 Chi. Leg. News, 327, Fed. Cas. No. 1,864; The Yarkand, 117 F. 836, affirmed in 120 F. 887; Pike v. Balch, 38 Me. 302, 61 Am. Dec. 248; Duncan v. Reed, 39 Me. 415, 63 Am. Dec. 635; Stephenson v. Piscataqua F. & M. Ins. Co., 54 Me. 55; Prince v. Ocean Ins. Co., 40 Me. 481; Gates v. Thompson, 57 Me. 442; Winn v. Columbian Ins. Co., 12 Pick. [Mass.] 279; Gordon v. Massachusetts F. & M. Ins. Co., 2 Pick. [Mass.] 249.

32. Pike v. Balch, 38 Me. 302, 61 Am. Dec. 248; Gaither v. Myrick, 9 Md. 118, 66 Am. Dec. 316; Butler v. Murray, 30 N. Y. 88, 86 Am. Dec. 355; McCall v. Sun Mut. Ins. Co., 66 N. Y. 517; and cases cited in preceding note. In the cases deciding that a master of a vessel has power to sell it in cases of necessity, different language is used to express just what necessity will justify a sale. For example: In Gaither v. Myrick, 9 Md. 118, 66 Am. Dec. 316, it was said that necessity to justify sale of cargo and ship before arriving at port of destination must be such a necessity as supersedes all human laws. In Hall v. Franklin Ins. Co., 9 Pick. [Mass.] 466, Putnam, J., delivering the opinion of the court, said: "The master's authority to sell must be confined to a case of extreme necessity, which leaves no alternative, which prescribes the law for itself, and puts the party in a positive state of compulsion to act. The master acts for the owners or insurers, because they cannot have an opportunity to act for themselves. If the property could be kept safely until they could be consulted, and have opportunity, in a reasonable time, to exercise their own judgment in regard to the sale, the necessity to act for them would cease." In Fitz v. Amelie, 2 Cliff. 445, Fed. Cas. No. 4,838, it is said: "When the ship is disabled by perils of the sea, and the master has no means of getting the repairs done in the place where the injury occurred, or, if being in a place where the repairs might be made, he has no funds in his possession and cannot, on account of the distance or other sufficient cause, communicate with the owner, and is not able to raise the necessary means by bottomry or otherwise to execute the repairs, or if the injuries to the ship are so great that the cost of repairing her would be greater than her value after the repairs were made, or if the ship is disabled so that she cannot proceed, and the cost of repairs will amount to more than half her value, reckoning one third new for old, and the master has no funds, and can neither procure any nor communicate with the owner, and the whole circumstances are such that a prudent owner would decide to break up the voyage, then the master is justified in selling the ship as the best thing that can be done for the interest of all concerned. Such a state of circumstances creates the moral necessity, the urgent necessity, the extreme necessity, the imperious, uncontrollable necessity, described in the decided cases, and authorizes the master to sell the ship, if in his judgment, honestly exercised, the sale will best promote the interest of all concerned." And in The Amelie, 6 Wall. [U. S.] 18, 27, Mr. Justice Davis says: "The sale of a ship becomes a necessity within the meaning of the commercial law when nothing better can be done for the owner or those concerned in the adventure." And see other cases cited in preceding notes.

writers with the same general rights and powers as he would have in regard to the original owners.[33]

§ 23. *Agency of vendor for vendee.*—When a contract of sale has been entered into between vendor and vendee, and the vendee refuses to take and pay for the goods, the vendor, if he has the control or possession of the goods, ordinarily has the choice of either one of three remedies to indemnify himself: (1) He may store or retain the property for the vendee, and sue him for the entire purchase price; (2) he may keep the property as his own, and recover the difference between the market price at the time and place of delivery, and the contract price; or (3) he may sell the property, acting as agent, for this purpose, of the vendee and recover the difference between the contract price and the price obtained on such resale. In such case, the vendor takes the position of agent for the vendee to make the sale, and all that is required of him is that he should act with reasonable care and diligence and good faith; he should make the sale without unnecessary delay, but he must be the judge as to the time and place of sale provided he act in good faith and with reasonable care and diligence and gives notice of his intention to sell.[34] But it is no part of such agency, or the duties involved in it, to notify the vendee of the time and place at which the goods are to be sold or exposed for sale.[35] If more is realized on such resale than is due to the vendor, he must account to the vendee for the surplus.[36]

The vendor, in such cases, is not strictly an agent of the vendee, but it is rather a general expression used to define the right of the vendor to make a resale and hold the vendee responsible for the loss. It is quite manifest that a resale made under such circumstances is not made by the vendor strictly as the agent of the vendee, but he acts for himself in disposing of the property for the purpose of ascertaining the actual loss he may sustain. His duties as to the manner of making the sale, as we have seen, in some respects resemble those of an agent, and hence he is said to take the position of an agent, but otherwise he cannot be considered as such.[37]

§ 24. *Agency of priests, ministers, etc.*—Priests, ministers, and other ecclesiastics in charge of a parish or other church property have only such authority to manage and control the property of the church or congregation as is given to them by the canons or laws of the church. Thus, a Catholic priest having charge of a parish has no implied authority to convey real estate, the title of which is in his bishop.[38] The mere fact that one is a priest or minister of a church does not authorize him to bind the trustees or members of such church by contracts in reference to the church property or church affairs.

33. General Interest Ins. Co. v. Ruggles, 12 Wheat. [U. S.] 408. See Pike v. Balch, 38 Me. 302, 61 Am. Dec. 248.

34. 2 Sutherland, Dam. (2d Ed.) § 647; West v. Cunningham, 9 Port. [Ala.] 104, 33 Am. Dec. 300; Magnes v. Sioux City Nursery & Seed Co., 14 Colo. App. 219; Bagley v. Findlay, 82 Ill. 524; Roebling's Sons' Co. v. Lock Stitch Fence Co., 130 Ill. 661; Rice v. Penn Plate Glass Co., 88 Ill. App. 407; Gilly v. Henry, 8 Mart. [La.] 402, 13 Am. Dec. 291; Atwood v. Lucas, 53 Me. 508, 89 Am. Dec. 713; Young v. Mertens, 27 Md. 115; Whitney v. Boardman, 118 Mass. 242; McLean v. Richardson, 127 Mass. 345; Van Horn v. Rucker, 33 Mo. 391, 84 Am. Dec. 52; Baker v. McKinney, 87 Mo. App. 361; Gordon v. Norris, 49 N. H. 376; Sands v. Taylor, 5 Johns. [N. Y.] 395, 4 Am. Dec. 374; Dustan v. McAndrew, 44 N. Y. 72; Westfall v. Peacock, 63 Barb. [N. Y.] 209; Pollen v. Le Roy, 30 N. Y. 549; Ackerman v. Rubens, 167 N. Y. 405, 82 Am. St. Rep. 728; Moore v. Potter, 155 N. Y. 481, 63 Am. St. Rep. 692; McCombs v. McKennan, 2 Watts & S. [Pa.] 216, 37 Am. Dec. 505; Coffman v. Hampton, 2 Watts & S. [Pa.] 377, 37 Am. Dec. 511; Waples v. Overaker, 77 Tex. 7, 19 Am. St. Rep. 727; Rosenbaum v. Weeden, 18 Grat. [Va.] 785, 98 Am. Dec. 737. Compare McGuinness v. Whalen, 16 R. I. 558, 27 Am. St. Rep. 763.

35. Pollen v. Le Roy, 30 N. Y. 549; Magnes v. Sioux City Nursery & Seed Co., 14 Colo. App. 219.

36. Westfall v. Peacock, 63 Barb. [N. Y.] 209; and see cases cited in preceding notes.

37. See Moore v. Potter, 155 N. Y. 481, 63 Am. St. Rep. 692.

38. Leahey v. Williams, 141 Mass. 345; Olcott v. Gabert, 86 Tex. 121.

AGRICULTURE.[1]

§ 1. Regulation (137).
§ 2. Products and Crop Liens (137).
§ 3. Agricultural Societies (137).

§ 1. *Regulation.*[2]—The pursuit of agriculture[3] and the production and sale of products have been subjects of regulation, as has also the growth of noxious weeds.[4]

§ 2. *Products and crop liens.*[5]—The owner of a farm and a tenant on shares are tenants in common of the products, in the absence of any special provision modifying their relations,[6] and either may maintain a bill in equity against his co-tenant for an accounting of the proceeds of the crops.[7]

An agreement to execute a mortgage on crops may be made before the latter are in being.[8]

Liens on crops are statutory and will be created or enforced according to the local statutes, and one to avail himself of such a lien must comply with the requirements of the statute creating it.[9] Statutes generally give the landlord a lien on all agricultural products to secure his rent and supplies for the current year,[10] also to one who furnishes supplies for the making of the crop,[11] and also to laborers.[12] In some states seed-liens must be recorded.[13] These liens may be waived.[14]

§ 3. *Agricultural societies.*[15]—A state may incorporate an agricultural society as a department of the state;[16] such an act does not constitute special or class legislation,[17] nor is the legality of the transfer and acceptance by the state subject

1. See, also, topic Emblements, 1 Curr. L. 1000.
2. 1 Curr. L. 66, 67, n. 41-43.
3. **Fertilizers:** Where a statute requires that bags containing fertilizer shall be labelled, sending the labels subsequent to the arrival of the bags, and acceptance and use of the fertilizer by the purchaser, is a sufficient compliance with the statute to enable plaintiff to recover the purchase price. Beard & Co. v. Goodman, 25 Ky. L. R. 1566, 78 S. W. 191. See 1 Curr. L. 66, n. 41.
4. Statute prohibiting railroads from allowing Johnson grass or Russian thistle to grow on their right of way and providing a penalty for its violation, held constitutional. International, etc., R. Co. v. Shelton [Tex. Civ. App.] 81 S. W. 794. See 1 Curr. L. 66, n. 42.
5. See 1 Curr. L. 67.
6. Sowles v. Martin [Vt.] 56 A. 979. Tenant agreed to give two-fifths of crop as rent. Black v. Golden [Mo. App.] 78 S. W. 301.
7. Sowles v. Martin [Vt.] 56 A. 979.
8. Sporer v. McDermott [Neb.] 96 N. W. 232, 659.
9. Thresher's lien, § 4824. Rev. Codes 1899 requires such a lien to state quantity of grain threshed, failure to do so held fatal. Moher v. Rasmusson [N. D.] 96 N. W. 162. See 1 Curr. L. 67, n. 47.
10. And this lien may be asserted against a purchaser irrespective of whether he had notice of the lien. Ball, Brown & Co. v. Sledge [Miss.] 36 So. 447. But it does not attach to crops shipped out of the state (Id.), though of course a tenant may give a mortgage on his crop to secure his landlord for advances in previous years. Walker v. Patterson's Estate [Tex. Civ. App.] 77 S. W. 437. In Texas, the lien of a landlord for supplies and advances extends only to the crop raised during the year in which they were furnished, and the lien of landlord for advances and supplies on crop of that year takes precedence over claim of tenant's wife and children for support. Id.
11. Expectation that they will be paid for shortly and in cash does not waive the lien accorded by Civ. Code, art. 3217. Southern Grocer Co. v. Adams [La.] 36 So. 226. This lien is not superseded by one subsequently acquired and recorded. Id.
12. Persons having contracts with a sugar refinery to weigh and load cane for shipment to the refinery at an agreed price per ton, and who live and pay the laborers to do the work, are independent contractors, and are not workmen or laborers on a plantation whose wages have a special privilege on the crop under the laws of Louisiana, nor clerks, secretaries or agents entitled to a privilege for their salaries against the property of the refining company under such laws. Fortier v. Delgado & Co. [C. C. A.] 122 F. 604.
13. Under Code Civ. Proc. §§ 731, 734, the record need not specify the number of bushels to be sown on each tract, and the lienor's duty is performed when he files the statement with the register of deeds. Schouweiler v. McCaull [S. D.] 99 N. W. 96.
14. Southern Grocer Co. v. Adams [La.] 36 So. 226. In Texas, this lien is not waived by permitting a tenant to apply to his own use a part of the crop produced without notice of a third party's claims against the tenant. Johnston v. Kleinsmith [Tex. Civ. App.] 77 S. W. 36.
15. See 1 Curr. L. 67.
16. Berman v. Minnesota State Agricultural Soc. [Minn.] 100 N. W. 732.
17. Laws 1903, p. 170, c. 126. Berman v. Minnesota State Agricultural Soc. [Minn.] 100 N. W. 732.

to collateral attack,[18] and when thus made a department of the state, such society is immune from suits brought for the wrongful conduct of its servants.[19] Some states give aid to agricultural societies,[20] but in order to receive such aid they must conform to all the laws relating thereto.[21]

An incorporated agricultural society, though it differs from the ordinary business corporations, is nevertheless to be classified as a private corporation.[22] They are, however, largely subject to statutory regulations. In Michigan, they may mortgage their property,[23] and are not required to have a seal.[24]

A state may in the exercise of its police power prohibit the temporary business of selling articles of provisions within a reasonable distance of a fair without the consent of the fair association.[25]

ALIENS.

§ 1. Who are Aliens (138).
§ 2. Disabilities and Privileges (138).
§ 3. Immigration, Exclusion, and Expulsion (140). Exclusion (142). Certificate (143). New Trial and Appeal (144).
§ 4. Naturalization (145).

§ 1. *Who are aliens.*[26]—The status of the wife follows that of the husband.[27] An alien woman marrying a citizen of the United States at once becomes a citizen of this country,[28] a woman marrying a foreign becomes an alien.[29] A child born in the United States of parents who are subjects of a foreign nation but have a permanent residence and domicile in the United States is a citizen of the United States.[30] A father being naturalized, the status of a minor child becomes that of the father.[31] A foreign corporation is an alien.[32] A native of Porto Rico who was an inhabitant of that island at the time of its cession to the United States by the treaty of April 11, 1899, with Spain,[33] is not an alien immigrant within the meaning of the Act of Congress of March 3, 1891.[34]

§ 2. *Disabilities and privileges.*[35]—At common law an alien can take property as against all except the state,[36] but he could neither take nor transmit

18. Berman v. Minnesota State Agricultural Soc. [Minn.] 100 N. W. 732.

19. Wrongful arrest. Berman v. Minnesota State Agricultural Soc. [Minn.] 100 N. W. 732.

20. In Nebraska, it rests in the discretion of the county board as to whether or not the county shall give assistance to an agriculture society. Sheldon v. Gage County Soc. [Neb.] 98 N. W. 1045.

21. In Nebraska, they must be organized. Sheldon v. Gage County Soc. [Neb.] 98 N. W. 1045.

22. Ismon v. Loder [Mich.] 97 N. W. 769.

23. Comp. Laws 1897, § 5974. Ismon v. Loder [Mich.] 97 N. W. 769.

24. Under Comp. Laws 1897, § 10,417, an unsealed conveyance by an agriculture society is valid. Ismon v. Loder [Mich.] 97 N. W. 769.

25. Gen. St. 1902, § 1358, fixing the distance at one mile, held constitutional and construed only to apply while a fair was in progress and only to temporary business on account of the fair. State v. Reynolds [Conn.] 58 A. 755.

26. By an allegation of citizenship one is not estopped to show that he is an alien. Marthinson v. Winyah Lumber Co., 125 F. 633. See 1 Curr. L. 67.

27. Hopkins v. Fachant [C. C. A.] 130 F. 839.

28. Married pending deportation proceedings, held should be released from custody. Hopkins v. Fachant [C. C. A.] 130 F. 839.

29. Moore v. Ruckgaber [C. C. A.] 114 F. 1020.

30. Child born in the United States of Chinese parents, who at the time of his birth were Chinese subjects, but had a permanent residence and domicile in the United States, and were not employed in any diplomatic or official capacity under the Emperor of China, held a citizen of the United States. Sing Tuck v. U. S. [C. C. A.] 128 F. 592.

31. Rexroth v. Schein, 206 Ill. 80, 69 N. E. 240.

32. Cannot hold land under the Washington state constitution. State v. Superior Court for Stevens County [Wash.] 74 P. 686.

33. 30 Stat. at L. 1754. Gonzales v. Williams, 192 U. S. 1, 24 S. Ct. 177.

34. 26 Stat. at L. 1084, c. 551, U. S. Comp. Stat. 1901, pp. 1294, 1296, providing for the detention and deportation of alien immigrants likely to become public charges. Gonzales v. Williams, 192 U. S. 1, 24 S. Ct. 177. See 1 Curr. L. 67.

35. See 1 Curr. L. 68.

36. Donaldson v. State [Ind.] 67 N. E. 1029; Pembroke v. Huston [Mo.] 79 S. W. 470. The interest which one obtains by condemnation of right of way is ownership of land. Aliens cannot hold land under the Washington state constitution. State v.

title to real property by descent.[37] By treaty[38] and by statute,[39] the disability of aliens to inherit land has been changed, and their rights depend upon the construction of those statutes.[40] An alien's right to take real estate by descent is governed by the statutes of the state in force at the time of the death of the owner thereof through whom such alien claimed title.[41] An alien may take property devised from native born children.[42] A widow, a nonresident alien, has a dower interest in land conveyed by her husband, a resident alien, alone.[43] Where a statute confers on nonresident aliens the right to inherit property within the state, which property is owned by another alien, this right is not vested, but a mere expectancy during the life of the owner, and may be changed by statute without infringing any constitutional rights of such nonresident aliens.[44] Where a statute which in any way supersedes the common-law rule is repealed, the common-law rule is revived.[45]

In some states the law of the domicile of a decedent governs the distribution of his personal property.[46] The question of domicile is always one of fact and depends upon the particular circumstances of each case.[47] Nonresident aliens can generally maintain an action for damages for a wrongful death where such damages are allowed by statute.[48] An alien has no right to raise the question whether a statute is in violation of art. 4, § 2 of the Constitution of the United

Superior Court for Stevens County [Wash.] 74 P. 686.

37. Donaldson v. State [Ind.] 67 N. E. 1029.

38. Art. 1, treaty of July 28, 1900, with Great Britain (31 Stat. 1939) and holding that said treaty is superior to the Rev. Code of Del. 1852, amended 1893, c. 81, § 1. The treaty allowed an alien three years in which to sell property. Doe v. Roe [Del. Super.] 55 A. 341.

39. A state has the power to change these rules by statute. Donaldson v. State [Ind.] 67 N. E. 1029.

40. Laws 1845, p. 95, c. 115, § 4, as amended by Laws 1875, p. 32, c. 38, providing that upon the death of any citizen who has purchased and taken a conveyance of land, his heirs may take and hold the same whether heirs or not. Held, has no application where decedent acquired land by descent. Stewart v. Russell, 91 App. Div. 310, 86 N. Y. S. 625. An alien claiming property as the heir of a deceased resident alien under a statute allowing the same must show that deceased was a resident alien. Richardson v. Amsdon, 85 N. Y. S. 342. In New York, real property within the state passes under the will of a nonresident alien and is controlled by the laws of New York. In re Barandon's Estate, 41 Misc. 380, 84 N. Y. S. 937. Under Laws 1874, c. 261, p. 317, and Laws 1875, c. 38, p. 32, nonresident aliens are entitled to inherit in like manner as if they were then citizens of the United States. Nonresident alien sisters could inherit. Kelly v. Pratt, 41 Misc. 31, 83 N. Y. S. 636. In Indiana, an alien who was a resident of the state at the time he acquired real estate, but never declared his intention of becoming a citizen, and was not a resident of the state at the time of his death, had no power to pass his land in the state by descent. Donaldson v. State [Ind.] 67 N. E. 1029. Under Laws 1891, p. 7, c. 3, a nonresident alien could take a title by purchase to land in Kansas, defeasible only at the suit of the state. Madden v. State [Kan.] 75 P. 1023. See 1 Curr. L. 68.

41. Stewart v. Russell, 91 App. Div. 310, 86 N. Y. S. 625.

42. Richardson v. Amsdon, 85 N. Y. S. 342.

43. McClain's Code 1888, § 3646, as to sale by nonresident aliens, does not change or govern the above. Casley v. Mitchell, 121 Iowa, 96, 96 N. W. 725.

44. Donaldson v. State [Ind.] 67 N. E. 1029. Nonresident alien heirs are not in a position to raise any question in regard to the repeal of Act 1861 (Acts 1861, p. 153, c. 79, § 1), providing that aliens who are bona fide residents of the United States may take and convey real estate. Id. Nonresident alien heirs are not in a position to question the constitutionality of Act Mar. 9, 1885 (Acts 1885, p. 79, c. 51), repealing statutes allowing aliens to hold and convey property. Id.

45. Donaldson v. State [Ind.] 67 N. E. 1029.

46. New York Code Civ. Proc. § 2694. In re Barandon's Estate, 41 Misc. 380, 84 N. Y. S. 937.

47. Held where a resident alien of New York actually resumed the domicile of origin in England, resided there for a long time, and had no intention of returning to New York, though stating in deeds, etc., that she resided in New York, being at present in England. Held not a resident alien of New York. Richardson v. Amsdon, 85 N. Y. S. 342.

48. Code 1887, §§ 2145, 2149, allowing such an action for benefit of surviving spouse or next of kin, enumerating them, nonresident aliens may bring an action for the wrongful death of their son. Bonthron v. Phoenix Light & Fuel Co. [Ariz.] 71 P. 941. Under a statute giving right of action to widow or next of kin for wrongful death of decedent, held an action could be maintained for the wrongful death of a resident alien who left surviving a nonresident alien next of kin. Tanas v. Municipal Gas Co., 88 App. Div. 251, 84 N. Y. S. 1053.

States.[49] In some states a resident alien may act as an administrator.[50] An alien is incompetent to act as a grand juror.[51] An alien may maintain a personal action sounding in tort in the courts of another country and against a citizen thereof.[52] The civil rights act does not apply to a negro born in Africa without proof that he is a citizen, either native or naturalized.[53] As to the right of a wife of an alien when abandoned by her husband, see note.[54]

§ 3. *Immigration, exclusion and expulsion.*[55]—The right to exclude or expel aliens of any nationality is the inherent and inalienable right of an independent and sovereign nation.[56] The exclusion of alien anarchists[57] does not violate article 1 of the amendments to the constitution,[58] and congress did not exceed its delegated powers by enacting the provisions of such act.[59] The treaty with Japan proclaimed March 21, 1895, does not prevent the United States from prohibiting Japanese paupers to enter.[60] An alien legally within a country may forfeit his right to remain there.[61] An advertisement for laborers in a foreign country is a violation of the Contract Labor Law, as amended.[62] Bringing a farm laborer into the country under a contract to work for others and advancing him money is prohibited.[63] Expert accountants are not members of a recognized learned profession and as such admissible.[64] An alien immigrant to the United States is an alien who comes or removes to the United States for the purpose of permanent residence.[65] An alien is entitled to be discharged from a hospital

49. Inheritance tax. In re Johnson's Estate, 139 Cal. 532, 73 P. 424.

50. Code Civ. Proc. § 2661. Tanas v. Municipal Gas Co., 88 App. Div. 251, 84 N. Y. S. 1053.

51. NOTE. Alien as juror: An alien is incompetent to act as a grand juror, and indictment will be set aside if attacked in a proper manner. State v. Ray, 54 Iowa, 109; Raganthall v. Com., 14 Bush [Ky.] 457; Com. v. Cherry, 2 Va. Cas. 20; State v. Cole, 17 Wis. 674; Reich v. State, 53 Ga. 73, 21 Am. Rep. 265. Incompetent as a petit juror. Guykowski v. People, 2 Ill. 476.—From note to State v. Russell [Iowa] 28 L. R. A. 195.

52. Libel. Crashley v. Press Pub. Co. [N. Y.] 71 N. E. 258.

53. Laws 1895, c. 1042 (Laws 1895, p. 974). Held could not recover penalty for violation thereof. Fuller v. McDermott, 87 N. Y. S. 536.

54. NOTE. Rights of wife of alien: A wife, abandoned by her husband or driven from his home in another state or country, and coming and residing within a state, may contract, sue and be sued, and convey her estate in the same manner as a feme sole in the latter state when her husband has never come into that state. Gregory v. Paul, 15 Mass. 31; Abbott v. Bayley, 6 Pick. [Mass.] 89; Wagg's Ex'r v. Gibbons, 5 Ohio St. 580; Blumenberg v. Adams, 49 Cal. 308; Gallagher v. Delargy, 57 Mo. 29; Cornwall v. Hoyt, 7 Conn. 420.—From note to Buford v. Adair [W. Va.] 64 Am. St. Rep. 854, 869.

55. See 1 Curr. L. 68.

56. Illegally within United States, deported. U. S. v. Tuck Lee, 120 F. 989; In re Sing Tuck, 126 F. 386; Kaoru Yamataya v. Fisher, 189 U. S. 86, 23 S. Ct. 611, 47 Law. Ed. 721. The power of congress to regulate immigration is superior to the treaty making power. U. S. v. Tuck Lee, 120 F. 989. Aliens may be deported simply because they are aliens (In re Sing Tuck, 126 F. 386), but a citizen of the United States cannot be constitutionally refused admission (In re Sing Tuck, 126 F. 386; In re Moy Quong Shing, 125 F. 641).

57. Act Mar. 3, 1903, c. 1012, § 2, 32 Stat. 1214 (U. S. Comp. St. Supp. 1903, p. 172). U. S. v. Williams, 126 F. 253. The conclusion of the immigrant inspector approved by the secretary of commerce and labor that an alien is an anarchist is supported by evidence that such alien advocated "as an anarchist" a universal strike and proposed to lecture upon "the legal murder of 1887," and to address mass meetings upon this subject in association with a person who had been convicted of advocating revolution and murder. U. S. v. Williams, 194 U. S. 279, 24 S. Ct. 719.

58. U. S. v. Williams, 126 F. 253.

59. U. S. v. Williams, 194 U. S. 279, 24 S. Ct. 719.

60. Kaoru Yamataya v. Fisher, 23 S. Ct. 611, 189 U. S. 86, 47 Law. Ed. 721.

61. Chinese laborer legally in United States left and returned without complying with the law. Held, could be deported. U. S. v. Tuck Lee, 120 F. 989. See 1 Curr. L. 69.

62. Act Mar. 3, 1891, c. 551, § 3, 26 Stat. 1084 [U. S. Comp. St. 1901, p. 1295], amending the Alien Contract Labor Law (Act Feb. 26, 1885, c. 164) § 1, 23 Stat. 332 [U. S. Comp. St. 1901, p. 1290]. U. S. v. Baltic Mills Co. [C. C. A.] 124 F. 38. See 1 Curr. L. 63.

63. U. S. v. Parsons [C. C. A.] 130 F. 681.

64. As the term "recognized learned profession" is used in the contract labor law. Act Cong. Mar. 3, 1903, c. 1012, 32 Stat. 1213, § 4. In re Ellis, 124 F. 637.

65. A Mexican boarded a ship in Mexico to sell goods, was carried off, demanded to be returned, told he would be landed on return voyage, brought to United States and while here escaped from boat, was working his way and not placed on the crew list, held, owners of boat not liable for bring-

under a writ of habeas corpus to which the immigration authorities are not parties, although he has not been admitted into the country by such authorities.[66]

Under acts of congress, Chinese merchants are admitted into the United States; such merchant must have a certificate and that certificate must strictly comply with the law in order to be of any value in establishing the holder's right to enter or remain there;[67] it must describe him as a merchant,[68] but it is not necessary that his name should appear in the company name.[69] A Chinaman lawfully entering this country as a merchant and carrying on a business as such for some time thereafter cannot be deported after changing his occupation.[70] Such a person entering prior to and being a merchant at the time of the passage of the act for the registration of Chinese laborers is not subject to the provisions of said act, though he subsequently becomes a laborer.[71] It is no defense to an action for deportation that the party had formerly entered this country.[72] A Chinaman being permitted to live in this country unmolested for a number of years, there is no presumption that his arrival antedated the date on which the exclusion act took effect.[73] The latest expression of congress, be it a statute or a treaty, governs as to the right of aliens to enter this country. The constructions placed on these acts will be found in the footnotes.[74] The immigration laws of the country, in so far as they are penal in nature, are to be strictly construed.[75] Under the law aliens should be deported within one year[76] to the country from which they came.[77] And the owners of the vessels bringing them are obliged to take them back.[78]

ing aliens into this country. Moffitt v. U. S. [C. C. A.] 128 F. 375.

66. In re Carlsen's Petition, 130 F. 379.

67. Merchant's certificate must state the nature, character, and estimated value of the business carried on by him. U. S. v. Gin Hing [Ariz.] 75 P. 689.

68. A Chinaman who in his certificate is described as a "salesman" is not a merchant who is entitled to remain in the United States. U. S. v. Gin Hing [Ariz.] 75 P. 539.

69. Construing act of May 5, 1892 (27 Stat. at L. 25, c. 60, U. S. Comp. St. 1901, p. 1319) § 2, as amended by act of November 3, 1893 (28 Stat. at. L. 7, c. 14, U. S. Comp. St. 1901, p. 1322). Grocery conducted in firm name held partners were "merchants." Tom Hong v. U. S., 193 U. S. 517, 24 S. Ct. 517.

70. Became a laborer. In re Yew Bing Hl, 128 F. 319.

71. Cannot be deported for failure to register. U. S. v. Louie Juen, 128 F. 522.

72. Where an alien subject to deportation arrives by water in a port of this country, it is no defense to an action for deportation that he had come into the Unites States three years before by water, had remained four months, bought a farm and taken out his first papers, and since his second arrival had married here. In re Kleibs, 128 F. 656.

73. Was in the country 19 years, appellate decision was rendered in 1904, exclusion act took effect in 1882, he never registered as required by law. U. S. v. Ah Chung [C. C. A.] 130 F. 885.

74. The word "knowingly" in the Act July 5, 1884, as to any person knowingly bringing Chinese into this country, refers to knowledge of the fact of landing. Sims v. U. S. [C. C. A.] 121 F. 515. Act May 2, 1902, continued in force without interruption the act of May 6, 1882, as amended by the act of July 5, 1884, and extended for ten years by the act of May 5, 1892. Id. The omission to provide for the deportation of contract laborers in the Act Cong. Mar. 3, 1903, c. 1012, 32 Stat. 1213, amending and reenacting the Immigration laws, does not repeal the contract labor laws. In re Ellis, 124 F. 637. The Chinese exclusion treaty of 1894, allowing Chinese laborers who have certain relatives or property in the United States to return, has reference to the condition of the laborer at the time of his return. In re Ong Tung, 125 F. 814. Act of Mar. 3, 1903, as to the deportation of aliens found in the United States in violation of said act, does not extend to aliens who entered the country before its passage (32 Stat. 1218, c. 1012 [U. S. Comp. St. Supp. 1903, p. 180]). In re Lea, 125 F. 234. Chinese Exclusion Act (Act Cong. Sept. 13, 1888, § 13, c. 1015, 25 Stat. 479 [U. S. Comp. St. 1901, p. 1317]), is unconstitutional, in that it authorizes the arrest and trial of persons who may not be Chinese persons, within the United States, without the protection guaranteed by the Federal constitution. U. S. v. Coe, 128 F. 199. See 1 Curr. L. 58.

75. Moffitt v. U. S. [C. C. A.] 128 F. 375.

76. The alien must be seized for deportation within one year of his last entry or the right is lost (Act March 3, 1891, c. 551, § 11, 26 Stat. 1085 [U. S. Comp. St. 1901, p. 1299]). In re Russomanno, 128 F. 528.

77. Alien emigrants unlawfully coming into this country from France who are then temporarily absent in British Columbia, and return within a year from their arrival from France, are properly deported to France. Lavin v. Le Fevre [C. C. A.] 125 F. 693.

78. Act Cong. Mar. 3, 1891, c. 551, 26 Stat. 1086 (U. S. Comp. St. 1901, p. 1299). H. Hackfeld & Co. v. U. S. [C. C. A.] 125 F. 596.

Exclusion.[80]—Congress has full authority to confer upon the executive officers of the government plenary power to exclude and deport aliens of any nationality.[81] Where a Chinese person is refused admission to the United States, the Federal courts will not interfere by habeas corpus until after a final decision on appeal by the secretary of commerce and labor.[82] But such persons having entered the United States must be given a hearing and cannot be deported without due process of law.[83] Federal courts will not intervene by habeas corpus to prevent such deportation where such alien had notice though an informal one,[84] and was not denied an opportunity to be heard though a want of knowledge of the English language, preventing her from understanding the questions, is pleaded.[85] Congress cannot commit to the executive department the right to determine finally the question of the citizenship of a person applying for admission into the United States.[86] But the supreme court having decided what facts must exist to constitute a person a citizen of the United States, congress may give the officers of the executive department power to determine the existence or nonexistence of those facts.[87] Whether the executive officers of the government in deporting an alien emigrant are proceeding according to law is a judicial question, which may be inquired into on habeas corpus;[88] but their decision as to facts is generally conclusive.[89]

Escaping from ship on return passage.—Two Japanese were locked in a room on the ship but escaped through a porthole 25 feet above the water. Defendants were held liable. Hackfeld & Co. v. U. S. [C. C. A.] 125 F. 596.

After the U. S. officials had consented to landing passengers on the responsibility of the steamship company and the latter had agreed to assume it, if given security, deportation without giving a reasonable opportunity to furnish security gives a prima facie cause of action. Kahaner v. International Nav. Co., 117 F. 979.

80. See 1 Curr. L. 68.

81. In re Sing Tuck, 126 F. 386; In re Moy Quong Shing, 125 F. 641; U. S. v. Tuck Lee, 120 F. 989; Kaoru Yamataya v. Fisher, 189 U. S. 86, 23 S. Ct. 611, 47 Law. Ed. 721. The return of a writ of habeas corpus by an alleged Chinese alien, showing that defendant was an officer of immigration under control of the commissioner general in charge of the port where the alien attempted to enter, by designation of the secretary of commerce and labor, and that he held such Chinese person as such officer, sufficiently showed authority for the detention. In re Moy Quong Shing, 125 F. 641. See 1 Curr. L. 68.

82. U. S. v. Sing Tuck, 194 U. S. 161, 24 S. Ct. 621.

83. The executive officers have no power to deport an alien who has entered the country and has become subject in all respects to its jurisdiction and a part of the population, without giving him an opportunity to be heard upon the question involving his right to be and remain in the United States. Kaoru Yamataya v. Fisher, 189 U. S. 86, 23 S. Ct. 611, 47 Law. Ed. 721.

Due process of law: Where, under the law, such persons have a tribunal in which to be heard, a hearing on notice, with opportunity to present evidence, a judgment and the right of appeal, all according to the law of the land, they are not denied due process of law. In re Sing Tuck, 126 F. 386. The secretary of the treasury cannot arbitrarily order the deportation of an alien who has secured entrance into the United States in violation of law. Hopkins v. Fachant [C. C. A.] 130 F. 839.

84. Kaoru Yamataya v. Fisher, 189 U. S. 86, 23 S. Ct. 611, 47 Law. Ed. 721.

85. These facts should have been presented to the officer having charge of the examination or to the secretary of the treasury. Kaoru Yamataya v. Fisher, 189 U. S. 86, 23 S. Ct. 611, 47 Law. Ed. 721.

86. In re Sing Tuck, 126 F. 386. Where an alleged Chinese citizen establishes a prima facie case of citizenship, he is entitled to have his right to remain judicially determined on habeas corpus. Sing Tuck v. U. S. [C. C. A.] 128 F. 592.

87. In this case born in the United States of alien parents. In re Sing Tuck, 126 F. 386. The decision of executive officers can also include the fact of birth. Under Act Cong. Feb. 14, 1903, c. 552, § 7, 32 Stat. 828 (U. S. Comp. St. Supp. 1903, p. 46), the executive officers of the department of commerce and labor have the authority to determine the above question, and also such department has authority to prescribe rules of evidence relating to presumptions and burden of proof in the determination of the alien's right of admission. In re Moy Quong Shing, 125 F. 641.

88. Lavin v. Le Fevre [C. C. A.] 125 F. 692.

89. Under the statutes of the United States rendering the decision of the board of special inquiry final as to exclusion for disease, the only jurisdictional fact necessary to the conclusiveness of such decision is the alienage of the immigrant, and when that is

Registration.[90]—The provisions for Chinese registration made by the act of May 5, 1892, § 6,[91] were not repealed by the act of April 29, 1902, § 1,[92] nor are they inconsistent with the treaty of December 8, 1894, with China.[93]

Certificate.[94]—The certificate must strictly comply with the requirements of the laws of this country in order to be of any value in establishing the holder's right to enter or remain here.[95] In determining the right of a Chinese person to enter, the immigration officers may disregard the collector's certificate.[96]

Deportation; procedure.[97]—A proceeding to expel or exclude aliens under the Federal law is civil, and not criminal in its nature,[98] therefore the fact that defendants refused to testify may be considered by the commission,[99] but is not of itself ground for deportation.[1] Upon a writ of habeas corpus by an excluded Chincse, no bail is allowed,[2] nor is such alien entitled to bail, pending appeal from a commissioner's order of deportation,[3] though it may be granted.[4] In a proceeding for the exclusion of an alleged Chinese person, the trial of the issue as to whether or not accused is a Chinese person is to be regarded as criminal in its nature.[5] No formal complaint or pleadings are required in proceedings for the

shown, the decision cannot be reviewed by the courts on the question of the existence or character of the disease [Act of Mar. 3, 1903, c. 1012, 32 Stat. 1214, § 10, see also prior act of Aug. 18, 1894, c. 301, 28 Stat. 390 (U. S. Comp. St. 1901, p. 1303)]. In re Neuwirth, 123 F. 347. The decision of the proper customs or immigration officer adverse to the claim of a person of the Chinese race to nativity in the United States, and denying him entry, is conclusive in subsequent proceedings for his deportation for being unlawfully in this country. U. S. v. Lue Yee, 124 F. 303. The deportation decree of a United States commissioner defines and establishes the status of a Chinese person alleged to be unlawfully in the United States. It is therefore relevant and competent evidence of the status of such person and is sufficient to justify a grand jury in finding an indictment against defendant for willfully bringing such person into the United States in violation of the Chinese Exclusion Act. U. S. v. Hills, 124 F. 831. A decision of the immigration board of special inquiry that an immigrant is an anarchist is not open to review by the United States circuit court in habeas corpus proceedings. U. S. v. Williams, 126 F. 253. Under Act of Mar. 3, 1903 (32 Stat. 1218, c. 1012, U. S. Comp. St. Supp. 1903, p. 180) the time of the entry of an alien arrested and held for deportation thereunder is one involving the jurisdiction of the officers assuming to exercise such authority and may be inquired into by a court on a writ of habeas corpus. In re Lea, 126 F. 234.

90. See 1 Curr. L. 68.

91. 27 Stat. at L. 25, c. 60, U. S. Comp. Stat. 1901, p. 1319, § 6, as amended by the act of November 3, 1893 (28 Stat. at L. 7, c. 14, U. S. Comp. Stat. 1901, p. 1322). Ah How v. U. S., 193 U. S. 65, 24 S. Ct. 357. See 1 Curr. L. 68.

92. 32 Stat. at L. 176, c. 641. Ah How v. U. S., 193 U. S. 65, 24 S. Ct. 357.

93. 28 Stat. at L. 1210. Ah How v. U. S., 193 U. S. 65, 24 S. Ct. 357.

94. See 1 Curr. L. 69.

95. Merchant's certificate must state the nature, character, and estimated value of the business carried on by him. U. S. v. Gin Hing [Ariz.] 76 P. 639.

96. In re Ong Lung, 125 F. 814. See 1 Curr. L. 69.

97. See 1 Curr. L. 69.

98. U. S. v. Moy You, 126 F. 226; U. S. v. Hills, 124 F. 831; In re Ah Tai, 125 F. 795. See 1 Curr. L. 69.

99. Where in a proceeding to exclude certain Chinese aliens, the only evidence offered was testimony by a witness that he was an uncle of defendants and that they were born in San Francisco, and defendants refused to be sworn in their own behalf, a finding against the aliens' right to remain held not erroneous. In this case the court did not believe the witness. U. S. v. Moy You, 126 F. 226. See 1 Curr. L. 69.

1. In an exactly similar case as the above as to facts, the witness was not contradicted, impeached, or discredited in any manner whatsoever, held error to order the deportation on the sole ground of their refusal to take the stand in their own behalf. U. S. v. Leung Shue, 126 F. 423. Established his citizenship by unimpeached testimony. Ark Foo v. U. S. [C. C. A.] 128 F. 697.

2. This by § 5 of the Chinese exclusion act of May 5, 1892, ch. 60, 27 Stat. 25 (U. S. Comp. St. 1901, p. 1320), and this section is not repealed by Act Aug. 18, 1894 (ch. 301, 28 Stat. 390; U. S. Comp. St. 1901, p. 1303), which makes decisions of immigration officers adverse to the immigrant final. In re Ong Lung, 125 F. 813.

3. In re Ah Tai, 125 F. 795.

4. A proceeding under the exclusion acts for the deportation of a Chinese alien, though civil in its nature, is sui generis, and the district judge to whom an appeal is taken from a commissioner's order directing deportation has inherent power to admit the alien to bail pending the appeal, nor is this changed by the provisions of the Chinese Exclusion Act, Nov. 3, 1893, c. 14, § 2, 28 Stat. 8 (U. S. Comp. St. 1901, p. 1322). In re Ah Tai, 125 F. 796. Admitted to bail by United States district court pending hearing before commissioner. In re Lum Poy, 128 F. 974.

determination of the right of Chinese laborers to remain in the United States.[6] Under the Chinese Exclusion Act,[7] the burden of proof is upon the United States to show that a person arrested as a Chinese alien is a Chinese person or a person of Chinese descent.[8] This proof can be made by an expert in the science of anthropology.[9] Expressions of opinion,[10] and evidence obtained by inquisitorial examinations, are inadmissible.[11] This proceeding being criminal in its nature, the accused is not required to testify.[12] The burden of proving his right to remain in the United States is upon the Chinese person sought to be deported,[13] or, in case he is ordered deported, to sustain his claim of right to be removed to a country other than China on the ground that he is a subject or citizen of such country.[14] The fact that a Chinaman was engaged in business as a merchant at the time of the passage of the act providing for the registration of Chinese laborers[15] may be established by Chinese witnesses.[16] A Chinese person's certificate is the sole evidence permissible on the part of the person producing it to establish his right of entry into the United States,[17] nor is this rule changed by the fact that he has been permitted to enter the United States.[18]

New trial and appeal.[19]—Application for a new trial after judgment of deportation had been entered before a United States commissioner should be addressed to the commissioner.[20] Cumulative evidence is not ground for a new trial,[21] and unexcused delay in attempting to obtain a new trial will preclude one.[22] From an order denying the motion for a new trial, appeal should be taken to the United States district court;[23] but an appeal to "the judge of the district court of that district" is in effect an appeal to the district court and not to the district judge, as an individual,[24] and the district court must enter a final order

5. U. S. v. Hung Chang, 126 F. 400.

6. Ah How v. U. S., 193 U. S. 65, 24 S. Ct. 357.

7. May 5, 1892, c. 60, § 3, 27 Stat. 25 (U. S. Comp. St. 1901, p. 1320). U. S. v. Hung Chang, 126 F. 400.

8. U. S. v. Hung Chang, 126 F. 400.

9. U. S. v. Hung Chang, 126 F. 400. One who derives his information from reading an article in a magazine, and certain letters and three months' experience as a government Chinese inspector and from association with friends whom he designates as Chinese is not such an expert. Id. One who has not read anything on the subject and his only experience with regard thereto was acquired in his position as Chinese inspector for about a year is not such an expert. Id. A person whose only means of judging between a Chinese, Japanese, or Korean was the method of arranging hair or the language spoken is not such an expert. Id.

10. Statements by alleged Chinese alien that he was born in China and that his parents and grandparents were Chinese, held inadmissible. U. S. v. Hung Chang, 126 F. 400.

11. Declarations made by a Chinese under arrest and with no admonition that it will be used against him are inadmissible. U. S. v. Hung Chang, 126 F. 400.

12. U. S. v. Hung Chang, 126 F. 400.

13. Act of May 5, 1892 (27 Stat. at L. 25, c. 60, U. S. Comp. Stat. 1901, p. 1319) § 3 is not repealed by the act of April 29, 1902 (32 Stat. at L. 176, c. 641), § 1, nor by the treaty with China of December 8, 1894 (28 Stat. at L. 1210) art. 4. Ah How v. U. S., 193 U. S. 65, 24 S. Ct. 357; U. S. v. Hay Foon, 125 F. 627.

A United States commissioner is not, as a matter of law, bound to be satisfied by the testimony of a Chinese laborer that he was disabled by sickness from obtaining the certificate of residence required in order to entitle him to remain in the United States. Ah How v. U. S., 193 U. S. 65, 24 S. Ct. 367. A written statement by a United States commissioner that a Chinaman was brought before him charged with being unlawfully within the United States, and was adjudged to have the right to remain in the United States by reason of being a citizen thereof, is not evidence of such adjudication. Id. See 1 Curr. L. 69.

14. U. S. v. Sing Lee, 125 F. 627.

15. Geary act, Act of Congress May 5, 1892, c. 60, 27 Stat. 25 (U. S. Comp. St. 1901, p. 1319). U. S. v. Louie Juen, 128 F. 622.

16. U. S. v. Louie Juen, 128 F. 522.

17. Where certificate describes him as "salesman" he cannot show by evidence aliunde that he is in fact a merchant. U. S. v. Gin Hing [Ariz.] 76 P. 639.

18. U. S. v. Gin Hing [Ariz.] 76 P. 639.

19. See 1 Curr. L. 69.

20. U. S. v. Ng Young, 126 F. 425.

21. Extra witness to testify that defendant was born in the United States. Held not ground for a new trial. U. S. v. Ng Young, 126 F. 425.

22. Chinese person apprehended on Sept. 9, 1903, trial was postponed until Oct. 3, no attempt was made to obtain a new trial until Nov. 26, held delay inexcusable. U. S. v. Ng Young, 126 F. 425.

23. U. S. v. Ng Young, 126 F. 425. See 1 Curr. L. 69.

24. Commissioner's transcript and other papers pertaining to the cause may therefore be filed in that court, and the final

in order that an appeal will lie to the circuit court of appeals.[25] There is no right of appeal by the United States from an order of a commissioner discharging a Chinese person arrested for being unlawfully in this country.[26] On an appeal from the order of the commissioner to the United States district court, the hearing is de novo.[27] The decision of the commissioner is conclusive unless appealed from,[28] and as a general rule findings of fact by a commissioner will not be disturbed on appeal.[29] Chinese persons after an adverse decision on their right to enter are not entitled to then for the first time raise the question of citizenship in the courts by proceedings in habeas corpus.[30]

§ 4. *Naturalization.*[31]—The power given congress by the constitution to establish an uniform rule of naturalization means that congress should make uniform rules whereby aliens may become citizens of the United States and of the state where they reside.[32] Congress may lawfully empower state courts to admit qualified aliens to citizenship,[33] and the state courts may legally exercise this power without legislative authority or permission from the states which created them,[34] and it is not necessary that a state court possess all of the common-law jurisdiction to qualify it to naturalize aliens; it is sufficient that it has some.[35] State courts while entertaining jurisdiction in naturalization proceedings, remain state courts,[36] hence perjury committed in such a proceeding is punishable by the

order of the judge may be entered as the final order of the court. In re U. S., 194 U. S. 194, 24 S. Ct. 629. An appeal from a commissioner's order in deportation proceedings is to the district court not to the judge thereof. U. S. v. Hung Chang [C. C. A.] 130 F. 439.

25. U. S. v. Hung Chang [C. C. A.] 130 F. 439; Tsoi Yii v. U. S. [C. C. A.] 129 F. 585.

26. § 13, Act Sept. 13, 1888, 25 Stat. 479, c. 1015 (U. S. Comp. St. 1901, p. 1317), which expressly gives the right of appeal to the defendant in case of conviction, by implication limits such right to him. U. S. v. Mar Ying Yuen, 123 F. 159.

27. It is not heard on the testimony taken before the commissioner. U. S. v. Hung Chang, 126 F. 400.

28. In re Sing Tuck, 126 F. 386.

29. Findings as to age of alien, and credibility of witness. Ouk Foo v. U. S. [C. C. A.] 128 F. 697.

30. In re Sing Tuck, 126 F. 386.

31. See 1 Curr. L. 70.

32. Whether or not this power is exclusive query? U. S. v. Severino, 125 F. 949.

33. Levin v. U. S. [C. C. A.] 128 F. 826.

34. Levin v. U. S. [C. C. A.] 128 F. 826.

35. St. Louis court of appeals has common-law jurisdiction so as to naturalize citizens. Levin v. U. S. [C. C. A.] 128 F. 826. A court has common-law jurisdiction so as to naturalize aliens under § 2165, Rev. St. (U. S. Comp. St. 1901, p. 1329), when it has the power to punish offenses, to enforce rights, or to redress wrongs recognized by the common law or courts which are governed by the principles, rules and usages of the common law in the determination of some of the causes of which they have jurisdiction. Levin v. U. S. [C. C. A.] 128 F. 826.

NOTE. Powers of state legislatures and courts in respect to naturalization: While there has been some conflict, it is now regarded as settled that except in relation to purely state citizenship, the state is wholly subject to the Federal law upon the subject. Scott v. Sandford, 19 How. [U. S.] 393, 15 Law. Ed. 691; Boyd v. State, 143 U. S. 160, 36 Law. Ed. 109; Golden v. Prince, 3 Wash. C. C. 314, Fed. Cas. No. 5,509; Com. v. Towles, 5 Leigh [Va.] 743; Barzizas v. Hopkins, 2 Rand. [Va.] 276. But a state may confer such rights of citizenship as it pleases so far as relates to itself only. In re Wehlitz, 16 Wis. 443, 84 Am. Dec. 700. While there is considerable doubt as to the power of the Federal government to confer the power of naturalization on state courts, the question is no longer of practical importance, for when we admit that congress cannot authoritatively confer judicial powers on state courts we only mean that congress cannot compel them to entertain jurisdiction in any case or to perform any judicial act, but we do not mean that congress cannot empower them to perform any judicial act to which they are competent, and for the performance of which they have an adequate inherent jurisdiction. Morgan v. Dudley, 18 B. Mon. [Ky.] 693, 68 Am. Dec. 735. See, also, Ex parte Knowles, 5 Cal. 304; State v. Penney, 10 Ark. 621; In re Ramsden, 13 How. Pr. [N. Y.] 435. Congress has conferred power to naturalize upon state courts having common-law jurisdiction and a seal and clerk; under this statute it is not necessary that the court have all the common-law jurisdiction that pertains to all classes of actions, but simply that it exercise its powers according to the course of the common law; but it must have, in addition to a seal, a clerk distinct from the judge, charged with the duty of keeping a true record of its doings and afterwards authenticating them. In re Dean, 83 Me. 489, 22 A. 385, 13 L. R. A. 229.—From note to State v. Judges of Inferior Court of Common Pleas [N. J. Law] 30 L. R. A. 761.

36, 37. U. S. v. Severino, 125 F. 949.

state court,[37] and the Federal court cannot entertain jurisdiction in the absence of a Federal statute conferring it.[38]

The process of naturalization is a judicial act.[39] The burden of proving naturalization is on the party asserting it,[40] but merely negative presumptions are not sufficient to support this burden.[41] The issuance of naturalization papers may be presumed,[42] but where there is no record or memorandum of a judgment of naturalization, a common-law court will not create one.[43]

A person aiding or abetting, by false impersonation or the use of a false certificate of citizenship, fraudulent naturalization, is guilty of a misdemeanor.[44] U. S. Rev. St. § 5424 does not include the uttering of a forged naturalization certificate by a person other than the person applying therefor or appearing as a witness for the person so applying.[45]

ALIMONY.

§ 1. **Nature and Purpose of the Allowance (146).**
§ 2. **Jurisdiction and Power to Award (147).**
§ 3. **Stage or Condition of the Divorce Proceeding (148).**
§ 4. **Reasons for and Against Provisional Allowances (148).** Permanent Allowances (149).
§ 5. **Amount, Character, and Duration (150).** Permanent Awards, Division of Property (151).
§ 6. **Procedure and Practice (152).**
§ 7. **Decree, Enforcement, and Discharge (153).**
§ 8. **Suits for Annulment and Actions for Separate Maintenance (154).**

§ 1. *Nature and purpose of the allowance.*[46]—A claim for alimony is not a property right, and after it has been awarded it does not become a part of the

38. U. S. v. Severino, 125 F. 949. By act July 14, 1870, c. 254, § 1, 16 Stat. 254 (U. S. Comp. St. 1901, p. 3654) confers on Federal courts jurisdiction of a perjury committed in naturalization proceedings in a state court, in the procedure prescribed by congress. Perjury committed in affidavit required by state law not by Federal. Held, Federal courts could not convict. Id.

39. **NOTE. Process of naturalization:** The process of naturalization in the mode prescribed by congress is a judicial act (Spratt v. Spratt, 4 Pet. [U. S.] 393, 7 Law. Ed. 897; Morgan v. Dudley, 18 B. Mon. [Ky.] 714), and must be exercised by the court itself (In re Clark, 18 Barb. [N. Y.] 444), it being only the preliminary application of an alien declaring his intention under oath which is regarded as ministerial, and may be done before the clerk of the court as well as before the court itself (In re Butterworth, 1 Woodb. & M. 323, Fed. Cas. No. 2,251. See Conk. Prac. 497.—From note to In re Dean [Me.] 13 L. R. A. 229.

40. Richardson v. Amsdon, 85 N. Y. S. 342.

41. No presumption that naturalization is not completed arises from the facts that there is no record of the final papers, and that the first ones are not on file. Richardson v. Amsdon, 85 N. Y. S. 342.

42. Persons claimed papers were issued, but had been destroyed, no record thereof, but proof was made that in a great number of cases no record had been made. Persons claiming had exercised the franchise for many years under a claim of lawful right to do so. Held, issuance would be presumed. Rexroth v. Schein, 206 Ill. 80, 69 N. E. 240.

The fact that an alien assumed to make leases and perform other acts which only a citizen might do is of no probative force in establishing his naturalization. Richardson v. Amsdon, 85 N. Y. S. 342. An affidavit by a third party that an alien took up his citizenship in the United States has no probative force in establishing the naturalization of the alien. Id.

43. Claim in this case was made thirty-three years after the alleged judgment was rendered; there was no record or entry or memorandum of such judgment; claim was made in different court from that which it is alleged rendered the judgment; held, could not "create" record. Gagnon v. U. S., 193 U. S. 451, 24 S. Ct. 510.

44. This though congress has called it a felony. Rev. St. § 5424 (U. S. Comp. St. 1901, p. 3668), §§ 5425 (p. 3669), 5426 (p. 3669), 5427 (p. 3670). U. S. v. York, 131 F. 323.

45. U. S. Comp. St. 1901, p. 3668. U. S. v. York, 131 F. 323.

46. **NOTE. Allowance of alimony to husband:** As a general rule a husband, whether he or the wife be granted the divorce, recovers alimony, to be paid out of the wife's separate estate (Greene v. Greene, 49 Neb. 546, 68 N. W. 947, 34 L. R. A. 110), though this rule has been changed by statute in some states. It has, however, been held that he can be awarded such an allowance where he was a confirmed invalid, unable to earn a living, and his wife had a separate estate, she having brought suit for a divorce for his misconduct, the court holding that since the status of married women has been changed, the same rule should be applicable to the wife as to the husband, and both should be placed upon an equality. Groth v. Groth, 28 Chicago Leg. N. 348.—From the case of Greene v. Greene [Neb.] 34 L. R. A. 110, and note thereto. See 1 Curr. L. 70.

wife's estate in bankruptcy,[47] but she is a creditor who may be defrauded,[48] and whom the legislature cannot divest of her right.[49] The ward of alimony settles the property relation of the parties,[50] and is not contingent on their obtaining the right to re-marry.[51] An allowance for the support of a child in Michigan is,[52] and in Illinois is not, "alimony."[53]

§ 2. *Jurisdiction and power to award.*[54]—Personal service within the state[55] in proceedings for alimony is necessary to acquire jurisdiction.[56] After a divorce has been obtained on service by publication the court has no power to order alimony,[57] but defendant may be compelled to support his children, if jurisdiction is subsequently acquired in the divorce suit,[58] or in an independent proceeding.[59] An affidavit of residence is sometimes jurisdictional.[60] Under a statute providing that the guilty party in a divorce proceeding shall forfeit all rights and claims under and by virtue of the marriage, judgment for alimony should not be rendered against a plaintiff who is granted a divorce,[61] but the statute does not preclude enforcement of a judgment for alimony pendente lite by the guilty wife.[62] In Connecticut the court is empowered to order payment of alimony in a proceeding to annul an illegal marriage, as well as in a divorce proceeding.[63] The court's power in such a case is not limited to cases where the

47. Where a claim for alimony was pending at time of wife's bankruptcy, it was not property she could dispose of, and there was no concealment in not scheduling it. In re Le Claire, 124 F. 654.

48. A wife entitled to alimony may sue to have a conveyance of land set aside as fraudulent against creditors. Botts v. Botts, 25 Ky. L. R. 300, 74 S. W. 1093.

49. Alimony when decreed becomes a vested right, and cannot be affected by subsequent legislation authorizing a modification. Goodsell v. Goodsell, 82 App. Div. 65, 81 N. Y. S. 806.

50. Where wife sued for divorce and prayed for alimony because defendant had obtained possession by fraud of certain of her property, and where she was awarded $600 it was conclusive in a suit for the recovery of the land. Baird v. Connell, 121 Iowa, 278, 96 N. W. 863.

51. Where the statute forbids the persons to marry within six months and the decree is to recite that it does not become absolute till then, money paid over to wife as alimony within that period cannot be recovered, nor can husband have any share of property though the wife dies within the six months. Durland v. Durland, 67 Kan. 734, 74 P. 274.

52. Brown v. Brown [Mich.] 97 N. W. 396.

53. Rush v. Flood, 105 Ill. App. 182.

54. See 1 Curr. L. 70.

55. Mo. Rev. St. 1899, § 582, providing for actual service of process in divorce on defendant outside of state does not authorize a judgment for alimony based thereon. Hedrix v. Chicago, R. I. & P. R. Co. [Mo. App.] 77 S. W. 495.

56. Leaving at the most notorious place of abode is insufficient [Civ. Code, § 2467]. Baldwin v. Baldwin, 116 Ga. 471. See 1 Curr. L. 70.

57. Under Iowa Code, § 3800, forbidding personal judgments on service by publication, a judgment for alimony against a nonresident who was not personally served and who had not appeared was invalid, and defendant's moving for a retrial under Iowa Code, § 3796, and failing to give bond, did not render it valid, but the court under Code, § 3180, might appropriate the property within the state for alimony. Rea v. Rea [Iowa] 98 N. W. 787. Where divorce has been obtained on service by publication, the court has no power to open and order alimony and suit money. Metler v. Metler, 32 Wash. 494, 73 P. 535.

58. Where divorce was obtained on service by publication and plaintiff was awarded one-third of the real estate, but no alimony or counsel fees as claimed, and thereafter jurisdiction is obtained over defendant, it is error to so modify decree as to require him to pay alimony and counsel fees, but he may be required to pay for the support of the children as they were not parties to the decree. McFarlane v. McFarlane, 43 Or. 477, 73 P. 203.

59. Where parties were divorced in Oklahoma, and in a subsequent proceeding in New Jersey in which the parties appeared, the father was, under §§ 23, 24 of Act of March 27, 1874, ordered to pay to mother $3 a week for support of children with liberty of mother to apply for increase in future, the right could not be lost by the father's moving to another state, as such proceedings are mere continuation of original proceedings. White v. White [N. J. Law] 55 A. 739.

60. N. C. Code 1883, § 1287, requiring the filing of affidavit, in action for divorce or alimony, verifying complaint and stating plaintiff has been a resident of the state for two years, and that defendant is about to leave, is jurisdictional, and on an unsworn affidavit no alimony pendente lite will be granted. Clark v. Clark, 133 N. C. 28, 45 S. E. 342.

61. Rev. St. 1899, § 2929. Slaughter v. Slaughter [Mo. App.] 80 S. W. 3.

62. Schlemmer v. Schlemmer [Mo. App.] 81 S. W. 636.

63. Alimony granted in a proceeding to annul a marriage between uncle and niece, which was void ab initio [Gen. St. 1902, §

woman is without fault or not equally at fault with the man.[64] A valid marriage is a prerequisite to the granting of either permanent or temporary alimony.[65]

§ 3. *Stage a condition of the divorce proceeding.*[66]—In New Jersey a wife can,[67] and in Kentucky she cannot, obtain alimony where the decree in divorce has awarded her none.[68] Alimony may be awarded after the case has been returned from an appellate court.[69]

§ 4. *Reasons for and against provisional allowances.*[70]—The allowances to the wife pendente lite for maintenance and to carry on suit are within the sound discretion of the court,[71] which is a broad one, and will only be reviewed where grossly abused.[72] Though the husband sues for a divorce because of cruel treatment[73] or adultery, adequate allowance should be made.[74] A wife is entitled to support pending an action for separation unless the husband is relieved there-

4562]. Stapleberg v. Stapleberg [Conn.] 58 A. 233.

64. Stapleberg v. Stapleberg [Conn.] 58 A. 233.

65. **NOTE. A valid marriage is a prerequisite** to the granting of either permanent or temporary alimony. Cowan v. Cowan, 10 Colo. 540, 16 P. 215; McFarland v. McFarland, 51 Iowa, 565, 2 N. W. 269; Collins v. Collins, 80 N. Y. 1; Bowman v. Worthington, 24 Ark. 522. But it has been held that a second wife, being blameless, is entitled to alimony where her husband concealed the fact from her that he had an undivorced wife living, and the second wife had no reason to doubt the validity of the marriage until his answer disclosed the fact that he had another wife. Strode v. Strode, 3 Bush [Ky.] 227, 96 Am. Dec. 211. See Lea v. Lea, 104 N. C. 603, 10 S. E. 488, 17 Am. St. Rep. 692.—From notes to Werner v. Werner [Kan.] 68 Am. St. Rep. 372; Hite v. Hite [Cal.] 71 Am. St. Rep. 82, and Methvin v. Methvin [Ga.] 60 Am. Dec. 664.

66. See 1 Curr. L. 70.

67. Under N. J. Sess. Laws 1902, p. 507, § 19, which provides that pending divorce or after final decree the court may order alimony, alimony may be awarded to wife on her petition though the decree for divorce awarded her none even where it had been asked for. McKensey v. McKensey [N. J. Eq.] 55 A. 1073.

68. Wife cannot by independent action after entry of divorce decree obtain alimony, where there was no reservation in the decree. Campbell v. Campbell, 25 Ky. L. R. 53, 74 S. W. 670.

NOTE. Suit for alimony after decree of divorce: There is a conflict as to whether or not an independent suit can be maintained unless authorized by statute. Some courts hold that alimony can only be granted as an incident to the decree of divorce. Bowman v. Worthington, 24 Ark. 522; Shannon v. Shannon, 2 Gray [Mass.] 285; Jones v. Jones, 18 Me. 308, 36 Am. Dec. 723; Chapman v. Chapman, 13 Ind. 396; Atwater v. Atwater, 53 Barb. [N. Y.] 621. But numerous courts hold that a wife may bring a separate action to recover an allowance for her separate support and maintenance independent of any suit for divorce. Butler v. Butler, 4 Litt. [Ky.] 202; Earle v. Earle, 27 Neb. 277, 43 N. W. 118, 20 Am. St. Rep. 667; Edgerton v. Edgerton, 12 Mont. 122, 29 P. 966, 33 Am. St. Rep. 557. But the action for alimony cannot, as a general rule, be maintained as an independent proceeding after the parties have been divorced. Wilde v. Wilde, 36 Iowa, 319; Bassett v. Bassett, 99 Wis. 344, 74 N. W. 780, 67 Am. St. Rep. 863; Downey v. Downey, 98 Ala. 373, 13 So. 412, 21 L. R. A. 677. But an independent action may be allowed where jurisdiction is obtained by constructive service. Adams v. Abbott, 21 Wash. 29, 56 P. 931; Weidman v. Weidman, 57 Ohio St. 101, 48 N. E. 506; Van Orsdal v. Van Orsdal, 67 Iowa, 35, 24 N. W. 579. And alimony need not be determined in the judgment dissolving the marriage relation if the judgment reserves the right to settle the question afterwards. Galusha v. Galusha, 138 N. Y. 272, 32 N. E. 1062.—From notes to In re Popejoy [Colo.] 77 Am. St. Rep. 222, 228; and Downey v. Downey [Ala.] 21 L. R. A. 677.

69. The reversal of a divorce decree in the supreme court does not affect the jurisdiction of circuit court to allow counsel fees. Harding v. Harding, 105 Ill. App. 363.

70. See 1 Curr. L. 71.

71. Will not be controlled where no abuse. Holloman v. Holloman, 118 Ga. 796, 45 S. E. 599. Where husband cruelly mistreated wife, discretion of court in awarding temporary alimony and attorney's fees will not be controlled. Godby v. Godby, 118 Ga. 541, 45 S. E. 439. Expenses, property, and income of husband considered, and held that wife, in action for separation, should have as temporary alimony $10 a week and use of residence. Bressette v. Bressette, 88 N. Y. S. 580. While the court in an action for separation cannot direct that plaintiff have the use of the residence pendente lite, it may order temporary alimony on the basis of such use being conceded and the defendant will be deemed to have acquiesced therein unless he objects specially thereto. Id.

72. Where defendant was possessed of estate worth $75,000, mostly land, and had been enjoined from disposing of it, and had paid temporary alimony as ordered by court, the appointment of receiver by judge in vacation for personal property was an abuse of discretion. Goff v. Goff [W. Va.] 46 S. E. 177.

73. Baier v. Baier [Minn.] 97 N. W. 671.

74. Bordeaux v. Bordeaux [Mont.] 75 P. 524. In a suit for divorce by husband, court may order temporary alimony, attorney's fees, and suit money to be paid by him Reed v. Reed [Neb.] 98 N. W. 73.

from by agreement through a trustee or by misconduct on the part of the wife.[75] Counsel fees should be allowed though the divorce was improperly granted,[78] and though an appeal was unsuccessful,[77] unless it was without merit,[78] and an allowance may be increased where a jury disagrees,[79] but will not be made for past services,[80] or where an allowance for fees is included in the decree for alimony.[81] The amount to be awarded depends on the value of services rendered[82] and rests in the sound discretion of the trial judge,[83] who in deciding the amount should use his own judgment and experience and not be wholly governed by affidavits of attorneys.[84] And a contract to pay the attorney according to the amount of alimony recovered is void.[85] Unusual grounds of expenditure will be considered in allowing suit money.[86] The power of the court to compel the husband to pay the wife's counsel fees in an action for divorce is not exhausted by the final judgment.[87] When the court has adjudged that plaintiff is not entitled to a divorce, it has no power to order an allowance for suit money.[88]

Permanent allowances.[89]—Permanent alimony is usually only given where the husband has been guilty of a matrimonial offense,[90] and is conditional on the wife's continued chastity.[91] But in some jurisdictions it is allowed even when the husband is blameless.[92] A wife granted a divorce with alimony, cannot be

75. Hawley v. Hawley, 88 N. Y. S. 606. It is the duty of the court to "make an allowance for the support of the wife out of the estate of the husband" pending a suit for divorce [Code 1896, § 1495]. Webb v. Webb [Ala.] 37 So. 96. Where the wife's petition for temporary alimony contains averments entitling her thereto, such averments will not be overthrown by irrelevant and scandalous matter included in the petition. Hawley v. Hawley, 88 N. Y. S. 606. An attorney has no power to compromise his client's judgment for alimony pendente lite. Schlemmer v. Schlemmer [Mo. App.] 81 S. W. 636. Where alimony is asked pending a suit by the divorced wife, the burden is upon her to show her necessitous condition [Civ. Code, art. 160]. Jackson v. Burns [La.] 36 So. 756.

76. Donnelly v. Donnelly, 25 Ky. L. R. 1543, 78 S. W. 182.

77. Where husband obtains divorce for adultery, wife may have alimony to prosecute an appeal, though unsuccessful, if it is taken in good faith. Viertel v. Viertel, 99 Mo. App. 710, 75 S. W. 187.

78. Allowance of attorney's fees is within sound discretion of court, and in case of an appeal without merit, husband will only be required to pay clerk's fees. Von Trott v. Von Trott, 118 Wis. 29, 94 N. W. 798.

79. Action for separation. Herrmann v. Herrmann, 88 App. Div. 76, 84 N. Y. S. 736.

80. After judgment for divorce against a wife court cannot allow money for past services of attorneys or expenses, though she was refused allowance during trial with the right reserved to allow it after trial, but she may be allowed money to enable her to further prosecute by a new trial or appeal. Bordeaux v. Bordeaux [Mont.] 75 P. 359.

81. A husband is not liable for counsel fees where the decree included them in the allowance made to the wife. Turner v. Turner, 104 Ill. App. 253.

82. Counsel fees of $100 held sufficient where defendant was in default and it appeared there would be no difficulty in proving the case. Bressette v. Bressette, 88 N. Y. S. 580.

83. Hinton v. Hinton, 117 Ga. 547, 43 S. E. 983. $5,000 counsel fees allowed where attorney spent seventy-six days on case, and defendant a man of means. Harding v. Harding, 105 Ill. App. 363. Under Ky. St. 1903, § 900, requiring the husband to pay costs of both parties, unless wife was at fault, and she was able to pay, the allowance of $250 counsel fee was proper, though divorce was improperly granted. Donnelly v. Donnelly, 25 Ky. L. R. 1543, 78 S. W. 182.

84. $2,000 allowed for counsel fees in a suit for separate maintenance carried to supreme court was reduced to $1,000. Hutchinson v. Hutchinson, 105 Ill. App. 349.

85. NOTE. A contract between a wife and her lawyer, providing that for his services in procuring an allowance of alimony and enforcing its payment, he shall receive a share of the alimony recovered, is void, not only because the claim for alimony is incapable of assignment but also because the contract is in contravention of public policy. Newman v. Freitas, 129 Cal. 283, 61 P. 907, 50 L. R. A. 548; Jordan v. Westerman, 62 Mich. 170, 4 Am. St. Rep. 836; Lynde v. Lynde, 64 N. J. Eq. 736, 52 A. 694, 58 L. R. A. 471, and note; Bowman v. Phillips [Kan.] 13 Am. St. Rep. 292, 299, and note.

86. The allowance to defendant of $425 suit money, where she had to travel a long distance, was not excessive. Goldie v. Goldie [Iowa] 98 N. W. 630.

87. The husband was compelled to pay counsel fees to wife where she attacked a judgment for divorce rendered in her favor. Grannis v. Superior Court of San Francisco [Cal.] 77 P. 647.

88. Wald v. Wald [Iowa] 99 N. W. 720.

89. See 1 Curr. L. 71.

90. Impotence is not such an offense. G——— v. G——— [N. J. Eq.] 56 A. 736.

91. In a divorce a mensa et thoro. G——— v. G——— [N. J. Eq.] 56 A. 736.

92. Where on wife's suit for divorce on

required to release her dower or surrender notes held against the husband, as a condition procedent to the payment of alimony.[93] An antenuptial contract does not bar the award of alimony,[94] though it is proper to deny it where the wife is at fault,[95] especially if she has means of her own.[96] The fact of a separation and a division of property is not a bar to alimony, though to be considered in determining the amount.[97] Though the Kentucky supreme court cannot disturb the divorce it will consider the merits of the judgment to ascertain if the alimony was rightfully awarded.[98]

Support of child.[99]—Where the wife is entitled to divorce and custody of child, she should have an allowance, in addition to alimony, to maintain and educate the child,[1] the amount of which is within the sound discretion of the trial court,[2] and cannot be discharged in bankruptcy.[3]

§ 5. *Amount, character, and duration.*[4]—The amount of alimony is in sound discretion of the court,[5] taking into consideration the husband's means,[6] including his pension,[7] the wife's lack of means,[8] and the children to be supported.[9]

ground of cruel conduct, the husband was found blameless and on his cross-petition was awarded a divorce because of the wife's adultery, the award to her of $1,000 alimony was not an abuse of discretion of court, nor a reward for her infidelity, but was proper that she might not be left destitute. Pauly v. Pauly [Okl.] 76 P. 148.

93. Rev. St. 5699, provided that she should be restored to her lands, should have alimony, and should be entitled to dower, and this was not amended by act May 19th, 1894, except in case it is found that the wife has ample property and the husband little or none. De Witt v. De Witt, 67 Ohio, 340, 66 N. E. 136.

94. An antenuptial contract whereby husband's note to wife was in full payment of her rights to his estate, will not bar the allowance to her as permanent alimony of specific property, where the divorce was obtained for husband's adultery, as such contracts did not contemplate a divorce through fault of the husband. Carter v. Carter [Vt.] 56 A. 989.

95. Where husband had divorce because of wife's fault and he had before conveyed property to her, and he owned but little property and was in feeble health. Cottrell v. Cottrell, 24 Ky. L. R. 2417, 74 S. W. 227.

96. Where the wife was at fault, had an income of $300 a year, and the husband was probably insolvent and had offered to provide for infant daughter. Henry v. Henry, 25 Ky. L. R. 596, 76 S. W. 130.

97. Though by a settlement property had been equally divided, yet in divorce proceeding, wife was allowed alimony in addition as she was blameless, in poor health, and had minor children to support. McKnight v. McKnight [Neb.] 98 N. W. 62.

98. Cottrell v. Cottrell, 24 Ky. L. R. 2417, 74 S. W. 227; Henry v. Henry, 25 Ky. L. R. 596, 76 S. W. 130; Greer v. Greer, 25 Ky. L. R. 655, 76 S. W. 166. The award of $7.50 alimony wrong where the court erred in granting the divorce. Donnelly v. Donnelly, 25 Ky. L. R. 1543, 78 S. W. 182.

99. See 1 Curr. L. 71.

1. Divorce on the ground of abandonment. Hall v. Hall, 25 Ky. L. R. 1304, 77 S. W. 668.

2. Hinton v. Hinton, 117 Ga. 547, 43 S. E. 983.

3. Order to pay for support of child is not an award of alimony, which is an allowance to a wife who is living apart from her husband on her own account, and an order to support a child cannot be discharged in bankruptcy, though a past obligation to his former wife for support of child will be discharged as any civil debt. Rush v. Flood, 105 Ill. App. 182.

4. See 1 Curr. L. 71.

5. Alimony of $75 a month and $1,000 solicitor's fees. Benham v. Benham, 208 Ill. 98, 70 N. E. 30. $800 alimony, and $150 attorney's fee proper. Greer v. Greer, 25 Ky. L. R. 655, 76 S. W. 166. In a suit by husband for divorce because of cruel treatment it was proper to allow wife $100 for her temporary support and attorney's fees, and $49 for expenses. Baier v. Baier [Minn.] 97 N. W. 671. In action for a separation, where the main issue was as to marriage, it was proper to allow plaintiff $500 for counsel fee and $25 weekly alimony, and on disagreement of jury, an additional counsel fee of $750. Herrmann v. Herrmann, 88 App. Div. 76, 84 N. Y. S. 736.

6. Where defendant had income of $90 a month and property worth $3,000, the allowance of $25 counsel fee and $25 a month was proper. Cupples v. Cupples, 31 Colo. 443, 72 P. 1056. In an action against wife for divorce on ground of adultery and desertion, where the husband was worth $69,000, the allowance of $200 to wife as suit money which was inadequate, was an abuse of discretion. Bordeaux v. Bordeaux [Vt.] 75 P. 524. Defendant with no property but with income from $820 to $1,000 a year was ordered to pay as permanent alimony $30 a month to wife, and $10 a month for support of child. Downing v. Downing [N. J. Eq.] 54 A. 542.

7. Though U. S. Rev. St. § 4747, provides that money due a pensioner shall not be liable to any process while in the Pension Office or in transmission, yet it could be considered as part of pensioner's resources in determining the amount of alimony. Bailey v. Bailey [Vt.] 66 A. 1014.

8. The allowance of $150 a year and $300 counsel fees in a suit for separation from bed and board proper where wife little property. Hughbanks v. Hughbanks, 25 Ky. L. R. 840, 76 S. W. 355.

9. Where the wife has the custody of

Permanent awards; division of property.[10]—Permanent alimony may,[11] and in Indiana must be awarded in gross.[12] In Nebraska realty cannot be awarded as alimony.[13] The court may consider the financial condition of the parties and their mutual conduct,[14] and will not ordinarily award the wife more than one-third of the property.[15] Property conveyed in fraud of creditors will be considered,[16] but a secret conveyance is not necessarily fraudulent.[17] Where wife has an interest in her husband's property other than such as attaches to her status as a wife, as if her earnings have been invested by him therein, the court may properly vest part of it in her.[18] Final division and distribution of the estate is usually preferable to an award of alimony as it ends litigation between the

four children, an award of $2,400 a year, when the husband's income is $4,600 and the divorce is for adultery, is proper. Harris v. Harris, 83 App. Div. 123, 82 N. Y. S. 568. The allowance to wife of $300 a year for the support of two children during infancy, and $500 a year to herself for life being a little more than half of defendant's income, was not excessive. Valentine v. Valentine, 87 App. Div. 156, 84 N. Y. S. 37. In a suit for separation where the wife is without means and has three infant children and the husband has an income of $2,000 a year, $10 a week and $50 counsel fee should have been allowed. Vaughn v. Vaughn, 89 App. Div. 611, 85 N. Y. S. 443. Where the husband was worth $6,000, was in good health, and had successful business, and the wife was in poor health and had two minor children to support, $1,800 was not excessive. Williams v. Williams [Wis.] 99 N. W. 431. Sufficiency where wife left husband because of his neglect and indifference and was poor. Boreing v. Boreing, 24 Ky. L. R. 1288, 71 S. W. 431. That a wife was in an insane hospital at low expense and the husband had large expenses because of sickness, held proper reasons for reducing. Davis v. Davis, 78 App. Div. 500, 79 N. Y. S. 621. Six dollars not excessive against a husband who has employment, for a wife and child. Dale v. Hauer, 109 La. 711, 33 So. 741. Where defendant was worth $10,000 and owed plaintiff some for advances, and plaintiff had performed valuable services, an award of $1,100 on annulment of an incestuous marriage was not an abuse of discretion. Stapleberg v. Stapleberg [Conn.] 58 A. 233.

10. See 1 Curr. L. 72.

11. In lieu of stated allowances, N. D. Rev. Codes, 1899, § 2761. De Roche v. De Roche [N. D.] 94 N. W. 767. Where a husband was worth $5,300, the allowance of $160 a year to wife for separate maintenance or in default, her option to take $2,500, was supported as an alternative decree and not a penalty. Goldie v. Goldie [Iowa] 98 N. W. 630.

12. Award of $4 a week was in violation of Burns' Ind. Rev. St. 1901, § 1069, providing that allmony should be a sum in gross. Marsh v. Marsh [Ind.] 70 N. E. 154.

13. Cizek v. Cizek [Neb.] 99 N. W. 28.

14. Where husband earned $40 to $50 a month and owned only $50 worth of property the award of $1,000 alimony was excessive and should be reduced to $500. Stutsman v. Stutsman, 30 Ind. App. 645, 66 N. E. 908. The allowance to wife of $250 alimony, from whom her husband obtained a divorce, where he had little personalty, only a small salary, an equity of $1,500 in real estate, many debts, and the wife contributed nothing, will not be disturbed. Donaldson v. Donaldson [Mich.] 96 N. W. 448. Where divorce is granted for husband's wrong, an award of $7,000 where wife gives $1,000 bond to support three minor children, and husband's property of $14,000 was jointly accumulated, was not excessive. De Roche v. De Roche [N. D.] 94 N. W. 767. Where each party found guilty of cruel treatment and husband was given divorce, and wife on separation had secured goods valued at $400 (one-half of personalty), and the net value of husband's real estate was $2,000, it was error to award her $2,000, but she was allowed $650. Lindenmann v. Lindenmann, 118 Wis. 175, 95 N. W. 96.

15. Where defendant, an elderly farmer, owned 80 acres worth $1,600, four-fifths of 125 acres, worth $1,500 (plaintiff owning the other one-fifth), $380 worth of farm stock, and had paid $175 temporary alimony, a judgment for $2,000 alimony, and $150 attorneys' fees and for sale of property to pay the same, was excessive, and should be modified to give plaintiff one-third of real estate for life, some stock, and $100 counsel fee. Hall v. Hall, 26 Ky. L. R. 1848, 78 S. W. 1127. Plaintiff cannot complain of award to her of full one-third of property where she had excessive allowance pending litigation and husband had supported her two children till they were grown, and she was in good health. Von Trott v. Von Trott, 118 Wis. 29, 94 N. W. 798.

16. Where husband previous to divorce proceedings had transferred all of his property to defraud his creditors, it was proper to consider its value in awarding alimony of the amount of $3,000. Dougan v. Dougan, 90 Minn. 471, 97 N. W. 122.

17. The conveyance of property by husband without knowledge of wife, during divorce proceeding, for full consideration, and where property had been set aside for wife with her knowledge, was not fraudulent and the property could not be awarded to wife. Richmond v. Smith, 117 Wis. 290, 94 N. W. 36.

18. Where wife's earnings together with his own money were invested in real estate in husband's name, court may vest part of property in wife in fee as alimony. Champion v. Myers, 207 Ill. 308, 69 N. E. 815.

Contra: Decree vesting part of husband's real estate in wife, void under c. 25, Neb. Comp. St. 1901, though the wife's petition alleged that it was purchased with money furnished by her. Cizek v. Cizek [Neb.] 99 N. W. 28.

parties.[19] In Minnesota, by statute, a wife who is granted a divorce on the ground of the adultery of her husband becomes at once entitled to her dower interest in his property as though he were dead,[20] and is entitled to partition of lands conveyed by her husband without her consent.[21] Her interest is subject in its just proportion, with his other real estate, to the payment of his debts,[22] but a judgment recovered against her husband after he has conveyed property, but before the divorce, is not a legal lien on her one-third interest,[23] and claims of the creditors cannot be enforced against her interest in an action by her for partition.[24]

§ 6. *Procedure and practice.—Temporary allowance*[25] may be awarded solely on the wife's testimony,[26] may include arrears,[27] and should be made payable at a definite time,[28] and will cease on the husband's death.[29] A court may not award alimony out of particular property or charge the award upon particular property but should leave it to operate as a general lien.[30] The court may award suit money as well as counsel fees,[31] and the order therefor may be entered after the decree.[32]

Permanent award[33] may be corrected on appeal.[34] A decree ordering payment of alimony pending a suit for separation is appealable without reference to the amount.[35] A consent decree for alimony is not subject to attack by appeal or otherwise.[36] A decree dismissing a complaint for divorce and adjudging a certain sum for alimony cannot be construed as a final determination of the controversy nor adjudge future rights of the parties.[37] A decree simply giving judgment for alimony in a certain sum cannot be interpreted as final so as to preclude a subsequent suit for maintenance.[38] The amount of the judgment rendered in a proceeding for alimony does not determine the jurisdiction of the court on appeal.[39] While a claim for future alimony under a decree of a state court, not reduced to final judgment, will not be enforced by Federal courts, it may be made the basis of a cause of action of a civil nature within the jurisdiction of the Federal court, other requisities of jurisdiction being present.[40] A final judgment

19. Williams v. Williams [Wis.] 99 N. W. 431.

20, 21, 22, 23, 24. Keith v. Mellenthin [Minn.] 100 N. W. 366.

25. See 1 Curr. L. 72.

26. Wife testified as to marriage where defendant had not appeared. Cope v. Cope [Mo. App.] 77 S. W. 92.

27. Where the petition for alimony was filed five months after separation, it was proper to order the payment of $5 a month, $25 payable in thirty days, and $5 the first of each month thereafter, as that was not the allowance of alimony in gross. Wright v. Wright, 117 Ga. 867, 45 S. E. 250.

28. Decreeing that defendant pay $50 "on demand, if necessary" is void, as the judge should determine that question. Cope v. Cope [Mo. App.] 77 S. W. 92.

29. Under N. Y. Code Civ. Proc. § 1769, an order for payment of money pending action loses its force on the death of the husband, and it cannot be sustained where it directs payment to plaintiff's attorneys. Kellogg v. Stoddard, 89 App. Div. 137, 84 N. Y. S. 1015.

30. Cizek v. Cizek [Neb.] 96 N. W. 657.

31. Though Colo. Laws 1893, c. 80, made provision for alimony and counsel fees pendente lite, it did not, because of silence as to suit money, repeal the previous practice in allowing it. Hart v. Hart, 31 Colo. 333, 73 P. 35.

32. Where the rule for an order for additional counsel fees and expenses was granted the day judgment was entered, the court has power subsequently to order their payment. Rieder v. Rieder, 21 Pa. Super. Ct. 488.

33. See 1 Curr. L. 73.

34. Error in amount of award. Stutsman v. Stutsman, 30 Ind. App. 645, 66 N. E. 908. A discharge from payment of alimony will not be disturbed when the grounds urged therefor are unsupported by the evidence. Smith v. Smith, 142 Cal. 636, 76 P. 489. The discharge of an order for alimony will not be disturbed where it is not shown that the discretion of the court was not well exercised. Id.

35. Const. 1898, art. 85. Dale v. Hauer, 109 La. 711, 33 So. 741.

36. Bonney v. Lamb [Ill.] 71 N. E. 375.

37, 38. Fred v. Fred [N. J. Eq.] 58 A. 611.

39. Where decree was for $100 attorney's fees, but the prayer was for $1,500 alimony and attorney's fees, held, an appeal would lie without a certificate. Wald v. Wald [Iowa] 99 N. W. 720.

40, 41. Israel v. Israel, 130 F. 237.

NOTE. Effect of foreign judgments: A judgment for alimony rendered after the appearance of the defendant is entitled to full faith and credit when used as the basis of an action, in another state, to collect over-

for alimony in a state court will be given full faith and credit in the Federal courts.[41] A court will apply the law of its own state in construing a judgment for alimony given in a foreign state in the absence of proof of the laws of the foreign state relating to such judgment.[42]

§ 7. *Decree, enforcement and discharge.*[43]—The order must run to the wife;[44] as to past payments it is not affected by her death,[45] or reversal in an appellate court,[46] and it may be enforced by refusing to allow husband to proceed in the suit until he has complied.[47]

Vacating or modifying discharge.[48]—Defendant's leaving the jurisdiction[49] or statutes limiting the time as to opening decrees do not affect the court's discretion to modify a decree,[50] upon clear proof of changed circumstances,[51] or a mistake in making the original decree,[52] but not upon any grounds which could have been presented at the original trial.[53] or appeal.[54] A reconcilement between the parties discharges defendant.[55] As to the effect of a second marriage see note.[56]

Attachment of the person.[57]—Failure to comply with terms of decree awarding alimony, including support of children,[58] unless it be alimony in gross,[59] sub-

due instalments of the alimony awarded. Arrington v. Arrington, 127 N. C. 190, 37 S. E. 212, 52 L. R. A. 201.

42. New Jersey practice of allowing alimony in instalments followed in construing a North Dakota judgment for alimony. Fred v. Fred [N. J. Eq.] 58 A. 611.

43. See 1 Curr. L. 73.

44. Kellogg v. Stoddard, 89 App. Div. 137, 84 N. Y. S. 1015.

45. Durland v. Durland, 67 Kan. 734, 74 P. 274.

46. Where on appeal $250 was paid into court pursuant to order as temporary alimony, and the appeal was dismissed for lack of jurisdiction, the sum could not be applied as a credit to the $500 permanent alimony awarded by trial court. Mercer v. Mercer [Colo. App.] 73 P. 662.

47. Order as to temporary alimony. Reed v. Reed [Neb.] 98 N. W. 73.

48. See 1 Curr. L. 73.

49. Where liberty was reserved to mother to apply for increase in amount ordered paid for support of children, the father cannot defeat the right by moving to another state, as the petition for an increase is a mere continuation of the original proceeding. White v. White [N. J. Law] 55 A. 739.

50. Under Colo. Divorce Act, § 9, the court may modify a decree relative to alimony and the custody of children because of changed circumstances, though more than one year has elapsed since the divorce. Stevens v. Stevens, 31 Colo. 188, 72 P. 1061.

51. The court, under Minn. Gen. St. 1894, § 4809, may modify a judgment awarding alimony for a gross amount. Holmes v. Holmes, 90 Minn. 466, 97 N. W. 147.

52. Where plaintiff was awarded $85 a month, and then sued on an ante-nuptial contract which had not been disclosed in the divorce proceedings and secured $75 a month, it was proper on application to so far modify the decree as to make it only $10 in addition to the amount payable under the contract. Bowlby v. Bowlby [Minn.] 97 N. W. 669.

53. Under N. Y. Code Civ. Proc. § 1759, as amended by laws of 1895, c. 891, evidence of the wife's adultery prior to divorce cannot be introduced. Goodsell v. Goodsell, 82 App. Div. 65, 81 N. Y. S. 806.

54. Where the judgment of trial court awarding alimony was affirmed, though by the dismissal of a bill of exceptions, the trial court was without jurisdiction to modify the same on any ground which might have been relied on in the bill of exceptions. Sumner v. Sumner, 118 Ga. 408, 45 S. E. 315.

55. Where after judgment for separation defendant was surety on husband's bond for alimony, and then parties became reconciled and lived together and then again separated, defendant was discharged. Stendal v. Ackerman, 86 N. Y. S. 468.

56. NOTE. Effect of a second marriage upon obligation to pay alimony: I. Remarriage of the husband: One cannot relieve himself from the payment of alimony according to the provisions of a divorce decree by the obligations imposed upon him by a second marriage. State v. Brown, 31 Wash. 397, 72 P. 86, 62 L. R. A. 974; Park v. Park, 80 N. Y. 156. II. Remarriage of the wife: In some states the wife's subsequent conduct or remarriage makes no difference unless it is shown that she thereby acquires a support equivalent to the alimony awarded her. Shepherd v. Shepherd, 1 Hun [N. Y.] 240; Stevenson v. Stevenson, 34 Hun [N. Y.] 157; Park v. Park, 18 Hun [N. Y.] 466; Kiralfy v. Kiralfy, 36 Misc. 407, 73 N. Y. S. 708; Olney v. Watts, 43 Ohio St. 499, 3 N. E. 354. But the fact of remarriage may be used to reduce the alimony. Brandt v. Brandt, 40 Or. 477, 67 Pac. 508. In some states remarriage by the wife cuts off the alimony. Stillman v. Stillman, 99 Ill. 196, 39 Am. Rep. 21; Ablee v. Wyman, 10 Gray [Mass.] 222; Southworth v. Treadwell, 168 Mass. 511, 47 N. E. 93; Bowman v. Worthington, 24 Ark. 522.—From note to State v. Brown [Wash.] 62 L. R. A. 974.

57. See 1 Curr. L. 74.

58. Under Mich. Pub. Acts 1899, No. 230, allowing imprisonment for nonpayment of alimony, the allowance for support of children is included. Brown v. Brown [Mich.] 97 N. W. 396.

59. Where alimony is required to be awarded in gross it is not enforceable by

jects the party to penalty for contempt, unless he shows his inability to perform its terms,[60] when it is not permitted as being "imprisonment for debt."[61]

Execution[62] may be had on alimony awarded in gross.[63]

Subjection of property.[64]—Court may order property sold if alimony is not paid by a fixed date.[65]

§ 8. *Suits for annulment and actions for separate maintenance.*[66]—A suit or a cross bill[67] for separate maintenance may be maintained by a wife who is living apart from her husband,[68] without fault on her part,[69] or where she was justified in leaving him,[70] and temporary alimony may be awarded her.[71]

ALTERATION OF INSTRUMENTS.

§ 1. Definition, Distinctions, and What Constitutes (154).
§ 2. Particular Instruments (156).
§ 3. Effect of Material Alteration; Rights of Parties (156).
§ 4. Pleading and Evidence (157).
§ 5. Curing or Ratifying Alterations (158).

§ 1. *Definition, distinctions, and what constitutes.*[72]—Alterations, interlineations, or erasures are material if they change the legal effect of the instrument, its operation, or the liability of the parties thereto.[73] If the alteration is made in-

contempt proceedings, but by execution. Marsh v. Marsh [Ind.] 70 N. E. 154.

60. The fact that defendant has married again and so exhausted his income, which was the same as when the alimony was decreed, will not relieve him from the penalty for contempt. State v. Brown, 31 Wash. 397, 72 P. 86. A husband who refuses to pay alimony as ordered by the court, having means to do so, may be attached for contempt (Webb v. Webb [Ala.] 37 So. 96); but if he is without means he cannot be compelled to pay by that method, though his inability to pay results from willful refusal to work (Id.).

61. Where the order committing petitioner for contempt recited that he willfully refused to pay alimony, but did not recite that he was able to pay, he will be discharged. In re Cowden, 139 Cal. 244, 73 P. 156.

62. See 1 Curr. L. 75.

63. Marsh v. Marsh [Ind.] 70 N. E. 154.

64. See 1 Curr. L. 75.

65. Court had power to order that if alimony was not paid in seven months the homestead should be sold and proceeds used in payment of alimony provided the wife paid a joint judgment against herself and husband. Johnson v. Johnson, 66 Kan. 546, 72 P. 267.

66. See 1 Curr. L. 75.

67. Suit for separate maintenance may be made by cross-petition in a divorce suit by husband. Goldie v. Goldie [Iowa] 98 N. W. 630.

68. A wife who is justifiably living apart from her husband may, independently of an action for divorce, recover an allowance for her separate support. Baier v. Baier [Minn.] 97 N. W. 671.

69. To maintain an action for alimony without prayer for divorce petitioner must allege that she was without fault. Simms v. Simms, 25 Ky. L. R. 303, 74 S. W. 1074.

70. A suit for alimony may be maintained by a wife who refused to accompany her husband from New York to Charleston because of his gross misconduct and indecency which justified her in separating from him. Levin v. Levin [S. C.] 46 S. E. 945.

71. In a suit for separate maintenance temporary allowance may be made though defendant sets up facts in cross-petition which would entitle him to a divorce. Cupples v. Cupples, 31 Colo. 443, 72 P. 1056.

72. See 1 Curr. L. 76.

73. Landt v. McCullough, 206 Ill. 214, 69 N. E. 107; Rochford v. McGee [S. D.] 94 N. W. 695.

Where a lease provided that the lessor should have the privilege of purchasing the improvements at the end of the term, said improvements to be valued by two real estate dealers, one chosen by each party, the insertion of the words "owner or" between the words "estate" and "dealers," and this lease also provided that the notice of termination should be served personally, a clause authorizing service by publication as inserted, also a typewritten page, different in appearance from the rest of the instrument, was inserted, having reference to right of lessor to purchase improvements, and providing that the lease should not be assigned during first 15 years without lessor's consent, and also in the clause "will yield up said demised premises in good condition together with all the buildings and improvements thereon," the words "together with," etc., were erased. Held, alterations were material. Landt v. McCullough, 206 Ill. 214, 69 N. E. 107. Insertion in chattel mortgage, after the description of the goods, of the words "in her storehouse" held material alteration. Cabell v. McKinney, 31 Ind. App. 601, 68 N. E. 601. Where, in a blank intended for the period of maturity of a note dated Aug. 26, 1901, the maker's name was inserted, and later in the instrument occur the words "due May 1, 1902," an alteration consisting in the erasure of the maker's name from such blank, and the insertion of the words "May 1st after" date, does not change the legal effect of the instrument. Bailey v. Gilman Bank, 99 Mo. App. 671, 74 S. W. 874. Alterations in a lease made by the lessee without the consent of

nocently, or by mistake, and neither those liable on the instrument nor any third party has suffered any injury in consequence thereof, the alteration is immaterial.[74] The alteration must be made by a party to the contract, or by a stranger with his consent;[75] an alteration made by a stranger without the consent of either party being a mere spoliation.[76] The evidence being conflicting, it is a question for the jury whether or not the alteration was made by a stranger.[77]

§ 2. *Particular instruments.*[78]—Changes in a negotiable *promissory note* after delivery which alter the medium of payment,[79] rate of interest,[80] time when interest commences to run,[81] date when interest is due,[82] liability of indorsers,[83] cutting a note from a memorandum, limiting its effect as a negotiable instru-

the lessor, giving the former the privilege of subletting and requiring the lessor to make certain repairs, are material. Ver Steeg v. Becker-Moore Paint Co. [Mo. App.] 80 S. W. 346.

Question of law or fact: Under Civ. Code, § 3703, fact of alteration is a question for the jury, materiality of alteration is for the court. Heard v. Tappin, 116 Ga. 930, 43 S. E. 375.

74. A note was made payable to a firm, in the firm name, and on the dissolution of the firm it was turned over to one of the partners who drew a line through the firm name and inserted his own as payee, the other partners indorsing it payable to the partner's order. Held, said partner being in law and in fact one of the payees, and the alteration being without fraud, and one that could not injure anyone, it was immaterial, and the said partner could restore it to its original condition. James v. Tilton, 183 Mass. 275, 67 N. E. 326. An erasure on a promissory note which does not affect the signer's liability as to the payee is immaterial. Defendant executed note to plaintiff, one defendant placed the word "surety" after his name. plaintiff erased this, held did not alter his liability to plaintiff and they were still liable to him as joint and several obligors. Galloway v. Bartholomew [Or.] 74 P. 467. A writing in pencil by the manager of a bank below the name of an indorser on a note held by it of his address, for the purpose of directing the bank clerks in keeping their records, is not an alteration of the instrument. Merchants' Bank of Canada v. Brown, 86 App. Div. 599, 83 N. Y. S. 1037. Where a note was executed in Mass., and apparently payable there, the affixing of an internal revenue stamp to it by the payee after its execution was not a material alteration under the holding of the Mass. courts that U. S. Comp. St. 1901, pp. 2292, 2297, prohibiting the admission in evidence of such documents when not stamped, applied to the Federal courts only. Rowe v. Bowman, 183 Mass. 488, 67 N. E. 636. An erasure in a building contract of words acknowledging the receipt of payment of the first instalment due thereunder is not material where the instalment has not in fact been paid. Sullivan v. California Realty Co., 142 Cal. 201, 75 P. 767. Where, notwithstanding an alleged alteration in the date of a bond attempted to be enforced against the estate of the deceased maker, an action on the bond, if treated as having been executed at the time the consideration therefor arose, would not be barred by limitations, the alleged alteration was immaterial. Bashaw's Adm'r v. Wallace's Adm'r, 101 Va. 733, 45 S. E. 290.

NOTE. Filling in blanks: Where, by filling in blanks, the character or legal tenor and effect of the instrument is changed, parties not consenting are discharged, as where bill of exchange was changed so as to make a promissory note. Tuellen v. Hare, 32 Ind. 211.—From note to Draper v. Wood [Mass.] 17 Am. Rep. 97, 104.

75. If an agent acting within the scope of his authority makes an alteration, it will have the same effect in invalidating the instrument as if made by the principal. But where agent who changed contract so as to call for a larger payment, had no express or implied authority, it was held not to impair the validity of the contract. Deering Harvester Co. v. White, 110 Tenn. 132, 72 S. W. 962.

NOTE. Alterations by agent: An alteration made in good faith by an agent of the maker does not avoid the instrument. Van Brunt v. Eoff, 35 Barb. [N. Y.] 501; Collins v. Makepeace, 13 Ind. 448; Miller v. Reed, 3 Grant, Cas. 51.—From note to Draper v. Wood [Mass.] 17 Am. Rep. 97, 101. It is not rendered void when altered by holder's agent without authority. Ballard v. Franklin L. Ins. Co., 81 Ind. 239; Bigelow v. Stilphen, 35 Vt. 521. But see Morrison v. Welty, 18 Md. 169; 3 Rand. Com. Paper, 876. If altered by payee's agent after its delivery to him and before delivery to the payee it is rendered void. Hamilton v. Hooper, 46 Iowa, 515.—From note to Wilson v. Hayes [Minn.] 4 L. R. A. 196.

76. White v. Harris [S. C.] 48 S. E. 41. Alteration in the purchase-money note without knowledge or consent of the seller is no defense against recovery of a chattel sold. Forbes v. Taylor [Ala.] 35 So. 855.

77. White v. Harris [S. C.] 48 S. E. 41.

78. See 1 Curr. L. 76.

79. Words, "This note to be exchanged for," certain bonds, "when issued at 90," written across the face of a promissory note, held a material alteration. Harnett v. Holdrege [Neb.] 97 N. W. 443.

80. Commercial Bank v. Maguire, 89 Minn. 394, 95 N. W. 212.

81. In a mortgage note in the phrase "interest after maturity," "maturity" was erased and "date" inserted. Held a material alteration. Hocknell v. Sheley, 66 Kan. 357, 71 P. 839.

82. Commercial Bank v. Maguire, 89 Minn. 394, 95 N. W. 212.

83. Words receiving notice and protest and guaranteeing payment of note added over

ment,[84] or striking out a clause providing for the payment of attorney's fees for collection,[85] are material alterations. To add a word of description to the name of an indorsee is not a material alteration of a note or draft when it is intended that the paper shall go to the indorsee in the exact capacity indicated by the title affixed.[86] Alterations made in a *deed* subsequent to its execution and delivery do not affect its validity.[87]

§ 3. *Effect of material alteration; rights of parties.*[88]—In order to render a written contract void, because of alterations made therein, it must appear that the writing has been intentionally altered in a material part by a person claiming a benefit under it, with intent to defraud the other party.[89] Alterations may be impliedly authorized.[90]

A material alteration of a promissory note after it has been signed by the parties and without their consent renders it void,[91] and when made with intent to defraud the debtor, no recovery can be had on the original consideration.[92] Nor can the person who made the alteration take advantage of it as a defense.[93] If

blank indorsement. Harnett v. Holdrege [Neb.] 97 N. W. 443.

84. Defendant signed in two places a one-paged instrument purporting to be an application for live stock insurance, lower part was a note given for the purpose of securing the payment of subsequent assessments, none of which were ever made; this note was detached and sold to a bona fide holder, defendant was not guilty of negligence. Held that the detachment of the note was a material alteration of the application and rendered the note void. Rochford v. McGee [S. D.] 94 N. W. 695.

85. White v. Harris [S. C.] 48 S. E. 41.

86. Birmingham Trust & Sav. Co. v. Whitney, 88 N. Y. S. 578.

87. Signature of party to deed crossed out with pen and ink, also all reference to him in acknowledgment done after execution and delivery. Slattery v. Slattery, 120 Iowa, 717, 95 N. W. 201. Plaintiff made material alterations in a sheriff's deed after its acknowledgment and delivery to him. Held, while plaintiff might be the equitable owner, yet he was not the legal owner so as to maintain the legal action of trespass. Kalbach v. Mathis [Mo. App.] 78 S. W. 684. Until a deed is delivered, it may, of course, be altered. Wetherington v. Williams, 134 N. C. 276, 46 S. E. 728.

88. See 1 Curr. L. 77.

89. Shirley v. Swafford, 119 Ga. 43, 45 S. E. 722. A spollation does not invalidate the instrument. Deering Harvester Co. v. White, 110 Tenn. 132, 72 S. W. 962; Paul v. Leeper, 98 Mo. App. 515, 72 S. W. 715. Does not relieve the maker of a note from liability. White v. Harris [S. C.] 48 S. E. 41.

90. Parties agreeing that an indorsee should take the paper as cashier, the indorsee is authorized to write an abbreviation of the word "cashier" after his name. Birmingham Trust & Sav. Co. v. Whitney, 88 N. Y. 578.

91. Rochford v. McGee [S. D.] 94 N. W. 695; White v. Harris [S. C.] 48 S. E. 41. As a result of this a material alteration of a note discharges the parties (Ofenstein v. Bryan, 20 App. D. C. 1), the indorsers (Harnett v. Holdrege [Neb.] 97 N. W. 443), and this is true even though the note is in the hands of a bona fide purchaser (Rochford v. McGee [S. D.] 94 N. W. 695; Commercial Bank v. Maguire, 89 Minn. 394, 95 N. W. 212; Ofensteln v. Bryan, 20 App. D. C. 1).

92. Hocknell v. Sheley, 66 Kan. 357, 71 P. 839.

NOTE. Effect of alteration as a discharge: If an alteration is not fraudulently made, the payee of a bill or note may resort to the original indebtedness, if that was independent of the note, and has not been discharged by the execution of it. Clute v. Small, 17 Wend. [N. Y.] 238; Booth v. Powers, 56 N. Y. 22, 31, and see cases cited; 2 Pars. Notes & B. 573; Vogle v. Ripper, 34 Ill. 100; Merrick v. Boury, 4 Ohio St. 60. But to have such resort the plaintiff must produce and surrender the note.—From note to Draper v Wood [Mass.] 17 Am. Rep. 97, 105. A fraudulent and material alteration discharges both the note and the debt. Meyer v. Huneke, 55 N. Y. 412; Smith v. Mace, 44 N. H. 553; Ballard v. Franklin L. Ins. Co., 81 Ind. 239; Woodworth v. Anderson, 63 Iowa, 503, 19 N. W. 296.—From note to Wilson v. Hayes [Minn.] 4 L. R. A. 196, 198.

NOTE. Effect on mortgage of alteration of note securing it: In some states the mortgage is viewed as an independent security for the debt and hence can be enforced, although the note has been altered or destroyed. Gillett v. Powell, 1 Speers, Eq. [S. C.] 144; Plyer v. Elliott, 19 S. C. 264; Smith v. Smith, 27 S. C. 166, 3 S. E. 78, 13 Am. St. Rep. 633 where the alteration was fraudulent; Heath v. Blake, 28 S. C. 406, 5 S. E. 842. In others an alteration of the note defeating recovery upon it, is sufficient to defeat an action upon the mortgage. Tate v. Fletcher, 77 Ind. 105; Sherman v. Sherman, 3 Ind. 337. Vogle v. Ripper, 34 Ill. 100, 85 Am. Dec. 298, holds that where the mortgagee fraudulently alters the note the debt is released or discharged, otherwise where the alteration is not fraudulent. This case is followed by Clough v. Seay, 49 Iowa, 111; Elliott v. Blair, 47 Ill. 342; Gillette v. Smith, 18 Hun [N. Y.] 10.—From note to Walton Plow Co. v. Campbell [Neb.] 16 L. R. A. 468.

93. In an action by the seller to recover a chattel sold on conditional sale, an alteration in the note given for the price was no defense, where it was made without the knowledge or consent of the seller. Forbes v. Taylor [Ala.] 35 So. 855.

the alteration be immaterial, while the note cannot be sued on or introduced in evidence, yet the debt it evidences remains a binding obligation.[94]

§ 4. *Pleading and evidence.*[95]—In order to affect the question of admissibility of a writing in evidence, it must appear that the alteration was in a part material to the question in dispute.[96] Alterations in instruments are presumed to have been inserted innocently, and before acknowledgment and delivery. But if there are suspicious circumstances apparent on the face of the instrument offered in evidence, the party producing the instrument, and claiming under it, is bound to remove the suspicion by accounting for the alteration,[97] but the contrary rule prevails under the civil law.[98] But this presumption of innocence does not extend to the alteration of negotiable instruments, where the party producing and claiming under the paper is bound to explain every apparent and material alteration.[99] Where a note is apparently made payable in the state in which it was made, the laws of that state govern as to whether or not the altera-

94. Bailey v. Gilman Bank, 99 Mo. App. 571, 74 S. W. 874.

NOTE. Effect of immaterial alteration made with a fraudulent intent: An immaterial alteration if made with fraudulent intent will avoid the instrument. Miller v. Reed, 27 Pa. 246; Miller v. Gilleland, 19 Pa. 119; Robinson v. Phoenix Ins. Co., 25 Iowa, 430; Booth v. Powers, 56 N. Y. 22.—From note to Draper v. Wood [Mass.] 17 Am. Rep. 97, 105.

If the alteration is made innocently or by mistake, and neither those liable on the instrument nor any third party has suffered any injury in consequence thereof, nor can he be injured if the note is restored to its original condition, it can be so restored. James v. Tilton, 183 Mass. 275, 67 N. E. 326.

95. See 1 Curr. L. 78.

NOTE. Pleading an altered bill or note: Where altered bills are declared on in their original form, the alteration must be specially pleaded; if declared on in their altered form the traverse of the acceptance is sufficient. Hirchman v. Budd, L. R. 8 Exch. 171. See, also, Hemming v. Trenery, 9 Adol. & El. 926; Parry v. Nicholson, 13 Mees. & W. 778; Davidson v. Cooper, 11 Mees. & W. 778; Calvert v. Baker, 4 Mees. & W. 417; Cock v. Coxwell, 2 Cromp., M. & R. 291.—From note to Draper v. Wood [Mass.] 17 Am. Rep. 97, 105, 106.

Evidence held insufficient to show alteration: Evidence held insufficient to support a finding that a note for $600 had been raised from $60 by unauthorized addition of a figure. Rogers v. Costigan, 25 Ky. L. R. 1349, 78 S. W. 121. In an action against the sureties on a trust agreement, evidence held insufficient to show that, after it had been signed by the sureties, a provision to the effect that additional security might be required was interlined in the instrument. Pogue v. Ross, 25 Ky. L. R. 187, 74 S. W. 1101. Parties believed mortgage covered only their half of farm, whereas it covered all, evidence examined and held to show that the instrument had not been changed. Conkling v. Levie [Neb.] 94 N. W. 987.

96. Sullivan v. California Realty Co., 142 Cal. 201, 75 P. 767. A deed is not inadmissible in evidence because of an alteration which is unimportant and immaterial to the case. Brice v. Sheffield, 118 Ga. 128, 44 S. E. 843.

97. Sheriff's deed: Held, while the presumption was that the alterations were made before acknowledgment and delivery, the appearance of the deed excited suspicion, and the court properly admitted explanatory evidence. Kalbach v. Mathis [Mo. App.] 78 S. W. 684; Wheadon v. Turregano [La.] 36 So. 808.

Lease: Held, alterations were material, and it was error to admit the lease in evidence without requiring the lessor to explain them. Landt v. McCullough, 206 Ill. 214, 69 N. E. 107. Receipts clearly showing alterations on their face are inadmissible in evidence until the alterations are explained. Rambousek v. Supreme Council of the Mystic Toilers, 119 Iowa, 263, 93 N. W. 277. Where the alteration complained of was the insertion in ink of the letter "s" after a word in a typewritten bond, held, the admission of the bond in evidence without requiring an explanation of the alteration was not error. Graham v. Middleby [Mass.] 70 N. E. 416. Where a surety erased his name from a bond and the principal was informed to notify the other sureties and procure an additional one which he did, held, erasure sufficiently explained. U. S. Fidelity & Guaranty Co. v. Fossati [Tex. Civ. App.] 81 S. W. 1038.

98. Wheadon v. Turregano [La.] 36 So. 808.

99. Ofenstein v. Bryan, 20 App. D. C. 1; Hodge v. Scott [Neb.] 95 N. W. 837.

An alleged alteration of a promissory note is a matter of defense, the burden of proof of which is on the defendant. Galloway v. Bartholomew [Or.] 74 P. 467. In an action on promissory notes, defended on the ground that they had been altered without the maker's consent, where plaintiff proceeded on the theory that the notes had not been altered, and in no way urged that the alleged alteration was a mere spoliation, he could not object, on appeal, to an instruction to find for defendant, if an alteration had been made, even though it was made without plaintiff's consent. Paul v. Leeper, 98 Mo. App. 615, 72 S. W. 715. Whether the alterations are so material and apparent as to require proof is a question of law for the court; the questions of when, how and by whom the alterations were made are for the jury. Ofenstein v. Bryan, 20 App. D. C. 1.

tion is material.[1] Where nothing to the contrary appears, it will be presumed that the alterations were contemporaneous with the execution of the instrument.[2] Where an action on an instrument is defended on the ground of an alteration subsequent to its execution, the burden of proof remains on the plaintiff to prove the contract on which he has declared.[3] A note assigned after alteration will be admissible in an action by the assignee against the assignor on the implied warranty of genuineness.[4]

§ 5. *Curing or ratifying alterations.*[5]—A party to an altered or forged negotiable instrument may bind himself by acknowledging it and promising to pay it, without a new consideration, if the instrument is in the hands of one who had no connection with the alteration or forgery, and the promise is not invoked in an attempt to compound a felony; but such acknowledgment or ratification, in order to bind, must be with full knowledge of the fact.[6]

AMBASSADORS AND CONSULS.

Documents which are a part of the archives of a foreign consulate are privileged, and a witness cannot be compelled to disclose their contents.[7] The privilege is that of the foreign government and not that of the witness, and the court will strike out, on motion, any testimony inadvertently or incautiously given by him which violates it.[8] Acknowledgments of instruments may be taken by United States consuls stationed in foreign countries.[9]

AMICUS CURIAE.

In order to be heard as amicus curiae the parties must have an interest in the question to be decided,[10] or be interested in another case that will be affected by the decision.[11] If the other parties consent the court will generally allow an interested party to file briefs in a pending case as amicus curiae.[12]

1. Whether or not there was a material alteration of a note, which was made in Massachusetts, and apparently to be paid in Massachusetts, must be determined by the laws administered in the courts of Massachusetts. Affixing a revenue stamp after execution held immaterial. Rowe v. Bowman, 183 Mass. 488, 67 N. E. 636.

2. Paul v. Leeper, 98 Mo. App. 515, 72 S. W. 715. In the absence of evidence that an alteration appearing on the face of an appeal bond was made after its execution, a motion to dismiss the appeal on this ground should be overruled. Parshall v. Clark [Tex. Civ. App.] 77 S. W. 437. Where there is no other evidence, the intention of the party at the time of execution is material in fixing time of alteration. If he intended it, the presumption will be that alteration and execution were contemporaneous. Cabell v. McKinney, 31 Ind. 601, 68 N. E. 601.

3. Action on a bond. Graham v. Middleby [Mass.] 70 N. E. 416.

4. Bailey v. Gilman Bank, 99 Mo. App. 571, 74 S. W. 874.

5. See 1 Curr. L. 79.

6. Ofenstein v. Bryan, 20 App. D. C. 1; Cabell v. McKinney, 31 Ind. 601, 68 N. E. 601. Iowa statute as to treble damages for destruction of valuable papers. Freeman v. Strobehn [Iowa] 97 N. W. 1094. Correction by court of misdescription of real estate in will, also latent ambiguity. In re Pope's Estate [Minn.] 97 N. W. 1046.

7, 8. Kessler v. Best, 121 F. 439.

9. Long v. Powell [Ga.] 48 S. E. 185. A foreign acknowledgment stating the venue as "Confederation of Switzerland, Canton de Vaud, City of Vervey—ss," and reciting that on the day named, before C., "consular agent of the United States in and for the said city of Vervey, at said city of Vervey, personally appeared," etc., sufficiently complies with the New York statute (Laws 1901, p. 1476, c. 611) requiring acknowledgments taken in foreign countries to be before the agent of the United States "residing within the country." Jordan v. Underhill, 91 App. Div. 124, 86 N. Y. S. 620.

10. Citizens and taxpayers may be heard in deciding whether revenue bond scrip can be used to pay taxes. Robinson v. Lee, 122 F. 1010. Where an answer must be verified by the defendant or some one in his behalf, one of several defendants may verify for all. Deved v. Carrington [Md.] 56 A. 818.

11, 12. Northern Securities Co. v. U. S., 191 U. S. 555, 24 S. Ct. 119. Leave to file briefs refused where it did not appear that the applicant was interested in any other case to be affected by the decision, and the parties were represented by competent counsel who did not consent to the filing. Id.

ANIMALS.

§ 1. Property in Animals (159).
§ 2. Personal Injuries Inflicted by Animals (159).
§ 3. Injuries to Property by Animals Trespassing or Running at Large (160).
§ 4. Liability for Killing or Injuring Animals (161).
§ 5. Contracts of Agistment (162).
§ 6. Estrays and Impounding (163).
§ 7. Regulations as to Care, Keeping, and Protection and Health (164). Interstate Transportation; Quarantine; Inspection (165).
§ 8. Marks and Brands (165).
§ 9. Cruelty to Animals (165).

§ 1. *Property in animals.*[13]—The modern rule is that the owner of a dog has such a property therein that he may maintain an action for its wrongful destruction.[14]

§ 2. *Personal injuries inflicted by animals.*[15]—Under the common-law rule, the owner or keeper of a vicious animal is liable for personal injuries inflicted by it, if its character is known by him.[16] Actual notice however is not necessary,[17] it being presumed from the circumstances,[18] and notice to the owner's wife has been held sufficient.[19] Under this rule the viciousness of a dog will not be presumed,[20] nor is it negligence per se to keep a vicious dog, the negligence

13. See 1 Curr. L. 79.

14. O'Neil v. Newman [Mich.] 93 N. W. 1064. Dictum that dog is subject of larceny. Florida Cent. & P. R. Co. v. Davis [Fla.] 34 So. 218. An interesting opinion on property in dogs. Strong v. Georgia R. & Elec. Co., 118 Ga. 515, 45 S. E. 366.

Note: At common law an owner had a property right in his dog. Mullaly v. People, 86 N. Y. 365; State v. Sumner, 2 Ind. 377; Dodson v. Mock, 20 N. C. (3 Dev. & B.) 282; Harrington v. Miles, 11 Kan. 481; Ex parte Cooper, 3 Tex. App. 489; White v. Brantley, 27 Ala. 430. **Contra,** Chunot v. Larson, 43 Wis. 536; State v. Harriman, 73 Me. 562. Replevin may be maintained to recover him. State v. Lynus, 26 Ohio St. 400; State v. McDuffie, 34 N. H. 523; Cummings v. Perham, 1 Metc. [Mass.] 555. Some cases hold that by virtue of the police power certain classes of dogs may be killed. Haller v. Sheridan, 27 Ind. 494; State v. Topeka, 36 Kan. 76; City of Hagerstown v. Witmer, 86 Md. 293, 37 A. 965; Tower v. Tower, 18 Pick. [Mass.] 262; City of Faribault v. Wilson, 34 Minn. 254, 25 N. W. 449; Morey v. Brown, 42 N. H. 373; Jenkins v. Ballantyne, 8 Utah, 245, 30 P. 760. **Contra,** Lowell v. Gathright, 97 Ind. 313; Lynn v. State, 33 Tex. Cr. App. 153, 25 S. W. 779; Heisrodt v. Hackett, 34 Mich. 283; Cozzens v. Cozzens, 109 Mass. 275. Some cases hold that a howling dog may not be killed. Jacquay v. Hartzell, 1 Ind. App. 500. Others affirm the right. Woolf v. Chalker, 31 Conn. 121; Brill v. Flagler, 23 Wend. [N. Y.] 354, overruled Dunlap v. Snyder, 17 Barb. [N. Y.] 561. A question for the jury. Hubbard v. Preston, 90 Mich. 221, 51 N. W. 209. Mere trespassing dogs cannot be killed. Brent v. Kimball, 60 Ill. 211; Marshall v. Blackshire, 44 Iowa, 475; Woolsey v. Haas, 65 Mo. App. 198. Sheep killing dogs may be killed. Thompson v. State, 67 Ala. 106; Dunlap v. Snyder, 17 Barb. [N. Y.] 561. Dogs chasing other animals cannot. Spray v. Ammerman, 66 Ill. 309; Livermore v. Batchelder, 141 Mass. 179, 5 N. E. 275; Hamby v. Samson, 105 Iowa, 112, 74 N. W. 918, 40 L. R. A. 508, and note; Graham v. Smith, 100 Ga. 434, 28 S. E. 225, 40 L. R. A. 503, and note.

15. See 1 Curr. L. 79.

16. Carroll v. Marcoux, 98 Me. 259, 56 A. 848; Perry v. Cobb [Ind. T.] 76 S. W. 289; Peck v. Williams, 24 R. I. 583, 54 A. 381; Fisher v. Weinholzer [Minn.] 97 N. W. 426; Boler v. Sorgenfrei, 86 N. Y. S. 180. An agreed state of facts that the plaintiff, a child of seven years, sitting on a fence between his home and the property of defendant, was bitten by a dog known to be vicious. Gladstone v. Brunkhurst [N. J. Law] 56 A. 142. If the owner has seen or heard enough to convince a man of ordinary prudence of the animal's inclination to bite people, or if he has knowledge of one attempt upon a person it is sufficient. Rowe v. Ehrmantraut [Minn.] 99 N. W. 211. Where a horse is properly in the place where the injury is inflicted, knowledge of its vicious character must be shown. A horse being led along the highway by a man riding another horse is in its proper place and in the absence of knowledge of its character, the owner is not liable for damages resulting from its kicking plaintiff's buggy and injuring him. Eddy v. Union R. Co. [R. I.] 56 A. 677.

17. Held to be a reversible error that the judge refused to charge a jury that the defendant would be liable if the facts were sufficient to put a reasonable man upon inquiry and he failed to heed the warnings. Nelson v. Barrett, 89 App. Div. 466, 85 N. Y. S. 817.

18. A witness may testify as to the repute of the animal, though his information be derived from one person only who had knowledge of the facts. Fisher v. Weinholzer [Minn.] 97 N. W. 426.

19. Where the defense in an action for injuries was that the dog's vicious character was not known, and neither the defendant nor his wife testified, it may be inferred that their testimony would have been unfavorable to the defense. Boler v. Sorgenfrei, 86 N. Y. S. 180.

20. In the absence of a statute, the fact that a dog was at large upon the highway does not obviate the necessity of proving the dog's vicious character. Leonard v. Donoghue, 87 App. Div. 104, 84 N. Y. S. 60. Where a dog had on three other occasions attacked passers by, evidence held to show

consisting in keeping after notice of its character.[21] After notice, the owner must exercise care commensurate with the danger.[22] One entering on strange premises must exercise due care, and whether he did or not is a question for the jury.[23] By statute, in some states, an injury by a dog is actionable,[24] though the person injured be a trespasser,[25] unless the trespasser provoked the dog to the attack.[26] A dog in the owner's cart upon the highway is not within an "inclosure."[27] The owner of hogs properly in the highway, is not liable for personal injuries proximately caused by them.[28] Ownership of a dog by the licensee, is shown by the issuance of such license, only upon proof of knowledge thereof by the licensee.[29] It is the duty of a liveryman to furnish a reasonably safe horse.[30]

§ 3. *Injuries to property by animals trespassing or running at large.*[31]—At common law the owner of animals was required to confine them to his own land,[32] but this rule is not in force in a majority of the American states,[33] where no actionable trespass is committed where animals wander on and depasture the uninclosed lands of another,[34] though even here the owner may not willfully drive his cattle on another's land.[35] Liability arises only if such animals break through a fence sufficient to turn ordinary cattle under ordinary circumstances;[36] in Missouri, however, the common law as to adjoining proprietors without a partition fence applies.[37] The defendant's inclosure must have been suitable, un-

a vicious disposition. Rowe v. Ehrmantraut [Minn.] 99 N. W. 211. A dog's propensity to attack other dogs is admissible to show its disposition. Id.

21. De Gray v. Murray, 69 N. J. Law, 456, 55 A. 237.

22. Where a dog was locked in a shed but so gnawed the wood that the fastening became loose the owner was held to have used the requisite care. De Gray v. Murray, 69 N. J. Law, 456, 55 A. 237.

23. Where a junk dealer entered premises where there was a sign on the barn "beware of the dog" and while in the act of picking up a rope was bitten evidence held to show that he was not in the exercise of due care. Spellman v. Dyer [Mass.] 71 N. E. 295. An instruction that if he was doing what an ordinary junk dealer would probably do, and did not intend to steal the rope, he was in the exercise of due care, was sufficiently favorable to the junk dealer. Id.

24. Knowledge of the dog's character and the care exercised by its owner are immaterial. Peck v. Williams, 24 R. I. 583, 54 A. 381; Carroll v. Marcoux, 98 Me. 259, 56 A. 848; Leonorovitz v. Ott, 40 Misc. 551, 82 N. Y. S. 880.

25. Plaintiff, a peddler, knocked at defendant's door and entered without further ceremony. Carroll v. Marcoux, 98 Me. 259, 56 A. 848. One who allows a biting dog to go at large knowing it to be such, is liable if it bite a trespasser. Leonorovitz v. Ott, 40 Misc. 551, 82 N. Y. S. 880.

26. Plaintiff climbed upon defendant's cart uninvited and was bitten by a dog therein. There being no sufficient proof of provocation defendant was held liable. Peck v. Williams, 24 R. I. 583, 54 A. 381.

27. "The inclosure" refers to land. Peck v. Williams, 24 R. I. 583, 54 A. 381.

28. Heist v. Jacoby [Neb.] 98 N. W. 1058.

29. Evidence of the issuing of a license in the name of another than the defendant was rejected, there being no proof as above indicated. Jordan v. Carberry [Mass.] 69 N. E. 1062.

30. In the absence of contributory negligence, a liveryman is liable who lets a horse known to be not reasonably safe for a given purpose, or whose faulty character should have been known by ordinary care. Nisbet v. Wells, 25 Ky. L. R. 511, 76 S. W. 120.

31. See 1 Curr. L. 80.

32. Laws 1872, p. 123, providing that damages could not be recovered unless cattle broke through a lawful fence, does not apply to sheep. Pacific Live Stock Co. v. Murray [Or.] 76 P. 1079.

33. Perry v. Cobb [Ind. T.] 76 S. W. 289; Muir v. Thixton, Millett & Co., 25 Ky. L. R. 1688, 78 S. W. 466; Gillespie v. Hendren, 98 Mo. App. 622, 73 S. W. 361. It is not unlawful at common law for animals to run at large. Kittredge v. Cincinnati, 2 Ohio, N. P. [N. S.] 6. But Laws 1875, p. 190, "An act to restrain sheep and swine from running at large in the state of Nebraska," does not protect passers along the highway against unconfined hogs. Heist v. Jacoby [Neb.] 98 N. W. 1058.

34. Public Lands, 2 Curr. L. 1295. Martin v. Platte Valley Sheep Co. [Wyo.] 76 P. 571.

35. Sweetman v. Cooper [Colo. App.] 76 P. 925.

36. Spalding v. Nesbit [Mo. App.] 79 S. W. 181. Whether a lawful fence existed is a question for the jury. Crenshaw v. Gardner, 25 Ky. L. R. 506, 76 S. W. 26. Where an injury is committed by reason of the viciousness of an animal, not trespassing, knowledge of such viciousness must be shown on the part of the owner. Perry v. Cobb [Ind. T.] 76 S. W. 289.

37. And under it each party must fence his own stock. Gillespie v. Hendren, 98 Mo. App. 622, 73 S. W. 361.

der the surrounding circumstances,[38] and the owner is liable for damages proximately caused by a negligent escape,[39] and the fact that the fence broken through was not a lawful one was no defense.[40] The person whose property is damaged is not restricted to the remedy specially provided for a breach of a statutory fence.[41] Animals trespassing upon the lands of another are not "going at large contrary to law,"[42] but a horse running unattended through the streets to its livery stable is.[43] A statement of a cause of action though informal and stating conclusions is sufficient after judgment.[44] The measure of damage is the value of the pasturage eaten or destroyed, together with the injury to the freehold.[45]

§ 4. *Liability for killing or injuring animals.*[46]—One is not justified in killing or willfully injuring domestic animals trespassing upon his property,[47] unless so provided by statute,[48] or if a dog is caught chasing or injuring sheep,[49] or hunting deer.[50] Where so provided the action is local.[51] To entitle one to a recovery from the county for sheep killed by dogs the statutory procedure must

38. Proof of the existence of sufficient fence prescribed will not alone relieve from liability. Plumb v. Maher [Conn.] 56 A. 494. Mere fact of a stallion being out of his pasture does not amount to contributory negligence on the part of the owner where the horse falls into a hole in the street and is killed. Kittredge v. Cincinnati, 2 Ohio N. P. (N. S.) 6.

39. Plumb v. Maher [Conn.] 56 A. 494. The owner of an unrestrained bull is liable for all damages occasioned by his being at large [Code, § 2312]. Burleigh v. Hines [Iowa] 99 N. W. 723. Nineteen thoroughbred heifers gotten with calf by unregistered bull. Id. Evidence held to show ownership of a dog which caused a runaway, and liability for damages. Austin v. Bartlett [N. Y.] 70 N. E. 855.

40. Burleigh v. Hines [Iowa] 99 N. W. 723. The owner of the heifers was not guilty of contributory negligence in placing them in the field knowing that the fence was inadequate. Id. To say that one is not negligent in keeping up a fence sufficient to restrain a stallion colt of the age of two years, does not apply to the case of a particular colt which has jumped the same fence once before. Kittredge v. Cincinnati, 2 Ohio N. P. (N. S.) 6.

41. Burch v. Samples [Tex. Civ. App.] 74 S. W. 81.

42. The owner of animals so trespassing is liable for damages only and not the penalty of ten cents a head imposed by statute for animals "going at large contrary to law" [Mich. Comp. Laws 1897, §§ 10688, 10689]. Miller v. Hoffman [Mich.] 97 N. W. 759.

43. And though the horse was well trained to go alone to the stable, its owner was held liable for injury to a person attempting to avoid the horse in the belief that it was vicious and had run away. Allen v. Hazzard [Tex. Civ. App.] 77 S. W. 268.

44. Where defendant's cattle left his premises, destroyed a certain amount of plaintiff's corn, held that at the time of the entry the stock law was in force. Young v. Prentice [Mo. App.] 80 S. W. 10.

45. Damages, 1 Curr. L. 833. Pacific Live Stock Co. v. Murray [Or.] 76 P. 1079. The owner was entitled to recover damages to a heifer sold before the action was brought. Burleigh v. Hines [Iowa] 99 N. W. 723.

46. See 1 Curr. L. 81.

47. Meadows v. State, 136 Ala. 67, 34 So. 183. That plaintiff's servant negligently left a gate open is not such contributory negligence as to bar a recovery. Kemp v. Briard [Neb.] 98 N. W. 1048. In Florida the larceny or malicious killing or injury of a dog returned by the owner for taxation is made a crime. Florida C. & P. R. Co. v. Davis [Fla.] 34 So. 218.

48. Under Code 1896, § 5092, one indicted for killing cows may show in justification or mitigation that at the time they were trespassing on growing crops cultivated without fence, where stock laws prevail. Prince v. State [Ala.] 37 So. 171. This fact is not inconsistent with acts establishing stock law districts, and providing penalties and remedies which may be enforced against the owner of stock. Id.

49. Whether such killing was justified is a question for the jury. O'Neil v. Newman [Mich.] 93 N. W. 1064.

50. Under Act 1898, p. 84, providing that any person may lawfully kill any dog found hunting deer, it may be killed only while so hunting, so a plea alleging merely that "on the day" of the killing, defendant found it hunting deer, is insufficient. Mossman v. Bostridge [Vt.] 57 A. 995. Under Vermont statute any dog, without regard to its breed or whether it was permitted to run at large, may be killed if caught hunting deer. Act 1898, p. 84, providing that dogs of a certain breed shall not be permitted to run at large, and that any person may lawfully kill any dog found hunting deer. Mossman v. Bostridge [Vt.] 57 A. 995. A plea in trespass for killing a dog alleging that on the day and date "of said supposed killing," it was found hunting deer, identifies the trespass attempted to be justified with the one declared on. Id.

51. Sand. & H. Dig. § 6252, fixes the local jurisdiction for killing live stock in the county where the killing occurred. An objection that it was not shown that cattle were killed in the county where suit was brought was good, though raised for the first time on appeal. St. Louis, etc., R. Co. v. Gray [Ark.] 80 S. W. 748. Where one killed three cows by firing three different shots, the three acts of shooting constituted a single offense. Prince v. State [Ala.] 37 So. 171.

be strictly complied with.[52] A liability arises if one negligently allows his diseased cattle to commingle with those of another,[53] or knowingly sells diseased stock,[54] or negligently sells feed containing poison,[55] or carelessly drives a hired team and permanently injures them.[56] An exception to the common law rule requires the proper fencing or guarding of "attractive nuisances,"[57] but natural barriers may serve as the equivalent of a legal fence.[58] Railroad companies are liable for injuries to animals resulting from negligent operation or defective construction of their road,[59] as are also municipal corporations for negligent use or defective construction of highways.[60]

§ 5. *Contracts of agistment.*[61]—An agister's lien is a perfect one, directly created by statute and does not depend for its existence upon the institution of judicial or other proceedings,[62] but he may, with consent of the owner and under circumstances not prejudicial to third persons, adopt other means than that provided by statute to secure a satisfaction of his claim;[63] the statutory lien will be strictly construed,[64] and in Missouri, to sustain such a lien upon a vehicle, the latter must have come into the agister's charge at the same time as the animal cared for.[65] In Iowa an agister's lien does not take priority over other liens of record,[66] and the prior mortgagee may maintain replevin without demand.[67] The degree of care required of an agister is that of ordinary diligence, that which men in general exercise in respect to their own affairs,[68] which is a question for the

52. He must allege the dogs to have been harbored by persons living in the county other than himself, and plead all the conditions precedent to a recovery. McCullough v. Colfax County [Neb.] 95 N. W. 29.

53. Whether the cattle were diseased and whether the defendant knew it are questions for the jury. Truskett v. Bronaugh [Ind. T.] 76 S. W. 294.

54. Intervening transfer by third persons does not discharge the liability. Damages recoverable are not only the purchase price but also the loss due to other animals contracting the contagion. Skinn v. Reutter [Mich.] 97 N. W. 152.

55. Where oats and paris green had been carelessly kept in the same room and were accidentally commingled during the confusion of a fire, the party selling the oats for feeding purposes was held liable, though the buyer knew the oats were damaged by water but did not know of the poison. Provost v. Cook, 184 Mass. 316, 68 N. E. 336.

56. The measure of damages is the difference in the team's value before and after such careless driving and the reasonable expenses incurred to prevent a greater loss. Cunningham v. Dickerson [Mo. App.] 79 S. W. 492.

57. The maintaining of a covered cistern upon the premises of an unfenced distillery does not come within this exception, there being no evidence that malt or corn was strewn about at the time a horse strayed upon the premises. Muir v. Thixton, Millett & Co., 25 Ky. L. R. 1688, 78 S. W. 466.

58. Taylor v. Spokane Falls & Northern R. Co., 32 Wash. 450, 73 P. 499.

59. See Railroads, 2 Curr. L. 1438, 1440.

60. See Highways and Streets, 2 Curr. L. 177.

61. Note: The lien of a recorded chattel mortgage is paramount to that of an agister. Lynde v. Parker, 155 Mass. 481, 34 N. E. 74; Bissell v. Pearce, 28 N. Y. 252; Corning v. Ashley, 51 Hun, 483, 4 N. Y. S. 256; Wright v. Sherman, 3 S. D. 290, 52 N. W. 1093, 17 L. R. A. 792 and note; Lambert v. Nicklass, 46 W. Va. 527, 31 S. E. 951, 44 L. R. A. 561 and note. An agister waives his lien by causing the property to be taken in execution for his debt. Fein v. Wyoming Loan & Trust Co., 3 Wyo. 331, 22 P. 1150. **Contra,** Lambert v. Nicklass, 45 W. Va. 527, 31 S. E. 951; Neff v. Rhodes, 20 Mo. App. 347. See 1 Curr. L. 82.

62. Such a lien is cognizable and enforceable in bankruptcy [chapter 620, p. 920, 17 Del. Laws]. In re Pratesi, 126 F. 588.

63. Where the superior lien and possession were in the agister he owed no duty to a mortgagor except to care for the animals and refrain from fraud or injury. Dale v. Council Bluffs Sav. Bank [Neb.] 94 N. W. 983.

64. For the reason that it is in derogation of the common law. Zartman-Thalman Carriage Co. v. Reid, 99 Mo. App. 415, 73 S. W. 942.

65. Lien refused where a carriage came into the care of a liveryman several months after the horse, though from thenceforth he had the care of both. Zartman-Thalman Carriage Co. v. Reid, 99 Mo. App. 415, 73 S. W. 942.

66. The mortgagee's knowledge that pasturage was being furnished would not destroy his priority. Beh v. Moore [Iowa] 100 N. W. 502.

67. Beh v. Moore [Iowa] 100 N. W. 502.

68. In the absence of a special contract an agister is not an insurer but must exercise reasonable care and diligence; that which a man of ordinary prudence would use under the same circumstances toward his own property. Arrington Bros. & Co. v. Fleming, 117 Ga. 449, 43 S. E. 691. A pasture which is not wholly inclosed is not inclosed at all. One who took horses to pasture, and allowed them to escape. Shropshire v. Sidebottom [Mont.] 76 P. 941.

jury,[69] and one who is not bound by a contract of agistment to return all the cattle taken may recover a balance due, though some of the cattle are missing.[70] The word "range" has a distinctive meaning,[71] as has also the phrase "to keep the old stock good."[72]

§ 6. *Estrays and impounding.*[73]—One attempting to hold cattle damage feasant must act in substantial compliance with the statute,[74] and he must not include an illegal item in the sum demanded as a condition of release.[75] The damages, to which one taking up estrays is entitled, are limited to such as were committed at the time of, and immediately preceding the trespass,[76] and one may be estopped by his conduct to claim damages for a past trespass,[77] but not by the fact that he allowed the owner to remove them.[78] In Michigan the owner of trespassing animals, dissatisfied with the sum demanded as a condition of release, may apply to a justice of the peace for the appointment of appraisers,[79] though their award is not binding.[80] One who takes up, confines and cares for a stray hog, as a protection to his crops, is not guilty of taking up a stray animal and making use of it.[81] Animals found at large may be impounded and sold for the charges of keeping,[82]

69. Defendant who had undertaken to pasture a mule was held not liable, and in his defense was permitted to show that prudent men also pastured animals in fields having one side unfenced but bounded by a river. Arrington Bros. & Co. v. Fleming, 117 Ga. 449, 43 S. E. 691.

70. Payment of "$1.00 per head for all he turns back." Miller v. Lewis [S. D.] 97 N. W. 364.

71. A sparsely populated and uninclosed prairie over which stock growers have been allowed to let cattle, horses, and other animals, owned by them or in their charge, roam and feed without restraint. Miller v. Lewis [S. D.] 97 N. W. 364.

72. Held, under the circumstances to mean that the older sheep could be disposed of and younger ones allowed to take their place, though the entire herd could not be sold. Turnbow v. Beckstead, 25 Utah, 468, 71 P. 1062.

73. Note: In order to distrain animals damage feasant, actual damages must have been suffered. McConnell v. Cate, 70 N. H. 296; Leavitt v. Thompson, 56 Barb. [N. Y.] 542; Gilbert v. Stephens, 6 Okla. 673, 55 P. 1070; Holden v. Torrey, 31 Vt. 690. The common law gave no right of sale and a Texas statute so providing was held unconstitutional. Armstrong v. Traylor, 87 Tex. 598, 30 S. W. 440. See, also, Pettit v. May, 34 Wis. 666; Bullock v. Geomble, 45 Ill. 218; Rockwell v. Nearing, 35 N. Y. 302; Campbell v. Evans, 45 N. Y. 356. Municipalities have the power to sell impounded animals if the proceedings therefor are with due process of law. Folmar v. Curtis, 86 Ala. 354; Amyx v. Taber, 23 Cal. 370; Whitlock v. West, 26 Conn. 406; Roberts v. Ogle, 30 Ill. 459; State v. Tweedy, 115 N. C. 704, 20 N. E. 183. The sale must be preceded by notice. Varden v. Mount, 78 Ky. 86; Donovan v. Vicksburg, 29 Miss. 247; Rosebaugh v. Saffin, 10 Ohio, 31; Armstrong v. Brown, 106 Ky. 81, 50 S. W. 17, 90 Am. St. Rep. 211, and note thereto. See 1 Curr. L. 82.

74. A tender of a sum equivalent to the actual damage justifies an action of replevin [Comp. St. 1901, art. 3, c. 2]. McAllister v. Wrede [Neb.] 97 N. W. 318. Act 1895, c. 137, forbidding the impounding of stock of nonresidents if their ownership was known was impliedly repealed by Act 1899, c. 137, and the impounding of hogs of a nonresident was legal. City of Clarendon v. Walker [Ark.] 80 S. W. 883. One is entitled to impound an animal which escapes into his enclosure on account of an adjoining owner's failure to maintain a line fence which he was bound to keep in repair. Walker v. Robertson [Mo. App.] 81 S. W. 1183.

75. So held upon a refusal to release the cattle except on payment of a sum including an officer's fees, the service of a notice by an officer being unnecessary. McAllister v. Wrede [Neb.] 97 N. W. 318.

76. Ch. 19, St. 1894. Where one was tendered the amount of damage caused by cattle but refused it, he was held liable to account for the milk drawn from the cows. Fleetham v. Therres [Minn.] 100 N. W. 377. Providing the distrainer was wrongful. Id.

77. One had knowledge that cattle went in and out of his meadow at will. Just as the owner was moving away he destrained the cattle and set up a claim for damages for the entire period. Adair v. Curry [Mo. App.] 80 S. W. 967.

78. Where one found a bull on his premises and locked him up, and notified the owner who removed him, he was not precluded from maintaining his action for damages under Code, § 2312. Burleigh v. Hines [Iowa] 99 N. W. 723.

79. But the opposite party has a right to be heard before the appointment [Comp. Laws 1897, § 10698]. Miller v. Hoffman [Mich.] 97 N. W. 759. Under Code, § 2317, providing for assessment of damages by township trustees for distrained trespassing stock, the fact that there are no trustees in the township where the cattle are distrained does not affect the right. Robinson v. Halley [Iowa] 100 N. W. 328.

80. Miller v. Hoffman [Mich.] 97 N. W. 759.

81. Pen. Code 1895, art. 918. Williams v. State [Tex. Cr. App.] 78 S. W. 928.

82. That the animal belongs to a nonresident of the municipality whose ordi-

but there must be a strict compliance with the statutory procedure of sale,[88] to pass a good title;[84] that the owner was not negligent is immaterial.[85] A statute is unconstitutional which provides for a sale without judicial proceedings to determine the amount of damages and whether the animal was actually at large.[86]

§ 7. *Regulations as to care, keeping and protection and health.*[87]—In some states, stock law districts, to prevent cattle running at large therein, may be created upon the requisite vote of the people,[88] but upon such an election the statutory procedure must be strictly followed;[89] the courts will take judicial notice of the existence of such districts.[90] In Alabama the districts may not be charged for one year,[91] and in Mississippi the partial stock law does not include cattle.[92] A state may lawfully forbid nonresidents to allow their stock to run at large within its jurisdiction.[93] Driving sheep from one range to another is not within a statute regulating "herding" and "grazing."[94] Statutes may authorize the destruction of dogs not properly muzzled,[95] and for a failure to so protect the public the owners may be fined and imprisoned.[96] A municipality may forbid the keeping of hogs within the corporate limits during a certain period of the year,[97] but prosecution under such an ordinance must strictly comply with the statutory procedure.[98] A town by-law on the keeping of animals within the town limits is void where the regulation of such matters properly belongs to the board of health.[99] A prohibition of the keeping of a noisy dog or other animal about a stable or other premises does not apply to a horse.[1] In Texas one is liable to a criminal action who willfully drives cattle from their accustomed range.[2] Statutes prohibiting the docking of horses are constitutional[3] and a valid exercise of the police power.[4]

nance is violated is immaterial. Jeans v. Morrison, 99 Mo. App. 208, 73 S. W. 235.

83. Especially as to the publication or service of proper notice. Jeans v. Morrison, 99 Mo. App. 208, 73 S. W. 235. A petition alleging that petitioner had seized cattle which had entered a lot occupied by him as tenant does not authorize the sale of such cattle under Code Civ. Proc. § 3084, which authorizes sale only when cattle were being pastured on a public street or on private property bordering thereon, neither did the petition allege that the cattle were wrongfully on the lot. Burns v. Morrow, 42 Misc. 657, 87 N. Y. S. 719.

84. Defective description of the animal in the posted notice, and a sale one day later than the time set, are fatal irregularities. Ryall v. Smith, 138 Ala. 145, 34 So. 1009.

85. An owner may not be liable for penalties prescribed by a cattle ordinance unless he be guilty of some negligence, but a city of fourth class has charter power to impound regardless of negligence. Dorton v. Burks, 99 Mo. App. 165, 73 S. W. 239.

86. Laws 1893, p. 32, Act No. 41. Greer v. Downey [Ariz.] 71 P. 900.

87. See 1 Curr. L. 83.

88. Keenan v. Harkins [Miss.] 35 So. 177. Under the Laws of 1900, p. 164, c. 124, such a district may contain a less quantity of land than a township. Shaw v. Woffard [Miss.] 34 So. 329.

89. A failure by the county court to declare and publish the result is fatal. King v. State [Tex. Cr. App.] 74 S. W. 773.

90. Lewis v. Rasp [Okl.] 76 P. 142.

91. Reed v. State, 136 Ala. 91, 34 So. 348.

92. Code 1892, § 2057. Whitfield v. Tatum [Miss.] 35 So. 447.

93. Such a statute is not unconstitutional, as contravening section 2, article 4, which declares that the citizens of each state shall be entitled to all privileges and immunities of citizens in the state. State v. Smith, 71 Ark. 478, 75 S. W. 1081.

94. Rev. St. 1887, § 1210, forbids the herding of sheep or the permitting of them to graze within two miles of another's dwelling; defendant held not liable though the sheep occasionally ate grass and passed within two miles of a dwelling. Phipps v. Grover [Idaho] 75 P. 64.

95. The statute is not invalid in that it shields the real culprit—the owner. Incorporated Town of Sibley v. Lastrico [Iowa] 97 N. W. 1074.

96. An ordinance making it a misdemeanor to allow unmuzzled dogs to run at large, is valid. Incorporated Town of Sibley v. Lastrico [Iowa] 97 N. W. 1074.

97. An ordinance declaring that no hogs shall be permitted within the corporate limits between the first of April and the first of October is not so unreasonable that the courts will declare it void. Smith v. Collier, 118 Ga. 306, 45 S. E. 417.

98. Prosecution on an indictment was dismissed where the statute provided for the beginning of suit on complaint by the town treasurer. Com. v. Rawson, 183 Mass. 491, 67 N. E. 605.

99. By-law forbidding the keeping of more than five swine, and their offspring of less than four months, within the town limits [Rev. Laws, c. 75, § 91]. Com. v. Rawson, 183 Mass. 491, 67 N. E. 605.

1. A conviction for the keeping of horses which stamped throughout the night was set aside on the ground that the expression "other animal" used after "dog" must be

Interstate transportation; quarantine; inspection.[5]—A state may establish general quarantine lines, or segregate infected animals,[6] and congress, under its power to regulate commerce, may make it a misdemeanor to drive or transport infected animals from one state to another.[7] Animals affected with a dangerous and contagious disease may be destroyed by the public authorities[8] without first granting the owner the privilege of a hearing,[9] but in the absence of actual proof of the infection or an exposure thereto, the officers so acting are liable.[10] The selection of a sheep dip by an inspector is a ministerial act and he is liable for damages due to his negligence.[11] In regulations as to infected cattle there must be no unjust discrimination.[12] The authorization of stringent regulations in case of an epidemic does not warrant their enforcement because the disease prevails to a greater or less extent in all the states and territories.[13]

§ 8. *Marks and brands.*[14]—A person or company can have but one recorded brand under the statutes of Texas,[15] and an unrecorded brand is not proof of ownership but may be shown, as any other flesh mark, for the purpose of identification.[16] That a lessor consented to the branding of sheep with the lessee's mark is not conclusive as to passing of title.[17] Under some statutes animals may be allowed to roam at large if properly marked.[18]

§ 9. *Cruelty to animals.*[19]—In New Jersey a justice has no jurisdiction of a prosecution for cruelty to animals.[20]

ANNUITIES.

As to the form of instrument required, see footnote.[21] An annuity is not pay-

read as applying to animals of the same kind. People v. Edelstein, 86 N. Y. S. 861.

2. Art. 913, Pen. Code, 1895. Newport v. State [Tex. Cr. App.] 77 S. W. 224.

3. Laws 1899, p. 175, prohibiting the use thereof. Bland v. People [Colo.] 76 P. 359. On a prosecution for using an unregistered docked horse in violation of L. 1899, p. 175, it was not necessary to prove that the horse was not registered where the docking took place after the passage of the act which forbids docking. Id.

4. Laws 1899, p. 175, prohibiting the use of unregistered docked horses, though it permits the use of registered docked horses. Bland v. People [Colo.] 76 P. 359. The fact that the act does not state that it is contrary to public morals does not prevent the courts from sustaining it on that ground. Id.

5. See 1 Curr. L. 83.

6. But there can be no conviction for disregarding a quarantine line, established by ultra vires act of the commission. Trent v. State [Tex. Cr. App.] 75 S. W. 857.

7. Such an act may be a misdemeanor though the animals are not moved from a district against which a quarantine has been declared. U. S. v. Slater, 123 F. 115.

8. Rev. St. 1898, §§ 1411, 1412, 1414. Lowe v. Conroy [Wis.] 97 N. W. 942.

9. The decision of the health authorities as to the existence of the disease is not final and due process of law grants the owner a right to be heard either before or after the destruction of the property. For improper destruction the officer and not the municipality is liable. Lowe v. Conroy [Wis.] 97 N. W. 942.

10. The pleadings should aver that the test made was efficacious. Pierce v. Dillingham, 203 Ill. 148, 67 N. E. 846.

11. Defendant inspector held liable where the dip provided by him caused the death of a portion of plaintiff's sheep and rendered the remainder unfit for breeding purposes. Bair v. Struck [Mont.] 74 P. 69.

12. Restrictions on the importation of "dairy or breeding cattle (cows, bulls and calves)" discriminate in favor of steers and as such are illegal. Pierce v. Dillingham, 203 Ill. 148, 67 N. E. 846.

13. Hurd's Rev. St. 1899, p. 155, c. 8. Pierce v. Dillingham, 203 Ill. 148, 67 N. E. 846.

14. See 1 Curr. L. 84.

15. If there be more than one recorded brand, they will be regarded as no more than flesh marks which may serve for purposes of identification but not as conclusive proof of ownership. Swan v. State [Tex. Cr. App.] 76 S. W. 464.

16. Sapp v. State [Tex. Cr. App.] 77 S. W. 456.

17. Turnbow v. Beckstead, 25 Utah, 468, 71 P. 1062.

18. The marking by the first letter of one's surname, where the statute requires the use of one's initials is not sufficient. Severance v. Elliott, 75 Vt. 421, 56 A. 85.

19. See 1 Curr. L. 84.

20. Though conferred upon him by Act 1880, P. L. p. 218, it was taken away by Act 1898, P. L. pp. 556, 564. New Jersey Soc. v. Compton [N. J. Law] 58 A. 110.

21. **NOTE. Form of instrument required to create an annuity:** An annuity for life not issuing out of nor being a charge upon lands is a mere chose in action for the payment of money and need not be made in the form of a deed nor under seal. Cahill v. Maryland L. Ins. Co., 90 Md. 333, 45 A. 180, 47 L. R. A. 614.

able in advance,[22] nor apportionable in respect of time,[23] the cases of infants and feme coverts, when necessary for maintenance, form exceptions to this rule.[24] Where a fixed sum is given "annually," the word "annually" denotes the amount to be paid and the time of payment.[25] An annuity "issuing and payable out of" certain real estate is a charge upon the land;[26] under a power given to enforce such an annuity, the land may be sold to pay arrearages,[27] and it is not allowable to deduct taxes proportionally from such an annuity.[28] In construing an annuity, the intention of the parties governs.[29]

22. Words of an antenuptial agreement creating an annuity "the same to take effect from and after the death of her husband" describe the time when the annuity begins to run. Mower v. Sanford [Conn.] 57 A. 119.

23. Antenuptial agreement, widow died in middle of year, no apportionment allowed. Mower v. Sanford [Conn.] 57 A. 119.

NOTE. Apportionment of annuities: At common law, an annuity was not apportionable. Bayard's Estate, 7 Pa. Dist. R. 279; Nehls v. Sauer, 119 Iowa, 440, 93 N. W. 346; Clapp v. Astor, 2 Edw. Ch. [N. Y.] 379; Nading v. Elliott, 137 Ind. 261, 36 N. E. 695; Wiggin v. Swett, 6 Metc. [Mass.] 194, 39 Am. Dec. 716; Dexter v. Phillips, 121 Mass. 178, 23 Am. Rep. 261; Manning v. Randolph, 4 N. J. Law, 144; In re Lackawanna Iron & Coal Co., 37 N. J. Eq. 26; Irving v. Rankine, 13 Hun [N. Y.] 147, affirmed in 79 N. Y. 636; Kearney v. Cruikshank, 117 N. Y. 95, 22 N. E. 580, reversing 46 Hun [N. Y.] 219; Stewart v. Swaim, 13 Phila. 185; Dubbs v. Watson, 2 Pa. Dist. R. 115; Moore v. Dunn, 92 N. C. 63; Griswold v. Griswold, 4 Bradf. [N. Y.] 216; Chase v. Darby, 110 Mich. 314, 68 N. W. 159, 64 Am. St. Rep. 347. Even though a day certain is fixed for payment. Ausman v. Montgomery, 5 U. C. C. P. 364; Pearly v. Smith, 3 Atk. 260; Wilson v. Harman, 2 Ves. Sr. 672. Though it has been held that where a testator fixes a day for payment, the annuity is apportionable so as to determine the amount to be paid between the date of his death and the date of the first payment. Waring v. Purcell, 1 Hill, Eq. [S. C.] 193. There are exceptions to this rule that annuities are not apportionable, equity allowing an apportionment where the annuity is for the maintenance of minor children or the widow or a divorced wife. Clapp v. Astor, 3 Edw. Ch. [N. Y.] 379; Hay v. Palmer, 2 P. Wms. 501; Reynish v. Martin, 3 Atk. 330; Ex parte Rutledge, Harp. Eq. [S. C.] 65, 14 Am. Dec. 696; Howell v. Hanforth, 2 W. Bl. 1016; Weigall v. Brome, 6 Sim. 99; Kearney v. Cruikshank, 117 N. Y. 95, 22 N. E. 580, reversing 46 Hun, 219. But an annuity given by a will to a married woman for her sole and separate use, and not to be subject in any manner to the control of her husband is not apportionable. Anderson v. Dwyer, 1 Schoales & L. 301. The imperfect right which a child has upon a parent for support, especially where this has been recognized by marriage settlement, has induced the courts to trench upon the general rule by what is now an established exception. Fisher v. Fisher, 5 Clark [Pa.] 178. It has also been held that an annuity to an eleemosynary establishment was apportionable. Attorney-General v. Smythies, 16 Beav. 385. There is another exception, viz.: That where an annuity is created or accepted in lieu or bar of dower, the annuity will be apportioned; the reason being that, as the thing for the surrender of which the annuity is given and received would obtain and remain during the life of the person entitled to it, so should the annuity which takes the place of it. Gheen v. Osborn, 17 Serg. & R. [Pa.] 171; Rhode Island Hospital Trust Co. v. Harris, 20 R. I. 160, 37 A. 701; In re Cushing's Will, 58 Vt. 393, 5 A. 186; Blight v. Blight, 51 Pa. 420; In re Lackawanna Iron & Coal Co., 37 N. J. Eq. 26 (the last four cases are cited with disapproval in Mower v. Sanford [Conn.] 57 A. 119, 63 L. R. A. 625); Sweigart v. Frey, 8 Serg. & R. [Pa.] 299. There are some authorities seemingly contra to this rule. Tracy v. Strong, 2 Conn. 659; Mower v. Sanford [Conn.] 57 A. 119, 63 L. R. A. 625; Queen v. Lords Com'rs of the Treasury, 16 Q. B. 357. The fact that a valuable consideration is paid for the annuity does not alter the rule that it is not apportionable. Heizer v. Heizer, 71 Ind. 526, 36 Am. Rep. 202; Chase v. Darby, 110 Mich. 314, 68 N. W. 159, 64 Am. St. Rep. 347.

The allowance of interest on the amount due for arrearages of an annuity is discretionary, where the annuity if for a widow's maintenance and prompt payment is necessary to her comfortable support (Beeson v. Elliot, 1 Del. Ch. 368; Addams v. Heffernan, 9 Watts [Pa.] 529); or in lieu of dower (Elliot v. Beeson, 1 Har. [Del.] 106; Houston v. Jamison's Adm'r, 4 Har. [Del.] 330; Seitzinger's Estate, 170 Pa. 531, 32 A. 1101). In some cases no interest has been allowed, see Isenhart v. Brown, 2 Edw. Ch. [N. Y.] 347; Philips v. Williams, 5 Grat. [Va.] 259.—From note to Henry v. Henderson, 81 Miss. 743, 33 So. 960, 63 L. R. A. 616.

24, 25. Mower v. Sanford [Conn.] 57 A. 179.

26. Gee v. Gee, 204 Ill. 588, 68 N. E. 515. See 1 Curr. L. 84, n. 83.

27. Gee v. Gee, 204 Ill. 588, 68 N. E. 515.

28. Angle v. Angle [N. J. Eq.] 57 A. 425. The annuity being of a fixed sum and not the entire income of the land, the rule that a life tenant must keep down taxes was held not to apply.

29. Annuity by son to father, and after his death to unmarried sister or sisters. Cohen v. Cohen, 141 Cal. 534, 75 P. 100.

Where a testator bequeaths in trust a sufficient sum to which at 6 per cent. will pay the annuities given, the suit which at 6 per cent. will produce the amount needed is the amount to be set aside. In re Sproule's Estate, 42 Misc. 448, 87 N. Y. S. 432; Mutual Life Ins. Co. v. Blair, 130 F. 971.

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§ 1. *The right in general. A. Constitution and statutes.*[30]—Appeal is a strict statutory right,[31] which does not exist unless expressly provided for[32] and may, after being given, be withdrawn by the statute, unless in so doing some provision of the organic law of the state is violated.[33]

The method prescribed by the legislature is exclusive and mandatory,[34] and neither court nor judge may modify it except as authorized by the statute.[35]

The right to an appeal is not a "vested" right, and therefore a statute cutting off the right will, if not otherwise provided, retroact on pending cases,[36] and the legislature has power to give to an appeal by one party the effect of vacating the judgment as to all parties, and transferring the cause for trial de novo.[37]

The right of appeal is favored by the courts.[38]

(§ 1) *B. Waiver, election, transfer or extinguishment.*[39]—The right may be waived,[40] but taking a second appeal in a case does not of itself constitute an abandonment of the first one.[41]

30. See 1 Curr. L. 86.

31. Coal Belt Elec. R. Co. v. Kays, 207 Ill. 632, 69 N. E. 920. Appeal from probate to supreme judicial court. Bartlett v. Slater, 183 Mass. 152, 66 N. E. 631; Appeal of Abbott, 97 Me. 278, 54 A. 755. Jurisdiction of appellate term over appeals from orders. Cohen v. Ridgewood Shirt Co., 84 N. Y. S. 188; Leavitt v. Katzoff, 86 N. Y. S. 495. See 1 Curr. L. 86, n. 6.

32. State v. Bloomfield State Bank [Neb.] 95 N. W. 790. Order allowing attorney's fees in condemnation proceedings. Detroit & T. Shore Line R. Co. v. Hall [Mich.] 94 N. W. 1066. The court has no power to allow an appeal merely because otherwise the appellant is without remedy. Maxon v. Gates, 118 Wis. 238, 95 N. W. 92; Fleshman v. McWhorter [W. Va.] 46 S. E. 116. A statute providing that the decision of a judge on certain questions shall be "final" merely means that it shall be considered a final order in a special proceeding and does not deprive the defeated party of his right of appeal granted elsewhere in the statutes [Consolidated School Laws; Laws 1894, pp. 1280-1282, c. 556, tit. 15, art. 1, §§ 4-7; Code Civ. Proc. § 1357]. Anderson v. School Dist. No. 15, 89 App. Div. 231, 85 N. Y. S. 943. Where an order of a court assuming to act under the special jurisdiction of a statute goes beyond the scope of the court's limited authority, an appeal lies, so far as the order is unauthorized, though the statute makes no provision for an appeal. Appropriation of water lots for oyster beds. Travers v. Dean [Md.] 56 A. 388.

33. Evansville & T. H. R. Co. v. Terre Haute, 161 Ind. 26, 67 N. E. 686. See 1 Curr. L. 86, n. 12.

34. Feathermann v. Granite County, 28 Mont. 462, 72 P. 972; Cornell v. Matthews, 28 Mont. 457, 72 P. 975; Bartlett v. Slater, 183 Mass. 152, 66 N. E. 631; Appeal of Abbott, 97 Me. 278, 54 A. 755; Hilts v. Hilts, 43 Or. 162, 72 P. 697.

35. Home Sav. & T. Co. v. District Court of Polk County, 121 Iowa, 1, 95 N. W. 522. See 1 Curr. L. 86, n. 9.

36. Evansville & T. H. R. Co v. Terre Haute, 161 Ind. 26, 67 N. E. 686; Cooley v. Pennsylvania R. Co., 40 Misc. 239, 81 N. Y. S. 692. See 1 Curr. L. 86, n. 10.

37. Matz v. Arick [Conn.] 56 A. 630.

38. Drexel v. Reed [Neb.] 95 N. W. 873.

39. See 1 Curr. L. 86.

40. Stipulation for filing amended complaint on payment of costs waives right to appeal from order consolidating actions. Rockefeller v. St. Regis Paper Co., 85 App. Div. 261, 83 N. Y. S. 138. Defendant present in court and not objecting to discontinuance without costs. Krakower v. Tauber, 85 N. Y. S. 339.

The right to have an intermediate ruling reviewed on appeal from final judgment is

Obedience to an order waives the right to a review;[42] but the intention must be clear,[43] as where the judgment is voluntarily paid,[44] and payment accepted;[45] but obedience to a writ of mandamus does not waive the right to appeal,[46] and payment by a garnishee without protest from the principal defendant will not waive the principal's right to appeal.[47]

Recognition of the validity of a judgment estops the party from asserting its invalidity,[48] and acceptance of benefits thereunder has a like effect;[49] but acceptance of that admitted to be due does not waive an appeal involving only the right to a further recovery.[50]

Enforcement of a judgment affirms it,[51] but a stipulation that the property in controversy shall be sold and the proceeds deposited with the clerk to await determination of the cause is not effectual as a release of errors or waiver of the right of appeal,[52] and enforcement of a foreclosure judgment does not waive the right to appeal.[53]

Agreement to the terms of a judgment waives an appeal,[54] and a judgment entered on stipulation of the parties is not appealable.[55]

(§ 1) *C. Pendency of a former appeal.*[56]—An appellant may voluntarily dismiss and take a second appeal within the time limited,[57] and in Washington the taking of a second appeal within the time allowed is permissible, though the first is not dismissed, the dismissal following by operation of law.[58] Where the first appeal taken is allowed to lapse for failure to file bond within the statutory period, a second appeal may be taken within the statutory period and properly perfected.[59]

Where a certificate of dissent is pending in the supreme court of Texas, a

not waived by failure to appeal from such ruling, though it was separately appealable. Des Moines Sav. Bank v. Morgan Jewelry Co. [Iowa] 99 N. W. 121; Jones v. Chicago & N. W. R. Co., 36 Iowa, 68; Parker v. Des Moines L. Ass'n, 108 Iowa, 117, 78 N. W. 826.

The filing of a motion, which is overruled, to vacate a decree and dismiss the action in which it is rendered, because of the findings of fact in the same action, does not waive an appeal from the decree. Anderson v. Hendrickson [Neb.] 95 N. W. 844. See 1 Curr. L. 86, n. 14.

41. Drexel v. Reed [Neb.] 95 N. W. 873.

42. Answering, after overruling of demurrer and motion to dismiss bill in obedience to decree ordering answer within 20 days, does not waive the right to appeal. Howison v. Baird, 138 Ala. 129, 35 So. 62. See 1 Curr. L. 86, n. 24.

43. Signor v. Clark [N. D.] 99 N. W. 68.

44. Payment under coercion does not waive. Signor v. Clark [N. D.] 99 N. W. 68. County on paying costs cannot keep case alive by stipulating that if the judgment should be reversed they would be repaid. Waters v. Garvin, 67 Kan. 855, 73 P. 902.

45. Talbot v. Mason [C. C. A.] 125 F. 101.

46. State v. Young, 66 S. C. 115, 44 S. E. 586.

47. Eastlund v. Amstrong, 117 Wis. 394, 94 N. W. 301.

48. Fidelity & Deposit Co. v. Kepley, 66 Kan. 343, 71 P. 818.

49. Entry by plaintiff in ejectment on that portion of the land awarded him by the judgment. Raborn v. Woods [Ind. App.] 70 N. E. 399. Creditor of an estate receiving his claim in full from proceeds of sale and asking confirmation of it cannot appeal from decree establishing title in decedent and directing sale. Parsons v. Rutherford [Miss.] 36 So. 187. A landowner in condemnation proceedings who has drawn from court, the sum awarded him and deposited there by the condemnor cannot appeal, though the statute provides that an appeal in such case shall not be suspensive. Parks v. Dallas Terminal R. & Union Depot Co. [Tex. Civ. App.] 78 S. W. 533. See 1 Curr. L. 86, n. 35.

50. Hodges v. Smith [Tex. Civ. App.] 79 S. W. 328.

51. Unless it is clear that a new trial ought not to result in diminishing the recovery. Whetstone v. McQueen, 137 Ala. 301, 34 So. 229. See 1 Curr. L. 87, n. 29.

52. Ryan v. Donley [Neb.] 96 N. W. 49; Id., 96 N. W. 234.

53. First Nat. Bank v. Wakefield, 138 Cal. 561, 72 P. 151.

54. Ewing v. Ewing, 161 Ind. 484, 69 N. E. 156. Where, on direction to the plaintiff to prepare findings and judgment, defendant reserved exceptions to each of such findings and judgment his "O. K." on findings and judgment subsequently served on him did not show consent thereto. Humphries v. Sorenson, 33 Wash. 563, 74 P. 690. See 1 Curr. L. 87, n. 40.

55. Corby v. Abbott, 28 Mont. 523, 73 P. 120. As where a stipulation waives all objections to the evidence and authorizes the justice to enter any judgment he sees fit. Lipps v. Markowitz, 84 N. Y. S. 172.

56. See 1 Curr. L. 88.

57. Groendyke v. Musgrave [Neb.] 99 N. W. 144.

58. King v. Branscheid, 32 Wash. 634, 73 P. 668; Noble v. Whitten [Wash.] 76 P. 95.

59. King v. Branscheid, 32 Wash. 634, 73 P. 668; Succession of Weber, 110 La. 674, 34 So. 731.

writ of error will not be allowed, though the party asking it filed the certificate and asks to have it disregarded in case the writ is allowed.[60]

A pro-forma affirmance on appeal bars a subsequent writ of error,[61] and where a defendant appellee, whose interest was identical with plaintiff's, assigned no cross errors, but fully argued a point not assigned by plaintiff appellant, he could not, on an adverse decision, bring error to review such question.[62]

An appeal from the district to the superior court in Connecticut, for trial de novo, vacates the judgment of the district court, and a concurrent appeal to the court of errors at the suit of the other party will not lie.[63]

§ 2. *The remedy for obtaining review. A. Appeal or error.*[64]—The supreme court of the United States has no jurisdiction on error in criminal cases.[65] Federal courts review decrees by appeal, judgments by error,[66] and this is the general rule;[67] but errors of law will be reviewed only on petition in error in Nebraska, whether the cause be legal or equitable, and appeal will not reach such matters.[68] Error and not appeal is the remedy in Colorado of one who has recovered judgment, but is dissatisfied with the relief granted,[69] but in Idaho, any party aggrieved may appeal.[70] Where error is dismissed for failure to serve certain parties, an application to have the case considered as on appeal may be granted on terms.[71]

In Louisiana, where the state for reasons of public policy desires to attack a judgment on a note entered on waiver of citation and confession, its remedy is by action of nullity and injunction and not by suspensive appeal.[72]

Error will not review a judgment not final.[73]

The remedy for reviewing probate decrees is discussed in the note.[74]

60. McCord v. Nabours [Tex.] 78 S. W. 223.

61. Schnabel v. Thomas [Mo. App.] 73 S. W. 917.

62. Suburban R. Co. v. Chicago, 204 Ill. 306, 68 N. E. 422.

63. Gen. St. 1902, §§ 539, 788. Lilley, Swift & Co. v. New York, etc., R. Co. [Conn.] 57 A. 109.

64. See 1 Curr. L. 88.

65. Contempt. O'Neal v. U. S., 190 U. S. 36, 23 S. Ct. 776.

66. Petition to set aside order for sale of property of insolvent bank by receiver under national banking act is equitable. Files v. Brown [C. C. A.] 124 F. 133. Mandamus to compel levy of tax is legal, not equitable, and appeal does not lie. Carter County v. Schmaistig [C. C. A.]. 127 F. 126. Proceeding to condemn land for public purpose is legal. Village of Mackinaw City v. U. S. [C. C. A.] 120 F. 252. Proceeding against municipal officers for violating an injunction restraining them from taxing assets of a bank is legal. Board of Councilmen of City of Frankfort v. Deposit Bank of Frankfort [C. C. A.] 127 F. 812. See 1 Curr. L. 88, n. 56.

67. State v. Bloomfield State Bank [Neb.] 95 N. W. 790; Trabue v. Williams [Fla.] 35 So. 872. Appeal will not lie from the decision of a single justice in Massachusetts dismissing a petition for certiorari. Inhabitants of Brockton v. Plymouth County Com'rs, 183 Mass. 42, 66 N. E. 427. Orders and judgments in contempt proceedings are reviewable by error only. Thompson v. Nelson [Neb.] 96 N. W. 194. See 1 Curr. L. 88, n. 57.

68. Danforet v. Fowler [Neb.] 94 N. W. 637; Pettibone v. Yeiser [Neb.] 96 N. W. 193; John Stewart & Co. v. Allen [Neb.] 96 N. W. 528. Rulings of the trial court on the admissibility of evidence can only be reviewed in Nebraska, by petition in error, not on appeal. Guthrie v. Guthrie [Neb.] 93 N. W. 1131; Smith v. Oster [Neb.] 95 N. W. 335. See 1 Curr. L. 88, n. 62.

69. Sess. Laws 1899, p. 172, § 1. Defendant claiming lien prior to mortgage foreclosed, awarded lien subsequent. Lockhaven Trust & Safe Deposit Co. v. U. S. Mortg. & T. Co. [Colo. App.] 73 P. 409. See 1 Curr. L. 88, n. 63, 64.

70. Rev. St. 1887, § 4802. Phillips v. Salmon River Min. & D. Co. [Idaho] 72 P. 886.

71. Jones v. Danforth [Neb.] 98 N. W. 668.

72. Kiernan v. Jackson, 111 La. 645, 35 So. 798.

73. Judgment for costs for defendant after verdict in his favor. Hall v. Patterson [Fla.] 33 So. 982. See 1 Curr. L. 89, n. 72.

74. A probate decree in Massachusetts is reviewable on probate appeal though the petition was equitable for the construction of a will. Bartlett v. Slater, 183 Mass. 152, 66 N. E. 631. Appeal and not error is the remedy to review a judgment of the circuit court of Florida on appeal from the county court, in a probate matter, the proceedings being equitable. Finch v. Bonar [Fla.] 35 So. 189. Proceedings of the probate court are reviewable by error as well as by appeal. Under guardian act. McCallum v. Chicago Title & T. Co., 203 Ill. 142, 67 N. E. 823. Allowance of claim against decedent's estate (Herman v. Beck [Neb.] 94 N. W. 512), but judgments of the district court rendered on appeal from the probate court are reviewable in Nebraska only by petition in error (Boales v. Ferguson [Neb.] 96 N. W. 337). Appeal will not lie to review the judgment of the county court on appeal from an in-

In New York, the report of a referee appointed under an order entered on a remittitur from the court of appeals, to assess damages to which that court by its final judgment held the plaintiff was entitled, can be reviewed only in compliance with the rule and not on a case and exceptions;[75] but the report of a referee appointed in proceedings for the dissolution of a corporation, not only to take proof and report with his opinion as to claims for costs, expenses and counsel fees, but to admit and reject creditor's claims, can only be reviewed on exceptions.[76]

(§ 2) *B. Certificate or reservation.*[77]—The statute providing for certifying tax cases to the supreme court for review, in Minnesota, has been repealed, and such cases may now be reviewed by appeal.[78]

(§ 2) *C. Ordinary or extraordinary and special modes of review.*[79]—Statutory remedies, as appeal or error, must, if adequate or applicable, be resorted to, and not writ of review,[80] certiorari,[81] prohibition,[82] mandamus,[83] injunction[85] or

terlocutory probate order. In re James' Estate [Neb.] 97 N. W. 22.

75. Gen. Practice rule 30. Bates v. Holbrook, 41 Misc. 129, 83 N. Y. S. 929.

76. People v. American L. & T. Co., 87 App. Div. 139, 84 N. Y. S. 114.

77. See 1 Curr. L. 89.

78. Gen. St. 1894, § 1598; Laws 1902, p. 1, c. 2. State v. Lockhart, 89 Minn. 121, 94 N. W. 168; State v. Griffith [Minn.] 98 N. W. 1023.

79. See 1 Curr. L. 89.

80. Petition to re-probate will will not lie; appeal being the remedy. Murray v. Lynch, 64 N. J. Eq. 290, 51 A. 713, 54 A. 1124. Order vacating judgment not so reviewable in absence of special circumstances rendering appeal ineffective. State v. Superior Court of King County [Wash.] 75 P. 809. A writ of review will be granted to review an order of the court below fixing the bond on appeal from an order quashing an execution at a mere fraction of the judgment. State v. Superior Court of Pierce County, 32 Wash. 693, 73 P. 779. The court, however, will not consider whether the judgment on which the execution issued was void, as that question is involved in the appeal from the order quashing the execution. Id. See 1 Curr. L. 89, n. 81.

81. State v. Thompson, 111 La. 315, 35 So. 582. Certiorari will not lie from order dismissing contest over proved will [Code Civ. Proc. §§ 963, 1068]. Mahoney v. Superior Court, 140 Cal. 513, 74 P. 13. Appeal, not certiorari, is the proper remedy for review of a probate order regarding the sale of land [Gen. St. 1894, § 4665]. In re Wilson's Estate [Minn.] 97 N. W. 647. Certiorari does not bring up a cause for review on its merits and when used to test the validity of a judicial act raises only the question of jurisdiction. Longstaff v. State [Wis.] 97 N. W. 900. Certiorari cannot be used where right to appeal has been lost by laches or an appeal has been decided adversely to appellant. Valentine v. Police Court, 141 Cal. 615, 75 P. 336. Certiorari not proper to review intermediate order reviewable with final judgment; substitution of claimant in claim and delivery. State v. District Court, 28 Mont. 445, 72 P. 867. Code Civ. Proc. § 2214 precludes certiorari in condemnation of right of way for ditch. State v. District Court of Fifth Judicial District [Mont.] 74 P. 200. An order restraining party from entering or conducting business in a building which the court finds to be in possession of a receiver, such possession being disputed by respondent, is appealable. State v. Superior Court of King County, 30 Wash. 177, 70 P. 256. Certiorari and prohibition are not proper to review action of district court in following mandate of court of appeals. State v. Foster, 111 La. 241, 35 So. 536. Owners of land on and over which a road is established are entitled to appeal from the final order of the commissioners laying out the road, and no reason being shown why appeal was not taken and the commissioners having jurisdiction, certiorari will not lie. Hegenbaumer v. Heckenkamp, 202 Ill. 621, 67 N. E. 389. The appeal provided by the New Jersey act to regulate elections is a substitute for the writ of certiorari provided by the same act, and the supreme corut has jurisdiction of such an appeal though the district court had not [P. L. 1896, p. 310, et seq. §§ 159, 175]. Darling v. Murphy [N. J. Law] 57 A. 263.

82. In re Gates, 117 Wis. 445, 94 N. W. 292; State v. Foster, 111 La. 241, 35 So. 536; Sanford v. District Court of Pima County [Ariz.] 71 P. 906; State v. Thompson, 111 La. 315, 35 So. 582; Knight v. Zahnhiser, 53 W. Va. 370, 44 S. E. 778. Cannot be used as writ of review by restraining issue of bench warrant after conviction of crime. Valentine v. Police Court, 141 Cal. 615, 75 P. 336. Prohibition will not lie to restrain a court from proceeding with a case after overruling a motion to dismiss for want of jurisdiction. State v. Superior Court of Kitsap County, 31 Wash. 410, 71 P. 1100. Prohibition will lie to prevent punishment for contempt where no remedy by appeal exists. State v. Superior Court of Spokane County, 31 Wash. 481, 71 P. 1095. Judgment on findings not restrained for mere error reviewable on appeal. State v. Superior Court of King County, 32 Wash. 498, 73 P. 479. Prohibition lies to prevent the exercise by an inferior court of a jurisdiction with which it has not been vested by law; not to correct errors in practice or proceedings. State v. Ausherman [Wyo.] 72 P. 200. See 1 Curr. L. 89, n. 83.

83. Steel v. Clinton Circuit Judge [Mich.] 95 N. W. 993. Rev. Pol. Code, § 850, does not provide a remedy by appeal from a refusal of the county board to consider a petition.

habeas corpus,[86] though the latter is proper where the court below totally lacks jurisdiction.[87]

Certiorari is the proper remedy where the ruling of a justice complained of involves only a question of law,[88] and lies to review a proceeding adjudging a party guilty of a criminal contempt,[89] and to review a decree of the circuit court of appeals revising proceedings of an inferior court of bankruptcy, under section 24b of the bankruptcy law;[90] but since the circuit court of appeals has power to issue the writ of certiorari only in aid of its appellate jurisdiction, it cannot by that writ review an unappealable order.[91]

Mandamus is proper to require the commissioner of patents to compel a primary examiner to forward an appeal from his decision to the board;[92] but cannot be used to perform the office of an appeal or writ of error, and does not lie to review a final judgment or decree sustaining a plea to the jurisdiction, even where no appeal or writ of error is given by law.[93]

A motion to stay proceedings will not be granted where its only effect would be to allow a party to again present a claim that has been denied, and he has an adequate remedy for any injustice that has been done him by appeal,[94] and execution will not be stayed as to a particular class of property after expiration of the term at which the judgment was rendered, where the limitation of the judgment was considered at the trial, and decided adversely to defendant.[95]

In Wisconsin a motion made in the ordinary way is the proper proceeding to bring up to circuit court for review an order of a court commissioner discharging a prisoner on habeas corpus.[96] Orders to sell property claimed as exempt,[97] and orders distributing the proceeds of sales of real estate by trustees,[98] are reviewable only by petition to revise under section 24b of the bankruptcy act; but an order dismissing an application for a discharge is reviewable by appeal under section 25a and not by petition.[99]

§ 3. *The parties. A. Persons entitled to take up the cause.*[1]—No person can obtain a review unless he has a legal interest which is affected,[2] and in Vir-

State v. Menzie [S. D.] 97 N. W. 745. Failure of trial court to follow mandate of appeal court is to be corrected by appeal or error. People v. District Court of Arapahoe County [Colo.] 75 P. 390.

85. Stone v. Little Yellow Drainage Dist., 118 Wis. 388, 95 N. W. 405. Judgment against garnishee if erroneous can be corrected on appeal. Eidemiller v. Eider, 32 Wash. 605, 73 P. 687.

86. In re Reiner, 122 F. 109; Ex parte Haggerty, 124 F. 441; Ex parte O'Neal, 125 F. 967; In re Strauss [C. C. A.] 126 F. 327. Whether information is sufficient cannot be reviewed on habeas corpus. Ex parte Stacey [Or.] 75 P. 1060.

87. Ex parte Stone [Tex. Cr. App.] 72 S. W. 1000. Appeal or error will not lie to review an order imposing punishment for violating an injunction, habeas corpus being the remedy if the court acted without jurisdiction. Remedial orders affecting property rights are appealable. Florida Cent. & P. R. Co. v. Williams [Fla.] 33 So. 991.

88. Caudell v. Southern R. Co., 119 Ga. 21, 45 S. E. 712.

89. In re Teitelbaum, 84 App. Div. 351, 82 N. Y. S. 887.

90. Holden v. Stratton, 191 U. S. 115, 24 S. Ct. 45.

91. U. S. v. Circuit Court [C. C. A.] 126 F. 169.

92. U. S. v. Allen, 192 U. S. 543, 24 S. Ct. 416; In re Frasch, 192 U. S. 566, 24 S. Ct. 424. No appeal lies to the court of appeals of the District of Columbia from an order of the commissioner of patents denying an appeal from the primary examiner to the board of examiners, mandamus to the commissioner being the proper remedy. Ex parte Frasch, 192 U. S. 566, 24 S. Ct. 424.

93. Mandamus to court of appeals to reinstate appeal dismissed for want of jurisdiction, denied. In re Key, 189 U. S. 84, 23 S. Ct. 624, 47 Law. Ed. 720.

94. Farmer's L. & T. Co. v. Hoffman House, 86 App. Div. 617, 83 N. Y. S. 364.

95. Foreign attachment on foreign note, where limitation of liability to a certain class of property only is claimed, but a general judgment is rendered, the only remedy is by appeal. Lewis v. Linton, 204 Pa. 234, 53 A. 999.

96. Longstaff v. State [Wis.] 97 N. W. 900.

97. Ingram v. Wilson [C. C. A.] 125 F. 913.

98. In re Groetzinger & Sons [C. C. A.] 127 F. 124.

99. In re Kuffler [C. C. A.] 127 F. 125.

1. See 1 Curr. L. 91.

2. Appeal of Abbott, 97 Me. 278, 54 A. 755. Parties and privies only. Large &

ginia, none but parties can appeal in chancery cases.[3] The right of one party to appeal does not universally confer it on his adversary,[4] it being necessary that the appellant have an appealable interest in the subject-matter of the suit,[5] and that that interest be affected adversely by the judgment complained of.[6] A defendant over whom the court acquired no jurisdiction is not aggrieved by an order granting an injunction against him,[7] and a party generally cannot appeal from a judgment or order which affects others only and not himself.[8]

One who has been denied leave to intervene cannot appeal the main case,[9] but a party entitled to intervene and appeal need not apply for intervention before appealing,[10] and an intervenor may appeal from a decree awarding certain costs against himself if the decree is otherwise appealable.[11] Parties entitled to an amendment substituting them as plaintiffs in a pending case are entitled to be heard on appeal from the judgment dismissing the complaint therein, after overruling their motion.[12] A motion to intervene cannot be granted after appeal.[13]

The surety in an execution can appeal from a judgment discharging property levied on from the lien of the execution.[14]

Any person interested and aggrieved may appeal from a proceeding not inter partes, especially in probate and administration orders,[15] but executors and administrators can appeal from probate decrees only when agrieved.[16] Devisees,[17] and ex-

Amsden Co. v. Samuel Nott & Son [Neb.] 95 N. W. 484. See 1 Curr. L. 91, n. 8.

3. Code 1887, § 3454. Southern R. Co. v. Glenn's Adm'r [Va.] 46 S. E. 776.

4. State v. Sanders, 111 La. 188, 35 So. 509.

5. Where a litigant has no interest in the subject-matter of the suit itself, his liability for costs will not give him the right to appeal. State v. Sanders, 111 La. 188, 35 So. 509. Husband having by antenuptial agreement no interest in wife's estate cannot appeal from allowance of claims against it. Williams v. Cleaveland [Conn.] 56 A. 850. Father cannot appeal from order affecting estate to which son is heir. Id. A mortgagee of the land taken may appeal in condemnation proceedings. Omaha Bridge & Terminal R. Co. v. Reed [Neb.] 96 N. W. 276. The principal defendant may appeal from a judgment against a garnishee. Eastlund v. Armstrong, 117 Wis. 394, 94 N. W. 301.

6. Defendants as to whom the case was dismissed cannot review judgment for plaintiff against other defendants. Cornish & Co. v. West, 89 Minn. 360, 94 N. W. 1082. A party is not "aggrieved" by an order denying him permission to amend an appeal bond not needing amendment. Ellis v. Barron County [Wis.] 98 N. W. 232. A creditor of an insolvent corporation in the hands of a receiver may appeal, without permission, from a decree retaining certain property within the lien of a mortgage and withdrawing it from the general assets of the company. Cook v. Anderson Food Co. [N. J. Eq.] 55 A. 1042.

7. MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 75 P. 89.

8. Defendant has no standing to appeal from an order denying the motion of one not a party to the action. Spear v. Murphy, 85 N. Y. S. 813. Plaintiff in an action to foreclose a land contract has no standing to appeal from an order subrogating an execution purchaser to plaintiff's rights on paying the amount of his judgment. Larson v. Olsefos, 118 Wis. 368, 95 N. W. 399. The prosecutor of a criminal charge has no standing to appeal from an order remitting the forfeiture of bail entered to secure the appearance of the prisoner. Com. v. Real Estate Title Ins. & T. Co., 22 Pa. Super. Ct. 235. An insolvent has no standing to appeal from the discharge of an order to show cause why a receiver for his property should not be appointed. In re Good's Insolvency, 21 Pa. Super. Ct. 625.

9. State v. Bloomfield State Bank [Neb.] 95 N. W. 791. See 1 Curr. L. 91, n. 9.

10. In re Sullivan, 84 App. Div. 51, 82 N. Y. S. 32.

11. In re Michigan Cent. R. Co. [C. C. A.] 124 F. 727.

12. Pugmire v. Diamond Coal & Coke Co., 26 Utah, 115, 72 P. 385.

13. Hight v. Batley, 32 Wash. 165, 72 P. 1034.

14. Hanna v. Charleston Nat. Bank [W. Va.] 46 S. E. 920.

15. Succession of Bothick, 110 La. 109, 34 So. 163. Son and sole heir of deceased person may appeal from order allowing claims against estate. Williams v. Cleaveland [Conn.] 56 A. 850. An executor has such interest as to entitle him to appeal as to the probating of the will [Probate Code, § 345, "Any party aggrieved may appeal," etc.]. Halde v. Schultz [S. D.] 97 N. W. 369. An administrator may appeal as to any order in the settlement of the estate [Rev. St. 1898, § 4031]. McKenney v. Minahan, 119 Wis. 651, 97 N. W. 489. City to whom tax is due is interested in an estate. In re Sullivan, 84 App. Div. 51, 82 N. Y. S. 32. See 1 Curr. L. 91, n. 13.

16. An executor is not interested in the distribution of the estate, it making no difference in the amount of his commissions. Lamar v. Lamar, 118 Ga. 684, 45 S. E. 498. An executor pending appeal from annulment of the will has a substantial right to appeal from an order of distribution. State

ecutors are aggrieved by an order setting aside property as homestead for use of widow pending administration.[18]

A taxpayer or citizen who shows no special injury cannot appeal in highway proceedings.[19] Election officers are concluded by the decision, on mandamus, to compel them to reconvene and count a rejected ballot, and cannot appeal therefrom.[20] The city is entitled to appeal in Illinois in special assessment cases, though the local improvement act does not so provide.[21] If in default a party cannot appeal,[22] unless expressly authorized by statute,[23] though if fundamentally wrong a judgment may be reversed despite defendant's default,[24] and in New York provision is expressly made for appeals by defendants on the ground of nonservice of process.[25] Nonresident defendants who appeared solely for the purpose of attacking the jurisdiction have no standing to appeal from the judgment,[26] and where the defendant filed no pleading below except a motion to strike the petition from the files, and it stated a cause of action, there is no issue for review.[27] Error will lie from an order allowing a claim against a decedent's estate, though no answer or objections were filed against the claim, and the order was made in the absence of the administrator.[28] One who appears, files an answer and participates in the trial by cross-examining witnesses, may appeal, though he introduced no evidence.[29] On appeal by plaintiff from a judgment sustaining a demurrer for want of facts filed by one defendant, a co-defendant constructively served, and not previously appearing, can prosecute a cross-appeal from the default judgment against him.[30] A third person who by reason of laches is not entitled to have a judgment vacated may be admitted to prosecute a pending appeal therefrom.[31]

A party in contempt will not be heard.[32]

A foreign corporation defendant may maintain appeal or error, though it has not complied with the statute necessary to entitle it to maintain suits in the courts of a state.[33]

(§ 3) *B. Necessary or proper parties to be joined or brought in.*[34]—All par-

v. Superior Court of King County, 28 Wash. 677, 69 P. 375. Where all the beneficiaries under a will and the executors have submitted a question in controversy to the appellate division, the executors alone have no such direct interest as will entitle them to appeal to the court of appeals. Isham v. New York Ass'n for Improving Condition of Poor, 177 N. Y. 218, 69 N. E. 367. An administrator can appeal from an order of the county court dismissing his petition for license to sell real estate to pay a claim he has allowed. In re Smith's Estate, 43 Or. 595, 75 P. 133.

17. The order has the effect to vest title in heirs subject to the order, thus removing it from the operation of the will. In re Levy's Estate, 141 Cal. 646, 75 P. 301.

18. In re Levy's Estate, 141 Cal. 646, 75 P. 301.

19. Bennett v. Tuftonborough [N. H.] 54 A. 700.

20. People v. Unger, 85 App. Div. 251, 83 N. Y. S. 84.

21. Hurd's Rev. St. 1901, p. 399, §§ 95, 96, and p. 527, § 213. City of Chicago v. Hulburt, 205 Ill. 372, 68 N. E. 786; City of Chicago v. Singer, 202 Ill. 75, 66 N. E. 874.

22. Forgotson v. Becker, 39 Misc. 813, 81 N. Y. S. 321; McLean v. Territory [Ariz.] 71 P. 926. See 1 Curr. L. 92, n. 34.

23. Laws 1902, p. 1486, c. 580. Long Branch Pier Co. v. Crossley, 40 Misc. 249, 81 N. Y. S. 905. Code Civ. Proc. § 3064. Fischer v. Brooklyn Heights R. Co., 84 N. Y. S. 254.

24. It had been opened and then reinstated after further default. Wolfe v. Murray, 96 Md. 727, 54 A. 876. See 1 Curr. L. 92, n. 35.

25. Code Civ. Proc. §§ 3046, 3057. The affidavits for reversal should be served with the notice of argument. Austen v. Columbia Lubricants Co., 85 N. Y. S. 362. Municipal court act, § 311, Laws 1902, p. 1578, c. 580. Where allegations of affidavits are not disputed they must be taken as true. Lazarus v. Boynton, 86 N. Y. S. 104. Compare Brown v. Bouse, 86 N. Y. S. 240.

26. Fowler v. Jenks, 90 Minn. 74, 96 N. W. 914.

27. Leaman v. Atkinson [Neb.] 96 N. W. 149.

28. Herman v. Beck [Neb.] 94 N. W. 512.

29. Creighton v. Chicago, R. I. & P. R. Co. [Neb.] 94 N. W 527.

30. Notwithstanding the remedy by motion for new trial provided for such cases by Sand. & H. Dig. § 5882. Beidler v. Beidler, 71 Ark. 318, 74 S. W. 13.

31. Koehler & Co. v. Brady, 82 App. Div. 279, 81 N. Y. S. 695.

32. Party escaping beyond jurisdiction in violation of ne exeat and injunction. Bronk v. Bronk [Fla.] 35 So. 870.

33. Swift & Co. v. Platte [Kan.] 72 P. 271.

34. See 1 Curr. L. 92.

ties who may be affected by a reversal should be brought in in order to give jurisdiction.[35] All joint defendants must be brought in, or else a severance of interest in the judgment must appear on the record,[36] and where the judgment rejects a moneyed demand against several defendants in solido, all defendants are necessary parties, and failure to cite one of them is fatal.[37] Appellant, however, is not required to look beyond the record and cite persons not parties to the judgment appealed from,[38] nor is it necessary to join parties whose interests will not be affected,[39] and a defendant not served and not appearing below need not be made a party.[40] Co-parties declining to join may be made defendants in error,[41] and an appeal may be by one of several co-parties in behalf of others; but in such case, rights of co-appellants wholly unconnected from those of appellant will not be reviewable.[42]

An appeal by a mortgagee in condemnation proceedings is not effectual as to the owner against whom no summons has been issued; the condemnation plaintiff may, however, bring him in if necessary to the protection of its rights.[43]

On appeal in mandamus against a board of county commissioners, the new incumbents of the office are not necessarily served and made parties.[44]

A sentence for contempt of court will not be reviewed in a proceeding to which the state is not a party.[45]

An appeal by an infant should be taken by his guardian ad litem.[46]

The administrator alone may prosecute error from the allowance of a claim against the estate.[47]

An appeal cannot be taken in the name of a receiver where its effect would be to compel the largest creditor to contribute to litigation against himself.[48]

35. Contestant in election proceedings is necessary party on appeal by intervenor. Moore v. Waddington [Neb.] 96 N. W. 279. Co-defendants having interest adverse to appellants. First Nat. Bank v. Gordon Hardware Co., 31 Wash. 682, 72 P. 464; Wax v. Northern Pac. R. Co., 32 Wash. 210, 73 P. 380. All parties adverse to appellant in the court below must be made appellees. Kuhn v. Am. Mut. L. Ins. Co., 160 Ind. 356, 66 N. E. 890. On appeal by a creditor of a bankrupt from an order approving a composition under which a majority of the creditors have received the amounts to which they were entitled, the assenting creditors are necessary parties. Marshall Field & Co. v. Wolf & Bro. Dry Goods Co. [C. C. A.] 120 F. 815. See 1 Curr. L. 93, n. 56, 57.

36. Faulkner v. Hutchins [C. C. A.] 126 F. 362. See 1 Curr. L. 93, n. 58.

37. Handlin v. Dodt, 110 La. 936, 34 So. 881.

38. Succession of Wegmann, 110 La. 930, 34 So. 878. In perfecting an appeal from a justice's court, it is necessary to bring before the circuit court only those persons who were parties to the judgment appealed from. Gormley v. Hartray, 105 Ill. App. 625.

39. Parties originally co-defendants presumed to have been dismissed from the case. Halstead v. Olson [Neb.] 97 N. W. 442. A widow's right of dower being unaffected by an order to sell her husband's real estate to pay debts, she is not a necessary party on appeal from such an order. In re Smith's Estate, 43 Or. 595, 73 P. 336. A vendor called in warranty in a petitory action, even though he has taken upon himself the defense of the suit in the lower court, may restrict his appeal to the judgment obtained against him by his vendee on the warranty, and in such case need not make the plaintiff in the main case a party to the appeal. Southern Development Co. v. Dubroca, 109 La. 990, 34 So. 50. Where the trustee in bankruptcy of a contractor to build a county building appeals from an order distributing the fund recovered by him from the county, the county is not a necessary party. Reid v. Pauly [C. C. A.] 121 F. 652.

40. Hines v. McLellan, 117 Ga. 845, 45 S. E. 279; Chason v. Anderson, 119 Ga. 495, 46 S. E. 629. Defendants not served with process and as to whom the cause was dismissed at plaintiff's cost should not be joined as plaintiffs in error. Patterson v. Morrell Hardware Co. [Colo. App.] 75 P. 592. See 1 Curr. L. 93, n. 45.

41. One of several complainants whose bill has been dismissed for want of equity may bring error, joining the others as defendants, his act in so doing, and theirs in declining to assign cross errors or unite in writ, operating to create a severance. Wormley v. Wormley, 207 Ill. 411, 69 N. E. 865.

42. Southern R. Co. v. Glenn's Adm'r [Va.] 46 S. E. 776.

43. Omaha Bridge & Terminal R. Co. v. Reed [Neb.] 96 N. W. 276.

44. State v. Board of Com'rs of Clinton County [Ind.] 68 N. E. 295.

45. Whitaker v. McBride [Neb.] 98 N. W. 877.

46. Ramsey v. Keith's Adm'r, 25 Ky. L. R. 1302, 77 S. W. 693.

47. Herman v. Beck [Neb.] 94 N. W. 512.

48. Cook v. Anderson Food Co. [N. J. Eq.] 55 A. 1042.

An appeal by a partnership must be in the name of the firm in Georgia.[49]

In Indiana, vacation appeals must bring in all parties,[50] and all defendants against whom judgment has been rendered made co-appellants,[51] but the statute does not require it, in term time appeals.[52]

A joint notice of appeal by plaintiff and defendants, whose interests are identical, is proper in Iowa,[53] and if co-parties refuse to join after notice they cannot afterwards appeal in their own right.[54]

Where defendant appeals, in Washington, notice must be given to the sureties on the cost bond which plaintiff furnished below,[55] but plaintiff on appeal from a judgment against himself alone need not notify his sureties,[56] though an appeal from a judgment against sureties on a cost bond will be dismissed, where the sureties on the bond have not joined in the appeal, nor been served with notice of appeal,[57] notwithstanding the judgment was without jurisdiction and absolutely void.[58]

Successors in title and interest and substituted parties.[59]—On the death of the appellee the personal representative should be substituted, where if appellant succeed, the judgment would be personal against appellee,[60] and where a foreclosure defendant has transferred his interest and died pending appeal, his grantee may properly be substituted;[61] but the assignee of a judgment is not entitled to notice of appeal.[62] Substitution, however, is permissive and addressed to the discretion of the court,[63] and application should be first made to the trial court, but where first made on appeal a like order should be made below.[64] Where a judgment debtor desires to appeal after the death of the creditor, no revival in the name of the administrator is necessary, but on a showing of the facts in the petition in error, appellate process will issue against the administrator.[65] Though defendant may prosecute a writ of error after plaintiff's death it should designate the defendants therein by name and not merely as "the heirs" of plaintiff.[66] In Massachusetts, where, pending an appeal from a decree of the probate court granting a separation, the wife dies leaving a will, the appeal should not be dismissed, but the superior court should retain the cause so far as necessary to finally dispose of all the questions involved in the appeal.[67] Though the question to be litigated

49. Civ. Code, § 4460. Kline v. Swift Specific Co., 118 Ga. 514, 45 S. E. 314.

50. Appeal prayed separately by one of several co-parties and granted in term time but not then perfected [Burns' Rev. St. 1901, § 647]. Burns v. Trustees of Huntertown Cemetery Church, 31 Ind. App. 640, 68 N. E. 915. Cf. Ashley v. Henderson [Ind. App.] 69 N. E. 469. See 1 Curr. L. 93, n. 53.

51. That appellant's rights were asserted by cross complaint is immaterial. Haymaker v. Schneck, 160 Ind. 443, 67 N. E. 181.

52. Burns' Rev. St. 1901, § 647a. Burns v. Trustees of Huntertown Cemetery Church, 31 Ind. App. 640, 68 N. E. 915. On appeal by one of several joint plaintiffs against whom a joint judgment for costs was rendered, the other co-plaintiffs should be named and notified as appellants, not as appellees. Id. Where all are named as appellants the filing of a refusal of part to join will not cause dismissal. Baltes Land Stone & Oil Co. v. Sutton [Ind. App.] 69 N. E. 179. See 1 Curr. L. 93, n. 55.

53. Code, §§ 4111, 4112, providing that co-parties must join or be barred. Thornburg v. Cardell [Iowa] 95 N. W. 239.

54. Code, §§ 4111, 4112, applies to parties brought in as defendants, their interests being identical with plaintiff's. Thornburg v. Cardell [Iowa] 95 N. W. 239.

55. Brockway v. Abbott [Wash.] 74 P. 1069.

56. O'Connor v. Lighthizer [Wash.] 75 P. 643.

57. Pierce v. Commercial Inv. Co., 31 Wash. 655, 72 P. 473.

58. Aetna Ins. Co. v. Thompson [Wash.] 76 P. 105.

59. See 1 Curr. L. 93.

60. Utter v. Kersey, 31 Ind. App. 25, 67 N. E. 109.

61. Fay v. Steubenrauch, 138 Cal. 656, 72 P. 156.

62. Currans v. Seattle & S. F. R. & Nav. Co. [Wash.] 76 P. 87.

63, 64. Fay v. Steubenrauch, 138 Cal. 656, 72 P. 156.

65. City of Charlottesville v. Stratton's Adm'r [Va.] 45 S. E. 737.

66. Western Union Tel. Co. v. Wofford [Tex. Civ. App.] 72 S. W. 620.

67. Rev. Laws, c. 153, § 36, c. 162, § 19 Rice v. Rice, 184 Mass. 488, 69 N. E. 319.

is one of general interest, a person not a party to the suit cannot be substituted as plaintiff after appeal.[68]

§ 4. *Adjudications which may be reviewed. A. Statutes and legislation.*[69]—Prior to the Arizona revision of 1901 no right of appeal from the action of the board of equalization existed.[70]

(§ 4) *B. Dependent on the general form or the character of the adjudication. 1. Nature of decision in general.*[71]—An order entered by consent is not appealable,[72] and the action of a judge cannot be reviewed under a statute giving an appeal from decisions of a court.[73] An order at chambers is not appealable.[74] The judgment must have been entered.[75]

Adjudications founded on the discretion[76] or wisdom of the trial court are not reviewable.[77]

"Merits," "principles of the cause," "orders preventing judgment," etc.[78] An order denying a motion to dismiss an action for want of jurisdiction does not affect a substantial right and prevent judgment,[79] but an order striking the cause on the ground that the case has been settled is appealable as preventing judgment;[80] and an order compelling plaintiff to separate his causes of action and allege which acts were negligent and which wanton involves the merits.[81] An order striking out a stipulation does not involve the merits and affect the judgment where the result would have been the same if the stipulation had been let stand.[82] An order involving the mode of trial for determining the issues raised by the pleadings is appealable,[83] but a motion mistakenly marked "filed," by the clerk, before leave granted to file it is not filed, and an order striking it merely purges the record of a mistake, and is therefore not appealable.[84] An order involving a matter of law which affects a substantial right is appealable.[85] In Virginia, any decree requiring the possession of property to be changed is appealable.[86]

(§ 4B) *2. Rulings relating to pleadings and process, and before trial.*[87]—Quashal of,[88] but not the refusal to quash summons, is appealable.[89] Neither is

68. 2 Bal. Code, § 4834, provides that in such matters one or more may sue for all. Hight v. Batley, 32 Wash. 166, 72 P. 1034.

69. See 1 Curr. L. 94.

70. Cochise County v. Copper Queen Consol. Min. Co. [Ariz.] 71 P. 946.

71. See 1 Curr. L. 94.

72. Order reciting that it was granted on opposing affidavits is not on consent. In re Post's Estate, 85 App. Div. 611, 82 N. Y. S. 1079.

73. Order taxing costs held an order of the court and not of the judge notwithstanding absence of caption [Code Civ. Proc. § 3265]. Lawson v. Speer, 91 App. Div. 411, 86 N. Y. S. 915. See 1 Curr. L. 94, n. 33.

74. Comp. Laws, §§ 4828, 5236. Order made while judge was holding court elsewhere, but appearing to be "by the court." Custer County Bank v. W. H. Walling Mercantile Co. [S. D.] 94 N. W. 682.

75. Code Civ. Proc. § 668. Entry on minutes of court. Marks v. Keenan, 140 Cal. 33, 73 P. 761. Minute entry not sufficient [Code Civ. Proc. §§ 1722, 1736]. Lisker v. O'Rourke, 28 Mont. 129, 72 P. 416. See 1 Curr. L. 95, n. 86, et seq.

76. See 1 Curr. L. 95.

77. See post, § 13 F 1. Rulings peculiar to province of trial court: Discretionary rulings. Meade County Bank v. Decker [S. D.] 98 N. W. 86. Order recommitting equity cause to take and report other testimony. Muckenfuss v. Fishburne, 66 S. C. 573, 44 S. E. 77; Id. 46 S. E. 637. Refusal of motion for order of reference on the accounting of an administrator in proceedings to subject land to the payment of debts. Gregory v. Perry, 66 S. C. 455, 45 S. E. 4.

78. See 1 Curr. L. 96.

79. Rev. St. 1898, § 3069, subd. 1. Maxon v. Gates, 118 Wis. 238, 95 N. W. 92. See 1 Curr. L. 96, n. 5.

80. Rev. St. 1898, § 3069, subd. 1. There had been a denial of a motion for findings and judgment on a verdict. Dr. Shoop Family Medicine Co. v. Schowalter [Wis.] 98 N. W. 940.

81. Acts 1898, p. 693, authorizes joinder. Bolin v. Southern R. Co., 65 S. C. 222, 43 S. E. 665; Lynch v. Spartan Mills, 66 S. C. 12, 44 S. E. 93.

82. R. S. 1898, § 3070. State v. Board of Trustees of Policemen's Pension Fund [Wis.] 98 N. W. 954.

83. Gregory v. Perry, 66 S. C. 455, 45 S. E. 4.

84. Born v. Schneider, 128 F. 179.

85. An order in a drainage proceeding under Code, § 1297, directing matters properly for the determination of commissioners to be referred to a jury [Code, § 648]. Porter v. Armstrong, 134 N. C. 447, 46 S. E. 997.

86. Decree appointing receiver and requiring him to take possession of property [Code 1887, § 3454]. Deckert v. Chesapeake Western Co., 101 Va. 804, 45 S. E. 799.

87. See 1 Curr. L. 96.

88. An order quashing the service of a summons after the time within which service

an order making a party defendant.[90] Rulings on motions to amend pleadings do not ordinarily affect any substantial right, nor have appealable finality.[91]

(§ 4B) 3. *Dismissals, nonsuits, orders to strike cause, etc.*[92]—If a dismissal determines the action it is appealable,[93] as is an involuntary nonsuit,[94] but a voluntary nonsuit,[95] or a dismissal on request or by consent of plaintiff is not appealable,[96] and an entry in the clerk's register noting the filing of an agreement to dismiss is not a dismissal from which an appeal can be taken.[97]

(§ 4B) 4. *Orders directing or arresting judgment, or on motion for new trial, are not reviewable at common law,*[98] or generally,[99] because lying in discretion,[1] but are by statute in some states.[2] And where a motion for a new trial is based upon alleged errors of law, no discretion is exercised in the decision, and it is reviewable.[3] Motions for new trial not being authorized in cases tried to the court in North Dakota, an appeal from an order denying such motion will not lie.[4] No appeal lies from an order denying a motion for a new trial of issues involved in the matter of a claim for compensation and expenses of a receivership, since no such motion lies.[5]

(§ 4B) 5. *Final judgment or decree.*[6]—The adjudication must be finally determinative of the controversy, and must substantially affect the rights of the parties.[7] It must be so far final that, if affirmed, nothing remains for the trial

may be made after filing complaint has the effect of discontinuing the action and is appealable. Wagnitz v. Ritter, 31 Wash. 343. 71 P. 1035.

89. An order denying a motion made on special appearance to quash service of summons is not appealable as an order affecting a substantial right, in effect determining the action or proceeding, or preventing final judgment [2 Bal. Code, § 6500]. Powell v. Nolan, 32 Wash. 403, 73 P. 349.

90. White v. Lawyers' Surety Co., 84 N. Y. S. 247.

91. Booth v. Callahan, 97 Md. 317, 55 A. 625. See 1 Curr. L. 96, n. 14.

92. See 1 Curr. L. 97.

93. An order dismissing an action for delay in serving the summons is final and appealable. Marks v. Keenan, 140 Cal. 33, 73 P. 751. Where a judgment of dismissal is prematurely entered without hearing on issue joined, an appeal lies only from an order on motion to vacate, and not from the judgment. State v. Huston, 32 Wash. 154, 72 P. 1015. No appeal lies from an order dismissing a complaint, as such order can be reviewed only on appeal from the final judgment. Kromback v. Pennsylvania Steel Co., 84 N. Y. S. 297. See 1 Curr. L. 97, n. 28.

94. Sims v. Southern R. Co., 66 S. C. 520, 45 S. E. 90. See 1 Curr. L. 97, n. 37.

95. Where plaintiff takes a nonsuit on the court's intimating that he is inclined to sustain a pending demurrer to the evidence, he cannot appeal, the nonsuit being voluntary. Carter v. O'Neill, 102 Mo. App. 391, 76 S. W. 717. See 1 Curr. L. 97, n. 34.

96. Bacon v. Abbey Press, 87 N. Y. S. 165.

97. Kinman v. Scheuer [Mont.] 75 P. 690.

98. See 1 Curr. L. 98.

99. N. J. Act April 3, 1902, does not give right of appeal from order refusing new trial. Mitchell v. Erie R. Co. [N. J. Law] 56 A. 236.

1. See post, § 13 F.

2. Blended motion for judgment notwithstanding findings or for new trial, is in effect motion for new trial. Noble v. Great Northern R. Co., 89 Minn. 147, 94 N. W. 434. Order directing judgment notwithstanding verdict, based on alternative motion for judgment or new trial. Peterson v. Minneapolis St. R. Co., 90 Minn. 52, 95 N. W. 751.

3. Under Gen. Laws, 1901, c. 46, p. 51, order is presumed not discretionary unless so stated. Fitger v. Archibald Guthrie & Co., 89 Minn. 330, 94 N. W. 888; Smith v. Minneapolis St. R. Co. [Minn.] 97 N. W. 881.

4. Rev. Code 1899, § 5630. Bank of Park River v. Town of Norton [N. D.] 97 N. W. 860.

5. Forrester v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 76 P. 2.

6. See 1 Curr. L. 98.

7. Morgan v. Thompson [C. C. A.] 124 F. 203; McLucas v. St. Joseph & G. I. R. Co. [Neb.] 96 N. W. 115; Fugazzi, Lovelace Co. v. Tomlinson, 119 Ga. 622, 46 S. E. 831.

Orders held final: The denial of a petition to set aside the appointment of an administrator. In re Tasanen's Estate, 25 Utah, 396, 71 P. 984. Order dismissing bill for want of equity after sustaining demurrer. Wormley v. Wormley, 207 Ill. 411, 69 N. E. 865. An order of the county court refusing an application to file a claim against a decedent's estate. Ribble v. Furmin [Neb.] 98 N. W. 420. Judgment in a proceeding in error. Code Civ. Proc. § 501, does not render such a judgment interlocutory. Bastian v. Adams [Neb.] 97 N. W. 231. Dismissal of action for failure to return and file summons. Pacific Pav. Co. v. Vizelich, 141 Cal. 4, 74 P. 352. A decree of the circuit court of appeals dismissing a bill for want of equity without prejudice to an action at law. Beasley v. Texas & P. R. Co., 191 U. S. 492, 24 S. Ct. 164. Decree ordering foreclosure and subrogation of complainant, and directing reference. Kirkland v. Mills, 138 Ala. 192, 35 So. 40. A decree for costs in favor of the clerk of court, providing for execution. In re Michigan Cent. R. [C. C.

court but to execute it.[8] It is not final if the case be retained,[9] or where an intermediate appellate court reverses a judgment of an inferior court and remands the case for a new trial,[10] or retains it for trial de novo.[11] Rulings on demurrer are not generally final. Until there has been in the trial court a judgment finally disposing of the case, the appellate court is without jurisdiction to entertain a complaint that error was committed by the trial judge in striking, on demurrer, portions of defendant's answer.[12] A judgment sustaining a demurrer to the petition which does not order that the "plaintiff take nothing by his writ" and that the "defendants go thereof without day" is not final.[13] A judgment overruling a de-

A.] 124 F. 727. Order allowing clerk commission on fund in custodia legis. Stillman v. Hart [C. C. A.] 126 F. 359. Order of county court awarding counsel fees incurred by persons after ceasing to be representatives of a decedent. In re Currier's Estate [Colo. App.] 74 P. 340. Judgment awarding plaintiff costs up to filing of answer and defendant costs after. Strull v. Louisville & N. R. Co., 26 Ky. L. R. 678, 76 S. W. 181.

Orders held not final: An order directing preparation of a decree in accordance with findings. Watkins v. Hughes, 206 Pa. 526, 56 A. 22. Order dismissing a motion for judgment on the pleadings. City of Philadelphia v. Pemberton, 206 Pa. 73, 55 A. 835. Order amending judgment. Murphy v. People, 207 Ill. 337, 69 N. E. 782. Order setting aside judgment or decree, fixing time for filing pleadings, and setting cause down for new trial [Code Civ. Proc. § 602]. Rose v. Dempster Mill. Mfg. Co. [Neb.] 94 N. W. 964. Order denying petition to vacate judgment allowing claim against decedent's estate. In re Emanuel's Estate, 31 Colo. 440, 72 P. 1079. A judgment overruling or sustaining a demurrer. Rodgers v. Kallmeyer [Mo. App.] 78 S. W. 334. Judgment dismissing the case as to one defendant. Ropes v. Lansing [Fla.] 35 So. 863. Order dissolving injunction (Stubbs v. McConnell, 119 Ga. 21, 45 S. E. 710), except where injunction is the sole purpose of bill and dissolution is granted for want of equity in bill (Cahill v. Welch, 208 Ill. 57, 69 N. E. 877). Order of the orphan's court dismissing motion to quash appeal from appraisement for collateral tax. In re Belcher's Estate, 205 Pa. 153, 54 A. 714. Order of circuit court that special appeal from justice stand for trial on the merits. Dodge v. Nichols [Mich.] 98 N. W. 737. An order substituting a claimant of property, on application of defendant in a claim and delivery action. State v. District Court of First Judicial District, 28 Mont. 445, 72 P. 867. An order directing the sale by an executor of his decedent's real estate. In re Williamson's Estate, 26 Utah, 50, 72 P. 2: citing Steam Laundry v. Dole, 20 Utah, 469, 58 P. 1109; Wilson v. Meyer, 23 Utah, 529, 65 P. 488; Musser v. Edmunds, 23 Utah, 425, 64 P. 1105; Ogden City v. Bear Lake & R. W. W. & Irr. Co., 16 Utah, 440, 52 P. 697, 41 L. R. A. 305; Popp v. Daisy Gold Min. Co., 22 Utah, 457, 63 P. 185. Order appointing commissioners in a partition proceeding. Albemarle Steam Nav. Co. v. Worrell, 133 N. C. 93, 45 S. E. 466. Denial of leave to intervene, and order refusing to entertain appeal from decision of receivers with reference to proof of claim before them, both being discretionary. Land Title & Trust Co. v. Asphalt Co. [C. C. A.] 127 F. 1. Judgment for costs only. Welch v. Tippery [Neb.] 95 N. W. 491; McLucas v. St. Joseph & G. I. R. Co. [Neb.] 96 N. W. 115; Corley v. Corley, 53 W. Va. 142, 44 S. E. 132; Solack v. Gans [Neb.] 96 N. W. 633; Thompson v. Nelson [Neb.] 96 N. W. 194; Carlson v. Jordan [Neb.] 95 N. W. 671; Jarvis v. Chase County [Neb.] 97 N. W. 831; Hall v. Patterson [Fla.] 33 So. 982; Haynes v. Bramlett [Fla.] 35 So. 3. See 1 Curr. L. 98, n. 47.

8. Morgan v. Thompson [C. C. A.] 124 F. 203. See 1 Curr. L. 98, n. 49.

9. Order in partition, providing for further decision after hearing proofs. Wickes v. Wickes [Md.] 56 A. 1017. Decree on intervening petition against receiver, directing accounting and reference to master. Mercantile Trust Co. v. Chicago, P. & St. L. R. Co. [C. C. A.] 123 F. 389. Order allowing provisionally, counsel fee on behalf of trust estate. Clarke v. O'Brien, 97 Md. 738, 56 A. 788.

10. Morgan v. Thompson [C. C. A.] 124 F. 203.

Though in Nebraska, a judgment of the district court on appeal from an inferior tribunal, which is complete so far as the district court is concerned, and leaves nothing further to be done in that court is final, though the cause is remanded for further proceedings [Code Civ. Proc. § 582] (Ribble v. Furmin [Neb.] 94 N. W. 967), and in Ohio, on the overruling of a motion for judgment on special findings inconsistent with the general verdict, and the affirmance thereof by the circuit court, though the case is reversed on another point and sent back for a new trial, the defendant may bring error in the supreme court from the affirmance, and need not wait until after retrial in the lower court (Davis v. Turner [Ohio] 68 N. E. 819).

11. Judgment of common pleas in Ohio reversing probate decree in appropriation proceedings. State v. Judges of Court of Common Pleas of Hamilton County, 69 Ohio St. 372, 69 N. E. 659. The judgment of the district court on error, reversing the judgment of a justice and retaining the case for trial, is not final until final disposition of the case. McCormick Harvesting Mach. Co. v. Kolb [Okl.] 74 P. 367.

12. Turner v. Camp, 110 Ga. 631, 36 S. E. 76; Harvey v. Bowles, 112 Ga. 421, 37 S. E. 364; Berryman v. Haden, 112 Ga. 752, 38 S. E. 53; Ray v. Anderson, 117 Ga. 136, 43 S. E. 408; Fugazzi, Lovelace Co. v. Tomlinson, 119 Ga. 622, 46 S. E. 831.

13. Akins v. Hicks [Mo. App.] 77 S. W. 86; Boren v. Jack [Tex. Civ. App.] 73 S. W. 1061. Cf. Staacke Bros. v. Walker [Tex. Civ. App.] 73 S. W. 408.

murrer to an application for a writ of quo warranto is not final,[14] but a judgment overruling a demurrer to a response to a motion for a rule on a master to compel him to pay over trust fund is.[15] Refusal of judgment non obstante veredicto is not final,[16] nor is judgment for defendant on demurrer to plaintiff's evidence without determination of a cross action,[17] but an appeal lies from the refusal of a judgment by default.[18] A judgment entered without sufficient service of process may be appealed from without first taking a rule to strike it off.[19] An appeal lies at the instance of the parties cast, or either of them, from a judgment not rendered by consent, decreeing the partition of property of which one of said parties, not a co-owner, is usufructuary.[20] Though a motion to correct for judicial error a judgment rendered after overruling of demurrer cannot be entertained, a writ of error may be allowed.[21]

It must finally dispose of the case as to all parties.[22]

The question of finality as to the federal courts is not determined by the state practice, but is governed by Federal statutes and decisions.[23]

(§ 4B) 6. *Orders and adjudications in interlocutory or provisional, extraordinary, and special proceedings.*[24]—Interlocutory or provisional orders are not separately reviewable in the absence of legislation,[25] and no separate appeal will lie from an interlocutory order after final judgment.[26]

Statutes generally provide what intermediate orders may be reviewed,[27] and an enumeration of appealable orders excludes the reviewability of those not enumerated.[28] Interlocutory orders to be appealable in Louisiana must work an irreparable injury,[29] and in Mississippi appeals lie from interlocutory decrees "in order to settle the principles of the cause."[30] While in Tennessee, interlocutory orders cannot be reviewed or restrained on application except when they trench upon final relief, and also are of a nature to be actually enforced.[31] Refusing to vacate an order of arrest,[32] and refusing to set aside the service of summons,[33] are not separately reviewable. An order refusing to change the place of trial is not appealable.[34] Neither is an order denying a motion to resettle a previous order by in-

14. Sayer v. Harding, 118 Ga. 642, 45 S. E. 418.

15. Maxwell's Trustee v. England, 26 Ky. L. R. 143, 74 S. W. 1091.

16. Nelson County v. Bardstown & L. Turnpike Co., 25 Ky. L. R. 1777, 78 S. W. 856.

17. Carothers v. Holloman [Tex. Civ. App.] 75 S. W. 1084.

18. Tennessee River Land & Timber Co. v. Butler, 134 N. C. 60, 45 S. E. 955.

19. Com. v. Bangs, 22 Pa. Super. Ct. 403.

20. Maguire v. Fluker [La.] 36 So. 231.

21. Second Nat. Bank v. Ralphsnyder [W. Va.] 46 S. E. 206.

22. Dismissal as to one and retention as to other defendants is not. Menge v. Warriner [C. C. A.] 120 F. 816. Final judgment as to one defendant and no disposition as to other is not. Stewart v. Lenoir, 31 Tex. Civ. App. 470, 72 S. W. 619; Britt v. Sweeney [Tex. Civ. App.] 75 S. W. 933. Judgment for defendants in an action against a partnership, service being had on one partner only, is final. Staacke Bros. v. Walker [Tex. Civ. App.] 73 S. W. 408. See 1 Curr. L. 99, n. 54.

23. Menge v. Warriner [C. C. A.] 120 F. 816.

24. See 1 Curr. L. 99.

25. See 1 Curr. L. 99, n. 56.

26. Bates v. Holbrook, 89 App. Div. 548, 85 N. Y. S. 573.

27. See 1 Curr. L. 99, n. 58.

28. White v. Lawyers' Surety Co., 84 N. Y. S. 247; Leavitt v. Katzoff, 86 N. Y. S. 495.

29. A judicial sequestration effecting no change of possession does not. State v. Allen, 110 La. 853, 34 So. 804. Order dismissing a rule to return into court a deposition is not. Drainage Commission of New Orleans v. Charles E. Collom & Co., 111 La. 815, 35 So. 918.

30. Order denying motion to dismiss case as to one party, where question involved is whether liability of such party has been settled by previous appeal [Code 1892, § 34]. State v. Woodruff [Miss.] 35 So. 422.

31. When a court has power to appoint a receiver under facts stated, objections as to matters of form only cannot be received when collaterally presented to the supreme court on an application for a supersedeas. Troughber v. Akin, 109 Tenn. 451, 73 S. W. 118. Orders requiring parties to interplead. Wagstaff v. Wagstaff, 67 Kan. 832, 72 P. 780.

32. Leavitt v. Katzoff, 86 N. Y. S. 495.

33. Reynolds v. Packer's Nat. Bank, 65 Kan. 461, 71 P. 847.

34. Waukesha County Agricultural Soc. v. Wisconsin Cent. R. Co., 117 Wis. 589, 94 N. W. 289.

serting therein that the motion was denied on a particular ground,[35] nor an interlocutory decree entered in the circuit court in execution of the mandate of the circuit court of appeals.[36] The reservation to a defeated party of the right to renew a motion which was denied is no ground for appeal by the successful party.[37] An appeal lies to the district court from an order of a United States commissioner denying a new trial in a Chinese exclusion case,[38] and from an order of the special term of the city court of New York, denying a motion to compel the acceptance of service of a notice of appeal.[39]

These orders must be final,[40] or affect a substantial right.[41]

An ex parte order appointing a receiver is appealable,[42] and an appeal lies from a judgment allowing his compensation and expenses.[43]

An order discharging an order to show cause for contempt in disobeying an order of court granted on final decree, is reviewable,[44] and proceedings to punish a witness for contempt in failing to give testimony for use in an action in another state constitute a special proceeding from which appeal will lie.[45] A judgment of the circuit court convicting defendant of contempt in an equity suit, being a judgment rendered in a criminal case separate and distinct from the equity suit, is reviewable by the circuit court of appeals on writ of error.[46]

Error lies in Wisconsin at the suit of either party to the decision of a commissioner in habeas corpus proceedings,[47] but no appeal on behalf of the state lies from an order of the probate judge in Alabama admitting a person charged with homicide to bail on habeas corpus, prior to indictment.[48]

An appeal lies from an order of reference and from an order denying a motion to vacate the order.[49]

35. Hall v. Redington, 87 App. Div. 248, 84 N. Y. S. 279.

36. Minnesota Moline Plow Co. v. Dowagiac Mfg. Co. [C. C. A.] 126 F. 746.

37. Denial of corporation's motion for discharge of receiver, with right to renew; appeal by receiver. Union Surety & Guaranty Co. v. Greater New York Amusement Co., 87 App. Div. 287, 84 N. Y. S. 286.

38. U. S. v. Ng Young, 126 F. 425.

39. Code Civ. Proc. § 3189. Masor v. Jacobus, 84 N. Y. S. 270.

40. **Orders held final:** Order quashing attachment. Steuart v. Chappell [Md.] 57 A. 17. Order dismissing petition for habeas corpus. Costello v. Palmer, 20 App. D. C. 210.

Orders not final: Order directing witness to answer certain specified questions. Strong v. Randall, 177 N. Y. 400, 69 N. E. 721. Order pending suit restraining threatened trespasses, for inspection and survey. Montana Ore Purchasing Co. v. Butte & B. Consol. Min. Co. [C. C. A.] 126 F. 168. Order of discharge on writ of habeas corpus. Magerstadt v. People, 105 Ill. App. 316. Order overruling plea to require another party to be made defendant in suit to foreclose mortgage. Miller v. Hubbard [Mich.] 98 N. E. 390. Order refusing a motion to strike from files a claim of exemptions in a garnishment proceeding and render judgment against garnishee. Chamberlain v. Mobile Fish & Oyster Co., 137 Ala. 187, 33 So. 822. See 1 Curr. L. 99, n. 64.

41. A judgment vacating a town or village plat is a final order affecting a substantial right, and appealable. Koochiching Co. v. Franson [Minn.] 98 N. W. 98. After appeal to the superior court from a judgment of an acting justice of the peace, an order of the superior court vacating the judgment appealed from on motion is a final order in a special proceeding, and affects a substantial right. Deuster v. Zillmer, 119 Wis. 402, 97 N. W. 31. An order taking minors' funds out of the hands of their tutor is presumably injurious to them and appealable. Succession of Wegmann, 110 La. 930, 34 So. 878. See 1 Curr. L. 99, n. 65.

42. Sess. Laws 1899, p. 146 expressly so provide. Rumney v. Donovan, 28 Mont. 69, 72 P. 305. Orders appointing receivers belong to the class of interlocutory orders, and are not in general reviewable upon application for supersedeas. Troughber v. Akin, 109 Tenn. 451, 73 S. W. 118.

43. Forrester v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 76 P. 2. Where an order is made fixing a receiver's compensation and expenses and subsequently another is made adjudging that a certain party shall pay such compensation and expenses, the latter order is the final one from which appeal will lie. State v. District Court, 28 Mont. 227, 72 P. 613.

44. Deppe v. Ford, 89 Minn. 253, 94 N. W. 679. Violating an injunction against infringement of a trade-mark. Enoch Morgan's Sons Co. v. Gibson [C. C. A.] 122 F. 420.

45. Strong v. Randall, 177 N. Y. 400, 69 N. E. 721.

46. Act Mch. 3, 1891, c. 617. In re Heinze [C. C. A.] 127 F. 96.

47. State v. Whitcher, 117 Wis. 668, 94 N. W. 787.

48. Cr. Code 1896, § 4314. State v. Berkstresser, 137 Ala. 109, 34 So. 686.

49. Albany Brass & Iron Co. v. Alton, 84 N. Y. S. 180.

Provisional orders for relief.[50]—Error will not lie from an order discharging an attachment when there is nothing in the record to show that any action was ever taken under the writ.[51] A rule made by a justice of the supreme court in vacation, discharging a rule to show cause why a writ of attachment issued out of the supreme court should not be quashed, cannot be reviewed as a motion made before a single justice.[52]

An order entered in the minutes granting an injunction is appealable,[53] but no appeal lies from an order of a judge intended as process to carry into effect an order granting an injunction.[54] Orders on motions to dissolve temporary injunctions are not appealable in Iowa,[55] Texas,[56] or Nebraska,[57] but in Louisiana, a judgment dissolving an injunction against acts of trespass on real property is appealable, whether interlocutory or not, the injury being irreparable.[58] The granting of a temporary restraining order is not reviewable after it has passed into a permanent injunction.[59] An order granting an injunction pendente lite,[60] or continuing a preliminary injunction, is appealable to the circuit court of appeals,[61] except in cases where that court would not have jurisdiction of an appeal from the final decree in the case.[62]

Eminent domain proceedings[63] are covered by statute, as shown below.[64]

(§ 4B) 7. *Orders after judgment*[65] are not separately appealable in Colorado.[66] An order vacating[67] or refusing to vacate a judgment is appealable,[68] but an order opening[69] or refusing to open a default is not,[70] and defendant cannot

50. See 1 Curr. L. 100.

51. Sand Hills Commercial Co. v. Phillips Bros. & Rennau [Neb.] 98 N. W. 718.

52. Garbett v. Mountford [N. J. Law] 57 A. 257.

53, 54. MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 75 P. 89.

55. An order on motion to dissolve a preliminary injunction not being a final adjudication of the merits can only be considered on a proper assignment of errors. Hawkeye Ins. Co. v. Huston, 121 Iowa, 393, 96 N. W. 895.

56. An appeal will not lie from an interlocutory order modifying and continuing in force a temporary injunction, where the record fails to show that the cause has been finally tried or disposed of. Medlin v. Seidemann [Tex. Civ. App.] 79 S. W. 590.

57. An order dissolving or modifying a temporary injunction is not reviewable except in connection with a final judgment disposing of the case. Horst v. Board of Sup'rs of Dodge County [Neb.] 98 N. W. 822.

58. Cotten v. Christen, 110 La. 444, 34 So. 597.

59. Wagstaff v. Wagstaff, 67 Kan. 832, 72 P. 780.

60. Act Mch. 3, 1891. Kerr v. City of New Orleans [C. C. A.] 126 F. 920.

61. Act Cong. June 6, 1900. Armat Moving Picture Co. v. Edison Mfg. Co. [C. C. A.] 125 F. 939.

62. Jurisdiction dependent solely on issue involving constitutionality of statute. Wright v. MacFarlane & Co. [C. C. A.] 122 F. 770.

63. See 1 Curr. L. 101.

64. N. C. Code, 1883, § 1946, limits appeal to final judgments confirming reports of commissioners on exceptions. Holly Shelter R. Co. v. Newton, 133 N. C. 132, 136, 45 S. E. 549. Upon the filing of exceptions to the report and the determination of them by the court, either party may appeal to the court at term, and thence, after judgment, to the supreme court [Code 1883, § 1946]. Cape Fear & N. R. Co. v. Stewart, 132 N. C. 248, 43 S. E. 638. Judgment for the recovery of the land is final, though the question of damages is still pending, but a mere determination that plaintiff has a right to condemn is not. The original order appointing commissioners is not appealable in West Virginia. Wheeling & E. G. R. Co. v. Atkinson, 53 W. Va. 539, 44 S. E. 773; citing Pack v. Chesapeake & O. R. Co., 5 W. Va. 118; Wheeling Bridge & Terminal Co. v. Wheeling Steel & Iron Co., 41 W. Va. 747, 24 S. E. 651; Tennessee Cent. R. Co. v. Campbell, 109 Tenn. 640, 75 S. W. 1012. N. J. Traction act of 1893 (P. L. 1893, p. 352; Gen. St. p. 3235) gives no right of appeal to companies organized thereunder, under the condemnation act of 1900, § 9 (P. L. 1900, p. 79). Paterson & St. L. Traction Co. v. De Gray [N. J. Law] 56 A. 250. Direct authority to appeal from "final orders" is not exclusive, and appeal will lie from order setting aside award of commissioners as excessive [Code Civ. Proc. § 3375]. In re Town of Guilford, 85 App. Div. 207, 83 N. Y. S. 312.

65. See 1 Curr. L. 101.

66. Mills' Ann. Code, § 898, provides for review on appeal from judgment. Van Buskirk v. Balch [Colo. App.] 74 P. 792. No appeal will lie from an order refusing to set aside a final judgment. Green v. Thatcher, 31 Colo. 363, 72 P. 1078; In re Emanuel's Estate, 31 Colo. 440, 72 P. 1079.

67. Department of Health of City of New York v. Babcock, 84 N. Y. S. 604. Not in Maryland if made within 30 days after entry of the judgment. Laubheimer v. Johnson [Md.] 57 A. 539.

68. Meade County Bank v. Decker [S. D.] 98 N. W. 86; Schrenkeisen v. Kroll, 85 N. Y. S. 1072. Contra, Leavitt v. Epstein, 86 N. Y. S. 208.

69. Department of Health of City of New York v. Babcock, 84 N. Y. S. 604. An order

appeal from an order opening a default against him on terms.[71] The refusal to vacate a judgment of dismissal for want of prosecution is not appealable,[72] neither is an order overruling a motion to set aside a pretended judgment of dismissal, which was in fact not a dismissal,[73] and an appeal does not lie from an order of the district court vacating a judgment which dismisses an appeal from the probate court;[74] but an order denying a motion to vacate the appointment of an administrator affects a substantial right and is appealable.[75]

An order denying a motion to correct a judgment is not separately appealable.[76]

An order discharging an order to show cause why defendant should not be punished for contempt in disobeying an order of court is a final one, affecting a substantial right, upon a summary application after judgment, and is appealable.[77] An interlocutory order designed to carry out a judgment previously rendered is ordinarily not appealable,[78] but an order overruling a motion to quash an execution is appealable under a statute allowing an appeal from a final order affecting a substantial right,[79] and where it is the only question at issue, an order recalling and quashing an execution is final and appealable.[80]

An order of the appellate term reversing on questions of law an order of the special term denying an application of the purchaser to be relieved from his purchase at a judicial sale, made after final judgment confirming the sale, is reviewable by the court of appeals.[81]

Orders relating to costs are reviewable on appeal from final judgment and not independently, costs being part of the judgment.[82]

An order refusing relief from an order denying settlement of a statement on motion for new trial, on the ground that the party seeking the settlement failed through surprise and excusable neglect, is appealable.[83]

(§ 4B) 8. *Decisions of intermediate courts.*[84]—A reversal by the appellate division in New York on questions of law only, the facts being examined and no error found, makes a case for the court of appeals.[85]

§ 4B) 9. *Parts of judgments.*[86]—Judgments may be reviewed in part so far as they are severable.[87]

(§ 4) *C. Dependent on character or value of action, subject-matter, or controversy.* 1. *Nature of action.*[88]—An action appealable to the circuit court in

setting aside a default and allowing defendant to answer in foreclosure of a tax lien, the summons by publication being defective, is not appealable as an order granting a new trial, nor as a final order after judgment affecting a substantial right. Ball. Code, § 6500 (Laws 1893, p. 119, § 1, sub. 7)]. Thompson v. Robbins, 32 Wash. 149, 72 P. 1043.

70. No appeal lies from an order of the municipal court in New York denying a motion to set aside a default judgment [Mun. Court Act, §§ 253-257, 311 (Laws 1902, c. 580)]. Leavitt v. Epstein, 86 N. Y. S. 208.

71. Long Branch Pier Co. v. Crossley, 40 Misc. 249, 81 N. Y. S. 905.

72. Tubman v. Baltimore & O. R. Co., 20 App. D. C. 541.

73. Kinman v. Scheuer [Mont.] 75 P. 690.

74. McMaster v. People's Bank of Edmond [Okl.] 73 P. 946.

75. In re Sutton's Estate, 31 Wash. 340, 71 P. 1012.

76. Cullen v. Harris [Utah] 73 P. 1048.

77. Deppe v. Ford, 89 Minn. 253, 94 N. W. 679.

78. It may be when the question is raised whether it had not already been carried out. Succession of Wegmann, 110 La. 930, 34 So. 878.

79. Ball. Ann. Codes & St. § 6500. Hewitt v. Root, 31 Wash. 312, 71 P. 1021.

80. Little & Smith v. Atchison, T. & S. F. R. Co. [Ind. T.] 76 S. W. 283.

81. Parish v. Parish, 175 N. Y. 181, 67 N. E. 298.

82. Spencer v. Mungus, 28 Mont. 357, 72 P. 663; King v. Allen [Mont.] 73 P. 1107.

83. Murphy v. Stelling, 138 Cal. 641, 72 P. 176.

84. See 1 Curr. L. 102.

85. Albring v. New York Cent. & H. R. R. Co., 174 N. Y. 179, 66 N. E. 665.

86. See 1 Curr. L. 103.

87. Defendant in foreclosure proceedings can appeal from the part of the judgment awarding a deficiency of judgment. Pereles v. Leiser, 119 Wis. 347, 96 N. W. 799.

88. See 1 Curr. L. 103.

Ohio, after final judgment in the court of common pleas, must be a civil action,[89] an action of which the common pleas has original jurisdiction, and one in which the right to demand a jury does not exist.[90] A judgment of a justice of the peace in forcible entry and detainer is not appealable in Nebraska, not being civil.[91]

(§ 4C) 2. *Questions of law.*[92]—No appeal lies in New Jersey from the district court upon questions of fact, but only for error in point of law, or upon the admission or rejection of evidence.[93]

(§ 4C) 3. *The existence of a constitutional question*[94] authorizes an appeal direct to the supreme court, in Missouri,[95] and ultimately to the highest court of probably all the states and to the Federal supreme court.[96] A previous decision of the same question by the supreme court of Missouri will not deprive it of jurisdiction,[97] and the question being open at the time of transfer, the court will retain the cause and decide it, though an interim decision settles the question.[98] The constitutional question must have been raised below,[99] and decided against the constitutionality of the statute.[1] A case properly before the Federal supreme court on a constitutional ground on appeal from a Federal court stands for decision on all questions properly in the record, even though the constitutional question is decided adversely to appellant;[2] but in such case the court will not be astute to support its jurisdiction upon another ground, which it could not consider apart from the failing foundation, and which has nothing to commend it but the letter of the law.[3]

The construction merely, of a statute[4] or contract, is not constitutional,[5] and the question whether the bill lodged with the secretary of state is the bill passed by the legislature and the finding of the court thereon raises no constitutional question.[6] The mere finding of an issue as to which party shall pay the costs cannot raise a constitutional question,[7] and the decision of a court cannot be "a law

89. Mandamus is a civil action. State v. Philbrick, 69 Ohio St. 283, 69 N. E. 439.

90. Rev. St. 1892, § 5226. Action for money not requiring a decree granting some mode of equitable relief is not appealable. Lange v. Lange, 69 Ohio St. 346, 69 N. E. 611.

91. Changed by statute, 1901, p. 484, c. 85. Sullivan Transfer Co. v. Paska [Neb.] 96 N. W. 163; Adkins v. Andrews [Neb.] 96 N. W. 228; Sullivan v. Haight [Neb.] 96 N. W. 487. Forcible entry and detainer proceedings are not civil. Adkins v. Andrews [Neb.] 96 N. W. 228.

92. See 1 Curr. L. 104.

93. P. L. 1902, p. 565. Phelps v. Seymour [N. J. Law] 57 A. 129.

94. See 1 Curr. L. 104.

95. Hilgert v. Barber Asphalt Pav. Co., 173 Mo. 319, 72 S. W. 1070. Criminal case. State v. Kentner [Mo. App.] 74 S. W. 9.

96. Rausch v. Barrere, 109 La. 563, 33 So. 602; Baltimore & O. S. W. R. Co. v. Harmon, 161 Ind. 358, 68 N. E. 589; Holmberg v. News-Times Pub. Co., 31 Colo. 456, 73 P. 865; People v. West Chicago St. R. Co., 203 Ill. 551, 68 N. E. 78.

97. Brown v. Missouri, K. & T. R. Co., 175 Mo. 185, 74 S. W. 973; State v. Smith, 177 Mo. 69, 75 S. W. 625.

98. Lee v. Jones [Mo.] 79 S. W. 927.

99. Brown v. Missouri, K. & T. R. Co., 175 Mo. 185, 74 S. W. 973; State v. Smith, 176 Mo. 44, 75 S. W. 468. The supreme court of Louisiana will retain jurisdiction on constitutional grounds, though not raised by pleadings, where appeal is allowed by the trial court on such a ground and the adverse litigant has answered complaint of error as to such constitutional question. Rausch v. Barrere, 109 La. 563, 33 So. 602. Objection on ground of taking property without due process of law and denial of equal protection of the law held sufficiently raised. Suess v. Imperial Life Ins. Co. [Mo. App.] 73 S. W. 353. Appeal from justice court; penalty and attorney fee to plaintiff in suit for labor claim. Baltimore & O. S. W. R. Co. v. Harmon, 161 Ind. 358, 68 N. E. 589. See 1 Curr. L. 105, n. 26.

1. Rausch v. Barrere, 109 La. 563, 33 So. 602. See 1 Curr. L. 105, n. 25.

2. Warner v. Searle & Hereth Co., 191 U. S. 195, 24 S. Ct. 79; Spreckles Sugar Refining Co. v. McClain, 192 U. S. 397, 24 S. Ct. 376.

3. San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 23 S. Ct. 571, 47 Law. Ed. 892.

4. Arbuckle v. Blackburn, 191 U. S. 405, 24 S. Ct. 148; Spreckles Sugar Refining Co. v. McClain, 192 U. S. 397, 24 S. Ct. 376. Question as to when an act takes effect. Hilgert v. Barber Asphalt Pav. Co., 173 Mo. 319, 72 S. W. 1070.

5. Question whether paving contractor is excused from performing contract within time stipulated is not. Hilgert v. Barber Asphalt Pav. Co., 173 Mo. 319, 72 S. W. 1070.

6. Holmberg v. News-Times Pub. Co., 31 Colo. 456, 73 P. 865.

7. Woody v. St. Louis & S. F. R. Co., 173 Mo. 547, 73 S. W. 475.

impairing the obligation of a contract."[8] Where a street railway company acquired its rights and constructed a tunnel under a navigable river on condition that navigation should not be obstructed, mandamus to compel it to lower the tunnel does not involve the determination of the constitutional question as to taking of property without compensation and due process of law.[9]

(§ 4C) 4. *Construction of statutes and public regulations*[10] is of itself a ground in some states,[11] though the case be one within the jurisdiction of a justice of the peace.[12] The question, however, must have been raised below.[13] The fact that a national bank is organized under a law of the United States will not confer jurisdiction upon the supreme court of a writ of error to the circuit court of appeals, where no other jurisdictional fact exists, except diversity of citizenship.[14]

(§ 4C) 5. *A jurisdictional question*[15] authorizes an appeal direct to the Federal supreme court,[16] but it must have been decided adversely to the plaintiff.[17]

(§ 4C) 6. *A federal question*[18] confers jurisdiction by direct appeal on the supreme court of Missouri.[19]

(§ 4C) 7. *Conflicting or overruling decisions.*[20] A conflict between the Missouri courts of appeals,[21] or between one of them and the supreme court,[22] makes a case certifiable to the supreme court. Jurisdiction, however, does not depend upon the actual existence of a conflict, but upon the fact that one of the judges deems it to exist.[23] Where the court of appeals unanimously deem their decision to be in conflict with that of the supreme court they should not certify the case, but should set aside their ruling, and make one conformable to that of the supreme court.[24]

(§ 4C) 8. *Revenue and tax cases,*[25] are appealable directly to the supreme court in Illinois,[26] Missouri,[27] and Louisiana,[28] but a controversy between two school districts as to which of them is entitled to school tax money,[29] or a suit to

8. Hilgert v. Barber Asphalt Pav. Co., 173 Mo. 319, 72 S. W. 1070.

9. People v. West Chicago St. R. Co., 203 Ill. 551, 68 N. E. 78.

10. See 1 Curr. L. 105.

11. Rocheblave Market Co. v. New Orleans, 110 La. 529, 34 So. 665. Burns' Rev. St. 1901, §§ 7510, 7512, regarding escape of gas and oil. Given v. State, 160 Ind. 552, 56 N. E. 750. Burns' Rev. St. §§ 7089, 7090, held not involved in suit for failure to furnish natural gas under contract. Mendenhall v. Diamond Plate Glass Co. [Ind.] 68 N. E. 595.

12, 13. Baltimore & O. S. W. R. Co. v. Harmon, 161 Ind. 358, 68 N. E. 589.

14. Continental Nat. Bank v. Buford, 191 U. S. 119, 24 S. Ct. 54.

15. See 1 Curr. L. 105.

16. Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 376, 24 S. Ct. 93. Question is raised by a finding as to whether facts exist conferring jurisdiction on the court. Diversity of citizenship. Sun Print. & Pub. Ass'n v. Edwards [C. C. A.] 121 F. 825. Where the contention is that on the facts no case of contempt was made out, and that therefore the court below had no jurisdiction to punish, the question is not one of jurisdiction, but goes to the merits. O'Neal v. U. S., 190 U. S. 36, 23 S. Ct. 776, 47 L. Ed. 945.

17. Decision sustaining jurisdiction but for defendant on the merits does not authorize appeal. Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 376, 24 S. Ct. 93.

18. See 1 Curr. L. 104, n. 21.

19. Plea of ultra vires by national bank. First Nat. Bank v. American Nat. Bank, 173 Mo. 153, 72 S. W. 1059.

20. See 1 Curr. L. 105.

21. A ruling that a sleeping car passenger when awake has exclusive custody of his luggage is not in conflict with a ruling that when he is asleep the custody is mixed. Morrow v. Pullman Palace Car Co., 98 Mo. App. 351, 73 S. W. 281.

22. That the Missouri court of appeals decides contrary to the ruling of the supreme court will not entitle the aggrieved party to a review by certiorari, where none of the judges of the court of appeals deems its opinion contrary to the supreme court's ruling. State v. Smith, 173 Mo. 398, 73 S. W. 211.

23. Clark v. Missouri, K. & T. R. Co. [Mo.] 77 S. W. 882.

24. Wilden v. McAllister [Mo.] 77 S. W. 730.

25. See 1 Curr. L. 105.

26. Practice Act, § 88.

27. Motion to vacate judgment for taxes and quash execution thereon, on the ground that defendant was a minor when the judgment was rendered, does not involve a construction of the revenue laws. State v. Gawronski [Mo.] 78 S. W. 807.

28. Burguieres v. Sanders, 111 La. 109, 35 So. 478.

29. People v. Helt, 203 Ill. 111, 67 N. E. 741; Trustees of Schools v. Board of School Inspectors, 208 Ill. 73, 69 N. E. 781.

restrain a county from entering into a contract with a private person to discover property omitted from the tax rolls, do not involve the revenue within the rule,[30] and in Louisiana, where the amount only, and not the validity of a tax, is in question, there is no jurisdiction.[31] In Kentucky, an action to recover personal property levied on to satisfy a tax may be appealed, irrespective of the amount in controversy.[32]

(§ 4C) 9. *Cases involving freeholds and titles,*[33] in most states, are appealable directly or ultimately to the highest court. The judgment to be rendered in the case must itself affect the title; that the title is the subject of collateral inquiry is not enough,[34] but when the ultimate object of an action is to unconditionally divest one party of title to realty and vest it in another, a freehold is involved.[35] Neither forcible entry proceedings,[36] suits for trespass, or to fix a boundary,[37] nor an action for damages because of prior conveyances of minerals from land concealed from plaintiff purchaser, involves title,[38] but a decree confirming title and charging it with a resulting trust does.[39] Actions concerning taxes on real estate,[40] and proceedings to foreclose liens on land, do not, as a rule, involve freeholds,[41] but where the defense of homestead is put in, the freehold is in issue;[42] and in Kentucky, where a lien upon land is asserted, the title is in controversy, and the court of appeals has jurisdiction regardless of the amount of the asserted lien.[43] Where the lien asserted is waived, no title is involved.[44] A suit to set aside a trust deed to land involves title in Missouri,[45] unless the ground be that the debt is paid.[46] Since surplus money arising on a sale under a trust deed is treated as realty, a contest over the ownership thereof under conflicting liens is within the exclusive jurisdiction of the supreme court in Missouri.[47]

30. Wilson v. Marion County, 205 Ill. 580, 68 N. E. 793.

31. Tobault v. New Orleans, 108 La. 686; Rocheblave Market Co. v. City of New Orleans, 110 La. 529, 34 So. 665.

32. Willis v. Thornton, 25 Ky. L. R. 1521, 78 S. W. 215.

33. See 1 Curr. L. 106.

34. Porter v. Kansas City & Northern Connecting R. Co., 175 Mo. 96, 74 S. W. 992. See 1 Curr. L. 106, n. 49.

35. Suit to annul conveyances. Venner v. Denver Union Water Co. [Colo.] 75 P. 412. A freehold is involved only where the result of the litigation must be that one party will gain and another lose a freehold estate, or where the title is so put in issue by the pleadings that a decision of the case necessarily involves a decision as to the title. Kellogg Newspaper Co. v. Corn Belt Nat. Bldg. & L. Ass'n, 105 Ill. App. 62. Mandamus to street railway company to compel lowering of tunnel under river does not, either as to freehold of company or easement of public. People v. West Chicago St. R. Co., 203 Ill. 551, 68 N. E. 78. Suit to set aside contract to convey in consideration of future support. Payne v. White, 207 Ill. 562, 69 N. E. 856. Petition to sell real estate of decedent to pay debts does not. Frier v. Lowe, 207 Ill. 410, 69 N. E. 899. The title is involved by a declaration for trespass quare clausum fregit, plea, liberum tenementum, and replication to the country. Illinois Cent. R. Co. v. Hatter, 207 Ill. 88, 69 N. E. 751.

36. Brennan Mercantile Co. v. Vickers, 31 Colo. 323, 73 P. 45.

37. Beasley v. Glassell, 110 La. 230, 34 So. 424.

38. Adkins v. Williams, 25 Ky. L. R. 1768, 78 S. W. 870.

39. Hewitt v. Price [Mo. App.] 74 S. W. 884.

40. An action to collect delinquent real estate taxes does not involve title. State v. Elliott [Mo.] 79 S. W. 696. A motion to vacate a judgment for taxes and quash the execution thereon, because of defendant's minority, does not involve title. State v. Gawronski [Mo.] 78 S. W. 807. A proceeding to set aside a special tax bill as a cloud on title does not involve title. Smith v. Westport, 174 Mo. 394, 74 S. W. 610.

41. Whether certain lots were subject to lien of trust deed. Williams v. Spitzer, 203 Ill. 606, 68 N. E. 49. Foreclosure of mortgage. Garber v. Garber, 66 Kan. 791, 72 P. 267. See 1 Curr. L. 107, n. 66.

42. Kellogg Newspaper Co. v. Corn Belt Nat. Bldg. & L. Ass'n, 105 Ill. App. 62.

43. Bybee's Ex'r v. Poynter, 25 Ky. L. R. 1251, 77 S. W. 698; Bishop v. Matney, 25 Ky. L. R. 1777, 78 S. W. 856. Vendor's lien. Carter v. Farthing, 24 Ky. L. R. 1927, 72 S. W. 745. Mechanic's lien. Fowler v. Pempelly, 25 Ky. L. R. 615, 76 S. W. 173.

44. Rhodes v. Frankfort Chair Co., 26 Ky. L. R. 2042, 79 S. W. 768.

45. Reed v. Colp [Mo. App.] 74 S. W. 422. Citing Nearen v. Bakewell, 110 Mo. 646, 19 S. W. 988; Overton v. Overton, 131 Mo. 669, 33 S. W. 1; Scheer v. Scheer, 148 Mo. 448, 50 S. W. 111; Bouner v. Lisenby, 73 Mo. App. 562.

46. Christopher v. People's Home & Sav. Ass'n [Mo.] 79 S. W. 899.

47. Eubank v. Finnell [Mo. App.] 73 S. W. 354.

(§ 4C) 10. *Validity of a franchise*[48] confers jurisdiction on the highest court of most states regardless of the amount involved.[49] Denial of a mandamus on the sole ground that the franchise of the corporation applying for it has expired, involves a question of franchise, and gives the supreme court jurisdiction of an appeal therefrom,[50] but no franchise is involved in mandamus to compel a street railway company to lower its tunnel under a river.[51]

(§ 4C) 11. *Probate and administration*[52] orders are usually appealable,[53] and where there is an appeal from the judgment in a contest over the probate of a will, an appeal lies from an order denying the motion for a new trial.[54]

(§ 4C) 12. *Bankruptcy matters.*[55]—The disposition by the district court of a fund surrendered by a mortgagee to a trustee in bankruptcy, subject to the mortgagee's lien, is reviewable on matter of law in the circuit court of appeals on petition therefor,[56] and an order denying the trustee's motion to expunge a claim allowed, unless further preferences were surrendered, and directing a return of a preference previously surrendered is appealable.[57]

(§ 4C) 13. *The jurisdictional amount,*[58] as prescribed by statute or constitution, must be involved,[59] excluding costs[60] and interest,[61] except where interest is recoverable as a part of the damages, in which case it is a part of the "amount in controversy."[62] An appeal, however, will lie from a judgment in effect enforcing the judgment of the supreme court, though the amount in controversy is less than the jurisdictional amount, since an appellate court should interpret its own judgments,[63] and an appeal lies to the court of appeals, in Colorado, from a final judgment of a court of record in a civil case, regardless of the amount of the judgment.[64] The constitutional provision that the supreme court of appeals, in Virginia, may have jurisdiction in civil cases involving not less than $300 is not self executing.[65]

Real, and not fictitious amounts, are the test of jurisdiction,[66] the evidence

48. See 1 Curr. L. 107.

49. Street railway. Indiana R. Co. v. Hoffman, 161 Ind. 593, 69 N. E. 399.

50. Iron Silver Min. Co. v. Cowie, 31 Colo. 450, 72 P. 1067.

51. Either of the company or the city. People v. West Chicago St. R. Co., 203 Ill. 551, 68 N. E. 78.

52. See 1 Curr. L. 107.

53. Decree accepting report of commissioners on claims not subject to collateral attack for fraud, being appealable. Judge of Probate v. Lee [N. H.] 56 A. 188. Order dismissing contest over proved will is appealable. Mahoney v. Superior Court of San Francisco, 140 Cal. 513, 74 P. 13. A judgment or order refusing to revoke the probate of a will is appealable [Code Civ. Proc. § 963 as amended 1901]. Hartmann v. Smith, 140 Cal. 461, 74 P. 7.

54. Hartmann v. Smith, 140 Cal. 461, 74 P. 7.

55. Petition in bankruptcy court asserting lien on specific property, held a bankruptcy proceeding under § 2, c. 7, within meaning of § 25, regulating appeals in bankruptcy proceedings, and not appealable independently, not being within § 25a "a judgment allowing or rejecting a debt or claim of $500 or over." Hutchinson v. Otis, 190 U. S. 552, 23 S. Ct. 778. Jurisdiction of supreme court of appeals in bankruptcy cases from circuit court of appeals. Hutchinson v. Otis, Wilcox & Co. [C. C. A.] 123 F. 14. See 1 Curr. L. 107, n. 69.

56. In re Antigo Screen Door Co. [C. C. A.] 123 F. 249.

57. Livingstone v. Heineman [C. C. A.] 120 F. 786.

58. See 1 Curr. L. 107, n. 80.

59. $100 in West Virginia. Brightwell v. Bare, 52 W. Va. 375, 44 S. E. 160. $200 exclusive of interest and costs, in Kentucky. Rhodes v. Frankfort Chair Co., 25 Ky. L. R. 2042, 79 S. W. 768. Intervenor prejudiced only to the extent of $50 cannot appeal. Newton v. Johnson Bros., 25 Ky. L. R. 653, 76 S. W. 161.

60. Costs allowed a commissioner are excluded. Rhodes v. Frankfort Chair Co., 25 Ky. L. R. 2042, 79 S. W. 768. See 1 Curr. L. 108, n. 81.

61. Rhodes v. Frankfort Chair Co., 25 Ky. L. R. 2042, 79 S. W. 768. The amount due at the time of bringing the suit, unaffected by subsequent accumulations of interest is decisive. Murphy v. Murphy, 207 Ill. 250, 69 N. E. 966.

62. Western Union Tel. Co. v. Noland [Tex. Civ. App.] 77 S. W. 1031. Interest which would necessarily accrue may be added to make up the jurisdictional amount. Herring v. Chesapeake & W. R. Co., 101 Va. 778, 45 S. E. 322.

63. State v. New Orleans Debenture Redemption Co. [La.] 36 So. 205.

64. Judgment for costs only is appealable. Crebbin v. Shinn [Colo. App.] 74 P. 795.

65. Flanary v. Kane [Va.] 46 S. E. 312.

66. Beasley v. Glassell, 110 La. 230, 34

being looked to to determine the question, irrespective of the allegations of the pleadings,[67] and where the evidence plainly shows the matter involved to be worth more than the jurisdictional amount, jurisdiction is sustained, though there is no averment as to the amount involved in the pleadings.[68] The right, however, is fixed by the pleadings rather than by the amount of the final judgment,[69] though in Colorado, the amount of the judgment rather than the amount in controversy controls.[70] The existence, however, of the jurisdictional amount must in some manner appear,[71] and where sufficient damages are alleged to give the appellate court jurisdiction, the court cannot say that a portion of such allegations is merely colorable, and that no recovery thereon could be had.[72]

The amount claimed by a dismissed set-off, plus the plaintiff's recovery, determines the amount in controversy on defendant's appeal,[73] and the amount claimed and recovered, for a wrongful death, and not the statutory amount recoverable controls.[74] The jurisdictional amount is not involved by a dispute as to the right of a party to pay $1 poll tax in a particular manner,[75] and where on motion to correct the journal entry, provisions for interest and costs are taken from the judgment, proceedings in error therefrom involve only the amount of such provisions.[76]

Where the original complaint is for an amount in excess of the jurisdictional amount, an amendment, before trial, procured by defendant, withdrawing the excess, will not deprive the defendant of his right of appeal,[77] and failure to request the submission of the issue of defendant's counterclaim will not amount to an abandonment of it, and deprive the court of jurisdiction, where there is no averment that it was interposed fraudulently to give jurisdiction.[78]

In succession proceedings, in Louisiana, the value of the entire succession determines appealability,[79] but elsewhere, claims against an estate are separate, and appealability is determined by the amount of each;[80] though a decree against distributees for a debt of their decedent involves the whole amount of the debt, and the distributees may appeal, regardless of the amount decreed against each,[81]

So. 424. In determining the jurisdiction of the supreme court on appeal from the appellate court of Illinois, the amount involved is determined by the evidence. Garden City Sand Co. v. American Ref. Crematory Co., 205 Ill. 42, 68 N. E. 724.

67. Beasley v. Glassell, 110 La. 230, 34 So. 424.

68. State v. Board of Pharmacy, 110 La. 99, 34 So. 159.

69. Attachment for more than $50 levied on property worth less, and judgment for less in favor of plaintiff is appealable to superior court. Padgett v. Ford, 117 Ga. 508, 43 S. E. 1002. A demurrer to an answer claiming a certain sum admits the sum named to be due and may be regarded as the amount in controversy, though the petition claims, and judgment is rendered for a less sum. Richart v. Goodpaster, 25 Ky. L. R. 889, 76 S. W. 831.

70. Splain v. Cripple Creek Mine & Supply Co., 31 Colo. 192, 72 P. 1060.

71. Where the form of procedure below does not require that the record or evidence show the amount or value in controversy, and it does not appear therein, affidavits may be filed in the supreme court to show a value giving jurisdiction (Hannah v. Charleston Nat. Bank, 53 W. Va. 82, 44 S. E. 152), but a claim presented against the estate of a decedent is not controlled by the statement in claimant's affidavit for a continuance as to what an absent witness will testify (Hall v. Hale's Estate, 202 Ill. 326, 66 N. E. 1050). The fact that defendant in an expropriation suit appealed to the supreme court cannot be accepted as evidence of the value of the matter in dispute, there being no showing of value in the record. City of New Orleans v. Contonio, 11 La. 545, 35 So. 740.

72. Sanger v. Chesapeake & O. R. Co. [Va.] 45 S. E. 750.

73. Unless the set-off is not a proper one. Montgomery v. Montgomery, 25 Ky. L. R. 1682, 78 S. W. 465.

74. Marsh v. Kansas City Southern R. Co. [Mo. App.] 78 S. W. 284.

75. State v. Sanders, 111 La. 188, 35 So. 509.

76. Edinburgh Lombard Inv. Co. v. Cooper [Kan.] 75 P. 488.

77. Taylor v. Spokane Falls & N. R. Co., 32 Wash. 450, 73 P. 499.

78. Western Union Tel. Co. v. Carver [Tex. Civ. App.] 74 S. W. 55.

79. Where the entire succession involves over $2,000 the court has jurisdiction. Succession of Bothick, 110 La. 109, 34 So. 163.

80. Corporation undergoing liquidation. Albany Mill Co. v. Huff Bros., 24 Ky. L. R. 2037, 72 S. W. 820. Decedent's estate. Cox v. Higginbotham's Adm'r, 25 Ky. L. R. 1057, 76 S. W. 1079.

and an appeal by executors from a decree requiring them to pay out legacies involves the total amount to be paid out, rather than the amount of each legacy.[82] In a bill to enforce the liability of stockholders for corporate debts, the liability of each stockholder, and not the liability of all, determines the amount in controversy.[83] Where expenses and costs are taxed half to plaintiff and half to defendant, the amount in controversy so far as either party is concerned, is half the total amount taxed.[84]

In replevin the amount involved is the value of the property, though defendant appellant prayed judgment for costs only,[85] but a suit for the possession of personal property by the owner against a lien claimant, in which the owner is successful, involves on appeal only the amount of the lien claimant's claim.[86] In an action for a breach of warranty of an article, the damages alleged, and not the value of the article alleged, furnish the basis of recovery.[87] More than the $5,000 necessary to give the supreme court jurisdiction of an appeal from the court of appeals of the District of Columbia is involved, where the relief demanded is the conveyance of a strip of land of slight value, or in the alternative to have the contract rescinded and be repaid the $6,000 paid for the whole tract.[88]

(§ 4C) 14. *Review of intermediate appeals.*[89]—No appeal lies to the supreme court from a decision of a circuit court of appeals, rendered on a petition to revise, in matter of law, the proceedings of a district court in bankruptcy,[90] and an appeal to the supreme court lies from a decision of the circuit court of appeals allowing or rejecting a claim against a bankrupt estate, only on a certificate of a justice of the supreme court, or where the amount in controversy exceeds $2,000, and the question involved is one which might have been taken on appeal or error from the highest court of a state to the supreme court.[91]

No appeal lies to the court of appeals of the District of Columbia in a case tried de novo in the supreme court on appeal from a justice of the peace.[92]

In Illinois, in actions ex contractu or ex delicto, if the damages sought are speculative in character and not capable of direct proof, and the damages are $1,000 or over, as shown by the judgment, an appeal lies to the supreme court from the appellate court without a certificate of error,[93] but where the damages are susceptible of direct proof and the judgment does not exceed $1,000, no appeal lies.[94] A suit to enjoin the collection of a judgment is not to recover money or chattels, and an appeal lies, though the judgment is less than $1,000, and no certificate of importance has been granted.[95]

An appeal lies in Indiana, from the appellate to the supreme court, only when the amount in controversy exceeds $6,000,[96] and actions within the jurisdiction of a justice of the peace are appealable neither to the supreme nor the appellate court, in the absence of certain questions.[97]

81. Smith v. Moore [Va.] 46 S. E. 826.
82. Ginter's Ex'rs v. Shelton [Va.] 45 S. E. 892.
83. Garden City Sand Co. v. American Refuse Crematory Co., 205 Ill. 42, 68 N. E. 724.
84. Nevian v. Herr, 25 Ky. L. R. 1475, 78 S. W. 137.
85. Gila Valley, G. & N. R. Co. v. Gila County [Ariz.] 71 P. 913.
86. Blank v. Powell [Kan.] 75 P. 486.
87. Everette Piano Co. v. Bash, 31 Ind. App. 498, 68 N. E. 329.
88. Shappirio v. Goldberg, 192 U. S. 232, 24 S. Ct. 259.
89. See 1 Curr. L. 110.
90, 91. Hutchinson v. Otis, Wilcox & Co. [C. C. A.] 123 F. 14.
92. D. C. Code, §§ 82, 226. Groff v. Miller, 20 App. D. C. 353; Key v. Roberts, 20 App. D. C. 391.
93. North Chicago St. R. Co. v. Cossar, 203 Ill. 608, 68 N. E. 88; Garden City Sand Co. v. American Refuse Crematory Co., 205 Ill. 42, 68 N. E. 724.
94. Bank of Commerce v. Miller, 202 Ill. 410, 66 N. E. 1039.
95. Torsell v. Elffert, 207 Ill. 621, 69 N. E. 761.
96. Suit involving partition of real estate, in which no money judgment was rendered, not appealable. Burke v. Barrett, 161 Ind. 416, 68 N. E. 896.
97. Everette Piano Co. v. Bash, 31 Ind. App. 498, 68 N. E. 329; Baltimore & O. S. W.

Certiorari will not lie from the supreme court of Colorado to review a decision of the court of appeals, except in cases where the court is without jurisdiction or has ignored decisions of the supreme court.[98]

(§ 4C) 15. *Federal review of state or territorial decisions*[99] will lie if there is a Federal question, but it must be a real and meritorious and not a fictitious one.[1] The claim of Federal right must have been specially set up,[2] and denied in the state court,[3] or at all events, it must appear from the record, by clear and necessary intendment, that the Federal question was directly invoked so that the state court could not have given judgment without deciding it.[4] If the decision of the state court rests on an independent ground, one which does not necessarily include a determination of the Federal right claimed, or upon a ground broad enough to sustain it without deciding the Federal question raised, the supreme court has no jurisdiction to review the judgment of the state court.[5] But where a Federal question is fairly presented, the jurisdiction attaches, though the state court assumes to base its decision on a state question, where the decision as to whether there is a Federal question involves the merits,[6] or it is apparent that the state question was injected for the purpose of denying the Federal right.[7] A personal as distinguished from an official interest is necessary to enable a party to invoke the jurisdiction of the supreme court to review the judgment of a state court.[8] Illustrative cases showing Federal questions are collected below.[9]

R. Co. v. Harmon, 161 Ind. 358, 68 N. E. 589.

98. People v. Court of Appeals [Colo.] 76 P. 407.

99. See Jurisdiction, 2 Curr. L. 613.

1. That refusal to allow filing of supplementary answer is taking without due process presents none. Sawyer v. Piper, 189 U. S. 154, 23 S. Ct. 633, 47 Law. Ed. 757.

2. Onondaga Nation v. Thacher, 189 U. S. 306, 23 S. Ct. 636, 47 Law. Ed. 826; Giles v. Teasley, 193 U. S. 146, 24 S. Ct. 359. Asserted too late on petition for writ of error in Federal court. Wabash Railroad v. Flannigan, 192 U. S. 29, 24 S. Ct. 224. Raised in time on motion for rehearing below, the state court entertaining and deciding the motion. Leigh v. Green, 193 U. S. 79, 24 S. Ct. 390; citing Mallett v. State, 181 U. S. 589, 21 S. Ct. 730, 45 Law. Ed. 1015. Failure to specifically claim right below prevents review here, notwithstanding discussion thereof by state court. Howard v. Fleming, 191 U. S. 126, 24 S. Ct. 49. See 1 Curr. L. 111, n. 46.

3. Giles v. Teasley, 193 U. S. 146, 24 S. Ct. 359. Citing Sayward v. Denny, 158 U. S. 180, 15 S. Ct. 777, 39 L. Ed. 941; Hoyt v. Shelden, 1 Black. 518, 17 L. Ed. 65; Maxwell v. Newbold, 18 How. 511, 15 L. Ed. 506.

4. Giles v. Teasley, 193 U. S. 146, 24 S. Ct. 359.

5. Giles v. Teasley, 193 U. S. 146, 24 S. Ct. 359. Citing New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 12 S. Ct. 142, 35 Law. Ed. 943; Eustis v. Bolles, 150 U. S. 361, 14 S. Ct. 131, 37 Law. Ed. 1111; Dower v. Richards, 151 U. S. 658-666, 14 S. Ct. 452, 38 Law. Ed. 305-308; Wade v. Lawder, 165 U. S. 624-628, 17 S. Ct. 426, 41 Law. Ed. 861. Denial to negro of right to register as voter under state constitution. Giles v. Teasley, 193 U. S. 146, 24 S. Ct. 359.

6. Citizens' Bank of Louisiana v. Parker, 192 U. S. 73, 24 S. Ct. 181.

7. Striking pleading raising question under local practice for prolixity. Rogers v. State of Alabama, 192 U. S. 226, 24 S. Ct. 257.

8. That costs were rendered against him personally will not confer jurisdiction. Smith v. Indiana, 191 U. S. 138, 24 S. Ct. 51.

9. **Questions held Federal:** Whether a Federal judgment has been given due force and effect in a state court. Deposit Bank v. Frankfort, 191 U. S. 499, 24 S. Ct. 154. The denial of credit to an Indiana judgment in Kentucky because service was had on the Ohio river raises a Federal question on the Virginia compact, defining the jurisdiction of the states having the river for a boundary. Wedding v. Meyler, 192 U. S. 573, 24 S. Ct. 322. Whether right of mortgagees of railroad company to reorganize the corporation after foreclosure is a contract. Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 24 S. Ct. 310.

Questions held not Federal: Extent of power of a public officer to question constitutionality of state statute as excuse for refusal to enforce it. Smith v. Indiana, 198 U. S. 138, 24 S. Ct. 51. Whether state has exempted persons or corporations from state tax. Missouri v. Dockery, 191 U. S. 165, 24 S. Ct. 53. The right of a carrier to limit its common-law liability is not Federal. A state court may administer the common law as it sees fit, notwithstanding adverse decisions in the Federal courts. Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 24 S. Ct. 132. Decision that conspiracy to defraud is a common-law offense is not, nor can supreme court pass upon sufficiency of indictment. Howard v. Fleming, 191 U. S. 126, 24 S. Ct. 49. Where the levy of a merchant's privilege tax violates no Federal right, the mere determination of who are merchants within the law involves no Federal question. American Steel & Wire Co. v. Speed, 192 U. S. 500, 24 S. Ct. 365. Whether certain waters claimed to be private are public. Winous Point Shooting Club v. Caspersen, 193 U. S. 189, 24 S. Ct.

The supreme court will review on writ of error a final decision of the supreme court of Porto Rico, where the value or sum in dispute exceeds $5,000 exclusive of costs; the circuit court of appeals act of 1891 not applying to such a case.[10]

The writ of error from the Federal supreme court properly runs to the court in which the judgment complained of was entered, the record remaining there and the judgment being entered on mandate from the highest court of the state.[11]

(§ 4) *D. Dependent on the parties.*[12]—An appeal lies to the supreme court from the circuit court of appeals where a foreign state is a party.[13] No appeal lies in behalf of the state from a judgment in favor of a petitioner for registration.[14]

(§ 4) *E. Questions certifiable.*[15]—Jurisdictional[16] and certain other questions of law are certifiable to the Federal supreme court by the circuit court of appeals,[17] and to the highest court of several of the states by inferior appellate courts. Questions of law only, and not cases, are certifiable,[18] and where questions of both form and substance are raised in the lower court, the mere matters of form should be first settled below, leaving to be certified only substantial questions of law.[19]

A case docketed in the supreme court of Wyoming before the statute limiting the class of questions certifiable took effect is properly before that court for determination,[20] and questions whether the constitutional procedure was followed by the legislature in adopting a law and whether its subject is properly expressed in its title are constitutional questions within that act.[21]

Abstract questions will not be answered,[22] i. e., if different questions in the case assume inconsistent facts,[23] nor will questions rendered immaterial by the answers to others be answered.[24]

431. See 1 Curr. L. 112, n. 59; also Jurisdiction, 2 Curr. L. 613.

10. Royal Ins. Co. v. Martin, 192 U. S. 149, 24 S. Ct. 247.

11. Wedding v. Meyler, 192 U. S. 573, 24 S. Ct. 322.

12. See 1 Curr. L. 113.

13. Republic of Colombia v. Cauca Co., 190 U. S. 524, 23 S. Ct. 704, 47 Law. Ed. 1159.

14. State v. Crenshaw, 138 Ala. 506, 35 So. 456.

15. See 1 Curr. L. 113.

16. The questions of jurisdiction certifiable direct to the supreme court of the United States from the circuit court include only those involving its jurisdiction as a Federal court, and not questions as to the jurisdiction generally of courts of equity. Whether principles of comity require relinquishment on showing jurisdiction previously acquired by state court. Louisville Trust Co. v. Knott, 191 U. S. 225, 24 S. Ct. 119. Where a cause is removed from a state court, and the jurisdiction is sustained, the circuit court of appeals cannot consider the question of jurisdiction on writ of error, but will certify it to the supreme court. Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer [C. C. A.] 126 F. 352. Where the whole case is appealed to the circuit court of appeals and errors on the merits and going to the jurisdiction of the circuit court are assigned, the circuit court of appeals has jurisdiction, and can decide the jurisdictional question or certify it, though the other errors are abandoned. Wirgman v. Persons [C. C. A.] 126 F. 449.

17. A question as to the construction of a state constitution, on which there are conflicting decisions, though none of the state supreme court, and which the circuit court of appeals is unable to determine, will be certified to the supreme court. Constitutional liability of stockholders for corporate debts [Const. Ohio, 1851, art. 13, § 3]. Middletown Nat. Bank v. Toledo, A. A. & N. M. R. Co. [C. C. A.] 127 F. 85.

18. A question which does not propound any question of law, but in broad terms calls upon the court to decide the whole case upon the facts stated, is not properly certifiable, and when included with others will not be answered. Whether facts stated constitute a breach of the bond sued on. Poole v. Burnet County [Tex.] 76 S. W. 425. The district court of Wyoming cannot certify the question whether a petition to which a general demurrer has been interposed states a cause of action [Rev. St. 1899, § 4276]. Jenkins v. City of Cheyenne [Wyo.] 73 P. 758. An order which merely finds that new and difficult questions have arisen in the case, but failing to state what such questions are, presents no question for decision. Smith v. Healy [Wyo.] 75 P. 430.

19. Clark v. Maksoodian [R. I.] 55 A. 640.

20. Laws 1903, p. 78, c. 72. State v. Cahill [Wyo.] 75 P. 433.

21. State v. Cahill [Wyo.] 75 P. 433.

22. Gulf, C. & S. F. R. Co. v. Johnson [Tex.] 78 S. W. 224.

23. The court below should find which state of facts exists, and certify only the question arising therefrom. McColpin v. McColpin's Estate, 96 Tex. 560, 74 S. W. 756.

§ 5. *Courts of review and their jurisdiction.*[25]—Appellate tribunals derive their jurisdiction from the law, and consent of parties will not confer it;[26] whence an appeal from a court that was without jurisdiction confers none,[27] but where the court of first instance has jurisdiction over the subject-matter, but makes a jurisdictional error in its proceedings, an appeal will confer jurisdiction.[28]

Jurisdiction generally extends to only so much of the case as involves the question conferring it;[29] but where one of the parties properly appeals to the court having jurisdiction as to his appeal, a cross appeal must also be taken to that court regardless of jurisdiction as to that appeal.[30]

Various questions respecting the jurisdiction of the courts of several states and territories are discussed in the note.[31]

In Federal courts,[32] the jurisdiction of the circuit court of appeals is final in all cases where the jurisdiction of the circuit court depends entirely on diversity of citizenship,[33] but where the pleadings state a case arising under the constitu-

24. House v. Dallas, 96 Tex. 594, 74 S. W. 901.

25. See 1 Curr. L. 113.

26. Boales v. Ferguson [Neb.] 96 N. W. 337; Home Sav. & Trust Co. v. District Court of Polk County, 121 Iowa, 1, 95 N. W. 522; Hayman v. Lambden, 97 Md. 33, 54 A. 962. See Jurisdiction, 2 Curr. L. 627.

27. Bastian v. Adams [Neb.] 97 N. W. 231. Where a justice of the peace has no jurisdiction, none is conferred by appeal to the district court. Sims v. Kennedy, 67 Kan. 383, 73 P. 61. Where the justice has no jurisdiction because suit was brought in the wrong county, the district court on appeal has none, nor can estoppel or consent confer it. Bailey v. Birkhofer [Iowa] 98 N. W. 694. Failure to raise objection to the jurisdiction in the lower court will not waive it, since consent cannot confer jurisdiction. Mansfield v. Mansfield, 203 Ill. 92, 67 N. E. 497.

28. Inquisition of lunacy before clerk. In re Anderson, 132 N. C. 243, 43 S. E. 649.

29. Validity of statute. Henry v. Thurston County, 31 Wash. 638, 72 P. 488. Validity of tax. Burguieres v. Sanders, 111 La. 109, 35 So. 478. See Jurisdiction, 2 Curr. L. 627, n. 25.

30. Snoqualmi Realty Co. v. Moynihan [Mo.] 78 S. W. 1014.

31. By reason of the saving clause in the act of congress reconstructing the judicial system of **Alaska,** the right is conserved to prosecute all pending actions to final judgment, either under the old or the new law [31 St. 662, c. 786, § 368]. Shoup v. Marks [C. C. A.] 128 F. 32. The suit had been removed from the district court to the supreme court of the United States on writ of error. Id. In **Colorado,** the supreme court will have jurisdiction of a cause transferred from the court of appeals only in case it would have had jurisdiction on direct appeal to that court. Currier v. Clark, 31 Colo. 126, 72 P. 55. The supreme court of Colorado has no jurisdiction of an appeal from the judgment of the county court quashing a certiorari to the judgment of a justice of the peace, there being no constitutional question, franchise or freehold involved. Loloff v. Heath, 31 Colo. 170, 71 P. 1112. In divorce cases in Colorado, the appeal lies to the supreme court, but where the suit is for separate maintenance only and the alimony awarded is less than the jurisdictional amount of that court, the appeal lies only to the court of appeals. Mitchell v. Mitchell, 31 Colo. 209, 72 P. 1064; Fahey v. Fahey [Colo.] 74 P. 884. The supreme court of **Georgia** has jurisdiction to review the judgments of the city court of Bainbridge on direct writ of error. Alabama Midland R. Co. v. E. Swindell & Co., 117 Ga. 883, 45 S. E. 264; Fordham v. A. Ehrlich & Bro., 117 Ga. 883, 45 S. E. 264. The appellate court in **Illinois** has no jurisdiction of an appeal in a drainage case. In re McCaleb, 105 Ill. App. 28. In **Indiana,** cases are transferred from the appellate to the supreme court, irrespective of the questions involved, where there is a disparity in the number of cases pending in the two courts [Burns' Rev. St. 1901, § 1337u]. Emmons v. Harding [Ind.] 70 N. E. 142. The court of appeals of the **Indian Territory** has no jurisdiction of an appeal from an order of the district court taxing the costs in an Indian citizenship case [Act June 30, 1896, c. 398, 29 St. 339]. Chickasaw Nation v. Roff [Ind. T.] 76 S. W. 101. On appeal from the clerk in **North Carolina,** the record is properly sent to the judge residing in the district, though another at that time was holding court there [Code, §§ 254, 256]. Huntley v. Hasty, 132 N. C. 279, 43 S. E. 844. All appeals from the probate court in **Oklahoma** in probate matters must be to the district court, whether presenting questions of law only or questions of both law and fact. Carpenter v. Russell [Okl.] 73 P. 930. The court of civil appeals of **Texas** has jurisdiction of an appeal from the district court in a case originally begun before a justice involving less than $100, though when suit was brought the appeal from the justice lay only to the county court. Southern Kansas R. Co. v. Cooper, 96 Tex. 482, 73 S. W. 947. The jurisdiction of the supreme court of **Washington** in disbarment proceedings is appellate only. In re Waugh, 32 Wash. 60, 72 P. 710. The constitution of 1899, art. 5, § 2, of **Wyoming,** limiting the jurisdiction of the supreme court to appeals except in specified instances repealed, the statute authorizing an application to that court or a judge thereof to vacate or modify an injunction [Rev. St. 1899, § 4051]. Smith v. Healy [Wyo.] 75 P. 430. See 1 Curr. L. 114, n. 90.

32. See Jurisdiction, 2 Curr. L. 612, n. 27.

tion or a law of the United States, error will lie in the supreme court, though the averments are not sustained.[34] The constitutional question must be really and substantially involved when tested by the rules of good pleading,[35] but where so involved, the plaintiff is of right entitled to the decision of the supreme court, the requisite amount being involved.[36] The construction as distinguished from the constitutionality of an act of congress is not a constitutional question,[37] but a decision involving the validity of a rule of the patent office draws in question "an authority exercised under the United States," giving the supreme court jurisdiction.[38] Where the jurisdiction of the Federal court depends entirely on the fact that a constitutional question is in issue, the appeal lies not to the circuit court of appeals, but direct to the supreme court,[39] and an order relating wholly to the jurisdiction of the circuit court is appealable direct to the supreme court.[40] The jurisdictional question need not be one of exclusively Federal nature, but may be one which is common to all courts.[41] The Federal supreme court does not consider itself bound as to a question of jurisdiction, because it may have exercised jurisdiction in a case where the question might have been raised, but passed sub silentio.[42] The determination of the question whether a corporation is engaged principally in mercantile and manufacturing pursuits so as to be within the bankruptcy act is within the jurisdiction of the district court, and an appeal therefrom lies to the circuit court of appeals rather than to the supreme court.[43]

§ 6. *Bringing up the cause. A. General nature and mode of practice.*[44]—Unlike error, appeal is a continuation of the suit below, and is governed as to its procedure by the law in force at the time the suit was begun,[45] and the right of appeal being statutory, the requirements of the statute governing and regulating it must be strictly complied with.[46]

(§ 6) *B. Time for instituting and perfecting.*[47]—Appeals must be prayed for,[48] or taken within the time limited by statute,[48] but failure to perfect an appeal

33. Warner v. Searle & Herett Co., 191 U. S. 195, 24 S. Ct. 79; Arbuckle v. Blackburn, 191 U. S. 406, 24 S. Ct. 148. A case begun in state court by a trustee in bankruptcy, and removed to Federal court by defendant on ground of diversity of citizenship, is in the Federal court as if it had been originally begun there on that ground, and not as if it had been commenced there by consent of defendant under section 23 of the bankruptcy act. Spencer v. Duplan Silk Co., 191 U. S. 526, 24 S. Ct. 174.

34. Trade-mark case. Warner v. Searle & Hereth Co., 191 U. S. 195, 24 S. Ct. 79.

35. Construction merely as distinguished from the constitutionality of a state law is not Federal. Arbuckle v. Blackburn, 191 U. S. 406, 24 S. Ct. 148. Where plaintiff relies wholly on common-law right, and defendant invokes constitution and laws of U. S. circuit court of appeals, decision is final. Spencer v. Duplan Silk Co., 191 U. S. 526, 24 S. Ct. 174. The fact that the suit involves the relations of the government with a railroad company is immaterial. Suit to recover for value of registered mail package lost by railroad's negligence. Bankers' Mut. Casualty Co. v. Minneapolis, etc., R. Co., 192 U. S. 371, 24 S. Ct. 325.

36. Revenue law. Spreckles Sugar Refining Co. v. McClain, 192 U. S. 397, 24 S. Ct. 376.

37. Arbuckle v. Blackburn, 191 U. S. 405, 24 S. Ct. 148. Revenue law. Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 24 S. Ct. 376.

38. U. S. v. Allen, 192 U. S. 543, 24 S. Ct. 416.

39. Appeal from Hawaii court. Wright v. MacFarlane & Co. [C. C. A.] 122 F. 770.

40. Application for leave to file bill of review denied on the merits as well as on jurisdictional grounds is not jurisdictional, so as to oust jurisdiction of the circuit court of appeals. Board of Councilmen of Frankfort v. Deposit Bank [C. C. A.] 124 F. 18. The question whether diversity of citizenship exists so as to vest jurisdiction in the circuit court cannot be passed upon by the circuit court of appeals [Act Mch. 3, 1891, § 6]. Sun Print. & Pub. Ass'n v. Edwards [C. C. A.] 121 F. 826.

41. St. Louis Cotton Compress Co. v. American Cotton Co. [C. C. A.] 125 F. 196.

42. Louisville Trust Co. v. Knott, 191 U. S. 225, 24 S. Ct. 119.

43. Columbia Iron Works v. National Lead Co. [C. C. A.] 127 F. 99.

44. See 1 Curr. L. 116.

45. Hays v. Olentangy Park Co., 24 Ohio Circ. R. 354; Cooley v. Pennsylvania R. Co., 40 Misc. 239, 81 N. Y. S. 692.

46. Appeal from probate to supreme judicial court. Bartlett v. Slater, 183 Mass. 152, 66 N. E. 631; Appeal of Abbott, 97 Me. 278, 54 A. 755; Featherman v. Granite County, 28 Mont. 462, 72 P. 972; Cornell v. Matthews, 28 Mont. 457, 72 P. 976; Hilts v. Hilts, 43 Or. 162, 72 P. 697.

47. See 1 Curr. L. 116.

48. Five days. Mills' Ann. Code, § 388.

during the term specified in the notice is not jurisdictional,[50] though failure to perfect within the time limited by statute is.[51]

The West Virginia statute of 1901 shortening the time to appeal from a decree did not retroact on decrees previously rendered,[52] and the 30 day period prescribed by the act of 1903 in Washington, as applied to judgments previously entered, began to run on the day the act took effect, and not on the day the judgment was rendered.[53]

An appeal is "taken" when notice of intention to appeal is served.[54] And proceedings in error are deemed commenced at the date of voluntary appearance when no summons in error is issued.[55]

Under the express provision of the code in California an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment.[56]

The date of the decree or judgment, as shown by the record, marks the time when limitations on the right of appeal begin to run,[57] and the recital in the

Best v. Rocky Mountain Nat. Bank, 31 Colo. 474, 73 P. 845; Van Buskirk v. Balch [Colo. App.] 74 P. 792.

49. Sixty days. Code Civ. Proc. § 1715. In re Campbell's Estate, 141 Cal. 72, 74 P. 550. Sixty days. Code Civ. Pro. § 1723. Appeal from order refusing new trial. Powell v. May [Mont.] 74 P. 80. Six months. In re Pittsburg Wagon Works' Estate, 204 Pa. 435, 54 A. 359; Henderson v. Barnes [Utah] 75 P. 759. Six months in chancery cases [Laws 1893, p. 61, c. 4130]. Hodges v. Moore [Fla.] 35 So. 13. One year. Robson v. Colson [Idaho] 72 P. 951; McCrea v. McGrew [Idaho] 75 P. 67; Durand v. Higgins, 67 Kan. 110, 72 P. 567. Bankruptcy. Williams Bros. v. Savage [C. C. A.] 120 F. 497. Trial on Apr. 5, appeal taken Apr. 7, is within 3 days. Forsythe v. Huey, 25 Ky. L. R. 147, 74 S. W. 1088. An appeal from an assessment of the board of mercantile appraisers in Pennsylvania must be taken within ten days [Act Apr. 11, 1862, Act May 2, 1899]. Com. v. Vetterlein, 21 Pa. Super. Ct. 587. An appeal from an order vacating a town or village plat must be taken within 30 days. Koochiching Co. v. Franson [Minn.] 98 N. W. 98. Apr. 28th after March 28th is not "within 30 days." Lykins v. Steele, 25 Ky. L. R. 536, 76 S. W. 39. An appeal from a judgment dismissing a petition for mandamus must be taken within 30 days, in Alabama [Code 1896. § 2827]. Smith v. Gordon, 138 Ala. 181, 35 So. 58. In Wisconsin, the dismissal of an appeal from a decision of a county board disallowing a claim is an order, and not a judgment, and therefore must be appealed from within 30 days from service of notice of entry thereof [Rev. St. 1898, §§ 2832, 3039, 3042]. Ellis v. Barron County [Wis.] 98 N. W. 232. An order adjudging that plaintiff shall pay the expenses of a receivership is a "final order in an action" and appealable within one year, and not an order "with respect to a receivership" appealable for only 60 days. State v. District Court of Second Judicial Dist. [Mont.] 72 P. 613. In Louisiana a nonresident plaintiff, appearing as such on the record, can appeal at any time within two years from the rendition of the judgment. Code Prac. art. 593. The universal legatee of one of the partners, plaintiffs, though a nonresident, cannot take advantage of this section. Blum & Co. v. Wyly [La.] 36 So. 202. There being no express statutory limitation or rule of court fixing the time within which a petition for review of an order of bankruptcy may be filed, the fact that it is not filed within six months is not conclusive ground for dismissal. In re Groetzinger & Sons [C. C. A.] 127 F. 124. Where the statute allows 15 days in which to appeal, appellant has the whole of the fifteenth day. Hewitt v. Root, 31 Wash. 312, 71 P. 1021. Appeal from judgment and an appeal from order refusing a new trial taken at the same time constitute one appeal, and the appeal as to new trial will not be dismissed because not filed within 60 days. McVay v. Bridgman [S. D.] 97 N. W. 20.

50. Hoff v. Shockley [Iowa] 98 N. W. 573. See 1 Curr. L. 116, n. 23.

51. Mills' Ann. St. § 2432. Irrigation cases. Needle Rock Ditch Co. v. Crawford Clipper Ditch Co. [Colo.] 75 P. 424. See 1 Curr. L. 116, n. 23-25.

52. Acts 1901, p. 164, c. 78. Despard v. Despard, 53 W. Va. 443, 44 S. E. 448.

53. Laws 1903, p. 74, c. 59, § 4. Rogers v. Trumbull, 32 Wash. 211, 73 P. 381.

54. Saverance v. Lockhart, 66 S. C. 539, 45 S. E. 83.

55. In re James' Estate [Neb.] 97 N. W. 22.

56. Code Civ. Proc. § 939. Gilbert v. Kelly, 138 Cal. 689, 72 P. 344; Sather Banking Co. v. Briggs Co., 138 Cal. 724, 72 P. 352; Dodge v. Carter, 140 Cal. 663, 74 P. 292; Thomas v. Northwestern Mut. Life Ins. Co., 142 Cal. 79, 75 P. 685. See 1 Curr. L. 116, n. 18.

57. Cresap v. Cresap [W. Va.] 46 S. E. 582. The time dates from the day on which the clerk's journal entry of the order for judgment was made. Groendyke v. Musgrave [Iowa] 99 N. W. 144. Limitations begin to run against the right to appeal from a probate order from the date of its entry. Death of contestant and lack of some one to represent him are immaterial. In re Turner's Estate, 139 Cal. 85, 72 P. 718. The running of the time for appeals from interlocutory orders is not postponed to the time

record of the date of hearing and rendition of the judgment is conclusive.[58] An amended judgment is appealable within the statutory period after amendment,[59] and a motion for new trial,[60] or other review ordinarily suspends the time pending decision of the motion.[61]

Under a statute limiting the right of appeal to a certain period after service of notice of the entry of the order, the time begins to run only on service of the order,[62] and delivery of the original order to defendant's attorney, with the date of its filing marked thereon, is not sufficient.[63]

An appeal is premature if brought before a final determination is had, or if the judgment be incomplete,[64] though the other party has appealed,[65] but the judgment need not have been filed,[66] and the right of appeal is not held in abeyance by the successful party's having an improper judgment entered and making a motion to correct it.[67] In a creditors' suit to convene the creditors of an insolvent corporation, a creditor whose debt, or its lien, is by a decree disallowed, may appeal without awaiting further action of the court as to debts of other creditors.[68]

"Fast" or "accelerated procedure."[69]—An order dissolving, vacating, or modifying an interlocutory injunction and appointment of receiver is not reviewable by "fast" writ of error.[70]

Delays and extensions.[71]—The courts ordinarily can allow an appeal after the time limited in a proper case,[72] and provisions for extensions of time to appeal are

the judgment roll is actually made up. Dore v. Klumpke, 140 Cal. 356, 73 P. 1064. The limitation as to the time for appeal begins to run when the judge gives his decision, and not the time when the judgment file is made out and signed. Appeal of Bulkeley [Conn.] 57 A. 112. An appeal taken within the statutory period after the first appealable judgment or order is entered is in time, and will bring up the finding of fact on which it is based. Rush v. Lake [C. C. A.] 122 F. 561. An appeal taken within the statutory period after the judge makes and files his findings is seasonable, though no request for findings was made within the statutory period. Appeal of Bulkeley [Conn.] 57 A. 112. Where the defendant dies before decision but after submission of a case, an appeal taken within the statutory period after the filing of the judgment, after his administrator was substituted a party is in time, though the judgment contained an order that it be filed nunc pro tunc as of the date of submission of the case. De Leonis v. Walsh, 140 Cal. 175, 73 P. 813.

58. Appeal of Bulkeley [Conn.] 57 A. 112.

59. In re Potter's Estate, 141 Cal. 350, 74 P. 986. See 1 Curr. L. 116, n. 31.

60. Where proceedings subsequent to denial of motion for new trial are not preserved, the time to appeal is calculated from that denial. Bonanza Lead Min. Co. v. Huff, 66 Kan. 786, 71 P. 849. Where it was stipulated that a motion for new trial should be considered as if the judgment had not been rendered, the time to appeal did not begin to run until the entry of the order on the motion. Prospectors' Development Co. v. Brook, 32 Wash. 315, 73 P. 376. The making of an unnecessary motion for new trial will not extend the time within which an appeal may be taken. Appeal from probate court. Stewart v. Kendrick [Okl.] 73 P. 299. See 1 Curr. L. 116, n. 32.

61. Party cannot enlarge statutory period by filing bill of review on objection available at original hearing. In re Sherwood's Estate, 206 Pa. 456, 56 A. 20. Where after expiration of the time limited, exceptions were filed on permission nunc pro tunc, and afterwards dismissed, the time for appeal began to run from the dismissal. Hinnershitz v. United Traction Co., 206 Pa. 91, 55 A. 841.

62. Rev. St. 1898, § 3042. Thirty days. Ellis v. Barron County [Wis.] 98 N. W. 232. See 1 Curr. L. 117, n. 35.

63. Greenwood L. & Guarantee Ass'n v. Childs [S. C.] 45 S. E. 167.

64. Judgment must be actually entered. Stein v. Goodenough, 69 N. J. Law, 635, 56 A. 701. Entry held sufficient. Moore v. Nashville, C. & St. L. R., 137 Ala. 495, 34 So. 617. Trial of right of property terminating in verdict for plaintiff but judgment for costs only entered. Hannah v. Charlestown Nat. Bank, 53 W. Va. 82, 44 S. E. 152. See 1 Curr. L. 116, n. 27.

65. In re Pittsburg Wagon Works' Estate, 204 Pa. 435, 54 A. 359.

66. In Alaska. Mackay v. Fox [C. C. A.] 121 F. 487.

67. Hynes v. Barnes [Mont.] 75 P. 523.

68. Kahle v. Long Reach Oil Co., 51 W. Va. 316, 41 S. E. 233.

69. See 1 Curr. L. 117.

70. Stubbs v. McConnell, 119 Ga. 21, 45 S. E. 710.

71. See 1 Curr. L. 117.

72. Mass. Rev. Laws, c. 162, § 13. Bartlett v. Slater, 183 Mass. 152, 66 N. E. 631. Where the judgment would be subject to collateral attack for fraud, an appeal nunc pro tunc will be allowed after expiration of the time limited by statute. Report of county auditor settling account of treasurer. In re Zeigler's Petition, 207 Pa. 131, 56 A. 419.

common,[78] but an order enlarging the time for perfecting an appeal, made after such time has expired, is ineffectual.[74]

(§ 6) *C. Affidavits and oaths.*[75]—A clerical error in the date of an affidavit may be corrected in the appellate court.[76] An affidavit by appellant's attorney stating that the appeal is not taken for delay but in good faith is sufficient.[77]

(§ 6) *D. Notice, citation, and summons.*[78]—The notice of appeal must describe the judgment,[79] and name the parties,[80] and be served on all parties respondent whose interests will be affected by a reversal or modification,[81] especially in Indiana in vacation appeals.[82] Service on each of co-parties is not jurisdictional,[83] though in such case questions prejudicial to the interests of those not served will not be considered.[84] Only such parties as have appeared need be served in Oregon.[85]

In New York, where the appeal is from a final judgment and appellant intends to review an interlocutory judgment or intermediate order, he must so specify in his notice of appeal.[86]

A notice of appeal by minors by their guardian ad litem is effective, though signed by him as attorney only.[87]

Service on the attorney who appeared below is sufficient,[88] and where a firm appears for appellee above, service on them will not be rejected because only one appears as attorney of record.[89] Service on an attorney who represented a deceased party before his death is insufficient,[90] and a voluntary appearance and waiver of

73. Extension of time for filing bond does not extend time for filing transcript. Coal Belt Elec. R. Co. v. Kays, 207 Ill. 632, 69 N. E. 920. A statement by the judge that a party has a certain length of time in which to appeal will not operate as an extension. Burke v. Wright, 75 Conn. 641, 55 A. 14. An administrator is such a party as to be entitled, upon proper showing, to an extension of time for appeal [Rev. St. 1898, § 4035]. McKenney v. Minahan, 119 Wis. 651, 97 N. W. 489.

74. Chamberlain Transp. Co. v. South Pier Coal Co. [C. C. A.] 126 F. 165.

75. See 1 Curr. L. 117.

76. Viertel v. Viertel, 99 Mo. App. 710, 75 S. W. 187.

77. Perkins v. Mason [Mo. App.] 79 S. W. 987.

78. See 1 Curr. L. 118.

79. A notice not averring from what the appeal is taken nor showing by whom it is signed is insufficient. Merrill v. Timorell [Iowa] 96 N. W. 237. A notice in replevin that the "intervenor has appealed the same" is sufficiently specific, though there were in effect two judgments, his exception being to both so far as they affected his interests. Augustine v. McDowell, 120 Iowa, 401, 94 N. W. 918. A notice from which it may be determined that appellant intends to prosecute appeals from two orders is sufficient (MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 76 P. 89), though appeal does not lie from one of such orders (Id.). A sufficient notice of appeal is not vitiated by a statement therein that appellant intends also to bring up another order made in the action. Masor v. Jacobus, 84 N. Y. S. 270. A notice describing the judgment as of the day it appears to have been rendered, though not filed and entered until the succeeding day, is sufficient. O'Neile v. Ternes, 32 Wash. 628, 73 P. 692.

80. Sheldon Mail v. O'Brien County Democrat [Iowa] 96 N. W. 773. Notice in case where additional parties were brought in by cross complaint held sufficient. Idaho Comstock Min. & Mill. Co. v. Lundstrom [Idaho] 74 P. 975. A notice of appeal signed by attorneys for parties appearing and against whom judgment was rendered is good, though the title of the action as stated therein gives the name of a defendant not served. Garrigan v. Kennedy [S. D.] 96 N. W. 89. Notice is not an original process and a designation of all defendants by the name of one followed by "et al" is sufficient. Philadelphia Mortg. & T. Co. v. Palmer, 32 Wash. 465, 73 P. 501.

81. Rev. St. 1887, § 4808. Titiman v. Alamance Min. Co. [Idaho] 74 P. 529. Rev. St. 1898, § 3305, Amend. Laws 1899, p. 83, c. 62. Stephens v. Stevens [Utah] 75 P. 619; Faulkner v. Hutchins [C. C. A.] 126 F. 362. See 1 Curr. L. 118, n. 72.

82. Appeal prayed and allowed in term time, but not perfected until after term. Ashley v. Henderson [Ind. App.] 69 N. E. 469.

83. Bowman v. Besley [Iowa] 97 N. W. 60. Notice need not be served on defendants who join in the appeal. Ramsay v. Tacoma Land Co., 31 Wash. 351, 71 P. 1024.

84. Bowman v. Besley [Iowa] 97 N. W. 60.

85. Sess. Laws 1899, p. 228, Ill. 1901, p. 77. In re Mendenhall's Will, 43 Or. 642, 72 P. 318.

86. Code Civ. Proc. § 1301. Koehler & Co. v. Brady, 87 App. Div. 326, 84 N. Y. S. 467.

87. Noble v. Whitten [Wash.] 76 P. 95.

88. National Bank of Commerce v. Pick [N. D.] 99 N. W. 63. See 1 Curr. L. 118, n. 74.

89. National Bank of Commerce v. Pick [N. D.] 99 N. W. 63.

90. In re Turner's Estate, 139 Cal. 85, 72 P. 718.

the issuance and service of summons in error, by defendant's attorney after defendant's death, confers no jurisdiction.[91]

A nonresident defaulting defendant may be served by depositing the notice in the post office,[92] and an agreement that two causes pending on appeal from a justice be tried together is an appearance in both and waives notice of appeal.[93]

Formal service on the clerk of the trial court is not necessary, mere filing in his office being sufficient.[94] Filing may be at any time after service and within the time limited for taking an appeal,[95] and that an interval elapses after service before filing is immaterial.[96]

An appeal from the probate to the superior court in Connecticut is properly made returnable to the next return day or the next but one,[97] and an appeal to the supreme court of errors next to be holden at a certain place sufficiently states the time of holding court, terms being regulated by law.[98]

(§ 6) *E. Application for leave to appeal, petition in error, assignments, and statements of appeal.*[99]—The filing of an assignment of errors before allowance of the appeal is indispensable in the circuit court of appeals.[1] In Nebraska, a petition in error is indispensable to secure a review of a judgment at law,[2] and judgment will not be reversed for errors of law occurring at the trial, unless it is alleged in the petition that the court erred in overruling the motion for a new trial.[3]

Where a statement of objections is not filed on entry of appeal from the probate to the supreme court in Massachusetts, no jurisdiction is acquired and the appeal may be dismissed on motion.[4]

The petition for a writ of error is usually required to state the errors relied on,[5] and review confined to the errors assigned;[6] but a review of the entire case under the statute of North Dakota will not be denied because the demand therefor contains unnecessary language which may be rejected as surplusage.[7]

An interest entitling appellant to appeal must be alleged in his motion, if it do not appear on the record.[8]

Failure of the assignments of error to specify what court the appeal is taken to is not jurisdictional, the appeal in fact being docketed in the only court having original appellate jurisdiction.[9]

91. Ritchey v. Seeley [Neb.] 94 N. W. 972.

92. Rev. St. 1887, § 4889, subd. 2. Titiman v. Alamance Min. Co. [Idaho] 74 P. 529.

93. Morgan v. Garretson-Greason Lumber Co. [Mo. App.] 79 S. W. 997.

94. National Bank of Commerce v. Pick [N. D.] 99 N. W. 63.

95. San Francisco Law & Collection Co. v. State, 141 Cal. 354, 74 P. 1047.

96. National Bank of Commerce v. Pick [N. D.] 99 N. W. 63.

97. Such an appeal is "civil process" within the statute, Gen. St. 1902, § 566. Appeal of Campbell [Conn.] 56 A. 554.

98. Hayden v. Fair Haven & W. R. Co. [Conn.] 56 A. 613.

99. See 1 Curr. L. 119.

1. Rule 11 (91 F. vi, 32 C. C. A. lxxxviii). Webber v. Mihills [C. C. A.] 124 F. 64. Later file mark is not conclusive. Tyee Consol. Min. Co. v. Langstedt [C. C. A.] 121 F. 709. Absence of file mark not conclusive. Moore v. Moore [C. C. A.] 121 F. 737.

2. Jarvis v. Chase County [Neb.] 97 N. W. 831.

3. Coxe Bros. & Co. v. Omaha Coal, Coke & Lime Co. [Neb.] 94 N. W. 519; Danforth v. Fowler [Neb.] 94 N. W. 637.

4. Bartlett v. Slater, 183 Mass. 152, 66 N. E. 631.

5. Va. Code 1887, § 3464. Norfolk & W. R. Co. v. Perrow, 101 Va. 345, 43 S. E. 614. An assignment alleging error in the refusal of the court to give instructions is sufficient. Norfolk & W. R. Co. v. Perrow, 101 Va. 345, 43 S. E. 614.

6. Woodard v. Cutter [Neb.] 96 N. W. 54; Payne v. Pettibone [Neb.] 96 N. W. 117; Baden v. Bertenshaw [Kan.] 74 P. 639. As to sufficiency of facts to constitute a cause of action. Lincoln Traction Co. v. Moore [Neb.] 97 N. W. 605; Johnson v. Carlson [Neb.] 95 N. W. 788.

7. Code, § 5630, providing for appeals in cases tried to the court. Prescott v. Brooks [N. D.] 94 N. W. 88.

8. Probate appeal. Appeal of Abbott, 97 Me. 278, 54 A. 755.

9. Emmons v. Harding [Ind.] 70 N. E. 142.

Errors first presented to the supreme court on rehearing of an application for a writ of error will not be considered.[10]

(§ 6) *F. Allocatur, order for appeal, certificate.*[11]—Application for leave to appeal from an order will be denied where not timely,[12] and appeal will be disallowed for unexcused delay in filing transcript.[13]

Federal practice.[14]—A formal order allowing an appeal is not essential, it being sufficient if the record shows that an appeal was prayed and in fact allowed.[15]

(§ 6) *G. Bonds, security, payment of costs; necessity.*[16]—Statutes as to filing of undertakings on appeal must be strictly complied with.[17] Administrators[18] and public representatives are usually exempted from giving bond,[19] but an heir is not.[20] On appeal in habeas corpus, the bond required in civil actions must be given,[21] but a special proceeding to contest a local option election in Texas may be appealed without bond.[22]

Intervening or substituted parties appellant cannot prosecute the appeal under the bond given by the original appellant,[23] and where the time for filing bond after notice of appeal, and also the time for giving notice of appeal, have expired, a motion will not be granted to substitute another as plaintiff and appellant and fix a time within which bond may be filed.[24]

The bond should be executed by appellant,[25] but he need not sign the bond in an election case in Kentucky.[26]

An indorsement on the back of the writ of error is a sufficient bond.[27]

The statute of 1903, in Washington, prescribing that the appeal bond shall be served and filed with the notice of appeal, applies to all appeals taken after the act took effect, though from judgments previously rendered.[28]

The certificate of the giving of security is not defective because denominating it a "recognizance" instead of a "bond,"[29] and a certificate omitting to state that the undertaking on appeal was "properly" filed, but containing recitals from which it can be seen that it was so filed, is sufficient.[30]

Affidavit of poverty[31] in lieu of a cost bond may be made by the party's attorney.[32]

10. George Scalfi & Co. v. State [Tex.] 74 S. W. 754.

11. See 1 Curr. L. 120.

12. More than six months delay. Born v. Schneider, 128 F. 179.

13. Western Union Tel. Co. v. Wofford [Tex. Civ. App.] 72 S. W. 620.

14. See 1 Curr. L. 121.

15. Chamberlain Transp. Co. v. South Pier Coal Co. [C. C. A.] 126 F. 165.

16. See 1 Curr. L. 121.

17. Undertaking filed with appeal subsequently abandoned cannot stand as undertaking on a subsequent appeal properly pursued. Morrison v. O'Brien [S. D.] 97 N. W. 2.

18. Michigan Mut. L. Ins. Co. v. Klatt [Neb.] 98 N. W. 436. Where the administrator's interest is purely personal, an appeal from an order dismissing void administration proceedings will not be allowed without bond. Holman v. Klatt [Tex. Civ. App.] 78 S. W. 1088. See 1 Curr. L. 121, n. 34.

19. U. S. marshal, on appeal in habeas corpus. Palmer v. Thompson, 20 App. D. C. 273. Action against state for bounty. San Francisco Law & Collection Co. v. State, 141 Cal. 354, 74 P. 1047; City of Jordan v. Seattle, 29 Wash. 531, 70 P. 54. Officers of civil service commission. Corbett v. Civil Service Commission of Seattle, 33 Wash. 190, 73 P. 1116. See 1 Curr. L. 121, n. 35.

20. Such bond to be approved by judge of probate and filed within time prescribed. Bartlett v. Frazer [Mich.] 95 N. W. 721.

21. State v. Superior Court of King County, 32 Wash. 143, 72 P. 1040.

22. Rev. St. 1895, art. 1804u. Martin v. Mitchell [Tex. Civ. App.] 74 S. W. 665.

23, 24. Hight v. Batley, 32 Wash. 165, 72 P. 1034.

25. The bond may be executed on appellant's behalf by attorney. Ramsay v. Tacoma Land Co., 31 Wash. 351, 71 P. 1024. An undertaking in the name of the original parties is sufficient. Idaho Comstock Min. & Mill. Co. v. Lundstrum [Idaho] 74 P. 976.

26. Acts Ex. Sess. 1900, p. 40, c. 6, § 12. Keller v. Ferguson, 24 Ky. L. R. 2012, 73 S. W. 785.

27. Vincent v. Mutual Reserve Fund Life Ass'n, 76 Conn. 650, 55 A. 177.

28. Rogers v. Trumbull, 32 Wash. 211, 73 P. 381.

29. Vincent v. Mutual Reserve Fund Life Ass'n, 76 Conn. 650, 55 A. 177.

30. Code Civ. Proc. § 1739. Davidson v. Wampler [Mont.] 74 P. 82.

31. See, also, 1 Curr. L. 803.

Payment of costs.[33]—Under the code of New York, the payment of costs imposed by orders is not a prerequisite to appeal therefrom,[34] and a party entitled to a stay of proceedings for the nonpayment of costs waives the stay by receiving and retaining from the opposite party the notices of appeal, printed papers and notice of argument.[35] An appeal from an order is not stayed by failure of the appellant to pay costs adjudged against him on a previous order.[36]

The county judge, in Nebraska, has a right to the prepayment of his fees, but he may waive it,[37] and in Louisiana, on appeal by a tax collector in an action to collect a license, the clerk cannot refuse a transcript until his fees are paid.[38]

In Washington, an owner appealing from a judgment for the sale of lands for nonpayment of a tax must deposit the amount of the judgment and costs.[39]

A deposit in lieu of a bond must be preceded by an order of appeal.[40]

Diverse parties or orders appealed from.[41]—Where an appeal is from the judgment and an order denying a motion for a new trial, a single undertaking referring to both is sufficient.[42]

Fixing, taking and approving.[43]—After an appeal has been allowed by the circuit, a judge of the court of appeals has no power to fix the amount of the appeal bond and take and approve the same.[44] In Texas, an appeal bond must be approved by the clerk, not the judge,[45] and a district judge cannot question a bond approved by the clerk, or entertain a motion to expunge the clerk's approval therefrom.[46] The judge a quo in Louisiana has jurisdiction to inquire into the solvency of sureties on an appeal bond, notwithstanding the appeal has been lodged in the supreme court, and if he finds them insolvent to dismiss the appeal.[47]

Sureties.[48]—A notary who is principal in an appeal bond can take the affidavits of the sureties thereon.[49] Failure of the sureties to justify within ten days renders the appeal a nullity in South Dakota.[50] Exceptions to the sufficiency of the sureties must be made in the lower court in Washington.[51]

The amount.[52]—The bond on appeal from an order quashing an execution need not be in double the amount of the judgment on which the execution issued.[53]

Terms and conditions.[54]—An error in the recital of the date of the judgment in the bond is not fatal if it be otherwise unmistakably identified,[55] and a bond purporting to be both an appeal and stay bond, for the proper sum, is sufficient

32. Harwell v. Southern Furniture Co. [Tex. Civ. App.] 76 S. W. 888.
33. See 1 Curr. L. 122.
34. Code Civ. Proc. § 779. Allen v. Becket, 85 N. Y. S. 192.
35. Allen v. Becket, 85 N. Y. S. 192.
36. Code Civ. Proc. § 779. Allen v. Becket, 84 N. Y. S. 1011.
37. Drexel v. Reed [Neb.] 96 N. W. 873.
38. State v. Estorge, 110 La. 479, 34 So. 643.
39. Laws 1897, p. 180, c. 71. Schultz v. Harris, 31 Wash. 302, 71 P. 1009.
40. Walker v. Parish of Tangipahoa, 111 La. 320, 35 So. 585.
41. See 1 Curr. L. 122.
42. Martin v. De Ornelas, 139 Cal. 41, 72 P. 440; White v. Stevenson, 139 Cal. 531, 73 P. 421.
43. See 1 Curr. L. 122.
44. Kreyling v. O'Reilly, 95 Mo. App. 561, 75 S. W. 694.
45, 46. Hill v. Halliburton [Tex. Civ. App.] 73 S. W. 21.
47. State v. St. Paul, 111 La. 71, 35 So. 389.
48. See 1 Curr. L. 122.
49. McLean v. Roller, 33 Wash. 166, 73 P. 1123.
50. Code Civ. Proc. 1903, §§ 445, 468. Donovan v. Woodcock [S. D.] 99 N. W. 82.
51. Ball. Ann. Codes & St. § 6510. Noble v. Whitten [Wash.] 76 P. 95. An objection to the form of the justification of the sureties (Frew v. Clark [Wash.] 76 P. 85), and failure of the sureties to justify as to property within the state must be taken advantage of below, since such objections go to the sufficiency of the sureties [Ball. Ann. Codes & St. § 6509] (Weiser v. Holzman, 33 Wash. 87, 73 P. 797).
52. See 1 Curr. L. 123.
53. State v. Superior Court of Pierce County, 32 Wash. 693, 73 P. 779.
54. Bond on appeal from justice held sufficient in form. Condon v. Robertson [Tex. Civ. App.] 76 S. W. 934. Bond held sufficient as to form within 2 Ball. Ann. Codes & St. § 6506. King v. Branscheid, 32 Wash. 634, 73 P. 668. See 1 Curr. L. 123.
55. Goodthye v. Delatour, 111 La. 766, 35 So. 896.

as such, though only conditioned as a stay bond.[56] An undertaking is not bad for reciting that appellant "is about to appeal," where he in fact had appealed.[57]

Irregularities and defects.[58]—Defects in an unnecessary bond are immaterial,[59] and an ambiguous bond will be given the construction that will make it valid.[60] Clerical errors do not vitiate,[61] and a bond executed by a party binds him and is valid, though executed as joint principal by another not a party.[62]

Failure through mistake to give the required undertaking is not fatal in Oregon, and on a proper showing appellant will be permitted to file it after time;[63] but defects cannot be amended by filing a new bond after time.[64]

(§ 6) *H. Entry below.*[65]—Entry in the probate court of the order granting the appeal therefrom is necessary in Arkansas,[66] and where entry below is a statutory substitute for personal service, such entry is jurisdictional.[67]

§ 7. *Transfer of jurisdiction, supersedeas and stay.*[68]—The appeal must be perfected to transfer jurisdiction and suspend the operation of the judgment,[69] and an administrator, though entitled to appeal without filing an appeal bond, is not entitled to a supersedeas on account of a mere intention to appeal, except during the time necessary to get his appeal filed in the appellate court;[70] but upon filing and service of notice of appeal and filing of bond, jurisdiction is transferred to the supreme court, irrespective of whether the subsequent proceedings are such as to empower that court to review the questions raised.[71]

Supersedeas by operation of appeal or error.[72]—A mere appeal by a city operates as a supersedeas,[73] and in Connecticut, an appeal by one of several defendants, from the city to the superior court in a mortgage foreclosure, transfers the entire case and vacates the judgment.[74] A writ of error out of the supreme court of the United States, to review the judgment of the state court, will not so operate, unless served within the statutory time.[75]

Generally speaking the trial court's power ceases for all purposes on the

56. King v. Branscheid, 32 Wash. 634, 73 P. 668.

57. Kaltschmidt v. Weber, 139 Cal. 76, 72 P. 632.

58. See 1 Curr. L. 123.

59. Judgment below against appellant for costs only. Voges v. Dittlingler [Tex. Civ. App.] 72 S. W. 875.

60. Whether appellant is obligated to pay all costs of trial and appellate courts or only appellate court. Giddings v. Fischer [Tex.] 77 S. W. 209.

61. A statement that the sureties are worth $200 "not subject to execution" will be regarded as a mere clerical error, the evident intent being to justify for $200. Jones v. Herrick, 33 Wash. 197, 74 P. 332. A bond on appeal from the county court obligating appellant to comply with the decree or judgment of the "district" is not bad for omission of the word "court." Bell v. Goss [Tex. Civ. App.] 76 S. W. 315.

62. Parshall v. Clark [Tex. Civ. App.] 77 S. W. 437.

63. Dowell v. Bolt [Or.] 75 P. 714.

64. A new bond cannot confer jurisdiction on the district court, on appeal from a justice of the peace, where filed after the time to appeal has passed, notwithstanding Code, § 357. The original bond named a stranger as obligee. Sutton v. Bower [Iowa] 99 N. W. 104. An undertaking filed more than a year after objection to sureties on prior one is ineffectual where not accompanied by a new notice of appeal. Donovan v. Woodcock [S. D.] 99 N. W. 82. See 1 Curr. L. 124, n. 85.

65. See 1 Curr. L. 124.

66. Bonner v. Gorman, 71 Ark. 480, 77 S. W. 602.

67. City of Orlando v. Macy [Fla.] 34 So. 298.

68. See 1 Curr. L. 124.

69. Filing and approval of appeal bond are essential [Hurd's Rev. St. 1899, p. 1293]. Holmes v. Chicago, 205 Ill. 536, 68 N. E. 1109. Transcript as well as petition in error must be filed. Morton v. Western Seed & Irrigation Co. [Neb.] 96 N. W. 183. In probate proceedings in Nebraska, the district court acquires jurisdiction of the appeal upon filing a transcript [Comp. St. 1901, c. 20, §§ 42-48]. Rhea v. Brown [Neb.] 94 N. W. 716. An order granting a suspensive appeal, without any step towards completing the appeal, will not operate as a suspensive appeal. Upton v. Adeline Sugar Factory Co., 109 La. 670, 33 So. 725. See 1 Curr. L. 124, n. 97.

70. Michigan Mut. L. Ins. Co. v. Klatt [Neb.] 98 N. W. 436.

71. Glavin v. Lane [Mont.] 74 P. 406.

72. See 1 Curr. L. 124.

73. Ball. Ann. Codes & St., § 6505. Jordan v. Seattle, 29 Wash. 581, 70 P. 54.

74. Matz v. Arick [Conn.] 56 A. 630.

75. Whitaker v. McBride [Neb.] 98 N. W. 877.

transfer of jurisdiction,[76] hence the trial court cannot entertain an application for a rehearing,[77] or to amend the judgment in a material matter thereafter,[78] and pending appeal from an interlocutory order, the case cannot be heard below on the merits,[79] but if the judgment rendered is void for want of jurisdiction, a motion to set it aside may be entertained, notwithstanding proceedings in error to reverse it are pending in the supreme court.[80] After appeal from a decree granting redemption from a tax deed, the district court may extend or change the time for redemption,[81] and an amended proof of claim against a bankrupt's estate may be filed in the bankruptcy court, after an appeal has been taken by the trustee to the circuit court of appeals, from a decree permitting proof as creditors.[82] In California the cause is removed only for the purpose, and to the extent of giving full and complete jurisdiction of such matters as are properly cognizable upon appeal,[83] and the right of the trial court to correct a clerical misprision on its record is not affected, especially where the correction affects no substantial right.[84] The district courts in Idaho retain jurisdiction in divorce cases to make orders directing payment of costs and necessary expenses, in perfecting and prosecuting the appeal, and the supreme court likewise has similar power.[85] In Florida, a statutory supersedeas, obtained by taking an appeal within 30 days, cannot be vacated by the supreme court on the ground that the appeal is frivolous.[86]

Execution on a judgment is stayed,[87] notwithstanding the writ of error was sued out improvidently,[88] but the validity of the judgment remains unchanged.[89] Hence a decree may be shown as a breach of the conditions of a trust deed, though error has been prosecuted from it and supersedeas granted.[90] An appeal from a nonappealable order does not stay further proceedings below,[91] and an appeal from that portion of a decree granting relief as prayed by a cross-bill impleading third parties does not affect the decree as to the relief prayed by the original bill.[92] An appeal from an order vacating a prior order does not have the effect of reviving the vacated order.[93] A restraining order of the court of civil appeals of Texas is

76. Record of the entry of judgment may be amended in formal matters. Channel v. Merrifield, 206 Ill. 278, 69 N. E. 32. Cannot vacate judgment for want of jurisdiction of persons. Aetna Ins. Co. v. Thompson [Wash.] 76 P. 105. After appeal in a will contest the trial court cannot re-docket the cause and entertain a petition for the appointment of a receiver as a further proceeding. Westfall v. Wait, 161 Ind. 449, 68 N. E. 1009. See 1 Curr. L. 124, n. 2.

77. Appeal from surrogate. In re Murphy's Will, 79 App. Div. 541, 81 N. Y. S. 101.

78. After appeal in claim and delivery in Montana, the trial court has no power to correct the judgment by entering one in the alternative. Hynes v. Barnes [Mont.] 76 P. 523. A judgment may be so amended as to conform to the verdict after an appeal has been taken. Denver v. Bradbury [Colo. App.] 75 P. 1077.

79. State v. Earle, 66 S. C. 194, 44 S. E. 781.

80. O'Loughlin v. Overton [Kan.] 74 P. 604.

81. Swan v. Harvey [Iowa] 98 N. W. 541.

82. Hutchinson v. Otis, Wilcox & Co., 190 U. S. 652, 23 S. Ct. 778, 47 Law. Ed. 1179.

83. Fay v. Steubenrauch, 138 Cal. 656, 72 P. 156. An appeal from the grant of general letters of administration does not deprive the court of jurisdiction over a special administrator of the estate previously granted. In re Heaton's Estate, 142 Cal. 116, 75 P. 662.

84. Fay v. Stubenrauch, 141 Cal. 673, 75 P. 174.

85. Rev. St. 1887, §§ 2472, 4927, Const. art. 5, § 9. Roby v. Roby [Idaho] 74 P. 957.

86. Johnson v. Turner [Fla.] 33 So. 238.

87. Execution may issue if a counter bond is given. Denning v. Yount, 66 Kan. 766, 71 P. 250. See 1 Curr. L. 125, n. 11.

88. Missouri: If a supersedeas bond is in terms of the statute, the question is not so much a construction of the bond as of the statute. Campbell v. Harrington, 93 Mo. App. 315.

89. Hendryx v. Evans, 120 Iowa, 310, 94 N. W. 863. An appeal and supersedeas by defendant in attachment does not bar an action on the restitution bond. Hoyle v. Stellwagen, 30 Ind. App. 674, 66 N. E. 910.

90. Brown v. Schintz, 203 Ill. 136, 67 N. E. 767.

91. Muckenfuss v. Fishburne [S. C.] 46 S. E. 537.

92. Smyth v. Stoddard, 203 Ill. 424, 67 N. E. 980.

93. Bateman v. Superior Court of San Francisco, 139 Cal. 140, 72 P. 922.

effective only while the case is before that court, and is not operative pending the decision on a writ of error in the supreme court.[94]

Supersedeas by special order or allowance.[95]—A suspensive appeal is properly denied, where its effect would be to oust the sheriff from his custody of sequestrated property.[96] An associate justice of the supreme court has power to suspend the operation of a restraining order pending appeal therefrom, after return has been filed in that court,[97] but in the absence of a direction from the trial judge, the supreme court of California cannot issue a supersedeas staying proceedings on a judgment in unlawful detainer, pending an appeal from an order vacating an order for the satisfaction of the judgment.[98] Strangers to a suit are liable for damages caused by illegal writ of supersedeas issued by them.[99]

As to what matters.[1]—On giving bond a temporary injunction may be continued in force pending appeal,[2] and an order continuing the appointment of a receiver, first appointed ex parte, is in effect an order appointing a receiver, and so appealable and may be superseded.[3] Where a case involves a constitutional question,[4] or where the refusal of a stay will deprive the party appealing of the benefit of his appeal,[5] and he has been reasonably diligent, and no injury will be occasioned the appellee, the stay will be granted;[6] but supersedeas will not be granted to an unappealable order,[7] nor to a decree that grants to plaintiff in error all the relief justified by his pleadings,[8] nor where it would be ineffective.[9]

The appeal from a judgment dismissing an application for the administration of a succession should be devolutive,[10] as should an interlocutory order permitting a judicial sequestration to be set aside on bond, where not working irreparable injury.[11] An appeal from a judgment revoking an order appointing a tutor, and appointing a special tutor in his place, will be dismissed as a suspensive, and maintained as a devolutive appeal,[12] but a judgment removing a definitive syndic is appealable suspensively, and pending appeal the district court is without jurisdiction to convoke a meeting of creditors to select his successor.[13]

Procedure, order or writ, and its effect.[14]—Where supersedeas is not taken a judgment is a bar, though an appeal therefrom is pending,[15] and where a chancery

94. Riggins v. Thompson, 96 Tex. 154, 71 S. W. 14.

95. See 1 Curr. L. 126.

96. State v. King, 110 La. 961, 35 So. 181.

97. State v. Rice [S. C.] 45 S. E. 153.

98. Bateman v. Superior Court of San Francisco, 139 Cal. 140, 72 P. 922.

99. **Supersedeas bond, by strangers to action:** In a suit to recover possession of real estate, plaintiff obtained a writ of possession. Strangers subsequently filed application for rehearing and filed an illegal supersedeas bond. Damage resulted to plaintiff. Held, that the sureties were liable. Leech v. Karthaus, 135 Ala. 396, 33 So. 342.

1. See 1 Curr. L. 126.

2. Ball. Ann. Codes & St., § 6507. State v. Superior Court of King County, 30 Wash. 197, 70 P. 233. See 1 Curr. L. 126, n. 32.

3. State v. Superior Court of Pierce County [Wash.] 74 P. 1070.

4. Tenement House Department of New York v. Moeschen, 41 Misc. 446, 85 N. Y. S. 19.

5. Corporation appealing from an order allowing an examination of its books and papers. McAlpin v. Universal Tobacco Co. [N. J. Eq.] 55 A. 999. A stay will be granted on appeal from an order of distribution of funds in the hands of a receiver, where the effect of the order is to put the fund beyond the reach of the court with the result of irreparable injustice if the order is wrong. People v. American L. & T. Co., 39 Misc. 647, 80 N. Y. S. 627.

6. Stay of sale of property on execution. Merritt v. Jordan [N. J. Eq.] 55 A. 1001.

7. Montana Ore Purchasing Co. v. Butte & B. Consol. Min. Co. [C. C. A.] 126 F. 168.

8. Lockhaven Trust & Safe Deposit Co. v. U. S. Mortg. & T. Co. [Colo. App.] 74 P. 793.

9. Supersedeas on application to review the cancellation of a liquor license will not be granted, where it appears that the license will expire before the appeal can be heard. State v. Bremerton, 32 Wash. 508, 73 P. 477.

10. Succession of Wintz, 111 La. 40, 35 So. 377.

11. State v. Allen, 110 La. 853, 34 So. 804.

12. Succession of Watt, 111 La. 937, 36 So. 31.

13. State v. Sommerville, 110 La. 953, 34 So. 757.

14. See 1 Curr. L. 126.

15. Small v. Reeves, 25 Ky. L. R. 729, 76 S. W. 395.

appeal is taken, in Michigan, without filing a supersedeas bond, the appellee is entitled to have the papers returned to the circuit court for enrollment, after the statutory period has passed after rendition of the decree.[16]

Where the decree is severable a part may be superseded without the rest.[17]

Supersedeas can only be directed to a party to the action.[18]

A supersedeas does not annul the judgment, but merely stays future proceedings;[19] neither can it retroact. Its effect is to preserve the status in quo pending the appeal. It cannot undo what has already been done under the judgment,[20] and the giving of a supersedeas bond on appeal from an order discharging a receiver does not reinstate the receiver nor authorize the court to maintain possession of the property,[21] though an order of the supreme court staying proceedings under an order appointing a receiver requires the immediate return of the property to the person from whom it was taken.[22] Where defendant appeals with supersedeas, plaintiffs need not pay the purchase price into court as directed by a decree for specific performance, until after affirmance.[23] Where a supersedeas is granted on appeal from an order dissolving a temporary injunction, a violation of the injunction is a contempt of the appellate court.[24]

Supersedeas bonds.—No supersedeas will be granted even to prevent waste,[25] until a bond in the amount and terms determined by the court has been given,[26] and where an executor appealing from a decree directing payment of legacies gives the appeal bond, but not the supersedeas bond provided by statute, the legatees can enforce the decree as though no appeal had been taken.[27]

16. Comp. Laws, § 463, and § 550, as amended by Pub. Acts 1899, p. 380, No. 243. Harmon v. Metcalfe [Mich.] 96 N. W. 1060.

17. State v. Baxter [Neb.] 96 N. W. 647.

18. Madera County v. Raymond Granite Co., 138 Cal. 244, 71 P. 112.

19. Whatever is done against the authority of the supersedeas should be set aside as improperly done. Hey v. Harding, 25 Ky. L. R. 1454, 78 S. W. 136.

20. Where possession of property is obtained by judgment, a subsequent supersedeas will not restore the property. Thompson v. Thompson, 24 Ky. L. R. 645, 69 S. W. 714. A mere restraining order is not continued in force after dissolution on the hearing by appeal with supersedeas. Riggins v. Thompson, 96 Tex. 154, 71 S. W. 14. The supersedeas bond is effectual to prevent further acts on an execution only when the countermand reaches the sheriff. A sale consummated before is valid. Edwards v. Olin, 121 Iowa, 143, 96 N. W. 742. Where an attachment under which sale had been made was discharged, and defendant entered an order of satisfaction on the sale bond, before supersedeas issued, the supersedeas did not affect the validity of the payment, and on reversal plaintiff was entitled to a ruling against the obligees on a sale bond. Hey v. Harding, 25 Ky. L. R. 1454, 78 S. W. 136. Appeal from an order quashing an execution and giving of bond does not vacate the order, and the sheriff cannot proceed to levy and sell. State v. Superior Court of Pierce County, 32 Wash. 693, 73 P. 779.

21. State v. Superior Court of Spokane County, 31 Wash. 481, 71 P. 1095.

22. The question being previously unlitigated a refusal under advice of counsel should be punished only by a nominal fine. Rumney v. Donovan, 28 Mont. 69, 72 P. 305. Where, in a suit to dissolve a partnership, a receiver is appointed and a final decree subsequently rendered dissolving the partnership and fixing the rights of the parties, an appeal and supersedeas from the final decree does not remove the property into the supreme court nor affect the right of the trial court to make necessary orders for its preservation. Lamb v. Rowan, 81 Miss. 369, 33 So. 4.

23. Southern Oil Co. v. Scales [Tex. Civ. App.] 69 S. W. 1033.

24. Injunction against grant of liquor license. Strickland v. Knight [Fla.] 35 So. 868.

25. Bank of Woodland v. Stephens, 137 Cal. 458, 70 P. 293.

26. State v. Baxter [Neb.] 96 N. W. 647. An order of sale in foreclosure is not stayed by appeal unless bond is given [Code Civ. Proc. § 352]. Muckenfuss v. Fishburne [S. C.] 46 S. E. 537. The losing party must act to prevent the judgment from being carried into effect. [Civ. Code, Ga., § 4608]. Gustoso Cigar Mfg. Co. v. Ray, 117 Ga. 565, 43 S. E. 984. Where in bail-trover proceedings, defendant has been discharged, the order of discharge can only be superseded by the plaintiff giving bond and complying with such other conditions as may be properly imposed. Id. A supersedeas is either a matter of statutory right, or vested in the discretion of the judge of the superior court [Civ. Code, Ga., § 4321]. Id. Where defendant has received an absolute order of discharge he is not required to give a bond in order to take advantage of the judgment in his own favor. Id. A judgment directing the sale of perishable property cannot be stayed on appeal without a stay bond [Code Civ. Proc., §§ 943, 949]. Toele v. Hydenfeidt, 138 Cal. 56, 70 P. 1013.

27. Code Civ. Proc., §§ 2577, 2578. In re

The filing of a supersedcas bond does not prevent ruling on the motion for new trial,[28] nor stay execution unless a petition in error has been filed in the appellate court.[29]

In Washington, on entering an appealable order the court, on request of the party obtaining the order, should fix the amount of the supersedeas bond required to stay the execution of it pending appeal,[30] and appeal need not be taken before application to fix such amount,[31] but where, as in California, the statute provides that a judgment shall be stayed by appeal only when a bond in amount fixed by the judge is filed, a party is not entitled to an order fixing the amount until he has appealed.[32] Where a tenant against whom ejectment has been brought is entitled to a suspensive appeal, the trial judge may fix the amount of the bond.[33] If the trial court refuse the remedy is by mandamus.[34]

The conditions of the bond must follow the statute,[35] and a bond not conditioned as required is not sufficient to prevent the enforcement of the judgment.[36] In Nebraska the amount and conditions of a supersedeas bond, in a case where no money judgment is awarded, are discretionary with the trial court,[37] and if he fail to fix the conditions, application should be made for a further order.[38]

In Washington the bond, if intended to operate both as an appeal bond and a supersedeas, must be for twice the amount of the judgment plus $200,[39] and on appeal from an order denying a motion to vacate an order for the payment of money, supersedeas to the order for payment will be granted only on filing bond for double the amount named in the order.[40] On appeal from an order appointing a receiver, a bond conditioned to pay only such damages as the court might award on affirmance of the order is not sufficient, either to supersede the receiver or effect a stay.[41]

§ 8. *Appearance, entry and docketing above.*[42]—In Colorado, where an appeal is dismissed for want of jurisdiction, it will be redocketed on error if reviewable in that manner.[43]

§ 9. *Perpetuation of proceedings and evidence for the reviewing court. A. The record proper and what it must show.*[44]—Where the existence of a certain question is essential to the jurisdiction of the appellate court, the facts giving ju-

Holmes' Estate, 79 App. Div. 267, 79 N. Y. S. 687.

28. Where a party is entitled to elect whether to proceed by appeal or by petition in error, the filing of a supersedeas bond for an appeal cannot operate as an election. Armstrong v. Mayer [Neb.] 95 N. W. 51.

29. Where real estate has been sold on execution, the filing of a supersedeas bond does not stay execution or deprive the purchaser of his right to a sheriff's deed, unless a petition in error has been filed in the appellate court. Hendryx v. Evans, 120 Iowa, 310, 94 N. W. 853.

30. State v. Superior Court of King County, 30 Wash. 177, 70 P. 256.

31. State v. Superior Court of Pierce County [Wash.] 74 P. 1070.

32. De Leonis v. York, 140 Cal. 333, 73 P. 1058.

33. Rev. St., § 2157. State v. Ellis, 110 La. 1042, 35 So. 282.

34. McBride v. Whitaker [Neb.] 98 Mo. 847.

35. Code 1897, § 4134. Home Sav. & Trust Co. v. District Court of Polk County, 121 Iowa, 1, 95 N. W. 522.

36. Gillespie v. Morsman [Neb.] 95 N. W. 1127.

37, 38. State v. Baxter [Neb.] 96 N. W. 647.

39. Winchester v. Morris, 33 Wash. 706, 74 P. 361; Lacaff v. Dutch Miller Min. & Smelting Co., 31 Wash. 566, 72 P. 112.

40. Credits Commutation Co. v. Superior Court of San Diego County, 140 Cal. 82, 73 P. 1009.

41. State v. Superior Court of King County, 30 Wash. 219, 232, 70 P. 484.

42. See 1 Curr. L. 127.

43. Mills' Ann. Code, § 388a. Loloff v. Heath, 31 Colo. 170, 71 P. 1112; Bailey v. O'Fallon, 30 Colo. 418, 70 P. 755; Stevens v. Stevens, 31 Colo. 188, 72 P. 1060; Brennan Mercantile Co. v. Vickers, 31 Colo. 323, 73 P. 45; McAllister v. Irwin's Estate, 31 Colo. 253, 264, 73 P. 47; Lockhaven Trust & Safe-Deposit Co. v. U. S. Mortg. & T. Co. [Colo. App.] 73 P. 409; Best v. Rocky Mountain Nat. Bank, 31 Colo. 474, 73 P. 845. Statute has no application to irrigation cases. Needle Rock Ditch Co. v. Crawford-Clipper Ditch Co. [Colo.] 75 P. 424. See 1 Curr. L. 127, n. 53-55.

44. See 1 Curr. L. 127.

risdiction must appear by the record.[45] The appealable interest of appellant, especially of one not a party to the record,[46] and prejudice to him, must appear.[47] The ruling complained of,[48] objections thereto,[49] and the judgment or order of the court below, must appear,[50] and a record entry thereof is essential.[51] There is no record where merely the original papers in the case, the minute entries and the reporter's transcript of the testimony are brought up.[52] Recitals in a bill of exceptions cannot supply necessary record entries.[53] Order book entries are an essential part of the record in Indiana,[54] and by statute, all papers pertaining to the cause and filed therein with certain exceptions are deemed part of the record.[55] A complete copy of the judgment roll,[56] consisting of certified copies of the necessary papers, is necessary in Montana, and a record composed of the originals withdrawn from the files of the trial court will not support an appeal.[57] A certificate of completeness is essential.[58] In Texas, an agreed statement of facts upon which the case was tried below, the judgment, the findings of fact and conclusions of law, the assignments of error and the appeal bond, by express provision of the statute, constitute a sufficient record to require revision of the judgment without the pleadings or other showing as to what the issues were below.[59]

Proceedings for new trial and to obtain review.[60]—The record must show the timely filing of a motion for new trial,[61] the taking of the appeal,[62] the notice of

45. Appeal from board of review on raising assessment of personal property—exemption not shown. Appeal of Havemeyer & Co., 202 Ill. 446, 66 N. E. 1044. A recital of due service in the judgment will prevail over a mere absence of process and proof of service from the record. City of Ballard v. Way [Wash.] 74 P. 1067. See 1 Curr. L. 127, n. 58, et seq.

46. Affidavits showing interest not incorporated in record. People v. Gay, 141 Cal. 41, 74 P. 443.

47. Brightwell v. Bare, 52 W. Va. 375, 44 S. E. 160.

48. The record must show that the court did rule as complained (disallow credits). Dobbins v. Humphreys, 171 Mo. 198, 70 S. W. 815. Introduction of evidence. Jamison v. Dooley [Tex. Civ. App.] 79 S. W. 91. Where the case settled does not state that the judge charged as recited in the exceptions, the matter is not before the court, Hart v. Cannon, 133 N. C. 10, 45 S. E. 351. To review errors required to be set up in a motion for a new trial, the record must show a ruling on such motion. Voorheis, Miller & Co. v. Leisure [Neb.] 95 N. W. 676. See 1 Curr. L. 128, n. 62.

49. Evidence. In re Van Alstine's Estate, 26 Utah, 193, 72 P. 942. In chancery cases, the record must show that specific objection and ruling thereon were made to the introduction of evidence complained of. Skinner v. Campbell [Fla.] 33 So. 526; Stockton v. National Bank of Jacksonville [Fla.] 34 So. 897; Pinney v. Pinney [Fla.] 35 So. 95. An error not shown by the bill of exceptions to have been objected to below will not be reviewed. Allowance of amendment to complaint. Bessemer Liquor Co. v. Tillman [Ala.] 36 So. 40. Where specific objections to particular questions and answers in a deposition do not appear in the bill of evidence, they will not be considered. Louisville & C. Packet Co. v. Bottorff, 25 Ky. L. R. 1324, 77 S. W. 920. See 1 Curr. L. 128, n. 67.

50. Mackay v. Fox [C. C. A.] 121 F. 487; Jones v. Vanatta [Colo. App.] 72 P. 810. To appear merely by bill of exceptions is not sufficient. Street v. Frank, 136 Ala. 616, 33 So. 879. See 1 Curr. L. 128, n. 63.

51. Mackay v. Fox [C. C. A.] 121 F. 487; Stein v. Goodenough, 69 N. J. Law, 635, 56 A. 701; Lisker v. O'Rourke, 28 Mont. 129, 72 P. 416, 755.

52. Brady v. Pinal County [Ariz.] 71 P. 910.

53. City of St. Charles v. Deemar, 174 Mo. 122, 73 S. W. 469.

54, 55. Cleveland, etc., R. Co. v. Wasson [Ind. App.] 66 N. E. 1020.

56. Code Civ. Proc. § 1736. Stanton v. Lewis, 28 Mont. 267, 72 P. 658; Featherman v. Granite County, 28 Mont. 462, 72 P. 972; Beck v. Holland, 28 Mont. 460, 72 P. 972; Bickford v. Kirwin [Mont.] 75 P. 518.

57. Code Civ. Proc. § 1738. Cornell v. Matthews, 28 Mont. 457, 72 P. 975. Statement on motion for new trial. Powell v. May [Mont.] 74 P. 80.

58. Code Civ. Proc. § 1739. Featherman v. Granite County, 28 Mont. 462, 72 P. 972. Certificate is sufficient. Porter v. Plymouth Gold Min. Co. [Mont.] 74 P. 938.

59. Rev. St. 1895, art. 1293. Scott v. Slaughter [Tex.] 77 S. W. 949.

60. See 1 Curr. L. 128.

61. Rev. St. 1887, par. 842. Santa Rita Land & Min. Co. v. Mercer [Ariz.] 73 P. 398; Ward v. Lemon [Ariz.] 73 P. 443; Fast v. Gray [Mo. App.] 78 S. W. 1048; State v. Sanford [Mo.] 79 S. W. 898. The notice of intention to move for a new trial is not a necessary part of the record in Montana on appeal from an order denying a new trial, unless some objection is presented to the notice in the trial court. King v. Pony Gold Min. Co., 28 Mont. 74, 72 P. 309. Citing many cases and disapproving Carr v. Closeer, 27 Mont. 94, 69 P. 560. See 1 Curr. L. 128, n. 73.

62. Morehouse v. Doxsee [Iowa] 99 N. W 143. See 1 Curr. L. 128, n. 75.

appeal,[63] and service thereof,[64] the entry of the appeal in the order book of the court below,[65] the bond on appeal,[66] and timely giving, filing and approval thereof.[67] All orders passed and proceedings had in the court below must, in order to be reviewed on appeal, form part of the bills of exceptions or the duly certified record. Such matters cannot be brought before the appellate court by agreements of counsel subsequently made.[68]

(§ 9) *B. What is part of record proper; necessity of bill of exceptions or its equivalent.*[69]—The record proper, which the appellate court can consider without its being authenticated by a bill of exceptions, comprehends pleadings and amendments thereto,[70] including demurrers,[71] motions in arrest of judgment,[72] and the statutory writ in mandamus in Indiana.[73] Documents are not part of the record,[74] unless shown in the transcript or submitted by order of court in accordance with the rule.[75] A recital in a proffered judgment which the judge refused to sign is not a part of the record.[76] A map attached to the record, but not appearing to have been introduced below or identified as having been there used, will not be considered.[77] Findings of fact and conclusions of law not made part of the record by journal entry or otherwise cannot be considered on error.[78] A statement in a journal entry, "no evidence except the files and records in the case being introduced," constitutes no part of the journal entry, and must be disregarded on appeal.[79] Where a cross complaint is introduced as evidence by plaintiff, and it is copied into the record as such, he cannot on appeal complain that it is not in the record.[80] The statement on motion for a new trial is no part of the judgment roll in Montana,[81] and on appeal from an order setting aside a default judgment, the judgment roll is no part of the record proper, and can be made of record only by including it in a bill of exceptions.[82] Where questions of fact as well as of law are involved, a statement of facts is necessary in Washington.[83]

Bringing matters into the record.[84]—The prevailing party as against an appellant must preserve the evidence,[85] but appellant must furnish copies of all papers used on the hearing,[86] and must produce and include in the bill such of

63. Stevens v. Hall [Idaho] 73 P. 527. See 1 Curr. L. 128, n. 74.

64. Porter v. Plymouth Gold Min. Co. [Mont.] 74 P. 938; Morehouse v. Doxsee [Iowa] 99 N. W. 143.

65. City of Orlando v. Macy [Fla.] 34 So. 298.

66. A memorandum by the clerk stating that a supersedeas bond was executed is not sufficient. Lykins v. Steele, 25 Ky. L. R. 536, 76 S. W. 39.

67. In re Miller [Okl.] 75 P. 1128.

68. Smith v. Hallwood Cash Register Co., 97 Md. 354, 55 A. 525.

69. See 1 Curr. L. 129.

70. Amended pleadings only are of record—originals require order. Chicago, I. & E. R. Co. v. Indiana Natural Gas & Oil Co. [Ind. App.] 70 N. E. 270. Judgment rendered on pleadings reviewable without bill of exceptions. Bennett v. Union Cent. Life Ins. Co., 203 Ill. 439, 67 N. E. 971. Where not shown by record, proper attempt to show by bill of exceptions is ineffectual. Edmunds Elec. Const. Co. v. Mariotte [Ind.] 69 N. E. 396. See 1 Curr. L. 129, n. 81.

71. Ruling on demurrer reviewed without exception. Lloyd v. Sandusky, 203 Ill. 621, 68 N. E. 154. An order sustaining a demurrer is reviewable without a bill of exceptions [Mills' Ann. Code, § 387]. Crebbin v. Shinn [Colo. App.] 74 P. 795. See 1 Curr. L. 129, n. 82.

72. Such a motion presented only in a bill of exceptions will not be reviewed. Kimble v. State [Fla.] 34 So. 5.

73. Hart v. State, 161 Ind. 189, 67 N. E. 996.

74. Sayer v. Brown, 119 Ga. 539, 46 S. E. 649. See 1 Curr. L. 129, n. 87.

75. Sup. Ct. Rule 12 (47 N. E. vi.). Soule v. People, 205 Ill. 618, 69 N. E. 22.

76. Tennessee River Land & Timber Co. v. Butler, 134 N. C. 50, 45 S. E. 956.

77. Hays v. Ison, 24 Ky. L. R. 1947, 72 S. W. 733.

78. Gildehaus v. Fidelity Bldg. & Sav. Co., 24 Ohio Circ. R. 110.

79. Campbell v. Mechanics' Sav. Bank, 66 Kan. 778, 71 P. 829.

80. Roberts v. Koss [Ind. App.] 70 N. E. 185.

81. Powell v. May [Mont.] 74 P. 80.

82. Code Civ. Proc. §§ 1737, 1739. Emerson v. McNair, 28 Mont. 578, 73 P. 121.

83. Action on covenant of warranty defended on ground of limitations and denial of ouster. Pierce v. Fawcett, 31 Wash. 271, 71 P. 1011.

84. See 1 Curr. L. 129.

85. Village of Harlem v. Suburban R. Co., 202 Ill. 301, 66 N. E. 1050. See 1 Curr. L. 129, n. 89.

86. Code Civ. Proc. § 951. On appeal from an order confirming a sale of real estate by executors, appellant must furnish copy of

the evidence as is material to the questions on which review is sought. A mere direction to the clerk to include all the evidence will not suffice.[87] A bill of exceptions is the usual procedure for bringing matters into the record. Where the bill of exceptions or statement is stricken from the record or cannot be considered, the case is left on the appeal from the judgment on the judgment roll alone,[88] and a judgment conforming to and supported by the pleadings will be affirmed.[89] Where the statute allows proceedings to be made of record by order, its provisions must be strictly complied with.[90] In Montana, errors arising from irregularities in the proceedings of the court, or abuse of discretion, must be preserved by motion for new trial and brought into the record by affidavit.[91] The matters which are not part of the record, but must be brought in by bill of exceptions or its equivalent, include errors occurring at the trial generally,[92] and exceptions thereto,[93] refusal to "sanction" petition for certiorari,[94] dismissal by a state court of a petition for removal to the Federal court.[95] A special appearance combined with a motion to quash the summons, together with the ruling thereon,[96] amendments to pleadings offered and disallowed,[97] an answer rejected on motion to set aside default and permit its filing,[98] bills of particulars,[99] interrogatories to the adverse party,[1] the evidence,[2] evidence and matters outside the judgment,[3] affidavits,[4] mo-

return of sale. In re Robinson's Estate, 142 Cal. 152, 75 P. 777.

87. State v. Napton, 28 Mont. 333, 72 P. 676.

88. Swartz v. Davis [Idaho] 74 P. 800; Wright v. Mathews, 28 Mont. 442, 72 P. 820. See 1 Curr. L. 129, n. 90.

89. Van Auken v. Mizner [Neb.] 93 N. W. 1121.

90. Instructions included by clerk on his own motion held not in record. Lake Erie & W. R. Co. v. Holland [Ind.] 69 N. E. 138. Instructions not signed by judge not considered, though exception thereto is signed. Michigan City v. Phillips [Ind. App.] 69 N. E. 700. Original pleadings can be made of record only by order. Chicago, I. & E. R. Co. v. Indiana Natural Gas & Oil Co. [Ind. App.] 70 N. E. 270. A transcript of stenographer's notes, certified as containing only the oral evidence, and not filed by order of court, cannot be used as a bill of exceptions. Southern R. Co. v. Thurman, 25 Ky. L. R. 804, 76 S. W. 499. Under the Iowa statute providing that in equitable actions the evidence may be brought into the record by filing within six months, the time begins to run with the entry of the original decree, where the supplemental decree did not disturb the conclusions complained of. [Code, § 3652]. Alford v. West End Syndicate [Iowa] 95 N. W. 241. The certificate of the trial judge and reporter that the shorthand notes were certified on the date of submission of the case cannot be impeached by affidavits filed in the supreme court on appeal. In re Bruning's Estate [Iowa] 96 N. W. 780. Where the notes of evidence bear a certain date as that of filing, it cannot be shown by affidavit on appeal that they were in fact filed on another date. Id. Where the shorthand notes were left for filing on the day the trial closed, the evidence is properly preserved, though they were not marked filed until later. Id. After rendition of the decree, oral testimony cannot be made part of the record by nunc pro tunc order. Tucker v. Hawkins [Ark.] 77 S. W. 902. See 1 Curr. L. 129, n. 91.

91. Code Civ. Proc. § 1172. Coleman v. Perry, 28 Mont. 1, 72 P. 42; Tague v. John Caplice Co., 28 Mont. 51, 72 P. 297; King v. Pony Gold Min. Co., 28 Mont. 74, 72 P. 309.

92. Belcher v. Wasson [Okl.] 75 P. 1131. See 1 Curr. L. 130, n. 96.

93. Rudolph v. Smith [Colo. App.] 72 P. 817; Brennan Mercantile Co. v. Vickers, 31 Colo. 324, 73 P. 46; Carlin v. Freeman [Colo. App.] 75 P. 26. See 1 Curr. L. 130, n. 5.

94. Where a petition for certiorari to a justice of the peace is not sanctioned by the superior court, it does not become part of the record, and can only be brought before the supreme court by bill of exception. Lenney v. Finley, 118 Ga. 718, 45 S. E. 593. See 1 Curr. L. 130, n. 98.

95. Louisville & N. R. Co. v. Satterwhite [Tenn.] 79 S. W. 106.

96. Engelke & F. Mill. Co. v. Grunthal [Fla.] 35 So. 17.

97. Sayer v. Brown, 119 Ga. 539, 46 S. E. 649.

98. Jett v. Farmers' Bank, 25 Ky. L. R. 817, 76 S. W. 385.

99. Saxton v. Musselman [S. D.] 95 N. W. 291; Paul v. Baltimore & O. R. Co. [Ind. App.] 69 N. E. 1024.

1. Though copied into record, they cannot be considered in support of default judgment under Code 1896, § 1856. Goodwater Warehouse Co. v. Street, 137 Ala. 621, 34 So. 903.

2. West v. Richmond R. & E. Co. [Va.] 46 S. E. 330; Denny v. Wright [Okl.] 74 P. 104. Where the paper book discloses a want of any bill of exceptions to bring up the evidence, the appeal will be quashed. In re O'Brien's Estate, 22 Pa. Super. Ct. 475. On appeal from an order on a husband for the support of his wife. Com. v. Dean, 21 Pa. Super. Ct. 641. Attempt under invalid statute insufficient [Burns' R. S. 1901, § 1475]. Crane v. Osborn, 30 Ind. App. 640, 66 N. E. 772. A shorthand reporter's notes filed with appellant's closing brief on appeal constitutes no part of the record and cannot be considered by the court. Hanna v. De Garmo, 140 Cal. 172, 73 P. 830. See 1 Curr. L. 130, n. 8.

tions and rulings thereon,[5] the affidavits[6] or other evidence in support thereof,[7] argument of counsel,[8] special findings,[9] the opinion of the trial court,[10] orders, stipulations and an oath and account of a receiver,[11] and rules of the trial court.[12] Instructions may be made part of the record in some states by being signed and filed,[13] but unless so made of record, they are not reviewable unless presented by bill.[14] A skeleton bill in Iowa, properly signed and containing proper directions, will bring the evidence into the record.[15] The summons is no part of the record until made so by oyer,[16] and a demurrer merely copied into the record by the clerk, there being no order recognizing it, is no part of the record.[17] A bill of exceptions only becomes a part of the record by a journal entry making it so.[18] Where the facts recited in a judgment are insufficient to support it, it cannot be said to contain all the evidence so as to dispense with the necessity of a statement of facts to review it.[19]

(§ 9) *C. The bill of exceptions.* 1. *Form and requisites.*[20]—The function of the bill of exceptions is to bring into the record the facts on which the trial court decided the questions of law presented for review,[21] and it should not include affidavits not presented to or considered by the trial court.[22]

The final bill of exceptions must be embraced in one document.[23] The rulings

3. Sutton v. Clarke, 42 Or. 526, 71 P. 794.

4. Bruce v. Casey-Swasey Co. [Okl.] 76 P. 280; Newtson v. Walker [Neb.] 95 N. W. 470; Stanbury v. Storer [Neb.] 97 N. W. 805; Sayer v. Brown, 119 Ga. 539, 46 S. E. 649. Affidavits merely copied into transcript not considered. Griggs v. MacLean, 33 Wash. 244, 74 P. 360; Sellers v. Pacific Wrecking & Salvage Co. [Wash.] 74 P. 1056. See 1 Curr. L. 130, n. 9.

5. McCain Bros. v. Street, 136 Ala. 625, 33 So. 872. Motion to quash summons and return. Brennan Mercantile Co. v. Vickers, 31 Colo. 324, 73 P. 46. Motion to dismiss action and subsequent reinstatement. Rawlings v. Casey [Colo. App.] 73 P. 1090. Overruling of a demurrer to a motion to strike defendant's affidavit for an interpleader. Meyer v. Bloch [Ala.] 35 So. 705. Motions to strike pleadings. Southern R. Co. v. Crenshaw, 136 Ala. 573, 34 So. 913; Lorts v. Wash, 175 Mo. 487, 75 S. W. 95; Smith v. Borden, 160 Ind. 223, 66 N. E. 681. Motion for continuance. Carlin v. Freeman [Colo. App.] 75 P. 26; San Antonio & A. P. R. Co. v. Klaus [Tex. Civ. App.] 79 S. W. 58; Scalfi v. Graves, 31 Tex. Civ. App. 667, 74 S. W. 795. Motion for new trial. Freeburgh v. Lamoureux [Wyo.] 73 Pa. 546; Phillips v. Jones, 176 Mo. 328, 75 S. W. 920; State v. Pulliam [Mo. App] 78 S. W. 315. Motion to quash deposition. Rock Island Implement Co. v. Sloan, 98 Mo. App. 489, 72 S. W. 728. Motions to strike interrogatories. Paul v. Baltimore & O. R. Co. [Ind. App.] 69 N. E. 1024. Motions to require pleadings to be made more definite and certain. Arkansas Cent. R. Co. v. State [Ark.] 79 S. W. 773. Motion to file additional pleas, the pleas, and the ruling thereon. Engelke v. Feiner Mill. Co. v. Grunthal. [Fla.] 35 So. 17. Motion for judgment. Rock Island Implement Co. v. Sloan, 98 Mo. App. 489, 72 S. W. 728. See 1 Curr. L. 130, n. 3.

6. Gutterson v. Meyer [Neb.] 94 N. W. 969; Johnson v. Carlson [Neb.] 95 N. W. 788. Inclusion in transcript is insufficient. Wayne Nat. Bank v. Kruger [Neb.] 95 N. W. 476. Affidavits used on hearing to open default judgment. Whitney v. Knowlton, 33 Wash. 319, 74 P. 469.

7. Motion to correct journal entry. Miller v. Brown [Neb.] 95 N. W. 797. Motion to dismiss and reinstatement. Rawlings v. Casey [Colo. App.] 73 P. 1090.

8. Cudahy Packing Co. v. Skoumal [C. C. A.] 125 F. 470. See 1 Curr. L. 130, n. 10

9. McCain Bros. v. Street, 136 Ala. 625, 33 So. 872.

10. Luman v. Golden Ancient Channel Min. Co., 140 Cal. 700, 74 P. 307; Phillips v. Coburn, 28 Mont. 45, 72 P. 291. Memorandum, which failed to state ground of award of new trial under Laws 1902, p. 1563, c. 580, held no part of record. Newbound v. Interurban St. R. Co., 86 N. Y. S. 68. See 1 Curr. L. 131, n. 13.

11. O'Neil v. McLennan [Cal.] 73 P. 576.

12. Rawlings v. Casey [Colo. App.] 73 P. 1090. See 1 Curr. L. 130, n. 7.

13. Burns' R. S. 1901, §§ 643, 544. Moss Tie Co. v. Huff [Ind. App.] 70 N. E. 86. Rev. St. 1892, §§ 1090, 1091. Baggett v. Savannah, F. & W. R. Co. [Fla.] 34 So. 564. Rev. St. 1899, § 3644, par. 7. Stoner v. Mau [Wyo.] 72 P. 193, 73 P. 548. See 1 Curr. L. 131, n. 14.

14. Rev. St. 1892, §§ 1090, 1091. Baggett v. Savannah, F. & W. R. Co. [Fla.] 34 So. 564; Michigan City v. Phillips [Ind. App.] 69 N. E. 700. Applies to instructions refused. Alabama Const. Co. v. Wagnon Bros., 137 Ala. 388, 34 So. 352. See 1 Curr. L. 131, n. 14.

15. Code, § 3752. Holscher's Heirs v. Gebrig [Iowa] 94 N. W. 486.

16. Snyder v. Philadelphia Co. [W. Va.] 46 S. E. 366.

17. Washington Nat. Bldg. & L. Ass'n v. Westfall [W. Va.] 47 S. E. 74.

18. Manley v. Wheeling & L. E. R. Co., 24 Ohio Circ. R. 70.

19. De Garcia v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 77 S. W. 275.

20. See 1 Curr. L. 131.

21, 22. State v. Fawcett [Neb.] 96 N. W. 219.

23. It is proper to incorporate term bills in the final bill [Rev. St. 1899, § 728]. Page

on a motion for a new trial and on motion in arrest of judgment may be brought up by separate bills, though the better practice is to bring all matters up by one bill.[24] A single bill of exceptions will not suffice to review different cases, though tried together by stipulation,[25] and a single cross bill will not suffice to bring up errors in favor of plaintiff in error in two cases separately appealed which were tried together below.[26] Plaintiff, by cross bill of exceptions, cannot complain of a judgment in favor of a successful defendant, the error proceedings being brought by a defendant who was cast in the court below.[27]

The general rule is that the bill must state the ground of objection,[28] and show that exceptions were taken to the rulings,[29] otherwise they will be disregarded on appeal;[30] but on objection that the copy filed did not show that exceptions were in fact taken, the court sent down to the circuit for the original bill.[31] A bill of exceptions to the exclusion of testimony must show the ground of exclusion,[32] and other grounds assigned will not be considered.[33] Where the statement or bill of exceptions fails to specify any particulars wherein the evidence fails to justify the verdict, the question whether it is excessive[34] or is supported by the evidence cannot be considered.[35] In order that the case may be reviewed on the merits, the bill of exceptions must show the motion for new trial, and the saving of proper exceptions.[36] Bills of exception, in Montana, unlike statements on motion for new trial, need not specify the particular errors of law on which the party relies.[37]

A paper referred to in the bill must be annexed or identified beyond doubt,[38] but failure to attach an exhibit referred to is not ground to strike where other questions are properly presented,[39] and wherever, in an election case, it is possible to describe a contested ballot so as to dispense with the necessity of producing, and inspection of the originals, this should be done.[40] Where a document has been

v. Roberts J. & R. Shoe Co. [Mo. App.] 78 S. W. 52. See 1 Curr. L. 131, n. 17.

24. Hay v. Collins, 118 Ga. 243, 44 S. E. 1002.

25. Cole v. Stanley, 118 Ga. 259, 45 S. E. 282. See 1 Curr. L. 131, n. 18, 19.

26. Harris v. Gano, 117 Ga. 950, 44 S. E. 8.

27. McMullen v. Butler & Co., 117 Ga. 845, 45 S. E. 258.

28. Question reserved on admission or exclusion of evidence. Fritzinger v. State, 31 Ind. App. 350, 67 N. E. 1006. A bill of exceptions containing no specifications of sufficiency of evidence to justify findings, and no assignments of error, cannot be considered on appeal from an order denying a motion for new trial. Sather Banking Co. v. Briggs Co., 138 Cal. 724, 72 P. 352. The errors relied on for reversal must be specified (Code Civ. Proc. § 308) either on appeal from order denying motion for new trial or from a judgment. Schouweller v. McCaull [S. D.] 99 N. W. 95. See 1 Curr. L. 131, n. 20.

29. Bank of Liberal v. Anderson, 100 Mo. App. 557, 75 S. W. 189. Exceptions to the ruling of the trial court on a motion for nonsuit must appear in the stating or substantive part of the bill. Hanna v. De Garmo, 140 Cal. 172, 73 P. 830.

30. Rev. Code Civ. Proc. § 303. Not cured by assignment of errors on appeal (Clark v. Mitchell [S. D.] 97 N. W. 358), nor by specification of errors on motion for new trial (Wenke v. Hall [S. D.] 95 N. W. 103). No specification of particulars wherein evidence is insufficient to justify decision of case tried to court. Boettcher v. Thompson [S. D.] 95 N. W. 874.

31. Words "duly excepted at the time," though faded, held sufficiently plain in original bill to show that exception was duly taken. Morris v. Missouri, K. & T. R. Co. [Mo. App.] 73 S. W. 1004.

32. Southern Kansas R. Co. of Texas v. Crump [Tex. Civ. App.] 74 S. W. 335; Watson v. Williamson [Tex. Civ. App.] 76 S. W. 793.

33. Metropolitan L. Ins. Co. v. Gibbs [Tex. Civ. App.] 78 S. W. 398.

34. Graybill v. De Young, 140 Cal. 323, 73 P. 1067.

35. Robertson v. Longley, 28 Mont. 128, 72 P. 423.

36. Hill v. Taylor, 99 Mo. App. 525, 74 S. W. 9; Smith v. Safety Fund Ins. Soc., 101 Mo. App. 696, 74 S. W. 168.

37. Nord v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 75 P. 681.

38. Reference to exhibit "A" will not include exhibit "B." Hammel v. Insurance Co. of Pa., 24 Ohio Circ. Ct. R. 101. Reference by exhibit number not sufficient in Oklahoma. Bruce v. Casey-Swasey Co. [Okl.] 75 P. 280. See 1 Curr. L. 131, n. 30.

39. Hammel v. Insurance Co. of Pa., 24 Ohio Circ. Ct. R. 101.

40. S. Ct. Rule 25, (54 P. xi.). Langley v. Head, 142 Cal. 368, 75 P. 1088.

once included it may be referred to otherwise in the bill by apt words, if again read in evidence.[41]

A statement in the bill that the accompanying transcript of evidence is full and correct, except as to certain omitted testimony, reciting it, adopts the recital as a part of the testimony.[42]

On appeal, in a writ of review, the return before the lower court and the evidence taken on the original hearing, certified as all the proceedings, will be regarded as a sufficient bill of exceptions or statement of facts.[43]

A bill of exceptions cannot bring up the instructions, in Indiana.[44]

Motion to strike out a bill must be timely.[45]

(§ 9C) 2. *Settlement, signing, and filing.*[46]—The bill must ordinarily be signed by the judge who heard the case,[47] and a bill signed by one of appellants' attorneys, after succeeding to the office, without appellees' knowledge or consent, will not be considered.[48] The statute of California providing that a judge may settle a bill after expiration of his term of office, having been regarded as valid and acted upon for an extended period, will be sustained, though its constitutionality has never been expressly raised and decided.[49]

A bill will not be considered if not presented within the time limited by statute, or the course of practice of the court,[50] notwithstanding the death of the trial judge,[51] or his absence from the state,[52] or a practice in the court below of entering an order reciting their filing, when they are in fact not filed,[53] but there may be a nunc pro tunc order authorizing the filing of a bill,[54] if the appellant was diligent in the preparation of it,[55] and a Federal judge may, under extraordinary circumstances, allow a bill after the term, though there has been no extension;[56] likewise a judge sitting as a chancellor has discretion to allow exceptions to be filed nunc pro tunc, after expiration of the time limited.[57] The statute in

41. Scott v. La Porte [Ind.] 68 N. E. 278.

42. Shanks v. Citizens' General Elec. Co., 25 Ky. L. R. 811, 76 S. W. 379.

43. Corbett v. Civil Service Commission of Seattle, 33 Wash. 190, 73 P. 1116.

44. Michigan City v. Phillips [Ind. App.] 69 N. E. 700. Original bill containing longhand manuscript of the evidence. Bant v. Donly, 160 Ind. 670, 67 N. E. 503.

45. Too late after transcript, abstract, and brief are filed. Merriner v. Jeppson [Colo. App.] 74 P. 341. See 1 Curr. L. 134, n. 81.

46. See 1 Curr. L. 132.

47. A mere certificate by the court stenographer is not sufficient. In re O'Brien's Estate, 22 Pa. Super. Ct. 475. In Florida, matters set up in an evidentiary bill not authenticated by the trial judge will not be considered. Denson v. Wimberly [Fla.] 36 So. 169. See 1 Curr. L. 132, n. 38.

48. Winters v. Coons [Ind.] 69 N. E. 458.

49. Code Civ. Proc. § 653. Miller v. Enterprise Canal & Land Co., 142 Cal. 208, 75 P. 770.

50. Emmett v. Farrow, 136 Ala. 512, 34 So. 932; Morris v. Thomasson [Ark.] 79 S. W. 790. Must be presented at same term unless extension granted. Koewing v. Wilder [C. C. A.] 126 F. 472; Earley v. Sutton, 24 Ky. L. R. 2381, 74 S. W. 238. Not signed within 30 days from rendition of verdict. Codd Co. v. Parker, 97 Md. 319, 55 A. 623. Service on opposite party is not enough [Gen. St. 1901, § 4753]. State v. De Bouge, 67 Kan. 554, 73 P. 76. A bill tendered on July 30, after judgment rendered June 30, is not "within 30 days." Mott v. Brunswick Pub. Co., 117 Ga. 149, 43 S. E. 716. Service on the 29th after certification on the 10th of the month is within the ten days allowed by the statute [Pol. Code, § 4, par. 8]. Rusk v. Hill, 117 Ga. 722, 45 S. E. 42. A brief of evidence filed on the 11th, after motion overruled on the 1st of the month, is within 10 days. Walker v. Neil, 117 Ga. 733, 45 S. E. 387. In Virginia, bills of exception may be signed within 30 days from the adjournment of the term at which the final judgment is rendered [Acts 1901, p. 186, c. 172]. Lynchburg Cotton Mills v. Stanley [Va.] 46 S. E. 908. In Georgia, where the bill of exceptions is not sued out within the statutory period after the ruling complained of, it cannot be reviewed. Order allowing amendment to petition. Lowery v. Idelson, 117 Ga. 778, 45 S. E. 51. See 1 Curr. L. 132, n. 43.

51. Berea College v. Powell, 25 Ky. L. R. 1235, 77 S. W. 381.

52. Lengelsen v. McGregor [Ind.] 67 N. E. 524, 70 N. E. 248.

53. Illinois Cent. R. Co. v. Glasscock, 24 Ky. L. R. 1936, 72 S. W. 769.

54. Koewing v. Wilder [C. C. A.] 126 F. 472. See 1 Curr. L. 132, n. 44.

55. Lengelson v. McGregor [Ind.] 70 N. E. 248.

56. Koewing v. Wilder [C. C. A.] 126 F. 472. See 1 Curr. L. 132, n. 45.

57. Hinnershitz v. United Traction Co., 206 Pa. 91, 55 A. 841.

Utah authorizes relief against failure through excusable neglect, mistake, inadvertence, or surprise, to serve in time and settle a bill.[58] Appellee by stipulation may waive his right to object that the bill was not filed in time,[59] and objections to the filing of a bill and to the extension of time therefor are waived by examination of the bill when tendered without objection.[60] A bill of exceptions signed at a term subsequent to that at which the trial was had, and during that at which a motion for new trial was heard and decided, is available only to bring up errors on the motion for new trial.[61] Where after reconvening pursuant to mandamus to settle and sign a bill of exceptions, the court, on refusal of plaintiff in error to amend his bill to show the truth, adjourns without day, it is without further power to allow and sign a bill.[62] Filing in the clerk's office is not a presentation to the judge.[63] The bill must be signed by plaintiff in error or his counsel as well as presented within the statutory period.[64]

It is presumed that the trial court acted regularly in settling the bill of exceptions,[65] and the affidavit of one attorney that the proposed bill of exceptions was not served on himself, his associate, or the party they represent, is insufficient to overcome the presumption of regularity of the trial court.[66] On being returned by the judge for correction a bill should be amended and retendered within a reasonable time, or it will be dismissed.[67] Where the defendant in error on being served with plaintiff's proposed bill retains it beyond the time allowed to prosecute error, proceedings may be begun on the return of the bill.[68] A bill allowed by the judge is not invalidated nor rendered incompetent, or incomplete, or defective, by failure on his part to pass upon proposed amendments; if the party proposing them desires to rely on them he should take proper steps to require a ruling thereon.[69] In Montana, where the appellant does not adopt the amendments proposed by the respondent, he must deliver the proposed statement and amendments to the judge for settlement within ten days,[70] and failing, the court on appeal will not consider the matters presented thereby.[71] In California, where the bill of exceptions is presented when the decision is made, the appellant can use it though the court does not actually settle it till a later date.[72] The Ohio act of Oct. 22, 1902, regulating the preparation and allowance of bills of exception applies only to judgments rendered after January 1, 1903.[73]

A bill filed within an extension allowed by the court is valid,[74] but the extension must be made before the time allowed has expired,[75] though in South Dakota, on good cause shown, the time may be extended after expiration of the

58. R. S. 1898, §§ 3286, 3005. Morgan v. Oregon Short Line R. Co. [Utah] 74 P. 523.

59. In re Dougherty's Estate, 139 Cal. 14, 72 P. 357. See 1 Curr. L. 133, n. 52.

60. Walling v. Eggers, 25 Ky. L. R. 1563, 78 S. W. 428.

61. People's Sav. Bank & Trust Co. v. Keith, 136 Ala. 469, 34 So. 925.

62. Frazier v. Weaver, 67 Kan. 829, 72 P. 792.

63. Forsythe v. Huey, 25 Ky. L. R. 147, 74 S. W. 1088.

64. O'Connell Bros. v. Friedman, Keller & Co., 117 Ga. 948, 43 S. E. 1001.

65, 66. Jones v. St. John Irr. Co. [Idaho] 74 P. 129.

67. Retention 55 days after preparation in 3 days. Walker v. Wood, 119 Ga. 624, 46 S. E. 869.

68. Saxton v. Harrington [Neb.] 94 N. W. 605.

69. Warren v. Wales [Neb.] 95 N. W. 610.

70. Code Civ. Proc. § 1173. Wright v. Mathews, 28 Mont. 442, 72 P. 820.

71. Wright v. Mathews, 28 Mont. 442, 72 P. 820.

72. Code Civ. Proc. § 649. In re Gordon, 142 Cal. 125, 75 P. 672.

73. Pittsburgh Coal Co. v. Youghiogheny & O. Coal Co., 68 Ohio St. 273, 67 N. E. 485.

74. Indefinite extension held to amount to an extension for the period within which a writ of error might be sued out. Koewing v. Wilder [C. C. A.] 126 F. 472. See 1 Curr. L. 132, n. 47.

75. Swartz v. Davis [Idaho] 74 P. 800; City of Florence v. Irvine, 137 Ala. 277, 33 So. 888. Where time expires on Sunday, order must be made on Saturday. Anniston Electric & Gas Co. v. Cooper, 136 Ala. 418, 34 So. 931. Leave to file not given until several days after motion for new trial overruled. Citizens' St. R. Co. v. Marvil, 161 Ind. 506, 67 N. E. 921. See 1 Curr. L. 133, n. 51.

original period.[76] Unauthorized extensions of time will not invalidate a subsequent extension regularly procured, unless prejudice to opposing party be shown,[77] and an extension of the time to the next term is not affected by an intervening special term.[78] A stipulation extending the time is valid, though filed in another division of the court than that before which the case was tried.[79] The rule authorizing the supreme court of the District of Columbia to prolong its term for the settlement of a bill is to be exercised only when invoked,[80] and cannot be exercised after the end of the term at which the judgment was entered.[81] Time allowed to make and serve a case, or settle a bill of exceptions, until a certain day, excludes that day.[82]

The bill must show that it was examined and approved by the judge as such,[83] within the time allowed by law,[84] and that the judge who signed it caused it to be filed in the cause.[85] The bill must be filed, in the court below,[86] after signature, and a filing before signature is insufficient,[87] and proper filing must appear on the record.[88]

Duty and enforcement.[89]—The court cannot refuse to settle a bill presented in proper time.[90] Where the trial justice, in Maine, disallows, or fails to sign and return the exceptions, the supreme judicial court, in a proper case, may allow them and grant a hearing.[91] Where it is the duty of the court to settle the bill, mandamus is the exclusive remedy for its enforcement,[92] but will not issue to compel the signing of a bill where the judge states that the bill proposed is not true, and that he has already signed a true one,[93] or where he refuses it as incomplete,[94] and the certification of a bill of exceptions to a judgment appearing

76. Comp. Laws, 1887, § 5093. McPherson v. Julius [S. D.] 95 N. W. 428.

77. Tweto v. Horton, 90 Minn. 451, 97 N. W. 128.

78. Mayes v. Lane, 26 Ky. L. R. 824, 76 S. W. 399.

79. Zumault v. Kansas City Suburban Belt R. Co., 175 Mo. 288, 74 S. W. 1015. See 1 Curr. L. 133, n. 52.

80, 81. Rule 2. Gordon v. Randle, 189 U. S. 417, 23 S. Ct. 635, 47 Law. Ed. 875.

82. Croco v. Hille, 66 Kan. 512, 72 P. 208; State v. Dyck [Kan.] 75 P. 488.

83. Lane v. Bowes [Ind. App.] 67 N. E. 1002; Howe v. White [Ind.] 69 N. E. 684; Brineger v. Louisville & N. R. Co., 24 Ky. L. R. 1973, 72 S. W. 783; Ward v. Ward [Tex. Civ. App.] 77 S. W. 829. A bill merely showing the judge's signature without any statement that he has examined or allowed it is not properly authenticated. Lane v. Bowes [Ind. App.] 67 N. E. 1002. See 1 Curr. L. 133, n. 65.

84. Emmett v. Farrow, 136 Ala. 512, 34 So. 932.

85. Burns' Rev. St. 1901, § 641. Howe v. White [Ind.] 69 N. E. 684.

86. Howe v. White [Ind.] 69 N. E. 684; Jay County Com'rs v. Bliss [Ind.] 69 N. E. 1003; Brennan Mercantile Co. v. Vickers, 31 Colo. 324, 73 P. 46; Bruce v. Casey-Swasey Co. [Okl.] 75 P. 280. A bill of exceptions signed but not filed in the court below is not in the record. Baut v. Donly, 160 Ind. 670, 67 N. E. 503. See 1 Curr. L. 133, n. 66.

87. A bill not showing that it was filed after signing is no part of the record. Veneziani v. Morrissey, 161 Ind. 391, 68 N. E. 682. Showing held sufficient. Howe v. White [Ind.] 69 N. E. 684. See 1 Curr. L. 133, n. 67, 68.

88. Either by record entry or certificate of the clerk. Howe v. White [Ind.] 69 N. E. 684; Jay County Com'rs v. Bliss [Ind.] 69 N. E. 1003. File marks and date of signature held to show proper filing. Baltimore & O. S. W. R. Co. v. Henderson, 31 Ind. App. 441, 68 N. E. 308. Where the bill, otherwise regular, does not appear to have been filed below, only the record proper is before the court. City of St. Charles v. Deemar, 174 Mo. 122, 73 S. W. 469; Smith v. Ramey [Mo. App.] 74 S. W. 436; Fast v. Gray [Mo. App.] 78 S. W. 1048. See 1 Curr. L. 129, n. 77.

89. See 1 Curr. L. 134.

90. For, though an appeal will lie whether the bill is made part of the record or not, the papers and other evidence used on the hearing, and the rulings on objections, cannot be of avail unless incorporated in a bill. State v. District Court, 28 Mont. 227, 72 P. 613.

91. Petition must be verified. Graffam v. Cobb, 98 Me. 200, 56 A. 645.

92. Hartmann v. Smith, 140 Cal. 461, 74 P. 7. Where after application to compel settlement the judge signs the bill, the application will be dismissed without costs. In re Donnolly, 140 Cal. xvii, 74 P. 139. The supreme and superior courts in Georgia, have concurrent jurisdiction to compel by mandamus the performance by officers of the latter court of any duty connected with the perfection of a bill of exceptions. If the bill cannot be perfected in the supreme court it will be remitted to the superior court that application may be there made. Cooper v. Nisbet, 118 Ga. 872, 45 S. E. 692. See 1 Curr. L. 134, n. 76.

93. State v. Maiden, 110 Tenn. 487, 76 S. W. 710. See 1 Curr. L. 134, n. 73.

to have been entered in exact compliance with the judgment of the supreme court will not be compelled.[95] The allowance of a bill after expiration of the statutory period, no extension having been obtained,[96] and no reasonable excuse for failure to procure an extension being shown, is discretionary,[97] and mandamus will not issue to compel a settlement, though refusal was on another ground.[98]

A statute authorizing bystanders to testify to the facts occurring at the trial, where the judge refuses to sign a proper bill, is not invalid as conferring judicial powers on them, since they do not by that act allow a bill of exceptions, but merely state the facts.[99] It must appear that the bill was presented to the judge and rejected by him,[1] and the affidavits must be filed within ten days from the filing of the bill.[2] The attorney of a party is not a bystander competent to make affidavit further than to show appellants' dissatisfaction with the statement made by the judge.[3] Where the judge amends a bill by interlineations and erasures, the affidavits of bystanders may show what the amendments are and what the truth is.[4]

Amendment and vacation.—A bill may be amended, but only from a matter of record.[5] It must appear on review that "good cause" was shown for an amendment to a bill of exceptions, made after the statutory period for amendment, or it will be stricken out on motion.[6] The supreme court cannot allow amendments to a bill of exceptions after it has been allowed, signed, and certified by the trial judge.[7]

Grounds for striking out a bill are shown below Where the striking of the bill of exceptions from the transcript would be practically a decision of the case against the appellant, he must have due notice of the motion and proofs in support thereof.[9]

(§ 9) *D. The settled case or statement of facts.*[10]—The case must be settled by the judge who heard it,[11] notwithstanding his absence, holding court in another circuit,[12] or an agreement of counsel.[13] Where the statement is not filed during the time limited and no order appears extending the time, it will be stricken out, or not considered,[14] notwithstanding an agreement of parties that it might be filed later,[15] unless due diligence and a good excuse is shown.[16] The time, how-

94. Lockhaven Trust & Safe Deposit Co. v. U. S. Mortg. & T. Co. [Colo. App.] 72 P. 602.

95. Willis v. Felton, 119 Ga. 634, 46 S. E. 857.

96. Hayes v. Clifford, 42 Or. 568, 72 P. 1.

97. Hayes v. Clifford, 42 Or. 568, 72 P. 1.

98. State v. District Court of Second Judicial Dist. [Mont.] 74 P. 414.

99. Sand. & H. Dig. § 5849. Boone v. Goodlett & Co., 71 Ark. 577, 76 S. W. 1059.

1. Morris v. Thomasson [Ark.] 79 S. W. 790.

2. Sand. & H. Dig. § 5849. Boone v. Goodlett & Co., 71 Ark. 577, 76 S. W. 1059.

3, 4. Boone v. Goodlett & Co., 71 Ark. 577, 76 S. W. 1059.

5. Not by attaching unidentified exhibits after time for signing has passed. Huron Dock Co. v. Swart, 24 Ohio Circ. R. 504. See 1 Curr. L. 134, n. 78.

6. Blackman v. City of Hot Springs [S. D.] 97 N. W. 7.

7. Boyle v. Union Pac. R. Co., 25 Utah, 420, 71 P. 988.

8. A long statement by the person who took down the evidence, interposed between the conclusion of the bill and certificate of the judge, while unnecessary and improper, does not vitiate the bill. Howe v. White [Ind.] 69 N. E. 684. A bill will not be stricken from the transcript on the ground that it was not served on the adverse party prior to the settlement. Jones v. St. John Irr. Co. [Idaho] 74 P. 129.

9. Jones v. St. John Irr. Co. [Idaho] 74 P. 129.

10. See 1 Curr. L. 134.

11. Anker v. Smith, 85 N. Y. S. 1062; Kennedy v. Birch [Tex. Civ. App.] 74 S. W. 593.

12. Equitable Ins. Co. v. Fishburne [S. C.] 45 S. E. 204.

13. Galveston, H. & S. A. R. Co. v. Perkins [Tex. Civ. App.] 73 S. W. 1067; Galveston, H. & S. A. R. Co. v. Keen [Tex. Civ. App.] 73 S. W. 1074.

14. Lemon v. Ward, 3 Ariz. 219, 73 P. 443; Conner v. Downs [Tex. Civ. App.] 75 S. W. 335; Jones v. Herrick, 33 Wash. 197, 74 P. 332. Appeal from order and from denial of motion to set aside order. So much of statement as relates to the order set aside. Lamono v. Cowley, 31 Wash. 297, 71 P. 1040. The period for filing a statement of facts begins to run only after decision of a motion to vacate, where the judgment, being one of dismissal, was irregularly entered. State v. Huston, 32 Wash. 154, 72 P. 1015. See 1 Curr. L. 134, n. 88.

15. Pearson v. West [Tex. Civ. App.] 75 S. W. 335.

ever, may be extended,[17] and the court is not limited to one extension,[18] but a statement filed in pursuance of an extension granted for more than the statutory period will not be considered.[19] That appellant was uncertain whether he could prosecute his appeal owing to lack of funds, will not excuse failure to move for an extension.[20] In California, the evidence as preserved in a statement made to be used on a motion for a new trial will be examined on appeal from the judgment, though the motion was never heard and the appeal was taken after the statutory period limited for bringing up the evidence.[21]

The case made need not be served on parties who did not appear at the trial.[22] Where appellee is not served with the case within the time limited by the rules, he is authorized to apply for an order declaring that appellant has waived his right to review other than presented by the judgment roll.[23] Where, on appeal by one defendant, the proposed case or statement is not served on another in whose favor a judgment was rendered, the appeal as to him only brings up the judgment roll.[24] Where defendants have filed exceptions to a referee's report, they are only entitled to serve a case where such exceptions are overruled, the report is confirmed, and the defendants appeal from the order of confirmation.[25] In Michigan, where the testimony in a chancery case is taken before a commissioner, appellant may have the case settled by the court, or the testimony transmitted by the register, but having elected, he must stand by his election.[26] Though a party moving for a new trial on the minutes has lost by lapse of time his right of appeal from the order denying the motion, he nevertheless has a right to have settled a statement of the case for use on appeal from the judgment, and is not limited to the use of such statements only as have been settled in the proceedings on motion for new trial.[27]

A judge cannot fix, in an adjournment order, a place outside the county, for settlement of a statement of facts except on consent of parties,[28] and where an order of adjournment is erroneous in that respect and the judge was without the county on the day named, a new notice fixing a proper place on a subsequent day is proper.[29]

Where a statement of facts has not been legally certified or approved as required by statute, it cannot be considered on appeal.[30]

A statement bearing merely the approval and signature of the trial judge will be presumed to have been made up by him in consequence of a disagreement of parties as authorized by statute.[31]

Matters relative to the contents of statements are discussed below.[32] The evi-

16. Yecker v. San Antonio Trac. Co. [Tex. Civ. App.] 76 S. W. 780.

17. Nunc pro tunc entry not sufficient. Ft. Worth & D. C. R. Co. v. Roberts [Tex. Civ. App.] 78 S. W. 1000.

18. Van Auken v. Garfield Tp., 66 Kan. 594, 72 P. 211.

19. In re Richards' Estate, 139 Cal. 72, 72 P. 633. The time cannot be extended in Washington beyond 90 days, even by stipulation, and a statement filed after that period will be stricken. Thomas v. Lincoln County, 32 Wash. 317, 73 P. 367.

20. Harpel v. Harpel, 31 Wash. 295, 71 P. 1010.

21. Kelly v. Ning Yung Ben. Ass'n, 138 Cal. 602, 72 P. 148.

22. Johnson v. Ware, 67 Kan. 840, 73 P. 99.

23. McIlvaine v. Steinson, 85 App. Div. 562, 13 Ann. Cas. 281, 83 N. Y. S. 285.

24. McIlvaine v. Steinson, 90 App. Div. 77, 85 N. Y. S. 889.

25. Bates v. Holbrook, 41 Misc. 129, 83 N. Y. S. 929.

26. Comp. Laws 1897, §§ 552, 10188. Hughes v. Love [Mich.] 98 N. W. 977.

27. Code Civ. Proc. § 950. Vinson v. Los Angeles P. R. Co., 141 Cal. 151, 74 P. 757.

28, 29. Prospector's Development Co. v. Brock, 31 Wash. 187, 71 P. 774.

30. Prospector's Development Co. v. Brock, 31 Wash. 187, 71 P. 774; Galveston, H. & S. A. R. Co. v. Perkins [Tex. Civ. App.] 73 S. W. 1067; Same v. Keen [Tex. Civ. App.] 73 S. W. 1074; Kennedy v. Birch [Tex. Civ. App.] 74 S. W. 593. Judge's certificate held sufficient, though not dated, not referring to any pages or exhibits, nor containing any order referring to exhibits or copies. O'Neile v. Ternes, 32 Wash. 528, 73 P. 692.

31. Rev. St. 1895, art. 1379. Bath v. Hous-

dence and instructions need not be included when there is no exception involving them,[33] and no statement of the case on appeal is necessary, where the pleadings, verdict and judgment show the grounds of error.[34] The court properly declines to report evidence that presents no question of law.[35]

When the term of office of the trial judge expires before the time set for serving a case and suggesting amendments, no time being otherwise fixed within which it is to be settled, jurisdiction to settle the case is preserved, but only until the expiration of the time for suggesting amendments.[36]

Consent to the settlement of a statement before the statutory period for offering amendments has passed is binding and precludes subsequent motion for correction in the absence of fraud or misrepresentation.[37]

Certiorari will not lie to have a statement approved nunc pro tunc, where no effort was made to procure approval,[38] and certiorari will be denied where appellant has retained a counter case seasonably served until too late to have it settled.[39] Where no proceedings to settle a statement appear to have been taken, a paper purporting to be such statement will not be returned to the trial judge for the purpose of certification, but will be stricken.[40]

Motions to strike out a statement because not filed in time are addressed to the trial court.[41] A statement of facts procured by misrepresentation of appellant's counsel is properly stricken out on motion,[42] but a statement filed after time will not be stricken where it came into the judge's hands in time and be delayed action thereon because of disagreement of parties.[43]

Defendant may withdraw his petition for a new trial, but his action will not withdraw the transcript of evidence and rulings he has prepared, and plaintiff who has also petitioned without preparing a transcript will be permitted to use defendant's on paying its cost.[44]

(§ 9) *E. Abstracts. Necessary contents.*[45]—All matters relied on for reversal,[46] or which counsel wish to urge, must be abstracted.[47] The abstract of the record proper must show that a motion for new trial was filed,[48] that an appeal was taken,[49] and proper proceedings to preserve the evidence.[50] The notice of appeal

ton & T. C. R. Co. [Tex. Civ. App.] 78 S. W. 993.

32. Concise statements as to conveyances are favored by appellate court, in a settled case. Abbreviated statements of contents and legal effect of deeds are commendable and will be assumed to be true unless shown to be unwarranted. Finnegan v. Brown, 90 Minn. 396, 97 N. W. 144. A report calling for interpretation of a clause of a will should contain the whole will. Woodbridge v. Jones, 183 Mass. 649, 67 N. E. 878. Appellant cannot have incorporated into the case on appeal the exceptions of the prevailing party to the exclusion of evidence, where the decision shows that it was founded on facts other than those to which the excluded evidence related. In re Levy's Will, 91 App. Div. 483, 86 N. Y. S. 862. Depositions and exhibits held properly part of statement, though not literally attached or referred to by name or number in judge's certificate. O'Neile v. Ternes, 32 Wash. 528, 73 P. 692. A recital in a case made, that it contains all the "proceedings," sufficiently shows that it contains all the evidence. John Deere Plow Co. v. Jones [Kan.] 75 P. 1039.

33. Parker v. Southern Exp. Co., 132 N. C. 128, 43 S. E. 603.

34. Cape Fear & N. R. Co. v. Stewart, 132 N. C. 248, 43 S. E. 638.

35. Horne v. Hutchins [N. H.] 54 A. 1024.

36. Butler v. Scott [Kan.] 75 P. 496.

37. State v. Griffin, 32 Wash. 67, 72 P. 1030.

38. Galveston, H. & S. A. R. Co. v. Perkins [Tex. Civ. App.] 73 S. W. 1067.

39. Stroud v. Western Union Tel. Co., 133 N. C. 253, 45 S. E. 592.

40. City of Sprague v. Meagher, 32 Wash. 62, 72 P. 708.

41. Wilson v. Tyler Coffin Co. [Tex. Civ. App.] 79 S. W. 327.

42. Corralitos Co. v. Mackay, 31 Tex. Civ. App. 316, 72 S. W. 624.

43. Bull v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 78 S. W. 525.

44. Gladding v. Union R. Co. [R. I.] 64 A. 1060.

45. See 1 Curr. L. 136.

46. Brennan Mercantile Co. v. Vickers, 31 Colo. 324, 73 P. 46; Carlin v. Freeman [Colo. App.] 76 P. 26.

47. Instructions complained of. Grand Lodge Locomotive Firemen v. Orrell, 206 Ill. 208, 69 N. E. 68. See 1 Curr. L. 135, n. 96.

48. Edwards v. Kelso [Mo. App.] 72 S. W. 726. See 1 Curr. L. 135, n. 99.

49. Morehouse v. Doxsee [Iowa] 99 N. W. 143. See 1 Curr. L. 136, n. 2.

need not be set out in full,[51] but the fact that it was served must be shown.[52] Exceptions must be shown,[53] and an abstract must comply with the rules of court.[54] Instructions must be numbered.[55] Review will not be made of matters insufficiently abstracted.[56] The report of a referee, containing his findings of fact, may be included, though the case is in equity and triable de novo.[57] A statement in the abstract that the title of the case as stated in the transcript and certificate is a clerical error will not entitle the transcript to consideration.[58] A printed abstract is necessary in Missouri, notwithstanding the appeal is taken in the long form and a full transcript is filed in the appellate court,[59] and the refiling of an abstract used in another case in which the pleadings were dissimilar and a different judgment rendered is not sufficient, notwithstanding a stipulation of counsel.[60]

Proceedings not to be stated in extenso.[61]—The substance only of the evidence should be set out,[62] and where the appeal is on a full record, the abstract need only contain a recital of the necessary facts.[63]

Supplemental or counter abstracts.[64]—Where appellees are not satisfied with appellant's abstract, they are entitled to file one supplying the omission,[65] and appellant's abstract if undenied by the appellee will be taken as a true statement of the contents of the record,[66] unless the record itself sets out a notice referred to in the abstract, in which case the appellee may challenge its sufficiency without an amended abstract.[67] An amended abstract by appellee must point out specifically the defect in appellant's abstract, or it will be taken as a fair statement of the record,[68] and a mere denial that translations of letters in a foreign language set out in appellant's abstract are correct will not put their correctness in issue.[69]

50. That the time for filing the bill of exceptions was properly extended where it was filed in vacation. That it appears in bill is not sufficient. Edwards v. Kelso [Mo. App.] 72 S. W. 726. Failure of the abstract to show the proceedings to preserve the evidence is not fatal where there is a transcript showing that the proceedings were regular. Burget v. Incorporated Town of Greenfield, 120 Iowa, 432, 94 N. W. 933.

51. Merrill v. Timbrell [Iowa] 95 N. W. 237; Stearns Paint Mfg. Co. v. Comstock, 121 Iowa, 430, 96 N. W. 869.

52. Morehouse v. Doxsee [Iowa] 99 N. W. 143.

53. Auckland v. Lawrence [Colo. App.] 74 P. 794; Carlin v. Freeman [Colo. App.] 75 P. 26; Jewell v. Shaw [Colo. App.] 75 P. 28.

54. On appeal from appellate court, in Illinois, must be indexed and contain opinion. Chadwick v. People, 206 Ill. 122, 68 N. E. 1108. Must be indexed. Ernst v. Schmitz, 207 Ill. 604, 69 N. E. 923. Must show all exceptions relied on. Carlin v. Freeman [Colo. App.] 75 P. 26. See 1 Curr. L. 135, n. 3.

55. Assignment of error in refusing certain numbered instruction presents no question where no such number is in the abstract. Pittsburg, etc., R. Co. v. Hewitt, 202 Ill. 28, 66 N. E. 829. See 1 Curr. L. 135, n. 5.

56. Evidence and instructions. Silver Springs, O. & G. R. Co. v. Van Ness [Fla.] 34 So. 884. Where the entire charge as given is not set out, the refusal of requested instructions cannot be reviewed. City of Pueblo v. Froney [Colo. App.] 71 P. 893. Where the evidence is not briefed, assignments of error depending thereon will not be considered. Lane v. Williams, 118 Ga. 167, 44 S. E. 993; Wall v. Mercer, 119 Ga. 346, 46 S. E. 420. Where the printed abstract is only of the record proper, which shows no error, the judgment will be affirmed. McQueen v. Groff [Mo. App.] 79 S. W. 734. See 1 Curr. L. 135, n. 97.

57. McCormick Harvesting Mach. Co. v. Pouder [Iowa] 98 N. W. 303.

58. Smith v. Brown [Iowa] 98 N. W. 567.

59. McQueen v. Groff [Mo. App.] 79 S. W. 734.

60. Laclede County Bank v. Jones, 175 Mo. 631, 74 S. W. 998.

61. See 1 Curr. L. 135.

62. Omission of cross-examination immaterial. Wolf v. Des Moines Elevator Co. [Iowa] 98 N. W. 301.

63. Reagan v. St. Louis Transit Co. [Mo.] 79 S. W. 435.

64. See 1 Curr. L. 136.

65. Venner v. Denver Union Water Co. [Colo.] 75 P. 927; Backhaus v. Buells, 43 Or. 558, 72 P. 976.

66. Merrill v. Timbrell [Iowa] 95 N. W. 237; Stearns Paint Mfg. Co. v. Comstock & McQuiston, 121 Iowa, 430, 96 N. W. 869.

67. Merrill v. Timbrell [Iowa] 95 N. W. 237.

68. Shebek v. National Cracker Co., 120 Iowa, 414, 94 N. W. 930. An additional abstract denying the correctness of appellant's in a general way and printing evidence without reference to the original will be stricken. See v. Wabash R. Co. [Iowa] 99 N. W. 106.

69. Schneider v. Schneider [Iowa] 98 N. W. 159.

A denial and additional abstract may be stricken for delay in filing,[70] it presenting no jurisdictional fact.[71] Where an amended abstract filed by appellee supplies omissions in the original and affords assistance to the court, its cost will not be taxed to appellee on affirmance of the decree,[72] but the cost of printing an unnecessarily prolix amendment will be taxed to the party filing it,[73] and where in divorce appellant's abstract is imperfect, appellee should be allowed to file an additional one at appellant's expense, or if she be financially unable, appellant should be ruled to furnish a complete abstract or furnish her money with which to do so.[74] Where no motion to dismiss is made, appellant will be allowed to amend his abstract without terms by stating from what order the appeal is taken.[75] An appellee whose demurrer to appellant's pleading has been sustained cannot contradict statements of fact in the pleading demurred to, and an amended abstract attempting it will be stricken.[76]

An insufficient abstract is cured by filing a sufficient supplementary one,[77] and appellant's failure to furnish an abstract may be healed by respondent's printing one.[78] Failure to copy into the record an agreement to extend time for filing a bill of exceptions is cured by a statement in the abstract of both parties that it was filed.[79]

§ 10. *Transmission of proceedings and evidence to reviewing court. A. Form and contents of transcript or return.*[80]—The transcript should contain only such papers as are necessary to an understanding of the questions raised,[81] excluding their formal parts,[82] but an incomplete transcript made under direction of appellant's counsel will in the fourth circuit necessitate dismissal of the appeal.[83] Not, however, in the seventh circuit, nor in Nebraska, where the remedy is by suggesting diminution of the record.[84] It is not necessary that the praecipe for a transcript be included, but where less than the entire record is ordered, the writing specifying what is desired must be included.[85] The transcript must show the pleadings,[86] and in chancery appeals must include the testimony and an abstract thereof in narrative form will not be considered.[87]

The original files will not take the place of a transcript.[88]

The transcript should be paged and indexed.[89]

70. And the cost thereof taxed to the party filing. Ridgeway v. Jewell [Iowa] 95 N. W. 410.

71. Reed v. Cunningham, 121 Iowa, 555, 96 N. W. 1119.

72. Wilkie v. Sassen [Iowa] 99 N. W. 124.

73. Wissler v. City of Atlantic [Iowa] 98 N. W. 131.

74. Benham v. Benham, 208 Ill. 98, 70 N. E. 30.

75. Neeley v. Roberts [S. D.] 76 N. W. 921.

76. Whited v. Iowa Cent. R. Co. [Iowa] 99 N. W. 131.

77. White v. Missouri Pac. R. Co., 98 Mo. App. 542, 72 S. W. 716. And failure of appellant's abstract to show a necessary fact may be cured by appellees. Lapsley v. Merchants' Bank of Jefferson City [Mo. App.] 78 S. W. 1095.

78. Rev. St. 1899, § 863, Rule 15. W. W. Kimball Co. v. Deaton, 102 Mo. App. 45, 74 S. W. 427.

79. Zumault v. Kansas City Suburban B. R. Co., 175 Mo. 288, 74 S. W. 1015.

80. See 1 Curr. L. 136.

81. Wolcott's Estate v. McCormick Harvesting Mach. Co. [Neb.] 96 N. W. 216. See 1 Curr. L. 136, n. 12.

82. Rule 7. Greene v. Montana Brew. Co., 28 Mont. 380, 72 P. 751.

83. Williams Bros. v. Savage [C. C. A.] 120 F. 497. See 1 Curr. L. 136, n. 13.

84. Wolcott's Estate v. McCormick Harvesting Mach. Co. [Neb.] 96 N. W. 216. An appeal will not be dismissed on motion on the ground that the record is insufficient, that being a matter to be determined at the hearing on the merits or to be corrected by certiorari for a diminution of the record. Merriman v. Chicago, D. & V. R. Co. [C. C. A.] 120 F. 240. See 1 Curr. L. 136, n. 13.

85. Burns' R. S. 1901, § 661; Acts 1903, p. 340, c. 193, § 7. Rutherford v. Prudention Ins. Co. [Ind. App.] 70 N. E. 177.

86. Complaint improperly omitted from transcript on change of venue held properly certified on appeal. Southern Ind. R. Co. v. Martin, 160 Ind. 280, 66 N. E. 886. See 1 Curr. L. 136, n. 14.

87. Wertz v. Wertz, 20 App. D. C. 98.

88. A praecipe for a transcript is not satisfied by an original bill of exceptions. Davis v. Kendall, 161 Ind. 412, 68 N. E. 894. See 1 Curr. L. 136, n. 16.

89. Rule 3. Smith v. Sutton [Ind. App.] 69 N. E. 688. See 1 Curr. L. 136, n. 17.

(§ 10) *B. Certification and authentication.*[90]—The transcript must be duly certified by the clerk,[91] under seal.[92] The bill of exceptions must appear in the transcript immediately following the recital of its filing.[93] In Indiana and Nebraska, it may appear in the original or by copy,[94] but unless embraced or copied as required by the statute, it will not be considered.[95] If not properly authenticated by the clerk of the district court, the bill is not properly in the record, and will not be examined.[96] Where the case is triable de novo on appeal, a transcript of evidence not properly entitled in the case cannot be considered.[97] The circuit court of appeals can act only upon a record that comes from the court below properly certified; it cannot make its own record by permitting the withdrawal and refiling of a record of a prior appeal.[98]

(§ 10) *C. Transmission, filing, and printing.*[99]—The appeal will be dismissed if the transcript is not filed within the time prescribed by law or rule of court,[1] though jurisdiction is not lost by failure to file in time,[2] especially where the duty lies upon the judge of the trial court;[3] but the circuit court of appeals can only acquire jurisdiction of a cause on error when the writ and record are returned to the next ensuing term of the court to which it is made returnable, unless sufficient cause is then shown why it is not so returned.[4]

Before an appeal founded upon a case prepared and settled can be heard in the appellate division, the judge trying the case should order the printed papers to be filed with the clerk of the appellate division.[5]

The clerk may properly refuse to print that portion of the record which embodies the evidence before the cost thereof is paid, it not being of service in deciding any question of law.[6] The number printed will be limited in a proper case.[7] As many copies of a necessary plat must be filed as there are copies of the printed record and briefs.[8]

90. See 1 Curr. L. 136.

91. Oligschlager v. Grell [Okl.] 75 P. 1131. On an appeal other than from an order on motion for new trial, the papers contained in the transcript must be identified by a proper certificate. Village of Sand Point v. Doyle [Idaho] 74 P. 861. Where a case is presented to the supreme court on appeal on a transcript of the record, the certificate must specifically show that the record is a full, true and complete transcript. Bruce v. Casey-Swasey Co. [Okl.] 75 P. 280. See 1 Curr. L. 136, n. 23.

92. Where the record is properly authenticated, the fact that the special bill of exceptions containing the exceptions has no seal will not preclude their review. Nichols v. Baltimore & O. S. W. R. Co. [Ind. App.] 70 N. E. 183. A case made, not attested by the clerk or having the seal of the court attached, is not sufficiently authenticated, notwithstanding signature by the judge. Oligschlager v. Grell [Okl.] 75 P. 1131. See 1 Curr. L. 136, n. 24.

93. Knickerbocker Ice Co. v. Lewis [Ind.] 67 N. E. 188.

94. Burns' Rev. St. 1901, §§ 638a, 661. Mankin v. Pennsylvania Co., 160 Ind. 447, 67 N. E. 229; Schlichter v. Taylor, 31 Ind. App. 164, 67 N. E. 556; Jay County Com'rs v. Bliss [Ind.] 69 N. E. 1003. Misnomer of party in praecipe is immaterial. Chicago, I. & L. R. Co. v. Cunningham [Ind. App.] 69 N. E. 304. Laws 1881, p. 204, c. 28. Van Auken v. Mizner [Neb.] 97 N. W. 324.

95. Burns' Rev. St. 1901, §§ 638a, 661, 662. Mankin v. Pennsylvania Co., 160 Ind. 447, 67 N. E. 229. Bill held sufficiently identified. Broadstreet v. Hall [Ind. App.] 69 N. E. 415.

96. Van Auken v. Mizner [Neb.] 93 N. W. 1121; Porter v. Detrick [Neb.] 96 N. W. 271; U. S. Nat. Bank v. Hanson [Neb.] 95 N. W. 364; Hammer v. Coglizer [Neb.] 95 N. W. 681; Van Auken v. Mizner [Neb.] 97 N. W. 334.

97. Smith v. Brown [Iowa] 98 N. W. 567.

98. Merriman v. Chicago, D. & V. R. Co. [C. C. A.] 120 F. 240.

99. See 1 Curr. L. 137.

1. Fonda v. Jackson, 203 Ill. 113, 67 N. E. 741. Bankruptcy case. Williams Bros. v. Savage [C. C. A.] 120 F. 497. Code Civ. Pro. § 592, as amended in 1901. Snell v. State [Neb.] 97 N. W. 329. Transcript not accompanied by filing fee cannot be filed. Hilts v. Hilts, 43 Or. 162, 72 P. 697. See 1 Cur. L. 137, n. 30.

2. Drexel v. Reed [Neb.] 95 N. W. 873; Hagadorn v. Wagoner [Neb.] 96 N. W. 184. Appeal from board of review. City Council of Marion v. Cedar Rapids & M. C. R. Co., 120 Iowa, 259, 94 N. W. 501. See 1 Curr. L. 137, n. 31.

3. Drexel v. Reed [Neb.] 95 N. W. 873.

4. Pender v. Brown [C. C. A.] 120 F. 496.

5. Odendall v. Haebler, 91 App. Div. 372, 86 N. Y. S. 599.

6. Allis v. Hall [Conn.] 56 A. 637.

7. Testimony was taken in camera and copies of the "record" printed were only as many as would supply the court where a trade secret was to be protected. Stone v. Goss [N. J. Err. & App.] 55 A. 736.

Appellants in Louisiana have three judicial days after return day within which to file the transcript.[9] The time limited for filing a transcript in California is suspended by a motion for new trial.[10]

(§ 10) *D. Amendment and corrections. In the reviewing court.*[11]—A probable clerical error in the transcript cannot be corrected by the appellate court. Resort must be had to certiorari;[12] and in Nebraska, where the transcript is incomplete or incorrect in some particular, the appropriate remedy is to procure an additional or corrected transcript duly certified, not to move to strike it from the files.[13] Where the record on appeal in a bankruptcy case does not clearly set forth facts necessary to a determination of the questions involved, it will be remanded to the district court with directions to have the facts fully reported to it and to pass on the same.[14] Affidavits will not be received to supply omissions from the transcript of the record,[15] nor will the court try the correctness or completeness of the transcript on affidavits, nor require the clerk of the lower court to produce the original record.[16] The appellate court cannot try on affidavits the question whether the bill of exceptions was not in fact signed and filed out of time, the record showing differently.[17] The Texas court of civil appeals has power on affidavit to ascertain such matters of fact as may be necessary to the proper exercise of their jurisdiction,[18] but it cannot consider affidavits showing that a proposed statement of facts was submitted to respondent's counsel, who declined to agree thereto, and that the judge thereupon adopted the statement found in the record.[19] The record cannot be corrected upon oral representations of counsel,[20] nor will the case on appeal be amended to show an assertion of counsel of his view of the law applicable to the facts of the case.[21] Where the averments in an application to rectify, supported by affidavit, are not denied before argument, they will be taken as true, though the statutory period within which denial might be made has not elapsed.[22] An additional transcript will not be stricken where it supplies matters omitted from the original.[23] Where no diminution of the record is suggested certiorari will not issue.[24]

The record must be corrected upon the evidences alone furnished by the records of the court.[25]

(§ 10) *E. Conclusiveness of record, and effect of conflict therein.*[26]—The record is conclusive and cannot be contradicted[27] by affidavits,[28] by oral repre-

8. Stephens v. McDonald, 132 N. C. 135, 43 S. E. 592.
9. Return day the 2nd. Transcript filed the 5th is in time. State v. Recorder of Mortgages, 111 La. 236, 35 So. 534.
10. Appeal Rule 2 (64 P. vii). Kelly v. Ning Yung Ben. Ass'n, 138 Cal. 602, 72 P. 148.
11. See 1 Curr. L. 138.
12. Smith v. Bunch, 31 Tex. Civ. App. 541, 73 S. W. 559. See 1 Curr. L. 138, n. 39.
13. Keeley Institute of Kansas v. Riggs [Neb.] 96 N. W. 1010.
14. Devries v. Shanahan [C. C. A.] 122 F. 629.
15. Crancer & Curtice Co. v. McKinley Music Co. [Neb.] 96 N. W. 617; Daly v. Minke, 86 N. Y. S. 92.
16. Keeley Institute of Kansas v. Riggs [Neb.] 96 N. W. 1010.
17. Von Boeckmann v. Loepp [Tex. Civ. App.] 73 S. W. 849; Western Union Tel. Co. v. Christensen [Tex. Civ. App.] 78 S. W. 744.
18. Rev. St. 1895, art. 998.
19. Bath v. Houston & T. C. R. Co. [Tex. Civ. App.] 78 S. W. 993.
20. Wentz v. Meyer [Neb.] 96 N. W. 272. See 1 Curr. L. 138, n. 43.
21. In re Levy's Will, 91 App. Div. 483, 86 N. Y. S. 862.
22. Uncas Paper Co. v. Corbin, 75 Conn. 675, 55 A. 165.
23. Records offered in evidence below. Loesche v. Goerdt [Iowa] 98 N. W. 571.
24. West v. Richmond R. & Elec. Co. [Va.] 46 S. E. 330.
25. Jett v. Farmers' Bank, 25 Ky. L. R. 817, 76 S. W. 385.
26. See 1 Curr. L. 138.
27. Madera County v. Raymond Granite Co., 139 Cal. 128, 72 P. 915; In re Pichoir's Estate [Cal.] 73 P. 604; Poston v. Williams, 99 Mo. App. 513, 73 S. W. 1099. Assignment that court considered counter affidavits on motion for new trial not sustained where record shows that permission to file them was refused. Springer v. Schultz, 205 Ill. 144, 68 N. E. 753. See 1 Curr. L. 138, n. 50.
28. A bill allowed and signed by the trial

sentations of counsel,[29] by recitals of the clerk not required by any statute or rule of practice,[30] or a certificate of the judge bearing date subsequent to the notice of appeal, and stipulation of counsel as to printing the transcript.[31] The statement of a jurisdictional fact is conclusive.[32] The judgment is the record, and controls as to what was decided.[33] A party is entitled to a true bill of exceptions, and if necessary, may have mandamus to compel its allowance, but a bill signed by the judge and accepted by the parties is conclusive of what occurred at the trial.[34] The recital of a deed in the answer must be accepted as correct as against its recital in plaintiff's abstract, it not having been introduced in evidence.[35] Where the record is contradictory as to when the court overruled a traverse to the return of service of the summons, it will be presumed to have been on the return day as shown prior to the making of a nunc pro tunc order.[36] But a party does not assent to the submission of an issue not proved, by presenting an instruction thereon after ineffectual objection.[37] An objection to the jurisdiction, though waived,[38] or not raised below, may be insisted on,[39] and a complainant, whose bill stating a legal cause of action is dismissed on the merits without a saving clause, is not estopped on appeal to deny the jurisdiction of the court below.[40] Appeal after trial on the merits does not waive one's plea to the jurisdiction which was decided adversely to him.[41] A party who objects to evidence and has it excluded cannot object that the judgment is unsupported for want of the evidence so excluded.[42] An admission by plaintiff's attorney on the trial that the complaint contained no allegation of actual damages does not conclude him on appeal, where the complaint does in fact contain such allegation.[43] The right to review a judgment granting insufficient relief is not waived by moving for the entry of the judgment after being denied a new trial.[44]

§ 11. *Practice and proceedings in appellate court before hearing. A. Joint and several appeals; consolidation; severance.*[45]—Two judgments, though rendered in suits consolidated and tried together below cannot be brought up on one writ of error.[46] Causes separately docketed after being improperly joined should be separately appealed.[47]

(§ 11) *B. Original and cross proceedings.*[48]—Cross proceedings instead of independent petition in error are necessary in some cases,[49] but a cross petition in

judge is a part of the record and its recitals cannot be impeached by affidavits. Phoenix Ins. Co. v. Howe [Neb.] 96 N. W. 73.

29. Wentz v. Meyer [Neb.] 96 N. W. 272.

30. Phoenix Mut. Life Ins. Co. v. Sparks [Neb.] 96 N. W. 214.

31. Madera County v. Raymond Granite Co., 139 Cal. 128, 72 P. 915.

32. Turner v. Barraud [Va.] 46 S. E. 318.

33. Burwell v. Brodie [N. C.] 47 S. E. 47. And a recital in a judgment that it was rendered on the pleadings will govern on appeal, though the case shows this to be an inadvertence. Patterson v. Freeman, 132 N. C. 357, 43 S. E. 904. A recital in the judgment that "proof was adduced" is conclusive that evidence was introduced. Lane v. Dowd, 172 Mo. 167, 72 S. W. 632. A recital that the nonsuit was involuntary is not conclusive. Carter v. O'Neill, 102 Mo. App. 391, 76 S. W. 717.

34. Collins v. George [Va.] 46 S. E. 684.

35. Watkins v. Iowa Cent. R. Co. [Iowa] 98 N. W. 910.

36. American Wire & Steel Bed Co. v. Goldman, 85 N. Y. S. 330.

37. Haslam v. Barge [Neb.] 96 N. W. 245. See 1 Curr. L. 141, n. 84.

38. Fidelity & Deposit Co. v. Jordan, 134 N. C. 236, 46 S. E. 496. See 1 Curr. L. 142, n. 86.

39. Carothers v. Holloman [Tex. Civ. App.] 75 S. W. 1084.

40. Sprinkler v. Duty [W. Va.] 46 S. E. 557.

41. Code Civ. Proc. § 100, permits a defendant to state all his defenses when he answers. Stull Bros. v. Powell [Neb.] 97 N. W. 249.

42. Knudson v. Parker [Neb.] 96 N. W. 1010.

43. Steedman v. South Carolina & G. E. R. Co., 66 S. C. 549, 45 S. E. 84.

44. Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co. [C. C. A.] 121 F. 524.

45. See 1 Curr. L. 139.

46. Louisville & N. R. Co. v. Summers [C. C. A.] 125 F. 719. See 1 Curr. L. 139, n. 60.

47. Burns' Rev. St. 1901, § 343. Giller v. West [Ind.] 69 N. E. 548.

48. See 1 Curr. L. 139.

49. If the record on writ of error fully presents matters affecting the judgment for review which defendant in error claims will

error is treated as an independent proceeding, and the party complaining must take the preliminary steps giving him a right to assign error.[50]

(§ 11) *C. Amendments of parties.*[51]—Upon the death of plaintiff after submission, the cause is properly revived below, after filing the mandate of the court of appeals.[52] An appeal by an under tutor and minority members of a family meeting from the homologation of its proceedings is not abated by the death of the under tutor and the appointment of another, who concurs in the views of the tutor and the majority.[53]

(§ 11) *D. Calendars; trial dockets; terms.*[54]—Parties cannot by consent confer jurisdiction on the court to hear a case at a term prior to that to which the case is by law returnable.[55] An appeal, by permission, from an interlocutory judgment in New York does not go on the regular calendar, but may be noticed by either party for argument on the motion calendar at his convenience.[56] In North Carolina an appeal may be taken to the term in session when the case is tried.[57] An appeal from the probate to the superior court in Connecticut is properly made returnable to the next return day, or the next but one.[58]

(§ 11) *E. Forming issues; pleading, assigning, and specifying error.*[59] 1. *In general.*—The assignment of errors is appellant's pleading, tendering an issue of law. It is the foundation upon which he rests his right to require the court to review the errors of the trial court, and is essential, in order to invoke the appellate power of the court.[60] Generally errors not assigned will not be reviewed,[61] and assignments not appearing to have been filed below will not be considered;[62] but a jurisdictional, or other fundamental error of law appearing on the face of the record will be considered, though not assigned.[63] Assignments are necessary in actions at law,[64] but not in equity cases.[65]

Constitutionality of statutes cannot be presented by independent assignments, but only by assignments of error in not sustaining demurrers, overruling motions for new trials, etc.[66] An assignment that damages are excessive presents no question in an action on a contract.[67]

The statute in Illinois that no assignment of error, calling into question the

entitle him to affirmative relief, he must file a cross petition and not bring an independent proceeding in error. Scully v. Smith, 66 Kan. 265, 71 P. 519.

50. Must present errors to trial court by motion for new trial. Wheeler v. Caldwell [Kan.] 75 P. 1031. A cross petition in error must, in Kansas, be filed within one year after the rendition of the judgment complained of, to confer jurisdiction to consider it. Durand v. Higgins, 67 Kan. 110, 72 P. 567.

51. See 1 Curr. L. 139.

52. Fisher v. Musick's Ex'r, 24 Ky. L. R. 1913, 72 S. W. 787.

53. Succession of Carbajal, 111 La. 944, 36 So. 41.

54. See 1 Curr. L. 139.

55. Record not being filed 30 days before beginning of term, case goes over to subsequent term. Bank of Colloden v. Bank of Forsyth, 119 Ga. 351, 46 S. E. 424.

56. Slater v. Slater, 174 N. Y. 264, 66 N. E. 934.

57. Rule 5 (28 S. E. v). Clegg v. Southern R. Co., 132 N. C. 292, 43 S. E. 836.

58. Such an appeal is "civil process" within Gen. St. 1902, § 566. Appeal of Campbell [Conn.] 56 A. 554.

59. See 1 Curr. L. 140.

60. Rubey v. Hough, 161 Ind. 203, 67 N. E. 257.

61. Johns v. Ruff [N. D.] 95 N. W. 440. Admission of evidence. Hale v. Bickett [Tex. Civ. App.] 78 S. W. 531. Where a finding that appellant never was the owner of the land in dispute is not challenged, the deed under which he claimed cannot be examined on appeal. Gilbert v. Kelly, 138 Cal. 689, 72 P. 344.

62. Gidcumb v. Gidcumb [Tex. Civ. App.] 73 S. W. 827.

63. Parker v. Dekle [Fla.] 35 So. 4; Hoodless v. Jernigan [Fla.] 35 So. 656. Cause of action being breach of contract, trial as in tort. Galveston, etc., R. Co. v. Hennigan [Tex. Civ. App.] 76 S. W. 452.

64. Anderson v. Brown [Iowa] 98 N. W. 274. In Indiana, by statute, assignments relate to matters of law only. Will contest cannot present question of fact [Burns' Rev. St. 1901, §§ 667, 2775]. Walt v. Westfall, 161 Ind. 648, 68 N. E. 271.

65. Luke v. Koenen, 120 Iowa, 103, 94 N. W. 278.

66. Proceedings for opening street. Pittsburgh, etc., R. Co. v. Wolcott [Ind.] 69 N. E. 451.

67. Conner v. Andrews Land, Home & Imp. Co. [Ind.] 70 N. E. 376.

decision of the appellate court on controverted questions of fact, shall be allowed in the supreme court applies only to actions at law and not to suits in equity.[68]

In Indiana the assignment must contain the full names of all parties[69] necessary to the appeal.[70]

(§ 11E) 2. *Proper parties to assign errors.*[71]—Errors cannot be urged which affect other parties, but not the objector,[72] or which are favorable to him,[73] or his co-defendant,[74] or which his position and the case require him to uphold,[75] as where he invites or assents to the action of the court.[76]

68. Starrett v. Brosseau, 208 Ill. 408, 70 N. E. 354.

69. Sup. Ct. Rule 6 (27 N. E. iv). Designation of parties as trustees and executors. Whisler v. Whisler [Ind.] 67 N. E. 984. So giving in proceeding where not required will not vitiate. Kelser v. Mills [Ind.] 69 N. E. 142.

70. Name presumed the full name. Kelser v. Mills [Ind.] 69 N. E. 142. Executor held necessary party. Whisler v. Whisler [Ind.] 70 N. E. 152.

71. See 1 Curr. L. 140.

72. Demurrer to evidence in tort action sustained as to part of defendants, remaining defendant cannot object that it should not have been sustained as to others. Mediary v. McAllister, 97 Md. 488, 55 A. 461. See 1 Curr. L. 140, n. 79. Appellant cannot complain of findings against others. Ambrose v. Drew, 139 Cal. 665, 73 P. 543. An unsuccessful bidder at a sale of real estate by executors cannot raise the question that the sale will not produce funds sufficient to pay creditors. In re Robinson's Estate, 142 Cal. 152, 75 P. 777. Errors as to plaintiff's judgment cannot be assigned on one defendant's appeal, by another. Smith v. Bunch, 31 Tex. Civ. App. 541, 73 S. W. 559.

73. Instruction on effect of receipt more favorable to defendant than pleadings authorize. Shmilovitz v. Bares, 76 Conn. 714, 65 A. 660. See 1 Curr. L. 140, n. 80. Injunction restraining any "substantial" change in sea wall where no change at all is authorized. Fisk v. Ley [Conn.] 56 A. 559. Plaintiff cannot complain of instructions taking certain defenses from the jury. Hoar v. Hennessy [Mont.] 74 P. 452. Party securing all relief asked for. Guarantee Co. of North America v. Phoenix Ins. Co. [C. C. A.] 124 F. 170. Plaintiff in replevin cannot complain that verdict for defendant did not find the value of the goods and assess damages for detention. Cabell v. McKinney, 31 Ind. App. 601, 68 N. E. 601. Imposition of costs on opposing party. Second Nat. Bank v. Smith, 118 Wis. 18, 94 N. W. 664. Defendant in ejectment is not prejudiced by failure of the judgment to dispose of plaintiff's claim of damages. Davis v. Shepherd, 31 Colo. 141, 72 P. 57. Error in instruction as to apportionment of forfeit money paid by plaintiff to defendant, where defendant defaulted and plaintiff did not, is not available to defendant. Eager v. Mathewson [Nev.] 74 P. 404. Defendant cannot complain of verdict less than he admitted to be due. Seattle Brewing & Malting Co. v. Donofrio [Wash.] 74 P. 823. Where the evidence is susceptible of only one of two verdicts for a certain amount or nothing, defendant can complain of a verdict for a less amount. Myers v. Myers, 86 App. Div. 73, 83 N. Y. S. 236. Defendant can take nothing by an appeal from a judgment sustaining one of several grounds of demurrer to the whole bill and overruling the others. Kinney v. Reeves & Co. [Ala.] 36 So. 22.

74. McCabe & Stein v. Farrell [Tex. Civ. App.] 77 S. W. 1049. See 1 Curr. L. 140, n. 81.

75. Review not made on issues differing from those raised below. See post, § 13c. "Restriction to rulings below." Decree against plaintiff in capacity in which he prayed decree. Sowles v. Sartwell [Vt.] 56 A. 282. Validity of special assessments, change of position as to repeal and repassing of ordinance. Berry v. People, 202 Ill. 231, 66 N. E. 1072. See 1 Curr. L. 140, n. 82.

76. Storm v. Holmes [Neb.] 96 N. W. 73; Mitchell v. Wabash R. Co., 97 Mo. App. 411, 76 S. W. 647.

Assent: Refusal to direct verdict waived by proceeding with testimony. Mediary v. McAllister, 97 Md. 488, 55 A. 461; Pittsburgh, etc., R. Co. v. Hewitt, 202 Ill. 28, 66 N. E. 829; McLain v. St. Louis & S. R. Co., 100 Mo. App. 374, 73 S. W. 909. Introducing evidence after overruling demurrer to evidence. Tamblyn v. Johnston [C. C. A.] 126 F. 267. Introducing evidence after being refused a nonsuit. Jones v. Warren, 134 N. C. 390, 46 S. E. 740. Failure of defendant filing cross bill to object to dismissal of original. Roderick v. McMeekin, 204 Ill. 625, 68 N. E. 473. A motion to direct a verdict does not waive the right to except to a refusal to send the case to the jury after denial of the motion to direct. One Pearl Chain v. U. S. [C. C. A.] 123 F. 371. Both parties requesting direction of verdict, both are estopped to insist that case should have been submitted to jury. United States v. Bishop [C. C. A.] 125 F. 181; Bank of Park River v. Norton [N. D.] 97 N. W. 860. Party not moving may object to direction on motion of adversary. Veeder v. Seaton, 85 App. Div. 196, 83 N. Y. S. 159. Filing amended pleading after demurrer sustained. Burke v. Wright, 75 Conn. 641, 55 A. 14; First Nat. Bank v. Farmers' & Merchants' Bank [Neb.] 95 N. W. 1062; McKee v. Illinois Cent. R. Co., 121 Iowa, 550, 97 N. W. 69. An order sustaining a demurrer to a substituted petition will not be disturbed where the petition substituted is substantially the same as a previous one ordered stricken out. McKee v. Illinois Cent. R. Co., 121 Iowa, 550, 97 N. W. 69. After filing new plea under leave to amend, sufficiency of superseded plea cannot be reviewed, it being regarded as withdrawn. Mediary v. McAllister, 97 Md. 488, 55 A. 461. Error in overruling demurrer not available where demurrant pleaded over. Emery v. Hanna [Neb.] 94 N. W. 973; First Nat. Bank v. Farmers' & Merchants' Bank [Neb.] 95 N. W. 1062. Distributee of estate cannot appeal from order confirming account after praying its confirmation.

(§ 11E) 3. *Cross errors.*[77]—On appeal in equity, the appellee is not concluded as to any matter directly involved in the questions raised by the appellant,[78] but as to matters not necessarily involved, he cannot urge errors unless he has cross appealed,[79] or cross assigned errors, and sometimes only when he has appealed or brought error independently.[80] The right of appellees to assign cross errors is expressly given by statute in Illinois,[81] but co-parties as to whom the case is not appealed cannot assign.[82] Questions cannot be first raised by an assignment of cross errors.[83] A defaulted party will not be heard.[84] An appellee who insists that the findings and judgment be affirmed cannot deny the truth of a finding.[85] A cross assignment by a party not appealing as to another party also not appealing will not be considered,[86] and where the judgment on two consolidated actions is severable, and a party appeals from that portion against him, the other portion cannot be reviewed on a cross assignment of appellee who has not appealed.[87]

(§ 11E) 4. *Specifications and averments.*[88]—Questions defectively raised

In re Sherwood's Estate, 206 Pa. 465, 56 A. 20. Judgment for amount contended for by appellant. Frappiea v. Johnson, 75 Vt. 397, 56 A. 100. Party cannot predicate error on a ruling which he was instrumental in procuring. Norbury v. Harper [Neb.] 97 N. W. 438. Reference unobjected to. Blanton v. Howard, 25 Ky. L. R. 929, 76 S. W. 511. By requesting instructions on a certain phase of the case appellant precludes himself from objecting afterwards that question was one of law. Gayle v. Missouri Car & Foundry Co., 177 Mo. 427, 76 S. W. 987.

Erroneous evidence brought out by appellant on cross-examination. Goldstein v. Morgan [Iowa] 96 N. W. 897. Unobjected to on direct and cross-examination, cannot be assigned as error on re-direct. Highland Boy Gold Min. Co. v. Pouch [C. C. A.] 124 F. 148.

Erroneous exclusion of evidence waived by refusal to re-offer after withdrawal of objection. Crawford v. Burke, 201 Ill. 581, 66 N. E. 833.

Instructions requested or substantially like those requested by appellant. Cahill v. Baird, 138 Cal. 691, 72 P. 342; Union League Club v. Blymer Ice Mach. Co., 204 Ill. 117, 68 N. E. 409; Consolidated Stone Co. v. Morgan, 160 Ind. 241, 66 N. E. 696; Stoner v. Mau [Wyo.] 73 P. 548; Blom-Collier Co. v. Martin [Mo. App.] 73 S. W. 729; Union Pac. R. Co. v. Lotway [Neb.] 96 N. W. 527; Rumsey & Co. v. City of Bessemer, 138 Ala. 329, 35 So. 353; Harris v. Southern R. Co., 25 Ky. L. R. 559, 76 S. W. 151; Sepetowski v. St. Louis Transit Co., 102 Mo. App. 110, 76 S. W. 693; Harden v. Hodges [Tex. Civ. App.] 76 S. W. 217; Over v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 73 S. W. 535; Bitter v. Butchers' & Saloon Men's Ice Mfg. Ass'n [Tex. Civ. App.] 77 S. W. 423. Error invited by refused special instructions of party complaining. Ellyson v. International & G. N. R. Co. [Tex. Civ. App.] 75 S. W. 868; Masterson v. Ribble [Tex. Civ. App.] 78 S. W. 358. Error in submitting a question not within the issues is not waived by failure to ask an instruction thereon. Kircher v. Larchwood, 120 Iowa, 578, 95 N. W. 184. Copied from instruction requested by appellant. Kinney v. McFaul [Iowa] 98 N. W. 276. "Invited error" does not result from requesting an erroneous instruction after the charge, which is also erroneous in the same respect, has been given. Missouri, K. & T. R. Co. v. Eyer, 96 Tex. 72, 70 S. W. 529. Instructions expressly recognized as correct when given. Wiley v. Lindley [Tex. Civ. App.] 76 S. W. 208. Requested instruction the converse of that complained of. Morton v. Case Threshing Mach. Co., 99 Mo. App. 630, 74 S. W. 434; Mitchell v. Wabash R. Co., 97 Mo. App. 411, 76 S. W. 647. Propositions of law submitted by appellant held to be law of case. Landis v. Wolf, 206 Ill. 392, 69 N. E. 103. See 1 Curr. L. 140, n. 83.

77. See 1 Curr. L. 142.

78. Clark v. Lancaster County [Neb.] 96 N. W. 593. See 1 Curr. L. 142, n. 96.

79. Clark v. Lancaster County [Neb.] 96 Mo. 593. An appellee can urge errors only when he has cross appealed. Gray v. Chase, 184 Mass. 444, 68 N. E. 676. See 1 Curr. L. 142, n. 97.

80. Hauptmann v. Hauptmann, 91 App. Div. 197, 86 N. Y. S. 427. In Federal courts. Guarantee Co. of North America v. Phenix Ins. Co. [C. C. A.] 124 F. 170. Merely alleging by respondent in answer to appellant's petition of appeal is not effective. Merritt v. Jordan [N. J. Err. & App.] 56 A. 296. See 1 Curr. L. 142, n. 98.

81. Hurd's Rev. St. 1899, p. 1295, § 78. Oliver v. Wilhite, 201 Ill. 552, 66 N. E. 837.

82. Oliver v. Wilhite, 201 Ill. 552, 66 N. E. 837.

83. Bank of Commerce v. Miller, 202 Ill. 410, 66 N. E. 1039.

84. Decree pro confesso is unassailable being supported by the pleadings. Dunfee v. Mutual Bldg. & L. Ass'n, 206 Ill. 133, 68 N. E. 1052.

85. Jones v. Horn [Mo. App.] 78 S. W. 638.

86. Blackwell v. Farmers' & Merchants' Nat. Bank [Tex. Civ. App.] 76 S. W. 454; Id. [Tex.] 79 S. W. 518. Where reversal would affect the interests of co-appellees, the judgment will not be reviewed on objection of an appellee who has not cross appealed. Jamison v. New York & T. Land Co. [Tex. Civ. App.] 77 S. W. 969.

87. Foster v. Rosa [Tex. Civ. App.] 77 S. W. 990.

88. See 1 Curr. L. 143.

may be considered,[89] but generally speaking, errors must be specifically assigned,[90] and errors not so specified will not be considered.[91] Assignments must specifically indicate the error complained of,[92] especially in cases referred to auditors, where the records are generally long and complicated;[93] but the particular in which the decision is against law need not be specified.[94]

The ground of the objection must be stated,[95] but the rule that the errors relied on must be set out separately and particularly does not require that the reasons why appellant claims the decision is erroneous be set out.[96] General statements are insufficient.[97] Several assignments, held too general, are referred to in the note.[98]

Error must be positively averred,[99] and mere declaratory statements are insufficient.[1]

A general objection will not raise special matters.[2]

An assignment will be confined to the error to which it refers, and cannot be extended by the brief to include another exception not referred to therein.[3]

89. Cammack v. Rogers, 96 Tex. 457, 73 S. W. 795. See 1 Curr. L. 143, n. 8.

90. Oakland Borough v. Boyden, 22 Pa. Super. Ct. 278; Croasdale v. Von Boyneburgk, 206 Pa. 15, 55 A. 770; In re Ramschasel's Estate, 21 Pa. Super. Ct. 497; Smith v. Hopkins [C. C. A.] 120 F. 921; Nelson v. Brisbin [Neb.] 98 N. W. 1057; Terry v. Cooper, 119 Ga. 142, 45 S. E. 975; Bartlett v. Slater, 183 Mass. 152, 66 N. E. 631. Allowance of excessive fees to attorneys. Deane v. Indiana Macadam & Construction Co., 161 Ind. 371, 68 N. E. 686. Entry of joint judgment instead of according to Code Civ. Proc. § 611. Campbell v. Lane [Neb.] 96 N. W. 1043. Specifications of error consisting in insufficiency of evidence and findings on probate of will, held sufficient. In re Motz's Estate, 136 Cal. 558, 69 P. 294. See 1 Curr. L. 143, n. 4 et seq.

91. Appeal of Board of Health of Village of Buffalo Lake [Minn.] 95 N. W. 221. Code, § 4136. McMillan v. American Exp. Co. [Iowa] 98 N. W. 629; Willett v. Johnson [Okl.] 76 P. 174; Norman v. Southern R. Co., 65 S. C. 517, 44 S. E. 83; Scott v. Seaboard Air Line R. Co., 118 S. C. 463, 45 S. E. 129. Error not included in a specification of error separately set out as such will not be examined. Ancient Order of the Pyramids v. Drake, 66 Kan. 538, 72 P. 239.

92. McLeod v. State [Tex. Civ. App.] 76 S. W. 216. Code, § 4136. Faville v. State Trust Co. [Iowa] 96 N. W. 1109; Osborne & Co. v. Ringland & Co., 122 Iowa, 329, 98 N. W. 116. A single assignment, in sustaining a motion for new trial or in arrest of judgment, as to each and every ground thereof, is not sufficiently specific [Code, § 4136]. Reeves & Co. v. Lamm Bros., 120 Iowa, 283, 94 N. W. 839.

93. Hudson v. Hudson, 119 Ga. 637, 46 S. E. 874.

94. Stuart v. Lord, 138 Cal. 672, 72 P. 142.

95. Quaker City Nat. Bank v. Hepworth, 21 Pa. Super. Ct. 566; Chimine v. Baker [Tex. Civ. App.] 75 S. W. 330.

96. Court Rule 10, subd. 3. Nord v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 75 P. 681.

97. Wymard v. Deeds, 21 Pa. Super. Ct. 332; Smith v. Hopkins [C. C. A.] 120 F. 921; O'Neil v. Newman [Mich.] 93 N. W. 1064; Hill v. Southern R. [S. C.] 46 S. E. 486. On appeal from decision of board of general appraisers. U. S. v. Brown, Durrell & Co. [C. C. A.] 127 F. 793. Such as that "there were irregularities in the proceedings of the court by which defendants were prevented from having a fair trial." Rawlings v. Anheuser-Busch Brewing Ass'n [Neb.] 95 N. W. 792. "Errors of law occurring at the trial and duly excepted to." Parsons Band Cutter & Self-Feeder Co. v. Gadeke [Neb.] 95 N. W. 850.

98. An assignment that the court erred in refusing to sustain all of appellant's special demurrers. Baum v. Corsicana Nat. Bank [Tex. Civ. App.] 75 S. W. 863. A specification that the appellate court erred in overruling the first assignment, which was that the trial court erred in overruling a general demurrer. J. E. Dunn & Co. v. Smith, 96 Tex. 478, 73 S. W. 945. An assignment that the court erred in sustaining the general demurrer and special exceptions of defendant, there being eight of the latter. City of San Antonio v. Talerico [Tex. Civ. App.] 78 S. W. 28. An assignment that the charge was reversible error. Central Tex. & N. W. R. Co. v. Gibson [Tex. Civ. App.] 79 S. W. 351. An assignment complaining of the refusal of five separate requests on different subjects. Yecker v. San Antonio Traction Co. [Tex. Civ. App.] 76 S. W. 780. An exception that the court erred in rendering said judgment. City of Wilmington v. McDonald, 133 N. C. 548, 45 S. E. 864. An assignment that the court erred in overruling the motion for new trial. City of Palestine v. Addington [Tex. Civ. App.] 75 S. W. 322; St. Louis, etc., R. Co. v. Doble [Tex. Civ. App.] 75 S. W. 340.

99. Suggestion that the court "sailed its judicial craft into dangerous shoals" in giving certain instruction, held insufficient. Milbourne v. State, 161 Ind. 364, 68 N. E. 684. See 1 Curr. L. 143, n. 13.

1. No statement that the court ruled erroneously, or reference to any ruling complained of. Goldstein v. Morgan [Iowa] 96 N. W. 897.

2. General assignment of insufficiency of complaint held insufficient to raise objection to ordinance pleaded therein. Baltimore & O. R. Co. v. Ryan, 31 Ind. App. 597, 68 N. E. 923. See 1 Curr. L. 144, n. 24.

3. Word v. Kennon [Tex. Civ. App.] 75 S. W. 334.

The objectionable part of the record must be indicated,[4] and it is an absolute necessity, in the Federal courts, that the rule be observed requiring errors to be assigned specifically, and to be pointed out in the brief by page in the record where they may be found.[5] The court will not search the record for grounds of objections purely technical, not specifically referred to by the assignments.[6]

Distinct errors may not be combined in one assignment,[7] one assignment lodged against several matters being insufficient if any of them are correct,[8] or if the ruling complained of did not extend to all of the matters alleged.[9] The same question should not be raised by different assignments.[10] Assignments submitted together, the questions raised by them being separate and indcpendent, and presented in one proposition will not be considered.[11]

In Texas the assignment must contain or be followed by a legal proposition,[12] and accompanied by a statement from the record.[13]

4. Fitzgerald v. Edison Elec. Illuminating Co., 207 Pa. 118, 56 A. 350. Mere naming of witness, there being several objections to his testimony is not sufficient. In re Harvey's Will [Iowa] 94 N. W. 559. See 1 Curr. L. 143, n. 17.

5. C. C. A. Rules 11 and 24, 90 F. cxlvi, 31 C. C. A. cxlvi. Walton v. Wild Goose Min. & Trading Co. [C. C. A.] 123 F. 209; Briggs v. Neal [C. C. A.] 120 F. 224; Smith v. Hopkins [C. C. A.] 120 F. 921; George Adams & F. Co. v. South Omaha Nat. Bank [C. C. A.] 123 F. 641. See 1 Curr. L. 143, n. 10.

6. Esterly v. Rua [C. C. A.] 122 F. 609; Piper v. Cashell [C. C. A.] 122 F. 614.

7. Briggs v. Neal [C. C. A.] 120 F. 224; Smith v. Hopkins [C. C. A.] 120 F. 921; Rawlings v. Anheuser-Busch Brew. Ass'n [Neb.] 95 N. W. 792; Halley v. Tichenor, 120 Iowa, 164, 94 N. W. 472; Faville v. State Trust Co. [Iowa] 96 N. W. 1109; Baum v. Corsican Nat. Bank [Tex. Civ. App.] 75 S. W. 863; Mallory Commission Co. v. Elwood, 120 Iowa, 632, 95 N. W. 176; Cooper Wagon & Buggy Co. v. Barnt [Iowa] 98 N. W. 356; Davison v. Ratcliffe [Iowa] 98 N. W. 472; Wren v. Howland [Tex. Civ. App.] 75 S. W. 894; Lewis v. Hoeldtke [Tex. Civ. App.] 76 S. W. 309; Galveston, H. & S. A. R. Co. v. Fales [Tex. Civ. App.] 77 S. W. 234; Houston & T. C. R. Co. v. De Berry [Tex. Civ. App.] 78 S. W. 736; Loeweke v. Lumberman's Bldg. & L. Ass'n, 21 Pa. Super. St. 389. Assignment including rulings on a large number of different requests for findings of law and fact. Kase v. Burnham, 206 Pa. 208, 55 A. 1028. That the court erred in overruling defendant's objections to evidence in each and every instance. Suddith v. Boone, 121 Iowa, 258, 96 N. W. 853. Such an assignment is not aided by propositions and statements in the brief explaining each of the rulings complained of. Cammack v. Rogers, 96 Tex. 457, 73 S. W. 795. An assignment combining separate and distinct errors will not be considered. Cochran v. Siegfried [Tex. Civ. App.] 75 S. W. 542; Texas & P. R. Co. v. Huber [Tex. Civ. App.] 75 S. W. 547. See 1 Curr. L. 144, n. 25.

8. Startzer v. Clarke [Neb.] 95 N. W. 509. Assignment challenging two paragraphs of a pleading is bad if either is good on demurrer. Stoy v. Bledsoe, 31 Ind. App. 643, 68 N. E. 907. Demurrers to several pleas. Western R. of Ala. v. Arnett, 137 Ala. 414, 34 So. 997. One matter not excepted to. Hill v. Indianapolis & V. R. Co., 31 Ind. App. 98, 67 N. E. 276. Several instructions. Young v. Montgomery, 161 Ind. 68, 67 N. E. 684; Ledwith v. Campbell [Neb.] 95 N. W. 838; Ashford v. Ashford, 136 Ala. 631, 34 So. 10. An assignment of error for refusal to give several instructions consisting of separate paragraphs will be considered only so far as to ascertain that one of the instructions is erroneous. Canon v. Farmers Bank [Neb.] 91 N. W. 585. The court erred in excluding from the testimony proof as to the truth of the article, and the charge made therein was refused consideration, where a portion of that testimony was rightly excluded. Williams v. Fuller [Neb.] 97 N. W. 246. See 1 Curr. L. 145, n. 31.

9. Overruling demurrers to only part of paragraphs assigned. Smith v. Borden, 160 Ind. 223, 66 N. E. 681.

10. Seifred v. Pennsylvania R. Co., 206 Pa. 399, 55 A. 1061.

11. Western Union Tel. Co. v. Crawford [Tex. Civ. App.] 75 S. W. 843.

12. Yecker v. San Antonio Traction Co. [Tex. Civ. App.] 76 S. W. 780; Houston Transfer Co. v. Renard [Tex. Civ. App.] 79 S. W. 838; Missouri, K. & T. R. Co. v. McFarland [Tex. Civ. App.] 75 S. W. 811; International & G. N. R. Co. v. Anchonda [Tex. Civ. App.] 75 S. W. 557; Texas & N. O. R. Co. v. Lee [Tex. Civ. App.] 74 S. W. 345; Duckworth v. Ft. Worth & R. G. R. Co. [Tex. Civ. App.] 75 S. W. 913; Galveston, etc., R. Co. v. Butchek [Tex. Civ. App.] 78 S. W. 740; Gulf, etc., R. Co. v. Dunn [Tex. Civ. App.] 78 S. W. 1080. A proposition not based upon, nor justified by the assignment, will not be considered. Galveston, etc., R. Co. v. Hubbard [Tex. Civ. App.] 76 S. W. 764. See 1 Curr. L. 144, n. 20.

13. Rule 31. Chimine v. Baker [Tex. Civ. App.] 75 S. W. 330; Texas & N. O. R. Co. v. Lee, [Tex. Civ. App.] 74 S. W. 345; Bull v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 78 S. W. 525; McLeod v. State [Tex. Civ. App.] 76 S. W. 216; Texas & P. R. Co. v. Huber [Tex. Civ. App.] 75 S. W. 547; Duckworth v. Ft. Worth & R. G. R. Co. [Tex. Civ. App.] 75 S. W. 913; Raywood Rice Canal & Milling Co. v. Langford Bros. [Tex. Civ. App.] 74 S. W. 926; International & G. N. R. Co. v. Thompson [Tex. Civ. App.] 77 S. W. 439; Houston Transfer Co. v. Renard [Tex. Civ. App.] 79 S. W. 838. See 1 Curr. L. 144, n. 21.

An assignment not signed by party or counsel is null and confers no jurisdiction.[14]

Joining in assignments.[15]—Appellants should not join in assignment if the ruling may be good as to one of them,[16] as where one only excepted below,[17] or one invited the action complained of;[18] nor should they join where the exception of each was several.[19] A joint assignment by three defendants to adverse rulings against one of them presents no question for review.[20] A joint exception taken by all appellants is not available in a separate assignment by one of them.[21] Where the demurrers and exceptions were both joint and several, an assignment by one defendant will raise the sufficiency of the complaint.[22] An assignment by one of two parties is not available to both jointly.[23] It is immaterial whether appellants are jointly interested in an assignment going to the absence of necessary parties, since the court will notice such a defect suo motu.[24]

Amendments and additional assignments.[25]—The court in its discretion may refuse to review errors not assigned, or may permit assignments to be incorporated by amendment.[26] A motion to amend an exception in the appellate court will be denied where the only purpose is to amplify it and make it clearer.[27]

Defects or errors in pleadings[28] will not be reviewed unless specially assigned, even in equitable actions,[29] and where error is not assigned, on the failure of the court to carry back a demurrer and sustain it to a pleading of the demurrant, it will not be considered on appeal.[30] A single assignment to the overruling of a demurrer to a pleading in several paragraphs presents only the sufficiency of the whole pleading;[31] but where a general exception is reserved to the overruling of a demurrer to a complaint in several counts, the assignment can be only to the pleading generally and not to the several counts.[32] Error in overruling a demurrer in the complaint is not raised by an assignment of error in overruling a motion for new trial in which one of the grounds is the sufficiency of the complaint.[33] An assignment of error in overruling a demurrer is not supported where no demurrer on that ground was filed.[34] An assignment specifically challenging the correctness of a ruling as to a part only of the grounds of a demurrer is insufficient to present a question for review.[35] Where defendant demurs to a complaint in two counts on the ground of improper joinder, and to each count on the ground of failure to state a cause of action, and his demurrer to the whole complaint and to one of the counts is overruled,

14. Rubey v. Hough, 161 Ind. 203, 67 N. E. 257.
15. See 1 Curr L. 145, n. 34.
16. Anderson v. Hall [Neb.] 94 N. W. 981.
17. Burns v. Trustees of Huntington Cemetery Church, 31 Ind. App. 640, 68 N. E. 915.
18. Storm v. Holmes [Neb.] 96 N. W. 73.
19. Motions for new trial by principal and sureties are several. Gough v. State [Ind. App.] 68 N. E. 1043.
20. Johnson v. Blair [Ind. App.] 70 N. E. 85.
21. Gough v. State [Ind. App.] 68 N. E. 1043.
22. Indianapolis & G. R. T. Co. v. Foreman [Ind.] 69 N. E. 669.
23. McLaughlin v. Union Nat. Sav. & L. Ass'n [Ind. App.] 67 N. E. 548.
24. Mote v. Morton [Fla.] 35 So. 656.
25. See 1 Curr. L. 145.
26. Johns v. Ruff [N. D.] 95 N. W. 440.
27. Willson v. Imperial Fertilizer Co. [S. C.] 46 S. E. 279.
28. See 1 Curr. L. 145.
29. Scribner v. Taggart [Iowa] 98 N. W. 798. Where no error is assigned touching any error in settling the pleadings, their sufficiency cannot be considered on objection to the evidence. Cleveland, etc., R. Co. v. Hamilton, 105 Ill. App. 75.
30. Lux & T. Stone Co. v. Donaldson [Ind.] 68 N. E. 1014. Assignment that court erred in sustaining demurrer is not sufficient. Coulter v. Bradley [Ind. App.] 69 N. E. 710.
31. Demurrer to answer carried back to complaint. Stutsman v. Stutsman, 30 Ind. App. 645, 66 N. E. 773. See 1 Curr. L. 145, n. 40.
32. Southern Ind. R. Co. v. Harrell, 161 Ind. 689, 68 N. E. 262.
33. Helberg v. Hammond Bldg. L. & Sav. Ass'n, 31 Ind. App. 58, 67 N. E. 111.
34. Brady v. Pinal County [Ariz.] 71 P. 910.
35. Though some of the grounds are "ridiculous and impossible." Chase v. Stearns [Iowa] 96 N. W. 1123.

and to the other count sustained, and he appeals, and only assigns as error the overruling of the demurrer to the whole complaint, his assignment cannot be sustained.[36]

Rulings on evidence.[37]—Error in the admission or exclusion of evidence must be specific and call the court's attention to the particular evidence improperly ruled upon.[38] What the evidence was which the court excluded should appear, at least in substance.[39] The particular evidence which is objectionable should be specified.[40] The names of the witnesses and the pages of the paper book where the testimony can be found must be stated,[41] but specific reference to the witness' name and the pages of the abstract do not indicate the error complained of, if various questions and numerous objections appear on those pages.[42] Where an assignment is based on the refusal of the court to permit a witness to testify to certain facts, but no question was asked calling for any such testimony, there is nothing before the court.[43] Where no errors are assigned to the rulings upon the admission of evidence, the competency of the witness being conceded, objections to the admission of evidence will not be considered.[44]

Instructions[45] complained of must be quoted in the assignment,[46] and the particular error specified,[47] and a general exception will be overruled if any distinct proposition embraced in the charge is correct.[48] The particulars in which a modification of a request was erroneous must be specified.[49] Exceptions must be stated separately.[50] Exceptions to a prayer as not supported by the evidence must specify in what particular the evidence is defective,[51] and exception to refusal of requests must point out the evidence requiring them.[52] A proposition under an assignment that a request if incorrect was sufficient to call the court's attention to the principle and require a charge thereon will not be considered in the absence of an assignment that the court should, in view of the request, have given a proper charge upon that

36. Howe v. Coates, 90 Minn. 508, 97 N. W. 129.

37. See 1 Curr. L. 145.

38. Rudolph v. Smith [Colo. App.] 72 P. 817. Reference to the page of the transcript is necessary. Reins v. King, 2 Mont. 511, 71 P. 763. Assignments of error as to the admission of testimony, based upon exceptions general in their character, are not reviewable on error in the supreme court. Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 24 S. Ct. 24. Citing Burton v. Driggs, 20 Wall. [U. S.] 125, 22 Law. Ed. 299; Noonan v. Caledonia Min. Co., 121 U. S. 400, 7 S. Ct. 911, 30 Law. Ed. 1063; Dist. of Columbia v. Woodbury, 136 U. S. 462, 10 S. Ct. 990, 34 Law. Ed. 476.

39. Quaker City Nat. Bank v. Hepworth, 21 Pa. Super. Ct. 666; Bailey v. Pittsburg, 207 Pa. 553, 56 A. 1085; Loeweke v. Lumberman's Bldg. & L. Ass'n, 21 Pa. Super. Ct. 389; Binion v. Georgia Southern & F. R. Co., 118 Ga. 282, 45 S. E. 276. Assignment that the court refused to permit answer to the "following question," followed by the question asked, is sufficient. Gough v. State [Ind. App.] 68 N. E. 1043. See 1 Curr. L. 146, n. 45.

40. Questions and answers, ruling of court, and the testimony admitted, should be quoted, and page of paper book specified. Loeweke v. Lumberman's Bldg. & L. Ass'n, 21 Pa. Super. Ct. 389; Quaker City Nat. Bank v. Hepworth, 21 Pa. Super. Ct. 666. See 1 Curr. L. 146, n. 47.

41. Gerwig v. Johnston Co., 207 Pa. 685, 57 A. 42. See 1 Curr. L. 146, n. 48.

42. In re Harvey's Will [Iowa] 94 N. W. 559. See 1 Curr. L. 146, n. 48.

43. Rawlings v. Clark [Colo.] 74 P. 346.

44. Catlin Consol. Canal Co. v. Euster [Colo. App.] 73 P. 846.

45. See 1 Curr. L. 146.

46. Com. v. Houghton, 22 Pa. Super. Ct. 52; Mitchell v. Jodon, 22 Pa. Super. Ct. 304; Childs v. Ponder, 117 Ga. 553, 43 S. E. 986.

47. Cox v. Crow [Neb.] 94 N. W. 524; Carter v. Kaufman [S. C.] 45 S. E. 1017; Arnold v. Producers' Fruit Co., 141 Cal. 738, 75 P. 326. See 1 Curr. L. 146, n. 49.

48. Richardson v. Babcock, 119 Wis. 141, 96 N. W. 554. In Colorado, a general assignment against each instruction is good if no numbered instruction contains more than one proposition; but if two distinct points, one of which is good, are presented by any instruction, the assignment fails. City of Pueblo v. Timbers, 31 Colo. 215, 72 P. 1059.

49. Thompson v. Family Protective Union, 66 S. C. 459, 45 S. E. 19.

50. To divide the charge into sections, each containing several propositions, and except to each is not sufficient [Code, § 550]. Gwaltney v. Provident Sav. Life Assur. Soc. [N. C.] 44 S. E. 659.

51. Sellman v. Wheeler, 95 Md. 751, 54 A. 612.

52. Davis v. Shepherd, 31 Colo. 141, 72 P. 57; Ft. Worth & D. C. R. Co. v. Kelley [Tex. Civ. App.] 76 S. W. 942.

subject.[53] Conflict in instructions will not be reviewed in the absence of an assignment complaining thereof,[54] and an assignment that the entire charge of the court was erroneous without pointing out specific errors is insufficient.[55] Objection to a portion of the charge not assigned as error will not be reviewed.[56]

Error in directing a verdict.[57]—An assignment that the court erred in directing a verdict is not too general,[58] and in such assignment the evidence need not be set out.[59] An assignment of error to a charge, directing a verdict for plaintiff, will raise the objection that owing to a variance recovery could not be had.[60] An assignment in general terms, that the court erred in granting a nonsuit, sufficiently presents the issue whether there was any evidence to sustain the case.[61]

Verdicts and findings of fact.[62]—The sufficiency of the evidence to justify the verdict will not be considered when there is no specification of the particulars wherein the evidence is insufficient,[63] but a specification that a particular finding is unsupported is sufficient,[64] and a specification in the positive form instead of the negative is not for that reason bad if it clearly appears wherein the evidence was insufficient.[65] Specifications which merely state what the evidence shows and what it does not show,[66] or that "the verdict is against the law of the case," do not raise the question.[67] Findings of fact, not complained of by assignments of error as unsupported by the evidence, will be considered as correct.[68] An assignment that the court erred in refusing a motion for a new trial will support the contention that the verdict was not sustained by the evidence, though a specific assignment of that point was expressly waived.[69] An assignment that the court erred in a certain finding will not be considered where the finding was amended and there is no assignment attacking the amended finding.[70] Excessiveness of damages awarded cannot be reviewed where it is not specified wherein they are excessive,[71] but in Texas, a verdict complained of as excessive will be reviewed, notwithstanding the assignment is general and multifarious.[72] In South Dakota, a specification that the evidence does not support the findings is sufficient.[73]

Motion for new trial.[74]—In Nebraska, the ruling on a motion for new trial must

53. Equitable Life Assur. Soc. v. Maverick [Tex. Civ. App.] 78 S. W. 560; First Nat. Bank v. Moor [Tex. Civ. App.] 79 S. W. 53.

54. Houston Elec. Co. v. Robinson [Tex. Civ. App.] 76 S. W. 209.

55. Fitzpatrick v. Union Traction Co., 206 Pa. 335, 55 A. 1050; Wood v. Schomacker Piano Forte Mfg. Co., 22 Pa. Super. Ct. 138. An assignment that the court erred in reading and refusing to read instructions asked and refused is insufficient [Code, § 4136]. Borden v. Isherwood, 120 Iowa, 677, 94 N. W. 1128.

56. Perry v. Detroit United R. [Mich.] 98 N. W. 17.

57. See 1 Curr. L. 146.

58. For defendant. McCarthy v. Mutual Reserve Fund Life Ass'n [Tex. Civ. App.] 74 S. W. 921. For plaintiff. Howell v. Pennington, 118 Ga. 494, 45 S. E. 272.

59. McCarthy v. Mutual Reserve Fund Life Ass'n [Tex. Civ. App.] 74 S. W. 921.

60. Townsend v. Kreigh [Mich.] 94 N. W. 732.

61. Fargason v. Ford, 119 Ga. 343, 46 S. E. 431.

62. See 1 Curr. L. 146.

63. Gagnier v. Fargo [N. D.] 96 N. W. 841; Liurette v. Hiller, 139 Cal. 729, 73 P. 336. See 1 Curr. L. 146, n. 58.

64. Swift v. Occidental Min. & Petroleum Co., 141 Cal. 161, 74 P. 700; Kenworthy v. Mast [Or.] 74 P. 841. Mistake in quoting finding held not fatal. Craig v. Crafton Water Co., 141 Cal. 178, 74 P. 762; Bell v. Staacke, 141 Cal. 186, 74 P. 774.

65. Drathman v. Cohen, 139 Cal. 310, 73 P. 181.

66. Ball v. Gussenhoven [Mont.] 74 P. 871.

67. Fagnier v. Fargo [N. D.] 96 N. W. 841.

68. Supreme Council, American Legion of Honor v. Storey [Tex. Civ. App.] 75 S. W. 901.

69. Supple v. Agnew, 202 Ill. 351, 66 N. E. 1069.

70. Merrill v. Miller, 28 Mont. 134, 72 P. 423.

71. City of Pueblo v. Timbers, 31 Colo. 215, 72 P. 1059. An assignment that the finding is not sustained by sufficient evidence will not bring up error in the amount of recovery. Dickenson v. Columbus State Bank [Neb.] 98 N. W. 813. See 1 Curr. L. 147, n. 63.

72. Galveston, etc., R. Co. v. Appeal [Tex. Civ. App.] 77 S. W. 635.

73. The reason why it does not is matter of argument. Bowdle v. Jenoks [S. D.] 99 N. W. 98.

74. See 1 Curr. L. 147.

be assigned as error in addition to the errors assigned in the motion itself.[75] An assignment in Oklahoma to the effect that the court erred in overruling the motion for new trial will present for review every alleged error embodied in the motion,[76] but it is otherwise in Nebraska and Iowa.[77]

Rulings by a lower court of appeal[78] should be assigned as error in "reversing" or "affirming" the judgment of the court below.[79] Such assignment will bring before the reviewing court all errors properly assigned in the lower court and not waived, and none other.[80] Error cannot be assigned on its opinion, but only on its judgment.[81]

(§ 11E) 5. *Demurrers, pleas, and replication.*[82]—If appellee or defendant desires to plead instead of joining in error, he must do it in apt time.[83] It not being the practice to demur to assignments or move to make them more specific, on a motion to dismiss for insufficiency, the assignments will be treated as though challenged for a deficiency therein.[84]

(§ 11) *F. Briefs and arguments.*[85]—Briefs must be filed within the time limited.[86] Where the action was tried below as an action at law, appellant should file the first brief.[87]

Leave to file briefs as amicus curiae will be granted in any case when justified by circumstances.[88]

A brief presented by one not licensed as a counselor will not be considered,[89] notwithstanding a stipulation to submit the case on briefs.[90] Questions not fairly raised by appellant's brief will not be passed upon,[91] unless fundamental,[92] and errors not insisted upon in the appellate court in Illinois will be considered waived on a further appeal to the supreme court.[93] A defect in the bill not urged by defendant will not be given effect, though obnoxious to general demurrer, and a general demurrer was interposed and overruled below.[94]

75. Coxe Bros. & Co. v. Omaha Coal, Coke & Lime Co. [Neb.] 94 N. W. 519. See 1 Curr. L. 147, n. 74.

76. Glaser v. Glaser, 13 Okl. 389, 74 P. 944.

77. Mains v. Mains [Neb.] 95 N. W. 776; Goldstein v. Morgan [Iowa] 96 N. W. 897.

78. See 1 Curr. L. 147.

79. Tevis v. Hammersmith, 161 Ind. 74, 67 N. E. 672. Rulings by lower court of appeal must be assigned as error, and this assignment must be shown by the record. Showing of abstract is not sufficient. Metropolitan Life Ins. Co. v. People, 205 Ill. 370, 68 N. E. 1050.

80. Tevis v. Hammersmith, 161 Ind. 74, 67 N. E. 672.

81. Voigt v. Anglo-American Provision Co., 202 Ill. 462, 66 N. E. 1054.

82. See 1 Curr. L. 147.

83. Appellate Court Rule 17. Collier v. Grey, 105 Ill. App. 485.

84. Whisler v. Whisler [Ind.] 70 N. E. 152.

85. See 1 Curr. L. 147.

86. Cross assignments stricken out where not supported by briefs within 60 days. Ct. Rule 21, 55 N. E. v. Lux & T. Stone Co. v. Donaldson [Ind.] 68 N. E. 1014. A respondent's brief not filed within the time limited by the rule will be stricken. Rule 10, subds. 4, 5. Knobb v. Reed, 28 Mont. 42, 72 P. 304.

87. Schmidtke v. Keller [Or.] 73 P. 332. An appellant is not in default in Washington for failure to file briefs where respondent has not returned the proposed statement of facts served on him, though the statement was faulty and amendments were proposed and allowed [Ball. Ann. Codes & St. § 5063]. Jefferson County v. Trumbull, 31 Wash. 217, 71 P. 787.

88. Northern Securities Co. v. United States, 191 U. S. 555, 24 S. Ct. 119. Citing Green v. Biddle, 8 Wheat. [U. S.] 1, 17, Florida v. Georgia, 17 How. [U. S.] 478, 491; The Gray Jacket, 5 Wall. [U. S.] 370. Where it did not appear that applicant was interested in any other case which would be affected by the decision, and the parties were represented by competent counsel and consent had not been given, the application was denied. Id.

89. Leaver v. Kilmer [N. J. Law] 54 A. 817.

90. Duysters v. Crawford, 69 N. J. Law, 229, 54 A. 823.

91. Farmers' L. & T. Co. v. Hastings [Neb.] 96 N. W. 104. A question as to the construction of a statute not briefed or suggested will not be considered. McLeod v. State [Tex. Civ. App.] 76 S. W. 216.

92. McColpin v. McColpin's Estate [Tex. Civ. App.] 75 S. W. 824.

93. Claim of argument in reply brief in court below not considered in absence of certified copy. City of Chicago v. Cook, 204 Ill. 373, 68 N. E. 538.

94. City of Orlando v. Equitable Bldg. & L. Ass'n [Fla.] 33 So. 986.

Appellee is not bound to contest the points raised on the appeal,[95] and appellee's failure to argue a point will not lead to reversal unless his neglect has been so flagrant as to demand it for the protection of the court,[96] though where no brief or argument is presented for appellee, the record will not be critically examined, and will be presumed to be properly represented in appellant's brief.[97] Where appellee fails to point out any omissions or inaccuracies in appellant's statement of the record, it will be taken as fair.[98] Appellant cannot argue in his reply brief matters not argued in chief,[99] and appellant will not be permitted to seek a modification as to matters not challenged in his briefs, when defeated in his attempt to secure a reversal of the entire decree.[1]

Statutes and court rules prescribing the form and contents of briefs are insisted on.[2] A common requirement is a summary of so much of the record as presents the error relied on,[3] or a concise abstract of the case.[4] Under the supreme court rule of Indiana, one who omits to briefly recite the evidence cannot object to its sufficiency,[5] but a compliance with that portion of the rule will entitle appellant to the review, though he omits to comply with another clause.[6] Failure to set out the substance of a complaint and the demurrer thereto waives the error in overruling the demurrer,[7] and failure to set out the interrogatories and answers waives the error in denying appellant's motion for judgment thereon.[8] If the instructions complained of or a succinct statement thereof are not set out, they will not be considered,[9] and where the brief fails to state or refer to any evidence presenting the issue referred to in a request, its refusal will not be reviewed.[10] If errors be not presented and argued properly, in briefs,[11] or orally,[12] they will be deemed waived.[13] The requirement

95. Gulf, C. & S. F. R. Co. v. Blanchard [Tex. Civ. App.] 73 S. W. 88.

96. Irvin v. Rushville Co-operative Telephone Co., 161 Ind. 524, 69 N. E. 258.

97. Reynolds v. Phillips [Neb.] 95 N. W. 491; William Deering & Co. v. Walter [Neb.] 96 N. W. 517.

98. Sup. Ct. Rule 23 (55 N. E. vi.). Pittsburgh, etc., R. Co. v. Selvers [Ind.] 70 W. E. 133. See 1 Curr. L. 148, n. 89.

99. State Security Bank v. Burns [Iowa] 96 N. W. 909. See 1 Curr. L. 148, n. 92.

1. Batty v. Hastings [Neb.] 95 N. W. 866. See 1 Curr. L. 148, n. 93.

2. Consolidated Stone Co. v. Morgan, 160 Ind. 241, 66 N. E. 696; Franklin Ins. Co. v. Wolf, 30 Ind. App. 534, 66 N. E. 756. See 1 Curr. L. 148, n. 94.

3. Sup. Ct. Rule 22, cl. 5 (55 N. E. vi). Consolidated Stone Co. v. Morgan, 160 Ind. 241, 66 N. E. 696; Franklin Ins. Co. v. Wolf, 30 Ind. App. 534, 66 N. E. 756; Schlichter v. Taylor, 31 Ind. App. 164, 67 N. E. 566; Harrold v. Fuenfstueck, 31 Ind. App. 275, 67 N. E. 699. Appellant's failure is cured where appellee sets it out in his brief. Chicago, I. & E. R. Co. v. Wysor Land Co. [Ind.] 69 N. E. 546. Rules 29, 30, 31. Walker v. Texas & N. O. R. Co. [Tex. Civ. App.] 75 S. W. 47. See 1 Curr. L. 148, n. 96.

4. **Montana:** Rule 10, subsec. 3. Casey v. Thieviege, 27 Mont. 516, 71 P. 756; Elliott v. Martin, 27 Mont. 519, 71 P. 756; Larkin v. Butte & B. Consol. Min. Co., 28 Mont. 41, 72 P. 304; Knobb v. Reed, 28 Mont. 42, 72 P. 304; Allen v. Reely, 28 Mont. 525, 73 P. 118.

5. Rule 22, cl. 5 (55 N. E. vi). Security Accident & Sick Ben. Ass'n v. Lee, 160 Ind. 249, 66 N. E. 745; Pittsburgh, etc., R. Co. v. Wilson, 161 Ind. 701, 66 N. E. 899; Groves v. Hobbs [Ind. App.] 70 N. E. 279. See 1 Curr. L. 149, n. 96.

6. Pittsburgh, etc., R. Co. v. Selvers [Ind.] 70 N. E. 133.

7. Perry, Matthews-Buskirk Stone Co. v. Wilson, 160 Ind. 435, 67 N. E. 183. Appellant's failure may be cured by appellee's brief. Chicago, I. & E. R. Co. v. Wysor Land Co. [Ind.] 69 N. E. 546.

8. Perry, Matthews-Buskirk Stone Co. v. Wilson, 160 Ind. 435, 67 N. E. 183.

9. Sup. Ct. Rule 22 (55 N. E. v). Cleveland, etc., R. Co. v. Stewart, 161 Ind. 242, 68 N. E. 170.

10. Davidson v. Jefferson [Tex. Civ. App.] 76 S. W. 765.

11. Zimmerman v. Denver Consol. Tramway Co. [Colo. App.] 72 P. 607; Jones v. New York, etc., R. Co., 184 Mass. 89, 68 N. E. 14; Franklin Ins. Co. v. Wolf, 30 Ind. App. 534, 66 N. E. 756; Helvie v. McKain [Ind. App.] 70 N. E. 178; Gilliland v. R. G. Dun & Co., 136 Ala. 327, 34 So. 25; McKinnon v. Hope [Ga.] 45 S. E. 413; Fuller v. New York Fire Ins. Co., 184 Mass. 12, 67 N. E. 879; Bemis v. McCloud [Neb.] 96 N. W. 214; Appeal of Board of Health of Village of Buffalo Lake [Minn.] 95 N. W. 221; White v. Collins, 90 Minn. 165, 95 N. W. 765; Brown v. Collins [Neb.] 96 N. W. 173. See 1 Curr. L. 149, n. 97, 98.

12. Thornton v. Dwight Mfg. Co., 137 Ala. 211, 34 So. 187; Western R. v. Arnett, 137 Ala. 414, 34 So. 997; McComb v. C. R. Brewer Lumber Co., 184 Mass. 276, 68 N. E. 222; Pearce v. Miller, 201 Ill. 188, 66 N. E. 221; Zimmerman v. Denver Consol. Tramway Co. [Colo. App.] 72 P. 607; Bartlett v. Slater, 183 Mass. 152, 66 N. E. 631; Smith v. Borden, 160 Ind. 223, 66 N. E. 681; Henderson v. Raymond Syndicate, 183 Mass. 443, 67 N. E.

that the assignments relied upon be copied in the brief is not complied with by stating the substance of them.[14]

The argument must go into the error discursively.[15] The "points" or "errors" must be specified and authorities cited,[16] and counsel must point out specifically in what the error complained of consists,[17] unless the error be so glaring as to need no argument.[18] Reference must be made to the bill where the rulings complained of may be found.[19] Assignments must be based on the specific grounds alleged below and argued as made.[20]

A brief incorporating no assignments of error may be stricken on motion,[21] but where no injury has resulted to appellee, appellant's brief not complying with the rules,[22] or tardily filed, will not be stricken,[23] and a brief will not be stricken in Washington for failure to point out the errors where but one is relied on and which is clearly stated at the close of the statement of facts.[24] The brief of a defendant in an equity suit will not be stricken on motion of a co-defendant as in aid of complainant, since each defendant is entitled to pursue the course that to him seems best.[25] Power to strike out scandalous argument will not, except in extreme cases, be used in such a way as to defeat ultimate justice.[26]

Failure to file briefs may lead to dismissal,[27] affirmance, or continuance at appellee's election;[28] but the court will impose a penalty rather than dismiss the case, where brief and abstract are not properly prepared.[29] A disregard of some of the rules in preparing appellant's brief does not necessarily prevent consideration of a sufficient assignment therein that the verdict is unsupported by the evidence.[30]

Refiling briefs from other courts.[31]—In Illinois, it is improper to file in the su-

427; Hoodless v. Jernigan [Fla.] 35 So. 656; Bourbonnais v. West Boylston Mfg. Co., 184 Mass. 250, 68 N. E. 232; Kelly v. West Boylston Mfg. Co., 184 Mass. 250, 68 N. E. 232; Clear Creek Stone Co. v. Dearmin, 160 Ind. 162, 66 N. E. 609; Frazer v. Fuller, 184 Mass. 499, 69 N. E. 217; Halley v. Tichenor, 120 Iowa, 164, 94 N. W. 472; Nichols v. Baltimore R. Co. [Ind. App.] 70 N. E. 183; Comer v. Morgan County Com'rs [Ind. App.] 70 N. E. 179. See 1 Curr. L. 149, n. 99.

13. Harnett v. Holdredge [Neb.] 97 N. W. 443; Nelson v. Brisbin [Neb.] 98 N. W. 1057; Oklahoma City v. McMaster, 12 Okl. 570, 73 P. 1012; Revell v. Thrash, 132 N. C. 803, 44 S. E. 596; Stoy v. Bledsoe, 31 Ind. App. 643, 68 N. E. 907. Unconstitutionality of law. Harding v. People, 202 Ill. 122, 66 N. E. 962.

14. Alexander v. Bowers [Tex. Civ. App.] 79 S. W. 342.

15. A mere statement that evidence objected to was immaterial is bad. Alabama Steel & Wire Co. v. Wrenn, 136 Ala. 475, 34 So. 970. A mere repetition of the assignment, followed by a statement that it was error, is not sufficient. Hoodless v. Jernigan [Fla.] 35 So. 656. See 1 Curr. L. 149, n. 2.

16. Hoodless v. Jernigan [Fla.] 35 So. 666. Rule 22 (55 N. E. v.). Given v. State, 160 Ind. 552, 66 N. E. 750; Franklin Ins. Co. v. Wolf, 30 Ind. App. 534, 66 N. E. 756. Failure to cite authorities waives point. Unconstitutionality of statute. Harding v. People, 202 Ill. 122, 66 N. E. 962. Assignment based on overruling demurrer, not considered, complaint stating cause of action. Montgomery St. R. v. Hastings, 138 Ala. 432, 35 So. 412. See 1 Curr. L. 149, n. 4.

17. Barnes v. Benham, 13 Okl. 582, 75 P. 1130; Henry School Tp. v. Meredith [Ind. App.] 70 N. E. 393.

18. Hoodless v. Jernigan [Fla.] 35 So. 656.

19. Citizens' Gas & Oil Min. Co. v. Whipple [Ind. App.] 69 N. E. 557; Hackney v. Raymond Bros. Clarke Co. [Neb.] 94 N. W. 822; Merrill v. Garver [Neb.] 96 N. W. 619; Farmers' Loan & Trust Co. v. Hastings [Neb.] 96 N. W. 104. Page should be cited. Hoodless v. Jernigan [Fla.] 35 So. 656. See 1 Curr. L. 149, n. 5.

20. Hoodless v. Jernigan [Fla.] 35 So. 656.

21. Johns v. Ruff [N. D.] 95 N. W. 440.

22. Bull v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 78 S. W. 525. Nonobservance of the rule in Washington will not be followed by striking the brief and affirmance, where it appears that no material injury has been effected by nonobservance of the rule. Jones v. Herrick [Wash.] 74 P. 332.

23. Ridgeway v. Jewell [Iowa] 96 N. W. 410.

24. Rule 8 (40 Pac. x). Brown v. Calloway [Wash.] 74 P. 630.

25. Chicago Terminal Transfer R. Co. v. Chicago, 203 Ill. 576, 68 N. E. 99.

26. Knight v. Hawkeye Loan & Brokerage Co., 121 Iowa 74, 95 N. W. 273.

27. Sup. Ct. Rule 10, subd. 5 requires filing within 60 days after transcript. Butler v. McCormick, 27 Mont. 615, 71 P. 764.

28. Turpin v. Gale, 97 Md. 740, 57 A. 208; Larkin v. Butte & B. Consol. Min. Co., 28 Mont. 41, 72 P. 304; Knobb v. Reed, 28 Mont. 42, 72 P. 304; Davison v. Keeton [Tex. Civ. App.] 73 S. W. 1083.

29. McVay v. Bridgman [S. D.] 97 N. W. 20.

30. Masterson v. Heitmann & Co. [Tex. Civ. App.] 77 S. W. 983.

31. See 1 Curr. L. 150.

preme court the brief and argument filed in the appellate court with a new cover and an addendum criticizing the opinion of the appellate court.[32]

(§ 11) *G. Grounds for dismissing, quashing, or striking out appeal.*[33]—An appeal which calls in question only discretionary orders of the trial court will be dismissed.[34] That appellants have paid for no part of the record, or that they insisted on the inclusion therein of immaterial matters, is no ground for dismissal, it having been printed and transmitted,[35] nor is the fact that immediately on filing, appellant caused the transcript to be forwarded to the supreme court, thereby depriving appellee of the use of it in preparing his brief, good ground, since on proper application he might have had it returned.[36] A motion to dismiss on the ground that there is an appeal from two orders in the same case will be denied where one of the orders is not appealable.[37] Where plaintiff in divorce dies pending appeal and defendant wife asserts no right to have the action revived, the appeal will be dismissed.[38] The withdrawal below of enough of plaintiff's claim to deprive the appellate court of jurisdiction will cause dismissal of his appeal, though the withdrawal was not entered of record.[39] Dismissal of an appeal from justice court on questions of law is properly denied where it was properly taken and the errors alleged are not jurisdictional.[40] Where a clerical misprision of parties for which an appeal is dismissed is corrected and the case re-appealed it will not be again dismissed on the ground that it is the same case previously dismissed.[41]

Nonexistence of any litigable right[42] is good cause, e. g. that the appeal is frivolous or futile,[43] or the judgment purely moot,[44] or the cause of action extinguished.[45]

32. McArthur Bros. Co. v. Whitney, 202 Ill. 527, 67 N. E. 163.

33. See 1 Curr. L. 150.

34. Person appointed administrator pendente lite and amount of security. In re Davenport [N. J. Prerog.] 56 A. 295.

35. Maynadier v. Armstrong [Md.] 56 A. 357.

36. Chapin v. City of Port Angeles, 31 Wash. 535, 72 P. 117.

37. Meade County Bank v. Decker [S. D.] 98 N. W. 86.

38. Sperry v. Sperry [Mo. App.] 72 S. W. 1077.

39. Edward Thompson Co. v. Fenley, 25 Ky. L. R. 1577, 78 S. W. 416.

40. Olson v. Shirley [N. D.] 96 N. W. 297.

41. City of Louisville v. Wemhoff, 25 Ky. L. R. 995, 76 S. W. 876.

42. See 1 Curr. L. 150, n. 21.

43. Settlement having been made, question of costs only at stake. Traves v. McLees, 32 Wash. 258, 73 P. 371. Not granted for frivolity unless plainly apparent. Dardenne v. Schwing, 111 La. 318, 35 So. 583. The possibility or probability that the succession will be exhausted by claims prior to appellant's will not require dismissal. Succession of Bothick, 110 La. 109, 34 So. 163. See 1 Curr. L. 150, n. 19.

44. Case stated, it not appearing that any action is actually pending. Dougherty v. Cumberland County, 22 Pa. Super. Ct. 591. Liquor license expiring before appeal from cancellation can be heard. State v. Bremerton, 32 Wash. 508, 73 P. 477. Compliance by foreign corporation with judgment of state court ousting it from doing business until it has complied with franchise law of state precludes review. American Book Co. v. Kansas, 193 U. S. 49, 24 S. Ct. 394. Where after appealing the appellant moves for and is granted a new trial resulting favorably, the appeal will be dismissed. Belding v. Belding [Iowa] 97 N. W. 1112. See 1 Curr. L. 150, n. 20.

45. Dismissal of trustee who has appealed, he not being a party in his own right. Clarke v. O'Brien, 97 Md. 739, 56 A. 829. Acquiescence in judgment must clearly appear. Succession of Bothick, 110 La. 109, 34 So. 163. Adverse suit against granting patent for mining lands extinguished by determination by land office that land is not mineral. Goldstein v. Behrends [C. C. A.] 123 F. 399. Appeal from interlocutory order granting injunction, not considered after final decree. Sullivan v. Postal Tel. Cable Co. [C. C. A.] 123 F. 411. Acceptance of part of claim after disallowance. Talbot v. Mason [C. C. A.] 125 F. 101. Where effect of reversal would be to reinstate, under civil service rules, an officer who has been, pending appeal, dismissed on other grounds. In re Croker, 175 N. Y. 158, 67 N. E. 307. Suit for usurpation of public office. Error dismissed where term of office has expired. Tennessee v. Condon, 189 U. S. 64, 23 S. Ct. 579, 47 Law. Ed. 709. Expiration of term of office. Elbon v. Hamrick [W. Va.] 46 S. E. 1029. Act restrained by injunction subsequently done by consent of all parties. Snell v. Welch, 28 Mont. 482, 72 P. 988. Appeal by trustee of corporation will be dismissed, it appearing that he has sold all his stock and is no longer legally a trustee. Oudin & B. Fire Clay Min. & Mfg. Co. v. Conlan [Wash.] 75 P. 798. Pending appeal in action to quiet title, parties sold land and divided proceeds in accordance with decree of court below. Traves v. McLees, 32 Wash. 258, 73 P. 371. Since refusal of injunction defendant has done the act sought to be enjoined, no supersedeas being taken. Davis v. Jasper, 119 Ga. 57, 45 S. E. 734. Appeal from denial of application for man-

A writ of error from the Federal supreme court to the highest court of a state will be dismissed, where the Federal question asserted to be contained in the record is manifestly lacking all color of merit.[46] Where it appears that all questions raised by appeal from the judgment have been decided on appeal from the overruling of the motion for new trial, the appeal will be dismissed,[47] and judgment in another case deciding all issues involved will cause dismissal,[48] but the determination of a Federal court that the question presented in a case before it was res judicata because of the decree of a state court does not necessitate a dismissal of an appeal from that state court decree.[49] Defendant in a suit for specific performance of a sale of personal property cannot cause dismissal by removing the property beyond the jurisdiction of the court.[50] An appeal in habeas corpus by one held under a warrant will be dismissed, where it appears that pending appeal he has been indicted and is held under a capias,[51] but dismissal will not be granted because the petitioner has been released on bail pending the appeal.[52] An appeal from an order overruling a motion to quash an execution will not be dismissed, on the ground that the sale has been set aside, where it does not appear that a resale may not be made.[53] Full payment of the fi. fa. founded on the judgment will not require dismissal, there being no supersedeas, since the defendant in case of reversal is entitled to recover his money back.[54] An appeal from an order quashing service of a summons will not be dismissed, on the ground that the suit has since been dismissed, where the order appealed from had the effect of disposing of the case.[55]

Where the main bill of exceptions is withdrawn,[56] or where judgment thereon is affirmed, the writ of error on the cross bill will be dismissed.[57]

Abandonment or failure of prosecution[58] is a constitutional and statutory ground of dismissal in Georgia.[59] Reinstatement after dismissal for such cause will not be made except for providential cause.[60] An appeal from justice court, being triable de novo, cannot be dismissed for nonappearance of defendant appellant, plaintiff being required to establish his cause of action in this as in any other case,[61] but where a defendant suffers default in the county court, and after appealing to the circuit files no answer, a dismissal of the appeal is proper and has the same effect as an affirmance.[62]

Any substantial defect[63] or want of jurisdiction[64] in the remedy for review,[65]

damus dismissed, where the act demanded was performed before the denial. Canvass of votes and determination of result of election. State v. Christopher, 32 Wash. 59, 72 P. 709. See 1 Curr. L. 150, n. 21.

46. Wabash R. Co. v. Flannigan, 192 U. S. 29, 24 S. Ct. 224; Swafford v. Templeton, 185 U. S. 487, 493, 22 S. Ct. 783, and cases cited. See 1 Curr. L. 152, n. 38.

47. Coats v. Harris [Idaho] 75 P. 246.

48. Akerman v. Cartersville, 119 Ga. 27, 45 S. E. 725.

49. Hennessy v. Tacoma Smelting & Refining Co. [Wash.] 74 P. 584.

50. There had been an injunction and the appeal was from an order dissolving it and dismissing the bill. Livesley v. Johnston [Or.] 76 P. 13.

51. Ex parte Tripp [Tex. Cr. App.] 77 S. W. 222.

52. Costello v. Palmer, 20 App. D. C. 210.

53. Hewitt v. Root, 31 Wash. 312, 71 P. 1021.

54. Hudson v. Alford, 118 Ga. 669, 45 S. E. 454.

55. Wagnitz v. Ritter, 31 Wash. 343, 71 P. 1035.

56. Hammond v. Conyers, 118 Ga. 539, 45 S. E. 417.

57. Lamar v. Harris, 117 Ga. 993, 44 S. E. 866.

58. See 1 Curr. L. 151.

59. Plaintiff in error unrepresented on call of case and no brief on file. Griffith v. Mitchell, 117 Ga. 476, 43 S. E. 742.

60. Ordinary delay of mail is not providential. Griffith v. Mitchell, 117 Ga. 476, 43 S. E. 742.

61. Barnes v. Southern R. Co., 133 N. C. 130, 45 S. E. 531.

62. Sebree v. Com., 25 Ky. L. R. 121, 74 S. W. 716.

63. See 1 Curr. L. 151.

64. Lack of appealable interest in appellant. Appeal of Abbott, 97 Me. 278, 54 A. 755. Appellate court of Illinois has no jurisdiction in drainage proceedings. In re McCaleb, 105 Ill. App. 28. When appeal papers from a justice to the circuit court are so defective as to confer no jurisdiction on the circuit court, none is conferred by an appeal to the supreme court from an order of dismissal. Ball, Brown & Co. v. Sledge [Miss.] 35 So. 214. Where no final

or prematurity,[66] or undue delay,[67] as in bringing up the record or transcript, case, etc.,[68] or in assigning errors,[69] or presenting briefs,[70] also any failure in respect to

judgment has been rendered the case cannot be heard by agreement of counsel, since jurisdiction cannot be so conferred. Hayman v. Lambden, 97 Md. 33, 54 A. 962. No appeal bond from justice to circuit, nor record of proceedings in justice court. Ruff v. Montgomery [Miss.] 35 So. 465. Lack of jurisdictional amount. Morgan's L. & T. R. & S. S. Co. v. J. M. Burgieres Co., 110 La. 9, 34 So. 106; Rocheblave Market Co. v. New Orleans, 110 La. 529, 34 So. 665; Gibbe v. Atkins, 110 La. 197, 34 So. 411. Writ of error made returnable to same term at which sued out. Ghira v. Foster [Fla.] 35 So. 876. No return or acknowledgment of service indorsed on or annexed to the bill of exceptions. Ethridge v. Finney, 119 Ga. 147, 46 S. E. 974; Smith & Co. v. Hirsch & Co., 119 Ga. 514, 46 S. E. 637. See 1 Curr. L. 151, n. 29.

Defect of parties: Stephens v. Stevens [Utah] 75 P. 619; Faulkner v. Hutchins [C. C. A.] 126 F. 362; Baltes Land, Stone & Oil Co. v. Sutton [Ind. App.] 69 N. E. 179. Error prosecuted by one having no interest and against whom no judgment has been rendered. Large & A. Co. v. Samuel Nott & Son [Neb.] 95 N. W. 484. Appeal by several perfected by one. Fortune v. Gilbert, 207 Ill. 235, 69 N. E. 857. Joint appeal by parties having no joint interest. May's Estate, 22 Pa. Super. Ct. 77. Dismissal will not be granted on the ground that the subject-matter has been assigned, where it appears that the assignee is the appellant. Sykes v. Beck [N. D.] 96 N. W. 844. Notice of appeal held not defective as including defendant not served. Garrigan v. Kennedy [S. D.] 96 N. W. 89. Order denying motion of defendant's attorney to reopen case in order that his rights as to costs and fees might be protected; appeal purporting to be taken by defendant instead of attorney dismissed as taken by party not aggrieved. Pomeranz v. Marcus, 86 App. Div. 321, 83 N. Y. S. 711. Service of a case made upon parties who did not appear at the trial being unnecessary, failure is not ground for dismissal. Johnson v. Ware, 67 Kan. 840, 73 P. 99. Heirs and legatees of decedent purchaser are necessary parties to suit to set aside foreclosure sale. Brooks v. Fithian, 67 Kan. 850, 73 P. 903. Failure to serve co-defendant whose interest is adverse. First Nat. Bank v. Gordon Hardware Co., 31 Wash. 682, 72 P. 464. Failure of defendant appealing to serve co-defendant. Wax v. Northern Pac. R. Co., 32 Wash. 210, 73 P. 380. Appeal by one only of partnership defendant. Kline v. Swift Specific Co., 118 Ga. 514, 45 S. E. 314.

Want or defect of notice of appeal: Ashley v. Henderson [Ind. App.] 69 N. E. 469. Merrill v. Timbrell [Iowa] 95 N. W. 237; Garrigan v. Konnedy [S. D.] 96 N. W. 89. Failure to name parties. Sheldon Mail v. O'Brien County Democrat [Iowa] 96 N. W. 773. Objections to want of service on co-respondents overruled. Martin v. De Ornelas, 139 Cal. 41, 72 P. 440. Attempted inclusion of three appeals in one notice with one undertaking. Griswold v. Bender [Nev.] 75 P. 161. No notice to sureties on plaintiff's cost bond. Brockway v. Abbott [Wash.] 74 P. 1069. In Washington an appeal will not be dismissed for informality in the notice if sufficient to inform appellee of the intention to appeal [Ball. Ann. Codes & St. § 6503]. Brown v. Calloway [Wash.] 75 P. 630.

65. See ante, § 2. Bringing appeal instead of error. Trabue v. Williams, [Fla.] 35 So. 872. Single bill of exceptions to review three cases tried together by stipulation. Cole v. Stanley, 118 Ga. 269, 45 S. E. 282. See 1 Curr. L. 151, n. 30.

66. No final judgment: McLucas v. St. Joseph & G. I. R. Co. [Neb.] 96 N. W. 115; Carlson v. Jordan [Neb.] 95 N. W. 671; Welch v. Tippery [Neb.] 95 N. W. 491; Hayman v. Lambden, 97 Md. 33, 54 A. 962; Solack v. Gans [Neb.] 96 N. W. 633; Griswold v. Bender [Nev.] 75 P. 161; Wheeling & E. G. R. Co. v. Atkineon, 53 W. Va. 539, 44 S. E. 773; Akins v. Hicks [Mo. App.] 77 S. W. 86; Stewart v. Lenoir, 31 Tex. Civ. App. 470, 72 S. W. 619; Britt v. Sweeney [Tex. Civ. App.] 76 S. W. 933; Boren v. Jack [Tex. Civ. App.] 73 S. W. 1061; August v. Hall [Ark.] 74 S. W. 518. Appeal from order confirming master's report. Munyos v. Filmore [Ind. T.] 76 S. W. 257. Judgment for costs only. Heinberg Bros. v. Thompson [Fla.] 35 So. 335; Marsh v. Bennett [Fla.] 35 So. 336; Birmingham Trust & Sav. Co. v. Jackson County Mill Co. [Fla.] 35 So. 877; Morrison v. McCaskill [Fla.] 35 So. 877; Cobb v. Santa Rosa County [Fla.] 36 So. 172; Hannah v. Charlestown Nat. Bank, 53 W. Va. 82, 44 S. E. 152. An order entered on the verdict of a jury on an issue out of chancery, that the defendant merely recover costs of the plaintiff is not a final judgment, decree, or order, giving the right of appeal. Corley v. Corley, 53 W. Va. 142, 44 S. E. 132. Order made at chambers. Custer County Bank v. W. H. Walling Mercantile Co. [S. D.] 94 N. W. 582. Mandamus. Judgment granting writ absolute not actually rendered. Thomas County Com'rs v. Hopkins [Ga.] 46 S. E. 433. Where notice of appeal is not served on the clerk until after filing judgment roll it is not premature, though served on party before. Brannon v. White Lake Tp. [S. D.] 95 N. W. 284. Minute entry directing judgment is not a judgment. Lisker v. O'Rourke, 28 Mont. 129, 73 P. 416. Dismissal for failure to file and serve a motion for a new trial will be denied, where it appears that a paper purporting to be such a motion was filed and treated as such a motion on its merits by the court and parties below. Crooker v. Pacific Lounge & Mattress Co. [Wash.] 76 P. 632. Order dissolving injunction and vacating appointment of receiver. Stubbs v. McConnell, 119 Ga. 21, 45 S. E. 710. An objection that an appeal from a judgment construing a will is premature, because a reference to take an account of advancements was necessary, is untenable where no motion for reference was made. Lee v. Baird, 134 N. C. 410, 46 S. E. 955. Defendant in whose favor a new trial has been awarded cannot appeal. Owsley v. Owsley, 25 Ky. L. R. 1218, 77 S. W. 402. Failure of a judgment to recite the formula, "that defendants go hence without day" does not af-

the bond if it be jurisdictional,[71] or any error of substance in the "record," "tran-

fect its finality. Staacke Bros. v. Walker & Chilcoat [Tex. Civ. App.] 73 S. W. 408. See 1 Curr. L. 151, n. 31.

67. Pittsburgh Wagon Work's Estate, 204 Pa. 435; Koochiching Co. v. Franson [Minn.] 98 N. W. 98; Van Buskirk v. Balch [Colo. App.] 74 P. 792; Powell v. May [Mont.] 74 P. 80; Henderson v. Barnes [Utah] 75 P. 759; Robson v. Colson [Idaho] 72 P. 951; McCrea v. McGrew [Idaho] 75 P. 67. Rule 14, subd. 5, and Rule 16, subd. 1, 90 F. clviii, clix, 31 C. C. A. clviii, clix. Chamberlain Transp. Co. v. South Pier Coal Co. [C. C. A.] 126 F. 165. Failure to retender bill of exceptions returned for correction. Walker v. Wood, 119 Ga. 624, 46 S. E. 869. Failure to file bond and serve citation for a few days, no prejudice being shown will not require dismissal in bankruptcy case. Columbia Iron Wks. Co. v. National Lead Co. [C. C. A.] 127 F. 99. Appeal from order allowing claim in bankruptcy. In re Alden Elec. Co. [C. C. A.] 123 F. 415. Delay in filing petition for review in bankruptcy held excusable. In re Groetzinger & Sons [C. C. A.] 127 F. 124. Failure to perfect appeal to term designated in notice is not jurisdictional. Hoff v. Shockley, 122 Iowa 720, 98 N. W. 573. Statute is mandatory in irrigation cases [Mills' Ann. St. §§ 2429, 2432]. Needle Rock Ditch Co. v. Crawford-Clipper Ditch Co. [Colo.] 75 P. 424. Failure to appeal within 6 months in chancery case [Laws 1893, c. 4130, p. 61]. Hodges v. Moore [Fla.] 35 So. 13. Delay in filing bill of exceptions in clerk's office. Seaboard Air-Line R. v. Wheat, 117 Ga. 751, 45 S. E. 77. Delay in prosecution, appeal from justice's judgment in unlawful detainer. American Brass Mfg. Co. v. Philippi [Mo. App.] 77 S. W. 475. See 1 Curr. L. 151, n. 32.

68. Snell v. State [Neb.] 97 N. W. 329; Stroud v. Western Union Tel. Co., 133 N. C. 253, 45 S. E. 592; Court of Honor v. Bankert, 31 Ind. App. 689, 68 N. E. 1039; Fonda v. Jackson, 202 Ill. 113, 67 N. E. 741; Porter v. Martin [Ala.] 35 So. 1006; Selber v. Young, 109 La. 1080, 34 So. 95. Abstract. Todd v. Carr [S. D.] 97 N. W. 720. A statement prepared for use on motion for new trial may be used on appeal though not actually used on motion for new trial. Kelley v. Ning Yung Ben. Ass'n, 138 Cal. 602, 72 P. 148. Motion denied where motion for new trial was made and statement thereon is in process of settlement. Bernard v. Sloan, 138 Cal. 746, 72 P. 360; Vinson v. Los Angeles Pac. R. Co. [Cal.] 72 P. 840. Failure of appellant guardian ad litem to file bill of exceptions or transcript. In re Moss, 141 Cal. xviii, 74 P. 546. Transcript not accompanied by filing fee cannot be filed. Hilts v. Hilts, 43 Or. 162, 72 P. 697. Delay in filing transcript not jurisdictional in Washington. Chapin v. Port Angeles, 31 Wash. 535, 72 P. 117. No complete transcript of record and no schedule of parts desired filed within 90 days. Nelson County v. Bardstown & L. Turnpike Co., 24 Ky. L. R. 2056, 72 S. W. 1104. Failure to file abstract and brief as stipulated on continuance. Plato v. Neff [Mo. App.] 74 S. W. 886. See 1 Curr. L. 151, n. 88.

69. Bartlett v. Slater, 183 Mass. 152, 66 N. E. 631. Failure to assign before allowance of appeal as required by C. C. A. rule 11, 91 Fed. vi, 32 C. C. A. lxxxviii. Webber v. Mihills [C. C. A.] 124 F. 64. Failure to assign before call of case. Atlantic & B. R. Co. v. Penny, 119 Ga. 479, 46 S. E. 665. See 1 Curr. L. 151, n. 34.

70. Todd v. Carr [S. D.] 97 N. W. 720; Butler v. McCormick [Mont.] 71 P. 764; Stroud v. Western U. Tel. Co., 133 N. C. 253, 45 S. E. 592; Russell v. Deadwood Development Co. [S. D.] 94 N. W. 693. No brief for either party. Lopez v. Vogis [Tex. Civ. App.] 73 S. W. 239. Filing briefs too late to give appellee full 20 days before submission in which to file his. San Antonio & A. P. R. Co. v. Brock [Tex. Civ. App.] 77 S. W. 953; Harris v. Bryson, 31 Tex. Civ. App. 514, 73 S. W. 548. Delay of six months after submission of the case. Welch v. Synoground [S. D.] 97 N. W. 720. Right to dismissal for failure to file points and authorities not affected by filing after motion. Rules 2 and 5. McCabe v. Healy, 139 Cal. 30, 72 P. 359. Failure to file within time stipulated by parties. Sheehan v. First Macy Ditch Co. [Wyo.] 73 P. 964. Motion to reinstate denied where no excuse is shown. Calvert v. Carstarphen, 133 N. C. 25, 45 S. E. 353. Failure to file abstract and brief as stipulated. Plato v. Neff [Mo. App.] 74 S. W. 886. Brief used in another case not sufficient. Laclede County Bank v. Jones, 175 Mo. 631, 74 S. W. 998. Failure to file in trial court and give notice to appellee. Gulf, etc., R. Co. v. Hall [Tex. Civ. App.] 74 S. W. 778. Failure to file brief below held waived by stipulation. San Antonio & A. P. R. Co. v. Turnham [Tex. Civ. App.] 77 S. W. 625. Where the appellant is in doubt as to whether the suit is at law or in equity and moves for an order determining that question, and designating who shall first file briefs, a counter motion to dismiss for failure to file briefs, if the suit be at law, and for failure to bring up the evidence, if it be in equity, will be refused and appellant directed to file the first brief and also give permission to bring up the evidence. Schmidtke v. Keller [Or.] 73 P. 332. See 1 Curr. L. 151, n. 35.

71. Winchester v. Morris [Wash.] 74 P. 361; Donovan v. Woodcock [S. D.] 99 N. W. 82; Rhea v. Brown [Neb.] 94 N. W. 716; Bartlett v. Frazier [Mich.] 95 N. W. 721; Shattuck v. Costello [Ariz.] 71 P. 940; Doran v. Lose, 3 Ariz. 284, 73 P. 443; Blum & Co. v. Wyly, 110 La. 211, 34 So. 416. Appeal to district court from order of county board rejecting claim. Cedar County v. McKinney Loan & Investment Co. [Neb.] 95 N. W. 605. Dismissal of involuntary petition in bankruptcy. In re Miller [Okl.] 75 P. 1128. Appeal dismissed where in absence of proof of "mistake or accident," the undertaking was not filed with the notice of appeal. Morrison v. O'Brien [S. D.] 97 N. W. 2. Failure to mention obligee, or provide that appeal shall be prosecuted with effect. Herrick v. Hill [Ariz.] 73 P. 399. Motion denied where bond is on file and no specific objection is made. Bernard v. Sloan, 138 Cal. 746, 72 P. 360. Undertaking not in conformity with notice of appeal. Walker v. McGinness [Idaho] 72 P. 835. Not jurisdictional in Oregon. Dowell v. Bolt [Or.] 75 P. 714. Where no amount

'script," "assignment," "briefs" or the like,[72] will ordinarily warrant and often necessitate dismissal. An appeal is neither premature nor too late if judgment

was fixed for that part of the judgment not for money, a bond for $200 and double the judgment for costs was sufficient. Lacaff v. Dutch Miller Min. & Smelting Co., 31 Wash. 666, 72 P. 112. The misuse of "plaintiff" for "defendant" is not fatal. Dossett v. St. Paul & T. Lumber Co., 31 Wash. 489, 72 P. 116. The failure of an unnecessary party to execute the appeal bond is not fatal. Person unnecessarily named in notice of appeal. Noble v. Whitten [Wash.] 76 P. 95. The fact that the amount of the bond required to take a suspensive appeal is written in the order granting the appeal is no ground of dismissal. Grasser v. Blank, 110 La. 493, 34 So. 648. Appeal by several not dismissed on the ground that only one is obligated to prosecute. Goothye v. Delatour, 111 La. 766, 35 So. 896. Where the bond is insufficient as for an amount less than double the costs as estimated by the clerk and time is given to file a new bond, the clerk cannot reduce his estimate and approve a bond for less than the amount ordered before. Black v. Claiborne [Tex. Civ. App.] 75 S. W. 40. An alteration in the bond not shown to have been made subsequent to its execution will not dismiss. Parshall v. Clark [Tex. Civ. App.] 77 S. W. 437. See 1 Curr. L. 151, n. 36.

72. Failure to file **abstracts.** Russell v. Deadwood Development Co. [S. D.] 94 N. W. 693; O'Neal v. Saville [Mo. App.] 73 S. W. 726; Whitehead v. St. Louis, I. M. & S. R. Co., 175 Mo. 475, 75 S. W. 919. Insufficient abstract. Brennan Mercantile Co. v. Vickers, 31 Colo. 324, 73 P. 46. Failure of abstract to show that appeal was taken or that notice was ever served. Morehouse v. Doxsee [Iowa] 99 N. W. 143. Abstract of another case of dissimilar pleadings and judgment not sufficient. Laclede County Bank v. Jones, 175 Mo. 631, 74 S. W. 998. Lack of index in abstract on appeal from appellate court in Illinois, and failure to print opinion. Chadwick v. People, 206 Ill. 122, 68 N. E. 1108; Ernst v. Schmitz, 207 Ill. 604, 69 N. E. 923. Lack of index in abstract. Chadwick v. People, 206 Ill. 122, 68 N. E. 1108; Ernst v. Schmitz, 207 Ill. 604, 69 N. E. 923. Failure of original abstract to contain judgment and show filing of bill of exceptions is not fatal, where transcript shows there was a judgment and amended abstract shows filing of bill. Trippensee v. Braun [Mo. App.] 78 S. W. 674. Absence of an affidavit for appeal from the abstract will not cause dismissal where the record recites that one was filed. Holland v. St. Louis & S. F. R. Co. [Mo. App.] 79 S. W. 508. Failure of an abstract otherwise good to show the day of the month, or the term when final judgment was rendered, is not ground for summary dismissal, those facts not being material to any question presented by the appeal. State v. Smith, 172 Mo. 446, 72 S. W. 692. That the abstract is not sufficiently full to authorize consideration of the assignments of error, is not ground for dismissal. Venner v. Denver Union Water Co. [Colo.] 75 P. 927.

Briefs: Failure of brief to show proceedings and refer to pages of record. Rules **29, 30, 31.** Walker v. Texas & N. O. R. Co. [Tex. Civ. App.] 75 S. W. 47. Failure to file and serve abstract and briefs. Rule 15. O'Neal v. Saville [Mo. App.] 73 S. W. 726. Absence of assignments of error in the brief is not ground for dismissal. Johns v. Ruff [N. D.] 95 Mo. 440.

Assignment embodying several matters. Loeweke v. Lumbermen's Bldg. & L. Ass'n, 21 Pa. Super. Ct. 389. Failure to sign assignments. Rubey v. Hough, 161 Ind. 203, 57 N. E. 257. Assignments not quoting charge complained of. Mitchell v. Jodon, 22 Pa. Super. Ct. 304. No assignments of error in appellant's brief, and no effort to supply omission after objection. Rule 29. Bowman v. Hoffman [Tex. Civ. App.] 74 S. W. 340.

Omissions from transcript record or paper book: Failure to print record in full, set forth a statement of the questions involved, and assign errors specifically. Oakland Borough v. Boyden, 22 Pa. Super. Ct. 278. Failure to print insurance policy on which suit is brought. Backenstone v. Nine, 22 Pa. Super. Ct. 29. Proceedings on case stated, no docket entry, judgment, or assignment of error. Warwick Iron & Steel Co v. McKeag, 205 Pa. 490, 55 A. 179. Failure to print opinion of court below. Sup. Ct. Rule 19. Sanker v. Pennsylvania R. Co., 205 Pa. 609, 55 A. 833. Failure to specify in writing particular errors and file in prothonotary's office in supreme court. Croasdale v. Von Boyneburgk, 206 Pa. 15, 55 A. 770. Omission to page and index transcript. Smith v. Sutton [Ind. App.] 69 N. E. 688. Failure of seals over tie of transcript to bear impression of seal of court. Dist. & county court Rule 90. Conner v. Downes [Tex. Civ. App.] 74 S. W. 781. No papers authenticated. Wilson v. Hickman [Colo. App.] 73 P. 1088; Village of Sand Point v. Doyle [Idaho] 74 P. 861. Case made insufficiently authenticated. Oligschlager v. Grell [Okl.] 75 P. 1131. No statement on appeal, no bill of exceptions, no specification of error, and no statement embodying copies of court minutes. Griswold v. Bender [Nev.] 75 P. 161. Judgment for intervenor and appeal by plaintiff; omission of order striking out plaintiff's answer to complaint in intervention, order refusing plaintiff's motion for leave to file answer, and order granting intervenor's motion for judgment on pleadings. Doty v. McClusky, 28 Mont. 607, 73 P. 118. Matters already part of the archives of the court by reason of being included in the transcripts of prior appeals need not be printed. Succession of Bothick, 110 La. 109, 34 So. 163. Slight variation in names of parties in bill of exceptions will not cause dismissal. Fussell v. Dennard, 113 Ga. 270, 45 S. E. 247. Incomplete **record** in Federal court. Williams Bros. v. Savage [C. C. A.] 120 F. 497; Merriman v. Chicago, D. & V. R. Co. [C. C. A.] 120 F. 240; Wolcott's Estate v. McCormick Harvesting Co. [Neb.] 96 N. W. 216. That the record is insufficient is not ground of dismissal. Merriman v. Chicago R. Co. [C. C. A.] 120 F. 240. Even though the certificate does not show that all the records filed in the action are returned, if it appears to the satisfaction of the court that such is the case, the appeal

has in fact been entered and the statutory period has not elapsed since notice thereof.[73] Omission of that which it is an officer's duty to supply is not chargeable to appellant,[74] nor is an amendable defect,[75] nor errors of procedure not prejudicial to defendant in error,[76] good cause. Appellant's failure to file an abstract may be cured by respondent furnishing one,[77] and omissions from appellant's brief may be cured by his reply.[78]

Where no exceptions were taken to the decree on a bill in equity, the appeal will be quashed,[79] and where a statement on motion for new trial does not specify wherein the evidence is insufficient to support the judgment a motion to disregard it will be sustained and the appeal dismissed.[80]

will not be dismissed. Jourdain v. Luchsinger [Minn.] 97 N. W. 740. No judgment roll. Stanton v. Lewis, 28 Mont. 267, 72 P. 658; Featherman v. Granite County, 28 Mont. 462, 72 P. 972; Beck v. Holland, 28 Mont. 460, 72 P. 972; Glavin v. Lane [Mont.] 74 P. 408; Denny v. Wright [Okl.] 74 P. 104. Failure to exhibit final judgment. Seaboard Air Line R. v. Bennett [Fla.] 36 So. 86; Kinman v. Scheuer [Mont.] 76 P. 690. Failure to include the judgment in the abstract will not cause dismissal where a certificate is duly filed, and the judgment itself is not challenged [Rev. St. 1899, § 813]. State v. Smith, 172 Mo. 618, 73 S. W. 134. Failure to insert in the "case" the fact that judgment has been entered is not ground for dismissal. Ballentine v. Hammond [S. C.] 46 S. E. 1000. Record must be by "copy"; originals of papers confer no jurisdiction. Cornell v. Matthews, 28 Mont. 457, 72 P. 975. No recital that record contains correct copies of papers and proceedings. First Nat. Bank v. Oxford Lake Line [Fla.] 34 So. 893. Where error is assigned on the overruling of a motion for new trial in which no point is made on the form of the verdict, and the bill of exceptions recites the substance of the verdict, the writ of error will not be dismissed because the verdict is not specified or transmitted as part of the record. Lenney v. Finley, 118 Ga. 427, 46 S. E. 317. The incorporation of material parts of the record proper in the bill of exceptions instead of bringing them up separately is not fatal. Daniel v. Central of Georgia R. Co., 119 Ga. 246, 46 S. E. 107. The unnecessary incorporation of formal parts of pleadings, writs, and other papers in the transcript on appeal, is not ground for dismissal, but no costs for unnecessary parts can be recovered. Greene v. Montana Brewing Co., 28 Mont. 380, 72 P. 751. Under statutes providing that appellant must bring up so much of the record as is necessary to present the questions to be decided, failure to bring up a complete transcript is not ground of a motion to dismiss, and if respondent feels that the record is incomplete he must himself complete it. Backhaus v. Buells, 43 Or. 568, 72 P. 976, 73 P. 342.

Failure of record to contain all evidence: Failure of the settled case to contain all the evidence is not ground for dismissal, but only goes to the power of the court to review the evidence. Sykes v. Beck [N. D.] 96 N. W. 844. The failure to transmit books and exhibits constituting part of the testimony taken before a circuit court commission in a chancery case is not ground for a dismissal of the appeal, the remedy being to have them submitted. Hughes v. Love [Mich.] 98 N. W. 977. Recital that no evidence except files and records was introduced does not supply place of bill of exceptions as files are no part of record. Campbell v. Mechanics' Sav. Bank, 66 Kan. 778, 71 P. 829. Dismissal on the ground that certain record evidence is not in the record will not be granted where it does not appear that it was offered below. In re Seim, 111 La. 554, 35 So. 744. Failure to bring up record in another case offered in evidence by appellees will not require dismissal, where clerk certifies it cannot be found and its loss is not attributable to appellant. Succession of Bothick, 110 La. 109, 34 So. 163. Where exhibits referred to in the record are fairly identifiable with papers already copied into the record, the proceeding in error will not be dismissed for failure to bring up all the evidence. Dendy v. First Nat. Bank, 67 Kan. 856, 71 P. 830, 74 P. 288. The trial judge's certificate cannot, by stating that all the evidence included, supply the lack of a statement to that effect in the record itself. Smith v. Alexander, 67 Kan. 862, 74 P. 240. A recital in the record at the close of the evidence that plaintiff and defendant having no further evidence, rested and the case was closed, is insufficient to show that all the evidence is contained in the case made. Id. See 1 Curr. L. 152, n. 37.

73. Prescott v. Brooks [N. D.] 94 N. W. 88.

74. Failure of county judge to transmit record in time. Drexel v. Reed [Neb.] 96 N. W. 873. Inability of register because of sickness to make up transcript. Maynadier v. Armstrong [Md.] 56 A. 357. Failure of clerk to enter filing of bill of exceptions properly filed. Woltemahr v. Doye [Mo. App.] 76 S. W. 1053. See 1 Curr. L. 152, n. 40.

75. A clerical error in the date of the affidavit for appeal will not dismiss. Viertel v. Viertel, 99 Mo. App. 710, 75 S. W. 187.

76. Revival of judgment by debtor in name of administrator of deceased creditor is harmless, since process would issue against administrator without it. Charlottesville v. Stratton's Adm'r [Va.] 45 S. E. 737.

77. W. W. Kimball & Co. v. Deaton, 102 Mo. App. 45, 74 S. W. 427.

78. Dismissal will not be made for failure to print in appellant's opening brief the findings of fact on which errors are assigned, where they are properly printed in his reply brief. Timm v. Timm [Wash.] 75 P. 879.

79. Beatty v. Harris, 205 Pa. 377, 54 A. 1031.

80. Robson v. Colson [Idaho] 72 P. 951.

(§ 11) *H. Raising and waiver of defects in appellate procedure; motions and pleas.*[81]—Power to inquire into matters of fact affecting the jurisdiction belongs to the appellate courts.[82] Where the appellate court in an appeal from a decree of divorce orders appellant to pay appellee temporary alimony, which is paid, a subsequent dismissal of the appeal for want of jurisdiction will not reverse the order for alimony, so as to entitle appellant to recover it.[83] Formal objections,[84] but not jurisdictional ones,[85] are waived if not raised before submission on the merits.

A motion to dismiss that involves the merits of the case will be ignored,[86] or the consideration thereof postponed until final hearing,[87] and unless it is very evident that the appeal should be dismissed on the ground averred, the motion to dismiss will be deferred until the case is heard on the merits.[88] A motion to dismiss or affirm for failure to file briefs will not be considered where an examination of the record shows that the judgment should be affirmed.[89]

A motion to dismiss for defect of procedure is sometimes sustained, unless appellant within a certain time takes measures to cure it,[90] and application for permission to remedy defects after motion is sometimes granted.[91] An abandonment of the appeal from the particular order involving the defect avoids the motion.[92] The affidavit of the clerk below attached to the brief of counsel for plaintiff in error, setting forth reasons why no service of the bill of exceptions was had, will not be considered in answer to a motion to dismiss.[93] Where the question of defendant's right to bring his writ of error at the stage of the proceedings is doubtful, he will on dismissal be permitted to withdraw his record and present the bill to the trial court as exceptions pendente lite.[94]

Plaintiff in error is entitled as a matter of right to dismiss where no prejudice to defendant will result,[95] but dismissal will not be granted on motion of appellant

81. See 1 Curr. L. 153.

82. Hill v. Halleburton [Tex. Civ. App.] 73 S. W. 21. See 1 Curr. L. 153, n. 47.

83. Mercer v. Mercer [Colo. App.] 73 P. 662.

84. Objections must be raised before submission on the merits. Cincinnati, I. & W. R. Co. v. People, 205 Ill. 538, 69 N. E. 40. An objection that the appeal was taken by an infant in his own name is waived if not raised until after submission. Ramsey v. Keith's Adm'r, 25 Ky. L. R. 1302, 77 S. W. 693. Defect of parties on appeal is waived by argument on the merits. Schoenberger v. White, 75 Conn. 605, 54 A. 882. Any defect in appellant's procedure is waived by appellee by service of amendments to the case. Cooley v. Pennsylvania R. Co., 40 Misc. 239, 81 N. Y. S. 692.

85. That appeal was brought where error only would lie is not waived by failure to object, since consent cannot confer jurisdiction. Boales v. Ferguson [Neb.] 96 N. W. 337.

86. Whether or not the court erred in entering its decree can be reviewed only on appeal therefrom and not on motion to dismiss the appeal. Bradley v. Eccles [C. C. A.] 126 F. 945. An appeal will not be dismissed on the ground that appellant is not a "party aggrieved" where a determination of that fact would amount to a determination of the merits. Appeal by special administrator from order settling his account. In re Heaton's Estate, 139 Cal. xix, 73 P. 185.

87. Where a cause is appealed from the county to the district and supreme courts successively, and the record shows that all the testimony before the county court on final hearing is before the supreme court, an objection that certain testimony lost was not supplied, or the irregularity waived, does not challenge the regularity of the appeal, and will not be entertained until hearing on the merits. In re Mendenhall's Will, 43 Or. 542, 72 P. 318.

88. Grasser v. Blank, 110 La. 493, 34 So. 648; Succession of Wintz, 111 La. 40, 35 So. 377; Grubbs v. Pierson, 111 La. 101, 35 So. 474. Appeal frivolous and taken for delay. Dardenne v. Schwing, 111 La. 318, 35 So. 583.

89. Steiger v. Fronhofer, 43 Or. 178, 72 P. 693.

90. Failure of seals on transcript to bear impression of court seal. Conner v. Downes [Tex. Civ. App.] 74 S. W. 781.

91. On motion to dismiss for irregularities in the bond, appellants will on application be given leave to amend and the motion denied. Venner v. Denver Union Water Co. [Colo.] 75 P. 927.

92. Objections to the hearing of an appeal from an order denying a new trial will not be considered where appellant in his reply brief abandons that appeal and relies wholly on his appeal from the judgment Martin v. De Ornelas, 139 Cal. 41, 72 P. 440.

93. Smith & Co. v. Hirsch & Co., 119 Ga. 514, 46 S. E. 637.

94. Thomas County Com'rs v. Hopkins [Ga.] 45 S. E. 433.

95. Though he has assigned cross errors. Fahey v. Fahey [Colo.] 74 P. 884. An appeal from an interlocutory decree may be dismissed without prejudice on the appellant's motion, where undue prejudice to the

after argument, if prejudicial to appellee and objected to by him.[96] The statutory provision in Colorado for dismissals without prejudice does not apply to irrigation cases.[97]

How presented.[98]—Mere irregularities of procedure must be objected to by motion, not on the final hearing.[99] Jurisdictional errors may be objected to at any time, even on rehearing,[1] and for such defects appearing on the record the court will dismiss suo motu.[2] Whether the abstract of appellant is sufficiently full to authorize consideration of the assignments of error cannot be raised by motion to dismiss.[3]

A motion[4] to dismiss must advise the court of the nature of the questions involved in the case.[5] Written motion may be waived.[6] It must be timely made[7] and notice given.[8] Service may be waived.[9] Mere departure from the prescribed method of bringing parties into court and applying for the dismissal of the appeal will be disregarded where a situation exists which warrants judicial action in the premises.[10] A motion to dismiss will be considered before final ruling in the case.[11]

Reinstatement.—A dismissed appeal may, on proper showing, be reinstated,[12] and reinstatement compelled by mandate from a higher court where dismissal was unadvised;[13] but motion will be denied where excessive delay is unexplained[14] or

appellee will not result. Greene v. United Shoe Machinery Co. [C. C. A.] 124 F. 961. On request of circuit judge. Mossberg v. Nutter [C. C. A.] 124 F. 966. An appeal taken by an incompetent from an order appointing a guardian for him may be dismissed on his own motion after notice to his counsel. In re Moss, 141 Cal. xviii, 74 P. 646.

96. Saint v. Cornwall, 207 Pa. 270, 56 A. 440.

97. Mills' Ann. Code, §§ 388a, 2429, 2432. Needle Rock Ditch Co. v. Crawford-Clipper Ditch Co. [Colo.] 75 P. 424.

98. See 1 Curr. L. 154.

99. Irregularity in taking the appeal must be raised by motion to dismiss, and not on submission on the merits. Cincinnati, I. & W. R. Co. v. People, 205 Ill. 538, 69 N. E. 40. That a stipulation extending the time for filing a bill of exceptions was not copied into the record is no ground for affirmance; such defect should be reached by motion of some kind. Zumault v. Kansas City Suburban Belt R. Co., 175 Mo. 288, 74 S. W. 1015. A motion to dismiss is a proper manner to take advantage of failure to file the transcript within the proper time. Hilts v. Hilts, 43 Or. 162, 72 P. 697.

1. Where there is no jurisdiction, an appeal will be dismissed on motion, though the question is not raised until on rehearing. Failure in respect to bond. Shattuck v. Costello [Ariz.] 71 P. 940.

2. The appeal court will take notice of its own lack of jurisdiction over the subject-matter and dismiss in such case without motion. Everette Piano Co. v. Bash, 31 Ind. App. 498, 68 N. E. 329. Abstract failing to show that appeal was taken. Morehouse v. Doxsee [Iowa] 99 N. W. 143. Record shows no entry of appeal and appellee makes no appearance. City of Orlando v. Macy [Fla.] 34 So. 298. Transcript showing no final judgment. Seaboard Air Line R. v. Bennett [Fla.] 36 So. 86. Where bill of exceptions is stricken from the transcript and nothing remains but the notice of appeal and clerk's certificate. Tingley v. Otis, 141 Cal. 71, 74 P. 448.

3. Venner v. Denver Union Water Co. [Colo.] 75 P. 927.

4. See 1 Curr. L. 154.

5. But where a lack of jurisdiction appears from plaintiff's motion to dismiss his own writ of error, failure to set forth a copy of the judgment is not fatal to the motion. Fahey v. Fahey [Colo.] 74 P. 884.

6. Arthur Fritsch Foundry & Mach. Co. v. Goodwin Mfg. Co., 96 Mo. App. 631, 75 S. W. 1119.

7. 18 months after cause briefed on merits is too late. Motion to dismiss a second appeal because entered while a prior appeal was pending. Dorman v. McDonald [Fla.] 36 So. 52.

8. A notice of motion to dismiss an appeal which fails to specify the grounds on which it is made is defective. Albany Brass & Iron Co. v. Alton, 84 N. Y. S. 180. The notice of motion must be served ten days before the motion can be heard. Rule 18. Rogers v. Trumbull, 31 Wash. 656, 72 P. 459. Leaving the notice of motion under the door of a room believed to be the office of appellant's attorney is insufficient service. Id.

9. A written motion to dismiss for want of prosecution may be waived and by consent of parties be submitted without service. Rule 24. Arthur Fritsch Foundry & Mach. Co. v. Goodwin Mfg. Co., 99 Mo. App. 631, 75 S. W. 1119.

10. Succession of Carbajal, 111 La. 944, 36 So. 41.

11. Lockhaven Trust & Safe Deposit Co. v. U. S. Mortg. & T. Co. [Colo. App.] 73 P. 409.

12. Where, as on appeal from a justice, the case is triable de novo, a dismissal is not final, but the case may be reinstated. Gorrell v. Willis [W. Va.] 46 S. E. 139.

13. The supreme court of Missouri can by mandamus compel the court of appeals to reinstate and decide an appeal improvidently dismissed. State v. Smith, 172 Mo. 446, 72 S. W. 692; Id., 172 Mo. 618, 73 S. W. 134.

14. Marion v. Barnwell [S. C.] 46 S. E. 536. Mandamus to reinstate an appeal applied for as soon as possible is not barred

where a decision by reason of events has become valueless.[15] An appeal dismissed for want of prosecution will be reinstated on appellee's motion and affirmed pro forma where necessary to preserve his rights under the bond.[16]

§ 12. *Hearing.*[17]—Where the question which the court determines to be decisive of the case is not discussed in argument, the case will be referred back to counsel for written argument on specific questions.[18] The provision of the Virginia constitution requiring reargument before the full bench in cases of division of opinion refers only to constitutional questions.[19]

§ 13. *Review. A. Mode of review; review proper or trial de novo.*[20]—An equity appeal brings up the case for trial de novo,[21] on the evidence introduced below,[22] and evidence excluded[23] or errors of the court in excluding,[24] or admitting testimony, will not be considered, since the court will consider only competent evidence,[25] unless clearly shown to have influenced the finding.[26] Since an equity suit is triable de novo on appeal on the whole evidence, declarations of law given or refused afford no ground of reversal.[27] The ruling on a motion to strike a pleading from the files will not be considered.[28] Exceptions not affecting the merits are disregarded.[29] An appeal from an order of a United States commissioner excluding a Chinese alien is tried de novo, and not on the testimony taken before the commissioner.[30] An appeal from an order striking off a satisfaction of judgment is in legal effect nothing more than a common-law certiorari.[31] Appeals from probate courts are usually de novo.[32] Appeals from the county court in license cases in Kentucky are heard in the circuit on bills of exceptions on the same evidence used below, and not de novo.[33] The Missouri court of appeals hears proceedings for disbarment on appeal from the circuit as an appellate court only,[34] and in drainage proceedings the

by laches, though proceedings to enforce the judgment have been begun, and the court of appeals has adjourned its term. State v. Smith, 172 Mo. 618, 73 S. W. 134. A motion to vacate an order of dismissal for informality in the motion to dismiss must be made during the term. Pisa v. Rezek, 206 Ill. 344, 69 N. E. 67.

15. Act sought to be enjoined fully performed. Marion v. Barnwell [S. C.] 46 S. E. 536.

16. Mattenlee v. Mattenlee [Mo. App.] 74 S. W. 885.

17. See 1 Curr. L. 155.

18. Construction of contract. Raymond v. Yarrington, 96 Tex. 443, 72 S. W. 580.

19. Art. 6, § 88. Funkhouser v. Spahr [Va.] 46 S. E. 378.

20. See 1 Curr. L. 155.

21. Suit to set aside trust deed for duress. Turner v. Overall, 172 Mo. 271, 72 S. W. 644. See 1 Curr. L. 155, n. 90.

22. American Zinc, Lead & Smelting Co. v. Markle Lead Works, 102 Mo. App. 158, 76 S. W. 668.

23. Guthrie v. Guthrie [Neb.] 93 N. W. 1131. Where the appellate division has the same power over the facts that the trial court had, it will consider evidence stricken out below, but included in the record. Appeal from surrogate [Code Civ. Proc. § 2586]. In re Rice's Will, 81 App. Div. 223, 81 N. Y. S. 68.

24. Southworth v. Southworth, 173 Mo. 59, 73 S. W. 129.

25. Turner v. Overall, 172 Mo. 271, 72 S. W. 644; Bowdle v. Jencks [S. D.] 99 N. W. 98; Arabian Horse Co. v. Bivens [Neb.] 96 N. W. 621; Finlen v. Heinze, 28 Mont. 548, 73 P. 123; Seaverns v. Costello [Ariz.] 71 P. 730; Hunter v. Guth [Colo. App.] 73 P. 1089; Brown v. Fitcher [Minn.] 97 N. W. 416; Smith v. Bunch, 31 Tex. Civ. App. 541, 73 S. W. 559; International & G. N. R. Co. v. Startz [Tex.] 77 S. W. 1. Will contest. Hunt v. Phillips [Wash.] 75 P. 970. Suit to quiet title. City of Port Townsend v. Lewis [Wash.] 75 P. 982. Suit to declare trust. Funk v. Hensler, 31 Wash. 528, 72 P. 102.

26. Rulofson v. Billings, 140 Cal. 452, 74 P. 35; Abernathy v. Reynolds [Ariz.] 71 P. 914. To be cause for reversal, the bill of exceptions must show that evidence improperly admitted was a basis for the judgment, where the trial was without a jury. Byrnes v. Eley [Neb.] 97 N. W. 298.

27. American Zinc, Lead & Smelting Co. v. Markle Lead Works, 102 Mo. App. 158, 76 S. W. 668.

28. Danforth v. Fowler [Neb.] 94 N. W. 637.

29. Action by receiver in supplementary proceedings to avoid chattel mortgage. Brunnemer v. Cook & Bernheimer Co., 89 App. Div. 406, 85 N. Y. S. 954.

30. U. S. v. Hung Chang, 126 F. 400.

31. Shoup v. Shoup, 205 Pa. 22, 54 A. 476.

32. In re Huntley's Will [S. C.] 45 S. E. 132; Klicka v. Klicka, 105 Ill. App. 369; In re James' Estate [Neb.] 97 N. W. 22; Ribble v. Furmin [Neb.] 98 N. W. 420. See 1 Curr. L. 155, n. 95.

33. Ky. St. 1899, § 4211. Hensley v. Metcalfe County Court, 25 Ky. L. R. 204, 74 S. W. 1054; Meredith v. Com., 25 Ky. L. R. 455, 76 S. W. 8; Hodges v. Metcalfe County Court, 25 Ky. L. R. 772, 76 S. W. 381.

34. State v. Smith, 176 Mo. 90, 75 S. W. 586.

whole case, and not merely the assessment of damages and benefits, is appealable to the supreme court, through the circuit where the case is tried de novo.[35] In North Carolina, the court hears the case on the facts alleged in the pleadings, and plaintiffs are not restricted to the relief demanded in their prayer for judgment, but may have any additional or different relief not inconsistent with the facts alleged in their complaint.[36] On appeal from a justice's judgment refusing to open a default, the superior court may disregard the justice's findings of fact and hear the matter anew.[37]

(§ 13) *B. Scope in general.*[38]—In hard cases the court will be diligent to assure itself that nothing occurred at the trial to appellant's prejudice.[39] Where jurisdiction attaches only by reason of the validity of a tax being questioned, review will extend only so far as to decide that question.[40] Where after an application to file a bill of review was denied, the court considered and denied on the merits a second application to file an amended bill, an appeal from the latter order brought up the entire question of the right to file the bill on the merits.[41] The ruling on a motion for judgment on the pleadings cannot be reviewed if it appears that the judgment conforms to and is sustained by the pleadings.[42] An appeal from a final order in mandamus proceedings presents both the facts and the law for review.[43] The question of the measure of damages does not arise on appeal from sustaining demurrer to the evidence for failure to show a cause of action.[44] The grounds on which a divorce was granted may be considered in determining the propriety of the award of alimony, though the judgment granting the divorce cannot be reviewed, for lack of authority in the court.[45]

Moot questions[46] will not be decided.[47] Unnecessary points will not be considered.[48] Error in refusing to discharge a receiver or increase his bond may be waived by allowing his appointment to become conclusive through failure to appeal.[49]

Error reaches only matter of law.[50]—The function of the supreme court of Kansas is to review alleged errors, and it will not make findings of fact nor canvass the record for that purpose.[51] On appeals in cases tried to the court, errors of law

35. Rev. St. 1899, § 8331. King's Lake Drainage & Levee Dist. v. Jamison, 176 Mo. 557, 75 S. W. 679.

36. Voorhees, Miller & Co. v. Porter [N. C.] 47 S. E. 31.

37. Turner & Son v. Case Threshing Mach. Co., 133 N. C. 381, 45 N. E. 781.

38. See 1 Curr. L. 156.

39. Schultze v. Goodstein, 82 App. Div. 316, 81 N. Y. S. 946.

40. Burguieres v. Sanders, 111 La. 109, 35 So. 478; cf. Henry v. Thurston County, 31 Wash. 638, 72 P. 488. See Jurisdiction, 2 Curr. L. 627, n. 25.

41. Board of Councilmen of City of Frankfort v. Deposit Bank [C. C. A.] 124 F. 18.

42. Danforth v. Fowler [Neb.] 94 N. W. 637.

43. People v. Wells, 85 App. Div. 378, 83 N. Y. S. 376.

44. Blalock & Co. v. Clark & Bro. [N. C.] 45 S. E. 642.

45. Greer v. Greer, 25 Ky. L. R. 655, 76 S. W. 166; Donnelly v. Donnelly, 25 Ky. L. R. 1543, 78 S. W. 182.

46. See 1 Curr. L. 156, n. 14.

47. American Book Co. v. Kansas, 193 U. S. 49, 24 S. Ct. 394; Davis v. Jasper, 119 Ga. 67, 45 S. E. 724. Such as the construction of statutes not material to appellant. Green v. Doerwald [Neb.] 96 N. W. 634. Propriety of decree limiting the use of a building to purposes other than the sale of intoxicating liquors not reviewed after expiration of the time limited. Pellett v. Fisher [Iowa] 94 N. W. 469. Term of office in regard to which mandamus was asked, expired two years previous to hearing. Lindsey v. Kerr [Iowa] 97 N. W. 1000. On settlement of decree enjoining one secret society from using substantially same ritual as another, the court will not examine rituals offered to determine whether they differ. Great Hive of Ladies of Maccabees v. Supreme Hive of Ladies of Maccabees [Mich.] 99 N. W. 26. Action for usurpation of public office; error dismissed where terms of office have expired. State v. Condon, 189 U. S. 64, 23 S. Ct. 579, 47 Law. Ed. 709. Where an act restrained by injunction has been performed with consent of all parties, the appeal from the injunction order will be dismissed. Snell v. Welch, 28 Mont. 482, 72 P. 988.

48. Which party had burden of proof is immaterial where evidence supports verdict. Elliott v. Martin, 27 Mont. 519, 71 P. 756.

49. Hereford v. Hereford, 134 Ala. 321, 32 So. 651.

50. See 1 Curr. L. 156.

51. Shuler v. Lashhorn, 67 Kan. 694, 74 P. 264.

occurring at the trial will not be reviewed for the correction thereof, but only in connection with a review of the facts on the merits.[52]

Particular courts of appeal.[53]—Where a constitutional question is involved, an appeal from the circuit to the supreme court of the United States opens up the whole case and the circuit judge cannot narrow the authority of the supreme court by a certificate relating only to the jurisdiction.[54] The appellate division of the supreme court of New York will pass upon the sufficiency of the evidence to sustain the verdict, the same as any other question.[55] In Missouri, in actions at law, the supreme court will not weigh the evidence, but merely determine whether any substantial evidence supports the verdict and judgment.[56] The court of appeals will not consider questions in the case beyond its jurisdiction.[57] The circuit court considers only questions of law on appeal in proceedings to assess damages for taking land for a highway.[58] In New Hampshire, in a case transferred in equity from the superior to the supreme court, the supreme court will not determine the facts, however strong the case may be, though the evidence is all reported.[59] The circuit court in Kentucky, on appeal in a will case, cannot determine whether certain devices are void for uncertainty.[60]

Review as dependent on parties appealing.[61]—A party not appealing from an order denying him relief will be presumed satisfied with it,[62] and he can obtain no relief on the appeal of other parties, except so far as the relief granted appellants may incidentally affect his rights.[63] Where both parties demand affirmative relief and the court dismisses the action, defendant cannot complain of the failure to grant him his relief unless he appeals.[64] Where a decree grants relief as to one matter and denies it as to the other, and plaintiff appeals only as to the denial, defendant cannot have the remainder of the decree reviewed without appealing.[65]

Waiver of errors in appellate court.[66]—Errors,[67] exceptions,[68] grounds in sup-

52. Bank of Park River v. Norton [N. D.] 97 N. W. 860.

53. See 1 Curr. L. 157.

54. Act 1891, c. 517, § 5, 26 St. 827. Giles v. Harris, 189 U. S. 475, 23 S. Ct. 639, 47 L. Ed. 909.

55. McGrath v. Home Ins. Co., 88 App. Div. 153, 48 N. Y. S. 374. The appellate division has the same authority to review the facts in a case appealed from the municipal court of New York City that it has to review judgments rendered by the supreme court [Code Civ. Proc. § 3063, as amended by Laws 1900, c. 553]. Blumenthal v. Lewy, 82 App. Div. 535, 81 N. Y. S. 528. See 1 Curr. L. 157, n. 27.

56. Sanders v. North End Bldg. & Loan Ass'n [Mo.] 77 S. W. 833.

57. Constitutionality of statute authorizing deed of swamp lands by county [Laws 1857, p. 268]. Houck v. Patty, 100 Mo. App. 302, 73 S. W. 389.

58. Shively v. Lankford, 174 Mo. 535, 74 S. W. 835.

59. Suit to establish resulting trust. Insufficient facts found below. Crowley v. Crowley [N. H.] 56 A. 190.

60. Leak's Heirs v. Leak's Ex'r, 24 Ky. L. R. 2217, 73 S. W. 789.

61. See 1 Curr. L. 157.

62. Powell v. Harrison, 88 App. Div. 228, 85 N. Y. S. 452.

63. MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 75 P. 89.

64. Whiting v. Doughton, 31 Wash. 327, 71 P. 1026.

65. State Sav. Bank v. Hunter [Iowa] 96 N. W. 1123.

66. See 1 Curr. L. 158.

67. Pearce v. Miller, 201 Ill. 188, 66 N. E. 221; Clear Creek Stone Co. v. Dearnin, 160 Ind. 162, 66 N. E. 609; Hackney v. Raymond Bros. Clarke Co. [Neb.] 94 N. W. 822; Nichols v. Baltimore, etc., R. Co. [Ind. App.] 70 N. E. 183; Jones v. New York, N. H. & H. R. Co., 184 Mass. 89, 68 N. E. 14; McComb v. C. R. Brewer Lumber Co., 184 Mass. 276, 68 N. E. 222; Bourbonnais v. West Boylston Mfg. Co., 184 Mass. 250, 68 N. E. 232; Stoy v. Bledsoe, 31 Ind. App. 643, 68 N. E. 907; Smith v. Borden, 160 Ind. 223, 66 N. E. 681; Brown v. Collins [Neb.] 96 N. W. 173; Bemis v. McCloud [Neb.] 96 N. W. 214; Halley v. Tichenor, 120 Iowa, 164, 94 N. W. 472; Harnett v. Holdredge [Neb.] 97 N. W. 443; Comer v. Morgan County Com'rs [Ind. App.] 70 N. E. 179; Nelson v. Brisbin [Neb.] 98 N. W. 1057; Gilbert v. Kelley, 138 Cal. 689, 72 P. 344; Zimmerman v. Denver Consol. Tramway Co. [Colo. App.] 72 P. 607; King v. Pony Gold Min. Co., 28 Mont. 74, 72 P. 309; Oklahoma City v. McMaster, 12 Okl. 570, 73 P. 1012; Western R. of Alabama v. Arnett, 137 Ala. 414, 34 So. 997; Lawrence v. Westlake, 28 Mont. 503, 73 P. 119; Holvie v. McKain [Ind. App.] 70 N. E. 178; Gilliland v. R. G. Dun & Co., 136 Ala. 327, 34 So. 25; Thornton v. Dwight Mfg. Co., 137 Ala. 211, 34 So. 187; McKinnon v. Hope, 118 Ga. 462, 45 S. E. 413. Unconstitutionality of law. Harding v. People, 202 Ill. 122,

port of a demurrer,[69] and grounds for new trial, will be deemed abandoned where not argued or discussed in briefs.[70] Where several grounds relied on in support of a motion for a new trial sustained generally are not argued, affirmance must follow.[71] An instruction favorable to appellant, on which no cross error is assigned by appellee, will be considered the law of the case.[72]

Procedure de novo.[73]—On appeal from final orders, judgments, and decrees of the probate courts, the trial is generally de novo,[74] but the parties are not entitled to a jury trial.[75] On appeal from the county to the district court, in Texas, the cause stands on the docket for trial as any other,[76] but jurisdiction in probate cases extends only to such questions as are within the jurisdiction of the court below.[77] On appeal from the county court, the superior court, in Georgia, may hear and sustain a demurrer previously overruled below.[78] On appeal from a judgment of the municipal court, in New York its validity will be determined according to the facts, though there was no motion to dismiss the complaint.[79] Where the superior court on appeal from an order of a justice refusing to open a default hears the motion de novo and makes findings of fact, the findings of the justice cannot be considered on further appeal.[80] The reversal of a justice's judgment on questions of law only reopens the case for trial in the district court, though the justice's judgment was a dismissal of the case,[81] but a reversal on error for lack of jurisdiction below is final.[82] In several states on appeal to the circuit or district court from the county or other inferior court, the parties on trial de novo, must confine themselves to substantially the same issues as those upon which the case was submitted to the court below,[83] but the rule applies to the substance only, and not the form of the pleadings by which such issues are raised.[84] Hence an amendment may be allowed.[85]

66 N. E. 962; White v. Collins, 90 Minn. 165, 95 N. W. 765. See 1 Curr. L. 158, n. 43.

68. Brazil Block Coal Co. v. Gibson, 160 Ind. 319, 66 N. E. 882; Bartlett v. Slater, 183 Mass. 152, 66 N. E. 631; Revell v. Thrash, 132 N. C. 803, 44 S. E. 596; Fuller v. New York Fire Ins. Co., 184 Mass. 12, 67 N. E. 879; Frazer v. Fuller, 184 Mass. 499, 69 N. E. 217; Hopwood v. Benjamin Atha & Illingsworth Co. [N. J. Err. & App.] 54 A. 435; Henderson v. Raymond Syndicate, 183 Mass. 443, 67 N. E. 427. Where a successful plaintiff expressly abandons exceptions reserved by him if defendant should be held liable, they will not be considered if the exceptions by defendant are overruled. Roth v. Adams [Mass.] 70 N. E. 445. See 1 Curr. L. 158, n. 45.

69. Neiden-Judson Drug Co. v. Commercial Nat. Bank [Utah] 74 P. 195. See 1 Curr. L. 158, n. 47.

70. Bass v. Citizens' Trust Co. [Ind.] 70 N. E. 400; Southern R. Co. v. Morris, 119 Ga. 234, 46 S. E. 85; Fussell v. Heard, 119 Ga. 527, 46 S. E. 621. See 1 Curr. L. 158, n. 46.

71. State Security Bank v. Burns [Iowa] 96 N. W. 909.

72. Chicago & E. I. R. Co. v. Heerey, 203 Ill. 492, 68 N. E. 74. See 1 Curr. L. 158, n. 53.

73. See 1 Curr. L. 159.

74. In re Huntley's Will [S. C.] 45 S. E. 132; Klicka v. Klicka, 105 Ill. App. 369; In re James' Estate [Neb.] 97 N. W. 22. On appeal from an order refusing permission to file a claim against a decedent's estate, the judgment should not be of reversal and remand, but the court should proceed to hearing on the issues as though the appeal had been from a disallowance of the claim. Ribble v. Furmin [Neb.] 98 N. W. 420.

75. Ribble v. Furmin [Neb.] 98 N. W. 420. See 1 Curr. L. 159, n. 54.

76. Stone v. Byars [Tex. Civ. App.] 73 S. W. 1086.

77. McColpin v. McColpin's Estate [Tex. Civ. App.] 75 S. W. 824.

78. Paxton v. Berrien County, 117 Ga. 891, 45 S. E. 266.

79. Riehl v. Levy, 86 N. Y. S. 464.

80. Turner & Son v. Case Threshing Mach. Co. [N. C.] 45 S. E. 781.

81. Olson v. Shirley [N. D.] 95 N. W. 297.

82. County court reversed by district. Bastian v. Adams [Neb.] 97 N. W. 231.

83. Mallory v. Fitzgerald's Estate [Neb.] 95 N. W. 501. Defense of rescission cannot be first raised in district court. Sloan Commission Co. v. Henry A. Fry & Co. [Neb.] 95 N. W. 852. Rev. St. 1898, § 4034. Amendment introducing entirely new item held not allowable. In re Ryan's Estate [Wis.] 94 N. W. 342. Only such issues as are presented by the petition to the county court, in the absence of amendment, are triable in the circuit. In re Olson's Estate [S. D.] 94 N. W. 421.

84. Appeal from county to district court. First Nat. Bank v. Wilbern [Neb.] 95 N. W. 12; Bennett's Estate v. Taylor [Neb.] 96 N. W. 669. Departure held not to prejudice appellant. Eppley v. Lovell [Neb.] 97 N. W. 1027. See 1 Curr. L. 159, n. 55, et seq.

85. Amendments not changing substance of action held allowable. In re Ryan's Estate [Wis.] 94 N. W. 342. On appeal from a justice's judgment, plaintiff may amend his

(§ 13) *C. Restriction to rulings below.*[86]—Questions presented may be reviewed, though not ruled upon formally, if the effect of other rulings was such as to decide the questions,[87] but the appellate court will not discuss and determine questions not considered or ruled upon by the trial court, where other prejudicial error is shown.[88] In the absence of exceptions properly saved only such errors as appear of record can be reviewed.[89] Assignments of error involving radical assumptions of fact not embraced in the special findings of fact made by the trial court will not be considered.[90]

Review will not be made on issues differing from those raised at the trial,[91]

pleadings so as to specify more particularly the items of damage and enlarge the amount thereof. City of Van Alstyne v. Morrison [Tex. Civ. App.] 77 S. W. 665. A statute providing that amendments of pleadings may be made after appeals from justices will not permit an amendment reducing the damages claimed so as to confer jurisdiction on the justice [Rev. St. 1899, § 4079]. U. S. Fidelity & Guaranty Co. v. Foskett-Kessner Feed Co., 100 Mo. App. 724, 73 S. W. 364. On appeal to the county court plaintiff may amend his claim of damages by the introduction of another item, though the effect is to give the appellate court jurisdiction. Von Boeckman v. Loepp [Tex. Civ. App.] 73 S. W. 849.

86. See 1 Curr. L. 159.

87. Not, however, if not assigned as error. Reed v. Cunningham, 121 Iowa, 555, 96 N. W. 1119; Williston v. Haight [Conn.] 57 A. 170. See 1 Curr. L. 159, n. 60.

88. Dysart v. Missouri, etc., R. Co. [C. C. A.] 122 F. 228.

89. Hartman v. Brunswick, 98 Mo. App. 674, 73 S. W. 726. The sufficiency of evidence to sustain a directed verdict is reviewable though no exception was taken to the direction. Dahl v. Stakke [N. D.] 96 N. W. 353.

90. Shuler v. Lashern, 61 Kan. 694, 74 P. 264.

91. Banking House of A. Castetter v. Stewart [Neb.] 98 N. W. 34. Defense not pleaded below. McDavid v. Sutton, 205 Ill. 544, 68 N. E. 1064; Lauer Brewing Co. v. Chmielewski, 206 Pa. 90, 56 A. 841; Carnahan v. Brewster [Neb.] 96 N. W. 590; McKean v. Scott, 84 N. Y. S. 456; Chamberlain v. Monkhouse, 67 Kan. 836, 72 P. 860; Fidelity & Deposit Co. v. Nisbet, 119 Ga. 316, 46 S. E. 444; Chicago Mill & Lumber Co. v. Sims, 101 Mo. App. 569, 74 S. W. 128; City of St. Louis v. Annex Realty Co., 175 Mo. 63, 74 S. W. 961; Meyer Bros. Drug Co. v. Bybee [Mo.] 78 S. W. 579. Questions not raised below. Philadelphia & T. R. Co. v. Neshaminy El. R. Co., 206 Pa. 343, 55 A. 1034; McArthur Bros. v. Whitney, 202 Ill. 527, 66 N. E. 163; Battles v. Roberts, 120 Iowa, 747, 95 N. W. 247; Stephens v. Duckett, 111 La. 979, 36 So. 89; Daily v. Saginaw Bldg. & L. Ass'n [Mich.] 95 N. W. 326; Carter & Co. v. Kaufman [S. C.] 45 S. E. 1017; Hettich v. Hillje [Tex. Civ. App.] 77 S. W. 641. New claim as basis for recoupment. Truax v. Heartt [Mich.] 97 N. W. 394; Cincinnati, I. & W. R. Co. v. People, 205 Ill. 538, 69 N. E. 40. Waiver of tort by pleading contract not called to attention of trial court. Chicago & N. W. R. Co. v. De Clow [C. C. A.] 124 F. 142. Action on note tried on theory that limitations were barred by new promise, question whether, the note bearing interest, it was not due until demand not considered. De Raismes v. De Raismes [N. J.] 56 A. 170. The appeal court will look to the whole record to determine the theory on which the case was tried. Blanchard-Hamilton Furniture Co. v. Colvin [Ind. App.] 69 N. E. 1032. Amendment of bill of particulars to present different theory not allowed on appeal. Kent v. Phenix Art Metal Co., 69 N. J. Law, 532, 55 A. 256. Shifting grounds for attacking constitutionality of statute. Cook v. Marshall County [Iowa] 95 N. W. 409. The appellate division cannot affirm an unwarranted judgment dismissing the action below on the ground of a supposed collusion not pleaded or presented to the trial court. Svensen v. Svenson [N. Y.] 70 N. E. 120. Plaintiff claiming under chattel mortgage cannot, on appeal, allege equities growing out of circumstances. Sweet v. Seitz, 83 App. Div. 631, 82 N. Y. S. 184. Whether statement of defendant to bank for purpose of procuring credit, was continuing or was renewed. Twelfth Ward Bank v. Cohen, 87 App. Div. 625, 84 N. Y. S. 310. A case treated as equitable below must be so treated on appeal. Talbott v. Butte City Water Co. [Mont.] 73 P. 1111; Hendrickson v. Wallace [Mont.] 75 P. 355; Mares v. Dillon [Mont.] 75 P. 963. Where an estoppel was relied on below, arising from defendant's admissions in an answer in another case, it cannot be claimed on appeal that the prior case concluded defendants as to facts therein involved. Flannery v. Campbell [Mont.] 75 P. 1109. Invalidity of contract as within statute of frauds cannot be first urged on appeal. Graham v. Heinrich, 13 Okl. 107, 74 P. 328. A jurisdictional fact admitted by the pleadings cannot be disputed on appeal. In re Smith's Estate, 43 Or. 595, 75 P. 133. Motion for a nonsuit must state the grounds relied on and none other can be urged on appeal. Boyle v. Union Pac. R. Co., 25 Utah, 420, 71 P. 988. Surprise cannot be urged above to an issue raised below. Meals v. De Soto Placer Min. Co., 33 Wash. 302, 74 P. 470. Suit to set aside sheriff's deed. Complainant cannot base recovery on error on grounds not alleged in bill. Butler v. Miller, 208 Ill. 231, 70 N. E. 309. Defendant relying on contributory negligence cannot attack declaration on appeal. Yazoo & M. V. R. Co. v. Schraag [Miss.] 36 So. 193. Objection that ordinances introduced below were not shown to be effective at date in question not raised below. Missouri, K. & T. R. Co. of Texas v. Owens [Tex. Civ. App.] 75 S. W. 579. Defenses not interposed below and not complained of in the petition in error will not be reviewed on error proceedings unless they go to the jurisdiction

though there is evidence in the record to support them,[92] and the general rule is that a theory of a case, or an assumption of fact adopted by a trial court with the acquiescence of the parties, will be followed by an appellate court to which the cause is taken.[93] The rule is particularly applicable where a party who has procured a decree on one theory seeks a modification of it on appeal on another theory.[94] On appeal from the municipal court in a case where the pleadings were oral, the issues will be determined from the evidence rather than the complaint.[95] Where a complaint is tested by demurrer it cannot be aided by other parts of the record on appeal.[96] Where the contract sued upon is void upon its face, if plaintiff relies upon any ulterior facts relieving it of its apparent invalidity he must plead them in traversable form, otherwise no presumption will be indulged in favor of its validity.[97]

of the subject-matter. Houser v. McCrystal [Neb.] 97 N. W. 828. See 1 Curr. L. 159, n. 63.

92. That appellant was permitted to testify without objection to matters foreign to the issues made by the pleadings does not constrain the appellate court to review the question raised by such testimony. Thomas v. Winne [C. C. A.] 122 F. 395. Where an issue is not raised by the pleadings and no amendment was offered below, the existence of evidence to support it will not justify the appeal court in going beyond the issues raised to modify the judgment. Abbott v. Reedy [Idaho] 75 P. 764. An amendment of the complaint to conform to the proofs which might have been made at the trial may be made in the appellate division, where necessary to sustain a judgment supported by the evidence. Johnson v. Albany, 86 App. Div. 567, 83 N. Y. S. 1002. But where the variance is substantial and was called to the attention of the trial court unsuccessfully, amendment will not be permitted. Smith v. Auburn, 88 App. Div. 396, 84 N. Y. S. 726.

93. Baker v. Kaiser [C. C. A.] 126 F. 317; Cincinnati, I. & W. R. Co. v. People, 205 Ill. 638, 69 N. E. 40; Klabunde v. Byron-Reed Co. [Neb.] 98 N. W. 182; Moynahan v. Interstate Min., Milling & Development Co., 31 Wash. 417, 72 P. 81; Parker v. Knights Templars' & Masons' Life Indemnity Co. [Neb.] 97 N. W. 281; Campion v. Lattimer [Neb.] 97 N. W. 290. As where the facts pleaded will admit of different theories. Blanchard-Hamilton Furniture Co. v. Colvin [Ind. App.] 69 N. E. 1032; Bull v. New Amsterdam Casualty Co., 85 N. Y. S. 329; Sanders v. Stimson Mill Co. [Wash.] 75 P. 974; Manker v. Western Union Tel. Co., 137 Ala. 292, 34 So. 839. Whether freight rate was posted not raised below. Myar v. St. Louis S. W. R. Co., 71 Ark. 552, 76 S. W. 557. Motion to stay issuance of order of restitution in ejectment treated below as a bill in equity. U. S. v. Marshall [C. C. A.] 122 F. 428. Suit tried on theory of negligence cannot be reviewed on theory of trespass (Duerr v. Consolidated Gas Co. of New York, 86 App. Div. 14, 83 N. Y. S. 714), or gross negligence (Turtenwald v. Wisconsin Lakes Ice & Cartage Co. [Wis.] 98 N. W. 948). Theory acted upon below followed on appeal though not responsive to pleadings. Schieck v. Donohue, 92 App. Div. 330, 87 N. Y. S. 206. Petition entitled in the matter of the estate and guardianship of a minor, treated as a suit in equity to set aside order settling guardian's account. In re Wells' Estate, 140 Cal. 349, 73 P. 1065. Party cannot on oral argument change position assumed at trial and in original brief in appellate court. Rucker v. Omaha & G. Smelting & Refining Co. [Colo. App.] 72 P. 682. Action in lower court tried on issue whether remedy barred by limitations or taken therefrom by new promise. Held, claim that note bore interest and hence did not become due until after demand could not be raised for first time on appeal. De Raismes v. De Raismes [N. J. Law] 66 A. 170. Matter asserted in petition and not denied in answer cannot be denied on appeal. Louisville & N. R. Co. v. Brooks, 25 Ky. L. R. 1307, 77 S. W. 693. Case tried below as on contract not reviewable, as tort. Herf & F. Chemical Co. v. Lackawanna Line, 100 Mo. App. 164, 73 S. W. 346. A party is confined on appeal to the position he took during the trial. Cady v. Coates, 101 Mo. App. 147, 74 S. W. 424. Defendant held bound by admission that certain statute applied. King v. Phoenix Ins. Co., 101 Mo. App. 163, 76 S. W. 55. Pleading treated below as sufficient, so treated above unless failing to state cause of action or stating one without the jurisdiction of the court. Turner v. Turner, 33 Wash. 118, 74 P. 55. The appeal court will not review the conclusions of the trial court as to facts essential to its jurisdiction, concerning which it was vested with power to hear and determine, at the instance of a party who appeared below and proceeded upon the theory that the court had jurisdiction. In re Latour's Estate, 140 Cal. 414, 73 P. 1070. Writings present at the trial, and made the basis for the examination of witnesses without objection, and treated by the court and both parties as in evidence, will be so treated on appeal, though there was no formal offer of them in evidence. Peterson v. Wolf [Neb.] 95 N. W. 332; Reed v. Morgan, 100 Mo. App. 713, 73 S. W. 381.

94. Commercial State Bank v. Ketchum [Neb.] 96 N. W. 614.

95. Greenberg v. Angerman, 84 N. Y. S. 244.

96. Fidelity & Casualty Co. v. Sanders [Ind. App.] 70 N. E. 167.

97. Marriage brokerage contract. Jangraw v. Perkins [Vt.] 56 A. 532.

Other grounds for sustaining a judgment than those presented below will not be considered,[98] but additional objections and arguments against the validity of a statute may be urged,[99] and a decree sustaining a demurrer to bill, without stating on what ground, is supported if any ground is well taken.[1] A defaulting defendant, who appears and applies for a rehearing, cannot on appeal from an order denying his rehearing attack the decree on any technical ground.[2] On appeal from a judgment for plaintiff on a directed verdict, where there was no demurrer to the answer, the answer will be regarded as stating a defense and the inquiry limited to whether there was evidence in its support that should have been submitted to the jury.[3] Error in sustaining a demurrer to portions of an answer will not be reviewed, where on the trial defendant was unrestricted in his proof of the facts set up therein, and all questions of law involved were then passed upon and made grounds of appeal.[4] There having been no motion for a new trial the court will consider only the sufficiency of the evidence to support the verdict, though a motion for judgment notwithstanding verdict was made and denied.[5] Where, in an action tried to the court, the only instruction asked is in the nature of a demurrer to the evidence, the appellate court will review the weight of the evidence only so far as to determine the correctness of that ruling.[6] On appeal in condemnation proceedings, the question whether certain persons, not parties, were entitled to damages will not be considered.[7] Matters proved by incompetent evidence unobjected to cannot be denied on appeal.[8]

Reasons not reviewed.[9]—If a correct result is reached in the trial court, the reasons therefor will not be reviewed,[10] and a just judgment warranted by the record and the facts will not be overthrown because based on the wrong reason.[11] Refusal of an application on the grouud of want of power will not be reversed where it should have been refused in the exercise of sound discretion.[12] A judg-

98. Other grounds for sustaining an order for change of venue (Quinn v. Brooklyn Heights R. Co., 88 App. Div. 57, 84 N. Y. S. 738), or demurrer than those specified below will not be considered (Johnson v. Saum [Iowa] 98 N. W. 599). A nonsuit will not be sustained on grounds not alleged below. Austin v. Piedmont Mfg. Co. [S. C.] 45 S. E. 135. Where a verdict is directed on an erroneous ground, reasons for sustaining it not passed upon by the trial court will not be considered. Verdict directed on ground that defendant's injuries were not caused by the accident, as claimed. Contributory negligence and defendant's freedom from fault not considered. Wolfarth v. L. Sternberg & Co. [N. J. Law] 56 A. 173. Other grounds than those presented to the jury cannot be considered to sustain their verdict. Coleman v. Botsford, 89 App. Div. 104, 85 N. Y. S. 1. A judgment of dismissal on the merits cannot be sustained on the theory that the complaint was bad for want of parties. Ullman v. Cameron, 87 N. Y. S. 148. A judgment erroneously entered against a plaintiff should not be affirmed on the ground that the court erred in overruling a demurrer to his declaration. Anderson v. Broward [Fla.] 34 So. 897. Judgment notwithstanding verdict will not be sustained on other grounds than those set up in motion. Johns v. Ruff [N. D.] 95 N. W. 440.

99. Fitch v. Board of Auditors of Claims [Mich.] 94 N. W. 952.

1. Adams v. Wilson, 137 Ala. 632, 34 So. 831.

2. Clark v. Brotherhood of Locomotive Firemen, 99 Mo. App. 687, 74 S. W. 412.

3. Vapereau v. Holcombe [Iowa] 98 N. W. 279.

4. Town of Old Saybrook v. Milford [Conn.] 56 A. 496.

5. Borgerson v. Cook Stone Co. [Minn.] 97 N. W. 734.

6. People's Nat. Bank v. Central Trust Co. [Mo.] 78 S. W. 618.

7. Marquette & S. E. R. Co. v. Longyear [Mich.] 94 N. W. 670.

8. Riverside County Sup'rs v. Thompson [C. C. A.] 122 F. 860.

9. See 1 Curr. L. 159.

10. Decree as favorable to appellant as he has right to ask. Wolcott v. Tweddle [Mich.] 95 N. W. 419. See 1 Curr. L. 159, n. 68.

11. Baker v. Kaiser [C. C. A.] 126 F. 317; Von Platen v. Winterbotham, 203 Ill. 198. 67 N. E. 843. A ruling may be affirmed though for different reasons than those assigned by the trial judge. Kelly v. Palmer [Minn.] 97 N. W. 578. A correct conclusion based on an erroneous reason will be affirmed. Brown v. Carolina Midland R. Co. [S. C.] 46 S. E. 283. A right judgment in an equity case will be affirmed notwithstanding the reasoning on which it is based. Johnson v. Franklin Bank, 173 Mo. 171, 73 S. W. 191. See 1 Curr. L. 159, n. 69.

12. Admission to bail pending extradition. Wright v. Henkel, 190 U. S. 40, 23 S. Ct. 781, 47 L. Ed. 948.

ment entered on a demurrer to the complaint sustained on the ground that no cause of action was stated therein will be affirmed if the demurrer should have been sustained on any other ground,[13] but a judgment erroneously sustaining a demurrer and dismissing the bill will not be affirmed on the ground that a correct decision was made on wrong grounds, since there was no testimony taken and no inquiry into the merits.[14] A ruling rejecting evidence that is incompetent will be affirmed though the objection was made on the wrong ground.[15] Where the record shows that competent evidence was rejected because the court regarded it incompetent, the judgment will not be sustained on the ground that he also had power to reject it on discretionary grounds.[16] The giving of a peremptory instruction will be sustained, if proper for any reason apparent from the record,[17] and on appeal from a dismissal of the complaint at the close of plaintiff's evidence, the court is not limited to the ground assigned by the court for its ruling, but must examine the entire record.[18] On appeal in equity the declarations of law given or refused will not be reviewed, since the decree may be right regardless of error in them.[19] Mere remarks of the court expressing views apparently not carried into the judgment will not warrant a review.[20] A declaration that plaintiff was not entitled to recover under the pleadings and proofs sufficiently indicates the theory under which the case was decided to warrant a review of the question whether under the pleadings and proofs, plaintiff could recover.[21] An order granting a new trial will be affirmed if any ground be well taken.[22] An appellate court may consider and apply to a pending case a curing statute passed to heal defects in titles similar to the one in question.[23]

(§ 13) *D. Restriction by character of order or judgment; matters brought up with final judgment.*[24]—Where a case is properly in the appellate court, all decrees and proceedings therein are reviewable.[25] Rulings on practice[26] and intermediate orders[27] go up with the judgment. Orders made after judgment do not.[28]

13. Porter v. Plymouth Gold Min. Co. [Mont.] 74 P. 938.

14. Thompson v. First Nat. Bank [Miss.] 36 So. 65.

15. Yoder v. Reynolds, 28 Mont. 183, 72 P. 417.

16. Pattee v. Whitcomb [N. H.] 56 A. 459.

17. Warren Deposit Bank v. Fidelity & Deposit Co., 25 Ky. L. R. 289, 74 S. W. 1111.

18. Baker v. Interurban St. R. Co., 86 N. Y. S. 9.

19. Heffernan v. Weir, 99 Mo. App. 301, 72 S. W. 1085.

20. Crawford v. Burke, 201 Ill. 581, 66 N. E. 833.

21. Kansas City v. Ferd Heim Brewing Co., 98 Mo. App. 590, 73 S. W. 302.

22. On appeal by defendant from an order granting plaintiff a new trial on a single ground plaintiff may insist that other grounds set up in his motion justify the order and should have been allowed. Emmons v. Quade, 176 Mo. 22, 75 S. W. 103. An order granting a new trial on a certain ground may be sustained on other grounds alleged if appellant does not show that they were not well taken. Morrison Mfg. Co. v. Roach [Mo. App.] 78 S. W. 644. Where an order is in general terms it will be sustained if justified on any of the grounds presented therefor, regardless of the opinion of the trial court in support of it. Schnittger v. Rose, 139 Cal. 656, 73 P. 449. Such opinion, however, may be examined for the purpose of determining any question of merit which will arise on new trial. Schnittger v. Rose, 139 Cal. 565, 73 P. 449. The opinion of the trial court cannot affect the question of the sufficiency of the evidence to sustain the findings (Luman v. Golden Ancient Channel Min. Co., 140 Cal. 700, 74 P. 307), nor be considered to determine the scope of the order (Ben Lomond Wine Co. v. Sladky, 141 Cal. 619, 75 P. 332). The opinion of the trial court setting forth the grounds on which a new trial was granted does not prevent review of the case and sustaining the order on other grounds. Simon Newman Co. v. Lassing, 141 Cal. 174, 74 P. 761.

23. State swamp lands. Simpson v. Stoddard County, 173 Mo. 421, 73 S. W. 700.

24. See 1 Curr. L. 160.

25. Deckert v. Chesapeake Western Co., 101 Va. 804, 45 S. E. 799.

26. Quashal of a count in a declaration after trial of an issue raised by plea in abatement may be reviewed. Upton v. Gerber [Mich.] 98 N. W. 854. Order as to new trial. McVay v. Bridgman [S. D.] 97 N. W. 20. An appeal from a final decree brings up a ruling striking out an amended cross bill, duly excepted to. Jackson v. Lemler [Miss.] 35 So. 306.

27. Under the statute in Wisconsin, the court may review any intermediate order involving the merits and necessarily affecting the judgment [Rev. St. 1898, §§ 3069, 3070]. Hart v. Jos. Schlitz Brewing Co. [Wis.] 98 N. W. 526. An order refusing to

Costs being part of the judgment, orders relating thereto go up,[29] and an order denying a motion to correct a judgment may be reviewed if properly preserved in the record.[30] An appeal from a final judgment rendered on report of a master stating the amount due a widow from the estate of her husband and his devisees will not bring up a judgment setting aside a receipt given by the widow renouncing her rights under the law and agreeing to take under the will.[31] On appeal from an order sustaining objections to a referee's report, a question as to whether there was a clerical error in the report cannot be considered, since any such mistake should be corrected below.[32] A judgment of foreclosure cannot be reviewed on appeal from the order confirming the sale.[33] A decree ordering foreclosure and subrogation, and directing a reference, being final and appealable, will not go up on appeal from the decree confirming the final report.[34] A decree directing partition cannot be reviewed on appeal from the order confirming the report of commissioners.[35] The discharge of a rule for judgment for want of a sufficient affidavit of defense cannot be reviewed on appeal from a jury trial.[36] A party who fails to appeal from an order granting him a new trial on terms has no ground of complaint on an appeal from the judgment.[37] In New York, only such interlocutory and intermediate judgments and orders are reviewable on appeal from final judgment as are specified in the notice of appeal.[38] Where the order appealed from is not a "final order" in a special proceeding, a specification in the notice of appeal of an intention to bring up the intermediate orders for review is not effective for that purpose.[39]

Matters reviewable on appeal from interlocutory orders.[40]—Proceedings subsequent to an interlocutory order are not considered,[41] the appeal standing on the record as it stood at the time the order was made.[42] On appeal from an order granting a preliminary injunction, the only inquiry is whether the discretion of the trial court was improvidently exercised,[43] the merits not being in issue.[44]

set aside and vacate a judgment is not [Rev. St. 1898, §§ 3069, 3070]. In re McMahon's Estate, 117 Wis. 463, 94 N. W. 351. Order setting aside a referee's report is reviewable, notwithstanding it has been appealed from independently, such appeal having been dismissed without consideration. Neeley v. Roberts [S. D.] 95 N. W. 921. An intermediate order substituting a claimant of property for defendant in claim and delivery goes up. State v. District Court of First Judicial Dist., 28 Mont. 445, 72 P. 867.

28. Order refusing to sign bill of exceptions. McGlaufiin v. Wormser, 28 Mont. 177, 72 P. 428.

29. Spencer v. Mungus, 28 Mont. 357, 72 P. 663. Order retaxing costs in Colorado [Mill's Ann. Code, § 398]. Van Buskirk v. Baich [Colo. App.] 74 P. 792. Where, on appeal from a judgment of foreclosure, that portion awarding decree for deficiency cannot be reviewed because of prematurity of the appeal, the order apportioning the costs is also now reviewable. Thomson v. Black [Ill.] 70 N. E. 318.

30. Cullen v. Harris [Utah] 73 P. 1048.

31. Frazer v. Frazer, 25 Ky. L. R. 473, 76 S. W. 13.

32. New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., 87 N. Y. S. 200.

33. Logan County v. McKinley-Lanning L. & T. Co. [Neb.] 97 N. W. 642.

34. Kirkland v. Mills, 138 Ala. 192, 35 So. 40.

35. Austin v. Austin [Mich.] 93 N. W. 1045.

36. Act Apr. 18, 1874, P. L. 64. Kessler v. Perrong, 22 Pa. Super. Ct. 578.

37. Carter v. Interurban St. R. Co., 86 N. Y. S. 206.

38. Code Civ. Proc. § 1301. H. Koehler & Co. v. Brady, 87 App. Div. 326, 84 N. Y. S. 457; Bates v. Holbrook, 89 App. Div. 548, 85 N. Y. S. 673. Order denying appellant's motion for jury trial [Code Civ. Proc. § 1316]. McIlvaine v. Steinson, 90 App. Div. 77, 85 N. Y. S. 889; Stearns v. Shepard & M. Lumber Co., 91 App. Div. 56, 86 N. Y. S. 396.

39. Code Civ. Proc. §§ 1301, 1358. Railroad crossing proceedings. Oneonta, etc., R. Co. v. Cooperstown & C. V. R. Co., 85 App. Div. 284, 83 N. Y. S. 307.

40. See 1 Curr. L. 160.

41. Additional evidence not introducible by stipulation. Austin Mfg. Co. v. American Wellworks [C. C. A.] 121 F. 76. Matters not presented to the court not considered. New Albany Waterworks v. Louisville Banking Co. [C. C. A.] 122 F. 776. On error to the denial of a motion to set aside an award of arbitrators, error cannot be assigned on the issuance of execution on the award. Muth v. Booye, 69 N. J. Law, 266, 55 A. 287. See 1 Curr. L. 160, n. 82.

42. Austin Mfg. Co. v. American Wellworks [C. C. A.] 121 F. 76.

43. Austin Mfg. Co. v. American Wellworks [C. C. A.] 121 F. 76; New Albany Waterworks v. Louisville Banking Co. [C. C.

On appeal from an order granting a motion to serve an amended answer, neither the sufficiency of a counterclaim contained therein nor the merits of the controversy will be considered.[45] Appeal from a decree overruling a demurrer to the bill will not bring up an order refusing to set aside an order restoring the cause to the docket after dismissal for want of prosecution,[46] nor rulings on objections to the allowance of amendments, nor on motion to strike amendments;[47] but where the question whether an amendment constituted a departure was presented by the demurrer, it may be reviewed.[48]

On appeal from grant or refusal of a new trial.[49]—Generally speaking, appeals from the grant or refusal of a new trial are confined to the motion,[50] and whether a jury was demandable as of right,[51] whether the verdict is sufficient,[52] whether the action or the pleadings are in proper form,[53] or support the findings,[54] or judgment,[55] whether a conclusion of law is correct,[56] whether the findings sustain the judgment[57] or conclusions of law,[58] or the evidence, the findings,[59] the form of the decree or judgment,[60] whether interest is allowable on the judgment,[61] the court's refusal to settle the statement on motion for a new trial,[62] can be considered only on appeal from the judgment.[63] The responsiveness of the verdict to the issues may be determined,[64] and on appeal from an order refusing a new trial, the court may scrutinize all the evidence and determine whether the verdict is not contrary thereto, though no motion was made at the close of plaintiff's case, or after the evidence was all in.[65] Reversal of the judgment cannot be made on appeal from an order granting a new trial.[66]

Equitable, provisional and special decrees and orders.[67]—It must be presumed that a court sitting without a jury,[68] or in equity, considered only competent evi-

A.] 122 F. 776. An appeal from an order granting a temporary injunction will raise only the question of whether the affidavits fairly tend to support the allegations of the complaint. Gray v. Bldg. Trades & Council [Minn.] 97 N. W. 663.

44. On appeal from an order granting a preliminary injunction against the infringement of a patent, the question of the validity of the patent will not be considered. Austin Mfg. Co. v. American Wellworks [C. C. A.] 121 F. 76. Where an injunction pendente lite was issued before issue joined, the court on appeal from that order will not examine the merits to determine whether the injunction was improvidently granted. Kerr v. City of New Orleans [C. C. A.] 126 F. 920.

45. Westinghouse, Church, Kerr & Co. v. Remington Salt Co., 89 App. Div. 126, 85 N. Y. S. 432.

46. Northwestern Land Ass'n v. Grady, 137 Ala. 219, 33 So. 874.

47, 48. Montgomery Iron Works v. Capital City Ins. Co., 137 Ala. 134, 34 So. 210.

49. See 1 Curr. L. 160.

50. Morse v. Wilson, 138 Cal. 558, 71 P. 801; Swift v. Occidental Min. & Petroleum Co., 141 Cal. 161, 74 P. 700. Questions not raised and determined below will not be considered. De Haven v. McAuley, 138 Cal. 573, 72 P. 152. See 1 Curr. L. 160, n. 87.

51, 52. Morse v. Wilson, 138 Cal. 558, 71 P. 801.

53. Morse v. Wilson, 138 Cal. 558, 71 P. 801; White v. Costigan, 138 Cal. 564, 72 P. 178; Cummings v. Kearney, 141 Cal. 156, 74 P. 759; Simon Newman Co. v. Lassing, 141 Cal. 174, 74 P. 761. Sufficiency of complaint not reviewable, there being no appeal from judgment. Swett v. Gray, 141 Cal. 63, 74 P. 439; Swift v. Occidental Mining & Petroleum Co., 141 Cal. 161, 74 P. 700.

54. Simon Newman Co. v. Lassing, 141 Cal. 174, 74 P. 761.

55. Sharp v. Bowie, 142 Cal. 462, 76 P. 62.

56. Rose v. Mesmer, 142 Cal. 322, 75 P. 905.

57. White v. Costigan, 138 Cal. 564, 72 P. 178; Swift v. Occidental Min. & Petroleum Co., 141 Cal. 161, 74 P. 700; Cummings v. Kearney, 141 Cal. 156, 74 P. 759; Kaiser v. Dalto, 140 Cal. 167, 73 P. 828.

58. Sharp v. Bowie, 142 Cal. 462, 76 P. 62.

59. Simon Newman Co. v. Lassing, 141 Cal. 174, 74 P. 761.

60. Rose v. Mesmer, 142 Cal. 322, 75 P. 905.

61. Durfee v. Seale, 139 Cal. 603, 73 P. 435.

62. Hartmann v. Smith, 140 Cal. 461, 74 P. 7.

63. Morse v. Wilson, 138 Cal. 558, 71 P. 801.

64. Hamilton v. Murray [Mont.] 74 P. 75.

65. Glaser v. Michelson, 86 N. Y. S. 286.

66. In re Bills' Estate [Cal.] 74 P. 704.

67. See 1 Curr. L. 161.

68. Hunter v. Guth [Colo. App.] 73 P. 1089; Byrnes v. Ely [Neb.] 97 N. W. 298; Smith v. Bunch, 31 Tex. Civ. App. 541, 73 S. W. 559; International & G. N. R. Co. v. Startz [Tex.] 77 S. W. 1; Abernathy v. Reynolds [Ariz.] 71 P. 914; Arabian Horse Co. v. Bivens [Neb.] 96 N. W. 621; Finlen v. Heinze, 28 Mont. 548, 73 P. 123; Seaverns v. Costello [Ariz.] 71 P. 930.

dence.[69] An appeal in an equity case will not present for review the rulings made during the progress of the trial.[70]

(§ 13) *E. Restriction by contents of record.*[71]—Cases appealed must be heard and decided upon the record made in the court from which the appeal is taken,[72] and questions not made in the record cannot be considered, though argued and insisted on.[73] The errors alleged must clearly appear,[74] the burden of showing error being always on the party alleging it,[75] and in the absence of an affirmative showing of error, it is assumed that the rulings below are correct.[76] Presumption not changed by direction of verdict, though in such case the existence of every material fact which the evidence tends to prove is assumed.[77] All reasonable presumptions are indulged to uphold the regularity of the proceedings of the trial court,[78] and objections not supported by the record will not be reviewed.[79]

69. Turner v. Overall, 172 Mo. 271, 72 S. W. 644; Southworth v. Southworth, 173 Mo. 59, 73 S. W. 129; Brown v. Fitcher [Minn.] 97 N. W. 416; Rulofson v. Billings, 140 Cal. 452, 74 P. 35; Hunt v. Phillips [Wash.] 75 P. 970; City of Pt. Townsend v. Lewis [Wash.] 75 P. 982; Funk v. Hensler, 31 Wash. 528, 72 P. 102; Bowdle v. Jencks [S. D.] 99 N. W. 98. See 1 Curr. L. 161, n. 98.

70. Danforth v. Fowler [Neb.] 94 N. W. 637; Smith v. Oster [Neb.] 95 N. W. 335; Pettibone v. Yeiser [Neb.] 96 N. W. 193; John Stewart & Co. v. Allen [Neb.] 96 N. W. 528; Flanagan v. Mathieson [Neb.] 97 N. W. 287. Errors at trial not considered when review is de novo. Security Sav. Soc. v. Cohalan, 31 Wash. 266, 71 P. 1020. See 1 Curr. L. 161, n. 99.

71. See 1 Curr. L. 162.

72. Boyle v. Union Pac. R. Co., 25 Utah, 420, 71 P. 988. Citing 3 Enc. Pl. & Prac. p. 502; Hayne, New Trials & App. § 271; Elliott, App. Proc. § 206.

73. Denny v. Broadway Nat. Bank, 118 Ga. 221, 44 S. E. 982. See 1 Curr. L. 162, n. 20.

74. Alaska Commercial Co. v. Dinkelspiel [C. C. A.] 126 F. 164; Shuler v. Lashorn, 67 Kan. 694, 74 P. 264; Hoedless v. Jernigan [Fla.] 35 So. 656. The fact that an amendment, claimed to be prejudicial, was in fact made during the trial, must appear. Pratt v. Smith [Neb.] 94 N. W. 104. An order refusing to set aside a judgment must be affirmed where the judgment is not in the record and no impropriety in it is shown by the transcript. Green v. Thatcher, 31 Colo. 363, 72 P. 1078. Rulings with reference to continuance not reviewed in absence of showing in record. Miller v. Matheson, 28 Mont. 132, 72 P. 414. If the statements of the court in his instructions, as to what the facts are, are erroneous the bill of exceptions should show it; otherwise the instructions will be presumed to be supported by evidence not brought up. Sharp v. U. S., 191 U. S. 341, 24 S. Ct. 114. See 1 Curr. L. 162, n. 17.

75. Shelby v. Creighton [Neb.] 96 N. W. 332; Gulf, C. & S. F. R. Co. v. Blanchard [Tex. Civ. App.] 73 S. W. 88. Where the brief of evidence is so confused as to be unintelligible, the verdict will be presumed supported by the evidence and a new trial properly denied. Grier v. Bowen, 118 Ga. 670, 45 S. E. 455. See 1 Curr. L. 162, n. 18.

76. Clark v. Wolf [Neb.] 96 N. W. 495; Sellers v. Pacific Wrecking & Salvage Co. [Wash.] 74 P. 1056; Alaska Com. Co. v. Dinkelspiel [C. C. A.] 126 F. 164; De Wolf v. People, 202 Ill. 73, 66 N. E. 868; Stedry v. Beck [Neb.] 94 N. W. 513; Post v. Smith [Neb.] 95 N. W. 500; Kingsley v. Swoboda [Neb.] 96 N. W. 518. Two conflicting petitions for vacation of decree. Presumed that ruling was made on one conforming to facts as stated in remainder of record. Reulet v. Hogan, 203 Ill. 525, 68 N. E. 97. Record showing redemption from judicial sale, presumption that recording fee was also paid to master. Morava v. Bonner, 205 Ill. 321, 68 N. E. 707. Where the proceeds of a life insurance policy were taxed as an inheritance and the record does not show the terms of the policy, it will be presumed on appeal that it was payable to decedent's executors and administrators and therefore taxable. In re Murphy's Estate, 21 Pa. Super. Ct. 384. Presumed that execution was restrained on sufficient facts to warrant it. Fairfield v. Day [N. H.] 55 A. 219. In the absence of any showing to the contrary, it will be presumed that the trial court complied with its rules. Union Book Co. v. Robinson, 105 Ill. App. 236. See 1 Curr. L. 162, n. 19.

77. Northdruft v. City of Lincoln [Neb.] 96 N. W. 163; Stanbury v. Storer [Neb.] 97 N. W. 805. In the absence of specific objections to evidence in the record, the court will not presume the objections raised on appeal were raised below. Kreenert v. Falk, 32 Wash. 180, 72 P. 1010. Judgment affirmed on imperfect record. Perkins v. Mahan, 25 Ky. L. R. 716, 76 S. W. 339.

78. Citizens' Bank v. Stockslager [Neb.] 96 N. W. 591; Jones v. Peterson [Or.] 74 P. 661; Lynch v. Pittman, 31 Tex. Civ. App. 553, 73 S. W. 862. Nonsuit will be presumed to have been properly granted. Hanna v. De Garmo, 140 Cal. 172, 73 P. 830. Judgment for costs in favor of plaintiff presumed not to have been against defendant not served in state, there being another defendant properly served. Maxcy v. McCord [Wis.] 98 N. W. 529. An order on the court's own motion, setting aside a license to practice law at the same term at which it was granted, will be presumed to have been on good grounds. Killian v. State [Ark.] 78 S. W. 766. Certiorari to a justice in a forcible entry and detainer case will be presumed not to have issued until after service of the summons, where such presumption is possible on the record and necessary to sustain the jurisdiction [Rev. St. 1899, § 3358].

Where it appears by the bill that evidence of an instruction by a wife to her husband as to the application of a certain payment given in plaintiff's absence, was rejected, it will not be assumed in support of the ruling that it was rejected because occurring in a private conversation between husband and wife.[89]

The reviewing court is confined to the record and will consider only such error as is there presented,[81] whether the suit be at law or in equity,[82] and affidavits or other evidence to affect the disposition of the case on appeal cannot be received.[83] Matters not in the record cannot be considered in support of the judgment,[84] and reversal will not be made upon evidence of matters occurring since the trial.[85] Where the bill of exceptions is deficient in showing facts required to be shown by it, it cannot be aided by reference to the evidentiary bill,[86] and statements in the abstract cannot supply omissions of documentary evidence from the bill of exceptions or record.[87] An omission in proof of a matter of record may be supplied, to sustain the judgment.[88] The record in a companion case between the same parties, and tried with the case appealed, cannot be considered though sent up,[89] but the record in a former suit, re-filed in the pending suit, may be considered to supply omissions from the record, no motion having been made to strike it out.[90] Omission of any portion of the record will preclude review of questions arising on the omitted portion.[91] A statement in the record indicating that matters other than the evidence were perhaps considered by the court in arriving at its conclusion, is not ground for reversal in the absence of any showing of prejudice.[92] On

Gossett v. Devorss, 98 Mo. App. 641, 73 S. W. 731. Where the record does not show whether an amendment to a pleading was inserted at a proper or improper place, it will be presumed to have been inserted at the proper place. Vinson v. Palmer [Fla.] 34 So. 276.

79. Exclusion of taxpayers from jury. Board of Councilmen of Harrodsburg v. Mitchell, 25 Ky. L. R. 1518, 78 S. W. 210. Error assigned on allowing plaintiff to dismiss as to one defendant before proof, record not showing that it was before. Scalfi v. Graves, 31 Tex. Civ. App. 667, 74 S. W. 795. A complaint that the trial judge by his manner prejudiced appellant before the jury cannot be considered in the absence of anything in the record to establish it. Klipstein v. Raschein, 117 Wis. 248, 94 N. W. 63. See 1 Curr. L. 162, n. 20.

80. Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 66 N. E. 646.

81. Modern Brotherhood of America v. Cummings [Neb.] 94 N. W. 144; Springer v. Chicago Real Estate, L. & T. Co., 202 Ill. 17, 66 N. E. 850; Boyle v. Union Pac. R. Co., 25 Utah, 420, 71 P. 988; Allen v. Becket, 84 N. Y. S. 1012; Ohio Colo. Min. & Mill. Co. v. Wiley [Colo. App.] 71 P. 1001; Archison v. Arnold [Wyo.] 72 P. 190. Though admitting the reading to the jury of the original but abandoned complaint to have been improper, inasmuch as the court is not informed by the record of its contents, such reading does not appear to be prejudicial to plaintiff. Loftus-Hubbard El. Co. v. Smith-Alvord Co., 90 Minn. 418, 97 N. W. 125. Record failing to show that issue of limitations was presented below, reversal will not be made because court's decision of that question prevented introduction of proof of other issues. Trega v. Mills [Wyo.] 73 P. 209. See 1 Curr. L. 162, n. 20.

82. Joyce v. Harding, 208 Ill. 77, 69 N. E. 747.

83. Nichols v. Roberts [N. D.] 96 N. W. 298; Whisler v. Whisler [Ind.] 70 N. E. 152; Gubner v. Farrell, 84 N. Y. S. 157; Daly v. Minke, 86 N. Y. S. 92. Settled case. Fisher v. Betts [N. D.] 96 N. W. 132. That party died before entry of decree. Joyce v. Harding, 208 Ill. 77, 69 N. E. 747. Whether demand for change of venue was made. Fischer v. Brooklyn Heights R. Co., 84 N. Y. S. 254. Misconduct of jury. Cahill v. Baird, 138 Cal. 691, 72 P. 342. See 1 Curr. L. 163, n. 26.

84. An order of reference by consent. Murray v. Barden, 132 N. C. 136, 43 S. E. 600.

85. Nor will such matters be considered for the purpose of directing the proceedings below. Marietta Chair Co. v. Henderson, 119 Ga. 65, 45 S. E. 725.

86. Silver Springs, O. & G. R. Co. v. Van Ness [Fla.] 34 So. 884; Hoodless v. Jernigan [Fla.] 35 So. 656.

87. Edwards v. Simms [Ariz.] 71 P. 902.

88. Cullingworth v. Wilson, 84 N. Y. S. 968.

89. Armstrong v. Ballew, 118 Ga. 168, 44 S. E. 996.

90. Gardner v. Continental Ins. Co., 25 Ky. L. R. 426, 75 S. W. 283.

91. Where no part of the record prior to an alias order of sale on which property is sold is brought up on appeal from an order of confirmation, no irregularity or lack of authority to issue such alias order can be presumed. National Life Ins. Co. v. Crandall [Neb.] 96 N. W. 624. On appeal from a judgment of the municipal court of New York, where the return contains neither the complaint nor the testimony, the correctness of the judgment on the merits cannot be reviewed. O'Brien v. Kuntz, 84 N. Y. S. 535.

92. Miller v. Miller [Iowa] 98 N. W. 631. See 1 Curr. L. 164, n. 35.

appeal from a judgment construing a will the court can consider a deposition on which the trial court based its finding of the facts necessary to an understanding of the will.[93] The opinion of the trial court has no place in the record and it cannot be referred to to rebut the presumption that the court considered all evidence properly before it.[94] When a ruling depends on the evidence, it cannot be reviewed unless all the evidence relating thereto is in the record,[95] and so shown by the bill,[96] and a bill of exceptions not properly authenticated by the clerk below will not be considered.[97] Where a written contract is not set out in the record, its construction, and the admissibility of evidence, and propriety of instructions concerning it will not be considered.[98] A ruling based on the evidence will be presumed correct in the absence of the evidence by stipulation.[99] A certificate that the evidence tended to show certain facts will raise the legal questions growing out of such facts.[1] Where there is no bill of exceptions, or substitute therefor, in the record, or because of defects it is stricken out or refused consideration, questions depending thereon will not be considered,[2] the only errors reviewable in such case being those appearing upon the journal properly entered thereon;[3] but errors appearing on the face of the record

93. Lee v. Baird, 134 N. C. 410, 46 S. E. 955.

94. Phillips v. Coburn, 28 Mont. 45, 72 P. 291.

95. Allowance of attorney fees not reviewed in absence of evidence. Deane v. Ind. Macadam & Construction Co., 161 Ind. 371, 68 N. E. 686. Refusal of court below to dismiss appeal from inferior court. Hagadorn v. Wagoner [Neb.] 96 N. W. 184. Whether damages are excessive. City of Pueblo v. Timbers, 31 Colo. 215, 72 P. 1059. Error in sustaining plea in abatement. Griffis v. Baxter & Co., 119 Ga. 612, 46 S. E. 840. Neither an order disposing of the fund in controversy, nor one enjoining interpleading defendants from prosecuting an independent suit to recover it can be reviewed in the absence of a showing that the entire record is before the court. Wagstaff v. Wagstaff, 67 Kan. 832, 72 P. 780. See 1 Curr. L. 163, n. 31.

96. Frazier v. Weaver, 67 Kan. 829, 72 P. 792. Where on error it appears from the papers before the court that there are other files not part of the transcript, and the certificate of the clerk does not show that the papers attached are a true and correct transcript, the court has no jurisdiction to examine the alleged errors. Kincaid v. Friedman, 67 Kan. 838, 73 P. 52. Where there is no certificate that the proceedings included constitute a complete transcript of the entire record the case cannot be reviewed as on a transcript of the record. Bonanza Lead Min. Co. v. Huff, 66 Kan. 786, 71 P. 849. Where the case on appeal contains no certificate that it contains all the evidence, the facts cannot be examined, but where the case was tried to a jury, the exceptions to rulings of the trial justice will be reviewed. Baker v. Griffin, 86 N. Y. S. 579.

97. Van Auken v. Mizner [Neb.] 93 N. W. 1121; Id., 97 N. W. 334; United States Nat. Bank v. Hanson [Neb.] 95 N. W. 364; Hammer v. Coglizer [Neb.] 95 N. W. 681.

98. Merriner v. Jeppson [Colo. App.] 74 P. 341.

99. Griffin v. Gingell, 25 Ky. L. R. 2031, 79 S. W. 284.

1. Brown v. Schintz, 202 Ill. 509, 67 N. E. 172.

2. Award of jury in condemnation proceedings not reviewed in absence of bill of exceptions. Clapp v. Macfarland, 20 App. D. C. 224. Where no evidence is preserved in the bill of exceptions, no question predicated thereon can be considered. Cerussite Min. Co. v. Anderson [Colo. App.] 75 P. 158; Sayer v. Brown, 119 Ga. 539, 46 S. E. 649; Douglas County v. Sayer, 119 Ga. 551, 46 S. E. 654. Judgment on an agreed statement of facts cannot be reviewed in the absence of a bill of exceptions. Stempel Fire Extinguisher Mfg. Co. v. National Fire Ins. Co. [Mo. App.] 77 S. W. 334. In the absence of a statement of facts, assignments involving issues of fact or depending on the status of the facts cannot be reviewed. Beaumont Imp. Co. v. Carr [Tex. Civ. App.] 75 S. W. 327. Except in case of an instruction obviously erroneous when considered in the light of the pleadings and verdict. Luna v. Missouri, K. & T. R. Co., 31 Tex. Civ. App. 604, 73 S. W. 1061; Galveston, H. & S. A. R. Co. v. Perkins [Tex. Civ. App.] 73 S. W. 1067. The pleading being sufficient to support it and there being no bill of exceptions, a decree in equity will be affirmed on appeal. Stanbury v. Storer [Neb.] 97 N. W. 805. Where the record on appeal contains neither findings of fact nor bills of exceptions, the only question presented is whether there is sufficient evidence to support the judgment. Holler v. Scott [Tex. Civ. App.] 75 S. W. 839. Where an action was dismissed after hearing the evidence, it will not be reviewed without a bill of exceptions, though the record recites that in the opinion of the trial judge the complaint does not state a cause of action. McCowan v. Votaw [Neb.] 93 N. W. 1129.

3. Manley v. Wheeling & L. E. R. Co., 24 Ohio Circ. R. 70. Where the record proper alone is brought, the appellate court is confined to a consideration of that only. State v. Carroll, 101 Mo. App. 110, 74 S. W. 468; Strauss v. St. Louis Transit Co., 102 Mo. App. 644, 77 S. W. 156. Assignments of error not based upon exceptions duly taken

proper will be reviewed whether the facts or evidence are before the court or not.[4] Where the only contention is whether the findings of fact justify the conclusions of law a statement of facts is unnecessary.[5] The judgment may be limited but not enlarged by a record that shows only the judgment and findings, since the complaint may have been insufficient to support a larger judgment.[6] In the Federal courts, where a jury is waived by written stipulation, and the finding of the court is general, and no bills of exceptions are taken to the rulings during the progress of the trial, the record presents no question for review by the appellate court,[7] and in the absence of a written stipulation waiving a jury, the only question reviewable is whether the judgment rendered is sustained by the pleadings.[8] Where the facts or evidence are absent from the record, all presumptions of fact necessary to sustain a judgment conformable to the pleadings will be indulged,[9] and no fact, the existence of which is necessary to overturn the judgment below, will be regarded as established without an affirmative showing thereof.[10] When

and preserved by bill of exceptions will not be considered unless such error is apparent from the record proper and not necessary to be preserved by bill. Rudolph v. Smith [Colo. App.] 72 P. 817; Carlin v. Freeman [Colo. App.] 75 P. 26. Where there is no statement properly authenticated, only errors appearing on the face of the judgment roll can be considered. Appeal from order of probate court setting aside homestead. In re Quinn's Estate [Nev.] 74 P. 5. Where there is no bill of evidence in the record (U. S. Cast Iron Pipe & Foundry Co. v. Gable, 25 Ky. L. R. 1692, 78 S. W. 485), or where the bill of exceptions has been stricken from the record, the only question reviewable is the sufficiency of the pleadings to support the judgment (Kice v. Louisville & N. R. Co., 25 Ky. L. R. 312, 75 S. W. 218). Record limited by stipulation held to present only question whether pleadings support judgment. Curtis v. Boquillas Land & Cattle Co. [Ariz.] 71 P. 924. On error, where no motion for new trial was filed below and no exceptions taken to rulings of the trial court, and there is no bill of exceptions, the only question open to the error court is whether the pleadings are sufficient to sustain the judgment. Gillespie v. Morsman [Neb.] 95 N. W. 774; Bemis v. McCloud [Neb.] 96 N. W. 214; Grove v. Dineen [Neb.] 96 N. W. 253; Porter v. Detrick [Neb.] 96 N. W. 271.

4. Error affirmatively appearing on the face of the record proper will be reviewed without a bill. Herman v. Beck [Neb.] 94 N. W. 512. See 1 Curr. L. 164, n. 34.

5. Fitz Henry v. Munter, 33 Wash. 629, 74 P. 1003.

6. Shelby v. Creighton [Neb.] 96 N. W. 382.

7. Rev. St. §§ 649, 700. National R. Co. v. O'Leary [C. C. A.] 126 F. 363.

8. City of Defiance v. Schmidt [C. C. A.] 123 F. 1.

9. Where the trial court found that a county was "organized" it will be presumed, in aid of the judgment, in the absence of a statement of facts, that every act necessary to constitute the county an organized county was done. McCaleb v. Rector [Tex. Civ. App.] 78 S. W. 956. In the absence of the evidence it will be presumed that the attorney fee allowed by the court in a foreclosure case was reasonable. Johnson v. Hibbard [Utah] 75 P. 737. A verdict will be presumed to have been properly directed where the facts are not before the court. Young v. Surget [Miss.] 34 So. 322. In the absence of a bill of exceptions it will be presumed that facts alleged in a motion to dismiss as to one defendant, which was granted, were proven. Scalfi v. Graves, 31 Tex. Civ. App. 667, 74 S. W. 795. Where the appointment of a receiver is collaterally attacked on appeal and the grounds of opposition urged below against his appointment are not shown, it will be presumed that evidence necessary to authorize the court's action was presented. Mesnager v. De Leonis, 140 Cal. 402, 73 P. 1052. In the absence of a bill of exceptions and statement in the record, the contentions that the appointment of a receiver was irregular, and that no jurisdiction to order a sale was acquired, cannot be considered. O'Neil v. McLennan [Cal.] 73 P. 576. In the absence of a bill of exceptions or any finding of the facts on which the court acted in making an order, it will be assumed that the court acted wholly within the law. Discharge and trial without jury in condemnation proceedings. Manley v. Wheeling & L. E. R. Co., 24 Ohio Circ. R. 70. On a general finding for defendant in a trial by the court, where the evidence is not preserved, and there is no special finding inconsistent with the general finding, if the answer sets forth a defense, the judgment of the trial court must, in the absence of error in making up the pleadings, be upheld. Snyder v. Johnson [Neb.] 95 N. W. 692. Where no instructions were asked or refused, and no exceptions to the rulings on evidence preserved, the judgment, if correct under any theory applicable to the facts, will be affirmed. Morrow v. Pullman Palace Car Co., 98 Mo. App. 351, 73 S. W. 281.

10. Where the petition is met by a general denial, matters of fact alleged in the petition cannot be regarded as proven without facts or findings in the record. Certificate of acknowledgment of deed. Beaumont Imp. Co. v. Carr [Tex. Civ. App.] 75 S. W. 327. An order denying a motion to vacate a judgment for taxes and quash the execution cannot be reviewed in the absence of the judgment and petition on which it was founded. State v. Gawronski [Mo.] 78 S. W. 807. Where it appears that the

the appeal is on the judgment roll alone, and no error appears on the face thereof, the judgment must be affirmed.[11] Though the bill does not contain all the evidence, if enough is preserved to raise a certain inference and defendant in error proposes to deny that inference, he must see that enough is stated to at least show that there was other evidence which might affect the conclusion.[12] Where, after demurrer to the evidence is overruled, defendant offers proof,[13] and his motion for directed verdict is then overruled, he is entitled on appeal to a review of the evidence as a whole.[14] It cannot be assumed in favor of an exceptant that a view by the jury added anything to the evidence stated in the bill.[15]

Jurisdiction and venue.[16]—Where the record shows that a certain person appeared at trial for one of the parties, it will be presumed that he was authorized so to do.[17] The overruling of a motion by the removing defendant to remand a cause to the state court will not be reviewed on the ground that an indispensable party defendant was shown by the evidence to be a citizen of the same state with complainant, where the evidence is not in the record and the bill and petition for removal show a removable case.[18]

Process and pleading.[19]—An exception to jurisdiction of the person cannot be sustained where the return of service is not in the record.[20] Where process is a part of the record proper, and the transcript shows none, the record will not be helped out by the presumption that proper process was served.[21]

Rulings on demurrers, exceptions, and motions to strike pleadings cannot be reviewed in the absence of the pleadings in question,[22] and where there is no showing that a demurrer was ever presented to the court, no complaint can be made that no disposition was ever made thereof.[23] Exception to the refusal of an amendment not in the record will not be considered.[24] Where the complaint is dismissed at the trial before a referee, and the answers filed are not contained

sheriff's deed, under which plaintiff claims, misdescribed the land and has been altered since delivery, he will not be granted relief as equitable owner in the absence of the execution from the record, since that may have been wrong too. Kalbach v. Mathis [Mo. App.] 78 S. W. 684. Where on appeal from the decision of the board of general appraisers affirming the collector's classification of imported merchandise, there is no evidence to overthrow the classification, the decision of the board must stand. Bailey & Co. v. U. S., 122 F. 751. The dismissal of a petition to set aside a judgment cannot be reviewed where no part of the record of the original suit is brought up. Jones v. Conway, 25 Ky. L. R. 2017, 79 S. W. 239. Where a plea of former judgment is traversed and the judgment pleaded is not in the bill of exceptions the defense will not be considered on appeal. Brinkman v. Sunken, 174 Mo. 709, 74 S. W. 963. An estoppel founded on an agreement and judgment in another case, neither of which is in the record, cannot be considered. Watkins v. Hopkins County [Tex. Civ. App.] 72 S. W. 872. Whether the appellee is barred by an estoppel cannot be considered in the absence of the documentary evidence on which his contention is based. Kraft v. Holzman, 206 Ill. 548, 69 N. E. 574.

11. Swartz v. Davis [Idaho] 74 P. 800.

12. City of Detroit v. Grummond [C. C. A.] 121 F. 963.

13. Oglesby v. Missouri Pac. R. Co., 177 Mo. 272, 76 S. W. 623.

14. McLain v. St. Louis & S. R. Co., 100 Mo. App. 374, 73 S. W. 909.

15. Williams v. Citizens' Elec. St. R. Co., 184 Mass. 437, 68 N. E. 840.

16. Jurisdiction of the court below to enter personal judgment against the defendant will be presumed unless the lack of it appear in the record. Culver v. Lieberman, 69 N. J. Law, 341, 55 A. 812. See 1 Curr. L. 164.

17. Department of Health v. Babcock, 84 N. Y. S. 604.

18. Wirgman v. Persons [C. C. A.] 126 F. 449.

19. See 1 Curr. L. 165.

20. Stoddard v. Cambridge Mut. Fire Ins. Co., 75 Vt. 253, 54 A. 284.

21. Mandamus. Hart v. State, 161 Ind. 189, 67 N. E. 996.

22. All the paragraphs of an answer must be included when there is a separate demurrer to each paragraph and some are overruled and some sustained. Chicago, etc., R. Co. v. Indiana Natural Gas & Oil Co. [Ind. App.] 70 N. E. 270. Where the answer is not in the record, an assignment complaining of the sustaining of special exceptions thereto cannot be considered. Crawford v. Abbey [Tex. Civ. App.] 79 S. W. 346. Error in striking out paragraphs of a pleading cannot be reviewed where the amended pleading subsequently filed is not in the record. Rawlings v. Casey [Colo. App.] 73 P. 1090.

23. O'Neil v. McLennan [Cal.] 73 P. 576.

24. Castellow v. Brown, 119 Ga. 461, 46 S. E. 632.

in the record, they cannot be reviewed.[25] Nothing appearing to the contrary, it will be presumed that leave was given to file an amended complaint,[26] that an amended pleading was a mere restatement of the matter of the original,[27] and that plaintiff stood upon his complaint on the sustaining of a demurrer to it.[28] Where there is nothing in the record to show the form of an application to amend a declaration, except the statement in the amended declaration that it was filed with leave of court, it will not be presumed that it was filed as a substitute to the original, but as an addition to it and that exhibits filed with the original are still before the court.[29] All reasonable presumptions not contrary to the record will be indulged with reference to the sufficiency of the pleadings below to support the judgment: i. e. that oral pleadings were amended to conform to the proof,[30] that a paper attached to the transcript purporting to amend the petition was not allowed as an amendment,[31] that a petition included in the transcript was a part of the complaint, though not referred to therein as an exhibit,[32] and variances between pleadings and proof unexcepted to below will not be considered unless material and substantial and affecting the right of the matter.[33] A judgment on the pleadings and amendments will not be reversed where they are confusing and involved, and there is nothing to show that they are all included in the record.[34] An order overruling a motion to dismiss for want of a written complaint will not be reviewed where the record does not show that a written complaint was not filed.[35] Where the sufficiency of a complaint is first raised on appeal,[36] or where the appeal is from the overruling of a general demurrer, the allegations of the petition must be accorded every reasonable intendment in favor of the right to be enforced,[37] the rule that it should be construed most strongly against the pleader having no application.

Motions and affidavits.[38]—To review the ruling on a motion the record must show the motion itself,[39] the grounds thereof,[40] the affidavits[41] or other evidence

25. Terwilliger v. Wheeler, 81 App. Div. 460, 81 N. Y. S. 173.

26. Pitzele v. Reuping [Ind. App.] 68 N. E. 603.

27. Shroyer v. Pittenger, 31 Ind. App. 158, 67 N. E. 475.

28. Noerdlinger v. Huff, 31 Wash. 360, 72 P. 73.

29. Abbott v. Bowers [Md.] 57 A. 538.

30. On appeal from the municipal court in a case in which the pleadings were oral and defendant consented that plaintiff might plead anything he wished, it will be presumed that the complaint was amended to conform to the proof, though a different cause of action than that first pleaded was proved. Poess v. Twelfth Ward Bank, 86 N. Y. S. 857.

31. The justice had dismissed the case as beyond his jurisdiction, and paper purported to amend by withdrawing part of demand. Fidelity & Guaranty Co. v. Feed Co., 100 Mo. App. 725.

32. Petition in highway proceedings. Wagner v. Mahrt, 32 Wash. 542, 73 P. 675.

33. V. S. 1630. Brown's Ex'r v. Dunn's Estate, 75 Vt. 264, 55 A. 364.

34. Ott v. Elmore, 67 Kan. 853, 73 P. 898.

35. Action to recover penalty for obstructing public road. Seidschlag v. Town of Antioch, 207 Ill. 280, 69 N. E. 949.

36. Vivion Mfg. Co. v. Robertson [Mo.] 75 S. W. 644.

37. St. Louis S. W. R. Co. v. Spivey [Tex.] 76 S. W. 748.

38. See 1 Curr. L. 166.

39. Motion to strike part of complaint. Crystal Ice Co. v. Morris, 160 Ind. 651, 67 N. E. 502. Motion for directed verdict. In re Harvey's Will [Iowa] 94 N. W. 559. Where a bill of exceptions taken to the overruling of a motion for continuance does not contain the motion or otherwise identify it as required by rule, it cannot be reviewed. Rules 55 and 86. Chicago, R. I. & T. R. Co. v. Long [Tex. Civ. App.] 74 S. W. 59; Ft. Worth & D. C. R. Co. v. Partin [Tex. Civ. App.] 76 S. W. 236. The motion for a new trial not being of itself a part of the record, where it is not included in the bill of exceptions, the grounds of it cannot be reviewed, though the journal entries show that it was made and denied and the denial excepted to. Freeburgh v. Lamoureux [Wyo.] 73 P. 545. See 1 Curr. L. 166, n. 66.

40. Motion to direct verdict. In re Harvey's Will [Iowa] 94 N. W. 559; Hopwood v. Benjamin Atha & Illingsworth Co., 68 N. J. Law, 707, 54 A. 435. See 1 Curr. L. 166, n. 67.

41. Affidavit for continuance held not properly brought into record. Du Quoin Waterworks Co. v. Parks, 207 Ill. 46, 69 N. E. 587. Affidavit on motion for new trial. Rudolph v. Smith [Colo. App.] 72 P. 817. Motion to retax costs. Van Buskirk v. Balch [Colo. App.] 74 P. 792. See 1 Curr. L. 166, n. 68.

on which the motion is based,[42] that it was ruled on,[43] and what the ruling was,[44] since error must affirmatively appear to secure reversal, all reasonable presumptions being indulged to support the ruling below.[45] On appeal from the grant or refusal of a new trial, the record should show the newly discovered evidence on which it is based,[46] and also the evidence in the case, since otherwise it cannot be seen that the new evidence was competent or material,[47] or was not merely cumulative.[48] Where the notice of a motion for a new trial specifies insufficiency of the evidence as a ground, but the statement contains no specifications, it cannot be presumed on appeal in support of the order granting the new trial that the evidence was insufficient to support the findings.[49] An appeal from an order denying a motion to vacate an order adjudging a party guilty of a criminal contempt presents no question for review, where the motion was based merely on the affidavit of the party and there is no certification that it contains all the proceedings.[50]

Proceedings at trial in general.[51]—Improper remarks of counsel must appear in the record to review alleged error therein.[52] Where the record does not show the arguments of counsel, it will be presumed the jury took the law from the court, as is their duty, and disregarded counsel's statements in so far as in conflict with the instructions.[53] An assignment of error based on the alleged misconduct of the jury will not be considered where it is ascertainable only from affidavits not included in the bill of exceptions.[54] Where there is no showing as to why the regular panel was not summoned to appear before the case was set for trial, it will be presumed there was justifiable cause for ordering a special jury.[55] It will be presumed the statute was read to the officer sent out in charge of the jury as provided therein, in the absence of any showing to the contrary, or that it was waived by the appellant.[56]

Admission or exclusion of evidence.[57]—Rulings on the admissibility of evi-

42. Verified motion to strike out report of highway viewers. Merom Gravel Co. v. Pearson [Ind. App.] 69 N. E. 694. Motion to dismiss appeal from justice. Cox v. Crow [Neb.] 94 N. W. 524. The ruling on a motion for new trial will not be reviewed in the absence of the newly discovered evidence from the record. Board of Councilmen v. Mitchell, 25 Ky. L. R. 1518, 78 S. W. 210.

43. No showing that motion was ever presented or ruled upon. Lake Erie & W. R. Co. v. Shelley [Ind. App.] 67 N. E. 564. Affidavits in support of a motion below not ruled upon will not be considered. Motion to amend reporter's notes of evidence. Modern Brotherhood of America v. Cummings [Neb.] 94 N. W. 144.

44. Ledwith v. Campbell [Neb.] 95 N. W. 838. See 1 Curr. L. 166, n. 69. A ruling that the motion "heretofore filed" is overruled, the motion for new trial being the only one before the court, sufficiently identifies it. Cummins v. Cummins, 30 Ind. App. 671, 66 N. E. 915.

45. Where the order denying a motion for a new trial states no reasons and appears to have been entered after the time allowed for making such motion, and there is no showing as to when the motion was made, it will be presumed in support of the judgment below that the motion was denied because not filed in time. City of Perry v. National Sewing Mach. Co., 13 Okl. 211, 74 P. 189. The propriety of an order refusing to continue in force a temporary injunction cannot be determined in the absence of the facts from the record, and it will be affirmed. Weeks v. New York & N. J. Tel. Co., 86 App. Div. 257, 83 N. Y. S. 678.

46. Board of Councilmen v. Mitchell, 25 Ky. L. R. 1518, 78 S. W. 210. Where the record on appeal does not contain the evidence on which a new trial was granted, but there was other evidence sufficient to sustain it, it will be affirmed. Tenoza v. Gollick, 80 App. Div. 638, 81 N. Y. S. 353.

47. Where evidence was not brought up, order was reversed. Rice's Ex'rs v. Wyatt, 25 Ky. L. R. 1060, 76 S. W. 1087.

48. Beckner v. Henquenet [Okl.] 75 P. 1131.

49. Ben Lomond Wine Co. v. Sladky, 141 Cal. 619, 75 P. 332.

50. In re Tietelbaum, 84 App. Div. 351, 82 N. Y. S. 887.

51. See 1 Curr. L. 166.

52. Notwithstanding attorney's promise to stenographer not to go outside the record. Kinney v. McFaul, 122 Iowa, 452, 98 N. W. 276. See 1 Curr. L. 166, n. 71.

53. Vocke v. Chicago, 208 Ill. 192, 70 N. E. 325.

54. Pledger v. Chicago, B. & Q. R. Co. [Neb.] 95 N. W. 1057.

55. Albany Land Co. v. Rickel [Ind.] 70 N. E. 158.

56. Walton v. Wild Goose Min. & Trading Co. [C. C. A.] 123 F. 209.

57. See 1 Curr. L. 166.

dence cannot be reviewed unless the record shows the evidence admitted[58] or excluded,[59] and sets it forth in such manner that the question can be decided without reference to other parts of the record,[60] and in the case of excluded evidence, such other evidence as is necessary to show its relevance or pertinence.[61] Specific errors in excluding evidence will be reviewed, although the bill of exceptions does not contain all the evidence.[62] Error of an auditor in overruling objections to evidence will not be considered unless the evidence is set forth in exceptions filed to his report.[63] The overruling of a motion to strike out all the evidence of a witness will not be reviewed where the bill sets out only a part of it.[64] The purpose for which the excluded evidence was offered,[65] and the ground of the objection thereto, must appear,[66] and an objection to admitted evidence will not be considered unless the ground thereof is stated in the case.[67] Where the question is not shown, error in refusing it[68] or in striking out the answer will not be reviewed.[69] Refusal to allow a certain question will not be reviewed where it does not appear what answer was expected,[70] especially where the witness was called by the party questioning him.[71] And the sustaining of an objection to the testimony of a witness on being asked a preliminary question will not be reviewed in the absence of a showing as to what was expected to be proved by him.[72] The rule does not apply to a hostile witness, nor to questions proper on cross-examina-

58. Blackwell v. Hatch, 13 Okl. 169, 73 P. 933; Smith v. Bunch, 31 Tex. Civ. App. 541, 73 S. W. 559. Written notice. McAdams v. Felkner, 140 Cal. 354, 73 P. 1064. Facts set up in bill held to show that paper referred to, though produced and identified, was not offered in evidence. Alaska Commercial Co. v. Dinkelspiel [C. C. A.] 126 F. 164. Error assigned because of admission of certain notes as evidence; the question refused consideration because notes not set out in the record. Harnett v. Holdrege [Neb.] 97 N. W. 443. See 1 Curr. L. 166, n. 80.

59. Cahill v. Baird, 138 Cal. 691, 72 P. 342; Nunn v. Jordan, 31 Wash. 506, 72 P. 124. Expected answer of witness must be shown. Briggs v. Chicago & N. W. R. Co. [C. C. A.] 125 F. 745; Tague v. John Caplice Co., 28 Mont. 51, 72 P. 297; Callaway v. Wilson, 141 Cal. 421, 74 P. 1035. Written instrument. United Railways & Elec. Co. v. Hertel, 97 Md. 382, 55 A. 428; Nolt v. Crow, 22 Pa. Super. Ct. 113. Where the testimony of a witness does not appear, it will be presumed that refusal to allow him to repeat it at the instance of another party was proper. Gage v. City of Chicago, 203 Ill. 26, 67 N. E. 477. Report of commissioner showing that declarations of party were excluded. Carmichael v. Henry Wood's Sons Co., 184 Mass. 73, 67 N. E. 961. Warrant or return of survey of land. Wilcox v. Snyder, 22 Pa. Super. Ct. 451. Papers not printed in paper book. McKnight v. Newell [Pa.] 57 A. 39. Excluded deed must be shown. Edwards v. Simms [Ariz.] 71 P. 902. Pleadings in prior case must be shown if rejection as evidence is to be reviewed. Finlen v. Heinze, 28 Mont. 548, 73 P. 123. Testimony of absent witnesses on former trial. Caskey v. La Belle, 101 Mo. App. 590, 74 S. W. 113. Exclusion of answers to questions cannot be held error unless the answers are set out in the bill of exceptions and error affirmatively appears. Fredrick Mfg. Co. v. Devlin [C. C. A.] 127 F. 71. See 1 Curr. L. 166, n. 81.

60. Georgia Northern R. Co. v. Hutchins, 119 Ga. 504, 46 S. E. 659.

61. Hoodless v. Jernigan [Fla.] 35 So. 656; Snooks v. Wingfield, 52 W. Va. 441, 44 S. E. 277; Wilson v. Brinker [Tex. Civ. App.] 76 S. W. 213. See 1 Curr. L. 167, n. 82.

62. It is sufficient that the record discloses distinct error in the exclusion of testimony prejudicial to appellant. Lathrop v. Humble [Wis.] 97 N. W. 905.

63. Rusk v. Hill, 117 Ga. 722, 45 S. E. 42; Trentham v. Blumenthal, 118 Ga. 530, 45 S. E. 421.

64. Fritzinger v. State, 31 Ind. App. 350, 67 N. E. 1006.

65, 66. Kendall v. Flanders [N. H.] 54 A. 285.

67. Colvin v. McCormick Cotton Oil Co., 66 S. C. 61, 44 S. E. 380.

68. Shugart v. Shugart [Tenn.] 76 S.W. 821.

69. Weller v. Wagner [Mo.] 79 S. W. 941. Objection that answer was unresponsive. Langenbeck v. Louis, 140 Cal. 406, 73 P. 1086.

70. Chimine v. Baker [Tex. Civ. App.] 75 S. W. 330; Grant v. Noel, 118 Ga. 258, 45 S. E. 279; Hendrick v. Daniel, 119 Ga. 358, 46 S. E. 438; Thomas v. Wheeling Electrical Co. [W. Va.] 46 S. E. 217; Williams v. Belmont Coal & Coke Co. [W. Va.] 46 S. E. 802; Moser v. South Covington & C. St. R. Co., 25 Ky. L. R. 154, 74 S. W. 1090; Texas & P. R. Co. v. Meeks [Tex. Civ. App.] 74 S. W. 329. Expert witness. Moyer v. Ramsay-Brisbane Stone Co., 119 Ga. 734, 46 S. E. 844; Stroh v. South Covington & C. St. R. Co., 25 Ky. L. R. 1868, 78 S. W. 1120; Shugart v. Shugart [Tenn.] 76 S. W. 821. See 1 Curr. L. 167, n. 87.

71. A ruling sustaining objections to a question to one's own witness will not be reviewed in the absence of an offer of proof. Boughn v. Security State Bank, 1 Neb. Unoff. 490, 95 N. W. 680; King v. Pony Gold Min. Co., 28 Mont. 74, 72 P. 309.

72. Harrison v. Incorporated Town of Ayrshire [Iowa] 99 N. W. 132.

tion,[78] and the rejection of the testimony of a witness offered as an expert on the ground that he is not qualified may be reviewed without a showing as to what his testimony would have been.[74] Error in excluding or admitting depositions must affirmatively appear.[75] The action of the trial court in admitting secondary evidence will be presumed based on sufficient evidence, the contrary not appearing,[76] and an objection to parol evidence will not be considered where the city ordinance, claimed to show the fact, is not in the record.[77] The record must show interrogatories and offers which presented to the trial court the question relied upon in the reviewing court as the ground of reversal.[78] A will, to construe which the action is brought, will be considered as properly in evidence, though by oversight it was not formally offered in evidence below.[79]

Sufficiency of evidence.[80]—If the sufficiency of the evidence is questioned, all the evidence must be presented.[81] The chancery rule is otherwise, appellee being required to show in the record evidence sustaining the decree.[82] In Missouri, where all the evidence is not in the record, on appeal in an equity case, the evidence cannot be considered,[83] and in Arkansas, where the record in a chancery cause fails to show that it contains all the evidence, the decree will be presumed correct.[84] Where the petition states a cause of action and the findings support

73. Bell v. Felt, 119 Ga. 498, 46 S. E. 642.

74. Muskeget Island Club v. Nantucket [Mass.] 70 N. E. 61.

75. An objection to a deposition for defect in authentication can be considered only when the authentication is in the record. Cheuvront v. Cheuvront [W. Va.] 46 S. E. 233. A ruling excluding a depoeition will be presumed correct in the absence of the notice and formal parts thereof. Coe v. Coe, 98 Mo. App. 472, 72 S. W. 707. That an objection to a deposition that appellant was not notified of the taking thereof may be available, the bill of exceptions must negative waiver of notice. Texas & P. R. Co. v. Murtishaw [Tex. Civ. App.] 78 S. W. 963.

76. Avery v. Stewart, 134 N. C. 287, 46 S. E. 519.

77. O'Brien v. Woburn, 184 Mass. 598, 69 N. E. 350.

78. Gardiner Campbell Co. v. Iroquois Iron Co. [C. C. A.] 127 F. 648.

79. Reed v. Morgan, 100 Mo. App. 713, 73 S. W. 381. Compare Peterson v. Wolf [Neb.] 95 N. W. 332.

80. See 1 Curr. L. 167.

81. Pittsburgh, C., C. & St. L. R. Co. v. Wilson, 161 Ind. 701, 66 N. E. 899; Emery v. Hanna [Neb.] 94 N. W. 973; United States Nat. Bank v. Hanson [Neb.] 95 N. W. 364; Curtis v. Boquillas Land & Cattle Co. [Ariz.] 71 P. 924; Lusch v. Pool [Ind. App.] 69 N. E. 687; Sayer v. Brown, 119 Ga. 539, 46 S. E. 649; Eggleston v. Royal Trust Co., 205 Ill. 170, 68 N. E. 709; Hutchinson v. Nay, 183 Mass. 365, 67 N. E. 601; King v. Crain [Mass.] 69 N. E. 1049; Tomlinson v. Balnaka [Ind.] 70 N. E. 165; Kringle v. Kringle [Iowa] 98 N. W. 883. Finding of facts by auditor assumed correct in absence of testimony in record. Stockdale v. Maginn, 207 Pa. 226, 227, 56 A. 439. Motion to set aside verdict not reviewable, no evidence in record except as set forth in findings in connection with court's rulings. Devine v. Warner [Conn.] 56 A. 562. Waiver of arbitration clause of fire insurance policy presumed in favor of judgment for plaintiff. Stoddard v. Cambridge Mut. Fire Ins. Co., 75 Vt. 253, 54 A. 284. Assignment that finding is not sustained, and recovery too large. Hatfield v. Chenoweth [Ind. App.] 70 N. E. 166. Where a ballot was not produced and the court had no copy, the decision as to its validity could not be reviewed. People v. Unger, 85 App. Div. 249, 83 N. Y. S. 83. Exhibits not in record. Zieph v. Rosenstein, 85 N. Y. S. 871. A finding conformable to the issues raised by the pleadings cannot be said to be erroneous in the absence of the evidence and instructions. Sherman v. Randolph, 13 Okl. 224, 74 P. 102. Order of approval of boundary commissioner's report heard on oral evidence not reviewed in absence of evidence. Corbin v. McDermott, 33 Wash. 212, 74 P. 361. A judgment reciting that after commencement of suit plaintiff used money claimed to have been paid by defendant in settlement, thereby ratifying the settlement, and that for that reason judgment was directed for defendant, will not be reviewed in the absence of a statement of facts. Dibble v. Seattle Elec. Co., 33 Wash. 596, 74 P. 807. See 1 Curr. L. 167, n. 90.

82. Failure to preserve evidence will work reversal. Village of Harlem v. Suburban R. Co., 202 Ill. 301, 66 N. E. 1060. But see Marchal v. Davis, 206 Ill. 231, 69 N. E. 43, where it is said that appellant failing to include all the evidence cannot complain of its omission. Where in a chancery case the party obtaining the decree fails to preserve the evidence by a certificate or otherwise, and the decree does not find the specific facts proven, it will be reversed on appeal. Torsell v. Elffert, 207 Ill. 621, 69 N. E. 761. See 1 Curr. L. 168, n. 91.

83. Nelson v. Hall [Mo. App.] 79 S. W. 500. Unless it affirmatively appears of record in an equity appeal that all the evidence is preserved, the cause will not be reviewed. Heffernan v. Weir, 99 Mo. App. 301, 72 S. W. 1085.

84. Simpson v. John H. Talbot & Co. [Ark.] 79 S. W. 761.

the decree, and the evidence is not preserved, it will be presumed that it supported the findings.[85] Insufficiency of the evidence to warrant a peremptory charge cannot be considered in the absence of a statement of facts, though the court sums up the evidence in the charge.[86] The record must affirmatively show that it contains all the evidence,[87] and where it does not, its sufficiency to support the verdict or findings will not be reviewed,[88] it being presumed in such case that the verdict has evidence to support it not set out in the record,[89] notwithstanding a stipulation that it contains all the evidence necessary to a determination of the questions raised.[90] Where the bill of exceptions shows that without doubt important evidence has been omitted therefrom, the findings and judgment will not be disturbed as contrary to the evidence;[91] and where the record on appeal in an equity case shows that not all the evidence is included, it will be presumed that there was sufficient to warrant findings of fact justifying the decree.[92] Where the evidence in respect to the finding complained of is complete, it will be reviewed, notwithstanding the absence of evidence on other issues, since it will be assumed that the evidence omitted was immaterial.[93] A verdict for defendant in ejectment cannot be disturbed where title papers are not in the record and nothing in the transcript shows title in plaintiff.[94] Where it appears from the pleadings and the evidence brought up that plaintiff could not recover in any event, judgment in his favor will be reversed, though all the evidence is not in the record.[95] Where evidence is omitted, the appellant must rebut the presumption that the order complained of was justified by the omitted evidence.[96] Where the record shows by inspection that all the evidence is not included, a recital or certificate that it is, is immaterial.[97] Where the appeal is from the judgment

85. Lexington Bank v. Marsh [Neb.] 95 N. W. 341; Jewell v. Shaw [Colo. App.] 75 P. 28.

86. Colley v. Wood [Tex. Civ. App.] 74 S. W. 602.

87. Kennedy v. Plank [Wis.] 97 N. W. 895; King v. Pony Gold Mln. Co., 28 Mont. 74, 72 P. 309; Robertson v. Longley, 28 Mont. 128, 72 P. 423; Saling v. Bolander [C. C. A.] 125 F. 701. Error in directing verdict not considered otherwise. Marvin v. Bowlby [Mich.] 98 N. W. 399. A judgment depending on the evidence will not be reviewed unless the clerk's certificate shows that the bill of exceptions contains all the evidence. Spence v. Lane [Neb.] 97 N. W. 478. Affidavits not properly certified, order based thereon not reviewable. Ellis v. City of Ashland, 117 Wis. 575, 94 N. W. 292; Milwaukee Trust Co. v. Sherwin [Wis.] 98 N. W. 223. No certificate. Meane v. Gotthelf, 31 Colo. 168, 71 P. 1117; Means v. Stow, 31 Colo. 282, 73 P. 48. Showing held sufficient. Truskett v. Bronaugh [Ind. T.] 76 S. W. 294. See 1 Curr. L. 168, n. 92.

88. In re Miller, 13 Okl. 557, 75 P. 1128; Demaris v. Parker, 33 Wash. 200, 74 P. 362; Stewart v. Guy, 138 Ala. 176, 34 So. 1007; Shafer & Co. v. Hausman [Ala.] 35 So. 691. Case tried to referee must show that all evidence heard by him was returned to district court. In re French & Holmes, 13 Okl. 549, 75 P. 278. Where the record does not purport to contain all the evidence the decision will not be reversed on the facts. Bradford v. Cline, 12 Okl. 339, 72 P. 369. The appellate court, however, did hold that from an inspection of the evidence before them the findings of the jury were proper. Kennedy v. Plank [Wis.] 97 N. W. 895. Where the certificate of evidence in the record on appeal in an equity suit does not state that the evidence certified to was all the evidence, a specific finding of fact must prevail. Champion v. Myers, 207 Ill. 308, 69 N. E. 815.

89. Truskett v. Bronaugh [Ind. T.] 76 S. W. 294.

90. Miller v. Farmers' & Merchants' State Bank, 85 App. Div. 175, 83 N. Y. S. 74.

91. Chicago, B. & Q. R. Co. v. Bigley [Neb.] 95 N. W. 844. Depositions omitted. Louisville & N. R. Co. v. Whitehead's Adm'r, 24 Ky. L. R. 2315, 73 S. W. 1128.

92. Ernst v. Schmitz, 207 Ill. 604, 69 N. E. 923.

93. Sullivan v. Washburn & Moen Mfg. Co., 139 Cal. 257, 72 P. 992.

94. Bowman v. Moss, 25 Ky. L. R. 1133, 77 S. W. 184.

95. Herring-Marvin Co. v. Smith, 43 Or. 315, 73 P. 340.

96. Tenoza v. Gollick, 80 App. Div. 638, 81 N. Y. S. 353. Exhibits omitted from place in bill and not properly authenticated elsewhere. Dendy v. First Nat. Bank, 67 Kan. 856, 71 P. 830. Presumption that documentary evidence not brought in supported decree. Marchal v. Davis, 206 Ill. 231, 69 N. E. 43. It will be presumed on appeal that affidavits not in the record supported the allowance of a claim against an estate. Cox v. Higginbotham's Adm'r, 25 Ky. L. R. 1057, 76 S. W. 1079.

97. Beckner v. Henquenet [Okl.] 75 P. 1131; Hatfield v. Chenoweth [Ind.] 70 N. E. 166. Map referred to by evidence not included. Diamond Block Coal Co. v. Cuthbertson [Ind. App.] 67 N. E. 558. The certificate that the bill of exceptions contains

on the judgment roll alone, the sufficiency of the evidence to support the findings cannot be considered.[98] Where the case on appeal does not show what part of an adversary's pleading plaintiff offered in evidence, it cannot be considered a part of his testimony to support a verdict in his favor.[99]

Instructions.[1]—The instructions given or refused must appear properly in the record.[2] The giving or refusal of instructions cannot be reviewed, unless the record contains the entire charge,[3] and the evidence to which they relate,[4] especially where certain issues are withdrawn from the case,[5] and the record must show that they were passed upon by the trial court, and an exception taken to the ruling,[6] since the presumption is that the court gave in substance, all proper instructions, and that the refusal of instructions asked was without prejudice.[7] The record must show that it contains the entire charge.[8] In the absence of a statement of facts instructions not clearly erroneous in view of the pleadings and verdict will not be reviewed,[9] and an objection to an instruction as unsupported by the evi-

all the evidence will be regarded as untrue, where the facts appearing on the face of the bill are in conflict with such recital. Gall v. Gall [Wis.] 97 N. W. 938. Recital in judgment that witnesses testified; documentary evidence only shown. Curtis v. Boquillas Land & Cattle Co. [Ariz.] 71 P. 924. Certificate not impeached by facts in record raising mere inference of omission. Pinney v. First Nat. Bank [Kan.] 75 P. 119. See 1 Curr. L. 168, n. 97.

98. Alexander v. Welcker, 141 Cal. 302, 74 P. 845; Erreca v. Meyer, 142 Cal. 308, 75 P. 826.

99. Clegg v. Southern R. Co., 133 N. C. 303, 45 S. E. 657.

1. See 1 Curr. L. 168.

2. Grand Lodge of Locomotive Firemen v. Orrell, 206 Ill. 208, 69 N. E. 68; Michigan City v. Phillips [Ind. App.] 69 N. E. 700; Wren v. Howland [Tex. Civ. App.] 75 S. W. 894; Brown v. Gillett, 33 Wash. 264, 74 P. 386; Davis v. Seaboard Air Line R. Co., 132 N. C. 291, 43 S. E. 840; Hughes v. School Dist. No. 37, 66 S. C. 259, 44 S. E. 784. Instructions held properly in, though not certified. Broadstreet v. Hall [Ind. App.] 69 N. E. 415. Refusal to further instruct after retirement presumed proper in absence of instructions given and request for further instructions from record. Buzanes v. Frost [Colo. App.] 75 P. 594. A recital in the transcript that the court instructed the jury to find for the plaintiff is a mere conclusion and in the absence of the instruction itself the error alleged will not be reviewed. Startzer v. Clarke [Neb.] 95 N. W. 509. See 1 Curr. L. 168, n. 3.

3. Lake Erie & W. R. Co. v. Holland [Ind.] 69 N. E. 138; Chicago, I. & E. R. Co. v. Wysor Land Co. [Ind.] 69 N. E. 546; Buelna v. Ryan, 139 Cal. 630, 73 P. 466; Dornbrook v. Rumely Co. [Wis.] 97 N. W. 493; City of Pueblo v. Froney [Colo. App.] 71 P. 893. Especially where the instruction refused was of a nature that an imperfection therein might be cured by others. Pittsburg, etc., R. Co. v. Smith, 207 Ill. 486, 69 N. E. 873. An objection to an instruction which "among others" was given cannot be reviewed in the absence of the others, since it will be presumed that the ones omitted qualified the one objected to. Hanson v. Stinehoff, 139 Cal. 169, 72 P. 913. See 1 Curr. L. 168, n. 4.

4. Chase v. Watson, 75 Vt. 385, 66 A. 10; Hoodless v. Jernigan [Fla.] 35 So. 666; Southern Pac. Co. v. Arnett [C. C. A.] 126 F. 75; Ft. Worth & D. C. R. Co. v. Kelley [Tex. Civ. App.] 76 S. W. 942; Fletcher v. Wakefield, 75 Vt. 257, 54 A. 1012; Mercer v. Southern R., 66 S. C. 246, 44 S. E. 750. In the absence of the evidence, the instructions will be approved if correct under any evidence admissible under the pleadings. Mankin v. Pennsylvania Co., 160 Ind. 447, 67 N. E. 229; Ball v. Marquis, 122 Iowa, 665, 98 N. W. 496. And instructions stating correct propositions of law will be presumed to have been refused because not applicable to the evidence. Diamond Block Coal Co. v. Cuthbertson [Ind. App.] 67 N. E. 558. Error in instructions to which the omitted evidence does not apply will be considered, notwithstanding its omission. Exhibits. Indiana Clay Co. v. Baltimore & O. S. W. R. Co., 31 Ind. App. 258, 67 N. E. 704. Where there is no bill of exceptions, instructions given that might have been proper under any possible condition of the evidence under the pleadings, will be approved. Connor v. Schreiner-Flack Grain Co. [Neb.] 96 N. W. 221. See 1 Curr. L. 168, n. 5.

5. A refusal to instruct that there is no evidence on a certain issue will not be reviewed where the evidence is not in the case and there is no statement that there was no evidence. Hart v. Cannon, 133 N. C. 10, 45 S. E. 351. See 1 Curr. L. 168, n. 7.

6. German Ins. Co. v. Stiner [Neb.] 96 N. W. 122; Texas Cotton Products Co. v. Denny Bros. [Tex. Civ. App.] 78 S. W. 557.

7. Columbia Mfg. Co. v. Hastings [C. C. A.] 121 F. 328. In the absence of the charge it will be presumed that the facts were properly submitted. Reynolds v. Fitzpatrick, 28 Mont. 170, 72 P. 510; Schull v. New Birdsall Co. [S. D.] 95 N. W. 276.

8. A statement in the bill that it contains all the instructions given is not falsified by a showing that a requested instruction of a particular number, which the court modified, was not in the record, since it may have been given under another number. Nichols v. Baltimore, etc., R. Co. [Ind. App.] 70 N. E. 183. See 1 Curr. L. 168, n. 8.

9. Luna v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 73 S. W. 1061; Galveston, etc., R. Co. v. Perkins [Tex. Civ. App.] 73 S. W. 1067;

dence cannot be considered if all the evidence is not in the record.[10] Where objection is made only to the instructions given, the bill need not give the instructions requested.[11] The ruling on a motion for a new trial will not be reviewed where the instructions on which it was based,[12] or the evidence on which the instructions were based, are not in the record.[13] Alleged error in instructions in an equity case will not be considered, the verdict being merely advisory.[14] Error in giving or refusing an instruction with reference to the argument of counsel will not be considered in the absence of a showing that counsel made any argument.[15] The correctness of prayers will be determined by the evidence unless special reference to the pleadings is made in the prayer.[16] Refused requests will not be considered on appeal as abandoned below, though appellant refused to allow appellee to read them, claiming they were not of record, where they were subsequently filed in the cause and appellee made no further request to read them.[17] In the absence of a showing to the contrary in the record, charges given will be presumed to have been requested in writing, and those refused will be presumed to have been unwritten and therefore unreviewable.[18] Instructions not excepted to will be presumed to have been full and accurate,[19] and satisfactory to appellant,[20] and regarded as the law of the case.[21]

Verdict or findings, judgment and execution.[22]—Necessary findings must be made and must appear.[23] A bill of exceptions complaining of the absence of findings must show that they were not waived, as waiver will be presumed in support of the judgment.[24] No findings of fact are required to review a judgment for plaintiff after sustaining demurrer to answer.[25] In Missouri, where the court

Avocato v. Dell 'Ara [Tex. Civ. App.] 77 S. W. 47.

10. Atwell v. Shook, 133 N. C. 387, 45 S. E. 777.

11. Nichols v. Baltimore, etc., R. Co. [Ind. App.] 70 N. E. 183.

12. Baggett v. Savannah, F. & W. R. Co. [Fla.] 34 So. 564.

13. Citizens' Bank & T. Co. v. Spencer [Fla.] 35 So. 73.

14. King v. Pony Gold Min. Co., 28 Mont. 74, 72 P. 309.

15. North Chicago St. R. Co. v. Wellner, 206 Ill. 272, 69 N. E. 6. Where there is no bill of exceptions to the argument of counsel, a request purporting to counteract prejudicial argument will be presumed refused because there was no such argument. International, etc., R. Co. v. Mills [Tex. Civ. App.] 78 S. W. 11.

16. Whitby v. Baltimore, C. & A. R. Co., 96 Md. 700, 54 A. 674.

17. Houston, etc., Co. v. Turner [Tex. Civ. App.] 78 S. W. 712.

18. Henderson v. State, 137 Ala. 83, 34 So. 828.

19. Griffin v. Cunningham, 183 Mass. 505, 67 N. E. 660; White v. McPherson, 183 Mass. 533, 67 N. E. 643.

20. Queck-Berner v. Atlantic Trust Co., 80 App. Div. 460, 81 N. Y. S. 146.

21. Cameron v. Mutual Life & T. Co., 121 Iowa, 477, 96 N. W. 961; Osborne & Co. v. Ringland & Co., 122 Iowa, 329, 98 N. W. 116.

22. See 1 Curr. L. 169.

23. Mere opinion of court not sufficient. In re Boston Dry Goods Co. [C. C. A.] 125 F. 226; In re Noyes Bros. [C. C. A.] 125 F. 226. The appellate division cannot take cognizance of the decision of the trial court which is not contained in the record. Sommer v. Sommer, 87 App. Div. 434, 84 N. Y. S. 444. Where the district court is requested to make findings of fact, it is its duty so to do that exceptions may be taken to its views of the law involved in the trial. Shuler v. Lashorn, 67 Kan. 694, 74 P. 264. Where the court rules that the facts are insufficient to authorize the introduction of secondary evidence, he should make a finding of such facts on request. Avery v. Stewart, 134 N. C. 287, 46 S. E. 519. Where in an equitable case the court calls and swears a jury, but after hearing plaintiff's evidence dismisses the complaint without making a written decision, and it appears that a question of fact within the issues was not passed upon, the judgment will be reversed. Flanigan v. Skelly, 89 App. Div. 108, 85 N. Y. S. 4. The entry of a judgment without a decision to support it will be corrected by remitting the case to the trial court for decision, and entry of judgment in conformity therewith. Sommer v. Sommer, 87 App. Div. 434, 84 N. Y. S. 444; Kent v. Common Council of City of Binghamton, 90 App. Div. 553, 86 N. Y. S. 411. Failure to find on facts in issue constituting a defense to an action will not justify a reversal, unless it is shown that there was evidence from which such facts could be found. Callahan v. James, 141 Cal. 291, 74 P. 853. Where the court makes merely a general finding, notwithstanding a request for special findings, the facts are not reviewable on appeal. Berwind-White Coal Min. Co. v. Martin [C. C. A.] 124 F. 313. On appeal an order granting a temporary injunction will be deemed a finding of the facts. Gray v. Building Trades Council [Minn.] 97 N. W. 663. See 1 Curr. L. 169, n. 21.

24. Baker v. Baker, 139 Cal. 626, 73 P. 469.

25. Burke v. Wright, 75 Conn. 641, 55 A. 14.

in trying issues of facts sits as a jury and gives a general verdict, the judgment will not be reviewed on appeal or by writ of error, unless declarations of law are asked and refused, in order that the appellate court may see upon what theory the case was tried. Unless this is done the finding of the court is incontrovertible on appeal.[26] Findings of fact filed after the expiration of the term at which the case was tried cannot be considered.[27] Findings of the jury set aside as unsupported by evidence and not assigned as error will not be reviewed as entitling a party to judgment.[28] The silence of the special finding is taken as equivalent to an express finding against the appellant on all material facts which he was obliged to prove.[29] Where no decision appears in the judgment roll it will be presumed that none was made.[30] Where in a case tried to the court the trial judge's conclusions are not brought up, the judgment will be referred to any warrantable theory of the case made by the testimony which will legally support it.[31] The memorandum of the reasons of the trial judge for his decision cannot be allowed to qualify, characterize, or limit his determination,[32] and alleged errors in the trial court's opinion will not be reviewed,[33] but the appellate division may examine the opinion of the trial court to ascertain the basis of its disposition of the case.[34] Whether certain items should have been allowed will not be reviewed where it does not affirmatively appear that the verdict included them,[35] but where recovery may have been based on either of two issues, only one of which was established, it will not be presumed to have been based on the one established.[36] Where the record does not show on which paragraph of the complaint the verdict was rendered, the appellee cannot urge that an instruction, not specifically referring to a defective paragraph, withdrew it from the jury.[37] A judgment for defendant on a verdict directed generally on a complaint in two paragraphs can be sustained only where neither cause of action is supported by evidence.[38] Where, in Alabama, in a case tried to the court, there are special findings, the supreme court on appeal is limited in its review to a determination of whether the findings support the judgment.[39] Where the evidence is not preserved and the transcript does not contain the pleadings, the findings of fact will be conclusively presumed correct.[40] Where the trial court refuses to set aside a default, on the ground of inexcusable neglect, his findings of fact are conclusive on appeal, and affidavits will not be considered.[41] In the absence of the evidence it will be assumed that it sustained the findings,[42] or judgment,[43] and where only a partial transcript is

26. Jordan v. Davis, 172 Mo. 599, 72 S. W. 688.
27. Beaumont Imp. Co. v. Carr [Tex. Civ. App.] 75 S. W. 327.
28. Casey-Swasey Co. v. Manchester Fire Assur. Co. [Tex. Civ. App.] 73 S. W. 864.
29. State Bank v. Backus, 160 Ind. 682, 67 N. E. 512. Facts as to which the findings are silent are presumed found against the party holding the affirmative of that issue. Stotts City Bank v. Miller Lumber Co., 102 Mo. App. 75, 74 S. W. 472.
30. Kent v. Common Council, 90 App. Div. 553, 86 N. Y. S. 411.
31. Ward v. Cameron [Tex. Civ. App.] 76 S. W. 249.
32. Pearson v. Great Northern R. Co., 90 Minn. 227, 95 N. W. 1113.
33. Upton v. Weisling [Ariz.] 71 P. 917.
34. Tenoza v. Gollick, 80 App. Div. 638, 81 N. Y. S. 353.
35. Page v. Brummer, 84 N. Y. S. 268.
36. Huey Co. v. Rothfeld, 84 N. Y. S. 883.
37. Cleveland, etc., R. Co. v. Lindsay [Ind. App.] 70 N. E. 283.
38. Gartner v. Chicago, etc., R. Co. [Neb.] 98 N. W. 1052.
39. The court will not review special findings of fact on evidence extrinsic of the findings. Kitchen & Bro. v. Robinson Bros., 138 Ala. 419, 35 So. 461.
40. Shelby v. Creighton [Neb.] 96 N. W. 382.
41. Osborn v. Leach, 133 N. C. 427, 45 S. E. 783.
42. Knickerbocker v. Robinson, 83 App. Div. 614, 82 N. Y. S. 314; King v. Pony Gold Min. Co., 28 Mont. 74, 72 P. 309. In the absence of a statement of facts the findings below will be regarded as conclusive. Conner v. Downis [Tex. Civ. App.] 75 S. W. 835; East v. Houston & T. Cent. R. Co. [Tex. Civ. App.] 77 S. W. 646; Altgelt v. Campbell [Tex. Civ. App.] 78 S. W. 967; Henning v. Wren [Tex. Civ. App.] 75 S. W. 905. Failure to find with reference to a particular cause of action will not be considered. John A. Roebling's Sons Co. v. Gray, 139 Cal. 607, 73 P. 422.
43. Cravens v. Despain, 25 Ky. L. R. 2018, 79 S. W. 276. Description of boundary in

brought up it will be presumed that the omitted parts sustain the judgment.[44] An issue neither requested nor submitted will be presumed found so as to support the judgment.[45] Where a decree disposing of the main issue of the cause makes no mention of the demurrer, it will be regarded as overruled.[46] A finding that an order vacating a highway was regularly made presumes that all necessary steps were taken to give it validity.[47] Where the superior court finds that in justice court judgment after service was "duly rendered," it will be presumed in support of the finding that due proof of a default or judgment after trial was made.[48] It will be presumed that a judgment dismissing the action at the cost of defendant was by his consent, the record not showing otherwise.[49] Where it is the duty of the court to enter judgment, and it can be fairly inferred that the order was made, but through mistake of the clerk, not spread of record, it will be so presumed.[50] Where the record shows no request for special findings of fact and conclusions of law, as required by statute,[51] or where the special findings are not filed or brought into the record by bill of exceptions or order of court, they will be treated on appeal as a general finding in favor of the successful party.[52] It will be presumed that no exception to a conclusion of law was taken where none appears in the record proper,[53] and where no findings of fact appear, an exception to the conclusions of law cannot be considered.[54] On appeal from the decision of a referee, the court of appeals of New York is confined to the findings of fact and cannot look into the record for additional facts,[55] and where a referee finds the facts and states his conclusions, on which the judgment is founded, the question presented on appeal, in the absence of a case, is whether the facts found support the conclusions and judgment.[56] Exhibits may be incorporated in the findings by reference.[57] Inclusion of a written instrument in the findings brings up its sufficiency to support them.[58] A judgment inconsistent with and contrary to the findings will be reversed,[59] but a decree will not be set aside on error, in the absence of a motion for a new trial, unless the findings show the decree clearly wrong.[60] The action of the court in taxing

judgment in trespass to try title. Rountree v. Haynes [Tex. Civ. App.] 73 S. W. 435. Where the evidence is not in the record, a decree supported by one phase of the bill will be presumed correct and affirmed. Pickering v. Yates [Miss.] 36 So. 10. In the absence of a bill of exceptions, or argument, or an assignment of error raising the point, it will be presumed that the facts found fully justified the conclusions of law and the judgment. Clark v. Mitchell [S. D.] 97 N. W. 358. A judgment of dismissal will be presumed to have been for good cause, there being several statutory grounds and the exact ground not shown, the appeal being on the judgment roll [Code Civ. Proc. § 581]. Woods v. Diepenbrock, 141 Cal. 55, 74 P. 546. Where it does not appear on what ground judgment for defendants was rendered, it will be presumed to be because plaintiff failed to make out a prima facie case, and there being no evidence in the record, affirmance follows. Boe v. Hawes, 28 Mont. 201, 72 P. 509.

44. Cravens v. Despain, 25 Ky. L. R. 2018, 79 S. W. 276. Where the record contains only a partial statement of facts all reasonable presumptions will be indulged to support the judgment. Voges v. Dittlinger [Tex. Civ. App.] 72 S. W. 875.

45. Seaton v. McReynolds [Tex. Civ. App.] 72 S. W. 874. Where appellant failed to request the submission of an issue to the jury, and the judgment rests upon a special verdict, it will be presumed from the evidence that the court found against him on that issue. Walker v. Marchbanks [Tex. Civ. App.] 74 S. W. 929.

46. Craig v. Craig [W. Va.] 46 S. E. 371.

47. Wagner v. Mahrt, 32 Wash. 542, 73 P. 675.

48. Brann v. Blum, 138 Cal. 644, 72 P. 168.

49. Robinson v. Starnes, 137 Ala. 438, 34 So. 686.

50. Fitzgerald v. Gore, 105 Ill. App. 242.

51. Burns' Rev. St. 1901, § 560. Bass v. Citizens' Trust Co. [Ind. App.] 70 N. E. 400.

52. Chapin v. Du Shane [Ind. App.] 69 N. E. 174.

53. Burns' Rev. St. 1901, §§ 560, 640, 641. Cooney v. American Mut. L. Ins. Co., 161 Ind. 193, 67 N. E. 989.

54. Chapin v. Du Shane [Ind. App.] 69 N. E. 174.

55. Sweet v. Henry, 175 N. Y. 268, 67 N. E. 574.

56. Tompkins v. Morton Trust Co., 91 App. Div. 274, 86 N. Y. S. 520.

57. Woodruff v. Butler, 75 Conn. 679, 55 A. 167.

58. Cornelius v. Ferguson [S. D.] 97 N. W. 388.

59. Gaffey v. Northwestern Mut. L. Ins. Co. [Neb.] 98 N. W. 826.

60. Bemis v. McCloud [Neb.] 97 N. W. 828.

costs is presumed to have been correct,[61] and in the absence of a statement of facts an order allowing costs against an estate in a probate proceeding will not be reviewed.[62] On appeal from an order denying a motion for retaxation of costs, the record must show what items were objected to, and the grounds of objection.[63] Failure to grant a close jail execution will not be reviewed in the absence of facts in the record showing that it ought to have been granted.[64]

(§ 13) *F. Rulings peculiar to province of trial court.* 1. *Discretionary rulings in general; interlocutory and provisional orders.*[65]—The discretion of the lower court is not an unlimited power, and its rulings and judgments during the progress of the trial are open to review,[66] but discretionary acts and rulings will not be disturbed, unless an abuse of discretion is shown.[67] The rule applies to grant or refusal of a change of venue,[68] or a continuance,[69] the allowance of an amendment of a motion for continuance,[70] the allowance of postponement on amendment of pleading,[71] the allowance of an amendment of a voucher in attachment,[72] the refusal of a motion to dissolve an attachment, the affidavit showing facts authorizing the writ,[73] the grant or refusal of leave to renew a motion previously denied,[74] the remission of the forfeiture of a bail bond,[75] and the supplying of missing records.[75] The construction or application of the court's own rules is discretionary.[77] The exercise of the jurisdiction of a trial judge sitting in equity in ordering damages to be assessed by a master instead of a jury,[78] the determination that a proposed railroad is a public necessity,[79] the selection of an administrator pendente lite, and the amount of security to be given by him,[80] the appointment of a receiver,[81] the allowance of compensation to an auditor,[82] the setting aside of a judicial sale in an equitable proceeding,[83] grant or refusal of an injunction, temporary[84] or per-

61. McCoy v. Board of Trustees of Town of Cloverdale, 31 Ind. App. 331, 67 N. E. 1007.

62. Pierson v. Blanton [Tex. Civ. App.] 77 S. W. 433.

63. Thomas v. International Silver Co., 84 N. Y. S. 612.

64. Chase v. Watson, 75 Vt. 385, 56 A. 10.

65. See 1 Curr. L. 170.

66. Stutsman v. Stutsman, 30 Ind. App. 646, 68 N. E. 908. Refusal to set off judgments. Leitz v. Hohman, 207 Pa. 289, 56 A. 868. Grant of motion to stay trial held improper. Hallenborg v. Greene, 87 App. Div. 622, 84 N. Y. S. 321. See 1 Curr. L. 170, n. 32.

67. Austin Mfg. Co. v. American Wellworks [C. C. A.] 121 F. 76. See 1 Curr. L. 170, n. 33.

68. Bartlett v. Smith [Neb.] 95 N. W. 661; Schilling v. Buhne, 139 Cal. 611, 73 P. 431. See 1 Curr. L. 170, n. 35.

69. Goldstein v. Morgan [Iowa] 96 N. W. 897; Chase v. Watson, 75 Vt. 385, 56 A. 10; Graffan v. Cobb, 98 Me. 200, 56 A. 645; Pacey v. McKinney [C. C. A.] 125 F. 675; Richards v. Enlow Cattle Co. [Neb.] 98 N. W. 659; Murphy v. Hood, 12 Okl. 593, 73 P. 261; In re Kasson's Estate, 141 Cal. 33, 74 P. 436; Benson v. Hamilton [Wash.] 76 P. 805; Fidelity & Deposit Co. v. Bucki & Son Lumber Co., 189 U. S. 136, 23 S. Ct. 682, 47 Law. Ed. 744; Norfolk & W. R. Co. v. Wade [Va.] 46 S. E. 915. Where continuance is claimed as a matter of right on appeal from justice, dispute of fact as to whether appellant was in court. Insell v. Kennedy, 120 Iowa, 234, 94 N. W. 456. Grant of stay of trial held improper under circumstances. Hallenborg v. Greene, 87 App. Div. 622, 84 N. Y. S. 321. Postponement because of absence of witness. Central Texas & N. W. R. Co. v. Smith [Tex. Civ. App.] 73 S. W. 537; Smith v. Bunch, 31 Tex. Civ. App. 541, 73 S. W. 559. See 1 Curr. L. 170, n. 40.

70. Goldstein v. Morgan [Iowa] 96 N. W. 897.

71. Crandall v. Lynch, 20 App. D. C. 73.

72. Booth v. Callahan, 97 Md. 317, 55 A. 625.

73. Landis v. Newton [Neb.] 95 N. W. 791.

74. Meade County Bank v. Decker [S. D.] 98 N. W. 86.

75. In re Sayles, 84 App. Div. 210, 82 N. Y. S. 671.

76. Sheldon v. Gage County Soc. of Agriculture [Neb.] 98 N. W. 1045.

77. Shannon v. Castner, 21 Pa. Super. Ct. 294; Roberts v. Kuhrt, 119 Ga. 704, 46 S. E. 856.

78. State v. Sunapee Dam Co. [N. H.] 55 A. 899.

79. Detroit & T. Shore Line R. Co. v. Hall [Mich.] 94 N. W. 1066.

80. In re Davenport [N. J. Prerog.] 56 A. 295.

81. U. S. Shipbuilding Co. v. Conklin [C. C. A.] 126 F. 132; Briggs v. Neal [C. C. A.] 120 F. 224; McKenzie v. Beaumont [Neb.] 97 N. W. 225. But the court will not hesitate to order a reversal where no action was pending that would justify or support the appointment of a receiver. Mann v. German-American Inv. Co. [Neb.] 97 N. W. 600.

82. Stockdale v. Maginn, 207 Pa. 226, 227, 56 A. 439.

83. In re Shea [C. C. A.] 126 F. 153.

84. Kerr v. City of New Orleans [C. C. A.] 126 F. 920; Austin Mfg. Co. v. American Wellworks [C. C. A.] 121 F. 76; New Albany Waterworks v. Louisville Banking Co. [C. C. A.] 122 F. 776; Empire State-Idaho Min. & Developing Co. v. Bunker Hill & S. Mining &

manent,[85] and the requirement of a bond before granting,[86] the refusal of a peremptory writ of mandamus, where not refused on the ground of lack of power, or any question of law,[87] the refusal of prohibition when applied for by a stranger to the proceedings sought to be enjoined,[88] an objection to a bankrupt's discharge,[89] will not be reviewed except where a clear abuse of discretion is shown. The award of custody of a child in habeas corpus proceedings,[90] and the amount of alimony and solicitor's fees in divorce,[91] are matters committed to the discretion of the trial court and unreviewable in the absence of improper exercise. In Wisconsin, the circuit court's discretion extends to the denial of a motion to dismiss an appeal from probate court,[92] and allowing an extension of time for appeal[93] and the dismissal of an appeal because of failure to require a return.[94] The rule that the discretion of the trial court as to the grant or refusal of an injunction will not be controlled does not apply where the right to the relief is based on a question of law,[95] and an order setting aside a referee's report will not be affirmed as discretionary where it appears on its face to be based on legal grounds.[96] Refusal to exercise discretion on the ground of lack of authority, where authority exists, is reviewable.[97] The discretion of the judge at special term, in New York, in refusing to open a judgment for mistake is reviewable by the appellate division, though no abuse is shown.[98] Where the trial court refuses an application to resettle an order so as to show that it was based on the minutes as well as on its own motion, it will be presumed on appeal that the order was not based on the minutes.[99]

Dismissal and nonsuit.[1]—On appeal from a judgment dismissing the action at the close of plaintiff's case, plaintiff is entitled to the most favorable inference that can be drawn from the evidence,[2] and he is entitled to the presumption that he could have proved material facts contained in his offer of proof.[3] On appeal from a judgment for plaintiff, the question whether a compulsory nonsuit should have

Concentrating Co. [C. C. A.] 121 F. 973. Injunction against sheriff's sale in state court not an abuse of discretion where bond was sufficient to protect against loss. Massie v. Buck [C. C. A.] 128 F. 27. A temporary injunction will not be interfered with on appeal from the order granting it, where the evidence at the preliminary hearing tends to support the allegations of the complaint. MacDonald v. Gerrick [Mont.] 74 P. 1083. See 1 Curr. L. 170, n. 42.

85. City of Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388; O'Neill Mfg. Co. v. Woodley, 118 Ga. 854, 45 S. E. 684; Steadman & Co. v. Southern Pine Co., 119 Ga. 616, 46 S. E. 838. The evidence conflicting, the defendant solvent, and no irreparable damage to complainant appearing. Everett v. Tabor, 119 Ga. 128, 46 S. E. 72.

86. Briggs v. Neal [C. C. A.] 120 F. 224.

87. People v. Interurban St. R. Co., 177 N. Y. 295, 69 N. E. 596.

88. Certificate of compliance by street railway. Kilty v. Railroad Com'rs, 184 Mass. 310, 68 N. E. 236.

89. Barred by laches. Adams v. Shirk [C. C. A.] 121 F. 823.

90. Chunn v. Graham, 117 Ga. 551, 43 S. E. 987.

91. Benham v. Benham [Ill.] 70 N. E. 30. An award of alimony is largely within the discretion of the trial court, but the abuse of such discretion will be corrected on appeal. Stutsman v. Stutsman, 80 Ind. App. 645, 66 N. E. 908.

92. Hanley v. Kraftczyk, 119 Wis. 352, 96 N. W. 820.

93. McKenney v. Minahan, 119 Wis. 551, 97 N. W. 489.

94. Allard v. Smith [Wis.] 97 N. W. 510.

95. Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co., 118 Ga. 255, 45 S. E. 267.

96. Neeley v. Roberts [S. D.] 95 N. W. 921.

97. Ellis v. Barron County [Wis.] 98 N. W. 232.

98. Code Civ. Proc. § 724. Lawson v. Adams, 89 App. Div. 303, 85 N. Y. S. 863.

99. McCormick v. Shea, 85 N. Y. S. 1029.

1. See 1 Curr. L. 171.

2. Benjamin v. Metropolitan St. R. Co., 84 N. Y. S. 458; Pritchard v. Brooklyn Heights R. Co., 89 App. Div. 269, 85 N. Y. S. 898; Mengle v. McClintic-Marshall Const. Co., 89 App. Div. 334, 85 N. Y. S. 1012; Kennedy v. White, 91 App. Div. 475, 86 N. Y. S. 852. On appeal from a nonsuit, plaintiff is entitled to the most favorable inferences to be drawn from his testimony. Bessent v. Southern R. Co., 132 N. C. 934, 44 S. E. 648; Lewis v. Clyde S. S. Co., 132 N. C. 904, 44 S. E. 666. Every fact in his favor which the evidence tends in the slightest degree to prove is taken as admitted. Moore v. St. Louis Transit Co., 95 Mo. App. 728, 75 S. W. 699. See 1 Curr. L. 171, n. 58.

3. O'Connor v. Moody, 90 App. Div. 440, 86 N. Y. S. 214.

been granted must be considered by giving the plaintiff every reasonable inference warranted by his testimony,[4] and defendant's evidence subsequently introduced may be considered.[5] Appellee cannot support a judgment of dismissal on the absence of testimony which he excluded by objection to the employment of an interpreter.[6] A refusal to grant a nonsuit furnishes no ground of appeal.[7] An order on motion to dismiss for lack of prosecution unless plaintiff placed the cause on the calendar within a time fixed will not be disturbed, no abuse of the court's discretion appearing.[8]

Orders relating to pleadings.[9]—Unless a gross abuse of discretion is shown, the granting or refusal of leave to amend a declaration,[10] complaint,[11] petition,[12] bill,[13] answer,[14] notice of special matter in defense[15] or reply,[16] will not be reviewed. The allowance of permission to file a plea[17] or answer after expiration of the time allowed by law,[18] or to file an additional plea, setting up the statute of limitations,[19] will not be reviewed, in the absence of a showing of abuse of judicial discretion.[20] For like reasons, the ruling on a motion to make pleadings more definite and certain,[21] and on motion to strike out parts of a pleading, are not available error on appeal.[22] Denial of a motion to strike a plea on the ground that it was filed without leave,[23] or the refusal of a motion to reinstate a petition after amendment to cure a defect for which a demurrer was sustained, will not be controlled unless an abuse of discretion is shown.[24]

Rulings relating to trial or evidence.[25]—The orderly and proper conduct of a trial is in the discretion of the trial judge, and will not be reviewed in the absence of a showing of abuse.[26] Rulings relating to the order and sequence of proofs offered,[27] the decision as to the qualifications of a witness offered as an expert,[28]

4. Baxter v. St. Louis Transit Co. [Mo. App.] 78 S. W. 70.

5. Fales & Jenks Mach. Co. v. Browning [S. C.] 46 S. E. 545.

6. Mennella v. Metropolitan St. R. Co., 86 N. Y. S. 930.

7. Devine v. Warner [Conn.] 56 A. 562; Plumb v. Maher [Conn.] 56 A. 494.

8. Wuppermann v. Valentine, 84 N. Y. S. 150.

9. See 1 Curr. L. 171.

10. Lord v. National Protective Soc. [Mich.] 96 N. W. 443.

11. Barnes v. Berendes, 139 Cal. 32, 72 P. 406; Tanner v. Harper [Colo.] 75 P. 404; Buelna v. Ryan, 139 Cal. 630, 73 P. 466.

12. Ledwith v. Campbell [Neb.] 95 N. W. 838; Willett v. Johnson, 13 Okl. 563, 76 P. 174. Whether petition for abatement of liquor nuisance should be amended on application of relator to withdraw, by substituting county solicitor and treating it as a prosecution for violation of the liquor law, is a question of fact not reviewable. State v. Lynch [N. H.] 55 A. 563.

13. Suit to set aside tax sale. Walker v. City of Detroit [Mich.] 98 N. W. 744.

14. Sawyer v. Piper, 189 U. S. 156, 23 S. Ct. 633, 47 Law. Ed. 769; Lange v. Union Pac. R. Co. [C. C. A.] 126 F. 338; Dickenson v. Columbus State Bank [Neb.] 98 N. W. 813; Brady v. Pinal County [Ariz.] 71 P. 910; Westinghouse, Church, Kerr & Co. v. Remington Salt Co., 89 App. Div. 126, 85 N. Y. S. 432; McClurg v. Brenton [Iowa] 98 N. W. 881; Barnes v. Berendes, 139 Cal. 32, 72 P. 406.

15. Chase v. Watson, 75 Vt. 385, 56 A. 10.

16. City of Madisonville v. Pemberton's Adm'r, 25 Ky. L. R. 347, 75 S. W. 229.

17. Baltimore City Charter, § 312, Acts 1898, p. 392, c. 123. Horner v. Plumley, 97 Md. 271, 54 A. 971.

18. City of Wilmington v. McDonald, 133 N. C. 548, 46 S. E. 864.

19. Cause at issue over three years. City of Chicago v. Cook, 204 Ill. 373, 68 N. E. 538.

20. Graham v. Heinrich, 13 Okl. 107, 74 P. 328.

21. Combs v. Thompson [Kan.] 74 P. 1127.

22. Conner v. Andrews Land, Home & Improvement Co. [Ind.] 70 N. E. 376. Baltimore City Charter, § 312 (Acts 1898, p. 392, c. 123). Horner v. Plumley, 97 Md. 271, 54 A. 971.

23. Lester v. Johnston, 137 Ala. 194, 33 So. 880.

24. Bowen v. Wyeth, 119 Ga. 687, 46 S. E. 823.

25. See 1 Curr. L. 172.

26. Wissler v. City of Atlantic [Iowa] 98 N. W. 131.

27. Order of proof. Foley v. Brunswick Traction Co., 69 N. J. Law, 481, 56 A. 803; Norfolk & A. Terminal R. Co. v. Morris' Adm'x, 101 Va. 422, 44 S. E. 719; Wilmoth v. Hamilton [C. C. A.] 127 F. 48. Whether court rule relating to order of proof should be relaxed in certain case is not a question of law. Gerrish v. Whitfield [N. H.] 55 A. 551. Permitting testimony on condition that materiality be subsequently shown. Ellis v. Thayer, 183 Mass. 309, 67 N. E. 825. Reopening case for further evidence. Percival v. Yousling, 120 Iowa, 451, 94 N. W. 913; Joplin Waterworks Co. v. Joplin, 177 Mo. 496, 76 S. W. 960. Bringing out evidence on redirect examination. Byrnes v. Eley [Neb.] 97 N. W. 298. Refusal to allow certain tes-

the latitude allowed on cross-examination of witnesses,[29] the allowance of leading questions,[30] the admission of declarations as res gestae,[31] the granting of a view of the premises,[32] the substitution of lost depositions on a resubmission of the case,[33] permitting a deposition, retaken without order of court first obtained, to be read,[34] allowing deposition to be read after witness making it has testified,[35] requiring that all attesting witnesses to a will be called in support of it,[36] and the ruling on a motion to strike incompetent evidence received without objection,[37] are all discretionary matters, which will not be reviewed unless abuse is shown. The finding of the trial court on preliminary questions of fact necessary to be decided before admitting or rejecting evidence, will not be disturbed unless clearly wrong,[38] and the conclusion of fact reasonably inferable from the evidence involved in the exclusion of testimony is not open to exception.[39] In North Carolina, the decision of the trial court as to whether the facts authorize the admission of secondary evidence of the contents of a written instrument is a question of law, reviewable on appeal.[40]

Refusal of a severance,[41] the submission of interrogatories for special findings,[42] limitation of argument to the jury,[43] permitting counsel to real legal authorities to jury in argument,[44] are all matters of discretion for the lower court. Refusal to direct a verdict will not be disturbed.[45] On review of a judgment on a directed verdict, incompetent evidence not objected to will be deemed evidence in the case,[46] and every fact favorable to the unsuccessful party which the evidence tends to prove will be regarded as conclusively established;[47] but where both par-

timony in sur-rebuttal. Beyer v. Hermann, 173 Mo. 295, 73 S. W. 164. See 1 Curr. L. 172, n. 71.

28. Ennis v. R. B. Little & Co. [R. I.] 55 A. 884; White v. McPherson, 183 Mass. 533, 67 N. E. 643; Waterhouse v. Jos. Schlitz Brewing Co. [S. D.] 94 N. W. 587. See 1 Curr. L. 172, n. 76.

29. Glenn v. Philadelphia & W. C. Traction Co., 206 Pa. 135, 55 A. 860; Shannon v. Castner, 21 Pa. Super. Ct. 294; Stroh v. South Covington & C. St. R. Co., 25 Ky. L. R. 1868, 78 S. W. 1120; Jennings v. Rooney, 183 Mass. 577, 67 N. E. 665; Forrester v. Boston & M. Consol. Copper & Silver Min. Co. [Kan.] 74 P. 1088. Party's own witness. Hackney v. Raymond Bros. Clarke Co. [Neb.] 94 N. W. 822. Extension beyond limits of direct examination. Fourth Nat. Bank v. Albaugh, 188 U. S. 734, 23 S. Ct. 450, 47 Law. Ed. 673. See 1 Curr. L. 172, n. 78.

30. Hackney v. Raymond Bros. Clarke Co. [Neb.] 94 N. W. 822; Pittsburgh, C. C. & St. L. R. Co. v. Kinnare, 203 Ill. 388, 67 N. E. 826; Colvin v. M'Cormick Cotton Oil Co., 66 S. C. 61, 44 S. E. 380; Hiersche v. Scott [Neb.] 95 N. W. 494; Camplon v. Lattimer [Neb.] 97 N. W. 290; Von Tobel v. Stetson & Post Mill Co., 32 Wash. 683, 73 P. 788.

31. Pledger v. Chicago, B. & Q. R. Co. [Neb.] 95 N. W. 1057.

32. Maloney v. King [Mont.] 76 P. 4; Davis v. American Telephone & Tel. Co., 53 W. Va. 616, 45 S. E. 926.

33. First Nat. Bank v. Reid [Iowa] 98 N. W. 107.

34. Code 1887, § 3364. Leonard v. St. John, 101 Va. 752, 45 S. E. 474.

35. Wilson v. Wilson [Tex. Civ. App.] 79 S. W. 839.

36. O'Connell v. Dow, 182 Mass. 541, 66 N. E. 788.

37. McCormick Harvesting Mach. Co. v. Carpenter [Neb.] 95 N. W. 617.

38. Secondary evidence on proof of loss of writing. Koehler v. Schilling [N. J. Law] 57 A. 154. The identification preliminary to the admission of photographs. Hupfer v. National Distilling Co., 119 Wis. 417, 96 N. W. 809. The trial court's decision as to the competency of evidence offered is conclusive unless manifestly erroneous. Kavanaugh v. Wausau [Wis.] 98 N. W. 550. Exclusion of evidence that may have become too remote presents no question of law. Union Hosiery Co. v. Hodgson [N. H.] 57 A. 384.

39. That witness offered was party in interest, the opposite party being an executor and not offering himself as witness. Wright v. Davis [N. H.] 57 A. 335.

40. Avery v. Stewart, 134 N. C. 287, 46 S. E. 519.

41. Smith v. Bunch, 31 Tex. Civ. App. 541, 73 S. W. 559.

42. Huber Mfg. Co. v. Gotchall [Neb.] 96 N. W. 611; Taggart Mercantile Co. v. Clack [Ariz.] 71 P. 925; Johnson v. Health [Neb.] 98 N. W. 832; Buckers Irr., Mill. & Imp. Co. v. Farmers' Independent Ditch Co., 31 Colo. App. 62, 72 P. 49.

43. Reagan v. St. Louis Transit Co. [Mo.] 79 S. W. 435.

44. Missouri, K. & T. R. Co. v. Moody [Tex. Civ. App.] 79 S. W. 856.

45. Moore v. Carey, 119 Ga. 91, 45 S. E. 976. See 1 Curr. L. 172, n. 86.

46. Healy v. Patterson [Iowa] 98 N. W. 576; Compare Horwitz v. Reinert, 84 N. Y. S. 254.

47. Preston v. Stover [Neb.] 97 N. W. 812; New York Hydraulic Press Brick Co. v. Cunn, 87 N. Y. S. 168.

ties move for direction, the presumption on appeal is the other way, and all facts and inferences which may be derived from the proofs will be deemed to have been found in favor of the party for whom the verdict was directed.[48] Incompetent evidence properly objected to will be disregarded on review, though the court did not before sustaining the demurrer to the evidence formally strike it out or notify plaintiff that it would be disregarded.[49] The appellate division has jurisdiction not only to review the discretion exercised by the special term in staying proceedings in an action pending appeal in another suit, but also has power to exercise an independent discretion on such appeal.[50] The ruling as to the admission of the remainder of a pleading, a part of which has been offered by one's adversary as an admission, is discretionary.[51]

Grant of new trial or rehearing or settlement of exceptions.[52]—An order granting or refusing a new trial on discretionary grounds will not be reviewed unless the discretion of the trial court has been abused,[53] but unless the grounds are discretionary, the order may be reviewed as any other.[54] The power to set aside ver-

48. Davis v. True, 89 App. Div. 319, 86 N. Y. S. 843; Cullinan v. Burkhard, 86 N. Y. S. 1003.

49. Lee v. Missouri Pac. R. Co., 67 Kan. 402, 73 P. 110.

50. Jenkins v. Baker, 91 App. Div. 400, 86 N. Y. S. 958.

51. Farmers' Mfg. Co. v. Steinmetz, 133 N. C. 192, 45 S. E. 552.

52. See 1 Curr. L. 173.

53. Plumb v. Maher [Conn.] 66 A. 494; Com. v. Houghton, 22 Pa. Super. Ct. 52; Smith v. Hopkins [C. C. A.] 120 F. 921; Matousbek v. Dutcher & Sons [Neb.] 93 N. W. 1049; Coxe Bros. & Co. v. Omaha Coal, Coke & Lime Co. [Neb.] 94 N. W. 619; Fitger v. Archibald Guthrie Co., 89 Minn. 330, 94 N. W. 888; Monmouth Pottery Co. v. White [Utah] 75 P. 622; Griggs v. MacLean, 33 Wash. 244, 74 P. 360; Graves v. Sanders [C. C. A.] 125 F. 690; Louisville & N. R. Co. v. Summers [C. C. A.] 125 F. 719; Luyties v. Hardy, 101 Mo. App. 693, 74 S. W. 167; Stuart v. Press Pub. Co., 83 App. Div. 467, 82 N. Y. S. 401; Kreielsheimer v. Nelson, 31 Wash. 406, 72 P. 72; Pritchett v. Samuel Weichselbaum Co., 119 Ga. 293, 46 S. E. 99; Hurt v. Louisville & N. R. Co., 25 Ky. L. R. 766, 76 S. W. 502. The case was withdrawn from the jury and a new trial subsequently granted. Brown v. Illinois Cent. R. Co. [Iowa] 98 N. W. 626. Question whether new trial should be granted held a question of fact. Ela v. Ela [N. H.] 55 A. 358. Statutory power of supreme court of Pennsylvania, of reversal for refusal of new trial, is exercised only in extreme cases [Laws 1891, p. 101]. Marcy v. Brock, 207 Pa. 95, 56 A. 335. Finding that jury would have failed in their duty if they had not held defendant liable precludes appellate court from reversing award of new trial on theory that defendant was not so liable. Barrette v. Carr, 76 Vt. 425, 56 A. 93. Where the grounds assigned relate to the facts, the decision is not reviewable. Carroll v. Charleston & S. R. Co., 65 S. C. 378, 43 S. E. 870. Grant of new trial not interfered with where there is substantial evidence against verdict. Secrist v. Eubank [Mo. App.] 78 S. W. 315. Surprise and mistake. Connally v. Pehle [Mo. App.] 79 S. W. 1006. Accident and surprise. State v. Bongard, 89 Minn. 426, 94 N. W. 1098. Inadequacy of damages. Starr v. Ritchie, 84 N. Y. S. 917. Excessiveness of verdict showing passion and prejudice. Friedman v. Pulitzer Pub. Co., 102 Mo. App. 683, 77 S. W. 340. Misconduct of jury. Gulf, C. & S. F. R. Co. v. Blanchard [Tex. Civ. App.] 73 S. W. 88; Reed v. Mexico, 101 Mo. App. 155, 76 S. W. 53. Disqualification of juror, failure to pay poll tax. Alexander & Kneeland v. Von Koehring [Tex. Civ. App.] 77 S. W. 629. Competent evidence on which verdict may rest is sufficient. Cleveland, etc., R. Co. v. Stewart, 161 Ind. 242, 68 N. E. 170; City of South Omaha v. Conroad [Neb.] 97 N. W. 796. Misconduct of counsel in argument. James McNeil & Bro. Co. v. Crucible Steel Co., 207 Pa. 493, 56 A. 1067; Hamilton v. City of Davenport [Iowa] 98 N. W. 135. Newly-discovered evidence. Hausmann v. Sutter St. R. Co., 139 Cal. 174, 72 P. 905; Louisville & C. Packet Co. v. Mulligan, 25 Ky. L. R. 1287, 77 S. W. 704; Pitman v. Holmes [Tex. Civ. App.] 78 S. W. 961. Insufficiency of evidence. Ross v. Robertson [N. D.] 94 N. W. 765; Rochford v. Albaugh [S. D.] 94 N. W. 701; Schnittger v. Rose, 139 Cal. 656, 73 P. 449; De Haven v. McAuley, 138 Cal. 573, 72 P. 162; Hausman v. Sutter St. R. Co., 139 Cal. 174, 72 P. 905; Bohn v. City of Racine, 119 Wis. 341, 96 N. W. 813; Schmitt v. Northern Pac. R. Co. [Wis.] 98 N. W. 202; Lynch v. Metropolitan St. R. Co., 84 N. Y. S. 495; Mock v. Los Angeles Traction Co., 139 Cal. 616, 73 P. 455; Welever v. Advance Shingle Co. [Wash.] 75 P. 863. Where there is a substantial conflict in the evidence. Hendrickson v. Wallace [Mont.] 76 P. 365. See 1 Curr. L. 173, n. 91. Golden v. Murphy [Nev.] 75 P. 625; Grantham v. Grantham, 118 Ga. 292, 45 S. E. 270; Moore v. Lunceford, 118 Ga. 253, 45 S. E. 279; Templeton v. Hannah, 118 Ga. 552, 45 S. E. 433; Burch v. Swift, 118 Ga. 931, 45 S. E. 698; Smith v. Rusk, 119 Ga. 47, 46 S. E. 716; Darlington Oil Co. v. Pee Dee Oil & Ice Co. [S. C.] 46 S. E. 720; Dieckman v. Weirich, 24 Ky. L. R. 2340, 73 S. W. 1119; Stephens v. Deatherage Lumber Co., 98 Mo. App. 365, 73 S. W. 291; Herndon v. Lewis, 176 Mo. 116, 74 S. W. 976; Spalding v. Edina [Mo. App.] 78 S. W. 302; Hunt v. Ancient Order of Pyramids [Mo. App.] 78 S. W. 649. See 1 Curr. L. 173, n. 99.

54. Motion on errors of law occurring at trial presents no discretionary ground. Fitger v. Archibald Guthrie & Co., 89 Minn.

dicts because excessive or because of insufficiency of evidence contemplates a judicial discretion, however, which may be corrected on appeal where justice demands it,[55] and where it appears that the judge has refused to exercise the discretion vested in him by law, review will be made.[56] Where the order granting[57] or denying a new trial does not state the particular ground on which it is made, every legitimate intendment will be indulged to support it,[58] and the order sustained, if any, even a discretionary, ground assigned will justify it. Where a new trial has been granted, a stronger case is required to secure a reversal than where it has been denied,[59] and the presumption in favor of the correctness of a grant is greatly strengthened when the action of the court is prompt and taken originally of its own motion,[60] but where there is no scintilla of evidence to support a verdict other than that rendered, a grant of a new trial will be overruled.[61] On review of the grant of a new trial because the evidence was "insufficient to support the verdict," the court considers all the evidence and not merely that of plaintiff, and will not reverse, though the plaintiff's evidence standing alone might support a verdict.[62] The rule that the uncorroborated testimony of a party is not conclusive on the jury does not divest the trial court of its discretion to grant a new trial.[63] Where a new trial is granted after directed verdict moved for by both parties,[64] and when error is predicated on the grant of a new trial for newly discovered evidence,[65] or after verdict as against evidence, every reasonable presumption will be indulged in favor of the correctness of the ruling.[66] An order granting a new trial for an erroneous instruction will be affirmed, the instruction being in fact bad, unless under the facts no other verdict could be sustained.[67] Errors at law committed at the trial and excepted to by defendant do not constitute ground for reversal of an order granting plaintiff a new trial.[68] Refusal of new trial will not be reversed because of insufficiency of evidence, unless it clearly appears that there is no credible evidence supporting the verdict,[69] or that serious error occurred in the admission or rejection of evidence or in the instructions,[70] and where the evidence is conflicting, it will be presumed that facts were found to warrant the

330, 94 N. W. 888. Presumption as to ground in absence of statement thereof in order [Laws 1901, c. 46]. Id.; Smith v. Minneapolis St. R. Co. [Minn.] 97 N. W. 881; Berg v. Olson, 88 Minn. 392, 93 N. W. 309; Fitger v. Archibald Guthrie & Co., 89 Minn. 330, 94 N. W. 888. Presumption does not apply in case of directed verdict. Second Nat. Bank v. Smith, 118 Wis. 18, 94 N. W. 664. Where the order specifies the exact ground which was a question of law, review will be made. Lawrence v. Pederson [Wash.] 74 P. 1011.

55. Code Civ. Proc. § 999. Lawrence v. Wilson, 86 App. Div. 472, 83 N. Y. S. 821.

56. Thompson v. Warren, 118 Ga. 644, 45 S. E. 912. The judge stated that the verdict was not satisfactory. Cumberland Telephone & T. Co. v. Smithwick [Tenn.] 79 S. W. 803.

57. Secrist v. Eubank [Mo. App.] 78 S. W. 315; Citizens' Rapid Transit Co. v. Dozier, 110 Tenn. 98, 72 S. W. 963. It will be presumed that the verdict was not justified by the evidence, or if special, that it was inconsistent, especially where costs imposed on moving party. Giese v. Milwaukee Elec. R. & Lighting Co., 116 Wis. 66, 92 N. W. 356.

58. Wright v. Mathews, 28 Mont. 442, 72 P. 820.

59. Rochford v. Albaugh [S. D.] 94 N. W. 701; Floyd v. Paducah R. & Light Co., 24 Ky. L. R. 2364, 73 S. W. 1122.

60. Uncas Paper Co. v. Corbin, 76 Conn. 675, 55 A. 165.

61. Ottomeyer v. Pritchett [Mo.] 77 S. W. 62.

62. Somerville v. Stockton [Mo.] 77 S. W. 298.

63. Rochford v. Albaugh [S. D.] 94 N. W. 701.

64. Appel v. Aetna Life Ins. Co., 86 App. Div. 83, 83 N. Y. S. 238.

65. Farmers' Trust Co. v. Treeman, 12 Okl. 612, 73 P. 300.

66. Fell v. John Hancock Mut. Life Ins. Co. [Conn.] 57 A. 175; Golden v. Murphy [Nev.] 75 P. 626.

67. Udden v. O'Reilly [Mo.] 79 S. W. 691.

68. DeHaven v. McAuley, 138 Cal. 573, 72 P. 152.

69. Kennedy v. Plank [Wis.] 97 N. W. 895. Refusal to grant a new trial cannot be reversed if the verdict can be sustained on any possible view of the evidence. Virginia-Carolina Chemical Co. v. Kirven, 65 S. C. 197, 43 S. E. 658. Refusal to set aside a verdict supported by evidence will not be disturbed. Bodie v. Charleston & W. C. R. Co., 66 S. C. 302, 44 S. E. 943; Glover v. Gasque [S. C.] 45 S. E. 113.

70. Zimmerman v. Denver Consol. Tramway Co. [Colo. App.] 72 P. 607.

refusal to set aside the verdict.[71] Refusal to set aside a verdict as excessive cannot be overruled unless it is apparent the jury were actuated by passion and prejudice.[72] On review of an exception, under the statute in Virginia, to refusal to set aside the verdict as contrary to the evidence, evidence contrary to the verdict cannot be considered.[73] Where the trial court has relieved a party of the effect of his failure to serve a statement on motion for new trial in time, it will not be presumed that denial of his motion for new trial was on the ground of delay in serving the statement.[74] Error prejudicial to respondent is no ground for sustaining the refusal of a new trial.[75] In Georgia, where the law and the evidence do not demand the verdict, and no abuse of discretion on the part of the trial court is shown, the first grant of a new trial will not be interfered with,[76] though it was put upon a single ground,[77] and where the evidence is conflicting and an abuse of discretion does not appear, a second grant will not be interfered with.[78] The statute in Virginia provides that where, on new trial granted on the ground that the verdict is unsupported by the evidence, the parties refuse to introduce testimony and the court enters judgment, the reviewing court shall examine the testimony introdueed on the original trial, and if the court erred, enter judgment on the verdict.[79] Though a motion might have been overruled because of a defect in form, the granting thereof will not be reversed on appeal, the merits not being attacked.[80] It will be presumed that any departure from the strict rules of evidence on the hearing of the motion was permitted in the exercise of a sound discretion.[81]

Whether to reopen a case and hear further evidence after the decree has been signed and entered is discretionary with the trial court, and his refusal will not be disturbed unless an abuse of discretion is shown.[82] An order dismissing a petition for rehearing of an order overruling objections to the confirmation of a judicial sale is discretionary and hence not appealable.[83]

The settlement of a case on appeal by the trial judge cannot be disturbed where no abuse of power is manifest,[84] except where it appears to have been based solely on the papers in the case, when it may be reviewed as any other question.[85] In the absence of any showing to the contrary it will be presumed that the extension of time to settle the statement of facts was authorized.[86] The action of the court in granting an extension of time for settling a bill of exceptions under a statute authorizing it on "good cause shown" is reviewable,[87] but where the statute

71. Pharr v. Atlanta & C. Air Line R. Co., 132 N. C. 418, 44 S. E. 37.

72. Mitchell v. Wabash R. Co., 97 Mo. App. 411, 76 S. W. 647. See 1 Curr. L. 173, n. 3.

73. Acts 1891-2, p. 962, c. 609, amending Code 1887, § 3484. Riverside Cotton Mills v. Lanier [Va.] 45 S. E. 875.

74. Baily v. Kreutzmann, 141 Cal. 519, 75 P. 104.

75. Virginia-Carolina Chemical Co. v. Kirven, 65 S. C. 197, 43 S. E. 658.

76. Civ. Code, § 5585. Peed v. Hamilton, 117 Ga. 449, 43 S. E. 702; Fugazzi, Lovelace & Co. v. Tomlinson, 119 Ga. 622, 46 S. E. 831; Johnson v. Winkles, 119 Ga. 262, 46 S. E. 99. Certiorari to justice. Shirley v. Swafford, 119 Ga. 43, 45 S. E. 722; Walker v. Hillyer, 119 Ga. 225, 46 S. E. 92; Lovvorn v. Jones, 119 Ga. 229, 46 S. E. 92. See 1 Curr. L. 173, n. 95.

77. Cordray v. Savannah, T. & I. of H. R., 117 Ga. 464, 43 S. E. 755.

78. Kimbrough v. Boswell, 119 Ga. 201, 45 S. E. 977; Johnson v. McKay, 119 Ga. 196, 45 S. E. 992.

79. Acts 1891-2, p. 962. Wood v. American Nat. Bank, 100 Va. 306, 40 S. E. 931; Northington v. Norfolk R. & Light Co. [Va.] 46 S. E. 475.

80. Balph v. Magaw [Ind. App.] 70 N. E. 188.

81. Ela v. Ela [N. H.] 55 A. 358.

82. In re Cummings' Estate, 120 Iowa, 421, 94 N. W. 1117.

83. Aukam v. Zantzinger [Md.] 56 A. 820.

84. Dispute as to what occurred at trial. Ditmas v. McKane, 87 App. Div. 54, 83 N. Y. S. 1077; Wallace v. Metropolitan St. R. Co., 84 N. Y. S. 253.

85. Marjulies v. Goldstein, 84 N. Y. S. 475.

86. O'Neile v. Ternes, 32 Wash. 528, 73 P. 692.

87. Comp. Laws 1887, § 5093. McPherson v. Julius [S. D.] 95 N. W. 428.
Contra: Rev. St. 1899, § 728. Smith v. Wil-

confers power in discretion, the court's discretion will be presumed to have been properly exercised.[88]

A petition for leave to enter an appeal from a decree of the judge of probate is addressed to the discretion of the presiding justice, and his decision is final and not subject to exception.[89]

Matters relating to judgments or costs.[90]—A motion to strike off an entry of satisfaction of a judgment is addressed to the discretion of the court, and the exercise of that discretion is not the subject of review.[91] So also rulings on an application to set aside or open a default,[92] vacate a decree,[93] or a judgment on the ground of mistake, surprise, or excusable neglect.[94] The supreme court will not review an order refusing to open a judgment except where the judgment below is a deduction from facts, and the result of reasoning on the same.[95] The refusal of the trial court to make the decision of the supreme court, reversing a judgment overruling a demurrer, the judgment of the trial court before a certain day, will not be controlled, no prejudice being shown.[96] The allowance of costs imposed as a condition of allowing an amendment of pleadings,[97] or granting a new trial,[98] or in other actions than those in which costs follow as of course,[99] such as equitable,[1] and probate proceedings,[2] will not be reviewed if no abuse of discretion is shown,[3] but an allowance to a clerk for special services whether based on a statute and allowed as a matter of law, or on a quantum meruit as a matter of discretion, is reviewable.[4] Allowing plaintiffs to prosecute as poor persons is discretionary.[5]

(§ 13F) 2. *Questions of fact.*[6]—Generally speaking questions of fact will not be reviewed on appeal,[7] the verdict or findings below being sustained unless mani-

liams Cooperage Co., 100 Mo. App. 153, 73 S. W. 315.

88. Dodd v. Guiseffi, 100 Mo. 311. 73 S. W. 304; Waldopfel v. St. Louis Transit Co., 102 Mo. App. 524, 77 S. W. 128.

89. Graffam v. Cobb, 98 Me. 200, 56 A. 645.

90. See 1 Curr. L. 175.

91. Shoup v. Shoup, 205 Pa. 22, 54 A. 476.

92. Casto v. Shew [Ind. App.] 68 N. E. 1041; Peru Plow & Implement Co. v. King [Minn.] 97 N. W. 373; Kapner v. Samuels, 84 N. Y. S. 195; O'Brien v. Leach, 139 Cal. 220. 72 P. 1004; Hegaas v. Hegaas, 28 Mont. 266, 72 P. 656; Greene v. Rowan [Mont.] 74 P. 456. Judgment taken on note on power of attorney, stay of execution pending hearing of motion to quash. Pearce v. Miller, 201 Ill. 188, 66 N. E. 221. See 1 Curr. L. 175, n. 33.

93. Fisher v. Puget Sound Brick, T. & T. C. Co. [Wash.] 76 P. 107. See 1 Curr. L. 175, n. 38.

94. Swanson v. Hoyle, 32 Wash. 159, 72 P. 1011. See 1 Curr. L. 175, n. 38.

95. Woodward v. Carson [Pa.] 57 A. 342.

96. Equity Life Ass'n v. Gammon, 119 Ga. 271, 46 S. E. 100.

97. Scheuer v. Monash, 40 Misc. 668, 83 N. Y. S. 253.

98. R. Connor Co. v. Goodwillie [Wis.] 98 N. W. 528. See 1 Curr. L. 174, n. 4.

99. Certiorari to justice. Louisville & N. R. Co. v. Solomon, 138 Ala. 151, 34 So. 1025.

1. Porter v. Trompen [Neb.] 96 N. W. 226; Jennings v. Parr, 66 S. C. 385, 44 S. E. 962. Dissolution of partnership and accounting. Hart v. Hart, 117 Wis. 639, 94 N. W. 890.

2. Eaton v. Brown, 20 App. D. C. 453; In re McMahon's Estate, 117 Wis. 463, 94 N. W. 351.

3. Rutherford v. Lucerne Canal & Power Co. [Wyo.] 75 P. 445.

4. In re Michigan Cent. R. [C. C. A.] 124 F. 727.

5. **Missouri** St. 1899, § 1542. In civil cases commenced by a nonresident, the plaintiff shall file a cost bond before the institution of the suit, and if the bond is not filed the court may dismiss the action, or the court may, at its discretion permit a plaintiff who is unable to pay costs to prosecute as a poor person, after giving security for costs. Carrier v. Missouri Pac. R. Co., 175 Mo. 470, 74 S. W. 1002.

6. See 1 Curr. L. 178.

7. Findings of fact of two lower courts will be accepted as correct by the Federal supreme court, in the absence of a clear showing of error. Shappiro v. Goldberg, 192 U. S. 232, 24 S. Ct. 259, 48 Law. Ed. 419. On error to a state court, the Federal court cannot re-examine the evidence, but is concluded by the finding of facts, and the fact that the findings of the inferior court are affirmed by divided court is immaterial. Minneapolis & St. L. R. Co. v. State, 193 U. S. 53, 24 S. Ct. 396, 48 Law. Ed. 614. Citing Egan v. Hart, 165 U. S. 188, 17 S. Ct. 300, 41 Law. Ed. 680; Dower v. Richards, 151 U. S. 658, 14 S. Ct. 452, 38 Law. Ed. 305. The finding of a circuit judge on a disputed question of fact on the hearing of a motion to dismiss an appeal from justice court will not be disturbed. Winner v. Williams [Miss.] 35 So. 308. A finding that a street was never "legally" dedicated is a conclusion of law and so reviewable. Sweatman v. Bathrick [S. D.] 95 N. W. 422. See 1 Curr. L. 176, n. 50.

festly wrong,[8] but on appeal from an order refusing to open accounts of executors, in New Jersey, questions of fact as well as of law will be reviewed,[9] and the Texas court of appeals has power to disregard a verdict and enter such judgment as the evidence demands, though the trial court could not do so.[10] The supreme court of Utah is not authorized to review the facts in a case at law except so far as may be necessary to determine questions of law.[11] On appeal from an order of the license board granting or refusing a license to sell liquors, the court should exercise his independent judgment on the evidence, without influence by the finding made by the board.[12] The circuit court of appeals cannot, upon petition for review in a bankruptcy case, challenge the facts, or an inference of fact, found by the court below,[13] and an adjudication of bankruptcy founded on an act of bankruptcy sufficiently pleaded and proved will not be set aside, though other alleged acts were neither properly pleaded nor sufficiently proved.[14] Whether the verdict is unsupported by any substantial evidence is a question of law, and may be reviewed on appeal from the judgment,[15] but whether conflicting evidence is sufficient to support the verdict is a question of fact, and cannot be so reviewed.[16] Where the evidence is undisputed or the facts not controverted, rulings of the court based thereon may be reviewed,[17] but a finding on agreed facts will not be disturbed unless the facts affirmatively establish the contrary conclusion as a matter of law.[18] Controverted questions of fact will not be reviewed where both parties moved for directed verdict below.[19] After a general verdict for plaintiff it will be assumed on appeal that a material allegation of the complaint was proven,[20] and a general finding for the defendant is conclusive upon all issues of fact raised by the pleadings, and the evidence is not reviewable to ascertain whether it supports the finding.[21] Exceptions based on questions of fact,[22] such as whether the find-

8. The judgment of a justice of the peace on conflicting evidence, affirmed on error in the district court, will not be reversed in the supreme court, it not appearing clearly wrong. Bullard v. Laughlin [Neb.] 96 N. W. 159. If a judgment entered on a general verdict, finds support in the evidence on any theory of the law embraced within the issues made by the pleadings, it will not be reversed because entirely unsupported by the testimony. Metropolitan St. R. Co. v. Arnold, 67 Kan. 260, 72 P. 857. The opinion of the court of private land claims as to the settlement and occupation of a claimed grant will be adopted by the supreme court in the absence of clear evidence to the contrary. Sena v. U. S., 189 U. S. 233, 23 S. Ct. 596, 47 Law. Ed. 787. The opinion of the trial judge on questions of fact is entitled to great weight, and unless clearly wrong will be affirmed. Brady v. Jay, 111 La. 1071, 36 So. 132.

9. In re Morris' Estate [N. J. Prerog.] 56 A. 161.

10. Rev. St. 1895, arts. 1027, 1335. Henne & Meyer v. Moultrie [Tex.] 77 S. W. 607.

11. Const. art. 8, § 9. Burt v. Utah Light & Power Co., 26 Utah, 157, 72 P. 497. Citing Anderson v. Min. Co., 15 Utah, 22, 49 P. 126; Nelson v. Southern P. Co., 15 Utah, 325, 49 P. 644; Mangum v. Bullion, Beck & Champion Min. Co., 15 Utah, 534, 50 P. 834; Whittaker v. Ferguson, 16 Utah, 240, 51 P. 980; Murray v. Salt Lake City R. Co., 16 Utah, 356, 52 P. 596; Wild v. Union Pac. R. Co., 23 Utah, 265, 63 P. 886; Kennedy v. Oregon, etc., R. Co., 18 Utah, 375, 54 P. 988; Croco v. Railroad Co., 18 Utah, 311, 54 P. 985, 44 L. R. A. 285; Braegger v. Oregon Short Line R. Co., 24 Utah, 391, 68 P. 140; Monmouth Pottery Co. v. White [Utah] 75 P. 622; Pence v. California Min. Co. [Utah] 75 P. 934.

12. Bennett v. Otto [Neb.] 94 N. W. 807.

13. In re Antigo Screen Door Co. [C. C. A.] 123 F. 249.

14. In re Lynan [C. C. A.] 127 F. 123.

15. Ball v. Gussenhoven [Mont.] 74 P. 871. The question as to the sufficiency of evidence to support a verdict cannot become one of law unless there is an entire absence of evidence on some material point. McCarty v. State [Ind.] 70 N. E. 131.

16. Ball v. Gussenhoven [Mont.] 74 P. 871.

17. The action of the trial court in submitting or refusing to submit the issue of contributory negligence on the undisputed facts cannot conclude the appellate court Swift & Co. v. Langbein [C. C. A.] 127 F. 111. The conclusion of the trial court as to the effect of a deed is not binding on the court on appeal, where the facts surrounding its execution are not controverted. Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 27 Mont 536, 71 P. 1005.

18. Sessa v. Arthur, 183 Mass. 230, 66 N. E. 804.

19. Dearman v. Marshall, 88 App. Div. 41, 84 N. Y. S. 705.

20. Albany Land Co. v. Rickel [Ind.] 70 N. E. 158. It will be assumed in support of a verdict in a negligence case, that the facts necessary for its support were found by the jury. Negligence by a physician. Baxter v. Campbell [S. D.] 97 N. W. 386.

ings[23] or verdict are justified by the evidence cannot be considered in law cases in South Carolina.[24]

Findings of fact in general.[25]—A verdict or finding of facts will only be set aside when not supported by evidence,[26] or against the clear preponderance thereof,[27] if properly submitted,[28] there being sufficient to carry the issues to the jury,[29] since the appellate court cannot pass upon the credibility of witnesses or the peculiar weight to be given to their testimony.[30] If there is substantial evidence in the record to sustain the verdict,[31] judgment,[32] or finding of facts, it will not be disturbed,[33] there being nothing intrinsically improbable in it,[34] though a strong doubt as to the fact arises,[35] or the plaintiff's accounts of the cause of his injury conflict,[36]

21. McDowell v. McCormick [C. C. A.] 121 F. 61.

22. Jones v. Charlestown & W. C. R. Co., 66 S. C. 410, 43 S. E. 884.

23. Cowart v. City Council of Greenville [S. C.] 45 S. E. 122. Suit by trustee in bankruptcy to recover goods of bankrupt alleged to have been transferred with intent to give a preference is at law. Hodges v. Kohn [S. C.] 46 S. E. 102.

24. Butler v. Western Union Tel. Co., 65 S. C. 510, 44 S. E. 91.

25. See 1 Curr. L. 177.

26. Johnson v. Heath [Neb.] 98 N. W. 832; Texas & N. O. R. Co. v. Lee [Tex. Civ. App.] 74 S. W. 345. Slander case. Covington v. Roberson, 111 La. 326, 35 So. 586. A mere opinion expressed by a circuit judge on a question of fact in an equity case is not a finding of facts. Hendryx v. Perkins [C. C. A.] 123 F. 268. Application for judgment against estate of decedent after limitations under Rev. St. 1901, c. 191, § 27. Decision held finding of fact not reviewable. Libby v. Hutchinson [N. H.] 55 A. 547. A conclusion on the facts as to which of two persons is the beneficiary intended by a will is a legal conclusion, reviewable on appeal. Preston v. Foster, 75 Conn. 709, 55 A. 558. Deed intended as mortgage. Farmers' & Merchants' Ins. Co. v. Hahn [Neb.] 96 N. W. 255. See 1 Curr. L. 177, n. 67.

27. Duffy v. Hinkley [Wis.] 98 N. W. 215; Palmer v. Ward, 91 App. Div. 449, 86 N. Y. S. 990; Denver Jobbers' Ass'n v. Rumsey [Colo. App.] 71 P. 1001; Brown v. Lockhart [Colo. App.] 71 P. 1086; Whitmore v. Utah Fuel Co., 26 Utah, 488, 73 P. 764; Mente & Co. v. Le Blanc, 111 La. 970, 36 So. 86; Louisville & N. R. Co. v. Price's Adm'r, 25 Ky. L. R. 1033, 76 S. W. 836.

28. Bosley v. Baltimore & O. R. Co. [W. Va.] 46 S. E. 613. No objections made to instructions. Miller v. Herbst, 82 App. Div. 634, 81 N. Y. S. 1022. See 1 Curr. L. 177, n. 68.

29. There being competent evidence to sustain the verdict, the appellate court will not examine the testimony to ascertain upon which side is the preponderance. Burt v. Utah Light & Power Co., 26 Utah, 157, 72 P. 497. See 1 Curr. L. 177, n. 70.

30. Cleveland, etc., R. Co. v. Stewart, 161 Ind. 242, 68 N. E. 170; Jones v. Boatmen's Bank, 66 Kan. 808, 72 P. 391; Morton v. Case Threshing Mach. Co., 99 Mo. App. 630, 74 S. W. 434; Astoria & C. R. R. Co. v. Kern [Or.] 76 P. 14; Cooper & Co. v. Sawyer, 31 Tex. Civ. App. 620, 73 S. W. 992. Where there is competent evidence to sustain a finding, the question of the weight of the evidence will not be reviewed. Turnbow v. Beckstead, 25 Utah, 480, 71 P. 1062. The trial court's conclusions as to the weight of the evidence will not be disturbed. Shroyer v. Campbell, 31 Ind. App. 83, 67 N. E. 193. See 1 Curr. L. 177, n. 69.

31. Parmly v. Farrar, 204 Ill. 438, 68 N. E. 438; La Plante v. La Zear, 31 Ind. App. 433, 68 N. E. 312; Watson v. Fagner, 105 Ill. App. 52; Aetna Life Ins. Co. v. Rehlaender [Neb.] 94 N. W. 129; Brazil Block Coal Co. v. Gibson, 160 Ind. 319, 66 N. E. 882; J. R. Alsing Co. v. New England Quartz & Spar Co., 174 N. Y. 536, 66 N. E. 1110; New York & N. J. Tel. Co. v. Connolly, 69 N. J. Law, 182, 54 A. 219; Johnson v. Chicago, etc., R. Co. [Iowa] 98 N. W. 642; Campion v. Latimer [Neb.] 97 N. W. 290; Tanner v. Harper [Colo.] 75 P. 404; Herring v. American Ins. Co. [Iowa] 99 N. W. 130; Williams v. Coleman, 117 Ga. 393, 43 S. E. 715; Pomeroy v. Gershon Bros., 118 Ga. 521, 46 S. E. 415; Hill Bros. v. Bank of Seneca, 100 Mo. App. 230, 73 S. W. 307; Pennsylvania R. Co. v. Naive [Tenn.] 79 S. W. 124. See 1 Curr. L. 178, n. 72.

32. Lewis v. Rasp [Okl.] 76 P. 142.

33. McAdams v. Felkner, 140 Cal. 354, 73 P. 1064; Ellis Co. v. Eyth, 69 N. J. Law, 579, 55 A. 54; Roberts v. Koss [Ind. App.] 70 N. E. 185; Stott'e City Bank v. Miller Lumber Co., 102 Mo. App. 75, 74 S. W. 472; Burgess v. Stribling [Mich.] 96 N. W. 1001; Abernathy v. Reynolds [Ariz.] 71 P. 914; Fuhlage v. Nagle [Mo. App.] 79 S. W. 1023; Costello v. Friedman [Ariz.] 71 P. 935; Heaton v. Clarke & Co. [Iowa] 98 N. W. 597; Wisconsin Farm Land Co. v. Bullard, 119 Wis. 320, 96 N. W. 833; Schulze v. Gallagher, 86 App. Div. 614, 82 N. Y. S. 1013; Smith v. Kissel, 92 App. Div. 235, 87 N. Y. S. 176; Curran v. Holland, 141 Cal. 437, 75 P. 46; Kyle v. Shore [Colo. App.] 71 P. 895; Thompson v. Wise Boy Min. & Mill. Co. [Idaho] 74 P. 968; Noland v. Owens, 13 Okl. 408, 74 P. 954; Reister v. Land [Okl.] 76 P. 156; Kilpatrick v. Brennan [Okl.] 76 P. 162. Question of bona fides of sale. Murphy v. Hood & Lumley, 12 Okl. 593, 73 P. 261. Where on remand with permission to introduce further evidence both parties decline to do so, the findings of the trial court sustained by the evidence cannot be set aside. Great Plains Water Co. v. Lamar Canal Co. [Colo.] 71 P. 1119. Question of adverse use to sustain a prescriptive right. Abbott v. Pond [Cal.] 76 P. 60. Special findings made by the trial court, in Missouri, pursuant to the statutory provisions are conclusive on issues of fact in actions at law, if the record contains evidence to support them, and they will not be disturbed on appeal, if the con-

or a different conclusion might have been reached,[37] or the court hesitates before saying there is sufficient.[38] Some positive, affirmative evidence in support of a judgment for plaintiff must appear in order to warrant an affirmance,[39] however, and where the verdict or finding is clearly unsupported by the evidence,[40] or is manifestly against its weight,[41] or the evidence is uncontradicted,[42] or there is such a lack of evidence in its support as to lead to the conclusion that it is manifestly wrong,[43] or is manifestly arbitrary and dictated by prejudice,[44] or cannot be accounted for on rational theories,[45] or is for an amount so excessive,[46] verdict clearly excessive for the injury received, injuries and sufferings being the only questions submitted to the jury,[47] or inadequate,[48] as to show passion or prejudice,[49] or where it appears that the jury must have been moved by seemingly equitable influences, instead of weighing the evidence under the rules of law given them, their verdict will be set aside.[50] To justify setting a verdict aside as contrary to the evidence it must convincingly, and indubitably appear to be so.[51] A mere preponderance of evidence against the verdict will not reverse,[52] nor will findings[53] or a verdict be set aside for a mere conflict,[54] but to justify reversal, the verdict must want the support of evidence sufficient to maintain it.[55]

An award of punitive damages, when allowable, will not be set aside as excessive.[56] A judgment will not be reversed, in the absence of prejudicial error, merely because the damages awarded by the jury seem too large,[57] the damages being

clusions of law are correct. Kansas City, etc., R. Co. v. Southern R. Co., 151 Mo. 373, 52 S. W. 205, 45 L. R. A. 380, 74 Am. St. Rep. 545; Webb City Lumber Co. v. Victor Min. Co., 78 Mo. App. 676; Freeman v. Moffitt, 119 Mo. 280, 25 S. W. 87; Sutter v. Raeder, 149 Mo. 297, 50 S. W. 813; City of De Soto v. American Guaranty Fund Mut. F. Ins. Co., 102 Mo. App. 1, 74 S. W. 1.

34. Collins v. City of Janesville, 117 Wis. 415, 94 N. W. 309.

35. Lewis v. Washington County R. Co., 97 Me. 340, 54 A. 766.

36. Joyce v. American Writing Paper Co., 184 Mass. 230, 68 N. E. 213.

37. Moynahan v. Interstate, M. M. & D. Co., 31 Wash. 417, 72 P. 81; Faux v. Willett, 69 N. J. Law, 52, 54 A. 520; Kelly v. Pittsburg & B. Traction Co., 204 Pa. 623, 54 A. 482; Heinly v. Goldberg, 105 Ill. App. 30; Boettler v. Tumlinson [Tex. Civ. App.] 77 S. W. 824. Verdict supported by incompetent and unreliable evidence. Jordan v. Morrison [Ind. App.] 66 N. E. 780. Where a deed claimed to be a mortgage is found by the trial court to be a deed, the evidence to warrant a reversal must be overwhelming. Emery v. Lowe, 140 Cal. 379, 73 P. 981. See 1 Curr. L. 178, n. 73.

38. Simons v. Daly [Idaho] 72 P. 507; Herf & Frerich's Chem. Co. v. Lackawanna Line, 100 Mo. App. 164, 73 S. W. 346.

39. Stoffelo v. Molina [Ariz.] 71 P. 912.

40. Lewis v. Washington Co. R. Co., 97 Me. 340, 54 A. 766; Chicago City Ry. Co. v. Osborne, 105 Ill. App. 462; Moran v. Kent, 87 App. Div. 610, 84 N. Y. S. 17. No act of negligence on defendant's part shown. Southern Transp. Co. v. Harper, 118 Ga. 672, 45 S. E. 458. Cause of death of assured. Sovereign Camp Woodmen of the World v. Hruby [Neb.] 96 N. W. 998. Plaintiff's account of injury uncorroborated, and weight of other testimony against him. Hatcher v. Pennsylvania R. Co., 69 N. J. Law, 227, 54 A. 563. Finding that certain property was personalty set aside, there being no evidence in the record to show that it was not realty. Watson v. Markham [Tex. Civ. App.] 77 S. W. 660.

41. Supreme Court of Independent Order of Foresters v. Mutter, 105 Ill. App. 518; Stevens v. Michigan Soap Works [Mich.] 96 N. W. 435. Plaintiff's testimony wholly uncorroborated and overwhelmingly contradicted. Manning v. Metropolitan St. R. Co., 85 N. Y. S. 1122.

42. Nester v. Baraga Tp. [Mich.] 95 N. W. 722.

43. Becker v. Vollmer [Neb.] 95 N. W. 482. Where the party has changed his testimony in material points. Trenholm v. Provident Sav. Life Assur. Soc., 84 N. Y. S. 136.

44. Jeans v. Morrison, 99 Mo. App. 208, 73 S. W. 235.

45. Spiro v. St. Louis Transit Co., 102 Mo. App. 250, 76 S. W. 684.

46. Lipschitz v. McCarty, 86 N. Y. S. 21; Bachmann v. Paul Weidmann Brewing Co., 80 App. Div. 634, 80 N. Y. S. 931.

47. Foley v. Brunswick Traction Co., 69 N. J. Law, 481, 55 A. 803.

48. Barrette v. Carr, 75 Vt. 425, 56 A. 93.

49. City of Chicago v. Merwin, 105 Ill. App. 168.

50. Furber v. Fogler, 97 Me. 585, 55 A. 514.

51. King v. Rowan [Miss.] 34 So. 325.

52. Sonka v. Sonka [Tex. Civ. App.] 75 S. W. 325.

53. Sanders v. Rawlings [Tex. Civ. App.] 77 S. W. 41.

54. Boyer v. St. Louis, S. F. & T. R. Co. [Tex. Civ App.] 72 S. W. 1038.

55. Sonka v. Sonka [Tex. Civ. App.] 75 S. W. 325.

56. Leonard v. Hoboken Print. & Pub. Co., 69 N. J. Law, 238, 54 A. 577.

57. On error. Tamblyn v. Johnston [C. C. A.] 126 F. 267; Corbett v. Oregon Short Line R. Co., 25 Utah, 449, 71 P. 1065; Burt

within the range of the testimony,[58] and not so great as to shock the judicial sense of right and justice,[59] or induce the belief that they are the result of passion, prejudice, or corruption,[60] there being nothing to show that the jury acted recklessly or unjustly.[61] Where the excessiveness of a verdict has been cured by remittitur below, the judgment based thereon will not be reversed on the ground that the passion and prejudice discovered by the amount of the verdict must also have affected the finding as to liability.[62] In Utah, the supreme court cannot review the evidence to determine whether or not the damages are excessive.[63] The supreme court of South Carolina cannot grant new trials because of excessive damages,[64] and mere excessiveness alone is not ground for new trial in Kansas, in the absence of passion or prejudice.[65] It will be presumed, in the absence of any showing to the contrary, that the jury, in assessing damages, followed the instructions of the court,[66] and because a jury in a fire insurance case returned a verdict for a much smaller sum than he claimed, it will not be assumed that they found his claim fraudulent, entitling defendant to a judgment notwithstanding the verdict.[67]

All favorable inferences legitimately arising from the evidence will be indulged in favor of the verdict[68] or findings,[69] and evidence allowed to go in generally without objection will, in support thereof, be deemed evidence in the case.[70] The findings of a chancellor in a common law action will be as favorably regarded as the verdict of a properly instructed jury,[71] and in contested election cases, the court adopts the findings of the triers of the facts, if supported by substantial evidence.[72] Where on trial to the court, the finding is supported by sufficient competent evidence, it will be presumed that incompetent evidence, though admitted, was disregarded,[73] unless it appears that the determination in some degree at least was based thereon.[74] In Virginia, on appeal from a judgment in a case tried without a jury, where it is contended that the decision is contrary to the evidence the appellant will be considered as admitting the truth of his adversaries' evidence, and all just inferences therefrom, and as waiving his own evidence which conflicts therewith, and all inferences from his own evidence, though not in conflict with his adversaries',

v. Utah Light & Power Co., 26 Utah, 157, 72 P. 497.

58. Condemnation proceedings for lands not taken. Groves & S. R. R. Co. v. Herman, 206 Ill. 34, 69 N. E. 36; Marquette & S. E. R. Co. v. Longyear [Mich.] 94 N. W. 670. Personal injury. Atlantic & B. R. Co. v. Douglas, 119 Ga. 658, 46 S. E. 867.

59. Malloy v. St. Louis & S. R. Co., 173 Mo. 75, 73 S. W. 159.

60. Southern Ind. R. Co. v. Davis [Ind. App.] 69 N. E. 550; Dunn v. Hearst, 139 Cal. 239, 73 P. 138; Denver Consol. Elec. Co. v. Lawrence, 31 Colo. 301, 73 P. 39.

61. Award in condemnation proceedings. Metropolitan R. Co. v. Macfarland, 20 App. D. C. 421. Personal injury case. Parks v. St. Louis & S. R. Co. [Mo.] 77 S. W. 70.

62. Gulf, B. & K. C. R. Co. v. O'Neill [Tex. Civ. App.] 74 S. W. 960.

63. Corbett v. Oregon Short Line R. Co., 25 Utah, 449, 71 P. 1065; Murray v. Salt Lake City R. Co., 16 Utah, 356, 52 P. 596; Braegger v. O. S. L. R. Co., 24 Utah, 39, 68 P. 140; Burt v. Utah L. & P. Co., 26 Utah, 157, 72 P. 497.

64. Weber v. Southern Ry. Co., 65 S. C. 356, 43 S. E. 883.

65. Chicago, R. I. & P. R. Co. v. Frazier, 66 Kan. 422, 71 P. 831.

66. Chicago, M. & St. P. R. Co. v. Brink [S. D.] 94 N. W. 422.

67. Security Ins. Co. v. Thornton [C. C. A.] 123 F. 664.

68. Dick v. Zimmerman, 105 Ill. App. 615.

69. Rose v. Mesmer, 142 Cal. 322, 75 P. 905.

70. Horwitz v. Reinert, 64 N. Y. S. 254; Healey v. Patterson [Iowa] 98 N. W. 576.

71. Suit against sheriff for taking insufficient forthcoming bond. Edwards-Barnard Co. v. Pflanz, 24 Ky. L. R. 2296, 73 S. W. 1018.

72. Donnell v. Lee, 101 Mo. App. 191, 73 S. W. 997.

73. Arabian Horse Co. v. Bivens [Neb.] 96 N. W. 621; Finlen v. Heinze, 28 Mont. 548, 73 P. 123; Seaverns v. Costello [Ariz.] 71 P. 930; Hunter v. Guth [Colo. App.] 73 P. 1089; Bowdle v. Jencks [S. D.] 99 N. W. 98; International, etc., R. Co. v. Startz [Tex.] 77 S. W. 1; Byrnes v. Ely [Neb.] 97 N. W. 298; Smith v. Bunch, 31 Tex. Civ. App. 541, 73 S. W. 559; Hunt v. Phillips [Wash.] 75 P. 970; Turner v. Overall, 172 Mo. 271, 72 S. W. 644; Southworth v. Southworth, 173 Mo. 59, 73 S. W. 129; Brown v. Fitcher [Minn.] 97 N. W. 416; Rulofson v. Billings, 140 Cal. 452, 74 P. 970; Funk v. Hensler, 31 Wash. 528, 72 P. 102; City of Pt. Townsend v. Lewis [Wash.] 75 P. 982. See 1 Curr. L. 180, n. 94.

74. Abernathy v. Reynolds [Ariz.] 71 P. 914.

which do not necessarily result therefrom.[75] A statutory provision that not more than one new trial shall be granted to the same party in the same case on the weight of the evidence has no application to courts of review.[76]

Review as affected by the character of the evidence.[77]—A verdict of a jury, on conflicting evidence, will not be disturbed unless clearly wrong,[78] the jury having been properly instructed,[79] though the court may entertain a different view than that of the jury as to the preponderance of the proof,[80] the jury and not the court

75. Parsons v. Maury & Maury, 101 Va. 516, 44 S. E. 768.

76. Columbus St. R. Co. v. Pace, 68 Ohio St. 200, 67 N. E. 490.

77. See 1 Curr. L. 181.

78. Pittsburgh, etc., R. Co. v. McNeil [Ind. App.] 69 N. E. 471; William Deering & Co. v. Walter [Neb.] 96 N. W. 617; Halley v. Tichenor, 120 Iowa, 164, 94 N. W. 472; Williams v. Williams, 206 Pa. 644, 55 A. 835; Kuntz v. New York, C. & St. L. R. Co., 206 Pa. 162, 55 A. 915; Columbian Fire Proofing Co. v. Great Northern Paper Co., 207 Pa. 232, 56 A. 434; Jones v. Bunker Hill & S. Min. & Concentrating Co., 124 F. 676; Illinois Cent. R. Co. v. Byrne, 105 Ill. App. 96; Webster Mfg. Co. v. Nisbett, 105 Ill. App. 261; Baertz v. Schmidt, 31 Ind. App. 698, 67 N. E. 697; Harrold v. Fuenfstueck, 31 Ind. App. 275, 67 N. E. 699; Noyes Carriage Co. v. Robbins, 31 Ind. App. 300, 67 N. E. 969; Morgan v. Jackson [Ind. App.] 69 N. E. 410; Ashley v. Heinrichs, 105 Ill. App. 102; Cozad Irr. Co. v. Barnes [Neb.] 94 N. W. 603; Darrah v. Juel, 1 Neb. Unoff. 834, 96 N. W. 166; Heffernan v. O'Neill, 1 Neb. Unoff. 362, 96 N. W. 244; Warder, Bushnell & Glessner Co. v. Myers [Neb.] 96 N. W. 992; Williams v. Fahn, 119 Iowa, 746, 94 N. W. 252; Lutz v. Anchor Fire Ins. Co., 120 Iowa, 136, 94 N. W. 274; Curd v. Wissler, 120 Iowa, 743, 95 N. W. 266; Wilkins v. Missouri Valley [Iowa] 96 N. W. 868; Arndt v. Thomas, 90 Minn. 355, 96 N. W. 1125; Ryan v. Incorporated Town of Lone Tree, 122 Iowa, 420, 98 N. W. 287; Leidigh v. Keever [Neb.] 97 N. W. 801; McCormick Harvesting Mach. Co. v. Johnson, 1 Neb. Unoff. 310, 95 N. W. 612; Busse v. Rogers [Wis.] 98 N. W. 219; Winslow Bros. Co. v. Du Puy [Pa.] 57 A. 189; Thilemann v. New York, 82 App. Div. 136, 81 N. Y. S. 773; Ryan v. Swartwout, 84 N. Y. S. 151; Call v. Case, 84 N. Y. S. 166; Freedman v. Badanes, 84 N. Y. S. 179; Sulinski v. Leahy, 84 N. Y. S. 928; Doering v. Metropolitan St. R. Co., 42 Misc. 192, 85 N. Y. S. 400; Neefus v. Eccles, 85 N. Y. S. 635; Deitch v. Feder, 86 N. Y. S. 802; Keating v. Mott, 86 N. Y. S. 1041; Charter Gas Engine Co. v. Perry Elec. Light, Power & Heat Co. [Iowa] 98 N. W. 880; Local Grain Co. v. Maschmeier [Neb.] 98 N. W. 1038; Stock v. Schlewing [Colo. App.] 73 P. 1090; Cash Hardware Co. v. Sweeney [Idaho] 72 P. 826; Nelson v. Great Northern R., 28 Mont. 297, 72 P. 642; Babcock v. Maxwell [Mont.] 74 P. 64; Ball v. Gussenhoven [Mont.] 74 P. 871; Hefferlin v. Karlman [Mont.] 74 P. 201; McMillan v. Frank [Mont.] 75 P. 686; Southern Nevada Gold & Silver Min. Co. v. Holmes Min. Co. [Nev.] 73 P. 759; Green v. Brown & Manzanares Co. [N. M.] 72 P. 17; Wicks v. Carlisle, 12 Okl. 337, 72 P. 377; Jensen v. McCornick, 26 Utah, 142, 72 P. 630; Towle v. Stimson Mill Co., 33 Wash. 305, 74 P. 471; Hindle v. Holcomb [Wash.] 75 P. 873; Roberti v. Anderson [Nev.] 76 P. 30; Deal v. Barnes, 117 Ga. 441, 43 S. E. 695; City of Newnan v. Daviston, 118 Ga. 122, 44 S. E. 861; Wilkins v. Grant, 118 Ga. 522, 45 S. E. 415; Jenkins v. National Union, 118 Ga. 587, 45 S. E. 449; Atlanta R. & Power Co. v. Monk [Ga.] 46 S. E. 494; Gordon v. Seaboard Air Line R. Co. [N. C.] 44 S. E. 25; Town of Central Covington v. Bellonby, 24 Ky. L. R. 2080, 72 S. W. 1107; Thompson v. T. J. Melton & Co., 24 Ky. L. R. 2461, 74 S. W. 192; Robards v. Jenkins, 25 Ky. L. R. 449, 76 S. W. 10; Wertheimer-Swarts Shoe Co. v. U. S. Casualty Co., 172 Mo. 136, 72 S. W. 635; Haller v. City of St. Louis, 176 Mo. 606, 75 S. W. 613; Warder, Bushnell & Glessner Co. v. Libby [Mo. App.] 78 S. W. 338; Sharp v. National Biscuit Co. [Mo.] 78 S. W. 787; O'Mara v. St. Louis Transit Co., 102 Mo. App. 202, 76 S. W. 680; Wiley v. Lindley [Tex. Civ. App.] 76 S. W. 208; Interstate Hotel Co. v. Woodward & B. Amusement Co. [Mo. App.] 77 S. W. 114; Weller v. Wagner [Mo.] 79 S. W. 941; Chicago, R. I. & T. R. Co. v. Armes [Tex. Civ. App.] 74 S. W. 77; Bonner v. Bonner [Tex. Civ. App.] 78 S. W. 535. General verdict for plaintiff in negligence case not set aside unless evidence shows as a matter of law that plaintiff was negligent. Chicago, I. & L. R. Co. v. Leachman, 161 Ind. 512, 69 N. E. 253; Brown v. Incorporated Town of Chillicothe [Iowa] 98 N. W. 602. The jury is best able to determine as to the weight of the testimony and credibility of the witnesses. Oelke v. Theis [Neb.] 97 N. W. 688. Whether well was dug with sufficient capacity to supply a farm. Bauschka v. McKey, 118 Wis. 369, 96 N. W. 372. Place of collision between vessels—within or without 3 mile limit. Grube v. Hamburg-American Packet Co., 83 App. Div. 636, 82 N. Y. S. 429. Action between brokers for a division of commissions. Miller v. Ivey [Miss.] 35 So. 417. Amount of damages. Louisville & N. R. Co. v. Cumnock, 25 Ky. L. R. 1330, 77 S. W. 933. Damages arising from raising grade of street. Board of Councilmen v. Mitchell, 26 Ky. L. R. 1518, 78 S. W. 210; Conn v. Louisville, 26 Ky. L. R. 1998, 79 S. W. 210. Soundness of testatrix's mind. Beyer v. Hermann, 173 Mo. 295, 73 S. W. 164. Notification by carrier of arrival of shipment. Herf & F. Chemical Co. v. Lackawanna Line, 100 Mo. App. 164, 73 S. W. 346. See 1 Curr. L. 181, n. 17.

79. Norfolk & A. Terminal Co. v Morris' Adm'x, 101 Va. 422, 44 S. E. 719; Choctaw & M. R. Co. v. Walker, 71 Ark. 571, 76 S. W. 1058. Instructions unobjected to. Western & S. Life Ins. Co. v. Brennan, 25 Ky. L. R. 1206, 77 S. W. 373.

80. Clark v. Ducheneau, 26 Utah, 97, 72 P. 331; Herf & F. Chemical Co. v. Lackawanna Line, 100 Mo. App. 164, 73 S. W. 346; Copley v. Union Pac. R. Co., 26 Utah, 361, 73 P. 517; Stanley v. Stanley, 32 Wash. 489, 73 P. 596.

being charged with the duty of passing on the weight of the evidence.[81] Findings by a referee, sustained by the trial court, the evidence being in conflict,[82] and a finding of the trial court without a jury on both law and facts will be treated as the verdict of a properly instructed jury,[83] and sustained if there is any competent testimony to support it,[84] though the appellate court is not entirely satisfied therewith,[85] especially where the court bases his belief in the credibility of the witnesses on their demeanor,[86] unless contrary to the overwhelming preponderance of the evidence,[87] or the court was influenced by prejudice,[88] misconceived the

81. Hutchinson v. Gorman, 71 Ark. 305, 73 S. W. 793.

82. Snoqualmi Realty Co. v. Moynihan [Mo.] 78 S. W. 1014.

83. Allis v. Hall [Conn.] 66 A. 637; In re Murphy's Estate, 21 Pa. Super. Ct. 384; Peterson v. Wolf [Neb.] 95 N. W. 332; Gaffey v. Northwestern Mut. Life Ins. Co. [Neb.] 98 N. W. 826; Monmouth Pottery Co. v. White [Utah] 75 P. 622; Planters' Bank & Trust Co. v. Major, 25 Ky. L. R. 702, 76 S. W. 331; McCord v. Hill, 117 Wis. 306, 94 N. W. 66; Kelley v. Shay, 206 Pa. 215, 55 A. 927; Heinze v. Butte & B. Consol. Min. Co. [C. C. A.] 126 F. 1; Skehill v. Abbott, 184 Mass. 145, 68 N. E. 37; O'Brien v. Collins, 205 Pa. 651, 55 A. 322; McIntosh v. Price [C. C. A.] 121 F. 716; Moore v. Moore [C. C. A.] 121 F. 737; Dawson County Nat. Bank v. Oldfather [Neb.] 93 N. W. 1127; Boldt v. Becker [Neb.] 95 N. W. 509; Murray v. Vaughan [Neb.] 95 N. W. 607; Sutton Nat. Bank v. Silver [Neb.] 95 N. W. 804; Peterson v. Peterson's Estate [Neb.] 95 N. W. 1054; Foley v. Doyle [Neb.] 95 N. W. 1067; Buck v. Oldeman [Neb.] 96 N. W. 117; Sullivan Sav. Inst. v. Sharp [Neb.] 96 N. W. 522; Holt v. Rust-Owen Lumber Co. [Neb.] 96 N. W. 613; Pardee v. Nelson [Neb.] 96 N. W. 630; Dunton v. Dawley [Iowa] 98 N. W. 307; Neal v. Heying [Iowa] 98 N. W. 603; Wantz v. Squires [Neb.] 97 N. W. 1058; Brown v. Cone, 80 App. Div. 413, 81 N. Y. S. 89; Riehlman v. Field, 81 App. Div. 526, 81 N. Y. S. 239; Levy v. Zasuly, 84 N. Y. S. 126; Egnstfeld v. Central Crosstown R. Co., 84 N. Y. S. 148; Leonardi v. Stemmler, 86 N. Y. S. 242; Litzky v. Horowitz, 87 N. Y. S. 136; Wendell v. Walker, 87 N. Y. S. 142; Taggart Mercantile Co. v. Clack [Ariz.] 71 P. 925; Barter v. Pima County [Ariz.] 73 P. 399; Green v. Miller, 3 Ariz. 205, 73 P. 399; White v. Brash, 3 Ariz. 212, 73 P. 445; Durfee v. Seale, 139 Cal. 603, 73 P. 435; Wagoner v. Silva, 139 Cal. 559, 73 P. 433; Schou v. Sotoyome Tribe, No. 12, 140 Cal. 254, 73 P. 996; Williams v. Long, 139 Cal. 186, 72 P. 911; Parke v. Boulware [Idaho] 73 P. 19; Rawlings v. Clark [Colo. App.] 74 P. 346; Carter v. Buck [Idaho] 75 P. 612; Abbott v. Reedy [Idaho] 75 P. 764; Cowden v. Mills [Idaho] 75 P. 766; Stevens v. Curran, 28 Mont. 366, 72 P. 753; Dobbins v. Humphrey, 171 Mo. 198, 70 S. W. 815; Morrow v. Pullman Palace Car Co., 98 Mo. App. 351, 73 S. W. 281; Gunby v. Drew [Fla.] 34 So. 305; Minneapolis, etc., R. Co. v. Minnesota, 193 U. S. 53, 24 S. Ct. 396; Carnes v. King, 32 Wash. 701, 73 P. 479; Bullion Beck & Champion Min. Co. v. Eureka Hill Min. Co. [Utah] 76 P. 19; G. W. Featherston Min. Co. v. Young, 118 Ga. 564, 45 S. E. 414; Avery v. Stewart, 134 N. C. 287, 46 S. E. 519; Hamilton v. Perry, 25 Ky. L. R. 647, 76 S. W. 52; Ferguson v. Smith, 25 Ky. L. R. 1041, 76 S. W. 1086; Louisville & N. R. Co. v. Brooks, 25 Ky. L. R. 1307, 77 S. W. 693; Chapin v. Stahlhuth, 102 Mo. App. 299, 76 S. W. 667; Kyle v. Gaff [Mo. App.] 78 S. W. 1047; Golden v. Tyer [Mo.] 79 S. W. 143; Boyce v. Royal Circle [Mo. App.] 79 S. W. 495; Storrie v. Shaw [Tex. Civ. App.] 76 S. W. 596; Gammel Book Co. v. Ben C. Jones & Co. [Tex. Civ. App.] 78 S. W. 21. Motion for new trial for misconduct of jury. Matoushek v. Dutcher & Sons [Neb.] 93 N. W. 1049. Whether transaction was a loan or a purchase of future unearned pay. Van Vechten v. McGuire [N. J. Law] 56 A. 123. Finding that a sewer benefits land to the amount of the assessment, and that the assessment is reasonable, is conclusive. Bassett v. City of New Haven [Conn.] 55 A. 579. Relationship of juror to party—motion for new trial. Geist v. Rapp, 206 Pa. 411, 55 A. 1063. Establishment of highway by prescription. Postal v. Martin [Neb.] 96 N. W. 8. Finding of necessity of highway. Johnson v. Hanson [Neb.] 95 N. W. 704. Judgment on motion to dissolve attachment. Werner v. Linsenmeyer [Neb.] 94 N. W. 105. Whether artizan's lien was waived is question of fact and unreversible on the law. Blumenberg Press v. Mutual Mercantile Ag., 177 N. Y. 362, 69 N. E. 641. Assignment that court erred in finding that one of two judgments sued on had been assigned presents question of fact only. Head v. Selleck [Conn.] 57 A. 281. Whether resulting trust existed; existence of agreement. Jayne v. Anway, 82 App. Div. 640, 81 N. Y. S. 821. Motion for security for costs on ground that action complained of was done in discharge of military duty—affidavits conflicting [Laws 1898, p. 514, c. 212, § 14]. McLaughlin v. Kipp, 82 App. Div. 413, 81 N. Y. S. 896. Where the evidence and not the facts are certified. Martin's Adm'r v. Richmond, F. & P. R. Co., 101 Va. 406, 44 S. E. 695; Gray v. Rumrill, 101 Va. 507, 44 S. E. 697. See 1 Curr. L. 184, n. 25.

84. Wroughton v. Waffle, 122 Iowa, 486, 98 N. W. 307; Milligan v. Owen [Iowa] 98 N. W. 792. Importance of a personal view of the witnesses, as to their credibility. Thomas v. Janesofsky [Neb.] 97 N. W. 832. Acquiescence in boundary for 10 years. Oster v. Devereaux [Iowa] 98 N. W. 579. See 1 Curr. L. 184, n. 26.

85. Wheeler v. Mineral Farm Consol. Min. Co., 31 Colo. 110, 71 P. 1101.

86. Park v. Metropolitan St. R. Co., 84 N. Y. S. 249; Blom-Collier Co. v. Martin, 98 Mo. App. 596, 73 S. W. 729.

87. Gallagher v. Ruffing, 118 Wis. 284, 95 N. W. 117. See 1 Curr. L. 184, n. 28.

88. Hunter v. Guth [Colo. App.] 73 P. 1089.

issues,[89] or committed some error in reaching its conclusion entitling appellant to a new trial.[90] The presumption in favor of the correctness of the court's decision upon the weight of the evidence will be overcome only when there is a clear preponderance of evidence against it.[91] If the evidence is all in writing, the findings of the trial court are not conclusive,[92] but where a view is had by the jury,[93] or the trial judge has examined the premises in question, the verdict or findings will not be disturbed unless it clearly appears that error has been committed.[94] Where there is undisputed evidence supporting the verdict, it cannot be set aside,[95] and a verdict based partly on oral evidence in which there is a conflict cannot be disturbed, though the evidence in its support be incredible;[96] but a verdict will not be sustained on a mere scintilla of evidence, it being flagrantly against the weight thereof.[97] Where the evidence is such that a verdict for either party would have to be sustained, instructions incorrectly defining the rights of the parties cannot be considered harmless.[98]

Evidence is conflicting within this rule as well when the testimony of a single witness is contradicted by circumstances and by statements elicited from him on cross-examination, as when it is disclosed by the conflicting testimony of several witnesses,[99] and incompetent testimony received without objection becomes evidence in the case.[1]

A motion at the close of the evidence by the plaintiff for a directed verdict, and by the defendant for a dismissal of the complaint, amounts to a submission of questions of fact to the judge.[2]

The determination of the police commissioner on the trial of a police officer for improper conduct, on conflicting evidence, will not be disturbed.[3] The decision of the board of review of assessments, honestly made on conflicting evidence, is treated like a verdict of a jury, and is not reviewable.[4]

The trial court will be presumed to have resolved a conflict in the evidence as to probative facts essential to be found to support the ultimate fact, in such a manner as to sustain the general finding.[5] Where the evidence conflicts, it will be presumed on appeal in support of the judgment below that a road to private premises was located as the law directs.[6]

In Washington, findings of fact by the trial court are not conclusive, but the appeal court must weigh the testimony, and this is especially true where a large portion of it is by deposition;[7] some weight, however, will be given the conclusions

89. Platte Valley Irr. Co. v. Central Trust Co. [Colo.] 75 P. 391.

90. Head v. Selleck [Conn.] 57 A. 281. Finding that alleged incompetent was incapable of managing property. In re Daniels, 140 Cal. 335, 73 P. 1053.

91. Dodson v. Crocker [S. D.] 94 N. W. 391.

92. Colorado Dry Goods Co. v. W. P. Dunn Co. [Colo. App.] 71 P. 887; Wheeler v. Mineral Farm Consol. Min. Co., 31 Colo. 110, 71 P. 1101.

93. Spohr v. City of Chicago, 206 Ill. 441, 69 N. E. 515. Damages in condemnation proceedings. Illinois, I. & M. R. Co. v. Humiston, 208 Ill. 100, 69 N. E. 880; Detroit & T. Shore Line R. Co. v. Hall [Mich.] 94 N. W. 1066.

94. Question whether street improvement is necessary and reasonable. Wells v. City of Chicago, 202 Ill. 448, 66 N. E. 1056.

95. State Mut. Ins. Co. v. Latourette, 71 Ark. 242, 74 S. W. 300.

96. Dodd v. Guiseffi, 100 Mo. App. 311, 73 S. W. 304.

97. Hurt v. Louisville & N. R. Co., 25 Ky. L. R. 755, 76 S. W. 502.

98. B. E. Brister & Co. v. Illinois Cent. R. Co. [Miss.] 36 So. 142.

99. Teske v. Teske [Neb.] 95 N. W. 685; Allis v. Hall [Conn.] 56 A. 637. The testimony of a single interested witness as opposed to that of many disinterested ones will create a conflict within the rule. Jones v. Boatmen's Bank, 66 Kan. 808, 72 P. 391.

1. Brightman v. Buffington, 184 Mass. 401, 68 N. E. 828; Union Bank v. Case, 84 N. Y. S. 550.

2. Cullinan v. Fidelity & Casualty Co. of New York, 84 App. Div. 292, 82 N. Y. S. 695.

3. People v. Partridge, 88 App. Div. 60, 84 N. Y. S. 779.

4. State v. Wharton, 117 Wis. 558, 94 N. W. 359.

5. Ballard v. Nye, 138 Cal. 588, 72 P. 156.

6. Lesley v. Klamath County [Or.] 75 P. 709.

7. Shead v. Moore, 31 Wash. 283, 71 P. 1010.

of the trial court who saw the witnesses and heard them testify,[8] and the findings sustained where the court cannot say that the evidence clearly preponderates against them.[9]

Effect of approval by the trial judge.[10]—A verdict on questions of fact approved by the trial judge will not usually be disturbed,[11] unless the evidence is overwhelmingly against it,[12] or error is manifest,[13] the same respect being paid to his decision in this as on any other matter of fact,[14] and since in denying a motion for a new trial the court necessarily decides that the verdict is not the result of passion or prejudice, the judgment will not be reversed on appeal on that ground.[15] Where a verdict is clearly wrong and excessive, it will be set aside in pursuance of the appellate court's superintending control over inferior courts, though the trial judge has refused a new trial.[16] Where a peremptory instruction for defendant is refused, the court on appeal from a judgment for plaintiff will not weigh the evidence, but will only inquire whether there is sufficient to support the verdict.[17] A finding on a disputed question of fact tried on ex parte affidavits will not be reviewed unless manifestly against the weight of the evidence.[18]

Effect of two trials below.[19]—Where a case has been tried by a jury, with the same result, and their conclusion twice approved by a trial judge, it will not be disturbed in the absence of anything appearing in the record which would have a tendency to influence them improperly,[20] though the appellate court may deem that the evidence preponderates the other way,[21] and where three trials have been had, all determined the same way, the verdict should be deemed conclusive in the absence of material error, or a showing of passion, partiality or prejudice.[22] A strong case is necessary to warrant reversal for error in awarding a new trial, where the second trial resulted adversely to the first.[23] Where the difference between three successive divisions of land by commissioners in partition is slight, the third one will not be set aside.[24]

8. National Bank of Commerce v. Cook, 31 Wash. 477, 71 P. 1094; Cochran v. Yoho [Wash.] 75 P. 816.

9. Funk v. Hensler, 31 Wash. 528, 72 P. 102; American Bridge Co. v. Robinson, 31 Wash. 407, 71 P. 1099. Parties only testifying and surrounding circumstances shedding no light. Cullen v. Whitham, 33 Wash. 366, 74 P. 581; Chantler v. Hubbell [Wash.] 75 P. 802.

10. See 1 Curr. L. 184, n. 30.

11. Nonprejudicial error in allowing exhibits to go to jury room. Cudahy Packing Co. v. Skoumal [C. C. A.] 125 F. 470. Award of damages for libel not disturbed. Dunn v. Hearst, 139 Cal. 239, 73 P. 138. Whether removal is abandonment of homestead or not is a question of fact. McGill v. Sutton, 67 Kan. 234, 72 P. 853. Motion for new trial overruled. Supreme Tent of Knights of Maccabees v. Stensland, 105 Ill. App. 267; Lawson v. Seattle & R. R. Co. [Wash.] 76 P. 71; Central of Georgia R. Co. v. Goodson, 118 Ga. 833, 45 S. E. 680; Roberts v. Cox, 119 Ga. 69, 45 S. E. 689; Lumpkin v. Cureton, 119 Ga. 64, 45 S. E. 729; Burk v. Hill, 119 Ga. 38, 45 S. E. 732; Linder v. Snow, 119 Ga. 41, 45 S. E. 732; Palmour v. Roper, 119 Ga. 10, 45 S. E. 790; Sterling v. Unity Cotton Mills, 119 Ga. 173, 45 S. E. 975; Peterson v. Westermann [Mo. App.] 77 S. W. 1015; Chattanooga Machinery Co. v. Hargraves [Tenn.] 78 S. W. 105.

12. Verdict upholding will. In re Keegan's Estate, 139 Cal. 123, 72 P. 828.

13. Howarth v. Porte, 110 La. 650, 34 So. 722.

14. Collins v. City of Janesville, 117 Wis. 415, 94 N. W. 309.

15. Green v. Brown & Manzanares Co. [N. M.] 72 P. 17.

16. Kennedy v. St. Louis Transit Co. [Mo. App.] 78 S. W. 77.

17. Consolidated Fireworks Co. v. Koehl, 206 Ill. 283, 68 N. E. 1077.

18. Question tried on ex parte affidavits on motion to dissolve attachment. Fremont Brewing Co. v. Pekarek [Neb.] 95 N. W. 12.

19. See 1 Curr. L. 185.

20. Chicago & A. R. Co. v. Flaherty, 105 Ill. App. 14; Leidigh v. Keever [Neb.] 97 N. W. 801.

21. Finkbinder v. Ernst [Mich.] 97 N. W. 684; Dodd v. Guiseffi, 100 Mo. 311, 73 S. W. 304.

22. Parmly v. Farrar, 105 Ill. App. 394; Williams v. Delaware, L. & W. R. Co., 81 App. Div. 444, 80 N. Y. S. 945; Supreme Lodge Knights of Honor v. Lapp's Adm'x, 25 Ky. L. R. 74, 74 S. W. 656. Retrial limited to question of amount of damages. Southern R. Co. v. O'Bryan, 119 Ga. 147, 45 S. E. 1000. First set aside, second reversed because excessive, third not disturbed either because of insufficient evidence or excessiveness. Board of Internal Improvement for Lincoln County v. Moore's Adm'r, 25 Ky. L. R. 15, 74 S. W. 683.

23. Hackney v. Raymond Bros. Clarke Co. [Neb.] 94 N. W. 822.

Effect of theory of facts on which judgment is based.[25]—A verdict cannot be sustained on a theory contrary to that upon which the case was submitted.[26]

In equitable proceedings.[27]—The findings and decree of a court of equity[28] and findings of fact by the trial judge approved by the court in banc,[29] or by a master, confirmed by the court below,[30] or by a commissioner, the evidence being in conflict,[31] will not be set aside, unless clearly erroneous or against the clear preponderance of the evidence,[32] especially where the hearing was in open court and the witnesses numerous,[33] the chancellor seeing and hearing the witnesses being in a better position to judge of their credibility,[34] though the chancellor has submitted the case to a jury for an advisory verdict,[35] and part of the evidence is in the form of depositions;[36] but where the evidence before the trial court was entirely written, and relates to matters as to which the trial court is in no better position to reach a correct solution than the appellate court, the rule has no application, and the appellate court should be governed by its own conclusion as to the weight of the evidence.[37] Findings of fact in equity cases are not conclusive on appeal in the Fed-

24. Garth's Guardian v. Thompson, 24 Ky. L. R. 1961, 72 S. W. 782.

25. See 1 Curr. L. 185.

26. Cook v. American E. C. & Schultze Gunpowder Co. [N. J. Law] 56 A. 114. An appellant will not be allowed to complain that a case was decided upon a theory in which he acquiesced. Shreeves v. Caldwell [Mich.] 97 N. W. 764.

27. See 1 Curr. L. 185.

28. Manhattan Life Ins. Co. v. Wright [C. C. A.] 126 F. 82; Kearny County Com'rs v. Irvine [C. C. A.] 126 F. 689; Allis v. Hall [Conn.] 56 A. 637; Power v. Allen [Neb.] 94 N. W. 532; Saxton v. Harrington [Neb.] 94 N. W. 605; Eckmann v. Turner [Neb.] 94 N. W. 625; Springer v. Chicago Real Estate, L. & T. Co., 202 Ill. 17, 66 N. E. 850; Terry v. Prevo [Neb.] 95 N. W. 338; Provident Life & Trust Co. v. Dennis [Neb.] 95 N. W. 361; First Nat. Bank v. Murray [Neb.] 95 N. W. 1123; Byers v. Byers [Pa.] 57 A. 62; Colbert v. Moore [Mass.] 70 N. E. 42; Regester's Sons Co. v. Reed [Mass.] 70 N. E. 53; Ginn v. Cannon, 119 Ga. 475, 46 S. E. 631; Sibley v. Stacey, 53 W. Va. 292, 44 S. E. 420; McDowell v. McDowell, 24 Ky. L. R. 2270, 73 S. W. 1022; Strong v. South, 24 Ky. L. R. 2281, 73 S. W. 1026; Carpenter v. Stephens, 25 Ky. L. R. 551, 76 S. W. 42; Owsley v. Owsley, 25 Ky. L. R. 1194, 77 S. W. 394. Life insurance. Intoxication as cause of death. Order of United Commercial Travelers of America v. McAdam [C. C. A.] 125 F. 358, Decree of divorce. Donaldson v. Donaldson [Mich.] 96 N. W. 448. Decree allowing attorney's fee; conflict of evidence. Forrester v. Boston & M. Consol. Copper & Silver Min. Co. [Kan.] 74 P. 1088. Application to dissolve temporary injunction. Richardson v. Kittlewell [Fla.] 33 So. 984. Finding that alleged verbal trust asserted after lapse of long time is not shown. Faulkner v. Grantham [W. Va.] 47 S. E. 78. Whether mortgage was genuine or fraudulent. Vaughn v. Duff, 25 Ky. L. R. 1552, 78 S. W. 164. See 1 Curr. L. 185, n. 44.

29. Watkins v. Hughes, 206 Pa. 526, 56 A. 22; In re Morgan's Estate, 207 Pa. 519, 56 A. 1075.

30. Lyons v. Lyons, 207 Pa. 13, 56 A. 56; Aetna Ins. Co. v. Jacobson, 105 Ill. App. 283; Garden City Sand Co. v. American Refuse Crematory Co., 105 Ill. App. 342; Smyth v. Stoddard, 105 Ill. App. 510; Big Creek Gap Coal & Iron Co. v. American Loan & Trust Co. [C. C. A.] 127 F. 625; Blackwell v. McNinch [S. C.] 46 S. E. 477; Calvary Baptist Church v. Dart [S. C.] 47 S. E. 66. Findings by register. Noble v. Gilliam, 136 Ala. 618, 33 So. 861. Genuineness of signature and acknowledgment of deed. Duncan v. Duncan, 203 Ill. 461, 67 N. E. 763. That presumption that mortgage on which interest is in arrears 40 years has been paid is not rebutted. Lancaster v. Flowers [Pa.] 57 A. 526.

31. Lusk v. Pelter & Co., 101 Va. 790, 45 S. E. 333.

32. Idaho Min. & Mill. Co. v. Davis [C. C. A.] 123 F. 396; Springer v. Chicago Real Estate Loan & Trust Co., 202 Ill. 17, 66 N. E. 850; Baumgartner v. Bradt, 207 Ill. 345, 69 N. E. 912; Pennsylvania Co. v. Ohio River Junction R. Co., 204 Pa. 356, 54 A. 259; Assets Realization Co. v. Wightman, 105 Ill. App. 618; Sisson v. O'Connor [Neb.] 95 N. W. 60; Van der Aa v. Van Drunen, 208 Ill. 108, 70 N. E. 33; Campbell v. Sherley, 25 Ky. L. R. 904, 76 S. W. 540. Finding that fraud was not established. Overstreet v. Citizens' Bank, 12 Okl. 383, 72 P. 379. Adverse possession. Murphy v. Dafoe [S. D.] 99 N. W. 86.

33. Springer v. Chicago Real Estate, Loan & T. Co., 202 Ill. 17, 66 N. E. 850; Boddie v. Brewer & H. Brew. Co., 204 Ill. 352, 68 N. E. 394; Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800; Lurie v. Sabath, 208 Ill. 401, 70 N. E. 323; Stuart v. Hauser [Idaho] 72 P. 719. See 1 Curr. L. 186, n. 52.

34. Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800; Bodelsen v. Swensen, 206 Ill. 68, 68 N. E. 1074; Hardy v. Dyas, 203 Ill. 211, 67 N. E. 852; Shea v. Teufert, 207 Ill. 222, 69 N. E. 872; McNerny v. Hubbard [Neb.] 93 N. W. 1123. Charge of adultery held not proved, though witnesses were undisputed. Schulze v. Schulze, 83 App. Div. 875, 82 N. Y. S. 266.

35. Dowle v. Driscoll, 203 Ill. 480, 68 N. E. 56; Hunter v. Bilheimer, 22 Pa. Super. Ct. 622; Richardson-Roberts-Bryne Dry Goods Co. v. Hockaday, 12 Okl. 546, 73 P. 957; Grainger & Co. v. Patterson, 24 Ky. L. R. 2387, 74 S. W. 210.

36. Dowle v. Driscoll, 203 Ill. 480, 68 N. E. 56.

37. Faulkner v. Sims [Neb.] 94 N. W.

eral courts, notwithstanding the statute providing that appeals shall be subject to the same rules, regulations and restrictions as writs of error,[38] and the appeal court will examine the record and come to its own conclusions,[39] notwithstanding the findings of the master have been approved by the court below.[40] In Indiana, by express provision of the statute, the appellate court, in all cases not triable by a jury, will consider the evidence and determine its sufficiency,[41] and a like rule obtains in several states on appeals in equity,[42] even where the witnesses were examined in the presence of the trial court;[43] and where a consideration of the entire record satisfies the court that the trial court reached a wrong conclusion, the decree will be reversed,[44] though owing to the trial court's opportunity to observe the witnesses,[45] the chancellor's findings will be disturbed with reluctance.[46] Under this rule, findings of a register, though disallowed or modified by the chancellor, come before the supreme court attended by the same presumption of correctness that waited on them before the chancellor.[47] In Kentucky, the court of appeals is not authorized to pass on the correctness of a final judgment granting a divorce,[48] and the decree of the chancellor refusing a divorce will be given great weight, and only reversed where manifestly wrong.[49] Likewise the award of custody of children in such case will be sustained, where sustained by the preponderance of the evidence.[50] A decree for defendant in divorce on conflicting evidence will not be disturbed unless clearly wrong.[51] Though on appeal in equity the court reviews the evidence, it will defer somewhat to the opinion of the chancellor.[52]

Proceedings before referees or auditors.[53]—Findings of a referee,[54] or an auditing judge,[55] or an auditor, confirmed by the court below,[56] will not be disturbed except in clear cases, especially where submitted on oral testimony, in which case findings will be treated as the verdict of a jury.[57] A finding based on a statutory presumption after the repeal of the statute will be reversed.[58] Where the trial

113; Michigan Trust Co. v. Red Cloud [Neb.] 96 N. W. 140.

38. Rev. St. 1012. Hendryx v. Perkins [C. C. A.] 123 F. 268.

39. Juneau Ferry & Nav. Co. v. Alaska S. S. Co. [C. C. A.] 121 F. 356.

40. Briggs v. Neal [C. C. A.] 120 F. 224.

41. Acts 1903, p. 341, c. 193. Webb v. Hammond, 31 Ind. App. 613, 68 N. E. 916.

42. McMurray v. McMurray [Mo.] 79 S. W. 701.

43. Grandin v. First Nat. Bank [Neb.] 98 N. W. 70; Emfinger v. Emfinger, 137 Ala. 337, 34 So. 346.

44. White v. White [Mich.] 97 N. W. 681; Cincinnati Tobacco Warehouse Co. v. Matthews, 24 Ky. L. R. 2446, 74 S. W. 242.

45. Wilkie v. Sassen [Iowa] 99 N. W. 124.

46. Greer v. Fontaine, 71 Ark. 605, 77 S. W. 56; Sulek v. McWilliams [Ark.] 78 S. W. 769; Rumsey Mfg. Co. v. Kaime, 173 Mo. 551, 73 S. W. 470.

47. Pollard v. American Freehold Land Mortg. Co. [Ala.] 135 So. 767.

48. Hendrix v. Hendrix, 25 Ky. L. R. 632, 76 S. W. 165; Greer v. Greer, 25 Ky. L. R. 655, 76 S. W. 166; Donnelly v. Donnelly, 25 Ky. L. R. 1543, 78 S. W. 182.

49. Harl v. Harl, 24 Ky. L. R. 2163, 73 S. W. 756.

50. Goodridge v. Goodridge, 25 Ky. L. R. 649, 76 S. W. 164.

51. Coe v. Coe, 98 Mo. App. 472, 72 S. W. 707.

52. Kalbach v. Mathis [Mo. App.] 78 S. W. 684. Fraud. New England Loan & T. Co. v. Browne, 177 Mo. 412, 76 S. W. 954.

53. See 1 Curr. L. 187.

54. Lexow v. Belding, 89 App. Div. 622, 85 N. Y. S. 918; Rossbach v. Beebe, 205 Pa. 652, 55 A. 320; Dusick v. Green, 118 Wis. 240, 95 N. W. 144; O'Neill v. City of Milwaukee [Wis.] 98 N. W. 963; Arkansas Land Co. v. Ladd [Mo. App.] 77 S. W. 322. That an alleged bankrupt was engaged chiefly in farming. Couts v. Townsend, 126 F. 249. Commissioners held referees not masters, and only questions open for review those which they referred to court. Selectmen of Town of Danvers v. Com., 184 Mass. 502, 69 N. E. 320. Constructive possession of tenant. Fell v. John F. Betz & Son, 22 Pa. Super. Ct. 418. Conflict of evidence. Rector, etc., of Mt. Calvary Church v. Albers, 174 Mo. 331, 73 S. W. 508. The finding of facts by a referee stands as the verdict of a jury. Tufts v. Latshaw, 172 Mo. 359, 72 S. W. 679. See 1 Curr. L. 187, n. 63.

55. In re May's Estate, 22 Pa. Super. Ct. 77; In re Wiley's Estate, 22 Pa. Super. Ct. 123.

56. In re Ridgway's Account, 206 Pa. 587, 56 A. 25; Malloy v. Lincoln Cotton Mills, 132 N. C. 432, 43 S. E. 951. See 1 Curr. L. 167, n. 64.

57. Johnson v. Johnson [Colo. App.] 72 P. 604.

58. Act Cong. July 7, 1838, c. 191, § 13, 5 St. 305. Steam boiler explosion presumed negligent. Richtman v. Haley [C. C. A.] 121 F. 353.

court strikes out a material finding supported by the testimony, its judgment will be reversed.[59]

(§ 13) *G. Rulings and decisions on intermediate appeals.*[60]—Findings of fact in the state court are conclusive on the supreme court of the United States.[61] Error in the admission of evidence at the trial not complained of on error in the circuit court of appeals will not be reviewed by the supreme court on error to the latter court.[62]

In Illinois, where the appellate court affirms the judgment of the trial court, its decision as to the facts proved is conclusive on a further appeal to the supreme court,[63] though the affirmance was on a disagreement of two judges, the third not sitting.[64] In such case the supreme court will not consider whether the weight of the evidence supports the verdict or findings,[65] but will only inquire whether there is any evidence in the record fairly tending to sustain them.[66] The appellant, however, has an undoubted right to have the appellate court pass on the question whether the verdict is against the weight of the evidence,[67] and it will be presumed on appeal to the supreme court that the appellate court did its duty in that respect, the question being properly before it.[66] In reversing a judgment and rendering one of its own, the appellate court must give therein a recital of the facts as found as a basis for review by the supreme court.[69] Such recital should

59. Fountain v. Kenney, 66 Kan. 797, 72 P. 392.

60. See 1 Curr. L. 187.

61. Shappiro v. Goldberg, 192 U. S. 232, 24 S. Ct. 259. See 1 Curr. L. 187, n. 71.

62. McLoughlin v. Raphael Tuck & Sons Co., 191 U. S. 267, 24 S. Ct. 105.

63. Harrison v. National Bank of Monmouth, 207 Ill. 630, 69 N. E. 871; Cramer v. Burkhalter, 207 Ill. 34, 69 N. E. 564; Voigt v. Anglo American Prov. Co., 202 Ill. 462, 66 N. E. 1054; Chicago & A. R. Co. v. Flaherty, 202 Ill. 151, 66 N. E. 1083; Supreme Lodge Order of Mut. Protection v. Meister, 204 Ill. 527, 68 N. E. 454; Illinois Cent. R. Co. v. Byrne, 205 Ill. 9, 68 N. E. 720; Nelson v. Fehd, 203 Ill. 120, 67 N. E. 828; Metropolitan West Side El. R. Co. v. Fortin, 203 Ill. 454, 67 N. E. 977; Clark v. Folkers [Neb.] 96 N. W. 328; Grace & Hyde Co. v. Probst, 208 Ill. 147, 70 N. E. 12. Whether evidence showed injury to spine. City of Aledo v. Honeyman, 208 Ill. 415, 70 N. E. 338. As that plaintiff in a personal injury case is a malingerer, that the verdict is excessive, and contrary to the evidence. Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087. Questions of negligence, contributory negligence, and servant's assumption of risk. Illinois Steel Co. v. Wierzbicky, 206 Ill. 201, 68 N. E. 1101. Whether weight of evidence supports verdict not reviewed. Cleveland, etc., R. Co. v. Hornsby, 202 Ill. 138, 66 N. E. 1052. "Principal door" to coal mine within Hurd's Rev. St. 1901, p. 1202. Himrod Coal Co. v. Stevens, 203 Ill. 115, 67 N. E. 389. Whether damages were excessive (malicious prosecution). Lasher v. Littell, 202 Ill. 551, 67 N. E. 372. Personal injury. Chicago & A. R. Co. v. Raidy, 203 Ill. 310, 67 N. E. 783. Inducing wrongful discharge by plaintiff's master. London Guarantee & Accident Co. v. Horn, 206 Ill. 493, 69 N. E. 526. Whether the verdict was result of passion. Prussing v. Jackson, 208 Ill. 85, 69 N. E. 771. Whether verdict is consistent with instructions, there being evidence tending to support the declaration. Illinois Cent. R. Co. v. Behrens, 208 Ill. 20, 69 N. E. 796. Whether plaintiff was member of certain lodge at time of contracting insurance. Traders' Mut. Life Ins. Co. v. Humphrey, 207 Ill. 540, 69 N. E. 875. Whether defendant was guarantor of note. Pfaelzer v. Kau, 207 Ill. 116, 69 N. E. 914. Whether pit boss was fellow servant of miner. Consolidated Coal Co. v. Fleischbein, 207 Ill. 593, 69 N. E. 963. Whether violation of law against child labor was wilful. Marquette Third Vein Coal Co. v. Dielie, 208 Ill. 116, 70 N. E. 17. See 1 Curr. L. 187, n. 72.

64. Crawford v. Burke, 201 Ill. 581, 66 N. E. 833.

65. Metropolitan West Side Elevated R. Co. v. Fortin, 203 Ill. 454, 67 N. E. 977; Illinois Cent. R. Co. v. Behrens, 208 Ill. 20, 69 N. E. 796; Dick v. Zimmerman, 207 Ill. 636, 69 N. E. 754; Chicago City R. Co. v. O'Donnell, 207 Ill. 478, 69 N. E. 882.

66. Pittsburgh, etc., R. Co. v. Kinnare, 203 Ill. 388, 67 N. E. 826; Metropolitan West Side El. R. Co. v. Fortin, 203 Ill. 454, 67 N. E. 977; Dick v. Zimmerman, 207 Ill. 636, 69 N. E. 754; Mayer v. Gersbacher, 207 Ill. 296, 69 N. E. 789. Sustained though conflicting. Miller v. John, 208 Ill. 173, 70 N. E. 27.

67. Voigt v. Anglo American Prov. Co., 202 Ill. 462, 66 N. E. 1054; Pittsburgh, etc., R. Co. v. Kinnare, 203 Ill. 388, 67 N. E. 826.

68. Voigt v. Anglo American Prov. Co., 202 Ill. 462, 66 N. E. 1054. Where the appellate court affirm a judgment, it muet be presumed they found it in accordance with the weight of the evidence, though the opinion states that the weight seems to be with the other party. Chicago City R. Co. v. Mead, 206 Ill. 174, 69 N. E. 19.

69. Practice act, § 88. Martin v. Martin, 202 Ill. 382, 67 N. E. 1; Trakal v. Heusner Baking Co., 204 Ill. 179, 68 N. E. 399. Failure will cause reversal. Hogan v. Chicago & A. R. Co., 202 Ill. 206, 66 N. E. 1070; Irwin v. Northwestern Nat. Life Ins. Co., 200 Ill. 677, 66 N. E. 386; Irwin v. Northwestern Nat. L. Ins. Co., 207 Ill. 531, 69 N. E. 824. Where the judgment is reversed and not re-

include every ultimate material fact on which the rights of the parties depend,[70] and should be of the ultimate, not the mere evidentiary facts,[71] nor of mere legal conclusions.[72] The judgment of the appellate court in such case is conclusive as to the facts thus recited,[73] but not as to legal conclusions inserted therein,[74] the supreme court being authorized to review as to the law arising out of such facts.[75] In cases tried to the court and not directly appealable, the supreme court can review only as to questions of law arising on the pleadings, evidence, etc., where no written propositions of law were requested.[76] The certificate of the appellate court presents no question for consideration unless the record shows questions of law to be passed upon.[77]

The unanimous decision of the appellate division of the supreme court of New York that there is evidence to support a finding of fact is not reviewable in the court of appeals,[78] and an un-unanimous affirmance is binding if supported by some evidence;[79] but the grant,[80] though not the refusal,[81] of a nonsuit, is reviewable as to all questions in the case. Where the decision of the trial court does not separately state the facts found, and the order of the appellate division does not state that the reversal is upon a question of fact, it will be presumed that all facts warranted by the evidence and necessary to support the judgment are found by the trial court.[82] Where the order of the appellate division does not state that the reversal was on a question of fact, the court of appeals will presume that it was on the law.[83] Where the appellate division grants a new trial on questions of fact, the court of appeals cannot review even rulings duly excepted to if there was a question of fact involved.[84] Where the appellate division reverses on the law the

manded for retrial, and no facts are recited, it will be presumed that the appellate court found the facts the same as the trial court, and that no cause of action was shown. Norwaysz v. Thuringia Ins. Co., 204 Ill. 234, 68 N. E. 551. Compare Seymour v. O. S. Richardson Fueling Co., 205 Ill. 77, 68 N. E. 716. Opinion of appellate court cannot be resorted to for facts, judgment only will be noticed. Martin v. Martin, 202 Ill. 382, 67 N. E. 1. See 1 Curr. L. 189, n. 88.

70. Martin v. Martin, 202 Ill. 382, 67 N. E. 1; Nowlin v. Hall [Tex.] 79 S. W. 806. See 1 Curr. L. 188, n. 75.

71. Martin v. Martin, 202 Ill. 382, 67 N. E. 1; Trakal v. Heusner Baking Co., 204 Ill. 179, 68 N. E. 399; Maney v. Eyres [Tex. Civ. App.] 77 S. W. 969; Galveston, etc., R. Co. v. Cloyd [Tex. Civ. App.] 78 S. W. 43.

72. Hogan v. Chicago & A. R. Co., 202 Ill. 206, 66 N. E. 1070; Martin v. Martin, 202 Ill. 382, 67 N. E. 1.

73. Ill. Practice act, § 87. Hogan v. Chicago & A. R. Co., 202 Ill. 206, 66 N. E. 1070; Martin v. Martin, 202 Ill. 382, 67 N. E. 1; Irwin v. Northwestern Nat. Life Ins. Co., 207 Ill. 531, 69 N. E. 824; Supple v. Agnew, 202 Ill. 351, 66 N. E. 1069; Baragwanath v. Lasher, 203 Ill. 247, 67 N. E. 781; Hogan v. Chicago & A. R. Co., 208 Ill. 161, 69 N. E. 853. Where the evidentiary facts were stipulated, the effect being left to the court, whether certain water pipes were fixtures. Chicago v. Smith, 204 Ill. 356, 68 N. E. 395. Findings as to negligence, contributory negligence, and assumption of risk held conclusive. Trakal v. Heusner Baking Co., 204 Ill. 179, 68 N. E. 399.

74. Martin v. Martin, 202 Ill. 382, 67 N. E. 1; Hogan v. Chicago, etc., R. Co., 202 Ill. 206, 66 N. E. 1070.

75. Hogan v. Chicago & A. R. Co., 202 Ill. 206, 66 N. E. 1070; Supple v. Agnew, 202 Ill. 351, 66 N. E. 1069; Martin v. Martin, 202 Ill. 382, 67 N. E. 1; Norwaysz v. Thuringia Ins. Co., 204 Ill. 234, 68 N. E. 551; Chicago v. Smith, 204 Ill. 356, 68 N. E. 395; Irwin v. Northwestern Nat. Life Ins. Co., 207 Ill. 531, 69 N. E. 824.

76. Alton v. Foster, 207 Ill. 150, 69 N. E. 783.

77. Harrison v. National Bank of Monmouth, 207 Ill. 630, 69 N. E. 871.

78. In re Granacher's Will, 174 N. Y. 504, 66 N. E. 1109; People v. Fornes, 175 N. Y. 114, 67 N. E. 216. Applies where assessment of tax was affirmed after trial de novo. People v. Feitner, 173 N. Y. 647, 66 N. E. 626. On appeal from certiorari to election contest where no ballots are shown no issue is presented for court of appeals. People v. Fornes, 175 N. Y. 114, 67 N. E. 216. Decision in long form on report of referee. Ide v. Brown [N. Y.] 70 N. E. 101.

79. Mandamus to compel railroad company to restore highway to state of usefulness. People v. Delaware & H. Co., 177 N. Y. 337, 69 N. E. 651.

80. Lindenthal v. Germania Life Ins. Co., 174 N. Y. 76, 66 N. E. 629.

81. Jonee v. Reilly, 174 N. Y. 97, 66 N. E. 649.

82. In re Barefield, 177 N. Y. 387, 69 N. E. 732.

83. Dunlap & Co. v. Young, 174 N. Y. 327, 66 N. E. 964; Blumenherg Press v. Mutual Mercantile Agency, 177 N. Y. 362, 69 N. E. 641. Surrogate's decree. In re Barefield, 177 N. Y. 387, 69 N. E. 732.

84. Vollkommer v. Cody, 177 N. Y. 124, 69 N. E. 277.

court of appeals can examine only, (1) whether material error was committed in receiving or rejecting evidence, (2) whether the conclusion of law is supported by the facts found, and (3) whether any material finding of fact is without evidence to support it.[85] If the appellate division grants a new trial solely on exceptions of law, the court of appeals may review such questions of law, and if the exceptions were not well taken reverse the order and reinstate the judgment.[86] The findings of the appellate division on the facts are binding on the court of appeals.[87] A finding as to what is the law of another state[88] and as to the liability of a trustee for sums misappropriated by a co-trustee,[89] are on questions of fact within this rule. Where the appellate division reverses on the facts as well as the law and the record on further appeal presents a question of fact, the judgment will be affirmed, unless dismissal is necessary to prevent injustice.[90] Where the findings of the trial court are supported by the evidence, and sustain a judgment rendered thereon which has been affirmed by the appellate division, failure to find other facts claimed to have been established by the evidence is not error of law reviewable in the court of appeals.[91] On appeal from an order of affirmance by the general term of the city court of New York, only questions of law can be reviewed, the facts found in the city court being conclusive.[92] Neither can the supreme court exercise discretionary power as to the conduct of the trial,[93] but on appeal from the municipal court the appellate term of the supreme court examines the facts as well as the law.[94] On appeal to the surrogate from an appraisement of the transfer tax, and subsequent appeal to the appellate division, the latter court cannot consider questions not specified in the notice of appeal to the surrogate.[95]

A reversal of the common pleas by the circuit, in Ohio, on a question of law may be reviewed by the supreme court,[96] and in the absence of a recital that the reversal was on the weight of the evidence, it will be presumed to have been on the law.[97]

In Tennessee the supreme court is bound by the finding of facts made by the court of chancery appeals, and also by its inferences of fact from the evidentiary facts found.[98]

Matters not raised in the court of civil appeals of Texas cannot be raised on further appeal to the supreme court.[99]

(§ 13) *H. Effect of decision on former review in same court.*[1]—The decision of an appellate court is binding on that court on a subsequent appeal or writ of error in the same case,[2] where the evidence is in legal effect the same,[3] and no

85. A reversal on the law will be reversed in the absence of any such error. Dunlap & Co. v. Young, 174 N. Y. 327, 66 N. E. 964.

86. Vollkommer v. Cody, 177 N. Y. 124, 69 N. E. 277.

87. Dunlap & Co. v. Young, 174 N. Y. 327, 66 N. E. 964; People v. Fornes, 175 N. Y. 114, 67 N. E. 216; Crooks v. People's Nat. Bank, 177 N. Y. 68, 69 N. E. 228. See 1 Curr. L. 188, n. 76.

88. Spies v. National City Bank, 174 N. Y. 222, 66 N. E. 736.

89. Westerfield v. Rogers, 174 N. Y. 230, 66 N. E. 813.

90. Crooks v. People's Nat. Bank, 177 N. Y. 68, 69 N. E. 228.

91. New York Cent., etc., R. Co. v. Auburn Interurban Elec. R. Co. [N. Y.] 70 N. E. 117.

92. McGonigle v. Keating, 84 N. Y. S. 477; Freedman v. Dickinson, 85 N. Y. S. 333; Frank V. Strauss & Co. v. Welsbach Gas Lamp Co., 42 Misc. 184, 85 N. Y. S. 367.

93. Freedman v. Dickinson, 85 N. Y. S. 333.

94. Fleck v. Neerenberg, 85 N. Y. S. 379; Nieland v. Mahnken, 89 App. Div. 463, 85 N. Y. S. 809.

95. Miller v. Tracy, 86 N. Y. S. 1024.

96, 97. Rheinstrom v. Steiner, 69 Ohio St. 452, 69 N. E. 745.

98. Acts 1895, p. 116, c. 76, § 11. Brown v. Timmons, 110 Tenn. 148, 72 S. W. 958; First Nat. Bank v. U. S. Fidelity & Guar. Co., 110 Tenn. 10, 75 S. W. 1076. See 1 Curr. L. 188, n. 80.

99. City of El Paso v. Ft. Dearborn Nat. Bank, 96 Tex. 496, 74 S. W. 21.

1. See 1 Curr. L. 189.

2. Wilson's Assignees v. Louisville Nat. Bank. Co., 25 Ky. L. R. 1065, 76 S. W. 1095; In re Maher's Estate, 204 Ill. 25, 68 N. E. 169;

matter necessarily involved in the adjudication on the former appeal will be re-examined[4] in the same case, though in an independent subsequent case the court may depart from a rule or principle it may have announced.[5] That the rule laid down has been modified in the interim by other cases is immaterial.[6] All questions raised by the record and necessarily involved in the decision are settled, though not touched upon in the opinion.[7] Matters not necessarily passed upon,[8] or questions which might have been but were not determined on the former appeal are not settled,[9] neither are questions not reviewed because not properly presented for review. If the petition fails to state a cause of action, it may be attacked after remand regardless of the number of times the case has been before the appellate court.[10] Where upon the former appeal the court did not render a judgment determining the rights of the parties, the decision does not bind.[11] The rule does not apply to language not necessary to a decision of the case,[12] nor to mere expressions of opinion as to matters not involved in the decision, nor to questions referred to by intimation only and not determined.[13] Propositions of law on which the court were equally divided are not settled,[14] and a pro-forma affirmance in the nature of a dismissal, resulting from failure to properly present

State v. Board of Com'rs [Ind.] 68 N. E. 295; Schmid v. Frankfort [Mich.] 96 N. W. 1056; Jones v. People's State Bank [Ind. App.] 69 N. E. 466; Stoll v. Loving [C. C. A.] 120 F. 806; Merrill v. Van Camp [Neb.] 96 N. W. 617; Born v. Home Ins. Co., 120 Iowa, 299, 94 N. W. 849; McCord v. Hill, 117 Wis. 306, 94 N. W. 66; Cincinnati, etc., R. Co. v. Wabash R. Co. [Ind.] 70 N. E. 256; Tampa Waterworks Co. v. Tampa [Fla.] 36 So. 174; Collins v. Sherwood, 53 W. Va. 336, 44 S. E. 457; Gray Tie & Lumber Co. v. Farmers' Bank, 24 Ky. L. R. 2319, 74 S. W. 174; Webb v. Porter, 25 Ky. L. R. 746, 76 S. W. 363; State v. Stuart, 102 Mo. App. 26, 74 S. W. 452; Booth & Co. v. Bethel, 25 Ky. L. R. 1747, 78 S. W. 868; Mensing Bros. & Co. v. Cardwell [Tex. Civ. App.] 75 S. W. 347. Sufficiency of judgment on which execution was issued. Wild v. Porter, 173 N. Y. 614, 66 N. E. 1118. That cause of fire was within provisions of policy. Orient Ins. Co. v. Leonard [C. C. A.] 120 F. 808. That negligence complained of was sufficient to authorize a recovery. Johnson v. Chicago, St. P., M. & O. R. Co. [Iowa] 98 N. W. 642. Appellant in former appeal is estopped to deny correctness of prior decision. Reynolds v. Fitzpatrick, 28 Mont. 170, 72 P. 510. Unconstitutionality of turnpike tax law [Acts 1889-90, vol. 2, p. 1385, c. 1034]. Vanceburg & S. L. Turnpike Road Co. v. Maysville & B. S. R. Co., 25 Ky. L. R. 1404, 77 S. W. 1118. Holding that departure in pleading was waived by failure to properly raise timely objection. Herf & Frerichs Chemical Co. v. Lackawanna Line, 100 Mo. App. 164, 73 S. W. 346. Evidence held not similar to that rejected on prior appeal; self serving declaration as to ownership and character of possession. Whitaker v. Whitaker, 175 Mo. 1, 74 S. W. 1029. Ruling of supreme court on prior appeal binds court of appeals. White v. Simonton [Tex. Civ. App.] 79 S. W. 621. See 1 Curr. L. 189, n. 94.

3. Russ v. American Cereal Co., 121 Iowa, 639, 96 N. W. 1092; Brooks v. Miller, 118 Ga. 676, 45 S. E. 485; Strickland v. Western & A. R. Co., 119 Ga. 70, 45 S. E. 721. The case had been remanded with leave to supply necessary facts omitted from the bill, but on subsequent appeal no further information was shown. Dietrich v. Hutchinson, 75 Vt. 339, 56 A. 6. That plaintiff made case for jury. Fitzgerald v. City of Benton Harbor [Mich.] 94 N. W. 186; Lewis v. Upton, 90 App. Div. 453, 86 N. Y. S. 397. Facts only inferable from evidence on first trial, conclusively established on second. Wellihan v. National Wheel Co. [Mich.] 98 N. W. 1003. In the absence of a showing of additional evidence on retrial, it will be presumed there was none. Senior v. Anderson, 138 Cal. 716, 72 P. 349. See 1 Curr. L. 190, n. 97.

4. Connecticut Trust & Safe Deposit Co. v. Fletcher [Neb.] 96 N. W. 988; Edney v. Baum [Neb.] 97 N. W. 262. Amount found due under pleadings and evidence is conclusive. Carpenter v. Lewis, 65 S. C. 400, 43 S. E. 881.

5. Hall v. Blackman [Idaho] 75 P. 608.

6. Jones v. Charleston & W. C. R. Co., 65 S. C. 410, 43 S. E. 884.

7. Oldig v. Fisk [Neb.] 95 N. W. 492; Crew v. Hutcheson, 119 Ga. 142, 46 S. E. 971; Dinkelspiel v. Central Kentucky Asylum for Insane, 24 Ky. L. R. 2240, 73 S. W. 771.

8. Rowan v. Chenoweth [W. Va.] 47 S. E. 80.

9. Reversal for confessed formal error does not settle merits. Gage v. People, 207 Ill. 61, 69 N. E. 635. See 1 Curr. L. 190, n. 99.

10. Edney v. Baum [Neb.] 97 N. W. 262.

11. Magnolia Park Co. v. Tinsley, 96 Tex. 364, 73 S. W. 5.

12. Yank v. Bordeaux [Mont.] 74 P. 77.

13. First Nat. Bank v. Farmers' & Merchants' Bank [Neb.] 96 N. W. 1062; Williams v. Miles [Neb.] 96 N. W. 151; Modern Woodmen of America v. Coleman [Neb.] 96 N. W. 154. Decision on appeal by plaintiff that facts constitute a waiver does not preclude examination on subsequent appeal by defendant of whether evidence to prove such facts is admissible. Knarston v. Manhattan Life Ins. Co., 40 Cal. 57, 73 P. 740.

14. Baldwin v. Burt [Neb.] 96 N. W. 401.

the case concludes nothing.[15] A second appeal brings up only the proceedings of the lower court on the mandate sent down in the prior appeal, and no question decided on the prior appeal can be considered.[16] Where the appellate court holds that plaintiff's evidence was sufficient to go to the jury, a verdict in his favor on the same evidence on retrial will not be disturbed on the sufficiency of the evidence,[17] but such decision does not necessarily require a decision in plaintiff's favor, and where the court sitting as a jury finds against plaintiff on retrial, his decision will not be disturbed.[18] On the other hand, a verdict for plaintiff on evidence that has once been determined insufficient will be set aside.[19] Where the validity of a patent has been sustained in the appellate court, its decision is binding on a lower court, in a suit involving the same patent, as to all matters before the court in the prior case, whether discussed in the opinion or not.[20] Where in an action for a personal injury against two defendants, the jury are instructed that one or both are liable, and instructed to find which, a reversal of a judgment on a verdict finding one liable and exonerating the other does not necessarily determine that the other is liable, but an appeal from the judgment in his favor will be determined on the evidence on which it was founded, irrespective of the other appeal.[21] The supreme court of the United States will revise the decision that a territorial court made on a second writ of error, though the territorial court considered itself bound by its decision on the prior writ, the prior decision not being reviewable in the supreme court for lack of finality.[22] A decree entered in strict accordance with the mandate on a prior appeal will be affirmed on motion.[23] An attempt by a substituted party on second appeal to raise a constitutional question, which in the prior appeal it was decided his predecessor was in no position to raise, must fail.[24] On proceedings in error after a retrial ordered by the court of appeals in Kansas, the supreme court will review the questions decided on the previous appeal, where they are of great public importance, and the decision below raises a conflict in the law.[25] The decision on appeal from an order continuing an injunction against trespass until the hearing of the trespass case is not binding on appeal in the trespass case.[26] A dismissal of an appeal concludes all questions raised by the motion.[27]

§ 14. *Provisional, ancillary, and interlocutory relief.*[28]—Where an order appointing a receiver was appealed to the supreme court and affirmed, and pending that appeal the main case was decided and appealed to the appellate court, the latter court will not enjoin possession by the receiver pending its decision.[29]

§ 15. *Decision and determination. A. Affirmance or reversal.*[30]—Errors which do not prejudice appellant,[31] or are not substantial, do not warrant a re-

15. Bevering v. Smith, 121 Iowa, 607, 96 N. W. 1110.
16. Montgomery County v. Cochran [C. C. A.] 126 F. 456.
17. Fitzgerald v. City of Benton Harbor [Mich.] 94 N. W. 186; Johnson v. Chicago, etc., R. Co. [Iowa] 98 N. W. 642; Lewis v. Upton, 90 App. Div. 453, 86 N. Y. S. 397. Notwithstanding the former judgment of affirmance of the appellate term was reversed on another question by the court of appeals. Kellegher v. Forty-Second St. M. & St. N. Ave. R. Co., 87 App. Div. 630, 84 N. Y. S. 784.
18. Cunningham v. Nilson, 84 N. Y. S. 669.
19. Board of Com'rs of Rio Grande County v. Phye, 31 Colo. 176, 71 P. 1108.
20. Badische Anilin & Soda Fabrik v. A. Klipstein & Co., 125 F. 543.
21. Connor v. General Fire Extinguisher Co., 174 N. Y. 515, 66 N. E. 1106.
22. U. S. v. Denver & R. G. R. Co., 191 U. S. 84, 24 S. Ct. 33.
23. Motion to dispense with printing record. McIntire v. McIntire, 20 App. D. C. 134.
24. Great Plains Water Co. v. Lamar Canal Co., 31 Colo. 96, 71 P. 1119.
25. Lorimer v. Fairchild [Kan.] 75 P. 124.
26. Carter v. White, 134 N. C. 466, 46 S. E. 983.
27. Muckenfuss v. Fishburne [S. C.] 46 S. E. 537.
28. See 1 Curr. L. 190.
29. Chicago & S. E. R. Co. v. Kenney, 29 Ind. App. 506, 68 N. E. 20.
30. See 1 Curr. L. 191.
31. Benson v. Bunting, 141 Cal. 462, 75 P. 59; Denver v. Teeter, 31 Colo. 486, 74 P.

versal,[32] and statutes in some states require the court to disregard immaterial errors;[33] but if error of law be prejudicial, reversal will follow, though the result of

459; Troy v. Brown [S. D.] 99 N. W. 76; Gamewell Fire-Alarm Telegraph Co. v. Fire & Police Telegraph Co., 25 Ky. L. R. 1010, 76 S. W. 862; Koelling v. August Gast Bank Note & Lithographing Co. [Mo. App.] 77 S. W. 474; Allen v. Hazzard [Tex. Civ. App.] 77 S. W. 268. Error favorable to appellant. Thurston's Adm'r v. Prather, 25 Ky. L. R. 1137, 77 S. W. 354. Variance between pleading and proof prejudicial only to appellee. East Jellico Coal Co. v. Golden, 25 Ky. L. R. 2056, 79 S. W. 291. Joint tort feasor has no interest in direction of verdict for his co-defendant. Robinson v. Chicago & A. R. Co. [Mich.] 97 N. W. 689. Appellant cannot complain of findings against another. Ambrose v. Drew, 139 Cal. 665, 73 P. 543. Failure to make finding in respect to a counterclaim partially allowed does not prejudice defendant. Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 75 P. 664. Where the only issue is whether the note sued on was delivered, a verdict generally for plaintiff, not finding the amount of recovery, is no error available to defendant. Buzanes v. Frost [Colo. App.] 75 P. 594. Objections to the allowance of an amendment to defendant's pleas will not be considered where one of plaintiffs has been rightly nonsuited and the other has obtained a verdict of which no complaint is made. Carey v. Moore, 119 Ga. 92, 45 S. E. 998. Plaintiff is not concerned in the regularity of the steps taken by the court to make the officer whose return of service is traversed a party to the proceeding. Branan v. Nashville, C. & St. L. R. Co., 119 Ga. 738, 46 S. E. 882. Defendants cannot complain because the party entitled to judgment waived it and allowed it to go in favor of others. Page v. Southern Const. Co., 25 Ky. L. R. 1634, 78 S. W. 879. A defendant who was served cannot object that others were not, the judgments being separate as to each defendant. In re McGee St. [Mo.] 74 S. W. 993. Appellant is not prejudiced by a conflict between an incorrect instruction given in his behalf and a correct one given for his adversary. Weston v. Lackawanna Min. Co. [Mo. App.] 78 S. W. 1044; Fehlhauer v. City of St. Louis [Mo.] 77 S. W. 843. Instruction on exemplary damages not considered when none are awarded. Sonnen v. St. Louis Transit Co., 102 Mo. App. 271, 76 S. W. 691. Error in instructing as to quotient verdicts not reviewable in absence of showing that one was rendered. Kolb v. St. Louis Transit Co., 102 Mo. App. 143, 76 S. W. 1050. An instruction imposing an illegal burden on plaintiff does not prejudice defendant. York v. Farmers' Bank [Mo. App.] 79 S. W. 968. That judgment was rendered in favor of plaintiff's attorney for half the recovery, that amount having been assigned him as a contingent fee, did not prejudice defendant. Gulf, C. & S. F. R. Co. v. Cooper [Tex. Civ. App.] 77 S. W. 263. See 1 Curr. L. 191, n. 22.

32. Parmly v. Farrar, 204 Ill. 38, 68 N. E. 438; Baldwin v. Burt [Neb.] 96 N. W. 401; McCrea v. McGrew [Idaho] 76 P. 67; Pacey v. McKinney [C. C. A.] 125 F. 675; Cook v. Littlefield, 98 Me. 299, 56 A. 899; Adams v. Elwood, 176 N. Y. 106, 68 N. E. 126; Jones v. City of Chicago, 206 Ill. 374, 69 N. E. 64; Brown v. Waterbury, 75 Conn. 727, 54 A. 1006; Tunnicliffe v. Fox [Neb.] 94 N. W. 1032; Clark v. Wolf [Neb.] 96 N. W. 435; Ramlose v. Dollman, 100 Mo. App. 347, 73 S. W. 917; Hannon v. St. Louis Transit Co., 102 Mo. App. 216, 77 S. W. 158. Objectionable conclusion of fact and law stricken out, remainder necessitating same judgment as that rendered. Kratz v. Cook [Ind. App.] 68 N. E. 689. Inaccurate language of complaint in speaking of transaction fully described therein treated on appeal as having been amended to conform to proof. Whittern v. Krick, 31 Ind. App. 577, 68 N. E. 694. Insufficiency of paragraph of complaint not relied on at trial. Insurance Co. of North America v. Hegewald, 161 Ind. 631, 66 N. E. 902. Subsequent admittance cures error in rejecting evidence. Pittsburgh, etc., R. Co. v. McNeil [Ind. App.] 69 N. E. 471. Amendment to judgment so as to provide for issue of execution. Knotts v. Crossly [Neb.] 95 N. W. 848. Action against makers of note and executor claiming that testator was surety merely, judgment determining rights not set aside for want of cross petition [Code § 3601]. Pratt v. Fishwild, 121 Iowa, 642, 96 N. W. 1089. Error in awarding right to open and close. Shaffer v. Des Moines Coal & Hay Co. [Iowa] 98 N. W. 111. Rejection of evidence that could not have changed result of trial in court. In re Rice's Will, 81 App. Div. 223, 81 N. Y. S. 68. Joint judgment against parties severally liable is harmless as to them. Johnson v. Bott [Colo. App.] 72 P. 612. Failure to enter findings of fact and conclusions of law in record affects no substantial right and is not ground for reversal. Kerns v. Lee [Or.] 75 P. 140. Instructions refused, substantially embodied in others. D'Arcy v. Mooshkin, 183 Mass. 382, 67 N. E. 339. Error in failing to require security for costs will not cause reversal of a judgment for plaintiff affirmable on the merits. Good Eye Min. Co. v. Robinson, 67 Kan. 510, 73 P. 102. Without regard to the theory upon which it is based, a judgment of the trial court will be affirmed unless there be material error. Woodmen Acc. Ass'n v. Hamilton [Neb.] 97 N. W. 1017. Where the court has jurisdiction of a vacation appeal, the denial of a term time appeal which would have resulted in no benefit to appellant is no ground of reversal. Baltimore & O. R. Co. v. Ryan, 31 Ind. App. 697, 68 N. E. 923. See 1 Curr. L. 191, n. 22.

33. Okl. St. 1893, § 4018. Blackwell v. Hatch, 13 Okl. 169, 73 P. 933. Wils. Rev. & Ann. St. 1903, § 4344. Graham v. Heinrich, 13 Okl. 107, 74 P. 328. Shannon's Code, § 6351. Pennsylvania R. Co. v. Naive [Tenn.] 79 S. W. 124; Sewell v. Tuthill [Tenn.] 79 S. W. 376. Where the entire record discloses that the judgment is clearly right, unsubstantial errors which do not go to the merits will be disregarded. People's Bank of Pratt v. Frick Co., 13 Okl. 179, 73 P. 949. Amendable defects are considered amended or disregarded in Washington [Ball. Code, § 6535]. Smith v. Newell, 32 Wash. 369, 73 P. 369; Selby v. Vancouver Waterworks Co., 32 Wash. 522, 73 P. 504. Where a judgment of the municipal court is supported by the evi-

the trial might have been the same without the error.[34] A general verdict for defendant where an invalid defense was submitted cannot be sustained.[35] A final decree rendered in the absence of necessary parties must be reversed and remanded in order that proper parties may be made regardless of how notice of the defect is brought to the attention of the court.[36] Where plaintiff fails to make out a case, a judgment rendered on verdict for defendant will be affirmed, notwithstanding errors in defendant's behalf.[37] A ruling correct on the merits or sustainable on a correct theory will not require reversal, though based on a wrong reason,[38] and a verdict supported by sufficient evidence will not be set aside because in conflict with an erroneous instruction.[39] A profitless reversal,[40] or one to permit the recovery of nominal damages,[41] will not be made, nor can plaintiff who is entitled to no verdict object that one in his favor is inadequate;[42] but a verdict for an amount unsupported by the evidence may be set aside, on defendant's appeal, though one for a larger amount would have been sustained.[43] A nominal judgment for a plaintiff entitled to none will be affirmed where he alone appeals, though it would have been reversed had defendant appealed.[44] A judgment that has been satisfied will be affirmed.[45] An affirmance on one party's bill in such terms as to deprive his adversary of any benefit from reversal on his independent bill will preclude consideration of the question presented thereby.[46]

dence, technical errors and defects not affecting the merits will be disregarded [Laws 1902, p. 1583, c. 580, § 326]. Greenberg v. Angerman, 84 N. Y. S. 244.

34. Dysart v. Missouri, K. & T. R. Co. [C. C. A.] 122 F. 223. See 1 Curr. L. 191, n. 23.

35. Heman v. Franklin, 99 Mo. App. 346, 73 S. W. 314.

36. Reger v. Gall [W. Va.] 48 S. E. 147.

37. Instructions. Hesselbach v. St. Louis [Mo.] 78 S. W. 1009; Fehlhauer v. City of St. Louis [Mo.] 77 S. W. 843. Claim against estate not shown, errors in evidence and instructions not considered. Hunicke v. Thomas' Estate, 102 Mo. App. 129, 76 S. W. 659. See 1 Curr. L. 191, n. 23.

38. Where it appears that a motion for new trial dismissed for delay in filing the engrossed bill of exceptions should have been denied on the merits, the dismissal will be affirmed. Galbrith v. Lowe, 142 Cal. 295, 75 P. 831. Error in failing to compel a witness to answer a question objected to on the ground of privilege is not reversible where the answer is inadmissible as evidence. Bullard v. Smith, 28 Mont. 387, 72 P. 761.

39. Collins v. George [Va.] 46 S. E. 684. Disregard by jury of erroneous instruction is harmless. Stoner v. Mau [Wyo.] 72 P. 193. That the verdict is contrary to an erroneous instruction does not require reversal. Johnston v. Kleinsmith [Tex. Civ. App.] 77 S. W. 36. The court will not inquire as to whether instructions to jury were erroneous, where the verdict is the only one justifiable by the evidence. Kielbeck v. Chicago, B. & Q. R. Co. [Neb.] 97 N. W. 750; American Order of Protection v. Stanley [Neb.] 97 N. W. 467.

40. Where same judgment would again be entered because of change of circumstances. Richards v. Enlow Cattle Co. [Neb.] 98 N. W. 659. Dismissal of injunction bill, the subject of which has expired. Jones v. Smith [Neb.] 97 N. W. 304. Where defendant was entitled to affirmative relief by reason of a tender filed below, a judgment refusing it will not be reversed where he has since withdrawn the tender. Whiting v. Doughton, 31 Wash 327, 71 P. 1026. Reversal will not be granted where the evidence upon which it is claimed a different result might be reached has been destroyed. In re Campbell, 124 F. 417. Time for which liquor license is sought having expired. State v. Harrison, 173 Mo. 19, 72 S. W. 1072. Decree for defendant in injunction affirmed where property has been finally adjudged to him in another suit. Philippi v. American Brass & Mfg. Co. [Mo. App.] 78 S. W. 77. See 1 Curr. L. 192, n. 33.

41. Judgment for defendant will not be reversed where plaintiff is entitled only to nominal damages. Ladd v. Redle [Wyo.] 75 P. 691; Gilbertson v. Incorporated Town of Lake Mills [Iowa] 94 N. W. 481; Cook v. Smith, 67 Kan. 53, 72 P. 524. See 1 Curr. L. 191, n. 28.

42. Masor v. Jacobus, 84 N. Y. S. 589. Plaintiff cannot complain of amount of judgment for all he would have been entitled to in a proper action, where technically he is entitled to none at all. Talcott v. Janasson, 85 N. Y. S. 833.

43. Myers v. Myers, 86 App. Div. 73, 83 N. Y. S. 236. Compare Galef v. Finkelstein, 84 N. Y. S. 856. Where a jury is instructed to return a verdict for the amount of a license tax sued for, if they find it to be reasonable and for such a sum as they deem just, if they find it to be unreasonable, and return a verdict for less; the rule that a defendant cannot object to too small a verdict does not apply, since if the tax is unreasonable, it is wholly void and neither court nor jury could assess a less sum. Postal Telegraph-Cable Co. v. New Hope, 192 U. S. 55, 24 S. Ct. 204.

44. Adler v. Schaumberger, 84 N. Y. S. 235.

45. Horwitz v. Reinert, 84 N. Y. S. 124; Jouda v. Kaplan, 84 N. Y. S. 863.

46. Edwards v. Central of Georgia R. Co., 118 Ga. 678, 45 S. E. 462.

Counsel will not be encouraged in stubborn efforts to demonstrate that rulings upon unimportant and trifling matters of practice are erroneous.[47] Manifest error in submitting an issue of law to the jury will necessitate a reversal where the verdict is not responsive to the issues and it does not appear what else was submitted,[48] and where the damages were assessed under an invalid count, the judgment will be reversed, though the declaration contains a good count and the damages are for a sum that would be sustained under the valid count.[49] An incorrect assessment for street improvement will not be disturbed where appellant fails to show that his assessment would be materially less under a correct apportionment.[50] Where both parties bring error and establish it by the record, reversal must follow.[51] Decision may be had by agreement.[52] A void judgment cannot be reversed in Kentucky before a motion to set it aside has been made and overruled below.[55]

Where a party has committed a defect or default in proceedings, a pro forma affirmance may be made without consideration of the merits,[54] as where pleadings necessary to a determination of the issues are not in the record and are beyond the reach of the court;[55] and affirmance follows where the alleged statement of facts is stricken from the files and no issue is presented on the record proper;[56] so where there is no real dispute.[57] An application for affirmance on the ground of failure to perfect the appeal will be denied where not preceded by the proper statutory steps,[58] and where the appellant on being granted an appeal on terms makes no move to comply, a presentation of the record for affirmance is unnecessary, as the judgment below stands.[59] In Texas, failure of appellant to file briefs below is not ground for affirmance on certificate.[60] Appellee may not have an

47. Cordill v. Minnesota Elevator Co., 89 Minn. 442, 95 N. W. 306.

48. Margulies v. Goldstein, 85 N. Y. S. 1024.

49. Illinois Cent. R. Co. v. Harper [Miss.] 85 So. 764.

50. Barrett v. Falls City Artificial Stone Co., 21 Ky. L. R. 669, 52 S. W. 947; Levi v. Coyne, 22 Ky. L. R. 493, 57 S. W. 790; Barber Asphalt Pav. Co. v. Gaar, 24 Ky. L. R. 2227, 73 S. W. 1106; Zender v. Barber Asphalt Pav. Co., 24 Ky. L. R. 2279, 74 S. W. 201; Schuster v. Barber Asphalt Pav. Co., 24 Ky. L. R. 2346, 74 S. W. 226; Chawk v. Beville, 21 Ky. L. R. 1769, 56 S. W. 414; McHenry v. Selvage, 99 Ky. 235, 35 S. W. 645; Snyder v. Barber Asphalt Pav. Co., 24 Ky. L. R. 2348, 73 S. W. 1118.

51. Kuhlman v. Cole [Neb.] 98 N. W. 419.

52. In re Bill's Estate, 141 Cal. xviii., 74 P. 704. Reversal in accordance with stipulation will be granted, though affirmance would have resulted otherwise. Mantle v. Largey, 28 Mont. 38, 72 P. 303. See 1 Curr. L. 192, n. 35.

53. Appeal after motion and before decision is premature [Civ. Code Prac. § 763]. Lyon's Ex'x v. Logan County Bank's Assignee, 25 Ky. L. R. 1668, 78 S. W. 454.

54. Failure to furnish briefs. Turpin v. Gale [Md.] 57 A. 208; Davison v. Keeton [Tex. Civ. App.] 73 S. W. 1083. Brief failing to comply with Rule 10, subd. 3. Larkin v. Butte & B. Consol. Min. Co., 28 Mont. 41, 72 P. 304; Knobb v. Reed, 28 Mont. 42, 72 P. 304; Allen v. Reely, 28 Mont. 525, 73 P. 118; Frederick v. McMahon, 28 Mont. 263, 72 P. 620. No bill of exceptions. West v. Richmond R. & E. Co. [Va.] 46 S. E. 330. No abstract or briefs. Harburger v. Smith, 177 Mo. 359, 76 S. W. 623. No abstract of record or evidence. Hickox v. Springfield, 208 Ill. 28, 69 N. E. 846. Failure to perfect appeal in time [Rev. St. 1899, § 812]. Long v. Hawkins [Mo.] 77 S. W. 77. Election case, failure to file transcript, on appeal from county to circuit court [Shannon's Code, §§ 4882, 4883]. Hayes v. Kelley [Tenn.] 76 S. W. 891. Failure of record to show that assignments of error were filed below. Gidcumb v. Gidcumb [Tex. Civ. App.] 73 S. W. 827. No question presented by record. McCormick v. Carey [Neb.] 95 N. W. 364. Only proposition urged being one that cannot be reviewed without statement of facts, and statement not approved or ordered filed by trial judge. Kennedy v. Birch [Tex. Civ. App.] 74 S. W. 593. Failure for 1½ months after receipt of transcript to file it, sufficient excuse for filing promptly on receipt, though late, being shown. Faux v. Lamaire [Tex. Civ. App.] 77 S. W. 439. Insufficient number of plats filed necessary to understanding of case. Stephens v. McDonald, 132 N. C. 135, 43 S. E. 592. See 1 Curr. L. 192, n. 37.

55. Error to judgment in certiorari to review judgment of justice, original declaration not brought up to superior court. Ross v. Mercer, 118 Ga. 905, 45 S. E. 787.

56. Sprague v. Meagher, 32 Wash. 62, 72 P. 708.

57. Judgment for sum admitted to be due and no provision for body execution as demanded. Kush v. Howes, 85 N. Y. S. 1124. See 1 Curr. L. 192, n. 38.

58. Rev. St. 1899, § 812. Kronck v. Reid [Mo. App.] 79 S. W. 1001.

59. State v. Thomas [Tenn.] 77 S. W. 667.

60. Rev. St. 1895, arts. 1016, 1017, limit-

affirmance for want of prosecution on a certificate filed after the term at which the transcript should have been presented, a writ of error having been sued out in the interim.[61]

Failure to file briefs is tantamount to a confession of error, but reversal will not follow failure to argue a point unless necessary for the protection of the court.[62]

An equal division of sitting and qualified judges makes an affirmance.[63] Reversal or affirmance must be entire, unless parts of the judgment are severable,[64] but where a judgment consists of severable parts, there may be affirmance as to the part not affected by the error, and reversal as to the rest.[65] A judgment bad as to one is bad as to all, and must be reversed as to all defendants, though it would have been proper against certain of them.[66] Where in trespass to try title the judgment is in favor of intervenors, and defendants alone appeal, it will be affirmed as to plaintiffs, though reversed as to defendants and intervenors.[67] As between appellees no change can be made in the judgment appealed from.[68] Affirmance of an interlocutory judgment will lead to affirmance of the final decree, where no other questions are presented.[69] On reversal, appellee will be adjudged to repay money he has received on the judgment, with legal interest.[70] Where a judgment in a creditor's action to compel an executor to sell real estate to pay debts is reversed, the defendant is entitled to a restitution of the property and an accounting for mesne profits, notwithstanding a new trial was ordered.[71]

Reversal on terms.[72]—The court cannot, on reversing a judgment for plaintiff in slander, put defendant on terms by which the judgment will stand as security for any judgment rendered on retrial, though the original defendant has deceased pending appeal, and reversal will abate the suit.[73]

ing grounds to failure to file record on appeal. Gulf, C. & S. F. R. Co. v. Hall [Tex. Civ. App.] 76 S. W. 590.

61. Western Union Tel. Co. v. Wofford [Tex. Civ. App.] 72 S. W. 520.

62. Irvin v. Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258.

63. State v. Sunapee Dam Co. [N. H.] 55 A. 899; Com. Title, Ins. & Trust Co. v. Coleman, 205 Pa. 535, 55 A. 320; Gibbs v. Seibt, 118 Wis. 145, 93 N. W. 1097; Central of Georgia R. Co. v. Wallace, 119 Ga. 238, 45 S. E. 87. See 1 Curr. L. 192, n. 39.

64. Seymour v. Richardson Fueling Co., 205 Ill. 77, 68 N. E. 716. Failure of one of joint defendants to perfect appeal, and failure of defendant, as to whom judgment is totally void, to object on that ground immaterial. Schoenberger v. White, 75 Conn. 605, 54 A. 882. Where the question submitted to the jury is whether plaintiffs own certain tracts of land or any part thereof, and they answer "no," any error as to one of the tracts will result on appeal in reversing the judgment and granting a new trial as to all. Rowe v. Cape Fear Lumber Co., 133 N. C. 433, 45 S. E. 880. See 1 Curr. L. 192, n. 42.

65. City of Buffalo v. Delaware, L. & W. R. Co., 176 N. Y. 308, 68 N. E. 587. Decree granted on condition unfavorable to appellant affirmed without condition, other party not appealing. O'Connor v. Hendrick, 90 App. Div. 432, 86 N. Y. S. 1. An action of assumpsit is severable from the attachment issued in aid thereof. Mullen v. Camp [Fla.] 35 So. 402. Where the action is for the recovery of distinct parcels of land, and successful as to a part only, though all should have been recovered, the judgment may be affirmed in so far as it is correct, and reversed and remanded as to the other matters. Village of Lee v. Harris, 206 Ill. 428, 69 N. E. 230.

66. One defendant having valid personal defense included in general judgment against several. Seymour v. O. S. Richardson Fueling Co., 205 Ill. 77, 68 N. E. 716. Where a party not served and not appearing was erroneously included in the judgment, a reversal was necessary as to all parties. Hutchinson v. Sine, 105 Ill. App. 638. Judgment for costs to two defendants, one only entitled. Kriz v. Peege, 119 Wis. 105, 95 N. W. 108.

Contra: Where there is no evidence warranting a judgment as to one of defendants it may be modified by reversal as to him and affirmance as to his codefendant. Crow v. Williams [Mo. App.] 79 S. W. 183.

67. Eddy v. Bosley [Tex. Civ. App.] 78 S. W. 565.

68. Schwartz v. Rosetta Gravel Pav. & Improvement Co., 110 La. 619, 34 So. 709.

69. Order denying injunction, and judgment sustaining demurrer and dismissing bill. Atlanta Trust & Banking Co. v. Nelms, 119 Ga. 630, 46 S. E. 851.

70. Fox v. Willis, 24 Ky. L. R. 2173, 73 S. W. 743.

71. Holly v. Gibbons, 177 N. Y. 401, 69 N. E. 731.

72. See 1 Curr. L. 195.

73. Irvine v. Gibson, 25 Ky. L. R. 1418, 77 S. W. 1106.

(§ 15) *B. Transfers and removals, and certifications or reservations.*[74]—The circuit court of appeals will certify a question as to the jurisdiction of the circuit court to the supreme court, and meanwhile reserve the other questions in the case.[75] An appeal to the wrong court, in Missouri, will be transferred by that court suo motu to the court having jurisdiction.[76] And in case of an erroneous transfer by the court of appeals the supreme court will return the cause to that court.[77] Where a case is appealed, in Indiana, to the supreme court on a constitutional question, the action of that court in transferring the case to the appellate court, which is without jurisdiction of such questions, in effect decides such question adversely to the appellant.[78]

(§ 15) *C. Remand or final determination.*[79]—Final determination may be given[80] if the pleadings show conclusively that plaintiff in error is entitled to judgment,[81] or if no different or more favorable result can be reached on new trial;[82] but if any material fact or right is in doubt,[83] or the interests of justice require it,[84] or if there be evidence tending to make a case or defense, though

74. See 1 Curr. L. 193.

75. Sun Printing & Pub. Ass'n v. Edwards [C. C. A.] 121 F. 826.

76. Reed v. Culp [Mo. App.] 74 S. W. 422; Dennison v. Keasbey [Mo. App.] 78 S. W. 1041; Jackson v. Binnicker [Mo.] 77 S. W. 740.

77. Porter v. Kansas City & Northern Connecting R. Co., 175 Mo. 96, 74 S. W. 992; Wilden v. McAllister [Mo.] 77 S. W. 730.

78. Jurisdiction concluded by transfer. Frank Bird Transfer Co. v. Krug, 30 Ind. App. 602, 65 N. E. 309.

79. See 1 Curr. L. 193.

80. Where the trial court committed no error in the rejection of evidence, and the record is sufficient for the court on appeal to determine the case on its merits, the court will do so and direct a proper judgment without remanding the case to the lower court. Security Sav. Soc. v. Cohalan, 31 Wash. 266, 71 P. 1020. Where judgment on the pleadings is entered for plaintiff on the overruling of a demurrer to the complaint and refusal to plead further, it is discretionary with the supreme court on affirmance to enter final judgment or remand for further proceedings. McLeod v. Lloyd, 43 Or. 260, 74 P. 491. Prior to the amendment of 1903 in New York, where the trial court entered its decision in the short form, the appellate division was required to review all questions of fact and law and grant such judgment to either party as the facts warranted, without ordering a new trial [Code Civ. Proc. 1022 as amended by Laws 1903, c. 85, p. 237]. Multz v. Price, 91 App. Div. 480, 86 N. Y. S. 480.

81. Story v. Robertson [Neb.] 98 N. W. 825. If defendants' pleas show no defense, the court on reversal will render judgment for plaintiff. Hurlburt & Sons v. Straub [W. Va.] 46 S. E. 163.

82. Cohen v. Boccuzzi, 86 N. Y. S. 187. Evidence was all received and afterwards rejected and included in bill of exceptions, and no rulings made that indicated that appellee had any evidence excluded, or failed to offer any he could produce. Lippincott v. Lawrie, 119 Wis. 573, 97 N. W. 179. See 1 Curr. L. 193, n. 56.

83. Fischbeck v. Mielenz, 119 Wis. 27, 96 N. W. 426; Western Union Tel. Co. v. Carver [Tex. Civ. App.] 74 S. W. 55. Verdict for full amount of counterclaim ignoring direction to find for plaintiff on his claim, new trial necessary. Smith v. Morrison [Colo. App.] 74 P. 535. Judgment against principal and agent who was also surety. Reversal as to principal, final judgment against surety cannot be rendered. Tabet v. Powell [Tex. Civ. App.] 78 S. W. 997. Where the trial court changes a special finding of the jury from an affirmative to a negative answer, because contrary to the undisputed evidence, the supreme court on reversal may grant a new trial [Rev. St. 1898, § 3071]. Blohowak v. Grochoski, 119 Wis. 189, 96 N. W. 551. Where the court below decides a case as upon bill and answer, overlooking the fact that a general replication has been filed the decree will be reversed and the case remanded for decision as though no decree had been entered. Echols v. Tracewell, 52 W. Va. 614, 44 S. E. 164. Final judgment cannot be awarded in an election contest where the trial court has found that election officers were guilty of wilful malconduct, and it is not shown, and cannot be determined, how much or in what way the vote was affected thereby. Kenworthy v. Mast, 141 Cal. 268, 74 P. 841. Where a complaint contains two distinct causes of action, and a counterclaim is pleaded to both of them growing out of the contract on which the second cause of action is founded, and on the trial orders are entered setting aside the verdict on the first cause of action as inadequate, denying defendant's motion to set aside the verdict on the second cause, and dismissing the counterclaim, which orders on appeal are all affirmed, the defendant is entitled to a retrial of the whole case without express provision therefor, and without motion therefor in the appellate court. Vernon v. O'Bannon Co., 86 App. Div. 374, 83 N. Y. S. 878. See 1 Curr. L. 193, n. 65.

84. Laporte v. Laporte, 109 La. 958, 34 So. 38; Smith's Heirs v. Johnston, 110 La. 557, 34 So. 677. On reversal of a judgment as unsupported by the evidence, it is within the discretion of the court to remand for a new trial, but such course will be followed only when it appears that the ends of justice will be best served thereby. Maupin v. Scottish Union & Nat. Ins. Co., 53 W. Va. 657, 45 S. E. 1003. In furtherance of justice, where a finding is set aside, and the former trial

the weight be against it,[85] or where the reversal is not based upon findings or a verdict,[86] or where the verdict or findings on which the judgment is based are not supported by the evidence,[87] a remand for a new trial is necessary.[88] Where the appellate court of Illinois reverses a case tried to a jury, for an error of law, it should remand it for a new trial.[89] Where an equitable proceeding is erroneously brought before the clerk and appealed to the superior court, that court will be permitted to retain jurisdiction and make all necessary orders, and to that end the case will be redocketed in that court.[90] Remand will not be made on reversal of judgment for plaintiff on the ground that defendant owed him no legal duty,[91] or where plaintiff could not recover in any event.[92] Remand will not be made in a chancery case on account of newly discovered evidence which is merely cumulative.[93] Where the issues are numerous, and the trial involved much time and expense, a retrial as to all will not be granted, on the ground that the finding on an unimportant issue is not sustained by the evidence.[94] On appeal from a decree of specific performance for complainant after the improper sustaining of a demurrer to the cross bill, final decree for specific performance cannot be entered, but the case must be remanded for issue on the cross bill.[95] The appellate court of Illinois may reverse without remanding, on the ground that the weight of evidence did not authorize the verdict, and in such case the facts found will conclude the supreme court, but it may inquire into the law arising out of such facts.[96]

Judgment may be modified,[97] if everything necessary to advise the court in so doing is before it,[98] or the facts admitted and the judgment as modified, af-

was unsatisfactory, instead of entering or directing a new decree, the appellate court will remand the cause for further proceedings. Faulkner v. Sims [Neb.] 94 N. W. 113.

85. Williams v. Delaware, L., & W. R. Co., 81 App. Div. 444, 80 N. Y. S. 945.

86. Schmid v. Frankfort [Mich.] 96 N. W. 1056.

87. Where the judgment appealed from correctly followed the findings, which were erroneous and not supported by the evidence, the supreme court on reversal, cannot enter judgment for the opposite party, but can only remand for retrial. Gwin v. Calegaris, 139 Cal. 384, 73 P. 851. Where the report of a referee is discredited by findings receiving no support from the evidence a new trial must be had. Fountain v. Kinney, 66 Kan. 797, 72 P. 392. In Michigan, the court will not enter judgment for appellant, where there is a reversal because of lack of evidence to sustain the verdict, for the reason that the evidence on a new trial may not be the same as in the record. Montmorency County v. Putnam [Mich.] 97 N. W. 399. Where plaintiff merely moved for judgment notwithstanding verdict, which was denied and judgment entered for defendant, final determination cannot be given on reversal on appeal, a new trial being necessary. Standard Mfg. Co. v. Slot [Wis.] 98 N. W. 923. On a general reversal on appeal on the evidence, the appellee is entitled to a retrial as a matter of right. Taicott v. Delta County Land & Cattle Co. [Colo. App.] 73 P. 256.

88. Bray v. O'Rourke, 89 App. Div. 400, 85 N. Y. S. 907. Judgment for defendant reversed but not clear that plaintiff could not recover. Id.

89. Seymour v. Richardson Fueling Co., 205 Ill. 77, 68 N. E. 716.

90. Smith v. Gudger, 133 N. C. 627, 45 S. E. 955.

91. Sykes v. St. Louis & S. E. R. Co. [Mo.] 77 S. W. 723.

92. Contributory negligence. Gulf, etc., R. Co. v. Matthews [Tex. Civ. App.] 74 S. W. 803. Where plaintiff's testimony would not justify a verdict in any event and it does not appear that any testimony offered by him has been excluded, a reversal of a judgment in his favor will not be accompanied by a remand for a new trial. Waters v. Anthony, 20 App. D. C. 124. Where a bill and the evidence show an unenforceable claim, a decree for complainant will be reversed and the bill dismissed though no demurrer was interposed below. Poling v. Williams [W. Va.] 46 S. E. 704.

93. Partnership accounting. Rowan v. Lamb [Miss.] 35 So. 427.

94. Rose v. Mesmer, 142 Cal. 322, 75 P. 905.

95. Katzenberger v. Weaver, 110 Tenn. 620, 75 S. W. 937.

96. Supple v. Agnew, 202 Ill. 351, 66 N. E. 1069.

97. See 1 Curr. L. 194.

98. Mechanics' lien on too much land may be limited to the proper area. Dusick v. Green, 118 Wis. 240, 95 N. W. 144. Striking out provision for arrest of defendant. Auerbach v. Rogin, 40 Misc. 695, 83 N. Y. S. 154. Failure to adjudge costs in favor of defendant in ejectment disclaiming possession will be corrected. Webb v. Reynolds [Ala.] 36 So. 15. Replevin by chattel mortgagee, judgment for defendant modified by canceling the mortgage. Kimball & Co. v. Deaton, 102 Mo. App. 45, 74 S. W. 427. A judgment for defendant in ejectment granting affirmative relief and giving him certain lands not sued for by plaintiff, and not

firmed;[99] but remittitur cannot be ordered where the facts necessary to a decision are not before the court,[1] and the evidence may be different on a new trial,[2] nor where the court is not authorized to find the facts.[3] Clerical errors,[4] and errors in computation may be corrected.[5] It cannot be modified in favor of a party not appealing,[6] and judgment for an amount greater than that recovered below cannot be awarded on appellee's cross assignment, though the proof is clear.[7] Where in conversion, possession and damages are both awarded, and there is no basis for the former, the judgment cannot be modified by eliminating the provision for possession, since the damages are presumptively for detention and not value.[8] On appeal from a circuit court to a circuit court of appeals by one of several attorneys from an order allowing them compensation out of a trust fund, the court is not limited to a redivision of the total amount awarded them, but may increase or decrease the allowance of the appellant without disturbing the others, or may increase or decrease the total allowance and redivide it as seems equitable.[9] Where a case has been tried to the court and conclusions of fact filed, the judgment can be reformed on appeal, and such judgment rendered as the record shows should have been rendered.[10] Where the supreme court of Missouri declines jurisdiction on the ground that the constitutional question was not properly raised below, the court of appeals will, notwithstanding that decision, relieve appellant from that portion of the judgment founded on the unconstitutional[11] statute, the case being clear.

Remand with directions.[12]—Judgment may be ordered for appellee on reversal, if all facts necessary to a determination of the party's rights are before the court.[13] On an appeal from a judgment on the judgment roll alone, a finding that nothing was due defendant on his cross complaint will prevent the direction

claimed by defendant, may be corrected on appeal without remanding. Johnson v. Fluetsch, 176 Mo. 452, 75 S. W. 1005. A decree erroneously divesting defendant's wife of all title to certain land fraudulently conveyed may be corrected by modification in respect to her dower. Bradshaw v. Halpin [Mo.] 79 S. W. 686. See 1 Curr. L. 194, n. 71.

99. Personal judgment for deficiency against defendant not personally liable. Levy v. La Fountain, 81 App. Div. 636, 81 N. Y. S. 468. A modification of the judgment to conform to an admission of error by appellee may be made. Blackwell v. Hatch, 13 Okl. 169, 73 P. 933. See 1 Curr. L. 194, n. 71.

1. Johnson v. City of Albany, 86 App. Div. 567, 83 N. Y. S. 1002. Age of parent necessary to determine amount of award for death of son. Robbins v. North Jersey St. R. Co. [N. J. Law] 57 A. 262. See 1 Curr. L. 194, n. 72.

2. Hall v. State, 92 App. Div. 96, 87 N. Y. S. 338.

3. Appellate division. Small v. Burke, 86 N. Y. S. 1066.

4. Clerical error in amount of judgment. Poerschke v. Horowitz, 84 App. Div. 443, 82 N. Y. S. 742. A clerical error in the judgment which may be corrected by the pleadings and evidence will not necessitate a reversal. Erroneous numbering of survey in question. Adkinson v. Porter [Tex. Civ. App.] 73 S. W. 43.

5. Error in calculating interest. Dils v. Hatcher, 25 Ky. L. R. 891, 76 S. W. 514.

6. Where one only of the bondholders objects to the amount allowed a trustee and receiver, the decree will be modified only to the extent that will give the complaining party his proper dividend. Girard Life Ins. Annuity & Trust Co. v. Bedford Coal & Iron Co., 20 Pa. Super. Ct. 304. See 1 Curr. L. 194, n. 78.

7. Groos & Co. v. Brewster [Tex. Civ. App.] 78 S. W. 359.

8. McCarthy v. James Rowland & Co., 85 N. Y. S. 327.

9. Glidden v. Cowen [C. C. A.] 123 F. 48.

10. Jackson v. Jernigan [Tex. Civ. App.] 77 S. W. 271.

11. Attorney's fee in action against railroad for killing stock [Rev. St. 1889, § 2613]. Brown v. Missouri, etc., R. Co. [Mo. App.] 78 S. W. 273.

12. See 1 Curr. L. 194.

13. Texas Fruit Co. v. Lane, 101 Mo. App. 712, 74 S. W. 400. Where the court set aside special findings in plaintiff's favor by reason of a misapplication of legal principles to the evidence, the court on plaintiff's appeal will order judgment on the verdict without directing a new trial. Ellis v. Chicago, etc., R. Co. [Wis.] 98 N. W. 942. Where the facts are sufficiently found below and the judgment reached is the result of an erroneous application of the law thereto, judgment will be directed without a retrial. Rew v. Independent School Dist. [Iowa] 98 N. W. 802. Where a special verdict has been rendered, and a motion for judgment non obstante denied, the supreme court on reversal may order judgment for defendant. Muench v. Heinemann, 119 Wis. 441, 96 N. W. 800. See 1 Curr. L. 195, n. 82.

of judgment in his favor.[14] Remand with leave to amend may be made in a proper case,[15] and where a judgment sustaining a demurrer to the declaration on general and special grounds was general, but on appeal is sustained only on a special ground which is amendable, plaintiff will be allowed to amend before the judgment of the supreme court is made the judgment of the court below.[16] In case issues of fact necessary to the determination of the cause are not passed upon at the trial, but the testimony is full and convincing, the appellate court will find the facts and direct such decree as its determination may require.[17] On review of a decree denying an injunction and adjudging title and possession in defendant, where the evidence shows title in neither party, the decree will be modified so as to dismiss the bill.[18] On appeal from an interlocutory decree for an injunction and an accounting, the cause will not be remanded with leave to reopen without first reversing, nor will reversal be granted for that purpose, but on proper application the appeal will be dismissed without prejudice, it appearing that the appellee will not be prejudiced thereby.[19] Upon reversal, the question of restitution rests in the sound discretion of the court.[20]

An affirmance may be conditioned,[21] on a remittitur of excessive[22] or illegal sums awarded,[23] or on consent that the judgment be modified by striking out the objectionable relief.[24] A general verdict on several items, one of which is invalid, will be affirmed on remittitur of the amount of the invalid one, it being of trifling importance.[25] Where it is impossible to segregate the damages allowed for various injuries, the admission of incompetent evidence of one of them will not be cured by a remittitur.[26] Judgment in slander cannot be modified by remittitur where founded on error, though defendant has died pending appeal and reversal will have the effect to abate the suit.[27] Where a defendant in ejectment is awarded damages to which he is not entitled, a voluntary remittitur will not cure the error, but the case will be remanded with directions to dismiss the claim for damages.[28] Where plaintiff within the time limited appeals from an order granting a new trial unless he will within a certain time remit part of his recovery, he cannot on appeal have a further opportunity to remit.[29]

(§ 15) *D. Findings, conclusions, or opinions on which decision is predicated.*[30]—The filing of a written opinion is discretionary,[31] and is not necessary

14. Cohen v. Cohen, 141 Cal. 634, 75 P. 100.

15. Where a general demurrer to a defective bill was sustained on the merits, though stating a case for equitable relief, the decree was reversed at the costs of the appellant and remanded with leave to amend or dismiss without prejudice. Fletcher v. Parker, 53 W. Va. 442, 44 S. E. 422. In furtherance of justice, where a decree is reversed, the court will remand the cause with leave to amend the petition and bring in new parties, instead of requiring the expense of a new suit. McCook Irrigation & Water Power Co. v. Crews [Neb.] 96 N. W. 996. Where an erroneous ruling compels plaintiff in his effort to extricate himself to so amend his complaint as to deprive himself of his cause of action, he is entitled to a reversal with permission to restore his original complaint. Bennett v. Mahler, 90 App. Div. 22, 85 N. Y. S. 669.

16. Brown v. Bowman, 119 Ga. 153, 46 S. E. 410.

17. Sanely v. Crapenhoft [Neb.] 95 N. W. 852.

18. Juneau Ferry & Navigation Co. v. Alaska S. S. Co. [C. C. A.] 121 F. 356.

19. Greene v. United Shoe Machinery Co. [C. C. A.] 124 F. 961; Mossberg v. Nutter [C. C. A.] 124 F. 966.

20. Though the general rule requiring restitution upon reversal is frankly recognized. State v. Horton [Neb.] 97 N. W. 434.

21. See 1 Curr. L. 195, n. 87.

22. Parmly v. Farrar, 204 Ill. 38, 68 N. E. 438; Davis v. Hall [Neb.] 97 N. W. 1023; Cahill v. Hagerty, 85 N. Y. S. 1115; Graham v. Merchant, 43 Or. 294, 72 P. 1088; Gallamore v. City of Olympia [Wash.] 75 P. 978.

23. Mesne profits before defendant has possession. Fitzpatrick v. Graham [C. C. A.] 122 F. 401. See 1 Curr. L. 197, n. 88.

24. Craig v. Grafton Water Co., 141 Cal. 178, 74 P. 762.

25. Shuck v. Pfenninghausen, 101 Mo. App. 697, 74 S. W. 331.

26. Chicago & E. I. R. Co. v. Donworth, 203 Ill. 192, 67 N. E. 797. See 1 Curr. L. 195, n. 80.

27. Irvine v. Gibson, 25 Ky. L. R. 1418, 77 S. W. 1106.

28. Benton v. Hopkins, 31 Colo. 518, 74 P. 891.

29. Swett v. Gray, 141 Cal. 63, 74 P. 439.

30. See 1 Curr. L. 195.

where only a question of fact is presented.[32] When a lower court of appeal reverses, it should make findings or conclusions to support and explain its decision,[33] and where it fails to do so, a motion to return the record to the court of appeals and not mandamus is the proper remedy.[34] The ultimate facts which the evidence establishes are what is required, and not the evidence itself,[35] or a finding upon every issue presented.[36]

(§ 15) *E. Modifying or relieving from appellate decree.*[37]—A formal judgment on appeal, based on voluntary appearance by the attorney of defendant in error after his death, is void and will be set aside on the facts being brought to the court's knowledge during the term.[38] Where plaintiff, on the sustaining of a demurrer, elects not to amend his declaration and appeals from a judgment for defendant, the appellate court after affirmance will not modify its judgment so as to allow amendment.[39] A remittitur cannot be ordered returned for the correction of an error therein after being once sent down.[40] Leave given to apply for a bill of review in the court below merely lifts the bar of the appellate decree, and leaves the application to be determined below on its merits, subject to review on appeal as in other cases.[41] In South Dakota, there must be an order to show cause before modification will be considered on motion.[42]

(§ 15) *F. Mandate and retrial.*[43]—Where the court of appeals reverses a decree for the probate of a will, the remittitur is properly filed in the surrogate's court, and the order making the judgment of the court of appeals the judgment of the surrogate's court is properly entered in that court.[44]

Decisions construing mandates are noted below.[45] The entire record may be considered.[46] A misnomer in an unnecessary recital of a party's name in the mandate will not vitiate it.[47]

The statute of Texas providing that no mandate shall issue after more than a year after decision applies to pending cases, and a case is properly dismissed below where the mandate was not taken out for more than a year after the enactment of the statute.[48] Upon remand with directions, the trial court has no jurisdiction but to follow the mandate,[49] which it must do, or a second reversal will

31. Parker v. Atlantic Coast Line R. Co., 133 N. C. 335, 45 S. E. 658.
32. Rev. St. 1898, § 2410. Kraniger v. Schmidt [Wis.] 98 N. W. 929.
33. Ill. Prac. Act, § 88. Martin v. Martin, 202 Ill. 382, 67 N. E. 1; Trakal v. Heusner Baking Co., 204 Ill. 179, 68 N. E. 399; Hogan v. Chicago & A. R. Co., 202 Ill. 206, 66 N. E. 1070; Irwin v. North Western Nat. L. Ins. Co., 200 Ill. 577, 66 N. E. 386; Id., 207 Ill. 531, 69 N. E. 824. See 1 Curr. L. 189, n. 88; also, 1 Curr. L. 195, n. 93.
34. Nowlin v. Hall [Tex.] 79 S. W. 806.
35. Maney v. Eyres [Tex. Civ. App.] 77 S. W. 969; Galveston, etc., R. Co. v. Cloyd [Tex. Civ. App.] 78 S. W. 43; Martin v. Martin, 202 Ill. 382, 67 N. E. 1; Trakal v. Heusner Baking Co., 204 Ill. 179, 68 N. E. 399.
36. Nowlin v. Hall [Tex.] 79 S. W. 806.
37. See 1 Curr. L. 196.
38. Ritchey v. Seeley [Neb.] 94 N. W. 972.
39. Jackson & Sharp Co. v. Fay, 20 App. D. C. 105.
40. Carpenter v. Lewis, 65 S. C. 400, 43 S. E. 881.
41. Board of Councilmen of City of Frankfort v. Deposit Bank [C. C. A.] 124 F. 18.
42. Kelly v. Oksali [S. D.] 97 N. W. 11.
43. See 1 Curr. L. 196.
44. In re Hopkins' Will, 41 Misc. 83, 83 N. Y. S. 890.
45. Construction of mandate on appeal from order as to priority of liens on railroad personalty and earnings under mortgage and claims for labor and materials. Bell v. St. Johnsbury & L. C. R. Co. [Vt.] 56 A. 105. Where the mandate directing certain payments to be applied as of a certain date makes no reference to interest, none should be allowed. Jennings v. Parr, 66 S. C. 385, 44 S. E. 962. A mandate directing a conveyance of the "land" in dispute authorizes a decree for a conveyance of the land and all the minerals thereon. Bogart v. Amanda Consol. Gold Min. Co. [Colo.] 74 P. 882.
46. Wilson's Assignees v. Louisville Nat. Banking Co., 25 Ky. L. R. 1065, 76 S. W. 1095.
47. Southern R. Co. v. Glenn's Adm'r [Va.] 46 S. E. 776.
48. Gen. Laws 1901, p. 122, c. 54. Watson v. Boswell [Tex. Civ. App.] 73 S. W. 985. Case may be dismissed on certificate that no mandate has issued. Watson v. Mirike [Tex. Civ. App.] 73 S. W. 986.
49. Story v. Robertson [Neb.] 98 N. W. 825; McBride v. Whitaker [Neb.] 98 N. W. 847. See 1 Curr. L. 197, n. 20.

follow.[50] The successful party is entitled to a judgment in accordance with the mandate, notwithstanding the intervention of new parties.[51] The trial court will follow the plan determined by the appellate court for the distribution of a fund.[52] When an order of the district court sustaining a claim of privilege by a witness in a bankruptcy case is reversed on appeal, the district court on remand properly vacates an order of the referee discharging the trustee, and requires the witness to attend for further examination.[53] Failure of the clerk below to make the proper entries does not deprive the court of jurisdiction to carry out the provisions of the mandate,[54] and the pendency in the appellate court of a second motion for rehearing is no ground for the disregard of the regular mandate to enforce the decree.[55] The reversal of a foreclosure judgment avoids a sale thereon.[56] Where, on reversal, vacation of a judicial sale is ordered on conditions, it is error for the trial court to refuse to comply with the mandate for noncompliance with the conditions without first setting a time within which compliance must be made.[57] Error cannot be assigned on the entry of a judgment in exact compliance with the judgment of the appellate court.[58]

Mandamus lies to enforce obedience to the mandate.[59]

It is not competent for the circuit court to amend or correct the mandate.[60] Where a case is remanded with directions, the correctness of the decision is not open to question in the trial court,[61] and any error in the remittitur must be corrected by the appellate court.[62] The action of the lower court in making the judgment operative against the proper person as shown by the opinion, regardless of a misnomer in the mandate, is a construction, not an amendment thereof.[63] The reversal of a foreclosure and deficiency judgment as excessive entirely vacates it, and the trial court cannot modify it by deducting the amount adjudged excessive.[64]

Retrial.[65]—No notice of retrial after remand is necessary where a cause once on the docket stays until disposed of,[66] but appellee is entitled to notice of reinstatement of the case below on return of the mandate, after a delay of four years after reversal.[67] Failure for more than a year to prosecute an action after reversal and remand will necessitate its dismissal.[68]

A general reversal of the findings and judgment of the trial court leaves the cause, except as to matters adjudicated on the appeal, in all respects as though no trial had ever been had,[69] and except that a new trial is necessary,[70] reinvests the trial court with discretion to proceed as justice may require.[71] On reversal

50. Direction as to placing on calendar below after amendment. Diebold v. Walter, 89 App. Div. 80, 85 N. Y. S. 437.

51. State v. Thompson [Neb.] 96 N. W. 47.

52. People v. American L. & T. Co., 39 Misc. 647, 80 N. Y. S. 627.

53. Brown v. Persons [C. C. A.] 122 F. 212.

54. Granger v. Sheriff, 140 Cal. 190, 73 P. 816.

55. Michigan Mut. L. Ins. Co. v. Klatt [Neb.] 98 N. W. 436.

56. Cowdrey v. London & San Francisco Bank, 139 Cal. 298, 73 P. 196.

57. Bloor v. Smith, 119 Wis. 163, 96 N. W. 544.

58. Willis v. Felton, 119 Ga. 634, 46 S. E. 857. Objection that sale should not have been made before ascertaining value of property under implied trust. McClellan v. Kerby [Ind. T.] 76 S. W. 295.

59. Schnepper v. Whiting [S. D.] 99 N. W. 84.

60. Southern R. Co. v. Glenn's Adm'r [Va.] 46 S. E. 776.

61. McBride v. Whitaker [Neb.] 98 N. W. 847.

62. Zapf v. Carter, 90 App. Div. 407, 86 N. Y. S. 175.

63. Southern R. Co. v. Glenn's Adm'r [Va.] 46 S. E. 776.

64. Cowdrey v. London & San Francisco Bank, 139 Cal. 298, 73 P. 196.

65. See 1 Curr. L. 196.

66. Comp. Laws 1887, § 5034. In re Olson's Estate [S. D.] 94 N. W. 421. See 1 Curr. L. 196, n. 11.

67. Penniman v. Tinsley [Tex. Civ. App.] 76 S. W. 367.

68. Excuses held insufficient [Comp. Laws, § 5239]. Root v. Sweeney [S. D.] 95 N. W. 916.

69. State v. Stull [Neb.] 96 N. W. 121.

70. Schnepper v. Whiting [S. D.] 99 N. W. 84.

71. Hoagland v. Stewart [Neb.] 98 N. W.

of a judgment rendered on the third successive verdict for plaintiff, the retrial was limited to the amount of recovery.[72] The decision of the appellate court stands as the law of the case on retrial in so far as the facts are the same as on the appeal.[73] A reversal on the ground that the evidence is not sufficient is controlling on retrial, the evidence being the same,[74] as is a holding that the evidence is sufficient, where the same and additional evidence is produced,[75] and where a judgment on directed verdict is reversed on the ground that the issues should have been submitted to the jury, the trial court cannot set aside the verdict rendered on the second trial on substantially the same evidence.[76] A reversal for insufficiency of evidence to support the judgment and remand generally does not preclude the introduction of further evidence on the new trial,[77] and where a defect of proof on the only issue in the case is supplied by uncontradicted evidence on retrial, a verdict may be directed.[78] Where the appellate court holds that defendant only owed plaintiff the duty of abstention from willful or wanton injury, the question of negligence on retrial is immaterial.[79] After the appellate court has decided that plaintiff's complaint states a cause of action, it is only necessary to determine whether his evidence tends to support it.[80] Where an equity decree for plaintiff is reversed with leave to amend, nothing is binding on the trial court except that the pleadings and evidence on the first trial did not authorize the decree.[81] On retrial, after reversal, it must be assumed that a question presented but not discussed by the appellate court was decided adversely to appellee.[82] Upon new trial after the reversal of a decree for the probate of a will the proponent must prove anew the making of the will.[83] A pro forma affirmance for defects in the record concludes the trial court on all questions that might have been reviewed by a proper bill of exceptions.[84]

Unless restricted by mandate, amendments may be allowed in the court below,[85] but a motion to amend by introducing a defense and counterclaim previously denied because of laches will not be granted,[86] and defendant cannot plead

428. Upon remand without direction, the trial court may act in any way consistent with the opinion of the appellate tribunal, may grant a motion for new trial on an amendment of the pleadings or a supplemental pleading on good cause shown. State v. District Court of Ramsey County [Minn.] 97 N. W. 581.

72. Southern R. Co. v. O'Bryan, 119 Ga. 147, 45 S. E. 1000.

73. Griffen v. Manice, 174 N. Y. 505, 66 N. E. 1109; Hall v. State, 92 App. Div. 96, 87 N. Y. S. 338; Pennsylvania Co. v. Scofield [C. C. A.] 121 F. 814; Eggett v. Allen, 119 Wis. 625, 96 N. W. 803; Euting v. Chicago & N. W. R. Co. [Wis.] 98 N. W. 944; Seaboard Nat. Bank v. Woesten, 176 Mo. 49, 76 S. W. 464. Determination that certain evidence is admissible. Richardson v. Dybedahl [S. D.] 98 N. W. 164. Whether hiring was indefinite or a yearly lease. Anhalt v. Lightstone, 39 Misc. 822, 81 N. Y. S. 288. Amendment of answer and new evidence not affecting result. Snyder v. Jack, 140 Cal. 584, 74 P. 139. Determination that under the pleadings the court had authority to establish priorities to water and enjoin interference. Miller v. Lake Irr. Co., 33 Wash. 132, 74 P. 61. Construction of deed. Ashcraft v. Cox, 25 Ky. L. R. 1303, 77 S. W. 718. No amendment of pleadings to show that common law does not obtain in sister state as presumed on appeal. Bank of Commerce's Receivers v. Windmuller, 25 Ky. L. R. 1334, 77 S. W. 1103.

74. Tyson v. Joseph H. Bauland Co., 85 App. Div. 612, 82 N. Y. S. 965.

75. Tyson v. Joseph H. Bauland Co., 86 App. Div. 612, 82 N. Y. S. 955; Southern R. Co. v. Phillips, 119 Ga. 146, 45 S. E. 967; Winter v. Supreme Lodge, K. P., 101 Mo. App. 550, 73 S. W. 877.

76. City of Philadelphia v. Atlantic & P. Telegraph Co., 127 F. 370.

77. In re Maher's Estate, 204 Ill. 25, 68 N. E. 159.

78. McGowan v. Brooks, 119 Ga. 494, 46 S. E. 626.

79. Downes v. Elmira Bridge Co., 82 App. Div. 639, 81 N. Y. S. 834.

80. Kellogg v. Sowerby, 93 App. Div. 124, 87 N. Y. S. 412.

81. Johnson v. Sherman County Irrigation Water Power & Imp. Co. [Neb.] 98 N. W. 1096.

82. Curtis v. Albee, 86 App. Div. 145, 83 N. Y. S. 430.

83. In re Hopkins' Will, 41 Misc. 83, 83 N. Y. S. 890.

84. Sumner v. Sumner, 118 Ga. 408, 45 S. E. 315.

85. People v. District Court [Colo.] 75 P. 390; Lang v. Metzger, 206 Ill. 475, 69 N. E. 493; Parke v. Boulware [Idaho] 73 P. 19; Jones v. Western Mfg. Co., 32 Wash. 375, 73 P. 359. See 1 Curr. L. 197, n. 23.

86. Henry & Co. v. Talcott, 89 App. Div. 75, 85 N. Y. S. 98.

on the trial after reversal of an order opening default which called forth an amendment of the petition which was not material.[87] The action is properly dismissed below where the judgment of the court of appeals leaves no ground of recovery and plaintiff does not amend.[88] Where, on affirmance of a judgment for plaintiff on the overruling of a demurrer to the complaint and refusal to plead further, the court remands the case for further proceedings, it is discretionary with the trial court to allow defendant to plead further.[89]

§ 16. *Rehearing and relief thereon.*[90]—A petition to rehear will not be entertained unless it appears that some material point was overlooked, or some controlling authority escaped the attention of the court, or some other weighty consideration requires it.[91] A time is usually provided within which rehearings must be taken or petitions filed,[92] but the Federal court rule to that effect is for the protection of the court and may be waived by it in a proper case.[93] An order staying the mandate after judgment indefinitely has the effect to retain the jurisdiction and incidentally the power to grant a rehearing, even after the term so long as the mandate has not issued.[94] Where the supreme court has summarily denied a certiorari to the circuit court of appeals on a petition setting up the identical issues decided in that court, the circuit court of appeals will assume that the supreme court impliedly passed on such issues and will decline to reopen the case by rehearing.[95] Appellee who filed no brief before the decision will not be given a rehearing to discuss the questions presented by appellant.[96] Rehearing will not be granted for immaterial or trivial errors,[97] and will be refused if the proper judgment has been rendered, even though reached by faulty reasoning.[98] Matters not certified by counsel as grounds will not be considered.[99] An alias motion to recall a mandate is not the proper remedy to take advantage of new matters affecting the merits of the controversy coming to the party's attention, since the judgment was entered.[1] Points not made on the original hearing will not as a rule be considered on application for rehearing,[2] and an omission from the statement of facts cannot be supplied by extrinsic evidence,[3] but a question of jurisdiction is available, though not previously raised.[4] Payment of a judg-

87. O'Connor v. Brucker, 117 Ga. 451, 43 S. E. 731.

88. Hawkins v. Nicholas County, 25 Ky. L. R. 704, 76 S. W. 329. Where in reversing a judgment for defendant, the court decides that the refusal of a proffered amendment of the complaint was not error because immaterial, but on rehearing directs that the amendment be permitted, it is in effect decided that the amendment is necessary to plaintiff's cause of action and dismissal below is proper if he refuse to amend. Norris Safe & Lock Co. v. Clark [Wash.] 74 P. 1019.

89. McLeod v. Lloyd, 43 Or. 260, 74 P. 491.

90. See 1 Curr. L. 198.

91. Elmore v. Seaboard Air Line R. Co., 132 N. C. 865, 44 S. E. 620.

92. A motion to recall a remittitur not made within the time limited will be denied where no sufficient excuse is shown. In re Sanford's Estate, 139 Cal. xix, 73 P. 466.

93. Burget v. Robinson [C. C. A.] 123 F. 262.

94. Burget v. Robinson [C. C. A.] 123 F. 262.

95. Burget v. Robinson [C. C. A.] 123 F. 262.

96. Town of Crown Point v. Thompson, 31 Ind. App. 201, 67 N. E. 555.

97. Though an appeal should have been dismissed instead of affirmed, the judgment will not be reopened to correct such error. Lisker v. O'Rourke, 28 Mont. 129, 72 P. 416, 755.

98. School Dist. of Omaha v. McDonald [Neb.] 97 N. W. 584.

99. Rule 53 (39 S. E. x). Kerr v. Hicks, 133 N. C. 175, 45 S. E. 529.

1. McLeod v. Lloyd [Or.] 75 P. 702.

2. Stephens v. Duckett, 111 La. 979, 36 So. 89; Altgeld v. Alamo Nat. Bank [Tex. Civ. App.] 79 S. W. 582. Parties will not be allowed to shift their grounds of action or defense. Cook v. Marshall Co. [Iowa] 95 N. W. 409. Where the issue as to a nonsuit was argued on the merits, an objection that it should not have been granted because not stating the specific ground on which it was based cannot be raised on rehearing. Herring-Marvin Co. v. Smith, 43 Or. 316, 73 P. 340. The appeal must be disposed of on the record presented on the first submission. An amended abstract filed after motion for rehearing granted will be stricken. Coe College v. Cedar Rapids, 120 Iowa, 541, 95 N. W. 267.

3. Deed proved below omitted from statement. Williamson v. Work [Tex. Civ. App.] 77 S. W. 266.

4. Objection that question could be con-

ment on affirmance thereof does not prevent rehearing and final reversal.[5] A rehearing after affirmance will not be awarded on appellee's affidavit that he should not have recovered below.[6] Rehearing on appeal in a habeas corpus case will be dismissed where, since affirmance, the prisoner has been released on bail.[7] On rehearing, the cause will be considered as though no former decision had been made,[8] and inconsistency with arguments advanced on the hearing will not prevent appellant advancing a sound argument.[9] A judgment establishing the existence of a right in one of the parties is admissible as evidence of that right, though a rehearing is pending on appeal therefrom.[10]

§ 17. *Liability on bonds and the like.*[11]—Principal and sureties are liable, though appeal was taken under a void statute, where the court assumed jurisdiction without objection and affirmed the judgment.[12] One who gives a supersedeas bond to hold in force pending proceedings in error an attachment or garnishment discharged by order of court, cannot be heard in defense of a suit on such bond to say that defendant to whom it was given had no interest in the property, or that the proceedings were irregular.[13] A supersedeas bond may be reformed in equity.[14]

Extent of liability.[15]—A bond superseding execution directed against specific property will not cover rents, damages, profits and taxes allowed by the appellant to accumulate on the property pending the appeal.[16] Where a land contract is foreclosed and a time for performance set, a bond on appeal from that decree conditioned to pay for use and occupation of the premises, in case of affirmance, creates a liability for use and occupation only for the time subsequent to the date set for performance.[17] On appeal by creditors of an estate from an order settling the account of trustee, a claimant filing a cross appeal cannot on affirmance recover interest on the amount allowed him, as against the obligees on the appeal bond.[18]

Satisfaction and discharge of sureties.[19]—As between principal and surety, the approval of the bond by the proper officer is immaterial.[20] Satisfaction of a judgment in an unlawful detainer suit for restitution of premises and rent does not release liability on the appeal bond, conditioned for payment of rents pending the appeal.[21]

Forfeiture and enforcement.[22]—A bond conditioned to "abide the judgment if the same shall be affirmed and pay the costs" is broken if the judgment be affirmed and not paid.[23] One who successfully attacks an appeal undertaking is estopped from subsequently contending for its validity.[24] That defendant in

sidered only on appeal from judgment, not on appeal from order denying new trial. Sharp v. Bowie [Cal.] 76 P. 62.

5. Pike, Morgan & Co. v. Wathen, 25 Ky. L. R. 1264, 78 S. W. 137.

6. Should be presented to lower court as ground for motion for new trial. Grubbs v. Pence, 25 Ky. L. R. 170, 74 S. W. 709.

7. Ex parte Walton [Tex. Cr. App.] 74 S. W. 314.

8. Van Auken v. Mizner [Neb.] 97 N. W. 334.

9. City of Louisville v. Wehmoff, 25 Ky. L. R. 1924, 79 S. W. 201.

10. Salt Lake City v. Salt Lake City Water & Electrical Power Co., 25 Utah, 456, 71 P. 1069.

11. See 1 Curr. L. 199.

12. McVey v. Peddie [Neb.] 96 N. W. 166.

13. Metcalf v. Bockoven, 1 Neb. Unoff. 822, 96 N. W. 406.

14. But reformation should extend no further than to make a complete statutory bond in the absence of express agreement for some other form. Nourse v. Weitz, 120 Iowa, 708, 95 N. W. 251.

15. See 1 Curr. L. 199.

16. Nourse v. Weitz, 120 Iowa, 708, 95 N. W. 251.

17. Buckley v. Crane [C. C. A.] 123 F. 29.

18. Marshall v. Dobler, 97 Md. 555, 55 A. 704.

19. See 1 Curr. L. 200.

20. Nourse v. Weitz, 120 Iowa, 708, 95 N. W. 251.

21. Carmack v. Drum [Wash.] 73 P. 377.

22. See 1 Curr. L. 200.

23. Harris v. Kansas El. Co., 66 Kan. 372, 71 P. 804.

24. U. S. Fidelity & Guaranty Co. v. Ettenheimer [Neb.] 97 N. W. 227.

error procured an order that additional sureties be furnished within ten days or the bond be stricken from the files, which were never furnished, is no defense to an action on the bond after affirmance.[25] The petition must allege that a supersedeas was issued by the clerk following the execution of the bond.[26] A petition alleging that the judgment was affirmed and is unpaid fails to allege a breach of a bond conditioned to pay "whatever judgment may be rendered on dismissal or trial" of the appeal.[27]

Judgment.[28]—Where the suit is on a special tax bill, which is no personal debt against the owner, a personal judgment against him or the surety on his appeal bond cannot be rendered.[29]

APPEARANCE.

§ 1. General; Special; What Constitutes Each (300). Appeal (301). Special Appearance (301).
§ 2. Who May Make or Enter (302).
§ 3. Effect (302).

§ 1. *General; special; what constitutes each.*[30] *General appearance.*[31]—Coming into court for any other purpose than to contest jurisdiction of the person is a general appearance,[32] even though understood and intended by the person so appearing as a special appearance.[33] There need be no formal filing of papers.[34] One contesting the question of jurisdiction of the person must confine himself strictly to that issue,[35] as any invocation of the powers of the court over the subject-matter waives the special appearance,[36] and results in submission to the juris-

25. English v. Smith [Neb.] 96 N. W. 60.
26. Hoskins v. Southern Nat. Bank, 24 Ky. L. R. 2250, 73 S. W. 786.
27. German Nat. Bank v. Beatrice Rapid Transit & Power Co. [Neb.] 95 N. W. 49.
28. See 1 Curr. L. 201.
29. Heman Const. Co. v. Loevy [Mo.] 78 S. W. 613.
30. See 1 Curr. L. 201, § 1.
31. See 1 Curr. L. 201.
32. Perrine v. Knights Templars' & Masons' Life Indemnity Co. [Neb.] 98 N. W. 841.

Held to constitute general appearance: Plea to the jurisdiction of the court over the subject-matter. Perrine v. Knights Templars' & Masons' Life Indemnity Co. [Neb.] 98 N. W. 841. Request for a continuance. Costello v. Palmer, 20 App. D. C. 210. Assent to a continuance. Honeycutt v. Nyquist, Peterson & Co. [Wyo.] 74 P. 90. Motion to paragraph plaintiff's declaration. Royer Wheel Co. v. Dunbar, 25 Ky. L. R. 746, 76 S. W. 366. Filing a motion to quash a citation, under Texas practice. Western Cottage Piano & Organ Co. v. Anderson [Tex.] 79 S. W. 516. Motion to set aside a sheriff's sale in a foreclosure suit. Jones v. Standiferd [Kan.] 77 P. 271. An agreement to change of venue includes an appearance. Jones v. Robb [Tex. Civ. App.] 80 S. W. 395. An appearance "specially" to object to a misnomer. Honeycutt v. Nyquist, Peterson & Co. [Wyo.] 74 P. 90. An agreement in open court to a continuance of a hearing on a motion to sell attached goods (Honeycutt v. Nyquist, Peterson & Co. [Wyo.] 74 P. 90), but not acceptance of service of a motion to sell property on attachment (Id.). Subsequent plea to the merits after a motion to quash for insufficient service has been overruled. Morris v. Healy Lumber Co., 33 Wash. 451, 74 P. 662. A motion to dismiss on grounds that action was in personam and not in rem, and that judgment on which action was based was dormant. Thompson v. Pfeiffer, 66 Kan. 368, 71 P. 828. A motion to quash a summons and writ of restitution, though in the form of a special appearance; and though the summons be quashed, it is proper to refuse to quash the writ or dismiss the action. Teator v. King [Wash.] 76 P. 688. Appearance personally and by counsel on a motion to dissolve an attachment, where defendant had been served with a rule to plead and had filed an answer and demurrer, before judgment was entered for failure to appear. Such formal appearance would justify the setting aside of the judgment. Mayler v. Wittish, 204 Pa. 180, 53 A. 768.

33. Thompson v. Pfeiffer, 66 Kan. 368, 71 P. 828. Called a "special appearance." Nichols & Shepard Co. v. Baker, 13 Okl. 1, 73 P. 302.
34. Defendant's attorney handed a copy of an answer to the merits to plaintiff's counsel in the presence of the judge, saying that the original would be filed, availing himself of this to press a motion to discharge a receiver. Powell v. National Bank of Commerce [Colo. App.] 74 P. 536.
35. Byers v. Byers [Pa.] 57 A. 62; Nichols & Shepard Co. v. Baker, 13 Okl. 1, 73 P. 302.
36. Teater v. King [Wash.] 76 P. 688. One who, after appearing specially, moves the court for affirmative relief in his own behalf, thereby makes a general appearance, and subjects himself to the jurisdiction of the court. Montague v. Marunda [Neb.] 99 N. W. 653. Where a defendant appears to object to the court's jurisdiction of his person, and failing to obtain a ruling thereon, answers and goes to trial, he thereby waives the ob-

diction of the court for all purposes.[37] However, when the lack of personal jurisdiction is not apparent on the face of the record, the defendant may unite with his plea to the jurisdiction a defense going only to the plaintiff's right of recovery without waiving his right to insist on his plea to the jurisdiction; but the exception does not extend to affirmative relief, as a counterclaim or cross action waives the former plea.[38] A subsequent general appearance does not waive the right to question in the higher court the action of the court on the question of jurisdiction.[39]

Appeal.[40]—As to the effect of an appeal from a judgment void for want of personal jurisdiction, the decisions are in conflict, some holding that such an appeal constitutes an appearance so that both the appellate court[41] and the trial court, when the case is remanded,[42] acquire jurisdiction of the person of the party appealing; others that prosecution of error from such a judgment does not constitute a general appearance in the action in which the judgment was rendered.[43] The date of a voluntary appearance is to be taken as the date of the commencement of the proceedings in error, where no summons is issued.[44]

Special appearance.[45]—The object and only office of a special appearance is the presentation of a purely jurisdictional question.[46] There may be a special appearance to move for dismissal for insufficient service of a writ,[47] to have an attachment vacated,[48] to file a petition for removal from a state to a Federal court,[49] to have a cause remanded to a state from a Federal court,[50] to plead privilege,[51] or to move to quash service or to strike suggestions of damages.[52] A defendant sued in a state court where, by statute, special appearances are forbidden, may appear specially in a Federal court to which the action has been transferred.[53]

jection. Conflict in authorities pointed out. Garrett v. Herring Furniture Co. [S. C.] 48 S. E. 254.

37. Byers v. Byers [Pa.] 57 A. 62.

38. Linton v. Heije [Neb.] 95 N. W. 1040.

39. American Wire & Steel Bed Co. v. Goldman, 85 N. Y. S. 330.

40. See 1 Curr. L. 202.

41. Taylor v. Sledge, 110 Tenn. 263, 75 S. W. 1074.

42. Special appearance below to object to invalid service. Drew Lumber Co. v. Walter [Fla.] 34 So. 244. Appeal by a purchaser at a judicial sale from an order denying a motion to set aside a resale. Wigginton v. Nehan, 25 Ky. L. R. 617, 76 S. W. 196. Appeal by plaintiff from judgment on counterclaim, plaintiff having had petition dismissed for want of jurisdiction. Louisville Tobacco Warehouse Co. v. Gist, 25 Ky. L. R. 387, 75 S. W. 243.

43. Bastian v. Adams [Neb.] 97 N. W. 231. Contra, doctrine formerly adhered to in Nebraska, said to have been overruled in Hurlburt v. Palmer, 39 Neb. 158, 57 N. W. 1019. Appellant claimed there had been no service of summons, and the question had never been passed upon. Long Branch Pier Co. v. Crossley, 84 N. Y. S. 227.

44. In re James' Estate [Neb.] 97 N. W. 22.

45. See 1 Curr. L. 201.

46. Nichols & Shepard Co. v. Baker, 13 Okl. 1, 73 P. 302; Westinghouse Air Brake Co. v. Christenson Engineering Co., 126 F. 764.

47. Thomas v. Thomas, 98 Me. 184, 56 A. 651.

48. No service on defendant who appeared only on a motion to vacate the attachment. This motion being denied, the case was several times adjourned and then dismissed, neither party appearing. Subsequently the case was restored by consent of defendant's attorneys. This consent did not constitute an appearance nor waive the question of jurisdiction. Delaney v. Bouse, 91 App. Div. 437, 86 N. Y. S. 880. But see Myler v. Wittish, 204 Pa. 180, 53 A. 758.

49. Defendant sued in state court where special appearances were prohibited by statute filed plea to jurisdiction simultaneously with its bond and petition to remove cause. Louden Machinery Co. v. American Malleable Iron Co., 127 F. 1008.

50. Motion to quash for lack of state court's jurisdiction denied by Federal court on ground of wrongful removal to latter court. May be reheard in state court. Paul v. Baltimore & O. R. Co. [Ind. App.] 69 N. E. 1024. A motion to strike an amended complaint accompanied by a plea in abatement on a special appearance, does not confer jurisdiction. Id. A motion to strike interrogatories filed by plaintiff to a plea in abatement under special appearance will not change defendant's special to a general appearance. Id.

51. A plea of privilege, as to the proper venue of an action did not invoke the jurisdiction of the court. St. Louis, etc., R. Co. v. White & Co. [Tex. Civ. App.] 76 S. W. 947.

52. Thomson v. McMorran Mill. Co. [Mich.] 94 N. W. 188.

53. Louden Machinery Co. v. American Malleable Iron Co., 127 F. 1008.

A defendant appearing specially is a "party" to the action, entitled to costs if his motion be sustained.[54]

Appearance as a witness is not an appearance as a party.[55]

§ 2. *Who may make or enter.*[56]—Jurisdiction may be acquired by voluntary appearance in person or by attorney,[57] and where an attorney, authorized to enter a special appearance only, honestly pleads matters amounting to a general appearance, the client is bound by such general appearance.[58] A wholly unauthorized appearance by one assuming to act as attorney is of no effect, and a judgment entered thereon will be set aside upon a satisfactory showing that the appearance was unauthorized.[59] Authority to appear for a party will be presumed from such appearance noted on the record on appeal.[60] The rule permitting appearance and answer by a person wrongly served, and yet sought to be held, is to enable him to plead that he is not liable because he is not the person against whom the plaintiff's alleged claim exists.[61] Hence it has no application where such person is notified that no claim is made against him individually, and the plaintiff will not be compelled to accept service of notice of appearance and answer.[62]

§ 3. *Effect.*[63]—Voluntary general appearance makes unnecessary the service of summons,[64] or citation,[65] or notice,[66] and hence results in a waiver of all defects in original process,[67] and of the question of jurisdiction of the person,[68] or

54. Motion to dismiss for insufficient service. Thomas v. Thomas, 98 Me. 184, 56 A. 651.

55. Suit against a corporation and individuals. One of the latter who was not served with process made an affidavit which was used as evidence for the corporation and plaintiff sought to construe this as a voluntary appearance giving the court jurisdiction over the individual. Talbot, Taylor & Co. v. Southern Pac. Co., 122 F. 147.

56. NOTE. Appearance of infants: An attorney cannot waive service of summons on an infant. Evans v. Davies, 39 Ark. 235. Nor enter an appearance for minor heirs not brought into court by proper summons of notice. Bonnell v. Holt, 89 Ill. 71; De La Hunt v. Holderbaugh, 58 Ind. 285. So a general appearance by counsel will not bind infant defendants not served with process. Valentine v. Cooley, Meigs [Tenn.] 613, 33 Am. Dec. 166. See, also, Priest v. Hamilton, 2 Tyler [Vt.] 50; Russell v. Texas & P. R. Co., 68 Tex. 646; Mercer v. Watson, 1 Watts [Pa.] 330; Cruikshank v. Gardner, 2 Hill [N. Y.] 333; Bloom v. Burdick, 1 Hill [N. Y.] 131, 37 Am. Dec. 299.

Nor can a guardian ad litem enter an appearance for a minor defendant. Chambers v. Jones, 72 Ill. 75; Pugh v. Pugh, 9 Ind. 132; Ingersoll v. Mangam, 84 N. Y. 622; Hickenbotham v. Blackledge, 54 Ill. 316.

Some courts hold an appearance by a guardian binding on the infant not served. Wrisley v. Kenyon, 28 Vt. 6; Smith v. McDonald, 42 Cal. 484; Ankeny v. Blackiston, 7 Or. 407; contra: Greenman v. Harney, 53 Ill. 386; Haley v. Taylor, 39 Ark. 104. —From note to Kromer v. Friday [Wash.] 32 L. R. A. 671. See 1 Curr. L. 203.

57. Gorman v. Stillman, 25 R. I. 55, 54 A. 934.

58. McNeal v. Gossard [Kan.] 74 P. 628.

59. Turner v. Turner, 33 Wash. 118, 74 P. 55.

60. Department of Health of City of New York v. Babcock, 84 N. Y. S. 604.

61, 62. Steinhaus v. Enterprise Vending Mach. Co., 81 N. Y. S. 282.

63. See 1 Curr. L. 203.

64. Ramsdell v. Duxberry [S. D.] 96 N. W. 132. Joining in a petition for removal. Union Iron & Foundry Co. v. Sonnefield [La.] 37 So. 20. Appearance of mortgagor in foreclosure action [Code Civ. Proc. §§ 416, 581]. Hibernia Sav. & L. Soc. v. Cochran, 141 Cal. 653, 75 P. 315. Filing answer to complaint in justice court. B. & C. Comp. § 63; McAnish v. Grant [Or.] 74 P. 396. A general appearance by any of nonresident defendants renders an order of publication unnecessary as to those that appear. McClung v. Sieg [W. Va.] 46 S. E. 210.

65. Jones v. Robb [Tex. Civ. App.] 80 S. W. 395. Where defendant sought affirmative relief and the judgment recited that plaintiff appeared by counsel, such recital sufficiently showed an appearance by plaintiff and that a citation to him was unnecessary. Smithers v. Smith [Tex. Civ. App.] 80 S. W. 646.

66. To an executor of a claim against his testator. Woltemahr v. Doye [Mo. App.] 76 S. W. 1053.

67. Gorman v. Stillman, 25 R. I. 55, 54 A. 934; Forsythe v. Huey, 25 Ky. L. R. 147, 74 S. W. 1088; Stryker v. Pendergast, 105 Ill. App. 413; Department of Health of New York v. Babcock, 84 N. Y. S. 604; Lewis Lumber Co. v. Camody, 137 Ala. 578, 35 So. 126; Perrine v. Knights Templars' & Masons' Life Indemnity Co. [Neb.] 98 N. W. 841; Mulholland v. Washington Match Co. [Wash.] 77 P. 497. General appearance on a motion for a new trial. Clark v. Brotherhood of Locomotive Firemen, 99 Mo. App. 687, 74 S. W. 412. A motion to quash summons and service is of no effect after a full appearance. Mulholland v. Washington Match Co. [Wash.] 77 P. 497. Voluntary demurrer or answer waives defects in service or return of summons. Adams v. Hopkins [Cal.] 77 P. 712. Successive general appearances to file demurrer to answer, and to take depositions, waive ob-

of an objection to the venue,[69] or an erroneous change of venue,[70] and gives the court complete jurisdiction for all the purposes of the action.[71] An objection going to the court's jurisdiction of the subject-matter is not waived by a general appearance,[72] nor is a prior void judgment validated thereby.[73] A general appearance waives a statute requiring, as a condition precedent to jurisdiction, that a nonresident plaintiff give security for costs.[74] Where defendant appears personally and pleads to the jurisdiction, the entry of a general appearance by his attorney, who urges only the jurisdictional issue, will not waive the special appearance.[75]

Withdrawal.[76]—Appearance being equivalent to personal service it is error to permit a withdrawal to the prejudice of plaintiff.[77]

APPRENTICES.

Parties seeking to cancel an apprenticeship will be remitted to the place of contract or the domicile where the laws thereof are doubtful and disputed, and the rights involved.[78]

ARBITRATION AND AWARD.

§ 1. The Remedy in General (303).
§ 2. The Submission and Agreement to Submit (303).
§ 3. The Arbitrators and Umpire (304).
§ 4. Hearing and Procedure Before Arbitrators (304).
§ 5. The Award; Requisites, Validity and Effect (305).
§ 6. International Disputes (306).
§ 7. Statutory Arbitration Between Employers and Employes (306).

Reference,[79] submission to court on agreed facts,[80] and arbitration under the terms of building contracts,[81] and insurance policies,[82] are elsewhere treated.

§ 1. *The remedy in general.*[83]—Statutory arbitrations are cumulative only.[84]

§ 2. *The submission and agreements to submit.*[85]—A bona fide contention is

jections to service of process. Haseltine v. Messmore [Mo.] 82 S. W. 115.

68. Gorman v. Stillman, 25 R. I. 55, 54 A. 934; Westinghouse Air Brake Co. v. Christenson Engineering Co., 126 F. 764; Royer Wheel Co. v. Dunbar, 25 Ky. L. R. 746, 76 S. W. 366; Brand v. Brand, 25 Ky. L. R. 987, 76 S. W. 868. Unconditional appearance and obtaining leave to answer. Harrison v. Murphy [Mo. App.] 80 S. W. 724. Appearance in court to which the cause was sent after a change of venue. Mankin v. Pennsylvania Co., 160 Ind. 447, 67 N. E. 229. Mechanic' lien action—nonresident builder appeared and answered, thereby submitting to jurisdiction of court. Smith v. Colloty, 69 N. J. Law, 365, 55 A. 805. Nonresidence waived by pleading it in answer to the merits. Guenther v. American Steel Hoop Co., 25 Ky. L. R. 795, 76 S. W. 419. A nonresident who appears and answers to the merits subjects himself to the jurisdiction of the court. Cassidy v. Willis [Tex. Civ. App.] 78 S. W. 40. One who has appeared, without objection to the court's jurisdiction, filed an amended complaint and reply, and proceeded to trial, cannot object to the jurisdiction of the court after judgment. Mankin v. Pennsylvania Co., 160 Ind. 447, 67 N. E. 229.

69. Venue in divorce. Gibbs v. Gibbs, 26 Utah, 382, 73 P. 641.

70. And the decree rendered is not subject to collateral attack on that ground. Rodney v. Gibbs [Mo.] 82 S. W. 187.

71. Perrine v. Knights Templars' & Masons' Life Indemnity Co. [Neb.] 98 N. W. 841.

72. Chicago Union Traction Co. v. City of Chicago [Ill.] 70 N. E. 659; Nevil v. Heinke, 22 Pa. Super. Ct. 614.

73. Void because summons insufficient. Woodham v. Anderson, 32 Wash. 500, 73 P. 536.

74. Costello v. Palmer, 20 App. D. C. 210.

75. State v. Shipley [Md.] 57 A. 12.

76. See 1 Curr. L. 205, § 4.

77. Insurance Trust & Agency v. Failing, 66 Kan. 336, 71 P. 826.

78. Reiss v. Pilcque, 42 Misc. 350, 86 N. Y. S. 704.

79. See Reference, 2 Curr. L. 1434.

80. See Submission of Controversy, 2 Curr. L. 1767.

81. See Building and Construction Contracts, 1 Curr. L. 374.

82. See Insurance, 2 Curr. L. 479.

83. See 1 Curr. L. 205.

84. See 1 Curr. L. 205, n. 4.

85. See 1 Curr. L. 205.

Note: The agreement to submit must name each arbitrator. Holdridge v. Stowell, 39 Minn. 360. The power of setting aside an award is analogous to the power of granting a new trial (Buckwater v. Russell, 119 Pa. 495) but as a general rule, in the abeence of fraud (Masury v. Whiton, 111 N. Y. 679, 18 N. E. 638; Goddard v. King, 40 Minn. 164, 41 N. W. 659), or misconduct (Shipman v. Fletcher, 82 Va. 601; Robinson v. Shanks, 118 Ind.

a sufficient basis for submission, though it is not well founded.[86] Technical words are not required to make a binding submission,[87] but it is not to be extended by implication beyond its plain words,[88] or so as to include subsequent differences.[89]

Who may make.—The United States by its attorney may be bound by an agreement to submit to arbitration.[90] An infant cannot submit a controversy to arbitration,[91] and an attempted submission is absolutely void.[92] One of two joint plaintiffs may agree with defendant to arbitrate,[93] and the award is binding on the parties so agreeing.[94]

Effect.—The submission of subject-matter of a pending suit to arbitration displaces such pending suit.[95] A party cannot withdraw from an agreement for arbitration after an award made.[96]

§ 3. *The arbitrators and umpire.*[97]—Arbitrators must be impartial and disinterested,[98] but prior service of an arbitrator in a similar capacity does not render him incompetent, nor invalidate an award in which he joined in the absence of a showing that he was prejudiced.[99] Designation of all the arbitrators by one party is waived by proceeding before them without objection.[1]

§ 4. *Hearing and procedure before arbitrators.*[2]—The arbitrators must act without unreasonable delay.[3] They must give notice to the parties of the time and place of hearing,[4] but a party attending,[5] or refusing to attend,[6] waives notice. Where an umpire is to act only in case of difference, which does not arise, his nonparticipation will not invalidate the award,[7] and on the other hand unauthorized

125, 20 N. E. 713), the award is conclusive (Thornton v. McCormick, 75 Iowa, 285, 39 N. W. 502), and it is presumed that all matters submitted were considered. Schmidt v. Glade, 126 Ill. 485, 18 N. E. 762; Brush v. Fisher, 70 Mich. 469, 38 N. W. 446, and note 14 Am. St. Rep. 510. An award upon a claim arising out of an illegal transaction is unenforceable. Hall v. Kimmer, 61 Mich. 269; Davis v. Wentworth, 17 N. H. 567; Maybin v. Coulon, 4 Dall. [U. S.] 298; Harrington v. Brown, 9 Allen [Mass.] 579; Singleton v. Benton, 114 Ga. 548 and note 58 L. R. A. 181. Otherwise under certain statutes. Noble v. Peebles, 13 Serg. & R. [Pa.] 319; Goodwin v. Yarborough, 1 Stew. [Ala.] 152.

86. Downing v. Lee, 98 Mo. App. 604, 73 S. W. 721.

87, 88. Somerset Borough v. Ott, 207 Pa. 539, 56 A. 1079. Where a contract provides that any question as to the intent or meaning of the contract shall be submitted to arbitration, a controversy arising out of the provisions of the contract and also out of acts of one of the parties is not such a controversy as is contemplated by this provision of the contract. Hudson River Water Power Co. v. Glens Falls Gas & Elec. Light Co., 90 App. Div. 513, 85 N. Y. S. 577.

89. Cutting v. Whittemore [N. H.] 54 A. 1098.

90. Judson v. United States [C. C. A.] 120 F. 637.

91. Neither in person nor by next friend. Millsaps v. Estes, 134 N. C. 486, 46 S. E. 988.

92. Millsaps v. Estes, 134 N. C. 486, 46 S. E. 988.

93, 94. Runyon v. Rutherford [W. Va.] 47 S. E. 150.

95. Jones v. Thomas [Wis.] 97 N. W. 950.

96. Vincent v. German Ins. Co., 120 Iowa, 272, 94 N. W. 458.

97. See 1 Curr. L. 206.

98. Produce Refrigerator Co. v. Norwich Union Fire Ins. Soc. [Minn.] 97 N. W. 875.

99. Experienced appraiser for fire insurance companies. Van Winkle v. Continental Fire Ins. Co. [W. Va.] 47 S. E. 82.

1. Judson v. United States [C. C. A.] 120 F. 637.

2. See 1 Curr. L. 206.

3. An arbitration agreement was signed March 2d and selection of arbitrators completed March 3d. They met July 28 and completed an award next day. Held no unreasonable delay. Vincent v. German Ins. Co., 120 Iowa, 272, 94 N. W. 458.

4. Slater v. La Grande Light & Power Co., 43 Or. 131, 72 P. 738. Where appraisers took no oath of office, gave no notice of meetings, and took no sworn testimony, they were held not arbitrators under the provisions of the Code but appraisers under the provisions of the contract. Agreement to renew lease, rent to be fixed by appraisers. Wurster v. Armfield, 175 N. Y. 256, 67 N. E. 584.

5. Shutt v. Hebebrand [Neb.] 95 N. W. 785. Where parties were present by their counsel at the hearing it is immaterial that they had no notice of the meeting. Mississippi Cotton Oil Co. v. Buster [Miss.] 36 So. 146. Counsel appearing for a party has power to consent that the award as drawn up be put in proper form and afterward signed, and the fact that this was done does not show that the party whom he represented had no opportunity to be present. Id.

6. Plaintiff told arbitrator that he would not attend and did not want anything to do with it. Vincent v. German Ins. Co., 120 Iowa, 272, 94 N. W. 458.

7. The umpire never attended. Vincent v. German Ins. Co., 120 Iowa, 272, 94 N. W. 458. But under an agreement for appraisal of property by two referees who upon disagreement were to choose a third and the finding of two of them to be final, it is sufficient if a third referee who is chosen to appraise certain articles only, and accepts the agreed appraisal of the original referees

participation by the umpire must be objected to at the hearing.[8] The arbitrators are bound to hear all material testimony offered by the parties,[9] unless it appears to have been the intention that they act on their own knowledge.[10] Equity will appraise property if arbitrators named in a contract fail to agree.[11]

§ 5. *The award; requisites, validity and effect.*[12]—The award must conform to the submission and cover all matters submitted.[13] An award need not be signed by the arbitrators at the same time and place as found,[14] and is not void because an umpire signs as "arbitrator."[15] The authority of arbitrators terminates with the time limit specified in the agreement.[16]

Enforcement of award.[17]—An award which has been made a rule of court may be enforced by contempt proceedings, but a writ of fi. fa. sued out for that purpose, will upon motion be quashed.[18] An agreement for arbitration will not be enforced at the instance of a party who willfully violates the contract.[19] A mutual submission is a sufficient consideration to support a note given in pursuance of the award.[20]

Review of award.[21]—In the absence of statute there is no appeal.[22] Every reasonable presumption is in favor of an award.[23] To justify setting it aside there must be misconduct or error prejudicial to the rights of the complaining party[24] clearly proved,[25] errors of judgment only not being sufficient.[26] After having accepted an award one cannot deny its effect as such,[27] nor can he after allowing entry of judgment assert that it should not have been made a rule of court.[29]

as to the others, makes a finding with one of the others as to the value of the property. Ralston v. Ihmsen, 204 Pa. 588, 54 A. 365.

8. Mississippi Cotton Oil Co. v. Buster [Miss.] 36 So. 146.

9. Refusal to hear material evidence will be fatal to the award, but such evidence must be offered. Van Winkle v. Continental Fire Ins. Co. [W. Va.] 47 S. E. 82. A denial by arbitrators of the right of a party to appear before them and offer evidence makes their award voidable. Redner v. New York Fire Ins. Co. [Minn.] 99 N. W. 886.

10. Experienced builders and contractors selected as arbitrators to appraise the sound value and loss upon insured property need not take evidence. Vincent v. German Ins. Co., 120 Iowa, 272, 94 N. W. 458.

11. Buildings left on land by tenant. Cooke v. Miller, 25 R. I. 92, 54 A. 927.

12. See 1 Curr. L. 206.

13. Jensen v. Deep Creek Farm & Live Stock Co. [Utah] 74 P. 427. Appraisal of only part of property destroyed. Rutter & Hendrix v. Hanover Fire Ins. Co., 138 Ala. 202, 35 So. 33. Award of damages for erection of dam held to cover future damages. King v. Fountain Water Co., 75 Conn. 521, 55 A. 10.

14. Mississippi Cotton Oil Co. v. Buster [Miss.] 36 So. 146.

15. It appeared from the award that he was umpire. Runyon v. Rutherford [W. Va.] 47 S. E. 150.

16. Jordan v. Lobe [Wash.] 74 P. 817. But the fact that an award is made at a later date than that required in the agreement for arbitration does not invalidate it if the agreement further provides for meetings to be held after the date set for making the award. Booye v. Muth, 69 N. J. Law, 266, 55 A. 287.

17. See 1 Curr. L. 207.

18. Booye v. Muth, 69 N. J. Law, 266, 55 A. 287.

19. Winsor v. German Sav. & L. Soc., 31 Wash. 365, 72 P. 66. Before a party can claim any benefit under an award he must show compliance on his part. Royals v. Lacey [Tex. Civ. App.] 73 S. W. 1062.

20. Downing v. Lee, 98 Mo. App. 604, 73 S. W. 721.

21. See 1 Curr. L. 207.

22. Wilbourn v. Hurt [Ala.] 36 So. 768.

23. Jensen v. Deep Creek Farm & Live Stock Co. [Utah] 74 P. 427. Where it was asserted that one arbitrator exerted influence over the others evidence held insufficient. Vincent v. German Ins. Co., 120 Iowa, 272, 94 N. W. 458.

24. Manson v. Wilcox, 140 Cal. 206, 73 P. 1004. Award of arbitrators obtained by fraud in the agreement to submit to arbitrators. McCurdy v. Danieli [Mich.] 97 N. W. 52. An award is final as to facts, except for corruption or partiality on the part of arbitrators, or fraud by a party. Booye v. Muth, 69 N. J. Law, 266, 55 A. 287. A statute providing that an award shall be final when accepted by the court, by implication gives court right to reject the same, but only when improper conduct of arbitrators is shown. Judson v. United States [C. C. A.] 120 F. 637. By statute an award may be made a rule of court and can be attacked only on the ground of error, fraud, or collusion. Mock v. Bowman, 24 Ohio Circ. R. 27. It has been intimated that if an award is sufficiently inadequate it may be set aside by the court. Vincent v. German Ins. Co., 120 Iowa, 272, 94 N. W. 458.

25, 26. Vincent v. German Ins. Co., 120 Iowa, 272, 94 N. W. 458; Van Winkle v. Continental Fire Ins. Co. [W. Va.] 47 S. E. 82.

27. A person who gave his note for the amount awarded against him, cannot set up that the submission was to appraisement. Downing v. Lee, 98 Mo. App. 604, 73 S. W. 721. Where an award has been agreed to and accepted by the parties, judgment thereon is by

Equity will not set aside an award where there is an adequate defense at law to an action on the award.[29]

An arbitrator cannot contradict an award he has signed.[30]

§ 6. *International disputes.*[31]—In a controversy between a foreign government and citizens of the United States an award signed by two of three members of a commission to arbitrate cannot be defeated because its commissioner resigned after the hearings were closed, where it was agreed that a majority vote should govern.[32]

§ 7. *Statutory arbitration between employers and employes.*[33]

ARGUMENT OF COUNSEL.

§ 1. Right of Argument (306).
§ 2. Opening Statements (307).
§ 3. Kind, Extent, and Mode of Argument or Comment During Trial (307).
§ 4. Excuses for Impropriety (311).
§ 5. Objections and Rulings (311).
§ 6. Action of Court or Counsel Curing Objection (312).

§ 1. *Right of argument.*[34]—The party having the burden of proof is entitled to open and close the argument,[35] unless he waives his right by allowing the other party to put in evidence,[36] or loses his right to close by the other party's making no reply.[37] Where both are claimants, the matter rests in the sound discretion of the court,[38] which will seldom be disturbed.[39] The court, by rule, may limit the length of argument,[40] or forbid an attorney who has been a witness from making the

consent. McLeod v. Graham, 132 N. C. 473, 43 S. E. 935.

28. McLeod v. Graham, 132 N. C. 473, 43 S. E. 935.

29. North Braddock Borough v. Corey, 205 Pa. 35, 54 A. 486.

30. Van Winkle v. Continental Fire Ins. Co. [W. Va.] 47 S. E. 82. It was proper to refuse a question to an arbitrator in impeachment of his award. Mississippi Cotton Oil Co. v. Buster [Miss.] 36 So. 146. Admissions of an arbitrator which are made after an award filed are not competent to impeach it. Manson v. Wilcox, 140 Cal. 206, 73 P. 1004.

31. See 1 Curr. L. 208.

32. Republic of Colombia v. Cauca Co., 190 U. S. 524, 23 S. Ct. 704, 47 Law. Ed. 1159.

33. See 1 Curr. L. 208.

34. See 1 Curr. L. 209.

35. In action on note where answer admitted complaint but set up affirmative defenses, the defendant was entitled to open and close. Long & Allstatter Co. v. Barnes [Ind.] 69 N. E. 454. Under Iowa Code, § 3701, where the party having the burden of the issue has the right to the opening and closing argument, issues entirely unsupported by evidence, or established by evidence with no conflict, are not for jury, or to be considered in determining which party is entitled to closing argument, but it would require a clear case of prejudice to warrant a reversal of error in awarding the right to open or close. Shaffer v. Des Moines Coal & Hay Co. [Iowa] 98 N. W. 111. Where defendant assumed affirmative and plaintiff put in no evidence, plaintiff cannot complain of refusal of right to open and close. Cable Co. v. Parantha, 118 Ga. 913, 45 S. E. 787. Where the answer admits the claim of the plaintiff, but sets up in one defense that nothing is due, and in another, a novation, defendant is entitled to the opening and closing of the argument, there being but the one issue. Gerlaugh v. Riley, 2 Ohio N. P. (N. S.) 107. Under Civ. Code Prac. § 526, the plaintiff has closing argument where the answer sets up affirmative defense on which issue is joined. Muldoon v. Meriwether, 25 Ky. L. R. 2085, 79 S. W. 1183. Where plaintiff adduces testimony and rests and defendant calls no witnesses under rule 47, it is the right of plaintiff's counsel to sum up. De Maria v. Cramer [N. J. Err. & App.] 58 A. 341.

36. Though defendant's plea admitted plaintiff's prima facie case on a note, yet if he allows him to introduce evidence in support, without objection, defendant waives his right to open and close the argument. Northington v. Granade, 113 Ga. 584, 45 S. E. 447.

37. Where there were two counsel for plaintiff and one, after evidence is in, has begun the argument, and defendant states that he has no desire to reply, the other has no right to close over objection of defendant. Hackney v. Delaware & A. Telegraph & Telephone Co., 69 N. J. Law, 335, 55 A. 252.

38. In a contest between parties, each claiming as next of kin and heir of deceased, the position of the parties being analogous to that on a bill of interpleader, neither is entitled of right to open and close, but the matter rests in the sound discretion of the court. Sorensen v. Sorensen [Neb.] 98 N. W. 837.

39. Not error to refuse to defendant the right to open and close, though he had filed the statutory admission. Guerguin v. Boone [Tex. Civ. App.] 77 S. W. 630.

40. Court rule providing that plaintiff, or defendant where he has the affirmative, may open and close and that the court may announce how much time will be allowed each side, the plaintiff having the right to apportion between opening and closing, provided not more than one-half was used in

argument,[41] or where it has come to a decision, it may forbid argument altogether,[42] and whether after argument by one party the other can cut off further argument by waiving his right is within the discretion of the court.[43]

§ 2. *Opening statements.*[44]—In opening, counsel may state what he expects to prove,[45] and the nature of the defense as it appears from the record,[46] and though the testimony is subsequently rejected, there will be no error if he acted in good faith,[47] or if the court cautions the jury that his statement is not evidence.[48] But the making of prejudicial statements as to matters which could not legally affect the liability of the parties,[49] especially after an adverse ruling of the court, is highly improper,[50] and may necessitate a new trial.[51] The opening statement of counsel is not such an admission as will take the place of proof, and authorize a nonsuit.[52]

§ 3. *Kind, extent, and mode of argument or comment during trial.*[53]—The object of the argument is to induce proper conclusions based upon the evidence,

closing, was reasonable. Reagan v. St. Louis Transit Co. [Mo.] 79 S. W. 436.

41. Court rule providing that attorney, who had been a witness, should not argue a case without permission, is not in conflict with 2 Ball. Ann. Codes & St. § 4993, subd. 5, which authorizes plaintiff or party having burden of proof to open and close the argument by himself, or counsel, as that right may be waived, and the rule was salutary to prevent confusion between an attorney's testimony and his argument. Voss v. Bender, 32 Wash. 566, 73 P. 697.

42. Where a case is tried by the court and after the evidence is all in the court is fully satisfied as to the weight of the evidence and the law applicable to it, it may decline to listen to argument of counsel, and on appeal, the question will not be on the right to argue, but whether the judgment was correct. Barnes v. Benham, 13 Okl. 582, 75 P. 1130.

43. Parties had agreed that defendant should have opening and closing after defendant opened; plaintiff waived his right, and further argument was not permitted. Henry v. Dussell [Neb.] 99 N. W. 484.

44. See 1 Curr. L. 209.

45. Counsel stated that he would prove a conspiracy between petitioner and a Catholic priest to get a will favorable to a Catholic institution. O'Connell v. Dow, 182 Mass. 541, 66 N. E. 788.

46. Mulligan v. Smith [Colo.] 76 P. 1063.

47. Statement in opening, that defendant had cheated in another land deal, which was objected to and court warned jury that the case was to be tried on the evidence, was not improper, it being impossible to know in advance what testimony would be competent, and the court of necessity relying largely on fairness of attorney. Miller v. John, 208 Ill. 173, 70 N. E. 27. Where counsel in opening stated his intention to prove that defendant knew that other accidents had occurred at the same place, but the evidence was subsequently excluded by the court, it was not prejudicial error, especially where made in good faith. Potter v. Cave [Iowa] 98 N. W. 569. Where plaintiff's counsel in an action for assault stated that he would prove that plaintiff was acquitted of the offense of provoking an assault, but during trial was not allowed to show how the prosecution terminated, there was no error, as the opening statement was not evidence. Schmitz v. Kirchan, 32 Wash. 546, 73 P. 678.

48. Where, in opening, counsel stated that he would show that "attempts had been made, and witnesses spirited away," and on objection, court stated that unless he proved it he would instruct the jury to disregard it, there was no error. Mulligan v. Metropolitan St. R. Co., 89 App. Div. 207, 85 N. Y. S. 791.

49. Where counsel in opening spoke of other accidents in defendant's quarry and in neighboring quarries, and stated that public policy demanded that juries assess full damages, the court should have withdrawn the same from jury when objection was made. Perry, Matthews-Buskirk Stone Co. v. Wilson, 160 Ind. 435, 67 N. E. 183. It was objectionable for plaintiff in opening to say that defendant had not only pursued plaintiff, but had "attempted to cast their mud and slime over the citizenship of Frio county." International, etc., R. Co. v. Mercer [Tex. Civ. App.] 78 S. W. 562. Where, in opening, counsel said "that defendant was a vulture preying upon people, and that he would not allow defendant to insure a dog for him," and objection was overruled, as there was only the single question of whether a notice was mailed, before the jury, the argument should have been suppressed, but judgment would not be reversed therefor. Metropolitan Life Ins. Co. v. Bradley [Tex. Civ. App.] 79 S. W. 367.

50. Where counsel in opening stated that petitioner had been found guilty of various offenses and had been disbarred for them, after the court had ruled that the record of disbarment was incompetent, it was highly improper, but did not as a matter of law entitle petitioner to a new trial. O'Connell v. Dow, 182 Mass. 541, 66 N. E. 788.

51. Where plaintiff was injured by being pushed by a crowd under a street car, and her counsel in opening said he desired to show the conduct of similar crowds, and an objection thereto was sustained, a new trial was granted where he persisted in the same line of argument, as the ruling, whether right or wrong, was the law of the trial. Batcheder v. Manchester St. Ry. [N. H.] 56 A. 752.

52. Fillingham v. St. Louis Transit Co., 102 Mo. App. 573, 77 S. W. 314.

53. See 1 Curr. L. 209.

and counsel may use his own system of reasoning,[54] and must be allowed reasonable comment on the evidence and conduct of witnesses,[55] and indulge in oratorical flights in his endeavor to impress his views upon the jury, if he adhere to the evidence,[56] or he may prepare his argument beforehand, and read it.[57]

Use of pleading and other writings belonging to case.[58]—Counsel may read to the jury special interrogatories[59] or depositions,[60] or pleadings of the adverse party,[61] or his own pleading, when there is a question as to his claim,[62] though the pleadings have not been put in evidence. But to misread purposely constitutes reversible error.[63]

Statements of law and reading from decisions.[64]—The reading of legal authorities in the presence of the jury rests to a large extent in the discretion of the court.[65] Even the erroneous statement of the law by counsel, if properly corrected, may be harmless,[66] but his reading and discussing the decision of the case on a former appeal,[67] or the decision in a similar case,[68] unless it is read as an illustration, is reversible error.[69]

54. Counsel may advise jury as to findings as to special questions submitted to them. Chicago & A. R. Co. v. Gore, 105 Ill. App. 16. In bastardy proceedings, defendant introduced photograph of the child; it was not error to allow opposing counsel to call attention to child itself, which was present in the court room. State v. Patterson [S. D.] 100 N. W. 162. In an action for false imprisonment for detaining two days without a hearing for a crime which he confessed to having committed, severe criticism on part of defendant's counsel was justified. Friesenhan v. Maines [Mich.] 100 N. W. 172

55. Chicago City R. Co. v. Creech, 207 Ill. 400, 69 N. E. 919. The reasonableness of which is a matter for the discretion of the court. Id.

56. It is within the province of counsel to take a sympathetic view of his client's injuries. St. Louis, etc., R. Co. v. Boback, 71 Ark. 427, 75 S. W. 473.

57. Counsel may read as part of his address to the jury a version of the evidence prepared by himself, if it does not misrepresent the evidence. Stull v. Stull [Neb.] 96 N. W. 196.

58. See 1 Curr. L. 209.

59. Counsel may discuss the evidence in relation to them in his closing argument. Chicago & A. R. Co. v. Gore, 202 Ill. 188, 66 N. E. 1063.

60. Lake St. El. R. Co. v. Shaw, 203 Ill. 39, 67 N. E. 374.

61. Error to refuse to allow counsel in closing to refer to or read pleading of adversary, though not put in evidence, as such allegations were admissions of record and were binding. Field v. Surpless, 83 App. Div. 268, 82 N. Y. S. 127. Where defendant read plaintiff's petition to show a variance, and plaintiff read a part of it to show that there was not, and then said that defendant had proved plaintiff's case by introducing the petition, held no error to allow such argument. Louisville & N. R. Co. v. Mulfinger's Adm'x [Ky.] 80 S. W. 499.

62. In reply to argument of defendant as to plaintiff's claim, plaintiff's counsel read declaration on the point, and where jury were told the purpose was merely to show the extent of plaintiff's claim, there was no error. Metropolitan R. Co. v. Loud, 20 App. D. C. 330. Where defendant in closing remarked that a certain claim made by plaintiff was an afterthought and a great surprise to him, it was error to refuse to allow plaintiff's counsel to read a paragraph in the complaint making such a claim. Beecroft v. New York Athletic Club, 80 App. Div. 524, 81 N. Y. S. 1069.

63. Where attorney in closing argument purposely misread a deposition on a controverted point, his conduct was most reprehensible and judgment would be reversed. Lake St. Elevated R. Co. v. Shaw, 203 Ill. 39, 67 N. E. 374.

64. See 1 Curr. L. 209.

65. Plaintiff's counsel in personal injury case was allowed to read in his argument in the presence of the jury an extract from Wood on Railroads. Missouri, K. & T. R. Co. v. Moody [Tex. Civ. App.] 79 S. W. 856; Post v. Leland, 184 Mass. 601, 69 N. E. 361.

66. In an action for injuries resulting from the defective filling of an excavation, where defendant's counsel in closing said that the concreting was done by the city, so that its liability ceased, it was not erroneous, as the statement of fact was supported by the evidence, and the statement of law, if erroneous, must be deemed corrected by the instructions. Leavitt v. New England Telephone & Telegraph Co. [N. H.] 56 A. 462.

67. Judgment was reversed where counsel was permitted to discuss before the jury the opinion on case in a former appeal, and to misconstrue it. Somes v. Ainsworth [Tex. Civ. App.] 75 S. W. 839.

68. It was error to permit counsel in argument to quote the facts, and comment and quote the opinion of the supreme court in a similar case. Matthews v. Thatcher [Tex. Civ. App.] 76 S. W. 61.

69. In an action for libel against a commercial agency where plaintiff's counsel read in closing argument an article from a magazine (opinion of supreme court of Michigan) on the abuses of commercial agencies, but without stating that it was a judicial opinion, it was not prejudicial, being used solely for argument and illustration. Minter v. Bradstreet Co., 174 Mo. 444, 73 S. W. 668

Comments on witnesses.[70]—Counsel in argument may make reasonable comments upon the evidence and the conduct,[71] and upon the absence of,[72] or objection to,[73] witnesses, unless privileged,[74] and the court will not scrutinize with great nicety the logical force of the argument,[75] but it will not allow opprobrious epithets,[76] or facts which are not in evidence, to be used.[77]

Inferences.[78]—Counsel are allowed a wide latitude in making inferences, as that their client is being persecuted in a second proceeding,[79] or that there was bad faith in purchasing without inquiry,[80] but no inferences are allowed to be made on the exclusion of evidence.[81]

Appeals to passion, prejudice, and sympathy.[82]—Explanatory remarks, though containing an appeal to one's sympathy, are proper;[83] but irrelevant remarks, designed to prejudice jury,[84] or an attack on defendant's method of trying the case,[85] or an unfair challenge to produce evidence,[86] or the declaration that interrogatories were entangling,[87] or that defendant was a large corporation[88] and would not be

70. See 1 Curr. L. 210.

71. Chicago City Ry. Co. v. Creech, 207 Ill. 490, 69 N. E. 919.

72. Attorneys may comment on the nonproduction of witnesses where they are shown to be cognizant of the facts in issue, it being a mere matter of argument. Chicago, B. & Q. R. Co. v. Krayenbuhl [Neb.] 98 N. W. 44.

73. Where plaintiff in testimony had stated what his wife had said on various occasions, it was not error for defendant to offer her as witness, as plaintiff might have waived the privilege, and it was competent for jury to know of plaintiff's refusal. Zimmerman v. Whiteley [Mich.] 95 N. W. 989.

74. It was error for defendant's counsel to comment on absence of plaintiff and his failure to testify in his suit against an executrix, where N. H. Pub. St. 1901, c. 224, § 16, provides that in such cases neither party shall testify unless the executor elects so to testify. Wright v. Davis [N. H.] 57 A. 335.

75. Comments on the readiness of witnesses to testify without being summoned was allowable. Sylvester v. State, 111 Fla. 416, 35 So. 142.

76. Where counsel called witnesses of the adverse party "cattle," it was highly improper, but not prejudicial error when retracted. Leslie v. Jackson & S. Traction Co. [Mich.] 96 N. W. 580.

77. In an action against a railroad where plaintiff's counsel in argument stated that defendant's employes would have lost their job if they had not testified as they did, it was error to refuse to sustain an objection, as there was no evidence of the fact, but on all of the evidence the judgment was affirmed. St. Louis, etc., R. Co. v. Boback, 71 Ark. 427, 75 S. W. 473. Where counsel indulged in improper criticisms of witness, and detailed an event connected with witness not in record, it was held not to have influenced verdict. City of Owensboro v. Knox's Adm'r, 25 Ky. L. R. 680, 76 S. W. 191.

78. See 1 Curr. L. 210.

79. Where a plaintiff, who had been prosecuted for murder on account of the death of a guest in a fire in his hotel, sued an insurance company for the loss on account of the fire, the statement of counsel that he believed that the company had something to do with hounding him to the bar of justice, while perhaps the evidence did not justify the inference, was not prejudicial. Hartley v. Pennsylvania Fire Ins. Co. [Minn.] 98 N. W. 198.

80. In replevin, where claimants asserted that they purchased in good faith the property from one holding a railroad shipping receipt, it was not objectionable for opposing counsel to argue that they acted in bad faith because they made no effort to communicate with the person to whom the receipt was issued. Hart v. Boston & M. R. R. [N. H.] 56 A. 920.

81. Arguing to jury that objections made to the admission of evidence were a practical admission that the facts to which it referred were true was most reprehensible and can only be cured by a reversal. Potter v. Cave [Iowa] 98 N. W. 569.

82. See 1 Curr. L. 212.

83. Where attorney in argument said "It was necessary to introduce this cap, not for the purpose of wringing a heart-rending cry from the mother, as stated by you, but for the purpose of showing the blood on the inside of it," there was nothing improper, as the cap was in evidence. Board of Internal Imp. for Lincoln County v. Moore's Adm'r, 25 Ky. L. R. 15, 74 S. W. 683. Where a married woman was run down in the street by a bicycle, it was not error for counsel to ask the jury how much they would take to have their wives run down and made a spectacle of. Adams Exp. Co. v. Aldridge [Colo. App.] 77 P. 6.

84. Ward v. Reed [Mich.] 96 N. W. 438. Reaffirming objectionable language after being told by the court to desist, and referring to matters not connected with the trial. Belcher v. Ballou [Iowa] 100 N. W. 474.

85. Where counsel in closing devoted his remarks largely to an attack on defendant and its manner of conducting its defense and objecting to testimony, it was improper, but did not warrant a reversal where court sustained an objection to the remarks. Pittsburgh, C., C. & St. L. R. Co. v. Kinnare, 203 Ill. 388, 67 N. E. 826.

86. It was prejudicial error for plaintiff in closing argument in personal injury case to challenge defendant to make experiments in stopping cars, when defendant had no right to offer further evidence. Little v. Boston & M. R. R. [N. H.] 55 A. 190.

87. Where attorney in closing said "These

hurt,[89] as it had made provision for accidents,[90] and should be compelled to behave.[91]

Matters outside of issues.[92]—Attempts to influence jury by stating the source of the court's instructions,[93] or the effect of a verdict on the parties in another action,[94] or an admission of the other party,[95] or that the defendant had done some other wrong,[96] are prejudicial, and the statement that an insurance company was the real defendant will entitle the defendant to a new trial.[97]

Matters not in evidence.[98]—To refer to a compromise, or former verdict,[99] or the value of plaintiff's services, or the facts of another case,[1] or to the prejudice existing in a community,[2] or to charge a party with cheating the public,[3] or a witness with a crime,[4] or to state the contents of a letter which the counsel is attempt-

interrogatories have been put to you by the defendant for the purpose of entangling you," but the court on objection warned the jury to disregard, there was a fair trial. Southern Indiana R. Co. v. Davis [Ind. App.] 69 N. E. 550.

88. Repeated appeals to jury to consider that defendant was a large corporation, and that the money would come from them and not out of anybody else's pocket were improper. Johnson v. Detroit & M. R. Co. [Mich.] 97 N. W. 760. Where counsel referred to a request of the opposing counsel to take the case from the jury, and stated that the opposing party was a great corporation who would resort to perjury to maintain its cause. Hillman v. Detroit United R. [Mich.] 100 N. W. 399.

89. In closing, plaintiff's counsel said "I just want to say to you, you don't have to worry much about the verdict against [defendant]" which was not prejudicial, though the court had excluded a question as to whether defendant was protected by employers' liability insurance. Burgess v. Stowe [Mich.] 96 N. W. 29.

90. Where, in closing, plaintiff's counsel in a personal injury case stated the value of plaintiff's services, and the facts as to another case, of both of which there was no evidence, and after being corrected by the court, stated that defendant expected these accidents and made provisions for them, the judgment was affirmed with reluctance, as the statements were designedly made to influence the jury, but the court instructed the jury to disregard them. Sweeney v. New York Cent., etc., R. Co., 83 App. Div. 565, 81 N. Y. S. 1112.

91. Counsel's advising jury that they should by their verdict compel corporations to exercise care towards their employes was improper, but in view of the verdict had had no influence. Houston Elec. Co. v. Robinson [Tex. Civ. App.] 76 S. W. 209.

92. See 1 Curr. L. 211.

93. Where counsel in closing stated that he would submit no instructions, but that the instructions which would be read would be those of the other side, it was unnecessary, though true, and where court directed him to confine his argument to the facts in the record, there was no injury suffered. Illinois Cent. R. Co. v. Leiner, 202 Ill. 624, 67 N. E. 398.

94. Where jury asked if plaintiff would be barred in equity, if they found for defendant, the request of plaintiff's counsel in jury's presence, for a charge that it would be a bar, though most extraordinary, was not ground for new trial. Benton v. Hunter, 119 Ga. 381, 46 S. E. 414.

95. Remark of plaintiff's counsel that defendant's counsel had said plaintiff had a good case was improper. Witzel v. Zuel, 90 Minn. 340, 96 N. W. 1124.

96. In an action by a physician to recover from a railroad for services rendered at a wreck, it was prejudicial for plaintiff's counsel in his argument to say that defendant had blundered. McKnight v. Detroit & M. R. Co. [Mich.] 97 N. W. 772.

97. Where plaintiff's counsel in examining jurors asked if they were interested in a certain insurance company, and then stated that he believed that that company was defending the case, and an objection was overruled, as court stated plaintiff had a right to find this out, a new trial was ordered, as it was prejudicial, as such fact was entirely immaterial to any issue. Lipschutz v. Ross, 84 N. Y. S. 632. But compare Burgess v. Stowe [Mich.] 96 N. W. 29.

98. See 1 Curr. L. 211.

99. Where plaintiff's evidence of a compromise was refused, it was reversible error for his counsel to refer to such compromise in his argument, and to the fact that the two former verdicts were in plaintiff's favor. Chowning v. Parker [Mo. App.] 78 S. W. 677. A remark, in closing, that another court had passed on the facts and rendered judgment for plaintiff, was reversible error. Underwriters' Fire Ass'n v. Henry [Tex. Civ. App.] 79 S. W. 1072.

1. Sweency v. New York Cent., etc., R. Co., 83 App. Div. 565, 81 N. Y. S. 1112.

2. In an action against a town, it was improper for plaintiff's counsel to say in argument "Doubtless, gentlemen, you know that you cannot get in trouble any quicker than to go to a little town and say something against the condition of the town to some of the city officials." Davis v. Alexander City, 137 Ala. 206, 33 So. 863.

3. Where the indorsee of a note, given in a horse trade, sued the makers, and the defense was that the indorser had cheated the makers, and that plaintiff was not a bona fide purchaser, it was permissible for counsel to refer to the parties as "horse jockeys," but not to say that they were the men "who had folsted upon the innocent public the notorious horse, Magnet," where there was no evidence as to this. Hallock v. Young [N. H.] 57 A. 236.

4. Where counsel animadverted upon veracity of defendant as a witness and insinuated that he kept an unlawful resort of which there was no evidence, it was error

ing to introduce,[5] or comment on the retention in their employ of a servant whose negligence had caused the injury,[6] in the presence of the jury, is not allowable where there is no evidence as to such matters, or to pass remarks tending to convey an erroneous impression,[7] is improper.

Remarks during the trial.[8]—Exclamations over a witness' reply,[9] or prejudicial remarks[10] made during trial, may be error; but offers to show that a witness had wrecked the companies he was connected with,[11] or to allow jury to take out certain papers,[12] were allowable. An admission made during trial may not be binding where the other party is not prejudiced.[13]

§ 4. *Excuses for impropriety.*[14]—The plea of inadvertence ought not to be received either as excuse or palliation.[15] A party whose counsel provoked the improper remarks cannot complain.[16]

§ 5. *Objections and rulings.*[17]—Improper argument must be objected to,[18] and the rulings of the court, excepted to, at the time,[19] in order to be reviewed. The decision of the trial court on motion for new trial will be final,[20] unless prejudice clearly appears.[21]

for the court on objection not to caution counsel and warn jury. Fisher v. Weinholzer [Minn.] 97 N. W. 426.

5. Though counsel in arguing the admissibility of a certain letter, which was actually incompetent, stated its contents before the jury, there was no reversal, as the court properly warned the jury, and the verdict was justified by the evidence. Connolly v. Brooklyn Heights R. Co., 86 App. Div. 245, 83 N. Y. S. 833.

6. Hinchman v. Pere Marquette R. Co. [Mich.] 99 N. W. 277.

7. That an inspection would show that a horse was not vicious, the jury not having inspected the horse. Hinchman v. Pere Marquette R. Co. [Mich.] 99 N. W. 277.

8. See 1 Curr. L. 212.

9. Any prejudice from counsel's saying "The idea that a man has owned a farm thirty years, and he does not know how many acres there is," was removed by defendant explaining that it bordered on a lake and was fractional. Gould v. Gregory [Mich.] 95 N. W. 414.

10. Where defendant asked plaintiff's attorney to admit that the conductor was killed in the same accident and plaintiff's attorney replied "There is no question about that, and it is a fact the railroad settled with the widow afterward," it was prejudicial. Greenfield v. Detroit & M. R. Co. [Mich.] 95 N. W. 546.

11. Where, on cross-examination of an expert after objection to his being asked what had become of an institution where he got his experience, counsel offered to show that the company was wrecked by his management, and so of every one with which he had been connected, it was not cause for reversal. Allington & Curtis Mfg. Co. v. Detroit Reduction Co. [Mich.] 95 N. W. 552.

12. An offer to court to allow jury to take certain papers in evidence out with them not cause for reversal, when court below did not regard it as prejudicial, and it was apparently made in good faith. Rawlings v. Anheuser-Busch Brewing Ass'n [Neb.] 95 N. W. 792.

13. Where plaintiff's counsel in reply to question admitted complaint contained no allegation of actual damage, though such question was raised by pleading and the evidence, he was not estopped where defendant had not been misled. Steedman v. South Carolina & G. E. R. Co., 66 S. C. 542, 45 S. E. 84.

14. See 1 Curr. L. 213.

15. "After instilling the poison, the wrong is not undone by an empty apology." Chowing v. Parker [Mo. App.] 78 S. W. 677. But compare Sweeney v. New York Cent., etc., R. Co., 83 App. Div. 565, 81 N. Y. S. 1112, where a new trial was refused.

16. Where plaintiff's counsel had remarked that plaintiff, who conducted a private lying-in hospital, was engaged in the same business churches were, plaintiff cannot complain because defendant's counsel characterized this as vile and sacreligious and intimated that such places were responsible for abortions and murders. Sterling v. Detroit [Mich.] 95 N. W. 986.

17. See 1 Curr. L. 213, and see Saving Questions for Review, 2 Curr. L. 1590.

18. Jenkins v. Chism, 25 Ky. L. R. 736, 76 S. W. 405. Where language of counsel was first called to attention of court by affidavits on motion for new trial, and no objection taken, or ruling obtained at the time, there is nothing to review. Chicago, etc., R. Co. v. Krayenbuhl [Neb.] 98 N. W. 44. Where plaintiff's counsel in closing indulges in false argument, it is the duty of the court at request of defendant to instruct the jury in reference thereto. Drumm-Flato Commission Co. v. Gerlach Bank [Mo. App.] 81 S. W. 503.

19. Where, on appellant's objection, the court ruled certain remarks improper and instructed jury to disregard them, and appellant did not except to ruling, he cannot complain because of remarks. International & G. N. R. Co. v. Mercer [Tex. Civ. App.] 78 S. W. 562. It is sufficient diligence that objection is made and exception taken without interrupting the argument. Texas Cent. R. Co. v. Pledger [Tex. Civ. App.] 81 S. W. 755.

20. Objectionable remarks by counsel are for the consideration of the trial court on motion for new trial, and could not be so prejudicial as to constitute reversible error.

§ 6. *Action of court or counsel curing objection.*[22]—The error in the use of objectionable language by counsel may be cured by his withdrawal of it,[23] and by the action of the court,[24] where the rebuke and warning to disregard is prompt,[25] and the verdict not unjust,[26] as the jury will not be presumed to have disregarded the warning,[27] unless it was not sufficiently pointed;[28] but improper argument is not cured by an instruction to disregard it,[29] nor by the action of the court in admonishing counsel.[30]

ARREST AND BINDING OVER.

§ 1. Occasion or Necessity for Warrant (312).
§ 2. Privilege from Arrest (314).
§ 3. Complaint, Affidavit, or Information to Procure Warrant (314).
§ 4. The Warrant and Its Issuance (315).
§ 5. Making Arrest and Keeping and Disposition of Prisoner (316).
§ 6. Preliminary Hearing, Binding Over, or Discharge (317).
§ 7. Custody Awaiting Indictment or Trial (318).

§ 1. *Occasion or necessity for warrant.*[31]—In the absence of an empowering statute peace officers have no authority to arrest for a misdemeanor without process,

James McNeil & Bro. Co. v. Crucible Steel Co., 207 Pa. 493, 56 A. 1067.

21. Streeter v. City of Marshalltown [Iowa] 99 N. W. 114.

22. See 1 Curr. L. 213.

23. Leslie v. Jackson & S. Traction Co. [Mich.] 96 N. W. 580. Where counsel withdrew prejudicial remark and the court instructed the jury that it was improper, there was no prejudicial error. McKnight v. Detroit & M. R. Co. [Mich.] 97 N. W. 772. A remark that "The railroads had well nigh corrupted the virtue of the country" was not reversible error, where the court told counsel that the remark was improper and counsel withdrew it. International & G. N. R. Co. v. Reeves [Tex. Civ. App.] 79 S. W. 1099.

24. Sweeney v. New York Cent., etc., R. Co., 83 App. Div. 565, 81 N. Y. S. 1112; International, etc., R. Co. v. Mercer [Tex. Civ. App.] 78 S. W. 562. Though a new trial was demanded. Southern Indiana R. Co. v. Davis [Ind. App.] 69 N. E. 650. Where attention of the court was called, argument not supported by the evidence, and the jury was told to disregard such improper statement. Weeks v. Scharer [C. C. A.] 129 F. 333. Immediate objection, and jury promptly told to disregard, nothing prejudicial said. No error. Chicago, etc., R. Co. v. Zapp, 209 Ill. 339, 70 N. E. 623. Exception to objectionable remarks made during examination of witnesses was promptly sustained and the jury directed to disregard them. Thompson v. Purdy [Or.] 77 P. 113.

25. Where, after an improper remark, judge immediately censured attorney and instructed jury to disregard, the judgment will not be reversed therefor. Greenfield v. Detroit & M. R. Co. [Mich.] 95 N. W. 546. When counsel in their zeal depart from the record, a sharp and prompt rebuke from the judge will ordinarily cure the error. Brown v. Silver [Neb.] 96 N. W. 281. Where counsel asked improper question to show why a witness was not present, the error was corrected where court instructed jury not to consider anything as to witness' presence or absence. International & G. N. R. Co. v. Anchonda [Tex. Civ. App.] 75 S. W. 567.

26. Connolly v. Brooklyn Heights R. Co., 86 App. Div. 245, 83 N. Y. S. 833.

27. Where plaintiff's counsel remarked that defendant's counsel had said plaintiff had a good case, but the court immediately rebuked the counsel and instructed the jury to disregard them, the court will not presume that the jury disregarded the instructions. Witzel v. Zuel, 90 Minn. 340, 96 N. W. 1124.

28. Where counsel in an action against a railroad stated that "there never was a railroad company sued, but what it made out a perfect defense," though he withdrew it on court's stating it improper, there was prejudicial error, as the rebuke was not sufficiently pointed. Chicago, R. I. & T. R. Co. v. Musick [Tex. Civ. App.] 76 S. W. 219. The court must use sufficiently emphatic language to destroy any impressions resulting. Leu v. St. Louis Transit Co. [Mo. App.] 80 S. W. 273.

29. Inflammatory and damaging statements not found in the evidence. Benoit v. New York & H. R. R. Co., 87 N. Y. S. 951.

30. Hillman v. Detroit United R. [Mich.] 100 N. W. 399.

31. Note. An officer acting in good faith and in obedience to a warrant apparently regular is not liable for false imprisonment (Pepper v. Mayes, 81 Ky. 674; Henke v. McCord, 55 Iowa, 378, 7 N. W. 623; Manigold v. Thorpe, 33 N. J. Law, 138; Leib v. Shelby Iron Co., 97 Ala. 626, 12 So. 67; Atwater v. Atwater, 43 Neb. 147, 61 N. W. 577; Brooks v. Mangen, 86 Mich. 576, 49 N. W. 633; Clarke v. May, 2 Gray [Mass.] 413; Whitten v. Bennett, 86 F. 405; Henry v. Lowell, 16 Barb. [N. Y.] 268), or if it is irregular only and not void (Welch v. Scott, 27 N. C. [5 Ired.] 72; Ressler v. Peits, 86 Ill. 275; Cowdery v. Johnson, 60 Vt. 595, 15 A. 188; otherwise where the warrant is void (Frayer v. Turner, 76 Wis. 562, 45 N. W. 411; Forbes v. Hicks, 27 Neb. 111, 42 N. W. 898; Batchelder v. Currier, 45 N. H. 460; Poulk v. Selvarne, 3 Blackf. [U. S.] 421; Savacool v. Boughton, 5 Wend. [N. Y.] 170); also where the court had no jurisdiction to issue the warrant (Moore v. Watts, 1 Ill. 18; Pearce v. Atwood, 13 Mass. 324), but in Stewart v. Hawley, 21 Wend. [N. Y.] 552, it was held that this fact must appear from the face of the warrant. The officer is also liable where he arrests one exempt from arrest. Hough-

except on view, and where the offense amounts to a breach of the peace,[32] in which case it is his duty to arrest without a warrant.[33] In Kentucky, a peace officer's jurisdiction is not confined to the district which elected him,[34] but Texas statute giving peace officers authority to arrest without a warrant does not apply to magistrates,[35] who should, however, institute proceedings for the arrest.[36] He may arrest without a warrant for a felony.[37] New process is not necessary to retake a prisoner illegally discharged,[38] nor where one in the custody of an officer pleads to the information.[39] A Georgia statute permits an arrest without process if there is liable to be a failure of justice for want of an officer to issue a warrant.[40] The question of arrest without a warrant must be properly raised,[41] in which case the burden is upon the officer to show reasonable and probable grounds for so acting.[42]

ton v. Wilson, 10 Gray [Mass.] 365; Davis v. Rowe, 118 N. Y. 55, 23 N. E. 166. In Cabell v. Arnold, 86 Tex. 102, 23 S. W. 645, it was held that an officer was not liable who arrested one without having the warrant in his hands. Taylor v. Strong, 3 Wend. [N. Y.] 384. Contra, Smith v. Clark, 53 N. J. Law, 197, 21 A. 491. He may arrest for a felony without a warrant. Samuel v. Payne, 1 Doug. [Mich.] 359; Firestone v. Rice, 71 Mich. 377, 38 N. W. 885; Kirk v. Garrett, 84 Md. 388, 35 A. 1089; Wade v. Chaffee, 8 R. I. 224. Or for a breach of peace "on view." Vandeveer v. Matlocks, 3 Ind. 479; Montgomery v. Sutten, 67 Iowa, 497, 25 N. W. 748. Otherwise for a breach of peace not "on view." Stittgen v. Rundel, 99 Wis. 78, 74 N. W. 536; Hall v. O'Malley, 49 Tex. 70; Quinn v. Heisel, 40 Mich. 576. Unless authorized by statute. Ford v. Breen, 173 Mass. 52, 53 N. E. 136; Sheets v. Atherton, 67 Vt. 229, 19 A. 926. An officer failing to take the prisoner before a magistrate within a reasonable time is liable. Harris v. Atlanta, 62 Ga. 291; Cochran v. Toher, 14 Minn. 293; Pratt v. Hill, 16 Barb. [N. Y.] 303; Hynes v. Jungren, 8 Kan. 391; Newby v. Gunn, 74 Tex. 455, 12 S. W. 67; Tubbs v. Tukey, 3 Cush. [Mass.] 438; Burke v. Bell, 36 Me. 317. A warrant describing one by a fictitious name will not enable the officer executing the same to justify the arrest. Harwood v. Siphers, 70 Me. 464; Mead v. Hows, 7 Cow. [N. Y.] 332; Williams v. Tidball [Ariz.] 8 P. 851. And if an officer arrests the wrong person he will be liable. Filer v. Smith, 96 Mich. 347, 55 N. W. 999; Formwalt v. Hylton, 66 Tex. 288, 1 S. W. 376; Holmes v. Blyler, 80 Iowa, 365, 45 N. W. 756. Or if he arrest the right person under a wrong name. Gurnsey v. Lovell, 9 Wend. [N. Y.] 319; West v. Cabel, 153 U. S. 78, 14 S. Ct. 752. An arrest cannot be made for one purpose and justified for another. Malcolmson v. Gibbons, 56 Mich. 459, 23 N. W. 166; Boaz v. Tate, 43 Ind. 60; Snead v. Bonnoil, 49 App. Div. 330, 63 N. Y. S. 553; Elwell v. Reynolds, 6 Kan. App. 545, 51 P. 578; Leger v. Warren, 62 Ohio, 500, 57 N. E. 508, and note 51 L. R. A. 193. See 1 Curr. L. 214.

32. State v. Dierker, 101 Mo. App. 636, 74 S. W. 153; Ex parte Richards [Tex. Cr. App.] 72 S. W. 838; Kossouf v. Knarr, 208 Pa. 146, 56 A. 854. Defendant arrested without warrant, for carrying concealed weapons. Jones v. Anniston, 138 Ala. 199, 35 So. 112. A city charter may authorize arrest without a warrant for a violation of its ordinances in the presence of an officer. Vann v. State [Tex. Cr. App.] 77 S. W. 813. A warrant is not necessary if an offense is committed in the officer's presence, for which he might arrest with a warrant if committed without his view. McCaffrey v. Thomas [Del. Super.] 56 A. 382; Marshall v. Cleaver [Del. Super.] 56 A. 380.

33. Ky. St. 1903, § 1347. Making it an offense to discharge firearms in a town. Hendrickson v. Com. [Ky.] 81 S. W. 266.

34. In Kentucky a city marshal may arrest at any place within the county in which his city is located. Cr. Code, § 26, names city marshals as peace officers, and, § 36, authorizes them to arrest without a warrant for offenses committed in their presence. Helm v. Com. [Ky.] 81 S. W. 270.

35. Pen. Code, 1895, art. 324, authorizing arrest where officer knows one is carrying a pistol. Morawietz v. State [Tex. Cr. App.] 80 S. W. 997.

36. Code Cr. Proc. 1895, art. 941, providing that if a justice knows a person is carrying a pistol he shall summon witness, and if it appears that the offense is being committed, shall issue a warrant. Morawietz v. State [Tex. Cr. App.] 80 S. W. 997.

37. Gen. St. 1894, § 1252 and § 7120. State v. Leindecker [Minn.] 97 N. W. 972. A peace officer may arrest without a warrant whenever he has reasonable grounds to suspect that a felony has been committed and it is wholly immaterial whether the suspicion arises out of information imparted to the officer by some one else, or whether it is founded on his own knowledge. Brish v. Carter [Md.] 57 A. 210.

38. Upon an informal order of the county commissioners the sheriff released a prisoner who was retaken by the sheriff succeeding to office. In re Troy, 67 Kan. 186, 72 P. 531.

39. Even though such custody be improper. State v. Melvern, 32 Wash. 7, 72 P. 489.

40. Pen. Code 1895, § 896. Franklin v. Amerson, 118 Ga. 860, 45 S. E. 698.

41. One convicted of drunkenness sought a reversal because of insufficiency of the evidence to sustain the verdict, and on such proceeding raised objection that the arrest was made without a warrant. Held, that inasmuch as the defendant was regularly before the court to answer a complaint duly made and received, it was immaterial on the question of guilt whether the arrest was legal or illegal, or whether defendant was arrested at all, before complaint made. Com. v. Conlin, 184 Mass. 195, 68 N. E. 207.

42. McCaffrey v. Thomas [Del. Super.]

Under certain conditions a person may be arrested for trial in another district.[43]

A private person[44] has no authority to arrest for a misdemeanor unless the offense is committed in his presence or within his immediate knowledge,[45] but if the offense is a felony and the offender is attempting to escape, a private person may arrest upon reasonable and probable grounds of suspicion.[46]

§ 2. *Privilege from arrest.*[47]—One is not subject to a second arrest while in the custody of the court,[48] whether the custody be actual or the accused be out on bail.[49]

§ 3. *Complaint, affidavit, or information to procure warrant.*[50]—In Idaho the inquisition of a coroner is not sufficient basis for an information,[51] though it was at common law.[52] There must be strict compliance with a statute requiring the affidavit for a criminal complaint to state a probable cause for the belief of the affiant,[53] and it must sufficiently acquaint the accused with the offense charged;[54] but the same strictness required of indictments is not necessary.[55] In Alabama the affidavit may be amended.[56]

The information must show that a crime has been committed and the probable guilt of the accused,[57] but if based upon the same transaction it need not charge the same precise offense named in the original warrant of arrest.[58] Where an accused is committed for a certain offense, an information cannot be filed against

56 A. 382; Marshall v. Cleaver [Del. Super.] 56 A. 380.

43. (1) Where an indictment has been found against him in such other district. (2) Where he has been held over for trial by the committing magistrate in such other district. (3) Where a bench warrant has been issued for him. (4) Where a verified complaint has been made before a proper officer in such other district. (5) Where such verified complaint is made before such officer of the district where the accused may be. U. S. v. Yarborough, 122 F. 293.

44. See 1 Curr. L. 214.

45. Pen. Code 1895, § 900. Franklin v. Amerson, 118 Ga. 860, 45 S. E. 698.

46. Pen. Code 1895, § 900. Franklin v. Amerson, 118 Ga. 860, 45 S. E. 698.

47. See 1 Curr. L. 215.

48. A court which has in its custody a person charged with a crime has exclusive custody and jurisdiction until the question of his guilt or innocence is determined, and if he is found guilty, until the imprisonment has expired. In re Beavers, 125 F. 988.

49. When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. In re Beavers, 125 F. 988. Comp. Laws, § 1117, providing that officers of courts shall be liable to arrest except during sitting of the court, does not permit counsel who has given bail for liberty of jail limits to go beyond the limits on professional business before the sitting of the court. Hughes v. Hally [Mich.] 100 N. W. 591.

50. See 1 Curr. L. 215.

51, 52. In re Sly [Idaho] 76 P. 766.

53. That affiant "has reason to believe and does believe" that an offense has been committed is not equivalent to an affirmation of the existence of a probable cause for believing. Streater v. State, 137 Ala. 93, 34 So. 395; Sims v. State, 137 Ala. 79, 34 So. 400. An affidavit defective in this respect does not authorize the issuance of a warrant, does not support a conviction and no valid judgment can be rendered upon it. Monroe v. State, 137 Ala. 88, 34 So. 382. Code Cr. Proc. § 177. Affidavit of an officer making an arrest without a warrant from the fact that the accused was charged by a bank cashier with committing a larceny held insufficient. People v. Crane, 88 N. Y. S. 343.

54. Spraggins v. State [Ala.] 35 So. 1000. Designation by number of the statute alleged to have been violated is sufficient. State v. Marmouget, 110 La. 191, 34 So. 408.

55. Spraggins v. State [Ala.] 35 So. 1000.

56. In prosecutions begun by affidavit it is not error per se for the court to allow the affidavit to be amended so as to perfect it or meet any supposed defects. Wright v. State, 136 Ala. 139, 34 So. 233.

57. People v. Mayer, 41 Misc. 368, 84 N. Y. S. 817. Affidavit for arrest for drawing a check on a bank in which one had no funds; it did not appear that there were no funds when the check was presented, nor did it appear where the transaction took place, or that there was a statute in that state making it a crime. Brown v. Coleman, 89 N. Y. S. 427.

58. People v. Stockwell [Mich.] 97 N. W. 765. An information charging one with embezzling money of a certain company, received by him as its agent, is not a departure from the original complaint under which he was committed, charging him with embezzling money intrusted to him as bailee. People v. Walker [Cal.] 77 P. 705. An affidavit for a prosecution for selling intoxicating liquor charging three separate sales, is in legal effect a charge of a first offense, and did not entitle accused to a trial by jury as no imprisonment could be imposed as sentence. Carey v. State [Ohio] 70 N. E. 955.

him for a different offense.[59] A deposition setting forth the adoption of a resolution by a town board prohibiting the hawking of goods without a license, on which a warrant is based, need not set forth in full the resolution.[60] An information is sufficient basis for extradition.[61]

In the prosecution of a corporation a preliminary complaint is not necessary.[62]

§ 4. *The warrant and its issuance.*[63]—A warrant must be supported by oath or affirmation,[64] and be fair upon its face, to be a protection to the officer serving it;[65] it must be sufficiently definite in the description of the offense,[66] though it may be amended in this respect;[67] and will not be held void because of a clerical error.[68] A warrant "particularly describes" a person though the initial letter of the middle name is omitted,[69] or only the initial letter of the first name is used,[70] and whether a warrant sufficiently describes a person is a question of law.[71] The governor's warrant is sufficient, where the accused is a fugitive from the state.[72]

A United States commissioner may issue a warrant for the arrest of a person in his district for an offense committed in Indian Territory against the laws of the United States,[73] and it is preferable that the application for warrant be made to the nearest commissioner.[74]

Probable cause must be shown for the issue of a warrant for removal,[75] but an indictment is sufficient,[76] and the commissioner should consider whether the indictment or complaint alleges an offense against the United States;[77] such a warrant may not be issued except where an offender has been committed in a district other than that where the offense is to be tried.[78]

In Texas before a warrant can be executed in another county than that of the issuing magistrate, it must be indorsed by a magistrate of such other county,[79]

59. A justice committed one for assault with a deadly weapon. The prosecuting attorney filed his information charging him with assault with a deadly weapon with intent to kill [Code, §§ 872, 809]. People v. Nogiri [Cal.] 76 P. 490.

60. Gilbert v. Satterlee, 88 N. Y. S. 871. A deposition alleged on positive knowledge of a violation of Laws 1898, §§ 184, 187, forbidding hawking of goods without a license, held sufficient to give a justice jurisdiction to issue a warrant. Gilbert v. Satterlee, 88 N. Y. S. 871.

61. People v. Stockwell [Mich.] 97 N. W. 765.

62. The finding of an indictment is the appropriate first step. U. S. v. Correspondence Institute of America, 125 F. 94.

63. See 1 Curr. L. 215.

64. The officer issuing a warrant under such circumstances is liable for false imprisonment. Kossouf v. Knarr, 206 Pa. 146, 55 A. 854.

65. The officer is not liable for false imprisonment if it apparently be process lawfully issued, and such as the officer might lawfully serve. Douglass v. Stahl [Ark.] 72 S. W. 568. If a justice has jurisdiction to issue a warrant he cannot be held liable in an action for false imprisonment, though it subsequently appear that no crime was committed. Gilbert v. Satterlee, 88 N. Y. S. 871.

66. Cr. Code, c. 178, art. 1, p. 403, §§ 5204-5208. Spraggins v. State [Ala.] 35 So. 1000.

67. Even after appeal. Louisville v. Wehmhoff, 25 Ky. L. R. 995, 76 S. W. 876.

68. So held when a United States commissioner signed a warrant as "Commissioner of the Circuit Court of the United States for the Western District of Arkansas." Douglass v. Stahl [Ark.] 72 S. W. 568.

69. A person's middle name is not recognized in law. Cox v. Durham [C. C. A.] 128 F. 870. A warrant for the arrest of J. I. Cox, late of Boulder, protects the officer in the arrest thereon of James T. Cox, where he was the person in fact intended. Id.

70. Especially where he is known by the initial. Cox v. Durham [C. C. A.] 128 F. 870.

71. To afford protection to the officer against an action for false imprisonment. Cox v. Durham [C. C. A.] 128 F. 870.

72. Held in extradition to authorize the sheriff to produce the respondent before the court in which an information had been filed. People v. Stockwell [Mich.] 97 N. W. 765.

73. Douglass v. Stahl [Ark.] 72 S. W. 568.

74. U. S. v. Yarborough, 122 F. 293.

75. Probable cause is shown by an indictment or a bench warrant, or a verified complaint before a committing magistrate of some other jurisdiction, or a record of the accused having been held for trial. U. S. v. Yarborough, 122 F. 293.

76. Indictment of a public officer for having received money for procuring a public contract. Beavers v. Henkel, 194 U. S. 73, 24 S. Ct. 605.

77. All doubts on this subject should be resolved in favor of the government. U. S. v. Yarborough, 122 F. 293.

78. Rev. St. § 1014 (U. S. Comp. St. 1901, p. 716). U. S. v. Yarborough, 122 F. 293.

79. Code Cr. Proc. §§ 259, 260. Ex parte Sykes [Tex. Cr. App.] 79 S. W. 538.

but whether a U. S. marshal may make an arrest on a warrant issued in another district than his own is unsettled.[80]

§ 5. *Making arrest and keeping and disposition of prisoner.*[81]—To constitute an arrest the officer must lay his hand on the defendant or take possession of his person,[82] and the accused should in some way have notice that he is taken by lawful authority;[83] though in Delaware all are bound to know the character of an officer acting within his jurisdiction.[84]

A delay in obtaining or serving a warrant will not be fatal where the evidence does not show the officer to have been dilatory or negligent,[85] and the immediate arrest required under the search and seizure process does not apply to an ordinary arrest.[86]

In making an arrest the officer should use no more force than to him, acting as an ordinarily prudent person, considering the degree of the crime,[87] whether the alleged crime be a misdemeanor or a felony,[88] would seem reasonable and apparently necessary to effect the arrest,[89] or prevent an escape, or protect himself.[90] The force he may use is necessarily greater than that required for self-defense.[91] It will be presumed that only that was done which was necessary to accomplish the arrest,[92] but this presumption may be rebutted.[93]

A policeman has no greater authority than a private person to arrest beyond the town limits, or pursue beyond the limit one who has successfully resisted arrest and escaped therefrom,[94] and an arrest beyond the limits of a state on a warrant issued therein, is without authority.[95]

Where a prisoner charged with a misdemeanor has already escaped, the officer cannot lawfully use any means to recapture him that he would not have been justified in employing to make the first arrest.[96]

The return of service is not a condition precedent to holding the prisoner, where the original warrant is still in the possession of the officer;[97] and the suspected party may be detained for only such a reasonable time as will enable the

80. U. S. v. Yarborough, 122 F. 293.

81. See 1 Curr. L. 216.

82. Petit v. Colmary [Del. Super.] 55 A. 344.

83. This may be by knowing the person making the arrest to be an officer, or by seeing his badge or uniform, or by being arrested while committing a breach of the peace or other crime, or by the person making the arrest giving notice of his purpose and reason for it, or by being immediately pursued from the scene of his crime. But it is not sufficient that the officer who was unknown to defendant, wore a badge covered by the lapel of his coat. Franklin v. Amerson, 118 Ga. 860, 45 S. E. 698.

84. He need not show his authority unless it is demanded or after the arrest. Petit v. Colmary [Del. Super.] 55 A. 344.

85. So held where an arrest was made 29 days after the seizure of property illegally held, and 23 days after the issuance of the warrant for arrest. State v. Nadeau, 97 Me. 275, 54 A. 725.

86. State v. Nadeau, 97 Me. 275, 54 A. 725.

87. He cannot chastise a prisoner for insolence. Moody v. State [Ga.] 48 S. E. 340.

88. Sossaman v. Cruse, 133 N. C. 470, 45 S. E. 757.

89. State v. Phillips, 119 Iowa, 652, 94 N. W. 229. Discussion of the rules that the force used must have been necessary, and that life may not be taken on arrest for misdemeanor or an attempted escape therefrom, unless the officer has reasonable apprehension of peril of his own life or great bodily harm. State v. Phillips, 119 Iowa, 652, 94 N. W. 229. Shooting with a pistol in an endeavor to arrest for a misdemeanor is excessive force. Sossaman v. Cruse, 133 N. C. 470, 45 S. E. 757. An arrest must not be made in a threatening and menacing manner. Vann v. State [Tex. Cr. App.] 77 S. W. 813.

90. The officer must use as little violence as the case will admit of. Petit v. Colmary [Del. Super.] 55 A. 344. The test is whether, in view of the surrounding circumstances, the officers were justified in a reasonable apprehension of danger. In re Lang, 127 F. 213.

91. Moody v. State [Ga.] 48 S. E. 340.

92. But this presumption may be overcome by evidence. In re Laing, 127 F 213.

93. Evidence held sufficient to show an officer guilty of assault and battery. Moody v. State [Ga.] 48 S. E. 340.

94. Sossamon v. Cruse, 133 N. C. 470, 45 S. E. 757.

95. Sheriff of Dallas county, Texas, on a warrant there issued arrested a prisoner who had escaped into Indian Territory. Ex parte Sykes [Tex.] 79 S. W. 538.

96. Sossamon v. Cruse, 133 N. C. 470, 45 S. E. 757.

97. Rev. St. 1876, § 1085. State v. Aucoin, 111 La. 51, 35 So. 381.

officer to carry him before a magistrate,[98] and he must not be subjected to cruel and unnecessary exposure to cold, nor deprived of suitable clothing and covering.[99]

A prisoner cannot be held for attempting to bribe an officer for his release unless the arrest was legal,[1] and whether the alleged bribe was offered before or after arrest is a question for the jury upon the final trial, and pending its determination the prisoner should be held.[2]

§ 6. *Preliminary hearing, binding over, or discharge.*[3]—A preliminary examination or a waiver thereof is necessary before the prosecution of a private person upon an information, for a felony,[4] and an irregularity in this respect may be raised by plea in abatement,[5] or in some cases by certiorari;[6] in the prosecution of a corporation a preliminary hearing is not essential.[7]

A recognizance must be in the words of the statute.[8] A policeman has no authority to accept bail for an appearance.[9]

The accused may be examined on two distinct and separate charges at one time,[10] and the evidence need show only probable cause for holding;[11] though in Alabama uncorroborated accomplice testimony will not be sufficient.[12]

One arrested as a fugitive from justice is entitled to an examination before the magistrate causing the arrest,[13] but not upon the merits of the case.[14]

The magistrate's return as to whether such examination has been held or offered is conclusive,[15] and a justice docket entry of an examination describing the

98. Brisch v. Carter [Md.] 57 A. 210.

99. Petit v. Colmary [Del. Super.] 55 A. 344.

1. Arrest made upon a telephone request and the circumstance not authorizing an arrest without a warrant. Ex parte Richards [Tex. Cr. App.] 72 S. W. 838.

2. The court refused a discharge on habeas corpus, where the evidence on this point was conflicting. Ex parte Richards [Tex. Cr. App.] 72 S. W. 838.

3. See 1 Curr. L. 216.

4. Jahnke v. State [Neb.] 94 N. W. 158. A coroner is not a magistrate and has no power to hold a preliminary examination [Rev. St. 1887, § 7511]. In re Sly [Idaho] 76 P. 766.

5. Upon such plea the court will only determine whether such examination has been had or waived; errors in judgment by the examining magistrate will not be thus reviewed. Jahnke v. State [Neb.] 94 N. W. 158.

6. State v. Aucoin, 110 La. 959, 35 So. 141.

7. The finding of an indictment is the appropriate first step. U. S. v. Correspondence Inst. of America, 125 F. 94.

8. Under Code Civ. Proc. 1895, art. 887, requiring a recognizance that accused shall appear from day to day and from "term to term," a recognizance binding an accused to appear from "time to time" is fatally defective. Samamiego v. State [Tex. Cr. App.] 80 S. W. 996.

9. A city council has no power by ordinance or otherwise to authorize policemen on making arrests for violation of a city ordinance to accept a deposit of money for the appearance of the party in the police court. Richardson v. Junction City [Kan.] 77 P. 691.

10. The rule forbidding a trial on more than one charge at a time does not apply to examinations before a justice. People v. Shuler [Mich.] 98 N. W. 986.

11. It is not necessary that the evidence be sufficient to support a verdict of guilty or show guilt beyond a reasonable doubt. The intent of the statute is that a magistrate shall at once ascertain whether the crime charged has been committed, and whether there be reasonable cause to believe the accused committed it. Jahnke v. State [Neb.] 94 N. W. 158. In general one may properly be bound over, if there is any evidence tending to show guilt. But upon habeas corpus proceedings the court will not consider the weight of the evidence where an alderman is held for trial on a charge of bribery, the evidence tending to show an illegal offer in consideration of his vote. People v. Van De Carr, 87 App. Div. 386, 84 N. Y. S. 461. It is sufficient if there be some competent evidence before the magistrate tending to show the commission of the offense named by the accused. State v. Baeverstad [N. D.] 97 N. W. 548. The failure of a state to produce all its attainable evidence on a preliminary examination is not ground for a release of a defendant held to answer. In re Sly [Idaho] 76 P. 766.

12. Because not sufficient to convict [Code 1896, § 5300]. State v. Smith, 138 Ala. 111, 35 So. 42.

13. Rev. St. 1876, § 1019. State v. Aucoin, 110 La. 959, 35 So. 141.

14. It would be against public policy to require the examination on the merits in the parish when arrest as a fugitive is made, because of the probable location of witnesses for prosecution. State v. Aucoin, 111 La. 51, 35 So. 381.

15. The relator's verified statement that he has been refused an examination, held to be overborne by the magistrate's return and certified copies of the record showing the contrary. State v. Aucoin, 110 La. 959, 35 So. 141.

offense as "pocket picking or larceny from the person" is sufficient.[16] There should be evidence as to identification of the accused to satisfy the magistrate.[17] A properly certified copy of an indictment constitutes a prima facie case to justify holding,[18] but upon a mere verified complaint before a foreign magistrate, the accused is entitled to have the commissioner hear evidence as to the probable cause,[19] and he should be apprised of his right to be present before the judge and resist the application for a warrant of removal.[20]

One may be held for trial upon a different offense than that charged in the complaint.[21] It is not necessary that a coroner's inquest be held, before one charged with murder may be held on preliminary examination.[22]

An illegal discharge from custody confers no rights upon the prisoner.[23]

In California the postponing of the preliminary examination for more than two days at a time, without the consent of the defendant, will not be ground for setting aside the information.[24] In New York the commitment on adjournment of an examination, without a written information being filed, is illegal.[25]

§ 7. *Custody awaiting indictment or trial.*[26]

ARSON.

Arson is an offense against the possession and not against the property.[27] Consequently, one in possession and occupancy of a house under a lease is not guilty of arson in burning the same,[28] unless made so by statute.[29] The burning of any object which falls legally under the words of the statute may be charged as a crime,[30] and the fact that certain articles are specifically mentioned does not limit its scope.[31]

Every essential ingredient of the crime must be set forth in the indictment.[32] The crime must be proved beyond a reasonable doubt.[33] Evidence of motive[34] and other circumstantial evidence[35] is admissible.

16. The word "or" is not used disjunctively but indicates the synonym of the terms preceding and following it. State v. Dunn, 66 Kan. 483, 71 P. 811.

17. The sufficiency of such evidence will not be reviewed on certiorari. State v. Aucoin, 111 La. 51, 35 So. 381.

18. The prisoner admitted he was the person mentioned in the indictment, and offered no evidence. He cannot insist on the production of the witnesses for the state. In re Runkle, 125 F. 996.

19. A verified complaint is prima facie true, and further evidence from the government cannot be required until the accused has raised a substantial doubt in his favor. U. S. v. Yarborough, 122 F. 293.

20. U. S. v. Yarborough, 122 F. 293.

21. State v. Aucoin, 111 La. 51, 35 So. 381.

22. In re Sly [Idaho] 76 P. 766.

23. He is in no better situation than one who escaped through the connivance of the officers. In re Troy, 67 Kan. 186, 72 P. 531.

24. The record failed to show that the defendant had not consented. The court also cited its own precedent that if appellant suffered any legal wrong it was merely in temporary illegal confinement, for which there was a remedy at the time. People v. Boren, 139 Cal. 210, 72 P. 899.

25. Code Cr. Proc. §§ 145, 148, 150, 188, 192, 194. People v. Crane, 88 N. Y. S. 343. Code Cr. Proc. § 192, providing that on adjournment of the examination of a person, the magistrate must commit or release him on bail, and § 193, prescribing form of commitment, a detention after adjournment without commitment is illegal. People v. Crane, 88 N. Y. S. 343.

26. See 1 Curr. L. 217.

27. This is true at common law and under the Alabama statute. State v. Young [Ala.] 36 So. 19.

28. State v. Young [Ala.] 36 So. 19.

29. Under Rev. St. § 6832, making it arson to burn one's own property of the value of $50.00 for the purpose of getting the insurance, it is not necessary that the building be the sole property of him who burns it; it is sufficient if it be of the required value. Jones v. State [Ohio] 70 N. E. 952.

30. Merry-go-round outfit is "goods, wares and merchandise." State v. Fontenot [La.] 36 So. 630. The words "goods, wares, and merchandise" are to be considered separately as to their meaning. Id.

31. State v. Fontenot [La.] 36 So. 630.

32. Charging the burning of a merry-go-round outfit must allege that the outfit was part of a stock of goods. State v. Fontenot [La.] 36 So. 630.

33. Evidence of a confession and motive held sufficient to sustain a conviction. Morgan v. State [Ga.] 48 S. E. 238. The building burned being private and unoccupied, ownership must be proved by introduction of the deed. Goldsmith v. State [Tex. Cr. App.] 81

ASSAULT AND BATTERY.

§ 1. Nature and Elements of Criminal Offense (319).
§ 2. Defenses (320).
§ 3. Indictment (321).
§ 4. Evidence; Instructions; Verdict; Punishment (321).
§ 5. Civil Liability (323).

§ 1. *Nature and elements of criminal offense.*[36]—An assault is an attempt to inflict unlawful corporal injuries on another.[37] There must be a present and apparent ability to inflict injury,[38] and a specific intent to injure.[39] If injury be inflicted, it is assault and battery. It is sufficient if the force put in operation comes in contact with a person indirectly.[40] In Texas, assaults are defined as aggravated by the use of a weapon,[41] or by difference in age or condition of parties.[42] There must be an intention to injure.[43] Indecent proposals to a female constitute an aggravated assault under this statute.[44] Former conviction for a simple assault is no bar to a subsequent prosecution for an aggravated assault.[45]

S. W. 710. Denial of a continuance because of absence of a witness who would testify to an alibi was error, the incriminating evidence being meager. Id.

34. Statement on oath that a merchant intended to carry a $4,000 stock admissible to show real value, and motive for arson, when insurance carried was $14,000. Hooker v. State [Md.] 56 A. 390.

35. State v. Ledford, 133 N. C. 714, 45 S. E. 944. Evidence of an experiment tried to test state's theory in a prosecution for arson held inadmissible. Hooker v. State [Md.] 56 A. 390.

36. See 1 Curr. L. 218.

37. State v. Harrigan [Del. Gen. Sess.] 55 A. 5. An assault is an unlawful attempt by violence, to do injury to the person of another: the person making the attempt having the present ability to commit such injury. Id. An assault consists in an offer to do bodily harm, made by a person who is in a position to inflict it. State v. Hunt [R. I.] 54 A. 773. An assault is an unlawful attempt to do violence to the person of another, and a battery is the unlawful commission of such violence. State v. Harrigan [Del. Gen. Sess.] 55 A. 5.

Note: An actual or specific intent is necessary. Mercer v. Corbin, 117 Ind. 450, 20 N. E. 132; State v. Myers, 19 Iowa, 517. So one who innocently injures another while acting in self defense is not liable. Morris v. Platt, 32 Conn. 75. Accidental injuries caused by doing a lawful act are not assaults. Brown v. Kendall, 6 Cush. [Mass.] 292; Gibbons v. Pepper, 4 Mod. 405. But injuries caused by reckless conduct are. Hoffman v. Eppers, 41 Wis. 251; Welch v. Durand, 36 Conn. 182; Weaver v. Ward, Hob. 134; Com. v. Lister, 15 Phila. [Pa.] 406, and note to Vosberg v. Putney [Wis.] 14 L. R. A. 226.

It is universally held that solicitation to have illicit intercourse is not an assault. State v. White, 52 Mo. App. 285; State v. Priestley, 74 Mo. 24; People v. Fleming, 94 Cal. 308, 29 P. 647; Rex v. Butler, 6 Car. & P. 368; State v. Owsley, 102 Mo. 678, 15 S. W. 137; State v. Butler, 8 Wash. 194, 35 P. 1093, and note 25 L. R. A. 434.

38. Where one had approached within three feet of another, and drawn back his hand as though to strike her with a bottle grasped therein, and she turned and fled, it was a question for the jury whether an assault had been committed. The jury returned a verdict of guilty. Robinson v. State, 118 Ga. 750, 45 S. E. 620. Pointing an unloaded gun at another accompanied with a threat to discharge it is not an assault. People v. Sylva [Cal.] 76 P. 814.

Contra: Where one drew his pistol and pointed it at another, he was held guilty of assault, though the pistol was not cocked. Pace v. State [Tex. Cr. App.] 79 S. W. 531. A bullet fired need not go in the direction of the person assaulted, as accuracy or inaccuracy of aim cannot determine guilt or innocence. State v. Hunt [R. I.] 54 A. 773.

39. In case of a kiss, the injury is solely to the feelings, the intent cannot be presumed. Chambless v. State [Tex. Cr. App.] 79 S. W. 577. If a man attempts by force to make a woman kiss him, it is an assault. But if he merely attempts to kiss her by her consent, intending no force, he is not guilty. Id. It is an assault to restrain one, by violence, from separating parties from fighting. Even though person restrained was a private citizen. Wilson v. State [Tex. Cr. App.] 74 S. W. 315.

40. Willfully and intentionally driving a horse into contact with a person lawfully on a highway. State v. Lewis [Del. Gen. Sess.] 55 A. 3.

41. An aggravated assault may be committed with a pistol, though it be not cocked. Pace v. State [Tex. Cr. App.] 79 S. W. 531.

42. The evidence must show that defendant was an adult male person. Davis v. State [Tex. Cr. App.] 76 S. W. 466.

43. Stripling v. State [Tex. Cr. App.] 80 S. W. 376.

44. In order to constitute an aggravated assault, there must have been an intent to make an indecent proposal. Where the only act done by one going into the room of a female was to take hold of her gown, the question of assault was for the jury. Stermer v. State [Tex Cr. App.] 78 S. W. 1072. One placing his arm on the back of the buggy seat and merely touching a female is not guilty of aggravated assault. Stripling v. State [Tex. Cr. App.] 80 S. W. 376. Or if he attempted to embrace her, having no intention to injure her feelings, and having ground to believe his advances would not be objected to. Id. Where prosecutrix and defendant's wife were sleeping in adjoining rooms, and defendant testified that he went into prosecutrix's room by mistake and left

§ 2. *Defenses.*[46]—Right of self defense is based on necessity,[47] and is available to every person who on just grounds apprehends an unlawful attack,[48] though it does not threaten serious bodily harm,[49] and a person threatened by several may exercise his right against the nearest assailant.[50] One assaulted may stand his ground and repel force with force,[51] so long as his defensive acts do not threaten death or great bodily harm to the assailant.[52] Whether unnecessary force was used is a question for the jury.[53] Though one acting in self defense accidentally injures another than his assailant, he is yet justified, criminal intent being lacking.[54] An owner may use sufficient force in removing a trespasser and is not guilty, though he acts in anger;[55] but an owner out of possession cannot regain it by force.[56]

A parent may moderately chastise his child without being guilty of assault.[57] An officer who uses more force than is necessary in making an arrest is guilty of an assault.[58]

Opprobrious words and insult constitute no defense,[59] unless so provided by statute.[60]

as soon as he discovered where he was, there was a question for the jury. Stermer v. State [Tex. Cr. App.] 78 S. W. 1072.

45. Jury instructed to acquit if assault was not aggravated one. Heinen v. State [Tex. Cr. App.] 74 S. W. 776.

46. See 1 Curr. L. 219.

47. Defendant struck prosecutor and drew a pistol; prosecutor reached for defendant's pistol, but he retreated and, on prosecutor's advancing, shot him. State v. McCann, 43 Or. 155, 72 P. 137.

48. One traveling along a highway across which a fence had been built which he was engaged in tearing down. Fence had been erected by abutting owners who claimed the road bad not been legally established. Hoy v. State [Neb.] 96 N. W. 228. Merely seeking a person for the purpose of provoking a difficulty does not deprive one of the right of self defense. Price v. State [Tex. Cr. App.] 79 S. W. 540. And in such case one is entitled to a charge on self defense, disconnected from the question of provoking a difficulty. Id. Where evidence showed only that the prosecutrix made an assault on the defendant, there could not be a conviction for aggravated assault. Reese v. State [Tex. Cr. App.] 78 S. W. 511.

49. Price v. State [Tex. Cr. App.] 79 S. W. 540; Rea v. State [Tex. Cr. App.] 80 S. W. 1003.

50. The others were swearing and threatening while advancing, while the one assaulted had hold of his bridle rein. Hoy v. State [Neb.] 96 N. W. 228.

51. Where citizens of a town attacked boisterous persons who were using profane language in the street, the roisterers felled one of them with a scale weight. State v. Evenson [Iowa] 97 N. W. 979. It is the duty of one assaulted to get out of the way if he can. State v. Harrigan [Del. Gen. Sess.] 55 A. 5.

52. People v. Dankberg, 91 App. Div. 67, 86 N. Y. S. 423. And see Homicide, 2 Curr. L. 223.

53. Where one was advancing with clenched fists and was stabbed, the defendant is guilty only in case he used excessive force. Rea v. State [Tex. Cr. App.] 80 S. W. 1003. Where parties threw flower pots and bottles of benzine at each other. State v. Green, 134 N. C. 658, 46 S. E. 761. Where defendant followed prosecuting witness and his wife for some distance to their wagon, where said witness got a gun, whereupon defendant drew his gun, it was no error to refuse to charge on self defense. Pace v. State [Tex. Cr. App.] 79 S. W. 531. Where two persons followed another, came upon him unawares, knocked him down and beat him, evidence held sufficient to authorize a charge of assault with premeditated design. Blain v. State [Tex. Cr. App.] 78 S. W. 518. Where a woman was the assailant and the defendant pushed her away and she fell down, evidence held sufficient to require a charge on self defense. Maxwell v. State [Tex. Cr. App.] 78 S. W. 516. Where the assaulted party was at the time in the act of picking up a knife, evidence held to entitle assailant to an instruction on self defense. McCardell v. State [Tex. Cr. App.] 77 S. W. 446.

54. O'Rear v. Com., 25 Ky. L. R. 1537, 78 S. W. 407; Howard v. Com. [Ky.] 81 S. W. 689.

55. Removing a drunken person who was objectionable. State v. Crook, 133 N. C. 672, 45 S. E. 564. One may use whatever force is necessary to protect his property from the trespass. Taylor v. State [Tex. Cr. App.] 80 S. W. 378.

56. State v. Bradbury, 67 Kan. 808, 74 P. 231.

57. Thompson v. State [Tex. Cr. App.] 80 S. W. 623. Where a father led his 17 year old daughter home by the hair, he was not guilty of aggravated assault. Goods v. State [Tex. Cr. App.] 77 S. W. 799. Texas statute defining aggravated assault on a child does not apply to a male over 14 years of age. Thompson v. State [Tex. Cr. App.] 80 S. W. 623.

58. Evidence held to show that an officer used excessive force. Moody v. State [Ga.] 48 S. E. 340.

59. State v. Harrigan [Del. Gen. Sess.] 55 A. 5. Accusing one of undue fondness for women and wine. State v. Leuhrsman [Iowa] 99 N. W. 140. Abusive and insulting language addressed by prosecutor to defendant's daughter on the day before the assault is not admissible in evidence as justification. Walker v. State, 117 Ga. 323, 43 S. E. 737.

[To be concluded.]

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ASSAULT AND BATTERY—Cont'd.

§ 3. *Indictment.*[61]—An indictment need not allege the acts constituting the assault,[62] unless it is so provided by statute.[63]

Where aggravated assault depends on particular means used, such means must be alleged,[64] but not where a particular kind of an assault is made by the statute an aggravated assault.[65] A blank in the indictment for the given name may be filled in after trial has begun,[66] and errors of form may be cured by amendment.[67]

A verdict for a less crime may be found under an indictment for the greater of the same generic class, notwithstanding the two are statutory,[68] and it is reversible error for a court to refuse to so instruct.[69]

§ 4. *Evidence; instructions; verdict; punishment.*[70]—The evidence must satisfy beyond a reasonable doubt.[71] Matters constituting res gestae,[72] and evidence bearing on the probability of the assault, is admissible,[73] if not too remote,[74] evi-

60. For simple assault. Price v. State, 118 Ga. 60, 44 S. E. 820.

61. See 1 Curr. L. 219.

62. That accused made an assault on a named person and did him unlawfully beat. Sims v. State, 118 Ga. 774, 45 S. E. 621. Rev. St. 1883, c. 118, defining assault, is merely declaratory of the common law, and an indictment thereunder need not allege that the act was done in a willful, wanton or insulting manner. State v. Creighton [Me.] 57 A. 592.

63. Where the statute provides that the information must charge the particular means used, the phrase "a heavy wooden stick" is not sufficient [Pen. Code, §§ 950-952]. People v. Perales, 141 Cal. 581, 75 P. 170.

64. Stokes v. State [Tex. Cr. App.] 81 S. W. 1213.

65. Assault by adult male on a female. Stokes v. State [Tex. Cr. App.] 81 S. W. 1213. An information that one, an adult male person, did then and there commit an aggravated assault upon a certain female person is sufficient. Stripling v. State [Tex. Cr. App.] 80 S. W. 376.

66. Accused was arraigned by his full name which also appeared on the back of the indictment. State v. Matthews [La.] 36 So. 48.

67. Fortenberry v. State [Tex. Cr. App.] 72 S. W. 593.

68. Indictment for willfully shooting at; verdict for assault. State v. Matthews, 111 La. 962, 36 So. 48. One indicted for assault with intent to commit murder found guilty of the offense of shooting at another. Harris v. State [Ga.] 47 S. E. 520. Assault with intent to murder. State v. Di Guglielmo [Del. Gen. Sess.] 55 A. 350. In a prosecution for assault with intent to do great bodily injury, it is not error to instruct that the crime charged includes assault and battery and assault, which may be considered in turn. State v. Lauhrsman [Iowa] 99 N. W. 140.

An instruction on simple assault should also be given in a prosecution for felonious assault with a rock, it being for the jury to determine whether the rock was a deadly or a dangerous weapon. State v. Shipley, 174 Mo. 512, 74 S. W. 612. An information for larceny from the person charged assault; held the crime alleged could not have been committed without an assault, and was therefore included in the greater offense. State v. Houghton [Or.] 75 P. 822. The doctrine of conviction of included offenses is fully treated in Indictment and Prosecution, 2 Curr. L. 307.

69. State v. Matthews, 111 La. 962, 36 So. 48.

70. See 1 Curr. L. 219.

71. Where one was stabbed at a Christmas tree entertainment, evidence held sufficient to support a conviction of felonious assault. State v. Thornhill, 177 Mo. 691, 76 S. W. 948. Where all the witnesses except prosecutor agreed that the latter assaulted the defendant, and was pushing him into the street when the latter struck him with a small cane, which broke at the first blow, a verdict of conviction was contrary to the weight of evidence. People v. Dankberg, 91 App. Div. 67, 86 N. Y. S. 423. Verdict for simple assault held error, where, according to the evidence, accused must have been guilty of assault with a deadly weapon if guilty at all. People v. Sylva [Cal.] 76 P. 814; State v. Lewis [Del. Gen. Sess.] 55 A. 3. Positive evidence of prosecutrix that defendant hit her with his fist in his own house where she had called in a peaceful manner, held sufficient to support a conviction. State v. Sayman [Mo. App.] 77 S. W. 337. Evidence warranting conviction for assault where one menaced another with a hoe. Price v. State, 118 Ga. 60, 44 S. E. 820. Evidence sufficient to sustain conviction for assault and battery. State v. Bragg, 90 Minn. 7, 95 N. W. 578.

72. Evidence as to acts of a third person who took part in an affray in which a felonious assault was committed was admissible as res gestae. State v. Thornhill, 177 Mo. 691, 76 S. W. 948. Conversation immediately succeeding the battery admissible. Moody v. State [Ga.] 48 S. E. 340. What one told a witness immediately after the assault is admissible. Taylor v. State [Tex. Cr. App.] 80 S. W. 378. Remarks concerning iron knuckles held admissible as res gestae. Wilson v. State [Tex. Cr. App.] 78 S. W. 232.

73. Character and reputation for chastity of a female. Barton v. Bruley, 119 Wis. 326, 96 N. W. 815. In a prosecution for felonious assault, the clothes of the prosecuting witness are admissible after the state had closed its case, they having been previously identified. State v. Thornhill, 177 Mo. 691, 76 S. W. 948. Evidence that a witness for the

dence of past assaults is not.[75] The rule allowing admission of all of a conversation where part has been introduced does not apply to past interviews.[76]

An instruction must furnish a definite legal rule for the guidance of the jury,[77] and be free from ambiguity.[78] An instruction need not be given on a theory to which the evidence affords no support,[79] and it is improper if given.[80] Points already covered need not be made the subject of another charge.[81]

A general *verdict* of guilty as charged is sufficient where court submitted only aggravated assault.[82] An immaterial departure from the words of the statute in the form of the verdict is not error,[83] and meaningless matter may be rejected as surplusage.[84]

Where a statute provides the punishment as "fine or imprisonment," both cannot be imposed,[85] nor can excessive punishments,[86] nor punishments not named in the statute.[87]

defense undertook to prevent a witness for the state from appearing was admissible. Id. Evidence that the prosecuting witness arrested the defendant the night before the assault was admissible. Wilson v. State [Tex. Cr. App.] 78 S. W. 232. Defendant may show that prosecutor had previously shot a dog of defendant's mother and had been warned not to come upon her property again to show defendant's conduct from his standpoint. Coleman v. State [Tex. Cr. App.] 74 S. W. 24.

74. The fact that a woman purchased beer. Barton v. Bruley, 119 Wis. 326, 96 N. W. 815. Where defendant allowed an agent to take peaceable possession of a machine and then assaulted him, evidence of the contract in reference to the possession of the machine is immaterial. Lockland v. State [Tex. Cr. App.] 73 S. W. 1054.

75. In an action for assault on a woman, indecent proposals made to other women are inadmissible. Barton v. Bruley, 119 Wis. 326, 96 N. W. 815. Evidence of previous instances in which defendant was either tried or arrested for disturbance of the peace is inadmissible. Maxwell v. State [Tex. Cr. App.] 78 S. W. 516. On a prosecution for aggravated assault, it was error to admit testimony on behalf of the state that the railroad hands of the crews to which the parties belonged were in the habit of throwing knives at each other. McCardell v. State [Tex. Cr. App.] 77 S. W. 446.

76. State v. Leuhrsman [Iowa] 99 N. W. 140.

77. An instruction that "If there was a clear intent to commit violence," the jury should find that an assault had been committed was insufficient. Butler v. State [Miss.] 35 So. 569. Where an assailant struck with his hands, and the assaulted immediately struck back with a knife, an instruction on what degree of force may be used is proper. Redden v. State [Tex. Cr. App.] 78 S. W. 929.

Where the evidence raises the issue, defendant is entitled to a charge that if the offense did not occur in the county charged, he cannot be convicted. Stripling v. State [Tex. Cr. App.] 80 S. W. 376. Where one persisted in untying a mule tied on her premises, whereupon the owner assaulted her, the statute on provoking an assault was properly charged. Taylor v. State [Tex. Cr. App.] 80 S. W. 378. A charge under Pen. Code 1895, § 485, that where injury is caused by violence, an intent to injure is presumed and it rests with the assailant to show the contrary, is not objectionable as a charge on the weight of evidence. Stripling v. State [Tex. Cr. App.] 80 S. W. 376.

78. Instruction defining assault held ambiguous. People v. Sylva [Cal.] 76 P. 814.

79. Indictment for willfully shooting, no evidence on which a verdict of simple assault could be found. State v. Matthews [La.] 36 So. 48; Stokes v. State [Tex. Cr. App.] 81 S. W. 1213; Rea v. State [Tex. Cr. App.] 80 S. W. 1003. Where an information charged an assault on one certain person, it was error to instruct that he would be guilty if he assaulted either of three persons named in the instruction. State v. Moore [Mo.] 77 S. W. 522.

80. Charge relative to a dangerous weapon, none being used. Taylor v. State [Tex. Cr. App.] 80 S. W. 378.

81. State v. Thornhill, 177 Mo. 691, 76 S. W. 948.

82. Heinen v. State [Tex. Cr. App.] 74 S. W. 776.

83. Verdict as prepared read "assault with intent to commit great bodily injury"; as rendered, "assault with intent to do great bodlly injury." State v. Leuhrsman [Iowa] 99 N. W. 140.

84. Under Ball. Ann. St. §§ 7057, 7058. Where the verdict was "assault with a deadly weapon" and there was no such crime defined in the statute, "with a deadly weapon" was rejected as surplusage and accused sentenced for simple assault. State v. Snider, 32 Wash. 299, 73 P. 355. One was indicted for assault with intent to kill, being armed with a dangerous weapon. The jury returned a verdict of "assault and battery with a dangerous weapon." Held, that the verdict meant no more than "assault and battery," and the words "and battery" might be rejected as surplusage. State v. Henry [Me.] 57 A. 891.

85. Gen. St. 1901, § 2028. One can be discharged on habeas corpus after paying the fine. In re McNeil [Kan.] 74 P. 1110. Under 22 Del. Laws, p. 493, one convicted of assault on his wife may be punished by fine and imprisonment, or whipping, in the discretion of the court. State v. Finley [Del. Gen. Sess.] 55 A. 1010.

86. $1,000.00 and two years in jail held excessive, where the only possible injury was to the feelings, resulting from a kiss. Chambless v. State [Tex. Cr. App.] 79 S. W. 577.

87. Under B. & C. Comp. § 1772, punishing

§ 5. *Civil liability.*[88] *What constitutes.*[89]—The same elements must appear in a civil as in a criminal assault.[90] A carrier is liable if his conductor uses excessive force in removing,[91] or assaults a passenger,[92] and an innkeeper is liable for an assault committed by his servant upon a guest.[93] An officer who uses excessive force in making an arrest is liable,[94] but a superintendent of a house of correction who directs his subordinates to punish an inmate is not.[95] It is not necessary that injury result,[96] as nominal damages may be awarded.[97]

Cross actions in favor of each party against the other may arise out of the same affray,[98] and the claims may be presented by a petition by one and set off by the other.[99] Infants may sue by next friend to recover damages for injuries occasioned by assault and battery committed by one other than a parent.[1]

Defenses.[2]—Consent is a defense to a civil action.[3] A parent,[4] or one standing in loco parentis, may administer reasonable chastisement,[5] and an officer in executing a valid writ,[6] or officials in clearing obstructions from the highway,[7] or carriers in expelling a passenger for unseemly conduct,[8] or any person in repelling an attack,[9] may use reasonable force, but cannot take life unless life or limb is in danger.[10] That one is entitled to the possession of premises does not justify an assault committed in taking it.[11]

Abusive language, opprobrious epithets,[12] a character for turbulence,[13] or the fact that one is supposed to be guilty of a crime, does not justify an assault.[14]

simple assault by fine or imprisonment in the county jail, one convicted could not be condemned to hard labor. State v. Houghton [Or.] 75 P. 822. The words "at hard labor" could not be treated as surplusage. Id.

88, 89. See 1 Curr. L. 220.

90. It is not an assault to solicit a woman to indulge in sexual intercourse. Reed v. Maley, 25 Ky. L. R. 209, 74 S. W. 1079.

91. Female passenger had no ticket. Randell v. Chicago, etc., R. Co., 102 Mo. App. 342, 76 S. W. 493.

92. The fact that the conductor supposed himself justified would not exempt the company from liability. Birmingham R. Light & Power Co. v. Mullen, 138 Ala. 614, 35 So. 701; Houston & T. C. R. Co. v. Bell [Tex. Civ. App.] 73 S. W. 56. And see Carriers, 1 Curr. L. 421.

93. A porter who was not engaged in the discharge of his duties at the time pointed a revolver at an infant son of a guest. Clancy v. Barker [Neb.] 98 N. W. 440.

94. Shooting with a pistol in an endeavor to arrest for a misdemeanor. An officer shot the prisoner after he had escaped from his control. Sossamon v. Cruse, 133 N. C. 470, 45 S. E. 757.

95. Martin v. Moore [Md.] 57 A. 671.

96. It was error for a court to instruct that unless the miscarriage resulted from injuries inflicted by the woman being thrown to the ground, there could be no recovery. Frederickson v. Nelson [Mich.] 97 N. W. 678.

97. Where plaintiff and another testified to the assault, demurrer was properly overruled. Willett v. Johnson, 13 Okl. 563, 76 P. 174.

98. Where one wrongfully makes an assault, and then retires and is assailed by the other. McNatt v. McRae, 117 Ga. 898, 45 S. E. 248.

99. McNatt v. McRae, 117 Ga. 898, 45 S. E. 248.

1. Clasen v. Pruhs [Neb.] 95 N. W. 640.

2. See 1 Curr. L. 221.

3. Where two persons voluntarily entered into a scuffle and one of them was accidentally injured. Gibeline v. Smith [Mo. App.] 80 S. W. 961.

4. A minor cannot recover damages for an assault by its parent. Parent and Child, 2 Curr. L. 1089. McKelvey v. McKelvey [Tenn.] 77 S. W. 664.

5. Whether or not the punishment was excessive, reasonable, or cruel, is question of fact for jury. Clasen v. Pruhs [Neb.] 95 N. W. 640. Aunt acting as foster mother; chastisement held unreasonably severe. Id. See, also, Drum v. Miller [N. C.] 47 S. E. 421, in which a school teacher was held not liable for injuries caused by throwing a pencil at a pupil who was misbehaving.

6. Writ of replevin. McKinstry v. Collins [Vt.] 56 A. 985.

7. It is a good defense that selectmen were using no more force than was necessary in removing obstructions from the highway [V. S. 3508-10]. Chase v. Watson, 75 Vt. 385, 56 A. 10. One was preventing the removal. Id.

8. Ickenroth v. St. Louis Transit Co., 102 Mo. App. 597, 77 S. W. 162.

9. Where plaintiff attempted to drive over defendant with a horse, defendant was entitled in self defense to arm himself with a stick, and if a movement on his part, without striking plaintiff, frightened the horse, causing plaintiff to be thrown and injured, defendant is not liable for such injuries. Halley v. Tichenor, 120 Iowa, 164, 94 N. W. 472. The question as to who was the aggressor is for the jury. Sweet v. Boyd [Iowa] 98 N. W. 601.

10. Moran v. Vicroy, 24 Ky. L. R. 2415, 74 S. W. 244.

11. A guest of one wrongfully in possession was taken by the arm and led off the premises. Shaffer v. Austin [Kan.] 74 P. 1118.

12. Used by a passenger toward a street

Pleading, evidence and trial.[15]—A complaint founded in negligence cannot be treated as one for assault and battery.[16] Pleadings held sufficient.[17]

The defense of son assault demesne,[18] or matters in justification must be specially pleaded,[19] and evidence thereof is not admissible under the general issue.[20]

The burden is on the plaintiff to establish a prima facie case[21] by a preponderance of evidence,[22] therefore the presumption that defendant is innocent until proven guilty does not apply.[23] Res gestae,[24] and evidence of the relative ages and sizes of the parties,[25] and evidence tending to show a disposition to commit the act, is admissible.[26] Other evidence held admissible is discussed in the note.[27] One can-

car conductor. Birmingham R. Light & Power Co. v. Mullen, 138 Ala. 614, 36 So. 701. Nor will the plea of self defense avail in such a case. Dannenberg v. Berkner, 118 Ga. 885, 45 S. E. 682.

13. Where persons attacked one who had called them names, and who had a reputation for shooting when drunk. Dannenberg v. Berkner, 118 Ga. 885, 45 S. E. 682.

14. Warner v. Talbot [La.] 36 So. 743.

15. See 1 Curr. L. 221.

16. Complaint alleged that injury occurred through negligent act of striking plaintiff with a pistol, which was discharged. Greathouse v. Croan [Ind. T.] 76 S. W. 273. An allegation of willful assault is not supported by proof of a battery resulting from negligence. One injured in a friendly scuffle. Gibeline v. Smith [Mo. App.] 80 S. W. 961.

17. Physical pain and mental suffering as elements of damage are alleged by an allegation that defendant struck plaintiff causing great pain and suffering. Carlson v. Hall [Iowa] 99 N. W. 671. Where one alleged that he believed his injuries were permanent; that he was lame and suffered pain and was under the care of a physician, it was an allegation that his injuries were permanent. Evans v. Elwood [Iowa] 98 N. W. 584. An action is not begun by trustee process, within meaning of section 1, c. 245, Pub. St. 1891, where a trustee blank was filled out with a fictitious name with no intention of having it served, and it was not served upon a trustee. Keenan v. Perrault [N. H.] 67 A. 335.

18. Lutlopp v. Heckmann [N. J. Err. & App.] 57 A. 1046.

19. Evidence thereof cannot be received under the general issue, and if received without objection cannot be considered. Harden v. Hodges [Tex. Civ. App.] 76 S. W. 217.

20. Blackmore v. Ellis [N. J. Err. & App.] 57 A. 1047.

21. To show that the injuries complained of are the result of the wrongful act. Willet v. Johnson, 13 Okl. 563, 76 P. 174. It is not incumbent on the one assaulted to show that it was without provocation. Sweet v. Boyd [Iowa] 98 N. W. 601.

22. Blackmore v. Ellis [N. J. Err. & App.] 57 A. 1047; Clasen v. Pruhs [Neb.] 95 N. W. 640. Evidence held insufficient to show that injuries to bladder and uterus resulted from the assault. Willet v. Johnson, 13 Okl. 563, 76 P. 174.

A verdict for one **on his own testimony** will not be disturbed because the assailant's denial is corroborated by three witnesses. Zwangizer v. Newman, 87 App. Div. 64, 83 N. Y. S. 1071. Where **two witnesses** testified that defendant was the aggressor, evidence held sufficient to show that he was. Evans v. Elwood [Iowa] 98 N. W. 584.

Where one assaulted testified that his assailant struck him in the eye and that he was also internally injured, though the physician who examined him testified that the injury did not amount to anything, held sufficiently conflicting to go to the jury on the right to recover. Schmitz v. Kirchan, 32 Wash. 546, 73 P. 678. Where there was evidence that one had been assaulted and beat and his face was cut, causing great pain, a nonsuit was properly denied. Jones v. Peterson [Or.] 74 P. 661. An allegation that an eye was cut out was supported by proof that the sight was cut out. Orscheln v. Scott [Mo. App.] 80 S. W. 982.

Where a woman commenced an affray, and the person she attacked took her by the wrists and held her. While she was bruised to some extent, evidence held to show that excessive force was not used. Mattice v. Scutt, 87 N. Y. S. 1009.

A cause of action for the wrong exists in favor of a female against one ravishing her, and in such case no testimony in corroboration of her is necessary to support a recovery; neither is her delay or failure to make seasonable complaint a bar to her action, but merely goes to her credibility; the sufficiency of the evidence in this as in other civil cases being, where there is a conflict, for the jury. Starnes v. Stevenson [Iowa] 98 N. W. 312.

23. Kurz v. Doerr, 86 App. Div. 607, 13 Ann. Cas. 340, 83 N. Y. S. 736.

24. Proof of complaint of pain at time of receiving the injury is admissible. Robinson v. Halley [Iowa] 100 N. W. 328. What was said and done by each of the parties at the time is admissible. Profane language used. Birmingham R. Light & Power Co. v. Mullen, 138 Ala. 614, 35 So. 701.

25. Birmingham R. Light & Power Co. v. Mullen, 138 Ala. 614, 35 So. 701.

26. One's habit of playing pranks on people; evidence of throwing pepper in a colored boy's eyes after the assault in issue. Lee v. Longwell [Mich.] 99 N. W. 379, citing People v. Seaman, 107 Mich. 357, 65 N. W. 203. Declarations of one pleading self defense that he would not go to a certain place for fear of meeting plaintiff, such declarations being made on occasions different from the occasion of the assault are too remote. Evans v. Elwood [Iowa] 98 N. W. 584. A question as to assailant's reputation for peace was not reversible error. Orscheln v. Scott [Mo. App.] 80 S. W. 982. Upon the issue of self defense, evidence of prior threats and hostile demonstrations, is competent as tending to show that defendant

not testify to conclusions.[28] A nonmedical witness is competent to testify whether an injury appeared recent or otherwise,[29] but not as to the cause and extent thereof.[30]

Instructions must be based on evidence within the issues.[31] Issues made by the pleadings cannot be broadened by instructions.[32] The court cannot be required to charge as to the legal effect of part of the facts proved,[33] nor to make facts substantially covered, the subject of a subsequent charge.[34]

Actual,[35] and if the assault was founded in malice,[36] exemplary damages may be recovered, but it is held that since the defendant is subject to criminal prosecution punitive damages cannot be assessed.[37] As a general rule provocation cannot be shown in mitigation,[38] but the contrary has been held.[39] The aggressor in an

was in peril, that plaintiff began the difficulty, and his motive. Moran v. Vicroy, 24 Ky. L. R. 2415, 74 S. W. 244. Evidence of plaintiff's character for violence and turbulence is inadmissible as, in the absence of any act of plaintiff of dubious import, is his general reputation for violence and turbulence. Houston & T. C. R. Co. v. Bell [Tex. Civ. App.] 73 S. W. 56.

27. In an action for assault on one's wife, which resulted in her death, he is entitled to show her physical condition before the injury. McKinstry v. Collins [Vt.] 56 A. 985. Evidence held not to show that plaintiff had been acquitted of an attempt to provoke a prior assault, therefore it did not constitute error. Schmitz v. Kirchan, 32 Wash. 546, 73 P. 678. Where one admitted that he assaulted another, it was harmless error to permit the justice before whom he pleaded guilty to testify. Id. A survey of the highway was admissible on the question of good faith. Thompson v. Fairbanks, 75 Vt. 361, 56 A. 11. A photograph taken of the inmate on the day of the assault was inadmissible, there being no proof of its correctness. Martin v. Moore [Md.] 57 A. 671.

28. Counsel asked defendant whether he kicked plaintiff in self defense. Evans v. Elwood [Iowa] 98 N. W. 584. To ask the assaulting party whether he did anything that would cause the injury complained of is incompetent. Robinson v. Halley [Iowa] 100 N. W. 328.

29. Wife's testimony as to the appearance of an injury. Robinson v. Halley [Iowa] 100 N. W. 328.

30. Injuries to bladder, uterus, and ovaries. Willet v. Johnson, 13 Okl. 563, 76 P. 174.

31. Matters in justification, received without being specially pleaded, cannot be subject of a charge. Harden v. Hodges [Tex. Civ. App.] 76 S. W. 217. An instruction assuming mitigating circumstances was properly refused when there were none. Birmingham R. Light & Power Co. v. Mullen, 138 Ala. 614, 35 So. 701.

32. Complaint alleged negligence and the court charged that a recovery could be had on proof of wilful shooting. Greathouse v. Croan [Ind. T.] 76 S. W. 273.

33. Blackmore v. Ellis [N. J. Err. & App.] 57 Atl. 1047.

34. Where the court charged that if the facts were as testified to by the defendant there could be no recovery, defendant was not prejudiced by the refusal to give instructions presenting his theory. Lee v. Longwell [Mich.] 99 N. W. 379. A charge that defendant could recover on his plea of set-off if he was without fault was not error, as it was apparent from the charge as a whole what was meant. McNatt v. McRae, 117 Ga. 898, 45 S. E. 248.

35. Verdict of $1,025.00 for a broken arm which was the principal injury complained of, held excessive in a case where damages by way of punishment were not allowed. Rees v. Rasmussen [Neb.] 98 N. W. 830. Where one testified that his eye was blackened and that he was injured internally, but his physician testified that the injuries did not amount to anything, a verdict for $225.00 was not excessive. Schmitz v. Kirchan, 32 Wash. 546, 73 P. 678. An objection that nominal damages only should be allowed was without merit. Id. Where a mob took a person, threatened to hang him, pulled him up several times, and held a pistol at his head, with a view to extort from him a confession of arson, a verdict for $500 was held insufficient. Warner v. Talbot [La.] 36 So. 743. $2,500.00 for destruction of an eye was not excessive in the absence of mitigating circumstances. Orscheln v. Scott [Mo. App.] 80 S. W. 982.

Damages of $4,100 held not excessive where plaintiff lost for life his earning capacity of $1.25 to $1.50 per day, and his expectancy was 23 or 24 years. Houston & T. C. R. Co. v. Bell [Tex. Civ. App.] 73 S. W. 56.

Where counsel in argument asked the jury to allow plaintiff what they would demand for loss of an eye, was not prejudicial where the jury returned a verdict for the same amount as rendered by two juries in preceding trials. Orscheln v. Scott [Mo. App.] 80 S. W. 982.

36. Blackmore v. Ellis [N. J. Err. & App.] 57 Atl. 1047. Punitive damages may be allowed if the assault is wanton, malicious, or brutal. Ickenroth v. St. Louis Transit Co., 102 Mo. App. 597, 77 S. W. 162. Where the jury found that no actual damage had resulted, it was not prejudicial error to withdraw the question of malice. Robinson v. Halley [Iowa] 100 N. W. 328, citing Myers v. Wright, 44 Iowa, 38.

37. Borkenstein v. Schrack, 31 Ill. App. 220, 67 N. E. 547.

38. Actual damages cannot be reduced by any evidence of provocation that does not amount to justification. Barrette v. Carr, 75 Vt. 425, 56 A. 93. Where one said to a street car conductor "If you put my friend off you will have to put me off," did not justify an assault by the conductor, nor mitigate damages therefor. Birmingham R. Light & Power Co. v. Mullen, 138 Ala. 614, 35 So. 701; Warner v. Talbot [La.] 36 So. 743.

affray with a minor cannot recover damages from the father.[40] The jury may consider future suffering in assessing damages,[41] and actual damages may be proved, though the damages laid are bodily pain and mental distress.[42] A court may set aside a verdict on the ground that damages are inadequate.[43]

Evidence as to assailant's financial condition is admissible.[44] Other points admissible are discussed in the note.[45]

ASSIGNMENTS.

§ 1. Rights Susceptible of Assignment (326.)
§ 2. Requisites and Sufficiency of Express Assignments (329).
§ 3. Constructive or Equitable Assignments (331).
§ 4. Construction, Interpretation, and Effect (334).
§ 5. Enforcement of Assignment and of Rights Assigned (335).

§ 1. *Rights susceptible of assignment.*[46]—A trust deed, in the nature of a mortgage[47] or a chattel mortgage, may be assigned.[48] A mortgagor before sale, but after foreclosure, may assign his right of redemption.[49] Notes, though indorsed nontransferable,[50] open accounts,[51] or debts, are assignable[52] in whole or in part,[53] but not by the debtor himself.[54] Contracts are assignable unless there is something in their terms to indicate the contrary.[55] An executory contract should not be assigned to a competing concern without the consent of the other party thereto.[56]

39. Opprobrious words though not actionable in slander. Dannenberg v. Berkner, 118 Ga. 885, 45 S. E. 682. Matters in justification admitted without being pleaded may be shown in mitigation of exemplary damages. Harden v. Hodges [Tex. Civ. App.] 76 S. W. 217.

40. The minor shot the plaintiff and was at the time this suit was prosecuted serving sentence therefor. Miller v. Moche, 111 La. 143, 35 So. 491.

41. Allegations that the assaulted person suffered pain and believed himself to be permanently injured were sufficient to authorize the jury to consider future suffering. Evans v. Elwood [Iowa] 98 N. W. 584. This is not permitting them to conjecture as to the amount. Id. The amount of damage suffered is for the jury. Sweet v. Boyd [Iowa] 98 N. W. 601.

42. Time he was forced to be idle. Jones v. Peterson [Or.] 74 P. 661.

43. The damages awarded barely covered the doctor's bill, so other elements must have been ignored. Barrette v. Carr, 75 Vt. 425, 56 A. 93, and note to Benton v. Collins [N. C.] 47 L. R. A. 33. In the absence of abuse of discretion its action is not subject to review. Id.

44. The jury may take that into consideration in assessing exemplary damages. Willet v. Johnson, 13 Okl. 563, 76 P. 174.

45. Testimony of a physician who had not been paid was competent to lay a foundation for evidence as to the value of them. Jones v. Peterson [Or.] 74 P. 661. Under B. & C. Comp. § 842, testimony of a physician's services is admissible though unconnected at the time with their value. Id. A married woman may be liable for medical services, so evidence thereof is admissible. Willet v. Johnson, 13 Okl. 563, 76 P. 174. Where both parties to an affray claimed punitive damages it was no error to read Civ. Code, § 3609, providing that additional damages may be given for wounded feelings of the plaintiff. McNatt v. McRae, 117 Ga. 898, 45 S. E. 248.

46. See 1 Curr. L. 222.

47. Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800.

48. But assignment pendente lite cannot operate to prejudice the other party. Powell v. National Bank of Commerce [Colo. App.] 74 P. 536.

49. This may be done independently of the statute [Iowa Code, § 4061]. Cooper v. Maurer, 122 Iowa, 321, 98 N. W. 124.

50. Herrick v. Edwards [Mo. App.] 81 S. W. 466.

51. Account for medical services rendered. Neal v. Heying [Iowa] 98 N. W. 603.

52. Amount due on a building contract. Allen v. Mayler, 184 Mass. 486, 69 N. E. 220. Bills for work done assigned. Zertanna v. Gray, 102 Mo. App. 188, 76 S. W. 710.

53. A partial assignment cannot be enforced at law, unless the debtor has consented thereto. Columbia Finance & Trust Co. v. First Nat. Bank, 25 Ky. L. R. 561, 76 S. W. 156.

54. The assignment by a contractor to his surety, to protect him for advances, of warrants in his favor drawn against his own property, gave the surety no lien on the property which he could enforce against a mortgage. United Loan & Deposit Bank v. Bitzer, 25 Ky. L. R. 1538, 78 S. W. 183.

55. Contracts by receiver for the betterment of a railroad were assignable to the purchaser at the foreclosure sale, as from the nature of the case, the property was liable to be sold at any time, and the surety company bonds of the contractor were also assignable, though in a certain sense insurance contracts, as the liability was not increased. American Bonding & Trust Co. v. Baltimore & O. S. W. R. Co. [C. C. A.] 124 F. 866. A logging contract sold. Forsman v. Mace, 111 La. 28, 35 So. 372. A contract to print a county map assigned. Hixson Map

Contracts for personal services requiring skill, science, and peculiar qualifications are not assignable,[57] this includes contracts to draw up abstracts,[58] to take care of and manage cattle,[59] or to act as a salesman,[60] but the other party may give force to the assignment by assenting thereto,[61] and this assent may be shown by receiving benefits under the assignment.[62] Contracts to furnish horses for delivery purposes,[63] or to furnish logs to be manufactured into lumber are not such personal contracts,[64] nor is a contract with a body politic to erect and operate a factory in consideration of certain concessions.[65] The right to select exempt property is not assignable.[66] The amount to become due on a contract,[67] a partnership interest,[68] the interest of a beneficiary of a policy after the death of the insured,[69] time checks,[70] or trade secrets are assignable,[71] but the right to a patent not yet issued cannot be assigned at law.[72] The assignor may recover the consideration for the assignment.[73]

An assignment of future earnings is not void as against public policy,[74] and the assignee takes precedence of subsequent attaching creditors,[75] though the term of the employment is indefinite,[76] and the duration or amount of the assignment is uncertain,[77] nor is such an assignment rendered invalid by statutes exempting

Co. v. Nebraska Post Co. [Neb.] 98 N. W. 872.

56. Where an electric power company contracted to supply a cement company with electricity for five years, an assignment by the latter to a lighting company, which was in competition with the former, was not enforceable, and the fact that after notice of the assignment the power company had furnished electricity to light company and accepted two monthly payments, was not a ratification of assignment, where there was no evidence that power company knew of the circumstances. Hudson River Water Power Co. v. Glens Falls Portland Cement Co., 41 Misc. 254, 84 N. Y. S. 62. But on appeal it was held that as the cement company was only forbidden to use the power for manufacture of paper, and the contract was to inure to the "successors and assigns" the contract was assignable, and that at any rate the power company was estopped from objecting since it had accepted payment with notice of the assignment, and that power transformers were to be introduced. Hudson River Water Power Co. v. Glens Falls Gas & Elec. Light Co., 90 App. Div. 513, 85 N. Y. S. 577.

57. Linn County Abstract Co. v. Beechley [Iowa] 99 N. W. 702. See 1 Curr. L. 222, n. 9-15.

58. Linn County Abstract Co. v. Beechley [Iowa] 99 N. W. 702.

59. Where one entered into a contract selling cattle with a clause that the management should belong to him, the contract was assignable by him where he in fact cared for the cattle. Houssels v. Jacobs [Mo.] 77 S. W. 857.

60. Wilson v. Imperial Fertilizer Co. [S. C.] 46 S. E. 279.

61. Hire shown by his active co-operation in the assignment. Willson v. Imperial Fertilizer Co. [S. C.] 46 S. E. 279. An indemnitor assenting to an assignment of the indemnity contract by the indemnitee is bound to the assignee. Hall v. Chltwood [Mo. App.] 81 S. W. 208.

62. Accepting payments from the assignee. Hudson River Water Power Co. v. Glens Falls Gas & Elec. Light Co., 90 App. Div. 513, 85 N. Y. S. 577.

63. A contract by a livery stable keeper to supply horses and wagons to a library for delivery purposes. Merritt v. Booklovers' Library, 89 App. Div. 454, 85 N. Y. S. 797.

64. Poling v. Condon-Lane Boom & Lumber Co. [W. Va.] 47 S. E. 279.

65. Residents of township agreed to furnish site and pay taxes of a factory for a certain time, if it would erect and operate the factory within said township, held assignable by the company. Northwestern Cooperage & Lumber Co. v. Byers [Mich.] 95 N. W. 529.

66. Wabash R. Co. v. Bowring [Mo. App.] 77 S. W. 106.

67. Berlin Iron Bridge Co. v. Connecticut River Banking Co. [Conn.] 57 A. 275.

68. Driscoll v. Driscoll [Cal.] 77 P. 471.

69. Saling v. Bolander [C. C. A.] 125 F. 701.

70. Their assignment operates also as an assignment of the cause of action. Fitger v. Archibald Guthrie & Co., 89 Minn. 330, 94 N. W. 888

71. Vulcan Detinning Co. v. American Can. Co. [N. J. Eq.] 58 A. 290.

72. The assignment to plaintiffs of exclusive right to use a machine for which grantors have applied for patent, does not give plaintiffs legal title to patent subsequently issued, or right to sue for its infringement. Milwaukee Carving Co. v. Brunswick-Balke-Collender Co. [C. C. A.] 126 F. 171.

73. The transferrer of a county contract to build a bridge, may sue the transferee for the consideration for the transfer. Herring v. White, 119 Ga. 48, 45 S. E. 697.

74. Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564; Colorado Fuel & Iron Co. v. Kidwell [Colo. App.] 76 P. 922. To a grocer to secure past debts and future advances, and also to prevent attachment of future earnings. Dole v. Farwell [N. H.] 55 A. 553; Petersen v. Ball, 121 Iowa, 544, 97 N. W. 79. See 1 Curr. L. 222, n. 4, 5.

75, 76. Colorado Fuel & Iron Co. v. Kidwell [Colo. App.] 76 P. 922; Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564.

77. For such accessories as assignor should need, held valid. Colorado Fuel & Iron Co. v. Kidwell [Colo. App.] 76 P. 922.

wages from execution,[78] though in some states it must be recorded in order to be valid except as between the parties;[79] in such states the assignor making two assignments of the same wages simultaneous in date and record, the assignee is not liable to an action thereon,[80] nor does want of knowledge on the part of the assignee of the other assignment affect the employer's liability,[81] and the statute not requiring the debt for which the assignment is security to be stated, it covers all debts between the same parties during its duration.[82] As to whether or not a discharge in bankruptcy will render the assignment inoperative there is a conflict.[83] Moneys due a contractor are not "future earnings."[84]

Contingent interests may be assigned,[85] and the current of authority is that an assignment of the naked expectancy of an heir apparent will be enforced in a court of equity.[88] A chose in action[87] or rights of action arising out of contract may be assigned[88] to any one except an attorney in the action;[89] this includes a right of action for real estate commissions,[90] or for the breach of a lease.[91] The survivor of joint payees may assign the right of action upon the obligation.[92] Rights of action, sounding in tort, affecting real property are assignable,[93] as the right to sue for flooding land,[94] also those affecting personal property, as the right to sue a sheriff for seizing property,[95] to recover money deposited in pursuance of a wagering agreement,[96] or for conversion,[97] but not a right to recover a penalty for usury.[98] An unliquidated claim for personal injuries cannot be assigned,[99]

78. Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564.

79. Park Brew. Co. v. McDermott, 25 R. I. 95, 54 A. 924; Whitcomb v. Waterville [Me.] 58 A. 68.

80, 81. Whitcomb v. Waterville [Me.] 58 A. 68.

82. Park Brew. Co. v. McDermott, 25 R. I. 95, 54 A. 924.

83. See Bankruptcy, 1 Curr. L. 337.

That it is rendered inoperative. In re West, 128 F. 205. That it is not. Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564.

84. Berlin Iron Bridge Co. v. Connecticut River Banking Co. [Conn.] 57 A. 275.

85. A beneficiary may assign his right in a benefit certificate on the life of another to a stranger to secure a debt, notwithstanding charter provision that the object is to aid the members and their families. Jarvis v. Binkley, 206 Ill. 541, 69 N. E. 582. A son's expectancy in the estate of his mother who was a lunatic is assignable. Searcy v. Gwaltney Bros. [Tex. Civ. App.] 81 S. W. 576. See 1 Curr. L. 222, n. 7.

86. If in good faith and for an adequate consideration; query, as to necessity of ancestor's knowledge. Mally v. Mally, 121 Iowa, 169, 96 N. W. 735.

87. Ebel v. Piehl [Mich.] 95 N. W. 1004. See 1 Curr. L. 223, n. 18-29.

88. Action for breach of contract of sale of tobacco assigned for two-thirds of what should be collected. Devine v. Warner [Conn.] 56 A. 562.

89. N. Y. Code Civ. Proc. § 73, prohibits attorneys from buying any chose in action for the purpose of suing thereon, but does not prevent an attorney who has wrongfully purchased a bond and mortgage from assigning it to another, here his wife, who may enforce it if in her own interest and not in fact in the attorney's interest. Beers v. Washbond, 86 App. Div. 582, 83 N. Y. S. 993.

90. Von Tobel v. Steteon & Post Mill Co., 32 Wash. 683, 73 P. 788.

91. Raywood Rice Canal & Milling Co. v. Langford Bros. [Tex. Civ. App.] 74 S. W. 926.

92. Semper v. Coates [Minn.] 100 N. W. 662.

93. Arose upon a counter-claim. McCornick v. Friedman [Idaho] 76 P. 762.

94. Right of action against a railroad for flooding crops. Hovey v. Grand Trunk Western R. Co. [Mich.] 97 N. W. 398. Action against a city for overflowing land. Nielsen v. Albert Lea [Minn.] 98 N. W. 195.

95. Action against a sheriff for seizure of stock assigned to secure moneys advanced to carry on the suit. Curtis v. Curtis [Mich.] 96 N. W. 32.

96. Is a chose in action arising upon an implied contract and hence is assignable under the Practice Act (Gen. St. p. 2591) § 340. Van Pelt v. Schauble, 68 N. J. Law, 638, 54 A. 437. 1 N. Y. Rev. St. (1st Ed.) p. 662, pt. 1, c. 20, tit. 8, § 8. Bernstein v. Horth, 85 N. Y. S. 263.

97. A common carrier settling with a consignee for goods converted by another may take an assignment of the consignee's claim and sue the person who has wrongfully taken the goods, in the name of the consignee, for the carrier's use. Breisch v. Leitzel, 22 Pa. Super. Ct. 25; Johnson, Nesbitt & Co. v. Gulf & C. R. Co. [Miss.] 34 So. 357.

98. Not assignable until reduced to judgment. Ex parte Hiers [S. C.] 45 S. E. 146.

99. McLeland v. St. Louis Transit Co. [Mo. App.] 80 S. W. 30.

NOTE. Assignability of cause of action for personal injuries: In the absence of statutory provisions as to the survival or assignment of a cause of action for a personal injury, it is generally held to be nonassignable. Francis v. Burnett, 84 Ky. 23; Lawerence v. Martin, 22 Cal. 173; Pulver v. Harris, 52 N. Y. 73. And the same is held even though the assignment be made after verdict. Central R. & Banking Co. v. Brunswick & W. R. Co., 87 Ga. 386, 13 S. E. 520; Averill v.

though in some states it may be partially assigned to attorneys as compensation for their services in such suit.[1] In some states rights and liabilities regulated by special provision of law are not assignable.[2] Judgments are assignable,[3] and the joint owner of a judgment may assign his undivided interest therein.[4] Liquor licenses are usually not transferable,[5] except with the consent of the authorities.[6] A land warrant to a Mexican war soldier may be assigned, and the assignee can locate the land,[7] but the assignment of half-breed scrip is forbidden by Act of Congress.[8]

§ 2. *Requisites and sufficiency of express assignments.*[9]—Claims may be assigned before[10] or after suit is brought,[11] or while suit is pending in the supreme court.[12] In some states an assignment of a cause of action after suit and before judgment must be in writing, filed with the clerk of the court, and noted upon the docket.[13] The evidence must be sufficient to show an actual assignment[14] from the owner of the thing assigned,[15] to an existing person,[16] the interest to vest in the assignee being a present right in the thing assigned.[17]

Longfellow, 66 Me. 237. But where the cause of action survives by statute it is assignable. Hawley v. Chicago, etc., R. Co., 71 Iowa, 717, 29 N. W. 787; Quin v. Moore, 15 N. Y. 432; Lehmann v. Farwell, 95 Wis. 185, 70 N. W. 170, 33 L. R. A. 333. Contra, North Chicago St. R. Co. v. Ackley, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177. And where the claim survives verdict it is assignable. Kent v. Chapel, 67 Minn. 420, 70 N. W. 2; Mackey v. Mackey, 43 Barb. 58.—From note to North Chicago S. R. Co. v. Ackley, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177. See 1 Curr. L. 223, n. 24.

1. Rev. St. 1895, art. 3353a. Gulf, C. & S. F. R. Co. v. Eldredge [Tex. Civ. App.] 80 S. W. 556.

2. Code Civ. Proc. § 1910. Penalty for refusal of street railway company to give a transfer is such a right, being regulated by Laws 1892, p. 1406, c. 676. Coyle v. Interurban St. R. Co., 88 N. Y. S. 136.

3. But the right of set-off not affected where assignee takes with knowledge of prior judgment. Wabash R. Co. v. Bowring [Mo. App.] 77 S. W. 106.

4. The assignee may redeem from a sale under a prior judgment. Hunter v. Mauseau [Minn.] 97 N. W. 651.

5. A liquor license is a personal privilege and not transferable, and a creditor who accepts a transfer from an insolvent, is not liable to pay to the insolvent trustee in bankruptcy. Bonnie & Co. v. Perry's Trustee, 25 Ky. L. R. 1560, 78 S. W. 208.

6. Liquor tax certificate, permitting liquor traffic on certain premises may be transferred. In re Cullinan, 87 App. Div. 47, 83 N. Y. S. 1025. Boston (Mass.) liquor licensee may be transferred by trustee in bankruptcy, though they are not mortgagable. In re McArdle, 126 F. 442.

7. Though Act Cong. Feb. 11, 1847, § 9, provides that instruments affecting the title to such bounty right executed before the issue of the warrant are void. Johnson v. Fluetsch, 176 Mo. 452, 75 S. W. 1005.

8. Buffalo Land & Exploration Co. v. Strong [Minn.] 97 N. W. 575.

9. See 1 Curr. L. 223.

10. Claims of 18 persons against defendant for fraudulent misrepresentations as to mining stock may be assigned so as to permit a single action to be brought. Benedict v. Guardian Trust Co., 91 App. Div. 103, 86 N. Y. S. 370.

11. But assigneee' rights are limited to those of the original plaintiffs. Yazoo & M. V. R. Co. v. S. B. Wilson & Co. [Miss.] 35 So. 340.

12. Where one third of a cause of action was assigned with agreement that it should not be compromised so that the assignee should receive less than $5,000 and the assignee paid for the assignment $5,000 it was not void as against public policy, or in contravention of Mills' Colo. Ann. St. § 1299, against officiously intermeddling in other's suits. O'Driscoll v. Doyle, 31 Colo. 193, 73 P. 27.

13. A complaint in an action upon a judgment showing that the cause of action had been assigned after suit and before judgment, but which did not show an assignment according to the statute is demurrable [Laws 1899, p. 154]. Fordyce v. McPhetrige, 71 Ark. 327, 73 S. W. 1096. Such statutes do not refer to assignments executed before suit is brought. Gulf, C. & S. F. R. Co. v. Eldredge [Tex. Civ. App.] 80 S. W. 556.

14. Where plaintiff, assignee, and his assignor, both testified as to the assignment of the contract, and the written assignment was offered in evidence, there was sufficient proof of the assignment. Miller v. Luders, 85 N. Y. S. 265. Where an oral assignment could not be established except by the testimony of the assignor who denied its existence, held too doubtful to be sustained. Wooster v. Trowbridge [C. C. A.] 120 F. 667. The assignment of a chose in action sufficiently proved by testimony of assignor that he intended to assign his title. Crocker v. Muller, 40 Misc. 685, 83 N. Y. S. 189.

15. Allegation that claim of Consolidated Chandelier Co. was assigned to plaintiff not supported by an assignment from Sanberg, and testimony that he was the "owner" of the company. Saffier v. Haft, 86 App. Div. 284, 13 Ann. Cas. 318, 83 N. Y. S. 763.

16. A claim to recover a wager from a stockholder is assignable by parol, but testimony of assignor that he had assigned it to assignee, without any proof of existence of latter, or that he had not reassigned it, was not sufficient to sustain suit by assignee. Bernstein v. Horth, 85 N. Y. S. 263.

17. Donovan v. Middlebrook, 88 N. Y. S.

The article assigned must be delivered,[18] but being incapable of manual delivery a written assignment duly delivered,[19] or an oral assignment if founded upon a valuable and adequate consideration and accompanied by acts which amount to a constructive delivery,[20] is sufficient. A chose in action may be assigned by parol,[21] and is sufficiently delivered by the debtor's promising to pay it to another.[22] Leases for terms of years,[23] notes,[24] and mortgages, must be assigned in writing and be duly delivered.[25] Execution of a written assignment, it being recorded, in pursuance of a previous oral assignment, and notice being given the one having possession of the property, removes all question of the sufficiency of the oral assignment.[26]

Any right of action in connection with the thing assigned passes, though not specifically mentioned.[27] As between the parties there must be a consideration.[28]

At common law an executor, administrator, or guardian can assign promissory notes payable to himself without an order of the court,[29] but this rule has been abrogated in some states by statute.[30]

No particular form and specific instrument in writing is required in giving notice to the debtor in the assignment of debts, any notice to the debtor being sufficient.[31] No formal acceptance is necessary to an assignment of future earnings,[32] payment to the assignee is sufficient,[33] and an agent may obtain authority to accept such assignments for the holder of the fund by course of dealing.[34]

607. Assignment of a written contract. Liberty Wall Paper Co. v. Stoner Wall Paper Mfg. Co. [N. Y.] 70 N. E. 501.

18. The possession by the assignee of, and the general indorsement of the assignor on, a written contract is a sufficient assignment thereof. Hixson Map Co. v. Nebraska Post Co. [Neb.] 98 N. W. 872.

NOTE. Delivery: Delivery is essential to the assignment. Basket v. Hassell, 107 U. S. 602, 2 S. Ct. 415; Pringle v. Pringle, 59 Pa. 281; In re Crawford, 113 N. Y. 560, 21 N. E. 692. And the delivery must be such as to confer upon the donee the present right to reduce the fund to possession. Baskett v. Hassell, 107 U. S. 602, 2 S. Ct. 415; Sterling v. Wilkinson, 83 Va. 791, 3 S. E. 533; Yancey v. Field, 85 Va. 756, 8 S. E. 721.—From note to Williamson v. Yager [Ky.] 34 Am. St. Rep. 184.

19. A written assignment of a partner's interest is sufficient, though the assignor continue to deal with the partnership property as he had formerly done. Driscoll v. Driscoll [Cal.] 77 P. 471. An assignment duly signed at the end of a statement of services rendered which was attached to the petition is sufficient. Neal v. Heying [Iowa] 98 N. W. 603. See 1 Curr. L. 223, n. 35, 36.

20. Share of estate in the hands of an administrator. Howe v. Howe, 97 Me. 422, 54 A. 908. See 1 Curr. L. 223, n. 31-33.

21. Father paid money to son directing him to pay $400 thereof to the latter's sister upon the father's death, the son promising to do so, in the presence of the daughter, held a sufficient assignment. Ebel v. Piehl [Mich.] 95 N. W. 1004.

22. Ebel v. Piehl [Mich.] 95 N. W. 1004.

23. A bond referring to a lease as "assigned" to defendant is not a sufficient writing to sustain the assignment. Landt v. McCullough, 206 Ill. 214, 69 N. E. 107.

24. A note must be assigned by indorsement thereon [Hurd's Ill. Rev. St. 1899, c. 98, § 4]. Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800.

25. Where decedent executed assignments of mortgages to certain beneficiaries, and left in box with memorandum to deliver to beneficiaries after his death, and where some were partly paid he executed checks to the beneficiaries for the amount and left with the assignments, but died with them all in his possession, there was no delivery. Clay v. Layton [Mich.] 96 N. W. 458.

26. Howe v. Howe, 97 Me. 422, 54 A. 908.

27. Assigning in writing "all damage which I sustained on account of flooding on the 2d day of July, ——" held sufficiently to show intent to assign right of action. Hovey v. Grand Trunk W. R. Co. [Mich.] 97 N. W. 398. The assignment of the "right, title and interest" of the assignor to certain shares of stock which had been converted carries with it the right of action for the conversion. Rothschild v. Allen, 90 App. Div. 233, 86 N. Y. S. 42. An assignment of time checks carries with it the right of action. Fitger v. Archibald Guthrie & Co., 89 Minn. 330, 94 N. W. 888.

28. An assignment of a vested remainder interest worth $32,500 for $8,750 cash, the life tenant dying 10 years thereafter, held a sufficient consideration and assignee entitled to the $32,500. In re Phillips' Estate, 205 Pa. 511, 55 A. 212. The uncontradicted evidence being that the assignment of a right of action for breach of a contract of sale was to one who had helped raise the crop sold, and that the assignee was to retain ⅓ of the proceeds and give the assignor ⅔, held sufficient to warrant the jury in finding that the assignee was a bona fide holder of the claim. Devine v. Warner [Conn.] 56 A. 562. See 1 Curr. L. 224, n. 45-48.

29. Browne v. Fidelity & Deposit Co. [Tex.] 80 S. W. 593.

30. Rev. St. 1895, arts. 2113, 2558. Browne v. Fidelity & Deposit Co. [Tex.] 80 S. W. 593.

31. Notice to a city is sufficient if given to the proper officer though the latter fails to

Record.[35]—Assignments of "future earnings"[36] in some states must be recorded to be valid except as between the parties,[37] though in some states they need not where given to secure a bona fide debt.[38] As to the right of the contracting parties to restrict the assignment of a contract see note.[39]

§ 3. *Constructive or equitable assignments.*[40]—The transfer of a note,[41] or debt,[42] or chose in action,[43] or part thereof,[44] carries with it the mortgage or lien securing it,[45] notwithstanding the statutory requisites have not been complied with.[46]

enter it on the books as required. Sintes v. Commerford [La.] 36 So. 656.

32. Colorado Fuel & Iron Co. v. Kidwell [Colo. App.] 76 P. 922. The acceptance by a street commissioner of an assignment of future earnings by an employe in his department in the following words, "Accepted. John B. Noyes, Street Commissioner," held sufficient. Lamoreux v. Morin [N. H.] 54 A. 1023.

33. Colorado Fuel & Iron Co. v. Kidwell [Colo. App.] 76 P. 922.

34. Street commissioner as agent of a city in accepting assignments by employes of his department of their future earnings. Lamoreux v. Morin [N. H.] 54 A. 1023.

35. See 1 Curr. L. 224.

36. Query, whether future earned wages are exempt property under Ia. Code, § 2906, and husband and wife must both join in a written assignment. Petersen v. Ball, 121 Iowa, 544, 97 N. W. 79.

37. Mass. Rev. Laws, c. 189, § 34. But where only a few dollars worth of work remained to be done on a contract to build a stable for $1,473, the assignment of the balance due on the contract was not an assignment of future earnings as the contract was substantially performed. Allen v. Mayers, 184 Mass. 472, 69 N. E. 220; Park Brew. Co. v. McDermott, 25 R. I. 95, 54 A. 924; Whitcomb v. Waterville [Me.] 58 A. 68.

38. Conn. Gen. St. 1902, § 836, declaring assignment of future earnings not valid against an attaching creditor unless to secure a bona fide debt, or recorded, does not apply to money due a contractor. Berlin Iron Bridge Co. v. Connecticut River Banking Co. [Conn.] 57 A. 275.

39. NOTE. Right to prohibit the assignment of a contract: Though a contract be in its nature assignable, the parties thereto may in terms restrict or prohibit its assignment, so that an assignee cannot succeed to any rights in the contract by virtue of the assignment thereof to him. Mueller v. Northwestern University, 195 Ill. 236, 63 N. E. 110, 88 Am. St. Rep. 194; Delaware County v. Diebold Safe, etc., Co., 133 U. S. 473, 10 S. Ct. 399; Carter v. State, 8 S. D. 153, 65 N. W. 422; Omaha v. Standard Oil Co., 55 Neb. 337, 75 N. W. 859; Burck v. Taylor, 152 U. S. 635, 14 S. Ct. 696.

An assignment of a contract in express violation of its positive provisions is void, and the person claiming through such an assignment is entitled to no relief in equity (Grigg v. Landis, 19 N. J. Eq. 350), and, on the other hand, a collateral covenant restraining the assignment of a contract cannot be enforced in equity it appearing that such restraint is but an incident to the objects of the principal covenants which have been substantially performed (Id.).

The debtor or contractor may waive a provision forbidding the assignment of the contract without his consent (Brewster v. City of Hornellsville, 35 App. Div. 161, 54 N. Y. S. 904), or he may become estopped to raise objection to the assignment (Pike v. Waltham, 168 Mass. 581, 47 N. E. 437; Staples v. Somerville, 176 Mass. 241, 57 N. E. 380).

The assignment being void all that is acquired by the assignee is a right to maintain an action against the assignor for the share of the profits which he has attempted to transfer. Burck v. Taylor, 152 U. S. 634, 14 S. Ct. 696.

Only the party for whose benefit such a restriction is made can insist upon it. Wilson v. Reuter, 29 Iowa, 176; Fortunato v. Patten, 147 N. Y. 277-281, 41 N. E. 572; Burnett v. Jersey City, 31 N. J. Eq. 341.

A stipulation in a contract against its assignment is not violated by its assignment as collateral security. Butler v. Rockwell, 14 Colo. 125, 23 P. 462; Board of Trustees v. Whalen, 17 Mont. 1, 41 P. 849.

Quaere, is the general rule permitting parties to stipulate against the assignment of their contracts restricted in its operation to transfers voluntarily made by them? It would seem so. See Freeman. Ex'ns, §§ 119, 194; Jackson v. Silvernail, 15 Johns. [N. Y.] 278; Higgins v. McConnell, 130 N. Y. 482, 29 N. E. 978; Moser v. Tucker, 87 Tex. 94, 26 S. W. 1044; Boone v. First Nat. Bank, 17 Tex. Civ. App. 365, 43 S. W. 594; Smith v. Putman, 3 Pick. [Mass.] 221; Riggs v. Pursell, 66 N. Y. 193; Jackson v. Corliss, 7 Johns. [N. Y.] 531; Doe d. Mitchinson v. Carter, 8 Term R. 300. —From note to Mueller v. Northwestern University, 195 Ill. 236, 63 N. E. 110, 88 Am. St. Rep. 194.

40. See 1 Curr. L. 224.

41. In action to foreclose a mortgage, the want of a formal written assignment, will not defeat the foreclosure. Brynjolfson v. Osthus [N. D.] 96 N. W. 261.

42. The indorsement of a note given for purchase money of land carries the vendor's lien and the right to enforce it. Mulky v. Karsell, 31 Ind. App. 595, 68 N. E. 689.

43. The assignee of a chose in action purchased at a receiver's sale became invested with equitable lien, which was created by the contract creating the debt. Appellant advanced money to purchase tobacco, which it was to sell, and it was to have a lien on tobacco and proceeds for advances, and expenses. Cincinnati Tobacco Warehouse Co. v. Leslie & Whitaker's Trustee, 25 Ky. L. R. 1570, 78 S. W. 413.

44. An assignment of part of the indebtedness carries a pro tanto interest in the mortgage securing it. Miller v. Campbell Commission Co., 13 Okl. 75, 74 P. 507.

45. Where one who held land under a deed which was subsequently declared to be a mortgage gave a mortgage to another, the

A court of equity gives effect to assignments of all kinds of future and contingent interests in personalty, as well as realty, if made for a valuable consideration, and not in contravention of public policy;[47] this includes patents applied for,[48] the interest of a beneficiary in a benefit certificate on the life of another,[49] and expectancies in real estate.[50] The assignor must be in a condition to transfer the property or chose in action, or to cause it to be transferred, to the assignee.[51] A partner after the dissolution of the partnership cannot assign partnership claims without consent of his former partners.[52]

Any order, writing or act, which makes an appropriation of a fund, amounts to an equitable assignment thereof,[53] but it must be drawn upon a particular fund,[54]

latter is an equitable assignee of the former. Kiddell v. Bristow [S. C.] 45 S. E. 174.

46. Where note and trust deed were assigned by a separate instrument, it only amounted to an equitable assignment, since Hurd's Ill. Rev. St. 1899, c. 98, § 4, requires indorsement on the note. Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800.

47. Guarantee fund belonging to contractors in the hands of the government. Wagenhurst v. Wineland, 20 App. D. C. 85.

48. The assignment of an exclusive right to use a machine, for which grantors have applied for patent, may operate in equity as an assignment of the patent subsequently issued. Milwaukee Carving Co. v. Brunswick-Balke-Collender Co. [C. C. A.] 126 F. 171.

49. An assignment of a benefit certificate on life of another to secure a debt will be supported in equity, notwithstanding charter rule that the benefit fund is to assist members, and that it shall be exempt from execution. Jarvis v. Binkley, 206 Ill. 541, 69 N. E. 582.

50. Conveyance by heir apparent of land he does not own is void at law, but may be enforced in equity as an agreement to convey. In re Ryder's Estate, 141 Cal. 366, 74 P. 993. Where, for a valuable consideration, consisting of present indebtedness and future advances, an assignment is made of all sums of money then due or which might become due to the assignor from an estate then unsettled in the hands of an administrator, held a valid equitable assignment as between the assignor and claimants. Howe v. Howe, 97 Me. 422, 54 A. 908.

51, 52. Wagenhurst v. Wineland, 20 App. D. C. 85.

53. Check. Fortier v. Delgado & Co. [C. C. A.] 122 F. 604. See 1 Curr. L. 224, n. 52.

NOTE. Check, Whether Assignment of Fund: One class of cases asserts the doctrine that the drawing and delivery of a check do not operate as an assignment, in any sense, of the drawer's rights as against the drawee, unless the check is in some way accepted by the drawee, and hence that, as between the drawer and the payee or holder, the check does not operate as an assignment of so much of the fund as is drawn upon, or of the drawer's rights as against the drawee. In other words, that a check drawn and delivered to the person to whose order it is payable does not operate, without acceptance by the drawee, as an assignment of the sum for which it was given, although the drawer may have, or may have had at the time it was drawn, funds in the possession of the drawee of an equal or larger amount. There being no privity, express or implied, between the holder of the check and the drawee, such holder of the check in its original form can bring no suit on it against the drawee. In case of nonpayment, the recourse of the holder is against the drawer and the indorser, if any. The drawer alone can bring suit to recover the funds against which the check was drawn, and ordinarily he only can maintain an action for failure to pay on presentment. He may revoke the check, and countermand its payment before acceptance, and if unaccepted, his death will operate as a revocation, and it seems that his insolvency has the same effect.

This view of the law of checks is unanimously adopted by the courts of England, and the vast weight of American authority is also found to be in full accord with this rule. Among the cases supporting it are National Bank v. Millard, 10 Wall. 152; National Bank v. Whitman, 94 U. S. 343; Dana v. Third Nat. Bank, 13 Allen, 445; Carr v. National, etc., Bank, 107 Mass. 45, 9 Am. Rep. 6; Aetna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; Case v. Henderson, 23 La. Ann. 49, 8 Am. Rep. 590; Colorado Nat. Bank v. Boettcher, 5 Colo. 185, 40 Am. Rep. 142; Griffin v. Kemp, 46 Ind. 172; National Bank v. Second Nat. Bank, 69 Ind. 479, 35 Am. Rep. 236; Harrison v. Wright, 100 Ind. 516, 50 Am. Rep. 805, fully discussing the subject and citing and classifying the cases; Merchants' Nat. Bank v. Coates, 79 Mo. 168; Dickinson v. Coates, 79 Mo. 250, 49 Am. Rep. 228; Coates v. Doran, 83 Mo. 337 (these cases overruling several cases in the Missouri court of appeals holding a contrary view); Creveling v. Bloomsbury Nat. Bank, 46 N. J. L. 255, 50 Am. Rep. 417; Duncan v. Berlin, 60 N. Y. 151; People v. Merchants' Bank, 78 N. Y. 269, 34 Am. Rep. 532; Risley v. Phoenix Bank, 83 N. Y. 318, 38 Am. Rep. 421; Veits v. Union Nat. Bank, 101 N. Y. 563; Saylor v. Bushong, 100 Pa. St. 23, 45 Am. Rep. 353; First Nat. Bank v. McMichael, 106 Pa. St. 460, 51 Am. Rep. 529; First Nat. Bank v. Shoemaker, 117 Pa. St. 94, 2 Am. St. Rep. 649; Purcell v. Allemong, 22 Gratt. 739; Essex Co. Nat. Bank v. Bank, 7 Biss. 193; Strain v. Courdin, 11 Nat. Bank Reg. 156; Rosenthal v. Mastin Bank, 17 Blatchf. 318; Moses v. Franklin Bank, 34 Md. 574; Attorney-General v. Continental Life Ins. Co., 71 N. Y. 325, 27 Am. Rep. 55; Lunt v. Bank, 49 Barb. 221; Grammel v. Carmer, 55 Mich. 201; First Nat. Bank v. Gish, 72 Pa. St. 14.

The doctrine has been lately approved by the supreme court of Alabama in National, etc., Bank v. Miller, 77 Ala. 168, and reaffirmed by the supreme court of the United States in Laclede Bank v. Schuler, 120 U. S. 511, where the court said: "The question of

must be accepted by the party upon whom it is drawn,[55] and delivered to the payee.[56] A check for a portion of a deposit does not generally operate at the time of delivery as an assignment pro tanto of the fund on deposit.[57] Orders given by a contractor for payment of money due which are accepted by the holder of the fund,[58] or warrants registered with a county treasurer,[59] operate as an equitable assignment of the fund. An agreement to pay a certain sum out of, or that one is entitled to receive the same from, a designated sum when received, does not operate as an equitable assignment,[60] the test being whether or not the debtor would be justified in paying the debt, or the portion contracted about, to the person claiming to be the assignee;[61] but it has been held that a direction to pay to another the money due does not constitute an assignment.[62] Neither a revocable power of

how far and under what circumstances a check of a depositor in a bank will be considered an equitable assignment to the payee of the check of all or any portion of the funds or deposits to the credit of the drawer in the bank, is one which has been very much considered of late years in the courts, and about which there is not a unanimity of opinion. In this court, it is very well settled that such a check, unless accepted by the bank, will not sustain an action at law by the drawee against the bank, as there is no privity of contract between them." In the later case of Florence Mining Co. v. Brown, 124 U. S. 391, the court said: "An order to pay a particular sum out of a special fund cannot be treated as an equitable assignment pro tanto, unless accompanied with such a relinquishment of control over the sum designated that the fundholder can safely pay it, and be compelled to do so, though forbidden by the drawer. A general deposit in a bank is so much money to the depositor's credit; it is a debt to him by the bank, payable on demand, to his order, not properly capable of identification and specific appropriation. A check upon the bank in the usual form not accepted or certified by its cashier to be good, does not constitute a transfer of any money to the credit of the holder; it is simply an order, which may be countermanded; and payment forbidden by the drawer at any time before it is actually cashed. It creates no lien on the money which the holder can enforce against the bank. It does not of itself constitute an equitable assignment." In the late case of Pickle v. Muse, 88 Tenn. 380-385, 17 Am. St. Rep. 900, the court reaffirmed this doctrine, and said: "This brings us to the question as to whether complainant can recover upon this check as against the bank. While the authorities are not agreed, yet the decided weight of opinion is, that the holder of a bank check cannot sue the bank for refusing payment, in the absence of proof that it was accepted by the bank, or that it has done some other act equivalent to and implying acceptance. This has been the uniform view of this court. Planters' Bank v. Merritt, 7 Heisk. 177; Planters' Bank v. Keesee, 7 Heisk. 200; Imboden v. Perrie, 13 Lea, 504. We are unable to see any reason for disturbing the rule as heretofore declared by this court, especially as the decided weight of authority is in accord with our decisions."—From note to Hemphill v. Yerkes [Pa.] 19 Am. St. Rep. 607. Other notes on the same subject will be found in 19 Am. Dec. 422, 96 Am. Dec. 132 and 45 Am. Rep. 355.

54. Curtis Bros. Lumber Co. v. McLoughlin, 80 App. Div. 636, 80 N. Y. S. 1016. A draft must specify the fund, and this though the amount of the draft is the precise sum in the drawee's hands [Negotiable Instruments Law, § 127]. Fulton v. Gesterding [Fla.] 36 So. 56. Check. Reviere v. Chambliss [Ga.] 48 S. E. 122. See 1 Curr. L. 224, n. 54.

55. Checks. Baltimore, etc., R. Co. v. First Nat. Bank [Va.] 47 S. E. 837; Reviere v. Chambliss [Ga.] 48 S. E. 122. See 1 Curr. L. 224, n. 55.

56. Where drawer placed order in an envelope and delivered it to the payee, he not knowing what the envelope contained, the envelope being indorsed that it was to be opened only upon the drawer's death or by his direction, held no delivery. Duryea v. Harvey, 183 Mass. 429, 67 N. E. 351.

57. Reviere v. Chambliss [Ga.] 48 S. E. 122. Where a distinct deposit was kept out of which the wages of employes were paid, and the checks on which were stamped "Cash Account," held, such checks operated as equitable assignments of so much of the deposit as was necessary for their payment. Fortier v. Delgado & Co. [C. C. A.] 122 F. 604. Under the negotiable instruments act. Baltimore, etc., R. Co. v. First Nat. Bank [Va.] 47 S. E. 837. See 1 Curr. L. 225, n. 56, 57.

58. Third Nat. Bank v. Atlantic City, 126 F. 413. Contractor for a city building to whom money was due presented an order to the city comptroller requesting him to issue a warrant for a specified sum in favor of a bank, which order the comptroller accepted, the order being then given to a bank which advanced money thereon, held not only an equitable assignment, but a transfer of the legal title to the payee. Third Nat. Bank v. Atlantic City [C. C. A.] 130 F. 711. Order upon a city comptroller given by a contractor upon any moneys becoming due upon the contract, held, the order was payable only out of the reserve fund or what might be due upon final settlement. Dickerson v. City of Spokane [Wash.] 77 P. 730.

59. Warrants of a county duly issued and registered with treasurer operate as an equitable assignment of the funds in his hands for their payment. Jennings v. Taylor [Va.] 45 S. E. 913.

60. Donovan v. Middlebrook, 88 N. Y. S. 607. Conversations to effect whatever interest one should have in his mother's estate should go to a certain person, insufficient to show a transfer. Mally v. Mally, 121 Iowa, 169, 96 N. W. 735. See 1 Curr. L. 224, n. 38; Id. 225, n. 59.

61. Donovan v. Middlebrook, 88 N. Y. S. 607.

62. Where a salesman sold goods for a

attorney to locate half-breed scrip,[63] nor an application by a beneficiary of an insurance policy for a change of beneficiaries,[64] nor the employment of an attorney on a contingent fee operate as an assignment of the claim.[65]

§ 4. *Construction, interpretation, and effect.*[66]—An assignment though absolute on its face may be shown to have been taken for collateral security.[67] An assignment of a contract carries with it all sums due thereunder,[68] but money due for extra work will not pass unless mentioned.[69] An assignment of one's interest in property carries with it the right to sue for torts concerning that property.[70] An assignment of a chose in action,[71] or of an expectancy,[72] is wholly ineffectual as against the debtor unless he has notice or knowledge of facts sufficient to put him on inquiry, and then the debtor may not be bound to recognize it,[73] but it will be complete, as against creditors of the assignor, if the trustee has notice or knowledge of it in season to disclose the fact of the assignment.[74]

There is a conflict as to whether assignees have priority according to priority of notice,[75] or priority of assignment.[76] A letter mentioning the assignment incidentally,[77] or presenting the order to the debtor before delivery to the assignee,[78] are

mill to defendants the bills being stamped "payable to" plaintiffs, that was not sufficient evidence of an assignment to sustain an action by plaintiffs. Greeff v. Levison, 84 N. Y. S. 298.

63. Power of attorney to locate Sioux half-breed scrip, and another to convey the land so located, where not coupled with an interest or given for a valuable consideration, are revocable, and so do not amount to an assignment of the scrip, which is forbidden. Buffalo Land & Exploration Co. v. Strong [Minn.] 97 N. W. 575. See 1 Curr. L. 225, n. 60-62.

64. Application signed by part of the beneficiaries. Saling v. Bolander [C. C. A.] 125 F. 701.

65. As to whether contract of employment of an attorney amounts to an equitable assignment of claim to him, see Nielsen v. Albert Lea [Minn.] 98 N. W. 195. See 1 Curr. L. 225, n. 60-62.

66. See 1 Curr. L. 225.

67. McDonald v. New York, 89 App. Div. 131, 85 N. Y. S. 1096.

68. Carries with it money retained by a city to insure completion of public works. Chapin v. Pike, 184 Mass. 184, 68 N. E. 42.

69. Plaintiff's letter to defendant saying he had assigned to another, certain bills due from defendant, did not cover what was due for extra work. Zertanna v. Gray, 102 Mo. App. 188, 76 S. W. 710.

70. Johnson, Nesbitt & Co. v. Gulf & C. R. Co. [Miss.] 34 So. 357.

71. Parties may settle a cause of action without consultation with their attorneys, if it is not done to defraud them, and is done without notice of any equitable assignment to the attorney. Nielsen v. Albert Lea [Minn.] 98 N. W. 195.

72. Howe v. Howe, 97 Me. 422, 54 A. 908.

73. Query, whether an employer is bound after notice of assignment of future wages to withhold them from employe. Petersen v. Ball, 121 Iowa, 544, 97 N. W. 79.

74. Howe v. Howe, 97 Me. 422, 54 A. 908.

75. In re Phillips' Estate, 205 Pa. 515, 55 A. 213; Third Nat. Bank v. Atlantic City, 126 F. 413.

76. Columbia Finance & Trust Co. v. First Nat. Bank, 25 Ky. L. R. 561, 76 S. W. 156.

NOTE: Can subsequent assignees obtain precedence by first giving notice? Upon this question there is irreconcilable conflict. In some states the rule is that the prior assignee in point of time is protected, this decision being supported by two reasons: (1) A valid assignment once being made the assignor has no further interest in the claim; Clark v. Hogeman, 13 W. Va. 718; Luse v. Parke, 17 N. J. Eq. 415: (2) The maxim, Prior in tempore, potior in jure; Maybin v. Kirby, 4 Rich. Eq. [S. C.] 105; Coon v. Reed, 79 Pa. 240; Muir v. Schenck, 3 Hill [N. Y.] 228, 38 Am. Dec. 633; Fairbanks v. Sargent, 104 N. Y. 108, 9 N. E. 870, 58 Am. Rep. 490; Tingle v. Fisher, 20 W. Va. 497. In other states, in the Federal courts and in England a different rule prevails; it being held that the question which of the successive bona fide assignees for value of the same obligation is entitled to priority depends upon when notice thereof was communicated to the debtor. Laclede Bank v. Schuler, 120 U. S. 511, 7 S. Ct. 644; Ward v. Morrison, 25 Vt. 593; Murdoch v. Finney, 21 Mo. 138; Miller v. Bomberger, 76 Pa. 78; Merchants,' etc., Bank v. Hewitt, 3 Iowa, 93, 66 Am. Dec. 49; The Elmbank, 72 Fed. 610; Dearle v. Hall, 3 Russ. 1; Stocks v. Dobson, 4 De Gex, M. & G. 11, 16, and annotations thereto. Special notice does not seem to be necessary, it being sufficient if the party to be affected has such knowledge of the facts or circumstances as ought to induce a reasonable belief of the fact, and the debtor is bound from the time of notice, although not concurring in the arrangement: Note to Stocks v. Dobson, 4 De Gex, M. & G. 11. If notice of assignments are simultaneous, the earlier assignment has priority: Calisher v. Forbes, 7 Ch. App. 109; Murdoch v. Finney, 21 Mo. 138, 140. —From note to Graham Paper Co. v. Pembroke [Cal.] 71 Am. St. Rep. 26.

77. A letter to the holder of the legal title to a chose in action assigned as collateral security offering to sell the property secured by the assignment, and stating that it was so secured, held not sufficient notice so as to give assignee priority over subsequent assignments of which proper notice was given. In re Phillips' Estate, 205 Pa. 525, 55 A. 216.

78. Third Nat. Bank v. Atlantic City, 126 F. 413.

ineffectual as notice. An assignment being superior to a foreign attachment, it is superior to an assignment after the attachment in which the assignee has given notice to the holder of the fund.[79] An assignment of property as security for a running account is not security for advances made by the assignee after notice of attachments placed on the security by creditors.[80] An assignment for the payment of a debt past due of such money as might thereafter become due upon a contract during its performance does not take priority over the claims of an assignee of the contract, who completed it after the assignor's abandonment.[81]

The assignee is not a bona fide holder, but he takes the property or right subject to all the equities existing between the parties,[82] he is chargeable with any notice or knowledge the original creditor possessed of fraud on the part of the debtor affecting the collection of the debt,[83] takes the right subject to forfeiture for acts of the assignor,[84] and is bound by any settlement,[85] or release,[86] entered into by the assignor prior to the assignment. A plaintiff suing in tort, assigning to his attorneys an interest in the cause of action declared upon, the attorney does not thereby become a necessary party to the suit,[87] nor can he be made a party to the suit upon the motion of the adverse party,[88] nor does it entitle the court to treat him as a party for the purpose of giving security for costs.[89] A transfer to an attorney of a part of a cause of action, referring to the cause and authorizing the attorney to do all things necessary for the prosecution or settlement of the cause, authorizes the attorney to prosecute the cause in the assignor's name.[90]

On an absolute assignment of a claim in payment of a debt, the surplus to be paid to other creditors of the assignor, the assignee takes the legal title, the equitable title as to such surplus being in the other creditors.[91] An assignor cannot settle a claim after assignment and notice to the debtor.[92] An assignor not acquiring title until subsequent to the assignment, the assignee takes title by estoppel.[93] A reassignment back to the assignor does not annul the assignment.[94]

§ 5. *Enforcement of assignment and of rights assigned.*[95]—The assignment

79. In re Phillips' Estate, 205 Pa. 525, 55 A. 216.

80. Howe v. Howe, 97 Me. 422, 54 A. 908.

81. Where a city contractor defaulted and assigned the contract to a surety, who completed the contract and then assigned his claim to plaintiff, such assignments were superior to a prior assignment made before any money was earned, to secure a past due debt, as contractor had abandoned contract, and nothing was then due him. Weeks v. New York, 42 Misc. 436, 87 N. Y. S. 98.

82. Where a corporation had no power to issue coupon bonds to pass by delivery, the assignee took them subject to prior equities. Georgetown Water Co. v. Fidelity Trust & Safety Vault Co., 25 Ky. L. R. 1739, 78 S. W. 113. Assignee of judgment acquires the assignor's interest at the date of the transfer. Fischbeck v. Mielenz, 119 Wis. 27, 96 N. W. 426. Assignee of a trust deed in the nature of a mortgage takes it subject to all defenses which the grantor could make against the grantee. Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800. See 1 Curr. L. 225, n. 63; Id. 226, n. 75.

83. Fuller v. Horner [Kan.] 77 P. 88.

84. Where one transferred liquor certificate after an offense had been committed, which was approved by authorities, who knew of the offense, it will not prevent them from enforcing the forfeiture. In re Cullinan, 87 App. Div. 47, 83 N. Y. S. 1025.

85. Dannenmann v. Charlton [La.] 36 So. 965.

86. Where the assignor, for consideration, releases the other party to the contract who had no notice of the assignment, the release binds the assignee. Smith v. Kissel, 92 App. Div. 235, 87 N. Y. S. 176.

87. Galveston, H. & S. A. R. Co. v. Mathes [Tex. Civ. App.] 73 S. W. 411. Does not render him a party in interest in the action. McLeland v. St. Louis Transit Co. [Mo. App.] 80 S. W. 30.

88. Galveston, H. & S. A. R. Co. v. Mathes [Tex. Civ. App.] 73 S. W. 411.

89. International & G. N. R. Co. v. Reeves [Tex. Civ. App.] 79 S. W. 1099; Galveston, H. & S. A. R. Co. v. Mathes [Tex. Civ. App.] 73 S. W. 411.

90. International, etc., R. Co. v. Reeves [Tex. Civ. App.] 79 S. W. 1099.

91. Sintes v. Commerford [La.] 36 So. 656.

92. Ivy Coal & Coke Co. v. Long [Ala.] 36 So. 722.

93. Vulcan Detinning Co. v. American Can. Co. [N. J. Eq.] 58 A. 290.

94. Where defendant had contracted to sell iron to plaintiff who assigned the contract to another, and on defendant's refusal to consent, the contract was reassigned to plaintiff, that did not annul the original assignment so as to authorize plaintiff to sue on the contract. Gardiner Campbell Co. v. Iroquois Iron Co. [C. C. A.] 127 F. 648.

95. See 1 Curr. L. 226.

being absolute, the assignee may generally sue in his own name,[96] though in some states he must show, as a condition precedent to exercising this right, that he is the owner in his own right and for his own benefit, without accountability,[97] and in an action upon such an assignment the assignor is not a necessary party,[98] and where the claim is assigned for security the assignee,[99] or the assignor, with the knowledge and acquiescence of the assignee,[1] may sue thereon in his own name; and the assignee of such a claim may make a settlement with the consent of his assignor,[2] and where such claim requires presentation before suit can be brought, presentation by the assignor with the assignee's knowledge and acquiescence is sufficient.[3] The assignment must be in existence at the commencement of the suit in order to entitle the assignee to sue thereon,[4] and in some states one's interest in an action being assigned during the pendency thereof, it may be prosecuted to judgment in the name of the original plaintiff.[6] The assignee of a trade secret may enjoin employees of his assignor, having knowledge of the same, from utilizing it.[6] The right to attach does not follow the debt assigned.[7]

The assignor in suing the assignee must allege the performance of conditions precedent.[8] It is sufficient to allege an assignment without specifying the assignor's authority,[9] though one claiming an assignment through an attorney in fact must show that the latter had authority.[10] An allegation of an assignment by a company is not supported by proof of an assignment executed by an individual.[11] Clerical errors will be overlooked.[12] Where a plaintiff claims as an assignee, an amendment of his complaint, so as to declare upon an account stated immediately between the parties without reference to the assignor, is a departure from the original cause of action.[13] One assailing the validity of an assignment on the ground that there was no consideration must prove lack of consideration.[14] The first assignee's title being defective a subsequent assignee must show that he is a bona fide purchaser for a valuable consideration.[16] The burden is upon the assignee to show that the debtor had knowl-

96. Claims. Huddleson v. Polk [Neb.] 97 N. W. 624. Practice Act (Gen. St. p. 2591) § 340. Van Pelt v. Schauble, 68 N. J. Law, 638, 54 A. 437.

97. Uncas Paper Co. v. Corbin, 75 Conn. 675, 55 A. 165.

98. O'Shaugnessy v. Humes, 129 F. 953.

99. Where a claim was assigned to secure a debt, the legal title thereto was in the assignee, even after the debt was paid, in the absence of a reassignment, and the assignee may sue thereon [Ball. Ann. Codes & St. § 4835]. Von Tobel v. Stetson & Post Mill Co., 32 Wash. 683, 73 P. 788.

1. Lamson v. Marshall [Mich.] 95 N. W. 78.

2. Curtis v. Curtis [Mich.] 96 N. W. 32.

3. Lamson v. Marshall [Mich.] 95 N. W. 78.

4. An undated writing purporting to be an assignment of a contract is not admissible in evidence to show defendant was the owner of the contract at the commencement of the action, where on cross-examination, it is shown that the writing was actually signed after the action was brought. Liberty Wall Paper Co. v. Stoner Wall Paper Mfg. Co. [N. Y.] 70 N. E. 501.

5. Code, § 3476. Mayo v. Halley [Iowa] 100 N. W. 529.

6. Vulcan Detinning Co. v. American Can. Co. [N. J. Eq.] 58 A. 290.

7. Fraud in the contracting of a debt is personal and does not follow an assignment of the debt, so that the assignee may procure a writ of attachment. Thwing v. Winkler, 13 Okl. 643, 75 P. 1126; Thwing v. Humphrey, 13 Okl. 646, 75 P. 1127.

8. Where assignee of a building contract was to pay assignor when paid by the owner, assignor must allege that the assignee has been paid by the owner. Schilling Co. v. Robert H. Reid & Co., 87 N. Y. S. 1115.

9. An allegation that the executor of the payee assigned some notes, without alleging that he had authority from the probate court, is sufficient as it is presumed that a valid assignment is alleged. Kern v. Brooks [Colo. App.] 73 P. 1092.

10. Darlington Miller Lumber Co. v. National Surety Co. [Tex. Civ. App.] 80 S. W. 238.

11. Saffier v. Haft, 86 App. Div. 284, 13 Ann. Cas. 318, 83 N. Y. S. 763.

12. That one in tracing his title to a trade secret states that the assignment to him was in April, 1898, and the date of assignment to his assignor was fixed as in February, 1899, held, discrepancy a clerical error. Vulcan Detinning Co. v. American Can. Co. [N. J. Eq.] 58 A. 290

13. Ivy Coal & Coke Co. v. Long [Ala.] 36 So. 722.

14. Colorado Fuel & Iron Co. v. Kidwell [Colo. App.] 76 P. 922. Under Civ. Code, §§ 1614, 1615. Driscoll v. Driscoll [Cal.] 77 P. 471.

15. Wagenhurst v. Wineland, 20 App. D. C. 85. Where the assignment was made only three days before suit and the assignment

edge of the assignment before a settlement was made.[16] An assignor is a competent witness, and may be questioned on cross-examination as to particulars of the transaction occurring before the assignment.[17] Upon default the assignee may purchase claims assigned as collateral security.[18] Where a settlement is made with an assignor, after suit is brought by the assignees, of part of the claim the court has jurisdiction to determine the debtor's liability to the assignee.[19]

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

§ 1. Nature of Transaction in General (337).
§ 2. Statutory Provisions and Conflict of Laws (337).
§ 3. Right to Make a General Assignment (338).
§ 4. Filing, Recording, or Registering; Qualifying of Assignee, Removals, and Substitution (338).
§ 5. Meaning and Effect in General (338).
§ 6. Legality and Equitableness (338).
§ 7. Property Passing to and Rights of the Assignee Therein (341).
§ 8. Liability of Assignee; Bond (342).
§ 9. Collection of Assets and Reduction to Money. Sale of Assets by Assignee (342).
§ 10. Administration of the Trust in General (343).
§ 11. Debts and Liabilities of the Estate (343).
§ 12. Presentment and Allowance of Claims (344).
§ 13. Classes and Priorities of Debts (344).
§ 14. Satisfaction and Discharge of Debts and Claims (345).
§ 15. Accounting, Settlement and Discharge, or Failure of Trust (345).

§ 1. *Nature of transaction in general.*[20]—A direct transfer to creditors, without the intervention of a duly appointed trustee, is not an assignment for the benefit of creditors,[21] nor does this term include the assignment of specific property for the benefit of particular creditors,[22] though in some states an assignment of all the debtor's property to one or more creditors is equivalent to a general assignment,[23] a surety on a note being a creditor of the maker within the meaning of such a statute.[24] In order to distinguish an assignment from a mortgage, the test is, was it the intention of the parties at the time of executing the instrument to divest the debtor of his title and so make an appropriation of the property affected to the raising of a fund to pay debts? If such was the intention, the instrument is an assignment for benefit of creditors.[25]

§ 2. *Statutory provisions and conflict of laws.*[26]—State acts on the subject are not generally retroactive,[27] and must not violate constitutional provisions.[28] The law of the state where the assignment was made governs, there being nothing

represented sums not really owing the assignee, held, the latter not a bona fide holder. Uncas Paper Co. v. Corbin, 75 Conn. 175, 56 A. 165.

16. Gulf, C. & S. F. R. Co. v. Eldredge [Tex. Civ. App.] 80 S. W. 566.

17. Ivy Coal & Coke Co. v. Long [Ala.] 36 So. 722.

18. The owner of a chose in action assigned it to secure a loan, his son joining in the assignment, though having no interest in the fund, under an agreement with the assignee that in default of the payment of premiums on policies on their lives issued by the assignee, it might sell the assignee's interest and become the purchaser at the sale. Held, on such a sale the assignee could acquire the assigned interest as against the assignor. In re Phillips' Estate, 205 Pa. 531, 55 A. 218.

19. Gulf, C. & S. F. Ry. Co. v. Eldredge [Tex. Civ. App.] 80 S. W. 566.

20. See 1 Curr. L. 227.

21. Anniston Iron & Supply Co. v. Anniston Rolling Mill Co., 125 F. 974. See 1 Curr. L. 227, n. 1.

22. Assignment of claim for injuries to assignor's attorney held not an assignment within the meaning of Code Pub. Gen. Laws, art. 16, § 205, and hence need not be recorded. United Rys. & Elec. Co. v. Rowe, 97 Md. 666, 55 A. 703. Where the transferror reserved the income for his own benefit. Heath v. Wilson, 139 Cal. 362, 73 P. 182. See 1 Curr. L. 227, n. 3.

23. Where debtor conveyed its property to its manager, he to give a mortgage thereon to a creditor, held a mere evasion of the statute [Code 1896, § 2153]. Smith v. McCadden [Ala.] 36 So. 376. Mortgage of all of grantor's estate held an assignment for benefit of creditors. Pollock v. Jones [C. C. A.] 124 F. 163.

24. Code 1896, § 2158. Smith v. McCadden [Ala.] 36 So. 376.

25. Smead v. Chandler & Co., 71 Ark. 605, 76 S. W. 1066.

26. See 1 Curr. L. 227.

27. **Kentucky** St. 1903, §§ 74-96 is not retroactive. Fitch v. Duckwall, 25 Ky. L. R. 1635, 78 S. W. 186.

28. **Washington** Insolvency Act (Laws 1890, p. 88) § 15 is not unconstitutional as embracing more than one subject, and that not stated in the title. Jensen-King-Byrd Co. v. Williams [Wash.] 76 P. 934.

in the instrument to indicate that it is to be performed elsewhere,[29] and the courts of such state are the only ones having jurisdiction of the proceedings.[30] The rights of a nonresident creditor in the collection of his claim in the state of his domicile are not affected by state insolvency laws, unless he has voluntarily submitted himself to their operation,[31] but a common-law assignment, containing no prejudicial provisions and being made in good faith, binds resident and nonresident creditors alike.[32] In the latter case, the assent of the creditors may be presumed; in the former it cannot.[33] The bankruptcy law does not suspend the operation of state insolvency laws, an assignment being good unless seasonably impeached by bankruptcy proceedings.[34]

§ 3. *Right to make a general assignment.*[35]—In Missouri, insurance companies under the surveillance of the superintendent of insurance cannot make a valid assignment for the benefit of creditors.[36]

§ 4. *Filing, recording, or registering; qualifying of assignee, removals, and substitution.*[37]—In some of the states, the deed of assignment must be recorded,[38] and it is no excuse that the assignor requested the assignee not to so record it.[39] That the assignee prior to the assignment and as attorney for several creditors attached the property of the debtor, subject to which attachments the property was assigned, does not invalidate the assignment.[40]

The assignee's management being wasteful, negligent, or otherwise inefficient, he may be removed upon petition by creditors,[41] though this right may be lost by laches.[42] The assignor being a corporation and insolvent, the courts in some states will remove the assignee and appoint a receiver.[43]

§ 5. *Meaning and effect in general.*[44]—Either an acceptance by the assignee or a deposit for record by the assignor without the assignee's acceptance irrevocably vests the beneficial interest in the property in the creditors.[45] In Missouri, the execution of a deed of assignment immediately after giving a preference does not invalidate the latter.[46] The intent to waive a constitutional right should be clear.[47]

§ 6. *Legality and equitableness.*[48]—Seals are seldom necessary.[49] A deed of

29. In re Browning [N. J. Prerog.] 57 A. 869. See 1 Curr. L. 227, n. 5, 6.

30. In re Browning [N. J. Prerog.] 57 A. 869.

31. Such assignment is not good as against a prior attachment, the creditor not assenting. Weston v. Nevers [N. H.] 54 A. 703.

32, 33. Weston v. Nevers [N. H.] 54 A. 703.

34. Hilliard v. Burlington Shoe Co. [Vt.] 56 A. 283. Assignment operates as a valid release. Hajjek v. Luck, 96 Tex. 517, 74 S. W. 305. The assignee may still sue under a state statute for property fraudulently conveyed. Downer v. Porter, 25 Ky. L. R. 571, 76 S. W. 135. Does not suspend the jurisdiction of state courts where no proceedings have been instituted in bankruptcy respecting the matter in controversy. Jensen-King-Byrd Co. v. Williams [Wash.] 76 P. 934.

35. See 1 Curr. L. 227.

36. Beale v. Connecticut Fire Ins. Co. [C. C. A.] 120 F. 790.

37. See 1 Curr. L. 227.

38. Comp. St. 1899, c. 6, § 6, providing that an assignment must be recorded within 24 hours, is mandatory and assignment void unless so recorded. Huddleson v. Polk [Neb.] 97 N. W. 624. Where assignment was deposited for record and before recorded withdrawn, held no record. Id. See 1 Curr. L. 227, n. 10.

39. Huddleson v. Polk [Neb.] 97 N. W. 624.

40. He having no lien on the land for his fees. Hilliard v. Burlington Shoe Co. [Vt.] 56 A. 283.

41. Dunlap v. Fible & Crabb Distilling Co., 25 Ky. L. R. 1116, 77 S. W. 173. See 1 Curr. L. 227, n. 11; Id. 228, n. 15.

42. Application made 7 years after appointment and 6 years after waiver of formal accounting by creditors, the debts exceeding the assets, held too late. In re Gebhart, 41 Misc. 570, 85 N. Y. S. 118.

43. P. L. 1899, p. 146, § 24. Corporation insolvent had not paid dividends for three years and was on the eve of bankruptcy; held, receiver would be appointed. Gilroy v. Somerville Woolen Mills [N. J. Eq.] 58 A. 651.

44. See 1 Curr. L. 228.

45. In re Browning [N. J. Prerog.] 57 A. 869. See 1 Curr. 228, n. 17.

46. Preference given by deed of trust. Smead v. D. W. Chandler & Co., 71 Ark. 505, 76 S. W. 1066.

47. Construing the phrase "subject to homestead exemption" as used in an assignment for benefit of creditors. Armour v. Doig [Fla.] 34 So. 249.

48. See 1 Curr. L. 228.

49. Milliken v. Houghton, 97 Me. 447, 54 A. 1075.

assignment executed in the name of a corporation by its president need not show on its face authority for its execution.[50] A deed of assignment by the directors of a corporation being made without authority may be validated by the subsequent assent or acquiescence of the stockholders,[51] and, the stockholders so assenting, creditors cannot attack the assignment in that it was made without authority.[52] By assenting to the assignment, creditors will be estopped to question the validity thereof.[53] The deed of assignment is not rendered void by providing for payment of the assignee.[54] The assignment being void in part it is void in toto.[55]

Reservation of property.[56]—The assignor intentionally withholding or secreting a part of his property, the assignment is void.[57]

50. Hilliard v. Burlington Shoe Co. [Vt.] 56 A. 283.

51. Blanton v. Kentucky Distilleries & Warehouse Co., 120 F. 318. But see 1 Curr. L. 228, n. 18-21.

52. In that proper legal notice of the meeting was not given. State Nat. Bank v. Duncan [Miss.] 35 So. 569.

53. Kaufman v. Simon, 80 Miss. 189.

54. Armour v. Doig [Fla.] 34 So. 249.

55. NOTE. The assignment being void in part, it is void in toto. Ware v. Wanless, 2 Wyo. 144. Equity will not sever the elements of fraud from the instrument and give effect to the rest. Ware v. Wanless, 2 Wyo. 144; Kayser v. Heavenrich, 5 Kan. 324. A debt being intentionally preferred, the whole assignment is void. Hiller v. Ellis, 72 Miss. 701, 18 So. 95.—From note to Bank of Little Rock v. Frank [Ark.] 58 Am. St. Rep. 65, 99.

56. See 1 Curr. L. 228.

57. Armour v. Doig [Fla.] 34 So. 249. Evidence that a few months previous the assignor had a larger amount of property than that turned over is competent on this question, no material losses appearing. Armour v. Doig [Fla.] 34 So. 249. See 1 Curr. L. 228, n. 25.

NOTE. Illegal reservations: A voluntary assignment for the benefit of creditors which reserves to the assignor any interest, benefit, or advantage, out of the property conveyed, to the exclusion or injury of creditors is fraudulent and void on its face. Kayser v. Heavenrich, 5 Kan. 324; Clafiin v. Iseman, 23 S. C. 416; Chafee v. Blatchford, 6 Mackey, 459; Ware v. Wanless, 2 Wyo. 144; Lawrence v. Norton, 15 F. 853; Muller v. Norton, 19 F. 719; Stadler v. Carroll, 19 F. 721; Bailey v. Mills, 27 Tex. 434; note to Turnipseed v. Schaefer, 2 Am. St. Rep. 24; Baldwin v. Peet, 22 Tex. 708, 75 Am. Dec. 806; Linn v. Wright, 18 Tex. 317, 70 Am. Dec. 282; Pike v. Bacon, 21 Me. 280, 38 Am. Dec. 259; Anderson v. Fuller, 1 McMull. Eq. 27, 36 Am. Dec. 290; McClurg v. Lecky, 3 Penr. & W. 83, 23 Am. Dec. 64; Doremus v. Lewis, 8 Barb. 124, 128; Curtis v. Leavitt, 15 N. Y. 9, 116; Kuykendall v. McDonald, 15 Mo. 416, 57 Am. Dec. 212; Austin v. Bell, 20 Johns. 442, 11 Am. Dec. 297.

Reservation of surplus. Grimshaw v. Walker, 12 Ala. 101; McReynolds v. Dedman, 47 Ark. 347; Truitt v. Caldwell, 3 Minn. 364, 74 Am. Dec. 764. Reservation of surplus after paying certain creditors. Doremus v. Lewis, 8 Barb. 124; Truitt v. Caldwell, 3 Minn. 364, 74 Am. Dec. 764; Greeley v. Dixon, 21 Fla. 413, 58 Am. Rep. 673. Reservation of the surplus, after payment of all the creditors, is valid. Hoffman v. Mackall, 5 Ohio St. 124, 64 Am. Dec. 637. Compare Bailey v. Mills, 27 Tex. 434. Reservation of surplus after the complete discharge of the debts of all "assenting" creditors is void, in so far as it attempts to protect such surplus from the claims of the nonassenting creditors, but does not invalidate the assignment as to the assenting creditors. Skipwith v. Cunningham, 8 Leigh, 271, 31 Am. Dec. 642.

Leaving debtor in possession vitiates an assignment: Anderson v. Fuller, 1 McMull. Eq. 27, 36 Am. Dec. 290; Shufeldt v. Jenkins, 22 F. 359, 368; Baum v. Pearce, 67 Miss. 700; especially where such possession is for any considerable length of time, and is unexplained (Grimsley v. Hooker, 3 Jones, Eq. 4, 67 Am. Dec. 227); or where control of the property is so reserved as to enable the debtor, at his pleasure, to make or withhold payment, according as his creditors shall submit to or reject the terms dictated by him. Nolon v. Douglas, 2 Hill Ch. 443, 30 Am. Dec. 368; Saunders v. Waggoner, 82 Va. 316; McCormick v. Atkinson, 78 Va. 8.

A debtor, in making an assignment for the benefit of his creditors, cannot withdraw from its operation any part of his property for the future support of himself. Pettibone v. Stevens, 15 Conn. 19, 38 Am. Dec. 57. So, if the assignor reserves one hundred dollars out of assets, for his own benefit, it will make the assignment fraudulent and void as to creditors, although the assets assigned are of great value, and the sum withheld by the assignor is to meet pressing family necessities (Montgomery v. Goodbar, 69 Miss. 333; but in Shufeldt v. Jenkins, 22 Fed. Rep. 359) 367, it is said that: "The law does not forbid the retention of a few hundred dollars by an insolvent grantor for paying small debts, when circumstances warrant the measure;" but that the deed of assignment ought not to conceal the fact.

An assignment which includes property consumable in using, is fraudulent and void, if it provides that the debtor shall remain in possession of such property and use it although other property not consumable is also included. Sommerville v. Horton, 4 Yerg. 541, 26 Am. Dec. 242. An assignment is not avoided, however, by the assignor's retention of property specified in the instrument as having been assigned. Pike v. Bacon, 21 Me. 280, 38 Am. Dec. 259.

Any reservation, in the assignment, of property for the benefit of the debtor's family, is fraudulent and void as to his nonassenting creditors (McClurg v. Lecky, 3 Penr. & W. 83, 23 Am. Dec. 64; Beck v. Burdett, 1 Paige, 305, 19 Am. Dec. 436); who may

Preferences.[56]—An assignment preferring certain creditors is void,[59] but an assignment providing for the payment of a secured creditor,[60] or a void claim,[61] does not provide for a real preference and is valid.

take the property in execution (McAllister v. Marshall, 6 Bin. 338, 6 Am. Dec. 458).

While an assignment for the benefit of creditors is fraudulent and void as against attaching creditors of the assignor, if he reserved a part of his property not exempt by law for his own benefit (Wichita, etc., Grocery Co. v. Records, 40 Kan. 119; Penzel Grocer Co. v. Williams, 53 Ark. 81), a general assignment of all the debtor's property is not rendered fraudulent because the debtor reserves to himself a homestead or other exemptions to which he is lawfully entitled. Southern Suspender Co. v. Van Borries, 91 Ala. 507; Frank v. Myers, 97 Ala. 437; Richardson v. Stringfellow, 100 Ala. 416; Penzel Grocer Co. v. Williams, 53 Ark. 81; Clark Shoe Co. v. Edwards, 57 Ark. 331; Baker v. Baer, 59 Ark. 503; King v. Hargadine-McKittrick, etc., Co., 60 Ark. 1; Wilhoit v. Bryant, 78 Cal. 263; Parker v. Cleveland, 37 Fla. 39; Dorr v. Schmidt, 38 Fla. 354; Bradley v. Bischel, 81 Iowa, 80; Muhr v. Pinover, 67 Md. 480; Hartzler v. Tottle, 85 Mo. 23; Bobbitt v. Rodwell, 105 N. C. 236; Morehead Banking Co. v. Whitaker, 110 N. C. 345; Davis v. Smith, 113 N. C. 94; Haynes v. Hoffman, 46 S. C. 157; Durham, etc., Co. v. Hemphill, 45 S. C. 621; Dawley v. Sherwin, 5 S. D. 594; Richardson v. Marqueze, 59 Miss. 80, 42 Am. Rep. 353; McFarland v. Bate, 45 Kan. 1.

Creditors are not hindered or delayed by the reservation of that which they have no right to touch. Hildebrand v. Bowman, 100 Pa. St. 580. The reservation of money which, in amount, is equal to a personal property exemption, in lieu of such exemption is no evidence of a fraudulent purpose. Morehead Banking Co. v. Whitaker, 110 N. C. 345. Nor is a provision in the assignment that the assignee shall sell the property conveyed and pay to the assignor a certain amount of money as his personal property exemptions. Blair v. Brown, 116 N. C. 631; showing facts, however, constituting sufficient evidence of a conspiracy to defraud the creditors to admit evidence of declarations of the debtor made after the assignment. It has been held that the reservation, from the proceeds of personal property assigned, of a sum equal to the assignor's exemptions renders the deed of assignment void (King v. Ruble, 54 Ark. 418); and, on the other hand, that, if the deed of assignment does not provide for the payment of exemptions out of the proceeds of the assigned property, and no fraud or collusion as to the execution of the instrument is shown, the subsequent allowance of the exemptions out of the sale of the assigned property does not render the deed of assignment fraudulent as to creditors (Dorr v. Schmidt, 38 Fla. 354). An assignment is not invalid becauee of a direction that a chattel exemption to which the debtor is entitled under the homestead laws of the state shall be in money derived from a sale of the property assigned for the benefit of creditors. Adler v. Cloud, 42 S. C. 272. But if appraisers award the assignor his exemption out of the proceeds of real estate to be sold, and the assignee afterward pays over the money of his own motion and without an order of the court, he will be surcharged with it on proof that the assignor's right to receive it had been forfeited by fraud. Kreider's Estate, 135 Pa. St. 578. An assignor for the benefit of creditors, who fraudulently denies the ownership of property belonging to him, and thus hinders the assignee in the discharge of his duties, forfeits his right to receive out of the assigned estate "so much property as would be exempt from levy and sale on execution," reserved by him in his deed of assignment. Kreider's Estate, 135 Pa. St. 578.

Withholding of property: It is a fraud to intentionally withhold from a general assignment for the benefit of creditors property which ought to have been included in it. If necessary, he should devote the whole of his property to the payment of his debts. Farrington v. Sexton, 43 Mich. 454; Smith v. Woodruff, 1 Hilt. 462; Yates v. Lyon, 61 Barb. 205, 209; Young v. Heermans, 66 N. Y. 374, 382; Shufeldt v. Jenkins, 22 F. 359, 367; Pike v. Bacon, 21 Me. 280, 38 Am. Dec. 259; Graves v. Roy, 13 La. 454, 33 Am. Dec. 568; Turnipseed v. Schaefer, 76 Ga. 109, 2 Am. St. Rep. 17; Albany, etc., Steel Co. v. Southern, etc., Works, 76 Ga. 135, 2 Am. St. Rep. 26. An assignment for the benefit of creditors purporting to convey all of the property of the assignor except that exempt is made fraudulent by the intentional withholding of any part of it not exempt. Penzel Grocer Co. v. Williams, 53 Ark. 81; Beardsley v. Frame, 86 Cal. 134. Though such material part is withheld for the purpose of applying it to other debts not secured by the assignment, and is actually so applied. Probst v. Welden, 46 Ark. 406; Clark Shoe Co. v. Edwards, 57 Ark. 331. The withholding of property considered to be of little or no value does not, however, invalidate an assignment. Sabin v. Lebenbaum, 26 Or. 420. It is not so much the value of what an assignor retains from an assignment that affects its good faith, as the fact of concealment. Shufeldt v. Jenkins, 22 F. 359, 368.

A party must be deemed to have intended the natural and inevitable consequences of his own acts; and so, when they are voluntary and necessarily operate to defraud others, he will be deemed to have intended the fraud. Coursey v. Morton, 132 N. Y. 556. If, therefore, an assignor for the benefit of creditors intentionally withholds and secretes property of a substantial value from the possession of the assignee, it renders the assignment void. Coursey v. Morton, 132 N. Y. 556; Turnipseed v. Schaefer, 76 Ga. 109, 2 Am. St. Rep. 17; Farrington v. Sexton, 43 Mich. 454; Baum v. Pearce, 67 Miss. 700; Tarbox v. Stevenson, 56 Minn. 510; Barnitz v. Rice, 14 Md. 24, 74 Am. Dec. 513.—From note to Bank of Little Rock v. Frank, 58 A. S. R. 65.

58. See 1 Curr. L. 228.

59. A mortgage disposing of the whole of the grantor's estate for the purpose of securing a single creditor is an assignment for creditors and void as a preference. Pol-

§ 7. *Property passing to and rights of the assignee therein.*[62]—The assignment being valid,[63] all the right, title, and interest the assignor has in the property passes thereby,[64] and becomes vested in the assignee the moment he accepts the trust and files the assignment for record.[65] Under a voluntary assignment, the assignee becomes a trustee for the creditors.[66] The estate does not "devolve" upon the assignee by the assignment, but is "granted" by it.[67] The assignee making an assignment for benefit of creditors, his assignee takes no title or right to the property held by his assignor as assignee.[68] At the common law, the assignee stands in the shoes of the assignor, representing him and taking the assigned property subject to all transfers and incumbrances, whether fraudulent as to creditors or not, and subject also to all equities existing between the assignor and any particular creditor;[69] under this rule he cannot sue the assignors for conspiring with others to defraud the firm and its creditors,[70] nor does he acquire title to property held by the assignor under a contract of conditional sale, though such contract is not recorded,[71] the seller being entitled to enforce the contract and obtain possession of the property by petition of intervention in the assignment proceedings,[72] no demand or surrender of the note given for the purchase price being necessary to entitle the seller to so intervene,[73] and there being a balance due the seller after the return of such chattels, he may prove it against the estate.[74] In some of the states, however, this rule has now been changed by statute, the assignee representing the creditors, not the assignor,[75] and hence he has power to set aside all conveyances or transfers of property by the assignor, which are fraudulent as to creditors, whether the property be within or without the state wherein he is appointed,[76] and the creditors have through him the rights of attaching creditors.[77]

An assignment for the benefit of creditors does not at the common law, in the absence of an estoppel, pass the debtor's interest in a contingent remainder,[78] though this rule has been changed by statute in some states.[79] The assignor's wife not joining in the assignment, has no effect on her dower interest.[80] The interest of an assignor in property can only be enforced or collected by the assignor.[81] A secured creditor not being paid may sell his security after notifying the assignee, and the sale being made in good faith and for as large a sum as possible, it is valid.[82]

lock v. Jones [C. C. A.] 124 F. 163. See 1 Curr. L. 228, n. 28, 29.

60. Within act requiring assignor to file a schedule of preferred creditors. Sutton v. Bessent, 133 N. C. 559, 45 S. E. 844. Attachment. Hilliard v. Burlington Shoe Co. [Vt.] 56 A. 283.

61. Within act requiring assignor to file a schedule of preferred creditors. Sutton v. Bessent, 133 N. C. 559, 45 S. E. 844.

62. See 1 Curr. L. 228.

63. The assignment being void, the assignee acquires no title. Beale v. Connecticut Fire Ins. Co. [C. C. A.] 120 F. 790.

64. Assignment by partner held to convey all the interest of such partner in partnership realty, title to which stood in the partners' individual names. Ryan v. Ruff, 90 Minn. 169, 95 N. W. 1114. See 1 Curr. L. 229, n. 39.

65. Declaring the Pennsylvania rule. In re Browning [N. J. Prerog.] 57 A. 869.

66. Hillis v. Asay, 105 Ill. App. 667.

67. Construing Civ. Code, § 4491. Babcock v. Maxwell [Mont.] 74 P. 64.

68. Rutherford v. Loving [Tex. Civ. App.] 73 S. W. 418.

69. In re St. Paul & K. C. Grain Co., 89 Minn. 98, 94 N. W. 218; In re Wise, 121 Iowa, 359, 96 N. W. 872. This rule has been adopted by statute in Montana [Civ. Code, § 4521]. Babcock v. Maxwell [Mont.] 74 P. 64.

70. This is not changed by Rev. St. 1899, § 365, giving such assignee the powers of a trustee in a deed of trust. Haseltine v. Messmore [Mo.] 82 S. W. 115.

71, 72, 73. In re Wise, 121 Iowa, 359, 96 N. W. 872.

74. Where contract fixed price, testimony as to value is immaterial. In re Wise, 121 Iowa, 359, 96 N. W. 872.

75. Gen. St. 1894, § 4233. In re St. Paul & K. C. Grain Co., 89 Minn. 98, 94 N. W. 218.

76, 77. In re St. Paul & K. C. Grain Co., 89 Minn. 98, 94 N. W. 218.

78. Wilson v. Langhorne [Va.] 47 S. E. 871.

79. Code 1887, § 2418. Wilson v. Langhorne [Va.] 47 S. E. 871. See 1 Curr. L. 229, n. 45.

80. Hanna's Assignees v. Gay, 25 Ky. L. R. 1794, 78 S. W. 916.

81. Where assignor's executrix joined in suit, held misjoinder of parties. Com. Trust Co. v. Frick, 120 F. 688.

82. Arbogast v. American Exch. Nat. Bank [C. C. A.] 125 F. 518.

Property transferred or conveyed by assignor.[83]—A sale by a debtor to a creditor, though made the day of the assignment, is valid as between the parties and cannot be set aside by the assignee where the only result would be to benefit the debtor.[84] An assignee claiming that a transfer by the assignor is within a statutory prohibition must prove the facts bringing the transaction within the terms of the statute and make it applicable,[85] there being no presumption that the property was delivered after the execution of the assignment.[86]

§ 8. *Liability of assignee; bond.*[87]—An assignee is only bound to use ordinary and reasonable diligence in the execution of his trust;[88] he is not personally liable upon a lease taken as part of the assigned estate,[89] and a creditor expressly releasing him from liability is bound by the release.[90] The assignee violating the conditions of the order of discharge,[91] as where he wrongfully redelivers property to the assignor, an action may be maintained on his bond for the damages caused thereby,[92] unless the aggrieved creditor assents to such violation.[93] In Wisconsin, the plaintiff need not file security for costs.[94] The creditor does not lose his right to proceed upon the bond by proving his claim in bankruptcy proceedings, afterwards brought by the assignor.[95] A surety on an assignee's bond, conditioned that the assignee will faithfully discharge all his duties, is liable for his principal's failure to pay over the assets as required by law.[96] A proceeding to release the sureties from liability for subsequent acts or omissions of the principal may be ex parte as to creditors of the principal, and, upon notice, to the latter only.[97]

§ 9. *Collection of assets and reduction to money. Sale of assets by assignee.*[98]—In some states, the assignee may sell real property at private or public sale,[99] an appraisal not being necessary.[1] If an appraisal, however, is necessary, the including of personalty is an irregularity which is cured by a confirmation of the sale as provided by the statutes, without any exception having been filed thereto.[2] The assignee and administrator of the deceased assignor may join in a special proceeding for the sale of the real estate to pay debts,[3] and an allegation in the petition that the intestate was seized in fee of the land does not affect the rights of creditors in such land.[4] The assignee selling claims of the assignor, not guar-

83. See 1 Curr. L. 229.

84. Would become part of his exempt property. Murray v. Williamson, 133 N. C. 318, 45 S. E. 637. See 1 Curr. L. 229, n. 52.

85. Dunn v. Train [C. C. A.] 125 F. 221.

86. Evidence held insufficient to support such a contention. Hayes v. Ammon, 90 App. Div. 604, 85 N. Y. S. 607.

87. See 1 Curr. L. 230.

88. He is not responsible for stolen goods unless it can be shown that the loss occurred by reason of his culpable negligence. Hillis v. Asay, 105 Ill. App. 667.

89. Man v. Katz, 40 Misc. 645, 83 N. Y. S. 94.

90. Held to have released assignee by a letter, and the latter having sold land upon which a lien existed and transferred the proceeds to another pursuant to an agreement to which the creditor had assented, the assignee is not liable. Louisville Ins. Co. v. Tate, 25 Ky. L. R. 61, 74 S. W. 722.

91. Ringenoldus v. Abresch, 119 Wis. 410, 96 N. W. 817.

92. An assignee being discharged on condition that assignor pay costs and expenses, redelivered property without assignor so doing, held action not a collateral attack on order of discharge, and maintainable, it being immaterial that the sureties might not be liable for debts incurred in the management of the estate. Construing also Rev. St. 1898, §§ 1700, 1701, 2832. Ringenoldus v. Abresch, 119 Wis. 410, 96 N. W. 817.

93. Accepting an indemnity bond, held an assent to the release. Ringenoldus v. Abresch, 119 Wis. 410, 96 N. W. 817.

94. Construing Rev. St. 1898, § 986. Ringenoldus v. Abresch, 119 Wis. 410, 96 N. W. 817.

95. Ringenoldus v. Abresch, 119 Wis. 410, 96 N. W. 817.

96. Wilson's Assignees v. Louisville Nat. Banking Co., 25 Ky. L. R. 1065, 76 S. W. 1095.

97. Construing Code Civ. Proc. § 812. Siebert v. Milbank, 88 N. Y. S. 993.

98. An assignment directing a sale with "all reasonable dispatch" does not violate Rev. St. § 2312, providing for a sale of the property. Armour v. Doig [Fla.] 34 So. 249. See 1 Curr. L. 230.

99. Kentucky St. § 87, as amended by Sess. Acts 1898, p. 104. Blanton v. Kentucky Distilleries & Warehouse Co., 120 F. 318.

1. Kentucky St. § 2362 et seq. Blanton v. Kentucky Distilleries & Warehouse Co., 120 F. 318.

2. Blanton v. Kentucky Distilleries & Warehouse Co., 120 F. 318.

3, 4. Robinson v. McDowell, 133 N. C. 132, 45 S. E. 545.

antying the amount, cannot recover from the purchaser money paid him by an attorney who had collected the same prior to the sale.[5]

An assignee cannot indirectly purchase assigned property,[6] though he may acquire property, which he has fairly sold in his fiduciary capacity, after the sale is complete and the title vested in the purchaser, but the sale remaining executory, he is disqualified to buy,[7] and the burden of showing that the first sale was fairly and regularly made is upon the assignee.[8]

Validity and setting aside sale.[9]—Persons having no interest in the property should not be made parties to proceedings on exceptions to the judicial sale of the property of the assignor.[10]

§ 10. *Administration of the trust in general.*[11]—A court obtaining jurisdiction of the proceedings, no other court has the right to interpose for the purpose of adjusting any claim or administering the estate, except, perhaps, a court of equity may, under special circumstances, intervene to prevent a failure of justice.[12] The assignee must administer the estate under the supervision of the court having jurisdiction of the proceedings.[13] At common law, the effect of an assignment for the benefit of creditors is to put an end to the business as ordinarily conducted, it being the duty of the assignee to proceed without unnecessary delay to convert the assigned estate into money and to apply the same to the payment of the assignor's debts,[14] and the assignor cannot in the deed of assignment authorize his assignee to continue and carry on the business, either for the benefit of creditors or for his own benefit.[15] While this is the general rule, there are exceptional cases in which the assignee with the consent of the creditors may work up the stock on hand and prepare it for the market, it being manifest that it will be for the benefit of the assigned estate.[16] The assignee, on his own judgment and against the protest of creditors, electing to continue a manifestly unprofitable business, he is liable for the cash and value of the property on hand when taking charge of the business.[17]

§ 11. *Debts and liabilities of the estate.*[18]—The claim must not be fraudulent,[19] and a lien being claimed, the petition must assert the same.[20] A claimant is not entitled to an allowance from the estate for services rendered in contesting other claims, the assignee being represented by competent counsel.[21]

Claim of assignee for compensation and allowance.[22]—The assignment being fairly made in good faith, the assignee is entitled to reasonable compensation for beneficial services and disbursements,[23] and for this compensation the assignee has

5. Remedy if any is against attorney. Curtis v. Albee, 86 App. Div. 145, 83 N. Y. S. 430.

6. Where he guaranteed that the purchaser could sell the property for a certain price, if not he would buy it, and in furtherance of such guaranty did buy it, the price guaranteed being more than the property could be sold for, held purchase invalid. Nabours v. McCord [Tex. Civ. App.] 75 S. W. 827. See 1 Curr. L. 230, n. 69-72.

7. Nabours v. McCord [Tex.] 80 S. W. 595.

8. Nabours v. McCord [Tex. Civ. App.] 75 S. W. 827.

9. See 1 Curr. L. 230.

10. Assignor having fee, daughter should not be made a party. McAdams v. Norton's Assignee, 25 Ky. L. R. 1719, 78 S. W. 880.

11. For rules respecting the collection of assets, administration, and settlement, see Bankruptcy, 1 Curr. L. 311; Estates of Decedents, 1 Curr. L. 1090; Receivers, 2 Curr. L. 1465; Trusts, 2 Curr. L. 1924. See, also, 1 Curr. L. 231.

12. Hillis v. Asay, 105 Ill. App. 667.

13. In re Browning [N. J. Prerog.] 57 A. 869.

14. Cooper v. Lankford, 25 Ky. L. R. 1578, 78 S. W. 197. See 1 Curr. L. 231, n. 82.

15, 16, 17. Cooper v. Lankford, 25 Ky. L. R. 1578, 78 S. W. 197.

18. See 1 Curr. L. 231.

19. Evidence that the creditor knew of and participated in another fraudulent claim is admissible on the issue as to whether the creditor's claim is fraudulent. Baum v. Corsicana Nat. Bank [Tex. Civ. App.] 75 S. W. 863.

20. Petition held to assert a lien on or interest in the proceeds of a sale of the assigned property under an attachment thereon. Baum v. Corsicana Nat. Bank [Tex. Civ. App] 75 S. W. 863.

21. This under Ky. St. 1899, § 489, allowing parties in interest a reasonable compensation for prosecuting for the benefit of others interested. Weller v. Hull's Assignee, 24 Ky. L. R. 2185, 74 S. W. 172.

22. See 1 Curr. L. 231.

23. Armour v. Doig [Fla.] 34 So. 249.

a lien on the estate,[24] which lien is unaffected by subsequent bankruptcy proceedings,[25] and is not waived by surrendering all the assets to the trustee in bankruptcy.[26] The assignee may in good faith employ counsel to advise and assist him in the discharge of his duties, and may pay them out of the trust fund reasonable compensation for their services,[27] and the allowance being made direct to the attorneys it cannot be defeated by any subsequent arrangement made by the assignor with his assignee.[28] An allowance of compensation,[29] or attorney's fees,[30] will not generally be disturbed on appeal.

§ 12. *Presentment and allowance of claims.*[31]—Statutes requiring the filing of claims against insolvents do not relate to a claim for an indebtedness incurred by the assignee on behalf of the estate after the assignment.[32] A claim being fraudulent, the creditor cannot object to the claim of another.[33] A claim should not be rejected without proof, and in some cases, pleadings should be filed and a trial had[34] before the proper officer,[35] of the issues raised. An objection to the allowance of a claim is sufficient if adequate to identify the claim.[36] Exceptions by a creditor to the allowance of exemptions to the assignor are an assertion of his claim and makes him a party to the proceedings, so that if the claim is not then barred by limitations, such defense cannot be set up after a judgment in his favor, though he did not present his claim to the assignee for allowance.[37] Payment by a debtor of the assignor, of a debt contracted by the assignor subsequent to the assignment, which does not result in benefit to the creditors, cannot be credited on the payor's debt.[38] A purchaser of goods assuming the debts of the seller as part consideration, such creditors are entitled to share in the purchaser's estate subsequently assigned for the benefit of creditors and entitled to have the assignee account to them.[39] The assignee is bound by the decree of a court unless he appeals therefrom,[40] and a creditor objecting to the allowance of the assignor's exemption, a trial on the merits resulting in favor of the creditor not being appealed from, is binding upon the assignee, though not a party to the proceedings, no other creditors having a debt superior to the exemption.[41]

§ 13. *Classes and priorities of debts.*[42]—The assignee takes the property of his assignor subject to all equities and liens that might have been enforced before the assignment;[43] thus a mechanic's lien,[44] a creditor secured by a deed of trust,[45]

Joint assignment by corporation and president thereof, corporation creditors claiming individual assets. Dunlap v. Fible & C. Distilling Co., 26 Ky. L. R. 1116, 77 S. W. 173. Estate sold for $60,000, assignee put in two years' time, held entitled to $2,400 compensation. Id.

24, 25, 26. In re Chase [C. C. A.] 124 F. 763.

27. Berkeley v. Green [Va.] 46 S. E. 387; Mattingly's Trustee v. Mattingly, 24 Ky. L. R. 2029, 72 S. W. 802.

28. Mattingly's Trustee v. Mattingly, 24 Ky. L. R. 2029, 72 S. W. 802.

29. Auditor's finding of fact. In re Powel's Estate [Pa.] 57 A. 981.

30. Though appearing small in view of all the circumstances. Thum v. Kentucky Citizens' Bldg. & Loan Ass'n's Receiver [Ky.] 80 S. W. 790.

31. See 1 Curr. L. 231.

32. Ringenoldus v. Abresch, 119 Wis. 410, 96 N. W. 817.

33. Baum v. Corsicana Nat. Bank [Tex. Civ. App.] 76 S. W. 863.

34. Where it was alleged that the claim belonged to the assignor's father's estate and that the father had devised him property subject to such indebtedness. Weller v. Hull's Assignee, 24 Ky. L. R. 2185, 74 S. W. 172.

35. In Alabama, the register in chancery may hear objections to a preferential allowance as well as to the claim as a whole [Code 1896, §§ 4152-4173]. Winston v. Miller [Ala.] 35 So. 853.

36. Held adequate though not stating the representative capacity of the claimant and misstating the amount of the preference claimed. Winston v. Miller [Ala.] 35 So. 853.

37. Matthews' Assignee v. Matthews' Assignee, 25 Ky. L. R. 1873, 79 S. W. 188.

38. Miller v. Arthur [Va.] 46 S. E. 323.

39. Voorhees, Miller & Co. v. Porter, 134 N. C. 591, 47 S. E. 31.

40. Decree of the probate court distributing the property of the assignor to judgment creditors. Snyder v. Murdock, 26 Utah, 233, 73 P. 22.

41. Matthews' Assignee v. Matthews' Assignee, 25 Ky. L. R. 1873, 79 S. W. 188.

42. See 1 Curr. L. 231.

43. John P. Kane & Co. v. Kinney, 174 N. Y. 69, 66 N. E. 619.

44. If lien statement is filed within the

and the beneficiary of trust funds,[46] are entitled to preferential payment. In some states wages of employes earned within a certain time before the assignment are given priority.[47] Creditors having liens should be first compelled to exhaust their liens and as to any balance should be allowed to share pro rata in the same manner as unsecured creditors.[48] The claims of creditors who stand in a hostile attitude to an assignment cannot be prorated with the claims of those who have complied with the act in a distribution of the proceeds of the assigned property,[49] but an action by a creditor to set aside the assignment on the ground of fraud is not an election by him to take in hostility to the assignment.[50]

§ 14. *Satisfaction and discharge of debts and claims.*[51]—The assignee being a debtor of the assignor, the debt, less commissions thereon, will be set off against the commissions allowed such assignee.[52] An insolvent having executed simultaneously two deeds of assignment, each for property in separate states, creditors presenting their claims in one state are not entitled to participate in the distribution of assets in the other state until the creditors in the latter state have received in the other state a percentage on their claims equal to the percentage received by the creditors in such state.[53] The assignment directing the distribution to be ratable, a creditor holding collateral security cannot receive dividends upon the face of his claim without crediting the value of the collaterals.[54] A creditor having a claim antedating the assignment, and having full knowledge of the latter and the administration of the estate, cannot enforce a judgment, subsequently recovered, outside of the insolvency proceedings.[55]

§ 15. *Accounting, settlement and discharge, or failure of trust.*[56]—One demanding an accounting several years after waiver of a formal accounting by the other creditors must do so by a suit in equity.[57] That the assignee was not charged on the accounting with interest on funds he neglected to invest is no ground for denying him commissions or the taxable costs of his accounting.[58] Costs in an accounting should be taxed by the clerk on notice to all parties who appeared in the proceeding,[59] though the court will tax them in the first instance if all parties have notice of the motion and there is no dispute.[60] The assignment being settled out of court, the assignor's title to the assets is not affected thereby.[61]

ASSISTANCE, WRIT OF.

Courts of equity have jurisdiction to issue the writ,[62] but a judge at chambers has not.[63] The judgment of a court ordering the writ may operate as a con-

statutory time. John P. Kane & Co. v. Kinney, 174 N. Y. 69, 66 N. E. 619.

45. Though a subsequent deed of trust had been given on the same land to another creditor, and the property had been sold by the assignee for benefit of creditors who held the proceeds. Sutton v. Bessent, 132 N. C. 559, 45 S. E. 844.

46. Upon showing that the assigned property included such trust funds. Winston v. Miller [Ala.] 35 So. 853.

47. Held, one buying produce from the farmers and shipping it to the assignor, though called a superintendent, is an employe [Laws 1897, p. 772, c. 624, § 29]. Hopkins v. Cromwell, 89 App. Div. 481, 85 N. Y. S. 839.

48. Weller v. Hull's Assignee, 24 Ky. L. R. 2185, 74 S. W. 172.

49. Huddleson v. Polk [Neb.] 97 N. W. 624.

50. Where he recovered judgment but obtained no benefit therefrom. In re Garver, 176 N. Y. 386, 68 N. E. 667.

51. See 1 Curr. L. 232.

52. Supreme court in the first department has power to so do. In re Oakley, 41 Misc. 652, 85 N. Y. S. 227.

53. Weller v. Hull's Assignee, 24 Ky. L. R. 2185, 74 S. W. 172.

54. Union & Planters' Bank v. Duncan [Miss.] 36 So. 690.

55. Jensen-King-Byrd Co. v. Williams [Wash.] 76 P. 934.

56. See 1 Curr. L. 232.

57. In re Gebhardt, 41 Misc. 570, 85 N. Y. S. 118.

58. In re Bostwick, 40 Misc. 17, 81 N. Y. S. 172.

59, 60. In re Oakley, 41 Misc. 652, 85 N. Y. S. 227.

61. Overholt v. Dietz, 43 Or. 194, 72 P. 695.

62. In foreclosure proceedings, to put purchasers into possession. State v. Evans, 176 Mo. 310, 75 S. W. 914.

63. Hartsuff v. Huss [Neb.] 95 N. W. 1070.

firmation of a foreclosure sale.[64] That an order of the court takes the form of a writ of assistance is immaterial.[65] A writ of assistance may be set aside at the instance of one who was not a party to the action at the time of its issue,[66] if it appear that he was a necessary party,[67] and a notice of appeal from the order granting the writ need not be served on all the parties to the original action.[68]

ASSOCIATIONS AND SOCIETIES.[69]

§ 1. Definition, Nature, and Organization (346).
§ 2. Internal Relations, Rights, and Duties (346).
§ 3. The Association and Persons Not Members (347).
§ 4. Actions and Litigation (348).
§ 5. Dissolution and Termination (348).

§ 1. *Definition, nature, and organization.*[70]—Associations formed for the purpose of pecuniary profit are controlled, as to the liabilities arising from contract, by the law of partnership.[71] Adoption of a name in use by an existing association will be enjoined.[72]

§ 2. *Internal relations, rights, and duties.*[73]—The constitution and by-laws adopted by a voluntary association constitute a contract between the members which, if not immoral or contrary to public policy or law, will be enforced by the courts,[74] and the funds of an association can be diverted from the purposes declared in the constitution, by-laws and rules only on consent of each individual member.[75]

Where a power is vested in the majority, a member cannot object to a majority action, on the ground that he was not in the state or had but constructive notice, there being no fraud.[76] Parol evidence may establish such action.[77]

The discretion of an association as to who may be admitted to membership will not usually be judicially controlled,[78] or its proceedings under its laws for the discipline of members,[79] though a member may have an action in damages for wrongful expulsion,[80] which will lie when the association has ratified an

64. State v. Evans, 176 Mo. 310, 75 S. W. 914.

65. Directing a sheriff to put mortgagee in possession [Code Civ. Proc. §§ 1675, 1347, 1373]. Title Guaranty & Trust Co. v. American Power & Const. Co., 88 N. Y. S. 502.

66. Grantee of a mortgagor who had been foreclosed. Mills v. Smiley [Idaho] 76 P. 783.

67. One claiming an interest in the land had not placed his deed on record [Rev. St. 1887, § 4520]. Mills v. Smiley [Idaho] 76 P. 783.

68. Only the parties to the writ. Mills v. Smiley [Idaho] 76 P. 783.

69. See Corporations, 1 Curr. L. 710; Joint Stock Companies, 2 Curr. L. 576; Exchanges and Boards of Trade, 1 Curr. L. 1176; Building and Loan Associations, 1 Curr. L. 387; Fraternal and Mutual Benefit Associations, 2 Curr. L. 79; Religious Societies, 2 Curr. L. 1502.

70. See 1 Curr. L. 233.

71. Contracts by association are regarded as joint and a judgment against a member merges the cause of action against all. United Press v. Abell Co., 87 App. Div. 344, 84 N. Y. S. 425.

72. Lane v. Brothers & Sisters of Evening Star Soc. [Ga.] 47 S. E. 951.

73. See Fraternal and Mutual Benefit Associations, 2 Curr. L. 79, for status of lodge members. See 1 Curr. L. 233.

74. Kalbitzer v. Goodhue, 52 W. Va. 435, 44 S. E. 264. Contracts of association for the division of town lots among the members who were purchasers, held to authorize sale of right of preference in selection at auction to the highest bidder, under a scheme adopted by the majority. Morey v. Clopton [Mo. App.] 77 S. W. 467.

75. Majority vote is not sufficient. Kalbitzer v. Goodhue, 52 W. Va. 435, 44 S. E. 264.

76. Morey v. Clopton [Mo. App.] 77 S. W. 467.

77. Where a temporary association is formed to divide land as agreed on by the majority, a meeting and action for such purpose may be proved by parol, without reference to any record kept by the secretary. Morey v. Clopton [Mo. App.] 77 S. W. 467.

78. A bar association, though incorporated, cannot be compelled by mandamus to admit to membership one whose application has been denied after consideration in accordance with its rules and regulations. State v. Louisiana Bar Ass'n, 111 La. 967, 36 So. 50.

79. Mason cannot have injunction of a trial on unproven allegation of a conspiracy to affect to his prejudice his trial on pending criminal indictments. Franklin v. Burnham, 40 Misc. 566, 82 N. Y. S. 882.

80. Mandamus is not his sole remedy. He may recover for the loss of benefits, of

expulsion not at first its associate act.[81] The member is not remitted to remedy within association, if inadequate or impracticable.[82]

Membership does not become a property right through the mere fact of the possession of property by the association.[83]

By-laws giving a power to terminate membership are not self executing,[84] but a notice that a member will be dropped unless he pays dues before a date named is sufficient.[85]

A member is entitled to notice of the proceedings of a committee appointed to act with reference to a dispute with a co-member.[86] Objection to the jurisdiction of a tribunal is waived by submission by the member and allowing the investigation to proceed.[87] If the action of a trial board is valid the invalidity of an attempted adoption by the association at an unauthorized meeting is cured by a valid subsequent adoption.[88]

Resignation,[89] or notice of intention to resign, in compliance with by-laws, may terminate further liabilities as a member.[90]

§ 3. *The association and persons not members.*[91]—An association may recover the entire amount of a debt due it as such, though a portion of its members have withdrawn.[92]

One contracting for an unincorporated association having no corporate or legal status is personally liable,[93] but an action cannot be maintained against an officer, unless the debt is one on which an action could be maintained against all the associates either jointly or severally.[94]

use and enjoyment of the property of the society, and also mental suffering occasioned by the fact and manner of expulsion. Lahiff v. St. Joseph's Total Abstinence & Benev. Soc. [Conn.] 57 A. 692.

81. A refusal at a regular meeting of readmission imposes liability for a wrongful expulsion though it is contended that a special meeting was not lawful for the purpose, hence an expulsion thereat was not binding on the association. Lahiff v. St. Joseph's Total Abstinence & Benevolent Soc. [Conn.] 57 A. 692.

82. Remedy by internal appeal before distant tribunal presided over by officer possibly hostile, and papers for appeal refused until payment of fine. Corregan v. Hay, 87 N. Y. S. 956.

83. The fact that an association has property derived from the payment of dues and fines, the possession of which is a mere incident and not the main object of the association, does not confer a property right on the members save that of enjoyment while in good standing. Hence proceedings under the laws of the association cannot be restrained as interfering with property rights. Injunction will not lie to prevent expulsion of mason. Franklin v. Burnham, 40 Misc. 566, 82 N. Y. S. 882.

84. A provision that on failure to pay dues a member shall be dropped is not self-executing, where it is provided that the action shall be taken by the board of governors. Member may still be held for regular dues. Westchester Golf Club Co. v. Pinkney, 87 N. Y. S. 153.

85. Westchester Golf Club. v. Pinkney, 87 N. Y. S. 153.

86. People v. East Buffalo Live Stock Ass'n, 88 App. Div. 619, 84 N. Y. S. 795.

87. People v. Old Guard of City of New York, 87 App. Div. 478, 84 N. Y. S. 766.

88. Such action pending mandamus for restoration of membership will cause denial of the writ. People v. Old Guard of City of New York, 87 App. Div. 478, 84 N. Y. S. 766.

89. Where an association of bottlers contracts for the collection of bottles for its members for a fixed period, a fixed sum cannot be recovered from a resigning member after his resignation. Such a contract is not contemplated by a by-law requiring payment of all liabilities as a condition to resignation. Long Island Bottlers' Union v Liebmann's Sons Brew. Co., 83 App. Dev. 146, 82 N. Y. S. 561.

90. Where it is provided that a member may resign on written notice of intent to do so, a specified time before the resignation shall take effect, the notice is sufficient without an additional filing of an actual resignation at the end of the period. Long Island Bottlers' Union v. Liebmann's Sons Brew. Co., 83 App. Div. 146, 82 N. Y. S. 561. Under a provision that notice of intention to resign shall operate as a waiver of all rights and privileges, such notice terminates general obligations on the discharge of existing dues to the association precedent to official resignation. Id.

91. See 1 Curr. L. 235.

92. Band held entitled to complete recovery on contract to furnish music. Detroit Light Guard Band v. First Michigan Independent Infantry [Mich.] 96 N. W. 934.

93. Complaint alleging a contract as committee of a commandery of Knights Templars in the name of the association, and signing in name of defendant's testator, held good against demurrer. McKinnie v. Postles [Del. Super.] 54 A. 798. Member contracting as agent. Detroit Light Guard Band v. First Mich. Independent Infantry [Mich.] 96 N. W. 934.

94. Association of more than seven mem-

§ 4. *Actions and litigation.*[95]—In the absence of statute a voluntary association cannot be sued at law as such,[96] but the right to sue an unincorporated association in the name under which it is known is frequently given by statute.[97] Such statutes do not abrogate the right to sue the members and association jointly.[98] Where the statutes of a state authorize such a suit its courts are not bound by comity to follow the method prescribed by the statute of another state.[99]

Process must be served in accordance with statutory provisions.[100]

§ 5. *Dissolution and termination.*[101]

ASSUMPSIT.

§ 1. Nature, Form, and Propriety of Action (348).
§ 2. The Common Counts (349).
§ 3. Declaration, Pleas, and Defenses (351).
§ 4. Evidence (352).

§ 1. *Nature, form, and propriety of action.*[1]—Assumpsit lies only on a simple contract,[2] express or implied,[3] the promise being the gist of the action.[4] Special statutory remedies are usually deemed merely cumulative to the remedy by assumpsit.[5]

Waiver of tort.[6]—The owner of property which has been converted may waive the tort and sue on the common counts in assumpsit.[7] Some states limit the right of election to cases in which the property has been converted into money.[8] Where the breach of duty sued on is a breach of a contract on which assumpsit will not lie, not a tort, the doctrine of waiver does not apply.[9] An election to pursue one remedy is a waiver of the right to pursue the other.[10]

bers formed for political purposes. Hosman v. Kinneally, 86 N. Y. S. 263.

95. See 1 Curr. L. 235.

96. Evidence held to show absence of any general fund in the hands of the association which might be chargeable in equity with debt. Methodist Episcopal Church South v. Clifton [Tex. Civ. App.] 78 S. W. 732. Where not organized to carry on trade or hold property within the state and not so doing. Cleland v. Anderson [Neb.] 92 N. W. 306. Bondholders' association in charge of improvement and reconstruction of corporate property. Standard L. & P. Co. v. Munsey [Tex. Civ. App.] 76 S. W. 931.

97. Under Code, art. 23, § 301, the creditor has an option to sue either the association or the members. Littleton v. Wells & McComas Council, No. 14 [Md.] 56 A. 798. Gen. St. 1902, § 588. Lahiff v. St. Joseph's Total Abstinence & Benev. Soc. [Conn.] 57 A. 692.

98. Comp. Laws, § 10,025. Detroit Light Guard Band v. First Michigan Independent Infantry [Mich.] 96 N. W. 934.

99. Saunders v. Adams Exp. Co. [N. J.] 57 A. 899.

100. Under P. L. 1903, p. 545, § 40, requiring service, in the case of an unincorporated organization, to be made on the agent or manager, or person in charge of the business of the organization, the agent need not be in charge of the whole business. Saunders v. Adams Exp. Co. [N. J.] 57 A. 899.

101. See 1 Curr. L. 236.

1. See 1 Curr. L. 236. See, also, Contracts, 1 Curr. L. 626; Implied Contracts, 2 Curr. L. 285.

2. Assumpsit will not lie on a lease, intentionally under seal, though it need not have been under seal. Crandall v. Johnson [R. I.] 58 A. 765.

3. Wherever one person has money equitably belonging to another, the law creates a promise by the former to pay it to the latter, and the obligation to do so may be enforced by assumpsit. Devries' Estate v. Hawkins [Neb.] 97 N. W. 792.

4. Waid v. Dixon [W. Va.] 46 S. E. 918.

5. Assumpsit will lie by a corporation to recover assessments from a delinquent stockholder, even though a state statute gives the corporation a lien and provides a forfeiture for nonpayment. Campbell v. American Alkali Co. [C. C. A.] 125 F. 207.

6. See Election of Remedies and Rights, 1 Curr. L. 992.

7. Brown v. Foster [Mich.] 100 N. W. 167. Petition held good, and suit properly brought in the name of one to whom the converted property had been pledged as security. Farmers' & Merchants' Bank v. Bennett & Co. [Ga.] 48 S. E. 398. Conversion of a check may be waived and suit for money had and received maintained to recover the proceeds. Silver v. Krellman, 89 App. Div. 363, 85 N. Y. S. 945.

8. It is said in this case that when the property has been converted into money or money's worth, plaintiff may sue either in trover for conversion, or in assumpsit, waiving the tort. But the larger number of states, including Rhode Island, hold that assumpsit will not lie when the property has not been so changed in form. So it was held in this case that it would not lie for the value of goods converted by defendant and destroyed while in his possession, after demand. Whipple v. Stephens [R. I.] 51 A. 375.

9. Where plaintiff claimed brokers were indebted to him by reason of a breach of duty in failing to require margins from a

§ 2. *The common counts.*[11]—At common law when the action is based on an express promise, special assumpsit must be brought,[12] unless the facts alleged are such that the law raises therefrom an implied promise.[13]

When a contract is executed and nothing further remains to be done on the part of the plaintiff, he may recover on the common counts,[14] When a contract has been performed, the fact that it was unenforceable because not in writing, will not warrant the bringing of a quantum valebat to recover alleged damages for breach.[15] Under a statute forbidding the use of the common counts unitedly, but permitting the count on an account annexed, when one or more of the items claimed would be described by any one of the common counts, such count on an account annexed includes, by intendment, all the allegations of all the common counts.[16] A statute authorizing the general counts in assumpsit in actions on insurance policies, and providing that the plea of nonassumpsit shall put in issue only the execution of the policy and the amount of damages sustained thereunder, does not place upon the defendant the burden of establishing the facts which he must put in issue,[17] and it is therefore constitutional.[18] The statute in Michigan, providing that an action in assumpsit may be brought for fraudulent representations or conduct for which trespass on the case would lie is constitutional.[19] To maintain such an action under this statute, it must clearly appear, by the necessary averments or by reference to it, that the suit is within the statutory provisions.[20] Special counts under this statute may be united with the common counts in assumpsit.[21]

Goods sold and delivered.—Both sale and delivery must appear to sustain a count in common form for goods sold and delivered.[22]

lender of stocks borrowed to cover a short sale, he could not recover the amount claimed on common counts for money had and received, since the breach of duty, if any, was a breach of contract, not a tort which could be waived and suit in assumpsit brought. Morris v. Jamieson, 205 Ill. 87, 68 N. E. 742.

10. But there can be no such waiver when the right to either remedy does not exist. Whipple v. Stephens [R. I.] 57 A. 375.

11. See 1 Curr. L. 236.

12. In an action on an insurance policy, the promise, conditions and fulfillment of the conditions, must be set forth. Hersey v. Northern Assur. Co., 75 Vt. 441, 56 A. 95. There can be no recovery on common counts on a promise to answer for the debt or default of a third person. West v. Grainger [Fla.] 35 So. 91. Suit on the common counts cannot be maintained for the recovery back of rent paid because of breach of covenant for quiet enjoyment. Prochaska v. Fox [Mich.] 100 N. W. 746.

13. Plaintiff's ownership of property, its destruction by fire, and payment of premiums, do not raise an implied promise to pay insurance. Hersey v. Northern Assur. Co., 75 Vt. 441, 56 A. 95.

14. Common counts for goods sold and delivered, for money paid for the use of the defendants, and for work and labor. Massey v. Greenabaum Bros. [Del.] 58 A. 804. Plaintiff exchanged a stock of goods for defendant's farm, agreeing to assume an incumbrance thereon. The mortgage was for a larger amount than that agreed to be assumed. Held, plaintiff having fully executed could recover the excess from the defendant in assumpsit. Wilson v. Wilson [Mo. App.] 80 S. W. 711.

15. The contract, though void, expresses the terms on which both parties acted. St. Louis Hay & Grain Co. v. United States, 191 U. S. 159, 24 S. Ct. 47.

16. Hence includes an allegation that money was paid at defendant's request. Rev. Laws, c. 173, § 6, clauses 7, 8. Action to recover taxes paid on defendant's land. Mass. Mut. Life Ins. Co. v. Green [Mass.] 70 N. E. 202.

17. Acts 1896, No. 121, p. 89. Hersey v. Northern Assur. Co., 75 Vt. 441, 56 A. 95.

18. It does not alter the substantive rights of the parties. Hersey v. Northern Assur. Co., 75 Vt. 441, 56 A. 95.

19. Comp. Laws, 1897, § 10421. First Nat. Bank v. Steel [Mich.] 99 N. W. 786.

20. Where two corporations merge in one, receiving stock of the new corporation in proportion to their assets, an action in assumpsit for money had and received will not lie to recover from a stockholder an amount in excess of the real value of his stock, alleged to have been obtained by fraudulent representations as to its value. Anderson Carriage Co. v. Pungs [Mich.] 95 N. W. 985.

21. To recover money loaned on worthless security by defendant's fraud. First Nat. Bank v. Steel [Mich.] 99 N. W. 786.

22. One cannot recover on a complaint for goods sold and delivered when the proof tends to show an account stated, no sale or delivery being shown. Consolidated Car Heating Co. v. Kahn, 84 N. Y. S. 919. The common count in assumpsit declaring on a promise to pay for goods sold and delivered cannot be used in a suit against a vendee of the original vendee to recover a balance due on goods sold, where the seller forebore to take the goods under a mortgage

Money had and received.[23]—An action in this form may be maintained to recover money paid on a judicial order or judgment subsequently set aside,[24] or money paid on a conditional sale after breach of the contract by the seller.[25] It is maintainable by a principal to recover money misappropriated by an agent,[26] by a corporation to recover money received from its officers under a contract void because ultra vires,[27] by one who has innocently made payments on an executory contract, void by statute, to recover money so paid,[28] or by a cestui que use against one who has received, and neglects or refuses to pay over, money received for plaintiff's use.[29] The action for money had and received may be maintained irrespective of whether it is maintainable as an action of trover and conversion.[30]

Money paid.[31]—Assumpsit will lie to recover money paid by plaintiff to a third person at defendant's request, to satisfy a claim against him.[32] A count for money paid must state it was paid at defendant's request,[33] and the omission of such allegation will not be cured by the allegation of a subsequent promise to pay in other counts.[34] Under a statute providing for a recovery of expenses incurred in breaking log jams and driving logs of another in order to secure a passageway, expenses incurred in merely moving logs to one side cannot be recovered.[35]

Work, labor and materials.—Where the employer refuses to perform, after performance by the employe, under a contract of employment, the employe may treat the contract as rescinded and sue on a quantum meruit.[36] In such case plaintiff may recover an amount not exceeding that claimed, if it appears that there was no agreement as to price.[37] One who has failed to fully perform his contract may recover the value of labor and materials actually furnished under it, not to exceed the contract price,[38] and in such action the defendants may recoup damages for failure to fully perform, unless they have waived that right.[39] Where a contractor could maintain mandamus to compel city officials to levy new assessments to pay for sewer construction, he could not recover from the city in assumpsit.[40]

given by the original vendee, the subsequent vendee having promised to pay. Miller v. Wilbur [Vt.] 56 A. 280.

23. See 1 Curr. L. 237.

24. Presumption is that payment was made upon implied understanding of restoration under such circumstances. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

25. Wood v. Kaufman [Mich.] 97 N. W. 47.

26. Guernsey v. Davis, 67 Kan. 378, 73 P. 101.

27. Loan to a private partnership. Leigh v. American Brake Beam Co., 205 Ill. 147, 68 N. E. 713.

28. Jones v. Mutual Fidelity Co., 123 F. 506.

29. If plaintiff is legally entitled to the money, it is immaterial how it came into defendant's hands. York v. Farmers' Bank [Mo. App.] 79 S. W. 968.

30. Bank received money with notice of the title of plaintiff thereto. York v. Farmers' Bank [Mo. App.] 79 S. W. 968.

31. See 1 Curr. L. 237.

32. Proof that payment was by a receipt for money due plaintiff is not a material variance from an allegation in a bill of particulars alleging a cash payment. McNerney v. Barnes [Conn.] 58 A. 714.

33, 34. Massachusetts Mut. Life Ins. Co. v. Green [Mass.] 70 N. E. 202.

35. Doyle v. Pelton [Mich.] 96 N. W. 483.

36. Boyd v. Vale, 84 App. Div. 414, 82 N. Y. S. 932. The value of services rendered under a contract so terminated may be recovered under a common count, no objection being made to the form of the pleading. Jerson v. Lee, 67 Kan. 539, 73 P. 72. Employe may elect to sue on the contract for damages for the breach, or recover in quantum meruit the value of his services. That employer boarded employe's mother and father for a time in part payment for services would not prevent a recovery on quantum meruit. Brown v. Woodbury, 183 Mass. 279, 67 N. E. 327.

37. Gill v. Staylor, 97 Md. 665, 55 A. 398. Verdict of $500 for services of daughter-in-law to a decedent held not excessive. Allen v. Allen, 101 Mo. App. 676, 74 S. W. 396.

38, 39. Decker v. School Dist. No. 2, 101 Mo. App. 115, 74 S. W. 390. In an action on a special contract for construction of a house there may be a recovery on common counts for work, labor and materials, if an acceptance of the work by defendant be shown. Aarnes v. Windham, 137 Ala. 513, 34 So. 816.

40. City of Alton v. Foster, 207 Ill. 150, 69 N. E. 783.

§ 3. *Declaration, pleas, and defenses.*[41]—In assumpsit the gist of the action is the promise to pay by defendant, and this promise the declaration must clearly allege,[42] unless its omission is permitted under a statute.[43] The averment of the promise may be in the same form or language, whether the promise is implied or express.[44] A count on a quantum meruit for work, labor, and services, must allege nonpayment.[45] Statutory provisions modifying the common law remedy or procedure must be observed. Statutes may provide forms for the statement of counts,[46] or prescribe what pleadings shall be required,[47] or require affidavits in certain cases.[48] Though a bill of particulars filed with a declaration for work and labor is defective, the declaration will be held sufficient on appeal if it shows defendant indebted to plaintiff in a certain sum which he agreed to pay.[49] A special count to enforce a lien for labor may be joined in a common law action with common counts for work done and materials furnished, and upon account stated.[50] Under a statute providing that general counts in assumpsit shall be a sufficient declaration in actions on insurance policies, the general counts must be aptly framed for the recovery of money due on a policy, but need not set forth the terms and conditions of the contract of insurance.[51] The declaration need not state that the specification required by this statute has been filed, since such specification, when filed, is a part of the record.[52] A petition that plaintiff was the owner and entitled to the possession of certain property, consigned to and sold by a third person, and that defendant had received the proceeds of such sale with knowledge of plaintiff's right thereto, and that plaintiff had demanded payment which defendant had refused, states a cause of action for money had and received.[53] A declaration containing allegations which are patently inconsistent is subject to a general demurrer.[54] An allegation in the declaration that all counts are for the same cause of action will not render a count, otherwise good, demurrable.[55] Where a declaration contains two counts, one based on an affirmance and

41. See 1 Curr. L. 238.

42. Wald v. Dixon [W. Va.] 46 S. E. 918. A declaration in assumpsit, based on contract, must allege mutual promises based on sufficient consideration. If based on an accord and satisfaction, such agreement must be complete as alleged. Grover v. Ohio River R. Co., 53 W. Va. 103, 44 S. E. 147.

43. A common count of indebitatus for services rendered is not demurrable for failure to include the usual allegation of a promise to pay. Under Code 1887, § 3272, providing for disregard of defects on demurrer unless there be an omission of something essential to the cause of action. City of Newport News v. Potter [C. C. A.] 122 F. 321.

44. If implied, the proof need not show a promise, but only a liability under the allegations. Wald v. Dixon [W. Va.] 46 S. E. 918.

45. Bacon v. Chapman, 85 App. Div. 309, 82 N. Y. S. 545.

46. A count reading, "For money payable to plaintiff. For money had and received by the defendant for the use of the plaintiff," held a sufficient compliance with a statute requiring such a count to read: "For money payable by the defendant to the plaintiff." Littleton v. Wells & McComas Council, No. 14 [Md.] 56 A. 798.

47. The statute required plaintiff in assumpsit to file a concise statement of his demand and the defendant to enter the statutory plea. Instead there were filed an answer, replication, amended answer, amended replication, and rejoinder, no plea being filed. Act 1887, p. 271. Hatfield v. Thomas Iron Co. [Pa.] 57 A. 950.

48. A plaintiff seeking to take advantage of a statute providing that, if plaintiff in assumpsit file an affidavit of his claim with the declaration, no plea in bar will be received without an affidavit, must make his affidavit conform strictly to the statutory requirements [Code 1887, § 3286]. Merriman Co. v. Thomas & Co. [Va.] 48 S. E. 490. Affidavit held defective because insufficient and not shown to have been filed by one having authority. Id.

49. Noyes Carriage Co. v. Robbins, 31 Ind. App. 300, 67 N. E. 959.

50. Under Rev. St. 1892, §§ 1004, 1744, as amended by chapter 4582, p. 122. West v. Grainger [Fla.] 35 So. 91.

51. Acts 1896, No. 121, p. 89. Hersey v. Northern Assur. Co., 75 Vt. 441, 56 A. 95.

52. Hersey v. Northern Assur. Co., 75 Vt. 441, 56 A. 95.

53. York v. Farmers' Bank [Mo. App.] 79 S. W. 968.

54. Counts alleging that defendant is indebted to plaintiff on a policy of insurance by reason of a loss, and that in consideration thereof, and of certain other things, it undertook to pay a certain sum if a loss should occur, and that such loss has occurred, are patently inconsistent. Hersey v. Northern Assur. Co., 75 Vt. 441, 56 A. 95.

55. Massachusetts Mut. Life Ins. Co. v. Green [Mass.] 70 N. E. 202.

the other on a disaffirmance of the contract, plaintiff may rely on both throughout the trial, and strike out one and rely on the other at the close of the evidence.[56] A court has no power to permit the amendment of a declaration containing the common counts in assumpsit by the addition of a count in tort.[57] When a verdict is for a sum greater than that demanded in the complaint, but the evidence shows plaintiff entitled to the sum awarded, the demand in the complaint may be deemed amended.[58]

The plea of the general issue admits the capacity in which the defendant is sued.[59] Under the general issue the defendant may prove that plaintiff prevented performance of the contract by him.[60] Where a declaration contains a special count and also common counts and defendant demurs to the declaration generally, except the common counts, he may be required to plead to the common counts without requiring the plaintiff to amend by striking the matter held bad on the demurrer.[61] Where special assumpsit was brought to recover a sum promised, to procure a settlement of insurance policies, and the proof showed an agreement procured by plaintiff, which defendant refused to carry out, there was at most a variance, not a failure of proof.[62] The sufficiency of the affidavit of defense depends upon the facts of the particular case.[63]

§ 4. *Evidence.*[64]—Under an allegation that the services sued for were reasonably worth a certain sum which defendant agreed to pay, plaintiff may show nature, extent, and fair value of the services, and the circumstances under which they were rendered.[65] The contract price of the services is competent evidence on the question of their value.[66] Evidence as to wages received by another employe is incompetent,[67] and evidence as to plaintiff's manner of living is inadmissible to show nonpayment of wages.[68] A promise by a decedent to pay a daughter-in-law for services need not be shown by direct evidence, but may be proved by circumstances and the nature of the services.[69] A book account admissible, the evidence tending to show it correctly kept.[70]

ASYLUMS AND HOSPITALS.

§ 1. Officers, Their Powers, Duties and Liabilities (352).
§ 2. Maintenance of Institutions and Support of Inmates (353).
§ 3. Liability of Institutions or Officers for Injuries to Inmates (353).

§ 1. *Officers, their powers, duties and liabilities.*[71]—The salary and term of

56. Brown v. Woodbury, 183 Mass. 279, 67 N. E. 327.

57. Doyle v. Pelton [Mich.] 96 N. W. 483.

58. Noyes Carriage Co. v. Robbins, 31 Ind. App. 300, 67 N. E. 959.

59. In assumpsit, the defense that defendant is not executor, must be pleaded in abatement, otherwise it is waived. Stewart v. Smith, 98 Me. 104, 56 A. 401.

60. Kelly v. Fahrney [C. C. A.] 123 F. 280.

61. West v. Grainger [Fla.] 35 So. 91.

62. Muldoon v. Meriwether, 25 Ky. L. R. 2085, 79 S. W. 1183.

63. In an action for money had and received, being money given defendants to purchase stock with leave to apply part for expenses, etc., it being charged that the stock bought was defendants' own, and that it had cost them $200, whereas they sold it for $300, an affidavit of defense setting up that plaintiffs knew defendants owned the stock and that it cost them $300, etc., held, by divided court, sufficient to take case to the jury. Tranter v. Porter, 207 Pa. 279, 56 A. 539. In an action to recover an alleged loan, an affidavit of defense setting up that plaintiff held the funds only as trustee for defendant, held sufficient. Knight v. Somerton Hills Cemetery, 205 Pa. 552, 55 A. 535.

64. See 1 Curr. L. 238.

65. Shirk v. Brookfield, 77 App. Div. 295, 79 N. Y. S. 225. Under an indebitatus count for services, evidence of the value of the services is admissible. City of Newport News v. Potter [C. C. A.] 122 F. 321.

66. Boyd v. Vale, 84 App. Div. 414, 82 N. Y. S. 932. The written contract of employment is admissible. Shirk v. Brookfield, 77 App. Div. 295, 79 N. Y. S. 225.

67, 68. Gill v. Staylor, 97 Md. 665, 55 A. 398.

69. Allen v. Allen, 101 Mo. App. 676, 74 S. W. 396. Statements by decedent to a third person are competent on this issue. Id.

70. Hurley v. Macey, 87 N. Y. S. 924.

office of members of the State Board of Charities and Corrections may be regulated by the legislature.[72] The trustees of a charitable corporation have no power to establish a pay-pupil department.[73] The trustees of the Michigan Asylum for the Insane have no authority to obligate the state to pay for drafting proposed legislation,[74] and it was the duty of the state auditor to refuse to audit such claims,[75] or to draw his warrant for the maintenance bills of the asylum until itemized vouchers covering expenditure of money previously drawn had been presented.[76] In New York, the matron of a charitable institution may make a binding contract to furnish a competent nurse to an inmate.[77]

§ 2. *Maintenance of institutions and support of inmates.*[78]—A voluntary association cannot be subjected to an ordinary judgment for debt.[79]

§ 3. *Liability of institutions or officers for injuries to inmates.*[80]—That a governmental charitable institution has power to sue and be sued does not render it liable for negligence.[81] A railroad relief department is not a charity relieved from liability for negligence in employing physicians,[82] but is only bound to exercise reasonable care in selecting them.[83]

ATTACHMENT.

§ 1. Definition, Nature and Distinctions (354).
§ 2. In What Actions It Will Issue (354).
§ 3. Right to and Grounds for the Writ (355).
§ 4. Attachable Property (357).
§ 5. Procednre in General (359).
§ 6. Affidavit and Its Sufficiency (361).
§ 7. Attachment Bond on Undertaking; Terms (362).
§ 8. The Writ or Warrant (363).
§ 9. The Levy or Seizure; Indemnifying Bonds (364).
§ 10. Return to the Writ (365).
§ 11. Custody, Sale, Redelivery, or Release of Attached Property (366).

71. See 1 Curr. L. 508.

72. Constitution limiting the number of members of State Board of Charities and Corrections to five is not violated by a law creating a new board of three to take the place of the old board. Thomas v. State [S. D.] 97 N. W. 1011. Constitutional provision that compensation of a public officer shall not be changed during his term is not violated by appointing a new Board of Charities and Corrections and changing the salary. Id. The contention that the legislature, having once fixed the compensation of members of the State Board of Charities and Corrections have no power to change it, is untenable. Id.

73. A testator bequeathed a sum for the establishment of a school for destitute children. A corporation was constituted to carry out his will. It was enjoined from establishing a pay pupil department. Rankine v. De Veaux College, 41 Misc. 655, 85 N. Y. S. 239.

74. Revision of asylum laws. Phelps v. Auditor General [Mich.] 99 N. W. 374, citing Cahil v. Board of State Auditors, 127 Mich. 487, 86 N. W. 950, holding that the governor did not have such authority.

75, 76. Comp. Laws 1897, § 1207. Phelps v. Auditor General [Mich.] 99 N. W. 374.

77. If such authority is conferred by the trustees. Ward v. St. Vincent's Hospital, 78 App. Div. 317, 79 N. Y. S. 1004. But a mere assurance that a nurse was competent is not sufficient. Id. A physician familiar with her work was competent to testify as to her ability. Her own testimony that she had had entire charge of similar work was competent. Id. Conduct of nurse in this particular case admissible. Id.

78. See 1 Curr. L. 509.

79. Parties as trustees of a voluntary religious association expended their moneys in erecting a building which was subsequently sold. The association held no property as a general fund, but all its property was charged with charitable uses distinct from the building in question. Methodist Episcopal Church South v. Clifton [Tex. Civ. App.] 78 S. W. 732.

80. See 1 Curr. L. 510.

81. The Alabama Insane Hospital is a state agency and not subject to suits for damage arising from its negligence in operating coal mines on the premises for purpose of furnishing fuel for the hospital. White v. Alabama Insane Hospital, 138 Ala. 479, 35 So. 454. Trustees of an asylum joined in an answer with the contractor against a materialman. The contractor alone might have answered. Held, this did not render them liable for interest on the money in controversy in their hands, which by injunction they were prevented from paying to any one. Newport Wharf & Lumber Co. v. Drew, 141 Cal. 103, 74 P. 697. See 1 Curr. L. 510, n. 74.

82. Haggerty v. St. Louis, etc., R. Co., 100 Mo. App. 424, 74 S. W. 456. Where a medical examiner visited a patient occasionally and advised him as to certain matters, he was held an attending physician. Haggerty v. St. Louis, etc., R. Co., 100 Mo. App. 424, 74 S. W. 456. See 1 Curr. L. 510.

83. Not liable under doctrine of respondeat superior for malpractice or negligence. Haggerty v. St. Louis, etc., R. Co., 100 Mo. App. 424, 74 S. W. 456. Whether an examining physician had authority to employ another to treat an injured employe, held a question for the jury. Id.

§ 12. Forthcoming Bonds and Receipts (367).
§ 13. Lien or Other Consequences of Levy (367).
§ 14. Conflicting Levies, Liens, and Creditors; Priorities (368).
§ 15. Enforcement and Dissolution, Discharge, Vacation, or Abandonment of Attachment (370).
A. Validity and Grounds for Setting Aside (370).
B. Procedure (371).
§ 16. Hostile and Opposing Claims to Attached Property (373).
§ 17. Wrongful Attachment (374).

§ 1. *Definition, nature and distinctions.*[84]—Attachment is a statutory remedy, and the local statutes must be consulted, any seemingly general rule being so only by reason of similar enactments in various states. It is a summary remedy,[85] and the statutes thereon are to be strictly interpreted or construed.[86] After appearance, the suit proceeds in personam, remaining a proceeding in rem as to the property attached.[87] A proceeding upon foreign attachment is in rem.[88] Attachment laws will not be impliedly repealed by further laws upon the same subject, unless the intention of the legislature is plain.[89]

§ 2. *In what actions it will issue.*[90]—Statutes regulating the grounds of attachment do not affect rights of attachment previously vested.[91] A party to sustain an attachment must have a just claim to found it upon,[92] the complaint must state a cause of action,[93] and under the statutes of some states contain a sufficient allegation of the service of the writ of attachment.[94] Unliquidated demands,[95] or nominal damages,[96] will not generally support attachment. The word "damages" after the amount alleged to be due as a debt is construed as only embracing interest, thus rendering the amount claimed certain.[97] Special grounds, as fraud, nonresidence, or concealment, must in some states coexist with the fact that the action is of a given class.[98] In most states attachments will issue on claims arising on contract;[99] this includes implied contracts.[1] A contract being separable, an attachment may issue if justified by any separable part.[2] A del credere agent, paying his employer, may sue, in his own name, the vendee, and attach his property.[3] The vendor in a conditional sale cannot maintain an attachment in an action

84. See 1 Curr. L. 239.
85. Forbes Piano Co. v. Owens [Ga.] 47 S. E. 938.
86. Munger v. Doolan, 75 Conn. 656, 55 A. 169; Buchanan v. Edmisten [Neb.] 95 N. W. 620; Forbes Piano Co. v. Owens [Ga.] 47 S. E. 938.
87. Chemical Nat. Bank v. Kellogg [N. J. Law] 57 A. 149.
88. If neither of the defendants own the property, they are not affected in any way. Coughran v. Germain [S. D.] 97 N. W. 743.
89. P. L. 1901, p. 158, § 1, is not impliedly repealed by P. L. 1903, p. 560, § 84. See this case for history of attachment legislation in New Jersey. Hotel Registry Realty Corp. v. Stafford [N. J. Law] 57 A. 145. Attachment laws of Louisiana are only modified, not repealed, by Act 23 of 1900. Hornbeck v. Gilmer, 110 La. 500, 34 So. 651.
90. See 1 Curr. L. 240.
91. Ky. St. 1903, §§ 74-96, as to assignments for benefit of creditors. Fitch v. Duckwall, 25 Ky. L. R. 1535, 78 S. W. 185.
92. Whitley v. Whitley's Adm'r [Ky.] 80 S. W. 825.
93. Porter v. Plymouth Gold Min. Co. [Mont.] 74 P. 938; Outerbridge v. Campbell, 87 App. Div. 597, 84 N. Y. S. 537. Allegations in the complaint and affidavit in an action for conversion of money held to show a cause of action therefor and to support the warrant of attachment. Kelsey v. Bank of Mansfield, 85 App. Div. 334, 83 N. Y. S. 281.
94. Code Civ. Proc. § 649. Allegation of service on one as treasurer is insufficient without an averment that the defendant is a corporation. Barton v. Albert Palmer Co., 87 App. Div. 35, 83 N. Y. S. 1041.
95. Stuart v. Chappell [Md.] 57 A. 17. Held would lie where damages were caused by delay in delivering structural steel under a contract. Hale Bros. v. Milliken, 142 Cal. 134, 75 P. 653. But see 1 Curr. L. 240, n. 4, 14.
96. Austrian Bentwood Furniture Co. v. Wright, 88 N. Y. S. 142.
97. Gardner v. Swift & Co. [Tenn.] 80 S. W. 764.
98. See post, § 3.
99. Sand. & H. Dig. § 325. Judge v. Curtis [Ark.] 78 S. W. 746. On a contract for the "direct payment" of money. Code Civ. Proc. § 890, will not issue in an action against sureties on a bond conditioned to be void, if the principal performed his contract. Ancient Order of Hibernians, Division No. 1 v. Sparrow [Mont.] 74 P. 197.
1. Liability of one knowingly buying crops subject to a landlord's lien may be treated by the landlord as arising upon an implied contract. Judge v. Curtis [Ark.] 78 S. W. 746.
2. A contract to train horses for a certain stated compensation and a per cent. of the purses won. Brien v. Stone, 82 App. Div. 450, 81 N. Y. S. 597.
3. McLean v. Colburn, 2 Ohio N. P. (N. S.) 257.

for the purchase price, though by bringing suit he waives his lien.[4] Generally, a secured creditor can only procure the levy of an attachment when the security without any fault on his part has become valueless.[5] By statute in some states, a landlord in an action to recover rent can attach crops growing or grown upon the land.[6] The collection of one's debt being endangered if the creditor should stop to obtain judgment or a return of no property found, an attachment will generally issue.[7] That a nonresident has conveyed property by a deed of trust does not authorize an attachment.[8] An attorney cannot attach the property of a nonresident client in a suit to recover for fees without notifying his client and giving him an opportunity to come in and defend.[9]

§ 3. *Right to and grounds for the writ.*[10]—Foreign attachment proceedings against residents of a state are void.[11]

Nonresidence.[12]—An action of attachment may be brought against a nonresident in any court in whose jurisdiction he has property,[13] and, after due notice, the court may satisfy the attachment out of such property.[14] A nonresident appearing and pleading to the merits, the court has jurisdiction of his person,[15] unless such plea is made with a distinct protestation that no jurisdiction has been acquired.[16] Personal service of a warrant of attachment on a resident member of a foreign limited partnership does not confer jurisdiction so as to render a nonresident partner liable therefor, the liability incurred by the resident partner being the only liability attached.[17] It appearing from the judgment roll that no property was attached, that defendant was a nonresident, was not served and did not appear, the court has no jurisdiction.[18] In some states, attachment may be made against a nonresident after two non ests.[19] The filing of an undertaking is not jurisdictional to the right to have an attachment issued against a nonresident defendant for a debt not due.[20] One who occasionally comes within the jurisdiction or intends at some uncertain time to return to it permanently is a nonresident,

4. Mark Means Transfer Co. v. Mackinzie [Idaho] 73 P. 135.

5. Security worthless at the time of pledging, and never becoming valuable, does not preclude the creditor from obtaining such attachment [Code Civ. Proc. § 537]. McPhee v. Townsend, 139 Cal. 638, 73 P. 584.

6. Sess. Laws 1901, p. 141, c. 17. Greeley v. Greeley, 12 Okl. 659, 73 P. 295. Under Gen. St. 1901, § 3871, landlord is entitled to attach crops raised by a tenant upon shares, the tenant having disposed of an appreciable portion of the crop, even though the time for harvesting and delivering the landlord's share has not arrived, and the crops being sold, the landlord is entitled to his share as of the date the crop should have been delivered to him. Harmon v. Payton [Kan.] 74 P. 618.

7. Where, on the day after levying such an attachment, the debtor made an assignment for the benefit of creditors, being hopelessly insolvent, its net loss for the ten months preceding the attachment being $20,000 and its liabilities increasing every day, held sufficient to warrant the attachment. Herman Goepper & Co. v. Phoenix Brew. Co., 25 Ky. L. R. 84, 74 S. W. 726.

8. Chattel mortgage permitted mortgagor to retain and dispose of property, substituting other of the same kind therefor, held not to furnish a ground of attachment where all the property was afterwards embraced in a deed of trust to the mortgagee. Wolf & Bro. v. Erwin & Wood Co., 71 Ark. 438, 75 S. W. 722.

9. Truitt v. Darnell [N. J. Eq.] 55 A. 692.

10. See 1 Curr. L. 240.

11. Though prosecuted in a county where they did not reside and could not be found, they making no appearance. Nelson v. Beatrice [Neb.] 96 N. W. 288; Coles & Sons Co. v. Blythe, 69 N. J. Law, 203, 54 A. 240.

12. See 1 Curr. L. 240.

13. Though temporarily in another county [Code Civ. Proc. art. 5, §§ 46-56]. Reynolds v. Williamson [Kan.] 74 P. 1122; National Broadway Bank v. Sampson [N. Y.] 71 N. E. 766; Jewett v. Boardman [Mo.] 81 S. W. 186; Hornbeck v. Gilmer, 110 La. 500, 34 So. 651. The court proceeds only against the defendant's interest in the property attached. Barnes v. Boston Inv. Co. [Neb.] 94 N. W. 101. See 1 Curr. L. 240, n. 16.

14. Brand v. Brand, 25 Ky. L. R. 987, 76 S. W. 868; Barnes v. Boston Inv. Co. [Neb.] 94 N. W. 101; Hornbeck v. Gilmer, 110 La. 500, 34 So. 651.

15. Brand v. Brand, 25 Ky. L. R. 987, 76 S. W. 868.

16. High v. Padrosa, 119 Ga. 648, 46 S. E. 859.

17. National Broadway Bank v. Sampson [N. Y.] 71 N. E. 766.

18. Ireland v. Adair [N. D.] 94 N. W. 766.

19. Code, art. 9, § 24. Steuart v. Chappell [Md.] 57 A. 17.

20. Gutterson v. Meyer [Neb.] 94 N. W. 969.

within the meaning of the attachment laws,[21] as is one traveling through a state delivering lectures.[22] Temporary absence is not nonresidence justifying attachment.[23] In some states attachment may issue against the property of an adult resident continuously without the state for a certain period, he not having designated a person to receive service.[24]

Attachment against corporations.[25]—In most states writs of attachment properly issue against the property of corporations.[26]

Fraudulent transfer or disposition of property.[27]—Fraudulent transfer of a debtor's assets is ground for attachment of the property.[28] Fraud,[29] actual[30] or intended,[31] is an essential element. Ordinarily, fraud should be found as a finding of fact,[32] though a conclusion of law may sometimes suffice.[33] Ordinarily, sales of property in the usual course of business to customers outside of the state

21. Imperial Cotton Oil Co. v. Allen [Miss.] 35 So. 216.

NOTE. Who is a nonresident: This is a question of actual residence, not of domicile, and is a question of fact to be determined by the ordinary and obvious indicia of residence. Keller v. Carr, 40 Minn. 428, 42 N. W. 292. But mere temporary absence of a debtor from the state does not render him a nonresident even though he may not have a house of usual abode there at which a summons against him might be served during such absence. Keller v. Carr, 40 Minn. 428, 42 N. W. 292; Crawford v. Wilson, 4 Barb. [N. Y.] 504; Tibbitts v. Townsend, 15 Abb. Pr. [N. Y.] 221. But it is otherwise where the absence is protracted. Haggart v. Morgan, 4 Sandf. [N. Y.] 198; Id., 5 N. Y. 422, 55 Am. Dec. 350; Caldwell v. Barclay, 1 Dall. [U. S.] 306, 1 Law. Ed. 149. Absence on account of war will not generally justify an attachment for nonresidence. Clark v. Pratt, 19 La. Ann. 102; Haynes v. Powell, 1 Lea [Tenn.] 347. Contra, Dorsey v. Kyle, 30 Md. 512; Dorsey v. Dorsey, 30 Md. 522, 96 Am. Dec. 633. That one has a place of business in a state will not of itself constitute him a resident. In these cases declarations of intent and domicile of family largely govern. Breed v. Mitchell, 48 Ga. 533; Chase v. Ninth Nat. Bank, 56 Pa. 366; Rayne v. Taylor, 10 La. Ann. 726; Perrine v. Evans, 35 N. J. Law, 221; Morgan v. Nunes, 54 Miss. 308; Wallace v. Castle, 68 N. Y. 370. A nonresident coming into a state does not become a resident until he has formed an intention to locate there. Burrows v. Miller, 4 How. Pr. 349; In re Fitzgerald, 2 Caines [N. Y.] 318. An absconding debtor is not necessarily a nonresident. Field v. Adreon, 7 Md. 209; Croxall v. Hutchings, 12 N. J. Law, 97; Barnet's Case, 1 Dall. [U. S.] 153, 1 Law. Ed. 77; Kennedy v. Baillie, 3 Yeates [Pa.] 55. Fugitives from justice are nonresidents. New York v. Genet, 63 N. Y. 646, 4 Hun, 487; Thames & M. Marine Ins. Co. v. Dimmick, 51 N. Y. St. Rep. 41, 22 N. Y. S. 1096. But see Starke v. Scott, 78 Va. 180. —From notes to Cousins v. Alworth [Minn.] 10 L. R. A. 604, and Monroe v. Williams & Turley [S. C.] 19 L. R. A. 665. See 1 Curr. L. 241, n. 23.

22. Garbett v. Mountford [N. J. Law] 64 A. 872.

23. Evidence as to abandonment of homestead and removal to another state, being denied, held insufficient. Werner v. Linsenmeyer [Neb.] 94 N. W. 105. See 1 Curr. L. 241, n. 22.

24. Code Civ. Proc. § 636. Certificate of clerk that no such designation has been found after search is a sufficient basis for a creditor's assertion on information and belief in the affidavit that none has been made. Ennis v. Untermyer, 87 N. Y. S. 695. This section does not apply to the city court of New York, which is governed by § 3169. Pierce v. Martin, 89 N. Y. S. 434.

25. See 1 Curr. L. 241.

26. Gokey v. Boston, etc., R. Co., 130 F. 994.

27. See 1 Curr. L. 241.

28. Belcher-Brown Lumber & Mercantile Co. v. Drane [Mo. App.] 80 S. W. 307. See 1 Curr. L. 241, n. 30.

29. Belcher-Brown Lumber & Mercantile Co. v. Drane [Mo. App.] 80 S. W. 307. Statement by agent of corporation about to move its factory to another state, made while engaged in dismantling its machinery, that it was a "dirty job," held to refer to the work in which he was engaged and had no reference to removal as affecting creditors. Davis v. Reflex Camera Co., 89 N. Y. S. 587. An affidavit of attachment showing that defendant, after being threatened with suit, stated that if plaintiff sued he would not get a cent, as she would sell her property and leave New York, and that three days thereafter she did sell it, held to show an intent to defraud creditors. Hill v. Martin, 88 N. Y. S. 708.

30. Violation of the limited partnership law by the payment of an honest debt is not such actual fraud. Pfluke Co. v. Papullas, 42 Misc. 15, 85 N. Y. S. 541. That the debtor gave a chattel mortgage with a provision allowing him to sell the goods mortgaged without accounting for the proceeds or reducing the debt, and that he had so sold some of the goods in the course of business, is not such actual fraud. Id.

31. Not fraud declared by statute owing to the omission of certain formalities. Mohlman Co. v. Landwehr, 87 App. Div. 83, 83 N. Y. S. 1073. Transfer must be made with intent to defraud creditors. This intent must be stated in the affidavit. American Exch. Bank v. Puckett [Neb.] 96 N. W. 796; Dunn v. Claunch, 13 Okl. 577, 76 P. 143. That one is about to dispose of his property so as to hinder and delay creditors is not a ground for attachment proceedings. Belcher-Brown Lumber & Mercantile Co. v. Drane [Mo. App.] 80 S. W. 307. But see 1 Curr. L. 241, n. 31.

32, 33. Zachariae v. Swanson [Tex. Civ. App.] 77 S. W. 627.

do not justify attachment.[34] The mere fact that a debtor is about to leave the state is no ground for attachment.[35] A debt being fraudulently contracted an attachment may be had.[36] In the absence of statutory definitions, the word "debt" as here used imports an obligation resting upon contract.[37] One from whom property is obtained by fraud may attach the same upon discovering the fraud.[38] The right of an assignee of a chose in action to procure a writ of attachment on the ground that the debt or obligation was fraudulently contracted exists only as against his immediate assignee.[39] The burden of proving a fraudulent intent is with the party applying for the writ,[40] and circumstances creating a strong suspicion, but falling short of prima facie proof, are not sufficient;[41] but the effect of a transfer from the debtor to his wife, being to leave his subsequently contracted indebtedness unpaid, the burden is upon the wife to show the good faith of the transaction as against an attaching creditor.[42]

§ 4. *Attachable property.*[43]—The property attached must be in the possession of the attachment debtor, or held for his benefit, or in fraud of the rights of the plaintiff,[44] and he must have an attachable interest therein.[45] An insurance policy being payable to any one of several parties, no one of them has an attachable interest in the insurance fund.[46] There being a reservation of produce in a contract for the sale of land until the land is paid for, the vendee has no attachable interest in the crops until such time.[47] Property which the debtor paid for but which was conveyed direct to his wife cannot be levied upon by attachment as against the debtor.[48] Where an attachment is sued out against several defendants and the property of only one is levied upon, the levy is properly dis-

34. Herman Goepper & Co. v. Phoenix Brewing Co., 25 Ky. L. R. 84, 74 S. W. 725. See 1 Curr. L. 242, n. 34.

35. Tyler v. Bowen [Iowa] 100 N. W. 505. The mere fact that a corporation was changing the location of its factory to a point without the state is no indication of fraud sufficient to support an attachment. Davis v. Reflex Camera Co., 89 N. Y. S. 587. In Georgia, that the defendant "has left the county and absconded" is no ground for attachment. Forbes Piano Co. v. Owens [Ga.] 47 S. E. 938.

36. Sonnesyn v. Akin [N. D.] 97 N. W. 557.

37. Does not apply in actions to recover damages for tort [Rev. Codes 1899, § 5352]. Sonnesyn v. Akin [N. D.] 97 N. W. 557.

38. Alexander v. Wade [Mo. App.] 80 S. W. 917.

39. Thwing v. Winkler, 13 Okl. 643, 75 P. 1126; Thwing v. Humphrey, 13 Okl. 646, 75 P. 1127.

40. Mohlman Co. v. Landwehr, 87 App. Div. 83, 83 N. Y. S. 1073; Durkin v. Paten, 89 N. Y. S. 622.

41. Allegation of suspicious acts subsequent to a sale, which are physically consistent with his having received full value for his property and with intent to apply the proceeds in good faith to the payment of his debts, held insufficient. Mohlman Co. v. Landwehr, 87 App. Div. 83, 83 N. Y. S. 1073. Affidavits stating that defendant had been away for several weeks, had offered to sell a horse and rig at a figure not disclosed, that he was sending a horse and carriage into the country for sale, that a few months previous a bank had refused to pay his check, and that he was indebted to a number of creditors, that there were mortgages against his property and that his liabilities were more than his assets, held insufficient. Durkin v. Paten, 89 N. Y. S. 622.

42. Bartlett v. Smith [Neb.] 95 N. W. 661.

43. See 1 Curr. L. 242.

44. McNabb v. Brice [Ga.] 48 S. E. 199; Rosencranz v. Swofford Bros. Dry Goods Co., 175 Mo. 518, 75 S. W. 445. In an action of attachment and to set aside a fraudulent conveyance, an allegation that the grantor "was the owner in fee simple of the unincumbered title" held a sufficient allegation of ownership. Trent v. Edmonds [Ind. App.] 70 N. E. 169. Where one continued in possession as before the alleged sale, no one but the immediate parties knowing of the transaction, the bill of sale not being recorded, held, the sheriff attached the stock before he had notice of the sale. Jordan v. Crickett [Iowa] 99 N. W. 163.

45. Joslyn v. Taplin [Vt.] 57 A. 995. Gen. Laws 1896, c. 212, § 9, giving the husband the right to administer upon the wife's intestats estate, and to take to himself the surplus after the payment of debts, held, he did not have an attachable interest in her choses in action until reduced to possession by suit as administrator. Providence County Sav. Bank v. Vadnais [R. I.] 58 A. 454.

NOTE. The reversionary interest in shares of stock in a foreign corporation, owned by a nonresident and pledged to a resident for the payment of a debt, is subject to attachment for claims against the nonresident owner. Simpson v. Jersey City Contracting Co., 165 N. Y. 193, 58 N. E. 896, 55 L. R. A. 796.

46. Providence County Sav. Bank v. Vadnais [R. I.] 58 A. 454.

47. Joslyn v. Taplin [Vt.] 57 A. 995.

48. Creditor must resort to equity. Fletcher v. Tuttle, 97 Me. 491, 54 A. 1110.

missed as to the rest.[49] Under the modern theory of attachment, property subject to execution is subject to attachment.[50] Exempt property is not subject to attachment,[51] and that the debtor appeared and moved to dissolve the attachment without first making claim for his exemption does not waive his right thereto.[52] An exemption of property of a husband continues for the benefit of his wife notwithstanding her abandonment by the husband.[53] At common law, the rolling stock and all other movable property of a railroad corporation were exempt from attachment,[54] though this has been changed by the constitution or statutes in various states,[55] and while such laws do not of themselves violate the Federal constitution, any writ of attachment interfering with the freedom of interstate commerce is abortive.[56]

The interest of a debtor in property fraudulently conveyed is subject to attachment,[57] the creditor being allowed to attach the property so conveyed, whether the debt is due or not,[58] as if no such conveyance had been made or attempted,[59] the attachment issuing against the grantee,[60] and after acquiring title, such levying creditor may maintain an action at law to recover possession of his premises, or may resort to equity to have the apparent cloud upon his title removed,[61] or his lien enforced,[62] or the action in attachment and to set aside the fraudulent conveyance, may be jointly prosecuted.[63] The property of an insolvent building association is subject to attachment.[64] Trust property cannot be held under an attachment for the trustee's personal debts.[65] Property in the hands of an administrator is not subject to attachment.[66] One's interest in

49. Connolly v. Atlantic Contracting Co. [Ga.] 47 S. E. 575.

50. Wall v. Norfolk & W. R. Co., 62 W. Va. 485, 44 S. E. 294. No writ of attachment can be enforced against property which cannot be seized upon execution. Fletcher v. Tuttle, 97 Me. 491, 64 A. 1110.

51. Under 2 Ball. Ann. Codes & St. § 5255, a debtor furnishing the sheriff a list of his exemptions and the creditor making no demand for an appraisement within a reasonable time, it becomes the duty of the sheriff to release such property as exempt. State v. Gardner, 32 Wash. 550, 73 P. 690. A **homestead** [Code 1896, § 2033]. Bailey v. Dunlap Mercantile Co., 138 Ala. 415, 36 So. 451. Under Rev. St. §§ 5438, 5441, a nonresident is not entitled to an exemption therein provided in lieu of homestead (Campbell v. Bennington, 4 Ohio Circ. R. [N. S.] 447), though an abandoned homestead may be subject to attachment (Stickley v. Widle, 122 Iowa, 400, 98 N. W. 135).

NOTE. Right to enjoin attachment proceedings: Attachment proceeding to reach any exempt property may be enjoined. Hager v. Adams, 70 Iowa, 746, 30 N. W. 36; Zimmerman v. Franke, 34 Kan. 650, 9 P. 747; Wabash Western R. Co. v. Siefert, 41 Mo. App. 35; Keyser v. Rice, 47 Md. 203, 28 Am. Rep. 448; Moton v. Hull, 77 Tex. 80, 13 S. W. 849, 8 L. R. A. 722. Also where debtor and creditor reside in the same state and the proceedings are in a foreign state. Snook v. Snetzer, 25 Ohio St. 616; Teager v. Landsley, 69 Iowa, 725, 27 N. W. 739.—From note to Thorndike v. Thorndike [Ill.] 21 L. R. A. 71, 75.

52. State v. Gardner, 32 Wash. 550, 73 P. 690.

53. Baum v. Turner, 25 Ky. L. R. 600, 76 S. W. 129.

54. Wall v. Norfolk & W. R. Co., 52 W. Va. 485, 44 S. E. 294. A railroad car of a foreign company temporarily within a state is not liable to attachment issued in an action in the courts of that state. Connery v. Quincy, etc., R. Co. [Minn.] 99 N. W. 365.

55. Constitution, art. 11, § 8. Wall v. Norfolk & W. R. Co., 52 W. Va. 485, 44 S. E. 294.

56. A car sent into a state loaded with freight from another state and to be returned to the latter state in the transaction of interstate commerce cannot be levied upon under an attachment in the first named state. Wall v. Norfolk & W. R. Co., 52 W. Va. 485, 44 S. E. 294.

57. Westervelt v. Baker [Neb.] 95 N. W. 793; Coulson v. Galtsman [Neb.] 96 N. W. 349.

58. Burns' Rev. St. 1901, § 925. Trent v. Edmonds [Ind. App.] 70 N. E. 169.

59. Fletcher v. Tuttle, 97 Me. 491, 54 A. 1110.

60. Trent v. Edmonds [Ind. App.] 70 N. E. 169. Under Code, § 3896, providing for the attachment of property in the possession of a third party, but of which the defendant is entitled to the immediate possession. Jordan v. Crickett [Iowa] 99 N. W. 163.

61. Fletcher v. Tuttle, 97 Me. 491, 54 A. 1110.

62. Coulson v. Galtsman [Neb.] 96 N. W. 349.

63. Trent v. Edmonds [Ind. App.] 70 N. E. 169.

64. Bories v. Union Building & Loan Ass'n, 141 Cal. 74, 74 P. 552.

65. Hussey v. Arnold [Mass.] 70 N. E. 87. As to beneficiaries' interest, see 1 Curr. L. 242, n. 46.

66. District court of Kansas has no jurisdiction to order such an attachment. O'Loughlin v. Overton [Kan.] 74 P. 604. See 1 Curr. L. 242, n. 44, 45.

an estate in the hands of an executor during the course of administration is not attachable.[67] Funds in custodia legis,[68] or in the hands of a public officer,[69] are exempt from attachment. In the absence of statutory provisions, equitable interests in property are not attachable in an action at law.[70] Under statutes providing that persons holding property of the defendant shall, upon application, give a certificate of the latter's interest therein, and upon refusal shall be subject to examination, it is not necessary to show that the property would be subject to levy in order to secure such examination,[71] nor does the right to demand the certificate depend, in most states, on the service of the warrant,[72] and the affidavit of the sheriff must show that the third party wholly failed to give a certificate.[73]

Attachable debts and choses in action.[74]—Some courts hold the situs of a debt, for the purposes of attachment proceedings, to be at the domicile of the debtor,[75] others that it is at the domicile of the creditor.[76] A contract debt, payable within a state but due a nonresident defendant by a foreign corporation, may be attached in an action brought in the state.[77]

§ 5. *Procedure in general.*[78]—The trial of the attachment is wholly distinct from the trial of the case on its merits, and sometimes precedes and sometimes follows the main trial.[79] The plaintiff must join as parties all persons interested in the property attached.[80] An action which has for its purpose the subjection of property to the payment of a debt, and is commenced by attachment for that purpose, is a civil action,[81] and is governed by statutes regulating such actions.[82] In attachment proceedings, it is not necessary that the account should itemize the indebtedness,[83] nor is a variance between an account filed with an original declaration under a rule-day act and one filed with a petition for a writ of attachment material, defendant never being summoned and no judgment by default being taken.[84]

In most states, papers in attachment proceedings are amendable the same as

67. Harris v. Kittle, 119 Ga. 29, 45 S. E. 729.

68. Dale v. Brumbly [Md.] 56 A. 807. See 1 Curr. L. 242, n. 43.

NOTE. Property in the hands of a receiver: After the appointment of a receiver, the property to which the receivership relates is in the custody of the law, even before he qualifies, so as to exempt it from the levy of an attachment; and such levy can confer no right or lien on the attachment creditor or on those claiming under him: Texas, etc., R. Co. v. Lewis, 81 Tex. 1, 16 S. W. 647, 26 Am. St. Rep. 776; State v. Ellis, 45 La. Ann. 1418; Pond v. Cooke, 45 Conn. 126, 29 Am. Rep. 668; Chicago, etc., R. Co. v. Keokuk, etc., Packet Co., 108 Ill. 317, 48 Am. Rep. 557; Atlas Bank v. Nahant Bank, 23 Pick. [Mass.] 480; Columbian Book Co. v. De Golyer, 115 Mass. 67.—From note to American, etc., Bank v. McGettigan [Ind.] 71 Am. St. Rep. 345, 365.

69. Clerk of court. Dale v. Brumbly [Md.] 56 A. 807.

70. Interest of a certificate holder in an association in the property of the latter. Hussey v. Arnold [Mass.] 70 N. E. 87.

71. Code Civ. Proc. § 651. Donner v. Mercy, 81 App. Div. 181, 80 N. Y. S. 1030.

72. Code Civ. Proc. § 650. Donner v. Mercy, 81 App. Div. 181, 80 N. Y. S. 1030.

73. That he failed to give one to a certain effect, affidavit held insufficient. Donner v. Mercy, 81 App. Div. 181, 80 N. Y. S. 1030.

74. See 1 Curr. L. 242; see, also, Garnishment, 2 Curr. L. 130.

75. The personal service of a warrant of attachment upon a nonresident partner of a foreign limited partnership for a debt due a foreign corporation and having a foreign situs, the partner being temporarily in the state, held invalid. National Broadway Bank v. Sampson [N. Y.] 71 N. E. 766.

76. The declaration in attachment showing that the property seized under the attachment was a debt due by a resident to a nonresident, it is amendable so as to show that the debt is payable within the state. High v. Padrosa, 119 Ga. 648, 46 S. E. 859; Glower v. Glidden Varnish Co. [Ga.] 48 S. E. 355.

77. Lancaster v. Spotswood, 41 Misc. 19. 83 N. Y. S. 572.

78. See 1 Curr. L. 243.

79. Edwards-Barnard Co. v. Pflanz, 24 Ky. L. R. 2296, 73 S. W. 1018.

80. Trustees under a prior deed of trust. Jackson v. Coffman, 110 Tenn. 271, 75 S. W. 718.

81. First Nat. Bank v. Hesser [Okl.] 77 P. 36.

82. In Oklahoma must be commenced in the county where defendant resides or is found. First Nat. Bank v. Hesser [Okl.] 77 P. 36.

83. Voucher for services of attorney. Steuart v. Chappell [Md.] 57 A. 17.

84. Steuart v. Chappell [Md.] 57 A. 17.

in any other case,[85] but amendments, in the absence of consent, necessitating further service of process, are not allowable.[86]

The *jurisdiction*[87] of the Federal court is determined by the amount in controversy.[88] In Georgia, the judge of a superior court being disqualified, jurisdiction can only be taken by the judge of the adjoining circuit to whom the petition for attachment is presented.[89] Acts necessary to the creation of the lien are not jurisdictional.[90] The court having no power to order the sale of the property, it has no power to order the attachment.[91]

Beginning action and acquiring jurisdiction.[92]—An attachment by common-law garnishment or trustee process cannot be created by consent.[93] In some states real property is attached by filing a certificate containing inter alia the names of the parties to the action,[94] under such a statute the names of the parties must be correctly given or no right is acquired thereunder.[95]

Necessity of issuance of summons and service thereof.[96]—A statute requiring service upon the party in possession of the property, the fact that such party is the plaintiff in the attachment suit does not excuse service upon him.[97] In the absence of special statutory regulations, personal service on a nonresident attachment defendant being required, the service must be upon him personally.[98] The warrant in attachment must have been issued before the summons can be served by publication.[99] In New York, in order to obtain an order directing service of the summons by publication, one must show by affidavit when he applies for such order,[1] the issuing of the writ of attachment.[2] There being a misnomer in notice by publication the proceedings are void.[3] The sufficiency of the affidavit for publication of the summons is not raised by an objection that the court has not obtained jurisdiction of the person of the defendant.[4] The papers showing that the

85. Act 1898, p. 127, c. 44. Voucher amended by adding thereto certificate of letters testamentary granted to plaintiffs and amending title of account to conform thereto. Booth v. Callahan, 97 Md. 317, 55 A. 625.

86. Gen. Laws 1896, c. 252, § 17. King v. McEnroy [R. I.] 55 A. 638.

87. See 1 Curr. L. 240; see, also, Jurisdiction, 2 Curr. L. 604.

88. The jurisdiction of a court is determined by the amount in controversy, not the value of the goods, in an attachment proceeding. Held, U. S. commissioner had jurisdiction when $300 was in controversy, but $90 damages claimed. Hughes Bros. Mfg. Co. v. Reagan [Ind. T.] 69 S. W. 940.

89. Civil Code, 1895, § 4543. McAndrew v. Irish-American Bank, 117 Ga. 510, 43 S. E. 858.

90. Failure to record levy with clerk of the court as provided in Clark's Code (3d Ed.), § 359 does not affect the efficiency of the levy as a basis of judgment against a nonresident. Evans v. Aldridge, 133 N. C. 378, 45 S. E. 772.

91. Probate Court of Oklahoma cannot issue an order of attachment to be levied upon real estate. Goodfellow Shoe Co. v. Griffith, 13 Okl. 51, 74 P. 109.

92. See 1 Curr. L. 243.

93. Voluntary appearance, without the statutory service upon him, of one named as trustee in a trustee process does not attach the funds of the principal defendant in his hands. Hathorn v. Robinson, 98 Me. 334, 56 A. 1057.

94. McDowell v. Parry [Or.] 76 P. 1081.

95. Wrong initials held a fatal defect even where changed in pencil, it not being conclusively shown that the alteration was made before filing the certificate. McDowell v. Parry [Or.] 76 P. 1081.

96. See 1 Curr. L. 243.

97. Munger v. Doolan, 75 Conn. 656, 55 A. 169. Statute provides that if defendant have no agent or attorney within the state a copy of the process and complaint should be left with the person in charge or possession of the property. Held void in such a case to leave such copies at the property attached for defendant and not with the person in possession [Rev. St. 1902, § 828]. Id.

98. Comp. Laws 1887, § 4898, providing that process may be left at his house in the presence of a member of his family over fourteen years old, applies only to such service within the state. First Nat. Bank v. Holmes [N. D.] 94 N. W. 764.

99. Little v. Christie [S. C.] 48 S. E. 89.

1. The issuing of the attachment cannot for the first time be shown by an affidavit read in opposition to a motion to set aside the order of publication. Wilson v. Lange, 40 Misc. 676, 83 N. Y. S. 180.

2. Code Civ. Proc. § 3170, relating to the City Court of New York. Wilson v. Lange, 40 Misc. 676, 83 N. Y. S. 180. But see 1 Curr. L. 244, n. 70.

3. Sole defendant described as O. P. Buchanan, his true name was Porter O. Buchanan, held misnomer fatal. Buchanan v. Edmisten [Neb.] 95 N. W. 620.

4. Barnes v. Boston Inv. Co. [Neb.] 94 N. W. 101.

defendants are nonresidents and that no order of publication has been taken on the return day of the process, the plaintiff is entitled to a reasonable time within which to perfect his suit by order of publication.[5] A general appearance by any of the nonresident defendants renders an order of publication unnecessary as to such of them as appear.[6]

§ 6. *Affidavit and its sufficiency.*[7]—The purpose of the statute requiring an affidavit in attachment setting forth the nature of the claim is to show whether it is of such a character as entitles the party to an attachment.[8] The affidavit must conform strictly to statutory requirements,[9] it must distinctly show that it is made by a natural person,[10] and it may be made by an attorney, if the latter has personal knowledge of the facts therein stated.[11] It may state an amount less than stated in the complaint.[12] Several statutory grounds being stated cumulatively, if any one of them be true the affidavit will be sustained though all the others be untrue.[13] In states requiring the affidavit to state the amount due the word "due" refers to the maturity of the claim rather than to the balance of indebtedness owing from one party to another.[14] Under a statute allowing the issuance of an attachment upon affidavit or testimony, a defective affidavit may be sufficient testimony to authorize the issuance of the writ.[15] An affidavit in attachment in a suit on a promissory note is sufficient in law, though the date of the note is stated differently in the petition and amended petition.[16] An alleged variance between the affidavit and bond cannot be raised for the first time upon appeal.[17]

Averments in general.[18]—An affidavit in attachment positively sworn to, need only be stated in the language of the statute,[19] but being made by a stranger to the transaction it must set forth the means by which his knowledge of the facts was obtained,[20] and failure to so allege is a fatal defect.[21] The affidavit must con-

5, 6. McClung v. Sleg [W. Va.] 46 S. E. 210.

7. See 1 Curr. L. 244.

8. Orlapp v. Schueller, 4 Ohio Circ. R. (N. S.) 611.

NOTE. **Affidavit, effect of and attack on:** The validity of a judgment depends upon the facts stated in the affidavit, and, when they are insufficient and not in compliance with the statute the judgment is void. Capehart v. Dowery, 10 W. Va. 130; McGowan v. Sprague, 23 Ala. 524; Kirksey v. Fike, 27 Ala. 383, 62 Am. Dec. 768. The affidavit becomes part of the record and is not subject to be aided or attacked by parol. Watts v. Carnes, 4 Heisk. [Tenn.] 532; Maples v. Tunis, 11 Humph. [Tenn.] 108, 53 Am. Dec. 779; Slivers v. Wilson, 5 Har. & J. [Md.] 130, 9 Am. Dec. 497; Goss v. Boulder County Com'rs, 4 Colo. 468.—From note to Miller v. White [W. Va.] 76 Am. St. Rep. 791, 801.

9. Landlord's affidavit must state that a lien is claimed upon the crops on the land. Sess. Laws 1901, p. 141, c. 17. Greeley v. Greeley, 12 Okl. 659, 73 P. 295.

10. Under a statute requiring the affidavit to be made by "the plaintiff, his agent or attorney" affidavit of a firm held insufficient though signed in the firm's name by an agent. Clements & Co. v. Puckett [Neb.] 95 N. W. 796.

11. Reister v. Land [Okl.] 76 P. 156.

12. This under Code Civ. Proc. § 540, requiring the writ to state the amount in conformity with the complaint. Hale Bros. v. Milliken, 142 Cal. 134, 75 P. 653.

13. Affidavits alleged defendant had absconded and her nonresidence, latter alone true, attachment sustained. Garbett v. Mountford [N. J. Law] 54 A. 872. See 1 Curr. L. 245, n. 95.

14. Construing Code §§ 2993, 3880, 3883. Need not allege set-off. Smeaton v. Cole, 120 Iowa, 368, 94 N. W. 909.

15. Civ. Code, § 4543. Price v. Cohen, Son & Co., 118 Ga. 211, 45 S. E. 225.

16. Orlapp v. Schueller, 4 Ohio Circ. R. (N. S.) 611.

17. McCain Bros. v. Street, 136 Ala. 625, 33 So. 872.

18. See 1 Curr. L. 244.

19. An allegation "that the claim was for necessaries, to wit, groceries," sufficient. McLane v. Colburn, 2 Ohio N. P. (N. S.) 257; Shawnee Commercial & Sav. Bank Co. v. Miller, 24 Ohio Circ. R. 198. Fraud. Thwing v. Winkler, 13 Okl. 643, 75 P. 1126; Thwing v. Humphrey, 13 Okl. 646, 75 P. 1127. Where unaccompanied by any facts showing the alleged grounds to be true held sufficient. Dunn v. Claunce, 13 Okl. 577, 76 P. 143. An affidavit upon the ground that the defendant did not leave enough property within the state to pay his debts need not allege that the defendant did not have sufficient property subject to execution within the state to pay the debt sued on [Civ. Code, § 237, subsec. 6]. Marks & Stix v. Gause, 24 Ky. L. R. 1949, 72 S. W. 733.

20. Knowledge of attachment plaintiff as to capacity of defendant's plant. Commercial Wood & Cement Co. v. Northampton Portland Cement Co., 41 Misc. 242, 84 N. Y. S. 38. Based upon information and belief.

tain, in unequivocal language, that the debt sued on is due.[22] The facts proving damages should be set forth in detail,[23] an insufficient allegation of damages being fatal.[24]

Averments as to nonresidence.[25]—The defendant being a nonresident there must be a sufficient allegation of that fact.[26]

Amended and supplemental affidavits.[27]—An affidavit defective in form may be amended like any other pleading,[28] so long as it is not done for the purpose of gaining jurisdiction,[29] and the cause of action is not changed,[30] but one has been permitted to amend an unsigned affidavit by filing a new one properly signed.[31] A defect in an affidavit cannot be cured by a counter affidavit.[32] The affidavit not being amendable it may be withdrawn and a new one substituted.[33]

§ 7. *Attachment bond or undertaking; terms.*[34]—The undertaking is valid though the writ be void.[35] The names of two of the defendants signing as sureties not appearing in the body of the bond, it is nevertheless valid.[36] Defendant being known by several names the undertaking running to him in any one of them is sufficient.[37] In most states the amount of the undertaking rests largely in the discretion of the clerk or court,[38] and should be fixed with reference to the amount sued for, and should be such as to give adequate security to the defendant.[39] Personal property being attached, it should generally equal the sum claimed in the affidavit.[40]

Liabilities on bond.[41]—A judgment in favor of defendant conclusively establishes the liability of the obligors upon the bond.[42] The attachment being improperly vacated there is no liability on the bond.[43] The plaintiff cannot recover

Mohlman Co. v. Landwehr, 87 App. Div. 83, 83 N. Y. S. 1073.

21. Mohlman Co. v. Landwehr, 87 App. Div. 83, 83 N. Y. S. 1073.

22. Gatward v. Wheeler [Idaho] 77 P. 23. See 1 Curr. L. 244, n. 84.

23. Austrian Bentwood Furniture Co. v. Wright, 88 N. Y. S. 142; Chazy Marble Lime Co. v. Deely, 88 App. Div. 150, 84 N. Y. S. 396. Where the complaint is verified. Levenson v. Briggs, 88 N. Y. S. 507. Unliquidated damages. Southwell v. Kingsland, 85 App. Div. 384, 83 N. Y. S. 356; Commercial Wood & Cement Co. v. Northampton Portland Cement Co., 41 Misc. 242, 84 N. Y. S. 38. Under Code, art. 9, § 13, in the declaration and a bond must be filed similar to that required in cases of attachment on original process for fraud. Steuart v. Chappell [Md.] 57 A. 17. See 1 Curr. L. 245, n. 85-87.

24. Austrian Bentwood Furniture Co. v. Wright, 88 N. Y. S. 142.

25. See 1 Curr. L. 245.

26. An affidavit showing that plaintiff personally conducted negotiations with the defendant, and positively stating not only that the defendant is a nonresident, but that he resides in another named state, sufficiently shows the defendant's nonresidence and plaintiff's personal knowledge thereof. Cole v. Smith, 84 App. Div. 500, 82 N. Y. S. 982. Affidavit alleging that defendants were not residents nor citizens of New York, but resided and were engaged in business in Texas, held to sufficiently allege nonresidence. Outerbridge v. Campbell, 87 App. Div. 597, 84 N. Y. S. 537.

27. See 1 Curr. L. 245.

28. Reister v. Land [Okl.] 76 P. 156.

29. Davis v. Reflex Camera Co., 89 N. Y. S. 587.

30. Allegation of damages for delay in delivering structural steel, that the use of the building was worth so much may be amended by inserting the word "reasonably" before the word "worth." Hale Bros. v. Milliken, 142 Cal. 134, 75 P. 653; Westover & Co. v. Van Dorn Iron Works Co. [Neb.] 97 N. W. 598.

31. Code, § 564, providing that the affidavit may be amended as to any defect of form or substance. McCain Bros. v. Street, 136 Ala. 625, 33 So. 872.

32. Affidavit did not state present condition of action as required by Gen. Prac. Rule 37. Cole v. Smith, 84 App. Div. 500, 82 N. Y. S. 982.

33. Davis v. Reflex Camera Co., 89 N. Y. S. 587.

34. See 1 Curr. L. 245.

35. Affidavit disclosed no statutory grounds. McLean v. Wright, 137 Ala. 644, 35 So. 45.

36. McLean v. Wright, 137 Ala. 644, 35 So. 45.

37. Defendant was known as "Lewis," "Lucien" and "Lew" Deranleau. Waller v. Deranleau [Neb.] 94 N. W. 1083.

38. Finney v. Moore [Idaho] 74 P. 866.

39. In maintaining an attachment for $50,000 an undertaking in $2,500 should be given. Guest v. Lowther, 84 App. Div. 462, 82 N. Y. S. 1015.

40. Finney v. Moore [Idaho] 74 P. 866.

41. See 1 Curr. L. 246.

42. Anvil Gold Min. Co. v. Hoxsie [C. C. A.] 125 F. 724.

43. Vacated on application of party having no standing to apply therefor. Steuer v. Rockwood, 87 N. Y. S. 144.

from the sureties any more than is due him from the principal,[44] hence they are allowed the benefit of legal offsets held by the principal.[45] The obligation of the bond being the payment of damages no demand is needed.[46] The surety is generally liable for the costs and expenses of the proceedings to vacate the attachment.[47] In the absence of statutory provisions attorney's fees are not a part of the costs which may be recovered in a suit upon the attachment bond,[48] though some courts hold contra.[49] Statutes allowing such fees are not generally construed so as to include fees for services on appeal,[50] nor on retrial, where caused by the negligence of the attachment defendant,[51] and fees paid under a proposed settlement which is set aside should be credited on the amount allowed.[52] The claim being settled in full while a motion to vacate is pending, the defendant is not entitled to costs for counsel fees in the proceedings to vacate.[53] The surety on a supersedeas bond in the suit upon paying the judgment cannot be subrogated to the judgment creditor's rights against the surety on the attachment bond.[54]

Actions on bond.[55]—The right to recover on the attachment bond accrues when the attachment is discharged.[56] The execution and delivery of a forthcoming bond does not waive defendant's right of action,[57] and the burden of pleading and establishing any discharge of liability rests upon the defendants.[58]

§ 8. *The writ or warrant.*[59]—A writ of attachment issuing out of a court which has acquired jurisdiction of the property through the attachment plaintiff's fraud is void.[60] The writ bearing the seal of the court may be signed by a deputy clerk,[61] and must be served by the officer to whom it is addressed.[62] In an attachment of property in the hands of a foreign corporation the name of the corporation must be correctly stated.[63] A writ is defective when it lacks something which the law requires it to contain, and the defect, in order to be amendable, must appear upon the face of the writ,[64] and the effect of the amendment must not be to create a new writ.[65] In the absence of statute the sheriff is not a guarantor of the solvency of a surety taken by him on a forthcoming bond[66] unless he accepts the insufficient sureties without making a reasonable effort to ascertain their solvency,[67] and a judgment for the sheriff in the court below creates a presumption that he used such care,[68] and will not be disturbed on appeal unless palpably against the weight of the evidence,[69] but his liability cannot exceed that of the sureties.[70] Such a liability being imposed by statute, a judgment must be rendered sustain-

44, 45, 46. Waller v. Deranleau [Neb.] 94 N. W. 1038.

47. Bond read: If defendant recovered judgment, or attachment was vacated, plaintiff would pay all costs awarded defendant and all damages which he might sustain. Tyng v. American Surety Co., 174 N. Y. 166, 66 N. E. 668.

48. Kilmer v. Gallaher, 120 Iowa, 575, 95 N. W. 180.

49. Tyng v. American Surety Co., 174 N. Y. 166, 66 N. E. 668.

50. Code, § 3887. The supreme court has no power to allow such fees. Kilmer v. Gallaher, 120 Iowa, 575, 95 N. W. 180.

51, 52. Kilmer v. Gallaher, 120 Iowa, 575, 95 N. W. 180.

53. Braunstein v. American Bonding Trust Co., 84 N. Y. S. 982.

54. Supersedeas bond was given without knowledge of surety on attachment bond. Fidelity & Deposit Co. v. Bowen [Iowa] 98 N. W. 897.

55. See 1 Curr. L. 246.

56. Miller v. Baker, 25 Ky. L. R. 1858, 79 S. W. 187.

57. Anvil Gold Min. Co. v. Hoxsie [C. C. A.] 125 F. 724.

58. Payment. Waller v. Deranleau [Neb.] 94 N. W. 1038.

59. See 1 Curr. L. 247.

60. Rosencranz v. Swafford Bros. Dry Goods Co., 175 Mo. 518, 75 S. W. 445.

61. Signed "A. B. Clerk by C. D.," held sufficient. Clements v. Utley [Minn.] 98 N. W. 188.

62. McArthur v. Boynton [Colo. App.] 74 P. 540.

63. Omitting the word "Mutual" from the name of an insurance company held fatal. King v. McEnroy [R. I.] 55 A. 638. As to names, see 1 Curr. L. 247, n. 25, 26, 30.

64. McArthur v. Boynton [Colo. App.] 74 P. 540.

65. Amendment changing name of county held not allowable. McArthur v. Boynton [Colo. App.] 74 P. 540.

66, 67, 68, 69, 70. Edwards-Barnard Co. v. Pflanz, 24 Ky. L. R. 2296, 73 S. W. 1018.

ing the attachment itself,[71] and the order sustaining the attachment, not being introduced in the court below, it cannot be added to the record on appeal,[72] and even if such an amendment of the record was allowable, it would not remedy the failure of the petition to allege that the attachment was sustained.[73] Plaintiff by suing upon a second bond given in lieu of the first ratifies the sheriff's release of the latter and becomes estopped to sue thereon.[74] A motion to quash a forthcoming bond cannot be made in an action on the bond.[75] In most states, in an action upon a forthcoming bond, it is necessary to allege and prove an order of the court in the attachment proceedings for the sale of the attached property, or directing the sheriff to repossess himself of such property.[76] The approval of the undertaking by the court and the discharge of the attachment may become conclusive evidence of the delivery and acceptance of the undertaking as a good forthcoming bond.[77]

§ 9. *The levy or seizure; indemnifying bonds.*[78]—The duty of an officer in executing a writ of attachment is to levy upon the property of the defendant to the writ, not upon the property of some one else,[79] to determine whether or not it is property which may be legally taken under the writ,[80] and that the quantity taken is necessary to the case in hand.[81] In all these particulars he is bound to exercise his own judgment, and is legally responsible to any person for the consequences of any error or mistake in its exercise to his prejudice.[82] An officer seizing property under a void attachment is a trespasser as against one rightfully in possession,[83] and the rightful owner is not estopped from suing him by purchasing the property at a sale ordered by the court during the pendency of replevin proceedings.[84] The seizure being tortious, all the attaching creditors joining with the sheriff in resisting an action of replevin become trespassers ab initio, and are jointly and severally liable for a money judgment rendered against them,[85] though one party satisfying such judgment, contribution will be enforced,[86] the basis being the ratio the several claims bear to each other.[87] A sheriff is entitled to an *indemnity* for levying on intangible as well as tangible property.[88]

Levy on debts or choses.[89]—In most states, in order to attach a debt or demand due the defendant, notice must be served upon the person against whom the demand exists,[90] a seizure of a right of the debtor in a suit being made by serving notice on the clerk of court, the plaintiff, and defendant.[91] Failure of the assignee of a chose in action to give notice to the debtor of the assignment is immaterial as against an attaching creditor.[92]

71. Personal judgment against the defendant held insufficient. Edwards-Barnard Co. v. Pflanz, 24 Ky. L. R. 2296, 73 S. W. 1018.

72, 73. Edwards-Barnard Co. v. Pflanz, 24 Ky. L. R. 2296, 73 S. W. 1018.

74. Hesser v. Rowley, 139 Cal. 410, 73 P. 156.

75. Craft v. Smith [Fla.] 33 So. 996.

76. Young v. Joseph Bros. [Neb.] 99 N. W. 522.

77. Ebner v. Heid [C. C. A.] 125 F. 680.

78. See 1 Curr. L. 243; see, also, Bonds, 1 Curr. L. 343; Indemnity, 2 Curr. L. 298.

79. In levying an attachment against a man, cannot levy on property of Indian wife. McKnight v. U. S. [C. C. A.] 130 F. 659.

80, 81, 82. McKnight v. U. S. [C. C. A.] 130 F. 659.

83. Plaintiff in replevin for such goods, making out a prima facie showing of ownership, the attachment being held void, the court cannot direct a verdict in favor of the sheriff. Hagar v. Haas, 66 Kan. 333, 71 P. 822.

84. Hagar v. Haas, 66 Kan. 333, 71 P. 822.

85, 86, 87. First Nat. Bank v. Avery Planter Co. [Neb.] 95 N. W. 622.

88. Code Civ. Proc. § 657. A debt is "goods or effects" within such section. Minor v. Gurley, 81 App. Div. 586, 81 N. Y. S. 367.

89. See 1 Curr. L. 248.

90. In North Dakota, a copy of the warrant of attachment and a notice showing the property attached must be delivered to and left with such person. Ireland v. Adair [N. D.] 94 N. W. 766.

91. Lehmann & Co. v. Rivers, 110 La. 1079, 35 So. 296.

92. Milligan v. Plymouth State Bank, 4 Ohio Circ. R. (N. S.) 585.

Notice of levy.[93]—Unless waived, notice, actual or constructive, must be given the defendant[94] within a reasonable time.[95] In some states, notice must be given the party in possession.[96] The notice of attachment being annexed to a copy of the warrant it is referable thereto.[97]

An equitable attachment.[98]—The appointment of a receiver in a creditor's bill or suit in equity to subject the separate property of a married woman to the payment of her business debts is an equitable attachment,[99] which entitles such creditor to a prior lien over other creditors upon the funds in the hands of the receiver, provided said suit is successfully prosecuted to a final decree.[1]

§ 10. *Return to the writ.*[2]—The Federal courts have authority to provide for the return of the writ other than in accordance with the state statutes.[3] In Connecticut, the property must be described in the officer's return.[4] A sheriff surrendering the property in accordance with a stipulation, agreed to by the attaching creditor, a return is unnecessary.[5] An affidavit by the sheriff that he "duly effected service" of the warrant of attachment, stating the time, place, and person on whom it was served, is sufficient.[6] The writ being returned served by one not an officer of the court, an alias writ should be issued upon plaintiff's request.[7] In order to render the return of the attachment fatally defective, when there has been in substance an execution of the process, it must be made to appear affirmatively that an essential act has been omitted, and there being no clear exhibition of such omission, it cannot be inferred;[8] that it fails to show the county in which the levy was made is no ground for dismissal.[9] That the clerk, after the return of the writ, wrote out the order of publication upon a separate piece of paper and had it published without entering it upon the record, will not invalidate the proceedings.[10] The return is presumed to be true,[11] and to state all acts done by the officer toward effecting the levy.[12] As between the parties to the action, the return is conclusive,[13] and in an action against the sheriff, the latter cannot, ordinarily, contradict his return,[14] though he may in a proper case upon proper showing and notice amend the same,[15] and it has been held that the return is in the nature of an admission only, and is subject to explanation.[16] The return being regular on its face, the burden is upon the debtor to show that the writ was not served in the manner stated.[17]

93. See 1 Curr. L. 248.

94. Attempt to levy upon one's interest in an estate in the hands of an executor is void, no notice being given defendant, though the executor was given notice as the tenant in possession. Harris v. Kittle, 119 Ga. 29, 45 S. E. 729.

95. Where attachment was levied by entry in the incumbrance book on November 19th, sheriff's return showed that he was unable to find the owner in the county until November 28th, and that notice was served on him on November 30th, held served with due diligence, there being no one in possession of the property. Stickley v. Widle, 122 Iowa, 400, 98 N. W. 135.

96. Code, § 3900. Where one claimed under an undisclosed bill of sale and procured the key to admit the sheriff, held sufficient to authorize the service upon him. Jordan v. Crickett [Iowa] 99 N. W. 163.

97. The recitals in the two clearly identifying the persons holding the property sought to be attached, the notice is sufficient. Lancaster v. Spotswood, 41 Misc. 19, 83 N. Y. S. 572.

98. See 1 Curr. L. 248.

99, 1. First Nat. Bank v. Hirschkowitz [Fla.] 35 So. 22.

2. See 1 Curr. L. 248.

3. Gokey v. Boston & M. R. Co., 130 F. 992.

4. Rev. St. 1888, § 907. Central Trust Co. v. Worcester Cycle Mfg. Co., 128 F. 483.

5. Central Trust Co. v. Worcester Cycle Mfg. Co., 128 F. 483.

6. Donner v. Mercy, 81 App. Div. 181, 80 N. Y. S. 1030.

7. Foote v. John E. Hall Commission Co. [Miss.] 36 So. 533.

8, 9. Connolly v. Atlantic Contracting Co. [Ga.] 47 S. E. 575.

10. Construing Shannon's Code, §§ 5221, 5937, 5234, 5278-5284. Gardner v. Swift & Co. [Tenn.] 80 S. W. 764.

11. Lewis v. Rasp [Okl.] 76 P. 142.

12. Ireland v. Adair [N. D.] 94 N. W. 766. See 1 Curr. L. 249, n. 47.

13, 14. Standard Wine Co. v. Chipman [Mich.] 97 N. W. 679.

15. Standard Wine Co. v. Chipman [Mich.] 97 N. W. 679. See 1 Curr. L. 249, n. 49.

16. The fact of service and the officer's return that he had served notice on plaintiff as the party in possession. Jordan v. Crickett [Iowa] 99 N. W. 163.

17. Lewis v. Rasp [Okl.] 76 P. 142.

§ 11. *Custody, sale, redelivery, or release of attached property.*[18]—The sheriff under an attachment has a special property in the goods, and a right to the possession as against any one claiming them under a title to which the lien of the attachment is superior;[19] thus replevin will not lie against him,[20] nor can a third party not a party to the case assert his title to property seized by the sheriff under bail process, in a trover suit, by filing a claim under claim laws,[21] and his possession being legal, he is entitled to continue in such possession until the lien acquired thereby is lost, or the property disposed of by force of it, or the lien satisfied.[22] An officer of the court taking possession of the property before appearance by the defendant may be authorized by the court to collect rents accruing after the entry of appearance.[23] The possession of a receiptor of property taken by a lawful writ is, in law, that of the officer to whom he is accountable.[24] Under statutes allowing the retention of the attached property during a certain period if the plaintiff announces his intention to appeal from the order of discharge, failure to announce such intention is immaterial where the officer retains possession of the property.[25] The sheriff has no title to the goods after the dismissal of the attachment suit,[26] though in New York, the lien being destroyed by act of parties, the sheriff may retain the property to secure his fees;[27] but the lien being destroyed by the action of the court, the latter is permitted to both determine the liability for fees and to direct their payment,[28] and in the latter case the defendant is liable for poundage upon the value of the property levied upon not exceeding the amount specified in the warrant,[29] or the action being settled, not exceeding the amount for which the settlement is made.[30] There being a partial release by stipulation of the property covered by the attachment, the sheriff is not entitled to poundage upon such property, the remaining portion being sufficient for the maximum fee allowed by law.[31] Under a statute allowing reasonable fees, a sheriff is entitled to recover directly from the plaintiff for keeping property under an attachment, released by plaintiff before the termination of the suit.[32] Under a statute requiring the officer serving process to indorse thereon his fees and charges in order to have them allowed, a sheriff's charges for securing attached property subsequent to the completion of the service and return of the writ may be recovered without being indorsed thereon.[33]

In some states the sheriff cannot release real estate from attachment except while the writ is in his possession and before the return.[34] Evidence that the release by the sheriff was the form in use at the time of granting it is admissible as tending to show the signing of the release.[35]

18. See 1 Curr. L. 249.

19. Rochester Lumber Co. v. Locke [N. H.] 54 A. 705.

20. Irey v. Gorman, 118 Wis. 8, 94 N. W. 658.

21. Civ. Code 1895, § 4611 et seq. Central Bank of Oakland v. Georgia Grocery Co. [Ga.] 48 S. E. 325.

22. First Nat. Bank v. Hesser [Okl.] 77 P. 36.

23. Chemical Nat. Bank v. Kellogg [N. J. Sup.] 57 A. 149.

24. Irey v. Gorman, 118 Wis. 8, 94 N. W. 658.

25. Code, § 3931. Sheldon v. Bigelow [Iowa] 100 N. W. 502.

26. Cannot deliver them to the attaching plaintiff. Rosencranz v. Swofford Bros. Dry Goods Co., 175 Mo. 518, 75 S. W. 445.

27. Esselsteyn v. Union Surety & Guaranty Co., 82 App. Div. 474, 81 N. Y. S. 532. As to fees see 1 Curr. L. 249, n. 51.

28. Esselsteyn v. Union Surety & Guaranty Co., 82 App. Div. 474, 81 N. Y. S. 532.

29. Laws 1890, p. 940, c. 523, § 17, as amended by Laws 1892, p. 868, c. 418, relative to the sheriff of New York city and county. Ducas Co. v. American Silk Dyeing & Finishing Co., 84 N. Y. S. 878.

30. Laws 1890, p. 940, c. 523, § 17, as amended by Laws 1892, p. 868, c. 418. Plummer v. International Power Co., 88 App. Div. 452, 85 N. Y. S. 107.

31. Plummer v. International Power Co., 88 App. Div. 452, 85 N. Y. S. 107.

32. V. S. 5366. Templeton v. Capital Sav. Bank & Trust Co. [Vt.] 57 A. 818.

33. V. S. 1111. Templeton v. Capital Sav. Bank & Trust Co. [Vt.] 57 A. 818.

§ 12. *Forthcoming bonds and receipts.*[36]—There being a substantial compliance with the statute, the bond is enforceable as a statutory bond;[37] thus the plaintiff may waive the formal approval of the bond provided by statute without invalidating its efficacy as a statutory release bond.[38] In order to render the bond valid, the property need not stand in the name of the attachment defendant,[39] the dissolution of the attachment being a sufficient consideration.[40] The giving of a supersedeas bond upon a writ of error ineffective for lack of jurisdiction does not affect a forthcoming bond previously given.[41] In some jurisdictions, before recovery can be had, demand must be made; but proceedings to collect on the judgment may amount to a demand for the payment of such judgment, the debtor being insolvent.[42] The bond running to a nominal plaintiff, the surety is liable to the real party in interest, who is substituted for such nominal plaintiff, the record being such as to advise the surety from the beginning as to who the real party in interest was.[43] Under statutes allowing the retention of the attached property during a certain period if the plaintiff announces his intention to appeal from the order of discharge, failure to announce such intention will not defeat the liability of sureties on a redelivery bond on reversal of judgment, the officer retaining possession of the property.[44] By giving a forthcoming bond, the defendant waives irregularity and defects in the attachment proceedings;[45] but not mere overstatement of the amount due.[46]

§ 13. *Lien or other consequences of levy.*[47]—By the levy one acquires a specific lien[48] for the satisfaction of any judgment which may be obtained in the suit,[49] which can only be lost by an order discharging the attachment.[50] The lien is such as to entitle the creditor to maintain a bill to remove a cloud on the title.[51] An attachment of mortgaged land, the mortgage being recorded, in an action against the mortgagor creates a lien only on the equity of redemption,[52] and such equity of redemption being attached, a foreclosure suit will not affect the attaching creditor's rights unless he is made a party, or charged with notice by the filing of a lis pendens.[53] In attachment proceedings against a nonresident who is not served the only lien created or foreclosed is that arising by virtue of the seizure of the property levied on.[54] The delivery of the forthcoming bond does not dissolve the lien,[55] and plaintiff, upon recovering judgment, may retake the property from a bona fide purchaser who purchased after the release under

34, 35. Hesser v. Rowley, 139 Cal. 410, 73 P. 156.

36. See 1 Curr. L. 250.

37. Ebner v. Heid [C. C. A.] 125 F. 680.

38. Code 1897, § 3907. Fidelity & Deposit Co. v. Bowen [Iowa] 98 N. W. 897.

39, 40. Fidelity & Deposit Co. v. Bowen [Iowa] 98 N. W. 897. Where the bond was under seal and recited as a consideration the release of all the property attached and the discharge of the attachment. Ebner v. Heid [C. C. A.] 125 F. 680.

41. Liability of sureties on attachment bond was not superseded and merged in the supersedeas bond. Ebner v. Heid [C. C. A.] 125 F. 680.

42. Ebner v. Heid [C. C. A.] 125 F. 680.

43. Campbell & Zell Co. v. American Surety Co., 129 F. 491.

44. Code, § 3931. Sheldon v. Bigelow [Iowa] 100 N. W. 502.

45. An undertaking, a copy of which is set forth in the opinion, held sufficient under Sess. Laws 1895, p. 18. Finney v. Moore [Idaho] 74 P. 866.

46. Anvil Gold Min. Co. v. Hoxsie [C. C. A.] 125 F. 724.

47. See 1 Curr. L. 250.

48. Coulson v. Saltsman [Neb.] 98 N. W. 1055.

49. Rochester Lumber Co. v. Locke [N. H.] 54 A. 705.

50. Is not lost by taking a general money judgment against defendant, without an order for the sale of the attached property, due diligence being used in the prosecution of a creditor's bill. Coulson v. Saltsman [Neb.] 98 N. W. 1055.

51. Regardless of the fact that the judgment at law pending these proceedings has been dormant, and without requiring issue and return of an execution as a prerequisite. Coulson v. Saltsman [Neb.] 98 N. W. 1055.

52, 53. London & San Francisco Bank v. Dexter Horton & Co. [C. C. A.] 126 F. 593.

54. Owens v. Atlantic Trust & Banking Co., 119 Ga. 924, 47 S. E. 215.

55. Chittenden v. Nichols, 31 Colo. 202, 72 P. 53; Edwards-Barnard Co. v. Pflanz, 24 Ky. L. R. 2296, 73 S. W. 1018.

the bond and without notice of the attachment.[56] In Oklahoma the lien of the attachment is not lost by a failure on the part of the probate or justice of the peace court to make proper docket entries of the issuance of such order of attachment.[57] Execution being issued upon the judgment the attachment is merged therein.[58] An attachment being void no lien is acquired.[59]

§ 14. *Conflicting levies, liens, and creditors; priorities.*[60]—An attaching creditor is not a purchaser for value, and takes the property subject to all equitable rights therein enforceable against the debtor,[61] hence the purchaser of one acquiescing in an attachment cannot contest its validity.[62] The claim of a purchaser in good faith and for a valuable consideration of a draft and bill of lading attached thereto is superior to the attachment lien of the vendee who refuses to pay the draft alleging the vendor to be his debtor.[63] In some states claims for services are preferred over the lien of the attaching creditor,[64] and a suit to establish such claim in so far as it seeks to establish and enforce a lien upon the debtor's property is equitable in its nature,[65] and must be brought within the time prescribed by law.[66] The lien of a pledgee of stock is superior to the lien of a subsequent attaching creditor of the assignor,[67] such attachment being valid, however, as to the interest of the assignor after the debt has been paid.[68] The rights of the beneficiary of a trust fund are superior to attaching creditors of the trustee.[69] The lien created by attachment is inferior to a title obtained by purchase before the attachment,[70] but superior to a prior unrecorded deed, given in good faith for a valuable consideration, of which the attaching creditor had no notice,[71] and such deed being given with the intent to defraud creditors it is invalid as against a subsequent attachment by one having knowledge thereof,[72] though in some states it is held that the deed will take precedence if recorded before the deed based upon the attachment or judgment.[73] The deed being delivered subsequent to the levying of the attachment, the mortgagee's lien is subject to that acquired by such attachment creditor by virtue of the levy of such attachment.[74] A stipulation to sell attached property and divide the proceeds does not affect the rights of an attaching creditor who is not a party thereto.[75] The first of a series of attaching creditors obtaining a sale of the

56. Chittenden v. Nichols, 31 Colo. 202, 72 P. 53.

57. First Nat. Bank v. Hesser [Okl.] 77 P. 36.

58. The execution being returned unsatisfied no lien enforceable by action remains. Barton v. Albert Palmer Co., 87 App. Div. 35, 83 N. Y. S. 1041.

59. Munger v. Doolan, 75 Conn. 656, 56 A. 169.

60. See 1 Curr. L. 251.

61. Attached a fund due debtor. Third Nat. Bank v. Atlantic City [C. C. A.] 126 F. 413.

62. Mercantile Realty Co. v. Stetson, 120 Iowa, 324, 94 N. W. 859.

63. Willard Mfg. Co. v. Tierney & Co., 133 N. C. 630, 45 S. E. 1026. See 1 Curr. L. 251, n. 81.

64. Code Civ. Proc. §§ 2152-2155. Shea v. Regan [Mont.] 74 P. 737. Code Civ. Proc. § 1206, giving laborers a preferred claim for services in cases of attachment does not create a lien upon the property seized. Winrod v. Wolters, 141 Cal. 399, 74 P. 1037.

65. Hence without the jurisdiction of a justice of the peace under the Montana Constitution, art. 8, § 21. Shea v. Regan [Mont.] 74 P. 737.

66. Under Code Civ. Proc. §§ 2153, 2154, 10 days after notice. Shea v. Regan [Mont.] 74 P. 737.

67. Even though not registered on the books of the corporation. Mapleton Bank v. Standrod [Idaho] 71 P. 119.

68. Mapleton Bank v. Standrod [Idaho] 71 P. 119.

69. Deposit by agent of principal's funds. Packer v. Crary, 121 Iowa, 388, 96 N. W. 870.

70. Owens v. Atlantic Trust & Banking Co., 119 Ga. 924, 47 S. E. 215.

NOTE. Action to remove cloud on title: The right of attachment plaintiff to try, in a court of law, the question whether grantee's title is good against the attachment cannot be forestalled by a bill in equity filed by the grantee to remove the attachment as a cloud on his title. Maisch v. Hoffman, 42 N. J. Eq. 116, 7 A. 349.—From note to Cousins v. Alworth [Minn.] 10 L. R. A. 504.

71. Bell Hardware Co. v. Riddle, 31 Tex. Civ. App. 411, 72 S. W. 613. Rev. Laws, c. 127, § 4. D'Arcy v. Mooshkin, 183 Mass. 382, 67 N. E. 339.

72. D'Arcy v. Mooshkin, 183 Mass. 382, 67 N. E. 339.

73, 74. Naudain v. Fullenwider [Neb.] 100 N. W. 296.

property under an order of the court which is reversed upon appeal, he is liable to an action for money had and received by the subsequent attaching creditors,[76] to which, however, he may set up any counterclaim or set-off,[77] and the statute of limitations does not begin to run until the first attachment is dissolved.[78] A prior valid attachment lien is presumed to continue until it is affirmatively shown that the priority has been lost.[79] A junior attaching creditor cannot take advantage of irregularities in the attachment proceedings.[80] In some states, by statute, creditors levying within a certain period share pro rata in the property.[81]

Priorities between attachments and mortgages.[82]—A mortgagee claiming through a deed filed for record subsequent to the levying and recording of an order of attachment takes with notice of the rights of the attaching creditor, and subject to such infirmities as inhere in the title of the mortgagor.[83] A mortgage of after acquired property is valid against subsequent attaching creditors.[84] The open and admitted inclusion of a small claim of another creditor in a valid chattel mortgage does not render such mortgage and possession thereunder fraudulent and unlawful as against attaching creditors.[85]

Surrender of attached property to a receiver.[86]—After a surrender to a receiver, under a stipulation that it be without prejudice, the court will not permit the rights of the attaching creditor to be defeated on technical grounds.[87] A creditor attaching an equity of redemption waives the attachment lien by filing a claim with the receiver of the property, subsequently appointed at the suit of the mortgagee, and not appealing from the disallowance thereof.[88] An attachment is not affected by the subsequent appointment of a receiver,[89] and is prior to any claim acquired by proceedings under the receivership to which the attachment creditor is not a party.[90]

Priority between attachments and assignments for benefit of creditors.[91]—As against a valid assignment a subsequent attaching creditor cannot claim any

75. Central Trust Co. v. Worcester Cycle Mfg. Co., 128 F. 483.

76, 77, 78. First Nat. Bank v. Avery Planter Co. [Neb.] 95 N. W. 622.

79. Claim that priority was lost by laches held not sustained. Westervelt v. Baker [Neb.] 95 N. W. 793.

80. NOTE. Right of junior attaching creditors to question validity of attachment: A junior attaching creditor cannot take advantage of irregularities or informalities in proceedings in a prior attachment though constituting good grounds for setting aside the attachment on the motion of the defendant. Glaser v. First Nat. Bank, 62 Ark. 171, 34 S. W. 1061, 35 L. R. A. 765; Meinhard v. Youngblood, 37 S. C. 231, 15 S. E. 950; Gilkeson Sloss Comm. Co. v. Bond, 44 La. Ann. 841, 11 So. 220; Claflin v. Sylvester, 99 Mo. 276, 12 S. W. 508. Though it has been held that such subsequent attaching creditor is entitled to relief against attachments based on demands not due, when there is no statute authorizing it, or on one which has no existence, or on one for which an attachment could not lawfully issue, they being fraudulent and void as to such creditors. Davis v. Claflin Co., 63 Ark. 157, 41 S. W. 996, 36 L. R. A. 776; Taaffe v. Josephson, 7 Cal. 353; Walker v. Roberts, 4 Rich. Law [S. C.] 561; Palmer v. Martindell, 43 N. J. Eq. 90, 10 A. 802.

81. In Idaho, these statutes do not apply to justice court practice. Kimball v. Raymond [Idaho] 72 P. 957.

82. Sufficiency of evidence of possession by a mortgagee to render mortgage valid as against a subsequent attachment. Taylor v. Harle-Haas Drug Co. [Neb.] 96 N. W. 182. Evidence held insufficient to sustain a finding of payment so as to place the attachment lien before that of the mortgage. Fitch v. Duckwall, 25 Ky. L. R. 1535, 78 S. W. 185. See 1 Curr. L. 251.

83. Naudain v. Fullenwider [Neb.] 100 N. W. 296.

84. In re Sentenne & Green Co. [D. C.] 120 F. 436.

85. Taylor v. Harle-Hass Drug Co. [Neb.] 96 N. W. 182.

86. See 1 Curr. L. 252.

87. Error in return of sheriff made after the surrender and stipulation. Central Trust Co. v. Worcester Cycle Mfg. Co., 128 F. 483. See 1 Curr. L. 252, n. 90.

88. Mercantile Realty Co. v. Stetson, 120 Iowa, 324, 94 N. W. 859.

89. Commission reported defendant as doing an unsafe business, attachment then levied, suit commenced by state, and association ordered to discontinue business and receivers appointed, held attachment lien valid. Bories v. Union Building & Loan Ass'n, 141 Cal. 74, 74 P. 552. See 1 Curr. L. 252, n. 92.

90. Mercantile Realty Co. v. Stetson, 120 Iowa, 324, 94 N. W. 859.

91. See 1 Curr. L. 252.

priority,[92] nor are the proceeds of assigned property subject to a levy under an attachment.[93]

Effect of bankruptcy proceedings.[94]—An adjudication in bankruptcy annuls all attachment levies obtained within four months prior to the filing of the petition,[95] unless preserved by an order of the court.[96] This provision of the bankruptcy act applies to attachments sued out in state as well as Federal courts,[97] and is binding upon the state courts.[98] It does not impair the obligation of a contract or divest the attaching creditor of a vested right,[99] and the state court is bound to take notice of the bankruptcy proceedings when properly pleaded as a defense.[1] It does not affect a valid attachment acquired more than four months before the filing of the petition,[2] though both plaintiff and defendant at the time of the attachment knew that defendant was insolvent,[3] and the plaintiff may prosecute his case to judgment and satisfy the same by an execution sale of the attached property,[4] nor does the adjudication in bankruptcy destroy or impair the title obtained by such attachment by a bona fide purchaser for value without notice or reasonable cause for inquiry.[5] The bankruptcy proceedings do not affect the lien of the attachment as against the bankrupt himself,[6] and the trustee failing to dispose of the property prior to the discharge, the attachment lien continues unaffected by the proceedings.[7] As to whether or not the lien of a sheriff, holding the property under an attachment, for his fees and necessary outlays in preserving the property, is discharged by bankruptcy there is a conflict among the decisions.[8]

§ 15. *Enforcement and dissolution, discharge, vacation, or abandonment of attachment. A. Validity and grounds for setting aside.*[9]—In New York, a defendant not being personally served, and not appearing, but the property being attached, the court will proceed to determine the cause,[10] and judgment being rendered against the plaintiff, upon appeal the only question that can be determined is the sufficiency of the affidavits,[11] but the court has no jurisdiction to enter judgment by default where the summons was not personally served, and the defendant appeared specially and moved to vacate the attachment which was unwarranted and based upon insufficient proof,[12] but the right to dispute the

92. State v. Keeler, 49 Mo. 548; Bryce v. Foot, 25 S. C. 467; Mussey v. Noyes, 26 Vt. 462; Savery v. Spaulding, 8 Iowa, 239, 74 Am. Dec. 300; Jacobs v. Remsen, 36 N. Y. 668; Wells v. Lamb, 18 Neb. 352. From note to In re Enderlin State Bank [N. D.] 26 L. R. A. 593.

93. Dewing v. Wentworth, 11 Cush. [Mass.] 499; Coffield v. Collins, 26 N. C. 486; Lanning v. Streeter, 57 Barb. [N. Y.] 33. From note to In re Enderlin State Bank [N. D.] 26 L. R. A. 593.

94. See 1 Curr. L. 252; see, also, Bankruptcy, 1 Curr. L. 311.

95. In re Goldberg [C. C. A.] 121 F. 578; Wood v. Carr, 24 Ky. L. R. 2144, 73 S. W. 762. Attachment after filing of petition is void, adjudication being made upon that petition. Cox v. State Bank, 125 F. 654. It is no defense that the property seized was exempt from execution in the state of the bankrupt's residence, and that his entire property was less than his statutory exemption in such state, as that no part thereof could pass to his creditors. Thompson v. Ragan, 25 Ky. L. R. 1684, 78 S. W. 485. See 1 Curr. L. 252, n. 96.

96. Thompson v. Fairbanks, 75 Vt. 361, 56 A. 11. See 1 Curr. L. 252, n. 96.

97. Wood v. Carr, 24 Ky. L. R. 2144, 73 S. W. 762.

98. Thompson v. Ragan, 25 Ky. L. R. 1684, 78 S. W. 485.

99, 1. Wood v. Carr, 24 Ky. L. R. 2144, 73 S. W. 762.

2. Fletcher v. Tuttle, 97 Me. 491, 54 A. 1110; In re Snell, 125 F. 154. See 1 Curr. L. 252.

3. Hurlbutt v. Brown [N. H.] 55 A. 1046.

4. In re Snell, 125 F. 154.

5. One acquiring title after the filing of the petition is not such a bona fide holder. See Bankruptcy, 1 Curr. L. 311. In re Goldberg [C. C. A.] 121 F. 578.

6. Bankrupt cannot retake possession from sheriff. Rochester Lumber Co. v. Locke [N. H.] 54 A. 705.

7. Rochester Lumber Co. v. Locke [N. H.] 54 A. 705.

8. That it is not. Wilkinson v. Raymond, 80 App. Div. 378, 81 N. Y. S. 82. See this case for authorities pro and con.

9. See 1 Curr. L. 253.

10. Municipal Court Act (Laws 1902, p. 1619, c. 580) § 91. Hill v. Martin, 88 N. Y. S. 708.

11. Hill v. Martin, 88 N. Y. S. 708.

12. Durkin v. Paten, 89 N. Y. S. 622;

jurisdiction of the court to enter such default judgment may be waived by appearance.[13] The action failing,[14] or being discontinued,[15] the attachment is vacated, and the defendant is entitled to have a formal order vacating it.[16] The undertaking being defective, the attachment will be quashed on motion.[17] The affidavit being false, which includes stating the wrong ground, the attachment will be dissolved.[18] An attachment issued upon insufficient grounds is fatally defective and cannot be amended.[19] In an action against a nonresident for unliquidated damages, the attachment should be for about two-thirds of the amount demanded as damages.[20] Matters of defense upon the trial are not necessarily proper matters to set up to vacate an attachment.[21] An administrator has sufficient interest to have a void attachment upon the intestate's property set aside.[22] One procuring a void attachment upon his debtor's property is not thereby placed in a new position so as to entitle him to claim equitable protection and advantage in proceedings to have such attachment judicially declared void.[23]

(§ 15) *B. Procedure.*[24]—The issues in attachment must be presented by the affidavit and the answer or traverse.[25] The answer to the affidavit must deny the allegations thereof.[26] In some states the defendant may appear and plead at any time before final judgment.[27] Leave to amend the answer is discretionary,[28] and the grounds of the court's refusal not appearing, error cannot be declared.[29] A suit begun by foreign attachment being removed to a Federal court because of diversity of citizenship, that court has jurisdiction to dissolve the attachment according to the state practice.[30] The motion to dismiss must be made before the forthcoming bond is given,[31] before the property is sold and the proceeds applied to the satisfaction of the judgment,[32] before final judgment.[33] In New York, the notice of motion to vacate for irregularity must specify the irregularity,[34] and the affidavit of the party moving to vacate an attachment

Mohlman Co. v. Landwehr, 87 App. Div. 83, 83 N. Y. S. 1073. Where affidavits consisted of recitals of hearsay. Delaney v. Bouse, 91 App. Div. 437, 86 N. Y. S. 880.

13. Delaney v. Bouse, 91 App. Div. 437, 86 N. Y. S. 880.

14. Anvil Gold Min. Co. v. Hoxsie [C. C. A.] 125 F. 724.

15. American Audit Co. v. Industrial Federation, 87 App. Div. 275, 84 N. Y. S. 369.

16. Under Gen. Prac. Rule No. 3, he is entitled to have the papers upon which the motion was made recited in the order. American Audit Co. v. Industrial Federation, 87 App. Div. 275, 84 N. Y. S. 369.

17. Bond was not for double the amount sued for as required by statute. Zachariae v. Swanson [Tex. Civ. App.] 77 S. W. 627.

18. Rev. Codes 1899, § 5376. Ground stated in affidavit was for a debt fraudulently contracted whereas action was for damages for deceit. Sonnesyn v. Akin [N. D.] 97 N. W. 557.

19. Forbes Piano Co. v. Owens [Ga.] 47 S. E. 938.

20. A like sum is excessive. Suit was for the alienation of affections of plaintiff's wife. Guest v. Lowther, 84 App. Div. 462, 82 N. Y. S. 1015. See 1 Curr. L. 247, n. 22.

21. As to whether cause of action was merged in another action. United Press v. Abell Co., 84 N. Y. S. 426.

22. Estate consisted only of the one piece of property. Munger v. Doolan, 75 Conn. 656, 55 A. 169.

23. Munger v. Doolan, 75 Conn. 656, 55 A. 169.

24. See 1 Curr. L. 254.

25. Denials in defendant's answer in the principal suit cannot be relied upon to put in issue the allegations of the affidavit. Midland Fuel Co. v. Schuessler [Colo. App.] 71 P. 894.

26. An allegation in an affidavit dated December 8th, that defendant is about to fraudulently transfer his property is not denied by a traverse dated December 19th, denying that defendant is about to do so. Midland Fuel Co. v. Schuessler [Colo. App.] 71 P. 894.

27. Georgia Civ. Code 1895, § 4558. And this is so whether the property attached has been replevied or not. Hodges v. Smith, 118 Ga. 789, 45 S. E. 617. This includes the filing of demurrer. Harrison v. Wilson Lumber Co., 119 Ga. 6, 45 S. E. 730. The court may in its discretion allow the defendant to file his affidavit, denying the allegations contained in the attachment affidavit, at the time when the motion to discharge is called for trial. Dunn v. Claunch, 13 Okl. 577, 76 P. 143.

28, 29. Midland Fuel Co. v. Schuessler [Colo. App.] 71 P. 894.

30. Commonwealth Trust Co. v. Frick, 120 F. 688.

31. Woodbridge v. Drought, 118 Ga. 671, 45 S. E. 266.

32. Code Civ. Proc. § 682. Pfluke Co. v. Papulias, 42 Misc. 18, 85 N. Y. S. 543.

33. Proceedings were against an alleged fraudulent grantee of land. Trent v. Edmonds [Ind. App.] 70 N. E. 169.

34. Rule 37 Gen. Rules of Prac. Notice

must state the present condition of the action, whether at issue, and if not yet tried, the time set for trial,[35] but such an objection to the affidavit cannot be raised for the first time on appeal.[36] Neither a claimant,[37] nor a stranger to the transaction whose property is wrongfully attached,[38] can move to vacate the attachment. One resisting a motion to vacate may by affidavit controvert, explain, or extend the facts stated by the moving party.[39] A motion to dismiss goes only to the writ,[40] hence though the attachment be void the suit need not be dismissed.[41] A motion to discharge an attachment is not a demurrer to the complaint.[42] In some states two separate bills of exceptions are required in attachment cases, one on the attachment branch and one as to the trial on the merits.[43] In some states, it appearing by affidavit that to plaintiff's knowledge defendant has not enough property subject to attachment to satisfy plaintiff's claim, the defendant may be examined under oath,[44] and on such an examination the defendant may be committed for contempt for refusal to answer questions.[45] As to whether it is proper, on a motion to dissolve an attachment, to pass upon the grounds of an attachment where they are the same as the issues in the case, authority is divided.[46] On a motion to dissolve for matters outside the record the court must take notice of the complaint and affidavit as part of the record, though not formally introduced, and the moving party must offer proof of his facts.[47] A judgment in foreign attachment will be reopened upon defendant alleging that he had no notice of the proceedings, and has a just and legal defense,[48] and when reopened the attachment continues.[49] On appeal from a magistrate's decision determining an attachment both parties are entitled to produce testimony de novo.[50]

Evidence.[51]—The burden is upon the attachment plaintiff to show that the property is subject to levy.[52] All the facts necessary to sustain the affidavit must be definitely shown in the testimony.[53] Plaintiff must maintain the grounds of his attachment as laid in his affidavit by the preponderance of the evidence,[54] though the defendant may waive the objection that the attachment was not dismissed for want of evidence on the part of the plaintiff, by introducing evidence

stating that on papers named, defendant would apply for an order vacating the attachment, held insufficient. Van Wickle v. Weaver Coal & Coke Co., 88 App. Div. 603, 85 N. Y. S. 82; Ennis v. Untermyer, 87 N. Y. S. 695.

35. Rule 37, General Rules of Practice. Austrian Bentwood Furniture Co. v. Wright, 88 N. Y. S. 142; Sanger v. Connor, 88 N. Y. S. 1054.

36. Austrian Bentwood Furniture Co. v. Wright, 88 N. Y. S. 142.

37. The right to vacate an attachment under Code, § 563, providing that an attachment issued without affidavit may be abated by defendant is limited to the defendant in attachment and cannot be exercised by a claimant. McCain Bros. v. Street, 136 Ala. 625, 33 So. 872.

38. Two corporations of same name. Remedy is by replevin, conversion, or trespass. Bacon v. Abbey Press, 87 N. Y. S. 155.

39. Pfluke Co. v. Papulias, 42 Misc. 18, 85 N. Y. S. 543.

40, 41. McAndrew v. Irish American Bank, 117 Ga. 510, 43 S. E. 858. In New York, the summons in an action against copartners being personally served on one of them the action should not be dismissed on vacating an attachment therein [Laws 1902, p. 1519, c. 580, § 90]. Feldman v. Siegel, 87 N. Y. S. 538.

42. So as to demand consideration of it as on a demurrer. Hale Bros. v. Milliken, 142 Cal. 134, 75 P. 653.

43. Rev. St. 1899, § 407. Alexander v. Wade [Mo. App.] 80 S. W. 917.

44. Code, § 3901. Carpenter v. Clements, 122 Iowa, 294, 98 N. W. 129.

45. Carpenter v. Clements, 122 Iowa, 294, 98 N. W. 129.

46. Sonnesyn v. Akin [N. D.] 97 N. W. 557, for authorities pro and con.

47. A prior agreement on the facts in another motion does not relieve him of the necessity of proof, where the motions were before different judges. Goldman v. Floter, 142 Cal. 388, 76 P. 58.

48, 49. In re Warthman [Del. Super.] 55 A. 6.

50. McLane v. Colburn, 2 Ohio N. P. (N. S.) 257.

51. See 1 Curr. L. 255.

52. Code 1896, § 2052. Bailey v. Dunlap Mercantile Co., 138 Ala. 415, 35 So. 451.

53. Wolf v. Erwin & Wood Co., 71 Ark. 438, 75 S. W. 722.

54. Williams v. Farmers' Gin & Grain Co., 13 Okl. 5, 73 P. 269; Dunn v. Claunch, 13 Okl. 577, 76 P. 143.

on his own behalf.[55] The question of nonresidence being presented by affidavits, it becomes purely a question of fact.[56] On the trial of a contest of a claim for exemption from an attachment the affidavit and undertaking are not relevant evidence,[57] but book entries by the sheriff of facts concerning the levy are admissible.[58]

Judgment and decree or order.[59]—The property being taken on a forthcoming bond the judgment must provide that defendant shall return the property or pay its value.[60] An order refusing to quash an attachment is not a final order,[61] but an order quashing an attachment is.[62]

Appeal.—An order vacating an attachment is not appealable.[63] In an action to compel delivery of property taken by attachment, there being nothing in the record to show whether the amount due under the attachment was less or more than the value of the property, it will be presumed upon appeal that it was not a less sum.[64] An order of the trial court discharging an attachment will be sustained unless clearly against the weight of the evidence.[65]

§ 16. *Hostile and opposing claims to attached property.*[66]—Any person claiming property attached may interplead in the cause,[67] but such interpleader must have the legal title or right to the immediate possession of the property,[68] and must recover upon the strength of his own claim, not upon the weakness of that of his adversary.[69] One of several interpleaders purchasing the claim of the plaintiff, the claims of the other interpleaders are not thereby disposed of but the case should proceed upon the issues raised.[70] In the absence of statutory provisions such interpleader is not required to give a bond before filing his interplea.[71] Under statutes permitting a married woman to contract, sue, and be sued on her own account, she can interplead in an attachment suit against her husband to recover her separate property.[72] The true owner is not estopped from asserting ownership as against an attaching creditor, by declarations of title by the party in possession, such declarations being unknown to the owner.[73] Preferred creditors intervening in an attachment suit which is about to be dismissed as groundless cannot maintain a bill in equity to have the attachment enforced for their benefit.[74] Neither the sheriff nor the attaching creditors are necessary or proper parties to a suit by a claimant to establish a disputed claim.[75]

55. Dunn v. Claunch, 13 Okl. 143, 76 P. 143.
56. Williams v. Farmers' Gin & Grain Co., 13 Okl. 5, 73 P. 269.
57. Bailey v. Dunlap Mercantile Co., 138 Ala. 415, 35 So. 451.
58. Book entries by a sheriff of facts concerning the levy outside of the information contained in the write and returns are admissible, though the books are not required to be kept by law, and as to facts contained in the writs or return is merely cumulative and their admission is harmless. Hesser v. Rowley, 139 Cal. 410, 73 P. 156.
59. See 1 Curr. L. 256.
60. Ballinger's Ann. Codes & St. §§ 5262, 5266. Hill v. Gardner [Wash.] 77 P. 808.
61. Steuart v. Chappell [Md.] 57 A. 17.
62. Hence is appealable. Steuart v. Chappell [Md.] 57 A. 17.
63. Feldman v. Siegel, 87 N. Y. S. 538.
64. Hill v. Gardner [Wash.] 77 P. 808.
65. Evidence consisted solely of affidavits and counter-affidavits. Fremont Brewing Co. v. Pekarek [Neb.] 95 N. W. 12; Werner v. Linsenmeyer [Neb.] 94 N. W. 105.
66. See 1 Curr. L. 257; also Liens, 2 Curr. L. 738.
67. Mortgagee and other lienors. Miller v. Campbell Commission Co., 13 Okl. 75, 74 P. 507. But see 1 Curr. L. 257, n. 62.
68. Rice, Stix & Co. v. Sally, 178 Mo. 107, 75 S. W. 398. Under a chattel mortgage providing that after default the mortgagee could take possession of and sell the chattels, the mortgagor after default cannot interplea in an attachment brought against the mortgagee. Connersville Buggy Co. v. Lowry [Mo. App.] 77 S. W. 771.
69. Defaulting mortgagor not having sufficient interest to interplead as against attaching creditor of mortgagee cannot show that the note was transferred to and owned by another than the defendant mortgagee. Connersville Buggy Co. v. Lowry [Mo. App.] 77 S. W. 771.
70, 71. Miller v. Campbell Commission Co., 13 Okl. 75, 74 P. 507.
72. Rev. St. 1899, § 4335. It makes no difference that the property was acquired from the husband. Evidence held insufficient to sustain such a transfer. Rice, Stix & Co. v. Sally, 176 Mo. 107, 75 S. W. 398.
73. Personal property. Wright v. Tanner [Minn.] 99 N. W. 422.
74. Winrod v. Wolters, 141 Cal. 399, 74 P. 1037.

Pleading.[76]—The ownership of movable property being in dispute, the party against whom the claim is asserted may require the intervenors to amend their pleadings so as to give him such information as will acquaint him with the details of the claim he must meet.[77]

Evidence and questions of fact.[78]—The burden is upon an interpleader to prove his title,[79] or right to possession,[80] though in some states the plaintiff must first make out a prima facie case that the property is liable to attachment,[81] which he may do by proving that the goods were in the control and possession of the defendant at the time of the levy.[82] Statements by the attachment defendant to the attaching creditor as to his own financial condition are inadmissible.[83] The nature of the possession, declarations of the parties as to title, and the relationship of the owner and party in possession, are competent evidence on the question of ownership.[84]

Trial.[85]—In some states the issues on the affidavit of claim must be made up at the term at which the attachment is returnable.[86] The issues made by the interpleader should be tried as like issues between plaintiff and defendant.[87] Several claimants interpleading, all the issues should be tried and determined, and the property awarded to the rightful claimant.[88]

§ 17. *Wrongful attachment.*[89]—An attachment maliciously made for an excessive amount is an actionable wrong,[90] but no action lies for wrongful attachment if facts justifying an attachment exist, although the creditor was ignorant thereof.[91] A judgment in favor of defendant conclusively establishes that the attachment was without sufficient cause.[92] That the plaintiff in his affidavit knowingly and grossly overstates the amount of his claim, warrants the inference of malice,[93] but that the claim attempted to be prosecuted by attachment was subject to a set-off of greater amount is not sufficient to justify such a conclusion.[94] There being several wrongful levies on the same property by the same parties but one cause of action arises.[95] A wife abandoned by her husband,[96] or a purchaser from an assignee for the benefit of creditors,[97] can maintain this

75. Code Civ. Proc. §§ 2153, 2154. Shea v. Regan [Mont.] 74 P. 737.

76. See 1 Curr. L. 257.

77. Intervenors claiming some horses out of a number attached ordered to give in their petition the name and description of each horse, the date and place of purchase, the price, if possible, and the person from whom they bought. Curtis v. Jordan, 110 La. 429, 34 So. 591.

78. See 1 Curr. L. 258.

79. Willard Mfg. Co. v. Tierney, 133 N. C. 630, 45 S. E. 1026; Torreyson v. Turnbaugh [Mo. App.] 79 S. W. 1002. See 1 Curr. L. 258, n. 84.

80. Torreyson v. Turnbaugh [Mo. App.] 79 S. W. 1002. See 1 Curr. L. 258, n. 84.

81. Code, § 4141. British & A. Mortg. Co. v. Cody, 135 Ala. 622, 33 So. 832.

82. The attachment being levied upon a crop, and being for rent due, testimony by the sheriff that he levied upon the crop while on land cultivated by the defendant, held to make a prima facie case. British & A. Mortg. Co. v. Cody, 135 Ala. 622, 33 So. 832.

83. Torreyson v. Turnbaugh [Mo. App.] 79 S. W. 1002.

84. Wright v. Tanner [Minn.] 99 N. W. 422.

85. See 1 Curr. L. 258.

86. In Mississippi, if not so done, the attachment may be discharged and the claimant released from his bond [Rev. Code 1892, §§ 4425-4428]. Tennent-Stribling Shoe Co. v. Roper [C. C. A.] 128 F. 40.

87, 88. Miller v. Campbell Commission Co., 13 Okl. 75, 74 P. 507.

89. See 1 Curr. L. 259.

90. Tamblyn v. Johnston [C. C. A.] 126 F. 267.

91. Lord, Owen & Co. v. Wood, 120 Iowa, 303, 94 N. W. 842.

92. Anvil Gold Min. Co. v. Hoxsie [C. C. A.] 125 F. 724.

93. Tamblyn v. Johnston [C. C. A.] 126 F. 267.

94. Smeaton v. Cole, 120 Iowa, 368, 94 N. W. 909.

95. Burdge v. Kelchner, 66 Kan. 642, 72 P. 232.

96. Civ. Code, § 34, subsec. 4, providing that if a husband desert his wife she may bring or defend any action he might bring or defend, held she could maintain an action for wrongful attachment of exempt property. Baum v. Turner, 25 Ky. L. R. 600, 76 S. W. 129.

97. A purchaser from an assignee for benefit of creditors by a sale ratified by the creditors, although not in accordance with the terms of the assignment, has sufficient title to maintain an action for wrongful

action. Allowing the garnishee to be discharged and costs to be entered against himself does not estop the attachment defendant from maintaining an action for wrongful attachment.[98] The sheriff assuming liability for the levy the owners have a cause of action against him for conversion, the levy being declared unlawful.[99] Mandamus has been allowed to compel the sheriff to redeliver property wrongfully attached.[1] A counterclaim for wrongful attachment cannot be made in the suit begun by the attachment.[2]

Pleading.[3]—The allegations must not be inconsistent.[4] An allegation that one wrongfully sued out his attachment is sufficient, after verdict, in the absence of a motion to make more specific.[5]

Evidence and questions of fact.[6]—The claim being that the attachment was wrongfully sued out, the attachment defendant must show that the attachment has been discharged in the suit in which it was issued,[7] but the wrong complained of being the seizure of property not subject to the writ, plaintiff need not show such discharge.[8] Malice being alleged all matters directly connected with the conduct of the business transactions between the two parties are relevant,[9] also that the attachment plaintiff did not properly apply money received to pay the debt.[10] Declarations of agent of attorney who filed the attachment papers are admissible as against the attorney's client.[11]

Damages.[12]—In the absence of statutes the wrongful issuance of the writ will not alone warrant the recovery of damages.[13] No damages being proven none can be recovered.[14] Damages allowed by a state court are recoverable, though the action is removed to the Federal courts.[15] The measure of damages is not affected by the subsequent conduct of the defendant in seizing the property upon execution.[16] Rent,[17] clerk hire,[18] depreciation of goods,[19] value of license to carry on business,[20] and of property used by sheriff,[21] may be recovered.

attachment. Rouss v. Ratliff [Tex. Civ. App.] 75 S. W. 862.

98. Tamblyn v. Johnston [C. C. A.] 126 F. 267.

99. Burdge v. Kelchner, 66 Kan. 642, 72 P. 232.

1. Where property was exempt. State v. Gardner, 32 Wash. 550, 73 P. 690.

2. Ingram v. Dalley [Iowa] 98 N. W. 627. 2 Ballinger's Ann. Codes & St. § 4913. Trespass. See this case for short discussion pro and con of above proposition. Tacoma Mill Co. v. Perry, 32 Wash. 650, 73 P. 801.

3. See 1 Curr. L. 260.

4. An allegation in the complaint that the property had been released from the levy, held, as against a general demurrer, merely a recitation of the effect of the judgment and not inconsistent with an allegation that the officer had refused to deliver the property to plaintiff. Chandler v. Howell [Tex. Civ. App.] 73 S. W. 426.

5. Waller v. Deranleau [Neb.] 94 N. W. 1038.

6. See 1 Curr. L. 260.

7, 8. Baum v. Turner, 25 Ky. L. R. 600, 76 S. W. 129.

9. Conversation of debtor's mother with creditors when account was opened, admissible. Lord, Owen & Co. v. Wood, 120 Iowa, 303, 94 N. W. 842.

10. Applied it on a debt not yet due. Tamblyn v. Johnston [C. C. A.] 126 F. 267.

11. Lord, Owen & Co. v. Wood, 120 Iowa, 303, 94 N. W. 842.

12. See 1 Curr. L. 260.

13. Smeaton v. Cole, 120 Iowa, 368, 94 N. W. 909.

14. Where no injury to defendant's credit or reputation is shown, and it not appearing what the value of the use of the property was during the existence of the lien, held, no damages could be recovered. Hume v. Netter, Geismar & Co. [Tex. Civ. App.] 72 S. W. 865.

15. Attorney's fees. Fidelity & Deposit Co. v. Bucki & Son Lumber Co., 189 U. S. 135, 23 S. Ct. 582, 47 Law. Ed. 744.

16. Miller v. Baker, 25 Ky. L. R. 1858, 79 S. W. 187.

17. Of the building in which the business is carried on. Lord, Owen & Co. v. Wood, 120 Iowa, 303, 94 N. W. 842. The sheriff, retaining possession of a building rented by the attachment defendant longer than is necessary to take an inventory of the goods seized, is liable for the rent. Hooks v. Pafford [Tex. Civ. App.] 78 S. W. 991.

18. Where a business could not be carried on, owing to a wrongful levy on a stock of goods, clerk hire which plaintiffs were compelled to pay under their contract could be recovered in an action for damages for the wrongful levy. Hooks v. Pafford [Tex. Civ. App.] 78 S. W. 991.

19. He is not estopped from claiming such damages, although he protested against a sale on the ground that they might depreciate. Lord, Owen & Co. v. Wood, 120 Iowa, 303, 94 N. W. 842.

20. A stock of liquors and a saloon license of plaintiff were wrongfully levied on as the property of plaintiff's vendor, so that plaintiff could not carry on his business. Held, he could recover the value of the license as a part of his damage. Hooks v.

Damages for loss of credit by reason of the wrongful attachment are recoverable,[22] though damages for injuries to the vendee's credit, and loss of profits resulting from actions brought by his vendor for breach of contract are not recoverable in a suit on the attachment bonds issued in such actions.[23] Attorney's fees paid for recovering property wrongfully attached cannot generally be recovered;[24] nor is interest accruing prior to the date of judgment recoverable.[25] The attachment defendant remaining in the possession of the property he can only recover nominal damages, unless he refrains from using it under instructions from the officer.[26] Exemplary damages may be allowed.[27] The attachment defendant may recover in the same action damages for the value of the goods not returned, together with expenses incurred in dissolving the attachment, and for loss of time.[28] That the attachment defendant procured a release of the property shortly after seizure is relevant and material on the question of damages,[29] and the good faith of the attachment plaintiff and the sureties on the bond is no defense.[30]

The measure of the debtor's damages for loss of time is what his time would have been worth at his particular business.[31] The property being held under subsequent attachments at the time of the vacation of defendant's attachment, the measure of damages is the difference in the market value of the property on the date of the levy of defendant's writ, and their value on the day when such writ was dissolved.[32] The property being held, at the time of the dissolution of the writ of attachment, under a valid writ of sequestration, the damages recoverable by the attachment defendant are only such as he appears to have sustained by reason of the charges in the affidavit and his expenses in procuring the dissolution of the writ.[33]

ATTORNEYS AND COUNSELORS.

§ 1. Admission to Practice and License Taxes (376).
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§ 3. Suspension and Disbarment. Grounds (378).
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§ 10. Law Partnerships and Associations (392).
§ 11. Public Attorneys (392).
A. Attorneys General (392).
B. District and State's or Prosecuting Attorneys (393).

§ 1. *Admission to practice and license taxes.*[34]—The granting of a license to practice law, being the exercise of a judicial function, can be impeached col-

Pafford [Tex. Civ. App.] 78 S. W. 991.

21. Coal. Hooks v. Pafford [Tex. Civ. App.] 78 S. W. 991.

22. Tamblyn v. Johnston [C. C. A.] 126 F. 267.

23. Fidelity & Deposit Co. v. Bucki & Son Lumber Co., 189 U. S. 135, 23 S. Ct. 582, 47 Law. Ed. 744.

24. Property of third party wrongfully seized. Bogard v. Tyler's Adm'r, 25 Ky. L. R. 1416, 78 S. W. 138.

25. Hill v. Gardiner [Wash.] 77 P. 808.

26. Low v. Ne Smith [Tex. Civ. App.] 77 S. W. 32.

27. **NOTE. Exemplary damages:** If an attachment, in addition to being wrongful, is sued out maliciously or vexatiously and without probable cause, for the purpose of harassing and oppressing the attachment defendant, rather than to preserve legal rights, exemplary or vindictive damages may be recovered in addition to actual damages. Kirksey v. Jones, 7 Ala. 622; Seay v. Greenwood, 21 Ala. 491; Foster v. Sweeney, 14 Serg. & R. [Pa.] 386; Frank v. Curtis, 58 Mo. App. 349; Campbell v. Chamberlain, 10 Iowa, 337.—From note to Tisdale v. Major, [Iowa] 68 Am. St. Rep. 263, 277.

28. Is not a misjoinder of cause of action ex contractu with causes ex delicto. Voss v. Bender, 32 Wash. 566, 73 P. 697.

29, 30. Anvil Gold Min. Co. v. Hoxsie [C. C. A.] 125 F. 724.

31. Not his reasonable wage or what he would have been able to earn in other employments. Lord, Owen & Co. v. Wood, 120 Iowa, 303, 94 N. W. 842.

32. Goods were perishable. The several writs of attachment were in no way connected with each other. Engelke & Feiner Mill. Co. v. Grunthal [Fla.] 35 So. 17.

laterally only by what affirmatively appears on the face of the record;[35] but a license to practice law may be withdrawn by the power which confers it.[36] The failure of an attorney to pay the statutory occupation tax will not bar his right to recover on a cause of action assigned to him by his client as compensation for his services.[37] In New Jersey, attorneys are licensed by the governor after examination and recommendation by the supreme court, the right of examination by that court being a constitutional one.[38]

§ 2. *Privileges and disabilities.*[39]—Attorneys are officers of the court, and must uphold and sustain its dignity, both in and out of court.[40] They are not exempt from arrest in civil actions, except when they are actually in attendance in court in the due course of their employment as attorneys, and are not at any time exempt from service of summons.[41] They may not sign any bond or enter into any recognizance as surety for an appearance in a criminal case.[42] An attorney may be committed for contempt of court, but the final order committing him must recite the particular circumstances of the offense.[43] When an attorney at law is elevated to the bench, his right to practice in any of the courts of the state is suspended as long as he remains thereon, except when he is party in an action and protecting his own individual rights exclusively.[44] Conduct which would disbar an attorney and subject him to criminal prosecution will prevent him from obtaining relief from the court.[45] A "Bar Association" is a private corporation, and all questions of membership are left to its determination under its regulations.[46]

33. Southern Grocer Co. v. Adams [La.] 36 So. 226.

34. See 1 Curr. L. 261.

35. Fish v. St. Louis County Print. & Pub. Co., 102 Mo. App. 6, 74 S. W. 641. Where, in a jury action against an attorney to recover securities which he claimed to hold as fees, it was admitted that he was a member of the bar, it was prejudicial error to permit defendant, over objections, to be asked questions as to his admission, and suggesting that it had been procured by unlawful and corrupt practices. Dodds v. Gregson [Wash.] 77 P. 791.

36. The circuit court may of its own motion, at the same term at which it had granted a license to practice law, set aside the order, and good grounds for such action will, on appeal, be presumed. Killian v. State [Ark.] 78 S. W. 766.

37. Ft. Worth & D. C. R. Co. v. Carlock & Gillespie [Tex. Civ. App.] 75 S. W. 931.

38. An act relieving registered law students from an examination provided by the supreme court is invalid. In re Branch [N. J. Law] 57 A. 431.

39. See 1 Curr. L. 262. As to privilege of communications see Witnessee, 2 Curr. L. 2163.

40. An attorney as party to an action is prohibited from knowingly making defamatory charges against a judge. Morrison v. Snow, 26 Utah, 247, 72 P. 924.

41. Attorney attending judicial sale is not privileged. Greenleaf v. People's Bank, 133 N. C. 292, 45 S. E. 638.

42. But they may sign as securities for a confession of judgment for a fine and costs. Halfacre v. State [Tenn.] 79 S. W. 132. In Texas, the district court rule that attorneys shall not be surety in any cause pending in court is directory merely, and such a bond is not defective on that ground. Prusiecki v. Ramzinski [Tex. Civ. App.] 81 S. W. 549.

Note. At common law an attorney was not prohibited from becoming surety for his client, except where so doing involved champerty. See Walker v. Holmes, 22 Wend. [N. Y.] 614; Abbott v. Zeigler, 9 Ind. 511. But statutes or rules of court in most states now forbid his doing so. If he become surety in violation thereof, he is liable on breach of the bond. Morrill v. Lamson, 138 Mass. 115; Tessier v. Crowley, 17 Neb. 207, 22 N. W. 422; Wright v. Schmidt, 47 Iowa, 233. But if the bond be attacked by motion, it will be deemed insufficient for the purposes of the action. Massie v. Mann, 17 Iowa, 131; Gilbank v. Stephenson, 30 Wis. 155. And it has been said that the attorney may be punished for contempt if the prohibition is by rule of court. Ohio & M. R. Co. v. Hardy, 64 Ind. 455.

43. A statement that he behaved in an insolent and disorderly manner, tending to interrupt the court and impair the respect due it, is insufficient. People v. Marean, 86 App. Div. 278, 83 N. Y. S. 843.

44. Perry v. Bush [Fla.] 35 So. 226. An order of court suspending an attorney from practice on his election to a judicial office is not needed when the constitution forbids his so practicing. In re Silkman, 84 N. Y. S. 1025.

45. Plaintiff obtained judgment for return of a diamond given to an attorney under an iniquitous agreement to testify falsely; attorney brings writ of error. Proceeding dismissed with censure. Smith v. Blank [Kan.] 76 P. 868.

46. Mandamus to compel a bar association to act upon an attorney's application for membership, will be denied on a showing that the application had been acted upon unfavorably. State v. Louisiana Bar Ass'n, 111 La. 967, 36 So. 50.

§ 3. *Suspension and disbarment. Grounds.*[47]—Where, subsequently to his admission to the bar, an attorney is guilty of such conduct that he no longer possesses the qualifications necessary to admit him, he should be disbarred.[48] The giving of fictitious copy of a decree of divorce to a client,[49] false allegations in a pleading reflecting on the character of one of the state judiciary,[50] advertising as a divorce lawyer,[51] imposing upon the court,[52] deceit and fraud upon clients,[53] or retaining a client's funds,[54] have been held good ground for disbarment; but the retention of funds under a claim of right does not merit the penalty of disbarment,[55] nor do exorbitant charges, nor the indebtedness to a client of a balance which is the subject of a bona fide dispute.[56] The conviction of crime many years prior to admission to the bar is not, as a matter of law, sufficient cause for disbarment.[57] A judicial officer practicing as a lawyer against a constitutional provision cannot be disbarred by the court; his offense being in his capacity as a judicial officer, and not as an attorney.[58]

Defense or excuse.[59]—Where collecting and failing to remit or account for money due to a client is ground for disbarment, the defense of alcoholism is not even a mitigating circumstance.[60] Where false allegations in a pleading reflect upon the character of a justice of the supreme court, the attorney making them cannot be excused by filing a disclaimer, in disbarment proceedings, that any such meaning was intended.[61]

Proceedings in general.[62]—Petitions in disbarment proceedings must be signed and verified according to statute, and the charges must be properly formulated.[63] In Washington, the superior court has original jurisdiction in matters of disbarment; the supreme court has only appellate jurisdiction.[64] The defendant is entitled to a change of venue, on motion for same, on the ground of prejudice of the judge.[65] The proceeding being quasi criminal, the evidence should be clear

47. See 1 Curr. L. 262.

48. People v. Essington [Colo.] 75 P. 394. The license of an attorney violating the statute regulating attorneys may be revoked by the court. Morrison v. Snow, 26 Utah, 247, 72 P. 924.

NOTE. Right to disbar for crime before criminal conviction: The weight of authority is to the effect that an attorney may be disbarred for an act constituting a crime, though there has been no criminal prosecution therefor. Ex parte Wall, 107 U. S. 265, 2 S. Ct. 569; In re Percy, 36 N. Y. 651; Penobscot County Bar v. Kimball, 64 Me. 140; Delano's Case, 58 N. H. 5; State v. Finley, 30 Fla. 302, 11 So. 500; Perry v. State, 3 G. Greene [Iowa] 550; Baker v. Com., 10 Bush [Ky.] 592; In re Eldridge, 82 N. Y. 161; People v. Appleton, 105 Ill. 474. The contrary rule was held in Anonymous, 7 N. J. Law, 162; Beene v. State, 22 Ark. 149; Ex parte Steinman, 95 Pa. 220; but see Serfass' Case, 116 Pa. 455, 9 A. 674. And a statute in California providing that "conviction of felony" shall be ground for disbarment has been held to make conviction a condition precedent to disbarment for acts constituting a felony. In re Stephens, 102 Cal. 264, 36 P. 586. The contrary conclusion was reached by another court under an identical statute. State v. Winton, 11 Or. 456, 5 P. 337.

49. People v. Belinski, 205 Ill. 564, 69 N. E. 5.

50. In re Snow [Utah] 75 P. 741.

51. People v. Taylor [Colo.] 75 P. 914.

52. An attorney retained and paid in a criminal suit induced his client to swear he was poor and had no attorney and had himself appointed and paid in addition by the county. In re Byrnes [Minn.] 100 N. W. 645.

53. An attorney is estopped to object that the fraud perpetrated on his client was three days before his admission, since that proved him guilty of falsely representing himself to be a licensed attorney. In re Elliott [S. D.] 100 N. W. 431.

54. Evidence of retaining money collected for a client and other money sent to redeem lands held sufficient to warrant the attorney's disbarment. People v. Kelsey [Colo.] 75 P. 390.

55. In re Thresher [Mont.] 73 P. 1109.

56. People v. Robinson [Colo.] 75 P. 922.

57. The attorney had been convicted of crime thirteen years before his admission to the bar, but had lived an upright life since being pardoned out. People v. Coleman [Ill.] 71 N. E. 693.

58. Surrogate practicing as an attorney. In re Silkman, 88 App. Div. 102, 84 N. Y. S. 1025.

59. See 1 Curr. L. 264.

60. People v. Webster, 31 Colo. 43, 71 P. 1116.

61. In re Snow [Utah] 75 P. 741.

62. See 1 Curr. L. 264.

63. In re Roe, 81 App. Div. 656, 81 N. Y. S. 249.

64. In re Waugh, 32 Wash. 50, 72 P. 710.

65. State ex rel. Scott v. Smith, 176 Mo. 90, 75 S. W. 586.

and convincing.[66] Disbarment proceedings, when carried to the court of appeals, are only reviewable, and not triable de novo.[67]

Reinstatement.[68]—The same authority that disbars attorneys may reinstate them, and this may be done purely as an act of judicial clemency.[68] The petition for the reinstatement must express regret for the culpable acts, and the assurance of upright future conduct.[70] A provision in an order denying reinstatement of an attorney, that it is without prejudice to the filing of another similar petition after a future date, does not preclude him from a hearing on the merits of another petition filed before that date, founded on other facts.[71]

§ 4. *Creation and termination of relation with client.*[72]—Parties have always the right to select their own attorneys.[73] Though an attorney be employed on a contingent fee, the client may discharge him at any time, he being then entitled to reasonable compensation;[74] but the client must notify interested parties of the discharge of the first attorney or be estopped, as to such parties, from questioning his authority.[75] In Wisconsin, the written consent of both the party to the action and his attorney is required, before an order for substitution of attorneys be signed.[76] The insanity of a client operates to terminate the relation of attorney and client, or to invalidate any contract between them.[77]

§ 5. *Rights, duties and liabilities between attorney and client; generally; loyalty and good faith.*[78]—An attorney owes his client the utmost loyalty and faith in conducting his affairs,[79] but an attorney is not under obligation to his client to maintain positions in court that do not accord with his own notions of law and justice, simply because they tend to his client's advantage.[80] Informa-

66. The client's claim to money withheld should be legally established before disbarment proceedings are begun. An application for disbarment of an attorney for fraud in depriving his client of money will not be entertained by the supreme court until the client has established his claim in the ordinary tribunals of the county where the cause of action arose. In re Delmas, 139 Cal. xix. 72 P. 402. The evidence of fraudulent acts of an attorney should be clear and convincing, as the charge involves moral turpitude and a liability to imprisonment. Dicker v. Cohen, 84 N. Y. S. 189. The evidence to justify a disbarment should be full, clear and convincing not merely a preponderance of evidence as in civil cases. In re Dodge [Minn.] 100 N. W. 684. Official misconduct, warranting disbarment, must be clearly proved, as it involves serious charges. People v. Robinson [Colo.] 75 P. 922. Evidence insufficient to convict an attorney of forging his client's name. Seiferd v. Meyer, 87 N. Y. S. 636.

67. An order reciting that the court "being of the opinion that the matters involved here are triable de novo, doth find," etc., shows that the court of appeals tried the case de novo, instead of exercising appellate jurisdiction which alone it could do. State v. Smith, 176 Mo. 90, 75 S. W. 586.

68. See 1 Curr. L. 265.

69. People v. Essington [Colo.] 75 P. 394. At the expiration of the time for which an attorney has been disbarred, he may apply to be reinstated, and on proper petition this will be done. A petition, with a certificate signed by nearly every member of the bar of his county, that the attorney since his disbarment "has conducted himself as, and is now, a man of good moral character," entitles him to reinstatement. In re Weed [Mont.] 77 P. 50.

70. In re Weed, 28 Mont. 264, 72 P. 653.

71. In re Sullivan [Mass.] 70 N. E. 441.

72. See 1 Curr. L. 265. Effect of termination of relation on compensation and lien, see post, § 7.

73. A court in permitting parties to intervene as defendants has no authority to require them to appear through the attorney employed by the original defendants. O'Connor v. Hendrick, 90 App. Div. 432, 86 N. Y. S. 1. An attorney representing a person who becomes insane has not per se the right to represent the person appointed as guardian. State v. District Court of Second Judicial Dist. [Mont.] 75 P. 516.

74. Breathitt Coal, Iron & Lumber Co. v. Gregory, 25 Ky. L. R. 1507, 78 S. W. 148. Where an attorney has contracted for a certain compensation, and an application for a substitution of attorneys is made, the fee to be paid as a condition of such substitution, is the reasonable value of the services rendered up to that time. Such v. Bank of State of New York, 121 F. 202; Joseph's Adm'r v. Lapp's Adm'r, 25 Ky. L. R. 1875, 78 S. W. 1119.

75. Butcher v. Quinn, 86 App. Div. 391, 83 N. Y. S. 700.

76. The court need not recognize a consent signed only by the attorney of record. In re McMahon's Estate, 117 Wis. 463, 94 N. W. 351.

77. Chase v. Chase [Ind.] 71 N. E. 485.

78. See 1 Curr. L. 266.

79. Cahill v. Dickson [Tex. Civ. App.] 77 S. W. 281.

80. Sprague v. Moore [Mich.] 99 N. W. 377.

tion acquired during the existence of the relation of attorney and client cannot thereafter be used by the attorney against his client.[81] He may not acquire title to property which is in any way the subject of his client's litigation, without knowledge of the client and adverse to his interests;[82] but upon the termination of the trust relation with their clients, attorneys may deal with property which had been the subject of litigation, the same as outside parties.[83] Having acted as general counsel does not prevent an attorney appearing for an adverse party.[84] An attorney has the right to advise and assist his client to the most advantageous compromise in his behalf, provided he makes no false statement of fact to the adverse party to induce such compromise.[85] He may also properly act for his clients, and at the same time assist the defendant in purchasing the claims of other creditors of the defendant.[86]

Diligence.[87]—An attorney is liable to his client for damages proximately flowing from his failure to possess and exercise such skill, prudence and diligence as commonly exercised by lawyers of ordinary skill and capacity; and is liable for both the actual and exemplary damages the client might reasonably have recovered in an action lost by the attorney's fault,[88] and unreasonable delay by an attorney in prosecuting an action works an abandonment of the employment.[89]

Dealings between attorney and client.[90]—Transactions between attorney and client will, on account of the confidential relation, be closely scrutinized, and the burden is on the attorney to show its fairness,[91] especially where he acquires any of his client's property;[92] but where the relation does not exist, the burden is on the layman to show the fraud in a transaction with an attorney.[93] A contract

81. Carson v. Fogg [Wash.] 76 P. 112. Knowledge acquired by an attorney when acting for one party is not chargeable to another party who subsequently employs the same attorney. An attorney is not required to disclose to one client secrets entrusted to him by another. Downer v. Porter, 25 Ky. L. R. 571, 76 S. W. 135.

82. Property so acquired will be deemed as held in trust for the client, though obtained with the attorney's money. Stanwood v. Wishard, 128 F. 499. An attorney is not permitted to buy in things, in the course of litigation, of which he has the management; the purchase, if made, will be held as in trust for the client, or may even be declared invalid. Phillips v. Phillips [Ky.] 80 S. W. 826. An attorney for a married couple cannot buy a judgment against the husband and enforce the same by a creditor's bill against lands in the wife's name, nor will he be heard in a court of equity to assert, in his interest, that the transfers to her are fraudulent, he having advised and assisted in such transfers. Garinger v. Palmer [C. C. A.] 126 F. 906.

83. Grantz v. Deadwood Terra Min. Co. [S. D.] 95 N. W. 277. A foreclosure sale does not terminate the relation of mortgagor and attorney, so as to permit the attorney to make a gain from the same subject-matter, and he holds in trust for his client any outstanding title that he may buy, adverse to such client's interest. Carson v. Fogg [Wash.] 76 P. 112. An attorney holding a second mortgage as part of lands covered by his client's first mortgage may, after the conclusion of his client's foreclosure and the bringing of suit against him for services, enforce his right of redemption. Sheehan v. Farwell [Mich.] 97 N. W. 728.

84. An attorney who has acted as general counsel for a party may appear as attorney for an adverse party in an action, provided he had not been consulted as to that action by the party for whom he had acted generally and had not learned from him facts that could be used prejudicially to him. Messenger v. Murphy, 33 Wash. 353, 74 P. 480.

85. Bunel v. O'Day, 125 F. 303.

86. Elastic Tip Co. v. Graham [Mass.] 71 N. E. 117.

87. See 1 Curr. L. 267.

88. Patterson v. Frazer [Tex. Civ. App.] 79 S. W. 1077. For an attorney employed to examine a title, to omit showing a judgment against the property, is actionable negligence. Renkert v. Title Guaranty Trust Co., 102 Mo. App. 267, 76 S. W. 641.

89. A judgment in favor of client was reversed on appeal; the attorney neglected and refused for 10 years to bring the case on for retrial. He was entitled to no compension. Farwell v. Colman [Wash.] 77 P. 379.

90. See 1 Curr. L. 267.

91. Barrett v. Ball, 101 Mo. App. 288, 78 S. W. 865.

92. Klein v. Borchert, 189 Minn. 377, 95 N. W. 215; Young v. Murphy [Wis.] 97 N. W. 496; Goldberg v. Goldstein, 87 App. Div. 516, 84 N. Y. S. 782. The validity of an assignment by an heir of his entire interest in an estate to the attorney who had procured it for him, though made after the attorney's employment was completed, will be reviewed as though the matters were still pending. Barrett v. Ball, 101 Mo. App. 288, 73 S. W. 865.

93. Jinks v. Moppin [Tex. Civ. App.] 80 S. W. 390.

by an attorney purchasing his client's interest in a claim in litigation will be closely scrutinized, but is not necessarily invalid.[94]

Accounting to client.[95]—An attorney must account to his client for all money or other assets coming into his hands in his capacity as attorney.[96] The relation of trust between an attorney and client in respect to funds collected by the latter does not pass to the bank in which the attorney has deposited the funds in his own name, so as to charge the bank, in respect thereto, as trustees for the client.[97] The rule that no assignment of a chose in action is good without notice to the debtor applies between attorneys and clients, as between others.[98]

§ 6. *Remedies between the parties.*[99]—Moneys collected and retained by an attorney may be recovered in an action for money had and received.[1] Such sums are not trusts and may be barred by the statute of limitations.[2] No demand is necessary before suit.[3] An attorney may be summarily ordered to repay money wrongfully withdrawn after being deposited in court.[4] The right to rule an attorney to pay over money retained depends upon the relation of attorney and client, and is limited to the client. It is penal in its nature and must be strictly construed.[5]

§ 7. *Compensation and lien.*[6]—The general principles of the law of contracts apply to permit an attorney to recover the fee contracted for if he perform the services agreed[7] or if performance is prevented by the client,[8] to extra compensation for services not covered by the contract,[9] and to recover on a quantum

94. Myers v. Luzerne County, 124 F. 436.

95. See 1 Curr. L. 268.

96. Hernandez v. Dart, 109 La. 880, 33 So. 905. An attorney for an administratrix may not retain from funds collected for her an amount claimed to be due him from her decedent. In re Thresher [Mont.] 73 P. 1109.

97. Rhinehart v. New Madrid Banking Co., 99 Mo. App. 381, 73 S. W. 315.

98. Nielsen v. Albert Lea [Minn.] 98 N. W. 196.

99. See 1 Curr. L. 268.

1. Where plaintiff admits a promise to pay, but there was no evidence that the agreed amount or the value of the services was equal to the amount retained, the complaint should not be dismissed. Reed v. Hayward, 82 App. Div. 416, 81 N. Y. S. 608. The remedy to compel an attorney to pay over money collected and unlawfully retained is by action and not by motion that the court summarily order payment to be made. Arone v. Launders, 43 Misc. 138, 88 N. Y. S. 259. If a client sues his attorneys for money had and received, he is estopped by his pleading from showing the character and origin of the fund, and that it was received by the attorneys under circumstances which precluded them from retaining it for their services. Dobbs v. Campbell, 66 Kan. 805, 72 P. 273.

2. Sheaf v. Dodge, 161 Ind. 270, 68 N. E. 292.

3. The client's action not being of the nature of trover. Vooth v. McEachen, 91 App. Div. 30, 86 N. Y. S. 431.

4. Brott v. Davidson, 87 App. Div. 29, 83 N. Y. S. 1075.

5. Associate counsel cannot by rule enforce a contract for equal division of fees. Haygood v. Haden, 119 Ga. 463, 46 S. E. 625. An attorney who retains money collected for a client is liable to rule, if after demand he fails to account therefor; but he is not liable under this summary process, for money received by him, not in his professional capacity, but merely as agent, to be remitted to a third party. Haygood v. McKenzie, 119 Ga. 466, 46 S. E. 624.

6. See 1 Curr. L. 269.

7. The conditions upon which a contract for a stipulated fee was made, being substantially fulfilled, the contract should be enforced, especially where it was brief and informally made. Ingersoll v. Coram, 127 F. 418. A valid contract between attorney and client for fees is not abrogated by an attempt to merge it in a void contract, and a void contract will not prevent recovery on a quantum meruit. McCurdy v. Dillon [Mich.] 98 N. W. 746. In an action for legal services, the fact that the payee named in the written contract was not an attorney was no defense, where the payee had no interest in the sums promised to be paid. Mulligan v. Smith [Colo.] 76 P. 1063.

8. A client may not by making a compromise over his attorney's objection defeat the latter's right to his contract compensation. Cosgrove v. Burton [Mo. App.] 78 S. W. 667. A client may abandon a suit at any time, but cannot by so doing defeat the contract claim of his attorney for what he would have recovered if not so prevented. Williams v. Philadelphia [Pa.] 57 A. 578. An attorney being paid in advance to prosecute an action, the client, on electing to abandon same, cannot recover the money so paid, if the attorney is willing to proceed, even though the abandonment was induced by attorney's admitting that he did not know whether the suit would be successful or not. Riehl v. Levy, 86 N. Y. S. 464.

9. Services rendered in excess of those contemplated in a written contract between attorney and client call for extra compensation, and parol evidence is admissible to show the surrounding circumstances, and the

meruit for part performance.[10] A contract for additional compensation without extra service lacks consideration.[11] Statutory costs awarded to a party in an action belong to him, and his attorney has no interest therein,[12] except a mere lien on them for his services.[13]

Contingent fees.[14]—Contingent fees, though tending to encourage speculative litigation, are not illegal,[15] unless infringing some other rule of public

nature of the services contemplated, the contract being uncertain in that respect. Barcus v. Gates, 130 F. 364.

10. An attorney conducting a foreclosure suit, after its commencement by another attorney and its reference to a master, is only entitled to fees in the proportion of his services to the whole legal services rendered. Ganzer v. Schmeltz, 206 Ill. 560, 69 N. E. 584. On rescission of a contract for legal compensation, an attorney may sue for the value of his services on a quantum meruit, and his right is not affected by his pleading and failing to prove a contract for a particular sum. On the disagreement of the jury, plaintiff declined to proceed further. The attorney then had a right to hold his contract for half the amount recovered as rescinded. Yuells v. Hyman, 84 N. Y. S. 460. In suing on a contract by which certain sums were to be paid in case of a successful termination, the fact that adverse judgments were entered defeats recovery; the proper remedy being a suit on a quantum meruit. Foley v. Kleinschmidt, 28 Mont. 198, 72 P. 432. A contract for a certain fee in event of a successful termination of a suit is abandoned by a compromise and dismissal of the action, and the attorney's fees must be recovered on a quantum meruit. Harris v. Root, 28 Mont. 159, 72 P. 429. Where an attorney makes a contract for certain services, but dies before completing them, his representative cannot recover the full amount of compensation agreed on. Appeal taken, but attorney died before hearing, and parties then settled the suit. Boyd v. Dally, 85 App. Div. 581, 83 N. Y. S. 539. An attorney for whom another is substituted may have the value of his services ascertained, and the amount made a lien upon the cause of action and the proceeds in the hands of the substituted attorneys. British Empire Typesetting Machine Co. v. Spellissy, 83 App. Div. 640, 82 N. Y. S. 47.

11. Kahle v. Plummer [Tex. Civ. App.] 74 S. W. 786.

12. Barry v. Third Ave. R. Co., 87 App. Div. 543, 84 N. Y. S. 830.

13. McIlvaine v. Steinson, 90 App. Div. 77, 85 N. Y. S. 889.

14. See 1 Curr. L. 270.

15. A contract by a city with an attorney to obtain credits with the state, at 10% on the amount collected is not champertous. Williams v. Philadelphia [Pa.] 57 A. 578. Where the services rendered by an attorney are not of such a character as to warrant a contingent fee, recovery can only be had for value of actual services rendered. Dorr v. Camden [W. Va.] 46 S. E. 1014. Under an agreement to pay the attorney a certain percentage of the amount recovered, and that the attorney was to get what he could in addition from the adverse party, it is immaterial what amount he received from that source. Lyon v. Wilcox, 85 App. Div. 617, 83 N. Y. S. 332. A contract that the attorney should have a certain percentage "of the amount collected" gives him a right to such per cent on the entire judgment including the costs. McIlvaine v. Steinson, 90 App. Div. 77, 85 N. Y. S. 889. The promise of an attorney to pay the expenses incident to the collection of his claim, if made with a view to induce his employment is illegal and a misdemeanor. But the taking of an interest in the claim as compensation for his services in collecting it is not against public policy, even though it prevents the client from settling it without the attorney's consent. Ft. Worth & D. C. R. Co. v. Carlock & Gillespie [Tex. Civ. App.] 75 S. W. 931. A contract for attorneys' services, by which they look solely to a percentage of the recovery for compensation without any right of recovery for services rendered, is void for champerty. That services were rendered before the execution of the contract does not affect its invalidity for champerty. Gargano v. Popel, 184 Mass. 571, 69 N. E. 343. An agreement by which an attorney undertakes proceedings to recover abatements, and to be paid nothing in case of failure, is champertous. Begly v. Weddigen, 86 App. Div. 629, 83 N. Y. S. 805. So also is an agreement by an attorney to prosecute certain claims at his own expense, for a certain compensation. Stedwell v. Hartmann, 173 N. Y. 624, 66 N. E. 1117. In Washington, the doctrine of champerty, in so far as it relates to the mode of payment between attorney and client, is repealed by statute, leaving the matter to the agreement of the parties. A contract between attorney and client to prosecute a suit against a physician for malpractice, the attorney to pay the disbursements, for a percentage of the recovery, is valid. Smits v. Hogan [Wash.] 77 P. 390. Equity may relieve from a champertous contract for attorney's services on the ground of constructive fraud, and a client is not barred from relief on the ground of being in pari delicto, and not coming into equity with clean hands. Gargano v. Popel, 184 Mass. 571, 69 N. E. 343.

NOTE. Contracts for contingent fees: An attorney's compensation may be made contingent upon his success, and be made payable by percentage or otherwise of the proceeds of the litigation. Such contracts are common, and while their propriety has been vehemently debated, they are not illegal as contrary to public policy or otherwise, and, when fairly made, are steadily enforced. Fowler v. Callan, 102 N. Y. 395, 7 N. E. 169; Croco v. Oregon Short Line R. R. Co., 18 Utah, 311, 54 P. 985; Davis v. Wehber, 66 Ark. 190, 49 S. W. 822, 74 Am. St. Rep. 81; Rector v. Rose, 62 Ark. 279, 36 S. W. 898; Hoffman v. Vallejo, 45 Cal. 564; Bergen v. Frisbie, 125 Cal. 168, 57 P. 784; Newkirk v. Cone, 18 Ill. 449; Funk v. Mohr, 185 Ill. 395, 57 N. E. 2; North Chicago St. R. Co. v. Ackley, 58 Ill. App. 572; Jewel v. Neidy, 61 Iowa, 299, 16 N. W. 141; Louisville Gas

policy;[16] but contracts for contingent fees will also be closely scrutinized, and if

Co. v. Hargis, 17 Ky. L. R. 1190, 33 S. W. 946; Martinez v. Succession of Vives, 32 La. Ann. 305; Cain v. Warford, 33 Md. 23; Blaisdell v. Ahern, 144 Mass. 393, 11 N. E. 681, 59 Am. Rep. 99; Davis v. Com., 164 Mass. 241, 41 N. E. 292; County of Chester v. Barber, 97 Pa. 455; Perry v. Dicken, 105 Pa. 83, 51 Am. Rep. 181; Fellows v. Smith, 190 Pa. 301, 42 A. 678; Wheeler v. Riviere [Tex. Civ. App.] 49 S. W. 697; Lewis v. Broun, 36 W. Va. 1, 14 S. E. 444; Gilchrist v. Brande, 58 Wis. 184, 15 N. W. 817; Dale v. Richards, 21 D. C. 312; Ex parte Plitt, 2 Wall. Jr. 453, Fed. Cas. No. 11,228. Thus, an agreement to pay a proctor in an admiralty case, out of the proceeds of a recovery, is valid and enforceable. The Alice Strong, 57 Fed. 249. And there is nothing illegal, immoral, or against public policy, in an agreement by an attorney for a contingent fee or a share of the proceeds, to present and prosecute claims against the United States. Taylor v. Bemiss, 110 U. S. 42, 3 S. Ct. 441; Stanton v. Embrey, 93 U. S. 548; Manning v. Perkins, 85 Me. 172, 26 A. 1015. A contract to pay an attorney a percentage of the value of the subject-matter in litigation to secure "a favorable" decision from the land department is not contrary to good morals or public policy. Bergen v. Frisbie, 125 Cal. 168, 57 P. 784. An agreement for a contingent fee does not make the attorney a party to the action (Gilchrist v. Brande, 58 Wis. 184, 15 N. W. 817); nor does his agreement for a certain percentage of recovery make him a necessary party plaintiff, and he need not be joined as such (McDonald v. Chicago, etc., R. Co., 26 Iowa, 124, 96 Am. Dec. 114). A conditional obligation to pay an attorney an extra fee in case of success, in an action in which the obligor is not a party, is given upon a valid and sufficient consideration, if such obligor is a party to other suits in which the same question is involved. Clay v. Ballard, 9 Rob. [La.] 308, 41 Am. Dec. 328. An attorney's contingent fee of five-twelfths of whatever the client may "realize" out of certain litigation means five-twelfths of the gross amount recovered, without deduction for the expense of litigation or settlement attending the transaction. Funk v. Mohr, 185 Ill. 395, 57 N. E. 2. His agreement to collect bonds for twenty-five per cent of the "amount made" entitles him to one-fourth of the amount collected on the bonds by suit or otherwise (Larned v. Dubuque, 86 Iowa, 166, 53 N. W. 105); but where the client agrees to pay a fee of fifty dollars, and also a percentage of the damages which he may recover in the action, he is answerable only for a percentage of the damages received, not for such percentage of the judgment obtained (Fisher v. Mylius, 42 W. Va. 638, 26 S. E. 309). If the compensation agreed upon is contingent on the successful result of the suit, the measure of damages is not the contingent fee, but the reasonable value of the services rendered by the attorney. French v. Cunningham, 149 Ind. 632, 49 N. E. 797. A contract for a contingent fee made by the mother and sole next of kin of a decedent, though binding on her, does not bind her descendants, nor the estate toward which she stands in no other relation than that of distributee. Sloan's Estate, 161 Pa. 237, 28 A. 1084. Under some circumstances, an attorney having a contract for a contingent fee may recover on a quantum meruit. Thus, where an attorney made a special contract to prosecute a suit for a certain fixed fee and a further contingent fee in case of success, and the client afterward dismissed the case without the attorney's consent, the attorney is not entitled to recover the whole contingent fee, but can recover, either on a special count or quantum meruit, reasonable value for his services. Polsley v. Anderson, 7 W. Va. 202, 23 Am. Rep. 613. So in case of a special contract for legal services for a percentage of the recovery, where the services are wrongfully prevented by the client, and where the attorney holds himself continually ready to serve, he may claim the whole compensation agreed on, subject to such abatement as would, in the natural course of things, have been incurred by him if the services had been continued. Brodie v. Watkins, 33 Ark. 545, 34 Am. Rep. 49. Where the complete performance of an attorney's services has been rendered impossible, or otherwise prevented, by the client, the attorney may, as a rule, recover on a quantum meruit, for the services rendered by him (French v. Cunningham, 149 Ind. 632, 49 N. E. 797); but a lawyer who has violated his contract for a contingent fee cannot recover on a quantum meruit without showing the performance of services, and that those services were of benefit to his client (Moyers v. Graham, 15 Lea [Tenn.] 57). If an attorney is employed by a county to prosecute an action against a county officer to recover moneys alleged to be illegally retained, under an agreement whereby his compensation is made contingent upon the success of the suit, and he is discharged before the termination of the suit, he cannot recover damages for the breach of the contract of employment, where it appears that the suit ought not to have resulted in favor of the county had it been prosecuted to judgment. Swinnerton v. Monterey Co., 76 Cal. 113, 18 P. 135.—From note to Shirk v. Neible [Ind.] 83 Am. St. Rep. 151.

16. Contract for fees in a divorce case based on percentage of alimony, and in case of settlement, to be a minimum of $2.000, is void as tending to prevent a reconciliation between husband and wife. McCurdy v. Dillon [Mich.] 98 N. W. 746.

Note: While a contract for a contingent fee is not illegal where the suit is of a legitimate character, it is otherwise where the employment of the attorney is of an unlawful character. Thus, if he agrees to prosecute a suit on a contingent fee and bear the costs and expense of litigation, the agreement is champertous and cannot be enforced in law or in equity. So his agreement to prosecute a suit on a contingent fee is void, if part of the consideration for his undertaking is that another attorney shall render his services and bear the costs and expense of litigation. Geer v. Frank, 179 Ill. 570, 53 N. E. 965. An attorney may recover compensation for purely professional services in procuring legislation in which his client is interested; but when the agreement between attorney and client provides

extortionate or obtained by undue means, will not be upheld,[17] the burden of showing unreasonableness being, however, on the client.[18] The champertous character of such agreements is specifically treated elsewhere.[19] An attorney obtaining a settlement without suit is entitled to a contingent fee contracted for.[20]

Implied contract.[21]—The contract to pay for legal services may be implied, or negatived, according to the circumstances.[22] There is no implied promise to pay an attorney whom one has not employed, because of incidental benefits derived from his services.[23] If a client prevent the prosecution of an action in which the attorney, under a contract, is to have a percentage of the amount recovered, the attorney's remedy is action for breach of contract, or on a quantum meruit, but in no such case is the percentage agreed on recoverable.[24] If prop-

for compensation contingent on the amount recovered under such legislation when procured by the attorney, the contract is against public policy and cannot be enforced. Spalding v. Ewing, 149 Pa. 375, 24 A. 219, 34 Am. St. Rep. 608; Trist v. Child, 21 Wall. [U. S.] 441. A contract to give an attorney a certain percentage of a claim against the United States government for services in collecting it is void as against public policy, when such services consist in procuring legislation compelling the payment of the claim. Id. So, if the valid part of an attorney's contract is blended and confused with the part which is forbidden, compensation cannot be recovered for either part, as the whole is a unit and indivisible, and that which is bad destroys the good. Trist v. Child, 21 Wall. [U. S.] 441. But unless there is something on the face of the contract which shows that the means and methods to be used by the attorney, or which were used by him, were improper, the presumption is that a contract for a contingent fee is valid and enforceable. Bergen v. Frisbie, 125 Cal. 168, 57 P. 784. Contracts for contingent fees will not be countenanced in proceedings for divorce or alimony. Such fees in these proceedings are vicious, because the law does not favor divorce, but does favor marriage, and will not sanction contracts intended to promote its dissolution by lending itself to their enforcement. All such contracts, in these cases, should be held illegal and void, as contrary to public policy. Newman v. Freitas, 129 Cal. 283, 61 P. 907; Brindley v. Brindley, 121 Ala. 429, 25 So. 751. So it has been held that the giving of contingent fees, or compensation for services rendered to the public, is contrary to sound policy, as where a county agrees to give attorneys a contingent fee to enable its commissioners to lawfully place upon the tax list certain lands which the assessor has erroneously left off of the assessment roll. Such a contract is void as against public policy. Platte County v. Gerrard, 12 Neb. 244, 11 N. W. 298.—From note to Shirk v. Neible [Ind.] 83 Am. St. Rep. 151.

17. Muller v. Kelly [C. C. A.] 125 F. 212. An agreement that plaintiff pay all disbursements, and pay his attorney 50% of amount of any recovery for injuries is unconscionable and void. Herman v. Metropolitan St. R. Co., 121 F. 184. An agreement for a percentage of money to be recovered, extorted from a client by threatening to refuse to take action or to disclose his exclusive information, unless client signed without consulting anyone, may be set aside and a reasonable compensation fixed. In re Pieris, 82 App. Div. 466, 81 N. Y. S. 927.

18. Tabet v. Powell [Tex. Civ. App.] 78 S. W. 997.

19. See Champerty and Maintenance, 1 Curr. L. 506.

20. Stoutenburgh v. Fleer, 87 N. Y. S. 504.

21. See 1 Curr. L. 270.

22. Where attorneys' services, beneficial to an estate, are rendered with the knowledge and without the objection of the administrator, who, however, did not employ them so as to become personally liable, the estate is chargeable therewith. Marx v. McMorran [Mich.] 99 N. W. 396. An attorney directed by the court to conduct a criminal prosecution, in place of the county attorney who is disqualified, is entitled to compensation from the county. Mathews v. Lincoln County Com'rs, 90 Minn. 348, 97 N. W. 101. In disbarment proceedings, the attorney directed by the court to draw up the accusation and prosecute may recover reasonable compensation from the county, though there is no statutory provision therefor. Hyatt v. Hamilton County, 121 Iowa, 292, 96 N. W. 855. Where a citizen employs an attorney to compel city officers to perform certain duties, and the result brings funds into the city treasury, it does not create an implied contract on the part of the city to pay the attorney for such services. Park v. Laurens [S. C.] 46 S. E. 1012. An attorney is not entitled to fees for foreclosing a trust deed wherein he is named as trustee. Gantzer v. Schmeltz, 206 Ill. 560, 69 N. E. 584. The allowance of attorney's fees in bankruptcy is in the discretion of the judge, and fees paid in contemplation of bankruptcy are only valid in so far as subsequently approved by the court. In re Morris, 125 F. 841.

23. Petitioners who oppose a trustee's sale, which later realizes an amount insufficient to pay the lien creditors who force the sale, are not entitled to have their attorney's fees paid out of the trust fund. Lamar v. Hall & Wimberly [C. C. A.] 129 F. 79.

24. Jordan v. Davis, 172 Mo. 599, 72 S. W. 686. Under an attorney's contract for a certain percentage of sums recovered, where he is prevented from prosecuting the claim, he is not entitled to anything under the contract but may bring damages for the breach thereof. Johnston v. Cutchin, 133 N. C. 119, 45 S. E. 522. Where a client prevents his attorney from performing the contract for services entered into between them,

erty is taken in part satisfaction of a judgment recovered, an attorney who holds a contract for a percentage of the recovery is entitled to a percentage on the fair value of the property, regardless of the price at which it was taken.[25] An agreement for a percentage of money recovered, where no charge is to be made by the attorney in case of failure to recover, is not a common-law contract for services, but an equitable assignment of part of whatever should be received, which the attorney can recover by a suit in equity.[26]

Assignments as security.—Where the client has in part assigned his claim to his attorney, with notice to the adverse party, he can only validly settle with the adverse party to the extent of the remainder of his claim.[27] Notice to the defendant's attorney of an assignment of an interest in a cause of action pending is notice to the defendant.[28] The filing and recording required by statute of the assignment of part of a claim for damages as compensation for legal services are not required to charge the one liable for the damages with notice of assignee's rights, but the burden is on the attorney to show that defendant had knowledge of the assignment.[29]

Employment of several attorneys, or by several clients.[30]—Where an attorney represents several parties, the fact that the services were for their common benefit is not conclusive as to whether their liability was joint or several, which question depends upon their express agreement, or their intention as gathered from all the circumstances.[31] Counsel, not partners, associated in litigation through separate employments, should be allowed fees from the fund in court in proportion to the services of each.[32] Where it is agreed in writing that two attorneys are to receive a certain percentage of money secured, and on one declining to act another is employed, that other is entitled to half of the percentage though not a party to the written agreement.[33] If an attorney reduce a claim to judgment, which judgment is in part enforced by another attorney acting for the creditor, the first attorney is entitled to his agreed commission.[34]

Allowance by court or taxation as costs.[35]—Professional services in ordinary cases cannot be taxed as costs,[36] but in many equitable proceedings solicitor's fees are allowed.[37] Statutes allowing taxation of attorney's fees are generally upheld,[38] and courts of equity often allow attorney's fees out of a fund in court

the client is liable to the attorney for breach of such contract, and the attorney need not wait for the conclusion of the case in which he tenders his services to bring his suit for damages. Watson v. Columbia Min. Co., 118 Ga. 603, 45 S. E. 460.

25. Barcus v. Gates, 130 F. 364.

26. Bennett v. Donovan, 83 App. Div. 95, 82 N. Y. S. 506.

27. Powell v. Galveston, etc., R. Co. [Tex. Civ. App.] 78 S. W. 975.

28. Missouri, etc., R. Co. v. Bacon [Tex. Civ. App.] 80 S. W. 572.

29. Gulf, etc., R. Co. v. Eldredge [Tex. Civ. App.] 80 S. W. 556.

30. See 1 Curr. L. 270.

31. Matthews v. Williams Mfg. Co., 98 Me. 234, 56 A. 759.

32. Glidden v. Cowen [C. C. A.] 123 F. 48.

33. In re McGee's Estate, 205 Pa. 590, 55 A. 776.

34. Raley v. Smith [Tex. Civ. App.] 73 S. W. 54.

35. See 1 Curr. L. 271.

36. Where a foreign deposition is taken in an action, defendant is not entitled to tax as costs a sum charged by foreign attorneys for professional services rendered defendant in taking the deposition. Topken v. Cunard S. S. Co., 88 N. Y. S. 394. Attorney's fees in a suit for dower against a purchaser from the husband cannot be taxed against the defendant. Beeman v. Kitzman [Iowa] 99 N. W. 171.

37. Solicitors' fees when taxable should be taxed like other costs, and a judgment therefor should not be rendered in favor of the solicitor in his own name. McMullen v. Reynolds, 209 Ill. 504, 70 N. E. 1041.

38. An attorney's fee provided for by statute in the prosecution of claims against insurance companies is not in violation of the U. S. Constitution, as denying to the insurance companies the equal protection of the laws. Farmers' & Merchants' Ins. Co. v. Dobney, 189 U. S. 301, 23 S. Ct. 565, 47 L. Ed. 821. An attorney's fee cannot constitutionally be taxed as costs in proceedings to foreclose a mechanic's lien. Atkinson v. Woodmansee [Kan.] 74 P. 640. The provision of a statute allowing an attorney's fee on foreclosure of assessment liens is valid as imposing a penalty for the property owner's delay in paying his obligations for public improvements. Brown v. Central Bermudez Co. [Ind.] 69 N. E. 150.

obtained or protected by legal services.[39] Where all the claimants of a fund appoint a trustee to collect the same, an attorney who intervenes in behalf of some of claimants individually is not entitled to have his fees made a charge on the fund.[40] The refusal to order an attorney to repay fees paid him on an order made without notice to adverse party is not an abuse of discretion, though the order be vacated after it has been complied with.[41]

Amount.[42]—Where attorney's fees are allowed against a fund in court, a reasonable amount in the discretion of the court is allowed.[43]

Evidence as to value of services.[44]—In estimating the value of legal services, the value of the property affected and the results achieved, may be considered;[45] it is also proper to include a reasonable retaining fee.[46] Attorneys who represent parties in the sale of state bonds, where litigation is necessary and undertaken to compel the state to accept such bonds for taxes, are not mere brokers, and the value of their services is not to be determined on that basis.[47] Restatements made on a rehearing of arguments made on appeal should not be treated as services rendered in separate cases in determining the compensation of attorneys

39. An attorney employed to resist the appointment of a receiver for a building association is entitled to fees out of the fund raised by the sale of the assets in the receiver's hands. Commonwealth v. Penn Germania Bld'g & Loan Ass'n, 204 Pa. 29, 53 A. 516. Equity may determine that counsel should be compensated for preserving a fund in court, notwithstanding an agreement, or an order of the court to the contrary. Oliver v. South Carolina Interstate & West Indian Exposition Co. [S. C.] 47 S. E. 988. When an award of counsel fees is set aside the receiver may recover from the attorney any excess paid in accordance with the erroneous award. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. Where an attorney employed by a receiver joins the receiver in submitting his claim for services to the court, the court's award is binding upon him until properly set aside, though the receiver is personally liable to him. Id. A general attorney for a receiver rendering services of a general and continuous character need not keep an itemized account thereof, as the court customarily allows such sum as is reasonable for the services performed. The amount allowed should depend on results accomplished, though a reasonable expense account may also be allowed. Id.

40. Sloan v. Smith [Conn.] 58 A. 712.

41. Brunings v. Townsend, 139 Cal. 137, 72 P. 919.

42. See 1 Curr. L. 271.

43. Services of an attorney, if adverse rather than beneficial to a trust fund, are not chargeable to that fund. Sprague v. Moore [Mich.] 99 N. W. 377. $225 for drawing an answer, making a motion for disclosure of residence, and a motion for costs, is excessive. $100 is sufficient. Frost v. Reinach, 81 N. Y. S. 246. $300 is a sufficient compensation for attorney's services in filing letters of administration. In re Pleris, 82 App. Div. 466, 81 N. Y. S. 927. Verdict for $1,000 was against the weight of the evidence. Whallen v. Hallam, 25 Ky. L. R. 965, 76 S. W. 850. Where evidence as to counsel fees placed the value at $1,000, and $700, and no disinterested witness placed it below $500, the fees allowed should not be less than $500. Reed v. Reed, 24 Ky. L. R. 2438, 74 S. W. 207. Under an act allowing $30 to attorneys appointed to defend criminals in cases where the punishment is imprisonment, an allowance of $50 by the court in a murder case is properly cut to $30, capital punishment having been abolished. Lake County Com'rs v. Glynn [Colo. App.] 74 P. 339. The measure of the husband's liability for wife's attorney's fees in separation suits is conclusively established by the order requiring him to pay a certain amount, and additional fees cannot be collected for recovering personal property of the wife remaining in the husband's possession. Damman v. Bancroft, 88 N. Y. S. 386. In fixing the value of the services of complainant solicitor in partition, the court has no right to refer that matter to members of the bar called in on the court's own motion. The report of members of the bar called in as a committee by the court, but not sworn, is not competent evidence and will not support an allowance for solicitor's fees. McMullen v. Reynolds, 209 Ill. 504, 70 N. E. 1041.

44. See 1 Curr. L. 271.

45. In an action to recover for services in examining the articles of incorporation of a mining company and passing on the value of the mine, evidence as to the value of the mine, of its productiveness, and of its capital stock is admissible. Graves v. Sanders [C. C. A.] 125 F. 690. Where favorable legislation is in part the result of actions at law, that fact may be considered in estimating the value of the attorney's services in those actions. Town of Hempstead v. New York, 86 App. Div. 300, 83 N. Y. S. 806. Where an attorney renders some services of value in the way of facilitating and expediting the collection of a claim, a contract for a percentage of the amount recovered is not void for want of consideration by reason of the fact that the claim would ultimately have been paid voluntarily. Claim against city for overpaid water rates, where the attorney prepared and filed affidavit as basis of claim and adjusted amount, with the officials. Rogers v. Polytechnic Institute of Brooklyn, 87 App. Div. 81, 84 N. Y. S. 12.

46. Roche v. Baldwin [Cal.] 76 P. 956.

47. Parsons v. Maury, 101 Va. 516, 44 S. E. 758.

so engaged.[48] Whether a note is placed in the hands of an attorney for collection, so as to entitle the holder to collect attorney's fees, is a question of fact for the jury.[49] On conflicting evidence as to value of legal services the verdict of a jury will not be disturbed.[50]

Proceedings to recover.—A contract by one attorney for services rendered at the request of another attorney, for a share of the fee received by the latter, is enforceable against the latter either at law for breach of contract, or in equity for money had and received.[51] The attorney's right of compensation does not accrue until his relation in the suit has terminated, at which period also the statute of limitations against his claim begins to run.[52] Attorneys must notify their clients of the specific sum claimed as fees before beginning suit for same, and make known to them pending proceedings for recovery thereof.[53]

A judgment that part of a recovery inure to the benefit of the attorneys of litigants who are all minors, the attorneys not being parties, is erroneous.[54] Where a private settlement is made after suit brought, the court has jurisdiction to determine defendant's liability to plaintiff's attorneys for an aliquot part of the settlement previously assigned to them as compensation,[55] but a satisfaction of a judgment will not be set aside in a case settled by the parties, unless it is necessary for the attorneys to realize the amount due them for their services, which amount they are entitled to have determined.[56] To recover their fees, attorneys are frequently allowed to continue, in their own interest, actions which their clients have settled, abandoned, or otherwise prevented the attorneys from completing,[57] and the evidence must be of such a character as would authorize a recovery by the client were the suit still proceeding for his benefit.[58] But they may not be continued merely to get costs against the adverse party as compensation for services rendered the client.[59]

48. In re Kellogg, 88 N. Y. S. 1033.

49. Rogers v. O'Barr [Tex. Civ. App.] 76 S. W. 593. Right to claim attorney's fees for collection provided for by note may be waived. Wicks-Nease v. James, 31 Tex. Civ. App. 151, 72 S. W. 87, where waiver was by presentment without demand for fees and allowance of amount of note only by probate court.

50. Evidence placed the value as high as $16,000 and as low as $100. A verdict of $700 would not be disturbed as against the weight of the evidence. Mack v. Miller, 87 App. Div. 359, 84 N. Y. S. 440.

51. Harrison v. Murphy [Mo. App.] 80 S. W. 724.

52. McCrea v. Scofield, 86 N. Y. S. 10.

53. Truitt v. Darnell [N. J. Eq.] 55 A. 692. Where judgment is rendered for legal services and there is no proof of demand, interest is properly allowed from the date of commencing suit. Trimble v. Kansas City, P. & G. R. Co. [Mo.] 79 S. W. 678.

54. White v. Simonton [Tex. Civ. App.] 79 S. W. 621.

55. Gulf, etc., R. Co. v. Eldredge [Tex. Civ. App.] 80 S. W. 556. The compromise of a judgment by plaintiff and defendant in fraud of an attorney having a lien thereon may be set aside at the suit of the attorney defrauded. Jones v. Duff Grain Co. [Neb.] 95 N. W. 1.

56. Corbit v. Watson, 88 App. Div. 467, 85 N. Y. S. 125.

57. An attorney to whom an interest in a cause of action is assigned in consideration of his services may, if the defendant settle with claimant with knowledge of the assignment, prosecute the original suit to judgment in his own interest and recover to the extent thereof. Powell v. Galveston, etc., R. Co. [Tex. Civ. App.] 78 S. W. 975. In a suit for fees by an attorney who has been prevented from prosecuting an action under his contract and discharged by his client, the opinion of witnesses cannot be heard as to what would have been the result of the action which is afterwards successfully prosecuted by another attorney. Breathitt Coal, Iron & Lumber Co. v. Gregory, 25 Ky. L. R. 1507, 78 S. W. 148. Where a defendant settles with a claimant, so that the attorney is prosecuting the action for his fees, and the defendant fraudulently keeps the claimant hidden out of the state, so that the attorney cannot prove injuries or damages, the attorney is entitled to recover from the defendant his proportion of the settlement. Powell v. Galveston, etc., R. Co. [Tex. Civ. App.] 78 S. W. 975. Attorneys who undertake to establish a client's right to a fund in court may, in spite of client's direction to proceed no further, continue the proceedings in his name to reverse the decision against him, in order to collect their fee out of the fund. Counsman v. Modern Woodmen of America [Neb.] 98 N. W. 414.

58. Atlanta R. & Power Co. v. Owens, 119 Ga. 833, 47 S. E. 213.

59. Pomeranz v. Marcus, 40 Misc. 442, 82 N. Y. S. 707.

Lien.[60]—An attorney can only claim a lien on money secured by his services when it has come into his possession, or is in an equity case in the grasp of the court;[61] but in a common law action he has no lien on funds brought into court in the action for distribution.[62] No lien on a fund secured by an attorney's services is allowed in Missouri.[66] The lien on a fund can only be for services rendered in the proceeding by which the money was recovered.[64] He can only have a lien on a claim when placed in his hands by a person who has title to it and the right to collect or assign it.[65] An attorney's lien for services rendered is on money due by the adverse party, and not on the judgment recovered. It is for services rendered by himself and not by another employed by him.[66] A client cannot, by dismissing an action and employing another attorney, defeat the lien of an attorney duly employed,[67] and the attorney's lien attaches to the proceeds of a compromise.[68] The act giving an attorney a lien does not apply to a judgment obtained by him before the passage of the act.[69] The New York statute relating to attorneys' liens applies to surrogates' courts; the right is not affected by the fact that the client is an executor, and the services rendered are in behalf of the estate, nor is the lien confined to moneys recovered by judgment.[70] The lien attaches to the whole judgment and the client cannot compel the attorney to forego same on showing that only a small portion of the face value of the judgment can be obtained, and that only in case the lien is extinguished.[71] An attorney's lien on the judgment is superior to defendant's equity of set-off.[72] An attorney has a lien upon the securities of his client,[73] if they come into his hands in the course of his professional employment.[74] In Louisiana attorneys have no lien for their fees prior to judgment.[75]

60. See 1 Curr. L. 272.

61. There is no attorney's lien on money in the hands of a subsequently employed attorney. Seybert v. Salem Tp., 22 Pa. Super. Ct. 459. An attorney who prosecutes an appeal from a city auditing board to the board of county supervisors for the adjustment of a constable's fees has a lien enforceable against the award. Perry v. Myer, 89 N. Y. S. 347.

62. Quakertown & E. R. Co. v. Guarantors' Liability Indemnity Co., 206 Pa. 350, 55 A. 1033.

63. The lien of an attorney is only that which he has as bailee of property coming into his hands. Kersey v. O'Day, 173 Mo. 560, 73 S. W. 481.

64. Halsell v. Turner [Miss.] 36 So. 531. An attorney securing a judgment for a client has no lien on a fund obtained from a bank by garnishment proceedings founded on said judgment, the judgment against the garnishee being procured by another attorney. Raley v. Hancock [Tex. Civ. App.] 77 S. W. 658. An attorney employed by an insolvent debtor to resist claims of creditors has no lien on the fund in the hands of the receiver, nor is he entitled to be paid therefrom. Ford v. Gilbert [Or.] 75 P. 138. An attorney defeating tax liens, under employment by holders of fractional parts of a previously acquired judgment, has no lien on the judgment as against a subsequent purchaser thereof. Alden v. White [Ind. App.] 68 N. E. 913. Nor in procuring a judgment in garnishment has he any lien on the fund for an amount due from his client under a contract made after his client's right had attached by means of the garnishment. Raley v. Hancock [Tex. Civ. App.] 77 S. W. 658.

65. Heirs of a beneficiary of an insurance policy have no right to collect, or assign same, it being the property of the administrator until the payment of debts. Joseph's Adm'r v. Lapp's Adm'r, 25 Ky. L. R. 1875, 78 S. W. 1119.

66. Code, § 321. Gibson v. Chicago, etc., R. Co., 122 Iowa, 565, 98 N. W. 474. The claim for services by an attorney who is employed by another attorney holding contractual relations with the plaintiff is not a lien, nor anything more than a personal claim against the attorney employing him. Hallam v. Coulter, 24 Ky. L. R. 2200, 73 S. W. 772.

67. Gibson v. Chicago, etc., R. Co., 122 Iowa, 565, 98 N. W. 474.

68. Witmark v. Perley, 86 N. Y. S. 756. Plaintiff may settle a case at any time, but the lien continues on the amount agreed on in settlement and may be foreclosed notwithstanding the defendant pays the money to the plaintiff without the attorney's consent. Morehouse v. Brooklyn Heights R. Co., 89 N. Y. S. 332.

69. Young v. Renshaw, 102 Mo. App. 173, 76 S. W. 701.

70. In re Crouch's Estate, 89 N. Y. S. 465.

71. Serwer v. Sarasohn, 91 App. Div. 538, 86 N. Y. S. 838.

72. Barry v. Third Ave. R. Co., 87 App. Div. 543, 84 N. Y. S. 830.

73. In re Sweeney, 86 App. Div. 647, 83 N. Y. S. 680.

74. Winans v. Grable [S. D.] 99 N. W. 1110.

75. While, as between plaintiff and his

Loss of lien.[76]—An attorney's lien is confined to the judgment or fund recovered by him as attorney. His lien on his client's papers depends on his possession, and ceases when he voluntarily parts with such possession.[77] If on a fund collected, it is released by the voluntary payment of the money to the client.[78] The lien for services rendered to an executor is not lost by transfer of the estate, by order of the court, to a co-executor, before final administration,[79] or by the appointment of a guardian for the client.[80]

Enforcement of lien.[81]—A statutory lien can be created and enforced only in the manner prescribed.[82] The written notice of lien required to be served on the defendant must be served personally, and not on the defendant's attorney.[83] If signed as attorney for his client, instead of for himself, it is sufficient to apprise defendant of a claim to a lien as attorney.[84] Where a judgment creditor has no notice of an attorney's intention to claim a lien on certain land belonging to a client, the lien acquired by filing the transcript of his judgment is superior to the attorney's right of lien.[85] The attorney's remedy for enforcing a lien is at common law and where the judgment is satisfied in disregard of his rights, it should be set aside and execution awarded to the extent of the lien.[86] The action to enforce may be brought against the client, or the adverse party, or both,[87] and a reference may be had to determine the amount of the attorney's lien.[88] In New York, the act authorizing the determining and enforcement of an attorney's lien provides a practice only as between attorney and client, and not against a defendant who has settled with plaintiff, unless plaintiff is shown to be insolvent.[89] The proper procedure, where an attorney has been defrauded by the compromise of a judgment upon which he had a lien, is to file an intervening petition and have the amount of his lien judicially determined before other steps are taken for its enforcement.[90] But it is not essential to the existence of the lien that the amount be definitely fixed, an allegation in the complaint of reasonable value is sufficient.[91] An attorney having a lien on a judgment may intervene in proceedings to revive such judgment and is entitled to a revivor thereof in his own name to the extent of his lien.[92] The attorney can follow the proceeds of a

attorney, the former has no right to compromise his claim without the attorney's consent, yet if the defendant is guilty of no collusion to defraud, and is not notified of the transfer to the attorney of all right of compromise, the attorney has no redress against the defendant. Smith v. Vicksburg, S. & P. R. Co. [La.] 36 So. 826.

76. See 1 Curr. L. 274.

77. Hazeltine v. Keenan [W. Va.] 46 S. E. 609. Lien asserted at time of surrendering papers, but no claim for compensation presented for three years. Winans v. Grable [S. D.] 99 N. W. 1110.

78. In an action at law to recover from an attorney part of the money retained by him as fees in a prior case, the attorney is not entitled to have the suit enjoined and his claim determined in equity, there being an adequate remedy at law. German v. Browne, 137 Ala. 429, 34 So. 986.

79. In re Crough's Estate, 41 Misc. 349, 84 N. Y. S. 936.

80. State v. District Court of Second Judicial Dist. of Silver Bow County [Mont.] 75 P. 516.

81. See 1 Curr. L. 275.

82. Nielsen v Albert Lea [Minn.] 98 N. W. 195.

83. Young v. Renshaw, 102 Mo. App. 173, 76 S. W. 701.

84. Gibson v. Chicago, etc., R. Co., 122 Iowa, 566, 98 N. W. 474.

85. Teller v. Hill [Colo. App.] 72 P. 811.

86. Young v. Renshaw, 102 Mo. App. 173, 76 S. W. 701. Where an attorney has served notice of lien for his compensation, and without his knowledge plaintiff before trial settles the case with defendant, the attorney may prosecute the case for his fees, and verdict may be rendered for the reasonable worth of his services, to which verdict his lien will attach. Herman v. Metropolitan St. R. Co., 121 F. 184.

87. Coombe v. Knox, 28 Mont. 202, 72 P. 641.

88. Cohn v. Polstein, 41 Misc. 431, 84 N. Y. S. 1072. On a substitution of attorneys the court may order a reference to determine the amount of the attorney's lien, and may impose ae a condition of the order of substitution that clients pay the amount due. In default of payment the attorney may have an execution. Kane v. Rose, 87 App. Div. 101, 84 N. Y. S. 111.

89. Dumowith v. Marks, 84 N. Y. S. 453.

90. Jones v. Duff Grain Co. [Neb.] 95 N. W. 1.

91. Coombe v. Knox, 28 Mont. 202, 72 P. 641.

92. In such a case the court may render judgment in favor of the attorney and

settlement so far as they belong to his client, and be paid out of them before his client's creditors. He may not continue the action to final judgment to enforce his lien where his client's property is ample to secure the same.[93] An action commenced as in equity to recover the value of services and establish an attorney's lien is properly transferred and triable by a jury.[94]

§ 8. *Authority of attorney to represent client.*[95] *Creation, proof and termination of authority.*[96]—The right of counsel to appear in a cause is generally a question of law for the court,[97] but it may be submitted to the jury for a special finding.[98] In the absence of a statutory requirement that an attorney's authority shall be evidenced in writing,[99] an attorney need not give proof of his authority to appear for a client.[1] It is presumed, and the burden of proof is on the one seeking to show lack of authority.[2] It cannot be questioned by answer, but only by a rule upon the attorney to show by what authority he appears, supported by affidavit showing the facts relied on to question the authority.[3] On a rule to determine the authority of an attorney to prosecute an appeal from a decree of lunacy, under a prior contract with the alleged lunatic, the lunacy decree cannot be treated as an adjudication that he was of unsound mind.[4] An attorney's authority to represent client does not have to be expressly renewed, if the court makes an order of severance and compels separate suits against the different defendants.[5] The adverse party cannot object to an attorney's authority as to acts acquiesced in by the client or his representative.[6] His authority ceases on the death of his client,[7] and as a general rule on the rendition of judgment in the action in which he was employed,[8] though this rule is subject to many exceptions,[9] or in case of an employment to collect, with the taking of security to the satisfaction of his client.[10]

Scope of authority.[11]—An attorney must act strictly within the scope of his

against the judgment debtor to the amount of the lien. Greek v. McDaniel [Neb.] 94 N. W. 518.

93. Cohn v. Polstein, 41 Misc. 431, 84 N. Y. S. 1072. An attorney holding an assignment of a share of damages to be received cannot, by giving notice of the assignment to the defendant, prevent a settlement between him and the client or compel the defendant to account to the attorney for his agreed share. Weller v. Jersey City, etc., R. Co. [N. J. Eq.] 57 A. 730.

94. Sweeley v. Sleman [Iowa] 98 N. W. 571.

95. See 1 Curr. L. 277.

96. Creation and termination of relation, see ante, § 5.

97. State v. De Wolfe [Mont.] 74 P. 1084.

98. Fosha v. Prosser [Wis.] 97 N. W. 924.

99. Pacific Pav. Co. v. Vizelich, 141 Cal. 4, 74 P. 352. The statute providing that the authority of an attorney cannot be questioned if the notice of appeal be signed by appellant has no application where it appears that appellant is a dissolved corporation. Austen v. Columbia Lubricants Co., 87 N. Y. S. 497.

1. Austen v. Columbia Lubricants Co., 85 N. Y. S. 362; State v. Long, 66 S. C. 398, 44 S. E. 960.

2. Uehlein v. Burk, 119 Iowa, 742, 94 N. W. 243; Brown v. Arnold [C. C. A.] 131 F. 723. A judgment against a sheriff for not reserving exemptions at an execution sale will not be reversed on the ground that the record did not show the authority of the attorney claiming the exemption, the point not having been raised at the trial. Fowler v. State [Md.] 58 A. 444.

3. Appearance in bankruptcy for petitioning creditors. Gage & Co. v. Bell, 124 F. 371.

4. Chase v. Chase [Ind.] 71 N. E. 485.

5. Mahler v. Animarium Co. [C. C. A.] 129 F. 897.

6. Where plaintiff in an action dies and the attorney takes subsequent proceedings which are acquiesced in by the executor, defendant cannot object to the attorney's authority. Fisher v. Musick's Ex'r, 24 Ky. L. R. 1913, 72 S. W. 787.

7. Service of notice of appeal on an attorney who had represented a party since deceased is ineffectual. In re Turner's Estate, 139 Cal. 85, 72 P. 718.

8. The employment of an attorney to prosecute a claim to recovery terminates with the rendition of judgment thereon, and the exhaustion of the usual legal process upon the judgment. It does not, in the absence of a showing of different intent, extend to subsequent proceedings against the debtor or his sureties. Lamb v. Wilson [Neb.] 97 N. W. 325.

9. Among these are that he may collect or enforce it, receipt for the proceeds and satisfy the judgment, and oppose steps to review or continue it. Brown v. Arnold [C. C. A.] 131 F. 723. He has the right to receive the money due on the judgment. Rhinehart v. New Madrid Banking Co., 99 Mo. App. 331, 73 S. W. 315.

10. Willis v. Gorrell [Va.] 47 S. E. 826.

11. See 1 Curr. L. 277.

authority.[12] In the absence of a disclaimer a party is presumed to know and acquiesce in the acts of his attorney in the case for which he is employed,[13] within the usual range of his duties,[14] and he is bound by his attorney's errors.[15] The acts of an attorney may be disavowed by a client upon discovery that the attorney, without the client's knowledge, is acting for other and adverse parties in the cause.[16] The actions of an attorney cannot bind a party from whom he has no express authority.[17] The authority of an attorney extends generally to all acts needful to the conduct of the action in which he is engaged, but not in other proceedings not essentially a part thereof,[18] thus he may in the absence of his client, advance legal costs and look to his client for reimbursement,[19] may make affidavits,[20] direct the service of particular notices,[21] enter an appeal,[22] agree to the use of a deposition taken in another action,[23] or agree that the case shall abide the final decision in another case.[24] His general authority does not extend to the dismissal[25] or compromise of an action,[26] the right of dismissal being in the client,[27] or the making of contracts on behalf of his client[28] not necessary to

12. An authority to represent a principal and surety in an action is not authority to sign a stay bond on behalf of the surety. Anderson v. Hendrickson [Neb.] 95 N. W. 844.

13. Lockner v. Holland County Ct., 81 N. Y. S. 730. A client is bound by his attorney's acts where the latter adopts methods which the former does not approve but does not prohibit. Alden v. Dyer [Minn.] 99 N. W. 784. A judgment creditor receiving payments on the judgment is held as having ratified his attorney's acts in enforcing the payments. Florence Cotton & Iron Co. v. Louisville Banking Co. [Ala.] 36 So. 456. Where a party enjoys the benefits of a settlement by his attorney, and has knowledge of the steps taken to procure same he must be held to have ratified his attorney's acts. Collins v. Fidelity Trust Co., 33 Wash. 136, 73 P. 1121. The acceptance, by order of the court, of the proceeds of an unauthorized settlement, and the use by him as directed, do not preclude a party from disregarding the settlement and insisting upon full property rights. Timm v. Timm [Wash.] 75 P. 879.

14. A mere agreement between counsel that the share of one party in the proceeds of sale shall be subject to remittances made by another party is not binding without some evidence that the client really assented thereto. Heyward v. Middleton, 65 S. C. 493, 43 S. E. 956.

15. Where an attorney is authorized to appear specially for a client in an action, and in so doing honestly pleads matters which operate as a general appearance, the client is bound by such general appearance. McNeal v. Gossard [Kan.] 74 P. 628.

16. Attorney for a legatee, acting also as attorney for the executors, without legatee's knowledge. In re Cummings' Estate, 120 Iowa, 421, 94 N. W. 1117.

17. The advice of an attorney not expressly authorized cannot bind a company in a suit for malicious prosecution. Belswanger v. American Bonding & Trust Co. [Md.] 57 A. 202.

18. Brown v. Arnold [C. C. A.] 127 F. 387.

19. In a suit by an attorney for fees and costs an award of damages must be made separately, and a general verdict for plaintiff is erroneous. Shuck v. Pfenninghausen, 101 Mo. App. 697, 74 S. W. 381.

20. Harwell v. Southern Furniture Co. [Tex. Civ. App.] 75 S. W. 888.

21. Cady v. Fair Plain Literary Ass'n [Mich.] 97 N. W. 680.

22. Friar v. Curry, Arrington & Co., 119 Ga. 908, 47 S. E. 206.

23. Thompson v. Ft. Worth, etc., R. Co., 31 Tex. Civ. App. 583, 73 S. W. 29.

24. Brown v. Arnold [C. C. A.] 131 F. 723.

Note: To the same effect see Stone v. Bank of Commerce, 174 U. S. 412, 19 S. Ct. 747; Ohlquest v. Farwell, 71 Iowa, 231, 32 N. W. 277; North Mo. R. Co. v. Stephens, 36 Mo. 150; Eidam v. Finnegan, 48 Minn. 53, 50 N. W. 933.

25. A retraxit, a release, or dismissal, cannot be made by an attorney without special authority therefor. Forest Coal Co. v. Doolittle [W. Va.] 46 S. E. 238. If employed to bring and prosecute an action he has no authority to dismiss same contrary to the desire of his client. Steinkamp v. Gaebel, 89 Neb. 507, 95 N. W. 684.

26. Not to bind his client by an attempted accord and satisfaction. Fosha v. Prosser [Wis.] 97 N. W. 924. Not to compromise an action, or accept land instead of money in satisfaction of a judgment, or authorize the sale of his client's land in payment for services to be rendered. Gray v. Howell, 205 Pa. 211, 54 A. 774. Without express authority, an attorney has no authority to bind his client by a compromise of a pending suit, or any matter entrusted to him. Benedict v. Wilhoite [Ky.] 80 S. W. 1155. An attorney for a wife has no authority to compromise her judgment for alimony pendente lite, though obtained by him while acting as her attorney. Schlemmer v. Schlemmer [Mo. App.] 81 S. W. 636. An attorney authorized by the wife in a divorce case to settle the property rights involved on the basis of an equal division has no right to accept $250 for the wife's right in property worth $3,000. Timm v. Timm [Wash.] 75 P. 879. "Stipulation" in condemnation proceedings by attorney for petitioner. Held, not binding on petitioner as attorney had no power to sign it. Du Pont v. Sanitary Dist. of Chicago, 203 Ill. 170, 67 N. E. 815.

27. A dismissal of a case by a client without costs may be made without the knowl-

the prosecution of the litigation.[29] He may not employ another lawyer to assist him and have the latter's services allowed to him as "personal and incidental expenses" within the statute.[30]

§ 9. *Rights and liabilities to third persons.*[31]—An attorney may be liable personally to a third person for his proceedings in an action.[32]

§ 10. *Law partnerships and associations.*[33]—The general principles of the law of partnerships applies to law firms.[34] A suit to dissolve a law partnership and recover a bonus paid to enter therein is an equity cause, and not simply an action to recover money.[35] Where a contract is made with an attorney that he alone shall render the services, his death terminates the contract, whether he is alone or is a member of a firm.[36] A general contract with a firm of attorneys to render certain services does not entitle client to demand that any particular member must act. In case of death of one member, or dissolution of the firm, the survivor cannot refuse to carry out executory contracts in force at the time, and if carried out the client is liable under the original contract with the firm.[37] Where the services of both members of a firm are contracted for, and one dies, the client may discharge the survivor, settle for services rendered and employ new counsel, but cannot re-employ survivor and defeat claim of estate of deceased partner.[38]

§ 11. *Public attorneys. A. Attorneys general.*[39]—The authority of the attorney general goes not only to the expediency of employing counsel in receivership cases but also to the amount of compensation.[40] Neither the attorney general, nor any officer of the department of justice is authorized to aid in the proceedings before a grand jury, nor can they delegate such authority.[41] A deputy attorney general, in admitting due personal service of papers, may act beyond his authority, but jurisdiction is thereby acquired as against the attorney general, and proceeding taken in consequence cannot be attacked collaterally.[42] The attorney general may authorize the employment of stenographers by the various district attorneys in government cases.[43] The attorney general is the legal adviser of the state officers, and where his salary is named in the constitution of the

edge or consent of his attorney of record. Paulson v. Lyson [N. D.] 97 N. W. 633. Parties to an action may settle litigation without consultation with the attorneys of either party, if not defeating any of the attorney's rights. Nielsen v. Albert Lea [Minn.] 98 N. W. 195.

28. An attorney cannot without special authority bind his client by a new promise to pay a debt cancelled by insolvency proceedings. Houghton v. Ellis [Colo. App.] 73 P. 752.

29. The standing attorney of a foreign corporation instructed to foreclose a trust deed has implied authority to make contracts necessary to accomplish such foreclosure. Fowler v. Iowa Land Co. [S. D.] 99 N. W. 1095.

30. In re Waldheimer, 84 App. Div. 366, 82 N. Y. S. 916.

31. See 1 Curr. L. 278.

32. An attorney who collects a judgment from a debtor and fraudulently collects same again from his surety is liable to the surety in a suit by him to recover the amount, and it is no defense that the attorney claims he was acting for the judgment creditor. Parsons v. Maxwell, 53 W. Va. 39, 44 S. E. 172. An attorney having an interest in certain proceedings and appearing for an undisclosed principal, is personally liable for services therein rendered at his request by a third party. Ross v. Niles, 84 N. Y. S. 142. An attorney is not liable to a sheriff for fees for levy made and released, where he did not satisfy the judgment or countermand the execution. O'Brien v. Allen, 40 Misc. 693, 83 N. Y. S. 251.

33. See 1 Curr. L. 279.

34. A law firm may sue on a contract for services made by a single member. Dennis v. First Nat. Bank, 33 Wash. 161, 73 P. 1125.

35. A bonus paid to enter the partnership should on dissolution be apportioned to the agreed and actual duration thereof. Hoyt v. Easton, 40 Misc. 264, 81 N. Y. S. 914.

36, 37, 38. Clifton v. Clark, Hood & Co. [Miss.] 36 So. 251.

39. See 1 Curr. L. 279.

40. Candee v. Cunneen, 86 N. Y. S. 723.

41. A special assistant to the attorney general is not an officer of the department of justice. U. S. v. Rosenthal, 121 F. 862.

42. Townsend v. Oneonta, etc., R. Co., 84 N. Y. S. 117.

43. An allowance per diem to stenographer if report not transcribed, and a certain amount per folio if transcribed, gives district attorney authority to have as much transcribed as he needs and to pay per diem for the balance. Swift v. U. S., 128 F. 763.

state, it fixes his entire compensation, so that a statute giving him a salary and fees is invalid.[44]

(§ 11) *B. District and state's or prosecuting attorneys.*[45]—A county attorney has authority to waive issuance and service of the summons in error in a case against the county in which he has appeared for it at the trial.[46] A county is not obliged to pay for legal services rendered at the instance of the county attorney without the authority of the county board.[47] The question as to whether an action in the county's name by the county attorney was sufficiently authorized cannot be raised by demurrer.[48] A district attorney of the United States, in condemnation proceedings by the government, has the same authority to submit the damages to arbitration as the attorney for an individual litigant would have.[49] Where the prosecution of crime by the commonwealth's attorney is provided for by statute, the employment of other attorneys for that purpose is not justified,[50] but an authority for a county to prosecute actions by the "county attorney or other person" is sufficient warrant for employing an attorney therefor.[51] A county attorney may be appointed by a board of county commissioners for the term for which such board is elected.[52] Under certain circumstances a county attorney pro tem. may be appointed.[53] A deputy county attorney, as such, may perform any duty devolving upon the county attorney.[54] A county attorney cannot contract with the county for extra-official services.[55] A state's attorney has the right to the aid of the prosecutor in a criminal case, but if he desires to use him as a witness, where the exclusion of witnesses has been ruled, he should examine him first.[56] A city attorney cannot compromise litigation in which the city is interested, without the consent of the mayor.[57] A district attorney is entitled to compensation for his services in prize cases in addition to his salary.[58] Where a commonwealth's attorney is compensated in part by a percentage of the fines paid into the county treasury, he may claim his share when the fines are paid, even though in the early part of the year it may make up the amount limited as his annual salary.[59] It is against public policy for public officers to defend actions for purely personal torts at the expense of the public.[60] The failure of a county attorney to turn over money voluntarily collected by him, and not in the performance of his official duties, does not render his sureties liable.[61] A prosecuting attorney is the proper one to protect the interests of a lunatic.[62]

44. State v. Maynard [Wash.] 76 P. 937.

45. See 1 Curr. L. 279.

46. Dakota County v. Bartlett [Neb.] 93 N. W. 192.

47. Card v. Dawes County [Neb.] 99 N. W. 662.

48. Otoe County v. Dorman [Neb.] 98 N. W. 1064.

49. Judson v. U. S. [C. C. A.] 120 F. 637.

50. Under a statute allowing compensation to attorneys appointed to enforce the laws relating to insurance companies, compensation to an attorney who prosecuted an insurance agent for soliciting without a license is not justified, such prosecution being the duty of the commonwealth's attorney. Ky. St. 1899, § 762, construed. Sims v. Com., 25 Ky. L. R. 282, 74 S. W. 1097.

51. Heath v. Albrook [Iowa] 98 N. W. 619. A county may, if necessary, employ counsel in addition to the district attorney. Santa Cruz County v. Barnes [Ariz.] 76 P. 621.

52. Hancock v. Craven County Com'rs, 132 N. C. 209, 43 S. E. 634.

53. Daniels v. State [Tex. Cr. App.] 77 S. W. 215.

54. Canada v. Territory, 12 Okl. 409, 72 P. 375.

55. Wilson v. Otoe County [Neb.] 98 N. W. 1050. In the absence of statutory authority a district attorney cannot make a county liable by contracting with a surgeon for a postmortem examination in a case where death by crime is suspected. Jones v. Sunflower County [Miss.] 36 So. 188. The prosecutor of the pleas has no power to bind the county by a contract with a detective to secure evidence of the violation of laws. The judgment that the detective could not recover on such contract does not preclude him from enforcing his claim for services. Gibboney v. Board of Chosen Freeholders [C. C. A.] 122 F. 46.

56. Smartt v. State [Tenn.] 80 S. W. 586.

57. Lake v. Hood [Tex. Civ. App.] 79 S. W. 323.

58. The Adula, 127 F. 853.

59. Hager v. Franklin [Ky.] 81 S. W. 926.

60. Corporation attorney not to defend policemen sued for a willful assault in making an arrest. Donahue v. Keeshan, 91 App. Div. 602, 87 N. Y. S. 144.

AUCTIONS AND AUCTIONEERS.

License and regulation.[63]—Unless required by statute, a license is not necessary;[64] but where a license fee is paid, it cannot be recovered on the enactment of a law making license unnecessary.[65] Where a resident auctioneer may make sales without a license, one temporarily resident may.[66]

Sale.[67]—A purchaser must comply with the terms of the sale,[68] and when he does so is entitled to the property purchased or damages for breach of contract.[69] Where there is no agreement as to credit and there has been no delivery, title will not pass until the purchase price is paid;[70] but if the terms provide for credit, it is optional with the purchaser to take it or pay cash.[71] A misdescription of the property in an advertisement of an auction sale,[72] or misleading and untrue statements made by the auctioneer at the time of the sale,[73] will release the purchaser, providing they were believed and acted upon by him.[74] That a corporation could not become an auctioneer cannot be set up as a defense by itself and the surety on the bond.[75]

BAIL, CIVIL.

The discharge of the debtor exonerates the bail;[76] that the order of discharge is reversed upon appeal and the debtor ordered to surrender himself is immaterial.[77] The judgment against the surety cannot exceed the amount of the

61. Wilson v. State, 67 Kan. 44, 72 P. 517.

62. Burns' Rev. St., § 2175. Chase v. Chase [Ind.] 71 N. E. 485.

63. See 1 Curr. L. 283.

64. Under city ordinance for licensing auctioneers, passed July 1902, no fees became due until June 1903. A prosecution and conviction for doing business without a license before that time was set aside. Atlantic City v. Freisinger, 69 N. J. Law, 132, 54 A. 249.

65. Under laws requiring a license fee, an auctioneer paid the fee from September, 1897, to September, 1898. Laws going into effect January 1, 1898, required no license fee. Held, the auctioneer could not recover back the proportionate part of his fee, as the latter act did not repeal the former or make the license void. Ryan v. New York, 40 Misc. 228, 81 N. Y. S. 685.

66. Statute inflicting a penalty for auctioneers, who sold without a license, excepted sales by a person made in the county where he resides. Held, one temporarily in the county was a resident. State v. Cunningham, 75 Vt. 332, 55 A. 654.

67. See 1 Curr. L. 283.

68. That the bidder must deposit a certain sum as soon as property is struck off and within 30 days examine the title and call at the office of the auctioneer prepared to take the deed and pay the balance. Sirk v. Emery, 184 Mass. 22, 67 N. E. 668.

69. When one bid in real property sold at auction, evidence that he looked up the title and tendered the purchaser price held sufficient to show that he was prepared to comply with terms of the sale. Sirk v. Emery, 184 Mass. 22, 67 N. E. 668. Refusal to deliver a horse sold at auction. Gruell v. Clark [Del. Super.] 54 A. 955.

70. A small portion of the purchase price was paid, and receipts for overdue interest on a mortgage for which there was no evidence that the vendor was liable was tendered. Held, the vendee had no right of possession so as to entitle him to maintain replevin. Haud v. Matthews [Pa.] 57 A. 351.

71. Terms of auction sale provided "sales over $10.00 a credit of eleven months will be given." Tender of cash instead of a note was compliance with terms. Gruell v. Clark [Del.] 54 A. 955.

72. That a sale of ground rent was of the "Calverton stock-yards," when the ground never belonged to the Calverton stock-yards. The description by courses and distances was correct. Doyle v. Whitridge, 97 Md. 711, 55 A. 459.

73. False statement that certain persons were lessees of the property, the ground rent of which was sold. Doyle v. Whitridge, 97 Md. 711, 55 A. 459.

74. An auctioneer represented a horse he was selling to be but eight years old. Just before the purchaser bid he was told by others that the mare was fifteen. Held, he could not rescind the sale. Korbel v. Skocpol [Neb.] 96 N. W. 1022.

NOTE. Chilling bids by appeal to sympathy: The only American case discussing the effect of an appeal to sympathy without fraud or misrepresentation is Herndon v. Gibson, 38 S. C. 357, 17 S. E. 145, 20 L. R. A. 545, in which it was held that a mortgage sale should be set aside because of an announcement by the mortgagor that she was a widow, dependent on the land for support, and desired to bid it in herself. To the same effect is the English case of Fuller v. Abrahams, 3 Brod. & B. 116.

75. A corporation executed a bond as auctioneer and received goods to be sold. In an action for the price of goods, it set up that, under the law, it could not become an auctioneer. Held, it was estopped. Lyon Bros. & Co. v. Stern, 110 La. 473, 34 So. 641.

76, 77. People v. Hathaway, 206 Ill. 42, 68 N. E. 1053.

bond.[78] An attorney violates his bond for the liberty of jail limits by going beyond such limits in the performance of professional engagements.[79] One arrested on a capias ad satisfaciendum, giving a bond for the liberty of jail limits and being thereafter surrendered by his sureties upon giving another such bond, is confined by virtue of a capias ad satisfaciendum.[80] Plaintiff being entitled upon forfeiture to an assignment of the bond, it may be assigned by a deputy sheriff.[81] A mere offer to surrender the principal in exoneration after the surety's time to answer has expired is unavailable as a defense to the action against said surety,[82] and the fact that such insufficient exoneration was performed upon the advice of an attorney is no ground for a new trial.[83] Such sureties not having a valid defense, the denial of the motion for a new trial upon an erroneous ground is harmless.[84] The denial of an exoneretur sought on the ground of the principal's discharge in bankruptcy is not res judicata of the bail's general liability on the bond.[85] In an action against the sureties, a return of "Not found" by the sheriff is conclusive.[86]

BAIL, CRIMINAL.

§ 1. Authority to Take and Right to Give Bail (395).
§ 2. Making of Recognizance and Sufficiency (396).
§ 3. Fulfillment or Forfeiture; Discharge; Rights and Liabilities of Sureties (397).
§ 4. Enforcement of Bond or Recognizance (398).
§ 5. Remission of Forfeiture and Return of Deposit in Lieu of Bail (399).

§ 1. *Authority to take and right to give bail.*[87]—The taking of bail consists in the acceptance by a competent court, magistrate or officer of the undertaking of sufficient bail for the appearance of the defendant, according to the terms of the undertaking that the bail will pay to the state the sum specified.[88] Excessive bail cannot be required.[89] The statutory deposit in lieu of bail may be made only by the defendant,[90] and a city council cannot confer authority upon policemen or police judge to accept a deposit in lieu of recognizance.[91] In general, bail is allowable in all cases "except capital offenses, where the proof is evident or the presumption great;"[92] but in Georgia, it is peculiarly within the discretion of the judge of the superior court to grant bail in capital cases.[93] If bail be any-

78. Garofalo v. Privіdi, 87 N. Y. S. 467.
79. Professional duties called for his presence at the supreme court. Hughes v. Hally [Mich.] 100 N. W. 591.
80. Within Comp. Laws, § 10,521, providing the measure of damages for forfeiture in such cases. Hughes v. Hally [Mich.] 100 N. W. 591.
81. Construing Comp. Laws, § 10,520. Hughes v. Hally [Mich.] 100 N. W. 591.
82. Construing Code Civ. Proc. § 599. Garofalo v. Privіdi, 87 N. Y. S. 467.
83, 84. Garofalo v. Privіdi, 87 N. Y. S. 467.
85. Petition prayed that an order might be entered discharging the bail from liability. People v. Hathaway, 206 Ill. 42, 68 N. E. 1053.
86. Garofalo v. Privіdi, 87 N. Y. S. 467; Kirk v. U. S., 13 F. 331; In re Beavers, 131 F. 366; State v. Haryzeil [N. D.] 100 N. W. 745; State v. Williams [Or.] 77 P. 965.
87. See 1 Curr. L. 284.
88. Ind. Ter. Ann. St. 1899, § 1385. Simon v. U. S. [Ind. T.] 76 S. W. 280.
89. State v. Lagoni [Mont.] 76 P. 1044.
90. Code, § 5524. The defendant cannot be lawfully discharged where deposit is made by a third party, and when such a deposit after an unauthorized acceptance thereof in lieu of bail has been restored to the depositor, the state cannot compel its return. State v. Anderson, 119 Iowa, 711, 94 N. W. 208.
91. Richardson v. Junction City [Kan.] 77 P. 691.
92. There being a doubt as to the question of self defense, defendant should be admitted to bail. Ex parte Majors [Miss.] 34 So. 151; State v. Lagoni [Mont.] 76 P. 1044. Upon the examination, it not being absolutely clear and conclusive beyond any reasonable doubt that the accused is guilty of a capital crime, he should be admitted to bail. Ex parte Locklin [Tex. Cr. App.] 72 S. W. 585. One held for murder in the second degree, it not being a capital offense under the allegations of the indictment, is entitled to bail. Accused was acquitted of murder in first degree and secured a reversal of his conviction for second degree. Ex parte Moore [Tex. Cr. App.] 80 S. W. 620. The supreme court on appeal will award bail in a murder case, if it should have been awarded, without discussion. Ex parte Smith [Tex. Cr. App.] 76 S. W. 917.
93. In the absence of a manifest and flagrant abuse of such discretion, the ruling

wise admissible, it may ordinarily be taken pending an appeal as well as before the original hearing;[94] but one is not entitled to bail, where, pending an appeal on a refusal to bail, he is indicted for the alleged crime,[95] and in Louisiana, a sentence of death or hard labor is a bar to bail, pending an appeal.[96] The courts are unwilling to hold that Federal circuit judges possess no power of admitting to bail other than as specifically vested by statute,[97] or that while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case extend that relief.[98] Upon reversal of a conviction, the accused cannot be compelled to give a new bond, but is entitled to his liberty under the original bond,[99] and the Texas statute does not authorize the magistrate to require an increase of bail after the bail of one under indictment has once been fixed.[1] In Kentucky, one charged with a felony cannot be admitted to bail before being brought before a magistrate, and a bail bond so given is void.[2] One held to bail pending an examination for removal is not subject to arrest until the first proceeding is determined.[3]

§ 2. *Making of recognizance and sufficiency.*[4]—Bail bonds should be construed with reference to the laws of the sovereign jurisdiction relating thereto, where given,[5] but a bond which cannot be lawfully required of the accused is nudum factum.[6]

A bail bond need not be approved,[7] but it will be presumed that the officer taking the bond did his duty.[8] A recognizance must be in substantial compliance with the statute,[9] and strictly conform to the facts in its recital of the judgment,[10]

will not be disturbed. Jernagin v. State, 118 Ga. 307, 45 S. E. 411.

94. Upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort be absolutely compelled to undergo imprisonment. In re Ah Tai, 125 F. 795. Pending an appeal in deportation proceedings, a Chinaman may be admitted to bail. U. S. Comp. St. 1901, p. 1322, does not apply when appeal is pending. Id. Relator indicted for murder held entitled to bail pending appeal. Ex parte Yerwood [Tex. Cr. App.] 81 S. W. 708.

95. Ex parte Forney [Tex. Cr. App.] 76 S. W. 440.

96. Rev. St. 1876, § 1007. State v. Williams [La.] 35 So. 140.

97, 98. Wright v. Henkel, 190 U. S. 40, 23 S. Ct. 781, 47 Law. Ed. 948. The circuit court held itself to be without power to admit to bail in foreign extradition cases. In re Wright, 123 F. 463.

99. Jenkins v. State [Tex. Cr. App.] 76 S. W. 464.

1. White's Ann. Code Cr. Proc. 1895, § 295 refers only to preliminary or examining trials. Jenkins v. State [Tex. Cr. App.] 77 S. W. 224.

2. Com. v. Phillips, 25 Ky. L. R. 544, 76 S. W. 118.

3. When bail is given, the principal is regarded as delivered to the custody of the sureties; it is a continuation of the original imprisonment. In re Beavers, 125 F. 988.

4. See 1 Curr. L. 285.

5. Boyles v. State [Wash.] 77 P. 198.

6. State v. Lagoni [Mont.] 76 P. 1044.

7. It is sufficient that the constable took the bond, placed it with the magistrate and released the prisoner. Crumpecker v. State [Tex. Cr. App.] 79 S. W. 554.

8. Recitals in the bond, in connection with the above presumption, held sufficient evidence that C. M. Porter and Charles Porter were one and the same person. State v. Porter [S. D.] 99 N. W. 80.

9. Angel v. State [Tex. Cr. App.] 80 S. W. 379. It is not a fatal defect that a recognizance reads "before the court in session" instead of "in open court" (Haley v. State [Tex. Cr. App.] 74 S. W. 38), or that the bond reads the defendant is bound in the full sum of two hundred dollars "and the sureties in additional sums of two hundred dollars each" whereas the statute requires that each be severally bound [Code Cr. Proc. § 887] (Id.). Under section 887, Code Cr. Proc., it must state that the accused was convicted "in this cause" and what the cause was, and must not be more onerous than the law provides in requiring his personal appearance. Robertson v. State [Tex. Cr. App.] 78 S. W. 517. The accidental substitution of the word "counseled" for "convicted" is fatal [Section 887, Code Cr. Proc.]. Allen v. State [Tex. Cr. App.] 79 S. W. 308. It must state that the defendant is charged with an offense against the law; "stands charged with the offense of unlawfully carrying a pistol" is not sufficient. Anderson v. State [Tex. Cr. App.] 72 S. W. 593. It must be for the statutory amount, and an undertaking for $40.00 is not sufficient when the minimum allowed is $50.00. Xydias v. State [Tex. Cr. App.] 76 S. W. 761. In Texas, a bond is void which is given over two months before the convening and adjourning of the term of court for which appearance is required. Douthit v. State [Tex. Cr. App.] 73 S. W. 809.

Time appearance required must be stated. It must etate the term of court at which the accused should appear [Cr. Code, § 4362]. Tolleson v. State [Ala.] 35 So. 997. Requiring defendant to appear "at the next

and in the case of an appeal bond, must be executed at the time of perfecting the appeal.[11]

§ 3. *Fulfillment or forfeiture; discharge; rights and liabilities of sureties.*[12] —A recognizance is defeasible only by a strict performance with the conditions therein named,[13] and the accused must appear at the time designated and deliver himself into the custody of the officers.[14] A condition that defendant appear at a certain term of court cannot be declared forfeited where he did appear and was tried,[15] and such a condition will not be construed as an obligation to appear from term to term,[16] but will continue in force where there is an adjournment or continuation of the term.[17] A bond is not forfeited by one who has previously pleaded to the charge of a misdemeanor, failing to appear and plead personally,

term of court" is not sufficient under a statute requiring an appearance at the court of conviction from day to day and from term to term. Anderson v. State [Tex. Cr. App.] 76 S. W. 470. Requiring an appearance at the "next regular term and there remain from day to day and from term to term of said court" is not sufficient under Code Cr. Proc. § 887, requiring an appearance "from day to day and from term to term." Franklin v. State [Tex. Cr. App.] 76 S. W. 470. That the accused shall appear "from day to day and from time to time" is not a substantial compliance with section 887, Code Cr. Proc., which requires an appearance from "term to term." Fulton v. State [Tex. Cr. App.] 78 S. W. 227. To appear "until this case is finally disposed of" is not in compliance with section 887, Code Cr. Proc., requiring an appearance "to abide the judgment of the court of criminal appeals of the state of Texas in this case." Cooper v. State [Tex. Cr. App.] 78 S. W. 346. "Until discharged by due course of law" is not in compliance with section 887, Code Cr. Proc., requiring that the accused "shall not depart without leave of this court." Cooper v. State [Tex. Cr. App.] 78 S. W. 346; Robertson v. State [Tex. Cr. App.] 78 S. W. 517. "And not depart without leave of the court" is not fatally defective because it should read "without leave of this court." Kees v. State [Tex. Cr. App.] 72 S. W. 855.

Description of offense: "An aggravated assault" is sufficient as a recital that the offense was a misdemeanor. Kees v. State [Tex. Cr. App.] 72 S. W. 855. A recital of the offense of "swindling over the value of $50.00" is sufficient designation as a felony, under a statute requiring a designation as a misdemeanor or a felony. White v. State [Tex. Cr. App.] 74 S. W. 770. A failure to recite that the defendant was convicted in the particular case of a misdemeanor and his punishment assessed, etc., is fatal under Code Cr. Proc. 1895, § 887. Cater v. State [Tex. Cr. App.] 77 S. W. 12; Hannon v. State [Tex. Cr. App.] 73 S. W. 1053; Angel v. State [Tex. Cr. App.] 80 S. W. 379. The bond must state the conviction of a misdemeanor "on an information on complaint" [Code Cr. Proc. 1895, § 889]. Day v. State [Tex. Cr. App.] 80 S. W. 373. "Who has been convicted in this court of a misdemeanor" is not in compliance with section 887, Code Cr. Proc., requiring the words, "who has been convicted in this cause of a misdemeanor." Perkins v. State [Tex. Cr. App.] 78 S. W. 346. A recognizance conditioned that the said Holcomb, who stands charged in this court of the offense of aggravated assault, and who has been convicted and his punishment assessed, etc., is not sufficient under section 887, Code Cr. Proc. Holcomb v. State [Tex. Cr. App.] 78 S. W. 231. The recognizance in an action for unlawfully selling liquor must state such sale to have been "without the written consent of the parent or guardian, or some one standing in their stead," where such is an ingredient of the offense. Mitchell v. State [Tex. Cr. App.] 72 S. W. 594.

The punishment assessed must be stated [section 887, Code Cr. Proc.]. Allen v. State [Tex. Cr. App.] 79 S. W. 537; Bean v. State [Tex. Cr. App.] 76 S. W. 759; Bourland v. State [Tex. Cr. App.] 77 S. W. 455; Angel v. State [Tex. Cr. App.] 80 S. W. 379; Hannon v. State [Tex. Cr. App.] 73 S. W. 1053; Anderson v. State [Tex. Cr. App.] 72 S. W. 593; Jackson v. State [Tex. Cr. App.] 73 S. W. 1055.

Omitting the concluding phrase, "in this case" is fatally defective under section 887, Code Cr. Proc. Gaither v. State [Tex. Cr. App.] 78 S. W. 234; Lockett v. State [Tex. Cr. App.] 78 S. W. 234; Franklin v. State [Tex. Cr. App.] 76 S. W. 759; Armstrong v. State [Tex. Cr. App.] 77 S. W. 446; Heinen v. State [Tex. Cr. App.] 74 S. W. 776; Meeks v. State [Tex. Cr. App.] 74 S. W. 910.

10. A recital that the judgment was $25.00 fine and 20 days' imprisonment is fatal where the fine was $35.00 and the imprisonment for 25 days. Hargrove v. State [Tex. Cr. App.] 76 S. W. 926. A recital merely that defendant was convicted and appeals is fatal where in fact the appeal is from an order dismissing an appeal. Buck v. State [Tex. Cr. App.] 77 S. W. 12.

11. A new bond cannot be subsequently executed to supply defects in the original bond, though it be an appearance bond. Lydias v. State [Tex. Cr. App.] 76 S. W. 761.

12. See 1 Curr. L. 286.

13. State v. Bongard, 89 Minn. 426, 94 N. W. 1093.

14. Lawrence v. Com., 25 Ky. L. R. 455, 76 S. W. 10.

15. Such a bond thereupon becomes functus officio. Fortenberry v. State [Tex. Cr. App.] 79 S. W. 538.

16. The term of court at which defendant was recognized to appear was held, but no action was taken for forfeiting the recognizance until a subsequent term. Bartling v. State [Neb.] 93 N. W. 1047.

17. And the liability of the surety extends to the next term [Comp. St. §§ 32, 33, c. 19]. Bartling v. State [Neb.] 93 N. W. 1047.

when the case is called for trial.[18] In Louisiana, the exact condition required by law for forfeiture must be shown to have been strictly fulfilled.[19]

The court in which the indictment is pending has jurisdiction to declare a forfeiture,[20] but the magistrate is not bound to enter the forfeiture upon the day of the breach.[21]

Sureties on a bail bond can only be discharged from liability by the appearance of their principal according to the condition of the recognizance, or by some intervening act of God, or the law of the state or of the obligee, which renders the performance of that condition impossible,[22] but the obligors of a bond have a right to insist that the prosecution observe the mandates of the statute.[23] The surrender of the defendant by his surety must be made to the sheriff or within the prison.[24] An oral order of release of the accused is sufficient so far as the prisoner and his sureties are concerned.[25]

A continuance of the cause, without consent of the accused, does not discharge the sureties,[26] nor does a failure of the clerk to mark the recognizance "filed,"[27] nor that it was taken by the court at chambers after an adjournment until the next day,[28] nor that it states the offense as V. L. O. L. meaning a violation of the local option law;[29] but it is a good defense that the indictment against the principal is void,[30] and a judgment of forfeiture will be reversed where an indictment or information was not filed within the statutory period after the accused was held to answer.[31]

The seizure of the accused, bailed on a charge of misdemeanor, is a satisfaction of the recognizance,[32] and the execution of an appeal recognizance releases the sureties on the bond below;[33] abandonment of a prosecution is a bar to recovery on a bail bond.[34]

§ 4. *Enforcement of bond or recognizance.*[35]—In an action against the sureties on a recognizance, it is immaterial that the accused may not have signed it,[36]

18. One accused of a misdemeanor may appear by counsel for any other purpose than to plead guilty [Code Cr. Proc. § 335]. People v. Welsh, 88 App. Div. 65, 84 N. Y. S. 703.

19. Failure of the accused to appear does not work a forfeiture of a bond conditioned that he shall appear when notified and such notice was not given. Notice to the sureties is not sufficient, under such a bond. But see, the dissenting opinion. Louisiana Soc. for Prevention of Cruelty to Children v. Moody, 111 La. 199, 35 So. 516.

20. Kirk v. U. S., 124 F. 324.

21. An entry at a subsequent date is equally good. Lawrence v. Com., 25 Ky. L. R. 455, 76 S. W. 10.

22. Illness, however severe and critical, is not a legal defense for nonappearance. Ringeman v. State, 136 Ala. 131, 34 So. 351.

23. Delay of more than the statutory period in the filing of an information is a good defense in an action upon the bond. Boyles v. State [Wash.] 77 P. 198.

24. The accused voluntarily entered the court room, where the sheriff took him into custody; held not to be a surrender by the surety. State v. Bordelon, 111 La. 105, 35 So. 476.

25. State v. Lagoni [Mont.] 76 P. 1044.

26. State v. Ballentine [Mo. App.] 80 S. W. 317.

27. It was in the possession of the clerk and showed on its face that it had been taken and approved by the judge of the court. State v. Ballentine [Mo. App.] 80 S. W. 317.

28. Rev. St. 1899, § 4160 does not limit the judge's power under Rev. St. 1899, § 2543. State v. Woodson [Mo.] 78 S. W. 603. In the absence of proof to the contrary, it will be assumed that the justice had not finally adjourned his court at the time of approving the bond. Crumpecker v. State [Tex. Cr. App.] 79 S. W. 564. A defense that the bond was taken when the court was not in session may be raised without a plea of non est factum. Id.

29. The sureties were in no way misled as to the character of the obligation. Allen v. Com., 24 Ky. L. R. 2257, 73 S. W. 1027.

30. Williams v. Candler, 119 Ga. 179, 45 S. E. 989.

31. Ball. Ann. Codes & St. § 6910. Boyles v. State [Wash.] 77 P. 198.

32. Code Cr. Proc. art. 910, provides that in a misdemeanor, judgment being affirmed, no proceedings need be had after filing the mandate, except to forfeit the recognizance or issue a capias or an execution. Carleton v. State [Tex. Cr. App.] 73 S. W. 1044.

33. Dismissal of the appeal does not revive the liability of the original sureties. Bailey v. State, 71 Ark. 498, 76 S. W. 551.

34. Louisiana Soc. for Prevention of Cruelty to Children v. Moody, 111 La. 199, 35 So. 516.

35. See 1 Curr. L. 287.

36. State v. Ballentine [Mo. App.] 80 S. W. 317. But the surety need not sign until the principal has done so. State v. Quattlebaum [S. C.] 45 S. E. 162.

but the failure of the sureties to sign is fatal.[37] An action on a bail bond may be brought in the district where the forfeiture occurred,[38] and in South Carolina, the court of general sessions has jurisdiction.[39]

A scire facias on a forfeited bail bond, not being a civil action, need contain no prayer for judgment.[40] Such writ may be issued by the court to which the criminal prosecution was removed by change of venue.[41] The alteration of a complaint against the principal on a forfeited bail bond, who has been rearrested, does not affect the scire facias proceedings.[42]

The complaint for forfeiture of a bail bond need not allege the filing of the bond,[43] nor with particularity that the defendant was released,[44] but it must state that the court declared the undertaking forfeited,[45] and that the amount due thereon has not been paid.[46]

The court has authority to order the institution of a proceeding upon a bail bond,[47] and may allow an amendment of the citation to the surety, he being in court.[48] In Kentucky, no pleading is required of the commonwealth in proceedings upon forfeited bail bonds.[49]

A stipulation in a recognizance, consenting to judgment immediately upon forfeiture, is a bar to an appeal from such a judgment.[50]

§ 5. *Remission of forfeiture and return of deposit in lieu of bail.*[51]—In an action upon a recognizance, the trial judge may remit any portion of the sum declared forfeited,[52] even after the close of the term in which forfeiture occurred;[53] but the release of defendant's co-sureties does not affect his liability for his proportionate share.[54] An application to set aside a forfeiture must be made within the statutory period.[55] In New York, there is no statutory limitation,[56] but a delay of sixteen years constitutes laches.[57] A forfeited bond will not be remitted where the principal violated one of the conditions by leaving the state temporarily, and he was never surrendered by his sureties and his subse-

37. The signing of an affidavit of justification at the end of the bond is not equivalent to signing the bond. Nelson v. State [Tex. Cr. App.] 73 S. W. 398.

38. The accused was arrested and committed in the central district of Indian Territory, and gave bail for appearance in the southern district; the bond being forfeited, an action thereon was properly laid in the southern district. Simon v. United States [Ind. T.] 76 S. W. 280.

39. Under Cr. Code, § 85, the court of common pleas is without such jurisdiction. State v. Quattlebaum [S. C.] 45 S. E. 162.

40, 41. State v. Baughman [Mo. App.] 74 S. W. 433.

42. A new count was inserted in the complaint. Abbott v. State [Tex. Cr. App.] 78 S. W. 510.

43. Rev. St. 1898, § 4686, only requires that the bond be returned to the clerk. State v. Davis [Utah] 75 P. 857.

44. It is sufficient to allege that the defendant was "admitted to bail." State v. Davis [Utah] 75 P. 857.

45, 46. State v. Lagoni [Mont.] 76 P. 1044.

47. Sess. Laws 1901, p. 70, c. 69. State v. Davis [Utah] 75 P. 857.

48. Amendment by inserting a date. White v. State [Tex. Cr. App.] 74 S. W. 770.

49. Cr. Code, § 94, sub. 3. Lawrence v. Com., 25 Ky. L. R. 455, 76 S. W. 10.

50. An order denying a motion to vacate the judgment is binding on the surety, in the absence of an appeal from such order. People v. Pernetti, 88 N. Y. S. 714.

51. See 1 Curr. L. 287.

52. This rests entirely in the discretion of the court, and it may entertain an application at any time before final judgment. State v. Bongard, 89 Minn. 426, 94 N. W. 1093; In re Sayles, 40 Misc. 135, 81 N. Y. S. 258. It is not an abuse of discretion for the court to remit only a part of a forfeited recognizance, though the accused subsequently submitted to trial, there being unusual equities involved. The offense was fornication and bastardy. Com. v. Cohen, 22 Pa. Super. Ct. 55. Final disposition of a recognizance is left to the discretion of the court. Com. v. Real Estate, Title Ins. & Trust Co., 22 Pa. Super. Ct. 235.

53. Mere forfeiture of a recognizance is not such a judgment as passes from the control of the court at the close of the term. Com. v. Real Estate Title Ins. & Trust Co., 22 Pa. Super. Ct. 235.

54. The cosureties, upon their own application, were released upon payment of $281.00 each, but defendant was compelled to pay $1,250.00. State v. Bongard, 89 Minn. 426, 94 N. W. 1093.

55. State v. Bordelon, 111 La. 105, 35 So. 476.

56. In re Sayles, 40 Misc. 135, 81 N. Y. S. 258.

57. A refusal to remit the forfeit after such a period is not an abuse of discretion. In re Sayles, 84 App. Div. 210, 82 N. Y. S. 671.

quent appearance was not a voluntary one.[58] A surety moving for exoneration departs from the statutory procedure at his peril.[59] A certificate of the district attorney that the state has lost no rights is not a prerequisite to an application for remission of a forfeited bail bond, in New York City.[60]

The state cannot compel a return of a deposit, accepted without authority from a third person, and restored to him,[61] but a deposit in lieu of bail, of money belonging to another, may be recovered from the county.[62]

BAILMENT.[63]

§ 1. Definition; Creation of (400).
§ 2. Rights and Liabilities as Between Bailor and Bailee (401).
§ 3. Rights and Liabilities of Third Persons (403).

§ 1. *Definition; creation of.*[64]—A bailment consists in the delivery of personal property by one person to another to be held according to the purpose or object of the delivery, and to be returned or delivered over when that purpose is accomplished.[65] To constitute a bailment the bailee must acquire independent and temporarily exclusive possession of the property.[66] A bailment has been said to exist whenever the ownership and possession of specific corporeal chattels are lawfully severed from each other.[67] To create the relation of bailor and bailee there must be an agreement to return the identical property received;[68] and if it be stipulated that another thing of the same kind, or an equivalent in value, or otherwise, is to be returned, the transaction will ordinarily constitute a sale and effect a change of title.[69] But where a warehouseman stands ready to deliver to depositors a like quantity of grain of the same kind and quality as that

58. State v. Bordelon [La.] 36 So. 874.

59. Code Cr. Proc. § 590. People v. Mahoney, 89 N. Y. S. 424.

60. In re Sayles, 84 App. Div. 210, 82 N. Y. S. 671. Pen. Code, § 597, governs New York City, and not Laws of 1882, p. 371, c. 410, § 1482. In re Sayles, 40 Misc. 135, 81 N. Y. S. 258.

61. The deposit may lawfully be made only by the defendant. State v. Anderson, 119 Iowa, 711, 94 N. W. 208.

62. Though the justice who took the bail had no authority so to do. Sutherland v. St. Lawrence County, 42 Misc. 38, 85 N. Y. S. 696.

63. Larceny by bailee, see Embezzlement, 1 Curr. L. 998.

64. See 1 Curr. L. 288.

65. Within the meaning of an embezzlement statute, the property must be the subject of larceny [Rev. Code, 1852, p. 943, c. 782, § 1]. State v. Sienkiewiez [Del. Gen. Sess.] 55 A. 346. A contract whereby a person agrees to hold goods for a sheriff until ordered released by him is a contract of bailment. Colbath v. Hoefer, 43 Or. 366, 73 P. 10. Where a porter brought grips to a hotel without authority or notice to any employe of the hotel, the owner not becoming a guest and paying nothing, the hotel company was not even a gratuitous bailee. Tulane Hotel Co. v. Holohan [Tenn.] 79 S. W. 113. Where a grocery company received goods to be sold if possible and if not to be returned, the parties expressly agreeing that there was not to be a sale, the transaction constituted a mere bailment. Furst Bros. v. Commercial Bank of Augusta, 117 Ga. 472, 43 S. E. 728.

66. Contract whereby the owner of timber employs another to convert it into ties at a certain rate per tie when inspected and delivered is not a bailment under statutory definition [Civ. Code 1895, § 2894]. Atlantic Coast Line R. Co. v. Baker, 118 Ga. 809, 45 S. E. 673.

67. Doyle v. Burns [Iowa] 99 N. W. 195.

68. Where plaintiff deposited wheat in an elevator under an agreement that he was to receive flour and bran therefor, and his assignors under an agreement to receive cash, the transaction was a sale. Potter v. Mt. Vernon Roller Mill Co., 101 Mo. App. 581, 73 S. W. 1005.

69. In a lease of mining property certain personalty was agreed to be returned at the expiration of the term, in kind or value, according to an invoice, at the lessor's option. Held, a sale of the personalty. Scott Mining & Smelting Co. v. Shultz, 67 Kan. 605, 73 P. 903.

NOTE. Bailment or sale: "Where logs are delivered to be sawed into boards, or leather to be made into shoes, rags into paper, olives into oil, grapes into wine, wheat into flour, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same wheat, or flour, or paper, but may deliver any other of equal value, it is said to be a sale or a loan, and the title to the thing delivered vests in the manufacturer." Laflin & R. Powder Co. v. Burkhardt, 97 U. S. 110, 24 Law. Ed. 973. Quoted in Potter v. Mt. Vernon Roller Mill Co., 101 Mo. App. 581, 73 S. W. 1005.

deposited by them, the transaction is a bailment, though there is no agreement to return the identical grain deposited.[70] A bailment may result from the actual delivery of property, though the contract sought to be made by the parties is void.[71] The contract between the United States and the owners of mail is a bailment of the letters and their contents, for hire of labor or services.[72] A corporation is not the bailee of its capital stock within the meaning of a statute authorizing the assessment and taxation of property in the possession of a bailee.[73]

§ 2. *Rights and liabilities as between bailor and bailee.*[74]—Parties to a contract of bailment may substitute a special contract for the one implied by law, and in such case the express agreement determines their rights and liabilities.[75] But in the absence of a special contract, the rights and liabilities of the parties are those that arise and are imposed by law.[76] Legal ownership of the property is in the bailor, and the bailee has bare possession, usually for some specific purpose.[77] Mere possession by the bailee does not give him apparent authority to sell.[78]

When a bailee fails to return property, or returns it in a damaged condition, the burden is upon him to show that the loss or damage did not occur through his negligence.[79] A bailee may excuse nondelivery by showing paramount title in a third person,[80] or seizure of the goods by officers of the law under prima facie valid authority,[81] or that the loss or damage was caused by inevitable accident or

70. Potter v. Mt. Vernon Roller Mill Co., 101 Mo. App. 581, 73 S. W. 1005.

71. Contract on Sunday. State v. Sienkiewiez [Del. Gen. Sess.] 55 A. 346.

72. National Surety Co. v. U. S. [C. C. A.] 129 F. 70.

73. Ky. St. 1899, § 4023. Com. v. Chesapeake & O. R. Co., 25 Ky. L. R. 1126, 77 S. W. 186.

74. See 1 Curr. L. 288.

75. If there was an absolute contract to return a boat in as good condition as received, liability thereunder could not be avoided by an act of God, the public enemy or any vis major. Direct Nav. Co. v. Davidson [Tex. Civ. App.] 74 S. W. 790. Bailee's liability on default fixed by the terms of the written contract. Hire of cash register with $100 forfeit for failure to return. National Cash Register Co. v. Caillias, 84 N. Y. S. 166. Where the place of the return of a portable paving car plant was changed by agreement, it was held there was no delivery to the owner until the key was delivered, and the lessee was held for repairs. Municipal Imp. Co. v. Uvalde Asphalt Co. [Tex. Civ. App.] 76 S. W. 448. Instructions as to measure of damages for injuries to property leased conflicting, one being on contract liability, and one under the general rule as in tort. Smith v. Stratton [Tex. Civ. App.] 78 S. W. 4.

76. In such case evidence of the owner's negligence, or an act of God, would be admissible to relieve bailee from liability. Direct Nav. Co. v. Davidson [Tex. Civ. App.] 74 S. W. 790.

77. In case of a trust, the trustee has legal title and possession. Held, that defendant held certain stock as bailee, not as trustee, and action in regard thereto could be maintained at law. Doyle v. Burns [Iowa] 99 N. W. 195.

78. Nichols v. Monjeau [Mich.] 94 N. W. 6.

79. Bissell v. Harris & Co. [Neb.] 95 N. W. 779. The law will presume the negligence of the bailee to have been the cause. Damages for injury to mare while in bailee's possession. Jackson v. McDonald [N. J. Law] 57 A. 126. Under a statute requiring ordinary care of a bailee, the burden of showing such care is on him in an action against him for failure to deliver a lost article [Civ. Code, §§ 2491, 2450]. Shropshire v. Sidebottom [Mont.] 76 P. 941. Bailee of horse for hire has burden of proving death of horse, while in his possession, was not caused by his negligence. Snell v. Cornwell, 87 N. Y. S. 1.

Contra: The owner of a team to recover for damages to it while in the possession of one who hired it, must show negligence of the defendant as the cause of the damage, but need not show the exact time or place of such negligence. Wisecarver v. Long & Camp, 120 Iowa, 59, 94 N. W. 467. An instruction that in order to recover for injuries to a team while in the possession of one who hired it, the owner must show negligence of the one hiring as the cause of the injuries, does not withdraw from the jury evidence of the condition of the team when taken out and when returned. Id.

80. Calbath v. Hoefer, 43 Or. 366, 73 P. 10.

Note: Where a third person asserts title to the property, the bailee may be entitled to maintain suit in the nature of an interpleader. Ball v. Liney, 48 N. Y. 6, 13, 8 Am. Rep. 511. And when the third person claims title derived from the bailor subsequent to the bailment, the bailee may compel the parties to interplead, since there is no denial of the original title or right. Betchel v. Sheafer, 117 Pa. 555, 11 A. 889. But the bailee must stand indifferent. Lawson v. Terminal Warehouse Co., 70 Hun, 281, 24 N. Y. S. 281; De Zouche v. Garrison, 140 Pa. 430, 21 A. 450. And he cannot thus seek relief from a state of affairs brought about by his own misconduct. Hatfield v. McWhorter, 40 Ga. 269. See note on "The Right of Interpleader," 91 Am. St. Rep. 608.

81. Goods taken from warehouse of a carrier. Southern R. Co. v. Heymann, 118

irresistible force.[82] A bailee for hire is charged with the duty of ordinary care in the preservation of the property deposited,[83] and the same degree of care is now usually required of a gratuitous bailee,[84] and of a bailee in a bailment for the benefit of both parties,[85] though some states adhere to the old rule and require only slight care of a bailee acting gratuitously.[86] To constitute conversion by the bailee his acts must amount to an assertion of right or dominion over the property inconsistent with the bailor's right of ownership,[87] and the purpose of the bailment.[88]

A bailee for repairs[89] or other work,[90] has a lien on the goods until charges for services are paid, in the absence of a special contract.[91] But such lien entitles the bailee only to the bare possession of the goods.[92] He may maintain detinue for the goods, or trover and conversion for their value, to the amount of his claim, if wrongfully deprived of his possession,[93] but cannot maintain a suit in equity to sell the property for payment of the claim.[94] One to whom goods are delivered for the purpose of performing work on them cannot recover for unworkmanlike services,[95] is liable for damages caused by the improper manner in which the work is done,[96] but is not liable for the loss of the goods not caused by his negligence.[97] The lessee of property is liable for the value of its use, less the expense of keeping.[98] In a suit for damages for breach of the contract of bailment, the bailees are estopped to deny matters admitted by them in a written receipt given for the goods.[99] A recovery from a bailee who has failed to account for goods will not be prevented by the fact that plaintiff could not

Ga. 616, 45 S. E. 491. A bailee for reward is not liable for failure to deliver goods to the bailor on demand, when the goods were taken under authority of a valid legal process, and the bailee notified the bailor of that fact within a reasonable time. Glass v. Hauser, 40 Misc. 661, 83 N. Y. S. 177.

82. This showing places burden on bailor to prove negligence of bailee. Bissell v. Harris & Co. [Neb.] 95 N. W. 779.

83. A bailee of horses liable for loss when pasture was not securely fenced [Civ. Code, § 2491]. Shropshire v. Sidebottom [Mont.] 76 P. 941.

84. Bank not liable for bonds kept in safe gratuitously, and stolen by trusted employe. Smith v. Elizabethport Banking Co., 69 N. J. Law, 288, 55 A. 248. Where a carrier receives personal baggage with the expectation that it is to be accompanied by the owner, but the owner does not in fact accompany it, the carrier is liable only as a gratuitous bailee. Trunk rifled while in baggageroom. Wood v. Maine Cent. R. Co., 98 Me. 98, 56 A. 457.

85. One who hires a team must use ordinary care in driving it, which includes observing the team while on the road to note effect of travel. Wisecarver v. Long, 120 Iowa, 59, 94 N. W. 467.

86. The mere fact that a bailee acting gratuitously, may expect an incidental advantage from his service, does not make the bailment one for hire. Merchants kept money for elevator owners to pay wheat checks, to keep business in the town and to save owners the expense of a safe in the elevator. Bissell v. Harris & Co. [Neb.] 95 N. W. 779. When one not a guest sends baggage to a hotel without compensation to be made, the innkeeper, if liable at all, is only liable as a gratuitous bailee, for gross negligence. Tulane Hotel Co. v. Holohan [Tenn.] 79 S. W. 113.

87. Where a bailee of a boat left it in possession of the owner, and never asserted any further rights over it, there was no conversion, though the boat was not delivered to the owner at the place agreed upon. Direct Nav. Co. v. Davidson [Tex. Civ. App.] 74 S. W. 790.

88. State v. Sienkiewiez [Del. Gen. Sess.] 55 A. 346. When one with whom money had been left to pay wheat checks changed some of the bills, and placed remainder in a bag in his safe, it was held there was no conversion, since the purpose of the deposit was carried out, and hence he was liable only as a bailee of the funds. Bissell v. Harris [Neb.] 95 N. W. 779.

89. Henderson v. Mahoney, 31 Tex. Civ. App. 539, 72 S. W. 1019.

90. Cut garments to be sewed. Davidson v. Fankuchen, 88 N. Y. S. 196.

91. A bailee of a bicycle for repairs, who agreed to ship it when repaired to the bailor, was not entitled to withhold it until charges were paid, but was liable in damages to the bailor for so wrongfully withholding it. Rollins v. Bowman Cycle Co., 89 N. Y. S. 289.

92, 93, 94. Burrough v. Ely [W. Va.] 46 S. E. 371.

95. Long v. Gingold, 84 N. Y. S. 194.

96. Damage to skins held not to have been caused by the dyer. Steinberg v. Schlesinger, 84 N. Y. S. 522.

97. Diamond to be polished lost because the machine which bailor caused to be used was defective. Vroman v. Kryn, 86 N. Y. S. 94.

98. Hire of horse. Not error to neglect to so instruct, when instruction was not requested. Palmer v. Smith [Conn.] 56 A. 516.

99. Colbath v. Hoefer, 43 Or. 366, 73 P. 10.

establish its loss definitely from its books, owing to negligent bookkeeping, if its claim could be otherwise proven.[1]

§ 3. *Rights and liabilities of third persons.*[2]—Bare possession by a bailee gives him no apparent authority to sell goods so as to vest title in a third person,[3] and an absolute sale by the bailee ends the bailment, so that the general owner has an immediate right of possession on which he can maintain trover.[4] The owner of property will not be estopped by failure to promptly disaffirm a sale by a bailee, to assert title against a subsequent transferee, when he had no knowledge of the intent of the first vendee to sell it.[5] A bailee for hire of services may maintain an action of trespass, trover, or conversion, for the disturbance of his possession by a wrongdoer, and may recover the value of the property as damages.[6] The United States, as the bailee of mail carried by it, may recover from the surety of a mail carrier the value of mail matter stolen by him, while performing his duty, whether or not the owners have presented claims for indemnity to the government.[7] A mortgage given on a stock of goods will not cover goods held by the mortgagor as bailee only.[8] A bailee of a third person may assert her right to possession of the property as against attaching creditors of her husband.[9]

BANKING AND FINANCE.

§ 1. The Occupation in General; Regulation, Supervision, Control (403).

§ 2. Associated or Incorporated Bankers; Corporate Existence Generally (404). Dividends (404). Transfer of Stock (405). Lien on Stock (405). General Powers (405). Reserve Fund (406). Personal Liability of Directors and Officers (406). An Action Against Wrongdoing Directors (407). Unauthorized Acts (408). Official or Individual Capacity (409). Notice to Bank from Knowledge of Officers (409). Winding Up (410). Reorganization (411). Stockholders' Individual Liability (411).

§ 3. National Banks; Officers and Examiners (412). Powers (412). Violation of Banking Act (413). Stock (413). Receivership (413). Enforcement of Stockholders' Liability (414). State Interference and Powers of State Courts (414). Usury by National Banks (415).

§ 4. Savings Banks (415). Powers (416). Liabilities of Directors (416). Rules (416). Reliance on Passbooks (416). Deposits and Repayment (417).

§ 5. Loan, Investment, and Trust Companies (417).

§ 6. Deposits and Repayment Thereof; Checks, Drafts, Certificates, Receipts, Credits (417). Relation of Banker and Depositor (417). Evidence of Deposit (418). Letters of Credit (418). Repayment of Deposits (418). Overdrafts (420). Forged or Altered Checks and Drafts (420). Checks Drawn Without Authority (422). Set-Off of Debts Due Bank Against Deposit (422). Deposits Received After Insolvency (423). General Deposits (423). Special Deposits (423). Specific Deposits (424). Trust Funds (424). Slander of Credit or Damages for Failure to Pay Checks (424). Actions to Recover Deposits (424). Defenses (425). Notes Payable at Bank (425). Certifications (425).

§ 7. Loans and Discounts (426). Drafts with Bills of Lading Attached (426).

§ 8. Collections (426), see special article p. 423. Duty to Preserve Rights of Parties (427).

§ 9. Offenses Against Banking Laws; Penalties (427). Receipt of Deposits When Insolvent (427).

§ 1. *The occupation in general; regulation, supervision, control.*[10]—The right to carry on a banking business is not a franchise, it belonging to the citizens

1. Knoop, Freirick & Co.'s Agency v. Columbus Compress Co. [Miss.] 36 So. 258.
2. See 1 Curr. L. 289.
3. Nichols v. Monjeau [Mich.] 94 N. W. 6. A mere bailee for storage has no authority to sell, and a bona fide purchaser from him does not acquire title as against the real owner. Ullman, Einstein & Co. v. Biddle, 53 W. Va. 415, 44 S. E. 280. The bare fact that the owner of property intrusts its custody to another does not give that other any apparent authority to sell and pass title to a third person Applied in case of a clerk who sold goods as his own. Ball-Barnhart-Putman Co. v. Lane [Mich.] 97 N. W. 727.
4. Lessee sold lasting machines. United Shoe Machinery Co. v. Holt [Mass.] 69 N. E. 1056.
5. Nichols v. Monjeau [Mich.] 94 N. W. 6.
6. Applied to a case where the United States recovered from a surety company the value of registered mail matter stolen by a letter carrier. National Surety Co. v. U. S. [C. C. A.] 129 F. 70. A bailee of goods sued for labor performed on the goods by a third person may maintain a counterclaim for their conversion. Bailee sent goods to be laundered and returned. Langfelder v. Renouf, 84 N. Y. S. 236.
7. National Surety Co. v. U. S. [C. C. A.] 129 F. 70.
8. Furst Bros. v. Commercial Bank, 117 Ga. 472, 43 S. E. 728.
9. Vermillion v. Parsons, 101 Mo. App. 602, 73 S. W. 994.
10. See 1 Curr. L. 289.

generally;[11] but the right to carry on such business through the agency of a corporation is a franchise, dependent on a grant of corporate powers by the state.[12] In some states, statutes regulate the amount of capital individuals must have in order to engage in the business,[13] and the manner of electing directors.[14] Officers of a building and loan association by participating in its lawful business do not become private bankers.[15]

Taxation of banks.[16]—An act exempting the capital of a bank from taxation includes an exemption from the imposition of a license tax for the carrying on of the banking business.[17] Savings banks are not charitable institutions so as to be exempt from taxation.[18] In New York, the personal property of trust companies is exempt from local assessment and taxation.[19]

§ 2. *Associated or incorporated bankers; corporate existence generally.*[20] *Stock subscriptions.*[21]—A subscription for stock in order to be binding must have the elements of a contract,[22] and it may be made by parol.[23] Where certain persons subscribe for all the stock of a bank, agreeing to afterwards apportion it among others, a subsequent subscription by one of the latter and a certificate issued to him does not constitute an overissue invalidating the last subscription.[24] A purchase of its own stock by a banking corporation, when legal,[25] does not constitute a reduction of the capital stock,[26] but the shares becoming the property of the bank may be resold or held for the benefit of creditors and the remaining stockholders, together with any dividends that may be earned on it.[27]

Dividends.[28]—A dividend declared in disregard of statutory regulations is void.[29] Failure to pay a declared dividend to all stockholders pro rata gives rise to a cause of action against the bank in favor of the stockholders discriminated against.[30] A distribution of the reserve fund will not be ordered by the court in the absence of a showing that plaintiff is a stockholder and that the directors had refused to declare dividends to which he was entitled.[31]

11. Bank of California v. San Francisco, 142 Cal. 276, 75 P. 832.

12. Taxation of a bank. Bank of California v. San Francisco, 142 Cal. 276, 75 P. 832.

13. Under the Laws of Missouri [Rev. St. 1899, §§ 1278, 1299, 1301], individuals engaging in the business of private banking in a city of over 150,000 inhabitants are not required to have a paid up capital of over $5,000, and when the law is conformed to, the secretary of state is obliged to issue the certificate provided for in § 1277 or mandamus will lie. State v. Cook, 174 Mo. 100, 73 S. W. 489.

14. Comp. Laws, § 8553, providing for the election of directors on the cumulative plan was repealed as to banks by Comp. Laws, §§ 6101, 6153. Attorney General v. Bridgman [Mich.] 96 N. W. 438.

15. And hence are not guilty of carrying on such a business without authority from the state. State v. Newberry [N. J. Law] 58 A. 163.

16. See Licenses, 2 Curr. L. 730; Taxes, 2 Curr. L. 1786.

17. Construing the provisions of the charter of the Citizens' Bank of Louisiana, as amended by La. Act Jan. 30, 1836, § 4. In this case the bank was incorporated to aid the agricultural interests of the state, and the state assisted by a loan of its credit, and retained partial control. Citizens' Bank v. Parker, 192 U. S. 73, 24 S. Ct. 181.

18. People v. Miller, 84 App. Div. 168, 82 N. Y. S. 621.

19. Construing Laws 1901, p. 318, c. 132, § 202, and § 187a (p. 316). People v. Lane, 41 Misc. 1, 83 N. Y. S. 606.

20, 21. See 1 Curr. L. 290.

22. Somerset Nat. Banking Co.'s Receiver v. Brinkley, 24 Ky. L. R. 2088, 72 S. W. 1129.

23. National bank. Somerset Nat. Banking Co.'s Receiver v. Adams, 24 Ky. L. R. 2083, 72 S. W. 1125.

24. Reorganization of state bank into national. Somerset Nat. Banking Co.'s Receiver v. Adams, 24 Ky. L. R. 2083, 72 S. W. 1125.

25. See post, General powers, p. 405.

26, 27. Draper v. Blackwell, 138 Ala. 182, 35 So. 110.

28. See 1 Curr. L. 290.

29. Construing Rev. St. 1899, § 1293. Lapsley v. Merchants' Bank of Jefferson City [Mo. App.] 78 S. W. 1095.

30. Tax dividend declared by national bank paid to some stockholders not to others. Redhead v. Iowa Nat. Bank [Iowa] 98 N. W. 806.

31. Mulcahy v. Hibernia Sav. & Loan Soc. [Cal.] 77 P. 910. An allegation in the complaint of bad faith on the part of the officers in endeavoring to exclude the plaintiff from membership has no bearing on any question relative to the reserve fund. Id. The complaint alleging as a reason for the accumulation of the fund that the directors wished to divide it amongst themselves on dissolution, the allegation constitutes a mere conclusion, as is also the allegation of no in-

Transfer of stock.[32]—The stock must be transferred to one legally liable to assume the obligation of a stockholder and who cannot repudiate such obligation.[33] A bank may waive those provisions of its by-laws relating to the transfer of its stock.[34] A statute requiring a transfer on the books of the bank, a delivery to the cashier with instructions to so transfer it is insufficient.[35] The cashier is not a necessary party in a suit to compel a transfer of stock on the books of the bank;[36] the president is sufficient.[37] Where a stockholder holds as a trustee for future purchasers it is not necessary to show authority from him for a transfer of such stock by the bank to a purchaser.[38]

Lien on stock.[39]—In Georgia, a bank's lien on stock being created by contract or by its charter cannot be foreclosed by judicial proceedings unless the defendant is duly served by an officer or by publication.[40]

General powers.[41]—It is competent for banks to form clearing-houses, and the rules made supplant the law as between themselves.[42] In the absence of statutory restriction, a solvent banking corporation, not contemplating insolvency or dissolution, may purchase its own stock in payment of a previously existing debt due from its stockholder,[43] and may contract to sell another's stock in a corporation within a certain time and for a stated sum.[44] A bank has the power to lease property,[45] and is liable upon the covenants of the lease.[46] It may become a party to a fraudulent conspiracy, the same as a natural person and with like responsibility.[47] Dealing in checks is part of the general powers of a bank,[48] and it may under certain circumstances become an undisclosed principal upon negotiable paper,[49] though it has no authority to become an accommodation surety for a business in which it has no interest, and from which it can derive no profit.[50] Banks can only consolidate when authorized by law, and then in the manner provided by law;[51] but where a bank, in contemplation of closing up its business, sells its assets, property and business to another bank, and makes arrangements for the liquidation of its assets, there is no consolidation.[52] Under the statutes of some

debtedness except as to depositors, and hence fund too large, the amount of deposits not being shown. Id.

32. See 1 Curr. L. 291.

33. Transfer to an infant does not relieve transferror from liability. Aldrich v. Bingham, 131 F. 363.

34. By-law provided that the transferee should be approved by board of directors, and should sign the by-laws. Defendant did neither, yet bank canceled old certificate and issued her a new one and paid her dividends. Held, provisions waived. People's Home Sav. Bank v. Rickard, 139 Cal. 285, 73 P. 858.

35. Construing Code of Laws 1902, § 1894. White v. Commercial & Farmers' Bank [S. C.] 46 S. E. 94.

36. Johnson v. Hume [Ala.] 36 So. 421.

37. Process should be directed to him. Johnson v. Hume [Ala.] 36 So. 421.

38. Reorganization of state bank into a national bank. Somerset Nat. Banking Co.'s Receiver v. Adams, 24 Ky. L. R. 2083, 72 S. W. 1125.

39. See 1 Curr. L. 291.

40. Owens v. Atlanta Trust & Banking Co. [Ga.] 47 S. E. 215.

41. See 1 Curr. L. 291.

42. Rules as to effect of indorsement. Crocker-Woolworth Nat. Bank v. Nevada Bank, 139 Cal. 564, 73 P. 466.

43. Draper v. Blackwell & Keith, 138 Ala. 182, 35 So. 110. For effect of such a purchase, see Stock subscriptions, ante p. 404.

44. As against public policy nor, in this case, as violating Laws 1892, p. 1911, c. 689, prohibiting a bank from holding stock in excess of 10 per cent. of its capital. Guase v. Commonwealth Trust Co., 89 N. Y. S. 723.

45. Weeks v. International Trust Co. [C. C. A.] 126 F. 370.

46. Where, owing to insolvency and the appointment of a receiver, a bank vacates its premises and thus breaks the covenants in a lease, it is liable in damages to the lessor. McGraw v. Union Trust Co. [Mich.] 98 N. W. 390.

47. Wright v. Stewart, 130 F. 905.

48. The fact that a bank purchased a check instead of receiving it for collection is not a deviation from the usual course of business so as to show bad faith. Citizens' State Bank v. Cowles, 89 App. Div. 281, 86 N. Y. S. 38.

49. Lewis v. First Nat. Bank [Neb.] 96 N. W. 365.

50. Surety on replevin bond. Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank [Neb.] 95 N. W. 819.

51. On Jan. 16, 1896, there was no law in Oklahoma authorizing two banks to consolidate. Overstreet v. Citizens' Bank, 12 Okl. 383, 72 P. 379.

52. Overstreet v. Citizens' Bank, 12 Okl. 383, 72 P. 379.

states, the bank through its officers is the agent of the stockholders in listing their stock for taxation,[53] and, as such agent, the bank cannot, in a suit to tax such shares, raise the question that some of them may have changed hands,[54] nor that the proceeding is unconstitutional.[55]

Reserve fund.—The amount of the reserve fund being left to the discretion of the directors, the courts will not attempt to control them unless their proceedings are unfair, or the officers act wantonly and in bad faith, or with disregard of the rights of the stockholders in such fund.[56]

Personal liability of directors and officers.[57]—A director is only required to act in good faith and to exercise such a degree of care as a reasonably prudent man would exercise under the same circumstances,[58] in some states, as such a man would exercise in his own affairs.[59] There is a marked difference between the duty which the directors owe to the bank, and that which they owe to strangers or creditors; in the absence of statute, they are not liable to the latter for mere nonfeasance.[60] A stockholder may bring an action against them for losses occasioned by their negligence, in behalf of himself and all others in a like situation, either after demand made that the bank should bring the action, and its refusal, or without demand, where the persons committing the wrongful acts continue as directors;[61] but such plaintiff must be a stockholder both at the time of the commission of the acts complained of, and at the time of the commencement of the action;[62] the plaintiff not being so qualified, a qualified stockholder being permitted by the court to intervene, the complaint should not be dismissed.[63] In most states, banks are prohibited from investing funds in trade or commerce, and the directors are liable for a loss sustained thereby;[64] they are also liable for money loaned to borrowers who were insolvent at the time, to the knowledge of the directors.[65] An allegation that overdrafts were negligently permitted is sustained by proof of illegal overdrafts.[66] In some states, by statute, a director is required to examine into the affairs of the bank, and it is no excuse for failure to do so that the cashier's fraud was so skillfully done that such an examination would not have revealed the same,[67] but this need not be done personally, for the custom of appointing discount and examining committees to attend to the details of the management of the business is a reasonable one.[68] A director may do business with a bank, and, so long as he does not act for the bank as well as for himself, his relation to the bank is the same as any other patron.[69]

A banker without compensation, investing and collecting the money of a depositor, is bound to exercise ordinary care and diligence,[70] and is responsible for

53. Under Ky. St. 1903, § 4241, as to notice in proceedings to tax omitted property. Com. v. Citizens' Nat. Bank, 25 Ky. L. R. 2100, 80 S. W. 158.

54. Com. v. Citizens' Nat. Bank, 25 Ky. L. R. 2100, 80 S. W. 158.

55. As violating the 14th amendment to the United States Constitution. Com. v. Citizens' Nat. Bank, 25 Ky. L. R. 2100, 80 S. W. 158.

56. St. 1862, p. 200, c. 187, § 11, does not prevent a bank from creating a reserve fund in excess of $100,000. The accumulation of a reserved fund of $250,000 is not of itself fraudulent. Mulcahy v. Hibernia Sav. & Loan Soc. [Cal.] 77 P. 910.

57. See 1 Curr. L. 291.

58. Stone v. Rottman [Mo.] 82 S. W. 76.

NOTE. Liability and duties of directors: Directors are charged with the duties of trustees, and must use good faith in the care of the bank's property. For a violation of these duties they are liable to account in equity, the same as other trustees. Bosworth v. Allen, 168 N. Y. 157, 61 N. E. 163, 85 Am. St. Rep. 667.—From note in Winchester v. Howard [Cal.] 89 Am. St. Rep. 169.

59. Hanna v. Lyon [N. Y.] 71 N. E. 778.

60. Stone v. Rottman [Mo.] 82 S. W. 76.

61, 62, 63. Hanna v. Lyon [N. Y.] 71 N. E. 778.

64, 65, 66. Stone v. Rottman [Mo.] 82 S. W. 76.

67. Gen. St. 1901, §§ 471, 472. Forbes v. Mohr [Kan.] 76 P. 827.

68. Stone v. Rottman [Mo.] 82 S. W. 76.

69. Representations by a director as to the financial conditions of the maker and indorser of a note he wished to discount. St. Johns Nat. Bank v. Steel [Mich.] 97 N. W. 704.

70, 71. Watson v. Fagner, 208 Ill. 136, 70

any loss resulting from a failure to do so;[71] nor is he relieved from such responsibility by the fact that the depositor made no attempt to collect the money invested.[72] As to what is admissible in evidence to show good faith and prudence, see notes.[73]

A cashier is not absolutely liable for overdrafts of a customer allowed by him according to the custom and usage of the bank, and upon the advice of the president and directors;[74] neither is he negligent in relying upon an identification by one personally known to him, there being nothing in that person's reputation or the transactions that would excite the suspicions of an ordinarily prudent man.[75] The cashier is not individually liable for the breach of a contract made in his official capacity.[76] In an action against a cashier for conversion of the bank's money, it is immaterial to whom he gave it, for what he spent it, or whether he loaned it to a solvent or insolvent corporation.[77]

An officer of a bank is liable for the natural and direct results of his acts, notwithstanding that some of his superiors may have been careless and some dishonest;[78] but when acting in good faith, he is not liable for the bank's own negligence.[79] Officers of a bank who are concerned in a misappropriation of its funds are liable, although they do not profit thereby;[80] and those who negligently fail to prevent it when they have knowledge of it are within that category.[81] In Iowa, a loan to an officer of a bank must be passed upon by the board of directors.[82] Statutes in some states render bank officials criminally liable for receiving deposits after knowledge of bank's insolvency.[83] A bank may ratify the acts of its officers and thus relieve them from liability.[84]

An action against wrongdoing directors.[85] *Powers of officers and right to represent bank.*[86]—As between a bank and innocent third parties who have dealt with its agents, authority may sometimes be inferred from a course of dealing.[87] It is without the general scope of a bank president's authority to agree to sell pledged property at a price bid therefor at a sale;[88] but the bank by buying the

N. E. 23. If he loans it to persons largely indebted to the bank, who afterward become insolvent, the suspicion arises that it was loaned with a view to carrying the borrower along until the money due the bank could be collected. Id.

72. Watson v. Fagner, 208 Ill. 136, 70 N. E. 23.

73. In an action against the president of a bank for loaning the money of the bank on worthless collateral, evidence that such collateral was received by other banks with other security in loans to the same party is admissible when it is shown what estimate was placed by them on the questionable security. Seventeenth Ward Bank v. Smith, 83 App. Div. 64, 82 N. Y. S. 529. The fact that other banks had made loans to the same party for which none of the collaterals in question appeared to have been accepted as security is irrelevant in such an action. Id.

74. Only required to exercise the care and judgment of an ordinarily prudent man. First Nat. Bank v. Reese, 25 Ky. L. R. 778, 76 S. W. 384.

75. King v. Exchange Bank [Mo. App.] 78 S. W. 1038.

76. Pease v. Francis [R. I.] 55 A. 686.

77. Allegations of these matters will be stricken from the pleadings. First Nat. Bank v. Gaddis, 31 Wash. 596, 72 P. 460.

78. Fiala v. Ainsworth [Neb.] 94 N. W. 153.

79. A bank took notes for collection, the notes being indorsed by its president. The bank later delivered up the original notes and made further advances; these notes the president did not indorse. Held, he was not liable for failing to tell bank of debtor's private and secured debt to him, where the advances were made without his knowledge and at the time of the maturity of the original debt, the debtor's property was sufficient to pay both. Bank of Newport v. Watson [Ark.] 74 S. W. 15.

80, 81. Fiala v. Ainsworth [Neb.] 94 N. W. 153.

82. A blanket resolution affords no protection [Acts 15th Gen. Assem. p. 52, c. 60, § 17]. German Sav. Bank v. Des Moines Nat. Bank, 122 Iowa, 737, 98 N. W. 606.

83. 2 Ball. Ann. Codes & St. § 7121 is not unconstitutional as violating art. 12, § 12 of the Washington State Constitution. State v. Oleson [Wash.] 76 P. 686.

84. Acquiescing for five years in the loaning of money to a speculative corporation held to relieve cashier from liability. First Nat. Bank v. Gaddis, 31 Wash. 596, 72 P. 460.

85, 86. See 1 Curr. L. 292.

87. Contract entered into by president and treasurer without authority of board of directors. Smith v. Bank of New England [N. H.] 54 A. 385.

88. Even though he owned a controlling interest in said bank. Agreed to sell to

property and keeping it with knowledge of the agreement and fraud becomes liable therefor, and cannot refuse to sell to the surety on the ground that the amount bid was insufficient to pay the debt.[89] Acts of a cashier in the usual course of business and within the apparent scope of his authority are binding on the bank.[90] He is the agent of the bank in transmitting funds for a depositor,[91] and being the collecting officer of the bank, he has the power to enter into a contract looking towards the collection of debts due the bank,[92] and in doing so, may obligate the bank to pay one a reasonable commission for procuring a purchaser of real estate held by the bank, under a mortgage, as security for a debt.[93] He has no authority to knowingly accept a worthless check on another bank and charge his bank with the amount thereof,[94] nor can he generally bind the bank by an issuance of drafts or certified checks when given for his private business,[95] nor has he any apparent or implied authority to make any representation on behalf of the bank as to the solvency of one of its debtors.[96] A bank may recover funds misappropriated by its cashier from one receiving them with knowledge of the misappropriation,[97] and it is no defense to this action that the directors were negligent.[98] Fraud by the cashier when acting in his official capacity is fraud of the bank.[99] Authority to a cashier to buy and sell stocks covers purchases made for cash and on margins.[1] Under a statute requiring claims against a decedent's estate to be sworn to, the claim of a bank may be verified by the cashier where the president is the administrator of the estate.[2] A teller may be authorized to enter into a transaction by custom and usage,[3] to discount notes.[4]

Unauthorized acts.[5]—A bank is estopped to deny an officer's authority to do an ultra vires act not malum in se or malum prohibitum,[6] and when within the apparent scope of his authority,[7] when to do so would injure an innocent person who has dealt with the officer on the faith of his apparent authority. Where unauthorized acts of an officer of a bank are done under circumstances raising no implication of authority, and are never ratified by the bank, the bank is not bound

surety on debt. Memphis City Bank v. Smith, 110 Tenn. 337, 75 S. W. 1065.

The fact that the president and treasurer executed the contract in question can be considered with other executive acts performed by them without special authorization, as bearing on the question of implied authority to execute the contract. Smith v. Bank of New England [N. H.] 54 A. 385.

89. Memphis City Bank v. Smith, 110 Tenn. 337, 75 S. W. 1065.

90. Agreement to hold securities deposited for collection for another. Mercantile Nat. Bank v. Peabody [Colo. App.] 72 P. 611.

91. Bank is liable for misappropriation of funds. Goshorn v. People's Nat. Bank [Ind. App.] 69 N. E. 185.

92, 93. First Nat. Bank v. Ratliff [Tex. Civ. App.] 76 S. W. 591.

94. Van Buren County Sav. Bank v. Stirling Woolen Mills [Iowa] 94 N. W. 945.

95. A debtor of a cashier taking a certified check drawn by the latter upon his bank is bound to take notice of the latter's authority to make such particular certification. Rankin v. Bush, 87 N. Y. S. 539.

There is no presumption that the wrongdoer has paid value or made restitution, and the burden is upon those claiming that he did to prove it. Mendel v. Boyd [Neb.] 99 N. W. 493. A bank cannot recover the amount collected on a cashier's draft issued by its cashier to his individual creditor, the cashier having implied authority through custom and usage to so do. Campbell v. National Broadway Bank [C. C. A.] 130 F. 699.

96. Taylor v. Commercial Bank, 174 N. Y. 181, 66 N. E. 726.

97. Draft by cashier, over his official title, on correspondent, to be used in speculation, held knowledge to commission company of abuse of authority on the part of the cashier. Kitchens v. Teasdale Comm. Co. [Mo. App.] 79 S. W. 1177.

98. Kitchens v. Teasdale Comm. Co. [Mo. App.] 79 S. W. 1177.

99. Fraud in obtaining collateral for debt of bank when bank was insolvent. Hallett v. Fish, 120 F. 986.

1. Bank claimed to be exempt from liability for purchases on margins. National Bank of Boyertown v. Fridenberg, 206 Pa. 243, 55 A. 960.

2. Cox v. Higginbotham's Adm'r, 25 Ky. L. R. 1057, 76 S. W. 1079.

3, 4. Iowa Nat. Bank v. Sherman [S. D.] 97 N. W. 12.

5. See 1 Curr. L. 293.

6. An executed ultra vires agreement. York v. Farmers' Bank [Mo. App.] 79 S. W. 968.

7. The act of a cashier in obligating the bank as an accommodation surety on a replevin bond, in a suit in which it has no interest, is not within his apparent authority. Sturdevant Bros. & Co. v. Farmers' & Merchants' Bank [Neb.] 95 N. W. 819.

thereby.[8] A third person is bound to know that a cashier cannot deal with himself individually, and hence the bank is not bound by the acts of the cashier in such a transaction.[9] Unauthorized acts may be ratified by accepting the benefits of the transaction,[10] or by subsequent knowledge and assent,[11] and knowing, the assent may be shown by silence and acquiescence, as well as by formal vote of ratification.[12] An unauthorized application of money by a bank may be ratified by the depositor.[13]

Official or individual capacity.[14]—One acting as a director and cashier of a bank is an implied trustee or agent for it.[15] The fact that a cashier is personally interested in a transaction is sufficient to put the other party upon inquiry as to the actual extent of the cashier's power,[16] he has no implied authority to dispose of the funds of the bank in satisfaction of his private debts,[17] and the bank can recover from the party receiving the same the amount so paid.[18] In making an agreement with a debtor that certain money shall be applied in a particular manner to his indebtedness a cashier acts in his official capacity.[19]

Notice to bank from knowledge of officers.[20]—Knowledge of the president of fraud in an agreement to sell pledged property of a bank is knowledge of the bank.[21] A bank is presumed to have knowledge of the fraud of its cashier.[22] An official's interest being hostile to the bank, his knowledge is not chargeable to the bank.[23] A bank is not chargeable with notice of facts of which its president acquires knowledge while dealing, in his private capacity, and on his own behalf, with third persons,[24] nor is knowledge on his part thus acquired imputable to the bank when dealing with him as an individual.[25] The fact that officers of a bank are stockholders in a corporation, which is the payee of a note, does not charge the bank with constructive notice of defenses of the maker of said note against the payee, where said officers had no actual notice thereof.[26] Knowledge of a director of a bank is not notice to the bank.[27] The holding of a public meeting in a city

8. President extended time of payment of debt. Arbogast v. American Exch. Nat. Bank [C.C.A.] 125 F. 518. See 1 Curr. L. 293.

9. Guaranteed his individual notes. German Sav. Bank v. Des Moines Nat. Bank, 122 Iowa, 737, 98 N. W. 606.

10. Cashier procured security for note given to debtor of bank, bank failed and debt was paid by persons owning the collateral, held could look to the receiver of the bank for reimbursement. Hallett v. Fish, 120 F. 986. Where a cashier gives his individual notes to a bank which sold them, receiving and retaining the proceeds, it ratifies the acts of the cashier. German Sav. Bank v. Des Moines Nat. Bank, 122 Iowa, 737, 98 N. W. 606. See 1 Curr. L. 294.

11. Actual knowledge is not necessary, if in the exercise of ordinary care they ought to have known it is in law as if they knew. Smith v. Bank of New England [N. H.] 54 A. 885. See 1 Curr. L. 294.

12. Smith v. Bank of New England [N. H.] 54 A. 885.

13. Money to be applied to secured debt and thus release collateral, money was applied to unsecured debt, with knowledge of these facts a renewal note was given and interest paid for two years. Held ratified. Pease v. Francis [R. I.] 55 A. 686.

14. See 1 Curr. L. 294.

15. Statute of limitations runs against the fraud from the time of the commission of the offense, unless concealed. Central Bank of Kansas City v. Thayer [Mo.] 82 S. W. 142.

16. Paid individual debts with funds of the bank. Hier v. Miller [Kan.] 75 P. 77; Rankin v. Bush, 87 N. Y. S. 539. See 1 Curr. L. 294.

17. Paid individual debts by entering amount thereof as a credit on depositor's bank book. Held, could recover of depositor. Hier v. Miller [Kan.] 75 P. 77; Rankin v. Bush, 87 N. Y. S. 539. See, however, Campbell v. National Broadway Bank [C. C. A.] 130 F. 599.

18. Hier v. Miller [Kan.] 75 P. 77.

19. Pease v. Francis [R. I.] 55 A. 686.

20. See 1 Curr. L. 295.

21. Memphis City Bank v. Smith, 110 Tenn. 337, 75 S. W. 1065.

22. Embezzlement. Goshorn v. People's Nat. Bank [Ind. App.] 69 N. E. 185.

23. Attorney of bank was president of a corporation in whose favor note was drawn. Note was without consideration. Davis v. Boone County Deposit Bank, 25 Ky. L. R. 2078, 80 S. W. 161; Central Bank of Kansas City v. Thayer [Mo.] 82 S. W. 142. Knowledge of fraud. Camden Safe Deposit & Trust Co. v. Lord [N. J. Eq.] 58 A. 607.

24, 25. People's Bank of Talbotton v. Exchange Bank, 116 Ga. 820, 43 S. E. 269.

26. Iowa Nat. Bank v. Sherman [S. D.] 97 N. W. 12.

27. That a grantee holds land as trustee. Homes Sav. & State Bank v. Peoria Agricultural & Trotting Soc., 205 Ill. 9, 68 N. E. 17. See 1 Curr. L. 295.

does not constitute notice to a bank in said city of the action taken therein, none of its officers being present.[28]

Winding up.[29]—Upon failure of the bank all general depositors stand on an equality;[30] this rule is not changed by reason of the deposit being a trust fund to the knowledge of the bank.[31] A deposit of money to purchase a letter of credit does not constitute a trust fund for the benefit of bankers honoring drafts drawn against the letter of credit, so as to give them priority over other creditors of the bank issuing the letter of credit.[32] The equity rule allowing dividends to a secured creditor upon the full amount of his claim obtains.[33] One who is induced by fraud of the cashier, when acting in his official capacity, to furnish securities for a loan to the bank, but is not told that the bank's capital is gone, is a preferred creditor to the amount of the loan paid by him to save his securities.[34] A preferred creditor is not entitled to be paid from a fund created by enforcing the double liability of stockholders to the exclusion of other creditors,[35] but a part of the general assets being used to enforce the stockholder's double liability, such preferred claim is entitled to a preference out of such double liability fund to the extent that the general assets were so used.[36] In proceedings to wind up a bank, the debt of the bank to a creditor who holds its note, and, as collateral, notes indorsed by it, is as regards the creditor's right to dividends the bank's note only.[37] In some states debts due the public are given priority over other claims.[38] The receiver of an insolvent bank may enjoin the suit of a resident creditor brought in another state, which prevents the collection of the assets of the bank.[39] A *national bank* being placed in the hands of a receiver as insolvent, the Federal law from that moment becomes the law of the distribution of its assets,[40] and the bankruptcy law has no application where the proceedings are under a special statute.[41] The owner of a trust fund which comes into the hands of the receiver of an insolvent national bank is not entitled to interest thereon, when it has not actually earned any.[42] The stockholders' agent for winding up the affairs of a national bank may be sued in the Federal courts irrespective of citizenship.[43] In determining whether the dissolution of a *savings bank* is "advisable," the only interests which should influence the judgment of the directors are those of the people,[44] and a depositor therein may, as a depositor and also as a citizen of the

28. Homes Sav. & State Bank v. Peoria Agricultural & Trotting Soc., 206 Ill. 9, 69 N. E. 17.

29. See 1 Curr. L. 296.

30. Officer v. Officer, 120 Iowa, 389, 94 N. W. 947.

31. Deposit by executor of funds of estate. Officer v. Officer, 120 Iowa, 389, 94 N. W. 947.

32. In this case there was a signature card on which was written "Guaranty for a letter of credit." Held, did not alter the above rule. Kuehne v. Union Trust Co. [Mich.] 95 N. W. 715.

33. In the winding up of a bank through a receiver, G. L. 1896, c. 178, § 42 et seq. governs, and does not change above rule. In re Burke [R. I.] 55 A. 825.

34. Collaterals advanced by financee of cashier. Hallett v. Fish, 120 F. 986; Id., 123 F. 201.

35. Liability of stockholders under Code, §§ 1882, 1883. Sioux City Stockyards Co. v. Fribourg, 121 Iowa, 230, 96 N. W. 747.

36. Sioux City Stockyards Co. v. Fribourg, 121 Iowa, 230, 96 N. W. 747.

37. Proceedings were under Gen. Laws 1896, c. 178, § 42 et seq. In re Burke [R. I.] 55 A. 825.

38. Under Code 1902, § 2538. Liability to a county is a debt due the public. Lockwood v. Lockwood [S. C.] 47 S. E. 441.

39. Davis v. Butters Lumber Co., 132 N. C. 233, 43 S. E. 650.

40. To the exclusion of the law of any state. First Nat. Bank v. Selden [C. C. A.] 120 F. 212.

41. In re Burke [R. I.] 55 A. 825.

42. Hallett v. Fish, 123 F. 201.

43. Construing Act Aug. 13, 1888, c. 866, § 4, 25 Stat. 436 [U. S. Comp. St. 1901, p. 514]. Weeks v. International Trust Co. [C. C. A.] 125 F. 370.

44. Under P. L. 1902, p. 677, c. 224. Barrett v. Bloomfield Sav. Inst. [N. J. Eq.] 54 A. 543. The fact that a trust company and a national bank have been organized in the same community with a savings bank does not show that the dissolution of the latter is "advisable." Id. Under P. L. 1876, p. 346 [the savings bank act, and made applicable by § 52 to institutions already organized] declaring that "all vacancies in such board by death, resignation or otherwise, shall be

community, maintain a bill to prevent the managers of said bank from dissolving it,[45] and the fact that in the case of dissolution he will receive back his deposit and share in the surplus, does not prevent him from maintaining such a bill.[46] A savings bank being dissolved, the surplus should be divided among the bona fide depositors at the time of dissolution.[47]

Reorganization.[48]—A bond being given, pending the application for the appointment of a receiver for a bank, providing for the return of the assets to the officers or stockholders and a full settlement by them within a certain number of years, any creditor who is a beneficiary of said bond may sue thereon after condition broken to his damage,[49] and a delivery of the assets to one of the makers of such bond does not relieve the sureties thereon from liability, where by their acts they assent to such delivery and ratify it,[50] and an answer setting up such taking of the property by the stockholders as a defense to a suit by the bank should allege that the action was by a majority of the stockholders.[51]

Stockholders' individual liability.[52]—A registered stockholder is prima facie liable, and the burden of proof is upon him to show a sale in good faith,[53] and a proper attempt to have the transfer made upon the books of the bank in accordance with the statutes,[54] though in some states the stockholder's liability continues for a limited time after the transfer of the stock.[55] A corporation obtaining stock in a bank by reason of ultra vires acts does not assume the stockholders' liability.[56] In some states in order that the holder of bank stock as collateral may be exempt from liability as to creditors, it must appear on the corporation's books that he holds the stock only as pledgee.[57] The liability of a stockholder is an obligation to the bank in trust for its creditors,[58] and the bank may not, as against creditors or other stockholders, relieve him from this liability.[59] It is created by statute,[60] though the liability is contractual,[61] and hence laws thereon should be construed to operate prospectively only,[62] and statutes imposing a double liability being in derogation of the common law, are to be strictly construed.[63] This liability may be enforced, before the assets are completely exhausted, upon it appearing that they will be insufficient,[64] unpaid subscriptions for stock should, however, first be resorted to.[65] In some states such liability is best enforced in the creditor's bill to have a receiver appointed,[66] but an independent action being brought by the receiver the creditors are not necessary, though proper parties,[67] and the complaint

filled by the board of managers," the unwillingness of the present managers to continue in office is no ground for dissolving a savings bank, where proper men can be found to take their places. Id.

45, 46, 47. Barrett v. Bloomfield Sav. Inst. [N. J. Eq.] 54 A. 543.

48. See 1 Curr. L. 296.

49. Bond given under Comp. St. 1901, c. 8, § 35. Rawson v. Taylor [Neb.] 95 N. W. 1033.

50. Taylor v. Weckerly [Neb.] 96 N. W. 613.

51. Savings bank. Omaha Sav. Bank v. Rosewater [Neb.] 96 N. W. 63.

52. See 1 Curr. L. 296.

53. Schofield v. Twining, 127 F. 486.

54. Purchaser promised to have stock transferred, failed to do so, held, registered stockholder liable. Schofield v. Twining, 127 F. 486. Where in the exercise of reasonable care he directs a proper officer of the bank to make the transfer on the books, he is not liable for the neglect of the officers of the bank to obey his direction. Hunt v. Seeger [Minn.] 98 N. W. 91.

55. In Minnesota, one year. Findings of fact of trial court sustained. Hunt v. Doran [Minn.] 100 N. W. 222; Hunt v. Seeger [Minn.] 98 N. W. 91.

56. White v. Commercial & Farmers' Bank [S. C.] 45 S. E. 94.

57. Construing Civ. Code, §§ 321, 322, providing that all banks shall keep a stock book and defining a stockholder. Hurlburt v. Arthur, 140 Cal. 103, 73 P. 734.

58, 59. Smathers v. Western Carolina Bank [N. C.] 47 S. E. 893.

60. Hence under Code Civ. Proc. § 338, must be brought within three years after the cause of action accrues. Jones v. Goldtree Bros. Co. [Cal.] 77 P. 939.

61. Smathers v. Western Carolina Bank [N. C.] 47 S. E. 893.

62, 63. Construing Pub. Laws 1897, p. 473, c. 298. Smathers v. Western Carolina Bank [N. C.] 47 S. E. 893.

64, 65, 66, 67, 68. Smathers v. Western Carolina Bank [N. C.] 47 S. E. 893.

should state the time when the several defendants became stockholders, and the dates the debts were contracted.[68] Upon the reorganization of an insolvent bank, the stockholders taking part therein are primarily liable for the debts of the old bank,[69] the stockholders not taking part in the reorganization being secondarily liable,[70] and the latter are not discharged by the issuance and delivery by the reorganized bank of new certificates of deposit to the creditors of the old.[71] A stockholder receiving stocks[72] and dividends[73] from the reorganized bank is estopped to deny liability on the ground of irregularities or nonassent thereto. Under a statute allowing the stock to be sold by the bank upon failure of the owner to pay assessments levied thereon, money derived from such sale belongs to the owner of the stock.[74]

§ 3. *National banks; officers and examiners.*[75]—In the absence of a by-law the president of a national bank has no power to bind the latter by a representation that a forged signature is genuine,[76] nor are its directors empowered, without action of the stockholders, to levy an assessment ordered by the comptroller of the currency for the purpose of restoring its capital and enabling it to continue in business.[77]

Powers.[78]—The powers of a national bank under the national banking act are essentially matters for Federal construction and interpretation, and in construing said act state courts must yield to and follow the decisions of the United States supreme court.[79] A national bank may take stock in another corporation as collateral and acquire title to it upon default of the debtor,[80] it cannot become a member of a partnership, and cannot become liable as a partner,[81] but it may, in order to secure payment of a debt, become a part owner in severalty of the property then owned by the partnership, and as such, liable for its proportionate share of the debts and expenses incurred in managing and disposing of said property.[82] It may receive and hold a building contract as collateral security for the repayment of a pre-existing debt.[83] A national bank has power to lease property for its occupancy in conducting its business for a term extending beyond the expiration in its charter, even though the lease is only alienable upon a condition,[84] and, when insolvent, it may transfer its bank building in consideration of release of ground rent, where the transaction is fair, public, and reasonable.[85] A national bank has no power to bind itself that a draft drawn on its customer will be paid,[86] nor has it authority to procure a signature to a note for another bank in order that it may lend money to a third person, and represent the signature to be

69, 70, 71. In re Receivership of Germania Bank [Minn.] 98 N. W. 341.

72. State v. Germania Bank [Minn.] 95 N. W. 1116; Cronstadt v. Willius, 90 Minn. 150, 95 N. W. 1116.

73. Had transferred stock to his children 5 years old, held, made no difference. Aldrich v. Bingham, 131 F. 363.

74. Indiana statutes (4 Burns' Supp. 1897, § 13). Chicago Title & Trust Co. v. State Bank [C. C. A.] 121 F. 58.

75. See 1 Curr. L. 297.

76. Commercial Nat. Bank v. First Nat. Bank [Tex. Sup.] 80 S. W. 601.

77. Construing U. S. Rev. St. §§ 5136, 5145 (U. S. Comp. St. 1901, pp. 3455, 3463), and § 5205 (U. S. Comp. St. 1901, p. 3495). Commercial Nat. Bank v. Weinhard, 192 U. S. 243, 24 S. Ct. 253.

78. See 1 Curr. L. 297.

79. First Nat. Bank v. American Nat. Bank, 173 Mo. 153, 72 S. W. 1059. But the application of such decisions to a case properly brought in the state courts is to be determined by state decisions. Security Nat. Bank v. St. Croix Power Co., 117 Wis. 211, 94 N. W. 74.

80. Union Nat. Bank v. Touzalin Imp. Co. [Neb.] 95 N. W. 489.

81, 82. Merchants' Nat. Bank v. Wehrmann [Ohio] 68 N. E. 1004.

83. As to whether or not it can complete said contract on the death of the owner, quaere? Security Nat. Bank v. St. Croix Power Co., 117 Wis. 211, 94 N. W. 74.

84. Assignable only by consent of lessor. Weeks v. International Trust Co. [C. C. A.] 125 F. 370. See 1 Curr. L. 297.

85. Bank was in arrears for taxes, rent, etc. Held, lessor of ground could not be held to an accounting by receiver of bank. Brown v. Schleier, 194 U. S. 18, 24 S. Ct. 558.

86. Construing Rev. St. U. S. § 5136 [U. S. Comp. St. 1901, p. 3455]. First Nat. Bank v. American Nat. Bank, 173 Mo. 153, 72 S. W. 1059.

genuine.[87] It cannot be estopped from pleading ultra vires by the performance of the contract by the other party,[88] nor can it willfully commit a trespass, though its officers may do so, becoming personally liable therefor.[89] Under the United States statutes a national bank is not subject to any visitorial powers except such as are authorized thereby.[90] The stockholder's right of inspection is not a visitorial power.[91] No reduction of capital of a national bank can be made without the approval of the comptroller of the currency,[92] and it is fairly within his authority to condition his approval on the adoption of such measures as he might think proper to do justice to the holders of the original shares.[93]

Violation of banking act.[94]—The directors of a national bank enter into an implied contract with the depositors, this implied contract being inherent in the contract of deposit, that the bank will use such deposits and its other assets in conformity with the safeguards provided by law.[95] The depositors may sue the directors upon this implied contract, though the bank be insolvent,[96] and are entitled to maintain a single suit in equity against such directors,[97] such a bill not being multifarious,[98] and the bill failing to allege the date the deposits were made may be amended.[99] This cause of action survives the death of the directors,[1] nor are the latter relieved from liability by the expiration of their term of office.[2]

Stock.[3]—A national bank cannot forbid the transfer of shares of its stock by a stockholder who is indebted to the bank.[4]

Receivership.[5]—The legal existence of a national bank is not cut short by its insolvency and the appointment of a receiver therefor,[6] nor by the expiration of its charter,[7] but it still continues as an entity capable of suing and being sued.[8] A Federal court sitting in equity has jurisdiction, except in those cases where the comptroller of the currency has the power, to appoint a receiver for a national bank to liquidate its obligations,[9] and to authorize him to collect and to enforce by action the liability of the shareholders of the bank.[10] The state courts have the power to appoint a receiver to wind up a national bank, at the instance of a stockholder, in all cases except those designated by act of congress to be brought under the authority of the United States.[11] The complaint must show that plaintiff tried to get redress by an appeal to his fellow-stockholders or to the directors,[12] and there being a defect of parties, the objection cannot be raised for the first

87. Commercial Nat. Bank v. First Nat. Bank [Tex.] 80 S. W. 601.

88. First Nat. Bank v. American Nat. Bank, 173 Mo. 153, 72 S. W. 1059.

89. Meyer v. First Nat. Bank [Idaho] 77 P. 334.

90. Rev. St. U. S. § 5241 [U. S. Comp. St. 1901, p. 3517]. Harkness v. Guthrie [Utah] 75 P. 624.

91. Right given by Rev. St. Utah, § 329, construed. Harkness v. Guthrie [Utah] 75 P. 624.

92. Rev. St. U. S. § 5143 [U. S. Comp. St. 1901, p. 3463]. Cogswell v. Second Nat. Bank [Conn.] 56 A. 574.

93. Create a trust fund. Question arose on objection to averment in complaint for the appointment of a receiver. Cogswell v. Second Nat. Bank [Conn.] 56 A. 574.

94. See 1 Curr. L. 298.

95, 96, 97, 98, 99, 1, 2. Boyd v. Schneider [C. C. A.] 131 F. 223.

3. See 1 Curr. L. 298.

4. Under a by-law while indebted to the bank a stockholder could not transfer stock except with consent of board of directors. Third Nat. Bank v. Buffalo German Ins. Co., 193 U. S. 581, 24 S. Ct. 524.

5. See 1 Curr. L. 298.

6. Camp v. First Nat. Bank [Fla.] 33 So. 241. See 1 Curr. L. 298.

7. Cogswell v. Second Nat. Bank [Conn.] 56 A. 574.

8. Where the legal title to a note, not an asset of the bank, is in its name, but the beneficial ownership in another, such bank may maintain a suit in its own name to recover the amount of the note. Camp v. First Nat. Bank [Fla.] 33 So. 241.

May still be sued by a stockholder and cestui que trust of a special trust fund for the appointment of a receiver. Cogswell v. Second Nat. Bank [Conn.] 56 A. 574.

9. Act of Congress June 3, 1864, c. 106 (13 Stat. 99). King v. Pomeroy [C. C. A.] 121 F. 287.

10. Under Rev. St. 5151 [U. S. Comp. St. 1901, p. 3465]. King v. Pomeroy [C. C. A.] 121 F. 287.

11. Cogswell v. Second Nat. Bank [Conn.] 56 A. 574.

12. This question can only be raised by special demurrer. Cogswell v. Second Nat. Bank [Conn.] 56 A. 574.

time on appeal.[13] One suing both as a cestui que trust and as a stockholder for the appointment of a receiver, on the ground that those who had gained control of it were using their power for improper purposes is entitled to the protection of courts of equity.[14]

The receiver of a national bank has the legal title to the property covered by his appointment, and is entitled to maintain an action at law in his own name in the state courts,[15] he is the proper party to sue, for the benefit of both creditors and stockholders, the directors of said bank for sums alleged to have been lost by negligence or mismanagement of the latter, the fund recovered to be used for general distribution as assets of the bank,[16] and in suing in a Federal court he is not bound to give a bond for costs.[17]

Enforcement of stockholders' liability.[18]—A national bank becoming insolvent, the comptroller of the currency must, within a reasonable time, make an accounting and determine the necessity for an assessment upon the stockholders;[19] the cause of action on the liability of a stockholder not accruing until an assessment has been ordered by the comptroller.[20] This action is governed by the statute of limitations of the state where the action is brought,[21] and the comptroller is subject to the rule that where preliminary action is essential he cannot delay the operation of the statute of limitations by unnecessary delay in taking such action,[22] nor will failure to make the accounting within a reasonable time prevent the running of limitations.[23] Federal courts hold that this cause of action does not accrue until the court ascertains its necessity, and fixes the time of payment,[24] no action of the comptroller being held necessary to empower a Federal court's receiver to enforce the liability of the shareholders.[25] The remedy of a creditor's suit to enforce the liability of shareholders of national banks in voluntary liquidation, is cumulative, not exclusive.[26] In order to render the pledgee of stock of a national bank liable as a shareholder, it must appear that he either became the owner of the shares in fact,[27] or had held himself out to be the owner, and thereby estopped himself to deny his liability as such.[28] The liability of a trust estate, depending upon the power of the trustee to make the estate a shareholder, cannot be determined in an action at law by the bank receiver against the stockholder.[29]

State interference and powers of state courts.[30]—An injunction will not issue from a state court against a national bank.[31] A state can tax the real estate of

13. Cogswell v. Second Nat. Bank [Conn.] 56 A. 574.

14. Objection that he had an adequate remedy at law held untenable. Cogswell v. Second Nat. Bank [Conn.] 56 A. 674.

15. Fish v. Olin [Vt.] 56 A. 533.

16. Liability of directors imposed by Rev. St. § 5239 [U. S. Comp. St. 1901, p. 3516]. Boyd v. Schneider, 124 F. 239. Whether previous adjudication forfeiting bank's charter is necessary, quaere? Whether it cannot be brought by others than the receiver, acting under the direction of the comptroller of the currency, quaere? But in no case can it be maintained by the creditors alone. Boyd v. Schneider, 124 F. 239.

17. Construing Rev. St. § 1001 [U. S. Comp. St. 1901 p. 713]. Pepper v. Fidelity & Casualty Co. [C. C. A.] 125 F. 822.

18. See 1 Curr. L. 298.

19, 20, 21, 22. Rankin v. Barton [Kan.] 77 P. 531.

23. Facts disclosed in the pleading showing a lack of diligence in making such accounting are not overcome by an averment of diligence. Rankin v. Barton [Kan.] 77 P. 631.

24. When cause of action accrues and statute of limitation begins to run. King v. Pomeroy [C. C. A.] 121 F. 287. See 1 Curr. L. 299.

25. King v. Pomeroy [C. C. A.] 121 F. 287.

26. Act June 30, 1876, c. 156, § 2 (19 Stat. 63 [U. S. Comp. St. 1901, p. 3609]). King v. Pomeroy [C. C. A.] 121 F. 287.

27. Rankin v. Fidelity Ins., Trust & Safe Deposit Co., 189 U. S. 242, 23 S. Ct. 553, 47 Law. Ed. 792.

28. Memorandum by assignee of pledgor. Pencil memorandum on stock ledger at bank, inadmissible in evidence. Estoppel by letters question for the jury. Rankin v. Fidelity Ins., Trust & Safe Deposit Co., 189 U. S. 242, 23 S. Ct. 553, 47 Law. Ed. 792.

29. Even though he alleges that he holds the stock as trustee. Hampton v. Foster, 127 F. 468.

30. See 1 Curr. L. 299.

31. Rev. St. U. S. § 5242. Meyer v. First Nat. Bank [Idaho] 77 P. 334.

national banks.[32] As to whether or not a state may tax the stock of a national bank there is a conflict.[33] In New Jersey a national bank cannot seek savings deposits or attempt to compete with a savings' institution.[34]

Usury by national banks.[35]—The right to recover twice the amount of usurious interest paid to a national bank is a right which survives,[36] and is therefore in most states assignable,[37] though the bank may relinquish the usurious part,[38] and evade the penalty by a bona fide sale of the note.[39] A controversy respecting usurious interest paid to a national bank is governed by the Federal law, though the transaction violates the powers of such bank.[40] The time the "usurious transaction occurred," in contemplation of the statute, is the date of the payment of the usurious interest.[41] The bankruptcy of the person paying such usurious interest does not preclude him from recovering under the statute, after his discharge, where his trustee in bankruptcy did not reduce the claim to possession.[42] Usury is a defense to an action by the receiver,[43] and it does not discharge the surety or guarantor on the debt.[44]

§ 4. *Savings banks.*[45]—A savings bank is not a benevolent and charitable institution, within the meaning of taxation laws.[46]

32. The bank having tendered taxes legally due is not liable for the penalty for nonpayment. First Nat. Bank v. Lampasas [Tex. Civ. App.] 78 S. W. 42.

33. A state cannot tax the stock of a national bank, though the bank may render itself liable for taxes on its stock by offering to pay it. First Nat. Bank v. Lampasas [Tex. Civ. App.] 78 S. W. 42. A state may levy a tax on the shares of stock of a national bank. Construing Rev. St. § 5210 (U. S. Comp. St. 1901, p. 3498). The national banking act and Kentucky Acts 1900, p. 65, c. 23. This tax may be levied by counties, cities, towns or taxing districts when authorized by the state. Commonwealth v. Citizens' Nat. Bank, 25 Ky. L. R. 2100, 80 S. W. 158.

34. P. L. 1876, p. 357. Barrett v. Bloomfield Sav. Inst., 64 N. J. Eq. 425, 54 A. 543.

35. See 1 Curr. L. 300.

36. Lasater v. First Nat. Bank [Tex. Civ. App.] 72 S. W. 1054.

37. Action may be maintained by a partner who has purchased all interest in a firm which has paid such usurious interest. Lasater v. First Nat. Bank [Tex. Civ. App.] 72 S. W. 1054; Id., 96 Tex. 345, 72 S. W. 1057.

NOTE. Assignability of claim for penalty: A cause of action against a national bank for usurious interest paid to it is not assignable. Lloyd v. First Nat. Bank, 5 Kan. App. 512, 47 P. 575; Pardoe v. Iowa State Bank, 106 Iowa, 345, 76 N. W. 800.—From note to Citizens' Nat. Bank v. Gentry [Ky.] 56 L. R. A. 673, 695.

38. NOTE. Right to relinquish illegal excess. In Talbot v. First Nat. Bank, 185 U. S. 172, 22 S. Ct. 612, 46 Law. Ed. 857, the court says that although interest greater than the legal rate may have been charged by a national bank, such excess may be relinquished and recovery be had at the legal rate.—From note to Citizens' Nat. Bank v. Gentry [Ky.] 56 L. R. A. 673, 679.

39. NOTE. Evasion of penalty by bank: A national bank may evade the penalty for taking usurious interest by selling and disposing of the note in good faith, mere assignment raises no presumption of an absolute sale. First Nat. Bank v. Miltonberger, 33 Neb. 847, 51 N. W. 232.—From note to Citizens' Nat. Bank v. Gentry [Ky.] 56 L. R. A. 673, 681.

40. Interest paid on note, secured by a collateral note and mortgage, the latter executed in the name of the president but for the benefit of the bank, thus violating the law prohibiting a national bank from taking real estate security for a debt coincidently contracted. Schuyler Nat. Bank v. Gadsden, 191 U. S. 451, 24 S. Ct. 129.

41. Rev. St. U. S. § 5198 [U. S. Comp. St. 1901, p. 3493], barring such actions after "two years from the time the usurious transaction occurred." Lasater v. First Nat. Bank [Tex. Civ. App.] 72 S. W. 1054.

42. Lasater v. First Nat. Bank [Tex. Civ. App.] 72 S. W. 1054.

43. NOTE. Availability of usury as a defense: The defense of usury is available as a defense in an action by the receiver of the national bank. Hade v. McVay, 31 Ohio St. 231. But it should be kept in mind that the courts now generally hold that where the usurious interest has been actually paid it is not available as a defense, but only in a separate action to recover the penalty of twice the amount of interest paid. Childs v. Alexander, 22 S. C. 169, holds that it is not available as a defense to a suit by the assignee of the bank.—From note to Citizens' Nat. Bank v. Gentry [Ky.] 56 L. R. A. 673, 696.

44. NOTE. Does not discharge surety or guarantor: A surety or guarantor of a debt to a national bank is not discharged because the bank charged or received usury. Wiley v. Starbuck, 44 Ind. 298; First Nat. Bank v. McEntire, 112 Ga. 232, 37 S. E. 381; First Nat. Bank v. Garlinghouse, 22 Ohio St. 492, 10 Am. Rep. 751; Lazear v. Nat. Union Bank, 52 Md. 78, 36 Am. Rep. 355; Allen v. First Nat. Bank, 23 Ohio St. 97.—From note to Citizens' National Bank v. Gentry [Ky.] 56 L. R. A. 673, 679.

45. See 1 Curr. L. 300.

46. People v. Miller, 84 App. Div. 168, 82 N. Y. S. 621.

Powers.[47]—A savings bank may acquire title to shares of stock of another corporation, where they are taken in good faith in compromise or discharge of an insolvent debtor, and such action is for the best interest of the bank,[48] and on thus becoming the owner of such stock, it is liable thereon as any other stockholder.[49] A savings bank is liable for breach of its contracts.[50] In some states other banks are not allowed to seek savings deposits.[51] Savings banks are amenable to new laws.[52]

Liabilities of directors.[53]—The managers of a savings bank are holders of a public trust of a benevolent and charitable nature,[54] as well as trustees for the depositors in their institution,[55] and hence must act disinterestedly.[56]

Rules.[57]—By-laws and rules printed in the passbook of a savings bank delivered to and accepted by the depositor, at the time he opens the account, constitute a contract between the parties.[58] Rules providing that the bank will endeavor to prevent fraud do not dispense with the exercise of ordinary care and diligence on the part of the bank officials.[59] A by-law providing that the bank shall be discharged by payment to one having the passbook is operative only during the lifetime of the depositor.[60] A by-law providing that no depositor shall receive any part of his deposit without producing the original book, unless it be proved to the satisfaction of the trustees or treasurer that such book has been lost, cannot render the treasurer or trustees the final arbiter of the question of whether the book was lost, and thus oust the courts of their jurisdiction,[61] nor is the test the arbitrary decision of the treasurer or trustees, but the mind of a reasonable man.[62] Payments made to a person other than the rules designate are made at the bank's peril.[63] A by-law of a savings bank restricting the transfer of stock is not binding on a bona fide pledgee for value of the stock without notice thereof.[64] A savings bank may become estopped to assert that a transaction was invalid under a by-law.[65]

Reliance on passbooks.[66]—The bank cannot rely exclusively upon the posses-

47. See 1 Curr. L. 300.

48, 49. Hill v. Shilling [Neb.] 95 N. W. 24.

50. Where a bank operates a savings department in its banking house, a claim for damages for breach of the bank's lease, on the bank's insolvency, is chargeable pro rata against the assets of each department. McGraw v. Union Trust Co. [Mich.] 98 N. W. 390.

51. P. L. 1899, p. 455, does not repeal P. L. 1876, p. 357. Barrett v. Bloomfield Sav. Inst., 64 N. J. Eq. 425, 54 A. 543.

52. The Kansas banking law of 1891 superseded the savings bank act of 1868. West v. Topeka Sav. Bank, 66 Kan. 524, 72 P. 252.

53. See 1 Curr. L. 300.

54, 55. Barrett v. Bloomfield Sav. Inst., 64 N. J. Eq. 425, 54 A. 543.

56. In dissolution proceedings they have no right to destroy the entity of the corporation while transferring to themselves its good will. Barrett v. Bloomfield Sav. Inst., 64 N. J. Eq. 425, 54 A. 543.

57. See 1 Curr. L. 301.

58. Ferguson v. Harlem Sav. Bank, 86 N. Y. S. 825. Rules as to payment of money. Kelley v. Buffalo Sav. Bank, 88 App. Div. 374, 84 N. Y. S. 642.

59. By-law that payment to persons holding passbook would be payment to depositor, and that bank would endeavor to prevent fraud. Held. difference in signatures not easily discernible and bank not negligent. Kelley v. Buffalo Sav. Bank, 88 App. Div. 374, 84 N. Y. S. 642. Payment on forged signature, held as all the rules of identification were exhausted, and as irregularities in signature were slight, no negligence, and where this testimony was uncontradicted error to submit question of negligence to jury. Ferguson v. Harlem Sav. Bank, 86 N. Y. S. 825.

60. Payment after depositor's death to one having power of attorney from depositor and passbook from depositor, does not relieve bank. Hoffman v. Union Dime Sav. Inst., 41 Misc. 517, 85 N. Y. S. 16.

61, 62. Webber v. Cambridgeport Sav. Bank [Mass.] 71 N. E. 567.

63. Rule declared that on death of depositor deposit should be paid to legal representatives. Bank paid it to one claiming as the donee of a gift causa mortis, bank held liable to the personal representative. Mahon v. South Brooklyn Sav. Inst., 175 N. Y. 69, 67 N. E. 118. Under a similar rule paid to one who held a power of attorney not knowing that depositor was dead, bank held liable. Hoffman v. Union Dime Sav. Inst., 41 Misc. 517, 85 N. Y. S. 16.

64. Just v. State Sav. Bank [Mich.] 94 N. W. 200.

65. Transfer of stock without consent of directors, new owner being elected to the board of directors and recognized as such officer. Just v. State Sav. Bank [Mich.] 94 N. W. 200.

66. See 1 Curr. L. 301.

sion of the passbook, and even where a rule provides that payment to the holder of the passbook will discharge the bank, the officials of the bank are bound to exercise ordinary care and diligence.[67]

Deposits and repayment.[68]—The depositors in a savings bank occupy a double relation to the corporation as such; in case of insolvency they are creditors of the corporation,[69] in other cases they are partners or stockholders,[70] in all they are the cestuis que trustent of the managers.[71] Where two persons jointly own a deposit in a savings bank the title to the whole fund vests in the survivor,[72] and it is immaterial whether or not such survivor has ever had the passbook in his possession.[73]

§ 5. *Loan, investment, and trust companies.*[74]—The company must receive its charter under a constitutional act.[75] The contract of a loan, trust, and guarantee company is not ultra vires merely because failure to exercise the ordinary care required of every trustee may subject it to an indemnity payment wholly disproportionate to its compensation.[76] And such a company holding as trustee, and rating securities at their actual worth, is not a guarantor of the actual worth of the securities.[77] A suit against an insolvent debenture company may be instituted by one or more debenture holders in behalf of all holders, their interest being joint,[78] and they may maintain a suit against it to prevent the wasting of its assets, though the debentures have not matured.[79]

§ 6. *Deposits and repayment thereof; checks, drafts, certificates, receipts, credits.*[80] *Deposits may be received from* a gambler with reason to believe that the money was won in gaming or by other questionable means; but the bank crosses the line of permissibility when, with a knowledge that such depositor is obtaining the money by fraud or theft, it does acts in aid of the wrongful means by which the money is obtained.[81] It may rightfully receive deposits from an agent of an insolvent principal, the latter having committed an act of bankruptcy upon which he is subsequently adjudged a bankrupt.[82]

Relation of banker and depositor.[83]—The relation of banker and depositor is that of debtor and creditor,[84] the banker's liability being discharged by payment.[85] He cannot repudiate this obligation by showing that the name of the depositor was that of something having no legal existence.[86] Money being deposited in a

67. Kelley v. Buffalo Sav. Bank, 88 App. Div. 374, 84 N. Y. S. 642; Ferguson v. Harlem Sav. Bank, 86 N. Y. S. 825. See "Rules," supra.

68. See 1 Curr. L. 301.

69. One must here keep in mind the distinction between the corporate entity of a savings bank and its managers. Barrett v. Bloomfield Sav. Inst., 64 N. J. Eq. 425, 54 A. 543.

70, 71. Barrett v. Bloomfield Sav. Inst., 64 N. J. Eq. 425, 54 A. 543.

72, 73. Farrelly v. Emigrant Industrial Sav. Bank, 92 App. Div. 529, 87 N. Y. S. 54.

74. See 1 Curr. L. 302.

75. Act 1898, p. 78, authorizing the secretary of state to grant charters to trust companies with banking privileges is not unconstitutional. Mulherin v. Kennedy [Ga.] 48 S. E. 437.

76. Smith v. Bank of New England [N. H.] 54 A. 385.

77. Stocks, etc., held as security for certificates of deposit issued by another trust company. Smith v. Bank of New England [N. H.] 54 A. 385.

78. To prevent officer of company from obtaining possession of guaranty fund. Christian v. Michigan Debenture Co. [Mich.] 96 N. W. 22.

79. Christian v. Michigan Debenture Co. [Mich.] 96 N. W. 22.

80. See 1 Curr. L. 302.

81. Wright v. Stewart, 130 F. 905.

82. Interstate Nat. Bank v. Claxton [Tex.] 80 S. W. 604.

83. See 1 Curr. L. 302.

84. First Nat. Bank v. City Nat. Bank, 102 Mo. App. 357, 76 S. W. 489. Not a bailment. Arnold v. Sedalia Nat. Bank, 100 Mo. App. 474, 74 S. W. 1038; Heath v. New Bedford Safe Deposit & Trust Co., 184 Mass. 481, 69 N. E. 215. Garnishment. Deposit by principal for use of his agent. Principal a debtor of bank. Curtis v. Parker & Co., 136 Ala. 217, 33 So. 935.

85. By becoming dissatisfied with delay in returning signature card, and the fact that deposit was to be immediately withdrawn, the nature of the contract is not changed, so as to discharge it from liability by returning it to person unauthorized to receive same. Heath v. New Bedford Safe Deposit & Trust Co., 184 Mass. 481, 69 N. E. 215.

86. That a partnership was illegal being formed between an individual and a corpora-

bank for the benefit of another, who is notified thereof by the bank, the relation between such person and the bank is that of depositor and banker.[87] A bank delivering a check to the payee at the request of the drawer "all charges to be paid by the payee" is, as to the drawer, a gratuitous bailee.[88]

Under an agreement to collect upon *collaterals,* deposited with it as security, and hold the proceeds for the benefit of another, a bank may be compelled to turn over the excess over the amount necessary to protect it, its liability for which the collateral was deposited as security not having ended.[89] In Oklahoma the remedy of an unsecured creditor against a bank which hypothecates his notes and credits as collateral for a loan is an action under the Code, not a suit in equity.[90]

Evidence of deposit.[91]—A passbook being sent to the bank to be written up and returned, it is in effect a demand on the part of the depositor to know what the bank claims to be a statement of his account, and a return of the book with the vouchers is an answer to that demand,[92] and, no objection being made by the depositor, it becomes in effect an account stated,[93] which most courts hold must be examined by the depositor within a reasonable time, and if incorrect, repudiated, failure to do so working an estoppel,[94] though this account stated may be questioned for fraud or mistake; the burden of proving such fraud or mistake clearly and satisfactorily resting upon the complainant.[95] A depositor is not bound to examine his bank book to discover whether the cashier has made a mistake in counting the amount of the deposit,[96] the contrary, however, being held, it seems that the depositor is not estopped to controvert the entry unless the bank is shown to have been prejudiced by his neglect to make such examination.[97] Whether or not an account is the depositor's individual account depends upon the circumstances of each case.[98]

Letters of credit.—One has no claim against the writer of a letter of credit unless he knew of its existence, and advanced his money on the faith of it.[99] The writer of a letter of credit cannot apply checks, cashed by one bank without any knowledge of the existence of the letter of credit, to the extinguishment of the amount named in the letter as against another bank subsequently cashing the bearer's checks on the faith of it.[1]

Repayment of deposits.[2]—A bank is bound to honor checks drawn on it by a depositor if it has sufficient funds belonging to the depositor when the check is presented, and the funds are not subject to any lien or claim,[3] or right of set-off in favor of the bank,[4] but the depositor being solvent the bank is liable, though

tion. And this estoppel is not terminated by the individual partner's debt. Willey v. Crocker-Woolworth Nat. Bank [Cal.] 72 P. 332.

87. Heath v. New Bedford Safe Deposit & Trust Co., 184 Mass. 481, 69 N. E. 215.

88. King v. Exchange Bank [Mo. App.] 78 S. W. 1038.

89. Mercantile Nat. Bank v. Peabody [Colo. App.] 72 P. 611.

90. Code Civ. Proc. §§ 518-520, c. 66, St. 1893. Overstreet v. Citizens' Bank, 12 Okl. 383, 72 P. 379.

91. See 1 Curr. L. 302.

92. Scanlon-Gipson Lumber Co. v. Germania Bank, 90 Minn. 478, 97 N. W. 380.

93. Farry v. Farmers' & Mechanics' Bank [N. J. Eq.] 58 A. 305.

94. Scanlon-Gipson Lumber Co. v. Germania Bank, 90 Minn. 478, 97 N. W. 380; Hennessy Bros. & Evans Co. v. Memphis Nat. Bank [C. C. A.] 129 F. 557.

95. Evidence held insufficient to show fraud. Farry v. Farmers' & Mechanics' Bank [N. J. Eq.] 58 A. 305.

96. Evidence held sufficient to show a demand. Kemble v. National Bank of Rondout, 88 N. Y. S. 246. On the question as to whether a bill deposited with a bank was a $100 gold certificate or a $1,000 greenback, the fact that within 1½ hours of the time of the deposit the depositor had received a $1,000 greenback and a $500 gold certificate is relevant. Id.

97. Kemble v. National Bank of Rondout, 88 N. Y. S. 246.

98. Whether deposits belonged to depositor or firm. Bank of Salem v. Shrimpton [Neb.] 96 N. W. 1002.

99, 1. Bank of Seneca v. First Nat. Bank [Mo. App.] 78 S. W. 1092.

2. See 1 Curr. L. 303.

3. Wiley v. Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655; Brown v. Schintz, 202 Ill. 509, 67 N. E. 172.

4. Depositor was insolvent. Owen v.

the funds have been set off by the bank against past due claims, no notice thereof having been given the depositor,[5] and the bank is obliged to honor the checks of its depositor even though he holds the money in a fiduciary capacity, it incurring no liability in so doing as long as it does not participate in any misapplication of funds or breach of trust,[6] though the conduct or course of dealing of the depositor may charge the bank with notice that he is violating his trust.[7] For its refusal or neglect to honor the depositor's check the bank may be sued either for conversion or for money had and received.[8] The statute of limitations runs against this right.[9] The check should be paid in money.[10] The deposit should be repaid to the true owner, and where the bank has sufficient knowledge to put it on inquiry that the depositor is not the true owner, it is liable for permitting it to be applied otherwise.[11] As between the parties every legal presumption is in favor of the personal ownership of the fund by the depositor,[12] hence the addition of the word "administrator" to the depositor's individual name has been held not to be notice to the bank that the fund was held in a fiduciary capacity.[13] A deposit of money in a bank by a third person to the credit of another does not show ownership in the latter in the absence of a showing of acceptance, or a presumption of acceptance.[14] Suit by an assignee of such third person for the benefit of his creditors is not an acceptance by the assignor of the benefit of such deposit,[15] nor is a letter by such an assignee to the bank that his assignor had funds in the bank evidence, in an action against the bank by the assignee, that the assignor owned the funds.[16] Such a deposit being for the benefit of the third party, it will be presumed to have been accepted by him,[17] but this is not true where the presumption would establish an unlawful act, or participation in an unlawful act.[18]

When, in the absence of fraud, a genuine check is presented to a bank and received as a deposit, the legal effect is that the check is paid,[19] and this effect does not depend upon there being cash enough in the bank the moment the check is presented to pay it,[20] nor on the financial condition of the bank as shown on a settlement of its affairs after insolvency.[21] The check being so presented, the bank becomes the owner thereof.[22] Where a bank accepts the check of a depositor, and puts it to the credit of another depositor, it is equivalent to a payment in cash to such second depositor of the amount of the check,[23] and the bank cannot recover from him the amount thereof on discovering that it in reality had no funds of the drawer.[24] A bank paying a check presented by a bona fide holder

American Nat. Bank [Tex. Civ. App.] 81 S. W. 988.

5. Callahan v. Bank of Anderson [S. C.] 48 S. E. 293.

6, 7. Interstate Nat. Bank v. Claxton [Tex.] 80 S. W. 604.

8. York v. Farmers' Bank [Mo. App.] 79 S. W. 968.

9. It seems to have been held that the statute of limitations runs against the cause of action against stockholders for indebtedness to a depositor from the time of deposit, and the transfer of such deposit by check to the savings department of the bank does not interrupt the running of such statute. Jones v. Goldtree Bros. Co. [Cal.] 77 P. 939.

10. It is not authorized to pay it in evidences of indebtedness held by it against the agent of the depositor. Goshorn v. People's Nat. Bank [Ind. App.] 69 N. E. 185.

11. Depositor was insolvent. Interstate Nat. Bank v. Claxton [Tex. Civ. App.] 77 S. W. 44. See 1 Curr. L. 303.

12. Sparrow v. State Exch. Bank [Mo. App.] 77 S. W. 168.

13. Sparrow v. State Exch. Bank [Mo. App.] 77 S. W. 168. The United States supreme court and many state courts have held contra to above. See Bank v. Insurance Co., 104 U. S. 54, 26 Law. Ed. 693.

14, 15, 16, 17, 18. Leach v. First Nat. Bank, 99 Mo. App. 681, 74 S. W. 416.

19. Check presented by payee as a deposit. Montgomery County v. Cochran [C. C. A.] 126 F. 456.

20, 21. Montgomery County v. Cochran [C. C. A.] 126 F. 456.

22. It being forwarded for collection to the drawee the original payee cannot recover from the drawee who pays it by mistake after it has been countermanded. National Bank of New Jersey v. Berrall [N. J. Err. & App.] 58 A. 189.

23. Bryan v. First Nat. Bank, 205 Pa. 7, 54 A. 480.

24. Bank had on its books funds of drawer to meet the checks, but in reality, owing to later dishonor of certain checks, had no money of his. Bryan v. First National Bank, 205 Pa. 7, 54 A. 480.

in the usual course of business, it cannot afterward recover back the money as paid by mistake, on the ground that payment of the check had been countermanded by the drawer.[25] A bank may rely on the solvency of the drawer of a draft deposited on his account with it, and if not paid by the drawee may charge it back.[26] Whether or not a note or check has been paid often depends upon the circumstances surrounding the transaction.[27] The drawing and delivery of a check on a bank deposit operates as an assignment of so much of the deposit as is called for by the check,[28] but it must be drawn upon a particular fund and be accepted by the bank.[29] Where, by a bond given by order of court, a bank agrees to pay the deposit of a receiver upon demand, it is not relieved from liability to do so by an agreement with the receiver whereby the latter agrees to leave the deposit for a specified time.[30] A depositor, on accounting with the bank, is entitled to the benefit of a deposit made by a bank official for the specific purpose of paying overdrafts occasioned by his misappropriation of the depositor's money.[31]

Overdrafts.—An overdraft allowed by a bank is a note due on demand and may be sued on as such,[32] and the same is true of a note given, payable on demand, to cover it, to the extent that the overdraft is thereby segregated from the account.[33] An overdraft draws interest from the date of demand or adjustment.[34]

Forged or altered checks and drafts.[35]—A bank paying a check to one presenting it under a forged indorsement may recover back the amount if it proceed with due diligence,[36] and may recover of an indorsee upon proof that a prior in-

25. National Bank of New Jersey v. Berrall [N. J. Err. & App.] 58 A. 189.

26. Hendley v. Globe Refinery Co. [Mo. App.] 79 S. W. 1163.

27. Where on the maturity of a note, of one of its depositors, sent to a bank for collection, the cashier drew his check in favor of the payee for the amount of the note, made a memorandum thereof on a block, wrote on the face of the note in the bank's name that it was paid, and perforated it and put in the files, and was then notified of the maker's insolvency, held, the note was already paid, nothing remaining besides entries of records on the books, but to remit the proceeds. Nineteenth Ward Bank v. First Nat. Bank, 184 Mass. 49, 67 N. E. 870.

28. Brown v. Schintz, 202 Ill. 509, 67 N. E. 172.

29. Reviere v. Chambliss [Ga.] 48 S. E. 122. Where bank answered a telegram, asking if the drawer had money in the bank, in the affirmative, held an assignment. New York Life Ins. Co. v. Patterson & Wallace [Tex. Civ. App.] 80 S. W. 1058.

30. Scott v. Whipple, 119 Ga. 485, 46 S. E. 663.

31. Van Buren County Sav. Bank v. Stirling Woolen Mills [Iowa] 94 N. W. 945.

32, 33, 34. Hennessy Bros. & Evans Co. v. Memphis Nat. Bank [C. C. A.] 129 F. 557.

35. See 1 Curr. L. 303.

36. In this case trust company guaranteed former indoreements, one of which was forged, held bank could recover from trust company and the latter from the person to whom the money was paid. Second Nat. Bank v. Guarantee Trust & Safe Deposit Co., 206 Pa. 616, 56 A. 72.

NOTE. Recovery by one paying a forged check: To entitle the payor to recover upon a forged instrument it must appear that he has sustained a loss, and if he being a banker, can charge the payment to the account of the depositor, he has lost nothing, and has no cause of action. Land Title & Trust Co. v. Northwestern Nat. Bank, 196 Pa. 230, 46 A. 420, 79 Am. St. Rep. 717. The payor upon discovering the forgery must promptly give notice to the person to whom the check was paid in order to recover from him. U. S. v. Clinton Nat. Bank, 28 F. 357. Reasonable diligence only is required. Schroeder v. Harvey, 75 Ill. 639; National Bank v. Bangs, 106 Mass. 441, 8 Am. Rep. 349.—From note to First Nat. Bank v. City Nat. Bank [Mass.] 94 Am. St. Rep. 637, 644.

As between banks the same rules apply and the money paid may be recovered provided that the bank paid is in no worse position than if payment had been refused. First Nat. Bank v. First Nat. Bank, 4 Ind. App. 355, 30 N. E. 808, 51 Am. St. Rep. 321. There is a line of cases in conflict with the above principles holding, in effect, that a banker or other payee upon whom a forged check has been drawn cannot upon the discovery of a forged indorsement thereon, recover the amount from an innocent and bona fide holder for value to whom he has paid it. Price v. Neal, 3 Burr. 1354; First Nat. Bank v. Marshalltown State Bank, 107 Iowa, 327, 77 N. W. 1045; Deposit Bank v. Fayette Nat. Bank, 90 Ky. 10, 13 S. W. 339; Commercial Bank v. First Nat. Bank, 30 Md. 11, 96 Am. Dec. 554; Neal v. Coburn, 92 Me. 139, 42 A. 348, 69 Am. St. Rep. 495; Germania Bank v. Boutell, 60 Minn. 192, 62 N. W. 327, 51 Am. St. Rep. 519; National Bank v. Grocers' Nat. Bank, 2 Daly [N. Y.] 289; Salt Springs Bank v. Syracuse Sav. Bank, 62 Barb. [N. Y.] 101; Iron City Bank v. Peyton [Tex. Civ. App.] 39 S. W. 660; Bank of St. Albans v. Farmers' Bank, 10 Vt. 141, 33 Am. Dec. 188. The drawer of a check cannot maintain an action against one who collects it on a forged indorsement from the bank on which it was drawn, although the bank paying the check may. Land Title & Trust Co. v. Northwestern Nat. Bank, 196 Pa. 230, 46 A. 420, 79 Am. St.

dorsement is forged,[37] the burden of proving the forged character of the instrument being on the bank.[38] It is liable for money paid to an indorsee, where it has knowledge that such indorsement was procured by fraud.[39] One depositing money in the name of another, representing himself to be such other person, the bank is not liable to him for money drawn out by such other person,[40] nor can one indorsing to an impostor recover from the bank when compelled to pay the real claimant.[41] The fact that the maker of a check is mistaken as to the identity of the payee will not allow him to recover from a bank, paying the check on said payee's indorsement, on the ground that the indorsement was forged.[42] In Massachusetts a bank is not bound to know the signatures of its patrons.[43] A bank is not liable for payments made upon a check altered by an agent within the apparent scope of his authority.[44] A depositor is not estopped to charge the bank with forged checks, if he has used ordinary care in the examination of his passbook and returned checks, and failed to discover the forged checks and to give notice thereof,[45] and where the examination is entrusted to a clerk he is only bound to use ordinary care in the selection of the clerk.[46] If the bank is negligent in paying the checks, the depositor is not estopped by his failure to make any examination.[47] What is a reasonable time in which a depositor should examine his passbook, after it has been balanced and returned to him with the canceled vouchers, is a question of law.[48] A bank on which a check is drawn, on taking it up in the clearing house properly indorsed, is presumed to have acted in good faith.[49] A bank taking a "raised" check for collection and indorsing it so as to convey no representation of ownership, the check being paid by the drawee, and by the collecting bank to the payee, the collecting bank is not liable to the drawee.[50] A bank falsely asserting that a signature is genuine is liable in an action for deceit.[51]

Rep. 717.—From note to First Nat. Bank v. City Nat. Bank [Mass.] 94 Am. St. Rep. 637, 644.

37. Egner v. Corn Exch. Bank, 86 N. Y. S. 107.

38. Action by bank to recover from another bank the amount of checks paid by the former to the latter through the clearing house, on the ground that the indorsements thereon were fraudulent and unauthorized. National Park Bank v. American Exch. Nat. Bank, 88 N. Y. S. 271.

39. Certificate of deposit. Currey v. Joplin Sav. Bank, 100 Mo. App. 532, 74 S. W. 1036.

40. Arkofsky v. State Sav. Bank [Minn.] 98 N. W. 326.

41. Hoffman v. American Exch. Nat. Bank [Neb.] 96 N. W. 112.

42. Maker of check given as the purchase price for horses bought of one B. thinking that B. was a man well known in business circles, whereas he was another man bearing the same name. Sherman v. Corn Exch. Bank, 91 App. Div. 84, 86 N. Y. S. 341.

43. A Massachusetts bank cashed a forged check on a Minnesota bank and sent it to the Minnesota bank for collection. The Minnesota bank paid it and on learning of the forgery brought action to recover the money so paid. Held, they could recover. First Nat. Bank v. City Nat. Bank, 182 Mass. 130, 65 N. E. 24.

44. Bookkeeper required to fill out and cash, but not sign, plaintiff's checks, held, any alteration in amount of check within his apparent authority and bank not liable. Champion Ice Mfg. & Cold Storage Co. v. American Bonding & Trust Co., 25 Ky. L. R. 239, 75 S. W. 197.

45, 46. Kenneth Inv. Co. v. National Bank of the Republic [Mo. App.] 77 S. W. 1002.

47. Such negligence may be shown by the fact that at a prior time the bank had cashed a check of plaintiff's, not signed by any one in authority, but simply plaintiff's name stamped with a rubber stamp, and this is so, though the money realized from that check was properly used. Kenneth Inv. Co. v. National Bank of the Republic [Mo. App.] 77 S. W. 1002.

48. Kenneth Inv. Co. v. National Bank of the Republic [Mo. App.] 77 S. W. 1002. Ten days cannot be arbitrarily fixed as a reasonable time, but it is a reasonable time where the depositor resides in the same town or city in which the bank is located. Id.

49. Indorsement was by an unauthorized person. Wedge Mines Co. v. Denver Nat. Bank [Colo. App.] 73 P. 873.

50. Crocker-Woolworth Nat. Bank v. Nevada Bank, 139 Cal. 564, 73 P. 456.

51. Commercial Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 77 S. W. 239.

Evidence as to genuineness: Where a depositor refused to pay a check on the ground that she never signed a check with her initials, and an expert testified that the initials were not in her handwriting, and the cashier and another employe of the bank testified that they saw her sign it, and other experts testified the handwriting to be hers, a verdict finding that she did not sign the check is against the weight of the evidence. Peo-

Checks drawn without authority.[52]—A bank is responsible to a depositor for payment of checks drawn on his fund without authority.[53] Several persons making a deposit to their joint credit, a check drawn thereon must be signed by all, or the bank pays it at its own risk.[54] A bank paying money on a check signed by one who claims to be the depositor's agent does so at its peril,[55] and it is bound to take notice of the limitations of his authority,[56] other than secret ones.[57] That the act was within the apparent scope of the agent's authority is no defense, where the bank had no knowledge of such agency nor acted upon the faith of it.[58] That one is agent for the purpose of depositing his principal's money, does not give him authority to check the deposit out.[59] Money being deposited by one in his own name with no notice express or implied to the bank of his being an agent, the bank is not liable to the owner for money paid out on the agent's individual check.[60] A bank is liable for knowingly misappropriating the funds of a corporation depositor to pay the individual debts of the latter's officers,[61] and when it knowingly allows the depositor of a trust fund to appropriate the same to the payment of his individual debt to the bank it can be compelled to refund the same.[62]

Set-off of debts due bank against deposit.[63]—A bank has the right to apply so much of the funds of a depositor to the payment of his matured indebtedness to it as may be necessary to discharge the same.[64] The right of set-off does not exist until the maturity of the debt due the bank,[65] unless the depositor be insolvent.[66] Where the indebtedness to the bank does not mature until after the death of the depositor the right of set-off does not exist,[67] though it has been held otherwise where the debt matured the day after the depositor's death.[68] A bank cannot, without the consent of the depositor, apply the latter's deposit to the payment of a check or note upon which he is security or guarantor.[69] It is entitled

ple's Sav. Bank & Trust Co. v. Keith, 136 Ala. 469, 34 So. 925.

52. See 1 Curr. L. 304.

53. Husband drew checks on wife's deposit, her separate property. Brown v. Daugherty, 120 F. 526.

54. Columbia Finance & Trust Co. v. First Nat. Bank, 25 Ky. L. R. 561, 76 S. W. 156.

55. Heath v. New Bedford Safe Deposit & Trust Co., 184 Mass. 481, 69 N. E. 215. Treasurer of corporation. Van Buren County Sav. Bank v. Stirling Woolen Mills [Iowa] 94 N. W. 945; Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 65 N. E. 136, 59 L. R. A. 657.

But where no damage results to the principal it is damnum absque injuria. New York Brick & Paving Co. v. Bronx Borough Bank, 42 Misc. 31, 85 N. Y. S. 557. A clerk having no authority from custom or usage to indorse his employer's checks, the latter may deny the validity of the indorsement as against a bank paying the check. Rosenberg v. Germania Bank, 88 N. Y. S. 952.

56. Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 65 N. E. 136, 59 L. R. A. 657. A bank receiving deposits in the name of an individual "and Co.," is put upon inquiry as to whether it is the deposit of the individual or of a partnership. Willey v. Crocker-Woolworth Nat. Bank [Cal.] 72 P. 832.

57. The fact that checks always bore the agent's indorsement is not notice that he could indorse for collection only. Wedge Mines Co. v. Denver Nat. Bank [Colo. App.] 73 P. 873.

58. Husband as agent for wife. Brown v. Daugherty, 120 F. 526.

59. Heath v. New Bedford Safe Deposit & Trust Co., 184 Mass. 481, 69 N. E. 215.

60. Martin v. Kansas Nat. Bank, 66 Kan. 655, 72 P. 218.

61. Officers of corporation drew check, on corporation's funds in defendant's bank, payable to defendant, defendant credited amount of same on individual debts of officers. Kelsey v. Bank of Mansfield, 85 App. Div. 334, 83 N. Y. S. 281.

62. Columbia Finance & Trust Co. v. First Nat. Bank, 25 Ky. L. R. 561, 76 S. W. 156.

63. The right of set-off is sometimes termed the "banker's lien on deposits." Sharp v. Citizens' Bank of Stanton [Neb.] 98 N. W. 50. See 1 Curr. L. 305.

64. Sparrow v. State Exch. Bank [Mo. App.] 77 S. W. 168.

65. Sharp v. Citizens' Bank of Stanton [Neb.] 98 N. W. 50. It is not entitled to an equitable set-off of unmatured notes of a depositor against its liability for damages for refusal to honor check, no bankruptcy or insolvency proceedings having been instituted against him at the time of the dishonor of his check. Wiley v. Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655.

66. Owen v. American Nat. Bank [Tex. Civ. App.] 81 S. W. 988.

67. Sharp v. Citizens' Bank of Stanton [Neb.] 98 N. W. 50.

68. Little's Adm'r v. City Nat. Bank, 25 Ky. L. R. 8, 74 S. W. 699.

69. O'Grady v. Stotts City Bank [Mo. App.] 80 S. W. 696.

to set off an insolvent corporation's deposit against the corporation's indebtedness to it.[70] The fact that money is deposited in a firm name, the bank understanding it to be the depositor's individual account, does not destroy the bank's right to set off the individual's note against such account.[71] A bank receiving a check, with a general indorsement in blank, for collection, and forwarding it with a like indorsement to its correspondent for collection, the latter is entitled to set off the proceeds as against the debt of the forwarding bank.[72] A bank cannot knowingly set off a deposit held by the depositor in a fiduciary capacity against the individual debt of the depositor due it.[73] A bank having no notice that a deposit is a specific one is entitled to apply it to the depositor's overdrafts.[74] A bank cannot be held to account to the owner of a fund which has been deposited by an agent in his own name and applied upon the agent's overdraft, the bank having no knowledge of the agency.[75] The fact that a bank is a preferred creditor of an insolvent does not authorize it to set off deposits made by the insolvent's assignee, as assignee, against its preferred claim.[76] A court has no power to summarily direct a bank to pay over to the receiver of a corporation the amount of the corporation's deposit in said bank, pending the determination of the right of the bank to set off such deposit against the corporation's indebtedness to it.[77] The right of set-off passes to the bank's assignee of the debt and account.[78] The right of a bank to a set-off will not be required by law, in the absence of express agreement or appropriation, so as to benefit a surety.[79]

Deposits received after insolvency.[80]—A bank discounting drafts when insolvent, to the knowledge of its officers, the drawer of the drafts may either demand and sue for them, or ratify the contract and prove his debt against the bank.[81]

General deposits.—Where the money deposited is mingled with other money of the bank, and the entire amount forms a single fund, from which depositors are paid, it is a general deposit.[82] Every deposit is presumed to be general.[83] Money deposited in a bank to the credit of a pledgee of chattels in order to release the goods is a general deposit though the facts were known to the bank officials.[84]

Special deposits.[85]—A special deposit is created where the money is left for safe keeping and the identical money is returned to the depositor.[85] A deposit of money paid into court, under a statute requiring the cashier of the bank to issue

70. Wheaton v. Daily Tel. Co. [C. C. A.] 124 F. 61.

71. Even though by secret agreement he has a partner in the firm business. Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 P. 106.

72. Continental Nat. Bank v. First Nat. Bank [Miss.] 36 So. 189.

73. Sparrow v. State Exch. Bank [Mo. App.] 77 S. W. 168; Interstate Nat. Bank v. Claxton [Tex.] 80 S. W. 604.

74. First Nat. Bank v. City Nat. Bank, 102 Mo. App. 357, 76 S. W. 489.

75. Kimmel v. Bean [Kan.] 75 P. 1118.

76. Johnston v. Green [Va.] 46 S. E. 388.

77. Wheaton v. Daily Tel. Co. [C. C. A.] 124 F. 61.

78. Right to set off individual's note against account kept in firm name. Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 P. 106.

79. Camp v. First Nat. Bank [Fla.] 33 So. 241. See 1 Curr. L. 305.

80. See 1 Curr. L. 305.

81. He cannot do both. Where he brought an action to recover the amount of the drafts and garnished the drawee who had accepted them, such action constituted an election to affirm the contract and he could not recover on the ground that they had been obtained by the bank by fraud. Davis v. Butters Lumber Co., 132 N. C. 233, 43 S. E. 650.

82. A general deposit differs from a loan in that the money is left with the bank for safe-keeping subject to order and payable, not in the specific money deposited, but in an equal sum. Officer v. Officer, 120 Iowa, 389, 94 N. W. 947.

83. Officer v. Officer, 120 Iowa, 389, 94 N. W. 947.

84. No special instructions were given. Attempt to secure priority over general creditors. Schofield Mfg. Co. v. Cochran [Ga.] 47 S. E. 208.

85. See 1 Curr. L. 305.

86. Officer v. Officer, 120 Iowa, 389, 94 N. W. 947.

a statement that the money is actually deposited in the bank and not mingled with any other funds, does not create a special deposit.[87]

Specific deposits.[88]—A specific deposit exists where money or property is given to the bank for some specific and particular purpose.[89] The burden is on the depositor to show that a bank has notice that a deposit is a specific one.[90]

Trust funds.[91]—A bank knowing that deposits are trust funds it cannot appropriate them to the payment of an individual debt due it from the depositor.[92] The deposit of money by a trustee in his own name, and without notice to the bank of the trust, does not render the deposit a trust fund in the hands of the bank.[93] That funds collected by a bank on a note sent it for collection are used in its own business is insufficient, upon its insolvency, to impress a fund realized by its receiver, by converting its assets into cash, with a trust for the payment of the money so collected and used.[94] The depositary of a trust fund is not entitled to retain the same where it has parted with no consideration and has acquired no rights,[95] although such deposit was made by an agent or trustee and until demand by the owner the depositary had no notice of its real character.[96] A principal has a right, as against the agent and bank, to his funds deposited by an agent in his name, though such funds are mingled with the agent's.[97] The fact that the deposit is public money does not make the deposit a trust fund.[98]

Slander of credit or damages for failure to pay checks.[99]—Damages for refusal to pay a check when the drawer has sufficient funds on hand are the natural and reasonable consequences arising therefrom.[1] Substantial[2] and special damages if properly alleged,[3] may be recovered. Where the refusal is due to the mistake of a clerk, in the absence of proof of special damages, nominal damages only can be recovered.[4]

Actions to recover deposits. Parties.[5]—In some states the holder of an unaccepted check may sue thereon,[6] and the fact that the bank claims not to have had the money on hand when a check was drawn on it does not take the case out of the rule.[7] In others,[8] and in the Federal courts,[9] he cannot maintain such a suit. In

87. Comp. Laws, §§ 420, 424. Retan v. Union Trust Co. [Mich.] 95 N. W. 1006.

88. See 1 Curr. L. 305.

89. Note for collection, money to pay a particular note, etc. Officer v. Officer, 120 Iowa, 389, 94 N. W. 947.

90. First Nat. Bank v. City Nat. Bank, 102 Mo. App. 357, 76 S. W. 489.

91. See 1 Curr. L. 305, n. 39-43.

92. State Bank of St. Johns v. McCabe [Mich.] 98 N. W. 20. See 1 Curr. L. 305. See, also, "Set-off of debts due bank against deposit," supra.

93. Deposit by an attorney of client's money. Rhinehart v. New Madrid Banking Co., 99 Mo. App. 381, 73 S. W. 315. And the fact that when the cestui que trust withdrew a portion on the depositor's check, she told the bank that a part of the rest was hers, does not entitle her to a money judgment in a suit at law against the bank. Id.

94. Ober & Sons v. Cochran, 118 Ga. 396, 45 S. E. 382.

95, 96. Union Stockyards Nat. Bank v. Campbell [Neb.] 96 N. W. 608.

97. Assignee of principal as against creditors of the agent. Packer v. Crary, 121 Iowa, 388, 96 N. W. 870.

98. Public money deposited, with the understanding that it shall draw interest, by the treasurer of the public board in a bank of which he is the cashier but not a stockholder does not constitute a trust fund so as to entitle such depositor to preferred payments on the insolvency of the bank, under Pub. Act 1875, pp. 158, 159, No. 131, prohibiting public officers from commingling public moneys with other funds. Board of Education of City of Detroit v. Union Trust Co. [Mich.] 99 N. W. 373.

99. See 1 Curr. L. 306.

1. Wiley v. Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655.

2. Depositor, studying in strange city, through failure to honor checks lost the confidence of her instructor, was delayed for two months in opening an art shop and spent $2.86 in telegraphing. Held, verdict for $500 not excessive. American Nat. Bank v. Morey, 25 Ky. L. R. 2151, 80 S. W. 157. See O'Grady v. Stotts City Bank [Mo. App.] 80 S. W. 696, where the authorities are collected by the Hon. Judge Bland.

3. Wiley v. Bunker Hill Nat. Bank, 183 Mass. 495, 67 N. E. 655.

4. Clark Co. v. Mt. Morris Bank, 85 App. Div. 362, 83 N. Y. S. 447.

5. See 1 Curr. L. 306.

6. Columbia Finance & Trust Co. v. First Nat. Bank, 25 Ky. L. R. 561, 76 S. W. 156; Bloom v. Winthrop State Bank, 121 Iowa, 101, 96 N. W. 733.

7. Columbia Finance & Trust Co. v. First Nat. Bank, 25 Ky. L. R. 561, 76 S. W. 156.

some states statutes provide for making all claimants for a deposit, who are not parties plaintiff, parties defendant.[10] In some cases an adverse claimant may interplead.[11]

Defenses.[12]—A bank on being sued by one other than the depositor should protect itself by depositing the money in court and asking a decision as to the ownership.[13] A bank charging off the credit given a depositor for checks presented and accepted, for the reason that the drawer failed to pay, cannot, in a suit for the credit given, defend on the ground that the checks were given for a gambling transaction.[14] The statute of limitations does not begin to run against a bank on paper payable on demand until demand has been made.[15] An action by the receiver, in a Federal court, against a stockholder is not a bar to an action by said stockholder, as a depositor, against said receiver for the amount of his deposit.[16] Money being deposited without an agreement for interest, the depositor withdrawing the deposit without interest cannot afterwards recover interest thereon.[17]

Notes payable at bank.[18]—A note payable at a bank where the maker keeps his account is equivalent to a check drawn by him upon that bank, so far as respects the power and duty of the bank to pay it,[19] but the bank may only treat it as such when the maker of the note has funds on deposit at the date of maturity.[20]

Certifications.[21]—By the certification of a check a bank becomes primarily liable for its payment to any bona fide holder thereof;[22] and must pay it to such a holder though notified by the maker that the check has been lost,[23] the drawer being released from liability.[24] The amount of a certified check, in the absence of fraud, is as much drawn from the depositor's account as if the money had been paid,[25] but the holder of such check, being paid, repaying the amount on being

8. Bryan v. First Nat. Bank, 205 Pa. 7, 54 A. 480. Unaccepted check. New York Life Ins. Co. v. Patterson [Tex. Civ. App.] 80 S. W. 1058; National Bank of New Jersey v. Berrall [N. J. Err. & App.] 58 A. 189.

9. Can maintain neither an action at law nor a suit in equity, the check being held not to be an assignment pro tanto, even in equity, as between the maker and payee, of the indebtedness owing by the bank upon which the check has been drawn. First Nat. Bank v. Selden [C. C. A.] 120 F. 212.

10. **New York:** Under Laws 1892, p. 1896, c. 689, § 115, providing for the making of all claimants, for a deposit in a savings bank, who are not parties plaintiff, parties defendant. Where a deposit is claimed by one as a gift, the depositor's administrator should be made a party defendant. Answering does not affect the bank's right to this relief. Quinn v. Bank for Sav. of New York, 86 N. Y. S. 285.

11. **NOTE. Interpleading conflicting claims to moneys deposited:** The right to interplead such adverse claimants exists in favor of a bank whether it be a savings bank or bank of exchange. The elements of a case for interpleader must be present, and hence if the bank denies any part of the demand of either claimant, interpleader will not lie. An objection that the bank is a bailee, hence not entitled to interplead, has not been sustained. City Bank v. Skelton, 2 Blatchf. 14, Fed. Cas. 2,739. See cases collected in note to Connecticut Mut. Life Co. v. Tucker [R. I.] 91 Am. St. Rep. 590, 608.

12. See 1 Curr. L. 307.

13. Arnold v. Sedalia Nat. Bank, 100 Mo. App. 474, 74 S. W. 1038.

14. Bryan v. First Nat. Bank, 205 Pa. 7, 54 A. 480.

15. Certificate of deposit payable on demand. Sharp v. Citizens' Bank of Stanton [Neb.] 98 N. W. 50.

16. Where the receiver defends such action on the ground that part of said deposit was used to pay plaintiff's subscription to the capital stock of said bank, the burden of proof is upon the receiver to show that the purchase of stock was actually made. Somerset Nat. Banking Co.'s Receiver v. Adams, 24 Ky. L. R. 2083, 72 S. W. 1125.

17. Payment of money was refused on demand but subsequently allowed. Arnold v. Sedalia Nat. Bank, 100 Mo. App. 474, 74 S. W. 1038.

18. See 1 Curr. L. 307.

19. Nineteenth Ward Bank v. First Nat. Bank, 184 Mass. 49, 67 N. E. 670.

20. State Bank of St. Johns v. McCabe [Mich.] 98 N. W. 20.

21. See 1 Curr. L. 307.

22. Poess v. Twelfth Ward Bank, 86 N. Y. S. 857. Neg. Inst. Law, § 325. Meuer v. Phoenix Nat. Bank, 94 App. Div. 331, 88 N. Y. S. 83.

23. Poess v. Twelfth Ward Bank, 86 N. Y. S. 857; Hermann Furniture & Plumbers' Cabinet Works v. German Exch. Bank, 87 N. Y. S. 462.

24. Neg. Inst. Law, § 325. Meuer v. Phoenix Nat. Bank, 94 App. Div. 331, 88 N. Y. S. 83.

25. Central Guarantee Trust & Safe Deposit Co. v. White, 206 Pa. 611, 56 A. 76; Hermann Furniture & Plumbers' Cabinet Works v. German Exch. Bank, 87 N. Y. S. 462.

threatened with suit, cannot maintain an action against the bank on its certification.[26]

§ 7. *Loans and discounts. Advances against bills of lading.*[27]—A bank agreeing to pay the check of a purchaser of goods for the purchase price thereof taking the bill of lading as security, upon so doing has a lien upon the goods for its advances.[28] A bank agreeing to advance money to dealers to pay for goods purchased, taking the bills of lading as security, and the uniform course of business being for the dealers to sell the goods, and after the sales are made, receive the bills from the bank, and on receiving payment to deposit the amount in the bank, upon a sale the bank cannot refuse to surrender the bills and recover the goods.[29]

Drafts with bills of lading attached.—A bank for value and without notice of fraud purchasing drafts with bills of lading attached from the consignor, said drafts being fully paid by the consignee, it is not liable to the latter for fraud perpetrated by the consignor in making out the bills of lading.[30] A bank is liable for damages caused by failure to forward bill of lading with draft,[31] and for a failure to follow instructions.[32]

§ 8. *Collections.*[33]—A collecting bank on drafts may make the drawee bank its agent for collection.[34] A bank forwarding checks for collection under a general indorsement in blank, the title to such collection, as to third parties dealing without notice and not being put upon inquiry, passes to the bank to which they are forwarded, and the former becomes simply a general creditor of the latter bank.[35] A bank forwarding drafts for collection under claim of ownership is presumed to be the owner,[36] though one receiving a draft endorsed generally but accompanied by an instruction that it is for "collection and credit" for the benefit of the drawer takes the draft in the capacity of a collecting agent,[37] and has notice that the forwarding bank is not the owner thereof.[38] A bank forwarding a draft to a bank who has a correspondent in the town where the draft is payable, the first bank not having an agent there, will be presumed to forward for collection.[39] It is not presumed that a bank holding a local check drawn upon another bank is the owner thereof except for collection.[40] The forwarding bank making an assignment and ceasing to do business before the draft is collected, the collecting

26. Poess v. Twelfth Ward Bank, 86 N. Y. S. 857.

27. See 1 Curr. L. 308.

28, 29. First Nat. Bank v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 72 S. W. 1033.

30. Blaisdell, Jr., Co. v. Citizens' Nat. Bank [Tex.] 75 S. W. 292.

NOTE. Liability of bank on drafts with bill of lading attached: A bank collecting a draft drawn by the consignor of goods, with a bill of lading attached thereto, is not liable to the consignee after his acceptance and payment of the draft, for a failure of title to the property described in the bill of lading, or for a breach of warranty as to the quality or quantity of the goods shipped, or for failure of consideration in whole or in part from any cause, between the consignor and the consignee. Hall v. Keller, 64 Kan. 211, 67 P. 518, from note to this case in 91 Am. St. Rep. 209.

31. Carload of onions spoiled by delay. Stoner v. Zachary [Iowa] 97 N. W. 1098.

32. Instructions being to deliver the bill of lading only after payment of the draft, a delivery of the bill of lading before payment of the draft renders the bank liable for the payment of the same. Gulf, etc., R. Co. v. North Tex. Grain Co. [Tex. Civ. App.] 74 S. W. 567.

33. See 1 Curr. L. 308. See post, **Bank Collections of Forged Paper** [Special Article].

34. Drawee bank when acting as such agent must charge indorsers. National Revere Bank v. National Bank of the Republic, 172 N. Y. 102, 64 N. E. 799.

35. Continental Nat. Bank v. First Nat. Bank [Miss.] 36 So. 189.

36. National Revere Bank v. National Bank of the Republic, 172 N. Y. 102, 64 N. E. 799.

37. Not as a purchaser. Josiah Morris & Co. v. Alabama Carbon Co. [Ala.] 36 So. 764.

38. Is not entitled to credit the proceeds against a debt of the forwarding bank upon the latter's failure. Josiah Morris & Co. v. Alabama Carbon Co. [Ala.] 36 So. 764.

39. Especially where the previous business relations of the parties tends to support this conclusion. National Revere Bank v. National Bank of the Republic, 172 N. Y. 102, 64 N. E. 799.

40. "Raised" check. Crocker-Woolworth Nat. Bank v. Nevada Bank, 139 Cal. 564, 73 P. 456.

bank's agency for the forwarding bank is terminated,[41] and the drawer may recover the amount subsequently collected.[42] A draft drawn in favor of the cashier of a bank, to enable the latter to collect the same and place the proceeds to the drawer's credit, does not divest the drawer's ownership of the debt for which the draft was drawn.[43]

Duty to preserve rights of parties.[44]—A collecting bank undertakes to collect and remit, or return draft.[45] The measure of a collecting agent's duty is ordinary care and reasonable diligence.[46] It must take proper means to charge indorser if note not paid,[47] and if this is not done it is liable if the drawer becomes insolvent,[48] the amount depending upon the latter's inability to collect from the maker,[49] and in such an action the indorser will be presumed to have been solvent at the time of maturity of the note.[50] It is liable to the drawer of a draft for damages sustained by the latter owing to the bank's failure to promptly return the draft after its nonpayment.[51] A general custom will not excuse the exercise of this care,[52] and a particular custom in order to be binding on the one sending the draft for collection must have been actually known to him when he sent it.[53] The collecting bank, in the absence of some special agreement, is liable for loss occasioned by a default of its agent for collection.[54]

§ 9. *Offenses against banking laws; penalties.*[55]—A conspiracy to defraud a national bank by causing false entries to be made in the books thereof, by an officer of the bank, is an offense against the United States.[56] The entry, by the cashier of a national bank on the books thereof, of a check which actually entered into a transaction of the bank as a "cash item" is not the making of a "false entry,"[57] although he knew the check to be worthless and fraudulent and made the entry with intent to deceive.[58] Where a bank accepts checks not stamped as required by acts of congress it cannot later, in a suit in which they are involved, object to their being offered in evidence because they were unstamped.[59]

Receipt of deposits when insolvent.[60]—In Kansas directors are liable for deposits received after insolvency, where they have failed to inquire into the affairs of the bank as required by statute, even though such an examination would not have revealed the insolvent condition of the bank.[61]

41, 42, 43. Josiah Morris & Co. v. Alabama Carbon Co. [Ala.] 36 So. 764.

44. See 1 Curr. L. 309.

45. National Revere Bank v. National Bank of the Republic, 172 N. Y. 102, 64 N. E. 799.

46. Bank of Bay Biscayne v. Monongahela Nat. Bank, 126 F. 436.

47. National Revere Bank v. National Bank of the Republic, 172 N. Y. 102, 64 N. E. 799; Howard v. Bank of Metropolis, 88 N. Y. S. 1070.

48. A bank received an indorsed draft for collection which it forwarded to the drawee and received in payment drafts upon itself for which there was no money on deposit. It protested these drafts and forwarded them to the drawer of the original paper. In the meantime the drawee of the original draft became insolvent. National Revere Bank v. National Bank of the Republic, 172 N. Y. 102, 64 N. E. 799.

49. Where maker died shortly after maturity of note his estate not having been administered on and there being evidence that the full amount of the note could not be collected therefrom, held payee need not prove insolvency. Howard v. Bank of Metropolis, 88 N. Y. S. 1070.

50. National Revere Bank v. National Bank of the Republic, 172 N. Y. 102, 64 N. E. 799.

51. Where at maturity and for a month thereafter, the drawee had property open to attachment to an amount larger than the draft, and before the draft was returned failed and made an assignment, held, drawer's damages are not remote as a matter of law. Lord v. Hingham Nat. Bank [Mass.] 71 N. E. 312. It is evidently not the custom of banks to retain no protest items after maturity. Id.

52, 53. Bank of Commerce v. Miller, 105 Ill. App. 224.

54. National Revere Bank v. National Bank of the Republic, 172 N. Y. 102, 64 N. E. 799.

55. See 1 Curr. L. 310.

56. Indictable under Rev. St. § 5440. Scott v. U. S. [C. C. A.] 130 F. 429.

57. Within the meaning of Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497]. U. S. v. Young, 128 F. 111.

58. U. S. v. Young, 128 F. 111.

59. Bryan v. First Nat. Bank, 205 Pa. 7, 54 A. 480.

60. See Deposits received after insolvency, supra. See 1 Curr. L. 310.

61. Gen. St. 1901, §§ 471, 472. Forbes v. Mohr [Kan.] 76 P. 827.

BANK COLLECTIONS OF FORGED OR ALTERED PAPER.*

[SPECIAL ARTICLE.]

What law governs.—The laws of the place of the performance of the immediate acts constituting the mistaken or wrongful payment of forged paper by a collecting bank govern its liability therefor to the true owner.[1]

Name of maker or drawee forged.—As a general rule, the drawee of a check or draft is charged with knowledge of the handwriting of its customer or correspondent, the drawer, and, if the drawee pays the paper, it must stand the loss if the paper was a forgery, and has passed into the hands of a bona fide purchaser.[2] But this rule is not available to the payee, who took the check from a stranger without inquiry, though in good faith, and himself indorsed it, and thereby gave it currency and credit; since the indorsement by the payee gives the paper the appearance of genuineness, and tends to divert the drawee from scrutiny and inquiry.[3] This modification of the general rule is of general application, and will relieve the drawee from liability to any party to the paper who has in any way contributed to the success of the fraud, or to the mistake of fact under which the payment was made.[4] While it is true that the cashier is the general executive officer of the bank

1. Reasoning by analogy from the rules determining what law governs the relation between the depositor and the collecting bank, see Selover, Bank Collections, § 6. In deciding the liability of a London bank which had a branch in Paris, where a forged instrument was paid, the court said: "Collection had to be obtained by acts done partly in Paris and partly in England, and as soon as the person carrying out these acts reached England, he came under English law, and anything done by him subsequently, if it amounted to a wrong, must be justified, if at all, by English law. * * * If the individual presented it for payment in England, and received payment there, he would by both those acts have committed what amounts to conversion in English law. Upon analysis it will be seen that those acts were done by the French bank,—it is immaterial whether by traveling to England or by means of third persons,—and the question is whether, according to English law, the transaction amounts to a conversion." La Cave & Co. v. Credit Lyonnais, 66 Law J., Q. B. 226. See, also, Kleinwort v. Le Comptoir Nationale d'Escompte de Paris, 63 Law J., Q. B. 674 [1894] 2 Q. B. Div. 157.

2. Northwestern Nat. Bank of Chicago v. Bank of Commerce of Kansas City, 107 Mo. 402, 410, 17 S. W. 982, 15 L. R. A. 102; Stout v. Benoist, 39 Mo. 277, and cases cited; United States Nat. Bank v. National Park Bank, 59 Hun, 495, 13 N. Y. S. 411, affirmed (on opinion of court below) in 129 N. Y. 647, 29 N. E. 1028; Crawford v. West Side Bank, 100 N. Y. 54, 2 N. E. 881; Oppenheim v. West Side Bank, 22 Misc. 722, 50 N. Y. S. 148; First Nat. Bank of Carthage v. Yost, 58 Hun, 606, 11 N. Y. S. 862; 3 Am. & Eng. Enc. Law, 222; Price v. Neal, 3 Burrows, 1354. The leading case on this question states that it was incumbent on the drawee to satisfy himself "that the bill drawn upon him 'was the drawer's hand' before he accepted or paid it;" and that, having paid it to a bona fide indorser for value, he cannot recover back the money from him, though the signature of the drawer was forged. Price v. Neal, 3 Burrows, 1355. To same effect is Smith v. Mercer, 6 Taunt. 76. In a Massachusetts case, Holmes, C. J., in holding that the drawee bank cannot recover back money paid through the clearing house to a collecting bank, on a forged check payable to cash and unindorsed, on the ground that it was charged with knowledge of the signature of the drawer, and that, under the evidence, it could not have been misled by the lack of indorsement, said: "The plaintiff's argument is directed to proving that we should not adopt the rule laid down in Price v. Neal, 3 Burrows, 1354, according to which a drawee paying a forged draft or check to a bona fide purchaser cannot recover back the money paid. We are aware that this rule has been questioned by some text writers; but it is of such universal, or nearly universal, acceptance, that we shall go into no extended discussion. * * * Probably the rule was adopted from an impression of convenience, rather than for any more academic reason; or perhaps Lord Mansfield took the case out of the doctrine as to payments under a mistake of fact, by the assumption that a holder who simply presents negotiable paper for payment makes no representation as to the signature, and that the drawee pays at his peril." Dedham Nat. Bank v. Everett Nat. Bank [Mass.] 59 N. E. 62. See, also, authorities cited in above case.

3. National Bank of North America v. Bangs, 106 Mass. 441; Ellis v. Ohio Life Insurance & Trust Co., 4 Ohio St. 628; Birmingham Nat. Bank v. Bradley, 103 Ala. 109, 15 So. 440, and cases cited. See, also, Green v. Purcell Nat. Bank, 1 Ind. T. 270, 37 S. W. 50.

4. Gloucester Bank v. Salem Bank, 17 Mass. 33, 42; Ellis v. Ohio Life Insurance & Trust Co., 4 Ohio St. 628; National Bank of North America v. Bangs, 106 Mass. 441. Where a steamboat agent, after being informed by letter that a draft drawn on the captain of the boat had been deposited in a

*Adapted from Selover on Bank Collections.

for whose acts it must stand as sponsor, yet, to create an estoppel against the bank by reason of his acts and representations as to forged paper, his connection with the transaction must be definitely shown.[5] Under the rule, the drawee is only charged with knowledge of the signature of the drawer, and not with knowledge of the genuineness of the body of the instrument, as between himself and other parties having equal means of determining the existence of an alteration.[6]

Indorsement of payee forged.—A bank which collects and pays to the depositors thereof checks, payable to order, on which the indorsement of the payee had been forged before deposit in the bank, is liable to the payee for conversion of the checks, though it was ignorant of the forgery, and acted in good faith.[7] But this rule cannot be invoked by one who has been impersonated,[8] though it seems this

certain bank for collection, went to the bank on the day it was due, described and called for the draft, and voluntarily paid it without further inquiry, the bank, which received no compensation for the transaction, and made no entries of it on the books, is not liable to him for the amount thereof, both the letter and the draft having been forged, where it appeared that the draft was deposited by a stranger with instructions that, if no one called to pay it before three o'clock, it was to be given to a notary for protest, and plaintiff called and paid it a few minutes later, and the amount was turned over to the depositor on the same day. Stephenson v. Mount, 19 La. Ann. 295.

5. A forged certificate of deposit was sent by plaintiff to defendant for collection, and by the latter sent to the bank purporting to have issued it. The cashier of the last-named bank passed it to the bookkeeper with other paper received from defendant, and a check was sent covering the aggregate amount of all the paper so received. The forgery was not discovered until after business hours of that day, when the bank immediately notified plaintiff and its principal of the forgery. On the next day it returned the certificate to defendant, who recredited such bank with the amount thereof under a general agreement to that effect respecting commercial paper found not good. It was held that defendant was justified in refunding the money to such bank as money paid by mistake, and that the passing of the forged certificate over to the bookkeeper did not amount to such a recognition of the genuineness of the certificate as would preclude the bank from setting up the subsequently discovered forgery, in the absence of a showing that the cashier actually passed on the genuineness of the certificate, or that it was his duty to do so, or that his acts were communicated to plaintiff or to defendant. Allen v. Fourth Nat. Bank of New York, 59 N. Y. 12, affirming 5 Jones & S. 137, distinguishing Price v. Neal, 3 Burrows, 1354, and citing Goddard v. Merchants' Bank, 4 Comst. [N. Y.] 149, and National Bank of Commerce v. National Mechanics' Banking Ass'n, 55 N. Y. 211, note.

6. Crawford v. West Side Bank, 100 N. Y. 54, 2 N. E. 881; United States Nat. Bank v. National Park Bank, 59 Hun, 495, 13 N. Y. S. 411, affirmed (on opinion of court below) in 129 N. Y. 647, 29 N. E. 1028; National Bank of Commerce v. National Mechanics' Banking Ass'n, 55 N. Y. 211; White v. Continental Nat. Bank, 64 N. Y. 316; Oppenheim v. West Side Bank, 22 Misc. 722, 50 N. Y. S. 148; Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, affirming 77 Ill. App. 316; First Nat. Bank of Chicago v. Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739.

7. Farmer v. People's Bank, 100 Tenn. 187, 47 S. W. 234; Pickle v. Muse, 88 Tenn. 381, 12 S. W. 919; Chism v. First Nat. Bank of New York, 96 Tenn. 641, 36 S. W. 387; Talbot v. Bank of Rochester, 1 Hill [N. Y.] 295; Buckley v. Second Nat. Bank of Jersey City, 35 N. J. Law, 400; Shaffer v. McKee, 19 Ohio St. 526; Salomon v. State Bank, 28 Misc. 324, 59 N. Y. S. 407. One whose property has been wrongfully converted is not bound to take it back, but may abandon it from the moment of its conversion, and sue for its value. Id.; People v. Bank of North America, 75 N. Y. 564. Liability of bank on its indorsement of the paper, see Selover, Bank Collections, § 164. Where a bank has collected the amount of a check received on a forged indorsement of the name of the payee, to whom the instrument had never been delivered, such payee, by a subsequent demand on the bank for the proceeds, ratifies the indorsement, and makes the check his property to such an extent as to sustain an action by him for the proceeds. Farmer v. People's Bank, 100 Tenn. 187, 47 S. W. 234; Pickle v. Muse, 88 Tenn. 381, 12 S. W. 919; Talbot v. Bank of Rochester, 1 Hill [N. Y.] 295; Buckley v. Second Nat. Bank of Jersey City, 35 N. J. Law, 400. "The action against the wrongdoer does not rest upon privity, but upon the fact that he has intermeddled with property not his own, and, asserting a hostile claim, he has interfered with the lawful use and dominion of the owner of the property." Farmer v. People's Bank, 100 Tenn. 187, 47 S. W. 234.

8. An indorsement of the payee's name is not forged when made by the person named and intended to be named as payee, who received the paper from the drawer, and was the actual person with whom the whole transaction was made, though he had fraudulently procured the draft by using as security a worthless note and mortgage purporting to have been, but not having been, executed by a man and wife having the same surname as such payee. First Nat. Bank of Ft. Worth v. American Exchange Nat. Bank, 49 App. Div. 349, 63 N. Y. S. 58. Payee had fraudulently represented himself to be the owner of land, and had obtained the paper by impersonating the real owner, but was, nevertheless, the

modification of the rule has been done away with by the section of the negotiable instrument act, declaring a signature which is forged or made without authority to be "wholly inoperative."[9] In England, the liability of the bank is governed by statute.[10] The payee of a check, by suing the bank, which collected and paid over the amount thereof on a forged indorsement of his name, for conversion of the check, affirms and ratifies the payment of the check by the maker.[11] An indorser subsequent to the forged indorsement is liable over to the bank for the amount refunded.[12]

Diligence in notifying parties.—The collecting bank must exercise reasonable diligence in notifying the holder or party from whom it received the paper of the forgery or alteration.[13] But the bank is under no obligation to give notice of the

person dealt with and intended as the payee of the paper. Emporia Nat. Bank v. Shotwell, 35 Kan. 360, 369; Crippen v. American Nat. Bank of Kansas City, 51 Mo. App. 509, and cases cited; Land Title & Trust Co. v. Northwestern Nat. Bank, 196 Pa. 230, 50 L. R. A. 75, and note collecting cases.

9. See Tolman v. American Nat. Bank, 22 R. I. 462, 52 L. R. A. 877, where the court holds that the rule at common law is not clear and that the negotiable instruments law has abrogated it.

10. The English Bills of Exchange Act 1882, § 82, providing that "where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment," protects a bank collecting for a customer the amount of a crossed cheque, on a forged indorsement of the payee's name, though at the time of receiving payment, and crediting it to the customer, his account was overdrawn, and a part of the credit canceled the overdraft. Clarke v. London & County Banking Co., 66 Law J., Q. B. 354. This section of the act is applicable, however, only in case the bank is dealing with a "customer;" and a stranger to the bank, whose only transaction with the bank is the passage on it of the forged instrument, is not a "customer," within the meaning of the act, and, in such case, the collecting bank, if it pays the amount of the paper to such stranger, is liable to the true owner for conversion of the funds. La Cave & Co. v. Credit Lyonnais, 66 Law J., Q. B. 226; Matthews v. Brown & Co., 10 Times Law R. 386 [1894] 63 Law J., Q. B. 494; Kleinwort v. Le Comptoir Nationale d'Escompte de Paris, 63 Law J., Q. B. 674, [1894] 2 Q. B. Div. 197; Arnold v. Cheque Bank, 45 Law J., C. P. 562, 1 C. P. Div. 578.

11. Salomon v. State Bank, 28 Misc. 324, 59 N. Y. S. 407; White v. Sweeny, 4 Daly [N. Y.] 223.

12. Where plaintiff in good faith took a check on a forged indorsement of the payee, and indorsed it in blank and delivered it to defendant bank for collection, and received the proceeds from the bank, the latter, on discovering the forgery and refunding the money to the drawee bank, may reimburse itself out of the first moneys of the plaintiff that come into its possession, though it had not notified plaintiff of the forgery; since plaintiff guarantied the genuineness of the payee's indorsement, and having received the proceeds, was chargeable with notice of the forgery. Green v. Purcell Nat. Bank, 1 Ind. T. 270, 37 S. W. 50. See, also, Mayer v. City of New York, 63 N. Y. 455, 457; Indig v. National City Bank, 80 N. Y. 100, 105.

13. Bank of Commerce v. Union Bank, 3 N. Y. 230; Oppenheim v. West Side Bank, 22 Misc. 722, 50 N. Y. S. 148. In case of an alteration, the bank exercises due diligence if it notifies the holder personally, on the day it is itself notified of the fraud, and also informs him of the same fact by letter three days later. Oppenheim v. West Side Bank, 22 Misc. 722, 50 N. Y. S. 148. The English rule is that "the holder of a bill is entitled to know, on the day when it becomes due, whether it is an honored or dishonored bill," and hence, where a forged acceptance is delivered to the acceptor's bankers on the day it is due, and they pay it on that day, but discover, on the following day, that it is a forgery, and give notice on that day to the holder, it cannot recover back the money paid. Cocks v. Masterman, 9 Barn. & C. 902. Aliter if notice was given on the day when payment was made. Wilkinson v. Johnson, 3 Barn. & C. 428. On the question of the difference between negligence in discovering a forgery or alteration and negligence in failing to giv notice after the discovery, the supreme court of New York, in a well-considered case, says: "A failure to discover, though resulting in a loss to another who might, if sooner apprised, have apprehended the forger, and recovered the money, gives no right of action, and for obvious reasons, one of which alone need be mentioned. There is no duty imposed on one who receives a forged check from another to unearth the crime. He receives it presuming, as he has a right to do, that all the signatures and indorsements are genuine, which is impliedly warranted by the person from whom it is received. This presumption, and the right to rely on this implied warranty, are only destroyed when, by inspection, the forgery could be detected because apparent on the face of the check or bill, or where, from the surrounding circumstances, the suspicions of the person receiving the note, check, or bill should be aroused, and his scrutiny challenged. Not so after discovery, for then the duty is incumbent on the one detecting such imperfection to act promptly in giving notice, and if he falls therein to the injury and damage of the one entitled to notice, he will be prevented from recovering the damage or in-

forgery of an indorsement of the payee's name to one who had indorsed the forged paper in blank to the bank for collection, and had received the proceeds.[14]

Indorsement of forged paper by bank.—If the bank indorses, without qualification or restriction, paper to which the signature of the maker or drawer was forged, it is liable to a bona fide holder on its implied warranty of the genuineness of the instrument,[15] and the genuineness of the signature of the maker or drawer.[16] The Federal courts, however, hold that the general indorsement of a collecting bank does not imply a warranty that a prior indorsement is genuine.[17] It has been held that indorsing "for collection" relieves the indorsing bank from liability to the drawee bank which paid the draft.[18] Presentment to the drawee through the clearing house is not equivalent to an indorsement.[19]

Charging back amount.—A collecting bank which has credited the amount of a check, but has remitted no money on account thereof, may charge back the amount thereof on discovering that it had been raised before it was delivered to the bank.[20] Where the bank has not been guilty of negligence with respect to altered paper, and the holder had notice of facts putting him on inquiry, the bank will be protected.[21] While it may be true that a bank would be estopped to claim a right to charge back the amount of raised paper, if its cashier had represented to the holder that it was good, and the holder had acted on this representation to his injury, a mere statement by the discount and collection teller of the collecting bank, that the check was "all right," has been held not to estop the bank.[22]

jury shown to have been actually incurred." Third Nat. Bank of New York City v. Merchants' Nat. Bank, 76 Hun, 475, 27 N. Y. S. 1070.

14. Green v. Purcell Nat. Bank, 1 Ind. T. 270, 37 S. W. 50, and cases cited; Birmingham Nat. Bank v. Bradley, 103 Ala. 109, 15 So. 440, and cases cited. See, also, National Bank of North America v. Bangs, 106 Mass. 441.

15. Crosby v. Wright, 70 Minn. 251.

16. Brown v. Ames, 59 Minn. 476; Condon v. Pearce, 43 Md. 83; First Nat. Bank of Chicago v. Northwestern Nat. Bank, 40 Ill. App. 640; Turnbull v. Bowyer, 40 N. Y. 456. Under the negotiable instruments laws these rules obtain, though the paper had been previously indorsed to the bank restrictively for collection. See Selover, Bank Collections, § 53.

17. A pension draft, to which the name of the payee had been forged after her death, was indorsed "for collection" to defendant bank by the initial bank, and, after having been indorsed generally by defendant, was paid to it by the United States, and the money remitted to the initial bank. It was held that defendant bank was not liable to the United States for the amount of the draft; the court stating that, "In such cases, the indorsement by the collecting agent, who has no proprietary interest, does not import any guaranty of the genuineness of all prior indorsements, but only of the agent's relation to the principal, as stated upon the face of the draft; and as this relation is evident upon the draft itself, the payor cannot claim to have been misled by the indorsement of the agent, or any right to rely on that indorsement as a guaranty of the genuineness of the payee's indorsement." United States v. American Exchange Nat. Bank, 70 F. 232, distinguishing Onondaga County Sav. Bank v. United States [C. C. A.] 64 F. 703.

18. Indorser was a bona fide purchaser. Northwestern Nat. Bank of Chicago v. Bank of Commerce of Kansas City, 107 Mo. 402, 412, 17 S. W. 982, 15 L. R. A. 102.

19. Since it is not made for the purpose of transfer; but is merely equivalent to a presentment by the bank in person. Dedham Nat. Bank v. Everett Nat. Bank [Mass.] 59 N. E. 62.

20. Birmingham Nat. Bank v. Bradley, 103 Ala. 109, 15 So. 440. This rule is in harmony with the general rules as to the right to charge back a credit given for worthless paper. See Selover, Bank Collections, § 15.

21. Defendant's cashier advised plaintiff, solely because of the suspicious nature of the transaction, to have nothing to do with a check, though it was apparently good and regular. The bank took the check for collection and gave plaintiff credit, and it was paid by the drawee bank. It had been altered so skillfully that it could not be detected by examination, and was discovered only when the drawer's account was balanced at the end of the month. It was held that defendant bank was not guilty of negligence, and that, on the discovery of the alterations, it was justified in refunding to the drawee bank, and charging back the amount against the account of the plaintiff. Rapp v. National Security Bank, 136 Pa. 426, 20 A. 508.

22. Neither party suspected an alteration. The duties of such teller relate only to the discount and collection of commercial paper, and his statement must consequently be limited to the fact of its payment by the drawee, and cannot be extended to the genuineness of the body of the check. Oppenheim v. West Side Bank, 22 Misc. 722, 50 N. Y. S. 148. See, also, Espy v. Bank of Cincinnati, 18 Wall. [U. S.] 604; Marine Nat. Bank v. National City Bank, 59 N. Y. 67;

Recovery back of payments.—The general rule is that money paid upon a raised check may be recovered back, providing the one seeking to recover has not, by his careless or negligent act, injured or prejudiced the rights of the person from whom recovery is sought,[23] and since a collecting bank, to which the payee of a forged or raised check indorsed the same, and from which he received full face value therefor, is under no obligation to such payee to discover the fraud,[24] it may recover back the money so paid.[25] Where the collecting bank has received money by mistake, as under forged or raised paper, and has paid it over to its principal before receiving notice of the forgery, or other fraud inducing the payment, it cannot be compelled to repay.[26] If the collecting bank has not paid over any money or made an actual remittance to its principal, but has merely credited to it the amount of the paper, which credit has never been drawn against, the collecting bank is liable as for money paid to it under mistake.[27] Each of several successive indorsers of a bill, who have successively paid money thereon by mistake, the name of the first indorser having been forged, may recover from his immediate indorser.[28] Funds obtained by forgery cannot be followed into the hands of an innocent person who has received them from the forger in payment of a debt.[29] A collecting bank may obligate itself to pay the difference between the original

Security Bank of New York v. National Bank of Republic, 67 N. Y. 458.

23. National Bank of Commerce v. National Mechanics' Banking Ass'n, 55 N. Y. 211; Marine Nat. Bank v. National City Bank, 59 N. Y. 67, 77; Clews v. Bank of New York National Banking Ass'n, 89 N. Y. 419; National Park Bank of New York v. Eldred Bank, 90 Hun, 285, 35 N. Y. S. 752; Oppenheim v. West Side Bank, 22 Misc. 722, 50 N. Y. S. 148.

24. See Selover, Bank Collections, § 163.

25. Birmingham Nat. Bank v. Bradley, 103 Ala. 109, 15 So. 440; Green v. Purcell Nat. Bank, 1 Ind. T. 270, 37 S. W. 50. See, also, Carpenter v. Northborough Nat. Bank, 123 Mass. 66; White v. Continental Nat. Bank, 64 N. Y. 316; Susquehanna Valley Bank v. Loomis, 85 N. Y. 207; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 20 N. E. 632.

26. National Park Bank v. Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 11 Am. St. Rep. 612, distinguishing Metropolitan Nat. Bank v. Loyd, 90 N. Y. 530; La Farge v. Kneeland, 7 Cow. [N. Y.] 460; Mowatt v. McLelan, 1 Wend. [N. Y.] 173; Herrick v. Gallagher, 60 Barb. [N. Y.] 566; Story, Agency, § 300. In the case first cited in this note, there was evidence that the proceeds of the draft involved in suit, and also the entire amount that the principal bank had to its credit with the collecting bank at the time the proceeds of the draft were turned over to the principal, had been drawn out at least two weeks before the alteration of the draft was discovered, and the court applied the familiar rule as to application of payments,—that where there is no specific direction, the payment will be applied to the oldest items; citing Sheppard v. Steele, 43 N. Y. 52; Allen v. Culver, 3 Denio [N. Y.] 284; Webb v. Dickenson, 11 Wend. [N. Y.] 63.

27. United States Nat. Bank v. National Park Bank, 59 Hun, 495, 13 N. Y. S. 411, affirmed (on the opinion of the court below) in 129 N. Y. 647, 29 N. E. 1028; Bank of Commerce v. Union Bank, 3 N. Y. 236; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 20 N. E. 632.

28. Canal Bank v. Bank of Albany, 1 Hill [N. Y.] 287, 294; Nassau Bank v. National Bank of Newburgh, 159 N. Y. 456, 54 N. E. 66, affirming 32 App. Div. 268, 52 N. Y. S. 1118, and 34 App. Div. 623, 54 N. Y. S. 1110; Rapp v. National Security Bank, 136 Pa. 426, 20 A. 508; Green v. Purcell Nat. Bank, 1 Ind. T. 270, 37 S. W. 50.

29. The forger first cashed a check for $2,400 at the defendant bank by forging the name of one of its depositors. He thereafter deposited in plaintiff bank a forged draft on a third bank for $6,000, which plaintiff collected, but afterwards repaid to the drawee bank on discovery of the forgery. Prior to the discovery of this second forgery, and while the $6,000 was still to his credit in plaintiff bank, the forger drew out substantially all of that amount, and among his drafts on that fund was a check for $2,400 on plaintiff bank to the order of the person whose name he had forged to the check cashed at defendant bank. This check he deposited in defendant bank to the credit of such person, and defendant collected it from plaintiff before it had any knowledge of the forgeries. It was held that defendant bank was not liable to plaintiff bank for the amount of the $2,400 check on plaintiff. Nassau Bank v. National Bank of Newburgh, 159 N. Y. 456, 54 N. E. 66, affirming 32 App. Div. 268, 52 N. Y. S. 1118, and 34 App. Div. 623, 54 N. Y. S. 1110. Citing Justh v. National Bank of Commonwealth, 56 N. Y. 478; Stephens v. Brooklyn Board of Education, 79 N. Y. 183; Hatch v. Fourth Nat. Bank, 147 N. Y. 184, 41 N. E. 403. It is of no conceivable importance that the existence of the fact of indebtedness was not known at the time when the forger sought to make reparation by repaying the moneys feloniously taken. Having made the payment, he could not reclaim it, and no interest in the money remained in him. It satisfied the claim which the bank undoubtedly possessed against him, and the discovery or knowledge of such a claim was not necessary to its existence.

amount of a draft and the amount as fraudulently altered and raised, by an offer to the drawer bank, accepted by it, to pay such difference if the draft was returned with an affidavit of the true amount, and the matter not made public, which conditions were all complied with by the drawer,[30] but an agreement of this kind is rescinded by a direction from the drawer to either pay the difference as agreed, or return the draft and affidavit, followed by a return thereof, together with a refusal to pay.[31] Where the drawee paid, by mistake, a fraudulently raised draft, to a bank holding it for collection, it may sue such bank for the overpayment, after a demand and a refusal to refund, without tendering back the paper itself.[32] The certification by the drawee bank of a draft merely vouches for the genuineness of the signature of the drawer, and the existence of sufficient funds of his at the bank to pay the draft. It does not warrant the genuineness of the body of the instrument, and, in case the draft was raised before certification, will not prevent the drawee bank from recovering the difference between the original and altered amount from a bank to which it paid the amount without knowledge of the alteration.[33] Where the money is received on forged or raised paper by a collecting bank ostensibly as owner, without disclosing its true relation to the paper as bailee or so-called agent for collection, it is uniformly held accountable as for money received by mistake.[34]

Ratification or waiver may relieve the bank of liability.[35]

30. National Bank of Commerce v. Manufacturers' & Traders' Bank, 122 N. Y. 367, 25 N. E. 355.

31. National Bank of Commerce v. Manufacturers' & Traders' Bank, 122 N. Y. 367, 25 N. E. 355. On this state of facts, an action for money had and received could not be maintained by the drawer bank against the collecting bank. Id.

32. Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 77 Ill. App. 316, affirmed. See, also, Brewster v. Burnett, 125 Mass. 68, where it was held that a purchaser of counterfeit United States bonds need not return them before suing for the amount paid therefor. To same effect is Kent v. Bornstein, 12 Allen [Mass.] 342, with regard to the return of a counterfeit bank bill.

33. Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, affirming 77 Ill. App. 316. On effect of certification of check, in general, see Merchants' Bank v. State Bank, 10 Wall. [U. S.] 604, 647. As to liability of bank after certification of raised check and subsequent statement to a purchaser that the certification was good, see Clews v. Bank of New York National Banking Ass'n, 114 N. Y. 70. Recovery in such cases is based on the double ground of mistake and want of consideration. Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, affirming 77 Ill. App. 316.

34. A collecting bank, which was the last of several indorsers of a draft payable to order, the first of whom was ostensibly the payee whose name had been forged, having received payment from the drawee on presentment without disclosing its agency, must repay the amount as money received by mistake on an instrument to which it had no title, though it was not notified of the forgery for two months after it had turned over the money to its principal. Canal Bank v. Bank of Albany, 1 Hill [N. Y.] 287. "No doubt the parties were equally innocent in a moral point of view. The conduct of both was bona fide, and the negligence, or rather misfortune, of both, the same. It was the duty, or, more properly, a measure of prudence, in each to have inquired into the forgery, which both omitted. But this raises no preference at law or in equity in favor of the defendants, but against them. They have obtained plaintiff's money without consideration; not as a gift, but under a mistake." Id. Proof of a custom of collecting banks not to disclose their agency on the paper is not admissible to charge the drawee of a forged draft, who paid the same to the collecting bank, with notice of the fact that such bank was merely an agent, though the agency was not disclosed, in the absence of proof of a further custom of banks not to collect paper as principals. Id. The indorsements on a raised draft, following an indorsement by the payee, for deposit, to the American Trust & Savings Bank, were as follows: "American Trust & Savings Bank. Paid Feb. 14, 1894. Paid through the Chicago Clearing House to Metropolitan National Bank." Held to pass title to the draft to the Metropolitan, and not to make it merely agent for collection. Metropolitan Nat. Bank v. Merchants' Nat. Bank, 182 Ill. 367, 55 N. E. 360, affirming 77 Ill. App. 316.

35. Greenfield Bank v. Crafts, 4 Allen [Mass.] 447; Wellington v. Jackson, 121 Mass. 157; Howard v. Duncan, 3 Lans. [N. Y.] 174. Proceeds used with knowledge. Ballston Spa Bank v. Marine Bank, 16 Wis. 120; Hughes v. Neal Loan & Banking Co., 97 Ga. 383, 23 S. E. 823. Indemnity accepted against forgery. Fitzpatrick v. School Commissioners, 7 Humph. [Tenn.] 224; Jones v. Hamlet, 2 Sneed [Tenn.] 256; Bell v. Waudby, 4 Wash. 743. Mere silence is not a ratification. California Bank v. Sayre, 85 Cal. 102; De Land v. Dixon Nat. Bank, 111 Ill. 323; Walters v. Munroe, 17 Md. 150. Failure of husband to notify bank of forgery by wife held to relieve bank of liability on checks forged thereafter. Neal v. First Nat. Bank, 26 Ind. App. 503.

BANKRUPTCY.

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§ 1. *Amendatory acts and general orders.*[62]—The amendatory act of 1903[63] does not apply to bankruptcy cases proper pending at the time of its passage;[64] it covers acts committed prior to the date of its passage, the action not being pending at that date,[65] and its application is not confined to rights of action subsequently arising, but is available to enforce existing rights of action.[66]

The general orders in bankruptcy have the same force as a provision of the bankruptcy act,[67] and are made under an express constitutional delegation of power.[68]

§ 2. *Supersession of state laws.*[69]—The national bankruptcy act does not apply to any act of bankruptcy occurring before July 1, 1898,[70] and on its passage at

62. See 1 Curr. L. 311.
63. Act Cong. Feb. 5, 1903 [32 Stat. 801].
64. In re Docker-Foster Co., 123 F. 190; In re Scott, 126 F. 981. Does not apply to a suit brought by a trustee. Pond v. New York Nat. Exch. Bank, 124 F. 992.
65. Obtaining property on credit on a materially false statement in writing made more than four months prior to the date of the amendatory act, and about six months prior to the filing of the petition in bankruptcy bars a discharge. In re Scott, 126 F. 981.
66. Pond v. New York Nat. Exch. Bank, 124 F. 992.
67, 68. In re Hoyt & Mitchell, 127 F. 968.
69. See 1 Curr. L. 312.
70. Grunsfeld Bros. v. Brownell [N. M.] 76 P. 310.

once suspended and superseded all state insolvency laws except as to cases and persons not within its purview,[71] hence a state insolvency law permitting a corporation to become a voluntary bankrupt is not suspended.[72] The state courts have the right to take charge of and distribute a debtor's property assigned for the benefit of creditors, until the assignment has been impeached as an act of bankruptcy,[73] but bankruptcy proceedings being instituted, the right of any claim against the bankrupt's estate to the preference given by such deed of assignment is defeated.[74]

§ 3. *Occasion for proceeding and acts of bankruptcy.*[75] *A. In general.*—Upon a debtor committing an act of bankruptcy a right immediately arises in the creditors to have his affairs wound up and his estate administered pursuant to the bankruptcy law.[76]

Insolvency.—Under the present bankruptcy law a debtor is not insolvent unless his property, at a fair valuation, is insufficient to pay his debts.[77] A bankrupt who denies his insolvency must produce his books or the burden is upon him to prove his solvency.[78] An adjudication of the insolvency of a partnership is an adjudication of the insolvency of each member thereof.[79] Property being transferred in payment of, or security for a just debt, the mere fact that it may involve a preference in bankruptcy, should bankruptcy proceedings be instituted, does not exclude it from consideration in determining the debtor's solvency.[80] An admission of insolvency under a state law is not an admission of insolvency sufficient to base involuntary proceedings on, insolvency as defined by

71. In re F. A. Hall Co., 121 F. 992. Act of 1898 provides a system of bankruptcy for particular cases only. Singer v. National Bedstead Mfg. Co. [N. J. Eq.] 55 A. 868. Kentucky St. 1899, § 84, providing that title to property fraudulently conveyed by an assignor for the benefit of creditors shall vest in the assignee, and §§ 1910, 1911, making a preferential transfer in contemplation of insolvency operate as an assignment for the benefit of creditors and subjecting such transfer to the control of equity upon the petition of any one interested does not constitute an insolvency act and is not superseded by the bankruptcy law. Downer v. Porter, 25 Ky. L. R. 571, 76 S. W. 135. Chapter 67, Sess. Laws 1889 of New Mexico, is not a bankruptcy law. Grunsfeld Bros. v. Brownell [N. M.] 76 P. 310.

NOTE. Effect of bankruptcy law on state insolvency laws: By the great weight of authority such act suspends the operation of the state law and proceedings cannot be instituted under the latter. Foley-Bean Lumber Co. v. Sawyer, 76 Minn. 118, 78 N. W. 1038; In re Etheridge Furniture Co., 92 F. 329. Some cases hold that proceedings under state laws concerning voluntary assignments are suspended. In re Smith, 92 F. 135; In re Etheridge Furniture Co., 92 F. 329.—From note to State v. Superior Court for King County [Wash.] 45 L. R. A. 177. See 1 Curr. L. 312.

72. Keystone Driller Co. v. Superior Court of San Francisco, 138 Cal. 738, 72 P. 398.

73. Assignee in state court may sue on a note given for goods bought of the insolvent, no proceedings having been instituted by the trustee in bankruptcy to recover the goods or the note as part of the bankrupt estate. Lucas v. Lucas' Assignee, 25 Ky. L. R. 822, 76 S. W. 371; Jensen-King-Byrd Co. v. Williams [Wash.] 76 P. 934; Duryea v. Muse, 117 Wis. 399, 94 N. W. 365; Randolph & Randolph v. Scruggs, 190 U. S. 533, 23 S. Ct. 710, 47 Law. Ed. 1165. The operation of the Vermont state assignment act is not suspended by the national bankruptcy act. Hilliard v. Burlington Shoe Co. [Vt.] 56 A. 283. See 1 Curr. L. 312.

74. Claim of attorneys for services. Randolph v. Scruggs, 190 U. S. 533, 23 S. Ct. 710, 47 Law. Ed. 1165.

75. See 1 Curr. L. 312.

76. In re Knight, 125 F. 35.

77. Insolvency need not occur by mere failure of the debtor to meet his obligations as they become due. Summerville v. Stockton Mill. Co. [Cal.] 76 P. 243. An instruction that notice of fact sufficient to lead a prudent man to the conclusion that a debtor "could not meet his obligations as they matured in the ordinary course of business" is notice of insolvency of the debtor, within the meaning of the Federal bankruptcy act, is erroneous. Hackney v. Raymond Bros. Clarke Co. [Neb.] 94 N. W. 822.

Illustrations: One whose assets amount to $29,630, and his liabilities to $32,500 is insolvent. Des Moines Sav. Bank v. Morgan Jewelry Co. [Iowa] 99 N. W. 121. A company owning buildings appraised at $100,000, and which could not be replaced for $250,000, also property, goods on hand and real estate worth $40,000, and being indebted in the sum of $81,200 is not insolvent within the meaning of the bankruptcy law (Act 1898, § 1, par. 15) so as to render a mortgage given to secure a creditor void as a preference, though a month after giving the mortgage it was adjudged a bankrupt and the plant could only be sold for $75,000. Empire State Trust Co. v. Wm. F. Fisher [N. J. Eq.] 57 A. 502.

78. Bogen v. Protter [C. C. A.] 129 F. 533.

79. Gray v. Brunold, 140 Cal. 615, 74 P. 303.

80. Section 1, subd. 15, as regards the property to be excluded, refers only to property conveyed, etc., with intent to defraud, hinder, or delay the creditors. In re Doscher, 120 F. 408.

the state law being different from insolvency under the bankruptcy act.[81] An alleged bankrupt's stock being partially destroyed, it is competent on the issue of insolvency to show the value of his stock before, and after the partial destruction.[82]

(§ 3) *B. Disposition of property with intent to hinder, delay, or defraud creditors.*[83]—The intent to hinder, delay, or defraud creditors must exist in order to render the transfer, concealment, or removal of the property an act of bankruptcy,[84] but the intent may be inferred from the natural and necessary result of the transfer,[85] as where the property is conveyed without consideration.[86]

(§ 3) *C. A preferential transfer of property while insolvent.*[87]—In order that a preferential transfer of property may amount to an act of bankruptcy the debtor must have been insolvent at the time,[88] a preference must have been intended,[89] and the transfer must have been to a creditor.[90] The transfer amounting to a preference, the law presumes that it was done with the intent to prefer such creditor,[91] and in determining whether or not a preference was given, the whole transaction must be considered.[92] A conditional transfer of property as by mortgage[93] is a transfer within the meaning of this section. Conveyance of property by a debtor to his only creditors is not an act of bankruptcy,[94] nor can one not a creditor at the time of the conveyance attach the same.[95] Payments of comparatively small sums of money by an insolvent corporation to each of a number of its creditors, being made in the usual course of business, do not raise a presumption of an intent to prefer such creditors over other creditors.[96] Re-

81. In re Doscher, 120 F. 408.

82. An alleged bankrupt's stock being partially destroyed by fire it is competent on the issue of insolvency to show, in the absence of his books and the insurance not being adjusted, the value of the goods before the fire and after, and to contradict or impeach his own estimates or appraisals. Bogen & Trummel v. Protter [C. C. A.] 129 F. 533.

83. See 1 Curr. L. 312.

84. This intent to defraud must be distinguished from the intent to prefer necessary under the next subdivision of the act. Thompson v. Fairbanks, 75 Vt. 361, 56 A. 11. Selling goods, under a threat by a creditor to institute criminal proceedings if the debtor did not pay up, to realize money to pay the debt, which money the creditor refused to receive and started criminal proceedings, is not a sale with intent to defraud. In re Belknap, 129 F. 646. A conveyance made by a debtor in good faith whether for an antecedent or present consideration does not constitute an act of bankruptcy, though its effect may be to hinder or delay creditors by removing from their reach assets of the debtor. Lansing Boiler & Engine Works v. Ryerson [C. C. A.] 128 F. 701. See 1 Curr. L. 312.

85. Insolvent corporation transferred business and property to another corporation in exchange for stock in the latter. Bean-Chamberlain Mfg. Co. v. Standard Spoke & Nipple Co. [C. C. A.] 131 F. 215.

86. Gray v. Chase, 184 Mass. 444, 68 N. E. 676. See 1 Curr. L. 312.

87. See 1 Curr. L. 313.

88. Troy Wagon Works v. Vastbinder, 130 F. 232.

89. Thompson v. First Nat. Bank [Miss.] 36 So. 65. Evidence that an insolvent debtor within four months of the filing of the petition in bankruptcy paid several bills maturing is insufficient to establish an act of bankruptcy, there being no evidence that he thereby intended to give preferences, or contemplated bankruptcy, nor that the creditors receiving such payments did not thereafter extend credit to him for larger amounts. Clark v. Henne & Meyer [C. C. A.] 127 F. 288.

90. An accommodation indorser is such a creditor. In re O'Donnell, 131 F. 150. The uncorroborated testimony of a single witness to a declaration made by an alleged bankrupt that the vendee of property conveyed by him was a creditor is insufficient to prove an act of bankruptcy, where the bankrupt testified that he was not indebted to the vendee, and received full payment for the land, and two other witnesses testified they saw the money paid. In re Foster, 126 F. 1014.

91. An answer in involuntary proceedings admitting that the bankrupt was insolvent and had sold property within four months prior to the filing of the petition and with the proceeds thereof paid certain debtors is an admission of a preference constituting an act of bankruptcy. Brinkley v. Smithwick, 126 F. 686.

92. Whole contract must be construed as to whether or not the bankrupt was the owner of the goods or the agent of the seller. Troy Wagon Works v. Vastbinder, 130 F. 232.

93. On real estate. In re Edelman [C. C. A.] 130 F. 700. A mortgage made by a debtor upon his entire property does not constitute an act of bankruptcy in a state where such mortgage creates a lien only and does not transfer the title where the mortgagor's remaining estate is greater in value than his unsecured debts. [Michigan]. Lansing Boiler & Engine Works v. Joseph T. Ryerson & Son [C. C. A.] 128 F. 701.

Chattel mortgage. In re Riggs Restaurant Co. [C. C. A.] 130 F. 691.

94, 95. Brake v. Callison [C. C. A.] 129 F. 201.

96. In re Douglas Coal & Coke Co., 131 F. 769.

cording being essential to the validity of an assignment of future earnings, such an assignment, by a debtor to secure a creditor, being recorded within four months of the filing of the petition constitutes an act of bankruptcy.[97]

(§ 3) *D. Suffered or permitted, while insolvent, the obtaining of a preference through legal proceedings.*[98]—In order to adjudge one a bankrupt on the ground of his suffering or permitting a creditor to obtain a preference through legal proceedings, without discharging the same, a preference must have actually resulted,[99] legal proceedings must have been instituted,[1] and a judgment must have been rendered therein,[2] and unsuccessful resistance by the debtor is unavailable as a defense to the bankruptcy proceedings.[3] A debtor allowing his creditor to levy upon his property, "suffers and permits" the obtaining of a preference through legal proceedings,[4] though allowing one to obtain a statutory lien enforceable without legal proceedings is not an act of bankruptcy,[5] nor is the due enforcement of liens acquired more than four months before the filing of the petition in bankruptcy.[6] It is not the mere obtaining of a preference through legal proceedings while insolvent that makes the debtor liable as a bankrupt, but it is the failure on his part to have the same vacated or discharged within five days before a sale or final disposition of the property.[7]

(§ 3) *E. General assignment.*[8]—Making a general assignment for the benefit of creditors is an act of bankruptcy, regardless of the debtor's solvency.[9] A direct transfer to creditors, without the intervention of a trustee duly appointed, is not an assignment for the benefit of creditors.[10]

Prior to the amendment of 1903 *application for a receiver* did not constitute an act of bankruptcy,[11] and this provision is not retroactive.[12] It is immaterial whether the receiver is temporary or permanent,[13] but he must have been appointed because of insolvency.[14] The filing of a bill in a collusive suit for the appointment of receivers, the proceedings being then discontinued, does not prevent the appointment of receivers in a subsequent suit for the same purpose, constituting an act of bankruptcy.[15] A corporation against whom creditors have filed a bill in a state court asking for the appointment of receivers, admitting in its answer the facts alleged and consenting to the relief prayed, the receivers being appointed, has committed an act of bankruptcy.[16] The record of the court ap-

97. In re O'Donnell, 131 F. 150.

98. See 1 Curr. L. 313, n. 28.

99. A distraint of goods under a landlord's warrant held not to operate as a preference. In re Belknap, 129 F. 646.

1. Failure by a debtor to take legal proceedings to retake goods taken and retained by a creditor is not an act of bankruptcy. In re Belknap, 129 F. 646.

2. Mere suing out of an attachment and levying the same is not sufficient. Seaboard Steel Casting Co. v. William R. Trigg Co., 124 F. 75.

3. Bradley Timber Co. v. White [C. C. A.] 121 F. 779.

4. Bogen v. Protter [C. C. A.] 129 F. 533.

5. Livery stable keeper's lien. In re Mero, 128 F. 630.

6. Owen v. Brown [C. C. A.] 120 F. 812.

7. In re Vastbinder, 126 F. 417; Bradley Timber Co. v. White [C. C. A.] 121 F. 779.

8. See 1 Curr. L. 312, n. 11.

9. Couts v. Townsend, 126 F. 249. See 1 Curr. L. 312.

10. Anniston Iron & Supply Co. v. Anniston Rolling Mill Co., 125 F. 974.

11. In re Burrell [C. C. A.] 123 F. 414.

12. Such an appointment made prior to the passage of the amendatory act will not support a petition in involuntary bankruptcy filed after that date, although the receivership still continues. Seaboard Steel Casting Co. v. William R. Trigg Co., 124 F. 75.

13. Blue Mountain Iron & Steel Co. v. Portner [C. C. A.] 131 F. 57.

14. Receiver appointed for property of a corporation in a suit to foreclose a mortgage, the bill not alleging insolvency, held insufficient to constitute an act of bankruptcy. In re Douglas Coal & Coke Co., 131 F. 769. Submission of questions, whether at the date of appointing the receivers, and at the date of the filing of the bankruptcy petition the property of the alleged bankrupt was at a fair valuation sufficient to pay his debts, and whether the appointment of the receivers was because of the debtor's insolvency, and if they had taken charge of the property, held proper. Blue Mountain Iron & Steel Co. v. Portner [C. C. A.] 131 F. 57.

15. Blue Mountain Iron & Steel Co. v. Portner [C. C. A.] 131 F. 57.

16. Lowenstein v. Henry McShane Mfg. Co., 130 F. 1007.

pointing the receivers is the best evidence of their appointment, and the reason therefor.[17]

(§ 3) *F. Admitted in writing insolvency and willingness to be adjudged a bankrupt.*[18]—The writing need not be made for the sole and express purpose of being adjudged a bankrupt, an admission in an answer to an involuntary proceeding is sufficient.[19] The admission for a corporation may be made by its board of directors,[20] and the appointment of receivers for the corporation does not deprive them of this power.[21] Solvency is no defense to proceedings based upon this ground.[22]

§ 4. *Persons who may be adjudged bankrupt and who may petition.*[23]—A natural person engaged chiefly in farming or the tillage of the soil cannot be adjudged an involuntary bankrupt,[24] but a corporation so engaged is not exempt.[25] A corporation cannot be adjudged an involuntary bankrupt by reason of its having a principal business which is beyond the authority given by its charter and within the scope of the bankruptcy act.[26] A corporation not of the excepted class is liable to be adjudged an involuntary bankrupt before actually engaging in business,[27] or after it has ceased to do business.[28] A corporation engaged principally in manufacturing or trading may be adjudged an involuntary bankrupt,[29] as where it is engaged in building ships,[30] buildings and bridges,[31] or in raising a

17. Blue Mountain Iron & Steel Co. v. Portner [C. C. A.] 131 F. 57.

18. See 1 Curr. L. 312, n. 17.

19. An admission in an answer to an involuntary proceeding by the bankrupt that he is insolvent, and that he intends to pay the debts in full, and is willing to answer fully at any time the court may designate, is sufficient. Brinkley v. Smithwick, 126 F. 686.

20. The board of directors of a corporation having power under the state laws to make a general assignment of the property of the corporation for the benefit of creditors, they may make an admission in writing on behalf of the corporation of its inability to pay its debts and willingness to be adjudged a bankrupt on that ground. In re C. Moench & Sons Co. [C. C. A.] 130 F. 685.

21. Temporary receivers. In re C. Moench & Sons Co. [C. C. A.] 130 F. 685. Appointment of receivers by a state court and subsequently by a bankruptcy court. In re C. Moench & Sons Co., 123 F. 965.

22. Directors of a corporation on the request of certain creditors passed such a resolution, held such creditors were entitled to have the corporation adjudged a bankrupt without regard to its solvency. In re C. Moench & Sons Co., 123 F. 965. Such a defense cannot be interposed by a creditor of a manufacturing corporation. In re C. Moench & Sons Co. [C. C. A.] 130 F. 685.

23. See 1 Curr. L. 313.

24. Even though he be at the same time a private banker. Couts v. Townsend, 126 F. 249. One managing and controlling plantations is engaged chiefly in farming or tilling the soil, and the fact that he maintains a store or commissary thereon does not affect his status as one chiefly engaged in farming. Wulbern v. Drake [C. C. A.] 120 F. 493. The owner of a farm upon which he resides, but who has leased the same for the current year is not engaged chiefly in farming and may be adjudged an involuntary bankrupt. In re Matson, 123 F. 743.

25. In re Lake Jackson Sugar Co., 129 F. 640.

26. A corporation whose only authorized business is that of a carrier is not susceptible to bankruptcy on the ground that its principal business is in fact that of a trader. In re Quimby Freight Forwarding Co., 121 F. 139.

27. A corporation organized for the purpose of manufacturing paper from wood pulp had purchased woodland and other property, but had never in fact started its factory. Held, could be adjudged an involuntary bankrupt. In re White Mountain Paper Co., 127 F. 180; affirmed in White Mountain Paper Co. v. Morse & Co. [C. C. A.] 127 F. 643. See 1 Curr. L. 313, n. 35.

28. Receivers were appointed by a state court for a manufacturing corporation before the filing of the petition; held subject to the bankruptcy act. In re C. Moench & Sons Co. [C. C. A.] 130 F. 685. Bankruptcy proceedings having been begun against a corporation, a decree entered in another state dissolving the corporation does not affect the bankruptcy proceeding. In re White Mountain Paper Co., 127 F. 180; affirmed in White Mountain Paper Co. v. Morse & Co. [C. C. A.] 127 F. 643.

29. Finding of a referee that a corporation was "extensively" engaged in trading falls short of the statutory word "principally" and will not justify an adjudication in bankruptcy. Philpot v. O'Brion [C. C. A.] 126 F. 167.

30. Columbia Ironworks v. National Lead Co. [C. C. A.] 127 F. 99. The corporation constructed boats, and parts and furniture for vessels, such as boilers, masts, tanks, paint, chairs, desks, tables, etc. Held, "principally engaged in manufacturing pursuits." In re Marine Const. & Dry Dock Co. [C. C. A.] 130 F. 446.

31. As a manufacturing corporation. In this case it simply furnished the labor, other parties furnishing the material. In re Niagara Contracting Co., 127 F. 782.

crop and manufacturing it into an article of merchandise.[32] A wage earner,[33] a building and loan association,[34] a corporation conducting a public warehouse,[35] a circulating library,[36] a private bank,[37] a brokerage business,[38] or that of a common carrier,[39] cannot be adjudged an involuntary bankrupt. That the bankrupt is a married woman does not exempt her from involuntary proceedings.[40] A partnership cannot be adjudged a bankrupt without all its members being adjudged bankrupts,[41] but the firm is not necessarily bankrupt because all of its partners are,[42] and the insanity of one partner does not defeat the proceedings.[43] The debtor being prima facie incapable of being adjudged an involuntary bankrupt, the burden of proof is upon the petitioning creditors.[44]

Voluntary proceedings.[45]—It is not obligatory on debtors to voluntarily go into bankruptcy.[46] A voluntary subsequent proceeding for the sole purpose of obtaining a discharge to which a prior proceeding has conclusively determined the bankrupt is not entitled, cannot lawfully be maintained,[47] and the bankruptcy court has power to dismiss such proceeding, even after adjudication.[48]

Involuntary proceedings.[49]—A creditor in order to maintain a petition must have been a creditor at the time of the commission of the alleged act of bankruptcy,[50] and must still own his claim against the estate.[51] The number of creditors necessary to the petition should be reckoned as of the date of the petition,[52] a number of claims becoming merged in one person, such person counts only as one

32. One raising sugar cane and manufacturing it into sugar, syrup, etc., is engaged chiefly in manufacturing, not farming. This distinction, however, is immaterial, as a farming corporation may be adjudged an involuntary bankrupt. In re Lake Jackson Sugar Co., 129 F. 640.

33. One who owns a team, wagons and a plow with which he worked by the day for different employers as he could obtain work, earning usually from $9 to $15 per week, and working alone when not able to find work for his team is not an independent contractor, but a wage earner. In re Yoder, 127 F. 894.

34. In this case organized to accumulate a fund from contributions of its members, from which loans were to be made to assist members in purchasing real estate, the profits of which business were divided among its members. In re New York Building-Loan Banking Co., 127 F. 471.

35. In re Pacific Coast Warehouse Co., 123 F. 749.

36. In re Parmelee Library [C. C. A.] 120 F. 235.

37. Incorporated under the laws of a state. In re Surety Guarantee & Trust Co. [C. C. A.] 121 F. 73.

38. Neither as a trader nor as engaged in mercantile pursuits. In re Surety Guarantee & Trust Co. [C. C. A.] 121 F. 73.

39. The purchase by a common carrier of horses, hay, wagons, harnesses, etc., necessary to carry on its business, and the occasional incidental sale of horses and wagons and the occasional boarding of horses, does not make it a trading or mercantile company. In re H. J. Quimby Freight Forwarding Co., 121 F. 139.

40. A married woman engaged in business on her own account, and owing business obligations of the amount required by the bankruptcy law, for which her separate property is liable in equity, may be adjudged an involuntary bankrupt. MacDonald v. Tefft-Weller Co. [C. C. A.] 128 F. 381.

41. If the members are able to pay their own and firm debts, whether out of joint or separate estates, the firm is not insolvent and cannot be adjudged a bankrupt. In re Forbes, 128 F. 137.

42. In re Mercur [C. C. A.] 122 F. 384.

43. In re L. Stein & Co. [C. C. A.] 127 F. 547.

44. The burden of proof rests upon the petitioning creditors to show that a corporation chartered for the purpose of transacting the business of a common carrier is a trading corporation. Philpot v. O'Brion [C. C. A.] 126 F. 167.

45. See 1 Curr. L. 313.

46. Summers v. Abbott [C. C. A.] 122 F. 36.

47. Bankrupt had failed to apply for a discharge in the former proceeding until too late. Kuntz v. Young [C. C. A.] 131 F. 719.

48. Kuntz v. Young [C. C. A.] 131 F. 719.

49. See 1 Curr. L. 313.

50. In re Callison, 130 F. 987.

51. A creditor contracting to sell his claim, but agreeing to first join in a petition against the debtor, which he does immediately thereafter, transferring and receiving payment for his claim, the claim must be considered as having been owned by the purchaser when the petition was filed. Lowenstein v. Henry McShane Mfg. Co., 130 F. 1007.

52. As to whether a single creditor is entitled to file an involuntary petition. In re Coburn, 126 F. 218; affirmed in Moulton v. Coburn [C. C. A.] 131 F. 201.

Where the number of creditors exceeds twelve, and three join in the filing of the petition, whether payment of the debt of one of the petitioning creditors after the petition is filed will defeat the proceeding for a lack of a sufficient number of creditors joining in the petition, quaere? Gage & Co. v. Bell, 124 F. 371.

creditor,[56] and creditors not joining in the petition should be counted.[54] A creditor misled into signing an involuntary petition in bankruptcy may withdraw.[55] Creditors joining in an involuntary petition must have provable claims,[58] though the claims need not be allowable,[57] nor liquidated.[58] While there is a conflict as to whether or not a creditor who has obtained a preference can file an involuntary petition,[59] still it is conceded by all authorities that a preferred creditor may surrender his preference and thus qualify,[60] and, as there is no one, prior to the appointment of a trustee, to whom he can surrender it, it is sufficient if he offers to do so in the petition,[61] or in the course of the proceedings.[62] One may become estopped to join in the petition by inducing,[63] or receiving benefits and assenting to the commission of the act of bankruptcy.[64]

§ 5. *Procedure for adjudication.*[65] *A. In general.*—Jurisdiction of the subject-matter in bankruptcy proceedings is conferred by law, jurisdiction of the person in involuntary proceedings is acquired by filing a petition and serving a copy of it, with a subpoena upon the alleged bankrupt.[66] The jurisdiction of the bankruptcy court depends upon alleged bankrupt having a bona fide residence within the district,[67] the whereabouts of his property is immaterial,[66] and it having jurisdiction of

53. An assignee for the benefit of creditors purchasing claims with the funds of a debtor, such claims become either merged in the assignee as a single claim in equity or are to be regarded as extinguished, and hence though split up by the assignee and assigned to various parties, which assignment is ratified by the original assignor, are to be treated as one claim in determining the number of creditors necessary to an involuntary petition. Leighton v. Kennedy [C. C. A.] 129 F. 737.

54. Creditors induced not to join in the petition by the voluntary assignee of the alleged bankrupt, acting in behalf of creditors and not as an agent of the creditor signing the petition, should be counted. In re Coburn, 126 F. 218.

55. The proper officers of a corporation authorized its agent to assent to an assignment by the debtor for the benefit of creditors. The agent assented, but not under seal, having no authority to execute any instrument under seal. The corporation, forgetting the assent, joined in the petition, then it ratified the act of its agent under seal and sought to withdraw from the petition. Held, as it joined under a misunderstanding of fact, it should be allowed to withdraw. In re Coburn, 126 F. 218; affirmed in Moulton v. Coburn [C. C. A.] 131 F. 201.

56. Creditor receiving a preference which has not been surrendered cannot join. In re Fishblate Clothing Co., 126 F. 986.

57. Creditor having received a preference can nevertheless join in a petition for involuntary bankruptcy, though his claim cannot be allowed until he surrenders the preference. In re Hornstein, 122 F. 266.

58. Claim is for damages arising out of a breach of warranty upon a sale of personal property, and is disputed by bankrupt. In re Frederic L. Grant Shoe Co., 125 F. 576; affirmed in In re Frederic L. Grant Shoe Co., [C. C. A.] 130 F. 881.

59. In re Vastbinder, 126 F. 417. (See this case for a partial list of authorities pro and con). That he must surrender such preference where he in good faith had obtained an attachment lien within four months of the filing of the petition. In re Hornstein, 122 F. 266.

60, 61, 62. In re Vastbinder, 126 F. 417.

63. Creditors made debtor a proposal that he convey to them all his stock of goods and they would accept the same in full payment of their claims; held, creditors participating therein and assenting thereto could not use the conveyance as a ground for having the debtor adjudged an involuntary bankrupt. Clarke v. Henne & Meyer [C. C. A.] 127 F. 288.

64. A creditor participating in, receiving a benefit under, and assenting to, a general assignment under the laws of a state, is estopped. Durham Paper Co. v. Seaboard Knitting Mills, 121 F. 179; Moulton v. Coburn [C. C. A.] 131 F. 201. Creditors of a corporation intervening and assisting in a suit in a state court to have receivers appointed are estopped to subsequently file a petition in bankruptcy, based on the appointment of the receivers as the act of bankruptcy. Lowenstein v. Henry McShane Mfg. Co., 130 F. 1007.

Obtaining a debtor to commit an act of bankruptcy in order that all creditors might share equally does not estop such creditors from urging such act as against a creditor, who, if the bankruptcy proceedings were dismissed, would obtain a preference by his attachment. In re Moench & Sons Co., 123 F. 965. A corporation is not estopped, by reason of one of its officers becoming, as an individual, the assignee of the bankrupt, from joining in a petition for involuntary bankruptcy. In re Winston, 122 F. 187.

65. See 1 Curr. L. 314.

66. In re Brett, 130 F. 981.

67. Removal of a person from one district to another for the express purpose of filing a petition in bankruptcy therein, and with the intention of leaving the district as soon as a discharge was obtained, is not a bona fide residence therein. In re Garneau [C. C. A.] 127 F. 677.

68. That the property of a corporation is in the possession of receivers appointed by the state court does not affect the jurisdiction of the bankruptcy court. In re C. Moench & Sons Co. [C. C. A.] 130 F. 685.

one member of the partnership, it has jurisdiction of all the partners and of the partnership property.[69] The court making the first adjudication of bankruptcy has exclusive jurisdiction of the proceeding.[70] The fact that one creditor's name was omitted from the list and that such creditor had no notice of the proceeding does not affect the court's jurisdiction in respect to the adjudication.[71] The simple forms of bankruptcy practice found in the general orders and forms prescribed by the supreme court should be followed,[72] and the petition and schedule should contain no abbreviation or interlineation except for the purpose of reference,[73] though amendments may be made at any stage of the proceedings regardless of the time which has elapsed.[74] The bankrupt's exemption from arrest continues until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court,[75] and the court may require security of the bankrupt that during its continuance he will obey all orders of the court and not meanwhile depart from its jurisdiction.[76]

(§ 5) *B. Voluntary.*[77]—An adjudication of bankruptcy made ex parte on a voluntary petition is not conclusive on creditors.[78]

(§ 5) *C. Involuntary.*[79]—The bankruptcy court has jurisdiction to determine whether or not the alleged bankrupt is a proper subject of involuntary proceedings.[80] The good faith of the petitioners, being open to question, the court is justified in resolving all doubtful questions both of law and fact against them.[81] The petition should show by express language or inference that the alleged bankrupt is not of the excepted classes,[82] that the claims of the petitioners amount in the aggregate to $500 or over,[83] and where it does not, the court has no power to permit an amendment joining other creditors having claims sufficient to make up the requisite amount.[84] The petition being insufficient by reason of one of the petitioners being disqualified, it may be cured by the intervention of others.[85] The petition in involuntary proceedings must set out the business in which the defendant is engaged,[86] or state specifically that he was not engaged in one of the excluded classes of business or occupation, but a defect in this regard may be cured by amendment.[87] An allegation, in the petition, of the commission of an act of bankruptcy, should state the specific fact relied upon,[88] with

69. That one partnsr for a long period antedating the commencement of the bankruptcy proceedings had been a resident of another state from that in which such proceedings were instituted, and was not served, does not divest the court of jurisdiction. Whitson v. Farber Bank [Mo. App.] 80 S. W. 327.

70. Gsneral order No. 6. Where pending an appeal from an order dismissing a petition in involuntary bankruptcy, the defendants wsre adjudged bankrupts in another district, the appeal will be dismissed. In re Sears, Humbert & Co. [C. C. A.] 128 F. 275; In re Knight, 125 F. 35.

71. Roberts v. Fernald [N. H.] 56 A. 942.

72. W. A. Gage & Co. v. Bell, 124 F. 371.

73. Gensral Orders in Bankruptcy No. 5. It seems that "Residence 135, Bway." is insufficient as designating 135 Broadway. Sutherland v. Lasher, 41 Misc. 249, 84 N. Y. S. 56.

74. In re Mercur [C. C. A.] 122 F. 384.

75. It is not restricted to the particular occasions when his physical attendance is required in court. In re Dresser, 124 F. 915.

76. In re Dresser, 124 F. 915.

77. See 1 Curr. L. 315.

78. May ask for a dismissal of the proceedings on the ground that court was without jurisdiction. In re Garneau [C. C. A.] 127 F. 677.

79. See 1 Curr. L. 314.

80. Columbia Iron Works v. National Lead Co. [C. C. A.] 127 F. 99.

81. One not a creditor purchased claims against the debtor. Lowenstein v. Henry McShane Mfg. Co., 130 F. 1007.

82. In re Brett, 130 F. 981; In re Callison, 130 F. 987.

83, 84. In re Stein, 130 F. 377.

85. In re Vastbinder, 126 F. 417.

86. In re Mero, 128 F. 630.

87. Contained averments consistent with his being a merchant. Beach v. Macon Grocery Co. [C. C. A.] 120 F. 736.

88. An allegation that a debtor committed various and sundry acts of bankruptcy by paying several of his creditors various sums of money while insolvent with intent to give preferences, without stating the names of the creditors or the sums so paid, is wholly insufficient. Clark v. Henne & Meyer [C. C. A.] 127 F. 288. Where the ground for filing the petition is removing property with intent to hinder, delay or defraud creditors, the facts should be as specific as possible, but greater detail than it is

time,[89] place, and circumstance.[90] The consideration of the claim need not be set forth and sworn to in the petition.[91] An involuntary petition need not allege in so many words that the preferred transferee is a creditor,[92] nor is it necessary to indicate in what manner the bankrupt indicated his intent, it being inferable from the facts alleged.[93] Several acts of bankruptcy may be set forth in one petition.[94] An attorney in fact for a petitioning creditor can make the necessary oath to the petition, where the facts are within his own knowledge,[95] and a defective verification may be cured by amendment.[96] Petitions may be consolidated by order of the court, and when done before reference to the referee precludes the latter from determining the necessity of the petitions.[97] In proceedings against a partnership, the petition must be specifically directed against it,[98] alleging an act of bankruptcy in which it is expressly involved, and the proceeding must result in an adjudication of the partnership itself,[99] but the petition of one partner to put his firm and copartners into bankruptcy need not allege an act of bankruptcy,[1] nor can the nonassenting partners set up the want of an act of bankruptcy as a defense to such a petition,[2] though they may set up the defense of solvency.[3] To maintain the action a partnership in fact must be shown,[4] and the existence of an alleged partnership being denied, it must be proven before an adjudication is made.[5] The petition being defective it should not be dismissed without first giving the petitioners an opportunity to apply for leave to amend.[6] Valid service of the petition can be made by leaving the subpoena and copy of the petition at the bankrupt's last and usual place of abode,[7] with some adult member or resident in the family.[8]

probable creditors can furnish is not required. In re Mero, 128 F. 630.

89. Clark v. Henne & Meyer [C. C. A.] 127 F. 288. Need only allege that the preferential transfer was made within four months of the filing of the petition. Specific date need not be given. In re Vastbinder, 126 F. 417. Where the jurats to the oaths of creditors verifying the same bear different dates from that upon which the petition was filed, the petition must show on its face that the acts of bankruptcy complained of were committed within four months of the date of filing the petition. Bradley Timber Co. v. White [C. C. A.] 121 F. 779.

90. Clark v. Henne & Meyer [C. C. A.] 127 F. 288.

91. Construing § 57. In re Brett, 130 F. 981. An averment in the petition that the petitioner is the owner and holder of a certain promissory note for a stated amount, dated more than three months before the filing of the petition, and due three months after date, held sufficient. Id.

92. Alleged that the debtor transferred property to C. H. Childs & Co. with intent to prefer them over his other creditors. In re Vastbinder, 126 F. 417.

93. In re Mero, 128 F. 630.

94. Bradley Timber Co. v. White [C. C. A.] 121 F. 779.

95. It will be assumed that they are within his own knowledge where the oath is positive in its terms. An oath on the affiant's knowledge, information, and belief is not positive and is insufficient. In re Vastbinder, 126 F. 417.

96. In re Vastbinder, 126 F. 417.

97. In re McCracken, 129 F. 621.

98. Simultaneous proceedings by the same creditor against all the partners does not bring the partnership into court, nor can this be remedied by amendment. In re Mercur [C. C. A.] 122 F. 384.

99. In re Mercur [C. C. A.] 122 F. 384.

1, 2. In re Forbes, 128 F. 137.

3. In this case Judge Lowell discusses the question as to whether or not a partnership is an entity within the meaning of the bankruptcy law, reaching the conclusion that it is not and hence cannot be adjudged a bankrupt without all the partners being adjudged bankrupts. In re Forbes, 128 F. 137.

4. To maintain involuntary proceedings against a person as a partner a partnership in fact must be shown, and not a mere holding out upon which he may become liable to creditors. In re C. F. Beckwith & Co., 130 F. 475.

5. It appeared that both of the original partners had died, leaving their interests to others, some of whom were minors, the firm was continued but by whom did not appear, except that two of the persons conducting the business and who committed the act of bankruptcy admitted they were partners and were willing to have the firm adjudged a bankrupt, the continuance of the partnership after the death of the original partners was denied by the minors. In re McLaren, 125 F. 835.

6. In re Brett, 130 F. 981.

7. Left copy of petition with subpoena with the clerk of the hotel of which the bankrupt was the proprietor and where he usually resided, held sufficient, though the bankrupt was at the time in another town, sick and unconscious and died two days later without regaining consciousness. In re Risteen, 122 F. 732.

8. The clerk of a hotel of which the bankrupt is the owner and where he usually resides is a proper person. In re Risteen, 122 F. 732.

Anyone showing by his answer an actual interest in the matter may contest the petition;[9] he need not have a provable claim.[10] The answer must conform to the United States supreme court orders,[11] it must not contain grounds of demurrer to the original petition which have already been disposed of by the court,[12] it must be properly verified,[13] and admit or unevasively deny, upon the oath of a competent person, the material facts alleged in the petition.[14] The authority of the attorney appearing for the petitioning creditors cannot be challenged by the answer.[15] The "list of creditors" required of a defendant debtor, when he sets up as a defense to a petition by a single creditor that the number of his creditors is more than twelve, must contain the names and addresses of such creditors,[16] a statement of the amount due each creditor,[17] the date of the debt,[18] when due,[19] whether due by note or account or by some other form of contract,[20] the consideration therefor,[21] whether owned jointly with another,[22] and such other full particulars as will enable the petitioning creditor to negotiate with others to join with him in the petition.[23] If the particulars are not sufficiently definite a reference will be ordered to ascertain them.[24] There being no reply in the bankruptcy proceedings new matter set up in the answer must be taken as true.[25] The bankrupt must schedule all his property and debts and has no right to determine what property is valuable and what is not.[26]

The alleged bankrupt is only entitled of right to a jury trial on the question of his insolvency,[27] and the acts of bankruptcy with which he is charged,[28] and this right is limited to the bankrupt.[29]

Proceedings will not be revised on grounds fully disposed of in former proceedings by the same petitioner.[30] A petition for the dismissal of involuntary bankruptcy proceedings must state a ground justifying a dismissal,[31] and where a dis-

9. In re C. Moench & Sons Co., 123 F. 977.

10. An attaching creditor may resist an involuntary petition without surrendering his attachment. In re C. Moench & Sons Co., 123 F. 977.

11, 12, 13, 14. Bradley Timber Co. v. White [C. C. A.] 121 F. 779. An involuntary petition alleging the giving of a preference while insolvent, a denial of the commission of such act of bankruptcy is a denial of insolvency. Troy Wagon Works v. Vastbinder, 130 F. 232.

15. This can only be done by a rule upon the attorney to show by what authority he appears for the party, supported by affidavit showing the facts relied on to question the authority. Gage & Co. v. Bell, 124 F. 371.

16. Act 1898, § 59d. Gage & Co. v. Bell, 124 F. 371.

17. 18, 19, 20, 21. Gage & Co. v. Bell, 124 F. 371.

22. As a partner or otherwise. Gage & Co. v. Bell, 124 F. 371.

23. Thus saving the necessity and cost of a reference to ascertain the facts. Gage & Co. v. Bell, 124 F. 371.

24. Gage & Co. v. Bell, 124 F. 371.

25. Brinkley v. Smithwick, 126 F. 686. The case being argued upon the petition and answer, the averments of the latter stand as true. Answer denied commission of act of bankruptcy. In re Doddy Jourdan & Co., 127 F. 771.

26. Bankrupt received a deed purporting to convey an interest in land, which interest he mortgaged. Held he could not omit the property nor the mortgage from his schedule on the ground that the conveyance vested no interest to the land in him. In re Gailey [C. C. A.] 127 F. 538. A beneficiary of a trust-fund conveyed her interest in the property so held in trust for her benefit to the bankrupt, held, conveyed an equitable interest in the land subject to the trust which the bankrupt was required to schedule. Id.

A statement in a bankrupt's schedule that a life insurance policy was payable to his wife, whereas it was an endowment policy payable to his wife in case of his death, but to himself if he lived less than two years after the filing of the petition, together with the fact that he omitted a debt from his schedule for which he had pledged the policy for security, held to show bad faith for the purpose of misleading creditors. In re Towne, 122 F. 313.

27. Objecting partners to petition filed by one of the firm to have a partnership adjudged a bankrupt are entitled to a jury trial on the question of insolvency. In re Forbes, 128 F. 137.

28. He is not entitled to one with respect to whether the petitioners are in fact creditors. Morss v. Franklin Coal Co., 125 F. 998.

29. Cannot be extended to intervening creditors contesting such issues. In re Herzikoff [C. C. A.] 121 F. 544.

30. Beach v. Macon Grocery Co. [C. C. A.] 120 F. 736.

31. An involuntary petition by three creditors will not be dismissed by two of them upon the application of the third, on the sole ground that the two "desire and consent that the said petition and proceedings be

missal is awarded on the ground that the defendant is not subject to bankruptcy proceedings, the court can make no order awarding costs.[32]

The adjudication can be made by the referee only when the judge is absent.[33] Objection to the jurisdiction of the court may be taken after adjudication by an application to set it aside, where the want of jurisdiction did not appear from the pleadings, but it should be done promptly upon the facts appearing from the evidence introduced.[34]

§ 6. *Protection and possession of the property pending the appointment of trustee; receivers.*[35]—The bankruptcy court has the power when necessary for the preservation of the estate, to have the bankrupt's property seized by a marshal or special master immediately upon the filing of the petition in bankruptcy,[36] to have such officer retain the same until the petition is dismissed or the trustee qualifies,[37] and after reasonable notice to the claimant to determine the right of ownership,[38] but it has no ancillary jurisdiction to appoint receivers for the property of a debtor against whom a petition in involuntary bankruptcy has been filed in another district.[39] While a bankrupt cannot convey his property after filing his petition in bankruptcy,[40] the commencement of bankruptcy proceedings does not terminate his contract with the government, nor affect the latter's rights thereunder.[41] A receiver in bankruptcy is a mere custodian of the property,[42] he cannot transfer title to any of the bankrupt's property,[43] nor determine any question of ownership or title,[44] without an order of the court. His possession being that of the court, the latter has jurisdiction to determine the ownership of the property.[45] As he takes the title of the bankrupt as of the date of the filing of the petition,[46] valid liens may be enforced against him.[47] One receiving goods from a receiver submits himself to the jurisdiction of the court for all purposes properly connected with proceedings to compel him to restore the property or its value,[48] and if he claims to be the owner the court has jurisdiction to determine the question of ownership and settle the whole matter.[49] The powers of a receiver pendente lite, appointed before adjudication, to protect the estate, are the same as that given ordinary receivers;[50] he is not the "legal representative" of the bankrupt,[51] and

dismissed." The court states that such a petition would be insufficient even though no objection were interposed. In re Lewis, 129 F. 147. An alleged involuntary bankrupt, admitting his insolvency in his answer, reserving in his answer the right "to move to dismiss for irregularities and want of notice," is too indefinite to be considered by the court. Brinkley v. Smithwick, 126 F. 686.

32. In re Philadelphia & L. Transp. Co., 127 F. 896.

33. Where the adjudication was by the referee, in an action by the trustee in a state court there must be affirmative proof that the judge was absent. Page v. Roberts, Johnson & Rand Shoe Co. [Mo. App.] 78 S. W. 52.

34. In re Niagara Contracting Co., 127 F. 782.

35. See 1 Curr. L. 315.

36. American Trust Co. v. Wallis [C. C. A.] 126 F. 464; In re Moody, 131 F. 525.

37. Act 1898, § 2, subd. 8. McNulty v. Feingold, 129 F. 1001.

38. This being a proceeding in bankruptcy as distinguished from a controversy at law or equity. In re Moody, 131 F. 525.

39. Ross-Meeham Foundry Co. v. Southern Car & Foundry Co., 124 F. 403; In re Williams, 123 F. 321.

40. Muschel v. Austern, 87 N. Y. S. 235.

41. The government is entitled to recover damages for the nonfulfillment of the contract and it makes no difference that such breach occurred before or after the commencement of the bankruptcy proceedings. In re Stoever, 127 F. 394.

42, 43. Muschel v. Austern, 87 N. Y. S. 235.

44, 45. In re Leeds Woolen Mills, 129 F. 922.

46. First Nat. Bank v. Pennsylvania Trust Co. [C. C. A.] 124 F. 968.

47. Bank loaned money to steel company taking as security a quantity of steel billets which were left on the steel company's land marked as the bank's property, bank having bill of sale. Part of loan was paid and four months later the same amount was reloaned. Held, lien valid as against receiver or general creditors. First Nat. Bank v. Pennsylvania Trust Co. [C. C. A.] 124 F. 968.

48, 49. In re Leeds Woolen Mills, 129 F. 922.

50. To obtain possession of property claimed adversely. Ross-Meeham Foundry Co. v. Southern Car & Foundry Co., 124 F. 403.

51. Cannot take the place of the bankrupt and as such be examined under oath as to

only when expressly authorized may make proof of loss, under a fire insurance policy, for the bankrupt.[52]

Suits by and against receivers.—A receiver in bankruptcy has only such authority to sue as the court appointing him chooses to give, and unless authorized, he cannot leave the court of original jurisdiction and sue elsewhere.[53]

§ 7. *Creditors' meetings; appointment of trustee; removals.*[54]—A creditor's proof of claim must be adequate in all particulars in order to allow him to participate in the creditors' meeting.[55] An attorney must have express authority from a creditor,[56] and if the latter is a partnership the person making the letter of attorney must make oath that he is a member of the firm,[57] in order to vote on the latter's behalf at the creditors' meeting. In order to participate, the power of attorney must be produced,[58] and accident does not constitute an excuse.[59] The creditors' selection of a trustee is not to be interfered with unless it clearly imperils the fair and efficient administration of the estate.[60] The fact that some of the votes cast were for a candidate who could not be approved by the court does not render those votes void so that the opposing candidate must be declared elected.[61] Creditors failing to elect a trustee at the first meeting are entitled to a reasonable adjournment,[62] and upon their failure to elect according to the provisions of the act the referee may make a selection,[63] or the court may appoint the trustee, and lapse of time does not affect this right.[64] If at the first meeting all claims offered for proof are in dispute and it is impracticable at that time to settle the same the referee may, in his discretion, appoint a trustee.[65]

§ 8. *Compositions.*[66]—The holders of contingent claims are not necessary nor proper parties to the composition.[67] There must be a strict compliance with the law as to the mode of composition and procedure;[68] promises to pay money or merchandise at a future day cannot be substituted for money;[69] the money cannot

loss by fire of the bankrupt's property. Sims v. Union Assur. Soc., 129 F. 804.

52. Sims v. Union Assur. Soc., 129 F. 804.

53. In re National Mercantile Agency, 128 F. 639. This rule is not peculiar to receivers in bankruptcy proceedings but applies to all receivers. Id.

54. See 1 Curr. L. 316.

55. In re Blue Ridge Packing Co., 125 F. 619. See post, § 15B. Proof of Claims.

56. Voted at election of trustee without a proxy or special power for that purpose. In re Lazoris, 120 F. 716.

57. Such statement being sworn to in the proof of debt accompanying the letter, though not in the letter itself is sufficient. In re Blue Ridge Packing Co., 125 F. 619.

58. In re Blue Ridge Packing Co., 125 F. 619.

59. Was mislaid and not produced until the meeting was over, held the attorney was properly refused the right to participate. In re Blue Ridge Packing Co., 125 F. 619.

60. The fact that the one who was chosen as trustee advised the voluntary assignment under the state law and was the assignee thereunder does not render him incompetent as trustee. In re Blue Ridge Packing Co., 125 F. 619. Nor does the fact that he had a law office with an attorney who represented certain alleged creditors whose claims were to be contested, and that these alleged creditors were former clients of his and put their claims into his associate's hands at his suggestion, and that he was elected trustee with their aid, render him incompetent. Id. A stockholder in a corporate creditor is not ineligible to act as trustee in bankruptcy. In re Lazoris, 120 F. 716.

Where the trustee chosen was not only a stockholder in the bankrupt corporation, but was closely associated, as attorney and legal advisor, with those who had been previously in control, and whose management was not only subject to criticism but might call for action upon the part of the trustee to hold them personally responsible, he should not be permitted to act over the objections of a minority. In re Gordon Supply & Mfg. Co., 129 F. 622.

61. In re Machin, 128 F. 315.

62. A request that the referee adjourn the meeting for 24 hours held reasonable. In re Nice, 123 F. 987.

63. In re Machin, 128 F. 315.

64. No assets appearing, no trustee was appointed, and referee reported estate closed. Over a year thereafter a creditor applied for the appointment of a trustee claiming that the bankrupt had died leaving assets fraudulently transferred, held, the court had jurisdiction to open the proceedings and appoint a trustee. Clark v. Pidcock [C. C. A.] 129 F. 745.

65. In re Cohen, 131 F. 391.

66. See 1 Curr. L. 316.

67. Mortgagees of unforeclosed mortgages on bankrupt's property. Their absence is no objection to the confirmation of the composition. In re Kahn, 121 F. 412.

68. In re Frear, 120 F. 978.

69. Act 1898, § 12b. In re Frear, 120 F. 978.

be deposited by a referee in a place selected by himself,[70] subject to his own order,[71] nor distributed by him.[72] A court has no power to confirm an irregular composition.[73] A composition cannot be confirmed if the bankrupt has been guilty of any of the acts, or failed to perform any of the duties which would be a bar to his discharge,[74] and this is true without regard to whether or not the creditors would be benefited thereby,[75] or that a majority of the creditors are in favor of accepting the same.[76] A composition will be set aside for fraud,[77] but fraud known to the petitioner before the confirmation cannot be so used,[78] and the creditor is not bound by statements as to the nonexistence of fraud in the order of confirmation.[79] The burden is upon the petitioner to show the fraud,[80] and while it is not absolutely necessary, it is desirable that the petition set forth all the details thereof.[81] The verification of a petition, being in the usual form for a bill in equity, is sufficient;[82] but the allegations of the petition being made on information and belief, the verification must be made by one having personal knowledge of the facts.[83] A creditor is not precluded from maintaining the petition by commencing an action against the bankrupt.[84] Assenting creditors are necessary parties to an appeal from an order confirming a composition.[85] The setting aside of a composition will not ordinarily have the effect of invalidating pro rata payments made in pursuance of such composition.[86] A creditor failing to claim his share of a composition, the amount thereof inures to the benefit of the bankrupt.[87] An order confirming a composition serves as a discharge.[88] An action cannot be maintained upon a new promise made after composition.[89] One holding composition notes as collateral security cannot sue thereon until default by his principal debtor.[90]

§ 9. *Property and rights passing to trustee. A. Particular kinds of proper-*

70. Place of deposit must be designated by the judge. Act 1898, § 12b. Judge does not include referee. Id. § 1. In re Frear, 120 F. 978.

71. Must be subject to order of judge. Act 1898, § 12b. In re Frear, 120 F. 978.

72. Must be distributed upon confirmation, as the judge directs. Act 1898, § 12e. In re Frear, 120 F. 978.

73. Although the motion for an order confirming the composition is unopposed. In re Frear, 120 F. 978.

74. Failed to keep books of account or records from which his true financial condition might be ascertained. In re Godwin, 122 F. 111.

75. In re Godwin, 122 F. 111.

76. Only one actively objected. In re Godwin, 122 F. 111.

77. A false statement by a bankrupt as to the condition of his estate made in a sworn schedule, if relied upon by a creditor in agreeing to a composition, is fraud in procuring the composition and sufficient to set it aside. In re Roukous, 128 F. 645.

78. In re Roukous, 128 F. 645.

79. Recitals in the order confirming a composition that it appears that the bankrupt has not been guilty of any acts, or failed to perform any of the duties, which would be a bar to his discharge, and that the offer and its acceptance were made in good faith and have not been procured by any means, promises or acts contrary to the acts of congress relating to bankruptcy. In re Roukous, 128 F. 645.

80. In re Roukous, 128 F. 645.

81. A petition held to state a case for relief, though in some respects too general in its allegations of fraudulent acts on the part of the bankrupt. In re Roukous, 128 F. 645. A petitioner alleging that he had no knowledge of the fraud prior to the date of confirmation need not allege the time or manner in which his knowledge was acquired. Id.

82. In re Roukous, 128 F. 645.

83. Verification made by an agent held insufficient. In re Roukous, 128 F. 648.

84. In re Roukous, 128 F. 648.

85. Majority had received amounts to which they were entitled. A representative number is sufficient. Marshall Field & Co. v. Wolf & Bro. Dry Goods Co. [C. C. A.] 120 F. 815.

86. The petition is not demurrable for failure to aver that the petitioner restored, or offered to restore, the consideration immediately on discovery of the fraud, and because it does not tender the same into court. In re Roukous, 128 F. 645.

87. Not to the other creditors. Hence bankrupt may object to the allowance from such surplus of claims offered for proof more than one year after adjudication. In re Lane, 125 F. 772.

88. Taylor v. Skiles [Tenn.] 81 S. W. 1258.

89. No consideration. Taylor v. Skiles [Tenn.] 81 S. W. 1258.

90. Composition notes executed by a bankrupt under an agreement that all should become due if one note should be in default, a creditor assigning his claim, but retaining the composition notes as collateral security for the payment of his assignee's notes, cannot sue thereon until default in his assignee's notes. Willey v. Browne, 206 Pa. 322, 55 A. 1029.

ty or rights.[91]—A liquor license,[92] membership in a chamber of commerce,[93] policies of insurance which are assignable,[94] including a semi-tontine insurance policy payable to the bankrupt, his assigns or legal representatives,[95] special deposits,[96] the good will of the bankrupt's business,[97] and the right to call for unpaid stock subscriptions,[98] all pass to the trustee. A vested remainder interest passes to the trustee of the remainderman.[99] The interest of the bankrupt as a tenant by the curtesy,[1] and alienable, beneficial interests in trust funds[2] pass to the trustee, and he may enforce an insurer's liability for goods destroyed.[3] The legal title to property obtained by crime having passed to the bankrupt, the property is assets of his estate,[4] and the creditors are not estopped by the representations of one not a bona fide purchaser.[5] The trustee takes only the rights of the bankrupt under a contract of the latter.[6] Property held by the bankrupt under a conditional sale, which is void for want of record, passes to the trustee.[7] The trustee in bankruptcy has the option to abandon or accept a lease held by the bankrupt;[8] if he accepts it, he is bound by its conditions to the same extent as the bankrupt was.[9] Partnership assets do not pass to the trustee of one of the members of the firm.[10] A bankrupt's incorporeal interest in an alleged invention for which a patent has been applied for does not pass to the trustee,[11] nor does a claim for alimony, made by a married

91. Section 70a of the act of 1898 is an enumeration of those properties, the title to which passes to the trustee by operation of law. Section 67f provides for such rights as shall vest in the trustee by order of court. In re Baird, 126 F. 845. See 1 Curr. L. 317.

92. Though transferable only with the approval of the body that granted it, and not subject to seizure on execution. In re Olewine, 125 F. 840.

93. In re Neimann, 124 F. 738.

Evidence as to whether or not certain seats in a stock exchange belonged to a partner or to the partnership, some of them being mentioned in the partnership articles and some not, held insufficient to warrant a finding that they belonged to the partnership. Burleigh v. Foreman [C. C. A.] 130 F. 13. See 1 Curr. L. 317, n. 10.

94. Fuller v. New York Fire Ins. Co., 184 Mass. 12, 67 N. E. 879. See 1 Curr. L. 317, n. 11, 12.

95. Does not have a cash surrender value. In re Mertens, 131 F. 972.

96. Lynam v. Belfast Nat. Bank [Me.] 57 A. 799. A bankrupt having a bank account in his own name as manager, but from which he paid after filing the petition a sum for his private purposes, it will be presumed that the amount so expended was his personal money, and he will be required to pay over such sum to his trustee. In re Kurtz, 125 F. 992.

97. Sale of all the assets of a firm's estate, including stock, fixtures, etc., the intent being to sell whatever interest the bankrupts had in the property, confers on the purchasers the right to advertise as the successors of the firm. Freeman v. Freeman, 86 App. Div. 110, 83 N. Y. S. 478.

98. Hence, directors by refusing to issue a call, cannot relieve the stockholders from liability. Rathbone v. Ayer, 84 App. Div. 186, 82 N. Y. S. 235. The right of action of a corporation for unpaid stock subscriptions passes to the corporation's trustee in bankruptcy. Commercial Bank of Augusta v. Warthen, 119 Ga. 990, 47 S. E. 536.

99. Loomer v. Loomer [Conn.] 57 A. 167. See 1 Curr. L. 317, n. 14.

1. Elmore v. Symonds, 183 Mass. 321, 67 N. E. 314.

2. Beneficial interests in a trust created by will, which are left wholly unrestrained and under the control of the beneficiaries, pass to the trustee in bankruptcy of such beneficiaries. Loomer v. Loomer [Conn.] 57 A. 167. In states where the surplus income of a trust fund is inalienable by the beneficiary, title thereto does not vest in the latter's trustee in bankruptcy. Butler v. Baudouine, 84 App. Div. 215, 13 N. Y. Ann. Cas. 188, 82 N. Y. S. 773.

3. Goods were destroyed after adjudication and before appointment of receiver. Fuller v. New York Fire Ins. Co., 184 Mass. 12, 67 N. E. 879.

4. Obtained under circumstances amounting to larceny. Lord v. Seymour, 85 App. Div. 617, 83 N. Y. S. 88.

5. Money was loaned to a firm who falsely represented that it was money a special partner had contributed to the firm. Lord v. Seymour, 85 App. Div. 617, 83 N. Y. S. 88.

6. Pattern contract provided that old patterns would be exchanged for new ones; held, trustee was not entitled to return patterns on hand to be credited to the bankrupt's account. In re Nichols, 122 F. 299.

7. In re Tweed, 131 F. 355; In re Butterwick, 131 F. 371.

8. Summerville v. Kelliher [Cal.] 77 P. 889.

9. At least so far as the payment of rent is concerned. Summerville v. Kelliher [Cal.] 77 P. 889.

10. Where one trustee was appointed for all individual partners as a result of simultaneous cases instituted by the same creditor against all the partners. In re Mercur [C. C. A.] 122 F. 384. See 1 Curr. L. 317, n. 16, 17.

11. The words "interests in patents, patent rights," etc., as used in the Act of 1898, § 70a, cl. 2, should be construed as referring to rights acquired under a patent to a third party. And such a right does not pass to

woman in a suit for divorce, which was pending at the time of her bankruptcy.[12] The trustee may recover usurious interest paid a national bank by the bankrupt.[13] There is a conflict as to whether or not a trustee can maintain an action for a tort committed against the bankrupt.[14] In Michigan, the right of a father to recover for the wrongful death of his child constitutes an asset belonging to his estate in bankruptcy.[15]

The beneficiary of trust funds may follow the same into the hands of a trustee in bankruptcy and can recover such as can be identified,[16] though it has been held that such beneficiary is only entitled to share with other creditors in the estate.[17] The time and place for claiming a misappropriated trust fund in the hands of a trustee in bankruptcy is at the audit where the fund into which such trust fund entered is being distributed,[18] and the right to recover trust funds may he lost by laches.[19] One voluntarily paying money to a bankrupt upon condition is entitled to have the money refunded by the trustee upon the nonfulfillment of the condition;[20] but where such funds are not demanded before the filing of the petition, interest cannot be recovered.[21]

Property fraudulently conveyed.[22]—Property fraudulently conveyed by the bankrupt passes to the trustee.[23] The latter or the creditors, where no trustee is appointed,[24] may maintain an action to set it aside, though the transfer was made more

the trustee as a transferable right under the same clause, although Rev. St. § 4895 [U. S. Comp. St. 1901, p. 3386] permits the inventor to transfer the same. In re Dann, 129 F. 495.

12. In re LeClaire, 124 F. 654. Is not a property right. Id.

13. Lasater v. First Nat. Bank [Tex. Civ. App.] 72 S. W. 1054; Id., 96 Tex. 345, 72 S. W. 1057.

14. That he may sue: Can sue on claim of bankrupt for conversion where the bankrupt had assigned the claim and the assignee thereof had reassigned the claim to the bankrupt. Brunnemer v. Cook & Bernheimer Co., 89 App. Div. 406, 85 N. Y. S. 964.

The trustee of a bankrupt corporation can maintain an action against the directors of a corporation for money wrongfully converted to their own use. Rathbone v. Ayer, 84 App. Div. 184, 82 N. Y. S. 239.

That he cannot: Cannot maintain an action for conspiracy for driving the bankrupt out of business, even though the action was pending at the time. Cleland v. Anderson [Neb.] 98 N. W. 1075; reversing Cleland v. Anderson [Neb.] 96 N. W. 212.

15. In re Burnstine, 131 F. 828.

16. Money received by the trustee in compromise of a judgment obtained by him, declaring a conveyance of trust funds by the bankrupt fraudulent, may be recovered by the beneficiary. Welch v. Polley, 177 N. Y. 117, 69 N. E. 279; reversing Welch v. Polley, 86 App. Div. 260, 83 N. Y. S. 819. Where, under Laws of Washington, 1901, p. 222, c. 109, § 1, a seller of goods in bulk gives a list of his creditors, held, the latter are entitled to priority of payment out of the buyer's bankrupt estate for the amount of the unpaid purchase price, after paying pro rata the expenses of the bankruptcy proceeding, in so far as such estate represented the stock remaining at the time of bankruptcy, or was capable of being segregated from the other assets of the bankrupt. In re Gaekill, 130 F. 235. Where goods are by mistake shipped to the wrong party, who sells the same and upon his becoming bankrupt the proceeds of said sale are placed in the bankrupt estate, the owner of the goods is entitled to the value thereof. In re Woods, 121 F. 599.

17. Father advanced sum of money to daughter and her husband for purchase of a lot, lot to be deeded to daughter; latter died before this was done, and it was agreed between her father and husband to sell the premises and treat the fund so realized as an advancement for the latter's infant daughter. This was done. Held, a valid trust and beneficiary could share with other creditors in her father's bankrupt estate. In re Upson, 123 F. 807.

18. In re Wilkesbarre Furniture Mfg. Co., 130 F. 796.

19. Creditors of a bankrupt firm, a member of which misappropriated firm money while acting as trustee for a bankrupt corporation, taking no steps to stay the distribution of the funds of the corporation pending the bankruptcy proceedings against the firm, nor to follow the firm's funds so misappropriated, are not entitled to claim that such funds awarded to a lien creditor of the corporation constituted a preference which the firm's trustee was entitled to recover. In re Wilkesbarre Furniture Mfg. Co., 130 F. 796.

20. Stockholders of a bankrupt corporation subscribed for additional stock upon the condition that every stockholder should so subscribe or the money would be returned, thus hoping to pay off outstanding claims. In re North Carolina Car Co., 127 F. 178.

21. In re North Carolina Car Co., 127 F. 178.

22. See 1 Curr. L. 317. See, also, Fraudulent Conveyances, 2 Curr. L. 116, for what constitutes.

23. The equitable title to property fraudulently conveyed passes to the trustee as part of the estate. Hillyer v. Le Roy, 84 App. Div. 129, 82 N. Y. S. 80. There must be fraud. In re Brumbaugh, 128 F. 971. See 1 Curr. L. 317, n. 21.

than four months prior to the filing of the petition,[25] except where the fraudulent transferee has transferred it to a bona fide purchaser.[26] The action may be maintained though no claim against the bankrupt has been reduced to judgment,[27] nor is this rule changed by the fact that such deed is recorded prior to the appointment of the trustee.[28] Whether or not fraudulent in fact, a deed of general assignment is constructively fraudulent, and property so conveyed within four months prior to the filing of the petition belongs to the trustee.[29] The trustee need not tender the amount paid to the bankrupt in order to recover the property,[30] but the money paid the bankrupt having been distributed to the creditors, the property cannot be recovered.[31] Whether concerned in the fraud or not, the grantee is liable to the trustee for the property and the profits thereof,[32] and, the conveyance being fraudulent in fact and made within four months prior to the filing of the petition, the grantee is not entitled to have his account against the insolvent,[33] nor the cash paid by him at an inadequate valuation,[34] credited thereon.

(§ 9) *B. Nature of trustee's title in general.*[35]—The trustee takes the same but no better title than the bankrupt had,[36] to all property not exempt which the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him,[37] whether mentioned in the bankrupt's schedules or not.[38] He takes the legal title,[39] and while he takes subject to all valid liens existing at the date of adjudication,[40] there is a conflict as to

24. In re Toothaker, 128 F. 187. A trustee being appointed, he cannot. Act 1898, §§ 23a, 23b, do not authorize such a suit. Viquesney v. Allen [C. C. A.] 131 F. 21.

25. Friedman v. Verchofsky, 105 Ill. App. 414; Carton v. Booze [N. J. Eq.] 57 A. 1029; Cox v. Wall, 132 N. C. 730, 44 S. E. 635; Joseph v. Raff, 82 App. Div. 47, 81 N. Y. S. 546. May take advantage of it the same as a judgment creditor. In re Carpenter, 125 F. 831. See 1 Curr. L. 317, n. 23.

26. Friedman v. Verchofsky, 105 Ill. App. 414.

A debtor fraudulently conveying property to a firm creditor, a corporation composed of the firm only and who took the goods of the firm without consideration and with full notice, is liable therefor. Nor in such a suit are the members of the firm necessary parties. Holloway v. Brame [Miss.] 36 So. 1. See 1 Curr. L. 317, n. 24.

27. Bill considered and held not demurrable. Beasley v. Coggins [Fla.] 37 So. 213.

28. Beasley v. Coggins [Fla.] 37 So. 213.

29. In re Knight, 125 F. 35.

30. Johnson v. Forsyth Mercantile Co., 127 F. 845.

31. A creditor electing to sue for the proceeds of property fraudulently conveyed by the bankrupt, and the proceeds of such sale being recovered and disbursed by the trustee, the creditor receiving a dividend, he is estopped from subsequently suing to recover the property. McWilliams v. Thomas [Tex. Civ. App.] 74 S. W. 596; Sharood v. Jordan, 90 Minn. 249, 95 N. W. 1108.

32. A voluntary grantee under a fraudulent conveyance though he has no knowledge of the fraud, is liable to the trustee in bankruptcy of the grantor, not only for the property but also for the amount that he should have received for rents and profits. Gray v. Chase, 184 Mass. 444, 68 N. E. 676. The transferee being concerned in the fraud, is regarded as a trustee ex maleficio for the creditors defrauded. Hillyer v. Le Roy, 84 App. Div. 129, 82 N. Y. S. 80.

33, 34. Holloway v. Brame [Miss.] 36 So. 1.

35. See 1 Curr. L. 317.

36. In re Beede, 126 F. 853; Bradley, Clark & Co. v. Benson [Minn.] 100 N. W. 670. Where bankrupt could not have canceled an assignment of an insurance policy on his life, made in good faith, his trustee in bankruptcy cannot have it canceled. King v. Crain [Mass.] 69 N. E. 1049. The creditors having notice that the bankrupt holds as an agent, the trustee does not take title to the property. Bills v. Schliep [C. C. A.] 127 F. 103.

Bankrupt treated money paid him by his mother as advances, trustee, years after, claims that by will they were not to be so treated, held, could not recover. Hunt v. Osborn, 86 App. Div. 464, 83 N. Y. S. 879. Evidence held insufficient to sustain a claim of ownership, by sheriff's sale, in property taken by trustee, the claimant having exercised few if any acts of dominion, and having for many years allowed the bankrupt to have possession and take all the rents and profits. In re Howard, 123 F. 991. See 1 Curr. L. 317, n. 26.

37. In re Galt, 120 F. 443. An agreement to bid in property of a bankrupt and sell the same, turning the profits over a specified amount, if any, over to the bankrupt, the bankrupt agreeing not to bid at the sale, is without consideration, except as to the agreement not to bid which is void, in that the bankrupt had parted with all title to the property and had no further interest therein. Fisher v. Hampton Transp. Co. [Mich.] 98 N. W. 1012.

38. Fleming v. Courtenay [Me.] 57 A. 592.

39. If equities are equal he therefore prevails. Elmore v. Symonds, 183 Mass. 321, 67 N. E. 314. To property scheduled by the bankrupt as his own. Buckingham v. Estes [C. C. A.] 128 F. 584.

40. In re Beede, 126 F. 853. As to what liens are valid, see next subdivision. See 1 Curr. L. 318, n. 28.

whether or not he takes as a bona fide purchaser for value,[41] most courts holding that he occupies a position similar to that of a judgment creditor,[42] his rights being determined by the local law.[43] A purchaser from the trustee takes the title of the bankrupt.[44] The title vests in the trustee as of the date of the adjudication,[45] no matter where the property is situated,[46] but it has been held that there was no "transfer" contrary to the terms of an insurance policy, where loss occurred after adjudication, but while custody was still in a receiver.[47] He does not take property acquired after adjudication,[48] though he may recover back payments made by the bankrupt after adjudication with funds belonging to the estate at the date of adjudication.[49] The trustee may demand claims owing the bankrupt,[50] and recover any of the latter's property which a creditor might,[51] the creditor's right being thus transferred to the trustee, the former is prevented from exercising it.[52] He represents only creditors who were such at the time of filing the petition.[53] Property in his hands is liable to state taxation.[54]

(§ 9) *C. The trustee takes title free from liens*[55] acquired by legal proceedings,[56] in a state or Federal court,[57] within four months prior to the filing of the petition,[58] in voluntary or involuntary proceedings,[59] by levy,[60] attachment,[61] judg-

41. That he does not: Omission to file conditional sale under which goods were sold to the bankrupt is immaterial under New York Laws 1897, c. 418, § 112, providing such unrecorded sales shall be void as to subsequent purchasers, etc., in good faith. Hewit v. Berlin Mach. Works, 194 U. S. 296, 24 S. Ct. 690.

That he does: Unrecorded deed of trust ineffectual as against him. In re Thorp, 130 F. 371.

42. May set aside fraudulent conveyances. Beasley v. Coggins [Fla.] 37 So. 213; In re Butterwick, 131 F. 371.

43. In re Butterwick, 131 F. 371.

44. A purchase of the bankrupt's interest in a contract for the conveyance of land. Harriman v. Tyndale, 184 Mass. 534, 69 N. E. 353.

45. The clause in § 70a, Act of 1898, reading "property which, prior to the petition, he could by any means have transferred" refers to the class of property that passes. Gray v. Chase, 184 Mass. 444, 68 N. E. 676; In re Beede, 126 F. 853.

46. In re Wilka, 131 F. 1004.

47. Fuller v. New York Fire Ins. Co., 184 Mass. 12, 67 N. E. 879.

48. In re Parish, 122 F. 553.

49. May maintain an action for money had and received for this purpose. Elmore v. Symonds, 183 Mass. 321, 67 N. E. 314.

50. Where right to paid up policy must have been demanded within a reasonable time, fact that assured was adjudged a bankrupt within that time is no excuse as trustee could have demanded it. Equitable Life Assur. Soc. v. Warren Deposit Bank, 25 Ky. L. R. 839, 76 S. W. 391.

51. Brunnemer v. Cook & Bernheimer Co., 89 App. Div. 406, 85 N. Y. S. 954. May assert the right of creditors to property as against the bankrupt's mortgagee. In re Antigo Screen Door Co. [C. C. A.] 123 F. 249; Hibbard v. Henderson [Or.] 75 P. 889.

52. A judgment creditor of the bankrupt, after the latter's discharge, cannot levy on and sell the bankrupt's property because of fraud in securing the discharge, a trustee should be appointed to maintain a suit to recover such property. Hibbard v. Henderson [Or.] 75 P. 889.

53. Cannot represent creditors who made a prior composition which they have not sought to avoid. Batchelder & Lincoln Co. v. Whitmore [C. C. A.] 122 F. 355. Under the laws of New York, an unfiled mortgage is void as to creditors who have reduced their claims to judgment and had execution issued thereon; but one who was a creditor during the time the mortgage remained unfiled may assert its invalidity on obtaining judgment and execution although the mortgage has been filed in the meantime, such judgment and execution being only essential to the enforcement of the right. Held, that where a mortgage was given prior to the four months' period, but was not recorded until within that period, the trustee of the vendor cannot claim such invalidity for one who was a creditor at the time of the giving of the mortgage, but who reduced his claim to judgment and issued execution thereon within the four months' period. In re Beede, 126 F. 853.

54. Swarts v. Hammer, 194 U. S. 441, 24 S. Ct. 695; In re Prince, 131 F. 546.

55. See 1 Curr. L. 318.

56. Taking possession of mortgaged property through a public officer is the obtaining of a lien through legal proceedings. In re Haynes, 123 F. 1001.

57. Applies to attachments sued out in state as well as Federal courts. Wood v. Carr, 24 Ky. L. R. 2144, 73 S. W. 762; Thompson v. Ragan, 25 Ky. L. R. 1684, 78 S. W. 485.

58. Crane Co. v. Pneumatic Signal Co., 42 Misc. 338, 86 N. Y. S. 711. Liens created by assignment executed for benefit of creditors within four months prior to the filing of the petition are void. In re Slomka [C. C. A.] 122 F. 630. Liens obtained more than four months prior to the filing of the petition are valid. Where a receiver for a judgment debtor was appointed more than four months prior to the filing of the petition in bankruptcy against a judgment debtor and thus under the New York Code obtained as of the date of his appointment a lien as against the latter judgment debtor, the latter's discharge

ment,[62] by execution issued on judgment,[63] also the levy and sale thereunder.[64] Some courts hold that the judgment is not annulled, the lien only being destroyed,[65] others that the judgment becomes null and void, its invalidity relating back to the time of its entry.[66] Also a lien obtained by garnishment,[67] or by writ of replevin,[68] also statutory liens, enforceable only by legal proceedings,[69] are rendered null and void as against the trustee, such as mechanic's liens.[70] There being a valid attachment of land standing in the bankrupt's name, but claimed by his wife, the trustee will be subrogated to the attaching creditor, both consenting.[71] It is the time of the creation of the lien that is the controlling date,[72] not the date of its enforce-

in bankruptcy did not impair this lien. Pickert v. Eaton, 81 App. Div. 423, 81 N. Y. S. 50. Where property of a bankrupt is subject to two liens one attached thereto prior and the other subsequent to four months before the filing of the petition, the first lien being valid the property is properly held thereunder, and does not pass to the trustee. Thompson v. Fairbanks, 75 Vt. 361, 56 A. 11.

59. McKenney v. Cheney, 118 Ga. 387, 45 S. E. 433; Mohr & Sons v. Mattox [Ga.] 48 S. E. 410. See 1 Curr. L. 318, n. 31.

60. Covers a seizure on a writ of replevin in a suit to recover property sold and delivered on credit under a contract which the plaintiff claims the right to rescind on the ground of fraud. In re Weinger, Bergman & Co., 126 F. 875. See 1 Curr. L. 318, n. 33.

61. Thompson v. Fairbanks, 75 Vt. 361, 56 A. 11. The bankruptcy court has jurisdiction to order a sheriff holding property of a bankrupt under attachment levied within four months before the filing of the petition in bankruptcy to deliver the same, or where the property has been sold, to turn the proceeds over to the trustee in bankruptcy. Alexander v. Wilson [Cal.] 77 P. 706. See 1 Curr. L. 318, n. 38.

62. In re Breslauer, 121 F. 910; Mohr & Sons v. Mattox [Ga.] 48 S. E. 410. The obtaining of the judgment being the act of bankruptcy complained of, the adjudication is not conclusive against the creditor's right to property acquired by said judgment. Pepperdine v. Bank of Seymour, 100 Mo. App. 387, 73 S. W. 890. A court may restrain a creditor from obtaining a judgment against a bankrupt until after the adjudication. In re Eastern Commission & Importing Co., 129 F. 847. Where property is sold under execution and the judgment satisfied prior to the filing of the petition, there is no judgment lien to be released and the trustee is not entitled to recover from the creditor the proceeds of the property so sold. Greene v. Montana Brewing Co., 28 Mont. 380, 72 P. 751. See 1 Curr. L. 318, n. 32.

63. In re Breslauer, 121 F. 910.

64. In re Breslauer, 121 F. 910; Cox v. State Bank of Chicago, 125 F. 664. Proceeds realized from a sale under execution are released from the claim of the execution creditor by the filing of a petition in bankruptcy against the debtor within four months after the judgment is rendered. Clarke v. Larremore, 188 U. S. 486, 23 S. Ct. 363, 47 L. Ed. 555.

65. In South Dakota, where a judgment is not a lien upon land unless filed in the county where the land is situated, the filing of the petition simply destroys the lien if one exists, and hence the assignee of such judgment creditor having had execution issued on said judgment and goods levied and sold thereunder, the proceeds being applied to satisfying the judgment, the judgment creditor is not liable on account thereof to the trustee in bankruptcy thereafter appointed. Davis v. Jewett Bros. [S. D.] 97 N. W. 16.

66. Judgment creditor is not entitled to a rule absolute against a sheriff for a failure to make the money issued on such a judgment. Mohr & Sone v. Mattox [Ga.] 48 S. E. 410.

67. Though the judgment upon which the garnishment proceedings were instituted was rendered several years before. Armour Packing Co. v. Wynn, 119 Ga. 683, 46 S. E. 865. See Curr. L. 318, n. 37.

68. In re Haynes, 123 F. 1001; In re Hymes Buggy & Implement Co., 130 F. 977.

69. A statutory lien enforceable without legal proceedings is not dissolved by adjudication. Livery stable keeper's lien. In re Mero, 128 F. 630. Lien given keeper of livery stable by 17 Delaware Laws, c. 620, p. 920. In re Pratesi, 126 F. 588.

70. Where the notice is not given until within the four month period the lien is void. In re Roeber [C. C. A.] 121 F. 449; reversing In re Roeber, 121 F. 444; Garretson v. Clark, [N. J. Eq.] 57 A. 414. Where petition and adjudication were made on the same day, what the effect of a notice given between the two would be, quaere. Garretson v. Clark [N. J. Eq.] 57 A. 414. A complaint to enforce a mechanic's lien which latter was not filed until after the adjudication, will be dismissed. Crane Co. v. Pneumatic Signal Co., 42 Misc. 338, 86 N. Y. S. 711. The right a claimant acquires by serving a stop notice under the mechanic's lien law of New Jersey (P. L. 1898, p. 538, § 3) is not invalidated by the bankruptcy law, though such service be made within four months of the filing of the petition in bankruptcy. Fehling v. Goings [N. J. Eq.] 58 A. 642. See 1 Curr. L. 318, n. 42.

71. In re Merrow, 131 F. 993.

72. An attachment lien being created by the levy, the lien is valid as against the trustee where the levy is made more than four months prior to the filing of the petition, though judgment is entered within that period. Pepperdine v. Bank of Seymour, 100 Mo. App. 387, 73 S. W. 890; Grandin v. First Nat. Bank [Neb.] 98 N. W. 70. An equitable lien upon partnership assets being created by a transfer of an interest in the partnership estate 18 months prior to the filing of the petition, it is superior to the title of the trustee, though the judgment of the state court establishing the validity of the lien

ment.[73] The filing of the petition is notice to all the world of the pendency of the proceeding, and in effect an attachment of the bankrupt's property, and an injunction against all persons prohibiting them from intermeddling with it.[74] This section does not apply to cases where the property or its proceeds are no longer held under the writs.[75] This provision of the national bankruptcy act does not impair the obligation of a contract,[76] nor divest the attaching creditor of a vested right,[77] and applies only as to liens sought to be asserted against the trustee or those claiming under him.[78] The trustee takes title free from secret liens,[79] such as unrecorded conditional sales,[80] or unrecorded contracts to sell,[81] and from liens contrary to public policy.[82] The bankruptcy court has jurisdiction to determine the validity of the lien asserted,[83] but may in its discretion allow it to be determined in the state court,[84] but in so doing it may reserve the right to have the property sold in the bankruptcy proceedings, the proceeds to remain in the trustee's hands to await the decision of the state court.[85] The petition must show upon its face that the petitioner is entitled to a lien,[86] and the petitioner not being able to maintain the suit on account of the bankruptcy proceedings, he may abandon it and sue in tort if he has such a cause of action.[87]

(§ 9) *D. Whether chattel mortgages*[88] executed by the bankrupt are valid

was rendered within the four months period. In re English, 122 F. 113. Where under the statutes of Massachusetts (Rev. Laws, c. 159, § 3, cl. 7 [Pub. St. 1892, c. 151, § 2, cl. 11]) a suit brought more than four months prior to adjudication to reach certain assets of the debtor, though judgment is not rendered until within two months of the adjudication, creates a valid equitable lien on the property in question. Snyder v. Smith [Mass.] 69 N, E. 1089.

73. Owen v. Brown [C. C. A.] 120 F. 812. Attachment. In re Snell, 125 F. 154; Hurlbutt v. Brown [N. H.] 55 A. 1046. Chattel mortgage. Thompson v. Fairbanks, 75 Vt. 361, 56 A. 11.

74. In re Mertens, 131 F. 507.

75. Does not apply when a writ of attachment has been fully executed and the proceeds paid over to the creditor, the latter not having reasonable cause to believe the debtor insolvent and that a preference was thereby intended. Johnson v. Anderson [Neb.] 97 N. W. 339.

76. Attachment lien sued out of state court [Act 1898, § 67, subd. f]. Wood v. Carr, 24 Ky. L. R. 2144, 73 S. W. 762.

77. Wood v. Carr, 24 Ky. L. R. 2144, 73 S. W. 762.

78. McKenney v. Cheney, 118 Ga. 387, 45 S. E. 433. Bankrupt filed a voluntary petition and forcibly took property from sheriff who held it under an attachment issued five days before the filing of the petition in bankruptcy, trustee did not take possession of property, held attachment was valid as against bankrupt after discharge. Rochester Lumber Co. v. Locke [N. H.] 54 A. 705.

79. Conveyance of partnership property by dormant partner void as against trustee of visible partner. White v. Farnham [Me.] 58 Atl. 425. A secret lien for improvements placed upon the premises is void as against the trustee. Elmore v. Symonds, 183 Mass. 321, 67 N. E. 314.

80. Under the Virginia Code c. 109. Chesapeake Shoe Co. v. Seldner [C. C. A.] 122 F. 593. Where bankrupt redelivered possession to seller a few days before the filing of the petition, held, title passed to trustee. McFarlan Carriage Co. v. Wells, 99 Mo. App. 641, 74 S. W. 878. An agreement by which title to goods sold to be resold in the due course of business, title to the proceeds of such resales to remain in the seller until the original vendor is paid, is invalid as a mortgage as against the vendee's trustee in bankruptcy. In re Carpenter, 125 F. 831; In re Gall, 120 F. 443. Also under Code Va. 1887, § 2877. Chesapeake Shoe Co. v. Seldner [C. C. A.] 122 F. 593. Evidence considered and held that the sale of a machine to the bankrupt was unconditional and that objections to it offered by the bankrupt were made in bad faith and hence did not affect delivery. In re Simpson Mfg. Co. [C. C. A.] 130 F. 307. The seller upon a conditional sale must show the utmost good faith in the transaction, and the burden is upon him to establish the fact that he remains the owner by a preponderance of the testimony. and that he did not become a seller and creditor. In re Leeds Woolen Mills, 129 F. 922.

81. Under the statutes of Virginia, unrecorded contracts of sale and conveyances are void as to lien creditors. In re Baird, 126 F. 845.

82. The bankruptcy court will not enforce a claim on a liquor license contrary to the policy of the board issuing it. In re McArdle, 126 F. 442.

83. Creditor claimed an equitable lien on money bankrupt claimed exempt. In re Lucius, 124 F. 455.

84. Validity of the lien of a chattel mortgage. In re Johnson, 127 F. 618.

85. In re Johnson, 127 F. 618.

86. One furnishing material to a sawmill is entitled to a lien under the laws of Georgia. A sash and door factory is not a sawmill, petition alleged that the sawmill was engaged in manufacturing sashes, etc., held demurrable. In re Gosch, 121 F. 604.

87. Vendor may sue on the ground that the goods were obtained by fraud. Standard Sewing Mach. Co. v. Alexander [S. C.] 47 S. E. 711.

88. See 1 Curr. L. 318.

liens must be determined by the law of the state where they were executed.[89] Chattel mortgages being valid as against all lien creditors and bona fide purchasers or mortgagees, they are valid as against the trustee,[90] but being void as against the trustee unless followed by possession, the mortgagee must take possession without knowledge of the mortgagor's insolvency.[91] A chattel mortgage given more than four months prior to the filing of the petition is valid as against the trustee, though not recorded until within such four-month period.[92]

(§ 9) *E. Preferential transfers.*[93]—In order to render a transfer of property voidable by the trustee as a preference, it must have been made by the bankrupt[94] while insolvent,[95] within four months prior to the filing of the petition[96] to a creditor,[97] or some one in his behalf,[98] the party so receiving it,[99] or the one to be benefited thereby,[1] having reasonable cause to believe that a preference was thereby intended.[2] He need not have actual knowledge of the debtor's insolvency,[3] though

89. In re Antigo Screen Door Co. [C. C. A.] 123 F. 249. See 1 Curr. L. 318, n. 46.

90. Hall v. Keating Implement & Mach. Co. [Tex. Civ. App.] 77 S. W. 1054. Void as to a judgment creditor is void as to trustee. Gove v. Morton Trust Co., 89 N. Y. S. 247. Where the mortgage is void as against attaching creditors and valid as between the parties, the trustee will not be subrogated to the rights of an attaching mortgage in order to enable him to defeat the mortgage. In re Sentenne & Green Co., 120 F. 436.

91. In re Ball, 123 F. 164. See 1 Curr. L. 318, n. 47.

92. First Nat. Bank v. Johnson [Neb.] 94 N. W. 837; Davis v. Turner [C. C. A.] 120 F. 605. See 1 Curr. L. 319, n. 50, 52-54.

93. See 1 Curr. L. 319.

94. Payment by a volunteer is not a preference. Wife paid out of her separate property what the bankrupt owed as treasurer of a lodge; held not a preference. Goode v. Elwood Lodge, No. 166, K. P., 160 Ind. 251, 66 N. E. 742. The fact that directors of a corporation borrow money which is used by the corporation, and later when the corporation is insolvent pay the debt with their individual notes, secured by a mortgage on their individual property, does not constitute a preference on the part of the corporation. Keegan v. Hamilton Nat. Bank [Ind.] 71 N. E. 647.

95. The debtor must have been insolvent at the date of the transfer. Schilling v. Curran [Mont.] 76 P. 998; In re Mandel, 127 F. 863; Kimball v. Dresser [Me.] 57 A. 787; Empire State Trust Co. v. William F. Fisher Co. [N. J. Eq.] 57 A. 502. See 1 Curr. L. 319, n. 59.

96. In re Mandel, 127 F. 863; Gamble v. Elkin, 205 Pa. 226, 54 A. 782; Joseph v. Raff, 82 App. Div. 47, 81 N. Y. S. 546; Allen v. Hollander, 128 F. 159. Real estate of the subsequent bankrupt was sold on foreclosure and bid in for mortgagor; bidder conveyed to defendant in this case to secure a debt of the mortgagor's, recorded more than four months before the filing of the petition; held, not a preference and valid as against the trustee. Pratt v. Christie, 88 N. Y. S. 585. It being undisputed that the transfer was within the prohibited period, a finding of fact that the property was sold within four months of the filing of the petition is unnecessary. Schilling v. Curran [Mont.] 76 P. 998. See 1 Curr. L. 319, n. 57.

97. A surety is a creditor. Goldberg v. Harlan [Ind. App.] 67 N. E. 707. An indorser on the obligation of a bankrupt is a creditor. In re Lyon [C. C. A.] 121 F. 723.

98. In re Levin, 127 F. 886. Agent. Gamble v. Elkin, 205 Pa. 226, 54 A. 782. Bankrupt owed firm; latter arranged with a purchaser of the stock of the bankrupt, whereby such purchaser assumed the indebtedness of the firm, paying part in cash and part by giving individual obligations therefor; held a preference. Hackney v. Hargreaves Bros. [Neb.] 99 N. W. 675. A creditor will not be permitted to obtain a preference indirectly by a transfer of his account, procuring a third party to loan money to the debtor for payment of such creditor. Hackney v. Raymond Bros. Clarke Co. [Neb.] 94 N. W. 822.

99, 1. Gamble v. Elkin, 205 Pa. 226, 54 A. 782.

2. In re Mandel, 127 F. 863; Gamble v. Elkin, 205 Pa. 226, 54 A. 782; Crawford v. Rumpf, 205 Pa. 154, 54 A. 709. Must be an express finding in this regard. Thompson v. Fairbanks, 75 Vt. 361, 56 A. 11; Summerville v. Stockton Mill. Co., 142 Cal. 529, 76 P. 243; Whitson v. Farber Bank [Mo. App.] 80 S. W. 327; Thompson v. First Nat. Bank [Miss.] 36 So. 65; Cullinane v. State Bank [Iowa] 98 N. W. 887. To recover property transferred by bankrupt to wife. Hackney v. First Nat. Bank [Neb.] 94 N. W. 805. Payment of money. Hackney v. Raymond Bros. Clarke Co. [Neb.] 94 N. W. 822.

What constitutes reasonable cause to believe that a preference was intended: This is a question of fact (Hackney v. Raymond Bros. Clarke Co. [Neb.] 94 N. W. 822), and the facts and circumstances with reference to the debtor's financial condition, which are brought home to the creditor, being such as would put an ordinarily prudent man upon inquiry, are sufficient to constitute reasonable cause to believe a debtor insolvent (Bardes v. First Nat. Bank, 122 Iowa, 443, 98 N. W. 284). He is chargeable with notice of such facts as a reasonable inquiry, in view of the facts with respect to the debtor's condition, which were brought home to him, might reasonably be expected to disclose. Hackney v. Raymond Bros. Clarke Co. [Neb.] 94 N. W. 822.

Illustrations: One may rely upon the decisions of the highest court of the state wherein he resides (Jacobs v. Van Sickel, 123 F. 340), and also upon the fact that the individual estate of each partner is primarily liable for the payment in full of his individ-

having reasonable ground to believe a debtor insolvent, he is chargeable with notice of intent to prefer,[4] and a preference must have actually resulted,[5] the effect of the preference must be to prefer one creditor over others of the same class,[6] and to do this, actual value must have passed.[7] Whether an intent to prefer on the part of the bankrupt is essential is the subject of conflicting decisions.[8] The trustee

ual debts (Id.). A creditor having reasonable ground to believe a debtor insolvent and the obvious effect of the receipt of money or property is to give him a preference, he is chargeable with notice of intent to prefer. Hackney v. Hargreaves Bros. [Neb.] 99 N. W. 675. Mere knowledge that the debtor had other liabilities, or of circumstances which might create a suspicion of possible insolvency, will not necessarily suffice. Hackney v. Raymond Bros. Clarke Co. [Neb.] 94 N. W. 822. Knowledge that a debtor's liabilities were slightly less than $30,000 and his assets more than $40,000, but that he was in need of money, does not show that the creditor knew or had reasonable cause to believe a debtor insolvent. Des Moines Sav. Bank v. Morgan Jewelry Co. [Iowa] 99 N. W. 121. Chattel mortgagee, under a mortgage executed more than seven years prior to the enactment of the bankruptcy law, took possession of property within four months from the time of filing the petition; held, in the absence of an express finding of reasonable cause to believe a preference given, there was no preference. Thompson v. Fairbanks, 75 Vt. 361, 56 A. 11. Creditor procured securities of insolvent debtor at considerable expense; held, had reasonable cause to believe a preference intended. Crawford v. Rumpf, 205 Pa. 154, 54 A. 709. A trust company through its agent and attorney loaned a merchant a sum of money, taking a chattel mortgage upon his goods; the money was paid by said agent and attorney directly to the merchant's creditors, some of whom were clients of the agent; the next day the company tried to sell defendant out; held, mortgage was void. In re Pease, 129 F. 446. Debtor had notes for about $6,000 in bank, all overdue; cashier found out that debtor had forged indorsements on notes, went to debtor who paid the forged notes; cashier did not know that it took all debtor's property to do so; held, bank did not have "reasonable cause to believe" debtor insolvent. Gnichtel v. First Nat. Bank [N. J. Eq.] 57 A. 508. Where a bank did not advance, in the particular transaction alleged to be a preference, the usual percentage upon the accounts given by the bankrupt as security, evidence considered and held that the bank had reasonable cause to believe that a preference was intended. In re Mandel, 127 F. 863. That the bankrupt passively allowed a creditor to institute an attachment suit against him, obtain judgment by default, and sell the property, does not constitute reasonable cause to believe a preference was intended. Johnson v. Anderson [Neb.] 97 N. W. 339. Where a banker went 30 miles with a debtor on a Sunday night for the purpose of enabling him to make a sale of his property at a great discount in order that the proceeds might be appropriated to the payment of the bank's indebtedness, held sufficient to cause the banker to have "reasonable" cause to believe that a preference was thereby intended. Bardes v. First Nat. Bank, 122 Iowa, 443, 98 N. W. 284. The cashier of a bank knew that a debtor owed other debts and that the money paid the bank upon its debt was her only assets. Held, the bank had reasonable ground to believe a preference intended. Harris v. Second Nat. Bank, 110 Tenn. 239, 75 S. W. 1053. The fact that a creditor receives payment upon a debt past due and which he has been urging the debtor to pay is not sufficient to charge him with reasonable cause to believe the debtor insolvent, and that a preference was intended. In re Goodhile, 130 F. 471. See 1 Curr. L. 319, n. 60, 61.

3. Hackney v. Raymond Bros. Clarke Co. [Neb.] 94 N. W. 822; Farmers' & Mechanics' Bank v. Wilson [Neb.] 95 N. W. 609. Debtor had no knowledge of insolvency; held preference could not be recovered back. Townes v. Alexander [S. C.] 48 S. E. 214. He must have reasonable cause to believe the debtor insolvent, but this proposition is involved in the one that he must have reasonable cause to believe that a preference was intended. Summerville v. Stockton Mill. Co., 142 Cal. 529, 76 P. 243. An affidavit of defense denying knowledge of insolvency and reasonable cause to believe transaction a preference is sufficient. Gamble v. Elkin, 205 Pa. 226, 54 A. 782. Knowledge of a clerk of a bankrupt firm of its insolvency is not binding upon a preferred creditor who subsequently hires said clerk to take charge of goods transferred to said creditor as a preference. Whitson v. Farber Bank [Mo. App.] 80 S. W. 327.

4. Hackney v. Raymond Bros. Clarke Co. [Neb.] 94 N. W. 822.

5. In re Mandel, 127 F. 863; Kimball v. Dresser [Me.] 57 A. 787; Brittain Dry Goods Co. v. Bertenshaw [Kan.] 75 P. 1027.

6. This is done where, after such payment, there is not sufficient property remaining in the hands of the insolvent to pay an equal percentage to other creditors of the same class. Baden v. Bertenshaw [Kan.] 74 P. 639. Where the bankrupt transferred insurance policies to a bank, for a part cash consideration, and partly in payment of a debt, held not a preference where through the failure of one of the insurance companies, the bank only collected the amount actually paid by it to the bankrupt at the time of the transfer. Engel v. Union Square Bank, 87 N. Y. S. 1070. Company hired laborers, insolvent operated stores and supplied the men; company deducted cost of supplies given each man and sent check for total to insolvent within four months of filing the petition in bankruptcy, and while the defendant owed them $20,000, the company withheld $2,210.73, owing to the insolvent. Held, a preference. Western Tie & Timber Co. v. Brown [C. C. A.] 129 F. 728.

7. Mere fictitious book entries are not sufficient. In re Steam Vehicle Co., 121 F. 939.

8. **That he must:** Summerville v. Stockton Mill. Co., 142 Cal. 529, 76 P. 243; Whitson v. Farber Bank [Mo. App.] 80 S. W. 327;

cannot avoid a sale to a bona fide purchaser[9] for a present, fair consideration,[10] but the burden is on the purchaser to show that he purchased in good faith for a present fair consideration.[11] The filing of a petition in bankruptcy, being a caveat to all the world and in effect an attachment and injunction,[12] one acquiring title thereafter is not a bona fide purchaser.[13] An exchange of securities of equal value is not a preference,[14] and the value being unequal, the transfer is void only to the extent of the excess given by the bankrupt over that received by him.[15] Security given in good faith for a present loan is valid,[16] but a transfer to secure the payment of an old obligation is void,[17] though there seems to be a conflict upon this

Thompson v. First Nat. Bank [Miss.] 36 So. 65.

That he need not: Western Tie & Timber Co. v. Brown [C. C. A.] 129 F. 728; Benedict v. Deshel, 177 N. Y. 1, 68 N. E. 999. If the effect of a transaction is inevitably a preference, then it is conclusively presumed that a preference was intended. Hackney v. Hargreaves Bros. [Neb.] 99 N. W. 675. See 1 Curr. L. 319, n. 58.

9. A purchaser in good faith is one who did not participate in the fraudulent intent or act of the bankrupt in making the sale, or have knowledge of such intent. Schilling v. Curran [Mont.] 76 P. 998; Bonnie & Co. v. Perry's Trustee, 25 Ky. L. R. 1560, 78 S. W. 208; Friedman v. Verchofsky, 105 Ill. App. 414; Unmack v. Douglass, 75 Conn. 633, 55 A. 12; Coolidge v. Ayers [Vt.] 57 A. 970. An absolute transfer of an account against the insolvent debtor in good faith, without any agreement or understanding that the purchaser of the account is to be protected by the creditor in any way, does not constitute a preference to the extent of the money he received on sale of his claim. Hackney v. Raymond Bros. Clarke Co. [Neb.] 94 N. W. 822. Where plaintiff claimed land under a purchase at an execution sale, and defendant claimed under a deed from the execution debtor, the rights of the respective parties becoming fixed by the delivery of their respective deeds, and the recording of defendant's deed, they are unaffected by subsequent bankruptcy proceedings in which the debtor is discharged. Mason v. Perkins [Mo.] 79 S. W. 683. A claim being transferred in good faith by the bankrupt prior to the adjudication, the trustee can only recover the same by returning the amount paid therefor. In re Burnstine, 131 F. 828.

10. Friedman v. Verchofsky, 105 Ill. App. 414; Hall v. Keating Implement & Mach. Co. [Tex. Civ. App.] 77 S. W. 1054; Unmack v. Douglass, 75 Conn. 633, 55 A. 12; Coolidge v. Ayers [Vt.] 57 A. 970. A fair consideration is one that is honest and free from suspicion; mere inadequacy is insufficient. Myers v. Fultz [Iowa] 100 N. W. 351.

Illustrations: Where a stock of goods invoiced at one time at $1,775, but were not worth more than fifty cents on the dollar at the time of the transfer, and the property given therefor was worth about $800, held a fair consideration. Myers v. Fultz [Iowa] 100 N. W. 351. Rents paid by bankrupt to another, on account of improvements put on premises, after adjudication can be recovered by the trustee. Elmore v. Symonds, 183 Mass. 321, 67 N. E. 314. A mortgage for $1,500 given by the bank within four months of filing the petition, the consideration being $1,310 in cash, the remainder being for additional interest and bonus, is for a "present, fair consideration" and the transaction being in good faith, the mortgage is valid. In re Sawyer, 130 F. 384. Where a creditor upon her claim becoming due advanced more money and took a mortgage upon the debtor's property for the whole sum in good faith and without notice of the debtor's insolvency, which mortgage was recorded the next day, held a valid lien for a present consideration, though given within four months of filing the petition. Phillips v. Kahn, 89 N. Y. S. 250. Where property of a bankrupt of the value of $500 which had been attached before the petition was filed was sold subsequent to the filing of the petition to a son of the attachment plaintiff for $50, held, the son was not a bona fide purchaser for value without notice. In re Goldberg, 121 F. 578. A court finding that the property was purchased in good faith without intent to hinder, delay or defraud creditors, and for a certain cash sum, and that, as a conclusion of law, the purchase was bona fide and for a present fair consideration, a further finding of fact as to whether the consideration was a "present fair" one is unnecessary. Schilling v. Curran [Mont.] 76 P. 998.

11. Answer alleging such facts is not impertinent or scandalous. McNulty v. Wiesen, 130 F. 1012.

12. In re Breslauer, 121 F. 910; Chesapeake Shoe Co. v. Seldner [C. C. A.] 122 F. 593; In re Antigo Screen Door Co. [C. C. A.] 123 F. 249; In re Rodgers [C. C. A.] 125 F. 169; In re Beede, 125 F. 853; Logan v. Nebraska Moline Plow Co. [Neb.] 93 N. W. 1128.

13. In re Goldberg, 121 F. 578.

14. Anniston Iron & Supply Co. v. Anniston Rolling Mill Co., 125 F. 974; In re Manning, 123 F. 181.

15. In re Mandel, 127 F. 863; In re Manning, 123 F. 181.

16. Farmers' Bank v. Carr & Co. [C. C. A.] 127 F. 690. Chattel mortgage. Davis v. Turner [C. C. A.] 120 F. 605. At the inception of a loan a life insurance policy was assigned as security; held, creditor was only required to account for and credit its value. In re Busby, 124 F. 469; Kennedy v. Pierce's Loan Co., 100 Mo. App. 269, 73 S. W. 357. A firm purchased stock and held the same as security for the money advanced in so purchasing; they sold the stock within four months of their principal's bankruptcy; held, such sale did not create a preference requiring them to surrender the same in order to prove their claim. In re Filer, 125 F. 261. See 1 Curr. L. 321, n. 77.

17. Stewart v. Hoffman [Mont.] 77 P. 689; In re Busby, 124 F. 459. Chattel mortgage. Pollock v. Jones [C. C. A.] 124 F. 163.

point in that the courts differ in their construction of the words "present consideration"[18] A sale to a bona fide purchaser is not rendered void because it is upon credit,[19] though made within four months prior to the filing of the petition. Whether or not one is a bona fide purchaser is a question for the jury.[20] The taking of security by a creditor is not evidence that the creditor believes the debtor insolvent.[21] A conveyance operating to hinder, delay or defraud creditors, made within four months prior to filing the petition in bankruptcy, may be avoided by the trustee,[22] and under the laws of some states, a transfer made within such period of four months without consideration, being void as to creditors, may be avoided by the trustee.[23] An assignment of exempt property is not fraudulent as to creditors.[24] Neither depositing money, while insolvent, in a creditor bank upon open account subject to check,[25] nor retaking of property sold under a conditional sale not filed until within four months of the filing of the petition, constitute a preference,[26] nor does the payment of interest upon a lien on realty of the bankrupt.[27] Giving a deed within the four-month period, to complete a valid, bona fide contract therefor, executed before such four-month period, does not constitute a preferential transfer.[28] An assignment for the benefit of creditors,[29] executing a written release,[30] and identifying the chattels to which the lien of a mortgage is to attach,[31] when done within four months prior to the filing of the petition, constitute preferential transfers. With respect to the date of the transfer of property, it is when the instrument conveying the property is recorded,[32] or when possession is taken,[33] or

18. A mortgage given to secure a pre-existing debt is not rendered invalid by the words "for a present consideration" in § 67, subsec. d. Empire State Trust Co. v. Fisher Co. [N. J. Eq.] 57 A. 502; Farmers' Bank v. Carr & Co. [C. C. A.] 127 F. 690.

19. A transfer of property by a bankrupt a few weeks before the commencement of the bankruptcy proceedings, whereby the transferee agrees to pay the balance of the purchase price due the original vendor, is as valid as though the amount thus assumed by the transferee had been paid by him to the bankrupt in cash. Unmack v. Douglass, 75 Conn. 633, 55 A. 12.

20. Coolidge v. Ayers [Vt.] 57 A. 970.

21. Empire State Trust Co. v. Fisher Co. [N. J. Eq.] 57 A. 502.

22. Sherman v. Luckhardt, 67 Kan. 682, 74 P. 277; In re Rodgers [C. C. A.] 125 F. 169. An allegation that a transfer "was for the purpose of preventing" the "creditors from collecting any indebtedness due them by" the bankrupt is equivalent to an allegation that it was with intent to "hinder or delay his creditors." Gray v. Brunold, 140 Cal. 615, 74 P. 303. Where, in a suit to recover a preferential payment on the ground that it was made with intent to hinder, delay or defraud creditors, there is evidence that the payment was made bona fide in the satisfaction of a just debt secured by an unrecorded mortgage, and that there were no other lien creditors, and that it did not appear that any of the creditors extended credit after the date of the mortgage; held sufficient evidence to support a verdict for defendant. Dickenson v. Stults [Ga.] 48 S. E. 173. A contract by a bankrupt commission firm, some years before its bankruptcy, by which it agreed to do all its business through another firm, obtaining the benefit of the latter's credit, held not invalid as a scheme to hinder, delay or defraud creditors. Ryttenberg v. Schefer, 131 F. 313.

23. In California, it is not necessary for a trustee to prove in an action to set aside a transfer by an insolvent debtor without consideration, that it was done with intent to delay or defraud the bankrupt's creditors. Gray v. Brunold, 140 Cal. 615, 74 P. 303.

24. Assigned to daughter, without consideration, right to fund payable on insurance policy on life of assignor, if the latter died before expiration of endowment period. Pulsifer v. Hussey, 97 Me. 434, 54 A. 1076.

25. Though the bank may set off its debt against such deposit. New York County Nat. Bank v. Massey, 192 U. S. 138, 24 S. Ct. 199; In re George M. Hill Co. [C. C. A.] 130 F. 315; In re Scherzer, 130 F. 631.

26. As no title passes. Bradley v. Benson [Minn.] 100 N. W. 670.

27. The lien for statutory dower and interest having attached to realty years before the bankruptcy, payment by the bankrupt of accrued interest within four months of bankruptcy is not a preference. In re Riddle's Sons, 122 F. 559.

28. Mercer's Trustee v. Mercer, 24 Ky. L. R. 2469, 74 S. W. 285.

29. In re Slomka [C. C. A.] 122 F. 630.

30. Coolidge v. Ayers [Vt.] 57 A. 970.

31. First Nat. Bank v. Johnson [Neb.] 94 N. W. 837.

32. In re Mandel, 127 F. 863. This provision refers to transactions originally intended as preferences, or which at their inception constituted such as a matter of law. Bradley, Clark & Co. v. Benson [Minn.] 100 N. W. 670.

33. A bankrupt from time to time assigned accounts due to a bank, receiving advances thereon under an agreement that any surplus collected on such accounts should be applied to any other indebtedness which might at the time be due the bank; held that such agreement related to the time when it became effective as to any particular accounts by their delivery thereunder,

notice is otherwise brought home to the creditors of the bankrupt,[34] that is controlling. The question of delivery being raised by the trustee in bankruptcy, it does not require as positive a change of possession as where the question is raised by a subsequent bona fide purchaser for value, or a subsequently attaching creditor in good faith.[35] Only existing creditors at the time of the transfer can object thereto,[36] and a creditor's right to property acquired from the bankrupt is not concluded by his resistance of the involuntary proceedings instituted against his debtor.[37] Though preferences are void under the bankruptcy act, yet the trustee cannot treat them as such for all purposes; he must first establish their invalidity in proceedings instituted to have them set aside;[38] nor does the former dismissal of involuntary proceedings based on said transfer bind a trustee in this regard.[39] The action by the trustee to recover a preference is against the transferee,[40] and he cannot pursue the property into the hands of a bona fide purchaser for value from such creditor.[41] He must sue sufficiently long before the expiration of one year from the adjudication to give the preferred creditor a reasonable time within which to surrender the preference and exhibit his claim against the estate.[42] The preferred creditor must return to the trustee the property,[43] or its full value,[44] even though he has paid part to other creditors,[45] and is not entitled to recover the amount actually turned over by him to the debtor.[46]

(§ 9) *F. Preferential payments.*[47]—A payment of money is a transfer of property,[48] and hence the rules as to what constitutes a preference are the same.[49] The payment of reasonable fees,[50] or giving security therefor[51] to an attorney for services then and thereafter to be rendered to the bankrupt, is not a preference, but such payments are valid only in so far as subsequently approved by the court;[52] nor is the giving of post-dated checks,[53] or a secret advantage to one creditor in a composition.[54] Payment by an insolvent, within four months prior to the filing

and accounts assigned and delivered by the debtor when insolvent, and within four months of the filing of the petition, the application of the surplus realized therefrom over the amount advanced to a prior indebtedness constituted a preference. In re Mandel, 127 F. 863. In the case of a preference by way of an unrecorded chattel mortgage, the transfer dates from the acquisition of possession under the mortgage. Tatman v. Humphrey, 184 Mass. 361, 68 N. E. 844; In re Ball, 123 F. 164.

34. In re Mandel, 127 F. 863.

35. Marking and setting aside is sufficient. Allen v. Hollander, 128 F. 159.

36. Partnership used firm assets to pay individual debts of one of the partners. Merchants' Bank v. Thomas [C. C. A.] 121 F. 306.

37. Pepperdine v. Bank of Seymour, 100 Mo. App. 387, 73 S. W. 890.

38. Where a policy of fire insurance is assigned after a fire in order to prefer a creditor, the bankrupt cannot sue thereon unless reassigned, though it is surrendered to him by the creditor. Traders' Ins. Co. v. Mann, 118 Ga. 381, 45 S. E. 426.

39. A judgment dismissing a petition in involuntary bankruptcy on the ground that an alleged preferential transfer of property is not sustained is not an adjudication which could bind a trustee subsequently appointed on an adjudication made by another court, in a suit brought by him against the alleged preferred creditor to recover the property. In re Sears, Humbert & Co. [C. C. A.] 128 F. 275.

40. Not against the bankrupt. Gray v. Brunold, 140 Cal. 615, 74 P. 303; Hackney v. Raymond Bros. Clarke Co. [Neb.] 94 N. W. 822.

41. Property fraudulently transferred by bankrupt to his wife, held could not be recovered from a bona fide vendee of the wife. Hackney v. First Nat. Bank [Neb.] 98 N. W. 412.

42. Swartz v. Frank [Mo.] 82 S. W. 60.

43, 44. Hackney v. First Nat. Bank [Neb.] 98 N. W. 412.

45. Whitson v. Farber Bank [Mo. App.] 80 S. W. 327.

46. Bonnie & Co. v. Perry's Trustee, 25 Ky. L. R. 1560, 78 S. W. 208.

47. See 1 Curr. L. 321.

48. Dickenson v. Stults [Ga.] 48 S. E. 173.

49. See ante, "Preferential transfers," for elements.

50. Swartz v. Frank [Mo.] 82 S. W. 60; Pratt v. Bothe [C. C. A.] 130 F. 670.

51. Mortgage. Furth v. Stahl, 205 Pa. 439, 55 A. 29.

52. In re Morris, 125 F. 841.

53. Transfer takes place at the time of actual payment. In re Lyon [C. C. A.] 121 F. 723. But see 1 Curr. L. 321, n. 81.

54. Note was given by debtor to creditor besides allowing latter to share with other creditors. Transaction took place several years before debtor's bankruptcy and before the passage of the bankruptcy act of 1898, but the court holds this makes no difference. Batchelder & Lincoln Co. v. Whitmore [C. C. A.] 122 F. 355. See 1 Curr. L. 321, n. 82.

of the petition in bankruptcy, of notes, is a preference,[55] and the trustee may recover such payments from the payee, though there were solvent indorsers on the note.[56] Such a preference must be considered as having been given at the date of the payment of the note, not at the date of its delivery.[57] Payments upon loans made previous to the first of such payments are also preferences.[58] A payment made by a third party to a creditor of a bankrupt is not a preference to such creditor,[59] and the trustee cannot recover as a preference sums collected within four months prior to the filing of the petition by a creditor from third persons, under a contract which had been in force between the bankrupt and the creditor for a number of years.[60] Payments by a bankrupt, within four months prior to the filing of the petition, upon a running account, and extension of new credits to him in good faith and the usual course of business by the vendor, the net result being a gain to the estate, do not constitute preferences,[61] but the result not so being, only the sum which is the direct loss to the estate constitutes the amount of the preference.[62] A suit in equity by a bankrupt's trustee to recover a preferential payment cannot be objected to on the ground of the existence of an adequate remedy at law.[63]

§ 10. *Collection, reduction to possession, and protection of property. A. Discovery.*[64]—The examination of third persons concerning the bankrupt's estate lies in the discretion of the court.[65] A court of bankruptcy cannot make an order on the application of the trustee of a bankrupt, whose estate is being administered in another district, requiring persons residing in the district to appear before the referee for examination concerning the acts, conduct, or property of the bankrupt,[66] though the contrary has been held.[67] The court having charge of the administra-

55. Notes were in the hands of indorsee. In re George M. Hill Co. [C. C. A.] 130 F. 315. See 1 Curr. L. 322, n. 91.

56. Harris v. Second Nat. Bank, 110 Tenn. 239, 75 S. W. 1053. See 1 Curr. L. 322, n. 92.

57. In re Wolf, 122 F. 127.

58. It is immaterial that all the loans were made during insolvency, and within the four-month period. In re Colton Export & Import Co. [C. C. A.] 121 F. 663.

59. See ante, "Preferential transfers." Keegan v. Hamilton Nat. Bank [Ind.] 71 N. E. 647; Goode v. Elwood Lodge, No. 166, K. P., 160 Ind. 251, 66 N. E. 742. See 1 Curr. L. 319, n. 86.

60. Ryttenberg v. Schefer, 131 F. 313.

61. "The law does not demand the segregation of the purchases into independent items so as to create distinct pre-existing debts." Jaquith v. Alden, 189 U. S. 78, 23 S. Ct. 649, 47 Law. Ed. 717; Yaple v. Dahl-Millikan Grocery Co., 193 U. S. 526, 24 S. Ct. 552; In re Sagor [C. C. A.] 121 F. 658. But where notes are given by a debtor to pay for goods purchased, and while still unpaid the creditor sells other goods to the debtor, who thereafter pays the notes when insolvent and within four months of filing the petition in bankruptcy, such payment constitutes a preference, which must be surrendered before the last account can be proved. In re Jones, 123 F. 128. Prior to the amendment of 1903, all indebtedness of a bankrupt to a particular creditor existing four months before the filing of the petition was to be treated as one claim, and any payment made and received even in good faith by both parties during the four-month period and while the debtor was insolvent was a preference; this rule has now been changed. In re Delling, 124 F. 852. See 1 Curr. L. 321, n. 88, 89.

62. Bankrupt borrowed money of bank and also obtained a discount of customers' notes, the bank also discounted notes given by the bankrupt to third parties, the net result of the transactions within four months of filing the petition being to decrease the bankrupt's direct indebtedness on its own notes given to the bank and to third parties, and to increase its contingent indebtedness on indorsements of customers' notes. Held, the latter should not be considered in determining the amount of preferences received by the bank, but that the excess of payments over new credits on both the other items of direct indebtedness, taken together, constituted a preference, which must be surrendered in order to prove a claim against the estate. In re George M. Hill Co. [C. C. A.] 130 F. 315. Under a pattern contract providing for the exchange of old patterns for new ones, patterns returned for exchange by the bankrupt within four months preceding the bankruptcy cannot be deemed a preference, the creditor being required to surrender as a preference only the excess of cash payments received during that time over the value of the patterns shipped during the same time. In re Nicholas, 122 F. 709.

63. Such suit is analogous to a suit by a judgment creditor to set aside a fraudulent conveyance. Pond v. New York Nat. Exch. Bank, 124 F. 992.

64. See 1 Curr. L. 322.

65. Creditor has not an unqualified right to such an examination. In this case third party was bankrupt's common-law assignee. In re Andrews, 130 F. 383.

66. In re Williams, 123 F. 321.

67. In re Sutter Bros., 131 F. 654.

tion of the bankrupt estate has the power to order the taking of the deposition of any person having knowledge concerning the acts, conduct, or property of the bankrupt, but who resides beyond the district or state, and more than 100 miles from the court,[68] and to compel, by proper process, the persons, so ordered to be examined, to testify fully in regard thereto.[69] When necessary the bankrupt's wife may be examined.[70]

(§ 10) *B. Compelling surrender by bankrupt.*[71]—The bankruptcy court, in the absence of fraud or concealment, can only order the bankrupt to deliver to the trustee such property as he has in his possession, or under his control,[72] and that he has such property in his possession or under his control must appear by almost incontestable proof.[73] Denial by the bankrupt under oath is not conclusive,[74] it appearing that the bankrupt had property shortly before the adjudication, of which no account nor credible explanation is given, the court may consider the property or its proceeds as being still in the possession or under the control of the bankrupt,[75] and the court can enforce obedience to such order by imprisonment for contempt,[76] but before committing the bankrupt the court should give him an opportunity to prove his inability to comply with the order.[77] The commitment of the bankrupt for refusal to surrender property is not imprisonment for debt,[78] and the bankrupt may be imprisoned for knowingly and fraudulently concealing from his trustee property belonging to his bankrupt estate.[79] The obtaining of an order requiring a bankrupt to pay over or surrender certain property should ordinarily be by a mo-

68, 69. In re Williams, 123 F. 321.

70. There being reasonable ground therefor a bankrupt's wife may be examined to determine whether a business conducted in her name is in fact hers or the bankrupt's, and may be asked such questions as are pertinent to that inquiry. In re Worrell, 125 F. 159.

71. See 1 Curr. L. 322.

72. In re Gerstel, 123 F. 166. In re Kane, 125 F. 984.

73. Proof that defendant had not been seen gambling, at which he claimed to have lost part of the money, and that if a statement made to a commercial agency was true he should have more on hand, the bankrupt denying the truth of this statement is not sufficient to warrant such an order. In re Adler, 129 F. 502; In re Felson, 124 F. 288. Cannot order him to turn over money collected from his debtor after he had received notice or knowledge of the filing of the petition by creditors to have him adjudged a bankrupt, which money has since passed into the possession of others and is not under the control of the bankrupt, there being no fraud whatsoever. American Trust Co. v. Wallis [C. C. A.] 126 F. 464.

74. If the court from the evidence finds that he has the property in his possession or under his control it may require him to surrender it or commit him for contempt in spite of such denial. Schweer v. Brown [C. C. A.] 130 F. 328. On answer of a bankrupt to a rule to show cause. In re Gerstel, 123 F. 166.

75. In re Gerstel, 123 F. 166. See 1 Curr. L. 323, n. 6. It is not a sufficient accounting of money traced into a bankrupt's hands for him to say that he gave it to his wife, who spent it for the benefit of himself and family, it not appearing that such sum was necessary to their maintenance. In re Kane, 125 F. 984. Bankrupt's testimony in explanation of disposition of funds being uncorroborated, although if true it apparently could easily have been corroborated, held sufficient to justify order requiring him to turn over the money. In re Henderson, 130 F. 385. A bankrupt claimed to have paid the assets in question to certain creditors but, though given every opportunity, failed to corroborate his statement as to such payments by producing such creditors, held an order directing him to pay to his trustee the amount so alleged to have been paid to the creditors not produced was proper. In re Leinweber, 128 F. 641. Where the bankrupt, a merchant in a town of 100 inhabitants, at the beginning of the four months' period, had a stock of goods worth $5,000 and $1,000 in money and accounts, within that time he bought goods of the value of over $27,000, these latter goods he sold immediately and failed to account for the proceeds except to say that he had gambled it away, held sufficient to justify court to find that he had the proceeds under his control or in his possession. Schweer v. Brown [C. C. A.] 130 F. 328.

76. In re Gerstel, 123 F. 166. This is the sole purpose of a contempt proceeding against a bankrupt. In re Kane, 125 F. 984; In re Goldfarb Bros., 131 F. 643. See 1 Curr. L. 322, n. 4.

77. In re Hausman [C. C. A.] 121 F. 984 See 1 Curr. L. 322, n. 6.

78. Schweer v. Brown [C. C. A.] 130 F. 328.

79. Evidence that a bankrupt had received from three or four persons, who owed him money at the time his voluntary petition was filed, several small sums on account of their debt, and that he applied the money so received to the payment of two of his own creditors held insufficient to establish a fraudulent concealment of assets. U. S. v. Lowenstein, 126 F. 884.

tion for a rule upon him to show cause,[80] sometimes by a mere affidavit,[81] and never by a formal petition and pleadings, as in a suit in equity, unless the purpose is to bring to the notice of the court some outside party who is not bound or ready to take notice of the proceedings in bankruptcy, or some outside matter that does not appear by the ordinary record.[82]

(§ 10) *C. Property in possession of officers appointed by state courts.*[83]—A state court acquiring jurisdiction over a bankrupt's property more than four months before the filing of the petition in bankruptcy, its right to control and administer the property for the purposes for which it acquired jurisdiction, is superior to the bankruptcy court,[84] but if the suit in the state court was begun and seizure made within such four month period,[85] or after the filing of the petition,[86] the right of the bankruptcy court over the property is superior to, and after adjudication[87] exclusive of the state court, and, after the adjudication, the bankruptcy court will not permit any person, even though he be an officer of a state court acting under its process,[88] to interfere with the property in its custody or in the possession of its officers. Actions in the state court, if not stayed, continue, and the debtor, even though a bankrupt, may be compelled to observe and obey all lawful orders of the state court,[89] and an application to restrain a state court from punishing a bankrupt for contempt may be treated as an application for a stay of the proceedings in the state court.[90] A court of bankruptcy has no power to enjoin the plaintiffs, in suits against the bankrupt in the state courts, from collecting their judgments from the surety upon the bankrupt's bail bond.[91] A court of bankruptcy has jurisdiction to compel an assignee for the benefit of creditors of the bankrupt, under an assignment constituting an act of bankruptcy, to turn over to the trustee or account for the property which came into his hands under the assignment,[92] and the trustee is bound to bring an action to recover property so held,[93] which action may be brought in a court of bankruptcy,[94] and a purchaser at a sale by an assignee for the benefit of creditors, having made no payment, acquires no title to the property purchased as against the trustee in bankruptcy of the assignor subsequently appointed on an adjudication based on the assignment.[95] A bankruptcy court will not summarily dispossess the receiver or other officers of a state court,[96] but only by formal proceedings taken by its own receiver or trustee for that purpose,[97] and

80, 81, 82. In re Adler, 129 F. 502.

83. See 1 Curr. L. 323.

84. General assignment for the benefit of creditors. In re Knight, 125 F. 35; Bloch v. Bloch, 42 Misc. 278, 86 N. Y. S. 1047.

85. It is immaterial that the suit in the state court was for the enforcement of a valid lien created before the four month period. In re Knight, 125 F. 35. A state court cannot by the appointment of a receiver because of insolvency obtain priority of jurisdiction to administer the property of a debtor to the exclusion of a court of bankruptcy. Id.

86. In re Weinger, Bergman & Co., 126 F. 875. Action to foreclose a mortgage. In re Kellogg [C. C. A.] 121 F. 833. A creditor recovering property under a writ of replevin in a state court before the adjudication in bankruptcy the state court has jurisdiction to continue the replevin action. McFarlan Carriage Co. v. Wells, 99 Mo. App. 641, 74 S. W. 878.

87. In re Knight, 125 F. 35. State court is without jurisdiction to determine the right to the possession of the property in a suit instituted after the adjudication (In re Reynolds, 127 F. 760); or to determine conflicting claims as to the title and right of possession (Mishawaka Woolen Mfg. Co. v. Powell, 98 Mo. App. 630, 72 S. W. 723). An action of replevin cannot be commenced and maintained against the trustee to recover property in the possession of and claimed by the bankrupt at the time of the adjudication and in the possession of the referee at the time the action is commenced. Crosby v. Spear [Me.] 57 A. 881.

88. Cannot be taken by a sheriff under a writ of replevin issuing out of a state court. Mishawaka Woolen Mfg. Co. v. Powell, 98 Mo. App. 530, 72 S. W. 723; In re Reynolds, 127 F. 760.

89. Proceedings supplementary to execution are proceedings in the action. In re William E. De Lany & Co., 124 F. 280.

90. No fine having been imposed, and it being evident that no actual contempt was intended. In re William E. De Lany & Co. 124 F. 280.

91. Jaquith v. Rowley, 188 U. S. 620, 33 S. Ct. 369, 47 Law. Ed. 620.

92. In re Thompson, 122 F. 174.

93, 94, 95. In re Knight, 125 F. 35.

96. Ross-Meeham Foundry Co. v. Southern Car & Foundry Co., 124 F. 403.

97. Will not interfere with the possession

the state court, upon proper application being made pursuant to an order of the bankruptcy court, will order its receiver to turn over the assets of the bankrupt to the bankruptcy receiver or trustee,[98] and the state receiver must apply to the bankruptcy court for the allowance of his commissions and expenses.[99] The bankruptcy court can only compel the state court's receiver to turn over such assets of the bankrupt as the latter's creditors are entitled to share in,[1] a state court having jurisdiction to complete pending mortgage foreclosure proceedings, its receiver is entitled to the possession of the property covered by the mortgage,[2] but as to the surplus arising from the mortgage sale,[3] or a sale upon execution,[4] the trustee in bankruptcy is entitled to possession.

(§ 10) *D. Summary proceedings against third persons; jurisdiction.*[5]—A court of bankruptcy has no jurisdiction to summarily require a third person to pay over money or surrender property in his possession, and to which he claims an adverse right as against the bankrupt's estate,[6] except where such court finds it absolutely necessary for the preservation of the estate to take the possession of the property from the adverse claimant by means of its officers.[7] The court, or a referee, has jurisdiction to summarily determine the question of the validity of the claim of a third party to a lien upon, or an interest in, property, or the proceeds of property, lawfully in the custody of a trustee in bankruptcy,[8] but the court has no jurisdiction of a plenary suit in equity for that purpose, brought by the trustee against the creditor, where the latter is a foreign corporation, and does not consent nor appear,[9] but it has jurisdiction if the property is in the hands of the bankrupt at the time of filing the petition.[10] The court may determine whether a real or pretended adverse claim exists,[11] the claim being adverse the issues are only determinable by a plenary suit,[12] but if it finds such claim to be colorable it has power to summarily place its receiver or trustee in bankruptcy in pos-

of the state court until after an application to the state court by the receiver or trustee of the bankruptcy court for the surrender of the possession to him and the unwarranted refusal of the state court to recognize the jurisdiction and authority of the bankruptcy court. Ross-Meeham Foundry Co. v. Southern Car & Foundry Co., 124 F. 403.

98, 99. Bloch v. Bloch, 42 Misc. 278, 86 N. Y. S. 1047.

1. Cannot compel him to turn over the share of a solvent tenant in common in the proceeds of the sale of common property. In re English [C. C. A.] 127 F. 940.

2. Merry v. Jones, 119 Ga. 643, 46 S. E. 861. This is true though the mortgagee also pays for relief usually incident to state insolvency proceedings, though this is not true of the converse of this statement. Merry v. Jones, 119 Ga. 643, 46 S. E. 861. See 1 Curr. L. 323, n. 12.

3. Merry v. Jones, 119 Ga. 643, 46 S. E. 861. See 1 Curr. L. 323, n. 13.

4. A constable is liable to a debtor's trustee in bankruptcy for any surplus received, or which he failed to collect, from a sale of the debtor's property upon execution. In re Geiser, 129 F. 237.

5. See 1 Curr. L. 323.

6. In re Flynn & Co., 126 F. 422; In re Knickerbocker, 121 F. 1004; In re Teschmacher & Mrazay, 127 F. 728; In re Rochford [C. C. A.] 124 F. 182. Has jurisdiction where not held under an adverse claim. In re Breslauer, 121 F. 910. See 1 Curr. L. 323, n. 15.

7. Such a seizure and the determination of the issue thus raised between the trustee and the adverse claimant is a proceeding in bankruptcy as distinguished from a controversy at law or in equity and hence within § 23 of the act of 1898. In re Rochford [C. C. A.] 124 F. 182.

8. In re Rochford [C. C. A.] 124 F. 182. May try and determine the title to property found in the possession of the bankrupt, which had been purchased and delivered to him. In re Mertens, 131 F. 507. An agreement between a creditor and a trustee in bankruptcy, whereby a creditor turns over a fund claimed by him to the trustee to be held by him for the creditor's benefit, subject to the bankruptcy court's order, gives that court authority to determine by a summary proceeding the right to the fund. Havens & Geddes Co. v. Pierek [C. C. A.] 120 F. 244.

9. Havens & Geddes Co. v. Pierek [C. C. A.] 120 F. 244.

10. In re Leeds Woolen Mills, 129 F. 922.

11. In re Breslauer, 121 F. 910. The referee may so do. In re Knickerbocker, 121 F. 1004; In re Teschmacher, 127 F. 728. Claim of seizure or process from a state court. In re Welnger, Bergman & Co., 126 F. 875; In re Kane, 131 F. 386. See 1 Curr. L. 323, n. 16-18.

12. Pleadings verified. In re Kane, 131 F. 386. The petition not alleging that the respondent's claim is colorable only, and respondent promptly objecting to the form of the proceeding, the bankruptcy court has no jurisdiction to determine the matter except by plenary suit. In re Scherber, 131 F. 121.

session of the property.[13] As to whether or not the court may acquire jurisdiction to summarily determine an adverse claim upon its merits by consent, there is a conflict in the decisions.[14] An adverse claim, to defeat these proceedings, must be a holding of the property at the time the petition was filed under a bona fide claim of ownership,[15] a mere lien,[16] or a claim by bailors,[17] are not such adverse claims, but a creditor's title to the proceeds of a sale upon execution,[18] the right of a surety on the bankrupt's bail bond to property left with him by the bankrupt to indemnify him for his liability,[19] and that of a buyer claiming under an executed sale from the bankrupt,[20] are such adverse claims, as is the claim of a party to whom it is alleged the bankrupt has fraudulently conveyed property,[21] and that of one claiming to have received a preference without reasonable cause to believe that a preference was thereby intended.[22] Where property is claimed adversely to a trustee the latter must proceed to obtain possession like any other owner,[23] and by regular proceedings in courts having jurisdiction,[24] the state and Federal courts having concurrent jurisdiction in this regard.[25]

(§ 10) *E. Actions to collect or reduce the property to the trustee's possession.*[26]—The trustee may bring an action in the state[27] or Federal[28] courts, at any time within two years of the date when the estate was properly closed,[29] without first obtaining an order to do so from the court of his appointment.[30] Denial of the trustee's appointment and qualification raises a material issue which must be determined before he is entitled to judgment.[31] The trustee in bankruptcy

13. Where property was taken after the filing of the petition in bankruptcy on a writ of replevin which described other property than that seized, the court has the power to order its surrender by the person in possession to the receiver or trustee in bankruptcy. In re Weinger, Bergman & Co., 126 F. 875; In re Kane, 131 F. 386.

14. That it may. In re Adams, 130 F. 788. That it cannot. In re Teschmacher & Mrazay, 127 F. 728. Of course if such claimant went on with the summary proceedings to the very end and only objected to the jurisdiction after a decision against him, the objection is not likely to receive much consideration, but a seasonable exercise of his right to object is entitled to protection. Id. See 1 Curr. L. 323, n. 17.

15, 16. In re Breslauer, 121 F. 910. Has jurisdiction to determine, in summary proceedings before the referee, the validity of a mortgage on property of the bankrupt of which the trustee has obtained the possession and legal title. In re Kellogg [C. C. A.] 121 F. 333.

17. Bailors permitting their goods, in the hands of an insolvent bailee becoming bankrupt, to pass into the custody of the receivers or trustees in bankruptcy cannot occupy the attitude of adverse claimants in determining the jurisdiction of the court. In re Leeds Woolen Mills, 129 F. 922.

18. A creditor's title to the proceeds of an execution, issued against the bankrupt within four months of filing the petition, which have been actually paid to the creditor by the sheriff. In re Knickerbocker, 121 F. 1004.

19. It is not necessary that the surety should claim to be the absolute owner of the property in his possession, it is sufficient if his liability has not been determined or satisfied. Jaquith v. Rowley, 188 U. S. 620, 23 S. Ct. 369, 47 Law. Ed. 620.

20. In re Flynn & Co., 126 F. 422.

21. McNulty v. Feingold, 129 F. 1001; In re Hartman, 121 F. 940.

22. In re Adams, 130 F. 788.

23. Ross-Meeham Foundry Co. v. Southern Car & Foundry Co., 124 F. 403.

24. Must make necessary persons parties, serve proper process, and file proper pleadings. Ross-Meeham Foundry Co. v. Southern Car & Foundry Co., 124 F. 403; In re Knickerbocker, 121 F. 1004; In re Teschmacher & Mrazay, 127 F. 728.

25. An adverse claimant may bring suit in the state court, and try title to the property, but after the jurisdiction of the bankruptcy court has attached he cannot take the property in specie out of the possession of the court or any of its agents. Crosby v. Spear [Me.] 57 A. 881. Receiver cannot enjoin trover brought in the state court. If the action was replevin, quaere. In re Kanter [C. C. A.] 121 F. 984.

26. See 1 Curr. L. 324.

27. See next subdivision, Jurisdiction of Courts. Clevenger v. Moore [N. J. Law] 58 A. 88.

28. See next subdivision, "Jurisdiction of Courts."

29. Estate had been improperly closed and then re-opened, held action could be brought at any time within two years of final closing. Bilafsky v. Abraham, 183 Mass. 401, 67 N. E. 318.

30. Traders' Ins. Co. v. Mann, 118 Ga. 381, 45 S. E. 426. Need not have written authority. McLanahan v. Blackwell, 119 Ga. 64, 45 S. E. 785.

31. Prevents judgment on the pleadings. Denial that alleged trustee is or ever was "the duly elected, appointed, qualified or acting trustee" of said bankrupt estate held sufficient. Summerville v. Stockton Mill. Co., 143 Cal. 529, 76 P. 243.

may maintain an action against a creditor whose name did not appear in the list of creditors, and who had no notice of the bankruptcy proceeding, to recover money collected in fraud of creditors,[32] and he need make no demand in order to recover property unlawfully transferred by the bankrupt.[33] An action to recover a preference is one at law not in equity,[34] but the trustee's action to recover the value of a preference should be one in equity for an accounting,[35] and he should also use a bill in equity to have a fraudulent conveyance set aside.[36] An action by the trustee to set aside a conveyance by the bankrupt, made with the intent to hinder, delay, or defraud creditors, is an action for relief on the ground of fraud,[37] and hence is governed by the statute of limitations as to such actions,[38] but an action to recover a preferential payment is not an action for fraud.[39] In a suit to set aside a transfer by the bankrupt as fraudulent, and as a preference, the case should not be referred to a jury until it appears on trial that it is necessary or desirable that the issues be so determined.[40] The defense of usury is available to the trustee in bankruptcy against a mortgage given by the bankrupt, the trustee having title to the property.[41] A judgment for defendant in an action by the trustee to determine the ownership of property is a bar to a subsequent action by the trustee to recover the proceeds thereof on the same grounds,[42] and this is true though the judgment in the first case was not given upon the merits.[43]

Jurisdiction of courts.[44]—The trustee taking actual possession of property, although it be in another state, it is in the custody of the bankruptcy court administering the estate.[45] In a suit by a trustee to recover a fund for the estate, defendant appearing generally and answering to the merits, the bankruptcy court has jurisdiction by consent.[46] As to whether or not a Federal court has jurisdiction, in the absence of consent, of an action by the trustee to set aside an alleged fraudulent transfer of property there is a conflict in the decisions.[47] Since the amendatory act of 1903 the bankruptcy court has jurisdiction of suits for the recovery of preferences.[48] The trustee may bring an action against a foreign corporation to collect a demand due the bankrupt, in the district where the bankrupt's family resides, though the bankrupt has absconded.[49] A state court has jurisdiction of an action by a trustee to collect an assessment levied upon the stockholders of a bankrupt corporation.[50]

Parties.[51]—In an action by a trustee in bankruptcy to set aside an alleged fraudulent chattel mortgage, subsequent mortgagees of the same property are not

32. Roberts v. Fernald [N. H.] 55 A. 942.
33. Goldberg v. Harlan [Ind. App.] 67 N. E. 707.
34. Hodges v. Kohn [S. C.] 45 S. E. 102.
35. Houghton v. Stiner, 92 App. Div. 171, 87 N. Y. S. 10.
36. Thompson v. First Nat. Bank [Miss.] 36 So. 65.
37, 38. Harrod v. Farrar [Kan.] 74 P. 624.
39. Baden v. Bertenshaw [Kan.] 74 P. 639.
40. Bare statement that a jury of business men is better qualified to pass on the questions to be presented is insufficient. Evans v. National Broadway Bank, 88 App. Div. 549, 85 N. Y. S. 101.
41. In re Kellogg [C. C. A.] 121 F. 333.
42. First action was to determine ownership of insurance policies, alleged to have been fraudulently transferred by the bankrupt, second action to recover fund realized therefrom. Engel v. Union Square Bank, 87 N. Y. S. 1070.
43. Entered upon a dismissal of the complaint for failure of proof. Engel v. Union Square Bank, 87 N. Y. S. 1070.
44. See 1 Curr. L. 324.
45. Referee has jurisdiction to order its sale free from liens. In re Wilka, 131 F. 1004.
46. Ryttenberg v. Schefer, 131 F. 313.
47. See 1 Curr. L. 324, n. 41.
That it has. McNulty v. Feingold, 129 F. 1001. Has concurrent jurisdiction with the state court. Johnston v. Forsyth Mercantile Co., 127 F. 845.
That it has not. Gregory v. Atkinson, 127 F. 133.
48. Section 8 of the Ray bill (Act Feb. 5, 1903) amending § 23b of the bankruptcy act of 1898, so as to give the bankruptcy court jurisdiction of suits for the recovery of certain preferences, is qualified by § 19 of the amendment of 1903, which provides that the provisions of the act shall not apply to pending cases. In re Hartman, 121 F. 940.
49. Sims v. Union Assur. Soc., 129 F. 804.
50. In such an action the validity of the assessment cannot be questioned. Clevenger v. Moore [N. J. Law] 58 A. 88.
51. See 1 Curr. L. 324, n. 39, 40.

necessary parties,[52] and a so-called separate answer of the bankrupt alleging such facts, and that such persons had not been made parties to the action, is properly considered as a demurrer for a defect of parties.[53] In an action to set aside an alleged fraudulent conveyance, all who were parties to the fraud, or who have acquired part of the property claiming title thereto are proper defendants.[54] A trustee in bankruptcy of a judgment debtor in a creditor's bill in a state court may not be substituted as complainant in the absence of an order of the Federal court that the lien be preserved by the trustee for the benefit of the estate,[55] and the petition of a trustee in bankruptcy asking to be substituted as party plaintiff in a creditor's bill filed by a creditor of the bankrupt, who has filed his claim before the referee in bankruptcy, must allege that such creditor has waived his security.[56]

Pleading.[57]—The pleadings are governed by the equity rules as to pleadings.[58] The complaint in an action to recover a preference must allege insolvency at the date of the transfer,[59] that the preference was given within the four months immediately preceding the filing of the petition,[60] and that the creditor had reasonable cause to believe that a preference was thereby intended.[61] In a suit to recover property fraudulently transferred, the general rule that where fraud is relied upon the facts and circumstances upon which reliance is had must be clearly and concisely set out applies.[62] A bill in equity to recover property alleged to have been fraudulently conveyed will not be dismissed though it alleges that the property was obtained by fraud, through a conspiracy, and that an accounting is necessary.[63] The complaint in an action by a trustee to recover money belonging to the bankrupt must allege nonpayment.[64] An allegation of conspiracy on the part of the bankrupt and defendants is sustained by proof that any two of the defendants so conspired.[65]

Evidence.[66]—The competency of a witness before the bankruptcy court must be determined by the laws of the state in which the proceedings are pending.[67] Copies of the proceedings in bankruptcy in order to be admissible in evidence in another court must be certified according to the provisions of the national bankruptcy law,[68] and where introduced at the trial of a suit by a trustee in the state court to prove a fact collateral to the main issue, it is unnecessary to support them

52. In this case subsequent mortgagees had not filed their mortgages as required by law. Shanks v. National Casket Co., 88 N. Y. S. 839.

53. Shanks v. National Casket Co., 88 N. Y. S. 839.

54. Sexton v. Sebring, 89 N. Y. S. 372.

55. Kinmouth v. Braeutigam [N. J. Eq.] 57 A. 1013.

56. Mere allegation of the filing of the creditor's claim and its allowance is insufficient. Kohout v. Chaloupka [Neb.] 96 N. W. 173.

57. See 1 Curr. L. 324.

58. The petition alleging that the property was not assigned for a present fair consideration, an answer denying this allegation need not set forth in detail all the circumstances connected with the facts alleged in the answer. McNulty v. Wiesen, 130 F. 1012.

59. It will not be presumed in the appellate court. Schilling v. Curran [Mont.] 75 P. 998.

60. Greene v. Montana Brewing Co., 28 Mont. 380, 72 P. 751.

61. Greene v. Montana Brewing Co., 28 Mont. 380, 72 P. 751. See 1 Curr. L. 324, n. 43.

62. A bill by a bankrupt's trustee to set aside a conveyance as fraudulent to creditors alleging that the goods were sold at a grossly inadequate price (stating the figures) and that the sale was conducted at night, and before business hours, and with great secrecy, and that the purchaser knew of the bankrupt's condition and, paying for the goods before an inventory could be taken, paid too large an amount, part of which was refunded, held sufficient to withstand demurrer for indefiniteness. Johnson v. Forsyth Mercantile Co., 127 F. 845.

63. Lyon v. Clark [Mich.] 100 N. W. 611.

64. Where the bankrupt had make an assignment for the benefit of creditors prior to bankruptcy, it must allege nonpayment to the trustee, assignee, or bankrupt. Cohen v. Wagar, 87 App. Div. 255, 84 N. Y. S. 377.

65. Saxton v. Sebring, 89 N. Y. S. 372.

66. See 1 Curr L. 324.

67. In re Josephine, 121 F. 142. In those states where a husband cannot testify against his wife without her consent, the petition and schedule thereto attached are inadmissible in evidence against the wife of the bankrupt without her consent. Action by trustee to recover property fraudulently conveyed. Halbert v. Pranke [Minn.] 97 N. W. 976.

68. A. Lehmann & Co. v. Rivers, 110 La. 1079, 35 So. 296.

by establishing the jurisdiction of the Federal court over the bankrupts.[69] A copy of the testimony given by the bankrupt before the referee, and which he states to be true, is inadmissible in a suit by his trustee to set aside an alleged preference.[70] The testimony of officers of a bankrupt corporation taken under either section 7, cl. 9, or section 21a, being reduced to writing, is admissible in a subsequent proceeding against them to recover property alleged to be in their possession or under their control,[71] but the testimony of one other than the bankrupt, or if a corporation, other than an officer or stockholder thereof, not being directed to any defined issue is inadmissible in such proceeding.[72] In an action to recover an alleged preference, the burden of proof is upon the trustee to prove all the essentials of a preferential transfer;[73] he must prove the payment or transfer by the debtor to the creditor,[74] that the debtor was insolvent at the time of the transfer,[75] that the preference was given within the four months immediately preceding the filing of the petition,[76] that the creditor had reasonable cause to believe a preference was thereby intended,[77] that a preference actually resulted,[78] and in those courts where it is held that the bankrupt must intend a preference, that fact must be proven by the trustee.[79] In an action to set aside a fraudulent conveyance the burden of proof is upon the trustee to prove the fraud,[80] and where he seeks to recover the value of property reconveyed by a vendee under a fraudulent conveyance from the grantor, the value of the goods so reconveyed.[81] The uncontradicted testimony of the creditor receiving the alleged preference that he did not know of the debtor's insolvency is sufficient to defeat a recovery.[82] Evidence that defendant's attorney was present at the bankruptcy proceedings is admissible to show defendant's knowledge thereof.[83] Acts of the bankrupt, in which the purchaser did not participate, occurring after the sale and payment are not competent evidence on the question of the purchaser's intent or knowledge.[84] Fraud may be proved by circumstantial evidence.[85] It has been held that the adjudication in bankruptcy conclusively establishes that a preference was intended.[86] Though evidence showing the due appointment of a trustee be admitted without objection, its sufficiency may be afterwards questioned.[87] Facts determined in the bankruptcy proceedings are not ad-

69. Properly certified copies of the adjudication and of the order of the referee approving the bond of the trustee are admissible in an action by the latter to recover a fraudulent preference, without showing the bankrupt had been served with a subpoena or had appeared before adjudication. Whitson v. Farber Bank [Mo. App.] 80 S. W. 327.

70. Bankrupt embodied it as part of a deposition. Bonnie & Co. v. Perry's Trustee, 25 Ky. L. R. 1560, 78 S. W. 208.

71, 72. In re Alphin & Lake Cotton Co., 131 F. 824.

73. Dickenson v. Stults [Ga.] 48 S. E. 173.

74. Kimball v. Dresser [Me.] 57 A. 787.

75. In re Mandel, 127 F. 863; Kimball v. Dresser [Me.] 57 A. 787. See 1 Curr. L. 324, n. 46.

76. Baden v. Bertenshaw [Kan.] 74 P. 639; Greene v. Montana Brewing Co., 28 Mont. 380, 72 P. 751; In re Mandel, 127 F. 863.

77. Greene v. Montana Brewing Co., 28 Mont. 380, 72 P. 751; Thompson v. First Nat. Bank [Miss.] 35 So. 55; Baden v. Bertenshaw [Kan.] 74 P. 639.

78. Baden v. Bertenshaw [Kan.] 74 P. 639; Kimball v. Dresser [Me.] 57 A. 787; In re Mandel, 127 F. 863.

79. Baden v. Bertenshaw [Kan.] 74 P. 639.

80. Halbert v. Pranke [Minn.] 97 N. W. 976. Under the laws of North Carolina the grantee under a fraudulent conveyance, claiming as a bona fide holder, must show that he is a purchaser for a valuable consideration and without notice of the grantor's fraud. Cox v. Wall, 132 N. C. 730, 44 S. E. 635. Action by trustee to recover certain stocks alleged to have been fraudulently carried by the bankrupt in his own name as trustee, evidence held sufficient to show that the bankrupt was the true owner, and insufficient to show that other stockholders or the company were parties to the fraud. Fowler v. Jenks, 90 Minn. 74, 95 N. W. 887.

81. Wallace v. Boggan, 137 Ala. 535, 34 So. 824.

82. Wife testified she did not know of husband's insolvency when he made payment to her, held sufficient. Townes v. Alexander [S. C.] 48 S. E. 214.

83. Calkins v. Farmers' & Mechanics' Bank, 99 Mo. App. 509, 73 S. W. 1098.

84. That the bankrupt secreted the money received for the purpose of defrauding his creditors. Schilling v. Curran [Mont.] 75 P. 998.

85. Sexton v. Sebring, 89 N. Y. S. 372.

86. Calkins v. Farmers' & Mechanics' Bank, 99 Mo. App. 509, 73 S. W. 1098.

87. Page v. Roberts, J. & R. Shoe Co. [Mo. App.] 78 S. W. 52.

missible in an action by the trustee against one not a party to the bankruptcy proceedings nor bound thereby.[88]

Insolvency.[89]—The adjudication of bankruptcy,[90] the books of the bankrupt,[91] the inventory,[92] the schedules,[93] and the appraisement,[94] are all admissible to prove insolvency though as to their value as proof there is a conflict. That a debtor made an assignment upon which he was declared a bankrupt is not proof of insolvency prior thereto.[95] Judgments existing against a debtor do not necessarily prove insolvency.[96]

Trial and judgment.[97]—Where a trustee is suing for the value of an alleged preference, an instruction that the verdict, if for the plaintiff, should be for the value of the "property, money or both" given the creditor, is too broad.[98] The trustee obtaining a judgment upon a theory not urged by him is upon reversal entitled to have the trial court pass upon the theories urged by him.[99]

Costs.[1]—It is competent for a state court, in a suit by a trustee, to set aside a fraudulent conveyance to allow the innocent vendee, under such conveyance, expenditures made in preserving the property,[2] but it is otherwise after the vendee has voluntarily surrendered the property to the trustee.[3] Trustees in bankruptcy are liable for the costs of a suit instituted by them to recover assets rejected by them as valueless.[4] Damages and costs are properly included in a judgment awarded against a receiver in bankruptcy, so as to render the sureties on the receiver's recognizance personally liable therefor.[5]

88. Testimony of the referee as to the fact of the debtor's insolvency as determined in the bankruptcy proceedings is inadmissible, in a suit by the trustee, to recover a preference from a creditor who was not a party to the bankruptcy proceedings, and was not bound thereby. Cullinane v. State Bank [Iowa] 98 N. W. 887.

89. See ante, § 3.

90. Hackney v. Hargreaves Bros. [Neb.] 99 N. W. 675. An adjudication of bankruptcy adjudging one insolvent as of the date of the filing of his schedule of liabilities is proof of his insolvency a short time prior thereto. One month. Sexton v. Sebring, 89 N. Y. S. 372. That 17 days after the transfer the debtor was adjudged a bankrupt does not establish his insolvency at the date of transfer. Kimball v. Dresser [Me.] 57 A. 787. The adjudication conclusively establishes the bankrupt's insolvency. Calkins v. Farmers' & Mechanics' Bank, 99 Mo. App. 509, 73 S. W. 1098. The adjudication in a bankruptcy proceeding that the bankrupt was insolvent at the time a judgment was obtained against her, less than four months before the filing of the petition in bankruptcy, held conclusive in an action by the trustee to recover the proceeds of a sale of the bankrupt's property under execution. DeGraff v. Lang, 92 App. Div. 564, 87 N. Y. S. 78. The adjudication in bankruptcy is a judicial finding of the fact of insolvency. In re Jones, 123 F. 128.

91. One not conclusive. In re Docker-Foster Co., 123 F. 190.

92, 93. In re Docker-Foster Co., 123 F. 190. Are admissible as evidence of the same class or character as the books of the bankrupt. Hackney v. Hargreaves Bros. [Neb.] 99 N. W. 675.

The verified schedules of a bankrupt are competent evidence on the question of insolvency, not only at the date of filing but within a reasonable time prior thereto, they are competent evidence in a suit to set aside a preferential transfer of property, of insolvency three weeks prior to filing of petition. In re Mandel, 127 F. 863.

Contra: They are not competent evidence of insolvency two weeks prior to the filing of the petition. Halbert v. Pranke [Minn.] 97 N. W. 976. Three months before such proceedings were instituted. Hackney v. Raymond Bros. Clarke Co. [Neb.] 94 N. W. 822. Schedules filed in bankruptcy proceedings showing an indebtedness of nearly $10,000, while they might justify an inference of insolvency six weeks prior thereto, are not sufficient to require a finding of insolvency. Summerville v. Stockton Mill Co., 142 Cal. 529, 76 P. 243.

94. In re Docker-Foster Co., 123 F. 190.

95. Swartz v. Frank [Mo.] 82 S. W. 60.

96. Summerville v. Stockton Mill Co., 142 Cal. 529, 76 P. 243.

97. See 1 Curr. L. 325.

98. Page v. Roberts, J. & R. Shoe Co. [Mo. App.] 78 S. W. 52.

99. The trustee suing to recover a preference, and obtaining judgment on the theory that the transfer was in fraud of creditors, a theory not urged by the trustee; on reversal the trustee is entitled to have the trial court pass on the question of preference and the appellate court will not order judgment for defendant. Cullinane v. State Bank [Iowa] 98 N. W. 887.

1. See 1 Curr. L. 325.

2. Paid liens on property bought. Arnold v. Eastin's Trustees, 25 Ky. L. R. 895, 76 S. W. 855.

3. Arnold v. Eastin's Trustees, 25 Ky. L. R. 895, 76 S. W. 855.

4. Rejected life insurance policy, wife kept it up, bankrupt died before discharge, held trustees could not recover amount paid on policy and were liable for the costs of the suit. In re Josephson, 121 F. 146.

5. Action of replevin brought by receiver

(§ 10) *F. Claims not reduced to possession by the trustee.*[6]—The trustee may, subject to the control of the bankruptcy court, refuse to take possession of properties that will be burdensome rather than profitable to the estate;[7] he must elect, within a reasonable time, whether or not he will take any particular property of the estate,[8] and if he does not do so it is deemed an election to reject,[9] and the action of the district court, many years after the assignee's discharge, in allowing him to sell the assets does not change this, no reference being made to this claim.[10] When he elects to reject, the title to the asset remains in the bankrupt;[11] thus the latter may recover usurious interest paid a national bank, his trustee in bankruptcy not reducing the claim to possession,[12] and the property being abandoned as valueless to the estate, the trustee is generally precluded from using the same upon its becoming valuable.[13] Trustees turning over property to the bankrupt as valueless, without an order of the court, the court, when that is made to appear, will approve such action nunc pro tunc.[14]

While the legal title to property not scheduled remains in the bankrupt after discharge, yet he holds it in trust for the creditors to be administered by a trustee.[15] Failure by a bankrupt to schedule a claim and notify the trustee of its existence will preclude him from suing thereon.[16]

§ 11. *Protection of trustee's title and possession. A. Restraining interference.*[17]—Courts of bankruptcy have power to enjoin all persons within their respective jurisdictions,[18] although strangers to the proceeding,[19] from doing any act that will interfere with or prevent the due administration of the bankrupt estate, it cannot enjoin proceedings in a state court in an action against the bankrupt for fraud,[20] and the proceedings being in a state court, no rule of comity requires the United States court to compel persons whose rights are seriously jeopardized by the proceedings in the state court to resort thereto for protection.[21]

(§ 11) *B. Actions affecting the trustee's title.*[22]—A state court has jurisdiction of an action of trover brought against a trustee or receiver in bankruptcy to recover the value of the property alleged to have been converted by him as a part of the assets of the estate.[23] No leave is necessary to sue a trustee in bankruptcy.[24] A bankrupt is not an indispensable party to a suit against his trustee by one claim-

in bankruptcy with permission of Federal court. Unmack v. Douglass, 75 Conn. 633, 55 A. 12.

6. See 1 Curr. L. 324.

7, 8. Fleming v. Courtenay [Me.] 57 A. 592.

9. Forbearance to claim an asset while acting as assignee and for 22 years thereafter held to show an intent to reject it. Fleming v. Courtenay [Me.] 57 A. 592.

10. His petition to the court for license to sell set forth that no assets of any value had come into his possession, and that he had an offer of $100 for all assets of whatsoever their nature belonging to the estate. The particular asset in question was an unliquidated claim. Petition was made 22 years after discharge. Fleming v. Courtenay [Me.] 57 A. 592.

11. Fleming v. Courtenay [Me.] 57 A. 592.

12. Lasater v. First Nat. Bank [Tex. Civ. App.] 72 S. W. 1054; Id., 96 Tex. 345, 72 S. W. 1057.

13. Where an ordinary life insurance policy of a bankrupt, having no cash surrender value, is turned over to him as valueless by the trustees without an order of the court, and he, keeping it up, dies before his discharge, the court will not require that the proceeds be turned over to the trustees. The rule is probably otherwise with endowment, tontine, or other investment policies having a determinable value [Act 1898, § 70, cl. 5]. In re Josephson, 121 F. 142; affirmed in Meyers v. Josephson [C. C. A.] 124 F. 734.

14. Turned over life insurance policy having no cash surrender value. In re Josephson, 121 F. 142.

15. Though omitted from the schedules in good faith and by advice of counsel. Rand v. Iowa Cent. R. Co., 89 N. Y. S. 212.

16. Atwood v. Bailey, 184 Mass. 133, 68 N. E. 13; Rand v. Iowa Cent. R. Co., 89 N. Y. S. 212.

17. See 1 Curr. L. 325.

18, 19. In re Hornstein, 122 F. 266. Restraining a claimant from prosecuting a suit for conversion against the trustee. In re Mertens, 131 F. 507.

20. In re Wollock, 120 F. 516.

21. In re Hornstein, 122 F. 266.

22. See 1 Curr. L. 326.

23. In re Spitzer [C. C. A.] 130 F. 879.

24. Motion for leave to sue, petitioner proposing to bring an action to foreclose a mechanic's lien on the property of the bankrupt, denied. In re Smith, 121 F. 1014.

ing an interest in property scheduled by the bankrupt as his own.[25] A lienor having intervened in a bankruptcy proceeding is bound by the questions adjudicated there.[26] The decree of adjudication being regular on the face of the records, it cannot be collaterally attacked.[27] The filing of a suggestion of the bankrupt's death, without any further action, is insufficient to entitle his widow to dower as against the trustee.[28] A reclaiming creditor is entitled to an inspection of the bankrupt's accounts and papers in the hands of the trustee.[29]

§ 12. *Rights of trustee in pending actions by and against bankrupt; jurisdiction of state courts.*[30]—The adjudication in bankruptcy does not abate an action pending against the bankrupt,[31] or take away the right of the state court to decree and enforce a specific lien upon the property.[32] A trustee in bankruptcy may intervene in a suit brought by the bankrupt before the adjudication in bankruptcy,[33] and he may appeal from the order denying his petition of intervention,[34] but he is not bound to intervene,[35] the suit does not abate upon his failure to have himself substituted as plaintiff,[36] nor is the bankrupt's debtor thereby discharged from liability,[37] but the suit may still be prosecuted by the bankrupt,[38] and this is so though no trustee is appointed.[39] In case the bankrupt ultimately recovers in such suit, and any question arises as to the right of the trustee or creditors to the money, or as to defendant's being protected in paying it to the proper party, both may be secured by subsequent steps taken for that purpose.[40] A bankrupt continuing to prosecute or defend a suit after adjudication, he cannot subsequently object to a judgment obtained therein on the ground that the trustee should have been substituted for him.[41] The trustee in bankruptcy voluntarily appearing in a proceeding against the bankrupt, without being made a party, has no standing in court, where he fails to prove either the fact or the date of the bankruptcy,[42] but being made a party he stands in the same position as the defendants with respect to the litigation.[43] A conditional discharge in bankruptcy providing that it should not affect

25. Suit by bankrupt's wife against his trustee in bankruptcy to enforce a resulting trust of real estate scheduled by the bankrupt as a part of his assets. Buckingham v. Estes [C. C. A.] 128 F. 584.

26. Is bound by finding of debtor's insolvency, and cannot claim otherwise in suit by trustee to recover an alleged preference. Des Moines Sav. Bank v. Morgan Jewelry Co. [Iowa] 99 N. W. 121.

27. Roberts v. Fernald [N. H.] 55 A. 942.

28. Suit by trustee in bankruptcy to have a deed by the bankrupt to his wife set aside as fraudulent. Gray v. Chase, 184 Mass. 444, 68 N. E. 676.

29. In re Saur, 122 F. 101.

30. See 1 Curr. L. 326.

31. Suit to foreclose a chattel mortgage given by the bankrupt. Des Moines Sav. Bank v. Morgan Jewelry Co. [Iowa] 99 N. W. 121. In states having statutes providing that no action shall abate by the transfer of any interest therein during its pendency, bankruptcy proceedings by the plaintiff do not operate to abate an action [Code, § 3476]. Wilsey v. Jewett Bros. & Co., 122 Iowa, 315, 98 N. W. 114.

32. May foreclose a chattel mortgage given by the bankrupt. Des Moines Sav. Bank v. Morgan Jewelry Co. [Iowa] 99 N. W. 121.

33. Griffin v. Mut. L. Ins. Co., 119 Ga. 664, 46 S. E. 870. May intervene and contest the validity or existence of the lien sought to be enforced and in case the validity of the lien be denied he may be awarded the property. Des Moines Sav. Bank v. Morgan Jewelry Co. [Iowa] 99 N. W. 121. May intervene in a suit to enforce an equitable lien against the bankrupt's property. Snyder v. Smith [Mass.] 69 N. E. 1089. Sections 11b and 11c simply provide for the taking care of suits already begun prior to the adjudication, and is not a limitation upon the right of a trustee to appear in any suit, but rather provides the manner of procedure with reference to suits already begun, and which may affect the estate of the bankrupt. Friedman v. Verchofsky, 105 Ill. App. 414.

34. Snyder v. Smith [Mass.] 69 N. E. 1089.

35, 36, 37. Griffin v. Mut. L. Ins. Co., 119 Ga. 664, 46 S. E. 870.

38. Griffin v. Mut. L. Ins. Co., 119 Ga. 664, 46 S. E. 870; Wilsey v. Jewett Bros. & Co., 122 Iowa, 315, 98 N. W. 114.

39, 40. Griffin v. Mut. L. Ins. Co., 119 Ga. 664, 46 S. E. 870.

41. Where pending a suit to set aside an alleged fraudulent conveyance of land the judgment debtors were adjudged bankrupts, and they were permitted to set up such fact in such suit by supplemental answer, but failed to urge therein that the action should have been prosecuted in the name of the trustee, such objection cannot be subsequently considered. Hillyer v. Le Roy, 84 App. Div. 129, 82 N. Y. S. 80.

42. Cannot question the validity of an attachment issued against such defendant. A. Lehmann & Co. v. Rivers, 110 La. 1079, 35 So. 296.

43. It is not necessary that the pleadings state a cause of action as against him.

a certain pending suit until final judgment therein, and that as to such judgment the discharge should have the same force that it would have if the judgment had been recovered after the application for the discharge, and before the granting of the same, permits the prosecution of such suit.[44]

§ 13. *Management of the property and reduction to money.*[45]—The courts of bankruptcy have the power to collect, reduce to money, and distribute all property in the possession of the debtor when the proceedings are instituted,[46] and they are not limited to the resultant interest of the bankrupt therein.[47] A bankruptcy court having in its possession a fund touching which there is a dispute may, by virtue of its inherent powers, determine the right to the fund thus in its possession;[48] it may marshal assets in the hands of a trustee,[49] compel the assignee under a void state assignment to render an account,[50] and the court may, in its discretion, turn over the property of a bankrupt to a lienor whose lien is equal to the value thereof.[51] An insurer is entitled to have the property taken care of and proof of loss made.[52] Being an officer of the court, and as such subject to its direction in all matters concerning money or property which may have come into his possession by virtue of his office,[53] the trustee may, under the direction of the court, make the necessary payments to mature a tontine life insurance policy payable to the bankrupt, his assigns or legal representatives, it being clearly for the benefit of the estate to so do.[54] A bankrupt's receiver and trustee taking possession of property in the hands of the bankrupt at the time of filing the petition are not liable in conversion to the seller to the bankrupt by selling the same under order of the court, such seller not electing to rescind for fraud until after the institution of the bankruptcy proceedings.[55] A trustee in bankruptcy is liable upon a reversal of a judgment recovered by him for a fund paid him under such judgment, and that his attorney retained a part thereof for fees and disbursements is no defense,[56] but the court of bankruptcy cannot summarily require him to pay a judgment for costs rendered against him in another jurisdiction, there being no funds of the estate in his hands.[57] A state court has jurisdiction to appoint an auditor to distribute the fund arising on foreclosure of the real estate of a bankrupt.[58]

Latimer v. McKinnon, 85 App. Div. 224, 83 N. Y. S. 315. He can raise no issue the bankrupt could not raise, and is bound by the issues tendered by the latter in his answer. The trustee cannot admit away by his answer any defense the bankrupt had. Id. In New York, the supplemental complaint bringing in as a party defendant's trustee in bankruptcy may demand the "same judgment as the original complaint" there being no answer in the case [Code Civ. Proc. § 1207]. Id.

44. Standard Sewing Mach. Co. v. Alexander [S. C.] 47 S. E. 711.

45. See 1 Curr. L. 326.

46. In re Union Trust Co. [C. C. A.] 122 F. 937.

47. May sell the property free from incumbrances. In re Union Trust Co. [C. C. A.] 122 F. 937.

48. This rule is not peculiar to bankruptcy courts. In re Antigo Screen Door Co. [C. C. A.] 123 F. 249. Receiver obtained peaceable possession of property of the bankrupt, though a warehouseman claimed to be in actual possession thereof and had issued receipts therefor to the bankrupt who had transferred the same, such property was sold by order of the court, the holders of the warehouse receipts agreeing thereto by stipulation, held, court had jurisdiction to determine the ownership of the fund. In re Rodgers [C. C. A.] 125 F. 169.

49. As between a partnership and individual creditors. Burleigh v. Foreman [C. C. A.] 125 F. 217.

50. Where he appears and submits his account and enters upon a hearing without objection, the court does not lose jurisdiction to require him to turn over the property to the trustee because he asserts title to a part of such property in himself. In re Thompson [C. C. A.] 128 F. 575.

51. The entire assets of a bankrupt being mortgaged for more than their value, the bankruptcy court will permit them to be turned over to the mortgagee, without prejudice to the right of the trustee, or the creditors of the bankrupt, to contest the validity of the mortgage by suit or otherwise in any court having jurisdiction. Equitable Loan & Security Co. v. Moss & Co. [C. C. A.] 125 F. 609.

52. Fuller v. N. Y. Fire Ins. Co., 184 Mass. 12, 67 N. E. 879.

53. In re Howard, 130 F. 1004.

54. In re Mertens, 131 F. 972.

55. In re Mertens, 131 F. 507.

56, 57. In re Howard, 130 F. 1004.

58. In this case the attorneys consented,

Sale by trustee.[59]—The sale by a trustee is a judicial one.[60] A court of bankruptcy has jurisdiction to order the sale of the nonexempt property of the bankrupt, free from incumbrances,[61] the lienor should be notified,[62] though he may waive such requirement.[63] In the absence of some special direction in the order of sale of real estate of a bankrupt, the trustee sells only the interest of the bankrupt therein,[64] one claiming an adverse interest to the bankrupt, and who is a stranger to the proceedings, is not affected by the sale,[65] and has no interest in the proceeds,[66] nor has the bankruptcy court, after the property has been sold and conveyed, jurisdiction to adjudicate the rights of such claimant therein,[67] nor are such facts grounds for setting aside the sale.[68] The referee has discretionary power to direct a private sale of the bankrupt's estate,[69] without notice to the creditors,[70] and such action of the referee ought not to be disturbed unless it clearly appears that his discretion was improvidently exercised.[71] An agreement to refrain from bidding at the sale, profits to be divided, is void.[72] A proper sale by a trustee in bankruptcy is a condition precedent to a valid conveyance.[73] Whenever practicable the property must be sold subject to the court's approval,[74] in such cases no title passes until the sale is confirmed,[75] and the purchaser has the burden of proving that it was impracticable to make the sale subject to the court's approval.[76] This approval need not always be formal,[77] acquiescence,[78] or use of the proceeds,[79] may meet the requirements of the statute. Confirmation of a sale by a trustee is equivalent to a prior order.[80] The disapproval of a sale by a referee where no attempt is made to review it is equivalent to disapproval by the court.[81] A court of bankruptcy has the power to set aside, in its discretion a sale of the bankrupt's property,[82] as where more can be obtained therefor,[83] or where parties are prevented from bidding without fault upon their part,[84] and this is so though the order of the referee to sell

held that while this would estop them still it made no difference. Furth v. Stahl, 205 Pa. 439, 55 A. 29.

59. See 1 Curr. L. 327.

60. As to payment of taxes realized by a "judicial sale" of the property. In re Harvey, 122 F. 745.

61. Where a mortgage thereon is of such an amount as to render it doubtful whether the equity of redemption is of any value. The questions between the trustee and mortgagee being such as could not be settled for a long time, and the expense of keeping the property large, a sale of the entire property without prejudice to the conflicting claims of the mortgagee and the trustee to the proceeds is justifiable. In re Union Trust Co. [C. C. A.] 122 F. 937.

Even though a mortgage has been given on such assets to secure its bonds. In re Shoe & Leather Reporter [C. C. A.] 129 F. 588. Where by a prompt sale, accruing interest and taxes would be saved, and the sale could be made by the trustee for less expense than by the sheriff, and the estate could be settled more promptly, and the wife of the bankrupt had deeded to the trustee her dower interest in the land, held such sale properly ordered. In re Keet, 128 F. 651; In re Prince, 131 F. 546. See 1 Curr. L. 327, n. 84.

62. Lienor resided in another state. In re Wilka, 131 F. 1004.

63. By making no objection to the sale on the hearing of the petition for confirmation. Keyser v. Wessel [C. C. A.] 128 F. 281.

64, 65, 66, 67, 68. In re Muhlhauser [C. C. A.] 121 F. 669.

69, 70, 71. In re Hawkins, 125 F. 633.

72. Agreement was entered into after some bids had been made and sale was still open. Fisher v. Hampton Transp. Co. [Mich.] 98 N. W. 1012.

73. Proper sale of equity of redemption is necessary before suit to redeem can be maintained. Davis v. Ives, 75 Conn. 611, 54 A. 922.

74. Even though it brings more than 75 per cent of the appraised value. In re Shea [C. C. A.] 126 F. 153. The express prohibition in § 70 against selling for less than 75 per cent without such approval does not by implication qualify the preceding words so that on a sale for more than that approval need not be sought. Davis v. Ives, 75 Conn. 611, 54 A. 922.

75. In re Shea [C. C. A.] 126 F. 153.

76. Davis v. Ives, 75 Conn. 611, 54 A. 922.

77, 78, 79. In re Shea [C. C. A.] 126 F. 153.

80. In re Harvey, 122 F. 745.

81. Davis v. Ives, 75 Conn. 611, 54 A. 922.

82. In re Shea [C. C. A.] 126 F. 153.

83. Where would-be bidders were prevented, without fault on their part, from bidding at the sale, the court may set the sale aside upon their agreeing to bid three times the amount realized, though the sale was for the full appraised value, and in such a case it is not necessary that the court find that the property was worth more than the sum realized. In re Shea [C. C. A.] 126 F. 153. Will not be set aside at the instance of one who has no other interest than the desire to become the purchaser at a resale and who offers to make a higher bid. In re Belden, 120 F. 524.

84. Seasonably advised officer of their in-

did not require the sale to be made subject to the approval of the court,[85] and such action of the court is not reviewable unless there is a clear abuse of power.[86] A decree of the bankruptcy court cannot be attacked in a collateral proceeding.[87]

§ 14. *Claims against the estate and proof and allowance. A. Claims provable.*[88]—Claims may be provable, but not allowable.[89] A debt in order to be provable must be a fixed liability, absolutely owing at the time of the filing of the petition against the bankrupt.[90] Contingent liabilities are not provable.[91] An annuity dependent upon life may be proven in bankruptcy,[92] but not where dependent upon a contingency which may or may not happen.[93] Attorneys' fees provided for in a bankrupt's note which is placed in the hands of an attorney for collection before the filing of the petition against the bankrupt are provable claims,[94] as is a stockholder's liability after being established by a decree.[95] Claims arising in tort, but which may also be treated as arising upon an implied contract,[96] those arising from transactions in which the bankrupt is the undisclosed principal,[97] and rent due upon a lease, are provable claims.[98] In states allowing a wife to contract with her husband for compensation for her services rendered in her husband's business outside the family relation, the wife of a bankrupt may prove a claim for services rendered under such a contract against his estate in bankruptcy.[99] Notes signed by a bankrupt firm which include claims on which one of the partners is not primarily liable are prima facie debts, provable against the firm's estate.[1] Damages for breach of a contract, the breach occurring at or before the filing of the petition in bankruptcy, may be proven,[2] but no damage being sustained, stipulated

tention, but he failed to notify them of time of sale. In re Shea [C. C. A.] 126 F. 153. Upon their giving security to make a substantially higher bid for the property at a resale. In re Shea, 122 F. 742.

85. In re Shea, 122 F. 742.

86. In re Shea [C. C. A.] 126 F. 153.

87. Courts will not partition land contrary to the bankruptcy court's decree. Trumbo v. Fulk [Va.] 48 S. E. 525.

88. See 1 Curr. L. 327.

89. In re Hornstein, 122 F. 266. That a debt may be defeated by the plea of limitations does not render it nonprovable. Hargadine-McKittrick Dry Goods Co. v. Hudson [C. C. A.] 122 F. 232.

90. In re Keeton, Stell & Co., 126 F. 426, 429.

NOTE. Fixed liabilities—Judgments other than for alimony: There are very few decisions on this point, there being a direct conflict between them. In re Alderson, 98 F. 588, held that a judgment imposing a fine for unlawful retailing was a provable debt, while in In re Moore, 111 F. 145, the court expressly refused to follow the preceding case. See, also, In re Baker, 96 F. 954; In re Hubbard, 98 F. 710, and In re Lipman, 94 F. 353.—From note to Cobb v. Overman [U. S.] 54 L. R. A. 369. See 1 Curr. L. 327, n. 97.

91. Contingent liability on bond. Leader v. Mattingly [Ala.] 37 So. 270.

92. Dunbar v. Dunbar, 190 U. S. 340, 23 S. Ct. 757, 47 Law. Ed. 1085.

93. Annuity to divorced wife "during her life or until she remarries," held nonprovable. Dunbar v. Dunbar, 190 U. S. 340, 23 S. Ct. 767, 47 Law. Ed. 1085.

94. Merchants' Bank v. Thomas [C. C. A.] 121 F. 306. Note not placed in the hands of a lawyer for collection until after the filing of the petition, though due at the time of such filing, held, attorney's fees not provable. In re Keeton, Stell & Co., 126 F. 426, 429.

95. Where, by suit, the indebtedness of an insolvent corporation was fixed at about 2-3 of its stock and a judgment was rendered against it for that sum and against the stockholders severally for an amount equal to the par value of the stock held by each, held that, as against a nonresident stockholder not a party to nor appearing in the suit, the decree being rendered prior to his being adjudged a bankrupt, made the claim against him on account of such stockholder's liability a provable debt. Dight v. Chapman [Or.] 75 P. 585.

96. In re Filer, 125 F. 261.

97. Bankrupt who was in the employ of a firm of brokers caused them to purchase stock on fictitious orders purporting to have been given by customers, such purchases being in fact intended for his own benefit. In re Filer, 125 Fed. 261.

98. In re Hinckel Brewing Co., 123 F. 942.

NOTE. Leases, rent: Excepting Pennsylvania, the courts all hold that rent which has not accrued at the time of the adjudication is not provable. In re Arnstein, 101 F. 706; In re Mahler, 105 F. 428; Atkins v. Wilcox [C. C. A.] 105 F. 596, 53 L. R. A. 118. But see In re Gerson, 2 Am. Bankr. R. 170, 8 Pa. Dist. R. 277; In re Goldstein, 2 Am. Bankr. R. 603.—From note to Cobb v. Overman [U. S.] 54 L. R. A. 369.

99. Pennsylvania P. L. 1893, 344. In re Domenig, 128 F. 146.

1. Merchants' Bank v. Thomas [C. C. A.] 121 F. 306.

2. In re Adams, 130 F. 381; In re Frederick L. Grant Shoe Co. [C. C. A.] 130 F. 881. See 1 Curr. L. 327, n. 98.

damages cannot be proven,[3] nor damages contingent upon a lessor's re-entry, or re-letting premises leased by the bankrupt.[4] The liability of a surety is not provable until the principal's liability is fixed,[5] nor is the contingent liability of a bankrupt to his surety provable.[6] An annual license fee imposed by a state on corporations is not provable against the estate of a bankrupt corporation before the fee for the year is assessed or collectible,[7] nor is the unliquidated liability of the bankrupt on a deficiency judgment provable.[8] A creditor whose claim is secured or partly paid by an accommodation indorser may prove his claim to the full amount, and exclude from the bankrupt estate the avails of such security or part payment.[9] In states where the separate property of a married woman is liable in equity for obligations incurred in business in which she is engaged on her own account, such obligations are provable against her estate in bankruptcy.[10] A partner's individual debt cannot become an obligation of the firm unless the creditor assents thereto, so as to preclude the latter from proving it against the individual's bankrupt estate.[11] It may be shown that a note signed and sealed by the individual members of a bankrupt partnership was given for money lent to the firm and used in the firm business, and, as such, provable against the partnership estate in bankruptcy;[12] also parol evidence is admissible to show that partner's joint notes are in fact firm debts.[13] A claimant for goods fraudulently obtained by a bankrupt cannot file a claim for goods sold and delivered under the contract and at the same time file a claim for a return of the goods sold remaining in the bankrupt's possession at the time of the filing of the petition.[14] A surety for a bankrupt who has discharged the debt either before or after the bankruptcy of his principal is subrogated to the rights of the creditor.[15] A loan made by a wife to her husband from her separate estate is provable as a debt against his bankrupt estate, without regard to its enforceability under the law of the state, the contract being valid in equity.[16] Unliquidated claims arising upon a contractual obligation or promise of the bankrupt may be liquidated and then proven;[17] this does not include statutory liabilities,[18] and refers only to claims whose

3. Northwest Fixture Co. v. Kilbourne & Clark Co. [C. C. A.] 128 F. 256.

4. A lessor is not entitled to prove a claim for damages against the lessee's bankrupt estate for breach of a covenant in the lease, that in case of the latter's bankruptcy the lessor might re-enter and the lessee would be liable for damages sustained by the lessor on account of the premises being unleased or being let for the remainder of the term for less rent. In re Shaffer, 124 F. 111.

5. Bankrupt as surety. In re Wiseman, 123 F. 185. An orphan's court in Pennsylvania entering a decree nisi and later confirming it absolute, adjudicating the account of an administrator and ordering a distribution, which latter part was later suspended and the administrator ordered to hold the balance, fixes the liability of the administrator and his sureties so that a subsequent administrator may prove the same against a surety's bankrupt estate. Hibberd v. Bailey [C. C. A.] 129 F. 575.

6. Under Act 1898, § 57i, it is the creditor's claim only that is provable. Insley v. Garside [C. C. A.] 121 F. 699.

7. Is not a contractual obligation attaching by implication from the inception of the company, and hence is not provable under Act 1898, § 64, cl. 4, including debts founded on contracts express or implied. In re Danville Rolling Mill Co., 121 F. 432.

8. In re Kahn, 121 F. 412.

9. In re Noyes Bros. [C. C. A.] 127 F. 286.

10. Florida. MacDonald v. Tefft-Weller Co. [C. C. A.] 128 F. 381.

11. The debt was entered on the books of the firm as a firm debt and payments made thereon by firm checks. In re Wiseman, 123 F. 187. See 1 Curr. L. 328, n. 13-16.

12. Davis v. Turner [C. C. A.] 120 F. 605. See 1 Curr. L. 328, n. 13-16.

13. In re L. B. Weisenberg & Co., 131 F. 517. Evidence that though the notes were signed by all the partners, the money was divided among them individually, held sufficient to show the debt not a firm debt, also that the testimony of the cashier of the bank making the loan was not admissible on the question. Id.

14. Bankrupt made false representations as to solvency. The seller by filing for goods sold and delivered under the contract and not for the possession of the goods obtained by fraud or for their value as damages, where possession could not be obtained, elected to affirm the contract and thereafter could not split his demand. In re Hildebrant, 120 F. 992.

15. Livingstone v. Heineman [C. C. A.] 120 F. 786.

16. James v. Gray [C. C. A.] 131 F. 401. But this is not true where the property transferred was received from the husband as a gift. In re Tucker, 131 F. 647.

17. Old Colony Boot & Shoe Co. v. Parker-

amount is uncertain.[19] A creditor having a provable debt, though the amount is unliquidated, having filed a petition against his debtor, and a jury trial being demanded thereon, the petitioner's claim may be determined and liquidated upon the same trial.[20] Claims for an indebtedness arising between the filing of an involuntary petition and adjudication cannot be proven.[21]

(§ 14) *B. Proof of claims.*[22]—The proof of claims is not an "action" or "suit" against the bankrupt.[23] No proof of debt can be made after the expiration of one year after the adjudication, except in those cases where the period is extended by the act to not exceeding one year and six months[24] and this is true, though the debt is unscheduled, the creditor having no notice of the bankruptcy proceedings, and the estate being still undistributed,[25] nor is this time extended by the fact that a composition is effected.[26] This provision is a statute of limitations,[27] and hence is not binding upon the United States.[28] The claim of an assignee under an assignment for the benefit of creditors for his expenditures need not be proved within one year after adjudication in order to be allowed.[29] Taxes accruing after adjudication need not be proved like ordinary debts.[30] Holders of notes of a bankrupt partnership, also indorsed by the individual partners, may at their election prove the same as individual debts of one of the partners.[31] Taking a new promise after proof of debt does not preclude the creditor from maintaining his proof, while at the same time proceeding against the bankrupt personally on the new promise, so long as he receives but one satisfaction for the debt,[32] nor is the seller of goods estopped to bring an action for fraud by proving the notes given for the purchase price.[33] The separate proof of an unsecured claim does not debar a creditor from subsequently proving a balance due on a secured claim after the security has been exhausted.[34] Choses in action which have been assigned before a petition is filed should be proved by the assignee as the real party in interest.[35] A creditor may in good faith sell and dispose of an account or other obligation held against a bankrupt debtor, regardless of the question of insolvency or notice thereof.[36]

A claim may be proven by filing a petition in the bankruptcy proceedings.[37]

Sampson-Adams Co., 183 Mass. 557, 67 N. E. 870.

18. Liability of a director of a corporation. Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co., 183 Mass. 557, 67 N. E. 870.

19. The claim of a surety for a bankrupt is not "liquidated by litigation" where the litigation is between the principal creditor and the surety to determine the latter's liability, the amount not being in controversy. In re E. O. Thompson's Sons, 123 F. 174. A claim against the estate of a bankrupt for sums obtained from his employers by forging indorsements on checks and cashing same, by taking cash from the drawer, and by inducing them to purchase stocks on false and fictitious orders, is not unliquidated where the amounts taken from and paid out by the claimants are certain. In re Filer, 125 F. 261.

20. In re Frederic L. Grant Shoe Co., 125 F. 576.

21. Claims for labor and materials furnished between such dates in pursuance of a contract entered into before filing the petition, but being executory at that date, held could not be proved. In re Adams, 130 F. 381.

22. See 1 Curr. L. 328.

23. In states where a wife cannot sue her husband except for divorce or to recover her separate property after his desertion, she may nevertheless prove a claim against his bankrupt estate [Pennsylvania statute of 1893 (P. L. 345, § 3)]. In re Domenig, 128 F. 146. Statutes forbidding a husband and wife from testifying against each other do not render the testimony of a wife incompetent in support of a claim filed by her against her husband's bankrupt estate. Id.

24. In re Paine, 127 F. 246.

25. His remedy is an action at law to recover upon the debt. Santa Rosa Bank v. White, 139 Cal. 703, 73 P. 577; In re Muskoka Lumber Co., 127 F. 886.

26. In re Brown, 123 F. 336.

27, 28. In re Stoever, 127 F. 394.

29. It is a controversy arising out of the settlement of the estate of the bankrupt. In re Levitt, 126 F. 889.

30. In re Prince, 131 F. 546.

31. Buckingham v. First Nat. Bank [C. C. A.] 131 F. 192.

32. Dowse v. Hammond [C. C. A.] 130 F. 103.

33. Standard Sew. Mach. Co. v. Alexander [S. C.] 47 S. E. 711.

34. In re Ball, 123 F. 164.

35. Leighton v. Kennedy [C. C. A.] 129 F. 737.

36. Hackney v. Hargreaves Bros. [Neb.] 99 N. W. 675.

37. Petition filed by bankrupt's wife

In the proof of a claim, absence of a date is a fatal defect,[38] but failure to have the title of the court at the head thereof is not fatal.[39] Items of the account constituting the consideration should be specified,[40] and sworn to in the proof,[41] and if the creditor's claim is based on notes, they should be produced and filed.[42] A notary public may administer the oath to a proof of claim,[43] and the signature and seal of the notary are prima facie sufficient authentication, whether he be a notary of the state where the bankruptcy proceedings are pending or not.[44] The proof of claims may be amended subsequent to one year after the adjudication,[45] and such amendments may be substituted, with the trustee's consent, for the defective original proof, although an appeal has been taken by the trustee from a decree of the bankruptcy court permitting the owners of the claim to prove as creditors.[46] One cannot by the amendment of prior proofs introduce proof of an entirely new claim upon a separate contract,[47] nor will a claim unconditionally withdrawn prior to the expiration of the year serve as a basis for filing a claim as an amendment thereof.[48] The petition of the trustee for an order for a re-examination of a claim need only allege facts which if true are a sufficient cause for the re-examination of the claim.[49] A referee may, in an order for the examination of a nonresident creditor, permit him to appear before the referee in the district in which he resides.[50]

(§ 14) *C. Contest of claims.*[51]—One having submitted himself and his claim to property in the possession of the bankrupt to the jurisdiction of the bankruptcy court, he is bound to prosecute his claim in such court.[52] Disputes as to the validity of certain claims arising at the first meeting of creditors, the right to continue the hearing of such contests is within the discretion of the referee.[53] The bankrupt may object to the allowance in composition of claims offered for proof more than one year after the adjudication,[54] but he cannot prevent the allowance of a claim

against the bankrupt and his trustee to enforce a resulting trust claimed by the petitioner in property which the trustee was about to sell. Buckingham v. Estes [C. C. A.] 128 F. 584.

38. Will prevent such creditors from participation in the creditors' meeting. In re Blue Ridge Packing Co., 125 F. 619.

39. So as to prevent the creditor's participation in the creditors' meeting. In re Blue Ridge Packing Co., 125 F. 619.

40. Statement that claim is for "printing done for said bankrupt at his request heretofore, to wit, in September, 1903, as per bill rendered," is insufficient. In re Blue Ridge Packing Co., 125 F. 619. That claim is for "goods, wares and merchandise sold and delivered by claimant to bankrupt at its request, consisting of green truck and vegetables, amounting to said sum of $140, with interest from * * *, being the balance now due on said claim on book account," is insufficient. Id. That claim is for "2,500 jar tops at $2.00 per 1,000=$50," [so in opinion] "1-3 blue, 1-3 white, 1-3 red," is sufficient. Id. Statement that claim is for "goods and merchandise sold," as evidenced by two notes, is insufficient. If the creditor intended to stand on the account he should have given the items; if on the notes, they should be produced and filed. Id.

41. Construing § 57. In re Brett, 130 F. 981.

42. In re Blue Ridge Packing Co., 125 F. 619.

43. In re Pancoast, 129 F. 643.

44. Claim sworn to in New Jersey and presented in Pennsylvania. In re Pancoast, 129 F. 643.

45. Hutchinson v. Otis, Wilcox & Co., 190 U. S. 552, 23 S. Ct. 778, 47 Law. Ed. 1179; Buckingham v. Estes [C. C. A.] 128 F. 584. Proof of claim was unverified. In re Roeber [C. C. A.] 127 F. 122. See 1 Curr. L. 329, n. 18.

46. Hutchinson v. Otis, Wilcox & Co., 190 U. S. 552, 23 S. Ct. 778, 47 Law. Ed. 1179.

47. A creditor who proved a claim based upon a promissory note against the bankrupt estate of a partnership cannot after the expiration of the year from adjudication add a claim against the estate of one of the partners based upon his indorsement on the note. In re McCallum & McCallum, 127 F. 768. See 1 Curr. L. 329, n. 19.

48. In re E. O. Thompson's Sons, 123 F. 174.

49. Need not aver facts which if proved would defeat the claim. In re George Watkinson & Co., 130 F. 218.

50. Reconsideration of a claim. In re George Watkinson & Co., 130 F. 218. Conflicting evidence as to whether goods were purchased and paid for examined and held to establish the debt of an alleged bankrupt to the petitioning creditor as claimed. In re Ferguson, 127 F. 407.

51. See 1 Curr. L. 329.

52. In re Mertens, 131 F. 507.

53. In re Cohen, 131 F. 391.

54. Some creditors did not claim their share of composition, preferred creditor tried to prove his claim in the surplus thus created. Claim was unavoidably and in good faith omitted from the bankrupt's schedule. In re Lane, 126 F. 772.

offered for proof after the expiration of such time where the delay was caused by his own fraud.[55] Any creditor of a bankrupt may interpose the defense of limitations to a claim presented for allowance against the estate.[56] In Iowa, creditors of a bankrupt cannot set up the defense of usury against another creditor's claim.[57] The creditor of a bankrupt cannot institute, without the concurrence of the trustee, a proceeding to re-examine the allowed claims of other creditors,[58] and if the trustee should without sufficient reason refuse to examine such claims, the court by its order can compel him to do so or remove him for disobedience.[59] No formal writing is required to assign a claim proved and allowed.[60] Under the act of 1867, the assignee purchasing a claim in good faith, it would be given effect.[61] Failure to file an answer to a petition seeking to expunge a claim justifies a decree pro confesso, carrying with it the ordinary incidents and consequences of such a decree.[62] The trustee may be precluded by reason of laches from having an allowance reviewed.[63] The disallowance of a claim by a court of bankruptcy constitutes a bar to a subsequent suit against the bankrupt on the same cause of action in another jurisdiction.[64]

(§ 14) *D. Surrender of preferences and effect thereof.*[65]—A creditor must surrender all preferences received[66] within the four months prior to the filing of the petition,[67] in order to prove his claim, and this disability inheres in the claim and operates against the holder into whose hands it may come, whether by assignment or subrogation,[68] but a bona fide holder of negotiable paper of the bankrupt is permitted to prove the same free from the taint of preferences received by the payee.[69] As to whether or not the creditor must have reasonable cause to believe that a preference was thereby intended in order to compel its surrender there is a conflict.[70] Preferred creditors are entitled to have proof of their claims allowed where the agreement to surrender their preferences is reached within one year after the adjudication, though the actual surrender of the property to the trustee does not occur until a short time thereafter.[71] A secured creditor, whose

55. Fraud in misstating facts in his schedule so as to make it appear that there was no estate for distribution. No objection being made by any other creditor of the trustee, it being conceded that the creditors who had proved their claims were to be paid in full before the petitioner received anything. In re Towne, 122 F. 313.

56. In re John J. Lafferty & Bro., 122 F. 558.

57. In re Worth, 130 F. 927.

58, 59. In re Lewensohn [C. C. A.] 121 F. 538.

60. Indorsement on notes held sufficient. Case was decided under Act 1867. Court stating rules to be the same under Act 1898. In re Sweetser, 131 F. 567.

61. In re Sweetser, 131 F. 567.

62. In re Docker-Foster Co., 123 F. 190.

63. Claim of lessor for rent of premises occupied by receiver down to date of adjudication was filed against the estate and allowed without objection, and so stood until after the discharge of the receiver; held could not be reviewed. In re Hinckel Brewing Co., 123 F. 942.

64. If the judgment was erroneous, the remedy was by appeal. Hargadine-McKittrick Dry Goods Co. v. Hudson [C. C. A.] 122 F. 232.

65. See 1 Curr. L. 329.

66. Creditor received preferences on separate and distinct debts, held, could not prove other claims until such preferences were surrendered. Act 1898, § 57g, deals with the creditors not with their claims. Dunn v. Gans [C. C. A.] 129 F. 750; Livingstone v. Heineman [C. C. A.] 120 F. 786; In re Flynn & Co., 126 F. 422; In re Busby, 124 F. 469.

67. Prior to the amendment of 1903, it was immaterial when the preference was given, provided the debtor was insolvent. In re Busby, 124 F. 469. A payment received more than four months before filing the petition need not be surrendered. In re Girard Glazed Kid Co., 129 F. 841.

68. Surety of bankrupt succeeding to rights of creditor whom he has paid. Livingstone v. Heineman [C. C. A.] 120 F. 786.

69. Bank discounting note, by crediting the payee with the amount of the discount, in the usual course of business and without knowledge of the insolvency of the maker is such a bona fide holder. In re Levi, 121 F. 198.

70. That he must. In re Goodhile, 130 F. 471.

That he need not. Harris v. Second Nat. Bank, 110 Tenn. 239, 75 S. W. 1053.

71. Creditors of a bankrupt who had collected their claims in suits begun within four months of the filing of the petition are entitled to have the proof of their claims allowed, upon paying the amount collected, to the trustee, though payment for the convenience of counsel, was delayed for a day or two beyond one year after the adjudica-

security is insufficient, disclosing his security in proving his claim before the referee may retain his security and share in the dividends as to the overplus,[72] but one holding a mortgage upon exempt property is not entitled to receive a dividend on his entire claim and resort to the security only to satisfy an unpaid balance.[73] A sale creating a new and separate debt may be proved by the debtor without surrendering a preferential payment of a previous debt.[74] A preferential payment affects the entire indebtedness due the creditor at the time of payment, though parts of the indebtedness accrued at different periods, and hence must be surrendered to entitle the creditor to prove his account.[75] A creditor holding two notes given by the bankrupt at the same time cannot prove and be allowed his claim upon one upon which no preference was received, without surrendering a preference received upon the other.[76] A note being given partly for a valid consideration and partly as a preference the amount of the preference should be deducted before the note is allowed.[77]

Mutual debts and credits accruing more than four months before filing the petition in bankruptcy may be set off against each other;[78] credits to the insolvent accruing subsequent to that time, which constitute voidable preferences, cannot be set off against debts which accrue prior to that date,[79] but mutual debts and credits accruing within four months prior to the filing of the petition, and which do not constitute voidable preferences, may be set off against each other,[80] as well as against the respective debts and credits accruing more than four months before the petition is filed,[81] but the debts or credits must be provable claims,[82] and it must be shown that the estate was benefited in some way by the payment.[83] A debt upon which a preferential payment is made cannot be set off against such payment.[84] The allowance of set off of new credits against a preference applies only to preferences recoverable by the trustee.[85] A bank may set off money deposited by an insolvent upon an open account subject to check,[86] but a bank having notice that a deposit is specific, it cannot set it off against the bankrupt depositor's account.[87] A bank, not having received a preference, is entitled to apply the amount of the

tion. Hutchinson v. Otis, 190 U. S. 552, 23 S. Ct. 778, 47 Law. Ed. 1179.

72. Kohout v. Chaloupka [Neb.] 96 N. W. 173.

73. In re Lantzenheimer, 124 F. 716.

74. A creditor receiving payment in full from his debtor within four months prior to the latter's bankruptcy and without knowledge of his insolvency, and afterwards selling him other goods, which are not paid for at the time of bankruptcy may prove the latter debt without surrender of the money received in payment of the previous debt. In re Wolf, 122 F. 127. See 1 Curr. L. 329, n. 37-40.

75. In re Lyon [C. C. A.] 121 F. 723. See 1 Curr. L. 329, n. 37-40.

76. Note first maturing was paid within four months prior to bankruptcy and during insolvency. In re E. O. Thompson's Sons, 121 F. 607. See 1 Curr. L. 329, n. 38.

77. Batchelder & Lincoln Co. v. Whitmore [C. C. A.] 122 F. 355.

78. Western Tie & Timber Co. v. Brown [C. C. A.] 129 F. 728. See 1 Curr. L. 330, n. 44.

79, 80, 81. Western Tie & Timber Co. v. Brown [C. C. A.] 129 F. 728.

82. Harris v. Second Nat. Bank, 110 Tenn. 239, 75 S. W. 1053.

NOTE. Set-offs: One of the requirements of a set-off is that it must be provable against the bankrupt estate. Act 1898, § 68b, and this requirement refers to the nature of the claim at the moment when it is sought to be set off, and not to its nature at the beginning of the bankruptcy proceedings. Morgan v. Wordell, 178 Mass. 350, 59 N. E. 1037, 55 L. R. A. 33. To allow a set-off in bankruptcy the debts must be mutual and be in the same right. Sawyer v. Hoag, 17 Wall. [U. S.] 610, 21 Law. Ed. 731.—From note to Morgan v. Wordell, 55 L. R. A. 33.

83. Tredway v. Kaufman, 21 Pa. Super. Ct. 256.

84. Harris v. Second Nat. Bank, 110 Tenn. 239, 75 S. W. 1053.

85. In re Jones, 123 F. 128.

86. New York County Nat. Bank v. Massey, 192 U. S. 138, 24 S. Ct. 199. See Banking and Finance, 1 Curr. L. 289.

87. Where a company was insolvent and had ceased to be a going concern and all its efforts and those of its creditors being to obtain an equal distribution of its assets, pending the result of these efforts it deposited a fund in a creditor bank with the intention that it should be held for its trustee in bankruptcy when appointed, though no notice of this was given the bank, held from all the circumstances it had notice of the character of the deposit. Lynam v. Belfast Nat. Bank [Me.] 57 A. 799.

general account of a depositor on a note of the latter held by the bank.[88] An order of the referee permitting the defendant to retain certain alleged preferences, and allowing the creditor's claim for the balance is an adjudication that the items so permitted to be retained by the creditor are proper set-offs.[89] A trustee may appeal from an order denying his motion to expunge a claim allowed, unless further preferences were surrendered and directing a return of a preference previously surrendered by the creditor.[90]

(§ 14) *E. Priorities.*[91]—Claims of the United States are entitled to priority whether proved in the bankruptcy proceeding or not.[92] Taxes legally due and owing by the bankrupt to the United States, the state, county, district, or municipality are given priority over the payment of dividends to creditors,[93] where the bankrupt is personally liable for the taxes.[94] The liability of the bankrupt for taxes being merely contractual, a claim therefor is not entitled to priority of payment as taxes legally owing by the bankrupt.[95] A trustee should not pay taxes which are secured where such payment would operate to the advantage of one third party against another.[96] One paying taxes legally due from a bankrupt is not thereby subrogated to the rights of the taxing power so as to be entitled to priority of payment.[97] The highest court of a state having declared that an annual charge imposed upon corporations is not a tax, the state is estopped to claim in the bankruptcy court that nevertheless it is included within the term "tax" as used in the bankruptcy act.[98] Costs of administering the estate rank third in the list of priorities.[99] Wages due workmen, clerks, or servants, which have been earned within three months before the date of the commencement of bankruptcy proceedings, not to exceed three hundred dollars to each claimant, are by the terms of the act given priority.[1] This includes wages owing at the date of bankruptcy, even though, by

88. In re Scherzer, 130 F. 631.

89. Clendening v. Red River Val. Nat. Bank [N. D.] 94 N. W. 901.

90. Livingstone v. Heineman [C. C. A.] 120 F. 786.

91. See 1 Curr. L. 330.

92. In re Stoever, 127 F. 394.

93. A city's claim against a bankrupt for taxes assessed against him, and legally due and owing, is entitled to priority of payment by the trustee, though the property on which the taxes were levied never came into the hands of the trustee. City of Waco v. Bryan [C. C. A.] 127 F. 79. Taxes as a class are given priority over everything. In re Prince, 131 F. 546.

94. There being a personal liability for assessments levied for local improvements they are entitled to preferred payment. In re Stalker, 123 F. 961. Value of property exceeded the amount of the taxes but was of less value than the mortgage debt and the taxes, property was sold under foreclosure decree subject to such taxes, held not entitled to priority of payment. Id. A tax being a charge upon the property alone it is not enforceable as a preferential claim against the bankrupt estate. In re Broom, 123 F. 639. Real property of a bankrupt being sold, delinquent municipal taxes must be paid from the fund realized from the sale, before any dividends are allowed in favor of the general creditors. In re Harvey, 122 F. 745. A city having a lien for an unpaid municipal tax on property of a bank is not, with reference to such taxes, a secured creditor within the meaning of the bankruptcy law. Id.

95. Claim for taxes assessed by a municipality against property of which the bankrupt was the lessee and which by his lease he contracted to pay. In re Broom, 123 F. 639.

96. In re Brinker, 128 F. 634.

97. Firm property was sold, about 10 years before the bankruptcy proceedings, taxes thereon were unpaid, of which fact the grantee had no knowledge and upon being forced to pay them obtained a judgment over against the firm and members thereof one of whom is the bankrupt. The grantee now claims to be subrogated to the rights of the city and hence entitled to priority of payment. Held a general creditor of bankrupt and not entitled to priority. Cooper Grocery Co. v. Bryan [C. C. A.] 127 F. 815. The purchaser at a foreclosure sale, having full knowledge of tax liens, is not entitled to demand relief by payment of the taxes, ostensibly to the municipality, but which in reality inures solely to his benefit, and when it may fairly be assumed that he bid in the incumbered property subject to existing liens for unpaid taxes and assessments. In re Brinker, 128 F. 634.

98. In re Danville Rolling Mill Co., 121 F. 432.

99. Cost of running hotel, maintaining good will, etc. In re Prince, 131 F. 546.

1. Act 1898, § 64b (4). In re B. H. Gladding Co., 120 F. 709; In re Harmon, 128 F. 170. Priority allowed wages is governed exclusively by § 64, cl. 4, of the Act of 1898, § 64, cl. 5, does not apply to wages. In re Slomka [C. C. A.] 122 F. 630. Laws N. Y. 1897, p. 772, c. 624, § 29, allowing wages,

contract between the wage earner and bankrupt, payment is to be deferred to a date later than the date of bankruptcy.[2] This clause merely limits the priority to wages owing and which have accrued within the three months' period,[3] and hence includes vacation pay.[4] "Piece-workers" are entitled to this priority.[5] In order to give a claim for wages priority it must be due the wage earner,[6] if such wage earner assign his claim after proving it, the assignee will be subrogated to this priority,[7] but not if the claim is assigned before proof.[8] One cannot schedule his claim as an unsecured debt and then claim it as a priority.[9] One having a valid lien on land of the bankrupt need not prove his claim in order to preserve the lien,[10] and a creditor mistakenly waiving his lien is entitled to have such lien allowed, where no one has changed his position on the faith of such waiver.[11] Property being sold free from liens, money realized therefrom, undiminished by anything except the costs of the sale, goes to satisfy valid liens on such property according to their priority.[12] The proceeds of a sale of the bankrupt's property covered by an unrecorded mortgage being insufficient to pay the claims of creditors, who became such after the execution of the mortgage, the fund should be distributed exclusively among such subsequent creditors.[13] A materialman's inchoate interest or lien is superior to, and not cut off by, voluntary bankruptcy proceedings occurring after the materials were furnished, but before notice of the lien is filed.[14] A partnership being declared a bankrupt the net proceeds of the partnership property are appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts,[15] but joint debts of the partners cannot be proved against the partnership estate so as to share on an equality with firm creditors.[16] Where there are no partnership assets, and no solvent partner, firm creditors share pari passu with the individual creditors in the separate estate of a bankrupt partner,[17] and the creditors have the right, after applying the firm assets to the payment of their debts, to look to the

earned within one year, priority, applies only where the assets are distributed under a general assignment. Id. Rev. St. Ohio 1890, §§ 3206a and 6355, are not inconsistent, the latter section dealing only with the funds in the hands of an assignee or trustee, and applies only to such laborers as are operatives. In re City Trust Co. [C. C. A.] 121 F. 706. Under Rev. St. Ohio, § 6355, the claims of operatives of a bankrupt are not entitled to priority in the distribution of its estate as against a mortgage executed in good faith to secure bonds issued for money loaned, and a bona fide assignment of the bankrupt's equity in the bonds, executed more than six months before bankruptcy to secure a valid debt. Id.

2. Vacation payments withheld until the following January. In re B. H. Gladding Co., 120 F. 709.

3, 4. In re B. H. Gladding Co., 120 F. 709.

5. In re Gurewitz [C. C. A.] 121 F. 982.

6. One advancing money to an insolvent for the payment of pay rolls of the latter is not entitled to a priority. In re N. C. Car Co., 127 F. 178.

7. In re N. C. Car Co., 127 F. 178. A large number of laborers assigned their claims to two of their number in order to save costs in prosecuting suits against the bankrupt to recover such wages, the assignees agreeing to account to their assignors for the amount due each when collected. In re Harmon, 128 F. 170.

8. In re North Carolina Car Co., 127 F. 178.

9. Attorney representing bankrupt scheduled his claim for fees as an unsecured debt having priority by agreement, held, could not be allowed as a priority, though Act 1898, § 64, enacts that an attorney's fee provided for is a priority to be paid in full. In re Morris, 125 F. 841.

10. Lien of a city for municipal taxes. In re Harvey, 122 F. 745.

11. Creditors mistakenly supposed they had collected their claims by valid attachments. Hutchinson v. Otis. Wilcox & Co., 190 U. S. 552, 23 S. Ct. 778, 47 Law. Ed. 1179.

12. In re Prince, 131 F. 546.

13. In re Cannon, 121 F. 582.

14. Voluntary bankruptcy proceedings on the part of building contractors do not affect the right of materialmen to thereafter file and enforce their liens. Crane Co. v. Smythe, 87 N. Y. S. 917.

15. Where one partner a short time before bankruptcy of the partnership assumed all the debts of the partners and took the firm property, creditors cannot claim that firm creditors assenting thereto became individual creditors of such partner, and at the same time repudiate the transaction so far as relates to a transfer of firm property. In re Worth, 130 F. 927. Firm property goes primarily to pay firm debts. In re Groetzinger [C. C. A.] 127 F. 814.

16. In re L. B. Weisenberg & Co., 131 F. 517.

17. Conrader v. Cohen [C. C. A.] 121 F. 801; In re Janes, 128 F. 527.

surplus of the assets of the individual partners.[18] The mortgagee of a homestead is a secured creditor.[19] A surety discharging his obligations as surety to a bankrupt becomes an unsecured creditor.[20] Under the bankruptcy law creditors for the purchase price of goods stand on the same footing and share pro rata with other creditors.[21] One having a secret lien must, in order to retain priority, establish his claim by proof under the bankruptcy act the same as other creditors.[22] A lienor permitting, without objection, the property upon which he has a lien to be sold with other property of the bankrupt for a lump sum, he cannot assert a lien upon the proceeds where it is impossible to determine what part of the proceeds was produced by the property upon which he had a lien.[23]

(§ 14) *F. Expenses of the proceeding.*[24]—A receiver for an involuntary bankrupt continuing in the occupation of leased premises until the time of adjudication, the lessor is entitled to an allowance of his claim for rent until that time.[25] If, however, on the filing of a voluntary petition in bankruptcy, the bankrupt abandons leased premises, the lessor may take possession, and is limited in his recovery of rent to the date of the filing of the petition.[26] The allowance of an attorney's fee is in the discretion of the judge,[27] and whether it is reasonable or not is within the exclusive jurisdiction of the Federal court,[28] the reasonableness of the amount to be determined upon evidence of the service performed and of its value,[29] or, in the absence of evidence of its value, by the court from knowledge of its worth.[30] A voluntary bankrupt's attorney can recover only the reasonable value of the services actually required, irrespective of the services rendered,[31] he cannot recover for clerical work.[32] The attorney for petitioning creditors is entitled to a reasonable fee as of right.[33] The attorneys for unsecured creditors are not en-

18. Gray v. Brunold, 140 Cal. 615, 74 P. 303.

19. Within the definition of the act making the term include a creditor who has security on property of a nature to be assignable thereunder. Fenley v. Poor [C. C. A.] 121 F. 739.

20. Livingstone v. Heineman [C. C. A.] 120 F. 786.

21. In re Campbell, 124 F. 417.

22. Lien of a landlord, for rent due him, on property of the tenant, the amount being, at the time of the tenant's bankruptcy, unadjudicated. In re Hayward, 130 F. 720.

23. Landlord had right to distrain stock and fixtures of a saloon for rent, allowed the stock and fixtures to be sold with the license, the latter a valuable asset, and was present in court when the sale was confirmed making no objection. In re Smith, 123 F. 188.

24. See 1 Curr. L. 331.

25. In re Hinckel Brewing Co., 123 F. 942. On the bankruptcy of a tenant of a farm on shares his trustee occupied the farm buildings until the crops were sold, held the landlord was entitled to compensation for the trustee's use and occupation thereof. In re Luckenbill, 127 F. 984.

26. In re Hinckel Brewing Co., 123 F. 942.

27. In re Morris, 125 F. 841. See 1 Curr. L. 331, n. 71.

28. Swartz v. Frank [Mo.] 82 S. W. 60.

29. Elements of value are these, "The nature of the service, time necessarily employed therein, the amount involved, the responsibility assumed, and the result obtained." Quoted from In re Curtis [C. C. A.] 100 F. 785, 786, and approved and concurred in in Smith v. Cooper [C. C. A.] 120 F. 230.

Illustrations: A fee of $1,000 allowed to attorneys, who obtained an order adjudging a debtor a bankrupt in involuntary proceedings, and brought proceedings to have the property of the debtor in the hands of a receiver in insolvency appointed by a state court turned over to the trustee in bankruptcy which proceeding was carried to the United States supreme court. Finally a compromise was effected whereby $2,500 was turned over to the trustee. Held not excessive. Smith v. Cooper [C. C. A.] 120 F. 230. An allowance of $75 is sufficient to attorneys for a voluntary bankrupt for services, consisting principally in preparing and filing the petition and schedules, the estate being worth $7,500. In re Lang, 127 F. 755. Where the bankrupt estate exclusive of exemptions did not exceed $5,500, payment by assignee for benefit of creditors and trustee in bankruptcy of $125 attorney's fees and $21.75 for serving notices and mileage is sufficient. Further payments properly disallowed by referee. In re Byerly, 128 F. 637.

30. Smith v. Cooper [C. C. A.] 120 F. 230.

31. In re Connell & Sons, 120 F. 846; In re Goldville Mfg. Co., 123 F. 579. May be allowed for services actually rendered in good faith for the real purpose of impartially administering the estate. Represented bankrupts at examination. In re Rosenthal, 120 F. 848. [The opinion by what is apparently a typographical error refers to the proceeding as an involuntary one.]

32. Posting bankrupt's books, writing extra copies of the schedules. In re Connell & Sons, 120 F. 846.

33. Smith v. Cooper [C. C. A.] 120 F. 230. See 1 Curr. L. 331, n. 73

titled to compensation, for services rendered in unsuccessfully contesting the validity of security given other creditors, from a fund realized by the sale of such security.[34] Where two involuntary petitions, filed by attorneys representing different creditors, are consolidated by order of the court, a single attorney's fee should be divided between such attorneys according to the relative value and amount of work done by each.[35] A creditor being re-examined as to his claim, he is entitled to reasonable traveling expenses if his claim is finally allowed, but not his counsel fees.[36] Property subject to liens being sold by consent of the lienors, the referee and trustee are entitled to commissions on the purchase price in full,[37] and the same is true where it is sold free from incumbrances.[38] A referee is not entitled to commissions on a fund belonging to secured creditors.[39] Under the act of 1898 the bankruptcy court had power to allow extra compensation to referees in cases where matters in litigation were referred to them as special masters.[40] A referee refusing to allow expenditures made by a trustee, the latter is the only one that can except thereto.[41] Where the methods of creditors cause a confusion of the claims the trustee should not be charged with the costs of a proceeding to determine issues arising out of such confusion.[42] Costs arising from the contest of a claim waged for the purpose of controlling the election of the trustee will not be allowed from the estate.[43]

(§ 14) *G. Expenses of receivers and assignees appointed prior to bankruptcy proceedings.*[44]—The court making the first adjudication in bankruptcy is the proper court to compensate a receiver appointed in another district pending action upon an involuntary petition therein.[45] The appointment of a receiver being erroneous or void, and being successfully contested, the receiver's compensation and the expenses of administration should be taxed to the parties who applied for the appointment,[46] if, however, the appointment is sustained, the items of expenses growing out of the receivership are proper charges against the unsuccessful contestant, and are chargeable and payable from his property in the possession of the court.[47] The referee is entitled to commissions on all moneys which are disbursed to creditors by the trustee,[48] this includes all sums which would have been paid through the trustee but for an outside agreement between the parties and their attorneys,[49] but prior to the amendment of 1903 this included only such sums as were paid to creditors having provable and allowed claims.[50] The only extra allowances allowable to a referee are for expenses necessarily incurred, a detailed account thereof being kept and returned to the court, verified by the oath of the referee that they were necessarily and actually incurred, with proper vouchers when procurable.[51] Referees cannot be allowed postage for notices sent in penalty envelopes.[52] A re-

34. In re Goldville Mfg. Co., 123 F. 579.
35. In re McCracken & McLeod, 129 F. 621.
36. In re George Watkinson & Co., 130 F. 218.
37. In re Sanford Furniture Mfg. Co., 126 F. 888.
38. Even though purchased by the party holding the incumbrance. In re Sanford Furniture Mfg. Co., 126 F. 888.
39. Mortgage. In re Goldville Mfg. Co., 123 F. 579.
40. It seems that by the amendment of 1903 to § 40a this rule has been abrogated. In re Goldville Mfg. Co., 123 F. 579.
41. Expenditures for counsel fees partially rejected. Held counsel could not except thereto. In re Byerly, 128 F. 637.
42. Dowse v. Hammond [C. C. A.] 130 F. 103
43. In re Worth, 130 F. 927.
44. See 1 Curr. L. 332.
45. In re Sears, Humbert & Co. [C. C. A.] 128 F. 275.
46. Expenses for feed and care of stock are "expenses of the receivership." Beach v. Macon Grocery Co. [C. C. A.] 125 F. 513.
47. Beach v. Macon Grocery Co. [C. C. A.] 125 F. 513.
48. In re Sanford Furniture Mfg. Co., 126 F. 888.
49. Agreement to sell the property free from a deed of trust. In re Sanford Furniture Mfg. Co., 126 F. 888.
50. Did not include money paid to satisfy fixed liens on realty sold by him though property was sold free from incumbrances and the liens satisfied from the proceeds. In re Hinckel Brewing Co., 124 F. 702.
51, 52. In re Daniels, 130 F. 597.

ceiver having charge of an involuntary bankrupt's estate before adjudication may be awarded the full maximum fixed for the compensation of a trustee, without reference to the compensation afterwards awarded to the latter.[53] The assignee under a bona fide[54] assignment for the benefit of creditors made prior to the filing of the petition in bankruptcy has a lien on the assets of the estate for his necessary disbursements and reasonable compensation for such services as were beneficial to the estate,[55] and the surrender by him of all the assets to the trustee in bankruptcy does not deprive him of the right to apply to the bankruptcy court for the payment of the amount of such lien.[56] That the assignee is appointed the trustee makes no difference.[57] Claims for services rendered to the assignee may be allowed to the same extent as if the assignee had paid them.[58] An attorney is only entitled to compensation for such services, rendered a state receiver, as are beneficial to the estate,[59] but he will not be allowed for such services as were beneficial, where as a whole, his services cost the estate and general creditors several times that amount in increased expenses of administration.[60] A charge for the preparation of the deed of assignment constituting the act of bankruptcy may be proved as an unpreferred claim.[61] An attachment being dissolved by subsequent proceedings in bankruptcy the sheriff is nevertheless entitled to his fees and outlay in preserving the property up to the time title passed to the trustee.[62]

§ 15. *Distribution of assets.*[63]—The administration and distribution of the property of a bankrupt is a proceeding in equity.[64] The statute of limitations of the state of a bankrupt's residence, and in which he is adjudged a bankrupt, governs and determines the rights of creditors in the administration of the bankrupt's estate.[65] One receiving money as the result of an audit after hearing will be protected by the order of the referee until it is set aside by proceedings taken directly for that purpose.[66] The distribution of the proceeds of a sale of real estate made by a trustee in bankruptcy is reviewable by the circuit court of appeals by a petition for review.[67]

§ 16. *Exemptions.*[68]—Under the national bankruptcy act, bankrupts are allowed the exemptions prescribed by the laws of the state in which the petition is filed, they having been domiciled in said state for the six months immedi-

53. Is not limited to an amount to be deducted from the trustee's maximum in proportion to the relative services rendered. In re Richards, 127 F. 772.

54. An assignment containing no secret trust and being without fraud in fact, and made in an honest attempt to have the property administered for the benefit of the creditors, and the assignee acting honestly and carefully, though constituting an act of bankruptcy is not fraudulent in law. Summers v. Abbott [C. C. A.] 122 F. 36.

55. In re Chase [C. C. A.] 124 F. 753; Randolph v. Scruggs, 190 U. S. 533, 23 S. Ct. 710, 47 Law. Ed. 1165; In re Levitt, 126 F. 889; In re Congdon, 129 F. 478.

56. In re Chase [C. C. A.] 124 F. 753.

57. In re Byerly, 128 F. 637.

58. Compensation for legal services rendered in unsuccessfully resisting an adjudication in bankruptcy are not allowable. Randolph v. Scruggs, 190 U. S. 533, 23 S. Ct. 710, 47 Law. Ed. 1165.

59. Is not entitled to compensation for services rendered the effect of which was to aid certain creditors in retaining preferences in violation of the bankruptcy law. In re M. Zier & Co., 127 F. 399. An attorney procuring a general assignment resulting in a detriment to the estate, and which was not only in law but in fact a fraud upon the bankruptcy law, is not entitled to compensation for services rendered therein. In re Congdon, 129 F. 478.

60. In re M. Zier & Co., 127 F. 399.

61. The deed being avoided by an adjudication in bankruptcy of the assignor. Randolph v. Scruggs, 190 U. S. 533, 23 S. Ct. 710, 47 Law. Ed. 1165.

62. Sheriff given a lien for such fees and expenditures by Code Civ. Proc. §§ 709, 3307, 3343, subd. 12. In this case the trustee came into the action pending in the state court. Wilkinson v. Raymond, 80 App. Div. 378, 81 N. Y. S. 82.

63. See 1 Curr. L. 327.

64. When authorized by act of Congress, it becomes a branch of equity jurisprudence. In re Rochford [C. C. A.] 124 F. 182.

65. Hargadine-McKittrick Dry Goods Co. v. Hudson [C. C. A.] 122 F. 232.

66. In re Wilkesbarre Furniture Mfg. Co., 130 F. 796.

67. In re Groetzinger & Sons [C. C. A.] 127 F. 124.

68. See 1 Curr. L. 332.

ately preceding the filing of the petition,[69] the enumeration of exemptions in § 70 applying only to property not exempt by the state laws.[70] The bankruptcy court has exclusive jurisdiction to determine claims of bankrupts to their exemptions,[71] though the trustee can set apart the exemption and pass upon such objections as may be made by creditors to his so doing,[72] and in setting aside, after appraisal, property claimed by the bankrupt as exempt, the trustee acts ministerially.[73] The court of bankruptcy, being a court of equity, will construe exemption laws liberally.[74] In states where life insurance policies are not exempt, only the surrender value at the date of bankruptcy goes to the creditors, and the bankrupt by securing the payment of an equal sum may hold the policy free from claims of creditors.[75] The surrender value referred to in § 70 refers only to the contract right of surrender;[76] nor does § 70 include policies payable to a wife or kindred of the assured.[77] An exemption in bankruptcy is of no avail as against the holder of a purchase-money mortgage or judgment therefor, when the holder of such mortgage or judgment does not prove his debt in bankruptcy.[78] A bankrupt cannot claim an exemption out of a preference that has been recovered back by the trustee.[79] A bankrupt occupying land as a homestead under a contract of purchase, the trustee is entitled to redeem the land and subject such portion thereof as does not constitute the bankrupt's homestead to the payment of his debts.[80] The time and manner of claiming such exemptions, and of setting apart and awarding them, are regulated by the bankruptcy act.[81] It is therein provided that the bankrupt shall claim his exemptions in his schedules,[82] and the trustee must set off such property to him and report the items, with their estimated value, to the court for approval;[83] the assent of the creditors cannot dispense with these formalities.[84] A bankrupt's schedules containing a waiver of his exemptions may be amended so as to allow him to claim them where he shows the waiver to have been the subject of accident or mistake,[85] and the application for leave to amend is made seasonably.[86] A bankrupt having properly claimed his exemption, it can-

69. See title Exemptions, 1 Curr. L. 1192, for what constitutes.

Act of 1898, § 6. Pulsifer v. Hussey, 97 Me. 434, 54 A. 1076; In re Le Vay, 125 F. 990; In re Kane [C. C. A.] 127 F. 552. The only question to be determined by the bankruptcy court upon an application by a bankrupt for his exemptions is whether or not he is entitled to the same as against general creditors. In re Brumbaugh, 128 F. 971. See 1 Curr. L. 332, n. 80, 81.

70. Pulsifer v. Hussey, 97 Me. 434, 54 A. 1076.

71. Has jurisdiction of a claim of a creditor asserting an equitable lien on property, the bankrupt claims exempt. In re Lucius, 124 F. 455; Thompson v. Ragan, 25 Ky. L. R. 1684, 78 S. W. 485.

72. Bell v. Dawson Grocery Co. [Ga.] 48 S. E. 150.

73. No presumption arises that property so set aside has been paid for. In re Campbell, 124 F. 417.

74. In re Kane [C. C. A.] 127 F. 552.

75. This construction harmonizes §§ 6 and 70. Pulsifer v. Hussey, 97 Me. 434, 54 A. 1076.

76. By terms of policy, cash surrender value was determined, and if desired, allowed only at the termination of five-year periods; held not to refer to a custom of the company of allowing this to be done at the expiration of yearly periods. Pulsifer v. Hussey, 97 Me. 434, 54 A. 1076.

77. Pulsifer v. Hussey, 97 Me. 434, 54 A. 1076.

78. Camp v. Young, 119 Ga. 981, 47 S. E. 560.

79. In re Coddington, 126 F. 891.

80. Duffield v. Dosh [Iowa] 99 N. W. 1074.

81. In re Kane [C. C. A.] 127 F. 552; In re Le Vay, 125 F. 990. Though a state law may require a bankrupt to claim his exemption out of the property before the sale, the bankruptcy court may allow him to take it from the proceeds after sale. In re Stein, 130 F. 629. A state statute required a debtor to select the specific personal property he claims as exempt; a court of bankruptcy is not bound to require such selection where it is for the best interest of all concerned, and where specific property being mortgaged cannot be selected and set apart as exempt, it may properly permit such property to be sold as an entirety, and award the bankrupt his exemption from the proceeds. In re Kane [C. C. A.] 127 F. 552.

82. In re Le Vay, 125 F. 990; In re Lucius, 124 F. 455; In re Coddington, 126 F. 891; In re Prince, 131 F. 546. See 1 Curr. L. 332, n. 82.

83, 84. In re Prince, 131 F. 546.

85. Parol evidence is admissible to show this. In re White, 128 F. 513.

86. Where eleven months elapsed, he must show a sufficient excuse for the delay, parol evidence being admissible to prove the cause of the delay. In re White, 128 F. 513.

not be diminished by, or put aside in favor of, the costs and expenses made in the proceedings,[87] even where the latter have been taken to preserve the property.[88] The burden of proof is upon the bankrupt to show that he is entitled to the exemptions.[89] Any party having an interest in the result may object to the allowance of an exemption.[90] No issue as to the bankrupt's right to exemptions arises until exceptions are filed to the trustee's report.[91] Lack of verification to an exception to the report of a trustee setting apart the bankrupt's exemptions is not jurisdictional.[92] The bankruptcy court in some cases will direct that a receiver set aside and preserve specific property which a bankrupt wishes to claim as exempt, and which otherwise would be sold,[93] and may, upon his giving a bond for its return, authorize its delivery to such bankrupt pending the determination of his right thereto.[94] A discharge will be withheld so as to enable a debtor to test his right to the bankrupt's exemption in the state courts.[95]

A bankruptcy court acquires no right to administer upon or distribute exempt property, even though its aid may be required to set it aside,[96] and this is true, though the creditor has agreed to waive the exemption as to a particular creditor,[97] and any attempt to do so is made in the course of a bankruptcy proceeding and is reviewable on petition to revise.[98] The bankrupt may become estopped to deny this power in the bankruptcy court.[99] The trustee in bankruptcy acquires no title to exempt property duly claimed.[1]

§ 17. *Death of bankrupt pending proceedings.*[2]—The allowance to the widow and children of a bankrupt dying during the proceedings is governed by the laws of the state of the bankrupt's residence,[3] and may be made by the bankruptcy

87. In re Le Vay, 125 F. 990. See 1 Curr. L. 333, n. 95.

88. As where it is perishable, a sale is ordered and made by a receiver. In re Le Vay, 125 F. 990.

89. Under the Virginia statute, must prove that such property has been paid for. In re Campbell, 124 F. 417.

90. Under the Virginia statute, not allowing a bankrupt to claim unpaid property as an exemption, any creditor may object to the allowance of such property as an exemption, without showing that his claim is for the purchase price of any of such property. In re Campbell, 124 F. 417. Creditors having claims for the unpaid purchase price of exempt property, and claiming the right to have it sold and the proceeds applied to such claims, are the proper persons to present such question. In re Boyd, 120 F. 999.

91. In re Campbell, 124 F. 417.

92. Where objection is not made on hearing before the referee, objection cannot be made on a review of his decision before the court. It is doubtful if such exception comes within the term "pleadings" as used in the act of 1898, § 18c, requiring all pleadings to be verified. In re Campbell, 124 F. 417.

93. In re N. Shaffer & Son, 128 F. 986; In re Joyce, 128 F. 985. His exemption being properly made, a sale by a receiver before adjudication made because of the perishable character of the goods will not deprive the bankrupt of his right to the proceeds. In re Le Vay, 125 F. 990.

94. In re N. Shaffer & Son, 128 F. 986.

95. Judgment obtained in a tort action against which exemptions were nonavailable. In re Brumbaugh, 128 F. 971. Where the exemption is waived, the creditor's remedy is in a court of equity. In Georgia, the property being of a perishable nature, the court will appoint a receiver to take charge of it until the judgment in rem is obtained. Bell v. Dawson Grocery Co. [Ga.] 48 S. E. 150.

96. In re Le Vay, 125 F. 990; McKenney v. Cheney, 118 Ga. 387, 45 S. E. 433; Lockwood v. Exch. Bank, 190 U. S. 294, 23 S. Ct. 751, 47 Law. Ed. 1061. Trustee cannot administer the property exempt. Bell v. Dawson Grocery Co. [Ga.] 48 S. E. 150.

97. Lockwood v. Exch. Bank, 190 U. S. 294, 23 S. Ct. 751, 47 Law. Ed. 1061. Has no power to order sale of homestead, exempt under the state laws, because a particular creditor may have the right under such laws to subject it to the payment of his debt. Ingram v. Wilson [C. C. A.] 125 F. 913. Trustee cannot determine the rights of creditors asserting waivers against it. Bell v. Dawson Grocery Co. [Ga.] 48 S. E. 150.

98. Under Act 1898, § 24, it is not a case where an appeal is expressly authorized by § 25 of that act. In this case bankruptcy court directed sale of exempt property. Ingram v. Wilson [C. C. A.] 125 F. 913.

99. A bankrupt invoking the benefits of the bankruptcy law and thereby precluding the seller of exempt property from obtaining a judgment and levying execution thereon is estopped to object that the court of bankruptcy has no jurisdiction to order such property sold, and the proceeds applied to the unpaid purchase price, on the ground that no judgment had been recovered or execution levied as required by the Iowa statute. In re Boyd, 120 F. 999.

1. McKenney v. Cheney, 118 Ga. 387, 45 S. E. 433.

2. See 1 Curr. L. 333.

3. Act 1898, § 8. In re Newton, 122 F. 103. See 1 Curr. L. 333, n. 7.

court from the bankrupt's estate in accordance with the state statutes.[4] The widow of a bankrupt is entitled to dower out of land conveyed by her husband to his "assignee" in bankruptcy, she not having joined in the deed nor received anything in lieu thereof.[5]

§ 18. *Referees, proceedings before them and review thereof.*[6]—Referees in bankruptcy are judicial officers,[7] and their orders made in the course of bankruptcy proceedings are entitled to the respect and credit due to officers who act judicially.[8] A proceeding before a referee in bankruptcy to recover a debt is analogous to an action brought for the same purpose.[9] In proceedings for contempts before a referee, the latter must certify the facts to the judge.[10] A witness is not subject to attachment for failing to appear and testify before a referee in obedience to a subpoena, unless his mileage and one day's attendance fees are paid or tendered to him.[11] A bankrupt is not exempt from prosecution for an offense growing out of a transaction concerning which he testified before the referee,[12] and may refuse to answer criminating questions.[13] The jurisdiction with which a referee is invested is made expressly subject to review by the judge of a court of bankruptcy,[14] and this power of review in the latter is exclusive.[15] Upon a proper petition for a review of any order, the referee should forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and his finding or order thereon.[16] A referee in bankruptcy has power to rule on the admissibility of evidence offered before him,[17] and is bound to personally hear the evidence unless his presence is waived by the parties.[18] Evidence taken before him to be available on appeal must be included in the record certified to the district court, and the certificate of the referee must show that it is the evidence so taken before him.[19] A referee's findings of fact will not be reversed upon appeal unless they are flagrantly against the weight of the evidence,[20] and the burden of proof is upon the objectors to show the facts to be as they insist.[21] Docket entries of a referee are the best evidence of matters therein stated,[22] and the record of a referee, in so far as it shows what was adjudicated, is conclusive

4. In Connecticut, they are entitled to such an amount as is necessary for their support. In re Newton, 122 F. 103.

5. That husband was paid his homestead exemption which he applied to wife's use makes no difference. It seems as though the court used the term "assignee" in place of "trustee." Cravens v. Shippen, 25 Ky. L. R. 1322, 77 S. W. 929.

6. See 1 Curr. L. 333. See, also, ante, § 14 B, Sale by trustee.

7. Clendening v. Red River Val. Nat. Bank [N. D.] 94 N. W. 901.

8. Adjudications upon the allowance or rejection of the claims of creditors. Clendening v. Red River Val. Nat. Bank [N. D.] 94 N. W. 901.

9. Legislature by an act cannot effect the reversal of a judgment already rendered. In re Stalker, 123 F. 961.

10. A witness failing to attend an application for an attachment in the first instance, without such certificate from the referee, is irregular. In re Kerber, 125 F. 653.

11. In re Kerber, 125 F. 653. See 1 Curr. L. 334, n. 12.

12. Burrell v. Mont., 194 U. S. 572, 24 S. Ct. 787.

13. Questions as to accuracy of a creditor's proof and the identifying of his signature to notes and his checkbook, held must be answered. In re Levin, 131 F. 388.

14. Brown v. Persons [C. C. A.] 122 F. 212.

15. State courts are without authority to review, revise or reverse adjudications of the referee. Clendening v. Red River Val. Nat. Bank [N. D.] 94 N. W. 901.

16. Transmitting to the clerk the notes of the testimony, his own opinion and the creditors' petition for a review is not a compliance with Bankr. Rule 27. In re Kurtz, 125 F. 992.

17, 18. In re Wilde's Sons, 131 F. 142.

19. Where the certificate of the referee is silent as regards any evidence, and a subsequent certificate attached to certain evidence sought to be made a part of the record was not certified to the district court until six days after it had affirmed the findings and judgment of the referee, held, such evidence not properly in record and not before appellate court. In re French, 13 Okl. 549, 75 P. 278; In re Cohen, 131 F. 391.

20. A finding that a private banker was engaged chiefly in farming. Couts v. Townsend, 126 F. 249. Finding of referee refusing discharge. In re Shriver, 125 F. 511; In re Williams, 120 F. 542. See 1 Curr. L. 334, n. 22-25.

21. Finding of a referee that certain moneys are the proceeds of property pledged to a lienholder. In re Williams, 120 F. 542.

22. Davis v. Ives, 75 Conn. 611, 54 A. 922.

and cannot be contradicted by parol evidence.[23] Papers used in a proceeding before a referee in bankruptcy may be certified either by the referee or clerk.[24]

§ 19. *Modification and vacation of orders of bankruptcy court.*[25]—In the absence of statutory prohibition, a court of bankruptcy has, generally, power to amend its decrees in its discretion,[26] and hence a judge of a court of bankruptcy has the power to vacate an order discharging a trustee.[27]

§ 20. *Appeal and review in bankruptcy cases.*—An appeal must be taken within ten days after the rendition of judgment,[28] which fact must appear in the record,[29] the record on appeal must be filed within the time allowed by law,[30] or an application for an extension must be made before the expiration of that time,[31] and the record must be complete,[32] or the appeal will be dismissed. Neither the bankruptcy act nor any rule of court limits the time within which a petition for review in bankruptcy may be filed,[33] but it has been held that no appeal or petition for review being taken from a final decree for over a year it becomes final and cannot be set aside or modified on motion.[34] A rehearing will not be granted upon the pretense of reconsidering the merits of the case, where the real purpose is to revive the petitioner's right of appeal,[35] but the district court cannot entertain a motion for a rehearing so long as an appeal is pending.[36] The circuit courts of appeal have power to summarily revise territorial district courts within their respective circuits as to matters of law arising in bankruptcy proceedings.[37] An intervening petition to reach a fund in the bankruptcy court, being incident to the claim, is a bankruptcy proceeding,[38] but a decree thereon is not an independent ground of appeal, where it is not "a judgment allowing or rejecting a debt or claim of $500 or over."[39] Whenever, in a suit in which a bankruptcy court is marshaling and distributing assets, any intervening party raises a distinct and separable

23. Testimony of a referee that he did not undertake to adjudicate a creditor's claim is inadmissible, it being directly contradictory to the necessary legal effect of his written order allowing said claim. Clendening v. Red River Val. Nat. Bank [N. D.] 94 N. W. 901.

24. Is not error to admit such papers in evidence when certified by the referee. McLanahan v. Blackwell, 119 Ga. 64, 45 S. E. 785.

25. See 1 Curr. L. 334.

26. In re Bimberg, 121 F. 942.

27. Where an order of a district court sustaining a claim of privilege of a witness is reversed by the circuit court of appeals and remanded for further proceedings, the district court properly vacated an order previously made by the referee discharging the trustee. Brown v. Persons [C. C. A.] 122 F. 212.

28. Act 1898, § 25a. From a decree granting a discharge. Williams Bros. v. Savage [C. C. A.] 120 F. 497. Where a district court disapproved a finding of fact by a referee on the disallowance of a claim, but entered no order in the matter, afterwards the referee entered an order allowing the claim, which was approved and confirmed by the court, held that an appeal taken within 10 days of the confirmation of the order allowing the claim was proper. Rush v. Lake [C. C. A.] 122 F. 561.

29. Williams Bros. v. Savage [C. C. A.] 120 F. 497.

30. Appeal from an order allowing a claim. In re Alden Elec. Co. [C. C. A.] 123 F. 415.

31. In re Alden Elec. Co. [C. C. A.] 123 F. 415.

32. Must contain all the papers, exhibits, depositions, and other proceedings necessary to the hearing in the appellate court. Williams Bros. v. Savage [C. C. A.] 120 F. 497.

33. Ordinarily by analogy such petition ought to be filed within six months, but that it is not is not conclusive ground for dismissal. Where owing to the unavoidable disappearance of important evidence, the judge below made two orders extending the time for filing the record in the appellate court, a reasonable excuse is afforded. In re Groetzinger & Sons [C. C. A.] 127 F. 124.

34. In re Hoyt & Mitchell, 127 F. 968.

35. If entitled to relief for that purpose the facts must be shown in the petition. In re Girard Glazed Kid Co., 129 F. 841.

36. First Nat. Bank v. State Nat. Bank [C. C. A.] 131 F. 430.

37. The summary revisory power of the circuit court of appeals for the eighth circuit extends to questions of law arising in the progress of bankruptcy proceedings in a district court of Oklahoma territory, which is assigned to the eighth circuit, although jurisdiction by appeal or writ of error is vested in the territorial supreme court. Plymouth Cordage Co. v. Smith, 194 U. S. 311, 24 S. Ct. 725.

38. Petition filed by creditors asserting a lien upon proceeds of a seat in a stock exchange which had not been insisted upon because they mistakenly supposed they had collected their claims by valid attachments. Hutchinson v. Otis, Wilcox & Co., 190 U. S. 552, 23 S. Ct. 778, 47 Law. Ed. 1179.

39. Act of 1898, § 25a, 3. Hutchinson v. Otis, Wilcox & Co., 190 U. S. 552, 23 S. Ct. 778, 47 Law. Ed. 1179.

issue or controversy involving substantial pecuniary rights, an appeal lies from an order entered thereon.[40] An appeal cannot be taken from a decision of a circuit court of appeals, allowing or rejecting a claim, to the United States supreme court, except upon a certificate of a justice of the supreme court,[41] or where the amount involved exceeds $2,000, and the questions are such as might have been taken up from the highest court of a state.[42] An appeal lies to the United States supreme court from a judgment of a circuit court of appeals entered upon an appeal from a judgment of a court of bankruptcy, sustaining a title to property in the possession of a trustee in bankruptcy, asserted by intervention raising a distinct and separable issue.[43] A judgment creditor may become a "party aggrieved" and therefore entitled to prosecute a petition for review of an order of the bankruptcy court.[44] Orders and decrees in a bankruptcy proceeding cannot be reviewed by writs of error.[45] The power of the appellate court to review, by original petition, the ruling of the bankruptcy court extends only to an order made in the bankruptcy proceedings proper, and does not embrace proceedings in suits by the trustee in bankruptcy,[46] and the appellate court cannot entertain a petition to revise in matter of law, where questions of fact are involved therein.[47] An appeal duly taken from an order in bankruptcy may be treated as a petition for revision, where the latter is the proper mode of review and only a question of law is presented.[48] Certiorari is the proper method of obtaining a review, in the supreme court of the United States, of a decision of the circuit court of appeals upon a petition for revision of an order of the district court allowing an exemption.[49] An assignment of error must be filed in the court below before an appeal is allowed,[50] and such assignment operates as a limitation upon such appeal.[51] On an appeal from an order dismissing an involuntary petition, an appeal bond must be given, approved, and filed in the trial court,[52] and such fact must appear upon the record,[53] but the appeal being taken within the time prescribed by the bankruptcy act, failure to file a bond and serve the citation until a few days after the expiration of that time does not invalidate the appeal.[54] The record on an appeal in bankruptcy not clearly setting forth facts necessary to a determination of the questions involved, it will be remanded to the district court, with directions to have the facts fully reported to

40. The case then presenting a controversy within the meaning of § 24a of the Act 1898. Issue was as to whether a partnership or an individual partner owned the property. Burleigh v. Foreman [C. C. A.] 125 F. 217.

41. Construing Act 1898, §§ 24a, 25b. and § 6, Act March 3, 1891, 26 Stat. 828, c. 517 [U. S. Comp. St. 1901, p. 549], creating the circuit court of appeals. Hutchinson v. Otis, Wilcox & Co. [C. C. A.] 123 F. 14.

42. Hutchinson v. Otis, Wilcox & Co. [C. C. A.] 123 F. 14.

43. Hewit v. Berlin Mach. Works, 194 U. S. 296, 24 S. Ct. 690.

44. Assignee of a judgment creditor who alone proved his claim against the bankrupt estate applied to have the estate reopened, on the ground that assets had been fraudulently conveyed, the court below discharged a restraining order and refused an injunction to restrain a further transfer, but appointed a trustee, none having been previously appointed, held could prosecute a petition for review. Clark v. Pidcock [C. C. A.] 129 F. 745.

45. A bankruptcy proceeding is a proceeding in equity. Lockman v. Lang [C. C. A.] 128 F. 279.

46. Mortgagee in possession of property of the bankrupt turned the same over to the trustee to sell, the proceeds to be turned into the registry of the bankruptcy court, the right of property to follow the fund, held, action of bankruptcy court in determining mortgagee's rights reviewable by appellate court. In re Antigo Screen Door Co. [C. C. A.] 123 F. 249.

47. Whether a court of bankruptcy erred in ordering a sale of property free from incumbrances. In re Union Trust Co. [C. C. A.] 122 F. 937.

48. Chesapeake Shoe Co. v. Seldner [C. C. A.] 122 F. 593.

49. The revising order is not a final decision allowing or rejecting a claim within the meaning of § 25b, of the Act of 1898. Holden v. Stratton, 191 U. S. 115, 24 S. Ct. 45.

50. Buckingham v. Estes [C. C. A.] 128 F. 584; Lockman v. Lang [C. C. A.] 128 F. 279.

51. Points not covered by assignment of error cannot be reviewed. Buckingham v. Estes [C. C. A.] 128 F. 584.

52, 53. In re Miller, 13 Okl. 557, 75 P. 1128.

54. No material prejudice was shown. Columbia Ironworks v. National Lead Co. [C. C. A.] 127 F. 99.

it and to pass on same.[55] An appeal lying under the bankruptcy act, the dissatisfied litigant may appeal both as to law and facts,[56] or may, where a question of law is concerned, raise that alone by a revisory petition. On a petition to revise a court of bankruptcy in a matter of law, findings which involve a distinct proposition of law or a substitute therefor are necessary.[57] A petition for review being filed, the proceeding must be prosecuted to a hearing and determination with reasonable diligence.[58] In order to maintain on appeal an objection that a claim was not allowed within one year, and therefore its allowance was erroneous, the transcript must show the date of the adjudication.[59] The circuit court of appeals may on appeal review a question of fact,[60] but it will not reverse a finding of fact by a referee and affirmed by the district court, unless manifestly against the weight of the evidence.[61] The appellate court upon a petition to review cannot challenge the facts, or an inference of fact, found by the court below,[62] it can only consider and rule upon questions of law.[63] Objections to the jurat on the specifications of objection to a bankrupt's discharge,[64] or that the goods of the bankrupt have not been properly inventoried,[65] cannot be made for the first time upon a petition to review. Appellate courts will not interfere in administrative matters where no substantial interests are concerned.[66] An order of dismissal will not be reversed upon appeal because of an immaterial departure from the technical rules of procedure.[67] Sufficient facts being alleged and proved to warrant the adjudication, the latter will not be set aside upon appeal because other acts alleged were neither properly pleaded nor sufficiently proved.[68]

§ 21. *Trustee's bonds; actions thereon.*[69]—An action upon a trustee's bond must be brought in the name of the United States,[70] it may be brought without first obtaining leave,[71] in a state court,[72] and the defaulting trustee being a fugitive from justice he is not a necessary party.[73] Payments made by a trustee in bankruptcy in violation of the rules, and without an order therefor, being disallowed,

55. Devries v. Shanahan [C. C. A.] 122 F. 629.

56. Burleigh v. Foreman [C. C. A.] 125 F. 217.

57. Cannot be supplied by the opinion of the court. In some cases involving issues of a substantial character justice might require the relaxation of the above rule. In re Boston Dry Goods Co. [C. C. A.] 125 F. 226.

58. Allowing two years and nine months to pass from the time of the filing of the petition before any real effort to prosecute the proceeding is made is such laches that the petition will be dismissed. In re Koenig, 127 F. 891.

59. Buckingham v. Estes [C. C. A.] 128 F. 584.

60. As to whether or not a claim should have been allowed. Rush v. Lake [C. C. A.] 122 F. 561.

61. In re Noyes Bros. [C. C. A.] 127 F. 286. Action to recover a preference. Hodges v. Kohn [S. C.] 45 S. E. 102. Findings on an accounting of rent. Buckingham v. Estes [C. C. A.] 128 F. 584. There being no distinct findings upon a question of fact by either the referee or the bankruptcy court, the appellate court is not aided in its consideration of the case by the weight which ordinarily attaches to findings of courts of the first instance. Burleigh v. Foreman [C. C. A.] 130 F. 13.

62, 63. In re Antigo Screen Door Co. [C. C. A.] 123 F. 249.

64. Godshalk Co. v. Sterling [C. C. A.] 129 F. 580.

65. In re Shoe & Leather Reporter [C. C. A.] 129 F. 588.

66. Will not interfere with an order of the district court fixing the minimum bid for the sale of assets of the bankrupt, and that a certain proportion of such price might be paid in bonds secured by a mortgage upon said assets. In re Shoe & Leather Reporter [C. C. A.] 129 F. 588.

67. Verdict of jury being advisory only, and the case being tried upon its merits, that immaterial issues were submitted to the jury is not sufficient for reversal. Oil Well Supply Co. v. Hall [C. C. A.] 128 F. 875.

68. In re Lynan [C. C. A.] 127 F. 123.

69. See 1 Curr. L. 334.

70. Cannot be brought in the name of the succeeding trustee, though in a state where actions must be brought in the name of the real party in interest. Alexander v. Union Surety & Guaranty Co., 89 App. Div. 3, 85 N. Y. S. 282.

71. Alexander v. Union Surety & Guaranty Co., 89 App. Div. 3, 85 N. Y. S. 282.

72. The supreme court of New York, having general jurisdiction, has jurisdiction of such an action. Alexander v. Union Surety & Guaranty Co., 89 App. Div. 3, 85 N. Y. S. 282.

73. Though a proper one. Alexander v. Union Surety & Guaranty Co., 89 App. Div. 3, 85 N. Y. S. 282.

the trustee and his bondsmen are liable therefor, though the court might have authorized such payments had the trustee applied for authority to make them.[74]

§ 22. *Discharge of bankrupt; its effect and how availed of. A. Procedure to obtain discharge and vacation thereof.*[75]—The failure of a bankrupt to apply for a discharge within the time allowed by law renders the question of his right to a discharge from those debts in a proceeding under a subsequent petition res adjudicata.[76] A bankrupt being allowed to file his petition for a discharge more than a year after adjudication, the only question open is whether or not he is entitled to a discharge,[77] creditors seeking to oppose it being confined to statutory objections,[78] and the court entertaining such a petition upon an insufficient showing, the remedy is a motion to vacate.[79] A bankrupt filing a petition for his discharge and taking no further steps in the matter for over a year is chargeable with an abuse of the bankruptcy proceedings for the purpose of delaying creditors, and on petition by a creditor his application for discharge will be dismissed.[80]

Notice of petition for discharge must be sent to creditors at their respective addresses.[81] An objecting creditor has no right to enter an appearance after the return day, and should not be allowed to do so, except for good cause shown in excuse of the delay.[82] The burden of proof is upon the opposing creditor to establish the ground for refusing the discharge by satisfactory and sufficient evidence.[83] Upon the hearing of the petition for a discharge and specifications in opposition thereto, the testimony of the bankrupt given at the first meeting of creditors is admissible,[84] but not the testimony of other witnesses taken at that time,[85] and the taking of the testimony by the referee of witnesses other than the bankrupt, upon petition for discharge and specifications in opposition thereto, before returning the same to the court is an irregularity,[86] but the bankrupt appearing and cross-examining the witness the testimony so taken will not be stricken out.[87]

By making an order of discharge it will be presumed that the court investigated the objections made thereto, and overruled the same on their merits.[88] An order of a bankruptcy court dismissing an application for discharge for want of prosecution is, in substance and effect, one denying a discharge.[89] A bankrupt having been refused a discharge cannot, a few months thereafter, prosecute a new application for a discharge upon the same facts.[90] An order denying a discharge is reviewable by appeal.[91] A discharge is not subject to collateral attack.[92]

74. In re Hoyt, 127 F. 963.

75. See 1 Curr. L. 335.

76. Kuntz v. Young [C. C. A.] 131 F. 719.

77. In re Haynes & Sons, 122 F. 560. See 1 Curr. L. 335, n. 34.

78. In re Haynes & Sons, 122 F. 560.

79. It is too late to contest the matter on the hearing of the petition. In re Haynes & Sons, 122 F. 560.

80. In this case the bankrupt also obtained an injunction staying proceedings by the creditor for the collection of a debt, held, injunction would be vacated. In re Lederer, 125 F. 96.

81. Where judgment creditor died before the filing of the petition for a discharge by the bankrupt, and her executrix and sole legatee had not proved her will, held proper to send the notices addressed to the creditor at her last place of residence. Such notice held sufficient to sustain motion by discharged bankrupt for cancellation of judgment under Code Civ. Proc. § 1268. Lent v. Farnsworth, 87 N. Y. S. 1112.

82. In re Ginsburg, 130 F. 627.

83. In re Chamberlain, 125 F. 629. See 1 Curr. L. 335, n. 51.

84. In re Goodhile, 130 F. 782. See 1 Curr. L. 335, n. 53.

85, 86, 87. In re Goodhile, 130 F. 782.

88. Affirmed the referee's report. Kentucky Nat. Bank v. Carley [C. C. A.] 127 F. 686.

89. In re Kuffler [C. C. A.] 127 F. 125.

90. Refused because of fraudulent concealment of assets from the trustee. In re Fiegenbaum [C. C. A.] 121 F. 69.

91. In re Kuffler [C. C. A.] 127 F. 125.

92. That the plaintiff, a discharged bankrupt, did not schedule the pending action as part of his assets is no defense thereto. Wilsey v. Jewett Bros. & Co., 122 Iowa, 315, 98 N. W. 114. Claiming that a discharge does not bar a particular claim is not a collateral attack. Sutherland v. Lasher, 41 Misc. 249, 84 N. Y. S. 56. A plea of discharge can be met by showing that the debt was excepted from the operation thereof, without the reply amounting to a collateral attack on the bankruptcy decree. Santa Rosa Bank v. White, 139 Cal. 703, 73 P. 577.

A court of bankruptcy may on its own motion vacate a discharge, in the furtherance of justice, before the expiration of a year after it was granted.[93] A creditor of a bankrupt who has failed to file or prove his claim within a year after adjudication may nevertheless move, as a party in interest, to vacate the discharge.[94] A creditor petitioning for a revocation of a bankrupt's discharge must not have been guilty of undue laches.[95] A petition for the revocation of a discharge in bankruptcy, setting out the facts, need not allege the legal conclusion that the facts did not warrant a discharge.[96]

(§ 22) *B. Grounds for refusal.*[97]—Provisions regulating the conditions on which bankrupts may be discharged are remedial in their nature, with respect to the bankrupts or to their creditors, or to both, and the strict rules of construction or interpretation appropriate to retroactive or retrospective laws are inapplicable to them.[98] A judgment denying a debtor a discharge from a debt, under a state insolvency law, is not an adjudication of his right to a discharge from such debt in bankruptcy, where it does not appear upon what grounds such judgment was based.[99] The provision of the bankruptcy act forbidding a discharge if the bankrupt has, in voluntary proceedings, been granted a discharge within six years is not retroactive as applied to cases where the first proceedings were had prior to its enactment, but merely adds a new condition of discharge in cases instituted after the amendment.[1] A discharge granted to a bankrupt in partnership proceedings instituted by himself is granted in voluntary proceedings, and prevents his obtaining a discharge within six years upon an individual voluntary petition.[2] A court undoubtedly has power to refuse a discharge, the entire proceeding being a palpable fraud upon the creditors.[3]

Commission of an offense.[4]—A false oath, to be available as a bar to a discharge, must have been knowingly and fraudulently false.[5] Omission of property from his schedules is sufficient to warrant the refusal of a discharge on the ground of his making a false oath,[6] and the bankrupt's right to a discharge is not restored by listing the property concealed after the making of the false oath is discovered.[7]

Destruction of or failure to keep books of account.[8]—Destruction of books of account prior to the contracting of indebtedness does not warrant the refusal of a discharge.[9] Prior to the amendatory act of 1903 it had to be satisfactorily shown that the failure to keep books was with fraudulent intent to thereby conceal his financial condition, and in contemplation of bankruptcy.[10] Failure to keep a complete set of books will not of itself bar a discharge.[11]

93, 94. In re Bimberg, 121 F. 942.

95. Creditor who had opportunities to examine bankrupt, appeared in opposition to discharge, and was given time to file specifications of objection, but failed to do so, and permitted the discharge to be granted without further objection, is guilty of undue laches. In re Upson, 124 F. 980.

96. In re Toothaker Bros., 128 F. 187.

97. See 1 Curr. L. 336.

98. In re Scott, 126 F. 981.

99. In re Bybee, 124 F. 1011.

1. Act 1898, § 14b, as amended by Act 1903, c. 487, § 4. In re Carleton, 131 F. 146.

2. In re Carleton, 131 F. 146.

3. That creditors opposing the discharge discontinue their opposition, and the referee in a supplemental report refuses a certificate of conformity, are sufficient to create a presumption or suspicion that some act has been done by or on behalf of the bankrupt to secure the discontinuance of the opposition, justifying a refusal of the bankrupt's discharge pending a further report by the referee. In re Sanborn, 131 F. 397.

4. See 1 Curr. L. 336.

5. Kentucky Nat. Bank v. Carley [C. C. A.] 127 F. 686; In re Breiner, 129 F. 155.

6. In re Garley [C. C. A.] 127 F. 538; In re Toothaker Bros., 128 F. 187.

Effect of omission of creditors, see 1 Curr. L. 336, n. 61.

7. In re Breiner, 129 F. 155.

8. See 1 Curr. L. 336.

9. Bankrupt inherited $155,000 from his father and lost the same in gambling and speculation, in the latter part of the year 1901 he destroyed his checkbook and passbook; having no account in the bank. Of the $9,304.54 total liabilities over $7,600 was for money borrowed, and of this only one item $11 seems to have been borrowed in 1901, the rest in 1902. Held, destruction of books not with fraudulent intent to conceal true financial condition, and not in contemplation of bankruptcy. In re Studebaker [C. C. A.] 127 F. 951.

10. Bankrupt kept no complete set of books, but used contracts of sale to aid those

Obtaining property upon false statements.[12]—A bankrupt obtaining property on credit upon a materially false statement in writing cannot be discharged,[13] such statement having been made for the purpose of obtaining such property.[14]

Concealment or transfer of property.[15]—The right to a discharge is forfeited if the bankrupt knowingly conceals his property.[16] In order to bar a discharge, a transfer of property to hinder, delay, or defraud his creditors need not be knowingly and fraudulently made,[17] though it must have been made within four months prior to the filing of the petition in bankruptcy.[18] His right to a discharge is not restored by listing the property concealed after the attempt to conceal the same has been discovered.[19] A bankrupt who does not surrender his estate to the trustee is not entitled to a discharge, even though he may have scheduled it and otherwise complied with the statute.[20] Where he, as beneficiary of a trust fund, is entitled to the interest and income thereof, he must assign his interest in the income and interest to his trustee in bankruptcy,[21] but where his right to the principal rests in the option of the trustee this right need not be so assigned.[22] In order to prevent a discharge on the ground of concealment of property it must appear that the property still belongs to the bankrupt estate.[23] Failure to schedule a pending claim for alimony,[24] or refusal to convey property claimed as an exemption, do not constitute a concealment of property preventing a discharge.[25]

he kept, no fraud being shown, held, no ground for refusing a discharge. In re Chamberlain, 125 F. 629; In re Allendorf, 129 F. 981. Failure to enter certain loans on the books induced by the fear that if a certain creditor knew that he was borrowing money he might "close him (the bankrupt) up," and that, as business was improving, he fully thought that he would be able to pay, does not justify a presumption that such failure to keep proper books was in contemplation of bankruptcy. Van Ingen v. Schophofen [C. C. A.] 129 F. 352. One who three years before bankruptcy inherited $150,000, which he testified he had lost in gambling, who at the time of the application for his discharge received a salary of $3,600, lived on a liberal scale, paying $2,000 a year for rent of apartment, and who during the year before the adjudication destroyed his bank book and check book, which action was never explained, held, that the inference was justified that the bankrupt destroyed such books with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy. In re Studebaker, 124 F. 945.

11. In re Allendorf, 129 F. 981.

12. See 1 Curr. L. 336.

13. Act of 1898, § 14b, as amended by the act of 1903. So held in a case where the statement was made more than four months prior to the date of the amendatory act, and about six months prior to the filing of the petition in bankruptcy. In re Scott, 126 F. 981. Section 14, subd. b., cl. 3, deals solely with a condition precedent to the discharge of bankrupts in future cases, it does not undertake to provide for the recovery of any property, or to set aside or otherwise affect any transaction. Id. A bankrupt obtaining property upon a written statement to a wholesale house, for the purpose of getting credit, in which was listed an asset valued at $1,400 which she did not possess, is not entitled to a discharge. In re Goodhile, 130 F. 732.

14. Statement made, property obtained and paid for, 8 months later other property bought on credit, held did not defeat discharge. In re Allendorf, 129 F. 981.

15. See 1 Curr. L. 336.

16. Knowingly concealed an interest in the estate of his grandfather. In re Breiner, 129 F. 155. In the absence of a clear misstatement by the bankrupt with regard to the ownership of property upon which he resided, the title to which stood in the name of his father, and to which the bankrupt was the prospective heir, there is no concealment of assets or a false oath so as to bar a discharge. In re Brumbaugh, 128 F. 971. The fact that a merchant's stock did not amount to the balance left after deducting the amount of the sales from the amount purchased is not sufficient of itself to bar a discharge on the ground of concealed property, it being shown that the bankrupt's methods of business were careless, and that he kept no complete set of books. In re Allendorf, 129 F. 981.

17. In re Gift, 130 F. 230. Where prior to the amendment (Act 1903, § 4) of Act 1898, § 14, subd. b., a bankrupt transferred property by a deed absolute on its face but without consideration, and not limited by any agreement retaining an interest in the grantor held there was as to such property no concealment of property by the bankrupt from the trustee. In re Dauchy, 122 F. 688.

18. In re Brumbaugh, 128 F. 97.

19. In re Breiner, 129 F. 155.

20, 21, 22. In re Fleishman, 120 F. 960.

23. Where it was alleged that property was fraudulently conveyed more than 2 years prior to bankruptcy, in order to constitute a fraudulent concealment, held, it must be shown that a secret lien exists in favor of the grantor. In re Dauchy [C. C. A.] 130 F. 532.

24. In re Le Claire, 124 F. 654.

25. Property awarded as alimony subsequent to bankruptcy claimed as a homestead. In re Le Claire, 124 F. 654. See 1 Curr. L. 336, n. 68.

(§ 22) *C. Liabilities released.*[26]—A state court is bound to take notice of a discharge in bankruptcy when properly pleaded as a defense.[27] A person seeking to avail himself of a discharge in bankruptcy as a defense must plead the discharge,[28] must show in which one of the United States district courts the petition was filed,[29] and allege facts showing that the court in which the proceedings were taken had jurisdiction of the parties or subject-matter,[30] though this has been held unnecessary,[31] but he must show that the debts sued on were scheduled in time for proof and allowance,[32] and that he received his certificate,[33] failing in any of these regards the answer is amendable.[34] He is not required to show that the claims sued on were provable,[35] nor that the debt is not within any of the classes excepted from the operation of the bankruptcy law,[36] though there is conflict on this latter point.[37] The state courts have jurisdiction to determine the effect of a discharge.[38]

The discharge of a bankrupt is but a personal release,[39] it does not release the property of the debtor from a valid lien attaching thereto, such lien not being expressly annulled by the provisions of the bankruptcy act.[40] Nonprovable debts are not released.[41] State acts allowing discharged bankrupts to obtain a cancellation of judgments against themselves are not generally intended to enlarge the scope of the Federal bankruptcy act,[42] and generally entitle the bankrupt to such cancellation as a matter of right.[43]

Debts created by fraud, embezzlement, or misappropriation in whatever capacity or relation the bankrupt was acting, are not released by the bankrupt's discharge,[44] the words "while acting as an officer or in any fiduciary capacity," as used in section 17, subd. 4, apply only to a defalcation.[45] "Debts created in any fiduciary

26. See 1 Curr. L. 337.

27. Wood v. Carr, 24 Ky. L. R. 2144, 73 S. W. 762. The petition of an intervenor in attachment claiming the property under a conveyance from the debtor, and alleging that since the judgment in the lower court the debtor has been declared a bankrupt and discharged from bankruptcy, and that plaintiff has proved his claim and participated in the distribution of the estate must allege the date of the filing of the petition in bankruptcy. House v. Johnson [Colo. App.] 76 P. 743.

28. Action on an account. Bailey v. Kraus, 39 Misc. 845, 81 N. Y. S. 492; Fowler v. Michael [Tex. Civ. App.] 81 S. W. 321.

29. Bailey v. Kraus, 39 Misc. 845, 81 N. Y. S. 492.

30. Otherwise answer is insufficient to admit proof. Bailey v. Kraus, 39 Misc. 845, 81 N. Y. S. 492; Fowler v. Michael [Tex. Civ. App.] 81 S. W. 321.

31. Bailey v. Gleason [Vt.] 56 A. 537.

32. Since there is no discharge as to a creditor not connected with the proceedings by the schedule. Bailey v. Gleason [Vt.] 56 A. 537.

33. Fowler v. Michael [Tex. Civ. App.] 81 S. W. 321.

34. Bailey v. Kraus, 39 Misc. 845, 81 N. Y. S. 492.

35, 36. Bailey v. Gleason [Vt.] 56 A. 537.

37. Fowler v. Michael [Tex. Civ. App.] 81 S. W. 321.

38. The Colorado court of appeals has jurisdiction to determine the effect of a discharge in bankruptcy pending an appeal or writ of error set up by a supplemental petition. Boyd v. Agricultural Ins. Co. [Colo. App.] 76 P. 986.

39. Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564.

40. Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564. See 1 Curr. L. 337, n. 83-92.

41. Contingent liability of the principal on a bond given to indemnify a constable against such damage as might result from levying an execution. Leader v. Mattingly [Ala.] 37 So. 270.

42. New York Code Civ. Proc. § 1268, does not render void a lien acquired in good faith more than four months prior to the commencement of the bankruptcy proceedings. Pickert v. Eaton, 81 App. Div. 423, 81 N. Y. S. 50.

43. Action on contract, defendant after issue joined discharged from bankruptcy, then obtained leave to set up such discharge in his answer on certain conditions but declined to avail himself of the privilege, held entitled to cancellation of judgment. Hussey v. Judson, 87 N. Y. S. 499.

44. In re Butts, 120 F. 966; Hyde & Sons v. Lesser, 87 N. Y. S. 878. Fraud. Crawford v. Burke, 201 Ill. 581, 66 N. E. 833. See 1 Curr. L. 337, n. 93; Id. 338, n. 8.

45. In re Butts, 120 F. 966; Hyde & Sons v. Lesser, 87 N. Y. S. 878; Crawford v. Burke, 201 Ill. 581, 66 N. E. 833. A complaint alleging that defendant did "wrongfully and fraudulently embezzle and misappropriate the plaintiff's money" the legal import of these words being that he became possessed of the money in a fiduciary capacity, his answer setting up a discharge in bankruptcy is demurrable. Watertown Carriage Co. v. Hall, 176 N. Y. 313, 68 N. E. 629. The court holds that under the circumstances of the case, it is unnecessary to decide the proposition stated in the text. Id.

Contra, by inference it would seem as though Field v. Howry [Mich.] 94 N. W. 213, took the opposite view.

capacity" include only technical trusts, and not trusts implied by law from contracts of agency,[46] or bailment.[47] Conditions as to settlement do not convert a contract of sale into one creating a trust and establishing a fiduciary relation between the parties,[48] nor render the debt from the bankrupt on account of goods sold and not paid for one created by fraud, embezzlement, misappropriation, or defalcation, while acting in a fiduciary capacity,[49] so as to prevent its release by a discharge in bankruptcy. Both a trustee for creditors[50] and a receiver appointed by the court[51] hold the funds in a fiduciary capacity. The relation between a broker and his patrons is not such a fiduciary one.[52] Obligations incurred by one selling goods on commission and retaining the proceeds constitute debts created while acting in a fiduciary relation within the meaning of the bankruptcy act.[53] Failure by a debtor to turn over wages collected by him in pursuance to an assignment of his future earnings is a defalcation while acting in a fiduciary capacity.[54] Since the amendment of 1903 a bankrupt is not released by his discharge from claims based on fraud though not reduced to judgment.[55]

A discharge in bankruptcy does not release the debtor from judgments obtained in actions for wilful and malicious injuries to the person or property of another.[56] Judgments for malicious prosecution,[57] slander,[58] or criminal conversation,[59] are not released. Judgments in a suit of trespass to try title,[60] in an action of trover and conversion,[61] or for breach of promise to marry,[62] are released by the discharge of the judgment debtor. A final money judgment being obtained upon an order requiring a putative father to support his child, the debt evidenced thereby is not released by a discharge of the judgment debtor,[63] nor is an order upon a father to support his child of tender years,[64] but the obligation to reimburse a

46. Agent owing his principal money is not a fiduciary debtor. Boyd v. Agricultural Ins. Co. [Colo. App.] 76 P. 986. See 1 Curr. L. 338, n. 99.

47. Boyd v. Agricultural Ins. Co. [Colo. App.] 76 P. 986.

48. Conditions on back of contract provided that buyer should hold in trust and separate for the settlement of the seller's account all goods unsold and everything received for goods sold. In re Butts, 120 F. 966.

49. In re Butts, 120 F. 966.

50. Loaning the money to a firm of which he was a member is such misappropriation, though he expected the loan would be repaid. Field v. Howry [Mich.] 94 N. W. 213.

51. The successor in office of the receiver did not by proving the claim for misappropriation of the debtor's funds against the receiver's estate in bankruptcy elect to treat it as an ordinary debt, rather than as a fiduciary obligation, and thereby waive his right to question the discharge in bankruptcy. Field v. Howry [Mich.] 94 N. W. 213.

52. A bankrupt broker is released by his discharge from liability upon a debt incurred by his failure to return to a customer securities deposited with him as collateral against loss. Crosby v. Miller, Vaughn & Co., 25 R. I. 172, 55 A. 328.

53. Laundry agent in country town solicited and sent laundry to laundry in city, on the latter's returning it the agent would deliver the packages, collecting therefor and sending the total collected, less his commission, to his principal, held, discharge in bankruptcy will not avail him as against his principal's claim for money not turned over. Shipley v. Platts [S. D.] 97 N. W. 1.

54. Mott Iron Works v. Toumey, 87 N. Y. S. 1020.

55. Construing together clauses 2 and 4 of § 17, Act 1898. In re Wollock, 120 F. 516.

Prior to the amendment the contrary rule prevailed. Smith & W. Co. v. Lambert, 69 N. J. Law, 487, 55 A. 88; Hargadine-McKittrick Dry Goods Co. v. Hudson [C. C. A.] 122 F. 232; Quaker City Watch Co. v. Lamoreaux, 21 Pa. Super. Ct. 493. "Fraud" as used in § 17, cl. 2, prior to the amendment, meant positive fraud, or fraud in fact, involving moral turpitude or intentional wrong. Crosby v. Miller, Vaughn & Co., 25 R. I. 172, 55 A. 328.

56. Stefanini v. Sroka, 88 N. Y. S. 167. Malice as here used means a wrongful act done intentionally without just cause or excuse. Tinker v. Colwell, 193 U. S. 473, 24 S. Ct. 505.

57. Mason v. Perkins [Mo.] 79 S. W. 683.

58. Sanderson v. Hunt, 25 Ky. L. R. 626, 76 S. W. 179.

59. A judgment for damages arising from the criminal conversation of the bankrupt with the judgment creditor's wife is not released. Tinker v. Colwell, 193 U. S. 473, 24 S. Ct. 505.

60. Imhoff v. Whittle [Tex. Civ. App.] 81 S. W. 814.

61. Is not an action for fraud within the meaning of § 17, cl. 2. Crosby v. Miller, Vaughn & Co., 25 R. I. 172, 55 A. 328. See 1 Curr. L. 338, n. 13, for contra case.

62. In re Brumbaugh, 128 F. 971.

63. Whether the same rule would apply since the amendment to § 17, subd. 2, by the act of 1903, quaere. McKittrick v. Cahoon, 89 Minn. 383, 95 N. W. 223.

64. Rush v. Flood, 105 Ill. App. 182. An

stranger for past support of the child is released by such a discharge.[65] The stay of a suit, as to the personal liability of the bankrupt, in a state court, ordered pending discharge, will not be continued after the discharge has been granted, but the temporary stay should be vacated without prejudice to the rights of the bankrupt under the discharge.[66]

A discharge in bankruptcy does not terminate a lease nor change the legal relation of landlord and tenant unless the landlord re-enters or the trustee assumes the lease.[67] The maker of a note is released from liability thereon by a discharge in bankruptcy.[68] As to whether or not a debt can escape the operation of the discharge by being secured by an assignment of future earnings there is a conflict.[69] The lien of a judgment rendered more than four months prior to the filing of the petition is not released by a discharge of the judgment debtor in bankruptcy, when the holder of such judgment does not prove his debt in the bankruptcy proceedings.[70] A discharge in bankruptcy does not release a lien upon exempt property, though obtained within four months prior to the filing of the petition in bankruptcy.[71]

An unscheduled provable debt is not released by the discharge unless the creditor,[72] or his agent,[73] had notice or actual knowledge of the bankruptcy proceedings, and the burden is upon the bankrupt to show that the creditor had such notice or knowledge.[74] An incorrectly described claim is equivalent for this purpose to an unscheduled one.[75] Failure to schedule a claim through ignorance of its existence does not render the discharge a bar thereto.[76] The assignee of a claim of a bankrupt is not bound by a settlement, of which he has no knowledge, in the bankruptcy court.[77] A provable claim not being proved, the creditor hav-

obligation of a bankrupt to his divorced wife for the support of their minor children is not released. Dunbar v. Dunbar, 190 U. S. 340, 23 S. Ct. 757, 47 Law. Ed. 1084.

Alimony: See 1 Curr. L. 338, n. 9.

65. Obligation to recompense divorced wife for expenditures made after remarrying. Rush v. Flood, 105 Ill. App. 182.

66. In re Flanders, 121 F. 936.

67. Witthaus v. Zimmerman, 91 App. Div. 202, 86 N. Y. S. 315.

68. Blackwell v. Farmers' & Merchants' Nat. Bank [Tex. Civ. App.] 76 S. W. 454.

69. That they cannot. In re West, 128 F. 205.

That such a debt is not superseded. Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564.

70. Mortgage. Camp v. Young, 119 Ga. 981, 47 S. E. 560.

Where but for a fraudulent transfer a judgment would have been a lien upon the real property of the debtor the discharge of the judgment debtor in bankruptcy does not affect the lien of the judgment as against such real property. Hillyer v. Le Roy, 84 App. Div. 129, 82 N. Y. S. 80.

71. Does not discharge the lien of a judgment obtained within four months prior to the adjudication of bankruptcy, upon a note waiving the homestead exemption allowed by the laws of Georgia upon lands set aside by the bankrupt court as exempt. McKenney v. Chency, 118 Ga. 387, 45 S. E. 433.

72. Reynolds v. Whittemore [Me.] 58 A. 415; Columbia Bank v. Birkett, 174 N. Y. 112, 66 N. E. 652. Constructive notice is insufficient. Santa Rosa Bank v. White, 139 Cal. 703, 73 P. 577. Stockholder's liability for a corporate debt. Wineman v. Fisher [Mich.] 98 N. Y. 404. A petition by a discharged bankrupt to restrain the collection of an unscheduled provable debt alleging that the creditor had notice or actual knowledge of the bankruptcy proceedings is sufficient. Jones v. Walter, 24 Ky. L. R. 2459, 74 S. W. 249; Karter v. Fields [Ala.] 37 So. 204.

73. Atkinson v. Elmore [Mo. App.] 77 S. W. 492. Knowledge of bankruptcy proceedings acquired by the cashier of a bank which is a creditor of the bankrupt will be imputed to the creditors of an insolvent corporation of which the bankrupt is a stockholder, the cashier, having no personal interest, being appointed the receiver to enforce and collect the amount of the liability of the stockholders. Dight v. Chapman [Or.] 75 P. 585.

74. Wineman v. Fisher [Mich.] 98 N. W. 404.

75. The scheduling of a bond and mortgage by a bankrupt as having been given by his wife alone excepts the claim from the discharge, where the bond and mortgage were given by the bankrupt and his wife. Fifth Ave. Bldg. & L. Ass'n v. Goldberg, 22 Pa. Super. Ct. 197. A voluntary bankrupt inserting an erroneous street number as the residence of a judgment creditor, when he did not know such residence, his motion to vacate the judgment and an execution issued thereon will be denied, where the creditor had no notice of the bankruptcy proceedings until such motion. Sutherland v. Lasher, 41 Misc. 249, 84 N. Y. S. 56.

76. Santa Rosa Bank v. White, 139 Cal. 703, 73 P. 577.

77. Bankrupt, a building contractor, assigned a claim against a property owner to pay the assignee for services, materials, etc.,

ing knowledge of the bankruptcy proceedings is absolutely barred by the discharge,[78] and though the creditor holds a waiver of exemption, it cannot be collected from the property set aside to the bankrupt as exempt.[79] In order to entitle a partner, filing a voluntary petition in bankruptcy, to a discharge from firm debts his petition must show the partnership assets and liabilities,[80] and the firm creditors must be notified,[81] but the petition failing in this regard it may be amended.[82]

The discharge of a bankrupt does not affect the liability of a co-debtor,[83] or guarantor.[84]

An unequivocal promise given after bankruptcy to pay a debt barred thereby is valid.[85] The promise to pay a debt discharged in bankruptcy must be clear, distinct, and unequivocal.[86] In most states an agreement to revive a debt discharged in bankruptcy, in order to be valid, must be in writing,[87] and where such promise is given the creditor may sue on the debt and need not sue on the new promise.[88] The discharge being proved, the burden is upon the plaintiff to show that the new promise was made both after the discharge was granted, and before the suit on the account was brought,[89] though it has been held that such a promise made after adjudication but before the discharge is binding.[90] A conditional promise to pay a debt discharged by bankruptcy must be accepted.[91]

A trustee failing to dispose of property previous to the bankrupt's discharge, the bankrupt's title remains unaffected by the bankruptcy proceedings,[92] and is subject to valid, undischarged liens acquired before the bankruptcy proceedings.[93]

Bankruptcy proceedings do not affect debts owing the bankrupt, except to make the trustee the payee.[94]

(§ 22) *D. Pleading and evidence.*[95]—Two or more creditors seeing fit to adopt the same specifications of objection may do so by signing the same paper.[96] Specifications of objection are amendable in matters of substance, after the time within which objections are required to be filed, only where the amendment is simply an

held, assignee could recover though property owner had settled with contractor's trustee in bankruptcy, assignee having no notice or knowledge of such proceedings. Rudner v. Bath [Mich.] 97 N. W. 685.

78, 79. Claster v. Soble, 22 Pa. Super. Ct. 631.

80. Schedule disclosed individual and partnership debts, held not entitled to a discharge from firm debts, though the firm had been dissolved and was without assets, and the firm debts were barred by limitation. In re Morrison, 127 F. 186.

81, 82. In re Morrison, 127 F. 186.

83. Witthaus v. Zimmerman, 91 App. Div. 202, 86 N. Y. S. 315. Surety. Boyd v. Agricultural Ins. Co. [Colo. App.] 76 P. 986; Leader v. Mattingly [Ala.] 37 So. 270. See 1 Curr. L. 338, n. 15.

84. Guarantor of the payment of the rent reserved in a lease was not discharged from liability on the guaranty by the tenant's discharge in bankruptcy before the end of the term. Witthaus v. Zimmerman, 91 App. Div. 202, 86 N. Y. S. 315.

85. In re Sweetser, 128 F. 165; Blackwell v. Farmers' & Merchants' Nat. Bank [Tex. Civ. App.] 76 S. W. 454.

86. Where two persons testified that bankrupt promised to pay the debt, which bankrupt denied, and another that the debtor had told him he intended to pay, and had promised to do so, held to show an unconditional promise to pay the debt. Brooks v. Paine, 25 Ky. L. R. 1125, 77 S. W. 190.

87. Laws 1897, p. 507, c. 417. Bair v. Hilbert, 84 App. Div. 621, 82 N. Y. S. 1010. Indorsed on bill for goods sold: "This account is O. K. * * * I will pay it. Owen Treanor" held sufficient. Gruenberg v. Treanor, 40 Misc. 232, 81 N. Y. S. 675.

88. New promise was not pleaded. Gruenberg v. Treanor, 40 Misc. 232, 81 N. Y. S. 675.

89. Thornton v. Nichols & Lemon, 119 Ga. 50, 45 S. E. 785.

90. Gruenberg v. Treanor, 40 Misc. 232, 81 N. Y. S. 675.

91. Debtor offered to pay the original debt in installments, creditor refused to accept payment in that manner, held the debt was not revived. Court says that if creditor had not answered to the proposition, an acceptance would probably be implied. International Harvester Co. v. Lyman [Minn.] 96 N. W. 87.

92. Rochester Lumber Co. v. Locke [N. H.] 54 A. 705.

93. Attachment lien and mortgage. Rochester Lumber Co. v. Locke [N. H.] 54 A. 705.

94. Kudner v. Bath [Mich.] 97 N. W. 685.

95. See 1 Curr. L. 338.

96. There is nothing joint about the paper. it is simply a device to avoid the multiplication of copies. In re Milgraum & Ost, 129 F. 827. See 1 Curr. L. 335, for this subject.

amplification of the charges which are stated in the original.[97] Leave to amend can only be granted by the judge,[98] and the privilege may be lost by laches.[99] There seems to be a conflict as to whether or not the specification of objection needs to be verified,[1] but in courts holding it necessary, the right to object to the specifications for lack thereof may be lost by allowing the cause to proceed,[2] and in those courts the verification may be made by the creditor's attorney,[3] and the verification being sworn to "to the best of the affiant's knowledge, information, and belief," it is sufficient.[4] The verification being held necessary it may be supplied by amendment.[5]

A specification of objection on the ground that the bankrupt failed to keep books knowingly and fraudulently concealing property should state the nature of the ground relied on,[6] a description of the property concealed from the trustee,[7] the names of the parties holding the title,[8] the time of the transfer,[9] and any other facts necessary to identify the transaction,[10] and that the bankrupt "knowingly and fraudulently" disposed of or concealed the property.[11] Specifications of objection on the ground of the bankrupt's making of a false oath must set out the facts relied on,[12] and must allege that such oath was "knowingly and fraudulently made."[13] A specification of an objection on the ground that the bankrupt failed to keep books of account, and thus fraudulently concealed his true financial condition, is sufficient if alleged in the language of the act,[14] though the contrary has been held,[15] such courts holding that a specification of objection, for any cause, in the language of

97. Supplying the details of alleged fraudulent transfers. In re Gift, 130 F. 230. See 1 Curr. L. 335, n. 44.

98. Not by a referee. In re Peck, 120 F. 972.

99. Leave to amend objections to a bankrupt's discharge, by incorporating therein objections urged by another creditor, 19 months after the objections were filed, and 15 months after its case was closed, is properly refused on the ground of laches. Kentucky Nat. Bank v. Carley [C. C. A.] 121 F. 822.

1. That it need not: Is not a pleading within the meaning of Act 1898, § 18c. In re Jamieson, 120 F. 697.

Contra, see In re Peck, 120 F. 972; In re Milgraum, 129 F. 827; In re Gift, 130 F. 230.

2. After submission of the case to the court upon evidence which fully supports and verifies certain of the specifications, an objection to the specifications for lack of verification is too late, and cannot be considered as a sufficient ground for dismissing the specifications and granting the discharge. In re Robinson, 123 F. 844.

3. In re Peck, 120 F. 972. Specifications of objection to the bankrupt's discharge should not ordinarily be signed and sworn to by attorneys in fact or in law, though they may be under exceptional circumstances. In re Milgraum, 129 F. 827.

4. In re Peck, 120 F. 972; In re Milgraum, 129 F. 827.

5. In re Gift, 130 F. 230.

6. An objection to the effect "that the bankrupt in consideration of bankruptcy, had conveyed his real property by written assignment to strangers, for an inadequate consideration, for the purpose of defrauding his creditors; that said pretended conveyance is merely in trust, to be reconveyed as soon as his petition for discharge is granted" is insufficient. In re Parish, 122 F. 553. A specification of objection that within four months of filing the petition the bankrupts transferred, removed, destroyed, or concealed their property with intent to hinder, delay, or defraud creditors, in that at certain stated times they did transfer to and conceal in certain stated places their property with such intent, is sufficient. In re Milgraum, 129 F. 827.

7. In re Parish, 122 F. 553. Specification of objection that defendant transferred "some of his property" is too vague; must specify what property. Godshalk Co. v. Sterling [C. C. A.] 129 F. 580.

8, 9, 10. In re Parish, 122 F. 553.

11. In re Patterson, 121 F. 921.

12. In re Ginsburg, 130 F. 627. Specifications of objection that the bankrupt made a materially false statement must set forth such statement. Godshalk Co. v. Sterling [C. C. A.] 129 F. 580.

13. In re Patterson, 121 F. 921.

14. In re Ginsburg, 130 F. 627; In re Patterson, 121 F. 921. That the bankrupt with intent to conceal his financial condition failed to keep books of account or records from which such condition might be ascertained is sufficient. Godshalk Co. v. Sterling [C. C. A.] 129 F. 580. That the bankrupt destroyed canceled checks and the stubs thereof, from which his financial condition might have been ascertained, is sufficient. Need not set forth the dates of the checks and other particulars. Id.

15. In re Peck, 120 F. 972. A specification of objection "that said bankrupts have, with intent to conceal their financial condition, destroyed, concealed, or failed to keep books of account, or records from which such condition might be ascertained" is insufficient. In re Milgraum, 129 F. 827.

the statute, is wholly insufficient, no evidence being receivable thereunder,[16] nor do they afford any basis for amendment.[17]

The proceeding to obtain a discharge is not a criminal one in any sense,[18] and hence a fair preponderance of satisfactory evidence is sufficient.[19]

§ 23. *Reopening, grounds and effect.*[20]—The discharge is not conclusive evidence that the bankrupt has accounted for all his property,[21] and a court of bankruptcy has power, in its discretion, to reopen the estate of a bankrupt to permit a trustee to maintain an action for concealed assets.[22] A referee has jurisdiction of a petition to reopen an estate.[23] No time is fixed within which the discharge of a bankrupt may be reopened,[24] laches will authorize the court to refuse to reopen the estate,[25] hence the rule is that a reasonable time, under all the circumstances of each case, should be allowed.[26]

A former trustee cannot seek to have the case reopened,[27] and as to whether or not creditors who have not proved their debts can file such a petition there is a conflict.[28] The right to have the case reopened may be lost by allowing the hearing of objections to a bankrupt's discharge to proceed without offering evidence therein.[29] The appointment of a trustee by the court upon the reopening of a bankrupt estate, without prior action on the part of the creditors, will not be considered void in a collateral action.[30]

Where a bankrupt estate is reopened, the effect, so far as the bankrupt and his creditors are concerned, is to place the parties in the same relation before the court as they were before the estate was closed and the bankrupt discharged.[31] A creditor who failed to file or prove his claim within a year after adjudication, upon obtaining a vacation of the discharge, is entitled to collect his claim from any property acquired by the bankrupt after bankruptcy.[32]

BASTARDS.

§ 1. Legal Elements and Evidences of Illegitimacy (496).
§ 2. Rights and Duties of and In Respect to Bastards (497).
§ 3. Procedure to Ascertain Paternity and Compel Support (498).
§ 4. Legitimation, Recognition, Adoption (499).

§ 1. *Legal elements and evidences of illegitimacy.*[33]—The civil law denomi-

16, 17. In re Peck, 120 F. 972.
18, 19. In re Dauchy, 122 F. 688.
20. See 1 Curr. L. 336, n. 58-60.
21. Rand v. Iowa Cent. R. Co., 89 N. Y. S. 212.
22. In re Goldman [C. C. A.] 129 F. 212. A bankrupt inherited from his father the income of a trust fund valued at $7,600, within one week he transferred his interest therein, receiving a loan of $1,000, within a month of his father's death he filed a voluntary petition and was adjudged a bankrupt, three months later he was discharged, two months and a half later the transferee of the income of the trust fund transferred it to the bankrupt's wife, who paid him $300, the balance due on the loan. Held such facts warranted setting aside the discharge on the ground that failure to disclose such trust fund in his schedules amounted to a fraudulent concealment of assets. In re Paine, 127 F. 246.
23. Bilafsky v. Abraham, 183 Mass. 401, 67 N. E. 318.
24. A petition to reopen is not a "suit" within the meaning of § 11d, of the act of 1898, providing that "suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed. In re Paine, 127 F. 246.
25, 26, 27. In re Paine, 127 F. 246.
28. That they cannot. In re Paine, 127 F. 246. Proof of the debt of a creditor being tendered and filed with the clerk of the bankruptcy court, after the case was closed in the referee's office, but prior to the discharge, and was never formally allowed, there being no assets, held, such proof was prima facie sufficient to entitle the creditor to apply to have the estate reopened on the ground that the bankrupt had fraudulently concealed assets applicable to creditors. Id.
That they can. In re Bimberg, 121 F. 942.
29. Where the referee proceeds with the taking of evidence on objections to a bankrupt's discharge, notwithstanding the objection of a creditor, the latter having had full opportunity to offer any evidence desired cannot subsequently be heard on a petition to reopen the case for the purpose of offering additional evidence. Kentucky Nat. Bank v. Carley [C. C. A.] 127 F. 686.
30. Fowler v. Jenks, 90 Minn. 74, 95 N. W. 887.
31. Title to concealed and nonscheduled

nates as "natural children" illegitimate children who have been acknowledged by their father; those not acknowledged or whose parents were incapable of contracting marriage at the time of the conception, are bastards.[34] The presumption of legitimacy of a child born during matrimonial cohabitation is sometimes held to be conclusive,[35] except where the husband is shown to be impotent,[36] but in some states, proof of nonaccess is admitted.[37] The legitimacy of children is presumed, and one claiming the contrary has the burden of proof,[38] which is not met by slight evidence.[39] The issue of Indians who cohabit as husband and wife according to the custom of Indian life is deemed legitimate.[40]

§ 2. *Rights and duties of and in respect to bastards.*[41]—At common law, a bastard or his issue cannot inherit from his mother's collateral kindred,[42] and they have no greater capacity to take under dispositions causa mortis.[43] The mother's legal duty is only to support the child until he becomes self supporting, and in case she is able to do so.[44] An agreement by the mother of an illegitimate child to care for and support him until a certain date is sufficient consideration to support a promise by the putative father to settle a sum of money on him on that date.[45] A legitimated bastard has all the rights of a child born in lawful wedlock,[46] but this does not affect his relation to his mother.[47] The illegitimate sister

property does not revest in the bankrupt after his discharge so as to deprive the court of jurisdiction upon the reopening of the estate. Fowler v. Jenks, 90 Minn. 74, 95 N. W. 887.

32. In re Bimberg, 121 F. 942.

33. See 1 Curr. L. 339.

34. Mother a colored person. Succession of Vance, 110 La. 760, 34 So. 767.

35. Town of Canaan v. Avery [N. H.] 58 A. 509.

36. Bunel v. O'Day, 125 F. 303.

37. Kennington v. Catoe [S. C.] 47 S. E. 719; State v. Liles, 134 N. C. 735, 47 S. E. 750.

Note: The rule formerly was that the presumption of legitimacy of a child born in wedlock was conclusive, but the modern decisions make it a question of fact to be determined on evidence of impotence or nonaccess. Woodward v. Blue, 107 N. C. 407, 12 S. E. 453; Shuman v. Shuman, 83 Wis. 250, 53 N. W. 455. If the parents cohabited and the husband was not impotent, neither parent is a competent witness, however, to show illegitimacy (Shuman v. Shuman, 83 Wis. 250, 53 N. W. 455; Inhabitants of Abington v. Duxbury, 105 Mass. 290; Scanlon v. Walshe, 81 Md. 118, 31 A. 498), and statutes making interested parties competent to testify do not change this rule (In re Mills' Estate, 137 Cal. 298, 70 P. 91; Egbert v. Greenwalt, 44 Mich. 245, 6 N. E. 654; Tioga County v. South Creek Tp., 75 Pa. 436).

38. Lewis v. Sizemore, 25 Ky. L. R. 1354, 78 S. W. 122.

39. Child born in 1821, few living witnesses who knew the facts of his birth or parentage. Testimony vague. Lewis v. Sizemore, 25 Ky. L. R. 1354, 78 S. W. 122. Declarations that a child was declarant's daughter, together with the fact that he was never married until several years after the child's birth, warrant an inference of illegitimacy. In re Heaton's Estate, 139 Cal. 237, 73 P. 186. Evidence of legitimacy held sufficient on prosecution of father for incest. People v. Koller, 142 Cal. 621, 76 P. 500. In a bill for partition, the legitimacy of the petitioner was denied and evidence of a marriage certificate claimed to have been her father's, though the name was different, and the acknowledgment by her father and his treatment of her since her birth, held sufficient to establish petitioner's legitimacy. Dailey v. Frey, 206 Pa. 227, 55 A. 962. Evidence held to show that child was born in wedlock, though its parents had previously cohabited illicitly. Tracy v. Frey, 88 N. Y. S. 874. Father died "few days" after the New Year. The child born when the "leaves began to fall." At the trial, it was "four snows" old; held legitimate. Kalyton v. Kalyton [Or.] 74 P. 491. Proof of unchastity of wife after birth of child is not admissible. Kennington v. Catoe [S. C.] 47 S. E. 719.

40. To determine descent of land. Kalyton v. Kalyton [Or.] 74 P. 491. Evidence held to show marriage of an Indian couple according to the custom of their tribe. Id. Evidence held to show that an Indian woman had been divorced from her husband according to the custom of her tribe, before the marriage resulting in the birth of this child. Id.

41. See 1 Curr. L. 339.

42. This is not changed by statute providing that "the heirs of a bastard, in the ascending and collateral lines, shall be the mother and her heirs, and the bastards and their heirs shall be heirs of the mother." Reynolds v. Hitchcock [N. H.] 56 A. 745.

43. Succession of Vance, 110 La. 760, 34 So. 767.

44, 45. Rosseau v. Rouss, 91 App. Div. 230, 86 N. Y. S. 497.

46. Inherits realty as an heir and receives personalty as next of kin, both lineally and collaterally. Scott v. Wilson, 110 Tenn. 175, 75 S. W. 1091.

47. Property inherited by him from his father descends to his mother and not to heirs at law of his father. Scott v. Wilson, 110 Tenn. 175, 75 S. W. 1091. Under Texas statute, the entire estate of a bastard passes to his mother to the exclusion of his putative father. Ford v. Boone [Tex. Civ. App.] 75 S. W. 353.

of a bastard takes as his heir in the right of their mother to the exclusion of the next of kin of the father.[48] The mother is not "a party interested in the event" of an action brought by the child against the estate of the putative father to enforce a contract.[49] The putative father is entitled to the custody of the child after the mother's death.[50] A bastard child, being entitled to support from its father, may sue under the civil damage act for injury to support.[51]

§ 3. *Procedure to ascertain paternity and compel support.*[52]—At common law, there was no legal obligation on the part of a putative father to support his illegitimate child.[53] Bastardy proceedings to compel a putative father to support the child now generally provided by statute are usually held to be civil proceedings.[54] The proceeding will lie, though the child was born outside the state.[55] A proceeding under the bastardy act is not barred for six years in South Dakota.[56] A complaint in the words of the statute is sufficient.[57]

Evidence.[58]—Intercourse at the time of conception must be shown.[59] Evidence of intercourse with others at about the time of conception will be considered according to its probable effect.[60] The chastity of the mother cannot be questioned.[61] The child must be brought into court.[62] By statute in several states, declarations of paternity by the mother are admissible if she remains constant therein,[63] and testimony of the mother to paternity is admissible to show constancy in accusations made in travail.[64] Declarations of paternity by the mother to her physician are not privileged communications.[65] Offer by defendant to have an abortion per-

48. In re Lutz's Estate, 43 Misc. 230, 88 N. Y. S. 556.

49. Rosseau v. Ronss, 91 App. Div. 230, 86 N. Y. S. 497.

50. Aycock v. Hampton [Miss.] 36 So. 245.

Note: The mother of an illegitimate child is prima facie entitled to its custody. Wright v. Bennett, 7 Ill. 587; Copeland v. State, 60 Ind. 394; State v. Stigall, 22 N. J. Law, 286; Marshall v. Reams, 32 Fla. 499, 14 So. 95. The putative father is ordinarily entitled to the custody as against third persons. Pote's Appeal, 106 Pa. 574. But the claims of both will be disregarded by the courts in establishing custody if the best interests of the child demand it. Sheers v. Stein, 75 Wis. 44, 43 N. W. 728; State v. Noble, 70 Iowa, 174, 30 N. W. 396; Marshall v. Reams, 32 Fla. 499, 14 So. 96.

51. Goulding v. Phillips [Iowa] 100 N. W. 516.

52. See 1 Curr. L. 339.

53. Bastard being nullius fillus. State v. Tieman, 32 Wash. 294, 73 P. 375.

54. Proceedings under a criminal statute reversed. State v. Tieman, 32 Wash. 294, 73 P. 375; State v. Liles, 134 N. C. 735, 47 S. E. 750.

55. State v. Patterson [S. D.] 100 N. W. 162.

56. It is "an action on a liability created by statute other than a penalty or forfeiture." State v. Patterson [S. D.] 100 N. W. 162.

57. A complaint by a person that she was unmarried, that she had been delivered of a child, and that a certain person was its father, held sufficient to sustain a verdict of guilty. Campion v. Lattimer [Neb.] 97 N. W. 290. Habeas corpus proceeding in which 97 N. W. 290 is affirmed. In re Campion [Neb.] 97 N. W. 443.

58. See 1 Curr. L. 340.

59. A complaint alleged that the child was begotten from June 24 to July 9. Evidence and date of birth showed that child must have been begotten in May. The conviction was reversed. People v. Wilson [Mich.] 99 N. W. 6. Evidence of the state showed that a child was begotten in October while prosecutrix was working for the accused. Evidence established the fact that prosecutrix worked for him only from August 25 to September 14. A finding of guilty was reversed. State v. Lowell [Iowa] 99 N. W. 125. Evidence of intercourse in September, and birth of fully developed child the third of June following, held sufficient to establish paternity. Ankeny v. Rawhouser [Neb.] 95 N. W. 1053.

60. Where intercourse with another than accused took place the night following the date of conception, evidence of the precautions to prevent conception was explained to the jury. Evidence held sufficient to establish the paternity. Guthrie v. State [Neb.] 96 N. W. 243. Evidence that prosecutrix was unduly intimate with another some 9 years prior to the conception of the child held inadmissible. Stahl v. State, 67 Kan. 864, 74 P. 238.

61. Testimony that about the time the child was begotten the reputation of the mother for chastity was bad is inadmissible on the question of paternity. People v. Wilson [Mich.] 99 N. W. 6.

62. Error in refusing to require the child to be brought into court is cured by its subsequent exhibition to the jury. Stahl v. State, 67 Kan. 864, 74 P. 238.

63. Evidence that the mother had accused a certain person of being the father of a child "from the first," and that her mother had not heard her accuse any other person, held admissible under statute to show the constancy of the accusation. Burns v. Donoghue [Mass.] 69 N. E. 1060.

64. Admitted over an objection that it was a mere conclusion. Baxter v. Gormley [Mass.] 71 N. E. 575.

ormed is admissible as an admission.[65] Prosecutrix is not an accomplice within he rule requiring corroboration.[67]

Instructions.[68]—Instructions as to the purpose of the statute,[69] and that false ssertions by the mother that the intercourse was forcible, are not necessarily fatal o the prosecution,[70] have been held not prejudicial.

Argument.—It is not error to allow counsel to call attention to the appearance f the child, where defendant introduced a photograph.[71]

Judgment.[72]—The award will not be disturbed unless manifestly excessive.[73] An undertaking given in justice court will not prevent an order after judgment in he circuit court on appeal that defendant be committed till he give security for ompliance with the judgment.[74]

§ 4. *Legitimation, recognition, adoption.*[75]—The law of the father's domicile it the time of the legitimating act will determine the status.[76] A bastard is legitimized by the subsequent marriage of his parents.[77] Statutes providing how a bastard may be legitimized must be literally complied with.[78] The criterion of treatment accorded an illegitimate child received into the family is the treatment usually accorded legitimate children.[79]

BETTING AND GAMING.[80]

§ 1. The Offense and Criminal Prosecutions (500).
A. The Offense (500).
B. Indictment or Information and Trial Procedure (502).
§ 2. Penalties and Seizure of Implements (505).
§ 3. Recovery Back of Money Lost (505).

The validity of wagering contracts is specifically treated elsewhere.[81]

65. People v. Abrahams, 88 N. Y. S. 924.
66. Gatzmeyer v. Peterson [Neb.] 94 N. W. 974.
67. Her interest in the event of the suit only may be considered. Gatzmeyer v. Peterson [Neb.] 94 N. W. 974.
68. Instruction that character of prosecutrix was not material held not misleading, other instructions indicating that her character in respect to chastity, not in respect to veracity, was referred to. Suckow v. State [Wis.] 99 N. W. 440.
69. An instruction that the proceeding is to compel the father to assist in supporting the fruits of his immoral act and indemnify the public against such burden is not objectionable as inviting a conviction. Stahl v. State, 67 Kan. 864, 74 P. 238.
70. A court instructed that it was a common thing for a woman to cling to the story that the connection by which the child was begotten was rape, that the fact that this was untrue did not necessarily show that the accusation that a certain person was the father was untrue. Held no error. Burns v. Donoghue [Mass.] 69 N. E. 1060.
71. State v. Patterson [S. D.] 100 N. W. 162.
72. See 1 Curr. L. 340.
73. Gatzmeyer v. Peterson [Neb.] 94 N. W. 974. Judgment for $2,250.00 is not excessive, the father being worth $9,000.00 to $12,000.00. Stahl v. State, 67 Kan. 864, 74 P. 238.
74. State v. Patterson [S. D.] 100 N. W. 162.
75. See 1 Curr. L. 340.
76. Petitioner and respondent were children of a common father, a slave. The father lived in Massachusetts, where intermarriage and acknowledgment were necessary. The petitioner in Virginia, where acknowledgment was sufficient. Father and mother had ceased to cohabit before the passage of the Virginia act legitimating children born of slave parents. Irving v. Ford, 183 Mass. 448, 67 N. E. 366.
77. A child of a common-law marriage, illegitimate because born while the first wife of his father was alive, is legitimized by the fact that the relation continued after the death of the first wife, and is entitled to a distributive share of his mother's estate with the children of the first marriage. In re Schmidt, 42 Misc. 463, 87 N. Y. S. 428.
78. Under Code providing that the father by publicly acknowledging a child as his own and receiving it into his home, etc., thereby adopts it, a will recognizing a child which remained in possession of testator's brother was not an acknowledgment within the statute. In re De Laveaga's Estate, 142 Cal. 158, 75 P. 790. Nor was a witnessed instrument declaring the one executing it to be the father of a certain child, "living as the foster son of another." Id. Nor the fact that the father paid for his support where the child never lived with him at his home. Id. Mere reference in casual conversation to a child as his is not proof of acknowledgment. Succession of Vance, 110 La. 760, 34 So. 767.
79. The fact that the father has no legitimate child, the treatment of which may be compared, is immaterial. In re Heaton's Estate, 139 Cal. 237, 73 P. 186.
80. See 1 Curr. L. 340.
81. See Gambling Contracts, 2 Curr. L. 129.

§ 1. *The offense and criminal prosecutions. A. The offense.*[82]—Every act of exhibiting a device for the purpose of gaming is an offense,[83] and a single bet or wager may be a violation of a statute against bets and wagers.[84] By statute an accessory before the fact in gaming may be punished as the principal.[85] One who acts as agent for parties out of the state, and who receives a commission on each transaction, is not guilty of buying and selling futures,[86] and receiving money in one state to be wagered by telegraph in another is not carrying on a gambling business in the former state.[87]

Validity of regulations.[88]—Legislation has been held valid which made it illegal to knowingly have in possession papers or property used in policy playing,[89] or to bet upon a horse race,[90] or to engage in pool selling outside of a race track authorized by law,[91] or to lease premises to be used for pool room purposes,[92] or to transmit messages to pool rooms for betting purposes,[93] or to play specified games of chance,[94] or to deal in futures,[95] or to keep a place where the pretended sale of stocks and provisions is indulged in,[96] or to bet upon an election,[97] likewise of legislation providing for the destruction of gaming implements;[98] but the giving of trading stamps is not a lottery which may be prohibited by the legislature.[99] In New York it is illegal to offer property for distribution, the title to which is to be determined by chance or lottery.[1] In the absence of express authority, a town cannot regulate gaming,[2] and a municipal ordinance against the conducting of a "bunco business" and in conflict with the statute upon gambling, is invalid.[3] An

82. See 1 Curr. L. 340.

83. Dalton v. State [Tex. Cr. App.] 74 S. W. 25.

84. Rev. St. 1899, § 4157, declares that words importing plural number shall include single transactions. State v. Villines [Mo. App.] 81 S. W. 212.

85. Rev. St. 1899, § 2364. State v. Edgen [Mo.] 80 S. W. 942.

86. Held, that defendant merely received offers for purchases or sales. Scales v. State [Tex. Cr. App.] 81 S. W. 947.

87. McQuesten v. Steinmetz [N. H.] 58 A. 876.

88. See 1 Curr. L. 340.

89. Such a statute is not class legislation. Pen. Code, § 344A, Laws 1901, p. 431. People v. Adams, 176 N. Y. 351, 68 N. E. 636; People v. Adams, 85 App. Div. 390, 83 N. Y. S. 481; Adams v. New York, 192 U. S. 585, 24 S. Ct. 372.

90. Ex parte Hernan [Tex. Cr. App.] 77 S. W. 225.

91. People v. Shannon, 87 App. Div. 32, 83 N. Y. S. 1061.

92. Ex parte Hernan [Tex. Cr. App.] 77 S. W. 225.

93. City of Louisville v. Wehmhoff, 25 Ky. L. R. 1924, 79 S. W. 201.

94. Slot machines, faro, roulette, monte, or any other game played with cards, dice, or other devices of whatever nature, for money, checks, credits, or other representatives of value [Laws 1901, c. 65]. State v. Cahill [Wyo.] 75 P. 433. A "sitting" may include many hands. All that transpires in playing the game of draw poker from the time certain players begin playing together on any one occasion until they cease playing together on that occasion is one transaction, and players are winners or losers according to final results. Zellers v. White, 208 Ill. 518, 70 N. E. 669.

95. Art. 377, Pen. Code. Fullerton v. State [Tex. Cr. App.] 75 S. W. 534.

96. Defendant convicted though the business was done through an agent in another town than where defendant lived [Rev. St. 1899, § 2339]. State v. Kentner [Mo.] 77 S. W. 522. Art. 377, Pen. Code. Fullerton v. State [Tex. Cr. App.] 75 S. W. 534.

97. Com. v. Leak, 25 Ky. L. R. 761, 76 S. W. 368. An election guessing contest is a wager. Hence violates Rev. St. § 4269. Hobing v. Enquirer Co., 2 Ohio N. P. (N. S.) 205.

98. State v. Klondike Machine [Vt.] 57 A. 994; Kite v. People [Colo.] 74 P. 886; Furth v. State [Ark.] 78 S. W. 759; Woods v. Cottrell [W. Va.] 47 S. E. 275.

99. Such a scheme is but a species of advertising, and a statute forbidding it is unconstitutional. State v. Dodge [Vt.] 56 A. 983.

NOTE. Trading stamps: The decision above cited is in line with the great weight of authority. To the same effect see City of Winston v. Beeson [N. C.] 47 N. E. 457, citing State v. Dalton, 22 R. I. 77, 46 A. 234; Young v. Com., 101 Va. 853, 45 S. E. 327; Ex parte McKenna, 126 Cal. 429, 58 P. 916; State v. Shugart, 138 Ala. 86, 35 So. 28; People v. Dycker, 72 App. Div. 308, 76 N. Y. S. 111; Com. v. Emerson, 165 Mass. 146, 42 N. E. 559; Com. v. Sisson, 178 Mass. 578, 60 N. E. 385; People v. Gillson, 109 N. Y. 389, 17 N. E. 343; Long v. State, 74 Md. 565, 22 A. 4. In Lansburgh v. District of Columbia, 11 App. D. C. 512, a trading stamp scheme was held to be a gift enterprise within a statutory definition of the term. See, also, Lotteries, 2 Curr. L. 764.

1. Pen. Code, § 328. Such an offense being a misdemeanor the supreme court had no jurisdiction. People v. Pickert, 89 N. Y. S. 183.

2. State v. Godfrey [W. Va.] 46 S. E. 185.

3. Clark v. State [Tex. Cr. App.] 81 S. W. 722.

ordinance requiring a license fee of $250.00 for each pool table is not an unreasonable regulation.[4] The Arkansas gambling law of 1901 was not constitutionally enacted in that the acts which passed the respective houses of the legislature did not correspond.[5] The New York statute making the possession of policy slips presumptive evidence of guilt against all except officers of the law is valid.[6]

Cards and other table games.[7]—It is not essential that a "table" be used to bring a gambling device within a statute prohibiting games of a like kind to certain table games,[8] or that there should be the principle of the one against the many.[9] A turkey raffle may constitute a table or bank game where the exhibitor is certain of a profit.[10] Craps is a table or bank game where one person sits behind a table and takes the bets of all others,[11] and is not within a statutory exception allowing certain dice games at a private residence.[12] The change of name of any of the games forbidden will not prevent conviction for playing them.[13] In Texas the mere exhibiting of a table or bank for gaming purposes is illegal,[14] and it is immaterial whether money or anything of value was bet.[15]

Racing and race tracks.[16]—The general rule is that betting on a horse race is gaming, and it is immaterial that the race is conducted elsewhere;[17] but betting on a horse race is not "gaming" in Kentucky.[18] Pool selling and book making outside the race course authorized by law are illegal in New York,[19] and the principal is liable for the acts of his agent in conducting a forbidden business,[20] but one who makes a bet, as agent for the bettor, is not guilty of "taking or accepting a bet" on a horse race.[21] The business of conducting a pool room or turf exchange may lawfully be discriminated against, though the business is thereby rendered unprofitable.[22] Recording of bets by "mechanical or other means" will include the registering of bets upon cards by use of initials.[23]

Slot machines.[24]—The keeping or exhibiting of any slot machine for gaming purposes is illegal in Texas.[25] A slot machine on which a cigar is guaranteed for each play is illegal as a table or bank game.[26] Where the statute enumerates cer-

4. Under Burns' Ann. St. 1901, § 3541, the city had power to regulate, restrain, license, or prohibit pool tables. Wysong v. Lebanon [Ind.] 71 N. E. 194.

5. Acts 1901, p. 114. Rogers v. State [Ark.] 82 S. W. 169.

6. Adams v. New York, 192 U. S. 585, 24 S. Ct. 372.

7. See 1 Curr. L. 341.

8. A slot machine is within this statute [Code 1899, § 151]. State v. Gaughan [W. Va.] 48 S. E. 210.

9. Dalton v. State [Tex. Cr. App.] 74 S. W. 25.

10. The exhibitor made from 30 to 50 cents on each raffle and the turkey was seldom taken by the winner, being sold to a confederate of the exhibitor. Dalton v. State [Tex. Cr. App.] 74 S. W. 25. See, also, Lotteries, 2 Curr. L. 764.

11. Pen. Code 1895, art. 388. Faucett v. State [Tex. Cr. App.] 79 S. W. 548. The playing of craps is illegal in Florida. Parkhill v. State [Fla.] 36 So. 170. See 1 Curr. L. 341, n. 8.

12. Faucett v. State [Tex. Cr. App.] 79 S. W. 548.

13. Ky. St. 1899, § 1961. Miller v. Com., 25 Ky. L. R. 1236, 77 S. W. 682.

14. Code Cr. Proc. 1895, arts. 682, 683. The state need not show that any betting was done. Brogden v. State [Tex. Cr. App.] 80 S. W. 378.

15. Carroll v. State [Tex. Cr. App.] 81 S. W. 294.

16. See 1 Curr. L. 341.

17. Thrower v. State, 117 Ga. 758, 45 S. E. 126. The selling of pools upon horse races is gambling. Moores v. State [Neb.] 99 N. W. 249.

18. Though punishable under a statute against wagering. City of Louisville v. Wehmhoff, 25 Ky. L. R. 1924, 79 S. W. 201.

19. Const. art. 1, § 9; Pen. Code, § 351. People v. Corballs, 86 App. Div. 531, 83 N. Y. S. 782; People v. Shannon, 87 App. Div. 32, 83 N. Y. S. 1061; People v. McCue, 87 App. Div. 72, 83 N. Y. S. 1088.

20. People v. Canepl, 87 N. Y. S. 773.

21. Acts Leg. 1903, p. 68, c. 50, p. 1. Windsor v. State [Tex. Cr. App.] 79 S. W. 312.

22. Act No. 206, p. 397 of 1902, confers on municipalities power to regulate or suppress poolrooms. City of Shreveport v. Schulsinger [La.] 36 So. 870.

23. "Mechanical" comprehends all of that class, and "other means" is meaningless unless it comprehends some means other than mechanical. State v. Villines [Mo. App.] 81 S. W. 212.

24. See 1 Curr. L. 341.

25. Clark v. State [Tex. Cr. App.] 80 S. W. 617.

26. A player was entitled to five cents in trade for every nickel he lost, though a loser seldom called for such reward. Meeks v. State [Tex. Cr. App.] 74 S. W. 910. In West Virginia a slot machine is a banking game like A. B. C. tables, faro, etc., if it

tain devices, a device not enumerated must be shown to be ordinarily used in gambling to bring it within a general clause of the statute.[27]

Gaming at public place.[28]—The playing a game of cards or dice in a public place is forbidden in Alabama.[29] Under a statute forbidding gaming except at a private residence occupied by a family, a tent may constitute such an exception,[30] and a game within 10 feet thereof was held to be "at the residence."[31] A private residence commonly resorted to for gaming is not within the exception,[32] nor a dug-out adjacent to a residence and occasionally used by the family,[33] but a room securely locked and accessible only to those engaged in the play is not a public place or place of public resort,[34] nor are an officer's living rooms in a county jail.[35] The testimony of one witness is sufficient for a jury to find that it was a "public place."[36]

Keeping a gaming place.—Keeping and maintaining a gaming house was a nuisance and punishable at common law[37] even before any sort of game was prohibited.[38] One may be guilty of keeping a gaming house, who maintains a place for people to congregate for betting purposes,[39] or who maintains a place where the public is invited to buy pools,[40] or who keeps a room where gaming is conducted, though such fact be unknown to him.[41] That the bets were consummated in another state is not a good defense in a prosecution for keeping a gaming house.[42] Each person participating in the keeping of a gaming house may be guilty of the offense though each performed but one of the subdivided duties.[43]

(§ 1) *B. Indictment or information and trial procedure.*[44]—Gaming and allied offenses being statutory, an indictment charging any of them is sufficient if it follows the statute and the latter sets forth all the facts which constitute the offense;[45] it need not allege the intent of the defendant,[46] nor state with particu-

gives unequal chances, in favor of the exhibitor. State v. Gaughan [W. Va.] 48 S. E. 210.

27. Com. v. Schatzman [Ky.] 82 S. W. 238.

28. See 1 Curr. L. 341.

29. Code 1896, § 4792. Dennis v. State [Ala.] 35 So. 651.

30. Arts. 379b, 381, Acts 1901, p. 26. The owner, who had been divorced, lived with one son in a tent which constituted their only home. Hipp v. State [Tex. Cr. App.] 75 S. W. 28.

31. Hipp v. State [Tex. Cr. App.] 75 S. W. 28.

32. Art. 379, Pen. Code 1895, as amended by Acts 1901, p. 26, c. 22. Evidence that parties went there six or eight times in six months held sufficient to sustain a finding that it was commonly resorted to. Floeckinger v. State [Tex. Cr. App.] 75 S. W. 303.

33. Such a place is an outhouse and not a private residence. Huse v. State [Tex. Cr. App.] 80 S. W. 618.

34. So held where the play was in the room of an hotel. State v. Kyer [W. Va.] 46 S. E. 694.

35. Though the building be owned by the public, it is not a public house within the statute. A public house is one which is commonly open to the public, either for business, pleasure, religious worship, the gratification of curiosity, or the like. Lewis v. State [Ala.] 37 So. 99.

36. Testimony of one witness that he had played craps in this same fence corner, off and on for four or five years, and the place was known as "The Old Crap Ground." Dennis v. State [Ala.] 35 So. 651.

37. State v. Morgan, 133 N. C. 743, 45 S. E. 1033.

38. Thrower v. State, 117 Ga. 753, 45 S. E. 126.

39. Though the betting be not unlawful. Jones v. State [Ga.] 47 S. E. 561. One who conducts gambling in a house which he had rented out would be in possession of the place and guilty of keeping a gaming house. Bryan v. State [Ga.] 47 S. E. 574.

40. Moores v. State [Neb.] 99 N. W. 249.

41. Burns' Rev. St. 1901, § 2173. Christ v. State [Ind. App.] 69 N. E. 269.

42. The decisive point is that the money was hazarded in the house kept by the accused, though supposedly subject to acceptance or rejection by one in another state. Jones v. State [Ga.] 47 S. E. 561.

43. Bryan v. State [Ga.] 47 S. E. 574.

44. See 1 Curr. L. 341.

45. State v. Kentner [Mo.] 77 S. W. 522; Com. v. Schatzman [Ky.] 82 S. W. 238. Code Cr. Proc. §§ 284, 285. People v. Adams, 85 App. Div. 390, 83 N. Y. S. 481; People v. Corbalis, 86 App. Div. 531, 83 N. Y. S. 782. It is not sufficient to follow the wording of the statute where the latter so far fails to individualize the offense as to properly notify defendant of the crime he is tried for; an information for conducting a place for the pretended sale of stocks must allege who permitted such acts and knowledge thereof by the defendants. State v. Runzi [Mo. App.] 80 S. W. 36. An indictment for playing a game prohibited by statute need not aver the manner in which the game was played, or who participated therein, or that money or property was bet or won or lost thereon. State v. Edgen [Mo.] 80 S. W. 942.

larity the place where the offense was committed.[47] In the absence of statute the information or indictment must name the parties who were permitted to play or allege that they were unknown.[48] An indictment is fatally defective which fails to allege that defendant had charge of a "place" where gaming was conducted,[49] or that some one played upon the slot machine complained of and won or lost something of value,[50] or that does not charge both the crime and the act constituting it,[51] or where the charge is of being a common gambler, that does not specify the kind of gaming indulged in.[52] An indictment for selling futures need not allege the specific sales relied upon,[53] nor one for keeping a gaming house, that games of chance were there played.[54] That one did feloniously engage in "pool selling and selling pools" is sufficient,[55] but a defective indictment for playing in an hotel or tavern cannot be held good for playing in a public place.[56] Where an offense may be committed by doing one or more of several things, the indictment may in a single count allege them together,[57] and conviction may be had on proof of commission of any one of the things, without proof of the commission of the others.[58] Under a statute making each day of conducting the business of dealing in futures a separate offense, such different occasions should be set out in distinct counts.[59] Counts under the statute against gaming, and counts for the common-

An indictment following the statute, naming one of the bettors, and the time and place where the race in question was run, is sufficient. State v. Villines [Mo. App.] 81 S. W. 212.

46. The intent is not an ingredient of the offense. State v. Kentner [Mo.] 77 S. W. 522.

47. It is sufficient to locate it in a certain county. Parkhill v. State [Fla.] 36 So. 170; State v. Runzi [Mo. App.] 80 S. W. 36. Designation as "The Loveland House" held sufficient. Com. v. Coleman, 184 Mass. 198, 68 N. E. 220; Com. v. Wood, 184 Mass. 198, 68 N. E. 220; People v. Corbalis, 86 App. Div. 531, 83 N. Y. S. 782.

48. Code Cr. Proc. 1901, § 217. Moore v. State [Neb.] 96 N. W. 196; Christ v. State [Ind. App.] 69 N. E. 269. Under the statute involved, parties need not be named. Com. v. Wood, 184 Mass. 198, 68 N. E. 220; Com. v. Coleman, 184 Mass. 198, 68 N. E. 220. In Kentucky, the indictment must be direct and certain as to the party charged, the offense charged, the county in which the offense was committed, the particular circumstances of the offense charged, if they be necessary to constitute a complete offense [Cr. Code Prac. § 124]. Miller v. Com., 25 Ky. L. R. 1236, 77 S. W. 682.

Contra, the exhibition was made to be seen by the public and it was wholly immaterial who saw it or who was induced to deal thereby. State v. Runzi [Mo. App.] 80 S. W. 36.

49. The indictment alleged that defendant had charge and control of a gaming table but not of a "place" under Rev. St. 1892, § 2644. Bravo v. State [Fla.] 36 So. 161. If defendants' ownership of the premises is alleged in the accusative part, it need not be repeated in the descriptive part of the indictment. Com. v. Schatzman [Ky.] 82 S. W. 238.

50. Com. v. McCarty, 25 Ky. L. R. 294, 74 S. W. 1046.

51. Code Cr. Proc. § 275, requiring a plain and concise statement of threats constituting the crime is not complied with by a substantial repetition, purporting to be the facts of the acts alleged as the crime. People v. Corbalis [N. Y.] 71 N. E. 106.

52. Burns' Ann. St. 1901, § 218. Bickell v. State [Ind. App.] 70 N. E. 548.

53. Pen. Code, art. 377, makes such selling a misdemeanor and declares each day of the business to be a separate offense. Fullerton v. State [Tex. Cr. App.] 75 S. W. 534. An indictment for dealing in futures need not allege an actual sale. Scales v. State [Tex. Cr. App.] 81 S. W. 947.

54. An allegation that defendant kept a common gaming house is sufficient, the word gaming having a definite meaning in law i. e. gambling, the playing of games for stakes or wagers. State v. Morgan, 133 N. C. 743, 45 S. E. 1033. There is a difference between gambling and gaming. Gaming refers to contests in which money has been wagered, although there may be no sport, no skill, no element of contest, between those betting. Thrower v. State, 117 Ga. 753, 45 S. E. 126.

55. People v. Corbalis, 86 App. Div. 531, 83 N. Y. S. 782.

56. The words "in the hotel of Lahen Nutteo," are descriptive merely and not of the essence of the offense. State v. Kyer, [W. Va.] 46 S. E. 694.

57. Bickell v. State [Ind. App.] 70 N. E. 548; People v. Corbalis, 86 App. Div. 531, 83 N. Y. S. 782. The different parts or stages of the same offense may be joined in one count. One who knowingly suffers money or other property to be raffled for in such house, shop, or building, and to be won there by thowing or using dice or any other game of chance, is guilty of but one offense. Com. v. Coleman, 184 Mass. 198, 68 N. E. 220.

58. People v. Corbalis, 86 App. Div. 531, 83 N. Y. S. 782. One may be convicted for keeping a place prohibited by law though he was in control of only a part of the building. Com. v. Wood, 184 Mass. 198, 68 N. E. 220; Com. v. Coleman, 184 Mass. 198, 68 N. E. 220.

59. Failure to set out as above is not

law offense of keeping a gaming house, may be joined in the same indictment.[60] The accusation may charge any offense included in the affidavit.[61]

At common law gambling was a nuisance for which a right of trial by jury did not exist.[62]

In Mississippi one indicted for a violation of the gaming laws may be tried thereunder for any antecedent violation not barred by the statute of limitations.[63]

In New York the possession of policy slips is presumptive evidence against all but public officers,[64] and the admission of defendant's private papers, wrongfully seized, is not equivalent to compelling him to be a witness against himself.[65] Cases involving the admissibility[66] and sufficiency of evidence in gambling cases are discussed below.[67]

It is error to say to the jury that although evidence as to defendant's good character is admissible it does not amount to much in a gaming case.[68] One charged with playing and betting on a card game on Sunday is entitled to an instruction that there must be proof beyond a reasonable doubt of the betting as well as the playing,[69] and as to whether defendant bet is a question for the jury.[70]

The recognizance on appeal must be in strict compliance with the statute.[71]

cured by confining the prosecution to one day. Pen. Code, art. 377. Scales v. State [Tex. Cr. App.] 81 S. W. 947.

60. The offenses are of the same nature and a similar judgment might be passed in each case. State v. Morgan, 133 N. C. 743, 45 S. E. 1033. The information should be verified or supported by affidavit of a person competent to testify. But such a defect will not be considered when raised for the first time on appeal after conviction. State v. Runzi [Mo. App.] 80 S. W. 36.

61. The accusation cannot be broader than the affidavit, but as the greater includes the lesser, if the affidavit is general, the accusation can be specific. Glass v. State, 119 Ga. 299, 46 S. E. 435.

62. Furth v. State [Ark.] 78 S. W. 759.

63. Code 1892, § 1431. But an indictment charging a number of defendants with individual offenses was bad. Howard v. State [Miss.] 35 So. 654.

64. Such a statute is not unconstitutional as allowing any public official to hold policy slips, for it relates only to cases where slips are seized and are in the custody of the officers of the law. Adams v. New York, 192 U. S. 585, 24 S. Ct. 372.

65. Adams v. New York, 192 U. S. 585, 24 S. Ct. 372.

66. That a house was knowingly rented for gaming purposes may be shown only by facts and inferences therefrom. Evidence admissible that the renter was generally known as a gambler, and as to the past use of the house. Rivers v. State, 118 Ga. 42, 44 S. E. 859. Evidence that defendant's name was on a building in which gaming was being conducted is admissible to show his control of the premises. Evidence that defendant was reputed to be the owner of the place and business is inadmissible. Crippen v. State [Tex. Cr. App.] 80 S. W. 372. It is reversible error to admit evidence of another offense than that charged in the information. Defendant was charged with allowing a minor to play pool upon defendant's premises, and the court admitted evidence of such conduct at another time than as charged. State v. Meadows [Mo. App.] 81 S. W. 463. The husband of a woman indicted jointly with another defendant is not incompetent to testify on the separate trial of such other defendant, though his testimony may tend to incriminate his wife. In case of a joint trial, his testimony would be incompetent. Rivers v. State, 118 Ga. 42, 44 S. E. 859. In a prosecution for dealing in futures, defendant should be allowed to put in evidence the charter of the corporation he represented. The charter permitted a sale of cotton, etc., unless actual delivery was contemplated. Scales v. State [Tex. Cr. App.] 81 S. W. 947.

67. Evidence that defendant and others each had cards in his hands, and money in front of him, and upon discovery attempted to escape, held sufficient to sustain verdict of guilty of playing and betting at a game played with cards for money. Harmon v. State [Ga.] 47 S. E. 547. Need not show the character of the game nor which of the players won or lost. Arnold v. State, 117 Ga. 706, 45 S. E. 59. That defendant and others were arranged in a circle with money in the center, and one of the party shuffling a deck of cards, is sufficient to sustain conviction for playing and betting at cards. Frost v. State [Ga.] 47 S. E. 901. A charge of keeping and maintaining a gaming house is sustained by evidence of guilt of either keeping or maintaining. Bryan v. State [Ga.] 47 S. E. 574. The jury must believe beyond a reasonable doubt that defendant was present or permitted a minor to play pool upon defendant's tables to convict under Rev. St. 1899, § 439. State v. Meadows [Mo. App.] 81 S. W. 463. In a prosecution for dealing in futures the state must show an agreement not to have an actual delivery. Scales v. State [Tex. Cr. App.] 81 S. W. 947.

68. Civ. Code 4334. Turner v. State, 118 Ga. 756, 45 S. E. 598.

69. Russ v. State, 138 Ala. 1, 35 So. 107.

70. That one of the witnesses testified that the game being played could not be played without betting on it did not conclude the jury in that particular. Russ v. State, 138 Ala. 1, 35 So. 107.

71. Recognizance would be fatally defective which omitted "in this case," and "of the

The court will not reverse a conviction for gaming where the finding of the jury was fully supported by the evidence.[72]

§ 2. *Penalties and seizure of implements.*[73]—Laws punishing gaming are remedial and are to be construed liberally, not liberally for the culprit, but for the suppression of evil.[74] Gaming instruments may be seized and destroyed upon summary proceedings, without a jury trial,[75] and it is no defense that the instrument might have been used for lawful purposes, if in fact it was used for gambling.[76]

§ 3. *Recovery back of money lost.*[77]—At common law, one wagering money could recover it at any time before a determination of the wager;[78] but by statute one may recover his wager from a stakeholder before or after the funds leave the latter's hands,[79] and such a claim is assignable by parol.[80] Recovery may be had of one for money lost to his agents or servants.[81] In Kentucky one who induces another to enter or play in a gaming place is liable to penalty and responsible to such other's creditors for the sum lost,[82] but this does not permit a part owner of the resort to recover of his partners.[83] In New York one may recover money lost on a wager on a horse race.[84] It is no defense that the game was played for chips,[85] or that defendant received part of plaintiff's stakes from others to whom they had been lost.[86] That the money secured on a mortgage was used to support a gaming place will not invalidate the mortgage in the hands of an innocent third party,[87] and a bona fide purchaser before maturity may recover on a note given in transfer for other notes executed in consideration of gambling debts.[88] Plaintiff cannot recover on checks given to pay a gaming debt contracted in his hotel and with his

same" court. Meeks v. State [Tex. Cr. App.] 74 S. W. 910.

72. Prothro v. State, 118 Ga. 73, 44 S. E. 802.

73. See 1 Curr. L. 342.

74. Fuller v. State [Miss.] 35 So. 214. A Florida statute prescribing a penalty for maintaining gaming apparatus held not repealed by a later statute prescribing a penalty for setting up or promoting games of chance and an information under the former was good. Dardem v. State [Fla.] 32 So. 924.

75. The right of trial by jury does not exist in such cases. Kite v. People [Colo.] 74 P. 886. Sand. & H. Dig. § 1618; Acts 1901, p. 114. Furth v. State [Ark.] 78 S. W. 759. Statute authorizing seizure and destruction of gaming table is not unconstitutional. Code 1899, § 1, c. 151. Such property may be destroyed only after conviction in the circuit court. Woods v. Cottrell [W. Va.] 47 S. E. 275. In Vermont a justice of the peace may order the destruction of a Klondike machine and no appeal lies from such an order [Acts 1898, p. 92, No. 121, § 2]. State v. Klondike Machine [Vt.] 57 A. 994.

76. Improper use without the knowledge of mortgagee. Kite v. People [Colo.] 74 P. 886.

77. See 1 Curr. L. 342.

78. When the losing party to an illegal contract remains silent until the contract is executed by the determination of the result upon which the wager was made, he cannot recover his part of the stake. Dooley v. Jackson [Mo. App.] 78 S. W. 330. As to recovery back of money obtained by fraud in procuring wager on pretended foot race, see Wright v. Stewart, 130 F. 905.

79. 1 Rev. St. (1st Ed.) p. 662, pt. 1, c. 20, tit. 8, § 8; 1 Birdseye's Rev. St. (3d Ed.) pp. 299, 300. Bernstein v. Horth, 85 N. Y. S. 263. 1 Rev. St. p. 662, §§ 8, 9. This right is in no way affected by section 17 of Laws 1895, p. 377, c. 570. Mendoza v. Rose, 88 N. Y. S. 938; Dooley v. Jackson [Mo. App.] 78 S. W. 330. But after determination of the result demand must be made previous to expiration of time agreed upon for determination of act, and action must be brought in three months of the accruing of the right [Rev. St. 1899, §§ 3430-3432]. White v. Gilleland, 93 Mo. App. 310.

80. Bernstein v. Horth, 85 N. Y. S. 263.

81. Hurd's Rev. St. 1901, c. 38, § 132. Zellers v. White, 208 Ill. 518, 70 N. E. 669.

82. Ky. St. § 1969. Stapp v. Mason, 24 Ky. L. R. 1680, 72 S. W. 11.

83. The statute was enacted for the protection of the community against gamblers and not for their protection. Wife of one partner not permitted to recover of other partners, money held by her husband belonging to her and lost in the business. Stapp v. Mason, 24 Ky. L. R. 1680, 72 S. W. 11.

84. Laws 1895, p. 377, c. 570, § 17. Though he went to the race course with the intention of suing if he lost. Moulton v. Westchester Racing Ass'n, 42 Misc. 487, 84 N. Y. S. 871.

85. The chips were merely markers, the money being actually deposited with the gaming house keeper. Zellers v. White, 208 Ill. 518, 70 N. E. 669.

86. Defendant won from all and was held liable for plaintiff's entire loss. Zellers v. White, 208 Ill. 518, 70 N. E. 669.

87. Birdsall v. Wheeler, 173 N. Y. 590, 65 N. E. 1114.

88. Higginbotham v. McGready [Mo.] 81 S. W. 883.

knowledge,[89] and in Colorado an assignment of note or other evidence of debt is void where any part of the consideration is a gambling debt.[90] A statute permitting a defense that an obligation was based on a gambling transaction, though such obligation shall have been transferred, is not unconstitutional.[91]

BIGAMY.

The offense.[92]—One may be guilty of bigamy, though he believes his first wife to be dead, or is ignorant of her being alive for less than seven years.[93] It is a complete defense that the first marriage alleged in the indictment is void by reason of a prior lawful marriage, still existing;[94] but restraint of marriage for a limited time because of divorce does not so invalidate a marriage during that time, subsequently ratified by cohabitation, that a third marriage does not constitute polygamy.[95] In Missouri, the statute of limitations does not run against the offense of bigamy during the pendency of an indictment subsequently quashed.[96]

Indictment[97] may be based on a voidable marriage,[98] and need not allege the legality of the former nor the illegality of the second marriage, nor the time and place of the celebration of the former marriage.[99]

Evidence and instructions.[1]—The burden is on the prosecution to prove both marriages and that the first wife was living at the time of the second marriage, but it falls upon defendant to prove that for seven years prior to his second marriage he did not know his first wife was living.[2] The previous marriage may be proven by circumstantial evidence,[3] or the uncorroborated admissions of the defendant,[4] and proof of the celebration of a marriage raises a presumption of the existence of every fact necessary to the validity thereof.[5] The testimony of the second wife, as to the second marriage, is admissible, but the incompetency of a lawful wife as a witness cannot be waived.[6] The introduction in evidence of a contract for

89. Jones v. Akin [Tex. Civ. App.] 80 S. W. 385.

90. Bank not compelled to honor a certificate of deposit which had been assigned in gambling; such an assignment is of no greater force than a forgery [Mills' Ann. St. § 1344]. Western Nat. Bank v. State Bank [Colo. App.] 70 P. 439.

91. Rev. St. 1899, § 3427. Higginbotham v. McGready [Mo.] 81 S. W. 883.

92. See 1 Curr. L. 342. Com. v. Josselyn [Mass.] 71 N. E. 313.

93. Absence of a wife driven away by the husband will not excuse him from inquiry even after seven years. State v. Goulden, 134 N. C. 743, 47 S. E. 450.

94. Lane v. State [Miss.] 34 So. 353.

95. By statute, defendant, upon divorce proceedings, was forbidden to marry for two years; St. 1895, p. 476, c. 427, providing a marriage improper because of a former spouse living, shall become valid upon termination of the impediment. Such a statute is not unconstitutional as retrospective. Commonwealth v. Josselyn [Mass.] 71 N. E. 313.

96. Rev. St. 1899, § 2422. State v. Hansbrough [Mo.] 80 S. W. 900.

97. See 1 Curr. L. 342.

98. Intoxication at the time of marriage will not render it void, but only voidable. Barber v. People, 203 Ill. 543, 68 N. E. 93.

99. Ferrill v. State [Fla.] 34 So. 220.

1. See 1 Curr. L. 343.

2. State v. Goulden, 134 N. C. 743, 47 S. E. 450.

3. State v. Pendleton, 67 Kan. 180, 72 P. 527. A valid marriage will be deemed proven, in the absence of rebutting testimony, from proof of marriage in fact followed by cohabitation and birth of children. Ferrell v. State [Fla.] 34 So. 220. Circumstances are admissible as tending to prove the marriage, though not sufficient to constitute a marriage. While a common-law marriage required no particular form or ceremony, enough had to be said and done to make a contract; proof of cohabitation and the public recognition of each other as husband and wife for twenty years held not sufficient to show a contract. State v. Hansbrough [Mo.] 80 S. W. 900.

4. McSein v. State [Ga.] 47 S. E. 544. Evidence was properly received that about two weeks previous to his second marriage, defendant was challenged with the existence of his first wife and replied that he wished he would hear of her death so that he would be free. State v. Goulden, 134 N. C. 743, 47 S. E. 450.

5. But such presumption is not conclusive. Barber v. People, 203 Ill. 543, 68 N. E. 93. But statutory provisions of New York, prohibiting marriage within three years after divorce in certain cases, is inadmissible as evidence, where divorce procured elsewhere. State v. Bentley, 75 Vt. 163, 53 A. 1068.

6. Barber v. People, 203 Ill. 543, 68 N. E. 93.

marriage because of seduction was not error where evidence tending to prove the same had been admitted without objection.[7]

An instruction is not improper which charges the jury that a mistake as to whether the first spouse was living is not a good defense unless proper care to ascertain the facts be shown.[8]

BLACKMAIL.

Blackmail consists in extorting or attempting to extort money by threats, as of violence,[9] or of arrest.[10]

An indictment in the language of the statute without stating the words of the threat is sufficient.[11] The use of "maliciously" instead of the statutory word "willfully" is not fatal.[12] An averment that defendant threatened a certain person with intent to extort money from him sufficiently imports that the threat was made in the hearing of such person.[13]

Evidence of the previous relations of the parties is admissible to characterize the language used in the transaction in question.[14]

BONDS.

§ 1. The Instrument; Essentials and Validity (507).
§ 2. Rights of Parties and Transferees (510).
§ 3. The Terms and Conditions in General; Interpretation, Legal Effect, Breach (511).
§ 4. Remedies and Procedure (514).

Scope of title.—Questions relating to negotiable bonds,[15] to indemnity,[16] and to suretyship, are treated elsewhere,[17] as are matters peculiar to various bonds given in the course of legal proceedings.[18]

§ 1. *The instrument; essentials and validity.*[19]—A statutory bond running to the wrong party,[20] or containing provisions not required by the statute,[21] while not good as such, may be enforced as a voluntary or common-law obligation, if not repugnant to the letter or policy of the law.[22] A bond not required by statute,

7. Welch v. State [Tex. Cr. App.] 81 S. W. 50.

8. The court need not specify the sources of information which led to the alleged mistake. Welch v. State [Tex. Cr. App.] 81 S. W. 50.

9. Any form of expression causing a fear of death is sufficient to constitute a "threat to kill," and it is not material that defendant was not in fact armed, if the person threatened thought he was. Glover v. People, 204 Ill. 170, 68 N. E. 464.

10. Extortion by impersonating an officer and threatening arrest held blackmail, not false pretenses. Jackson v. State, 118 Ga. 125, 44 S. E. 833.

11, 12, 13. Glover v. People, 204 Ill. 170, 68 N. E. 464.

14. Though it tends to prove an independent crime by defendant. Glover v. People, 204 Ill. 170, 68 N. E. 464.

15. See Municipal Bonds, 2 Curr. L. 931; Railroads, 2 Curr. L. 1382; Corporations, 1 Curr. L. 710.

16. See Indemnity, 2 Curr. L. 198.

17. See Suretyship, 2 Curr. L. 1776.

18. See Attachment, 1 Curr. L. 239; Appeal and Review, 1 Curr. L. 85; Injunction, 2 Curr. L. 397, and like titles.

19. See 1 Curr. L. 343.

20. Dudley v. Rice, 119 Wis. 97, 95 N. W. 936. A contractor's bond running to the city instead of to the state, as required by statute, is a good common-law obligation. Pacific Bridge Co. v. U. S. Fidelity & Guaranty Co., 33 Wash. 47, 73 P. 772. An official bond running to a named person, described as mayor, and to his successors in office, instead of to the mayor and council of the municipality as required by law, is not a good statutory bond, but may be enforced as a voluntary or common-law obligation. Anderson v. Blair, 118 Ga. 211, 45 S. E. 28. In such case, the obligee named therein, or his personal representatives, are the only persons who can maintain an action thereon. Neither the person to whom the law requires the bond to be given nor his personal representatives can do so. Id. To county treasurer for county instead of to county. Buhrer v. Baldwin [Mich.] 100 N. W. 468. Constable's bond running to county judge instead of the governor. Hines v. Norris [Tex. Civ. App.] 81 S. W. 791.

21. Dudley v. Rice, 119 Wis. 97, 95 N. W. 936. A bond given to the United States by a collector of internal revenue, conditioned for the faithful performance of their duties by all deputies, is valid and enforceable, although the statute only requires one for the performance of the collector's own duties [U. S. Rev. St. § 3143, U. S. Comp. St. 1901, p. 2041]. Laffan v. U. S. [C. C. A.] 122 F. 333.

22. Dudley v. Rice, 119 Wis. 97, 96 N. W. 936. Even if an administrator's bond, which

if given voluntarily for a valid consideration, is binding at common law, unless repugnant to the letter or policy of the law;[23] but one unlawfully exacted by a court or officer,[24] or given pursuant to an unconstitutional statute,[25] unless supported by a consideration independent thereof,[26] is void and cannot be enforced for any purpose. To render a bond void for want of conformity to a statute, it must be made so by express enactment, or must be intended as a fraud on the obligors, by color of law, by an evasion of the statute.[27] Mere irregularities[28] or clerical errors do not affect the validity of the instrument.[29]

A security for costs on appeal, which does not set out the amount for which the makers agree to become responsible, is invalid.[30]

The formal approval of bonds required in certain legal proceedings may be waived,[31] and where the bond was voluntarily given to procure an advantage to the principal obligor, neither he nor his surety can object that it was not entered

does not state that it is payable for the benefit of all concerned, and which was never approved by the ordinary, has no sureties, and the conditions of which are not in the exact terms of the statute, is not a valid statutory bond; it is good as a voluntary obligation. Awtrey v. Campbell, 118 Ga. 464, 45 S. E. 301.

23. Dudley v. Rice, 119 Wis. 97, 95 N. W. 936. A bond of the guardian of a lunatic, conditioned that such guardian would pay over the amount found due on a settlement, either with the court or with the ward if found of sound mind, is enforceable as a common-law obligation, though the court had no jurisdiction of the guardianship proceedings, so that it was invalid as a statutory bond. The statute limiting the time within which an action can be brought against the sureties thereon (Wis. Rev. St. 1898, § 3968) became a part of the contract, though it does not apply as a statute. Id. A court of equity has power to accept from defendant, as a condition of the discharge of a receiver for its property, a bond conditioned for the performance of the final decree, and to render judgment thereon against both principal and surety for the amount of complainant's ultimate recovery. Such bond is good as a common-law obligation, and the obligor, after receiving the benefits resulting from its execution, is estopped from denying its validity. Twin City Power Co. v. Barrett [C. C. A.] 126 F. 302.

24. In such cases there is no consideration, the obligor being entitled to every right claimed without bond, and hence securing nothing by giving it. Dudley v. Rice, 119 Wis. 97, 95 N. W. 936.

25. Bond given by a contractor under Cal. Code Civ. Proc. § 1203. San Francisco Lumber Co. v. Bibb, 139 Cal. 192, 72 P. 964.

26. As bond given on appeal in action of forcible entry and detention, conditioned on payment of rent, where obligor has retained possession of premises thereunder, and statute allowing appeal has afterwards been declared unconstitutional. U. S. Fidelity & Guaranty Co. v. Ettenheimer [Neb.] 99 N. W. 652.

27. Meador v. Adams [Tex. Civ. App.] 76 S. W. 238.

28. Bond running to treasurer for use of county instead of to county. Buhrer v. Baldwin [Mich.] 100 N. W. 468. If the penalty of a statutory bond, voluntarily given, be greater than that prescribed by said statute, the bond is valid and enforceable to the amount of the statutory penalty, and void only as to the excess. Bond for sale of malt liquors under Tex. Rev. St. 1895, art. 5060g, as amended by Laws 1901, c. 136. Meador v. Adams [Tex. Civ. App.] 76 S. W. 238. The fact that an official bond is joint instead of joint and several as required by statute cannot be availed of by the obligors as a defense in an action thereon, but the bond is good to the extent it complies with the statute in that regard. Wilcox v. Perkins County [Neb.] 97 N. W. 236. An action on an administrator's bond, from which the amount of the penalty has been omitted, may be maintained without a reformation of the instrument. McManus v. Harrigan, 41 Misc. 615, 85 N. Y. S. 220. The omission from a receiver's bond of a certificate to the effect that the officer who took the acknowledgment of the surety was a notary public is a mere irregularity. Such a bond is properly received in evidence in an action by the receiver. Livingston v. Eaton, 90 App. Div. 251, 85 N. Y. S. 500. The validity of an attachment bond is not affected by the fact that the names of two of the sureties, who signed it at the bottom, do not appear in its body, nor by defects in the affidavit for attachment. McLean v. Wright, 137 Ala. 644, 35 So. 45. A redelivery bond in attachment, providing that, in case plaintiff recovered judgment in the action, defendant would, on demand, pay to plaintiffs the amount of said judgment, with the costs and disbursements of the action, is a substantial compliance with a statute requiring a bond "to the effect that the sureties will pay to plaintiff the amount of the judgment that may be recovered against the defendant in the action," and is enforceable as a statutory bond [Hill's Ann. Laws Or. 1892, § 159]. Ebner v. Heid [C. C. A.] 125 F. 680.

29. Where an appeal bond states that the sureties are worth "$200, not subject to execution over and above all liabilities," the word "not" will be regarded as a clerical error. Jones v. Herrick, 33 Wash. 197, 74 P. 332.

30. The affidavit of the sureties thereon that each is worth a specified sum does not cure the defect. Under S. C. circuit court rule, No. 10. Taylor v. Dempsey, 66 S. C. 513, 45 S. E. 78.

31. Plaintiff may waive formal approval of statutory bond to discharge attachment [approval required under Iowa Code 1897, § 3907]. Fidelity & Deposit Co. v. Bowen [Iowa] 98 N. W. 897.

into before the proper officer.[32] A bond partially conditioned for the performance of a contract farming out a portion of the fees of a paid office is invalid as to such portion.[33] The validity of a receiver's bond, or its execution, cannot be raised collaterally in defense of an action brought by him to foreclose a mortgage.[34]

Consideration.[35]—A bond under seal imports a consideration.[36] If the guaranty and the contract guarantied are a part of the same transaction, the consideration for the latter supports the former;[37] but if they are not one transaction, the bond must be supported by an independent consideration.[38] There is sufficient consideration to support a contractor's bond, where, prior to the execution of a building contract, the obligee demanded a bond from the contractor, and signed the contract in consideration of his promise to furnish one, even though one was not required by such contract.[39] The dissolution of an attachment is sufficient consideration to support a bond given to secure the release of the attached property.[40] Where, on appeal, an undertaking is given beyond that required by statute, it cannot be enforced as to such excess unless a consideration aliunde exists therefor.[41] A statutory obligation has its consideration in the attainment of the object allowed by the statute.[42] One who executes a bond under circumstances which would estop him to assert its invalidity for want of consideration cannot, in an action thereon, avoid liability on the ground that plaintiff is estopped to assert that there was any consideration.[43]

Execution.[44]—A stipulation in a bond that it shall not be valid unless countersigned is binding, and absence of the countersignature renders it invalid;[45] but this stipulation may be waived,[46] as may provisions requiring fidelity bonds to be signed by the employe whose fidelity is thereby insured.[47]

32. Where writ issued on replevin bond and property taken under it, fact that it was not entered into before magistrate issuing writ, as required by statute (Conn. Gen. St. 1902, § 1057), no defense. Douglass v. Unmack [Conn.] 58 A. 710.

33. Bond of a deputy sheriff for the faithful performance of his duties, embodying a reference to a contract with the sheriff for the portion of the fees, cannot be enforced as to the sum specified in the contract to be paid by the deputy to the sheriff, but is valid as to public funds collected by him by virtue of his office and the sheriff can maintain an action against him thereon, even though such contract rendered the appointment invalid. White v. Cook, 51 W. Va. 201, 41 S. E. 410, 57 L. R. A. 417.

34. Livingston v. Eaton, 90 App. Div. 251, 85 N. Y. S. 500.

35. See 1 Curr. L. 343.

36. Graham v. Middleby [Mass.] 70 N. E. 416; Considine v. Gallagher, 31 Wash. 669, 72 P. 469. Appeal bond. Gein v. Little, 89 N. Y. S. 488.

37, 38. Considine v. Gallagher, 31 Wash. 669, 72 P. 469.

39. Sweeney v. Aetna Indemnity Co. [Wash.] 74 P. 1057.

40. The fact that the property was not in the name of the defendant when the bond was executed does not render it without consideration. Fidelity & Deposit Co. v. Bowen [Iowa] 98 N. W. 897. A bond to release an attachment, which is under seal, and recites as a consideration the release of all the property attached and the discharge of the attachment, is based on a sufficient consideration to render it enforceable as a common-law obligation. Ebner v. Heid [C. C. A.] 125 F. 680.

41. Agreement to pay notes, if unsuccessful, held supported by sufficient consideration. Gein v. Little, 89 N. Y. S. 488.

42. No consideration need be expressed to avoid statute of frauds. Appeal bond. Gein v. Little, 89 N. Y. S. 488.

43. Bond on appeal in action of forcible entry and detainer given under void statute. U. S. Fidelity & Guaranty Co. v. Ettenheimer [Neb.] 99 N. W. 652.

44. See 1 Curr. L. 343.

45. Pacific Nat. Bank v. Aetna Indemnity Co., 33 Wash. 428, 74 P. 590.

46. Where the general agent of the bonding company personally induced the guarantee to incur the obligation, gave the bond as indemnity and signed and delivered it himself, having secured the signature of his subordinate agent thereto as a mere matter of form, held, that the bond was executed by such general agent, and the signature of such subordinate was not necessary to give it validity, though it contained a stipulation, inserted by such general agent and not by the company, that such signature was necessary to give it validity. Pacific Nat. Bank v. Aetna Indemnity Co., 33 Wash. 428, 74 P. 590. The countersigning of a bond by an agent of the bonding company, who also acted as agent of the principal, held to have been with the consent of the company, and not to have rendered the bond invalid on the theory that such agent acted for both parties. Id.

47. Receipt of premiums therefor and for two renewals, with knowledge that such signature was lacking, works estoppel.

Delivery.[48]—An order of the court discharging an attachment, reciting that it was made upon all the records filed in the case and upon the execution of a good and sufficient undertaking, is conclusive evidence of the delivery of such undertaking to the court and its acceptance by him as a delivery bond for the release of the property, where the bond has been approved by the court and filed with the clerk.[49] Notice of acceptance of a guaranty bond is not necessary.[50] The beneficiary of a bond guaranteeing the acts of another may assume that the premium therefor has been paid.[51] Changes in the contract to secure the performance of which the bond is given, made at the instance of one of the obligors without the knowledge or consent of the obligee, do not affect the validity of the bond.[52]

§ 2. *Rights of parties and transferees.*[53]—One who has the obligation of two different bonds for the performance of the same contract may enforce either at his election.[54]

A surety bond for the faithful performance of a contract passes under an assignment of such contract, and the assignee may maintain an action thereon in his own name.[55] The assignment of a liquor tax certificate does not release the parties to the bond given to secure it, unless the certificate was presented to the proper authorities for cancellation, or the assignment was consented to by them, as required by statute.[56] A substitution of bonds may be ratified by the obligee therein named.[57] A redelivery bond in attachment is not merged in a supersedeas bond given on appeal, where it is subsequently determined that the appellate court has no jurisdiction in the matter.[58] A bond to secure the faithful performance of his duties by an agent and conditioned to be void if he pays all obligations existing or to arise to his principal may be revoked as to future transactions, at the will of the obligor.[59] A demand by the obligor for his release, and

Proctor Coal Co. v. U. S. Fidelity & Guaranty Co., 124 F. 424.

48. See 1 Curr. L. 343.

49. Ebner v. Heid [C. C. A.] 125 F. 680.

50. Where the signers of a bond, guaranteeing the faithful performance of his duties by an employe, delivered it to such employe for delivery to the obligee, with knowledge that the obligee had agreed to accept it, the obligee was not required to give them notice of its acceptance, but it became binding and enforceable on delivery to him. Singer Mfg. Co. v. Freerks [N. D.] 98 N. W. 705.

51. The guarantor is estopped to deny such payment as against the beneficiary who has, in good faith, parted with value, relying thereon, especially where there is no recital therein that such payment is a necessary prerequisite to its validity. Pacific Nat. Bank v. Aetna Indemnity Co., 33 Wash. 428, 74 P. 590.

52. The fact that a bonding company furnished a contractor's bond only because of a change in the contract, consented to by an architect acting without authority, and hence not binding on the obligee, did not render the bond void, it having been furnished by the contractor as a consideration for the contract, and delivered to the obligee without notice of the change. Sweeney v. Aetna Indemnity Co. [Wash.] 74 P. 1057.

53. See 1 Curr. L. 343.

54. National Surety Co. v. U. S. [C. C. A.] 123 F. 294. A proposal bond securing the performance of a mail route contract, and a bond afterwards taken from the contractor for the same purpose, are independent undertakings, and the dismissal of a suit brought on the first bond is no defense to an action on the second. Id.

55. Contract and bond assigned by receivers of a railroad on reorganization thereof. American Bonding & Trust Co. v. Baltimore & O. S. W. R. Co. [C. C. A.] 124 F. 866. The fact that such bond was executed by a bonding company and that such contracts are held, in a sense, to be insurance contracts, does not render it nonassignable by the obligee. Id. The fact that the contract provided that it might be canceled for a breach of its terms and provided for liquidated damages therefor would not prevent a recovery on a bond given to secure its faithful performance. Id. The fact that the contract to secure the performance of which a bond is given has been assigned is no defense to an action on the bond brought by the obligee. Graham v. Middleby [Mass.] 70 N. E. 416.

56. Cullinan v. Kuch, 177 N. Y. 303, 69 N. E. 597.

57. The action of a sheriff in substituting a new delivery bond in attachment for one previously given, and releasing the sureties on the first one, is ratified by the obligee bringing suit on the second one, with full knowledge of the facts and such obligee is thereby estopped to sue on the first bond, though the sheriff had no authority to take the original bond, and release the property attached. Hesser v. Rowley, 139 Cal. 410, 73 P. 156.

58. Ebner v. Heid [C. C. A.] 125 F. 680.

59. Under California Code (sec. 2814), defining a continuing guaranty as one relating to a future liability of the principal un-

consent thereto by the obligee's agent, are sufficient, no formal release being necessary.[60] Suit can be maintained on an official bond only for such wrongful acts of the official as occur during the term of office for which he is chosen.[61] The fact that money received by a public officer by virtue of his office, was collected without authority is no defense to an action on his bond.[62] The obligee in a bond, it seems, gains no rights in a sum deposited to protect the surety.[63] A fund deposited to indemnify a surety does not fall under an equitable lien to the obligee, when the condition of the bond has been fulfilled.[64]

§ 3. *The terms and conditions in general; interpretation, legal effect, breach.*[65]—A bond will be most strongly construed against the person preparing it;[66] and when given pursuant to an order of court, in the light of and in connection with such order.[67]

A recital in a bond that it was given by virtue of a certain statute is not conclusive, but is simply prima facie evidence of the fact,[68] and when the fact that it is given by virtue of a particular statute is apparent otherwise than by recital, it is as available for all purposes as if recited.[69] A bond will generally be construed as penal in character, even when it expressly recites that the sum named therein is stipulated damages, unless such a construction would tend to defeat its essential object.[70] This import, however, may be overcome by other parts of the instrument.[71] Legislative acts imposing additional duties on a public officer, and expressly making him liable on his bond for a breach thereof, become a part of the bonds thereafter entered into by such officers.[72]

der successive transactions; (sec. 2844), providing that a surety has all the rights of a guarantor; (sec. 2815) and that a continuing guaranty may be revoked at any time by the guarantor, as to future transactions. Such a contract is technically one of suretyship. White Sewing Mach. Co. v. Courtney, 141 Cal. 674, 75 P. 296. Where an agent, whose liability to his principal was secured by a bond, had goods of the principal in his possession for sale when the bond was revoked, and the principal thereafter sold the goods to the agent, taking his note therefor, the obligation on the note was a new one, for which the surety was not liable. Id.

60. White Sew. Mach. Co. v. Courtney, 141 Cal. 674, 75 P. 296.

61. State v. Greer, 101 Mo. App. 669, 74 S. W. 881. Where there was no evidence to prove that a public administrator's defalcation occurred during his first term of office, but his annual settlements showed that the balance sued for was still in his hands during his second term, the sureties on his second bond were the parties liable therefor. Id.

62. Money collected from gambling houses and brothels and turned over to city treasurer. City of Phillipsburg v. Degenhart [Mont.] 76 P. 694.

63. Malicki v. Bulkley, 206 Ill. 249, 69 N. E. 87.

64. It makes no difference that the liability secured has finally and in another way become fixed and that the principal is insolvent. Malicki v. Bulkley, 206 Ill. 249, 69 N. E. 87. The facts were that an appeal bond was given, that appellant was successful but was defeated on the second trial. Id.

65. See 1 Curr. L. 344.

66. City Trust, S.-D. & S. Co. v. Lee, 204 Ill. 69, 68 N. E. 485. Under a bond guaranteeing an employer against loss sustained through "the dishonesty or any act of fraud" of a collector "amounting to larceny or embezzlement" the bonding company was liable for a conversion of rent collected by him, though this did not amount to larceny or embezzlement, since the words "amounting to embezzlement" did not qualify the word "dishonesty." Id.

67. A bond conditioned to pay damages in the event that a certain cause should be decided in favor of the defendant is not breached because many of the issues were decided in his favor, when the decree of the court was against him and he recovered little or nothing. Baer v. Fidelity & Deposit Co. [C. C. A.] 130 F. 94. A bond conditioned to pay such damages "as the court might determine" had been sustained by reason of a deposit in court, held to refer to the court then having jurisdiction of the case. Id.

68. San Francisco Lumber Co. v. Bibb, 139 Cal. 192, 72 P. 964.

69. Contractor's bond held to have been given under Cal. Code Civ. Proc. § 1203, although it did not so recite, and hence to be void. San Francisco Lumber Co. v. Bibb, 139 Cal. 192, 72 P. 964.

70. The fact that the amount was intended as liquidated damages and its reasonableness must be affirmatively shown. Disosway v. Edwards, 134 N. C. 254, 46 S. E. 501; Ellis v. Ft. Bend County, 31 Tex. Civ. App. 596, 74 S. W. 43. A bond conditioned for the observance of the liquor law is in the nature of a contract for the observance of such law, and the sum named therein is not a penalty, but liquidated damages (under New York liquor tax law). Cullinan v. Burkhard, 86 N. Y. S. 1003.

71. City of Madison v. American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097.

72. Ga. Acts 1872, p. 57, relating to sales of state lands by ordinary. State v. Henderson [Ga.] 48 S. E. 334.

The official bond of a public officer covers all acts of his assistants and deputies within the scope of their authority, the same as if performed by himself personally, though he may be ignorant of their conduct.[73] A bond conditioned that the obligor will observe a liquor license law renders him liable for acts of his clerk while in the performance of his business.[74] The ordinary rules for the construction of written instruments apply.[75] A trust deed given to save harmless the sureties on an official bond inures to the benefit of persons having valid claims against the county on default of such officer.[76]

Renewal bonds take the place of the original bond, and the liability of the maker is not increased thereby, unless it appears that the parties so intended.[77]

73. Bond of a city clerk covering the entire administrative duties of his office covers the acts of his second assistant, the latter being a bonded officer and exempt from the operation of the civil service law of Milwaukee [Laws 1895, c. 313, § 6, p. 633]. Butler v. Milwaukee, 119 Wis. 526, 97 N. W. 185.

74. N. Y. liquor license law. Cullinan v. Burkhard, 86 N. Y. S. 1003.

75. Bonds construed: In a suit on a liquor dealer's bond conditioned that he would not allow minors to "enter and remain" in his place of business, there could be no recovery for entry "or" remaining, but the two must concur [Rev. St. Tex. 1895, art. 5060g, as amended by Laws 1901, p. 314, c. 136, construed]. Minter v. State [Tex. Civ. App.] 76 S. W. 312. Where the entry and remaining was only for a time sufficient to purchase and drink a glass of beer, and the sale was made in good faith and on reasonable grounds of belief that the person was an adult, there could be no recovery for permitting such entering and remaining. Id. An administrator's bond construed and held to render him liable thereunder to the ordinary, for the benefit of those interested, for whatever damages they might have sustained by his failure to administer the estate according to law. Awtrey v. Campbell, 118 Ga. 464, 45 S. E. 301. A bond running to persons about to reorganize a railroad company, which bound the obligors to pay all indebtedness of the company in excess of a certain sum, held to have been made solely for the benefit of the reorganized company which, after an assignment thereof to it, was entitled to recover the damages suffered by it by reason of a breach of the conditions thereof. Moundsville, B. & W. R. Co. v. Wilson, 52 W. Va. 647, 44 S. E. 169. Surety bond construed and held to contain an unequivocal promise to indemnify the obligee for all loss arising out of any indebtedness then due it from its agent. Union Cent. Life Ins. Co. v. Prigge, 90 Minn. 370, 96 N. W. 917. The operation of a sewage plant by the city held not to have affected its right to recover on a bond given by the construction company for the faithful performance of its contract, taking into consideration the terms of the contract and the necessity of the use. City of Madison v. American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097. A bond was given to secure the performance, without delay, of a contract to sell certain property and deposit the proceeds in bank in two installments of equal amount and on specified dates. Held that a failure to deposit either of the installments on the dates named was a breach of the contract, though there was no evidence that the property had been sold. Carpenter v. Fulmer, 118 Wis. 454, 95 N. W. 403. A provision in a bond, given to secure the performance of a contract that any action thereon must be brought within six months after a breach of the contract is a reasonable one. Is a complete defense by the surety to an action brought against it more than six months after such breach, but is not available to the contractor as a defense. Marshalltown Stone Co. v. Louis Drach Const. Co., 123 F. 746. The filing of an amended and substituted petition, merely to supply omissions in the original petition, and to state a cause of action with more certainty, does not constitute the commencement of a new action for the purpose of a defense of such limitation. Id.

76. Jennings v. Taylor [Va.] 45 S. E. 913.

77. A fidelity bond recited that the insurer would make good to the employer, to the extent of $7,000, all loss occasioned by the dishonesty of the employe occurring during the continuance of the bond or any renewal thereof. The liability of the bond was limited to default occurring during one year. A renewal for the following year was given, which recited that it was a renewal bond subject to the conditions of the original bond. Held that the renewal bond was a new contract only so far as it extended the indemnity of the original contract to another year, but there was in effect one bond, with one penalty, viz. $7,000, and the guarantor was liable for that amount only. First Nat. Bank v. U. S. Fidelity & Guaranty Co., 110 Tenn. 10, 75 S. W. 1076. A fidelity bond bound the guarantor to make good any loss sustained by the guarantor occurring during the continuance of the bond or any renewal thereof, and discovered during such continuance or within six months thereafter, and provided that on the issue of any subsequent bond or renewal, liability on bonds previously issued should cease, and that it was the intention of the parties that only the last bond should be in force at any one time. Held that the bond and renewals did not constitute a continuous contract of suretyship, but that each renewal was a separate and distinct contract, and that the original contract and each renewal stood for the malfeasance of the employe during the continuance of each, and discovered within six months after the termination of each, the purpose being to avoid double liability on the part of the company. Proctor Coal Co. v. U. S. Fidelity & Guaranty Co., 124 F. 424.

The official bond of a tax collector conditioned that his sureties will make good all moneys that may come into his hands, that he does not faithfully account for, embraces all such moneys previously received and on hand when the bond was executed, and all moneys subsequently collected, but not prior defalcations, unless the money had then been or was subsequently restored.[78] County warrants issued against funds in the hands of the treasurer, and duly registered as required by law, constitute an equitable assignment of so much of the funds as is necessary to meet their payment, and the treasurer and his sureties become liable therefor.[79] A bond given by a contractor for a public improvement, conditioned on his payment for labor and material furnished, is made for the benefit of laborers and material men, and they may maintain actions thereon.[80] A statutory bond for the hire of convicts furnishes security for the payment of the amount of hire agreed on only, and recovery cannot be had thereon for inhuman treatment of the convicts, or for the breach of any other condition thereof.[81] Requirement that a bond shall be given to secure performance of the contract does not require the owner to accept a bond requiring him to perform additional acts for the protection of his sureties.[82]

A replevin bond is breached by allowing the action to abate.[83]

Where bonds are given during the course of legal proceedings to indemnify parties thereto, the judgment in such proceedings is conclusive as to their breach and the amount of damage resulting therefrom.[84] One who gives an undertaking

78. Lake County v. Neilon [Or.] 74 P. 212.

79. Code Va. 1887, § 2920, relating to limitation of actions on contracts does not apply. No limitation as to principal, and only the ten year limitation as to sureties. Jennings v. Taylor [Va.] 45 S. E. 913.

80. A provision in such bond authorizing its assignment to laborers and material men, and stipulating that in such case it shall inure to the benefit of all of them, does not prevent a material man from suing thereon as a contract for his benefit and without such assignment, where he is the only creditor of the contractor. Buffalo Forge Co. v. Cullen & S. Mfg. Co. [Mo. App.] 79 S. W. 1024. May be joined as coplaintiffs in action brought by city. Town of Gastonia v. McEnlee-Peterson Engineering Co., 131 N. C. 363, 42 S. E. 858. Under a contract for the building of a school house which required the contractor to provide all the materials and perform all the work necessary, and a bond running to the school district alone conditioned that the contractor should provide the materials and all labor necessary and for the delivery to the district of the school house "free and clear from any liens or claims of any kind" and that he should pay any sum of money that the district might be compelled to pay to remove any liens, incumbrances, or claims against the building which might be claimed against the district, the bondsmen were not liable to materialmen for labor and material furnished, the bond being for the benefit of the district alone. Green Bay Lumber Co. v. Independent School Dist., 121 Iowa, 663, 97 N. W. 72. A bond exacted from a city contractor for the protection of subcontractors and persons furnishing material for city work is taken for the protection of the city's own interests as well. City of Philadelphia v. Neill, 206 Pa. 333, 55 A. 1032. The statute of California (Cal. Code Civ. Proc. § 1203), requiring building contractors to secure their contracts by bonds inuring to the benefit of all persons furnishing materials to be used in the building, is unconstitutional as being an unreasonable restriction on the power to make contracts. San Francisco Lumber Co. v. Bibb, 139 Cal. 192, 72 P. 964.

81. Under Rev. St. Tex. 1895, art. 3745, providing that hirers of convicts shall execute a bond in the amount of hire agreed upon, conditioned that he will pay the amount mentioned in the bond when due, that he will treat the convicts humanely, etc. Ellis v. Ft. Bend County, 31 Tex. Civ. App. 596, 74 S. W. 43.

82. The owner need not accept a bond requiring him to give immediate notice in writing to the surety of default by the principal and to institute any suit on the bond within six months after the work is completed. Brown v. Levy, 29 Tex. Civ. App. 389, 69 S. W. 255.

83. An action may be maintained on a replevin bond without the return of an execution, where plaintiff suffers the action to abate after the property has been seized. Laws N. Y. 1902, c. 580, p. 1531 and Code Civ. Proc. § 1731, do not apply to such cases. Not necessary to have case marked dismissed. Verra v. Costantino, 84 N. Y. S. 222. The parties to a replevin bond conditioned for the return of the property if the action is discontinued are liable thereon, if plaintiff fails to appear in the replevin action and retains the property, though no judgment is entered requiring a return of the property, or for its value in case no return is made. No judgment at all having been entered, a statute (Laws N. Y. 1902, c. 580, § 126; Code Civ. Proc. § 1733) providing that after final judgment has been rendered, no action can be maintained until after the return of an execution, does not apply. Rogers v. U. S. Fidelity & Guarantee Co., 84 N. Y. S. 203.

84. Recovery of judgment in action of

to procure the discharge of garnishment proceedings cannot, in an action thereon, question whether the garnishee held anything belonging to defendant,[85] nor can one who gives a supersedeas bond to hold in force, pending an appeal, an attachment and garnishment discharged by the trial court be heard, in an action on such bond, to say that the person to whom such bond was given had no interest in the attached property, or that the attachment proceedings were invalid because of irregularity.[86] But one who successfully attacks such appellate proceedings upon the ground that they are unauthorized by law and wholly void is estopped from afterwards asserting that they are in any respect valid, and therefore cannot maintain an action on the appeal undertaking by which they were begun.[87]

Recovery cannot be had on a bond given on the issuance of a temporary injunction, where such injunction is rightfully awarded, but is afterwards properly dissolved because of matters done or arising subsequent to its issuance.[88]

The principal and sureties upon an undertaking in an appeal, prosecuted under a void statute, to a court to which in fact no appeal lies are liable thereon if the court, without objection, entertains the appeal and renders judgment adverse to appellant which is acquiesced in by him.[89]

An indemnity bond given a constable, after an illegal levy under an execution, to induce him not to return the property is enforceable against the sureties.[90]

The fact that county funds are deposited with a partnership in the banking business instead of with a corporation, as required by statute, is no defense to an action thereon.[91]

§ 4. *Remedies and procedure.*[92]—At common law an action on a bond could only be brought by the obligee named therein, but this rule has been generally modified by statute so as to allow an action to be maintained by the person for whose benefit it was given, he being the real party in interest.[93] Hence it has been held that a person belonging to a class for whose benefit an official bond has been given, and who has been injured by such official's negligence or misconduct, may sue upon the same in his own name.[94] Indemnitors cannot be impleaded by the sureties.[95]

claim and delivery conclusive proof of breach of redelivery bond and amount of resulting damage under S. C. Code, §§ 232, 238. Parish v. Smith, 66 S. C. 424, 45 S. E. 16. A judgment in favor of defendant in an attachment suit is conclusive of the liability of the obligors upon an attachment bond for the payment of all costs and damages defendant may sustain by reason thereof, if the same be wrongful or without sufficient cause. The good faith of plaintiff and the sureties on the bond is immaterial. Defendant is not estopped to maintain an action thereon by giving a bond to release the attachment. Anvil Gold Min. Co. v. Hoxsie [C. C. A.] 125 F. 724. In a suit on a bond given on the issuance of a temporary injunction, the final decree in the injunction suit is res adjudicata as to all matters therein decided. Scott v. Frank, 121 Iowa, 218, 96 N. W. 764. See, also, titles Former Adjudication, 2 Curr. L. 60; Estoppel, 1 Curr. L. 1130.

85. Wilkinson v. U. S. Fidelity & Guaranty Co., 119 Wis. 226, 96 N. W. 560.

86. Whether he is estopped to assert that the proceedings are void for want of jurisdiction not decided. Metcalf v. Bockoven [Neb.] 96 N. W. 406.

87. Void as statutory obligation. U. S. Fidelity & Guaranty Co. v. Ettenheimer [Neb.] 97 N. W. 227.

88. Where a temporary injunction was issued restraining the taking of certain land under void condemnation proceedings, and was dissolved after a recondemnation no action on the bond will lie. Scott v. Frank, 121 Iowa, 218, 96 N. W. 764.

89. McVey v. Peddie [Neb.] 96 N. W. 166. See, also, Estoppel, 1 Curr. L. 1130; Suretyship, 2 Curr. L. 1776.

90. Hines v. Norris [Tex. Civ. App.] 81 S. W. 791.

91. Mich. Local Acts 1879, p. 217, No. 393. Buhrer v. Baldwin [Mich.] 100 N. W. 468.

92. See 1 Curr. L. 344.

93. Barker v. Glendore [Neb.] 99 N. W. 548. Under Burns' Rev. St. 1894, § 253, the county is the party interested so that the board of commissioners of the county is the proper relator in an action by the state on the bond of a county auditor to recover money alleged to be due the county. Nowlin v. State, 30 Ind. App. 277, 66 N. E. 54.

94. Under Neb. Code Civ. Proc. §§ 29, 643, providing for official bonds, and that they must be joint and several. Suit by heirs on bond of county judge who appropriated money belonging to estate. Barker v. Glendore [Neb.] 99 N. W. 548.

NOTE. Right of third person to sue on bond: In New York, the tendency is not to hold obligors liable to third parties, the

An action on an administrator's bond will lie at any time after breach.[96] The authorities are in conflict as to whether an action at law can be maintained on the bond of an officer or fiduciary before settlement of his accounts.[97] Equity has no jurisdiction of a suit by a single creditor of a decedent on the bond of the administrator of his estate, on a legal demand, where such administrator has made the settlements required by law, unless the bill seeks to surcharge or falsify such accounts.[98] Where an act provides that suit on an officer's bond shall be brought in the name of the state, an action so brought is not demurrable, though the bond is made payable to the governor.[99] The fraudulent concealment by a notary of a false acknowledgment certified by him postpones the running of the statute of limitations against an action on his official bond.[1] An action on a bond given to secure the performance of a contract, and conditioned to be void if it was performed, is not an action on a contract for the direct payment of money, within a statute authorizing attachment.[2] In order to make a parol promise that a bond

third parties not being the principal ones to be benefited. So where, upon the dissolution of a firm, one partner executes to another a bond with a surety, conditioned for the payment by the partner executing it of all the firm debts, the liability of the obligors is to the obligee only, not to the firm creditors, and an action cannot be maintained thereon by a firm creditor to recover his indebtedness of the obligors. Merrill v. Green, 55 N. Y. 270; Hurd v. Johnson Park Inv. Co., 13 Misc. 643, 34 N. Y. S. 915. And in Buffalo Cement Co. v. McNaughton, 90 Hun, 74, 35 N. Y. S. 453, where a contractor gave a bond to a city, the sureties on which covenant that the contractor shall pay for all materials which he shall purchase and use about the work, and that, in case he fail so to do, the materialmen may bring an action on the bond in their own names to recover for their materials, it was held that materialmen could not sue, in the absence of proof that they knew of the bond and its provisions and furnished the material, relying on the bond; and that the doctrine of Lawrence v. Fox, 20 N. Y. 268, could not apply because the city (the promisee) was under no obligation to the materialmen. The rule in Pennsylvania is strict, since the general doctrine is confined within narrow limits. Morrison v. Beckey, 6 Watts, 349. In Minnesota, it would seem that a third party might sue sureties if the promisee were under some obligation to such third party. Jefferson v. Asch, 53 Minn. 446, 55 N. W. 604, 39 Am. St. Rep. 618. As holding the same rule, see Montgomery v. Rief, 15 Utah, 495, 50 P. 623. The Kansas courts are liberal in permitting a third party to sue sureties. Hardesty v. Cox, 53 Kan. 618, 36 P. 985. The Nebraska courts are even more liberal, and in Lyman v. Lincoln, 38 Neb. 794, 57 N. W. 531, materialmen were allowed to sue sureties on a bond given by a contractor to a city, even though the city (the promisee) seems to have been under no obligation to the materialmen (third parties). See Kaufmann v. Cooper, 46 Neb. 644, 65 N. W. 796; Fitzgerald v. McClay, 47 Neb. 816, 66 N. W. 828, which hold the same doctrine. Missouri courts, on the other hand, and especially as distinguished from New York, hold that a city is under such an obligation to laborers and materialmen who furnish work and materials on public buildings that they can sustain an action against sureties on a bond given to the city. Devers v. Howard, 144 Mo. 671, 46 S. W. 625; School Dist. v. Livers, 147 Mo. 580, 49 S. W. 507; City of St. Louis v. Von Phul, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695. The Oregon courts, which insist that some fund must be placed in the hands of the promisor to which the third party has some equitable claim in order to sustain an action by a third party, would naturally deny a third party a right of action against a surety. Parker v. Jeffery, 26 Or. 186, 37 P. 712; Brower Lumber Co. v. Miller, 28 Or. 565, 43 P. 659, 52 Am. St. Rep. 807.—From exhaustive note on right of persons benefited by contract to sue thereon. 71 Am. St. Rep. 169.

95. In an action on a sheriff's bond for failure to turn over taxes collected by him, where no theft or embezzlement was charged, the sureties could not bring in as party defendant and file a petition against a guaranty company which had given them a bond indemnifying them against embezzlement on the part of the sheriff. U. S. Fidelity & Guaranty Co. v. Fossati [Tex.] 80 S. W. 74.

96. The fact that the claims of the interested parties have not been perfected before suit or judgment is immaterial. Judge of Probate v. Lee [N. H.] 56 A. 188.

97. A county may maintain a common-law action against the sureties on the bond of a county treasurer who fails to pay over to his successor a balance shown by his books to be due the county, though the county auditor may not as yet have settled and adjusted the treasurer's accounts. The Pennsylvania Act (P. L. 545, § 48) providing for the auditing of such accounts and a statement of the balance due from county officers is for the protection of the public and not of the officer or his sureties. Lancaster County v. Hershey, 205 Pa. 343, 54 A. 1038. An action at law cannot be maintained on a guardian's bond until there has been an account or settlement, as provided by law, showing a balance in his hands. Pinnell v. Hinkle [W. Va.] 46 S. E. 171.

98. Thompson v. Mann, 53 W. Va. 432, 44 S. E. 246.

99. State v. Henderson [Ga.] 48 S. E. 334.

1. Under Rev. St. Mo. 1899, § 8836, such action must be brought within three years after the cause of action accrues. State v. Hawkins [Mo. App.] 77 S. W. 98.

2. Neither the default nor the amount to be paid is certain [Mont. Code Civ. Proc. §

given to secure deferred payments for land was not to be paid until an outside interest in such land had been released a defense to an action thereon, it must appear that the purchaser was induced to buy the land and give the bond on the faith of such promise, and would not have done so without it.[3]

Pleading.[4]—A breach of the bond,[5] and resultant damage must be pleaded.[6] A general averment of nonpayment of the penalty is sufficient.[7] Averments of notice to defendant of facts constituting a breach of the conditions of the bond are not necessary where it appears that they are actually or presumptively known to him.[8] A complaint which sets out the bond in full, showing that it is an instrument under seal, is not demurrable for failure to allege that the bond was based on a sufficient consideration.[9] In an action on a forthcoming bond in attachment, an order of court directing the sale of the attached property must be alleged and proved.[10]

Evidence.[11]—To entitle the obligee to recover more than nominal damages he must show the actual damage suffered by him through a breach of the conditions of the bond.[12] Where it is difficult or impossible to show such actual damage, he must show that he has sustained some actual loss, and that the amount of the bond is not unreasonable.[13] A statement of the account of a public officer from the books of the treasury department, properly certified and showing a balance due the United States, is sufficient prima facie evidence of a breach of his bond in failing to account for public money or property.[14] Evidence that plaintiff sold

890]. Ancient Order of Hibernians v. Sparrow [Mont.] 74 P. 197.

3. Stewart v. New York & C. Gas Coal Co., 207 Pa. 220, 56 A. 435.

4. See 1 Curr. L. 345.

5. A complaint on a contractor's bond, setting out the bond in full, including the contract the performance of which it was given to secure, and averring that such contract was unperformed in certain particulars from which the damages claimed resulted, and that settlement had been demanded and refused, sufficiently alleges a breach of the bond, and states a cause of action. Fidelity & Deposit Co. v. Robertson, 136 Ala. 379, 34 So. 933.

6. An allegation, in an action on a penal bond, that plaintiff is "endamaged in the sum of one thousand dollars," is not such a specific allegation of fact as to be admitted on demurrer, but it is sufficient to entitle him to an inquiry as to his actual damages, where his cause of action has been admitted by demurrer. Disosway v. Edwards, 134 N. C. 254, 46 S. E. 501. In an action on an attachment bond, allegations in the answer that the property was released shortly after it was seized are relevant and material on the question of damages and good on demurrer. Anvil Gold Min. Co. v. Hoxsie [C. C. A.] 125 F. 724.

7. The words in a declaration on a penal bond that defendants "the same to pay hath hitherto wholly neglected and refused, and still do neglect and refuse," held a sufficient allegation of nonpayment of the penalty on general demurrer. Moundsville, B. & W. R. Co. v. Wilson, 52 W. Va. 647, 44 S. E. 169.

8. Moundsville, B. & W. R. Co. v. Wilson, 52 W. Va. 647, 44 S. E. 169.

Sufficiency of pleadings in general: Petition in action on administrator's bond held to state a cause of action, treating the instrument as a voluntary obligation. Awtrey v. Campbell, 118 Ga. 464, 45 S. E. 301. Complaint in action on official bond of clerk of council held sufficient on demurrer. Anderson v. Blair, 118 Ga. 211, 45 S. E. 28. Petition in action by heir, to recover on bond of county judge who wrongfully appropriated money belonging to estate and paid into court, held to state cause of action. Barker v. Glendore [Neb.] 99 N. W. 648.

9. The bond imports a consideration, and a want of it, if available at all, is a matter of defense. Considine v. Gallagher, 31 Wash. 669, 72 P. 469.

10. Given under Neb. Code Civ. Proc. § 206. Young v. Joseph Bros. & Davidson [Neb.] 99 N. W. 522.

11. See 1 Curr. L. 345.

12. Disosway v. Edwards, 134 N. C. 254, 46 S. E. 501; Ellis v. Ft. Bend County, 31 Tex. Civ. App. 596, 74 S. W. 43. The words "penal sum" in that part of a bond providing for the consequences of a breach thereof are ordinarily to be construed strictly, and as meaning a penalty, requiring actual damage to be shown in order to recover thereunder. City of Madison v. American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097. No recovery can be had on a voluntary bond given to cover damages arising out of certain orders of court issued in an equity suit, which would otherwise have been damnum absque injuria, since no damages can be proved. Baer v. Fidelity & Deposit Co. [C. C. A.] 130 F. 94.

13. Disosway v. Edwards, 134 N. C. 254, 46 S. E. 501. In an action on a bond, conditioned for the performance of an agreement not to engage in a certain business at a certain place and for a specified period, held error to enter judgment for the full amount thereof, on overruling a demurrer to the complaint, in the absence of specific allegations of damage, or showing that the amount of the bond was reasonable, no proof having been taken on the subject. Id.

14. Laffan v. U. S. [C. C. A.] 122 F. 333.

and furnished brick to a city contractor, and that the latter used them in carrying out his contract, brings him within the terms of a bond exacted by the city from such contractor for the purpose of protecting subcontractors and persons furnishing material for city works.[15] A statement of an officer of a corporation which sold material to a city contractor, that he did not think the transaction was within the terms of a bond exacted by the city from such contractor for the protection of subcontractors and persons furnishing materials for the work, does not amount to a waiver of the benefit of such bond.[16] Schedules of property attached to a bond and signed by sureties and pleaded as exhibits to plaintiff's petition are admissible as tending to show that the sureties signed the bond.[17] Reports of an officer which are required by law are admissible in evidence against the sureties on his official bond and are prima facie true.[18] The pleadings and judgment in a former action against the obligor of a bond for acts amounting to a breach of its conditions are admissible in an action on the bond against his sureties.[19] Under a complaint against sureties alleging that the obligee had recovered judgment against the principal for moneys advanced to him during the life of the bond, and that it had not been paid, recovery can be had only on proof of such judgment and not on proof of independent liability under the bond.[20] The defense of want of consideration may be raised by sureties though not pleaded, where the complaint does not allege that the bond was under seal.[21] The burden is on the defendant to rebut the presumption of consideration raised by the fact that the instrument is under seal.[22]

15, 16. City of Phila. v. Neill, 206 Pa. 333, 55 A. 1032.

17. U. S. Fidelity & Guaranty Co. v. Fossati [Tex. Civ. App.] 81 S. W. 1038.

18. City of Philipsburg v. Degenhart [Mont.] 76 P. 694.

19. Inadmissible in action on bond of U. S. marshal for failure to pay over money, where it does not appear in the judgment that the former action had anything to do with such failure or the subject-matter of the bond, and there is nothing in the pleadings tending to show that the items on which the judgment was based were chargeable against him during the life of the bond. U. S. v. Meade [Ariz.] 76 P. 467.

20. U. S. v. Meade [Ariz.] 76 P. 467.

21. Gein v. Little, 89 N. Y. S. 488.

22. Appeal bond. Evidence insufficient. Gein v. Little, 89 N. Y. S. 488.

Sufficiency of evidence: City of Madison v. American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097. Evidence in an action on an official bond held sufficient to authorize the court to direct a verdict for plaintiff. Wilcox v. Perkins County [Neb.] 97 N. W. 236. Bond to secure payment of alimony. Crew v. Hutcheson, 119 Ga. 142, 45 S. E. 971. Where, in an action on a redelivery bond in attachment after judgment for plaintiff, it appeared that all defendant's property had been sold by execution under the judgment and bought by plaintiff, and that defendant was insolvent and had no property within the jurisdiction of the court, and that he had resisted plaintiff's collection of the judgment, such proceedings amounted to a demand for the payment of the judgment on which the action on the bond would be based, and defendant's insolvency rendered a further demand unnecessary. Ebner v. Heid [C. C. A.] 125 F. 680.

Admissibility of evidence in general: In an action on a bond securing performance of a mail route contract, a single letter of the auditor of the postoffice department to the effect that on a similar contract defendant would only be liable in case the sureties on the proposal bond, given to secure the performance of the same contract, should fail to pay the damage caused by a breach thereof, was irrelevant and inadmissible. National Surety Co. v. U. S. [C. C. A.] 123 F. 294. A copy of a bond certified to by the acting secretary of the treasury is admissible in evidence in a suit on such bond by the United States, under a statute (U. S. Comp. St. 1901, pp. 670, 671) providing that such copies are admissible when certified to by the "secretary or assistant secretary." Laffan v. U. S. [C. C. A.] 122 F. 333. In an action by a surety against a state officer for breach of a contract to repay to the surety money paid on the bond of the chief clerk of such officer in lieu of a liability which has been discovered by the examiner of public accounts, evidence that the examination had been made was relevant, though not the examiner's official report, if there was nothing in the statutes providing for such report giving it effect as evidence. Culver v. Caldwell, 137 Ala. 125, 34 So. 13. Evidence as to false entries made by the commissioner may be admissible as showing whether there was an indebtedness of the chief clerk. Id. Where defendant, sued as principal on a bond, is allowed to withdraw an answer to the effect that he signed as surety only, and to file one pleading non est factum, the original answer, if signed or sworn to by him, may be proved against him as an admission. Wyles v. Berry, 25 Ky. L. R. 606, 76 S. W. 126. In an action against the principal on a bond for money loaned by order of court, plaintiff may show the financial condition at the time of the loan of a third person for whom the money was actually borrowed. Id.

Rulings and instructions.[23]

Judgment and damages.[24]—For a breach of an administrator's bond there can be only one judgment, and that must be for the whole penalty and stand as security for all parties interested, whether they are parties to the suit or not.[25] Only the actual loss sustained by the breach of the bond may be recovered.[26] It is no objection to the recovery, at least as against the principal debtor, that the verdict which is less than the penal sum with interest exceeds the sum named on the face of the bond.[27] There can be no recovery on a penal bond with collateral condition in excess of the penalty of the bond.[28] Statutes in some states provide that interest on the amount recovered cannot be allowed, where the bond is conditioned for the performance of an act, and not for the payment of money.[29]

BOUNDARIES.

§ 1. Rules for Locating or Identifying (518).
§ 2. Riparian or Littoral Boundaries (521).
§ 3. Establishment by Agreement of Adjoiners (522).
§ 4. Establishment by Acquiescence or Estoppel (522).
§ 5. Establishment by Arbitration, Action, or Statutory Mode. Right of Action (523).

§ 1. *Rules for locating or identifying.*[30]—A line described in clear and unambiguous terms is the controlling call in the title.[31] When reliable indications fail, the rule is to reach the objective point by the line of shortest distance.[32] The location of a block of surveys may be established by a single undoubted monument found on the ground.[33] The marks of a block of land consist of the marks of every tract of the block, and if originally intended as corners, become marks for establishing the entire block.[34] If marks for interior corners be found they establish the lines for interior tracts.[35] Processioners must respect possession existing at the time lines are marked.[36] A call "to" a strip of land does not carry the line over or into the strip.[37]

23, 24. See 1 Curr. L. 345.

25. Judge of Probate v. Lee [N. H.] 66 A. 188.

26. A contractor purchased premises from plaintiff giving him a purchase money mortgage, and also executed to him a building loan mortgage, to secure the payment of money advanced for the erection of a building thereon, and a bond to secure the erection of such building. The building was not finished, and plaintiff foreclosed the building-loan mortgage, bid in the property, and entered a deficiency judgment against the contractor. He then completed the building. In an action to recover the penalty of the bond, held that, as the property was worth the amount of the purchase money mortgage and the amount of plaintiff's bid at the sale, the purchase operated as a payment to that extent, and he could recover only the amount of the deficiency judgment. In such cases the bond indemnifies only from loss and damage which flows from a breach of the principal contract. Westcott v. Fidelity & Deposit Co., 87 App. Div. 497, 84 N. Y. S. 731.

27. U. S. v. Walker, 128 F. 1012.

28. Mo. Rev. St. 1899, § 471. Bond to secure performance of contract to install heating apparatus in school-house. Board of Education of St. Louis v. National Surety Co. [Mo.] 82 S. W. 70.

29. N. Y. Code Civ. Proc. § 1915. Westcott v. Fidelity & Deposit Co., 87 App. Div. 497, 84 N. Y. S. 731.

30. See 1 Curr. L. 346.

31. A strip immediately west of and adjoining another definite tract. Kellog v. McFatter, 111 La. 1037, 36 So. 112.

32. In establishing a line never indicated otherwise than on paper. Leonard v. Smith, 111 La. 1008, 36 So. 101.

33. Knupp v. Barnard, 206 Pa. 280, 55 A. 981.

34. A block consists of a quantity of land entered by one for several. Knupp v. Barnard, 206 Pa. 280, 55 A. 981.

35. Though it may change exterior line. Knupp v. Barnard, 206 Pa. 280, 55 A. 981.

36. Civ. Code 1895, § 3248. But not mere naked possession. Riddle v. Sheppard, 119 Ga. 930, 47 S. E. 201.

37. Whether it be shore line or upland. Dunton v. Parker, 97 Me. 461, 54 A. 1116. Where a survey and warrant offered in evidence show a beginning at the S. W. point on a lake and a final call for a stake on the edge of the lake at the N. W. corner, as there is no evidence of any marks or monuments on the ground, showing a west line other than the bank of the lake, the line is to be run on the bank. Wilcox v. Snyder, 22 Pa. Super. Ct. 451. Where a call is thence to a point on the shore "20 feet above low water mark, thence along the said shore about 20 feet above low water mark to a point" the grantee at most is only entitled to a line parallel with low water mark and twenty feet distant therefrom. Lynch v. Troxell, 207 Pa. 162, 56 A. 413.

The true location is a question of fact,[38] resting in the intention of the parties,[39] to be established by a preponderance of evidence.[40]

Surveyors.[41]—The duty of a surveyor is to go upon the land with a copy of the field notes, search for and survey its lines and corners and report the result of his work.[42] A survey establishes a line but does not determine title.[43]

Monuments control courses, distances,[44] *and quantity,*[45] but they must have been officially established,[46] and be so described that they can be found with absolute certainty,[47] so a location by monument will control the distance,[48] and where a natural boundary is called for, it should be reached by extending the line according to the course.[49] Where monuments have been lost or removed their

38. That it had become fixed by acquiescence cannot be declared as a matter of law. Broll v. Wishert [Tex. Civ. App.] 79 S. W. 1089. Between partitioned estates where the indenture of partition was so ambiguous as to require parol evidence to explain it. Graves v. Broughton [Mass.] 69 N. E. 1083. Where the location of two adjoining tracts of a block depends upon the position of the interior line of the block, and the evidence is conflicting. Knupp v. Barnard, 206 Pa. 280, 55 A. 981. Where a call terminates at a swamp, the question whether the edge or run of the swamp is meant is for the jury. Rowe v. Cape Fear Lumber Co., 133 N. C. 433, 45 S. E. 830. Where one took government land between two surveys evidence held for the jury as to the location of the boundaries. Taylor v. Lewis [Tex. Civ. App.] 81 S. W. 634.

39. By description in a patent a patentee got more land than he entered. He conveyed a part by course and distance to another. Held, a question for the jury whether the grantee took the entire tract. Marcy v. Brock, 207 Pa. 95, 56 A. 335.

40. Evidence held to show that parties to a conveyance understood one of the boundaries to be a certain fence. Dows Real Estate & Trust Co. v. Emerson [Iowa] 99 N. W. 724. Evidence sufficient to sustain findings locating boundary. Asher v. Howard, 24 Ky. L. R. 2118, 72 S. W. 1105. Finding that timber was not cut on the wrong side of a boundary line sustained. Garred v. Blackburn [Ky.] 82 S. W. 234. Sufficiency of evidence to show that a call beginning at a tree on the top of a cliff, and following the cliff with its meanders, should be taken literally, and not follow a precipice between the cliff and the river, especially as it was impossible to run the calls upon the precipice. Cincinnati Southern R. Co.'s Trustee v. Society of Shakers' Trustees, 25 Ky. L. R. 1339, 78 S. W. 130.

41. See 1 Curr. L. 350, n. 69-71; Id. 347, n. 21-27.

42. Report held sufficient though containing statements outside his instructions. Broll v. Wishert [Tex. Civ. App.] 79 S. W. 1089.

43. After title acquired by adverse possession. Helton v. Fastnow [Ind. App.] 71 N. E. 230.

44. Tarvin v. Walkers Creek Coal & Coke Co., 25 Ky. L. R. 2246, 80 S. W. 504. Deed conveying a certain frontage also stated that it began at a certain corner and ran to the corner of another lot. Bird v. Noon [Ariz.] 76 P. 592. The actual monuments with reference to which a conveyance is made. Dows Real Estate & Trust Co. v. Emerson [Iowa] 99 N. W. 724. Marks made by surveyors. Kaiser v. Dalto, 140 Cal. 167, 73 P. 828. Monuments fixed by an original government survey. Schmidtke v. Keller [Or.] 74 P. 222. A call for a stake near Cumberland Gap does not mean in Cumberland Gap; within five miles might be reasonably spoken of as near. Creech v. Johnson, 25 Ky. L. R. 656, 76 S. W. 185. Boundaries in the general description fixed by government monuments and a natural object prevail over an erroneous description by metes and bounds. Patton v. Fox [Mo.] 78 S. W. 804. A way referred to as a boundary is a monument. McKenzie v. Gleason, 184 Mass. 452, 69 N. E. 1076. Evidence held to show that a monument had not been moved. Dowling v. Linburg [N. J. Eq.] 57 A. 1035. A line as shown by monuments and as platted by city authorities acquiesced in for many years cannot be overthrown by measurements. Kaiser v. Dalto, 140 Cal. 167, 73 P. 828. See 1 Curr. L. 346.

45. "East half" and "West half" controlled by a blazed line. People v. Hall, 43 Misc. 117, 88 N. Y. S. 276.

46. Warehouse built on the assumption that a line was in a certain place. Anderson v. Wirth [Mich.] 96 N. W. 926.

47. Description of a corner held insufficient. Summerfield v. White [W. Va.] 46 S. E. 154. Lines and boundaries cannot be controlled by objects found on the ground where there are no calls for such objects. Missouri, K. & T. R. Co. v. Anderson [Tex. Civ. App.] 81 S. W. 781.

48. Where the call is thence 110 feet to an alley, the line of the alley governs, though only 105 feet from the last corner. Alley is a monument. McCutcheon's Heirs v. Rawleigh, 25 Ky. L. R. 549, 76 S. W. 50. Where a grant from the Commonwealth described a boundary as "314 perches to a corner; thence by parts of lots Nos. 12 and 11 North 67½ deg. East 54 perches to a corner" etc., and to reach the latter corner the line would have to be extended 66½ perches, the grantee was entitled to the excess as against the commonwealth. Marcy v. Brock, 207 Pa. 95, 56 A. 336. When the corners as actually located are established, the calls of the deed must give way to the marked objects found on the ground, and the lines must be run to the established corners. McCormick v. Applegate, 25 Ky. L. R. 914, 76 S. W. 511.

49. Extended to run of a swamp, though the call was to its edge. Rowe v. Cape Fear Lumber Co., 133 N. C. 433, 45 S. E. 830.

location may be established by parol,[50] but parol evidence cannot establish another monument in the place of the call for the original monument there contained.[51] If they cannot be established, courses and distances control the description,[52] and where there are no original monuments or other evidence, the field notes of the original survey must be resorted to.[53] The line as actually run on the ground in making the original survey controls the distance given in the surveyor's notes,[54] unless the contrary appears to be the intention of the parties.[55] Where a line has been recognized for a long period and old marks are found thereon, it has preference to another line on which no marks are found.[56]

Conflicts between plats and maps and monuments.[57]—In some states it is provided by statute that maps referred to control when inconsistent with other particulars,[58] and a plat referred to in a deed makes it a part thereof,[59] but a reference to a map merely to designate a block in which a lot is located,[60] or a boundary indicated by marginal words on a plat with reference to which lots are sold cannot control the express terms of the deed.[61]

Government surveys.[62]—Established government corners control courses and distances,[63] and the beginning corner of a survey is of no higher importance than any other,[64] but where a corner is not found or its location satisfactorily proven, the field notes of the government survey control, and are prima facie evidence of the true line.[65] Corners in surrounding surveys do not control conflicting calls.[66] Lost meander corners may be restored by running the line from the nearest corner the direction and distance called for by the notes of the original survey.[67] Contiguous lands set apart as distinct bodies on the maps of the United States may serve as boundaries, though their limits have never been marked and they belong to the vendor.[68] A mistake of a surveyor in recording a survey could not change a boundary.[69]

50. By preponderance of evidence. Resurrection Gold Min. Co. v. Fortune Gold Min. Co. [C. C. A.] 129 F. 668. When the marks or monuments are gone, proof of their former location may be supplied. Rock v. Greenewald, 22 Pa. Super. Ct. 641.

51. Round stake with figures written thereon with lead pencil does not fill description of a post four inches square with figures cut into it. Resurrection Gold Min. Co. v. Fortune Gold Min. Co. [C. C. A.] 129 F. 668.

52. Resurrection Gold Min. Co. v. Fortune Gold Min. Co. [C. C. A.] 129 F. 668.

53. Where re-establishment of township line in courses and distances agreed with field notes of original survey, it would control over another claimed line which mentioned certain monuments not mentioned in the field notes. U. S. v. McKee, 128 F. 1002.

54. Killgore v. Carmichael, 42 Or. 618, 72 P. 637.

55. But lines marked on a survey do not control the calls in a deed, in case of a variance, in the absence of a mistake. Elliott v. Jefferson, 133 N. C. 207, 45 S. E. 568.

56. Tarvin v. Walkers Creek Coal & Coke Co., 26 Ky. L. R. 2246, 80 S. W. 504.

57. See 1 Curr. L. 347.

58. Under Code Civ. Proc. § 2077, where a patent referred to a certain state survey. Miller v. Grunsky, 141 Cal. 441, 75 P. 48. Under Code Civ. Proc. § 2077, it was not prejudicial error to admit state surveys, inconsistent with a United States plat under which one claimed. Surveys made prior to his application to purchase. Id.

59. Establishes the boundaries of the land thereby conveyed. Snooks v. Wingfield, 52 W. Va. 441, 44 S. E. 277.

60. Width of street had been changed leaving a strip in front of the lot. Donahue v. Keystone Gas Co., 90 App. Div. 386, 85 N. Y. S. 478.

61. Fisk v. Ley [Conn.] 56 A. 559.

62. See 1 Curr. L. 347.

63. Creech v. Johnson, 25 Ky. L. R. 666, 76 S. W. 185. Where beginning corner was admitted the survey should be located by beginning there and following calls, and courses called for in the patent should yield to marked boundaries, made at time of survey. Whitehouse Cannel Coal Co. v. Wells, 25 Ky. L. R. 60, 74 S. W. 736.

64. Courses may be reversed. Creech v. Johnson, 26 Ky. L. R. 666, 76 S. W. 185.

65. Knoll v. Randolph [Neb.] 94 N. W. 964. United States survey field notes when applied to disputed line by a surveyor held sufficient to take case to the jury, though former owner testified to another location of the line. Baty v. Elrod [Neb.] 97 N. W. 343.

66. They are to be considered in connection with other evidence. Masterson v. Ribble [Tex. Civ. App.] 78 S. W. 358.

67. Entire controversy turned upon location of this corner. Simmons v. Jamieson, 32 Wash. 619, 73 P. 700.

68. In a sale per aversionem. Randolph v. Sentilles, 110 La. 419, 34 So. 587.

69. Will not vest in one land not patented to him. Bryant v. Kendall, 25 Ky. L. R. 1859, 79 S. W. 186.

Conflicts between surveys or descriptions of different date.[70]—A junior survey is subservient to a senior.[71] It being necessary to disregard one of two sets of calls in the field notes of office surveys, calls made under a mistake as to the relative position of the surveys may be disregarded and effect may be given to the intention of the person who made the field notes.[72]

Highways, streets, or ways as boundaries.[73]—A boundary on a way includes the soil to the center thereof,[74] with an easement over the other half,[75] unless an intention to the contrary appears.[76] In this respect there is no distinction between country highways and city streets.[77]

§ 2. *Riparian or littoral boundaries.*[78]—Where the boundary line between two states is the center line of the main channel, the line is a changing one and follows the usual course of navigation.[79] The owner of upland adjoining tide water prima facie owns to low water mark,[80] unless this presumption is rebutted by proof,[81] and a riparian proprietor on a navigable stream owns to the center thereof subject to public rights,[82] but whether a patentee of the United States to land bounding on a non-navigable lake belonging to the United States takes title to the adjoining submerged land is determined by the law of the state where the land lies.[83] A deed conveying a bank of a stream is presumed to carry title to the thread thereof,[84] and it will include land subsequently added by artificial causes,[85] but where a river by avulsion changes its channel the boundary is not changed.[86]

70. See 1 Curr. L. 347.

71. Lands conveyed simultaneously by a common grantor overlapped in description. Adams v. Wilson, 137 Ala. 632, 34 So. 831.

72. Sellman v. Sellman [Tex. Civ. App.] 73 S. W. 48.

73. See 1 Curr. L. 348.

74. Description "to a stake near an old road, thence by said road." McKenzie v. Gleason, 184 Mass. 452, 69 N. E. 1076. Evidence held insufficient to show a contrary intention. Pittsburg, V. & C. R. Co. v. Fischer Foundry & Mach. Co., 208 Pa. 73, 57 A. 191. Under Comp. Laws, 3252, unless the fee is expressly reserved. Sweatman v. Bathrick [S. D.] 95 N. W. 422. Description "along said street" does not show an intention to reserve. Id. Since there is a strong presumption that a grantor in conveying land with reference to a way intended to include the way. McKenzie v. Gleason, 184 Mass. 452, 69 N. E. 1075. A state grant of land bordering on a highway is presumed to convey title to the center thereof. Paige v. Schenectady R. Co. [N. Y.] 70 N. E. 213.

75. An owner blocked up one-half the street. Healey v. Kelly, 25 R. I. 581, 54 A. 588.

76. Bounded by northerly side of said road shows contrary intention. McKenzie v. Gleason, 184 Mass. 452, 69 N. E. 1076.

77. Paige v. Schenectady R. Co. [N. Y.] 70 N. E. 213. And it is immaterial whether the street was used under common law or statutory dedication. Sweatman v. Bathrick [S. D.] 95 N. W. 422. Where proprietor of land and maker of a plat sells lots fronting on a street dedicated to the public by common law dedication. Owen v. Village of Brookport, 208 Ill. 35, 69 N. E. 952.

78. See 1 Curr. L. 348.

79. Mississippi River between Minnesota and Wisconsin. Franzini v. Layland [Wis.] 97 N. W. 499.

80. Colonial ordinance of 1641-47. Dunton v. Parker, 97 Me. 461, 54 A. 1115.

Note: Where a boundary is the "bank of a stream," a grantee will not take to the thread (Bradford v. Cressey, 45 Me. 9; Rockwell v. Baldwin, 53 Ill. 19); but to low water mark (Yates v. Van De Bogert, 56 N. Y. 526; Lamb v. Rickets, 11 Ohio, 311; Murphy v. Copeland, 58 Iowa, 409, 10 N. W. 786); but it has been held to carry to the thread (Ex parte Jennings, 6 Cow. [N. Y.] 518). There is a diversity of opinion whether lines running "along the shore" extend to the thread, Starr v. Child, 20 Wend. [N. Y.] 149, and Sleeper v. Loconia, 60 N. H. 201, holding that it does; and Child v. Starr, 4 Hill [N. Y.] 369; Stevens v. King, 76 Me. 197; Storer v Freeman, 6 Mass. 435, and Handly's Lessee v. Anthony, 5 Wheat. [U. S.] 384, holding the contrary.—Note to Allen v. Weber [Wis.] 27 Am. St. Rep. 51.

81. Description "to the shore" "thence by the shore" may be considered in determining whether the grant included the strip between high and low water mark. Evidence held to show that it was the intention that grantee should take riparian rights. Dunton v. Parker, 97 Me. 461, 54 A. 1115.

82. An unsurveyed island passes with the land to which it is appurtenant. Franzini v. Layland [Wis.] 97 N. W. 499. See Navigable Waters, 2 Curr. L. 989; Waters and Water Supply, 2 Curr. L. 2034.

83. By Illinois law he does not. Hardin v. Shedd, 190 U. S. 508, 23 S. Ct. 685, 47 Law. Ed. 1156.

84. Including a dam. Roberts v. Decker [Wis.] 97 N. W. 519. And this is not rebutted by a covenant that the grantee should help defray the expenses of keeping the dam in repair. Id. A street located along a river front extends to the middle of the river. Owen v. Village of Brockport, 208 Ill. 35, 69 N. E. 952.

85. Filling in. Block v. Diver [Kan.] 74 P. 1123.

86. Remains thread of original channel.

Meander lines.[87]—The stream and not the meander line is the boundary of a riparian owner,[88] where the government issues a patent for fractional subdivisions abutting on a meander line.[89]

§ 3. *Establishment by agreement of adjoiners.*[90]—Adjoining owners may by parol agreement establish a boundary which, when followed by possession, will be binding upon them,[91] both in law and equity,[92] and upon their successors,[93] even though they be innocent purchasers,[94] and the period of acquiescence falls short of the time required for gaining title by adverse possession.[95] But the terms of the agreement must be settled between them,[96] and be entered into before limitations have run in favor of one of the parties.[97] It is the policy of the law to give stability to such an agreement,[98] and rights thereunder are not affected by a subsequent agreement to modify it.[99] Such adjustment may be shown as well by circumstances and recognition as by direct evidence of a formal agreement.[1] Such an agreement does not preclude the admission of evidence to establish the real boundaries.[2]

§ 4. *Establishment by acquiescence or estoppel.*[3]—A boundary may be established by acquiescence,[4] or by a holding under a mistake as to the true line,[5] if it is between contiguous lands of the parties,[6] especially where it is recognized for the period necessary to acquire title by adverse possession.[7] As so established it will control over a plat.[8]

Rodriguez v. Hernandez [Tex. Civ. App.] 79 S. W. 343.

87. See 1 Curr. L. 349.

88. Evidence held to show that a surveyor's line was a meander line and not an independent boundary. Leonard v. Wood [Ind. App.] 70 N. E. 827. Lands between the meander line of navigable lakes and the line of ordinary high water belong to the upland owner. Johnson v. Brown, 33 Wash. 588, 74 P. 677.

89. Legal subdivisions under sec. 2395, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1471). Johnson v. Hurst [Idaho] 77 P. 784.

90. See 1 Curr. L. 349.

91. Not an agreement passing title. Steinhilber v. Holmes [Kan.] 75 P. 1019.

Note: Where boundary is fixed by mutual agreement it is binding though not acquiesced in for the statutory period (Jones v. Pashby, 67 Mich. 459, 35 N. W. 152; Eiden v. Eiden, 76 Wis. 435, 45 N. W. 322; Lagow v. Glover, 77 Tex. 448, 14 S. W. 141; Glover v. Wright, 82 Ga. 115, 8 S. E. 452), and acts and admissions are evidence of its location (Davidson v. Arledge, 97 N. C. 172, 2 S. E. 378, and note to Johnson v. Archibald [Tex.] 22 Am. St. Rep. 27). Line of an old fence agreed upon by the parties. Rook v. Greenewald, 22 Pa. Super. Ct. 641. Agreement in writing to abide by a line to be established by a surveyor. Surveyor placed no monuments and abandoned the survey before its completion. McCormick v. Applegate, 25 Ky. L. R. 914, 76 S. W. 511. Where by deed poll one released to another a strip of land under a brick wall, the boundary was established by such deed. Fleming v. Cohen [Mass.] 71 N. E. 563. Original boundary indefinite and unascertained. Sherman v. King, 71 Ark. 248, 72 S. W. 571. The disputed question is a sufficient consideration for the agreement. Gardner v. White, 24 Ky. L. R. 2444, 74 S. W. 206. Pol. Code, c. 13, §§ 3250-3259, amended by Sess. Laws 1901, p. 139, providing what are legal fences, do not prevent an adjoining owner from building a division fence partly on the land of his neighbor. Hoar v. Hennessy [Mont.] 74 P. 452. A stone wall is not an unreasonable fence. Id. See Fences, 1 Curr. L. 1206.

92. Evidence held to show that parties agreed to a survey and acquiesced therein. Brown v. Bowerman [Mich.] 97 N. W. 352.

93. Acquiescence for 25 or 30 years in a boundary agreed upon by parol is binding on the successors of the parties making the agreement. Campbell v. Combs, 25 Ky. L. R. 1643, 77 S. W. 923. Evidence held to show that a boundary was established by agreement between the grantors of the parties to this action. Sloan v. King [Tex. Civ. App.] 77 S. W. 48.

94. Without notice of such agreement. Sloan v. King [Tex. Civ. App.] 77 S. W. 48.

95. Steinhilber v. Holmes [Kan.] 75 P. 1019. Such an agreement is not within the Statute of Frauds; it may be parol. Farr v. Woolfolk, 118 Ga. 277, 45 S. E. 230.

96. Parties never came to any definite agreement. Geoghegan v. Turner [Ky.] 82 S. W. 244.

97. Batly v. Elrod [Neb.] 97 N. W. 343.

98. Most satisfactory way of determining the true boundary and prevents litigation. Hoar v. Hennessy [Mont.] 74 P. 452.

99. One of the parties refused to execute the modification. Masterson v. Bockel [Tex. Civ. App.] 75 S. W. 42.

1. Evidence held to show an agreement. Hoar v. Hennessy [Mont.] 74 P. 452.

2. Sloan v. King [Tex. Civ. App.] 77 S. W. 48.

3. See 1 Curr. L. 349, n. 59-71.

4. A practical location of boundaries as acquiesced in for a number of years will not be disturbed. People v. Hall, 43 Misc. 117, 88 N. Y. S. 276.

5. Continued for statutory period. See Adverse Possession, 3 Curr. L. 51. Williams v. Shepherdson [Neb.] 95 N. W. 827.

6. Cavanaugh v. Wholey [Cal.] 76 P. 979.

7. Occupancy for the statutory period is such acquiescence in a boundary line as es-

Estoppel.[9]—A boundary may result from an estoppel.[10] Such estoppel may be established by parol and it is not necessary to show an intent to mislead.[11]

§ 5. *Establishment by arbitration, action, or statutory mode. Right of action.*[12]—A court of equity has no jurisdiction to settle a disputed boundary,[13] unless objection to the jurisdiction be waived.[14] In Minnesota only persons owning land adjoining the plaintiff need be made parties.[15] A complaint alleging possession only and not a right thereto, and praying that an existing boundary be maintained, states an action in boundary.[16]

In adjudicating title to land of a foreign state, the same rules should be applied as are applied elsewhere in the state.[17]

Burden of proof.[18]—In a boundary suit the burden is not on either party to establish the location of his land.[19] Where the description is vague and uncertain the burden rests upon those claiming under it to show to what it applies.[20] The onus lies on a party appealing from a survey made by the county surveyor to show that the survey is incorrect.[21]

Admissibility of evidence.[22]—A latent ambiguity in the calls of a deed may be dispelled by parol evidence[23] in an action to establish the boundary.[24] Evidence aliunde is admissible where there is doubt as to the true location of a sur-

tablishes a practical location. Kennedy v. Niles [Iowa] 96 N. W. 772. Division fence jointly built by coterminous owners and acquiesced in for 10 years. Nance County v. Russell [Neb.] 97 N. W. 320. Acquiescence by adjoining owners for 7 years by acts or declarations, under Civ. Code § 3247. Farr v. Woolfolk, 118 Ga. 277, 45 S. E. 230. Cannot be affected by a subsequent survey. Helton v. Fastnow [Ind. App.] 71 N. E. 230. Grantor and grantee recognized a certain fence as the line for 10 years. Dows Real Estate & Trust Co. v. Emerson [Iowa] 99 N. W. 724. Where a line was recognized and acquiesced in for 10 years. Rattray v. Talcott [Iowa] 100 N. W. 36. The existence of a fence for 15 years is better evidence of a boundary between lots than the computation of surveyors, on the supposition that the lots were of like proportions. Kennedy v. Niles [Iowa] 96 N. W. 772. The fact that the area of one's land falls short of amount called for by the original survey is no ground for changing a line when he has acquiesced in it for 15 years. Klinkefus v. Vanmeter, 122 Iowa, 412, 98 N. W. 286.

8. Plat referred to in a deed conveying land to a city. Dows Real Estate & Trust Co. v. Emerson [Iowa] 99 N. W. 724.

9. See 1 Curr. L. 350, n. 65-69.

10. Where vendee improved land according to what he and vendor supposed the true boundary. Parrish v. Williams [Tex. Civ. App.] 79 S. W. 1097. By conveying by a different description than that by which one acquired title the later deeds cannot be used as evidence of the location of the disputed line. Summerfield v. White [W. Va.] 46 S. E. 154. By inducing a purchase by representations as to the line. Thompson v. Borg, 90 Minn. 209, 95 N. W. 896. Where monuments have been lost and parties living in the vicinity improved with reference to a corner established by a surveyor appointed by a court commissioner. Brutsche v. Bowers [Iowa] 97 N. W. 1076. Occupancy in accordance with a fence recognized as a division line between plaintiff's land and a highway for more than fifteen years, and acquiescence in such line by the defendant, who built a fence on his side of the highway, estops one from questioning the boundaries of the highway. Klinkefus v. Vanmeter, 122 Iowa, 412, 98 N. W. 286. Charged with notice of inconsistent surveys. Bryant v. Main, 25 Ky. L. R. 1742, 77 S. W. 680.

11. Thompson v. Borg, 90 Minn. 209, 95 N. W. 896.

12. See 1 Curr. L. 350.

13. Eakin v. Taylor [W. Va.] 47 S. E. 992.

14. By prayer in answer that line be established. Killgore v. Carmichael, 42 Or. 618, 72 P. 637.

15. Proceedings under Gen. St. §§ 5823-5829, complaint making all persons interested in adjoining land parties, held to state a cause of action. Rock v. Donora Min. Co. [Minn.] 97 N. W. 889. It is discretionary with the court to stay proceedings when persons not interested in the land originally involved are not made parties [Gen. St. 1894, § 5825]. Id.

16. Not a possessory action. Heidman v. Sequin, 110 La. 449, 34 So. 599. Where the answer sets up title and both parties introduce evidence thereof, the action ceased to be possessory, even if it was such originally. Id.

17. River changed its channel by avulsion. Rodriguez v. Hernandez [Tex. Civ. App.] 79 S. W. 343.

18. See 1 Curr. L. 351.

19. Charge to this effect was improper. Masterson v. Ribble [Tex. Civ. App.] 78 S. W. 358.

20. Peery's Adm'r v. Elliott, 101 Va. 709, 44 S. E. 919.

21. Evidence held insufficient to show that a survey was incorrect. Watkins v. Havighorst, 13 Okl. 128, 74 P. 318.

22. See 1 Curr. L. 351.

23. Arising when an effort is made to apply them to the land. Sloan v. King [Tex. Civ. App.] 77 S. W. 48. To ascertain the meaning of terms in a deed of partition. Graves v. Broughton [Mass.] 69 N. E. 1083.

24. Resort to equity unnecessary. Sloan v. King [Tex. Civ. App.] 77 S. W. 48.

vey,[25] but not to change lines and corners, where the field notes are not ambiguous.[26] Evidence that a certain point is generally reputed to be a corner is admissible,[27] if it appear to have been of such interest in the neighborhood as to have provoked discussion.[28]

Instructions.[29]—Where boundaries of land conveyed by patent are in question the court should instruct as to the effect of marked lines as called.[30] It is no error to refuse to instruct against the weight of evidence,[31] or on a point which there is no evidence to support.[32]

Verdict and finding.[33]—A decree in statutory proceedings to determine a boundary is conclusive, if not appealed from, or the issue of title raised.[34] So a finding that a boundary has been acquiesced in for ten years will not be disturbed on appeal,[35] but a verdict which establishes a boundary against the weight of the evidence will be set aside.[36] One not a party to a suit is not bound therein as to any determination made therein as to the boundary.[37]

BOUNTIES.

The Minnesota sugar bounty act is unconstitutional,[38] and no obligation rests on the state to pay bounties on sugar whose culture was induced by the act.[39]

25. Trust deed did not describe the land by courses and distances. Nothing to show that it was intended to embrace a mill tract. Peery's Adm'r v. Elliott, 101 Va. 709, 44 S. E. 919. Where the calls when applied to the land, disclose a latent ambiguity. Sloan v. King [Tex. Civ. App.] 77 S. W. 48.

Surveys and opinions of surveyors: Where a survey begins and ends on a river with other corners in a prairie, adjoining surveys made subsequently by different surveyors, in which the prairie corners are identified upon the ground by artificial objects called for in the subsequent field notes, but not in the original field notes, are inadmissible. Matthews v. Thatcher [Tex. Civ. App.] 76 S. W. 61. But where the beginning corner on a river cannot be identified on the ground because of changes in the river, subsequent adjoining surveys identifying the prairie corners are admissible to identify the beginning corner. Id. Declarations of a person not shown to be in a position to know the location of a boundary inadmissible. Id. A surveyor who made experimental surveys may by way of introduction state that corners were pointed out to him as beginning corners and may detail conditions disclosed by his survey. Id. Where a survey must be construed on its calls for courses and distances, evidence that surveys made about the same time contained excessive acreage is inadmissible. Id.

26. Jamison v. New York & T. Land Co. [Tex. Civ. App.] 77 S. W. 969. Where dispute was as to location of a north and south line a question as to a quarter line was immaterial. Pugh v. Schindler [Mich.] 94 N. W. 1056.

27. Witness may state that a spot was pointed out to him as, and was generally reputed to be, the corner. Matthews v. Thatcher [Tex. Civ. App.] 76 S. W. 61. That a corner was referred to in subsequent adjoining surveys and its east line made a county boundary by legislative act is admissible on the issue of local public interest. Id.

28. A surveyor, who has made a survey after suit, based on corners pointed out by defendant, cannot state that other surveys would be affected by changes proposed by the plaintiff, though he may detail the conditions and distances disclosed by his survey. Matthews v. Thatcher [Tex. Civ. App.] 76 S. W. 61. Evidence of a county surveyor that his office records recognized a corner as claimed by defendant is inadmissible. Id.

29. See 1 Curr. L. 352.

30. Whitehouse Cannel Coal Co. v. Wells, 25 Ky. L. R. 60, 74 S. W. 736.

31. A refusal to charge that a crooked fence is better evidence than a recent survey is proper, especially where there were traditions and alleged agreements on the assumption that it was not the true line. Pugh v. Schindler [Mich.] 94 N. W. 1056. An instruction authorizing the location of a corner of a subsequent survey by reference to the corner of a prior survey was improper under the evidence. Matthews v. Thatcher [Tex. Civ. App.] 76 S. W. 61. An instruction that "it will not do to permit boundaries to be disturbed and moved, upon a survey made from an assumed starting point, without some proof, as I have said, of its being a true line located and fixed by the government survey" is not objectionable if the jury have previously been instructed that the plaintiff's case must be established by a preponderance of evidence. Pugh v. Schindler [Mich.] 94 N. W. 1056.

32. An instruction that the location of a stake as a corner was the controlling inquiry, and if the jury found where the original surveyor placed it, it would end the controversy, is error, as the call for the stake could not control the distance from the beginning corner. Matthews v. Thatcher [Tex. Civ. App.] 76 S. W. 61.

33. See 1 Curr. L. 352.

34. Laws 1893, p. 44, c. 22, providing for establishment of boundaries by special proceedings. Parker v. Taylor, 133 N. C. 103, 45 S. E. 473.

35. Being a question of fact. Oster v. Devereaux [Iowa] 98 N. W. 579.

36. Where the jury did not regard the

The action of a state auditor refusing to issue bounty warrants is quasi judicial and may be reviewed by certiorari.[40] The statute governing grant of new trials generally applies to suits against the state for coyote scalp bounties.[41]

BREACH OF MARRIAGE PROMISE.

The promise.[42]—A proposal by one party and an acceptance by the other, both being free to marry, shows a promise.[43] A promise can be shown from the character of correspondence,[44] or oral declarations,[45] but the language must be clear.[46] An oral contract to marry is within the statute of frauds, unless excepted by the terms of the statute.[47] The promise is binding according to all its terms.[48] A promise of marriage in consideration of illicit sexual intercourse is void.[49] A law prohibiting marriage within one year after divorce does not prohibit a contract to marry.[50]

Breach and defenses.[51]—After a distinct refusal, the woman is not obliged to again offer herself in order to maintain an action.[52] Where one of the parties without excuse fails to perform his agreement at the time fixed for the ceremony, the other party may rescind and maintain an action for damages.[53] Where one of the parties to a marriage contract discovers that the other is of immoral character, he may sever the relation with impunity;[54] but if he enters into the contract with knowledge of all the facts, he may not do so,[55] and illicit relations induced by a promise to marry will not justify a breach of promise[56] nor the fact that the woman was guilty of apparently unseemly conduct.[57] That a woman

evidence of an ancient boundary fence. Saunders v. Sutton [N. J. Law] 55 A. 652.

37. A city. Dows Real Estate & Trust Co. v. Emerson [Iowa] 99 N. W. 724.

38. It infringes § 5, art. 9, prohibiting the state from contracting debts except as therein allowed, and § 10, art. 9, prohibiting the state from lending aid to any private individual. Minnesota Sugar Co. v. Iverson [Minn.] 97 N. W. 454.

Note: Similar acts have been declared unconstitutional in Michigan (Mich. Sugar Co. v. Dix, 124 Mich. 674, 83 N. W. 625), and the District of Columbia (U. S. v. Carlisle, 5 App. D. C. 138).

39, 40. Minnesota Sugar Co. v. Iverson [Minn.] 97 N. W. 454.

41. The act makes the general rules of civil procedure applicable. San Francisco Law & Collection Co. v. State, 141 Cal. 354, 74 P. 1047.

42. See 1 Curr. L. 353.

43. Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024.

44. Evidence, letters and conduct, presentation of ring, etc., held sufficient to show a promise of marriage. Poehlmann v. Kertz, 105 Ill. App. 249; Id., 204 Ill. 418, 68 N. E. 467.

45. In February, 1901, the parties had agreed to marry in March, 1902. In June, 1901, the man said, "I intend to marry you as I promised. In March we will go to the farm and live right." Held to constitute a new promise, and not a mere rehearsal of the terms of a contract void under the statute of frauds. Parrish v. Parrish, 67 Kan. 323, 72 P. 844.

46. Evidence of correspondence held not sufficient to sustain a promise of marriage. Johansen v. Modahl [Neb.] 94 N. W. 532.

47. By the terms of the contract, the marriage was not to take place for three years. Haslam v. Barge [Neb.] 96 N. W. 245. Evidence of correspondence, etc., held not to establish a written contract to marry. Id.

48. Ceremony to be performed according to rules and customs of a particular church. Waneck v. Kratky [Neb.] 96 N. W. 651.

49. No recovery can be had for breach. Edmonds v. Hughes, 24 Ky. L. R. 2467, 74 S. W. 283.

50. Buelna v. Ryan, 139 Cal. 630, 73 P. 466.

51. See 1 Curr. L. 253, n. 2, 3.

NOTE. Previous engagement or marriage: That defendant was at the time of making the promise affianced to another (Roper v. Clay, 18 Mo. 383; Albertz v. Albertz, 78 Wis. 72, 47 N. W. 95), or was then married to another is no defense, if plaintiff was ignorant of such fact at the time of accepting the promise (Kelley v. Riley, 106 Mass. 339; Pollock v. Sullivan, 53 Vt. 507).

52. Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024.

53. It was agreed that marriage was to be performed at a certain date and hour. The groom failed to appear. Waneck v. Kratky [Neb.] 96 N. W. 651.

54. Williams v. Fahn, 119 Iowa, 746, 94 N. W. 252; Welker v. Metcalf [Pa.] 58 A. 687; Edmonds v. Hughes, 24 Ky. L. R. 2467, 74 S. W. 283. No proof of specific acts of immoral nature is necessary. Williams v. Fahn, 119 Iowa, 746, 94 N. W. 252.

55. A gentleman 74 years old contracted to marry a deaf and dumb woman aged 45, of shady character. She was allowed to recover $1,500.00. Williams v. Fahn, 119 Iowa, 746, 94 N. W. 252.

56. Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024.

57. That the woman visited houses of

subsequent to the contract became incapable of procreation is a defense.[58] *A petition*[59] which states that plaintiff was at the place designated during the month the ceremony was to be performed and was ready to carry out her part of the agreement is sufficient.[60] A complaint need not allege that plaintiff was willing to marry defendant up to the time of the filing thereof.[61]

Limitations run against the action from the time of breach and not from the time of making the contract.[62]

Damages; aggravation and mitigation.[63]—Evidence of seduction is admissible, though not charged in the declaration.[64] In computing damages, the jury are entitled to consider the entire course of conduct of the parties,[65] a subsequent offer to marry, made in good faith, together with the circumstances under which the breach occurred,[66] where, in the trial of the case, the man seeks to blacken the character of the woman,[67] and it need not be shown that he was actuated by malice in making the charge.[68] The general reputation for wealth as distinguished from the actual circumstances is not a proper matter to be taken into consideration in estimating damages.[69] The measure of damages to be recovered is a sum sufficient to compensate for the breach of contract and for any mortification of feelings suffered.[70]

assignation is no defense if she visited them for a moral purpose. Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024.

58. Edmonds v. Hughes, 24 Ky. L. R. 2467, 74 S. W. 283.

NOTE. Fraudulent concealment of facts as defense: In the case of Van Houten v. Morse, 162 Mass. 414, 38 N. E. 705, 44 Am. St. Rep. 373, it was held that although a woman is under no obligation on accepting an offer of marriage to voluntarily disclose the circumstances of her past life, if she assumes to do so, any concealment operates as a fraud, justifying the man in refusing to perform. Citing Short v. Currier, 153 Mass. 182, 26 N. E. 444; Burns v. Dockray, 156 Mass. 135, 30 N. E. 551; Atwood v. Chapman, 68 Me. 38; Devoe v. Brandt, 53 N. Y. 462. Applying this rule, it was held that failure to fully disclose the circumstances of a previous divorce and the fact that her family had some negro blood justified a breach, though in the absence of such concealment, such facts would not be a justification.

59. See 1 Curr. L. 354, n. 8, 9.

60. The ceremony was to take place at Middlesborough, in July, date not mentioned. Plaintiff remained there the entire month. Grubbs v. Pence, 24 Ky. L. R. 2183, 73 S. W. 785. The fact that an order in favor of plaintiff had been paid at a different place was inadmissible to show that she was not at Middlesborough. Id.

61. Alleging that defendant refused to marry up to that time is sufficient. Buelna v. Ryan, 139 Cal. 630, 73 P. 466.

62. Buelna v. Ryan, 139 Cal. 630, 73 P. 466.

63. See 1 Curr. L. 354, n. 10-14.

64. Poehlmann v. Kertz, 105 Ill. App. 249. It is not error to admit evidence of a previous contract, void as being within the statute of frauds, to corroborate testimony of a new promise. Parrish v. Parrish, 67 Kan. 323, 72 P. 844. But it is discretionary with the court as to how much of this previous intercourse is to be admitted. Id. See 1 Curr. L. 354, n. 9.

65. That the man had her announce the engagement, and after assurance of marriage seduced her. His disregard for the virtue of a woman who trusted him. Poehlmann v. Kertz, 105 Ill. App. 249.

66. After the complaint was served, defendant renewed his offer to marry and stated as his reason for not keeping the promise that his son had gone blind and that he could not give plaintiff the attention she deserved as his wife. McCarty v. Heryford, 125 F. 46.

67. By charges of unchastity. Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024.

Note: To the same effect see Kelley v. Highfield, 15 Or. 277, 14 P. 744; Reed v. Clark, 47 Cal. 203; Davis v. Slagle, 27 Mo. 603; Thorn v. Knapp, 42 N. Y. 475.

68. Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024.

69. Johansen v. Modahl [Neb.] 94 N. W. 532. Where evidence of settlement and the benefits claimed by defendant was conflicting, a verdict for plaintiff was not disturbed. Williams v. Fahn, 119 Iowa, 746, 94 N. W. 252.

70. Grubbs v. Pence, 24 Ky. L. R. 2183, 73 S. W. 785. Man 74 years old promised to marry a deaf and dumb woman of 46. Verdict of $1,500.00 not disturbed. Williams v. Fahn, 119 Iowa, 746, 94 N. W. 252. Verdict for $22,500.00 held excessive where defendant was worth only $50,000.00, especially where offer of marriage was renewed after commencement of the action, and where the only matter in aggravation of damages was seduction, which was not made until after the renewal offer, and this was not sustained by the evidence. McCarty v. Heryford, 125 F. 46. Defendant was a railway mail clerk and his only property was a house, not paid for. Verdict for $25,000.00 was excessive. Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024.

NOTE. Exemplary damages: Actions for breach of promise of marriage form an exception to the rule that exemplary damages are recoverable only in case of tort. Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308; McPherson v. Ryan, 59 Mich. 33, 26 N. E. 321. The breach must have been wanton or malicious or accompanied by circumstances of

Liability of third person inducing breach.—A parent is not liable to his son's fiance for inducing him to break his contract to marry her.[71] Her remedy against the parent is an action for slander.[72]

BRIBERY.

Nature and elements of offense.[73]—Bribery is the giving, offering, or receiving of anything of value, or any valuable service, intended to influence a public officer or agent, de facto,[74] or de jure, in the discharge of his legal duty;[75] the true test being whether the matter is before the officer in his official capacity, or is one that may be brought before him in such capacity.[76] An analogous offense is created by the Federal statute prohibiting Federal officers from receiving private compensation for services in respect to any matter in which the United States is interested.[77] Bribery was an indictable offense at common law,[78] and there was no difference in liability between the giver and the receiver.[78] Under the Missouri statute, an offer to give a bribe is as illegal as the giving of one,[80] and one may be guilty as an accessory who knowingly assists in the escape of one guilty of bribery.[81] The Indiana constitutional provision rendering ineligible for office one who gives or offers an election bribe does not refer to a primary election.[82] The Federal statute on bribery for a valuable consideration covers only some valuable thing like money, property, or notes.[83]

Indictment.[84]—The indictment must be direct and definite,[85] and must, on

aggravation. Dupont v. McAdow, 6 Mont. 226, 9 P. 925.

71. Leonard v. Whetstone [Ind. App.] 68 N. E. 197.

72. The parents made false and slanderous charges against her. Leonard v. Whetstone [Ind. App.] 68 N. E. 197.

73. See 1 Curr. L. 354.

74. A de facto officer may be bribed. State v. Butler [Mo.] 77 S. W. 560.

75. Pen. Code, § 72. People v. Van De Carr, 87 App. Div. 386, 84 N. Y. S. 461. A justice of the peace who receives money in consideration of not instituting a prosecution is guilty of bribery, where a legal duty existed to begin such prosecution. Morawietz v. State [Tex. Cr. App.] 80 S. W. 997.

76. People v. McGarry [Mich.] 99 N. W. 147; State v. Lehman [Mo.] 81 S. W. 1118. The test of one's being an officer is that the incumbent in his independent capacity is clothed with some part of the sovereignty of the state, to be exercised in the interest of the public and required by law. Barker v. State [Ohio] 68 N. E. 575. An attempt to influence one's vote on a question which could not lawfully come before him does not constitute bribery. The St. Louis board of health has no authority to let a contract of the disposal of garbage [Rev. St. 1899, § 2089]. State v. Butler [Mo.] 77 S. W. 560. One is not guilty of bribery as a "member of Congress," before he has been accepted as a member thereof and assumed his duties. Where the prosecution's opening statement admits a fact which must prevent a conviction, the court may on its own motion direct a verdict for the accused. U. S. v. Dietrich, 126 F. 676. A Federal Indian agent may be guilty of bribery as an officer of the United States [U. S. Comp. St. 1901, p. 3709]. Sharp v. U. S., 13 Okl. 522, 76 P. 177. An accountant employed by a board of revision is a city employe and may be guilty of bribery as such [Rev. St. 1892, § 6900]. Barker v. State [Ohio] 68 N. E. 575. A city attorney is punishable under a statute on bribery of judicial and executive officers [Comp. Laws, § 11,312]. People v. Salsbury [Mich.] 96 N. W. 936.

77. Rev. St. § 5480. An inquiry by the postoffice department as to the propriety of issuing a "fraud order" is within the statute. U. S. v. Burton, 131 F. 552.

78. In the early days it was limited to judicial officers or those engaged in the administration of justice, but was later extended to all public officers. People v. Van De Carr, 87 App. Div. 386, 84 N. Y. S. 461. Bribery at election of members of parliament was a common-law offense and so probably at municipal elections. Doyle v. Kirby, 184 Mass. 409, 68 N. E. 843.

79. Pub. St. 1881, c. 7, §§ 60, 61; Gen. St. c. 7, § 31. Doyle v. Kirby, 184 Mass. 409, 68 N. E. 843.

80. There need be no actual tender nor an offer to give any definite amount [Rev. St. 1899, § 2043]. State v. Woodward [Mo.] 81 S. W. 857.

81. One charged as an accessory has the burden of proving himself within the class of persons exempt under Rev. St. 1899, § 2365. State v. Miller [Mo.] 81 S. W. 867.

82. Const. art. 2, § 6. Under section 2327 Burns' Rev. St. 1901, on bribery at a primary election, a conviction is necessary before one is ineligible for office. Gray v. Seitz [Ind.] 69 N. E. 456.

83. A non-negotiable instrument, made invalid by statute, is not "property" nor "valuable consideration" [U. S. Comp. St. 1901, p. 1212]. U. S. v. Miller, 125 F. 520; U. S. v. Driggs, 125 F. 520.

84. See 1 Curr. L. 354.

85. Const. art. 1, § 6; Gen. St. 1894, § 7241; Gen. St. 1894, § 7247. State v. Ames [Minn.] 98 N. W. 190.

its face, by plain allegations, not by inference merely, charge some act constituting bribery,[86] but if it substantially follows the language of the statute it is sufficient.[87] It will not be uncertain because it states that part of the money was paid by persons unknown to the grand jury,[88] nor bad for duplicity because it alleges that several persons contributed to the fund used as a bribe,[89] nor defective in charging bribery of a city attorney in a matter which might properly come before him.[90] An indictment for corruptly agreeing with others to vote in a specified manner need not charge the defendants separately,[91] and an allegation that defendant had not been a resident of or usually resident within the state since the commission of an offense, properly raises an avoidance of the bar of limitations, and is not defective as pleading in the alternative.[92]

Evidence.[93]—All testimony tending to show the receiving of the bribe is admissible as bearing on the corpus delicti,[94] likewise evidence that defendant attempted to suppress testimony or induce perjury,[95] and evidence of other crimes by the accused is admissible where there is a logical connection with the offense charged.[96] The voluntary admissions of defendant may be received,[97] and conversations in furtherance of a bribery conspiracy are admissible though held in defendant's absence,[98] or though in defendant's presence and a conspiracy be not proven.[99] On a charge of corruptly forming a voting agreement with others, the state need not show the guilt of each of the alleged conspirators.[1]

Trial and instructions.[2]—The accused is not entitled to a separate trial on the issue of limitations.[3]

The court may charge the jury to consider defendant's interest, in weighing his testimony,[4] and it is sufficient that the court charged a consideration of all the evidence and that certain testimony as to defendant's good character was

86. It should charge with certainty and precision all the facts necessary to constitute the offense and must conform to the language or state all the facts which bring it within the terms of the statute. State v. Schnettler [Mo.] 79 S. W. 1123. The indictment should possess sufficient certainty to apprise the defendant of the offense with which he is charged. Sharp v. U. S., 13 Okl. 522, 76 P. 177. The indictment for bribery on election must express the exact legal status of the position the person seeks. Held fatal that the indictment charged bribery on an election "for the office of congress," there being no such office. Allison v. State [Tex. Cr. App.] 78 S. W. 1065. Indictment of United States senator for receiving compensation for services for client in inquiry before postal department held sufficient. U. S. v. Burton, 131 F. 552.

87. An indictment charging bribery in connection with leases need not describe the land, give the number of the lease, name of the lessee, quantity of each nor condition of contract. Sharp v. U. S., 13 Okl. 522, 76 P. 177.

88, 89. State v. Ames [Minn.] 98 N. W. 190.

90. It was the duty of the city attorney to advise properly regarding the contract, and it is immaterial that the council could not lawfully have entered upon such a contract. People v. McGarry [Mich.] 99 N. W. 147.

91. Rev. St. 1899, § 2531, provides that an indictment shall not be invalid for defects therein unless tending to substantially prejudice defendant's rights. State v. Lehman [Mo.] 81 S. W. 1118.

92. Rev. St. 1899, § 2421. State v. Snyder [Mo.] 82 S. W. 12.

93. See 1 Curr. L. 355.

94. People v. McGarry [Mich.] 99 N. W. 147.

95. People v. Salisbury [Mich.] 96 N. W. 936.

96. State v. Schnettler [Mo.] 79 S. W. 1123. Evidence of other crimes is admissible when it tends directly or indirectly to establish the defendant's guilt of the crime charged in the indictment on trial or some essential ingredient of such offense. State v. Ames, 90 Minn. 183, 96 N. W. 330.

97. A valuable discussion on voluntary admissions. State v. Woodward [Mo.] 81 S. W. 857.

98. There being abundant evidence of the conspiracy of bribery and defendant's connection with it, the court properly admitted evidence of the actions of the other conspirators before defendant's complicity was shown. People v. McGarry [Mich.] 99 N. W. 147; State v. Ames, 90 Minn. 183, 96 N. W. 330.

99. State v. Lehman [Mo.] 81 S. W. 1118.

1. Hence it is immaterial whether one of those accused was a de jure or a de facto officer. State v. Lehman [Mo.] 81 S. W. 1118.

2. See 1 Curr. L. 355.

3. Bribery is within the three-year limitation imposed by Rev. St. 1899, § 2419. State v. Snyder [Mo.] 82 S. W. 12.

4. State v. Ames, 90 Minn. 183, 96 N. W. 330.

competent.[5] The issues should be clearly presented,[6] but an instruction that one may commit bribery in the interests of a company only if employed by its directors was properly refused.[7]

BRIDGES.

§ 1. Regulation and Control (529).
§ 2. Establishment and Location by Public Agencies (529).
§ 3. Contracts and Construction (530).
§ 4. Public Liability for Cost and Maintenance (530).
§ 5. Establishment, Construction, and Maintenance by Private Enterprise (531).
§ 6. Injuries from Defective Bridges (531).
§ 7. Injuries to Bridges (535).

§ 1. *Regulation and control.*—Until congress acts, the power of the state over bridges over its navigable streams is plenary,[8] and congress did not intend by the river and harbor act of 1899 to deprive the states of their right to say what structures should be built in navigable streams wholly within their limits,[9] nor deprive the owner of a bridge, previously erected, of the right to make repairs.[10] A railroad by the mere fact of its incorporation is not empowered to bridge a navigable stream without consent of the legislature.[11] A bridge cannot be construed to be a ferry, but it may well be a substitute for a ferry when it was manifestly so intended.[12] A statute providing for the setting aside of the tolls of a bridge connecting two towns for the purpose of building a free bridge is invalid where it mentions only one of the towns, they being joint owners of the tolls.[13]

§ 2. *Establishment and location by public agencies.*[14]—A petition of resident tax payers is the usual means of setting in motion the procedure for building bridges by public authority,[15] and a limit on the amount that may be expended without the authority of the electors interested, expressed by vote, is frequently set.[16] Statutes often require that plans and specifications be adopted in advance of the letting of the contract,[17] and the advertisement and contract must be based upon such plans.[18] The approval of the general plan of a bridge by the proper boards or bodies does not prevent changes in detail thereafter.[19]

5. The court need not specifically say that the jury must consider the evidence as to defendant's good character. State v. Ames, 90 Minn. 183, 96 N. W. 330.

6. Instructions that the jury need not consider whether defendant was an inhabitant of the state, and that the fact of his being an inhabitant thereof and having a home therein had no bearing as to whether he was usually a resident thereof, are misleading where an issue is made as to the exception to the limitation. Rev. St. 1899, § 2421, provides that the statute of limitations shall not run while the defendant is not an inhabitant of or usually resident within the state. State v. Snyder [Mo.] 82 S. W. 12.

7. The evidence was clear that he was a criminal agent of the company under orders of its president. State v. Faulkner, 175 Mo. 546, 75 S. W. 116.

8. Power of congress over bridges over navigable waters. Cummings v. Chicago, 188 U. S. 410, 23 S. Ct. 472. In the absence of congressional legislation, a state may authorize the building of a bridge over a navigable interstate stream. Kansas City, etc., R. Co. v. Wiygul [Miss.] 33 So. 965. See Navigable Waters, 2 Curr. L. 994.

9. Under existing legislation, the right to erect a bridge or other structure in a navigable water of the United States, wholly within the limits of a state, depends upon the concurrent or joint assent of the state and national governments. River & Harbor act of 1899. Cummings v. Chicago, 188 U. S. 410, 23 S. Ct. 472, 47 Law. Ed. 525; Calumet G. & E. Co. v. Chicago, 188 U. S. 431, 23 S. Ct. 477, 47 Law. Ed. 532.

10. Kansas City, etc., R. Co. v. Wiygul [Miss.] 33 So. 965.

11. Dundalk, etc., R. Co. v. Smith, 97 Md. 177, 54 A. 628.

12. Where so substituted, it will be charged with a license or privilege of free passage resting on the ferry. Du Pont v. Charleston Bridge Co., 65 S. C. 524, 44 S. E. 86.

13. City of Shreveport v. Tidwell [La.] 36 So. 312.

14. See 1 Curr. L. 355.

15. Where a petition for the construction of a bridge is presented to a board of supervisors at a regular session and denied, a new petition may be presented and granted at an adjourned session without reconsidering the former action. Ionia County Sup'rs v. Ionia Circuit Judge [Mich.] 96 N. W. 497.

16. A statutory provision that when it is necessary to raise a sum in excess of $2,000 for building any bridge in a township, the question shall be submitted to a vote of electors, does not apply to the construction of bridges partly within two townships. Ionia County Sup'rs v. Ionia Circuit Judge [Mich.] 96 N. W. 497.

17, 18. Clark v. Lancaster County [Neb.] 96 N. W. 593.

§ 3. *Contracts and construction.*[20]—As in the case of other public contracts, it is usually prescribed by statutes that contracts for bridges shall be let only upon competitive bids;[21] where, however, express authority to so build a bridge is given, competitive bidding is not necessary.[22] A board of supervisors having contracted for the erection of a bridge, it could contract without advertising for new bids for extra work found necessary during its construction, where it pertained to a necessary part of the bridge.[23] In Nebraska, no authority exists for repairing by annual contract, and where a repair job amounts to more than $100, it must be done by advertising for bids, based upon plans and specifications previously adopted.[24]

Since the presumption is that public officials observe and obey the law, a complaint need not allege that the bridges, to recover compensation for which suit is brought, were such as could be lawfully erected by the defendant board,[25] but an instruction that if the plaintiffs built the bridge on a public road, they were entitled to recover its reasonable value, though the county had not entered into any contract for its construction, is erroneous.[26]

§ 4. *Public liability for cost and maintenance.*[27]—The question which of two municipalities or in what proportion they shall bear the expense of maintaining a bridge most frequently arises with relation to bridges over streams forming the boundary between counties,[28] towns,[29] or cities,[30] and bridges on highways forming the boundary line.[31] This joint liability is statutory, and proceedings to enforce it must follow the statute;[32] but where the liability exists, it is imma-

19. Sanborn v. Lindenthal, 41 Misc. 564, 85 N. Y. S. 206.

20. See 1 Curr. L. 355.

21. Clark v. Lancaster County [Neb.] 96 N. W. 593. County commissioners can exercise no powers not expressly given by statute, and statutory requirements relative to advertising for bids must be complied with. State v. Snyder, 2 Ohio N. P. (N. S.) 261. The cost of the substructure must be estimated in determining the cost of the bridge. Under Rev. St. § 796. When cost of bridge was less than $1,000.00 county commissioners could let contract without advertising for bids. Cost of substructure was not figured in. Id. See Public Contracts, 2 Curr. L. 1285, n. 87.

22. Knowles v. New York, 176 N. Y. 430, 68 N. E. 860.

23. Fenders, or clusters of piles above and below the bridge, but totally disconnected therefrom are not such a necessary part of the bridge. Marion County v. Foxworth [Miss.] 36 So. 36.

24. Clark v. Lancaster County [Neb.] 96 N. W. 593.

25. Bayne v. Wright County Com'rs, 90 Minn. 1, 95 N. W. 456.

26. Howard County v. Lambright [Ark.] 80 S. W. 148.

27. See 1 Curr. L. 355.

28. State v. Thomas [Mo.] 82 S. W. 106; Queen Anne's County Com'rs v. Talbot County Com'rs [Md.] 57 A. 1; In re Newark Plank Road and Bridges, 63 N. J. Eq. 710, 53 A. 5. When the legislature refers to streams which divide counties, it must be understood as meaning streams in which are situated the boundary lines which divide the counties. Dodge County v. Saunders County [Neb.] 97 N. W. 617. Where a bridge over a stream which divides two counties is a charge upon each, it is the duty of the county board of either county, when notified in writing by the other, to join in a contract for the repairs of the bridge, to either comply with the notice by joining in the contract or unequivocally refuse to do so. Iske v. State [Neb.] 100 N. W. 315. See 1 Curr. L. 356, n. 20 et seq.

29. Town of East Fishkill v. Wappinger, 89 N. Y. S. 599.

30. A toll bridge between two cities divided by a river, being converted into a highway, must be maintained by the two cities. State v. Bangor, 98 Me. 114, 56 A. 589.

31. A county can become obligated to contribute towards the expenses of building a bridge over a stream upon a boundary line between itself and another county, either by entering in the first instance into a joint contract for the construction of such bridge in the manner prescribed by statute, or by subsequently ratifying a contract for that purpose. Saline County v. Gage County [Neb.] 97 N. W. 583. When the county boards of adjoining counties have attempted to enter into a joint contract for the purpose of building a bridge, but by reason of the neglect of requisite formalities one of such counties fails of becoming obligated thereby, and the other in good faith and pursuant to the contract builds and pays for the bridge, the former may ratify and confirm the contract by allowance in behalf of the latter of a claim for one-half the contract price of the structure, and a taxpayer cannot defeat or annul such ratification by appealing from the order of allowance. Id. See 1 Curr. L. 356.

32. Iske v. State [Neb.] 100 N. W. 315; Saline County v. Gage County [Neb.] 97 N. W. 583. The fact that a resolution passed by the board of one of two adjoining counties calling upon the other to join in mak-

terial whether the boundary stream lies half in each county or wholly in one county, the boundary line being one bank of the stream.[33] The duty of adjoining municipalities to repair, when clear, may be enforced by mandamus;[34] but the rule as to original construction is otherwise, and where statutes provide that a bridge between two counties shall be built upon the determination of both counties, such determination once made is the exercise of a discretion which mandamus will not lie to review,[35] and generally speaking, courts will not substitute their judgment for that of the township authorities in relation to how the bridges of the township shall be maintained, nor decide the cost of repairs where there is an honest dispute as to what expenditure will be required.[36]

In Iowa, the duty of keeping in repair a bridge within the corporate limits of a city rests upon the city and not upon the county,[37] but in Kentucky, though a bridge may be wholly within the limits of a city, yet if in fact it is a county bridge, that is, part of a county highway, it becomes the duty of the county to replace it on its destruction.[38] Provisions in a statute for the levy of taxes for repairing bridges must be strictly complied with.[39]

§ 5. *Establishment, construction, and maintenance by private enterprise,* is more fully treated elsewhere.[40] A municipality may grant to a corporation the right to build bridges across its basins to the extent that the municipality is concerned,[41] and the legislature of Missouri has power to confer on foreign corporations the right of eminent domain, to be exercised in the construction of a toll bridge for public use.[42] The incorporation of a railroad does not of itself confer on it the right to cross navigable waters of the state without the consent of the legislature.[43] The approach to a bridge is a part thereof, so that an attempted conveyance of such approach by a company chartered to build and operate the bridge is ultra vires.[44] The dedication of a bridge by a railroad company to a town for the public use, and the complete and formal acceptance thereof by the town, releases the railway company from all responsibility to the public in the premises.[45] The fact that the upper portion of a bridge is used as a railroad bridge does not prevent a toll bridge license being required.[46]

§ 6. *Injuries from defective bridges.*[47]—The right of navigation being paramount, it is incumbent on the owner of a bridge to so construct it that it may be readily opened to permit the passage of vessels, to place it in charge of persons competent to operate it, to equip it with lights and signals giving warning of its

ing bridge repairs designates two bridges, while, after the latter's refusal, a contract is let and recovery sought as to one only is not fatal. Dodge County v. Saunders County [Neb.] 97 N. W. 617.

33. Dodge County v. Saunders County [Neb.] 97 N. W. 617; In re Newark Plank Road & Bridges, 63 N. J. Eq. 710, 53 A. 5. Where a stream between two towns does not form the boundary line between them, being almost wholly within the limits of the one town, and yet might properly be said to be upon the boundary in such a manner that the construction of bridges would involve the soil or territory of both towns, the towns were not liable by force of the statute alone to share equally the expense, though they might be equitably liable to do so. Town of East Fishkill v. Wappinger, 89 N. Y. S. 599.

34. Iske v. State [Neb.] 100 N. W. 315.

35. State v. Thomas [Mo.] 82 S. W. 106.

36. Kingsley v. Nylan [Mich.] 99 N. W. 744.

37. Freeman v. Independence [Iowa] 97 N. W. 1083.

38. Leslie County v. Wooten, 25 Ky. L. R. 217, 76 S. W. 208.

39. People v. Chicago & A. R. Co., 206 Ill. 594, 69 N. E. 51; Cincinnati, I. & W. R. Co. v. People, 206 Ill. 565, 69 N. E. 628.

40. See Railroads, 2 Curr. L. 1382; Toll Roads and Bridges, 2 Curr. L. 1872.

41. Capdevielle v. New Orleans & S. F. R. Co., 110 La. 904, 34 So. 868.

42. Southern Ill. & M. Bridge Co. v. Stone, 174 Mo. 1, 73 S. W. 453.

43. Dundalk, S. P. & N. P. R. Co. v. Smith, 97 Md. 177, 64 A. 628.

44. Pittsburg, C., C. & St. L. R. Co. v. Dodd, 24 Ky. L. R. 205, 72 S. W. 822.

45. Hicks v. Chesapeake & O. R. Co. [Va.] 45 S. E. 888.

46. Southern R. Co. v. Mitchell, 139 Ala. 629, 37 So. 85.

47. See 1 Curr. L. 357.

position in opening and closing, and to give timely warning to approaching vessels if it cannot be opened, and for a failure of duty in this respect if injury result the owner is liable.[48]

Where the owner of a private bridge knowingly leaves open his property under circumstances calculated to lead others to think that they are invited to use it, he assumes an obligation to see that it is kept in reasonable repair,[49] but where there is no invitation, express or implied, to use it, he is not liable to one injured because of its defective condition.[50]

By the common law of some states municipalities are required to keep bridges in a reasonably safe condition for travel, and are liable for injuries resulting from failure so to do;[51] the general rule, however, is that the liability is entirely statutory,[52] but whatever its source, the liability is not that of an insurer,[53] and there can be no recovery where officials having in charge the care and maintenance of a bridge had no notice of its defective condition, and had used due diligence in its care and maintenance.[54] But where the defect is of a nature that proper inspection would have discovered it, and has existed so long that the authorities must be presumed to have known of it, the municipality cannot defend on the ground of lack of notice.[55] A township which elects to maintain its highways and bridges by the labor of its inhabitants instead of a system of general taxation, cannot escape liability for personal injuries for its negligence in failing to repair a bridge.[56]

Officers are not liable for injuries unless willfully and grossly negligent.[57]

Defective construction.[58]—The builder of a bridge must use reasonable care to avoid the flowage of lands by reason of his abutments and embankments,[59] but he is not required to anticipate and use precautions against extraordinary or unprece-

48. Clement v. Metropolitan West Side El. R. Co. [C. C. A.] 123 F. 271.

49. Lawson v. Shreveport Waterworks Co., 111 La. 73, 35 So. 390.

50. Carson Lime Co. v. Rutherford's Adm'r [Va.] 46 S. E. 304.

51. City of Connersville v. Snider, 31 Ind. App. 218, 67 N. E. 555; Buechner v. New Orleans [La.] 36 So. 603.

52. Hackney v. Coweta County, 117 Ga. 327, 43 S. E. 725. A county is not liable, unless made so by statute, though the law requires it to keep the highway in repair, and gives it power to provide means with which to do so. Schroeder v. Multnomah County [Or.] 76 P. 772. In Georgia no remedy, statutory or common law, exists for injuries caused by a defective bridge built across a stream between two counties. Paxton v. Berrien County, 117 Ga. 891, 45 S. E. 266.

53. Warren County v. Evans, 118 Ga. 200, 44 S. E. 986; Comstock v. Georgetown Tp. [Mich.] 100 N. W. 788.

54. Robe v. Snohomish County [Wash.] 77 P. 810. No recovery can be had where it does not appear that the board was aware of the defect, or that it had existed for so long a time that reasonable inspections would have caused it to have been disclosed. Creighton v. Board of Chosen Freeholders [N. J. Law] 57 A. 870. If the defect in a bridge is a latent defect, not discernible from the ordinary tests and examinations usually made to ascertain its condition, and if those charged with such examination have not been negligent in their duty in that regard, no liability results for damage caused by such latent and undiscovered defect. Johnson County v. Carmen [Neb.] 99 N. W. 502.

55. Where a defect in a bridge in a populous part of the city consisted of a hole two or three feet long and six inches wide, which had existed three or four months, the city was chargeable with notice. City of Connersville v. Snider, 31 Ind. App. 218, 67 N. E. 555. If a bridge becomes weakened to the point of danger from natural decay, and the exercise of reasonable care and inspection would have revealed the condition the county cannot rely on a want of notice. Perry v. Clarke County, 120 Iowa, 96, 94 N. W. 454. See, also, Walker v. Ontario, 118 Wis. 564, 95 N. W. 1086. It is negligence for the supervisors of a county to fail to inspect a bridge under their control, knowing the use of traction engines to be general, where its floor timbers have not been renewed for fifty-five years. Smith v. Muncy Creek Tp., 206 Pa. 7, 55 A. 757.

56. Pearl v. Benton Tp. [Mich.] 100 N. W. 188.

57. Schooler v. Arrington [Mo. App.] 81 S. W. 468.

58. See 1 Curr. L. 357.

59. Kipp v. New York Cent. & H. R. R. Co., 89 App. Div. 392, 85 N. Y. S. 855. Whoever proposes to build a bridge over a stream, before placing his piers or other erection tending in any degree to dam the water or divert it from its natural flow, must study the country through which it flows, its usual freshets, and occasional great floods, which are not usual but which experience teaches may occur at any time, and use reasonable care and skill to avoid producing or increasing damage from these sources. Jones v. Seaboard A. L. R. Co. [S. C.] 45 S. E. 188.

dented floods,[60] and a landowner, in giving a deed to a railway company for a right of way over his lands adjacent to a proposed bridge, must be held to have had in view all damage coming to his property from a reasonably skillful and proper construction of the bridge.[61] The builder is liable for injuries resulting from his negligence during the process of construction.[62]

Proximate cause of injury.[63]—A municipality cannot be held liable, as for defective construction, for an injury that does not occur on the bridge itself and is not chargeable to any defect therein.[64] Delinquency in complying with a statute requiring that a bridge be spanned with plank before a traction engine is driven over it is no defense, unless there is some direct causal relation between the failure and the accident.[65]

Contributory negligence.[66]—One who puts a bridge to a use for which it was not intended,[67] or uses it with knowledge of its defective condition,[68] or is otherwise negligent in his use of a bridge, cannot recover;[69] and a boy, partially blind, who after being warned goes on a bridge, and while the draw is open walks off, is guilty of contributory negligence.[70]

60. Whether a flood falls within one or the other of these classes is a question of fact for the jury. Jones v. Seaboard A. L. R. Co. [S. C.] 45 S. E. 188. In an action for the negligent construction of a bridge whereby water is backed upon plaintiff's premises it is error for the court to charge that if the bridge was carefully constructed plaintiff would still have a remedy for obstructing the stream. Kipp v. New York Cent. & H. R. R. Co., 89 App. Div. 392, 85 N. Y. S. 855.

61. But this does not authorize the company to locate piers at such an oblique angle to the natural flow of the stream as to present a much greater surface and obstruction to the current, diverting the water to the damage of the adjacent soil. Jones v. Seaboard A. L. R. Co. [S. C.] 45 S. E. 188. Nor may it allow large cribs or pens filled with stone and used in building a temporary bridge to remain after the completion of the permanent structure, to the injury of the adjacent owner. Id.

62. It is not negligence per se for a county, while repairing a bridge, to regularly pile plank on the bridge, leaving room for teams to pass opposite the pile, which remained from May 29 over Decoration Day to morning of May 31, and from which injury resulted. Karl v. Juniata County, 206 Pa. 633, 56 A. 78.

A person who has contracted with a county to build a new bridge, and during the course of construction to provide and maintain a temporary foot bridge, assuming all risks pertaining thereto, is not liable to a person injured under circumstances from which it might be inferred that the injuries were caused by a failure to light the temporary footbridge. Styles v. F. R. Long Co. [N. J. Err. & App.] 57 A. 448.

63. See 1 Curr. L. 358.

64. It being plain that the plank bridge off one end of which the plaintiff's wheel fell, causing the injury, was not a part of the traveled path, but outside of it, and constructed solely for the purpose of facilitating access to and from the traveled path to a private way, which opened into the highway, and from which the plaintiff was driving, he could not recover. Felch v. West Brookfield, 184 Mass. 309, 68 N. E. 227.

The mere fact that a person traveling upon the highway after dark mistakes the wing wall of a bridge for a footpath, and after getting upon it falls off and is injured, affords no ground for concluding that the bridge was improperly constructed. Weeks v. Board of Chosen Freeholders, 68 N. J. Law, 622, 54 A. 826.

65. Walker v. Ontario, 118 Wis. 564, 95 N. W. 1086; Tackett v. Taylor County [Iowa] 98 N. W. 730. For further casee where traction engines have broken through bridges, see Schooler v. Arrington [Mo. App.] 81 S. W. 468; Smith v. Muncy Creek Tp., 206 Pa. 7, 55 A. 767; Perry v. Clarke County, 120 Iowa, 96, 94 N. W. 454; Johnson County v. Carmen [Neb.] 99 N. W. 502; Comstock v. Georgetown Tp. [Mich.] 100 N. W. 788. See, also, 1 Curr. L. 358, n. 40; Id., 360, n. 74. A complaint for injuries to a traction engine by the breaking of a bridge is insufficient, where it appears that the engine weighed more than seven tons, and it is not alleged that plaintiff took the precautions prescribed by Rev. St. 1898, § 1347b, requiring persons crossing bridges with such engines to span the bridge with planks. Stone v. Tilden [Wis.] 99 N. W. 1026.

66. See 1 Curr. L. 358.

67. Plaintiff sat down and leaned against railing to rest. Knowles v. Central of Ga. R. Co., 118 Ga. 795, 45 S. E. 605.

68. A bridge being found unsafe was barricaded by the supervisors, but after some repairs, was thrown open and was in constant use. The supervisors had a notice posted on it that it was unsafe for travel. Plaintiff's knowledge of the notice was held not conclusive that he was negligent in using the bridge, he having been personally advised by the supervisors that it had been repaired and was safe. Jones v. Shelby County [Iowa] 100 N. W. 520.

69. A charge that it was the duty of a person in crossing a bridge with a traction engine to use ordinary care, and that ordinary care under these circumstances was such as should be suitable to or commensurate with the hazard or risk which would naturally attend the crossing, sustained. Walker v. Ontario, 118 Wis. 564, 95 N. W. 1086. See, also, Perry v. Clarke County, 120 Iowa, 96, 94 N. W. 454.

Remedies.[71]—A statute which requires the filing of a statement of claim as a condition precedent to a right of action should receive a reasonable construction, and requires but a substantial compliance.[72]

Though highway commissioners of certain towns were given control and direction of a bridge between the towns, an action for injuries thereto must be brought in the names of the towns, and not in the names of their highway commissioners.[73]

Pleading and evidence.[74]—It is not necessary to use the term "proximate cause" in the complaint. An averment that the defect complained of caused the injury is sufficient,[75] but a complaint against a bridge commissioner which does not charge that his action, in reporting a bridge as properly constructed and safe for travel, was instigated by willfulness is insufficient.[76]

Where in an action against a railroad company to recover for obstructing the flow of a navigable stream, during a freshet, causing damage to plaintiff's land, it was claimed that the damage resulted from an unprecedented flood, the burden of proof of such fact was on the defendant.[77]

It is competent for the plaintiff to show that while the bridge was in the same condition, accidents of a similar nature had occurred at the same place a short time prior thereto,[78] and that there were other defects in the bridge than the defects that caused the accident, also to prove its general defective condition.[79] The fact that the town board settled with the owner of the engine cannot affect the case of one suing for personal injuries, and testimony to that effect is not admissible.[80] While the weight of the testimony is entirely for the jury, yet mere speculation and conjecture must not be confused with legitimate testimony.[81]

Interrogatories.—A special interrogatory in an action for injury from a defective bridge, as to whether plaintiff saw the notice of its unsafe condition posted on it, is objectionable as not limiting the jury to the time of the accident.[82]

Questions for jury.[83]—The question of negligence in taking a tank full of

70. Desure v. New York Cent. & H. R. R. Co., 87 N. Y. S. 988.

71. See 1 Curr. L. 359.

72. Eggleston v. Chautauqua, 90 App. Div. 314, 86 N. Y. S. 279; Bayne v. Board of County Com'rs, 90 Minn. 1, 95 N. W. 456. The fact that a statement of claim was called a "petition" instead of a "notice" does not render it insufficient. Perry v. Clarke County, 120 Iowa, 96, 94 N. W. 454. Verification by an agent is sufficient. Id. See 1 Curr. L. 359, n. 63.

73. Town of Palatine v. Canajoharie Water Supply Co., 90 App. Div. 548, 86 N. Y. S. 412.

74. See 1 Curr. L. 359.

75. City of Franklin v. Davenport, 31 Ind. App. 648, 68 N. E. 907.

76. Schooler v. Arrington [Mo. App.] 81 S. W. 468.

77. Jones v. Seaboard A. L. R. Co. [S. C.] 45 S. E. 188.

78. City of Kingfisher v. Altizer, 13 Okl. 121, 74 P. 107. See 1 Curr. L. 360, n. 71.

79. This class of testimony is competent for the purpose of showing that the authorities had knowledge of the defective condition, or that the defects had existed for such a length of time that by the exercise of reasonable care they could have been repaired. City of Kingfisher v. Altizer, 13 Okl. 121, 74 P. 107.

80. Comstock v. Georgetown Tp. [Mich.] 100 N. W. 788.

81. In an action against a town for negligent death alleged to have been caused by the absence of any railing on a bridge, whereby plaintiff's intestate, when intoxicated, in attempting to cross the bridge in the dark fell into the water, evidence that deceased was found dead in the water a short distance from the bridge, that some articles belonging to him were found on the other side of the bridge about 75 feet from his body, and that an overcoat which he had on when last seen was also found a few feet away from the body, was insufficient to justify submission to the jury of the issue as to whether deceased fell off the bridge. Armstrong v. Cosmopolis, 32 Wash. 110, 72 P. 1033. In an action against a county for death alleged to have been negligently caused by the absence of a guard railing on a bridge, evidence held not sufficient to sustain a verdict against the county. Reidhead v. Skagit County, 33 Wash. 174, 73 P. 1118. Evidence held sufficient to show that boy fell through hole in bridge. Buechner v. New Orleans [La.] 36 So. 603. Evidence, in an action by a railroad for damage to its bridge trestle by defendant's barges breaking loose from their moorings and drifting against the trestle, examined and held sufficient to sustain finding that the barges were not left in charge of a watchman. Astoria & C. R. R. Co. v. Kern [Or.] 76 P. 14.

82. Jones v. Shelby County [Iowa] 100 N. W. 520.

83. See 1 Curr. L. 360.

water upon a bridge with an engine,[84] whether it was negligent for the driver of a threshing engine to remain on the engine while crossing a bridge,[85] and of the sufficiency of barricades as a warning of dangerous conditions, are questions of fact and for the jury.[86] Whether a pedestrian crossing a bridge on a dark night was negligent in turning to cross the street, where he tripped over a chain,[87] and whether a flood by which plaintiff's lands were damaged was one which the builder of a bridge should have foreseen and provided against is a question of fact.[88]

§ 7. *Injuries to bridges.*[89]—If a bridge is unfavorably affected by a dam below only in extraordinary and unusual freshets, which occur but seldom in a long series of years, the dam is not of unlawful height as to the bridge.[90] On trial of an indictment for maliciously destroying a bridge, malice is for the jury.[91]

BROKERS.[92]

§ 1. Employment and Relation in General (535).
§ 2. Mutual Rights, Duties, and Liabilities (538). Scope of Authority (539). Ratification (540). Revocation of Authority (540). Damages (540). Remedies and Procedure (541).
§ 3. Rights and Liabilities as to Third Persons (541).
§ 4. Compensation and Lien (542). Sale Agent (545). Good Faith (546). Complaint (547). Evidence (548). Instructions (549).

§ 1. *Employment and relation in general.*[93]—The agreement must contain all essential elements of a contract,[94] and may be established by correspondence between the parties;[95] but the fact that one accepts the benefits of the endeavors of a broker does not establish the relation,[96] because a mere volunteer acquires no

84. Comstock v. Georgetown Tp. [Mich.] 100 N. W. 788. See 1 Curr. L. 360, n. 74.

85. Perry v. Clarke County, 120 Iowa, 96, 94 N. W. 454.

86. Feldkamp v. Kansas City [Kan.] 75 P. 464.

87. Milliken v. St. Clair [Mich.] 99 N. W. 7.

88. Jones v. Seaboard A. L. R. Co. [S. C.] 45 S. E. 188.

89. See 1 Curr. L. 360.

90. It is not necessary that a freshet be unprecedented or higher than any preceding freshet within memory to constitute it an extraordinary and unusual freshet within the above rule. Inhabitants of Palmyra v. Waverly Woolen Co. [Me.] 58 A. 674.

91. Evidence of malice held sufficient as against contention that defendant believed bridge was on private grounds. People v. Myring [Cal.] 77 P. 975.

92. See, also, Agency, 3 Curr. L. 68; Factors, 1 Curr. L. 1200, and as to brokers engaged in dealings in futures, Gambling Contracts, 2 Curr. L. 129.

93. See 1 Curr. L. 360.

94. Agreement to sell town lots at such terms as might be deemed advantageous, to receive 10 per cent, etc. was valid. Albany Land Co. v. Rickel [Ind.] 70 N. E. 158. Where broker was to receive his commissions from vendor, evidence held to show he was the vendor's agent. Gough v. Loomis [Iowa] 99 N. W. 295. A contract giving one the exclusive privilege of selling land is a contract of agency, not an option. Faraday Coal & Coke Co. v. Owens [Ky.] 80 S. W. 1171. Where a daughter of a principal gave a broker a sole agency, evidence held to show he was such. Sylvester v. Johnson, 110 Tenn. 392, 75 S. W. 923. Contract agreeing to pay an agent a certain amount on sale of land to himself or anyone else was an agreement to pay commission. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227. Contract construed that brokers were to have commissions on all fish sold out of an entire catch except 15 per cent thereof. Emerson v. Pacific Coast & Norway Packing Co. [Minn.] 100 N. W. 365. Where evidence held to sustain verdict that relation of principal and broker existed. Camp v. Minnesota Canning Co., 89 Minn. 252, 94 N. W. 687. Evidence held to show authority from owner for broker to sell land. Steidl v. McClymonds, 90 Minn. 205, 95 N. W. 906. Evidence examined and held to sustain finding of the trial court. Gallagher v. Bell, 89 Minn. 291, 94 N. W. 867.

95. In reply to broker's letter asking if principal would sell, the latter wrote that he would accept $250, and this with the correspondence following held to amount to the giving of authority to broker. West v. Mills, 83 App. Div. 629, 82 N. Y. S. 473. Employment held to be shown by correspondence. Steidl v. McClymonds, 90 Minn. 205, 95 N. W. 906. An owner employed a broker to procure a purchaser within 30 days; at the expiration he wrote making enquiry and directing him to sell within the next 30 days. Held, the contract was extended. Johnson Bros. v. Wright [Iowa] 99 N. W. 103. Correspondence leading up to employment admissible to show it. Veale v. Green [Mo. App.] 79 S. W. 731. Letter written by broker to an owner inquiring price, and a reply stating it, is not on its face authority. Johnson v. Whalen, 13 Okl. 320, 74 P. 503.

96. Circumstances indicated that broker was working for purchaser. Downing v. Buck [Mich.] 98 N. W. 388. Held that where plaintiff acted for third person in making a sale of the latter's property to defendant,

rights.[97] Authority will be presumed from long acquiescence in the acts of a broker.[98]

Whether the relation exists is a mixed question of law and fact.[99] It cannot be proved by declarations of the agent,[1] nor by proof of general reputation.[2] Acceptance of offer of employment may be shown by evidence of attempts to effect the transaction.[3] A statement to a broker that if he or any one else would procure a purchaser by a certain date, the land might go, constituted an ordinary revocable authority.[4] Assent by the principal to an assignment is an agreement to substitute the assignee as agent,[5] or an assignment of the contract may be ratified.[6] *Penal provisions* in the contract are strictly construed.[7]

Authority to contract relative to real estate must be in writing;[8] but an agency to purchase real estate may be established by parol,[9] and a contract with reference to the sale of lands may be constituted of an employment to sell land for another.[10] In Nebraska, the contract must be in writing subscribed by both parties, describing the land and setting forth the amount of compensation.[11] Correspondence is sufficient,[12]

whose promise was only to pay the price of the property sold no inference could be drawn that there was an express or implied agreement on defendant's part to pay commission. Moses v. Beverly, 137 Ala. 473, 34 So. 825. Nothing in their dealings from which an owner could infer that a broker was acting for him. Downing v. Buck [Mich.] 98 N. W. 388. Evidence held insufficient to show that a broker was employed to make a lease. Brady v. American Mach. & Foundry Co., 86 App. Div. 267, 83 N. Y. S. 663. Where written contract read for the sale of mining property in Ures district and the actual sale of such property was in Arispe district, held, that agent was not entitled to commissions. Wulff v. Lindsay [Ariz.] 71 P. 963. Broker had authority to sell one of two named tugs. Purchaser secured by broker took neither, but without bad faith purchased a third tug from principal. Held, that broker was not entitled to compensation. Samuels v. Luckenbach, 205 Pa. 428, 54 A. 1091.

97. A mere volunteer acting without authority, who brings parties together, is not entitled to compensation for his services. Samuels v. Luckenbach, 205 Pa. 428, 54 A. 1091. Where broker offered reward to have borrowers brought to him, the fact that some third party sends a borrower to him, but fails to state that he is relying on reward, cannot authorize such person's recovering any commission. Van Vlissingen v. Manning, 105 Ill. App. 255. Where a principal denies the employment of a broker, evidence of the employment of other brokers is admissible. Hunn v. Ashton, 121 Iowa, 265, 96 N. W. 745.

98. After 60 years without repudiation of a deed made by an agent. Tarvin v. Walkers Creek Coal & Coke Co., 25 Ky. L. R. 2246, 80 S. W. 504.

99. Gough v. Loomis [Iowa] 99 N. W. 295. Where terms of employment and nature of services rendered were in dispute, error to direct verdict for commissions. Ryan v. Page [Iowa] 92 N. W. 768. It is error to dismiss case on ground that the relation of principal and broker did not exist, when the evidence tends to show that the principal had reasonable cause to believe that the broker was instrumental in bringing about the sale. Henninger v. Burch, 90 Minn. 43, 95 N. W. 578. Evidence held for the jury as to whether a broker was authorized to sell. Father and son had an interest in the land; authority given by father. Phillips v. Hazen, 122 Iowa, 475, 98 N. W. 305. Evidence held for the jury as to whether an attorney in fact of the owner executed and delivered to a broker a writing with the intention of authorizing him to sell land. Cody v. Dempsey, 86 App. Div. 335, 13 Ann. Cas. 322, 83 N. Y. S. 899.

1. Eastland v. Maney [Tex. Civ. App.] 81 S. W. 574. Declarations thereof inadmissible. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227.

2. Reputed to be the agent. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227.

3. To sell the land. Veale v. Green [Mo. App.] 79 S. W. 731. Where a broker had been requested to list property and did nothing further until he notified the customer that he had found a purchaser, evidence held to show an employment. Sandefur v. Hines [Kan.] 76 P. 444.

4. Could be revoked before such date. Milligan v. Owen [Iowa] 98 N. W. 792.

5. Broker partnership dissolved. Albany Land Co. v. Rickel [Ind.] 70 N. E. 158.

6. Accepting reports, proceeds of sales and executing papers to the assignee in his name. Albany Land Co. v. Rickel [Ind.] 70 N. E. 158

7. That owner could withdraw the land or raise the price on paying the broker two per cent on stipulated price. Tracy v. Abney, 122 Iowa, 306, 98 N. W. 121.

8. Verbal promise by owner to carry out contract made by broker not so authorized is not binding. Kesner v. Miesch, 204 Ill. 320, 68 N. E. 405; Covey v. Henry [Neb.] 98 N. W. 434. Civ. Code, § 1624. Jamison v. Hyde, 141 Cal. 109, 74 P. 695.

9. Rathbun v. McLay [Conn.] 56 A. 511.

10. This would not be a contract for the sale of land. Ivy Coal & Coke Co. v. Long, 139 Ala. 535, 36 So. 722.

11. Comp. St. 1901, § 74, c. 73. Correspondence held insufficient, where letter accepting was not written until after the sale. Danielson v. Goebel [Neb.] 98 N. W. 819.

12. Comp. St. 1903, § 74, c. 73. Setting forth terms. David Bradley v. Bower [Neb.] 99 N. W. 490.

and such a contract may be modified by parol as to such provisions as are not required to be in writing.[13] A writing signed by an attorney in fact is sufficient to relieve the broker from the provisions of a statute making it a misdemeanor to offer real estate for sale without written authority,[14] but a memorandum was held insufficient,[15] and where such a statute applies to particular localities, it is unconstitutional.[16]

That the sales are conducted by one partner of a firm of brokers is not a breach,[17] nor is the fact that an owner offers to sell to another during the continuance of an option,[18] or sells after appointing an exclusive agent.[19]

Brokers may be regulated by means of an annual tax and be required to make a sworn statement that all their orders were executed on their respective exchanges.[20] Where a statute requires a broker to be licensed and imposes a penalty for a violation, a contract in violation thereof is not void.[21]

An executor has power to employ a broker,[22] or ratify an agreement by one assuming to act for him;[23] but he cannot delegate discretion as to terms of the sale,[24] and a president of a corporation who owns nearly all the stock and in whom is confided the general management of the business has no authority to contract to pay commissions for the sale of his own stock.[25]

Double agency.[26]—If both parties are aware of the circumstances, there is no impropriety in a double agency;[27] but if not, the contract arranged thereby is void,[28]

13. Terms of sale. David Bradley v. Bower [Neb.] 99 N. W. 491.

14. Pen. Code, § 640d (Laws 1901, c. 128). Cody v. Dempsey, 86 App. Div. 336, 13 Ann. Cas. 322, 83 N. Y. S. 899.

15. Pencil memorandum, "Property 76 Mangin Street; $9,000, no less," insufficient compliance with Laws 1901, c. 128, § 640d, to authorize a sale at any price. Cohen v. Boccuzzi, 86 N. Y. S. 187.

16. Pen. Code, § 640 (Laws 1901, c. 128), applying to cities of first and second classes. Cody v. Dempsey, 86 App. Div. 336, 13 Ann. Cas. 322, 83 N. Y. S. 899.

Constitutional in first department. Charles v. Arthur, 84 N. Y. S. 284. A criminal statute, making it a misdemeanor for real estate broker to sell property without written authority, is a reasonable exercise of the police power of the state and does not infringe any property rights. Whiteley v. Terry, 83 App. Div. 197, 82 N. Y. S. 89.

17. Selling town lots at a different town. Albany Land Co. v. Rickel [Ind.] 70 N. E. 168.

18. Contingently on the failure of the option holder to comply with its terms. Smith v. Lawrence, 98 Me. 92, 56 A. 456.

19. Not negativing the right of the principal to sell. Ingold v. Symonds [Iowa] 99 N. W. 713. Authority to sell land "until sold" does not create an exclusive agency. Revoked by sale by principal or another broker. Kidman v. Howard [S. D.] 99 N. W. 1104. Notification that if sale was made by a certain date, a reduced price would be accepted did not operate to give exclusive agency until such date. The property had been listed with several brokers. White v. Benton, 121 Iowa, 354, 96 N. W. 876.

20. Broker applying for license refused to make the sworn statement. Belding v. Rector, 71 Ark. 463, 76 S. W. 1066. Comp. Laws, § 11572, providing that when an agent misappropriates money delivered to him with written instructions as to its use, he shall be guilty of a felony, includes brokers. People v. Karste [Mich.] 93 N. W. 1081.

21. Penalty is all that is required. Ober v. Stephens [W. Va.] 46 S. E. 195.

22. To find purchaser for land of the estate, also to contract to pay him a specified commission. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227.

23. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227.

24. As to commission of subagent. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227.

25. Demarest v. Spiral Riveted Tube Co. [N. J. Law] 58 A. 161.

26. See 1 Curr. L. 362.

27. Brokers had regular customers for whom they bought and others for whom they sold. Lincoln v. Levi Cotton Mills Co. [C. C. A.] 128 F. 866. A broker acting in a double capacity without the knowledge of the parties cannot recover commissions (Colline v. McClurg, 1 Colo. App. 348; Cottom v. Holliday, 69 Ill. 176; Rice v. Wood, 113 Mass. 133; Murray v. Beard, 102 N. Y. 508, 7 N. E. 553; Hall v. Gambril, 92 F. 32), unless the party negotiating the transaction is not in the occupation of an agent (Lyle v. University Land & Inv. Co. [Tex. Civ. App.] 30 S. W. 723), or his only business is to bring the parties together (Atkinson v. Pack, 114 N. C. 697, 19 N. E. 628; Pape v. Wright, 116 Ind. 502, 19 N. E. 459; Barry v. Schmidt, 57 Wis. 172, 16 N. W. 24, and note to Leathers v. Canfield [Mich.] 46 L. R. A. 33; Brackenridge v. Payne [Tex.] 43 L. R. A. 693, and Lunney v. Healey [Neb.] 44 L. R. A. 593, where the cases on the rights to compensation are collected and discussed; Red Cypress Lumber Co. v. Perry, 118 Ga. 876, 45 S. E. 674, citing other cases). Uncontradicted evidence showed that a seller had knowledge of the fact. Darrow Inv. Co. v. Breyman, 32 Wash. 234, 73 P. 363.

28. Seller had no knowledge of his agency for purchaser. McClure v. Ullman, 102 Mo. App. 697, 77 S. W. 325.

and the broker cannot recover his commissions.[29] That a broker advanced money to the purchaser does not make him his agent.[30] The burden is on the principal to show that there was a double agency, and such fact was not known to him.[31] A contract made thereunder is not ratified by a retention of the money paid, when its source is unknown.[32]

§ 2. *Mutual rights, duties, and liabilities.*[33]—The broker may be discharged at will,[34] unless done for the sole purpose of defeating his right to commissions,[35] and in the absence of custom the rights of the broker end with his discharge.[36]

Where stocks are actually bought and sold there is no wagering contract.[37]

It is the duty of a stock broker when so ordered to act promptly.[38] Mere silence cannot be construed as an order to brokers to sell stock held on a margin.[39] Where brokers sell stock on margin the legal title is in the vendee.[40] All demands by a stock broker on his customer for margins must be specific, definite, and certain, and the customer is entitled to a reasonable time within which to comply,[41] and if he does not comply the broker may take steps to protect himself.[42] The failure of a purchaser to put up further margins where notified to do so does not relieve from the duty of giving notice of time and place of sale by a pledgee.[43] Where a broker, after breach of the contract between the customers, refuses to disclose to the one who the other is he is personally liable.[44] In the absence of cus-

29. Rutledge & K. Realty Co. v. Neely, 97 Mo. 384, 73 S. W. 359.

30. Agent for seller advanced money so purchaser could buy. Goodson v. Embleton [Mo. App.] 80 S. W. 22.

31. Red Cypress Lumber Co. v. Perry, 118 Ga. 876, 45 S. E. 674.

32. Several purchasers. McClure v. Ullman, 102 Mo. App. 697, 77 S. W. 325.

33. See 1 Curr. L. 362.

34. Employment does not give broker any reasonable time to procure tenant or purchaser. Cadigan v. Crabtree [Mass.] 70 N. E. 1033. The principal has a right to withdraw land from the market at any time before acceptance of offer. Flynn v. Jordal [Iowa] 100 N. W. 326.

35. Camp v. Minnesota Canning Co., 89 Minn. 252, 94 N. W. 687. Where principal sold land to purchaser at a price in violation of his agreement with broker. Baker v. Murphy, 105 Ill. App. 151. Revoked after owner had been put in communication with the purchaser. Gibson v. Hunt [Iowa] 94 N. W. 277.

36. Two months after authority was revoked, broker effected a lease. Cadigan v. Crabtree [Mass.] 70 N. E. 1033. A notice of sale sent by the broker by telegraph must be received prior to the signing of another contract. Owner had listed with other brokers and reserved right to sell. Johnson Bros. v. Wright [Iowa] 99 N. W. 103.

37. Stat. 1890, p. 479, though certificates were not delivered to the purchaser. Post v. Leland, 184 Mass. 601, 69 N. E. 361. On the question whether or not a certain contract is void as a wager, the burden of proof is on him who alleges it. Boyle v. Henning, 121 F. 376.

38. Note: A broker may be directed to sell at any time and he must obey or he is personally liable for any resulting loss. Allen v. McConihe, 124 N. Y. 342, 26 N. E. 812; Johnston v. Miller, 67 Ark. 172, 53 S. W. 1052. What is a reasonable time within which to sell is a question of law (Davis v. Gwynne, 57 N. Y. 676), and if he has agreed not to sell until a certain time he may not, though margins held have run out (Morgan v. Jandon, 40 How. Pr. [N. Y.] 366; Rogers v. Wiley, 131 N. Y. 527, 30 N. E. 582), and in any event he has no right to sell until he has made a demand for more margins (Gruman v. Smith, 81 N. Y. 25; Stenton v. Jerome, 54 N. Y. 480, and note to Van Dusen-Harrington Co. v. Jungeblut, 74 Am. St. R. 463). Purchase; report the transaction; receive the stock and have the certificates ready for delivery whenever the purchaser shall pay for them. Tuell v. Paine, 39 Misc. 712, 80 N. Y. S. 956. Question whether certain telegrams passing between principal and broker amounted to authority to buy certain stock held question for the jury. Boyle v. Henning, 121 F. 376.

39. Brokers wrote to a customer asking him to put up margins; he did not reply and some days thereafter they sold. He brings action to recover for the highest price obtainable the day after the letter requesting margins. Lynch v. Simmonds, 87 N. Y. S. 420. No error for court to read from a prior opinion a statement of law relative to right to recover margins under Stat. 1890, p. 479. Post v. Leland, 184 Mass. 601, 69 N. E. 361.

40. Brokers are pledgees for the repayment of advances made by them. Rothschild v. Allen, 90 App. Div. 233, 86 N. Y. S. 42. A broker is not relieved from his duty to deliver stock sold on margin by the fact that one to whom he pledged it sold it on the broker's suspension of business. Id. Failure of a broker to deliver to a customer stock sold on margin is a conversion. Id.

41. No demand is specific unless it mentions a particular amount of money, or states facts from which a particular amount of money can be ascertained. Boyle v. Henning, 121 F. 376.

42. Purchase stock to replace that borrowed to cover a short sale for his principal. Boyle v. Henning, 121 F. 376.

43. Rothschild v. Allen, 90 App. Div. 233, 86 N. Y. S. 42.

44. Brokers sold certain yarn for a cus-

tom, brokers are not liable if they fail to require a lender to put up margins to secure the borrower against a decline.[45]

Acting in good faith and with full knowledge of the principal the broker may purchase.[46] The fact that a broker made a sale to himself of a certain block of stock does not invalidate sales by him in good faith to other parties,[47] and where property is to be sold at a fixed price it is no defense that the broker was interested as a purchaser.[48] General customs of brokers,[49] or rules of a stock exchange cannot be received against a client of a broker who is ignorant of them,[50] on the ground that they constitute a custom of the business.[51]

A broker is entitled to a deed running to himself when it is shown that it is for his security in advancing money to make the purchase.[52] His bondsmen are liable for a breach of his contract.[53] Where brokers purchase stock on false orders of an employee they may treat him as principal.[54] The admissibility of evidence to show rights is treated in the note.[55]

Instructions.[56]—A charge that if the broker had cause to believe that a customer did not intend that he should purchase stocks was proper.[57]

Scope of authority.[58]—Authority to make a loan is not authority to collect either principal or interest,[59] nor is authority to collect rents authority to procure a purchaser,[60] nor authority to sell at a certain price authority to agree to deferred payments.[61] A broker cannot accept a check in payment.[62] If he is authorized to accept earnest money he cannot accept foreign coin.[63] Authority to sell oil is authority to stipulate how much shall be put in the buyer's tanks.[64] Where a broker does not reside where the land to be sold is situated he is presumed to have authority to appoint a subagent.[65] Depositing money subject to the check of a broker after

tomer which the purchaser refused to accept. Lincoln v. Levi Cotton Mills Co. [C. C. A.] 128 F. 865. Where a broker notifies his customer that the purchaser has refused to carry out the contract there is an unconditional breach. Id. The measure of damages is the profit he would have received if the buyer had fulfilled his contract, less the profit received from a sale to others. Id.

45. Borrowed to cover a short sale. Morris v. Jamieson, 205 Ill. 87, 68 N. E. 742. Evidence held insufficient to establish such a custom. Id.

46. After purchase tract of land was found to be larger than principal believed. He could not rescind. Teal v. McKnight, 110 La. 256, 34 So. 434.

47. Evans v. Wrenn, 93 App. Div. 346, 88 N. Y. S. 617.

48. Selover v. Isle Harbor Land Co. [Minn.] 98 N. W. 344.

49. Employ subagents in sale of mining property. Chilberg v. Lyng [C. C. A.] 128 F. 899.

50. In an action to recover money deposited as margins. Newman v. Lee, 87 App. Div. 116, 84 N. Y. S. 106.

51. Newman v. Lee, 87 App. Div. 116, 84 N. Y. S. 106.

52. Goodson v. Embleton [Mo. App.] 80 S. W. 22.

53. Where a broker failed to remit proceeds of sales to his principals. Merkley & Son v. U. S. Fidelity & Guaranty Co., 24 Ky. L. R. 2308, 73 S. W. 1126.

54. Collect the amount from his estate in bankruptcy. In re Filer, 125 F. 261.

55. Under Stat. 1890, p. 479, providing for a recovery of money paid for margins, evidence that a customer did not understand what a notice that stock had been bought on his account meant was inadmissible. Post v. Leland, 184 Mass. 601, 69 N. E. 361. Letters written by brokers to customer's wife also inadmissible. Refusal to allow cross-examination as to other transactions no error. Not referred to on direct examination. Bertelson v. Hoffman [Wash.] 77 P. 801.

56. See 1 Curr. L. 362.

57. No error to refuse to give a requested instruction in the language submitted [Stat. 1890, p. 479]. Post v. Leland, 184 Mass. 601, 68 N. E. 361.

58. See 1 Curr. L. 362.

59. Where principal requested the broker to notify the debtor when interest was due, evidence held insufficient to show authority to collect. Ortmeier v. Ivory, 208 Ill. 577, 70 N. E. 665.

60. Action brought for commissions. Hunn v. Ashton, 121 Iowa, 265, 96 N. W. 745.

61. Staten v. Hammer, 121 Iowa, 499, 96 N. W. 964; Edwards v. Davidson [Tex. Civ. App.] 79 S. W. 48. In answer to a request for margins a customer telegraphed, "I will have to let my stock go." Held an authorization to sell, not inconsistent, however, until notice of its execution, with other orders to a subagent who executed the orders. Evans v. Wrenn, 93 App. Div. 346, 88 N. Y. S. 617.

62. Purchase price of land. Ormsby v. Graham [Iowa] 98 N. W. 724.

63. Mexican money. Edwards v. Davidson [Tex. Civ. App.] 79 S. W. 48.

64. Sherman Oil & Cotton Co. v. Dallas O. & R. Co. [Tex. Civ. App.] 77 S. W. 961.

65. Eastland v. Maney [Tex. Civ. App.] 81 S. W. 574.

the principal has approved the application for a loan does not give a broker authority to make a loan.[66]

Ratification.[67]—An agency is ratified by adopting the contract made by the agent,[68] and an execution of a contract of exchange by a wife is a ratification by her of the broker's acts of procuring an exchange authorized by her husband.[69] One joint owner may ratify the contract between his co-owner and the broker by assisting at the sale to the customer procured.[70] There can be no ratification without full knowledge of the facts,[71] and an owner's execution of a deed in ignorance of the terms made by an agent is not a ratification.[72] Advancement in value is ground for refusal to ratify an unauthorized contract.[73] Where a purchaser from a broker asserts ratification he must prove it.[74]

Revocation of authority[75] to collect rents is a revocation of the authority to procure a purchaser.[76] Authority to sell is revoked by a sale by the owner,[77] especially where he reserves the right to sell,[78] or if the contract does not negative such right,[79] and the manner in which it is accomplished is immaterial.[80] Authority to sell is not revoked by his giving an option,[81] but is by notice of the exercise of an option.[82] A contract limited to a definite period terminates at the expiration thereof.[83]

Damages.[84]—An agency coupled with an interest is revoked subject to liability for damages suffered by reason of its termination contrary to the terms of the contract creating it.[85] If the principal refuses to carry out his contract the broker may rescind and recover on a quantum meruit.[86] On breach of contract between principal and broker the measure of damages is the loss of profits as shown by the evidence excluding uncertain and conjectural profits,[87] and such damages may be

66. Brokers exacted commission making note usurious. Barksdale v. Security Inv. Co. [Ga.] 47 S. E. 943.

67. See 1 Curr. L. 363.

68. An owner intrusted land to her brother to sell; he employed a broker. Hurt v. Jones [Mo. App.] 79 S. W. 486. Where a principal completed a sale after he knew it was procured by brokers and was notified that they would claim their commission, evidence held to show a ratification. Decker v. Widdicomb [Mich.] 100 N. W. 573.

69. Charles v. Cook, 88 App. Div. 81, 84 N. Y. S. 867.

70. Assisting in getting title papers in order, etc. McKinnon v. Hope, 118 Ga. 462, 45 S. E. 413.

71. Judgment against a principal compelling him to repay the amount of a first payment under an unauthorized contract to the agent insufficient to show a ratification. Fleming v. Burke, 122 Iowa, 433, 98 N. W. 288.

72. Broker had agreed to deferred payments. Edwards v. Davidson [Tex. Civ. App.] 79 S. W. 48.

73. Staten v. Hammer, 121 Iowa, 499, 96 N. W. 964.

74. Edwards v. Davidson [Tex. Civ. App.] 79 S. W. 48.

75. See 1 Curr. L. 367.

76. Even if the first authorized the second. Hunn v. Ashton, 121 Iowa, 265, 96 N. W. 745.

77. Notice unnecessary. Wallace v. Figone [Mo. App.] 81 S. W. 492.

78. White v. Benton, 121 Iowa, 354, 96 N. W. 876; Johnson Bros. v. Wright [Iowa] 99 N. W. 103. After listing property the owner withdrew it from the market, but stated that he would offer it for sale after he made some changes. Held, broker's authority was revoked. George B. Loving Co. v. Hesperian Cattle Co., 176 Mo. 330, 75 S. W. 1095. Principal had a right to revoke it. Id.

79. Broker had exclusive agency to procure loan. Mott v. Ferguson [Minn.] 99 N. W. 804. Where one notified the brokers that if a sale was consummated by a certain date a reduced price would be accepted, it did not suspend his right to sell, though the brokers notified him that they would make a sale by that date. White v. Benton, 121 Iowa, 354, 96 N. W. 876.

80. After giving agency to procure a loan to cancel a mortgage the principal secured a renewal. Mott v. Ferguson [Minn.] 99 N. W. 804.

81. Wallace v. Figone [Mo. App.] 81 S. W. 492.

82. Faraday Coal & Coke Co. v. Owens [Ky.] 80 S. W. 1171.

83. For sale made after that time no commission can be recovered. La Force v. Wash. University [Mo. App.] 81 S. W. 209. Evidence held not to show an implied renewal. Id.

84. See 1 Curr. L. 363.

85. Milligan v. Owen [Iowa] 98 N. W. 792.

86. To pay a share of profits for obtaining a partner. Boyd v. Vale, 84 App. Div. 414, 82 N. Y. S. 932.

87. Not a matter for the discretion of the jury. Emerson v. Pac. Coast & N. Packing Co. [Minn.] 100 N. W. 365. Award for breach of contract to sell fish not sustained by evidence. Id. That a broker could have procured a purchaser after the revocation of his

recovered by an accounting in equity.[88] Where an agent fails to show that he could have made a sale, nominal damages only can be recovered for a revocation of his authority.[89] Refusal to enter judgment for nominal damages is not reversible error.[90]

Remedies and procedure.[91]—An action on the common counts cannot be maintained for a breach of duty.[92] The defendant may be entitled to a bill of particulars.[93]

§ 3. *Rights and liabilities as to third persons.*[94]—Where brokers, at the instance of a customer, purchase stock which they hold as security, its sale within four months prior to his bankruptcy did not create a preference.[95]

Broker's liability to third persons.—A broker is individually liable for unauthorized acts,[96] or for false representations without regard to the liability of his principal.[97] It is immaterial whether his representations were intentionally false.[98] When sued by a third person he may show that it was customary to use a different form of words when contracting in his own name than when contracting subject to confirmation.[99] A real estate broker cannot charge a prospective purchaser with the expenses of a trip and his services in showing him the property.[1] A principal is liable to third persons for acts of the broker within the apparent scope of his authority,[2] or for his negligence,[3] but not for acts beyond it,[4] unless

authority is admissible on an issue of damages for revocation. Milligan v. Owen [Iowa] 98 N. W. 792.

88. Tuell v. Paine, 39 Misc. 712, 80 N. Y. S. 956.

89. Milligan v. Owen [Iowa] 98 N. W. 792.

90. For revocation of authority. Milligan v. Owen [Iowa] 98 N. W. 792.

91. See 1 Curr. L. 364.

92. Failure to require a lender of stock to put up margins. Morris v. Jamieson, 205 Ill. 87, 68 N. E. 742. If it amounts to a breach of contract and not a tort. Id.

93. As to nature of agreements, whether oral or written, date, and whether made directly or through an agent. Treadwell v. Greene, 87 App. Div. 289, 84 N. Y. S. 354.

94. See 1 Curr. L. 364.

95. In re Filer, 125 F. 261.

96. Absolute sale of tomatoes. McKown v. Gettys, 25 Ky. L. R. 2070, 80 S. W. 169. President of corporation employing a broker. Groeltz v. Armstrong [Iowa] 99 N. W. 128. It was a question for the jury whether a president of a corporation induced a broker to believe that he had authority to bind the corporation. Id. A broker is liable to a corporation for selling its bonds on forged authority. Treasurer of a corporation, on forged authority, had bonds held by the company transferred to his name and he took them to a broker to sell. Jennie Clarkson Home for Children v. Chesapeake & O. R. Co., 41 Misc. 214, 83 N. Y. S. 913. And the buyer may sue on the contract. McKown v. Gettys, 25 Ky. L. R. 2070, 80 S. W. 169.

97. A. acting as agent for B. to sell 120 acres of land induced C. to enter into a contract for sale of such land, on representations that title was clear. Held that A. was liable in damages. Riley v. Bell, 120 Iowa, 618, 95 N. W. 170.

98. If the other party is not chargeable with knowledge of his want of authority. Groeltz v. Armstrong [Iowa] 99 N. W. 128.

99. McKown v. Gettys, 25 Ky. L. R. 2070, 80 S. W. 169.

1. Hale v. Knapp [Mich.] 96 N. W. 1060. Where one item in an account against a prospective purchaser was illegal, the fact may be considered in determining the status of the other items. Id.

2. Broker had authority to sell oil and plaintiff bought it. Set up that broker did not have authority to sell that grade of oil. Southern Cotton Oil Co. v. Shreveport Cotton Oil Co., 111 La. 387, 35 So. 610. In a contract for the sale of tanks of oil to contain "about" 135 barrels, the word "about" would not excuse the seller from filling them to their capacity. Sherman Oil & Cotton Co. v. Dallas O. & R. Co. [Tex. Civ. App.] 77 S. W. 961. Actual value of the property may not be shown where the disparity between it and the price received is not so great as to show improbability of the contract being made. Bertelson v. Hoffman [Wash.] 77 P. 801. Specific performance will lie against principal for transfer of real estate where authorized broker sells land to a third party. West v. Mills, 83 App. Div. 629, 82 N. Y. S. 473. A purchaser has acquired the property with regard to the seller as soon as there exists an agreement for the object, and the price thereof, although the object has not yet been delivered nor the price paid. Teal v. McKnight, 110 La. 256, 34 So. 434.

3. Broker employed to obtain tenants and authorized to conduct them through the premises. Customers sustained an injury while examining premises. Boyd v. U. S. Mortg. & Trust Co., 94 App. Div. 413, 88 N. Y. S. 289.

4. In an action on the common counts to recover money paid by a purchaser to an agent, evidence held not to show authority in him to collect, therefore principal was not liable. Rohde v. Marquis [Mich.] 97 N. W. 53. Broker had authority to sell for 60 days. Time of payment was extended beyond such time. Contract could not be enforced. Smith v. McCann, 205 Pa. 57, 54 A. 498. Where a purchaser buys on terms which he knows are beyond the scope of the authority of the broker to make, he cannot enforce the con-

ratified by him,[5] nor by a contract for a sale of real estate made by an agent individually and under his own seal.[6] If the acceptance is subject to confirmation by the seller no contract is created until confirmation,[7] and a demand for security by the intending purchaser is not a waiver of the requirement of confirmation.[8] The principal need not set up excess of authority in an action for specific performance.[9] Knowledge of a broker is not knowledge of his principal.[10] Where a broker's contract was silent as to the capacity of tank cars in which oil was to be delivered, an oral agreement to this effect may be shown.[11]

§ 4. *Compensation and lien.*[12]—If he procures a customer ready and able to carry out the transaction according to the terms submitted to him by his principal,[13] and the burden is on him to prove his readiness and ability,[14] he is entitled to his commissions,[15] though the transaction is never consummated,[16] and especially so where a binding contract is entered into,[17] but where a contract was not entered into he must have procured a valid obligation and tendered it, or have brought the parties together so that a contract might have been entered into had his principal so desired.[18]

tract. Fleming v. Burke [Iowa] 98 N. W. 283. Sale after term of employment expired. Smith v. McCann, 205 Pa. 57, 54 A. 498.

5. Where a contract to purchase, signed by the proposed purchaser, is presented to the vendor to decide whether the purchaser is acceptable, and he then executes the contract or ratifies the unauthorized act of his agent, it is binding upon him. Flynn v. Jordal [Iowa] 100 N. W. 326. Unauthorized contract held ratified by correspondence. Sleeper v. Murphy, 120 Iowa, 132, 94 N. W. 275.

6. Blanchard v. Archer, 87 N. Y. S. 665.

7. By local custom both buyer and seller confirmed each other in writing. Johnston v. Fairmont Mills [C. C. A.] 129 F. 74.

8. Before confirmation the seller became insolvent. Johnston v. Fairmont Mills [C. C. A.] 129 F. 74.

9. Staten v. Hammer, 121 Iowa, 499, 96 N. W. 964.

10. Insurance broker had knowledge of facts which would render the policy void when made. Held the conditions were not not waived. McGrath v. Home Ins. Co., 88 App. Div. 153, 84 N. Y. S. 374.

11. Sherman Oil & Cotton Co. v. Dallas O. & R. Co. [Tex. Civ. App.] 77 S. W. 961. Letters written between broker and seller were admissible to show agreement as to capacity of tanks. Id. An answer by a broker that he had an understanding with the seller that cars of oil sold should contain 135 barrels is a conclusion. Id. An answer as to custom of filling oil tanks is not responsive to a question as to the capacity of the tanks. Id.

12. See 1 Curr. L. 365.

13. Where an owner represented to the broker that a lot was 76 feet deep, and purchaser refused to take it because it proved to be but 66 feet, no commissions could be recovered. Hausman v. Herdtfelder, 81 App. Div. 46, 80 N. Y. S. 1039. Where sale was completed by an executor on different terms than proposed by testator to the broker. Trickey v. Crowe [Ariz.] 71 P. 965. Where deal was declared off simply because the owner insisted that purchaser should pay taxes accruing during the time necessary for the latter to look up title, broker is not entitled to his commissions. Sheinhouse v. Klueppel, 80 App. Div. 445, 81 N. Y. S. 116. Facts properly submitted on this proposition. Brockenbrow v. Stafford [Tex. Civ. App.] 76 S. W. 576. Would not as to payment in sale of mining property. Brown v. Keegan [Colo.] 76 P. 1056. Where after considerable bickering between seller and purchaser the seller had to purchase an adjoining lot and throw it in, no commission could be recovered. Tooker v. Duckworth [Mo. App.] 80 S. W. 963. Purchaser rejected a deed because description of property was type written. Park v. Hogle [Iowa] 99 N. W. 185. The same rule applies to the holder of an option. Smith v. Lawrence, 98 Me. 92, 56 A. 455. If a principal is doubtful of the proposed purchaser's ability to carry out the contract he may accept conditionally. That he proves able. Flynn v. Jordal [Iowa] 100 N. W. 326.

14. Instruction presuming that purchaser was able was erroneous. Colburn v. Seymour [Colo.] 76 P. 1058. A contract signed by the purchaser is prima facie evidence of his willingness to buy, but no evidence of his ability to perform its conditions. Flynn v. Jordal [Iowa] 100 N. W. 326.

15. Error in the contract, if the owner does not refuse to sell on account thereof and the purchaser stands ready to correct it, is no ground for thereafter refusing to sell. Johnson Bros. v. Wright [Iowa] 99 N. W. 103. It is immaterial whether there was a consideration to support the option when the intending purchaser is willing to accept the offer. Wilson v. Clark [Tex. Civ. App.] 79 S. W. 649.

16. Lewis v. Simpson [Iowa] 98 N. W. 508; Collins v. Padden, 120 Iowa, 381, 94 N. W. 905. And that the purchaser afterwards fails to carry out his agreement makes no difference. Seabury v. Fidelity Ins., T. & S. D. Co., 205 Pa. 234, 54 A. 898. Broker found a party able and willing to exchange after first agreeing to make the deal. His customer backed out. He was entitled to commissions. Suydam v. Healy, 87 N. Y. S. 669.

17. Though the contract is never carried

A slight modification of the terms will not defeat his right.[19] All his expenditures are at his own risk, to be recouped only in case of success.[20]

If his endeavors have been the procuring cause of the transaction,[21] the burden of which is on him to show,[22] he is entitled to his commissions,[23] even though

out. Flynn v. Jordal [Iowa] 100 N. W. 326. Though the third party subsequently refuses to carry it out. Charles v. Cook, 88 App. Div. 81, 84 N. Y. S. 867.

18. Flynn v. Jordal [Iowa] 100 N. W. 826. If a principal accepts a proposed purchaser conditionally, or if the purchaser withdraws his offer before acceptance, the broker is not entitled to commissions, unless it is shown that the purchaser was able, ready and willing to purchase at the time of tender to the principal. Id. A broker, who in accordance with his contract, brings the purchaser and principal together, is entitled to his compensation when these latter parties arrive at a definite understanding, in relation to such contract, acceptable to both. Seabury v. Fidelity I., T. & S. D. Co., 205 Pa. 234, 54 A. 898.

19. Where broker was authorized to sell for $4,500, and the owner sold to the purchaser procured for $4,300; broker was entitled to commission. Smith v. Truitt [Mo. App.] 80 S. W. 686. Broker procured purchaser, for the sale of an automobile, who was ready and willing to carry out his contract with exception of first payment. This being waived by principal, held that broker was entitled to his commission. Veeder v. Seaton, 85 App. Div. 196, 83 N. Y. S. 159. Where a broker was employed to rent one floor of a building and the owner availed himself of his services in renting another, he was entitled to commission. Snydam v. Vogel, 84 N. Y. S. 915. Broker was authorized to sell tract of land for $70,000 cash. Purchaser finally refused to pay all cash, but did make deal whereby he paid part cash and secured the rest up to $70,000. Court left it for jury to say whether principal had waived his right to insist on provision for cash as against broker. S. E. Crowley Co. v. Myers, 69 N. J. Law, 245, 55 A. 305. Broker acting for principal secured a loan of $20,000, his commission to be a certain per cent of amount, at certain times, remaining unpaid. Principal borrowed $5,000 more and then cancelled both these notes and gave a new note for $25,000. Held that broker could still recover his commission. Clay v. Lakenan, 101 Mo. App. 563, 74 S. W. 391. Where price finally agreed upon is less than that at which the broker was instructed to sell, he is entitled to commission. Martin v. Fegan, 88 N. Y. S. 472. Modified and carried out. Broker had waived his right to commissions if the sale was not consummated. Cody v. Dempsey, 86 App. Div. 335, 13 Ann. Cas. 322, 83 N. Y. S. 899. His right to commission is not affected by a change in an agreement relative to the purchase of other interests. Good v. Smith [Or.] 76 P. 354.

20. Smith v. Lawrence, 98 Me. 92, 56 A. 455. Procuring an abstract to be extended to date. Sale never consummated. Park v. Hogle [Iowa] 99 N. W. 185.

21. That a broker did not inform his principal before the sale that a purchaser was his customer was not controlling as to whether he was the procuring cause. Metcalfe v. Gordon, 86 App. Div. 368, 83 N. Y. S. 808. A broker who mentions parties to principal saying that they are his customers, but who does not see the one who buys the property until after the sale, is not entitled to commission. Whiteley v. Terry, 83 App. Div. 197, 82 N. Y. S. 89. Purchaser was not able to buy on the terms of owner. Harmon v. Enright [Mo. App.] 81 S. W. 1180. Evidence held insufficient to show that the owner agreed to find a lessee for the purchaser and guarantee payment of rent. Brokers recommended a customer with whom they, the brokers, could not deal. Transaction was arranged with this party subsequently, by another broker. The first broker was not entitled to commissions. Sampson v. Ottinger, 87 N. Y. S. 796. Where a customer asked a broker about a certain farm, and the broker saw the owner, but his authority was subsequently revoked and a sale made by owner the broker was not the procuring cause. McCrory v. Kellogg [Mo. App.] 81 S. W. 465. Evidence of correspondence held insufficient to show that a sale was effected through the broker's agency. Hunn v. Ashton, 121 Iowa, 265, 96 N. W. 745. Evidence held to show an intervening cause. Studer v. Byson [Minn.] 100 N. W. 90. An instruction that principal would be liable for commissions where he sold the land himself, and there was nothing in the contract against such right, held error. Evans v. Gay [Tex. Civ. App.] 74 S. W. 575.

22. Client asserted that deal was carried through by another broker. Schatzberg v. Groswirth, 84 N. Y. S. 259. On conflicting evidence as to whether a broker was the procuring cause, the question was for the jury. Von Tobel v. Stetson & Post Mill Co., 32 Wash. 683, 73 P. 788. As to whether correspondence of broker was the procuring cause of a sale of land, evidence held for jury. Donovan v. Weed, 86 App. Div. 630, 83 N. Y. S. 682.

23. Where a broker introduced a probable customer who subsequently became a purchaser, he was the procuring cause. Martin v. Fegan, 88 N. Y. S. 472. Though at the time the agent solicited the purchaser to buy he was not able. Marlatt v. Elliott [Kan.] 77 P. 104. Proper to so instruct. Jaeger v. Glover, 89 Minn. 490, 95 N. W. 311. A verdict for plaintiff in an action for commissions as a broker involving the question of his employment by defendants and his being the procuring cause of the sale held not against the weight of evidence. Abraham v. Burstein, 85 App. Div. 631, 81 N. Y. S. 937. Where broker took party of landseekers to view the premises and one bought. White v. Collins, 90 Minn. 165, 95 N. W. 765. Broker procured purchaser to buy land but the price being too high, purchaser sent his own agent to principal and succeeded in buying the land for $1,000 less. Held, that broker was entitled to his commission. McCormack v. Henderson, 100 Mo. App. 647, 75 S. W. 171. Though he procures

the transaction was not completed until after the termination of his authority;[24] but he is not entitled to commissions for a sale made to his customer after his discharge,[25] nor for a sale under a revoked contract of agency.[26] He must do something more than get authority to sell,[27] though he need not conduct the transaction to a final conclusion,[28] and he is not entitled to commissions for unsuccessful efforts.[29]

The performance of the contract is a prerequisite to the right to commissions,[30] but negotiating a conditional sale is sufficient,[31] and he may be entitled to recover on the quantum meruit for part performance.[32]

his purchasers through the assistance of other agents. Henninger v. Burch, 90 Minn. 43, 95 N. W. 578. Correspondence held to show that broker was procuring cause. Steidl v. McClymonds, 90 Minn. 205, 95 N. W. 906. Where brokers advertised the property and prepared for its sale at auction, but the owner sold it at private sale the day before the auction. Donald v. Lawson, 87 N. Y. S. 486. Evidence held to show that one had by correspondence, etc., procured a purchaser. Sandefur v. Hines [Kan.] 76 P. 444. Evidence held to show that a broker had procured a purchaser and was entitled to a five per cent commission, though there had been another settlement. Summers v. Summers [Ky.] 80 S. W. 1154. Where a principal stated to a broker after the sale that he was entitled to his commissions, evidence held to show that he was the procuring cause of the sale and was not limited to procuring a purchaser at a certain price. Metcalfe v. Gordon, 86 App. Div. 368, 83 N. Y. S. 808. Where one purchased directly from owner, evidence held to show that broker was procuring cause. Veale v. Green [Mo. App.] 79 S. W. 731. Evidence held to show a broker entitled to commissions for sale of leasehold. Steer v. Dwyer [Mo. App.] 79 S. W. 738. Where a buyer's attention was called to the property by an advertisement of a broker. Kiernan v. Bloom, 86 N. Y. S. 899. "If the property sold is brought to the attention of the purchaser by the broker, and the principal carries on the negotiations himself or agrees to an exchange instead of sale, or allows the purchaser a certain time to agree to his terms, and before the expiration of the time allowed, sells to another, the broker is entitled to his commissions." Showaker v. Kelly, 21 Pa. Super. Ct. 390. Evidence held to show that an agreed compensation was $650 instead of $160. Cuperman v. Stern, 88 N. Y. S. 147.

24. Jaeger v. Glover, 89 Minn. 490, 95 N. W. 311; Crowley Co. v. Myers, 69 N. J. Law, 246, 55 A. 305.

25. Sale made to a customer with whom the broker unsuccessfully negotiated. Leonard v. Eldredge, 184 Mass. 594, 69 N. E. 337. A sale by the owner to one with whom a broker had negotiated without authority does not entitle him to commission. Negotiated after his authority had been revoked. George B. Loving Co. v. Hesperian Cattle Co., 176 Mo. 330, 75 S. W. 1095. Conversation between broker and purchaser subsequent to revocation inadmissible. Id.

26. Evidence held to show a written contract had been superseded by a new oral contract. Kidman v. Garrison [Iowa] 97 N. W. 1078.

27. Sale was negotiated by the owner. Scherer v. Colwell, 87 N. Y. S. 490.

28. Marlatt v. Elliott [Kan.] 77 P. 104.

29. Where a sale was consummated by the principal two months after negotiations by the broker with the purchaser, evidence held to show that the broker was not the procuring cause. Phinney v. Chesebro, 87 App. Div. 409, 84 N. Y. S. 449.

30. Not error to so instruct where there was no proof from which value of services outside the special contract could be found chargeable. Ivy Coal & Coke Co. v. Long, 139 Ala. 535, 36 So. 722. Instructions to a real estate broker to list lands for sale at $40 per acre, $1,600 to $2,000 cash and the balance in annual payments of $600, with interest payable annually, the crop of the current year to be reserved to the vendor, are not fulfilled by carrying out agreement with exceptions of interest—postponed 9½ months, notes payable on or before date and no crop reservation. Sleeper v. Murphy, 120 Iowa, 132, 94 N. W. 275. Purchaser defaulted. Lassen v. Bayliss [C. C. A.] 125 F. 744. One brought the parties together but no terms were agreed upon, subsequently another broker effected an agreement between them on different terms. De Zavala v. Royaliner, 84 N. Y. S. 969. One employed to procure a loan is entitled to compensation only in case he procures it. Demarest v. Spiral Riveted Tube Co. [N. J. Law] 58 A. 161. Lender backed out after he had agreed to make it. Ashfield v. Case, 87 N. Y. S. 649. Procurement of option not sufficient where he was to effect a sale. Lawrence v. Pederson [Wash.] 74 P. 1011. Where contract called for the sale of an entire tract, sale of part of it is insufficient. Shinn v. Boyd [Tex. Civ. App.] 77 S. W. 1027. Where the contract is for a sale, no commission can be recovered until a sale is effected, unless the principal acts in bad faith. Parker v. National Mut. Bldg. & L. Ass'n [W. Va.] 46 S. E. 811. Where commission is to be paid on sale, producing purchaser is not sufficient. Ormsby v. Graham [Iowa] 98 N. W. 724. Contract construed and held not to entitle broker to commissions for trying in good faith to sell the land without success. Sherburne Land Co. v. Eells [Minn.] 99 N. W. 419.

31. Receipt for part of purchase price $1,000 of $30,000, signed by owner, indicates conditional sale. Merriman v. Wickersham, 141 Cal. 567, 75 P. 180.

32. The owner sold to a purchaser found by the broker, a portion of the land listed. Delta & Pine Land Co. v. Wallace [Miss.] 36 So. 263.

Where a condition is annexed to the transaction, it must be performed before commissions can be recovered,[33] and where right to commissions was limited to the time the vendor received payment, no recovery thereof could be had until such time;[34] but where payment of commissions does not depend on the payment of the entire purchase price, he is entitled to receive them as installments are paid.[35]

A sale agent is entitled to commission on all sales,[36] except those made by the owner,[37] especially where he reserves a right to sell.[38]

Arbitrary refusal of the principal to consummate the transaction does not defeat the right to commissions,[39] nor does his inability to give a clear title[40] or immediate possession,[41] nor a mistake in listing as to the description,[42] nor notice to the broker of a defect in the title acquired after he has procured a purchaser,[43] nor the sale by the principal to one with whom the broker has negotiated,[44] and that he has a cause of action against his customer for fraud is no defense.[45] He may recover, though he knew that the principal did not have the amount of stock he employed him to sell.[46]

33. Was to acquire property free from taxes which he did not, though he procured a warranty deed. Rice v. Omberg, 25 Ky. L. R. 531, 76 S. W. 15. Agreement to take loan on condition that he got title to the property. Frye v. Schwarz, 87 App. Div. 611, 83 N. Y. S. 1070.

34. Payment was reserved until it was shown a certain amount could be realized on the business sold. Hart v. Garrett Co., 87 N. Y. S. 574.

35. Frank v. Bonnevie [Colo. App.] 77 P. 363.

36. Whisky broker. Brown & Bro. v. Lapp, 25 Ky. L. R. 1134, 77 S. W. 194. Sold to one with whom he had negotiated. Sylvester v. Johnson, 110 Tenn. 392, 75 S. W. 923.

37. Where owner sold, though the broker had the exclusive agency under a contract which did not negative the owner's right to sell. Ingold v. Symonds [Iowa] 99 N. W. 713. Contract did not negative principal's right, and he procured a loan before the broker did. Mott v. Ferguson [Minn.] 99 N. W. 804.

38. Tracy v. Abney, 122 Iowa, 306, 98 N. W. 121. Nor does the fact that the contract provides for a penalty to be paid the broker in case the price is raised or the land taken out of the market entitle him to the penalty on a sale by the owner. Id.

39. By failing to furnish an abstract after the broker procured one to make a loan. Rundle v. Staats [Colo. App.] 73 P. 1091. When broker produces purchaser able and willing to purchase. Merriman v. Wickersham, 141 Cal. 567, 75 P. 180. Where he has found a purchaser. Gwinnup v. Sibert [Mo. App.] 80 S. W. 589. Where the principal refused to make a deed as to a certain fractional section. Heaton v. Clarke, 122 Iowa, 716, 98 N. W. 597; Ward v. McQueen [N. D.] 100 N. W. 253. He must accede to reasonable terms under the contract. Allowance of six months in which to pay $1,000.00. Wendle v. Palmer [Conn.] 58 A. 12. Whether during the continuance of an option the owner offered to sell to another at a less price, the statement of his proposed purchaser is hearsay. Smith v. Lawrence, 98 Me. 92, 56 A. 455. It is error to instruct that the commission was not to be paid unless the sale were consummated and that the risk of failure was wholly on the broker. Bruce v. Hurlbut, 81 App. Div. 311, 81 N. Y. S. 54. Evidence of interviews between an owner and a customer of a broker who held an option held insufficient to show that the owner dissuaded the customer from purchasing. Smith v. Lawrence, 98 Me. 92, 56 A. 455.

40. Part of land in adverse possession. Bruce v. Wolfe, 102 Mo. App. 384, 76 S. W. 723. Lien on property. Smye v. Groesbeck [Tex. Civ. App.] 73 S. W. 972; Finck v. Bauer, 40 Misc. 218, 81 N. Y. S. 625. Contention that he was entitled to a reasonable time to perfect his title is no avail. Nor is fact that owner offered to perfect his title. Vendee not obliged to accept. Bruce v. Wolfe, 102 Mo. App. 384, 76 S. W. 723. Implied condition that title should be perfect. Wilson v. Clark [Tex. Civ. App.] 79 S. W. 649. If a sale falls through because of a defect in the vendor's title. Cusack v. Aikman, 87 N. Y. S. 940. A receipt by the owner, reciting that he has received earnest money on purchase of certain land which is to be returned if title fails, is not varied by parol evidence of the purchaser's willingness to take it when title is shown to be satisfactory. Wilson v. Clark [Tex. Civ. App.] 79 S. W. 649. Nor does such a receipt require the purchaser to have the land surveyed. Id.

41. Putter v. Berger, 88 N. Y. S. 462.

42. Tyler v. Justice [Ga.] 48 S. E. 328.

43. McKinnon & Eve v. Hope, 132 Ga. 1149, 45 S. E. 413.

44. Though this terminates the agency. Sylvester v. Johnson, 110 Tenn. 392, 75 S. W. 923. Broker, in a sale of land, was to receive all above a certain price per acre as his commission. After securing purchaser, the principal connived with such purchaser to sell him the land at the marginal price. Held, that broker could recover what his services were worth. Baker v. Murphy, 105 Ill. App. 151.

45. By collusion between customer and vendee, the deed was made to a third party. Martin v. Fegan, 88 N. Y. S. 472.

46. Error to make his recovery depend on guaranty that the other members of the firm would authorize the sale. Enright v. Ford [Mo. App.] 80 S. W. 291.

Where a principal sold his entire tract to one who agreed to pay commissions on applications sent in by his agents, the agent could collect at the rate fixed by his contract,[47] though the question of his fair dealing and the consequent validity of the contract for commissions may be for the jury.[48]

Where a broker gave his receipt for commissions to the lessee to be used by her as payment of rent he could not recover from his principal.[49] A broker may be precluded from recovering his commissions by becoming an officer of a purchasing corporation,[50] because of the fiduciary relation he sustains.[51] Failure of a broker to comply with an ordinance requiring a license will not preclude him from recovering a commission,[52] especially where such ordinance is not enforced.[53]

Good faith.[54]—If he fails to make a full disclosure of the facts,[55] or makes misrepresentations to his principal, he cannot recover commissions, though the contract becomes binding.[56]

A local custom to pay brokers who negotiate a deal cannot fasten upon a property owner any liability.[57] Whether the broker has complied with his contract is a question of law.[58]

In some states an authorization to sell real estate must be in writing in order that the broker may recover his compensation,[59] and in such case the broker cannot recover on a quantum meruit,[60] while in others an agent's authority to procure a purchaser need not be.[61] The statute of frauds cannot be invoked for the protection of a broker to secure commissions.[62] A part of the New York courts hold that

47. The fact that it had been represented to the purchaser that the rate had been reduced is immaterial. Heaton v. Clarke, 122 Iowa, 716, 98 N. W. 597.

48. Goldshear v. Barron, 42 Misc. 198, 85 N. Y. S. 395.

49. Irrespective of novation, any private agreement between broker and lessee as to use of the receipt would not affect rights of lessor. Davis v. True, 89 App. Div. 319, 85 N. Y. S. 843.

50. Corporation to which sale was made was not in existence when contract was made, but when sale was effected he wae a director. Goldshear v. Barron, 42 Misc. 198, 85 N. Y. S. 395.

51. A. was authorized to sell land. F. made an agreement with him whereby he was to sell land and receive half the profits. F. formed a corporation and sold to them at a greatly advanced price. Held, that brokers were in a fiduciary relation to corporation and hence could not recover excess in price. Tegarden Bros. v. Big Star Zinc Co., 71 Ark. 277, 72 S. W. 989.

52. Where it is not shown that both parties agreed to violate the ordinance. Tooker v. Duckworth [Mo. App.] 80 S. W. 963.

53. Ordinance, City of Guthrie. Where city refused to accept the tax, failure to pay it could not be set up as a defense in an action for commissions. Wicks v. Carlisle, 12 Okl. 337, 72 P. 377.

54. See 1 Curr. L. 370.

55. Making changes in a contract without authority, even though the principal was not prejudiced thereby. Humphrey v. Robinson, 134 N. C. 432, 46 S. E. 953; Jeffries v. Robbins, 66 Kan. 427, 71 P. 852.

56. As to purpose for which lots sold were to be used. Whaples v. Fahys, 87 App. Div. 518, 84 N. Y. S. 793.

57. For effecting a lease. Brady v. American M. & F. Co., 86 App. Div. 267, 83 N. Y. S. 663. Proof of custom to pay commissions is insufficient to warrant a recovery. King v. Hammond, 84 N. Y. S. 121. Circumstances indicated that the broker was working in the interests of the purchaser. Downing v. Buck [Mich.] 98 N. W. 388.

58. Error to submit it to the jury. Goodson v. Embleton [Mo. App.] 80 S. W. 22.

59. Gen. St. p. 1604, § 10. Leimbach v. Regner [N. J. Law] 57 A. 138. A subsequent promise to pay is without consideration. Stout v. Humphrey, 69 N. J. Law, 436, 55 A. 281. Gen. St. p. 1604, § 10. Kent v. Phenix Art Metal Co., 69 N. J. Law, 532, 55 A. 256; Wulff v. Lindsay [Ariz.] 71 P. 963. Gen. St. p. 1604, § 10. Indivisible contract for sale of both real and personal property. Kent v. Phenix Art Metal Co., 69 N. J. Law, 532, 55 A. 256.

60. Leimbach v. Regner [N. J. Law] 57 A. 138. Burns' Rev. St. 1901, § 6629a. Beahler v. Clark [Ind. App.] 68 N. E. 613. Civ. Code, § 1624. Jamison v. Hyde, 141 Cal. 109, 74 P. 695. Comp. St. 1903, § 74, c. 73. Blair v. Austin [Neb.] 98 N. W. 1040.

61. Under Rev. St. 1899, § 3418. Gwinnup v. Sibert [Mo. App.] 80 S. W. 589. After they accept purchase money, they are estopped to assert that there was no sale, and that broker's services consisted merely in procuring a purchaser, where the sale was subsequently rescinded. Id. If he produces a purchaser, he is entitled to recover. Wilson v. Clark [Tex. Civ. App.] 79 S. W. 649. Broker at customer's request bought real estate, taking title in his own name and afterwards conveying it to the customer when the customer agreed to pay him a certain commission. Huff v. Hardwick [Colo. App.] 75 P. 593. Between purchaser and seller. Goodson v. Embleton [Mo. App.] 80 S. W. 22.

62. Broker had agency to procure a loan to cancel a mortgage. The principal pro-

commission for sale of land cannot be recovered unless made under written authority,[63] while the contra is maintained in other courts of the same state.[64]

Amount of commission depends upon the agreement of the parties,[65] or, where there is no controlling agreement, upon what the services are reasonably worth.[66]

A principal is liable for the compensation of a subagent.[67]

Agreement for commissions for a sale or a lease furnishes a cause of action for both.[68]

A principal cannot refuse to accept services on one ground and payment of commissions on another.[69]

The complaint[70] must allege what the broker was employed to do and that it had been accomplished,[71] but the acts constituting the efforts to effect the transaction need not be set forth.[72] It may set forth a single claim in several counts,[73] and does not fail to state a cause of action because not alleging that the broker communicated to the owner the name of a proposed purchaser.[74] In a real estate

cured an oral promise of renewal. Mott v. Ferguson [Minn.] 99 N. W. 804.

63. Pen. Code, § 640d. Adler v. Schaumberger, 84 N. Y. S. 235. Pencil memorandum held insufficient. Cohen v. Boccuzzi, 86 N. Y. S. 187. Question of waiver of written authority cannot be raised. Kronenberger v. Quinn, 86 N. Y. S. 139. No written authority is a valid defense to an action for commission. Davis v. Kidansky, 86 N. Y. S. 6. No written authority from wife who owned land, though there was from her husband. Charles v. Arthur, 84 N. Y. S. 284. He must prove written authority. Borglo v. Gange, 87 N. Y. S. 538; Peck v. Antes, 84 N. Y. S. 252.

64. The right to recover commissions for a sale of land without written authority is not prevented by a statute making such a sale a misdemeanor [Pen. Code, § 640d (Laws 1901, c. 128)]. Cody v. Dempsey, 86 App. Div. 335, 13 Ann. Cas. 322, 83 N. Y. S. 899.

65. Where amount of commission was fixed by a tacit understanding between the parties. Armstrong v. Cleveland [Tex. Civ. App.] 74 S. W. 789.

66. Boyd v. Vale, 84 App. Div. 414, 82 N. Y. S. 932. An employment to procure an option, which principal did not take advantage of. Boardman v. Hanks [Mass.] 70 N. E. 1012.

67. Where broker has authority to employ him. Eastland v. Maney [Tex. Civ. App.] 81 S. W. 574. Petition by a subagent for compensation, alleging that agent was nonresident and that subagent was a resident of county where land was located, permits proof of agent's authority to employ a subagent. Id. Where an agent agreed with a subagent to sell at a certain price if the owner would take it, the subagent took the risk of getting his commissions in making a sale at that price. Id.

68. Goldshear v. Barron, 42 Misc. 198, 85 N. Y. S. 395. Where a broker procured options on a number of lots of different owners and they agreed to pay him a commission for selling them, and a formal contract was signed by them severally, the price being fixed at a gross sum, there was not a joint liability for commissions. Whaples v. Fahys, 87 App. Div. 518, 84 N. Y. S. 793.

69. Refusal to accept loan because commission asked was excessive, and demand for commission defended on ground that lender had incorporated a new condition in the application. Hotchkiss v. Kuchler, 86 App. Div. 265, 83 N. Y. S. 710. Refused sale because he did not need the money, defended on ground that he never employed the broker. Sandefur v. Hines [Kan.] 76 P. 444.

70. See 1 Curr. L. 372.

71. Complaint held insufficient. Fenwick v. Watkins, 25 Ky. L. R. 1962, 79 S. W. 214. A complaint states a cause of action if it alleges an agreement whereby a purchaser was to be procured for defendant's land at a certain price per acre for which services the plaintiffs were to receive a certain specified sum of money from defendant as commission; that they procured and sent such a purchaser, and that he bought the land at the price fixed. Lemon v. De Wolf, 89 Minn. 465, 95 N. W. 316. Complaint held to allege contract to pay commissions where brokers authorized purchaser to offer a sum less than demanded by the owner. Blake v. Austin [Tex. Civ. App.] 75 S. W. 571. Complaint alleging authority to sell for a fixed price and on request of the owner, the broker gave him the name of a party who would purchase at a less price and who bought the property, held to state a cause of action on a quantum meruit. Von Tobel v. Stetson & Post Mill Co., 32 Wash. 683, 73 P. 788. A petition alleging that a broker procured a purchaser with whom his principal entered into negotiations and consummated a sale is good against general demurrer. Brockenbrow v. Stafford [Tex. Civ. App.] 76 S. W. 576. Statement held sufficient in justice court. Smith v. Trultt [Mo. App.] 80 S. W. 686. Petition by subagent for commission insufficient, as it did not show that the agent had authority to agree to pay a stipulated commission. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227. Modification of an oral agreement made on discovery of a mutual mistake becomes part of the contract. Properly pleaded as such. Good v. Smith [Or.] 76 P. 354.

72. Alleging employment and sale held sufficient. Yarborough v. Creager [Tex. Civ. App.] 77 S. W. 645.

73. So as to meet all possible proofs which will appear at the trial. Spotswood v. Morris [Idaho] 77 P. 216.

74. It not appearing that it was demanded or refused or that injury was suffered

transaction that the contract has been signed must be alleged.[76] An allegation of willingness, readiness, and ability, to purchase is an allegation of fact,[76] and must be set forth where the transaction is not consummated.[77] Where the petition counts on a contract there can be no recovery on a quantum meruit,[78] nor as for a breach thereof,[79] nor can one declare on a written contract and recover on proof of a sale under an oral one,[80] but under an allegation for a commission for two and one half per cent, eleven and one half per cent may be proved and recovered,[81] and a cause should not be dismissed because the broker fails to prove that he was the procuring cause of the sale.[82] Where the petition alleged that the contract bound the defendant individually, recovery could not be had on proof that the corporation of which he was president was bound.[83] An actual cause of action must exist at the time of bringing the suit, and no cause of action subsequently arising can be introduced by amended or supplemental complaint,[84] but it is not error to allow an amendment where it does not change the cause of action.[85] Where a petition sought interest, a filing thereof was a demand, and it was properly allowed from date of such filing.[86] An allegation for sums expended in procuring an abstract was proper.[87] Petition for commissions properly alleged agreement between owner and purchaser settling the failure to sell.[88]

Evidence[89] which goes to show the amount due,[90] and acts which one would naturally do in the usual course of business are admissible,[91] and the broker may testify that he advertised in a certain newspaper,[92] and where action is on a quan-

because of it. Berteleon v. Hoffman [Wash.] 77 P. 801.

75. Petition set out copies of letters constituting contract, no signatures shown. David Bradley v. Bower [Neb.] 99 N. W. 490.

76. Not a conclusion. Wilson v. Clark [Tex. Civ. App.] 79 S. W. 649.

77. Purchaser did not buy the land. Armstrong v. Cleveland [Tex. Civ. App.] 74 S. W. 789.

78. No proof of employment, though there was proof that a buyer was procured. McDonnell v. Stephenson [Mo. App.] 77 S. W. 766. Evidence held to show express contract. Armstrong v. Cleveland [Tex. Civ. App.] 74 S. W. 789. Where action for commission is on an express contract, the reasonable value of the broker's services cannot be shown. Where contract fixed right to compensation, it was held error to submit issue as to reasonable value of broker's services. Evans v. Gay [Tex. Civ. App.] 74 S. W. 575.

79. Evidence thereof not admissible. Cosgrove v. Leonard M. & R. Co., 175 Mo. 100, 74 S. W 986.

80. Written contract had been revoked. Braly v. Barnett [Tex. Civ. App.] 78 S. W. 965.

81. Not a variance. Hightower v. Kitchens, 118 Ga. 277, 45 S. E. 267.

82. Under Municipal Court Act (Laws 1902, §§ 248, 249). Wakefield v. Street, 86 App. Div. 630, 83 N. Y. S. 765.

83. Groeltz v. Armstrong [Iowa] 99 N. W. 128.

84. Nonsuit had been granted because option had not matured, pending motion for new trial purchaser complied with option, error to grant new trial to permit plaintiff to allege completion of sale. Lawrence v. Pederson [Wash.] 74 P. 1011.

85. Inserting name of person having an interest. Title not in issue. Good v. Smith [Or.] 76 P. 354. Where plaintiff's evidence failed to show a written authority, it was not error to permit defendant to amend his answer, making it a denial instead of an admission of the contract [Civ. Code, § 1624]. Jamison v. Hyde, 141 Cal. 109, 74 P. 695.

86. Brown & Bro. v. Lapp, 25 Ky. L. R. 1134, 77 S. W. 194.

87. Error to strike it out when there was nothing to show that it was not included in his obligation to procure a purchaser. Wilson v. Clark [Tex. Civ. App.] 79 S. W. 649.

88. Showing purchaser had been procured. Wilson v. Clark [Tex. Civ. App.] 79 S. W. 649.

89. See 1 Curr. L. 373.

90. In a sale of mining claims for a customer, other interests were sold and each was not separately valued; evidence that all were of equal value, and what the total acreage was, was admissible. Huff v. Hardwick [Colo. App.] 75 P. 593. Broker was entitled to recover if it could be shown what proportion should be credited to claims in which he was interested. Id. Value of services may be proved by evidence of customary real estate commissions. No compensation agreed upon, owner had ratified and accepted benefit of his services. Hurt v. Jones [Mo. App.] 79 S. W. 486. Evidence held not to sustain a judgment for commissioners where a sale was effected under a substituted agreement. Jones v. Pendleton [Mich.] 96 N. W. 574.

91. Sending bill 20 days after discharge. Bradley v. Gorham [Conn.] 58 A. 698.

92. No effort being made to prove the contents of the advertisement. Yarborough v. Creager [Tex. Civ. App.] 77 S. W. 645. A newspaper advertisement is admissible as showing what a broker did in an endeavor to sell. Decker v. Widdicomb [Mich.] 100 N. W. 573.

tum meruit it is proper to show the reasonable value of his services.[93] Conversations between broker and agent relative to the subject-matter,[94] or between the principal and a third party are admissible,[95] but statements made by a principal's husband to a broker's agent,[96] or statements of the broker that he had the land in his hands for sale are inadmissible, when they do not specify the time and place.[97] Evidence which will reveal an undisclosed principal is properly excluded.[98] Where a broker had the sole agency contracts made by the owner with other agents are immaterial.[99] Evidence of an express contract is inadmissible under a general denial.[1]

Instructions.[2]—On an allegation that the broker sold the land it is error to instruct that he is entitled to recover if he was trying to sell.[3] An instruction requiring proof of matters not in issue is error.[4] Where the ultimate facts entitling to recovery have been instructed upon it is error to refuse to instruct the negative.[5] It is not error to refuse to restrict a right to recover to a finding of an express promise to pay, where it is alleged that the broker became entitled to his commission and the principal promised to pay.[6] A charge that if the purchasers were accepted by the owner as satisfactory the broker is entitled to his commission, but if not it must appear that they were able and willing to purchase, is inconsistent with a charge that the contract had been ratified by the owner.[7] An instruction, "you will have to determine from the testimony whether Mr. Showaker was the man who consummated and carried through that deal between Kelly and the others," held proper.[8] An instruction, seeming to assume a sole agency where there was not one, was not prejudicial to a principal where it was plainly an attempt to charge on his theory of an abandonment.[9] A clause in an instruction "If you believe that his own efforts to procure a purchaser had been abandoned" is not objectionable as making the right to recover dependent on two states of facts, the jury having also been charged as to the effect of his inability to procure a purchaser.[10]

93. Evidence of reasonable value of broker's services in a suit on a quantum meruit for commissions held admissible. Boyd v. Vale, 84 App. Div. 414, 82 N. Y. S. 932.

94. As to purchases made by a certain party. Richardson v. Babcock, 119 Wis. 141, 96 N. W. 554. It is not error to admit testimony as to what took place at a public sale of land, at which time it was alleged that the parties made the oral agreement sued on. Borden v. Isherwood, 120 Iowa, 677, 94 N. W. 1128.

95. To show that broker had procured a purchaser. Good v. Smith [Or.] 76 P. 354.

96. Statements made by a principal's husband to a broker's agent that he was entitled to commissions, inadmissible. Winans v. Demarest, 84 N. Y. S. 504.

97. Bradley v. Gorman [Conn.] 58 A. 698.

98. Downing v. Buck [Mich.] 98 N. W. 388.

99. Error to submit their existence to the jury. Yarborough v. Creager [Tex. Civ. App.] 77 S. W. 645.

1. Broker brought quantum meruit for services. Reishus-Remer Land Co. v. Benner [Minn.] 98 N. W. 186.

2. See 1 Curr. L. 373.

3. Yarborough v. Creager [Tex. Civ. App.] 77 S. W. 645.

4. Employment of broker not in issue, but only whether he was the procuring cause. Anderson v. Bradford, 102 Mo. App. 433, 76 S. W. 726. Error in charging that several defendants owned land in certain proportions, there being no evidence to that effect, was not prejudicial where it was not considered. Eastland v. Maney [Tex. Civ. App.] 81 S. W. 574.

5. Bruce v. Wolfe, 102 Mo. App. 384, 76 S. W. 723. No error to refuse an instruction that if broker had not requested an abstract of title, he could not recover, where the evidence showed that an abstract had been requested and the sale fell through because it was refused. Id.

6. Bertelson v. Hoffman [Wash.] 77 P. 801. Remark by the court that if a broker had no more business honesty than that he ought not to recover, held not prejudicial under the circumstances. Metcalfe v. Gordon, 86 App. Div. 368, 83 N. Y. S. 808. Instruction of evidence as to whether purchaser was procured by a broker held proper. Donovan v. Weed, 86 App. Div. 630, 83 N. Y. S. 682.

7. Flynn v. Jordal [Iowa] 100 N. W. 326.

8. Showaker v. Kelly, 21 Pa. Super. Ct. 390.

9, 10. Von Tobel v. Stetson & Post Mill. Co., 32 Wash. 683, 73 P. 788.

BUILDING AND CONSTRUCTION CONTRACTS.

§ 1. The Contract, Sufficiency and Interpretation (550).
§ 2. Performance of Contract (551).
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§ 15. Remedies and Procedure (559).

§ 1. *The contract, sufficiency and interpretation.*[11]—Matters common to all contracts,[12] or peculiar to contracts for public works,[13] are elsewhere treated. A contract to erect a building in violation of a city ordinance is void;[14] but failure to sign plans and specifications, as required by statute, is not fatal.[15]

Interpretation.[16]—The ordinary rules for the construction of contracts apply. Particular terms and provisions construed will be found in the notes.[17]

Plans, specifications and detail drawings.[18]—An annexed drawing[19] or one

11. See 1 Curr. L. 374.
12. See Contracts, 1 Curr. L. 626.
13. See Public Contracts, 2 Curr. L. 1280.
14. Contractor cannot recover on cause of action arising out of contract to erect a building of combustible materials within the fire limits of the city, in violation of a city ordinance. Finding that building was to be constructed of fireproof materials, erroneous. Chimene v. Pennington [Tex. Civ. App.] 79 S. W. 63.
15. Cal. Code Civ. Proc. § 1183½, providing that contract shall otherwise be void, intended to protect subcontractors, materialmen and laborers. Sullivan v. Cal. Realty Co., 142 Cal. 201, 75 P. 767.
16. See 1 Curr. L. 375, n. 6-7.
17. In a contract whereby plaintiff agreed to pay a third person a certain price per yard for the removal of gravel **"as designated by the city engineer,"** the latter words held to refer to the amount to be removed and not to its location. Normile v. Ballard, 33 Wash. 369, 74 P. 566.

"Payments to be made as iron is used as per my contract," held to require payment only for such iron as was actually used in the work, including temporary work. Burden on plaintiff to show delivery and progress of work to point where payment became due. Weber v. Farrell, 84 N. Y. S. 272. Estimates of a resident engineer in immediate charge of construction **under direction of engineer in charge** held to have been made by the "engineer in charge of construction." American B. & T. Co. v. Baltimore & O. S. W. R. Co. [C. C. A.] 124 F. 866.

Agreement to transport materials held to mean transportation to station nearest to the place where they were to be used. American B. & T. Co. v. Baltimore & O. S. W. R. Co. [C. C. A.] 124 F. 866. A contract providing for lathing and plastering at a **specified rate per square yard** requires compensation to be fixed in accordance with the measured area, and it is error to allow the jury to fix it in accordance with the number of lath used, under a local custom. Smith v. Colloty, 69 N. J. Law, 366, 55 A. 805.

"Price for excavated material" held to mean material excavated, loaded and carted to a certain road, and not material used on premises. Duncan v. Jacobs, 184 Mass. 123, 68 N. E. 38. Contract between defendant and a construction company that the construction company would **protect adjacent walls,** held an adjacent landowner who is no party to the contract could not compel the defendants to take measures to protect his walls from damage. Carpenter v. Reliance Realty Co. [Mo. App.] 77 S. W. 1004. Provision for a **claim in writing** by the contractor to the architect for any delay caused by any "act" of the owner or architect, does not apply to extra work required of the contractor. Reardon v. Cushing, 90 Minn. 360, 96 N. W. 1126. A contract which provided "I to **furnish all foundations** and common labor" does not preclude the idea that the same party was to direct the construction. Masterson v. Heitmann & Co. [Tex. Civ. App.] 77 S. W. 983. Calling an architect to inspect work held within provision that owner may terminate contract **if evident to architect** that builder is not complying with its terms, there being no regular architect employed. Hay v. Bush, 110 La. 575, 34 So. 692. Under an agreement to **complete a building by September 1,** and to pay damages for each day's delay after September 15, the former date is the time fixed for its completion. National Surety Co. v. Long [C. C. A.] 125 F. 887. Where a party builds a house on the lot of another at cost, the agreement being that the property should then be sold and the **net profits divided equally,** but no purchaser can be found, the builder held to be entitled to half the difference between the value of the lot as unimproved, plus the cost of improvements, and the market value of the property. Davis v. Kellar, 25 Ky. L. R. 279, 74 S. W. 1100. Parties held to have entered into **separate contracts** for construction of two houses, though subcontracts were let for work on both jointly. Separate agreements with the purchasers of two lots on which they were to be built. Smith v. Wilcox [Or.] 74 P. 708. Provision giving company **right to make changes** in dimensions of tunnel, construed. Daly v. Busk Tunnel R. Co. [C. C. A.] 129 F. 513.

18. See 1 Curr. L. 375.
19. Where there is a drawing annexed to specifications for construction of a sewer,

referred to[20] is part of the contract, and it is for jury to say in case of doubt which of two plans is the one referred to.[21]

Fraud, misrepresentation, or mistake.[22]—A contractor knowing the contents of a contract, but misled as to its meaning, cannot avoid for fraud.[23] If it is shown that part of the agreement was omitted because of mistake of the parties or fraud on the part of the plaintiff, then the jury should assess damages at what the work is reasonably worth.[24]

§ 2. *Performance of contract.*[25]—The defective performance of a contract constitutes a breach,[26] but in the absence of a guaranty, the contractor is only required to do the work in a workmanlike manner, and is not responsible for results.[27] He will be held to have contemplated natural obstructions which may arise, and will not be excused from performance in a good and workmanlike manner by reason thereof.[28]

Where a notice to commence work is received after the date fixed therein, the contractor is required to begin work within a reasonable time thereafter.[29]

The question of proper performance concerns only the parties thereto, and a collateral incumbrancer cannot complain of incomplete performance, for the owner is entitled to waive such if he choose.[30]

Deviation from specifications.[31]—Substantial performance may warrant a recovery on the contract, with deductions for unfinished work;[32] but in such case, the contractor must show both that the defects and omissions were unsubstantial and unintentional, and must also show the amount necessary to make them good.[33]

If the architect or owner is given power to reject defective material, his failure to do so constitutes a waiver of such defects.[34] If part of the rejected

showing probable line of rock and the specifications state that bidders must satisfy themselves as to the location of rock, there is no warranty as to the location of rock. Kelly v. New York, 87 App. Div. 299, 84 N. Y. S. 349.

20. Where it clearly appears that specifications under which work was done were the ones intended by the contract, the parties are bound by them, though they are not identified as the contract seems to require. Signed by architect alone. Snoqualmi Realty Co. v. Moynihan [Mo.] 78 S. W. 1014.

21. Cook v. Littlefield, 98 Me. 299, 56 A. 899.

22. These subjects are fully treated in separate topics. See Fraud and Undue Influence, 2 Curr. L. 104; Mistake and Accident, 2 Curr. L. 903. See, also, 1 Curr. L. 376.

23. Nesbit v. Jencks, 81 App. Div. 140, 80 N. Y. S. 1085.

24. Contract to construct stairway did not contain what defendant claimed was the agreement as to dimensions. Voss v. Schebeck, 25 Ky. L. R. 481, 76 S. W. 21.

25. See 1 Curr. L. 376.

26. Machinery called for by contract not delivered until after the stipulated time, and then in a defective condition. Payne v. Amos Kent B. & L. Co., 110 La. 750, 34 So. 763.

27. Under a contract for drilling a well, there is no implied undertaking to obtain water or as to quantity or quality to be obtained. Butler v. Davis, 119 Wis. 166, 96 N. W. 561.

28. Contract to build a church in a cemetery where soil was soft because of use for interment. Zimmerman v. Conrad [Mo. App.] 74 S. W. 139.

29. Where work was to commerce upon a day to be designated, a notice to commence work upon May 9th, which is received May 10th, is sufficient to require contractor to commence within a reasonable time. Masterson v. New York, 87 App. Div. 622, 84 N. Y. S. 312.

30. Nolt v. Crow, 22 Pa. Super. Ct. 113.

31. See 1 Curr. L. 377.

32. Woods v. Robertson, 85 N. Y. S. 338. The fact that a small sum will be required to complete the building will not prevent a recovery on the contract, where it has been substantially performed, and the contractors have offered to complete any work that might be incomplete, and to make such slight repairs or corrections as might be necessary. Windham v. Independent Tel. Co. [Wash.] 76 P. 936.

33. Cannot do so if neglect is willful. Norton v. U. S. Wood Preserving Co., 89 App. Div. 237, 85 N. Y. S. 886. General noncompliance sufficient to prove intentional deviation and preclude recovery. Braseth v. State Bank of Edinburg [N. D.] 98 N. W. 79. Where the contractor abandons the work, he is not entitled to recover on the ground of substantial compliance, unless he has completed the building without any omissions so substantial as to call for damages, except in subordination to the part of the contract permitting the owner to complete the building at his expense. Rowe v. Gerry, 86 App. Div. 349, 83 N. Y. S. 740.

34. Provision that contractor should submit to judgment of architect all work and materials and architect frequently saw his work. Siebert v. Roth, 118 Wis. 250, 95 N. W. 118. Not entitled to make deductions for alleged unsatisfactory material and work

material is good, but there is no data to determine the respective amounts, the builder is not entitled to credit for any of the material furnished,[35] nor can the owner recover for additional expense incurred partly through his fault and partly through that of the builder, when it is impossible to separate it.[36]

Whether the contract has been executed in accordance with the plans and specifications,[37] and whether such requirements have been waived, are questions for the jury.[38]

Liability for failure to perform.[39]—If the contract is without reservation, the contractor cannot excuse nonperformance on account of storms,[40] but if the owner, by his conduct, induces the contractor not to erect the building, he cannot recover damages for failure to perform.[41]

Damage to finished work.[42]—The general rule is that if the premises are destroyed without fault on either side, both parties are excused from further performance of the contract, and neither has a right of action against the other, unless a contrary intention appears;[43] but this is not the case where one has bound himself to erect a building of a specified description.[44]

Abandonment.[45]—The innocent party may treat a contract as abandoned for failure to perform, when he is thereby deprived of the benefit that would have

furnished by a subcontractor, where the architects had authority to compel the removal thereof during the progress of the work. G. A. Fuller Co. v. Young Co. [C. C. A.] 126 F. 343.

35. Snoqualmi Realty Co. v. Moynihan [Mo.] 78 S. W. 1014.

36. Owner did over most of the woodwork, but was not justified in so doing as to most of it. This necessitated a further expense for heating and watchmen. Held, owner could recover no damages. Snoqualmi Realty Co. v. Moynihan [Mo.] 78 S. W. 1014.

37. As to meaning of "Blanco P. Carrara" marble. G. A. Fuller Co. v. Young Co. [C. C. A.] 126 F. 343.

38. Woarms v. Becker, 84 App. Div. 491, 82 N. Y. S. 1086.

39. See 1 Curr. L. 377.

40. Contract to supply materials to owner of lot with which to construct house. Payment to be made when roof on. Shingles not furnished on account of storms. Woolf v. Shaefer, 41 Misc. 640, 85 N. Y. S. 205.

41. Agreement to rescind. Carter & Co. v. Kaufman [S. C.] 45 S. E. 1017.

42. See 1 Curr. L. 377.

43. Building destroyed by fire before completion of contract to build annex. Krause v. Crothersville School Trustees [Ind.] 70 N. E. 264. Owner could not impose obligation on contractor to complete the work by offering to restore the old building. Id. Where contractor has expended more than he has received under the contracts, the payments made will be treated as an execution pro tanto and the loss left where it falls. Id.

NOTE. Completion prevented by destruction of building. A contractor to do a work which depends on the owner's co-operating work or on the continued existence or integrity of an existing structure is discharged if performance of his undertaking is made impossible by destruction of the existing structure: So held where a main building was destroyed, preventing completion of an addition. Krause v. Crothersville School Trustees [Ind.] 70 N. E. 264, 65 L. R. A. 111. Following Butterfield v. Byron, 153 Mass. 521, 27 N. E. 667, 25 Am. St. Rep. 656 with note, 12 L. R. A. 672 with note. The criterion seems to be whether the contractor was accountable by the terms of the contract despite any such casualties, whether he assumed the risk. He does not do so where the principal structure is not wholly his or he undertakes regardless of the risk. It is a question of interpretation. Butterfield v. Byron, supra.

It is not necessary in such case to reconstruct the main building. Neither is the contractor denied the protection of the rule because it appears that he could have completed sooner, or because the owner offers to restore the main building. Krause v. Crothersville School Trustees, supra.

A stipulation protecting the owner from liability for loss does not of itself cast a liability on the contractor. Krause v. Crothersville School Trustees, supra.

If the contract be entire and performance is prevented by destruction of the subject-matter without fault of either party, **neither can recover on the contract, and the contractor cannot recover on a quantum meruit unless some benefit has resulted to the owner.** Krause v. Crothersville School Trustees, supra. In Butterfield v. Byron, supra, the value of unused and unconsumed materials was recovered of the owner, who took them after the fire. As to this question, consult Implied Contracts, 2 Curr. L. 285.

44. Barn to be built upon foundations furnished by the owner. Held not work upon a building of another party, but plaintiff had bound himself to build a barn. Vogt v. Hecker, 118 Wis. 306, 95 N. W. 90. Immaterial that the owner agreed to furnish the lumber unless there is a breach of duty to supply it. Id. Contract for construction of dam held to require loss resulting from destruction before completion to fall on contractor. W. A. Chapman & Co. v. Montgomery W. P. Co. [C. C. A.] 126 F. 372. See Contracts, 1 Curr. L. 626.

45. See 1 Curr. L. 377.

arisen from performance,[45] and impossibility of performance, caused by the owner does not relieve him from liability under the contract.[47] The contractor has a right to abandon the contract as soon as the owner's acts render it impossible for him to perform it within the time specified, time being of the essence of the contract,[48] or upon the nonpayment of instalments due thereunder.[49]

Whether the contract was abandoned is a question for the jury.[50]

Equity will restrain a subcontractor, who has abandoned his contract, from removing such part of his plant as is necessary to preserve the work until a reasonable time elapses for the substitution of another plant.[51]

§ 3. *Modification of contract.*[52]—A written contract not under seal may be modified by a parol agreement before breach,[53] or by the acts of the parties;[54] but a contract to modify a previous one must be supported by a new consideration.[55]

Unless specially authorized to do so, an architect has no authority to alter or modify the building contract.[56]

§ 4. *Changes in plans and specifications.*[57]—If the engineer has power to annul one portion of the contract without releasing the contractor from performing the other portions, a change in the plans and specifications of the work on one section beyond the power to change reserved in the contract does not release the contractor as to other portions.[58]

The question as to whether changes in the plans and specifications are material and whether they were within the contemplation of the parties when the contract was made is one of fact for the jury.[59]

§ 5. *Extra work.*[60]—A contractor is entitled to recover the reasonable value of all extra labor or material in excess of that required by the contract furnished by him, by the owner's direction,[61] or with his knowledge and consent,[62] though

46. Delay in completing stairway may operate to destroy the benefit which prompted the owner to contract. Koerper v. Royal Inv. Co., 102 Mo. App. 543, 77 S. W. 307.

47. Failure to procure right of way. Measure of damages is profits contractor prevented from earning. Altoona Electrical, E. & S. Co. v. Kittanning & F. C. St. R. Co., 126 F. 559.

48. A cause of action accrues to a contractor, and the statute of limitations begins to run on issuance of injunction restraining continuance of work because of city's failure to properly assess damages and benefits. Ash v. Independence [Mo. App.] 77 S. W. 104.

49. Lawrence Bros. v. Heylman, 89 App. Div. 620, 85 N. Y. S. 789.

50. Plaintiff contended delay was forced by refusal of defendant to pay him, while defendant contended that it was causeless and inexcusable. Koerper v. Royal Inv. Co., 102 Mo. App. 543, 77 S. W. 307.

51. McCabe v. Hunt, 40 Misc. 466, 82 N. Y. S. 664.

52. See 1 Curr. L. 377.

53. Time of making payments. Eagle Iron Works v. Farley, 83 App. Div. 82, 82 N. Y. S. 603.

54. Requirement that builder purchase hardware modified by owner purchasing it with his consent. Cline v. Shell, 43 Or. 372, 73 P. 12.

55. A new agreement to proceed with work under terms different from those in the original contract, which had been rescinded, is supported by a sufficient consideration. Koerper v. Royal Inv. Co., 102 Mo. App. 543, 77 S. W. 307. See Contracts, 1 Curr. L. 626.

56. Provisions inserted in contract by architect, who is made agent for the owner for purposes of the contract, for purpose of inducing surety company to furnish bond, not binding on owner without notice. Sweeney v. Aetna Indemnity Co. [Wash.] 74 P. 1057.

57. See 1 Curr. L. 378.

58. American B. & T. Co. v. Baltimore, etc., R. Co. [C. C. A.] 124 F. 866.

59. Change of plans and specifications for railroad betterments. American B. & T. Co. v. Baltimore, etc., R. Co. [C. C. A.] 124 F. 866.

60. See 1 Curr. L. 378.

61. Architects may recover reasonable value for extra work if the owner promised before the work was done to pay for it, or if ordered by him. Contract called for a $500 fee for $5,400, but the work amounted to $50,000 before finished. Baker v. Pulitzer Pub. Co. [Mo. App.] 77 S. W. 585.

62. Contract for 3,000 feet of lumber and 12,000 furnished. Libby v. Deake, 97 Me. 377, 54 A. 856. Reasonable value of all labor and materials furnished and accepted in the construction of work not covered by the contract. City of Chicago v. McKechney, 205 Ill. 372, 68 N. E. 954. Where a contractor does extra work which the owner testifies he did not authorize, it is error for the court to instruct the jury that the owner would be liable for the reasonable value of the extra work and materials, as it destroys the effect of the owner's evidence. William-

the contract stipulates that the builder shall not charge for extra work unless ordered in writing.[63] He may also recover extra compensation for doing over his original work if not necessitated by any neglect of his contractual duty,[64] but not for work within the intendment of the contract.[65] A provision that compensation for the extra work can be had only upon written order of the engineer implies that work so ordered will be paid for.[66] The refusal of the architect to include the cost thereof in his final estimate does not preclude recovery, where he is not made arbiter of disputes.[67]

§ 6. *Delay in performance.*[68]—Where no time is fixed for completion, the work must be done within a reasonable time, taking into consideration all the facts and circumstances of the case.[69]

A contractor is not liable for delay caused by the owner, or his agents or servants,[70] even though the contract provides that the owner's request for alterations shall in no way affect or make void the contract;[71] but he cannot escape liability for delay because of extra work, when such delay was caused by lack of facilities for carrying it on concurrently with the original work.[72]

Waiver of delay or extension of time.[73]—Contractors consent to delay by

son v. Smith & Co. [Tex. Civ. App.] 79 S. W. 51.

63. Not binding when both parties agree on changes. Hay v. Bush, 110 La. 575, 34 So. 692. May be waived by architect as agent for owner. Langley v. Rouss, 85 App. Div. 27, 82 N. Y. S. 1082.

64. Sewer pipes properly laid settled, and it was necessary to relay them. Allen v. Melrose, 184 Mass. 1, 67 N. E. 1060.

65. Additional excavation and masonry below depth marked on plan of bridge piers held not extra work for which contractor entitled to compensation beyond that fixed in the contract, the measurements on the plans being approximate only, and the price fixed being so much per cubic yard. Geary v. New Haven [Conn.] 56 A. 584. Contract to build sewer held to be contract to do work as plan then was or might thereafter be changed, and lowering of grade held to be within power expressly given engineer and not to entitle contractor to extra compensation over the price per yard as fixed by the contract. Allen v. Melrose, 184 Mass. 1, 67 N. E. 1060. A subcontractor, who agrees to do the lathing and plastering called for by the plans and specifications cannot recover extra compensation for work done under the contract, though it was rendered necessary by imperfections in the work of the contractor. Graves Elevator Co. v. Parker Co., 92 App. Div. 456, 87 N. Y. S. 166.

66. Sheathing a trench made it necessary to widen it. Johnson v. Albany, 86 App. Div. 567, 83 N. Y. S. 1002.

67. Though payments are to be made upon his certificate. Jacob v. Welsser, 207 Pa. 484, 56 A. 1065.

68. See 1 Curr. L. 379.

69. Lang v. Menasha Paper Co., 119 Wis. 1, 96 N. W. 393; Koerper v. Royal Inv. Co., 102 Mo. App. 543, 77 S. W. 607.

70. Structure over sidewalk prevented putting up decorative iron work. Cornell v. Standard Oil Co., 91 App. Div. 345, 86 N. Y. S. 633. Defendants failed to disprove that performance was delayed by other work carried on by other people for the defendants themselves. New York Metal Ceiling Co. v. Raub, 86 N. Y. S. 249. Failure to obtain rights of way as agreed. Altoona Electrical E. & S. Co. v. Kittanning, etc., R. Co., 126 F. 559. Evidence insufficient to show error in refusing to allow plaintiff anything for delay. Snoqualmi Realty Co. v. Moynihan [Mo.] 78 S. W. 1014. Where parties assumed that it was the duty of the seller to superintend the building of the foundations for an irrigation pump and he sent a man for that purpose, he will not be allowed to claim that it was the duty of the buyer to construct them without supervision, and that the delay was caused by his failure to do so. Masterson v. Heitmann & Co. [Tex. Civ. App.] 77 S. W. 983.

71. When contractor ready to plaster, owner decided to wire building for electric light. Steps were changed, and extra excavation done. Owner undecided as to color of paint. Small v. Burke, 86 N. Y. S. 1066.

72. Contract to do work on a boiler. Contractors later employed to do extra work on the steamship in connection with the work specified in the contract. U. S. Fidelity & Guaranty Co. v. Damskibsaktieselskabet Habil, 138 Ala. 348, 35 So. 344.

73. NOTE. A stipulated penalty for delay will not be enforced in favor of the owner who has delayed performance by tardiness in preliminary construction work: This was held in King Iron Bridge & Mfg. Co. v. St. Louis, 43 F. 768, 10 L. R. A. 826, in which the city's delay in completing piers hindered the contractor in erecting the superstructure. The law is regarded as settled and the court cites Stewart v. Keteltas, 36 N. Y. 388; Weeks v. McCarty, 89 N. Y. 566; Starr v. Gregory Consolidated Min. Co., 6 Mont. 485, 13 P. 195; Mansfield v. New York, etc., R. Co., 102 N. Y. 205, 6 N. E. 386; Cape Fear & D. R. Navigation Co. v. Wilcox, 52 N. C. (7 Jones Law) 481; Dumke v. Puhlman, 62 Wis. 18, 21 N. W. 820; Jones v. Chesapeake & O. R. Co., 14 W. Va. 523. See, also, note to King Iron Bridge & Mfg. Co. v. St. Louis [U. S.] 10 L. R. A. 826 on provisions for penalties or stipulated damages. See 1 Curr. L. 379.

continuing the work,[74] and the owners by permitting them to do so without objection,[75] or by rendering them assistance.[76] But if the contractor can complete the work within the time fixed, plus the time occasioned by delays caused or assented to by the owner, he is liable for the damages provided for in the contract for each day's delay beyond that time.[77] A complaint founded on one breach may amount to a waiver of a similar prior breach,[78] and demand to complete a building which has not been finished within a reasonable time amounts to a virtual extension of time.[79]

Liquidated damages.[80]—Where a fixed sum is agreed upon as damages in case of a breach of the contract, it will be regarded as liquidated damages only in case the actual damage is incapable of exact determination, and the sum agreed upon is not on its face out of all proportion to the probable loss.[81] If such sum is grossly disproportionate to the probable value of the use of the building, the owner can recover only actual damages.[82] The burden of proof is upon the owner to show that a "penalty" is intended as liquidated damages if it is not so stated in the contract, and that the damage amounts approximately to the sum stated.[83]

An owner who takes possession and completes the work cannot recover the damages for delay stipulated for in the contract, but only his actual damage.[84]

§ 7. *Termination or cancellation of contract.*[85]—Failure to comply with the terms of the contract warrants rescission,[86] but one has no right to cancel for nonperformance when his own act is the cause thereof.[87] Where the owner wrongfully stops the work, the contractor may treat the contract as rescinded.[88]

A contract will not be canceled unless there is an offer by the plaintiff to pay the defendant for materials and labor furnished under it.[89]

74, 75. U. S. Fidelity & Guaranty Co. v. Damskibsaktieselskabet Habil, 138 Ala. 348, 35 So. 344.

76. On subletting a grading contract, the principal contractor reserved right to place an additional force on the work if he was of the opinion that enough men were not being employed to complete it within the specified time and deduct the cost from the contract price. Held, putting on his own men and teams by the contractor was a waiver of delay of subcontractor. McArthur Bros. Co. v. Whitney, 202 Ill. 527, 67 N. E. 163.

77. U. S. Fidelity & Guaranty Co. v. Damskibsaktieselskabet Habil, 138 Ala. 348, 35 So. 344.

78. Unnecessary delay in building an annex which with the original building was destroyed by fire. Complaint by owners for failure to complete after the fire waived a claim for delay prior to the fire. Krause v. Crothersville Trustees [Ind.] 70 N. E. 264.

79. Krause v. Board of School Trustees of School Town of Crothersville [Ind. App.] 66 N. E. 1010.

80. This subject is fully discussed in Damages, 1 Curr. L. 834; see, also, 1 Curr. L. 379.

81. Pressed Steel Car Co. v. Eastern R. Co. [C. C. A.] 121 F. 609. Will be regarded as penalty if it exceeds actual damage. Lee v. Carroll Normal School Co. [Neb.] 96 N. W. 65. In default of completion upon a certain day, $100 per month was to be paid until building finished; held liquidated damages. Carter & Co. v. Kaufman [S. C.] 45 S. E. 1017.

82. A contract was to construct a church for $3,400, the contractor to pay $3 per day damages for failure to complete at a certain date. In an action on the contract, there was no evidence as to the actual loss due to delay. Held, an instruction that no damages should be allowed for delay was erroneously refused. Zimmerman v. Conrad [Mo. App.] 74 S. W. 139.

83. Held, court would not take judicial notice of the fact that rental value approximated penalty provided. Small v. Burke, 86 N. Y. S. 1066.

84. The contract provided for $5 per day for delay. Before the time stipulated for completion, the owner declared the contract forfeited and completed the building. Held, he cannot treat the contract binding as to this provision. Fidelity & Deposit Co. v. Robertson, 136 Ala. 379, 34 So. 933.

85. See 1 Curr. L. 380.

86. Defects in construction and delay held to warrant owner in terminating contract and completing the work himself. Hay v. Bush, 110 La. 575, 34 So. 692.

87. Owner could not cancel where contractor refused to proceed because of his failure to pay first instalment of price. Koerper v. Royal Inv. Co., 102 Mo. App. 543, 77 S. W. 307.

88. Requested to stop work for a few days but to remain on the premises and did so, but hears nothing further from the owner. Dobbling v. York Springs R. Co., 207 Pa. 123, 56 A. 349. Cannot thereafter be required to continue work under original contract. Cochran v. Yoho [Wash.] 75 P. 815.

89. Contract void because not recorded as required by Code. Sullivan v. California Realty Co., 142 Cal. 201, 75 P. 767.

§ 8. *Completion by owner or third person.*[90]—Where work is abandoned and the owner completes it under a provision in the contract, the contractor is entitled to any balance of the contract price above the cost of completion.[91] A surety who completes a contract abandoned by his principal is entitled to sums reserved from payments made to the original contractor.[92]

A provision that the engineer may take any measure he sees fit to complete the contract on time does not authorize him to take possession of the buildings and tools of the contractor for use in so doing.[93]

§ 9. *Architect's and other certificates of performance.*[94]—Provisions requiring the production of architect's certificates before recovery can be had will not be implied.[95] Where the contract provides that payment shall be made upon certificate of the architect that the work has been performed,[96] or that he shall certify as to the damages resulting from failure to complete the work, such certificate is a condition precedent to the right of recovery,[97] unless it appears that it was refused unreasonably, or in bad faith,[98] or that its production has been waived.[99]

Where the architect is one of contracting parties, a demand for payment constitutes a demand for his certificate.[1]

§ 10. *Arbitration of disputes.*[2]—Where the contract does not provide for the architect's decision upon disputed points, no such provision can be implied.[3] The agreement to submit differences to arbitration implies a promise to abide by the award,[4] and such disputes cannot afterwards be litigated by a party in the

90. NOTE. An election by the owner to complete the work estops him to forfeit for noncompletion: It being provided in the contract that if the contractor neglect to satisfactorily complete the work, the owner, after notice, may do so, and deduct the cost from the contract price, the latter availing himself of the privilege to so do, cannot assert a forfeiture in respect to the deficiency so supplied by him, but is simply entitled to deduct the expense incurred. Crouch v. Gutmann, 134 N. Y. 45, 31 N. E. 271, 30 Am. St. Rep. 608. See 1 Curr. L. 380.

91. Work deemed to be done under contract. White v. Livingston, 174 N. Y. 538, 66 N. E. 1118. See 1 Curr. L. 381, n. 77.

92. Would have been necessary for owner to expend the money to complete work before resorting to bond. St. Peter's Catholic Church v. Vannote [N. J. Eq.] 56 A. 1037.

93. Montgomery Water Power Co. v. William A. Chapman & Co. [C. C. A.] 126 F. 68.

94. See 1 Curr. L. 381.

95. Provision that work shall be satisfactory to architects, and that if subcontractor obtains architect's certificate performance will be conclusively presumed, does not make a failure to obtain it a bar to recovery. Fuller Co. v. Young Co. [C. C. A.] 126 F. 343.

96. McGlauflin v. Wormser, 28 Mont. 177, 72 P. 428.

97. American Bonding & Trust Co. v. Gibson County [C. C. A.] 127 F. 671.

98. Facts sufficient to require determination by jury as to whether commissioner of highways acted in bad faith in refusing to give certificate as to delays caused by city. Masterson v. New York, 87 App. Div. 622, 84 N. Y. S. 312; Rowe v. Gerry, 86 App. Div. 349, 83 N. Y. S. 740. Refusal of certificate as to extra work without justification where work done under oral direction of architect. Langley v. Rouss, 85 App. Div. 27, 82 N. Y. S. 1082. Where contractor has power to terminate employment of subcontractor for failure to properly perform, on certificate of architect to that effect, and does so before receiving such certificate, such certificate is no defense, and the propriety of his action is for the jury. In case termination is wrongful, measure of damages is proportionate part of price for work done and profits he would have realized on rest. Sullivan v. Moffatt [N. J. Law] 56 A. 304.

In some states unreasonableness is not sufficient, and a contract which provides that final payment shall be made when work is satisfactory to the owner and architect gives the owner or architect absolute right to reject the work if he acts in good faith. Fairmont Plumbing Co. v. Carr [W. Va.] 46 S. E. 458. A whimsical refusal of an architect's certificate will not prevent a recovery where the building is substantially completed. Windham v. Independent Tel. Co. [Wash.] 76 P. 936.

99. Where all but part of last payment made without certificate. Abrahamson-Engesser Co. v. McCafferty, 86 N. Y. S. 185. The architect's failure to furnish a certificate of completion is immaterial, where the owners have moved into and occupied the building with the understanding, on the announcement made by the architect and the contractor, that such act should constitute an acceptance. Windham v. Independent Tel. Co. [Wash.] 76 P. 936.

1. Abrahamson-Engesser Co. v. McCafferty, 86 N. Y. S. 185.

2. See 1 Curr. L. 381.

3. Fuller Co. v. Young Co. [C. C. A.] 126 F. 343.

4. Somerset Borough v. Ott, 207 Pa. 539, 56 A. 1079.

courts until he has shown an offer to arbitrate and a refusal by the other party;[5] but an unreasonable delay in making an award relieves him from such agreement.[6] An agreement to arbitrate disputes does not prevent an action for damages for an unauthorized rescission of the contract.[7]

An agreement providing that the completion of the work specified therein will settle all disagreements precludes the owner from retaining a part of the contract price for defects existing prior thereto.[8] Decisions of an arbitrator may only be attacked for actual and intentional fraud on his part, or accident, mistake, or fraud practiced on him by which he was misled.[9]

§ 11. *Acceptance.*[10]—If a party accepts work as done, he cannot claim specific performance on the part of the builder as a condition precedent to payment, but is entitled to reduce the amount to be paid by the amount of damages he has sustained by failure to fully perform.[11] Payment of the contractor and disposal of remaining material by the owner constitutes a waiver of further performance,[12] but a mere naked use,[13] or a use from necessity, does not,[14] nor will the use of a temporary structure constitute an acceptance of the completed work.[15]

Acceptance is not a waiver of a guaranty of fitness.[16]

§ 12. *Payment.*[17]—Where payments are made without directions as to how they are to be applied, the creditor may make the application,[18] but it will be presumed that they were intended to pay the earlier rather than the later debts.[19] Where interest is not provided for in the contract, a demand is necessary for the exact amount.[20]

If the contract provides that final payment is to be made upon delivery with a full release of liens, such release is a condition precedent to payment.[21] Under a provision that the owner, upon the filing of a lien or notice of claim, may keep

5. Agreement that owner should fix damages for delay and if not satisfactory to the builder, an arbitrator to be appointed. Owner notified builder of amount he claimed as damages and the latter took no steps toward arbitrating. Held, he could not set up defenses that would have been open to him before an arbitrator, but was bound by sum fixed by owner. Childs Lumber & Mfg. Co. v. Page, 32 Wash. 250, 73 P. 353. A contract providing for acceptance by the directors of public works to be binding upon all parties leaves to the controller no discretion to refuse payment upon approval of the work by the director. Com. v. Pittsburg, 206 Pa. 379, 55 A. 1058.

6. Delay by commissioners of over three months authorizes contractor to sue. Johnson v. Albany, 86 App. Div. 567, 83 N. Y. S. 1002. An agreement that the engineer shall decide every question that may arise relative to the execution of the contract does not contemplate that he shall determine the damages caused by abandonment. Somerset Borough v. Ott, 207 Pa. 539, 56 A. 1079.

7. Action for damages for the loss of a contract and not for work done. Dobbling v. York Springs R. Co., 207 Pa. 123, 56 A. 349.

8. Pisani v. Jordan, 85 N. Y. S. 375.

9. Erroneous or unjust judgment not sufficient. Com. v. Pittsburg, 206 Pa. 379, 55 A. 1058.

10. See 1 Curr. L. 382.

11. Water tank not according to specifications, but upon an agreement by the plaintiff to change it, the defendant paid part of the agreed price and commenced using it. Gray v. New Paynesville, 89 Minn. 258, 94 N. W. 721.

12. Contractor did not bail out last part of an oil well nor case it, but owner made a payment and disposed of the casing. Texas Gulf Coast Land & Oil Co. v. Galveston-Chicago W. B. & D. Co. [Tex. Civ. App.] 77 S. W. 974.

13. Unless accompanied by further acts or language implying acceptance. Question of fact in each case. Aarnes v. Windham, 137 Ala. 513, 34 So. 816.

14. Walking over steps and a walk from a man's house to the street. Gwinnup v. Shies, 161 Ind. 500, 69 N. E. 158. Use of defective lumber kiln and machinery in carrying on business. Payne v. Amos Kent Brick & Lumber Co., 110 La. 750, 34 So. 763.

15. Temporary bridge erected by contractors to avoid liability for delay in completion. Stimson Mill Co. v. Los Angeles Traction Co., 141 Cal. 30, 74 P. 357.

16. Repairs to boiler with a six months' guaranty against leakage. U. S. Fidelity & Guaranty Co. v. Damskibsaktieselskabet Habil, 138 Ala. 348, 35 So. 344.

17. See 1 Curr. L. 383.

18. Smith v. Wilcox [Or.] 74 P. 708.

19. Presumed to have been intended to pay for first three buildings completed and not the uncompleted ones. Kloepfer v. Maher, 84 N. Y. S. 138.

20. Excelsior Terra Cotta Co. v. Harde, 90 App. Div. 4, 85 N. Y. S. 732.

21. Releases dated after suit commenced. Titus v. Gunn, 69 N. J. Law, 410, 55 A. 735.

back an amount sufficient to pay the same, the builder may recover the balance.[22] The assignee of a builder's claim may recover for the work done if he is also assignee of all liens filed.[23]

§ 13. *Subcontracts.*[24]—A subcontractor who has notice of the terms of the original contract between the owner and builder is bound thereby.[25] An order of payment to a subcontractor, made by a contractor and referring to the original contract, must be construed with such contract.[26] The fact that a subcontractor refrains from filing a lien against the building is a sufficient consideration to support a promise of the owner to pay his claim.[27] A contractor who has accepted the work of a subcontractor, and has then obtained the architect's certificate that the main contract has been completed, and received the contract price, cannot claim that the subcontract was not completed in accordance with the terms of the original contract,[28] and the furnishing of such certificate is a sufficient compliance with the provisions of a subcontract requiring the architect's approval of the work done thereunder.[29]

Withholding payments for benefit of subcontractor.[30]—Under the Indiana statutes, a notice by a subcontractor to the owner that money is due him from the contractor and to withhold payment of that amount makes the owner personally liable for the full amount.[31]

Rights on default by subcontractor.[32]

§ 14. *Bonds.*[33]—A law requiring a bond is void as making a discrimination on the right to contract.[34]

Slight delay on the part of the owner in selecting material is not a breach going to the entire consideration of the contract so as to annul it, but only operates to relieve the contractor from liability for delay in completing the building and to give him a claim for loss occasioned by the enforced delay.[35]

If the bond refers to the contract, the two instruments are to be construed together.[36] Where the contract requires the builder to pay for materials furnished and the bond is conditioned on his completing the work according to contract, the guarantor is responsible for materialmen's liens.[37]

A bond given by a contractor to one employing him to build, stating that the building shall be delivered free of all claims, is not intended for the benefit of a subcontractor furnishing work or materials.[38]

A mere oral understanding as to times of payment differing from that in

22. Perry v. Levenson, 82 App. Div. 94, 81 N. Y. S. 586.

23. Cady v. Fair Plain Literary Ass'n [Mich.] 97 N. W. 680.

24. See 1 Curr. L. 383.

25. Subcontractor bound to do work satisfactory to architect. Stein v. McCarthy [Wis.] 97 N. W. 912. Where subcontractor makes a contract to furnish material, referring therein to the original contract, he is bound by provision therein requiring approval by architect. Woarms v. Becker, 84 App. Div. 491, 82 N. Y. S. 1086.

26. Payment to be made as per my contract. Weber v. Farrell, 84 N. Y. S. 272.

27. Culver v. Pocono Spring Water Ice Co., 206 Pa. 481, 56 A. 29.

28, 29. Graves Elevator Co. v. Parker Co., 92 App. Div. 456, 87 N. Y. S. 156.

30. See 1 Curr. L. 384.

31. Burns' Rev. St. 1894, § 7262. Roberts v. Koss [Ind. App.] 70 N. E. 185.

32, 33. See 1 Curr. L. 384.

34. Code Civ. Proc. § 1203 held void. Snell v. Bradbury, 139 Cal. 379, 73 P. 150.

35. Does not relieve surety on contractor's bond. Bagwell v. American Surety Co., 102 Mo. App. 707, 77 S. W. 327.

36. Closson v. Billman, 161 Ind. 610, 69 N. E. 449.

37. Closson v. Billman, 161 Ind. 610, 69 N. E. 449. Sureties guaranteeing the construction of a building in strict accordance with plan and specifications and terms of contract are not discharged until the building has been released of liens for labor and material. Mayes v. Lane, 25 Ky. L. R. 824, 76 S. W. 399. Where a contract provides for the retention of 15 per cent of the contract price until completion of the building free from liens, sureties upon the contractor's bond are not released because the owner pays out that amount to dispose of liens before the completion of the contract. Id.

38. Materialmen cannot recover thereon. Green Bay Lumber Co. v. Independent School Dist., 121 Iowa, 663, 97 N. W. 72.

the contract will not release the surety.[39] An owner is under no obligation to sureties upon a contractor's bond to see to the application of payments to the discharge of debts due for material and labor.[40] After the lapse of two years, there is no presumption that defects are due to faulty construction.[41]

§ 15. *Remedies and procedure.*[42]—A provision giving the engineer power to annul the contract in case of failure to perform properly, and providing that in case he does so the amount then due shall be regarded as liquidated damages, does not provide an exclusive remedy for a breach, but in case of wrongful abandonment, action may be brought on the contractor's bond.[43]

Recovery in general assumpsit or on quantum meruit.[44]—Where the contract is fully performed except for payment, recovery may be had in indebitatus assumpsit.[45] The contractor cannot recover under his contract unless the work is completed, but if the owner accepts the building as constructed, recovery may be had under the common counts for work, labor, and materials furnished.[46] If the owner prevents the completion of the work,[47] or otherwise breaches the contract so as to justify an abandonment thereof, the contractor may recover the agreed value of the work done.[48]

Where no price is agreed upon, the builder is entitled to recover the reasonable value of his work.[49]

Pleading.[50]—The general rule that the complaint must contain a plain and concise statement of facts, which will not leave the defendant in doubt as to the cause of action, applies to actions on building contracts.[51]

Performance of conditions precedent to a right of recovery, or an excuse for their nonperformance, must be pleaded,[52] but a general allegation of performance is sufficient.[53]

39. Mere oral request and promise that the owner have five days' grace in paying instalments. Bagwell v. American Surety Co., 102 Mo. App. 707, 77 S. W. 327.

40. Mayes v. Lane, 25 Ky. L. R. 824, 76 S. W. 399.

41. The liability of a surety under the Code arises should a building fall to ruin, either in whole or in part owing to the badness of the workmanship, but if at the end of two years after completion a defect arises, it must be shown that it is exclusively the fault of the principal in order to hold the surety. Police Jury of Parish of Vernon v. Johnson, 111 La. 279, 35 So. 560.

42. See 1 Curr. L. 384.

43. American Bonding & Trust Co. v. Baltimore & O. S. W. R. Co. [C. C. A.] 124 F. 866.

44. See 1 Curr. L. 384.

45. McArthur Bros. Co. v. Whitney, 202 Ill. 527, 67 N. E. 163.

46. Owner moved into house before completed, the contractor agreeing to finish the same according to contract. Evidence that materials and construction were not as per contract. Aarnes v. Windham, 137 Ala. 513, 34 So. 816. Can recover nothing under the contract or on quantum meruit unless owner accepts and uses work. Construction of a walk lowest in the middle so as to collect rain water and steps unfinished. Gwinnup v. Shies, 161 Ind. 500, 69 N. E. 168. Owner may recoup damages for failure to perform. Contract to construct Turkish bath to satisfaction of owner. Tile was poor and floor uneven, so that water would not drain. Mosaic Tile Co. v. Chiera [Mich.] 95 N. W. 537.

47. And such profits as he would have realized from the work not done while owner may claim a rebate for loss caused by noncompliance with the contract. Wilson v. Borden, 68 N. J. Law, 627, 54 A. 815.

48. Lawrence Bros. v. Heylman, 89 App. Div. 620, 85 N. Y. S. 789.

49. Shmilovitz v. Bares, 75 Conn. 714, 55 A. 560.

50. See 1 Curr. L. 385.

51. Complaint for breach of contract to complete building, necessitating completion by plaintiff, held sufficient. Bryant v. Broadwell, 140 Cal. 490, 74 P. 33. Suit by contractor on subcontractor's bond, which made it his duty to save contractor from any loss. Complaint alleged that subcontractor had incurred indebtedness which contractor was compelled to pay and that the subcontractor on demand had refused to reimburse him. Pac. Bridge Co. v. U. S. Fidelity & Guaranty Co., 33 Wash. 47, 73 P. 772. In an action on a bond against a surety for breach of contract by his principal, a supplemental complaint, alleging a further breach of the same contract may properly be filed, even though the time for bringing suit on the bond had expired. Id. A complaint in an action on a contractor's bond, setting out the bond and contract and alleging nonperformance in specified particulars resulting in damage for which a settlement had been demanded, sufficiently sets forth a breach of contract and states a cause of action. Failure to supply proper material and sufficient men. Fidelity & Deposit Co. v. Robertson, 136 Ala. 379, 34 So. 933.

52. Obtaining architect's certificate. Rowe v. Gerry, 86 App. Div. 349, 83 N. Y. S. 740.

A plea that the contractor was delayed by acts of his employer must state the extent of the delay so caused.[54]

Where a material part of a contract remains unperformed, a party cannot recover upon an allegation of full performance.[55]

Defendant cannot plead by way of counterclaim that plaintiff agreed to construct in a manner different from that provided in the contract, in the absence of an allegation that such contract failed to contain the whole agreement, or that the omission was due to mistake or fraud.[56]

Failure to execute in a workmanlike manner may be proved under a general denial.[57]

Variance.[58]—An allegation of performance does not authorize proof of nonperformance because of facts not pleaded.[59]

Evidence.[60]—If the compensation is not fixed in the contract, evidence as to the value of the services is admissible.[61]

Evidence of customs and usages is admissible for the purpose of showing the meaning of trade terms.[62]

Expert testimony is not admissible to show substantial compliance with the contract,[63] nor to show the proper classification of material, where such classification depends on the manner in which it was handled and witness did not see the work done.[64]

If an architect's certificate is required, its execution must be proved.[65] If the written contract is ambiguous, an independent verbal contract relating to the subject-matter, but not inconsistent with it, may be shown.[66] Where a requirement of written evidence to charge the owner for work done under alterations of the contract has been waived by oral directions for alterations acted on by the contractor, oral evidence of the alterations and their value is admissible in an action on the contractor's bond.[67]

Where contract requires architect's certificate, its execution or refusal must be alleged and proved. Beck v. N. Y. Bldg. Loan Banking Co., 85 N. Y. S. 323. Evidence of notice by owner of election to complete building, introduced as proof of extra services, inadmissible to excuse failure to produce architect's certificate, where such notice was not pleaded. Id.; Vanderhoof v. Shell, 42 Or. 578, 72 P. 126; McGlauflin v. Wormser, 28 Mont. 177, 72 P. 428.

53. Not necessary to state facts constituting performance of a condition precedent, but sufficient to state that all conditions have been performed. Under N. Y. Code Civ. Proc. § 533. Acceptance of work by engineer. Vandegrift v. Bertron, 83 App. Div. 548, 82 N. Y. S. 153.

54. U. S. Fidelity & Guaranty Co. v. Damskibsaktieselskabet Habil, 138 Ala. 348, 35 So. 344.

55. Excelsior Terra Cotta Co. v. Harde, 90 App. Div. 4, 85 N. Y. S. 732.

56. Agreement that stairs be large enough to admit of piano and book cases being carried up. Voss v. Schebeck, 25 Ky. L. R. 481, 76 S. W. 21.

57. Gwinnup v. Shies, 161 Ind. 500, 69 N. E. 158.

58. See 1 Curr. L. 386.

59. Rowe v. Gerry, 86 App. Div. 349, 83 N. Y. S. 740.

60. See 1 Curr. L. 386.

61. Suit upon a written contract which was not set out in the abstract of record and its terms unknown. Merriner v. Jeppson [Colo. App.] 74 P. 341.

62. "San Domingo mahogany." Snoqualmi Realty Co. v. Moynihan [Mo.] 78 S. W. 1014.

63. Zimmerman v. Conrad [Mo. App.] 74 S. W. 139.

64. Opinions of an expert that certain material should be classified as loose rock inadmissible, where it was formed from looking at the sides of the cut long after it was made and, by the terms of the contract, the classification depended on the manner in which the material was handled. American B. & T. Co. v. Baltimore & O. S. W. R. Co. [C. C. A.] 124 F. 866.

65. Where plaintiff in an action for work, labor and materials under a contract failed to allege a notice of election by the defendant to complete the building, evidence of such notice introduced as proof of extra services, was inadmissible to excuse failure to produce architect's certificate. Beck v. N. Y. Bldg. Loan Banking Co., 85 N. Y. S. 323.

66. In action for extra work consisting of balustrades and lattice work on piazzas, an independent verbal agreement relating thereto is not inconsistent where they are shown on the plan referred to in the original contract. Cook v. Littlefield, 98 Me. 299, 56 A. 899. See Contracts, 1 Curr. L. 626; Evidence, 1 Curr. L. 1136.

67. Crowley v. U. S. Fidelity & Guaranty Co., 29 Wash. 268, 69 P. 784.

BUILDING AND LOAN ASSOCIATIONS.

§ 1. In General. Statutory Provisions (561).
§ 2. Membership and Stock (562).
§ 3. Loans and Mortgages (565).
A. In General (565).
B. Usury. Conflict of Laws (565).
C. Accounting with Borrower While Solvent (568).
D. Accounting after Insolvency (569).
§ 4. Termination and Insolvency. Voluntary Liquidation (571).

§ 1. *In general. Statutory provisions.*—The Iowa statute regulating the conduct of the building and loan business by unincorporated associations,[68] and the Louisiana act regulating the business of homestead associations,[69] are held constitutional. An association must comply with statutory requirements before doing business in a state other than that of its domicile.[70] Such statutes do not exempt corporations taking advantage thereof from the general rule requiring their contracts to be tested by the same rules as those of similar domestic corporations.[71] Contracts which by their terms are to become vested in numerical order, without regard to the amount paid thereon, are expressly forbidden by statute in Massachusetts.[72] In Louisiana, homestead associations may buy property for cash and resell to the original owner on credit, the second sale giving the association a vendor's lien.[73]

Charter and by-laws.[74]—A shareholder and member of an association is presumed to know its charter and by-laws.[75] Valid by-laws of an association to which a member agrees become a part of his contract.[76] But a by-law which changes a borrower's rights, after he effects a loan, is not binding upon him.[77] A borrower may be estopped to set up the invalidity of a by-law,[78] or to deny

68. Acts 29th Gen. Assem. p. 45, c. 77. Question arose in habeas corpus proceedings for release of one arrested for soliciting contracts for an unincorporated foreign association, which had not complied with statutory requirements. Brady v. Mattern [Iowa] 100 N. W. 358.

69. Act No. 115, p. 177, of 1888. American Homestead Co. v. Karstendiek, 111 La. 884, 35 So. 964.

70. A contract with a foreign loan association which has not complied with a statute requiring certificates of incorporation to be filed with the secretary of state, is void, and no action is maintainable thereon. Hoskins v. Rochester Sav. & Loan Ass'n [Mich.] 95 N. W. 566. A defense, in an action by a homestead association, to recover the price of property sold, that plaintiff has not complied with provisions of the homestead association law, not supported by proof, is not entitled to consideration. American Homestead Co. v. Karstendiek, 111 La. 884, 35 So. 964.

71. A bond for a loan executed by the wife alone is void, though a mortgage given to secure the loan is properly executed and is on her separate property [Rev. St. 1892, § 2208]. Equitable Bldg. & Loan Ass'n v. King [Fla.] 37 So. 181.

72. Contracts of an association to enable purchasers to buy real estate, discharge incumbrances and pay for improvements, held to violate Rev. Laws, c. 73, because such contracts became vested in numerical order, without regard to amount paid thereon. Attorney General v. Pitcher, 183 Mass. 514, 67 N. E. 606. The business of a home buyers' association, the members whereof hold contracts for $1,000 each, requiring certain payments and becoming vested in numerical order so as to entitle holders to a loan is not a co-operative banking business within Rev. Laws, c. 114, § 1, prohibiting persons from transacting the business of accumulating the savings of members and loaning the same, unless incorporated in Massachusetts. Id. Rev. Laws, c. 73, forbidding negotiation and sale of certificates and obligations redeemable in numerical order, and providing a penalty of $50 for each offense, and for forfeiture of the franchise of a domestic corporation and of the right to transact business in the state by a foreign corporation, does not authorize the attorney general to maintain a suit in equity against individuals carrying on the prohibited business as co-partners. Id.

73. Act No. 115, p. 177, of 1888. American Homestead Co. v. Karstendiek, 111 La. 884, 35 So. 964.

74. See 1 Curr. L. 388, 389.

75. Coggeshall v. Sussman, 41 Misc. 384, 84 N. Y. S. 1097.

76. Provident Mut. Bldg. Loan Ass'n v. Davis [Cal.] 76 P. 1034.

77. Since the usury laws of the state cannot be changed either by such by-laws or by contract. Ga. State Bldg. & Loan Ass'n v. Grant [Miss.] 34 So. 84.

78. A loan made in accordance with by-laws dispensing with premium bids in open meeting, such by-laws being adopted before passage of a statute authorizing such procedure, is not usurious, for the reason that acting on the by-laws after the law was passed amounted to a readoption of them, and estopped the borrower from setting up their invalidity. Collins v. Cobe, 202 Ill. 469, 66 N. E. 1079.

the legal organization of the association as a corporation.[79] Oral or printed statements of officers or agents of an association, in direct contradiction of the by-laws or the terms of a contract of which the by-laws are made a part, cannot be made the basis of an estoppel unless such representations are fraudulently made.[80] An officer of a building and loan association is competent to discharge the duties of trustee in a trust deed given the association on a loan by it.[81] Documentary evidence[82] in proof of the charter or by-laws must be properly authenticated.

§ 2. *Membership and stock.*[83]—In the absence of prohibitory statutes, associations may lawfully issue paid up stock,[84] and include in its membership a borrowing and nonborrowing class, the latter being liable only for instalments on stock, not for premiums or interest.[85] The mere fact that there are different classes of stock with different rights and liabilities of stockholders does not necessarily destroy the company's character as a building and loan association.[86] A statute legalizing premiums, fees and fines, in addition to interest, does not authorize the issuance of preferred stock or discrimination between shareholders.[87] One who invests money in a loan association and receives a certificate of deposit, drawing annual interest, based on the earnings of the business, and a separate certificate of membership and ownership of stock, is a stockholder, and not a mere creditor of the association.[88] A stockholder can vote by proxy only when authorized by statute or the articles or by-laws of the corporation.[89] A member seeking to recover dues, in accordance with the terms of his certificate and the by-laws of the association, must allege and prove the existence of the fund out of which such dues are payable.[90] Fines for default in payments on stock will be allowed only when reasonable.[91]

79. Crete Bldg. & Loan Ass'n v. Patz [Neb.] 95 N. W. 793.

80. Noah v. German American Bldg. Ass'n, 31 Ind. App. 504, 68 N. E. 615.

81. McDonnell v. De Soto Sav. & Bldg. Ass'n, 175 Mo. 250, 75 S. W. 438.

82. In a foreclosure suit, the certificate of stock, with by-laws and other statements printed thereon, constituting the contract with the association, is admissible in evidence. Floyd-Jones v. Anderson [Mont.] 76 P. 751. Certificates of stock admissible in action to cancel lien and declare debt usurious and for other relief against an association. American Mut. Bldg. & Sav. Ass'n v. Cornibe [Tex. Civ. App.] 80 S. W. 1026. Letter from association secretary relative to contract, admissible to show association was then doing business and that a five-year contract then existed between member and association. Floyd-Jones v. Anderson [Mont.] 76 P. 751. A book containing printed by-laws used and recognized by members, there being no other copy of such by-laws, was admissible, though the book contained other matter. Star Loan Ass'n v. Moore [Del.] 55 A. 946. A paper purporting to be the charter of a corporation, which does not show that it is a certified copy of the recorded act, but merely purports to come from the secretary of state and to be recorded, is not admissible in evidence. Id. The affidavit of the secretary of a loan association that the paper annexed is the true copy of the original record of the account of a borrowing member is not admissible to prove the state of the account, under Burns' Rev. St. 1901, § 474, regarding proof of the acts of corporations by sworn copies of the records thereof. Coppes v. Union Nat. Sav. & Loan Ass'n [Ind. App.] 67 N. E. 1022.

83. See 1 Curr. L. 389.

84, 85. Bell v. Southern Home Bldg. & Loan Ass'n [Ala.] 37 So. 237.

86. A plea properly stricken because not showing that different classes of stock existed when defendant became a member, nor that the alleged inequalities were such as to destroy the building and loan feature of the company. Rooney v. Southern Bldg. & Loan Ass'n, 119 Ga. 941, 47 S. E. 345.

87. Laws 27th Gen. Assem. p. 32, c. 48. Winegardner v. Equitable Loan Co., 120 Iowa, 485, 94 N. W. 1110. One who subscribed for and received preferred stock in a loan corporation, on which a loan was received, such preference being void as an unjust discrimination between shareholders, was not estopped to set up the invalidity of the contract by having made payments or delayed asserting such invalidity, where such acts did not prejudice the loan company. Id.

88. His rights are those of an owner of paid-up stock. Ottawa Mut. Loan & Sav. Ass'n v. Merriman, 67 Kan. 779, 74 P. 256.

89. Iowa Code, § 1900, in regard to the right to and method of voting in "elections," covers the action of stockholders in going into voluntary liquidation. A member having voted more than 10% of the stock at such "election," the action taken was invalid. McKee v. Howe Sav. & Trust Co., 122 Iowa, 731, 98 N. W. 609.

90. Ronca v. N. Y. Bldg. Loan Banking Co., 84 N. Y. S. 879.

91. Fines for default in payment of dues

Status of borrowing members.[92]—Borrowing and nonborrowing members of a loan association so far as stock and payments thereon are concerned, stand on an equal footing, and should equally receive the benefits and bear the burdens.[93] A borrowing member does not cease to be a member and stockholder by assigning his stock as collateral security for a loan.[94]

on stock will not be allowed, without a showing being made as to their reasonableness and for what they were charged. Fidelity Sav. Ass'n v. Bank of Commerce [Wyo.] 75 P. 448. Where a certain fine per month on each share during the period of delinquency is provided for, the repeated imposition of the same fine, increasing each month in arithmetical progression, will not be permitted. Id.

NOTE. Fines; nature and validity: Whether or not fines will be sustained depends upon the view taken by the court of the nature of the fine. Thus some courts consider a fine to be in the nature of liquidated damages for default in payment or for nonperformance of a promise. Goodman v. Durant Bldg. & Loan Ass'n, 71 Miss. 310, 14 So. 146; McGannon v. Cent. Bldg. Ass'n No. 2, 19 W. Va. 726. In North Carolina, fines are regarded as additional interest and within the provisions of the usury laws. Rowland v. Old Dominion Bldg. & Loan Ass'n, 116 N. C. 878, 22 S. E. 8. In other states it is expressly declared by statute that neither premiums nor fines shall be deemed usurious. A Pennsylvania statute of that kind was held valid in Juniata Bldg. & Loan Ass'n v. Mixell, 84 Pa. 313. And in the many cases where fines are sustained and enforced, it is necessarily assumed that they do not come within the provisions of the usury laws.

For what imposed: Fines are most usually imposed for nonpayment of dues on stock, upon the ground that the success of the enterprise depends on prompt payment of such dues by members. Pfeister v. Wheeling Bldg. Ass'n, 19 W. Va. 676; McGannon v. Cent. Bldg. Ass'n No. 2, Id. 726; Parker v. U. S. Bldg., L. & L. Ass'n, Id. 744; Setliff v. North Nashville Bldg. & Sav. Ass'n [Tenn. Ch. App.] 39 S. W. 546. Fines for nonpayment of interest are upheld in the last named case, supra, and in Clarksville Bldg. & Loan Ass'n v. Stephens, 26 N. J. Eq. 351. But in West Virginia and Ohio the imposition of such fines is held to be beyond the power of the association. See McGannon v. Cent. Bldg. Ass'n No. 2, and Parker v. U. S. Bldg., L. & L. Ass'n, supra; Hagerman v. Ohio Bldg. & Sav. Ass'n, 25 Ohio St. 186; Forrest City United Land & Bldg. Ass'n v. Gallagher, 25 Ohio St. 208. As to the **amount of fines,** the general rule is that they must be reasonable. 25 Ohio St. 186 and 208, supra. For fines which have been held reasonable, see McGannon v. Cent. Bldg. Ass'n No. 2, 19 W. Va. 726; Parker v. U. S. Bldg, L. & L. Ass'n, 19 W. Va. 744; Ricks v. Durant Bldg. & Loan Ass'n [Miss.] 18 So. 359; Clarksville Bldg. & Loan Ass'n v. Stephens, 26 N. J. Eq. 351; In re Middlesbrough Bldg. Soc., 54 Law J. Ch. 592. Pennsylvania has a statute limiting the amount of fines. Nat. Sav. Fund & Bldg. Ass'n v. Robinson, 19 Phila. [Pa.] 358.

By-laws requiring payment of fines are generally held not to make such fines cumulative. Monumental, Permanent Bldg. & Land Soc. v. Lewin, 38 Md. 445; Shannon v. Howard Mut. Bldg. Ass'n, 36 Md. 383; Ocmulgee Bldg. & Loan Ass'n v. Thomson, 52 Ga. 427; Hagerman v. Ohio Bldg. & Sav. Ass'n, 25 Ohio St. 186; Forrest City United Land & Bldg. Ass'n v. Gallagher, 25 Ohio St. 208.

Secured by mortgage: It is not uncommon for mortgages to such associations to provide expressly for payment of fines as well as dues. Massey v. Citizens' Bldg. & Sav. Ass'n, 22 Kan. 624; Ingoldby v. Riley, 28 Law T. [N. S.] 55; Juniata Bldg. & Loan Ass'n v. Mixell, 84 Pa. 313; Rhoads v. Hoernerstown Bldg. & Sav. Ass'n, 82 Pa. 180. That security for fines may be included in the mortgage is expressly decided in Hagerman v. Ohio Bldg. & Sav. Ass'n, 25 Ohio St. 186. Fines are included where the mortgage is to secure compliance with all the by-laws and regulations. Setliff v. North Nashville Bldg. & Sav. Ass'n [Tenn. Ch. App.] 39 S. W. 546. See, also, McCahan v. Columbian Bldg. Ass'n, 40 Md. 226. That fines are not included unless the mortgage makes express provision therefor is held in Robertson v. American Homestead Ass'n, 10 Md. 397, 69 Am. Dec. 145, and Bowen v. Lincoln Bldg. & Loan Ass'n, 51 N. J. Eq. 272, 28 A. 67.—From note in 35 L. R. A. 215.

92. See 1 Curr. L. 390.

93. Monier v. Clarke [N. M.] 75 P. 35.

94. He remains liable for premiums. (Authorities collected and doctrine discussed.) Fidelity Sav. Ass'n v. Bank of Commerce [Wyo.] 75 P. 448. A member who is in debt to the association cannot be considered as having withdrawn from membership until he has paid or tendered the debt. Yager v. Nat. Bldg. & Loan Ass'n, 25 Ky. L. R. 1853, 79 S. W. 197. In the absence of fraud, a borrower, taking stock and assigning it as security is a stockholder. Stanley v. Verity, 98 Mo. App. 632, 73 S. W. 727. Since a borrower from an association is also a stockholder, premiums on the stock cannot be construed as premiums on the loan. Attempted in order to show contract inequitable and have it set aside. Pac. States Sav., L. & B. Co. v. Green [C. C. A.] 123 F. 43. An association which has accepted shares of its stock as a pledge for a loan may be estopped to claim that the issuance of the stock was a mere device to hide the real transaction, and that the subscriber is not a member of the association. The association here took no steps to enforce the lien or to apply the stock to the payment of the debt. Western Loan & Sav. Co. v. Garff [Utah] 75 P. 375.

Contra: In some states it is held that when a member borrows money and pledges his stock, he ceases to be a member, and becomes a mere debtor. Interstate Bldg. & Loan Ass'n v. Holland, 65 S. C. 448, 43 S. E. 978.

Maturity of stock.[95]—In the absence of any special agreement, stock matures only when the dues paid and earnings apportioned to it amount to the face value thereof.[96] As to the effect of an agreement that stock shall mature after a specified number of payments or in a specified time, the courts are not agreed, some holding that when an association so agrees and represents at the time the loan is made, stock matures when the required number of payments has been made, whether the dues and earnings were sufficient to mature it or not,[97] and that the stockholder cannot be required to pay more than the specified number;[98] others, that such an agreement works an estoppel;[99] and many that the agreement is ultra vires and void.[1] Representations of an association through its agents as to the amount or time required to mature stock are regarded as mere expressions of opinion and not fraudulent, though not verified.[2] An association is under no duty to mature the stock of a defaulting stockholder.[3]

95. See 1 Curr. L. 391.

96. Noah v. German American Bldg. Ass'n, 31 Ind. App. 504, 68 N. E. 615; Winegardner v. Equitable Loan Co., 120 Iowa, 485, 94 N. W. 1110. Where by-laws provide that liability for instalments shall be limited to a certain number, and others provide that stock shall not mature until the loan fund portion of instalments, with earnings, should equal the face value of the stock, such stock does not mature until the stock is worth its face value, notwithstanding the required number of payments has been made. Miller v. Wayne International Bldg. & Loan Ass'n [Ind. App.] 70 N. E. 180.

97. Iowa Business Men's Bldg. & Loan Ass'n v. Berlau [Iowa] 98 N. W. 766. A contract whereby an association agrees to mature stock at the end of a certain time, the member performing his contract, is enforceable. People v. N. Y. Nat. Bldg. & Loan Ass'n, 88 N. Y. S. 850. Settlement under a contract to mature stock in five years held valid. Floyd-Jones v. Anderson [Mont.] 76 P. 751. An absolute promise to mature stock in a specified time is not rendered conditional upon the success of the undertaking by the agreement by the stockholder to pay a certain monthly instalment on each share until maturity, or withdrawal, and the provision of the by-laws, accepted by him, that such instalments shall be paid until stock is fully paid. Eastern Bldg. & Loan Ass'n v. Williamson, 189 U. S. 122, 23 S. Ct. 527, 47 Law. Ed. 735. An absolute promise to mature stock in a specified time is not affected by the fact that before a stockholder obtained a loan on such stock, the by-laws were amended to provide for the maturity of stock only when dues and earnings equalled the par value thereof. Id. A state court may place its own construction upon the effect of an absolute promise to mature stock in a specified time, and the effect thereon of the corporation's charter and by-laws, and the statutes and decisions of the state where the association was incorporated, without contravening the full faith and credit clause of the constitution. Id.

98. Certificate provided that payments on stock should not exceed a certain number. Noah v. German American Bldg. Ass'n, 31 Ind. App. 504, 68 N. E. 615. A borrowing member cannot avail himself of an agreement as to the number of payments which will mature stock, when that agreement is not embodied in his bond and mortgage. Id.

99. The defense that an absolute promise to mature stock in a specified time is ultra vires cannot be set up in a suit on such promise, by a stockholder who has fully executed the contract on his part. Eastern Bldg. & Loan Ass'n v. Williamson, 189 U. S. 122, 23 S. Ct. 527, 47 Law. Ed. 735. Though the act of an association representing that a certain number of payments would mature stock is ultra vires, yet, when relied upon by a tranferee of property, charged with a loan secured by stock, the association may be estopped to claim a larger amount on such stock, before releasing a trust deed. Williams v. Verity, 98 Mo. App. 654, 73 S. W. 732.

1. The act of an association determining and representing that a certain number of payments would mature the stock is ultra vires. Williams v. Verity, 98 Mo. App. 654, 73 S. W. 732. A loan must be discharged by maturity of stock in the usual course of business, or by payments large enough to discharge the loan at once, regardless of an agreement as to maturity after a certain number of payments. Gary v. Verity, 101 Mo. App. 586, 74 S. W. 161. Such an agreement with one member is in contravention of the rights of other stockholders. Id. A building and loan association has no power to guarantee the maturity of stock after a certain number of instalments have been paid. A corporation attempting to guarantee stock in this way is not entitled to the benefit of preferential statutes applicable to building and loan associations. Winegardner v. Equitable Loan Co., 120 Iowa, 485, 94 N. W. 1110. An agreement by an association that a certain number of payments should mature the stock of a stockholder is of no effect, unless expressly authorized by statute, because it violates the principle of mutuality among stockholders. Code 1896, §§ 1122-1137 does not authorize such a contract. Richter v. Southern Bldg. & Loan Ass'n, 137 Ala. 521, 34 So. 562.

2. Where it appears that a borrowing member's stock will not be matured as rapidly as represented, on account of mismanagement in including a large class of non-borrowing members, the remedy is withdrawal in accordance with the by-laws, or appeal to the governing board or agents of the corporation before a resort to the court is had. Bell v. Southern Home Bldg. & Loan Ass'n [Ala.] 37 So. 237.

3. Motes v. People's Bldg. & Loan Ass'n, 137 Ala. 369, 34 So. 344.

§ 3. *Loans and mortgages. A. In general.*[4]—Where a building and loan contract is unenforceable as such because it is a discrimination between members, but the borrowing member treats it as enforceable as an ordinary loan, it may be so enforced.[5] An association is bound by a construction placed by the parties on an ambiguous note at the time of making the loan, where such construction is in accordance with representations made by the association.[6] Where a contract requires the expenditure of a portion of a loan on improvements on real estate, the borrower cannot set up nonliability for such portion, because it was for the benefit of the association.[7] A provision for attorney's fees in a loan association mortgage is enforceable.[8] Accrued fines for default in payment of dues on stock are an essential part of the liability of the member, but do not become a part of the mortgage debt, unless made so by the mortgage.[9] By statute in Utah, a borrowing member may repay loans at any time by complying with the charter and by-laws.[10] A payment to a local agent of a foreign loan association is a payment to the association.[11] It is no defense against a payment on a loan that a building and loan association has gone out of business as such.[12] A shareholder and member of an association cannot raise the defense of ultra vires when sued for a loan, on a contract executed by the association.[13] False representations of existing facts by officers of an association, fraudulently made, constitute a good defense against a mortgage foreclosure suit.[14] A grantee of premises mortgaged, by a borrowing member, who assumes and agrees to pay the mortgage, becomes liable for all the obligations secured, such as dues and premiums, besides principal and interest.[15] But it is held elsewhere that the additional liability must be expressly assumed.[16]

(§ 3) *B. Usury. Conflict of laws.*[17]—The contract of a borrowing member of a building and loan association is governed by the law of the place where it is incorporated and has its home office, and where subscriptions to, and instalments on, stock, and interest are payable, though the security is in another state.[18] But

4. **A complaint** of which the by-laws of an association were made a part, held to sufficiently allege when payments on stock were to be made, that stock had not matured, that defendants were in default and that the loan was due and unpaid. Miller v. Wayne International Bldg. & Loan Ass'n [Ind. App.] 70 N. E. 180. See 1 Curr. L. 392.

5. Winegardner v. Equitable Loan Co., 120 Iowa, 485, 94 N. W. 1110.

6. Iowa Business Men's Bldg. & Loan Ass'n v. Berlau [Iowa] 98 N. W. 766.

7. Motes v. People's Bldg. & Loan Ass'n, 137 Ala. 369, 34 So. 344.

8. Columbian Bldg. & Loan Ass'n v. Rice [S. C.] 47 S. E. 63. Attorney's fees are properly allowed in foreclosure suit by receiver, the mortgage providing therefor. Ottenosser v. Scott [Fla.] 37 So. 161.

9. Fidelity Sav. Ass'n v. Bank of Commerce [Wyo.] 75 P. 448. Where fines for default in payments of dues on stock are by the by-laws made a lien on the stock, they will be allowed, if reasonable, in determining the withdrawal value of the stock, to be credited on the mortgage debt. Id.

10. One who made payments according to by-laws up to a certain time, and then paid the balance due in a single payment, was entitled to have the bond and mortgage securing the loan canceled, regardless of the conscionableness or unconscionableness of the contract [Rev. St. 1898, § 396]. Hiskey v. Pac. States Sav., L. & B. Co. [Utah] 76 P. 20.

11. Hoskins v. Rochester Sav. & Loan Ass'n [Mich.] 95 N. W. 566.

12. Motes v. People's Bldg. & Loan Ass'n, 137 Ala. 369, 34 So. 344.

13. Coggeshall v. Sussman, 41 Misc. 384, 84 N. Y. S. 1097; Noah v. German-American Bldg. Ass'n, 31 Ind. App. 504, 68 N. E. 615.

14. The answer sufficiently set out the defense, though it was not sustained by the evidence. No. 5 Fidelity Bldg. & Sav. Union v. Driver, 31 Ind. App. 691, 69 N. E. 177.

15. Miller v. Wayne International Bldg. & Loan Ass'n [Ind. App.] 70 N. E. 180.

16. A stockholder in a building and loan association borrowed money from it on a vendor's lien note, assigning the stock as security and giving a bond for payment of dues, premiums, etc. He thereafter sold the land to defendant, who assumed the note, but nothing was said in the deed as to assuming liability on the bond. The association transferred the stock to defendant without his knowledge and accepted payments on the note. Held, defendant was not liable as a stockholder in the association. Manor v. Aldrich [C. C. A.] 126 F. 934.

17. See 1 Curr. L. 393.

18. Interstate Bldg. & Loan Ass'n v. Edgefield Hotel Co., 120 F. 422; Alexander v. Southern Home Bldg. & Loan Ass'n, 120 F.

if the contract is to be performed in a state other than that of the domicile of the corporation, the law of the place of performance governs.[19]

Exemption from usury laws.[20]—Building and loan associations are usually exempted from the operation of usury laws,[21] mutual participation in profits and losses being the basic principle underlying building and loan contracts, which renders them nonusurious.[22] Some courts hold that premiums and interest are payable under separate and distinct contracts, and are not to be confused so as to render the contract usurious.[23] A company cannot, by calling itself a building and loan association, acquire the privilege of charging more than the legal interest rate on ordinary loans, if it is not such an association in fact.[24] That a company bears the name of a building and loan association imports that it is such in fact, and the burden is on a member asserting the contrary to prove it.[25] Though the lender be a building and loan association, the contract must be shown to be a building and loan contract, and not a simple loan to one not a member.[26] If the relation of corporation and stockholder is a mere fiction, entered into for the purpose of effecting a loan, the contract will be construed as a simple loan.[27]

963; Pacific States Sav., Loan & Bldg. Co. v. Green [C. C. A.] 123 F. 43. A contract requiring all payments to be made at the home office of the association in Virginia, held a Virginia contract. Columbian Bldg. & Loan Ass'n v. Rice [S. C.] 47 S. E. 63. A bond and mortgage given to a Minnesota association, payable at its home office, is a contract of that state, though real estate security is located in Idaho. Lewis v. Clark [C. C. A.] 129 F. 570.

19. A loan by a Missouri corporation, negotiated with its agent in Kansas, bond and mortgage being executed in Kansas by residents thereof, and mortgage security being situate therein and payment being there made, is a Kansas contract. Royal Loan Ass'n v. Forter [Kan.] 75 P. 484. It was held in Michigan that where a loan made by a foreign corporation, secured by a mortgage on property in Michigan, the premiums being payable to a local agent therein, the contract will be governed by the laws of Michigan. Hoskins v. Rochester Sav. & Loan Ass'n [Mich.] 95 N. W. 566. And a contract executed in Nebraska, secured by mortgage on property in Nebraska, was held a Nebraska contract, though the association was incorporated in New York and had its main office there. People's Bldg. Loan & Sav. Ass'n v. Parish [Neb.] 96 N. W. 243. After insolvency of an association, where evidences of indebtedness have passed into the hands of strangers, the rights of a borrowing member will be governed by the law of his domicile, not the domicile of the association. Spinney v. Chapman, 121 Iowa, 38, 95 N. W. 230.

20. See 1 Curr. L. 394.

21. Missouri. Stanley v. Verity, 98 Mo. App. 632, 73 S. W. 727. Iowa. Bacon v. Iowa Sav. & Loan Ass'n, 121 Iowa, 449, 96 N. W. 977. The fact that one not a member becomes a surety for a member of an association, securing a loan, does not take the contract out of the statute permitting building and loan associations to charge rates of interest higher than the legal rate. Wife gave note and mortgage on her separate property, securing loan, her husband signing as surety. Wife was a member of the association, husband was not. Le Mars Bldg. & Loan Ass'n v. McLain, 120 Iowa, 527, 94 N. W. 1122. Rev. St. Ohio, § 3836, exempting such associations from the usury laws, is constitutional. Brooklyn Bldg. & L. Ass'n Co. v. Desnoyers, 4 Ohio C. C. (N. S.) 337. Premiums and fines, when imposed by building associations, are not usury if reasonable. Spies v. Southern Ohio Loan & Trust Co., 4 Ohio C. C. (N. S.) 103. A contract of a borrowing member of an association held not inequitable, owing to character and purpose of the organization. Pacific States Sav. Loan & Bldg. Co. v. Green [C. C. A.] 123 F. 43. A contract whereby the borrowing member received $1,500 and agreed to pay 6% interest, and premiums amounting to $108 annually, and dues on the stock, profits being credited to the stock, held not so inequitable and unconscionable that it will not be enforced. Fidelity Sav. Ass'n v. Bank of Commerce [Wyo.] 75 P. 448.

22. Rooney v. Southern Bldg. & Loan Ass'n, 119 Ga. 941, 47 S. E. 345.

23. Motes v. People's Bldg. & Loan Ass'n, 137 Ala. 369, 34 So. 344. The loan contract of a borrowing member is separate from his contract as a stockholder, and payments on stock are not to be treated as payments on the loan. Suit to rescind certain contracts with association. Bell v. Southern Home Bldg. & Loan Ass'n [Ala.] 37 So. 237. Even though premiums be regarded as additional interest on the loan, they are not invalid unless they violate some usury statute. Fidelity Sav. Ass'n v. Bank of Commerce [Wyo.] 75 P. 448.

24, 25. Rooney v. Southern Bldg. & Loan Ass'n, 119 Ga. 941, 47 S. E. 345.

26. Royal Loan Ass'n v. Forter [Kan.] 75 P. 484.

27. All payments will be credited on the loan. Hence borrowing stockholder not estopped to claim such application of payments on the ground that if the claim had been made earlier, the moneys received would not have been disposed of as they were. Johnson v. Washington Nat. Bldg. Loan & Inv. Ass'n [Or.] 77 P. 872. For a loan of $500, a note for $714 was given, to be paid in monthly instalments of $8.40, $2.50 monthly being also payable as interest, stock being issued. American Mut. Bldg.

The statutes of many states exempting building association loans from the usury statutes provide for a system of competitive bidding to determine the premiums on loans.[23] The provisions of such statutes must be strictly followed in order to bring the contract within the protection furnished,[29] and, where they exist, the charging of premiums arbitrarily fixed in amount, renders the contract usurious.[30] But the mere existence of a by-law fixing a minimum premium will not render a loan usurious, if it was in fact made after free competition, and the premium bid was higher than the fixed minimum.[31] Where competitive bidding is not required, the statute may permit the borrower and association to agree on a premium rate in addition to interest,[32] sometimes limiting the total amount charged.[33]

In some jurisdictions, building and loan contracts are subject to the usury laws,[34] and where regarded as usurious, all payments are credited on the principal and interest of the loan,[35] and if the amount so paid is in excess of the principal

& Sav. Ass'n v. Cornibe [Tex. Civ. App.] 80 S. W. 1026. An answer setting up in substance that a contract was a building and loan contract in form only, to evade the usury laws, was not subject to demurrer on the ground that it attempted to set up usury and failed to allege facts showing the contract was not privileged. National Bldg. Ass'n v. Quin [Ga.] 47 S. E. 962.

28. Competitive bidding for the premium to be paid for the preference of priority of loans is an essential feature of the building society plan, with which foreign corporations doing business in Florida must comply [Laws 1893, c. 4158]. Skinner v. Southern Home Bldg. & Loan Ass'n [Fla.] 35 So. 67.

29. A premium of 20%, and 8% on the face of the loan, the agreement being fixed in private and not by competitive bidding as required by statute, is usurious. Assets Realization Co. v. Wightman, 105 Ill. App. 618.

30. Where the statute required competitive bidding, an association by-law authorizing the secretary and cashier to make loans at a premium not less than the average for the last three months, is illegal; and premiums thereunder illegal. Mutual Home & Sav. Ass'n v. Worz, 67 Kan. 506, 73 P. 116. A foreign building and loan association cannot charge a fixed premium and interest on loans to members in Florida, the contract being one made in and governed by Florida laws. Skinner v. Southern Home Bldg. & Loan Ass'n [Fla.] 35 So. 67. A by-law of a building association which fixes a minimum premium, higher than the rate of interest allowed by statute, is inconsistent with the statute requiring loans to shareholders to be made upon competitive bidding, and renders any loan made in accordance with it usurious. McDonnell v. De Soto Sav. & Bldg. Ass'n, 175 Mo. 250, 75 S. W. 438; Kittredge v. Chillicothe Loan & Bldg. Ass'n [Mo. App.] 77 S. W. 147. Premium being exacted without competitive bidding, as required by statute, but included in a note, the note was held usurious to that extent, and the premium applied on the note as of its date [Rev. St. 1889, §§ 2812, 2814; Rev. St. 1899, § 3709]. Lewis v. Farmers' Loan & Bldg. Ass'n [Mo.] 81 S. W. 887.

31. A borrower, who obtains, after competitive bidding, a loan at a premium in advance of the minimum fixed by the by-laws of the association, cannot take advantage of the minimum so fixed. Daily v. Saginaw Bldg. & Loan Ass'n [Mich.] 95 N. W. 326; Kittredge v. Chillicothe Loan & Bldg. Ass'n [Mo. App.] 77 S. W. 147.

32. Where an association deducted from the amount of a loan to a member, certain monthly instalments of dues, payable in advance, and required in addition monthly payments, including premiums payable periodically, such exaction of a double premium was held not to be permitted by Burns' Rev. St. 1901, § 4463l, allowing the borrower and association to agree on a premium rate in addition to interest, without bidding. Coppes v. Union Nat. Sav. & Loan Ass'n [Ind. App.] 67 N. E. 1022. Corporations created under Laws 1892, c. 689 may charge both interest and premiums. Coggeshall v. Sussman, 41 Misc. 384, 84 N. Y. S. 1097. A contract of a loan association incorporated under Laws 1851, c. 122, compelling a borrower to pay both interest and premiums, is not usurious. Roberts v. Murray, 40 Misc. 339, 81 N. Y. S. 1023.

33. A stipulation in the bond of a borrowing member that, on maturity of the stock, total payments of instalments, interest and premiums shall not exceed the amount of the loan with the highest interest allowed by statute, entitles the borrower to the benefit thereof only on maturity of the stock. Georgia State Bldg. & Loan Ass'n v. Grant [Miss.] 34 So. 84.

34. People's Bldg. Loan & Sav. Ass'n v. Parish [Neb.] 96 N. W. 243. In Nebraska, the usury laws apply to contracts made by foreign associations before the passage of statutes permitting them to do business in the state. A loan contract calling for interest and dues, $660 having been paid and $495 actually received, held usurious. Clarke v. Woodruff [Neb.] 100 N. W. 314. A loan association contract requiring fixed monthly payments of interest, premiums and dues until stock is fully paid up is usurious. Harper v. Middle States Loan, Bldg. & Const. Co. [W. Va.] 46 S. E. 817. Such a contract is usurious because such payments are payable for an indefinite period. Prince v. Holston Nat. Bldg. & Loan Ass'n [W. Va.] 46 S. E. 708.

35. Prince v. Holston Nat. Bldg. & Loan Ass'n [W. Va.] 46 S. E. 708. In Utah, it

and interest, the excess may be recovered,[36] in the absence of a statute to the contrary.[37] But it has been held that one who voluntarily pays usurious interest cannot recover any part thereof, in an action at law, but if the payment of such interest was induced by fraud, a suit in equity will lie.[38]

A valid compromise may be made of an alleged usurious debt.[39] A grantee of property mortgaged to secure a debt to an association, usurious as to an illegal premium, who knows nothing of the premium, which is not mentioned in the mortgage, may set up the usury against the association.[40] In an action to cancel a lien and declare a debt usurious, the court properly decreed cancellation of the stock given by defendant association, under the prayer for other and further relief.[41]

(§ 3) *C. Accounting with borrower while solvent.*[42]—A borrowing member of a going concern is only chargeable with his loan and legal interest, and should be credited with all payments, whether made as dues, premiums or interest,[43] and with the withdrawal value of his stock at the time he received the loan,[44] together with the dividends earned previous to the association's insolvency.[45] The value

is held that borrowing members are entitled to have monthly payments of dues and premiums credited on the loan. Hiskey v. Pacific States Sav., Loan & Bldg. Co. [Utah] 76 P. 20. In Oregon, building and loan association contracts calling for interest, premiums and dues are held usurious as to all payments in excess of the stipulated rate of interest, and such payments in excess are applied in extinguishment of the debt and interest. Contract called for 6% interest annually, 6% annual premium, and $9.75 per month on 15 shares of stock pledged to secure the loan. Epping v. Washington Nat. Bldg., Loan & Inv. Ass'n [Or.] 74 P. 923.

36. Harper v. Middle States Loan, Bldg. & Const. Co. [W. Va.] 46 S. E. 817.

37. Contract being usurious, the receiver could recover only the principal, after deducting all payments made, neither costs nor interest being in such case recoverable [Rev. St. 1893, § 1390]. Carpenter v. Lewis, 65 S. C. 400, 43 S. E. 881.

38. Action to recover payments made to an association represented to be a mutual building association. Beach v. Guaranty Sav. & Loan Ass'n [Or.] 76 P. 16.

39. Association claimed debt valid under Minnesota law and borrower claimed it usurious under Kentucky law. Gray v. U. S. Sav. & Loan Co., 25 Ky. L. R. 1120, 77 S. W. 200.

40. Lewis v. Farmers' Loan & Bldg. Ass'n [Mo.] 81 S. W. 887.

41. American Mut. Bldg. & Sav. Ass'n v. Carnibe [Tex. Civ. App.] 80 S. W. 1026. In an action to cancel a lien and declare a debt usurious, evidence connecting the person effecting the loan with a building and loan association, defendant, was admissible. Id.

42. See 1 Curr. L. 398-400.

43. National Bldg. & Loan Ass'n v. Frisbie, 25 Ky. L. R. 449, 76 S. W. 7; Yager v. National Bldg. & Loan Ass'n, 25 Ky. L. R. 1853, 79 S. W. 197. Where by-laws provided for payment of 50 cents a month on each $100 of money borrowed, and a bond securing a loan, provided for a premium of 50 cents a month on each share of stock, the face value of which was $100, held, such payments under the bond should be treated as premiums by a borrowing member as such, and not dues on the stock. Miller v. Wayne International Bldg. & Loan Ass'n [Ind. App.] 70 N. E. 180. Held, under a provision in the bond of a borrowing member, as to final settlement, he was to be charged with the amount actually advanced him, with interest at 8 per cent, and credited with instalments on stock and interest paid. Interstate Bldg. & Loan Ass'n v. Edgefield Hotel Co., 120 F. 422. But not with premiums for insurance on mortgaged premises. Alexander v. Southern Home Bldg. & Loan Ass'n, 120 F. 963. A provision of a by-law that where a contract is governed by statutes limiting the amount of premium and interest, only so much of the premiums will be taken as profits, as will, with interest, amount to the highest interest rate there allowed, the balance of premiums being used in settlement in reduction of the debt, means that the benefit allowed can be taken advantage of only on final settlement, after maturity of the stock. Georgia State Bldg. & Loan Ass'n v. Grant [Miss.] 34 So. 84. Applicant to a loan association for a loan of $40,000 was told that under the rules of the association as to fees, dues, etc., the initial payment would be $1,000. He accepted $39,000. Held, in suit to foreclose mortgage, the $1,000 payment was voluntary and defendant was not entitled to any credit therefor. State Mut. Bldg. & Loan Ass'n v. O'Callaghan [N. J. Eq.] 57 A. 496.

44. Interstate Bldg. & Loan Ass'n v. Holland, 65 S. C. 448, 43 S. E. 978. Upon winding up the affairs of an association, it is competent for the stockholders to determine the liability of a borrowing member by making a final estimate of the value of the stock and deducting this from the amount of his indebtedness. Star Loan Ass'n v. Moore [Del. Super.] 55 A. 946. But a payment of an amount so determined is not a discharge of the debtor, unless the estimate of the value of the stock is final, and not to be changed by subsequent disposition of property. Id.

45. Where a stockholder institutes a suit to pay off a loan and withdraw while the association is a going concern, his right to be credited with the value of his pledged

of stock, surrendered to be credited on a loan, is determined by the assets and liabilities of the association at the time of the surrender, and not by the amount paid thereon.[46] A member is bound by by-laws fixing the withdrawal value of his stock, if such by-laws do not contravene any law.[47] A tender by a borrowing member, before the voluntary liquidation of the association, renders him liable only for his loan and interest, and not for losses, and entitles him to credit for all payments.[48] A borrowing member is not entitled to have credited on his loan admission fees, stock dues, and fines, paid before he became a borrower.[49] A borrowing member seeking to have his contract declared usurious cannot be credited, on the loan, with fines, withdrawal fees, and amounts paid on expense accounts as a stockholder.[50] Where a borrowing member has a final settlement with the association, while solvent, he may recover thereafter for usury paid the association, and is not chargeable with losses accruing after such final settlement.[51] Notice of settlement and withdrawal may be waived.[52] A withdrawing stockholder should be charged with interest on the full amount of the loan, since the deductions of premium, being illegal, were credited on the loan.[53] In Iowa, a borrower is charged with the full amount of the loan received by him, together with delinquent dues, interest, premium, and fines, and credited with the withdrawal value of the pledged stock, but no greater recovery can be had against him than the net amount of the principal actually received, with interest thereon at a rate not greater than twelve per cent.[54] After completed settlement and withdrawal, it is immaterial whether the contract was one which the association had power to make.[55]

(§ 3) *D. Accounting after insolvency.*[56]—Insolvency works a rescission of the contract between the association and its members, and loans made by it become

stock and dividends, at the time he demanded a settlement, is not affected by the subsequent insolvency of the association. Reitz v. Hayward, 100 Mo. App. 216, 73 S. W. 374. A borrowing member, having pledged stock as collateral, was permitted, in a suit to foreclose a trust deed, to recover the difference between the principal of the note and the value of his paid-up stock and accumulated profits. Western Loan & Sav. Co. v. Garff [Utah] 75 P. 375.

46. Peal v. Citizens' Bldg. & Loan Ass'n's Assignee, 25 Ky. L. R. 1084, 77 S. W. 932. The credit to be allowed a withdrawing member, repaying his loan, on his pledged stock, is computed according to the actual value of the stock at the time of settlement. Reitz v. Hayward, 100 Mo. App. 216, 73 S. W. 374.

47. A deduction from first stock payment for reserve fund is not violative of Civ. Code, § 634, limiting an entrance fee to a smaller sum. Provident Mut. Bldg.-Loan Ass'n v. Davis [Cal.] 76 P. 1034.

48. National Bldg. & Loan Ass'n v. Frisbie, 25 Ky. L. R. 449, 76 S. W. 7.

49. Interstate Bldg. & Loan Ass'n v. Holland, 65 S. C. 448, 43 S. E. 978.

50. Georgia State Bldg. & Loan Ass'n v. Grant [Miss.] 34 So. 84.

51. Olliges v. Kentucky Citizens' Bldg. & Loan Ass'n's Assignee, 24 Ky. L. R. 1954, 72 S. W. 747.

52, 53. Reitz v. Hayward, 100 Mo. App. 216, 73 S. W. 374.

54. Bacon v. Iowa Sav. & Loan Ass'n, 121 Iowa, 449, 96 N. W. 977. In a suit to foreclose a mortgage securing a bond, which provided a greater rate of interest than 12%, the amount due was the amount received on the loan, with interest at 12%, less the withdrawal value of the stock, and interest already paid. Iowa Cent. Bldg. & Loan Ass'n v. Klock [Iowa] 94 N. W. 1120.

55. Floyd-Jones v. Anderson [Mont.] 76 P. 751.

56. NOTE. Effect of insolvency on borrowing members: The contract made by a borrowing member with the association is to the effect that he will pay dues, premiums, and fines, and that he will repay his loan as provided for in the note or other evidence of indebtedness given by him. Since, when an association becomes insolvent, a realization of the aims of the association and the expectations of members becomes impossible, the courts treat the contract as rescinded or terminated by insolvency, and refuse to enforce the obligations of the borrowing member thereunder, or enforce them in a manner equitable to borrowing and nonborrowing members alike. Low St. Bldg. Ass'n v. Zucker, 48 Md. 448; Knutsen v. Northwestern Loan & Bldg. Ass'n, 67 Minn. 201, 69 N. W. 889; Strohen v. Franklin Sav. Fund & Loan etc. Ass'n, 115 Pa. 273, 8 A. 843. Thus, after insolvency, neither the corporation nor its receiver can enforce subsequently accruing liabilities for dues or premiums. Curtis v. Granite State Provident Ass'n, 69 Conn. 6, 36 A. 1023. Low St. Bldg. Ass'n v. Zucker, 48 Md. 448. Loans become immediately due and collectible upon insolvency. Curtis v. Granite State Provident Ass'n, 69 Conn. 6, 36 A. 1023; Strauss v. Carolina Inter-State Bldg. & Loan Ass'n, 117 N. C. 308, 23 S. E. 450, 53 Am. St. Rep. 585. In allowing credit upon the loan made to a borrowing member, the theory of the cases is to place borrowing and nonborrow-

at once due and payable, regardless of the terms of the contract.[57] The borrower is charged with the amount of his loan with interest.[58] Payments actually made, referable to the loan,[59] such as interest and premiums,[60] are credited thereon; but payments on the stock, such as dues, cannot be credited on a member's loan,[61] since credit therefor can be given only after final distribution by the receiver,[62] when all shareholders, borrowing and nonborrowing, will be paid pro rata from the fund for final distribution.[63] On final settlement, the borrowing member is entitled to be credited only with the actual value of his stock, not its face value.[64] Where a shareholder, after notice of withdrawal, borrows a sum less than the withdrawal value of his stock, he cannot, in an action by the receiver after insolvency to recover the loan, offset the withdrawal value of his stock.[65] After insolvency, caused by no fault of a borrowing member, the latter is not chargeable

ing members on the same terms as stockholders. Consequently, the borrowing member, after insolvency, cannot be credited with dues on stock, since this would amount to a withdrawal, to the prejudice of nonborrowing members and creditors. The borrowing member, after insolvency, is therefore charged with the sum actually received on his loan, and interest thereon, and credited with all payments made as a borrower, but not credited with sums paid as a stockholder. Curtis v. Granite State Provident Ass'n, 69 Conn. 6, 36 A. 1023; Hekeinkaemper v. German Bldg. & Sav. Ass'n, 22 Kan. 549; Rogers v. Rains, 18 Ky. L. R. 768, 38 S. W. 483; Strohen v. Franklin Sav. Fund & Loan Ass'n, 115 Pa. 273, 8 A. 843. It has been held in Illinois, however, that the borrowing member should not be credited with premiums. Choisser v. Young, 69 Ill. App. 252; Towle v. American Bldg., Loan & Inv. Soc., 61 F. 446. In Maryland, the borrowing member is charged with interest at the legal rate only, and not the rate charged in the note and mortgage. Windsor v. Bandel, 40 Md. 172; Waverly Mut., etc. Ass'n v. Buck, 64 Md. 338, 1 A. 561. In North and South Carolina, the borrowing member is credited with all payments, including dues on the stock. Strauss v. Carolina Inter-State Bldg. & Loan Ass'n, 117 N. C. 308, 23 S. E. 450, 53 Am. St. Rep. 585; Buist v. Bryan, 44 S. C. 121, 21 S. E. 537, 51 Am. St. Rep. 787.—From note to Curtis v. Granite State Provident Ass'n [Conn.] 61 Am. St. Rep. 24. See 1 Curr. L. 400.

57. Lewis v. Clark [C. C. A.] 129 F. 570. After a building and loan association has become insolvent and passed into the hands of a receiver, the borrowing member's obligation will be regarded as a simple loan, upon which payments actually made, except stock payments, will be credited, and the balance will be regarded as a debt at once due and payable. Spinney v. Chapman, 121 Iowa, 38, 95 N. W. 230. But premiums agreed to be paid cannot be charged against the borrower. Roberts v. Murray, 40 Misc. 339, 81 N. Y. S. 1023.

58. In settling a debt of a borrowing member to an insolvent building and loan association, interest at 6% is computed on the sum actually received and all payments are credited on the loan. Carman v. Carrico, 25 Ky. L. R. 2143, 80 S. W. 216. Upon foreclosure of a mortgage against a member after insolvency, the mortgagor should be charged with the amount of his loan, with interest, and credited with interest paid and interest on the installments of interest. Monier v. Clarke [N. M.] 75 P. 35. The interest chargeable on the loan should be at the legal rate, where the contract was made. 7% on Minnesota contract. Id. In Nebraska, a loan contract being usurious, the borrower, in foreclosure suit by receiver, was held only for amount actually received. Clarke v. Woodruff [Neb.] 100 N. W. 314.

59. The loan and stock contracts of a borrowing member are separate and distinct; and in the final accounting after insolvency all payments referable to the loan contract should be credited thereon. Riggs v. Capital Brick Co., 128 F. 491.

60. Steele v. New Park City Bldg. & Loan Ass'n, 24 Ky. L. R. 2303, 74 S. W. 177. And for usurious premiums and interest thereon. Gary v. Verity, 101 Mo. App. 586, 74 S. W. 161. In foreclosure suit after insolvency, the borrower is chargeable with the amount of his loan, with interest, and credited with interest and premiums paid applied according to rule of partial payments. Riggs v. Capital Brick Co., 128 F. 491.

61. Sleeper v. Winkel, 122 F. 736; Peal v. Citizens' Bldg. & Loan Ass'n's Assignee, 25 Ky. L. R. 685, 76 S. W. 332; Yager v. National Bldg. & Loan Ass'n, 25 Ky. L. R. 1853, 79 S. W. 197. In foreclosure suit after insolvency a borrowing member cannot have dues and premiums credited on the loan. Roberts v. Cronk, 88 N. Y. S. 103.

62. Roberts v. Murray, 40 Misc. 339, 81 N. Y. S. 1023.

63. Steele v. New Park City Bldg. & Loan Ass'n, 24 Ky. L. R. 2303, 74 S. W. 177; Gary v. Verity, 101 Mo. App. 586, 74 S. W. 161. After the debts of an insolvent association have been paid, a borrowing member is entitled to a pro rata dividend with nonborrowing members on the stock. Monier v. Clarke [N. M.] 75 P. 35.

64. Ottensoser v. Scott [Fla.] 37 So. 161. In a suit by an assignee of claims against a borrowing member of an insolvent association, which had passed into the hands of a receiver, such debtor was credited with payments of interest and premiums and with the actual value of his stock, and charged with interest at 6% from the time the receiver was appointed, on the balance found due. Spinney v. Chapman, 121 Iowa, 38, 95 N. W. 230.

65. Gaskill v. Polhemus [N. J. Err. & App.] 57 A. 1048.

with earned premium, bid by him for priority of loan and deducted from the sum loaned.[68]

§ 4. *Termination and insolvency. Voluntary liquidation.*[67]—An association may go into voluntary liquidation and so defeat the right of a borrowing member to a settlement with it as a going concern.[68] Under a statute permitting corporations to go into voluntary liquidation by the written consent of the owners of a majority of the stock, a pleading setting up such liquidation of a building and loan association must allege that a resolution to go into liquidation was passed with the consent required by law.[69]

Receivership.[70]—A mere debtor of an association cannot maintain a bill to wind up its affairs and distribute its assets.[71] A borrowing member of an association cannot in a single bill in equity ask, as debtor, that his stock be declared illegal and his obligation on the loan canceled for usury, and also, as stockholder, ask to have the business of the association wound up and its assets distributed.[72] Upon the appointment of a receiver of an insolvent association, its business ceases and nothing remains but liquidation.[73] To authorize the court to enter judgment directing a receiver to proceed with winding up the affairs of the association, the report of the receiver must be reasonably certain and definite as to assets and liabilities of the association, and probable cost of settling.[74] Before judgment may be entered winding up the affairs of the association, proof must be heard on contested questions of fact raised by shareholders' exceptions to the receiver's report.[75] Only reasonable diligence is required of a receiver.[76]

Insolvency[77] of a building and loan association consists of its inability to perform the purposes for which it was created.[78] Insolvency is always a question of fact and is never presumed.[79] Mere deficiency of assets does not constitute insolvency, but merely a loss of capital stock and security, and depreciation of stock held by the members.[80] Payments on stock are liabilities in determining solvency.[81]

Rights of withdrawing shareholders.[82]—The directors of a building and loan association cannot require a member to withdraw his investment, except in pur-

66. Authorities pro and con cited. Ottensoser v. Scott [Fla.] 37 So. 161.

67. See 1 Curr. L. 403.

68, 69. Yager v. National Bldg. & Loan Ass'n, 25 Ky. L. R. 1853, 79 S. W. 197.

70. See 1 Curr. L. 402.

71. Day v. Nat. Mut. Bldg. & Loan Ass'n, 53 W. Va. 550, 44 S. E. 779.

72. Bill dismissed for multifariousness. Day v. Nat. Mut. Bldg. & Loan Ass'n, 53 W. Va. 550, 44 S. E. 779.

73. Monier v. Clarke [N. M.] 75 P. 35.

74, 75. Steele v. New Park City Bldg. & Loan Ass'n, 24 Ky. L. R. 2303, 74 S. W. 177.

76. Laws 1902, c. 60, § 3, requiring the receiver of a building association to "proceed immediately" to convert assets into cash, requires only reasonable diligence and speed, and does not require a sacrifice of the assets. People v. New York Bldg. Loan Banking Co., 41 Misc. 363, 84 N. Y. S. 844.

77. See 1 Curr. L. 402.

78. Lewis v. Clark [C. C. A.] 129 F. 570.

79, 80. Floyd-Jones v. Anderson [Mont.] 76 P. 751.

81. So an association incorporated under Laws 1851, c. 122 is insolvent when unable to repay contributions of members for stock. People v. New York Bldg. Loan Banking Co., 41 Misc. 363, 84 N. Y. S. 844.

82. **NOTE. Withdrawal:** The rules of building and loan associations usually provide that stockholders may withdraw, on giving the proper notice, and that their claims will be paid in the order in which such notices mature. The status of a member after giving notice of withdrawal is the subject of much dispute. It has been held that on compliance with the conditions of a withdrawal, a shareholder becomes a creditor of the association and is no longer a member. Englehardt v. Fifth Ward, etc. Ass'n, 5 Misc. 518, 25 N. Y. S. 835; Id., 148 N. Y. 281, 42 N. E. 710, 35 L. R. A. 289; In re Norwich & N. Provident Bldg. Soc., 45 Law J. Ch. [N. S.] 785; U. S. Bldg. & Loan Ass'n v. Silverman, 85 Pa. 394; Maloney v. Real Estate, Bldg. & Loan Ass'n, 57 Mo. App. 384. But most cases indicate that membership may continue for some purposes after notice of withdrawal has been given. Thus it was held that their claims are very different from those of general outside creditors. Christian's Appeal, 102 Pa. 184. See, also, Sibun v. Pearce, 44 Ch. Div. 354, 63 Law T. [N. S.] 123; Walker v. General Mut. Bldg. Soc., 36 Ch. Div. 777, 57 Law T. [N. S.] 574.

Rights of withdrawing members when association is insolvent: According to the English doctrine, members whose notices of withdrawal have matured before the date of a deed of dissolution, or order to wind up the affairs of the association, are entitled to priority over other members, but not

suance of a valid by-law.[83] A borrowing member of an association who gives notice of withdrawal does not become ipso facto a creditor of the association for the withdrawal value of his shares, or for the excess thereof over his indebtedness, so as to exempt his stock from its share of the general indebtedness.[84] A member who withdraws at a time when the association is in fact, though not notoriously, insolvent, no legal steps having been taken to wind up its affairs, has only the right to a pro rata share in the distribution of assets, not the right of a creditor.[85] The fact that an agreement was made between the association and the withdrawing member, compromising the latter's claim, does not change the rule.[86] But where a stockholder serves notice of withdrawal of stock, in accordance with the constitution and by-laws, and the claim, though persisted in, is not paid, such claim, after insolvency and receivership of the association, becomes a preferred one.[87] Where a member of a building and loan association has made full settlement and withdrawn therefrom, such settlement and withdrawal cannot be set aside by the association without a showing of fraud or bad faith.[88]

BUILDINGS AND BUILDING RESTRICTIONS.

§ 1. Public Regulation (572).
§ 2. Private Regulation. Restrictive Covenants (574).
§ 3. Liability for Unsafe Condition of Premises (576).
§ 4. Liability for Negligent Operation of Elevators (576).

§ 1. *Public regulation.*[89]—An ordinance prohibiting construction does not

over outside creditors of the association. Barnard v. Tomson [1894] 1 Ch. 374; Walton v. Edge, 10 App. Cas. 33, 54 Law J. Ch. [N. S.] 362, 52 Law T. [N. S.] 666; In re Middlesbrough, R. S. & C. Dist. Permanent Ben. Bldg. Soc., 53 Law T. [N. S.] 203. But there is no such right of priority, when at the time of giving or maturity of such notices, the association was known to be insolvent. In re Sunderland 36th Universal Bldg. Soc., 24 Q. B. Div. 394.

The American cases adopt a different doctrine and hold that when an association is in fact insolvent, a withdrawing member has the right to a pro rata share only, even though he believed the association solvent when he gave his notice. Chapman v. Young, 65 Ill. App. 131. An order for the amount of his claim does not make him a general creditor. Christian's Appeal, 102 Pa. 184; In re National Sav. Loan & Bldg. Ass'n's Estate, 9 Wkly. Notes Cas. 79. A judgment for the amount of his claims cannot be enforced by execution so as to cut out creditors or stockholders, but may stand as the basis on which to compute his pro rata share on final distribution. Hanney v. Enterprise Sav. Fund & Bldg. Ass'n, 16 Wkly. Notes Cas. 450. See 1 Curr. L. 402.

83. A by-law permitting the directors to require the withdrawal of a member, to be designated at their pleasure, such selection not being based on any equitable principle or rule of general application, is invalid and inoperative as to one who was a member when the by-law was passed. Ottawa Mut. Loan & Sav. Ass'n v. Merriman, 67 Kan. 779, 74 P. 256.

84. Coggeshall v. McGrath, 89 N. Y. S. 334. A member, appearing as a claimant upon the estate of an insolvent association, "upon the ground of his stock interest, is to be treated as a member, and not as a creditor." Walker v. Terry, 138 Ala. 428, 35 So. 466.

85. Colin v. Wellford [Va.] 46 S. E. 780. It is immaterial that the fact of insolvency was not known to the shareholder. Reitz v. Hayward, 100 Mo. App. 216, 73 S. W. 374.

86. Colin v. Wellford [Va.] 46 S. E. 780.

87. Silvers v. Merchants' & M. Sav. Fund & Bldg. Ass'n [N. J. Eq.] 56 A. 294.

88. Floyd-Jones v. Anderson [Mont.] 76 P. 751.

89. **NOTE. Validity of regulations:** Building restrictions being justifiable only as an exercise of the police power (as to which see Constitutional Law, 1 Curr. L. 576 and Municipal Corporations, 2 Curr. L. 967), they must not only be designed to serve some end of public welfare, but must be reasonable in their character. Thus requirement of a building permit is usually sustained (Hasty v. Huntington, 105 Ind. 540, 5 N. E. 559), but arbitrary power to deny the same must not be vested in the officer charged with their issuance (Bostock v. Sams, 95 Md. 400, 52 A. 665, 93 Am. St. Rep. 394 [with note]; City of Sioux Falls v. Kirby, 6 S. D. 62, 60 N. W. 156; State v. Tenant, 110 N. C. 609, 14 S. E. 387).

To sustain a regulation as to the height of buildings a very clear case of public necessity must appear. Parker v. Com., 178 Mass. 199, 59 N. E. 634.

Requirement of noncombustible materials within reasonable fire limits is generally sustained. Canepa v. Birmingham, 92 Ala. 358, 9 So. 180; Ex parte Fiske, 72 Cal. 125, 13 P. 310; Ford v. Thralkill, 84 Ga. 169, 10 S. E. 600; King v. Davenport, 98 Ill. 305; First Nat. Bank v. Sarlls, 129 Ind. 201, 28 N. E. 434; City of Salem v. Maynes, 123 Mass. 372; Alexander v. Greenville, 54 Miss. 659; Hubbard v. Medford, 20 Or. 315, 25 P. 640; Klingler v. Bickel, 117 Pa. 326, 11 A. 555; Brady v. N. W. Ins. Co., 11 Mich. 425; State v. Johnson, 114 N. C. 846, 19 S. E. 599. As have regulations requiring fire escapes (Arms v. Ayer, 192 Ill.

prohibit repair,[90] but under a statute prohibiting enlarging of buildings, no substantial change will be permitted.[91] A city council cannot be vested with discriminatory power in granting building permits,[92] nor can it deny lawful permits,[93] nor forbid the erection of a negro church on the ground that it is a nuisance,[94] nor during the life of a general ordinance, cancel a building permit granted in conformity with its provisions.[95] The inadvertent omission of a word in a permit will not be allowed to negative the authority therein granted.[96] Increased danger of fire and general depreciation of value of neighboring property are not grounds for injunctive relief against the erection of a building.[97] A city granting a building permit does not render itself liable for the negligent act of the builder.[98]

The supervision of construction of buildings by public authorities is regulated by statute.[99]

A certificate issued by the building inspector that a statute relative to fire escapes has been complied with relates to the building and is available to succeeding owners;[1] it is conclusive as to compliance, and relieves the owner from any liability,[2] but it must affirmatively appear that inspection has been made.[3] The

601, 61 N. E. 861; Willy v. Mulledy, 78 N. Y. 316; Schott v. Harvey, 105 Pa. 222); or the maintenance of water closets, sewers, etc. (Sprigg v. Garrett Park, 89 Md. 406, 43 A. 813; Com. v. Roberts, 155 Mass. 281, 29 N. E. 522); or the maintenance of a water supply on each floor of a tenement building (Health Dept. v. Rector, 145 N. Y. 32, 39 N. E. 833).

Regulations for the public health or safety may be made applicable to buildings in existence at the time of the enactment. Com. v. Roberts, 155 Mass. 281, 29 N. E. 522; Health Dept. v. Rector, 145 N. Y. 32, 39 N. E. 833.—From note to Bostock v. Sams, 95 Md. 400, 52 A. 665, 93 Am. St. Rep. 394. See 1 Curr. L. 404.

90. That no building shall be "constructed or reconstructed" except of incombustible material does not prohibit the repair of wooden buildings [Ordinance No. 907, city of Bradford]. Contas v. Bradford, 206 Pa. 291, 55 A. 989.

91. Under Stat. 1900, c. 321, requiring buildings erected or enlarged for use as a hotel to be of first class construction, the term "enlarged" would embrace a carrying up of the walls of a building with a slanting roof, though the height of the roof was not changed. Murdock v. Swasey, 183 Mass. 573, 67 N. E. 671.

92. An ordinance giving the common council discriminatory power to issue building permits or to determine when a structure is injurious to the reasonable enjoyment of adjacent owners is unconstitutional. Boyd v. Board of Councilmen, 25 Ky. L. R. 1311, 77 S. W. 669.

93. Ky. St. 1899, § 3290 sought to prevent erection of a negro church. Boyd v. Board of Councilmen, 25 Ky. L. R. 1311, 77 S. W. 669.

94. Ky. St. § 3290. Boyd v. Board of Councilmen, 25 Ky. L. R. 1311, 77 S. W. 669.

95. Gallagher v. Flury [Md.] 57 A. 672.

96. The word "stable" in a permit for "carriage house, stable and coal shed." Gallagher v. Flury [Md.] 57 A. 672.

97. A stable. It will not be presumed that filth will be allowed to accumulate. Gallagher v. Flury [Md.] 57 A. 672. The proximity of such buildings is an incident of city life. Id.

98. Material dropping on pedestrians in the street below. Copeland v. Seattle, 33 Wash. 415, 74 P. 582.

99. The fact that the public buildings law of New York makes it the duty of the state architect to prepare plans for state buildings and exact construction in conformity thereto does not take public buildings from the operation of the law requiring descriptions and drawings of plumbing and drainage of public and private buildings in New York City to be filed in the department of buildings and approved by the superintendent of buildings before work is commenced thereon [Laws 1896, p. 1055, c. 803, § 5. Public Buildings Law, § 8, as amended by Laws 1902, p. 579, c. 212]. City of New York v. Burleson Hardware Co., 89 App. Div. 222, 85 N. Y. S. 763.

Laws 1897, c. 415, as amended by Laws 1899, c. 192, requires contractors to floor buildings under construction to within three stories below the one under construction, where the filling between the floors is to be of fireproof material, otherwise within two stories. Holzman v. Katzman, 87 N. Y. S. 478.

Under charter 1901, one building a tenement house, is not required to leave an open area or vault in front of it, so digging a vault without written permission is a voluntary construction, and is a violation of Laws 1895, c. 567. City of New York v. Madison Ave. Real Estate Co., 42 Misc. 535, 85 N. Y. S. 1118.

1. P. L. 1879, 128. Bonbright v. Schoettler [C. C. A.] 127 F. 320.

Note. A master is not required to furnish fire escapes (Jones v. Granite Mills, 126 Mass. 84; Schwandner v. Birge, 33 Hun [N. Y.] 186), unless required by statute (Willy v. Mulledy, 78 N. Y. 314; McLaughlin v. Armfield, 58 Hun [N. Y.] 376, 12 N. Y. S. 164; Lee v. Smith, 42 Ohio St. 458; Schott v. Harvey, 105 Pa. 222; Keely v. O'Conner, 106 Pa. 321; Pauley v. Steam Gauge & L. Co., 131 N. Y. 90, 29 N. E. 999, 42 N. Y. St. Rep. 636; Rose v. King [Ohio] and note 15 L. R. A. 160). Failure to construct fire escape must be the cause of the injury (Weeks v. McNulty, 101 Tenn. 495, 48 S. W. 809, 43 L. R. A. 185).

2. Damages or penalty. Bonbright v. Schoettler [C. C. A.] 127 F. 320. A fire

superintendent of buildings of New York City, and not the state factory inspector, has exclusive jurisdiction in regard to fire escapes on factories within the city.[4] Under the statute forbidding the obstruction of passageways in theaters by persons occupying them during a performance, a manager is liable for the penalty imposed when he permits people to stand in the space necessarily used as a passageway by those entering through a side entrance.[5]

§ 2. *Private regulation. Restrictive covenants.*[6]—Restrictive covenants run

escape that was sufficient under Act 1879 (P. L. 128), is sufficient under Act 1885 (P. L. 68). Id. P. L. 128, providing that "nothing in this act shall interfere with fire escapes now in use and approved," does not relieve an owner from providing the number of fire escapes required by the act. Snyder v. Bonbright, 123 F. 817.

3. Certificate of inspection of ropes and chains no proof of inspection of stairways. Snyder v. Bonbright, 123 F. 817.

4. History of legislation on subject reviewed. City of New York v. Trustees of Sailors' Snug Harbor, 85 App. Div. 355, 83 N. Y. S. 442.

5. Laws 1897, pp. 263, 272, c. 378 (Charter §§ 762, 773). Sturgis v. Hayman, 84 N. Y. S. 126.

6. **NOTE. Building restrictions in deeds:** The purpose of these is generally to prevent the erection of such buildings as will impair the value of the residue of the land belonging to the grantor or conveyed to others. So long as the restriction is reasonable and in accord with public policy, no valid objection to it is discernible. These restrictions assume various forms. Some of them are directed toward the height, material, or value of buildings that may be constructed on the land conveyed. See Quatman v. McCray, 128 Cal. 285, 60 P. 856; Hobson v. Cartwright, 93 Ky. 368, 20 S. W. 281; Keening v. Ayling, 126 Mass. 404; Frink v. Hughes [Mich.] 94 N. W. 601; Clark v. Martin, 49 Pa. 289. Others place limitations on the building line, requiring that no building shall be located less than a certain specified distance from the street or approach to within a certain distance of the boundary of the land. See Ewertsen v. Gerstenberg, 186 Ill. 344, 57 N. E. 1051; Herrick v. Marshall, 66 Me. 435; Linzee v. Mixer, 101 Mass. 512; Att'y Gen. v. Gardiner, 117 Mass. 492; Sanborn v. Rice, 129 Mass. 387; Nowell v. Boston Academy, 130 Mass. 209; Payson v. Burnham, 141 Mass. 547, 6 N. E. 708; Hamlen v. Werner, 144 Mass. 396, 11 N. E. 684; Att'y Gen. v. Ayer, 148 Mass. 584, 20 N. E. 451; Att'y Gen. v. Algonquin Club, 153 Mass. 447, 27 N. E. 2; Smith v. Bradley, 154 Mass. 227, 28 N. E. 14; In re Welsh, 175 Mass. 68, 55 N. E. 1043; Best v. Nagle, 182 Mass. 495; 65 N. E. 842; Sutcliffe v. Eisele, 62 N. J. Eq. 222, 50 A. 69. A piazza attached to a house, whether covered by its own roof or by an extension of the roof of the house, if it projects beyond the line prescribed, violates the restriction or condition against the construction of buildings nearer than a specified distance from the street. Bagnall v. Davies, 140 Mass. 76, 2 N. E. 786; Reardon v. Murphy, 163 Mass. 501, 40 N. E. 854. So does a bay window, one story high and built up from the foundation wall (Kirkpatrick v. Peshine, 24 N. J. Eq. 206), and a porch built upon brick foundations, roofed and permanently attached to the whole front of the house (Ogontz Land & Imp. Co. v. Johnson, 168 Pa. 178, 31 A. 1008). Compare Hawes v. Favor, 161 Ill. 440, 43 N. E. 1076; Graham v. Hite, 93 Ky. 474, 20 S. W. 506. Others forbid the erection of any other buildings on the land conveyed, except dwelling houses and the necessary outbuildings. See Duncan v. Cent. Pass. R. Co., 85 Ky. 525, 4 S. W. 228; Hopkins v. Smith, 162 Mass. 444, 38 N. E. 1122; Fuller v. Arms, 45 Vt. 400. Such conditions or restrictions are violated by putting up a tent, fitted up with a stove and furniture, to be lived in in the daytime temporarily in the summer (Blakemore v. Stanley, 159 Mass. 6, 33 N. E. 689); or by using a portion of the building for a grocery or a meat and vegetable store (Dorr v. Harrahan, 101 Mass. 531, 3 Am. Rep. 398; Cornish v. Wiessman, 56 N. J. Eq. 610, 35 A. 408); or by converting a dwelling into a public eating house (Parker v. Nightingale, 6 Allen [Mass.] 341, 83 Am. Dec. 632); or by carrying on a photograph gallery (Frink v. Hughes [Mich.] 94 N. W. 601). And a condition that only one single dwelling house shall be erected is broken by the erection of a building containing several tenements designed for separate families. Gillis v. Bailey, 17 N. H. 18, 21 N. H. 149. And a condition that no dwelling house should contain more than two tenements, or be constructed for more than two families is broken by the erection of a building with capacity for three families. Ivarson v. Mulvey, 179 Mass. 141, 60 N. E. 477. A condition that the property shall be used for residence purposes only does not prohibit the building of an apartment house, with flats, each complete for housekeeping, but with a large dining room for the use of such occupants as desire it instead of their private dining rooms. McMurtry v. Phillips Inv. Co., 19 Ky. L. R. 2021, 45 S. W. 96. If a building is maintained as a single dwelling house, but is used also as a private institution for the treatment of persons suffering from the liquor and kindred habits, who are boarded and lodged there during treatment, a restriction in the deed conveying the land, that no building other than one single dwelling house shall be maintained on the lot, is not violated. Stone v. Pillsbury, 167 Mass. 332, 45 N. E. 768.

Effect of change in neighborhood: When the conditions of cities greatly change, it is not for the interest of the community that restrictions put upon land in reference to the quiet of residential streets should continue, when the neighborhood is entirely given up to business, unless they are so expressed as plainly to be binding. Boston Baptist Social Union v. Trustees of Boston University, 183 Mass. 202, 66 N. E. 714. If the purpose of restrictive covenants inserted in a conveyance is to make the locality a

with the land[7] and are strictly construed.[8] Nothing will be regarded as a violation thereof that is not in plain disregard of its terms;[9] thus, a covenant against the erection of tenement houses does not forbid the erection of a modern apartment house,[10] nor does a covenant against the erection of a building restrict the erection of a wall.[11] A restrictive covenant in a lease is not violated by a subletting for the forbidden use.[12] They will not be enforced against trivial violations, especially where there has been a substantial violation which has been allowed to remain unmolested;[13] they are terminated when the occasion for them ceases,[14] and are waived by a failure to enforce them,[15] but not by making a more favorable covenant to subsequent grantee of lots in same plat,[16] nor by accepting payment of rent.[17] That restrictive conditions may be available to other grantees of lots in the same plat, a general scheme whereby restrictions were to apply to all the lots must be shown,[18] and such a covenant cannot be enforced by one not an owner within the plat.[19] A covenant which does not pass any estate may be a general scheme which when acted upon will be binding on those joining therein,[20] and a grantee

suitable one for residence, but owing to the general growth of the city and the present use of the whole neighborhood for business, this purpose can no longer be accomplished, no matter how rigidly the restriction is enforced, it is oppressive and inequitable to give effect to it, and equity will not enjoin its violation, though when there is no remedy at law the bill may be retained for the purpose of assessing damages. Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476. See too Roth v. Jung, 79 App. Div. 1, 79 N. Y. S. 822. Equity will refuse to enforce a covenant not to devote a certain property to business purposes where there bas been such a change in the character of the neighborhood by the building of an elevated railway and the increase of business houses, as to defeat the object of the agreement, and render it inequitable to deprive the owner of the privilege of using his property as its surroundings required. Trustees of Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365. And so where there is a covenant against the erection of cheap buildings, if conditions so change that only such buildings are suited to the vicinity, the covenant will not be enforced. Page v. Murray, 46 N. J. Eq. 325, 19 A. 11.—From note to Wakefield v. Van Tassel, 95 Am. St. Rep. 208. See 1 Curr. L. 404.

7. A condition that a deed shall be void if intoxicants are sold on the premises. Jetter v. Lyon [Neb.] 97 N. W. 596. Covenant in a lease against selling liquor. Granite Bldg. Corp. v. Green [R. I.] 57 A. 649.

8. That nothing but a dwelling house should be erected south of the railroad track. Later the track was moved farther north. The covenant did not apply to the strip thus added. Stein v. Lyon, 91 App. Div. 593, 87 N. Y. S. 125. Restrictive building covenants in deeds are to be construed most strongly against the covenantor, but in accordance with the intent of the parties as expressed or implied from surrounding circumstances. Deeves v. Constable, 87 App. Div. 352, 84 N. Y. S. 592.

9. That no dwelling house should be erected not violated by an addition to a church which contained a study and living rooms. Crofton v. St. Clement's Church [Pa.] 57 A. 570. A restriction that no building should be built on the rear 10 feet of a lot is not violated if there is nothing built on it. Id.

10. Laws 1867, c. 9, defining a tenement house, is inapplicable. Kitching v. Brown, 92 App. Div. 160, 87 N. Y. S. 75.

11. Clark v. Lee [Mass.] 70 N. E. 47.

12. Selling liquor. Granite Bldg. Corp. v. Greene [R. I.] 57 A. 649.

13. Bay window in an upper story encroached. Hemsley v. Marlborough Hotel Co. [N. J. Eq.] 55 A. 994.

14. A grantor sold adjoining land with a restrictive covenant that no building should be built within 20 feet of his residence. His successors tore down the residence and put up business building. Held, covenant terminated. Deeves v. Constable, 87 App. Div. 352, 84 N. Y. S. 592.

15. That business would not be carried on on the premises on Sunday. Ocean City Ass'n v. Chalfant [N. J. Eq.] 55 A. 801.

16. A condition on the breach of which the land is to revert to the grantor or his heirs is not waived where in other deeds of lots in the same vicinity the condition referred to the grantor only. Jetter v. Lyon [Neb.] 97 N. W. 596.

17. Granite Bldg. Corp. v. Greene [R. I.] 57 A. 649.

18. Hemsley v. Marlborough Hotel Co. [N. J. Eq.] 55 A. 994. Restrictions in a deed were solely for the grantor's benefit, and there was no mutual covenant on his part to similarly restrict lands remaining in the block. The land of a grantee, released from restrictions, was not subject to an easement in favor of the land of other grantees in the same block. Gebhard v. Addison, 87 App. Div. 375, 84 N. Y. S. 418.

19. Not by a grantee of a lot on the other side of the street. Hemsley v. Marlborough Hotel Co. [N. J. Eq.] 55 A. 994. Where a grantor conveyed by deed containing a restrictive covenant, land on the opposite side of the street from his residence lot, it was held the restriction did not inure to the benefit of his lot. Id.

20. No words of grant in a covenant by which beach front owners permitted the city to build a board walk, with aiding covenant against the erection of building on the ocean side. Atlantic City v. New Auditorium Pier Co. [N. J. Eq.] 58 A. 729.

with actual notice thereof will be restrained from violating it, though his deed was recorded first.[21]

§ 3. *Liability for unsafe condition of premises.*[22]—A municipal corporation is exempt from liability for injuries sustained through its negligence in the management of a building operated by it in its governmental capacity,[23] but private owners[24] and occupants must use ordinary care to keep their premises in such condition that those who come there by invitation may not be exposed to danger,[25] and are liable, though they did not know of the defect, if they could by the exercise of due diligence have discovered it.[26] Where a construction company is engaged in repairing a building which the owner continues to use, the construction company must use reasonable care to protect the employes of the owner.[27] The only duty owed a trespasser is to refrain from willfully injuring him.[28]

It is negligence to leave debris scattered over a yard,[29] or to leave obstacles in such a position that they are liable to fall,[30] but it is not negligence to leave the door of a vacant house open,[31] nor to leave a vacant house without inspection for a month.[32]

Evidence showing the dangerous condition of the premises,[33] or notice thereof,[34] is admissible. The question of contributory negligence is ordinarily for the jury.[35]

§ 4. *Liability for negligent operation of elevators.*[36]—Liability for accidents falls on the party who has control of the elevator.[37]

21. Several beach front owners covenanted that they would not build on the ocean side of a board walk which the city was allowed to build under such covenant. Atlantic City v. New Auditorium Pier Co. [N. J. Eq.] 58 A. 729.

22. See 1 Curr. L. 406.

23. School building. Ernst v. West Covington, 25 Ky. L. R. 1027, 76 S. W. 1089.

Note: Counties are not liable for injuries caused by negligence in construction or maintenance of public buildings. Kincaid v. Hardin County, 53 Iowa, 430, 5 N. W. 589; Hamilton County Com'rs v. Mighels, 7 Ohio St. 109; Sheppard v. Pulaski County, 13 Ky. L. R. 672, 18 S. W. 15; Vigo County Com'rs v. Daily, 132 Ind. 73, 31 N. E. 531; Hill v. Boston, 122 Mass. 344; Eastman v. Meredith, 36 N. H. 284; Hughes v. County of Monroe, 147 N. Y. 49, 41 N. E. 407, 39 L. R. A. 33, note.

24. Stair broke down and injured prospective lessee. Smith v. Jackson [N. J. Law] 56 A. 118.

25. Injury by the breaking of rapidly moving belt in a creamery, which the owners knew was quite liable to break. True v. Meredith Creamery [N. H.] 55 A. 893. Where there was no fault in the construction of a cellar door in the sidewalk, the owner of the premises not in possession is not liable for injuries sustained by one falling into it. Fehlhauer v. St. Louis [Mo.] 77 S. W. 843. Licensee fell down an unguarded cellarway. McHugh v. Kerr [Pa.] 57 A. 520. Injury by breaking of platform scales. McIntyre v. Pfaudler Vacuum Fermentation Co. [Mich.] 95 N. W. 527.

26. Evidence held to show that he should have discovered a defect in platform scales. McIntyre v. Pfaudler Vacuum Fermentation Co. [Mich.] 95 N. W. 527.

27. Gile v. Bishop Co., 184 Mass. 413, 68 N. E. 837.

28. One fell into an excavation. Frederburg v. Bear, 89 Minn. 241, 94 N. W. 683.

29. Where debris, sticks, and stones were lying in a yard, evidence held to show a dangerous condition. Wesener v. Smith, 89 App. Div. 211, 86 N. Y. S. 837.

30. Door taken from its hinges and leaned against a wall fell without being touched, and injured one. Klitzke v. Webb [Wis.] 97 N. W. 901. Chimney had been seen to sway a year before it fell; was not supported or secured in any manner to a nearby wall. Travers v. Murray, 87 App. Div. 552, 84 N. Y. S. 558.

31. Child playing therein was injured by her companion letting a window sash drop on her. O'Connor v. Brucker, 117 Ga. 451, 43 S. E. 731.

32. Gas leakage caused explosion. Consol. Gas Co. v. Getty, 96 Md. 683, 54 A. 660. Where a policeman presented a lighted candle at a cellar opening in a vacant house, thereby causing an explosion of gas, any negligence was not imputable to the owner. Id.

33. A diagram showing location of a cellar door in a store is admissible. Franklin v. Engel [Wash.] 76 P. 84. Where all testimony was that stringers would last for five years, an instruction that ordinary experience ought to have advised a prudent man that they would not last so long was erroneous. McIntyre v. Pfaudler Vacuum Fermentation Co. [Mich.] 95 N. W. 527.

34. That the trap door had been open many times and the proprietor of the store had been told to look out for it. Franklin v. Engel [Wash.] 76 P. 84.

35. Where one fell over debris scattered in a yard. Wesener v. Smith, 89 App. Div. 211, 85 N. Y. S. 837. Customer, with defective eyesight, as proprietor knew, was told to go to back of store for goods, and fell through trap door. No sufficient warn-

Some courts seem to hold that operators of elevators must use that degree of care required of common carriers of passengers,[38] but others require only the highest degree that a prudent person would exercise under the same circumstances,[39] and others merely the exercise of ordinary care,[40] and this only toward those on the premises by invitation.[41] Where an occupant directs one on his premises by invitation to use an unsafe elevator, he is liable for injuries sustained.[42] The operator must give a passenger a reasonable opportunity to alight,[43] and negligence in attempting to alight is no defense where the passenger is injured through the subsequent gross negligence of the operator.[44]

Elevator shafts in rooms where customers or visitors are liable to go must be guarded;[45] but to show negligence it must appear that the opening was so situated as to be dangerous,[46] and that persons injured were on the premises by the express or implied invitation of the owner.[47] The question of negligence is ordinarily one for the jury.[48]

While it is ordinarily true that one who walks into an open elevator well is guilty of contributory negligence,[49] the contrary may be shown,[50] and it is generally a question for the jury.[51]

ing. Held no contributory negligence. Brown v. Stevens [Mich.] 99 N. W. 12.

36. See 1 Curr. L. 409.

37. Where an owner of a building took care of the elevators, testimony of a lessee of a part of the building held sufficient to show that the elevator was within his control. Humphreys v. Portsmouth T. & G. Co., 184 Mass. 422, 68 N. E. 836. The grantor in a deed of trust who constitutes the trustee his attorney in fact to take charge of the building remains the principal of an elevator operator employed by the trustee. Luckel v. Century Bldg. Co., 177 Mo. 608, 76 S. W. 1035.

38. Where an iceman was directed to use a freight elevator, petition for injuries held not to allege the relation of passenger and carrier, and owner was liable only for ordinary care. Downs v. Seeley [Conn.] 56 A. 602.

39. Where a passenger was caught in the door of an elevator and injured by its moving up and down, evidence held to show negligence. Luckel v. Century Bldg. Co., 177 Mo. 608, 76 S. W. 1035.

40. Burgess v. Stowe [Mich.] 96 N. W. 29.

41. Not to one on his premises doing business with his servants. Muench v. Heinemann, 119 Wis. 441, 96 N. W. 800. Whether opening the gate and calling "elevator" was an invitation to enter was a question for the jury. Burgess v. Stow [Mich.] 96 N. W. 29.

42. Ford v. Crigler, 25 Ky. L. R. 66, 74 S. W. 661.

43. Luckel v. Century Bldg. Co., 177 Mo. 608, 76 S. W. 1035.

44. Caught between the roof of the car and floor of the building. Luckel v. Century Bldg. Co., 177 Mo. 608, 76 S. W. 1035.

45. Shaft in a dark storage room. Evidence held sufficient to show negligence. Reid v. Linck, 206 Pa. 109, 55 A. 849. Evidence that other persons had previously fallen down the shaft was admissible. Id. Employe fell through and was killed. Hillebrand v. Standard Biscuit Co., 139 Cal. 233, 73 P. 163. Where an employe of a tenant of a building was injured by falling down the shaft of an elevator, the door of which was open, the landlord being obligated by lease to carry tenants only, held, the landlord owed the employe the duty of exercising reasonable care in guarding the shaft. Breuer v. Frank, 2 Ohio N. P. (N. S.) 69. Trapdoor over elevator shaft in middle of store floor left open, people standing round and plaintiff, a customer, not sufficiently warned. Held negligence. Brown v. Stevens [Mich.] 99 N. W. 12. Elevator in dark corner of hotel office, almost impossible to see into shaft in daytime, door partly open and car down, sufficient to show negligence. Bremer v. Pleiss [Wis.] 98 N. W. 945. Where a boy five years old fell down an open elevator shaft in a store building, evidence held to show negligence. Hayes v. Pitts-Kimball Co., 183 Mass. 262, 67 N. E. 249.

46. Goods in dimly lighted room in wholesale house, arranged to leave passageway to elevator. Evidence sufficient to show negligence. Wilsey v. Jewett Bros. & Co., 122 Iowa, 315, 98 N. W. 114. Where a strange boy opened the door of an elevator shaft, and a licensee fell down it, evidence showed that the negligence of having an elevator shaft, the door of which was often open, was not the proximate cause of this injury. Cole v. German Sav. & Loan Soc. [C. C. A.] 124 F. 113. Statutes requiring signals to be attached to elevators not so protected as to be inaccessible from without is inapplicable where injuries were caused by pushing open a trap door. Gen. Laws 1896, c. 108. Gallowshaw v. Lonsdale Co. [R. I.] 66 A. 932.

47. Retail clerk came to wholesale house to get goods. Not a trespasser and used ordinary care. Wilsey v. Jewett Bros. & Co., 122 Iowa, 315, 98 N. W. 114.

48. Where the operator's testimony was that he saw the passenger caught in the door, it was not error to refuse to direct a verdict. Luckel v. Century Bldg. Co., 177 Mo. 608, 76 S. W. 1035. A finding that one was invited to pass over an automatic trap door was not justified. Connors v. Merchants' Mfg. Co., 184 Mass. 466, 69 N. E. 218.

49. Humphreys v. Portsmouth T. & G. Co., 184 Mass. 422, 68 N. E. 836. Evidence showed hotel guest familiar with elevator guilty of contributory negligence in going into a

Points already covered need not be made the subject of a subsequent instruction.[52]

Admissions of the owner of the way in which the accident was caused are admissible,[53] but it was no error to refuse a question relative to signals, where the statute requiring them was recently enacted and the person injured had no notice of it.[54] To hold an owner liable on imputed knowledge, the facts constituting it must be clearly alleged, especially where he suffers a default.[55]

BURGLARY.

§ 1. What Constitutes (578).
§ 2. Indictment and Proof Thereunder (579).
§ 3. Evidence. Sufficiency (581).
§ 4. Instructions and Verdict (582).

§ 1. *What constitutes.*[56] *Breaking and entry.*[57]—To constitute a breaking, defendant's acts must have made an entry possible.[58] Unlocking[59] or otherwise unfastening doors[60] is sufficient. An entry which is not in itself a trespass may be sufficient, if made with felonious intent.[61]

shaft when car was not there. Bremer v. Pleiss [Wis.] 98 N. W. 945. Where a servant was injured by the automatic opening of a trap door covering an elevator shaft, evidence held to show contributory negligence. Connors v. Merchants' Mfg. Co., 184 Mass. 466, 69 N. E. 218.

50. Where a five-year-old boy, visiting a store with his grandmother, went away from her and fell down an open elevator well, evidence held insufficient to show contributory negligence. Hayes v. Pitts-Kimball Co., 183 Mass. 262, 67 N. E. 249. Where a new employe fell down an open elevator well, located in a dark place, evidence held to show that be was in the exercise of due care. Humphreys v. Portsmouth T. & G. Co., 184 Mass. 422, 68 N. E. 836.

51. Whether an employe was guilty of contributory negligence in stepping on a trap door over an elevator shaft was for the jury. Hillebrand v. Standard Biscuit Co., 139 Cal. 233, 73 P. 163. A submission of all the evidence of contributory negligence is sufficient, and it is no error to refuse to charge certain parts thereof. Hayes v. Pitts-Kimball Co., 183 Mass. 262, 67 N. E. 249. Whether one who stepped into an elevator well when the owner opened the gate and called "elevator" was guilty of contributory negligence was for the jury. Burgess v. Stowe [Mich.] 96 N. W. 29.

52. Relative to operator's and passenger's duty. Luckel v. Century Bldg. Co., 177 Mo. 608, 76 S. W. 1035. It was not error to refuse to instruct that recovery could not be had because of the defective shaft, where the court had already instructed that recovery could not be had unless entrance to the elevator was made at the owner's invitation. Burgess v. Stowe [Mich.] 96 N. W. 29.

53. Manner in which a pulley was attached to the ceiling. Muench v. Heinemann, 119 Wis. 441, 96 N. W. 800.

54. Stat. 1901, c. 439. Connors v. Merchants' Mfg. Co., 184 Mass. 466, 69 N. E. 218.

55. Downs v. Seeley [Conn.] 56 A. 502.

56. Note: Burglary is an offense against the security of the dwelling house or habitation. It is the possession that is invaded, and the crime is not against the buildings as property. State v. Toole, 29 Conn. 342, 76 Am. Dec. 602; Anderson v. State, 48 Ala. 665, 17 Am. Rep. 36. The rule may of course be changed by statute, as in Wisconsin, where the offense is held to be affecting real estate. Neubrandt v. State, 53 Wis. 89, 9 N. W. 824. Citations from People v. Richards [N. Y.] 2 Am. St. Rep. 383. See 1 Curr. L. 411.

57. Note: The breaking may be actual or constructive. Clarke v. Com., 25 Grat. [Va.] 908. Among acts which have been held to constitute a sufficient breaking are: pushing open closed door (State v. Reid, 20 Iowa, 413); opening door secured by chain hooked to nail (State v. Hecox, 83 Mo. 531); opening closed blinds (Com. v. Stephenson, 8 Pick. [Mass.] 354); pushing up trap door (Harrison v. State, 20 Tex. App. 387, 54 Am. Rep. 529). See also, State v. Boon, 35 N. C. (13 Ired.) 244, 57 Am. Dec. 555; Rolland v. Com., 85 Pa. 66, 27 Am. Rep. 626; Walker v. State, 63 Ala. 49, 35 Am. Rep. 1. For cases holding there was no breaking, see: Com. v. Strupney, 105 Mass. 588, 7 Am. Rep. 556; State v. Kennedy, 16 Mo. App. 287; Green v. State, 68 Ala. 539; Timmons v. State, 34 Ohio St. 426, 32 Am. Rep. 376. Citations from People v. Richards [N. Y.] 2 Am. St. Rep. 385, 386. See 1 Curr. L. 411.

58. Removing window strip only. Gaddie v. Com., 25 Ky. L. R. 1585, 78 S. W. 162.

59. With intent to steal personalty therein. State v. Peebles [Mo.] 77 S. W. 518.

60. Removing a button from an outer, and a slab from an inner, door of a chicken house. State v. Helms [Mo.] 78 S. W. 592.

61. Entry of a store during business hours with intent to commit larceny. The statute read: "Every person who enters * * * with intent," etc. People v. Brittain, 142 Cal. 8, 75 P. 314.

Note. The following are somewhat novel cases: Where defendant, in the nighttime, bored holes through the walls of a granary so that wheat was forced through by its own weight, the defendant taking away and selling the grain, it was held that there was a sufficient entry, and an intent to steal within the granary was sufficiently shown. State v. Crawford, 8 N. D. 539, 80 N. W. 193, 46 L. R. A. 312. A servant having a right to lodge in his master's house is guilty

Intent.[62]—Felonious intent in breaking and entry is essential.[63] Such intent may be inferred from the breaking, entry and carrying away of property.[64]

The degree of the offense is made by statutes to depend on the time of, or special circumstances attending, its commission,[65] and on this issue the mental condition of defendant, such as intoxication, is irrelevant, being relevant only on an issue of intent.[66]

Accomplices.[67]—One who aids or abets in the breaking and entry,[68] or in concealment of the stolen property,[69] will be treated as an accomplice. Mere receipt of stolen goods without knowledge of the theft will not make one an accomplice in the burglary.[70] The accomplice of one who breaks and enters a building may be convicted of an attempt to break and enter a building.[71]

Nature and situation of building.[72]—One charged with burglary of a dwelling house may be convicted on proof of burglary of a barn within the curtilage.[73] A hotel is a building within the meaning of a statute defining burglary as a breaking or entering a dwelling house "or other building."[74] To constitute the offense of burglary of a private residence,[75] the family need not be personally present at the time of the burglary.[76] A flat car is not a "railroad car" within the meaning of a burglary statute.[77]

§ 2. *Indictment and proof thereunder.*[78]—The sufficiency of the indictment[79] will of course be determined by reference to the statute under which it was drawn.[80] If an indictment charging larceny from the house is good under either

of burglary if he opens a closed door or raises a sash and enters the building, not for the purpose of using the house as a lodging place, but with intent to steal his master's goods. State v. Howard, 64 S. C. 344, 42 S. E. 173, 58 L. R. A. 685.

62. See 1 Curr. L. 411.

63. State v. Tough [N. D.] 96 N. W. 1025. Intent to commit rape. State v. Worthern [Iowa] 100 N. W. 330.

64. State v. Peebles [Mo.] 77 S. W. 518.

65. Day or nighttime in California. People v. Dowell, 141 Cal. 493, 75 P. 45. Breaking into a chicken house is burglary in the second degree, regardless of the purpose for which the chickens were kept there. State v. Helms [Mo.] 78 S. W. 592.

66. People v. Dowell, 141 Cal. 493, 75 P. 45.

67. See 1 Curr. L. 829, n. 87-92.

68. State v. Peebles [Mo.] 77 S. W. 518. An accomplice must have been present and must have known the unlawful intent of the principal. Glenn v. State [Tex. Cr. App.] 76 S. W. 757. Conviction for breaking and entering an office, not adjoining to or occupied with a dwelling house, in the nighttime, affirmed, the proof showing accused aided and abetted in commission of the offense. People v. McDonald [Mich.] 94 N. W. 1064.

69. A sister who assisted in hiding stolen goods after the burglary. McDaniel v. State [Tex. Cr. App.] 81 S. W. 301.

70. Though the circumstances were such as to put him on inquiry. Short v. Com., 25 Ky. L. R. 451, 76 S. W. 11.

71. Sufficiency of instruction on the point. State v. Mahoney [Iowa] 97 N. W. 1089.

72. See 1 Curr. L. 411.

73. A statute (Pub. Acts 1899, No. 34, p. 50), providing punishment for burglary of barn or outbuilding, did not change the common law of burglary. People v. Griffith [Mich.] 95 N. W. 719.

74. Bruen v. People, 206 Ill. 417, 69 N. E. 24.

75. The punishment for burglary in the daytime is not changed by the fact that the building burglarized was a private residence. Holland v. State [Tex. Cr. App.] 74 S. W. 763.

76. Under White's Ann. Pen. Code, art. 485c. Handy v. State [Tex. Cr. App.] 80 S. W. 526.

77. 2 Ball. Ann. Codes & St. § 7104. Wheat loaded on a flat car and covered with a tarpaulin fastened to sides of car was stolen. Held, not burglary. State v. Petit, 32 Wash. 129, 72 P. 1021.

78. See 1 Curr. L. 411.

79. Indictment held to sufficiently charge the intent to commit rape. State v. Staton, 133 N. C. 642, 45 S. E. 362.

80. An indictment charging that defendant, in the nighttime, having in his possession certain implements of burglary, did attempt to commit the crime of burglary while unlawfully attempting to break and enter a store, charges an attempt, and not merely an intent, to commit the crime [2 Ball. Ann. Codes & St. §§ 7106, 7437]. State v. Garbe [Wash.] 75 P. 993. An indictment for breaking and entering a dwelling with intent to commit a felony therein is not duplicitous for charging in the same count that accused was armed with a dangerous weapon and made an actual assault upon a person who was lawfully in the dwelling (Davis v. State [Fla.] 35 So. 76), nor is such indictment had on motion to quash, though the allegations as to the dangerous weapon are insufficient, if the assault is sufficiently set out [Acts 1895, c. 4405, p. 167] (Id.). If the building is a permanent and substantial structure, the indictment need not allege that it was especially constructed to keep the goods stolen [Code, § 4417 construed]. Smith v. State [Ala.] 37 So. 157. Under a statute defining burglary generally and fix-

of two sections of the statute, the court may treat it as drawn under either.[81] No distinction need be made in the indictment between defendants who are principals.[82] An indictment which, after stating the county, alleges that defendant did "then and there," commit the offense, sufficiently alleges the venue of the burglary.[83] An indictment to meet anticipated proof may charge night and day burglary in different counts.[84] Ownership of the building burglarized must be alleged and proved[85] unless it is otherwise sufficiently described, so that defendant cannot be misled.[86] Where the complaint and information both identify a building by street and number, there is no variance, though the terms of the description are not otherwise identical.[87] Where two or more persons own the property in common or jointly, the ownership may be alleged as in either or all.[88] An indictment for burglary of community property must allege ownership in the husband.[89] Ownership of the property in the building, which it is charged accused intended to steal, need not be alleged;[90] but, if alleged, must be proved as laid, and a failure to do so constitutes a fatal variance.[91]

Sufficiency of proof; variance.[92]—Proof of commission of the crime on a day other than that charged is sufficient if the defendant is not thereby prejudiced.[93] Occupancy and possession is all that is required to prove ownership in burglary.[94] A slight variance between the allegations of the indictment or information and the proof as to the description[95] or ownership[96] of the premises burglarized will be disregarded if the defendant is not thereby prejudiced.[97] Where defendant is charged with an attempt to break and enter a building, proof of an actual breaking and entry is not a variance, but establishes the attempt.[98] There may be a conviction under an indictment charging a statutory burglary, though the evidence shows the greater offense of common-law burglary, since such conviction would sustain a plea of former jeopardy upon an indictment for burglary based on the

ing a punishment therefor, with a proviso for longer minimum imprisonment if the crime is committed at night, there is no variance between an indictment alleging the crime generally and proof of its commission at night. Bruen v. People, 206 Ill. 417, 69 N. E. 24. An indictment for burglary for breaking and entering a railroad car with intent to steal will sustain a conviction for entering a railroad car with intent to steal. Under Rev. Codes 1899, §§ 7406, 7411. State v. Tough [N. D.] 96 N. W. 1025.

81. The offense being a misdemeanor and punishable as such [Penal Code 1895, §§ 178, 179, 182]. Heard v. State [Ga.] 48 S. E. 311.

82. One who actually breaks and enters a house and steals therefrom, and his confederate, who stands near and watches these acts, are principals in the second degree. McWhorter v. State, 118 Ga. 55, 44 S. E. 873.

83. Cabellero v. State [Tex. Cr. App.] 80 S. W. 1014.

84. Miller v. State [Tex. Cr. App.] 77 S. W. 800.

85. An allegation that the building was the depot of a named railway without alleging it was a corporation which owned the depot, insufficient. State v. Horned [Mo.] 76 S. W. 953. Ownership of hotel by partners held sufficiently established. Bruen v. People, 206 Ill. 417, 69 N. E. 24.

86. Street number given. People v. Price [Cal.] 77 P. 73.

87. People v. Price [Cal.] 77 P. 73.

88. No variance where alleged to be in one and proven to be jointly in two [Code Cr. Proc. 1895, art. 445]. Mass v. State [Tex. Cr. App.] 81 S. W. 45.

89. Where indictment alleged ownership in wife and evidence showed community property, there was a fatal variance. Jones v. State [Tex. Cr. App.] 80 S. W. 630.

90, 91. Crosky v. State [Fla.] 35 So. 153.

92. See 1 Curr. L. 411, 412, n. 26, 27.

93. State v. Rogers [Mont.] 77 P. 293. 18th or 19th of March. State v. Bates [Mo.] 81 S. W. 408.

94. Scoville v. State [Tex. Cr. App.] 81 S. W. 717.

95. Indictment charged burglary of a private residence and proof showed burglary of a room in a hotel used as a private residence. Holland v. State [Tex. Cr. App.] 74 S. W. 763. A low partition divided a room into two and each had a front door, and the information charged burglary of one side and the proof showed entry on that side and taking goods from the other. State v. Peebles [Mo.] 77 S. W. 518. Where an information sufficiently described the place of the burglary without the number of the room, proof of the number was unnecessary, though included in the information. People v. Kelso, 142 Cal. 336, 75 P. 904.

96. Proof that two brothers occupied a house burglarized, and one paid the rent, will support an allegation of ownership in either. Scoville v. State [Tex. Cr. App.] 81 S. W. 717.

97. State v. Rogers [Mont.] 77 P. 293.

98. State v. Mahoney [Iowa] 97 N. W. 1089.

same facts.[99] Where burglary of a private residence in the daytime and nighttime are made separate offenses and an indictment alleges both in different counts, but the evidence clearly showed burglary in the nighttime, it was error to submit the issue of burglary in the daytime.[1]

§ 3. *Evidence. Sufficiency.*[2]—Recent unexplained possession of goods shown to have been feloniously taken by means of a burglary is prima facie evidence of guilt of burglary,[3] providing the jury find that the breaking and entering and stealing of the goods were parts of the same transaction.[4] This prima facie showing is not a presumption requiring, but only authorizing, conviction,[5] and it may be overcome by a reasonable explanation of his possession.[6] Mere possession of recently stolen property, without evidence of a breaking, is not sufficient.[7] But the evidence need not show immediate, actual possession of the goods at the time when defendant was taken.[8] Proof of the possession of stolen property by defendant places on him the burden of explaining his possession,[9] and the giving of a reasonable explanation does not place on the state the burden of proving such explanation false.[10] The identity of the stolen goods, having no distinctive earmarks, may be established by coincidence in quantity and kind.[11] The elements of the crime,[12] the fact of its commission by defendant,[13] and the fact that it was committed within the limitation period,[14] may be shown by circumstantial evidence. For sufficiency of evidence in particular instances, see cases cited in note.[15]

Admissibility.[16]—Evidence as to the location of stolen property,[17] or as to keys,[18] or other property found in defendant's possession at time of arrest,[19] and of his conduct and statements at that time,[20] is competent, and the property itself

99. State v. Staton, 133 N. C. 642, 45 S. E. 362.

1. Jones v. State [Tex. Cr. App.] 80 S. W. 530.

2. See 1 Curr. L. 412.

3. Instruction upheld and conviction affirmed. People v. Lang, 142 Cal. 482, 76 P. 232.

4. State v. Brady, 121 Iowa, 561, 97 N. W. 62.

5. State v. Brady, 121 Iowa, 561, 97 N. W. 62. Conviction sustained when possession of stolen goods traced to defendant. Short v. Com., 25 Ky. L. R. 451, 76 S. W. 11. Possession of a pocketbook stolen at same time watch was taken by burglar. State v. Hullen, 133 N. C. 656, 45 S. E. 513. Evidence circumstantial and main circumstance being recent, possession of the stolen property will not prevent sustaining conviction. Davis v. State [Tex. Cr. App.] 74 S. W. 919.

6. Lovelace v. State [Tex. Cr. App.] 76 S. W. 756. If the jury believe the explanation by defendant of his possession of such property is reasonably and probably true, they should acquit him. McCoy v. State [Tex. Cr. App.] 81 S. W. 46.

7. Strickland v. State [Tex. Cr. App.] 78 S. W. 689.

8. Perry v. State [Tex. Cr. App.] 78 S. W. 513.

9. Evidence sufficient to support conviction. State v. Raphael [Iowa] 99 N. W. 151.

10. Instruction disapproved. Dyer v. State [Tex. Cr. App.] 77 S. W. 456.

11. Conviction affirmed. Jordan v. State, 119 Ga. 443, 46 S. E. 679.

12. The breaking and entry as well as the intent may be shown by circumstantial evidence. State v. Peebles [Mo.] 77 S. W. 518.

13. Circumstantial evidence sufficient. Jones v. Com., 25 Ky. L. R. 2062, 79 S. W. 1188. Circumstantial evidence showing possession of stolen goods and other circumstances sufficient. Brown v. State [Tex. Cr. App.] 78 S. W. 936.

14. Where, on a trial in December, 1903, there was evidence that "recently during the first week in November" the store of the witness was broken and entered and goods stolen, it was sufficiently shown. Jordan v. State, 119 Ga. 443, 46 S. E. 679.

15. Evidence held to sustain conviction. Miller v. State [Tex. Cr. App.] 77 S. W. 800. Evidence insufficient to connect defendant with the crime. State v. King, 174 Mo. 647, 74 S. W. 627. Where evidence was hearsay and uncorroborated testimony of accomplice, conviction not sustained. Frazier v. Com., 25 Ky. L. R. 461, 76 S. W. 28.

16. See 1 Curr. L. 411.

17. Testimony that witness told prosecutor where money was placed was properly admitted, witness not stating what was said. Washington v. State [Tex. Cr. App.] 77 S. W. 810.

18. Where burglary of a hotel was charged, evidence of possession of keys to rooms in two other hotels and to a room in the hotel burglarized was admissible. Bruen v. People, 206 Ill. 417, 69 N. E. 24.

19. Kennedy v. State [Neb.] 99 N. W. 645. On the trial of one of three men arrested for the same burglary, it is competent to show what property was found on the persons of all three. People v. Wilson [Mich.] 95 N. W. 536. Evidence of the possession of property taken from another defendant, associated in committing the crime with defendant, it being shown that the property was originally taken from the premises at the time of the burglary, was

so found is admissible.[21] Evidence of other similar offenses is inadmissible unless some connection with the offense charged is shown.[22] But where there were two or more burglaries at about the same time, evidence as to one may be admitted on trial of another when a part of the res gestae and tending to connect defendant with the offense charged.[23] The condition of the house at the time defendant was seen leaving it may be shown,[24] but evidence by prosecuting witness that since the burglary he put a lock on the door and carried the key is inadmissible to show he had control at the time of the burglary.[25] A confession is admissible if not extorted by fear and violence.[26]

§ 4. *Instructions and verdict.*[27]—The defendant is entitled to an instruction to the jury on the definition of the crime he is charged with intending to commit.[28] Instructions based on defendant's testimony,[29] or statements testified to by another witness,[30] or on defendant's theory of the case,[31] should usually be given. As to propriety of instructions on particular issues,[32] or the necessity of a charge based on circumstantial evidence,[33] see cases cited in the notes.

One indicted for burglary and larceny may be convicted of larceny only,[34] or may be convicted of burglary and acquitted of the accompanying larceny.[35] A verdict of 30 years confinement for burglary of a private residence is not a "cruel and unusual punishment."[36] The value of the property stolen is immaterial in fixing the punishment.[37] A verdict that "the jury find defendant guilty as charged in the indictment, assess his punishment in the penitentiary for two years," is suffi-

admissible. Mass v. State [Tex. Cr. App.] 81 S. W. 46.

20. Evidence held to sustain verdict of guilty. Kennedy v. State [Neb.] 99 N. W. 645.

21. Johnson v. State [Tex. Cr. App.] 76 S. W. 925.

22. Subsequent burglary, not shown to have any connection with the offense charged. McCoy v. State [Tex. Cr. App.] 81 S. W. 47. That the same house had been broken into before. Glenn v. State [Tex. Cr. App.] 76 S. W. 757.

23. Bits taken from blacksmith shop used in gaining entrance to storehouse and bits and property taken from storehouse found close together and where defendant was seen. Perry v. State [Tex. Cr. App.] 78 S. W. 513. Evidence that a store was entered by the use of bits of the same size as those taken from another building and later found near where defendant had been seen with stolen property, admissible. Conviction sustained. Id. On trial for burglary and larceny, evidence of other offenses by defendant in the same town on the same day is admissible to show defendant's presence in the town and to identify him. State v. Bates [Mo.] 81 S. W. 408.

24. Washington v. State [Tex. Cr. App.] 77 S. W. 810.

25. Johnson v. State [Tex. Cr. App.] 76 S. W. 925.

26. Accused was taken to the store; he was charged with burglarizing, and kept there a day and a half, and confessed on the way to jail. State v. Robertson, 111 La. 35, 35 So. 375.

27. See 1 Curr. L. 412.

28. Breaking and entering with intent to "steal." State v. Tough [N. D.] 96 N. W. 1025.

29. Error to refuse an instruction based on testimony regarding defendant's explanation of his possession of stolen property. Gather v. State [Tex. Cr. App.] 81 S. W. 717. Sufficiency of instruction on defendant's testimony. Fields v. State [Tex. Cr. App.] 74 S. W. 309.

30. Proper to instruct as to consideration of statements of defendant testified to by a witness. State v. Chappell [Mo.] 78 S. W. 585.

31. Instruction presenting defendant's theory of the case not given. Simmons v. State [Tex. Cr. App.] 74 S. W. 762.

32. An instruction charging that defendant must show he came into possession of stolen goods "honestly and fairly" is erroneous, since he need only show he acquired them by some means not connected with the crime charged. State v. Brady, 121 Iowa, 561, 97 N. W. 62. An instruction that the venue must be proven and that it must be proven beyond a reasonable doubt that defendant broke and entered with intent to commit the crime of rape therein was proper. State v. Worthen [Iowa] 100 N. W. 330. A charge on defendant's alibi which assumed the house had been burglarized was not prejudicial where the jury had been instructed to find all the elements of burglary before finding defendant guilty. Davis v. State [Tex. Cr. App.] 74 S. W. 919.

33. Held not necessary. Holland v. State [Tex. Cr. App.] 74 S. W. 763; Fields v. State [Tex. Cr. App.] 74 S. W. 309.

34. State v. Bates [Mo.] 81 S. W. 408.

35. State v. Helms [Mo.] 78 S. W. 592.

36. Under White's Ann. Pen. Code, art. 485c., and Const. art. 1, § 13. Handy v. State [Tex. Cr. App.] 80 S. W. 526.

37. Acts 1895, c. 285, p. 365, providing imprisonment for not more than one year for larceny, when the value of the property is less than $20, has no application to "larceny from the dwelling by breaking and

ciently intelligible.[38] Where the indictment charges day and night burglary in different counts, a verdict of guilty will be imputed to the count justified by the evidence.[39]

CANALS.[40]

The right of eminent domain when given to a canal company is, as in all cases, strictly limited in its exercise to the terms of the grant.[41] Where a canal is a public highway, the abandonment of a part of it will not affect the status of what remains in use.[42] By observing certain conditions, railroad companies have the right to bridge canals,[43] but the fact that such conditions will be violated cannot be raised on an appeal from an order granting the right to erect the bridge.[44] The transferee of the state succeeds to the duties of the state with respect to the canal.[45]

A canal company is liable for damages by flooding the lands of abutting owners,[46] though the work be not negligently done,[47] and such damages are not awarded in condemnation proceedings.[48] Liability for negligence does not arise from a failure to guard a canal.[49]

Whether the exercise by a transferee of a franchise granted to the original company is ultra vires is a question between the state and purchaser.[50]

entering in the daytime." State v. Hullen, 133 N. C. 656, 45 S. E. 513.

38. Cabellero v. State [Tex. Cr. App.] 80 S. W. 1014.

39. Miller v. State [Tex. Cr. App.] 77 S. W. 800; State v. Lewis [Mo.] 79 S. W. 671.

40. **Franchise by compact between states:** Where a compact entered into between Virginia and North Carolina (2 Rev. St. p. 225) declared canal franchises granted to be irrevocable without the consent of both states, a Virginia corporation to which such franchises had been granted without the consent of North Carolina could not justify an enterprise thereunder. Pinnix v. Lake Drummond Canal & Water Co., 132 N. C. 124, 43 S. E. 578.

41. Act 1790, § 10 provided that a canal company might condemn a right of way not exceeding a certain width. Held, where it did not appear what amount was condemned, it was limited to the extent of its use. Pinnix v. Lake Drummond Canal & Water Co., 132 N. C. 124, 43 S. E. 578.

42. A company by authority of Laws 1899, c. 469, sold a portion of its canal and abandoned the remainder. New York Cement Co. v. Consolidated Rosendale Cement Co. [N. Y.] 70 N. E. 451. Patrons have the same rights in the portion in use as they had prior to abandonment. Id.

43. Where a railroad company is authorized to condemn easements of crossings, it should be permitted to institute proceedings without interference from the trustees appointed by the court having control of the canal. Chesapeake & O. Canal Co. v. Western Md. R. Co. [Md.] 58 A. 34.

44. The canal was under control of the circuit court and the company would have been in contempt had it instituted condemnation proceedings without the order. Chesapeake & O. Canal Co. v. Western Md. R. Co. [Md.] 58 A. 34. The right to build bridges across her basins may be granted to the extent that the city is concerned. Capdevielle v. New Orleans & S. F. R. Co., 110 La. 904, 34 So. 868.

45. To maintain bridges over the canal, as P. L. 75, made this the duty of the canal commissioners. Book v. Pennsylvania R. Co., 207 Pa. 138, 56 A. 352.

46. In widening its canal, it filled up plaintiff's ditch, caused large amounts of mud and sand to be thrown on his land. Pinnix v. Lake Drummond Canal & Water Co., 132 N. C. 124, 43 S. E. 578. Evidence held sufficient to authorize a recovery of damages by a landowner by reason of a flood caused by insufficient opening in an aqueduct. Greeley v. State, 88 N. Y. S. 468. On a claim for damages caused by leakage, evidence held to show that some damage was sustained. Crowley v. State, 90 App. Div. 613, 85 N. Y. S. 1027. Laws 1894, c. 338, providing that damages resulting from management of canals may be recovered from the state, renders the state liable for its failure to provide opening in an aqueduct across a stream of sufficient capacity to meet extraordinary conditions. Greeley v. State, 88 N. Y. S. 468.

In an action for injuries to land, evidence that the superintendent told plaintiff, whose land had been injured, that he could not drain into the canal unless he sold some land to the company, was admissible. Bullock v. Lake Drummond Canal & Water Co., 132 N. C. 179, 43 S. E. 593. Effect of improvements on land adjoining that which was injured, immaterial. Id.

47. Pinnix v. Lake Drummond Canal & Water Co., 132 N. C. 124, 43 S. E. 578.

48. Evidence thereof was inadmissible where the condemnation proceedings were not pleaded. Turpen v. Turlock Irr. Dist., 141 Cal. 1, 74 P. 295.

49. Maintenance of unguarded canal is not negligence so as to render the company liable for death of a child five years old, who was drowned therein. McCabe v. American Woolen Co., 124 F. 283.

50. New York Cement Co. v. Consolidated R. Cement Co. [N. Y.] 70 N. E. 451.

CANCELLATION OF INSTRUMENTS.[51]

§ 1. **Nature of Remedy (584).**
§ 2. **Cause of Action and Grounds for Relief (585).** Conditions Precedent (587). Laches (588). Effect of Death of Party (589). Evidence and Proof (589).
§ 3. **Procedure (590).** Pleading (590). Parties (590).

§ 1. *Nature of remedy.*[52]—The suit for cancellation or annulment of instruments or contracts is a purely equitable remedy,[53] and cannot be maintained or brought in a court of law.[54] Having acquired jurisdiction in a suit for cancellation, the equity court will retain it to settle the equities between the parties,[55] and may grant relief upon both equitable and legal rights,[56] providing legal relief is asked for in the prayer,[57] and necessary facts are pleaded.[58] But the court cannot grant relief inconsistent with the cause of action pleaded,[59] or based on findings unwarranted by the evidence or the prayer for relief.[60] On the other hand, cancellation may be granted in a suit brought for another purpose, the prayer being for general relief and the proof warranting such a decree.[61]

51. **The title includes** cases in which cancellation of such instruments as deeds or mortgages of real property, leases, chattel mortgages, insurance policies and promissory notes has been sought, or in which the annulment or rescission of contracts has been the relief sought.

The titles Fraudulent Conveyances, 2 Curr. L. 116; **Fraud and Undue Influence,** 2 Curr. L. 104, and **Mistake and Accident,** 2 Curr. L. 903, respectively treat of the nature, elements and effect of fraud such as will avoid a transfer to defeat creditors and purchasers in good faith, of fraud or undue influence having a like effect between the parties, and of mistake and accident having that effect.

52. See 1 Curr. L. 413.

53. Where the execution of many notes grew out of the same transaction, equity had jurisdiction to entertain suit by all the makers for their cancellation. Notes by 57 persons fraudulently obtained by railway corporation about to build through the town. Mobile, J. & K. C. R. Co. [Miss.] 36 So. 82. Equity has jurisdiction to cancel promissory notes for total failure of consideration and to enjoin an action at law thereon. Womelsdorf v. O'Connor, 53 W. Va. 314, 44 S. E. 191. Federal court has jurisdiction as a court of equity to cancel a policy of insurance, notwithstanding a Missouri statute (Rev. St. 1899, § 7890), declaring that misrepresentation in procuring a policy shall be a question for the jury. Union Life Ins. Co. v. Riggs, 123 F. 312.

54. Replevin will not lie to correct, modify or cancel a contract. Cattle sought to be recovered, which had been wrongfully sold by one in possession under a written contract. Penton v. Hansen, 13 Okl. 450, 73 P. 843. Cancellation of mortgage notes was asked in a court of law, and refused. Twogood v. Allee [Iowa] 99 N. W. 288. Under the Georgia statutes, a city court, having no jurisdiction to grant affirmative equitable relief, cannot entertain a suit to set aside an assignment. Ehrlich & Bro. v. Shuptrine, 117 Ga. 882, 45 S. E. 279.

55. Property conveyed in consideration of love and affection and support by grantee, the only daughter of grantor. Grantee died and her husband refused to further perform. The court refused to rescind, but took charge of the property so as to insure support for the grantor, and preserve residue, if any, for her daughter's children. Keister v. Cubine, 101 Va. 768, 45 S. E. 285. An old couple conveyed land for the consideration of care being taken of them by their children. The deed was set aside for incompetency, but the grantees were permitted to recover their expenditures, the contract not being inequitable or fraudulent. Bollnow v. Roach [Ill.] 71 N. E. 454. Under the California statute, the court, on dismissing on the merits a suit for the cancellation of a contract, may enter judgment for defendant on a cross claim, although the amount of the latter is below the amount fixing the jurisdiction of the court. Sullivan v. California Realty Co., 142 Cal. 201, 75 P. 767. In a suit to set aside a conveyance, where the right of possession is in issue, it is the duty of the court to determine that issue, and if all parties are before the court, to put the party entitled thereto in possession. Albin v. Parnell [Neb.] 99 N. W. 645.

56. In a suit to cancel a deed of mining interests, it was held reformation was the proper remedy, but that in either form, an amendment should have been allowed so as to cover judgment for damages for improvements placed on the land. Gillis v. Arringdale [N. C.] 47 S. E. 429.

57. Where, in an equitable suit to cancel a deed, no legal relief is asked, damages cannot be awarded. Rubie Combination Gold Min. Co. v. Princess Alice Gold Min. Co., 31 Colo. 158, 71 P. 1121.

58. A suit to set aside a conveyance cannot be considered one to **remove cloud** on title when possession is not alleged to be in complainants, and there is no proof of such possession. Boddie v. Bush, 136 Ala. 550, 33 So. 826.

59. In a suit instituted to cancel an agreement in writing, on the ground that it is invalid for fraud, jurisdiction cannot be retained to construe the instrument and grant an injunction based thereon, since the latter relief, if proper, is inconsistent with the cause of action stated in the bill. Kerr v. Southwick [C. C. A.] 120 F. 772.

60. In suit to cancel deed for fraud and undue influence, court erroneously found that grantor had a life estate and right to possession. Butler v. Carvin, 33 Wash. 621, 74 P. 813.

61. If a petition states a good cause of action for cancellation, that relief may be

It was held in California that, within the meaning of statutes of limitation, a suit to set aside a conveyance for fraud was a suit for the recovery of real property;[62] in Kansas, the limitation statute governing actions for fraud was held to apply.[63]

Adequacy of remedy at law[64] will, as in other cases, oust equity jurisdiction.[65] If the averments of the bill show the instrument to be absolutely void, it will not be set aside in equity, as plaintiffs have in such case a complete and adequate remedy at law.[66] Suit will not lie for cancellation of an instrument which is a mere receipt, since its terms may be contradicted or varied by parol, thus giving an adequate remedy at law.[67]

A Federal court of equity will not take jurisdiction of a suit for the delivery up and cancellation of a policy when misrepresentations and concealment can be perfectly well established in a defense at law in an action on the policy.[68] The rule is not altered by the fact that suit has been, or may be brought, in a state court, where such defense cannot be made, if the right of removal to the Federal court exists;[69] and it is immaterial that such removal will result in a forfeiture of the company's license to do business in the state, since such forfeiture is the result of the company's own act.[70]

§ 2. *Cause of action and grounds for relief.*[71]—Equity will ordinarily grant

granted, though the prayer be for specific performance and other and further relief. Oil and gas lease canceled as to portion of lands covered. Coffinberry v. Sun Oil Co., 68 Ohio St. 488, 67 N. E. 1069. Deed from mother to son in consideration of $500 and agreement to support, consideration having failed. Suit was for balance of price, and cancellation was granted. Stephenson v. Stephenson, 24 Ky. L. R. 1873, 72 S. W. 742.

62. Not governed by statute limiting actions on ground of fraud or mistake, where fraud and undue influence were the grounds for relief. Murphy v. Crowley, 140 Cal. 141, 73 P. 820.

63. Under the Kansas statute, an action to set aside a deed on the ground of fraud is barred on the expiration of two years after the discovery of the fraud, and the filing of the deeds in the registry is equivalent to such discovery. Rogers v. Richards, 67 Kan. 706, 74 P. 255.

64. See 1 Curr. L. 413.

65. Allegations of bill held insufficient to warrant equity intervention. Handley v. Sprinkle [Mont.] 77 P. 296. Held, plaintiff had adequate remedy at law to recover ground rent, and hence bill to cancel agreement to reduce ground rent would not lie. Norris v. Crowe, 206 Pa. 438, 55 A. 1125. If an action in ejectment is available, a suit to set aside a conveyance will not lie. Purchaser at execution sale could not set aside a prior conveyance, alleged to have been fraudulent and void, when defendants were in possession. Ropes v. Jenerson [Fla.] 34 So. 955. Must be as complete and as adequate, as sufficient and as final, as the remedy in equity. Cable v. U. S. Life Ins. Co., 191 U. S. 288, 24 S. Ct. 74, 48 Law. Ed. 188. It must be a remedy which may be resorted to without impediment created otherwise than by act of the party. Id. It was held that the defense of fraud which might be asserted in an action on an insurance policy in a state court was an adequate remedy which would preclude maintenance of a suit to cancel the policy in a Federal court, since the assertion of that defense could not be said to depend on the will of the adverse party. Riggs v. Union Life Ins. Co. [C. C. A.] 129 F. 207. Must be capable of being asserted without rendering the party asserting it liable to the imposition of heavy penalties or forfeitures. Cable v. U. S. Life Ins. Co., 191 U. S. 288, 24 S. Ct. 74, 48 Law. Ed. 188. In the Federal courts the remedy must exist on the law side of the same court. Where the rights of all claimants could not be determined in the law action, held not a bar. Mutual Life Ins. Co. v. Blair, 130 F. 971. When there is an adequate remedy at law, a Federal court will not retain jurisdiction simply because the law as there administered is more favorable to petitioner than in a state court. Applied in insurance company case to cancel a policy. Cable v. U. S. Life Ins. Co., 191 U. S. 288, 24 S. Ct. 74, 48 Law. Ed. 188.

66. Boddie v. Bush, 136 Ala. 560, 33 So. 826. Equity would not cancel insurance policies where bill failed to allege fraud but set up facts showing policies were never delivered. Northwestern Mut. Life Ins. Co. v. Amos [Mich.] 98 N. W. 1018. Bill for cancellation dismissed where deed was a forgery, and even if not forged, had never been delivered. Green v. Brown [Miss.] 34 So. 147.

67. Fraud inducing the settlement for which it was given may be shown in a law action. Such v. Bank of State of New York, 127 F. 450.

68. Cable v. U. S. Life Ins. Co., 191 U. S. 288, 24 S. Ct. 74, 48 Law. Ed. 188.

69. Cable v. U. S. Life Ins. Co., 191 U. S. 288, 24 S. Ct. 74, 48 Law. Ed. 188; Riggs v. Union Life Ins. Co. [C. C. A.] 129 F. 207.

70. The company signs an agreement for a license in order to do business. Cable v. U. S. Life Ins. Co., 191 U. S. 288, 24 S. Ct. 74, 48 Law. Ed. 188; Riggs v. Union Life Ins. Co. [C. C. A.] 129 F. 207.

71. See 1 Curr. L. 414.

NOTE. When patent to land will be canceled: "First, where the government, being

relief when the instrument or contract sought to be canceled or set aside was procured by fraudulent misrepresentations[72] or other fraud,[73] or duress,[74] or undue influence, especially when the parties to the transaction stand in a fiduciary relation.[75] Relief on the ground of fraud will not be granted if it appears that the fraud was not directly connected with the transaction,[76] or that the petitioner has not suffered injury or cannot show some special ground for equitable relief,[77] or that the fraud was made possible by plaintiff's agent, the other party acting in good faith.[78]

A mistake of fact is ground for the remedy, whether mutual,[79] or unilateral,[80] but a mistake of law, unaccompanied by special circumstances, such as misrepresentation, undue influence, or misplaced confidence, is not.[81]

Conveyances made[82] or recorded[83] without authority may be set aside. Fail-

the only party interested, the patent is charged to have been obtained by fraud in representations or conduct; second, where the land by appropriate reservation is not subject to patent, but is nevertheless erroneously patented; third, where the land, though subject to patent in the ordinary administration of the land office, is patented to the wrong person, either through fraud or by reason of mistake or inadvertence." U. S. v. Bell Tel. Co., 167 U. S. 239, 17 S. Ct. 809, 42 Law. Ed. 144. Quoted in Lynch v. U. S., 13 Okl. 142, 73 P. 1095.

72. Misrepresentations as to purchaser, a Catholic corporation, against which seller was prejudiced. Thompson v. Barry, 184 Mass. 429, 68 N. E. 674. False representations and promise of marriage by married man held sufficient ground for setting aside conveyance. Harris v. Dumont, 207 Ill. 583, 69 N. E. 811. A false representation that defendant would take up and cancel two other mortgages if plaintiff would execute to him a new mortgage, and failure of the mortgagee to carry out the agreement is sufficient ground for cancellation of such mortgage. Hill v. Gettys [N. C.] 47 S. E. 449. A railway company fraudulently represented that it would build through a rival town if certain notes were not given, when in fact, it had already contracted to build through plaintiff's town. Notes given were canceled. Hightower v. Mobile, J. & K. C. R. Co. [Miss.] 36 So. 82. A petition seeking cancellation of conveyance and alleging fraudulent misrepresentations as to value of mineral leases given in exchange for deed of land, states a cause of action. Cooper v. Maggard [Tex. Civ. App.] 79 S. W. 607.

73. Evidence held to show defendant's agent knew of and participated in fraud in procuring deed, which is set aside. Schreckhise v. Wiseman [Va.] 45 S. E. 745. Where one who has promised to leave property to a person at his death conveys it to a third person in fraud of the promisee, a cause of action at once arises to set the conveyance aside. Teske v. Dittberner [Neb.] 98 N. W. 57.

74. A married woman who makes a conveyance in consequence of a threat that her husband will be prosecuted for forgery and a promise that he will be protected if the conveyance is made is not debarred from relief under the maxim **in pari delicto,** since the parties are not in an equal position, and the conveyance may be set aside for duress. Turner v. Overall, 172 Mo. 271, 72 S. W. 644.

75. Where a lawyer induced his ignorant, feeble-minded foster sister to convey, there was found to be a fiduciary relation, and deed was set aside. Walker v. Shepard [Ill.] 71 N. E. 422. Where a wife executed a declaration of trust, carrying out the provisions of her husband's will as to the proceeds of life insurance policies, it was held there was no such fiduciary relation as that equity, presuming the transaction invalid, would annul the declaration. Rogers v. Rogers, 97 Md. 573, 55 A. 450. Evidence held to show undue influence in procuring execution of deed; but deed allowed to stand on condition that grantee accept land as his full share of father's (grantor's) estate. Krause v. Krause [N. J. Eq.] 55 A. 1095.

76. Pittenger v. Pittenger, 208 Ill. 582, 70 N. E. 699.

77. Applied in suit by United States to cancel land patent. Lynch v. U. S., 13 Okl. 142, 73 P. 1095.

78. Gray Cloud Land Co. v. Clay, 89 Minn. 166, 94 N. W. 552.

79. A mutual mistake of fact, if material, is ground for rescission or cancellation of the contract by either party. Lease canceled on showing of mutual, material mistake as to condition of premises. Barker v. Fitzgerald, 105 Ill. App. 536. Where the instrument intended by both parties to embody a contract of conditional sale was executed in the form of a chattel mortgage, the instrument was canceled, in suit for replevin of piano sold. Kimball Co. v. Deaton, 102 Mo. App. 45, 74 S. W. 427.

80. But the court said that when the mistake is mutual, the remedy is reformation. Deed conveying property to order rescinded for unilateral mistake. Wirsching v. Grand Lodge of Free and Accepted Masons [N. J. Eq.] 56 A. 713.

81. Norris v. Crowe, 206 Pa. 438, 55 A. 1125.

82. Contract of exchange of lands set aside because made without authority from plaintiff church corporation. North Louisiana Baptist Ass'n v. Milliken, 110 La. 1002, 35 So. 264. In foreclosure action, the mortgage and note were ordered delivered up and canceled because void, having been executed without authority, after revocation, by death, of power of attorney. Brown v. Skotland [N. D.] 97 N. W. 543.

83. Where deeds, not intended to be and not in law delivered are put on record by the grantees, so as to be a cloud on grantor's title, he may have them canceled. Bunn v. Stewart [Mo.] 81 S. W. 1091.

ure to record is not ground for cancellation.[84] Inadequacy of consideration is not alone a sufficient ground for setting aside a conveyance,[85] but if coupled with circumstances tending to show oppression or undue influence or mental incapacity, relief will be granted.[86] Complete failure of consideration seems to be sufficient.[87]

Where a grantor conveys land in consideration of an agreement by the grantee to support the grantor during his or her natural life, failure of the grantee to carry out the agreement is ground for cancellation of the conveyance.[88] This is on the theory that there was fraud in the inception of the contract, and does not apply when failure to perform is by the grantee's heirs.[89] When this ground is relied upon, plaintiff must plead a re-entry or demand for possession,[90] and demand for performance,[91] or facts showing that demand for performance would have been unavailing.[92]

Where cancellation is sought on the ground of incompetency of the parties on one side, it will not be granted if any of the parties on that side appear capable of contracting.[93]

The right to rescission of a contract of conveyance is not affected by the fact that title was in a third person for the plaintiff's benefit.[94] Where cancellation of a deed by defendant to a third person is sought, plaintiff must show a right to specific performance of, or damages for breach of, an agreement relating to the same land.[95]

Conditions precedent.[96]—It is the general rule that a party seeking to have a contract canceled must show himself ready to place the other party in statu quo,[97]

84. A bill to cancel plaintiff's signature to a deed releasing restrictions on lots will not lie on the ground simply that another grantee, to whom the deed was conditionally delivered to sign refuses to record it. Wentworth v. Eichorn [Mass.] 69 N. E. 366.

85. But where a fiduciary relation exists, gross inadequacy is evidence of fraud. Walker v. Shephard [Ill.] 71 N. E. 422. Mere inadequacy of consideration no ground to set aside conveyance. Booker v. Booker, 208 Ill. 529, 70 N. E. 709. Mere inadequacy, without showing of fraud, insufficient to set aside conveyance. Hagan v. Ward, 86 App. Div. 620, 83 N. Y. S. 436. Want of consideration, such as failure to perform promises, is not alone sufficient to warrant setting aside a bond or mortgage. Hill v. Gettys [N. C.] 47 S. E. 449. Adequacy of consideration is immaterial in absence of circumstances showing other equitable grounds for relief. Jacobson v. Nealand, 122 Iowa, 372, 98 N. W. 158. Inadequacy of price and negligence of attorney held not sufficient ground for setting aside sheriff's deed, especially since sale had been confirmed by court at the time. Crebbin v. Powell [Kan.] 74 P. 621.

86. Hardy v. Dyas, 203 Ill. 211, 67 N. E. 852.

87. Deed from father to daughter set aside where she had paid no part of expressed consideration and had been fully compensated for services to parents. Stringfellow v. Hanson, 25 Utah, 480, 71 P. 1052.

88. Stebbins v. Petty, 209 Ill. 291, 70 N. E. 673. Doctrine recognized but held inapplicable as facts did not show failure to carry out agreement to support. Pittenger v. Pittenger, 208 Ill. 582, 70 N. E. 699. Plaintiff and husband deeded land to son and wife in consideration of furnishing them a home. The agreement was carried out for 15 months and parties then agreed to rescind because all were dissatisfied. Rescission was prevented by sickness and death. Held, sufficient ground for equitable relief and contract rescinded. McDowell v. McDowell, 24 Ky. L. R. 2270, 73 S. W. 1022.

89. Stebbins v. Petty, 209 Ill. 291, 70 N. E. 673.

90, 91. Tomlinson v. Tomlinson [Ind.] 70 N. E. 881.

92. As when grantee, having promised to support grantor, drove her away. Tomlinson v. Tomlinson [Ind.] 70 N. E. 881.

93. One of three parties to a lease did not appear from the evidence to be incompetent. Barlow v. Strange [Ga.] 48 S. E. 344.

94. Thompson v. Barry, 184 Mass. 429, 68 N. E. 674.

95. Relief refused. Prusiecke v. Ramzinski [Tex. Civ. App.] 81 S. W. 771.

96. See 1 Curr. L. 416.

97. Cheuvront v. Cheuvront [W. Va.] 46 S. E. 233. Where mother was granted cancellation of a deed for nonperformance by the son, of an agreement to care for her, he was entitled to recover $20 paid her on the price. Stephenson v. Stephenson, 24 Ky. L. R. 1873, 72 S. W. 742. Where deed was canceled, defendant being allowed to retain certain property, held, he was sufficiently compensated for expense incurred while contract was in force. McDowell v. McDowell, 24 Ky. L. R. 2270, 73 S. W. 1022. Cancellation of building contract refused when plaintiff did not offer to pay defendant for work done and materials furnished thereunder. Sullivan v. California Realty Co., 142 Cal. 201, 75 P. 767.

Note: Since "he who seeks equity must do equity," **the court will ordinarily refuse to cancel contracts unless the parties be placed in statu quo.** Worthington v. Collins,

as by tendering back benefits received under the contract,[98] and relief may be denied where the parties,[99] or innocent third parties,[1] cannot be so placed. The tender of benefits received must be absolute and made in good faith;[2] but may be sufficient if made in the bill.[3] But where the other party has been guilty of fraud or unconscionable conduct, equity may grant relief without an offer to place him in statu quo.[4] Such tender may be unnecessary where all performance is denied.[5] In Louisiana, tender of the price received is not a condition precedent to the bringing and maintenance of an action to rescind a sale for lesion beyond moiety.[6]

Laches.[7]—Unexplained delay for an unreasonable period bars the remedy.[8] But if the delay is not unreasonable,[9] or is caused by ignorance of rights,[10] it will not preclude relief. Laches of a grantor will not bar suit by his heir to set aside a conveyance.[11] The plaintiff may be precluded from maintaining suit for cancellation by an equitable election.[12]

39 W. Va. 406, 19 S. E. 527; Christian v. Vance, 41 W. Va. 754, 24 S. E. 596. This is the general rule where the transaction is purely of a commercial nature, or applies solely to property rights, and the doctrine has been carried so far that a court of equity has refused relief, though a party has been unable to restore what he has received on account of misfortune. But where a fiduciary relation existe between the parties and the one in whom confidence has been reposed has been guilty of fraud, deceit, overreaching, or unconscionable conduct, relief may be granted without a return of benefits received by the petitioner. See Cheuvront v. Cheuvront [W. Va.] 45 S. E. 233.

98. Payments made under an antenuptial agreement. Russell v. Russell, 129 F. 434. In suit to cancel deed fraudulently delivered while in escrow, plaintiff was required to repay a portion of consideration received. Ruble Combination Gold Min. Co. v. Princess Alice Gold Min. Co., 31 Colo. 158, 71 P. 1121. Cancellation of a deed will not be decreed without a tender by plaintiff of the consideration received. Alaska & C. Commercial Co. v. Solner [C. C. A.] 123 F. 855.

99. A cancellation of a chattel mortgage will not be decreed unless the original status of the parties can be restored. Anderson v. Anderson Food Co. [N. J. Eq.] 57 A. 489.

1. Though a patent was obtained by fraud, the government cannot have it canceled, when the land has been used for townsite purposes and the rights of innocent holders have intervened. Lynch v. U. S., 13 Okl. 142, 73 P. 1095.

2. Alaska & C. Commercial Co. v. Solner [C. C. A.] 123 F. 855.

3. Failure to do so before filing the bill is material only on the question of costs. McLeod v. McLeod, 137 Ala. 267, 34 So. 228.

4. Tender of an amount received in a settlement is unnecessary in order to maintain a suit for cancellation of a receipt given, when by fraud, defendant overstated the amount paid out by him. Price v. Stout, 84 App. Div. 334, 82 N. Y. S. 935. An offer to return part of the land and cash received from an exchange induced by fraud held a sufficient tender under the facts. Harris v. Dumont, 207 Ill. 583, 69 N. E. 811. Grantee took deed for inadequate price, taking advantage of grantor's incompetency, and the confidence reposed in him. Return of consideration not required. Hardy v. Dyas, 203 Ill. 211, 67 N. E. 852. A wife was granted cancellation of a separation contract procured by fraud, though she was unable to repay money given her to induce her to agree to the contract. Cheuvront v. Cheuvront [W. Va.] 46 S. E. 233.

5. There need be no tender of consideration or offer to reimburse when all performance is denied by plaintiff, who sets up fraud in the other party. Whether there must be reimbursement cannot be determined from the pleadings in such case. Sheehan v. Allen, 67 Kan. 712, 74 P. 245.

6. Ware v. Couvillion, 112 La. 43, 36 So. 220.

7. See 1 Curr. L. 416.

8. Booker v. Booker, 208 Ill. 529, 70 N. E. 709. Plaintiffs sought cancellation of deed on ground of incompetency and fraud 41 years after right of action accrued, no excuse being given for delay, and original parties being long since dead. Wilkes v. Phillips [Ga.] 48 S. E. 113. Where there was a failure of plaintiff's grantor to repudiate a deed given by her without joining her husband, for 19 years, plaintiff, acquiring title from woman after a divorce, was barred by laches. Dickman v. Dryden, 90 Minn. 244, 95 N. W. 1120.

9. A suit by a widow to set aside an antenuptial agreement for fraud is not barred by laches where commenced at once after the unsuccessful termination of a prior suit for its reformation, which was commenced within a year after her husband's death, she at all times asserting the invalidity of the agreement. Russell v. Russell, 129 F. 434.

10. Delay in bringing suit to set aside an unreasonable settlement will not bar relief when caused by ignorance of rights, and the other parties have not been placed in a position rendering an assertion of the claim unreasonable. James v. Aller [N. J. Eq.] 57 A. 476.

11. Donnelly v. Rees, 141 Cal. 56, 74 P. 433.

12. Where plaintiff's property was given to defendant by a donor who at the time gave plaintiff other property which he accepted and received, making no objection for four years after reaching majority, he had elected. Barrier v. Kelly [Miss.] 33 So. 974.

Effect of death of party.—After a loss on the policy by death of the insured, such a suit cannot be maintained, in the absence of special circumstances invoking equity jurisdiction;[13] but before such loss it may be maintained,[14] and jurisdiction, when acquired, is not affected by death of the insured after commencement of the action.[15] The grantor's heirs may have cancellation of a conveyance for nonperformance of a condition to provide support.[16]

Evidence and proof.[17]—The allegations setting out the grounds on which relief is sought must be substantially and clearly proven.[18] But in a suit to set aside a conveyance between parties between whom a fiduciary relation exists, the burden is on the grantee to show the transaction free from fraud or undue influence.[19] A certificate of acknowledgment is not evidence of a grantor's mental

13. The misrepresentation and concealment being an adequate defense in an action on the policy. Riggs v. Union Life Ins. Co. [C. C. A.] 129 F. 207. Reversing circuit court below as to this proposition. See Union Life Ins. Co. v. Riggs, 123 F. 312; Mutual Life Ins. Co. v. Blair, 130 F. 971; Des Moines Life Ins. Co. v. Seifert [Ill.] 71 N. E. 349.

14. Riggs v. Union Life Ins. Co. [C. C. A.] 129 F. 207; Mutual Life Ins. Co. v. Blair, 130 F. 971.

15. Riggs v. Union Life Ins. Co. [C. C. A.] 129 F. 207. A plea in bar alleging the insured's death, and the bringing and pendency of an action at law, held not available to present the objection that the bill was not sustainable for want of equity. Mutual Life Ins. Co. v. Blair, 130 F. 971.

16. Man and wife conveyed to two children in consideration of support, care, medical attendance, etc. After the grantor's death, other heirs brought bill to cancel conveyance on ground of failure to perform any of the conditions of the agreement. A demurrer to the bill was held to have been erroneously sustained. Fluharty v. Fluharty [W. Va.] 46 S. E. 199.

17. See 1 Curr. L. 419.

18. Evidence insufficient to show incompetency, undue influence, or failure of support by grantees. Pamment v. Warner [Mich.] 97 N. W. 692. In action to set aside assignments of mortgages, evidence held to show a delivery before death of assignor, and decree for assignee affirmed. Peirson v. McNeal [Mich.] 100 N. W. 458. Cancellation of deed refused, when there was evidence as to circumstances surrounding its execution, no evidence that consideration was not paid, or of fraud or undue influence. Fink v. Van Fassen, 206 Pa. 362, 55 A. 1054. In suit to set aside conveyance by widow to daughter, other children being excluded, where it appeared the grantee cared for grantor for 17 years faithfully, it was held there was no presumption of undue influence, and evidence did not show any ground for setting deed aside. Vance v. Davis, 118 Wis. 548, 95 N. W. 939. A public contract will not be annulled unless the municipality can show that the contractor has not performed the conditions of his contract. City of El Reno v. El Reno Water Co. [Okl.] 76 P. 126.

Fraud must be proven by clear and satisfactory evidence. Grantor held competent and transaction free from fraud. Burnham v. Burnham, 119 Wis. 509, 97 N. W. 176. Cancellation of contract refused evidence not sustaining allegations of fraud. Perkins v. Blanchard Co., 81 App. Div. 635, 82 N. Y. S. 1080. Evidence held insufficient to show participation in fraud by defendant in suit to set aside mortgage. Mohr v. Griffin, 137 Ala. 456, 34 So. 378. Proof of fraud insufficient in suit by government to cancel land patent. U. S. v. Detroit Timber & Lumber Co., 124 F. 393. Held that an agreement for a license under a patent could not be canceled, as it was not invalid for fraud, though inchoate and incomplete. Kerr v. Southwick [C. C. A.] 120 F. 772. The burden is on the party asserting it. Moore v. Baker [N. J. Eq.] 55 A. 106.

Forgery must be substantially and clearly proven. Grantor's testimony will not overcome certificate of acknowledgment, ordinarily. But held, in this case, that forgery was established. Parlin & Orendorff Co. v. Hutson, 198 Ill. 389, 65 N. E. 93. Evidence held to show signatures to mortgage and note not forged. Colbert v. Moore [Mass.] 70 N. E. 42.

Mental incapacity of grantor held not to have been shown. Hayman v. Wakeham [Mich.] 94 N. W. 1062.

19. Deed and transfer of promissory notes to Dowie, head of religious sect, by an old lady, a member, set aside, because the burden not met by defendants. Dowie v. Driscoll, 203 Ill. 480, 68 N. E. 56. Contract by old, weak-minded, ignorant woman to sell set aside, though no active fraud in vendee was shown, the contract being almost entirely executory, price inadequate, and circumstances such as to give vendee an undue advantage. Wilkie v. Sassen, 123 Iowa, 421, 99 N. W. 124. Evidence held to require a decree canceling, on the ground of fraud, a conveyance of land, with a reservation of a life estate, made for an inadequate consideration by an aged negro woman to her physician. Norfleet v. Beall [Miss.] 34 So. 328. Conveyance by old man to housekeeper held free from undue influence. Crooks v. Smith [Iowa] 99 N. W. 112. Where a fiduciary relation exists between the parties, proof of gross inadequacy becomes evidence of fraud. Walker v. Shephard [Ill.] 71 N. E. 422.

Attorney and client: Where attorney bought land of a client, who had consulted him about it, the attorney must show the utmost good faith and that the client was not overreached. Young v. Murphy [Wis.] 97 N. W. 496.

Husband and wife: In a suit by a wife to cancel a separation contract, alleged to have been procured by fraud, the burden was on

capacity,[20] nor is a record in a former suit to set aside another conveyance admissible on that issue.[21]

§ 3. *Procedure.*[22]—Since the action is equitable, the court tries all questions of fact and should make findings thereon.[23] The statutes granting new trial of right in actions affecting title to land apply to a suit to cancel a conveyance.[24]

Pleading.[25]—The bill must set out facts sufficient to constitute fraud when that is the ground of the relief prayed for.[26] But only the result of undue influence, not the particular acts constituting it, need be alleged.[27] The bill must show a sufficient tender of the property received,[28] and must show complainant's title to that transferred.[29] A bill to cancel a conveyance by a common donor to defendant of plaintiff's property, which shows that the donor at the same time made a gift of other property to plaintiff, must disclose the value of the property received by plaintiff.[30] A petition by the United States to annul a patent for fraud must, under the code, contain all the material averments essential to a good bill in equity under the chancery practice.[31] Equitable considerations, which it is claimed warrant the court in refusing to annul a mortgage without restoration of the consideration, must be presented by answer and cannot be raised on demurrer.[32] In a purely equitable action to cancel a contract, a mere allegation that plaintiff has an adequate remedy at law is not good as a defense under the code.[33]

Parties.[34]—All persons interested in the subject-matter of the contract sought to be canceled are necessary parties.[35] In suit to cancel an agreement to pay commissions, the other party to the contract, for procuring which the commission is sought, is not a necessary party.[36] In suit for cancellation of a policy of insurance on the ground of a fraudulent conspiracy between the insured and others, brought after the death of the insured, the co-conspirators may be made parties defendant with the executors or beneficiaries for the purpose of having liability for costs adjudicated.[37]

the husband to show she acted with full knowledge and that the transaction was fair. Cheuvront v. Cheuvront [W. Va.] 46 S. E. 233. In a suit by the wife to cancel a conveyance by her to her husband, the burden is on defendants to show the contract fair and equitable. Evidence held not sufficient. Harraway v. Harraway, 136 Ala. 499, 34 So. 836.

20. It is evidence only of those facts to which the notary is required to certify. Walker v. Shepard [Ill.] 71 N. E. 422.

21. Defendants not having been parties to the former action. Bollnow v. Roach [Ill.] 71 N. E. 454.

22. See 1 Curr. L. 416.

23. Action to set aside conveyance for fraud sent back for retrial because improperly tried by jury and court omitted to make findings. Flanigan v. Skelly, 89 App. Div. 108, 85 N. Y. S. 4.

24. Krise v. Wilson, 31 Ind. App. 590, 68 N. E. 693. Burns' Ann. St. 1901, § 1076. Tomlinson v. Tomlinson [Ind.] 70 N. E. 881.

25. See 1 Curr. L. 417.

26. To cancel bill of sale of stock for fraud. Bill held demurrable. Wetherell v. Johnson, 208 Ill. 247, 70 N. E. 229. Allegations of fraud held to be sufficient. Tomlinson v. Tomlinson [Ind.] 70 N. E. 881.

27. McLeod v. McLeod, 137 Ala. 267, 34 So. 228.

28. Alaska & C. Commercial Co. v. Solner [C. C. A.] 123 F. 855.

29. Cancellation of a lease being sought the bill must allege title to the lands in plaintiff. Indiana Natural Gas & Oil Co. v. Sexton, 31 Ind. App. 575, 68 N. E. 692.

30. Especially if he does not offer to return it. An election is involved and he must do equity. Barrier v. Kelly [Miss.] 33 So. 974.

31. The United States in such suit has no rights superior to any other suitor. Lynch v. U. S., 13 Okl. 142, 73 P. 1095.

32. Lange v. Geiser, 138 Cal. 682, 72 P. 343.

33. Contract for royalties on songs to be published, plaintiff alleging publisher did not intend to publish them, but made contract to prevent competition. Edmonds v. Stern, 89 App. Div. 539, 85 N. Y. S. 665.

34. See 1 Curr. L. 417, with annotations.

35. In a suit to cancel a patent, every person having an interest in the land covered by the patent is an indispensable party, without whom equity will not proceed. Lynch v. U. S., 13 Okl. 142, 73 P. 1095. Where a municipality made a contract for construction of a system of waterworks, authorizing the contractor to mortgage the same to secure loans to enable him to proceed with the work, the mortgagees are necessary parties in a suit by the municipality to cancel the contract. City of El Reno v. El Reno Water Co. [Okl.] 76 P. 126.

36. Warren v. Miller [Iowa] 99 N. W. 127.

37. Union Life Ins. Co. v. Riggs, 123 F. 312.

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PART I. IN GENERAL.[38]

§ 1. *Definitions and distinctions.*[39]—Street railway companies[40] and persons maintaining or operating passenger elevators,[41] especially in a public building, are within the term common carriers.[42]

Irrigation companies are regarded as quasi-public servants, analogous to common carriers,[43] and so are telegraph companies.[44]

38. This topic treats only of the laws relating to common carriage of persons or goods. That relating to corporations engaged in carriage (see Railroads, 2 Curr. L. 1382; Shipping and Water Traffic, 2 Curr. L. 1648), is pertinent to other topics specifically devoted to it. Likewise the relations between the carrier and its employes are those of Master and Servant, 2 Curr. L. 801. The rules peculiar to water carriage are treated in Shipping and Water Traffic, 2 Curr. L. 1648.

39. See 1 Curr. L. 422.

40. Lincoln Traction Co. v. Heller [Neb.] 100 N. W. 197.

41. See article Buildings, 1 Curr. L. 404, for a complete treatment of their duties and liabilities. Luckel v. Century Bldg. Co., 177 Mo. 608, 76 S. W. 1035; Springer v. Schultz, 105 Ill. App. 544. Passenger elevator in an office building. Goldsmith v. Holland Bldg. Co. [Mo.] 81 S. W. 1112.

42. Fox v. Philadelphia, 208 Pa. 127, 57 A. 356.

But in Michigna, there is a deviation from this rule. Burgess v. Stowe [Mich.] 96 N. W. 29.

43. Gould v. Maricopa Canal Co. [Ariz.] 76 P. 598. See Waters and Water Supply, 2 Curr. L. 2034.

44. See article Telegraphs and Telephones, 2 Curr. L. 1843. Cogdell v. W. U. Tel. Co., 135 N. C. 431, 47 S. E. 490.

Validity of incorporation is immaterial in fixing the duties of a carrier.[45]

A common carrier may become a private carrier or bailee for hire, when he undertakes to carry something which it is not his business to carry.[46] In such case he has a right to limit or release himself from liability by contract.[47]

§ 2. *Duty to undertake and provide carriage.*[48]—The carrier must undertake carriage and may be penalized for a refusal.[49] A common carrier may make such reasonable rules and regulations for the conduct of its business as it may deem necessary.[50] It is subject to such reasonable regulations as each state or the United States may under the constitution establish.[51]

There must be no unequal discrimination[52] against those seeking to use regular trains, even in favor of a patron who has voluntarily expended more than his share in procuring such service.[53]

Charges.[54]—The common law prevents unjust or unreasonable discriminations.[55] Rates must also conform to such rates as the states on local and the United States on interstate business[56] respectively prescribe, and as the charter contemplates.[57]

A railroad sending its cars over a branch must not discriminate against any shipper thereon,[58] and where it has acquired terminal rights, must not make discriminatory charges for use thereof.[59] A statutory permission to charge expenses of maintenance to owners of private sidetracks does not authorize an arbitrary charge imposed on shipments from such tracks.[60]

45. Express company. Adams Exp. Co. v. State, 161 Ind. 328, 67 N. E. 1033.

46. Wilson v. Atlantic Coast Line R. Co., 129 F. 774.

47. Wilson v. Atlantic Coast Line R. Co., 129 F. 774. A railroad company is not required, as a common carrier, to transport a circus train belonging to a circus company, a part of which is loaded with wild animals, over its line on a schedule to be arranged by the circus company. Contract releasing railroad from liability for injury or damage to employes or property of circus company in consideration of reduced rate held valid. Id.

48. See 1 Curr. L. 422.

49. Where a car of lumber was properly loaded, the carrier was liable for the penalty under Code 1883, § 1964, as amended by Laws 1903, c. 444, for refusing to receive the same, though it was to be shipped out of the state. Currie v. Raleigh & A. Air Line R. Co., 135 N. C. 535, 47 S. E. 654.

NOTE. Effect of strikes on carriers' liability: A carrier was held not to be relieved from its duty to receive freight from a connecting line by its fear that a strike on its own line might result from so doing. Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co., 34 F. 481. In Kentucky, it was held that a failure to supply cars to individual shippers, caused by a strike of coal miners in a certain district, was excusable, since it was more important to continue its general freight and passenger business than to carry the coal of an individual shipper. Louisville & N. R. Co. v. Queen City Coal Co., 18 Ky. L. R. 126, 35 S. W. 626.—From note to Empire Transp. Co. v. Phila. & R. C. & I. Co., 35 L. R. A. 623.

50. Lewis v. Weatherford, etc., R. Co. [Tex. Civ. App.] 81 S. W. 111. See, also, post, § 27. Rules pertinent to particular matters are treated in the section dealing with that to which the rules relate. See following sections.

51. See Commerce, 1 Curr. L. 538. Constitutional provisions against discrimination held not self-executing [Const., §§ 15, 22]. N. W. Warehouse Co. v. Or. R. & Nav. Co., 32 Wash. 218, 73 P. 388.

52. See 1 Curr. L. 422, n. 6-9.

Newspapers are entitled to equal rights on a scheduled train, notwithstanding it has been established and supported by the enterprise of one to secure quick delivery of its papers. In an action to compel acceptance of other papers as freight, the equities between the papers as to expenses incurred cannot be worked out on cross bill. Memphis News Pub. Co. v. Southern R. Co., 110 Tenn. 684, 75 S. W. 941.

53. Where a train has been established at the expense and by the enterprise of a single newspaper, the carrier cannot impose as a condition a sharing of the expense voluntarily assumed by the first. Memphis News Pub. Co. v. Southern R. Co., 110 Tenn. 684, 75 S. W. 941.

54. See 1 Curr. L. 422. See post, § 14, for general treatment of freight charges. See Commerce, 1 Curr. L. 538, for Interstate Commerce Act.

55. Injunction may be had. Tift v. Southern R. Co., 123 F. 789.

56. Evidence held to show that on transshipment a shipment lost its character as interstate commerce. Gulf, C. & S. F. R. Co. v. State [Tex.] 78 S. W. 495.

57. By reincorporation under a general act, a railroad is estopped to contest the validity of regulations of rates contained therein. Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 24 S. Ct. 310.

58. Kellogg v. Sowerby, 93 App. Div. 124, 87 N. Y. S. 412.

59. Question of fairness of charge does not enter when exacted of but one shipper. Ohio Coal Co. v. Whitcomb [C. C. A.] 123 F. 359.

60. Rev. St. Wis. 1898, § 1802. Ohio Coal Co. v. Whitcomb [C. C. A.] 123 F. 359.

What constitutes discrimination.[61]—Conditions must be similar to establish discrimination,[62] and unfairness of a long haul rate does not depend on actually greater mileage.[63] A carrier may make a difference in rates to competitive points,[64] hence a charge of lower rates for a longer haul due to competition is not an unjust discrimination if a greater rate for a shorter haul is not unreasonable,[65] and a through rate may be less than the sum of local rates.[66] A contract to maintain rates from one point to competitive points, not exceeding the rates from two other places, is not discrimination within the meaning of the Inter State Commerce Act,[67] neither is a milling in transit agreement.[68]

Carriage at established rates to pay a legal and determined debt is not a discrimination,[69] and where not a blind to cover a low rate, a carrier may buy a commodity and sell it for delivery at another point at less than cost plus established freight charges.[70]

In a proceeding for discrimination between localities or charging more for a shorter haul, it need not be shown that more than commission rates are charged.[71]

Statutory provisions against discrimination[72] may require the carrier to forward freight in the order received and impose a liability for ensuing damages,[73] and penal provisions are construed strictly.[74]

Under certain statutes, triple damages and attorney's fees are recoverable.[75]

Remedies.[76]—The existence of a remedy against the person favored does not absolve the carrier.[77] An agreement to pay an extra charge reserving legal rights does not waive remedies for discrimination.[78] Each act of discrimination need

61. See 1 Curr. L. 423. See Commerce, 1 Curr. L. 538, for discussion of effect of Interstate Commerce Act.

62. Held lawful: Refusal to furnish cars to be loaded with coal from wagons as had been done. Harp v. Choctaw, O. & G. R. Co. [C. C. A.] 125 F. 445. To charge greater rate for car lot made of small lots combined by a forwarding agent, than for the car lot of a single owner [24 Stat. 379, § 2]. Lundquist v. Grand Trunk Western R. Co., 121 F. 915.

63. Rev. St. 1899, §§ 1133, 1134. Cohn v. St. Louis, I. M. & S. R. Co. [Mo.] 79 S. W. 961.

64. A mere possibility of competition will not make a greater rate to a point obnoxious to the long and short haul clause of Interstate Commerce Act. Rates from New Orleans to La Grange, Ga., based on Atlanta as a competitive point, held proper. Interstate Commerce Comm. v. Louisville & N. R. Co., 190 U. S. 273, 23 S. Ct. 687, 47 Law. Ed. 1047. Lower rates from Chicago and western points to Norfolk and Richmond, Va., than to Wilmington, N. C., held justified by conditions. Interstate Commerce Comm. v. Cincinnati, P. & V. R. Co., 124 F. 624.

65. Interstate Commerce Comm. v. Southern R. Co. [C. C. A.] 122 F. 800.

66. Const. § 215. Within this meaning, a contract may be through, though there is no express agreement between the connecting carriers. Southern R. Co. v. Com., 25 Ky. L. R. 1078, 77 S. W. 207.

67. Laurel Cotton Mills v. Gulf & S. I. R. Co. [Miss.] 37 So. 134.

68. Laurel Cotton Mills v. Gulf & S. I. R. Co. [Miss.] 37 So. 134. And in an action for breach of such contract, the burden is not on the plaintiff to show that the contract rate had been filed with the Interstate Commerce Commission and approved by the State Railroad Commission. Id.

69. Interstate Commerce Comm. v. Chesapeake & O. R. Co., 128 F. 59.

70. Contract held to show violation of § 3 of Interstate Commerce Act. Interstate Commerce Comm. v. Chesapeake & O. R. Co., 128 F. 59.

71. Rev. St. 1899, §§ 1133, 1134. Cohn v. St. Louis, I. M. & S. R. Co. [Mo.] 79 S. W. 961.

72. Rev. St. 1899, § 1126, is not repealed by § 1124. McGrew v. Mo. Pac. R. Co., 177 Mo. 533, 76 S. W. 995. See 1 Curr. L. 423.

73. Rev. St. 1895, arts. 4537, 4539. Hill v. St. Louis S. W. R. Co. [Tex. Civ. App.] 75 S. W. 874.

74. Penalties provided by Acts 1887, p. 110, c. 120, are not extended by the rearrangement in Rev. St. 1895, so as to be applicable to additional cases such as violations of Acts 1883, p. 69, c. 70, providing a liability for damages for failure to forward freight in the order received. St. Louis S. W. R. Co. v. Hill [Tex.] 80 S. W. 368. In proceedings to recover the penalty, the case must be brought clearly within the statute. Only actual damages are awarded where proof failed to show receipt of goods "in the warehouse or depot" [Rev. St. 1895, art. 4537]. Hill v. St. Louis S. W. R. Co. [Tex. Civ. App.] 75 S. W. 874. [On rehearing in this case it was held sufficient to show delivery on the station platform.]

75. Rev. St. 1899, § 1140. Cohn v. St. Louis, I. M. & S. R. Co. [Mo.] 79 S. W. 961.

76. Penalties and Indictments, see 1 Curr. L. 424, n. 33-38.

77. Railroad agreed with an association of elevators to add an elevator charge to its freight rate and pay the amount so collected to the association. Kellogg v. Sowerby, 93 App. Div. 124, 87 N. Y. S. 412.

78. Ohio Coal Co. v. Whitcomb [C. C. A.] 123 F. 359.

not be made a separate cause of action.[78] In statutory and penal actions, the acts coming within the statute must be well pleaded.[80] Quo warranto will not lie for a discrimination which affects private interests only,[81] but if a franchise be violated, it can be remedied only by public suit.[82] The United States may maintain a suit in equity to restrain discrimination.[83]

§ 3. *Rights and relations between carrier and connecting carrier, draymen, or transfer men.*[84]—A railroad is bound to accept freight from another carrier at its published rate.[85] By statute generally it is required that other carriers be treated with equal fairness.[86] It is not an unreasonable preference under the interstate commerce act for a railroad to refuse shipments of cattle for delivery at a stockyards on a different line, with which, however, it has physical connection, if it maintains at the same city of general destination a stockyards on its own line.[87] The carrier may give one transfer agent the exclusive right of soliciting business on its trains,[88] and may exclude soliciting draymen from its depot grounds, where not employed by passengers and when passengers are afforded reasonable facilities of egress.[89]

Statutes imposing penalties for not stopping passenger trains at junction points, being penal, are to be strictly construed.[90]

Part II. Carriage of Goods.

§ 4. *Delivery to carrier and inception of liability.*[91]—A carrier has the right to make reasonable rules concerning the classification and suitable preparation of

78. Rev. St. 1899, §§ 1133, 1134. Cohn v. St. Louis, I. M. & S. R. Co. [Mo.] 79 S. W. 961.

80. A complaint alleging that goods were tendered at a certain depot on a certain date and that the carrier refused to receive the same is a sufficient allegation of tender. In an action for a penalty under Code 1883, § 1964, as amended by Laws 1903, c. 444. Currie v. Raleigh & A. Air Line R. Co., 135 N. C. 535, 47 S. E. 654. Petition for discrimination under Rev. St. 1899, § 1113, held sufficient statement of manner of plaintiff's injury. Cohn v. St. Louis, I. M. & S. R. Co. [Mo.] 79 S. W. 961. Code 1883, § 1964, amended by Laws 1903, c. 444, imposing a penalty for a refusal to receive goods for transportation, is a public statute and need not be pleaded. Currie v. Raleigh & A. Air Line R. Co., 135 N. C. 535, 47 S. E. 654.

By what name sued: The Adams Express Co., a copartnership, is properly sued in that name by the state to recover a penalty for discrimination. Adams Exp. Co. v. State, 161 Ind. 328, 67 N. E. 1033.

81. Reconsignment charges in transferring cars from one switch back to another. Rev. St. 1899, c. 12, arts. 2, 4 provides a remedy in the Railroad Commission. State v. Atchison, T. & S. F. R. Co., 176 Mo. 687, 75 S. W. 776.

82. Maximum rate clause. Millcreek Tp. v. Erie Rapid Transit St. R. Co. [Pa.] 58 A. 613.

83. Elkins act permits a suit in equity for violations of Interstate Commerce Act prior to its enactment [Act Feb. 19, 1903 (32 Stat. 847, c. 708)]. United States v. Mich. Cent. R. Co., 122 F. 544. Injunction held properly granted against coal shipments under contract of sale by carrier affording discrimination. Interstate Commerce Comm. v. Chesapeake & O. R. Co., 128 F. 59.

84. See 1 Curr. L. 424. See Railroads, 2 Curr. L. 140, for duty to make transfer connections.

85. There need not be an agreement for a joint through rate. A combination of local rates need not have been charged by the initial carrier. The fact that the cars of other companies were loaded, on which the carrier would have to pay mileage, is not material, nor is the fact that the initial carrier, in consideration of a given per cent of the consignor's shipments, has agreed to give as low a rate as any other road. Tex. & P. R. Co. v. Tex. Short Line R. Co. [Tex. Civ. App.] 80 S. W. 567.

86. Acts requiring express companies to furnish equal accommodations to all other like companies are held constitutional. See Constitutional Law, 1 Curr. L. 569. Adams Exp. Co. v. State, 161 Ind. 328, 67 N. E. 1033. A complaint alleging that defendant, an express company, refused to accept a described package, complete its transportation and collect charges, as was its custom and usage at that point with other express companies, is sufficient under Act March 7, 1901, Acts 1901, p. 149, c. 93; Burns' Rev. St. 1901, §§ 3312b-3312f, imposing a penalty on express companies refusing equal privileges to other express companies. Adams Exp. Co. v. State, 161 Ind. 328, 67 N. E. 1033.

87. See Commerce, 1 Curr. L. 538. Cent. Stock Yards Co. v. Louisville & N. R. Co., 192 U. S. 568, 24 S. Ct. 339.

88. Such regulation does not violate Texas anti-trust law [Rev. St. 1895, art. 5313]. Lewis v. Weatherford, M. W. & N. W. R. Co. [Tex. Civ. App.] 81 S. W. 111.

89. Hedding v. Gallagher [N. H.] 57 A. 225.

90. Sufficiency and admissibility of evidence under Rev. St. 1899, § 1075, considered. State v. St. Louis & S. F. R. Co. [Mo. App.] 79 S. W. 714.

91. See 1 Curr. L. 425.

articles for shipment,[92] and the place where it will receive articles for carriage,[93] and may change and modify rules on reasonable notice to the public.[94] Liability may accrue without issuance of bill of lading or intent to ship at once.[95] Whether entire and exclusive custody of goods has been given the carrier, imposing liability as such, is a question for the jury.[96]

§ 5. *Special contracts for carriage,*[97] *and bills of lading.*[98]—It is not essential that every detail shall be predetermined.[99] Within the scope of apparent or disclosed authority, the carrier's agent may make binding contracts.[1] An undisclosed principal is bound by the terms agreed to by his agent.[2] Words will be taken as the parties intended.[3] A written contract merges a previous oral one,[4] but under certain circumstances an action may be maintained on a verbal contract, although a written contract may subsequently have been entered into.[5] Rebilling and fixing destination at a transfer point does not necessarily make a new contract.[6] Where a contract for preferential rates was for the benefit of a shipper and his assigns, it did not pass to a legatee under the will of the shipper.[7]

Bills of lading.[8]—A carbon copy of a bill of lading designed for filing is not a duplicate requiring a revenue stamp.[9]

Between the carrier and parties entitled to receive the property at its hands,

92. The question is one of law. Chicago, R. I. & P. R. Co. v. Colby [Neb.] 96 N. W. 145. Where a car has a defective draw bar, the carrier waives such objection by agreeing to haul it by the sound draw bar at the rear of a train. Illinois Cent. R. Co. v. Byrne, 205 Ill. 9, 68 N. E. 720.

93, 94. Where carrier designated siding where coal would be received, which was not an unreasonable place, shipper could not compel it to receive coal at siding where other merchandise was received merely because it was more convenient to him. Robinson v. Baltimore & O. R. Co. [C. C. A.] 129 F. 753. Shipper restrained from dumping coal at other siding, taking possession of cars and blocking siding with teams, thus creating public nuisance. Id.

95. As where goods are delivered to and received by a carrier for shipment. Missouri, K. & T. R. Co. v. Beard [Tex. Civ. App.] 78 S. W. 253.

96. Bottles and cases deposited on depot platform, it being contended that defendant had no notice they were ready for shipment. Stapleton v. Grand Trunk R. Co. [Mich.] 94 N. W. 739. Evidence held insufficient to show custom to regard goods on platform awaiting shipping instructions as in custody of carrier. Missouri, K. & T. R. Co. v. Beard [Tex. Civ. App.] 78 S. W. 253.

97. See 1 Curr. L. 425.

98. See 1 Curr. L. 426.

99. A contract to furnish a train may be complete, though the time is left to be determined. Outland v. Seaboard Air Line R. Co., 134 N. C. 350, 46 S. E. 735. Final destination not fixed. Soper v. Tyler [Conn.] 58 A. 699.

1. A general freight agent has power to bind the company by an **agreement to furnish a train.** Outland v. Seaboard Air Line R. Co., 134 N. C. 350, 46 S. E. 735. **A station agent** has no power to contract for a **discriminatory rate.** Myar v. St. Louis Southwestern R. Co., 71 Ark. 552, 76 S. W. 557.

Disclosure of limitations: A statement by agent that his routing would probably be disregarded prevents his act in accepting freight, routed in a particular way, from being binding. Bessling & Co. v. Houston & T. C. R. Co. [Tex. Civ. App.] 80 S. W. 639. The carrier is liable for contracts of **a traveling freight agent** who contracts without disclosing limitations on his general authority to solicit business. Baker v. Chicago Great Western R. Co. [Minn.] 97 N. W. 650.

2. The action may sound in tort. Central of Georgia R. Co. v. James, 117 Ga. 832, 45 S. E. 223.

3. A contract to furnish "a train" to haul fifty cars of freight construed to mean trains sufficient. Outland v. Seaboard Air Line R. Co., 134 N. C. 350, 46 S. E. 735.

The intention of the parties to make an open contract or one requiring acceptance before shipment is a question for the jury. Baker v. Chicago Great Western R. Co. [Minn.] 97 N. W. 650.

4. Where the written contract of shipment states that it is not agreed to deliver for a particular market, evidence of a prior oral agreement is inadmissible, especially where the original shippers were not parties; nor does the joinder of the parties thereto as plaintiffs render it admissible. Yazoo & M. V. R. Co. v. Wilson & Co. [Miss.] 35 So. 340.

5. Shipment of stock. Gulf, C. & S. F. R. Co. v. McCord [Tex. Civ. App.] 81 S. W. 1032.

6. Single bill of lading was issued and at a subsequent transfer point the ultimate destination was to be fixed. Soper v. Tyler [Conn.] 58 A. 699.

7. Sullivan v. Louisville & N. R. Co., 138 Ala. 650, 35 So. 694.

8. Bills of lading are quasi-negotiable. See Negotiable Instruments, 2 Curr. L. 1013. By means of a transfer of them a sale of the goods shipped is often effected. See Sales, 2 Curr. L. 1527. As to the liabilities of banks on drafts with bills of lading attached, see Banking, etc., 3 Curr. L. 403. See, also, 1 Curr. L. 426.

9. 30 Stat. 448, Act June 13, 1898, c. 448. Wright v. Michigan Cent. R. Co. [C. C. A.] 130 F. 843.

bills of lading are symbols of title.[10] A shipper is bound by the conditions of a bill of lading which he accepts at the time the shipment is made, though he does not receive it, or agree to it in writing,[11] and it will not be presumed that a deviation was assented to.[12] Parol evidence of the forwarding route is admissible where the bill of lading is silent,[13] but a mere instruction in writing to forward by a certain route has no effect.[14]

Interpretation.[15]—Names written on the bill have such significance as the parties intended,[16] and the force and meaning to be given words may be shown by extrinsic evidence.[17] Meaningless blanks are not to be considered.[18] An apparent good order receipt refers only to the outward appearance of the package.[19]

Indorsement and transfer,[20] as affecting rights between the carrier and the owner or holder of the bill of lading, will be treated in succeeding sections. As affecting title to the goods or rights respecting attached drafts, it is not germane to this title.

§ 6. *The duty to furnish cars*[21] does not require provision for an unusual amount of freight offered occasionally and at long intervals.[22] In case of scarcity, cars may be fairly apportioned.[23] Where there is an agreement to furnish cars, the shipper is not bound to cease the preparation of freight on finding that the carrier may not be able to furnish the cars.[24] Unreasonable neglect in providing cars is usually a question for the jury,[25] though seventy-five or eighty days' delay has been held unreasonable as a matter of law.[26]

§ 7. *Forwarding and transporting goods.*[27]—The transportation must be with reasonable expedition, unless there is notice of necessity for unusual haste.[28] A

10. Ryan v. Great Northern R. Co., 90 Minn. 12, 95 N. W. 758.

11. Not bound by conditions written into it which he does not read or accept, or authorize or assent to, as to delivery to any connecting carrier, where shipping receipt specified carrier. Cleveland, C., C. & St. L. R. Co. v. Potts & Co. [Ind. App.] 71 N. E. 685.

12. The burden is on the carrier to show that the shipper assented to the billing of goods to a place other than that designated in the shipping receipt. Cleveland, C., C. & St. L. R. Co. v. Potts & Co. [Ind. App.] 71 N. E. 685.

13. Louisville & N. R. Co. v. Duncan & Orr, 137 Ala. 446, 34 So. 988.

14. Bessling & Co. v. Houston & T. C. R. Co. [Tex. Civ. App.] 80 S. W. 639.

15. See 1 Curr. L. 427.

16. Writing of name of consignee in margin of bill of lading held to be with intention to prevent delivery without production of the bill. Grayson County Nat. Bank v. Nashville, C. & St. L. Ry. [Tex. Civ. App.] 79 S. W. 1094.

17. Deposition of ship's mate held admissible to show custom to receipt for cotton as in good condition, where apparently so or not damaged too much. Bath v. Houston & T. C. R. Co. [Tex. Civ. App.] 78 S. W. 993. May be shown that word "notify" in bill of lading is among carriers regarded as meaning that the party to be notified is entitled to the shipment on presentation of the bill accompanied by the draft to which it is attached. Stoner v. Zachary [Iowa] 97 N. W. 1098.

18. Grayson County Nat. Bank v. Nashville, C. & St. L. Ry. [Tex. Civ. App.] 79 S. W. 1094.

19. Plaintiff must show by affirmative proof that contents were in good order. Thyll v. New York & L. B. R. Co., 84 N. Y. S. 175.

20. See 1 Curr. L. 427; also consult Banking, etc., 1 Curr. L. 289; Negotiable Instruments, 2 Curr. L. 1013; Sales, 2 Curr. L. 1527.

21. See 1 Curr. L. 426, n. 59-63.

22. State v. Chicago, B. & Q. R. Co. [Neb.] 99 N. W. 309. In the absence of notice of urgent necessity, the carrier need not put forth unusual efforts to move hay. Strough v. New York Cent. & H. R. R. Co., 92 App. Div. 584, 87 N. Y. S. 30.

23. In fair proportion to the amount of each shipper's business. See ante, § 2, as to discrimination. One shipper may thus receive fewer cars than another. State v. Chicago, B. & Q. R. Co. [Neb.] 99 N. W. 309. An allotment of cars between mines should not be arbitrarily made, but should be based on all the different factors in the daily output. Factors pointed out and facts held to show discrimination. U. S. v. West Virginia Northern R. Co., 125 F. 252.

24. Outland v. Seaboard Air Line R. Co., 134 N. C. 350, 46 S. E. 735.

25. Strough v. New York Cent. & H. R. R. Co., 92 App. Div. 584, 87 N. Y. S. 30.

26. Not palliated by reasonable efforts to procure foreign cars. Outland v. Seaboard Air Line R. Co., 134 N. C. 350, 46 S. E. 735.

27. See 1 Curr. L. 428.

28. Choctaw & M. R. Co. v. Walker, 71 Ark. 671, 76 S. W. 1058.

NOTE. Liability for delays from strikes, etc.: The carrier was said to be liable for a complete failure to deliver goods caused by the depredations or the violence of mobs, rioters, strikers, thieves and the like. Missouri P. R. Co. v. Nevill, 60 Ark. 375, 30 S.

code provision requiring freight to be forwarded in five days under penalty does not remit the common-law liability.[29] The consignee must use ordinary care in ascertaining and removing causes of delay.[30] What is proper diligence is a question of fact for the jury.[31]

Delivery to succeeding carrier.—If no forwarder be specified the initial carrier may select it.[32] Otherwise does so at its own risk.[33]

When the connecting carrier refuses a shipment, the initial carrier should use the same care that the owner, being a man of ordinary care and prudence, would have exercised under the same knowledge in forwarding.[34] It is the duty of the initial carrier to give notice to the consignor unless the property is of such character that injury will result from the time consumed.[35]

§ 8. *Loss of or injury to goods.*[36]—A carrier is not liable for loss of goods not in its possession or under its control, or in no way attributable to its negligence.[37] If in its custody, it is not absolved by the fact that the act of its agent representing a third person caused the loss,[38] nor does the shipper's knowledge always excuse the carrier's negligence.[39] The carrier may be responsible for the burning of goods placed on its platform.[40] It is not negligence for a carrier to fail to take precautions against loss by fire of cars on a siding in the open country,[41] and it is not liable for loss by unprecedented storm, though had cars been delivered promptly they would have been previously unloaded,[42] the question of negligence in such cases being for the jury.[43] Nondisclosure of value or the signing of a clear receipt may wholly or partially release the carrier.[44]

W. 425, 28 L. R. A. 80. The carrier is held liable for delay in transporting goods caused by a strike of its employes, unaccompanied by violence or intimidation. Central R. & Banking Co. v. Georgia Fruit & Vegetable Exch., 91 Ga. 389, 17 S. E. 904; Pittsburgh, Ft. W. & C. R. Co. v. Hazen, 84 Ill. 36, 25 Am. Rep. 422; Missouri Pac. R. Co. v. Levi [Tex. App.] 14 S. W. 1062; Read v. St. Louis, K. C. & N. R. Co., 60 Mo. 199. But the carrier is generally relieved from liability for delay caused by mob violence of strikers which cannot be overcome by reasonable efforts. Geismer v. Lake Shore & M. S. R. Co., 102 N. Y. 563, 55 Am. Rep. 837; International & G. N. R. Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A. 545; Lake Shore & M. S. R. Co. v. Bennett, 89 Ind. 457; Haas v. Kansas City, etc., R. Co., 81 Ga. 792, 7 S. E. 629; Louisville & N. R. Co. v. Bell, 13 Ky. L. R. 393.—From note to Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co. [U. S.] 35 L. R. A. 623.

29. Code, § 1964. Parker v. Atlantic Coast Line R. Co., 133 N. C. 335, 45 S. E. 658.

30. Nonprepayment of freight. $?59 damages sustained. Louisville & C. Packet Co. v. Bottorff, 25 Ky. L. R. 1324, 77 S. W. 920.

31. Roth Clothing Co. v. Maine S. S. Co., 86 N. Y. S. 25.

32. Bessling & Co. v. Houston & T. C. R. Co. [Tex. Civ. App.] 80 S. W. 639.

33. A car line taking freight for a point "Care M. P. R. R." must deliver to that road, and is liable for an intermediate carrier. It was liable for delay in doing so on the part of a transportation company to which it delivered them. James S. Davis Clothing Co. v. Merchants' Dispatch Transp. Co. [Mo. App.] 81 S. W. 226.

34. Selection of circuitous route held negligent. Louisville & N. R. Co. v. Duncan, 137 Ala. 446, 34 So. 988.

35. Louisville & N. R. Co. v. Duncan, 137 Ala. 446, 34 So. 988.

36. See 1 Curr. L. 428.

37. Not liable for cotton burned while in possession of compress company, though cost of compression was included in the freight and paid by carrier. Edwards & Co. v. Tex. Midland R. Co. [Tex. Civ. App.] 81 S. W. 800. Where a horse became frightened while in the custody of the carrier and ran away, but no fault was attributable to the carrier, he was not liable. Kaplan v. Midland R. Terminal Co., 88 N. Y. S. 945.

38. Where an express agent at request of the owner attempts to select and forward the owner's goods, the company is liable as for a conversion of goods belonging to others erroneously forwarded. Edwards v. American Exp. Co., 121 Iowa, 744, 96 N. W. 740.

39. A carrier is not relieved from liability for furnishing a refrigerator car improperly iced, by the fact that the shipper discovers such fact before his goods are loaded, if he has no opportunity to remedy the situation or honestly believes they will travel safely. Whether discovered in time to remedy the condition and impose liability on the shippers is for the jury. Johnson v. Toledo, S. & M. R. Co. [Mich.] 95 N. W. 724.

40. It is not in itself negligence to store cotton on the platform unless the shipper has notice that locomotives are so equipped or operated as to be dangerous. Southern R. Co. v. Wilson, 138 Ala. 510, 35 So. 561. Evidence held to show liability for firing cotton placed for shipment. Mo., K. & T. R. Co. v. Beard [Tex. Civ. App.] 78 S. W. 253.

41. Siding maintained for benefit of planters in that locality. Charnock v. Tex. & P. R. Co., 194 U. S. 432, 24 S. Ct. 671.

42. Hunt Bros. v. Mo., K. & T. R. Co. [Tex. Civ. App.] 74 S. W. 69.

43. Evidence that a car containing explo-

§ 9. *Delivery by carrier and storage at destination.*[45]—In the absence of a special contract or custom to the contrary, the duty of a common carrier of goods is not completed upon their mere arrival at destination, but includes their delivery to the consignee,[46] or their deposit in depot or warehouse, and notice given,[47] though there is a custom not to notify;[48] but a custom may remove the necessity of giving notice on particular days.[49] Where the contract contemplates delivery upon the carrier's premises at the place of destination, and no time for their arrival or delivery is stipulated for, the carrier is bound to allow the consignee a reasonable time in which to make inquiries as to their arrival,[50] or else to give him notice of such arrival.[51] In either case, the consignee is entitled to a reasonable time and opportunity, after notice of their arrival, in which to take the goods away.[52] What is a reasonable time depends upon all the circumstances of the case, and is a question of fact.[53] A well known custom that the carrier shall notify the consignee by mail is to be considered as part of the contract of transportation.[54] Demand for delivery and tender of charges may not be essential.[55] The consignees are not bound to make inquiry if they have reason to think a shipment overdue.[56] Misinformation in response to an inquiry may make a liability, though the notice had been sent.[57]

After refusal to deliver, the carrier is liable for subsequent damages.[58]

Presentation of the shipping receipt or bill of lading properly indorsed is essential on a shipment to consignor's order,[59] and usage and custom will not dispense therewith,[60] nor will the shipper's direction to deliver without it.[61] A right to presentation of a shipping bill is waived by refusal to deliver on ground of unpaid freight.[62]

A statute punishing the delivery of goods without production of the bill of lading, unless non-negotiable, cannot be made a basis of recovery by one induced to take the bill through a forgery rendering it apparently negotiable.[63]

Liability for delivery of goods at a wrong station is waived by direction of

sives, so placarded, was allowed to stand 3 or 4 days on a transfer track, is for the jury. Phoenix Powder Mfg. Co. v. Wabash R. Co., 101 Mo. App. 442, 74 S. W. 492.

44, 45. See 1 Curr. L. 429.

46. Burr v. Adams Exp. Co. [N. J. Law] 58 A. 609.

47. Pa. R. Co. v. Naive [Tenn.] 79 S. W. 124. Especially where there is a custom. Ala. & V. R. Co. v. J. M. & C. B. Pounder [Miss.] 35 So. 155.

48. Liability exists for freight destroyed by fire in depot. Gulf & C. R. Co. v. Fuqua [Miss.] 36 So. 449.

49. July 4th. One who ships goods to that destination is bound by the custom. Pa. R. Co. v. Naive [Tenn.] 79 S. W. 124.

50, 51. Burr v. Adams Exp. Co. [N. J. Law] 58 A. 609.

52. Plaintiff learned of arrival of goods at 8 p. m., paid charges and arranged for delivery to expressman the next morning. Goods stolen that night. Company held liable. Burr v. Adams Exp. Co. [N. J. Law] 58 A. 609.

53. Burr v. Adams Exp. Co. [N. J. Law] 58 A. 609. It is not an unreasonable delay to fail to deliver goods at Denver, July 10th, which had been shipped from New York July 2d. Brooks v. Del., L. & W. R. Co., 88 N. Y. S. 961.

54. Roth Clothing Co. v. Maine S. S. Co., 88 N. Y. S. 987.

55. Where a consignee refused to accept goods and the consignor informed the carrier to return them and an agent of the carrier called on the consignor, looked at his receipt and said he would trace the goods. Hirsch v. Platt, 89 N. Y. S. 362.

56. Pa. R. Co. v. Naive [Tenn.] 79 S. W. 124.

57. Where the agent of the consignee inquires for freight, it is negligence to fail to inform him of its arrival, though notice has been mailed the consignee and the car number given by the agent is erroneous. Ala. & V. R. Co. v. J. M. & C. B. Pounder [Miss.] 35 So. 155.

58. Thyll v. New York & L. B. R. Co., 92 App. Div. 513, 87 N. Y. S. 345.

59, 60. Grayson County Nat. Bank v. Nashville, etc., R. Co. [Tex. Civ. App.] 79 S. W. 1904. But see Clegg v. Southern R. Co., 135 N. C. 148, 47 S. E. 667.

61. And after notice by the shipper to a final carrier that he holds the bills of lading and not to deliver, the carrier is not liable for delay in insisting on the production of the bills of lading or freight receipts by the person entitled to delivery, though it has meantime been notified by the shipper to deliver without them. Schlichting v. Chicago, R. I. & P. R. Co., 121 Iowa, 502, 96 N. W. 959.

62. Ill. Cent. R. Co. v. Seitz, 105 Ill. App. 89.

63. Pen. Code, § 633. Mairs v. Baltimore & O. R. Co., 175 N. Y. 409, 67 N. E. 901.

the consignee to forward to another and acceptance there.[64] The carrier may demand its production of the bill of lading as a condition to a diversion of the shipment.[65] Whether the setting of a car at an agreed point is a delivery is a question of fact.[66]

Delivery to duly authorized agent of consignee is sufficient.[67] The person rightfully entitled to possession,[68] or an officer of the law under a prima facie valid authority,[69] may claim delivery from the carrier, but the carrier must show that such delivery is binding on the consignee.[70] The carrier may be justified in delivering goods to the actual purchaser, though he be not named in the bill of lading and does not produce it.[71]

Acceptance and unloading.—Mere payment of transportation charges does not amount to acceptance of delivery, the goods not having been removed.[72]

For damages resulting from delay in unloading, the consignee may be liable.[73]

Refusal by consignee.[74]—The shipper should be notified in a reasonable time of refusal,[75] but to prevent loss the carrier may sell unaccepted perishable goods.[76]

Storage at destination.—The extraordinary liability as a carrier continues until the consignee has had a reasonable opportunity to inspect and remove the goods during business hours,[77] or until the consignee accepts.[78] Thereafter if proper storage facilities do not exist at destination, the carrier may store unclaimed freight elsewhere.[79] The happening of an injury does not raise presumptive negligence as against a warehousing carrier.[80]

Liability for conversion.[81]—There must be an absolute denial of the right to the goods or the excuses for nondelivery must be unreasonable, inconsistent or made in bad faith to constitute a conversion.[82] Misdelivery of goods is deemed a conver-

64. Hayman v. Canadian Pac. R. Co., 86 N. Y. S. 728.

65. Not sufficient that person be consignee. Ryan v. Great Northern R. Co., 90 Minn. 12, 95 N. W. 758.

66. Whether the consignee has a right to assume that it is so placed with the purpose of delivering it to him. Brown v. Pontiac, O. & N. R. Co. [Mich.] 94 N. W. 1050.

67. Brunswick & W. R. Co. v. Rothchild & Co., 119 Ga. 604, 46 S. E. 830.

68. Where the shipper has not had rightful possession, the carrier must surrender on demand of the rightful owner at any time before delivery to the consignee. An action of replevin in such case need not allege that the defendant's line passes through the county in which suit is brought as required in an action for injury to person or property. Atchison, T. & S. F. R. Co. v. Jordon Stock Food Co., 67 Kan. 86, 72 P. 533. So it may deliver to a mortgagee entitled to possession on condition broken. Johnston v. Chicago, B. & Q. R. Co. [Neb.] 97 N. W. 479. A carrier must deliver goods to the true owner, claiming under the consignee, when it has notice of his rights, and the bill of lading has already been surrendered. Certified orders for cars of grain held notice of the right of the bank, to whom they had been delivered. National Newark Banking Co. v. Del., L. & W. R. Co. [N. J. Err. & App.] 58 A. 311. Notice to the agent of the carrier charged with the duty of delivering freight of the right of one claiming under the consignee to have the goods delivered to him is notice to the carrier. Id.

69. Southern R. Co. v. Heymann, 118 Ga. 616, 45 S. E. 491.

70. Delivery to barkeeper at casino is not justified by addressing consignee at the casino. Charles Schlesinger & Sons v. New York, N. H. & H. R. Co., 85 N. Y. S. 372.

71. Where such had been the course of dealing between the parties. Bernstein v. New York, N. H. & H. R. Co., 88 N. Y. S. 971.

72. Burr v. Adams Exp. Co. [N. J. Law] 58 A. 609.

73. Evidence held insufficient to show damage to boat frozen in before unloading. Scott v. International Paper Co., 86 N. Y. S. 785.

74. See 1 Curr. L. 431.

75. Mo., K. & T. R. Co. v. Jenkins [Tex. Civ. App.] 80 S. W. 428.

76. Fish not called for in 54 hours, after 2 notices and affording indications of decay is properly sold [Laws 1899, p. 1924, c. 582]. Leech v. New York, N. H. & H. R. Co., 40 Misc. 654, 83 N. Y. S. 166.

77. Liability exists for loss by fire without negligence. Mo. Pac. R. Co. v. Newberger & Bro., 67 Kan. 846, 73 P. 57.

78. The carrier is not liable for the destruction of goods by fire not due to his negligence, where the consignee has assumed control and instead of removing them promptly allowed them to remain until a more convenient time. Stapleton v. Grand Trunk R. Co. [Mich.] 94 N. W. 739.

79. Facts held not to show liability where it was carried back 14 miles to Galveston and there destroyed by an unprecedented storm. Gulf, C. & S. F. R. Co. v. North Tex. Grain Co. [Tex. Civ. App.] 74 S. W. 567.

80. Evidence held insufficient to show wetting of goods. Thyll v. New York & L. B. R. Co., 84 N. Y. S. 175.

81. See 1 Curr. L. 430.

82. Facts held not to show conversion.

sion of them, the same as a total failure to deliver them;[83] but mere delay is not a conversion.[84] A demand by the owner upon the carrier for goods in its possession, and a refusal on its part to deliver them, constitute a conversion, in the absence of a sufficient legal ground for such refusal.[85] The right or duty to demand a bill of lading controls the question of whether a refusal to surrender without its production is a conversion.[86] A conversion is not excused by mistake,[87] or the fact that the property is susceptible of unlawful use.[88] A tender of the goods to the owner, where there has been no previous demand and refusal, is a defense to an action for their conversion,[89] but an offer to return freight is not, though it may go in mitigation of damages.[90] A lien for freight must be pleaded to go in mitigation of damages for wrongful taking.[91]

An assignment to the carrier of the shipper's interest in goods wrongfully delivered confers on the carrier the right to sue the person to whom delivery has been made for conversion.[92]

§ 10. *Liability of carrier or connecting carrier.*[93]—At common law and where there is not a through or joint contract, one carrier is not liable for the negligence of another.[94] Such liability is not assumed by a mere agreement to

Rubin v. Wells Fargo Exp. Co., 85 N. Y. S. 1108.

83. Delivery to wrong person or at wrong place. Defendant disregarded directions as to destination and connecting carrier to which they were to be delivered. Cleveland, C., C. & St. L. R. Co. v. Potts & Co. [Ind. App.] 71 N. E. 685.

84. There must be a demand where the goods have been safely kept. Ryland v. Chesapeake & O. R. Co. [W. Va.] 46 S. E. 923. Coffins delayed. St. Louis S. W. R. Co. v. Tyler Coffin Co. [Tex. Civ. App.] 81 S. W. 826.

85. Evidence held not to show demand for shipment of coffins or refusal to deliver them. St. Louis S. W. R. Co. v. Tyler Coffin Co. [Tex. Civ. App.] 81 S. W. 826. Refused on the sole ground that owner would not pay the amount of freight demanded which was excessive. Meanwhile goods were frozen. Clegg v. Southern R. Co., 135 N. C. 148, 47 S. E. 667.

86. Delivery on a bond without presentation of a bill of lading and payment of draft attached is a conversion. Marshall & M. Grain Co. v. Kan. City, Ft. S. & M. R. Co., 176 Mo. 480, 75 S. W. 638. Refusal is a conversion where the demand is not justified. First Nat. Bank v. San Antonio & A. P. R. Co. [Tex.] 77 S. W. 410.

NOTE. Notify shipment; rights of party notified: A railroad company refused to deliver perishable goods to a consignee in a "notify" shipment, because he would not pay excessive charges. In a suit by the consignee for injury caused to the goods by the delay, it was held he could recover in spite of the fact that at the time he demanded the goods the bill of lading had not been transferred to him by the bank to which it had been sent. Clegg v. Southern R. R. [N. C.] 47 S. E. 667.

An action would lie against the carrier in favor of the bank, on the facts of the principal case for wrongful delivery without production of the bill of lading. Hirskell v. Farmers Nat. Bank, 89 Pa. 155. Delivery in such case amounts to a conversion. Furman v. R. R., 106 N. Y. 579; North Pa. R. R. v. Commercial Bank, 123 U. S. 627. The word "notify" implies that such a party is a stranger to the transaction until he receives title from the real consignee, the bank; for otherwise, notice would be given to him without specific direction. Hutchinson, Carriers [4th Ed.] § 131b. It is difficult, then, to see how his rights are violated by the refusal to deliver until he secures the indorsement of the bank, irrespective of whether the carrier knows that he does not hold the bill of lading.—IV Columbia Law Rev. 509.

87. A conversion of coal to its own use by a carrier. Frazier v. Atchison, T. & S. F. R. Co. [Mo. App.] 78 S. W. 679.

88. That a nickel in the slot machine is capable of being used as a gambling device is not a defense to conversion in the absence of proof that it was so used. Edwards v. American Exp. Co., 121 Iowa, 744, 96 N. W. 740.

89. St. Louis S. W. R. Co. v. Tyler Coffin Co. [Tex. Civ. App.] 81 S. W. 826.

90. Marshall & M. Grain Co. v. Kan. City, Ft. S. & M. R. Co., 176 Mo. 480, 75 S. W. 638.

91. Haebler v. New York Cent. & H. R. R. Co., 84 N. Y. S. 509.

92. Johnson v. Gulf & C. R. Co. [Miss.] 34 So. 357.

93. See 1 Curr. L. 431.

94. Cudahy Packing Co. v. Dorsey [Tex. Civ. App.] 78 S. W. 20; Thomas v. Frankfort & C. R. Co., 25 Ky. L. R. 1051, 76 S. W. 1093. Where there is no joint contract, two railroad companies cannot be sued for the distinctly separate wrong of one because property has been transported over the connecting lines of the two [Laws 1899, p. 214, c. 125, does not apply]. Tex. & P. R. Co. v. Lynch [Tex.] 75 S. W. 486. An initial carrier, by delivery of a refrigerator car iced properly and in good condition to a connecting carrier, discharges its liability in the absence of special contract. Insertion of words "Ice when needed" in bills does not make a special contract. Farnsworth v. New York Cent. & H. R. R. Co., 88 App. Div. 320, 84 N. Y. S. 658. Error in waybill given to connecting carrier excuses it for failure to deliver at proper destination. Hayman v. Canadian Pac. R. Co., 86 N. Y. S. 728.

deliver to the other,[95] or by receipting for an extra terminal point,[96] except perhaps to one on a line operating under a traffic agreement.[97] An initial carrier accepting goods for shipment beyond its line and undertaking to keep the car in condition is liable,[98] and it is liable for foreign damage resulting from the defective condition of the car furnished and its unsuitableness for the purpose intended.[99]

The initial carrier is bound to obey the instructions given him by the shipper, and to communicate them to the connecting carrier.[1] The connecting carrier is bound by the bill of lading issued by the initial carrier only so far as it is a contract.[2]

Exemption and limitation of liability.[3]—A limitation of liability to the carrier's own line may be effective, though the connecting point is not specified.[4] A connecting carrier cannot have the benefit of a limitation of time to present claims in favor of initial carrier.[5]

A statute forbidding a carrier to relieve itself from the negligence of a carrier by whom it undertakes to complete a through contract is valid.[6]

Loss or injury.[7]—It is presumed that injury occurred in the hands of the final carrier, though by statute liability is imposed on the first carrier also,[8] or though the goods are in a sealed car,[9] and a local expressman is a common carrier in such a sense that delivery of freight to him in good condition raises a presumption of delivery in good order to a railroad acting as connecting carrier.[10] This presumption of negligence may be rebutted by a showing of proper handling on its part and of improper loading by the shipper or initial carrier.[11]

The initial carrier is relieved by a showing of safe delivery to a station in control of the successor.[12]

Statutory remedies.[13]—The Georgia tracing act is held not to deny the equal protection of laws to initial and connecting carriers doing business within the state.[14]

A statute providing that the last of connecting carriers to receive goods shall be liable to the consignee for all damage, the ultimate liability to be settled among the carriers, is not in violation of the commerce clause of the Federal constitution.[15]

§ 11. *Limitation of liability.*[16]—The carrier cannot exempt itself from lia-

95. Cannot recover from the first carrier where the goods are taken from the final carrier in replevin. American Hay Co. v. Bath & H. R. Co., 85 N. Y. S. 341.

96. Does not import a contract to carry to the final destination. Farnsworth v. New York Cent. & H. R. R. Co., 88 App. Div. 320, 84 N. Y. S. 658.

97. Issuance of bill of lading to point on line of road with which the carrier has a joint traffic arrangement, held a through contract within Rev. St. 1899, § 944. Western Sash & D. Co. v. Chicago, R. I. & P. R. Co., 177 Mo. 641, 76 S. W. 998.

98. Johnson v. Toledo, S. & M. R. Co. [Mich.] 95 N. W. 724.

99. Agent informed that plaintiff intended to ship bees in car. International & G. N. R. Co. v. Aten [Tex. Civ. App.] 81 S. W. 346.

1. As to destination and manner of shipment. Cleveland, C., C. & St. L. R. Co. v. Potts & Co. [Ind. App.] 71 N. E. 685.

2. Tex. & P. R. Co. v. Kelly [Tex. Civ. App.] 74 S. W. 343.

3. See 1 Curr. L. 432.

4. Was left blank. Nenno v. St. Louis & S. F. R. Co. [Mo. App.] 80 S. W. 24.

5. Grayson County Nat. Bank v. Nashville, C. & St. L. R. Co. [Tex. Civ. App.] 79 S. W. 1094.

6. Rev. St. 1899, § 5222 invalidates a contract limiting liability to line of carrier. Contract for through shipment from Missouri to a point beyond its line in Arkansas. Marshall & M. Grain Co. v. Kan. City, Ft. S. & M. R. Co., 176 Mo. 480, 75 S. W. 638.

7. See 1 Curr. L. 433.

8. Civ. Code, § 2176. Willett v. Southern R. Co. [S. C.] 45 S. E. 93.

9. Beede v. Wis. Cent. R. Co., 90 Minn. 36, 95 N. W. 454.

10. Willett v. Southern R. Co. [S. C.] 45 S. E. 93.

11. Tex. & P. R. Co. v. Kelly [Tex. Civ. App.] 74 S. W. 343.

12. Evidence of plaintiff. Thyll v. New York & L. B. R. Co., 92 App. Div. 513, 87 N. Y. S. 345.

13. See 1 Curr. L. 433.

14. Civ. Code 1895, §§ 2317, 2318. Southern R. Co. v. Ragsdale [Ga.] 47 S. E. 179.

15. Civ. Code 1895, § 2298. Kavanaugh & Co. v. Southern R. Co. [Ga.] 47 S. E. 526. This remedy may be waived and the carriers proceeded against on their common-law liability. Id.

16. See 1 Curr. L. 434.

bility for negligence,[17] but may be invoked when an affirmative act of wrongdoing is not shown.[18] Limitations, however, may have the effect of shifting the burden of proof of negligence.[19] An express company taking a draft for collection cannot limit its liability to that of an ordinary carrier.[20] In the absence of a statement of value, a limitation thereof is valid,[21] and having limited amount of its liability, the carrier cannot by its bill of lading secure the benefit of insurance on the excess value of the goods.[22] An exemption from liability for damages by fire, expressed in the bill of lading, is valid.[23] Any deviation from the terms of the contract of carriage will deprive the carrier of the benefits of limitations of liability therein.[24]

A limitation, valid in the state where the contract is made, will be recognized in the state in which action is brought.[25] In refusing to recognize[26] or allow[27] contracts limiting liability, a state does not regulate interstate commerce.

17. Paul v. Pa. R. Co. [N. J. Law] 57 A. 139. Clause "Subject to delay" in contract of shipment of perishable goods cannot be given such effect. Parker v. Atlantic Coast Line R. Co., 133 N. C. 335, 45 S. E. 658. Limitation respecting operation of side track held not one as carrier. Mann v. Pere Marquette R. Co. [Mich.] 97 N. W. 721. Such an exemption is invalid, though there is a statute imposing a penalty for failure to transport in a certain time in the absence of agreement [Code, § 1967]. Parker v. Atlantic Coast Line R. Co., 133 N. C. 335, 45 S. E. 658.

18. Hirsch v. New York Dispatch & D. Co., 85 N. Y. S. 198.

19. Injury from wet. Thyll v. New York & L. B. R. Co., 92 App. Div. 513, 87 N. Y. S. 345. A contract exempting liability for wet places on the shipper the burden of establishing a specific act of negligence on the part of the carrier, the proximate cause of the injury. Id., 84 N. Y. S. 175. Showing of loss by fire in freight house is not sufficient. Van Akin v. Erie R. Co., 92 App. Div. 23, 87 N. Y. S. 871. Contract "Subject to delay" does not shift the burden from the carrier of showing due diligence. Parker v. Atlantic Coast Line R. Co., 133 N. C. 335, 45 S. E. 658.

20. Cannot limit amount of liability for taking check instead of cash. Gowling v. American Exp. Co., 102 Mo. App. 366, 76 S. W. 712.

21. Wilson v. Platt, 84 N. Y. S. 143. Express receipt stamped by messenger "value asked and not given" effectively limits value to amount stated therein. Limitation to $50 unless greater value is stated and in absence of gross negligence or fraud becomes effective. Bernstein v. Weir, 40 Misc. 635, 83 N. Y. S. 48.

22. Pa. R. Co. v. Burr [C. C. A.] 130 F. 847.

23. Though the option to ship under the common-law liability was not presented to the shipper. Cau v. Tex. & P. R. Co., 194 U. S. 427, 24 S. Ct. 663.

24. Cleveland, C., C. & St. L. R. Co. v. Potts & Co. [Ind. App.] 71 N. E. 685.

25. Limitation of liability for fire in contract made in Illinois to carry to Kentucky will be recognized in Kentucky, though invalid under Const. § 196, the loss having occurred in Illinois. Cleveland, C., C. & St. L. R. Co. v. Druien [Ky.] 80 S. W. 778. A contract for shipment from Illinois to Missouri made in Illinois is to be construed by the law of that state. Nenno v. St. Louis & S. F. R. Co. [Mo. App.] 80 S. W. 24.

NOTE. Conflict of laws as to carriers' contracts limiting liability: The validity of a stipulation limiting the carrier's common-law liability, in a contract of carriage from one state or country to another, is to be determined by the law of the place where the contract was made and the transportation commenced, without reference to the law of the place of destination, or of the place where the alleged breach of contract or loss or injury occurred. This rule is said to have been applied in the following cases where the question was as to the right of a common carrier to limit its common-law liability by excepting losses or injuries not due to negligence. The Henry B. Hyde, 82 F. 681 (valid); Hale v. N. J. Steam Nav. Co., 15 Conn. 546, 39 Am. Dec. 398 (invalid); Camp v. Hartford & N. Y. Steamboat Co., 43 Conn. 340 (valid); Western & A. R. Co. v. Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102 (valid); St. Joseph & G. I. R. Co. v. Palmer, 38 Neb. 463, 56 N. W. 957, 22 L. R. A. 335 (invalid).

The same rule has been applied as to stipulations limiting liability for negligent loss or injury, though in the cases here cited it seems to have been tacitly assumed that such stipulations were not so opposed to the public policy of the forum that enforcement would be refused, even though valid where made. Liverpool & G. W. Steam Co. v. Phoenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 Law. Ed. 788 (invalid); Mexican Nat. R. Co. v. Jackson [C. C. A.] 118 F. 549; Ill. Cent. R. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210 (invalid). But the Federal courts refuse to enforce such stipulations, without regard to their validity where the contract was made, on the ground that they are opposed to the public policy of the United States. The Kensington, 183 U. S. 263, 22 S. Ct. 102, 46 Law. Ed. 190; The Iowa, 50 F. 561; The Hugo, 57 F. 403 (affirmed in 168 U. S. 104, 18 S. Ct. 12, without passing on point in question); The New England, 110 F. 415. It is unnecessary to invoke the public policy of the United States in passing on stipulations to which the Harter act applies, as in such case that act governs. See Knott v. Botany Worsted Mills, 179 U. S. 69, 21 S. Ct. 30, 45 Law. Ed. 90.

The same general rule, first stated in this note, has also been applied in cases passing

Necessity and sufficiency of agreement between carrier and shipper.[28]—Limitations in the bill of lading must be distinctly brought to the shipper's notice in order that a contract may result from his nondissent.[29] Where the shipper has possession of and fills out his own shipping receipts, there is a special contract.[30] A limitation of common-law liability must be on consideration,[31] which is not presumed,[32] but a lack of independent consideration expressed in the bill will not avoid such provision if the contract be entire.[33]

§ 12. *Public records of traffic.*—The names and addresses of consignor and consignee are "marks" which must be recorded by carriers before delivering liquors to nonlicensè towns in Massachusetts.[34]

§ 13. *Remedies and procedure.*[35] *Timely notice or suit.*—Provisions in bills of lading, requiring notice of claims to be presented and actions for damages to be brought within a certain time, are generally held to be valid conditions precedent,[36] but this rule does not apply to cases where there has been a conversion of the goods.[37] Provision for timely claim is waived by acceptance of informal notice and refusal of payment on other grounds.[38]

Persons who may sue.[39]—A consignee who is injured may sue on a contract with his consignor,[40] and must sue when title has passed to him.[41] Bankers to whom a draft with bill of lading attached is forwarded for collection, by becoming responsible for the freight, are entitled to complain of a conversion by the carrier,[42] but the consignors on election to hold the bank, for negligence in surrendering control of the shipment, cannot.[43] An action for a breach of a special rate contract during lifetime of the promisee could be maintained only by his executors

on the validity of stipulations limiting the amount of the carrier's liability. Pac. Exp. Co. v. Foley, 46 Kan. 457, 26 P. 665, 12 L. R. A. 799 (valid); Ohio & M. R. Co. v. Tabor, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18, 34 L. R. A. 685, 688 (invalid). The general rule will be defeated where the court takes the position that the limitation passed upon is contrary to the public policy of the forum and hence invalid. Chicago, B. & Q. R. Co. v. Gardiner, 51 Neb. 70, 70 N. W. 508. None of the cases cited in this note in support of the general rule makes any distinction based on the place of the loss or injury, and in some it expressly appeared that the loss or injury occurred outside the jurisdiction of the state in which the contract was made and the transportation commenced. For other citations and full discussion see note to Hughes v. Pa. R. Co. (202 Pa. 222, 51 A. 990) in 63 L. R. A. 513.

26. Limitation of amount of liability for negligence in a contract of interstate carriage. Pa. R. Co. v. Hughes, 191 U. S. 477, 24 S. Ct. 132.

27. Limitation of liability beyond its line on entering into a through contract [Rev. St. 1899, § 914]. Western Sash & D. Co. v. Chicago, R. I. & P. R. Co., 177 Mo. 641, 76 S. W. 998.

28. See 1 Curr. L. 435.

29. Limitation of value recoverable stamped across face. Doyle v. Baltimore & O. R. Co., 126 F. 841. No contract arises from receipt where the shipper cannot read and his attention is not called to a limitation of amount, the receipt being merely handed to him. Pompilj v. Manhattan Delivery Co., 84 N. Y. S. 230.

30. Bernstein v. Weir, 40 Misc. 635, 83 N. Y. S. 48; Wilson v. Platt, 84 N. Y. S. 143.

31. Limitation of liability for fire where not in consideration of less rate, or no rate is agreed on, there was held to be no consideration. Phoenix Powder Mfg. Co. v. Wabash R. Co., 101 Mo. App. 442, 74 S. W. 492. Where the rate is the usual one, "owner's risk," an additional exemption under a clause "subject to delay" is without consideration. Perishable fruit. Parker v. Atlantic Coast Line R. Co., 133 N. C. 335, 45 S. E. 658.

32. Phoenix Powder Mfg. Co. v. Wabash R. Co., 101 Mo. App. 442, 74 S. W. 492.

33. Principal consideration suffices, though the carrier may have had but one rate. Cau v. Tex. & P. R. Co., 194 U. S. 427, 24 S. Ct. 663.

34. Rev. Laws, c. 100, § 50. Com. v. Shea [Mass.] 69 N. E. 1066.

35. See 1 Curr. L. 436.

36. Cleveland, etc., R. Co. v. Potts & Co. [Ind. App.] 71 N. E. 685. Such is not available to a connecting carrier. Grayson County Nat. Bank v. Nashville, etc., R. Co. [Tex. Civ. App.] 79 S. W. 1094.

37. Provision requiring claim to be made within ten days rendered invalid by misdelivery of goods Cleveland, etc., R. Co. v. Potts & Co. [Ind. App.] 71 N. E. 685.

38. Frankfurt v. Weir, 40 Misc. 683, 83 N. Y. S. 112.

39. See 1 Curr. L. 436.

40. Burriss v. Mo. Pac. R. Co. [Mo. App.] 78 S. W. 1042.

41. Frankfurt v. Weir, 40 Misc. 683, 83 N. Y. S. 112.

42, 43. Gulf, etc., R. Co. v. North Tex. Grain Co. [Tex. Civ. App.] 74 S. W. 567.

as personal representatives.[44] Statutory remedies avail only the parties within the statute.[45]

Particular remedies available.—When a carrier having possession declines to deliver to the person having title, replevin will lie.[46] Under the Code in North Carolina, it is not material whether suit is brought in assumpsit or in case for loss from delay in transmission.[47] The penalty for delay in paying damage is now abolished in South Carolina.[48]

Venue[49] in the absence of statute is determined by ordinary rules.[50] By some statutes, connecting carriers on through contracts may be sued jointly in a county where any one is found.[51] The venue of an action in Georgia for failure to trace freight, or to inform the owner by which of connecting carriers it was lost, is the county where the principal place of business of the initial carrier is located.[52]

Pleading, proofs, and evidence.[53]—The complaint must not declare on alternatively distinct causes of action against the defendant as through carrier and connecting carrier.[54] In an action against a railroad company to recover for violation of its duty as a common carrier, plaintiff is not required to plead or prove the written contract under which the shipment was made.[55] If a special contract be declared on, the existence of the consideration therein stated cannot be denied,[56] the party being bound by a bill of lading as set out unless he avoids such result by his pleading,[57] but a suit on a contract evidenced by a bill of lading does not prevent denial of validity of restrictive clauses.[58] When the suit is tortwise, the duty to carry must be well pleaded.[59] Plaintiff in trover must show title.[60] Negligence must be pleaded to a legal conclusion,[61] but not by setting out facts.[62]

Under general denial to the consignee's action, freight cannot be allowed nor money paid the consignor recouped.[63]

44. Sullivan v. Louisville & N. R. Co., 138 Ala. 650, 35 So. 694. Such a contract is one for the performance of services and not for the payment of money. Id.

45. Under Gen. St. 1901, § 5943, only the consignee, his heirs or assigns can recover for shortage of grain shipped. Owner and consignor cannot. Weber v. Chicago, etc., R. Co. [Kan.] 77 P. 533. See Railway Co. v. Simonson, 64 Kan. 802, 68 P. 653.

46. Pub. St. 1901, c. 241, § 2. Hart v. Boston & M. R. R. [N. H.] 56 A. 920. See article Replevin, 2 Curr. L. 1514.

47. Parker v. Atl. Coast Line R. Co., 133 N. C. 335, 45 S. E. 658.

48. Code 1902, § 1711, providing that carriers shall be liable for breakage, and if they refuse to pay for 60 days, for a penalty in addition, was repealed by Acts 1903, p. 81. Johnson v. Southern R. Co. [S. C.] 48 S. E. 260.

49. See 1 Curr. L. 436.

50. See article Venue, 2 Curr. L. 2000, especially p. 2002, n. 29-34, p. 2003, n. 52-62.

51. Plea containing practical denial of a through contract held sufficient to entitle defendant, one of connecting carriers, to be sued in another county [Rev. St. 1895, art. 331a]. Tex. & P. R. Co. v. Lynch [Tex.] 75 S. W. 486. See, also, 2 Curr. L. 2004, n. 62.

52. Civ. Code 1895, §§ 2317, 2318. McCall v. Central of Ga. R. Co. [Ga.] 48 S. E. 157.

53. See 1 Curr. L. 436.

54. Louisville & N. R. Co. v. Duncan, 137 Ala. 446, 34 So. 988.

55. Is matter of defense. Empire State Cattle Co. v. Atchison, etc., R. Co., 129 F. 480.

56. In an action on a contract of carriage, providing for release from liability in transportation of a circus train in consideration of a reduced rate, an allegation that the statement therein that such reduced rate was given is false, is demurrable. Wilson v. Atl. Coast Line R. Co., 129 F. 774.

57. Complaint in action for damages to machinery due to misdelivery, held sufficient on demurrer, there being an allegation that the bill of lading on which carrier relied was not delivered until after the loss. Cleveland, etc., R. Co. v. Potts & Co. [Ind. App.] 71 N. E. 685.

58. Phoenix Powder Mfg. Co. v. Wabash R. Co., 101 Mo. App. 442, 74 S. W. 492.

59. In an action in tort for injuries to such train, a petition alleging such contract as a matter of inducement only, and that the same was void, and that it was a part of the railroad's duty as a carrier to transport circuses, is demurrable. Carrier not obliged to transport such trains and hence may contract against liability. Wilson v. Atl. Coast Line R. Co., 129 F. 774.

60. "Was then and always has been property of plaintiff" suffices. Cleveland, etc., R. Co. v. Potts & Co. [Ind. App.] 71 N. E. 685.

61. Petition held insufficient to fix liability for failure of carrier to inform connecting carriers that goods were consigned to the shipper's order. St. Louis & S. F. R. Co. v. Miller [Tex. Civ. App.] 79 S. W. 43.

62. Unreasonable and long delay of freight. Ala. & V. R. Co. v. Pounder [Miss.] 35 So. 155.

63. Frazier v. Atchison, etc., R. Co. [Mo. App.] 78 S. W. 679.

The plaintiff must, according to his allegations,[64] prove every material issue[65] by evidence legally sufficient,[66] and the carrier must do the same as to defenses.[67] Cases illustrating these general rules are cited. The burden is cast on carrier by a showing of good condition on delivery to it and damage while in its possession.[68] A presumption of ownership of goods arises from production of a bill of lading with draft attached bearing an unrestricted indorsement.[69] The consignee, if a buyer, need not show payment of purchase price in order to sue for conversion.[70] To avail of a limitation the carrier must prove such freedom from fault as it exacts.[71]

The ordinary rules[72] as to admissions, hearsay,[73] and best evidence,[74] apply. Obvious conditions are relevant to show negligence,[75] but customs bearing on a matter posterior to the wrong are immaterial.[76]

Instructions.[77]—Recent holdings on form and sufficiency,[78] and the appropriateness or necessity[79] of particular charges, are collected in the note.

64. Variance: Allegation of negligent destruction of a package and evidence of destruction by a fire not attributable to negligence. Farr v. Adams Exp. Co., 100 Mo. App. 674, 75 S. W. 183. Complaint in the Code form on a bill of lading, proof of a bill containing special limitations, not a variance. Nashville, etc., R. Co. v. Cody, 137 Ala. 597, 34 So. 1003.

65. Where it was alleged that the carrier received goods, but neither delivered them to the consignee nor returned them to the consignor, a **general denial** put both receipt and nondelivery in issue. Brooks v. Del., L. & W. R. Co., 88 N. Y. S. 961. Proof of date of consignee's refusal is essential in action for failure to notify of refusal. Mo., etc., R. Co. v. Jenkins [Tex. Civ. App.] 80 S. W. 428.

66. Sufficiency of evidence: To show negligence of final carrier. Thyll v. New York & L. B. R. Co., 92 App. Div. 513, 87 N. Y. S. 345. To show injury from frost due to negligence of last of connecting carriers. Beede v. Wis. Cent. R. Co., 90 Minn. 36, 95 N. W. 454. To support recovery for freight burned. Ft. Worth & D. C. R. Co. v. Garrison [Tex. Civ. App.] 79 S. W. 611. To show negligence in failing to give notice of arrival and failing to place goods in cold storage. Pa. R. Co. v. Naive [Tenn.] 79 S. W. 124.

To prove contract: Written contract to ship to St. Louis is not conclusive against contract established by other evidence to carry to East St. Louis, the petition alleging such a contract, but not stating whether written. Mo., etc., R. Co. v. Storey [Tex. Civ. App.] 75 S. W. 847.

To prove misdelivery: Injury to machinery due to misdelivery. Cleveland, etc., R. Co. v. Potts & Co. [Ind. App.] 71 N. E. 685.

To prove failure to notify: Statements by the carrier's clerk that he had mailed three notifications are not rebutted by the simple statement of the consignee's clerk that he had never received notification. Roth Clothing Co. v. Me. S. S. Co., 88 N. Y. S. 987.

67. Proof of occasional acceptance of bills of lading by a shipper cannot overcome positive proof of the nonacceptance of the bill in question. Cleveland, etc., R. Co. v. Potts & Co. [Ind. App.] 71 N. E. 685.

68. Pa. R. Co. v. Naive [Tenn.] 79 S. W. 124. Where a carrier receives property in good condition and returns it broken, he has the burden to show no negligence. Hoffberg v. Bumford, 88 N. Y. S. 940.

69. Willard Mfg. Co. v. Tierney, 133 N. C. 630, 45 S. E. 1026.

70. To impose such burden it must be first shown that title could not pass until payment. Evidence held to authorize suit. Frazier v. Atchison, etc., R. Co. [Mo. App.] 78 S. W. 679.

71. Liability for damage caused by fire. Cau v. Tex. & P. R. Co., 194 U. S. 427, 24 S. Ct. 663.

72. See generally, Evidence, 1 Curr. L. 1136. Consult Negligence, 2 Curr. L. 996. Evidence of damage see post, this section. Where an insurer sues for goods burned, it cannot be shown that the plaintiff with other companies had made a level rate on the shed in which the goods were stored, together with other sheds as an admission by plaintiff of the absence of negligence. Judd v. New York & T. S. S. Co. [C. C. A.] 128 F. 7. A letter from the agent of an initial carrier is not evidence against a connecting carrier of the good condition of goods on delivery to it. Thyll v. New York & L. B. R. Co., 84 N. Y. S. 175.

73. Statements of watchmen after fire and termination of employment by defendant, as to cause of fire, are not admissible as res gestae. Marande v. Tex. & P. R. Co. [C. C. A.] 124 F. 42.

74. Press copies of way bills are not best evidence unless originals are shown to be destroyed or the person making the copies and original is dead. Act between third persons. Haas v. Chubb, 67 Kan. 787, 74 P. 230.

75. On negligence in storing goods in an unsafe place, condition of neighboring buildings may be shown, together with city ordinance prohibiting smoking in the vicinity. Judd v. New York & T. S. S. Co., 130 F. 991.

76. In an action for conversion, where the carrier has regained possession and stored the freight, evidence of a custom so to store is immaterial. Marshall & M. Grain Co. v. Kan. City, etc., R. Co., 176 Mo. 480, 75 S. W. 638.

77. See 1 Curr. L. 438.

78. Instructions held properly to submit the **effect of a statute** (3 Starr & C. Ann. St. 1896 [2nd Ed.] p. 3277), prohibiting attaching of burden cars to rear of passenger trains on contract to haul car of scenery. Ill. Cent. R. Co. v. Byrne, 205 Ill. 9, 68 N. E. 720. In-

Damages.[80]—Damages for delay may be measured by diminution in value[81] or value of use.[82] On wrongful delivery, the measure of damages is the market value less charges, also any special damage which might have been foreseen.[83] On failure to give shipper notice of a refusal, the carrier is liable for decline in the market value from the time at which by ordinary care it could have given notice to the consignor,[84] or when notice is not until unreasonable time after return, for the difference in value at time of notice and at time and place when delivery should have been made.[85] If settlement is to be on terms made by an intermediary, his decision and not ordinary rules governs.[86] Value and damages are proved as in other cases.[87] Newspapers admitted to show "the condition of the market" may be read to show existence of a strike and acts of the carrier with regard to it.[88]

§ 14. *Freight and other charges.*[89]—The power of a state to regulate rates does not extend to rates on interstate commerce.[90] In the absence of special contract, an agreement for usual freight rate is implied.[91] After classification and ac-

struction as to **when liability of carrier terminated** held properly refused as assuming matter in dispute. Pa. R. Co. v. Naive [Tenn.] 79 S. W. 124. Instructions in an action for goods lost, which imply that a **bill of lading** not assented to or accepted by the shipper and consigning the goods to a different point than that designated by him is binding on him, are erroneous. Cleveland, etc., R. Co. v. Potts & Co. [Ind. App.] 71 N. E. 685.

79. Evidence held not to require instruction as to liability for **delivery without production of bill of lading.** Mo., etc., R. Co. v. Jenkins [Tex. Civ. App.] 80 S. W. 428. A charge that **cars are to be furnished within a reasonable time** is not harmful, though there is no evidence that cars were to be furnished as needed as averred in the complaint. Outland v. Seaboard Air Line R. Co., 134 N. C. 350, 46 S. E. 735. Instruction as to **duty of carrier to ship in reasonable time** held not required by pleadings or evidence in action for failure to notify of refusal by consignee. Mo., etc., R. Co. v. Jenkins [Tex. Civ. App.] 80 S. W. 428. Where there are two theories of liability for fire, one based on the care required of defendant as a railroad, and one as carrier, defendant is entitled to have the issue of **contributory negligence** submitted. Mo., etc., R. Co. v. Beard [Tex. Civ. App.] 78 S. W. 253. Where an indorsement of a bill of lading "subject to delay" is without legal effect, it is not prejudicial to the carrier to submit whether the goods were shipped under **special contract.** Parker v. Atl. Coast Line R. Co., 133 N. C. 335, 45 S. E. 658.

80. See generally, article Damages, 1 Curr. L. 833.

81. Difference in condition on arrival and condition in which they should have arrived. Potatoes. Admissibility of evidence considered. Garlington v. Ft. Worth, etc., R. Co. [Tex. Civ. App.] 78 S. W. 368. Is the difference between the value at the time they ought to have been delivered and at the time of delivery. Merchandise. Roth Clothing Co. v. Me. S. S. Co., 88 N. Y. S. 987.

82. Household goods. Mo., etc., R. Co. v. Clifton [Tex. Civ. App.] 80 S. W. 386.

On failure to haul theatrical scenery in time for a performance, the nature of plaintiff's business and his profits for a reasonable time prior to the time of violation of the contract may be considered on the question of damages. Ill. Cent. R. Co. v. Byrne, 205 Ill. 9, 68 N. E. 720.

83. Thus in case of knowledge of a contract to be fulfilled. Grayson County Nat. Bank v. Nashville, etc., R. Co. [Tex. Civ. App.] 79 S. W. 1094.

84. Mo., etc., R. Co. v. Jenkins [Tex. Civ. App.] 80 S. W. 428.

85. Roth Clothing Co. v. Me. S. S. Co., 86 N. Y. S. 25.

86. Agreement whereby party made agent of carrier settle for damages suffered by consignee on account of nondelivery of goods. held to take case out of general rule as to damage for loss of goods, and to bind carrier to pay amount agreed upon in addition to value of goods. Cleveland, etc., R. Co. v. Potts & Co. [Ind. App.] 71 N. E. 685.

87. See Damages, 1 Curr. L. 833. On market value, price at which goods were actually sold is admissible. Garlington v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 78 S. W. 368. In action for injuries to bees in transportation, plaintiff, who was engaged in the business, held competent to testify as to the amount of damages sustained. International, etc., R. Co. v. Aten [Tex. Civ. App.] 81 S. W. 346.

88. Perishable fruit. Parker v. Atl. Coast Line R. Co., 133 N. C. 335, 45 S. E. 658.

89. See 1 Curr. L. 439, for Evidence of establishment of rates, Rebates, Persons liable, Advances. 1 Curr. L. 440, for Actions for freight and charges.

90. A state railroad commission is without power to require railroad to abolish "proportional tariffs" applying only to interstate or foreign shipments, adopted with approval of Interstate Commerce Commission to prevent stopping of export shipments of grain in transit for purposes of cleaning, grading, etc. Rosenbaum Grain Co. v. Chicago, etc., R. Co., 130 F. 46. See full treatment Commerce, 1 Curr. L. 538.

91. A receiving carrier is not bound to transport for a lower rate agreed on by an initial carrier, by the mere fact that it accepts the shipment which under the law it cannot refuse. Thomas v. Frankfort & C. R. Co., 25 Ky. L. R. 1051, 76 S. W. 1093. Where a shipment is consigned to the shippers, no contract as to rates is shown by

ceptance of freight at a given rate, the carrier cannot recover a greater rate without notice on a reclassification,[92] but notice of increase in accordance with the interstate commerce act is waived by payment without protest.[93] A shipper is not protected against an increase in rates by the fact that he has a quantity of goods on hand for shipment.[94]

The consignor is primarily liable for freight.[95]

Demurrage.[96]—A state regulation of storage car service and demurrage charges is not void, though it incidentally affects interstate commerce.[97]

Reasonable demurrage charges are enforceable.[98] It is not discrimination to charge demurrage for particular classes of freight and not others.[99] The distance freight has to be hauled from cars does not bear on reasonable time for removal.[1] When demurrage rules provide that in case the proper siding is full, delivery shall be regarded as of the time it would otherwise have been made, it is not material that the siding be occupied with cars of other consignees having equal rights thereon.[2] Notice in addition to notice of arrival is not necessary to impose liability for demurrage.[3]

Liens and enforcement.[4]—A carrier can have a lien only on articles toward which services are rendered,[5] but when several cars of a shipment are subject to demurrage, the lien of the entire charge may be asserted against one or more.[6] The lien is not assignable.[7] It extends to demurrage charges,[8] advances to preceding carrier,[9] or duties on the goods paid at a port of entry to secure their possession.[10] A lien cannot be had where goods are damaged in excess of charges.[11] In enforcing liens, statutory conditions must be complied with.[12] When a sale is otherwise made, the carrier is liable as for conversion.[13]

Recovery of overpayment.[14]—One who pays transfer charges under protest

the fact that a purchaser had required information as to rates. Myar v. St. Louis S. W. R. Co., 71 Ark. 552, 76 S. W. 557.

92. Ill. Cent. R. Co. v. Seitz, 105 Ill. App. 89.

93. Act Congress Feb. 4, 1887, c. 104, § 6 (24 Stat. 380). Strough v. New York Cent. & H. R. R. Co., 92 App. Div. 584, 87 N. Y. S. 30. The reasonableness of a rate need not be submitted where voluntarily paid and there is no proof. Id.

94. Strough v. New York Cent. & H. R. R. Co., 92 App. Div. 584, 87 N. Y. S. 30.

95. Portland Flouring Mills Co. v. British & F. M. Ins. Co. [C. C. A.] 130 F. 860.

96. See 1 Curr. L. 439.

97. Rules I to XX of the Corporation Commission under Const. 1902, § 155, and Act May 16, 1903; Acts 1902-03-04, p. 392. Atl. Coast Line R. Co. v. Com. [Va.] 46 S. E. 911.

98. New Orleans, etc., R. Co. v. George & Co. [Miss.] 35 So. 193. May be imposed for failure to unload bulk freight from cars within a reasonable time. Schumacker v. Chicago & N. W. R. Co., 207 Ill. 199, 69 N. E. 825.

99. New Orleans, etc., R. Co. v. George & Co. [Miss.] 35 So. 193.

1. Schumacker v. Chicago, etc., R. Co., 207 Ill. 199, 69 N. E. 825.

2, 3. New Orleans, etc., R. Co. v. George & Co. [Miss.] 35 So. 193.

4. See 1 Curr. L. 439.

5. Lien for charges for hauling other goods does not extend to a trap driven to the depot by the owner. Taylor v. Smith, 87 App. Div. 78, 84 N. Y. S. 13.

6. New Orleans, etc., R. Co. v. George & Co. [Miss.] 35 So. 193.

7. Assignment to an attaching creditor is not a defense to wrongful attachment. Rosencranz v. Swofford Bros. Dry Goods Co., 175 Mo. 518, 75 S. W. 445.

8. Schumacker v. Chicago, etc., R. Co., 207 Ill. 199, 69 N. E. 825. A statutory lien for freight and storage [Code 1892, § 2108]. New Orleans, etc., R. Co. v. George & Co. [Miss.] 35 So. 193.

9. Thomas v. Frankfort & C. R. Co., 25 Ky. L. R. 1051, 76 S. W. 1093.

10. This lien extends to a final carrier who has advanced such payments to a preceding carrier and is not defeated because the initial carrier wrongfully changed the bonded destination, occasioning loss when the contract of carriage stipulated that the carriers should be liable only for losses on their own lines and that there should be no joint liability. Wabash R. Co. v. Pearce, 192 U. S. 179, 24 S. Ct. 231.

11. Public cartman's statutory lien. Browning v. Belford, 83 App. Div. 144, 13 Ann. Cas. 154, 82 N. Y. S. 489.

12. Cartman must send notice to bureau of licenses and place property in store as designated. Construing N. Y. City ordinance. Browning v. Belford, 83 App. Div. 144, 13 Ann. Cas. 154, 82 N. Y. S. 489; Taylor v. Smith, 87 App. Div. 78, 84 N. Y. S. 13.

13. Rev. St. 1895, art. 328. Gulf, etc., R. Co. v. North Tex. Grain Co. [Tex. Civ. App.] 74 S. W. 567. Oats are not perishable freight, subject to sale for charges on five days' notice under Rev. St. 1895, art. 331. Id.

14. See 1 Curr. L. 440.

cannot recover them back when he had other means of reaching cars consigned to him.[15]

Part III. Carriage of Live Stock.

§ 15. *Duty to carry and contract of carriage generally.*[16]—A carrier, though bound to furnish cars in pursuance of a contract,[17] is not bound to furnish the particular kind of cars demanded when others are suitable,[18] but on demand of a particular kind of cars, it is not bound to furnish other suitable ones.[19] Demand must be written to impose liability for a statutory penalty.[20] Nine days may be assumed to be a reasonable time.[21]

Signature of the contract by the carrier is not essential where the contract has been acted on.[22]

A contract of carriage of cattle is not void as contemplating a violation of a quarantine law, unless it is shown that the regulations of such law could not have been complied with.[23]

Receipt of stock in the carrier's pens,[24] or in cars,[25] initiates its liability. Where the contract provides that liability shall end at the terminus named, a parol agreement for shipment farther does not extend the liability.[26]

§ 16. *Care required of carrier.*[27]—The carrier is liable only for a violation of duty, statutory or otherwise,[28] not for injury necessarily incurred,[29] or due to the peculiar nature and propensities of animals,[30] or the shipper's negligence.[31]

Liability exists for negligence concurring with act of God.[32]

15. Bernhardt v. Carolina & N. W. R. Co., 135 N. C. 258, 47 S. E. 427.

16. See 1 Curr. L. 440. See ante, §§ 4, 6, for related matter in carriage of ordinary freight.

17. Evidence held to show negligence in failing to procure cars. Tex. & P. R. Co. v. Powell [Tex. Civ. App.] 79 S. W. 86.

18. Failure to furnish stable cars does not subject to penalty under Sayles' Civ. St. 1897, art. 4497. Tex. & P. R. Co. v. Barrow [Tex. Civ. App.] 77 S. W. 643.

19. Tex. & P. R. Co. v. Barrow [Tex. Civ. App.] 77 S. W. 643.

20. Sayles' Civ. St. 1897, art. 4497. Tex. & P. R. Co. v. Barrow [Tex. Civ. App.] 77 S. W. 643.

21. Rev. St. 1895, §§ 4497-4500. Tex. & P. R. Co. v. Smith [Tex. Civ. App.] 79 S. W. 614.

22. Duplicate contract held binding, though the name of the carrier was affixed only by rubber stamp, where it appeared by the consignee's signature thereon that he had accepted a pass issued by the carrier in accordance with its stipulations. Burriss v. Mo. Pac. R. Co. [Mo. App.] 78 S. W. 1042.

23. Tex. Cent. R. Co. v. Pittman [Tex. Civ. App.] 79 S. W. 847.

24. Lackland v. Chicago & A. R. Co., 101 Mo. 420, 74 S. W. 505. Instruction as to degree of care a carrier must exercise toward cattle in its pens held proper. Ft. Worth, etc., R. Co. v. Waggoner Nat. Bank [Tex. Civ. App.] 81 S. W. 1050.

25. Where hogs are watered and loaded just prior to the scheduled time for the arrival of the train on which they are to be shipped as directed by defendant's agent, there is a delivery imposing the duty of transporting without unreasonable delay. McCrary v. Mo., etc., R. Co., 99 Mo. App. 518, 74 S. W. 2. In tort no recovery can be had for damages prior to the loading. Cattle. Instruction held proper. Nelson v. Great Northern R. Co., 28 Mont. 297, 72 P. 642.

26. Chicago, etc., R. Co. v. Carroll [Tex. Civ. App.] 81 S. W. 1020.

27. See 1 Curr. L. 440.

28. So an action for damages will lie for failure to comply with the United States statutes as to unloading and resting. Where a local statute provides that a statutory penalty shall not remove a right of action for damages, a shipper may have an action for damages [Ky. St. 1903, § 466]. Cincinnati, etc., R. Co. v. Gregg, 25 Ky. L. R. 2329, 80 S. W. 512.

There is no distinction as to negligence in the failure to perform statutory and other duties. The latter must be established, however. Toledo, etc., R. Co. v. Beery, 31 Ind. App. 556, 68 N. E. 702.

29. Charge held erroneous. St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 77 S. W. 28. Shippers of live stock assume the risk of unavoidable accidents and delays. Delays due to washouts. McKenzie v. Mich. Cent. R. Co. [Mich.] 100 N. W. 260.

30. Lewis v. Pa. R. Co. [N. J. Law] 56 A. 128. Injury to mule occasioned by his kicking and catching his foot in slats of car door is from inherent viciousness. Central of Ga. R. Co. v. James, 117 Ga. 832, 45 S. E. 223.

31. Shrinkage due to cattle being placed in pens by shipper sooner than reasonably necessary to have them in position for loading held not recoverable (International, etc., R. Co. v. Earnest [Tex. Civ. App.] 77 S. W. 29), but where a carrier invites the delivery of cattle to it for shipment, it cannot assert that the shipper is negligent in adopting the means offered. Held for jury whether shade or shelter should have been provided for hogs awaiting shipment. Lackland v. Chicago & A. R. Co., 101 Mo. App. 420, 74 S. W. 505.

Rest and feeding.—The shipper need not demand a rest.[33] The carrier is not, however, under an absolute duty to unload stock for rest, feed and water on the shipper's request.[34] It is no defence for exceeding the statutory period of confinement that part of the period was while the cattle were in the hands of an antecedent carrier.[35]

Unreasonable delay.[36]—In the absence of special contract,[37] delivery must be in a reasonable time,[38] which is a jury question.[39] There must be evidence of the time requisite and that actually consumed.[40] Judicial notice of increase in traffic may be taken.[41] The carrier is not liable for delay anticipated by the shipper,[42] or caused by him,[43] or by act of God;[44] but the carrier is not freed from liability for delay caused by Act of God, where with knowledge it accepts cattle without informing the shipper.[45]

Time necessarily occupied by stops as required by the Federal statute must not be considered as delay,[46] or time required to give attention to cattle.[47]

32. Jones v. Minneapolis & St. L. R. Co. [Minn.] 97 N. W. 893. No liability where train is snowbound in blizzard and cattle frozen in the absence of concurring negligence. Id.

33. Southern Pac. Co. v. Arnett [C. C. A.] 126 F. 75.

Contra, a carrier is not chargeable with the neglect to afford an opportunity to feed and water live stock, accompanied by a caretaker, until it has been requested by him to do so and has refused. McKenzie v. Mich. Cent. R. Co. [Mich.] 100 N. W. 260.

34. The demand must be reasonable [Sayles' Ann. Civ. St. 1897, art. 326; U. S. Comp. St. 1901, p. 2995, § 4386]. Mo., etc., R. Co. v. Clark [Tex. Civ. App.] 79 S. W. 827. Where failure to feed or water stock or take them from the cars to rest was not alleged as a cause of their injury and there was no evidence that such failure contributed to their injury, it was not error to refuse to charge that if injuries resulted from their being left in the cars for 28 hours the verdict should be for defendant. St. Louis S. W. R. Co. v. Lovelady [Tex. Civ. App.] 81 S. W. 1040. Where no charge presenting the defense of inherent weakness of the cattle was requested, the carrier could not complain of the failure of the court to present it. Id.

35. Rev. St. U. S. § 4386, punishing confinement of cattle more than 28 hours. Cincinnati, etc., R. Co. v. Gregg, 25 Ky. L. R. 2329, 80 S. W. 512.

36. See 1 Curr. L. 441.

37. Where a carrier had agreed that cattle should be delivered at its pens on a certain day, it was liable for injuries to them because of its negligence, though it did not have notice that the cattle had been placed in the pens. Evidence held for the jury as to whether the cattle were lost. Ft. Worth, etc., R. Co. v. Waggoner Nat. Bank [Tex. Civ. App.] 81 S. W. 1050.

38. Bosley v. Baltimore & O. R. Co. [Va.] 46 S. E. 613; Southern R. Co. v. Railey Bros. [Ky.] 80 S. W. 786. A common carrier is bound to transport live stock only with reasonable dispatch. Delays due to washouts. McKenzie v. Mich. Cent. R. Co. [Mich.] 100 N. W. 260. It is the duty of a carrier to transport live stock with reasonable dispatch, in view of the character of the shipment and its liability to injury from detention. St. Louis S. W. R. Co. v. Hunt [Tex. Civ. App.] 81 S. W. 322. A charge that if the carrier used ordinary care to transport stock with reasonable dispatch, ignoring the question whether it was properly handled, the failure to use ordinary care in the latter respect being one of the acts of negligence alleged, was erroneous. St. Louis S. W. R. Co. v. Lovelady [Tex. Civ. App.] 81 S. W. 1040.

39. Bosley v. Baltimore & O. R. Co. [Va.] 46 S. E. 613. Unreasonableness of delay and cause of shrinkage of cattle. Chinn v. Chicago & A. R. Co., 100 Mo. App. 576, 75 S. W. 375. Whether delay was due to unavoidable shortage of cars. Id.

40. Johnston v. Chicago, etc., R. Co. [Neb.] 97 N. W. 479.

41. Action for unreasonable delay in carriage of cattle. Chinn v. Chicago & A. R. Co., 100 Mo. App. 576, 75 S. W. 375.

42. Where hogs are shipped at the earliest practicable scheduled time, the carrier is not liable, though there is a delay of four hours which it was known to the shippers would occur. Nashville, etc., R. Co. v. Stone [Tenn.] 79 S. W. 1031.

43. A mortgagor shipper cannot recover for delays occasioned by his attempt to ship contrary to the obligations of his mortgage. Johnston v. Chicago, etc., R. Co. [Neb.] 97 N. W. 479. Carrier is not liable for delay occasioned by statements of its agent that a final carrier would accept the shipper's check. Louisville & A. R. Co. v. Bennett, 25 Ky. L. R. 834, 76 S. W. 408.

44. Storm is act of God. Herring v. Chesapeake & W. R. Co., 101 Va. 778, 45 S. E. 322. Though a carrier may be liable for a delay in forwarding cattle, it is not liable for injury, the proximate cause of which was exposure to severe storm and cold after it was en route. Id.

45. Blizzard. Nelson v. Great Northern R. Co., 28 Mont. 297, 72 P. 642.

46. St. Louis, etc., R. Co. v. Carlisle [Tex. Civ. App.] 78 S. W. 553.

47. A delay of 12 hours while a cow included in the shipment is receiving attention in calving is not negligence, especially where 5 hours' delay was imposed by law on that length of run. Lewis v. Pa. R. Co. [N. J. Law] 56 A. 128.

§ 17. *Delivery.*[48]

§ 18. *Liability of carrier or connecting carrier.*[49]—A carrier undertaking the carriage of cattle as agent of another is held to reasonable care.[50] In the absence of special contract, the initial carrier discharges its liability for cattle to be transported beyond its line by delivery to the connecting carrier.[51]

The fault is with the initial carrier in not forwarding a way bill, where the connecting carrier's agents refuse a shipment for that reason under their rules, though they might have obtained necessary information from other sources.[52] Where freight has been transported by successive carriers and is damaged en route, the presumption is, in the absence of evidence to the contrary, that the injury occurred upon the line of the last carrier through whose hands it passed.[53]

Through contracts.[54]—When the undertaking is joint, all of the connecting carriers are liable for the negligence of each.[55] The initial carrier is liable for damages sustained on the connecting line, with a right of judgment over against such line.[56] A way bill to a particular destination does not show through contract.[57]

Limitation of liability.[58]—Where the carrier limits its liability to its own line, it cannot be held for negligence of connecting carriers, where there is no evidence of partnership or agency.[59]

Delay.[60]—A connecting carrier is liable for delay occasioned by defect in a car which it accepts from another.[61]

§ 19. *Limitation of liability.*[62]—The carrier cannot by contract free itself from liability for negligence,[63] or the duty to furnish a fit car,[64] save that the shipper may waive patent defects.[65] These principles are applicable to express companies.[66]

Limitations as to amount.[67]—A carrier cannot limit the amount of its liability for losses caused by its negligence,[68] though it has been held that it may agree

48. No cases for this section, but see 1 Curr. L. 441; and for related matter, see ante, § 9.

49. Rights where separate bills of lading are taken, see 1 Curr. L. 442. Rights where quarantine arises en route, see 1 Curr. L. 442, n. 10.

50. Southern Kan. R. Co. v. Crump [Tex. Civ. App.] 74 S. W. 335.

51. Pa. Co. v. Dickson, 31 Ind. App. 451, 67 N. E. 538. Liability exists for injury while its employes are loading animals into car of connecting carrier. Gulf, etc., R. Co. v. Mathews [Tex. Civ. App.] 76 S. W. 607.

52. 101 Live Stock Co. v. Kan. City, etc., R. Co., 100 Mo. 674, 75 S. W. 782.

53. Ft. Worth, etc., R. Co. v. Shanley [Tex. Civ. App.] 81 S. W. 1014. In such case the burden is on the last carrier to show that the damage occurred before it received the goods, and, if it does so, the burden is then cast upon the next preceding carrier to acquit itself in the same way, and so on. Id. Initial carrier held not a joint wrongdoer with connecting carrier, so as to preclude its recovering against the latter for its liability to plaintiff for damages due to delay in shipping cattle. Tex. Cent. R. Co. v. Cauble [Tex. Civ. App.] 81 S. W. 1022.

54. See 1 Curr. L. 441.

55. Chicago, etc., R. Co. v. Halsell [Tex. Civ. App.] 80 S. W. 140.

56. Tex. & P. R. Co. v. Andrews [Tex. Civ. App.] 80 S. W. 390.

57. Stock. Herring v. Chesapeake & W. R. Co., 101 Va. 778, 45 S. E. 322.

58. See 1 Curr. L. 442. See, also, ante, §§ 11, 12 for related matter.

59. International & G. N. R. Co. v. Startz [Tex.] 77 S. W. 1. Limitation to own line prevents liability for delays on connecting lines. International & G. N. R. Co. v. Earnest [Tex. Civ. App.] 77 S. W. 29.

60. See 1 Curr. L. 442.

61. St. Louis, etc., R. Co. v. Carlisle [Tex. Civ. App.] 78 S. W. 553.

62. See 1 Curr. L. 443. See, also, ante, § 12, for related matter.

63. Gulf, etc., R. Co. v. Dunman [Tex. Civ. App.] 81 S. W. 789; Botts v. Wabash R. Co. [Mo. App.] 80 S. W. 976. Delay [Civ. Code, §§ 2876, 2877, 2912]. Nelson v. Great Northern R. Co., 28 Mont. 297, 72 P. 642; Paul v. Pa. R. Co. [N. J. Law] 57 A. 139. "Delay incident to ordinary transportation" must be delays consistent with ordinary care. Southern Pac. Co. v. Arnett [C. C. A.] 126 F. 75.

64. Defects which are hidden are not excused by condition requiring shipper to inspect and select car. Lake Erie & W. R. Co. v. Holland [Ind.] 69 N. E. 138.

65. Space between slats of a car door, rendering it possible for a mule to catch his hoof between them, is a patent defect, waived by a contract showing acceptance of the car by the shipper. Central of Ga. R. Co. v. James, 117 Ga. 832, 45 S. E. 223.

66. Code, § 2165. McMillan v. American Exp. Co., 123 Iowa, 236, 98 N. W. 629.

67. See 1 Curr. L. 443.

68. Paul v. Pa. R. Co. [N. J. Law] 57 A. 139.

in advance as to value of stock,[69] which agreed value or limitation merely limits recovery beyond such amount,[70] and a rising market causing stock, though damaged, to sell on arrival at more than the agreed valuation, will not prevent recovery of actual damages up to the amount of valuation.[71] The valuation must be reasonable.[72] The shipper must show that an agreed valuation is not binding.[73]

Consideration.[74]—Limitations of common-law liability must be on consideration[75] other than the original contractual relation of the parties,[76] hence if stipulated rates be exceeded, the limitation will not avail,[77] but a consideration is not needed to support a limitation of liability to the carrier's own line,[78] or a stipulation that cattle shall be valued at the place of shipment.[79]

A shipper need not be tendered the option to hold the carrier to his common-law liability, but the carrier must be in readiness to issue a common-law bill of lading.[80]

Assent to limitation.[81]—A limitation of liability not in the contract cannot be raised by custom,[82] though a custom to sign similar contracts raises a presumption of knowledge of the shipper.[83]

Though a shipper has objected to a car furnished under a special contract, he reaffirms the contract if it is deemed to be abrogated, by insisting on other of its provisions.[84]

Provision that shipper shall accompany and care for or load and unload stock.[85]—A contract imposing on the shipper the duty to feed and water is valid,[86] in the absence of statute,[87] but failure to accompany stock as provided in a way bill does not prevent recovery for neglect of the actual duty of transportation.[88] A custom

A contract that in case of delay the measure of damages shall be the cost of food and water while the cattle are detained will not relieve against negligence. Bosley v. Baltimore & O. R. Co. [W. Va.] 46 S. E. 613; Baltimore, etc., R. Co. v. Ross, 105 Ill. App. 54.

69. Hill v. Northern Pac. R. Co., 33 Wash. 697, 74 P. 1054.

70. Nelson v. Great Northern R. Co., 28 Mont. 297, 72 P. 642.

71. U. S. Exp. Co. v. Joyce [Ind. App.] 69 N. E. 1015.

72. A valuation of hogs at $5.00 each is unreasonable. Nashville, etc., R. Co. v. Stone [Tenn.] 79 S. W. 1031.

73. U. S. Exp. Co. v. Joyce [Ind. App.] 69 N. E. 1015.

74. See 1 Curr. L. 443.

75. Rice v. Wabash R. Co. [Mo. App.] 80 S. W. 974. Where a contract is not for a reduced rate, a limitation of liability is without consideration. Summers v. Wabash R. Co. [Mo. App.] 79 S. W. 481.

76. Value. Evansville, etc., R. Co. v. Kevekorder [Ind. App.] 69 N. E. 1022.

77. Charging larger rate for shipment of live stock than that stipulated for, due to fact that carrier turned car over to another company. Hendrix v. Wabash R. Co. [Mo. App]. 80 S. W. 970.

78. Nashville, etc., R. Co. v. Stone [Tenn.] 79 S. W. 1031.

79. 101 Live Stock Co. v. Kan. City, etc., R. Co., 100 Mo. App. 674, 75 S. W. 782.

80. Evidence that person who had shipped for years never had one is admissible to show they had never been offered a common-law contract. Nashville, etc., R. Co. v. Stone [Tenn.] 79 S. W. 1031.

81. See 1 Curr. L. 443.

82. McMillan v. American Exp. Co., 123 Iowa, 236, 98 N. W. 629.

83. Nashville, etc., R. Co. v. Stone [Tenn.] 79 S. W. 1031.

84. Objection as to preparation of floor waived by demand of free transportation. Gilleland v. Louisville & N. R. Co., 119 Ga. 789, 47 S. E. 336.

85. See 1 Curr. L. 443.

86. Lewis v. Pa. R. Co. [N. J. Law] 56 A. 128; Paul v. Pa. R. Co. [N. J. Law] 57 A. 139. By the giving of a reduced rate and free transportation to the shipper, the carrier may relieve itself from the duty of caring for stock. Central of Ga. R. Co. v. James, 117 Ga. 832, 45 S. E. 223. Instruction as to duty of carrier to feed and water is error where shipper has assumed duty. St. Louis S. W. R. Co. v. Musick [Tex. Civ. App.] 80 S. W. 673. Where plaintiff was bound to feed and water, he cannot show a request to defendant's agent to water and feed while in pens of a connecting carrier, the defendant's liability being limited to its line. Gulf, etc., R. Co. v. Dunman [Tex. Civ. App.] 76 S. W. 588.

87. Under Const. § 196 against restriction of common-law liability, a carrier is not relieved from the duty of caring for stock by a bill of lading requiring shipper to unload, feed and water and send a person in charge. Such a clause simply shifts burden of proof of negligence. Cincinnati, etc., R. Co. v. Sanders, 25 Ky. L. R. 2333, 80 S. W. 488.

88. Failure to drench hogs, the appliances being in charge of the trainmen and the duty performed by them. Wallace v. Lake Shore, etc., R. Co. [Mich.] 95 N. W. 750.

to ship without a person accompanying is not admissible where the contract stipulates for such accompaniment.[89]

The burden of showing cause of death is not placed on the shipper by the fact that his agents accompany the shipment,[90] and an injury to stock through defective car flooring is not covered by an agreement by the shipper to assume care in transit.[91]

Provisions for notice of injury.[92]—A requirement of a verified claim for loss or damage within five days from removal of stock is valid.[93]

Waiver of limitation.[94]—A carrier which undertakes the duty of feeding and watering cattle without consent of the shipper who is bound to take care of them under the contract, is liable for negligent performance.[95]

Time of filing claim is waived by a refusal to settle based on other grounds,[96] and a defective claim is waived by failure to object,[97] or by denial of liability.[98]

§ 20. *Procedure in actions relating to carriage of stock. Right of action; parties; venue.*[99]—An action in tort based on violations of the carrier's common-law duty may be maintained though a special contract has been entered into, but a complaint in such an action cannot be amended to authorize recovery on the special contract.[1]

Owners of a joint shipment may join in a suit to recover damages sustained by each.[2] The owner may sue for stock shipped in the name of an agent.[3]

Statutes often make the carrier suable in any one of several counties where it may be found.[4] Such statutes extend to shipments beyond the state boundary.[5]

Pleading.[6]—The facts showing negligence should be averred[7] and causal connection shown between the breach of duty and the injury.[8] Gross negligence

89. Needy v. Western Md. R. Co., 22 Pa. Super. Ct. 489.

90. Nelson v. Great Northern R. Co., 28 Mont. 297, 72 P. 642.

91. Lake Erie & W. R. Co. v. Holland [Ind.] 69 N. E. 138.

92. See 1 Curr. L. 444.

93. Baltimore, etc., R. Co. v. Ross, 105 Ill. App. 54.

94. See 1 Curr. L. 444.

95. 101 Live Stock Co. v. Kan. City, etc., R. Co., 100 Mo. App. 674, 75 S. W. 782.

96. Wallace v. Lake Shore, etc., R. Co. [Mich.] 95 N. W. 750.

97. Notice by letter not objected to. Nelson v. Great Northern R. Co., 28 Mont. 297, 72 P. 642. No objection for absence of an affidavit and negotiations opened for settlement. Summers v. Wabash R. Co. [Mo. App.] 79 S. W. 481.

98. A refusal to investigate and denial of all liability is a waiver of written notice. 101 Live Stock Co. v. Kan. City, etc., R. Co., 100 Mo. App. 674, 75 S. W. 782.

99. See 1 Curr. L. 444. A special contract pleaded and established in defense does not prevent its maintenance. Nelson v. Great Northern R. Co., 28 Mont. 297, 72 P. 642.

1. A declaration sounding in tort for failure to furnish a suitable car cannot be amended by setting up a special contract for the equipment of the car. Gilleland v. Louisville & N. R. Co., 119 Ga. 789, 47 S. E. 336.

2. Tex. & P. R. Co. v. Andrews [Tex. Civ. App.] 80 S. W. 390.

3. Code Civ. Proc. § 540. Summers v. Wabash R. Co. [Mo. App.] 79 S. W. 481.

4. Under Laws 1899, p. 214, c. 125, a non-resident corporation may be sued in a county where another road, with which it has entered into a through contract, has an agent. St. Louis, etc., R. Co. v. White & Co. [Tex. Civ. App.] 76 S. W. 947. Under statutes providing that any or all of connecting carriers may be sued in any county in which either extends, it is not material that the shipper has accompanied the stock [Gen. Laws 26 Leg. p. 214, c. 125, § 1]. Tex. & P. R. Co. v. Murtishaw [Tex. Civ. App.] 78 S. W. 953. Consult Venue, etc., 2 Curr. L. 2000.

5. Tex. & P. R. Co. v. Murtishaw [Tex. Civ. App.] 78 S. W. 953.

6. See 1 Curr. L. 445.

7. Where the action is ex delicto, the contract need not be set out, but where the question is properly raised by special demurrer should set up the facts constituting a breach of duty and also that loss was sustained thereby. Louisville & N. R. Co. v. Cody, 119 Ga. 371, 46 S. E. 429. An averment that "the injury to plaintiff's horses was caused wholly on account of the negligence of defendants" is insufficient no reference being made to any act of negligence before mentioned. Toledo, etc., R. Co. v. Beery, 31 Ind. App. 556, 68 N. E. 702.

Contra, negligence is sufficiently alleged by an averment of death of horses during transportation and while in defendant's possession by and through its negligence. Smith v. Great Northern R. Co. [Minn.] 99 N. W. 47.

8. A complaint in an action based on failure to give an opportunity to unload cattle must aver facts showing that such was the cause of the injury. Toledo, etc., R. Co. v. Beery, 31 Ind. App. 556, 68 N. E. 702.

supervening a limitation of liability must be pleaded if relied on.[9] An action may be brought on a written contract of shipment without adopting a clause limiting value, the invalidity of which is set up in the complaint,[10] though a declaration on a special contract cannot be amended to aver that the contract set out is not binding.[11] Where special damages are claimed, facts showing them to have been within the contemplation of the parties must be alleged.[12]

The pleading will be taken as in tort or on contract according to the legal effect of its allegations.[13] The fact that a complaint sets up a special contract does not necessarily render the cause of action ex contractu.[14]

Under the codes, a reply to a defense of overloading is not necessary.[15] An averment that it was the carrier's duty to place a car of stock in position to be unloaded immediately on arrival is admitted by demurrer making its neglect negligence.[16] A contract limiting liability is admissible under the general issue in case.[17] It is a variance if negligence[18] or a cause of injury[19] or damage[20] substantially different from that pleaded, be proved.

Burden of proof and evidence.[21]—The shipper has the burden of showing compliance with conditions precedent to recovery.[22] It cannot be assumed that injuries are due to the fault of the carrier rather than to the natural propensities of the animals where the causes are of equal probability.[23] The shipper must establish negligence concurring with an overpowering cause when such cause is established.[24]

Proof of loss establishes a prima facie case[25] in the absence of particular limitations.[26] When, if the loss is from an excepted cause, the burden is on the ship-

9. Cattle. Baltimore, etc., R. Co. v. Ross, 105 Ill. App. 54.

10. Evansville, etc., R. Co. v. Kevekordes [Ind. App.] 69 N. E. 1022; Lake Erie & W. R. Co. v. Holland [Ind.] 69 N. E. 138.

11. Southern R. Co. v. Parramore, 119 Ga. 690, 46 S. E. 822.

12. Where the price of cattle per pound is contracted to be paid on delivery, damages for shrinkage are special and it must be shown by the pleadings that they were contemplated by the carrier on acceptance for shipment. Houston, etc., R. Co. v. Brown [Tex. Civ. App.] 76 S. W. 580.

13. A complaint averring that a shipper of live stock had no choice in rates, that there was no reduction in the usual charges, and no consideration for a waiver of defendant's liability, is not on the special contract. Lake Erie & W. R. Co. v. Holland [Ind.] 69 N. E. 138.

An action against connecting carriers for delay in transmission of cattle held to be on contract and hence within Code, § 363, providing that an action on contract may stand for **trial against one defendant and be continued as to co-defendants.** Louisville & A. R. Co. v. Bennett, 25 Ky. L. R. 834, 76 S. W. 408.

14. Complaint in action for delay of cattle held to be in tort, the facts alleged being violation of common-law duty. Nelson v. Great Northern R. Co., 28 Mont. 297, 72 P. 642.

15. Tex. & P. R. Co. v. White [Tex. Civ. App.] 80 S. W. 641.

16. Toledo, etc., R. Co. v. Beery, 31 Ind. App. 556, 68 N. E. 702.

17. Baltimore, etc., R. Co. v. Ross, 105 Ill. App. 54.

18. Proof of delay is inadmissible unless pleaded. Central of Ga. R. Co. v. James, 117 Ga. 832, 45 S. E. 223. Damage from tracks being out of repair cannot be submitted where not pleaded or supported by evidence. St. Louis, etc., R. Co. v. Carlisle [Tex. Civ. App.] 78 S. W. 553. Evidence that horses were injured by drinking too much water at a stop is admissible though not pleaded where their action is due to a failure to water prior thereto, which was the neglect pleaded. Gulf, etc., R. Co. v. Dunn [Tex. Civ. App.] 78 S. W. 1080.

19. Evidence of a cause of injury not pleaded is admissible where drawn out on cross-examination of plaintiff by one company sued and damage occurred on line of other. Tex. & P. R. Co. v. Murtishaw [Tex. Civ. App.] 78 S. W. 953.

20. Death of cattle not alleged in petition cannot be recovered for. Tex. & P. R. Co. v. Andrews [Tex. Civ. App.] 80 S. W. 390.

21. See 1 Curr. L. 445, n. 51-65, 73, 74.

22. Rule applies where the condition appears from the evidence as well as where pleaded. Notice of injury to cattle. Kalina v. Union Pac. R. Co. [Kan.] 76 P. 438.

23. Dead calf and calf with broken leg. Lewis v. Pa. R. Co. [N. J. Law] 55 A. 128.

24. Jones v. Minneapolis & St. L. R. Co. [Minn.] 97 N. W. 893.

25. Proof that horses were in good condition when shipped, that the car in which they were was derailed and thrown down an embankment, that they bore marks of the accident and were since unserviceable, timid, and difficult to handle, presents a prima facie case. Keyes-Marshall Bros. Livery Co. v. St. Louis & H. R. Co. [Mo. App.] 80 S. W. 53.

26. A contract to load and take care of hogs, to unload and also to inspect the condition of the car, and to see that doors and windows are kept fastened, prevents the

per to show negligence,[27] the carrier has burden of showing that loss falls within the exemption,[28] and has burden of showing assent to a limitation,[29] a presumption of which arises from the signature of the shipping contract.[30] A shipper alleging want of consideration for a limitation of value has the burden.[31]

There is no presumption that the time scheduled to be made by cattle trains is reasonable.[32]

Admissibility[33] *and sufficiency*[34] *of evidence* are discussed in illustrative cases

burden of proof of freedom from negligence passing on mere proof of failure to deliver the number of hogs loaded. Needy v. Western Md. R. Co., 22 Pa. Super. Ct. 489.

27. Nashville, etc., R. Co. v. Stone [Tenn.] 79 S. W. 1031.

28. Kalina v. Union Pac. R. Co. [Kan.] 76 P. 438.

29. Cleveland, etc., R. Co. v. Patton, 203 Ill. 376, 67 N. E. 804.

30. Limitation of value. Evansville & T. H. R. Co. v. Kevekordes [Ind. App.] 69 N. E. 1022.

31. Evansville & T. H. R. Co. v. Kevekordes [Ind. App.] 69 N. E. 1022.

32. Tex. & P. R. Co. v. Currie [Tex. Civ. App.] 76 S. W. 810.

33. Testimony of plaintiff to **terms of an alleged oral contract** of carriage is admissible where the question was whether shipment was under oral or written contract. Chicago, etc., R. Co. v. Halsell [Tex. Civ. App.] 81 S. W. 1241. A claim is not an **offer of compromise** and the admissions therein may be used to contradict the plaintiff's evidence as to the amount of damage. St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 77 S. W. 28. Held not error to admit evidence of a **custom as to which** of two connecting carriers **should furnish cars** "properly cleaned and suitable for shipping," on question of their liability inter se. Chicago, etc., R. Co. v. Carroll [Tex. Civ. App.] 81 S. W. 1020.

Record of cars furnished is best evidence. Tex. & P. R. Co. v. Smith [Tex. Civ. App.] 79 S. W. 614. Evidence of opinions of persons present as reasonable necessity of **leaving cattle train** to clear obstructed road held incompetent, as also statements of engineer concerning blockade. Southern Kan. R. Co. v. Crump [Tex. Civ. App.] 74 S. W. 335. Statement that **schedule of rates** had been filed is not best evidence of its **filing** in the office of the secretary of state. Summers v. Wabash R. Co. [Mo. App.] 79 S. W. 481.

Error in **exclusion** of evidence of limitations, which would be void if established, is **harmless.** McMillan v. American Exp. Co., 123 Iowa, 236, 98 N. W. 629.

Admissions of employes [a conductor] as to negligence with regard to matters not within his employment are inadmissible. St. Louis, etc., R. Co. v. Carlisle [Tex. Civ. App.] 78 S. W. 553. Statements of depot agent as to when delivery would be made is admissible as bearing on reasonableness. Southern R. Co. v. Railey Bros. [Ky.] 80 S. W. 786. Evidence tending to show that a person with knowledge of defendants acted in their joint interest and in their common benefit is admissible to show a common undertaking. Chicago, etc., R. Co. v. Halsell [Tex. Civ. App.] 80 S. W. 140.

Admissible on damages. Plaintiff may testify as to **value of cattle at destination** had they been delivered in the condition they should have been. Gulf, etc., R. Co. v. Mathews [Tex. Civ. App.] 76 S. W. 607.

Market value of cattle, dead and injured, is admissible though the contract limits the value where it is necessary to leave the validity of such contract to the jury. Nashville, etc., R. Co. v. Stone [Tenn.] 79 S. W. 1031. Witness may testify to **value "in good condition."** Tex. & P. R. Co. v. White [Tex. Civ. App.] 80 S. W. 641.

Account of sales or telegrams sent plaintiff by third persons are **hearsay.** International, etc., R. Co. v. Startz [Tex.] 77 S. W. 1. Witness held qualified to give **opinion** that condition of cattle was caused by **bad handling and delay.** St. Louis, etc., R. Co. v. White & Co. [Tex. Civ. App.] 76 S. W. 947. Evidence that **cattle arrived too late** for a particular market, causing loss, is admissible though there is no agreement to deliver on that market. Bosley v. Baltimore & O. R. Co. [W. Va.] 46 S. E. 613.

Statement that cattle were damaged $3.25 per head held admissible as a short method of stating the proper measure of damage which witness had already given. Chicago, etc., R. Co. v. Halsell [Tex. Civ. App.] 80 S. W. 140. In an action for injuries to cattle, **testimony of experts** as to the **transportable condition** of the cattle, the effect of delay and bad treatment received during transportation, held admissible. Chicago, etc., R. Co. v. Carroll [Tex. Civ. App.] 81 S. W. 1020. Also as to what constituted overloading and what was a reasonable time to transfer them from one carrier to another. Id. Also competent to prove the condition, history, and shortage of the cattle placed in pasture at their destination. Id. Admission of evidence as to freight charged harmless, though it was immaterial. Id.

34. Held sufficient to establish: To support verdict for plaintiff. St. Louis S. W. R. Co. v. Lovelady [Tex. Civ. App.] 81 S. W. 1040; Gulf, etc., R. Co. v. McCord [Tex. Civ. App.] 81 S. W. 1032. Negligence of carrier in transporting live stock. Gulf, etc., R. Co. v. Dunman [Tex. Civ. App.] 81 S. W. 789. Negligent delay and exposure of livestock to heat. Nashville, etc., R. Co. v. Stone [Tenn.] 79 S. W. 1031. That negligence in permitting jack to remain down in a crate contributed to his death. Pacific Exp. Co. v. Emerson, 101 Mo. App. 62, 74 S. W. 132. Injury from released causes such as inherent viciousness or defect in car. Ragsdale v. Southern R. Co., 119 Ga. 627, 46 S. E. 832. Liability for unusual delay. Bosley v. Baltimore & O. R. Co. [W. Va.] 46 S. E. 613. Against two carriers for delay and rough handling of cattle. Gulf, etc., R. Co. v. Batte [Tex. Civ. App.] 81 S. W. 813.

That carrier failed to provide stock cars

cited. Testimony as to market value at a certain place and on a certain day is admissible even though acquired from market reports and newspapers.[35] Nonsuit cannot be directed in an action for failure to promptly furnish cars though there is no proof of value at destination.[36] Evidence that cattle were sold at an established market in the usual manner is sufficient to establish sale at market value.[37] Where an initial carrier delayed stock during the most trying time of day, the jury may infer that the injury occurred on that rather than a connecting line.[38]

Instructions.—The rules usual in civil actions are applicable.[39] Where the carrier's liability is limited to its own line, a special charge must be given on dam-

suitable for shipping and to warrant submission of question as to which of two connecting carriers was liable for such failure. Chicago, etc., R. Co. v. Carroll [Tex. Civ. App.] 81 S. W. 1020. Unreasonable delay, damaging hogs, over contention that it was excused by hot boxes on new cars. McCrary v. Mo., etc., R. Co., 99 Mo. App. 518, 74 S. W. 2. Negligence in billing cattle to connecting carrier. 101 Live Stock Co. v. Kansas City, etc., R. Co., 100 Mo. App. 674, 75 S. W. 782.

Whether cattle shipment contract was executed on false representation of agent that initial carrier assumed through liability. Louisville & A. R. Co. v. Bennett, 25 Ky. L. R. 834, 76 S. W. 408. Unwarranted delay and failure to shower hogs. Wallace v. Lake Shore, etc., R. Co. [Mich.] 95 N. W. 750.

35. Chicago, etc., R. Co. v. Halsell [Tex. Civ. App.] 81 S. W. 1241.

36. Plaintiff entitled to at least nominal damages. St. Louis S. W. R. Co. v. Musick [Tex. Civ. App.] 80 S. W. 673.

37. St. Louis, etc., R. Co. v. White & Co. [Tex. Civ. App.] 76 S. W. 947.

38. Wallace v. Lake Shore, etc., R. Co. [Mich.] 95 N. W. 750.

39. See generally article Instructions, 2 Curr. L. 461; also specifically consult 1 Curr. L. 446.

Questions for jury see 1 Curr. L. 446, n. 66-72. Instructions in action for damages for injuries to cattle held not objectionable as tending to confuse the jury. Gulf, etc., R. Co. v. McCord [Tex. Civ. App.] 81 S. W. 1032. Question submitted just as requested. Chicago, etc., R. Co. v. Carroll [Tex. Civ. App.] 81 S. W. 1020. As to counterclaim for negligent killing of jack, held covered by other instructions in action to recover for his transportation. Pacific Exp. Co. v. Emerson, 101 Mo. App. 62, 74 S. W. 132. That failure to transport stock on regular stock train was not negligence [refused as outside issues]. St. Louis S. W. R. Co. v. Lovelady [Tex. Civ. App.] 81 S. W. 1040.

Particular instructions: An instruction that the carrier would not be liable for the **rough handling** of cattle if done in the usual and customary manner held erroneous. Chicago, etc., R. Co. v. Carroll [Tex. Civ. App.] 81 S. W. 1020. In an action for injuries to cattle where defendant claimed that they were weak from prior lack of care, instruction failing to require that **plaintiff's prior treatment of cattle** must have proximately caused or contributed to cause the injuries in order to preclude recovery, held erroneous. Ft. Worth, etc., R. Co. v. Alexander [Tex. Civ. App.] 81 S. W. 1015. As to liability of carrier for injuries to **cattle hooked by other cattle** in course of transportation. [Covered by general charge.] Gulf, etc., R. Co. v. Dunman [Tex. Civ. App.] 81 S. W. 789. As to liability for **delay caused by unloading cattle for food,** water, and rest. Ft. Worth, etc., R. Co. v. Alexander [Tex. Civ. App.] 81 S. W. 1015. As to **burden of showing which** of several carriers **was liable** for injuries to horses,—erroneous. Ft. Worth, etc., R. Co. v. Shanley [Tex. Civ. App.] 81 S. W. 1014.

Instructions in action for damage and **delay in shipment** of cattle, approved. Gulf, etc., R. Co. v. Batte [Tex. Civ. App.] 81 S. W. 813. **"Reasonable prudent"** instead of "reasonably prudent" is harmless. St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 77 S. W. 28. Charge as to effect of **agreement by shipper to care for stock** need not be given where it appears opportunity was not afforded him. Gulf, etc., R. Co. v. Dunn [Tex. Civ. App.] 78 S. W. 1080. Construed together held **not to assume that cars were demanded** in reasonable time. Tex. & P. R. Co. v. Powell [Tex. Civ. App.] 79 S. W. 86. Properly refused as relieving defendant from liability for **negligence of its own employes** in feeding, watering, or hauling delayed cattle. Southern Kan. R. Co. v. Crump [Tex. Civ. App.] 74 S. W. 335. That plaintiff was entitled to **designate connecting carrier** held error as not supported by evidence. 101 Live Stock Co. v. Kan. City, etc., R. Co., 100 Mo. App. 674, 75 S. W. 782. Instruction that it was the **duty of the carrier to transport** live stock "with such dispatch as was reasonably necessary," held substantially correct. St. Louis S. W. R. Co. v. Hunt [Tex. Civ. App.] 81 S. W. 322.

Damages: Where jury are instructed that they can only charge defendant with such damages as were proximately caused by its negligence, it is not error to refrain from giving an affirmative instruction that it would not be liable for **injuries caused by inherent weakness or vice of the stock.** St. Louis S. W. R. Co. v. Lovelady [Tex. Civ. App.] 81 S. W. 1040. Instruction that a **connecting carrier** is not liable for damages sustained on a connecting road which only became apparent or developed while the freight was in its hands, held not required by the evidence. Tex. & P. R. Co. v. Murtishaw [Tex. Civ. App.] 78 S. W. 953. Held not misleading as permitting assessment against one carrier of damages occasioned by negligence of connecting carrier. Tex. & P. R. Co. v. Currie [Tex. Civ. App.] 76 S. W. 810. Criticised but held not misleading as allowing **double damages.** Mo., etc., R. Co. v. Storey [Tex. Civ. App.] 75 S. W. 847. Instruction as to damage for delay in furnishing cars for cattle held error as allow-

ages which the evidence shows to be due to delay by a connecting carrier, though a general charge is given.[40] Defendant is entitled to have submitted the issue of injury being proximately caused by condition of cattle and not delay.[41]

§ 21. *Damages.*[42]—The measure of damages is usually the difference between the market value at the time and in the condition they arrive and the value at the place, time, and in the condition in which they should have arrived,[43] and necessarily added expense,[44] but only such as is reasonably necessary.[45] Value at final destination controls.[46] Where expense of feeding at point of delivery and also shrinkage is recovered, the weight should be taken after feeding.[47] Interest from time of demand of damages may be awarded.[48] The measure of damage for cattle dying en route is reasonable net value at destination.[49] A carrier guilty of negligence or unreasonable delay proximately causing injury is liable though the results may have been more disastrous than had the cattle been in good condition.[50] In the absence of notice of a special contract of sale, it does not bear on damages.[51] A contract, silent as to time, does not exclude special damage from failure to reach a market in time.[52] The carrier tardy in furnishing cars is responsible for loss occasioned by failure to reach a particular market though connecting carriers also delayed the shipment, and had they not done so the market would have been reached.[56]

ing double damages. St. Louis S. W. R. Co. v. Musick [Tex. Civ. App.] 80 S. W. 673. Not erroneous as authorizing recovery for **natural shrinkage.** Tex. & P. R. Co. v. Currie [Tex. Civ. App.] 76 S. W. 810. Instruction as to measure of damages in action for injuries to live stock not erroneous for failure to inform jury that carrier would not be liable for **injuries caused by their inherent weakness.** St. Louis S. W. R. Co. v. Lovelady [Tex. Civ. App.] 81 S. W. 1040. Instruction in action for damage to and delay in shipment of stock erroneous as precluding recovery for **delays and rough handling en route.** Ft. Worth, etc., R. Co. v. Alexander [Tex. Civ. App.] 81 S. W. 1015. Instructions **limiting amount of recovery to that fixed by contract,** erroneous, where delay due to carrier's negligence. Botts v. Wabash R. Co. [Mo. App.] 80 S. W. 976. Instruction as to **measure of damages for delay** in shipping cattle erroneous as stating wrong rule, and as deciding a question of fact in issue. Chicago, etc., R. Co. v. Halsell [Tex. Civ. App.] 81 S. W. 1241. Under evidence and contract, instruction that carrier was not liable for **damages for failure to feed and water** stock at station, approved. St. Louis S. W. R. Co. v. Hunt [Tex. Civ. App.] 81 S. W. 322.

40. Gulf, etc., R. Co. v. Dunman [Tex. Civ. App.] 76 S. W. 588.

41. Tex. & P. R. Co. v. Dawson [Tex. Civ. App.] 78 S. W. 235.

42. See 1 Curr. L. 447. General questions of damages are treated in the article Damages.

43. Chicago, etc., R. Co. v. Halsell [Tex. Civ. App.] 81 S. W. 1241; Gulf, etc., R. Co. v. Ware [Tex. Civ. App.] 78 S. W. 961. Charge held not prejudicial. St. Louis, etc., R. v. Barnes [Tex. Civ. App.] 80 S. W. 104. **Market value means** price cattle will bring when market is opened after their arrival. Southern Kan. R. Co. v. Crump [Tex. Civ. App.] 74 S. W. 335. Evidence as to proceeds of sale a month later is immaterial. Cleveland, etc., R. Co. v. Patton, 203 Ill. 376, 67 N. E. 804. Mares may be shown to have lost their foals after arrival. Tex. & P. R. Co. v. Murtishaw [Tex. Civ. App.] 78 S. W. 953. There is harmless error in allowing the jury to fix market value at a point a few miles distant from the actual destination. 101 Live Stock Co. v. Kan. City, etc., R. Co., 100 Mo. App. 674, 75 S. W. 782.

44. In action for delay of carrier in transporting cattle, plaintiff is entitled to recover for extra feed necessitated thereby and for difference in value of cattle as received from value they would have had if there had been no delay. Hendrix v. Wabash R. Co. [Mo. App.] 80 S. W. 970. Where cars are not furnished within a reasonable time, the expenses of holding cattle may be recovered. Tex. & P. R. Co. v. Smith [Tex. Civ. App.] 79 S. W. 614.

45. Tex. & P. R. Co. v. Powell [Tex. Civ. App.] 79 S. W. 86.

46. Where the agreement is to deliver at defendant's terminal for transportation to destination. Tex. & P. R. Co. v. White [Tex. Civ. App.] 80 S. W. 641.

47. Nelson v. Great Northern R. Co., 28 Mont. 297, 72 P. 642.

48. Breach of contract to transport with reasonable care. Southern Pac. Co. v. Arnett [C. C. A.] 126 F. 75. It is proper to allow the jury to consider the question of interest on the value as a part of the measure of damages. Instruction approved. Gulf, etc., R. Co. v. Batte [Tex. Civ. App.] 81 S. W. 813.

49. St. Louis, etc., R. Co. v. Burns [Tex. Civ. App.] 80 S. W. 104.

50. Tex. & P. R. Co. v. Dawson [Tex. Civ. App.] 78 S. W. 235.

51. St. Louis S. W. R. Co. v. Musick [Tex. Civ. App.] 80 S. W. 673.

52. Though the contract is not to catch a particular market, failure to do so may be alleged without varying a written contract where the complaint avers that the carrier had knowledge of the market which the shipper intended to reach and that it could have been reached by transportation with

The shipper must not be negligent in preventing further damage.[54] A shipper of cattle for sale is not bound to hold and feed them in order to obviate the effect of a carrier's negligence, but may dispose of them at once and sue for the difference between the market value and what it would have been if they had been properly transported.[55] Evidence on damages and instructions on same have already been discussed.[56]

Part IV. Carriage of Passengers.

§ 22. *Who are passengers.*[57]—A passenger is one who travels in some public conveyance, by virtue of a contract, express or implied, with the carrier.[58] A contract will be implied from knowledge and consent of the conductor,[59] and from the boarding of a car with intent to pay fare,[60] or in good faith.[61] Passengers include all those who solicit the services of the carrier.[62]

The possession of a ticket is not essential,[63] and the person may be on the

reasonable dispatch. Pa. Co. v. Dickson, 31 Ind. App. 451, 67 N. E. 538.

53. Tex. & P. R. Co. v. Smith [Tex. Civ. App.] 79 S. W. 614.

54. Facts held not to warrant application of rule. Hogs. Lackland v. Chicago & A. R. Co., 101 Mo. App. 420, 74 S. W. 505.

55. St. Louis S. W. R. Co. v. Hunt [Tex. Civ. App.] 81 S. W. 322.

56. See ante, § 20.

57. Who are common carriers, see ante, § 1. See 1 Curr. L. 448, 449.

58. An employe of the shipper accompanying live stock, whose transportation has been included in the price paid as freight, is a passenger within meaning of act exempting railroad company from liability for injuries to anyone not a passenger [Act April 4, 1868; 2 Purd. Dig. p. 1604, pl. 6]. Rowdin v. Pennsylvania R. Co., 208 Pa. 623, 57 A. 1125.

NOTE. When one becomes a passenger: The relation of passenger and carrier is commonly to be implied from circumstances which must be such as to warrant the implication that the one has offered himself as a passenger and the other has accepted him. Ordinarily the carrier will not be deemed to have accepted one as a passenger unless he has presented himself to be carried in a proper condition, in a proper manner and at a proper place. The previous purchase of a ticket is not a controlling circumstance. Thus one who had a ticket and was running across the railway premises outside the station to catch a train, and was struck by an incoming train, was held not a passenger. Webster v. Fitchburg R. Co., 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521. On the other hand, a person may under certain circumstances be entitled to the rights of a passenger, though he has not yet purchased a ticket. So where one goes to a station in good faith at a reasonable hour to take a train (Grimes v. Pa. Co., 36 F. 72); or who goes to station to take a train in case he found a friend on board (Tex. & P. R. Co. v. Best, 66 Tex. 116, 18 S. W. 224); or is on his way to the station in a stage managed by the company (Buffett v. Troy & B. R. Co., 40 N. Y. 168); or one who has not bought a ticket because told by the agent to pay on the train (Allender v. Chicago, etc., R. Co., 37 Iowa, 264). The relation ordinarily commences at least as soon as a ticket is purchased with the immediate purpose of taking the cars as soon as they are ready. Johns v. Charlotte, etc., R. Co., 39 S. C. 162, 17 S. E. 698, 20 L. R. A. 520; Warren v. Fitchburg R. Co., 8 Allen [Mass.] 227, 85 Am. Dec. 700. See other cases cited in note to Webster v. Fitchburg R. Co., 24 L. R. A. 521.

59. Mooted as to whether person accustomed to be carried free and who rendered occasional assistance to employes was a passenger. Chaney v. Louisiana & M. R. Co., 176 Mo. 598, 75 S. W. 595.

60. Had not paid his fare when he sought to alight and was injured. Dallas Rapid Transit R. Co. v. Payne [Tex. Civ. App.] 78 S. W. 1085.

61. Defendant held liable for injuries to special policeman who boarded car believing he had a right to ride thereon, but who was ready and willing to pay his fare if it had been demanded of him. Denison & S. R. Co. v. Johnson [Tex. Civ. App.] 81 S. W. 780.

62. One who solicits services of licensed hackman is a passenger within meaning of city ordinance, making it unlawful to refuse to carry passengers, though he has not entered the vehicle or been accepted by the carrier. Atlantic City v. Brown [N. J. Law] 58 A. 110.

63. Person crossing tracks to take train with intention to pay fare is a passenger. Albin v. Chicago, etc., R. Co. [Mo. App.] 77 S. W. 153.

NOTE. A newsboy who is permitted to jump on and off the cars for the purpose of selling his papers, according to the weight of authority, is neither a passenger nor a trespasser, but occupies the position of a mere licensee. North Chicago St. R. Co. v. Thurston, 43 Ill. App. 587; Raming v. Metropolitan St. R. Co., 157 Mo. 477, 57 S. W. 268; Padgitt v. Moll, 159 Mo. 143, 60 S. W. 121; Fleming v. Brooklyn City R. Co., 1 Abb. N. C. 433, affirmed 74 N. Y. 618; Phila. Traction Co. v. Orbann, 119 Pa. 37, 12 A. 816; Blackmore v. Toronto St. R. Co., 38 U. C. Q. B. 172. In Amato v. Sixth Ave. R. Co., 9 Misc. 4, 29 N. Y. S. 51, nothing was said as to the custom of the railroad in allowing newsboys to sell their papers on their cars, but the court apparently recognized no middle ground, and said: "We assume that, in boarding the defendant's car, not intending to become a passenger, the plaintiff, for the time being, was a trespasser." In Padgitt v. Moll, 159 Mo. 143, 60 S. W. 121, the court

wrong train,[64] though a person who offers to pay fare only to a station for which the train does not receive passengers becomes a trespasser.[65] One entitled to carriage in a particular manner may be a trespasser if he fail to comply with the agreement.[66] The same person may be both an employe and a passenger.[67]

One riding on a pass which was void because declared so by statute can, it has been held, recover for injuries sustained.[68]

Persons stealing rides[69] or attempting to evade payment of fare are trespassers,[70] and such acts are made criminal in some states.[71]

Persons on other than passenger trains.[72]—Ordinarily one is not a passenger who boards a train not designed for such traffic,[73] but a person of authority may permit one to so become a passenger.[74] Mere belief in his authority does not suffice,[75] nor does silent acquiescence of a conductor in a person's riding on an engine at the engineer's invitation make him a passenger.[76]

said: "A newsboy jumping on and off a moving street car to sell his newspapers, not hailing to stop the car to receive him, nor signaling to stop to allow him to alight, not asking or receiving permission, either express or tacit, not asking or waiting for leave or license, but jumping on and off under circumstances that clearly indicate no purpose to pay fare, and no aim to be transported, but only to avail himself of the presence of persons on the car likely to buy his papers, is in no sense a passenger." It has also been held that he is in no better position if he is ready to pay fare if called upon. Raming v. Metropolitan St. R. Co., 157 Mo. 477, 57 S. W. 268. The cases are not in accord as to the degree of care required of the company under these circumstances. In North Chicago St. R. Co. v. Thurston, 43 Ill. App. 587, it was held that the plaintiff could not recover unless he could prove that the company wantonly or willfully inflicted an injury upon him, and in Fleming v. Brooklyn City R. Co., 1 Abb. N. C. 433, affirmed 74 N. Y. 618, the court said: "The complaint proceeds upon the theory that, by permitting newsboys to traffic with the passengers on the cars, the defendant becomes charged with the duty of looking after their safety, of seeing that they do not run into danger, and of stopping and slackening the speed of the car for them to leave, whether requested to do so or not. I do not think the railroad company can fairly be said to have assumed any such obligation. Of course the driver had no right to do anything which would recklessly or needlessly expose this boy to danger." In Padgitt v. Moll, 159 Mo. 143, 60 S. W. 121, it was held that, while the plaintiff was in no sense a passenger, and the carrier was not under any obligation to observe towards him the same degree of care which it was obliged to show its passengers, nevertheless the law did require, under such circumstances, the exercise of ordinary care. If a newsboy is allowed on a car, and is then ordered to get off when he can do so with safety, he is a trespasser if he remains on the car, and protected from willful injury only (Indianapolis St. R. Co. v. Hockett [Ind. App.] 64 N. E. 633), but he must hear the order (Indianapolis St. R. Co. v. Hockett, 161 Ind. 196, 67 N. E. 106).—From Clark, St. Ry. Acc. Law [2d Ed.] § 11.

64. Is entitled to the same care. St. Louis S. W. R. Co. v. Pruitt [Tex. Civ. App.] 79 S. W. 598.

65. Flood v. Chesapeake & O. R. Co., 25 Ky. L. R. 2135, 80 S. W. 184.

66. A newsboy on running board is a trespasser when his sole rights were under a contract to enter and leave by rear platform and only when car was at rest. Albert v. Boston El. R. Co. [Mass.] 70 N. E. 52.

67. Telegraph lineman riding to and from his work and having nothing to do with the operation of the train. Carswell v. Macon, etc., R. Co., 118 Ga. 825, 45 S. E. 695.

68. Laws 1891, c. 320, § 4, making it an unjust discrimination. McNeill v. Durham & C. R. Co., 135 N. C. 682, 47 S. E. 755. Conditions on the back of such pass are of no effect. Id. Authorities collected and discussed on the doctrine of pari delicto. Dissenting opinion by Clark, C. J., concurred in by Montgomery, J., holds that the traveler must either found his action on a riding without fare, which is unlawful, or on a contract [advertising pass], which is void. Id.

69. See Railroads, 2 Curr. L. 1382; Street Railways, 2 Curr. L. 1742, for a discussion of the carrier's duties toward them. Pledger v. Chicago, etc., R. Co. [Neb.] 95 N. W. 1057; Klenk v. Or. Short Line R. Co. [Utah] 76 P. 214; Johnson v. Chicago, etc., R. Co., 123 Iowa, 224, 98 N. W. 642; Bjornquist v. Boston & A. R. Co. [Mass.] 70 N. E. 53; McKeon v. New York, etc., R. Co., 183 Mass. 271, 67 N. E. 329; Louisville & N. R. Co. v. Kimbrough, 24 Ky. L. R. 2409, 74 S. W. 229.

70. Evidence held not to show liability toward person injured while alighting. Chicago, etc., R. Co. v. Smith, 110 Tenn. 197, 75 S. W. 711.

71. Acts 1897, p. 116. Drunkenness is no excuse [Pen. Code, § 39]. Brazzell v. State, 119 Ga. 559, 46 S. E. 837.

72. See 1 Curr. L. 449.

73. One who intrudes himself on a freight train not carrying passengers, without knowledge or consent of employes, is a trespasser. St. Louis S. W. R. Co. v. Mayfield [Tex. Civ. App.] 79 S. W. 365.

74. One riding on a freight train under direction of the trainmaster to the conductor is a passenger, though the rule of the company confines the authority to grant permits to the general superintendent. Dysart v. Missouri, etc., R. Co. [C. C. A.] 122 F. 228.

75. One boarding a freight train under

A continued and open and notorious disregard of rules by employes may amount to a waiver.[77] It will not be presumed that a brakeman on a freight train has authority to make an agreement to carry a passenger,[78] even though the carrier knows they have previously done so,[79] or that one becomes a passenger by getting on a coal car[80] not open to passengers.[81] The burden is on plaintiff to prove that such is the case.[82] Caretakers of live stock in transit are passengers for hire,[83] and the freight contract need not bear their names.[84]

When relation begins.[85]—The passenger may be such though he has not yet paid his fare,[86] or have actually boarded the car or train provided he has indicated his intention,[87] but until some offer is made to become a passenger, the conductor is not bound to anticipate such intention,[88] and the purpose of becoming a passenger must be so evinced that the conductor or carman could or should have observed it.[89] The character attaches when the intending passenger passes over the carrier's premises in his approach to the car,[90] even though he mistakes his car.[91]

The intending passenger's coming must be a reasonable time before departure of the train,[92] and he must remain in the station and places provided

the belief that a track superintendent had the right to authorize him to ride thereon, is a trespasser, but not a willful one. Ala. & V. R. Co. v. Livingston [Miss.] 36 So. 256.

76. Radley v. Columbia So. R. Co. [Or.] 75 P. 212.

77. Carriage of passengers on freight trains. Greenfield v. Detroit & M. R. Co. [Mich.] 95 N. W. 546.

78. Missouri, etc., R. Co. v. Huff [Tex.] 81 S. W. 525.

79. Does not raise an inference that they have authority to do so. Missouri, etc., R. Co. v. Huff [Tex.] 81 S. W. 525. In action for injuries received while riding on coal car in freight train, where plaintiff claimed to have paid his fare to a brakeman, instruction as to plaintiff's right to assume brakeman's authority in the premises held erroneous for authorizing such presumption and for excluding from consideration evidence that such practice was pursued by brakemen in spite of efforts to prevent it. Not cured by other instructions. Id.

80. Missouri, etc., R. Co. v. Huff [Tex.] 81 S. W. 525.

81. One who intruded himself on a freight train not for passengers without the knowledge of the carrier was not a passenger. St. Louis S. W. R. Co. v. Mayfield [Tex. Civ. App.] 79 S. W. 365.

82. Questions for jury. Missouri, etc., R. Co. v. Huff [Tex.] 81 S. W. 525.

83. Feldschneider v. Chicago, etc., R. Co. [Wis.] 99 N. W. 1034. Freight includes fare. Passenger within meaning of act exempting railroads from liability for injury to persons not paseengers [Act April 4, 1868; 2 Purd. Dig. p. 1604, pl. 6]. Rowdin v. Pennsylvania R. Co., 208 Pa. 623, 57 A. 1125.

84. One who, with the knowledge and consent of the agents of the carrier and of the conductor of the train, accompanies a shipment of live stock as an attendant, is a passenger, notwithstanding the fact that his name did not appear on the written contract as one of such attendants. American Exp. Co. v. Ogles [Tex. Civ. App.] 81 S. W. 1023. Testimony of plaintiff, in such case, that no one complained of his presence on the car, held admissible, there being evidence that the express company's agents and conductor of the train consented to his presence. Id.

85. See 1 Curr. L. 448.

86. As where he intends to and is prepared to pay. Dallas Rapid Transit R. Co. v. Payne [Tex. Civ. App.] 78 S. W. 1085.

87. Contractual relation between passenger and carrier begins as soon as the passenger comes within the sphere of peril incident to street cars, where the car has been signalled and has stopped to take on passengers. Injured before coming in actual contact with the car by the falling of a broken trolley pole. Holzenkamp v. Cincinnati Traction Co., 2 Ohio N. P. (N. S.) 157. One attempting to board a car which has slowed in obedience to his signal at a proper place is a passenger, though he may be negligent. O'Mara v. St. Louis Transit Co., 102 Mo. App. 202, 76 S. W. 680.

88. Allegation that person was engaegd in or about becoming a passenger on said car is not sufficient. Birmingham R. & Elec. Co. v. Mason, 137 Ala. 342, 34 So. 207.

89. One who intending to become a passenger approached the car from the rear and was in such a position that the conductor looking out for passengers could not have seen her was not a passenger. Foster v. Seattle Elec. Co. [Wash.] 76 P. 995. Employes are bound to exercise only ordinary care to ascertain whether a person standing in the street desires to become a passenger. Id. A person does not become a passenger by making an attempt to board a car at a place where he is not expected and where the car men are ignorant of his presence. Attempt to board a car stopped to throw a switch. McCarty v. St. Louis & S. R. Co. [Mo. App.] 80 S. W. 7.

90. A person with a drovers' pass is a passenger while walking along the tracks to reach the caboose. Lake Shore, etc., R. Co. v. Hotchkiss, 24 Ohio Circ. R. 431.

91. One is not a trespasser in approaching a train which does not carry passengers under erroneous direction of station agent to take passage thereon. Albin v. Chicago, etc,. R. Co. [Mo. App.] 77 S. W. 153.

92. Question properly left to the jury where she was present five hours prior to

for his accommodation.[93] Whether the relation exists is for the jury on a conflict of evidence.[94]

When relation ceases or is interrupted.[95]—The relation exists from starting point to usual stopping place at final disposition,[96] and during the period needed for a safe exit.[97] The arriving passenger is entitled to remain at the station such time as is reasonably necessary to prepare for departure.[98] It does not cease when one goes on the platform to change cars[99] or recheck baggage.[1]

After alighting from a street car in the street, passenger becomes at once a traveler on a public thoroughfare;[2] otherwise during unnecessary departures from his car while en route.[3] The fact that a passenger assumes a dangerous position on the car does not alter his character as a passenger.[4]

Where a person is injured while riding on a train at a distance from a station, his status as a passenger is not determined by the relation he may have borne to the carrier at the station.[5] One who, having once disembarked from a train, returns for the purpose of using it as a mode of crossing the track, is a mere trespasser.[6]

§ 23. *Duty to receive and carry passengers.*[7]—A railroad as a common carrier must permit all who pay the regular fare to travel on their trains,[8] unless their condition is such as to render them dangerous to the safety or comfort of other passengers,[9] or their known purposes in traveling are unlawful.[10] If

departure. Holcombe v. Southern R. Co., 66 S. C. 6, 44 S. E. 68.

93. Holcombe v. Southern R. Co., 66 S. C. 6, 44 S. E. 68.

94. Citizen's St. R. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935.

95. See 1 Curr. L. 448.

96. One does not as a matter of law cease to be a passenger on leaving a train on which he is riding in charge of property at a temporary stop before it was placed at a spot to be unloaded and returning next morning. Hardin v. Ft. Worth, etc., R. Co. [Tex. Civ. App.] 77 S. W. 431.

97. Is entitled to the highest degree of care. Fillingham v. St. Louis Transit Co., 102 Mo. App. 573, 77 S. W. 314. Carrier liable if, after plaintiff started to leave street car, but before she reached platform, it was suddenly started and she was thereby thrown down and injured. Kroner v. St. Louis Transit Co. [Mo. App.] 80 S. W. 915.

98. St. Louis S. W. R. Co. v. Wallace [Tex. Civ. App.] 74 S. W. 581.

99. One having a through ticket, who is required to go upon a platform in order to change cars. Wood v. Metropolitan St. R. Co. [Mo.] 81 S. W. 152.

1. Where, with knowledge, the carrier permits a passenger to alight to recheck baggage. Chicago, etc., R. Co. v. Gore, 105 Ill. App. 16.

2. Indianapolis St. R. Co. v. Tenner [Ind. App.] 67 N. E. 1044; Louisville R. Co. v. Meglemery, 25 L. R. 1587, 78 S. W. 217; Id., 25 Ky. L. R. 2062, 79 S. W. 287. See Clark, St. Ry. Acc. Law (2d Ed.) 7, 8.

3. One who leaves a through train on which he is a passenger at a temporary stop for the purpose of getting a drink is not a passenger, and his negligence in attempting to cross a track ahead of a train bars any recovery for injuries [Comp. St. 1901, c. 72, art. 1, § 3]. Sattler v. Chicago, etc., R. Co. [Neb.] 98 N. W. 663.

4. Standing on a projection outside the vestibule of a crowded car. Birmingham R., L. & P. Co. v. Bynum, 139 Ala. 389, 36 So. 736.

5. Radley v. Columbia Southern R. Co. [Or.] 75 P. 212.

6. Injured by stumbling over water hose and sudden jerking of train. Ratteree v. Galveston, etc., R. Co. [Tex. Civ. App.] 81 S. W. 566.

7. See 1 Curr. L. 453-459.

8. The fact that a passenger has been drunk on previous occasions does not justify his exclusion when in fit condition. Code 1883, § 1963, is mandatory as to duty to transport. Story v. Norfolk & S. R. Co., 133 N. C. 59, 45 S. E. 349. Nor can the carrier show intoxication at a later date. Id. A news agent subject to the rules of the carrier, though not in its employ, on being ejected for an infraction of the rules, is entitled to ride on tender of fare. Choctaw, etc., R. Co. v. Hill, 110 Tenn. 396, 75 S. W. 963. A person engaged in ticket scalping cannot for that reason be refused passage on payment of fare. Ford v East Louisiana R. Co., 110 La. 414, 34 So. 585.

9. A lunatic may be refused passage, though in charge of attendants, and secured in case he is cursing and using obscene language. Owens v. Macon & B. R. Co., 119 Ga. 230, 46 S. E. 87. Drunken passenger, though he has a ticket. Story v. Norfolk & S. R. Co., 133 N. C. 59, 45 S. E. 349.

10. NOTE. Duty towards persons prosecuting illegal pursuit: In a recent case (Godwin v. Carolina Tel. & T. Co. [N. C.] 48 S. E. 636), judicial aid to compel installation of a telephone in a bawdy house was refused. The ground was that the courts would not require the rendition of a public service for an unlawful use. It was said that while a carrier could not refuse to transport the keeper of such a house, it could refuse to haul a car used for such a purpose; also that it might reject an intending passenger

it is necessary that a violent lunatic be transported, the carrier is entitled to notice to make proper arrangements.[11] A carrier is not required to take a passenger on a train which is not a passenger train.[12] Punitive damages for a wanton or aggravated exclusion,[13] and special damages in contemplation of the parties,[14] may be recovered.

Through trains may be run, not stopping save at schedule stations,[15] but there must be no discrimination in receiving and refusing differently ticketed passengers.[16] Stops[17] are obligatory, at customary places only.[18] They must be such as to enable one to board.[19]

Stops must be made at flag stations on proper signal,[20] if seen and understood[21] by the engineer or trainmen,[22] else the carrier will be liable both for compensatory[23] and punitive damages,[24] if the failure to stop was willful.[25]

Ejection of passengers.[26]—A passenger failing to produce a ticket good on its face,[27] or a transfer slip,[28] or other indicia of right, or to pay fare, may be expelled. It is no excuse that he has lost it,[29] or has entrusted it to another

whom it knew to be traveling for the execution of a crime.

11. A carrier cannot be bound to transport a lunatic in a baggage car. Owens v. Macon & B. R. Co., 119 Ga. 230, 46 S. E. 87.

12. One rode out on an emergency train. The conductor refused to carry him back. Louisville & N. R. Co. v. Du Bose [Ga.] 47 S. E. 917.

13. When, in the presence of a large crowd, the conductor pushes back an intending passenger, telling him he was drunk and a nuisance, there is evidence of "wantonness, insult or other aggravation." Story v. Norfolk & S. R. Co., 133 N. C. 59, 45 S. E. 349.

14 To be an element of damages for exclusion, the sickness of plaintiff or his family must have been known to the conductor. Story v. Norfolk & S. R. Co., 133 N. C. 59, 45 S. E. 349. $1,000 reduced to $100 for discrimination and refusing to transport passenger, damages being alleged to be augmented on account of suffering from snake bite. Gulf, etc., R. Co. v. Moore [Tex. Civ. App.] 80 S W. 426.

15. Petition for failure to stop interurban electric car held demurrable. Battle v. Georgia R. & Elec. Co. [Ga.] 48 S. F. 337. See, also, Railroads, 2 Curr. L. 1410.

16. A carrier in according through passengers from outside the state over roads connecting with its lines at a particular point, the right to be carried therefrom on a particular train and denying those holding continuous passage tickets over its own lines the same right, violates the Interstate Commerce Act. Act Feb. 4, 1887, c. 104, 24 St. 380, may be made the basis of a civil action by the person aggrieved. Gulf, etc., R. Co. v. Moore [Tex. Civ. App.] 80 S. W. 426.

17, 18. See, also, post, § 26C, Taking on Passengers. When the carrier is in the habit of receiving passengers. Creech v. Charleston, etc., R. Co., 66 S. C. 528, 45 S. E. 86.

19. Failure to stop a sufficient time to permit plaintiff to board authorizes recovery for time lost, expense incurred or personal inconvenience. Verdict for punitive damages on ground of abuse held unsupported. Mobile & O. R. Co. v. Reeves, 25 Ky. L. R. 2236, 80 S. W. 471.

20. Instruction as to effect of signal by third person held confusing. Southern R. Co. v. Lanning [Miss.] 35 So. 417.

21. The instructions must require the engineer to understand the signal. Southern R. Co. v. Lanning [Miss.] 35 So. 417.

22. The question of whether employes other than the engineer saw the signal should not be submitted in the absence of evidence. Southern R. Co. v. Lanning [Miss.] 35 So. 417.

23, 24. When the employes are not in fault, there is no ground for recovery, and merely compensatory damages may be awarded when there is mere negligence. Southern R. Co. v. Lanning [Miss.] 35 So. 417. To render a company liable for **special damages,** the facts from which they arise must have been known to it. Pleading held sufficient and evidence insufficient to support recovery for mental anguish in being unable to reach bedside of dying child. International, etc., R. Co. v. Sammon [Tex. Civ. App.] 79 S. W. 354.

$3,333.33 reduced to $2,000 for failure to stop at flag station. Yazoo, etc., R. Co. v. Faust [Miss.] 34 So. 356.

25. Where the fireman testified that he also was keeping a lookout for signals, the right to punitive damages should not be limited to the failure of the engineer to see and stop. Yazoo, etc., R. Co. v. Mitchell [Miss.] 35 So. 339.

In an action of this kind an employe who is not a party cannot testify to his previous character in obeying signals. Reeves v. Southern R. Co. [S. C.] 46 S. E. 543.

Instructions should specify acts required to be found willful or capricious. Southern R. Co. v. Lanning [Miss.] 35 So. 417; Yazoo, etc., R. Co. v. Mitchell [Miss.] 35 So. 339.

Instructions in action for willfully refusing to stop at station held proper. Reeves v. Southern R. Co. [S. C.] 46 S. E. 543. See, also, article Railroads, 2 Curr. L. 1410.

26. On refusal to pay extra charge, see 1 Curr. L. 454. Place of ejection, see 1 Curr. L. 455.

27. Brown v. Rapid R. Co. [Mich.] 96 N. W. 925.

28. A rule that a person transferring from one line to another must produce either a transfer or fare is reasonable. Crowley v. Fitchburg, etc., R. Co. [Mass.] 70 N. E. 56.

29. Ticket was blown from plaintiff's

who fails to board the train.[30] Though the carrier was first in the wrong by refusing a proper transfer[31] or ticket,[32] the attempt to travel without paying the demanded fare will subject one to ejection;[33] but where a passenger boards the first train he is given an opportunity to, he cannot be ousted because the limit of his ticket has expired[34] by reason of the carrier's delay.[35] One who is on a car without right to free passage, and refuses to pay his fare, may be ejected[36] after demand of ticket or fare and refusal.[37] Disorderly conduct will justify expulsion,[38] but not merely ungracious language and demeanor.[39]

If a ticket is invalid, the traveler's good faith in assuming to ride does not protect him,[40] unless the carrier or its agent sold a defective ticket and he had no notice.[41] Similarly, the holder of a transfer slip which is defective by the carrier's fault is entitled to ride[42] on proper explanation.[43] He need not have examined it,[44] but a transfer may be properly refused after expiration of the

hand. Harp v. Southern R. Co. [Ga.] 47 S. E. 206.

30. Nutter v. Southern R. Co., 25 Ky. L. R. 1700, 78 S. W. 470.

31. One cannot recover for ejection for refusal to pay fare on a return trip, though he has been refused a transfer and instead of getting off remained on the car to the end of the line. Hoelljes v. Interurban St. R. Co., 87 N. Y. S. 133.

32. Where a passenger refused an exchange ticket for his interchangeable mileage by the station agent, gets on the train knowing that by the terms of his contract his mileage would not be accepted, he cannot recover damages for his ejection. Schmidt v. Cleveland, etc., R. Co., 25 Ky. L. R. 11, 74 S. W. 674.

33. NOTE. Duty of passenger to pay fare wrongfully demanded to avoid expulsion or lessen damages: There is a conflict of authority on this proposition. In some states it is held that where a passenger is already entitled to transportation, he need not pay, though able to do so. Sprenger v. Tacoma Traction Co., 15 Wash. 660, 47 P. 17, 43 L. R. A. 706; Head v. Ga. Pac. R. Co., 79 Ga. 358, 7 S. E. 217; Pa. Co. v. Bray, 125 Ind. 229, 25 N. E. 439; Calloway v. Mellett, 15 Ind. App. 366, 44 N. E. 198; Ellsworth v. Chicago, etc., R. Co., 95 Iowa, 98, 63 S. W. 584, 29 L. R. A. 173; Krueger v. Chicago, etc., R. Co., 68 Minn. 445, 71 N. W. 683; Cherry v. Kan. City, etc., R. Co., 52 Mo. App. 499; Yorton v. Milwaukee, etc., R. Co., 62 Wis. 367, 21 N. W. 516, 23 N. W. 401. In other states it is held that he must pay or leave the train. St. Louis, etc., R. Co. v. Trimble, 54 Ark. 354, 15 S. W. 899; Pullman Palace Car Co. v. Reed, 75 Ill. 125, 20 Am. Rep. 232; Western Md. R. Co. v. Stocksdale, 83 Md. 245, 34 A. 880; Cincinnati, etc., R. Co. v. Cole, 29 Ohio St. 126, 23 Am. Rep. 729. Others hold that the passenger must pay if he has been negligent in starting so that he has failed to secure a proper ticket, or if he has notice of the infirmities of his ticket, or if he gets on a train without a transfer. Atchison, etc., R. Co. v. Hogue, 50 Kan. 40, 31 P. 698; Bradshaw v. South Boston R. Co., 135 Mass. 409, 46 Am. Rep. 481; White v. Grand Rapids, etc., R. Co., 107 Mich. 681, 65 N. W. 521. Many cases have held that where failure to have a proper ticket is the fault of the ticket agent, the passenger is under no duty to pay. Head v. Ga. Pac. R. Co., 79 Ga. 358, 7 S. E. 217; Murdock v. Boston & A. R. Co., 137 Mass. 293, 50 Am. Rep. 307; Gulf, etc., R. Co. v. Rather, 3 Tex. Civ. App. 72; Louisville & N. R. Co. v. Breckinridge, 99 Ky. 1, 34 S. W. 702. Others, that, though the ticket agent was at fault, the passenger should pay to avoid trouble. Mosher v. St. Louis, etc., R. Co., 23 F. 326; Peabody v. Or. R. & N. Co., 21 Or. 121, 26 P. 1053, 12 L. R. A. 823; Chicago, etc., R. Co. v. Griffin, 68 Ill. 499. See exhaustive note to Sprenger v. Tacoma Traction Co. (15 Wash. 660, 47 P. 17) in 43 L. R. A. 706, from which these citations are taken.

34. Marx v. Louisiana Western R. Co., 112 La. 1085, 36 So. 862.

35. Trains within the limit did not stop. Marx v. Louisiana Western R. Co., 112 La. 1085, 36 So. 862.

36. Braymer v. Seattle, etc., R. Co. [Wash.] 77 P. 495.

37. Though permission was withdrawn on the ground that plaintiff was engaged in ticket scalping. Ford v. East Louisiana R. Co., 110 La. 414, 34 So. 585.

38. Facts held to justify expulsion of passenger becoming abusive in altercation over retained pass. Gallegly v. Kan. City, etc., R. Co. [Miss.] 35 So. 420. Drunkenness warrants ejection. Korn v. Chesapeake, etc., R. Co. [C. C. A.] 125 F. 897.

39. Plaintiff's conduct in refusing to unfold his transfer and otherwise held not such as to justify conductor in ejecting him from a street car. El Paso Elec. R. Co. v. Alderete [Tex. Civ. App.] 81 S. W. 1246. "Damned if I will unfold it, unfold it yourself" held neither profane nor obscene. Id.

40. Passenger was informed that his ticket was invalid and that he must either pay fare or get off. Clark v. Great Northern R. Co., 31 Wash. 658, 72 P. 477.

41. Ticket valid on its face. Erie R. Co. v. Littell [C. C. A.] 128 F. 546. Carrier is liable for the ejection of a passenger due to mistake of its agent in giving him a wrong ticket. The conductor, however, may rely on the ticket and his act does not entail personal liability if not accompanied by unreasonable or unnecessary force or insult. Ill. Cent. R. Co. v. Jackson, 25 Ky. L. R. 2087, 79 S. W. 1187.

42. Not charged with negligence of transferring conductor. Memphis St. R. Co. v. Graves, 110 Tenn. 232, 75 S. W. 729.

43. Instruction approved. Citizens' St. R. Co. v. Clark [Ind. App.] 71 N. E. 53.

44. Laws 1890, c. 565, p. 1082. Moon v. Interurban St. R. Co., 85 N. Y. S. 363.

time limited on its face.[45] The passenger must show the carrier at fault in giving an expired transfer,[46] and when he has opportunity or occasion, he should demand a new transfer before leaving his car.[47] One conductor's statement to another will not take the place of a transfer.[48]

A mistaken passenger on a wrong train should be transported back or left at a proper place until it is done.[49] But if one knowingly boards a train not for passengers,[50] or requiring pay for extra accommodations which he refuses,[51] or not scheduled for his station,[52] he may be expelled.

Tender of fare to avoid expulsion.[53]—After expulsion begins, tender of fare is ordinarily,[54] but not always, too late.[55] The carrier was in a late case held bound to accept tender of fare by fellow passengers after threat of expulsion and refusal to pay.[56]

Manner of ejection.[57]—The act of ejection must be with no unnecessary force,[58] and at a proper place[59] and with respect to obvious or known conditions.[60] The carrier must be foresighted to guard an apparently helpless person from danger after ejection.[61]

Injuries caused by resistance.[62]—Injuries occasioned by undue resistance,[53]

45. Passenger must pay his fare, but may have an action against the company in case the fault is the company's. Garrison v. United R. & Elec. Co., 97 Md. 347, 55 A. 371.

46. Hornesby v. Ga. R. & Elec. Co. [Ga.] 48 S. E. 339.

Note: The numerical weight of the decisions favors the rule that he may rely on what has been given him. Clark, St. Ry. Acc. Law, § 83.

47. Time limit expires through delay of the car on which he is riding. Held, that passenger who voluntarily left the car and attempted to reach the transfer point before the time limit expired could not recover, though a company's custom was not to issue new transfers in case of delay. Hornesby v. Ga. R. & Elec. Co. [Ga.] 48 S. E. 339.

48. Conductor of connecting line failed to furnish a transfer and informed the receiving conductor that the fare was paid. A passenger refusing to pay under such circumstances is evading payment of fare within Rev. Laws, c. 111, § 251, and his arrest is justified. Crowley v. Fitchburg & L. St. R. Co. [Mass.] 70 N. E. 56.

49. Evidence held for jury as to negligence in putting off female passenger without money at a point requiring many hours wait. St. Louis S. W. R. Co. v. Pruitt [Tex. Civ. App.] 79 S. W. 598. Instruction held not erroneous as stating that it was negligence to refuse to carry a person boarding the wrong train to a particular station where she had relatives. Id. [Tex.] 80 S. W. 72.

50. Waiver of rules: Where rules against carriage of passengers are openly and habitually violated, and for such time that the officers by use of ordinary care might have known thereof, they are presumed to be abrogated. The same rule applies to authority of employes to invite passengers to board and to collect fares. Evidence held sufficient. Mo., etc., R. Co. v. Huff [Tex. Civ. App.] 78 S. W. 249.

51. Ticket not good except in hands of purchaser of berth. Ames v. Southern Pac. Co., 141 Cal. 728, 75 P. 310.

52. A person who goes on a train with knowledge that it does not stop at his destination and does not get off at the previous stop, refusing to pay fare to the next regular stop, may be ejected at any reasonably safe place. New York, etc., R. Co. v. Willing, 24 Ohio Circ. R. 474.

53. See 1 Curr. L. 454, n. 89.

54. Where passenger has had reasonable time and opportunity. Garrison v. United R. & Elec. Co., 97 Md. 347, 55 A. 371.

55. Facts in controversy over credit certificate on credential contract held to justify such tender. Holt v. Hannibal & St. J. R. Co., 174 Mo. 524, 74 S. W. 631.

56. Randell v. Chicago, etc., R. Co., 102 Mo. App. 342, 76 S. W. 493.

57. See 1 Curr. L. 455.

58. A conductor may expel a boisterous passenger, but if assaulted by him must use only the force requisite to self-defense. Ickenroth v. St. Louis Transit Co., 102 Mo. App. 597, 77 S. W. 162.

59, 60. Facts held to justify ejection of drunken passenger in a lighted place 300 yards from station. Korn v. Chesapeake & O. R. Co. [C. C. A.] 125 F. 897. Evidence held not to show that drunken passenger ejected from train was in such a condition that he would probably not be able to take care of himself, and to justify peremptory instruction to find for defendant. Tuttle v. Cincinnati, etc., R. Co. [Ky.] 80 S. W. 802. In ejecting a drunken passenger for refusal to pay his fare, due care under the circumstances must be used to select a place where he can protect himself, or others can protect him, from danger from passing trains or otherwise. Id. His condition must be such as would reasonably indicate that he, on account of such condition and the surrounding circumstances, would be liable to such injury. Proximate cause of injury held to be whiskey, drunk after ejection from train. Id.

61. Facts held insufficient to show that station agent had knowledge that an intending passenger was helpless from cocaine, thus imposing liability for his death after ejection from a train by the conductor. Korn v. Chesapeake & O. R. Co. [C. C. A.] 125 F. 897.

62. See 1 Curr. L. 456.

beyond that which is incidental to a removal by force and compulsion,[64] will not be compensated, and where violent and unnecessary force is used, contributory negligence of the passenger in resisting need not be submitted.[65]

Failure to afford an opportunity to purchase a ticket will not authorize a passenger to invite an assault and recover damages therefor by resistance to expulsion for failure to pay added charge.[66] Where one explains why he did not take the first train, expulsion should be stayed until the truth of his statements is ascertained.[67]

Elements and measure of damage.[68]—Damages as alleged may include[69] physical pain, if appreciable, and bodily or mental suffering naturally resulting.[70] Indignity[71] and other elements of mental suffering may be included, though the expulsion was not actuated by malice or willfulness.[72] Recovery may be had for mental suffering alone.[73] The passenger is entitled to at least nominal damages if ejected from a moving train contrary to statute requiring a stop.[74] Mere provocative or abusive language will not have the effect of mitigating the actual or compensatory damages recoverable by plaintiff on account of being forcibly ejected from a moving car.[75]

Where the expulsion of a passenger is willful and wanton, he is entitled to recover punitive damages,[76] but cannot be had in an action for breach of con-

63. Randell v. Chicago, etc., R. Co., 102 Mo. App. 342, 76 S. W. 493.

64. Erie R. Co. v. Littell [C. C. A.] 128 F. 546. A passenger who has tendered lawful money in payment of fare does not forfeit his right to damages by reasonable resistance to his expulsion. Breen v. St. Louis Transit Co., 102 Mo. App. 479, 77 S. W. 78.

65. Randell v. Chicago, etc., R. Co., 102 Mo. App. 342, 76 S. W. 493.

66. Cannot sue for assault and battery. Monnier v. New York, etc., R. Co., 175 N. Y. 281, 67 N. E. 569.

67. First train did not stop. Marx v. La. W. R. Co., 112 La. 1085, 36 So. 862.

68. See article Damages, 1 Curr. L. 833, for a complete treatment of this topic. $350 held not excessive. Ill. Cent. R. Co. v. Jackson, 25 Ky. L. R. 2087, 79 S. W. 1187. $250 held not excessive. Marx v. La. Western R. Co., 112 La. 1085, 36 So. 862. $250 held not excessive for ejection at about sundown, entailing a walk of six miles and a night's delay, together with insulting and humiliating language. Houston, etc., R. Co. v. McNeel [Tex. Civ. App.] 76 S. W. 206. $250 not excessive for ejection of news agent. Choctaw, etc., R. Co. v. Hill, 110 Tenn. 396, 75 S. W. 963. Evidence held to support verdict for $1,000 for assault by conductor on boy of 16. Mo., etc., R. Co. v. Gaines [Tex. Civ. App.] 79 S. W. 1104. Damages for loss of time cannot be based on a mere showing that plaintiff was a lawyer, without a showing of his income or of what a lawyer of his standing might be reasonably expected to earn. Pa. Co. v. Scofield [C. C. A.] 121 F. 814. Proof of expenses and length and value of time spent in litigation must be adduced to permit a recovery therefor. Id. Evidence that conductor took plaintiff by shoulder will warrant recovery for display of superior force. Id. See 1 Curr. L. 458.

69. In an action for ejection, where the passenger does not count for unused fare or request it at time of expulsion, he cannot have an instructed verdict pro tanto. Gallegly v. Kan. City, etc., R. Co. [Miss.] 35 So. 420. Where negligence in leaving an intoxicated passenger on a platform after ejection is not counted on, it cannot be made a basis of recovery. Moore v. Nashville, etc., R.. 137 Ala. 495, 34 So. 617.

70. Breen v. St. Louis Transit Co., 102 Mo. App. 479, 77 S. W. 78. Evidence that plaintiff was jerked from train authorizes instruction on physical suffering. Choctaw, etc., R. Co. v. Hill, 110 Tenn. 396, 75 S. W. 963. Compensation for mental distress may be given, and for injuries, if any, sustained in walking to a place to secure lodging, provided a reasonably prudent man under the circumstances would have done so. Houston, etc., R. Co. v. McNeel [Tex. Civ. App.] 76 S. W. 206. A person wrongfully put off may recover for an injury sustained by walking on a cattle guard in the dark on his way to his destination. New York, etc., R. Co. v. Willing, 24 Ohio Circ. R. 474.

71. An expression of opinion that fare tendered is counterfeit is not element of damages. Breen v. St. Louis Transit Co., 102 Mo. App. 479, 77 S. W. 78.

72. Coine v. Chicago & N. W. R. Co. [Iowa] 99 N. W. 134.

73. Mo., etc., R. Co. v. Tarwater [Tex. Civ. App.] 75 S. W. 937.

74. Rev. St. 1899, § 1074 requires a stop. Holt v. Hannibal & St. J. R. Co., 174 Mo. 524, 74 S. W. 631.

75. Mahoning Valley R. Co. v. De Pascale [Ohio] 71 N. E. 633. In an action for wrongfully ejecting plaintiff from a moving car, where the jury is restricted to the allowance of compensatory damages, it is improper to charge that the jury may consider plaintiff's abusive language in mitigation thereof. Id.

76. Dagnall v. Southern R. Co. [S. C.] 48 S. E. 97. Where a conductor knew that there was a mistake in the limit of a ticket and required additional fare under threat of expulsion, evidence held for the jury on a claim for exemplary damages. Chiles v. Southern R. Co. [S. C.] 48 S. E. 252.

tract growing out of an expulsion for defect in a transfer.[77] They may be awarded where the conductor refuses to accept a female passenger's explanation that she has been directed by a station agent to take that particular train, and ejects her alone and in the night.[78]

Remedies and procedure for ejection.[79]—Wrongful expulsion from a train is not only a breach of contract but also a tort.[80] For wrongful ejection, the cause of action arises where the ejection occurs,[81] and if plaintiff seeks to recover for the physical and mental pain, the action is one for personal injuries, and venue is so fixed.[82] The action is ex contractu when the negligence was in defectively punching the return portion of a ticket.[83] The municipal court of New York has jurisdiction of an action for wrongful ejection.[84]

An action on a violation of a contract of carriage and one for excessive force in ejection cannot be joined,[85] nor can negligence of a ticket seller and wrongful ejection be pleaded in the same count.[86] Allegations of inducement that plaintiff purchased a ticket do not sound in tort.[87] Actual ejection must be pleaded.[88] An averment that an assault was committed by a carrier through its employes is sufficient.[89] A plea that a conductor was acting as a police officer in ejecting a passenger is insufficient without alleging ground for so acting.[90] Where disorderly conduct is set up in justification of ejectment, it must be averred that only such force was used as was reasonably necessary.[91] Where it is alleged that excessive force was used, variance between an allegation that plaintiff was a passenger and proof that she was a trespasser is immaterial.[92]

The carrier must establish refusal to pay fare,[93] and contributory misconduct on the part of plaintiff,[94] but there is no presumption that a person riding on the blind baggage is a passenger.[95] The general rules as to admissibility of evidence are applicable as illustrated below.[96] In the absence of directions in

77. Moon v. Interurban St. R. Co., 85 N. Y. S. 363.

78. Though his conduct is free from insolence. Ill. Cent. R. Co. v. Harper [Miss.] 35 So. 764.

79. See 1 Curr. L. 456, n. 11-29.

80. Elements of damages include compensation for mental suffering arising from humiliation. Marx v. La. Western R. Co., 112 La. 1085, 36 So. 862.

81. Not where the ticket was purchased (Georgia, etc., R. Co. v. Pearson [Ga.] 47 S. E. 904), but where the company has no office in the county where the ejection took place, the company can be sued in the county of its residence (Id.).

82. Laws 1901, p. 31, c. 17. Tex. & P. R. Co. v. Lynch [Tex.] 75 S. W. 486.

83. Tort will not lie. Western Md. R. Co. v. Schaun, 97 Md. 563, 55 A. 701. Evidence that the conductor punching the return ticket was the same who refused it is not sufficient to impose liability in such form of action. Id.

84. The municipal court may have jurisdiction where the acts complained of while constituting an assault are also a breach of the duty owing to the public and passengers. Fallon v. Interurban St. R. Co., 40 Misc. 687, 83 N. Y. S. 171. Municipal court has jurisdiction where passenger is thrown from car by conductor on alleged nonpayment of fare. Kearns v. New York, etc., R. Co., 86 N. Y. S. 179.

85. Complaint held demurrable [Ball. Ann. Codes & St. § 4942]. Clark v. Great Northern R. Co., 31 Wash. 658, 72 P. 477.

86. Count held to state two causes of action. Southern R. Co. v. Bunnell [Ala.] 36 So. 380.

87. Action for violent ejection. Southern R. Co. v. Bunnell [Ala.] 36 So. 380.

88. A complaint alleging that the conductor threatened to eject him and did assault and beat him but did not allege that he was actually put off the car states a cause of action for assault, but not for ejection. Damages for unlawful ejection could not be recovered. Ray v. United Traction Co., 89 N. Y. S. 49.

89. Ejection of passenger having wrong transfer. Citizens' St. R. Co. v. Clark [Ind. App.] 71 N. E. 53.

90, 91. Moore v. Nashville, etc., R., 137 Ala. 495, 34 So. 617.

92. Randell v. Chicago, etc., R. Co., 102 Mo. App. 342, 76 S. W. 493.

93. Ejection. Holt v. Hannibal, etc., R. Co., 174 Mo. 524, 74 S W. 631.

94. El Paso Elec. R. Co. v. Alderete [Tex. Civ. App.] 81 S. W. 1246.

95. He had a ticket, but the conductor who put him off did not know it. McGraw v. Southern R. Co., 135 N. C. 264, 47 S. E. 758.

96. **Held admissible:** Evidence that defendant had waived conditions against transfer in a ticket and had encouraged scalping, introduced to support cause of action for breach of contract, should be excluded when the breach of contract is eliminated from issues. Clark v. Great Northern R. Co., 31 Wash. 658, 72 P. 477. Plaintiff may testify he purchased a ticket to a certain place without violating the rule as to parol evidence.

the ticket, plaintiff, in an action for ejection, may show declarations of ticket agents and conductors as to proper routes.[97] Evidence of plaintiff's good character is not admissible.[98] Accepting a ticket sold by another company is evidence that the selling company acted as agent for the road accepting the same.[99] Instances of sufficiency of evidence,[1] and holdings as to the propriety of particular instructions will be found in the footnotes.[2]

Delays.—By the sale of a ticket, a carrier impliedly contracts to transport the passenger to his destination without unreasonable delay,[3] on schedule time.[4] The burden is on the carrier to show the cause of a delay, and that it was excusable.[5] For delay the passenger may recover such actual damages as the

Coine v. Chicago, etc., R. Co. [Iowa] 99 N. W. 134. As explaining failure to produce tickets taken up, one with knowledge may testify to a custom to destroy them. Shealey v. South Carolina & G. R. Co. [S. C.] 45 S. E. 119. Where passenger was negligently put off train to await the proper one to transport her, she may testify as to telling the conductor of her circumstances. St. Louis S. W. R. Co. v. Pruitt [Tex. Civ. App.] 79 S. W. 598.

Held inadmissible: Evidence as to remedies applied to plaintiff after ejection. Southern R. Co. v. Bunnell [Ala.] 36 So. 380. That plaintiff asked conductor to lend him the sum necessary to purchase ticket farther than the one issued him by mistake. Id. That plaintiff asked his son for a loan or that persons outside the car were cursing. Moore v. Nashville, etc., R. Co., 137 Ala. 495, 34 So. 617. Evidence of a custom of conductors to permit such men to ride free where plaintiff in action for ejection had tendered fare but was an old trackman. Mo., etc., R. Co. v. Tarwater [Tex. Civ. App.] 75 S. W. 937. Ticket agent cannot be asked as to previous mistakes in issuing tickets. Southern R. Co. v. Bunnell [Ala.] 36 So. 380. Where a ticket was alleged to have been carelessly issued to a wrong destination, the conductor cannot be asked as to his efforts to secure its return from the general office. Id. Where one is ejected for refusing to pay his fare, evidence of the general character of the conductor was inadmissible. Braymer v. Seattle, etc., R. Co. [Wash.] 77 P. 495. Especially where the action was based on breach of contract of carriage and the employment of an incompetent conductor was not alleged. Id.

Res gestae: Statement of conductor after ejection of passenger and while the car was proceeding without stopping is not. Gotwald v. St. Louis Transit Co., 102 Mo. App. 492, 77 S. W. 125. Statement 5 or 10 minutes after ejection and after plaintiff had walked 50 yards is not. Mo., etc., R. Co. v. Tarwater [Tex. Civ. App.] 75 S. W. 937.

97. Ill. Cent. R. Co. v. Harper [Miss.] 35 So. 764.

98. Breen v. St. Louis Transit Co., 102 Mo. App. 479, 77 S. W. 78.

99. Chiles v. Southern R. [S. C.] 48 S. E. 252. A general passenger agent may testify that in selling a ticket his company acted as agent for another. Id.

1. Evidence held to justify ejection on account of drunken and obscene conduct. Atchison, etc., R. Co. v. Wood [Tex. Civ. App.] 77 S. W. 964. Evidence held for jury on use of excessive force willfully or wantonly in expelling female passenger with aid of negro policeman. Randell v. Chicago, etc., R. Co., 102 Mo. App. 342, 76 S. W. 493. Evidence held to support finding of negligence causing plaintiff to alight under the circumstances. Mo., etc., R. Co. v. Huff [Tex. Civ. App.] 78 S. W. 249. Question of reasonableness of time afforded an intoxicated passenger to pay fare held for jury under the evidence. Huba's Estate v. Schenectady R. Co., 85 App. Div. 199, 83 N. Y. S. 157.

2. See article Instructions, 2 Curr. L. 461. Instruction held proper. El Paso Elec. R. Co. v. Alderete [Tex. Civ. App.] 81 S. W. 1246. Instruction as to ejection of passenger erroneous as failing to state the duty of the brakeman, the rule by which jury was to determine when he ceased to act in performance of his duty, and as giving impression that if plaintiff was pushed onto platform defendant would be liable for results of his falling off in any event. Battis v. Chicago, etc., R. Co. [Iowa] 100 N. W. 543. Charge as to damages from ejection held proper. Choctaw, etc., R. Co. v. Hill, 110 Tenn. 396, 75 S. W. 963. Instruction held not erroneous as placing the burden of proof on defendant. El Paso Elec. R. Co. v. Alderete [Tex. Civ. App.] 81 S. W. 1246. Where unnecessary violence is not averred, an instruction as to its effect is error. Huba's Estate v. Schenectady R. Co., 85 App. Div. 199, 83 N. Y. S. 157. Instruction as to effect of conductor acting maliciously while not in management of car should not be given in the absence of evidence that he was not at some time in the management of the car. Schwartzman v. Brooklyn Heights R. Co., 84 App. Div. 608, 82 N. Y. S. 890. Instructions held not to place on defendant the burden of negativing plaintiff's right to recover. Coine v. Chicago, etc., R. Co. [Iowa] 99 N. W. 134. Instruction as to unusual force in ejection held supported by pleadings. Gotwald v. St. Louis Transit Co., 102 Mo. App. 492, 77 S. W. 125.

3. Delay of 24 hours prima facie unreasonable. International, etc., R. Co. v. Harder [Tex. Civ. App.] 81 S. W. 356. Where a train was delayed 10 hours and no information was given the passengers as to the cause or probable length of delay, a nonsuit should not be granted. Miller v. Southern R. Co. [S. C.] 48 S. E. 99. Negligence is essential. Id.

4. Miller v. Southern R. Co. [S. C.] 48 S. E. 99.

5. Where it was caused by a wreck, it will not be presumed, in the absence of evidence, that the carrier was in no way responsible therefor, or that it used due diligence to repair the damage. International, etc., R. Co. v. Harder [Tex. Civ. App.] 81 S. W. 356.

carrier might reasonably have anticipated would result,[6] but not punitive damages unless the carrier's conduct was willful, wanton and malicious.[7] Wanton disregard of duty is not shown by the detaching of an engine from a train for the purpose of forwarding a Pullman car in pursuance of orders issued on account of a wreck.[8] Allegations that defendant "wrongfully and unlawfully" refused to convey plaintiff according to its schedule are to be disregarded, since they do not assign specific legal character to the acts of defendants.[9]

§ 24. *Rates and fares, tickets and special contracts.*[10] *Right of public to supervise rates.*[11]—Except where it has been lawfully bargained away,[12] the state or its authorized subdivisions[13] may regulate fares and rates in a reasonable degree,[14] especially when so reserved or fixed in charter or franchise.[15] A statute fixing the rate per mile does not require the charge to be divided for distance less than a mile.[16] The statutes of New Jersey give railroad companies an uncontrolled discretion to fix such rates as their own interests may from time to time require, subject only to the maximum rates therein specified, and to the reserved right of repeal and modification by the legislature.[17] The courts may decide whether a particular rate is reasonable or unreasonable, or a given statutory rate confiscatory, but they have no power to declare in general what rates shall not be exceeded.[18] An injunction pendente lite may be granted by a Federal court against the enforcement of an order of a state railroad commission unwarrantedly reducing rates.[19] It is not a discrimination[20] to refuse the United States the benefit of a

6. Verdict excessive where no evidence of time lost and little as to physical comfort and inconvenience. International, etc., R. Co. v. Harder [Tex. Civ. App.] 81 S. W. 356. Not for inconvenience, loss of time or fatigue, unless it has produced pecuniary damage or personal loss. Miller v. Southern R. Co. [S. C.] 48 S. E. 99. Mere inconvenience, annoyance and delay cannot be recovered for on breach of contract for through transportation. Miller v. Baltimore & O. R. Co., 89 App. Div. 457, 85 N. Y. S. 883.

7. Miller v. Southern R. Co. [S. C.] 48 S. E. 99. Where a train was delayed 10 hours and no information given the passengers, a charge that the company was not liable for punitive damages was properly refused Id.

8, 9. Aaron v. Southern R. Co. [S. C.] 46 S. E. 556.

10. See 1 Curr. L. 449, and consult redemption of tickets, 1 Curr. L. 452; round trip tickets, 1 Curr. L. 451; stop over privileges, 1 Curr. L. 452.

11. 1 Curr. L. 450, n. 28-34.

12. Impairing contract or vested rights: Acceptance of a location granted by a town does not cause conditions as to fares to become a contract or validate them. Keefe v. Lexington, etc., R. Co. [Mass.] 70 N. E. 37. The acceptance of an ordinance securing the public the benefit of a five cent fare created a contract right to charge such fare which could not be reduced under a right reserved to regulate fares. Such a contract does not violate Bates' Ohio Ann. St. 1897, § 2502. Cleveland v. Cleveland City R. Co., 194 U. S. 517, 24 S. Ct. 756; Cleveland v. Cleveland Elec. R. Co., 194 U. S. 538, 24 S. Ct. 764.

13. The legislature has the right to regulate the rates of fare to be charged by a street railway company, in the absence of any provision in its charter relinquishing it. Company cannot assert invalidity of act compelling street railroad companies to give half fare to school children (Acts 28th Leg. [1903] c. 116, p. 182), in view of constitutional provision that all franchises are subject to legislative control. San Antonio Traction Co. v. Altgelt [Tex. Civ. App.] 81 S. W. 106. The power to regulate rates to be charged by carriers belongs to the legislature. Raritan River R. Co. v. Middlesex & S. Traction Co. [N. J. Err. & App.] 58 A. 332. Under a general permission to stipulate for conditions conducive to public interest on granting locations, **town authorities** cannot limit fares [Pub. St. 1882, c. 113, § 43 (Rev. Laws, c. 112, § 69); Stat. 1898, p. 743, c. 578, § 13]. Keefe v. Lexington & B. St. R. Co. [Mass.] 70 N. E. 37.

14. Must not work a practical destruction of carrier's property. No evidence in mandamus to compel street railway company to give half fare rates to school child under statute (Acts 28th Leg. [1903] p. 182, c. 116) that rate was not such as to give company fair income on its investment after paying for repairs. San Antonio Traction Co. v. Altgelt [Tex. Civ. App.] 81 S. W. 106.

15. Chartered under a provision reserving power of alteration. Construing statutes. Topham v. Interurban St. R. Co., 42 Misc. 503, 86 N. Y. S. 295. A village franchise fixing a rate of fare to points outside the village is binding. Vining v. Detroit, etc., R. Co. [Mich.] 95 N. W. 542.

16. Act March 11, 1880; Gen. St. p. 2701, § 270. Hunter v. Erie R. Co. [N. J. Law] 56 A. 139.

17. Gen. St. p. 2643. Raritan River R. Co. v. Middlesex & S. Traction Co. [N. J. Err. & App.] 58 A. 332.

18. Raritan River R. Co. v. Middlesex & S. Traction Co. [N. J. Err. & App.] 58 A. 332.

19. May be granted on a showing that the rates previously charged did not earn interest on amount invested. Joint operation does not prevent the road being regard-

"ten party" rate in the transportation of soldiers.[21] An agreement between a railroad company and a competitor, that during a limited period the former will not reduce passenger rates unless required by law to do so, is not contrary to public policy.[22]

Penalties for overcharge.[23]—A mistake in good faith as to the right to make an increased charge because of grades overcome is within an exception from penalty of those acting by mistake.[24] A penal action is one founded on a "statute," and hence each statute declared on must in New Jersey be indorsed on the process.[25]

Tickets and contracts.—Except as there has been an express agreement, the contract is implied from circumstances and the duty of carriage, and not from subsequent statements of employes,[26] or mere coincidences.[27] The contract may exist on payment of fare by a stranger,[28] but the fact that one purchases a ticket for another does not constitute a contract between the purchaser and the carrier.[29] In so far as the ticket is a mere voucher or receipt,[30] parol evidence is admissible to show the terms of the contract,[31] but the terms of a contract ticket, signed by the passenger cannot be so varied.[32]

Conditions and limits.—The carrier may exact as a condition to a reduced rate excursion ticket that the holder identify himself by signature, and if this is not satisfactory, by other proofs.[33] A ticket torn in two pieces is not a "mutilated" one and therefore void.[34] A passenger has a right to ride on a first class ticket for which he has paid full fare, at any time.[35] The validity of a ticket cannot be lim-

ed as a single line where the road is credited with increased business and reduced expenses. The value of the property returned for taxation is not conclusive. The railroad commission of Florida is not exempt from injunction as a judicial body. Louisville & N. R. Co. v. Brown, 123 F. 946.

20, 21. See ante, § 2. The rate being established for parties traveling for the giving of exhibitions, limited closely as to time, payable in cash in advance and actuated by the hope of securing return passage and other concurrent public travel, none of which essentials are incident to transportation of soldiers. U. S. v. Chicago, etc., R. Co. [C. C. A.] 127 F. 785.

22. Raritan River R. Co. v. Middlesex & S. Traction Co. [N. J. Err. & App.] 58 A. 332.

23. See 1 Curr. L. 424, n. 33-38.

24. Laws 1899, p. 1096, c. 565, §§ 37, 39. Goodspeed v. Ithaca St. R. Co., 88 App. Div. 147, 84 N. Y. S. 383.

25. In qui tam action to recover penalty under Gen. St. p. 2673, § 149; Act of March 11, 1880; Gen. St. p. 2701, § 270, must also be indorsed on the process. Hunter v. Erie R. Co. [N. J. Law] 56 A. 139.

26. Where one got onto a car that ran only to an intermediate point and there was no system of transfers to the cars that ran further, there was no contract of carriage beyond such point. A statement by the superintendent who was on the car that he would have the through car pick him up did not constitute such a contract. Braymer v. Seattle, etc., R. Co. [Wash.] 77 P. 495. Nor did a statement made by him the next day that he intended to have the conductor pick him up but had forgotten. Id.

27. Where a street car bound only for an intermediate point was boarded by a through passenger and there was no system of transfers, the fact that the through car left at about this time was immaterial on the question of the contract of carriage. Braymer v. Seattle, etc., R. Co. [Wash.] 77 P. 495.

28. Where there was evidence from which a jury might have found an implied contract to carry in consideration of payment for tickets by a third person, nonsuit was properly denied. Mims v. Seaboard Air Line R. [S. C.] 48 S. E. 269. Failure to prove contract did not render denial erroneous. Id.

29. Where a husband purchased a ticket for his wife, she alone could maintain an action for breach of the contract to carry. Ga., etc., R. Co. v. Brown [Ga.] 47 S. E. 942.

30. Ames v. Southern Pac. Co., 141 Cal. 728, 75 P. 310, and authorities there cited.

31. May be shown that compliance with certain regulations as to securing berths was necessary to passage. Ames v. Southern Pac. Co., 141 Cal. 728, 75 P. 310. Dissenting opinion that specification of certain train excluded an implied condition that berth must be purchased. Id.

32. Mo., etc., R. Co. v. Harrison [Tex.] 80 S. W. 1139.

33. Where validating agent is not satisfied with signature, the plaintiff must have offered additional proofs. The question of the reasonableness of the act of the agent is for the jury. Baltimore, etc., R. Co. v. Hudson, 25 Ky. L. R. 2154, 80 S. W. 454. Proof of identity must be such as would satisfy the mind of a reasonably conscientious and prudent man. Id.

34. Within the meaning of a stipulation thereon that it shall be void if mutilated. Young v. Central of Ga. R. Co. [Ga.] 47 S. E. 556.

35. His attention was not called to conditions printed on the back. Dagnall v. Southern R. Co. [S. C.] 48 S. E. 97. Question as to whether he knew of conditions on back of ticket properly excluded. Id.

ited by custom, rule or notice not brought home to the passenger;[36] e. g., a rule that the most direct of several routes must be taken.[37]

Mileage books and credential contracts.[38]—Refusal to issue an exchange ticket for interchangeable mileage, for passage over any part of the road, held out as a portion of its system, whether used under right of absolute ownership, leasehold or special permit, renders a carrier liable.[39] The measure of damages is the value of plaintiff's time, his expenses and loss directly occasioned thereby.[40] An obligation to buy tickets under a credential contract at the station may be waived by allowing conductors to customarily issue credit slips on cash fares.[41] Mileage good only for a trip wholly within a state may be used on a trip, beginning outside the state, but covered by other tickets until the state line is crossed.[42]

Property, ownership and redemption of tickets.[43]—Unused mileage goes to personal representatives of the owner and cannot be used for the transportation of the remains of the owner.[44]

If the ticket be lost or taken up by any agent of the carrier who had authority to take it, the carrier is responsible.[45] The passenger may purchase another and sue for the price.[46] A husband may recover the amount paid for his wife's ticket, though she does not join or assign.[47]

Generally speaking, the carrier or its legal successor[48] must honor or redeem outstanding or unused tickets. This may be compelled by statute[49] under reasonable penalties.[50] In an action for such penalty, proof must show a sale of the ticket by the carrier,[51] but not of the degree required in criminal cases.[52]

A conductor is not a proper party to an action for refusal to honor a ticket.[53] Where a second fare was paid under protest to prevent further abuse and insult from a conductor, the passenger's recovery cannot be limited to the fare so paid.[54]

36. Carvey v. Detroit & M. R. Co. [Mich.] 95 N. W. 716.

37. Ill. Cent. R. Co. v. Harper [Miss.] 35 So. 764.

38. See 1 Curr. L. 450, n. 35-37.

39. Facts held to impose liability for refusal. Schmidt v. Cleveland, etc., R. Co., 25 Ky. L. R. 11, 74 S. W. 674.

40. Schmidt v. Cleveland, etc., R. Co., 25 Ky. L. R. 11, 74 S. W. 674.

41. Holt v. Hannibal, etc., R. Co., 174 Mo. 524, 74 S. W. 631.

42. Horton v. Erie R. Co., 86 App. Div. 379, 83 N. Y. S. 733.

43. See 1 Curr. L. 451, n. 46-49; Id., 452, n. 57.

44. Minnish v. Southern R. Co., 135 N. C. 342, 47 S. E. 432.

45. A carrier is responsible for the proximate consequences of a baggage agent in losing or misplacing a passenger's ticket. Cannot be held for injuries from ejection on boarding train without ticket and refusing to pay fare. So a person allowing his wife to board a train without ticket or money is negligent, and whether he had money to pay fare is immaterial. Galveston, etc., R. Co. v. Scott [Tex. Civ. App.] 79 S. W. 642. Taken up. Stewart v. Baltimore & O. R. Co., 88 N. Y. S. 377.

46. Stewart v. Baltimore & O. R. Co., 88 N. Y. S. 377.

47. Miller v. Baltimore & O. R. Co., 89 App. Div. 457, 85 N. Y. S. 883.

48. Purchasers of a railroad on foreclosure subject to outstanding obligations of the receivers must honor outstanding and unused tickets issued by them. Erie R. Co. v. Littell [C. C. A.] 128 F. 546.

49. Where a provision in a statute making it a misdemeanor to sell an unused railroad ticket was unconstitutional, it did not invalidate a provision in the same statute for a penalty for refusal to redeem unused tickets [Batts' Ann. St. arts. 4560a, 4560b]. Tex. & P. R. Co. v. Mahaffey [Tex. Civ. App.] 81 S. W. 1047. Batts' Ann. St. arts. 4560a, 4560b, prescribing a penalty for refusal to redeem an unused passenger ticket, is not unconstitutional. Id.

50. A penalty not exceeding $500.00 for refusal to redeem unused passenger tickets is not unreasonable [Batts' Ann. St. arts. 4560a, 4560b]. Tex. & P. R. Co. v. Mahaffey [Tex. Civ. App.] 81 S. W. 1047.

51. Where one purchased a ticket from a person at the window and such person refused to redeem the ticket, evidence held sufficient to show that he was the agent of the carrier. In an action to recover the penalty for refusal to redeem. Tex. & P. R. Co. v. Mahaffey [Tex. Civ. App.] 81 S. W. 1047.

52. In an action to recover a penalty under Batts' Ann. St. arts. 4560a, 4560b, for refusal to redeem an unused ticket, the same degree of proof is not required as in a criminal prosecution. Tex. & P. R. Co. v. Mahaffey [Tex. Civ. App.] 81 S. W. 1047.

53. His joinder as a defendant renders a complaint for breach of contract of carriage and excessive violence in ejection demurrable. Clark v. Great Northern R. Co., 31 Wash. 658, 72 P. 477.

54. Strull v. Louisville & N. R. Co., 28 Ky. L. R. 678, 76 S. W. 181.

Dealing in nontransferable special rate tickets has been restrained,[55] despite the invalidity of an agreement from which the rate resulted;[56] but there must be no adequate legal remedy,[57] and other equitable circumstances must coexist.[58]

Lien for charges.—A carrier has no lien for fare on the baggage of a wife, where, without her knowledge, it refunds to her husband the money paid for the passage and allows him to retain the prepaid certificate.[59]

Cash fares must be in legal tender.[60] An extra charge for cash fares[61] cannot be imposed where the fare thereby exceeds the statutory maximum.[62] A higher charge by a street car company is not justified unless tickets are on sale at all points where it receives passengers.[63]

55. See 1 Curr. L. 451, n. 42-46. An injunction may be obtained to prevent ticket brokers dealing in special tickets which recite on their face that they are issued at reduced rates and not transferable. Facts and pleadings held to authorize such a writ with regard to excursion tickets to Louisiana Purchase Exposition. Schubach v. McDonald [Mo.] 78 S. W. 1020.

56. An agreement between carriers to make a low rate, though contrary to public policy, will not prevent one of them having an injunction against scalpers dealing in the return portions of such low rate tickets. Kinner v. Lake Shore, etc., R. Co., 69 Ohio St. 339, 69 N. E. 614.

57. Company is not without other adequate remedies. New York Cent., etc., R. Co. v. Reeves, 41 Misc. 490, 85 N. Y. S. 28.

58. Bill to enjoin numerous brokers having no connection with each other is multifarious. New York Cent., etc., R. Co. v. Reeves, 41 Misc. 490, 85 N. Y. S. 28. Injunction on the ground of conspiracy to defraud will be denied unless facts are alleged. Id.

59. Moszkowitz v. International Nav. Co., 84 N. Y. S. 297.

60. NOTE: The question as to what is legal tender for car fare, both as to the quality and the amount of the sum offered, has risen several times. A genuine silver coin of the United States (a half dollar of 1824), distinguishable as such, though somewhat rare, and differing in appearance from other coins of this government of like denomination and of later dates, is nevertheless a legal tender for car fare, and a passenger ejected for refusal to make payment otherwise than by tendering such coin is entitled to an action for damages. Atlanta Consol. St. R. Co. v. Keeny, 99 Ga. 266, 25 S. E. 629. Similarly, a genuine silver coin worn smooth by use, not appreciably diminished in weight, and distinguishable, is a legal tender for car fare, and a passenger ejected for refusal to make other payment can maintain an action for such ejection. Mobile St. R. Co. v. Watters, 135 Ala. 227, 33 So. 42; Jersey City & B. R. Co. v. Morgan, 52 N. J. Law, 60. Where a passenger tenders the exact fare in legal coin, he is wrongfully ejected, even though the coin is so worn that the conductor honestly believes it is not good. Ruth v. St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055. A dollar bill, however, from the upper left-hand corner of which a piece one inch and a half by one inch and a quarter has been torn, is not legal tender for car fare, and the conductor may eject a passenger who refuses to make other payment. He is not bound to accept a bill which is substantially mutilated. North Hudson County R. Co. v. Anderson, 61 N. J. Law 248, 68 Am. St. Rep. 703. A passenger upon a street railroad is not bound to tender the exact fare, but must tender a reasonable sum, and the carrier must accept such tender, and furnish change to a reasonable amount. Barrett v. Market St. R. Co., 81 Cal. 296, 15 Am. St. Rep. 61; Barker v. Central Park, etc., R. Co., 151 N. Y. 237, 56 Am. St. Rep. 626; Muldowney v. Pittsburg & B. Traction Co., 8 Pa. Super. Ct. 335. The authorities are not in harmony as to what is a reasonable sum. In California, it has been held that the tender of a five-dollar gold piece is reasonable. Barrett v. Market St. R. Co., 81 Cal. 296, 15 Am. St. Rep. 61. The court said: "It does not follow, if it be established as a rule that five dollars is a reasonable amount to be tendered to a conductor that twenty dollars or fifty dollars is also a reasonable amount, and must be accepted. The fears of the appellant are based upon the assumption that passengers generally will contumaciously, to avoid payment of fare, and require the companies to carry them free, offer a coin of a large denomination; but these fears, we think, can safely be set aside upon the theory that a question like this will settle itself by a spirit of mutual accommodation between carrier and passenger. It is a well known fact that the five-dollar gold piece is practically the lowest gold coin in use in this section of the country." In New York, on the contrary, it has been held that a rule of a street car company in a large city, requiring its conductors to furnish change to passengers to the amount of two dollars, is reasonable, and a tender of a five-dollar bill is unreasonable, and need not be accepted. Barker v. Central Park, etc., R. Co., 151 N. Y. 237, 56 Am. St. Rep. 626. In commenting upon the California case just cited, the court said: "It is quite possible that there existed local reasons for the decision in California, as the judge writing the opinion suggested that the five-dollar gold piece was practically the lowest gold coin in use in that section of the country." In Pennsylvania, also, it has been held that the tender of a five-dollar bill for a five-cent fare is unreasonable as matter of law, and the conductor is not bound to receive it. Muldowney v. Pittsburg & B. Traction Co., 8 Pa. Super. Ct. 336.—From Clark, St. Ry. Acc. Law (2d Ed.) § 74.

61. See 1 Curr. L. 453.

62. Even though there was opportunity to get tickets. Fulmer v. Southern R. Co. [S. C.] 45 S. E. 196.

The duty of furnishing transfers may be imposed on urban carriers which consolidate or extend their privileges,[64] even though there is another route over which plaintiff might travel for one fare,[65] or though undue crowding of streets at transfer points would ensue.[66] The corporation need not be within city if railroad is.[67] Corporations organized under the Stock Corporation Law are amenable.[68] A statute requiring the giving of transfers for continuous rides does not prevent their being limited as to time of use,[69] which must cover the passage of a car and convenient time to board it.[70] Liability is not removed by the fact that conductor has no transfers, or that the passengers who are boys are skylarking,[71] or that the passenger has been riding to collect penalties.[72] A franchise condition requiring the issuance of transfers between lines within the city does not require them to lines in another city, though owned and operated in common;[73] but a right to carriage on transfers within city limits extends to after-acquired municipal territory.[74] Penalties for refusal have been prescribed,[75] which the passenger is the party entitled to recover under the New York law for refusing a transfer.[76] A penalty cannot be recovered for not giving a transfer where it is not shown that plaintiff took the proper car or that had he taken the transfer, it would have been refused, though it was refused on the car he boarded.[77]

Limitation of liability.[78]—A stipulation limiting the liability for injuries to a passenger for hire to an arbitrary sum is void.[79] One is bound by the express conditions on a thousand-mile ticket accepted by him, that the company selling it assumes no responsibility thereon beyond its own lines.[80]

The common-law liability toward a newsboy cannot be avoided by a condition imposed for his transportation.[81] A limitation in the contract with an express company may relieve the carrier from liability for negligent injury of an express messenger.[82]

63. Kennedy v. Birmingham R., L. & P. Co., 138 Ala. 225, 35 So. 108.

64. A consolidation under the New York railroad law carries with it the obligation to give transfers. Topham v. Interurban St. R. Co., 42 Misc. 503, 86 N. Y. S. 295.

Statutes requiring corporations contracting for mutual use of roads wholly within municipal limits to furnish transfers are upheld. Under Laws 1890, p. 1114, c. 565, §§ 78, 105, the Interurban Street Railway Company must give transfers over all its lines within New York City for single fare. Blume v. Interurban St. R. Co., 41 Misc. 171, 83 N. Y. S. 989. Law includes leases of roads as well as traffic agreements. Topham v. Interurban St. R. Co., 42 Misc. 503, 86 N. Y. S. 295.

65, 66, 67, 68. Topham v. Interurban St. R. Co., 42 Misc. 503, 86 N. Y. S. 295.

69. Act Assem. 1900, c. 313, p. 463. Garrison v. United R. & Elec. Co., 97 Md. 347, 55 A. 371.

70. Hornesby v. Ga. R. & Elec. Co. [Ga.] 48 S. E. 339.

71. Evidence held to show willful refusal. Rosenberg v. Brooklyn Heights R. Co., 91 App. Div. 580, 86 N. Y. S. 871.

72. Leave to appeal was granted to have the question determined and also that of whether more than one penalty could be had. McLean v. Interurban St. R. Co., 87 N. Y. S. 135.

73. City of Montpelier v. Barre & M. T. & Power Co. [Vt.] 56 A. 278.

74. Ind. R. Co. v. Hoffman, 161 Ind. 593, 69 N. E. 399.

75. Under Laws 1892, p. 1406, c. 676, a passenger can recover the penalty thereby provided for refusal of a lessee company to issue him a transfer from one leased line to another. O'Reilly v. Brooklyn Heights R. Co., 89 N. Y. S. 41. But this statute has no application to leases made prior to May, 1891. Topham v. Interurban St. R. Co., 89 N. Y. S. 298.

76. Under Railroad Law, § 104; Laws 1890, c. 565, p. 1082; Amended Laws 1892, c. 676, pp. 1405, 1406, he is the aggrieved party. A minor may sue by guardian ad litem [Code Civ. Proc. § 468]. Fox v. Interurban St. R. Co., 42 Misc. 538, 86 N. Y. S. 64.

77. Weinstein v. Interurban St. R. Co., 86 N. Y. S. 731.

78. See 1 Curr. L. 482.

79. Limiting liability for injuries to one accompanying live stock. Feldschneider v. Chicago, etc., R. Co. [Wis.] 99 N. W. 1034. A carrier cannot contract against its own or its servant's negligence. Release for injuries to driver accompanying live stock. Rowdin v. Pennsylvania R. Co., 208 Pa. 623, 57 A. 1125.

80. Seller not liable for ejection of passenger from train of another carrier. Motions for nonsuit and to direct verdict for defendant improperly denied. Spiess v. Erie R. Co. [N. J. Law] 58 A. 116. Error to submit to the jury the question whether plaintiff believed he had a right to use the ticket on such road. Id.

81. Boy employed by corporation [Sayles' Ann. Civ. St. 1897, arts. 319, 320]. Tex. & P. R. Co. v. Fenwick [Tex. Civ. App.] 78 S. W. 548.

82. Contract construed and messenger

The United States supreme court has held that a stipulation in a free pass may relieve a carrier from liability for the ordinary negligence of its servants toward one using it with knowledge of the condition.[86] In this it is at variance with certain state courts,[84] the decisions of which are sometimes based on local statutes.[85]

Notice of the stipulation need not have been brought home to the passenger,[86] and a wife using a pass obtained by her husband is bound by its conditions, though she has not authorized him to agree thereto.[87] It may be shown that a pass was issued on a mutual consideration and not as a gratuity, though the pass recites that it is complimentary.[88]

§ 25. *Condition and care of premises.*—Only ordinary care to preserve the lives, health and persons of passengers who are awaiting at stations the arrival of trains is required.[89] The carrier must provide reasonable accommodations at its stations for passengers for a reasonable time before and after departure of trains[90] scheduled to stop.[91] Rules as to care of station apply to any point where it is made necessary or proper by the acts of the carrier to go to board the trains.[92] Failure to keep a station warm is not excused because the station agent sometimes invited passengers into his office,[93] or because the passenger was cold when he arrived.[94]

The carrier must keep its platforms safe[95] from obstructions,[96] or apparently dangerous conditions,[97] and safe to alight upon,[98] and must not lead passengers into

held charged with notice. Long v. Lehigh Valley R. Co. [C. C. A.] 130 F. 870.

83. Provision that company "shall not be liable under any circumstances, whether of negligence of agents or otherwise, for any injury to the person. Northern P. R. Co. v. Adams, 192 U. S. 440, 24 S. Ct. 408; Boering v. Chesapeake Beach R. Co., 20 App. D. C. 500.

84. Condition in free pass causing user to assume all risk is invalid. Mo., etc., R. Co. v. Flood [Tex. Civ. App.] 79 S. W. 1106.

85. A stipulation in a free pass against liability is void. [Comp. St. c. 72, art. 1, § 3]. Chicago, etc., R. Co. v. Collier, 1 Neb. Unoff. 278, 95 N. W. 472.

86. Boering v. Chesapeake Beach R. Co., 193 U. S. 442, 24 S. Ct. 515.

87, 88. Boering v. Chesapeake Beach R. Co., 20 App. D. C. 500.

89. Sickness resulting from exposure at station. Ga., etc., R. Co. v. Brown [Ga.] 47 S. E. 942.

90. Need not keep a station comfortable all night. Brown v. Ga., etc., R. Co., 119 Ga. 88, 46 S. E. 71. Where a station is closed on arrival, a passenger may recover for damages resulting from exposure to the weather during the time reasonably necessary to secure accommodations. Rev. St. 1895, art. 4521 requires stations to be kept open one hour before and after arrival and departure of trains. St. Louis S. W. R. Co. v. Wallace [Tex. Civ. App.] 74 S. W. 581.

91. Where a mistake is made by the carrier in directing a passenger to take a train not stopping at his destination, the passenger cannot recover because the station there is closed, if on being informed of the mistake he remains on the train after a request to get off at the preceding station. St. Louis S. W. R. Co. v. Wallace [Tex. Civ. App.] 74 S. W. 581. Where the train on which a passenger is entitled to carriage does not stop and plaintiff suffers damage from the unheated condition of the waiting room, such damage is resultant on the failure to transport. Brown v. Ga., etc., R. Co., 119 Ga. 88, 46 S. E. 71.

92. San Antonio, etc., R. Co. v. Turney [Tex. Civ. App.] 78 S. W. 256.

93. Where the weather was inclement. Such custom cannot be shown. Mo., etc., R. Co. v. McCutcheon [Tex. Civ. App.] 77 S. W. 232.

94. Increased or continued cold occasioned by the condition of a waiting room. Instruction held error as allowing recovery also for cold in riding to station. Tex. Midland R. Co. v. Little [Tex. Civ. App.] 77 S. W. 958.

95. See 1 Curr. L. 463; Wood v. Metropolitan St. R. Co. [Mo.] 81 S. W. 152. Failure to furnish a railing for an elevated platform is not material where not the proximate cause of injury. Jury found as a fact that cause was an attempt to board the train after start and close of gates. Lautorer v. Manhattan R. Co. [C. C. A.] 128 F. 540.

96. Question held for jury as to whether permitting skids to remain on platform was negligence. Chicago, etc., R. Co. v. Barrett [Tex. Civ. App.] 80 S. W. 660. Passenger falling over freight on platform. Matthieson v. Burlington, etc., R. Co. [Iowa] 100 N. W. 51.

97. Maintenance of a box on platform for use of alighting passengers does not impose liability to person at station and injured by stumbling against it, no similar accident having previously happened and it being in plain sight. Pitkin v. New York, etc., R. Co., 87 N. Y. S. 906. Must keep the platform unobstructed with trucks, etc., within a reasonably safe distance in anticipation of **passenger leaving or boarding moving train.** Chicago & A. R. Co. v. Gore, 105 Ill. App. 16.

98. Held for jury, negligence in leaving

danger from passing trains,[99] by overcrowding,[1] or injure them by careless movement of baggage.[2] These rules apply where the carrier is but a licensee of the premises,[3] and even to structures on premises of others which it knows are used by passengers,[4] and to abutting streets[5] or paths.[6]

§ 26. *Means and facilities of transportation,*[7] such as tracks with their appliances,[8] platforms,[9] cars[10] and couplings,[11] and the vestibules,[12] or passageways from one car to another,[13] and engines or motive power,[14] must be maintained in safe condition by the highest degree of care,[15] lack of which must be the cause of the injury.[16] Cars must be kept reasonably comfortable and well conditioned.[17] It is the duty of a common carrier of passengers to see that due care is taken in filling the gas tanks on its cars.[18] It must use proper appliances to prevent escape of sparks and cinders and ensuing injury.[19] Where the engine is properly equipped

space of 10 or 12 inches from lower step of car to platform. Randolph v. Chicago, etc., R. Co. [Mo. App.] 79 S. W. 1170.

99. Platform so constructed that cars overlap it 13 or 14 inches furnishes question for jury. Lehigh Valley R. Co. v. Dupont [C. C. A.] 128 F. 840. A passenger waiting on a platform may recover when struck by the body of a brakeman climbing the side of a passing freight car, and who "humped" his body out just before reaching plaintiff. Tex. & P. R. Co. v. Russell [Tex. Civ. App.] 74 S. W. 569.

1. Dittmar v. Brooklyn Heights R. Co., 91 App. Div. 378, 86 N. Y. S. 878.

2. Trunk on platform. Holcombe v. Southern R. Co., 66 S. C. 6, 44 S. E. 68.

3. Pavilion constructed on the street. Leveret v. Shreveport Belt R. Co., 110 La. 399, 34 So. 579.

4. A stile erected by a third person to afford access to pleasure grounds owned by him, though the defective portion is on ground on which the carrier had no right to enter. Cotant v. Boone Suburban R. Co. [Iowa] 99 N. W. 115.

5. A railroad company is bound to use ordinary care to keep the approaches from the street to its station in a reasonably safe condition. Liable to one intending to become passenger who is injured by slipping on snow and ice which it has knowingly allowed to accumulate on steps, though such accumulations do not amount to an obstruction to travel. Ill. Cent. R. Co. v. Keegan [Ill.] 71 N. E. 321.

6. Ice allowed to accumulate in a path which, to its knowledge, is customarily used as a means of egress from its depot grounds, though it has provided another safe way. Lemon v. Grand Rapids & I. R. Co. [Mich.] 100 N. W. 22.

7. See 1 Curr. L. 465.

8. Evidence that a car running from 12 to 20 miles an hour was derailed at a curve where crushed rock had been permitted to accumulate is sufficient to go to the jury on averments of negligence in operation and construction and maintenance of track. Smith v. Milwaukee Elec. R. & L. Co., 119 Wis. 336, 96 N. W. 823. Utmost human skill and foresight with regard to tracks and switches. Klinger v. United Traction Co., 92 App. Div. 100, 87 N. Y. S. 864. It may be negligence to leave a street car switch unfastened and run over it at high speed, it being located so that it is apt to be tampered with by children. Evidence held to warrant submission of question. Leslie v. Jackson & S. Traction Co. [Mich.] 96 N. W. 580.

9. Where a passenger stepped from a slowly moving train and slipped on a greasy platform, evidence as to negligence of the carrier was for the jury. Newcomb v. New York Cent., etc., R. Co. [Mo.] 81 S. W. 1069.

10. A high degree of care and diligence must be exercised with regard to rolling stock. Howell v. Lansing City Elec. R. Co. [Mich.] 99 N. W. 406.

11. A carrier is not liable if cars come uncoupled without apparent cause or discoverable defect. Instruction to such effect held improperly refused. Holland v. St. Louis, etc., R. Co. [Mo. App.] 79 S. W. 508.

12. Fact that vestibule door is open while train is at high speed discloses negligence. Robinson v. Chicago & A. R. Co. [Mich.] 97 N. W. 689. Negligence in regard to defective fastenings of vestibule doors is not confined to failure to repair in a reasonable time after discovery. Id.

13. Use of a plank "walk way" from coach to coach coupled with chains, held negligence. St. Louis S. W. R. Co. v. Keitt [Tex. Civ. App.] 76 S. W. 311.

14. Carrier must use as to engines and appliances the high degree of care which a very prudent and cautious person would use in similar circumstances. "Proper" care not too onerous. Mo., etc., R. Co. v. Flood [Tex. Civ. App.] 79 S. W. 1106.

15. Must exercise the highest degree of practical care to provide a safe roadbed, sound cross ties and safe cars. La. & N. W. R. Co. v. Crumpler [C. C. A.] 122 F. 425.

16. No liability exists for a cold incurred, not the result of neglect to properly warm a coach. Tyler v. Tex. & P. R. Co. [Tex. Civ. App.] 79 S. W. 1075.

17. Evidence held to controvert alleged uncomfortable condition and temperature of a coach. Tyler v. Tex. & P. R. Co. [Tex. Civ. App.] 79 S. W. 1075.

18. Railroad company and gas company both liable for injuries to plaintiff from explosion of gas occurring while tanks were being filled by gas company's servant, either by reason of his negligence or because of defective appliances. Chicago, etc., R. Co. v. Rhodes [Tex. Civ. App.] 80 S. W. 869.

19. Mo., etc., R. Co. v. Flood [Tex. Civ. App.] 79 S. W. 1106; St. Louis S. W. R. Co. v. Parks [Tex.] 76 S. W. 740. Must use the highest degree of care to prevent injury compatible with the reasonable execution of its business. St. Louis S. W. R. Co. v. Parks [Tex.] 76 S. W. 740.

and operated, the fact that a coach door is opened does not impose liability for an injury from cinders.[20] Where street cars are equipped with inner footboards, it is not negligence to omit to post notices warning passengers to keep off of them.[21] If the cause of collision is the failure of the company to restore a street to its former safe condition, a street car company is liable.[22] The use of usual and approved appliances and methods,[23] not the most improved in use,[24] is essential. The duty of inspection has been held not to require the carrier to find and remove from car steps mud gathered en route.[25]

In case of the common use of the line by several roads, the responsibility of the carrying company is the same as if it alone used it, and it is bound to use due care for the maintenance of the whole line in proper condition.[26] In the discharge of such obligation, the other companies and their agents are to be deemed the subordinate agents of the carrying company.[27] Where a dining car is placed at the rear of a train and passengers invited to it, the carrier is bound to provide a safe passage, and is responsible for defects in intervening Pullman cars hauled by it.[28] The liability that in the ordinary transaction of business in a freight yard, cars would escape and run down onto the main line, held one which reasonable foresight would have perceived, and hence it was duty of carrier to make adequate provision against it, though such yard was used in common with other companies.[29]

Separate accommodations for white and colored passengers.—A complaint for compelling plaintiff to ride in the negro car must aver that she was entitled to ride with the white passengers and negative her color.[30]

Indictments must follow the statute,[31] and the case be brought within the section relied on.[32]

§ 27. *Operation and management of trains and other vehicles.*[33]—That high degree of care which skillful and practical railroad operatives would exercise under similar circumstances must be exercised.[34] This may include a reasonable degree of presence of mind in the presence of danger.[35] High speed[36] coupled with other

20. Mo., etc., R. Co. v. Orton, 67 Kan. 848, 73 P. 63.

21. Allen v. St. Louis Transit Co. [Mo.] 81 S. W. 1142.

22. Because of an obstacle in the street, a truck collided with a car. Freeland v. Brooklyn Heights R. Co., 43 Misc. 132, 88 N. Y. S. 264.

23. Selection of "one of the best approved appliances" is not sufficient. St. Louis S. W. R. Co. v. Parks [Tex.] 76 S. W. 740. Cars and appliances are to be measured by those which have proved most efficacious in known use in the same business. Palmer v. Warren St. R. Co., 206 Pa. 574, 56 A. 49.

24. Most improved pattern of headlight in use imposes too great a duty. Ala. Midland R. Co. v. Gulliford, 119 Ga. 523, 46 S. E. 655. It is not bound to select or exercise the highest degree of care to select the best spark arrester in use. Need only exercise the high degree of care due a passenger to secure the best or most approved spark arrester. Mo., etc., R. Co. v. Mitchell [Tex. Civ. App.] 79 S. W. 94.

25. Liability does not exist in the absence of knowledge of their condition. Evidence held to require nonsuit in action for slipping on muddy steps. Vancleve v. St. Louis, etc., R. Co. [Mo. App.] 80 S. W. 706.

26, 27. Dunn v. Pa. R. Co. [N. J. Law] 58 A. 164.

28. In this case certain Illinois decisions are construed not contra. Robinson v. Chicago & A. R. Co. [Mich.] 97 N. W. 689.

29. Dunn v. Pa. R. Co. [N. J. Law] 58 A. 164.

30. Southern R. Co. v. Thurman, 25 Ky. L. R. 804, 76 S. W. 499.

31. Indictment under Ky. St. 1899, § 796, for discrimination, must allege that car in which colored passenger was compelled to ride was set apart for the use of such passengers. Louisville & N. R. Co. v. Com., 25 Ky. L. R. 1442, 78 S. W. 167.

32. A separate coach or coach with separate compartments for white and colored passengers need not be provided on a freight train carrying a combination car used as a caboose [Ky. St. 1899, § 801]. Louisville & N. R. Co. v. Com., 25 Ky. L. R. 1442, 78 S. W. 167. Conviction for failure to furnish separate coaches cannot be had under Ky. St. 1899, § 795, on facts showing discrimination in convenience or accommodations in separate cars furnished, punishable under § 796. Ill. Cent. R. Co. v. Com., 25 Ky. L. R. 295, 74 S. W. 1076.

33. See 1 Curr. L. 467.

34. Heyde v. St. Louis Transit Co., 102 Mo. App. 537, 77 S. W. 127. Evidence held to sustain findings that plaintiff's injuries were due to the negligence of defendant's motorman in taking street car past a burning building. Citizens' R. Co. v. Jones [Tex. Civ. App.] 81 S. W. 553.

dangerous conditions is negligence. Jerks or bumps incidental to mixed trains, when operated with proper care, are not a basis of liability.[37] Street railways are bound to extraordinary care at crossings.[38] Where a passenger is injured by a collision with a wagon, it has been held that the paramount right of the car must be exercised in a reasonable manner.[39] Passengers on the steps must be protected in passing other cars[40] or wagons[41] too closely. Motormen must recognize the fact that alighting passengers are apt to cross tracks behind cars, and the carrier must exercise reasonable care as to cars on other tracks.[42] Running a special train past a platform on which are passengers for a regular train, at a high speed and without notice to the station master, is not negligence per se.[43] Cars must be adequately warmed.[44]

Reasonable regulations on travelers may be adopted.[45] A rule of a street railway forbidding the carriage of dogs,[46] or cumbersome packages,[47] are reasonable, and the decision of a conductor as to what is "cumbersome" should be sustained unless unreasonable.[48] Overcrowding cars may be negligence.[49] The

35. Motorman. Howell v. Lansing City Elec. R. Co. [Mich.] 99 N. W. 406.

36. Ordinance forbidding "engineer," etc., held to apply to railroads. Southern R. Co. v. Jones [Ind. App.] 71 N. E. 275. Evidence that a train was run down grade around a curve with apparently rotten cross ties is sufficient to go to the jury on recklessness. Injury to passenger. Griffin v. Southern R. Co., 66 S. C. 77, 44 S. E. 562. Running street car at high rate of speed down grade toward curve, causing derailment, held negligence. South Covington, etc., R. Co. v. Constans, 25 Ky. L. R. 158, 74 S. W. 705.

37. Ill. Cent. R. Co. v. Vinson, 25 Ky. L. R. 652, 76 S. W. 167; Id., 25 Ky. L. R. 38, 74 S. W. 671.

38. Richmond Traction Co. v. Williams [Va.] 46 S. E. 292.

39. Frank v. Metropolitan St. R. Co., 91 App. Div. 485, 86 N. Y. S. 1018. High speed in a dense fog may be negligence, although the motorman sees the danger as soon as possible and then does all in his power to avert accident. Fisher v. Union R. Co., 86 App. Div. 365, 83 N. Y. S. 694. See Clark, St. Ry. Acc. Law (2d Ed.) §§ 53, 54.

40. When a passenger on a step is injured by a car of another company on a curve, such other company should not be relieved by an instruction from liability, though its car has come to a stand. Parks v. St. Louis, etc., R. Co., 178 Mo. 108, 77 S. W. 70.

41. Negligence of motorman in moving car forward past a vehicle in such a manner that its hub passed over the car steps, held for jury, where he had knowledge that passengers were standing on the steps. Seller v. Market St. R. Co., 139 Cal. 268, 72 P. 1006.

42. Reed v. Metropolitan St. R. Co., 87 App. Div. 427, 84 N. Y. S. 454.

43. Lehigh Valley R. Co. v. Dupont [C. C. A.] 128 F. 840.

44. Where a passenger was injured by the "trailer" car while boarding a train, it was held that an ordinance requiring a fender and a conductor and a motorman on each car did not apply to "trailers." Von Diest v. San Antonio Traction Co. [Tex. Civ. App.] 77 S. W. 632.

45. The question of the propriety or reasonableness of a rule is for the court. O'Gorman v. New York, etc., R. Co., 89 N. Y. S. 589.

46. Such a rule excludes all dogs. O'Gorman v. New York, etc., R. Co., 89 N. Y. S. 589.

47. A cage two and one-half feet high and two feet square is cumbersome. Ray v. United Traction Co., 89 N. Y. S. 49.

48. Ray v. United Traction Co., 89 N. Y. S. 49.

49. NOTE: It is not negligence, as a matter of law, to crowd street cars or the platforms of street cars, but the question is generally left to the jury: Holloway v. Pasadena & P. R. Co., 130 Cal. 177; Chicago City R. Co. v. Young, 62 Ill. 238; Burns v. Boston El. R. Co. [Mass.] 66 N. E. 418; Brusch v. St. Paul City R. Co., 52 Minn. 512; Pray v. Omaha St. R. Co., 44 Neb. 167, 48 Am. St. Rep. 717; East Omaha St. R. Co. v. Godola, 50 Neb. 906; Lehr v. Steinway, etc., R. Co., 118 N. Y. 556; Graham v. Manhattan R. Co., 149 N. Y. 336; Cattano v. Metropolitan St. R. Co., 173 N. Y. 565; Mt. Adams, etc., R. Co. v. Reul, 4 Ohio Circ. R. 362; Anderson v. City R. Co., 42 Or. 505, 71 P. 659. In Meesel v. Lynn & B. R. Co., 8 Allen [Mass.] 234, the court said: "The seats inside the car are not the only places where the managers of the train expect passengers to remain; but it is notorious that they stop habitually to receive passengers to stand inside until the car is full, and then to stand upon the platforms till they are full, and continue to stop and receive them even after there is no place for them to stand except on the steps of the platform. Neither the officers of these corporations nor the managers of the cars nor the traveling public seem to regard this practice as hazardous, nor does the experience thus far seem to require that it should be restrained upon the ground of its danger." Where a woman with a child on her arm alighted when there was ice on the steps, and a passenger stood so that she could not get hold of the rail, the case was held to be for the jury. Neslie v. Second & Third Sts. Pass. R. Co., 113 Pa. 300, 6 A. 72. In an action for negligent overcrowding of a car, evidence that the plaintiff stood alone on the platform, and was pushed off by passengers leaving, will not support the action. Randall v. Frankford & S. Pass. R. Co., 8

mere fact that a passenger is compelled to stand on a steam car platform is not ground for recovery.[50] Where passengers are riding on the rear platform, there is a duty imposed of handling the car with increased care.[51] Young children should not be allowed on platforms.[52] As to adults on platforms and running board, negligence is usually a question for the jury.[53]

§ 28. *The duty to protect its passengers*[54] renders a carrier, though a corporation, liable for a willful assault by a conductor on a passenger.[55] It is liable for acts of injury by an employe in the course of his employment, though in departure from the authority conferred or implied;[56] but when the person is not a passenger, the carrier is not liable for an assault unless by its authority or under its direction.[57] Where a conductor's manner is insolent and abusive, a passenger who pays fare twice to avoid such abuse may recover for the tort.[58]

Damages cannot be recovered where the passenger himself provokes the wrong,[59] but abusive or opprobrious language alone will not justify an assault by a conductor,[60] nor will a statement by a passenger that he will have to be put off if another is.[61] An assault is not justified by the mere fact that it is in an honest and proper effort to eject a passenger, unless in self-defense.[62]

The carrier not being an insurer[63] is not liable for unanticipated acts of fellow passengers.[64] It may be liable to one injured by being crowded into a car.[65] Lia-

Pa. Co. Ct. R. 277. Where a passenger testified that he stood with one foot on the platform and one on the step, with articles in both hands, and that he was crowded between two men and fell from the car while it was in ordinary motion, there was held to be no evidence of negligence. Barry v. Union Traction Co., 194 Pa. 576. It is lack of due care, as a matter of law, for a passenger to get upon the front platform on a very stormy night, when the car is too crowded for him to ride in safety (Tregear v. Dry Dock, etc., R. Co., 14 Abb. Pr. [N. S.; N. Y.] 49), and where a passenger who made his way from the car onto the crowded platform was pushed off, it was held that, even assuming negligence on the part of the company in permitting such crowding, nevertheless the passenger knew that the crowd was there, and could not recover for the injury (Chicago City R. Co. v. Considine, 50 Ill. App. 471). Where the company allows its car to be greatly overcrowded without objection, and then runs a car so near the intersection of a switch of the main track that cars cannot pass without injury to passengers, it is gross negligence. Topeka City R. Co. v. Higgs, 38 Kan. 375, 5 Am. St. Rep. 754. Where a passenger in a crowded car stood in the gripman's aisle, and was struck by a brake, it was held that, when a street railway company allows its car to be crowded, they are not to be relieved from using the high degree of care required of them because a passenger lightly disobeys a rule, unless he is warned of the danger so that he appreciates it. West Chicago St. R. Co. v. Johnson, 77 Ill. App. 142, affirmed 180 Ill. 285. It has been held that a street railway company must use greater care than usual when it allows its cars to become crowded. Geddes v. Metropolitan R. Co., 103 Mass. 391; Archer v. Ft. Wayne, etc., R. Co., 87 Mich. 101; Kinkade v. Atlantic Ave. R. Co., 9 Misc. 273, 29 N. Y. S. 747; Anderson v. City R. Co., 42 Or. 505, 71 P. 659; Sandford v. Hestonville, etc., R. Co., 136 Pa. 84, 20 A. 799; McCaw v. Union Traction Co., 205 Pa. 271, 54 A. 893.—From Clark, St. Ry. Acc. Law (2d Ed.) § 49.

50. There must also have been negligence. Rolette v. Great Northern R. Co. [Minn.] 97 N. W. 431.

51. Magrane v. St. Louis & S. R. Co. [Mo.] 81 S. W. 1158.

52. Front platform. Denison & S. R. Co. v. Carter [Tex. Civ. App.] 79 S. W. 320. Negligence of motorman in allowing a boy seven years and eight months old to ride on platform is for the jury. Parker v. Wash. Elec. St. R. Co., 207 Pa. 438, 56 A. 1001.

53. See post, § 31 B.

54. See 1 Curr. L. 473.

55. O'Donnel v. St. Louis Transit Co. [Mo. App.] 80 S. W. 315.

56. Striking passenger. Moritz v. Interurban St. R. Co., 84 N. Y. S. 162. Act need not be in the scope of his employment [Civ. Code, § 2790]. Taillon v. Mears [Mont.] 74 P. 421. Assault and injury by the servants of carrier. Citizens' St. R. Co. v. Clark [Ind. App.] 71 N. E. 53; Garvik v. Burlington, etc., R. Co. [Iowa] 100 N. W. 498. Where it is averred that plaintiff was a passenger, it need not be averred that an assault was within the scope of the servant's duty. Birmingham R. & Elec. Co. v. Mason, 137 Ala. 342, 34 So. 207. Petition held to state cause of action which alleged an assault without provocation by a conductor on one attempting to board a car stopped to receive passengers. Strauss v. St. Louis Transit Co., 102 Mo. App. 644, 77 S. W. 156.

57. Birmingham R. & Elec. Co. v. Mason, 137 Ala. 342, 34 So. 207.

58. Strull v. Louisville & N. R. Co., 25 Ky. L. R. 678, 76 S. W. 181.

59. Instruction held erroneous as authorizing actual damages. Freedman v. Metropolitan St. R. Co., 89 App. Div. 486, 85 N. Y. S. 986.

60, 61, 62. Birmingham R., L. & P. Co. v. Mullen, 138 Ala. 614, 35 So. 701.

63. See post, § 31A.

64. Assault. Stutsky v. Brooklyn

bility does not exist to a passenger preparing to alight, who is injured by a person attempting to board before the train stopped, though the conductor was momentarily inattentive.[66] Where a passenger is jostled from a platform, it should be shown that it was the result of defendant's negligence.[67]

The carrier must use ordinary care to protect its passengers while in its stations,[68] or on its trains,[69] or even after alighting,[70] against assaults and insults of which it knew or might have known or foreseen.[71]

§ 29. *Taking on or setting down passengers.*[72] *Taking on.*[73]—Trains must stop a sufficient time to allow passenger to board with safety,[74] but it has been held that elevated trains need not be held until all persons on the platform get aboard.[75] A carrier by street railroad is bound to extraordinary care to avoid injuring passengers boarding or alighting from its cars at stops at regular places,[76] but it is not an insurer, even as to a cripple.[77] It is negligence to increase the passenger's peril by coming in contact with him on mounting the step,[78] or jerking the car when the conductor knows one is attempting to board,[79] and it may be so to prevent one from boarding who does not know that the signal has been given to start.[80] Some indication of readiness to start should be manifest.[81] In starting, the conductor should not signal from a point whence he cannot see the platform steps or passengers attempting to board,[82] but it is not negligence for street car to start

Heights R. Co., 88 N. Y. S. 358. Premature starting of a car in consequence of a signal given by another passenger. McDonough v. Third Avenue R. Co., 88 N. Y. S. 609. Falling over a broken ticket box which the crowd had broken down. Wagner v. Brooklyn Heights R. Co., 88 N. Y. S. 791.

65. Elevated road. Viemeister v. Brooklyn Heights R. Co., 91 App. Div. 510, 87 N. Y. S. 162.

66. Fritz v. Southern R. Co., 132 N. C. 829, 44 S. E. 613.

67. Rolette v. Great Northern R. Co. [Minn.] 97 N. W. 431.

68. Carrier liable where those in charge of depot knew, or by exercise of ordinary care, could have known, of wanton injuries inflicted on passenger therein. Tate v. Ill. Cent. R. Co., 26 Ky. L. R. 309, 341, 81 S. W. 256. Evidence of knowledge or reason to know held for jury. Id. Failure to light a station cannot be held proximate cause of an assault on a female passenger therein. Allegation of such neglect is not aided by averment that carrier should have foreseen the danger. Prokop v. Gulf, etc., R. Co. [Tex. Civ. App.] 79 S. W. 101.

69. Must not expose female to indecent language. St. Louis S. W. R. Co. v. Wright [Tex. Civ. App.] 75 S. W. 565.

70. Spangler v. St. Joseph & G. I. R. Co. [Kan.] 74 P. 607. Where the employes have knowledge of an impending pistol duel on the platform, they must warn alighting passengers. Penny v. Atlantic Coast Line R. Co., 133 N. C. 221, 45 S. E. 563. Liability exists for transporting colored persons to the carrier's park with knowledge of a conspiracy of third persons to injure them and without exercising care to prevent such injury. Indianapolis St. R. Co. v. Dawson, 31 Ind. App. 605, 68 N. E. 909.

71. Notice to station porter, who exercises no authority and is not charged with the duty of looking after passengers, is not notice to the carrier of wanton injuries being inflicted on a passenger. Tate v. Ill. Cent. R. Co., 26 Ky. L. R. 309, 341, 81 S. W. 256. Car stopped at regular station for a short period, none of the employes were in the coach, which was lighted; held, that an assault on a woman by a negro entering the car could not be contemplated by a prudent person, and verdict was properly instructed for defendant. Segal v. St. Louis S. W. R. Co. [Tex. Civ. App.] 80 S. W. 233.

72. See 1 Curr. L. 464, 470.

73. See 1 Curr. L. 464.

74. Mobile & O. R. Co. v. Reeves, 25 Ky. L. R. 2236, 80 S. W. 471.

75. Notwithstanding Laws 1890, c. 565, p. 1126, and Penal Code, § 419, requiring a stop until all persons on a platform desiring to board are permitted to do so. Lauterer v. Manhattan R. Co. [C. C. A.] 128 F. 540.

76. Richmond Traction Co. v. Williams [Va.] 46 S. E. 292. Conductor and porter ought to have seen that passenger was attempting to board train when they gave signal to start. St. Louis S. W. R. Co. v. Cannon [Tex. Civ. App.] 81 S. W. 778.

77. Instruction making the carrier an insurer until a cripple had taken his seat was erroneous. Shadletsky v. New York City R. Co., 88 N. Y. S. 1014.

78. Conductor saw passenger's position. Fleming v. St. Louis & S. R. Co., 101 Mo. App. 217, 74 S. W. 382.

79. Fremont v. Metropolitan St. R. Co., 83 App. Div. 414, 82 N. Y. S. 307.

80. Passenger was pushed from car. Ferris v. Interurban St. R. Co., 89 App. Div. 361, 85 N. Y. S. 806.

81. Liability for starting a train without notice is not removed by the fact that the passenger is not attempting to board in the manner customary at that place. Passenger tried to board at car steps instead of crossing a plank from station into baggage car and thence to his coach, having no notice of the custom. Atlantic & B. R. Co. v. Anderson, 118 Ga. 288, 45 S. E. 271.

82. Liability exists where car starts while person is boarding, though there is a conflict as to whether the attempt was made after a signal to start. McGill v. Cent.

while passenger is passing from the platform into the car.[83] It is the duty of the motorman to keep a lookout for those who may desire to ride, and when this is manifest, to give them a reasonable opportunity to get on in safety;[84] but a motorman who obeys the signal of the conductor and does not know that it will result in an injury to a passenger is not negligent.[85]

Slowing a car in obedience to a signal is an invitation to board it,[86] though not to board it while in motion.[87] So stopping a crowded car is an implied invitation to take passage unless warning or notice is given.[88] Where a car has stopped to receive passengers, the question of who gave the signal to stop does not affect the duty to passengers getting on board.[89] Employes are not bound to prevent a person from attempting to board a moving car.[90] One who signals a street car coming around a curve has no right to assume that it will stop at any particular point on such curve, and until he has been given to understand by some act of the conductor or motorman that he can safely attempt to board it, or until the conditions are such that he can do so, the company owes him no duty.[91] The fact that one voluntarily assumes a position of danger relative to a passing street car, and not the sudden acceleration of the speed of the car, is the proximate cause of the injury to such person by being struck by the overhang of such car.[92] The care required is the same at any point made proper by the acts of the carrier as it is at a station.[93]

Setting down.[94]—It is the duty of a carrier to set passengers down safely at a station at the termination of their journey.[95] Railway passengers should be apprised of approach to their stations,[96] and trains should not start up suddenly after slowing.[97] If, after such announcement, the train makes its next stop short of or beyond the station, that fact must also be announced.[98] Street car passengers should be warned if a stop, made after a transfer point is called, is not to discharge

Crosstown R. Co., 84 N. Y. S. 477. Where a conductor looks to see if any one is boarding or is desirous to board the car, it is not negligence for him to signal to start. Foster v. Seattle Elec. Co. [Wash.] 76 P. 995. It is negligence for a conductor to start his car when he could have seen that a passenger was in the act of boarding it. Id.

83. Sharp v. New Orleans City R. Co., 111 La. 395, 35 So. 614. From the running board into the car. Canavan v. Interurban St. R. Co., 87 N. Y. S. 491.

84. Jaques v. Sioux City Traction Co. [Iowa] 99 N. W. 1069.

85. Foster v. Seattle Elec. Co. [Wash.] 76 P. 995.

86. Where motorman is looking at intending passenger when he signals to stop the car, a slackening of speed may be an invitation to enter. Mulligan v. Metropolitan St. R. Co., 89 App. Div. 207, 85 N. Y. S. 791. Liability exists for misleading passenger into belief that car is slowing to receive him, unless he is contributorily negligent. Maguire v. St. Louis Transit Co. [Mo. App.] 78 S. W. 838. Where a car has been slowed down in obedience to a signal at a usual stopping place, the motorman must use a high degree of care such as would be exercised by a skillful and careful motorman under like circumstances, to so manage the car as to allow plaintiff to safely get on the car and reach a place of safety. Elkenberry v. St. Louis Transit Co. [Mo. App.] 80 S. W. 360.

87. The fact that a car slackens speed at a street crossing is not a notice of intention to stop or an invitation to board while in motion. Fremont v. Metropolitan St. R. Co., 83 App. Div. 414, 82 N. Y. S. 307.

88. Citizens' St. R. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935. One boarding a crowded car under implied invitation may assume that he will be given a reasonable opportunity to reach a place of safety before it is put in motion. Id.

89. Stoddard v. St. Louis, etc., R. Co. [Mo. App.] 80 S. W. 33.

90. Leu v. St. Louis Transit Co. [Mo. App.] 80 S. W. 273.

91, 92. Garvey v. Rhode Island Co. [R. I.] 58 A. 456.

93. San Antonio, etc., R. Co. v. Turney [Tex. Civ. App.] 78 S. W. 256.

94. See 1 Curr. L. 470.

95. Englehaupt v. Erie R. Co. [Pa.] 58 A. 154.

96. Announce the name of the station on the approach of the train. Englehaupt v. Erie R. Co. [Pa.] 58 A. 154. A failure to announce a station does not impose liability toward a passenger not misled. Southern R. Co. v. Hobbs, 118 Ga. 227, 45 S. E. 23.

97. Held for jury as to whether it was proximate cause. Moorman v. Atchison, etc., R. Co. [Mo. App.] 78 S. W. 1098.

98. Liable for injuries to passenger who fell through bridge because of unexpected stoppage. Englehaupt v. Erie R. Co. [Pa.] 58 A. 154. Question of defendant's negligence in unexpected stoppage of train and plaintiff's contributory negligence in alighting held for jury on conflicting evidence. Id.

passengers.[99] To slacken speed after a stop signal is given, and then increase it, is evidence of negligence in not stopping.[1] It may be negligence for conductor to direct passenger to get up and go on platform while car is in motion.[2] A motorman must exercise reasonable care in listening for signals to stop, given by passengers intending to alight.[3] A departing passenger should signify his intention to alight.[4]

The train must stop a time reasonably sufficient to enable passengers to alight at the station of their destination in safety,[5] by the usual mode of egress from its cars,[6] and not be negligently carried by a station after notice.[7] Having done so, its duty is discharged in the absence of notice of special conditions.[8] The announcement of a station is not an invitation for passengers to alight before the train is brought to a standstill.[9] A stool should be furnished where the platform is low.[10] A custom of conductors to lend special assistance to alighting female passengers is not binding unless the carrier has knowledge of it.[11]

The duty of street car company as to length of stop is no greater than that of a steam railroad,[12] but the company must use great care while the passenger is alighting.[13] Sufficient time must be given,[14] and passengers allowed to get to safe

99. United R. & Elec. Co. v. Woodbridge, 97 Md. 629, 55 A. 444.

1. Dallas Rapid Transit R. Co. v. Payne [Tex. Civ. App.] 78 S. W. 1085.

2. Hennessy v. Muskegon T. & Lighting Co. [Mich.] 97 N. W. 36.

3. Fuller v. Denison & S. R. Co. [Tex. Civ. App.] 74 S. W. 940.

4. Where a conductor has no notice of a passenger's intention to alight, there is no liability for an injury caused by starting the car. McCarthy v. Interurban St. R. Co., 88 N. Y. S. 388. A conductor who has no notice that a passenger intends to leave the car cannot be charged with negligence in starting the car. Brown v. Interurban St. R. Co., 43 Misc. 374, 87 N. Y. S. 461.

5. Galveston, etc., R. Co. v. Hubbard [Tex. Civ. App.] 76 S. W. 764; Englehaupt v. Erie R. Co. [Pa.] 58 A. 154; Shealey v. South Carolina & G. R. Co. [S. C.] 45 S. E. 119. Reasonable time under the usual and ordinary circumstances must be given. Chicago, etc., R. Co. v. Armes [Tex. Civ. App.] 74 S. W. 77. Sudden start while passenger is alighting before a reasonable time is afforded is negligence. Rutledge v. New Orleans, etc., R. Co. [C. C. A.] 129 F. 94. Instruction held to properly state law. Crump v. Davis [Ind. App.] 70 N. E. 887; Southern R. Co. v. Bandy [Ga.] 47 S. E. 923.

6. Ratteree v. Galveston, etc., R. Co. [Tex. Civ. App.] 81 S. W. 566. A railroad company has a right to designate certain doors and steps by which passengers shall leave the train, and to reserve others for the performance of its necessary work. Vestibule on coach, where plaintiff was hurt by tripping over hose, not open on station side and opened on other side only for purpose of conveying water into car. Id.

7. Infirmity required longer stop. Southern R. Co. v. Hobbs, 118 Ga. 227, 45 S. E. 23. Notice to carrier is not necessary to render it liable for injuries resulting from a person carried beyond her destination being of delicate health and thinly clad. Pecos, etc., R. Co. v. Williams [Tex. Civ. App.] 78 S. W. 5. Where a female passenger poorly clad is set down a mile beyond her station, and compelled to walk back in a sleet storm, possible error in a charge extending the carrier's liability to her as a passenger is not prejudicial. Id.

8. It is not bound to know whether other passengers are in the act of alighting or on platforms for such purpose. Shealey v. South Carolina & G. R. Co. [S. C.] 45 S. E. 119. It is not bound to care of "very cautious person" in starting again. St. Louis S. W. R. Co. v. Turner [Tex. Civ. App.] 77 S. W. 255. Evidence held to show that passenger had time to alight, but awaited special attention from the conductor. Southern R. Co. v. Hobbs, 118 Ga. 227, 45 S. E. 23.

9. Pittsburg, etc., R. Co. v. Miller [Ind. App.] 70 N. E. 1006.

10. Failure to furnish customary stool and have porter present is negligence toward passenger alighting in dark from step 23 inches above ground. Cincinnati, etc., R. Co. v. Bell, 25 Ky. L. R. 10, 74 S. W. 700.

11. Southern R. Co. v. Hobbs, 118 Ga. 227, 45 S. E. 23. Since a carrier is not ordinarily under any duty to assist passengers to alight, it is not liable for a failure of a conductor to fulfil a promise to give such assistance to a passenger not entitled to claim it as a matter of right or to a passenger who, though he needs assistance, fails to inform the conductor who has no notice of the fact. Id.

12. Boone v. Oakland Transit Co., 139 Cal. 490, 73 P. 243. Must stop cars long enough to allow time to alight. Scamell v. St. Louis Transit Co., 102 Mo. App. 198, 76 S. W. 660. To suddenly start a car while a person is alighting after a stop for that purpose is negligence. Indianapolis St. R. v. Brown [Ind. App.] 69 N. E. 407. Negligent sudden start of car throwing alighting passenger in front of car on parallel track held proximate cause of injury. Scamell v. St. Louis Transit Co., 102 Mo. App. 198, 76 S. W. 660.

13. For a conductor to start the car when he is standing on a lady's skirt and she is endeavoring to alight is evidence of negligence. Citizens' St. R. Co. v. Shepherd, 65 N. E. 765, 29 Ind. App. 412. See Clark, St. Ry. Acc. Law (2d Ed.) §§ 60, 64.

NOTE. Alighting from street car: Pas-

place before starting.[15] The conductor must see that no one is in act of alighting before starting.[16] Where a person is accompanied by a child, the stop must be long enough to permit her to assist the child to alight.[17] The stop need not have been at a usual point if a passenger is endeavoring to alight with knowledge of the employes.[18] The servants must have reason to suppose that passenger intends to alight.[19] A motorman is not bound to anticipate that a passenger will attempt to alight between crossings, though he has seen her signal for a stop at the preceding crossing and has slackened speed.[20] Even though a car did not stop to discharge passengers, plaintiff can recover if those in charge thereof suddenly started it forward when they knew, or by the exercise of proper care could have known, that she was alighting therefrom.[21] Negligence in not stopping a car will be assumed where the signal to stop was given and the speed of the car was at first lessened and then increased.[22] Carriage of passenger beyond destination is not proximate cause of injury sustained from fall on sidewalk while going back to her destination.[23]

The carrier is bound to provide a safe place for the passenger to alight[24] at any point where it stops to discharge passengers,[25] but it is not liable for accidents

sengers upon street cars are entitled to sufficient time to get off, and the duty of the carrier is not discharged until the passenger is free from the car. The relation of passenger and carrier certainly exists while the passenger is in the act of alighting. Atlanta Consol. St. R. Co. v. Bates, 103 Ga. 333; Ft. Wayne Traction Co. v. Morvilius, 31 Ind. App. 464, 68 N. E. 304; Louisville R. Co. v. Park, 96 Ky. 580; Jacobs v. West End St. R. Co., 178 Mass. 116; Finn v. Valley City St. & Cable R. Co., 86 Mich. 74; Fillingham v. St. Louis Transit Co., 102 Mo. App. 573, 77 S. W. 314. After the passenger has stepped from the car into the street, however, it is held that he is no longer upon the premises of the railway company, but upon a public place, where he has the same rights with every occupier, and over which place the company has no control. His rights are those of a traveler upon the highway, and not of a passenger, for the relation of carrier and passenger has ceased. Hanson v. Urbana, etc., R. Co., 75 Ill. App. 474; West Chicago St. R. Co. v. Walsh, 78 Ill. App. 595; Indianapolis St. R. Co. v. Tenner [Ind. App.] 67 N. E. 1044; Conway v. Lewiston, etc., R. Co., 87 Me. 283, 90 Me. 199; Central R. Co. v. Peacock, 69 Md. 257, 9 Am. St. Rep. 425; Creamer v. West End St. R. Co., 156 Mass. 320, 32 Am. St. Rep. 456; Bigelow v. West End St. R. Co., 161 Mass. 393; Gargan v. West End St. R. Co., 176 Mass. 106; Platt v. Forty-second St., etc., R. Co., 2 Hun [N. Y.] 124; Wells v. Steinway R. Co., 18 App. Div. [N. Y.] 180; Smith v. City R. Co., 29 Or. 539; Finseth v. Suburban R. Co., 32 Or. 1; Buzby v. Phila. Traction Co., 126 Pa. 559, 12 Am. St. Rep. 919; St. R. Co. v. Boddy, 105 Tenn. 666. If a passenger alights for a mere temporary purpose, this must be understood by those in charge of the car, if the relation of carrier and passenger is to be held to continue.—From Clark, St. Ry. Acc. Law (2d Ed.) § 7.

14. Sudden start before time to alight. Kroner v. St. Louis Transit Co. [Mo. App.] 80 S. W. 915.

15. Street car company is bound to highest care. Norfolk & A. Terminal Co. v. Morris' Adm'x, 101 Va. 422, 44 S. E. 719

16. After stop to receive or discharge passengers. Memphis St. R. Co. v. Shaw, 110 Tenn. 467, 75 S. W. 713.

17. Hannon v. St. Louis Transit Co., 102 Mo. App. 216, 77 S. W. 158.

18. Must afford reasonable opportunity. Jacobson v. St. Louis Transit Co. [Mo. App.] 80 S. W. 309. Where a car has stopped close to a crossing, it is negligence to start it while a passenger is alighting. [40 or 50 feet from corner.] United R. & Elec. Co. v. Hertel, 97 Md. 382, 55 A. 428.

19. Grabenstein v. Metropolitan St. R. Co., 84 N. Y. S. 261. Liability does not exist where passenger at end of line does not attempt to get off till car is reversed and the persons in charge have no notice of his intention. Spaulding v. Quincy & B. St. R. Co., 184 Mass. 470, 69 N. E. 217.

20. Root v. Des Moines R. Co., 122 Iowa, 469, 98 N. W. 291.

21. Houghton v. Louisville R. Co., 26 Ky. L. R. 393, 81 S. W. 695.

22. Passenger injured when alighting. Dallas Rapid Transit R. Co. v. Payne [Tex. Civ. App.] 78 S. W. 1085.

23. Haley v. St. Louis Transit Co. [Mo.] 77 S. W. 731.

24. It is negligence for a railway company to stop its train on a dark night in an unlighted place when they must step down a distance imperiling personal safety. Ellis v. Chicago, etc., R. Co. [Wis.] 98 N. W. 942. Question held for jury as to allowing ice to gather. Harris v. Pittsburg, etc., R. Co. [Ind. App.] 70 N. E. 407. Evidence held for jury as to care in permitting elderly female passenger to alight on yielding gravel. Joslyn v. Milford, etc., R. Co., 184 Mass. 65, 67 N. E. 866. Compare § 25, ante.

25. Where it is agreed to set down a passenger at a water tank, the same care must be used as at a station. Chesapeake & O. R. Co. v. Topping, 25 Ky. L. R. 1390, 78 S. W. 135. Where the carrier stops a freight caboose a distance from the station, it is bound to furnish drovers in charge of stock a safe means of access. Chicago, etc., R. Co. v. Troyer [Neb.] 97 N. W. 308. It is the duty of a street car company to select a reasonably safe place for landing passen-

which cannot be reasonably anticipated.[26] If a passenger selects the place to alight, he assumes the risk incident thereto.[27]

A street car company must guard the passenger from injury from the dangerous condition of the highway where it stops to discharge him or warn him of the danger where it has notice and he has not,[28] and if it is negligent in stopping the car at the place it did and not assisting a passenger to alight, the city which has excavated the street at that point is not liable for injury.[29] Failure to stop at crossing is not the proximate cause of injury to a passenger alighting at the point where the car stops.[30]

An elevated road should have an employe at the rear of its cars to see that gates are not closed before admission of passengers to the station.[31]

§ 30. *Duty to persons other than passengers.*—These usually fall within the category of employes[32] or licensees, trespassers, and strangers.[33] To persons boarding cars by permission to assist passengers, the same duty is owing as to passengers.[34] Such are not trespassers,[35] and must not be ejected from a moving train.[36] The carrier is bound to use ordinary care and diligence for the safety of one not a passenger who boards its car for a lawful purpose and on the implied invitation of its servants.[37] A carrier owes no duty to trespassers on its trains except not to hurt them if discovered in a position of peril.[38]

Toward a passenger in the cars of another company, a street railroad is bound only to reasonable and ordinary care.[39] Where unnecessary force is used in ejecting one from a street car, he is entitled to recover for the assault, irrespective of whether he is entitled to the rights of a passenger or not.[40]

§ 31. *Liability for personal injuries. A. General principles. What law governs.*[41]—In a common-law action for injuries received in another state, the common law of the forum governs.[42]

gers. Track on a public road. Macon R. & Light Co. v. Vining [Ga.] 48 S. E. 232.

26. Adult passenger who secured the stoppage of the train for his own accommodation cannot recover for an injury sustained by stepping on a cinder and falling, the place being perfectly safe and the ground in full and plain view. Bascom v. Wabash R. Co., 102 Mo. App. 430, 76 S. W. 697. Carrier is not liable for strain sustained by passenger in alighting at a point off a crossing, but without apparent risk to alighting passengers. Lynch v. St. Louis Transit Co., 102 Mo. App. 630, 77 S. W. 100. Recovery cannot be had where a female passenger misjudges the distance she can safely step from a standing car and falls, she not being misled or misdirected and the conditions being perfectly apparent and the track conforming to the highway. Scanlon v. Phila. Rapid Transit Co., 208 Pa. 195, 57 A. 521.

27. Macon R. & Light Co. v. Vining [Ga.] 48 S. E. 232.

28. Leaving car at night and stepping into excavation. Ft. Wayne Traction Co. v. Morvilius, 31 Ind. App. 464, 68 N. E. 304. Should not stop at dangerous points. Leveret v. Shreveport Belt R. Co., 110 La. 399, 34 So. 679.

29. Yecker v. San Antonio Traction Co. [Tex. Civ. App.] 76 S. W. 780.

30. Lynch v. St. Louis Transit Co., 102 Mo. App. 630, 77 S. W. 100.

31. Metropolitan St. R. Co. v. Hanson, 67 Kan. 256, 72 P. 773.

32. See Master and Servant, 2 Curr. L. 801. Consult 1 Curr. L. 448, and ante, § 22.

33. See Railroads, 2 Curr. L. 1382; Street Railways, 2 Curr. L. 1742.

34. Conductor should see that he is given time to get off. Bishop v. Ill. Cent. R. Co., 25 Ky. L. R. 1363, 77 S. W. 1099.

35. One accompanying his sister to a train to assist her to board it and going on board. Morrow v. Atlanta & C. Air Line R. Co., 134 N. C. 92, 46 S. E. 12.

36. Where one escorted passengers onto a train which moved out before he got off and the conductor put him off while it was moving, he was entitled to recover. Southern R. Co. v. Merritt [Ga.] 47 S. E. 908.

37. One boarding car for purpose of inducing those in charge of it to make an extra trip, as it sometimes did, injured by being thrown off by its being suddenly started. Brock v. St. Louis Transit Co. [Mo. App.] 81 S. W. 219.

38. One using train as means of crossing track. Ratteree v. Galveston, etc., R. Co. [Tex. Civ. App.] 81 S. W. 666.

39. Klinger v. United Traction Co., 92 App. Div. 100, 87 N. Y. S. 864. See titles Railroads, 2 Curr. L. 1382; Street Railways, 2 Curr. L. 1742.

40. Citizens' St. R. Co. v. Clark [Ind. App.] 71 N. E. 63. Evidence held to show that plaintiff was ejected from car operated by defendant. Id.

41. See 1 Curr. L. 459.

42. Error to require highest degree of care and diligence known to skilled persons engaged in the business. Ala. Midland R. Co. v. Guilford, 119 Ga. 623, 46 S. E. 655.

Degree of care required.[43]—A carrier of passengers is not an insurer of their safety,[44] but is bound to a very high degree of care which is variously defined,[45] and this rule applies equally to street railroads,[46] cabs, and the like.[47] This duty arises only from the relation of passenger and carrier,[48] and the servants of a carrier cannot be held to personal liability under the same rules as the carrier,[49] being liable only for negligence or excess of duties.[50] It does not follow that the trainmen performed all the duties which they owed travelers from the fact that they performed all that were required of them by the company.[51]

Negligence must be proximate cause of injury,[52] but a carrier is liable for injury from its negligence concurring with that of another.[53] The question of

43. See 1 Curr. L. 459.

44. Must exercise the care a very cautious, prudent, and competent person would exercise under the circumstances. Tyler v. Tex. & P. R. Co. [Tex. Civ. App.] 79 S. W. 1075; Carrier by stage. Taillon v. Mears [Mont.] 74 P. 421. Street railroad. Citizens' St. R. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935. A carrier owes its passengers a high degree of care but is not absolutely bound to furnish them reasonably safe cars or to operate the same in a safe manner. Citizene' R. Co. v. Sinclair [Tex. Civ. App.] 81 S. W. 329. A carrier need not guard against accidents not reasonably to be expected. Not liable where passenger put his hand through glass swinging door of a kind long in use. Fahner v. Brooklyn Heights R. Co., 86 App. Div. 488, 83 N. Y. S. 815. Not liable for an assault by one passenger upon another which it had no reason to anticipate. Stutsky v. Brooklyn Heights R. Co., 88 N. Y. S. 358.

45. Carriers are bound to know or exercise the highest degree of care consistent with the proper and prudent conduct of their business to ascertain and remove causes which may derail their cars. Louisville R. Co. v. Hartlege, 25 Ky. L. R. 152, 74 S. W. 742. In making coupling if defendant used a degree of care or caution, less in however small a degree than the utmost care of very cautious railroad men under the circumstances it is liable. Mathew v. Wabash R. Co. [Mo. App.] 78 S. W. 271. All that human care and vigilance reasonably can do to prevent the injury. Brunnchow v. Rhode Island Co. [R. I.] 58 A. 656. Not "the utmost care that human imagination can conceive." Magrane v. St. Louis & S. R. Co. [Mo.] 81 S. W. 1158. Highest degree of care consistent with the practical conduct of its business. Johnson v. Seattle Elec. Co. [Wash.] 77 P. 677. The highest degree of care. International, etc., R. Co. v. Shuford [Tex. Civ. App.] 81 N. W. 1189. Highest degree of care reasonably practicable under the circumstances. Foster v. Seattle Elec. Co. [Wash.] 76 P. 995. Common carriers are required to do all that human care, vigilance, or foresight can reasonably do, consistent with the character and mode of conveyance adopted and the practical prosecution of the business, to prevent accidents to passengers. Chicago City R. Co. v. Bundy [Ill.] 71 N. E. 28. To exercise such a high degree of foresight as to possible dangers, and of prudence in guarding against them, as would be used by very cautious, prudent, and competent persons under similar circumstances. International, etc., R. Co. v. Clark [Tex. Civ. App.] 81 S. W. 821.

46. North Chicago St. R. Co. v. Polkey, 203 Ill. 225, 67 N. E. 793; Indianapolis St. R. Co. v. Brown [Ind. App.] 69 N. E. 407; Crump v. Davis [Ind. App.] 70 N. E. 886. "Highest degree of care." Tillman v. St. Louis Transit Co., 102 Mo. App. 553, 77 S. W. 320. Highest degree of practical care and diligence consistent with the means of transportation adopted. Palmer v. Warren St. R. Co., 206 Pa. 574, 56 A. 49. High degree of care such as should be exercised by careful, skillful railroad employes under similar circumstances. Robinson v. St. Louis & S. R. Co. [Mo. App.] 77 S. W. 493. "Utmost skill and care" in management. Metropolitan St. R. Co. v. Hanson, 67 Kan. 256, 72 P. 773. Degree of care which very cautious, prudent and competent persons usually exercise under the same or similar circumstances. St. John v. Gulf, etc., R. Co. [Tex. Civ. App.] 80 S. W. 235. Reasonable care, considering the nature of its business and the responsibilities attaching to the carrying of human beings. Frank v. Metropolitan St. R. Co., 91 App. Div. 485, 86 N. Y. S. 1018. "Highest" degree of care not required in avoidance of collision with vehicle. Kelly v. Metropolitan St. R. Co., 89 App. Div. 159, 85 N. Y. S. 842. "Utmost skill, diligence and foresight consistent with the business." Lincoln Traction Co. v. Heller [Neb.] 100 N. W. 197. The rule that operators of a car are charged only with the duty of exercising reasonable care applies as to teams in the street but not as to passengers. Zvonik v. Interurban St. R. Co., 88 N. Y. S. 399. Reasonable care to prevent collisions. Frank v. Metropolitan St. R. Co., 91 App. Div. 485, 86 N. Y. S. 1018.

47. Stiner v. Metropolitan St. R. Co., 84 N. Y. S. 285.

48. See ante, § 22.

49. Collision. Bryce v. Southern R. Co., 125 F. 958.

50. Unnecessary force in ejecting passenger. Ill. Cent. R. Co. v. Jackson, 25 Ky. L. R. 2087, 79 S. W. 1187.

51. Feldschneider v. Chicago, etc., R. Co. [Wis.] 99 N. W. 1034.

52. Runaway. Taillon v. Mears [Mont.] 74 P. 421. The driver's negligence in causing horses to fall is not the proximate cause of injury to a passenger kicked while they are being released. Roedecker v. Metropolitan St. Co., 87 App. Div. 227, 84 N. Y. S. 300. Fact that plaintiff was compelled to ride on mixed train, though he had a first class ticket, held not the proximate cause of injury resulting from his stepping on banana peel and train making sudden lurch. Error to admit evidence on this issue, and submit it to jury. Chicago, etc., R. Co. v. Gragg [Tex. Civ. App.] 81 S. W. 93.

proximate cause is one of fact.[54] There is no liability for casualties which cannot be reasonably guarded against or anticipated.[55] Violation of a statute or ordinance is negligence per se.[56] There are no degrees of negligence.[57]

Gross negligence may also impose criminal liability.[58]

Carriage of passengers on freight trains.[59]—Passengers on freight and mixed trains assume the risks necessarily incident to that means of transportation,[60] but the carrier is nevertheless held to the utmost care[61] consistent with practical operation.[62]

Duty toward intoxicated, infirm, or delicate persons.[63]—Though the carrier has no notice of the infirm condition of a passenger, he is entitled to the same high care which is the right of other passengers,[64] and if the carrier has such notice the care must be such[65] and only such[66] as is appropriate to the condition.

Liability of carrier or connecting carrier.[67]—Under an agreement to divide through business on a mileage basis, connecting roads are liable as partners.[68] The initial carrier is liable, under an agreement for the use of one car, for an entire trip over two roads, for failure to furnish a car which is capable of being made comfortably warm.[69] But it is the duty of the connecting carrier, in such case, to use the highest degree of care to preserve the comfort of its passengers, and the

53. Louisville & E. Mail Co. v. Barnes' Adm'r, 25 Ky. L. A. 2036, 79 S. W. 261; Frank v. Metropolitan St. R. Co., 91 App. Div. 485, 86 N. Y. S. 1018.

54. Harris v. Pittsburg, etc., R. Co. [Ind. App.] 70 N. E. 407.

55. Conductor's transfer punch fell from his pocket and hit a passenger in the eye. Cheyne v. Van Brunt, etc., R. Co., 89 N. Y. S. 626. A passenger standing on running board swung back so as to come in contact with the pillar of an elevated railway. Canavan v. Interurban St. R. Co., 87 N. Y. S. 491. A carrier is not an insurer and is not liable for injuries which might have been anticipated if the means necessary to prevent it would have amounted to a practical prohibition of its business. Foster v. Seattle Elec. Co. [Wash.] 76 P. 995.

56. Ordinance requiring conductors on street cars. Lincoln Traction Co. v. Heller [Neb.] 100 N. W. 197. Violation of an ordinance requiring the motorman to stop before crossing a railroad track. Gulf, etc., R. Co. v. Holt, 30 Tex. App. 330, 70 S. W. 591.

57. "Slightest neglect" should be avoided in instructions. Magrane v. St. Louis & S. R. Co. [Mo.] 81 S. W. 1158.

58. See Corporations, 1 Curr. L. 710; Homicide, 2 Curr. L. 223. An interesting illustrative case of liability for homicide is State v. Young [N. J. Law] 56 A. 471.

59. See 1 Curr. L. 460.

60. Jerks reasonably incident. Ill. Cent. R. Co. v. Vinson, 25 Ky. L. R. 38, 74 S. W. 671; Id., 25 Ky. L. R. 652, 76 S. W. 167; Chesapeake & O. R. Co. v. Jordan, 25 Ky. L. R. 574, 76 S. W. 145. Liability does not exist for a sudden jolt not shown to be the result of negligent handling of the train or defect in track or appliances. Portuchek v. Wabash R. Co., 101 Mo. App. 52, 74 S. W. 368. Passenger on mixed train does not assume risk of jars occasioned by parting of coupling, though no greater than usual. Holland v. St. Louis, etc., R. Co. [Mo. App.] 79 S. W. 508.

61. Hardin v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 77 S. W. 431.

62. Highest practicable degree of care practically consistent with the operation of such a train. Chesapeake & O. R. Co. v. Jordan, 25 Ky. L. R. 574, 76 S. W. 145. One traveling on a shipper's or drover's ticket is entitled to the care due a passenger, regard being had to the means of transportation necessarily adopted. Chicago, etc., R. Co. v. Troyer [Neb.] 97 N. W. 308.

63. See 1 Curr. L. 461.

64. In case the carrier does not exercise such care, she may recover for an aggravation of an existing ailment. Mathew v. Wabash R. Co. [Mo. App.] 78 S. W. 271.

65. Where a passenger becomes sick or unconscious, reasonable and ordinary care must be employed in looking after and protecting him. Atchison, etc., R. Co. v. Parry, 67 Kan. 515, 73 P. 105. Where a depot master allows a passenger apparently just recovering from a fit to go on a street near the tracks, a jury may be justified that his negligence is the proximate cause of an injury four hours later after the passenger has wandered five miles on the track. Id. Old and apparently infirm passengers are entitled to greater care. Should be assisted to alight if necessary. Memphis St. R. Co. v. Shaw, 110 Tenn. 467, 75 S. W. 713.

66. A carrier is not bound to escort a passenger to the proper car of a vestibuled train, she not being ill to such a degree as to require assistance. Ill. Cent. R. Co. v. Harper [Miss.] 35 So. 764.

67. See 1 Curr. L. 482, n. 94.

68. Injury at station. Lehigh Valley R. Co. v. Dupont [C. C. A.] 128 F. 840.

69. Missouri, etc., R. Co. v. Harrison [Tex.] 80 S. W. 1139. A carrier agreeing to furnish a through car is liable for negligence in failing to supply proper heating apparatus though the injury occurs while the car is in the hands of the connecting carrier. Liability is not removed by a limitation on a coupon ticket that the selling company acted as agent only and was not responsible beyond its line. Id. [Tex. Civ. App.] 77 S. W. 1036.

initial carrier is not liable for its failure to do so.[70] An express company is liable for injuries to a passenger on a train employed by it for purposes of transportation, though such train belonged to, and was operated by, the agents of and over the line of, a railroad company, and the injuries were caused by the negligence of the latter company.[71] In such case, the railroad company is the agent of the express company and the latter is strictly responsible for its acts,[72] and an action will lie in favor of the injured passenger against either or both of such companies.[73]

(§ 31) *B. Contributory negligence of passenger.*[74]—A passenger is required to exercise such reasonable care for his own safety as persons of ordinary prudence and intelligence would ordinarily exercise under the same circumstances,[75] though by statute in some states this duty is modified;[76] but a city ordinance that conductors shall not allow women and children to leave moving cars does not abrogate rules as to contributory negligence.[77] The character of the train is an element.[78] His negligence must proximately contribute to the injury,[79] but the amount of influence which it exerts cannot be considered.[80] Reckless or wanton conduct of the carrier may prevent its assertion,[81] but the duty of the carrier to use every means in its power to prevent injury to one who has, by his own negligence, exposed himself to injury, does not arise until his peril is discovered.[82] If they do not know of it, no duty is imposed on them, even though, by the exercise of ordinary care, they might have discovered it.[83] The passenger never assumes the risk of the carrier's negligence, there being a distinction between assumption of risk and contributory negligence.[84]

The negligence of a carrier is not imputed to a passenger who is injured by

70. Mo., etc., R. Co. v. Harrison [Tex.] 80 S. W. 1139.

71, 72, 73. American Exp. Co. v. Ogles [Tex. Civ. App.] 81 S. W. 1023.

74. See 1 Curr. L. 474.

75. Chicago City R. Co. v. Bundy [Ill.] 71 N. E. 28. A carrier is not required to guard against heedlessness of personal safety by passengers or disregard of its reasonable rules. Lauterer v. Manhattan R. Co. [C. C. A.] 128 F. 540. Contributory negligence is usually a matter of defense. Negligence in leaving train after call of station, held matter of defense. Coe v. Louisville & N. R. Co., 25 Ky. L. R. 1679, 78 S. W. 439; Ill. Cent. R. Co. v. Jolly, 25 Ky. L. R. 1735, 78 S. W. 476. A passenger traveling in a street car is not bound as a person approaching a dangerous crossing to keep all his senses alert and be on the lookout for danger. He may assume that the carrier will exercise the care toward him required by law. Jones v. United Railways & Elec. Co. [Md.] 57 A. 620.

76. Contributory negligence no defense for injury by kicking switch in municipal limits, but this statute does not apply outside such limits. Yazoo, etc., R. Co. v. Humphrey [Miss.] 36 So. 154.

77. Shareman v. St. Louis Transit Co. [Mo. App.] 78 S. W. 846.

78. Held for jury when woman on mixed train was injured by a jolt, she being then standing in aisle talking to a friend. Yazoo, etc., R. Co. v. Humphrey [Miss.] 36 So. 154.

79. Instruction to such effect is proper. St. Louis, etc., R. Co. v. Smith [Tex. Civ. App.] 79 S. W. 340; St. Louis S. W. R. Co. v. Cannon [Tex. Civ. App.] 81 S. W. 778. Injury from sudden start while alighting. Chicago, etc., R. Co. v. Armes [Tex. Civ. App.] 74 S. W. 77.

80. Error to charge that it must have contributed in a "material sense." Root v. Des Moines R. Co., 122 Iowa, 469, 98 N. W. 290. Any want of care, however slight, contributing proximately to the injury, defeats a recovery. Birmingham R., L. & P. Co. v. Bynum [Ala.] 36 So. 736. An instruction that the contribution must have some bearing on the act charged and be a direct and proximate contribution to that act was proper. Nelson v. Ga., etc., R. [S. C.] 47 S. E. 722.

81. Question held for jury in case of passenger standing on step of front platform outside the gate and struck by car passing on a curve in violation of rules. Parks v. St. Louis & S. R. Co., 178 Mo. 108, 77 S. W. 70. Motorman accelerated speed with knowledge that a person is trying to board his car. Elkenberry v. St. Louis Transit Co. [Mo. App.] 80 S. W. 360. Though a passenger is attempting to board at an unusual place, the carrier must use ordinary care to keep a hand rail in good repair. McCarty v. St. Louis & S. R. Co. [Mo. App.] 80 S. W. 7. Where a passenger has a clear chance to avoid the result of the carrier's negligence, but failed to avoid the danger, he cannot recover. Passenger stepped from moving train after seeing the signal to start. Simmons v. Seaboard Air Line R. [Ga.] 47 S. E. 570.

82. Passenger jumping off train. Harris v. Gulf, etc., R. Co. [Tex. Civ. App.] 80 S. W. 1023.

83. Harris v. Gulf, etc., R. Co. [Tex. Civ. App.] 80 S. W. 1023.

84. Plea attempting to set up assumption of risk held insufficient. Parks v. St. Louis & S. R. Co., 178 Mo. 108, 77 S. W. 70.

the concurrent negligence of the carrier and another, and he may recover against both,[85] nor does negligence of the driver of a vehicle collided with affect the passenger.[86] Where a child is not guilty of negligence, no negligence of his mother may be imputed.[87]

Acts due to impulse of sudden danger.[88]—Reasonable efforts to prevent injury are not negligent,[89] such as jumping from a car in well grounded fear of imminent danger.[90]

Acts done at direction of employes.[91]—Directions of the carrier's employes, unless involving obvious danger,[92] may prevent an imputation of negligence,[93] and it is not a want of due care if a passenger prudently uses the means which the company affords him for disembarking;[94] but a protest by an employe against a passenger's act does not render it negligent per se.[95]

Approaching car.[96]—A passenger must use ordinary care to discover the situation of the platforms and approaches,[97] and of the car which he seeks to enter.[98]

Boarding moving train or cars.[99]—Negligence in attempting to board a moving train is usually a question for the jury,[1] unless the surrounding facts are such

85. Louisville & C. Packet Co. v. Mulligan, 25 Ky. L. R. 1287, 77 S. W. 704.

86. Frank v. Metropolitan St. R. Co., 91 App. Div. 486, 86 N. Y. S. 1018.

87. Child jolted from car. Nashville R. Co. v. Howard [Tenn.] 78 S. W. 1098.

88. See 1 Curr. L. 475.

89. Evidence of efforts of woman to protect herself from falling on sudden start of car while she was alighting, held not to show contributory negligence. Brazis v. St. Louis Transit Co., 102 Mo. App. 224, 76 S. W. 708.

90. Palmer v. Warren St. R. Co., 206 Pa. 574, 56 A. 49; Howell v. Lansing City Elec. R. Co. [Mich.] 99 N. W. 406. Where smoke and flames appeared in different parts of a car, causing a panic, and a passenger was injured while attempting to escape, evidence held sufficient to justify an inference of negligence. Dorff v. Brooklyn Heights R. Co., 88 N. Y. S. 463.

91. See 1 Curr. L. 476.

92. Alighting from moving train. Southern R. Co. v. Bandy [Ga.] 47 S. E. 923.

93. Where planks are placed between coaches for use, a passenger is not negligent per se in attempting to cross, though he notices their shaky condition. St. Louis S. W. R. Co. v. Keitt [Tex. Civ. App.] 76 S. W. 311. An intending passenger is not negligent per se in going on a narrow platform just before passage of a special at the direction of a station master. Lehigh Valley R. Co. v. Dupont [C. C. A.] 128 F. 840. Where the duty to announce is statutory, the passengers may assume, unless warned, that the first stop after the announcement is at the station. Coe v. Louisville & N. R. Co., 25 Ky. L. R. 1679, 78 S. W. 439. A passenger does not assume the risk in an attempt to alight at a place selected by the employes. Fillingham v. St. Louis Transit Co., 102 Mo. App. 573, 77 S. W. 314. Where one alighted from a moving train, evidence held to show that the carrier was negligent in that the porter told the passenger to alight. Newcomb v. New York Cent., etc., R. Co. [Mo.] 81 S. W. 1069. If by direction of a conductor a passenger alights from a moving train, the company is liable. Southern R. Co. v. Bandy [Ga.] 47 S. E. 923.

94. Southern R. Co. v. Bandy [Ga.] 47 S. E. 923.

95. Getting off train in motion. Central of Ga. R. Co. v. McKinney, 118 Ga. 535, 45 S. E. 430.

96. See 1 Curr. L. 476.

97. An intending passenger, unaware of the fact that passing trains overlap the platform, may assume that they do not, but must use the platform with ordinary care and prudence. Lehigh Valley R. Co. v. Dupont [C. C. A.] 128 F. 840. A person in charge of cattle, approaching the caboose between tracks, is negligent in not seeking a place of safety on the approach of a train on the parallel track, if he has reasonable opportunity. Lake Shore, etc., R. Co. v. Hotchkiss, 24 Ohio Circ. R. 431. One waiting to board an approaching car, who takes a position which is safe with reference to the ordinary cars used by the company, and not knowing that the approaching one was larger, is not guilty of contributory negligence as a matter of law, and does not assume the risk of its striking him. Denison & S. R. Co. v. Craig [Tex. Civ. App.] 80 S. W. 865.

98. One attempting to board a car not in service is not negligent unless he saw such fact or could have seen it by the exercise of due care. Leu v. St. Louis Transit Co. [Mo. App.] 80 S. W. 273. Company not liable for injuries received by one who, after signaling car about to round curve to stop, places himself so near the track that he is bound to be hit by the overhang of the car. Garvey v. Rhode Island Co. [R. I.] 58 A. 456.

99. See 1 Curr. L. 476.

1. South Chicago City R. Co. v. Dufresne, 102 Ill. App. 493; Schmidt v. North Jersey St. R. Co. [N. J. Law] 58 A. 72; Chicago & A. R. Co. v. Gore, 105 Ill. App. 16. Train moving three miles an hour. Creech v. Charleston, etc., R. Co., 66 S. C. 528, 45 S. E. 86. Car which had slackened speed in obedience to signal. Clinton v. Brooklyn Heights R. Co., 91 App. Div. 374, 86 N. Y. S. 932. Car which had almost stopped. Mulligan v. Metropolitan St. R. Co., 89 App. Div. 207, 85 N. Y. S. 791. Car moving slowly. Leu v. St. Louis Transit Co. [Mo. App.] 80 S. W. 273; Maguire v. St. Louis Transit Co. [Mo.

that the court may say that it would not be undertaken by a reasonably prudent person,[2] although there is no complete unanimity of authority.[3] The person attempting to board assumes risks from acceleration of speed, if not seen by the persons in charge.[4] It is not negligence, as a matter of law, for a woman with an armful of bundles to attempt to get on a standing street car.[5] A passenger may, in the exercise of due care, grasp something to prevent himself falling.[6]

Boarding crowded car.[7]—An attempt to board a crowded car is not negligence per se,[8] but a passenger on such a car must exercise the care customary to ordinary prudent persons under the circumstances.[9]

Riding in dangerous position.[10]—It is as a rule negligence to ride in a dangerous position with knowledge, or in disobedience to known rules of the carrier,[11] but one in the baggage car through necessity and with permission of the conductor is not negligent per se,[12] nor is it negligence for a passenger to temporarily leave his seat for a legitimate purpose, though he is compelled to stand on his return, it having been taken by another,[13] nor to ride by an open window;[14] but attempting to pass from one coach to another while the train is going at full speed is contributory negligence.[15]

Riding on platform or running board of street car.[16]—Negligence is not by the

App.] 78 S. W. 835. Active man of 38, attempting to board a car rounding a curve at from 5 to 6 miles per hour at a usual stopping place and with which he is familiar. Eikenberry v. St. Louis Transit Co. [Mo. App.] 80 S. W. 360. Car moving rapidly. Fremont v. Metropolitan St. R. Co., 88 N. Y. S. 752. One attempting to get on a street car in motion, and being thrown and injured by the car giving a sudden lurch, held not guilty of negligence. South Chicago City R. Co. v. Dufresne, 102 Ill. App. 493.

2. Not negligence per se to attempt to board a car which has slowed in obedience to signal, unless speed is such that negligence is manifest or the person is infirm or encumbered. O'Mara v. St. Louis Transit Co., 102 Mo. App. 202, 76 S. W. 680. An attempt to board a moving elevated train after the gates are closed is negligence. Lauterer v. Manhattan R. Co. [C. C. A.] 128 F. 540.

3. One attempting to board a car which has slackened speed to stop in obedience to his signal is negligent. Hunterson v. Union Traction Co., 205 Pa. 568, 55 A. 543. Failure to stop a reasonable length of time does not justify an attempt to board a moving train to prevent being left. Ricks v. Ga. Southern & F. R. Co., 118 Ga. 259, 45 S. E. 268. One who came toward a car from the rear and attempted to board it as it was moving was guilty of contributory negligence. Foster v. Seattle Elec. Co. [Wash.] 76 P. 995. One who attempts to board a moving car is guilty of contributory negligence. Id. Where one boarding a moving car was struck by an obstacle near the track, there was no negligence on part of the carrier. Allen v. Northern Pac. R. Co. [Wash.] 77 P. 204. Where one is injured while attempting to board a moving train, there is no presumption of negligence on part of the carrier. Id.

4. Fremont v. Metropolitan St. R. Co., 83 App. Div. 414, 82 N. Y. S. 307.

5. Jaques v. Sioux City Traction Co. [Iowa] 99 N. W. 1069.

6. Evidence sufficient to warrant finding that passenger had reason to suppose that car might start suddenly and that he was justified in grasping jamb of doorway with his thumb in slot in which door slides. Carroll v. Boston & N. St. R. Co. [Mass.] 71 N. E. 89. Evidence sufficient to warrant finding that the conductor knew, or, by the exercise of due care, would have known, that plaintiff's thumb was in the slot, and hence was negligent in closing the door as he did. Id. Where a cripple grasped the jamb of a door and his hand was injured by the conductor's closing the door, the cripple was not guilty of contributory negligence. Shadletsky v. New York City R. Co., 88 N. Y. S. 1014.

7. See 1 Curr. L. 477.

8. Citizens' St. R. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935.

9. Instruction that he does not assume any increased risk held error. Zimmer v. Fox River Valley Elec. R. Co., 118 Wis. 614, 95 N. W. 957.

10. See 1 Curr. L. 477.

11. Riding on the locomotive is negligence per se. Radley v. Columbia So. R. Co. [Or.] 75 P. 212. A passenger is not justified in climbing to the top of a car by the fact that all the seats are taken. The rule is not altered by the fact that a written prohibition is not posted in accord with Rev. St. 1899, § 1080. Chaney v. La. & M. R. Co., 176 Mo. 598, 75 S. W. 595.

12. Custodian of lunatic compelled to ride with his charge in such car because of inability to take into a coach the chair in which the lunatic was. Chesapeake & O. R. Co. v. Jordan, 25 Ky. L. R. 574, 76 S. W. 145.

13. Holland v. St. Louis, etc., R. Co. [Mo. App.] 79 S. W. 508. Negligence to stand in caboose in disobedience to posted warning is not aided by fact that passenger has risen to get a drink and is waiting for water to cool. Krumm v. St. Louis, etc., R. Co., 71 Ark. 590, 76 S. W. 1075.

14. Mo., etc., R. Co. v. Flood [Tex. Civ. App.] 79 S. W. 1106.

15. Dougherty v. Yazoo, etc., R. Co. [Miss.] 36 So. 699.

weight of authority legally inferred from riding on a platform or footboard of a street car, though a seat can be obtained;[17] but one so riding accepts the additional risks.[18] The use of a footboard is not restricted to boarding and alighting,[19] and one using a footboard along an open car is not negligent per se, nor is his failure to look around.[20]

Riding on platform of railroad train.[21]—It is not negligence per se to be on the platform of a moving train in the absence of conditions making the act dangerous,[22] but the passenger must obey or endeavor to obey direction to go inside,[23] and though he cannot find a seat, the passenger is not justified in standing on the platform if there is standing room inside.[24]

Allowing body to project from car.—As to whether a passenger is negligent per se in allowing his body to project beyond the car line is a matter of conflict,[25] though there appears to be an increasing tendency to submit the question to the jury.[26] The fact that a passenger in an open car rests his elbow on a side rail without allowing it to project does not establish his negligence.[27]

Acts preparatory to alighting.[28]—The usual acts of a passenger preparatory to leaving a train or car as it nears his destination are ordinarily not held negligent per se,[29] so it is not negligence per se for him to leave his seat and go forward as

16. See Curr. L. 477.

17. Kreimelmann v. Jourdan [Mo. App.] 80 S. W. 323. One who could obtain seat on side of car away from parallel track, but nevertheless goes on the inside footboard, is not negligent per se, especially when knowledge of the first vacant seat is not shown. Id. Question for jury in sitting on body of open car and resting feet on running board in case of boy of 13. Seller v. Market St. R. Co., 139 Cal. 268, 72 P. 1006. Whether it was contributory negligence for a passenger to stand on the inner footboard of a street car was a question for the jury. Allen v. St. Louis Transit Co. [Mo.] 81 S. W. 1142. A passenger standing on the rear platform must exercise the degree of care the increased danger entails. Magrane v. St. Louis & S. R. Co. [Mo.] 81 S. W. 1158. It is not negligence per se for a passenger upon an electric street car to ride upon the platform thereof. Brunnchow v. Rhode Island Co. [R. I.] 58 A. 656. The rules which govern riding on the platforms of steam railroads apply to an interurban car running in the open country, and it is lack of due care for a passenger to ride on the rear platform against the rule of the company and the request of the conductor when there are vacant seats inside. Cincinnati, etc., St. R. Co. v. Lohe, 68 Ohio St. 101, 67 N. E. 161. Question of contributory negligence in one riding on rear platform of a car, standing on a projection outside the vestibule, car crowded, was for the jury. Birmingham R., L. & P. Co. v. Bynum [Ala.] 36 So. 736.

18. Vogler v. Cent. Crosstown R. Co., 83 App. Div. 101, 82 N. Y. S. 485. Plaintiff assumes the risk of ordinary motion in riding on step. Evidence held not to show unusual condition with respect to roadbed or management. Moskowitz v. Brooklyn Heights R. Co., 89 App. Div. 425, 85 N. Y. S. 960. Evidence held to warrant finding of absence of negligence on part of passenger on step of crowded platform thrown off at curve. Zimmer v. Fox River Valley Elec. R. Co., 118 Wis. 614, 95 N. W. 957. One riding on a platform who with knowledge of the danger places his arm within the sweep of a revolving brake handle is negligent. Brewer v. St. Louis Transit Co. [Mo. App.] 79 S. W. 1021.

19. Passengers may pass along it to seats. Kreimelmann v. Jourdan [Mo. App.] 80 S. W. 323.

20. When he does not know that tracks are in dangerous proximity and is going to a seat, there being no precautions taken against such use. Kreimelmann v. Jourdan [Mo. App.] 80 S. W. 323.

21. See 1 Curr. L. 478.

22. Such as infirm condition of the passenger or high speed of train. Augusta So. R. Co. v. Snider, 118 Ga. 146, 44 S. E. 1005. If the car is overcrowded, it is not, as a matter of law, negligence. Question held for jury. Pa. Co. v. Paul [C. C. A.] 126 F. 157.

23. The passenger is not bound to push his way inside by main force. Whether he can reach a place within the car by reasonable effort is a question for the jury. Rolette v. Great Northern R. Co. [Minn.] 97 N. W. 431.

24. Rolette v. Great Northern R. Co. [Minn.] 97 N. W. 431.

25. See 1 Curr. L. 478. One protruding head and shoulders from window of a car moving 40 or 45 miles an hour is guilty of gross negligence. Union Pac. R. Co. v. Roeser [Neb.] 95 N. W. 68. Voluntarily protruding any part of the person beyond the sides of a moving car is negligence as a matter of law. Huber v. Cedar Rapids, etc., R. Co. [Iowa] 100 N. W. 478.

26. Allowing arm to extend beyond window sill. McCord v. Atlanta & C. Air Line R. Co., 134 N. C. 53, 45 S. E. 1031. Head and arm coming in contact with gate of stock pen. Gulf, etc., R. Co. v. Phillips [Tex. Civ. App.] 74 S. W. 793.

27. Jones v. United R. & Elec. Co. [Md.] 57 A. 620.

28. Failure to seek assistance, see 1 Curr. L. 479.

29. Question of contributory negligence in going on platform at call of conductor

train slows at destination,[30] but the passenger must not expose himself to unnecessary danger.[31]

Leaving moving train or car.[32]—Negligence in alighting from a moving train or car is in general a question of fact for the jury,[33] as is the speed at which the train is moving.[34] The jury should not be charged that a warning not to alight given by a bystander too late to be acted on rendered the passenger negligent.[35]

Alighting at unusual place.[36]—The absence of a conductor may confer a greater discretion on the passenger as to where to attempt to alight.[37] A notice that cars stop at near sides of cross streets is not sufficient alone to charge a person attempting to alight elsewhere with negligence.[38] The attempt may be excused by custom,[39] or by misleading acts of the carrier.[40]

held for the jury. **Baltimore & P. R. Co. v.** Jean [Md.] 57 A. 540. A boy seven years and eight months old is not negligent in going on and remaining on a front platform to tell the motorman where he wished to get off. Parker v. Wash. Elec. St. R. Co., 207 Pa. 438, 56 A. 1001. Negligence in stepping through open gates of slowly moving car about to stop and standing on step, after notifying motorman to stop, is for the jury. Paganini v. North Jersey St. R. Co. [N. J. Law] 57 A. 128. Facts held not to make prima facie case of contributory negligence of passenger slipping on slippery deck. Gillum v. New York & T. S. S. Co. [Tex. Civ. App.] 76 S. W. 232. Woman is not negligent in attempting to alight with a grip, it not being shown that she was unable to carry it. Weight of 60 pounds. Chicago, etc., R. Co. v. Armes [Tex. Civ. App.] 74 S. W. 77. Not negligence per se to fail to take hold of hand rail. Crump v. Davis [Ind. App.] 70 N. E. 886.

30. Chesapeake & O. R. Co. v. Topping, 25 Ky. L. R. 1390, 78 S. W. 135. Question of contributory negligence in standing in aisle on approach to destination is for jury, though the injury is due to an unusual jerk; if the jerk is incident to proper care, he cannot recover. Ill. Cent. R. Co. v. Jolly, 25 Ky. L. R. 1735, 78 S. W. 476.

31. One standing up at the extreme edge of the car and riding backward cannot recover for a sudden stop in obedience to his signal, though he is thrown off. Jennings v. Union Traction Co., 206 Pa. 31, 55 A. 765. Leaving seat and stepping down on running board and remaining there while the car is in motion is negligent. Bainbridge v. Union Traction Co., 206 Pa. 71, 55 A. 836. Not negligent per se to prepare to alight from car slowed to 3 miles per hour in obedience, as the passenger supposed, to his signal, preventing recovery for a jerk. Dawson v. St. Louis Transit Co., 102 Mo. App. 277, 76 S. W. 689.

32. See 1 Curr. L. 479.

33. Bishop v. Ill. Cent. R. Co., 25 Ky. L. R. 1363, 77 S. W. 1099. Jumping from train moving 6 miles an hour to avoid being carried by. Harris v. Pittsburg, etc., R. Co. [Ind. App.] 70 N. E. 407. Attempt to alight from car which is moving slowly and has started after female passenger has reached lowest step of platform. St. Louis S. W. R. Co. v. Massay [Tex. Civ. App.] 76 S. W. 585. Passenger alighting in dark and not noticing train is in motion. Atchison, etc., R. Co. v. Loewe [Kan.] 74 P. 234. Attempt to leave car moving 3 miles per hour. Dawson v. St. Louis Transit Co., 102 Mo. App. 277, 76 S. W. 689. Not per se, female attempting to leave moving street car. Crump v. Davis [Ind. App.] 70 N. E. 886. For woman to get off while street car is in motion is contributory negligence; otherwise if it started while she was alghting after a stop. Richmond Traction Co. v. Williams [Va.] 46 S. E. 292. The act of a passenger in voluntarily alighting from a moving train is not necessarily negligence. Pittsburg, etc., R. Co. v. Miller [Ind. App.] 70 N. E. 1006. Ordinarily alighting from a passenger train before it is brought to a standstill at a station is contributory negligence. Id. The question depends on the attendant circumstances, and is for the jury, unless the conditions disclosed are such as exclude the inference of nonnegligence. Id. Whether a person is guilty of contributory negligence in alighting from a slowly moving train is a question for the jury. Newcomb v. New York, etc., R. Co. [Mo.] 81 S. W. 1069. The fact that one was not contributorily negligent in alighting from a moving train does not entitle him to recover unless the carrier was at the time guilty of negligence. Simmons v. Seaboard Air Line R. Co. [Ga.] 47 S. E. 570. Where one alighted from a car, passed back of it and onto a parallel track without looking, she was guilty of contributory negligence. Metropolitan St. R. Co. v. Ryan [Kan.] 77 P. 267. Where a passenger alighted from a rapidly moving car, he was guilty of contributory negligence. Pearl v. Interurban St. R. Co., 88 N. Y. S. 915.

34. Bishop v. Ill. Cent. R. Co., 25 Ky. L. R. 1363, 77 S. W. 1099.

35. Chicago, etc., R. Co. v. Armes [Tex. Civ. App.] 74 S. W. 77.

36. See 1 Curr. L. 480.

37. Attempt to alight at a second stop a car length after a preceding stop held for jury. Gillespie v. Yonkers R. Co., 87 App. Div. 38, 83 N. Y. S. 1043.

38. United R. & Elec. Co. v. Hertel, 97 Md. 382, 55 A. 428; United R. & Elec. Co. v. Woodbridge, 97 Md. 629, 55 A. 444.

39. Where a habit to alight at a stop on the near side of the street is well known to the carrier, one is not guilty of negligence in attempting to leave a car at such point after it has come to a full stop. Richmond Traction Co. v. Williams [Va.] 46 S. E. 292.

40. Where, after a transfer point has been called, the car stops, though not on the crossing, it is not negligence per se to attempt to alight. United R. & Elec. Co. v. Woodbridge, 97 Md. 629, 55 A. 444.

Care required after alighting.[41]—One who is old, crippled and deaf is not negligent in traveling alone and without arranging to be met at her destination.[42] One passing along tracks to a station from a freight caboose on which he is riding may rely on the exercise of the utmost care by the carrier, and need guard only against known and apparent peril.[43]

After alighting from a street car, a passenger becoming a mere traveler must look and listen for cars on parallel tracks.[44] If he looks and listens before he passes on the parallel track, he is not per se negligent in not looking after he passes the car from which he alighted.[45]

(§ 31) *C. Remedies and procedure.*[46]—The measure of damages differing in no respect from that in other cases of personal injury, it is elsewhere treated.[47] No notice of the injury need be given to the carrier.[48]

Pleading.[49]—The pleading should show that plaintiff was a passenger,[50] and that defendant's breach of duty was the proximate cause of injury.[51] When one or more facts are essential to a cause of action and any one of them is not sufficiently alleged, the complaint is bad.[52] It is usually held that negligence may be alleged in general terms,[53] though specific averments are sometimes required,[54] and where the use of offensive language is the gravamen of the action, the words

41. See 1 Curr. L. 480.

42. May recover for injury sustained in falling over a cattle guard, the exit provided being a stile over a barbed wire fence, which by reason of the darkness, she did not see. Tex. & P. R. Co. v. Reid [Tex. Civ. App.] 74 S. W. 99.

43. Evidence held not to show negligence. Chicago, etc., R. Co. v. Troyer [Neb.] 97 N. W. 308.

44. Indianapolis St. R. Co. v. Tenner [Ind. App.] 67 N. E. 1044.

45. Reed v. Metropolitan St. R. Co., 87 App. Div. 427, 84 N. Y. S. 454.

46. See topics treating of practice generally, 1 Curr. L. 484.

47. See Damages, 1 Curr. L. 833.

48. Rev. Laws, c. 112, § 44, does not require notice of the time, place, and cause of injury where injury results from unsafe condition of ground near track on defendant's private property on which plaintiff alighted. Joslyn v. Milford, etc., R. Co., 184 Mass. 65, 67 N. E. 866.

49. See articles on Negligence and Pleading for general rules.

50. Pleading held sufficient prima facie. Citizens' St. R. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935. A complaint alleging a direction by a tenant to an ice man to deliver ice by means of a freight elevator controlled by the tenant does not show him a common carrier. Downs v. Seeley, 76 Conn. 317, 56 A. 502.

51. An allegation held sufficient to show that a sudden stop was the proximate cause of an injury from a passenger being thrown against another. McCauley v. Rhode Island Co. [R. I.] 57 A. 376. Complaint in action against street railway company for injuries to passenger by derailment of car, held to sufficiently aver that defendant's negligence was the proximate cause of the injury. Indianapolis St. R. Co. v. Schmidt [Ind.] 71 N. E. 201.

52. Complaint in action for injuries to passenger on freight train due to collision, alleging that such collision was due to negligence in not having a proper and efficient brake, and in running in excess of the speed limit fixed by a city ordinance, held defective for failure to allege that such ordinance was in force when the injury occurred. Southern R. Co. v. Jones [Ind. App.] 71 N. E. 275.

53. Allegation in general terms is sufficient though passenger has knowledge of the particular act of negligence. San Antonio Traction Co. v. Williams [Tex. Civ. App.] 78 S. W. 977. "Solely by the fault, carelessness, and negligence of the defendant, and its servants and employes as aforesaid," is sufficient to aver negligence. Citizens' St. R. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935. Pleading held to present issue of failure of motorman to use ordinary care to hear a signal to stop. Fuller v. Denison & S. R. Co. [Tex. Civ. App.] 74 S. W. 940. Petition alleging injury from sudden jerk held good against general demurrer. Mack v. Savannah & S. R. Co., 118 Ga. 629, 45 S. E. 509. Petition alleging injury from sudden jerk held sufficient as against a general exception. Mo., etc., R. Co. v. Moody [Tex. Civ. App.] 79 S. W. 856. An averment "that defendant, through and by its servant in charge of said car, negligently ran said car," etc., sufficiently avers that such servant was acting within the scope of his employment. Indianapolis St. R. Co. v. Schmidt [Ind.] 71 N. E. 201.

54. Averment of "insufficient brakes and other appliances to stop said car" is too general without specific averments of the particular appliance causing the injury and whether injury was received by falling, jumping, being struck, or otherwise. Newton v. People's R. Co. [Del.] 55 A. 2. A complaint alleging that the plaintiff was a passenger on defendant's train, that it was derailed, and that he was injured thereby, sufficiently states a cause of action, and is not subject to a motion to make it more definite and certain. Burden on company to disprove negligence. Bryce v. Southern R. Co., 129 F. 966.

need not be set out.[55] On the other hand, the averments of fact may dispense with the necessity of characterizing defendant's conduct,[56] but recital of evidentiary facts will not supply an averment of willfulness.[57] An act characterized in a count as both negligent and willful will support both actual and punitive damages.[58]

Under an ordinance prohibiting conductors from allowing women and children to alight while cars are in motion, a petition which alleges that the motion was imperceptible may be amended to make it imperceptible to her.[59] A complaint showing that plaintiff was injured while doing what is negligence per se is bad.[60]

Conformity of pleadings and proof and variance.—As in all pleadings,[61] the proof must conform substantially to the averments but immaterial variance may be disregarded,[62] and evidence not conforming to the averments is not admissible.[63] Where several acts of negligence all essential to recovery are alleged, all must be proven,[64] but an election is not required where the same facts support more than one imputation of negligence.[65]

Presumptions and burden of proof.[66]—The showing of an injury to plaintiff while a passenger from a cause within the carrier's control or incident to the carriage raises a presumption of negligence. Illustrations of this rule are grouped in the notes.[67] The rule that negligence is implied from the happening of the acci-

55. Permitting use of offensive language in presence of female. St. Louis S. W. R. Co. v. Wright [Tex. Civ. App.] 75 S. W. 565.

56. Other facts alleged may remove the necessity of an averment that the place of a stop was "unsafe" or "dangerous." Fillingham v. St. Louis Transit Co., 102 Mo. App. 573, 77 S. W. 314.

57. To recover for a willful injury, it is not sufficient to allege the willful starting of a car without alleging that defendant intended willfully and purposely to injure plaintiff. Union Traction Co. v. Lowe [Ind. App.] 67 N. E. 1021.

58. Act 1898 (22 Stat. 693). Steedman v. South Carolina, etc., R. Co., 66 S. C. 542, 45 S. E. 84.

59. Petition held to state cause of action. Shareman v. St. Louis Transit Co. [Mo. App.] 78 S. W. 846.

60. A complaint disclosing the fact that plaintiff, voluntarily and without reason, left the train while it was in motion, under circumstances rendering such action dangerous, as he must have known, is demurrable. Complaint alleged that on account of darkness plaintiff believed train had stopped. Pittsburg, etc., R. Co. v. Miller [Ind. App.] 70 N. E. 1006. It is not necessary for a declaration for injury to a passenger riding on the platform of an electric street car to show that it was necessary for plaintiff to stand there. Not per se negligence. Brunnchow v. Rhode Island Co. [R. I] 58 A. 656.

61. See Pleading, 2 Curr. L. 1178.

62. Immaterial: Between averments of negligence and proof of an assault where the complaint discloses all the circumstances. Moritz v. Interurban St. R. Co., 84 N. Y. S. 162. Where place of accident is stated, erroneous averment of the particular one of the defendant's lines on which it was. Powell v. Hudson Valley R. Co., 88 App. Div. 133, 84 N. Y. S. 337. Allegation that bearings were overheated and proof that plate over wheel was overheated. Id. Between an allegation of failure to afford time to alight and proof that plaintiff individually had time to alight but injury was occasioned by a pause to assist a child with her. Hannon v. St. Louis Transit Co., 102 Mo. App. 216, 77 S. W. 158. Proof that car suddenly started held not variant from petition. Shareman v. St. Louis Transit Co. [Mo. App.] 78 S. W. 846.

Material: Proof of a smooth start before gates were closed does not support allegation of sudden and violent start throwing plaintiff to platform. Lake St. El. R. Co. v. Shaw, 203 Ill. 39, 67 N. E. 374.

63. Negligence: Evidence that just as plaintiff attempted to step from the car, the train gave a lurch, tends to support an allegation that the train was, as plaintiff was about to alight, suddenly and violently moved. Lake St. El. R. Co. v. Shaw, 203 Ill. 39, 67 N. E. 374.

Contributory negligence: Where contributory negligence is not pleaded, evidence that plaintiff, having a weak ankle, was negligent in alighting, is inadmissible. Bailey v. Seattle & R. R. Co., 32 Wash. 640, 73 P. 679.

Nature and extent of injuries: Under allegation of inflammation of the ovaries, evidence of its effect on other organs may be introduced. Mo., etc., R. Co. v. McCutcheon [Tex. Civ. App.] 77 S. W. 232. Evidence of special paralyzing effects may be given under averment of permanent injury to spine. Grady v. St. Louis Transit Co., 102 Mo. App. 212, 76 S. W. 673.

64. Petition held to require proof of all acts of negligence alleged. Williams v. Galveston, etc., R. Co. [Tex. Civ. App.] 78 S. W. 45. Where the petition charges two acts of negligence jointly, both must be proved. Raising water hose in car door and starting train suddenly. Ratteree v. Galveston, etc., R. Co. [Tex. Civ. App.] 81 S. W. 566.

65. Complaint averring failure to stop according to ordinance and acceleration of speed as plaintiff attempted to board, and in another count a stop and start suddenly on his attempt to board does not require an election. Maguire v. St. Louis Transit Co. [Mo. App.] 78 S. W. 838.

66. See 1 Curr. L. 486.

dent does not apply where happenings are ordinarily incident to the prosecution of the carrier's business in the usual manner or accidents not such as do not usually occur without negligence,[66] and the rule applies only to passengers.[69] The doctrine of res ipsa loquitur may be relied on though there is an unsuccessful attempt to prove the precise cause.[70] Where the doctrine of res ipsa loquitur does not apply, plaintiff must prove negligence and in some states absence of contributory negligence.[71]

The burden of establishing facts raising the presumption is on plaintiff,[72] and thereafter the carrier has the burden of showing contributory negligence or excepted

67. City & S. R. Co. v. Svedborg, 20 App. D. C. 543; Rowdin v. Pa. R. Co., 208 Pa. 623, 57 A. 1125; Lincoln Traction Co. v. Heller [Neb.] 100 N. W. 197; Fitch v. Mason City, etc., Traction Co. [Iowa] 100 N. W. 618.

Facts raising presumption: Jerk while passenger was boarding and before she had time to reach a place of safety. Stoddard v. St. Louis, etc., R. Co. [Mo. App.] 80 S. W. 33. That a hand rail gives way while being used by a person attempting to board. McCarty v. St. Louis & S. R. Co. [Mo. App.] 80 S. W. 7. Collision of two trains running in opposite directions on the same track. Hedrix v. Chicago, etc., R. Co. [Mo. App.] 77 S. W. 495. Car of another company taking the wrong track at a switch operated by the company in whose car plaintiff was riding causing a collision. Klinger v. United Traction Co., 92 App. Div. 100, 87 N. Y. S. 864. Collision due to defective appliance on another car of the same company. Palmer v. Warren St. R. Co., 206 Pa. 574, 56 A. 49. Acts inducing a passenger to jump on well grounded fear of injury from an impending collision. Id. Derailment. Cronk v. Wabash R. Co., 123 Iowa, 349, 98 N. W. 884; International, etc., R. Co. v. Thompson [Tex. Civ. App.] 77 S. W. 439. Proof of freedom from contributory negligence of injury from derailment. Heyde v. St. Louis Transit Co., 102 Mo. App. 537, 77 S. W. 127. That platform gate swung open allowing plaintiff to fall. Aston v. St. Louis Transit Co. [Mo. App.] 79 S. W. 999. Heating by friction of a plate in car floor. Powell v. Hudson Valley R. Co., 88 App. Div. 133, 84 N. Y. S. 337. Falling of trolley pole. Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087. Evidence that burning out of fuse produced a flame greater in intensity and duration than could have resulted had it been in proper condition. Cassady v. Old Colony St. R. Co., 184 Mass. 156, 68 N. E. 10. Injury from mailpouch hanging beside track. McCord v. Atlanta, etc., R. Co., 134 N. C. 53, 45 S. E. 1031. Slip on an asphalt pavement while alighting at night in train shed. Barnes v. New York Cent., etc., R. Co., 42 Misc. 622, 87 N. Y. S. 608. Breaking of a plank in platform. Leveret v. Shreveport Belt R. Co., 110 La. 399, 34 So. 579. Start while passenger is alighting after stop. Denver Consol. Tramway Co. v. Rush [Colo. App.] 73 P. 664. That train failed to stop a sufficient length of time to allow plaintiff to get on board and was started with a sudden jerk while plaintiff was on the lower step of the platform. St. John v. Gulf, etc., R. Co. [Tex. Civ. App.] 80 S. W. 235. That plaintiff, a passenger, desiring to transfer after notice to change was given and the car had stopped apparently to permit such change, was injured by its sudden starting. United R. & Elec. Co. v. Woodbridge, 97 Md. 629, 55 A. 444. Evidence of negligence of horse-car driver held for jury where horses swerved and upset car. Doolin v. Omnibus Cable Co., 140 Cal. 369, 73 P. 1060. Plaintiff thrown from electric car by sudden jerk or lurch. Fitch v. Mason City, etc., Traction Co. [Iowa] 100 N. W. 618. Collision of car, running at high speed, with wagon. Thurston v. Detroit United R. Co. [Mich.] 100 N. W. 395. Passenger on street car injured while attempting to alight. Chicago City R. Co. v. Bundy [Ill.] 71 N. E. 28. The fact that a collision results from cars being run in opposite directions on the same track is prima facie evidence of negligence. Magrane v. St. Louis & S. R. Co. [Mo.] 81 S. W. 1158. **Contra,** Palmer v. Warren St. R. Co., 206 Pa. 574, 56 A. 49. Derailment of car. Logan v. Metropolitan St. R. Co. [Mo.] 82 S. W. 126; Bryce v. Southern R. Co., 129 F. 966; Indianapolis St. R. Co. v. Schmidt [Ind.] 71 N. E. 201. Train breaking in two. Feldschneider v. Chicago, etc., R. Co. [Wis.] 99 N. W. 1034.

68. Not implied where passenger on mixed train was thrown down while coupling is being made in the ordinary way. Yazoo, etc., R. Co. v. Humphrey [Miss.] 36 So. 154. Burning out of fuse. Cassady v. Old Colony St. R. Co., 184 Mass. 156, 68 N. E. 10. The burden, in an action for personal injuries resulting from collision of two street cars, is on plaintiff to make out his case by a preponderance of the evidence. Galveston City R. Co. v. Chapman [Tex. Civ. App.] 80 S. W. 856. To shift burden, plaintiff must show that accident occurred through defendant's fault. Injury while alighting from car. Peck v. St. Louis Transit Co., 178 Mo. 617, 77 S. W. 736. The fact that a passenger is injured by something under the control of the carrier is not necessarily prima facie evidence of negligence. Struck by an obstacle near the track. Allen v. Northern Pac. R. Co. [Wash.] 77 P. 204.

69. Not to one boarding car to induce those in charge to make extra trip. Brock v. St. Louis Transit Co. [Mo. App.] 81 S. W. 219.

70. Burning out of fuse. Cassady v. Old Colony St. R. Co., 184 Mass. 156, 68 N. E. 10. Where a portion of the counts charge general negligence, a prima facie case arises from proof of the injury though negligence specifically alleged has not been established. Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087.

71. Action by passenger in coach. Taillon v. Mears [Mont.] 74 P. 421.

72. Instructions held to state the rule properly. Kefauver v. Phila. & R. R. Co., 122 F. 966.

cause unless plaintiff's proof tends to show such defenses.[73] The burden on defendant is discharged by showing that the injury complained of was caused by plaintiff's want of care.[74]

Statutory provisions that proof of injury inflicted by the running of locomotives or cars is prima facie evidence of negligence do not apply to injuries to passengers.[75]

Admissibility of evidence.[76]—Decisions as to the admissibility of evidence in actions by passengers for personal injuries are collected in the footnotes.[77]

73. Boone v. Oakland Transit Co., 139 Cal. 490, 73 P. 243. Where one is injured in getting on or off a moving car, he has the burden of showing why the case should go to the jury as an exception. Hunterson v. Union Traction Co., 205 Pa. 568, 55 A. 543. In Indiana, the burden is on defendant to show contributory negligence, and does not shift [Burns' Rev. St. 1901, § 359a] (Harris v. Pittsburg, etc., R. Co. [Ind. App.] 70 N. E. 407), and the burden of proof of assumption of risk is on defendant (Citizens' St. R. Co. v. Jolly, 161 Ind. 80, 67 N. E. 935; Rowdin v. Pa. R. Co., 208 Pa. 623, 57 A. 1125).

74. City & S. R. Co. v. Svedborg, 20 App. D. C. 543.

75. Rev. Code 1892, § 1808. Yazoo, etc., R. Co. v. Humphrey [Miss.] 36 So. 154.

76. See 1 Curr. L. 487.

77. Prior and subsequent occurrences and conditions: Evidence of prior assaults and newspaper accounts of occurrences at its park are admissible to show negligence of carrier toward a colored person assaulted at its amusement park. Indianapolis St. R. Co. v. Dawson, 31 Ind. App. 605, 68 N. E. 909. Sudden jolts at the same point in the track on prior occasions. Nashville R. R. v. Howard [Tenn.] 78 S. W. 1098. Breaking of rails at other and nearby points on the road. Whittlesey v. Burlington, etc., R. Co., 121 Iowa, 597, 97 N. W. 66. Previous condition of gate. Gulf, etc., R. Co. v. Phillips [Tex. Civ. App.] 74 S. W. 793. Evidence as to difficulty in starting a sliding car door on the same or similar cars is incompetent where the injury was not shown to have been from the difficulty of starting, or that the cars were in the same condition. Williams v. Citizens' Elec. St. R. Co., 184 Mass. 437, 68 N. E. 840. Condition of track 13 months after accident is inadmissible. Cronk v. Wabash R. Co. [Iowa] 98 N. W. 884. Evidence as to whether other passengers were injured in the collision. Mullin v. Boston El. R. Co. [Mass.] 70 N. E. 1021. Evidence of the condition of a switch eight days after the accident. Logan v. Metropolitan St. Ry. Co. [Mo.] 82 S. W. 126. That another passenger had fallen at the same place is admissible. Holzhauser v. Brooklyn Heights R. Co., 43 Misc. 145, 88 N. Y. S. 269. It was proper for a witness who had worked for the company to testify how often coupling had become uncoupled or broken. Birmingham R., L. & P. Co. v. Bynum, 139 Ala. 389, 36 So. 736. Evidence that many persons had previously ridden on seat where plaintiff was sitting when thrown off electric car admissible to show that plaintiff was using seat provided for passengers or used by them with defendant's consent. Fitch v. Mason City & C. L. Traction Co. [Iowa] 100 N. W. 618. Where a passenger was injured by falling on a greasy platform, evidence that shortly afterwards great crowds departed from the platform in safety was inadmissible. Newcomb v. New York, etc., R. Co. [Mo.] 81 S. W. 1069. Where one was injured while standing on an inner footboard by a car going in the opposite direction, reports to the carrier of other accidents from the same cause are hearsay. Allen v. St. Louis Transit Co. [Mo.] 81 S. W. 1142.

Rules, regulations, and records of carrier: Rules directing method of operation of which complaints are made are admissible. Frizzell v. Omaha St. R. Co. [C. C. A.] 124 F. 176. A company rule in violation of a city ordinance pleaded is inadmissible. Maguire v. St. Louis Transit Co. [Mo. App.] 78 S. W. 838. Regulations and customs of which plaintiff does not know are inadmissible. Custom to stop away from crossing. United R. & Elec. Co. v. Hertel, 97 Md. 382, 55 A. 428. On an issue as to whether a car was stopped when plaintiff began to board it, a rule previously adopted requiring cars to stop there is admissible, as also evidence of previous stops. Nassau Elec. R. Co. v. Corliss [C. C. A.] 126 F. 355. Evidence that the carrier had no record of the accident was admissible. Shadletsky v. New York City R. Co., 88 N. Y. S. 1014.

Opinions. See Evidence, 1 Curr. L. 1136. Persons accustomed to railroad travel may give opinions as to speed of a car. Aston v. St. Louis Transit Co. [Mo. App.] 79 S. W. 999. Not a subject of expert testimony whether a heavy car when derailed would disturb the alignment of the rails. Cronk v. Wabash R. Co., 123 Iowa, 349, 98 N. W. 884. Error in admission of evidence as to distance in which train might be stopped is harmless where the undisputed evidence showed that the train could not have been stopped in time to prevent the collision. International, etc., R. Co. v. Thompson [Tex. Civ. App.] 77 S. W. 439. Of nonexperts as to physical condition of plaintiff after injury, admissible. Chicago City R. Co. v. Bundy [Ill.] 71 N. E. 28. That he appeared to be suffering. St. Louis S. W. R. Co. v. Burke [Tex. Civ. App.] 81 S. W. 774. A medical expert may give his own opinion, in view of the statement of facts, that the injury was the cause of the disease or condition found in the injured person. Wood v. Metropolitan St. R. Co. [Mo.] 81 S. W. 152. Of nonexperts as to speed of car, admissible. Chicago City R. Co. v. Bundy [Ill.] 71 N. E. 28. Where the jury saw the plan of the car, the dimensions and distances between the track, expert evidence as to whether it was dangerous for passengers to stand on an inner footboard was inadmissible. Allen v. St. Louis Transit Co. [Mo.] 81 S. W. 1142.

Statements of employes: Statements by

Sufficiency of evidence.[78]—The presence or absence of due care must be determined from all the facts and circumstances appearing in the particular case, and is usually for the jury.[79] Cases in which the sufficiency of evidence to establish particular grounds of recovery, or to authorize submission of the question to the jury, has been considered, are grouped in the footnotes.[80] Where a street is ob-

conductor after returning to the car after having gone back half a block to a fallen passenger are not res gestae. Boone v. Oakland Transit Co., 139 Cal. 490, 73 P. 243. Declaration of brakeman showing that rounding of curve caused plaintiff's hand to be caught in door held res gestae. Trumbull v. Donahue [Colo. App.] 72 P. 684. Evidence as to what was said and done by the conductor is admissible where plaintiff alleges that she was negligently carried by her destination and that the conductor treated her rudely and on her return trip wantonly carried her beyond her stopping place. Memphis St. R. Co. v. Shaw, 110 Tenn. 467, 75 S. W. 713. Statements by car starter after the accident and when not engaged in the company's business are inadmissible. Wimmer v. Metropolitan St. R. Co., 92 App. Div. 258, 86 N. Y. S. 1052. That plaintiff asked conductor to let her off at certain place and that he said he would, admissible. Chicago City R. Co. v. Bundy [Ill.] 71 N. E. 28. Declarations made by a conductor immediately after the injury were not res gestae. Nelson v. Georgia, etc., R. Co. [S. C.] 47 S. E. 722.

Remarks of bystanders: Statements of passengers in response to request to ring a signal to stop are immaterial. Boone v. Oakland Transit Co., 139 Cal. 490, 73 P. 243. **Statements of injured party** made to physicians in course of treatment. Chicago City R. Co. v. Bundy [Ill.] 71 N. E. 28; St. Louis S. W. R. Co. v. Burke [Tex. Civ. App.] 81 S. W. 774. Complaints and expressions of pain made by passenger forcibly ejected from train held admissible. Battis v. Chicago, etc., R. Co. [Iowa] 100 N. W. 543. In an action for personal injuries it is competent to prove expressions of pain or suffering or the indication of such condition by groans or inarticulate cries. Indianapolis St. R. Co. v. Schmidt [Ind.] 71 N. E. 201. Error in allowing plaintiff's husband to state that she made complaints, immaterial. Chicago City R. Co. v. Bundy [Ill.] 71 N. E. 28.

Contributory negligence: Possession of accident policy does not show contributory negligence. Missouri, etc., R. Co. v. Flood [Tex. Civ. App.] 79 S. W. 1106. Warrant for plaintiff's arrest, of which she is not shown to have had knowledge, is inadmissible to show an attempt to leave the train before it reached the station. St. Louis, etc., R. Co. v. Smith [Tex. Civ. App.] 79 S. W. 340. That passenger was warned of danger of standing or walking in the aisle is improperly excluded. Yazoo, etc., R. Co. v. Humphrey [Miss.] 36 So. 154. An altercation with motorman over fare is admissible in action for failure to obey signal to stop as justifying plaintiff's attempt to leave the car while in motion believing he would be carried farther. Fuller v. Denison & S. R. Co. [Tex. Civ. App.] 74 S. W. 940. In action for injury to his hand by closing of door, plaintiff may show crowded condition of the train causing him to assume the position he was in. Trumbull v. Donahue [Colo. App.] 72 P. 684. In an action for injury by contact with a stone on a wagon passing a street car, evidence of the noise made by the stone striking the car before it reached plaintiff's seat is admissible. Jones v. United R. & Elec. Co. [Md.] 57 A. 620. Plaintiff may corroborate his evidence of his position by the evidence of others who noticed him. Trumbull v. Donahue [Colo. App.] 72 P. 684. City ordinance making it an offense for passengers to jump off moving cars held inadmissible. Denison & S. R. Co. v. Johnson [Tex. Civ. App.] 81 S. W. 780.

Miscellaneous matters: Notice of defect in a street railroad is admissible without regard to the source. Notice from railroad commissioners is admissible though a statute provides that their advice shall not impair legal rights and duties [Laws 1890, p. 1131, c. 565, § 162, as amended by Laws 1892, p. 1416, c. 676]. Baruth v. Poughkeepsie City, etc., R. Co., 89 App. Div. 324, 85 N. Y. S. 822. A failure to maintain a fence may be shown as bearing on negligence where injury was caused by collision with cattle. International & G. N. R. Co. v. Thompson [Tex. Civ. App.] 77 S. W. 439. Age, height, and weight of plaintiff may be shown in action for assault. Birmingham R. L. & P. Co. v. Mullen, 138 Ala. 614, 35 So. 701. Plaintiff may show how many times conductor cursed as part of res gestae in action for assault. Id. Where evidence of a violent jerk is introduced without objection, it cannot be withdrawn where the averment was that the car was negligently started so as to throw plaintiff against it and injure her. Plum v. Metropolitan St. R. Co., 86 N. Y. S. 827.

78. See 1 Curr. L. 488.

79. Of passenger injured by falling over freight on platform. Matthieson v. Burlington, etc., R. Co. [Iowa] 100 N. W. 51.

80. Taking on passengers: Pushing passenger from train. Cincinnati, etc., R. Co. v. Holcomb, 25 Ky. L. R. 1444, 78 S. W. 205; Texas & P. R. Co. v. Tems [Tex. Civ. App.] 77 S. W. 230. Negligent striking of wharf boat throwing intending passenger into water. Louisville & E. Mail Co. v. Barnes' Adm'r, 25 Ky. L. R. 2036, 79 S. W. 261. Negligent and premature start of railroad train. Atchison, etc., R. Co. v. Loewe [Kan.] 74 P. 234. Negligence in striking intending passenger standing on the platform there having been ample space provided and no accidents during three years' heavy use. State v. United R. & Elec. Co. [Md.] 56 A. 789. Start while boarding. Deutschmann v. Third Ave. R. Co., 87 App. Div. 503, 84 N. Y. S. 887; Central of Georgia R. Co. v. Goodman, 119 Ga. 234, 45 S. E. 969. While boarding horse car. Benjamin v. Metropolitan St. R. Co., 84 N. Y. S. 458. Slipping on icy steps. Illinois Cent. R. Co. v. Keegan [Ill.] 71 N. E. 321. Defective platform. Wood v. Metropolitan St. R. Co. [Mo.] 81 S. W. 152. Car backed as plaintiff was getting on. Jaques v. Sioux

structed it is a question for the jury whether a motorman is justified in assuming that he can operate his car and that a driver will use reasonable care to get out of his way.[81] Plaintiff's evidence alone may be sufficient,[82] but not when shown to

City Traction Co. [Iowa] 99 N. W. 1069. Where a passenger alighted from a crowded car to let other passengers off and in attempting to regain his place was injured by the sudden starting of the car, evidence of negligence and contributory negligence was for the jury. Michelson v. Metropolitan St. R. Co., 87 N. Y. S. 501.

Means of transportation: Negligence in maintenance of automatic coupling. Holland v. St. Louis, etc., R. Co. [Mo. App.] 79 S. W. 508. Ineffective repair of brake. Howell v. Lansing City Elec. R. Co. [Mich.] 99 N. W. 406. Defect in car wheel. Greenfield v. Detroit & M. R. Co. [Mich.] 95 N. W. 546. Diligence in guarding against broken wheel flanges. Carswell v. Macon, etc., R. Co., 118 Ga. 826, 45 S. E. 695. To show greater flame than should attend burning out of fuse in proper condition. Cassady v. Old Colony St. R. Co., 184 Mass. 156, 68 N. E. 10. Failure to lock switch. Heyde v. St. Louis Transit Co., 102 Mo. App. 537, 77 S. W. 127. Proper loading of logs where a fall of one derailed the train. Greenfield v. Detroit & M. R. Co. [Mich.] 95 N. W. 546. Failure to provide proper coupling pin. Birmingham R. L. & P. Co. v. Bynum [Ala.] 36 So. 736. Absence of fenders and conductor. Lincoln Traction Co. v. Heller [Neb.] 100 N. W. 197. Whether gate of stock pen which swung loose and struck arm of passenger in passing train was unfastened by a stranger. Gulf, etc., R. Co. v. Phillips [Tex. Civ. App.] 74 S. W. 793. Passenger knocked from running board by pillar. Canavan v. Interurban St. R. Co., 87 N. Y. S. 491; Cusick v. Interurban St. R. Co., 86 N. Y. S. 758.

81. Frank v. Metropolitan St. R. Co., 91 App. Div. 485, 86 N. Y. S. 1018. Leaving a side foot board open when passing cars render it dangerous. Kreimelmann v. Jourdan [Mo. App.] 80 S. W. 323. The question of whether a jerk of a mixed train is unusual or extraordinary in degree is for jury. Chesapeake & O. R. Co. v. Jordan, 25 Ky. L. R. 574, 76 S. W. 145.

Care en route: Question for the jury whether the street was maintained in a safe condition. Freeland v. Brooklyn Heights R. Co., 43 Misc. 132, 88 N. Y. S. 264. Collision between two companies at switch held to impose liability on both. Klinger v. United Traction Co., 92 App. Div. 100, 87 N. Y. S. 864. Negligence of motorman in collision with truck. Smith v. Metropolitan St. R. Co., 92 App. Div. 213, 86 N. Y. S. 1087. Excessive speed of horse car on curve. Vogler v. Central Crosstown R. Co., 83 App. Div. 101, 82 N. Y. S. 485. Causing plaintiff to be thrown from street car at curve. Zimmer v. Fox River Valley Electric R. Co., 118 Wis. 614, 95 N. W. 957. Breaking in two of train. Feldschneider v. Chicago, etc., R. Co. [Wis.] 99 N. W. 1034. Plaintiff thrown by sudden jar. Davis v. Seaboard Air Line R. Co., 132 N. C. 291, 43 S. E. 840. Severe jerk throwing passenger from body of car to street. Ilges v. St. Louis Transit Co., 102 Mo. App. 529, 77 S. W. 93. Exposing passenger to crowding by intoxicated smoking and disorderly passengers. Texas & P. R. Co. v. Bratcher [Tex. Civ. App.] 78 S. W. 531. Misleading passenger as to time to alight. Baltimore & P. R. Co. v. Jean [Md.] 57 A. 540. Allowing one train to approach another so as to cause imminent danger of collision. Williams v. Galveston, etc., R. Co. [Tex. Civ. App.] 78 S. W. 45. Derailment of street car. Logan v. Metropolitan St. R. Co. [Mo.] 82 S. W. 126; Indianapolis St. R. Co. v. Schmidt [Ind.] 71 N. E. 201. Passenger in elevator, caught between the floor and the top of the door in the elevator cage. Masonic Fraternity Temple Ass'n v. Collins [Ill.] 71 N. E. 396. Passenger's dress caught on an obstruction protruding from an elevator shaft. Goldsmith v. Holland Bldg. Co. [Mo.] 81 S. W. 1112. Collision between street car and wagon. Thurston v. Detroit United R. Co. [Mich.] 100 N. W. 395. Throwing passenger from running board. Sheeron v. Coney Island & B. R. Co., 89 App. Div. 338, 85 N. Y. S. 958. Evidence that plaintiff on approaching the open rear door of the rear coach was thrown through it by a sudden jerk presents an issue of negligence. Field v. Delaware, etc., R. Co., 69 N. J. Law, 433, 55 A. 241. Running around curve without slackening speed authorizes recovery by passenger compelled to stand on rear platform and thrown therefrom. Gatens v. Metropolitan St. R. Co., 89 App. Div. 311, 85 N. Y. S. 967. Facts held not to show negligence in causing plaintiff to fall from platform by natural or inevitable swing of car rounding curve. Moser v. South Covington & C. St. R. Co., 25 Ky. L. R. 154, 74 S. W. 1090. Valise fell on a passenger. Held insufficient to show negligence. Whiting v. New York, etc., R. Co., 89 N. Y. S. 584. Where a passenger was standing on the running board and was injured by the conductor's dropping a guard rail on his hand, the question of negligence was for the jury. McDonald v. Savannah Elec. Co. [Ga.] 47 S. E. 547. Evidence held to warrant finding that motorman operating larger car than customary was guilty of negligence in allowing it to strike intending passenger. Denison & S. R. Co. v. Craig [Tex. Civ. App.] 80 S. W. 865. Motorman set brake unprotected and unguarded so that it came loose and struck passenger. Kentucky & I. Bridge & R. Co. v. Shrader [Ky.] 80 S. W. 1094. Evidence in action for injuries received from being thrown off street car by electric shock held sufficient to show defendant's negligence and that plaintiff was not guilty of contributory negligence. Denison & S. R. Co. v. Johnson [Tex. Civ. App.] 81 S. W. 780. Evidence sufficient to show that decedent's death was due to collision caused by defendant's negligence. St. Louis S. W. R. Co. v. Burke [Tex. Civ. App.] 81 S. W. 774. Evidence held for jury in action for assault by third persons at station. Seawell v. Carolina Cent. R. Co., 132 N. C. 856, 44 S. E. 610. Whether conductor was negligent in closing sliding door on passenger's hand. Egnstfeld v. Central Crosstown R. Co., 84 N. Y. S. 148. Not per se negligent to permit passenger to ride on the running board. Injury through striking tunnel. North Chicago

be false in some respects,[83] and the question of where car stopped may be for jury though plaintiff is contradicted by two of her own witnesses;[84] but plaintiff's evidence wholly uncorroborated and contradicted by disinterested witnesses will not sustain a verdict.[85]

St. R. Co. v. Polkey, 203 Ill. 225, 67 N. E. 793. Where a passenger was injured while standing on the inner footboard of a street car, evidence of the carrier's negligence was for the jury. Allen v. St. Louis Transit Co. [Mo.] 81 S. W. 1142. Evidence that a woman, 75 years old, was thrown down by a violent lurch of the car is in the absence of evidence of contributory negligence sufficient to take the question of negligence to the jury. Harty v. New York, etc., R. Co., 88 N. Y. S. 422. Negligence becomes a question for the jury when a freight train is started so that a person with a drover's pass is injured while trying to reach the caboose thereon on which he is to ride by being compelled to pass between moving trains, the engineer knowing of his presence, and all other facts concerning the approach of the other train. Lake Shore, etc., R. Co. v. Hotchkiss, 24 Ohio Circ. R. 431.

Starting or jerking while passenger is alighting: Evidence held for jury. Koues v. Metropolitan St. R. Co., 86 App. Div. 611, 83 N. Y. S. 380; Gunn v. Metropolitan St. R. Co., 86 N. Y. S. 241; Fox v. Metropolitan St. R. Co., 87 N. Y. S. 754; Yazoo, etc., R. Co. v. Hatch [Miss.] 35 So. 941; Meade v. Boston El. R. Co. [Mass.] 70 N. E. 197; Baker v. Interurban St. R. Co., 86 N. Y. S. 9; City & S. R. Co. v. Svedborg, 20 App. D. C. 543; Kramer v. Metropolitan St. R. Co., 86 N. Y. S. 33; Bente v. Metropolitan St. R. Co., 90 App. Div. 213, 86 N. Y. S. 85; Andrews v. Metropolitan St. R. Co., 91 App. Div. 63, 86 N. Y. S. 338; Chicago City R. Co. v. Bundy [Ill.] 71 N. E. 28; Abbitt v. St. Louis Transit Co. [Mo. App.] 81 S. W. 484; Duffy v. St. Louis Transit Co. [Mo. App.] 78 S. W. 831. Evidence that conductor caused the car to move forward is not necessary though the sole negligence alleged is in starting while passenger was alighting. Jacobson v. St. Louis Transit Co. [Mo. App.] 80 S. W. 309. Question of reasonableness of time afforded to alight is for the jury though plaintiff fell 75 ft. from place of stop since such fact is not conclusive that he jumped off. Lucas v. Marquette City, etc., R. Co. [Mich.] 98 N. W. 980.

Contributory negligence: Attempting to board a car without knowledge of the position of the gates. Ganz v. Metropolitan St. R. Co., 84 N. Y. S. 579. Attempting to alight to avoid imminent collision. Williams v. Galveston, etc., R. Co. [Tex. Civ. App.] 78 S. W. 45. Attempt to alight before stop. Grabenstein v. Metropolitan St. R. Co., 86 N. Y. S. 727; Champane v. La Crosse City R. Co. [Wis.] 99 N. W. 334; Howell v. Lansing City Elec. R. Co. [Mich.] 99 N. W. 406; Lynch v. Interurban St. R. Co., 88 N. Y. S. 935; Maloney v. Metropolitan St. R. Co., 88 N. Y. S. 638. Alighting in disregard of warning before car stopped. Clancy v. Yonkers R. Co., 88 App. Div. 612, 84 N. Y. S. 789. Stepping off moving train. Rutledge v. New Orleans, etc., R. Co. [C. C. A.] 129 F. 94; Denison & S. R. Co. v. Johnson [Tex. Civ. App.] 81 S. W. 780. Attempting to alight on uneven ground. Fillingham v. St. Louis Transit Co., 102 Mo. App. 573, 77 S. W. 314. Attempt to alight from a street car as it was starting after a stop. Lee v. Elizabeth, etc., R. Co., 69 N. J. Law, 607, 55 A. 106. Passenger thrown in front of car on parallel track. Scamell v. St. Louis Transit Co., 102 Mo. App. 198, 76 S. W. 660. Attempting to use a stile in place of other means of egress from a carrier's grounds. Cotant v. Boone Suburban R. Co. [Iowa] 99 N. W. 115. Question of whether intending passenger could have seen ditch and of negligence in failing to warn him, held for jury. San Antonio, etc., R. Co. v. Turney [Tex. Civ. App.] 78 S. W. 256. Evidence of passenger that he was unaware of danger from stone on a passing wagon is not overcome by evidence that the noise made by the stone in striking the car before it reached plaintiff should have been heard. Jones v. United R. & Elec. Co. [Md.] 57 A. 620. Where there is no evidence that reasonable time was given plaintiff to reach a place of safety after stopping the car to receive passengers, her contributory negligence need not be submitted. Stoddard v. St. Louis, etc., R. Co. [Mo. App.] 80 S. W. 33.

Proximate cause: Mere showing that car started is insufficient without showing how it was started or that it caused plaintiff to fall while boarding. Meyerowitz v. Interurban St. R. Co., 84 N. Y. S. 233. Evidence held to show that spinal trouble resulted from physical hurts other than an electric shock for the injuries from which recovery could not be had. Perry v. Detroit United R. [Mich.] 98 N. W. 17. Evidence held insufficient to connect injury to passenger's finger from defective door with his subsequent fainting and falling from train, or to show that injury was occasioned by the door. Williams v. Citizens' Elec. St. R. Co., 184 Mass. 437, 68 N. E. 840. Evidence held sufficient in action for injuries from collision to establish cause of injury. Central of Georgia R. Co. v. Stancel, 118 Ga. 142, 44 S. E. 975. Question held for jury as to whether accident was result of sudden start as passenger was alighting or of intoxication from morphine or whiskey. Miller v. South Covington, etc., R. Co., 25 Ky. L. R. 207, 74 S. W. 747. Conflicting evidence as to cause of injury being attempt to leave moving car or sudden start held for jury. Scamell v. St. Louis Transit Co. [Mo. App.] 77 S. W. 1021.

82. That the car started while she was alighting. Koues v. Metropolitan St. R. Co., 86 App. Div. 611, 83 N. Y. S. 380. Where it is the only positive evidence of the manner of the accident. Field v. Delaware, etc., R. Co., 69 N. J. Law, 433, 55 A. 241.

83. Where evidence conflicted and a passenger falsely testified that he was in a certain coach where injured a verdict for him will not be permitted to stand. Chiavarelli v. New York, etc., R. Co., 88 N. Y. S. 869. On contradictory evidence as to cause of passenger falling, a judgment for him could not be sustained. Mullarkey v. Interurban St. R. Co., 88 N. Y. S. 699.

84. Gold v. Dry Dock, etc., R. Co., 84 N. Y. S. 1017.

Where a passenger was last seen going out of a car toward the next which he did not enter, there being no evidence of intent to commit suicide, it is a fair inference that he was thrown from the train by a lurch.[86]

Where evidence is undisputed tending to show possession of a transfer, failure to produce it at the trial is not fatal.[87] Slight evidence, uncontradicted, is sufficient to support ownership by defendant where not an issue but an inducement to the general charge of negligence averred.[88]

On trial of an action to recover for use of indecent language, the plaintiff must state the particular language used by other passengers as near as possible; it is not sufficient that she state they cursed, and used vulgar and obscene language.[89]

Confusing and misleading instructions.[90]—Instructions as to paramount right of defendant to use of tracks are properly refused where liability on collision with vehicles has been correctly stated.[91] Decisions as to the definiteness and clearness of instructions or their contradictory character are grouped in the notes.[92]

Instructions as to burden of proof.—Proper instructions as to the burden of proof are indicated in the notes.[93]

85. Start while alighting. Manning v. Metropolitan St. R. Co., 86 N. Y. S. 1122. Verdict set aside on contradiction in plaintiff's evidence in action for injuries in boarding street car. Northington v. Norfolk R. & L. Co. [Va.] 46 S. E. 476.

86. Robinson v. Chicago & A. R. Co. [Mich.] 97 N. W. 689.

87, 88. Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087.

89. St. Louis S. W. R. Co. v. Wright [Tex. Civ. App.] 75 S. W. 565.

90. See 1 Curr. L. 490.

91. Frank v. Metropolitan St. R. Co., 91 App. Div. 485, 86 N. Y. S. 1018.

92. Not erroneous: To allude to fact that defendant is not a corporation while holding him to the liability of a common carrier. Crump v. Davis [Ind. App.] 70 N. E. 887. A reference to collecting fares in a charge as to the duty of a conductor toward a passenger about to board the car was not objectionable. Foster v. Seattle Elec. Co. [Wash.] 76 P. 995. To allow conductor to be included in instruction as to burden of proof of negligence being on plaintiff though there was no evidence that the conductor was negligent. City & S. R. Co. v. Svedborg, 194 U. S. 201, 24 S. Ct. 656. As to effect of having no conductor on a street car criticised. Root v. Des Moines R. Co. [Iowa] 98 N. W. 291. Modification of instruction as to relative rights of street car and private vehicle held not prejudicial. Doolin v. Omnibus Cable Co., 140 Cal. 369, 73 P. 1060.

Misleading: A charge that the negligence relied on was a sudden jerk sufficient to throw the passenger from the train need not add "thus causing the injury resulting in his death." Pa. Co. v. Paul [C. C. A.] 126 F. 157. Stating that carriers are not "absolute" insurers is not erroneous as warranting inference that they are in some degree insurers. Cronk v. Wabash R. Co., 123 Iowa, 349, 98 N. W. 884. As fixing liability on showing of collision and consequent injury. Houston Elec. Co. v. Nelson [Tex. Civ. App.] 77 S. W. 978.

Conflicting: As to when liability as carrier began. Mo., etc., R. Co. v. Beard [Tex. Civ. App.] 78 S. W. 253. Instruction modified as to cessation of liability to passenger as such. Louisville R. Co. v. Meglemery, 25 Ky. L. R. 2062, 79 S. W. 287.

Not conflicting: As to rule of care, burden of proof of defendant's ownership and presumption of negligence. Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087. Where the causes of a jerk as alleged are summed up, it is misleading for the court to add "or for any other cause which could have been guarded against by the exercise," etc. Citizens' St. R. Co. v. Jolly, 161 Ind. 80, 67 N. E. 936. Imposing duty of holding street car until passengers were seated. Maguire v. St. Louis Transit Co. [Mo. App.] 78 S. W. 838.

93. Cronk v. Wabash R. Co., 123 Iowa, 349, 98 N. W. 884; Indianapolis St. R. Co. v. Brown [Ind. App.] 69 N. E. 407. Held not to throw burden of proof in whole case on plaintiff without distinguishing contributory negligence alleged in the answer. Peck v. St. Louis Transit Co., 178 Mo. 617, 77 S. W. 736. Held not to impose on plaintiff burden of showing that the sudden starting of a car could have been prevented by the high degree of care incumbent on the carrier. Reagan v. St. Louis Transit Co. [Mo.] 79 S. W. 435. Held error as placing the proof of absence of contributory negligence on plaintiff. St. John v. Gulf, etc., R. Co. [Tex. Civ. App.] 80 S. W. 236. Instruction, "with a reasonable degree of certainty," that decedent's death was due to the injury received, held erroneous as requiring too high a degree of proof. St. Louis S. W. R. Co. v. Burke [Tex. Civ. App.] 81 S. W. 774. As to burden of proof approved. Galveston City R. Co. v. Chapman [Tex. Civ. App.] 80 S. W. 856; Chicago City R. Co. v. Bundy [Ill.] 71 N. E. 28. Instructions as to burden of proof not uncertain in referring to claims of plaintiff, or as to "circumstances" which jury might consider in support of presumption as to negligence, and approved. Fitch v. Mason City, etc., Traction Co. [Iowa] 100 N. W. 618. Instructions as to burden of proof in action for death through negligence in operating street car, approved. Lincoln Traction Co.

Instructions invading province of jury.[94]—The existence of negligence or facts in issue should not be assumed.[95] The charge should not assume mitigating circumstances.[96] A special interrogatory does not assume the fact of injury by requiring a finding of whether a defective condition of a track contributed to the injury of plaintiff.[97] On the other hand, questions of law should not be submitted.[98]

Instructions emphasizing or omitting particular facts.[99]—Where facts are grouped in an instruction all that are material should be considered and prominence given to none.[1]

v. Heller [Neb.] 100 N. W. 197. In action for injuries to passenger, charge that plaintiff started with undertaking on him to prove negligence includes request that if collision was not due to defendant's negligence, plaintiff could not recover. Savage v. Marlborough St. R. Co. [Mass.] 71 N. E. 531. In an action for injuries caused by collision, where defendant offers no explanation of the accident, an instruction that the mere fact of the collision was not evidence of negligence is improper. Id. Instruction as to presumption of negligence arising from plaintiff's injury, approved. Logan v. Metropolitan St. R. Co. [Mo.] 82 S. W. 126. Proper to give such instruction though the cause of the accident was known. Id.

94. See 1 Curr. L. 490.

95. Should not assume plaintiff's drunkenness where controverted. Birmingham R., L. & P. Co. v. Mullen, 138 Ala. 614, 35 So. 701. Must not exclude from jury question of whether runaway was unavoidable. Taillon v. Mears [Mont.] 74 P. 421. Error to instruct as to facts rendering the sufferance of a tree to stand where it might fall across the track negligence, unless such as to constitute negligence per se. Ala. Midland R. Co. v. Guilford, 119 Ga. 523, 46 S. E. 655. An instruction assuming absence of negligence cannot be given where the question is properly for the jury. City & S. R. Co. v. Svedborg, 194 U. S. 201, 24 S. Ct. 656. Should not assume an issue of fact as to distance plaintiff was compelled to walk through failure to stop car. Northern Tex. Traction Co. v. Peterman [Tex. Civ. App.] 80 S. W. 535.

Held proper: As not assuming that car was stopped when plaintiff attempted to alight. St. Louis S. W. R. Co. v. Dolan [Tex. Civ. App.] 77 S. W. 415. As to liability toward person boarding car held not to withdraw defendant's negligence as a question of fact. Doering v. Metropolitan St. R. Co., 42 Misc. 192, 85 N. Y. S. 400. In action by person pushed off of train held good on criticisms that it was on the facts and failed to submit contributory negligence. Tex. & P. R. Co. v. Tems [Tex. Civ. App.] 77 S. W. 230. Held not to inform the jury that they should find for plaintiff as a matter of law in case his version of an accident while alighting from a car was true. Bente v. Metropolitan St. R. Co., 90 App. Div. 213, 86 N. Y. S. 85. Held not to assume that speed was dangerous. South Covington, etc., R. Co. v. Constans, 25 Ky. L. R. 158, 74 S. W. 705. Instruction as to alighting from moving train not bad as assuming that an admitted fact was a material issue. Harris v. Gulf, etc., R. Co. [Tex. Civ. App.] 80 S. W. 1023.

Held improper: Instruction as to negligence of passenger in exposing himself to cinders. Mo., etc., R. Co. v. Flood [Tex. Civ. App.] 79 S. W. 1106. Instruction that mere fact of collision with wagon does not show liability. Houston Elec. Co. v. Nelson [Tex. Civ. App.] 77 S. W. 978. Charge that fact that passenger was "compelled to walk" and the "discomforts, inconvenience, and expense which are shown by the proofs in this case." Northern Tex. Traction Co. v. Hooper [Tex. Civ. App.] 80 S. W. 113. Where the defendant has introduced evidence tending to show that it has used proper care to avoid the accident, a charge that the fact of injury is prima facie evidence of negligence which the defendant must rebut by a showing of such care. St. Louis S. W. R. Co. v. Parks [Tex.] 76 S. W. 740.

96. Birmingham R., L. & P. Co. v. Mullen, 138 Ala. 614, 35 So. 701.

97. Cronk v. Wabash R. Co., 123 Iowa, 349, 98 N. W. 884.

98. As to liability for injuries due to sudden starting of car when plaintiff was about to alight, not objectionable as submitting a question of law to be determined as one of fact. Abbitt v. St. Louis Transit Co. [Mo. App.] 81 S. W. 484.

99. See 1 Curr. L. 491.

1. Instructions approved in action for defective gate. Aston v. St. Louis Transit Co. [Mo. App.] 79 S. W. 999. Instructions as to duty to find by preponderance of evidence that plaintiff's attempt to alight before stop caused injuries held not to ignore other issues as to contributory negligence. Kennedy v. St. Louis Transit Co. [Mo. App.] 78 S. W. 77. Held not to give undue prominence to stop of car. Peck v. St. Louis Transit Co., 178 Mo. 617, 77 S. W. 736. Held error as omitting question of whether conductor in mounting car displaced plaintiff's footing. Fleming v. St. Louis & S. R. Co., 101 Mo. App. 217, 74 S. W. 382. Held not erroneous as withdrawing question of plaintiff's intoxication. Lawson v. Seattle & R. R. Co., 34 Wash. 500, 76 P. 71. Where only evidence of contributory negligence was in passing vacant seat such fact may be made the basis of an instruction without giving it undue prominence. Pelly v. Denison & S. R. Co. [Tex. Civ. App.] 78 S. W. 542. Where there is no evidence of contributory negligence, it is not error to ignore the question in instructions. Magrane v. St. Louis & S. R. Co. [Mo.] 81 S. W. 1158. Instruction attempting to limit effect of evidence as to time when ticket office was opened to point as to whether plaintiff exercised sufficient care in boarding train. St. Louis S. W. R. Co. v. Cannon [Tex. Civ. App.] 81 S. W. 778. Instruction as to contributory negligence of plaintiff in getting off moving train not objectionable as singling out and giving prominence to an uncontroverted fact. Harris v. Gulf, etc., R. Co. [Tex. Civ. App.] 80 S. W. 1023.

Conformity of instructions with evidence.[2]—The instructions must be justified by the evidence.[3]

Conformity of instructions with issues.[4]—The issues must be defined,[5] and instructions must not be given as to matters not in issue,[6] but issues should not be ignored.[7]

2. See 1 Curr. L. 491.

3. A count unsupported by the evidence should be withdrawn from consideration. North Chicago St. R. Co. v. Polkey, 203 Ill. 225, 67 N. E. 793. Where plaintiff's evidence is confined to a fall from catching her foot in a hole under defendant's rail, it is proper to confine the jury to such issue. Howland v. New York, etc., R. Co. [R. I.] 58 A. 683.

Instructions held supported by evidence: Alluding to "wreck and derailment." San Antonio Traction Co. v. Williams [Tex. Civ. App.] 78 S. W. 977. That negligence must be direct and proximate cause of injury. Pelly v. Denison & S. R. Co. [Tex. Civ. App.] 78 S. W. 542. As to attempt to board being at conductor's direction. San Antonio, etc., R. Co. v. Turney [Tex. Civ. App.] 78 S. W. 256. As to negligence in care of tracks and switches. Heyde v. St. Louis Transit Co., 102 Mo. App. 537, 77 S. W. 127. As to humiliation and disgrace in assault case. Sonnen v. St. Louis Transfer Co., 102 Mo. App. 271, 76 S. W. 691. As to exemplary damages for failure to stop car. Northern Tex. Traction Co. v. Peterman [Tex. Civ. App.] 80 S. W. 535. As to contributory negligence. Williams v. Galveston, etc., R. Co. [Tex. Civ. App.] 78 S. W. 45. Evidence held to require issue of contributory negligence in boarding crowded train and in not holding baby himself in action for failure to furnish seat, compelling wife to stand and hold child. Tex., etc., R. Co. v. Rea [Tex. Civ. App.] 74 S. W. 939. Instruction not erroneous in assuming that motorman of street car was under direction of conductor. Brock v. St. Louis Transit Co. [Mo. App.] 81 S. W. 219.

Instructions held unsupported: Imposing liability in case plaintiff was thrown from a train by other than defendant's agents or if they negligently permitted other persons to do so. Louisville & N. R. Co. v. Board, 25 Ky. L. R. 2180, 80 S. W. 218. That plaintiff assumed a position of peril on car steps at a stop for his convenience in getting off at a point farther on. Fleming v. St. Louis & S. R. Co., 101 Mo. App. 217, 74 S. W. 382. As to effect of extraordinary demand for transportation as excusing failure to furnish proper cars. Tex. & P. R. Co. v. Bratcher [Tex. Civ. App.] 78 S. W. 531. As to duty to protect premises away from station. San Antonio, etc., R. Co. v. Turney [Tex. Civ. App.] 78 S. W. 256. As to remote and proximate cause in injury to passenger from striking gate of stock pen. Gulf, etc., R. Co. v. Phillips [Tex. Civ. App.] 74 S. W. 793. As to duty being only to exercise such diligence in providing extra accommodations under the circumstances as a very prudent person would exercise under similar circumstances. Tex., etc., R. Co. v. Rea [Tex. Civ. App.] 74 S. W. 939. As to injury being caused by natural lateral motion on curve and not sudden jerk. Eikenberry v. St. Louis Transit Co. [Mo. App.] 80 S. W. 350. Instructions as to duty as to alighting from moving car need not have been given where there is a finding that the car was at a stand. Indianapolis St. R. Co. v. Brown [Ind. App.] 69 N. E. 407. Instruction as to duty not to start while passenger is alighting is not proper on evidence of a sudden start before coming to a full stop. Boone v. Oakland Transit Co., 139 Cal. 490, 73 P. 243. Issue of discovered peril is not presented by information by passenger to conductor on entering the car that she was sick and needed assistance. Pelly v. Denison & S. R. Co. [Tex. Civ. App.] 78 S. W. 542. Charge as to contributory negligence of passenger getting on train, erroneous because no evidence of the facts therein stated. St. Louis S. W. R. Co. v. Cannon [Tex. Civ. App.] 81 S. W. 778. Instruction as to negligence of motorman in starting car, erroneous as assuming existence of facts contradicted by the evidence. Brock v. St. Louis Transit Co. [Mo. App.] 81 S. W. 219.

4. See 1 Curr. L. 491.

5. Petition merely alleged that plaintiff was a passenger and was injured, but did not refer the accident to any negligence of the carrier. Instructions for carrier withdrew every phase of case on which negligence could be predicated. Instructions given for plaintiff were indefinite. Allen v. St. Louis Transit Co. [Mo.] 81 S. W. 1142.

6. Plea of negligence in leaving moving car will not support instruction on assuming dangerous position. Fleming v. St. Louis & S. R. Co., 101 Mo. App. 217, 74 S. W. 382. Error to instruct as to duty to provide competent men and proper cars when not in issue. Illinois Cent. R. Co. v. Vinson, 25 Ky. L. R. 38, 74 S. W. 671. It is error to instruct on willful injury as removing liability for contributory negligence, where the issues and evidence do not present such theory. Jacobson v. St. Louis Transit Co. [Mo. App.] 80 S. W. 309. Instruction held not objectionable as allowing a recovery for a sudden stop after a start not pleaded. Hastings v. Boland [Mich.] 98 N. W. 1017. Where a passenger was pushed off the platform because of a panic immediately before a collision, an instruction based on the theory that he was injured by the collision was not erroneous. Magrane v. St. Louis & S. R. Co. [Mo.] 81 S. W. 1158. It is proper to refuse an instruction on the issue of discovered peril, when such issue is not raised by the evidence. Harris v. Gulf, etc., R. Co. [Tex. Civ. App.] 80 S. W. 1023.

7. Defendant held entitled to instruction as to duty toward passenger in moving car forward after alighting passenger had cleared it. Louisville R. Co. v. Meglemery, 25 Ky. L. R. 1587, 78 S. W. 217. Instruction in assault case held not erroneous as omitting theory of self-defense on part of conductor. Sonnen v. St. Louis Transfer Co., 102 Mo. App. 271, 76 S. W. 691. Negligence alleged in failing to have an employe in attendance

Instructions as to the extent of the carrier's liability,[8] where the decisions appear to be based on the form, are considered in the notes. The substantive law of liability has already been treated.[9] An abstract definition of the degree of care

to assist in alighting should not be ignored. Chicago, etc., R. Co. v. Armes [Tex. Civ. App.] 74 S. W. 77. Where complaint was founded on negligence of defendant's employes in suddenly raising a water hose which passed through a car door and in suddenly starting the train, instruction held not erroneous for failure to include negligence in placing the hose in such position. Ratteree v. Galveston, etc., R. Co. [Tex. Civ. App.] 81 S. W. 566.

8. See 1 Curr. L. 491.

9. See ante, § 23 et seq.

Approved: As to effect of arm being outside of street car, without additional charge that it was negligence in the passenger to allow his arm to protrude. Zeliff v. New Jersey St. R. Co., 69 N. J. Law, 641, 56 A. 96. As to effect of failure to see intending passenger's signal. Clinton v. Brooklyn Heights R. Co., 91 App. Div. 374, 86 N. Y. S. 932. As to duty of carrier and passenger as to mail pouch suspended by the track. McCord v. Atlanta & C. Air Line R. Co., 134 N. C. 63, 45 S. E. 1031. That cars should stop at certain point held not to impose duty without regard to whether there were intending passengers. Maguire v. St. Louis Transit Co. [Mo. App.] 78 S. W. 838. Use of word "slowly" in instruction as describing speed of car. Dawson v. St. Louis Transit Co., 102 Mo. App. 277, 76 S. W. 689. Use of "stopped still" instead of "stopped" is not error. Peck v. St. Louis Transit Co., 178 Mo. 617, 77 S. W. 736. "Human skill and foresight" need not be defined where the instructions required the carrier to keep tracks only in "reasonably safe condition." Nashville R. R. v. Howard (Tenn.) 78 S. W. 1098. Failure to define "utmost care, skill and vigilance." Fillingham v. St. Louis Transit Co., 102 Mo. App. 673, 77 S. W. 314. Failure to define "highest degree of care." Ilgee v. St. Louis Transit Co., 102 Mo. App. 529, 77 S. W. 93. Striking from instruction of phrase as to implied invitation from slowing car. Eikenberry v. St. Louis Transit Co. [Mo. App.] 80 S. W. 360. Held not to make the carrier an insurer of the condition of a car. Missouri, etc., R. Co. v. Harrison [Tex. Civ. App.] 77 S. W. 1036. Held not to include elements not necessary to discharge of defendant's liability. Champane v. La Crosse City R. Co. [Wis.] 99 N. W. 334. Jury may be instructed that there can be no recovery for injury from alleged defective premises at a station, if the conditions were usual and the usual conditions were safe. Howland v. New York, etc., R. Co. [R. I.] 58 A. 683. Instructions as to duty to furnish information as to where a passenger would find his train and as to failure to make inquiry for a train held proper. Newcomb v. New York, etc., R. Co. [Mo.] 81 S. W. 1069. As to degree of care required of carrier, approved. International, etc., R. Co. v. Clark [Tex. Civ. App.] 81 S. W. 821. Charge requiring jury to find for plaintiff if train was negligently started while she was getting aboard, approved. St. Louis S. W. R. Co. v. Cannon [Tex. Civ. App.] 81 S. W. 778. Instruction as to negligence of defendant not erroneous for failure to require that it must have "proximately" contributed to the injuries complained of. Ratteree v. Galveston, etc., R. Co. [Tex. Civ. App.] 81 S. W. 566. Instruction as to degree of care on part of carrier not objectionable as calculated to mislead jury as to the decisive issue which it was called upon to determine. Abbitt v. St. Louis Transit Co. [Mo. App.] 81 S. W. 484. Defining negligence in action for injuries resulting from being struck by brake handle, approved. Kentucky, etc., R. Co. v. Shrader [Ky.] 80 S. W. 1094. As to negligence of motorman in action for injuries resulting from collision of two street cars, not objectionable as failing to specify which was meant. Galveston City R. Co. v. Chapman [Tex. Civ. App.] 80 S. W. 856. As to degree of care required of carrier, approved. Chicago City R. Co. v. Bundy [Ill.] 71 N. E. 28. Instruction as to speed of electric cars, approved. Fitch v. Mason City & C. L. T. Co. [Iowa] 100 N. W. 618. Instructions as to degree of care required of defendant, approved. Not objectionable as making defendant insurer, or as assuming that defendant was negligent in not providing guard for seat. Id. Instruction as to liability for assault on passenger by employe, approved. Garvik v. Burlington, etc., R. Co. [Iowa] 100 N. W. 498. Instruction in regard to right to recover if defendant was negligent and plaintiff was not, approved. Matthieson v. Burlington, etc., R. Co. [Iowa] 100 N. W. 51. Definition of proximate cause, approved. Feldschneider v. Chicago, etc., R. Co. [Wis.] 99 N. W. 1034. Instructions as to kind of care owed by carrier to passenger about to alight and the care which she should have exercised, held proper. Houghton v. Louisville R. Co. [Ky.] 81 S. W. 696.

Disapproved: In an action against a street railway company for personal injuries to a passenger who was thrown down when the car rounded a curve, it was proper to refuse to instruct that if the jury found that the car was not going at an improper speed they should find for defendant, since irregularity of motion might have caused the accident. Brierly v. Union R. Co. [R. I.] 58 A. 451. Error to charge that liability as to elevators is same as other carriers, without stating what that is. Masonic Fraternity Temple Ass'n v. Collins [Ill.] 71 N. E. 396. Instruction making negligence to depend on whether room enough was left for passengers on platform, and whether plaintiff could have discovered obstruction had she looked, improper. Matthieson v. Burlington, etc., R. Co. [Iowa] 100 N. W. 51. As rendering initial carrier liable for failure of connecting carrier to warm car furnished by former, disapproved. Missouri, etc., R. Co. v. Harrison [Tex.] 80 S. W. 1139. That it was the duty of the carrier to provide reasonably safe cars and to cause them to be operated in a reasonably safe manner, erroneous. Citizens' R. Co. v. Sinclair [Tex. Civ. App.] 81 S. W. 329. Instruction in action for injuries to passenger resulting from starting car when she was about to get off, held erroneous, as precluding recovery unless car stopped for purpose of letting off passengers. Houghton v. Louisville R. Co.,

required of the carrier in setting down passengers is not requisite where the duty under the particular facts is stated.[10] Defendant is entitled to have the issue of proper care submitted to the jury in terms.[11] An instruction as to care due an alighting passenger must not omit element of notice to carrier of his intention.[12]

Instructions as to contributory negligence[13] should not be given where the issue is not presented.[14] As to the propriety of particular instructions, see the footnote.[15]

Instructions cured by other instructions.[16]—The instructions are to be construed as a whole,[17] and defects may be so cured.[18]

26 Ky. L. R. 393, 81 S. W. 695. Instructions making a failure of the passenger to exercise ordinary care a bar to recovery, without the condition that it must have contributed to the injury, are erroneous. St. Louis S. W. R. Co. v. Cannon [Tex. Civ. App.] 81 S. W. 778. It is error to submit the question of negligence without instructing as to what constitutes. Magrane v. St. Louis & S. R. Co. [Mo.] 81 S. W. 1158. An instruction that the duty of the motorman and conductor is to exercise toward passengers the highest degree of care consistent with the proper discharge of their other duties is erroneous. Foster v. Seattle Elec. Co. [Wash.] 76 P. 995.

10. Henning v. Louisville R. Co., 24 Ky. L. R. 2419, 74 S. W. 209.

11. Houston Elec. Co. v. Nelson [Tex. Civ. App.] 77 S. W. 978.

12. Texas Southern R. Co. v. Long [Tex. Civ. App.] 80 S. W. 114.

13. See 1 Curr. L. 492.

14. In the absence of plea of contributory negligence, jury need not be instructed that issue is not in case. Duffy v. St. Louis Transit Co. [Mo. App.] 78 S. W. 831. Where plaintiff claimed that she was shoved from a train and defendant denied that, or that she even fell therefrom, an instruction as to contributory negligence is not justified. Cincinnati, etc., R. Co. v. Halcomb, 25 Ky. L. R. 1444, 78 S. W. 205.

15. Approved: Shealey v. South Carolina & G. R. Co. [S. C.] 45 S. E. 119. Leaving moving train, approved. St. Louis S. W. R. Co. v. Massay [Tex. Civ. App.] 76 S. W. 585. Held not to require contributory negligence to be sole cause of injury. Louisville R. Co. v. Neglemery, 25 Ky. L. R. 1587, 78 S. W. 217. Held not to require plaintiff to be justified in attempting to escape apparent danger to be in imminent danger of losing his life or of receiving great bodily injury. Williams v. Galveston, etc., R. Co. [Tex. Civ. App.] 78 S. W. 45. Held not to charge that certain facts constituted contributory negligence. Id. Held not to give undue prominence to defense. Id. Held not erroneous as not limiting speed at which passenger might attempt to board car apparently slowing to receive him, when evidence showed it was moving slowly. Maguire v. St. Louis Transit Co. [Mo. App.] 78 S. W. 838. Held not to require finding that plaintiff was negligent in addition to fact of sufficient stop in order to relieve defendant, when plaintiff was injured while attempting to board train. International, etc., R. Co. v. Anchonda [Tex. Civ. App.] 75 S. W. 557. Instruction submitting to the jury the question of whether an attempt to alight while the train was in motion necessarily contributed to plaintiff's fall, held not prejudicial. Chicago, etc., R. Co. v. Armes [Tex. Civ. App.] 74 S. W. 77. As to contributory negligence of plaintiff in attempting to leave moving car, approved. Denison & S. R. Co. v. Johnson [Tex. Civ. App.] 81 S. W. 780. As to degree of care required of passenger, approved. Chicago City R. Co. v. Bundy [Ill.] 71 N. E. 28. Defendant entitled to instruction that failure to stop street car and give plaintiff an opportunity to alight did not give plaintiff right to jump from moving car. McDonald v. City Elec. R. Co. [Mich.] 100 N. W. 592.

Disapproved: That high care which a person of ordinary prudence, etc., places too great a duty on plaintiff as a charge on contributory negligence. St. John v. Gulf, etc., R. Co. [Tex. Civ. App.] 80 S. W. 235. Instruction held erroneous as directing finding for plaintiff, unless they found an absence of all care in alighting after the train started, after a stop at her station. Louisville, etc., R. Co. v. Coons, 25 Ky. L. R. 509, 76 S. W. 45. Particular form of instruction as to contributory negligence in boarding train in motion held properly refused. International, etc., R. Co. v. Anchonda [Tex. Civ. App.] 75 S. W. 557. Instruction as to voluntary assumption by plaintiff of danger in boarding car which had made its last regular trip, erroneous. Brock v. St. Louis Transit Co. [Mo. App.] 81 S. W. 219. Instruction as to duty of carrier to allow sufficient time to alight from street car, and as to contributory negligence in jumping from moving car, held misleading, and not cured by subsequent instruction as to contributory negligence. McDonald v. City Elec. R. Co. [Mich.] 100 N. W. 592. Instruction making question of contributory negligence depend wholly on whether plaintiff looked where she was stepping, properly refused. Mathieson v. Burlington, etc., R. Co. [Iowa] 100 N. W. 51.

16. See 1 Curr. L. 492.

17. Instruction as to contributory negligence need not be repeated in one as to recovery for mental anguish. International, etc., R. Co. v. Anchonda [Tex. Civ. App.] 75 S. W. 557.

18. Instruction failing to postulate knowledge of relationship before award of damage for anguish of plaintiff in being separated from her children by being thrown from train while attempting to board it, held cured by previous instructions. International, etc., R. Co. v. Anchonda [Tex. Civ. App.] 75 S. W. 557. Refusal to give abstract instruction as to duties concerning passenger on a log train held cured by other instructions. Greenfield v. Detroit & M. R. Co. [Mich.] 95 N. W. 546. Instructions held to cover requested instruction that defendant was not liable if accident resulted from

Part V. Carriage of Baggage and Passengers' Effects.

§ 32. *Rights, duties, and liabilities.*[19]—A contract to carry a reasonable amount of personal baggage is implied in the contract of carriage,[20] but this implied obligation is limited to such articles as are reasonably required for the comfort or convenience of the passenger and his family having regard to his circumstances, the length of the journey, etc.,[21] and the carrier may refuse to carry other articles except as freight,[22] though there is a statutory provision entitling a passenger to a certain weight of baggage.[23] At common law, there is no fixed limit to the value of baggage, the reasonableness of the quantity for which liability exists being for the jury.[24] Where no partnership or special contract is shown between connecting carriers, one could not be held liable for a loss of baggage by the other.[25]

§ 33. *Care of baggage and effects.*[26]—The general liability is that of an insurer,[27] but where a passenger does not intend to accompany his baggage, the carrier is in the absence of a special contract liable only as a gratuitous bailee,[28] though

a defect in trucks not discoverable by the exercise of the utmost care, skill and diligence. Louisiana, etc., R. Co. v. Crumpler [C. C. A.] 122 F. 425. Omission of contributory negligence idea held cured by other instructions. Louisville R. Co. v. Meglemery, 25 Ky. L. R. 1587, 78 S. W. 217. Refusal to instruct that if a passenger had failed to exercise the degree of care required of him while standing on an inner footboard, he should not recover, was not cured by charging that if he exercised ordinary care he could recover. Allen v. St. Louis Transit Co. [Mo.] 81 S. W. 1142. Not error to refuse charge as to proximate cause which was sufficiently covered in main charge. St. Louis S. W. R. Co. v. Burke [Tex. Civ. App.] 81 S. W. 774. Requested instruction as to contributory negligence covered by that given. Fitch v. Mason City & C. L. T. Co. [Iowa] 100 N. W. 618. Failure to charge what liability rests on "other carriers" cured by instructions enumerating facts which must have been proved. Masonic Fraternity Temple Ass'n v. Collins [Ill.] 71 N. E. 396. As to care required in keeping track in safe condition in action for injuries due to derailment of street car at switch. Any generality therein cured by other instructions. Logan v. Metropolitan St. R. Co. [Mo.] 82 S. W. 125.

19. See 1 Curr. L. 493.

20. Saunders v. Southern R. Co. [C. C. A.] 128 F. 15; Yazoo, etc., R. Co. v. Baldwin [Tenn.] 81 S. W. 599.

21. Saunders v. Southern R. Co. [C. C. A.] 128 F. 15. The term baggage cannot be accurately defined since what it includes depends largely on the circumstances of each particular case. Yazoo, etc., R. Co. v. Baldwin [Tenn.] 81 S. W. 599. Woman's clothing and that of her children, fancy work, and miscellaneous ornaments, savings bank and contents, zither key, and small amount of her husband's clothing, all in her trunk, held baggage, where family was moving. Id.

Stage costumes, scenery, furniture, etc., of a traveling theatrical company is not baggage. Saunders v. Southern R. Co. [C. C. A.] 128 F. 15. A woman's **jewelry** and every article pertaining to her wardrobe that may be necessary or convenient to her traveling is baggage. Galveston, etc., R. Co. v. Fales [Tex. Civ. App.] 77 S. W. 234. Whether heavy **winter clothing** is proper baggage on short trip in summer is for the jury. Mo., etc., R. Co. v. Meck [Tex. Civ. App.] 75 S. W. 317. Whether **mechanic's tools** were proper baggage held for jury. Id. **Household goods** and articles that generally go as freight such as bedding, lamps, dishes, etc., when family is moving from one state to another, are not ordinarily included, where the carrier has no notice that they are being transported. Yazoo, etc., R. Co. v. Baldwin [Tenn.] 81 S. W. 599.

22. Saunders v. Southern R. Co. [C. C. A.] 128 F. 15. The fact that the manager of a theatrical troupe bought a ticket for eighteen instead of the fourteen persons he expected to carry does not imply any agreement in respect to free carriage of articles not proper baggage. Id.

23. Wilson's Rev. & Ann. St. 1903, §§ 708, 709, does not cover butcher's tools to be used in starting in business. Choctaw, etc., R. Co. v. Zwirtz, 13 Okl. 411, 73 P. 941.

24. Galveston, etc., R. Co. v. Fales [Tex. Civ. App.] 77 S. W. 234.

25. No evidence that the second had ever received it from the initial carrier. Romero v. McKernan, 88 N. Y. S. 365.

26. Steamship held liable for baggage thrown overboard by officer. De Felice v. Compagnie Francaise De Navigation, 83 App. Div. 73, 82 N. Y. S. 552. See 1 Curr. L. 493.

27. Saunders v. Southern R. Co. [C. C. A.] 128 F. 15. The carrier is liable for hand baggage taken into a Pullman car as an insurer unless the passenger in same denies the custody of the employes. Nashville, etc., R. Co. v. Lillie [Tenn.] 78 S. W. 1055. A carrier received a trunk from an expressman, but when the passenger wished to check it it could not be found. The baggage man gave her a check and told her it would be forwarded. Held, the company's relation was that of carrier not warehouseman. Williams v. Central R. Co., 93 App. Div. 582, 88 N. Y. S. 434.

28. Such liability exists where the baggage is checked in the ordinary way in the expectation that it will be accompanied by the owner. Wood v. Me. Cent. R. Co., 98 Me. 98, 55 A. 457. Where the carrier is a mere gratuitous bailee, it is not liable for theft from a trunk deposited in an ordinarily constructed baggage room with the doors

a husband may join with his wife in suing on the general liability as to her baggage though not himself a passenger.[29]

The fact that baggage given Pullman porter is not returned shows negligence,[30] but as to hand luggage taken into a day coach, the carrier is not an insurer.[31]

The passenger need not inform carrier at time of delivery to it, of the specific articles contained in baggage,[32] but must exercise good faith to impose liability for unusual or improper articles.[33] The carrier is not liable as bailee for storage of articles improperly shipped as baggage.[34]

§ 34. *Limitation of liability.*[35]—The carrier may contract for a reasonable limitation of its common-law liability for loss or damage to baggage not resulting from its negligence,[36] or, as a condition, a free pass may require the passenger to assume all risk as to baggage,[37] but a statute permitting limitation does not apply to baggage lost by theft at the station of departure before the passenger had an opportunity to check it.[38]

A statute prohibiting limitation of common-law liability for property is applicable to interstate shipments.[39] A contract in general terms will be construed consistently with law not to release liability for negligence.[40] The passenger must consent to a limitation of liability,[41] and must have notice in such a way as to afford an opportunity for acceptance or rejection.[42]

and windows secured in the ordinary manner. Id.

29. Yazoo, etc., R. Co. v. Baldwin [Tenn.] 81 S. W. 599.

NOTE. Liability for baggage not accompanied by passenger: It was recently held in Michigan that one who purchases a railroad ticket for the sole purpose of checking his baggage upon it, with no intention of becoming a passenger on the train, can hold the carrier liable only as a gratuitous bailee of the baggage, and cannot recover in case it is stolen from the baggage room, unless the carrier is guilty of gross negligence. Marshall v. Pontiac, etc., R. Co., 126 Mich. 45, 55 L. R. A. 650. Says the writer of a note to this case in the L. R. A.: "The decision is * * * unexpected and * * * much at variance with the common supposition that the carrier accepts liability for a trunk when it accepts it as baggage and regularly checks it upon a valid ticket, without regard to the owner's transportation on the same train." The writer claims that the authorities most nearly in point are clearly opposed to the decision in the Michigan case and go far to support the contrary doctrine. Among the cases cited by him are: Beers v. Boston, etc., R. Co., 67 Conn. 417, 34 A. 541, 32 L. R. A. 535; Fairfax v. New York, etc., R. Co., 73 N. Y. 167, 29 Am. Rep. 119; Warner v. Burlington, etc., R. Co., 22 Iowa, 166, 92 Am. Dec. 389; Black v. The Trent, 18 La. Ann. 664. Two cases cited by the court in the Michigan decision are said not to support that decision: The Elvira Harbeck, 2 Blatchf. 336, Fed. Cas. No. 4,424 and Wilson v. Grand Trunk R. Co., 56 Me. 60, 96 Am. Dec. 435 and 57 Me. 138, 2 Am. Rep. 26. "The reason of the matter seems very clear, in view of the modern development of baggage transportation in this country. * * * Baggage is checked when taken into the carrier's possession and kept in the carrier's exclusive custody and control until it reaches" its destination. Carriers frequently refuse to carry baggage on certain trains. There seems to be no reason for requiring the owner of a ticket to get upon the train which carries his baggage, since he has no control over it. The writer concludes that both reason, based on modern transportation methods, and authority are contrary to the Michigan decision. See case and note in [Mich.] 55 L. R. A. 650.

30. Umbrella. Irving v. Pullman Co., 84 N. Y. S. 248. Where a porter told a passenger he could safely leave his baggage in his berth, and it was stolen while he was absent, evidence held for the jury as to the negligence of the carrier. Arthur v. Pullman Co., 88 N. Y. S. 981.

31. Nashville, etc., R. Co. v. Lillie [Tenn.] 78 S. W. 1055.

32. Galveston, etc., R. Co. v. Fales [Tex. Civ. App.] 77 S. W. 234.

33. Liability exists for merchandise accepted with notice and without deception. Saunders v. Southern R. Co. [C. C. A.] 128 F. 15.

34. Liability as warehouseman is not greater than that as carrier. Mo., etc., R. Co. v. Meck [Tex. Civ. App.] 75 S. W. 317.

35. See 1 Curr. L. 494.

36. Saunders v. Southern R. Co. [C. C. A.] 128 F. 15. Passenger held bound by limitation printed on excursion ticket. Jacobs v. Central R. Co., 208 Pa. 535, 57 A. 982. Limitation of carrier's liability for loss of a passenger's baggage to 150 pounds at $1 a pound, unless special agreement be made, held reasonable. Id. See 1 Curr. L. 494.

37. Holly v. Southern R. Co. [Ga.] 47 S. E. 188.

38. Williams v. Central R. Co., 93 App. Div. 582, 88 N. Y. S. 434.

39. Limitation of liability for baggage to $100 held invalid where loss occurred on initial line. Galveston, etc., R. Co. v. Fales [Tex. Civ. App.] 77 S. W. 234.

40. Saunders v. Southern R. Co. [C. C. A.] 128 F. 15. Limitation in amount does not ap-

§ 35. *Damages.*[43]—The measure of damages is the value of baggage at destination and not at point of connection.[44] The value of wearing apparel and articles of daily use is not governed by market value.[45]

§ 36. *Remedies and procedure.*[46]—Where delivery in good condition to the first carrier is shown, it is presumed to continue while in his possession and liability is imposed on the succeeding carrier.[47] A derailment causing damage raises a presumption of negligence.[48]

CASE, ACTION ON.

Case lies for consequential injuries resulting indirectly from a wrongful act,[1] as for injuries resulting from negligence,[2] or for wrongful act committed by one's servant without his orders for which he as principal is responsible.[3]

Plaintiff must declare on a wrong and not on a promise.[4] A count in trespass cannot be joined in an action brought in case.[5] A release may be proved under the general issue, though made after issue joined.[6]

CAUSES OF ACTION AND DEFENSES.

This article deals only with abstract and fundamental principles. The specific applications of the rules governing the joinder and splitting of causes are pertinent to Pleading,[7] the joinder of parties to Parties,[8] and the consolidation and severance of trials to Trial.[9]

Relatively to the law of pleading, a cause of action is some particular right of the plaintiff against the defendant, together with some definite violation of that right,[10] and is for the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.[11] The "gist of the action" is the cause for which the

ply to loss by negligence unless so stated. Tewes v. North German Lloyd S. S. Co., 89 App. Div. 148, 85 N. Y. S. 994.

41. Assent is not shown when emigrant is given receipt containing limitation in language she does not understand. Engberman v. North German Lloyd S. S. Co., 84 N. Y. S. 201. Acceptance of special contract as receipt without knowledge of limitations does not limit. Valuation of baggage. Malone v. Metropolitan Exp. Co., 86 N. Y. S. 1039.

42. Where a theatrical advance agent is informed that a ticket purchased by him entitles free carriage of scenery, etc., and has no knowledge of conditions as to limitation of liability, such conditions cannot be imposed as a condition to carriage without a new consideration. Knowledge of a property man cannot be imputed to him. Question of assent held for jury. Saunders v. Southern R. Co. [C. C. A.] 128 F. 15. Evidence as to whether a notice limiting liability for loss of baggage had been conspicuously posted, held for the jury. Williams v. Central R. Co., 93 App. Div. 582, 88 N. Y. S. 434. Where plaintiff neither read the receipt nor had his attention called to it he is not bound. Strong v. Long Island R. Co., 86 N. Y. S. 911. In the absence of proof to the contrary, the presumption is that one who purchases a ticket reads it. Limitation of liability for baggage. Jacobs v. Central R. Co., 208 Pa. 535, 57 A. 982.

43. See article Damages, 1 Curr. L. 833.

44, 45. Galveston, etc., R. Co. v. Fales [Tex. Civ. App.] 77 S. W. 234.

46. See 1 Curr. L. 495.

47. Baggage. Evidence held not to overcome presumption. Strong v. Long Island R. Co., 86 N. Y. S. 911.

48. Instruction for loss of baggage held erroneous as making fact of wreck conclusive as to liability. Galveston, etc., R. Co. v. Fales [Tex. Civ. App.] 77 S. W. 234.

1. One deprived of his possession by acts tending to inspire one with apprehension of violence. His camp outfit destroyed. Eisele v. Oddie, 128 F. 941.

2. Case lies against the master of an assaulting servant when the master was merely negligent; trespass lies if he directed the assault. Smith v. Rhode Island Co. [R. I.] 57 A. 1056.

3. Smith v. Rhode Island Co. [R. I.] 57 A. 1056.

4. A declaration for "unskillfully and negligently" doing what was "undertaken" sounds in case and not assumpsit. Mullin v. Flanders, 73 Vt. 96, 50 A. 813.

5. Smith v. Rhode Island Co. [R. I.] 57 A. 1056.

6. Papke v. Hammond Co., 192 Ill. 631, 61 N. E. 910.

7. See 2 Curr. L. 1178.

8. See 2 Curr. L. 1092.

9. See 2 Curr. L. 1907.

10. City of Columbus v. Anglin [Ga.] 48 S. E. 318; Fogarty v. Southern Pac. Co., 123 F. 973.

11. Fogarty v. Southern Pac. Co., 123 F. 973; Eisele v. Oddie, 128 F. 941; Penoyer v. People, 106 Ill. App. 481.

action lies.[12] A legal right in plaintiff,[13] and a violation of that right[14] are essential. The omission of a duty does not constitute the foundation of an action unless it results in injury to one for whose protection the duty was imposed.[15] Abstract questions of law cannot be made the subject of litigation.[16]

To maintain an action for the use of another, there must be a legal right of action in the party bringing suit.[17]

The same legal right may be violated more than once, and each violation may give rise to a new and distinct cause of action.[18] A wrong, in a legal sense, is a violation of only one right,[19] and from a single wrong but one cause of action can arise.[20] All of a series of acts having in view the consummation of a single fraudulent purpose, being parts of one subject-matter, which is the primary subject of the action or an incidental part of a subject of controversy, may be brought into a single action for adjudication.[21] In some states, certain crimes give rise to two statutory actions, one the criminal action, the other a civil action for a penalty.[22] A person having a legal right needing judicial enforcement or judicial protection is entitled to be accorded a legal remedy.[23]

Causes of action are ex contractu[24] or ex delicto.[25] Whether a cause of action is one arising out of contract or by a tort becomes material in applying certain remedies.[26]

Defenses.[27]—One possessing a right may enforce it notwithstanding his motive,[28] but the court will refuse to hear collusive suits.[29] The question of collusion will not generally be determined on demurrer.[30] Prematurity in bringing the action is a defense.[31] That others are liable or culpable with defendant is no

12. Penoyer v. People, 105 Ill. App. 481.

13. Legal title to a promissory note is sufficient, though such owner has no beneficial interest. Manley v. Park [Kan.] 75 P. 557.

A private citizen cannot in a civil action try the issue as to whether or not a corporation is violating the law. MacGinniss v. Boston & M. Consol. C. & S. Min. Co. [Mont.] 75 P. 89. Private citizen cannot challenge validity of ordinance unless he shows some injury peculiar to himself. Unger v. Fanwood Tp., 59 N. J. Law, 548, 55 A. 42. Cannot enjoin public improvements without special injury being shown. Ray v. Colby [Neb.] 97 N. W. 591. See 1 Curr. L. 496, n. 30.

14. City of Columbus v. Anglin [Ga.] 48 S. E. 318.

15. Erie R. Co. v. McCormick [Ohio] 58 N. E. 571. Declaration must show such duty. Hortenstine v. Virginia-Carolina R. Co. [Va.] 47 S. E. 995.

16. Where, before trial in a suit to reform an instrument, the parties executed a contract embodying the provisions sought to be inserted, there is no occasion for the court to act. Daugherty v. Curtis [Iowa] 97 N. W. 67. A controversy is settled by a conveyance to one who effects a settlement pending appeal, agreeing that it shall not be affected by the appeal. Wedekind v. Bell, 26 Nev. 395, 69 P. 612. See 1 Curr. L. 496, n. 31.

17. State v. Bank of Quitman, 117 Ga. 849, 45 S. E. 236.

18. City of Columbus v. Anglin [Ga.] 48 S. E. 318. A single transaction causing one item of damage is a single cause of action. Otoe County v. Dorman [Neb.] 98 N. W. 1054.

19. The same act may violate any number of rights, but each such violation would constitute a different wrong. A single wrong may, however, be composed of numerous elements and shown by various facts. City of Columbus v. Anglin [Ga.] 48 S. E. 318.

20. City of Columbus v. Anglin [Ga.] 48 S. E. 318; Otoe County v. Dorman [Neb.] 98 N. W. 1064; Pakas v. Hollingshead, 42 Misc. 287, 85 N. Y. S. 550.

21. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

22. One is barred by limitations, though the other be commenced before. Com. v. Elkins, 25 Ky. L. R. 485, 75 S. W. 25.

23. Citizens' Bank v. Marr, 111 La. 501, 35 So. 780.

24. An employer failing to provide medical attendance for an employe as promised, the cause of action is for breach of contract. Galveston, H. & S. A. R. Co. v. Hennigan [Tex. Civ. App.] 76 S. W. 452.

25. Failure of railway ticket agent to correctly punch plaintiff's ticket gives rise to a cause of action ex contractu, while ejectment from train by reason of such wrong ticket gives rise to one in tort. Southern R. Co. v. Bunnell [Ala.] 35 So. 380.

26. For examples, see Assumpsit, 1 Curr. L. 235. Also to determine whether attachment will issue as on a claim "arising out of contract," see Attachment, 1 Curr. L. 239.

27. See 1 Curr. L. 496.

28. MacGinniss v. Boston & M. Consol. C. & S. Min. Co. [Mont.] 75 P. 89. See 1 Curr. L. 495, n. 38.

29. A collusive suit will be dismissed by the court suo motu. Robinson v. Lee, 122 F. 1010.

30. Mills v. Chicago, 127 F. 731. See 1 Curr. L. 497, n. 47.

31. Action brought for breach of lease be-

defense.[32] In an action for a joint tort, a separate defense may defeat a joint recovery.[33] In matter of substance, the distinction between legal and equitable defenses is preserved.[34] An agreement of warranty independent of a complete written agreement can only be availed of by way of counterclaim.[35]

CEMETERIES.

Public control.[36]—Cemeteries are subject to regulation or suppression by the exercise of the police power.[37]

Acquisition of land for cemetery purposes.[38]—Cemeteries are among the purposes for which land may be dedicated in the United States,[39] and no particular form or ceremony is necessary to such dedication.[40] The legislature may lawfully condemn land for a public burial ground, to be maintained by a public or private corporation or voluntary association;[41] but private use of land by a private corporation, though it may be in a sense a public convenience and necessity, is not strictly a public use justifying condemnation of land for the purpose.[42] The legislature may authorize one cemetery association to take land already owned by another association, providing the latter has condemned or appropriated the land for the purpose of preventing its use for the public purpose, and not to carry out the avowed purposes of its organization.[43] A provision in a grant to a municipality that the land is to be used forever as a public burial place will not be construed as a condition subsequent unless there is a provision for re-entry or reversion to the grantors or their heirs or representatives.[44] The city of Denver, Colo., acquired an absolute, alienable title to land, under a patent to its mayor in trust,

fore date of its taking effect. Neilsen v. Mayer, 85 N. Y. S. 1069. An action for fraud in the sale of property does not arise until the property is purchased. Hutchinson v. Young, 87 N. Y. S. 678. Damages subsequent to bringing the action cannot be recovered. Jones v. Kramer & Bros. Co., 133 N. C. 446, 45 S. E. 827. The commencement of an action is a sufficient demand for the amount of the claim. Hopkins v. International Lumber Co., 33 Wash. 181, 73 P. 1113. See 1 Curr. L. 497, n. 46.

32. City of Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388.

33. Fogarty v. Southern Pac. Co., 123 F. 973.

34. The defense of purchaser for a valuable consideration without notice is always equitable in its nature. Maxwell v. Foster [S. C.] 45 S. E. 927. One cannot base an equitable defense on a contract which he has failed to perform. Howard v. Hewitt, 139 Cal. 614, 73 P. 414.

35. Atwater v. Orford Copper Co., 85 N. Y. S. 426.

36. See 1 Curr. L. 497.

37. Ordinance prohibiting burials within city or county of San Francisco valid, and not in conflict with certain other statutes. Odd Fellows' Cemetery Ass'n v. San Francisco, 140 Cal. 226, 73 P. 987.

38. See 1 Curr. L. 497.

39. Wormley v. Wormley, 207 Ill. 411, 69 N. E. 865.

40. Express setting apart of land for such purpose, staking out land and permitting burials therein, and notorious use for 20 years, cited as examples of dedications. In case at bar, the cemetery was recognized as such over 50 years and owner and relatives had used it for burial purposes. Held a dedication. Wormley v. Wormley, 207 Ill. 411, 69 N. E. 865. A church which allowed members to bury their dead on its lot for twenty years, the church officers exercising general oversight and control, dedicated such part of its lot for burial purposes. Little v. Presbyterian Church [S. C.] 47 S. E. 974.

41. Use as public burial ground a public use. Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n [Conn.] 58 A. 467.

42. Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n [Conn.] 58 A. 467.

43. Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n [Conn.] 58 A. 467. 13 Sp. Laws Conn. p. 321 authorized plaintiff association to apply for condemnation of so much of the land owned by defendant association as the superior court should deem necessary, providing it was first found that defendant association was organized to prevent plaintiff's acquisition of the land, and not to carry out its declared purpose to use the land as a public cemetery. It was held that the special law did not violate the provisions of the declaration of rights prohibiting monopolies and gratuities or securing equality before the law; that the law required all the steps essential to due process of law; that the grantor of defendant association was not a necessary party to such condemnation proceedings; that the law did not provide a forfeiture of defendant's corporate franchise; and the law was valid. Id.

44. Intention must be clear that land was to be used literally in perpetuity for burial purposes only. Thornton v. Natchez [C. C. A.] 129 F. 84. Representatives barred by laches from maintaining action for recovery of lands granted for burial ground and converted into park. Id.

authorized by act of Congress, which provided that the land was to be held and used for a burial place.[45]

Under a law authorizing the board of health of a township to purchase land for cemetery purposes and hold it in trust for the township, the township is a proper party in a suit to enforce rights arising from the holding of such property.[46]

Rights of lot owners; trespass.[47]—The owner of a burial lot in a public cemetery, with exclusive right of burial therein, has no title to the soil, but only a mere easement or license,[48] but when a cemetery association or church sells particular lots in a cemetery, the purchaser becomes the owner of the soil,[49] and his right to its possession protects interments made by him from disturbance.[50] The public may confirm a parol grant by ordinance,[51] and thereafter cannot convey to another nor disturb the first grantor's possession. If it attempts to convey the lots to others, who have notice of the first grantee's possession, they, disturbing his possession, are mere trespassers.[52] Equity will enjoin the owner of land from defacing or meddling with graves on land dedicated to the public for burial purposes at the suit of any person having deceased relatives or friends buried therein.[53]

Acts of trespass in cemeteries is made a penal offense in Texas.[54]

Cemetery associations.[55]—An exemption of cemetery corporations from the general laws relating to liability for corporate debts will not relieve stockholders from liability for their unpaid stock, when there are no corporate assets.[56]

CENSUS AND STATISTICS.

Census.[57]—Courts will take judicial notice of the population of a county as shown by the United States census.[58] A trifling omission in a census in proceedings to incorporate a town will be disregarded,[59] and the use of initials for Christian names in the enumerating list will not vitiate such census.[60] An assessor's census of a town and a school census of the entire school district, including the town and some adjacent territory, is a sufficient compliance with an act requiring a school census before an election to issue waterworks bonds.[61]

Statistics.[62]—The title "An act to provide for the registration of marriages,

45. Wright v. Morgan, 191 U. S. 55, 24 S. Ct. 6.

46. Board may be joined by amendment on timely objection. Oneida Tp. v. Allen [Mich.] 100 N. W. 441. Land dedicated as an approach to a cemetery held to be subject to an easement in original owner and grantee. Id.

47. See 1 Curr. L. 498, 499, n. 71-75, 80, 85.

48. He cannot maintain ejectment. Stewart v. Garrett, 119 Ga. 386, 46 S. E. 427.

49, 50. Little v. Presbyterian Church [S. C.] 47 S. E. 974.

51. Where one, under parol grant, enters into possession of burial lots in the free part of a public cemetery, and the city afterwards quits his possession by ordinance, any disturbance of such possession by the city is unlawful. Wilkinson v. Strickland [Miss.] 35 So. 177.

52. Wilkinson v. Strickland [Miss.] 35 So. 177.

53. Wormley v. Wormley, 207 Ill. 411, 69 N. E. 865.

54. The word "wrongfully" must be included in instructions on the elements of the offense, and court should instruct on meaning of "inclosure" when requested, the statute applying to inclosed graveyards only. Bird v. State [Tex. Cr. App.] 79 S. W. 25.

55. See 1 Curr. L. 497.

56. A statute exempting proprietors of burying grounds from the laws providing for chancery proceedings against officers and property of corporations held not to apply to stockholders in a cemetery corporation. Little Co. v. Woodward Ave. Cemetery Ass'n [Mich.] 97 N. W. 682.

57. See 1 Curr. L. 499.

58. Whitley County Com'rs v. Garty, 161 Ind. 464, 68 N. E. 1012.

59. Failure to list the head of one family of three in a population of 1,131, substantial compliance, even though statute be deemed mandatory. Stembel v. Bell, 161 Ind. 323, 68 N. E. 589.

60. Stembel v. Bell, 161 Ind. 323, 68 N. E. 589.

61. Act of March 4, 1898, c. 35, § 1 (30 Stat. 252). Ter. v. Whitehall [Okl.] 76 P. 148.

62. See 1 Curr. L. 499.

births and deaths" is sufficient to warrant the inclusion in the act of provisions requiring physicians to keep a record of and report births or deaths at which they attend professionally.[63] Statutes requiring such records and reports are within the police power,[64] and are not unconstitutional because not providing for compensation to the physicians.[65] An indictment against a physician for failing to comply with such a statute must allege that he was a practicing physician during the period for which it is alleged he did not do his duty,[66] and that he attended professionally at births or deaths.[67] An act requiring a record of marriages and births to be kept and a report thereof to be made within ten days, on penalty of a fine of $100, is penal in nature and cannot be enlarged by judicial construction.[68] Mailing a birth notice is a sufficient compliance with a provision requiring report of births by physicians assisting therein professionally.[69] The superintendent of state prisons cannot be compelled by mandamus to return photographs and Bertillon measurements of a prisoner, though the conviction is subsequently reversed and he is acquitted.[70] By statute in Vermont, no public record of births, marriages or deaths, required by law to be kept, nor any certified copy thereof, is competent to prove any fact stated therein, except the fact of birth, marriage or death.[71]

CERTIORARI.[72]

§ 1. Nature, Occasion and Propriety of the Remedy (667). Ancillary Certiorari (670). Prerogative Writ (670).
§ 2. Right to Certiorari; Parties (670).
§ 3. Procedure for Writ; Writ, Service and Return (671). The Statutory Bond and Prepayment of Costs (672). The Writ (672). Notice of Writ to Parties in Original Cause (672). Service of Writ (673). The Return (673). Objections and Amendments (673). Quashal or Dismissal (673).
§ 4. Hearing and Questions Which May Be Raised or Settled (674).
§ 5. Judgment (675).
§ 6. Costs (676).
§ 7. Review of Certiorari (676).

§ 1. *Nature, occasion and propriety of the remedy.*[73]—From a common-law remedy to superintend proceedings assailed for defective jurisdiction, the remedy has been variously enlarged and restricted by statutes, and special forms of certiorari established in many of the states.[74] In some of the western Code states it is known as the writ of review.[75] It lies to remove to a superior court for review the record and proceedings[76] of an inferior court, officer, tribunal or board exercising judicial functions.[77] Its revisory nature is not destroyed by statutory enlargements of its scope to admit of trials of fact.[78]

63. Acts 1873-74, p. 13, c. 134. Com. v. McConnell, 25 Ky. L. R. 552, 76 S. W. 41.

64, 65, 66, 67. Com. v. McConnell, 25 Ky. L. R. 552, 76 S. W. 41.

68. New York City Charter, § 1239. Department of Health v. Owen, 42 Misc. 221, 85 N. Y. S. 397.

69. New York City Charter, §§ 1237, 1239. Department of Health v. Owen, 42 Misc. 221, 85 N. Y. S. 397.

70. In re Molineux, 41 Misc. 154, 83 N. Y. S. 943.

71. No. 44, Acts of 1902, p. 49, changing law of 74 Vt. 147, 52 Atl. 438, which held that cause of death could be shown by such records. The statute is constitutional, merely changing a rule of evidence. McKinstry v. Collins [Vt.] 56 A. 985.

72. Compare Appeal and Review, 3 Curr. L. 167.

73. See 1 Curr. L. 499.

74. See note to 40 Am. St. Rep. 29. Matters reviewable on certiorari and the cases there collected.

75. Its office is the same. McAnish v. Grant [Or.] 74 P. 396.

76. The writ will not bring up the evidence, but only the record, from an inspection of which jurisdiction and the correctness of the judgment are to be determined. McAnish v. Grant [Or.] 74 P. 396.

77. A civil service commission, created by a city charter, is such a tribunal whose action, judicial in character, will be reviewed on certiorari. Corbett v. Civil Service Comm., 33 Wash. 190, 73 P. 1116. An award by a board of revision of assessment, made in the exercise of a discretion vested in it, is not judicial. People v. Phillips, 88 App. Div. 560, 85 N. Y. S. 200. Action of board of supervisors of a county in the matter of incorporation of a city is legislative and ministerial. Borchard v. Ventura County Sup'rs [Cal.] 77 P. 708. Except where a writ of certiorari is used in an ancillary proceeding, it has no legitimate use except to try the validity, on jurisdictional grounds, of some judicial or quasi judicial determi-

It is not essential, however, that the proceedings should be judicial in the sense that the word is used when applied to a court of justice; they may be only quasi-judicial,[79] such as the removal of public officers or servants,[80] the issuance of liquor licenses,[81] the action of tax commissioners in fixing an assessment,[82] or the passage of a resolution at a township meeting, fixing the sum of money to be raised for lighting purposes.[83]

In order that this remedy may avail, three requisites are indispensable,[84] namely, the action complained of must have been in excess of or without jurisdiction,[85] there must be no right of appeal,[86] adequate to afford relief,[87] nor any

nation. In Wisconsin, it is now considered that where there is jurisdiction to hear proceedings upon habeas corpus, error in deciding the questions involved is judicial, and not jurisdictional, error, and certiorari will not lie. State v. Whitcher, 117 Wis. 668, 94 N. W. 787. The action of the state auditor, ex officio commissioner of lands, in refusing to grant an application for a mineral lease, is ministerial. State v. Iverson [Minn.] 100 N. W. 91. See 1 Curr. L. 499, n. 94.

NOTE. Certiorari to proceedings of a judicial nature forming the basis of executive action. In People v. Hoffman, 166 N. Y. 462, 64 L. R. A. 597, it is said that there is grave doubt whether the courts could compel the governor to make return to a writ of certiorari [citing People v. Morton, 166 N. Y. 136, 41 L. R. A. 231]. Such a writ was directed against the governor in People v. Hill, 126 N. Y. 497, but the question was not raised. In People v. Hoffman, supra, the writ though issued to the governor was not served, but it was served on the adjutant general, as custodian of the record of a military tribunal which the writ sought to review; and it was held, sustaining the writ, that the review was not a review of executive action, but of the judicial proceedings resulting in findings upon which the governor removed a militia officer from his command. The court said, "While we cannot touch the person of the governor, we can pass upon the effect of his acts and decide whether they are valid or invalid." The military tribunal having acted without jurisdiction, the removal based upon its findings was a nullity. People v. Hoffman, supra.

78. The special statutory certiorari of New York does not cease to be a writ of review by reason of the enlarged scope in the proceedings, which may be had thereunder. It possesses all of the requisites of the common law and code writs, and in addition thereto, authorizes a rehearing on the question at issue and the introduction of additional proofs bearing thereon. People v. Feitner, 92 App. Div. 518, 87 N. Y. S. 304.

79. The perplexity of determining whether or not certiorari will lie in any given case arises out of the difficulty in distinguishing between legislative, executive or ministerial acts, and those of a judicial nature in which an officer or special tribunal is called upon to act in a judicial or quasi-judicial capacity. Minn. Sugar Co. v. Iverson [Minn.] 97 N. W. 454. If the determination of the tribunal or the officer called upon to act affects the rights or property of a citizen, analogous to the manner in which they are affected by proceedings or decisions of courts acting judicially, the proceedings in question are of a judicial nature, and the writ will lie. Id. If they do not so affect rights or property, the determination in question must be considered as ministerial, legislative or administrative, as the case may be and so treated by the courts. Id.

80. Held judicial: Removal of police captain by police commissioner. People v. Greene, 89 App. Div. 296, 85 N. Y. S. 866. Removal of members of police force by mayor and aldermen. Gill v. Brunswick, 118 Ga. 85, 44 S. E. 830. Removal without hearing of deputy tax commissioner who has served the time required by law in the volunteer fire department. People v. Wells, 86 App. Div. 270, 83 N. Y. S. 789.

Removal of a fire commissioner by the mayor of a municipality **held not judicial.** In re Carter, 141 Cal. 316, 74 P. 997.

Note: The remedy generally lies to review a removal when it may be made only for cause upon an inquiry after notice and a hearing which cause did not exist or which inquiry was not made in due process. But when the power of removal is at pleasure or is purely executive, certiorari will not lie. See note 40 Am. St. Rep. 45, and cases there cited.

81. Certiorari is the proper method for determining the validity of dramshop licenses, when the facts necessary to such a determination appear of record. Cooper v. Hunt [Mo. App.] 77 S. W. 483.

82. People v. Barker, 84 App. Div. 469, 83 N. Y. S. 33. In New York, one aggrieved by the failure to tax persons liable to taxation has a remedy by certiorari [Laws 1897, p. 324, c. 378, § 906, as amended by Laws 1901, p. 386, c. 466]. City of New York v. Tucker, 91 App. Div. 214, 86 N. Y. S. 509. Under the New York statute that if it appear on the return to a writ of certiorari to review an assessment of taxes that the assessment complained of is illegal or erroneous, the court may order such assessment stricken from the roll or corrected in whole or in part, such order is a final order, and review of a reassessment must be by new proceedings [Laws 1896, p. 883]. People v. Wells, 87 App. Div. 284, 84 N. Y. S. 277.

83. Brown v. Street Lighting Dist. No. 1, 69 N. J. Law, 485, 55 A. 1080.

84. State v. Dist. Court, 28 Mont. 445, 72 P. 867; State v. Dist. Court [Mont.] 74 P. 200; City Council of Cripple Creek v. Hanley [Colo. App.] 75 P. 600.

85. Allen v. Printup, 118 Ga. 630, 45 S. E. 911; Inhabitants of South Berwick v. York County Com'rs, 98 Me. 108, 56 A. 623; Candell v. Southern R. Co., 119 Ga. 21, 45 S. E. 712. An order of a judge made in a recount under an election law cannot be re-

other plain, speedy and adequate remedy.[88] It is also essential that a final order or determination shall have been made,[89] or some action taken.[90] Want of other remedy and judicial finality may in emergencies and exceptional cases be nonessentials.[91] The writ will not reach mere error, either of fact or of law, in the

viewed upon certiorari, unless in the proceedings the justice has exceeded his jurisdiction. Kehoe v. Stagmeier [N. J. Law] 66 A. 262.

Illustrations: In forcible entry and detainer. Johnson v. Booge [N. J. Law] 56 A. 238. On discharge of prisoner by circuit court commissioner on habeas corpus. Longstaff v. State [Wis.] 97 N. W. 900. On appointment of receiver for a corporation **pendente lite.** Gibbs v. Morgan [Idaho] 72 P. 733. Failure of assessors to make "a careful, particular and thorough comparison" of tax duplicates as required by statute is jurisdictional. Borough of Woodstown v. Board of Assessors [N. J. Law] 56 A. 124. Allowance of a claim against an estate, barred by the statute of limitations, is in excess of jurisdiction. Farrow v. Nevin [Or.] 75 P. 711. Where a motion is made which the trial court has power to entertain, and the party the right to present, the action of the court on the motion cannot be reviewed. Motion to set aside a judgment in a divorce case. Grannis v. Super. Court [Cal.] 77 P. 647.

86. Kent v. Crenshaw [Iowa] 94 N. W. 1131; State v. Leche [La.] 36 So. 868; State v. Denney, 34 Wash. 56, 74 P. 1021. An order granting an amendment to a statement upon motion for a new trial is not an appealable order, and hence certiorari lies to review such an order. Fountain Water Co. v. Super. Court, 139 Cal. 648, 73 P. 590. In New Jersey, certiorari is the only remedy for the review of proceedings in a district court in forcible entry and detainer and tenancy cases. Act of 1902, giving appeal, does not apply. Johnson v. Booge [N. J. Law] 56 A. 238. Certiorari and not appeal is the proper method of obtaining a review in the supreme court of the United States of a decision of the circuit court of appeals, made in the exercise of its jurisdiction to revise an order under the Bankruptcy Acts of 1898, § 24b. Such revising order is not appealable as a decision allowing or rejecting a claim under § 25b. Holden v. Stratten, 191 U. S. 115, 24 S. Ct. 45. See 1 Curr. L. 500, n. 2.

87. The proper method to review a proceeding adjudging a party guilty of criminal contempt is not by appeal, but by certiorari. In re Teitelbaum, 84 App. Div. 351, 82 N. Y. S. 887. Certiorari is the proper remedy to vacate a judgment of a United States commissioner, whether he had either lost jurisdiction of the subject-matter or of the defendant. If appeal should be taken in the former case, it would be dismissed, if in the latter it would be an appearance. Franklin v. Bottoms [Ind. T.] 76 S. W. 287.

NOTE. Review of contempt proceedings by certiorari: The propriety of certiorari in contempt cases and the matters reviewable thereby are discussed in the cases cited in notes 22 Am. St. R. 420, 422, 40 Am. St. R. 36.

88. Hegenbaumer v. Heckenkamp, 202 Ill. 621, 67 N. E. 389. Contested election. Kehoe v. Stagmeier [N. J. Law] 56 A. 252. Auditing claims. People v. Cross, 87 App. Div. 56, 83 N. Y. S. 1083. The delays and annoyances incident to an appeal do not affect the adequacy thereof. State v. Denney, 34 Wash. 56, 74 P. 1021; State v. Superior Court, 34 Wash. 248, 75 P. 809. For the trial of controversies between rival claimants to office, quo warranto and not certiorari is the proper remedy. MacFall v. Dover [N. J. Law] 57 A. 136; Schwarz v. Dover [N. J. Law] 57 A. 394. Where the party whose title is assailed is already inducted into office, certiorari can in no event lie, quo warranto is only remedy; but where he has not yet gained possession, there is conflict as to appropriateness of certiorari. MacFall v. Dover [N. J. Law] 57 A. 136.

Primary remedies not exhausted: Not every order which is not appealable is the subject of the writ of review. No emergency being shown why the questions presented for review may not as effectively be determined after final judgment, the writ will not be granted. State v. Super. Court, 34 Wash. 248, 75 P. 809. It is not the proper remedy to review an order of the county court granting administrators the right to use mortgaged stock, where the threatened injury is from acts of the administrators and not from the order. Stafford & Co. v. Dunovant's Estate [Tex. Civ. App.] 81 S. W. 65.

NOTE. The propriety of reviewing habeas corpus and other legal remedies which are sometimes regarded as quasi criminal and sometimes as civil in their nature, may depend on which character is given to the proceeding in the particular state: Thus, habeas corpus to determine the custody of an infant has been regarded as a civil suit, reviewable by appeal, like other civil suits, although in the case of a habeas corpus to secure discharge from illegal imprisonment, there might be a doubt as to whether the ordinary remedies were available. People v. Court of Appeals [Colo.] 61 L. R. A. 105.

89. Singer Mfg. Co. v. McNeal Paint & Glass Co., 117 Ga. 1005, 44 S. E. 861. Mere arrest for violation of an ordinance is not sufficient; certiorari will not lie until after conviction. Unger v. Inhabitants of Fanwood Tp., 69 N. J. Law, 548, 55 A. 42. See, also, Cent. R. Co. v. Elizabeth [N. J. Law] 57 A. 404. A fine levied by a town board of health in an ex parte proceeding in relator's absence, for failure to comply with an order directing him to repair a sewer in front of his premises which he had destroyed, is not conclusive upon him. People v. Board of Health, 83 App. Div. 671, 82 N. Y. S. 21. See 1 Curr. L. 499, n. 95.

90. Not the proper remedy to restrain the threatened enforcement of an ordinance. Bill Posting Sign Co. v. Atlantic City [N. J. Law] 58 A. 342.

91. **Interlocutory orders** may be annulled on certiorari for the reason that the injury which the complaining party may suffer will have been done long before review can be had upon appeal from final judgment. State v. Dist. Court, 28 Mont. 445, 72 P. 867; State v. Superior Court, 32 Wash. 693, 73 P. 779.

exercise of a rightful jurisdiction,[92] or where the writ can accomplish nothing.[93] In New York, a refusal to exercise jurisdiction may be thus reviewed.[94]

Ancillary certiorari.[95]—Sometimes the writ issues as ancillary to another proceeding, as habeas corpus.[96] Certiorari issues in aid of an appeal only when diminution of the record is suggested.[97] The circuit court of appeals has power to issue writs of certiorari only in aid of its appellate jurisdiction, and cannot issue such a writ to review an order of a circuit court which is not appealable.[98]

A prerogative writ[99] will issue from a court having a general superintendence and control over inferior jurisdictions newly created and not otherwise reviewable.[1] In New Jersey, the supreme court is, excepting one instance, the sole depositary of the prerogative writ.[2]

§ 2. *Right to certiorari; parties.*[3]—Review by certiorari is a matter of grace resting in the discretion of the court allowing the writ.[4]

So too if the **exigency is of such an extreme nature** as obviously to justify and demand the interposition of the extraordinary superintending power of the court of last resort, certiorari will issue. Commitment to a home for feeble minded is not such an exigency. In re Mielke [Wis.] 98 N. W. 245.

92. McAnish v. Grant [Or.] 74 P. 396; Farrow v. Nevin [Or.] 75 P. 711; People v. Court of Appeals [Colo.] 75 P. 921; People v. Court of Appeals [Colo. App.] 75 P. 407. Question of fact involved, no appeal to a jury having been entered. Singer Mfg. Co. v. Falls [Ga.] 45 S. E. 723.

NOTE. Certiorari will not review the decision of a board as to who is the lowest and best bidder on a public contract, if there is any rational basis of fact to support the determination reached in making the award. If there is such a basis, the evidence will not be weighed in order to review the decision reached. McGovern v. Board of Public Works, 57 N. J. L. 580; Sheffbauer v. Karney, 57 N. J. L. 588, cited in note 50 Am. St. R. 495.

93. As where a claim has been audited and allowed and the record thereof has passed on in its regular order to another body. People v. Cross, 87 App. Div. 55, 83 N. Y. S. 1083. See 1 Curr. L. 500, n. 99.

94. Where commissioners appointed to assess damages caused by changes of grade of streets dismissed claim of a landowner for damages on ground that they had no jurisdiction, the remedy of the claimant was not by application to them to reopen the case, but certiorari to review the decision. People v. Leonard, 87 App. Div. 259, 84 N. Y. S. 341.

95. See 1 Curr. L. 501.

96. As distinguished from habeas corpus, certiorari reaches and requires the production of a judicial or quasi-judicial record, but never the body of any person, while habeas corpus reaches the latter, but not the former. When the latter writ is used for its general purpose, the former may, in aid of it, be used for its particular purpose. State v. Whitcher, 117 Wis. 668, 94 N. W. 787. In New York, the writ of certiorari as a writ of review in criminal cases has been abolished. In case of a conviction, it may issue to inquire into the cause of detention, in which event its use is designed to reach those cases only where the production of the body is unnecessary to the decision of the question presented. People v. Van De Carr, 86 App. Div. 9, 83 N. Y. S. 245.

97. West v. Richmond R. & Elec. Co. [Va.] 46 S. E. 330. Certiorari does not lie from the court of appeals to correct the record of cause on appeal claimed to have been altered since it was heard in the circuit. Bowman v. Ray [Ky.] 80 S. W. 200.

98. U. S. v. Circuit Court [C. C. A.] 126 F. 169.

99. See 1 Curr. L. 501.

1. When a new jurisdiction is created by a statute which gives no remedy for the revision of its exercise, and the court or officer exercising it proceeds in a summary mode, or in a course different from the common law. Home Sav. & Trust Co. v. Dist. Court, 121 Iowa, 1, 95 N. W. 522.

NOTE. For a court to radically misconceive a well settled law on a given subject, or to ignore it, is not an excess of jurisdiction which the court of last resort will correct by means of its superintending power to issue certiorari. A "general superintending control" of inferior courts does not include such power, especially when the highest court is declared to be one of appellate jurisdiction only. People v. Court of Appeals [Colo.] 51 L. R. A. 105, following People v. Richmond, 16 Colo. 285; Ingersoll v. Minge, 50 La. Ann. 748. The grounds on which prerogative jurisdiction will be exercised over a court of intermediate appeal are enumerated as follows: First, when the intermediate court is without jurisdiction to review the judgment in question. Second, when in a clear case it refuses to be guided or controlled by the law as laid down in prior decisions of the court of last resort. Departure from the settled rules of law is not the same as repudiation of a prior decision of the court of last resort. People v. Court of Appeals, supra.

2. Art. 10, § 1, Const. with the exception noted in Dufford v. Decue, 31 N. J. Law, 302. City of East Orange v. Hussey [N. J. Err. & App.] 57 A. 1086.

3. See 1 Curr. L. 501.

4. P. L. 1902, p. 565 gives appeal as a right, certiorari remaining concurrent. Marcus v. Graver [N. J. Law] 58 A. 564. It was held improper to allow it to relieve an individual whose injury was trifling, the rights of the general public being adverse. The proceeding attacked was one to fix water rates. It was fair and the irregularity was simply that it did not originate with the

To entitle one to a writ of review, he must have been a party to the suit or matter in controversy,[5] or show some interest[6] or injury peculiar to himself.[7] He may lose the right through tardiness in seeking the remedy.[8]

The taxpayers in townships of a disorganized county are proper parties and may join.[9]

Judgment below may not be amended at the request of respondent in certiorari who does not otherwise complain.[10]

So far as certiorari reviewing a municipal ordinance is a proceeding in rem, the governmental authorities of the town, being custodians of the record, are the only necessary parties.[11] The contractor, to pay whom a board of supervisors ordered the levy of a tax, is not a necessary party in proceeding to test the legality of such order.[12] Any person or body, however, beneficially interested in the determination to be reviewed, may, in the discretion of the court, be admitted to defend.[13] Persons may be brought in whose interests have attached pendente lite.[14]

§ 3. *Procedure for writ; writ, service and return.—Application*[15] must be timely,[16] contain proper allegations,[17] specifically assign errors of law,[18] and affirmatively show necessary jurisdictional facts.[19] Where the remedy by certiorari is

proper body, but this was remediable. State v. Gosnell, 116 Wis. 606, 93 N. W. 542, 61 L. R. A. 33.

5. Wash. County Abstract Co. v. Stewart [Idaho] 74 P. 955. See 1 Curr. L. 501, n. 20.

6. One suing as a public officer cannot maintain certiorari where his only interest is that of an individual taxpayer. People v. Cross, 87 App. Div. 56, 83 N. Y. S. 1083. A prosecutor's lack of interest in the controversy is not affirmatively shown by the mere fact that the return brings up an ordinance instead of a conviction under it. Cent. R. Co. v. Elizabeth [N. J. Law] 57 A. 404. On final hearing, it will be assumed that the prosecutor in certiorari has sufficient interest to give him a standing in court unless his interest has been previously challenged. Lantry v. Sage, 69 N. J. Law, 560, 55 A. 34. See 1 Curr. L. 501, n. 21.

7. Unger v. Inhabitants of Fanwood Tp., 69 N. J. Law, 548, 55 A. 42.

8. Five years' delay. Hopewell v. Board of Trustees, 69 N. J. Law, 597, 55 A. 653. Delay of two months in sending papers to judge for settlement of case. Stroud v. Western Union Tel. Co., 133 N. C. 253, 45 S. E. 592. See 1 Curr. L. 501, n. 24.

9. Fitch v. Board of Auditors of Claims [Mich.] 94 N. W. 952.

10. Ware v. Couvillion, 112 La. 43, 36 So. 220.

11. Schwarz v. Dover [N. J. Law] 57 A. 394; MacFall v. Dover [N. J. Law] 57 A. 136.

12. Tod v. Crisman, 123 Iowa, 693, 99 N. W. 686.

13. People v. Leonard, 89 App. Div. 643, 82 N. Y. S. 1110. Where, in a certiorari to a state board of tax commissioners, a city or local board of assessors is to be affected, such city or board is entitled to be made a party. People v. Priest, 41 Misc. 545, 85 N. Y. S. 235. See 1 Curr. L. 502, n. 30.

14. Judgment may be deferred to bring in additional parties. Allen v. Board, etc., of Hunterdon County [N. J. Law] 58 A. 346.

15. See 1 Curr. L. 502, n. 31.

16. Five years' delay too long. Hopewell v. Trustees of Flemington, 69 N. J. Law, 597, 55 A. 653. Two months' delay in sending papers. Stroud v. Western Union Tel. Co., 133 N. C. 253, 45 S. E. 592. In New York, the time to apply for a writ of certiorari to review the determination of commissioners laying out a highway does not begin to run until the order laying out the highway is recorded in the town clerk's office. People v. Vandewater, 83 App. Div. 60, 82 N. Y. S. 626.

17. There must be substantial compliance with statutory provisions, if any. Farrow v. Nevin [Or.] 75 P. 711. A petition for certiorari to review a tax assessment is only required to contain conclusions of fact without supporting evidence. In re Cathedral of Incarnation in Diocese of Long Island, 91 App. Div. 543, 86 N. Y. S. 900. A petition which sets out part of the evidence given on the trial, but does not negative every phase of the evidence and facts which would justify the judgment, is insufficient. Gulf, C. & S. F. R. Co. v. Kinney [Tex. Civ. App.] 77 S. W. 18.

18. Inhabitants of South Berwick v. County Com'rs, 98 Me. 108, 56 A. 623; Savannah, F. & W. R. Co. v. Gill, 118 Ga. 737, 45 S. E. 623. A petition for certiorari which does not plainly and distinctly set forth an assignment of error on any ruling, decision or judgment of an inferior judicatory is void; and being void, no renewal thereof can be had within six months. Citizens' Banking Co. v. Paris, 119 Ga. 517, 46 S. E. 638. Where a petition to review a judgment of a justice of the peace does not aver that the justice had no jurisdiction, it will be presumed that he had. Hegenbaumer v. Heckenkamp, 202 Ill. 621, 67 N. E. 389. An assignment of error in a petition for the writ that a certain named statute is unconstitutional is too indefinite to raise any question for determination, and it cannot be cured by averments in the bill of exceptions. Newkirk v. Southern R. Co. [Ga.] 48 S. E. 426. See 1 Curr. L. 502, n. 36.

19. Or be properly supplied by the answer. Inhabitants of South Berwick v. County Com'rs, 98 Me. 108, 56 A. 623. Presumption favors it. Id. See 1 Curr. L. 502, n. 34.

independent of the one by appeal, it is not necessary that the application for the writ show cause why the applicant did not appeal.[20] While exceptions to the judgments in two separate and distinct cases cannot be embraced in one petition for certiorari, it is proper to embody in one such petition exceptions to every ruling or judgment rendered during the progress of a single case, adverse to the party against whom the final judgment is rendered.[21] A petition is not defective because not entitled in a particular court as a complaint in an ordinary action,[22] or because of the incorrect statement of the name of the court.[23] Verification may be by the authorized attorney of the applicant.[24]

Where an application for a writ of review is not sufficiently specific, defendant's remedy is by motion to make it more definite and certain, and not by demurrer.[25]

In Louisiana, a rule of the supreme court requires that an applicant shall file an application for a rehearing in the court of appeal, which must be acted upon finally, before the applicant will be entitled to apply for certiorari or review.[26]

The statutory bond[27] *and prepayment of costs*[28] are prerequisite to the issuance of the writ,[29] and with the certificate for the payment of costs should be filed with the petition.[30] Prepayment of fees is necessary if demanded.[31] The applicant for the writ is required to pay only the costs accrued on the trial resulting in the judgment to which he excepts.[32]

The writ[33] is sufficient if issued by order of the court, though attested and sealed by the clerk.[34] Failure to issue the formal writ may be waived.[35] It must run to the court of whose proceedings review is sought,[36] and where it runs to a board or body other than a court having no official name, it must be directed to the members thereof by name.[37]

Notice of writ to parties in original cause[38] must be within the time prescribed by statute or rule of court.[39] Where public interests are attacked, notice of the writ must be served on the proper officer representing such public interests.[40]

20. Parlin & Orendorff Co. v. Keel [Tex. Civ. App.] 78 S. W. 1082.

21. Odum v. Macon & B. R. Co., 118 Ga. 792, 45 S. E. 619.

22. Farrow v. Nevin [Or.] 75 P. 711.

23. Adams v. Kelly [Or.] 74 P. 399.

24. People v. Leonard, 83 App. Div. 643, 82 N. Y. S. 1110. See 1 Curr. L. 502, n. 32.

25. Corbett v. Civil Service Comm., 33 Wash. 190, 73 P. 1116.

26. If the ruling of the court of appeals does not show that the rehearing was refused because the applicant had failed to insist upon his motion for a rehearing, the supreme court will not assume that such is the fact. Harrison v. Ottman, 111 La. 730, 35 So. 844.

27. See 1 Curr. L. 504.

28. See 1 Curr. L. 809.

29. Where a partnership, alleged to be composed of two named persons, was sued, and only one of them was served, who pleaded that he was not a member of the partnership, and a verdict was found for the defendant, a certiorari bond given by the plaintiff should have been made payable to the individual served. John M. Miller Co. v. Anderson, 118 Ga. 432, 45 S. E. 365.

30. Writ issued before bond filed is void. Cole v. Thurman, 119 Ga. 55, 45 S. E. 718.

31. I X L Lime Co. v. Superior Court [Cal.] 76 P. 973.

32. Where there had been successive trials and both parties had paid costs, one in justice court and the other on appeal. Johns v. Lewis Drug Co. [Ga.] 48 S. E. 127.

33. See 1 Curr. L. 503.

Effect of writ, see 1 Curr. L. 504. Compare Transfer of jurisdiction on appeal, etc., 3 Curr. L. 200.

34. Corbett v. Civil Service Comm., 33 Wash. 190, 73 P. 1116.

35. In an action brought in the circuit court to quash orders of the county court calling in warrants, copies of all records of county court were admitted in evidence and no objection was made for the failure to issue the writ. Nevada County v. Williams [Ark.] 81 S. W. 384.

In Georgia, the clerk must issue the writ and enter the same on his docket, but need not hand it to the sheriff for service [Civ. Code, §§ 5547, 4643]. Tucker v. Graysville [Ga.] 47 S. E. 523.

36. Relator could test the validity of the judgment of the court of appeal by certiorari directed to the court of appeal, not by certiorari to the district court. State v. Foster, 111 La. 241, 35 So. 536.

37. People v. Leonard, 83 App. Div. 643, 82 N. Y. S. 1110. See 1 Curr. L. 503, n. 47.

38. See 1 Curr. L. 503.

39. Failure to give written notice within the time prescribed cannot be excused on the ground of unavoidable cause when it appears that counsel took no steps towards serving notice for three months after writ was issued. Southern R. Co. v. Carr, 118

[To be concluded.]

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CERTIORARI—Cont'd.

Service of writ.[41]—In Georgia, the plaintiff must have the writ served upon the officer whose judgment is sought to be reviewed.[42] If the clerk at the request of the petitioner undertakes to perform any act in connection with the service of the writ, he does so as the agent of the petitioner.[43]

The return,[44] in order to supply jurisdictional matter, must not only be under oath, but should set out facts conferring jurisdiction which were actually adjudicated, but by inadvertence omitted from the record.[45] When made by a board or body composed of two or more persons, it should be in the name of the board or body, and be executed by a majority of the members thereof.[46] Proper practice requires that the lower court should be called on to certify the facts found. If it is unable to certify the facts, depositions may be taken to determine what facts were found.[47] Where the petition attacks the judgment on the ground that it is contrary to evidence, the record must state the facts on which the judgment was based.[48] If the return is false in fact, the remedy is in an action for false return; if insufficient in form, by compelling a further and more specific return.[49] The special statutory certiorari of New York does not require the comptroller to return the grounds of his refusal to revise or readjust the account for taxes.[50] Payment of the fees for preparing and certifying the record is a condition precedent to the right to have it sent up.[51]

Objections and amendments.[52]—Findings of fact not objected to in the trial court will be accepted by the reviewing court as conclusive.[53]

Quashal or dismissal.[54]—Mere irregularities in procedure do not necessitate a dismissal,[55] but such as prevent a transfer of the cause are fatal.[56] The writ must be prosecuted with reasonable diligence.[57] The failure of the trial judge

Ga. 355, 45 S. E. 409; Southern R. Co. v. Hornsby, 118 Ga. 358, 45 S. E. 410.

40. Tippett v. McGrath [N. J. Law] 56 A. 134. County commissioners who as a court pass judgment in a road tax proceeding are not the original parties who must be notified. Either the state's attorney or the road overseer must be notified. Notice to the members of the court which rendered the judgment complained of is not sufficient. Sheppard v. Walker, 118 Ga. 47, 44 S. E. 801.

41. See 1 Curr. L. 503, n. 49-51.

42. Civ. Code 1895, § 4644. Tucker v. Graysville [Ga.] 47 S. E. 523.

43. Not as agent of the law. Civ. Code 1895, § 5125. Tucker v. Graysville [Ga.] 47 S. E. 523.

44. See 1 Curr. L. 503.

NOTE. What the record is, and what is extrinsic to it, and whether the evidence is a part of the record, depends on and varies with the character of the original tribunal. If the original court be one of record, all the matters essential to a memorial of the proceedings and such as have been specially made a part of the record may be considered and no others. See 3 Curr. L. 206, Appeal and Review, § 9. The contents of the record of inferior courts or those of summary jurisdiction and the mode of making up the same for return to a writ of certiorari is pointed out in Farmington, etc., Co. v. County Com'rs, 112 Mass. 206.

45. Inhabitants of South Berwick v. County Com'rs, 98 Me. 108, 56 A. 623.

46. A return by a minority cannot be considered. People v. Eno, 176 N. Y. 513, 68 N. E. 868.

47. Coles & Sons Co. v. Blythe, 69 N. J. Law, 666, 55 A. 816.

48. Central of Georgia R. Co. v. Potter [Ga.] 47 S. E. 924.

49. People v. Eno, 176 N. Y. 513, 68 N. E. 868.

In Georgia, if the answer is not satisfactory, the law (Code 1895, § 4647) provides a method by which to test its sufficiency and correct any errors. Central of Georgia R. Co. v. Potter [Ga.] 47 S. E. 924.

50. People v. Miller, 92 App. Div. 116, 87 N. Y. S. 341.

51. Code Civ. Proc. §§ 1070, 1071. St. 1895, c. 207, pp. 267, 268. I X L Lime Co. v. Superior Court for Santa Cruz County [Cal.] 76 P. 973.

52. See 1 Curr. L. 503.

53. Corbett v. Civil Service Comm., 33 Wash. 190, 73 P. 1116.

54. See 1 Curr. L. 504.

55. While the orlginal papers in a case tried in justice court and the originals of the documentary evidence submitted upon the trial should not be attached to a petition for certiorari, the fact that they were so attached is not cause for dismissal. Brannon v. Dunahoo, 118 Ga. 225, 44 S. E. 991.

56. A writ, void because issued before the applicant has given the bond required by the statute, must be dismissed, it not being competent to amend the bond. Miller Co. v. Anderson, 118 Ga. 432, 45 S. E. 365.

57. Where the proceeding was prosecuted in good faith six months from date of issue to return, held not ground for dismissal. Warren v. Superior Court of San Francisco [Cal.] 77 P. 910. Where, through mistake of

to file a proper answer is not sufficient reason to dismiss the certiorari,[58] but it is proper where no move is made to correct an unresponsive return.[59] The objection that the officer allowing the writ had no authority so to do can be raised only by motion to dismiss and not by the return.[60] Where the impropriety of certiorari was decided after the return, the cause was allowed to stand as on appeal.[61]

§ 4. *Hearing and questions which may be raised or settled.*[62]—Ordinarily, the questions presented by this writ are only such as go to the jurisdiction of the inferior tribunal, or to the legality of its action;[63] but where there is no other remedy for reviewing the action of the inferior tribunal, it is frequently provided by statute that the court may investigate and decide the questions involved on their merits, even to the extent of considering the facts.[64] Ordinarily, however,

the clerk, the writ is not served within the time required by law and the officer fails to answer, the writ must be dismissed. Tucker v. Graysville [Ga.] 47 S. E. 523.

58. Not filed on first day of the term, but during such term and before motion to dismiss was filed. Sutton v. State [Ga.] 48 S. E. 342.

59. Tyner v. Leake, 117 Ga. 990, 44 S. E. 812.

60. Tweddle v. Judge of Superior Court of Grand Rapids [Mich.] 96 N. W. 22.

61. A case in a circuit court on a writ of certiorari to a judgment of a justice of the peace awarded before the decision of Richmond v. Henderson, 48 W. Va. 389, 37 S. E. 653, and within the requisite period of time, will upon request be treated as being in said court on appeal. Schaffer v. McJunkin [W. Va.] 46 S. E. 153.

62. See 1 Curr. L. 504.

63. The court, on certiorari to review the action of a city council in an election contest for the office of alderman, cannot consider whether the evidence before the council justified its action, but is confined to the sole question of jurisdiction. City Council of Cripple Creek v. Hanley [Colo. App.] 75 P. 600. Where no irregularity is disclosed, the writ should be dismissed without considering any other question. Appeal of Plains Tp., 206 Pa. 556, 56 A. 60. In Pennsylvania, the proceedings being entirely statutory and without appeal, the findings of facts or the merits of the case cannot be reviewed; but under the general supervisory powers of the court it is entitled on certiorari to inspect the whole record to ascertain whether the court below exceeded its jurisdiction or its proper legal discretion. Independence Party Nomination, 208 Pa. 108, 57 A. 344.

NOTE. Errors which are reviewable in certiorari under the varying scope which that remedy has in different states. Where the common law function of a certiorari remains unchanged, it will of course reach only jurisdictional and not judicial errors. See cases collected in exhaustive note, 40 Am. St. R. 29, also Territory v. Dunbar, 1 Ariz. 510; State v. LaBlanc, 42 La. Ann. 1190; State v. Judge, 42 La. Ann. 1089; Barber v. Harris, 6 Mackey, 586; Brown v. Robertson, 123 Ill. 631; Sayers v. Super. Ct., 84 Cal. 642. Cited in Note 2, 23 Am. St. R. 108. In many states the writ has been broadened so that it is analogous to a writ of error. It will reach errors of law, and for this purpose the evidence may be examined in order to ascertain whether it was legally sufficient to support the findings of an essential fact. McAlilley v. Wharton, 75 Ala. 491; Central P. R. Co. v. Placer Co., 43 Cal. 365; Jackson v. People, 9 Mich. 111, 77 Am. Dec. 491; Rayner v. State, 52 Md. 368; Lapan v. Com'rs, 65 Me. 160; State v. Davis, 48 N. J. L. 112; Ex parte Madison Tea Co., 62 Ala. 93; Rosson v. McElvaine, 49 Mich. 194; State v. Whitford, 54 Wis. 150; Gerdes v. Champion, 108 Ill. 137; People v. Smith, 45 N. Y. 776; People v. Betts, 55 N. Y. 600; Duggan v. McGruder, 12 Am. Dec. 529, 537 (note). Cited in note 23 Am. St. R. 108. Both in the strict original scope and in the broadened scope of the remedy, the errors specified must be such as appear wholly in the record brought up. Extrinsic matter cannot be offered either to show the existence of errors or a transcendence of jurisdiction. Fore v. Fore, 44 Ala. 478; Alexander v. Archer [Nev.] 24 P. 373; Miller v. McCullough, 21 Ark. 426; North v. Joslyn, 59 Mich. 624; Gallaway v. Corbett, 52 Mich. 60; Tuxberry v. Com'rs, 117 Mass. 563; Barclay v. Bradston, 49 N. J. L. 629; Emery v. Bran, 67 Me. 39; Lees v. Drainage Com'rs, 125 Ill. 47; People v. Talmadge, 46 Hun, 606; State v. Kemen, 61 Wis. 494; People v. Fire Com'rs, 73 N. Y. 437; Hannibal & St. J. R. Co. v. State Ward, 64 Mo. 296. Cited in note 23 Am. St. R. 108. Also Richardson v. Smith, 59 N. H. 517; Matthews v. Otsego Co., 48 Mich. 587; In re McCandless Turnpike Co., 110 Pa. 605; Beer v. Com'rs of Highways, 109 Ill. 379; Hyslop v. Finch, 99 Ill. 171; Campden v. Bloch, 65 Ala. 236; Dicus v. Bright, 23 Ark. 107; De Pedrorena v. Super. Ct., 80 Cal. 144; Menden v. Worcester, 5 Allen, 13. Cited in note 40 Am. St. R. 35.

64. Home Sav. & Trust Co. v. District Court of Polk County, 121 Iowa, 1, 95 N. W. 522. In New York, under a provision that the determination of the State Board of Equalization may be reversed where there is such a preponderance of proof against it that a verdict of a jury affirming the existence thereof in an action in the supreme court would be set aside as against the weight of evidence, the preponderance should be so great that the error would clearly appear to authorize a reversal [Code Civ. Proc. § 2140]. People v. Priest, 85 N. Y. S. 481. In certiorari to review an assessment, the return is not conclusive; the evidence may be considered. People v. Miller, 84 App. Div. 168, 82 N. Y. S. 621. And the proceeding is substantially a new trial, admitting of additional proof. People v. Wells, 84 App. Div. 330, 82 N. Y. S. 564. See 1 Curr. L. 505, n. 91.

the findings of the lower court,[65] and the denials and allegations of a return, so far as they put in issue the material allegations of a petition, must be taken as true.[66] The mere allegation that a trial judge is biased, without a rule to take testimony as to such bias, cannot be considered.[67] Only the proceedings as they existed at the time of the adjudication can be reviewed.[68] Certiorari, in reviewing the action of a board of review, reaches only the judgment of the board, not the manner in which it was executed,[69] but the opinion as well as the judgment may, if necessary, be considered.[70]

§ 5. *Judgment.*[71]—Where certiorari is overruled, it is not erroneous to order that the judgment of the lower court proceed,[72] but final judgment may not be entered where certiorari is sustained,[73] though a former certiorari in the same case, complaining of a similar verdict, may have been sustained;[74] unless under no view of the case could there be a recovery against the petitioner.[75] The case may be remanded, however, to the justice court with instructions.[76] When the sole question is legal insufficiency of proof, it should not be rendered.[77] An injunction will not be set aside in proceedings for certiorari.[78]

Where it appears that the necessary consequence of a judgment such as the prosecutor seeks will be to injuriously affect the interest of third parties, or public interests not already represented in court, it is within the discretion of the court to defer judgment until those who are interested in sustaining the proceeding under review are made parties.[79]

In New Jersey, the legislature may confer upon a single justice of the supreme court power to hear and determine, after return and upon notice, any proceedings in certiorari, and direct that the order and determination of such justice therein shall be entered as the judgment of the supreme court.[80]

65. Appeal of Welsh, 22 Pa. Super. Ct. 392. The appellate court will not review findings of fact, if there is any evidence to support the findings. Coles & Sons Co. v. Blythe, 69 N. J. Law, 666, 55 A. 816. The confirmation of an assessment for benefits or damages will not be reversed on certiorari where there are facts in the record returned to sustain the finding of the court that the assessment violated no legal principle. City of Newark v. Weeks [N. J. Law] 56 A. 118.

66. People v. Eno, 176 N. Y. 513, 68 N. E. 868; State v. Aucoin, 110 La. 959, 35 So. 141. At the hearing nothing can be considered but the petition and the answer, unless both parties agree that the court may consider facts not appearing in the record. Tyner v. Leake, 117 Ga. 990, 44 S. E. 812.

The return to a writ of review may not be contradicted by **affidavits** of the petitioner. Borchard v. Board of Sup'rs of Ventura County [Cal.] 77 P. 708.

Agreed facts: The court cannot act upon an agreement that the petition and answer shall be taken as true where not conflicting. It involves a comparison of two different statements and tends to create conflict where clearness is required. Central of Georgia R. Co. v. Potter [Ga.] 47 S. E. 924.

67. State v. De Maio [N. J. Law] 55 A. 644.

68. A board of supervisors had been enjoined from levying a tax, to pay for a ditch. An amendment of its record made after submission of the injunction suit was sought to be availed of. Tod v. Crisman, 123 Iowa, 693, 99 N. W. 686.

69. State v. Lewis, 118 Wis. 432, 95 N. W. 388.

70. In certiorari to review summary proceedings, no review on the merits being permissible, and as a mere inspection of the docket would show nothing, the appellate court can look to the opinion as well as the action of the court to see whether it exceeded its jurisdiction or its proper legal discretion. Independence Party Nomination, 208 Pa. 108, 57 A. 344.

71. See 1 Curr. L. 505.

72. Georgia Southern & F. R. Co. v. Giddens, 117 Ga. 799, 45 S. E. 67.

73. Bryan v. Central of Georgia R. Co., 117 Ga. 827, 45 S. E. 72.

74. Patterson v. Central of Georgia R. Co., 117 Ga. 827, 45 S. E. 250.

75. Widgeon v. Southern Exp. Co., 118 Ga. 841, 45 S. E. 679.

76. Patterson v. Central of Georgia R. Co., 117 Ga. 827, 45 S. E. 250.

77. Where the only error alleged in a petition for the writ is that the verdict was contrary to the evidence, the writ should be sustained but final judgment should not be entered, though the evidence demanded the writ and there is no conflict. Seaboard Air Line R. v. Blue [Ga.] 47 S. E. 569.

78. State v. Leche [La.] 36 So. 868.

79. MacFall v. Dover [N. J. Law] 57 A. 136. Judgment on the writ may be deferred in order to permit third parties to be brought in, who had acquired contractual rights under resolutions of a board of chosen freeholders. Allen v. Board of Chosen Freeholders of Hunterdon County [N. J. Law] 58 A. 346.

§ 6. *Costs*[81] are not ordinarily to be taxed against a board, officer or judge who it is alleged has exceeded lawful jurisdiction, but against the person procuring the order adjudged illegal to be entered.[82] The discretion lodged by the statutes in the court in the matter of costs is not revisable.[83]

§ 7. *Review of certiorari.*[84]—Error lies to the refusal of a certiorari,[85] and to review the action of the court below on the hearing.[86] All presumptions, however, are in favor of the judgment of the court below,[87] and questions which might have been made in the inferior judicatory, but which are not referred to in the petition for certiorari,[88] and questions not raised by the pleadings, will not be considered.[89] Neither will assignments of error and recitals of fact in a petition for certiorari not affirmatively verified in the answer.[90] In Georgia, where certiorari is the remedy for reviewing a justice's judgment on the merits, the grant of a first new trial, where the evidence conflicts and does not as a matter of law imperatively demand the verdict rendered, will not be reviewed.[91] Neither, where there is substantial evidence to support the verdict or finding, will the appellate court interfere with a judgment overruling the writ;[92] but where there is no sufficient evidence to support the verdict, a certiorari setting up such want of evidence should be sustained.[93]

80. Brown v. Street Lighting Dist. No. 1, 69 N. J. Law, 485, 55 A. 1080.

81. See 1 Curr. L. 505.

82. If not a party to the action, he may be brought in for this purpose by proper notice. Coffey v. Gamble [Iowa] 94 N. W. 936.

83. Louisville & N. R. Co. v. Solomon, 138 Ala. 151, 34 So. 1025.

84. See 1 Curr. L. 506.

85. Lenney v. Finley, 118 Ga. 718, 45 S. E. 593.

86. Longstaff v. State [Wis.] 97 N. W. 900.

87. Where the answer of the justice of the peace does not set forth the evidence introduced on the trial of the case, nor verify that contained in the petition for certiorari, and where none of the assignments of error can be properly considered and determined without a reference to the evidence, an affirmance of the judgment overruling the certiorari necessarily results. Ballard v. Parker, 119 Ga. 803, 47 S. E. 171. When, upon the trial of a certiorari case, none of the assignments of error made in the petition for the writ can be determined without considering the evidence introduced in the lower court, and the answer of the judge of such court fails to disclose in any way what the evidence was, the judge of the superior court cannot do otherwise than to overrule the same. Colbert v. State, 118 Ga. 302, 45 S. E. 403. Where exception is taken to a judgment overruling a certiorari from a justice court in a case in which the decision of that court turned on the question of the priority of certain contesting liens, and the record fails to show the dates of the liens, the dates being material, the court must affirm the judgment, since it cannot be determined whether the decision in the justice court was erroneous or correct. Peak v. Simmons, 119 Ga. 63, 45 S. E. 698. Where the petition presents questions of both law and fact and the superior court sustains the writ without indicating the ground, and grants a new trial, the judgment will not be reversed in the absence of an abuse of discretion by the trial court. Goodman v. Butler, 119 Ga. 54, 47 S. E. 910.

88. Perry v. Brunswick & W. R. Co., 119 Ga. 819, 47 S. E. 172. A ground for reversal, not alleged in the petition, but urged for the first time on the hearing in the appellate court, will not be considered. Holz v. Rediske, 119 Wis. 563, 97 N. W. 162.

89. Where the declaration is not returned with the record and without it it is impossible to determine whether superior court committed error in his ruling on certiorari, an affirmance must follow. Ross v. Mercer, 118 Ga. 905, 45 S. E. 787. The plea of a defendant not having been embodied and returned in the certiorari record, the appellate court cannot pass upon the sufficiency of a demurrer thereto. Hodges v. Smith, 118 Ga. 789, 45 S. E. 617.

90. Shirling v. Kennon, 119 Ga. 501, 46 S. E. 630; Taylor v. Sandersville, 118 Ga. 63, 44 S. E. 845. Certain facts having been verified by the answer, it was not error to sustain certiorari. Thompson v. Hays, 119 Ga. 167, 45 S. E. 970.

91. Lovingood v. Lovingood, 119 Ga. 26, 45 S. E. 697; Flanders v. Wood, 113 Ga. 635, 38 S. E. 975; Ferry & Co. v. Mattox, 118 Ga. 146, 44 S. E. 1005; Shirley v. Swafford, 119 Ga. 43, 45 S. E. 722; Walker v. Hillyer, 119 Ga. 225, 46 S. E. 92; Lovvorn v. Jones, 119 Ga. 229, 46 S. E. 92. See 1 Curr. L. 506, n. 6.

92. Lovvorn v. Jones, 119 Ga. 229, 46 S. E. 92; Georgia Southern & F. R. Co. v. Giddens, 117 Ga. 799, 45 S. E. 67; Central of Georgia R. Co. v. Woolsey, 117 Ga. 838, 45 S. E. 267; Ramsey v. Rogers, 118 Ga. 868, 45 S. E. 693. Where the evidence is sufficient to warrant the finding of a justice of the peace, the superior court did not err in overruling a petition for certiorari. Mitcham v. Cochran, 119 Ga. 184, 45 S. E. 989. Where there was some conflict in the evidence, there was no error in refusing a certiorari, the only assignment of error being that the verdict was contrary to law and the evidence. Macon, D. & S. R. Co. v. Hightower, 119 Ga. 243, 46 S. E. 103.

93. Hudgins v. Lampkin, 118 Ga. 842, 45

CHAMPERTY AND MAINTENANCE.

A grant of land held adversely by one in the actual occupancy thereof[94] under a claim of title is void.[95] There must, however, be an ouster of possession.[96] In some states, however, such sale not coming within the statutory definition of "litigious rights," the sale is valid.[97] This rule against conveyances of land held adversely does not apply to judicial sales,[98] nor to a purchase-money mortgage given by the purchaser at such sale,[99] though by statutes in some states it applies to execution sales.[1] In states where the deed is void as to the adverse possessor only, an action cannot be maintained against the latter in the name of the grantee,[2] though one may be maintained against such claimant in the name of the grantor for the grantee's use.[3] The "adverse possession" intended by the Kentucky statute seems to be the same as that which might ripen into a title.[4]

Contingent fees are not champertous,[5] if no interest in the cause of action passes,[6] but it being shown that they are obtained from the suitor by any undue influence of the attorney over the client, or by any fraud or imposition, or that the compensation is clearly excessive, so as to amount to extortion, the court will protect the aggrieved party.[7] In New York, however, an agreement for a contingent fee, the attorney to advance all court costs, is champertous.[8] An agreement whereby an attorney is to be paid nothing for his services and disbursements in case of failure,[9] nor to have a debt for the same in case of success,[10] is cham-

S. E. 679. It appearing from the recitals of fact and the brief of the evidence set forth in the petition for certiorari that on the trial thereof in the justice court in which it was brought the defendants failed to establish by evidence any of the special defenses relied on by them, save only that they were entitled to a small credit upon the note sued on, but that the jury nevertheless returned a general verdict in their favor, the judge of the court below erred in refusing to sanction the plaintiff's petition for certiorari. Carter & Dorough v. Minton, 119 Ga. 474, 46 S. E. 658.

94. Tarvin v. Walker's Creek Coal & Coke Co., 25 Ky. L. R. 2246, 80 S. W. 504. Life tenant does not hold adversely to reversioner. Lewis v. Lewis [Conn.] 57 A. 735. A conveyance, by a purchaser at a foreclosure sale, while the land is in the actual adverse possession of the mortgagor's tien, is champertous. Stovall v. Haynes, 25 Ky. L. R. 1789, 78 S. W. 895. See 1 Curr. L. 506, n. 19, 20.

95. Schneller v. Plankinton [N. D.] 98 N. W. 77. Will not support an action of ejectment against the adverse claimant. Smith v. Klay [Fla.] 36 So. 54. See 1 Curr. L. 506, n. 13.

96. That there is an overhanging structure does not render the conveyance void [Gen. St. 1902, § 4042]. Norwalk Heating & Lighting Co. v. Vernam, 75 Conn. 662, 55 A. 168.

97. Sanders v. Ditch, 110 La. 884, 34 So. 860.

98. De Garmo v. Phelps, 176 N. Y. 455, 68 N. E. 873.

99. Given the same day he obtained the deed. De Garmo v. Phelps, 176 N. Y. 455, 68 N. E. 873.

1. Ky. St. 1899, § 210. Farmers' Bank v. Pryse, 25 Ky. L. R. 807, 76 S. W. 358.

2, 3. Schneller v. Plankinton [N. D.] 98 N. W. 77. See 1 Curr. L. 507, n. 26.

4. If several grants be conveyed as one tract and the grantee's tenant leases all but occupies only one, there is a possession of all adverse to a hostile claimant of the unoccupied tract. Such claimant's deed is void as to all. Scott v. Mineral Development Co. [C. C. A.] 130 F. 497.

5. A contract with an attorney to prosecute claims for 10 per cent of the amount collected held legal. Williams v. Phila., 208 Pa. 282, 57 A. 578. An agreement whereby one agrees to look up and collect all taxes on property which had escaped taxation, he standing all expenses and receiving a percentage of the amount collected, is not champertous. Shinn v. Cunningham, 120 Iowa, 383, 94 N. W. 941.

6. See 1 Curr. L. 507, n. 28, 29.

7. Swiss immigrant badly injured, contingent fee was ⅓ of amount recovered, which amounted to $10,000, which was voluntarily paid; held, the condition of the client and fairness of the transaction were for the jury. Muller v. Kelly [C. C. A.] 125 F. 212.

NOTE. Disbarment of attorney: An attorney making a champertous agreement is guilty of a flagrant breech of professional duty and is thereby rendered amenable to the summary jurisdiction of the court, which may disbar him therefor. In re Evans, 22 Utah, 366, 62 P. 913, 53 L. R. A. 952.

8. Taylor v. Enthoven, 88 N. Y. S. 138.

9. Begly v. Weddigen, 86 App. Div. 629, 83 N. Y. S. 805.

10. Gargano v. Pope, 184 Mass. 571, 69 N. E. 343; Robertson v. Cayard [Tenn.] 77 S. W. 1056.

NOTE. Agreement to pay judgment: An agreement by an attorney to pay any judgment that should be finally rendered against his client in a certain suit, in consideration of the latter appealing the case and paying the attorney a fee for conducting the same, is void as against public policy and cannot

pertous,[11] and such contract providing that it should cover services rendered or to be rendered, its invalidity is not affected by the fact that services were rendered prior to its execution.[12] An assignment of an allowed claim to secure fees is not a "buying * * * in order to bring action."[13] In Washington, the doctrine of champerty respecting fees to be paid out of the recovery has been abrogated.[14]

Contracts by litigants[15] with others in consideration of aid given to share in the fruits of the litigation are not void.[16] An agreement by one having any interest in the subject-matter, whether it be legal or equitable, great or small, vested or contingent, certain or uncertain, to prosecute the suit is not champerty or maintenance.[17] A wife assisting her husband financially in prosecuting a suit to judgment is not guilty of champerty.[18]

A bona fide sale or assignment of a right of action is not champertous, even though legal proceedings may be necessary to reduce it to possession,[19] nor is such an assignment of an interest in a pending action, each party to pay his proportionate share of the expenses of the litigation, maintenance.[20] The assignment of an interest in the cause of action to one's attorney is not barratry where the attorney did not induce the employment by personal solicitation nor by loans or promises thereof.[21] In states where an attorney is prohibited from purchasing choses in action, a bona fide assignee of an attorney purchasing such a claim may enforce the claim;[22] but the attorney cannot maintain an action on a claim assigned to him for the purpose of bringing an action in the county.[23]

Champerty is a defense[24] only where the champertous agreement is sought to be enforced.[25] Equity has jurisdiction to relieve one from a champertous contract on the ground of constructive fraud,[26] and the aggrieved party is not debarred from such relief on the ground that he is in pari delicto and does not come into equity with clean hands.[27]

CHARITABLE GIFTS.

§ 1. Nature and Essentials; Validity (678).
§ 2. Capacity of Donee or Trustee (680).
§ 3. Interpretation and Construction (680).
§ 4. Administration and Enforcement (681).

§ 1. *Nature and essentials; validity.*[28]—To come within the rule of charitable

be enforced by either attorney or client. Adye v. Hanna, 47 Iowa, 264, 29 Am. Rep. 484. —From note to Bowman v. Phillips, 13 Am. St. Rep. 292, 299.

11. Note: But there are numerous authorities holding that a contract to pay the attorney a percentage of the recovery, contingent upon his success in the suit, is not champertous but valid (McDonald v. Chicago & N. W. R. Co., 29 Iowa, 170; Newkirk v. Cone, 18 Ill. 449; Jewell v. Neidy, 61 Iowa, 299, 16 N. W. 141; Stewart v. H. & T. C. R. Co., 62 Tex. 246; Jeffries v. Mut. L. Ins. Co., 110 U. S. 305, 4 S. Ct. 8); unless some unfair advantage is taken of the client (Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 74 Am. St. Rep. 81).—From note to Shirk v. Neible, 83 Am. St. Rep. 150, 170.

12. Gargano v. Pape, 184 Mass. 571, 69 N. E. 343.

13. Pen. Code, § 161. In re Cummins' Estate [Cal.] 77 P. 479.

14. 2 Ball. Ann. Codes & St. § 5165. Agreement to sue for a third and pay all disbursements is valid. Smits v. Hogan [Wash.] 77 P. 390.

15. See 1 Curr. L. 507.

16. As against public policy. Fenn v. McCarrell, 208 Pa. 615, 57 A. 1108.

17. An agreement whereby an assignor who retains a contingent interest in the property agrees to prosecute for an alleged trespass for the benefit of the assignee at the latter's expense is not champertous nor in violation of Pen. Code, § 320. Finlen v. Heinze, 28 Mont. 548, 73 P. 123.

18. Ex parte Hiers [S. C.] 45 S. E. 146.

19. Assignment of claim for damages, consisting only of attorney's fees to attorney, held valid. Lacey v. Davis [Iowa] 98 N. W. 366.

20. Mills' Ann. St. § 1299. O'Driscoll v. Doyle, 31 Colo. 193, 73 P. 27.

21. Mo., K. & T. R. Co. v. Bacon [Tex. Civ. App.] 80 S. W. 572.

22. Holding that Code Civ. Proc. §§ 73, 74, 75, does not render the purchase by the attorney void, but simply denies to him the use of the courts for the purpose of prosecution. Beers v. Washbond, 86 App. Div. 582, 83 N. Y. S. 993.

23. Sugarman v. Mandolia, 88 N. Y. S. 393.

24. See 1 Curr. L. 507.

25. Debtor cannot object in suit by as-

uses, the gift must be to a public charity;[29] thus a Young Men's Christian Association,[30] or a gift to a school district, to be devoted to the education of poor children,[31] or a devise to the pastors and deacons in trust for a church,[32] or a devise to furnish homes to industrious girls at the least possible cost to them, and providing that others so inclined might add to it,[33] but not a railroad relief department maintained by sums deducted from the wages of employes,[34] nor a devise for the purpose of educating the descendants of two persons named,[35] is public. There must be a sufficiently defined property or fund given.[36] No trustee is necessary.[37] In most of the states, it is regarded inherent in a public charity that the beneficiaries be somewhat uncertain, and in these it suffices if a purpose be indicated and the ultimate beneficiaries be capable of selection or ascertainment in administering it.[38] Where the doctrine of charitable gifts is not in force, the essentials of a private express trust must be found.[39] Thus a definite beneficiary,[40] and a trustee capable of taking, are essential.[41] If a particular donee be indicated, it must at least be ascertainable.[42] A vested[43] gift for charity is not within the

signee. Lacey v. Davis [Iowa] 98 N. W. 366. Not in the original action. Forbes v. Mohr [Kan.] 76 P. 827. Does not bar the original suit. Robertson v. Cayard [Tenn.] 77 S. W. 1056.

26. Contingent attorney's fee. Gargano v. Pape, 184 Mass. 571, 69 N. E. 343.

27. Gargano v. Pape, 184 Mass. 671, 69 N. E. 343.

28. See 1 Curr. L. 510.

29. Historical and antiquarian society which permitted visitors but was not obliged to do so, held not charitable so as to be exempt from inheritance tax. In re Landis' Estate [N. J. Prerog.] 56 A. 1039.

Note: A gift to charity is one that extends to the rich as well as the poor. (Mitford v. Reynolds, 1 Phill. Ch. 185; Coggshall v. Pelton, 7 Johns. 292; Perrin v. Carey, 24 How. 465; Kain v. Gibboney, 101 U. S. 362), and must confer a public benefit open to an indefinite number of persons (Festorazzi v. St. Joseph's Catholic Church, 104 Ala. 327, 53 Am. St. Rep. 48), and may be applied to anything that tends to promote the well doing or well being of man (Ould v. Washington Hospital, 95 U. S. 303; Protestant, etc., Soc. v. Churchman, 80 Va. 718), thus schools (Curling v. Curling, 8 Dana, 38, 33 Am. Dec. 475; Gerke v. Purcell, 25 Ohio St. 229; Magee v. O'Niell, 19 S. C. 170), libraries (Maynard v. Woodward, 36 Mich. 423; Duggan v. Slocum, 83 F. 244; Hinckley's Estate, 58 Cal. 457) and the relief of the poor and unfortunate (Camp v. Crocker, 52 Conn. 412; Darcy v. Kelly, 153 Mass. 433.—From note to Hoeffer v. Clogan, 63 Am. St. Rep. 248.

30. Property exempt from taxation. Com. v. Y. M. C. A., 25 Ky. L. R. 940, 76 S. W. 522.

31. Though the surplus if any was to go to the district. Com. v. Pollitt, 25 Ky. L. R. 790, 76 S. W. 412.

32. Osgood v. Rogers [Mass.] 71 N. E. 306.

33. In re Daly's Estate, 208 Pa. 58, 57 A. 180.

34. Liable for negligence in selecting a physician. Haggerty v. St. Louis, etc., R. Co., 100 Mo. App. 424, 74 S. W. 456.

35. Within the rule against perpetuities. Johnson v. De Pauw University, 35 Ky. L. R. 950, 76 S. W. 851.

36. Gidley v. Lovenberg [Tex. Civ. App.] 79 S. W. 831. A devise of the rents of a building carries the building itself [Rev. St. 1895, art. 624]. Id.

37. Where an executor was to use a certain fund to organize a charity and he was also "detainer" of the estate until the provisions of the will were carried out, the bequest was not void for want of a trustee. Gidley v. Lovenberg [Tex. Civ. App.] 79 S. W. 831.

38. See 5 Am. & Eng. Enc. Law, 905.

Illustrations: A devise to an executor to be distributed "to the poor in his discretion," under Ky. St. 1899, § 317. Thompson's Ex'r v. Brown, 25 Ky. L. R. 371, 75 S. W. 210. Gift to an executor to be disposed of in such proportions as he may deem wise for the aid of certain religious societies [Ky. St. 1903, § 317]. Leak's Heirs v. Leak's Ex'r, 25 Ky. L. R. 1703, 78 S. W. 471. Devise for the benefit of the unfortunate widows and orphans of a certain town or the indigent Israelites of a certain city. Gidley v. Lovenberg [Tex. Civ. App.] 79 S. W. 831. To furnish homes for industrious girls. In re Daly's Estate, 208 Pa. 58, 57 A. 180. For the benefit of the white public schools, or for a city hospital as the city authorities should elect, is certain. City of Huntsville v. Smith, 137 Ala. 382, 35 So. 120.

39. See Trusts, 2 Curr. L. 1924.

40. The beneficiary must be definite. Devise to an unincorporated association is void. Laws 1893, p. 1748, c. 701 was not in effect when this devise was made. Murray v. Miller, 178 N. Y. 316, 70 N. E. 870. Nor could it take affect as a power in trust. Id. A devise to a class is sufficiently definite. To those suffering from destruction of property by storms, floods and fire and other accidental natural causes, who are fairly entitled to relief. Kronshage v. Varrell [Wis.] 97 N. W. 928.

41. Prior to 1893, a gift to an unincorporated body was void in New York. Nor was a gift in trust for such body valid. 1 Rev. St. (1st Ed.) pt. 2, c. 1. Murray v. Miller, 85 App. Div. 414, 83 N. Y. S. 591. Laws 1893, c. 701, are not retroactive. Id.

42. Gift to be divided between Indian and Domestic missions of the United States, nothing to show that any society was to take the bequest. Bowman v. Domestic & Foreign Missionary Soc., 42 Misc. 574, 87 N. Y. S.

rule against perpetuities.[44] Such rule, however, defeats a trust in those states where charitable trusts are not recognized,[45] but not a gift direct without any trust.[46] The doctrine of charitable uses does not exist in Michigan[47] nor Wisconsin,[48] and formerly not in New York,[49] but does in Massachusetts.[50]

The validity of a charitable gift in a will depends on the law of the state where the testator was domiciled and the lands devised are situated.[51] Where the instrument creating the gift is required to be attested, the attestation must be legal.[52]

§ 2. *Capacity of donee or trustee.*[53]—The donee's capacity is measured at the time when the gift must vest,[54] hence nonexistence of a contemplated corporate donee is not an objection.[55] A limitation in the charter of a corporation as to the amount of property it may hold is for the benefit of the general public, and heirs cannot object,[56] nor can the state up to that amount.[57] Where charitable trusts are not recognized if the donee is not empowered to take at the death of the testator, the gift is void.[58] A legislative "sanction" of such gifts may be read in a general charter power to take real estate.[59]

§ 3. *Interpretation and construction.*[60]—The ordinary rules of interpretation apply.[61] A few specific instances follow.

Where the trustee or donee is designated by ambiguous terms, that construction will be adopted which seems to accord with the intention of the donor.[62]

621. Domestic and foreign missionary society not entitled to take. Id.

43. It has no application where a postponement respecting the gift goes only to its form or mode. It is vested. Brigham v. Peter Bent Brigham Hospital, 126 F. 796.

44. Accumulations can be directed beyond lives. Brigham v. Peter Bent Brigham Hospital, 126 F. 796.

45. Gift to officer of unincorporated society, being in trust to be applied to the use of such body, was invalid as in violation of the rule against perpstuities. Murray v. Miller, 178 N. Y. 316, 70 N. E. 870. As creating a passive trust. Id. Nor could it take effect as a power in trust. The trust being void, the power in trust would also be. Id.

46. A gift of personalty to an incorporated association to be invested and the proceeds applied for its own benefit is a gift absolute and valid. Not a trust. Statute against perpetuities does not apply. In re Daniels' Estate, 41 Misc. 299, 84 N. Y. S. 684.

47. A gift to establish a bed in perpetuity in a hospital and income of another sum to be applied to relief of certain needy poor is void. Hopkins v. Crossley [Mich.] 96 N. W. 499.

48. A devise to trustees to be conveyed to a city for specified purposes held to convey absolute title. Hence not in violation of the rule. Danforth v. Oshkosh, 119 Wis. 252, 97 N. W. 258. Strong dissenting opinion discusses origin of the doctrine. Id.

49. Murray v. Miller, 85 App. Div. 414, 83 N. Y. S. 591.

50, 51. Brigham v. Peter Bent Brigham Hospital, 126 F. 796.

52. Under P. L. 322, one witness signed a will before the testator and the other without seeing the testator sign. Appeal of Appley, 206 Pa. 1, 55 A. 795.

53. See 1 Curr. L. 512.

54. A gift limited after a life estate to a person who shall be known at the death of the testator as the treasurer of an unincorporated body vested at the testator's death. The treasurer of an incorporated body could not take. Murray v. Miller, 85 App. Div. 414, 83 N. Y. S. 591. Could not be affected by subsequent legislation. Id.

55. Brigham v. Peter Bent Brigham Hospital, 126 F. 795.

56. Brigham v. Peter Bent Brigham Hospital, 126 F. 796. See 1 Curr. L. 512, n. 11.

Note: Whether a gift is void as to any excess above its legal capacity to take, there is a conflict. In re McGraw's Estate, 111 N. Y. 66, 7 Am. St. Rep. 684, n., 2 L. R. A. 255, n.; Wood v. Hammond, 16 R. I. 98, holding that it is and Farrington v. Putnam, 90 Me. 405, 38 L. R. A. 339; Hanson v. Little Sisters of the Poor, 79 Md. 434, 32 L. R. A. 293, n.; Hamsler v. Hamsler, 132 Ill. 273, 8 L. R. A. 556; Jones v. Habersham, 107 U. S. 174, holding that such gifts can only be attacked in a direct proceeding by the state. See Brigham v. Peter Bent Brigham Hospital, 126 F. 795.

57. Where a state has authorized a particular corporation to hold property to a certain amount, it cannot object to its taking by devise up to such amount. Brigham v. Peter Bent Brigham Hospital, 125 F. 796.

58. Cannot be affected by subsequent legislation. Murray v. Miller, 85 App. Div. 414, 83 N. Y. S. 591.

59. Charter creating "Sisters of Charity" empowered to acquire real estate satisfies Declar. Rights, art. 33. Rogers v. Sisters of Charity, 97 Md. 550, 55 A. 318.

60. See 1 Curr. L. 512.

61. See Deeds of Conveyance, 1 Curr. L. 908; Wills, 2 Curr. L. 2076. A bequest of all personal property, to be sold and the proceeds devoted to a charity did not carry money on deposit at date of donor's death. City of Huntsville v. Smith, 137 Ala. 382, 35 So. 120.

62. By will a bequest was left to the

Where the corporate name was "The mayor and aldermen of the city of Huntsville," a gift to the "City of Huntsville" was certain.[63] Words defining the number of beneficiaries will mean so many each year if revenue is to be applied annually.[64] A bequest for the benefit of the poor of a certain district is not for the exclusive benefit of the paupers of such district.[65]

A deed of feoffment to a society able to take land, for the use of another passes title to the latter under the statute of uses.[66] Under a devise to a school district unless testator's son should return, the district took a defeasible fee.[67] A gift is not contingent merely because the executor may die before the charity is organized to which he is to transfer the property.[68] Different charities do not necessarily hold a gift in severalty because it was given in "parts."[69]

§ 4. *Administration and enforcement.*[70]—Only trustees legally appointed may act,[71] and long acquiescence by the clerical managers in the actions of others did not give such others the right to act.[72] Where the original trustees die, others may be appointed in their stead,[73] and persons who by the language of the will would have been suitable to the donor should be appointed.[74] The trust must be accepted.[75] The board of managers may act by the concurrence of a majority of its members.[76]

The gift must be administered according to the directions of the donor,[77] but when it becomes impossible to administer it according to his directions, the general purpose should be carried out as nearly as practicable.[78] Where a beneficiary

Baptist church and society of K. This description was equally applicable to two societies, one of which the donor had at times attended. Preston v. Foster, 75 Conn. 709, 55 A. 558. A devise to create a charity and directing the executors to obtain a charter constituted them trustees until the corporate organization was completed. No failure as to trustee. In re Daly's Estate, 208 Pa. 58, 57 A. 180. A provision appointing as managers of a fund the ministers of the oldest Episcopalian, Congregational and Presbyterian churches, means three ministers. City of Boston v. Doyle, 184 Mass. 373, 68 N. E. 851. Where the minister of the oldest Congregational church was named as trustee, "Congregational" referred to that well known denomination. Id.

63. City of Huntsville v. Smith, 137 Ala. 382, 35 So. 120.

64. A judgment in a suit to construe a will, directing the executor to loan money and collect interest annually and appropriate it to the education of four poor children, to be selected by him, meant that four children were to be selected each year, not that only four were to be educated. Gray v. Gray's Adm'r, 24 Ky. L. R. 848, 70 S. W. 46.

65. Though it was to be administered by the overseers of the poor. Brookville Borough v. Startzell, 207 Pa. 347, 56 A. 938.

66. Conveyance to the Sisters of Charity for the use of an orphan asylum. Rogers v. Sisters of Charity, 97 Md. 550, 55 A. 318.

67. Com. v. Pollitt, 25 Ky. L. R. 790, 75 S. W. 412.

68. Where, after the death of a life tenant, the executors were to apply the property to a charity and the executors died before the life tenants, the devise was valid. Gidley v. Lovenberg [Tex. Civ. App.] 79 S. W. 831.

69. Where only the income was to be used, they took as tenants in common. Osgood v. Rogers [Mass.] 71 N. E. 306.

70. See 1 Curr. L. 512.

71. Where selectmen were named as managers of a fund and the office was abolished and the mayor and aldermen became their successors as officers of the city, they did not become managers of the fund. City of Boston v. Doyle, 184 Mass. 373, 68 N. E. 851.

72. Three ministers and the board of selectmen were appointed by the will. The office of selectmen was abolished and the mayor and aldermen for some time acted with the ministers. City of Boston v. Doyle, 184 Mass. 373, 68 N. E. 851.

73. Loyd v. Webster, 117 Ga. 775, 45 S. E. 77.

74. In one clause it said "It is presumed that there will always be virtuous and benevolent citizens." City of Boston v. Doyle, 184 Mass. 373, 68 N. E. 851. Rev. Laws, c. 149, § 1, in relation to the giving of bond by trustees, is not applicable to managers of a fund devised to charity. Id.

75. There was a sufficient acceptance where a town at a legally warned meeting voted to accept a bequest. Bequest for an academy and providing that the town should appoint a board of trustees. This was done at the meeting. Bellows Free Academy v. Sowles [Vt.] 57 A. 996.

76. City of Boston v. Doyle, 184 Mass. 373, 68 N. E. 851.

77. Body of persons appointed to administer the fund had no power to establish a pay pupil department. Rankine v. De Veaux College, 41 Misc. 655, 85 N. Y. S. 239. A bequest to erect a building upon a certain lot unless some other person donated a lot cannot be located on a lot acquired by the board of trustees. State v. Chickering [N. H.] 55 A. 937.

78. The office of selectmen who were appointed trustees was abolished. The will made no other provision. City of Boston v. Doyle, 184 Mass. 373, 68 N. E. 851, and cases cited.

church established another and then went out of existence, the case was a proper one for the application of the cy pres doctrine.[79] A trustee cannot compromise with those contesting the validity of a bequest and accept less than the amount thereof,[80] and an agreement entered into by his attorney without his consent with a part of the heirs is not binding.[81] Under a bequest of certain corporate stock, the dividends of which were to be reinvested in the same stock until the fund reached a certain amount, the trustees had power to sell the stock when its market value would realize such amount.[82] Where a town was the real trustee, it was the proper party to maintain an action for an interference with the fund.[83] The fact that the trustees incorporated does not constitute an attempt to divert funds contrary to the provisions of the will.[84]

CHATTEL MORTGAGES.[1]

§ 1. **What Constitutes a Chattel Mortgage (682).**
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§ 16. **Remedies Against Third Persons (698).**

§ 1. *What constitutes a chattel mortgage.*[2]—The essential element of a chattel mortgage is that it be given to secure a debt.[3] No particular form is necessary;[4] there must, however, be a present conveyance of the property,[5] and an express or implied defeasance.[6] If possible, the intention of the parties will be given effect;[7] thus bills of sale,[8] conditional sales, title remaining in the vendor,[9] leases,[10] deeds of trust,[11] and a written assignment of an insurance policy as col-

79. Osgood v. Rogers [Mass.] 71 N. E. 306. The supreme judicial court in a case pending before it has power to frame a scheme for administration under the cy pres doctrine. Id.

80, 81. Lake v. Hood [Tex. Civ. App.] 79 S. W. 323.

82. Bellows Free Academy v. Sowles [Vt.] 57 A. 996.

83. Regardless of the fact that trustees appointed by it had incorporated. Bellows Free Academy v. Sowles [Vt.] 57 A. 996.

84. A will provided that trustees appointed by the town should have charge of the fund. A private act was passed under which they incorporated. Nothing has been done or attempted contrary to the provisions of the will. Bellows Free Academy v. Sowles [Vt.] 57 A. 996.

1. See Bankruptcy, 1 Curr. L. 311, for chattel mortgages as preferences or fraudulent transfer under bankruptcy act. See Limitation of Actions, 2 Curr. L. 746, for operation of limitation laws on chattel mortgage. See Fraudulent Conveyances, 2 Curr. L. 116, for mortgage in fraud of creditors.

2. See 1 Curr. L. 513.

3. First Nat. Bank v. Taylor [Kan.] 76 P. 425. The existence of this element is not implied in a provision that a bill of sale shall be void if the grantors shall pay a certain sum of money by a certain day. Smith v. Hope [Fla.] 35 So. 865. See 1 Curr. L. 513, n. 36.

4. Harding v. Eldridge [Mass.] 71 N. E. 115.

5. A negotiable promissory note containing a statement that a piano was given as collateral security for its payment, joined with a power of sale, held not a mortgage of the piano, nor was this changed by the recording of the note. Harding v. Eldridge [Mass.] 71 N. E. 115.

6. Harding v. Eldridge [Mass.] 71 N. E. 115. See 1 Curr. L. 513, n. 37.

7. Smith v. Hope [Fla.] 35 So. 865.

8. Thompson v. Dyer [R. I.] 55 A. 824; Haynes v. Hobbs [Mich.] 98 N. W. 978; Dickinson v. Oliver, 89 N. Y. S. 52; Denton Bros. v. Shields [Ga.] 48 S. E. 423; Miller v. Campbell Commission Co., 13 Okl. 75, 74 P. 507. See 1 Curr. L. 514, n. 39, 40.

9. Not only as against third persons, but also between the parties to the instrument. Hall v. Keating I. & Mach. Co. [Tex. Civ. App.] 77 S. W. 1054; In re Carpenter, 125 F. 831. See 1 Curr. L. 513, n. 38.

10. Ward v. Rippe [Minn.] 100 N. W. 386; Dickinson v. Oliver, 89 N. Y. S. 52. A lease assumed to be an equitable mortgage. Thurlough v. Dresser, 98 Me. 161, 56 A. 654. See 1 Curr. L. 514, n. 41.

11. To secure creditors. Smead v. Chandler & Co., 71 Ark. 505, 76 S. W. 1066.

lateral security for a note,[12] have been held chattel mortgages. A bill of sale absolute upon its face may be shown by parol testimony to be a chattel mortgage,[13] but if the circumstances which render a conditional sale a mortgage in law do not appear from the bill, they must be set up by plea or answer.[14] A statute providing that a conveyance absolute on its face, the maker parting with the possession of the property, cannot, in the absence of fraud, be shown to be a mortgage, applies only to tangible property.[15] The test to distinguish a mortgage from an assignment for the benefit of creditors is: whether the intention at the time of execution was to divest the debtor of the title, and so make an appropriation of the property affected to the raising of a fund to pay debts, or merely was to secure the payment of debts.[16]

§ 2. *Subject-matter. What may be mortgaged.*[17]—Any property which may be sold, is, as a general rule, capable of being mortgaged.[18] An alienable contingent interest[19] may be mortgaged, and a mortgage on future acquired property is valid in equity;[20] thus a manufacturer may make a valid mortgage of raw material to be purchased in the future, and of the product to be made therefrom.[21] Growing crops,[22] and crops to be grown,[23] may be mortgaged, the lien attaching, as between the parties, upon the property coming into the possession of the mortgagor,[24] and, as between such parties, it relates back to the date of the mortgage,[25] and it makes no difference whether the crops are raised by the mortgagor or his sublessee.[26] In some states it is a crime to mortgage personal property held under conditional purchase.[27]

Title and interest of mortgagor.[28]—The mortgagor must have title to the property.[29]

Description of property.[30]—The description must be such as, aided by the inquiries which the mortgage itself indicates and directs, will enable third persons to identify the property.[31] One being in possession of facts from which he must,

12. Manhattan L. Ins. Co. v. Wright [C. C. A.] 126 F. 82.

13. Miller v. Campbell Commission Co., 13 Okl. 75, 74 P. 507.

14. In such a case the conditional sale will not be held a mortgage upon demurrer. Smith v. Hope [Fla.] 35 So. 865.

15. Rev. Code 1892, § 4233 does not embrace the transfer of life insurance policies during the life of the assured. Armstrong v. Owens [Miss.] 35 So. 320.

16. Smead v. Chandler & Co., 71 Ark. 505, 76 S. W. 1066.

17. Sec 1 Curr. L. 514.

18. For exceptions see 1 Curr. L. 514, n. 42, 43. A diamond ring. Salabes v. Castelberg [Md.] 57 A. 20.

19. Ward v. Ward, 131 F. 946. Such a mortgage is presumed to be bona fide. Id.

20. Mortgage of a stock of drugs and fixtures and the property to be placed on the premises by way of replenishment, held valid. Stoll v. Sibson [N. J. Eq.] 56 A. 710; Thompson v. Fairbanks, 75 Vt. 361, 56 A. 11. Covers property whether acquired by original mortgagor or purchaser. Stoll v. Sibson [N. J. Eq.] 56 A. 710.

21. Logs and the lumber to be made therefrom. Morton v. Williamson Bros. [Ark.] 81 S. W. 235.

22. Hayes v. First State Bank [Neb.] 98 N. W. 423.

23. The planting and growing being provided and stipulated for in such mortgage [St. 1893, c. 48, art. 1, § 8]. Eckles v. Ray, 13 Okl. 541, 75 P. 286. An agreement to execute a mortgage upon crops to be grown in the future will be enforced in equity if sufficiently definite in its terms and clearly established, and the situation of the parties and property is such that justice and equity call for such a remedy. Sporer v. McDermott [Neb.] 96 N. W. 232, 659; Ryan v. Donley [Neb.] 96 N. W. 234.

24. Morton v. Williamson Bros. [Ark.] 81 S. W. 235.

25. Thompson v. Fairbanks, 75 Vt. 361, 56 A. 11.

26. The lessee of real estate for cash rent gave a mortgage upon crops to be planted and grown on the leased premises as security for the contracted rental value. Eckles v. Ray, 13 Okl. 541, 75 P. 286.

27. Under Pen. Code 1895, § 673, it is necessary to show that the mortgage was given "with intent to defraud the vendor," and if the mortgagor is ignorant of the fact that the title has been reserved, he cannot properly be convicted of the offense. Miley v. State, 118 Ga. 274, 45 S. E. 245.

28. See 1 Curr. L. 514.

29. A chattel mortgage by a husband covering separate property of the wife cannot be foreclosed as to such property. Parish v. Austin [Tex. Civ. App.] 76 S. W. 583. See 1 Curr. L. 514, n. 45.

30. See 1 Curr. L. 514.

31. Salabes v. Castelberg [Md.] 57 A. 20. A chattel mortgage covered 482 head of steers, two and three years old past, all

as a person of ordinary intelligence, know that certain chattels are included in a mortgage, the description is sufficient as to him, though slightly incorrect.[32] Parol evidence is always admissible to identify the property included in a chattel mortgage.[33] A mortgage given to cover only a part of a lot or mass of chattels of the same kind and description is valid.[34] A statute requiring the description to be in writing or typewriting, but not printed on the face of the instrument, is not unconstitutional.[35] A mortgage covers only property included in its terms,[36] and does not extend to substituted property.[37]

§ 3. *Consideration.*[38]—A mortgage may be given to secure one on a contingent liability,[39] it may be given to secure future advances,[40] but no advances

dehorned, and all branded with a certain brand, and recited that they were owned by the mortgagor and were in his possession on certain described premises, it being shown that the mortgagor had on the premises described but 471 head of steers of the ages specified, held to convey such 471 head although some of them were not dehorned or branded. George Adams & Frederick Co. v. South Omaha Nat. Bank [C. C. A.] 123 F. 641. A mortgage upon growing grass, stipulating that it shall cover the hay in stacks, is good on the hay in stack against an execution creditor, the mortgagor being still in possession. Hayes v. First State Bank [Neb.] 98 N. W. 423. Property described in a mortgage as "all the dry goods, etc., kept in stock at the storehouse and warerooms," of the mortgagor "at L," is sufficiently identified by proof that there is but one store at L. Rice v. Sally, 176 Mo. 107, 75 S. W. 398. A chattel mortgage describing all the property of the mortgagor of certain kinds "now being and remaining" in his possession is sufficient. In re Beede, 126 F. 853.

Illustrations as to specific chattels: Cattle; description held sufficient. State Nat. Bank v. Cudahy Packing Co., 125 F. 543; Goff v. Byers Bros. & Co. [Neb.] 96 N. W. 1037; Greer v. Crenshaw [Tex. Civ. App.] 75 S. W. 589; Trower Bros. Co. v. Hamilton [Mo.] 77 S. W. 1081. Description held insufficient. State Nat. Bank v. Cudahy Packing Co., 125 F. 543; Packers Nat. Bank v. Chicago, etc., R. Co., 122 Iowa, 503, 98 N. W. 310.

Crops: Description held sufficient. Becker v. Bowen [Tex. Civ. App.] 79 S. W. 45. Held insufficient. Thurlough v. Dresser, 98 Me. 161, 56 A. 654.

Diamond ring: Description held sufficient. Salabee v. Castelberg [Md.] 57 A. 20.

Contractor's outfit: Description held sufficient. In re Brannock, 131 F. 819.

Description of livery property, together with all after-acquired property, held sufficient. Thompson v. Fairbanks, 75 Vt. 351, 56 A. 11.

32. Described cattle as being branded on left hip instead of on the right hip. Kerfoot v. State Bank of Waterloo [Okl.] 77 P. 46. Mortgage on specifically described cattle said to be on the mortgagor's farm, "section 6, town 44," etc., in J. county. The land described was in P. county, into which the mortgagor's farm extended; held, defect not fatal. Trower Bros. Co. v. Hamilton [Mo.] 77 S. W. 1081.

33. Becker v. Bowen [Tex. Civ. App.] 79 S. W. 45.

34. Whether it disclosee that only a part of the lot is embraced is immaterial. Sparks v. Depoeit Bank, 25 Ky. L. R. 1481, 78 S. W. 171.

NOTE. Validity of such mortgage in general: Cases collated by O'Rear, J. The authorities are not uniform as to whether such mortgage is void. As between the parties to it, it is generally held to be valid. Call v. Gray, 37 N. H. 428, 75 Am. Dec. 141; Williamson v. Steele, 3 Lea [Tenn.] 527, 31 Am. Rep. 652; Stephens v. Tucker, 14 N. J. Law, 600. In some cases it has been held valid as against purchasers or creditors when the parties to such mortgage, conceded to be invalid, have designated the property to be included by setting it apart, or separating it from the general bulk, or by the mortgagee's taking possession of a part which the parties thereby show an intention to designate as the part embraced by the mortgage. Parsons Sav. Bank v. Sargent, 20 Kan. 575; Brittain Dry Goods Co. v. Blanchard, 60 Kan. 253, 56 P. 474; Pruett v. Warren, 87 Mo. App. 556; Inter-State Galloway Cattle Co. v. McLain, 42 Kan. 580, 22 P. 728. The reason for holding these mortgages valid may be found in the following cases: Heyward's Case, 2 Co. Litt. 145; Bacon's Abr. "Election" (B); Mervyn v. Lyds, Dyer, 90a; Wofford v. McKinna, 23 Tex. 36, 76 Am. Dec. 53; Call v. Gray, 37 N. H. 428, 75 Am. Dec. 141; Oxsheer v. Watt, 91 Tex. 124, 41 S. W. 466, 66 Am. St. Rep. 863. It is called the doctrine of selection or election, for by such instrument the grantor impliedly invests his grantee with the right to select the stated number or quantity from the greater. Injustice to neither mortgagor, purchaser nor creditor can result from this rule; for, unless the election is made before the rights of the purchaser or creditor intervene, the latter will be entitled to at least the average of the whole, or maybe to themselves have choice, leaving enough of the average of the whole to satisfy the mortgage. See Sparks v. Deposit Bank, 25 Ky. L. R. 1481, 78 S. W. 171.

35. Civ. Code 1902, § 3002 does not violate the 14th amendment to the Federal constitution, nor the constitution of South Carolina, 1895, art. 1, § 5. Rose v. Harllee [S. C.] 48 S. E. 541.

36. Mortgage covered goods enumerated in an annexed schedule, held not to include goods not enumerated in said schedule, which were sold to mortgagor and replevied by the vendor. Lembeck & B. E. Brew. Co. v. Hatch, 88 N. Y. S. 1068.

37. Vinall v. Hendricks [Ind. App.] 71 N. E. 582.

38. See 1 Curr. L. 515.

39. To secure the mortgagee against loss

being made thereunder, no lien attaches to the property described therein.[41] The sufficiency of the description of the debts, obligations, and undertaking intended to be secured by a chattel mortgage, are governed by the rules applicable to real estate mortgages.[42] The affidavit of mortgagee stating the consideration, though annexed to the mortgage, is not conclusive thereof.[43] In some states it is unlawful for the mortgagee to require the mortgagor to pay taxes on the interest covenanted to be made.[44]

§ 4. *Fraudulent conveyances.*[45]—A mortgage permitting the mortgagor to retain and sell the mortgaged property in the ordinary course of trade[46] is valid as between the parties,[47] though fraudulent as to creditors[48] unless, by the terms of

as surety on a debt of the mortgagor. Gee v. Van Natta-Lynds Drug Co. [Mo. App.] 78 S. W. 288.

40, 41. Backhaus v. Buells, 43 Or. 558, 73 P. 342.

42. Thompson v. Fairbanks, 75 Vt. 361, 56 A. 11. A common-law chattel mortgage conditioned to secure the mortgagee for the payment of all that the mortgagor then owed the mortgagee, or might thereafter owe him by note, book account, or in any other manner, is sufficient to include a subsequent indebtedness arising for rent of buildings (Id.), and the liability of the mortgagee as surety on one of the mortgagor's notes to a bank (Id.). A mortgage given to secure a $1,000 note and renewals thereof, and all other advances by the mortgagee "now made or to be hereafter made" is sufficiently specific to put a subsequent mortgagee with notice of it on inquiry and enable him to ascertain the exact amount secured. First Nat. Bank v. Reid, 122 Iowa, 280, 98 N. W. 107. Evidence as to knowledge of mortgagor of business methods examined and held to show that a third chattel mortgage did not include the sums secured by the prior mortgages. Miller v. De Yoe [N. J. Eq.] 58 A. 179.

43. Miller v. Gourley [N. J. Eq.] 55 A. 1083.

44. Code Pub. Gen. Laws, art. 81, § 146d, as amended by Acts 1902, p. 33, c. 26, obliging a mortgagee to make affidavit that he has not required and will not require the mortgagor to pay the tax on the interest covenanted to be paid, does not apply to a purchase-money chattel mortgage, interest not being covenanted for, or, so far as appears, secretly or indirectly provided for. Salabes v. Castelberg [Md.] 57 A. 20.

45. See 1 Curr. L. 516.

46. A mortgage on the goods of a corporation allowing it to conduct its usual business and sell such property in the usual course thereof, held to allow it to deposit part of such goods in warehouses outside of the state where located and use the warehouse receipts as collateral for its commercial paper. Anderson v. Anderson Food Co. [N. J. Eq.] 57 A. 489.

47. Skilton v. Coddington, 86 App. Div. 166, 13 Ann. Cas. 298, 83 N. Y. S. 351.

48. In re Antigo Screen Door Co. [C. C. A.] 123 F. 249; Gee v. Van Natta-Lynds Drug Co. [Mo. App.] 78 S. W. 288; Brinker v. Ashenfelter, 1 Neb. Unoff. 793, 95 N. W. 1124. See 1 Curr. L. 516, n. 71.

NOTE. Effect of a provision allowing the mortgagor the possession with the power of sale: The agreement allowing the mortgagor to dispose of the property for his own benefit, it is conclusively fraudulent as to creditors, and it is immaterial whether the agreement is apparent on the face of the mortgage or not. Russell v. Winne, 4 Abb. Pr. [N. S.] 388, 37 N. Y. 595, 97 Am. Dec. 755; Southard v. Pinckney, 5 Abb. N. C. 196; Southard v. Benner, 72 N. Y. 425; Horton v. Williams, 21 Minn. 191; Stein v. Munch, 24 Minn. 391; Aiken v. Pascall, 19 Or. 493, 24 P. 1039; Saunders v. Waggoner, 82 Va. 322. As to the effect of a stipulation vesting the mortgagor with possession with power of sale, the courts are in conflict; some courts hold that such a provision is as vicious as though he was expressly given power to sell for his own benefit and that, therefore, the mortgage is void as a matter of law. Logan v. Logan, 22 Fla. 562; Lyon v. Council Bluffs Sav. Bank, 29 F. 581; Leser v. Glaser, 32 Kan. 552, 4 P. 1026; Price v. Pitzer, 44 Md. 527; Lodge v. Samuels, 50 Mo. 204; Leopold v. Silverman, 7 Mont. 266, 16 P. 580; Hedman v. Anderson, 6 Neb. 399; Wagner v. Jones, 7 Daly [N. Y.] 375; Collins v. Myers, 16 Ohio, 547; Willer v. Kray, 73 Tex. 534, 11 S. W. 540. Other courts hold that such a provision does not conclusively show fraud, that it may be capable of explanation and consistent with an honest purpose, and that, therefore, an opportunity to explain should be given and the question passed on as one of fact for the jury. Lister v. Simpson, 38 N. J. Eq. 438; Fletcher v. Powers, 131 Mass. 333; Blanchard v. Cooke, 144 Mass. 226, 11 N. E. 83; Muncle Nat. Bank v. Brown, 112 Ind. 481, 14 N. E. 358; Googins v. Gilmore, 47 Me. 15; Cheatham v. Hawkins, 76 N. C. 336; Gay v. Bidwell, 7 Mich. 521. The courts are in conflict as to how far the invalidity extends; some courts hold that the mortgage is valid as to property of which no sale is contemplated. Hayes v. Westcott, 91 Ala. 143, 8 So. 337, 11 L. R. A. 488; Garrettson v. Pegg, 64 Ill. 111; Davenport v. Foulke, 68 Ind. 382; Bullene v. Barrett, 87 Mo. 186; Rocheleau v. Boyle, 11 Mont. 451, 28 P. 872; In re Kahley, 2 Biss. 383, Fed. Cas. No. 7,593. Others hold that the invalidity relates to all property purported to be covered by the mortgage. Russell v. Winne, 37 N. Y. 595, 97 Am. Dec. 755; In re Burrows, 7 Biss. 526, Fed. Cas. No. 2,204; Harman v. Hoskins, 56 Miss. 148; Bank of Rome v. Haselton, 15 Lea [Tenn.] 216; Claflin v. Foley, 22 W. Va. 434; Dodds v. Johnson, 3 T. & C. [N. Y.] 215; Smith v. Kenney, 1 Mackey [D. C.] 12; Harbison v. Tufts, 1 Colo. App. 140, 27 P. 1014; Gallagher v. Rosenfield, 47 Minn. 507, 50 N. W. 696.—From note to Ephraim v. Kelleher, 18 L. R. A. 604.

the agreement, the proceeds of such sale are to be applied to the payment of the mortgage debt.[49] The presumption of good faith raised in the latter case is only prima facie.[50] The clause permitting the sale of goods by the mortgagor, if not made with a fraudulent intent, does not render the mortgage void as to the goods unsold, but its only effect is to withdraw the goods sold from the operation of the mortgage.[51] Rights of a mortgagor because of having been induced by fraud to execute a chattel mortgage do not pass to one purchasing the chattel from him.[52] A mortgagee of a fraudulent vendee, without knowledge of the fraud, is protected and treated as an innocent purchaser, to the extent of the mortgage debt.[53] The open and admitted inclusion of a small claim of another creditor in a chattel mortgage given to secure a bona fide indebtedness will not of itself render such mortgage fraudulent and unlawful as against attaching creditors.[54] In some states a chattel mortgage made by a corporation when insolvent, or in contemplation of insolvency, is void.[55] Consent by a creditor to the giving of a mortgage does not estop him from attacking the validity of the mortgage given.[56]

§ 5. *Form, execution, and delivery.*[57]—Like other contracts, a chattel mortgage is invalidated by duress[58] or fraud.[59] A verbal chattel mortgage is binding on the parties and those having knowledge of its existence.[60] The execution of the mortgage, though attested by subscribing witnesses, may be proved by the maker,[61] and, though such mortgagor signs by mark, it is not necessary to show by what means he knew that he signed that particular writing,[62] though the statute requiring the attestation of a witness who can and does write his name, the execution of the mortgage must be proved by proving both the signature of the witness and the mark of the maker.[63] In the absence of proof of the date of an undated chattel mortgage, it cannot be assumed that it was executed prior to the date when it was proved by the subscribing witness,[64] or recorded.[65] In Illinois the failure of

49. Dugan v. Beckett [C. C. A.] 129 F. 56; Skilton v. Coddington, 86 App. Div. 166, 13 Ann. Cas. 298, 83 N. Y. S. 351. Allowing him to sell property as agent of mortgagee. Morton v. Williamson Bros. [Ark.] 81 S. W. 235. See 1 Curr. L. 516, n. 72.

50. Aleshire v. Lee County Sav. Bank, 105 Ill. App. 32. The permission to sell being included in a parol contemporaneous agreement, such agreement may be shown. Id.

51. In re Ball, 123 F. 164. If the purchaser is a bona fide purchaser for value and without notice. Aleshire v. Lee County Sav. Bank, 105 Ill. App. 32.

52. Soule v. Harrington [Mich.] 97 N. W. 357.

53. Sparks v. Galena Nat. Bank [Kan.] 74 P. 619.

54. Taylor v. Harle-Haas Drug Co. (Neb.) 96 N. W. 182.

55. Gen. St. p. 2113, § 4. Miller v. Gourley [N. J. Eq.] 55 A. 1083.

56. Brinker v. Ashenfelter, 1 Neb. Unoff. 793, 95 N. W. 1124.

57. See 1 Curr. L. 516.

58. Where no threats were made but mortgagee refused to sign the mortgage for several hours, finally signing on the insistence of the mortgagor and mortgagee's brother that a valid trade had been made and that certain consequences would result, held no duress. Knight v. Brown [Mich.] 100 N. W. 602. See 1 Curr. L. 517, n. 91; and see Duress, 1 Curr. L. 962.

59. Where clause in a mortgage was introduced, after discussion of attorneys for both parties, by the mortgagor's attorney who retained the mortgage in his possession for some time before it was executed, and its contents were made known to the mortgagor's representatives who executed the mortgage, held no fraud shown. Anderson v. Anderson Food Co. [N. J. Eq.] 57 A. 489. See Fraud and Undue Influence, 2 Curr. L. 104.

60. First Nat. Bank v. Taylor [Kan.] 76 P. 425. See 1 Curr. L. 516, n. 86.

61. Code 1896, § 1797. Ballow v. Collins, 139 Ala. 543, 36 So. 712. An identification by the mortgagor that he knew he had signed the mortgage offered because the mortgagee had told him so, and that he had given but one mortgage to such mortgagee, held insufficient. Id.

62. Ballow v. Collins, 139 Ala. 543, 36 So. 712.

63. Ballow v. Collins, 139 Ala. 543, 36 So. 712. Error in admitting such mortgage in evidence without testimony that the persons whose names appeared as attesting witnesses had signed their names is not reached by objection that the witnesses were not called, and that it was not shown in what manner the witness identified the mortgage. Id.

64. Metropolitan Store & S. Fixture Co. v. Albrecht [N. J. Law] 56 A. 237.

65. A mortgage reciting that it was executed "this ——— day of August, 1892," and registered on the 20th day of that month, is a valid mortgage as of the latter date as against third persons. Becker v. Bowen [Tex. Civ. App.] 79 S. W. 45.

a note secured by a chattel mortgage to state upon its face that it is so secured does not render it void as between the parties, if possession of the mortgaged property is taken before the lien of a third party attaches.[66] The mortgage is collateral to the debt represented by the notes which constitute the primary contract and which must govern where there is an irreconcilable contradiction between them and the mortgage.[67] An oral agreement made prior to the execution of the mortgage is inadmissible to vary the terms of the mortgage.[68] In order to attack a chattel mortgage for failure to file or for the conditions therein, a creditor must, by judgment, execution, or other process, have obtained a specific lien and claim against the property involved.[69] A receiver in supplementary proceedings may bring an action to avoid a chattel mortgage made by the judgment debtor on the ground that it is not properly filed.[70] Such an action is a suit in equity.[71] A mortgagor by accepting benefits under the mortgage is not thereby estopped to deny its invalidity,[72] though a corporation by so doing is estopped to deny that it was unauthorized.[73]

A mortgage is governed by the laws of the state where the note, for which it is security, is payable,[74] though in an action to enforce the mortgage against third persons the lex fori governs.[75] A federal court in determining the validity of chattel mortgages is governed by the settled law of the state in which they were given.[76]

Acknowledgment, affidavit, and extension.[77]—The acknowledgment must conform to the laws of the state where made.[78] In California, an unacknowledged chattel mortgage is not void as against creditors of a subsequent purchaser of the mortgaged property who assumed the mortgage debt.[79] An affidavit is not required to a common-law chattel mortgage.[80] The affidavit refers to the mortgage and they must be read together.[81] An affidavit stating that a lump sum is due is not rendered defective by the mortgage showing that such sum is payable in instalments.[82] A mortgage is valid as between the parties though an affidavit of good faith is not filed as required by statute.[83]

§ 6. *Filing or recording and notice of title or rights.*[84]—The recording of a chattel mortgage and the effect thereof are governed by the law of the state where

66. Construing Laws 1895, p. 260. Springer v. Lipsis, 209 Ill. 261, 70 N. E. 641.

67. Conflict as to the date upon which the debt falls due. Ferris v. Johnson [Mich.] 98 N. W. 1014.

68. Oral agreement for extension of time of payment. Connersville Buggy Co. v. Lowry [Mo. App.] 77 S. W. 771.

69. Skilton v. Coddington, 86 App. Div. 166, 13 Ann. Cas. 298, 83 N. Y. S. 351.

70. Brunnemer v. Cook, 89 App. Div. 406, 85 N. Y. S. 954.

71. An appeal from the judgment therein is governed by the chancery rule that exceptions which do not affect the merits are disregarded. Brunnemer v. Cook, 89 App. Div. 406, 85 N. Y. S. 954.

72. Rose v. Harllee [S. C.] 48 S. E. 541.

73. Miller v. Gourley [N. J. Eq.] 55 A. 1083.

74. As to usury laws. Trower Bros. Co. v. Hamilton [Mo.] 77 S. W. 1081.

75. Smead v. Chandler & Co., 71 Ark. 505, 76 S. W. 1066.

76. Bankruptcy court. In re Antigo Screen Door Co. [C. C. A.] 123 F. 249; In re Beede, 126 F. 853. The law on the subject being regarded as a rule of property. Dugan v. Beckett [C. C. A.] 129 F. 56.

77. See 1 Curr. L. 517.

78. Tweto v. Horton, 90 Minn. 451, 97 N. W. 128.

79. Construing Civ. Code, § 2957. Mortgagors formed corporation to whom mortgaged property was transferred, it assuming the mortgage, and agreeing with the creditors of the mortgagor to pay them all. Mortgagee assented to the arrangement but would not release his lien. Corporation failed to pay the debt, held estopped from claiming the property free from the mortgage though the latter was unacknowledged. Talcott v. Hurlbert [Cal.] 76 P. 647.

80. Thompson v. Fairbanks, 75 Vt. 361, 66 A. 11.

81. In determining the consideration. Metropolitan Store & S. Fixture Co. v. Albrecht [N. J. Law] 56 A. 237.

82. Metropolitan Store & S. Fixture Co. v. Albrecht [N. J. Law] 56 A. 237. The word "due" held to signify the present existence of a debt payable thereafter. Id.

83. Rev. St. 1898, § 150. No affidavit of mortgagee. Johnson v. Hibbard [Utah] 75 P. 737.

84. See 1 Curr. L. 518. See, also, Notice and Record of Title, 2 Curr. L. 1053.

the property is situated.[85] A mortgage is valid between the parties, though unrecorded,[86] and failure to file raises no presumption of fraud,[87] though it renders the mortgage void as to third parties who, not having actual notice of the mortgage,[88] have acquired adverse rights or suffered prejudice during the interval between execution and recording or taking possession by the mortgagor;[89] it is only void, however, to the extent to which such creditors have been damaged by such action,[90] and this rule applies to equitable as well as legal mortgages.[91] In some states, however, the mortgage is valid as to debts contracted after its execution, if recorded before seizure.[92] One accepting and relying on a chattel mortgage which is, by its terms, subject to a prior one, cannot question the validity of the prior mortgage on the ground that it was unrecorded.[93] Mortgagees of a crop, whose mortgage is recorded, are not obliged to take immediate possession of the crop after it has been harvested in order to preserve their lien.[94] In some states, mortgages for supplies furnished in raising a crop take priority over older judgments irrespective of record.[95] An administrator, as trustee for the creditors, may insist that a chattel mortgage executed by the decedent is void, as against existing creditors, for want of record.[96] A chattel mortgage being executed on property in one state, and duly filed for record, it will be binding on the property after its removal to another state,[97] though it will not be given priority over the liens of attaching creditors

85. In re Brannock, 131 F. 819.

86. Maker cannot attach the property when in the hands of a transferee of the mortgage, in an action by the maker against the mortgagee. Thompson v. Dyer [R. I.] 55 A. 824. Considering the law of Wisconsin. In re Antigo Screen Door Co. [C. C. A.] 123 F. 249. Though it covers personalty and realty. Ward v. Ward, 131 F. 946. Though unaccompanied by any change of possession. Skilton v. Coddington, 86 App. Div. 166, 13 Ann. Cas. 298, 83 N. Y. S. 351. See 1 Curr. L. 518, n. 13.

87. In re Beede, 126 F. 853; Summerville v. Kelliher [Cal.] 77 P. 889.

88. Loeser v. Jorgensen [Mich.] 100 N. W. 460; Cowden v. Finney [Idaho] 76 P. 765. There being a direct and substantial conflict on the question of actual notice, the appellate court will not disturb the findings of the trial court. Id.

89. Creditors. Summerville v. Kelliher [Cal.] 77 P. 889. Considering the law of Wisconsin. In re Antigo Screen Door Co. [C. C. A.] 123 F. 249; News Pub. Co. v. Tyndale, 2 Neb. Unoff. 256, 96 N. W. 125; First Nat. Bank v. Reid, 122 Iowa, 280, 98 N. W. 107; Skilton v. Coddington, 86 App. Div. 166, 13 Ann. Cas. 298, 83 N. Y. S. 351; Harrison v. South Carthage Min. Co. [Mo. App.] 79 S. W. 1160.

90. First Nat. Bank v. Tolerton [Neb.] 97 N. W. 248. By the statutes and decisions of New York, an unfiled mortgage is void only as against creditors who have reduced their claims to judgment, and had execution issued thereon; but one who was a general creditor during the time the mortgage remained unfiled may assert its invalidity on obtaining judgment and execution, although it has been filed in the meantime. In re Beede, 126 F. 853.

Purchaser at execution sale under a judgment against the mortgagor. Johns v. Kamarad, 2 Neb. Unoff. 157, 96 N. W. 118.

Subsequent mortgagees: Though the prior mortgagee takes possession of the property before the subsequent mortgage is recorded. Sheets v. Poff, 123 Iowa, 714, 99 N. W. 573. Such prior mortgagee's claim will not be preferred on the ground that he is a creditor of the mortgagor, and took possession before notice of the subsequent mortgage. Id. In Wisconsin, the second mortgagee's knowledge of the first mortgage or the intent of the mortgagor to hinder or delay creditors, is immaterial. Dornbrook v. Rumely Co. [Wis.] 97 N. W. 493.

Innocent purchasers. Cowden v. Finney [Idaho] 75 P. 766; Iowa Loan Co. v. Kimball Piano Co. [Iowa] 99 N. W. 576. A mortgagee under an unrecorded chattel mortgage, surreptitiously seizing the property without authority of law or consent of the mortgagor, and who, in replevin by a holder of a subsequent unrecorded mortgage, denies that the property was seized by virtue of his mortgage, is not an innocent purchaser, even though when he seized the property he canceled a book account held against the mortgagor. Id.

91. Thurlough v. Dresser, 98 Me. 161, 56 A. 654.

92. Harrison v. South Carthage Min. Co. [Mo. App.] 79 S. W. 1160. In these states it is held valid as against a judgment rendered against the mortgagor on claims arising both before its execution and afterwards, but before it is recorded, when recorded before seizure under the judgment. Id.

93. First Nat. Bank v. Reid, 122 Iowa, 280, 98 N. W. 107.

94. Zorn v. Livesley [Or.] 76 P. 1057.

95. Acts 1899, p. 78; Van Epps' Code Supp. § 6592 makes such mortgage superior to the lien of an older common-law judgment, though not recorded until after the levy of the fi. fa. on the matured crop. Franklin v. Callway [Ga.] 47 S. E. 970.

96. Blackman v. Baxter [Iowa] 100 N. W. 75.

97. Kerfoot v. State Bank of Waterloo [Okl.] 77 P. 46.

in the latter state,[98] nor mortgagees of property for which it was exchanged.[99] The registration of the assignment of a mortgage is wholly the creature of statute, and, the statute not requiring its registration, the assignee is not guilty of negligence in failing to so do,[1] and such assignee, though he has no record title, will be protected against subsequent purchasers and incumbrancers in good faith.[2] A chattel mortgage executed, acknowledged, and recorded in one state is not, under the statute law of some states, entitled to registration in the latter sister states.[3]

In some states the mortgage must be recorded in the county where the mortgagor resides;[4] that the residence is temporary is immaterial the mortgagor having possession of the property.[5] Generally the recital in the mortgage of the place where the mortgagor resides is not evidence of his place of residence,[6] though the recital being in both a first or second mortgage, it is prima facie evidence of such residence in a suit by the first mortgagee, or his assigns, against the second mortgagee.[7] The mortgage being duly executed in the state and recorded in the county where the property is actually situated and in the possession of the mortgagor, it is presumed that the latter resides in such county.[8] In other states it must be filed in the county where the property is located,[9] and this is especially true where the mortgagor is a nonresident.[10] Under the United States statutes, a mortgage on a vessel must be recorded in the office of the collector of customs at the port nearest the owner's place of residence.[11] In most states, a mortgage including real estate and chattels must be recorded both as a chattel and a real estate mortgage in order to be valid as against creditors of the mortgagor,[12] though

98. Snyder v. Yates [Tenn.] 79 S. W. 796.

99. The owner of personal property, which is claimed and recorded as a homestead, moving to another county and exchanging the property, the mortgagee of the property received in exchange the mortgage reciting that it is free from incumbrances, has a valid lien upon such property as against the beneficiaries of the homestead. Ford v. Fargason [Ga.] 48 S. E. 180.

1. Declaring the rule in Kansas. Kerfoot v. State Bank of Waterloo [Okl.] 77 P. 46. The formal assignment and transfer of the note is all that is necessary. Webb's Ann. St. of Kansas, Vol. 2, c. 120, § 9, does not require the recording of such assignment. First Nat. Bank v. National Live Stock Bank, 13 Okl. 719, 76 P. 130. The fact that a mortgagee in Kansas, in the absence of a contract to the contrary, owns the legal title to the property mortgaged, does not require an assignment of such mortgage to be placed of record, there being no statute imposing such a duty. Id.

2. May recover against them in a replevin action involving the property included in his mortgage. First Nat. Bank v. National Live Stock Bank, 13 Okl. 719, 76 P. 130.

3. So as to give notice to creditors of the mortgagor. Snyder v. Yates [Tenn.] 79 S. W. 796.

4. In re Brannock, 131 F. 819. In Indiana must be recorded in county where mortgagor resides, and within 10 days after its execution [Burns' Rev. St. Ind. 1901, § 6638]. Arnold v. Eastin's Trustees, 25 Ky. L. R. 895, 76 S. W. 855. See 1 Curr. L. 518, n. 18, 22.

5. Railroad contractor temporarily in county performing work. In re Brannock, 131 F. 819.

6. Code Iowa, § 2906. In re Brannock, 131 F. 819.

7. Tweto v. Horton, 90 Minn. 451, 97 N. W. 128; Nickerson v. Wells-Stone Mercantile Co., 71 Minn. 230, 73 N. W. 959, 74 N. W. 891, distinguished.

Admissibility of evidence: On the question of residence, a contract made between a chattel mortgagor and mortgagee prior to the execution of the mortgage is admissible to show the mortgagor's residence at the time of its execution. Brunnemer v. Cook, 89 App. Div. 406, 85 N. Y. S. 954. Evidence that the mortgagor told a supervisor that he had a homestead in F., and that he made and delivered to such supervisor a statement of his taxable property in that township is relevant. Loeser v. Jorgensen [Mich.] 100 N. W. 450. On the same issue, evidence that the day after the mortgage was given, the mortgagor appeared before the registration board at F., and claimed himself to be a resident of that township, entitled to vote there, and that he registered and voted there is admissible. Id.

8. In re Brannock, 131 F. 819.

9. First Nat. Bank v. Hesser [Okl.] 77 P. 36. See 1 Curr. L. 518, n. 20.

10. Mortgage executed by a nonresident, which includes an account due from a resident, must be recorded in the county where the debtor resides [Sand. & H. Dig. § 5090]. Smead v. Chandler & Co., 71 Ark. 505, 76 S. W. 1066.

11. Rev. St. U. S. §§ 4141, 4192. Recording in any other place is ineffectual to impart constructive notice. Arnold v. Eastin's Trustees, 25 Ky. L. R. 895, 76 S. W. 855. Coal barges used on an inland river are such vessels. Id.

12. Construing Gen. St. p. 2113, §§ 4, 5.

in Missouri, it being recorded as a real estate mortgage, it constitutes constructive notice of the incumbrance on the chattels.[13] In order to be guilty of collusion with the mortgagor in misleading a mortgagee as to the mortgagor's place of residence, one must have knowledge of the latter's intent to defraud or of a prior unrecorded mortgage.[14] The effect of a statute prescribing a time limit for the recording of instruments is that, if the instrument is recorded within that time, the record, and consequently the notice imparted thereby, relates back to the time of the execution of the instrument. Record after the expiration of that time will not be invalid, but it is only notice from the time that the record is made, and does not relate back to the time of execution.[15] A chattel mortgage left for record, but returned unrecorded, has not been recorded.[16] As soon as the mortgage is deposited, it is presumed to have been transcribed, and this presumption continues until the mortgage is taken away unrecorded.[17] A record being defective, a subsequent valid recording is ineffectual as to antecedent creditors,[18] though an improper filing or failure to take possession may be cured by the subsequent delivery of possession before creditors have obtained a lien on the property.[19]

Notice of title or rights.[20]—The record of a mortgage conclusively imputes notice of its contents, and of the mortgagee's rights thereunder, irrespective of the question of actual notice,[21] third persons not being, however, chargeable with notice of more than they can ascertain from the record or from being put upon inquiry thereby.[22] As far as notice is concerned, actual notice of the instrument[23] or knowledge of facts sufficient to put one on inquiry,[24] or possession by the mortgagee,[25] are just as efficacious as filing. The beginning of an action to enforce a lien may be equivalent to actual possession, thus dispensing with record.[26] In order to impart constructive notice, the description must be adequate,[27] and the instrument must be properly acknowledged.[28]

§ 7. *Title and ownership.*[29]—The general rule, following the common law, is that the mortgagee takes the legal title subject to be defeated on the perform-

Knickerbocker Trust Co. v. Penn Cordage Co. [N. J. Err. & App.] 58 A. 409.

13. This though the statute requires chattel mortgages to be recorded in separate books. Long v. Gorman [Mo. App.] 79 S. W. 180. [The court admits the evil of this rule, but bases its decision on stare decisis.]

14. Dornbrook v. Rumely Co. [Wis.] 97 N. W. 493.

15. Construing Civ. Code 1895, § 2726. Armitage-Herschell Co. v. Muscogee Real Estate Co., 119 Ga. 552, 46 S. E. 634.

16, 17. Knickerbocker Trust Co. v. Penn Cordage Co. [N. J. Err. & App.] 58 A. 409.

18. First record was in wrong office. Arnold v. Eastin's Trustees, 25 Ky. L. R. 895, 76 S. W. 855.

19. In Wisconsin, it seems the lien must be acquired by execution or attachment. In re Antigo Screen Door Co. [C. C. A.] 123 F. 249.

20. See 1 Curr L. 519.

21. Zorn v. Livesley [Or.] 76 P. 1057; Morton v. Williamson Bros. [Ark.] 81 S. W. 235.

22. Notice of the mortgage of a crop to be planted in 1899 is not notice of a mortgage on a crop planted or to be planted in 1900. Thurlough v. Dresser, 98 Me. 161, 56 A. 654.

23. Loeser v. Jorgensen [Mich.] 100 N. W. 450; Salmon v. Norris, 88 N. Y. S. 780. See 1 Curr. L. 519, n. 38.

24. An attachment creditor having notice of a levy under a writ of attachment, such notice is sufficient to put him on inquiry as to the existence of a mortgage. Cassidy v. Willis [Tex. Civ. App.] 78 S. W. 40.

25. Springer v. Lipsis, 209 Ill. 261, 70 N. E. 641; Thompson v. Fairbanks, 75 Vt. 361, 56 A. 11. See 1 Curr. L. 518, n. 17.

26. Ryan v. Donley [Neb.] 96 N. W. 234.

27. A description of property sought to be included in a chattel mortgage as "all other personal property" now owned, or which the mortgagor might acquire during the life of the mortgage, held not sufficiently specific. Farmers' & Merchants' Bank v. Stockdale, 121 Iowa, 748, 96 N. W. 732. Where the mortgage, after describing the chattels included, contained a recital that all of the property was in a certain section, township, and range of a particular county, "and in other places in said county," held insufficient to include property in the county, but not in the designated section, as against a subsequent mortgagee having only the notice imparted by the record. Id.

28. The mortgage must not be acknowledged before a notary having an interest in the same. Farmers' & Merchants' Bank v. Stockdale, 121 Iowa, 748, 96 N. W. 732. Release. First Nat. Bank v. National Live Stock Bank, 13 Okl. 719, 76 P. 130.

29. See 1 Curr. L. 520.

ance of the conditions,[30] but the courts are not all in harmony with this rule.[31] After default, the mortgagee, having by the terms of the mortgage the right of possession, the mortgagor has no general or special property right in the chattels sufficient to sustain an interplea in attachment as against the mortgagee's attaching creditor.[32] The possession taken by a mortgagee upon default in order to be effectual must be actual, and of such a character as to give notice to the public that the mortgagee has become the owner.[33] Though the mortgage includes the good will of a business, the mortgagee cannot enjoin the mortgagor's wife from carrying on the business in her name and with her property, with her husband as agent.[34] The mortgagor being in possession of the property, he is entitled to the rents and profits thereof, the mortgagee being entitled to them only from the time that he has a receiver appointed to save them for him.[35] A purchaser from the mortgagor,[36] or the mortgagee,[37] does not, by reason of such purchase, or the mortgage, admit the mortgagor's title.

§ 8. *Right of possession.*[38]—The mortgagee is entitled to possession after default by the mortgagor,[39] though he may by agreement be entitled to possession prior to default;[40] a provision authorizing the mortgagee upon named contingencies to take possession of the property being valid;[41] and upon the happen-

30. Thompson v. Fairbanks, 75 Vt. 361, 56 A. 11. On his taking possession, such title operates against the creditors of the mortgagor. Id. The liens created respectively by mortgage and execution, against the mortgagor, on the same chattels, are essentially different, and cannot co-exist. Osborne & Co. v. Hughey [Okl.] 76 P. 146. Before the lien of such execution can attach, the officer must pay off or tender the amount of any existing mortgage liens, or deposit the amount of the mortgage debt with an officer authorized by law to receive the same. Id. (This case is apparently in conflict with Kerfoot v. State Bank of Waterloo [Okl.] 77 P. 46; see post next note.) Under Code 1896, § 1064, a mortgage of unplanted crops made on or after January 1st of the year in which they are to be grown, conveys the legal title. Gaston v. Marengo Imp. Co., 139 Ala. 465, 36 So. 738.

31. The execution of a chattel mortgage creates a mere lien upon the property (Backhaus v. Buells, 43 Or. 558, 73 P. 342); the mortgagor retaining such a title thereto that he may sell or further incumber it (Id.).

As against all persons, except the mortgagee, the mortgagor is regarded as the owner of the property mortgaged, and as having, therefore, the right to maintain an action against a third person for its conversion. Stephens v. Head, 138 Ala. 455, 35 So. 565. As a general rule, a mortgagee and his assignee acquire only a lien on the interest of the mortgagor in the property mortgaged. Kerfoot v. State Bank of Waterloo [Okl.] 77 P. 46. (This case is apparently in conflict with Osborne & Co. v. Hughey [Okl.] 76 P. 146.) A mortgagee of cattle not being in possession thereof is not liable for trespasses committed by them. Is not the owner within the meaning of Comp. St. 1901, c. 2, art. 3. Goff v. Byers Bros. & Co. [Neb.] 96 N. W. 1037. A chattel mortgage does not pass title to the mortgagee, or give him a right to possession of the mortgaged property before the debt becomes due, unless the mortgage so provides. Summerville v. Stockton Mill. Co., 142 Cal. 529, 76 P. 243. After condition broken, but prior to demand by a mortgagee for the possession of chattels, and prior to his taking possession, the mortgagor may maintain an action for their conversion by a stranger. Converted by a warehouseman with whom they were stored. Bigler v. Leonori [Mo. App.] 77 S. W. 324.

32. Connersville Buggy Co. v. Lowry [Mo. App.] 77 S. W. 771. If the court however should erroneously allow him to interplead, he cannot show that the mortgage note has been transferred to and is owned by another than defendant mortgagee. Id.

33. The estate owning the building in which the mortgaged chattels were located, the executor telling an employe of the mortgagor to take charge of the property for the estate, is insufficient as a change of possession. Ankele v. Elder [Colo. App.] 75 P. 29.

34. Vinall v. Hendricks [Ind. App.] 71 N. E. 682.

35. Georgetown Water Co. v. Fidelity Trust & Safety Vault Co.'s Trustee, 25 Ky. L. R. 1739, 78 S. W. 113.

36. Karter v. Fields [Ala.] 37 So. 204.

37. Potter v. Lohse [Mont.] 77 P. 419.

38. See 1 Curr. L. 520.

39. Backhaus v. Buells, 43 Or. 558, 73 P. 342. Where the debts are due when the mortgage is executed, the covenant to pay debts is broken as soon as made, and in that sense the mortgagor is in default, thus giving the mortgagee the right to take possession at any time. Summerville v. Stockton Mill. Co., 142 Cal. 529, 76 P. 243. See 1 Curr. L. 520, n. 54.

40. An allegation of possession under a chattel mortgage by agreement with the mortgagor renders it unnecessary to allege demand of payment of demand notes secured by the mortgage in order to show the mortgagee's right of possession. Taylor v. Harle-Haas Drug Co. [Neb.] 96 N. W. 182. Evidence considered and held sufficient to sustain plaintiff's claim that he is a mortgagee in possession. Meyer v. First Nat. Bank [Neb.] 98 N. W. 682.

41. First Nat. Bank v. Steers [Idaho] 7[illegible] P. 225. A covenant allowing the mortgagee

ing of such contingency, the mortgagee may, in some cases, maintain an action of claim and delivery to recover possession of the mortgaged property.[42] A mortgagee, having the right to take possession of the property whenever he deems himself insecure, must act in good faith, and not arbitrarily, in determining whether he is insecure,[43] and as to whether or not he acted in good faith is for the jury to determine from all the facts of the case.[44] A mortgage designating the mortgagee and his assigns as the only persons allowed to take possession of and sell the property, the right is limited to them.[45] The right to rescind the contract under which the mortgaged property has been delivered to the mortgagee because of breach of the agreement by the latter may be lost by laches,[46] and the mortgagor not living up to his part of the agreement cannot rescind on the ground that the mortgagee did not perform his part.[47] An agreement to extend the time for payment of a debt secured by chattel mortgage does not postpone the mortgagee's right to the possession of the mortgaged property for failure to pay the debt at the time originally agreed on.[48] In some jurisdictions, the mortgagee securing possession after condition broken, the mortgagor's title is not extinguished, but continues until the lien is foreclosed and he is divested of such title in the manner prescribed by law,[49] and such mortgagee cannot keep, treat, or dispose of the property as his own,[50] the right given the mortgagee to take possession of the mortgaged property after condition broken being for the purpose of foreclosure only;[51] but this holding is not universal.[52] A mortgagee prematurely taking possession of the chattels, the mortgagor may maintain replevin,[53] and the plaintiff cannot be limited in his right of recovery to the price for which defendant may have sold the same,[54] but is entitled to recover damages,[55] though it is error to allow damages for the value of the use of the property after the time

to take any steps necessary to protect the mortgaged property gives him an equal right with the mortgagor to the possession of the property for the purpose of protecting it. Summerville v. Stockton Mill. Co., 142 Cal. 529, 76 P. 243.

42. Held proper where possession was sought to be recovered from an officer claiming the property under a writ of attachment issued and levied subsequent to the mortgage lien, and who refused to deliver up the property upon demand of the mortgagee, or to pay the mortgage debt. First Nat. Bank v. Steers [Idaho] 75 P. 225.

43. Feller v. McKillip [Mo. App.] 81 S. W. 641.

NOTE. Right to take possession under an insecurity clause: The courts are in conflict as to how far the mortgagee can go in taking possession under a "danger," "safety," or "insecurity" clause in a chattel mortgage. One class of decisions allow him to arbitrarily take possession. Hill v. Merriman, 72 Wis. 483, 40 N. W. 399; Werner v. Bergman, 28 Kan. 60, 42 Am. Rep. 152; Braley v. Byrnes, 21 Minn. 483. This case is, however, no authority in Minnesota as the rule has been changed by statute. Deal v. Osborne & Co., 42 Minn. 102, 43 N. W. 835. The majority of the courts refuse, however, to recognize a doctrine so extreme as the above, and limit the rights of the mortgagee more or less. Generally the rule may be stated as follows: He must have just cause based upon the actual existence of facts constituting a reasonable ground for believing himself insecure. Woods v. Gaar, 93 Mich. 143, 53 N. W. 14; Barret v. Hart, 42 Ohio St. 41, 51 Am. Rep. 801; Newlean v. Olson, 22 Neb. 717, 36 N. W. 155; Rector-Wilhelmy Co. v. Nissen, 35 Neb. 716, 53 N. W. 670; Roy v. Goings, 96 Ill. 361, 36 Am. Rep. 151.—From note to Robison v. Gray, 23 L. R. A. 780.

44. Feller v. McKillip [Mo. App.] 81 S. W. 641.

45. Mortgagee, not having assigned it, marked it paid, and mailed it to the mortgagor's surety, held the surety acquired no right to take possession of the property. Mardis v. Sims [Ala.] 37 So. 243.

46. Lost where the completeness of his title was not questioned for three and one-half years. Ward v. Sherman, 192 U. S. 168, 24 S. Ct. 227.

47. Ward v. Sherman, 192 U. S. 168, 24 S. Ct. 227.

48. Connersville Buggy Co. v. Lowry [Mo. App.] 77 S. W. 771.

49, 50, 51. Backhaus v. Buells, 43 Or. 558, 72 P. 976, 73 P. 342.

52. Potter v. Lohse [Mont.] 77 P. 419. In such an action a charge to find for plaintiff, if he was the owner of the property and defendant had knowledge of his rights, is erroneous as ignoring the question of plaintiff's right to possession. Id.

53. Ferris v. Johnson [Mich.] 98 N. W. 1014.

54. Cowden v. Finney [Idaho] 75 P. 765.

55. The situation of the property, the interest of the parties, and the mortgagee's right to possession after default, are all circumstances bearing on the question of damages. Ferris v. Johnson [Mich.] 98 N. W. 1014.

when, under the terms of the mortgage, the mortgagee was lawfully entitled to its possession,[56] and the mortgagee cannot offset his lien against the value of the use of the property to the time such right of possession would have accrued.[57] In replevin by a mortgagee against a prior mortgagee, the latter's lack of notice of the subsequent mortgage is immaterial and does not justify his seizure of the property, he denying in his answer that he took it by virtue of his mortgage.[58] One seizing the property of another under a wrongful and fraudulent chattel mortgage is liable to the owner of the property for the damages sustained.[59]

§ 9. *Liens and priorities; waiver. Duration of mortgage lien.*[60]—The lien of a mortgage on future-acquired property attaches as soon as the property is acquired by the mortgagor,[61] and in the case of a crop, the lien continues after the same is harvested,[62] though it is lost where the crop, after severance, is removed by the mortgagor or by some third person from the mortgagor's land.[63]

Conflicting liens.[64]—A chattel mortgage duly filed takes precedence of a later agister's claim,[65] a demand not being necessary to entitle the mortgagee to maintain replevin against persons claiming possession under such a lien.[66] A written mortgage takes precedence over a prior verbal mortgage not coupled with possession by the mortgagee.[67] A chattel mortgage is not protected against a prior unrecorded contract of conditional sale where the debt secured by the mortgage was contracted previous to the sale.[68] A purchaser at a sale under a trust deed who takes possession has the right to the growing crop as against a chattel mortgagee thereof having actual knowledge of the trust deed, the mortgage being executed subsequent to the latter, though prior to the sale.[69] Advancements for supplies are under certain circumstances entitled to priority of payment.[70] A writ of execution lying inactive, at the instance of a creditor or his attorney, in the officer's hands, its lien is subordinated to that of a mortgage executed and recorded before the levy of the writ.[71]

Waiver of liens.[72]—The mortgagee taking possession in pursuance of the terms of the mortgage, his lien is not extinguished where he does not claim to hold otherwise than as mortgagee.[73]

56. Ferris v. Johnson [Mich.] 98 N. W. 1014.

57. Frappiea v. Johnson [Vt.] 56 A. 100.

58. Iowa Loan Co. v. Kimball Piano Co. [Iowa] 99 N. W. 576.

59. Tootle v. Kent, 12 Okl. 674, 73 P. 310. Where the owner's store is closed, it may include loss of profits, depreciation in value of goods, and damage to his financial standing and credit, so long as the damages are not remote, speculative, or conjectural. Id.

60. See 1 Curr. L. 521.

61. Stoll v. Gibson [N. J. Eq.] 56 A. 710.

62. Is superior to the lien of a levy under execution issued upon a judgment against the mortgagor, made at a time when it is apparent that the harvested crop is of the annual crop described in the mortgage. Hayes v. First State Bank [Neb.] 98 N. W. 423.

63. It is not lost where the mortgagee, in pursuance of the terms of the mortgage, removes the crop for his better security [Civ. Code, § 2972]. Summerville v. Stockton Mill. Co., 142 Cal. 529, 76 P. 243.

64. See 1 Curr. L. 521, n. 75.

65. Though the mortgagee has knowledge that pasturage is being furnished. Beh v. Moore [Iowa] 100 N. W. 502. See 1 Curr. L. 521, n. 75.

66. Beh v. Moore [Iowa] 100 N. W. 502.

67. Muller v. Parcel [Neb.] 99 N. W. 684.

68. First Nat. Bank v. Reid, 122 Iowa, 280, 98 N. W. 107.

69. Penryn Fruit Co. v. Sherman-Worrell Fruit Co., 142 Cal. 643, 76 P. 484.

70. Advancements made to enable the mortgagor to harvest the crop are entitled to priority of payment from the proceeds, there being an oral agreement to that effect, over a subsequent mortgagee with knowledge of the advancement, and over an assignee of a mortgagee assenting to such agreement. Dickenson v. Columbus State Bank [Neb.] 98 N. W. 813.

71. Ankele v. Elder [Colo. App.] 75 P. 29.

72. See 1 Curr. L. 522, n. 86-89.

73. Summerville v. Kelliher [Cal.] 77 P. 889. A mortgage of crops giving the mortgagee power to take possession and store the crops, his act in so doing, where he does not claim to hold otherwise than as mortgagee, does not amount to a conversion under Civ. Code § 2910, providing that a lien is extinguished by the wrongful conversion of the property by the lienor (Summerville v. Stockton Mill. Co., 142 Cal. 529, 76 P. 243), even though such taking possession was not authorized by the terms of the mortgage (Id.).

§ 10. *Disposal and use of the property by the mortgagor.*[74]—In some states, the unlawful disposition of mortgaged property is a crime.[75] In general, the mortgagor cannot dispose of the mortgaged property except with the knowledge[76] or consent[77] of the mortgagee. In the absence of such knowledge or consent, the mortgagee may maintain an action against the purchaser, the latter having either actual or constructive notice of the mortgage,[78] or against an agent of the mortgagor, the sale violating the terms of the mortgage, of which fact the agent had constructive notice,[79] and this right of action is not lost, though the mortgagee accepts part of the proceeds in payment of another debt owed him by the mortgagor, he having no knowledge of the source of the money,[80] and under such circumstances he need not return the money in order to maintain such action.[81] The mortgagee consenting to the sale, the purchaser takes title free from the lien,[82] unless expressly reserved from the consent,[83] and such permission is a defense to an action against the mortgagor for fraud in selling the property.[84] The evidence on the question of consent being conflicting, the question is for the jury.[85] Property purchased with the proceeds of a sale of mortgaged property by the mortgagor is not impressed with a trust in favor of the mortgagee, unless the proceeds can be specifically traced into the property purchased.[86] In an action to establish such a trust, the burden is on plaintiff to identify the property into which the proceeds of the sale passed,[87] and the question of registration of the mortgage cannot affect the question of ownership of the proceeds of the sale.[88] The mortgagee consenting to the sale of a part of the mortgaged property by the mortgagor, such consent does not render the mortgagee liable for the mortgagor's breach of contract.[89] The mortgage providing that a rescission of conditions should only be valid when

74. See 1 Curr. L. 522.

75. Larceny in Iowa. In re Renshaw [S. D.] 99 N. W. 83. The Iowa statute covers the case of a sale in Iowa of personalty mortgaged to residents of that state, though the mortgage was executed, delivered, and filed in another state by nonresidents of Iowa. Id.

V. S. 2259, providing that a mortgagor shall not sell the chattels without the written consent of the mortgagee indorsed on the mortgage and on the record thereof, does not apply to an action on the case for fraud brought by the purchaser of mortgaged chattels against the mortgagor on the ground that the sale was induced by the mortgagor's fraudulent statement that the property was free from incumbrances. Colston v. Bean [Vt.] 58 A. 795.

In such a prosecution, it may be shown that defendant offered to pay the mortgage, also evidence of other debts of the defendant is admissible, but the disposition of the property received by one claiming to be the agent of defendant is inadmissible in the absence of proof of his authority, nor is it competent to show that defendant had formerly committed a similar offense. Owens v. State [Tex. Cr. App.] 79 S. W. 575.

See 1 Curr. L. 522, n. 94, 95.

76. Zorn v. Livesley [Or.] 75 P. 1057. The contract of sale containing a guaranty by the mortgagee of the performance of the mortgagor's contract of sale is admissible to show the mortgagee's knowledge of such sale, though signed only by the mortgagor. Burroughs v. Butler-Ryan Co., 121 Iowa, 215, 96 N. W. 750.

77. Greer v. Newland [Kan.] 77 P. 98; Gosnell v. Webster [Neb.] 97 N. W. 1060; Zorn v. Livesley [Or.] 75 P. 1057. An allegation that plaintiff "waived and surrendered the alleged claim of the mortgage upon the said hops" is a conclusion of law. Zorn v. Livesley [Or.] 75 P. 1057.

78. Gosnell v. Webster [Neb.] 97 N. W. 1060. Evidence held sufficient to authorize the court to assume that the purchaser had notice of the mortgage before purchasing. Soule v. Harrington [Mich.] 97 N. W. 357.

79. Greer v. Newland [Kan.] 77 P. 98.

80, 81. Gosnell v. Webster [Neb.] 97 N. W. 1060.

82. Colston v. Bean [Vt.] 58 A. 795; Zorn v. Livesley [Or.] 75 P. 1057. See 1 Curr. L. 522, n. 92.

83. Mortgagee agreed to sale subject to mortgage. Fields v. Jobson Wagon Co. [Mo. App.] 81 S. W. 635.

84. Colston v. Bean [Vt.] 58 A. 795.

85. Burroughs v. Butler-Ryan Co., 121 Iowa, 215, 96 N. W. 750. Evidence being uncontradicted the issue is properly withdrawn from the jury. Zorn v. Livesley [Or.] 75 P. 1057.

86. Where personalty, different parts of which were mortgaged to different persons, was sold by the mortgagor, all the proceeds being put into his business and used to pay debts and purchase other property, held, the property purchased was not impressed with a trust in favor of the mortgagees. Tex. Moline Plow Co. v. Kingman Tex. Implement Co. [Tex. Civ. App.] 80 S. W. 1042.

87, 88. Tex. Moline Plow Co. v. Kingman Tex. Implement Co. [Tex. Civ. App.] 80 S. W. 1042.

89. Burroughs v. Butler-Ryan Co., 121 Iowa, 215, 96 N. W. 750.

in writing, a third party obtaining possession of the chattel through a violation of such conditions cannot, in an action by the mortgagee for conversion, set up an oral rescission of such conditions by the mortgagor and mortgagee.[90] A mortgagee of a gambling device incapable of being used for any other purpose, permitting the mortgagor to retain and use the same, cannot object to its destruction by the state on the ground that he did not consent to its wrongful use.[91]

§ 11. *Assignment of the mortgage.*[92]—The assignment and transfer of a note secured by a chattel mortgage carries the security without a formal assignment of the mortgage.[93] An assignment of a distinct part of an indebtedness secured by mortgage carries with it a pro tanto interest in the mortgage, and a lien in common to the extent of the respective interests.[94] A purchaser from a chattel mortgagee is subrogated to the rights of his grantor with respect to his property purchased.[95] The provision for commission for selling the mortgaged property commonly found in chattel mortgages taken by commission merchants does not constitute the mortgagee the agent for an assignee of the note or mortgage for the purpose of selling the cattle for the assignee's benefit.[96]

§ 12. *Payment and discharge.*[97]—Payment is a defense which may be interposed to any suit based upon the mortgage,[98] being legal as well as equitable in its nature.[99] In order to constitute payment and discharge, there need be no formal delivery of the property in which payment is made; it is sufficient if the mortgagee receives the property.[1] Possession of the notes by the mortgagee is prima facie evidence of nonpayment,[2] and it seems as though the mortgagor regaining possession of the property from the mortgagee, a presumption of payment arises.[3] The time of payment may be extended by agreement,[4] but the extension should be for a definite period of time.[5] The mortgagee is not bound to look for payment to one voluntarily promising to pay the same, but may recover of the mortgagor funds realized by the latter from the mortgaged property, though the mortgage has been released and discharged of record.[6] The property being sold at a foreclosure sale under a second mortgage, the interest of the first mortgagee being

90. Salabes v. Castelberg [Md.] 57 A. 20.

91. Roulette wheel. Kite v. People [Colo.] 74 P. 886.

92. See 1 Curr. L. 523.

93. Tweto v. Horton, 90 Minn. 451, 97 N. W. 128; First Nat. Bank v. National Live Stock Bank, 13 Okl. 719, 76 P. 130. Kansas rule. Kerfoot v. State Bank of Waterloo [Okl.] 77 P. 46. Such assignee may purchase the mortgaged property from the mortgagor in payment or part payment of the debt secured by the mortgage. Hall v. Keating Implement & Mach. Co. [Tex. Civ. App.] 77 S. W. 1054. Where the note contained the following indorsement: "The mortgage securing this note bears the amount of revenue stamps required by law, duly canceled." State Nat. Bank v. Cudahy Packing Co., 126 F. 543. See 1 Curr. L. 523, n. 98.

94. Miller v. Campbell Commission Co., 13 Okl. 75, 74 P. 507.

95. Although there is no contract of assignment between him and his grantee. Potter v. Lohse [Mont.] 77 P. 419.

96. State Nat. Bank v. Cudahy Packing Co., 126 F. 543.

97. See 1 Curr. L. 523.

98. Dorman v. McDonald [Fla.] 36 So. 52.

99. Payment being alleged, equity will not intervene unless it appears that from the nature of the proof or from lapse of time this defense will fail if not adjudicated at once, or that there is reason to apprehend many or vexatious suits by the mortgagor, or that some other recognized ground of equitable intervention exists. Dorman v. McDonald [Fla.] 36 So. 52.

1. Took cattle by force. Drumm-Flato Commission Co. v. Gerlach Bank [Mo. App.] 81 S. W. 503.

2. Action of replevin by mortgagee. Heagney v. Case Threshing Mach. Co. [Neb.] 99 N. W. 260.

3. Any presumption of payment of a crop mortgage from possession of the crops by the mortgagor is overcome by evidence showing that the mortgagor got possession of the crops from the mortgagee's warehouse, and shipped them without the mortgagee's knowledge or consent. Zorn v. Livesley [Or.] 75 P. 1057.

4. That mortgagor endeavored to find a purchaser for the property after the time of payment had expired, held admissible to show extension. Lemon v. McBride [Mich.] 96 N. W. 453.

5. An agreement between a wholesale milliner and a retail milliner, extending time of payment until the fall season, is an agreement for the extension of the mortgage for a definite period. Feller v. McKillip [Mo. App.] 81 S. W. 641.

6. Cal. Wine-Makers' Corp. v. Sciaroni, 139 Cal. 277, 72 P. 990.

transferred by agreement to the proceeds, he cannot recover more than the sum due on his mortgage, though the agreement states a larger sum to be due him.[7] A renewal mortgage is not a new contract, though a different rate of interest and additional sum for attorney's fees are provided therein.[8]

Tender, by a junior mortgagee, of the amount due on a prior mortgage, entitles him to compel the senior mortgagee to cancel his mortgage on payment of the debt, and authorizes an injunction against the foreclosure of the senior mortgage;[9] and if the amount is in dispute, he should pay into court the amount tendered with an affidavit offering present payment of such sum and security for the balance in dispute.[10] A chattel mortgagee prior to bankruptcy, but after a general assignment, who accepts a part of the mortgaged property in full satisfaction of his debt, loses his lien on the remainder.[11] Novation, by the substitution of a new debtor, does not discharge the mortgage, nothing being said about releasing it.[12]

One creditor being secured by mortgage on several pieces of property, while another creditor is secured by a junior mortgage on only a part of the property, the prior creditor, when chargeable with actual notice of the rights of the junior creditor, is bound to exhaust his security on the property not covered by the junior lien, and must account to the junior lienholder if he releases his security on, or pays over to the mortgagor the proceeds of, the property not covered by the lien of the junior mortgagee, after actual notice of the junior lien.[13]

§ 13. *Redemption.*[14]—A mortgagor losing by breach of the conditions of the mortgage all title and right of possession still has an equity of redemption.[15] The sale of the property by the mortgagee, with the mortgagor's consent, operates at the common law as a formal foreclosure of his equitable right of redemption.[16] A court of equity has jurisdiction of a suit to redeem property from a mortgage after default in the payment of the mortgage debt, and the mortgagor has no adequate remedy at law.[17] The question of tender is ordinarily one for the jury.[18]

§ 14. *Foreclosure.*[19]—The statutory provisions must be followed,[20] though this method is not exclusive,[21] a court of equity having power to foreclose the mortgage.[22] To be entitled to the remedy of foreclosure, there must be an ascertained debt;[23] if the obligation be unliquidated, the mortgagee must resort to some appropriate judicial proceeding to enforce his lien, in which the amount of his debt must be ascertained, and the rights of the parties declared and enforced.[24]

7. Blumberg v. Marks, 87 N. Y. S. 512.

8. Vollmer v. Reid's Estate [Idaho] 77 P. 325.

9, 10. Bernheimer & S. P. Brew. Co. v. Koehler, 42 Misc. 377, 86 N. Y. S. 716.

11. Cannot thereafter transfer it to one fellow creditor to the exclusion of others. In re Thompson [C. C. A.] 128 F. 575.

12. Purchaser of mortgaged chattels agreed to pay the debt. Held, mortgage not discharged, nor was the purchaser the mortgagor as to his creditors [Construing Civ. Code, §§ 1531, 2957]. Talcott v. Hurlbert [Cal.] 76 P. 647.

13. First Nat. Bank v. Taylor [Kan.] 76 P. 425.

14. See 1 Curr. L. 524.

15. Fishel v. Hamilton Storage Warehouse Co., 42 Misc. 532, 86 N. Y. S. 196.

16. Thompson v. Fairbanks, 75 Vt. 361, 56 A. 11.

17. Manhattan L. Ins. Co. v. Wright [C. C. A.] 126 F. 82.

18. Lemon v. McBride [Mich.] 96 N. W. 453. See 1 Curr. L. 524, n. 23, 24.

19. See 1 Curr. L. 524.

20. A chattel mortgagee bringing suit, under municipal court act (Laws 1902, p. 1532, c. 580) §§ 137, 139, to foreclose a lien will be deemed a lienholder, and not the owner of the chattels, though a default has vested in him the absolute title and right of possession, and hence must join the mortgagor. Fishel v. Hamilton Storage Warehouse Co., 42 Misc. 532, 86 N. Y. S. 196.

21. Momrich v. Schwartz [Neb.] 96 N. W. 636.

22. Though a foreclosure by advertisement is stipulated. Momrich v. Schwartz [Neb.] 96 N. W. 636.

23. Construing B. & C. Comp. § 5636. Backhaus v. Buells, 43 Or. 558, 73 P. 342.

24. Backhaus v. Buells, 43 Or. 558, 73 P. 342.

The suit for foreclosure may be joined with an action for conversion of mortgaged property.[25] An injunction being necessary to the successful foreclosure of a chattel mortgage, it will be granted.[26] The complaint must allege the ownership of the debt by plaintiff,[27] and must conform to the ordinary rules of pleading.[28] Neither the corporation, alleged to be the owner of the mortgaged chattels, nor its receiver having ever been in actual or constructive possession of the property, it is not necessary for the mortgagee to obtain leave of court before beginning proceedings to foreclose the mortgage as against the receiver.[29] A mortgagee having the right of redemption left is a necessary party to an action to foreclose.[30] Any person interested may intervene in the foreclosure proceedings and set up facts showing that the mortgagee has no right to foreclose.[31] The pendency of an action for the foreclosure of an alleged chattel mortgage, and in which a temporary injunction has been procured restraining the sale or disposition of the property by the alleged mortgagor, places the property in constructive custody of the law.[32] On foreclosure it is competent for a court of equity to refuse to retain more of the property than is necessary to discharge the amount due.[33]

After forfeiture the mortgagee has the right to sell the property in satisfaction of his debt,[34] and in exercising this right he must sell the property for the best price obtainable, which must be fair and reasonable, and failing to do so he is liable to the mortgagor.[35] The mortgagee selling the property, consisting of various articles, en masse, is prima facie evidence of unfairness.[36] The purchaser at foreclosure proceedings of a contingent interest takes absolute title upon its becoming vested in the mortgagor.[37] It being ordered that the sale should be confirmed unless the mortgagee should show that his security was thereby endangered,

25. Cassidy v. Willis [Tex. Civ. App.] 78 S. W. 40.

26. Momrich v. Schwartz [Neb.] 96 N. W. 636.

27. A complaint in a suit to foreclose alleging that the note and mortgage were made and delivered by defendant to the payee, who afterwards, before maturity, and for a valuable consideration, assigned and delivered the same to plaintiff, who has ever since been the owner and holder of the same, and that the note is due and wholly unpaid is sufficient to withstand a general demurrer. Johnson v. Hibbard [Utah] 75 P. 737.

28. That one sues for a greater amount than the mortgage was given to secure, and alleges in his complaint that the mortgage was given to secure the indebtedness due him by the defendant mortgagor, does not constitute a variance preventing his showing that as to the amount recited in the mortgage the debt sued for was secured by it, and foreclosing for that amount. Becker v. Bowen [Tex. Civ. App.] 79 S. W. 45.

29. Kidder v. Beavers, 33 Wash. 635, 74 P. 819.

30. Fishel v. Hamilton Storage Warehouse Co., 42 Misc. 532, 86 N. Y. S. 196.

31. But one alleging that he desires to contest such mortgage, because the mortgaged property is largely in excess of the mortgage debt, and that he does not know whether the mortgage is valid or how much is due upon the debt and is unable to find out these facts is not entitled to have the foreclosure proceedings restrained [2 Ball. Ann. Codes & St. § 5876]. Kidder v. Beavers, 33 Wash. 635, 74 P. 819.

32. Withdraws the property from pursuit by general creditors of the alleged mortgagor in another court by means of the ordinary procedure of an action at law, judgment, and execution. Ryan v. Donley [Neb.] 96 N. W. 234.

33. Momrich v. Schwartz [Neb.] 96 N. W. 636.

34. Thompson v. Fairbanks, 75 Vt. 361, 56 A. 11.

35. Smitton v. Seibert [Mich.] 99 N. W. 381; Johnson Bros. v. Selden [Ala.] 37 So. 249. Private sale. First Nat. Bank v. Wright [Mo. App.] 78 S. W. 686. In an action for an unpaid balance of the loan, the mortgagee may, under a plea of set-off, show that the mortgaged property was sold for less than its value. Johnson Bros. v. Selden [Ala.] 37 So. 249.

36. Johnson Bros. v. Selden [Ala.] 37 So. 249.

37. Where if a remainderman died without children and before the termination of the particular estate, his share was to go to the survivors or their children, held, where one remainderman purchased at foreclosure sale the interest of another, that such purchaser's title was not affected by his death without children before the termination of the particular estate, but passed to his heirs, and became vested in them on the termination of the particular estate during the life of the mortgagor. Ward v. Ward, 131 F. 946.

no such showing being attempted, the sale is binding.[38] In New York, failure to procure an order confirming the referee's report of sale does not invalidate the title of a purchaser at the sale who has paid the consideration and received the referee's deed.[39] A resale being ordered, the purchaser at the invalid sale should be permitted to bid at the resale, and to apply on the purchase price so much of the sum paid by him on the first purchase as remained after deducting what he received from sales of the assets while in his hands.[40] A purchaser at a sale by the mortgagee, the mortgagor consenting and agreeing that the proceeds should go to pay the mortgage debt, has no right to deduct from the amount bid any indebtedness due him by the mortgagor,[41] and the proceeds, being less than the amount due the mortgagee, become the latter's absolute property.[42] In Georgia, unless the execution issued upon foreclosure be arrested by counter-affidavit, it is final process,[43] and the only persons authorized to file such counter-affidavit are the mortgagor, his special agent or legal representative, and a creditor of the mortgagor.[44] When such an execution is levied upon the mortgaged property, and a claim is interposed thereto, the claimant, upon the trial of the claim, cannot amend the same by alleging that the mortgagor is not indebted to the mortgagee.[45] On appeal by plaintiff in a suit for foreclosure, holders of mortgage liens on the property, and the assignor of notes on which suit was brought, and who was made a defendant by a cross-complaint for the foreclosure of a prior mortgage, are properly made appellees,[46] and, the evidence not being before the appellate court, it will assume that the attorney's fees allowed by the trial court are reasonable and justified by the proof.[47]

§ 15. *Remedies as between the parties.*[48]—The mortgagor, or his legal representative, is entitled to recover in trover for the sale of more of the property than is sufficient to pay the debt secured by the mortgage.[49] A mortgage will not be canceled unless the mortgagor places the mortgagee in statu quo by redelivering the property purchased,[50] the mortgagee being a necessary party to the suit.[51] There being a mutual mistake, the mortgage will be reformed, but the evidence thereof must be clear.[52] An assignee of the mortgagee, under an unambiguous written assignment, cannot show by parol that he purchased the property outright and in good faith.[53]

38. Purchasers are liable on their sale bond. Georgetown Water Co. v. Fidelity Trust & S. V. Co.'s Trustee, 25 Ky. L. R. 1739, 78 S. W. 113.

39. Ward v. Ward, 131 F. 946.

40. Smitton v. Seibert [Mich.] 99 N. W. 381.

41. Williams v. Corker [Cal.] 77 P. 1004. Evidence considered and held sufficient to warrant the finding that the auctioneer selling the property was the mortgagee's agent, and that the entries in the auctioneer's book were sufficient to point out what part of the mortgaged property was sold. Id.

42. By reason of the agreement between the parties, and not by reason of the lien of the mortgage attaching to the proceeds of the sale. Williams v. Corker [Cal.] 77 P. 1004.

43, 44. Ford v. Fargason [Ga.] 48 S. E. 180.

45. Ford v. Fargason [Ga.] 48 S. E. 180. Nor can he introduce evidence tending to show such fact. Id.

46. Vinall v. Hendricks [Ind. App.] 71 N. E. 682.

47. Johnson v. Hibbard [Utah] 75 P. 737.

48. See 1 Curr. L. 525.

49. Haynes v. Hobbs [Mich.] 98 N. W. 978.

50. Purchase money mortgage. Anderson v. Anderson Food Co. [N. J. Eq.] 57 A. 489.

51. Cannot be canceled in an action by a trustee in bankruptcy to set aside a sale of the bankrupt's property, the proceeds of which sale were applied to the discharge of an unrecorded chattel mortgage of the bankrupt's, the mortgagee not being a party to the action. Bonnie & Co. v. Perry's Trustees, 25 Ky. L. R. 1560, 78 S. W. 208.

52. Evidence considered and held not to show clearly that the phrase "stock manufactured, or unmanufactured, and in process of manufacture" was included in the mortgage by mutual mistake. Anderson v. Anderson Food Co. [N. J. Eq.] 57 A. 489.

53. Action for conversion, he having sold more of the property than was sufficient to pay the indebtedness secured. Haynes v. Hobbs [Mich.] 98 N. W. 978. Evidence held sufficient to justify a finding that the assignee received $850 for the property. Id.

§ 16. *Remedies against third persons.*[54]—One wrongfully seizing and selling mortgaged property is liable to the mortgagor for conversion,[55] the measure of damages being the value of the property irrespective of the mortgage debt, the difference being the subject of an accounting between the parties to the mortgage,[56] the question of interest being in some states one for the jury,[57] or he may be held accountable in an action on the case for the money realized on the sale.[58] One purchasing mortgaged property from the mortgagee, with constructive notice of the mortgage, before maturity of the debt, is liable in conversion to a prior assignee of the mortgage.[59] The rights of a mortgagee being interfered with by attachment proceedings, he may assert his right and lien to the property attached by interpleading in the attachment proceedings.[60]

In an action of conversion by the mortgagor against a purchaser from the mortgagee, the mortgagee is not a necessary party to give defendant complete protection against plaintiff.[61] The mortgagee bringing an action of conversion he must allege (1) that at the date of the conversion he was the owner and holder of the notes; (2) that the notes had not been paid, or, if paid in part, the amount then due; (3) that he had some property interest in the chattels converted, either general or special, and was either in actual possession or entitled to the possession thereof; and (4) the value of the property converted.[62] Plaintiff's affidavit is not admissible, in such an action, to show the amount of advances made under the mortgage.[63] The evidence being conflicting, the question is one for the jury.[64] In this action, the defense that the note secured by the mortgage is usurious and that hence the mortgage is void is, in some states, open to defendant,[65] and when allowable is provable under a general denial.[66]

CITIZENS.[67]

An alien cannot be estopped by an erroneous allegation of citizenship in a pleading, from showing his true citizenship.[68] A state statute providing that a nonresident cannot act as administrator does not make an administrator appointed therein a citizen of the state for the purpose of the jurisdiction of a Federal court.[69]

54. See 1 Curr. L. 525.

55. Sold chattels on execution against the mortgagor after he was in default. Biehler v. Irwin, 84 N. Y. S. 574.

56. Biehler v. Irwin, 84 N. Y. S. 574.

57. Bigler v. Leonori [Mo. App.] 77 S. W. 324.

58. George Adams & Frederick Co. v. South Omaha Nat. Bank [C. C. A.] 123 F. 641.

59. State Nat. Bank v. Cudahy Packing Co., 126 F. 543.

NOTE. Personal liability of purchaser: The purchaser of personal property subject to the lien of a chattel mortgage can never become personally liable to the holder of the mortgage by the simple fact of such purchase, but only when he does some act interfering with, or destroying, the lien, i. e., some act which may be said to amount to a conversion. Hull v. Carnley, 11 N. Y. 501, 17 N. Y. 202; Goulet v. Asseler, 22 N. Y. 225; Hall v. Sampson, 35 N. Y. 274, 91 Am. Dec. 56; Manning v. Monaghan, 23 N. Y. 539, 28 N. Y. 585. Such purchaser may in good faith transfer such property, previous to the forfeiture of the condition of the mortgage, or a demand from the holder thereof. Same cases.—From note to Rogers-Ruger Co. v. Murray, 59 L. R. A. 737.

60. Miller v. Campbell Commission Co., 13 Okl. 75, 74 P. 507.

61. Potter v. Lohse [Mont.] 77 P. 419.

62. Harrington v. Stromberg-Mullins Co. [Mont.] 74 P. 413.

63. Sand. & H. Dig. § 2972 does not authorize its admission. Loewenberg v. Gilliam [Ark.] 79 S. W. 1064.

64. As to the identity of the property. Ladd v. Williams [Mo. App.] 79 S. W. 511.

65. Rev. St. 1899, § 3710. Defendant claimed to be the true owner of the chattels, and that they had been fraudulently mortgaged to the mortgagee. Davis v. Tandy [Mo. App.] 81 S. W. 457.

66. Davis v. Tandy [Mo. App.] 81 S. W. 457.

67. See Aliens, 1 Curr. L. 67; Constitutional Law, 1 Curr. L. 569; Domicile, 1 Curr. L. 954; Elections, 1 Curr. L. 981.

68. Bill with erroneous allegation dismissed, another filed. Marthinson v. Winyah Lumber Co., 125 F. 633.

69. McDuffie v. Montgomery, 128 F. 105.

CIVIL ARREST.

§ 1. Privilege from Arrest (700).
§ 2. Arrest on Mesne Process. When Allowable (700).
§ 3. Execution Against the Body. Occasion and Propriety (701).
§ 4. Supersedeas Bail or Discharge from Arrest. Final Process (701).

§ 1. *Privilege from arrest.*[70]—A bankrupt is exempt from arrest on civil process issuing from a state court, except on a debt or claim for which his discharge in bankruptcy would not be a release.[71] This exemption, unless vacated or suspended by the court, extends until the final adjudication.[72] In some states, attorneys are exempt from civil arrest when actually in attendance in court.[73]

§ 2. *Arrest on mesne process. When allowable.*[74]—In order to have a debtor arrested on the ground of a fraudulent disposition of property, there must be an actual intent to defraud.[75] The constitutional prohibitions against arrest for debt include all contractual obligations, but not those of a penal or quasi-penal character.[76]

Procedure to obtain order of arrest.[77]—In most states, the arrest may be ordered upon affidavits;[78] but in New York, a complaint being filed, it must state a cause of action.[79] In the affidavit certainty to a certain intent in general is sufficient.[80] The affidavit in most states should contain a statement of the facts claimed to justify the belief,[81] and such statement should be such that, if uncontradicted, the court can see that the defendant is guilty of the charge alleged.[82] A mere inference will not justify the granting of the order.[83] The rules of pleading as to statement of facts apply.[84] The existence of the oath or affidavit justifying the issuance of the certificate may in some cases be presumed.[85]

70. See 1 Curr. L. 526.

71. Bankruptcy Act 1898, § 9a, subd. 2. In re Dresser, 124 F. 915.

72. Is not restricted to the particular occasions when his physical attendance in court is required. In re Dresser, 124 F. 915. The bankruptcy court may require him to furnish a bond to obey the orders of the court and not depart from the jurisdiction during the continuance of such exemption from arrest. Id.

73. Construing Code, §§ 641, 1367, 1735. Greenleaf v. People's Bank, 133 N. C. 292, 45 S. E. 638.

NOTE. Exemption of lawyers from arrest: Cases and laws collated by the Hon. Chief Justice Clark. This exemption is an old English custom and has been adopted in only a few of the states and in some of those where it has been adopted it has been modified or repealed. It seems to have been repealed in England. See Greenleaf v. People's Bank, 133 N. C. 292, 45 S. E. 638.

74. See 1 Curr. L. 527.

75. That the sale is constructively fraudulent in that it violates a statute is not sufficient. Mann v. Chrestopulos, 87 App. Div. 222, 84 N. Y. S. 372. See 1 Curr. L. 527, n. 82.

76. NOTE. Constitutional prohibitions against imprisonment for debt: Debts arising from contract fall within the statutory prohibition (In re Wheeler, 34 Kan. 96, 8 P. 276; Kennedy v. People, 122 Ill. 649, 13 N. E. 213; Ex parte Hardy, 68 Ala. 303); but the debt being contracted by fraud, the debtor is deprived of the protection of the provision (Moore v. Mullen, 77 N. C. 328; Ex parte Clark, 20 N. J. Law, 648; State v. Becht, 23 Minn. 411). The prohibition does not apply to proceedings in tort (Rich v. People, 66 Ill. 513; Long v. McLean, 88 N. C. 3; Cotton v. Sharpstein, 14 Wis. 228); nor is it applicable to defendant's obligation to pay costs of criminal prosecution (Caldwell v. State, 55 Ala. 133; Kennedy v. People, 122 Ill. 649, 13 N. E. 213; Smith v. State, 23 Ind. 132); nor to the obligation of a putative father to pay for the support of his child (Musser v. Stewart, 21 Ohio St. 353; Ex parte Cottrell, 13 Neb. 193, 13 N. W. 174; Lower v. Wallick, 25 Ind. 68). But see Holmes v. State, 2 G. Greene [Iowa] 501.—From note to State v. Brewer, 37 Am. St. Rep. 752, 758.

77. See 1 Curr. L. 527.

78. Code Civ. Proc. §§ 549, 557-559. Lewis v. Pollack, 85 App. Div. 577, 83 N. Y. S. 287.

79. A defective complaint being amended, the arrest will not be vacated [Code Civ. Proc. §§ 549, 557-559]. Lewis v. Pollack, 85 App. Div. 577, 83 N. Y. S. 287.

80. Where the affidavit alleged that the defendant fraudulently contracted the debt and set forth the facts justifying the belief, held sufficient. Lyhrig Coal Co. v. Ludlum, 69 Ohio St. 311, 69 N. E. 562.

81. But not the evidence of such facts [Rev. St. § 5492]. Lyhrig Coal Co. v. Ludlum, 69 Ohio St. 311, 69 N. E. 562. Fraudulent transfer. Mann v. Chrestopulos, 87 App. Div. 222, 84 N. Y. S. 372.

82. An affidavit for arrest of defendants in an action for obtaining goods on a false statement as to their financial condition is insufficient, it not showing that affiant had any personal knowledge that defendants made or signed the statement or ever saw the original. Price v. Levy, 93 App. Div. 274, 87 N. Y. S. 740.

83. Price v. Levy, 93 App. Div. 274, 87 N. Y. S. 740.

84. Lyhrig Coal Co. v. Ludlum, 69 Ohio St. 311, 69 N. E. 562.

§ 3. *Execution against the body. Occasion and propriety.*[86]—An execution against the body is an extraordinary civil remedy;[87] it can only be invoked where the ordinary execution against property is shown to be unavailing on account of the debtor's fraud,[88] and the creditor bringing himself within the prescribed conditions, it is claimed and issued as a matter of right.[89] A successful defendant is not entitled to body execution to secure his costs if the plaintiff would have been denied the writ if successful.[90] In New York, wage earners suing for wages earned are entitled to an execution against the person of their former employer.[91] In states where an order of arrest cannot be served until after final judgment, failure to enter judgment for a year after verdict does not preclude the plaintiff from obtaining such an order.[92] A close jail execution will not be granted where there are no facts showing that a certificate ought to have been granted.[93]

The order and writ.[94]—The writ must recite the issuing and return of an execution against the property, specifying the county to which it was issued.[95]

Arrest and return.—A sheriff cannot arrest under an execution against the body outside of the county of which he is an officer.[96] The return on the execution is conclusive, as between the parties and their privies, that the debtor was duly arrested and duly admitted to bail.[97]

§ 4. *Supersedeas bail or discharge from arrest.*[98] *Final process.*[99]—In New York, the proceedings for the discharge are not commenced until the petition, schedules, and affidavit with due proof of fourteen days service are presented to the court.[1] Statutes providing that the defendant shall be discharged from custody if plaintiff neglects to enter judgment within ten days after it is in his power to do so, the days are to be computed from the date of granting or execution of the order of arrest,[2] and defendant must show in his affidavit for an order to show cause why he should not be discharged that the time has elapsed.[3] In some states, one imprisoned for debt may be released upon taking the "poor debtor's oath,"[4] and generally the word "debt" as here used does not include liability for personal injuries to the plaintiff.[5] Concealment of property at the time of the application for the oath is a ground for refusal.[6] A special justice has no power to take a poor debtor's recognizance except while sitting as a court in the absence of the standing justice, and this fact should appear of record,[7] though failing to so ap-

85. Where four executions were issued and the arrest was made on the fourth, also a certificate of arrest was made by the court and attached to the second execution, and the debtor making no objection when arrested, held, existence would be presumed. Bent v. Stone, 184 Mass. 92, 68 N. E. 46.

86. See 1 Curr. L. 528.

87. Joyce v. Everson, 161 Ind. 440, 69 N. E. 135.

88. Joyce v. Everson, 161 Ind. 440, 69 N. E. 135. Will not issue without the previous issue and return of an execution against his property to the county where he resides. Fisher v. Young, 41 Misc. 552, 85 N. Y. S. 115.

89. Joyce v. Everson, 161 Ind. 440, 69 N. E. 135.

90. Defendant being a woman and not subject to such writ, she could not have one. Allen v. Becket, 84 N. Y. S. 1009.

91. Laws 1902, p. 1569, c. 580. This includes a female domestic servant. Greenberg v. Laeov, 84 N. Y. S. 930.

92. Construing Code Civ. Proc. § 551. Wasserman v. Benjamin, 88 App. Div. 1, 84 N. Y. S. 489.

93. Chase v. Watson, 75 Vt. 385, 56 A. 10.

94. See 1 Curr. L. 528.

95, 96. Fisher v. Young, 41 Misc. 552, 85 N. Y. S. 115.

97. An escape cannot be shown. Bent v. Stone, 184 Mass. 92, 68 N. E. 46.

98, 99. See 1 Curr. L. 529.

1. Code, § 2205 applies, not § 780. In re Quick, 92 App. Div. 131, 87 N. Y. S. 316.

2. Construing Code Civ. Proc. § 572. Wasserman v. Benjamin, 88 App. Div. 1, 84 N. Y. S. 489.

3. Wasserman v. Benjamin, 88 App. Div. 1, 84 N. Y. S. 489.

4. Gen. Laws 1896, c. 260, § 1. Taylor v. Bliss [R. I.] 57 A. 939.

5. Gen. Laws 1896, c. 260, § 1. Does not include liability to husband for alienation of wife's affections. Taylor v. Bliss [R. I.] 57 A. 939.

6. Pub. St. 1891, c. 236, § 6. Statute does not contemplate refusal of oath because debtor was concealing property at the time of his arrest. Mass. Breweries Co. v. Colburn [N. H.] 57 A. 653.

7, 8, 9, 10, 11. Bent v. Stone, 184 Mass. 92, 68 N. E. 46.

pear, the record is amendable.[8] Such recognizance need not state the facts which gave the special justice jurisdiction,[9] nor is it rendered invalid by failure to refer to the amendment to the act authorizing it.[10] In an action on a poor debtor's recognizance for breach of condition to deliver himself up for examination, it is a fair inference that he did not submit to such examination from evidence that plaintiff had no notice or information of such examination.[11] In some states, the debtor must be imprisoned for a certain time before being entitled to his discharge; nominal custody as under bonds for jail limits is not such imprisonment.[12] Statutes providing for the discharge of defendant if plaintiff unreasonably "delays" the trial do not apply to neglect to proceed.[13] Defendant not appealing from an order denying his motion to vacate an order of arrest, the sufficiency of the affidavit cannot be reviewed upon appeal from the judgment.[14]

CIVIL RIGHTS.[15]

Civil rights have no relation to the establishment, support, or management of the government.[16] Congress has the right to legislate against individuals[17] and protect citizens in the enjoyment of fundamental rights.[18] It is a violation of a constitutional right to exclude citizens from sitting as jurors on the sole ground of race or color.[19] Where separate but unequal accommodations were furnished by a carrier, a prosecution for failing to furnish "separate" coaches must fail.[20]

CLERKS OF COURT.

§ 1. General Powers and Duties (702).
§ 2. Fees and Compensation; in General (703).
§ 3. Liability on Bond (704).

§ 1. *General powers and duties.*[21]—The clerk of a court is essentially a ministerial officer, having nothing to do with the character or purpose of papers tendered to him to be filed,[22] or with the purpose for which a search of the records is requested.[23] When suit is ordered or process directed to be issued, it is his duty to comply if the party is prima facie entitled to it,[24] provided his fees are paid or tendered,[25] but this applies only to fees incident to his office,[26] and he cannot insist on prepayment from the state.[27] He is liable for the damages resulting from

12. Comp. Laws 1897. §§ 9701-9713. Ruslewski v. Michalski [Mich.] 98 N. W. 1.

13. Failure to file a note of issue or serve notice of trial is not such a delay. Goff v. Charlier, 89 N. Y. S. 722. See 1 Curr. L. 530, n. 24.

14. Anker v. Smith, 87 N. Y. S. 479.

15. See 1 Curr. L. 530.

16. Winnett v. Adams [Neb.] 99 N. W. 681. Equity will not undertake to manage a political party for the protection of a political right. Id.

17. 13 Amend. U. S. Const. U. S. v. Morris, 125 F. 332.

18. U. S. Comp. St. 1901, p. 1262. U. S. v. Morris, 125 F. 332. The right to lease and cultivate land is a constitutional right [Rev. St. U. S. § 5508]. Id. Conspiracy to deprive negroes of this right. Id.

19. Binyon v. U. S. [Ind. T.] 76 S. W. 265.

20. The prosecution should have been under Ky. St. § 796, instead of section 795. Ill. Cent. R. Co. v. Com., 25 Ky. L. R. 295, 74 S. W. 1076. As to exclusion of persons of defendant's race or nationality from jury in criminal prosecution, see Jury, 2 Curr. L. 633.

21. See 1 Curr. L. 531, § 1.

22. U. S. v. Bell, 127 F. 1002.

23. The clerk of court is required to search the judgment records on tender of his fee, and cannot refuse because the information is intended to be used generally in an abstract business. State v. Scow [Minn.] 100 N. W. 382.

24. U. S. v. Bell, 127 F. 1002.

25. A clerk is justified in refusing to print a portion of a record embodying evidence in an equity case, until the costs thereof are paid him. Allis v. Hall, 76 Conn. 322, 56 A. 637. To justify his action in withholding a transcript of appeal, the clerk must make certain that the amount he demands is correct, prepare an itemized bill and have it approved by the court. State v. Wells, 111 La. 463, 35 So. 641.

26. Clerk had paid sheriff his costs for making service of citations of appeal. State v. Wells, 111 La. 463, 35 So. 641.

27. As against a parish tax-collector. State v. Estorage, 110 La. 479, 34 So. 643.

his refusal to perform a duty of his office,[28] and mandamus will lie to enforce such duty.[29] The clerk has no authority to retain money paid him in his official capacity on a judgment in order to apply it on a judgment for costs in favor of the county and against the one for whom the money was paid.[30] In Texas, it is not his duty to receive money due on a judgment, and he is not liable as an officer of the court for its conversion.[31] When the term of the clerk expires, his successor takes up the office where his predecessor set it down,[32] and an ad interim clerk appointed by the court becomes functus officio on the commissioning of his successor,[33] and mandamus lies to compel him to surrender the records of the office.[34] Where the law conferring the authority to appoint deputies is silent as to any limitation of the right of removal, it may be exercised at pleasure.[35] A contract by which a deputy is to continue as such for the entire term is void as against public policy, when the law does not limit his continuance in office.[36] In Texas deputies are invested with all the power of the principal clerk.[37]

§ 2. *Fees and compensation; in general.*[38]—Statutes providing for fees will not be extended beyond their letter.[39] A statute making provision for fees does not include compensation for ex officio services.[40] In Indiana, the salaries of county clerks are graded according to population and services required in the various counties.[41] The fees required in Pennsylvania to be paid to the clerk of the court of quarter sessions by applicants for liquor licenses belong to the county and not to the clerk, in counties containing more than 150,000 inhabitants.[42] In Louisiana, the clerk of court cannot collect his fees from the parish, in criminal cases where a conviction is secured.[43] Texas laws limiting the amount of fees to be retained by the clerk and requiring the excess to be paid to the county treasurer is constitutional.[44] A chancery clerk is entitled to be furnished with the postage necessary in the business of his office.[45] The clerk of a territorial district court is not entitled in all cases to the fees allowed by statutes of the United States, but in cases in which the United States is not a party, the legislature may fix the compensation.[46] The clerk of the supreme court of New Mexico is entitled to fees for services in a suit by a county to collect taxes.[47] A clerk of district court in Minnesota is entitled, on search of the judgment records, to fifty cents for each

28. Clerk of federal circuit court refused to issue summons in assumpsit in response to a praecipe. U. S. v. Bell, 127 F. 1002.

29. Search of judgment records. State v. Scow [Minn.] 100 N. W. 382.

30. May v. State [Ind.] 69 N. E. 999.

31. He had appropriated such money to payment of costs. City of Whitesboro v. Diamond [Tex. Civ. App.] 75 S. W. 540.

32. He may collect outstanding fees and apply them to the conduct of the office; they need not be paid into the state treasury. Chinn v. Shackelford, 25 Ky. L. R. 1813, 78 S. W. 908. Acts 1893, p. 1157, does not apply to this office. Id.

33, 34. State v. Givens [Fla.] 37 So. 308.

35. Rev. St. 1899, § 527. Horstman v. Adamson, 101 Mo. App. 119, 74 S. W. 398, citing other cases.

36. Rev. St. 1899, § 527. Horstman v. Adamson, 101 Mo. App. 119, 74 S. W. 398.

37. Code 1858, § 4050. Privy examination of married woman. Wilkerson v. Dennison [Tenn.] 80 S. W. 765.

38. See 1 Curr. L. 531.

39. Acts 1896-97, p. 1461 and Acts 1900-01 does not apply to Cleburne County. Reese v. Cleburne County, 139 Ala. 299, 35 So. 879.

40. Reese v. Cleburne County, 139 Ala. 299, 35 So. 879. Acknowledgment of tax deeds not being necessary, the clerk is not entitled to fees for taking same unless the acknowledgment was requested by the holder. Village of Morgan Park v. Knopf (Ill.) 71 N. E. 340.

41. State v. Shutts, 161 Ind. 590, 69 N. E. 397.

42. Schuylkill County v. Shoener, 205 Pa. 592, 55 A. 791.

43. Act No. 99, 1876. He must look to the convicted defendant. Parish Board of Directors v. Hebert, 112 La. 467, 36 So. 497.

44. Gammels' Laws Tex. vol. 10, p. 1445. Tarrant County v. Butler [Tex. Civ. App.] 80 S. W. 656.

45. Under Rev. Code 1892, § 296, providing for "stationery" and "all other articles necessary." Downing v. Hinds County [Miss.] 36 So. 73.

46. Pima County v. Martin, 3 Ariz. 59, 73 P. 399.

47. Seno v. Bernalillo County [N. M.] 78 P. 46.

judgment certified and fifty cents for certifying to the nonexistence of judgments against any one person.[48]

United States courts.[49]—Moneys collected by a clerk of a federal court belong to the government, subject to the payment of his compensation and fees and necessary office expenses.[50] Under the federal statutes only "moneys" to be paid into court or to its officers must be deposited with a depositary so as to entitle the clerk of court to commissions thereon.[51] A clerk of a circuit court is not entitled to fees in addition to cost for printing the record in a case for the circuit court of appeals,[52] although the clerk of the court of appeals is entitled to such fee,[53] and is required to accept any portion of such record which has been properly printed.[54] A clerk of the circuit court is entitled only to the reasonable cost of such printing, and cannot tax the increased cost for hastening the work when unnecessary and incurred on his own responsibility.[55] A clerk of a district court is not entitled to a commission on prize money paid, by agreement of the parties, into the registry of the court instead of to an assistant treasurer of the United States as provided by statute.[56] A clerk is entitled to the allowance of a proper fee for a service performed under an order of the court,[57] but not otherwise.[58]

§ 3. *Liability on bond.*[59]—In an action on the bond of a clerk of court to enforce liability for moneys appropriated by him, it must be shown that the moneys came into his hands as clerk and that failure to account for the same was a breach of official duty.[60] Hence, there is no liability on his bond for money paid as compensation for unofficial acts directed by the court, whether or not the court had authority to direct such acts.[61] There is a liability for all fees or moneys which he is directed by law to receive and account for.[62] Where there has been a breach of official duty by a clerk of a federal court, resulting in substantial injury, suit may be brought on the clerk's bond in the name of the United States, to the use of the party injured.[63] Where such action is for failure to issue summons, complainant must show a good cause of action against those whom he sought to sue, and also more than nominal damages.[64] The ordinary in Georgia is both judge and clerk

48. State v. Scow [Minn.] 100 N. W. 382.
49. See 1 Curr. L. 532.
50. Cost of printing forms in bankruptcy proceedings under direction of judge for use of referees, so far as necessary, were proper "office expenses." U. S. v. Mason [C. C. A.] 129 F. 742.
51. Rev. St. § 995 (U. S. Comp. St. 1901, p. 711). Curtice v. Crawford County Bank, 124 F. 919.
52. Thornton v. Insurance Cos., 125 F. 250.
53. Rule 31, § 7; Page's Rules, p. 169.
54, 55. Thornton v. Insurance Cos., 125 F. 250.
56. The Adula, 127 F. 849.
57. Issuing subpoenas. Services in connection with affidavits of defendants in criminal cases of inability to pay costs [U. S. Rev. St. §§ 828, 878 (25 Stat. 655)]. U. S. v. Jones, 193 U. S. 528, 24 S. Ct. 561. Charges for transcript of record on writ of error, ordered by court on behalf of an indigent criminal defendant. Administering oaths and affixing jurats. Id. A clerk of the circuit court is entitled to charge 15 cents per folio of 100 words for making up and certifying a record and return to the court of appeals in response to a writ of error. Thornton v. Insurance Cos., 125 F. 250.
58. Furnishing certificates to copies and copies of orders. Administering oaths and affixing jurats to accounts of United States marshals. U. S. v. Jones, 193 U. S. 528, 24 S. Ct. 561. Charges for administering oaths on the voir dire of grand and petit jurors cannot be justified under U. S. Rev. St. § 828. Id.
59. See 1 Curr. L. 533.
60. State v. Flynn, 161 Ind. 554, 69 N. E. 159.
61. Not liable for money paid for preparation of hand-bar dockets for printing, for use of bench and bar. State v. Flynn, 161 Ind. 554, 69 N. E. 159; State v. Shutts, 161 Ind. 590, 69 N. E. 397. No liability on bond for compensation paid him by board of commissioners for reproducing a public record. State v. Shutts, 161 Ind. 590, 69 N. E. 397.
62. Sheriff's fees in actions must be paid either to the sheriff or his successor or the county. State v. Flynn, 161 Ind. 554, 69 N. E. 159. Under Texas laws, fees paid to the clerk for making new indexes to records, are official fees for which he is required to account to the county [Rev. St. 1895, art. 1143, and Gammels' Laws, vol. 10, p. 1445]. Tarrant County v. Butler [Tex. Civ. App.] 80 S. W. 656. County clerk in Indiana may retain per diem for attending sessions of court. State v. Flynn, 161 Ind. 554, 69 N. E. 159; State v. Shutts, 161 Ind. 554, 69 N. E. 397.
63. U. S. v. Bell, 127 F. 1002.
64. A mere claim for the amount for which

of the court of ordinary, and is liable on his official bond for ministerial but not for judicial acts.[65]

COLLEGES AND ACADEMIES.[66]

The fact that an institution is authorized to take and hold land[67] does not render it a corporation for pecuniary benefit.[68] Where a college locates in a certain place in consideration of endowments contributed by the citizens, it cannot subsequently remove if special injury would result to the subscribers.[69] There is no constitutional limitation which restrains a legislature from establishing a college to promote substantial classes.[70]

The statute creating the University of Louisiana did not incorporate into that constitution the corporation known as the "Faculty of the Medical College of Louisiana," but only the school itself,[71] and the corporation was ipso facto dissolved thereby.[72] The State University of Nebraska is a state institution and its board of regents an agent of the state,[73] as is the North Dakota State Normal School;[74] therefore mandamus will not lie to compel them to issue certificates for salaries to professors.[75]

The legislature may control the property of educational institutions which constitute a part of the state educational system.[76] A note and mortgage running to Creighton University, trustee for Creighton College, is enforceable, though Creighton College is not incorporated.[77] The state board of agriculture has power to employ a professor in the state agricultural college on contract for a reasonable term.[78]

A student who has been wrongfully expelled, without notice, is entitled to mandamus to compel his restoration, whether the school be organized for profit or not.[79] An action at law would not furnish adequate relief.[80]

he sought to hold defendants in the desired action is not enough. U. S. v. Bell, 127 F. 1002.

65. Additional ministerial duties imposed by statute. State v. Henderson [Ga.] 48 S. E. 334.

66. Exemption from taxation is treated in Taxes, 2 Curr. L. 1786.

67. Under its charter of 1810, Columbia College is empowered to take and hold realty of the value therein mentioned, exclusive of the value of realty it was entitled to hold under the charter to King's College. Land acquired prior to 1810; land acquired under special acts, Laws 1790, c. 38; Laws 1802, c. 105; Laws 1857, c. 132; Laws 1860, c. 51, and mortgages not included. Phoenix v. Trustees of Columbia College, 87 App. Div. 438, 84 N. Y. S. 897. The University of Washington is not precluded by its enabling act to participate in a grant of land for charitable, educational and penal institutions. 25 Stat. 680 grants land to the state for a university. 25 Stat. 681 grants land for charitable, educational, and penal institutions. State v. Callvert, 34 Wash. 58, 74 P. 1018.

68. McLeod v. Lincoln Medical College (Neb.) 96 N. W. 265.

69. P. L. 1360. Packard v. Thiel College, 207 Pa. 280, 56 A. 869. Where the act of incorporation provides that a college shall be "permanently" located at a place to be determined by the trustees, one who contributed funds after the location was made may enjoin removal. Id. [Pa.] 58 A. 670.

70. Agriculture. Trustees of Rutgers College v. Morgan [N. J. Law] 57 A. 250. Art. 4, § 7, State Const. prohibits legislature from appropriating school fund to any free public school to which all children are not admitted. Id.

71, 72. Succession of Hutchinson, 112 La. 656, 36 So. 639.

73. Von Forel v. State [Neb.] 96 N. W. 648, following State v. Moore, 46 Neb. 379, 64 N. W. 975.

74. Laws 1903, c. 49, authorizing issuance of bonds to "build" a school, and providing for repayment out of revenues dedicated to "support" of the school, is void. State v. McMillan [N. D.] 96 N. W. 310.

75. Ministerial act. Von Forel v. State [Neb.] 96 N. W. 648.

76. Authorize a lease of property of an academy which was created by the state and not by private effort. Trustees of Carrick Academy v. Clark [Tenn.] 80 S. W. 64.

77. Donee sufficiently definite. Goddard v. Clarke [Neb.] 96 N. W. 350.

78. One year is a reasonable term. State Board of Agriculture v. Meyers [Colo. App.] 77 P. 372.

79. Night law student. Baltimore University v. Colton [Md.] 57 A. 14.

80. Baltimore University v. Colton [Md.] 57 A. 14.

COMBINATIONS AND MONOPOLIES.

§ 1. Combinations Violative of the Federal Anti-Trust Act (706).
§ 2. Combinations Violative of State Anti-Trust Acts and of the Common Law (708).
§ 3. Grants of Privileges by Statute, Ordinance and Contracts with Municipalities Tending to Create Monopolies (710).

§ 1. *Combinations violative of the Federal anti-trust act.*[81]—Under its power to regulate commerce among the several states and with foreign nations, congress has power to establish rules by which interstate and international commerce shall be governed, and by the anti-trust act has prescribed the rule of free competition among those engaged in such commerce.[82] The act is not at all new in trade and commerce, since when congress declared contracts, combinations, and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than apply to interstate commerce a rule that had long been applied by the several states when dealing with combinations that were in restraint of their domestic commerce.[83] Although the act has no reference to the mere manufacture or production of articles or commodities within the limits of the several states,[84] it embraces and declares to be illegal every contract, combination or conspiracy in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several states or with foreign nations.[85] A combination, however, which promotes, or but incidentally or indirectly restricts, competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, is not a contract, combination or conspiracy in restraint of trade within the true interpretation of the act, and is not subject to its denunciation.[86] The natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce.[87] Whence restraint of trade is not dependent upon any consideration of reasonableness or unreasonableness, in the combination averred. The Federal statute looks solely to competition and to the giving of competition full play, by making illegal any effort at restriction upon competition.[88]

Railroad carriers engaged in interstate or international trade or commerce are embraced by the act,[89] and every combination or conspirary which would extinguish competition between otherwise competing railroads engaged in interstate trade or commerce and which would in that way restrain such trade or commerce is made illegal.[90] Whence the establishing of a holding corporation and the transfer thereto of the stock of railroad companies owning competing lines is in violation thereof.[91]

Combinations even among private manufacturers or dealers whereby interstate or international commerce is restrained are equally embraced by the act,[92] but a

81. See 1 Curr. L. 535.

82. Act July 2, 1890, c. 647 (26 Stat. 209). Northern Securities Co. v. U. S., 193 U. S. 197, 24 S. Ct. 436. The constitutional guarantee of liberty of contract does not prevent congress from prescribing the rule of free competition for those engaged in interstate and international commerce. Id.

83. Northern Securities Co. v. U. S., 193 U. S. 197, 24 S. Ct. 436.

84. Northern Securities Co. v. U. S., 193 U. S. 197, 24 S. Ct. 436; Robinson v. Suburban Brick Co. [C. C. A.] 127 F. 804.

85. Northern Securities Co. v. U. S., 193 U. S. 197, 24 S. Ct. 436; Phillips v. Iola Portland Cement Co. [C. C. A.] 125 F. 593; Whitwell v. Continental Tobacco Co. [C. C. A.] 125 F. 454, citing many cases.

86. Whitwell v. Continental Tobacco Co. [C. C. A.] 125 F. 458, citing many cases; Phillips v. Iola Portland Cement Co. [C. C. A.] 125 F. 593.

87. Northern Securities Co. v. U. S., 193 U. S. 197, 24 S. Ct. 436.

88. U. S. v. Swift & Co., 122 F. 529; Northern Securities Co. v. U. S., 193 U. S. 197, 24 S. Ct. 436.

89. Northern Securities Co. v. U. S., 193 U. S. 197, 24 S. Ct. 436; State v. Northern Securities Co., 123 F. 692.

90, 91. Northern Securities Co. v. U. S., 193 U. S. 197, 24 S. Ct. 436.

92. Northern Securities Co. v. U. S., 193 U. S. 197, 24 S. Ct. 436. An agreement of packing companies to refrain from bidding against each other in the purchase of cattle,

combination by the owners of patents on machines adapted to a similar purpose, to control the business, is not illegal, the very object of the patent laws being to create a monopoly.[93] In determining whether or not a combination is in violation of the Federal anti-trust law, as in restraint of interstate commerce, the true inquiry is whether it tends directly to appreciably restrain interstate trade; if it does, it is within the statute;[94] nor does the anti-trust act of July 2, 1890, extend to contracts which may incidentally or in some remote way come into relation with, or become the source of interstate commerce.[95] There is a clear distinction between the aggregation of properties by purchase when the seller no longer retains an interest in the property, and a combination of owners and properties under one management, where each owner's interest is continued in the combination.[96]

and to bid up prices temporarily to stimulate shipments, intending to cease from bidding when shipments have arrived, is an unlawful combination under the Sherman act. U. S. v. Swift & Co., 122 F. 529. A combination of tile, mantel and grate manufacturers and dealers residing in several states, to deprive supply dealers not members of the association, is within the statute. Montague & Co. v. Lowry, 193 U. S. 38, 24 S. Ct. 307. The restriction of its own trade by a corporation to those dealers who will buy only of it is not violative of the act. Whitwell v. Continental Tobacco Co. [C. C. A.] 125 F. 454. A contract of sale by a manufacturer to a jobber of some of its product to be shipped across the state line to the jobber, under an agreement that the jobber will not resell to parties outside the state, is not violative of the law. Phillips v. Iola Portland Cement Co. [C. C. A.] 125 F. 593.

93. U. S. Consol. Seeded Raisin Co. v. Griffin [C. C. A.] 126 F. 364.

94. A combination between all the lumber manufacturers of a city to raise and maintain the price to local consumers, and to refuse to sell to consumers who purchase any part of their supplies from outside mills, some of such mills being in another state, is within the act. Ellis v. Paulsen & Co. [C. C. A.] 131 F. 182. It is immaterial that such is not its ultimate object, nor is it material to ascertain what proportion the resulting restraint of interstate commerce bears to other results. Id. A city ordinance requiring the use of Trinidad lake asphalt for paving does not violate the provisions of such instruments, because this particular kind of asphalt is a product of a foreign country, and there are deposits in several of the United States from which suitable asphalt can be had. Field v. Barber Asphalt Pav. Co., 194 U. S. 618, 24 S. Ct. 784. An agreement between carriers to pay a percentage of all freights earned to competitors, no provision being made as to maintaining rates or preventing competition, no prices being fixed and dealings not being confined to any combination of persons, does not violate c. 647, 26 Stat. 209. Ceballos v. Munson S. S. Line, 93 App. Div. 593, 87 N. Y. S. 811.

NOTE. Test of an illegal trust: To form an illegal trust, it is not necessary that a pure monopoly be effected. The test is whether the contract or combination in its apparent purpose and natural consequence places such a restriction upon competition as tends to create a monopoly. Addyston P. & S. Co. v. U. S., 175 U. S. 211, 20 S. Ct. 96; Tex. Standard Oil Co. v. Adoue, 83 Tex. 650, 19 S. W. 274, 29 Am. St. Rep. 690. In this last case it was said that "the agreement may be illegal if the natural or necessary consequences of its operation are to prevent competition and create fictitious prices, independent of the law of demand and supply, and to such an extent as to injuriously affect the interests of the public, or the interests of any particular class of citizens who may be especially interested, either as producers or consumers, in the articles or staples which are the subject of the restrictions imposed by the contract." It is not the mere sale of the right to compete in a particular business or calling which is invalid, for such an agreement may be entered into if the rights of the public are not affected. Cowan v. Fairbrother, 118 N. C. 406, 24 S. E. 212, 54 Am. St. Rep. 733. It is the tendency to create a monopoly that renders the agreement void, and makes an illegal trust out of a combination. Fishburn v. Chicago, 171 Ill. 338, 49 N. E. 532, 63 Am. St. Rep. 236. The mere consolidation of firms for the purpose of reducing competition between them is not in itself illegal. Oakdale Mfg. Co. v. Garst, 18 R. I. 484, 28 A. 972, 49 Am. St. Rep. 784; Cohen v. Berlin & J. Envelope Co., 38 App. Div. 499, 56 N. Y. S. 588. But this rule should not be carried to such an extent as to require the courts to assume to say how much competition is desirable, as has been attempted in some cases. Leslie v. Lorillard, 110 N. Y. 519, 18 N. E. 363. The reason for this rule is pointed out in U. S. v. Addyston P. & S. Co. [C. C. A.] 85 F. 271, it there being said that "the manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it."—From note to Harding v. American Glucose Co., 74 Am. St. Rep. 189, 240.

95. 26 Stat. 209, c. 647. Davis v. Booth & Co. [C. C. A.] 131 F. 31. There is no objection to the enforcement of a contract in the consideration and performance of which nothing illegal inheres, that it may incidentally aid one of the parties in evading or violating the anti-trust act. Ingraham v. Nat. Salt Co. [C. C. A.] 130 F. 676.

96. Davis v. Booth & Co. [C. C. A.] 131 F. 31. An agreement ancillary to a sale of a corporation's business, by which the stockholders who received the purchase price agreed that they would not either directly or indirectly engage in the same business within certain distinct limits for a period of 10 years, is not void as against public policy nor as an unreasonable restraint of competition in trade at common law. Id.

A municipal corporation engaged in operating water, electric lighting or similar plants from which revenue derived is as to such matters a business corporation, and may maintain suit under the anti-trust statute for injury to its business,[97] and every member of the illegal combination is liable for the damages, and the fact that the plaintiff had no contractual relations with defendant is immaterial.[98]

§ 2. *Combinations violative of state anti-trust acts and of the common law.*[99] —Contracts intended to restrain trade, as by stifling competition or monopolizing business, are void and unenforceable by statute in most states and by the common law.[1] At the common law and under those statutes which are merely declaratory of it, an exception is made in favor of agreements not to engage in a particular business for a limited time in a certain place or district. Such agreements are most frequently met with as covenants in contracts of sale of business and good will,[2] and a contract restraining the prosecution of a certain business is valid in South Dakota only when made in connection with the sale of the good will of a business.[3]

A city's contract for lights for a stated period within its power to make is not invalid by reason of exclusiveness, since exclusiveness is natural to such contracts.[4]

An association which by assessing fines against its members compels them to cease business relations with another to his injury is liable to him for the damage caused.[5]

In several states statutes of more or less recent date, called anti-trust laws, have been enacted in most cases punishing acts that were merely invalid under the common law or prior statutes, and enlarging the powers of the courts to prevent

97, 98. City of Atlanta v. Chattanooga F. & Pipe Works [C. C. A.] 127 F. 23.

NOTE. What are not defenses to an illegal trust: It is no defense to an illegal trust to say that its monopoly has in fact resulted in the reduction of the price of the commodity. Richardson v. Buhl, 77 Mich. 632, 43 N. W. 1102; State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 34 Am. St. Rep. 541; People v. Milk Exch., 145 N. Y. 267, 39 N. E. 1062, 45 Am. St. Rep. 609. The anti-trust laws equally discredit such defense. San Antonio Gas Co. v. State, 22 Tex. Civ. App. 118, 54 S. W. 289. Again it is no defense that a complete monopoly has not been established. U. S. v. E. C. Knight Co., 156 U. S. 1, 15 S. Ct. 249; Addyston P. & S. Co. v. U. S., 175 U. S. 211, 20 S. Ct. 96, affirming 85 F. 271. Nor is it a defense that the public is not injured by the agreement. Anheuser-Busch Brew. Ass'n v. Houck [Tex. Civ. App.] 27 S. W. 692; Cent. Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; State v. Portland Natural Gas Co., 153 Ind. 483, 53 N. E. 1089; Anderson v. Jett, 89 Ky. 375, 12 S. W. 670; Judd v. Harrington, 139 N. Y. 105, 34 N. E. 790. Though some of the courts seem to have gone astray on this proposition. See Cent. Shade Roller Co. v. Cushman, 143 Mass. 353, 9 N. E. 629; Rafferty v. Buffalo City Gas Co., 37 App. Div. 618, 56 N. Y. S. 288.—From note to Harding v. American Glucose Co., 74 Am. St. Rep. 189, 271.

99. See 1 Curr. L. 536.

1. Detroit Salt Co. v. Nat. Salt Co. [Mich.] 96 N. W. 1; State v. Continental Tobacco Co., 177 Mo. 1, 75 S. W. 737; Booth & Co. v. Davis, 127 F. 875; Troy Buggy Works Co. v. Fife [Tex. Civ. App.] 74 S. W. 956; Simmons v. Terry [Tex. Civ. App.] 79 S. W. 1103. Two newspapers agreeing to bid maximum price for county printing and divide fee. Division refused enforcement. Pendleton v. Asbury [Mo. App.] 78 S. W. 651. The sale and transfer by a corporation of its property and good will to another corporation, such sale being within its powers, cannot be repudiated on the ground that the purchaser acquired the property for the purpose of obtaining a monopoly of the business and in pursuance of an illegal combination in restraint of trade. Metcalf v. American School Furniture Co., 122 F. 115. Cf. McGinniss v. Boston & M. Consol. C. & S. Min. Co. [Mont.] 75 P. 89. Suit on a contract to sell the output of a factory at 5 per cent. less than the prices quoted by another manufacturer cannot be met by an averment that the methods of the other manufacturer are unfair, and that the prices quoted by him are less than the cost of manufacture. Matthews Glass Co. v. Burk [Ind.] 70 N. E. 371. The rules of a cemetery association giving its superintendent a practical monopoly of the opening of graves in the cemetery are not in restraint of trade. Roanoke Cemetery Co. v. Goodwin, 101 Va. 605, 44 S. E. 769. The fact that a ferry company is engaged in an illegal pool and combination is no defense to an action by it to enjoin trespass on its lands. Wilson v. Sullivan, 25 Ky. L. R. 1110, 77 S. W. 193.

2. A covenant in a contract by which the owners of manufactories conveyed them to a corporation in exchange for its stock, binding the sellers not to engage in the same business within a radius of 50 miles for ten years, is valid. Robinson v. Suburban Brick Co. [C. C. A.] 127 F. 804; Booth & Co. v. Davis, 127 F. 875. See, also, Contracts, 1 Curr. L. 648.

3. Civ. Code, § 1277. Prescott v. Bidwell [S. D.] 99 N. W. 93.

4. Davenport Gas & Elec. Co. v. Davenport [Iowa] 98 N. W. 892.

5. Martell v. White [Mass.] 69 N. E. 1085.

the forming of combinations and monopolies and prevent their operation when formed. Cases founded on such enactments are discussed below.[6] A contract by a telephone company with a customer, to put in a telephone on condition that the customer will not use another system, is void because of its tendency to stifle competition and create a monopoly.[7] That unincorporated associations and individuals are absolutely prohibited from engaging in the building and loan business does not create a monopoly so long as the business is open to all corporations complying with reasonable statutory regulations.[8] A contract for the sale of a business, the seller not retaining any interest in the property, is not void under state statutes.[9] A monopoly in order to be illegal must restrain one from the free pursuit of his lawful business.[10] The test as to the illegality of a combination is its tendency to endanger the public by controlling prices, limiting production and suppressing competition so as to restrain trade and create a monopoly.[11] Allegations as to a combination to regulate and control the quantity and price of supplies to the damage of plaintiff are good at common law, without regard to the constitutionality of Valentine anti-trust act (Ohio).[12] A corporation accumulating, in the course of its principal business, a by-product in which it does not deal, may lawfully agree to sell its entire output of such by-product to another company.[13]

6. The purchase by one manufacturing corporation of the plant and business of another in the same business is not within the statute in Missouri [Sess. Acts 1897, p. 208, § 1]. State v. Continental Tobacco Co., 177 Mo. 1, 75 S. W. 737. An agreement by a publisher's association, ostensibly to maintain the price of copyrighted books, but effected by excluding dealers who undersell, from the sale of books of all kinds, copyrighted or not, is invalid and contrary to the anti-trust act of New York [Laws 1899, p. 1514, c. 690]. Straus v. American Publishers' Ass'n, 177 N. Y. 473, 69 N. E. 1107; Id., 85 App. Div. 446, 83 N. Y. S. 271. And measures taken by the association to enforce the agreement will be enjoined. Id., 92 App. Div. 350, 86 N. Y. S. 1091. The anti-trust law of Minnesota is in substantially the same language as the Sherman anti-trust law, and in the Federal court receives a similar construction [Minn. Laws 1899, p. 487, c. 359; Act July 2, 1890, c. 467 (26 Stat. 209)]. State of Minn. v. Northern Securities Co., 123 F. 692. The Federal and Minnesota anti-trust acts apply to railroads, and any contract or arrangement between railroad companies for the purpose and having the effect of preventing competition by fixing rates to be maintained by the parties, is in violation of their provisions; but contracts or combinations which do not directly and necessarily affect transportation or rates therefor are not in restraint of trade or commerce, nor within the statute, even though they may remotely and indirectly appear to have some probable effect in that direction. State of Minn. v. Northern Securities Co., 123 F. 692. Cf. Northern Securities Co. v. U. S., 193 U. S. 197, 24 S. Ct. 436. Refusal to supply cars to be loaded with coal on the railroad's own tracks, and furnishing them to be loaded on the tracks of miners who have provided themselves with private spur tracks, is not an undue preference under the Arkansas statute. Harp v. Choctaw, etc., R. Co. [C. C. A.] 125 F. 445. The Michigan act of 1899 is prospective in its operation only and does not affect a contract made prior to its enactment which was valid when made [Laws 1899, p. 409, No. 255]. Booth & Co. v. Davis, 127 F. 875. The anti-trust law of Texas of 1899 is constitutional against the objection that it imposes excessive fines and that it compels a witness to incriminate himself, the latter provision being separate from the body of the act [Acts 1899, p. 251, c. 146]. State v. Laredo Ice Co., 96 Tex. 461, 73 S. W. 951. Under the anti-trust law of 1899 in Texas, a contract by a manufacturer with a dealer not to sell any of his product to another in certain cities is void. Troy Buggy Works Co. v. Fife [Tex. Civ. App.] 74 S. W. 956; Simmons & Co. v. Terry [Tex. Civ. App.] 79 S. W. 1103.

Note: A "corner" when accomplished by confederation, to raise or depress prices and operate on the market, is a conspiracy, if the means be unlawful. Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173; People v. Melvin, 2 Wheeler Cr. Cas. 262.—From note to People v. North River Sugar Refining Co. [N. Y.] 2 L. R. A. 33.

7. Gwynn v. Citizens' Tel. Co. [S. C.] 48 S. E. 460.

8. Brady v. Mattern [Iowa] 100 N. W. 358.

9. Construing Law of Michigan [3 How. Ann. St. § 9354j]. Davis v. Booth & Co. [C. C. A.] 131 F. 31.

10. A carrier may make a regulation giving one individual the exclusive right to solicit on its trains the transfer business of its passengers. Lewis v. Weatherford, etc., R. Co. [Tex. Civ. App.] 81 S. W. 111.

11. Needles v. Bishop & Babcock Co., 2 Ohio N. P. [N. S.] 77. To render a combination illegal as against public policy, evil intent or actual injury to the public need not be shown. Id.

12. Needles v. Bishop & Babcock Co., 2 Ohio N. P. [N. S.] 77.

13. Is not an unlawful combination. State v. St. Paul Gaslight Co. [Minn.] 100 N. W. 216. That the seller is a public service corporation makes no difference. Id.

Constitutional provisions prohibiting monopolies in general,[14] and constitutional and statutory provisions against the consolidation of competing railroads, are common;[15] such a provision has been held to apply only to railroads proper and not to street railroads.[16] An inhibition against the consolidation of parallel or competing railroads does not apply to companies owning lines of railroads used alone in terminal business.[17] An answer to a suit to set aside an alleged fraudulent combination in restraint of trade is not objectionable on the ground that defendants denied facts, of which they had knowledge, on information or belief.[18] In such a suit, the complaint alleging that a certain person "is the manager of said corporation," an answer verified sometime after the service of the complaint, alleging that such person "is not now" the manager, is not objectionable as evasive,[19] but the complaint alleging that plaintiff had been requested to join such combination, an answer admitting that plaintiff had been invited to buy goods from the defendant on like terms with others is evasive and should be stricken out.[20] Irresponsive and insufficient allegations are set forth below.[21]

§ 3. *Grants of privileges by statute, ordinance and contracts with municipalities tending to create monopolies.*[22]—Cities have not the power to grant exclusive franchises, unless expressly granted in their charters,[23] and an ordinance granting the right to a corporation to build and operate an electric light plant, and containing no provision that the franchise so granted is exclusive, will not be so considered, and the city cannot be restrained from building and operating a plant of its own.[24] The Illinois statute authorizing the consolidation of gas companies

14. N. C. Const. art. 1, § 31. State v. Biggs, 133 N. C. 729, 46 S. E. 401. The provision of the constitution of Washington, denouncing monopolies, is not self-executing, and the statutes passed in accordance therewith must be examined to determine what is illegal. Where there are four grain warehouses at a railroad station belonging to different parties, there is no monopoly of such business. N. W. Warehouse Co. v. Or. R. & Nav. Co., 32 Wash. 218, 73 P. 388. To make a combination unlawful under the constitution and statutes of Montana, there must exist a specific intent, or necessary tendency to accomplish the prohibited result of regulation of price or production [Const. art. 15, § 20; Pen. Code, § 321]. McGinniss v. Boston & M. Consol. C. & S. Min. Co. [Mont.] 75 P. 89. The keeping of sailors' boarding houses is not of itself such an illegal or injurious business as to authorize the legislature to grant a monopoly of it, and the board of commissioners of Oregon are not authorized to so construe the act organizing the board [Const. art. 1, § 20; Laws 1903, p. 238]. White v. Mears [Or.] 74 P. 931. The medical registration or license law of North Carolina is unconstitutional, as intended not solely to confer protection on the public, but to confer a monopoly on the method of treatment of diseases by doctors of medicine [Const. art. 1, § 31; Act 1903, p. 1074, c. 697, amending Code, § 3122]. State v. Biggs, 133 N. C. 729, 46 S. E. 401.

15. S. C. Act 1894 (21 Stat. p. 812); Const. 1895, art. 9, § 8. Complaint for penalty against railroad offending held sufficient. Edwards v. Southern R. Co., 66 S. C. 277, 44 S. E. 748.

16. Const. art. 10, § 5. Scott v. Farmers' & Merchants' Nat. Bank [Tex.] 75 S. W. 7.

17. State v. Terminal Ass'n of St. Louis [Mo.] 81 S. W. 395 (By a divided court). An information alleging that by the consolidation the respondent acquired a parallel bridge for the purpose of handling the terminal business of a city, and failing to show that the lines acquired had equal facilities for handling the terminal business of the city with those possessed by respondent at the time of consolidation, is insufficient. Id.

18, 19, 20. Straus v. American Publishers' Ass'n, 89 N. Y. S. 172.

21. Where a complaint set forth and the answer admitted that "they have maintained the plans and rules of the American Publishers' Association as the same have from time to time been amended," the answer is irresponsive to the complaint and should be stricken out, and a general denial interposed, unless the plans and rules of the association, together with the dates of their adoption and their nature, are specifically alleged. Straus v. American Publishers' Ass'n, 89 N. Y. S. 172. The complaint charging that defendants established a system of espionage in the store of plaintiffs, and otherwise, to secure information as to plaintiff's business and the source from which they obtained book supplies, an answer admitting that defendant association had by lawful means endeavored to ascertain how plaintiffs obtained supplies of copyrighted books is irresponsive and insufficient. Id. The complaint alleging that defendant adopted a resolution to prevent the reduction of the price of books published by them, an answer admitting the adoption of "certain resolutions" and denying that their purport is correctly set forth is insufficient. Id.

22. See 1 Curr. L. 538. See, also, Contracts, 1 Curr. L. 626, and Municipal Corporations, 2 Curr. L. 940.

23. Ter. v. De Wolfe, 13 Okl. 454, 74 P. 98.

24. Joplin v. Southwest Mo. Light Co., 191 U. S. 150, 24 S. Ct. 43.

in the same city is not invalid as tending to create a monopoly.[25] A statute providing for the purchase by a foreign railroad company of a road within the state, provided that parallel lines shall not be consolidated, prohibits the purchase of a state line parallel to the foreign line of the purchasing company.[26]

COMMERCE.

§ 1. Public Regulation in General (711). Hawkers' and Peddlers' Licenses (712). Regulations of Foreign Corporations in General (712). Regulation of Telegraph and Telephone Companies (713). Regulation of Railroads and Other Carriers (713). Discrimination in Rates Under Interstate Commerce Act (713). Offenses against Regulatory Acts (714). Regulation of Traffic in Intoxicating Liquors (714). Adulteration of Articles of Food and Drink (715). Quarantine Laws (715). State Burdens on Foreign Commerce (715).

§ 2. Domestic and Interstate or Foreign Commerce (716).

§ 3. Regulation of Intrastate Commerce (717).

§ 1. *Public regulation in general. Meaning of term and general limitations of federal and state powers.*[27]—In a general sense, interstate commerce consists of trade and traffic between citizens of different states, and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities;[28] but the law includes the intercourse, all the initiatory and intervening acts, instrumentalities and dealings.[29] The commerce clause confers exclusive jurisdiction upon congress, and the silence of that body amounts to an assertion that the subject shall be left free and untrammeled,[30] but only such regulations as directly interfere with the freedom of interstate commerce are prohibited to the states.[31] The test of interstate commerce is that the transaction, as an entirety, including each part calculated to bring about the result, reaches into two or more states, and that the parties dealing with reference thereto deal from different states.[32] Under its police power, a state may reasonably regulate the relative rights and duties of all persons or corporations within its jurisdiction, though incidentally affecting interstate commerce,[33] but a prohibition of the possession of fish during a certain season, though brought from without the state, is an interference.[34]

25. Hurd's Rev. St. 1901, p. 495. People v. People's G. & Coke Co., 205 Ill. 482, 68 N. E. 950.

26. Ill. Laws 1899, p. 116. Ill. State Trust Co. v. St. Louis, etc., R. Co., 208 Ill. 419, 70 N. E. 357.

27. See 1 Curr. L. 538.

28. U. S. v. Slater, 123 F. 115.

29. Com. v. Hogan, etc., Co., 25 Ky. L. R. 41, 74 S. W. 737; U. S. v. Swift & Co., 122 F. 529.

30. Wall v. Norfolk & W. R. Co., 52 W. Va. 485, 44 S. E. 294; Southern Exp. Co. v. Goldberg, 101 Va. 619, 44 S. E. 893; Atl. & Pac. Tel. Co. v. Phila., 190 U. S. 160, 23 S. Ct. 817.

31. Crossman v. Lurman, 192 U. S. 189, 24 S. Ct. 234; Field v. Barber Asphalt Paving Co., 194 U. S. 618, 24 S. Ct. 784.

32. It is none the less interstate commerce because local incidents of purchases are to be regarded as outside the interstate commerce character of the transaction. U. S. v. Swift & Co., 122 F. 529.

33. Rules relative to storage and demurrage, adopted by corporation commission, sustained. Atlantic Coast Line R. Co. v. Commonwealth [Va.] 46 S. E. 911. By local ordinance, the transmission to pool rooms of messages to be used in pool selling was made illegal. City of Louisville v. Wehmoff, 25 Ky. L. R. 1924, 79 S. W. 201. Refusal to limit the carrier's liability for negligence to the valuation agreed upon in contract for shipment. Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 24 S. Ct. 132.

NOTE: Constitutionality of laws affecting interstate commerce in interdicted articles: [For the purposes of this note, the cases showing the development of the intoxicating liquor law have alone been taken, as all interstate traffic in interdicted articles is governed by the same rules.] A state may constitutionally pass legislation prohibiting the manufacture of spirituous or other intoxicating liquors within the state to be there sold or bartered for general use as a beverage. Mugler v. Kansas, 123 U. S. 623. But the state cannot pass a law forbidding common carriers from bringing intoxicating liquors into the state from any other state or territory, unless furnished with an official certificate from a state official, such a law being unconstitutional as forbidding interstate commerce in the article. Such law cannot be upheld as an inspection, nor a quarantine law; the quarantine power does not allow a state at its mere will to declare what articles are entitled to admission; if it invoked such power, the state might forbid all, and thus nullify the commercial power altogether. Bowman v. Railroad, 125 U. S. 415. In Kidd v. Pearson, 128 U. S. ——, it is held that a state statute which pro-

Hawkers' and peddlers' licenses.[35]—A tax may lawfully be exacted from hawkers and peddlers who are the actual owners of the goods at the time of delivery.[36]

Regulations of foreign corporations in general.[37]—A statute requiring foreign corporations to file copies of their charters and obtain a certificate authorizing them to do business within the state is not an interference with interstate commerce,[38] but such a statute in Texas does not apply to a corporation selling goods through an agency in the state.[39] A single transaction by a foreign corporation may constitute doing business within the state.[40]

vided first, that foreign intoxicating liquors may be imported into the state and there kept for sale by the importer, in the original packages, or for transportation in such packages and sale beyond the limits of the state; and second, that intoxicating liquors may be manufactured and sold within the state for mechanical, medicinal, culinary and sacramental purposes, but for no other, and not even for the purpose of transportation beyond the state, was not an undertaking to regulate commerce among the states. Following the law as decided by the last case, the supreme court, in Telsy v. Hardin, 135 U. S. 100, held that a statute, of a state, prohibiting the sale of any intoxicating liquor, except for pharmaceutical, medicinal, chemical, or sacramental purposes and under a license from a county court of the state, was, as applied to a sale by the importer, and in original packages or kegs, unbroken and unopened, of such liquors manufactured in and brought from another state, unconstitutional and void as repugnant to the commerce clause of the Federal constitution. The rule is stated by Tucker as follows: "Where the package is broken by the importer, or the unbroken package is sold by him, the transitus is complete and the property passes under state power; but it seems if the consignee chooses to transport the unbroken package to another state, he may do so." 2 Tucker, Const. 549.

In 1890, congress passed the act known as the "Wilson Bill" [26 Stat. 313, c. 728], enacting that all fermented, distilled or other intoxicating liquors or liquids transported "into" any state or territory, or remaining therein for use, consumption, sale, or storage, shall "upon arrival in", such state or territory be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police power, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. The supreme court in In re Raher, 140 U. S. 545, held this act to be a valid and constitutional exercise of the legislative power conferred upon congress, and that after such act took effect, such liquors or liquids being introduced into a state or territory from another state, whether in original packages or otherwise, became subject to the operation of such of its then existing laws as had been properly enacted in the exercise of its police powers.

The provisions of the "Wilson Bill were not intended to and did not cause the power of the state to attach to an interstate commerce shipment whilst the merchandise was in transit under such shipment and until its arrival at the point of destination and delivery there to the consignee." Rhodes v. Iowa, 170 U. S. 412, 426. "It is reasonable to infer that the provisions of the act [The Wilson Bill] were intended by congress to cause the legislative authority of the respective states to attach to intoxicating liquors coming into the states by an interstate shipment, only after the consummation of the shipment, but before the sale of the merchandise, that is, that the one receiving merchandise of the character named should, whilst retaining the full right to use the same, no longer enjoy the right to sell free from the restrictions to sell created by state legislation, a right which the decision in Leisy v. Hardin, 135 U. S. 100 [decided just previous to the passage of the Wilson Bill] had just previously declared to exist." Rhodes v. Iowa, 170 U. S. 412, 423.

"Original packages are such as are used in bona fide transactions carried on between the manufacturer and wholesale dealer residing in different states. Where the size of the package is such as to indicate that it was prepared for the purpose of evading the law of the state to which it was sent, it will not be protected as an original package against the police laws of that state." Austin v. Tennessee, 179 U. S. 343. [Cigarette case.]

34. Laws 1902, p. 487, c. 194, § 141. People v. Booth & Co., 42 Misc. 321, 86 N. Y. S. 272.

35. See 1 Curr. L. 538.

36. Laws of 1903, c. 165. In re Lipschitz [N. D.] 95 N. W. 157. Where goods were shipped to the soliciting agent in bulk, as his property, and were by him delivered, there is no act of interstate commerce, though the agent received his wares from a foreign corporation. In re Pringle, 67 Kan. 364, 72 P. 864; City of Muskegon v. Zeeryp [Mich.] 96 N. W. 502.

37. See 1 Curr. L. 539.

38. Rev. St. 1899, §§ 1025, 1026. Appellant was held to be engaged in business in Missouri. Fay Fruit Co. v. McKinney [Mo. App.] 77 S. W. 160; John Deere Plow Co. v. Wyland [Kan.] 76 P. 863. Section 571, Ky. St. 1903 has no reference to sales by drummers or correspondence or otherwise than through agents at an established place for conducting business in the state. Com. v. Parlin & Orendorff Co., 26 Ky. L. R. 58, 80 S. W. 791. The sale of whisky located in another state and to be subsequently shipped, notes being given in payment therefor, is not within Const. La. 1898, art. 264, forbidding a foreign corporation from doing business in Louisiana, except on compliance with certain regulations. Julius Kessler & Co. v. E. F. Perilloux & Co., 127 F. 1011.

39. Hallwood Cash Register Co. v. Berry [Tex. Civ. App.] 80 S. W. 857; De Witt v.

Regulation of telegraph and telephone companies.[41]—A municipality may impose an occupation tax on telegraph companies if the ordinance fairly excludes interstate business,[42] or it may require the payment of a reasonable license fee for the enforcement of local governmental supervision.[43] In estimating the taxable value of property within the state and belonging to a foreign telegraph company, it may be regarded as part of an interstate system.[44]

Regulation of railroads and other carriers.[45]—A state cannot prescribe the rates to be charged by common carriers of interstate commerce,[46] and a state railroad commission cannot compel the cancellation of "proportional tariffs" applied to interstate traffic, nor prohibit the stoppage in transit for cleaning purposes, of export shipments.[47] In the absence of congressional legislation, a state may require an interstate carrier to use great care,[48] and to be liable for the whole loss due to its negligence;[49] it may lawfully prohibit express companies from unjustly discriminating against other companies of like nature, and may provide a forfeiture penalty therefor.[50] It is the legal duty of railroad companies under the federal statute to furnish freight cars for interstate commerce without unjust discrimination.[51] The safety appliance act of congress applies to a locomotive tender,[52] and a temporary suspension of transit of a car used in an interstate shipment does not terminate the necessity of automatic couplers.[53] But a carrier conducting an intrastate business and refusing to issue through bills of lading is not within this statute.[54]

Discrimination in rates under interstate commerce act.[55]—The interstate commerce commission is not vested with authority to fix rates, maximum or minimum,[56] such a power being legislative and not judicial.[57] A railroad company is

Berger Mfg. Co. [Tex. Civ. App.] 81 S. W. 334.

40. John Deere Plow Co. v. Wyland [Kan.] 76 P. 863.

41. See 1 Curr. L. 539.

42. The ordinance in question, however, was held invalid as a tax on business of the United States. Western Union Tel. Co. v. Wakefield [Neb.] 95 N. W. 659.

43. Atl. & Pac. Tel. Co. v. Phila., 190 U. S. 160, 23 S. Ct. 817.

44. The state was not precluded from taxing the property because the state had not conferred a franchise on the company or because it derived rights under the act of 1866, or was engaged in interstate commerce. Western Union Tel. Co. v. Mo., 190 U. S. 412, 23 S. Ct. 730, 47 Law. Ed. 1116.

45. See 1 Curr. L. 539.

46. Section 1215, Code 1887, held void. So. Exp. Co. v. Goldberg, 101 Va. 619, 44 S. E. 893.

47. Proportional tariffs adopted with the approval of the interstate commerce commission. J. Rosenbaum Grain Co. v. Chicago, etc., R. Co., 130 F. 46. The Florida railroad commission has legislative, executive and judicial powers, but its action may be reviewed by the courts, and they alone can enforce the commission's orders. Louisville & N. R. Co. v. Brown, 123 F. 946.

48, 49. Pa. R. Co. v. Hughes, 191 U. S. 477, 24 S. Ct. 132. A state may prohibit a carrier from limiting its liability by stipulations in the bill of lading, though interstate business is in some degree affected. So long as congress has not legislated upon the subject, such statutes will be deemed to be in aid of commerce. Galveston, etc., R. Co. v. Fales [Tex. Civ. App.] 77 S. W. 234. A statute placing a full responsibility for loss or damage upon the initial carrier, which issues the bill of lading, is not an interference with interstate commerce, though the shipment be to a point without the state [Rev. St. 1889, § 944]. Western Sash & Door Co. v. Chicago, R. I. & P. R. Co., 177 Mo. 641, 76 S. W. 998. Statute fixing the responsibility for goods lost or damaged upon the carrier last receiving them in good order held valid [Civ. Code 1895, § 2298]. Kavanaugh & Co. v. Southern R. Co. [Ga.] 47 S. E. 526.

50. Burns' Rev. St. 1901, § 3312 et seq. are not unconstitutional as depriving one of property without due process of law, or as an interference with interstate commerce or as providing a penalty not proportionate to the offense. Adams Exp. Co. v. State, 161 Ind. 328, 67 N. E. 1033.

51. The number of cars being limited, they should be furnished proportionately, considering the number of workings, the number and capacity of mine cars, the number of mine openings, miners, etc. United States v. West Va. Northern R. Co., 125 F. 252.

52. 27 Stat. 531. Phila. & R. R. Co. v. Winkler [Del.] 56 A. 112.

53. U. S. Comp. St. 1901, p. 3174. Chicago, M. & St. P. R. Co. v. Voelker [C. C. A.] 129 F. 522.

54. United States v. Geddes [C. C. A.] 131 F. 452.

55. See 1 Curr. L. 540.

56. Interstate Commerce Com. v. Cincinnati, etc., R. Co., 124 F. 624.

57, 58. Louisville & N. R. Co. v. Brown, 123 F. 946.

entitled to charge reasonable rates, earning the usual and legal rate of interest on the actual value of its property,[58] and the question of reasonableness is peculiarly one for judicial investigation and decision.[59] The interstate commerce act adopts the common-law rule requiring common carriers to carry for all, without unjust discrimination.[60] Carriers are not bound to establish through routes and joint tariffs, but if established, it must be without condition subjecting particular persons or localities to undue disadvantage.[61] On a through shipment, a carrier may charge less than the sum of the local rates,[62] and a discrimination in through rates to two places equally distant, in favor of the one where active competition for connecting business exists, is not necessarily unreasonable.[63] A refusal to accept through freight, routed at the desire of the shipper, is violative of the interstate commerce act.[64] Polling and rebating are both illegal, and one cannot be employed as a preventive of the other.[65] Doubts as to the lawfulness of an order of the commission will be resolved in its favor, especially where the hearing is on demurrer;[66] but action by the interstate commerce commission, on a matter which might properly come before it, is not a prerequisite to a remedy at law or equity.[67] Under a complaint for unjust rates in carrying coal, the commission may compel the production of contracts under which the coal was transported and payment made; also of contracts under which a road purchases collieries whose proprietors were about to construct a competing line;[68] but evidence as to combinations and contracts for the purchase and sale of coal is irrelevant.[69] A sworn return of a road's value for taxation purposes is not conclusive on the company in a proceeding to determine the reasonableness of a rate.[70]

Offenses against regulatory acts.[71]—A state may inflict a penalty upon a carrier for wrongfully refusing to transport goods, though their destination be a point without the state;[72] or may impose a personal liability on the agent of an insurance company not complying with the laws of Pennsylvania, though the property insured is out of the state, the contract being made through an agent therein;[73] or may forbid a foreign corporation doing business within the state from using the state courts, unless the proper reports have been filed.[74] It is no defense that other participants in the unlawful act are not joined in the suit.[75]

Regulation of traffic in intoxicating liquors.[76]—A municipality may require all dealers in liquors to procure a license, whether the business be wholesale or retail,[77] though the effect of the license law may be to favor a local producer.[78] The

59. But where the reasonableness of a rate is pending before the interstate commerce commission, and no irreparable injury is being done, the court will await the ruling of the commission. Tift v. Southern R. Co., 123 F. 789.

60. Tift v. Southern R. Co., 123 F. 789.

61. Interstate Commerce Com. v. Southern Pac. Co., 123 F. 597.

62. Const. 215, held not to apply under the evidence. Southern R. Co. v. Com., 25 Ky. L. R. 1078, 77 S. W. 207.

63. Interstate Commerce Com. v. Cincinnati, etc., R. Co., 124 F. 624.

64. Under the common law, the initial carrier may designate the route, but this will not permit the execution of a pooling agreement [U. S. Comp. St. 1901, p. 3156]. Interstate Commerce Com. v. Southern Pac. Co., 123 F. 597.

65, .66. Interstate Commerce Com. v. Southern Pac. Co., 123 F. 597.

67. Tift v. Southern R. Co., 123 F. 789.

68. This does not compel one to furnish evidence against himself, nor permit unreasonable searches. Interstate Commerce Com. v. Baird, 194 U. S. 25, 24 S. Ct. 563.

69. Interstate Commerce Com. v. Phila. & R. R. Co., 123 F. 969.

70. Louisville & N. R. Co. v. Brown, 123 F. 946.

71. See 1 Curr. L. 541.

72. Code 1883, § 1964, amended Laws 1903, p. 788, c. 444. Currie v. Raleigh & A. Air Line R. Co., 135 N. C. 535, 47 S. E. 654.

73. Act Pa. May 1, 1876, § 48. Adler-Weinberger S. S. Co. v. Rothschild & Co., 123 F. 145.

74. Gen. St. 1901, § 1283. John Deere Plow Co. v. Wyland [Kan.] 76 P. 863.

75. Interstate Commerce Com. v. Southern Pac. Co., 123 F. 597.

76. See 1 Curr. L. 541.

77. Duluth B. & M. Co. v. Superior [C. C. A.] 123 F. 353.

78. Such an ordinance is not discriminative within the fourteenth amendment, nor a violation of the right of congress to reg-

statute forbidding the shipping of wines or spirits under any other than the trade name applies only to distillers, dealers in spirits, etc.,[79] and does not refer to a shipment without any designation whatever.[80] A state may tax the retailing of liquors upon a vessel plying between ports within and without the taxing state.[81]

Adulteration of articles of food and drink.[82]—A state may forbid the selling of adulterated food within its borders, though such adulteration be not injurious to health;[83] but it can not prohibit the sale of oleomargarine, it being a lawful subject of commerce under the acts of congress.[84]

Quarantine laws.[85]—Under the commerce clause, congress may make it a misdemeanor to transport or drive from one state to another stock known to be diseased,[86] but the courts may inquire whether an alleged quarantine regulation is in fact such, or is an attempt to give a monopoly of grazing grounds.[87] A statute requiring the carcasses of calves shipped from any point within the state to be properly tagged is not an interference with interstate commerce.[88]

State burdens on foreign commerce.[89]—A state cannot tax the privilege of engaging in foreign commerce,[90] but in the absence of Federal legislation, a state may provide for a lien upon either foreign or domestic vessels for nonperformance of their contracts.[91] No state can compel a party or corporation to pay for the privilege of engaging in interstate commerce,[92] but this immunity does not prevent

ulate commerce, it appearing that the enactment was under the police power. Duluth B. & M. Co. v. Superior [C. C. A.] 123 F. 352.

79. U. S. Comp. St. 1901, p. 2277. The information must allege the shipper to be one forbidden by statute to ship by other than its true name. U. S. v. Twenty Boxes of Corn Liquor. 123 F. 135.

80. A package marked only "Glass; this side up with care" has no designation of its contents. U. S. v. Twenty Boxes of Corn Liquor, 123 F. 135.

81. Acts Tenn. 1903, p. 615, c. 357, § 4. Harrell v. Speed [Tenn.] 81 S. W. 840. The sale of liquor on a vessel within the state limits is not interstate commerce, though the vessel be engaged in such commerce. Foppiano v. Speed [Tenn.] 82 S. W. 222.

82. See 1 Curr. L. 541.

83. Coffee beans colored by a yellow wash. Crossman v. Lurman, 192 U. S. 189, 24 S. Ct. 234.

84. Chap. 8, p. 12, Acts 1891, Code 1899, p. 1115, held unconstitutional. State v. Bruce [W. Va.] 47 S. E. 146.

85. See 1 Curr. L. 541.

86. U. S. v. Slater, 123 F. 115 [U. S. Comp. St. 1901, p. 299]. This liability is irrespective of whether a quarantine has been established or whether the state from which the stock came has been declared an "infected district." Id. An order of the department of agriculture, giving notice of the existence of scabies among sheep, and warning against the transportation of such sheep, need not specify particular districts under quarantine. Id. An information for driving from one state to another, stock known to be infected with a contagious disease, need not set out the particular rule or regulation violated. Id.

87. Restraining injunction allowed where the bill showed an almost complete absence of disease, easily curable, and the driving of such sheep across the state had been prohibited under a so-called quarantine. Smith v. Lowe, 121 F. 753.

88. Laws 1902, p. 59, c. 30, §§ 70e, 70f. People v. Bishopp, 89 N. Y. S. 709.

89. See 1 Curr. L. 542.

90. A license tax upon a cotton buyer, who only fills orders from abroad, is invalid as a tax on exports. State v. E. Allgeyer & Co., 110 La. 839, 34 So. 798.

91. Ballinger's Ann. Codes & St. Wash. §§ 5953, 5954. The Energia, 124 F. 842.

92. Atl. & Pac. Tel. Co. v. Phila., 190 U. S. 160, 23 S. Ct. 817, 47 Law. Ed. 995. A license tax for engaging in business in the state is invalid as applied to a foreign corporation selling a single machine within the state by mail order and shipped C. O. D. [N. C. Laws 1901, p. 116, § 52]. Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 24 S. Ct. 151. The cars of a corporation (not a railroad company) foreign to Illinois, but in transit therein, are engaged in interstate commerce and not there taxable. In re Union Tank Line Co., 205 Ill. 347, 68 N. E. 504. Receipts from express business, originating and transferred within the state for delivery in another state or shipped outside the state for delivery within, are exempt from taxation as being derived from interstate commerce. People v. Miller, 88 N. Y. S. 373. The transportation of railroad cars across a stream forming a boundary between two states is interstate commerce and not subject to taxes. Ill. Rev. Laws 1874, c. 55, made the granting of the license discretionary and compelled the licensee to conduct a general ferry business; even assuming that a state may regulate a ferry upon a navigable boundary stream, such a statute is invalid. St. Clair County v. Interstate Sand & Car Transfer Co., 192 U. S. 454, 24 S. Ct. 300. Otherwise of the storing and transferring of freight in Buffalo. Laws 1896, p. 857, c. 908, § 184; Laws 1881, p. 484, c. 361, § 6. The business of defendant was held to be incidentally connected with interstate commerce, but not of itself such commerce. People v. Miller, 84 App. Div. 174, 82 N. Y. S. 582.

a state from imposing ordinary property taxes upon property having a situs within its territory, and employed in interstate commerce,[93] and where goods, the property of a resident of one state, are shipped from that state to the owner's place of business in another state, there to be stored and offered for sale in open market by his agent, the business of selling them is not interstate commerce, but is subject to taxation by the state,[94] though it is otherwise where the goods are shipped direct to fill orders previously secured.[95] A state may include in the basis of taxation of an interstate road, the income from interstate business, proportioned according to the length of the road within the state,[96] and a state tax upon the intangible property of an express company, proportioned according to the mileage within that state, is not unlawful.[97] A franchise is a part of the taxable property, unless derived from the Federal government.[98] That a toll bridge is part of a structure used in interstate commerce does not prevent its taxation.[99] An ordinance requiring a license for vehicles used within the city does not apply to vehicles of merchants of another state delivering goods to customers in such city.[1] The clause is not infringed by an act taxing insurance companies on business transacted within the state, where it applies impartially to both domestic and foreign companies,[2] but a tax on land, timber and mill business, and exempting operators who do not ship out of the state, is an interference.[3] A statute requiring any action upon a written instrument to be commenced within two years does not interfere with interstate commerce,[4] nor does the designation by a municipal council of a certain kind of asphalt for pavement obtainable only from abroad.[5] An ordinance requiring that all hay, oats, etc., intended for consumption within the corporate limits be weighed at the city market, is not unreasonable.[6]

§ 2. *Domestic and interstate or foreign commerce.*[7]—A freight car sent from one state to another, loaded and to be returned with freight in the opposite direction, is engaged in interstate commerce and cannot be reached by attachment or garnishment.[8] Goods have "arrived" and are subject to state regulation when deposited in a freight house awaiting call by the consignee.[9]

93. Atl. & Pac. Tel. Co. v. Phila., 190 U. S. 160, 23 S. Ct. 817. A state may tax the terminal cab service of an interstate carrier, where such service is wholly within the taxing state. While the cab service may be rendered at the beginning or conclusion of an interstate transportation, it is no part thereof (People v. Knight, 192 U. S. 21, 24 S. Ct. 202), and may levy an annual tax upon sleeping car companies carrying one or more passengers witbin the state. In Tennessee, a carrier may decline all local business if it sees fit [Shannon's Code, § 3046] (Allen v. Pullman's Palace Car Co., 191 U. S. 171, 24 S. Ct. 39), but a specified tax on each car operating within the state is illegal for the reason that no distinction was made as to cars engaged in interstate traffic (Id.).

94. Kehrer v. Stewart, 117 Ga. 969, 44 S. E. 854. Laws 1903, p. 339, c. 247, § 56, sustained. Lacy v. Armour Packing Co., 134 N. C. 567, 47 S. E. 53. Goods brought into one state from another are not imports, and after reaching their destination are subject to taxation, though still in the original package. American Steel & Wire Co. v. Speed, 192 U. S. 500, 24 S. Ct. 365. A state may lawfully tax a foreign corporation upon its goods stored within the state for distributing purposes. When so stored, the goods were no longer in transit, but had reached their destination and were there held for sale. Id. A license imposed on business of a nonresident within the state is not a regulation within the interstate commerce clause of the constitution of the United States [Acts 1898, p. 192, No. 127]. State v. Hammond Packing Co., 110 La. 180, 34 So. 368.

95. Kehrer v. Stewart, 117 Ga. 969, 44 S. E. 854.

96. Act of June 4, 1897. Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 48 Law. Ed. 229.

97. Ky. St. 1903, § 4077 et seq. Coulter v. Weir [C. C. A.] 127 F. 897.

98. Atl. & Pac. Tel. Co. v. Phila., 190 U. S. 160, 23 S. Ct. 817.

99. Southern R. Co. v. Mitchell [Ala.] 37 So. 85.

1. Dooley v. Bristol [Va.] 46 S. E. 296.

2. Northwestern Mut. Life Ins. Co. v. Lewis & Clarke County, 28 Mont. 484, 72 P. 982.

3. Act 1900, p. 44, c. 43, § 8, held invalid. Adams v. Mississippi Lumber Co. [Miss.] 36 So. 68.

4. Code Civ. Pro. § 339. Higgins v. Graham, 143 Cal. 131, 76 P. 898.

5. The constitution prohibits only that which directly interferes with interstate or foreign commerce. Field v. Barber Asphalt Pav. Co., 194 U. S. 618, 24 S. Ct. 784.

6. State v. Smith, 123 Iowa, 654, 96 N. W. 899.

7. See 1 Curr. L. 542.

Original packages.[16]—States have no power to tax directly, or by license upon the importer, goods imported from other states or countries, while in their original packages, or before they have become commingled with the general property of the state and lost their distinctive character as imports.[11]

Sales by orders taken by agent of nonresident.[12]—The selling from samples of goods to be shipped direct to the purchaser is interstate commerce,[13] likewise of sales through orders subject to the approval and shipment of a foreign corporation,[14] or goods shipped in care of the agent and delivered in the original package.[15] But one who delivers the goods at the time of the order is not engaged in interstate commerce, though acting for a foreign corporation.[16]

§ 3. *Regulation of intrastate commerce.*[17]—Regulation of common carriers,[18] sale of unmarked or falsely marked food packages,[19] and inspection,[20] and license laws,[21] are elsewhere treated. The Kentucky act requiring fertilizer to be labeled with the manufacturer's name is for the benefit of the purchaser, and is satisfied by the attaching of labels with his consent after shipment to him.[22] A statute forbidding the sale of bottles, boxes, etc., bearing the owner's trademark unless he consent in writing to the sale, is unconstitutional.[23]

COMMON LAW.[24]

In general.[25]—The common law on a given subject, not having been expressly repealed or displaced, or altered by any statute, remains in force.[26]

Statutes in derogation.[27]—A city having power to enact ordinances not in conflict with the laws of the state, it may enact ordinances changing common-law rules not subject of statutory enactments.[28]

Construction of statutes enacting common law.[29]—In some states, the common law of England has been adopted by statute as the law of the state.[30] The term

8. Wall v. Norfolk & W. R. Co., 52 W. Va. 485, 44 S. E. 294.

9. Intoxicating liquors. Construing Act Cong. Aug. 8, 1890, c. 728. Southern R. Co. v. Heymann, 118 Ga. 516, 45 S. E. 491.

10. See 1 Curr. L. 542.

11. Norfolk & W. R. Co. v. Sims, 191 U. S. 441, 24 S. Ct. 151. Goods shipped in care of an agent and delivered in the original packages [Pub. Laws 1903, p. 333, c. 247]. Wrought Iron Range Co. v. Campen, 135 N. C. 506, 47 S. E. 658.

12. See 1 Curr. L. 543.

13. In re Lipschitz [N. D.] 95 N. W. 157. Act March 16, 1901, is unconstitutional as applied to an agent selling stoves by sample, the orders being forwarded to the foreign corporation which shipped direct to the purchaser. In re Kinyon [Idaho] 75 P. 258. Appellant sold stoves from a sample, the orders were filled by a foreign corporation and shipped direct to the purchaser, and delivered to him in unbroken packages; appellant not liable under Gen. Laws 1899, p. 201, c. 116. Harkins v. State [Tex. Cr. App.] 75 S. W. 25. Orders were secured by defendant, who forwarded them to an Illinois corporation. Comp. St. of 1903, § 52, art. 1, c. 77 was held valid and not to apply to the above facts. Menke v. State [Neb.] 97 N. W. 1020.

14. Defendant not liable under Ky. St. 1899, § 571, prohibiting a foreign corporation from doing business without designating an agent on whom process might be served. Commonwealth v. Hogan, McMorrow & Tieke Co., 25 Ky. L. R. 41, 74 S. W. 737.

15. Pub. Laws 1903, p. 333, c. 247. Wrought Iron Range Co. v. Campen, 135 N. C. 506, 47 S. E. 658.

16. Sess. Laws 1901, p. 155. In re Abel [Idaho] 77 P. 521.

17. See 1 Curr. L. 57, n. 41, 43.

18. See Carriers, 3 Curr. L. 592, § 2; Id. 603, § 12.

19. See Food, 2 Curr. L. 10.

20. See Inspection Laws, 2 Curr. L. 460.

21. See Licenses, 2 Curr. L. 730.

22. B. F. Beard & Co. v. Goodman, 25 Ky. L. R. 1566, 78 S. W. 191.

23. It is special legislation and not justified as an exercise of the police power. Norwich v. Walker-Gordon Laboratory Co., 205 Ill. 497, 68 N. E. 938.

24. The determination of what is the common-law rule on particular subjects and how far it has been modified by statute is excluded to the titles dealing with the subjects involved. As to adoption of the common law of Hawaii. See 1 Curr. L. 865, n. 6.

25. See 1 Curr. L. 543.

26. Harper v. Middle States Loan, Bldg. & Const. Co. [W. Va.] 46 S. E. 817. New York city ordinance as to licensed cabs. Cargill v. Duffy, 123 F. 721.

27. See 1 Curr. L. 543.

28. Cargill v. Duffy, 123 F. 721. See, also, Statutes, 2 Curr. L. 1707.

29. See 1 Curr. L. 543.

30. In Colorado (2 Mills' Ann. St. § 4184),

"common law," as here used, does not include the judicial decisions of England rendered subsequently to the independence of America,[31] though such decisions are entitled to respect as evidence of what the common law, as so adopted, is, and in particular cases may properly be regarded as conclusive.[32] Such portions of the common law as are inapplicable to the particular conditions of the various states are not the law of such states.[33] The common law being in force, an adjudication settling a principle in a manner expressly regretted by the English judges must be followed until changed by legislative enactment.[34]

The Federal courts have no common-law jurisdiction,[35] but as to matters within their jurisdiction, the common-law rules of the state where the controversy arises are applied in the absence of a controlling statute.[36] In these courts, in the absence of a Federal statute, the common-law rules as to the reception and consideration of evidence govern.[37] A state statute conferring on a state court equitable jurisdiction, which neither the state nor Federal courts had previously exercised, is recognized by the Federal courts as giving them like jurisdiction.[38]

Presumption of prevalence of common law in a sister state.[39]—In the absence of proof to the contrary, it is presumed that the common law prevails in a sister state.[40] But the common law is not presumed to be in force in any state or country where English institutions have not been established.[41] Statutory modifications must be pleaded and proven.[42] The judgment of another state is presumptive evidence of the unwritten or common law of such other state.[43]

Repeal.—A statute declaratory of[44] or superseding[45] a common-law rule, being repealed, the common-law rule remains in force or is revived.

COMPOSITION WITH CREDITORS.[46]

The promises of the different creditors form a sufficient consideration for the composition agreement.[47] Such an agreement being entered into, it supersedes

held to include the statute of uses. Teller v. Hill [Colo. App.] 72 P. 811.

31. Johnson v. Union Pac. Coal Co. [Utah] 76 P. 1089. See 1 Curr. L. 543, n. 16.

32. Johnson v. Union Pac. Coal Co. [Utah] 76 P. 1089.

33. Common-law rule as to percolating waters held inapplicable to state of California. Katz v. Walkinshaw, 141 Cal. 116, 74 P. 766. See 1 Curr. L. 543, n. 17.

34. State v. Forbes, 111 La. 473, 35 So. 710.

35. Pa. v. Wheeling & B. Bridge Co., 13 How. [U. S.] 518, 14 Law. Ed. 249. See, also, Jurisdiction, 2 Curr. L. 604.

NOTE. In the United States courts and territories: There is no common law of the United States as distinguished from the individual states. People v. Folsom, 5 Cal. 374; Wheaton v. Peters, 8 Pet. [U. S.] 658, 8 L. Ed. 1079; Forepaugh v. Delaware, L. & W. R. Co., 128 Pa. 217, 5 L. R. A. 608. The common law is the rule of decision in the Federal courts, even when sitting in a territory, in the absence of statutes repealing or modifying it. Pyeatt v. Powell, 10 U. S. App. 200, 61 F. 551. There are no common-law offenses against the United States. United States v. Eaton, 144 U. S. 677, 36 Law. Ed. 591.—From note to McKennon v. Winn, 22 L. R. A. 501.

36. There being no statutory rule in the state where the accident occurred, the common-law rule in relation to the law of fellow-servants will be applied. Pa. Co. v. Fishack [C. C. A.] 123 F. 465.

37. As to testimony of accomplices. Hanley v. U. S. [C. C. A.] 123 F. 849.

38. Conklin v. U. S. Shipbuilding Co., 123 F. 913.

39. See 1 Curr. L. 544.

40. Baltimore & O. S. W. R. Co. v. Hollenbeck, 161 Ind. 452, 69 N. E. 136; Rosemand v. Southern Ry., 66 S. C. 91, 44 S. E. 574; Wells v. Gress, 118 Ga. 566, 45 S. E. 418; Columbian B. & L. Ass'n v. Rice [S. C.] 47 S. E. 63; Price v. Clevenger, 99 Mo. App. 536, 74 S. W. 894; State v. Clark, 178 Mo. 20, 76 S. W. 1007. In the absence of evidence to the contrary, it is presumed that the law of a sister state is the same as the common law of the forum. Hazen v. Mathews, 184 Mass. 388, 68 N. E. 838. Law of Indian tribe presumed to be the same. Ricknor v. Clabber [Ind. T.] 76 S. W. 271.

41. Banco De Sonora v. Bankers' Mut. Casualty Co. [Iowa] 100 N. W. 532.

42. Wells v. Gress, 118 Ga. 566, 46 S. E. 418.

43. Bath Gas Light Co. v. Rowland, 84 App. Div. 663, 82 N. Y. S. 841.

44. Harper v. Middle States Loan, Bldg. & Const. Co. [W. Va.] 46 S. E. 817.

45. Donaldson v. State [Ind.] 67 N. E. 1029.

46. See Accord and Satisfaction, 1 Curr. L. 8; also for compositions in bankruptcy proceedings see Bankruptcy, 1 Curr. L. 311.

the original claim, and thereafter, until some default is made by the debtor, the creditor can sue and recover only on the composition agreement.[48] A creditor leaving the amount of his claims blank, he is bound for all the claims he has.[49] A creditor signing a composition agreement cannot reserve to himself any secret advantage, nor impose any conditions not apparent on the face of the instrument,[50] but the taking of a secret preference by a creditor does not nullify the composition, the debtor and creditor both remaining bound by its terms.[51] The preference, however, is void, a valid composition not being essential to this invalidity; if executory, it is nonenforceable, and if executed, may be rescinded by the non-preferred creditors.[52] A creditor rescinding for fraud or otherwise, the release given in pursuance of the composition must return the money received.[53] Mere failure to read such release, he being able and having an opportunity to do so, does not render it ineffectual as to him,[54] nor does the fact that another creditor makes an erroneous statement as to the legal effect of the release.[55]

CONFESSION OF JUDGMENT.

A circuit clerk is without jurisdiction to enter a judgment by confession, where no default has been taken, no declaration filed, no summons addressed or delivered to a sheriff or other proper officer to serve, and plaintiff appears to have taken no part in proceedings. A judgment so entered is void.[56] A judgment by confession depends for its validity entirely upon the statute, the provisions of which must be strictly complied with.[57] In Arkansas, confession of judgment cannot be made by attorney, but only by the one against whom the cause of action exists personally.[58] But where defendants executed a power authorizing plaintiff's attorney to waive service of summons, enter appearance and consent to judgment, and judgment is confessed by the attorney acting under the power, such judgment is in the nature of a judgment by consent and is valid in the absence

47. Where a formal release was executed, held supported by pro rata distribution and agreement by debtor to procure release of certain preferences. McNealey v. Baldridge [Mo. App.] 78 S. W. 1031.

48. Cannot complain on appeal that the jury only rendered a verdict for the amount he is entitled to under the agreement. Talcott v. Janasson, 85 N. Y. S. 833.

49. That he intended not to include a note makes no difference, even though held by a bank as collateral. Metcalf v. Morse Ironworks & Dry Dock Co., 84 N. Y. S. 582.

50. Metcalf v. Morse Ironworks & Dry Dock Co., 84 N. Y. S. 582.

51. Glens Falls Nat. Bank v. Van Nostrand, 41 Misc. 526, 85 N. Y. S. 50.

NOTE. Effect of giving one creditor a secret advantage: Giving a secret advantage to one creditor does not render the composition entirely void (Hanover Nat. Bank v. Blake, 142 N. Y. 404, 40 Am. St. Rep. 607, 27 L. R. A. 33, n.), though such a preference being given a creditor not guilty of fraud may recover on the original claim, ignoring the general composition. Cobb v. Tirrell, 137 Mass. 143; Saul v. Buck, 72 Ga. 254; Kullman v. Greenebaum, 92 Cal. 403, 27 Am. St. Rep. 150. Contracts, notes, securities and obligations given a creditor to induce him to sign the composition, giving him a secret advantage over other creditors are void, whether made before or after the composition, by the debtor or his agent. Brown v. Nealley, 161 Mass. 1; O'Shea v. Collier White Lead & Oil Co., 42 Mo. 397, 97 Am. Dec. 332; Bliss v. Matteson, 45 N. Y. 22; McFarland v. Garber, 10 Ind. 151, 71 Am. Dec. 305; In re Clement's Appeal, 52 Conn. 464. A creditor perpetrating a fraud upon other creditors in obtaining a secret preference cannot recover on the note or contract for the balance. Willis v. Morris, 63 Tex. 458, 51 Am. Rep. 655; Ex parte Oliver, 4 De G. & S. 354. And, generally, such preferred creditor may be required to return the preference to the debtor, though the latter is to a certain extent a participant in such fraud. Gilmour v. Thompson, 49 How. Pr. 198; Estabrook v. Scott, 3 Ves. Jr. 456. A creditor cannot avoid a composition that is not general because other creditors not parties thereto may have obtained an advantage. Eaton v. Lincoln, 13 Mass. 424; Argall v. Cook, 43 Conn. 160, 21 Am. Rep. 641; Cheverout v. Tentor, 53 Md. 295.—From note to Hanover Nat. Bank v. Blake [N. Y.] 27 L. R. A. 33.

52. Guaranty. Glens Falls Nat. Bank v. Van Nostrand, 41 Misc. 526, 85 N. Y. S. 50.

53, 54, 55. McNealey v. Baldridge [Mo. App.] 78 S. W. 1031.

56. Wilhelm v. Locklar [Fla.] 35 So. 6.

57. Houpt v. Bohl, 71 Ark. 330, 75 S. W. 470.

58. Under Sand. & H. Dig., § 5872, but this was not true under former law, Gould's Dig. c. 133, § 137. Houpt v. Bohl, 71 Ark. 330, 75 S. W. 470.

of fraud or ignorance of the facts by defendants.[59] A judgment entered by stipulation of the parties is a judgment by consent, of which a party to the agreement cannot complain.[60] A waiver of citation and confession of judgment made in a note, simultaneous with its execution, are without effect;[61] but waiver of citation and confession of judgment, made after maturity of the note, will warrant a judgment thereon,[62] though the circumstances under which this was done may give rise to an action of nullity for fraud.[63] Equity may restrain proceedings at law to collect a judgment entered by virtue of warrant of attorney for confessing judgment contained in a bond procured by fraud.[64]

CONFLICT OF LAWS.

§ 1. Contracts in General (720).
§ 2. Effect of Status or Domicile (722).
§ 3. Matters Relating to Personal Property (722).
§ 4. Effect of Public Policy (723).
§ 5. Protection of Citizens in State of Forum (723).
§ 6. Contracts Respecting Realty (723).
§ 7. Application of Remedies (723). Recovery for Wrongful Death (724). Statutes of Limitations (724). Presumptions and Judicial Notice Regarding Foreign Laws (725).
§ 8. Torts (725).

§ 1. *Contracts in general.*[65]—The construction, validity and enforcement of contracts are governed by the law of the state where made,[66] unless they are to be performed in another state, when they are governed by the laws of the latter.[67] This rule is not changed by the taking of foreign security,[68] and the security being a mere incident of the debt, it is governed by the same laws as the latter;[69] but it has been held that the place of payment will not determine the law where to do so would render the contract usurious, as the parties will not be presumed to have contracted with reference to a law which would render their contract illegal.[70] The parties may by stipulation make the laws of a place, other than

59. Houpt v. Bohl, 71 Ark. 330, 75 S. W. 470.

60. Corby v. Abbott, 28 Mont. 523, 73 P. 120.

61. But the note itself is not annulled. Kiernan v. Jackson, 111 La. 645, 35 So. 798.

62, 63. Kiernan v. Jackson, 111 La. 645, 35 So. 798.

64. But evidence held to show a loan actually made and transaction free from fraud. Norwood v. Richardson [Del.] 57 A. 244.

65. See 1 Curr. L. 559.

66. Building and loan association contract. National Mut. Bldg. & Loan Ass'n v. Retzman [Neb.] 96 N. W. 204; People's Bldg. Loan & Sav. Ass'n v. Parish, 1 Neb. Unoff. 505, 96 N. W. 243; Trower Bros. Co. v. Hamilton [Mo.] 77 S. W. 1081. As to rate of interest. Monier v. Clarke [N. M.] 75 P. 35. A contract made in New York by residents thereof for the sale to residents of another state of coffee to be shipped from a foreign country to New York city by a designated steamer, the buyers to have free storage and fire insurance for the first month after the arrival of the steamer, held a New York contract. Crossman v. Lurman, 192 U. S. 189, 24 S. Ct. 234. See, also, Baird v. Vines [S. D.] 99 N. W. 89. See 1 Curr. L. 559, n. 54-55.

NOTE. Which law governs: The United States supreme court in Scudder v. Union Nat. Bank, 91 U. S. 406, 23 Law. Ed. 245, lays down the following rules for determining the governing law of a contract: First, "Matters bearing upon the execution, the interpretation, and validity of a contract are determined by the law of the place where the contract is made." Second, "Matters connected with its performance are regulated by the law prevailing at the place of performance." Third, "Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought."

67. Daniels v. Boston & M. R. Co., 184 Mass. 337, 68 N. E. 337. Building and loan contract secured by mortgage on property in South Carolina, all money to be paid at the home office in Virginia, held a Virginia contract. Columbian Bldg. & Loan Ass'n v. Rice [S. C.] 47 S. E. 63. See 1 Curr. L. 561 n. 62.

68. Trower Bros. Co. v. Hamilton [Mo.] 77 S. W. 1081. A contract with a building and loan association is governed by the place of payment, though secured by a mortgage upon real estate in another state. Pacific States Sav. Loan & Bldg. Co. v. Green [C. C. A.] 123 F. 43. See 1 Curr. L. 564, n. 91-92.

69. Resident of Missouri executed in Kansas a note payable in the latter state, secured on a mortgage on property in Missouri; held both note and mortgage Kansas contracts. Trower Bros. Co. v. Hamilton [Mo.] 77 S. W. 1081.

70. Whitlock v. Cohn [Ark.] 80 S. W. 141.

that indicated by these rules, controlling,[71] though a general stipulation will not be effectual as to matters expressly provided for in a way which is contrary to the laws of the designated state.[72] Under these rules it is held that the validity of,[73] and the rate and allowance of interest,[74] and liability upon[75] a negotiable instrument, are determined by the law of the place of payment, though it has been held that there being no express legislation in such state, the decisions of its courts are not binding on the Federal courts.[76] An order for goods being taken in one state and approved and filled in another, the law of the latter state governs.[77] Statutes on the subject of usury, in the state wherein the contract was made, govern,[78] though the Federal law governs a controversy respecting usurious interest paid on a note held by a national bank, though the collateral note and mortgage were executed in favor of the bank president for the benefit of the bank.[79] The law of the place of sale, not that of original publication, governs the effect of a publication of literary property.[80] In the absence of stipulations to the contrary, insurance policies are governed by the laws of the state where the policy is delivered and the premiums paid.[81] A contract void at the place where made is illegal

71. English marine insurance policy provided that salvage should be payable per rules of port of discharge; held, law of such port governed. International Nav. Co. v. Sea Ins. Co., 124 F. 93. As to rate of interest in building contract, it being made subject to the laws of Florida. Skinner v. Southern Home Bldg. & Loan Ass'n [Fla.] 35 So. 67.

72. Mutual L. Ins. Co. v. Hill, 193 U. S. 551, 24 S. Ct. 538.

73. Agent lived in Massachusetts, principal in Wisconsin; met in New York, and in furtherance of a sale of land in Florida, executed, on Sunday, certain promissory notes payable in Massachusetts; held, law of latter state governs. Brown v. Gates [Wis.] 97 N. W. 221. A note made and payable in one country is governed by the laws of that country. Merchants' Bank of Canada v. Brown, 86 App. Div. 599, 83 N. Y. S. 1037. See 1 Curr. L. 561, n. 62.

74. No rate of interest was fixed in the note. Simpson v. Hefter, 42 Misc. 482, 87 N. Y. S. 243.

NOTE. Conflict of laws as to interest and usury: In determining what law governs as to usury, it is necessary to arrive at the intention of the parties as to the real situs of the contract, and as to what state they had reference to in fixing the rate of interest. Jackson v. American Mortg. Co., 88 Ga. 766, 15 S. E. 812. A court of one state will not administer the mere penal exactions of foreign law by forfeiture, but when by those laws the contract is void in such foreign state, it is void everywhere, and the courts of another state will not enforce it, though it might have been valid if made under the law of the forum. McAllister v. Smith, 17 Ill. 328, 65 Am. Dec. 651; Akers v. Demond, 103 Mass. 318; Houghton v. Page, 2 N. H. 42, 9 Am. Dec. 30; McGarry v. Nicklin, 110 Ala. 559, 17 So. 726; Clague v. Their Creditors, 2 La. 115, 20 Am. Dec. 300.—From note to United States Sav. & Loan Co. v. Beckley [Ala.] 62 L. R. A. 33.

75. Smith v. Myers, 207 Ill. 126, 69 N. E. 858. Note payable in Kentucky, signed by the principal debtor and delivered in Ohio, signed on the back by a party in Kentucky and by one in Pennsylvania, held governed by laws of Kentucky. Montana Coal & Coke Co. v. Cincinnati Coal & Coke Co., 69 Ohio St. 351, 69 N. E. 613.

76. On the question of negotiability. State Nat. Bank v. Cudahy Packing Co., 126 F. 543.

NOTE. Rule in the Federal courts: The Federal courts assert their right, in the absence of a local statute, to determine questions relating to negotiable paper upon what they deem to be the general principles of the law merchant, and do not consider themselves bound by the decisions of the courts of a state, the law of which, if statutory, would concededly govern. As to whether a pre-existing indebtedness constitutes a valuable consideration. Swift v. Tyson, 16 Pet. [U. S.] 1, 10 Law. Ed. 865; Oates v. First Nat. Bank, 100 U. S. 239, 25 Law. Ed. 580; Brooklyn City & U. R. Co. v. National Bank, 102 U. S. 14, 26 Law. Ed. 61. As to liability of parties on note. First Nat. Bank v. Lock-Stitch Fence Co., 24 F. 221; Phipps v. Harding [C. C. A.] 70 F. 468, 30 L. R. A. 513; Van Vleet v. Sledge, 45 F. 743.—From note to Spies v. National City Bank [N. Y.] 61 L. R. A. 193.

77. Also the order being filled in the state where taken, it is governed by the laws of that state. Succession of Welsh, 111 La. 801, 35 So. 913.

78. Trower Bros. Co. v. Hamilton [Mo.] 77 S. W. 1081. See 1 Curr. L. 560, n. 58.

79. Schuyler Nat. Bank v. Gadsden, 191 U. S. 451, 24 S. Ct. 129.

80. Wagner v. Conried, 125 F. 798.

81. Plaut v. Mutual Life Ins. Co., 4 Ohio C. C. (N. S.) 94. A policy of life insurance issued to a resident of Iowa, premiums being payable in New York, held governed by the laws of the latter state in the absence of proof of the place of actual delivery. Summit v. U. S. Life Ins. Co., 123 Iowa, 681, 99 N. W. 663. The application for a policy of insurance being made in Kentucky, the policy accepted in Kentucky and the premiums paid there held a Kentucky contract. Carrollton Furniture Mfg. Co. v. American Credit Indemnity Co. [C. C. A.] 124 F. 25. Life insurance policy held, under its terms, made in the state where delivered to insured and first payment was made. Grevenig v. Washington Life Ins. Co., 112 La. 879, 36 So. 790. Statutes on the subject of insurance

and void everywhere,[82] and its illegality being a violation of a statutory enactment of the state where made, the construction placed upon the statute by the courts of such state must control.[83] Disqualifications of a penal character have no extraterritorial effect, and comity does not require a recognition of them in other states.[84] Federal courts will recognize an equity and enforce it by way of equitable lien which the state statutes do not recognize.[85]

§ 2. *Effect of status or domicile.*[86]—The law of the domicile of a decedent governs the distribution of his personal property,[87] and the validity of a charitable gift in a will depends upon the law of the state where the testator was domiciled, and the lands devised are situated,[88] though the necessity of formalities in the execution of a will are governed by the law of the state where presented for probate.[89] A corporation is not bound by the laws of states other than its domicile, except as by its acts it has subjected itself to them and as to whether it has is a question of general, not local, law.[90] For the purposes of descent and distribution of property, the status acquired by adoption in a state or country having jurisdiction will be recognized in other states and countries.[91]

§ 3. *Matters relating to personal property.*[92]—The validity of a chattel mortgage is governed by the settled law of the state in which it is given,[93] though its

are only applicable to transactions within the state. Grevenig v. Washington Life Ins. Co., 112 La. 879, 36 So. 790; Washington Life Ins. Co. v. Glover, 25 Ky. L. R. 1327, 78 S. W. 146. See 1 Curr. L. 560, n. 69.

NOTE. Application of law of the state where insured property is located: An action being brought upon a contract of property insurance in the state where the property is situated, the court will apply a statute of the state which either expressly, or by construction, extends to all contracts of insurance upon property within the state, although the contract may have been made and the loss payable in another state (see Ross v. Kimberly & C. Co., 89 Wis. 545, 62 N. W. 526, 27 L. R. A. 556); but in the absence of such a statute, or when the action is brought in some state other than that where the property is situated, the location of the insured property does not furnish the criterion of the governing law (Clay F. & M. Ins. Co. v. Huron Salt & Lumber Co., 31 Mich. 346; Merchants' & M. Ins. Co. v. Linchey, 3 Mo. App. 588). But the state where the property is situated may, as to some provisions of the policy, be the place of performance, and as such its law governs; thus it will control in the construction of a provision with reference to the precautions to be observed by the insured. King Brick Mfg. Co. v. Phoenix Ins. Co., 164 Mass. 291, 41 N. E. 277.—From note to Johnson v. Mutual Life Ins. Co. [Mass.] 63 L. R. A. 833, 855.

82, 83. Alleghany Co. v. Allen, 69 N. J. Law, 270, 55 A. 724.

84. Statute prohibiting foreign corporation from transacting business in the state until conforming to certain requirements. Alleghany Co. v. Allen, 69 N. J. Law, 270, 55 A. 724.

85. Howard v. Delgado & Co. [C. C. A.] 121 F. 26.

86. See 1 Curr. L. 551.

87. In re Barandon's Estate [Misc.] 84 N. Y. S. 937. See 1 Curr. L. 561, n. 67.

88. Brigham v. Peter Bent Brigham Hospital, 126 F. 796.

89. Necessity of attestation by the subscribing witnesses in the presence of the testator. In re Jones' Will, 85 N. Y. S. 294.

90. Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co., 124 F. 259.

91. McColpin v. McColpin's Estate [Tex. Civ. App.] 77 S. W. 238.

NOTE. Adoption: In most cases in which foreign adoption has been recognized, the child and the adoptive parents were domiciled in the state where the decree was rendered. Renz v. Drury, 57 Kan. 84, 45 P. 71, 57 Am. St. Rep. 312. See, also, Foster v. Waterman, 124 Mass. 594, In Wolf's Appeal [Pa.] 12 Cent. Rep. 426, 13 A. 760; Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665. These last two cases hold that under the Pennsylvania statute, temporary residence of the adoptive parents is sufficient. On the question whether the recognition of such decree may be compelled by the requirement of the Federal constitution requiring each state to give full faith and credit to the judicial proceedings of every other state, the following cases will be of interest: Smith v. Derr, 34 Pa. 126, 75 Am. Dec. 641; McCreery v. Davis, 44 S. C. 195, 22 S. E. 178, 51 Am. St. Rep. 794, 28 L. R. A. 655; Keegan v. Geraghty, 101 Ill. 26; Sunderland's Estate, 60 Iowa, 732, 13 N. W. 655. These courts have none of them referred to the constitutional provision, but have regarded the question as one of comity depending upon principles of private international law. The proposition stated in the text has been expressly applied to the descent of real property by Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665; Gray v. Holmes, 57 Kan. 217, 45 P. 596, 33 L. R. A. 207; Ross v. Ross, 129 Mass. 246, 37 Am. Rep. 321; Melvin v. Martin, 18 R. I. 650, 30 A. 467. —From note to Irving v. Ford [Mass.] 65 L. R. A. 177, 186.

92. See 1 Curr. L. 562.

93. In re Antigo Screen Door Co. [C. C. A.] 123 F. 249.

record and effect thereof are governed by the law of the state where the property is situated.[94] A contract affecting personal property, being made within the state within which the property is at the time situated, is governed by the laws of such state, though the property be subsequently moved elsewhere.[95]

§ 4. *Effect of public policy.*[96]—The courts of a state will not enforce a law of a foreign state which is contrary to pure morals, or to abstract justice, or to enforce which would be contrary to the public policy of the former state.[97] Contracts free from usury because falling under the laws of another state will be enforced.[98]

§ 5. *Protection of citizens in state of forum.*[99]—While a contract is to be construed according to the lex loci contractus, a court will not, in a question of priority, set aside its own statutes and rules to the prejudice of its own citizens.[1] The statutes of a state have of themselves no extraterritorial force,[2] and whatever effect they have in foreign states is by virtue of the laws of such state, or under the doctrine of comity.[3] An owner undertaking to mortgage, according to the laws of one state, personal property situated in another state, and the mortgagee attempting to enforce the mortgage in the state of the actual situs of the property against third persons domiciled there, the law of the forum governs.[4] An action upon a foreign judgment is regulated by the law of the state where the action is brought.[5]

§ 6. *Contracts respecting realty.*[6]—The law of the sovereignty in which real property is situated governs as to transfers of such property, whether conveyed absolutely or by way of mortgage.[7] A covenant being personal, its validity is determined by the law of the state where made.[8]

94. In re Brannock, 131 F. 819.

95. A contract to furnish materials for the construction of a dock, reserving a lien thereon to the seller, being made in Indiana, in which state the dock was at the time a mere chattel, the right of the seller to enforce such lien on the dock which had been placed in the Ohio river and within the jurisdiction of the Kentucky courts must be determined by the laws of Indiana. Arnold v. Eastin's Trustees, 25 Ky. L. R. 895, 76 S. W. 865.

See monograph—The Locus of Sales C. O. D.—IV Columbia Law Rev. 641.

96. See 1 Curr. L. 562, § 4; Id. 663, § 6.

97. The law of Canada that contributory negligence does not constitute a bar to an action for damages for injuries, though contrary to the law of Vermont, will be enforced in the latter state. Morisette v. Canadian P. R. Co. [Vt.] 56 A. 1102.

NOTE. What laws will be so enforced: Some states decline to administer foreign laws unless closely analogous to their own. Mexican Nat. R. Co. v. Jackson, 89 Tex. 107, 33 S. W. 857, 59 Am. St. Rep. 28, 31 L. R. A. 276; Anderson v. M. & St. P. R. Co., 37 Wis. 321; Richardson v. N. Y. C. R. Co., 98 Mass. 85. But the majority of the courts will not, in otherwise proper cases, refuse to adopt and apply the law of a foreign state, however unlike the law of its own, unless it be contrary to pure morals, or abstract justice, or unless the enforcement would be of evil example, and harmful to its own people, and therefore inconsistent with the dignity of the government whose authority is invoked. Herrick v. Minneapolis, etc., R. Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771; Higgins v. R. Co., 165 Mass. 180, 29 N. E. 534, 31 Am. St. Rep. 544; Dennick v. R. Co., 103 U. S. 11, 26 Law. Ed. 439; McLeod v. R. Co., 58 Vt. 727, 6 A. 648; Chicago, etc., R. Co. v. Rouse, 178 Ill. 132, 52 N. E. 951, 44 L. R. A. 410. See Morisette v. Canadian P. R. Co. [Vt.] 56 A. 1102.

98. Columbian Building & Loan Ass'n v. Rice [S. C.] 47 S. E. 63.

99. See 1 Curr. L. 563.

1. A chattel mortgage executed and recorded in Illinois on property afterwards transferred to Tennessee will not be given priority in the courts of the latter state over the liens of local attaching creditors. Snyder v. Yates [Tenn.] 79 S. W. 796.

2. Recording laws. Snyder v. Yates [Tenn.] 79 S. W. 796. Insurance laws. Provident Sav. Life Assur. Soc. v. Bailey, 26 Ky. L. R. 2251, 80 S. W. 452. Exemption laws. Baltimore, etc., R. Co. v. Hollenbeck, 161 Ind. 452, 69 N. E. 136. See 1 Curr. L. 663, n. 86.

3. Snyder v. Yates [Tenn.] 79 S. W. 796.

4. This rule only applies when the actual situs of the property and the forum are the same. Smead v. Chandler, 71 Ark. 605, 76 S. W. 1066.

5. Chicago Title & Trust Co. v. Smith [Mass.] 70 N. E. 426.

6. See 1 Curr. L. 564.

7. Bowdle v. Jencks [S. D.] 99 N. W. 98. See 1 Curr. L. 564, n. 90.

8. Though the contract involve the purchase of land in another state. Robinson v. Suburban Brick Co. [C. C. A.] 127 F. 804.

§ 7. *Application of remedies.*[9]—The lex fori governs in all matters relating to the remedy,[10] except where created by statute with and as a part of the right,[11] and the course of procedure.[12] It determines whether an action for the damages for injury to land is local or transitory,[13] the question of the party to be sued,[14] though through comity the courts may follow the method of procedure sanctioned by the domicile of the defendant.[15] The rules of pleading and evidence, including presumptions and the burden of proof, are governed by the lex fori,[16] as is the sufficiency of a notice to take depositions as to time of service and not by the law of the state where the depositions are to be taken.[17] The items of damage that may be recovered are governed by the lex fori.[18] The presentation of claims against estates of decedents is governed by the law of state where the estate is being probated.[19] Congress having legislated generally upon the subjects of pleading, the rules of the state practice are superseded in so far as they affect the Federal courts,[20] and state statutes governing the reception and consideration of evidence do not control in proceedings in the Federal courts.[21]

Recovery for wrongful death.[22]—A right of action for wrongful death is governed by the law of the place where the cause of action arose,[23] and the proceeds of such suit will be distributed according to the law of such place,[24] the law of the forum applying only as showing that the foreign statute is not against the policy of the law of such state,[25] though the amount recoverable is governed by the statutes of the state where the action is brought.[26] Such foreign law must, however, be proved.[27]

Statutes of limitation.[28]—In some states, the statute of limitations of the state where the cause of action arose governs,[29] though generally the law of the forum governs,[30] except where the right is created by a statute which allows only

9. See 1 Curr. L. 564.

10. Waters v. Spencer, 89 N. Y. S. 693; Brand v. Brand, 25 Ky. L. R. 987, 76 S. W. 868.

11. Dorr Cattle Co. v. Des Moines Nat. Bank [Iowa] 98 N. W. 918.

12. As to plaintiff's right to bring the action in his own name. Waters v. Spencer, 89 N. Y. S. 693.

13. Peyton v. Desmond [C. C. A.] 129 F. 1.

14. Unincorporated association. Saunders v. Adams Exp. Co. [N. J. Law] 57 A. 899.

15. Saunders v. Adams Exp. Co. [N. J. Law] 57 A. 899.

16. Death by wrongful act. Baltimore & O. R. Co. v. Ryan, 31 Ind. App. 597, 68 N. E. 923. The evidence by which a contract is sought to be proved is governed by the lex fori. Marvel v. Marvel [Neb.] 97 N. W. 640.

17. In re Wogan [Mo. App.] 77 S. W. 490.

18. Dorr Cattle Co. v. Des Moines Nat. Bank [Iowa] 98 N. W. 918. See 1 Curr. L. 565, n. 99.

19. Action cannot be maintained in the Federal court to enforce a claim against such estate after the time allowed by the statute of such state has expired. Schurmeier v. Connecticut Mut. Life Ins. Co. [C. C. A.] 124 F. 866.

20. Lange v. Union Pac. R. Co. [C. C. A.] 126 F. 338.

21. Testimony of accomplices. Hanley v. U. S. [C. C. A.] 123 F. 849.

22. See 1 Curr. L. 565.

23. Leman v. Baltimore & O. R. Co., 128 F. 191. Under Wyoming statutes, the action must be brought within that state. Sanbo v. Union Pac. Coal Co., 130 F. 52.

24. Leman v. Baltimore & O. R. Co., 128 F. 191; Sanbo v. Union Pac. Coal Co., 130 F. 52.

25. Leman v. Baltimore & O. R. Co., 128 F. 191.

26. A statute of another state, providing for recovery of damages for wrongful death of a citizen of such state in such state, will be enforced in Ohio, but the amount recoverable will be governed by Ohio statute. Schell v. Youngstown Iron & Sheet Co., 4 Ohio C. C. (N. S.) 172. See 1 Curr. L. 566, n. 99.

27. **NOTE. Proof of law of state where cause of action arose:** In an action to recover damages for the wrongful death of a person in another state, it is generally held to be necessary to prove that such a right of action is given by the law of the state where the occurrence took place. Selma, etc., R. Co. v. Lacy, 43 Ga. 461; Hamilton v. Hannibal, etc., R. Co., 39 Kan. 56; Hyde v. Wabash, etc., R. Co., 61 Iowa, 441, 47 Am. Rep. 820; State v. Pittsburgh, etc., R. Co., 45 Md. 41; Debevaise v. New York, etc., R. Co., 98 N. Y. 377, 50 Am. Rep. 683; Nashville, etc., R. Co. v. Eakin, 6 Cold. [Tenn.] 582; Needham v. Grand Trunk R. Co., 38 Vt. 294.—From note to Attrill v. Huntington [Md.] 14 Am. St. Rep. 344, 354. See post, Presumptions and judicial notice regarding foreign laws.

28. See 1 Curr. L. 565.

29. Action against indorser on a note [Code Civ. Proc. § 390a]. Holmes v. Hengen, 85 N. Y. S. 35.

30. Damages for an alleged illegal execution on the property of plaintiff. Montague v. Cummings, 119 Ga. 139, 45 S. E. 979; Ross

a specified time for its enforcement.[31] A judgment rendered on the plea of the statute of limitations in one jurisdiction does not bar an action in another jurisdiction having a different statute of limitations.[32]

Presumptions and judicial notice regarding foreign laws.[33]—It is only in the absence of something to the contrary[34] that the law of the sister state is presumed to be the same as the lex fori.[35] In the absence of proof, it is presumed that the common-law rule exists in a sister state.[36] The presumption, in the absence of proof to the contrary, that the law of a foreign state is like the lex fori, does not extend to positive statutory law.[37] Courts will not take judicial notice of the statutory provisions of a foreign state;[38] to be available, they must be alleged[39] and proven.[40] Such laws not being pleaded nor proven, the law of the forum prevails.[41] The law of the foreign state being alleged as a fact, it need only be proved substantially as alleged.[42]

§ 8. *Torts.*[43]—The right to sue for a tort,[44] the liability of the perpetrator,[45] and the defenses that he may plead, are, with few exceptions, governed by the law of the place where the cause of action arose,[46] and the right of action may be pursued in any court having competent jurisdiction over the subject-matter and the parties.[47] United States admiralty courts having jurisdiction of cases of tort arising between an American and a foreigner, on a foreign vessel on the high seas, the general maritime law of this country governs.[48] Whether municipal corporations are responsible for negligence in any stated case is a matter of local law, which the Federal court must follow.[49] The right of action being statutory, the statutes of the sister state must be pleaded and proved.[50]

v. Kansas City R. Co. [Tex. Civ. App.] 79 S. W. 626; Taylor v. Union Pac. R. Co., 123 F. 155. See 1 Curr. L. 565, n. 1.

31. Nor is this rule changed by the fact that the railroad invoking its aid is incorporated in another state from that in which the statute exists, it being liable to suit in the latter state. Ross v. Kansas City R. Co. [Tex. Civ. App.] 79 S. W. 626.

32. Brand v. Brand, 25 Ky. L. R. 987, 76 S. W. 868.

33. See 1 Curr. L. 566.

34. In requisition proceedings, an indictment being founded upon the law of the sister state, the law of such state will not be presumed to be the same as that of the forum, where under the laws of the latter, the indictment is insufficient. In re Renshaw [S. D.] 99 N. W. 83.

35. McMillan v. American Exp. Co., 123 Iowa, 236, 98 N. W. 629; Baird v. Vines [S. D.] 99 N. W. 89. In the absence of proof of the law of a sister state, the court will apply the law of its own state in interpreting a decree of a court of the sister state. Fred v. Fred [N. J. Eq.] 58 A. 611. As the common law of the forum. Hazen v. Mathews, 184 Mass. 388, 68 N. E. 838. See 1 Curr. L. 566, n. 10-11.

36. Baltimore, etc., R. Co. v. Hollenbeck, 161 Ind. 452, 69 N. E. 136. Hence no legal limitation on the rate of interest in such state. Columbian Building & Loan Ass'n v. Rice [S. C.] 47 S. E. 63. See 1 Curr. L. 566, n. 12.

37. Waters v. Spencer, 89 N. Y. S. 693.

38. Insurance laws. New York Life Ins. Co. v. Smith, 139 Ala. 303, 35 So. 1004. Will not take judicial notice of the laws of an Indian tribe. Rowe v. Henderson [Ind. T.] 76 S. W. 250. See 1 Curr. L. 566, n. 15, 16.

39. Columbian Building & Loan Ass'n v. Rice [S. C.] 47 S. E. 63.

40. New York Life Ins. Co. v. Smith, 139 Ala. 303, 35 So. 1004.

41. Indian tribal law. Rowe v. Henderson [Ind. T.] 76 S. W. 250; Ricknor v. Clabber [Ind. T.] 76 S. W. 271.

42. Morisette v. Canadian P. R. Co. [Vt.] 58 A. 1102.

43. See 1 Curr. L. 566.

44. Dorr Cattle Co. v. Des Moines Nat. Bank [Iowa] 98 N. W. 918.

45. Dorr Cattle Co. v. Des Moines Nat. Bank [Iowa] 98 N. W. 918. Liability of master for injury to servant so held, though contract of employment was entered into in another state. Pennsylvania Co. v. Fishack [C. C. A.] 123 F. 465. Fraudulent representations. Stratton's Independence v. Dines, 126 F. 968. Where injury to servant of railway happened in Iowa, but suit was brought in Missouri, Iowa decisions formed the precedents of the case. Mitchell v. Wabash R. Co., 97 Mo. App. 411, 76 S. W. 647. Death being caused by the alleged negligence of a railroad in Illinois in an action in Indiana for damages, held plaintiff entitled to benefit of Illinois statute relative to the use of whistles and bells on locomotive engines. Baltimore & O. R. Co. v. Ryan, 31 Ind. App. 597, 68 N. E. 923.

46. Dorr Cattle Co. v. Des Moines Nat. Bank [Iowa] 98 N. W. 918.

47. International Nav. Co. v. Lindstrom [C. C. A.] 123 F. 475.

48. Elder Dempster Shipping Co. v. Poupipirt [C. C. A.] 125 F. 732.

49. City of Denver v. Porter [C. C. A.] 126 F. 288.

50. Baltimore & O. R. Co. v. Ryan, 31 Ind. App. 597, 68 N. E. 923.

CONSPIRACY.

§ 1. **Civil Liability (726).** Particular Conspiracies (726). Actions (727).
§ 2. **Criminal Liability (727).** Indictable Conspiracies (728). Defenses (728). Who Liable (729). Indictments (729). Evidence (729). Trial (730).

§ 1. *Civil liability.*[51]—Conspiracy cannot be made the subject of a civil action unless something in pursuance of the conspiracy has been done, occasioning an injury[52] not too remote or uncertain for estimation.[53] Actual damage, however, need not be shown where the injury clearly appears.[54] Pursuit of a lawful thing,[55] though influenced by vindictiveness, is not actionable.[56]

Particular conspiracies.[57]—Workmen may lawfully combine to withdraw in a body from their employment, for the purpose of obtaining an advance in wages, a reduction of the hours of labor, or any other legitimate advantage, even though they may know that such action will necessarily cause injury to the business of their employers; but the abandonment of service must not be in violation of any continuing contract, must be conducted in a lawful manner, without any attempt at coercion by means of threats or intimidation, and under such circumstances as not to wantonly or maliciously inflict injury to person or property.[58] Employers also have the right to combine to refuse employment to any kind or class of workmen precisely as employes have the right to combine to refuse to be employed,[59] and since in the absence of a contract for employment for a definite period, the employer may discharge his employes at any time, there can be no such thing as an unlawful conspir-

51. See 1 Curr. L. 566.

52. The mere allegation that the defendants conspired and confederated together is of no consequence unless it also appears that they so did to do an unlawful act or a lawful act in an unlawful manner. Bitzer v. Washburn, 121 Iowa, 462, 96 N. W. 978. A mere conspiracy to cheat and defraud amounts to nothing; the fraud and injury must be connected. New York, etc., R. Co. v. Reeves, 86 N. Y. S. 28.

53. Bitzer v. Washburn, 121 Iowa, 462, 96 N. W. 978.

54. In an action for conspiracy to ruin plaintiff's business by slanderous reports, an instruction that neither conspiracy nor acts done in pursuance thereof constitute a basis of recovery unless actual damage results and is affirmatively shown, is erroneous. Brown v. American Freehold Land Mortg. Co. [Tex. Civ. App.] 81 S. W. 824.

55. Conspiracy to defeat the collection of a judgment. Bitzer v. Washburn, 121 Iowa, 462, 96 N. W. 978. Exclusion of member from seat in a church convention. Cranfill v. Hayden [Tex. Civ. App.] 76 S. W. 573. Where either the assignor or assignee of mining leases might have prosecuted an alleged trespass, the fact that the assignment required that the assignor should prosecute for the benefit of the assignee, who agreed to pay the expenses of the litigation, did not render it void as a conspiracy to maintain any suit. Finlen v. Heinze, 28 Mont. 548, 73 P. 123.

56. Action by a priest of the Protestant Episcopal Church against the bishop of his diocese and members of his congregation for conspiracy resulting in his deposition from office. Irvine v. Elliott, 206 Pa. 152, 55 A. 859.

57. See 1 Curr. L. 566.

58. State v. Stockford [Conn.] 58 A. 769; People v. McFarlin, 89 N. Y. S. 527. Accordingly if members of a trades union combine to prevent members of a rival union from obtaining work by threats of a strike, they combine to accomplish an unlawful purpose. Erdman v. Mitchell, 207 Pa. 79, 56 A. 327. And a preliminary injunction against a trades union will not be vacated where the strike had been ordered against the employer not on any question of wages, but merely because he had refused to agree to employ only union men. Davis Mach. Co. v. Robinson, 84 N. Y. S. 837. The language or conduct which will constitute the unlawful use of threats or means to intimidate need not be such as to induce a fear of personal injury. Any words or acts which are calculated and intended to cause an ordinary person to fear an injury to his person, business or property are equivalent to threats. State v. Stockford [Conn.] 58 A. 769. Acts amounting to a boycott constitute a conspiracy, and may be restrained by injunction. Gray v. Building Trades Council [Minn.] 97 N. W. 663. A boycott is a combination of several persons to cause a loss to a third person by causing others against their will to withdraw from him their beneficial business intercourse through threats that unless a compliance with their demands is made, the persons forming the combination will cause loss or injury to him; or an organization formed to exclude a person from business relations with others by persuasion, intimidation, and other acts which tend to violence, and thereby cause him through fear of resulting injury to submit to dictation in the management of his affairs. Id. See 1 Curr. L. 566, n. 22; also, 1 Curr. L. 567, annotation.

59. Atkins v. Fletcher Co. [N. J. Eq.] 55 A. 1074. It is not a conspiracy to report to other employers, members of an association, the names of employes who have left employment without an agreed notice. There was an agreement not to employ such. Willis v. Muscogee Mfg. Co. [Ga.] 48 S. E. 177.

acy to destroy a labor union by discharging its members or refusing to employ them.[60] A street railway company may be liable for transporting colored passengers without warning to a place where they are assaulted pursuant to a conspiracy which its employes knew to exist.[61] A conspiracy to ruin plaintiff's business by circulating slanderous reports is actionable.[62]

Actions.[63]—Each conspirator is responsible for the acts and representations of all the others within the scope of the conspiracy.[64] An action cannot be maintained by a stockholder for conspiracy to injure and ruin the corporation.[65]

The averment of conspiracy adds nothing in legal effect to the other averments of a pleading.[66] A bill of particulars may be required.[67]

In a civil action, an allegation of conspiracy is supported by proof of a mere illegal agreement to act.[68] Direct proof is not required; like any other fact it may be proved by any facts or circumstances which satisfy the mind of its existence,[69] and when there is any evidence to warrant a finding, the question is for the jury.[70] After the introduction of competent evidence tending to prove a conspiracy, evidence of conversations between plaintiff and either of defendants, relating to the transaction, is competent and binding on the others, though they were not present.[71] In an action against a railway company for transporting colored passengers without warning to a place where they were assaulted pursuant to a conspiracy which its employes knew to exist, evidence of prior assaults committed on colored persons at the same place, and articles published in daily papers describing the occurrences, are admissible.[72]

A judgment against several parties for a liability arising out of a fraudulent conspiracy should be against them jointly and severally.[73]

§ 2. *Criminal liability.*[74]—A combination of persons for the accomplishment

60. Boyer v. Western Union Tel. Co., 124 F. 246.

61. Indianapolis St. R. Co. v. Dawson, 31 Ind. App. 605, 68 N. E. 909.

62. Brown v. American Freehold Land Mortg. Co. [Tex.] 80 S. W. 985.

63. See 1 Curr. L. 567.

64. Conspiracy to injure business. Brown v. American Freehold Land Mortg. Co. [Tex.] 80 S. W. 985. Conspiracy to cheat by false representations inducing exchange of land. Miller v. John, 208 Ill. 173, 70 N. E. 27. Where a conspiracy to publish a libel is shown, all conspirators are responsible for all of the publications, though no one of them was concerned in all. Cranfill v. Hayden [Tex. Civ. App.] 75 S. W. 573.

65. The remedy for such a wrong is through a suit by the corporation or through a bill in equity if the corporate officers refuse to act. Converse v. United Shoe Machinery Co. [Mass.] 70 N. E. 444.

66. Converse v. United Shoe Machinery Co. [Mass.] 70 N. E. 444. Allegations in a bill to restrain the sale of round-trip tickets by ticket brokers, of a malicious conspiracy to defraud plaintiff, are insufficient to justify equitable relief where it is not stated in what the conspiracy consists. New York, etc., R. Co. v. Reeves, 85 N. Y. S. 28.

67. Where it is alleged that the defendant company by and through its officers, agents and servants did conspire to defraud plaintiff, the defendant is entitled to a bill of particulars setting out the names of such agents. Riker v. Erlanger, 87 App. Div. 137, 84 N. Y. S. 69.

68. Saxton v. Sebring, 89 N. Y. S. 372.

69. Saxton v. Sebring, 89 N. Y. S. 372; Owens v. State [Ga.] 48 S. E. 21. Action by trustee to set aside alleged fraudulent conveyance of bankrupt's property. Saxton v. Sebring, 89 N. Y. S. 372.

70. McNaughton v. Smith [Mich.] 99 N. W. 382. Evidence held to show fraudulent conspiracy to suppress a will and deprive devisees of benefit thereof. Anderson's Adm'r v. Smith [Va.] 48 S. E. 29.

71. Miller v. John, 208 Ill. 173, 70 N. E. 27.

72. Indianapolis St. R. Co. v. Dawson, 31 Ind. App. 605, 68 N. E. 909.

73. Anderson's Adm'r v. Smith [Va.] 48 S. E. 29.

74. See 1 Curr. L. 567.

Note. The general holding is that, as defrauding a person of his property is not necessarily a crime, an indictment charging a conspiracy to defraud must aver unlawful means by which this object was to be accomplished. State v. Williams, 48 Me. 218; Com. v. Shedd, 7 Cush. [Mass.] 514; Oderman v. People, 4 Mich. 414; March v. People, 7 Barb. [N. Y.] 391. The contrary rule prevails in Pennsylvania. Com. v. McKisson, 8 Serg. & R. [Pa.] 420, 11 Am. Dec. 630. A combination to secrete or dispose of the property of a debtor for the purpose of defrauding his creditors is indictable (Hull v. Eaton, 25 Vt. 458; Heine v. Com., 91 Pa. 145; Ellzey v. State, 57 Miss. 827), as is a combination by which goods are to be purchased on credit from a third person, and concealed to avoid payment of the price (Com. v. Ward, 1 Mass. 473). A general charge of conspiracy to cheat a municipal corporation imports an indictable defense on account of character of

of a particular object may be criminal, either because the object itself is criminal in its character,[75] or because the means by which a lawful object is to be effected are criminal.[76] It is not necessary to show that the conspirators actually come together, or that they are acquainted with each other.[77]

Indictable conspiracies.[78]—A conspiracy between two or more persons to prevent negro citizens from exercising the right to lease and cultivate land is indictable;[79] likewise a conspiracy to commit adultery.[80] In Pennsylvania, a combination to enforce the payment of a debt from the wages of labor is indictable.[81] Cases involving the Federal statute are discussed below.[82]

Defenses.[83]—It is immaterial whether the object of the conspiracy is effectuated; the gist of the offense lies in the unlawful agreement.[84]

corporation. State v. Young, 37 N. J. Law, 184. See cases collected in note [Mich.] 51 Am. Dec. 82. See, also, 1 Curr. L. 568, annotation.

75. A combination which contemplates the use of force, threats, or intimidation to induce workmen to abandon together the service of their employers is criminal. State v. Stockford [Conn.] 58 A. 769. The object being unlawful, the offense is complete the moment the conspiracy is made. Com. v. Stambaugh, 22 Pa. Super. Ct. 386.

76. Attempt to pass state medical examination by procuring beforehand copies of the proposed questions. State v. Stewart, 32 Wash. 103, 72 P. 1026. So when members of an organization, no matter how commendable the purpose for its existence may be, endeavor to compel a man to join by threatening him that unless he does so they will not only refuse to labor with him, but that in order to prevent him from obtaining work at his trade, they will utilize the entire power and enginery of the association to turn custom from and promote hostility toward any one who does employ him, then the members of such association, who are cooperating by such means to bring about such a result, are guilty of the crime of conspiracy. People v. McFarlin, 89 N. Y. S. 527.

77. Use of a go-between. State v. Stewart, 32 Wash. 103, 72 P. 1026.

NOTE. General elements of conspiracy: It is not necessary that the parties should have been previously acquainted with each other (People v. Mather, 4 Wend. [N. Y.] 229, 21 Am. Dec. 122), or that they should have agreed upon the particular manner in which the conspiracy was to be carried out (United States v. Rindskopf, 6 Biss. 259), or that the object of the conspiracy should have been in itself criminal (State v. Rowley, 12 Conn. 101; Smith v. People, 25 Ill. 17, 76 Am. Dec. 780). Cases collected in note [Mich.] 51 Am. Dec. 82.

78. See 1 Curr. L. 567, n. 27-32.

79. U. S. v. Morris, 125 F. 322.

80. State v. Clemenson, 123 Iowa, 524, 99 N. W. 139.

81. Com. v. Stambaugh, 22 Pa. Super. Ct. 386.

82. The Federal statute Rev. St. § 5440 provides that if two or more person conspire, either "to commit an offense against the United States, or to defraud the United States in any manner or for any purpose," and some overt act be done, all the parties to the conspiracy shall be liable, etc. This statute applies with equal force to rights of the United States, created subsequent to its passage, as well as those previously existing. Curley v. U. S. [C. C. A.] 130 F. 1. The term "defraud" as used in this statute should not be construed as limited only to frauds respecting property right, but to include the deprivation of a right by deception or artifice. Id. False impersonation of another at civil service examination. U. S. v. Curley, 122 F. 738. But an agreement between a member of congress and another, the one to receive a bribe for aiding to procure an office and the other to pay the same, constitutes a substantive offense, and cannot be made the basis of an indictment for conspiracy under this statute. U. S. v. Dietrich, 126 F. 664. An indictment charging that defendant, a contractor, conspired with certain postal officials, one of whom was charged with the duty of procuring supplies through contracts let after advertisements or in open market at reasonable prices, to defraud the United States, by having let to him a contract without competition, at exorbitant prices, for articles for which there was no immediate necessity, in pursuance of which the articles were purchased from defendant thereafter, and the voucher approved, states an indictable conspiracy within Federal statutes. In re Runkle, 125 F. 996. The object of the conspiracy must be to commit some offense against the United States in the sense only that it must be to do some act made an offense by the laws of the United States. Scott v. U. S. [C. C. A.] 130 F. 429. A conspiracy to deceive an agent appointed to examine the affairs of national banks by causing false entries to be made in books of bank. Id. Straw bail. Radford v. U. S. [C. C. A.] 129 F. 49. Defrauding customs. U. S. v. Rosenthal, 126 F. 766.

83. See 1 Curr. L. 567.

84. State v. Stewart, 32 Wash. 103, 72 P. 1026; Moore v. People, 31 Colo. 336, 73 P. 30. In a prosecution for conspiracy to defraud the United States by the execution of straw bail, it was not necessary that the government should prove that the accused did not appear on the day required, since the government was defrauded when the accused were released on the strength of a recognizance apparently good but worthless in fact (Radford v. U. S. [C. C. A.] 129 F. 49), and it is no defense to an indictment for conspiracy to defraud the customs revenue of the United States that if the practice prescribed by the statute had been followed, the object of the alleged conspiracy could not have been accomplished (U. S. v. Rosenthal, 126 F. 766).

Who liable.[85]—Mere membership in a firm, it not appearing that such connection was used or such relation assumed for the purpose of subserving the conspiracy, is not enough to render the partner liable.[86] While the common-law offense of conspiracy has not been incorporated in the Penal Code of Georgia, conspiring with another to commit an offense may be an element in the guilt of one charged as accessory before the fact.[87]

Indictments[88] passed on are collected in the note.[89] An information for conspiracy to defraud by means of forged checks need not give a particular or minute description of the checks.[90] An indictment of a man for conspiracy to commit adultery need not allege that he knew that the woman was married.[91] The objection to the form of an indictment that it charges not only conspiracy but false pretenses as well, in violation of the Code,[92] can only be taken by demurrer.

Evidence.[93]—Conspiracy may be proved by facts and circumstances, and the weight and sufficiency of the evidence is for the jury.[94] The acts and declarations of a conspirator, in furtherance of the common purpose, are evidence against himself, and are also evidence against his associates when they are made during the performance of the fraudulent transactions which constitute the crime charged.[95] Proof of acts of unchastity on the part of one of the defendants is not admissible in a prosecution for conspiracy to defraud legatees under a will.[96] Where, in a prosecution for conspiracy, the court held that certain evidence introduced was admissible

85. See 1 Curr. L. 568.

86. Conspiracy to defraud the customs revenue. U. S. v. Cohn, 128 F. 615.

87. Bishop v. State, 118 Ga. 799, 45 S. E. 614.

88. See 1 Curr. L. 568.

89. Sufficient indictments: An indictment charging that "defendants did willfully conspire to cheat and defraud" sufficiently defines the offense, within a code provision requiring an indictment to name the crime with which a defendant is accused, or if it have none, then to give a brief description of it. People v. Rathbun, 89 N. Y. S. 746. Under a code provision that no agreement except to commit felony amounts to a conspiracy unless some act in addition to the agreement be done to effectuate the object thereof, an indictment which alleges a conspiracy to obtain money from the public by false pretenses and alleges overt acts in furtherance of the conspiracy and also the obtaining a sum of money by such false pretenses, is sufficient. People v. Welchers, 87 N. Y. S. 897. So an information, charging a conspiracy to obtain from a member of a state medical examining board, a set of questions to be used at the examination held by such board, is good. State v. Stewart, 32 Wash. 103, 72 P. 1026. An indictment for conspiracy to deprive the government of land which alleges that the lands sought to be acquired were "public lands" and that defendants had conspired to defraud the United States of such land is not demurrable for failure to allege other facts showing that the land is in fact public land. U. S. v. McKinley, 126 F. 242. And an indictment which charges a conspiracy to defraud by "dealing and pretending to deal" in green goods so called, is not bad for repugnancy. Lehman v. U. S. [C. C. A.] 127 F. 41.

Defective indictments: An indictment that defendants conspired to injure certain persons "in the free exercise and enjoyment of a right and privilege secured to them," without specifying in what the right consisted, is defective. McKenna v. U. S. [C. C. A.] 127 F. 88. So an indictment for conspiracy to defraud the United States of sums to become due to it as customs duties must allege, to some extent at least, the means intended to be used. U. S. v. Grunberg, 131 F. 137. It being a statutory offense to knowingly and willfully retard or obstruct the passage of the mails, an indictment charging conspiracy, but omitting to allege that it was done "knowingly and willfully" is defective. Conrad v. U. S. [C. C. A.] 127 F. 798.

90. Moore v. People, 31 Colo. 336, 73 P. 30; People v. Rathbun, 89 N. Y. S. 746. It is, however, the better practice, when it can be done, to set out the means intended to be employed, with sufficient certainty to identify the offense charged. Moore v. People, 31 Colo. 336, 73 P. 30. An indictment which does so does not thereby charge more than one crime. People v. Rathbun, 89 N. Y. S. 746. See, also, People v. Welchers, 87 N. Y. S. 897.

91. Such knowledge is necessarily included in the allegation of a conspiracy to perpetrate that particular crime. State v. Clemenson, 123 Iowa, 524, 99 N. W. 139.

92. Code Crim. Proc. § 323, subd. 3. People v. Welchers, 87 N. Y. S. 897.

93. See 1 Curr. L. 568.

94. Conspiracy to rob. People v. Lawrence, 143 Cal. 148, 76 P. 893. Conspiracy to murder. People v. Moran [Cal.] 77 P. 777. In a prosecution for unlawfully confederating for the purpose of intimidating, alarming, disturbing, and injuring another, evidence held to justify a submission of defendant's guilt to the jury. Gambrel v. Com. [Ky.] 80 S. W. 808.

95. Com. v. Stambaugh, 22 Pa. Super. Ct. 386.

96. State v. Hendrick [N. J. Law] 56 A. 247.

as against one of the conspirators only and called the government attorney's attention explicitly to the fact that it was inadmissible against the others, the admission of such evidence was not subject to exception on the part of the other defendants.[97]

Trial may proceed against the only defendant under arrest, though others are indicted.[98]

CONSTITUTIONAL LAW.

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§ 24. Schools and Education; School Funds (792).
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§ 1. *Adoption and amendment of constitutions.*[1]—The making of a constitution is but legislation; legislation, however, of the most solemn character.[2] Manifestly, a court cannot inquire into the legality of a constitution to which it owes its own life and existence;[3] the regularity of the adoption of amendments may be questioned, however, and whether an amendment has been regularly proposed, adopted and ratified is a question for the courts and not for the political department of the government.[4]

97. Radford v. U. S. [C. C. A.] 129 F. 49.
98. Com. v. Stambaugh, 22 Pa. Super. Ct. 386.
1. See 1 Curr. L. 569.
2. Shirley v. Lankford, 174 Mo. 535, 74 S. W. 835.
3. Kadderly v. Portland [Or.] 74 P. 710. The Virginia constitution of 1902, though ordained and promulgated by a constitutional convention without submission to the people, having been acquiesced in by all three branches of the government and by the voters registering and voting under it, and being in fact the organic law of the state, must be so regarded irrespective of whether it was legally adopted. Taylor v.

In submitting an amendment, the legislature acts not in its legislative capacity, but as a constitutional convention, and is not bound by constitutional provisions regarding the enactment of statutes.[5] It is generally provided, however, that bills and joint resolutions submitting amendments be passed with certain formalities,[6] and enrolled and entered in full on the journal of each house.[7] Such provisions are not mandatory,[8] for the popular adoption may cure irregularities of this kind,[9] and an irregularity going merely to the mode of declaring the vote should not defeat the public will.[10] In Oregon, a proposed amendment must be agreed to by two successive legislatures before submission to the people, and while one is pending, no other can be acted upon;[11] but if the second legislature fails to act, the proposal lapses and another may be proposed, notwithstanding the prohibition.[12] If not restrained by the constitution, statutes directing the manner in which amendments shall be submitted to vote,[13] and providing for a canvass thereof, are valid.[14] Amendments may not be submitted, the subject of which is not embraced in the article sought to be amended, but new articles may be added to the constitution embodying subjects not mentioned in the original.[15] A provision that if more than one amendment is submitted, opportunity shall be given to vote on each separately, does not require that each section of a single amendment shall be so submitted,[16] and a provision against submitting amendments to more than six articles of the constitution at one time has reference only to direct amendments, and not to amendments by construction or implication.[17] Publication must be according to the rule prescribed.[18] A title, while not necessary, is proper to identify the amendment;[19] but the fact that the title of a proposed amendment, as published prior to election, was misleading, is no objection to the validity of the amendment in the absence of a showing that any voter was deceived.[20] The full text of the proposed amendment need not be printed on the ballot, the substance thereof being sufficient.[21] Only a majority of the electors voting thereon is necessary for adoption.[22]

The initiative and referendum amendment to the constitution of Oregon does not conflict with the Federal guaranty of a republican form of government[23] and

Com., 101 Va. 829, 44 S. E. 754. Cf. Weston v. Ryan [Neb.] 97 N. W. 347.

4. Kadderly v. Portland [Or.] 74 P. 710.

5. Local and special laws, subjects and titles of acts and the like. Weston v. Ryan [Neb.] 97 N. W. 347.

6. A constitutional provision that amendments shall be "read" three times in the legislature is understood not in its usual popular signification, but according to its received meaning and interpretation among legislative bodies. Saunders v. Board of Liquidation of City Debt, 110 La. 313, 34 So. 457.

7. Piecemeal entry is sufficient [Const. art. 20, § 1]. People v. Loomis [Mich.] 98 N. W. 262.

8. People v. Sours, 31 Colo. 369, 74 P. 167.

9. The will of the people legitimately expressed should not be thwarted by the design or carelessness of an employe of the legislature. People v. Sours, 31 Colo. 369, 74 P. 167.

10. A constitutional amendment cannot, after long acquiescence (16 years), be set aside on the ground that the statute providing for a canvass of the votes therefor was irregularly passed, there being no attempt to show that the amendment did not in fact receive a majority of votes. Weston v. Ryan [Neb.] 97 N. W. 347.

11. Const. art. 17, §§ 1, 2. Kadderly v. Portland [Or.] 74 P. 710.

12. Kadderly v. Portland [Or.] 74 P. 710.

13. The statute of Ohio providing for the submission of constitutional amendments through the machinery of political parties is valid. State v. Laylin [Ohio] 68 N. E. 574. Where a constitution merely provides that constitutional amendments be submitted to the electors, the method of submission is left to the legislature. People v. Loomis [Mich.] 98 N. W. 262.

14. Weston v. Ryan [Neb.] 97 N. W. 347.

15, 16, 17. People v. Sours, 31 Colo. 369, 74 P. 167.

18. A constitutional amendment published in a paper which prints its news, politics and policies in German, with a supplement of miscellaneous matter in English, is published in a German newspaper. State v. Slater, 2 Ohio N. P. (N. S.) 101.

19. Saunders v. Board of Liquidation of City Debt, 110 La. 313, 34 So. 457.

20. People v. Sours, 31 Colo. 369, 74 P. 167.

21. Const. art. 20, § 1. People v. Loomis [Mich.] 98 N. W. 262.

22. People v. Sours, 31 Colo. 369, 74 P. 167. Some states require a majority of all voting at the election. Id.

23. Merely reserving to the people a larger share of legislative power. Kadderly v. Portland [Or.] 74 P. 710.

was regularly proposed, ratified and adopted in accordance with the provisions of the Oregon constitution.[24]

The date of the taking effect of a constitutional amendment cannot be established by admission or agreement of counsel.[25]

§ 2. *Operative force and effect.*[26]—Constitutional prohibitions on the passage of certain laws operate prospectively only and do not repeal existing statutes,[27] and a constitutional provision abolishing the distinction between sealed and unsealed instruments does not repeal or modify a law in force at its adoption, except as to the seal.[28]

Self-executing provisions.[29]—A constitutional provision is self executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced, and it is not self executing when it merely indicates principles without laying down rules by means of which those principles may be given the force of law.[30] But where the constitutional convention itself construes a section as not self executing, by providing for the enactment of laws for its enforcement, it is the duty of courts to adopt that interpretation.[31] Provisions requiring an election to be held,[32] one reserving power to regulate public service charges,[33] and one requiring assessment of damages by free holders,[34] have been construed as self executing. The Missouri amendment dispensing with unanimity in verdicts of juries is self executing in so far as it applies to grand juries and juries in courts of record in civil cases, but not as applicable to juries in courts not of record.[35] A constitutional provision that the highest court may have jurisdiction in certain cases does not ex proprio vigore confer that jurisdiction,[36] nor is jurisdiction conferred on a court by a provision which needs legislation to give it effect.[37]

Constitutions, like statutes, have no extra-territorial effect.[38]

§ 3. *Interpretation and exposition. A. When called for.*[39]—Courts refuse to pass on the constitutionality of a statute unless absolutely necessary to a decision of the case,[40] and cannot attempt, prior to an actual controversy, to pass upon

24. Not in violation of art. 17, § 1, providing that when an amendment is proposed, it shall be referred to the next session of the legislature, and, if approved by them, then submitted to popular vote, or of section 2, prohibiting the proposal of any additional amendment while one is awaiting action. Kadderly v. Portland [Or.] 74 P. 710.

25. City Council of Denver v. Adams County Com'rs [Colo.] 77 P. 858.

26. See 1 Curr. L. 570.

27. Statute limiting damages recoverable for wrongful death. Mestas v. Diamond Coal & Coke Co. [Wyo.] 76 P. 567. A special law in force at the adoption of a constitutional provision prohibiting the enactment of such laws continues until repealed. Special charter. Ulbrecht v. Keokuk [Iowa] 97 N. W. 1082. A special act incorporating a taxing district is not repealed by the adoption of a constitutional provision against the passage of special laws and repealing inconsistent laws. City of Covington v. District of Highlands, 24 Ky. L. R. 433, 68 S. W. 669.

28. Daniel v. Garner, 71 Ark. 484, 76 S. W. 1063.

29. See 1 Curr. L. 570.

30. Cooley, Const. Lim. [7th Ed.] p. 121. Sharp v. National Biscuit Co. [Mo.] 78 S. W. 787.

31. The provision of the constitution of Washington against monopolies and discrimination by railroads is not self executing. Northwestern Warehouse Co. v. Oregon R. & Nav. Co., 32 Wash. 218, 73 P. 388.

32. May be held at the required time without special legislation providing therefor. State v. Moores [Neb.] 96 N. W. 1011.

33. Self executing so far as it prohibits the bartering away of that power, and becomes a part of every public service contract subsequently made. City of Tampa v. Tampa Waterworks Co. [Fla.] 34 So. 631.

34. Taking property for public use [Mo. Const. art. 2, § 21]. Shively v. Lankford, 174 Mo. 535, 74 S. W. 835.

35. Acts 1899, p. 382, amend. Const. art. 2, § 28. Sharp v. National Biscuit Co. [Mo.] 78 S. W. 787.

36. Flanary v. Kane [Va.] 46 S. E. 312.

37. The provision of the Texas constitution giving the district court jurisdiction over election contests is not self executing, and such jurisdiction can be exercised only as authorized by statute [Const. art. 5, § 8, amended 1891]. Mercer v. Woods [Tex. Civ. App.] 78 S. W. 15.

38. Constitutional inhibition against limitation of common-law liability is not effective as to contract made out of state [Const. § 196]. Cleveland, etc., R. Co. v. Druien [Ky.] 80 S. W. 778.

39. See 1 Curr. L. 570.

40. Jack v. Grangeville [Idaho] 74 P. 969;

the validity of provisions that may never be properly questioned.[41] The validity of a statute cannot be questioned by one to whom it has no application,[42] or who is not injured thereby,[43] or who has voluntarily met its requirements,[44] and a person accused cannot question a provision of the statute beneficial to him, the benefits of which he may avail himself of or not as he elects.[45] The constitutionality of a statute making it the duty of police officers to search persons suspected of carrying concealed weapons cannot be raised by one on trial for assault on an officer engaged in that duty.[46] One who has invoked the aid of a statute cannot question its constitutionality,[47] but an importer whose goods are seized on reim-

Bray v. State [Ala.] 37 So. 250; State v. King, 28 Mont. 268, 72 P. 657; State v. Pearson, 110 La. 387, 34 So. 575. Although declination involves declination of jurisdiction and decision of case on merits. Gregg v. Board of Com'rs of Lake County [Colo.] 76 P. 376. Whether statute is invalid as depriving electors of right to choose officers not determined on mandamus to compel calling of election. People v. Potter, 88 App. Div. 239, 85 N. Y. S. 460. Not when case can be decided on other grounds. Weir v. State, 161 Ind. 435, 68 N. E. 1023. Not when relators are not aggrieved whether statute be valid or not. Green v. Doerwald [Neb.] 96 N. W. 634. See 1 Curr. L. 570, n. 69.

41. In advance of any attempt to exercise controverted powers, the courts will not pass upon separate and independent clauses which if void will not interfere with the main purpose of a statute. Toney v. Mason, 119 Ga. 83, 46 S. E. 80. The court cannot attempt, prior to an actual controversy arising, to direct the officers charged with the enforcement of a law relating to their duty in putting it into operation. State v. Fleming [Neb.] 97 N. W. 1063.

42. Davidson v. Von Detten, 139 Cal. 467, 73 P. 189; State v. Pearson, 110 La. 387, 34 So. 575. Validity of statute allowing entry by plaintiff in condemnation proceedings before payment of damages cannot be raised by one awarded no damages. Marks v. Bradshaw Mountain R. Co. [Ariz.] 76 P. 470. An alien cannot question a statute on the ground that privileges and immunities of the citizens of the state are not extended to the citizens of the several states [U. S. Const. art. 4, § 2]. In re Johnson's Estate, 139 Cal. 532, 73 P. 424. Those who are excluded from this country cannot assert the rights in general obtaining in favor of citizens, such as the rights of free speech and press, the right to petition, etc. (Anarchist case). U. S. v. Williams, 194 U. S. 279, 24 S. Ct. 719. One not a physician cannot question a statute on the ground that it discriminates between different classes of physicians. Local option law. Sweeney v. Webb [Tex. Civ. App.] 76 S. W. 766. The constitutionality of an act prohibiting the selling and giving away of intoxicants cannot be attacked on the ground that it fails to discriminate in favor of the household use of intoxicants, by one who has been convicted of both selling and giving away. Parker v. State [Md.] 57 A. 677. A suggested invalidity of a liquor law for failure to exempt certain sales cannot be taken advantage of by one not prosecuted for such a sale. In re O'Brien [Mont.] 75 P. 196. Constitutionality of statute authorizing formation of drainage district cannot be raised by one outside the district. Laguna Drainage Dist. v. Charles Martin Co. [Cal.] 77 P. 933.

43. Courts do not listen to a party whose objection to a law is not that his own rights are affected, but that the rights of some other party, who is not complaining, are. Cooley, Const. Lim. [5th Ed.] 216. Anti-compact law affecting insurance companies. Hartford Fire Ins. Co. v. Perkins, 125 F. 502. The only person who can complain that a law impairs the obligation of contracts is one who has an interest in the enforcement of the obligation of the contract said to be impaired. Templeton v. Horne, 82 Ill. 491; Burke v. Snively, 208 Ill. 328, 70 N. E. 327. An alien who does not show that any of his rights were affected by the repeal of a statute conferring on aliens the right to take property by descent cannot question the constitutionality of such repeal. Donaldson v. State [Ind.] 67 N. E. 1029. A national bank cannot raise the question that proceedings to tax the shares of its stock are violative of the fourteenth amendment; the stockholders alone are interested in that question. Com. v. Citizens' Nat. Bank, 25 Ky. L. R. 2100, 80 S. W. 158. Successful bidders for an issue of school bonds, who refuse to take the bonds because of their invalidity and are refused return of their deposit thereon, have an interest entitling them to raise the question of the constitutionality of the statute authorizing the issue. School City of Rushville v. Hayes [Ind.] 70 N. E. 134. Whether a statute defining an incompetent is invalid as a legislative attempt to define and construe prior statutes cannot be raised by one found incompetent in regular proceedings, not referring to the statute objected to, though the finding of his incompetence adopts the language of the statute. In re Daniels, 140 Cal. 335, 73 P. 1053. Any male inhabitant of the state over 21 years old may sue to test the constitutionality of a statute apportioning senators and representatives, though the wrong complained of does not exist in his own district. Brooks v. State [Ind.] 70 N. E. 980.

44. The constitutionality of a law requiring the bond of an officer to be a lien on the real estate of the officer and his sureties cannot be attacked by persons voluntarily executing such bond. City of Mt. Vernon v. Kenlon, 89 N. Y. S. 817.

45. State v. Cucullu, 110 La. 1087, 35 So. 300.

46. Keady v. People [Colo.] 74 P. 892.

47. Act providing for interlocking devices at railroad grade crossings. Minneapolis, etc., R. Co. v. Gowrie, etc., R. Co., 123 Iowa, 543, 99 N. W. 181. Persons made heirs and devisees by a statute cannot question provision for setting apart widow's share. Otto

portation is not estopped to deny the constitutionality of the law by which they are seized, because on a former seizure he gave a bond to carry them out of the country and not reimport them.[48] Petitioners for a local improvement prosecuted in strict compliance with the law cannot, after completion of the work, question the constitutionality of the statute,[49] nor, where they have failed to seek the remedy provided by the statute, can they question the constitutionality of the assessment therefor.[50] Since a foreign corporation has no right to do business in a state, it cannot question the constitutionality of the statute imposing conditions on its privilege to do business there.[51] Objections to a statute must point out what provision of the constitution is violated,[52] and the manner of its violation,[53] and the objector must show facts sufficient to bring himself within the protection of the clause invoked.[54] Defendant, in an action to condemn land, may raise the question that plaintiff is an alien and disentitled to hold lands in the state,[55] and quo warranto proceedings to determine constitutionality are frequent.[56] The constitutional question must have been raised below,[57] and decided adversely to the appellant.[58]

(§ 3) *B. General rules of interpretation. Constitutions.*[59]—The framers of constitutions and the people who adopt them must be understood to have employed words in their natural sense, and to have intended what they said.[60] The intention of the framers, however, must prevail, whatever language may have been used to express it,[61] whence all parts of a constitution relating to the same subject must be construed together, and if possible under any reasonable construction, made to harmonize, and every part rendered effective.[62] Debates of the members of the convention which framed the constitution are frequently consulted with a view to

v. Long [Cal.] 77 P. 885. An agreement by lot owners that a local improvement was legally prosecuted, made for the purpose of obtaining a market for the sale of bonds by the municipality to enable it to make the improvement, estops them from alleging the unconstitutionality of the statute under which the assessment is made. Shepard v. Barron, 194 U. S. 553, 24 S. Ct. 737.

48. U. S. v. Seven Packages of Tea, 126 F. 224.

49. Shepard v. Barron, 194 U. S. 553, 24 S. Ct. 737.

50. Estoppel to object that other lands should have been included in the assessment district and that lot owner is therefore denied the equal protection of the law. O'Dea v. Mitchell [Cal.] 77 P. 1020.

51. Hartford Fire Ins. Co. v. Perkins, 125 F. 502.

52. Brown v. State, 114 Ga. 60, 39 S. E. 873; State v. Wilson [Iowa] 99 N. W. 1060; Morton v. Nelms, 118 Ga. 786, 45 S. E. 616; Sayer v. Brown, 119 Ga. 539, 46 S. E. 649; State v. Brockmiller [Mo. App.] 81 S. W. 214. An objection to an act as "not being a constitutional exercise of legislative authority" is too vague. Levy v. State, 161 Ind. 251, 68 N. E. 172.

53. A lot owner objecting to a local assessment on the ground of inequality of protection must show what other lands should have been included in the district; a mere general allegation that others should have been included is not enough. O'Dea v. Mitchell [Cal.] 77 P. 1020.

54. A person on trial objecting to the constitutionality of a statute on the ground that it was not enacted as the constitution directs must present the facts he relies on to the trial court, and include them in his bill of exceptions on error or they will not be considered. Peckham v. People [Colo.] 75 P. 422. A city making no showing as to its income cannot assert the invalidity of a statute under which a debt was contracted, on the ground that a debt greater than its income is created contrary to the constitution. Barber Asphalt Pav. Co. v. St. Joseph [Mo.] 82 S. W. 64.

55. State v. Superior Court for Stevens County, 33 Wash. 542, 74 P. 686.

56. Quo warranto is maintainable to test the constitutionality of a statute authorizing the consolidation of competing corporations. People v. People's Gaslight & Coke Co., 205 Ill. 482, 68 N. E. 950. An answer to a petition in quo warranto, alleging that respondents are holding office by virtue of a certain statute, is sufficient to put the constitutionality of the statute in issue. State v. Nolan [Neb.] 98 N. W. 657.

57. General demurrer to petition does not raise the question of the constitutionality of the statute on which the action is based. State v. Henderson [Ga.] 48 S. E. 334.

58. State v. Brockmiller [Mo. App.] 81 S. W. 214.

59. See 1 Curr. L. 571.

60. Per Ch. J. Marshall, in Gibbons v. Ogden, 9 Wheat. [U. S.] 1, 6 Law. Ed. 23; Ex parte Heyman [Tex. Cr. App.] 78 S. W. 349; Burke v. Snively, 208 Ill. 328, 70 N. E. 327.

61. And the meaning of general words will be restricted when necessary to carry out that intention. State v. Eldredge [Utah] 76 P. 337.

62. Gibbs v. Gibbs, 26 Utah, 382, 73 P. 641; State v. Eldredge [Utah] 76 P. 337.

determining the meaning of doubtful provisions,[63] and contemporaneous construction by co-ordinate branches of the government, long continued in, is entitled to great weight in determining the meaning of doubtful provisions.[64] Such aid, however, is to be resorted to only when ambiguity is found, or the meaning is doubtful.[65] The rule applying where a statute of one state is re-enacted in another applies to constitutions,[66] but the court will not presume that a constitutional provision existing in several states was adopted from any particular one of them so as to bind itself to the construction adopted by that state.[67] Technical words must be construed according to their legal definition, in the absence of anything to clearly indicate that the words were not intended to be so used.[68] That the validity of a constitutional amendment is not free from doubt is of itself a sufficient reason for sustaining it.[69]

Federal courts usually follow the state court's interpretation.[70]

Statutes.[71]—Whenever a legislative enactment is clearly in the least degree contrary to the constitution, the duty of the courts to give effect to the organic law as the supreme will of the people is unquestionable,[72] the maxim "de minimis non curat lex" having no application where the violation of a constitutional right is in question.[73] They are not, however, at liberty to set aside an act of the legislature because in their opinion it is opposed to a spirit supposed to pervade the constitution, but not expressed in words,[74] though it is said the constitution may be as effectively violated by an act contrary to its spirit, as by one contrary to its letter;[75]

63. Burke v. Snively, 208 Ill. 328, 70 N. E. 327. The contrary rule obtains, however, in Virginia, the court relying for authority on cases holding that parliamentary debates are not examinable to determine the meaning of statutes. Funkhouser v. Spahr [Va.] 46 S. E. 378. See 1 Curr. L. 571, n. 81.

64. Burke v. Snively, 208 Ill. 328, 70 N. E. 327; Linton v. Lucy Cobb Institute, 117 Ga. 678, 45 S. E. 53; City Council v. Board of Com'rs [Colo.] 77 P. 858. The contemporaneous construction of a clause of the constitution, acquiesced in for more than a century by the legislative, executive and judicial branches of the government, places it beyond debate or question. Const. art. 1, § 8. Right of state courts to admit qualified aliens to citizenship. Levin v. U. S. [C. C. A.] 128 F. 826. See 1 Curr. L. 571, n. 82.

65. Burke v. Snively, 208 Ill. 328, 70 N. E. 327.

66. Stein v. Morrison [Idaho] 75 P. 246. See 1 Curr. L. 571, n. 80.

67. Voss v. Waterloo Water Co. [Ind.] 71 N. E. 208.

68. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784.

69. Kadderly v. Portland [Or.] 74 P. 710.

70. See Stare Decisis, 2 Curr. L. 1698.

NOTE. Federal courts. Interpretation of state statutes: Suit was brought in a Federal court by citizens of Pennsylvania to enforce a mechanic's lien given by an Ohio statute. The materials were furnished before the Ohio supreme court had passed on the constitutionality of the statute. Subsequently, but before the institution of this suit, that court declared the statute repugnant to the Ohio constitution. Held, the Federal court should decide the constitutionality independently of the Ohio decision. Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532. In general, the Federal courts will follow the decisions of the state courts in interpreting statutes and constitutions. Post v. Supervisors, 105 U. S. 667. Though originally Federal courts followed the changes of opinion in the state courts (Green v. Neal, 6 Pet. [U. S.] 291), it is now settled that they will not allow the rights of parties to be changed where relations were entered into on the basis of a former interpretation (Douglass v. County of Pike, 101 U. S. 677). For similar reasons, it would seem, the Federal courts will interpret according to their own opinion a statute unadjudicated upon when the rights of the parties were fixed, notwithstanding a contrary result reached in the meantime by the state court. Burgess v. Seligman, 107 U. S. 20; Anderson v. Santa Anna, 116 U. S. 356. The Federal courts are reluctant to run counter to state decisions, however, and it would seem justly, for the result is to establish different rules of law for citizens of different states, a result directly contrary to the purpose of giving jurisdiction in cases of diverse citizenship. The principal case must depend on the doctrine that some sort of rights can be acquired under an unconstitutional statute (see U. S. v. Realty Co., 163 U. S. 427), since decisions announced before the fixing of rights of parties will be followed (Fairfield v. County of Gallatin, 100 U. S. 47, 52).—IV Columbia Law Rev. 509.

71. See 1 Curr. L. 571.

72. For an exhaustive discussion of the right and duty of the courts to declare statutes in conflict with the constitution invalid, see Atkinson v. Woodmansee [Kan.] 74 P. 640. Criticising the dissenting opinion in In re Davis, 58 Kan. 368, 49 P. 160.

73. Spring Valley Waterworks v. San Francisco, 124 F. 574, 602.

74. Brown v. Galveston [Tex.] 75 S. W. 488. See 1 Curr. L. 571, n. 83.

75. State v. Kohnke, 109 La. 838, 33 So. 793.

nor have they authority to interfere on the ground of natural justice and right,[76] or inquire whether an act conserves a wise or reasonable public policy, so long as the legislature does not pass the limits fixed by the constitution.[77] The manner in which favorable consideration by the legislature was obtained for an act is not open to inquiry.[78] Neither is their motive in passing it,[79] the courts being bound to assume that the law making body acted with good faith and a desire to promote the public good.[80] A statute will not be declared void on the presumption that it will be used as a basis to assert an unjust or illegal claim to the property of the state.[81]

Every presumption must be indulged in favor of the validity of a statute,[82] and its validity sustained until it is clearly shown to be violative of some constitutional restriction.[83] A reasonable doubt as to the constitutionality of a law stamps it as constitutional,[84] since all such doubts must be resolved in favor of the law.[85]

In cases of doubtful terms or meaning, that construction will be applied which upholds the act, if possible, without violence to the manifest legislative purpose,[86]

76. Tiedeman, Lim. Pol. Powers, § 3; Block v. Schwartz [Utah] 76 P. 22; Com. v. Reinecke Coal Min. Co., 25 Ky. L. R. 2027, 79 S. W. 287; Viemeister v. White, 88 App. Div. 44, 84 N. Y. S. 712; Kerr v. Perry School Tp. [Ind.] 70 N. E. 246.

77. Northern Securities Co. v. U. S., 193 U. S. 197, 24 S. Ct. 436; Block v. Schwartz [Utah] 76 P. 22; City of Little Rock v. North Little Rock [Ark.] 79 S. W. 785; Atkin v. Kansas, 191 U. S. 207, 24 S. Ct. 124; People v. Lochner, 177 N. Y. 145, 69 N. E. 373; City of Danville v. Hatcher, 101 Va. 523, 44 S. E. 723. Statute compelling vaccination of school children. French v. Davidson [Cal.] 77 P. 663. Sunday law prohibiting sale of meat and permitting sale of confectionery and tobacco. State v. Justus [Minn.] 98 N. W. 325. Questions of the wisdom, policy and expediency of the laws are for the legislature to determine, and not the courts. In re Boyce [Nev.] 75 P. 1. It is the duty of courts, after a law has been enacted, to determine, in a proper proceeding, whether it conflicts with the fundamental law, and to construe and interpret it so as to ascertain the rights of the parties litigant, but they have no authority to consider the question of its necessity or expediency. Kadderly v. Portland [Or.] 74 P. 710. The reasonableness of a municipal ordinance is not a matter for the courts to any greater extent than it would be if a statute were under consideration. Anderson v. State [Neb.] 96 N. W. 149.

78. City of Little Rock v. North Little Rock [Ark.] 79 S. W. 785.

79. City of Little Rock v. North Little Rock [Ark.] 79 S. W. 785; Odd Fellows Cemetery Ass'n v. San Francisco, 140 Cal. 226, 73 P. 987; In re Smith [Cal.] 77 P. 180; Dodge v. Woolsey, 18 How. [U. S.] 371; Manigault v. Ward & Co., 123 F. 707; McCray v. U. S., 195 U. S. 27, 24 S. Ct. 769. Intent of legislature in abolishing city office during term cannot be inquired into. Downey v. State, 160 Ind. 578, 67 N. E. 450. Rule applies to municipal ordinances. Dobbins v. Los Angeles, 139 Cal. 179, 72 P. 970.

80. Bohmer v. Haffen, 161 N. Y. 390, 55 N. E. 1047; People v. Lochner, 177 N. Y. 145, 69 N. E. 373; Young v. Com., 101 Va. 853, 45 S. E. 327.

81. Statute purchasing compiled statutes for use of legislature and state officers. Marsh v. Stonebraker [Neb.] 98 N. W. 699.

82. Buttfield v. Stranahan, 192 U. S. 470, 24 S. Ct. 349; Manigault v. Ward, 123 F. 707; Sanders v. Com., 25 Ky. L. R. 1165, 77 S. W. 358; Ex parte Loving, 178 Mo. 194, 77 S. W. 508; State v. Cantwell [Mo.] 78 S. W. 569; State v. Hyman [Md.] 57 A. 6; Bland v. People [Colo.] 76 P. 359. Until the contrary is shown, it will be presumed the legislature kept within the constitutional limit in the levy of taxes. Stein v. Morrison [Idaho] 75 P. 246. The public interests imperatively demand that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably beyond all question in violation of the fundamental law. Per Justice Harlan, in Atkin v. Kan., 191 U. S. 207, 24 S. Ct. 124, 48 Law. Ed. 207; State v. Cantwell [Mo.] 78 S. W. 569; In re Watson [S. D.] 97 N. W. 463; State v. Nolan [Neb.] 98 N. W. 657; Bland v. People [Colo.] 76 P. 359; Northwestern Mut. Life Ins. Co. v. Lewis & Clarke County, 28 Mont. 484, 72 P. 982; Western Ranches v. Custer County, 28 Mont. 278, 72 P. 659.

83. In re Boyce [Nev.] 75 P. 1; Brady v. Mattern [Iowa] 100 N. W. 358. Repugnancy to the constitution must be so clear, plain and palpable as to leave no reasonable doubt or hesitation upon the judicial mind. State v. Polk County Com'rs, 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161.

84. Brown v. Galveston [Tex.] 75 S. W. 488; Soper v. Lawrence Bros. Co., 98 Me. 268, 56 A. 908; State v. Ide [Wash.] 77 P. 961.

85. Ex parte Loving, 178 Mo. 194, 77 S. W. 508; Olds v. State Land Office Com'r [Mich.] 96 N. W. 508; Northwestern Mut. Life Ins. Co. v. Lewis & Clarke County, 28 Mont. 484, 72 P. 982; People v. Rose, 203 Ill. 46, 67 N. E. 746.

86. Com. v. Barney, 24 Ky. L. R. 2352, 74 S. W. 181; Ex parte Loving, 178 Mo. 194, 77 S. W. 508; State v. Hyman [Md.] 57 A. 6; Rosin v. Lidgerwood Mfg. Co., 89 App. Div. 245, 86 N. Y. S. 49; People v. Lochner, 177 N. Y. 145, 69 N. E. 373; People v. Rose, 207 Ill. 352, 69 N. E. 762; In re Watson [S. D.] 97 N. W. 463. See 1 Curr. L. 572, n. 86.

and both the statute and the constitution will be liberally construed with a view to sustaining legislative action.[87] A territorial income tax law is not invalid for not expressly exempting the salaries of judicial officers, since if the constitution requires their exemption, the exemption will attach as though expressly made in the law itself.[88]

A statute containing invalid provisions yields only to the extent of its repugnancy to the constitution,[89] and a part may be unconstitutional without rendering the whole statute bad, if the invalid part be so independent of the remainder that it may be eliminated without invalidating the other provisions,[90] unless the invalid portion was manifestly an inducement to the passage of the remainder.[91] The presumptions, however, favor the unconstitutionality of the remaining portions,[92] and where the unconstitutional portion is essentially and inseparably connected in substance with that which is constitutional, the whole must be rejected.[93] Where,

87. Western Ranches v. Custer County, 28 Mont. 278, 72 P. 659.

88. Peacock v. Pratt [C. C. A.] 121 F. 772.

89. Logan County v. Carnahan [Neb.] 95 N. W. 812; Union Pac. R. Co. v. Sprague [Neb.] 95 N. W. 46; State v. Fleming [Neb.] 97 N. W. 1063; State v. Insurance Co. [Neb.] 99 N. W. 36. A provision in the charter of New Orleans (La. Acts 1902, No. 216, p. 445, § 22), authorizing the mayor to fill vacancies caused by the death of city officers, is unconstitutional in so far as it provides that such appointees shall hold office during the whole of the unexpired term, but it will be enforced to the extent of allowing them to hold office until a successor to the deceased officer may be elected [Const. art. 319]. Watson v. McGrath [La.] 36 So. 204.

90. State v. Nolan [Neb.] 98 N. W. 657; Northwestern Mut. Life Ins. Co. v. Lewis & Clarke County, 28 Mont. 484, 72 P. 982; Toney v. Macon, 119 Ga. 83, 46 S. E. 80; In re Abel [Idaho] 77 P. 621; Seattle & L. W. Waterway Co. v. Seattle Dock Co. [Wash.] 77 P. 845; Levy v. State, 161 Ind. 251, 68 N. E. 172; Watson v. McGrath [La.] 36 So. 204; State v. Pearson, 110 La. 387, 34 So. 575; Com. v. Anselvich [Mass.] 71 N. E. 790. Provision that damages for taking property be assessed by "householders," constitution requiring "freeholders." Shively v. Lankford, 174 Mo. 535, 74 S. W. 835. An income tax law is not rendered invalid by failure to exempt a salary which by the constitution is exempt, nor by incorporating therein unconstitutional provisional remedies for the better enforcement of the law. Peacock v. Pratt [C. C. A.] 121 F. 772. Only those provisions not germane to the title need be eliminated. City of Oak Cliff v. State [Tex. Civ. App.] 77 S. W. 24; Ex parte Hernan [Tex. Cr. App.] 77 S. W. 225; Logan County v. Carnahan [Neb.] 95 N. W. 812. Adverse possession of wild lands. Soper v. Lawrence Bros. Co., 98 Me. 268, 56 A. 908. Statute providing for discharge of superintendent of prison. Corscadden v. Haswell, 88 App. Div. 158, 84 N. Y. S. 597. Where a provision of the statute for the creation of a corporation which is regarded as unconstitutional as requiring a person to give evidence against himself may be stricken from the act without impairing the general purposes thereof, the act is not unconstitutional as a whole. Section 8 of Act 1899, p. 248, c. 146, providing that failure of the corporation to answer an inquiry from the secretary of state shall be prima facie evidence that it is transacting business in the state, and has violated the provision of the act. State v. Laredo Ice Co., 96 Tex. 461, 73 S. W. 951. Statute providing for expenditure of money for public improvement, containing illegal provision for assessment on abutters. Edwards v. Bruorton, 184 Mass. 529, 69 N. E. 328, citing many cases. Statute punishing desecration of national flag. People v. Van De Carr, 91 App. Div. 20, 86 N. Y. S. 644. Exception in agricultural law in favor of farmers making vinegar. People v. Windholz, 92 App. Div. 569, 86 N. Y. S. 1015. Statute authorizing local option elections in municipalities other than those named in constitution [Art. 16, § 20]. Sweeney v. Webb [Tex. Civ. App.] 76 S. W. 766. Sewer assessment act. White v. Gove, 183 Mass. 333, 67 N. E. 359. Unjust discrimination between physicians in Texas local option law. Busch & Co. v. Webb, 122 F. 655. A general revenue law will not be declared unconstitutional on account of discriminative provisions which may be rejected without impairing the enforcement of the valid provisions. State v. Fleming [Neb.] 97 N. W. 1063. Wash. Laws 1899, p. 295, c. 141, § 12 (Ball. Ann. Codes & St. § 1740a), relating to taxation, construed and held that the unconstitutionality of a proviso allowing deductions in certain cases does not affect the validity of the balance of the act. Nathan v. Spokane County [Wash.] 76 P. 521. Unconstitutionality of prohibition against selling unused railroad tickets does not impair remainder of statute requiring redemption of unused tickets. Texas & P. R. Co. v. Mahaffey [Tex. Civ. App.] 81 S. W. 1047.

91. State v. Insurance Co. [Neb.] 99 N. W. 36; Northwestern Mut. Life Ins. Co. v. Lewis & Clarke County, 28 Mont. 484, 72 P. 982.

92. In such case the court must be satisfied that it was the legislative intent that the valid portions stand as the law independent of the invalid parts. Western Union Tel. Co. v. Austin, 67 Kan. 208, 72 P. 850.

93. Law exempting funds due from mutual benefit societies from seizure on garnishment, etc., but excepting certain named societies from its provisions [Act May 12, 1899, Supp. Sayles' Civ. St. 1899-1900, tit. 49a]. Supreme Lodge United Benev. Ass'n v. Johnson [Tex. Civ. App.] 77 S. W. 661. See, also, Id. [Tex.] 81 S. W. 18. School law based on invalid classification of districts. Riccio v. Hoboken, 69 N. J. Law, 649, 55 A. 1109.

in its application to any particular contract, a statute is found to impair the obligation of contracts, it may be declared inoperative as to that contract without holding it unconstitutional in other respects.[94] Where the attempted extension of a local law over the entire state is ineffectual for defect of title, a clause in the act repealing the existing general law on the same subject will not be upheld.[95] The enactment of an invalid amendment to a law will not invalidate the whole law, though the whole act as amended is re-enacted in accordance with the constitutional provision.[96] An act invalid as an amendment of a prior act for failure to set it out may be sustained as an independent statute on the same subject.[97]

Scope of Federal and state power.—The government of the United States was formed with enumerated powers which must be broad enough to embrace the power exercised,[98] but the power of the state legislature cannot be denied unless we find in the constitution of the United States or of the state, that it is prohibited,[99] though the constitution may take from the legislature the power of legislation, by implication as well as by express prohibition.[1] Where a grant of power is given, all the means necessary to effectuate the power pass as incidents to the grant.[2] A power will be implied only when without its exercise an express duty or authority would be nugatory,[3] and a prohibition of the exercise of a power will be implied only when, looking to the language and purpose of the constitution, it is evident that without such an implication the will of the people as illustrated by a careful consideration of all its provisions cannot be given effect.[4] Acquiescence for no length of time can legalize a clear usurpation of power.[5]

Law impeding sale of patented articles and patent rights. Union County Nat. Bank v. Ozan Lumber Co., 127 F. 206. Law creating additional judges for circuit and providing for their election at a time and for a term unauthorized by the constitution. People v. Olsen, 204 Ill. 494, 68 N. E. 376. Invalid exemption held controlling. Kellyville Coal Co. v. Harrier, 207 Ill. 624, 69 N. E. 927. Law relative to county seat and providing for building court house. Board of Com'rs v. State, 161 Ind. 616, 69 N. E. 442. One part of a statute may be held void and another good only where the portions are clearly separable and susceptible of separate enforcement; but when it is apparent that the entire faulty enactment is designed to constitute a complete whole, and that one part would not have been enacted except in connection with the other, if a part is found to be bad, the entire statute must fall. Gen. St. Kan. 1901, c. 57b, relating to libel, held in conflict with section 18 of the Bill of Rights, and hence void. Hanson v. Krehbiel [Kan.] 75 P. 1041. Invalid sections of an act limiting its application to certain cities cannot be rejected and the rest sustained where the effect would be to thereby render it applicable to cities not intended to be included in the legislative scheme [Gen. St. N. J. p. 465]. In re Fagan [N. J. Law] 57 A. 469. Statute submitting issue of municipal debt with other issues foreign thereto. Cain v. Smith, 117 Ga. 902, 44 S. E. 5.

94. Brady v. Mattern [Iowa] 100 N. W. 358.

95. People v. De Blaay [Mich.] 100 N. W. 598.

96. People v. Butler St. Foundry & Iron Co., 201 Ill. 236, 66 N. E. 349.

97. State v. Scott, 32 Wash. 279, 73 P. 365.

98. Trustees of Rutgers College v. Morgan [N. J. Law] 57 A. 250; In re Boyce [Nev.] 75 P. 1.

99. Cooley, Const. Lim. 223; Maxwell v. Goetschius, 40 N. J. Law, 383, 29 Am. Rep. 242; Trustees of Rutgers College v. Morgan [N. J. Law] 57 A. 250; Hinton v. Board of Sup'rs [Miss.] 36 So. 565; In re Boyce [Nev.] 75 P. 1; Wallace v. Reno [Nev.] 73 P. 528; In re Watson [S. D.] 97 N. W. 463. The state legislature may exercise every legislative function not denied it by the constitution and not delegated by it to some other department of the state government. Burke v. Snively, 208 Ill. 328, 70 N. E. 327. The legislature may declare desertion of wife and children a misdemeanor. State v. Cucullu, 110 La. 1087, 35 So. 300.

1. It is necessarily implied that the legislature has not the power to submit to the voters questions as to incurring indebtedness, in connection with issues entirely foreign to the debt. Cain v. Smith, 117 Ga. 902, 44 S. E. 5.

2. Riggins v. Richards [Tex.] 77 S. W. 946; U. S. v. Morris, 125 F. 322; Levin v. U. S. [C. C. A.] 128 F. 826.

3. Brown v. Galveston [Tex.] 75 S. W. 488; City of Oak Cliff v. State [Tex. Civ. App.] 77 S. W. 24. Power to legislate in reference to the location of county seats does not imply power to provide for and regulate the building of a court house, that being "county business" within the inhibition of Const. art. 4, § 22, prohibiting local or special laws regulating county business. Board of Com'rs v. State, 161 Ind. 616, 69 N. E. 442.

4. Lytle v. Halff, 75 Tex. 132, 12 S. W. 610; City of Oak Cliff v. State [Tex. Civ. App.] 77 S. W. 24.

The court cannot consider evidence aliunde, but is confined to the consideration of the law itself, and facts and circumstances surrounding it of which judicial notice can be taken.[6]

Where the words of a statute are plain, specific and unambiguous so as to call for no construction, the meaning which the words import must be conclusively presumed to be the meaning which the legislature intended.[7] A statute should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant, but every sentence and word shall, if possible, be given its ordinary meaning and acceptation.[8] The several sections of a statute must be construed together and harmonized if possible,[9] and all statutes in pari materia must be taken together and construed as if they were one enactment, and, if possible, effect given to every provision.[10] A construction will not be adopted which renders some portions meaningless, or which results in an absurdity, unless the language is so plain and unequivocal as to permit of no other interpretation,[11] and a suggested construction of a state statute which would lead to a manifest absurdity, and which has not, and is not likely to receive judicial sanction, will not be accepted by the supreme court of the United States as the basis of declaring the statute unconstitutional, when the courts of the state have given it the only construction consistent with its purposes and under which it is constitutional.[12] An election law will not be held invalid on the ground that it may be so construed as to result in the disfranchisement of electors, where such is not the natural and necessary construction.[13]

A statute copied from a similar statute of another state is presumed to be adopted with the construction it had already received.[14] The presumption, however, is not conclusive,[15] and where the same provision exists in several states, there is no presumption that the construction of any particular state was in view.[16]

One of the offices of a proviso is to qualify the generality of the body of the sentence of which it is a part, though it can have no potency to enlarge the scope or force of the enactment.[17]

The title is ordinarily no part of a statute and cannot be used to set at naught its obvious meaning;[18] or deprive it of its real and intended character;[19] it may, however, be considered as a key to the correct interpretation thereof, where the

5. Ex parte Heyman [Tex. Cr. App.] 78 S. W. 349.

6. Use of school sinks in tenement houses. Tenement House Department v. Moeschen, 89 App. Div. 526, 85 N. Y. S. 704. Prohibition of burials in city and county of San Francisco. Odd Fellows Cemetery Ass'n v. San Francisco, 140 Cal. 226, 73 P. 987.
Contra: Erection of gas works. In re Smith [Cal.] 77 P. 180.

7. State v. Insurance Co. [Neb.] 99 N. W. 36.

8. Crozer v. People, 206 Ill. 464, 69 N. E. 489; Funkhouser v. Spahr [Va.] 46 S. E. 378.

9. State v. Nolan [Neb.] 98 N. W. 657.

10. Fisher v. Betts [N. D.] 96 N. W. 132; Logan County v. Carnahan [Neb.] 95 N. W. 812.

11. Logan County v. Carnahan [Neb.] 95 N. W. 812.

12. Adams v. New York, 192 U. S. 585, 24 S. Ct. 372.

13. Applied to Brannock Law. Jeffrey v. State of Ohio, 4 Ohio C. C. (N. S.) 494.

14. James v. Appel, 192 U. S. 129, 24 S. Ct. 222.

15. State v. Mortensen, 26 Utah, 312, 73 P. 562, 633; Coulam v. Doull, 4 Utah, 267, 9 P. 568; Dixon v. Ricketts, 26 Utah, 215, 72 P. 947; Matthews v. Jensen, 21 Utah, 207, 61 P. 303.

16. A constitutional provision. Voss v. Waterloo Water Co. [Ind.] 71 N. E. 208.

17. Burke v. Snively, 208 Ill. 328, 70 N. E. 327. The effect of a proviso is to carve special exceptions only out of the enacting clause. U. S. v. Dickson, 15 Pet. [U. S.] 165; Burke v. Snively, 208 Ill. 328, 70 N. E. 327.

18. Patterson v. The Eudora, 190 U. S. 169, 23 S. Ct. 821, 47 Law. Ed. 1002, citing U. S. v. Fisher, 2 Cranch [U. S.] 358, 386; Yazoo, etc., R. Co. v. Thomas, 132 U. S. 174, 188; U. S. v. O. & C. R. Co., 164 U. S. 526, 541; Price v. Forrest, 173 U. S. 410, 427; Endlich, Interp. Stat. §§ 58, 59.

19. People v. Lochner, 177 N. Y. 145, 69 N. E. 373.

intent is otherwise ambiguous.[20] The compiler's headlines to a chapter of an act are no part of its title.[21] That a statute might with more propriety have been inserted in the Code of Procedure, rather than the Civil Code cannot affect its validity.[22] In considering whether the title to an act reasonably indicates its subject, the language used in the title must be liberally construed, but cannot be given a meaning directly the reverse of the usual acceptance of the words used.[23]

The punctuation of an act or its title is not controlling in construing it for the purpose of ascertaining its real meaning.[24]

A statute passed in contravention of the constitution is void, conveys no rights and binds no man, and cannot be ratified by acquiescence on the part of the state,[25] nor can any moral obligation on the part of the state arise from it.[26]

§ 4. *Executive, legislative and judicial functions.*[27]—The three phased division of government is coupled in Arkansas with a provision disabling one to hold offices under different departments.[28]

(§ 4) *A. Executive functions.*[29]—The executive power of the governor is compatible with an ex officio membership of a levee board.[30] The pardoning power is not invaded by the indeterminate sentence law of Kansas.[31] It is the exclusive province of the governor to determine whether an occasion for an extra session of the legislature exists, and his conclusion is not reviewable by the courts.[32] His acts are not subject to judicial supervision, though he may perhaps be compelled to perform a purely ministerial duty enjoined by law.[33] The governor in effect ratifies a legislative appointment by approving the bill by which it is made, since by vetoing it he might if he chose prevent its passage on the ground that it interfered with his prerogative of appointment.[34]

(§ 4) *B. Legislative functions.*[35]—"Acts of Parliament derogating to the power of subsequent Parliaments bind not."[36]

State legislatures have all the powers not expressly or by necessary implication withheld by the state and Federal constitutions,[37] and in the absence of constitutional restrictions, may invest municipal corporations with the police power of the state in whole or in part.[38] Instances of the exercise of legislative power are collected below.[39]

20. Rosin v. Lidgerwood Mfg. Co., 89 App. Div. 245, 85 N. Y. S. 49.

21. State v. Graham, 34 Wash. 81, 74 P. 1058.

22. De Yoe v. Superior Court, 140 Cal. 476, 74 P. 28.

23. State v. Coffin [Idaho] 74 P. 962.

24. Quotation marks are punctuation marks. State v. Banfield, 43 Or. 287, 72 P. 1093.

25. Ellinger v. Com. [Va.] 45 S. E. 807.

26. Minnesota Sugar Co. v. Iverson [Minn.] 97 N. W. 454.

27. See 1 Curr. L. 572.

28. Const. Ark. art. 4, §§ 1, 2. Peterson v. Culpepper [Ark.] 79 S. W. 783.

29. See 1 Curr. L. 572.

30. Does not give him power not appertaining to the executive. Dehon v. Lafourche Basin Levee Board, 110 La. 767, 34 So. 770.

31. State v. Stephenson [Kan.] 76 P. 905. See 1 Curr. L. 573, n. 4.

32. State v. Fair [Wash.] 76 P. 731.

33. Issuance of commission to legally appointed judge, compelled by mandamus. Traynor v. Beckham, 25 Ky. L. R. 283, 74 S. W. 1105. Consult Mandamus, 2 Curr. L. 771. See, also, annotation, 3 Curr. L. 668, n. 77, holding that judicial acts on which executive power depends may be reviewed by certiorari. And see 1 Curr. L. 573, n. 1.

34. Thomas v. State [S. D.] 97 N. W. 1011. See 1 Curr. L. 572, n. 96 et seq.

35. See 1 Curr. L. 573.

36. Bl. Com. 90; Cooley, Const. Llm. [4th Ed.] p. 152 (*126, n. 3), and the fact that the subsequent legislature failed to require petition and notice before passing a private bill as prescribed by the prior one cannot invalidate the act, since such failure is either a declaration of independence or a repeal pro tanto. Manigault v. Ward, 123 F. 707. One legislature has no power to prohibit a subsequent legislature from the full performance of its duties in the enactment of such laws as in its judgment are demanded for the safety or general welfare of the public. Board of Education v. Phillips, 67 Kan. 549, 73 P. 97. See 1 Curr. L. 573, n. 6.

37. Trustees of Rutgers College v. Morgan [N. J. Law] 57 A. 250; Hinton v. Perry County Sup'rs [Miss.] 36 So. 565; In re Boyce [Nev.] 75 P. 1; Wallace v. Reno [Nev.] 73 P.

The legislature is necessarily invested with certain discretionary powers, with the exercise of which the courts cannot interfere so long as the legislature does not transcend constitutional limitations.[40] Among such powers is that of determining under what circumstances and to what extent the power of eminent domain may be exercised, and to provide the manner of its exercise.[41] Where laws "necessary for the immediate preservation of the public peace, health, or safety" are exempted from the initiative and referendum of a constitution, the question of necessity is legislative.[42] The power to impose taxes is legislative,[43] and the judiciary cannot legitimately question the policy or refuse to sanction the provisions of any taxing law not inconsistent with the fundamental law of the state.[44] Likewise the imposition of a license is particularly a legislative function, not to be interfered with except in cases of clear illegality.[45] Whether a special act is necessary is a matter within the discretion of the legislature,[46] and is not affected by the fact that a general law has been passed on the same subject.[47] Nor is evidence admissible to show that an exercise of the police power of the state in favor of the health and safety of persons employed in certain work is unnecessary.[48] It is held, however, in South Carolina, that the question

528; In re Watson [S. D.] 97 N. W. 463; Burke v. Snively, 208 Ill. 328, 70 N. E. 327; State v. Cucullu, 110 La. 1087, 35 So. 300; Cain v. Smith, 117 Ga. 902, 44 S. E. 5.

38. Regulation of sale of liquors. City of Danville v. Hatcher, 101 Va. 523, 44 S. E. 723. An ordinance fixing the rate of hire for hacks and imposing fine and imprisonment for refusal to pay such rate is within the legislative authority of a municipality authorized to regulate such conveyances. Bray v. State [Ala.] 37 So. 250.

39. An act extending the time of a private bridge company to take tolls is within the legislative power. State v. Bangor, 98 Me. 114, 56 A. 589. Authority to the water commissioners of a city to borrow money for the purpose of extending the waterworks and securing it by mortgage is within the power of the legislature. Brockenbrough v. Board of Water Com'rs, 134 N. C. 1, 46 S. E. 28. A statute prescribing the procedure for changing venue cannot be successfully attacked on the ground that it authorizes one court to control or compel action by the clerk of another. Dudley v. Birmingham Ry., L. & P. Co., 139 Ala. 453, 36 So. 700. It is within the power of the legislature to give to an appeal to the superior court, by any party to a judgment, the effect of vacating that judgment as to every other party as well as himself, and transferring the cause for trial de novo. Matz v. Arick, 76 Conn. 388, 56 A. 630. Where it is provided that counties may be subdivided into districts as the legislature directs, the legislature itself may subdivide [Const. art. 6, § 15]. Grainger County v. State [Tenn.] 80 S. W. 750. Where, by the constitution, married women are vested with the power of disposing of their personal property that power cannot be taken away from them by any act of the legislature. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784.

40. Viemeister v. White, 88 App. Div. 44, 84 N. Y. S. 712.

41. Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 P. 670. Whether proposed use is public is a judicial question in Washington. Healy Lumber Co. v. Morris, 33 Wash. 490, 74 P. 681. The question of the necessity, propriety or expediency of resorting to the exercise of the power of eminent domain, in the absence of constitutional or statutory provisions to the contrary, is legislative, and not judicial. Zircle v. Southern R. Co. [Va.] 46 S. E. 802.

42. Kadderly v. Portland [Or.] 74 P. 710.

43. State v. Guilbert [Ohio] 71 N. E. 636; Kettle v. Dallas [Tex. Civ. App.] 80 S. W. 874.

44. Kettle v. Dallas [Tex. Civ. App.] 80 S. W. 874. Under a power to levy a license tax on any business which cannot be reached by the ad valorem system, whether a business can be so reached or not is a legislative question. Gordon Bros. v. Newport News [Va.] 47 S. E. 828.

45. State v. Hammond Packing Co., 110 La. 180, 34 So. 368.

46. St. Louis S. W. R. Co. v. Grayson [Ark.] 78 S. W. 777, **citing** Boyd v. Bryant, 35 Ark. 73, 37 Am. Rep. 6; Davis v. Gaines, 48 Ark. 371, 3 S. W. 184; State v. Sloan, 66 Ark. 579, 53 S. W. 47, 74 Am. St. Rep. 106; Smith v. Grayson County [Tex. Civ. App.] 44 S. W. 921; City of Dallas v. Western Elect. Co., 83 Tex. 244, 18 S. W. 552; City of Indianapolis v. Navin [Ind.] 47 N. E. 526, 41 L. R. A. 337; Williams v. Nashville, 89 Tenn. 487, 15 S. W. 364; Ex parte Falk, 42 Ohio St. 638; State v. Powers, 38 Ohio St. 54; Clarke v. Jack, 60 Ala. 278; People v. McFadden, 81 Cal. 489, 22 P. 851, 15 Am. St. Rep. 66.

City of Oak Cliff v. State [Tex. Civ. App.] 77 S. W. 24, **citing** Owners of Land v. People, 113 Ill. 315; Wichita v. Burleigh, 36 Kan. 34, 12 P. 332; City of St. Louis v. Shields, 62 Mo. 247; Dillon, Mun. Corp. § 48.

Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571; Weston v. Ryan [Neb.] 97 N. W. 347.

47. City of Oak Cliff v. State [Tex. Civ. App.] 77 S. W. 24, **citing** Smith v. Grayson County [Tex. Civ. App.] 44 S. W. 921; City of Dallas v. Western Elect. Co., 83 Tex. 244, 18 S. W. 552; City of Indianapolis v. Navin [Ind.] 47 N. E. 526, 41 L. R. A. 337.

48. State v. Cantwell [Mo.] 78 S. W. 569.

is one for the courts to determine,[49] and in New York, the legislative determination as to what is a proper exercise of the police power is not final, but is subject to the supervision of the courts.[50] The rule that whether the exercise of a special power granted the legislature is necessary is one of legislative discretion applies to the exercise of such powers by municipalities when within the powers granted to them.[51]

The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers,[52] but the courts, by granting injunctions against ticket brokers, restraining them from dealing in nontransferable excursion tickets, do not infringe upon the powers of the legislature.[53]

The legislature may delegate to a municipality legislative authority over its own municipal affairs,[54] and may invest in it all or any portion of the state's police power.[55] There is no delegation of legislative power by an act allowing parts of different municipalities to vote whether they will join to create a new town,[56] and under a constitution providing for general laws for the incorporation of cities and towns, it is not an objectionable delegation to authorize the governor to pass upon the right of any municipality to incorporate.[57] A statute requiring a court to detach territory from a city on proof of certain facts, giving the court no discretionary powers, is not a delegation,[58] but a statute providing that landowners by petition may cause lands to be removed from the limits of a city is invalid as a delegation to the petitioner.[59]

Neither the Federal statute empowering the secretary of the interior to make forestry regulations and providing punishment for their breach,[60] nor the one conferring on the postmaster general authority to prevent the use of the mails to distribute printed matter which has been declared nonmailable, is invalid as a delegation.[61]

A law providing two methods to enforce payment of taxes and permitting the county board to pursue either method does not delegate legislative power,[62] nor does a statute granting them a discretion as to the institution of any proceedings,[63] and a statute giving the county commissioners a discretion as to which tracts of land on which are unpaid taxes, they will sell for taxes, is valid.[64]

Local option liquor laws are upheld.[65]

Legislative power is not granted by an ordinance prohibiting the use of fire crackers except on permission of the mayor,[66] nor by a statute requiring the ap-

49. State v. Hammond, 66 S. C. 219, 44 S. E. 797.

50. Tenement House Dept. v. Moeschen, 84 N. Y. S. 577.

51. Gordon Bros. v. Newport News [Va.] 47 S. E. 828.

52. Gray, J., in Spencer v. Merchant, 125 U. S. 345, 8 S. Ct. 921, 31 Law. Ed. 763; St. Louis, etc., R. Co. v. Grayson [Ark.] 78 S. W. 777.

53. Schubach v. McDonald [Mo.] 78 S. W. 1020.

54. Town council. City of Little Rock v. North Little Rock [Ark.] 79 S. W. 785. An irrigation district is a municipal corporation and as such may receive a delegation of power with respect to the purposes of its organization. Const. art. 11, § 13 prohibits delegation of public powers to private individuals. Merchants' Nat. Bank v. Escondido Irr. Dist. [Cal.] 77 P. 937.

55. City of Danville v. Hatcher, 101 Va. 523, 44 S. E. 723; Bray v. State [Ala.] 37 So. 250.

56. City of Little Rock v. North Little Rock [Ark.] 79 S. W. 785.

57. Const. Miss. § 88. City of Jackson v. Whiting [Miss.] 36 So. 611.

58. Town of Edgewater v. Liebhardt [Colo.] 76 P. 366.

59. City of Hutchinson v. Leimbach [Kan.] 74 P. 598.

60. Dent v. U. S. [Ariz.] 76 P. 455; Dastervignes v. U. S. [C. C. A.] 122 F. 30.

61. Missouri Drug Co. v. Wyman, 129 F. 623.

62. Woodrough v. Douglas County [Neb.] 98 N. W. 1092.

63. Picton v. Cass County [N. D.] 100 N. W. 711.

64. Baker v. Atchison County Com'rs, 67 Kan. 527, 73 P. 70.

65. In re O'Brien [Mont.] 75 P. 196; In re McGonnell's License [Pa.] 58 A. 615.

66. City of Centralia v. Smitt [Mo. App.] 77 S. W. 488.

proval of the executive council of the plan of building and loan associations before granting them a license.[67] The barber's license law is not invalid for failure to prescribe the necessary qualifications for license and leaving them to be determined by the examiners.[68] An excise board does not derive its powers by delegation from the council of a city by reason of the fact that the council is empowered to determine whether or not such a board is necessary.[69]

(§ 4) *C. Judicial functions.*[70]—Judicial duties may not be imposed upon nonjudicial officers,[71] nor nonjudicial duties on the judiciary.[72]

Judicial powers are not conferred on nonjudicial officers by a statute for licensing dentists that requires applicants to furnish the board satisfactory evidence of graduation from a reputable school,[73] nor by one authorizing the county auditor to assess omitted personal property after hearing,[74] nor by an act conferring on the representatives of a political party exclusive jurisdiction to determine factional disputes within the party,[75] nor one conferring the powers of a justice of the

67. Brady v. Mattern [Iowa] 100 N. W. 358.

68. State v. Briggs [Or.] 77 P. 750.

69. Schwarz v. Dover [N. J. Law] 57 A. 394.

70. See 1 Curr. L. 574.

71. Determination of right of Chinese aliens to enter U. S. In re Sing Tuck, 126 F. 386. A statute providing for the purchase by a city of a private lighting plant and for the appointment of a commission to carry out the scheme by appraisal of the property, etc., is not invalid as conferring judicial powers on the commission, since they are empowered only to do what the statute directs and are not a court. Norwich Gas & Elec. Co. v. Norwich, 76 Conn. 565, 57 A. 746. Statute providing for board to audit accounts of and adjudication of claims against disorganized county confers judicial powers, and is not validated by provision for review by courts. Fitch v. Board of Auditors of Claims [Mich.] 94 N. W. 952. Delegation of power to all officers empowered to administer oaths, to punish for contempt in not answering, refusing to be sworn, etc., is invalid. Burns v. Superior Court of San Francisco, 140 Cal. 1, 73 P. 597. The coroner is not a judicial officer in Idaho. In re Sly [Idaho] 76 P. 766. The board of aldermen of a city, while sitting on the trial of charges preferred against the mayor, is not a court, but an administrative body. Riggins v. Richards [Tex.] 77 S. W. 946.

72. Counting names to local option petition. Board of Sup'rs of Election v. Todd, 97 Md. 247, 54 A. 963. Detaching territory from a city. Town of Edgewater v. Liebhardt [Colo.] 76 P. 366. Statute placing care of court house, etc., in crier of court. Prince George's County Com'rs v. Mitchell, 97 Md. 330, 55 A. 673.

NOTE. An act delegating to courts or judges the power of making appointments to office is valid if the power to appoint or provide an appointing power is vested in the legislature, and if nonjudicial powers are not conferred on the court as a judicial body: It is said that the power of appointing or electing to office does not necessarily and ordinarily belong to either the executive, legislative or judicial department. In the absence of any constitutional provision, the legislature may control it as a part of the law making power and may delegate it to any person or persons whom it may choose. If the power has been committed to the executive, it then becomes an executive function. If to the legislature, it is legislative, and if "to any member or members of the judiciary," then it is "a judicial function or at least the function of a judge." See note to People v. Freeman [Cal.] 13 Am. St. Rep. 122, 130. In State v. Barker, 116 Iowa, 96, 89 N. W. 202, 93 Am. St. Rep. 222, the exact question arose under a law authorizing the district court to appoint trustees for city waterworks in certain classes of municipalities. The act in question conferred the appointing power upon the "district court," which is a constitutional court. Deemer, J., in an extended opinion, collects the cases supporting the proposition that nonjudicial powers cannot be conferred upon a constitutional court, and cites numerous instances of such powers. It was held accordingly that "the appointment of trustees to manage and control a system of waterworks belonging to a municipal corporation in advance of litigation or of any dispute concerning their management or control is * * * not a judicial function." In the note to State v. Barker [Iowa] 93 Am. St. Rep. 235, is cited State v. Hocker, 39 Fla. 477, 63 Am. St. Rep. 174, wherein a statute authorizing the supreme court to appoint a board of examiners to grant certificates for admission to the bar was declared unconstitutional.

The power of the judicial branch to make appointments has been generally upheld but is denied by some of the courts which hold it to be executive. 6 Am. & Eng. Enc. Law [2d Ed.] 1062.

It is suggested that the cases may be grouped thus: (1) Those where appointing power is not regarded as exclusively legislative, executive, or judicial. (2) Those where it is legislative in which class power of appointment may in a limited degree be delegated to "judges" but not to "courts." (3) Those where the power is executive in which case judicial appointment cannot be authorized. [Editor.]

73. Ex parte Whitely [Cal.] 77 P. 879.

74. Clark v. Horn, 122 Iowa, 375, 98 N. W. 148.

75. People v. District Court of Second Judicial Dist. [Colo.] 74 P. 896; Allen v. Burrow [Kan.] 77 P. 555.

peace on town clerks;[76] nor by a statute providing that town councils shall by ordinance provide a substitute police judge,[77] nor by a statute authorizing proof of a bill of exceptions by the affidavits of bystanders.[78] A statute providing for refusal of a liquor license, where a remonstrance signed by a majority of the voters of the township is presented, is not objectionable as conferring judicial power on the citizens,[79] and a statute providing a special tribunal for the settlement of disputes regarding nominations for public office and making its decisions final is not invalid as granting judicial powers to executive officers, or as impairing the original jurisdiction of the supreme court.[80] A statute providing that a probate judge cannot commit one to an insane asylum without the certificate of two reputable physicians, merely establishes a rule of evidence, and is not invalid for making the order of the court depend on the action of nonjundicial persons.[81]

Nonjudicial functions are not imposed upon a court by a statute authorizing the appointment by a justice of the peace of a person to take charge of insane persons committed by such justice,[82] nor by a statute authorizing the district court to establish and provide for the construction of ditches to drain wet and overflowed land, where the same extends into two or more counties,[83] and power to the supreme court to reduce an excessive sentence in a criminal case and impose such as the circumstances warrant does not invest the judiciary with executive power.[84] Authority to appoint county park commissioners may be conferred upon a justice of the supreme court in New Jersey,[85] and authority to appoint excise commissioners,[86] and commissioners of equalization of taxes, may be conferred upon the judge of the court of common pleas.[87] The New Jersey act for the protection of railway crossings is not invalid as conferring upon the judiciary powers belonging exclusively to the legislature.[88]

The legislature may not interfere in litigation before the courts,[89] but a statute validating previous contracts, executed without certain statutory formalities, is not an invasion,[90] and the legislature may authorize a county to pay a demand not legally enforceable, but for which it has received a valuable consideration, and which in good conscience it ought to pay, although the supreme court has enjoined its payment without deciding it to be illegal.[91] A statute requiring that all proceedings relative to an assessment for a local improvement be taken

76. Baltimore & O. R. Co. v. Whiting, 161 Ind. 228, 68 N. E. 266.

77. Town of Grayson v. Bagby, 25 Ky. L. R. 44, 74 S. W. 659.

78. Sand. & H. Dig. § 5849. Boone v. Goodlett, 71 Ark. 577, 76 S. W. 1059.

79. Hoop v. Affleck [Ind.] 70 N. E. 978.

80. Allen v. Burrow [Kan.] 77 P. 555.

81. Grinky v. Durfee [Mich.] 100 N. W. 171.

82. Board of Com'rs of Madison County v. Moore, 161 Ind. 426, 68 N. E. 905.

83. State v. Crosby [Minn.] 99 N. W. 636.

84. Palmer v. State [Neb.] 97 N. W. 235.

85. Ross v. Board of Chosen Freeholders, 69 N. J. Law, 291, 55 A. 310.

86. Schwarz v. Dover [N. J. Law] 57 A. 394.

87. New Jersey Zinc Co. v. Sussex County Board [N. J. Law] 56 A. 138.

88. Exkert v. Perth Amboy & W. R. Co. [N. J. Err. & App.] 57 A. 438.

89. Act of April, 1904, relieving county treasurers, was not a legislative interference with a judgment of a court. State v. Gibson, 4 Ohio C. C. (N. S.) 433. A statute imposing additional duties upon grade crossing commissioners previously appointed by the court is not an interference in judicial proceedings. Lancy v. Boston [Mass.] 71 N. E. 302. A statute confirming a report of grade crossing commissioners and substituting another procedure after confirmation for the one previously prescribed is not the exercise of judicial functions by the legislature. Providence, etc., Steamboat Co. v. Fall River, 183 Mass. 535, 67 N. E. 647.

90. Steger v. Traveling Men's Bldg. & Loan Ass'n, 208 Ill. 236, 70 N. E. 236; State v. Gunn [Minn.] 100 N. W. 97. The legislature has power to validate an issue of bonds invalid because of the omission of a duty that could have been omitted in the original enabling act, notwithstanding a previous adjudication of invalidity on that ground. Givens v. Hillsborough County [Fla.] 35 So. 88.

91. Act of April, 1904, authorizing payment for collecting forfeited taxes. State v. Gibson, 2 Ohio N. P. (N. S.) 221.

in vacation, except the hearing of exceptions and entry of judgment, does not violate the provision vesting judicial power.[92]

The constitutional powers of the courts are not invaded by a statute which overrules motions for new trials, unless acted upon at the same term at which made,[93] nor by one limiting the defenses that may be made to a tax sale,[94] nor by a statute forbidding divorced persons to remarry within a limited time, and providing that a decree shall not be absolutely effective for a certain period,[95] nor by statutes regulating the right to change of venue,[96] and providing for the disqualification of judges on filing an affidavit.[97] That jurisdiction in equity cases is conferred on certain courts by the constitution does not deprive the legislature of power to regulate the practice in such courts of granting preventive relief, including injunctions.[98] The indeterminate sentence law of Kansas is valid,[99] and a statute fixing a minimum but no maximum fine for an offense is not an encroachment on the judiciary by withdrawing from it power to punish the offense according to circumstances.[1] The legislature may say what is prima facie evidence of a fact, but it is not within its power to declare what shall be conclusive evidence, as that would be an invasion of the province of the judiciary.[2] The anti-trust law of Illinois, requiring answers to questions relative to its violation, and providing a penalty for failure to comply, is not an assumption of judicial power.[3] The recommendation of persons qualified for admission to the bar is a power of the supreme court of New Jersey, antedating the constitution and confirmed by it, and an attempted regulation thereof by the legislature is invalid.[4] A statute providing that election officers shall be confirmed by the court, and that they shall thereupon become officers of the court, subject to punishment for contempt, is valid.[5]

While the legislature has certain discretionary powers with the exercise of which the courts will not interfere,[6] there are certain other questions regarded as purely judicial, in regard to which the courts will brook no interference by the legislature; among these are whether the legislature in creating a new county has complied with the constitutional provision respecting the area and population of new counties and those from which the territory is taken,[7] and whether the discretion in apportioning senators and representatives vested in the legislature has been abused by being exercised in defiance of the constitutional limitations thereon.[8] Whether or not a proposed use of property to be taken is public is a judicial question under the constitution of Washington, which the court approaches unaffected by any presumption arising from the legislative assertion.[9] The question of what mortuary assessment rates fraternal insurance associations must adopt

92. Const. art. 6, § 1. City of St. Joseph v. Truckenmiller [Mo.] 81 S. W. 1116.

93. James v. Appel, 192 U. S. 129, 24 S. Ct. 222.

94. Downey v. People, 205 Ill. 230, 68 N. E. 807.

95. Durland v. Durland, 67 Kan. 734, 74 P. 274.

96. Dudley v. Birmingham Ry. L. & P. Co., 139 Ala. 453, 36 So. 700.

97. State v. Clancy [Mont.] 77 P. 312.

98. Wright v. Superior Court of Santa Clara County, 139 Cal. 469, 73 P. 145.

99. State v. Stephenson [Kan.] 76 P. 905.

1. $300 for liquor selling. State v. Constantine [Vt.] 56 A. 1101.

2. A statute providing that failure by a corporation to make certain reports and pay certain fees shall be prima facie evidence of nonuser and shall work a forfeiture of its franchise is not invalid as providing for legislative or administrative forfeiture of corporate franchises. People v. Rose, 207 Ill. 352, 69 N. E. 762.

3. People v. Butler St. Foundry & Iron Co., 201 Ill. 236, 66 N. E. 349.

4. In re Branch [N. J. Law] 57 A. 431.

5. Const. art. 6, § 18 gives the county court jurisdiction in certain specified matters and such other jurisdiction as may be provided by law. Sherman v. People [Ill.] 71 N. E. 618.

6. See ante, § 4B. "Legislative functions."

7. Const. § 63. Zimmerman v. Brooks, 25 Ky. L. R. 2284, 80 S. W. 443.

8. Brooks v. State [Ind.] 70 N. E. 980.

9. Const. art. 1, § 16. Healy Lumber Co. v. Morris, 33 Wash. 490, 74 P. 681.

may be determined by the legislature, and is not necessarily one of evidence to be weighed by the courts,[10] and in Louisiana, the question of benefit vel non to particular property arising from a local improvement is legislative and not judicial.[11]

§ 5. *Relative powers of Federal and state or other subordinate governments.*[12]—The New York statute, as construed by the courts of that state, permitting the enforcement of liens for repairs made on canal boats in that state, infringes the exclusive admiralty jurisdiction of the Federal courts.[13]

The authority of congress over bankruptcy matters is exclusive whenever it chooses to exercise it, and the bankruptcy act of 1898 ipso facto suspended the operation of all state laws on the subject.[14]

Congress may lawfully empower the courts of the states to admit qualified aliens to citizenship, and the courts of the states may legally exercise this power without legislative authority or permission from the states which created them.[15]

The provisions of a state law cannot affect rights acquired under a patent of the United States,[16] and a state statute impeding the sale of patent rights by regulations not applied to other property is invalid.[17]

§ 6. *Police power in general.*[18]—The fourteenth amendment was not intended to interfere with the exercise of police power by the states,[19] since all property and personal rights are held subject to that power,[20] but neither the legislature nor a municipality can under guise of regulation arbitrarily invade

10. State v. Fraternal Knights & Ladies [Wash.] 77 P. 500.

11. Moody & Co. v. Spotorno, 112 La. 1008, 36 So. 836.

12. See 1 Curr. L. 576.

13. N. Y. Laws 1897, c. 418, §§ 30, 35. Perry v. Haines, 191 U. S. 17, 24 S. Ct. 8.

14. In re Hall Co., 121 F. 992.

15. Const. art. 1, § 8. Levin v. U. S. [C. C. A.] 128 F. 826.

16. U. S. Consol. Seeded Raisin Co. v. Griffin & Skelley Co. [C. C. A.] 126 F. 364.

17. Negotiable paper not to be taken. Pegram v. American Alkali Co., 122 F. 1000; Union County Nat. Bank v. Ozan Lumber Co., 127 F. 207.

NOTE. Validity of a statute requiring every obligation given in consideration of the sale of a patent right to so state on its face: "The supreme court of the United States has never considered the validity or invalidity of such legislation. . The decisions of other courts are not uniform. Some of them deny and others affirm the constitutionality of such statutes; the earlier adjudications being mainly of the former class, and the later ones generally of the latter class. Among the cases in which the denial is made are Ex parte Robinson, 2 Biss. 309, Fed. Cas. No. 11,932; Helm v. First Nat. Bank, 43 Ind. 167, 13 Am. Rep. 395; Hollida v. Hunt, 70 Ill. 109, 22 Am. Rep. 63; Cranson v. Smith, 37 Mich. 309, 26 Am. Rep. 514; Crittenden v. White, 23 Minn. 24, 23 Am. Rep. 676; Woollen v. Banker, 2 Flipp. 33, Fed. Cas. No. 18,030, 22 Am. Rep. 69 note. And those making the affirmative are Breckhill v. Randall, 102 Ind. 528, 1 N. E. 362, 52 Am. Rep. 695; New v. Walker, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40; Tod v. Wick Bros., 36 Ohio St. 370; Haskell v. Jones, 86 Pa. 173; Herdic v. Roessler, 109 N. Y. 127, 16 N. E. 198; Tilson v. Gatling, 60 Ark. 114, 29 S. W. 35; Mason v. McLeod, 57 Kan. 105, 45 P. 76, 57 Am. St. Rep. 327, 41 L. R. A. 548. If necessary, other cases of each line might be cited. Ex parte Robinson, 2 Biss. 309, Fed. Cas. No. 11,932, which stands at the head of those cases declaring legislation of this kind violative of the Federal constitution, and upon whose authority most of them seem to be rested, is believed by some courts to have been overthrown by the reasoning of the supreme court of the United States in Patterson v. Kentucky, 97 U. S. 501, 24 Law. Ed. 1115; Reeves v. Carring, 51 F. 774; Breckhill v. Randall, 102 Ind. 528, 1 N. E. 362, 52 Am. Rep. 695. But a different view of that reasoning was expressed and the doctrine of Ex parte Robinson applied, in Castle v. Hutchinson, 25 F. 394. See State v. Cook, 107 Tenn. 499, 64 S. W. 720, 62 L. R. A. 174.

18. Definition of police power. People v. Lochner, 177 N. Y. 145, 69 N. E. 373; Sanders v. Com., 25 Ky. L. R. 1165, 77 S. W. 358; California Reduction Co. v. Sanitary Reduction Works [C. C. A.] 126 F. 29; Com. v. Alger, 7 Cush. [Mass.] 84; Bland v. People [Colo.] 76 P. 359. See 1 Curr. L. 576.

19. People v. Lochner, 177 N. Y. 145, 69 N. E. 373, citing many cases; Bland v. People [Colo.] 76 P. 359. Liquor traffic is not one of the privileges or immunities guarantied. City of Danville v. Hatcher, 101 Va. 523, 44 S. E. 723. Pool rooms and turf exchanges may be regulated, though the effect of the regulation may be to render the business unprofitable. City of Shreveport v. Schulsinger [La.] 36 So. 870.

20. Odd Fellows' Cemetery Ass'n v. San Francisco, 140 Cal. 226, 73 P. 987.

City of St. Louis v. Galt [Mo.] 77 S. W. 876, citing State v. Addington, 12 Mo. App. 217, 77 Mo. 110; St. Louis v. Meyrose, etc., Co., 139 Mo. 560, 41 S. W. 244, 61 Am. St. Rep. 474; State v. Beattie, 16 Mo. App. 145; City of Chillicothe v. Brown, 38 Mo. App. 609.

Internal and domestic commerce are subject to the police power of the state. In re Abel [Idaho] 77 P. 621.

personal or property rights.[21] Such laws, however, are not unconstitutional because they may incidentally operate to deprive individuals of their property or its use without compensation, or interfere with their personal liberty, nor because they may give one person a monopoly of a certain business, private rights being required to yield in such cases to the public good,[22] it being of the essence of the exercise by the legislature of its police power that citizens may, for the public good, be constrained in their conduct, even in respect to matters otherwise right.[23]

The legislative determination as to what is a proper exercise of the police power is not final, but is subject to the supervision of the courts;[24] unless, however, the court can see that the regulation has no just relation to the object which it purports to carry out, and no reasonable tendency to protect the public health, safety, comfort or morals, the decision of the legislature is conclusive.[25] In determining the question, the courts will hear evidence aliunde the regulation itself,[26] but will not consider the motives that prompted its enactment.[27] If there is a doubt as to the unreasonableness of a police ordinance, the fact that the doubt exists is a sufficient reason for the court to decline to adjudge the ordinance invalid.[28] That a statute does not in terms state that the mischief sought to be remedied by it is contrary to public morals does not prevent its being sustained on that ground, since the law must be sustained unless clearly unconstitutional.[29]

Where authorized by law, business licenses may be revoked by the municipality granting them, whenever there is reason to believe that the business is a nuisance, a menace to public health, or detrimental to peace or morals;[30] but a state or municipality cannot impose a license tax under cloak of its police power that is so far in excess of the cost of any reasonable inspection as to amount to a source of revenue.[31]

A statute modifying the rule of fellow servant as applied to the servants of railroad companies is within the police power of the state,[32] and statutes prescribing the time and manner of paying laborers are upheld in Kentucky[33] and Indiana,[34] but not in Missouri.[35]

21. And when such regulations are called in question, the test should be whether they have some relation to health and safety, and whether such is in fact the end sought to be attained. California Reduction Co. v. Sanitary Reduction Works of San Francisco [C. C. A.] 126 F. 29; People v. Lochner, 177 N. Y. 145, 69 N. E. 373; Young v. Com., 101 Va. 853, 45 S. E. 327. See 1 Curr. L. 576, n. 60.

22. Ordinance creating garbage monopoly. California Reduction Co. v. Sanitary Reduction Works [C. C. A.] 126 F. 29. Anti-sweat shop law of Maryland. State v. Hyman [Md.] 57 A. 6. A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not invalid because it may affect incidentally the exercise of some right guaranteed by the constitution. Anderson v. State [Neb.] 96 N. W. 149.

23. Control over primary elections. Hopper v. Stack, 69 N. J. Law, 562, 56 A. 1.

24. Prohibition of use of school sinks in tenement houses. Tenement House Department v. Moeschen, 84 N. Y. S. 577; Id., 89 App. Div. 526, 85 N. Y. S. 704. Use of docked horses. Bland v. People [Colo.] 76 P. 359. Prohibition of gas works in prescribed district. In re Smith [Cal.] 77 P. 180.

25. Regulation prohibiting burials within city and county of San Francisco. Odd Fellows' Cemetery Ass'n v. San Francisco, 140 Cal. 226, 73 P. 987. Regulation of building and loan associations. Brady v. Mattern [Iowa] 100 N. W. 358.

26, 27. In re Smith [Cal.] 77 P. 180.

28. In re Wilshire, 103 F. 620; Odd Fellows' Cemetery Ass'n v. San Francisco, 140 Cal. 226, 73 P. 987; Bland v. People [Colo.] 76 P. 359.

29. Bland v. People [Colo.] 76 P. 359.

30. Wallace v. Reno [Nev.] 73 P. 528.

31. Postal Teleg. Cable Co. v. Taylor, 192 U. S. 64, 24 S. Ct. 208. A showing that the cost of inspection is much less than the amount authorized to be charged is insufficient to establish the invalidity of the statute on such ground. Territory v. Denver, etc., R. Co. [N. M.] 78 P. 74.

32. Froelich v. Toledo & O. C. R. Co., 24 Ohio Circ. R. 359.

Contra, the same statute. Kane v. Erie R. Co., 128 F. 474.

33. A statute providing that laborers in mines be paid on certain days is a proper exercise of the police power. Commonwealth v. Reinecke Coal Min. Co., 25 Ky. L. R. 2027, 79 S. W. 287.

34. A statute prohibiting the assignment of wages to become due to employes, and in-

Game laws[36] and laws to protect and promote the shellfish industry, are proper.[37]

Building and loan associations may be regulated,[38] but the occupation of horseshoeing may not,[39] and a statute authorizing a public officer to bring suit to settle private rights to the use of water is unauthorized.[40] Taking possession by a special administrator of a living person's property on the supposition that he is dead is not a valid exercise of the police power,[41] neither is the building of a dock at the expense of an abutting owner,[42] nor a statute restricting the fees of employment agents.[43]

Public health[44] may be conserved by statutes and ordinances regulating the practice of certain professions, trades, and occupations having a direct relation thereto, such as dentistry[45] and plumbing.[46] Regulations of dairies,[47] cemeteries,[48] gas works,[49] smoke[50] and weeds,[51] are sustained.[52] A requirement that children shall be vaccinated as a condition of attending the public schools is proper.[53] Statutes limiting the hours of labor in certain occupations not considered healtbful are upheld,[54] as are statutes prohibiting the manufacture of clothing under certain unsanitary conditions.[55] The pollution by riparian owners of streams used for domestic water supply may be prohibited,[56] and a statute requiring physicians to keep without compensation a registry of births and deaths at

validating any agreement whereby an employer is relieved from weekly paying to his employe his full wages, is within the police power. International Text Book Co. v. Weissinger, 160 Ind. 349, 65 N. E. 521.

35. A statute prohibiting payment of wages in anything but lawful money or tokens redeemable in money cannot be sustained as an exercise of the police power. State v. Missouri Tie & Timber Co. [Mo.] 80 S. W. 933.

36. Hornbeke v. White [Colo. App.] 76 P. 926.

37. Brooks v. Tripp, 135 N. C. 159, 47 S. E. 401.

38. Brady v. Mattern [Iowa] 100 N. W. 358.

39. People v. Beattie, 89 N. Y. S. 193.

40. Bear Lake County v. Budge [Idaho] 75 P. 614.

41. Clapp v. Houg [N. D.] 98 N. W. 710. Such a proceeding has been enacted and applied in Indiana, but its validity seems to have been unquestioned. See Romy v. State [Ind. App.] 67 N. E. 998.

42. Lathrop v. Racine, 119 Wis. 461, 97 N. W. 192.

43. Ex parte Dickey [Cal.] 77 P. 924.

44. See 1 Curr. L. 577, n. 69.

45. State v. Chapman, 69 N. J. Law, 464, 55 A. 94. Legislation prescribing regulations under which only those persons possessing proper qualifications shall be admitted to the practice of any profession or calling requiring special skill is a valid exercise of the police power of the state for the protection of the public against unskillful and incompetent persons. Dentists. Ex parte Whitley [Cal.] 77 P. 879.

46. State v. Justus, 90 Minn. 474, 97 N. W. 124.

47. A prohibition of unauthorized dairies within city limits is a proper police regulation. Fischer v. St. Louis, 194 U. S. 361, 24 S. Ct. 673.

48. A prohibition of future burials in a city, even in established cemeteries, may be valid. Odd Fellows' Cemetery Ass'n v. San Francisco, 140 Cal. 226, 73 P. 987.

49. Ordinance limiting the district within which gas works may be erected is proper. Dobbins v. Los Angeles, 139 Cal. 179, 72 P. 970. In California, the manufacture of gas may be regulated, but not prohibited, the constitution giving gas companies the right to use streets [Const. art. 11, § 19]. In re Smith [Cal.] 77 P. 180.

50. Regulations of the smoke nuisance in cities are valid. City of St. Paul v. Haugbro [Minn.] 100 N. W. 470.

51. A statute declaring certain noxious weeds nuisances and compelling their destruction is a valid exercise. State v. Boehm [Minn.] 100 N. W. 95. Constitutional and statutory powers to abate and prevent nuisances authorize a city to provide by ordinance against allowing growth of weeds on city lots. City of St. Louis v. Galt [Mo.] 77 S. W. 876.

52. NOTE. Power to regulate the sale of food products: The following may be stated as the general propositions governing this subject: First, the legislature cannot forbid or wholly prevent the sale of a wholesome article of food. Second, legislation intended and reasonably adapted to prevent an article being manufactured in imitation or semblance of a well known article in common use, and thus imposing upon consumers or purchasers, is valid. Third, in the interest of public health the legislature may declare articles of food, not complying with a specified standard, unwholesome, and forbid their sale. People v. Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; People v. Arensberg, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483; People v. Kilber, 106 N. Y. 321, 12 N. E. 795; People v. Girard, 145 N. Y. 105, 39 N. E. 823. See People v. Biesecker, 169 N. Y. 53, 61 N. E. 990, 57 L. R. A. 178.

53. Viemeister v. White, 88 App. Div. 44, 84 N. Y. S. 712; French v. Davidson [Cal.] 77 P. 663.

which they have attended professionally, and deposit a copy thereof is within the police power.[57] A statute prohibiting the sale of bottles and other empty packages without consent of the owner is not within the police power, being designed for the protection of the owner rather than the public.[58]

Public safety is a proper ground for the exercise of the state's police power, either by the legislature or municipalities, and so long as the regulations have a fair tendency to accomplish a useful purpose, they will be sustained.[59] Ordinances prohibiting the explosion of fire crackers,[60] and compelling the removal or sanding of ice and snow on sidewalks, are proper,[61] but the police power of a city will not extend to the prohibition of the erection of a brick church with a slate roof therein, merely because the people erecting it, being negroes, are likely to conduct their services in a noisy manner.[62] Railroads may be required to fence their right of way,[63] and to carry streets over their tracks by bridges.[64] As a measure conducive to public safety, the "stealing" or "attempting to steal" rides on railroad trains may be made penal, irrespective of whether a "ride" may be the subject of larceny or not.[65] Reasonable regulation of bill boards is proper in New Jersey,[66] but in New York, their erection on unimproved or vacant land cannot be prohibited.[67] In states where irrigation is necessary, the legislature has a right to enact laws to prevent the waste of water so long as vested rights are upheld.[68] Primary elections may be regulated.[69] A prohibition against selling articles of provisions temporarily, while a fair is in progress within one mile thereof without consent of the managers, is within the police power.[70]

Public morals.—There is no question but that the state in the exercise of its police powers can absolutely or conditionally, as it sees fit, prohibit the sale or manufacture of intoxicating liquors within its territory,[71] or throw around the

54. Mines, smelters and ore mills. In re Boyce [Nev.] 75 P. 1. Persons employed beneath ground in mines. State v. Cantwell [Mo.] 78 S. W. 569. Bakery employes. People v. Lochner, 177 N. Y. 145, 69 N. E. 373, citing many cases. For a note on the power of the state to limit the hours of labor, see 65 L. R. A. 33.

55. The sweat-shop statute of Maryland has a substantial relation to the public health, so as to be within the scope of the police power. State v. Hyman [Md.] 57 A. 6.

56. Sprague v. Dorr [Mass.] 69 N. E. 344.

57. Acts 1873-4, p. 13, c. 134. Commonwealth v. McConnell, 25 Ky. L. R. 552, 76 S. W. 41.

58. Horwich v. Walker-Gordon Laboratory Co., 205 Ill. 497, 68 N. E. 938.

Contra: Commonwealth v. Anselvich [Mass.] 71 N. E. 790.

59. Statute prescribing no test of efficiency, arbitrarily says who may and who may not labor at a given employment, fails to provide for safety of the public and unequally affects property of same kind and use, is unconstitutional. C., etc., R. Co. v. State, 4 Ohio C. C. (N. S.) 126.

60. City of Centralia v. Smith [Mo. App.] 77 S. W. 488.

61. State v. McMahon, 76 Conn. 97, 55 A. 591.

62. Boyd v. Board of Councilmen of Frankfort, 25 Ky. L. R. 1311, 77 S. W. 669.

63. Sanger v. Chesapeake & O. R. Co. [Va.] 45 S. E. 750. A statute requiring railroad companies to fence their rights of way, and allowing the adjoining owner after notice to fence and recover from the company its cost and reasonable attorney's fees, is within the police power. Terre Haute & L. R. Co. v. Salmon, 161 Ind. 131, 67 N. E. 918.

64. A statute empowering a city to require railroad companies to bridge their tracks at street crossings, being referable to the police power, applies to railroads whose tracks were constructed before the street was built or the city incorporated, and to the case of tracks laid in a cut 20 feet below the grade of the crossing street. City of Harriman v. Southern R. Co. [Tenn.] 82 S. W. 213.

65. Pressley v. State, 118 Ga. 315, 45 S. E. 395.

66. City of Passaic v. Paterson Bill Posting, A. & S. Painting Co. [N. J. Law] 58 A. 343; Bill Posting Sign Co. v. Atlantic City [N. J. Law] 58 A. 342.

67. People v. Green, 85 App. Div. 400, 83 N. Y. S. 460.

68. Nash v. Clark [Utah] 75 P. 371.

69. Hopper v. Stack, 69 N. J. Law, 562, 56 A. 1.

70. State v. Reynolds [Conn.] 58 A. 755.

71. Bowman v. State, 38 Tex. Cr. R. 14, 40 S. W. 796, 41 S. W. 635; Sweeney v. Webb [Tex. Civ. App.] 76 S. W. 766; Mugler v. Kan., 123 U. S. 623, 8 S. Ct. 273; Rippey v. Tex., 193 U. S. 504, 24 S. Ct. 516; August Busch & Co. v. Webb, 122 F. 655; City of Danville v. Hatcher, 101 Va. 523, 44 S. E. 723.

NOTE. Police power; acts of discretion: The plaintiff applied for a writ of mandamus to compel the city council of New Orleans to give him a barroom license. The council refused the license on the ground that there were already enough barrooms in the neighborhood. Held, a writ of mandamus should

traffic such safeguards of the morals of the people as to the state may seem best.[72] Likewise, pool rooms and turf exchanges may be regulated.[73] Regulations facilitating the detection of larceny,[74] and impeding its commission,[75] and the commission of frauds, are proper.[76] A law may be valid as an inspection law, though its purpose is not to improve the quality of the goods, but to aid in the detection and punishment of crime or fraud against the industry,[77] and though interstate shipments are to be inspected.[78] Anti-trading stamp laws have been held invalid as an exercise of the police power on the ground that they prohibit schemes in the nature of a lottery, there being no element of chance in the trading stamp scheme,[79] neither is it valid on the ground that the scheme is unlawful, as demoralizing to legitimate business.[80] A statute prohibiting the mutilation of the national flag is a proper exercise,[81] and a statute prohibiting the use of unregistered docked horses is valid, though it permits the use of those registered within 90 days after the passage of the act.[82]

§ 7. *Liberty of contract and right of property.*[83]—The liberty guarantied by the constitution is not restricted to mere freedom from imprisonment, but embraces religious, civil, political and personal rights, including the right of each citizen to purchase, hold and sell property in the same manner and to the same

he issued, for the refusal of the license is an arbitrary and unjust exercise of the police power. State v. New Orleans [La.] 36 So. 999.

It lies within the police power of a state to regulate the liquor traffic, even to prohibiting it altogether. Crowley v. Christensen, 137 U. S. 86. In the absence of express legislative authority, the licensing board is vested with no discretion and so must issue a license to anyone complying with the statutory requirements. City of Rome v. Duke, 19 Ga. 93; Henry v. Barton, 107 Cal. 535. Where discretion is granted by the legislature, however, it cannot be arbitrarily exercised. Appeal of Kelminski, 164 Pa. 231. But the decision of the licensing board must be the outcome of an examination and a consideration of the relevant facts as to the requirements of the public and the suitableness of the place. United States v. Douglass, 19 D. C. 99; Perry v. Salt Lake City, 7 Utah, 143. If the board has acted in good faith, although its decision is apparently wrong, the court will not interfere. Lanck's Appeal, 2 Pa. Super. Ct. 53. While the refusal of a license to one applicant and the issuing of it to another, without a valid reason for the discrimination, is an abuse of discretion (Ex parte Levy, 43 Ark. 42, 51 Am. Rep. 550; People v. Commissioners, 4 Misc. [N. Y.] 330), a refusal on the ground that there are a sufficient number of licensed barrooms in the neighborhood is a sound exercise of discretion and a valid use of the police power (People v. Board of Excise, 16 N. Y. S. 798; Perry v. Salt Lake City, 7 Utah, 143; Hillsboro v. Smith, 110 N. C. 417; People v. Murray, 38 N. Y. S. 177).—IV. Columbia Law Rev. 511.

72. Exclusion of women from saloons. Cronin v. Adams, 192 U. S. 108, 24 S. Ct. 219. Hours of closing, and prohibition of screens. City of Danville v. Hatcher, 101 Va. 523, 44 S. E. 723.

73. City of Shreveport v. Schlusinger [La.] 36 So. 870. An ordinance prohibiting the transmission of telegraphic messages to the operators of pool rooms is a valid exercise of the police power. City of Louisville v. Wehmoff, 25 Ky. L. R. 1924, 79 S. W. 201.

74. A police regulation, the effect of the enforcement of which is to require a junk dealer to record and report to the police the purchase of a sheet of copper, a metal bell, a water spigot, a lead pipe, and a gas jet, for all of which he paid 28 cents. is not unreasonable on its face, but it is competent for a dealer charged with violating its provisions to show its unreasonableness. Ullman v. District of Columbia, 21 App. D. C. 241. Mere assertion by the accused that it is impossible to keep a record of such articles is insufficient to show that the regulation was unreasonable. Id.

75. A statute making it a crime to transport seed cotton by night in a certain county is valid. Jenkins v. State, 119 Ga. 430, 46 S. E. 629.

76. A statute making sales of stocks of goods by merchants not in the usual course of trade fraudulent where not surrounded by certain formalities is not a proper exercise of the police power. Block v. Schwartz [Utah] 76 P. 22.

Contra: Walp v. Mooar, 76 Conn. 515, 57 A. 277; Squire & Co. v. Tellier [Mass.] 69 N. E. 312; Miller v. Crawford [Ohio] 71 N. E. 631.

77, 78. Laws 1901, p. 96, c. 45, providing for the inspection of the hides of slaughtered animals. Territory v. Denver, etc., R. Co. [N. M.] 78 P. 74. Laws 1901, p. 96, c. 45, requiring the hides of slaughtered animals to be kept 30 days for inspection, for which a charge of 10 cents a hide is required to be paid by the owner, is a valid exercise of the police power. Id.

79. State v. Dodge [Vt.] 56 A. 983. See, also, Young v. Com., 101 Va. 853, 45 S. E. 327.

80. State v. Dodge [Vt.] 56 A. 983. Laws 1899, p. 298, c. 60, §§ 1, 2. State v. Ramseyer [N. H.] 58 A. 958.

81. People v. Van De Carr, 91 App. Div. 20, 86 N. Y. S. 644.

82. Bland v. People [Colo.] 76 P. 359.

83. See 1 Curr. L. 577.

extent as every other citizen.[84] Liberty of contract cannot be arbitrarily invaded. Thus a statute that attempts to define a sale of liquor and fix its locus regardless of the known rules of law is beyond the legislative power,[85] and the Iowa statute prohibiting fire insurance companies doing business in the state from agreeing with each other as to rates, etc., on pain of forfeiture of their license, is invalid;[86] but a similar statute of South Dakota was held by the Federal court of that circuit to be unimpeachable by a foreign company because, having the power to refuse a foreign company license for any or no reason, the company could not question the reason.[87] Statutes limiting public officers and contractors doing public work to the employment of citizens,[88] providing for the payment of laborers in lawful money only,[89] making it unlawful to discharge an employe for membership in a labor union,[90] and restricting the fees chargeable by employment agents are invalid as an undue interference with the right of private contract;[91] but a statute prohibiting the assignment of future wages and invalidating contracts, whereby employers are relieved from weekly payments in full, is not an unreasonable restraint upon the liberty of the citizen,[92] and the employment contracts of sailors are exceptional, and an act of congress nullifying advance payments to seamen on account of wages to be earned does not interfere with the right of contract guar-

84. Block v. Schwartz [Utah] 76 P. 22.

85. James v. State [Tex. Cr. App.] 78 S. W. 951.

86. Code, § 1754. Greenwich Ins. Co. v. Carroll, 125 F. 121. Of a similar statute in South Dakota. Hartford Fire Ins. Co. v. Perkins, 125 F. 502.

87. Hartford Fire Ins. Co. v. Perkins, 125 F. 502.

88. City of Chicago v. Hulbert, 205 Ill. 346, 68 N. E. 786.

NOTE. Right of legislature to fix by statute compensation which a city must pay for labor or other service: Cases collated by Dowling, J.: The liberty to contract, subject only to such limitations as may be imposed by the legislature in the legitimate exercise of the police power for the public welfare is not only secured by the constitution of nearly every state, but is undoubtedly within the protection of the Federal constitution and covered by the 14th amendment thereof [U. S. Const. art. 14, § 1]. People v. Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; Hooper v. California, 155 U. S. 648, 662, 15 S. Ct. 207, 39 Law. Ed. 297, 303; Bailey v. People, 190 Ill. 28, 60 N. E. 98, 83 Am. St. Rep. 116, 54 L. R. A. 838; Kuhn v. Detroit, 70 Mich. 537, 38 N. W. 470; People v. Rosenberg, 138 N. Y. 410, 416, 34 N. E. 285; People v. Coler, 166 N. Y. 1, 21, 59 N. E. 716, 52 L. R. A. 814; Palmer v. Tingle, 55 Ohio St. 423, 45 N. E. 813. Corporations both private and public are entitled to the benefit of this provision for the preservation and protection of their right to make contracts affecting their local affairs. In re Parrott, 6 Sawy. 349, 1 F. 481; Butchers' Union, etc., Co. v. Crescent City, etc., Co., 111 U. S. 746, 764, 4 S. Ct. 652, 28 Law. Ed. 585, 589; Blythe v. State, 4 Ind. 525; Howard County v. Pollard, 153 Ind. 371, 55 N. E. 87; Smyth v. Ames, 169 U. S. 466, 18 S. Ct. 418, 42 Law. Ed. 819. If the legislature has the right to fix the minimum rate of wages to be paid for common labor, then it has the power to fix the maximum rate. And if it can regulate the price of labor, it may also regulate the prices of flour, fuel, merchandise and land. But these are powers which have never been conceded to the legislature, and their exercise by the state would be utterly inconsistent with our ideas of civil liberty. Among the most odious and oppressive laws ever enacted by the English parliament, in the worst of times, were the statutes of labor of Hen. VI. and Edw. III. These enactments fixed a maximum rate of wages for the laboring man, prohibited him from seeking employment outside of his own county, required him to work for the first employer who demanded his services, and punished every violation of the statute with severe penalties. In the very nature and constitution of things, legislation which interferes with the operation of natural and economic law defeats its own object, and furnishes to those whom it professes to favor few of the advantages expected from its provisions. Statutes attempting to regulate such wages have been before the courts of many states and in nearly every instance have been held unconstitutional. People v. Coler, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 841; State v. Norton, 5 Ohio N. P. 183; Commonwealth v. Perry, 155 Mass. 117, 28 N. E. 1126, 31 Am. St. Rep. 533, 14 L. R. A. 325; Ramsey v. People, 142 Ill. 380, 32 N. E. 364, 17 L. R. A. 853; Jones v. Great Southern Fireproof Hotel Co., 79 F. 477; State v. Julaw, 129 Mo. 163, 31 S. W. 781, 50 Am. St. Rep. 443, 29 L. R. A. 257; Shaver v. Pennsylvania Co., 71 F. 931; Atkins v. Randolph, 31 Vt. 237; Palmer v. Tingle, 55 Ohio St. 423, 45 N. E. 813; Cleveland v. Clements Bros. Constr. Co., 67 Ohio St. 197, 65 N. E. 885, 93 Am. St. Rep. 670, 59 L. R. A. 775. See Street v. Varney Electrical Supply Co., 160 Ind. 338, 66 N. E. 895, 61 L. R. A. 154, 160.

89. Kelleyville Coal Co. v. Harrier, 207 Ill. 624, 69 N. E. 927; State v. Missouri Tie & Timber Co. [Mo.] 80 S. W. 933.

90. Coffeyville Vitrified Brick & Tile Co. v. Perry [Kan.] 76 P. 848.

91. Ex parte Dickey [Cal.] 77 P. 924.

92. International Text Book Co. v. Weissinger, 160 Ind. 349, 65 N. E. 521.

anteed by the fourteenth amendment.[93] An act making the breach of labor contracts or leases a penal offense is unconstitutional.[94] Liberty of contract is not invaded by a statute limiting the hours bakers shall work.[95] Whether the right of contract is infringed by a statute prohibiting the offer of real property for sale without written authority is undetermined in New York,[96] and the cases conflict on the validity of a statute invalidating as to creditors, sales of stocks of goods made otherwise than in due course of trade, unless conforming to certain regulations.[97] The constitutional guaranty of liberty of contract is not infringed by the enforcement of the Federal anti-trust act of July 2, 1890,[98] nor the anti-trust law of Kansas.[99] Liberty of contract is not interfered with by a mechanic's lien statute, giving those who furnish the contractor a lien regardless of the state of his account with the owner,[1] especially where he does not comply with the statute in making his contract,[2] and a statute prescribing a form of contract which must be used by mechanics and builders to entitle them and the property owners to the benefits of the act, but which does not prohibit them from using any other form, is valid;[3] but a statute requiring all who contract about erecting buildings to secure their contracts by bonds to enure to the benefit of all who furnish materials to be used in the building is unreasonable.[4]

Right of property[5] is not violated by an ordinance prohibiting the growth of noxious weeds on one's city lots,[6] nor by an ordinance requiring a garbage contract to be let, and forbidding all others but the contractor from transporting garbage through the streets,[7] nor by a statute making it unlawful to have in possession property used for gambling,[8] nor by a law declaring a spite fence a nuisance,[9] nor by a rule prohibiting riparian owners from polluting streams,[10] nor by a law prohibiting the use of unregistered docked horses,[11] nor by a statute requiring that the carcasses of calves shipped within the state be tagged.[12] A railroad company is not deprived of its right reasonably to control and manage its property by a state statute requiring it to establish stations on its line, where the state commission designates,[13] and a statute compelling every railroad to carry passengers between points on its line for a single fare is a proper exercise of the police power, and not invalid as tending to impair the salability of the railroad property or diminish its business.[14] The New Jersey statute regulating the practice of dentistry and prohibiting unlicensed persons is a reasonable regulation and does

93. Peterson v. Eudora, 190 U. S. 169, 23 S. Ct. 821, 47 Law. Ed. 1002.

94. Violates the 14th amendment to the constitution of the United States, and also the constitution of Alabama. Construing and holding Acts 1900-01, p. 1208, unconstitutional. Toney v. State [Ala.] 37 So. 332, citing Peonage Cases, 123 F. 671.

95. People v. Lochner, 177 N. Y. 145, 69 N. E. 373.

96. Pen. Code, § 640d. Infringed. Cody v. Dempsey, 86 App. Div. 335, 13 Ann. Cas. 322, 83 N. Y. S. 899; Grossman v. Caminez, 79 App. Div. 15, 79 N. Y. S. 900.

Contra: Charles v. Arthur, 84 N. Y. S. 284; Whiteley v. Terry, 83 App. Div. 197, 82 N. Y. S. 89. See 1 Curr. L. 578, n. 83.

97. Valid. Squire & Co. v. Tellier [Mass.] 69 N. E. 312. See, also, Walp v. Mooar, 76 Conn. 515, 57 A. 277.

Contra: Block v. Schwartz [Utah] 76 P. 22; Miller v. Crawford [Ohio] 71 N. E. 631.

98. Northern Securities Co. v. U. S., 193 U. S. 197, 24 S. Ct. 436.

99. State v. Jack [Kan.] 76 P. 911.

1. Ohio statute. Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 24 S. Ct. 576.

2, 3. Chicago Lumber Co. v. Newcomb [Colo. App.] 74 P. 786.

4. San Francisco Lumber Co. v. Bibb, 139 Cal. 192, 72 P. 964; Snell v. Bradbury, 139 Cal. 379, 73 P. 150.

5. See 1 Curr. L. 578.

6. Const. art. 2, § 4. City of St. Louis v. Galt [Mo.] 77 S. W. 876.

7. People v. Gardner [Mich.] 100 N. W. 126.

8. People v. Adams, 176 N. Y. 351, 68 N. E. 636.

9. Horan v. Byrnes [N. H.] 54 A. 945.

10. Sprague v. Dorr [Mass.] 69 N. E. 344.

11. Const. art. 2, § 3. Bland v. People [Colo.] 76 P. 359.

12. People v. Bishopp, 89 N. Y. S. 709.

13. Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 24 S. Ct. 396.

14. Blume v. Interurban St. R. Co., 41 Misc. 171, 83 N. Y. S. 989.

not take nor destroy property, though a calling, business or profession chosen and followed is property.[15] The manufacture of artificially colored oleomargarine may be prohibited, and hence may be taxed by a free government without the violation of fundamental rights.[16] A law prohibiting the possession during the closed season of trout taken outside the state is void as depriving citizens of the rights of property and liberty guarantied by the constitution.[17] A statute prohibiting the use of trading stamps is unconstitutional, as depriving a citizen of the means of acquiring and possessing property.[18]

Private property cannot be taken for private use,[19] nor for a public and private use,[20] and any legislation authorizing the diversion to private use of property acquired for public use is void.[21] A use is public when it will promote the public interest, and tend to develop the resources of the state,[22] but the condemnation of private lands for a logging road is for a private use and cannot be authorized in Washington.[23] A railway may exercise the right of eminent domain in acquiring property necessary for the construction of a branch track to reach a private industrial enterprise, if the track is to be used by the company in furtherance of its individual business.[24]

Aliens cannot acquire land by purchase in Washington.[25]

§ 8. *Freedom of speech and of the press.*[26]—The clause of the Federal constitution prohibiting the abridgment of freedom of speech and the press deals with the speech of persons in the United States, and has no bearing upon the question what persons shall be allowed to enter therein,[27] whence the anarchist exclusion act is not invalid as abridging the exercise of religion or freedom of speech.[28] Neither is this guaranty violated by a statute that prohibits the distribution of written or printed hand bills in public places.[29]

§ 9. *Personal and religious liberty.*[30]—The thirteenth, unlike the fourteenth and fifteenth amendments, operates directly upon persons as well as upon the states, and it is within the powers of congress to enact a law protecting citizens in their rights guarantied thereby against the acts of individuals, as well as of

15. State v. Chapman, 69 N. J. Law, 464, 55 A. 94.
16. McCray v. U. S., 195 U. S. 27, 24 S. Ct. 769.
17. People v. Booth & Co., 42 Misc. 321, 86 N. Y. S. 272.
18. Laws 1899, p. 298, c. 60, §§ 1, 2. State v. Ramseyer [N. H.] 58 A. 958.
19. Nash v. Clark [Utah] 75 P. 371. Const. Mo. art. 2, § 20. Statute granting power to purchase or erect lighting plant to furnish public and private consumers is valid. State v. Allen, 178 Mo. 555, 77 S. W. 868. A cemetery operated by a private corporation is not a public use. Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n [Conn.] 58 A. 467. An ordinance prohibiting growths of weeds on a city lot does not. City of St. Louis v. Gait [Mo.] 77 S. W. 876. A taking of land for a private road, open to the public, is not objectionable. Madera County v. Raymond Granite Co., 139 Cal. 128, 72 P. 915. Considering several sections of the constitution together, it is determined that private property shall not be taken for private use, without consent of the owner, except in cases where this power is conferred upon corporations by the general assembly, and then only upon just compensation. Boyd v. Winnsboro Granite Co., 66 S. C. 433, 45 S. E. 10. Whether the use is public or private is a judicial question in Washington. Healy Lumber Co. v. Morris, 33 Wash. 490, 74 P. 681. Presumptions favor the determination of the legislature. Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 A. 1001.
20. Gaylord v. Sanitary Dist. of Chicago, 204 Ill. 576, 68 N. E. 522.
21. Sanborn v. Van Duyne, 90 Minn. 215, 96 N. W. 41.
22. Taking water to irrigate a farm is for a public use in this sense. Nash v. Clark [Utah] 75 P. 371. In Maine, the taking of private property under the mill act is sustained on the ground that such taking is an exercise of the power of eminent domain. Ingram v. Maine Water Co., 98 Me. 566, 57 A. 893.
23. Healy Lumber Co. v. Morris, 33 Wash. 490, 74 P. 681.
24. Zircle v. Southern R. Co. [Va.] 45 S. E. 802.
25. Easement acquired by eminent domain is prohibited [Const. art. 2, § 33]. State v. Superior Court for Stevens County, 33 Wash. 542, 74 P. 686.
26. See 1 Curr. L. 578.
27. United States v. Williams, 126 F. 253.
28. Act Mch. 3. 1903. United States v. Williams, 126 F. 253.
29. Anderson v. State [Neb.] 96 N. W. 149.
30. See 1 Curr. L. 578.

states;[31] and the guaranty against involuntary servitude is infringed by the Alabama statute preventing laborers who have broken a contract of employment from obtaining employment elsewhere.[32] The statute providing for the arrest and summary trial of persons within the United States on affidavit that they are Chinese is unconstitutional.[33]

A statute prohibiting the use of the national flag as an advertisement for merchandise,[34] and the anti-trading stamp law of Virginia, are denounced as an invasion of personal liberty.[35]

The Texas local option law is not an interference with the religious practices of the Jews in regard to wine drinking, the prohibition being against the sale of liquors and not against the use of wine in worship,[36] and a statute making it a misdemeanor to fail to furnish medical attendance to a minor is not unconstitutional as interfering with the belief of those who rely on prayer.[37] The constitution and by-laws of a mutual benefit society, providing for forfeiture of membership for failure to remain communicants of a certain church, do not interfere with liberty of conscience or freedom of worship.[38]

"Imprisonment for debt"[39] is accomplished by the Alabama statute making it unlawful for a laborer to hire to another employer after breach of a contract of hire, or for another employer to hire such a laborer[40] but not by imprisonment under an ordinance fixing a rate of hire for hacks, etc., and imposing a fine or imprisonment for refusal to pay such rate.[41] A statute punishing as common cheats and swindlers those who obtain money or value in advance on a contract of hiring without intent to perform the service contracted for is valid.[42]

Right to choose employment.[43]—A person's business, occupation or calling is aside from the chattels or money employed therein, property, within the meaning of the law, and entitled to its protection,[44] and a person living under the Federal

31. United States v. Morris, 125 F. 322.

32. Act Mch. 1, 1901. Peonage Cases, 123 F. 671. See, also, Toney v. State [Ala.] 37 So. 332.

33. Sec. 13 of the Act of Sept. 13, 1888, c. 1015, 25 Stat. 479. United States v. Coe, 128 F. 199.

34. People v. Van De Carr, 91 App. Div. 20, 86 N. Y. S. 644.

35. Young v. Commonwealth, 101 Va. 853, 45 S. E. 327. See, also, State v. Dodge [Vt.] 56 A. 983; State v. Ramseyer [N. H.] 58 A. 958.

36. Sweeney v. Webb [Tex. Civ. App.] 76 S. W. 766.

37. Const. art. 1, § 3. People v. Pierson, 176 N. Y. 201, 68 N. E. 243.

NOTE. Constitutionality of statutes requiring the furnishing of medical attendance to minors: Freedom from restraint on the exercise of religion does not permit one to break the law because his unlawful acts were in the exercise of his religion, or according to the dictates of his conscience. Reynolds v. U. S., 98 U. S. 166. The peace and safety of the state involve the protection of the lives and health of its children, as well as the obedience to its laws. The law of nature, as well as the common law, devolves upon the parents the duty of caring for their young in sickness and in health, and of doing whatever may be necessary for their care, maintenance, and preservation, including medical attendance; and any omission to do this is a public wrong, which the state under its police powers may prevent. The legislature is the sovereign power of the state. It may enact laws for the maintenance of order by prescribing a punishment for those who transgress. Barker v. People, 3 Cow. [N. Y.] 686-704, 15 Am. Dec. 322; Lawton v. Steele, 119 N. Y. 226-236, 23 N. E. 878, 16 Am. St. Rep. 813, 7 L. R. A. 134; Thurlow v. Massachusetts, 5 How. [U. S.] 504-583, 12 Law. Ed. 256-291. Hence, though religious beliefs differ as to the correct mode of healing the sick, the legislature may prescribe the mode to be practiced on minors, and a court of law has nothing to do with these variances in religious beliefs, and have no power to determine which is correct. See People v. Pierson, 176 N. Y. 201, 98 Am. St. Rep. 666, 63 L. R. A. 187.

Adults: Statement by the Hon. Judge Cullen. As to an adult (except possibly in the case of a contagious disease which would affect the health of others), I think there is no power to prescribe what medical treatment he shall receive, and that he is entitled to follow his own election, whether that election be dictated by religious belief or other consideration. See concurring opinion in People v. Pierson, 176 N. Y. 201, 98 Am. St. Rep. 666, 63 L. R. A. 187.

38. Barry v. Order of the Catholic Knights, 119 Wis. 362, 96 N. W. 797.

39. See 1 Curr. L. 578.

40. Act Mch. 1, 1901. Peonage Cases, 123 F. 671.

41. Bray v. State [Ala.] 37 So. 250.

42. Lamar v. State [Ga.] 47 S. E. 598.

43. See 1 Curr. L. 579.

44. Gray v. Building, Trades & Council [Minn.] 97 N. W. 663.

constitution is at liberty to adopt and follow such lawful industrial pursuits as he sees fit, and has a right to the full exercise and enjoyment of his faculties in a lawful pursuit or calling in a proper manner, subject only to such restraints as are necessary for the common welfare.[45] Under this rule, the anti-trading stamp act of Vermont is invalid,[46] and a statute providing for the licensing and examining of horseshoers is an arbitrary interference with personal liberty and private property.[47] Likewise a license tax on peddlers, exempting certain classes, the classification being founded on no reasonable distinction, is invalid,[48] but a license tax on transient merchants is upheld.[49] In Pennsylvania, a combination among workmen to prevent others from obtaining work or to prevent an employer from employing others by threats of a strike violates the letter and spirit of the Declaration of Rights.[50]

§ 10. *Equal protection of laws.*[51]—The fourteenth and fifteenth amendments of the Federal constitution have reference solely to actions of the state and not to any action of private individuals, though it is immaterial whether the state acts by its legislative, executive or judicial authority.[52] Whence the discriminatory execution of a valid law may invade constitutional rights,[53] and equal protection is denied a person of the African race, whenever persons of his race are for that reason excluded from the grand jury finding an indictment against him.[54] Equal protection of the laws requires that the law shall have equality of operation, but that does not mean equality of operation on persons merely as such, but on persons according to their relations.[55] The discrimination contemplated by the clause is a discrimination between persons coming within the same class,[56] and equal protection is not denied by treating different classes of persons in a different way, if it be a way not inappropriate to the class, and the class be set apart from others on reasonable grounds,[57]

45. State v. Dodge [Vt.] 56 A. 983.

46. State v. Dodge [Vt.] 56 A. 983. See, also, Young v. Com., 101 Va. 853, 45 S. E. 327.

47. People v. Beattie, 89 N. Y. S. 193.

48. State v. Whitcom [Wis.] 99 N. W. 468.

49. Levy v. State, 161 Ind. 251, 68 N. E. 172.

50. Erdman v. Mitchell, 207 Pa. 79, 56 A. 327.

51. See 1 Curr. L. 579.

52. United States v. Reese, 92 U. S. 214; United States v. Cruikshank, 92 U. S. 542; Virginia v. Rives, 100 U. S. 313; Ex parte Virginia, 100 U. S. 339; Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18; United States v. Harris, 106 U. S. 629, 1 S. Ct. 601; James v. Bowman, 190 U. S. 127, 23 S. Ct. 678; United States v. Morris, 125 F. 322.

53. Arbitrary refusal of building permit to negroes desiring to build church. Boyd v. Board of Councilmen, 25 Ky. L. R. 1311, 77 S. W. 669.

54. Rogers v. Alabama, 192 U. S. 226, 24 S. Ct. 257. Failure to draw negroes on the grand and petit juries, in a county where one-fourth the population eligible is of that race, is a discrimination against a negro on trial. Smith v. State [Tex. Cr. App.] 77 S. W. 453. Merely that no negro was drawn on the grand or petit jury does not show discrimination against a negro on trial for a crime, there must be an omission to draw them because of their race. Thompson v. State [Tex. Cr. App.] 77 S. W. 449.

55. State v. Fraternal Knights & Ladies [Wash.] 77 P. 500, citing many cases.

56. Ex parte Hernan [Tex. Cr. App.] 77 S. W. 225. See 1 Curr. L. 579, n. 5.

57. Norwich Gas & Elec. Co. v. Norwich, 76 Conn. 565, 57 A. 746; Cotting v. Kan. City Stock Yards Co., 183 U. S. 79, 111, 22 S. Ct. 30, 46 Law. Ed. 92. A statute allowing mileage to county officers at different rates in different classes of counties is not objectionable in the absence of a showing that it will result in unequal reimbursement, considering the difference in cost of travel in the respective counties. Henry v. Thurston County, 31 Wash. 638, 72 P. 488.

NOTE. Equality in laws affecting different classes: Section 1, art. 14, of the United States constitution, providing that "no state shall make or enforce any law which shall * * * deny to any person within its jurisdiction the equal protection of the laws," does not preclude state legislation applicable only to a particular class of persons, if there be a reasonable ground for treating such class of persons differently from the general mass. That constitutional provision was so construed by the supreme court of the United States early after its adoption and the construction steadfastly adhered to up to the present time. Soon Hing v. Crawley, 113 U. S. 703, 5 S. Ct. 730, 28 Law. Ed. 1145; Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 Law. Ed. 923; Missouri P. R. Co. v. Humes, 115 U. S. 512, 6 S. Ct. 110, 29 Law. Ed. 463; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 8 S. Ct. 1161, 32 Law. Ed. 107; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 10 S. Ct. 533, 33 Law. Ed. 892. The rules of classification which generally prevail are as follows: First, all classification must be based

nor is there any inhibition against prescribing different penalties for different acts or different classes of the same act.[56]

Equal protection of the laws is not denied by rules and regulations of the department of the interior, prohibiting the grazing of sheep on forest reservations, except under special circumstances,[59] nor by a statute limiting the fees a justice of the peace may receive for criminal cases from the county in any one month,[60] nor by a statute requiring vaccination of children as a condition of their attendance on the public schools,[61] nor by a law prohibiting the use of unregistered docked horses,[62] nor by the provision of the civil service law that veteran volunteer firemen in public service shall be entitled to notice and a hearing before discharge, other public servants not being so protected,[63] nor by a statute operating only on special charter cities,[64] nor by a statute annexing territory to a municipality and providing sanitary regulations differing from those in force in the original city,[65] nor by the homestead association law of Louisiana, by which it is provided that a sale of a homestead for cash to the association and a resale on credit to the original owner gives rise to a vendor's lien.[66] That a local option statute discriminates in favor of those who vote for prohibition will not invalidate it.[67] An ordinance compelling the removal or sanding of snow and ice on sidewalks is not invalid for inequality as applying only to owners of land,[68] but an ordinance giving the council arbitrary power to refuse permission to erect buildings is void.[69] A statute providing for the purchase by a city of a private lighting plant does not deny the equal protection of the laws, the duty being cast upon all municipalities in similar circumstances and owing equally to all corporations similarly situated.[70] The Arkansas statute making void negotiable instruments not showing on their face that they were given for a patented article, but excepting dealers selling patented articles in the usual course of business, is invalid as a denial of the equal protection of the laws.[71]

Inspection fees and licenses.[72]—A license law is not invalid because operative only on pawnshops, loan offices and second-hand stores,[73] and a license or privilege tax imposed on foreign corporations as a condition of doing business in the state is valid.[74] A license tax on liquor dealers is unobjectionable,[75] and a statute licensing

upon substantial distinctions which make one class really different from another. Second, the classification adopted must be germane to the purposes of the law. Third, the classification must not be based upon existing conditions only; it must not be so constituted as to prevent additions to the number included within the class. Fourth, to whatever class a law may apply, it must apply equally to each member thereof. Johnson v. Milwaukee, 88 Wis. 333, 60 N. W. 270; Julien v. Model Bldg., L. & I. Ass'n, 116 Wis. 79, 92 N. W. 561, 61 L. R. A. 668. Whether any particular classification made by the legislature satisfies these requisites is primarily a legislative question. The field covered by its discretionary power in the matter is very broad. It is, of course, not above judicial control, but it is safe from restraint so long as any reasonable ground can be discovered to support it. The court can apply no test to the matter except the constitutional test. That of the mere wisdom of the measure is exclusively for legislative consideration. See Julien v. Model Bldg., L. & I. Ass'n, 116 Wis. 19, 92 N. W. 561, 61 L. R. A. 668.

58. Ex parte Hernan [Tex. Cr. App.] 77 S. W. 225.

59. Dastervignes v. United States, 122 F. 30.

60. Herbert v. Baltimore County Com'rs, 97 Md. 639, 55 A. 376.

61. Viemeister v. White, 88 App. Div. 44, 84 N. Y. S. 712.

62. Bland v. People [Colo.] 76 P. 359.

63. People v. Folks, 89 App. Div. 171, 85 N. Y. S. 1100.

64. Ulbrecht v. Keokuk [Iowa] 97 N. W. 1082.

65. Toney v. Macon, 119 Ga. 83, 46 S. E. 80.

66. American Homestead Co. v. Karstendiek, 111 La. 884, 35 So. 964.

67. Rippey v. Texas, 193 U. S. 504, 24 S. Ct. 516; August Busch & Co. v. Webb, 122 F. 655.

68. State v. McMahon, 76 Conn. 97, 55 A. 591.

69. Boyd v. Board of Councilmen, 25 Ky. L. R. 1311, 77 S. W. 669.

70. Norwich Gas & Elec. Co. v. Norwich, 76 Conn. 565, 57 A. 746.

71. Union County Nat. Bank v. Ozan Lumber Co., 127 F. 206.

72. See 1 Curr. L. 580.

73. City of Butte v. Paltrovich [Mont.] 75 P. 521.

74. State v. Hammond Packing Co., 110 La. 180, 34 So. 368.

75. Parsons v. People [Colo.] 76 P. 666.

transient merchants is valid.[76] An ordinance licensing oil dealers, except such as deal in oils on which the license tax has been paid, does not deny equal protection.[77]

Taxation.[78]—The fourteenth amendment was not intended to compel the states to adopt iron rules of equal taxation, or subvert the systems of the states pertaining to general and specific taxation,[79] neither does it forbid the classification of property or persons for the purposes of taxation, but merely compels the equal application of the law to all members of the same class, when the classification is based upon reasonable ground, and not an arbitrary selection.[80] A statute taxing the personal property of a domestic corporation in the state of its domicile, regardless of where the property is situated, does not deny the equal protection of the laws though the property is also taxed at its actual situs,[81] and this, notwithstanding the property is composed of railway cars, and domestic railroad companies are not taxed on cars in use outside the state, a different mode of taxation having been adopted for railroads.[82] A taxpayer whose tax is correct is not denied the equal protection of the laws by an exemption of certain other property from the tax, either wholly or in part,[83] and an inheritance tax law, exempting charitable institutions, is not invalid, though construed to exempt only such institutions as are organized within the state;[84] but taxation by a state board of equalization of the property of railroad companies at its full cash value, while other property is assessed at only 80 per cent., denies the companies the equal protection of the law.[85] Equal protection of the laws is not denied where a tax is levied on debts due from solvent debtors, on the theory that debts due from insolvent debtors are favored,[86] and an excise tax which operates uniformly throughout the state and bears uniformly upon all persons standing in the same category, is unobjectionable.[87] A statute making an agent liable for the taxes on funds he holds for investment does not deny him the equal protection of the law.[88] The cigarette tax of Iowa, of similar nature to the mulct liquor tax, is not invalid for failure to similarly provide that its payment will bar prosecutions.[89]

Local improvements.[90]—Equal protection is not denied by assessment by the front foot and not according to benefits.[91]

Regulations of business, trades and professions.[92]—A general police regulation, subject to exceptions, does not, as to those not favored by the exception, deny equal protection of the law,[93] and the "four-mile law" of Tennessee, relative to liquor sales,

76. Levy v. State, 161 Ind. 251, 68 N. E. 172.

77. Standard Oil Co. v. Spartanburg, 66 S. C. 37, 44 S. E. 377.

78. See 1 Curr. L. 580.

79. Cass Farm Co. v. Detroit, 181 U. S. 396, 21 S. Ct. 644, 645; Glozza v. Tiernan, 148 U. S. 657, 13 S. Ct. 721. A vehicle tax is not void because exempting street cars, automobiles and the carriages of nonresidents. Kersey v. Terre Haute, 161 Ind. 471, 68 N. E. 1027.

80. Tax on packing houses is valid. Lacy v. Armour Packing Co., 134 N. C. 567, 47 S. E. 53, citing many cases. The legislature may provide one method for determining the value of the property of corporations of one class, and a different method for determining the value of property of a different class. Taxation of capital stock of certain corporations by State Board of Equalization, others by local assessor, held constitutional. The Hub v. Hanberg [Ill.] 71 N. E. 826.

81, 82. Commonwealth v. Union Refrigerator Transit Co. [Ky.] 80 S. W. 490.

83. Missouri v. Dockery, 191 U. S. 165, 24 S. Ct. 53; State v. Fleming [Neb.] 97 N. W. 1063. A law taxing savings banks, but exempting religious, charitable and beneficial institutions, is not invalid, though the charter of the bank recites that it is enacted for a beneficent purpose, i. e. encouraging habits of industry and economy. People v. Miller, 84 App. Div. 168, 82 N. Y. S. 621.

84. Humphreys v. State [Ohio] 70 N. E. 957.

85. Louisville & N. R. Co. v. Coulter, 131 F. 282.

86. Kingsley v. Merrill [Wis.] 99 N. W. 1044.

87. State v. Guilbert [Ohio] 71 N. E. 636.

88. Heinz v. Board of Equalization, 121 Iowa, 445, 96 N. W. 967.

89. Hodge v. Muscatine County, 121 Iowa, 482, 96 N. W. 968.

90. See 1 Curr. L. 581.

91. Ross v. Kendall [Mo.] 81 S. W. 1107.

92. See 1 Curr. L. 581.

93. Prohibition of dairies in city limits. Fischer v. St. Louis, 194 U. S. 361, 24 S. Ct. 673; Schefe v. St. Louis, 194 U. S. 373, 24 S. Ct. 676.

is not invalid because it excepts sales by manufacturers in wholesale packages or quantities.[94] A local option law prohibiting the sale of liquors, except upon the prescription of a physician, denies no one the equal protection of the law,[95] but a limitation of the right to prescribe to those physicians making the practice of medicine their "principal calling" is invalid.[96] It has been held that a Federal right is invaded by a statute prohibiting fire insurance companies from agreeing with others as to rates, agents' compensation, manner of transacting business, etc., on pain of forfeiture of license;[97] on the other hand, a similar statute was held unimpeachable by a foreign corporation, on the ground that as the state has the power to entirely withhold its permission to do business in the state, its grounds for withholding are not questionable.[98] A retaliatory or reciprocal tax on foreign insurance companies is not invalid.[99] Statutes regulating the hours of employment for bakery employes,[1] and workers in mines, smelters and ore reduction mills, are unobjectionable,[2] and a law requiring that 8 hours shall constitute a day's work on public work does not, as applied to one contracting for such work after its passage, deny him the equal protection of the laws.[3] A statute providing for payment of wages only in lawful money, but excepting farmers and their servants, is invalid.[4] A statute prohibiting the adulteration of foods, but providing an exception in favor of coloring pure butter, is not objectionable.[5] A statute licensing peddlers, but exempting certain specified classes, the classification being founded upon no reasonable basis, is invalid.[6] The anti-trust law of Kansas does not deny the equal protection of the laws.[7]

Operation of railroads.[8]—Railroads are recognized as proper subjects of classification and many statutes applicable only to them are upheld. Thus a law directed solely against railroad companies and imposing a penalty for allowing certain weeds to go to seed upon their rights of way is not regarded as denying them the equal protection of the laws,[9] nor is a statute rendering a railroad company liable for damage by fire, communicated from its right of way,[10] and a statute requiring railroad companies, and no other carriers, to redeem unused tickets and parts of tickets, under penalty, is valid.[11] A statute modifying the rule of fellow-servant as to certain of the servants of railway companies does not deny railroads the equal protection of the law, because not applying to other employers,[12] nor does it bear unjustly on servants because not extended to all the servants of railway companies.[13] A statute penalizing railroad companies for failure to trace shipments, though of no extra-territorial effect, does not for that reason deny railroads within the state the equal protection of the laws,[14] nor is equal protection denied by a judgment for damages against a railroad by the owner of land abutting on a street it has occupied necessarily, in

94. Webster v. State [Tenn.] 82 S. W. 179.
95. Sweeney v. Webb [Tex. Civ. App.] 76 S. W. 766.
96. August Busch & Co. v. Webb, 122 F. 655.
97. Iowa Code, §§ 1754, 1755. Greenwich Ins. Co. v. Carroll, 125 F. 121.
98. Hartford Fire Ins. Co. v. Perkins, 125 F. 502.
99. State v. Insurance Co. [Neb.] 99 N. W. 36.
1. People v. Lochner, 177 N. Y. 145, 69 N. E. 373. Statutes limiting hours of labor. People v. Orange C. R. Construction Co. [N. Y.] 65 L. R. A. 33, note.
2. In re Boyce [Nev.] 75 P. 1.
3. Atkin v. Kansas, 191 U. S. 207, 24 S. Ct. 124.
4. Kellyville Coal Co. v. Harrier, 207 Ill. 624, 69 N. E. 927.
Contra: Johnson, Lytle & Co. v. Spartan Mills [S. C.] 47 S. E. 695.
5. People v. Hinshaw [Mich.] 97 N. W. 758.
6. State v. Whitcom [Wis.] 99 N. W. 468.
7. State v. Jack [Kan.] 76 P. 911.
8. See 1 Curr. L. 582.
9. Missouri, etc., R. Co. v. May, 194 U. S. 267, 24 S. Ct. 638; International & G. N. R. Co. v. Shelton [Tex. Civ. App.] 81 S. W. 794.
10. Brown v. Carolina Midland R. Co. [S. C.] 46 S. E. 283.
11. Texas & P. R. Co. v. Mahaffey [Tex. Civ. App.] 81 S. W. 1047.
12. Froelich v. Toledo & O. C. R. Co., 24 Ohio Circ. R. 359. See **contra** as to the same statute, Kane v. Erie R. Co., 128 F. 474.
13. Froelich v. Toledo & O. C. R. Co., 24 Ohio Circ. R. 359.
14. Southern R. Co. v. Ragsdale, 119 Ga. 773, 47 S. E. 179.

making a change of grade ordered by the legislature.[15] A statute requiring the separation of the races in street railway cars is valid,[16] and equal protection is not denied by a regulation of the rate of fare on a street railroad not shown to be unreasonable.[17]

Criminal laws and procedure.[18]—If a statute against pool selling be so construed as to permit the owner of a building to sell pools therein, and punish him if he permitted another to do so, it would not for that reason violate the fourteenth amendment.[19] A statute punishing bettors or buyers of pools and bookmakers or pool sellers with unequal severity is not for that reason invalid,[20] and that one of three conspirators was sentenced to seven while the others were sentenced to ten years' imprisonment is not a denial of equal protection of the laws.[21] A law punishing unlicensed peddlers except civil war veterans is discriminative,[22] but that a statute, making possession of gambling paraphernalia prima-facie evidence of guilt, excludes police officers from its operation, is not a denial of equal protection.[23] The Michigan local option law is not invalid because it discriminates between druggists doing business in local option counties, as compared with those doing business elsewhere,[24] and a jury commission law for a single county does not deny equal protection to one convicted by a jury drawn thereunder.[25] A statute punishing male persons living with or accepting the earnings of prostitutes is unobjectionable.[26] The Alabama act penalizing laborers and renters for breaking contracts of employment denies them the equal protection of the laws.[27] A statute making the possession of registered bottles and other empty packages prima facie unlawful is unconstitutional, as authorizing conviction of such persons on evidence that would not warrant the conviction of others.[28]

Civil remedies and proceedings.[29]—The fourteenth amendment safeguards fundamental rights and not the mere forum which a state may see proper to designate for their enforcement and protection,[30] but this clause confirms to citizens of other states the same right to maintain suits against foreign corporations that citizens of the state of the former have,[31] though a statute of limitations, operative only on instruments executed outside the state, is valid.[32]

A law exempting funds due from mutual benefit societies from seizure on execution or other process, and not extending the same protection to other life insurance companies, is not based on an unreasonable classification,[33] nor does an exception of certain named societies of similar nature from its provisions invalidate it.[34]

A statute requiring employes suing their employers for negligent injuries to

15. Knapp & C. Mfg. Co. v. New York, etc., R. Co., 76 Conn. 311, 56 A. 512.
16. State v. Peareon, 110 La. 387, 34 So. 575.
17. San Antonio Traction Co. v. Altgelt [Tex. Civ. App.] 81 S. W. 106.
18. See 1 Curr. L. 583. Quare, whether the juvenile court act of Pennsylvania does not violate the fourteenth amendment. Mansfield's Case, 22 Pa. Super. Ct. 224.
19. Ex parte Hernan [Tex. Cr. App.] 77 S. W. 225.
20. Ex parte Hernan [Tex. Cr. App.] 77 S. W. 225.
21. Howard v. Fleming, 191 U. S. 126, 24 S. Ct. 49.
22. State v. Shedrol, 75 Vt. 277, 54 A. 1081.
23. Adams v. New York, 192 U. S. 585, 24 S. Ct. 372.
24. People v. Shuler [Mich.] 98 N. W. 986.
25. People v. Gardner [Mich.] 100 N. W. 126.
26. State v. Graham, 34 Wash. 81, 74 P. 1058.
27. Act Mch. 1, 1901. Peonage Cases, 123 F. 671. See Toney v. State [Ala.] 37 So. 332.
28. Horwich v. Walker-Gordon Laboratory Co., 205 Ill. 497, 68 N. E. 938.
Contra: Commonwealth v. Anselvich [Mass.] 71 N. E. 790.
29. See 1 Curr. L. 584.
30. Statute providing for change of venue where one party is a corporation having more than 50 stockholders. Cincinnati St. R. Co. v. Snell, 193 U. S. 30, 24 S. Ct. 319.
31. Kidd v. New Hampshire Traction Co. [N. H.] 56 A. 465.
32. Higgins v. Graham, 143 Cal. 131, 76 P. 898.
33. Supreme Lodge United Benev. Ass'n v. Johnson [Tex. Civ. App.] 77 S. W. 661; Id. [Tex.] 81 S. W. 18.
34. Supreme Lodge United Benev. Ass'n v. Johnson [Tex. Civ. App.] 77 S. W. 661.

give notice thereof, if applied to the common-law rights of action in existence before its passage, is invalid, as a denial of the equal protection of the law to the servant,[35] and a statute abrogating the rules of fellow-servant, and assumption of risk in favor of the employes of corporations, denies to corporations the equal protection of the law.[36]

A statute dispensing with the prolix method of pleading in actions on insurance policies is not invalid because relating only to insurance.[37]

A statute authorizing the recovery of actual damages only against the publishers of newspapers for libel, in case retraction has been published, is not invalid as a denial of equal protection of the laws.[38]

A statute extending to plaintiffs in mechanic's lien cases a right to recover attorney's fees not extended plaintiffs in other cases, nor the defendants in these cases, is invalid in Kansas and Colorado.[39] Such a statute has been sustained, however, in Idaho and several other states,[40] and a statute allowing suitors in proceedings under a special statute to recover their full costs is not unconstitutional, because suitors under other statutes are denied that right.[41] A statute authorizing an allowance for counsel fees to successful complainants in chancery cases does not deny defendants the equal protection of the laws.[42]

§ 11. *Privileges and immunities of citizens.*[43]—That section of the Federal constitution guarantying to citizens of each state all privileges and immunities of citizens of the several states operates only on discriminations made by the state in its capacity of a sovereign, not upon the acts of individuals;[44] it extends no protection to aliens or citizens of the United States who are citizens of a territory,[45] and a corporation is not a "citizen" within this section.[46] The privileges and immunities guarantied by it are only such as are lawful in their character, and it does not extend to matters that are against public policy and subject to police regulation,[47] neither does it confer on nonresidents any other or greater privileges and immunities than are granted to residents of a state.[48] A state statute extending a certain special privilege to citizens of the state is not for that reason invalid, the constitution being effective to extend it also to the citizens of the several states.[49] A civil right is a right accorded to every member of a district, community or nation, while a political right is a right exercisable in the administration of government.[50] A stat-

35. Rosin v. Lidgerwood Mfg. Co., 89 App. Div. 245, 86 N. Y. S. 49.

36. Ballard v. Mississippi Cotton Oil Co., 81 Miss. 507, 34 So. 533, 62 L. R. A. 407; Yazoo, etc., R. Co. v. Schraag [Miss.] 36 So. 193.

37. Hersey v. Northern Assur. Co., 75 Vt. 441, 56 A. 95.

38. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

39. Atkinson v. Woodmansee [Kan.] 74 P. 640; Davidson v. Jennings, 27 Colo. 187, 60 P. 354, 83 Am. St. Rep. 49, 48 L. R. A. 340.

40. Thompson v. Wise Boy Mill. & Min. Co. [Idaho] 74 P. 958, and cases cited.

41. La Goo v. Seaman [Mich.] 99 N. W. 393.

42. McMullin v. Doughty [N. J. Eq.] 55 A. 284.

43. See 1 Curr. L. 584.

44. Const. art. 4, § 2. United States v. Morris, 125 F. 322, citing Paul v. Virginia, 8 Wall. [U. S.] 168; Ward v. Maryland, 12 Wall. [U. S.] 418; Slaughterhouse Cases, 16 Wall. [U. S.] 36; Blake v. McClung, 172 U. S. 239, 19 S. Ct. 165.

45. In re Johnson's Estate, 139 Cal. 532, 73 P. 424.

NOTE. Equality of privileges and immunities does not belong to citizens of territories: This interstate citizenship is only granted to citizens of a state, not to citizens of the United States. Prentiss v. Brennan, 2 Blatchf. 162, Fed. Cas. No. 11,385; United States v. Cruikshank, 92 U. S. 542, 23 Law. Ed. 588; Picquet v. Swan, 5 Mason, 35, Fed. Cas. No. 11,134. It is plain, therefore, that unless a law deprives the inhabitants of a territory of some property or vested right, or of personal liberty, without due process of law, congress has plenary power of legislation over them. Wharton Crim. Law, § 461; Sutherland, Stat. Constr. § 23; Thompson v. Utah, 170 U. S. 349, 18 S. Ct. 620, 42 Law. Ed. 1066; Cole v. Cunningham, 133 U. S. 107, 10 S. Ct. 269, 33 Law. Ed. 538. See McFadden v. Blocker [Ind. T.] 58 L. R. A. 894.

46. Aetna Ins. Co. v. Brigham [Ga.] 48 S. E. 348.

47. Act punishing male persons living with or accepting earnings of prostitutes. State v. Graham, 34 Wash. 81, 74 P. 1058.

48. Brown v. Birmingham [Ala.] 37 So. 173.

49. In re Johnson's Estate, 139 Cal. 532, 73 P. 424.

ute providing for substituted service on nonresidents does not violate,[51] and there is no discrimination against nonresidents in a law that gives them four weeks' notice of a tax sale by publication, and gives residents 20 days' personal notice, though the general statutes of the state provide a longer notice to nonresidents in ordinary proceedings.[52] Nonresidents are not discriminated against by a statute providing for the enforcement of claims against nonresident decedents by attachment of their property in the state, against nonresident executors,[53] nor by a license tax on foreign corporations levied as a condition of doing business within the state,[54] nor by a statute of limitations operative only on instruments executed outside the state,[55] nor by a state statute providing that local improvements shall not be made if a majority of resident property owners shall protest.[56] It is not one of the privileges of a citizen of the United States to bring an action in any state against any person upon whom service can be made therein, regardless of their or his residence, or of the nature of the cause of action, or where it arose.[57] The legislature of a state has power to prohibit nonresidents from hunting or fishing within its territory, license so to do not being one of the privileges or immunities of citizens,[58] and the right to organize trade unions, though a fundamental right of a citizen of all free governments, is not a right, privilege or immunity granted or secured to citizens of the United States by its constitution or laws, but is left solely to the protection of the states.[59]

§ 12. *Grants of special privileges and immunities; class legislation.*[60]—Whether or not classifications of municipalities are reasonable or unjust and arbitrary frequently arises with reference to whether statutes infringe the provision against local or special laws. This question will be fully treated in the topic Statutes q. v. Reference is made below to some of the cases bearing on this question.[61]

It is not the purpose of the fourteenth amendment to prevent the states from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed.[62] A law which is uniform in its operation is not rendered invalid merely because of the limited number of persons who will be affected by it.[63] Special privi-

50. Equity will not interpose for the protection of political rights. Winnett v. Adams [Neb.] 99 N. W. 681.

51. Guenther v. American Steel Hoop Co., 25 Ky. L. R. 795, 76 S. W. 419.

52. Johnson v. Hunter, 127 F. 219.

53. Manley v. Mayer [Kan.] 75 P. 560.

54. State v. Hammond Packing Co., 110 La. 180, 34 So. 368.

55. Higgins v. Graham, 143 Cal. 131, 76 P. 898.

56. Field v. Barber Asphalt Pav. Co., 194 U. S. 618, 24 S. Ct. 784.

57. Collard v. Beach, 87 N. Y. S. 884.

58. Brooks v. Tripp, 135 N. C. 159, 47 S. E. 401.

59. United States v. Moore, 129 F. 630.

60. See 1 Curr. L. 585.

61. Statute operating on cities and towns whose boundaries are not more than one mile apart, there being but two. City of Little Rock v. North Little Rock [Ark.] 79 S. W. 785. Statute operative only on counties having more than a certain population, there being but two. Ex parte Loving, 178 Mo. 194, 77 S. W. 508. An act operative on only cities of the first class, there being but one. City of Louisville v. Wemhoff, 26 Ky. L. R. 995, 76 S. W. 876. A statute applying only to counties expending $7,000 for court house purposes is invalid. Hetland v. Norman County Com'rs, 89 Minn. 492, 95 N. W. 305. Cities of 10,000 which have owned waterworks, but have sold them, reserving the right to repurchase. Thomas v. City of St. Cloud, 90 Minn. 477, 97 N. W. 125. A jury law applicable to counties of 200,000 population and over is not arbitrary. State v. Ames [Minn.] 98 N. W. 190. A bill providing that it shall apply to all counties having a population of from 120,000 to 150,000 people by the last or any succeeding Federal census is not unconstitutional, as class legislation and partial laws. Archibald v. Clark [Tenn.] 82 S. W. 310.

62. Field v. Barber Asphalt Pav. Co., 194 U. S. 618, 24 S. Ct. 784. Classification and discrimination among citizens, if reasonable, is a recognized legislative prerogative. As to what are and what are not residence portions under the Brannock local option law. City of Columbus v. Jeffrey, 2 Ohio N. P. (N. S.) 85.

63. Law affecting sales by retail dealers of their stocks otherwise than in due course of trade. Walp v. Mooar, 76 Conn. 515, 57 A. 277. A statute authorizing the consolidation of gas companies generally is not special, be-

leges are granted by an act relieving certain registered law students from the necessity of a scholastic examination,[64] but not by a statute providing for the purchase by the city of a private lighting plant,[65] nor by a statute authorizing the publication of a compilation of the statutes of the state and purchasing sufficient copies thereof for the use of the state,[66] nor by a statute authorizing a particular cemetery association to apply for the condemnation of land belonging to another,[67] nor by a law exempting a building and loan association from the operation of the usury laws.[68] The Nebraska irrigation law, while giving the appropriator an exclusive right to the water so long as he applies it to a beneficial use, and thereby creating a monopoly, does not grant such a privilege as to conflict with the constitution,[69] and the homestead association law of Louisiana, by which it is provided that a sale of a homestead to the association for cash and a resale to the original owner for credit shall give rise to a vendor's lien, confers no special or exclusive right or privilege on such associations.[70] A waiver of a forfeiture of street railway's franchise for failure to build is not the granting of a new right within a provision against granting privileges.[71]

An exception of sidewalks from a local improvement act is not class legislation,[72] nor is a statute permitting a majority of the landowners along a public highway to initiate proceedings to improve it;[73] neither is a statute prescribing different mileage fees for county officers of counties of different classes,[74] nor a statute repealing the charter of the state agricultural society, and erecting a state department of the same name.[75] But a proclamation excluding cattle imported from all other states for breeding and dairy purposes without a certificate of nonreaction to a tuberculin test, but allowing free importation for slaughter or other purposes, is invalid,[76] and so is an ordinance declaring that particular switch tracks are a nuisance and ordering their removal.[77]

Licenses, and privilege and occupation taxes.[78]—Statutes providing for the licensing of occupations as a means of regulation do not confer arbitrary power on the licensing boards to grant or refuse licenses at will, but require them to grant licenses to all who comply with the reasonable regulations imposed. In this sense, they cannot be said to confer special privileges on licensees.[79] A

cause it may be taken advantage of only by the companies of a certain city. People v. People's Gaslight & Coke Co., 205 Ill. 482, 68 N. E. 950. A vaccination statute is not class legislation merely because operative only on school children. French v. Davidson [Cal.] 77 P. 553.

64. In re Branch [N. J. Law] 57 A. 431.

65. Not conferred on owner of plant. Norwich Gas & Elec. Co. v. City of Norwich, 76 Conn. 565, 57 A. 746.

66. Not on the publisher. Marsh v. Stonebraker [Neb.] 98 N. W. 699.

67. Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n [Conn.] 58 A. 467.

68. Construing Rev. St. of Ohio, § 3836. Brooklyn Bldg. & L. Ass'n Co. v. Desnoyers, 4 Ohio C. C. (N. S.) 337. The Ohio statute (§ 3836), declaring that dues, fines, premiums or other assessments imposed by building and loan associations shall not be deemed usury, although in excess of the legal rate of interest, is not unconstitutional. Spies v. Southern Ohio Loan & Trust Co., 4 Ohio C. C. (N. S.) 103.

69. Comp. St. 1903, c. 93a, art. 2, § 28. Farmers' Irr. Dist. v. Frank [Neb.] 100 N. W. 236.

70. American Homestead Co. v. Karstendick, 111 La. 884, 35 So. 954.

71. Newport News & O. P. R. & Elec. Co v. Hampton Roads R. & Elec. Co. [Va.] 47 S. E. 839.

72. Gage v. Chicago, 203 Ill. 26, 67 N. E. 477.

73. Bowlin v. Cochran, 161 Ind. 485, 69 N. E. 153.

74. Henry v. Thurston County, 31 Wash. 638, 72 P. 488.

75. Berman v. Minnesota State Agricultural Soc. [Minn.] 100 N. W. 732.

76. Pierce v. Dillingham, 203 Ill. 148, 67 N. E. 846.

77. It should be by general ordinance, applying to all tracks similarly situated. People v. Blocki, 203 Ill. 363, 67 N. E. 809.

78. See 1 Curr. L. 584, n. 87 et seq.

79. Barbers. State v. Briggs [Or.] 77 P. 750. Dentists. Ex parte Whitely [Cal.] 77 P. 879. Exemption of persons engaged in the practice at the time of its enactment is not fatal. Id. A statute providing for the licensing of transient merchants applying to residents and nonresidents alike. Levy v. State, 161 Ind. 251, 68 N. E. 172. The sailors' boarding-house law of Oregon does not authorize the board to arbitrarily refuse to

license tax law, though applicable only to cities of a certain class, is not for that reason invalid, because persons engaged in the same business in cities of other classes are not subject to the tax.[80] An exception in an act licensing peddlers, in favor of those dealing in nursery stock and agricultural products, is not class legislation,[81] nor is a statute licensing automobiles, but excepting from its provisions those kept in stock in course of manufacture, for sale, repair, or storage,[82] nor is an ordinance imposing a vehicle tax, but exempting street cars, automobiles and the vehicles of nonresidents.[83] A privilege tax discriminating between banks and other money lenders is not unjust,[84] neither is an ordinance taxing oil dealers, except such as deal in oils on which the tax has been paid, unlawfully discriminative,[85] but a law requiring journeymen plumbers to pass an examination not required of master plumbers, and limited in its operation to cities of 10,000 and upward having a system of waterworks, is arbitrary.[86]

Taxation.—A statute providing for the assessment and taxation of fugitive traders coming into the state after the general assessment has been made, and taxing them at the same rate other property pays for the current year, is unobjectionable,[87] but a proviso allowing a rebate to such as remain until the next regular assessment is levied is invalid.[88] An inheritance tax law exempting charitable institutions is valid, though construed to exempt only those organized within the state.[89] A provision in the constitution of a state forfeiting tracts of land of 1,000 acres and over for nonpayment of tax, and not applying to tracts of smaller area, is invalid.[90]

Regulations of business, trades and professions.—The exemption of building and loan and homestead associations from the anti-trust law does not render it invalid, there being an essential difference between these associations and other corporations,[91] but an exception in favor of combinations to raise wages grafted by way of amendment on the act is invalid.[92] A statute imposing other and more onerous regulations on unincorporated building and loan associations than upon incorporated ones is not objectionable.[93] Regulations restrictive of the practice of dentistry[94] and medicine are valid.[95] A statute attempting to restrict runners for wholesale houses to taking orders from merchants only is invalid,[96] and the anti-trading stamp law of Vermont is an unlawful interference with the rights of citizens.[97] A statute prohibiting the sale of bottles and other empty packages without consent of the owner is special legislation,[98] though a

license any applicant, hence is not class legislation, nor does it tend to create a monopoly. White v. Mears [Or.] 74 P. 931; White v. Holman [Or.] 74 P. 933.

80. Livery stable keepers. Ex parte Jackson [Cal.] 77 P. 457.

81. In re Abel [Idaho] 77 P. 621; People v. De Blaay [Mich.] 100 N. W. 598; In re Watson [S. D.] 97 N. W. 463.

Contra: State v. Whitcom [Wis.] 99 N. W. 468.

82. People v. MacWilliams, 91 App. Div. 176, 86 N. Y. S. 357.

83. Kersey v. Terre Haute, 161 Ind. 471, 68 N. E. 1027.

84. Cowart v. City Council of Greenville [S. C.] 45 S. E. 122.

85. Standard Oil Co. v. Spartanburg, 66 S. C. 37, 44 S. E. 377.

86. State v. Justus, 90 Minn. 474, 97 N. W. 124.

87, 88. Nathan v. Spokane County [Wash.] 76 P. 521.

89. Humphreys v. State [Ohio] 70 N. E. 957.

90. King v. Hatfield, 130 F. 564.

91, 92. People v. Butler St. Foundry & Iron Co., 201 Ill. 236, 66 N. E. 349.

93. Brady v. Mattern [Iowa] 100 N. W. 358.

94. Gothard v. People [Colo.] 74 P. 890; Ex parte Whitely [Cal.] 77 P. 879.

95. The California medical practitioner's law, providing for qualifications equal to those required in a certain school, does not discriminate in favor of that school. Ex parte Gerino [Cal.] 77 P. 166. And no unlawful privilege or immunity is granted by a statute granting to medical societies the power to appoint the members of the State Board of Medical Examiners. Id.

96. In re Abel [Idaho] 77 P. 621.

97. State v. Dodge [Vt.] 56 A. 983. Cf. Young v. Com., 101 Va. 853, 45 S. E. 327.

98. Const. art. 4, § 22. Horwich v. Walker-Gordon Laboratory Co., 205 Ill. 497, 68 N. E. 938.

statute prohibiting the filling of such bottles is upheld in Massachusetts.[99] A statute, invalidating as to creditors, sales of stocks of goods otherwise than in due course of trade unless made in conformity with specified regulations, is within the police power, and is not objectionable as class legislation.[1]

Railroad companies are endowed with such powers and their business is of such nature that the placing of them in a class by themselves is not arbitrary.[2] A statute requiring a separation of the races in street railway cars is valid.[3]

Insurance.—There is such a difference between insurance and other kinds of business that a classification separating them is justifiable,[4] and a classification separating the mutuals from the stock companies is not arbitrary.[5] Special privileges are not granted to fraternal insurance associations previously formed by a statute requiring those subsequently formed to adopt certain assessment rates.[6] Statutes prohibiting combinations between fire insurance companies doing business in the state is not violative of the state constitution,[7] and a law providing for reciprocal exactions from foreign insurance companies organized in states, the laws of which discriminate against foreign companies, is not founded on an arbitrary or unreasonable classification.[8]

Liquor Traffic.—The local option liquor law is not class legislation in that it discriminates in favor of those who favor prohibition of the traffic,[9] and the "four mile" liquor law of Tennessee is not invalid because it exempts sales by manufacturers at wholesale.[10] No special privilege is granted by a law providing that, on remonstrance of a majority of the voters of a township, a liquor license shall be refused, though such remonstrances are authorized to be signed by an attorney empowered to act for his principals in all cases.[11] An ordinance imposing a tax on the maintenance of a depot for the distribution of liquors in the city, and not on brewers manufacturing there, is not discriminative,[12] and an ordinance imposing a license fee on wholesale liquor dealers who were required to pay none before, and imposing no further license on dramshop keepers, though they might also sell at wholesale, is not invalid.[13]

Relations of master and servant.—Laws limiting the hours of labor in certain unhealthy employments,[14] regulating payment of wages and preventing black-

99. Commonwealth v. Anselvich [Mass.] 71 N. E. 790.

1. Walp v. Mooar, 76 Conn. 515, 57 A. 277; John P. Squire & Co. v. Tellier [Mass.] 69 N. E. 312.

Contra: Block v. Schwartz [Utah] 76 P. 22; Miller v. Crawford [Ohio] 71 N. E. 631.

2. Statute abrogating rule of fellow-servant, in part. Froelich v. Toledo, etc., R. Co., 24 Ohio Circ. R. 359. Special tax law for railroads. Com. v. Union Refrigerator Transit Co. [Ky.] 80 S. W. 490.

3. State v. Pearson, 110 La. 387, 34 So. 575.

4. Statute punishing refusal in bad faith to pay loss by imposing penalty in form of attorney's fee [Acts 1901, p. 248, c. 141, §§ 1, 2]. Continental Fire Ins. Co. v. Whitaker [Tenn.] 79 S. W. 119, citing many cases. Tillis v. Liverpool & L. & G. Ins. Co. [Fla.] 35 So. 171; Farmers' & Merchants' Ins. Co. v. Dobney, 189 U. S. 301, 23 S. Ct. 565; Hartford Fire Ins. Co. v. Redding [Fla.] 37 So. 62. Statute requiring them to pay losses in full to the amount of the policy and invalidating agreements to the contrary. Aetna Ins. Co. v. Brigham [Ga.] 48 S. E. 348.

5. Continental Fire Ins. Co. v. Whitaker [Tenn.] 79 S. W. 119. A law exempting from execution funds due on mutual benefit certificates and not on other life insurance policies is not unreasonable. Supreme Lodge United Benev. Ass'n v. Johnson [Tex. Civ. App.] 77 S. W. 661; Id. [Tex.] 81 S. W. 18. A statute providing that no misrepresentation shall avoid an insurance policy unless made with intent to deceive or effective to increase the risk is not class legislation, though it applies only to fire insurance companies not operating on the mutual or assessment plan. Continental Fire Ins. Co. v. Whitaker [Tenn.] 79 S. W. 119.

6. State v. Fraternal Knights & Ladies [Wash.] 77 P. 500.

7. Iowa Code, §§ 1754, 1755. Greenwich Ins. Co. v. Carroll, 125 F. 121. S. D. Sess. Laws 1903, p. 183, c. 158. Hartford Fire Ins. Co. v. Perkins, 125 F. 502.

8. State v. Insurance Co. [Neb.] 99 N. W. 36.

9. Sweeney v. Webb [Tex. Civ. App.] 76 S. W. 766.

10. Webster v. State [Tenn.] 82 S. W. 179.

11. Hoop v. Affleck [Ind.] 70 N. E. 978.

12. Duluth Brewing & Malting Co. v. Superior [C. C. A.] 123 F. 353.

13. Strauss v. Galesburg, 203 Ill. 234, 67 N. E. 836.

listing, are upheld,[15] but the Alabama statute imposing a penalty on both the employer and employe entering into a contract of employment, where the employe has broken a similar contract with another, is invalid, it being limited in its application to laborers and renters.[16]

Criminal laws and procedure.—As respects grazing on the public domain, sheep and goats are naturally in a class by themselves and a law or regulation limiting the right of pasturing them on forest reservations is not an unjust or illegal discrimination against their owners.[17] A statute prohibiting the keeping open of butcher shops on Sunday while permitting confectionery and tobacco to be sold in an orderly manner on that day is not class legislation.[18] A statute prohibiting the use of the national flag for advertising merchandise, but excepting certain uses,[19] and a law defining adulterated vinegar and punishing its sale, but excepting from its provisions farmers making vinegar from apples raised on their own farms, are invalid as unlawfully discriminative.[20] The juvenile court act of Pennsylvania, separating citizens over 16 years of age and those under that age who are confined in institutions from those under that age not so confined, makes an arbitrary classification.[21]

Civil remedies and proceedings.—Suit for divorce, being a proceeding sui generis, is a legitimate subject for legislative classification,[22] and a statute changing the common-law rule applicable, where a tenant holds over, though only applicable to urban real estate, is not founded on an arbitrary classification.[23] Statutory regulations of the right to a review upon appeal or otherwise, as regards costs and security for costs, cannot be condemned as class legislation merely because it is more burdensome for some persons than for others to comply therewith.[24] A statute imposing attorney's fees and expenses as costs on defendants in mechanic's lien cases, treating all such defendants alike, is not class legislation,[25] though the contrary has been held in Kansas and Colorado,[26] and a statute authorizing an allowance for counsel fees to successful complainants in chancery cases is not invalid as a local or special law granting an exclusive benefit to an individual.[27]

§ 13. *Laws impairing the obligations of contracts.*[28]—The law in force at the time a contract is made becomes a part of it and cannot be changed to the detriment of either of the contracting parties by subsequent legislation,[29] but

14. A statute limiting the hours of labor of workers in mines, smelters and ore reduction works is unobjectionable. In re Boyce [Nev.] 75 P. 1. A law prohibiting the employment of miners more than 8 hours a day is not class legislation, the health and safety of such employes being promoted thereby [Laws 1901, p. 211]. State v. Cantwell [Mo.] 78 S. W. 569.

15. Commonwealth v. Reinecke Coal Min. Co., 25 Ky. L. R. 2027, 79 S. W. 287.

16. Act Mch. 1, 1901. Peonage Cases, 123 F. 671.

17. Dastervignes v. U. S. [C. C. A.] 122 F. 30.

18. State v. Justus [Minn.] 98 N. W. 325.

19. People v. Van De Carr, 91 App. Div. 20, 86 N. Y. S. 644.

20. People v. Windholz, 92 App. Div. 569, 86 N. Y. S. 1015.

21. Mansfield's Case, 22 Pa. Super. Ct. 224.

22. Deyoe v. Superior Court of Mendocino County, 140 Cal. 476, 74 P. 28.

23. Stees v. Bergmeier [Minn.] 98 N. W. 648.

24. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

25. Thompson v. Wise Boy Mill. & Min. Co. [Idaho] 74 P. 958, citing many cases.

26. Atkinson v. Woodmansee [Kan.] 74 P. 640; Davidson v. Jennings, 27 Colo. 187, 60 P. 354, 83 Am. St. Rep. 49, 48 L. R. A. 340.

27. McMullen v. Doughty [N. J. Eq.] 55 A. 284.

28. Statutes limiting hours of labor. People v. Orange County Road Construction Co. [N. Y.] 65 L. R. A. 33, note. See 1 Curr. L. 586.

29. Fisher v. Betts [N. D.] 96 N. W. 132; May v. Cass County [N. D.] 96 N. W. 292. Where a mortgage has already been renewed under the existing law by extending the note which it secures, no subsequent enactment prescribing a different manner of renewal can invalidate the renewal already accomplished. Wilson v. Pickering, 28 Mont. 435, 72 P. 821.

NOTE. Impairment of obligation. General rules: First and most primary among these is that an act which in any degree, no matter how slightly, modifies the obliga-

the section cannot be invoked against a mere change of decision with regard to a statute enacted prior to the making of the contract in question,[30] and the fact that a valid public statute has the incidental effect to abrogate a contract between two individuals cannot invalidate it.[31] Decisions merely construing contracts do not impair their obligation,[32] and a statute binding the parties to a contract previously attempted to be made, but which was invalid for defective execution, is not objectionable.[33] Statutes requiring instruments to be recorded and invalidating them in favor of instruments subsequently executed and properly recorded, in case they are not so recorded, are not unconstitutional with respect to pre-existing instruments.[34] A statute providing that before any amendment to, or alteration in, the constitution or by-laws of a fraternal beneficiary association shall be of force, it shall be filed in the office of the auditor of public accounts, is not invalid as applied to benefit certificates issued before its passage.[35] The obligation of a contract is not impaired by a statute providing that laborers in mines be paid on certain dates,[36] and giving laborers in manufacturing establishments a lien superior to that of mortgagees.[37] A statute providing proceedings to compel banks to pay lost certificates of deposit and avoiding them in the hands of all holders is invalid.[38]

What is a contract.[39]—The provisions of special charters under which corporations are organized are generally regarded as contractual,[40] though the rule is otherwise as to provisions of a general incorporation law, in which power to alter or amend is reserved,[41] and a state statute authorizing the change by an

tion of the contract by attempting to relieve the one party from any duty by the contract assumed, is repugnant to the constitutional prohibition. This rule only applies to "legislation which affects the contract directly and not incidentally, or only by consequence." Von Hoffman v. Quincy, 4 Wall. [U. S.] 553. Another general rule early established is that over mere remedial procedure the power of the legislature is absolute; that laws regulating it involve so much the consideration of public convenience and welfare that individuals cannot be conceded vested rights therein. Comell v. Hichens, 11 Wis. 368. See Oshkosh W. W. Co. v. Oshkosh, 109 Wis. 208, 85 N. W. 376, 95 Am. St. Rep. 870. [This case contains a fine collection and discussion of the various cases on the second rule stated above.]

30. National Mut. Bldg. & L. Ass'n v. Brahan, 193 U. S. 635, 24 S. Ct. 532, citing Lehigh Water Co. v. Easton, 121 U. S. 388, 7 S. Ct. 916; New Orleans Waterworks Co. v. Louisiana Sugar Refining Co., 125 U. S. 18, 8 S. Ct. 741; Central Land Co. v. Laidley, 159 U. S. 103, 16 S. Ct. 80. See, also, Tucker v. State [Ind.] 71 N. E. 140; Price v. Toledo, 4 Ohio C. C. (N. S.) 57. Previous decisions of the state court are a part of the contract of purchase of bonds issued under statutory authority, the subsequent overruling of which cannot be permitted. Graves v. Moore County Com'rs, 135 N. C. 49, 47 S. E. 134.

31. Act authorizing building of dam which individuals had agreed not to build. Manigault v. Ward, 123 F. 707.

32. Shepherd's Point Land Co. v. Atlantic Hotel, 134 N. C. 397, 46 S. E. 748.

33. But statute cannot operate to deprive third persons of vested rights. Steger v. Traveling Men's Bldg. & Loan Ass'n, 208 Ill. 236, 70 N. E. 236.

34. Knights of Maccabees of the World v. Nitsch [Neb.] 95 N. W. 626, citing Jackson v. Lamphire, 3 Pet. [U. S.] 280; Vance v. Vance, 108 U. S. 514, 2 S. Ct. 854; Weil v. State, 46 Ohio St. 450; Bird v. Keller, 77 Me. 270; Stafford v. Lick, 7 Cal. 479; Varick v. Briggs, 6 Paige [N. Y.] 323.

35. Knights of Maccabees of the World v. Nitsch [Neb.] 95 N. W. 626.

36. Commonwealth v. Reinecke Coal Min. Co., 25 Ky. L. R. 2027, 79 S. W. 287.

37. Graham v. Magann, Fawke Lumber Co. [Ky.] 80 S. W. 799.

38. In re Cook, 86 App. Div. 586, 83 N. Y. S. 1009.

39. See 1 Curr. L. 586.

40. The acceptance of a special charter by an educational institution, exempting its property from taxation, constitutes a contract. State v. Westminister College Trustees, 175 Mo. 52, 74 S. W. 990. An exemption from taxation for a term of years contained in the charter of a railroad company constitutes a contract. Bancroft v. Wicomico County Com'rs, 121 F. 874. A water company incorporating under a special act fixing the maximum charge it may make cannot escape the burden of its charter by renouncing the benefits it confers and accepting a subsequent general incorporation act. White Haven Borough v. White Haven Water Co. [Pa.] 58 A. 159.

41. A provision in the general railroad law of a state authorizing the incorporation of purchasers of a road on foreclosure sale does not constitute a contract with the bondholders. Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 24 S. Ct. 310. A provision in the general tax law of a state that railroads building under certain conditions shall be exempt from taxation for a term of years does not constitute a contract with roads coming under its provisions.

assessment insurance organization to the regular premium plan impairs the obligation of no contract, the policy holder having no contract right in the particular plan.[42] The rights granted to municipalities by their charters or the general law are not contractual,[43] but an irrigation district organized under a law making all the property in the district liable for its indebtedness confers on the residents an interest that is violated by a statute authorizing the directors without consent of the taxpayers to pledge its property for the payment of its bonds, thus subjecting them to the possibility of losing it.[44] The rule that contract rights acquired under an interpretation of the law made by the supreme court are not divested by a subsequent contrary decision does not apply to the claims of public officers to fees or salaries established by law, as such officers have no vested interest in the offices and their right to such fees and salaries is not founded on contract.[45] The right of the board of control of a state institution to sue and be sued is not a part of a contract made by it, and the statutory taking away of the corporate powers of the board affects the remedy merely and does not violate the obligation of the contract.[46] The rights of a school teacher who has accepted the provisions of a statute providing for retirement on pay after a certain length of service are founded on contract and cannot be violated by subsequent legislation,[47] but though a statute providing pensions for policemen scales down their salaries and puts the sum thus withheld into a fund for that purpose, a policeman does not acquire contractual rights to the pension which cannot be infringed by subsequent legislation.[48] An authorization to build tracks on a street, on condition of maintaining paving between

Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 24 S. Ct. 107. A provision in a general statute authorizing the incorporation of water companies, that boards of supervisors might fix rates but not reduce them below a certain rate does not amount to a contract so that the legislature may not subsequently authorize the fixing of a lower rate. Stanislaus County v. San Joaquin & K. River Canal & Irrigation Co., 192 U. S. 201, 24 S. Ct. 241.

42. Wright v. Minnesota Mut. L. Ins. Co., 193 U. S. 657, 24 S. Ct. 549.

43. A statute authorizing townships to adopt a township road system and relieving them of contribution to the county road tax on their adoption thereof does not constitute a contract and a subsequent local act establishing a county road system for the county is not invalid as an impairment. Board of Sup'rs of Saginaw County v. Hubinger [Mich.] 100 N. W. 261. A statute providing for the annexation of certain territory to a city and limiting the rate of taxation in such territory to the rate assessed by the county is not a contract which the city is interested in, and a subsequent statute construing the prior one cannot be considered as an impairment. Joesting v. Baltimore, 97 Md. 589, 55 A. 456. A statute abolishing school districts and transferring their property to the towns in which they are situated is not objectionable as violating the obligation of contracts, the undertaking of towns and school districts to provide for the education of children not arising out of contract, but as a duty required of them by law. In re School Committee of North Smithfield [R. I.] 58 A. 628.

44. Merchants' Nat. Bank v. Escondido Irr. Dist. [Cal.] 77 P. 937.

45. Tucker v. State [Ind.] 71 N. E. 140.

46. Wheeler v. Board of Control of State Public School [Mich.] 100 N. W. 394.

47. Ball v. Board of Trustees of Teachers' Retirement Fund [N. J. Law] 58 A. 111.

48. State v. Board of Trustees of Policemen's Pension Fund [Wis.] 98 N. W. 954. See 1 Curr. L. 587, n. 34.

NOTE. Impairment of immature pension or bounty rights is not invalid: The relator's husband was a member of the police force. By statute, a portion of his salary was withheld so as to be used for a pension fund for his widow, if he died while serving the city. A statute subsequently destroyed this pension right. The relator's husband having since died, she attacks the statute and seeks to force the enrollment of her name on the pension list. Held, there was no vested right in relator, and the legislature impaired no contractual right of relator in withdrawing the right to the pension. State v. Board of Trustees of Policemen's Pension Fund [Wis.] 98 N. W. 954. An office is a creature of law and not a contract. Butler v. Pennsylvania, 10 How. [U. S.] 402. The legislature may increase or decrease the salary attached thereto or altogether destroy it without disturbing any contract right. Commonwealth v. Bacon, 6 Serg. & R. [Pa.] 320. Pension rights have been regarded by the courts in the same light. Pennie v. Reis, 132 U. S. 464. Salary already earned has been held to give a quasi-contractual right that the legislature could not destroy. Fisk v. Jefferson Police Jury, 116 U. S. 131, and conceivably, under the facts of the principal case, there should be a remedy on that theory. The courts seem to deny recovery as a matter of policy. See I Columbia Law Rev. 55.—IV Columbia Law Rev. 510.

tracks with a certain material, does not preclude the city from subsequently paving with a different material and assessing its proportion of the cost against the street railway company,[49] and a liquor license confers no contract rights and may be revoked at any time by the authority granting it, so far as any inhibition in the Federal constitution is concerned.[50]

State or municipal contracts.[51]—The valid contract of a municipal corporation is just as sacred from legislative interference or destruction as one between individual citizens,[52] and where a municipality has entered into a contract which it has power to make, no subsequent act of the legislature withdrawing the subject from its control can relieve it of its liability on the contract;[53] but ultra vires contracts are not protected,[54] and the inhibition does not apply to contracts made by parties dealing with a department of the government, concerning the future exercise of powers conferred for public purposes by legislative acts, where the subject-matter of the contract is one which affects the safety and welfare of the public.[55] A contract between a municipality and a water company for a supply of water is made subject to a reserved power in the constitution to regulate the charges for public service, and such a regulation, though operative on contracts previously made, is not violative of the obligation of the contract.[56]

Corporate charters and franchises.[57]—All reasonable regulations of corporations are upheld where there is a provision, general or special, reserving to the legislature the right to alter, amend or repeal charters or the general incorporation law,[58] and additional powers conferred upon a corporation subsequent to

49. Binninger v. New York, 177 N. Y. 199, 69 N. E. 390.

50. Wallace v. Reno [Nev.] 73 P. 528, citing many cases.

51. See 1 Curr. L. 587.

52. Shinn v. Cunningham, 120 Iowa, 383, 94 N. W. 941; May v. Cass County [N. D.] 96 N. W. 292. A statute organizing a police board and empowering them to appoint a janitor is inoperative in so far as it impairs a valid contract of a janitor previously employed by the city. Wiggin v. Manchester [N. H.] 58 A. 522. A constitutional amendment destroying and abolishing certain townships which have issued bonds is invalid in so far as it operates to defeat payment of the bonds. Ex parte Folsom, 131 F. 496. A joint resolution directing the state treasurer to write off the books certain past due bonds and no longer carry them as debts of the state refers to a mere matter of bookkeeping, affects no owner of such bonds, and does not impair the obligation of the contract. Smith v. Jennings [S. C.] 45 S. E. 821. Rights which have become vested under a contract resting for its validity upon a statute cannot be impaired or annulled by a repeal of such statute. May v. Cass County [N. D.] 96 N. W. 292.

53. City of Ludlow v. Peck-Williamson Heating & Ventilating Co., 25 Ky. L. R. 831, 76 S. W. 377.

54. Contract by city for water running forever. Westminister Water Co. v. Westminister [Md.] 56 A. 990.

55. Agreement not to issue more bonds until those already issued are paid is void. Board of Education of City of Leavenworth v. Phillips, 67 Kan. 549, 73 P. 97.

56. City of Tampa v. Tampa Waterworks Co. [Fla.] 34 So. 631.

57. See 1 Curr. L. 587.

58. Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 24 S. Ct. 310; Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 24 S. Ct. 107; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co., 192 U. S. 201, 24 S. Ct. 241. Adoption or acceptance of amendment to charter embodying such provision brings a corporation under the power. Yates v. People, 207 Ill. 316, 69 N. E. 775. A statute providing for annual reports and payment of fees by corporations on pain of forfeiture of franchise is not invalid as to those previously organized under a statute reserving to the legislature the power of amendment and regulation. People v. Rose, 207 Ill. 352, 69 N. E. 762. Where power is reserved in the charter of a street railway company to alter, amend, or repeal it at will, a statute requiring it to extend its road along certain streets does not impair the obligation of a contract. Metropolitan R. Co. v. Macfarland, 20 App. D. C. 421. Public franchises and charters are granted subject to the provisions of the constitutions under which they are granted, and regulations within the scope of such provisions are not violative of the obligation of contracts. Water companies. City of Tampa v. Tampa Waterworks Co. [Fla.] 34 So. 631. Street railways. San Antonio Traction Co. v. Altgelt [Tex. Civ. App.] 81 S. W. 106. Where power is reserved by the constitution to the legislature to alter, amend, or repeal laws for the chartering of corporations, no stockholder can complain of a change of the law relative to the power of corporations to dispose of their property. Allen v. Ajax Min. Co. [Mont.] 77 P. 47. The reservation of a power to add to, alter, amend, or repeal a charter, authorizes the proper legislative

its original charter are to be interpreted in accordance with the law then existing, and not in accordance with the law existing at the time of the original grant.[59]

Public service franchises.[60]—An exclusive franchise by a city to a water company for a term of years is a contract which may not be impaired either by revocation or by the city's entering into competition,[61] and the right arising to a telephone company by a construction of its lines on the streets by authority of a city is one that cannot be impaired by a subsequent grant of permission to move a building along the street.[62] A statute authorizing municipalities to install electric plants to supply both the public and private consumers is not violative of the obligation of a contract, though the franchise under which a private corporation is operating a plant in a certain city has several years yet to run.[63] A reduction of water rates to an amount paying six per cent. on the actual value of the property is not confiscation.[64]

Tax and assessment laws.[65]—A statute imposing a tax on certain occupations, made operative the year after its passage, is not violative of the obligation of contracts.[66] No subsequent legislation can repeal the law in force when a tax sale was made, so as to change the effect of the deed as evidence in matters of substance.[67]

Regulations of remedies.[68]—Laws affecting the remedy only for the enforcement of a contract are unobjectionable,[69] but a statute which is designed, and if enforced, would be effectual to deprive the obligees of existing contracts of an important and efficient remedy for their enforcement, is violative of the Federal constitution.[70] Impairment does not result from a statute invalidating, notwithstanding assignment, bills and notes for money won at gaming,[71] nor from a construction applying to existing debts a statute exempting the proceeds of a sale of a homestead from garnishment for a limited period,[72] and a statute providing that negotiable instruments may contain a provision for at-

body to make any addition, alteration, or amendment which does not impair vested rights or substantially interfere with the accomplishment of the main purposes of the charter. Right to compel permission of use of railroad bridge by another company. Union Pac. R. Co. v. Mason City, etc., R. Co. [C. C. A.] 128 F. 230, citing Sinking Fund Cases, 99 U. S. 700; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 14 S. Ct. 439.

59. Phoenix v. Trustees of Columbia College, 87 App. Div. 438, 84 N. Y. S. 897.

60. See 1 Curr. L. 588.

61. Columbia Ave. Sav. Fund, etc., Co. v. Dawson, 130 F. 152.

62. Northwestern Tel. Exch. Co. v. Anderson [N. D.] 98 N. W. 706.

63. State v. Allen, 178 Mo. 555, 77 S. W. 868.

64. Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co., 192 U. S. 201, 24 S. Ct. 241.

65. See 1 Curr. L. 588.

66. Does not interfere with contract between employer and employe engaged in taxed occupation. Kehrer v. Stewart, 117 Ga. 969, 44 S. E. 854.

67. Fisher v. Betts [N. D.] 96 N. W. 132.

68. See 1 Curr. L. 589.

69. Bullard v. Smith, 28 Mont. 387, 72 P. 761. A law changing the rules of evidence relates to the remedy and is not within the constitutional inhibition. Ky. St. 1903, § 679, providing that by-laws of an insurance company shall not be received in evidence unless attached to the policy and made a part of it. Hunziker v. Supreme Lodge K. P., 25 Ky. L. R. 1510, 78 S. W. 201. The statute of North Carolina substituting the insurance commissioner in place of the secretary of state as the person to be served with process in a suit against a foreign insurance company, changed the remedy merely, and therefore does not impair the obligation of contracts as respects policies previously issued. Johnston v. Mutual Reserve Fund Life Ins. Co., 87 N. Y. S. 438.

70. Denial of deficiency judgment to mortgagees. Burrows v. Vanderbergh [Neb.] 95 N. W. 57. A state statute forfeiting the estate of a mortgagee in possession under purchase at foreclosure, in case he fails to obtain a sheriff's deed within a certain time, construed in the state court to cut off the mortgagee's rights and reinvest title in the mortgagor without payment of his debt, violates the obligation of a contract where the foreclosure occurred prior to the enactment of the statute [Ill. Act March 22, 1872, § 30]. Bradley v. Lightcap, 195 U. S. 1, 24, 24 S. Ct. 748, 753.

71. Higginbotham v. McGready [Mo.] 81 S. W. 883.

72. Lewis v. Goldthwaite Nat. Bank [Tex. Civ. App.] 81 S. W. 797.

torney's fee is valid, though applying to notes given prior to its enactment.[73] Statutes changing the rate of interest on judgments are valid, even as applying to judgments previously entered,[74] and usury statutes do not affect the obligation of the contract, but pertain to the remedy only, by giving to the debtor the privilege of avoiding his contract when usurious, and their repeal without a saving clause takes away such privilege even as to contracts previously made.[75]

§ 14. *Retroactive legislation; vested rights.*[76]—Save under those constitutions which forbid retroactive laws, they may be passed so long as other constitutional limitations are untouched.[77] Thus contract rights acquired under a prior interpretation of the law cannot be divested by a subsequent reversal of that interpretation,[78] and a statute validating previously made contracts cannot divest ad interim acquired rights of third persons.[79] Under a reserved right to amend, an insurance charter may by statute be changed to allow a different plan of insurance,[80] but a beneficiary's right cannot be destroyed by the assured without consent.[81] It is not retroaction to recognize an existing claim or condition,[82] and prescribe remedies,[83] but rights acquired must not be unfixed.[84] Purely statutory rights,[85] such as the right of disposal by will,[86] do not become irrepealably vested. The right to office[87] and expectant pension benefits to an incumbent[88] are not vested, but rights under a contract for public service[89] are. The enforcement of a statute providing that laborers in mines be paid on certain dates is not an interference with vested rights.[90] The power of congress over foreign commerce being absolute, no one can have a vested right to trade with foreign nations.[91]

73. Bullard v. Smith, 28 Mont. 387, 72 P. 761.

74. Stanford v. Coram, 28 Mont. 288, 72 P. 655.

75. Petterson v. Berry [C. C. A.] 125 F. 902.

76. See 1 Curr. L. 589.

77. Though not prohibited in terms by the constitution, is nevertheless invalid if vested rights be destroyed and property taken without due process of law. Ordinance providing for reassessment of unauthorized local improvement. Martin v. Oskaloosa [Iowa] 99 N. W. 557. A statute repealing the existing provisions for deficiency judgments of foreclosure of mortgages does not take away or impair the right of a mortgagee to such a judgment in any case where his mortgage was given prior to the time of its enactment. Burrows v. Vanderbergh [Neb.] 95 N. W. 57.

78. Tucker v. State [Ind.] 71 N. E. 140; Graves v. Moore County, 135 N. C. 49, 47 S. E. 134. See, also, National Mut. Building & L. Ass'n v. Brahan, 193 U. S. 635, 24 S. Ct. 532. Statutes appiying to the city of Toledo, under which assessments were made for local improvements, were subsequently held unconstitutional as special legislation. Price v. City of Toledo, 4 Ohio C. C. (N. S.) 57.

79. Steger v. Traveling Men's Building & Loan Ass'n, 208 Ill. 236, 70 N. E. 236.

80. Change from the assessment to the regular premium plan. Assessments became larger as to those who retained old policies. Wright v. Minnesota Mut. L. Ins. Co., 193 U. S. 657, 24 S. Ct. 549.

81. Sangunitto v. Goldey, 88 App. Div. 78, 84 N. Y. S. 989.

82. Moral claim involved in past transactions. State v. Gibson, 4 Ohio C. C. (N. S.) 433.

83. The Ray bill, forbidding a discharge in bankruptcy if the bankrupt has in voluntary proceedings been granted a discharge within six years, is not retroactive because applying to cases in which the first discharge has already been granted [Act Feb. 5, 1903, c. 487, 32 St. 798]. In re Carleton, 131 F. 146.

84. Statute legalizing organization of a school district where the controversy had not been decided. State v. Van Huse [Wis.] 97 N. W. 503.

85. Right to recover money paid on wagering contracts. Wilson v. Head, 184 Mass. 515, 69 N. E. 317.

86. Provision limiting the right of a wife to dispose of her property by will applies to property acquired by her prior to its enactment. Spurlock v. Burnett [Mo.] 81 S. W. 1221.

87. An officer appointed for a definite term has no vested property interest therein which may not be taken away by the legislature. Mial v. Ellington, 134 N. C. 131, 46 S. E. 961. Overruling the previous decisions of the court for 70 years.

88. Policeman by reason of holding office after the enactment of a statute pensioning policemen and their widows. State v. Board of Trustees of Policemen's Pension Fund [Wis.] 98 N. W. 954.

89. Right of a physician to compensation for his services by contract with a township board of health under the law in existence when the contract was made and the services performed. Kapp v. Board of Auditors of Washtenaw County [Mich.] 100 N. W. 603.

90. Commonwealth v. Reinecke Coal Min. Co., 25 Ky. L. R. 2027, 79 S. W. 287.

91. Buttfield v. Stranahan, 192 U. S. 470, 24 S. Ct. 349.

Interests in realty[92] once fixed cannot be diminished, but may be regulated,[93] while mere expectancies[94] or preferences[95] may be taken away. A privilege or franchise in a street is not an interest in the continued existence of the street.[96]

Taxes, licenses and public rights.[97]—A statute providing for the taxation, when discovered, of omitted property for all the years of its omission, is not objectionable as retrospective,[98] nor is a law authorizing the reassessment of further sums necessary to complete a local improvement already begun and assessed.[99] A statute imposing a tax on certain occupations, taking effect the year following its passage, cannot be objected to as retrospective or ex post facto.[1] The legislature may take away liquor licenses at pleasure.[2]

Laws affecting corporations.[3]—Whether a statute or ordinance reducing the rates to be charged by a public service corporation deprives it of its property without due process of law, denies it the equal protection of the law, or abridges its privileges and immunities, are questions to be determined by the court upon original independent investigation, and not by an examination of the proceedings before the legislative body to ascertain what evidence it had before it and the sufficiency thereof.[4] A mortgagee or purchaser acquires nothing which the mortgagor had not, and acquires no vested rights distinct from those of the corporation, as against the legislature.[5] Compliance with existing statutes by a foreign express company does not give it a vested right to do business subject only to such law, and exempt it from all future legislative control.[6] A statute making failure of a corporation to make reports evidence of nonuser of its franchise, such failure not being prior to that time, evidence of anything is not for that reason invalid.[7]

Regulation of procedure.[8]—No vested right in a particular remedy,[9] or rule of evidence, exists,[10] and a change in the law whereby a wrongdoer may have

92. See 1 Curr. L. 590. Purposes of and occasions for sale of land in course of administration cannot be changed after death of decedent. In re Newlove's Estate [Cal.] 75 P. 1083. Change of dower interest to the detriment of the widow's heirs after it has vested. Bottorff v. Lewis, 121 Iowa, 27, 95 N. W. 262. A statute enacted after a lease took effect cannot be applied in considering its terms. Caley v. Thornquist, 89 Minn. 348, 94 N. W. 1084.

93. Rights to the use of water acquired by prior appropriation. Willey v. Decker, 11 Wyo. 496, 73 P. 210.

94. Right of nonresident aliens to inherit real estate in the state. Donaldson v. State [Ind.], 67 N. E. 1029.

95. The preferential right given to a successful contestant of a claim to public land by the Federal statutes [24 Stat. 140]. Graham v. Great Falls Water Power & Town-Site Co. [Mont.] 76 P. 808.

96. A statute requiring the removal of all overhead wires in streets and giving the option of placing them in conduits gives the owners no vested right against vacating streets wherein the conduits were built. Boston Elec. Light Co. v. Boston Terminal Co., 184 Mass. 566, 69 N. E. 346.

97. See 1 Curr. L. 590.

98. State v. Vogelsang [Mo.] 81 S. W. 1087. A statute merely providing for the listing for taxation and the collection of taxes on property that has escaped taxation in previous years interferes with no vested right. Western Assur. Co. v. Halliday, 127 F. 830.

99. Stone v. Little Yellow Drainage Dist., 118 Wis. 388, 95 N. W. 405.

1. Kehrer v. Stewart, 117 Ga. 969, 44 S. E. 854.

2. Wallace v. Reno [Nev.] 73 P. 528, citing many cases.

3. See 1 Curr. L. 590.

4. Spring Valley Waterworks v. San Francisco, 124 F. 574.

5. Union Pac. R. Co. v. Mason City & Ft. D. R. Co. [C. C. A.] 128 F. 230, citing Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155.

6. Adams Exp. Co. v. State [Ind.] 67 N. E. 1033.

7. People v. Rose, 207 Ill. 352, 69 N. E. 762.

8. See 1 Curr. L. 591.

9. Statute providing that negotiable instruments may contain provision for attorney's fee may properly apply to existing contracts. Bullard v. Smith, 28 Mont. 387, 72 P. 761. Suit begun before adoption of constitutional amendment dispensing with unanimity of verdict. Roenfeldt v. St. Louis & S. R. Co. [Mo.] 79 S. W. 706. Suit to determine water rights. Boise City Irr. & Land Co. v. Stewart [Idaho] 77 P. 25.

10. The law of evidence is a part of the remedy and is subject to legislative control. Boise City Irr. & Land Co. v. Stewart [Idaho] 77 P. 25. Limitation of purpose for which public record of birth, marriage or death may be shown. McKinstry v. Collins [Vt.] 56 A. 985.

contribution from his joint tort feasors, since it relates only to the remedy, is void, though it applies to torts committed before its enactment.[11] The Minnesota statute providing for the enforcement of stockholders' liability for corporate debts does not by reason of its construction as applicable to corporations organized before its enactment, contravene any provision of the Federal constitution.[12] Proceedings at an unauthorized meeting of a state board may be legalized.[13]

Statutes of limitation[14] affecting existing rights are not invalid if a reasonable time is given for the commencement of an action before the bar takes effect.[15] Whether or not the right to plead the statute of limitations is a vested property right, or merely remedial, is in many jurisdictions unsettled,[16] but a city being a mere agency of the state, a statute removing the state's claim against the city for its share of license money from the operation of the statute is not objectionable.[17]

§ 15. *Deprivation without due process of law, or contrary to law of the land.*[18]—The fourteenth amendment adds nothing to the rights of any citizen against another, but merely furnishes additional guaranties against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society.[19]

Due process of law does not necessarily require the interference of the judicial power,[20] though as applied to proceedings in court it means according to the settled course of judicial proceedings as regulated by the laws of the state wherein the proceedings are had.[21] It is satisfied by notice and a right to be heard,[22] and opportunity to enforce and protect one's rights.[23] It need not provide for

11. First Nat. Bank of Independence v. Steel [Mich.] 99 N. W. 786.

12. Robinson v. Brown, 126 F. 429.

13. Tax commissioners. First Nat. Bank v. Isaacs, 161 Ind. 278, 68 N. E. 288.

14. See 1 Curr. L. 591.

15. Adverse possession of wild lands. Soper v. Lawrence Bros. Co., 98 Me. 268, 56 A. 908, citing Terry v. Anderson, 95 U. S. 632.

16. State v. City of Aberdeen, 34 Wash. 61, 74 P. 1022. The right of a judgment creditor to rebut the presumption of payment from lapse of time is a vested one, which the legislature cannot by subsequent legislation disturb or impair. Chiles v. School Dist. of Buckner [Mo. App.] 77 S. W. 82.

17. State v. Aberdeen, 34 Wash. 61, 74 P. 1022.

18. See 1 Curr. L. 591.

19. United States v. Moore, 129 F. 630.

20. Public Clearing House v. Coyne, 194 U. S. 497, 24 S. Ct. 789.

21. Howard v. Fleming, 191 U. S. 126, 24 S. Ct. 49, citing Walker v. Sauvinet, 92 U. S. 90, 23 Law. Ed. 678; Pennoyer v. Neff, 95 U. S. 714, 24 Law. Ed. 565; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 4 S. Ct. 663, 28 Law. Ed. 569; Dartmouth College v. Woodward, 4 Wheat. [U. S.] 518, 4 Law. Ed. 629; Andrus v. Fidelity M. L. Ins. Ass'n, 168 Mo. 162, 67 S. W. 582; Cooley, Const. Lim. (6th Ed.) p. 431; City of St. Louis v. Gait [Mo.] 77 S. W. 876; Hibben v. Smith, 191 U. S. 310, 24 S. Ct. 88.

22. Hibben v. Smith, 191 U. S. 310, 24 S. Ct. 88; In re Sing Tuck, 126 F. 386; Johnson v. Hunter, 127 F. 219. Taxation proceedings. Godfrey v. Bennington Water Co., 75 Vt. 350, 55 A. 654. Notice outside the state may be sufficient. White v. White [N. J. Err. & App.] 55 A. 739. Notice of every step is not necessary. Adams v. Roanoke [Va.] 45 S. E. 881.

23. Provision in city charter requiring presentation of claims to council, and providing for appeal either by claimant or taxpayer to court is valid. State v. District Court, 90 Minn. 457, 97 N. W. 132.

Note: Constitutional or organic modes of procedure are a part of due process only where such guarantees reach. Thus, in Hawaii, an unanimous verdict of a jury is not necessary in criminal trials. Hawaii v. Edwards, 11 Haw. Rep. 571. In the Philippines, no jury at all is requisite or guaranteed. Door v. United States, 24 S. Ct. 808, 3 Mich. L. R. 56.

The right of a Chinaman to remain in the United States may be altogether submitted to the discretion of an administrative immigration commissioner. Chinese Exclusion Cases, 24 S. Ct. 621, 3 Mich. L. R. 57.

In a recent Kansas case (Hanson v. Krehbiel [Kan.] 75 P. 1041, 64 L. R. A. 790) was construed an act of the Kansas legislature providing that in the event of libel by a newspaper, the injured party should be restricted to "actual" damages if the defendant, after notice, made a full and fair retraction in a conspicuous place in the paper. It was held that to take away the right to recover general damages usual in libel cases was a deprivation of the remedy, and the act was declared to be unconstitutional. The court, in speaking of the "due course of law" secured by the Bill of Rights, said: "Whatever these terms may mean they do mean due and orderly procedure of courts in the

the adjudication of all differences if other remedies are available.[24] Notice is necessary,[25] but a jury trial is not in all cases.[26] To arbitrarily exclude a person from a society because of his political affiliations and refuse reinstatement is not due process.[27]

Property[28] within this clause does not include the right to trade with foreign lands.[29] It does not consist in an exemption from regulation tending to safety[30] or public convenience[31] or necessary to public supervision of public service.[32]

The property of municipal corporations is the property of the state and may be taken from one and given to another at the will of the legislature so long as it is not thereby diverted from the public use for which it was acquired.[33] But the legislature cannot alter or extend the dedication of a public square as against an abutting owner who has purchased with reference to it,[34] and an irrigation district is not a municipal corporation to the extent that the legislature

ascertainment of damages for injury to the end that the injured one 'shall have remedy,' —that is, proper and adequate remedy,— thus to be ascertained." This holding is supported by some authority. Park v. Detroit Free Press Co., 72 Mich. 560, 40 N. W. 731, 16 Am. St. Rep. 544, 1 L. R. A. 599; McGee v. Baumgartner, 121 Mich. 287, 80 N. W. 21. And it may be argued with reason that due process of law is not alone satisfied with notice and hearing. Even these safeguards would be empty forms if the suitor were to have no results from his litigation. It affects the remedy. The supreme court of Minnesota, construing a like statute differs. Allen v. Pioneer Press Co., 40 Minn. 117, 41 N. W. 936, 12 Am. St. Rep. 707, 3 L. R. A. 532. The opinion states: "After all the consideration that we are able to give to the subject, we are unable to say that the legislature has transcended its constitutional powers in imposing these restrictions and limitations upon the legal remedy of plaintiffs in actions for libel."—3 Mich. Law R. 61.

24. Refusal of a co-operative telephone service for nonpayment of tolls, though subscriber claims a set-off against the company of an amount greater than his indebtedness. Irvin v. Rushville Co-Operative Telephone Co., 161 Ind. 524, 69 N. E. 258.

25. Beebe v. Magoun, 122 Iowa, 94, 97 N. W. 986; In re New York, 89 N. Y. S. 6. Due process of law requires personal service of summons when practicable, and authorizes constructive service only when personal service is impracticable. Bear Lake County v. Budge [Idaho] 75 P. 614. Proceedings to sell land for nonpayment of tax, being in rem, personal notice to the owner is not necessary. Woodrough v. Douglas County [Neb.] 98 N. W. 1092. Published notice to all interested is not sufficient notice to a living person supposed to be dead, to justify special administration on his property. Clapp v. Houg [N. D.] 98 N. W. 710.

26. Summary proceedings to abate liquor nuisance. Kirkland v. State [Ark.] 78 S. W. 770.

27. Membership corporation, organized for social and literary purposes, pledged by its constitution to support a party. Stein v. Marks, 89 N. Y. S. 921.

28. See 1 Curr. L. 591.

29. An act of congress prohibiting the importation of certain goods does not violate the due process clause. Buttfield v. Stranahan, 192 U. S. 470, 24 S. Ct. 349.

30. Law requiring railroad to keep its right of way clear of dry vegetation and undergrowth [Rev. St. 1889, § 2614]. McFarland v. Mississippi River & B. T. R. Co., 175 Mo. 423, 75 S. W. 152.

31. Statute requiring railroad to establish stations on its lines wherever the state commission directs. Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 24 S. Ct. 396.

32. Regulation of the rate of fare on a street railroad not shown to be unreasonable. San Antonio Traction Co. v. Altgelt [Tex. Civ. App.] 81 S. W. 106. Regulation of a water company requiring it to charge only reasonable rates. City of Tampa v. Tampa Waterworks Co. [Fla.] 34 So. 631. A reduction of water rates to an amount paying six per cent. on the actual value of the property is not confiscation. Stanislaus County v. San Joaquin & K. River Canal & Irr. Co., 192 U. S. 201, 24 S. Ct. 241.

33. Statute abolishing school districts and vesting property in towns is valid. In re School Committee of North Smithfield [R. I.] 58 A. 628. The legislature may transfer the possession and control of police station houses and other police property from the city to a board of commissioners, such transfer not being a diversion of the use to which it is dedicated. Wiggin v. City of Manchester [N. H.] 58 A. 523. That a constitutional amendment erecting a new county within the limits of an old one transfers the title to the property of the old county to the new is no objection to it. People v. Sours, 31 Colo. 369, 74 P. 167.

A statute authorizing the detaching of territory from one municipality and attaching it to another and making no provision as to municipal property and debts does not take property without due process of law and without compensation (City of Little Rock v. North Little Rock [Ark.] 79 S. W. 785), and a statute requiring a city having waterworks to furnish water to another contiguous city or town having none is valid (Chicago v. Cicero [Ill.] 71 N. E. 356); but a statute providing that money accruing from city licenses shall be divided between the state, county and city is not (State v. Boyd [Nev.] 74 P. 654).

34. Fessler v. Union [N. J. Eq.] 56 A. 272.

may dispose of its property as it pleases, but as to its water it is a private owner and entitled to due process of law.[35]

The right to the use of the mails is a statutory privilege only and its withdrawal by the postmaster general for fraud is not a deprivation without due process of law.[36]

Liberty.—An alien unlawfully here has no liberty to remain.[37]

Reasonableness of regulations is not measured by any individual case.[38] It is dependent on public necessity or public welfare in view of the evil sought to be remedied.[39] A regulation must not take away the right to use the property.[40]

Regulations of business and occupations.[41]—Laws regulative of business that cannot be prosecuted without license,[42] prescribing hours of labor in certain unhealthy occupations,[43] and on public work,[44] and providing for the payment of laborers, are upheld.[45]

Due process is not denied by an ordinance prohibiting unauthorized dairies within the city limits,[46] nor by a prohibition of selling milk from cows fed on still slops.[47] Statutes prohibiting the use of trading stamps are invalid,[48] but a law prohibiting the sale by retailers of their stocks of goods without writing and record, and limiting the title of the purchaser, is not invalid as a deprivation without due process.[49] The anti-trust law of Kansas is not violative of the guar-

35. Merchants' Nat. Bank v. Escondido Irr. Dist. [Cal.] 77 P. 937.

36. Missouri Drug Co. v. Wyman, 129 F. 623; Public Clearing House v. Coyne, 194 U. S. 497, 24 S. Ct. 789. The statute is not unconstitutional in that it authorizes the return to the senders of remittances sent to the debarred persons; such act is not a confiscation of the property of the addressee, but a mere refusal of the facilities of the postoffice department. Public Clearing House v. Coyne, 194 U. S. 497, 24 S. Ct. 789. The statute authorizing the postmaster general to seize and detain all mail matter addressed to persons excluded from the use of the mails because of fraudulent practices is not unconstitutional because it may include letters in no way connected with the fraud. Id.

37. Deporting does not deprive him without due process of law [Act March, 1903, 32 St. 1213]. United States v. Williams, 194 U. S. 279, 24 S. Ct. 719.

38. A law requiring the substitution of individual water closets for school sinks in tenement houses is not a deprivation of property though in an individual instance the expense of making the change exceeds the owner's equity in the property. Tenement House Dept. v. Moeschen, 89 App. Div. 526, 85 N. Y. S. 704.

39. Held reasonable. Prohibiting the use of unregistered docked horses. Bland v. People [Colo.] 76 P. 359. Vaccination of children as a condition of their attendance at the public schools. Viemeister v. White, 88 App. Div. 44, 84 N. Y. S. 712.

40. An ordinance conferring on the council arbitrary power to refuse building permits is void. Negro church. Boyd v. Board of Councilmen, 25 Ky. L. R. 1311, 77 S. W. 669.

41. See 1 Curr. L. 592.

42. A law prohibiting hackmen from permitting their horses and vehicles to stand on any public street for hire, or from walking or driving through the streets soliciting patronage is not invalid as a deprivation without due process, since they have no right to conduct business in the public street except as licensees. People v. Sewer, W. & S. Commission, 90 App. Div. 555, 86 N. Y. S. 445. The sale or manufacture of intoxicating liquors not being a matter of right, but subject to state regulation or prohibition, the enactment of a prohibitory law is not invalid on the ground that it deprives a dealer or manufacturer of his property without due process of law. August Busch & Co. v. Webb, 122 F. 655.

43. Statutes limiting hours of labor. People v. Orange County Road Construction Co. [N. Y.] 65 L. R. A. 33, note. A statute limiting the hours of labor in bakeries and confectionery manufactories is valid. People v. Lochner, 177 N. Y. 145, 69 N. E. 373. A statute limiting the hours of labor of workers in mines, smelters, and ore reduction mills is unobjectionable. In re Boyce [Nev.] 75 P. 1.

44. A statute providing that 8 hours shall constitute a day's work on public work does not, as applied to one contracting for such work after its passage, deprive him of his property without due process of law. Atkin v. Kansas, 191 U. S. 207, 24 S. Ct. 124.

45. A statute prohibiting the assignment of future wages, and agreements relieving employers from paying weekly in full, is not a deprivation without due process. International Text-Book Co. v. Weissinger, 160 Ind. 349, 65 N. E. 521. A statute prohibiting the issuance by any employer of any token not redeemable in current money at its face value on demand, violates the due process clause. State v. Missouri Tie & Timber Co. [Mo.] 80 S. W. 933.

46. Fischer v. St. Louis, 194 U. S. 361, 24 S. Ct. 673.

47. Sanders v. Com., 25 Ky. L. R. 1165, 77 S. W. 358.

48. State v. Dodge [Vt.] 56 A. 983; Young v. Com., 101 Va. 853, 45 S. E. 327; State v. Ramseyer [N. H.] 58 A. 958.

49. Walp v. Mooar, 76 Conn. 515, 57 A.

anty,[50] and a statute providing a penalty against an express company unjustly discriminating against another company in the same business does not deprive it of its property without due process of law on the theory that it has a right to demand prepayment of charges of whom it will.[51]

Statutes creating a liability may be valid,[52] and the mechanic's lien law of Ohio does not, in providing a lien for subcontractors and others who furnish the contractor, deprive the owner of his property without due process of law.[53] A statute may provide for an attorney's fee in certain cases as a penalty for delay in payment of a legal claim until suit brought.[54]

Local assessments for improvements[55] require notice[56] and an opportunity to be heard before the assessing body, but no appeal.[57] One who has a mere right to purchase public lands so assessed need not be notified.[58] Pecuniary interest in assessing officers must be such as to incapacitate them or the levy is valid.[59] Where power is reserved in the charter of a street railway company to alter, amend, or repeal it at will, proceedings under a statute requiring it to extend its road along certain streets, and assessing it with benefits for widening such streets, does not deprive it of property without due process of law.[60] Assessments by the front foot rule are not necessarily invalid,[61] unless out of all proportion to benefits conferred,[62] or assessed regardless of special benefits conferred.[63] Those who petition under an invalid law cannot complain that it deprives them.[64]

Drainage acts[65] satisfy the requirement of due process where the land owner has notice of the assessment[66] though no appeal is provided for,[67] but notice is necessary,[68] though a further assessment of sums necessary to complete a local improvement is not invalid for want of notice.[69]

277; Squire & Co. v. Tellier [Mass.] 69 N. E. 312.

Contra: Block v. Schwartz [Utah] 76 P. 22; Miller v. Crawford [Ohio] 71 N. E. 631.

50. State v. Jack [Kan.] 76 P. 911.

51. Adams Exp. Co. v. State [Ind.] 67 N. E. 1033.

52. See 1 Curr. L. 593.

53. Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 24 S. Ct. 576, citing many cases.

54. Foreclosure of lien based on assessment for local improvement. Brown v. Central Bermudez Co. [Ind.] 69 N. E. 150. Recovery from railroad company on suit to recover the cost by an adjoining owner of fencing its right of way. Terre Haute & L. R. Co. v. Salmon, 161 Ind. 131, 67 N. E. 918.

55. A scheme of taxation for drainage purposes held not violative of the constitution. Burguieres v. Sanders, 111 La. 109, 35 So. 478. See 1 Curr. L. 593.

56. In re City of New York, 89 N. Y. S. 6. Notice to abutters will not sustain assessments against other owners of land in vicinity. Beebe v. Magoun, 122 Iowa, 94, 97 N. W. 986. Notice by publication of the boundaries of the assessment district is sufficient. City of St. Joseph v. Truckenmiller [Mo.] 81 S. W. 1116.

57. Such hearing may be conclusive. Hibben v. Smith, 191 U. S. 310, 24 S. Ct. 88. That the right of appeal is given in case of property in cities assessed for a local improvement, and not in favor of property in towns does not render the statute invalid. Deane v. Indiana Macadam & Construction Co., 161 Ind. 371, 68 N. E. 686. Notice of every step is not necessary if taxpayer is given opportunity to be heard before the assessment is finally determined upon. Adams v. Roanoke [Va.] 45 S. E. 881; City of St. Joseph v. Truckenmiller [Mo.] 81 S. W. 1116. Due process is not denied by local improvement statutes and proceedings providing notice and a hearing to all interested persons. Kettle v. Dallas [Tex. Civ. App.] 80 S. W. 874.

58. Expense to be a lien on adjacent tide lands owned by the state which adjacent owners of uplands have the first right to purchase. Seattle & L. W. Waterway Co. v. Seattle Dock Co. [Wash.] 77 P. 845.

59. That a majority of the commissioners owned property benefitted by the improvement does not so incapacitate them. Hibben v. Smith, 191 U. S. 310, 24 S. Ct. 88.

60. Metropolitan R. Co. v. Macfarland, 20 App. D. C. 421.

61. Deane v. Indiana Macadam & Const. Co., 161 Ind. 371, 68 N. E. 686; Adams v. Roanoke [Va.] 45 S. E. 881; Ross v. Kendall [Mo.] 81 S. W. 1107.

62. McMillan v. Butte [Mont.] 76 P. 203.

63. Lathrop v. Racine, 119 Wis. 461, 97 N. W. 192.

64. Shepard v. Barron, 194 U. S. 553, 24 S. Ct. 737.

65. See 1 Curr. L. 594.

66. Stone v. Little Yellow Drainage Dist., 118 Wis. 388, 95 N. W. 405.

67. St. Louis Southwestern R. Co. v. Grayson [Ark.] 78 S. W. 777.

68. Notice to abutters will not support assessment against other owners in vicinity. Beebe v. Magoun, 122 Iowa, 94, 97 N. W. 986.

69. Stone v. Little Yellow Drainage Dist., 118 Wis. 388, 95 N. W. 405.

Taxation.[70]—A taxing act which exceeds the power of the legislature is void and proceedings thereunder do not constitute due process of law.[71] The right of a taxpayer to be heard is constitutional, and the legislature cannot in the first instance, nor by a curative statute, deprive him of it,[72] but notice to the owner of the assessment and levy of a tax is not necessary where a writ of error is provided for review of the assessment.[73] A state does not infringe the rights of a taxpayer by exempting a corporation from a tax wholly or in part,[74] and due process of law is not denied by the Federal statute taxing oleomargarine, because congress has not seen fit to tax natural butter.[75] A statute making an agent personally liable for the taxes on funds he holds for investment does not deprive him without due process,[76] but a statute imposing a privilege tax on the business of advertising in cars, depots, etc., and providing that the railway company leasing the privilege shall be liable for the tax, is invalid.[77] A statute imposing a tax on real estate where the manufacture or sale of cigarettes is carried on is valid though not providing for notice of its assessment, and providing for collection by summary method,[78] but a statute providing that a building within 500 feet of a hydrant may be assessed for fire protection, if water from the waterworks is not used therein, is invalid.[79]

A statute forfeiting title to lands ipso facto for nonpayment of taxes, without any judicial determination, is invalid,[80] but proceedings to foreclose a tax lien are not without due process for want of notice where in accordance with the state law publication is made and any one interested has a right to appear and defend,[81] and notice by publication is sufficient though addressed to a person other than the owner and the owner is nonresident.[82]

Civil remedies and proceedings.[83]—Statutes of limitation are not open to the objection that they deprive persons of their property without due process of law.[84] Notice ordinarily necessary is not so if it could work no benefit.[85] Service of foreign corporations[86] and nonresidents[87] may be upon the persons of

70. See 1 Curr. L. 594.

71. Connecticut inheritance tax law is valid. Appeal of Nettleton, 76 Conn. 235, 56 A. 565.

72. Godfrey v. Bennington Water Co., 75 Vt. 350, 55 A. 654.

73. Nathan v. Spokane County [Wash.] 76 P. 521.

74. Missouri v. Dockery, 191 U. S. 165, 24 S. Ct. 53.

75. McCray v. U. S., 196 U. S. 27, 24 S. Ct. 769.

76. Heinz v. Board of Equalization of City of Davenport, 121 Iowa, 445, 96 N. W. 967.

77. Knoxville Traction Co. v. McMillan [Tenn.] 77 S. W. 665.

78. Hodge v. Muscatine County, 121 Iowa, 482, 96 N. W. 968.

79. Village of Canaseraga v. Green, 88 N. Y. S. 539.

80. Parish v. East Coast Cedar Co., 133 N. C. 478, 45 S. E. 768. State constitutions or statutes that attempt to divest the title of the owner of lands and vest it in another for nonpayment of taxes, without any judicial proceeding and do not provide for redemption, or for a sale and return of the proceeds over and above the taxes and fees, violate the provision requiring due process of law. King v. Hatfield, 130 F. 564; Roper Lumber Co. v. Elizabeth City Lumber Co., 135 N. C. 742, 47 S. E. 757.

81. Leigh v. Green, 193 U. S. 79, 24 S. Ct. 390. Four weeks' notice by publication of the sale of lands for nonpayment of a tax is not unconstitutional as unreasonably short. Johnson v. Hunter, 127 F. 219.

82. Williams v. Pittock [Wash.] 77 P. 385.

83. See 1 Curr. L. 595.

84. Linton v. Heye [Neb.] 95 N. W. 1040. A statute limiting the time within which possession can be claimed or defended under a tax deed is one of limitations. St. Mary's Power Co. v. Chandler-Dunbar Water Power Co. [Mich.] 95 N. W. 654.

85. That no notice to a litigant of the filing of an affidavit disqualifying the trial judge is required by a statute is no ground of invalidity, since the mere filing of the affidavit accomplishes its purpose and notice to the adversary would not benefit him. State v. Clancy [Mont.] 77 P. 312.

86. Service of process on the secretary of a foreign corporation maintaining its principal place of business in a state in accordance with the state statute is sufficient [Ball. Ann. Codes & St. Wash. § 4875]. Smith v. Empire State-Idaho Min. & Development Co., 127 F. 462.

87. The Massachusetts statute providing for service in a cross action on the attorney appearing for a nonresident plaintiff is valid [Rev. Laws, c. 170, §§ 2, 3]. Arkwright Mills v. Aultman & T. Machinery Co., 128 F. 195.

their officers and representatives, and service outside the state may suffice.[88] A statute providing for the appointment of a guardian for a minor child without notice to the parent is not a deprivation of the parent of any valuable right, the state having a right to provide for the custody and control of children.[89]

Recent statutes permitting amendment of the statement for mechanic's lien after suit brought,[90] authorizing an inspection of mines in an action to determine adverse claims thereto,[91] authorizing a directed verdict,[92] and providing that plaintiff in forcible entry proceedings shall, on filing bond, be entitled to a writ of restitution before judgment,[93] have been sustained, while a law attaching conclusiveness to a tax receipt[94] has been held invalid.

Recovery against the master alone in a tort action against master and servant jointly does not deprive the master of his property without due process of law on the theory that he is thereby deprived of his right of reimbursement from the servant.[95]

The right to a new trial after judgment is not specifically granted by the constitution, nor a right essential to due process of law, but is a statutory privilege granted to an aggrieved party on statutory conditions which must be complied with.[96]

A statute providing that tender of the amount of the debt shall divest the title of the purchaser at foreclosure sale does not unjustly deprive him,[97] but due process of law is denied by a statute which divests the title of a mortgagee in possession under purchase at foreclosure for failure to obtain a sheriff's deed within a stated time.[98]

A statute authorizing special administration on the estates of persons believed to be dead is invalid when applied to the estate of a living person,[99] but a statute providing for administration of the estates of persons presumed to be dead by reason of their long absence does not deprive such persons of their property without due process of law, being strictly in rem and all rights of the owner being preserved.[1]

The rents of a married woman's separate estate being community property, she is not deprived thereof without due process of law by the appointment of a receiver for rents of property mortgaged by herself to secure a debt of her husband, she having joined in an assignment of the rents.[2]

Criminal offenses and procedure.[3]—To constitute due process of law in a criminal case, there must be a law describing the offense, an accusation informing the accused of the nature of the offense must be presented, he must have his day in court, and his trial must proceed according to established procedure consisting of rules of pleading and practice before a court of competent juris-

88. Notice of proceedings for an increase of the allowance for the support of children of divorced parents. White v. White [N. J. Err. & App.] 55 A. 739.

89. In re Lundberg [Cal.] 77 P. 156.

90. Atkinson v. Woodmansee [Kan.] 74 P. 640.

91. State v. District Court of Second Judicial Dist., 28 Mont. 528, 73 P. 230.

92. Where evidence demands and there is no conflict. Tilley v. Cox, 119 Ga. 867, 47 S. E. 219.

93. Morris v. Healy Lumber Co., 33 Wash. 451, 74 P. 662.

94. Making the possession of a tax receipt conclusive evidence that all prior taxes have been paid takes the county's property without due process. Harris v. Stearns [S. D.] 97 N. W. 361.

95. Southern R. Co. v. Carson, 194 U. S. 136, 24 S. Ct. 609.

96. Etchells v. Wainwright, 76 Conn. 534, 57 A. 121.

97. Leet v. Armbruster [Cal.] 77 P. 653.

98. Bradley v. Lightcap, 195 U. S. 1, 24, 24 S. Ct. 748, 753.

99. Clapp v. Houg [N. D.] 98 N. W. 710. See, also, Romy v. State [Ind. App.] 67 N. E. 998.

1. Cunnius v. Reading School Dist., 206 Pa. 469, 56 A. 16.

2. De Berrera v. Frost [Tex. Civ. App.] 77 S. W. 637.

3. See 1 Curr. L. 595.

diction.[4] An erroneous decision by a state court as to what the common law of a subject is, if violative of no fundamental right, or specific constitutional provision, does not deny him due process of law.[5] A statute authorizing the seizure and summary destruction of only such property as is made and kept solely for gambling[6] or other unlawful purposes does not deprive the owner without due process,[7] but property of a nature innocent in itself cannot be so destroyed without hearing merely because it has been put to an unlawful use.[8] A statute defining and punishing incest, though not making knowledge of the relationship an element of the crime is not for that reason invalid,[9] and a statute providing for the summary punishment of election officers for contempt of court is valid;[10] but a statute prohibiting the use of the national flag for advertising and label purposes in so far as it applies to articles manufactured before its enactment is invalid.[11] A statute limiting the fees a justice of the peace may receive from the county in criminal cases in any one month cannot be considered as depriving the citizen of his liberty on the ground that by convicting one accused of crime the justice might increase his fees.[12] The conviction in regular manner of a city lot owner of a violation of an ordinance prohibiting growths of weeds on city lots is due process.[13]

The Federal supreme court will not inquire whether the indictment on which the accused was convicted in the state court sufficiently charged an offense,[14] and a statute providing for the indictment of an accessory before the fact in similar terms to a principal is not a deprivation.[15]

The due process clause is not violated by a statute making the possession of policy slips prima facie evidence of guilt,[16] and the reading of the deposition of an absent witness does not deprive the accused on trial in a state court of his liberty without due process of law.[17] Proceedings before the district court of Kansas to take testimony under the Anti-Trust Law of that state are judicial and constitute due process.[18]

§ 16. *Compensation for taking property.*[19]—The power of eminent domain is inherent in every independent government; it is not conferred by the constitutions of the American states, the provisions therein being limitations merely on the exercise of the power.[20] The constitutional provision that private property shall not be taken nor damaged for public use without just compensation[21]

4. Jamison v. Wimbish, 130 F. 351.
5. West v. La., 194 U. S. 258, 24 S. Ct. 650. The decision of a state court that certain acts constitute an offense at the common law presents no Federal question. Howard v. Fleming, 191 U. S. 126, 24 S. Ct. 49. Where the highest court of a state holds that an instruction in a criminal case correctly defining reasonable doubt is sufficient without reference to the presumption of innocence, an instruction following the rule cannot be regarded by the Federal supreme court as a denial of due process. Howard v. Fleming, 191 U. S. 126, 24 S. Ct. 49; Howard v. North Carolina, 191 U. S. 126, 24 S. Ct. 49.
6. Sand. & H. Dig. § 1618. Garland Novelty Co. v. State, 71 Ark. 138, 71 S. W. 257. Code 1899, c. 161, § 1. Woods v. Cottrell [W. Va.] 47 S. E. 276.
7. McConnell v. McKillip [Neb.] 99 N. W. 505.
8. Guns, etc., used in violating game law. McConnell v. McKillip [Neb.] 99 N. W. 505.
9. State v. Glindemann, 34 Wash. 221, 75 P. 800.
10. Sherman v. People [Ill.] 71 N. E. 618.
11. People v. Van De Carr, 178 N. Y. 426, 70 N. E. 966.
12. Herbert v. Baltimore County Com'rs, 97 Md. 639, 55 A. 376.
13. City of St. Louis v. Galt [Mo.] 77 S. W. 876.
14. Howard v. Fleming, 191 U. S. 126, 24 S. Ct. 49.
15. People v. Nolan [Cal.] 77 P. 774.
16. Adams v. New York, 192 U. S. 585, 24 S. Ct. 372.
17. West v. Louisiana, 194 U. S. 258, 24 S. Ct. 650.
18. State v. Jack [Kan.] 76 P. 911.
19. See 1 Curr. L. 696. See extended treatment in Eminent Domain, 1 Curr. L. 1002.
20. Shively v. Lankford, 174 Mo. 635, 74 S. W. 835. The power of eminent domain is a power recognized but not granted by the constitution, it being inherent in the government. Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 P. 670.
21. Gaylord v. Sanitary Dist. of Chicago, 204 Ill. 571, 68 N. E. 522; Juvinall v. Jamesburg Drainage Dist., 204 Ill. 106, 68 N. E.

means that private property shall be taken for no other than a public use, and then only upon the payment of a just compensation.[22] A use is public when it will promote the public interest and tend to develop the resources of the state.[23] The question whether a use is public is strictly a judicial one, unprejudiced by anything the legislature has said upon the subject, in Washington,[24] and legislative in Virginia.[25] The provisions looking to compensation for private property taken for public use do not limit the proper use of public highways,[26] and land held and used for a public use when needed for a different or inconsistent public use may be condemned for the latter use.[27] A constitutional provision requiring payment into court is satisfied by a statute providing payment to a township trustee in case of a township road,[28] and is not violated by retaining a part of the money paid into court, to satisfy a special tax bill issued against the land before condemnation.[29] Property is not taken without just compensation by an ordinance prohibiting the growth of rank and noxious weeds on one's city lot,[30] nor by a rule prohibiting by riparian owners the pollution of streams used for domestic water supply,[31] nor by a statute licensing transient merchants,[32] nor one providing for the inspection of mining claims in a suit to determine adverse claims,[33] nor by an assessment of property for a local improvement based on the benefits derived.[34]

§ 17. *Right to justice and guaranty of remedies.*[35]—The constitution guaranties to every citizen liberty and a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character;[36] this guaranty is of a remedy for only such injuries as result from an invasion or infringement of a legal right, or the failure to discharge a legal duty or obligation.[37] An appeal is a sufficient remedy if adequate in scope,[38] likewise an exclusive

440. Meaning of "just compensation." Spring Val. Waterworks v. San Francisco, 124 F. 574, 601.

22. Gaylord v. Sanitary Dist. of Chicago, 204 Ill. 576, 68 N. E. 522. The provision that private property shall not be taken for public use without just compensation is construed to mean that private property shall not be taken for private use. Nash v. Clark [Utah] 75 P. 371. Right to erect billboards on one's own land is property not to be taken without compensation. People v. Green, 85 App. Div. 400, 83 N. Y. S. 460. A statute providing for the condemnation of private property for public use, but failing either directly or by reference to the general statutes on eminent domain to provide compensation to the owner, is invalid [Acts 1901, p. 90, c. 63]. Watauga Water Co. v. Scott [Tenn.] 76 S. W. 888.

23. Taking water to irrigate a farm is for a public use in this sense. Nash v. Clark [Utah] 75 P. 371. Drainage is public. Laguna Drainage Dist. v. Charles Martin Co. [Cal.] 77 P. 933. Private spur track may be public. Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 A. 1001. The private use of land for a burial ground by a private corporation is not public. Starr Burying Grounds Ass'n v. North Lane Cemetery Ass'n [Conn.] 58 A. 467. If a branch railroad track is open for public use on equal terms to all having occasion at any time to use it, so that all can demand that they be served without discrimination as of right, and the track is subject to governmental control, under general laws, as are the main lines of a railroad, the use is public. Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 A. 1001.

24. Healy Lumber Co. v. Morris, 33 Wash. 490, 74 P. 681.

25. Zircle v. Southern R. Co. [Va.] 45 S. E. 802.

26. Telephone line is not an additional servitude. Kirby v. Citizens' Tel. Co. [S. D.] 97 N. W. 3.

27. Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n [Conn.] 58 A. 467.

28. Mo. const., art. 2, § 21. Shively v. Lankford, 174 Mo. 535, 74 S. W. 835.

29. Ross v. Kendall [Mo.] 81 S. W. 1107.

30. Const. U. S. Amend. 5. City of St. Louis v. Galt [Mo.] 77 S. W. 876.

31. Sprague v. Dorr [Mass.] 69 N. E. 344.

32. Levy v. State, 161 Ind. 251, 68 N. E. 172.

33. State v. District Court of Second Judicial Dist., 28 Mont. 528, 73 P. 230.

34. Stone v. Little Yellow Drainage Dist., 118 Wis. 388, 95 N. W. 405. Property is not taken without just compensation by an assessment for a local improvement petitioned for under the statute by the lot owners who fail to object to the improvement or the constitutionality of the statute under which it is made, until after the completion of the improvement. Shepard v. Barron, 194 U. S. 553, 24 S. Ct. 737.

35. See 1 Curr. L. 597.

36. Gray v. Building Trades & Council [Minn.] 97 N. W. 663.

37. Statutory remedies may be withdrawn. Liability of city for personal injury from defective street. Goddard v. Lincoln [Neb.] 96 N. W. 273.

38. A statute providing for the initiation of proceedings to improve a highway on petition of a majority of the landowners,

remedy provided by statute,[39] and one trial without review is enough.[40] Remedy is denied where the pleading of a party is stricken for disobedience of a provisional order.[41] The right is not invaded by the Montana statute providing for a change of judges on filing an affidavit of prejudice, though providing that two-thirds of the judges of the state may be disqualified in this manner.[42] Reasonable regulations imposing costs and requiring security for costs as incidents of judicial proceedings to redress wrongs or protect rights do not require a suitor to purchase justice.[43] A statute penalizing any member of a board of review who intentionally agrees to omit property from taxation contravenes no principle of public justice.[44] Recovery against one joint defendant deprives him of no Federal right, though if sued alone he could have removed the suit to the Federal court.[45] A statute limiting the right of action for libel to certain actual damages therein defined in case a retraction has been published on demand is unconstitutional, as depriving persons libeled of their remedy for wrongs,[46] but a similar statute not defining actual damages was sustained as permitting recovery as to everything except punitive damages, to which there is no property right.[47]

§ 18. *Jury trials preserved.*[48]—The right of trial by jury as it existed at common law has been almost universally preserved. Some constitutions dispense with unanimity. In some states the constitutional right is supplemented by a statutory right in cases where it did not exist at common law.[49]

§ 19. *Crimes, prosecutions, punishments and penalties.*[50]—The sixth amendment of the Federal constitution does not apply to proceedings in the state courts generally,[51] neither is it applicable to prosecutions in California, notwithstanding the declaration in the constitution of that state that it is an inseparable part of the American union, and subject to its laws and constitution.[52] Persons accused of crime are entitled under American constitutions to a speedy and public trial by an impartial jury in the county or district where the crime was committed,[53] but this provision does not invalidate a statute providing for

and for the assessment of its cost as benefits, giving all owners notice and a right of appeal, is unobjectionable [Ind. Bill of Rights, § 12]. Bowlin v. Cochran, 161 Ind. 486, 69 N. E. 153.

39. Assessment proceeding. McCall v. Rochester, 89 N. Y. S. 766.

40. Fleshman v. McWhorter [W. Va.] 46 S. E. 116.

41. Answer to be stricken for refusal to attend when required to give his deposition. Held invalid, as tending unduly to restrict the right to defend an action [Code Civ. Proc. § 1991]. Summerville v. Kelliher [Cal.] 77 P. 889.

42. State v. Clancy [Mont.] 77 P. 312.

43. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

44. State v. Zillman [Wis.] 98 N. W. 543.

45. Southern R. Co. v. Carson, 194 U. S. 136, 24 S. Ct. 609.

46. Hanson v. Krehbiel [Kan.] 75 P. 1041. See, also, annotation, ante, § 15.

47. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

48. See 1 Curr. L. 597.

49. See a full treatment in Jury, 2 Curr. L. 633.

50. See 1 Curr. L. 599.

51. West v. Louisiana, 194 U. S. 258, 24 S. Ct. 650; People v. Welsh, 88 App. Div. 65, 84 N. Y. S. 703. In Georgia it seems that misdemeanor cases before a city court may be prosecuted on accusation signed officially by the prosecuting officer. Even were it not so an accusation founded on affidavit suffices and it does not matter that the act creating the court fails to specifically require it. Wright v. Davis [Ga.] 48 S. E. 170.

52. People v. Nolan [Cal.] 77 P. 774.

53. O'Berry v. State [Fla.] 36 So. 440.

NOTE. What is a "crime" within the meaning of the constitution? Schick v. U. S., 24 S. Ct. 826 was a case of prosecution by information for a penalty for the knowing purchase or receipt for sale of oleomargarine which had not been stamped according to law. The question mainly argued in the supreme court was whether the plaintiff in error could lawfully waive the trial by jury in view of the 3d clause of section 2, art. 3, of the constitution, which provides that "the trial of all crimes, except in cases of impeachment, shall be by jury," and article 6 of the amendments, which provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed." In other words, was the violation of the act relative to the purchase or sale of oleomargarine a crime?

Mr. Justice Brewer, who wrote the opin-

change of venue on application either of the accused or the state,[54] and where the accused has taken no steps to procure a speedy trial, the fact that the public prosecutor has not set the case for trial as early as he could have been required to, will not prevent a trial.[55] The constitution in providing that a defendant shall have compulsory process to obtain the testimony of his own witnesses does not guaranty their attendance, nor more than ordinary diligence in serving subpoenas,[56] and the provisions against bills of attainder and that no conviction shall work forfeiture of estate does not apply to a holding that a husband could not by jure mariti take any interest in his wife's property, he having murdered her, since such property under the holding never came to him.[57] A statute providing for the summary punishment of election officers for contempt of court is not objectionable for providing that such conviction and punishment shall be no bar to subsequent criminal prosecution.[58] A statute imposing a penalty on a railroad company for failure of its engineer to stop its train at a railroad crossing is not for that reason invalid, as it merely exacts the duty of seeing that its employe acts in obedience to the statute.[59] Whether or not a crime is infamous depends upon the fact whether, by the statute defining it, an infamous punishment can be awarded.[60] The indeterminate sentence law is for the benefit of convicts, and constitutional.[61] The bastardy act of Nebraska is valid,[62] but that of Washington is not.[63]

The constitutional prohibition against ex post facto laws applies only to criminal or penal statutes.[64] The indeterminate sentence law of Kansas is ex post facto as applied to offenses committed prior to its enactment,[65] but a change in the law regarding persons condemned to death, whereby they are confined in the state penitentiary instead of the county jail pending execution, works no disadvantage, and is not ex post facto, even as applied to those convicted before its enactment.[66] A statute requiring one convicted of a second offense to give bond

ion of the court, mainly relied upon the definition given by Blackstone, which is as follows: "A crime or misdemeanor is an act committed or omitted, in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms; though in common usage, the word 'crimes' is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors' only." This, said Mr. Justice Brewer, was the definition with which the framers of the constitution were presumably familiar, and they must have used the term in that sense. It was therefore held that the offense under consideration was not a crime within the meaning of the constitution.

An express and specific definition of this term had, as a fact, been given by the supreme court of the United States in an earlier case, though the opinion in the case at bar does not refer to it. In Commonwealth v. Dennison, 24 How. [U. S.] 66, 99, one of the fugitive slave cases, the governor of Ohio had refused to deliver up one Lago, who was under indictment in Kentucky for the offense of assisting a slave to escape, on the ground that the alleged offense against the local statute of Kentucky was not a crime within the meaning of the constitution. But the unanimous court, speaking by Mr. Chief Justice Taney, held that the words, "treason, felony, or other crime," in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by the law of the state. The word "crime" of itself includes every offense, from the highest to the lowest in the grade of offenses, and includes what are called "misdemeanors," as well as "treason and felony."—3 Mich. L. R. 59.

54. O'Berry v. State [Fla.] 36 So. 440.
55. State v. Banks, 111 La. 22, 35 So. 370.
56. Smith v. State, 118 Ga. 61, 44 S. E. 817.
57. U. S. Const. art. 1, §§ 9, 10; Tenn. const. art. 1, § 12. Box v. Lanier [Tenn.] 79 S. W. 1042.
58. Sherman v. People [Ill.] 71 N. E. 618.
59. State v. Chicago, etc., R. Co., 122 Iowa, 22, 96 N. W. 904.
60. Jamison v. Wimbish, 130 F. 351.
61. People v. Adams, 176 N. Y. 351, 68 N. E. 636; State v. Stephenson [Kan.] 76 P. 905. Cf. State v. Tyree [Kan.] 77 P. 290.
62. Gatzmeyer v. Peterson [Neb.] 94 N. W. 974.
63. State v. Tieman, 32 Wash. 294, 73 P. 375.
64. Calder v. Bull, 3 Dall. [U. S.] 386; Fletcher v. Peck, 6 Cranch [U. S.] 138; Ogden v. Saunders, 12 Wheat. [U. S.] 266; Watson v. Mercer, 8 Pet. [U. S.] 110; De Pass v. Bidwell, 124 F. 615. See 1 Curr. L. 599, n. 22.
65. State v. Tyree [Kan.] 77 P. 290.
66. State v. Rooney [N. D.] 95 N. W. 513.

for future behavior in addition to punishment is not invalid as punishing for prior offenses, but is merely declaratory of the common law,[67] and a statute providing a severer penalty for a third conviction of larceny is not ex post facto, though applying to one whose prior convictions were had before its enactment,[68] nor is it invalid on the ground that it changes the rules of evidence and admits different testimony than was admissible at the time of the commission of the offense.[69] A statute validating polygamous marriages from the time the previous marriage is dissolved by death or divorce applies to a case where divorce prohibiting remarriage for two years had been granted before its enactment, but the two years had not expired, and so construed, the statute is not objectionable as retroactive.[70] A statute including embezzlement in the definition of larceny, but in no way altering the rules of evidence or the nature of evidence required to convict, should be construed to relate merely to matters of pleading, and therefore not ex post facto as applied to crimes committed before its enactment.[71] A law punishing individuals for practicing a profession in the state without license is not ex post facto because applicable to those who were legally practicing before its enactment.[72]

There is nothing in the constitution of the United States or in those of the several states that guaranties to a person charged with a misdemeanor the right to demand an indictment by a grand jury.[73] The legislature may prescribe a form of indictment or information to be used,[74] but it must acquaint the accused with the nature and cause of the accusation against him,[75] and run in the name of the people or the state as required by the constitution.[76] In several states felonies must be prosecuted by indictment.[77]

The necessity of defendant's presence at the trial of felony cases does not extend to the view of the premises,[78] and a defendant in a state court who appears by counsel may be tried for a misdemeanor in his absence.[79]

The sixth amendment of the Federal constitution does not apply to proceedings in state courts, nor is there any specific provision in the Federal constitution requiring defendant to be confronted with the witnesses against him in a criminal trial in the state courts.[80] The right when constitutionally granted may be waived,[81] and is required only once in Louisiana.[82] A statute permitting proof

67. Huyser v. Com., 25 Ky. L. R. 608, 76 S. W. 174.

68, 69. Iowa v. Jones, 128 F. 626.

70. Commonwealth v. Josselyn [Mass.] 71 N. E. 313.

71. Commonwealth v. Kelley, 184 Mass. 320, 68 N. E. 346.

72. State v. Chapman, 69 N. J. Law, 464, 55 A. 94.

73. Green v. State, 119 Ga. 120, 45 S. E. 990.

74. Brass v. State [Fla.] 34 So. 307. The legislature may provide that an indictment for murder shall specify the degree. Commonwealth v. Ibrahim, 184 Mass. 255, 68 N. E. 231. A statute recognizing different degrees of murder and providing that it shall not be construed to require any change in indictments therefor is not violative of the right of a person accused to be informed of the nature of the accusation against him. State v. Cole, 132 N. C. 1069, 44 S. E. 391.

75. Brass v. State [Fla.] 34 So. 307.

76. The omission of the word "the" from the commencement of an information required by the constitution to begin "In the name and by the authority of the state of Texas" is immaterial [Const. art. 5, § 12]. Weaver v. State [Tex. Cr. App.] 76 S. W. 564. A provision that all prosecutions shall be in the name and by the authority of the commonwealth does not prohibit prosecutions in municipal courts in the name of the city for violations of its ordinances. City of Louisville v. Wemhoff, 25 Ky. L. R. 995, 76 S. W. 876.

77. The juvenile court act of Pennsylvania violates the bill of rights in providing for prosecutions for felony by information. Mansfield's Case, 22 Pa. Super. Ct. 224.

78. State v. Mortensen, 26 Utah, 312, 73 P. 562, 633.

79. People v. Welsh, 88 App. Div. 65, 84 N. Y. S. 703.

80. West v. Louisiana, 194 U. S. 258, 24 S. Ct. 650; People v. Welsh, 88 App. Div. 65, 84 N. Y. S. 703.

81. Stipulation as to testimony of absent witness and declination to accompany jury on view of premises. State v. Mortensen, 26 Utah, 312, 73 P. 562, 633.

82. State v. Banks, 111 La. 22, 35 So. 370. See 1 Curr. L. p. 599, n. 31.

of the general reputation of accused's house on a prosecution for keeping a house of ill fame is valid.[83]

The guaranty against furnishing evidence against oneself can be waived, and if a witness before the grand jury makes no claim of privilege and testifies falsely, he is liable for perjury, though his answers, if truthful, might subject him to a criminal charge.[84] That under it a citizen may be compelled to furnish evidence against himself is no objection to an income-tax law as a whole, since if the law is invalid in that respect, the citizen may claim the benefit of the constitution whenever his rights may be assailed under color of the law.[85] A statute requiring self incrimination, but granting immunity from prosecution coextensive with the constitutional privilege of silence, is valid.[86] Absolute immunity is necessary, however,[87] though a state law need not furnish immunity from prosecution under a Federal statute on the same subject.[88] Defendant is not compelled to incriminate himself where the state introduces in evidence papers found in the execution of a valid search warrant.[89] The court cannot compel a defendant to accompany the jury on its view of the premises, since to do so might lead to self incrimination.[90] The requirement that druggists doing business in local option counties shall render weekly reports of sales to the prosecuting attorney does not clash with the provision against self incrimination.[91]

Excessive penalties are prohibited only in criminal cases,[92] and a penalty imposed by statute will not be held unconstitutional as excessive, unless so excessive as to shock the sense of mankind;[93] undue leniency in one case does not transform a reasonable punishment in another case to a cruel one,[94] and failure to fix a minimum penalty for a violation of a law as directed by the constitution is not fatal to the law, where a maximum is provided by general law.[95] The constitution of Kentucky forbids the passage of any ordinance fixing less penalty than that fixed by a statute for the same offense.[96]

§ 20. *Searches and seizures.*[97]—The guaranty of the Federal constitution against unreasonable searches and seizures does not apply to actions in the courts of the states,[98] and there is no violation of the constitutional guaranty in admitting in evidence in a criminal trial, papers found in the execution of a valid search warrant prior to the indictment.[99] An order authorizing a party to an

83. State v. Wilson [Iowa] 99 N. W. 1060.
84. State v. Faulkner, 175 Mo. 546, 75 S. W. 116.
85. Peacock v. Pratt [C. C. A.] 121 F. 772.
86. Statute against trusts and combinations. People v. Butler St. Foundry & Iron Co., 201 Ill. 236, 66 N. E. 349; State v. Jack [Kan.] 76 P. 911.
87. Gambling. People v. O'Brien, 176 N. Y. 253, 68 N. E. 353; People v. Wyatt, 176 N. Y. 253, 68 N. E. 353. Anti-trust law. State v. Jack [Kan.] 76 P. 911.
88. State v. Jack [Kan.] 76 P. 911.
89. Adams v. New York, 192 U. S. 585, 24 S. Ct. 372; People v. Adams, 85 App. Div. 390, 83 N. Y. S. 481.
90. State v. Mortensen, 26 Utah, 312, 73 P. 562, 633.
91. People v. Shuler [Mich.] 98 N. W. 986.
92. An act providing a penalty to be recovered by civil action against an express company, unjustly discriminating against another, is not repugnant to the constitutional provision declaring that all penalties shall be proportioned to the nature of the offense, as such provision only has reference to criminal proceedings [Const. art. 1, § 16]. Adams Exp. Co. v. State [Ind.] 67 N. E. 1033.
93. A fine of $5 for each prairie chicken found in one's possession during closed season is not. McMahon v. State [Neb.] 97 N. W. 1035. Ten years in the penitentiary for a conspiracy to swindle by means of a gold brick is not so cruel or unusual as to violate the Federal constitution. Howard v. Fleming, 191 U. S. 126, 24 S. Ct. 49. A fine of not less than $300 for illegal liquor selling is not so disproportionate to the offense as to amount to a cruel and unusual punishment. State v. Constantino [Vt.] 56 A. 1101.
94. Howard v. Fleming, 191 U. S. 126, 24 S. Ct. 49.
95. State v. Pearson, 110 La. 387, 34 So. 575.
96. Const. § 168. Operation of pool rooms. City of Louisville v. Wemhoff, 25 Ky. L. R. 1924, 79 S. W. 201.
97. See 1 Curr. L. 601.
98. People v. Adams, 176 N. Y. 351, 68 N. E. 636.
99. Adams v. New York, 192 U. S. 585, 24 S. Ct. 372; People v. Adams, 85 App. Div. 390, 83 N. Y. S. 481.

action to examine his adversary's books before trial is not unreasonable.[1] An income-tax law is not wholly invalidated by providing for unreasonable searches and seizures, since the citizen may claim protection of the constitution whenever his rights thereunder are attacked.[2]

§ 21. *Suffrage and elections.*[3]—While the privilege to vote may not be abridged by a state on account of race, color or previous condition of servitude, the privilege is not given by the Federal constitution or any of its amendments, nor is it a privilege springing from citizenship of the United States.[4] The right to vote by secret ballot is neither natural nor constitutional, and a statute providing that if challenged at a primary election, the voter must make affidavit that at the prior election he voted for a majority of the party candidates, is valid.[5] A provision authorizing the legislature to pass laws to secure the purity of elections authorizes a law making the representatives of a political party the final arbiters of factional disputes within the party,[6] and a state statute limiting the right of citizens of other states to vote after removal into the state enacting it, by requiring a declaration of intention, is not violative of any right guarantied by the Federal constitution;[7] neither is it void as being unreasonable or offensive, or as imposing additional qualifications other than those imposed by the constitution of the state.[8] A statute providing for a board of five persons to be elected by the people, but limiting the voter's right to vote for but three members, is invalid in New Jersey.[9] Under the constitution of New York, no person for the purpose of voting is deemed to have gained or lost a residence by reason of attendance at a seminary of learning.[10] A statute providing conditions of registration is not unconstitutional as qualifying the right of voters to vote.[11] By-laws of a corporation which compel a member thereof under penalty of expulsion to give up the free exercise of his right of suffrage are in conflict with a constitutional provision declaring that no citizen shall be disfranchised unless by the law of the land or judgment of his peers.[12]

§ 22. *Frame and organization of government; courts; officers.*[13]—In regard to the subdivisions of government, large power is given the legislature.[14] In so far as the properties and funds of these subdivisions are public, it has control over them,[15] and may subject annexed citizens to burdens of city taxation.[16] The constitution of Wisconsin provides for one system of county and town government, as nearly uniform as practicable.[17]

Initiative and referendum laws do not impair a republican form of gov-

1. Swedish-American Tel. Co. v. Fidelity & Casualty Co., 208 Ill. 562, 70 N. E. 768.
2. Peacock v. Pratt [C. C. A.] 121 F. 772.
3. See 1 Curr. L. 601.
4. Minor v. Happersett, 21 Wall. [U. S.] 162; Pope v. Williams, 193 U. S. 621, 24 S. Ct. 573.
5. Hopper v. Stack, 69 N. J. Law, 562, 56 A. 1.
6. People v. District Court Second Judicial Dist [Colo.] 74 P. 896.
7. Pope v. Williams, 193 U. S. 621, 24 S. Ct. 573.
8. Pope v. Williams [Md.] 56 A. 543.
9. Bowden v. Bedell, 68 N. J. Law, 451, 53 A. 198; Smith v. Perth Amboy [N. J. Law] 56 A. 145.
10. Const. art. 2, § 3. Petition for registration by student held insufficient. In re McCormack, 86 App. Div. 362, 83 N. Y. S. 847.
11. Acts 1904, p. 31, c. 6, requiring the production of a registration certificate, does not violate the Kentucky state constitution. Yates v. Collins [Ky.] 82 S. W. 282.
12. Stein v. Marks, 89 N. Y. S. 921.
13. See 1 Curr. L. 601.
14. Boundaries of city and county of Denver under Const. Amend. art. 20. Town of Montclair v. Thomas, 31 Colo. 327, 73 P. 48.
15. The legislature of Colorado has the same control over the funds of the new county of Denver established by the recent amendment to the constitution that it has over the funds of other counties [Amendment art. 20]. City Council of Denver v. Adams County Com'rs [Colo.] 77 P. 858.
16. To pay the existing bonded indebtedness of the city. Toney v. Macon, 119 Ga. 83, 46 S. E. 80.
17. Special charter making mayor member of board of supervisors, and general statute making the supervisor of each ward a member, do not so clash as to violate the constitution. State v. Kersten, 118 Wis. 287, 95 N. W. 120.

ernment, since they merely reserve to the people a larger share of legislative power;[18] neither does a grant to a city of power to make its own charter, and not in express terms limiting it by the constitution and general laws of the state.[19]

Provisions against the holding of offices under different departments of the government at the same time are met.[20] That in Arkansas refers only to state officers.[21]

The right of local self-government[22] is said to be a principle that permeates the whole system of American government.[23] It has been denied, however,[24] and the constitution of Mississippi expressly provides against any such right.[25] In those states where the principle is recognized, the legislature cannot directly or indirectly appoint, or provide for the appointment, by any authority outside the locality affected, of any officers of a local body,[26] except such as are mere arms of the police power of the state, such as fire and police boards;[27] but the fact that a statute confers powers upon a local board not in contemplation when the board was elected is no objection.[28] The formation of towns or cities or the change of their boundaries is not a "local concern" placed by the constitution of Arkansas, in the jurisdiction of the county court and beyond the control of the legislature,[29] and where bonds have been sold by a township to improve a certain street, and a village is subsequently incorporated including that street within its territory, a provision in the act of incorporation that the township treasurer shall turn the fund over to the village does not interfere.[30] A statute authorizing a township board to issue bonds for the improvement of a certain street in the township does not interfere,[31] and a statute establishing a sewerage district is not objectionable as being a local and special law regulating the internal affairs of towns and counties.[32] The county park act of New Jersey is not invalid as a special regulation of the internal affairs of a county.[33] The power and authority conferred by the constitution of

18. Kadderly v. City of Portland [Or.] 74 P. 710.

19. People v. Sours, 31 Colo. 369, 74 P. 167.

20, 21. Const. Ark. art. 4, §§ 1, 2. Sheriff and chief of police are not incompatible. Peterson v. Culpepper [Ark.] 79 S. W. 783.

22. See 1 Curr. L. 601. Compare Municipal Corporations, 2 Curr. L. 940.

23. Cooley, Const. Lim. pp. 47, 207, 223. State v. Eldredge [Utah] 76 P. 337.

24. No right of local self-government, either by the constitution, or based on history or tradition, exists in Texas, prohibiting the legislature from abolishing a city government, and vesting its control in an appointive body selected by the governor of the state. Brown v. Galveston [Tex.] 75 S. W. 488. It is not a constitutional right of the people of New Jersey to have all matters of local concern intrusted to municipal corporations. Within constitutional limits, the people of the state, acting through the general legislature, may delegate to the municipalities such portion of political power as they may deem expedient, may withhold other powers, and may withdraw any part of that which has been delegated. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571. A statute incorporating a town and providing that certain named persons shall act as mayor and aldermen until their successors shall be elected by the people of the town is valid. Lambert v. Norman, 119 Ga. 351, 46 S. E. 433.

25. Adams v. Kuykendall [Miss.] 35 So. 830.

26. Under the home rule provision of the constitution of New York, the lengthening of the term of office of a city officer is practically an appointment for that time and invalid. Const. art. 10, § 2. Such a law is not sustainable on the theory that the effect is a mere incident of a change of the time of election from March to November. In re Haase, 88 App. Div. 242, 85 N. Y. S. 462. In Pennsylvania, the legislature in creating a new court cannot legislate upon the bench the judge of an old court. The judge must be chosen by the people of the district. In re Mansfield, 22 Pa. Super. Ct. 224.

27. The legislature may provide for the appointment by the governor of local police commissioners who shall have control of local police matters. Wiggin v. Manchester [N. H.] 58 A. 522. In Nebraska, the legislature may confer on the governor power to appoint the fire and police board of cities of the first class. State v. Nolan [Neb.] 98 N. W. 657.

28. Grosse Pointe Tp. v. Finn [Mich.] 96 N. W. 1078.

29. Const. 1874, art. 7, § 28. City of Little Rock v. North Little Rock [Ark.] 79 S. W. 785.

30. Payne v. Grosse Pointe Tp. [Mich.] 96 N. W. 1077.

31. Grosse Pointe Tp. v. Finn [Mich.] 96 N. W. 1078.

32. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571.

33. Gen. St. p. 2618. Ross v. Board of Chosen Freeholders of Essex, 69 N. J. Law, 291, 55 A. 310.

Minnesota upon cities to frame their own charters extends to and embraces all subjects appropriate to the orderly condition of public affairs.[34]

Courts[35] and their terms and jurisdiction as defined by the constitution are inviolate, but regulations of procedure within such limits are valid.

No offices may be created[36] except as authorized by the constitution. Nor may tenure terms or compensation be altered beyond such authority.

§ 23. *Taxation and fiscal affairs.*[37]—In the absence of constitutional restraint, the legislature has absolute power with respect to the means of raising revenue by taxation.[38] The power to tax, however, can be exercised only for public purposes;[39] and by the power authorized in respect of the particular purpose.[40]

An ordinance compelling the removal or sanding of snow and ice on sidewalks is not invalid as an improper exercise of the taxing power.[41]

Credits[42] and franchises[43] are taxable. Privilege and occupation taxes may be laid on a generic class embracing several that are often distinct,[44] but a single act cannot be taxed per se as a privilege,[45] and when licenses are imposed for revenue, they are in some sense taxes,[46] but not within general taxation provisions referring to property.[47] Hence uniformity and proportion of tax to value do not apply.[48]

The Federal statute imposing a stamp tax on the manifests for clearance of any ship or cargo for a foreign port is in effect a tax on exports and invalid,[49] but a tax on shell fish taken and shipped out of a certain county imposed in connection with a statute protecting the industry is not an export tax, and is therefore not unconstitutional for that reason.[50] The congressional power to levy ex-

34. Presentation of claims to auditors and procedure thereafter are included. State v. District Court of St. Louis County, 90 Minn. 457, 97 N. W. 132.

35. See 1 Curr. L. 602, n. 70-80. Compare Courts, 3 Curr. L.

36. See 1 Curr. L. 602, n. 68; also Officers and Public Employes, 2 Curr. L. 1069.

37. See 1 Curr. L. 604.

38. State v. Eldredge [Utah] 76 P. 337; Parsons v. People [Colo.] 76 P. 666.

39. Statute authorizing creation of debt to equip electric light plant to furnish city and private consumers is public [Const. Mo. art. 10, §§ 1, 3, 10]. State v. Allen, 178 Mo. 555, 77 S. W. 868. A statute providing for payment by the county of attorneys appointed to defend indigent persons accused of crime does not violate a provision of the constitution prohibiting the appropriation of money of the county to the aid of an individual [Const. art. 8, § 10; Code Cr. Proc. § 308]. People v. Grout, 87 App. Div. 193, 84 N. Y. S. 97. Sugar bounty is not public. Minnesota Sugar Co. v. Iverson [Minn.] 97 N. W. 454.

40. The juvenile court law of Missouri, in providing that the counties in which it is operative shall pay its expenses, is not violative of the provision that the legislature shall not levy taxes for municipal purposes [Const. art. 10, §§ 1, 10]. Ex parte Loving, 178 Mo. 194, 77 S. W. 508.

41. State v. McMahon, 76 Conn. 97, 55 A. 591.

42. Credits are property and properly taxable as such. Kingsley v. Merrill [Wis.] 99 N. W. 1044. There is no inhibition in the Federal constitution against the right of the state to tax property in the shape of credits. Where the same are evidenced by notes or obligations held within the state, in the hands of an agent of the owner for the purpose of collection or renewal, with a view to new loans, and carrying on such transactions as a permanent business. State Bd. of Assessors v. Comptoir Nat. D'Escompte De Paris, 191 U. S. 388, 24 S. Ct. 109.

43. The franchise of being a corporation is assessable as a franchise under the constitution of California, and such an assessment is not violative of the 14th amendment. Bank of California v. San Francisco, 142 Cal. 276, 75 P. 832.

44. Under constitutional power to tax trades, occupations and professions, an ordinance imposing a license tax on real estate agents, so defined as to include several allied occupations, is not for that reason invalid [Const. §§ 174, 181]. City of Covington v. Herzog, 25 Ky. L. R. 938, 76 S. W. 538.

45. Purchasing note [Const. art. 2, § 28]. Trentha v. Moore [Tenn.] 76 S. W. 904.

46. License taxes imposed by municipal corporations for revenue are taxes, and power to collect them can be vested only by general laws [Const. art. 11, § 13]. Ex parte Jackson [Cal.] 77 P. 457.

47. Stein v. Morrison [Idaho] 75 P. 246; Parsons v. People [Colo.] 76 P. 666.

48. In re Watson [S. D.] 97 N. W. 463. See, also, post, this section, Equality and Uniformity.

49. War Tax Act, June 13, 1898. New York & Cuba Mail S. S. Co. v. U. S., 125 F. 320.

50. Brooks v. Tripp, 135 N. C. 159, 47 S. E. 401.

cises was not exceeded by the statute taxing oleomargarine because its enforcement will destroy or restrict the manufacture,[51] and an excise which does not conflict with any express limitation in the constitution cannot be held invalid because the court may deem the rate of taxation too high.[52] The provision of the Federal constitution prohibiting any state, without the consent of congress, to lay duties on exports, applies only to commerce with a foreign country.[53]

Equality and uniformity.[54]—The aphorism that "taxation must be equal and uniform" is not a fundamental maxim of government limiting the taxing power, unless embodied in the state constitution;[55] and when so embodied, it applies only to assessment and taxation, not to the expenditure of money arising from it,[55] and does not require absolute or mathematical uniformity.[57] The requirement of the Federal constitution that all duties, imposts and excises shall be uniform throughout the United States is a rule of taxation only for the United States, and has no application to the powers of taxation of a state or territorial legislature;[58] but tax laws must not be so un-uniform as to deny the equal protection of the laws.[59] Local assessments,[60] water rates,[61] taxes on inheritances,[62] and license, privilege and occupation taxes, are not within the rule.[63] Exemptions do not violate the rule. Tax on all money lenders except banks does not.[64] A savings bank tax is not invalid because religious, charitable and beneficial institutions are not taxed,[65]

51, 52. McCray v. U. S., 195 U. S. 27, 24 S. Ct. 769.

53. Laws 1901, p. 96, c. 45, § 3, prohibiting the transportation beyond the limits of the territory of any hides not inspected or tagged, for which a fee of 10 cents a hide was permitted, does not violate art. 1, § 10 of the Federal constitution, in so far as such law applies to the shipment of hides within the United States. Territory v. Denver, etc., R. Co. [N. M.] 78 P. 74.

54. See 1 Curr. L. 605.

55. State v. Travelers' Ins. Co., 73 Conn. 255, 47 A. 299; Travellers' Ins. Co. v. Conn., 185 U. S. 364, 22 S. Ct. 673; Sharpless v. Phila., 21 Pa. 147, 59 Am. Dec. 759; State v. McMahon, 76 Conn. 97, 55 A. 591; Appeal of Nettleton, 76 Conn. 235, 56 A. 565. The constitution of Mississippi requires uniformity. Adams v. Kuykendall [Miss.] 35 So. 830.

56. Kerr v. Perry School Tp. [Ind.] 70 N. E. 246. The provision of the Ohio constitution that taxes shall be levied on property by a uniform rule does not require that the general revenue shall be so expended that each taxpayer shall receive benefits therefrom in proportion to the amount he has paid. City of Columbus v. Jeffrey, 2 Ohio N. P. (N. S.) 85.

57. A statute abolishing school districts and vesting their property in towns is not contrary to the provision which declares that the burdens of the state ought to be fairly distributed among its citizens. In re School Committee of North Smithfield [R. I.] 58 A. 628. Provision for quadrennial reassessment is valid [Ill. Const. art. 9, § 1]. Crozer v. People, 206 Ill. 464, 69 N. E. 489.

58. Const. art. 1, § 8. Peacock & Co. v. Pratt [C. C. A.] 121 F. 772.

59. See ante, § 10. Peacock v. Pratt [C. C. A.] 121 F. 772; Kersey v. Terre Haute, 161 Ind. 471, 68 N. E. 1027. The only limitation requiring uniformity of taxation in the territories is contained in the fourteenth amendment to the Federal constitution, which guarantees to all persons the equal protection of the law. Territory v. Denver, etc., R. Co. [N. M.] 78 P. 74. This guaranty is not quite the exact equivalent of "equality" and "uniformity" as used in state constitutions. Given a reasonable and just classification of taxpayers, all that such fourteenth amendment requires is that all in the class shall be treated alike. Id.

60. Kadderly v. Portland [Or.] 74 P. 710.

61. Water rates are not taxes, and there is no discrimination in obliging a consumer to take at meter rates, though costing him slightly more than flat rates previously in force. Powell v. Duluth [Minn.] 97 N. W. 450.

62. The tax on inheritances is an excise tax, and as such is not within the rule of uniformity. State v. Guilbert [Ohio] 71 N. E. 636.

63. The rule of uniformity has been found impracticable, and is not enforced as to those license taxes imposed for regulation, prohibition and revenue under the police power of the state. State v. Hammond Packing Co., 110 La. 180, 34 So. 368. A tax imposed on a foreign corporation for the privilege of doing business in a state is not within the constitutional rule of uniformity. State v. Insurance Co. [Neb.] 99 N. W. 36. An occupation or license tax on liquor dealers does not clash with the provision for uniformity. Parsons v. People [Colo.] 76 P. 666. A tax levied on oysters in connection with the administration of a protective statute, not being for revenue, need not observe the rule. Brooks v. Tripp, 135 N. C. 159, 47 S. E. 401.

64. Cowart v. City Council [S. C.] 45 S. E. 122.

65. People v. Miller, 84 App. Div. 168, 82 N. Y. S. 621. A statute licensing transient merchants and exempting from its provisions officers making judicial sales does not violate the rule. Levy v. State, 161 Ind. 251, 68 N. E. 172. The fact that the inheritance tax law of Connecticut exempts estates of $10,000 and less does not amount to a hostile

though a license tax on peddlers, exempting certain classes of persons from its provisions, its classification being founded on no reasonable basis, is invalid,[66] and a poll-tax law exempting members of volunteer fire companies is void for nonuniformity.[67] A statute providing for the assessment and taxation at the current rate of the property of fugitive traders coming into the state after the regular assessment is levied is unobjectionable,[68] but a proviso allowing a rebate to such as remain until the next regular assessment is made is invalid.[69] Uniformity is not violated by a law authorizing a city to contract a debt to purchase or build an electric light plant to supply the public and also private consumers, though such plant when erected will not be subject to tax, and a private plant of similar nature will.[70] In Massachusetts, the constitutional test of a law relating to taxation is whether the tax imposed is proportional and reasonable,[71] and in Maine, the legislature can levy no higher rate of tax upon lands in unincorporated places than it can upon other land.[72] It is no objection to a revenue law that different means are provided for arriving at the value of different classes of property, if equality of taxation is finally obtained,[73] and the classification of property as personal and real for the purpose of taxation is not controlled by the common-law distinctions between these classes of property.[74] A provision that taxes shall bear interest from the time they are due until paid does not violate the rule of uniformity,[75] and the rule does not prohibit a greater penalty for nonpayment of taxes as to one class of property than to another.[76] A mere allegation that a license tax is oppressive and unjust states only a conclusion and not a cause of action.[77] Decisions relative to the uniformity of particular taxes are discussed below.[78]

Double taxation.[79]—In construing laws which impose taxes, courts will incline to that construction which will avoid double taxation; but the power if clearly exercised cannot be denied to the legislature;[80] and the fact that a tax law results in double taxation will not invalidate it.[81] The legislature may exact a license

discrimination. Appeal of Nettleton, 76 Conn. 235, 56 A. 565. A proviso excepting sidewalks from the general rules to be followed in other local improvement proceedings does not violate. Gage v. Chicago, 203 Ill. 26, 67 N. E. 477. The rule of uniformity does not prevent the classification of employments for taxation, nor the total exemption of some. In re Watson [S. D.] 97 N. W. 463.

66. State v. Whitcom [Wis.] 99 N. W. 468.

67. State v. Ide [Wash.] 77 P. 961.

68, 69. Nathan v. Spokane County [Wash.] 76 P. 521.

70. Const. Mo. art. 10, § 3. State v. Allen, 178 Mo. 555, 77 S. W. 868.

71. White v. Gove, 183 Mass. 333, 67 N. E. 359.

72. Const. art. 9, § 8. In re State Taxation [Me.] 55 A. 827.

73. State v. Fleming [Neb.] 97 N. W. 1063.

74. Missouri, etc., R. Co. v. Miami County Com'rs, 67 Kan. 434, 73 P. 103.

75. Galveston City Charter, § 95a. Tex. Const. art. 8, §§ 1, 3. Galveston & W. R. Co. v. Galveston, 96 Tex. 520, 74 S. W. 537.

76. Missouri, etc., R. Co. v. Miami County Com'rs, 67 Kan. 434, 73 P. 103.

77. $25 on real estate agents. City of Covington v. Herzog, 25 Ky. L. R. 938, 76 S. W. 538.

78. Unequal and not uniform: A license tax on oil dealers except such as deal in oils on which the tax has been paid. Standard Oil Co. v. Spartanburg, 66 S. C. 37, 44 S. E. 377.

Rule not violated: Statute taxing personal property, belonging to a Kentucky corporation in Kentucky, regardless of where it is situated [Const. § 171]. Commonwealth v. Union Refrigerator Transit Co. [Ky.] 80 S. W. 490. Privilege tax upon packing houses. Lacy v. Armour Packing Co., 134 N. C. 567, 47 S. E. 53. Statute taxing all insurance companies, domestic and foreign, on their net income. Northwestern Mut. Life Ins. Co. v. Lewis & Clarke County, 28 Mont. 484, 72 P. 982. A tax on debts due from solvent debtors is not un-uniform on the theory that it distinguishes between debts due from solvent and insolvent debtors. Kingsley v. Merrill [Wis.] 99 N. W. 1044.

79. See 1 Curr. L. 606.

80. Woodruff v. Oswego Starch Factory, 177 N. Y. 23, 68 N. E. 994.

81. Property of domestic corporation without the state is taxable at home, though also taxed where located. Commonwealth v. Union Refrigerator Transit Co. [Ky.] 80 S. W. 490. That an insurance company pays a tax graduated by the amount of its premiums collected within the state does not exempt it from payment of the property tax uniformly levied on all classes of property within the state. Western Assur. Co. v. Halliday, 127 F. 830; Id. [C. C. A.] 126 F. 257.

fee and at the same time subject to taxation the property employed in the occupation licensed,[82] and taxation as personal property of rents reserved in a lease is not objectionable as double taxation, the land being also taxed.[83] An assessment of vendor's lien notes and the real estate for which they were given does not constitute double taxation,[84] nor does a tax on debts due from solvent debtors.[85] The exercise of the power of taxation according to both the actual fact of the situs and according to the fiction of the domicile of the owner, though inconsistent and seemingly unjust, does not infringe the constitutional authority of the state, for in the one case it attains its end through its power over the property itself, and in the other through its authority over the owner.[86]

Exemption clauses.[87]—The constitutions of some of the states expressly prohibit all exemptions from taxation,[88] while in others the provision for uniformity is construed with that effect,[89] and in others, certain exemptions, such as the property of educational and charitable institutions,[90] and property devoted to public uses or belonging to municipalities, are permitted.[91] A statute providing for a tax on insurance companies, proportioned to their net income and relieving them from all other taxes, is obnoxious to the provision prohibiting the relinquishment of the power to tax corporations and corporate property.[92] A statute licensing transient merchants, but exempting officers making judicial sales, is not invalid for the exemption,[93] and an exemption, in an income-tax law, of educational insti-

82. Levy v. State, 161 Ind. 251, 68 N. E. 172. A tax on billiard and pool tables according to their value, and on their keepers in the form of a license, is not double. State v. Jones [Idaho] 75 P. 819.

83. Woodruff v. Oswego Starch Factory, 177 N. Y. 23, 68 N. E. 994.

84. Adams v. Kuykendall [Miss.] 35 So. 830.

85. Kingsley v. Merrill [Wis.] 99 N. W. 1044.

86. Western Assur. Co. v. Halliday, 127 F. 830; Id. [C. C. A.] 126 F. 257, citing State Tax on Foreign Held Bonds, 15 Wall. [U. S.] 300; Grant v. Jones, 39 Ohio St. 506; Walker v. Jack [C. C. A.] 88 F. 576; Street R. Co. v. Morrow, 87 Tenn. 407; Savings Soc. v. Multnomah Co., 169 U. S. 421; New Orleans v. Stempel, 175 U. S. 309; In re Blackstone's Estate, 171 N. Y. 682; Blackstone v. Miller, 188 U. S. 189; Grundy County v. Tenn. Coal Co., 94 Tenn. 296; People v. Insurance Co., 29 Cal. 534; State v. Board of Assessors, 47 La. Ann. 1544; Matter of Whiting, 150 N. Y. 27, 55 Am. St. Rep. 640, 34 L. R. A. 232; Hubbard v. Brush, 61 Ohio St. 252.

87. See 1 Curr. L. 606.

88. In Nebraska, no exemptions of property are permitted [Const. art. 9, § 1]. State v. Insurance Co. [Neb.] 99 N. W. 36. A statute providing that possession of a tax receipt shall be conclusive evidence of the payment of all prior taxes is repugnant to a provision declaring that all laws exempting property from taxation shall be void. Harris v. Stearns [S. D.] 97 N. W. 361.

89. Exemptions must be made with reference to the requirement of uniformity, where that requirement exists, and an exemption based on the personal status of the owner rather than the character of the property or the use to which it is put is invalid. Members of fire companies. Tippett v. McGrath [N. J. Law] 56 A. 134. An exemption of bills and notes given for the purchase of property within the jurisdiction subject to taxation is not a proper classification, and is void under a constitutional rule requiring uniformity. Adams v. Kuykendall [Miss.] 35 So. 830.

90. Peacock v. Pratt [C. C. A.] 121 F. 772. The legislature of Michigan has power to exempt the stock of, and securities held by, building associations. National Loan & Investment Co. v. Detroit [Mich.] 99 N. W. 380. Under the constitution of Georgia, productive property is taxable, though it belongs to and the income is devoted to charitable or educational uses; but buildings used as a college are exempt, though a tuition fee is charged students. Linton v. Lucy Cobb Institute, 117 Ga. 678, 45 S. E. 53. The constitution of Missouri of 1820 placed no limitation on the legislature with respect to granting exemption of taxation to educational institutions. State v. Board of Trustees, 175 Mo. 52, 74 S. W. 990.

91. The property of a water company is not exempt from taxation under a statute exempting property devoted to public use, though the company furnishes water to the town. Godfrey v. Bennington Water Co., 75 Vt. 350, 55 A. 654. A constitutional exemption of the property of municipal corporations does not extend to assessments for local improvements [Const. art. 10, § 6]. Barber Asphalt Pav. Co. v. St. Joseph [Mo.] 82 S. W. 64. A city in Georgia has no power under the constitution to exempt a water company from the payment of an ad valorem tax on its property for municipal purposes, either directly or by commuting such taxes in consideration of certain service to be supplied by the company. Columbia Ave. Sav. Fund, Title & Trust Co. v. Dawson, 130 F. 152.

92. Const. art. 12, § 1. Northwestern Mut. Life Ins. Co. v. Lewis & Clarke County, 28 Mont. 484, 72 P. 982.

93. Const. art. 10, § 1 prohibits exemptions from taxation not therein described. Levy v. State, 161 Ind. 251, 68 N. E. 172.

tutions, fraternal benefit societies and insurance companies, the last named being otherwise taxed, is not an illegal discrimination.[94] An exemption from an income-tax law of incomes of private persons below $1,000 is not illegal,[95] nor is the inheritance tax law of Ohio invalid for the exemptions therein contained.[96]

Levy, assessment, collection, and equalization.[97]—Assessment of local property by the state board of equalization is contrary to the principle of local self-government permeating the constitution of Utah,[98] but in Illinois a law providing for the assessment of the track real estate of railroads as a unit, and its distribution between the towns through which the road runs, is not in conflict with the constitutional provision that all real estate shall be taxed within the limits, and not otherwise, of the municipalities wherein it is located.[99] A law under which a school district determines the amount of the levy and the county commissioners merely perform the ministerial duty of spreading the tax is not objectionable as empowering one municipality to exercise the taxing functions of another.[1] In Montana, the county treasurer is the only collector of taxes unless the legislature sees fit to authorize cities to collect within their own limits.[2] The sale of lands for nonpayment of tax for what they will bring, though less than the amount of the tax, does not release or commute the unpaid portion contrary to the constitution.[3] It being within the power of the legislature to prohibit the remedy of setting aside an illegal tax, a statute limiting it is valid.[4]

Public improvements.[5]—There is no excess of the taxing power in an assessment for a local improvement that does not exceed the benefits accruing to the land assessed,[6] but under the constitution of Massachusetts, a special assessment not founded on an equivalent in benefit is invalid,[7] and a statute authorizing the assessment against abutting owners of a certain amount per front foot of the cost of an improvement, without respect to the benefits derived from it, is unconstitutional.[8] A statute authorizing a general judgment against a city for its proportionate part of the cost of local improvements on streets on which it owns abutting property does not violate the provision forbidding the legislature to impose taxes on cities for county, town or other municipal purposes,[9] and the Washington statute providing for the excavation of waterways and filling of tide lands of the state, the expense to be a lien on the lands, does not pledge the state's credit.[10] No provision is violated by a regulation requiring street railway companies to pave between their tracks and for two feet on either side.[11]

Debt limit, and limit of levy.[12]—An appropriation of public revenue in advance of its receipt does not constitute a debt,[13] and a contract for future services to be paid for as rendered does not create a debt for the aggregate sum of the payments contracted for;[14] but such a contract by a city already indebted to the

94, 95. Peacock v. Pratt [C. C. A.] 121 F. 772.

96. State v. Guilbert [Ohio] 71 N. E. 636.

97. Neb. laws 1903, c. 75, providing for the collection of taxes on real estate held valid. Woodrough v. Douglas County [Neb.] 98 N. W. 1092. See 1 Curr. L. 607.

98. State v. Eldredge [Utah] 76 P. 337.

99. People v. State Board of Equalization, 205 Ill. 296, 68 N. E. 943.

1. State v. Byrne, 32 Wash. 264, 73 P. 394.

2. Const. art. 16, § 5; art. 12, § 4. State v. Weston [Mont.] 74 P. 415.

3. Const. art. 9, § 4. Woodrough v. Douglas County [Neb.] 98 N. W. 1092.

4. Loomis v. Little Falls, 176 N. Y. 31, 68 N. E. 105.

5. See 1 Curr. L. 607.

6. Stone v. Little Yellow Drainage Dist., 118 Wis. 388, 95 N. W. 405.

7. White v. Gove, 183 Mass. 333, 67 N. E. 359.

8. White v. Gove, 183 Mass. 333, 67 N. E 359; Harwood v. Street Com'rs, 183 Mass. 348, 67 N. E. 362; Lorden v. Coffey, 178 Mass 489, 60 N. E. 124; Edwards v. Bruorton, 184 Mass. 529, 69 N. E. 328.

9. Const. art. 10, § 10. Barber Asphalt Pav. Co. v. St. Joseph [Mo.] 82 S. W. 64.

10. Seattle L. W. Waterway Co. v. Seattle Dock Co. [Wash.] 77 P. 845.

11. Kettle v. Dallas [Tex. Civ. App.] 80 S. W. 874.

12. See 1 Curr. L. 608.

13. Stein v. Morrison [Idaho] 75 P. 246.

14. Columbia Ave. Sav. Fund, S. D. T. &

charter limit, and whose revenues are insufficient to meet the payments exceeds the limit.[15] The issue of bonds by the city water commission, pledging the income of the waterworks and providing against the payment thereof by the city, is not the contracting of a debt by the city, nor a pledging of its faith or a loan of its credit, which the constitution inhibits except on vote of the citizens.[16] The limit is not exceeded by a contract for a local improvement, the cost of which is payable only by local assessment,[17] but a city cannot evade restrictions on its power to incur indebtedness by issuing bonds payable out of a fund raised by special assessment, where there are no special benefits.[18] Refunding bonds, the proceeds of which are used to pay outstanding indebtedness, are void where their issue temporarily exceeds the constitutional limit,[19] but the funding of a debt incurred previous to the adoption of the constitution is not within its prohibition.[20] A prohibition to the counties of a state prohibits the legislature from compelling a county to exceed the debt limit,[21] but a provision limiting the indebtedness that the legislature may create without vote of the people does not apply to municipal indebtedness,[22] and a statute authorizing supervisors to order the building of bridges situate in more than one township at the expense of the townships does not clash with the limitation on the supervisor's power to borrow money.[23]

Until the contrary is shown, it will be presumed the legislature kept within the constitutional limit as to the levy of taxes.[24] A provision against exceeding a certain rate of levy except for a specified purpose permits a levy for that purpose, whether the debt was incurred under a law enacted previously or subsequently to the adoption of the constitution;[25] but the constitutional limit includes taxes of all sorts, and a library is not within an exception in favor of taxes for school purposes.[26] In Nebraska, the county authorities are prohibited from assessing in excess of 15 mills on the dollar, except for the payment of indebtedness existing at the time of the adoption of the constitution, unless authorized by vote of the people of the county.[27]

Submission of question of indebtedness.[28]—The general assembly has not the power to provide for the submission of a question of incurring indebtedness in connection with other issues entered foreign to the matter of the debt sought to be incurred.[29]

Provision for payment of debts.[30]—The current salary of an officer not being a debt, an ordinance establishing an office is not invalid because not providing a fund to pay the salary attached to it.[31]

T. Co. v. Dawson, 130 F. 152; Voss v. Waterloo Water Co. [Ind.] 71 N. E. 208.

15. Voss v. Waterloo Water Co. [Ind.] 71 N. E. 208.

16. Const. art. 7, § 7. Brockenbrough v. Board of Water Com'rs, 134 N. C. 1, 46 S. E. 28.

17. Kadderly v. Portland [Or.] 74 P. 710.

18. Voss v. Waterloo Water Co. [Ind.] 71 N. E. 208.

19. Const. art. 11, § 3, limiting county indebtedness to 5%. Reynolds v. Lyon County, 121 Iowa, 733, 96 N. W. 1096.

20. Sisk v. Cargile, 138 Ala. 164, 35 So. 114.

21. Eaton v. Mimnaugh, 43 Or. 465, 73 P. 754.

22. N. J. Const. art. 4, § 6, par. 4. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571.

23. Board of Sup'rs of Ionia County v. Ionia Circuit Judge [Mich.] 96 N. W. 497.

24. Stein v. Morrison [Idaho] 75 P. 246.

25. Sisk v. Cargile, 138 Ala. 164, 35 So. 114.

26. Brooks v. Schultz, 178 Mo. 222, 77 S. W. 861.

27. Excessive tax on road district held invalid [Const. art. 9, § 5]. Dixon County v. Chicago, etc., R. Co., 1 Neb. Unoff. 240, 95 N. W. 340. Precinct tax to build public scales not authorized by vote of people held invalid. Union Pac. R. Co. v. Howard County [Neb.] 97 N. W. 280.

28. See 1 Curr. L. 609.

29. Cain v. Smith, 117 Ga. 902, 44 S. E. 5.

30. See 1 Curr. L. 609.

31. Const. art. 11, § 5. City of Oak Cliff v. Etheridge [Tex. Civ. App.] 76 S. W. 602.

Public aid, donations and loans of credit.[32]—Under the constitution of North Carolina, statutes pledging the credit of the state or authorizing any of its subdivisions to pledge theirs must be passed with special formalities, and are invalid unless so passed.[33] When conditions are prescribed on which charities may be aided, they must be fulfilled.[34] An act providing for a bounty to be paid by the state to the manufacturers of sugar is invalid as taxation for other than a public purpose.[35] A law giving a municipal council authority to deposit public funds in a bank is not unconstitutional on the ground that the city loans its credit to the bank.[36] The legislature of Illinois has no power to appropriate money, other than that arising from tolls, to the repair of the Illinois and Michigan canal.[37]

§ 24. *Schools and education; school funds.*[38]—The constitutional provision requiring the legislature to provide for the maintenance and support of free common schools wherein all the children of the state may be educated does not operate to make education a constitutional right instead of a privilege, and thus prevent the legislature from imposing any reasonable regulations on the privilege.[39] A statute abolishing school districts and vesting their property in towns is within the authority of the legislature,[40] and in Texas, the constitutional duty of the legislature is to provide for the sale of school lands for the benefit of the school fund, and to regulate the sales in such manner as will be most beneficial to the fund.[41] The constitution of South Carolina in providing that county boards shall levy a three mile tax for school purposes confers on them only an administrative duty, leaving them without discretion other than to obey.[42] The constitution of New York prohibits the payment of public moneys to schools,[43] but permits payment to orphan asylums for the education of inmates.[44] Local or special acts providing for the support of the common schools are prohibited in Indiana,[45] but in New Jersey, the establishment of the state agricultural college is not prohibited by the constitutional provision against enacting private, local or special laws, providing for the management and support of public schools,[46] nor the provision against granting land or money to any society, association or corporation,[47] and the limitation in the constitution of the use of the state school fund for children between the ages of 5 and 18 years does not exclude the legislative power to provide for the education of persons not within that class, and it is competent for the legislature to establish an agricultural college with the grant to it of the income of the Federal endowment, and to provide for additional support from state funds other than the public school fund.[48]

§ 25. *Commerce.*[49]—The sole power to regulate interstate and foreign com-

32. See 1 Curr. L. 610.

33. Graves v. Moore County, 135 N. C. 49, 47 S. E. 134.

34. A city in New York cannot grant land to a hospital association for an endowment, it not being for the "poor" and the aid not being per capita the inmates. Mt. Sinai Hospital v. Hyman, 92 App. Div. 270, 87 N. Y. S. 276.

35. Minnesota Sugar Co. v. Iverson [Minn.] 97 N. W. 454.

36. § 135 of Municipal Code of 1902. State of Ohio v. Bowers, 4 Ohio C. C. (N. S.) 345.

37. Burke v. Snively, 208 Ill. 328, 70 N. E. 327.

38. See 1 Curr. L. 610. Compare Common etc. Schools, 1 Curr. L. 544, and title Schools and Education to appear in 4 Curr. L. Disposal of public lands set apart for schools, see Public Lands, 2 Curr. L. 1295.

39. Const. art. 9, § 1. Requirement of vaccination is not invalid [Laws 1893, p. 1556, c. 661, § 200]. Viemeister v. White, 88 App. Div. 44, 84 N. Y. S. 712.

40. In re School Committee of North Smithfield [R. I.] 58 A. 628.

41. Const. art. 7, § 4. Conn v. Terrell [Tex.] 80 S. W. 608.

42. Dickson v. Burckmyer [S. C.] 46 S. E. 343.

43. Const. art. 9, § 4.

44. St. Mary's Boy's orphan school of Rochester is an orphan asylum [Const. art. 8, § 14]. Sargent v. Board of Education of Rochester, 177 N. Y. 317, 69 N. E. 722.

45. Const. art. 4, § 22. School City of Rushville v. Hayes [Ind.] 70 N. E. 134.

46, 47, 48. Trustees of Rutgers College v. Morgan [N. J. Law] 57 A. 250.

49. See 1 Curr. L. 610.

merce is vested in congress, but the states may, within their limitations, regulate their domestic commerce and may enact such inspection laws and police regulations as do not attempt regulation of commerce.[50] The power of congress to regulate commerce with foreign nations and among the several states is exclusive and absolute, and is not limited by other clauses of the constitution,[51] and the congressional act withdrawing from common carriers engaged in interstate commerce the right to avail themselves of the doctrine of assumption of risk, where they have failed to provide automatic couplers, is within the power of congress.[52] State statutes which in some remote degree may bear upon interstate commerce are in some cases constitutional.[53] Whenever seamen's contracts of employment relate to commerce not wholly within a state, legislation enforcing restrictions thereon comes within the domain of congress, under the commerce clause of the constitution, and such legislation is not contrary to either the thirteenth or fourteenth amendment.[54]

§ 26. *The enactment of statutes*[55] is hedged about with various inhibitions, such as those against local and special laws, laws addressed to a plurality of subjects and not reciting their subjects in their titles, amendatory acts not setting out that amended, powers of special sessions, also provisions regulating legislative procedure and some relating to interpretation and effect of statutes.[56]

§ 27. *Miscellaneous provisions other than foregoing. Right to bear arms.*[57] —A city ordinance prohibiting the carrying of weapons, in so far as it prohibits the carrying of a pistol under all circumstances, violates the constitutional right to keep and bear arms.[58]

Right to require information by compulsion.[59]—The constitution of Texas furnishes no authority for a court to compel a plaintiff in a personal injury case to submit to a physical examination.[60]

Usury laws.[61]—A constitutional provision requiring the separate taxation of mortgages and invalidating contracts by which the mortgagor agrees to pay the tax thereon is essentially a usury law.[62]

Liquor traffic.—The constitution of Texas provides that the legislature shall enact a law whereby the several municipal subdivisions of the state may from time to time determine whether the sale of liquors shall be prohibited within prescribed limits.[63] It is not necessary that such a law afford the inhabitants of cities and towns within a county adopting it, power to repeal it as to themselves or their territory;[64] nor that authority to determine be conferred upon all the

50. See Commerce, 3 Curr. L. 711. A state has the power to enact inspection laws applicable to interstate commerce. Territory v. Denver, etc., R. Co. [N. M.] 78 P. 74.

51. Prohibition of importation of tea, below fixed standard of quality. Buttfield v. Stranahan, 192 U. S. 470, 24 S. Ct. 349. The power over commerce with foreign nations and among the several states is vested in congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. Anti-trust act of July 2, 1890, is valid. Northern Securities Co. v. U. S., 193 U. S. 197, 24 S. Ct. 436, citing Gibbons v. Ogden, 9 Wheat. [U. S.] 1.

52. Act Cong. March 2, 1893, c. 196; 27 Stat. 531. Kansas City, etc., R. Co. v. Flippo, 138 Ala. 487, 35 So. 457.

53. Civ. Code, §§ 2317, 2318, requiring a carrier to give information as to lost goods, is constitutional. Central of Georgia R. Co. v. Murphy, 116 Ga. 863, 43 S. E. 265; Savannah, etc., R. Co. v. Elder, 116 Ga. 942, 43 S. E. 379.

54. Patterson v. Eudora, 190 U. S. 169, 23 S. Ct. 821, 47 Law. Ed. 1002.

55. See 1 Curr. L. 611.

56. See Statutes, 2 Curr. L. 1707.

57. See 1 Curr. L. 611.

58. State v. Rosenthal, 75 Vt. 295, 55 A. 610.

59. See 1 Curr. L. 611.

60. Austin & N. W. R. Co. v. Cluck [Tex.] 77 S. W. 403.

61. See 1 Curr. L. 611.

62. Const. art. 13, §§ 4, 5. Matthews v. Ormerd, 140 Cal. 578, 74 P. 136.

63. Const. § 20, art. 16. Sweeney v. Webb [Tex. Civ. App.] 76 S. W. 766; Ex parte Heyman [Tex. Cr. App.] 78 S. W. 349.

64, 65. Sweeney v. Webb [Tex. Civ. App.] 76 S. W. 766.

various subdivisions which the legislature has power to confer it upon;[66] but the legislature cannot empower a county to create other or different subdivisions for the purpose than those already existing.[66] Under it the legislature may enact a law providing for limited prohibition in the designated areas.[67] A local option statute is not violative of the provision that all laws of a general nature shall have a uniform operation throughout the state.[68]

Homesteads and other exemptions.—The constitution of Texas exempts the homestead, whether urban or rural, when established, but does not guaranty that the character impressed upon the property at one time shall continue for the future.[69] When a rural homestead right exists in lands adjacent to a town or city, the mere fact of the extension of the corporate limits of the city or town so as to embrace the homestead or a part of it will not destroy its character as a rural homestead, nor impair the rights of the owner in the property as such;[70] but where the town actually builds and extends so as to include what was before in the country, it then becomes in fact a part of the town, and its rural character no longer exists.[71]

Regulation of carriers.—In some states, carriers are not permitted to contract in limitation of their common-law liability,[72] and where telegraph companies are classified as carriers by the constitution, they cannot limit their liability as such.[73] A provision requiring railway companies to carry all persons for the same charge does not prohibit the making of a through rate less than the sum of the locals.[74]

Corporations, in Missouri, cannot increase their capital stock and bonded indebtedness except in pursuance of the general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting called for the purpose, first giving 60 days' public notice, as may be provided by law.[75] No notice is necessary, however, to entitle a corporation to increase its stock with the unanimous consent of all the stockholders in meeting assembled, and a similar provision of the constitution of Pennsylvania is not applicable to an indebtedness of the company incurred in the line of business for which the corporation was organized.[76] The constitutional provision of Florida, authorizing the legislature to correct abuses in the charges of persons and corporations engaged as common carriers and in "other public service," applies to water companies.[77] Provisions against granting or changing charters of incorporation by local or special law are frequent.[78] Under the Washington provision that foreign corporations shall not be permitted to transact business on more favorable conditions than domestic ones, a statute regulating the rates of fraternal

66. Ex parte Hegman [Tex. Cr. App.] 78 S. W. 349.

67. August Busch & Co. v. Webb, 122 F. 655.

68. State v. Handler, 178 Mo. 38, 76 S. W. 984; Ex parte Handler, 178 Mo. 383, 75 S. W. 920, citing many cases.

69. Lauchheimer & Sons v. Saunders [Tex.] 76 S. W. 750, citing Wilder v. McConnell, 91 Tex. 604, 45 S. W. 146; Bull v. Conroe, 13 Wis. 233; Taylor v. Boulware, 17 Tex. 78, 67 Am. Dec. 642; Iken v. Olenick, 42 Tex. 196.

70, 71. Lauchheimer & Sons v. Saunders [Tex.] 76 S. W. 750, citing Wilder v. McConnell, 91 Tex. 604, 45 S. W. 146; Posey v. Bass, 77 Tex. 512, 14 S. W. 156; Iken v. Olenick, 42 Tex. 196; Roberts v. Cawthorn [Tex. Civ. App.] 63 S. W. 332; Watkins v. Abbott [Tex. Civ. App.] 37 S. W. 252; Williams v. Willis, 84 Tex. 398, 19 S. W. 683.

72. Const. § 196 has no extra-territorial effect. Cleveland, etc., R. Co. v. Druien [Ky.] 80 S. W. 778.

73. Const. 1890, § 195. Postal Telegraph & Cable Co. v. Wells [Miss.] 35 So. 190.

74. Southern R. Co. v. Com., 25 Ky. L. R. 1078, 77 S. W. 207.

75. Const. art. 12, § 8. Staten v. Cook, 178 Mo. 189, 77 S. W. 559.

76. Curtis v. Natalie Anthracite Coal Co., 89 App. Div. 61, 85 N. Y. S. 413.

77. Const. art. 16, § 30. City of Tampa v. Tampa Waterworks Co. [Fla.] 34 So. 631.

78. Allen v. Ajax Min. Co. [Mont.] 77 P. 47; Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571.

insurance associations subsequently formed is valid, though not operative on foreign corporations previously formed.[79]

Wrongful death.—The provision of the constitution of New York against abrogating the right of action for injuries resulting in death is not violated by a statute requiring notice of injury to be given to the employer before suit.[80]

Claims against state.—The constitution of New York prohibits the allowance of any claim against the state which as between citizens would be barred by lapse of time.[81] Under the constitution of Michigan, the legislature cannot audit or allow claims against the state,[82] but an act substituting other lands for those agreed to be given for a specified public work, there being none of the specified class available, is not invalid as an attempt to give the contractor extra compensation, though the price of such lands has been advanced since the work was done.[83]

Master and servant.—The Kentucky constitution provides that all laborers in mines shall be paid in lawful money.[84] The constitution of South Carolina abrogates the rule of assumption of risk of defective appliances, except as to conductors and engineers having charge of cars and engines voluntarily operated by them.[85]

Public lands.—Neither under the enabling act nor the constitution can the state of Washington sell tide lands which prior to the admission of the state were patented by the United States, and by proclamation included in an Indian reservation.[86]

Water.—Under the constitution of Idaho, the legislature is required to provide by law the manner in which reasonable water rates may be fixed; until they have so provided, owners and consumers may contract at such rates as they deem just.[87]

Married women are secured in their separate estate by the constitution of North Carolina.[88]

CONTEMPT.

§ 1. Nature of a Contempt and What Constitutes One (795).
A. Elements of Contempt and Nature of Proceeding, Civil or Criminal (795).
B. Acts in Disobedience of Court (796).
C. Official Misconduct and Obstruction or Perversion of Justice (797).
§ 2. Defense, Excuse or Purgation (798).
§ 3. Power to Punish or Redress; Contempt or Other Remedy (798).
§ 4. Pleadings and Other Proceedings Before Hearing (799).
§ 5. Hearing; Evidence; Trial (799).
§ 6. Findings and Judgment (800).
§ 7. Punishment; Fine and Commitment; Further Proceedings (800).
§ 8. Discharge or Pardon (800).
§ 9. Review of Proceedings (800).

§ 1. *Nature of a contempt and what constitutes one. A. Elements of contempt and nature of proceeding, civil or criminal.*[89]—The object and purpose of

79. State v. Fraternal Knights & Ladies [Wash.] 77 P. 500.

80. Const. art. 1, § 18. Gmaehle v. Rosenberg, 83 App. Div. 339, 82 N. Y. S. 366.

81. Claim of Essex county for taxes on exempt land held barred [Const. art. 7, § 6]. People v. Miller, 85 App. Div. 145, 83 N. Y. S. 559.

82. Cannot provide for auditing of claims against municipality [Const. art. 4, § 21]. Fitch v. Board of Auditors [Mich.] 94 N. W. 952.

83. Olds v. State Land Office Com'r [Mich.] 96 N. W. 508.

84. Const. § 244. Commonwealth v. Reinecke Coal Min. Co., 25 Ky. L. R. 2027, 79 S. W. 287.

85. A conductor is not barred by knowledge of defects unless he would have regarded the car as dangerous or unsafe if he had used ordinary prudence [Const. art. 9, § 15]. Barksdale v. Charleston & W. C. R. Co., 66 S. C. 204, 44 S. E. 743.

86. Act Feb. 22, 1889, c. 180, § 4; Const. art. 26, cl. 2, art. 17, § 2. Jones v. Cailvert, 32 Wash. 610, 73 P. 701.

87. Const. art. 15, § 6. Jack v. Grangeville [Idaho] 74 P. 969.

88. Const. art. 10, § 6. She may dispose of anything not requiring conveyance. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784. Incapacity to contract remains as at common law except as removed by statute. Id.

89. See 1 Curr. L. 611.

contempt proceedings is to vindicate the authority and dignity of the court, though they may also incidentally benefit a party,[90] but contempt proceedings cannot be substituted for ordinary process of law to attain private ends.[91] Civil contempts are such as affect a private person. Criminal contempts are acts against the majesty of the law, or the court as an agency of the government.[92] Direct contempts are those committed in the presence of the court, or so near as to interrupt its proceedings. Constructive contempts arise from matters not transpiring in court, but which tend to degrade the authority of the court or embarrass the administration of justice.[93] Persons having knowledge of an order of injunction are punishable for a violation of same, though not parties to the action.[94] A violation by oneself or through others is equally punishable.[95] The offense of contempt of court, by a crime, is not merged in the crime, and a conviction or acquittal of the one is no bar to a prosecution for the other.[96]

(§ 1) *B. Acts in disobedience of court.*[97]—Resistance willfully offered to the lawful order of a court is punishable as a criminal contempt, unless the court lacks jurisdiction to make the order,[98] as is violation of an injunction,[99] or disobedience

90. State v. Civil Dist. Court for Parish of Orleans, 112 La. 182, 36 So. 315. Proceedings to punish for contempt may be resorted to to compel payment of money ordered by the court to be paid, in cases where execution cannot issue, only after demand by the party entitled to receive it. General Elec. Co. v. Sire, 88 App. Div. 498, 85 N. Y. S. 141.

91. Contempt proceedings must not be substituted for specific legal remedies provided by law, and it is not every act rendering ineffectual an order of court which can be followed up by imprisonment for contempt of the person bringing about that result. State v. Civil District Court for Parish of Orleans. 112 La. 182, 36 So. 315. A court of bankruptcy has jurisdiction and power to order a bankrupt to surrender property to a trustee, and to enforce the order by imprisonment for contempt (In re Gerstel, 123 F. 166); but not for failure to turn over money, which before the proceedings were begun, had been paid out to creditors. The sole purpose is to reach the property in his control and not to punish him for concealing assets from his trustee (In re Kane, 125 F. 984).

92. State v. Shepherd, 177 Mo. 205, 76 S. W. 79. Where a contempt of court constitutes a criminal misdemeanor, the proceeding to punish therefor is in its nature a criminal proceeding, entirely independent and distinct from the suit in which the contempt is committed. Willful violation of an injunction by a party to the record. Bullock Elec. & Mfg. Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 129 F. 105. But an order in contempt, which is remedial and coercive in character, and entered for the purpose of enforcing private rights of parties, judicially determined, is a civil proceeding. A preliminary injunction authorizing inspection of a mine was violated by refusal to allow the inspection; an order of contempt was issued, the order to be discharged, however, on compliance with the injunction. Heinze v. Butte & B. Consol. Min. Co. [C. C. A.] 129 F. 274.

93. State v. Shepherd, 177 Mo. 205, 76 S. W. 79.

94. An order forbidding interference with plaintiff's business. People v. Marr, 88 App. Div. 422, 84 N. Y. S. 965. A purchaser of property pendente lite is bound by the injunction in a suit against the grantor relating to same. Heinze v. Butte & B. Consol. Min. Co. [C. C. A.] 129 F. 274.

95. Janney v. Pan-Coast Ventilator & Mfg. Co., 131 F. 143. Officers of a corporation party to a suit, though not parties themselves, are liable to punishment for contempt for violation of an injunction therein, where they have power to enforce compliance with it by the company. The injunction authorized an inspection and survey of a mine. Heinze v. Butte & B. Consol. Min. Co. [C. C. A.] 129 F. 274. Where persons are enjoined as individuals, they cannot escape liability to punishment for contempt, by organizing a corporation which violates the injunction. Diamond Drill & Mach. Co. v. Kelley Bros., 130 F. 893.

96. Subornation of perjury by party to a cause. Ricketts v. State [Tenn.] 77 S. W. 1076; Sherman v. People [Ill.] 71 N. E. 618; Chicago Directory Co. v. U. S. Directory Co., 123 F. 194.

97. See 1 Curr. L. 612.

98. Search warrant for intoxicating liquors made upon insufficient affidavits. State v. McGahey [N. D.] 97 N. W. 865.

99. Injunction to prevent passage and approval of an ordinance. If made merely on the ground that it would not be for the best interests of the public, the court has no jurisdiction, and disobedience would not be contempt. Wright v. People, 31 Colo. 461, 73 P. 869. The injunction was dissolved, but an appeal was taken and supersedeas granted, suspending the dissolving order. The violation of the injunction during the existence of the supersedeas was contempt of court. Strickland v. Knight [Fla.] 35 So. 868. Attorneys of a judgment creditor were enjoined by a court of bankruptcy from proceeding to collect the judgment; they procured an order from the state court adjudging the bankrupt in contempt of an order issued prior to the bankruptcy, and imposing a fine, payable to the attorneys, equal to the judgment; held, their application for such an order was a continuation of the proceedings to collect judgment and a contempt of the court of bankruptcy. In re Fortunato,

of a judicial order,[1] such as refusal to produce books before a grand jury,[2] failure of executor to produce property,[3] refusal to submit to an examination in supplemental proceedings,[4] or to produce books,[5] or to pay alimony ordered by the court,[6] or to comply with an order to make a petition more specific,[7] disobeying a writ of review,[8] disposing of property contrary to an order,[9] failure of a witness to attend,[10] violation of an order excluding witnesses from the court room.[11] The failure to obey one part of an alternative order is not a contempt of court.[12]

(§ 1) *C. Official misconduct and obstruction or perversion of justice.*[13]—Contempt of court includes such acts as the fabrication of evidence to deceive the court,[14] imposition, by attorneys, of a fictitious case upon the court,[15] intimidation of witnesses,[16] subornation of perjury,[17] making false affidavits in replevin,[18] obstructing a writ of habeas corpus,[19] tampering with a jury,[20] and defamation of the court;[21] but it has been held that the publication must relate to a case then pending before the court.[22] Judges of election are in so far "officers of the court"

123 F. 622. Defendants were enjoined from using plaintiff's system of numbering to order goods by, and told their customers to order by putting the figure 1 in front of plaintiff's system of numbers. Brown v. Braunstein, 86 App. Div. 499, 83 N. Y. S. 798. It is no excuse that the manner of operating appliances, the use of which was enjoined, was changed and improved, and rendered less dangerous to the public. Young v. Chadima Bros. [Iowa] 96 N. W. 1105. Violating an injunction, which prohibits acts of violence, by threatening persons with death and sharing in assaults upon them, is a criminal contempt. Stearns v. Marr, 84 N. Y. S. 36.

1. Where a witness refuses to testify in an action, and cannot be coerced except by commitment, the judge has no discretion but to commit him until he complies. Crocker v. Conrey, 140 Cal. 213, 73 P. 1006.

2. No rule of public policy prohibiting disclosure by grand jurors of facts coming to their knowledge, nor statute relative to their testimony, prevents them making a report to the court to have punished for contempt a witness who refuses to produce books before them. In re Archer [Mich.] 96 N. W. 442.

3. The excuse of an executor, who was ordered to produce a certain picture in court, that same was lost, without showing that same was lost without his fault, or that he had taken proper care of it, was insufficient to relieve him from contempt. Reed v. Reed, 24 Ky. L. R. 2438, 74 S. W. 207.

4. People v. McCarthy, 84 N. Y. S. 1062.

5. Friedman v. Newman, 86 N. Y. S. 735; In re Backus, 91 App. Div. 266, 86 N. Y. S. 638.

6. Brown v. Brown [Mich.] 97 N. W. 396.

7. Howard v. Western Union Tel. Co., 25 Ky. L. R. 828, 76 S. W. 387.

8. Failure of judge to send up complete record. In re Harney [Mont.] 74 P. 1080.

9. People v. Paine, 92 App. Div. 303, 86 N. Y. S. 1109. Disposing of property after injunction served. Oshinsky v. Gottlieb, 84 N. Y. S. 871.

10. In re Boeshore, 125 F. 651.

11. Loose v. State [Wis.] 97 N. W. 526.

12. Order that plaintiff pay the costs of preceding actions in ejectment, or have the cause dismissed. The failure to pay involved no contempt. Ex parte Colley [Ala.] 37 So. 232.

13. See 1 Curr. L. 613.

14. Chicago Directory Co. v. U. S. Directory Co., 123 F. 194.

15. Hatfield v. King, 131 F. 791.

16. Russell v. Mandell [Mich.] 99 N. W. 864.

17. Ricketts v. State [Tenn.] 77 S. W. 1076.

18. By means of false affidavits in replevin, the lien of an execution was removed and the property passed beyond the jurisdiction of the court. In re Goslin, 88 N. Y. S. 670.

19. The chief of police and county attorney with knowledge of the writ, avoided its service and aided in delivering a prisoner to the messenger of the governor of another state. State v. District Court of Seventh Judicial Dist. [Mont.] 74 P. 412.

20. In re Odum, 133 N. C. 250, 45 S. E. 569. A mere effort to secure the services of a party to tamper with the jury does not authorize punishment for contempt, where the party takes no action in the matter. Ex parte McRae [Tex. Cr. App.] 77 S. W. 211.

21. An article in the public press which, without justification or excuse, scandalizes courts and libels public officers, is a criminal contempt and punishable as such. State v. Shepherd, 177 Mo. 205, 76 S. W. 79.

22. Ex parte Green [Tex. Cr. App.] 81 S. W. 723.

NOTE: The publication of an article in a newspaper is not a contempt unless it reflects upon the conduct of the court in reference to a pending suit or proceeding, and tends in some manner to influence its decisions therein, or to impede, interrupt or embarrass the proceedings of the court in reference thereto. State v. Kaiser, 20 Or. 50, 8 L. R. A. 584. A newspaper reporter obtaining information as to a verdict or decision by eavesdropping and publishing the same is guilty of contempt of court. In re Choate, 24 Abb. N. C. [N. Y.] 430, 41 Alb. Law J. 287; Orman v. State, 24 Tex. App. 495. The reporter concealing himself in the jury room, the contempt is committed in the immediate view and presence of the court, and is summarily punishable. In re Choate, 24 Abb. N. C. [N. Y.] 430, 41 Alb. Law J. 287. A fair and reasonable review and comment upon court proceedings, as they take place from time to time, is not a contempt of court. Cooper v. People, 13 Colo. 352, 6 L. R. A.

that their misbehavior is punishable summarily as for contempt.[23] Unfairness in a marshal in summoning talesmen is not evidence of a willful contempt of court.[24] A court has jurisdiction to punish, as for contempt of itself, an assault on one of its officers engaged in the performance of his duties as such.[25]

§ 2. *Defense, excuse or purgation.*[26]—Lack of jurisdiction in a court to make an order is sufficient excuse for disobeying same,[27] but dilatory motions filed are no excuse, though in good faith;[28] and mere irregularity does not justify disobedience.[29] A person arrested on a warrant cannot be punished for contempt for refusing to be sworn and testify against himself.[30]

§ 3. *Power to punish or redress; contempt or other remedy.*[31]—The power to punish for contempt is inherent in courts of record and cannot be impaired by the legislature.[32] The jurisdiction of Federal courts in contempt is limited to misbehavior in or near the court, misbehavior of its officers, and resistance to its orders.[33] A judge at chambers has no power to punish for a contempt not committed in his presence, unless expressly authorized by statute.[34] The power being judicial in its nature, it cannot be vested in a court commissioner,[35] a notary pub-

430.—From note to State v. Kaiser [Or.] 8 L. R. A. 584.

23. The statute constituting them officers of the court and authorizing their summary punishment is not unconstitutional as depriving of liberty without due process of law. Sherman v. People [Ill.] 71 N. E. 618.

24. A talesman known to be a friend of defendant was summoned in a criminal case under an open venire. Richards v. U. S. [C. C. A.] 126 F. 105.

25. Assault on trustee in bankruptcy; the courts of bankruptcy being held to be continuously open. Ex parte O'Neal, 125 F. 967. In proceedings for contempt for an assault committed on an officer of the court, where not in the actual presence of the court, it is immaterial whether the court at the time of the resistance was actually in session, with a judge present in the district, or whether the place was at a greater or less distance from where the court was held. Id.

26. See 1 Curr. L. 615.

27. Search warrant for intoxicating liquors issued upon insufficient affidavits. State v. McGahey, 12 N. D. 535, 97 N. W. 865. Pending a trial of title to public office, courts have no jurisdiction to restrain de facto officers from exercising their functions. State v. Rice [S. C.] 45 S. E. 153.

28. The violation of an injunction cannot be excused by showing that at the time of the violation a motion had been filed to modify the injunction; nor is it a defense that party accused acted in good faith. Young v. Rothrock, 121 Iowa, 588, 96 N. W. 1105.

29. A party committed for contempt for not turning property over to a receiver cannot obtain release on habeas corpus by showing that the receiver had not filed his bond before making a demand. The order committing him is voidable, but not void. In re Spies, 92 App. Div. 175, 86 N. Y. S. 1043. A commitment to jail for contempt for refusing to answer questions at an examination respecting his property is not illegal because the affidavit authorizing the examination was made by plaintiff's attorney. Carpenter v. Clements, 122 Iowa, 294, 98 N. W. 129.

30. Bill of Rights, art. 1, § 10 provides that no accused shall be compelled to give evidence against himself. Ex parte Sauls [Tex. Cr. App.] 78 S. W. 1073.

31. See 1 Curr. L. 615.

32. Rev. St. § 1616, authorizing courts of record to punish for contempt persons guilty of specified acts "and no others," is unconstitutional. State v. Shepherd, 177 Mo. 205, 76 S. W. 79. So also the district courts, and the legislature cannot abridge their powers so as to leave such courts without proper and vigorous means of protecting themselves from insult, or of enforcing their lawful orders. State v. Clancy [Mont.] 76 P. 10. A statute exempting females from imprisonment, or any order of arrest and bail, or on an execution against the body, does not prevent their imprisonment for contempt of an order in supplementary proceedings to turn over money belonging to the debtor. Joyce v. Everson, 161 Ind. 440, 69 N. E. 135.

NOTE. Legislative power to abridge the power of courts to punish for contempt: In many of the cases in which the power of the legislature to abridge the power of courts to punish for contempt has been considered, nothing has been said as to any distinction between courts created by the constitution and those which were created by the legislature itself. In those cases, however, where the distinction has been suggested, it has been regarded as controlling. It may be said, as a general rule, that the power of a constitutional court to punish for contempt cannot be taken away by the legislature. State v. Frew, 24 W. Va. 416, 49 Am. Rep. 257; Ex parte Robinson, 19 Wall. [U. S.] 505, 22 Law. Ed. 205. As to inferior courts created by the legislature itself, the rule is not so clearly established. See Rutherford v. Holmes, 66 N. Y. 372; Newton v. Locklin, 77 Ill. 103; In re Shortridge, 99 Cal. 526, 37 Am. St. Rep. 78, 21 L. R. A. 755.—From note to Hale v. State [Ohio] 36 L. R. A. 254.

33. They cannot punish for contempt an editorial criticism of the official integrity of the court. Cuyler v. Atlantic, etc., R. Co., 131 F. 95.

34. Mau v. Stoner [Wyo.] 76 P. 584.

35. A court commissioner has no power to punish for contempt, beyond that possessed by a judge at chambers, and the re-

lic,[36] or a board of arbitration,[37] and the power of a justice of the peace is very limited.[38] Where a mandate from an appellate court directing the entry of a decree granting an injunction has been filed in the lower court, a subsequent violation of the injunction is punishable by the lower court and not by the appellate court.[39] The exercise of the power of commitment for contempt may be compelled by mandamus.[40]

§ 4. *Pleadings and other proceedings before hearing.*[41]—Direct contempts are punishable summarily by the court acting spontaneously. In constructive contempts, the court on information issues a citation to the offender to show cause why he should not be punished for contempt.[42] Where supplemental proceedings are held in a county different from the one whence execution was issued, contempt proceedings must be instituted in the county where the examination is held, and in the special proceedings,[43] and the proceedings being of a criminal nature, no change of venue is allowable.[44] An application for attachment for contempt of a witness who fails to obey a subpoena to appear before a referee must be accompanied by a certificate of the referee as to the facts.[45] Failure to base contempt proceedings on affidavits is waived by the contemner being sworn at his request and answering to the charge.[46] Before punishing for contempt in violating an injunction, it is proper to order a reference to take testimony as to the alleged violation.[47] Where a person charged with contempt has a right to file a written explanation of his conduct, he must be allowed to file it before his punishment is assessed.[48]

§ 5. *Hearing; evidence; trial.*[49]—In contempt proceedings, there is no right

view of the commissioner's acts by the court, even when it goes farther and inflicts the penalty, cannot change the nature of the proceeding and make it the act of the court in the exercise of its general jurisdiction. Mau v. Stoner [Wyo.] 76 P. 584. A United States commissioner is an officer of the court which appoints him, and without power to punish for contempt for proceedings before him, such power being in the court. United States v. Beavers, 125 F. 778.

36. Civ. Code Proc. § 1991, authorizing notaries to punish for contempt in disobeying subpoenas, is unconstitutional in attempting to vest judicial powers in ministerial officers. Burns v. Superior Court of City and County of San Francisco, 140 Cal. 1, 73 P. 597.

37. Const. art. 6, § 1, vests all the judicial power of the state in certain named courts, which can only punish for contempt to maintain their own authority and in cases before them. State v. Ryan [Mo.] 81 S. W. 435.

38. A refusal to surrender one accused of crime to an arresting officer holding a warrant cannot be dealt with as a contempt of court by a justice who has merely issued the warrant. A fine of $5.00 and imprisonment for 5 hours is the limit of punishment a justice can conflict in contempt cases. Ormond v. Ball [Ga.] 48 S. E. 383. In Massachusetts, justices of the peace have no power to punish a witness for contempt for refusing to answer questions put to him. Lawson v. Rowley [Mass.] 69 N. E. 1082.

39. Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., 124 F. 736.

40. Crocker v. Conrey, 140 Cal. 213, 73 P. 1006.

41. See 1 Curr. L. 616.

42. State v. Shepherd, 177 Mo. 205, 76 S. W. 79.

NOTE. Summary punishment for contempt: There is a distinction between a commitment by precept for the nonpayment of money and a commitment upon a conviction and fine as punishment for a contempt in misconduct punishable by fine and imprisonment. In the latter case the prisoner is not entitled to the jail liberties, and in the former "he is in execution in a civil action," and is entitled thereto. People v. Cowles, 3 Abb. App. Dec. 514; People v. Cowles, 4 Keyes [N. Y.] 50; People v. Bennett, 4 Paige [N. Y.] 282, 3 N. Y. Ch. (Law. Ed.) 437; Patrick v. Warner, 4 Paige [N. Y.] 397, 3 N. Y. Ch. (Law. Ed.) 486. See Rose v. Tyrell, 25 Wis. 565. Summary punishment for contempt is not an infringement of the constitution, which guarantees to every citizen a trial by jury. This power, however, is to be exercised only where no other adequate remedy can protect public justice from obstruction. Gandy v. State, 13 Neb. 451; State v. Doty, 32 N. J. Law, 403, 90 Am. Dec. 671; State v. Matthews. 37 N. H. 450; Ex parte Grace, 12 Iowa, 208, 79 Am. Dec. 529; State v. Anderson, 40 Iowa, 207.—From note to State v. Kaiser [Or.] 8 L. R. A. 584.

43. In re Backus, 91 App. Div. 266. 86 N. Y. S. 638.

44. State v. Clancy [Mont.] 76 P. 10; State v. District Court of Second Judicial Dist. [Mont.] 77 P. 318.

45. In re Kerber, 125 F. 653.

46. In re Odum, 133 N. C. 250, 45 S. E. 569.

47. People v. Marr, 88 App. Div. 422, 84 N. Y. S. 965.

48. Code, § 4465. State v. District Court of Taylor County [Iowa] 99 N. W. 712.

49. See 1 Curr. L. 617.

to a trial by jury.[50] The evidence to sustain charges of contempt of court must be clear and convincing.[51] In cases of a violation of an injunction, where the question is in dispute and doubtful, it will not be determined on ex parte affidavits, but only after a regular hearing.[52] Interrogatories may be prepared covering the facts in the affidavits supporting a petition to punish for contempt.[53] The evidence to justify an order requiring a bankrupt to turn over property to his trustee or be punished for contempt must be clear and satisfactory, and furnish a basis for a finding as to the amount withheld.[54] A refusal to file an answer to a charge of contempt may be treated by the court as an admission.[55]

§ 6. *Findings and judgment.*[56]—It is necessary in a contempt proceeding that the facts be found and filed; not merely set out in the judgment.[57] A commitment for contempt for not obeying an order to pay alimony cannot be justified unless the order of commitment recites that party disobeying was able to pay.[58]

§ 7. *Punishment; fine and commitment; further proceedings.*[59]—A fine for contempt may be imposed equal to applicant's actual loss, if the party obstructing the administration of justice caused the loss by his wrongful act;[60] but the fine must not be based on plaintiff's loss without actual loss shown.[61] Parties in contempt of the orders of a court are not entitled to any relief at its hands.[62]

§ 8. *Discharge or pardon.*[63]—A party in contempt for violation of an order intended to enforce a private right can only be relieved by compliance with the order.[64]

§ 9. *Review of proceedings.*[65]—A judgment for contempt, if in excess of the court's jurisdiction, may be relieved from, on habeas corpus.[66] Where jurisdiction exists, it is held in some jurisdictions that there is no right of review,[67] while in

50. A person appearing in person and by counsel, and having a hearing as to the contempt according to the practice in such cases, has had the benefit of "due process of law." State v. Shepherd, 177 Mo. 205, 76 S. W. 79.

51. Rule for contempt against attorneys for imposing a fictitious case upon the court. Evidence held insufficient. Hatfield v. King, 131 F. 791.

52. Question of the violation of the court's injunction in infringing a patent. In re Henvis, 125 F. 655. Question as to whether a certain contract was within the class of contracts forbidden by the injunction to be filed. International Register Co. v. Recording Fare Register Co., 125 F. 790.

53. Where sufficient affidavits are prepared by an attorney appointed by the court, the petitioner has no right to others prepared by himself [Code, § 10891]. Russell v. Mandell [Mich.] 99 N. W. 864.

54. In re Goldfarb Bros., 131 F. 643.

55. Toozer v. State [Neb.] 97 N. W. 584.

56. See 1 Curr. L. 618.

57. In re Odum, 133 N. C. 250, 45 S. E. 569. In an order or warrant for commitment for contempt, the particular circumstances of the offense must be set forth [Compiled Laws 1897, § 1101]. Tweddle v. Judge of Superior Court of Grand Rapids [Mich.] 96 N. W. 22. A statement of the particular facts constituting contempt must be included in the final order committing an attorney for contempt. A mere statement that he behaved in the presence of the court in an insolent manner, tending to disturb the court and impair its authority, is insufficient. People v. Marean, 86 App. Div. 278, 83 N. Y. S. 843. Where a court or judge acts upon personal knowledge, a statement of the facts upon which the order imposing punishment for contempt is founded must be entered on the records, otherwise the judgment may be annulled [Code, § 4466]. State v. District Court of Taylor County [Iowa] 99 N. W. 712.

58. In re Cowden, 139 Cal. 244, 73 P. 156.

59. See 1 Curr. L. 618.

60. By means of false affidavits in replevin, the lien of an execution was removed, and the property passed beyond the control of the court. In re Goslin, 88 N. Y. S. 670.

61. On failure to produce books on supplemental proceedings, there was no evidence of actual loss, but only a claim that the books might show assets. Friedman v. Newman, 86 N. Y. S. 735.

62. The fact that one who brings in a petition in a cause is already in contempt for disobedience to orders therein is a ground for dismissing his petition. Lind v. Lind [Mass.] 70 N. E. 199.

63. See 1 Curr. L. 619.

64. Order to compel production of books containing pertinent evidence. Swedish-American Tel. Co. v. Fidelity & Casualty Co., 208 Ill. 562, 70 N. E. 768.

65. See 1 Curr. L. 619.

66. Cuyler v. Atlantic, etc., R. Co., 131 F. 95. In a habeas corpus proceeding to obtain relief from imprisonment for contempt, the petitioner may supplement the record by alleging such additional facts as tend to show his misbehavior was not a contempt. Ex parte O'Neal, 125 F. 967. Where a Federal district court has jurisdiction to punish as for contempt an assault on its officer, the circuit court cannot, on a writ of habeas corpus, review alleged errors in such proceedings. Id.

67. The judgment of a district court that a contempt had been committed is not reviewable by the supreme court, where the district court had jurisdiction of the parties and the subject-matter. Ex parte Brown [Ariz.] 77 P. 489.

others it is held that appeal[68] or error[69] will lie. A sentence in contempt of court, being in the nature of a criminal proceeding, will not be reviewed in a proceeding to which the state is not a party.[70] Where an order, on which civil contempt proceedings are based, is set aside, the contempt proceedings are ipso facto dissolved.[71]

CONTINUANCE AND POSTPONEMENT.[72]

§ 1. Power and Duty of Court (801).
§ 2. Grounds for Continuance or Postponement (802).
A. In General (802).
B. Absence or Disability of Party or Counsel (802).
C. Absence of or Inability to Procure Evidence (803).
D. Surprise (804).
§ 3. Sufficiency of Affidavits (805).
§ 4. Appellate Procedure (805).

Postponement of criminal prosecutions is elsewhere treated.[73]

§ 1. *Power and duty of court.*[74]—A court of record has inherent power to adjourn from day to day and from week to week,[75] and the order of adjournment may be made orally by the judge.[76] Though the order should always appear on the minutes,[77] it need not be there noted at once by the clerk.[78]

It is the universal rule that the grant of a continuance rests largely in discretion,[79] which will not be disturbed unless abuse of discretion clearly appears.[80] But the court should not make a ruling until after an examination of the affidavit or showing on which the motion for a continuance is made.[81]

§ 2. *Grounds for continuance or postponement. A. In general.*[82]—A continuance will usually be granted where its refusal would result in hardship or manifest

68. Proceedings to punish a witness for contempt in failing to give testimony for use in an action in another state is a special proceeding from which an appeal will lie. Strong v. Randall, 177 N. Y. 400, 69 N. E. 721. An order adjudging a party litigant in contempt for violation of an order entered for the benefit of the adverse party is appealable directly to the supreme court. Order compelling the production of books containing pertinent evidence. Swedish-American Tel. Co. v. Fidelity & Casualty Co., 208 Ill. 562, 70 N. E. 768. An order made during a trial, punishing an attorney for contempt, is an independent order and appealable. King v. Hanson [N. D.] 99 N. W. 1085. An order adjudging one in contempt for violation of an interlocutory injunction cannot be reviewed except upon appeal from the final decree in the cause (Christensen Engineering Co. v. Westinghouse Air Brake Co. [C. C. A.] 129 F. 96); but an order discharging a rule to show cause for contempt in violating an injunction is reviewable by appeal (Enoch Morgan's Sons Co. v. Gibson [C. C. A.] 122 F. 420).

69. A judgment of conviction for contempt, if unconditional and absolute, is a criminal proceeding and final, and reviewable by writ of error, and not by appeal (Bullock Elec. & Mfg. Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 129 F. 105); but if remedial and coercive in character, and intended to enforce the private rights of parties, it is a civil proceeding and not reviewable by writ of error (Heinze v. Butte & B. Consol. Min. Co. [C. C. A.] 129 F. 274). Orders and judgments of the district court in proceedings for contempt are reviewable by petition in error only. Thompson v. Nelson [Neb.] 96 N. W. 194. A writ of error and not appeal is the proper mode of reviewing an order of a Federal court adjudging a party guilty of contempt. Bessette v. Conkey Co., 194 U. S. 324, 24 S. Ct. 655.

70. Whitaker v. McBride [Neb.] 98 N. W. 877.

71. Order to show cause why de facto public officers should not be restrained from exercising their functions, set aside as beyond the court's jurisdiction. State v. Rice [S. C.] 45 S. E. 153.

72. Definitions and distinctions, 1 Curr. L. 620, § 1.

73. See Indictment and Prosecution, 2 Curr. L. 307.

74. See 1 Curr. L. 620.

75, 76, 77. Cribb v. State, 118 Ga. 316, 45 S. E. 396.

78. Failure to note the order on the minutes will not affect its validity. Cribb v. State, 118 Ga. 316, 45 S. E. 396.

79. Murphy v. Hood, 12 Okl. 593, 73 P. 261. That a case long pending has been set for a particular date by consent is taken into consideration in ruling on an application for a continuance. In re Kasson's Estate, 141 Cal. 33, 74 P. 436. No evidence to show order for continuance not given in exercise of sound discretion and in furtherance of justice. Hence, ruling not subject to exceptions. Graffam v. Cobb, 98 Me. 200, 56 A. 645.

80. Murphy v. Hood, 12 Okl. 593, 73 P. 261; Chase v. Watson, 75 Vt. 385, 56 A. 10. Judgment will not be reversed unless a clear abuse of discretion in refusing continuance. Chambers v. Modern Woodmen of America [S. D.] 99 N. W. 1107.

81. Landt v. McCullough, 206 Ill. 214, 69 N. E. 107. Hence it is error to refuse leave to present an affidavit, without regard to its sufficiency. Leave to file affidavit for continuance after plaintiff had amended his complaint, under Starr & C. Ann. St. 1896, c. 110, par. 26. Id.

82. See 1 Curr. L. 620.

injustice.[83] Application therefor must be made in good faith and not merely for delay,[84] good faith being a question of fact.[85] Overruling a motion to quash a citation,[86] appointment of a receiver for plaintiff corporation,[87] and pendency of a suit in another court involving the subject-matter,[88] have been held not to constitute grounds for continuance.

(§ 2) *B. Absence or disability of party or counsel.*[89]—To obtain a continuance on the ground of absence of a party, there must be a sufficient showing that such party is necessary,[90] or that he is a material and necessary witness in his own behalf.[91] If illness is the cause of absence, it must be properly proved;[92] that a party may be necessarily absent on account of another's illness is not sufficient.[93]

Inability of sole counsel to proceed with a trial on account of sickness is sufficient ground for continuance.[94] A continuance because of absence of counsel will not be granted where it appears that the party is represented by qualified counsel.[95]

83. Where a witness without the jurisdiction of the court had promised but failed to appear, it was error to refuse an adjournment and thereby in effect mulct the defendant in the sum of $10,000, for not being ready. Under Rule 7, of Special Rules for Regulation of Trial Terms. Faist v. Metropolitan St. R. Co., 89 App. Div. 593, 85 N. Y. S. 646. Where counsel had been engaged in court and had relied on arrangements for a compromise, which, however, had not been effected, one party having been absent, it was error to refuse a continuance for lack of preparation, even though the moving party was guilty of laches, where the ruling would result in a loss of the land involved without a trial on the merits. Commonwealth Land & Lumber Co. v. Cornett [Ky.] 80 S. W. 1167. Where a survey ordered by the court in an action to quiet title was not taken, owing to illness of the surveyor, and the defendant failed to prepare his case because of that fact, it was error to refuse a continuance. Branson v. Eversole [Ky.] 80 S. W. 1126.

84. Randolph v. Hudson, 12 Okl. 616, 74 P. 946. By statute in Georgia, this must be made to appear by statement of counsel in court or by a representative of the party on oath [Civ. Code 1895, § 5128 et seq.]. Atlantic & B. R. Co. v. Douglas, 119 Ga. 658, 46 S. E. 867. No error in refusing a continuance where, though affidavits showing illness and necessary absence had been filed, no formal motion was made, and no attempt to plead or disclose the defense had been made, though two continuances had been granted. Second Nat. Bank v. Ralphsnyder [W. Va.] 46 S. E. 206. After giving notice that he desired oral examination of witnesses, defendant could not on trial withdraw his notice in order to compel a continuance. Lessly v. Ogden [Miss.] 35 So. 825.

85. Counter-affidavits reasonably tended to show purpose of delay. Randolph v. Hudson, 12 Okl. 616, 74 P. 946.

86. Since defendant must then answer or suffer default. Western Cottage Piano & Organ Co. v. Anderson [Tex.] 79 S. W. 516.

87. Rooney v. Southern Bldg. & Loan Ass'n, 119 Ga. 941, 47 S. E. 345.

88. It was proper to refuse to continue an accounting by an executrix until after the termination of litigation in another court involving title to testator's land, when it was uncertain how long that litigation would continue and debts of the estate were increasing. Phillips v. Phillips' Adm'r [Ky.] 80 S. W. 826. An action by the United States for the recovery of a penalty need not be postponed until a district judge and the secretary of the treasury have acted upon a petition for remission of the penalty, since such action may be taken as well after as before trial. Peacock v. U. S. [C. C. A.] 125 F. 583.

89. See 1 Curr. L. 621.

90. Especially after one continuance has already been granted. Ley v. Hahn [Tex. Civ. App.] 81 S. W. 354. Under a statute requiring parties whose presence is necessary to the determination of a controversy to be brought in, it was proper for the court to continue the cause for that purpose and to refuse to dismiss [Code, § 3466]. Farmers' Sav. Bank v. Independent School Dist., 122 Iowa, 99, 97 N. W. 988.

91. Daly v. Minke, 86 N. Y. S. 92. That his place could not be supplied. Black v. Webber, 1 Neb. Unoff. 468, 96 N. W. 606.

92. No abuse of discretion in refusing continuance on ground of illness of defendant, when shown by unsworn certificate of physician, and by affidavits of defendant and his son, sworn to before their attorney, and when suit had already been pending two years, and it did not appear defendant's place could not be supplied. Black v. Webber, 1 Neb. Unoff. 468, 96 N. W. 606.

93. It was not error to refuse a continuance on the ground of illness of the brother of a party, when the court assured him the trial would be suspended in case his brother's condition demanded his presence. Hathcock v. McGouirk, 119 Ga. 973, 47 S. E. 563.

94. Thompson v. Hays, 119 Ga. 167, 45 S. E. 970.

95. Continuance properly refused upon a mere showing that counsel expected to assist at trial were unable to attend. Chambers v. Modern Woodmen of America [S. D.] 99 N. W. 1107. Illness of one attorney no ground for continuance when another member of the firm is present. Forked Deer Pants Co. v. Shipley, 25 Ky. L. R. 2299, 80 S. W. 476. Where it appeared that an attorney had had full charge of the litigation from the beginning, the fact that his partner was necessarily absent in congress is not sufficient ground for a continuance. In re Kasson's Estate, 141 Cal. 33, 74 P. 436. It was proper to refuse a continuance on ground of illness of one of counsel where the operation causing the illness was foreseen, and the other attorney was familiar with the case and had time to prepare. Rhodes v. Southern R. Co. [S. C.] 47 S. E. 689. Where three

and the case had been set for a particular date by stipulation,[96] or that there had been previous continuances for the same cause.[97] Where there is a statute prescribing what showing must be made for continuance on this ground, its requirements must be fully met.[98]

(§ 2) *C. Absence of or inability to procure evidence.*[99]—Unless he is a nonresident,[1] absence of a material witness for sufficient cause is a ground for continuance,[2] when it is shown that the desired evidence is material,[3] that due diligence was used to procure the evidence,[4] or the attendance of the absent witness,[5] that the same facts could not be proven by other witnesses,[6] and that there is probability that the testimony of the absent witness can be procured within a reasonable time.[7] The name of the absent witness,[8] and the testimony he is expected to give,[9] must also be shown.[10] To establish the fact that the absent witness had been subpoenaed, a legal service of the subpoena must be shown.[11] Error in refusing a continuance on the ground of

counsel were associated in defending a case, two of whom were partners, a continuance on the ground that one partner would be engaged in the supreme court was properly refused, where it was not shown that the others were not qualified to try the case, or that the other partner could not attend to the case in the supreme court. York v. Steward [Mont.] 76 P. 756. Defendant, having one attorney in court, was not deprived of opportunity to examine the jury by the justice's refusal to wait for the associate counsel. Fischer v. Brooklyn Heights R. Co., 84 N. Y. S. 254.

96. One of the attorneys had left for London on legal business. Schlesinger v. Keene, 88 N. Y. S. 1042.

97. A case in municipal court had been continued several times because defendant or his attorney was engaged in another trial, and the case was set peremptorily for a particular date. O'Brien v. Kuntz, 84 N. Y. S. 535.

98. In Georgia, if the leading counsel is absent from providential cause, the case will be continued if the party swears he cannot safely go to trial with such counsel absent, that he expects his services at the next term, and that the application for continuance is not made for delay only. Statutes not complied with. Counsel ill [Civ. Code 1895, §§ 4425, 4426, 5132]. Whitley v. Clegg [Ga.] 48 S. E. 406.

99. See 1 Curr. L. 622.

1. Hathcock v. McGouirk, 119 Ga. 973, 47 S. E. 563.

2. Sickness and absence of widow in will contest. In re Townsend's Estate, 122 Iowa, 246, 97 N. W. 1103.

3. Ley v. Hahn [Tex. Civ. App.] 81 S. W. 354. Tenant had contract on which case depended, and after being summoned by suppoena duces tecum, disappeared. Error to refuse continuance. Bedford v. Gartrell [Miss.] 36 So. 629. Where, in a proceeding for striking certain territory from the corporate limits of a city, subpoenas were issued to 85 witnesses resident in the territory in question and 24 were not served and did not appear, it was errror to refuse a continuance. Gaskin v. Georgetown [Ky.] 80 S. W. 821.

4. In an action on notes, where defendant was notified to produce them, but stated he had hypothecated them, and plaintiff made no effort to obtain them from the third person, he did not show due diligence and was not entitled to continuance. Laun v. Ponath [Mo. App.] 79 S. W. 729. Where defendants lost an affidavit to be read in the absence of a witness in order to prevent a continuance and made no effort to replace it, as they might have done, they could not thereafter complain of injury by its loss. Chowning v. Parker [Mo. App.] 78 S. W. 677.

5. Gallagher v. Diamond State Steel Co. [Del. Super.] 57 A. 533; Murphy v. Hood, 12 Okl. 593, 73 P. 261. Witness not subpoenaed and no other effort made to procure his attendance. Hosman v. Kinneally, 43 Misc. 76, 86 N. Y. S. 263. Defendant was not diligent in discovering need of its physician at the trial of a personal injury action. Galveston, etc., R. Co. v. Walker [Tex. Civ. App.] 76 S. W. 228. Where first subpoena was not issued at defendant's request and second was not issued until day of trial, there was not due diligence. Ley v. Hahn [Tex. Civ. App.] 81 S. W. 354. A second continuance on ground of absence of witness properly refused where after the first the witness was communicated with and promised to attend next day and party then announced ready for trial. Gulf, etc., R. Co. v. Robinson [Tex. Civ. App.] 79 S. W. 827. Where it was known 16 days before trial that a desired witness refused to attend and no effort was made to postpone trial or procure his testimony, it was not error to refuse continuance, asked on day of trial, to procure it. Cobb Chocolate Co. v. Knudson, 207 Ill. 452, 69 N. E. 816. Complaint alleging contract by agents, filed six months, during which time defendant might have learned agents' names and secured their testimony. Pacey v. McKinney [C. C. A.] 126 F. 676. Securing a subpoena duces tecum and later an attachment was due diligence. Bedford v. Gartrell [Miss.] 36 So. 629.

6. Murphy v. Hood, 12 Okl. 593, 73 P. 261; Ley v. Hahn [Tex. Civ. App.] 81 S. W. 354.

7. Murphy v. Hood, 12 Okl. 593, 73 P. 261.

8. Gallagher v. Diamond State Steel Co. [Del. Super.] 57 A. 533.

9. Mere conclusions of fact or law insufficient. Murphy v. Hood, 12 Okl. 593, 73 P. 261; Earl v. State [Tex. Civ. App.] 76 S. W. 207.

10. See post, Affidavits or application.

11. A mere showing that the subpoena was left with a person for the witness without showing relation between such person

sickness of a material witness, whose presence and advice were needed during the trial, was not cured by the appearance of such witness after the trial had progressed several days.[12]

Admission of testimony to avoid continuance.[13]—A continuance on the ground of absence of a material witness is properly refused when the adverse party admits that the witness, if present, would testify to all the facts stated by the moving party as those to which he would testify.[14] The party making such admission does not admit the truth of such testimony, but has the right to disprove it.[15] But some courts hold that in order to prevent a continuance, there must be an admission of the truth of the facts to which the absent witness would testify.[16]

(§ 2) *D. Surprise.*[17]—A continuance will not be granted on the ground of surprise resulting from the amendment of pleadings when the amendment consists only in the addition of purely formal allegations,[18] or a more detailed statement of facts,[19] or when the amended pleading presents no new cause of action.[20] To obtain a continuance on the ground of surprise, the moving party must show ability to obtain evidence to meet the new matter brought out on the stand,[21] or in the amended pleading.[22] If the ground be lack of service of the pleading, the point should be raised by motion to dismiss, not by motion for a continuance.[23] Discontinuance at trial of a count for mesne profits in a declaration in ejectment is not an amendment to the declaration entitling the other party to a continuance to give him time to support his cause on the amended proceeding.[24] In Georgia, on application for continuance on ground of surprise resulting from amendment of pleadings, the party must make oath, or his counsel must state in his place "that such surprise is not claimed for the purpose of delay."[25]

and the witness was insufficient. Bacot v. Deas [S. C.] 45 S. E. 171.

12. Evidence to show such witness had been sick was admissible when she appeared. In re Townsend's Estate, 122 Iowa, 246, 97 N. W. 1108.

13. See 1 Curr. L. 624, § 3.

14. Witness intoxicated [2 Ball. Ann. Codes & St. §§ 5993, 4977]. Bensen v. Hamilton, 34 Wash. 201, 75 P. 805; Pacey v. McKinney [C. C. A.] 125 F. 675; Goldstein v. Morgan, 122 Iowa, 27, 96 N. W. 897.

15. Nugent v. Armour Packing Co. [Mo. App.] 81 S. W. 506.

16. See 1 Curr. L. 624, citing Louisville & N. R. Co. v. Voss, 109 Tenn. 718, 72 S. W. 983.

17. See 1 Curr. L. 623.

18. Allegation of due care in action for negligence. Milliken v. St. Clair [Mich.] 99 N. W. 7.

19. An amended petition which simply describes injuries more in detail does not operate as a surprise. Ft. Worth, etc., R. Co. v. Partin [Tex. Civ. App.] 76 S. W. 236. Amendment of a petition by a more detailed statement of the facts, but setting up no new cause of action, did not require a continuance where defendants had about two weeks to answer the new petition. Linten v. Cathers [Neb.] 97 N. W. 800. The filing of an amended bill of particulars called for by plaintiff was not ground for a continuance when the information therein might have been previously gained from the original bill or by inquiry. American Bonding & Trust Co. v. Milstead [Va.] 47 S. E. 853.

20. Amended petition did not change cause of action and could not operate as a surprise. Galveston, etc., R. Co. v. Walker [Tex. Civ. App.] 76 S. W. 228. Addition of a second count which introduced no new cause of action. United States Fidelity & Guaranty Co. v. Damskibsaktieselskabet Habil, 138 Ala. 348, 35 So. 344. The original action against a township was on the same warrant and notice was given of the character of the action and parties thereto. Mitchelltree School Tp. v. Hall [Ind. App.] 68 N. E. 919.

21. Where plaintiff in a personal injury action was twice seized with violent convulsions and became unconscious while on the witness stand, it was not error to refuse a continuance on the application of the adverse party, on the ground of surprise, in that there were no allegations in complaint that plaintiff was subject to such attacks, where there was no showing that it could be proved that the attacks were simulated or were not the result of injuries received. International, etc., R. Co. v. Pina [Tex. Civ. App.] 77 S. W. 979.

22. The moving party did not know whether or not he would have other evidence on the trial if the case were continued. Alabama Steel & Wire Co. v. Wrenn, 136 Ala. 475, 34 So. 970.

23. A continuance will not be granted upon a mere general allegation that defendant had not been given reasonable notice of the nature of the complaint and the time and place at which it would be passed upon, and that neither the complaint nor a copy had been served upon it, without a showing that defendant had been taken by surprise or was not fully prepared. Savannah, etc., R. Co. v. Gill, 118 Ga. 737, 45 S. E. 623.

§ 3. *Sufficiency of affidavits.*[26]—A motion for a continuance must usually be based upon an affidavit,[27] the formal sufficiency and contents of which depend upon the statutes. An affidavit for a continuance on the ground of absence of a witness must disclose the name of the witness,[28] and must state clearly and concisely the facts expected to be proved by the absent witness.[29] In Texas, the application for a continuance on the ground of want of testimony must contain an affidavit that the testimony is material, showing its materiality,[30] and that the party applying for the continuance has used due diligence to procure such testimony, stating such diligence.[31] Depositions attached to an affidavit for continuance and referred to therein are a part of the affidavit and admissible in evidence with it.[32]

§ 4. *Appellate procedure.*—In order to present error for consideration on appeal, the application for a continuance, the ruling on which is assigned as error, must be included in the bill of exceptions.[33] Where the deposition of a witness, absent from trial on account of illness, had previously been taken, the denial of a continuance by the trial judge would not be reviewed on appeal when the deposition was not included in the record.[34]

CONTRACTS.

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24. Acts Md. 1785, c. 80. Crandall v. Lynch, 20 App. D. C. 73.

25. Civ. Code 1895, § 5128. Atlantic & B. R. Co. v. Douglas, 119 Ga. 658, 45 S. E. 867.

26. See 1 Curr. L. 625, § 5.

27. As to the showing necessary to be made therein, see ante, § 2, A, B, C, D. Civ. Code, § 329. Murphy v. Hood, 12 Okl. 593, 73 P. 261.

28. Gallagher v. Diamond State Steel Co. [Del. Super.] 57 A. 533.

29. Murphy v. Hood, 12 Okl. 593, 73 P. 261.

30. The following, "To show materiality," etc., "the defendants state that they expect to prove," etc., followed by a statement of facts, held insufficient. Patton v. Williams [Tex. Civ. App.] 79 S. W. 357.

31. The facts showing diligence without the affidavit that party "has used due diligence" is not sufficient. Patton v. Williams [Tex. Civ. App.] 79 S. W. 357.

32. Bell v. Lloyd, 67 Kan. 859, 74 P. 242.

33. Ft. Worth, etc., R. Co. v. Partin [Tex. Civ. App.] 76 S. W. 236.

34. Shannon v. Marchbanks [Tex. Civ. App.] 80 S. W. 860.

Scope of topic.—Topics of "Implied Contracts," "Building and Construction Contracts," and "Public Contracts," embrace matters so designated, and topics of "Fraud," "Mistake," "Duress," and "Incompetency" treat the questions of contractual capacity and freedom of assent.

§ 1. *Nature and formal requisites. A. Definition and kinds of contracts.*[1]—A contract is an agreement by which at least one of the concurring parties acquires a right to an act or forbearance upon the part of the other or others.[2] The stipulations between the parties constitute the contract, while the writing is only evidence of the agreement.[3]

Contracts are either executed or executory. An executed contract is one in which all the parties thereto have performed all the obligations which they have originally assumed.[4] An executory contract is one in which something remains to be done by one or more of the parties.[5]

A contract under seal is a specialty, and a simple contract is one not under seal.[6]

A promise which has become binding is termed an obligation.[7]

(§ 1) *B. Offer and acceptance.*[8]—An offer by one party, accepted by the other, makes a mutual contract, binding on both.[9] But in order that it may do so, the parties must agree as to all the essential elements of the contract.[10] A stipulation to subsequently agree in regard to the manner of performance does not impose a binding obligation, and the contract is not enforceable until the minds of the parties subsequently meet in regard to the matter.[11]

1. See 1 Curr. L. 626.
2. Hammon, Cont., p. 6.
3. Reformation of contract for sale of land for mistake. Webb v. Hammond, 31 Ind. App. 613, 68 N. E. 916.
4. A deed becomes an executed contract when signed and delivered. Possession not necessary [Ga. Civ. Code, § 3632]. Watkins v. Nugen, 118 Ga. 372, 45 S. E. 262. Contract between two telephone companies to each build part of line and that each should then have the use of the other's lines for 20 years not executed by building line. Bastin Tel. Co. v. Richmond Tel. Co., 25 Ky. L. R. 1249, 77 S. W. 702.
5. Ga. Civ. Code, § 3632. Watkins v. Nugen, 118 Ga. 372, 45 S. E. 262. A contract for personal services is executory until the date fixed therein for its termination. Contract to display advertisements in street car, cards being subject to approval of advertising company, is one for personal services, and not a license or lease. Ward v. American Health Food Co., 119 Wis. 12, 96 N. W. 388.
6. Streeter Jr. Co. v. Janu, 90 Minn. 393, 96 N. W. 1128. Under the statutes of Minnesota, all distinctions between the two are abolished (Laws 1899, p. 88, c. 86), when the contract is between private parties. Right to pursue undisclosed principal. Id.
7. Livesley v. Johnston [Or.] 76 P. 946.
8. See 1 Curr. L. 627.
9. To establish a bilateral contract involving mutual promises, when the parties are at the same place, there must be an offer and an acceptance thereof in accordance with its terms. Busher v. New York Life Ins. Co. [N. H.] 58 A. 41; Mendell v. Willyoung, 42 Misc. 210, 85 N. Y. S. 647. Letters held not to constitute contract for sale of land. Niles v. Hancock, 140 Cal. 157, 73 P. 840. A written order for machinery to be shipped to the purchaser, which fully describes such machinery and the terms of its sale, becomes a contract on its unconditional acceptance. Reeves & Co. v. Bruening [N. D.] 100 N. W. 241. Written proposition to one to act as agent to sell land, signed by proposer but not by other party. Rowan & Co. v. Hull [W. Va.] 47 S. E. 92 Correspondence held to show contract. Roberts v. Pacific & A. R. & Nav. Co. [C. C. A.] 121 F. 785. Offer by letter and acceptance held to constitute valid contract. Harrington v. F. W. Brockman Commission Co. [Mo. App.] 81 S. W. 629. An agreement to give one an option to purchase, though unilateral and without consideration, becomes binding and enforceable when accepted and acted upon by the other party. Evidence held to show acceptance. Carter v. Love, 206 Ill. 310, 69 N. E. 85. Correspondence held not to amount to an agreement for extension of time on note. Travis v. Watson [Mich.] 96 N. W. 28.
10. Failure to agree on terms of credit or amount of interest on deferred payment in negotiations for sale of land. Niles v. Hancock, 140 Cal. 157, 73 P. 840. Minds of parties held to have met respecting subject-matter, the disagreement being only on the question of construction. Sale of iron. Farquhar Co. v. New River Mineral Co., 87 App. Div. 329, 84 N. Y. S. 802. Acceptance of offer to remove snow held to create binding contract. Snow Melting Co. v. New York, 88 App. Div. 575, 85 N. Y. S. 168. Negotiations between parties and delivery of check to third person held to have constituted complete transaction and an absolute and unrestricted loan. Salmons v. Western Union Tel. Co., 133 N. C. 541, 45 S. E. 896. Letters held not to constitute contract to furnish steam boiler drums. Affidavit of defense sufficient. Kinney v. Harrison Mfg. & Boiler Co., 22 Pa. Super. Ct. 601.
11. Evidence sufficient to justify submis-

A mere proposal without consideration creates no obligation,[12] and may be withdrawn at any time before acceptance,[13] but not thereafter.[14] Unless revoked, an offer will ordinarily remain open for a reasonable time.[15] An offer, which in its terms limits the time of acceptance, is withdrawn by the expiration of the time.[16] But where the offer runs until a specified date, the party making it cannot, after it has been accepted, prevent an effectual tender of performance by filing a bill for a rescission before such date.[17] A contract will be implied where the acceptance in a designated manner of an offer, agreed to be held open for a specified time, was prevented by the person making the offer.[18]

One rejecting an offer thereby relieves the other party from any further liability thereon,[19] and cannot, by afterwards accepting it without the offerer's consent, renew such liability.[20]

The acceptance must be absolute and unconditional, and in accordance with the terms of the offer,[21] and a proposal to accept, or acceptance of, an offer, on

sion to jury of question whether minds of parties met as to manner of conducting test of storage battery cars. Hopedale Elec. Co. v. Electric Storage Battery Co., 89 N. Y. S. 325.

12. Frank v. Stratford-Handcock [Wyo.] 77 P. 134. Offer to general public to divide commissions with parties procuring borrowers for money. Van Vlissingen v. Manning, 105 Ill. App. 255. Guaranty signed without request of other party, in his absence, for no consideration except future advances to be made to principal debtor. John Deere Plow Co. v. McCullough, 102 Mo. App. 458, 76 S. W. 716. Letter of instructions as to route via which goods were to be shipped, signed by plaintiff alone and not accepted or acted upon by defendant. Bessling & Co. v. Houston & T. C. R. Co. [Tex. Civ. App.] 80 S. W. 639. Agreement to purchase books to be paid for in instalments, providing that the purchaser understands that it is not subject to cancellation and that the seller may consult certain persons as to the buyer's reputation, is a mere order, revocable at any time before acceptance, and, considered as a contract, is unilateral, without consideration and not enforceable after revocation. Cary v. Appo, 84 N. Y. S. 569. The fact that the publisher incurs a liability to the agent for commission for every order obtained, irrespective of the outcome of the sale, is immaterial, it not being shown that purchaser knew that fact. Id. The fact that the agent signed the order as salesman and wrote "10 per cent. off" does not show an acceptance by the publisher, in the absence of a showing of agent's authority to accept offer, or give discount, nor does a provision that "first payment may be made to the agent," where no such payment was made, and it was not shown what agent was referred to. Id.

13. Rickard v. Taylor [C. C. A.] 122 F. 931; Kileen v. Kennedy, 90 Minn. 414, 97 N. W. 126. "We agree to sell A our steel turnings for the season of 1901 for $6 per ton, at factory," signed by defendant, does not import consideration or promise to purchase, and is a mere promise to sell, subject to withdrawal before acted upon. Alderman v. New Departure Bell Co., 75 Conn. 519, 54 A. 198. Defendant not liable on order for cash register where order provided that it should not be countermanded, but it was countermanded before it was accepted, there being no consideration for such provision. Hallwood Cash Register Co. v. Finnegan, 84 N. Y. S. 154. Sale of property brought to notice of holder of voluntary option to purchase, before any attempted acceptance thereof, constitutes sufficient revocation. Frank v. Stratford-Handcock [Wyo.] 77 P. 134.

14. Mendell v. Willyoung, 42 Misc. 210, 85 N. Y. S. 647. N. Dak. Rev. Codes 1899, § 3862. Reeves & Co. v. Bruening [N. D.] 100 N. W. 241. Contract to convey land which has been accepted by grantee. Rodman v. Robinson, 134 N. C. 503, 47 S. E. 19.

15. Niles v. Hancock, 140 Cal. 157, 73 P. 840. Acceptance by vendee of contract of sale and return thereof to vendor within four days held reasonable time. Gough v. Loomis, 123 Iowa, 642, 99 N. W. 295.

16. Contract of sale of timber sent to bank to be delivered upon payment of specified sum within certain time held a mere offer, which was revoked at expiration of such time. Rickard v. Taylor [C. C. A.] 122 F. 931.

17. Option to purchase. Carter v. Love, 206 Ill. 310, 69 N. E. 85.

18. The other party being willing and ready to accept. Guilford v. Mason, 24 R. I. 386, 53 A. 284.

19. Niles v. Hancock, 140 Cal. 157, 73 P. 840.

20. Niles v. Hancock, 140 Cal. 157, 73 P. 840. Cannot abandon counter proposition and accept original offer. Id. Cannot enforce offer for sale of land by afterwards waiving conditions insisted upon up to time of withdrawal. Lambert v. Gerner, 142 Cal. 399, 76 P. 53.

21. Frank v. Stratford-Handcock [Wyo.] 77 P. 134; Kileen v. Kennedy, 90 Minn. 414, 97 N. W. 126. No meeting of minds in regard to sale of canned corn. Rider v. Wood, 138 Ala. 235, 35 So. 46. Agreement to accept offer to sell land at certain price if vendor would furnish unlimited certificate of title from certain insurance company not unconditional. Lambert v. Gerner, 142 Cal. 399, 76 P. 53. Where defendants ordered goods to be shipped at a certain time and plaintiffs replied that they did not know whether they could ship them, but would do the best they could, there is no agreement to deliver at a particular time. Danziger v. Pittsfield Shoe Co.,

terms varying from those proposed, is a rejection thereof,[22] and constitutes a new proposal.[23]

The consent necessary to a contract must be communicated by the parties to each other,[24] and such communication must be by some act or omission of the party contracting, by which he intends to communicate it, or which necessarily tends to such communication.[25] If the proposal is clear and definite, and one to which a simple assent is a complete answer, such assent may be given either in writing or by words or acts.[26] When the offer is sent by mail or telegraph, the reply may be sent by the same medium, and the contract will be complete when the acceptance is mailed, or delivered at the telegraph office, properly addressed to the party making the offer, and beyond the acceptor's control.[27] If the contract is unilateral, an intention to accept, accompanied by performance, is sufficient to complete it.[28]

In the absence of a contrary intention, an offer and acceptance constitute a valid agreement without the execution of a formal contract, though it was the understanding that such a contract was to be executed.[29]

204 Ill. 145, 68 N. E. 534. Offer to allow plaintiff to sell ice as defendant's agent for certain sum and acceptance by plaintiff as purchaser in his own right does not constitute contract. Rogers v. French, 122 Iowa, 18, 96 N. W. 767. Where offer to sell ice does not specify time of payment, it will be presumed that payment is to be made in cash on delivery, and hence acceptance agreeing to settle promptly is not unconditional. Id. Offer does not waive variation in acceptance when he does not know of it. Metropolitan Coal Co. v. Boutell Transportation & Towing Co. [Mass.] 70 N. E. 421. No contract where written estimate for work and material was returned with indorsement, "If written contract satisfactory, agree to take at $750." Levenson v. Bollowa, 85 N. Y. S. 386.

22. Niles v. Hancock, 140 Cal. 157, 73 P. 840. Puts an end to the negotiations unless the offer is renewed or the party making it assents to the modifications. Agreement to sell standing timber. Kileen v. Kennedy, 90 Minn. 414, 97 N. W. 126.

23. Charter of vessel. Metropolitan Coal Co. v. Boutell Transportation & Towing Co. [Mass.] 70 N. E. 421. Cal. Civ. Code, § 1585. Niles v. Hancock, 140 Cal. 157, 73 P. 840. An acceptance by the original proponent of the modification made by the other party concludes the agreement, and makes the modification or condition a part of it. Contract for sale and installation of water wheel. Sloan v. Wolf Co. [C. C. A.] 124 F. 196.

24. Niles v. Hancock, 140 Cal. 157, 73 P. 840. Where parties are not together, acceptance must be manifested by some appropriate act. Mendell v. Willyoung, 42 Misc. 210, 85 N. Y. S. 647. No contract where application for life insurance policy was taken by agent of insurer and forwarded to company, which issued a policy and sent it to the agent, who received it after the death of the applicant, and never delivered it. Busher v. New York Life Ins. Co. [N. H.] 58 A. 41.

25. Letter to party's own agent insufficient. Land contract. Niles v. Hancock, 140 Cal. 157, 73 P. 840.

26. Beginning publication of advertisement, of which defendant presumably had notice. Mendell v. Willyoung, 42 Misc. 210, 85 N. Y. S. 647. A voluntary acceptance of the benefits of a transaction is a consent to all the obligations arising from it [Cal. Civ. Code, § 1589]. Gallagher v. Equitable Gaslight Co., 140 Cal. 699, 75 P. 329. Furnishing gas under contract made by agent at reduced rate. Id. By bringing suit on a contract, one thereby puts himself under its obligations. Id. Any unequivocal conduct on the part of the person to whom offer is made is sufficient. Counter proposition in acceptance of offer. Gough v. Loomis, 123 Iowa, 642, 99 N. W. 295. Performance of the conditions of a proposal or the acceptance of the consideration offered therewith, is an acceptance [Cal. Civ. Code, § 1584]. Gallagher v. Equitable Gaslight Co., 141 Cal. 699, 75 P. 329. Provision as to rate to be paid for gas inserted in contract on consumer's objection to original provision. Id. A demand by a creditor on the purchase of a business, who has assumed, as part of the consideration for the sale, the payment of the debts of the seller, for the payment of his claim, constitutes an acceptance. Lyon v. Clochessy, 43 Misc. 67, 86 N. Y. S. 245. Bill of lading, draft attached, payment of draft, receipt of bill of lading, constitute contract to deliver goods as per terms. Callender, Holder & Co. v. Short [Tex. Civ. App.] 78 S. W. 366. An acceptance of an offer of guaranty is binding from the time of the receipt according to the terms of the offer and the contract so formed is not varied by the receipt subsequently of conditional acceptances. Contract of guaranty. Irion v. Eskrigge, 30 Tex. Civ. App. 466, 70 S. W. 779.

27. Busher v. New York Life Ins. Co. [N. H.] 58 A. 41. When letter accepting offer for sale of machinery is deposited in postoffice. Reeves & Co. v. Bruening [N. D.] 100 N. W. 241.

28. Where party simply required to do something and not to promise to do it. Busher v. New York Life Ins. Co. [N. H.] 58 A. 41.

29. Not the case where both parties recognize the right to alter the terms of the agreement before execution of written contract. Agreement to furnish materials for street improvements. Boysen v. Van Dorn Iron Works, 87 N. Y. S. 995.

The signature of a contract by the obligees raises a presumption of their acceptance thereof, no other object being apparent.[30] One who signs a contract may be bound by the terms thereof, though not named therein,[31] and though he may have had no connection with the negotiations leading up to it.[32] One who accepts and adopts a written contract is bound thereby, even though he does not sign it.[33]

The rules governing the acceptance of offers made to the public generally are the same as those governing the offer of rewards,[34] and are discussed in the article on that subject.[35]

(§ 1) *C. Reality of consent.*[36]—No contract is complete without the mutual assent of the parties,[37] and their minds must meet as to all its essential terms.[38] Fraud and undue influence,[39] and accident and mistake, including the effect of a failure to read a contract before signing it, are fully treated elsewhere,[40] as is want of capacity to contract.[41]

§ 2. *Consideration. Necessity.*[42]—All contracts must be supported by a legal consideration,[43] and one who relies on a naked promise does so at his peril.[44]

At common law, a seal conclusively imported a consideration,[45] but this rule

30. Employment as agent. Taylor Co. v. Bannerman [Wis.] 97 N. W. 918.

31. Acceptance of offer to G. & Co. by "G. & Co., by G." binds G. individually. General Elec. Co. v. Gill, 127 F. 241. The acceptance of an offer to a firm on its behalf "by" a named person, who is one of the partners, constitutes an additional proposal that the signer shall become a party to the agreement, and on acceptance, he becomes bound. General Elec. Co. v. Gill, 127 F. 241; Gill v. General Elec. Co. [C. C. A.] 129 F. 349. See Agency, § 3, 1 Curr. L. 60.

32. Gill v. General Elec. Co. [C. C. A.] 129 F. 349.

33. Contract reciting that vendors "have sold" and that vendee "agrees to pay" the purchase money. Forthman v. Deters, 206 Ill. 159, 69 N. E. 97. Where writing on its face purports to be consummated contract. Id. A contract of affreightment is binding on the carrier, though not signed by it, where its name is twice imprinted thereon with a rubber stamp, and it appears that it was delivered by the carrier to the consignor, by whom it was signed in duplicate, one copy being retained by him and the other delivered to the consignee and the cattle shipped under it, and that the consignees accepted a pass from the carrier in accordance with the conditions of said contract. Burris v. Missouri Pac. R. Co. [Mo. App.] 78 S. W. 1042.

34. Van Vlissingen v. Manning, 105 Ill. App. 255.

35. See title Rewards, 2 Curr. L. 1521.

36. See 1 Curr. L. 627.

37. Kileen v. Kennedy, 90 Minn. 414, 97 N. W. 126. A notice printed on a box of pills to the effect that the title thereto remains in the maker, that it can be sold only for a certain price, and that the acceptance of the box is an assent to such conditions and an agreement to pay a certain sum as liquidated damages for their breach, held not binding on one who purchases such pills from a person other than the manufacturer who received no notice of the terms of a contract to the same effect, which purchasers from the manufacturer were compelled to sign, but had actual knowledge thereof. Garst v. Wissler, 21 Pa. Super. Ct. 532.

38. Unsigned and undated memorandum, reciting that a certain amount is due another, held not a contract. Brown v. Silver, 2 Neb. Unoff. 164, 96 N. W. 281. Agreement to repay money loaned to third person. Instructions approved. Ford v. McLane, 131 Mich. 371, 91 N. W. 617. Series of letters containing propositions, but not definitely fixing the time of payment nor containing definite agreement as to subject-matter, held not to constitute contract. Joseph Joseph Bros. Co. v. Schonthal Iron & Steel Co. [Md.] 58 A. 205. Evidence in action to enforce contract for sale of realty held not to show meeting of minds, so as to make enforceable contract. Babcock v. Ormsby [S. D.] 100 N. W. 759.

39. See title Fraud and Undue Influence, 2 Curr. L. 104.

40. See Mistake and Accident, 2 Curr. L. 903. For matters relating to procedure in actions to set aside contracts on the ground of fraud, accident or mistake, see Cancellation of Instruments, 1 Curr. L. 413.

41. See Incompetency, 2 Curr. L. 295.

42. See 1 Curr. L. 630.

43. Leaving business and traveling for benefit of testator, sufficient consideration to support contract to devise. Spencer v. Spencer [R. I.] 55 A. 637. A contract must be founded on a valuable consideration. Cook v. Casler, 87 App. Div. 8, 83 N. Y. S. 1045. Purchase of business and good will sufficient consideration for agreement not to compete with purchaser. Pittsburg Stove & Range Co. v. Pennsylvania Stove Co., 208 Pa. 37, 57 A. 77. As to necessity for new consideration in case of modification of contract, see post, § 6.

44. Does not work estoppel. Inhabitants of Freeman v. Dodge, 98 Me. 531, 57 A. 884. Liability will not be imposed on the husband for payment of a debt of his wife, for which he would not otherwise be liable, by a mere bald promise to pay the same. McBride v. Adams, 84 N. Y. S. 1060.

45. Conant v. Jones [Ga.] 48 S. E. 234. Georgia Code, § 3656, merely a codification of common law. Sivell v. Hogan, 119 Ga. 167, 46 S. E. 67. Contract for sale of storage battery. Graham v. Middleby [Mass.] 70 N. E. 416. Sale of realty. Forthman v. Deters, 206 Ill. 159, 69 N. E. 97.

did not apply to contracts in restraint of trade,[46] or to those in which the consideration was fraudulent or illegal.[47] It has been modified or abrogated by statute in many states.[48] The fact that the party seeking to enforce the contract himself introduces evidence showing that it was without consideration is immaterial.[49] The true consideration for a contract may always be shown whether one is named therein or not.[50] A consideration will also be presumed from the execution of the contract.[51]

What constitutes.[52]—Any benefit to the promisor, or to a third person at his request, or an injury, loss, charge, inconvenience, or a risk thereof to the promisee, is a sufficient consideration to support a contract.[53] A very slight advantage or

46, 47. Sivell v. Hogan, 119 Ga. 167, 46 S. E. 67.

48. Hammon, Cont., § 272, n. 105.

49. Sale of cotton for future delivery. Sivell v. Hogan, 119 Ga. 167, 46 S. E. 67.

50. Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781. Note given for purchase price of sawmill timber. Butler & Co. v. McCall, 119 Ga. 503, 46 S. E. 647. Immoral consideration for deed. Watkins v. Nugen, 118 Ga. 375, 45 S. E. 260. Deed reciting consideration of $1.00. Harraway v. Harraway, 136 Ala. 499, 34 So. 836. Contract for sale of land. Baltes Land, Stone & Oil Co. v. Sutton [Ind. App.] 69 N. E. 179. Parol evidence is admissible to show that a contract was in fact made without consideration. Not permissible under guise of so doing to show oral agreement modifying or varying writing. Agreement to refund note given on exchange of land. Stewart v. Hughes [Wyo.] 75 P. 945.

51. Evidence insufficient to show lack of consideration for note and mortgage. Ambrose v. Drew, 139 Cal. 665, 73 P. 543. A recital in a note, running directly to plaintiff, of value received, imports a consideration as moving directly to him from the maker, and the burden of showing the contrary is on the maker. Kramer v. Kramer, 90 App. Div. 176, 86 N. Y. S. 129.

52. See 1 Curr. L. 630.

53. Any damage, or suspension of a right, or possibility of loss, occasioned to the promisee by the promise of another, is sufficient, though no actual benefit accrues to the promisor. Restraint on power of competition part of consideration for purchase of business. Booth & Co. v. Davis, 127 F. 875; Rutherford v. Rutherford [W. Va.] 47 S. E. 240. A promise which is neither a detriment to the promisor, nor a benefit to the promisee, is not sufficient to support a conveyance, as against the grantor's creditors. Wood v. Potts [Ala.] 37 So. 253. A promise by a married woman to support the grantor, in which her husband does not join, is no consideration to support a deed, under a statute making a married woman incapable of contracting without the consent of her husband [Ala. Code 1886, § 23]. Id. A benefit to be derived by each party to a contract. Rowan & Co. v. Hull [W. Va.] 47 S. E. 92. A detriment or loss to the promisee may constitute the consideration for a promissory note. Bode v. Werner, 4 Ohio C. C. (N. S.) 158. May be a detriment to the promisee, or a benefit to a third person, and not necessarily a benefit to the promisor. Agreement by plaintiff to allow defendant's son to marry his minor daughter in consideration of defendant's paying a certain sum to plaintiff for their support. Henry v. Dussell [Neb.] 99 N. W. 484. Any act which is a benefit to one party or a disadvantage to the other. Sale of physician's practice for purpose of forming a partnership with a specialist is sufficient consideration to support a promise by the latter not to engage in general practice within certain district. Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781. Question as to whether consideration for note executed by defendant to plaintiff at his brother's request, passed between defendant and his brother, held, under the evidence to be for the jury. Kramer v. Kramer, 90 App. Div. 176, 86 N. Y. S. 129.

The following agreements have been held to be supported by a sufficient consideration: Failure of plaintiff to maintain validity of patent and to protect defendant as its licensee sufficient to support modification abrogating provision for payment of minimum royalties. Taylor Gas Producer Co. v. Wood [C. C. A.] 125 F. 337. The withholding, by agreement, of competition for business, though but a single transaction is involved, when not opposed to public policy. Agreement of contractor to abandon negotiations for construction of building and allow another to obtain the contract supports a promise by the latter to pay a debt owed by the contractor to a third person. Moore v. First Nat. Bank, 139 Ala. 595, 36 So. 777. The fact that notes and a mortgage given to an attorney are assets of an estate is sufficient to support a transfer of them to its representative. Ambrose v. Drew, 139 Cal. 665, 73 P. 543. Inducing one to take chances of having business ruined by taking nonunion men to board sufficient to support promise by employer to furnish certain number of boarders for definite time and pay their board. Marr v. Burlington, etc., R. Co., 121 Iowa, 117, 96 N. W. 716. Where testator gave fund in trust to his child, which on his death passed to her husband, who voluntarily assigned it to their children, they took it subject to his debts so that orders on the executor which they gave his creditors for payment of their claims were supported by a sufficient consideration. Drye v. Cunningham Medley & Co., 24 Ky. L. R. 2500, 74 S. W. 272. An agreement by a debtor to turn over certain property for pro rata distribution among his creditors. Cumberland Valley Bank's Assignee v. Citizens' Nat. Bank, 25 Ky. L. R. 1807, 78 S. W. 889. A promise by a son, made upon receipt of property from his father, to pay a certain sum to a third person upon the father's death. Ebel v. Piehl [Mich.] 95 N. W. 1004. A mortgage given by a limited partnership to one of its members to secure deficiency on purchase-money mort-

disadvantage is sufficient when the contract is made by one of good capacity, and

gage, foreclosure sale of land purchased by him for them, they having agreed to indemnify him for his personal liability thereon. Stradley v. Cargill Elevator Co. [Mich.] 97 N. W. 776. Advancements by daughter made without any definite agreement for payment, held sufficient to support transfer of property to her by her mother. Carson v. Murphy, 1 Neb. Unoff. 519, 96 N. W. 110. Services rendered by real estate agents in effecting sale support agreement on part of agent for vendor to divide his commission with them. Howard v. Murphy [N. J. Law] 56 A. 143. A promise by a third person to pay a given sum to a creditor in consideration of the discharge of an indebtedness or a colorable claim asserted by him against the debtor. Note delivered to husband to enable him to discharge obligation to his wife under antinuptial agreement. Kramer v. Kramer, 90 App. Div. 176, 86 N. Y. S. 129. The lower price for which brokers secured property is sufficient consideration to support a promise by the purchasers to pay them a certain sum in lieu of commissions, the owner not being willing to sell unless relieved from payment of such commissions. Deitch v. Feder, 86 N. Y. S. 802. An agreement by the grantee under a warranty deed, with a covenant against incumbrances to pay a materialman's claim, which is a liability of the grantor, notwithstanding the fact that materialman never filed lien, and that time within which he could do so had expired when suit was brought. Materialman's right to file lien against wife's property for materials furnished husband, and used in erecting buildings on property is liability of wife. Hurd v. Wing, 86 N. Y. S. 907. An agreement between a mortgagor and defendant, whereby the former released his interest in the profits derived from the mortgaged premises, which were to be divided between them under a prior agreement, and the latter assumed and paid the mortgage debt. Smith v. Kissel, 92 App. Div. 235, 87 N. Y. S. 176. A sale by next of kin of a deceased partner of their interest in the business to the surviving partner sufficient to support a promise on his part to pay a firm debt to a third person. Flagg v. Fisk, 87 N. Y. S. 630. An agreement to substitute a third person for one of the parties to a contract. Contract to pay percentages on cattle carried to Cuba. Ceballos v. Munson S. S. Line, 87 N. Y. S. 811. Reversing Id., 42 Misc. 22, 85 N. Y. S. 530, for insufficient evidence. A promise to pay plaintiff's expenses and attorney's fees incurred in negotiations for the purchase of certain stumpage, if he would not withdraw his offer, and would meet defendant at a specified time and place. Manary v. Runyon, 43 Or. 495, 73 P. 1028. The taking over of an entire stock of goods is sufficient to support an agreement to pay the debts of the seller. Creditors parties to consideration though not to agreement and may sue in their own names, if claims within consideration. Sargent v. Johns, 206 Pa. 386, 55 A. 1051. Plaintiff and defendant undertook to have a judgment of $9,000 against defendant, for $5,000 of which plaintiff was bound to indemnify defendant under a policy of insurance, reduced. Held, that an agreement whereby each party agreed absolutely to pay a certain proportion of the sum finally paid was supported by a consideration, and binding on defendant though such sum was less than $5,000. Frankfort Marine, Acc. & Plate Glass Ins. Co. v. Witty, 208 Pa. 569, 57 A. 990. A promise of re-employment and its execution constitutes a valuable consideration for a release from liability for personal injuries. Re-employment and $1.00. Quebe v. Gulf, etc., R. Co. [Tex. Civ. App.] 77 S. W. 442. Where prior and subsequent to the execution of a contract for legal services in the settlement of a claim for injuries, the attorney gave advice and rendered valuable services to his client in accordance with the terms thereof and did not refuse to render services at any time prior to the private settlement of the claim, an objection that the contract was without consideration could not be sustained. Tabet v. Powell [Tex. Civ. App.] 78 S. W. 997. Transfer of interest of person settling on government land with intention of acquiring title thereto sufficient consideration to support promise, he not being a trespasser. Waring v. Loomis [Wash.] 76 P. 510. See Public Lands, 2 Curr. L. 1295. An equitable mortgage is a good consideration and justification for the giving of a formal mortgage, where in the absence of the equitable right, a valid security could not be given because of the rights of creditors. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. An agreement in a lease giving the lessee an option to purchase is supported by the lease. Frank v. Stratford-Handcock [Wyo.] 77 P. 134.

Bonds: Redelivery bond in attachment, under seal and reciting as consideration the release of the attached property, is supported by sufficient consideration. Ebner v. Held [C. C. A.] 125 F. 680. The dissolution of the attachment which results therefrom is sufficient consideration to support a release bond, though property is not in the name of the attachment defendant. Fidelity & Deposit Co. v. Bowen, 123 Iowa, 356, 98 N. W. 897. The signature of a surety to an appeal bond is not without consideration, though the appeal is afterwards dismissed, at least where it operated to stay proceedings for six months. It is for purpose of preventing appeal from becoming ineffectual. Morin v. Wells [Mont.] 75 P. 688.

Notes: The indorsement and delivery of a note by the payee thereof to an insurance company upon the company delivering a policy of insurance to the maker. Muller v. Swanton, 140 Cal. 249, 73 P. 994. A note given by the drawee of a bill of exchange in payment thereof when presented at maturity. Torpey v. Tebo, 184 Mass. 307, 68 N. E. 223. Surrender and cancellation of old note is good and sufficient consideration for giving new one in lieu thereof. Zuendt v. Doerner, 101 Mo. 528, 73 S. W. 873. Surrender of stock pledged to secure payment of a note sufficient to support signature of surety. Id. Retiring notes of an individual at the instance of a corporation which had bought the stock for which the notes were given held sufficient to support notes of the corporation. Flour City Nat. Bank v. Shire, 88 App. Div. 401, 84 N. Y. S. 810. Relinquishment of the right of dower is a valuable consideration for a note. Southern Loan &

without fraud, imposition or mistake.[54] Giving one a right or privilege which he already possesses,[55] or an opportunity to do what he has a right to do, is not a valid consideration for a promise on his part.[56] Where the promise is without

Trust Co. v. Benbow, 135 N. C. 303, 47 S. E. 435.

Consideration held sufficient: For check given housekeeper for services rendered deceased. Clay v. Layton [Mich.] 96 N. W. 458. For contract to pay certain sum annually, etc. Gall v. Gall [Wis.] 97 N. W. 938. Evidence held to show consideration for note, and that it was not given merely for accommodation. Waterville Trust Co. v. Libby, 98 Me. 241, 56 A. 841. To sustain an agreement by heir to convey land in payment of debt against decedent's estate, which was valid lien on land of estate and hence a burden on her. McCarty v. May [Tex. Civ. App.] 74 S. W. 804; Pratt v. Fishwild, 121 Iowa, 642, 96 N. W. 1089.

The following agreements held to be without consideration: A promise by an insurance agent, who was payee of a note given for the premium on a policy, that the maker would not be held liable thereon, and that the company would look to the payee. Muller v. Swanton, 140 Cal. 249, 73 P. 994. Promise to allow purchase money for timber, over and above expenses, to apply on certain drafts. Pate v. Wyly & Co., 118 Ga. 262, 45 S. E. 217. A promise, made after the execution of a contract of sale, to pay a sum in addition to that named therein, which was no part of the consideration for the sale and was not considered in fixing the price. Howard v. McNeil, 25 Ky. L. R. 1394, 78 S. W. 142. An oral agreement, void under a statute. Unexecuted verbal agreement modifying contract for sale of land, void under Mont. Civ. Code, §§ 2281, 2204. Easterly v. Jackson [Mont.] 75 P. 357. An agreement not to enforce a judgment until a claim of a third party against the judgment creditor was settled. Burton v. Kipp [Mont.] 76 P. 563. An agreement between the obligor in a bond and the obligee, that moneys due the obligor on his books should be paid and applied as part payment on the bond, made after the execution of the bond. Bishop v. Smith [N. J.] 57 A. 874. A promise that a fund arising on foreclosure sale of property will be sufficient to pay interest coupons, where it does not appear that the coupon holders would have taken any steps beyond securing such result in its absence. Morton Trust Co. v. Home Telephone Co. [N. J. Eq.] 57 A. 1020. An agreement by defendant that if plaintiff would procure and give defendant a surety company bond, he would then pay a certain conditional obligation to plaintiff, held not supported by any consideration, plaintiff not having agreed to procure the bond. Cook v. Casler, 87 App. Div. 8, 83 N. Y. S. 1045. An agreement that a tenant in possession under a written lease might occupy premises rent free until they were torn down is void for uncertainty and without consideration. Kaven v. Chrystie, 84 N. Y. S. 470. A statement in an order for books that "this order is not to be countermanded." Cary v. Appo, 84 N. Y. S. 569. A compromise agreement whereby defendants agreed to pay the amount of a judgment which they supposed was a lien on land conveyed to them, but which in fact was not. Bell v. Pfadenhauer, 89 App. Div. 279, 85 N. Y. S. 869. The fact that a husband joined in a conveyance by his wife of property which he had previously conveyed to her not sufficient to support an agreement by the grantee to pay a debt of the husband. Hurd v. Wing, 86 N. Y. S. 907. The fact that land conveyed by a city will be subject to taxation does not constitute a sufficient consideration to support such conveyance. Fact that land conveyed to hospital will be subject to taxation in hands of purchaser from it. Mt. Sinai Hospital v. Hyman, 92 App. Div. 270, 87 N. Y. S. 276. Agreement to assume debt of contractor. Wood v. Atlantic, etc., R. Co., 131 N. C. 48, 42 S. E. 462. A note and mortgage given to one creditor of an insolvent, to secure the amount coming to him over and above the amount due him on the basis of a proposed composition, with the understanding that the same shall represent the amount due him after such composition. Wheeler v. Pettyjohn [Okl.] 76 P. 117. Agreement to convey certain land to plaintiffs if they would convey other land to a town-site company, where plaintiffs had executed their part, and conveyance by them was to other party's interest. McCarty v. May [Tex. Civ. App.] 74 S. W. 804. A written contract relieving defendant from liability under a previous verbal one. Action for damages against common carrier for injuries. St. Louis, etc., R. Co. v. Warren [Tex. Civ. App.] 80 S. W. 537.

54. Resumption of business relations between plaintiff and defendant sufficient as matter of law to support promise to mark off or hold in abeyance disputed claim. Erie Forge Co. v. Pennsylvania Iron Works Co., 22 Pa. Super. Ct. 550. Note given in consideration of payee furnishing money to corporation in which maker was interested, consideration received. Helvie v. McKain [Ind. App.] 70 N. E. 178. A promise to do an act which one is not legally bound to do is a sufficient consideration for a contract to forbear action, notwithstanding the fact that the act is apparently more to the interest of the promisor than the promisee, and that it is difficult to ascribe a motive to the latter for wishing it done. Agreement by purchaser of personalty to withhold action on warranty of title on promise of seller to carry action of replevin which had been brought therefor, and which buyer had defended in lower court, through supreme court, at his own expense. Dendy v. Russell, 67 Kan. 721, 74 P. 248.

55. Wells v. Geyer, 12 N. D. 316, 96 N. W. 289. Permission granted to a mortgagor in possession to remain in possession for three months is no consideration for an agreement by the latter to then vacate, and to surrender all rights and claims to the property, there being a mutual mistake of law as to the mortgagor's right to possession and of redemption. Id.

56. Giving defendant opportunity to examine her own accounts. Massachusetts Mut. Life Ins. Co. v. Green [Mass.] 70 N. E. 202.

consideration, but the promisor allows the promisee to proceed, and, upon the faith of such promise, do what he requested him to do, he will be held bound thereby,[57] but when the promisee does no more than to renew his request, the promisor is still at liberty to grant or refuse it as he sees fit, even though the promisee has by that time put himself in a position to do what he then for the first time offers to do.[58] Marriage is a sufficient consideration to support a voluntary settlement based thereon.[59]

In general an agreement to accept part payment in full satisfaction of a claim is invalid for want of consideration,[60] but such is not the case when the debtor is insolvent.[61] An agreement to do what one has no legal right to do is not sufficient consideration to support a contract.[62] The granting of reduced rates is sufficient consideration for the limitation of a carrier's common-law liability.[63] Extending the time of payment of a claim is a valuable consideration,[64] and a promise to pay interest for a definite period of time will support an agreement to extend the time of payment of an obligation for a like period.[65]

The union of a merely insufficient with a sufficient consideration, by the terms of a contract or a declaration thereon, does not vitiate either the contract or the pleading.[66] There is a presumption of law in favor of the sufficiency of the consideration of a written promise, and the burden is on defendant to show want of consideration.[67]

Mutual promises.[68]—Mutual promises operate one as a consideration for the other, and constitute a contract binding and obligatory upon both parties.[69] The

57. Cook v. Casler, 87 App. Div. 8, 83 N. Y. S. 1045.

58. The fact that plaintiff, about two months later, procured such bond and tendered it to defendant, and demanded payment, does not obligate him to accept it. Cook v. Casler, 87 App. Div. 8, 83 N. Y. S. 1045.

59. Agreement made after engagement and before marriage. Kramer v. Kramer, 90 App. Div. 176, 86 N. Y. S. 129.

60. But this is not the case when the debtor is insolvent. Engbretson v. Seiberling, 122 Iowa, 522, 98 N. W. 319. Discharge of judgment in consideration of payment of less sum. Upton v. Dennis [Mich.] 94 N. W. 728. The least additional consideration in such cases is sufficient. Fact that debtor was compelled to borrow money at a larger rate of interest than could have been collected on the debt, and that he contemplated making an assignment or going through bankruptcy, which fact was known to the creditor, sufficient. Rotan Grocery Co. v. Noble [Tex. Civ. App.] 81 S. W. 586.

61. Engbretson v. Seiberling, 122 Iowa, 522, 98 N. W. 319.

62. Agreement of one co-owner to indemnify other if he would refuse offer to purchase the property not supported by consideration. Chase v. Soule [Vt.] 57 A. 754.

63. Granting of rates specified in schedule filed with interstate commerce commission is not, though company had a higher rate, so filed. Summers v. Wabash R. Co. [Mo. App.] 79 S. W. 481. See Carriers, §§ 12, 19, 23, 29, 1 Curr. L. 421.

64. Will support giving of mortgage to secure it. O'Brien v. Fleckenstein, 86 App. Div. 140, 83 N. Y. S. 499. Agreement by mortgagee to extend time of payment of mortgage debt supported by purchase by another of stock in mortgagor corporation. Hauser v. Capital City Brewing Co. [N. J. Eq.] 57 A. 722. Extending the time of payment, waiving a forfeiture of the lease, and allowing the makers to remain in possession of the premises sufficient to support note for past-due rent. Emery v. Lowe, 140 Cal. 379, 73 P. 981.

65. Agreement to keep an overdue loan secured by mortgage, and pay a reduced rate of interest on the note given for the loan is a sufficient consideration for an extension of the time for payment. Lorimer v. Fairchild [Kan.] 75 P. 124; First Nat. Bank v. Wells, 98 Mo. 573, 73 S. W. 293.

66. Moore v. First Nat. Bank, 139 Ala. 595, 36 So. 777.

67. Note. Power v. Hambrick, 25 Ky. L. R. 30, 74 S. W. 660; Hickok v. Bunting, 92 App. Div. 167, 86 N. Y. S. 1059. The fact that the note states the origin of the indebtedness to be other than money advanced directly to the maker does not change the rule. "Having been the cause of a money loss to" the payee. Hickok v. Bunting, 92 App. Div. 167, 86 N. Y. S. 1059. Evidence held to show that there was no consideration for note. Carman v. Carrico, 25 Ky. L. R. 2143, 80 S. W. 216. Under the statutes of Kentucky importing a consideration to every written instrument, the burden of showing want of consideration for a note is on the maker. Cox v. Cox's Ex'r, 25 Ky. L. R. 1934, 79 S. W. 220. One holding a note given many years before in settlement of complicated accounts is entitled to benefit of all presumptions as to sufficiency of consideration until maker shows that it embraces items not properly charged therein. Id.

68. See 1 Curr. L. 631.

69. Sale of hops. Livesley v. Johnston [Or.] 76 P. 946. An agreement by husband to allow land which his deceased wife held in

release of the parties to an executory contract from their respective obligations thereunder is sufficient consideration to support its abrogation by mutual consent,[70] and the release of performance of one contract is sufficient consideration to support another.[71]

Legal duty.[72]—An agreement to do what one is already legally bound to do is no consideration for a contract.[73] Payment of interest already earned and due will not support a promise of forbearance to sue.[74] A subsequent agreement to pay for what by a previous contract one has agreed to furnish free is without consideration.[75] A promise to do something which the promisor is legally bound to do as a public duty, but in the proper performance of which the promisee has a special interest, when he is without means of enforcing such performance or redress in case of nonperformance unless damnified, constitutes a consideration for a reciprocal promise.[76] A contingent statutory liability is not a sufficient consideration to support a promise.[77]

Forbearance or compromise.[78]—Forbearance or a promise to forbear from doing what the promisor has a right to do may constitute a sufficient consideration.[79]

fee to be leased for payment of her debts, held sufficient consideration to support contract whereby such land and land in which wife owned life interest with remainder to her children was placed in the possession of one of such children, with directions to rent it and pay the debts of deceased out of the proceeds. Riddle v. Riddle [Ky.] 80 S. W. 1129. Agreement of parties to organize corporation and run mill sufficient consideration for note. Third Nat. Bank v. Reichert, 101 Mo. 242, 73 S. W. 893. Agreement to apportion cases among partners in law firm. Lamb v. Wilson, 3 Neb. Unoff. 505, 97 N. W. 325. An agreement by a mother to assume a debt of her son, who had become a defaulter, on condition that his employer would not disclose his defalcation, would retain him in his employ, and would release him from all liability therefor, is based on a sufficient consideration. American Wire & Steel Bed Co. v. Schultz, 88 N. Y. S. 396. A promise to pay a certain sum as purchase money is sufficient consideration for a contract to convey land. Rodman v. Robinson, 134 N. C. 503, 47 S. E. 19. An agreement by a subcontractor not to file a lien supports a promise on the part of the owner to pay the amount of his claim. Culver v. Pocono Spring Water Ice Co., 206 Pa. 481, 56 A. 29. Mutual promises by which shipper agrees to load and ship cattle on certain day and railroad agrees to have cars ready, taken in connection with fact that shipper had cattle ready at time agreed upon, constitute sufficient consideration to support contract. Gulf, etc., R. Co. v. Combes [Tex. Civ. App.] 80 S. W. 1045. Agreement to pay part of cost of building on government land sufficient consideration to support contract by other party to pay rent therefor and acquire title thereto for benefit of both parties. Waring v. Loomis [Wash.] 76 P. 510. Promise of remuneration for services to be performed as agent for sale of land. Rowan & Co. v. Hull [W. Va.] 47 S. E. 92.

Where the contract consists of mutual obligations, each being a consideration for the other, evidence of lack of consideration is inadmissible. Lease. Conant v. Jones [Ga.] 48 S. E. 234.

70. Barrie v. King, 105 Ill. App. 426.

71. Agreement by grantor in deed of trust to pay bonus, on payment of amount secured before maturity, supports a promise by grantee to pay back bonus in case he reloans the money. Fullerton v. Schloss [Mo. App.] 77 S. W. 770.

72. See 1 Curr. L. 632.

73. Agreement by agent to pay additional sum to one of several owners of realty to induce him to sign deed, which he was bound to sign under previous contract. Easterly v. Jackson [Mont.] 75 P. 357. A mortgagor's promise to pay the amount due on the mortgage is no consideration for the mortgagee's promise to release his lien on the land. Watts v. Parks, 25 Ky. L. R. 1908, 78 S. W. 1125.

74. Note. Ferris v. Johnson [Mich.] 98 N. W. 1014. A promise to pay such interest for a definite time, or at least from some period, must be deducible from the writing or conversations constituting the new contract. Not where both parties understood that money could be paid at any time. Id.

75. Electrical appliances. Rooney v. Thomson, 84 N. Y. S. 263.

76. Agreement between traction and railroad companies to bear equally the expense of maintaining bridges across railroad tracks. Raritan River R. Co. v. Middlesex & S. Traction Co. [N. J. Err. & App.] 58 A. 332.

77. Contingent liability of son to reimburse town for pauper supplies furnished mother does not become fixed until judgment recovered. Inhabitants of Freeman v. Dodge, 98 Me. 531, 57 A. 884.

78. See 1 Curr. L. 631.

79. Hammon, Cont., § 333, p. 675. A forbearance on the part of a debtor to interpose any reasonable defense he may have to a claim, so that the creditor takes judgment by confession, supports a promise by such creditor to pay a debt owed by the debtor to a third person. Moore v. First Nat. Bank, 139 Ala. 595, 36 So. 777. An agreement by an administratrix who is also a beneficiary of the estate, personally guaranteeing payment of a claim, is supported by an agreement on the part of the creditor not

The discontinuance of a suit[80] or an agreement to forbear to sue,[81] or to dismiss or abandon an appeal, is sufficient consideration to support a contract.[82] But an agreement to forbear a resistance which one has no power to make against a concededly valid demand is not sufficient consideration to support a promise to accept less than the amount due thereunder.[83]

The compromise of a doubtful right is sufficient consideration to support a promise where there is neither actual nor constructive fraud, and the parties act in good faith,[84] and where such agreement has been partly performed, the merits of the controversy on which it was based are not open to litigation between the parties.[85] But there must be an honest claim, asserted without fraud, and a real ground for dispute, about which lawyers and courts might differ, and if there is such ground, it is immaterial upon which side the right ultimately appears to have been.[86]

Subscriptions.[87]—Mutual promises to subscribe money to promote a beneficial object in which the subscribers have a common interest are generally enforceable.[88]

to object to the confirmation of a sale made by her or to ask for her removal on the ground of manipulating it in her private interest. No fraud shown. Wiggenhorn v. Fitzgerald [Neb.] 98 N. W. 1079. Forbearance of a creditor to enforce a claim is sufficient consideration to support a mortgage to secure it, though debt was antecedent one. O'Brien v. Fleckenstein, 86 App. Div. 140, 83 N. Y. S. 499.

80. Of a wife's action for separation, in which she might have secured an allowance of counsel fees and alimony, is a sufficient consideration for an agreement on the part of the husband to support her and that if he fails to do so she shall immediately become vested with her dower interest in his realty. Sommer v. Sommer, 87 App. Div. 434, 84 N. Y. S. 444.

81. Agreement to forbear on debtor promising to pay at once and actually paying a part of the debt, and that he might pay balance when convenient supported by sufficient consideration. Samuel Cupples Woodenware Co. v. Dreyfus, 102 Mo. App. 463, 76 S. W. 734. To refrain from instituting suit to have promisor's grandmother, from whom promisee has recently purchased property, declared of unsound mind, sufficient to support agreement by latter to pay sum of money. Johnson v. Staley [Ind. App.] 70 N. E. 541.

82. Steger v. Hume [Tex.] 79 S. W. 19.

83. Agreement by vendor that if vendee would not resist foreclosure of lien, he would buy in the land in full satisfaction of his claim and accept for it less than the amount owing him, held a mere gratuity. Foster v. Ross [Tex. Civ. App.] 77 S. W. 990.

84. Claim for money improperly retained by officer as salary. Adams v. Crown Coal & Tow Co., 198 Ill. 445, 65 N. E. 97. To support note. Sharp v. Bowie, 142 Cal. 462, 76 P. 62. Release of obligation to support father in settlement of controversy between parties. Rutherford v. Rutherford [W. Va.] 47 S. E. 240. Uncertainty as to which of two parties, both of whom deny liability, is liable for a debt of a fixed amount, is sufficient consideration to support a settlement between one of them and the creditor, whereby the latter accepts a part of the amount due in discharge of the debt. Payment by surety of county judge, who failed to account for money paid into court, of claim for land condemned by railroad company. Chicago, etc., R. Co. v. Brown [Neb.] 97 N. W. 1038. The avoidance of litigation is sufficient consideration to support compromise agreements even though it eventually appears that, if the demand had been litigated, no recovery could have been had. Will not be set aside on slight grounds. Compromise by surety with obligee of contractor's bond. Daly v. Busk Tunnel R. Co. [C. C. A.] 129 F. 513. Settlement of a dispute in regard to the meaning of a contract to do certain work and an agreement to proceed therewith is sufficient consideration to support an agreement to modify such contract. New Jersey Trust & Safe Deposit Co. v. National Gas & Const. Co. [N. J. Law] 58 A. 104. A note given by a wife to purchase exemption from suit against husband is based on a sufficient consideration. King v. Hansing, 88 Minn. 401, 93 N. W. 307. Compromise of suit for recovery of land held by defendant under valid grant is a sufficient consideration for promissory notes given in pursuance thereof, though plaintiff's claim is based on a void grant, it appearing that otherwise defendant would have had to have borne the entire expense of litigation. Peaslee v. Walker [Tex. Civ. App.] 78 S. W. 980. The settlement of a pending suit supports note. Power v. Hambrick, 25 Ky. L. R. 30, 74 S. W. 660. Contract between building association and borrower, by which they settled question of usury supported by sufficient consideration, validity of claim being doubtful. Gray v. U. S. Sav. & Loan Co., 25 Ky. L. R. 1120, 77 S. W. 200.

85. Adams v. Crown Coal & Tow Co., 198 Ill. 445, 65 N. E. 97. The fact that the claim is wholly without merit is immaterial, if it is asserted in good faith, and is one on which a controversy may honestly arise. Settlement of adverse claim to land. Fact that claimant, after defendant refused to pay notes given in pursuance of agreement, prosecuted claim to final judgment, whereby it was determined that she had no interest in land, will not prevent recovery on such notes. Sharp v. Bowie, 142 Cal. 462, 76 P. 62.

86. Gray v. U. S. Sav. & Loan Co., 25 Ky. L. R. 1120, 77 S. W. 200.

87. See 1 Curr. L. 632.

88. Hammon, Cont., § 340, et seq. This

Change or substitution of new contract.[89]—The consideration in a contract of novation is the discharge of the original obligation.[90]

Past consideration.[91]—A past consideration will not ordinarily support a promise,[92] but this rule does not apply to a promise to pay a debt barred by the statute of limitations, or from which one has been discharged in bankruptcy.[93] An entire promise, founded partly upon a past and executed consideration and partly upon an executory consideration, is supported by the latter.[94] Where there is a request to continue services of a character theretofore rendered, such continuance is a sufficient consideration to support a promise to pay for those rendered prior to such request.[95] The fact that no definite time is fixed during which such services shall continue is immaterial, since the law will imply a reasonable time.[96]

Validity.[97]—*A good consideration,* as distinguished from a valuable consideration, is family affection.[98] It will support a deed between husband and wife or relatives within the degree of nephew or cousin.[99] This rule, however, does not apply generally to the law of contracts, and hence love and affection does not afford consideration for a promise.[1]

A mere moral obligation is not ordinarily a sufficient consideration for a promise,[2] but a moral obligation to pay a pre-existing legal debt will support a note and mortgage given in payment thereof,[3] and the natural obligation arising out of a father's relation to an illegitimate child will support a contract on his part for its support and maintenance, whether made with the mother or a stranger.[4]

Adequacy.[5]—It is not essential that the consideration should be adequate in point of actual value,[6] and courts will not ordinarily consider the question of its equality or inequality in the absence of mistake, misrepresentation or fraud.[7]

subject is fully discussed in the article Subscriptions, 2 Curr. L. 1770.

89. See 1 Curr. L. 633.

90. This must be agreed to by the original creditor, original debtor, and the new debtor. Gerlaugh v. Riley, 2 Ohio N. P. (N. S.) 107. See Novation, 2 Curr. L. 1061.

91. See 1 Curr. L. 636.

92. Hammon, Cont., § 324 et seq. Agreement that plaintiff should have half interest in certain mining stock not supported by consideration. Shoemaker v. Munn [Colo. App.] 76 P. 924.

93. Hammon, Cont., § 328. A creditor who has, after bankruptcy, taken a new promise based on the old debt, may prove his claim in bankruptcy and also maintain an action on the new promise, provided he receives but a single satisfaction of his debt. In re Sweetser, 128 F. 165. A promise to pay a debt, from which one has been discharged in bankruptcy, must be clear, distinct and unequivocal. Mere expression of intention to pay not sufficient, but fact that debtor also expressed intention and made conditional promise will not prevent recovery on unequivocal promise. Brooks v. Paine, 25 Ky. L. R. 1125, 77 S. W. 190.

94, 95. Fisk Min. & Mill Co. v. Reed [Colo.] 77 P. 240.

96. Contract to drain mine. Fisk Min. & Mill Co. v. Reed [Colo.] 77 P. 240.

97. See 1 Curr. L. 630.

98. Hammon, Cont., § 329, et seq. Will not support deed as against grantor's creditors. Wood v. Potts [Ala.] 37 So. 253.

99. Hammon, Cont., § 329, et seq. Will support deed between husband and wife where no rights of third persons intervene. Paulus v. Reed, 121 Iowa, 224, 96 N. W. 757.

1. Hammon, Cont., § 329, et seq. Will not support note. Shugart v. Shugart [Tenn.] 76 S. W. 821.

2. To pay expenses incurred by town in relieving mother from distress. Inhabitants of Freeman v. Dodge, 98 Me. 531, 57 A. 884. Services which one is morally bound to render without compensation, as services of mother to daughter. Shugart v. Shugart [Tenn.] 76 S. W. 821.

3. Fourth Nat. Bank v. Craig, 1 Neb. Unoff. 849, 96 N. W. 185.

4. Will support agreement to settle certain sum on him on a certain date, provided mother would care for and support him until that time, her duty being merely to support him until he becomes self supporting, in case she is able to do so. Rosseau v. Rouss, 91 App. Div. 230, 86 N. Y. S. 497.

5. See 1 Curr. L. 634.

6. Purchase of property and good will sufficient consideration for agreement not to compete with purchaser. Pittsburg Stove & Range Co. v. Pa. Stove Co., 208 Pa. 37, 57 A. 77. Mere inadequacy of consideration is not a defense to action on a note between the original parties. Furber v. Fogler, 97 Me. 585, 55 A. 514. In action to set aside deed reciting a consideration in hand paid, the adequacy of such consideration is immaterial. Jacobsen v. Nealand, 122 Iowa, 372, 98 N. W. 158. Adequacy of consideration cannot be inquired into, but the want of any consideration whatever may be. Gray v. U. S. Sav. & Loan Co., 25 Ky. L. R. 1120, 77 S. W. 200. Note given for advances to corporation in which defendant was interested. Helvie v. McKain [Ind. App.] 70 N. E. 178. Adequacy of consideration for contracts in partial restraint of trade is exclusively for the par-

Expressing consideration.[8] *Want or failure.*[9]—Want or failure of consideration is a defense pro tanto as between the original parties to the contract.[10]

The question whether the deed or the title is the consideration for a contract to convey,[11] and the effect of want of consideration on the validity of deeds as against the grantor's creditors is treated elsewhere.[12]

§ 3. *Validity of contract. A. General principles.*[13]—The legality of a contract is determined by the nature of the transaction and the intent of the parties, and not by its formal incidents.[14] Mere unreasonableness or absurdity does not vitiate it.[15] A contract, void in its inception, is not validated by a suit in a foreign state upon the instrument by which it is evidenced.[16]

The validity of contracts between corporations and their officers and directors is treated elsewhere.[17] The validity of usurious[18] and gambling contracts,[19] and contracts made on Sunday,[20] depends upon the wording of the statutes of the various states, and questions concerning them are treated in separate articles.

(§ 3) *B. Subject-matter or consideration.*[21]—If a statute directly prohibits the making of a certain class of contracts, or either enjoins or prohibits the doing of a certain class of acts, an agreement entered into in violation thereof, or which involves a violation thereof, is void.[22] There is a conflict of authority as to whether

ties. Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781. Fact that covenant not to engage in particular business is of little protective value, immaterial. Fleckenstein Bros. v. Fleckenstein [N. J. Eq.] 57 A. 1025.

7. Erie Forge Co. v. Pennsylvania Iron Works Co., 22 Pa. Super. Ct. 550; Riddle v. Riddle [Ky.] 80 S. W. 1129. Question as to whether release of dower interest by wife such an inadequate consideration for note of husband as to suggest fraud is for jury. Southern Loan & Trust Co. v. Benbow, 135 N. C. 303, 47 S. E. 435.

8. See 1 Curr. L. 637. For necessity of expressing consideration under statute of frauds, see title Frauds, Statute of, § 9, 2 Curr. L. 112.

9. See 1 Curr. L. 637.

10. Furber v. Fogler, 97 Me. 585, 55 A. 514. Reservation of right to take consideration in case note not paid may be construed as reservation of security in consideration. Where the property forming consideration is lost, maker cannot deem note void for failure of consideration. Vapereau v. Holcombe, 122 Iowa, 406, 98 N. W. 279. Failure to repair harvester as agreed held to operate as failure of consideration for money paid on note. Warder, Bushnell & Glessner Co. v. Myers [Neb.] 96 N. W. 992. Where a note indorsed by a responsible person and secured by chattel mortgage is given in consideration of other notes, consideration of the latter does not wholly fail, though the maker of the first note and mortgage becomes bankrupt. Central Sav. Bank v. O'Connor [Mich.] 94 N. W. 11. Depreciation of stock forming consideration for note is not a failure of consideration. Furber v. Fogler, 97 Me. 585, 55 A. 514.

11. See Vendors and Purchasers, § 10, 2 Curr. L. 1994.

12. See Fraudulent Conveyances, § 1B, 2 Curr. L. 117.

13. See 1 Curr. L. 638.

14. Buying and selling options. Corn Exch. Nat. Bank v. Jansen [Neb.] 97 N. W. 814. Fact that it was to be used as collateral does not make note given for gambling debt valid. Consideration and not purpose for which it is to be used is test. Id.

15. A contract whereby each party agreed to pay the other a commission on the number of cattle he carried to Cuba held not so absurd or unreasonable as to be incapable of enforcement. Ceballos v. Munson S. S. Line, 87 N. Y. S. 811.

16. Note given for gambling debt. Corn Exch. Nat. Bank v. Jansen [Neb.] 97 N. W. 814.

17. See Corporations, § 15S, 1 Curr. L. 778.

18. See Usury, 2 Curr. L. 1966.

19. See Gambling Contracts, 2 Curr. L. 129; Lotteries, 2 Curr. L. 764.

20. See Sunday, § 2, 2 Curr. L. 1772.

21. See 1 Curr. L. 639.

22. Hammon, Cont., § 209; Ober v. Stephens [W. Va.] 46 S. E. 195. Contracts in contravention of a statute are utterly void and are incapable of becoming the foundation of any right. Agreement to act for another in taking land under pre-emption act. Gross v. Hafeman [Minn.] 97 N. W. 430.

Contracts held void: Contracts with the United States entered into by member of congress [U. S. Rev. St. § 3739 (U. S. Comp. St. 1901, p. 2508)]. United States v. Dietrich, 126 F. 671. An agreement to purchase counterfeit money. Chapman v. Haley, 25 Ky. L. R. 2182, 80 S. W. 190. To erect building of combustible material within fire limits contrary to city ordinance. Chimene v. Pennington [Tex. Civ. App.] 79 S. W. 63. An agreement containing an assignment to an attorney of an interest in a claim against the government in contravention of Rev. St. U. S. § 3477. Owens v. Wilkinson, 20 App. D. C. 51. An agreement allowing the purchaser of a saloon to run it under the seller's license until it expires. Padget v. O'Connor [Neb.] 98 N. W. 870. Contracts in violation of statutes governing sale of intoxicants. Mitchell v. Branham [Mo. App.] 79 S. W. 739. Under Mont. Civ. Code, § 2240, making that unlawful which is contrary to the policy of express law, a contract providing that parties

the mere imposition of a penalty on any specific act or omission renders a contract to do or omit to do such act void;[23] but it may be said generally that the test in such cases is the intent of the legislature.[24]

A contract in contravention of a void statute is valid.[25]

Definiteness and certainty of terms.[26]—The contract must be definite and certain in its terms,[27] but it will not be held void for uncertainty if its terms are sufficiently definite to enable it to be ascertained, with a reasonable degree of certainty, what agreement the parties intended to make,[28] nor where it merely fails to fix a time for performance, since the law will presume that it is to be performed within a reasonable time.[29] Uncertainties may be cured by performance.[30]

(§ 3) *C. Mutuality.*[31]—In general, contracts must be mutual, that is they must be binding on both parties thereto, or they will bind neither;[32] but this rule

shall be directors of a corporation for an indefinite period, statute provides that directors shall be elected annually [Mont. Civ. Code, § 431]. Glass v. Basin & Bay State Min. Co. [Mont.] 77 P. 302.

Contracts held valid: Where a provision in a contract between a warehouse company and a railway company, whereby th former was to lay pipes to supply the latter with water, was abandoned upon discovery that the warehouse company had no authority to lay mains across the street, and the railway company agreed to lay them instead, held not such a collusion to evade the police power of the city as to render the agreement illegal. City of Canton v. Canton Cotton Warehouse Co. [Miss.] 36 So. 266. An agreement allowing a traction company to cross a railroad is not void under the New Jersey statute (P. L. 1895, p. 462, Gen. St. p. 2717), because made without application to the chancellor to define the mode of crossing. Raritan River R. Co. v. Middlesex & S. Traction Co. [N. J. Err. & App.] 58 A. 332.

23. In Kansas, it is held that such contracts are void, and no recovery can be had thereon, though the statute does not expressly so declare. Note given for a patent right not containing statement to that effect [Kan. Gen. St. 1901, § 4357]. Pinney v. First Nat. Bank [Kan.] 75 P. 119.

In West Virginia, it is held that such penalty excludes all others, and that contracts made in contravention thereof are not void, unless it clearly appears that the legislature intended otherwise. Contract of real estate agent, who has not obtained license as broker under Laws of West Virginia (Acts 1885, p. 18, c. 1, § 46), to sell land for commission, held valid. Instructions approved. Ober v. Stephens [W. Va.] 46 S. E. 195.

24. Pinney v. First Nat. Bank [Kan.] 75 P. 119.

25. Anti-trust statute. Wolf Co. v. Galbraith [Tex. Civ. App.] 80 S. W. 648.

26. See 1 Curr. L. 640.

27. Thing sold, price, and time of delivery held definite and certain in contract of sale. Nelson v. Hirsch & Sons' Iron & Rail Co., 102 Mo. App. 498, 77 S. W. 590.

Contracts held sufficiently definite: Agreement not to engage in practice of medicine in certain locality, "unless forced to return by reason of some unforeseen necessity." Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781. Uncertainty of description in informal contract for sale of land held cured by subsequent written contract. Gough v. Loomis, 123 Iowa, 642, 99 N. W. 295. Agreement to work "for three months, more or less, or until said second party's logs are sawed," held definite as to time. Wilson v. Godkin [Mich.] 93 N. W. 985. Description of land in contract as between the parties. Waring v. Loomis [Wash.] 76 P. 510.

Contracts held void for uncertainty: Agreement by physician to locate elsewhere in case he did not get a certain appointment, "or the field is not larger than now." Teague v. Schaub, 133 N. C. 458, 45 S. E. 762. Agreement not to enforce a judgment until a claim of a third party against the judgment creditor was settled, held too indefinite as to time to be enforceable. Burton v. Kipp [Mont.] 76 P. 563. Agreement by officer of corporation to pay wages to injured employe, wanting in sufficient precision to render it capable of enforcement. Smith v. Crum Lynne Iron & Steel Co., 208 Pa. 462, 57 A. 953. Contract to convey right of way held too indefinite in description of land to be specifically enforced. Bauer v. Lumaghi Coal Co., 209 Ill. 316, 70 N. E. 634.

28. Agreement to pay a "just and proper proportion" of the cost of draining a mine not void for uncertainty. Fisk Min. & Mill. Co. v. Reed [Colo.] 77 P. 240. As an aid in determining it, the facts and circumstances surrounding the transaction at the time the contract was made may be taken into consideration. Agreement to pay "just and proper proportion" of cost of draining mine held to require cost to be equally divided, and payment for past as well as future drainage. Id.

29. Guaranty that mortgage should be extended. Length of extension not fixed. Leis v. Sinclair, 67 Kan. 748, 74 P. 261.

30. Parties to contract to procure extension of mortgage held to have ratified it by their conduct and to have thereby cured any uncertainty therein. Leis v. Sinclair, 67 Kan. 748, 74 P. 261.

31. See 1 Curr. L. 641.

32. Where both parties have bound themselves or intended to bind themselves by reciprocal obligations. Frank v. Startford-Handcock [Wyo.] 77 P. 134. As to effect of want of mutuality on right to specific performance, see title Specific Performance, § 3, 2 Curr. L. 1682; Hoffman v. Colgan, 25 Ky. L. R. 98, 74 S. W. 724; Baumhoff v. Okl. City Elec. & Gas & Power Co. [Okl.] 77 P. 40. Contract of guaranty. John Deere Plow Co. v. McCullough, 102 Mo. App. 458, 76 S. W. 716. Contract which cannot be enforced by one party against the other cannot be enforced by the latter against the former.

does not apply to contracts unilateral in form, though bilateral in effect, such as bonds and the like,[33] nor to contracts which have been wholly or partially executed,[34] nor to optional contracts for the purchase or sale of land, founded upon a proper and sufficient consideration.[35] An option is a contract by which the owner of property agrees with another person that he shall have the right to buy it at a fixed price, within a time certain.[36] A contract may be optional with one party and obligatory on the other.[37] The fact that the time for performance is optional does not render the contract without mutuality, since in such case either party may perform within a reasonable time.[38]

Bauer v. Lumaghi Coal Co., 209 Ill. 316, 70 N. E. 634; Henry School Tp. v. Meredith [Ind. App.] 70 N. E. 393. Provision in contract for services as school teacher that it shall hold good "as long as the trustee sees fit" does not authorize discharge without cause. Id. Arrangement whereby defendant was to sell plaintiff's coffees held not to bind defendant to anything and hence to be lacking in mutuality. Steinwender-Stoffregen Coffee Co. v. Guenther Grocery Co. [Ky.] 80 S. W. 1170. Contract must be mutual in its obligations and remedy. Cook v. Casler, 87 App. Div. 8, 83 N. Y. S. 1045. Where the agreement is wholly executory. Sale of hops. Livesley v. Johnston [Or.] 76 P. 946. Bilateral contracts are mutual, as offer to one to act as agent for sale of land accepted by him. Rowan & Co. v. Hull [W. Va.] 47 S. E. 92.

Contracts held mutual: An agreement in a contract for picking, curing and sale of hops, to pay a certain sum per pound, "upon delivery and acceptance of said hops," held not to confer on plaintiff an arbitrary power to refuse to accept hops of the quality described. Lehman v. Salzgeber, 124 F. 479. Contract not to engage in the practice of medicine within a certain district, made in consideration of a third person's agreement to purchase the practice of another physician so as to allow the latter to go into partnership with the promisor. Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781. Contract to furnish plaintiff mineral water to supply the trade at a certain place, he to use his best endeavors to push the sale thereof. Spencer v. Taylor [Kan.] 77 P. 276. Agreement to work "for three months, more or less, or until said second party's logs are sawed." Wilson v. Godkin [Mich.] 98 N. W. 985. Agreement by defendant to purchase wire at certain price, which plaintiffs agreed to stretch after posts had been placed. Mohr Hardware Co. v. Dubey [Mich.] 100 N. W. 127. Contract to reimburse plaintiff for his expenses if he would not withdraw an offer to purchase certain stumpage and would meet defendant at a certain time. Manary v. Runyon, 43 Or. 495, 73 P. 1028.

Contracts lacking mutuality: A contract whereby one party agrees to saw all timber furnished by the other, but which does not bind the latter to furnish any, is unilateral, and cannot be made the basis of a suit for damages for failure to furnish such timber. Harrison v. Wilson Lumber Co., 119 Ga. 6, 45 S. E. 730. An agreement by one party to convey a right of way to the other whenever he demands it, and tenders the purchase price. Bauer v. Lumaghi Coal Co., 209 Ill. 316, 70 N. E. 634. Contract whereby one agrees to purchase real estate at foreclosure sale and resell to owner at same price, which is its full value, with interest, taking mortgage as security. Calvary Baptist Church v. Dart [S. C.] 47 S. E. 66.

33. Frank v. Stratford-Handcock [Wyo.] 77 P. 134.

34. Hoffman v. Colgan, 25 Ky. L. R. 98, 74 S. W. 724. Contract to drain mine. Fisk Min. & Mill. Co. v. Reed [Colo.] 77 P. 240. If work is done thereunder, an obligation arises on the part of the party furnishing timber to pay for that actually sawed in accordance with the terms of the contract. Harrison v. Wilson Lumber Co., 119 Ga. 6, 45 S. E. 730; Burnell v. Bradbury, 67 Kan. 762, 74 P. 279. Agreement to give prospector half interest in gold he might develop on certain land becomes binding when he locates gold at considerable expense. Brown v. Bowman, 119 Ga. 153, 46 S. E. 410. A unilateral contract, though required by the statute of frauds to be in writing, may be made mutual by the other party's doing some act which would take the case out of the statute so far as he is concerned. Contract to deliver cotton at future time held unilateral and unenforceable, plaintiff having done nothing prior to the time fixed for delivery which would bind him to receive it. Givell v. Hogan, 119 Ga. 167, 46 S. E. 67.

35. Frank v. Stratford-Handcock [Wyo.] 77 P. 134. Contract for sale of land, giving vendee right to refuse to take land in case he could not purchase a certain other tract. Watkins v. Youll [Neb.] 96 N. W. 1042. Agreement in lease giving lessee option to purchase is continuing offer to sell and cannot be revoked within period specified. Frank v. Stratford-Handcock [Wyo]. 77 P. 134. An optional agreement to convey, or to renew a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced in equity, if made upon proper consideration. Id. When an option for sale of realty, with or without consideration, is accepted within the time allowed and according to its terms, a binding contract is created. Id.

36. Evidence insufficient to show option to purchase land. McLaurin v. Cuba Co., 87 App. Div. 558, 84 N. Y. S. 526.

37. Acceptance of order for "two to three hundred tons" of iron, 25 tons to be delivered in November, "and the balance as ordered in the next six months," binds the seller to deliver 300 tons, if ordered in the time limited, the purchaser having the right of election. Farquhar Co. v. New River Mineral Co., 87 App. Div. 329, 84 N. Y. S. 802.

38. Sale of realty. Burnell v. Bradbury, 67 Kan. 762, 74 P. 279. Contract to take gas from gas company not lacking in mu-

The mere fact that the contract contains a condition precedent, which, if not consummated, may defeat performance, does not render it void for want of mutuality.[39] A provision in a contract of sale, giving the buyer a right to reject the goods if not satisfactory, does not make it void for want of mutuality.[40] An accepted offer to furnish an article in such quantities as shall be needed, required or consumed by the established business of the acceptor during a specified time is valid and binding, there being an implied agreement by the latter to purchase the same from the person making the offer.[41] A contract does not necessarily lack mutuality because one party does not expressly bind himself to do anything,[42] since an acceptance binds a party to perform any acts on his part necessarily implied either from those things which the other party is bound to do, or from the situation created by the contract.[43]

(§ 3) *D. Public policy in general.*[44]—A contract, to be against public policy, must be such that its performance would in some way have a tendency to work an injury to the public.[45] Contracts are not in violation of the public policy of the government unless prohibited by the express terms or the fair implication of a statute, or condemned by some decision of the courts construing the subject-matter.[46] It should appear that the agreement itself contemplated the wrongful acts,[47] and the test is the intention of the parties and not the method by which the agreement was carried out.[48] Hence a contract is not necessarily void because its performance may have led incidentally to a violation of the law, if that was

tuality because no time was fixed for continuance of the service. Gallagher v. Equitable Gaslight Co., 141 Cal. 699, 75 P. 329. The fact that defendant had no control over plaintiffs' pumping operations would not prevent it from entering into a binding agreement, the purpose of which was to have such operations carried on for its benefit. The fact that they were not to continue for any definite time is immaterial. Contract to drain mine. Fisk Min. & Mill. Co. v. Reed [Colo.] 77 P. 240.

39. Provision for sale of franchises after council shall have amended them in manner to be mutually agreed upon. Baumhoff v. Oklahoma City Elec. & Gas & Power Co. [Okl.] 77 P. 40.

40. Livesley v. Johnston [Or.] 76 P. 946; Livesley v. Heise [Or.] 76 P. 952.

41. Klipstein & Co. v. Allen, 123 F. 992.

42. Contract appointing plaintiff exclusive agent for defendant to sell stone, binds former to act as such agent and to use due diligence in selling stone, and hence does not lack mutuality, though such obligation is not expressed. Taylor Co. v. Bannerman [Wis.] 97 N. W. 918.

43. Taylor Co. v. Bannerman [Wis.] 97 N. W. 918. It is not necessary, in order to render a contract for gas, between a consumer and a gas company, mutual, that the company shall agree therein to furnish gas, since it is bound to do so under the law. Gallagher v. Equitable Gaslight Co., 141 Cal. 699, 75 P. 329.

44. See 1 Curr. L. 642.

45. Contract procured by fraud is not. Pikes Peak Paint Co. v. Masury & Son [Colo. App.] 74 P. 796.

46. Lease by homestead settler of standing timber for turpentine purposes, prior to issuance of patent, held valid. Orrell v. Bay Mfg. Co. [Miss.] 36 So. 561.

Contracts held not contrary to public policy: A contract for the employment of a married man as salesman for babbit metal on condition that he should not associate with a woman of bad repute. Gould v. Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896. Extension of statutory time for filing appeal bond. Statute directory. Morin v. Wells [Mont.] 75 P. 688. A contract whereby a bank agrees to sell plaintiff's stock for him for a certain sum within a certain time. Gause v. Com. Trust Co., 89 N. Y. S. 723. A stipulation in a contract of sale, giving the buyer the right to cancel his order at any time before shipment. Contract for engine. Hypse v. Avery Mfg. Co. [Tex. Civ. App.] 74 S. W. 812. An assignment of future earnings. Statutes exempting wages from execution do not change rule. Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564. Contract whereby corporation agreed to take back stock sold if purchaser is dissatisfied, not objectionable as secret contract, whereby subscriber to corporate stock is enabled to withdraw his subscription. Porter v. Plymouth Gold Min. Co. [Mont.] 74 P. 938. Sale of saloon and agreement not to engage in business in same town. Mitchell v. Branham [Mo. App.] 79 S. W. 739. Agreement by creditor of a firm, to whom a claim of the firm had been assigned, to pay any balance collected thereon to the wife of one of the partners, in consideration of her releasing her claim to certain money, held not void as being a contract to pay to her money belonging to a third person, the assigned claim being less than the amount due the creditor. Antonelle v. Kennedy & Shaw Lumber Co., 140 Cal. 309, 73 P. 966.

47. Drake v. Lauer, 93 App. Div. 86, 86 N. Y. S. 986.

48. Not sufficient that acts were done which might be condemned. Drake v. Lauer, 93 App. Div. 86, 86 N. Y. S. 986. Tendency of the transaction and not its results. Steger v. Hume [Tex.] 79 S. W. 19.

not its intention or necessary consequence, but it might have been performed legally in a manner consistent with its terms.[49]

Agreements in fraud of creditors are void.[50] So also are contracts made by the agent of one party to serve another with whom the first is dealing, where the interests of the two are adverse.[51] But a promise by individuals or corporations to pay a portion of the expense of necessary public improvements is valid.[52]

A public service corporation cannot contract away its duties to the public.[53]

It devolves upon the party claiming that a contract is contrary to public policy to prove it by competent evidence.[54] If a contract, otherwise valid, may be rendered illegal as against public policy by reason of the intention of the parties to so use it as to commit civil injuries to third persons, such illegality cannot be declared as a matter of law where the evidence of such intention is conflicting.[55]

(§ 3) *E. Limitations of liability.*[56]—Common carriers and other public serv-

49. Fact that seller of a saloon agreed to transfer his license to purchaser, though statute declares such licenses not to be assignable or transferable, does not render contract void, there being nothing to prevent the purchaser from obtaining a new license. Mitchell v. Branham [Mo. App.] 79 S. W. 739.

50. Procuring by insolvent corporation of third party to guaranty debt at bank on indorsement of note, thereby inducing bank to cancel indorsement and sign compromise agreement, though composition failed. Glens Falls Nat. Bank v. Van Nostrand, 85 N. Y. S. 50. In case of a joint or general composition with creditors by an insolvent, an underhand agreement whereby the debtor is to pay one creditor a larger amount than the others is fraudulent and void as subserving good morals and public policy. Evidence sufficient to sustain findings. Wheeler v. Pettyjohn [Okl.] 76 P. 117. See titles Compositions with Creditors, 1 Curr. L. 558; Fraudulent Conveyances, 2 Curr. L. 116; Assignments for Benefit of Creditors, § 6, 1 Curr. L. 228.

51. Contract giving engineer in charge of construction of plant a share in the profits of the contractor, unless it is known to, or ratified by, employer. Instructions considered. Smythe's Estate v. Evans, 209 Ill. 376, 70 N. E. 906. Cannot act as agent of both buyer and seller. McClure v. Ullman, 102 Mo. App. 697, 77 S. W. 325. A contract between the agents of a vendor, employed to sell land at a fixed price, and those acting for the vendee whereby they agree to divide between them the difference between the price paid by the vendee, and that received by the vendor, when unknown to the vendee. Howard v. Murphy [N. J. Law] 56 A. 143. See title Agency, § 4, 1 Curr. L. 61. A contract to pay an attorney of an adverse party to do or to refrain from doing something that will affect the interest of his client is void. Steger v. Hume [Tex.] 79 S. W. 19.

52. Agreement by realty company with town to pay portion of expense of building bridge sufficiently strong to support street cars. Improvement necessary to town and beneficial to company. Board of Trustees of Charlotte Tp. v. Piedmont Realty Co., 134 N. C. 41, 46 S. E. 723. See, also, Id. [N. C.] 45 S. E. 959. An agreement of a street railroad company to grade and macadamize a street in consideration of the consent of the owners of abutting property to the building of a car line thereon is not contrary to public policy. Not purchase of frontage consent, inuring to the exclusive benefit of such owner. Farson v. Fogg, 105 Ill. App. 572.

53. Contracts held void: A covenant not to erect a railroad station within a certain distance of one therein stipulated for will not be specifically enforced, especially when such station is ordered by state railroad commission. Beasley v. Texas & P. R. Co., 191 U. S. 492, 24 S. Ct. 164. Contracts of a railroad company not to locate sidetracks for stone quarries near its line. Chicago, etc., R. Co. v. Southern I. R. Co. [Ind. App.] 70 N. E. 843. Contract by railroad company to abandon or delegate to another the performance of its public duties under its charter. Lease of one road to another. Cox v. Terre Haute, etc., R. Co., 123 F. 439. Sale of franchises by telephone company to another telephone company without legislative authority. Cumberland Tel. & T. Co. v. Evansville, 127 F. 187. Lease by electric light company of all its property to competitor for 10 years, and obligating itself not to engage in the business for that period. Keene Syndicate v. Wichita Gas, Elec. L. & P. Co. [Kan.] 76 P. 834.

Contracts held valid: A contract whereby a company agrees to ship a certain per cent of its output over a particular railroad, which agrees to carry it at as low a rate as may be offered by any other road. Texas & P. R. Co. v. Texas Short Line R. Co. [Tex. Civ. App.] 80 S. W. 567. A condition in a deed to a railroad company that if it failed to maintain a depot on the land it should revert to the grantors, there being no restriction against maintaining them at other points. Griswold v. Minneapolis, etc., R. Co., 12 N. D. 435, 97 N. W. 538. An agreement by a railroad company that it will not reduce its rates during a certain period, unless required by law to do so. Statutes give power to companies to fix rates not exceeding certain limits, subject to right of legislature to modify law [Gen. St. N. J. p. 2643]. Raritan River R. Co. v. Middlesex & S. Traction Co. [N. J. Err. & App.] 58 A. 332. See titles Railroads, 2 Curr. L. 1382; Telegraphs and Telephones, § 1, 2 Curr. L. 1843.

54. Evidence insufficient to show contract for exchange of land contrary to public policy as violating rules of U. S. land department. Stickney v. Hughes Wyo.] 75 P. 945.

55. U. S. Consolidated Seeded Raisin Co. v. Griffin & Skelley Co. [C. C. A.] 126 F. 364.

56. See 1 Curr. L. 643.

ice corporations cannot, by contract, relieve themselves from liability for their own negligence,[57] but they may, for a valuable consideration, limit their common-law liability.[58]

(§ 3) *F. Relating to marriage or divorce.*[59]—Marriage brokerage contracts are void,[60] and a contract to hasten an intended marriage is as obnoxious to the rule as one to bring about a marriage between strangers.[61]

Contracts tending to prevent a reconciliation between a husband and wife,[62] or to procure their separation, are void as against public policy.[63] But a contract for the resumption of the marriage relation, providing that if the husband fails to support his wife she shall immediately become vested with her dower interest in his property, is valid.[64]

(§ 3) *G. Contracts tending to promote immorality.*—A contract to enable one to conduct a house of ill fame,[65] or a contract made in consideration of future illicit intercourse, or in contemplation of a state of concubinage, or of which an illicit relation is understood by the parties to form a part, is void as against public policy.[66]

(§ 3) *H. Litigious agreements.*[67]—Agreements which tend to promote litigation are contrary to public policy.[68] An agreement by a stranger to furnish testimony for a compensation depending upon the success of his efforts is void.[69]

(§ 3) *I. Compounding offenses.*[70]—An agreement made in consideration of the compounding of a felony is void.[71]

(§ 3) *J. Interfering with public service.*[72]—Agreements which tend to promote dereliction of public duty,[73] or the object of which is to defeat a regular pro-

57. Duty of carrier to furnish safe cars. Lake Erie & W. R. Co. v. Holland [Ind.] 69 N. E. 138.

58. For a full discussion of this subject, see Carriers, §§ 12, 19, 26J, 1 Curr. L. 421. Must be supported by a valuable consideration, other than the mere acceptance of the property for carriage by carrier. Lake Erie & W. R. Co. v. Holland [Ind.] 69 N. E. 138. A reduction in the usual rate is sufficient. Reduction must be actual, and mere recital that it has been made is not sufficient. Id. A contract whereby a railroad company is released from liability for damages by fire to buildings on land leased by it, though caused by its negligence, is not contrary to public policy. Ordelheide v. Wabash R. Co., 175 Mo. 337, 75 S. W. 149. Provision that electric light company shall not be liable in any event for damage to person or property arising, accruing, or resulting from use of light does not relieve it from liability for shock to user. Denver Consol. Elec. Co. v. Lawrence, 31 Colo. 301, 73 P. 39.

59. See 1 Curr. L. 644.

60. Jangraw v. Perkins [Vt.] 56 A. 532.

61. Condition in mortgage that it should be void if R. should marry plaintiff's daughter immediately and be her faithful husband for six years. Jangraw v. Perkins [Vt.] 56 A. 532.

62. To pay attorney a percentage of alimony recovered in a divorce suit. McCurdy v. Dillon [Mich.] 98 N. W. 746.

63. Edic v. Horn, 42 Misc. 26, 85 N. Y. S. 535.

64. Sommer v. Sommer, 87 App. Div. 434, 84 N. Y. S. 444.

65. Money paid thereunder cannot be recovered, though contract valid on its face. McDonald v. Born [Mich.] 97 N. W. 693. Evidence insufficient to show that the assignee of a contract of sale of pianos knew that they were sold to assist the vendee in furnishing a house of prostitution. Ramsey v. Smith, 138 Ala. 333, 35 So. 325. Lease of building to be used for house of ill fame wholly void. Berni v. Boyer, 90 Minn. 469, 97 N. W. 121.

66. Illicit relations held not to form part of consideration for agreement of father to provide for illegitimate child. Doty's Adm'rs v. Doty's Guardian [Ky.] 80 S. W. 803. Deed made in consideration of future illicit intercourse is void. Watkins v. Nugen, 118 Ga. 372, 45 S. E. 262. Deed cannot operate to vest title. Id., 118 Ga. 375, 45 S. E. 260.

67. See 1 Curr. L. 645.

68. O'Driscoll v. Doyle, 31 Colo. 193, 73 P. 27. Assignment of an interest in a cause of action and agreement to pay a certain sum therefor, a part of which was to be paid for expenses incurred, and that each party should thereafter pay his share of the expenses, and that the suit should not be compromised so as to net the purchaser less than a certain sum, held valid. Id. Agreement between husband and wife, whereby the latter assists the former financially in prosecuting a suit to judgment, is not champertous. Ex parte Hiers [S. C.] 45 S. E. 146.

69. Physician to receive 10% of amount recovered for his testimony. Laffin v. Billington, 86 N. Y. S. 267.

70. See 1 Curr. L. 646.

71. Note transferred to maker for cancellation. Bishop v. Matney, 25 Ky. L. R. 1777, 78 S. W. 856.

72. See 1 Curr. L. 646, and special article post, p. 861.

73. Agreement by firm of building contractors, whose chief contracts were for public works in city, to pay expenses of a member of firm incurred in campaign for office of president of city council. Ward v.

ceeding in a court of justice,[74] or which tend to do away with competition at public sales,[75] or in the securing of public contracts, are void as against public policy.[76] So also are agreements to influence public officers,[77] or officers of court, with reference to their official duties,[78] or which tend to induce them to resign their positions.[79] But agreements to pay officers for lawful services in an independent employment forming no part of their official duties are valid.[80] An agreement by a public officer to continue one as his deputy during his whole term is contrary to public policy.[81]

Agreements for professional services in the procurement of congressional legislation, which involve personal solicitation of members of congress, are void as against public policy, whether improper means are used in such solicitations or not.[82] But the mere fact that the validity of a contract is made to depend upon legislative action does not render it void,[83] nor does the fact that one employing an attorney believes that he will use improper influence to accomplish the object of the contract, unless such attorney agreed and intended to use such improper influence.[84]

(§ 3) *K. Restraint of trade.*[85]—Contracts in general restraint of trade are illegal.[86] Contracts in partial restraint of trade are generally held to be valid[87]

Hartley, 178 Mo. 135, 77 S. W. 802. A provision of a police benevolent society entitling its members to receive a pecuniary benefit on dismissal from the force, particularly under Greater New York Charter (Laws 1901, pp. 127, 129, c. 466) §§ 300, 302, forbidding removals except for cause, etc. McCormick v. McCarton, 88 N. Y. S. 722.

74. To pay prosecutrix certain sum on dismissal of criminal charge of seduction. Johnson v. Douglas, 32 Wash. 293, 73 P. 374.

75. Agreement to refrain from bidding at bankrupt sale after some bids had been made and sale was still open. Fisher v. Hampton Transp. Co. [Mich.] 98 N. W. 1012. A bond executed by an administratrix, conditioned that she will reimburse a proposed purchaser at a foreclosure sale of lots belonging to the estate for any amount which he may be compelled to bid over a certain sum. Beatrice Creamery Co. v. Fitzgerald [Neb.] 97 N. W. 301.

76. Agreement of only two newspaper publishers in county to bid maximum rate for county printing and divide proceeds. Immaterial that county financial statement was to be published in both without extra charge. Pendleton v. Asbury [Mo. App.] 78 S. W. 651.

77. Contract under which plaintiff gave defendant benefit of his experience, procured opinion of counsel, and assisted defendant in presenting facts to state auditor's agent, so that the latter admitted that a claim for taxes being prosecuted by the state against defendant was invalid, held not contrary to public policy, there being no evidence of impropriety on plaintiff's part. Lebus v. Dunlap [Ky.] 80 S. W. 803. Contract for services in securing canal construction contracts from state officers, through favoritism arising from political and social relations. Drake v. Lauer, 93 App. Div. 86, 86 N. Y. S. 986.

78. Contract by assignee of interest of heirs in estate of decedent to pay attorneys, appointed to represent unknown heirs in suit to establish heirship and for partition, a certain sum to refrain from appealing from judgment allowing them fees for their services, held void on ground that it hastened final judgment, and extinguished right of appeal in their clients. Steger v. Hume [Tex.] 79 S. W. 19. Agreement to pay receiver for allowing receivership to remain open, and for use of his name in collecting assets. National Exch. Bank v. Woodside [Mo. App.] 80 S. W. 715.

79. Notes given in consideration of the resignation of an executor are not enforceable. Currier v. Clark [Colo. App.] 75 P. 927.

80. Receiver. National Exch. Bank v. Woodside [Mo. App.] 80 S. W. 715. An agreement to pay a reward for aid in securing a conviction of a criminal, made to one who was a member of the sheriff's posse, but after the termination of his official duties. Cornwell v. St. Louis Transit Co. [Mo. App.] 80 S. W. 744.

81. Even though the statute providing for the appointment of deputies is silent as to their term of office. Absolute power of removal an incident to the power of appointment, to be exercised without legal liability for results. Motive for removal cannot be inquired into. Horstman v. Adamson, 101 Mo. App. 119, 74 S. W. 398.

82. Employment of attorney to procure longevity pay for surgeon in navy. Owens v. Wilkinson, 20 App. D. C. 51.

83. Contract for sale of stock in gas company on condition that its franchise should be amended in a manner to be agreed upon. Baumhoff v. Oklahoma City Elec. & Gas & Power Co. [Okl.] 77 P. 40.

84. To secure patent for government land. Mulligan v. Smith [Colo.] 76 P. 1063. A contract employing an attorney to collect a claim against the government, valid in its inception, is not rendered invalid because such attorney procures personal solicitations to be made to members of congress to procure its allowance. Evidence held not to show that improper negotiations were in fact conducted. Knut v. Nutt [Miss.] 35 So. 686.

85. See 1 Curr. L. 648.

86. Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781.

where the restraint is such as to afford only a fair and reasonable protection to the interests of the party in favor of whom it is given, and is not so large as to interfere with the interests of the general public.[88] Thus contracts whereby a party binds himself not to carry on a particular business within a limited territory and for a limited time are generally held to be valid, especially if they accompany and are a part of the consideration for a sale.[89] The question of reasonableness is one of law,[90] to be determined from the facts of each particular case.[91]

Patented inventions and secrets of art or trade not patentable are not within the purview of the rule prohibiting contracts in restraint of trade.[92] Hence an agreement by one having an exclusive license to manufacture and sell a patented article within certain territory not to use or sell a similar article within the same territory,[93] or to otherwise keep up the monopoly given by the patent laws, is valid.[94] An agreement by an employe, in consideration of his employment, that his employer shall have the benefit of all inventions made by him while so employed and that he will keep the same forever secret if required, is not against public policy.[95]

An agreement tending to restrict competition in the letting of a private contract is not contrary to public policy,[96] unless it amounts to a fraud on the party inviting bids.[97]

On the question as to whether a contract is in restraint of trade and tends to create a monopoly, it is proper to show the circumstances attending its making, the

87. Robinson v. Suburban Brick Co. [C. C. A.] 127 F. 804. If some legal consideration, its adequacy is immaterial. Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781.

88. Swigert v. Tilden, 121 Iowa, 650, 97 N. W. 82. Agreement by coal companies, giving to another company, organized by them, exclusive right to sell their entire outfit at uniform prices, held void. Slaughter v. Thacker Coal & Coke Co. [W. Va.] 47 S. E. 247.

Test is reasonableness: Gwynn v. Citizens' Telephone Co. [S. C.] 48 S. E. 460. As applied to the particular circumstances of each case. Agreement not to manufacture or sell embossing machines, embodying the special features of those which defendants were to manufacture and sell under the contract for twenty years, held valid, considering the nature of the business, the limited number of customers, etc. Bancroft v. Union Embossing Co. [N. H.] 67 A. 97. Not to compete with plaintiff for ten years in "the territory or immediate vicinity of the territory dealt in by the company or operated in by ourselves, or the agents or employes of the company," held reasonable. Booth & Co. v. Davis, 127 F. 875. Restraint imposed must not be larger than is necessary to protect party for whose benefit contract is made. Id.

Contracts injuriously affecting public interests: Contract by telephone company to put in telephone on condition that customer will not use another system. Gwynn v. Citizens' Telephone Co. [S. C.] 48 S. E. 460.

89. Not to engage in competing business within radius of 50 miles of place of business of corporation, to which owners of brick making sold out, for period of ten years. Robinson v. Suburban Brick Co. [C. C. A.] 127 F. 804. Not to engage in saloon business in certain town. Mitchell v. Branham [Mo. App.] 79 S. W. 739. Agreement of physician not to practice medicine within certain reasonable territorial limits. Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781. A contract prohibiting a person and his assigns from selling liquor upon a certain lot is not against public policy, as tending to create a monopoly or as an unreasonable restraint of trade. Sullivan v. Kohlenberg, 31 Iowa, 215, 67 N. E. 541.

90. Bancroft v. Union Embossing Co. [N. H.] 67 A. 97.

91. Agreement not to manufacture shirts within 100 miles of certain city or sell them in two states for 10 years held valid. Swigert v. Tilden, 121 Iowa, 650, 97 N. W. 82.

92. Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 S. W. 1008.

93. Construction of fire proof floors and ceilings in eight states. Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 S. W. 1008.

94. Conveyance of several similar patents to one party, providing that licensees shall prosecute infringers, imposing conditions as to use, and prohibiting licensees from using other machines. United States Consol. Seeded Raisin Co. v. Griffin Co. [C. C. A.] 126 F. 364.

95. Not unconscionable and is binding on him after termination of employment. Thibodeau v. Hildreth [C. C. A.] 124 F. 892.

96. Contract for construction of mill. Moore v. First Nat. Bank, 139 Ala. 595, 36 So. 777.

97. An agreement whereby a definite number of persons, invited to bid on a certain piece of work, secretly agree as to the amount to be bid by each, put in false bids, and agree to divide the resulting profits, is fraudulent as to the party inviting bids, and equity will not compel parties getting the contract to perform the agreement as to division of profits with the others. Southard v. George W. Jump Co., 43 Misc. 164, 88 N. Y. S. 317.

object and purpose in view, and the construction placed upon it by the parties as evidenced by their dealings under it.[98] When there is dispute and uncertainty as to the object, purpose, intent and knowledge of the parties to a contract not illegal upon its face, the question of illegality is for the jury;[99] but where all the evidence is consistent only with an unlawful object and purpose on the part of all the parties, the rule is otherwise.[1]

Statutes in some states prohibit contracts restraining one from exercising a lawful vocation, except in certain specified cases.[2]

The subject of combinations and monopolies is treated elsewhere.[3]

(§ 3) *L. Effect of invalidity.*[4]—A contract void for one purpose is void for all purposes.[5] A contract against public policy is absolutely void,[6] and may be attacked by anyone in any proceeding in which it is sought to found rights thereon.[7]

If an entire and indivisible contract contains an illegal stipulation, the whole contract is void,[8] but if the contract is divisible, the void portions will not affect the validity of the remainder.[9]

Neither a court of equity nor a court of law will lend its aid to either praty to a contract founded upon an illegal or immoral consideration,[10] or which is contrary to public policy.[11] If the contract is executed, it will be left to stand.[12] Thus one who pays out money on an illegal contract cannot recover it, though the other party

98. Detroit Salt Co. v. National Salt Co. [Mich.] 96 N. W. 1.

99. To control manufacture and sale of salt. Detroit Salt Co. v. National Salt Co. [Mich.] 96 N. W. 1.

1. Detroit Salt Co. v. National Salt Co. [Mich.] 96 N. W. 1. Contract for sale of entire output of salt held illegal as in restraint of trade and tending to create a monopoly, if not on its face, at least in view of the surrounding circumstances. Id.

2. Provision in contract of sale that defendant should not engage in abstract business held void under S. Dak. Code, §§ 1277, 1278, 1279. Prescott v. Bidwell [S. D.] 99 N. W. 93.

3. See Combinations and Monopolies, 1 Curr. L. 535.

4. See 1 Curr. L. 651.

5. If void under statute of frauds cannot be used as basis for computing amount to which plaintiff is entitled under quantum meruit. In re Sheldon's Estate [Wis.] 97 N. W. 524.

6. Pikes Peak Paint Co. v. Masury & Son [Colo. App.] 74 P. 796.

7. Sale of franchises of telephone company. Cumberland Tel. & T. Co. v. Evansville, 127 F. 187.

8. Where part of consideration for notes is resignation of administrator, they cannot be enforced. Currier v. Clark [Colo. App.] 75 P. 927. Combination between carriers to prevent competition, void as against public policy. Chicago, etc., R. Co. v. Southern Ind. R. Co. [Ind. App.] 70 N. E. 843. If any part of the consideration is illegal, the whole is void and the contract will fall. Note given for stock of liquors, and for privilege of running saloon under seller's license until it expired, which was forbidden by statute, held void. Padget v. O'Connor [Neb.] 98 N. W. 870. Contract between two telephone companies that each should build part of line within a year and that each should then have the use of the other's lines for 20 years is indivisible. Whole void under statute of frauds because not in writing. Bastin Tel. Co. v. Richmond Tel. Co., 25 Ky. L. R. 1249, 77 S. W. 702.

9. Provisions in restraint of trade. United States Consol. Seeded Raisin Co. v. Griffin & Skelley Co. [C. C. A.] 126 F. 364. Provision of agreement between railroad and telegraph company, giving the latter exclusive right to maintain lines on former's right of way, subsequently rendered illegal by act of congress, does not render whole contract void. Western Union Tel. Co. v. Pennsylvania Co. [C. C. A.] 129 F. 849. An agreement to pay an attorney a percentage of the amount collected on a claim against the government is not rendered void because a power of attorney given him in relation thereto and at the same time contravenes the United States statutes, since the two are separable under Rev. St. U. S. § 3477 (U. S. Comp. St. 1901, p. 2320), prohibiting such power until allowance of claim. Knut v. Nutt [Miss.] 35 So. 686.

10. Watkins v. Nugen, 118 Ga. 372, 45 S. E. 262; Hines v. Union Sav. Bank & Trust Co. [Ga.] 48 S. E. 120. Test whether party must bring in illegal transaction to support his claim. Mitchell v. Branham [Mo. App.] 79 S. W. 739.

11. Chicago, etc., R. Co. v. Southern Ind. R. Co. [Ind. App.] 70 N. E. 843. Contract contrary to policy of law. Glass v. Basin & B. State Min. Co. [Mont.] 77 P. 302. Cannot be made the basis of a cause of action or an affirmative defense, but the court will leave the parties where it finds them. Cannot enforce or recover money expended thereunder. Ward v. Hartley, 178 Mo. 135, 77 S. W. 302; Pendleton v. Asbury [Mo. App.] 78 S. W. 651. Liquidated damages provided for breach of contract in restraint of trade cannot be recovered. Slaughter v. Thacker Coal & Coke Co. [W. Va.] 47 S. E. 247. Rent cannot be recovered under void lease and agreement not to engage in electric lighting business. Keene Syndicate v. Wichita Gas, Electric Light & Power Co. [Kan.] 76 P. 834.

12. Will not set aside deed given in consideration of illicit intercourse. Watkins v.

refuses to perform.[13] If executory, neither party can enforce it.[14] But this rule does not apply where the contract sued on is separate and distinct from the original unlawful act, and is founded on a new and distinct consideration.[15] Thus mere knowledge on the part of one lending money that it is to be used for an illegal or immoral purpose will not prevent its recovery.[16] Also a court will declare a deed given for an immoral consideration, void upon suit of an innocent person not a party thereto, upon whose title it is a cloud.[17] There is a conflict of authority as to whether one rendering services under a contract contrary to public policy may recover therefor on a quantum meruit.[18] A contract based on an illegal or immoral consideration is not a gift.[19] A law making contracts in relation to a business carried on in disregard of the privilege tax void does not shield an agent from liability for misappropriation of funds in the conduct of such business.[20] The only penalty as to contracts against public policy or in restraint of trade is that courts refuse to enforce them.[21] Parties to an unlawful combination to prevent competition and stifle bidding at a tax sale cannot complain of the sale on that ground.[22]

Though illegality is not pleaded, if it appears from the case made by either party, it is the duty of the court, on his own motion, to refuse to entertain the action.[23]

Nugen, 118 Ga. 372, 45 S. E. 262. Will not set it aside indirectly by refusing to give deed, executed for immoral consideration, proper effect when offered as evidence of right to recover in ejectment. Beard v. White [Ga.] 48 S. E. 400. Rent for lease of one railroad to another, void as against public policy. Cox v. Terre Haute & I. R. Co., 123 F. 439. Where insurance agents made illegal agreement to pay first premium on policy of life insurance in consideration of defendant's taking it out through them, they cannot thereafter recover amount thereof from defendant, though they have accounted to the company therefor. Equitable Life Assur. Soc. v. Wetherill [C. C. A.] 127 F. 947 Agreement that engineer shall share in profits of contractor. Smythe's Estate v. Evans, 209 Ill. 376, 70 N. E. 906. For materials furnished to build combustible building within fire limits. Chimene v. Pennington [Tex. Civ. App.] 79 S. W. 63. The fact that an executed contract, admittedly fraudulent, was without consideration, does not change the rule. Equity will not set aside deed wholly without consideration, given by grantor to prevent land being subject to judgment for allmony in action then pending against him, though grantor remained in possession until his death. Castellow v. Brown, 119 Ga. 461, 46 S. E. 632.

13. To purchase counterfeit money. Chapman v. Haley, 25 Ky. L. R. 2182, 80 S. W. 190. Money paid under contract to enable one to conduct house of ill fame. McDonald v. Born [Mich.] 97 N. W. 693. Defendant not compelled to return money expended under contract against public policy. Ward v. Hartley, 178 Mo. 135, 77 S. W. 302. Party cannot recover money paid prosecutrix to procure dismissal of criminal charge of seduction. Johnson v. Douglas, 32 Wash. 293, 73 P. 374. Though other has received benefits without giving return. Drake v. Lauer, 93 App. Div. 86, 86 N. Y. S. 986.

14. Watkins v. Nugen, 118 Ga. 372, 45 S. E. 262. Damages cannot be recovered for breach of a contract, where its performance is impossible within limits legally permissible to the parties. Contract for construction of waterworks in connection with supply which town had no legal authority to use. Smith v. Stoughton [Mass.] 70 N. E. 195. Immoral consideration. Beard v. White [Ga.] 48 S. E. 400.

15. Allegation that money was loaned to be used for purpose of preventing prosecution of defendant's husband for embezzlement and that lender knew such fact, held demurrable, it not appearing that the illegal transaction was consideration for note and mortgage given to secure loan, or that the lender had anything to do with it, and it distinctly appearing that such transactions were separate and distinct. Hines v. Union Sav. Bank & Trust Co. [Ga.] 48 S. E. 120.

16. Hines v. Union Sav. Bank & Trust Co. [Ga.] 48 S. E. 120.

17. Watkins v. Nugen, 118 Ga. 375, 45 S. E. 260.

18. In the District of Columbia, it is held that where some of the services rendered under a contract void as against public policy are legitimate, but the contract is indivisible, and it is impossible to distinguish the good from the bad, there can be no recovery for any of them, on a quantum meruit. Owens v. Wilkinson, 20 App. D. C. 51.

In Michigan, one who renders services under a contract void as against public policy may recover on a quantum meruit. McCurdy v. Dillon [Mich.] 98 N. W. 746.

19. Deed in consideration of illicit intercourse. Watkins v. Nugen, 118 Ga. 372, 45 S. E. 262.

20. Decell v. Hazlehurst Oil Mill & Fertilizer Co. [Miss.] 35 So. 761.

21. In action in replevin to recover prunes delivered to plaintiff by growers, under contract that plaintiff was to pack and sell them in consideration of part of the proceeds, where growers had afterwards sold their interest to defendant, who had thereafter taken possession of the crop, held that defense that contract was in restraint of trade was of no merit, since it was valid as far as performed, and the action was not one to enforce the contract, or for specific perform-

§ 4. *Interpretation. A. General rules.*[24]—A contract should be given effect in accordance with the intention of the parties at the time it was executed,[25] and

ance. California Cured Fruit Ass'n v. Stelling, 141 Cal. 713, 75 P. 320.

22. Pueblo Realty Trust Co. v. Tate [Colo.] 75 P. 402.

23. Finding that conveyance was made to enable plaintiff to fraudulently take up government land by falsely representing that she did not own land so conveyed, not sufficient to require such action, it appearing that, if such intent existed, it was never carried out. De Leonis v. Walsh, 140 Cal. 175, 73 P. 813. Where the contract appears from plaintiff's evidence to be against public policy, defendant may take advantage of it, though he has pleaded only a general denial. Against public policy. McClure v. Ullman, 102 Mo. App. 697, 77 S. W. 325. Relief may be denied in action to enforce agreement to refrain from bidding at public sale, though defense of illegality not pleaded. Fisher v. Hampton Transp. Co. [Mich.] 98 N. W. 1012.

24. See 1 Curr. L. 652.

25. Consumers' Gas Trust Co. v. Littler [Ind.] 70 N. E. 363; Cohen v. Cohen, 141 Cal. 534, 75 P. 100; White v. Sayers, 101 Va. 821, 45 S. E. 747.

Particular contracts construed: Agreement **not to practice medicine** in certain locality "unless forced to return by reason of some unforeseen necessity." Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781. Contract **between carriers to prevent competition,** and for crossing held indivisible, such being evident intent. Chicago, etc., R. Co. v. Southern Ind. R. Co. [Ind. App.] 70 N. E. 843. Contract in regard to **maintenance of dam.** Nuckolls v. Anderson [Ga.] 48 S. E. 191. As to whether agreement **to submit to arbitration** validity of judgment works discharge of judgment. Jones v. Thomas [Wis.] 97 N. W. 950. Contract held to be one of bargain and sale of mine and **not a partnership,** and that it gave plaintiff no interest in mines subsequently located by defendant. Roberts v. Date [C. C. A.] 123 F. 238. A contract by which persons agree to the **removal of a dam** unlawfully built across a stream does not preclude them from thereafter seeking legislative authority to construct another dam, or from constructing it when such authority is obtained. Manigault v. Ward & Co., 123 F. 707. Provision in contract for **construction of lighthouse** that plaintiff and defendant should each be responsible for any accident or damage resulting from his operation or neglect, held not to apply to destruction of whole work by act of God. United States v. Guerber, 124 F. 823. Provision in **charter of vessel** held to give right to cancel only on adverse report of surveyor after actual survey, which it was incumbent on charterers to have made unless prevented by owners. Cornwall v. Moore & Co., 125 F. 646. Plaintiff held to have lost **option** to quarry additional marble by failure to quarry amount required by contract. Wilson v. Freedley, 125 F. 962. Under contract giving plaintiff sole option for 60 days to interest capital in defendant's invention and agreeing to pay him in event of a satisfactory arrangement, held that he was not entitled to compensation for arrangement made after that time. Magoun v. Bruck, 183 Mass. 370, 67 N. E. 319. Question as to whether plaintiff was entitled to extension of **contract of employment** as advertising manager held to depend on whether the amount of cash defendant received for advertising done during his term of service exceeded a fixed sum. Greening v. Commercial Tribune Co. [C. C. A.] 126 F. 939. Evidence held to show that respondent assumed **expense of unloading excavated material** at dump, the matter not being mentioned in the contract. Hastorf v. Degnon-McLean Contracting Co., 128 F. 982. Provision in contract of **sale of timber** that any tramway put upon land by purchaser should become property of vendor, held not to include iron of railroad which purchaser put down in its place, the vendor knowing of the change and encouraging the purchaser to sell such iron, and the iron being worth more than the purchase price of the timber. Grider v. Three States Lumber Co. [Ark.] 79 S. W. 763. In contract for sale of timber for railroad ties "consisting of white oak, post oak and chestnut oak, no limit in size of post oak and chestnut oak, that will measure in diameter not over 12 inches," the limitation as to size held to refer to white oak alone, and that the diameter should be determined by measurement at the stump. Leonard v. Holland, 25 Ky. L. R. 2009, 79 S. W. 227. Defendant held not bound to furnish plaintiff any orders for hats under contract requiring plaintiffs **to furnish plant, equipment and labor** necessary to manufacture hats of style and quality which defendant might desire plaintiffs to manufacture for him. McGarrigle v. Green, 76 Conn. 398, 56 A. 609. Contract held not to have **rendered third party liable** for plaintiff's indebtedness to defendant, or to have released defendant. Ellis v. Conrad Seipp Brewing Co., 207 Ill. 291, 69 N. E. 808. **Sale of cattle** by defendants, induced by information furnished by plaintiffs, held within terms of contract whereby they were to co-operate in cattle business. Asher v. Greenleaf [Kan.] 74 P. 633. Contract for **use of boiler cleaner,** with provision that after a certain amount of rent had been paid it should belong to lessees, held not to require renting for longer than one year or that lessee should purchase. Allegations of pleading not supported by contract filed with it as exhibit. Union Boiler & Tube Cleaner Co. v. Louisville R. Co., 25 Ky. L. R. 122, 74 S. W. 1056. Evidence held to show that defendants were entitled, under a verbal contract, to **trees prepared for market** before plaintiff notified them that the contract was at an end. Austin v. Schwing, 110 La. 595, 34 So. 700. Provision for advancements under **building loan contract.** Fotornick v. Watson, 184 Mass. 187, 68 N. E. 215. Agreement by underwriters to pay for **advertising bonds** out of funds received from subscriptions held not to entitle advertisers to recover, where underwriting agreement is canceled for fraud, and no bonds are issued, and amounts paid as evidence of good faith are returned. Barron v. International Trust Co., 184 Mass. 440, 68 N. E. 831. Contract held to be one for absolute **sale of stock remedies** and to give defendant exclusive agency for remedies in certain specified localities. Sutton v. Baker [Minn.] 97 N. W. 420. Under contract **to procure title** to outstanding interest in certain realty, the grantor held not entitled to make profit out of the transaction. Orr v.

where the intention clearly appears from the words used, no construction is necessary.[26] Ambiguity requiring judicial construction may arise from applying the contract to the subject-matter thereof, as well as from the literal sense of the words.[27]

The terms of a parol contract are to be deduced from all the conversations and

Buschman [Miss.] 36 So. 535. Contract held not to make defendants plaintiffs' **sales agents,** but merely to give them the right to purchase engines at certain discounts, within specified localities. Russell & Co. v. McSwegan, 84 N. Y. S. 614. Lessee of right to put up **building signs** not relieved from liability because proposed sign was rejected by building department, where contract provided that lease was made subject to all rules of such department, and it did not appear that no other sign could have been put up without infringing such rules. Landau v. Gude Co., 84 N. Y. S. 672. Promise to pay for **sleigh hired from plaintiff** if he broke it held not a promise to pay as upon purchase, but merely to pay for injuries. Brown v. Cuozzo, 89 App. Div. 619, 85 N. Y. S. 759. Agreement to **institute test** of storage battery cars purchased from plaintiff held to require defendant to make such test at its expense. Hopedale Elec. Co. v. Electric Storage Battery Co., 89 N. Y. S. 325. A remark construed not to be a promise **to assume debt of a contractor.** Wood v. Atlantic, etc., R. Co., 131 N. C. 48, 42 S. E. 462. Contract **to pave whole of street** where sidings were laid when city paved balance, held not to render street railway company liable for paving where siding had been laid, but afterwards removed, notice of intention to remove having been given before ordinance authorizing pavement was passed. Shamokin Borough v. Shamokin & Mt. C. Elec. Ry. Co., 206 Pa. 625, 56 A. 64. Agreement **to pay wages to injured employe** held to contemplate temporary disability only. Smith v. Crum Lynne Iron & Steel Co., 208 Pa. 462, 57 A. 953.

Release from liability held to include injuries caused by same accident which were unknown when release was signed. Quebe v. Gulf, etc., R. Co. [Tex. Civ. App.] 77 S. W. 442. Provision in contract for **pasturage of cattle,** whereby plaintiff reserved right to provide for their care in case defendant failed to do so, held to authorize plaintiff to recover for additional feed supplied by him and made necessary by defendant's failure to supply same. Rudolph v. Sneed [Tex. Civ. App.] 78 S. W. 1001.

Particular words and phrases: Contract to carry cattle on certain vessels **"all sailing"** during certain months, held to import guaranty that all would sail. Morris v. Chesapeake & O. S. S. Co., 125 F. 62. An agreement to pay complainant a certain per cent of all "rentals or royalties actually **received or rated as paid"** from licenses or leases of telephones, held to cover gross sums received by defendant for perpetual or other exclusive licenses under the patents embraced in the contract, for which sums it gave no consideration except such licenses. Western Union Tel. Co. v. American Bell Telephone Co. [C. C. A.] 125 F. 342. An agreement to transport lumber at preferential rates for a shipper and his **"assigns,"** and limiting the meaning of the latter word to his legal representatives in case of his death, his successors in case of his retirement, and to any mill that he might build or purchase, does not pass to legatee of his business under his will. Sullivan v. Louisville & N. R. Co., 138 Ala. 650, 35 So. 694. Phrase **"the amount of expenditures actually made"** on certain contracts, in contract guarantying that they equaled a certain sum, held to include expenses of procuring them. Berlin Iron Bridge Co. v. American Bridge Co., 76 Conn. 1, 55 A. 573. Words **"shop cost"** held under terms of contract to mean cost at works. Id. Agreement to divide **"net profits"** resulting from building and sale of house. Davis v. Kellar, 25 Ky. L. R. 279, 74 S. W. 1100. Provision in contract for boring well that company should **"set"** pump, held not to necessarily imply that it should transport it to the well. Harris v. Louisiana Mach. & Well Works Co., 112 La. 196, 36 So. 320. A contract giving plaintiff the **"proceeds"** of certain logs, held to entitle him only to the net proceeds after deduction of raftage and boomage. Moss Point Lumber Co. v. Thompson [Miss.] 35 So. 828. A provision that defendant should not use **"any construction similar"** to that which it was given the right to use by the contract held to include every system of fire proof construction which might be used for same purpose, and generally in use at the date of the patent thereon. Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 S. W. 1008. "Verbal **conditions heretofore agreed to** with reference to said property," in contract of employment of broker, held to refer to conditions in regard to property and not to commissions. Frye v. Schwarz, 87 App. Div. 611, 83 N. Y. S. 1070.

"Improvements" includes removable machinery, track, etc., used in developing mine. Smith v. Detroit & D. Gold Min. Co. [S. D.] 97 N. W. 17. Order for installation of irrigation pump reading **"I to furnish** all the foundations and common labor," does not necessarily exclude the construction was to be done under direction and plans of seller. Masterson v. Heitman & Co. [Tex. Civ. App.] 77 S. W. 983. Provision in contract for pasturage of cattle that defendant was to be liable for missing cattle, save such as might die from **"natural causes,** i. e. some disease, etc.," held to show intention that he was not to be responsible for those who died from disease or other causes over which he had no control. Rudolph v. Sneed [Tex. Civ. App.] 78 S. W. 1001.

26. Chicago, etc., R. Co. v. Southern Ind. R. Co. [Ind. App.] 70 N. E. 843. Court cannot, by way of construction or explanation, defeat the express stipulation of the parties. Rent at $3,000 "for the first three years," does not mean $3,000 per year. Liebeskind v. Moore Co., 84 N. Y. S. 850. Contract whereby defendants, to whom plaintiff had deeded property, agreed to pay him rents and profits thereof, and in case of sale to apply proceeds on mortgage thereon, held not to entitle plaintiff to interest on pro-

negotiations of the parties in regard to the subject,[28] and will be determined from a preponderance of the evidence.[29] The terms of a written contract are conclusive as to all matters which they cover,[30] the question being not what the parties intended to do, but what have they done by apt and proper words.[31] Hence, courts will enforce valid contracts as they find them, without adding to or subtracting therefrom conditions not found in the writing,[32] and no provisions will be implied[33] except such as are necessary to carry out the expressed intention of the parties.[34] The exception of one article from the operation of an agreement shows an intention to include all the others therein referred to.[35] Neither the wisdom of the parties nor their motives will be considered.[36] A construction rendering the contract valid will be preferred to one making it void,[37] and contracts are to be construed

ceeds of such sale which had been applied to payment of mortgage. Ellis v. Cole, 86 App. Div. 233, 83 N. Y. S. 641.

27. In re Sheldon's Estate [Wis.] 97 N. W. 524.

28. Agreement to pay commission for sale of land. Memorandum not intended as agreement. Good v. Smith [Or.] 76 P. 354.

29. Oral contract whereby plaintiff was employed as manager of molasses department of cannery held terminable at will of defendant. Chaffe v. Barataria Canning Co. [La.] 36 So. 943.

30. Agreement to promote corporation to purchase and operate brewery. Locke v. Wilson [Mich.] 98 N. W. 400. Where a written contract is relied upon by both parties, it will be literally construed and enforced by the courts. Under provision in contract of sale of harvester, giving purchaser right to rescind under certain conditions and providing that a return of machine and consideration should constitute full settlement of transaction, buyer cannot rescind and also, in action for price, counterclaim for damages for breach. McCormick Harvesting Mach. Co. v. Brown [Neb.] 98 N. W. 697.

31. Rose v. Lanyon Zinc Co. [Kan.] 74 P. 625; McGarrigle v. Green, 76 Conn. 398, 56 A. 609. What they meant, understood, and intended by the words employed. Fisk Min. & Mill. Co. v. Reed [Colo.] 77 P. 240. The meeting of minds determined by expressed intention, and not by secret intentions, which may be wholly at variance therewith. Contract for storage of goods in warehouse. Hudson v. Columbian Transfer Co. [Mich.] 100 N. W. 402. Special meaning cannot be given to the terms used by proof of unexpressed intention. That term "legal representatives" was used with the intention of giving party right to bequeath contract by will. Sullivan v. Louisville & N. R. Co., 138 Ala. 650, 35 So. 694.

32. Will not add to contract for removal of manure condition as to quality. Keyes & W. Livery Co. v. Freber, 102 Mo. App. 316, 76 S. W. 698. Sale of coal. Withers v. Moore, 140 Cal. 591, 74 P. 159. Regardless of consequences, where no invalidity is involved or public policy violated, and there is no mutual mistake or fraud, nor clear evidence of modification. Provision making notice to architect condition precedent to allowance for delay in completing building. Davis v. La Crosse Hospital Ass'n [Wis.] 99 N. W. 351.

33. Expressed conditions will not be extended by implication, the presumption being that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument. Provisions for forfeiture of oil lease. Rose v. Lanyon Zinc Co. [Kan.] 74 P. 625. Acceptance of electric light service by a city after the expiration of a contract for a year does not of itself imply a contract for exactly another year, there being an apparent intention to the contrary. Howell Elec. Light & Power Co. v. Village of Howell [Mich.] 92 N. W. 904. An agreement by an insurance company, supported by a sufficient consideration, to renew insurance, will not justify an implied agreement on the part of the other party to accept such insurance. Barker v. Pullman's Palace Car Co., 124 F. 555. Provision making architect's certificate final as to disputés will not be implied. Fuller Co. v. Young Co. [C. C. A.] 126 F. 343. Where a deed and contract are not connected by the evidence, the court cannot supply the omission, if any, by inference. Frank v. Stratford-Handcock [Wyo.] 77 P. 134.

34. A promise to pay for services to be performed implies a request for their performance. Fisk Min. & Mill Co. v. Reed [Colo.] 77 P. 240. Law will imply agreement to make formal written assignment of patent right in contract of sale thereof, if such assignment is necessary to pass title. Thourot v. Hotub, 81 App. Div. 634, 80 N. Y. S. 1083. Contract to continuously furnish power for use of water wheel already in place impliedly excepts periods when, on account of its location, it could not be used because of high water. Citizens' Elec. L. & P. Co. v. Gonzales Water Power Co. [Tex. Civ. App.] 76 S. W. 577. The sale of an electric lighting plant, doing public and private lighting under a public franchise, the obvious intention being to include the going business with the plant, impliedly includes the unfinished monthly contracts for lighting and the supplies on hand, as incidents of the plant. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

35. Rooney v. Thomson, 84 N. Y. S. 263.

36. Dendy v. Russell, 67 Kan. 721, 74 P. 248. Even if it appears unusual or unreasonable. Oral contract for services. Chaffe v. Barataria Canning Co. [La.] 36 So. 943.

37. In re Sheldon's Estate [Wis.] 97 N. W. 524; Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781. Agreement to collect claim from government by suit "or through any diplomatic negotiations as may be deemed by him best" is not void on its face. Knut v. Nutt [Miss.] 35 So. 686. The law does not presume illegality. Agreement of father to support illegitimate child held not based on

with reference to the subject-matter and the understood situations of the parties,[38] and the object sought to be attained;[39] and should be viewed as the mass of mankind would view them.[40] If complete in themselves, they must be construed without the aid of extrinsic proof,[41] but if ambiguous or of doubtful meaning, the situation of the parties and the circumstances surrounding the transaction may be shown.[42]

The whole contract must be construed together,[43] effect, if possible, being given to all its parts.[44] Written and printed portions will be reconciled if possible,[45] it being presumed that the contract contains no clauses not intended by the parties,[46] but if not, the written portions will generally control.[47]

The practical interpretation given to contracts by the parties to them, while

continuance of illicit relations with mother. Doty's Adm'rs v. Doty's Guardian [Ky.] 80 S. W. 803. Doubts as to the validity of a contract should be resolved in its favor. Contract to carry freight in Alaska held sufficiently definite. Durand v. Heney, 33 Wash. 38, 73 P. 775. If fairly open to two constructions. As to whether transaction was assignment of interest in government contract contrary to statute. North Pacific Lumber Co. v. Spore [Or.] 75 P. 890. Agreement held not to show intent to acquire government land fraudulently. Waring v. Loomis [Wash.] 76 P. 510.

38. Western Union Tel. Co. v. American Bell Telephone Co. [C. C. A.] 125 F. 342. Contract in regard to interest of parties in mineral lands held to create partnership which could be terminated by mutual consent. White v. Sayers, 101 Va. 821, 45 S. E. 747.

39. A covenant by a contractor that plans and specifications for work on a subway did not involve danger to adjacent buildings, if the work was done without negligence, and agreeing to indemnify city for damages to adjacent buildings, held to be for the protection of the city only and to impose on contractor liability of city for defects in plans. Haefelin v. McDonald, 89 N. Y. S. 395. Defendant's contract to rent land to a reliable tenant who could carry himself with feed, provisions, etc., and to plant a certain amount of rice, held not to bind him to plant rice in any event, but only to furnish tenant who was able and willing to do so. Failure because unable to obtain water not a breach. Barr v. Cardiff [Tex. Civ. App.] 75 S. W. 341.

40. White v. Sayers, 101 Ga. 821, 45 S. E. 747.

41. Sullivan v. Louisville & N. R. Co., 138 Ala. 650, 35 So. 694.

42. Provision for delivery of stock when C.'s ownership of a part of a mine was "finally determined." Clarke v. Eureka County Bank, 123 F. 922. To secure extension of mortgage assumed by vendee. Leis v. Sinclair, 67 Kan. 748, 74 P. 261. As to whether words "thus avoiding shock and jar," in contract for installation of elevator, referred to water hammer in city water pipes or jar to passengers. Reedy Elevator Mfg. Co. v. Mertz [Mo. App.] 80 S. W. 684. Finding as to belief of parties, based on extrinsic evidence immaterial. Contract to give defendant exclusive right to manufacture machines held not agreement to procure patent. Bancroft v. Union Embossing Co. [N. H.] 57 A. 97. Question as to sufficiency of memorandum under statute of frauds. Brauer v. Oceanic Steam Nav. Co., 178 N. Y. 339, 70 N. E. 863. Liability of reinsurer to assured. Ruohs v. Traders' Fire Ins. Co. [Tenn.] 78 S. W. 85. As to whether amount named in agreement not to engage in business, is stipulated damages or penalty. Rucker v. Campbell [Tex. Civ. App.] 79 S. W. 627. Ambiguous contracts are to be construed in the light of the circumstances and conditions under which they were made, keeping in view the situation, interest and motives of the parties as far as they can be determined by the contract and other evidence, and then giving to the language used a reasonable construction. Receipt reciting that a mining company had received a certain sum "to be repaid from the first profits of the mine," held to evidence an absolute obligation to repay within a reasonable time, whether mine made profits or not. Busby v. Century Gold Min. Co. [Utah] 75 P. 725. Sale of tomatoes. Newell v. New Holstein Canning Co., 119 Wis. 635, 97 N. W. 487. Agreement to devise property. In re Sheldon's Estate [Wis.] 97 N. W. 524.

43. Contract for carrying freight in Alaska. Durand v. Heney, 33 Wash. 38, 73 P. 775. Contract for pool of stock. Spier v. Hyde, 92 App. Div. 467, 87 N. Y. S. 285. Contract for exchange of land construed. Stickney v. Hughes [Wyo.] 75 P. 945. Term "minerals," held, under the circumstances, not to include coal. White v. Sayers, 101 Va. 821, 45 S. E. 747. Oil lease held to require development of property. Indiana Natural Gas & Oil Co. v. Granger [Ind. App.] 70 N. E. 395. Building contract. Fuller Co. v. Young Co. [C. C. A.] 126 F. 343. Contract to pay real estate broker commissions when land is sold, but not giving him exclusive authority to sell, held not to entitle him to commission on sale by owner. Tracy v. Abney, 122 Iowa, 306, 98 N. W. 121. Contract to pay certain sum to two sisters "during the period they remain unmarried." Held allowance of one not cut off by marriage of other. Cohen v. Cohen, 141 Cal. 534, 75 P. 100.

44. Indiana Natural Gas & Oil Co. v. Granger [Ind. App.] 70 N. E. 395.

45. Written provision fixing date of delivery for engine and providing for liquidated damages construed with printed form. Hardie Tynes Foundry & Mach. Co. v. Glen Allen Oil Mill [Miss.] 36 So. 262. Contract to deliver cattle construed. Eager v. Mathewson [Nev.] 74 P. 404.

46. Hardie Tynes Foundry & Mach. Co. v. Glen Allen Oil Mill [Miss.] 36 So. 262.

47. Eager v. Mathewson [Nev.] 74 P. 404. Contract for construction of tunnel prepared on printed form. Daly v. Busk Tunnel R. Co. [C. C. A.] 129 F. 513.

engaged in their performance and before any controversy has arisen concerning them, is one of the best indications of their true intent,[48] and should control, where the contract is ambiguous, and such construction is not inconsistent with its terms,[49] or contrary to law;[50] but not when the language is clear and capable of only one construction, which is reasonable.[51]

In so far as a contract imposes a penalty[52] or a forfeiture, it will be strictly construed, and its terms will never be extended by implication.[53] Conditions precedent are not favored, and are to be strictly construed against one seeking to avail himself of them,[54] especially when a literal construction would work a forfeiture.[55] That construction will be favored which will treat the sum named in the contract as damages for its breach as penal rather than as liquidated damages.[56]

All laws which affect the validity, construction, discharge, or enforcement of a contract, which exist at the time and place of its execution, and where it is to be performed, enter into and form a part of it.[57] The fact that the relations of the parties under it are fiduciary should be taken into consideration.[58]

In case of doubt as to the legal import of the language used, it will be construed most strongly against the party using it.[59]

(§ 4) *B. What is part of contract.*[60]—If the agreement is evidenced by more than one writing, all of them are to be read together, and construed as one contract;[61] and the same is true of several contracts relating to the same subject-matter, and entered into as a general whole to accomplish the single purpose therein clearly expressed.[62]

48. Note held evidence of loan and not extension of time of payment of insurance premium. Manhattan Life Ins. Co. v. Wright [C. C. A.] 126 F. 82. As to waiver of notice of acceptance in guaranty. Swisher v. Deering, 204 Ill. 203, 68 N. E. 517. Agreement to arbitrate suit construed as requiring that judgment should abide the award. Jones v. Thomas [Wis.] 97 N. W. 950. Agreement that employe, who was to work at whatever employer might direct, was to receive higher wages when he acted as engineer, was practical construction of original contract as not including engineer's services. Wilson v. Godkin [Mich.] 98 N. W. 985. Agreement to devise property. In re Sheldon's Estate [Wis.] 97 N. W. 524. The acquiescence of both parties in a construction of a contract for over three years is of great importance in determining its meaning. Western Union Tel. Co. v. American Bell Telephone Co. [C. C. A.] 125 F. 342; Kinney v. McBride & Co., 88 App. Div. 92, 84 N. Y. S. 958.

49. Seller of irrigation pump acquiescing in buyer's contention that it was duty of seller to superintend installation cannot set up in action on contract that it was buyer's duty and that his failure to do so caused delay complained of. Masterson v. Heitmann & Co. [Tex. Civ. App.] 77 S. W. 983. Contract for use of water wheel involving terms of previous parol agreement. Citizens' Elec. Light & Power Co. v. Gonzales Water Power Co. [Tex. Civ. App.] 76 S. W. 577. As to whether agreement was new lease or continuation of old one. Wood v. Edison Elec. Illuminating Co., 184 Mass. 523, 69 N. E. 364. Contract of sale of air compressor not ambiguous. Oil Creek Gold Min. Co. v. Fairbanks, Morse & Co. [Colo. App.] 74 P. 543.

50. Deed. Clark v. Lambert [W. Va.] 47 S. E. 312.

51. Parol evidence not admissible to show that provision that balance due on bill of sale was to be paid in monthly instalments of the "amounts realized from the sale of articles covered by the bill of sale" was construed by agent of buyer as meaning that payments should be made on basis of purchase price of articles. Kenney v. McBride & Co., 88 App. Div. 92, 84 N. Y. S. 958.

52. Provision that owner might withdraw land from market or raise price on paying broker certain per cent does not entitle him to such percentage on sale by owner. Tracy v. Abney, 122 Iowa, 306, 98 N. W. 121.

53. Oil lease held not forfeited by assignment without consent of lessor. Rose v. Lanyon Zinc Co. [Kan.] 74 P. 625.

54, 55. Antonelle v. Kennedy & Shaw Lumber Co., 140 Cal. 309, 73 P. 966.

56. Rucker v. Campbell [Tex. Civ. App.] 79 S. W. 627.

57. Laws rendering contracts by members of congress with government void. United States v. Dietrich, 126 F. 671.

58. Contract in regard to telephone business held to create relation in nature of a trust. Western Union Tel. Co. v. American Bell Telephone Co. [C. C. A.] 125 F. 342.

59. Provision that title was not to be accepted if it was defective in the opinion of a title company held not to release buyer where company reported adversely under mistake of fact. Hoffman v. Colgan, 25 Ky. L. R. 98, 74 S. W. 724. One who himself writes a contract cannot be heard to question the plain and obvious meaning of the language used. Action for rescission of contract to convey realty. Boyd v. Liefer [Cal.] 77 P. 953.

60. See 1 Curr. L. 653.

61. Letter written by employe agreeing not to associate with a certain woman held to constitute part of contract of employment. Gould v. Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896.

(§ 4) *C. Character; joint or several, etc.*[63]—An obligation undertaken or a right granted to two or more is presumed to be joint, in the absence of words of severance.[64] If the contract is in writing, the nature of the liability in such cases is to be determined from the words of the instrument alone;[65] if oral, from all the circumstances of the case.[66]

(§ 4) *D. Language used.*[67]—Words will be given their primary and ordinary meaning, in the absence of anything to show a contrary intent.[68] No ambiguity can arise from use of words which have no technical or commercial meaning.[69] If a literal construction would render the contract frivolous and ineffectual, and frustrate its apparent object, a different construction will, if possible, be adopted.[70] Words relating to nonessentials, however much multiplied, should not be permitted to control the sense.[71] Clerical errors will be disregarded[72] and inaccuracy of language resulting from inserting a word not meant, or using the wrong word, will not be permitted to defeat the intention, when it can be distinctly ascertained.[73] Qualifying words are not to be read into a contract, where they would narrow the apparent general purpose and defeat a reasonable and just result.[74]

(§ 4) *E. Custom or usage.*[75]—Proof of a general usage is admissible to explain a contract, either in the absence of express stipulations or where the meaning of the parties is uncertain from the language used, and where the usage of the trade to which it relates with reference to which it was made, may explain and supply deficiencies in the instrument;[76] but not to vary or contradict its plain and positive terms.[77]

62. For sale of land. Morey v. Clopton [Mo. App.] 77 S. W. 467.

63. See 1 Curr. L. 653.

64. Words of joinder not necessary. Agreement to erect milk condensory plant held to create joint liability. Immaterial that defendants agreed to incorporate where amount of stock subscribed was less than contract price and part of them did not subscribe at all. Pittsley v. King, 206 Pa. 193. 55 A. 920. Evidence held to show that contract for construction of telephone line was joint obligation of defendants [N. D. Rev. Codes 1899, § 3766]. Clements v. Miller [N. D.] 100 N. W. 239. Under an agreement by one tenant in common to sell his interest to the other two, the obligations of the purchasers to the vendor were several as well as joint. One could rescind by agreement with vendor, without affecting rights of other and without his consent. Mylin v. King, 139 Ala. 319, 35 So. 998.

Under the California Code, § 1659, where all parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several. Contract to pay additional sum for land held joint and several. Gummer v. Mairs, 140 Cal. 535, 74 P. 26.

65. Pittsley v. King, 206 Pa. 193, 55 A. 920.

66. Fact that professional services were rendered under oral contract for common benefit not conclusive, but question may still depend on express agreement or upon their intention as gathered from all the circumstances. Question one for jury. Matthews v. Williams Mfg. Co., 98 Me. 234, 56 A. 759. Liability of owners to broker for commissions for selling lots held several. Whaples v. Fahys, 87 App. Div. 518, 84 N. Y. S. 793.

67. See 1 Curr. L. 655.

68. "Legal representatives," used in connection with word "assigns," means executors or administrators. Sullivan v. Louisville & N. R. Co., 138 Ala. 650, 35 So. 694. Natural meaning in connection with the facts and circumstances existing and referred to when they are used. Provision that payments might "occasionally" be made on ten days time held to mean when exigencies of business required. Morton v. Clark, 184 Mass. 555, 69 N. E. 309. Plain, ordinary and popular sense unless they have acquired a different meaning. Agreement to pay counsel fees when a will is "defeated" satisfied by decree on stipulation in probate court at variance with terms of will. Ingersoll v. Coram, 127 F. 418.

69. Manure. Keyes & W. Livery Co. v. Freber, 102 Mo. App. 315, 76 S. W. 698.

70. "Rentals" and "royalties." Western Union Tel. Co. v. American Bell Tel. Co. [C. C. A.] 125 F. 342.

71. Western Union Tel. Co. v. American Bell Tel. Co. [C. C. A.] 125 F. 342.

72. Word "heretofore" used for "hereafter" in contract for services. Mulligan v. Smith [Colo.] 76 P. 1063. Provision in trust deed that solicitor's fees for foreclosing it shall be five per cent of the principal "note" held to mean of the principal "notes." Noe v. Whitbeck, 105 Ill. App. 502.

73. Noe v. Whitbeck, 105 Ill. App. 502. Provision in oil lease giving such other rights and privileges as are vested in "mines" under the law, held to mean as are vested in "miners." Swift v. Occidental Min. & Petroleum Co., 141 Cal. 161, 74 P. 700.

74. Ingersoll v. Coram, 127 F. 418.

75. See 1 Curr. L. 657.

76. Kalamazoo Corset Co. v. Simon, 129 F. 144. "San Domingo mahogany." Snoqualmi Realty Co. v. Moynihan [Mo.] 78 S. W. 1014. Of a custom allowing a prospector to burn oil produced on a claim to show rights of

(§ 4) *F. As to place, time and compensation. Place.*—A contract is made at the place where it becomes complete,[78] and is performable in the place where the circumstances, viewed in the light of pertinent statutes, indicate that the parties intended or expected it to be performed.[79]

Time.—Ordinarily, time will not be regarded as of the essence of the contract,[80] unless the parties so stipulate, or the nature of the agreement is such as to indicate that such must have been their intention.[81]

If a contract other than a money demand specifies no time within which performance is to take place, the promisor will ordinarily be allowed a reasonable time, taking into consideration the subject-matter of the agreement.[82] What is a reasonable time depends upon the circumstances of the case, and is to be determined with reference to the means and ability of the party who is required to perform.[83] Such time will not begin to run until some one interested in the matter calls for something to be done respecting it.[84] If a contract is not limited as to its duration by its express terms or by the inherent nature of the agreement itself, the obligations it imposes will be presumed to be perpetual.[85] This rule, of course, does not apply where the relations created are personal ones merely, as those of partnership, mas-

lessee claiming under written lease. Swift v. Occidental Min. & Petroleum Co., 141 Cal. 161, 74 P. 700. Evidence admissible to show custom among brokers to use different form of words when contracting in their own name and when contracting subject to the confirmation of others. McKown v. Gettys, 25 Ky. L. R. 2070, 80 S. W. 169. Architect held not entitled to recover for preparing plans for building not erected, where uniform custom between parties was for him to be paid only in case buildings were erected. In re McCaul's Estate, 206 Pa. 506, 56 A. 26; Appeal of Clarkson, 206 Pa. 506, 56 A. 26. To explain characters, marks and technical terms used in a particular business which are unintelligible to persons not acquainted therewith. Question as to sufficiency of memorandum under statute of frauds. Brauer v. Oceanic Steam Nav. Co., 178 N. Y. 339, 70 N. E. 863.

77. Terms of reference to a "stock sheet" in contract of sale of "job lot" of goods held to exclude custom from consideration, it not being ordinary job-lot sale, and the custom being too uncertain in its terms. Kalamazoo Corset Co. v. Simon, 129 F. 144. As to whom benefit in reduction of duty on coal purchased in foreign market should inure. Withers v. Moore, 140 Cal. 591, 74 P. 159. Under Cal. Code Civ. Proc. § 1870, subd. 12, providing that evidence may be given of usage to explain the true character of a contract, where it is not plain, but that usage is never admissible except as an instrument of interpretation. Id. See Customs and Usages, 1 Curr. L. 830.

78. Promise to repay money advanced by bank. Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 P. 855. A contract made orally or by telephone is made in the county where the offer of one is accepted by the other. In county where party is when he accepts. Id.

79. Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 P. 855. A contract to repay money loaned by a bank is, in the absence of a provision to the contrary, to be performed in the county where the bank is situated. Is agreement to pay at the bank. Id.

80. Time of payment in contract for sale of land. Wheeling Creek Gas, Coal & Coke Co. v. Elder [W. Va.] 46 S. E. 357. Time is not ordinarily of the essence of a contract to repay money borrowed. Assignment of insurance policy as collateral security for note. Manhattan Life Ins. Co. v. Wright [C. C. A.] 126 F. 82.

81. Contract to deliver cotton in future. Swell v. Hogan, 119 Ga. 167, 46 S. E. 67. The time of payment of insurance premiums is. Manhattan Life Ins. Co. v. Wright [C. C. A.] 126 F. 82.

82. Sale of saw logs. Poling v. Condon-Lane Boom & Lumber Co. [W. Va.] 47 S. E. 279. Where contract obligated defendant to procure a lease for plaintiff for two years from a specified date, but no time was specified within which it was to be procured, he was entitled to a reasonable time from such date, and an action brought before such date is prima facie premature. Neilsen v. Mayer, 85 N. Y. S. 1069. Agreement as to settlement of title in land contract. Bryant v. Atlantic Coast Line R. Co., 119 Ga. 607, 46 S. E. 829. Where agreement to sell land to pay debt does not fix time when sale is to be made or price and terms of sale, law will imply that it is to be made within reasonable time, for reasonable price and on reasonable terms. Johnson v. Staley [Ind. App.] 70 N. E. 541. Guaranty that mortgage should be extended. Length of extension not fixed. Leis v. Sinclair, 67 Kan. 748, 74 P. 261.

83. Evidence of conversations of parties admissible to show circumstances under which contract was made and what they thought was reasonable time. Neilsen v. Mayer, 85 N. Y. S. 1069.

84. In action for breach of contract to procure lease, failure to allege demand therefor after date when it was to begin to run is demurrable. Neilsen v. Mayer, 85 N. Y. S. 1069.

85. Contract giving telegraph company right to maintain line on right of way of railroad company held to give rights of property in nature of an easement, and not to be revocable at the will of the railroad company. Western Union Tel. Co. v. Pennsylvania Co. [C. C. A.] 129 F. 849.

ter and servant, and the like,[86] in which case, if there is no time for continuance, either party may in good faith terminate the contract when he sees fit on reasonable notice to the other.[87]

Where no stated price is fixed in the contract, the ordinary or going price will be presumed.[88]

(§ 4) *G. What law governs.*—The lex loci contractus governs in so far as the nature, application and interpretation of a contract are concerned,[89] but the lex fori governs the course of procedure in giving redress thereon.[90] The evidence by which a contract is proved is no part of the contract, and hence is governed by the lex fori.[91] Where a contract is made and is to be performed in the same state, the laws of that state govern the rights of the parties thereunder.[92] A contract made in one state to be performed in another is governed by the laws of the latter as to its validity, obligation and effect.[93]

§ 5. *Modification and merger.*[94]—Parties to a contract may at pleasure, by mutual assent, alter, modify, or rescind it.[95] The general rule is that a contract must be discharged in the same form as that in which it was made,[96] but this does not apply where the contract as modified has been acted upon.[97] Any contract,

86. Western Union Tel. Co. v. Pennsylvania Co. [C. C. A.] 129 F. 849.

87. Evidence insufficient to sustain finding that defendant was bound by a contract in regard to cattle shipping business which he could not change at will. Ceballos v. Munson S. S. Line, 87 N. Y. S. 811.

Particular contracts construed: Provision that shipments were to be made as ordered but all to be made before certain date means that orders shall be given so that they may be filled before such date and not so that shipments may be made at uniform rate. Wells v. Hartford Manilla Co., 76 Conn. 27, 55 A. 599. Under agreement to make good within a year defects in heating apparatus installed by plaintiff, held that he had a year after making contract to make system complete, and comply with terms of agreement. Lehmann v. Warren Webster & Co., 209 Ill. 264, 70 N. E. 600. An agreement that bills may be charged to one **"for the present"** means so long as the contract was not terminated by notice, for an indefinite period, with implied condition that it should not be unreasonable, 15 months not unreasonable. Lewis v. Worrell [Mass.] 71 N. E. 73. Contract of employment held to be for indefinite period and not to authorize plaintiff to lease store in defendant's name, or for a longer period than a month. Harrington v. Brockman Commission Co. [Mo. App.] 81 S. W. 629. Option contract for sale of iron held to have been extended by mutual consent for length of time seller's furnaces were shut down. Farquhar Co. v. New River Mineral Co., 87 App. Div. 329, 84 N. Y. S. 802.

"Immediately" means forthwith. Notice 11 days after default not immediate notice. National Surety Co. v. Long [C. C. A.] 125 F. 887.

88. For carriage of freight. Durand v. Heney, 33 Wash. 38, 73 P. 775.

89. Marvel v. Marvel [Neb.] 97 N. W. 640. Contract of sale of coffee made in New York and storage and delivery to be there, held to be New York contract, and its validity determined by laws of that state. Crossman v. Lurman, 192 U. S. 189, 48 Law. Ed. 401. A contract void at the place where made is void everywhere. Contrary to statute requiring corporation to obtain certificate of compliance with corporation laws. Allegheny Co. v. Allen, 69 N. J. Law, 270, 55 A. 724. Agreement on sale of land in Ohio to a West Virginia corporation not to engage in competing business within 50 miles of place of business of such corporation depends for its validity on laws of West Virginia. Robinson v. Suburban Brick Co. [C. C. A.] 127 F. 804. Contracts made in Nebraska with residents of that state, by a foreign building and loan association through agents located in such state, are Nebraska contracts, and their construction, validity and enforcement are governed by its laws. As to usury. National Mut. Bldg. & Loan Ass'n v. Retzman [Neb.] 96 N. W. 204. Legality of notes, given to secure debts for dealing in options to purchase grain, made in one state and sent by mail to payees in another for purpose of taking up old notes, is determined by the law of the latter state. Corn Exch. Nat. Bank v. Jansen [Neb.] 97 N. W. 814.

90. Marvel v. Marvel [Neb.] 97 N. W. 640.

91. Creation of trust in realty by parol. Marvel v. Marvel [Neb.] 97 N. W. 640.

92. As to whether master waived right to discharge servant. Daniels v. Boston & M. R. Co., 184 Mass. 337, 68 N. E. 337.

93. Place of payment expressed in note when signed. Montana Coal & Coke Co. v. Cincinnati Coal & Coke Co., 69 Ohio St. 351, 69 N. E. 613.

94. See 1 Curr. L. 669.

95. Contract for sale of land by tenants in common. Mylin v. King, 139 Ala. 319, 35 So. 998.

96. Arbogast v. Mylius [W. Va.] 46 S. E. 809.

In Montana, a written contract can be altered only by another contract in writing or an executed oral agreement [Mont. Civ. Code, §§ 2281, 2204]. Easterly v. Jackson [Mont.] 75 P. 357.

97. Contract for sale of land, under seal, orally rescinded and land resold. Arbogast v. Mylius [W. Va.] 46 S. E. 809. Sale of machinery [N. D. Rev. Codes 1899, § 3963]. Reeves & Co. v. Bruening [N. D.] 100 N. W. 241. Unless a contrary intention appears. Agel v. Patch Mfg. Co. [Vt.] 58 A. 792.

written or verbal, not under seal, may be modified or annulled by a subsequent verbal contract, if permissible under the statute of frauds.[98] If the modification is mutual, no further consideration is necessary,[99] but if unilateral, the rule is otherwise.[1]

A contract which is substituted for and supersedes a prior one determines the rights of the parties in regard to the transaction.[2]

Merger.[3]—In the absence of fraud or mistake, a complete written contract is a merger of all antecedent or simultaneous agreements between the parties, and affords conclusive evidence of knowledge and assent on the part of the parties to its contents, terms and conditions.[4] An implied contract is merged in a subsequent express contract in regard to the same subject-matter.[5] A valid contract is not abrogated by an attempt to merge it in a void one.[6] An action may be maintained

Written agreement to submit fire loss to arbitration. Rutter v. Hanover Fire Ins. Co., 138 Ala. 202, 35 So. 33. A provision in a building contract requiring the contractor to furnish the hardware was modified by the owners purchasing it in the presence and with the consent of the contractor, and requesting the seller to charge it to him. Cline v. Shell, 43 Or. 372, 73 P. 12.

98. To install heating plant. Putnam Foundry & Mach. Co. v. Canfield [R. I.] 56 A. 1033. Contract for sale of land consisting of letters modified by parol agreement as to price, etc. David Bradley v. Bower [Neb.] 99 N. W. 490. Evidence held to show parol modification of contract of employment as land agent. Youngberg v. Lamberton [Minn.] 97 N. W. 571. Employment as salesman. Instructions approved. Strahl v. Western Grocer Co. [Neb.] 98 N. W. 1043; Harrington v. Brockman Commission Co. [Mo. App.] 81 S. W. 629.

99. Strahl v. Western Grocer Co. [Neb.] 98 N. W. 1043; Mylin v. King, 139 Ala. 319, 35 So. 998.

1. Harrington v. Brockman Commission Co. [Mo. App.] 81 S. W. 629. Subsequent agreements, without consideration, will be held of no avail. First Nat. Bank v. Wells, 98 Mo. 573, 73 S. W. 293. There being an encroachment on property deeded, the grantor deposited a certain sum for grantee's benefit, to be returned upon delivery of a release of the land so affected before a certain date. Held, that an extension of time, made after said date, without consideration, did not authorize recovery of such deposit upon tender of a release after the date originally specified. Bronner v. Hirsch, 84 N. Y. S. 139. Where one undertakes to perform service or labor for another for a given sum, a subsequent agreement to pay a larger sum must be based on a new consideration in order to be enforceable. Building contract. Willingham Sash & Door Co. v. Drew, 117 Ga. 850, 45 S. E. 237. Where defendant, under an oral contract, hired plaintiff to work for him for a specified time at a certain rate per week, a subsequent written agreement giving defendant the right to discharge him at the end of any week was without consideration and did not affect the oral one. Fanger v. Caspary, 87 App. Div. 417, 84 N. Y. S. 410.

2. Spier v. Hyde, 92 App. Div. 467, 87 N. Y. S. 285. Plaintiff not entitled to recover on written contract for broker's commission where it appears that new oral contract was substituted therefor. Instructions approved. Kildman v. Garrison, 122 Iowa, 215, 97 N. W. 1078. Endorsement on back of contract held to constitute new agreement as to payments under contract to secure purchaser for insurance company. Hart v. Garrett Co., 87 N. Y. S. 574.

3. See 1 Curr. L. 671.

4. Harrington v. Brockman Commission Co. [Mo. App.] 81 S. W. 629. Cannot declare on oral agreement in same terms as void written one and secure admission of latter in evidence as admission of facts therein contained. Owens v. Wilkinson, 20 App. D. C. 51. A verbal agreement by the agent of a railroad company to furnish cars for shipment of cattle is not merged in a subsequent written contract limiting the authority of the agent to make such a contract. Gulf, etc., R. Co. v. Combes [Tex. Civ. App.] 80 S. W. 1045. Oral agreement for purchase of lot and terms of receipt given for first payment held merged in subsequent written contract adjusting all matters in dispute between them. Hutchinson v. Coonley, 209 Ill. 437, 70 N. E. 686. A verbal contract is superseded by a subsequent written contract relating to the same subject-matter. Contract for sale of land [Mont. Civ. Code, §§ 2186]. Easterly v. Jackson [Mont.] 75 P. 357. One who claims that a third contract has never become operative for failure to comply with conditions precedent cannot object that an implied and a written contract, on which plaintiffs' first and second causes of action were based, were merged in such third contract. For installation of hot air plant. Stagg v. St. Jean [Mont.] 74 P. 740. Understanding that one indorser on note should save others harmless held to be superseded by giving a new note which they were notified would render them all makers. Tinker v. Catlin, 205 Ill. 108, 68 N. E. 773.

5. Contract to sort and deliver logs with reasonable dispatch as they came down the river, implied from defendant's operation of a boom, merged in subsequent express contract to sort and saw plaintiff's logs, delivered in jam above the boom, with reasonable dispatch. Riedinger v. Diamond Match Co. [C. C. A.] 123 F. 244.

6. Employment of attorney under contract tending to prevent reconciliation between husband and wife. McCurdy v. Dillon [Mich.] 98 N. W. 746. Verbal contract not affected by attempt to merge it in void written one. Word v. Kennon [Tex. Civ. App.] 75 S. W. 365.

against a railroad company on a verbal contract of shipment, under certain circumstances, though a written contract is thereafter entered into.[7]

§ 6. *Discharge by performance or breach. A. General rules.*[8]—A material breach of any of the terms of an entire contract justifies the other party in refusing to be thereafter bound by it,[9] and entitles him to bring an action for damages therefor.[10] The only test of the right to recover for the breach of a contract is the existence of such breach.[11] The immateriality of a warranty or condition precedent, and the innocuousness of a failure to perform it, are no defense,[12] and the care or negligence of the obligor in his endeavor to perform is immaterial.[13]

If one party to a contract fails to make a payment as provided for therein, the other party may continue performance under the contract and sue thereunder for the fixed value of his services, or he may treat the contract as at an end and sue on a quantum meruit.[14]

A party is entitled to stop further performance of an executory contract, and thereby limit his liability for the remaining period for which it is to run to damages for its breach.[15]

Repudiation.—If one party repudiates the contract, either before or during performance, the other party is thereby excused from further performance on his part.[16] He may either elect to treat the contract as still in force and pursue his

7. Instructions approved. Gulf, etc., R. Co. v. McCord [Tex. Civ. App.] 81 S. W. 1032. See, also, Evidence, § 10 E, post.

8. See 1 Curr. L. 671.

9. Employment. Ornstein v. Yahr & L. Drug Co., 119 Wis. 429, 96 N. W. 826. The refusal to furnish an advertisement is a breach of a contract with publishers to insert one. Haynes & Co. v. Nye [Mass.] 70 N. E. 932. Notification to discontinue advertising constitutes a breach of contract. Ward v. American Health Food Co., 119 Wis. 12, 96 N. W. 388. Contract by lessee of opera house with manager held breached by sale of the lease, and not by verbal repudiation of contract or return to accommodation indorser of note given by manager. Markowitz v. Greenwall Theatrical Circuit Co. [Tex. Civ. App.] 75 S. W. 74, 317. A provision that defendant will not use or sell any construction similar to that which it was given permission to manufacture, and will construct such construction "with good faith and the utmost diligence" is violated by its inducing a party to use a different construction for the sole purpose of saving royalties which it would otherwise have to pay to plaintiff. Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 S. W. 1008.

10. Failure to furnish casing, pipe, and material for pump for well which plaintiff was to drill until several weeks after its completion, held breach. Olson v. Viroqua [Wis.] 99 N. W. 326. Refusal to take instruments, though had contracted to do so for definite term. Parker v. McKannon Bros. & Co. [Vt.] 56 A. 536. Failure to notify defendant that plaintiff could not furnish required number of convicts, as provided for by contract, held material variation therefrom. Griffith v. Newell [S. C.] 48 S. E. 259. The mere clerical work of copying an abstract which one declines to certify or extend is not a breach of a contract not to engage in the business of abstractor of titles, nor is the obtaining of abstracts for his personal use from plaintiff's competitor at reduced rates. Linn County Abstract Co. v. Beechley [Iowa] 99 N. W. 702. The fact that plaintiffs returned unfinished garments to defendants held not to constitute a breach of the contract to manufacture them, it not appearing that they had agreed to make any definite number, or that it would cost defendants any more to manufacture them than the price which they had agreed to pay plaintiffs. Goldberg v. Zucker [Sup.] 88 N. Y. S. 410. Allowing insurance company to defend case held breach of contract retaining attorney. Watson v. Columbia Min. Co., 118 Ga. 603, 45 S. E. 460.

11, 12. National Surety Co. v. Long [C. C. A.] 125 F. 887.

13. Giving notice to surety of failure of contractor to fulfill contract. National Surety Co. v. Long [C. C. A.] 125 F. 887.

14. Contract to haul ties. Cook v. Gallatin R. Co., 28 Mont. 509, 73 P. 131. A failure of one party to pay a monthly instalment due thereunder, in the absence of facts showing an abandonment or repudiation of the contract on his part, does not authorize the other party to rescind and recover prospective profits, but only to recover for what he has actually delivered. Hudson River Power Transmission Co. v. United Traction Co., 43 Misc. 205, 88 N. Y. S. 448. Failure to make instalment of payment on time gives right to rescind. Contractors & Builders' Supply Co. v. Alta Portland C. Co., 4 Ohio C. C. (N. S.) 225.

15. Contract for advertising in street cars. Ward v. American Health Food Co., 119 Wis. 12, 96 N. W. 388. Sale of buttons. McCall Co. v. Jennings, 26 Utah, 459, 73 P. 639; Hixson Map Co. v. Nebraska Post Co. [Neb.] 98 N. W. 872. Contract giving plaintiff sole right to introduce asphalt block pavement. Dunham v. Hastings Pavement Co., 88 N. Y. S. 835.

16. Poling v. Condon-Lane Boom & Lumber Co. [W. Va.] 47 S. E. 279. Evidence held to show that plaintiff abandoned contract for sale to him of timber, and refused to

remedies thereunder, or to consider it as at an end and sue for damages for its breach.[17] But there must be an absolute and unequivocal refusal to perform, and the other party must adopt the renunciation by so acting upon it as to declare in effect that he too treats it as at an end.[18] If the innocent party refuses to accept the renunciation and continues to insist on performance, the contract remains in existence for the benefit and at the risk of both parties.[19]

Where one party to a contract makes further performance impossible, the other party is thereby discharged and may sue for damages for a breach.[20] He cannot thereafter be compelled to resume performance by notice to him to do so.[21] He who commits the first substantial breach of a contract,[22] or who by his own acts disables himself from performing it, cannot recover for a breach by the other party,[23] nor can one take advantage of a breach induced by his own conduct.[24] Thus one who prevents execution within the time[25] or in manner agreed upon cannot avail himself of such nonperformance for the purpose of avoiding it.[26]

perform on his part. Gross v. Lewis [W. Va.] 46 S. E. 174.

17. In case of purchaser of personal property to perform, vendor has election, but if vendor fails, purchaser has no other remedy than to sue for breach. Pakas v. Hollingshead, 42 Misc. 287, 86 N. Y. S. 560. May sue at once or await the event and accept performance if the first party repents and tenders it. Need not tender amount thereafter becoming due. Markowitz v. Greenwall Theatrical Circuit Co. [Tex. Civ. App.] 75 S. W. 74, 317. Material modification of benefit certificate in beneficial association by reducing amount of benefit releases from future payment of dues and authorizes rescission and suit for damages. Authorities reviewed. O'Neill v. Supreme Council A. L. H. [N. J. Law] 57 A. 463. An order to a railroad contractor to stop work but to remain there for a time, which is not followed by an order to resume work, justifies contractor in treating contract as rescinded. Dobbling v. York Spring R. Co., 207 Pa. 123, 56 A. 349.

18. Facts held not to show anticipatory breach. Wells v. Hartford Manilla Co., 76 Conn. 27, 55 A. 599. Test is whether his acts and conduct evince an intention no longer to be bound. Failure of purchaser to allow true weight does not authorize rescission. Hartnett v. Baker [Del. Super.] 56 A. 672. Improperly notifying the other party who was not in default that the contract is at an end is a breach. Emack v. Hughes, 74 Vt. 382, 52 A. 1061. In order that a mere notice of intention not to perform may constitute a breach, the other party must act upon it. Letter held not a repudiation or renunciation of contract for sale of saw logs. Poling v. Condon-Lane Boom & Lumber Co. [W. Va.] 47 S. E. 279. A refusal to perform before the time of performance arrives does not by itself amount to a breach, unless the other party adopts such renunciation. Wells v. Hartford Manilla Co., 76 Conn. 27, 55 A. 599. A mere declaration by a party to a contract, before performance is due by either party, that he does not intend to carry it out, does not constitute a breach so as to at once authorize the other to maintain an action therefor, since he may at any time before performance becomes due recant and comply with his agreement (Hixson Map Co. v. Nebraska Post Co. [Neb.] 98 N. W. 872); but if he fails to withdraw his declaration before the time comes for performance, it will excuse the default of the other party (Id.). Letter held not to be such absolute repudiation of contract as to justify discharge of employe. Daniels v. Boston & M. R. Co., 184 Mass. 337, 68 N. E. 337.

19. Poling v. Condon-Lane Lumber Co. [W. Va.] 47 S. E. 279.

20. Work on building contract wrongfully stopped by owner. Cochran v. Yoho, 34 Wash. 238, 75 P. 815. Agreement to pay attorney contingent fee for his services and refusal to proceed after disagreement of jury. Value of services question of fact. Yuells v. Hyman, 84 N. Y. S. 460.

21. Cochran v. Yoho, 34 Wash. 238, 75 P. 815. An employe who has been discharged and has acquiesced therein is not obliged to return to work at the request of the employer. Youngberg v. Lamberton [Minn.] 97 N. W. 571.

22. National Surety Co. v. Long [C. C. A.] 125 F. 887.

23. Closing of plaintiff's restaurant due to breach of contract by defendant held not to relieve defendant from liability for damage. Marr v. Burlington, C. R. & N. R. Co., 121 Iowa, 117, 96 N. W. 716. A contract by which a party agrees to sell "his rights" under certain patents, but which recites that he has purchased the right to manufacture, use, and vend the patented article within certain territory, binds him to transfer substantially the rights recited, and he cannot enforce such contract unless he possessed such rights, and was able to assign them at the time fixed for performance. Kent v. Addicks [C. C. A.] 126 F. 112.

24. Building contract. Carter & Co. v. Kaufman [S. C.] 45 S. E. 1017. Cannot insist on performance of condition precedent which he has prevented by his own act, or departure from terms of contract. Antonelle v. Kennedy & S. Lumber Co., 140 Cal. 309, 73 P. 966.

25. Installation of heating plant. Lehmann v. Warren Webster & Co., 209 Ill. 264, 70 N. E. 600. Plaintiff delayed in performance of building contract by others working for defendant. New York Metal Ceiling Co. v. Raub, 86 N. Y. S. 249.

26. Differences in size of cards due to die furnished by defendant. Miller v. Blanchard Co., 84 N. Y. S. 585. An injunction restraining one from cutting timber

One who refuses performance of a contract cannot be awarded relief to which he would not have been entitled had he performed.[27]

One injured by breach of a divisible contract may adhere to one part and treat the other as rescinded, or maintain an action to rescind.[28] A contract is severable where it consists of separate items having no relation to each other and each supported by a separate consideration.[29]

A party cannot complain of a breach which in no way affects his rights.[30]

Conditions.[31]—An obligation is conditional when the rights or duties of any party thereto depend upon the occurrence of an uncertain event.[32] Conditions concurrent are those which are mutually dependent, and are to be performed at the same time.[33]

If the parties sufficiently express an intention to require literal compliance with the provisions of a contract, such provisions will be regarded as conditions precedent,[34] the question being one of intent, to be gathered from the whole contract.[35] Before a party to a contract can require another party to perform any act under it,[36] or recover for its breach,[37] he must fulfill all conditions precedent therein im-

which he had no right to cut under his contract does not excuse him for ceasing work. Cessation held not an abandonment authorizing other party to cut trees sold under contract. Leonard v. Holland, 25 Ky. L. R. 2009, 79 S. W. 227.

27. Owner of patent who agrees to assign it, but does not do so, cannot recover from intended assignee for its infringement. Schmitt v. Nelson Valve Co. [C. C. A.] 125 F. 754.

28. Weil v. Stone [Ind. App.] 69 N. E. 698.

29. Sale of skins. Weil v. Stone [Ind. App.] 69 N. E. 698. When the part to be performed by one party consists of several distinct and separate items and the price to be paid by the other is apportioned to each item, or is left to be implied by law. Bill of sale and supplemental contract disposing of good will, etc., held distinct contracts. Kinney v. McBride & Co., 88 App. Div. 92, 84 N. Y. S. 958. Where the consideration for an oil and gas lease was a certain fixed rent and the right to use gas from the pipe lines of defendant, held that the consideration was an entirety, and plaintiffs could not recover possession of the premises for failure to pay rent while they continued to use gas. King v. Morristown Fuel & Light Co., 31 Ind. App. 476, 68 N. E. 310.

30. Under an agreement that proceeds of a claim shall be equally divided after deducting "costs, fees and charges," one of the parties who receives his share cannot complain because the payment of the balance of an attorney's fee was not divided equally between the other two. Adams v. Crown Coal & Tow Co., 198 Ill. 445, 65 N. E. 97.

31. See 1 Curr. L. 671.

32. Mont. Civ. Code, § 1950. Porter v. Plymouth Gold Min. Co. [Mont.] 74 P. 938.

33. Mont. Civ. Code, § 1953. Porter v. Plymouth Gold Min. Co. [Mont.] 74 P. 938.

34. Withers v. Moore, 140 Cal. 591, 74 P. 159.

35. Antonelle v. Kennedy & S. Lumber Co., 140 Cal. 309, 73 P. 966. Provision that balance of money due on a claim assigned by a firm to a creditor, above the amount owing to such creditor, should be paid to wife of one of the partners, in consideration for her advancing a certain sum to apply on firm debt, provided she obtained her husband's consent thereto. Held, such consent was not condition precedent. Id. Making deposit held condition precedent to right of lessee to exercise option to purchase. Frank v. Stratford-Handcock [Wyo.] 77 P. 134.

36. A provision in an escrow agreement that stock shall be delivered, when C.'s ownership of a part of a mine has been finally determined, creates a condition precedent, which must be shown to have been fulfilled before delivery can be legally demanded. Clarke v. Eureka County Bank, 123 F. 922. Vendee in possession of lot under contract of sale held not obliged to make or keep good a tender until compliance with condition precedent on part of vendors to furnish abstract. Hutchinson v. Coonley, 209 Ill. 437, 70 N. E. 686. Payment of one-half of purchase price of certain lot within a year held condition precedent to plaintiff's right to a half interest therein under contract, whether such amount was demanded from him or not. Walker v. Sawyer's Estate [Ind. App.] 70 N. E. 540. Performance of guaranty to sell a certain amount of goods within a year held to be a condition precedent to the right of agent to recover anything for services under his contract of employment, in the absence of a showing that he was prevented from doing so by failure of other party to furnish goods as agreed. Compania Industrial Mexicana v. Stillwell-Bierce & Smithwaile Co. [Tex. Civ. App.] 81 S. W. 538. Must be strictly complied with. Frank v. Stratford-Handcock [Wyo.] 77 P. 134.

37. A conditional promise to pay a debt barred by the statute of limitations, though accompanied by an express acknowledgment and a payment of account, is not sufficient to authorize recovery without proof that the condition has been fulfilled. Promise to pay out of money coming to debtor from his father's estate held conditional. Tridell v. Munhall, 124 F. 802. Agreement to honor draft on condition that two cars of cattle be consigned to drawee. First State Bank v. Thuet, 88 Minn. 364, 93 N. W. 1. Provision in agreement to pay for advertising when plaintiff sent defendant a

posed upon himself,[38] and must be able and offer to fulfill all conditions concurrent so imposed upon him, on like fulfillment by the other party.[39]

Demand and tender.[40] *Demand.*—Where the contract provides for the payment of a definite sum of money, either at a certain time or generally, no demand is necessary.[41] The commencement of a suit is equivalent to a demand for money due under a contract.[42] A demand for performance is not necessary where defendant has renounced his contract and notified plaintiff of his refusal to perform.[43]

Tender.[44]—An offer to perform before the time fixed by the contract for performance is insufficient.[45] If a party to a contract is excused from performance, he is excused from notifying the other party that he is ready to perform,[46] and a formal tender of performance is not necessary where it appears that if made it would have been futile.[47] One who tenders performance on the day it is due, which is refused, is thereby released from further liability.[48]

(§ 6) *B. Acceptance and waiver.*—Waiver is an intentional relinquishment of a known right.[49] Provisions of a contract may be waived by the party for whose

customer, that plaintiff was to have credit when the bill of such customer was paid held condition precedent to defendant's liability. Nassau v. Guttridge [N. J. Law] 56 A. 137. Where delivery of certain mushrooms at defendant's request was condition precedent to an obligation to pay a certain sum under a compromise agreement, plaintiff could not recover until he had delivered them. Zucca v. Kuhne, 84 N. Y. S. 181. Promise to pay plaintiff a percentage on sale of insurance company "as soon as we receive compensation or commission." Hart v. Garrett Co., 87 N. Y. S. 574. Under an agreement to pay a certain sum for procuring a bondsman for the faithful performance of a building loan contract by defendant, to be paid by defendant in instalments at his convenience, the first not to be due before the tearing down of the old building and the last not before the completion of the new one, the happening of such conditions must be proved before recovery can be had of the respective instalments. Huchberger v. Barsody, 88 N. Y. S. 978. Failure to give notice of intent to furnish less quantity of tomatoes than that called for by contract, as provided for therein, held to prevent either party from taking advantage of provision for liquidated damages. Newell v. New Holstein Canning Co., 119 Wis. 635, 97 N. W. 487. Where the contract provides for an architect's certificate, proof of the execution thereof or its refusal is a necessary prerequisite to contractor's right to recover. Evidence of notice of election of owner to complete building, where not pleaded, inadmissible to excuse failure. Beck v. New York Bldg. Loan Banking Co., 85 N. Y. S. 323. Where architect is one of the owners, a demand and refusal of payment is equivalent to a demand and refusal of architect's certificate. Abramson-Engesser Co. v. McCafferty, 86 N. Y. S. 185. See Building and Construction Contracts, § 9, 1 Curr. L. 381.

38. This is particularly the case where the contract is executory. Provision in contract for sale of coal that it should be shipped under particular charter party, held condition precedent to liability of purchaser. Withers v. Moore, 140 Cal. 591, 74 P. 159.

39. Duty to redeliver stock to corporation and payment therefor by it held mutually dependent and concurrent conditions to be performed simultaneously [Mont. Civ. Code, § 1955]. Porter v. Plymouth Gold Min. Co. [Mont.] 74 P. 938.

40. See 1 Curr. L. 671.

41. Agreement to pay certain sum in cash annually. Pleading need not allege demand. Gall v. Gall [Wis.] 97 N. W. 938. An action may be maintained on a contract whereby one binds himself to pay the notes of another without a demand for payment of the notes. Baltes Land, Stone & Oil Co. v. Sutton [Ind. App.] 69 N. E. 179.

42. For services in securing patent to government land. Mulligan v. Smith [Colo.] 76 P. 1063. Commencement of action on contract for price of timber held sufficient demand for payment. Hopkins v. International Lumber Co., 33 Wash. 181, 73 P. 1113.

43. Action to annul deed given in consideration of future support. Complaint insufficient for failure to allege demand for possession or re-entry for breach of condition. Tomlinson v. Tomlinson [Ind.] 70 N. E. 881.

44. See 1 Curr. L. 671.

45. Porter v. Plymouth Gold Min. Co. [Mont.] 74 P. 938.

46. Facts held to justify finding that defendant left the state to evade a tender of performance of a construction loan contract, so as to excuse plaintiff from proving an offer to perform as a condition precedent to his right to recover for its breach. Fotternick v. Watson, 184 Mass. 187, 68 N. E. 215.

47. Where other party formally announced that he would not receive money. Lapham v. Bossemeyer Bros. [Neb.] 98 N. W. 699. Not necessary to cut and haul sugar cane where defendant informed plaintiff that contract was at an end. Avery v. Segura Sugar Co., 111 La. 891, 35 So. 967. Tender of deed where other party states he will not pay. Sharp v. Bowie, 142 Cal. 462, 76 P. 62. Where one party wholly repudiates the contract, the other may maintain an action for its breach without thereafter giving notice that he is ready to perform, though the time for performance on his part has not gone by. Fotternick v. Watson, 184 Mass. 187, 68 N. E. 215.

48. Watkins v. Youll [Neb.] 96 N. W. 1042.

49. Instruction approved. Griffith v. Newell [S. C.] 48 S. E. 259.

benefit they were made.[50] An absolute and unconditional acceptance waives any deficiencies in the manner or time of performance,[51] unless made without knowledge of the facts.[52] A mere breach of contract or failure to comply with the provisions therein upon which certain advantages are made to depend should not be deemed a waiver of those parts of the agreement which would otherwise condemn the party guilty of the breach to damages, or the party failing to perform to lose the advantages.[53] The fact that one pays for what he receives under a contract, while demanding his full rights thereunder, does not constitute a waiver of such rights,[54] nor is a mere failure to enforce a forfeiture for conditions broken a waiver of performance of conditions on which a renewal depends.[55]

(§ 6) *C. Excuses for breach.*—If a party charges himself with an obligation possible to be performed, he must make good unless performance is rendered impossible by the act of God, the law, or the other party.[56] An agreement to do some-

50. Notice of intention to exercise option to renew lease. Wood v. Edison Elec. Illuminating Co., 184 Mass. 523, 69 N. E. 364. Acquiescence in use by lessees of oil as fuel is at least a waiver of right to declare forfeiture therefor, where lease is ambiguous. Swift v. Occidental Min. & Petroleum Co., 141 Cal. 161, 74 P. 700. Acceptance of annual rental held waiver of right to forfeit oil lease for failure to prospect within reasonable time. Consumers' Gas Trust Co. v. Littler [Ind.] 70 N. E. 363. Permitting a contractor to perform, after the time fixed for performance has expired, is a waiver of the right to plead such delay as a defense to an action for the agreed price, but not of the right to counterclaim for any actual damage suffered thereby, as loss of rent for failure to install elevator. Crocker-Wheeler Co. v. Varick Realty Co., 88 N. Y. S. 412. Payments without architects' certificate held waiver of requirement of certificate before each payment. Abramson-Engesser Co. v. McCafferty, 86 N. Y. S. 185. Provision in agreement between press companies in regard to news service, requiring written notice of termination of contract, held to have been waived where knowledge brought home to other party, who acquiesced therein. Mason v. United Press, 88 N. Y. S. 99. A contract providing for termination only by written notice may be terminated by verbal notice when the obligor and obligee are corporations under one management, and a resolution is passed by one directing its secretary, who is also secretary of the other, to terminate the contract. Id. Defendant held to have waived condition that it would pay plaintiff's expenses to city, if he would negotiate upon basis of royalty for books sold, by urging trip after plaintiff informed it that he would only negotiate on basis of a cash payment. De Brumoff v. Werner Co., 88 N. Y. S. 361. Failure to cancel contract to convey land promptly on discovery of a default thereunder is a waiver of the right to do so. Timmins v. Russell [N. D.] 99 N. W. 48. A provision in a fire insurance policy that the proofs of loss must be filed within 60 days is not waived on the part of the company where the adjuster told the insured to get his duplicate bills of account books burned ready and he would come and inspect them. He did not return within 60 days. Billings v. National Ins. Co., 2 Ohio N. P. (N. S.) 21.

51. Bailing and casing of well waived by paying plaintiffs a sum on account and selling them the casing intended to be used, with full knowledge of the facts. Texas Gulf Coast Land & Oil Co. v. Galveston-Chicago Well Boring & Drilling Co. [Tex. Civ. App.] 77 S. W. 974. Time limit for acceptance of contract for sale of land held waived by conduct of vendor. Gough v. Loomis, 123 Iowa, 642, 99 N. W. 295. Deficiencies in quantity of goods and time of delivery waived by acceptance. Heidelbaugh v. Cranston [Del. Super.] 56 A. 367. Acceptance of cards after a reasonable opportunity for inspection. Miller v. Blanchard Co., 84 N. Y. S. 585. Objection that timber estimates not furnished by engineer in accordance with contract waived by defendants making payments based on estimates furnished by themselves. Hopkins v. International Lumber Co., 33 Wash. 181, 73 P. 1113. Plaintiff held not to have waived rights under cane planter's contract. Avery v. Segura Sugar Co., 111 La. 891, 35 So. 967.

52. Offerer held not to have waived variations in acceptance which were not known to him. Metropolitan Coal Co. v. Boutell Transportation & Towing Co. [Mass.] 70 N. E. 421. The retention of money paid under an illegal contract does not constitute a ratification, where it is not known whether principal or agent who acted for both parties in contract for sale of land furnished it. McClure v. Ullman, 102 Mo. App. 697, 77 S. W. 325. Mere fact that a party receives work done under a contract at a time and under circumstances when he was induced to believe that the other party had fully complied therewith does not preclude him from defending an action for the contract price on the ground of defective performance subsequently discovered, even when he has given a note for such price. Painting wagon. Ketterer Mfg. Co. v. Baltic Brew. Co., 22 Pa. Super. Ct. 210. Payments without knowledge of facts held not a waiver of right, under terms of contract for exchange of lands, to recover money paid on notes. Stickney v. Hughes [Wyo.] 75 P. 945.

53. Conditions prerequisite to allowance for extra work under building contract. Davis v. La Crosse Hospital Ass'n [Wis.] 99 N. W. 351.

54. Contract for hiring of convicts. Griffith v. Newell [S. C.] 48 S. E. 259.

55. Failure to observe covenants of oil lease. Swift v. Occidental Min. & Petroleum Co., 141 Cal. 161, 74 P. 700.

56. Dixon v. Breon, 22 Pa. Super. Ct. 340

thing which both parties know at the time to be physically impossible cannot be enforced,[57] but in order to come within this rule, the contract must be obviously impossible on its face from its very nature, the mere fact that it is improbable, or that it is in fact out of the power of the obligor, being insufficient.[58]

When parties contract for the doing of some act with reference to an existing thing, the continued existence of which is essential thereto, there is an implied condition that such continued existence shall be a condition of the contract duty,[59] and where the subject-matter of the contract is destroyed without fault on either side, both parties are excused from further performance, and neither has a cause of action against the other, the law leaving the parties where it finds them and allowing each to suffer his own loss.[60] He who contracts to perform an entire work at an entire price can recover no compensation without completing it, though it becomes unexpectedly difficult or even impossible, without the fault of the other party.[61]

If a contract, possible and legal at the time it was made, becomes impossible by act of God, or illegal by an ordinance of the state, both parties are excused from further performance.[62] If a legal prohibition is temporary only, the parties are not excused from performance after such prohibition is removed.[63] Where performance of a contract by a corporation is prevented by its dissolution at the instance of the state or power creating it, it may annul its contracts and in so doing does not commit a breach thereof.[64]

The words of a mere general covenant will not be construed as an undertaking to answer for a subsequent event happening without the fault of the covenantor, which renders performance impossible, either owing to the act of God,[65] the act of the law,[66] or the destruction of the subject-matter of the contract by a vis major or otherwise.[67] The rule applies where the event is of such a character that it cannot be reasonably supposed to have been contemplated by the parties when the contract was made, the question being one of intention.[68]

(§ 6) *D. Sufficiency of performance.*[69]—In general, parties are bound to car-

57. Reid v. Alaska Packing Ass'n, 43 Or. 429, 73 P. 337.

58. Contract to sell salmon packed in Alaska, to be "exactly like Puget Sound fancy sockeye," is not void as stipulating for the impossible, though such fish are not, as far as known, found in Alaska. Reid v. Alaska Packing Ass'n, 43 Or. 429, 73 P. 337; Dixon v. Breon, 22 Pa. Super. Ct. 340. Provision in contract for furnishing tomatoes, excusing seller from performing in case he was prevented by circumstances beyond his control, held not to excuse failure due to destruction of crop by frost, no particular tomatoes being mentioned, and seller having right to purchase them in open market. Newell v. New Holstein Canning Co., 119 Wis. 635, 97 N. W. 487.

59. Fact that owner agreed to furnish materials and foundation for building does not bring contract to build barn within this rule. Vogt v. Hecker, 118 Wis. 306, 95 N. W. 90.

60. Krause v. Board of Trustees of School Town [Ind.] 70 N. E. 264. Where a contract is entered into of a continuing character or to be performed at a future time, dependent upon the continued existence of a particular person or thing, or the continuing ability of the obligor to perform, subsequent death, destruction or disability will excuse such performance. Agreement to cut and deliver certain particularly described timber and manufacture it into lumber, held discharged by destruction of timber, after it was cut, by forest fire. Dixon v. Breon, 22 Pa. Super. Ct. 340.

61. Building, to be constructed out of materials furnished by owner, destroyed by storm when partially completed. Vogt v. Hecker, 118 Wis. 306, 95 N. W. 90.

62. Employment as teacher. School closed by board of health on account of smallpox. School Dist. No. 16 v. Howard [Neb.] 98 N. W. 666. Government contract rendered illegal by election of contractor to United States senate. United States v. Dietrich, 126 F. 671.

63. School Dist. No. 16 v. Howard [Neb.] 98 N. W. 666.

64. Griffith v. Blackwater Boom & Lumber Co. [W. Va.] 48 S. E. 442. See, also, Corporations, § 12, 1 Curr. L. 738.

65, 66. Krause v. Board of Trustees of School Town [Ind.] 70 N. E. 264.

67. Excused from performance of contract to build annex to school building where latter was destroyed by fire due to lightning. Krause v. Board of Trustees of School Town [Ind.] 70 N. E. 264.

68. Krause v. Board of Trustees of School Town [Ind.] 70 N. E. 264.

69. See 1 Curr. L. 675.

ry out the contract strictly in accordance with its terms,[70] the question of what those terms are being one of interpretation.[71] If a party fails to perform his contract in full he may nevertheless recover compensation for the part performed, less the damages occasioned by his failure.[72] He who makes an entire contract can recover no pay unless he performs it entirely and according to its terms.[73] This rule does not apply in the case of laborers who contract to perform personal services and, without fault of either party, fail of complete performance,[74] in building contracts where the contractor, acting in good faith, fails to entirely satisfy the contract, but the structure is so substantially in compliance therewith that it fully accomplishes the purpose of that contracted for, and the other party voluntarily accepts the benefits thereof, or where the failure is mere inconsiderable incompleteness, and the expense of completion is easy of ascertainment,[75] or where the contractor supplies an article different from and inferior to that promised, and the recipient, having full opportunity to reject without loss, accepts and retains it.[76] Use from necessity, where the party cannot forego it without at the same time giving up his own premises, does not constitute acceptance.[77] When a contract has been performed in a substantial part, and the other party has voluntarily accepted the benefit of such part performance, knowing that the contract was not being fully performed, he may thereby be precluded from relying on the performance of the balance as a condition precedent to his liability to pay for what he has received, and may be compelled to rely on his claim for damages for defective performance.[78]

In order to recover for substantial performance, plaintiff must show that the defects and omissions are unsubstantial, and unintentional, and also the amount needed to make them good.[79] He cannot willfully disregard the provisions of the contract and then recover the contract price, less the amount it would have cost him to do the work properly.[80]

70. Ketterer Mfg. Co. v. Baltic Brew. Co., 22 Pa. Super. Ct. 210. No effectual tender of articles under a contract can be made unless they comply in all material respects with the contract, both as to the articles themselves and the time when the tender is made. Tender of books with monogram, not provided for in contract, ineffectual. Barrie v. King, 105 Ill. App. 426. Placing monogram on books held material departure from contract. Id. Acts of grantors in attempting to obtain extension of mortgage debt assumed by grantees held not a compliance with their agreement guarantying an extension. Leis v. Sinclair, 67 Kan. 748, 74 P. 261.

71. See ante, § 4.

72. Sale of pipe. Pittsburgh Plate Glass Co. v. Kerlin Bros. Co. [C. C. A.] 122 F. 414.

73. Manitowoc Steam Boiler Works v. Manitowoc Glue Co. [Wis.] 97 N. W. 515. Where the agreement is an entire one, a party is not bound to accept part performance with the understanding that the other party does not intend to fully perform. Sale of tomatoes. Newell v. New Holstein Canning Co., 119 Wis. 635, 97 N. W. 487.

74. Manitowoc Steam Boiler Works v. Manitowoc Glue Co. [Wis.] 97 N. W. 515.

75. Boiler held not substantial compliance. Manitowoc Steam Boiler Works v. Manitowoc Glue Co. [Wis.] 97 N. W. 515. Unless work under a building contract is completed without any omission, so substantial in its character as to call for an allowance of damages, he is entitled to nothing upon the ground of substantial compliance, except in subordination to a provision of the contract permitting the owner to complete the work at the contractor's expense. Rowe v. Gerry, 86 App. Div. 349, 83 N. Y. S. 740. See Building and Construction Contracts, § 2, 1 Curr. L. 377.

76. Evidence insufficient to show acceptance of steam boiler. Manitowoc Steam Boiler Works v. Manitowoc Glue Co. [Wis.] 97 N. W. 515. Where contract of sale apportionable may sue in assumpsit for goods accepted, and other party may set off damages resulting from breach. Briggs v. Morgan [Mo. App.] 78 S. W. 295.

77. Boiler connected with factory. Manitowoc Steam Boiler Works v. Manitowoc Glue Co. [Wis.] 97 N. W. 515. See Waiver, § 7 B, ante.

78. Receipt of insufficient water supply by city without terminating contract and taking possession of plant as authorized by contract. Joplin Waterworks Co. v. Joplin, 177 Mo. 496, 76 S. W. 960.

79. Norton v. U. S. Wood Preserving Co., 89 App. Div. 237, 85 N. Y. S. 886. Substantial performance where 1% of cards had rough edges and were somewhat different in size. Miller v. Blanchard Co., 84 N. Y. S. 585.

80. Paving contract. Norton v. United States Wood Preserving Co., 89 App. Div. 237, 85 N. Y. S. 886. See Building and Construction Contracts, § 2, 1 Curr. L. 377.

Provisions in contracts for the rendition of services, the manufacture of articles and the construction or improvement of works that they shall be completed to the satisfaction of the promisor, may either reserve to him an absolute right of decision without requiring him to disclose his reasons therefor, and not subject to review by the promisee or the courts,[81] or they may require him to act reasonably and fairly in the matter, and to base his decision on grounds which are just, reasonable and sensible, in which case the correctness of such decision and the adequacy of the grounds on which it is based are open to judicial determination.[82] Whether a contract falls into the first or second of these classes depends upon the circumstances of each case.[83] If it involves the taste, feelings or sensibility of the promisor, or if the contract itself gives him the absolute right to do so, he may reject the article or work absolutely,[84] but when the question is doubtful, the provision is generally construed as an agreement to do the thing in such a manner as reasonably ought to satisfy him.[85] Where the contract is to be completed to the satisfaction of a third person, his decision is conclusive except in the case of fraud, bad faith, or any dishonest disregard of the rights of the contracting parties.[86]

(§ 6) *E. Rights after default.*[87]—In case of a breach of contract, it is the duty of the injured party to minimize the loss, when it is practicable to do so, by a reasonable outlay of money,[88] and he may recover money so paid.[89]

Where notice is given by one party that the contract is rescinded on his part, it is the duty of the other to save him, so far as possible, from all future damages.[90] He cannot continue performance and recover the contract price as such,

81. Parlin & Orendorff Co. v. Greenville [C. C. A.] 127 F. 55.

82. Parlin & Orendorff Co. v. Greenville [C. C. A.] 127 F. 55. May be inquired into if acts fraudulently, arbitrarily or capriciously, with sheer purpose of avoiding his obligation to accept. Under provision in contract for sale of hops, giving buyer right to reject any or all of them if not of quantity or quality agreed upon, in his judgment, buyer must accept unless in his honest judgment, exercised in absolute good faith, the hops are not such as were contracted for. Livesley v. Johnston [Or.] 76 P. 946. Where not a mere matter of taste, the test is not the arbitrary decision of such person, but the mind of a reasonable man. Provision in by-laws of bank that no person shall receive any part of his principal or interest without producing his book or proving to the satisfaction of the trustees that it has been lost or destroyed. Evidence sufficient to sustain finding for plaintiff. Webber v. Cambridgeport Sav. Bank [Mass.] 71 N. E. 567. In sales dependent upon conditions precedent, such as approval by the buyer or another, he must act honestly, reasonably and fairly. Disapproval based on mistake of fact not binding. Hoffman v. Colgan, 25 Ky. L. R. 98, 74 S. W. 724. Right to determine shrinkage of snow under contract for removal must be exercised fairly and honestly and in a reasonable manner. Snow Melting Co. v. New York, 88 App. Div. 575, 85 N. Y. S. 168.

83. Parlin & Orendorff Co. v. Greenville [C. C. A.] 127 F. 55.

84. Parlin & Orendorff Co. v. Greenville [C. C. A.] 127 F. 55; Livesley v. Johnston [Or.] 76 P. 946.

85. Parlin & Orendorff Co. v. Greenville [C. C. A.] 127 F. 55.

86. Under agreement to erect garbage furnace for city to be paid for when completed and tested to the satisfaction of a committee of the council, such committee cannot defeat the contractor's right of recovery by unreasonably and capriciously refusing to express its satisfaction with the work, where a test shows it to be in all respects in accordance with the specifications. Parlin & Orendorff Co. v. Greenville [C. C. A.] 127 F. 55; Livesley v. Johnston [Or.] 76 P. 946. Provision in contract for putting in plumbing and heating work of house that payment shall be made when work is satisfactory to owner, and architect gives owner or architect absolute right of rejection for defects or incompleteness, and his reasons for rejection cannot be ignored if he acts in good faith and without fraud. Evidence sufficient to sustain verdict. Fairmont Plumbing Co. v. Carr [W. Va.] 46 S. E. 458. Contractor excused from producing architect's certificate if he shows that it was refused in bad faith or unreasonably. Payments to be made on written certificate that they were due. Done under oral direction of architect. Langley v. Rouss, 85 App. Div. 27, 82 N. Y. S. 1082. See Building and Construction Contracts, § 9, 1 Curr. L. 381.

87. See 1 Curr. L. 677.

88. Griffith v. Blackwater Boom & Lumber Co. [W. Va.] 48 S. E. 442.

89. Timber contracts abrogated by dissolution of corporation with which they were made. Griffith v. Blackwater Boom & Lumber Co. [W. Va.] 48 S. E. 442.

90. Under advertising contract, plaintiff had no right to continue publication after notification that defendant refused to fulfill

but is restricted to an action for damages for its breach.[91] If damages are enhanced by the negligence or willfulness of either party, the increased loss falls on him.[92]

§ 7. *Damages for breach.*[93]—The subject of damages is fully treated elsewhere.[94]

§ 8. *Rescission and abandonment. A. By agreement or under special provisions of the contract.*[95]—A mutually executory contract may be abrogated at any time by agreement of the parties thereto,[96] and without any further consideration than the release of such parties from their respective obligations.[97] The contract itself may also provide for its abrogation.[98] Acts indicating abandonment are not always sufficient to establish it, and are generally material only as they tend to prove intent.[99] The test is the existence of an intent to abandon.[1] The presumption is against such an intent and the burden is on the party alleging it to clearly establish it by evidence sufficient to overcome such presumption.[2] When the parties mutually terminate a contract of employment before the expiration of its term, it becomes fully executed, though it has by its terms a longer period to run.[3] A release of one of two joint contractors releases both.[4]

(§ 8) *B. Occasion and right to rescind or abandon without consent.*—Since a meeting of the minds of the parties is essential to its formation,[5] a contract may be rescinded for fraud or undue influence,[6] accident or mistake,[7] or duress.[8] Since the remedy is largely equitable,[9] in case of rescission, the other party must be restored, as far as possible, to the position he occupied when the contract was made;[10] but benefits which the party rescinding would be entitled to retain in

his contract. Mendell v. Willyoung, 42 Misc. 210, 85 N. Y. S. 647. Bound to use reasonable exertions to keep down damages resulting to him from a breach of advertising contract. Ward v. American Health Food Co., 119 Wis. 12, 96 N. W. 388. No right to continue manufacture and shipment of goods. McCall Co. v. Jennings, 26 Utah, 459, 73 P. 639. Cannot continue performance for the purpose of increasing such damages. Dunham v. Hastings Pavement Co., 88 N. Y. S. 835.

91. To manufacture and sell maps. Hixson Map Co. v. Nebraska Post Co. [Neb.] 98 N. W. 872. May not continue publication of advertisement. Food Trade Pub. Co. v. Harnishfeger, 87 N. Y. S. 421. Cannot recover contract price by inserting advertisement which other party has forbidden him to use. Haynes & Co. v. Nye [Mass.] 70 N. E. 932.

92. Value of goods stolen from truck left unguarded in street not recoverable in action against livery stable keeper for breach of contract to provide storage for trucks over night. Peyser v. Lund, 89 App. Div. 195, 85 N. Y. S. 881.

93. See 1 Curr. L. 677.

94. See title Damages, 1 Curr. L. 833.

95. See 1 Curr. L. 679.

96. Barrie v. King, 105 Ill. App. 426. Annulment requires mutual assent. Plaintiff's failure to reply to proposition of defendant for cancellation until five weeks after it was made, held not an acceptance of such proposal. Baltimore & L. R. Co. v. Steel Rail Supply Co. [C. C. A.] 123 F. 655.

97. Barrie v. King, 105 Ill. App. 426. See ante, § 6.

98. Defendant held not to have terminated cane planter's contract with plaintiff, as it had a right to do under the contract, and to be liable for damages for breach. Avery v. Segura Sugar Co., 111 La. 891, 35 So. 967.

99. Manhattan Life Ins. Co. v. Wright [C. C. A.] 126 F. 82.

1. Rights under insurance policy. Manhattan Life Ins. Co. v. Wright [C. C. A.] 126 F. 82.

2. Manhattan Life Ins. Co. v. Wright [C. C. A.] 126 F. 82.

3. Where one who was hired as salesman for a year was to receive bonus if sales amounted to certain sum, and they exceeded that sum at the end of ten months, at which time the contract was terminated by mutual consent, he was entitled to the bonus. Scheuer v. Monash, 40 Misc. 668, 83 N. Y. S. 253.

4. Rutherford v. Rutherford [W. Va.] 47 S. E. 240.

5. See ante, § 1 C.

6. See Fraud and Undue Influence, 2 Curr. L. 104. False representations as to a material fact in regard to the subject-matter of the contract authorize a rescission. Representations as to speed of vessel hired for use in trans-Atlantic trade held to have been made in contemplation of such trade, and fact that she did not maintain such speed on longer voyage in different waters held not evidence that they were false. Clydesdale Shipowners' Co. v. Brauer S. S. Co., 120 F. 854.

7. See Mistake and Accident, 2 Curr. L. 903. The fact that one party to a contract did not fully understand its legal effect does not justify a court in setting it aside. That he did not understand that he was dealing with purchaser of land as principal. Carter v. Love, 206 Ill. 310, 69 N. E. 85.

8. See Duress, 1 Curr. L. 962.

9. See Cancellation of Instruments, 1 Curr. L. 413.

10. Clydesdale Shipowners' Co. v. Brauer

any event need not be returned.[11] A deed or contract made in consideration of the support of the grantors will only be set aside in equity, where there has been an entire failure or refusal to perform the agreement, or such a substantial failure in respect to material matters as would render the performance of the rest a thing different from what was contracted for.[12] One who obtains, through a compromise and supplemental agreement, a continuation of a contract, which the other party had a right to terminate, to completion to his advantage, cannot, after obtaining the resulting benefit, repudiate the agreement.[13] One who pays money on a contract cannot recover the same unless he is entitled to a rescission.[14] A rescission will not be decreed to one who was himself at fault at the time of the dereliction of which he complains.[15]

In order to justify the abandonment of a contract and the proper remedy growing out of it, the failure of the opposite party must be a total one.[16] For partial derelictions and noncompliances in matters not necessarily of first importance to the accomplishment of the object of the agreement, the party injured must seek his remedy under the stipulations of the contract itself.[17]

(§ 8) *C. Time and mode of rescission or abandonment.*—Rescission must be made within a reasonable time after the grounds thereof have been discovered,[18] reasonableness depending on the circumstances of the case.[19]

One who has a right to rescind a contract for fraud in procuring it should make known his rescission to the other party as soon as possible after discovering such right;[20] but delay will not prevent the defrauded party from setting up such fraud in an action brought against him for the contract price, and in such case he is entitled to relief to the extent he was damaged thereby.[21]

A contract whereby one member of a firm agrees to pay the partnership debts

S. S. Co., 120 F. 854. Assignment of patent rights. Fraud. Felt v. Bell, 205 Ill. 213, 68 N. E. 794. Contract for sale of entire crop of molasses, broken after part had been delivered [La. Civ. Code, arts. 2045, 637]. Barrow v. Penick, 110 La. 572, 34 So. 691. Contract to prospect for gold with option to purchase cannot be rescinded on ground that part of property covered belonged to another, where parties knew of dispute as to title and contract provided that in case adverse claimants were successful a certain sum should be deducted from purchase price (Smith v. Detroit & D. Gold Min. Co. [S. D.] 97 N. W. 17), nor where depreciation in values results from demonstration of its unproductiveness (Id.).

11. Return of the consideration is not a condition precedent to the cancellation of a mortgage given to secure a pre-existing debt. Jenkins v. Jonas Schwab Co., 138 Ala. 664, 35 So. 649.

12. Evidence held to show substantial compliance. Pittenger v. Pittenger, 208 Ill. 582, 70 N. E. 699. In case of a failure to perform contracts made in consideration of the support of one of the makers, a court of equity will entertain jurisdiction to set it aside upon the ground that the circumstances justify an inference of the abandonment thereof, and a presumption of fraudulent intent in entering into it. Evidence insufficient to show fraudulent intent. Id.

13. Contract to saw logs. Defense on ground that supplemental agreement increasing price was obtained by duress. Moorman v. Plummer Lumber Co. [La.] 37 So. 17.

14. Fraud in contract for sale of realty. Provident Loan Trust Co. v. McIntosh [Kan.] 75 P. 498.

15. Provident Loan Trust Co. v. McIntosh [Kan.] 75 P. 498.

16. Object must have been defeated or rendered unattainable by his misconduct or default. Pittenger v. Pittenger, 208 Ill. 582, 70 N. E. 699.

17. Pittenger v. Pittenger, 208 Ill. 582, 70 N. E. 699.

18. Delay of several months when cause could have been discovered in few days. Clydesdale Shipowners' Co. v. Brauer S. S. Co., 120 F. 854. Option to purchase mining property. 16 months too long. [Rev. Civ. Code S. D. 1903, § 1285]. Smith v. Detroit & D. Gold Min. Co. [S. D.] 97 N. W. 17.

19. Right to rescind contract of sale by which property was delivered to mortgagee, and to treat him as mortgagee in possession barred by laches. Three years not reasonable. Ward v. Sherman, 192 U. S. 168, 48 Law. Ed. 391. May be question of law under circumstances. Sale of cutters. Manley v. Crescent Novelty Mfg. Co. [Mo. App.] 77 S. W. 489.

20. Contract for sale of land. Holdredge v. Watson, 1 Neb. Unoff. 687, 96 N. W. 67. Sale of realty. Evans v. Duke, 140 Cal. 22, 73 P. 732. See Cancellation of Instruments, § 3, 1 Curr. L. 416.

21. Evans v. Duke, 140 Cal. 22, 73 P. 732.

in consideration for a sale of the others' interest to him may be rescinded at any time before it is accepted by any of the creditors.[22]

(§ 8) *D. Remedies.*—The remedy in such cases is either an equitable action for the cancellation of the contract[23] or an action at law to recover for its partial performance.

§ 9. *Remedies for breach. A. The right and its accrual.*[24]—Action may be brought for breach of a contract as soon as such breach occurs.[25] Only one action can be maintained for the breach of an entire contract.[26] In an action for breach of an agreement not to engage in the saloon business in a certain town, plaintiff is not entitled to recover for losses occasioned by such breach during a period when he was conducting his business without a license.[27]

(§ 9) *B. Defenses and counter rights.*—Only rights arising out of the contract may be urged defensively in an action thereon.[28] Failure of plaintiff to perform is usually a defense,[29] but not where plaintiff's action is on a quantum meruit and failure to perform was excusable.[30] Anything that would entitle defendant in an action on a specialty to relief in a court of equity is a good defense in a court of law, where equity is administered through legal forms.[31] A provision making the decision of the engineer final as to any disputes touching the agreement does not prevent action for unauthorized rescission.[32]

(§ 9) *C. Particular remedies, and election between them.*—Money paid on a contract, the consideration for which has wholly failed,[33] or which has been rescinded, may be recovered in assumpsit.[34] The defense of want of consideration presents an issue triable at law, not in equity.[35] Equity has jurisdiction to rescind a contract for fraud,[36] and of a suit for an accounting under a contract

22. Georgia Home Ins. Co. v. Boykin, 137 Ala. 350, 34 So. 1012.

23. See Cancellation of Instruments, 1 Curr. L. 413.

24. See 1 Curr. L. 685.

25. Action by servant for breach of contract, whereby she was to serve him during lifetime and he was to leave her legacy, may be brought immediately on her wrongful discharge. Edwards v. Slate, 184 Mass. 317, 68 N. E. 342. Upon violation of a contract by one of the parties thereto, the other may sue immediately for such special damage as he has suffered. Attorney may sue for breach of contract of employment before completion of suit which he was not given opportunity to defend. Watson v. Columbia Min. Co., 118 Ga. 603, 45 S. E. 460.

26. Contract for erection of tobacco warehouse equipped with modern appliances, with agreement by defendant to lease it for two years. Action for breach in failing to equip properly held bar to right to counterclaim on ground of damages resulting therefrom in action for rent. Hancock v. White Hall Tobacco Warehouse Co. [Va.] 46 S. E. 288.

27. Mitchell v. Branham [Mo. App.] 79 S. W. 739.

28. An independent agreement of warranty is not available as a defense to an action on a written contract containing no warranty, except by way of counterclaim. Atwater v. Orford Copper Co., 85 N. Y. S. 426. A client cannot justify a breach of his contract with an attorney by showing a contract with another attorney or with an insurance company or with any one else, made without notice to such attorney, by which he secures other means of defending a case brought against him. Watson v. Columbia Min. Co., 118 Ga. 603, 45 S. E. 460.

29. A wife's failure to discharge her marital obligations is a complete defense to an action on a contract for resumption of such relations, providing that if the husband failed to support her she should immediately become vested with her dower interest in his realty. Sommer v. Sommer, 87 App. Div. 434, 84 N. Y. S. 444. Fact that plaintiffs entered into a written contract with defendant's son for carrying mail was no bar to their right of action against defendant on a subsequent original verbal contract with defendant, who was surety for his son on the written contract, in regard to the same subject, where the service was performed under the verbal one. Instructions approved. Young v. Ledford, 99 Mo. App. 565, 74 S. W. 443. Where one agrees with a mother to rear her minor child and pay him a gratuity on arriving at age, the fact that he voluntarily left such person's house is a matter of defense to an action on the contract. Jones v. Comer, 25 Ky. L. R. 1104, 77 S. W. 184.

30. Performance prevented by defendant. Turney v. Baker [Mo. App.] 77 S. W. 479.

31. Fraud going to consideration. Atherholt v. Hughes [Pa.] 58 A. 269.

32. Railroad construction. Dobbling v. York Springs R. Co., 207 Pa. 123, 56 A. 349.

33. Pleadings sufficient. Warder, Bushnell & Glessner Co. v. Myers [Neb.] 96 N. W. 992.

34. Contract for sale of land rescinded orally. Arbogast v. Mylius [W. Va.] 46 S. E. 809.

35. Boone v. Goodlett & Co., 71 Ark. 577, 76 S. W. 1059.

creating a trust relation,[37] where the legal remedy is not adequate,[38] or under some circumstances to restrain breach.[39] An action ex contractu cannot be combined with one in tort.[40]

(§ 9) *D. Procedure before trial.*—The question of venue depends upon the statutes of the various states.[41]

(§ 9) *E. Parties, pleading and evidence. Parties.*—All parties to a joint contract should be made defendants in an action to enforce it.[42] Where husband and wife are jointly liable on a note, and the wife dies before suit, the husband may be sued alone.[43] Where one sues four joint contractors and one cannot be served, judgment may be entered against the other three.[44]

Contracts may be enforced by the parties thereto or their privies.[45]

36. Slayback v. Raymond, 87 N. Y. S. 931.

37. Western Union Tel. Co. v. American Bell Telephone Co. [C. C. A.] 125 F. 342. See, also, Accounting, Action for, 3 Curr. L. 24.

38. An action at law will lie for breach of a contract to pay a certain portion of the net profits realized on the sale of any insurance stock to a purchaser procured by plaintiff, where it appears that plaintiff has executed the contract, that defendant paid a part of such compensation, and that thereafter the parties entered into an agreement that the balance, if any, should be determined and paid within a certain time, which was not done. Suit for accounting will not lie. Hart v. Garrett Co., 87 App. Div. 536, 84 N. Y. S. 774.

39. One who is a stranger to a contract may be enjoined from causing a breach thereof by a party thereto, when he will, by such breach, acquire an advantage for himself, and so, in effect, appropriate the property of complainant. Where one covenants not to engage in a business and third persons employ him and hold him out as their agent and superintendent with knowledge that plaintiff is thereby injured. Fleckenstein Bros. Co. v. Fleckenstein [N. J. Eq.] 57 A. 1025. Injunction will also lie to restrain third persons from profiting by such person's services and experience. Booth & Co. v. Davis, 127 F. 875. Injunction will issue to restrain a third person from making agreements with persons who have contracted with complainant, undertaking to indemnify them for damages for breach of such contracts, with the purpose of inducing such breach. Contracts for sale of law books. American Law Book Co. v. Edward Thompson Co., 84 N. Y. S. 225. Injunction will lie to restrain the violation of a contract restricting one in the exercise of his trade or profession within a specified locality or a given period of time. Rucker v. Campbell [Tex. Civ. App.] 79 S. W. 627. But where the parties have stipulated what the damages shall be in the event of a breach, and they are such as the law will regard as stipulated damages, there is an adequate remedy at law and an injunction will not be granted. Stipulated damages for breach of agreement not to engage in cotton weighing business. No act necessary to be restrained in order to afford relief. Id. An injunction will issue to restrain ticket brokers from dealing in tickets issued to persons who, in consideration of reduced fares, have agreed not to transfer them, their nontransferability being stated on their face. Louisville & N. R. Co. v. Bitterman, 128 F. 176. See, also, Injunction, 2 Curr. L. 397.

40. Damages for breach of contract and for fraud. Kinney v. Harrison Mfg. & Boiler Co., 22 Pa. Super. Ct. 601.

41. In Texas, where a person has contracted in writing to perform an obligation in any particular county, suit may be brought against him either in such county, or in the county of his domicile. Plaintiffs need not allege that contract was to be performed in county where suit was brought. Defendant must show contrary in his plea of privilege. Callender, Holder & Co. v. Short [Tex. Civ. App.] 78 S. W. 366. If a written contract must necessarily be executed in a county different from that in which the party contracting resides, he may be sued in either of such counties. Contract need not expressly state where it is to be performed, but question is whether legal effect of instrument is that it shall be performed in county where suit is brought [Tex. Rev. St. 1895, art. 1194, par. 5]. Bell County Brick Co. v. Cox & Co. [Tex. Civ. App.] 76 S. W. 607.

In California, suit may be brought in the county where the contract is made or where it is to be performed [Cal. Const. art. 12, § 16]. Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 P. 855.

42. Contract for construction of telephone line [N. D. Rev. Codes 1899, § 5232]. Clements v. Miller [N. D.] 100 N. W. 239. The validity of a note cannot be determined in a suit to which the person to whom it has been assigned is not a party. Daugherty v. Curtis [Iowa] 97 N. W. 67.

43. Under R. I. Gen. Laws 1896, c. 233, § 17, providing that on death of joint contractor, unless otherwise provided, his representatives may be charged as if contract had been several, administrator must be sued separately. Providence County Sav. Bank v. Vadrais [R. I.] 55 A. 754.

44. Contract for services. Van Zandt v. Winters, 22 Pa. Super. Ct. 181.

45. Allegation that S., on behalf of complainant and himself, entered into an agreement with defendant by which they were to jointly prosecute a certain enterprise and divide the profits, and that defendant knew of complainant's interest in the contract. Held, that the contract pleaded created no contractual relation between complainant and defendant which would support a suit. Moore v. Hammond [C. C. A.] 121 F. 759. Under an agreement between a railway company and a cotton compress company, whereby the former delivered cotton to the

At common law, the general rule was that a stranger to the consideration could not maintain an action on the contract.[46] In the United States, there is a conflict of authority on this question. In some states, the common-law rule is followed,[47] while in others the mere fact that a promise is made for a person's benefit gives him the right to enforce it.[48] Still other states hold that he may do so only when the contract was entered into for his benefit, or such benefit is the direct result of performance and within the contemplation of the parties, and

latter instead of to the consignees, and gave the consignees compress tickets therefor calling for an equal number of bales of average weight and quality, there is such privity between them as entitles a consignee to equitable relief against both companies for shortage in cotton shipped by him. Mississippi Cotton Compress & Warehouse Co. v. Levy & Co. [Miss.] 36 So. 281. An owner of live stock, who sells the same to one having an agreement with a bank, whereby he is permitted to overdraw his account when purchasing stock, and meet such overdraft by drawing on his commission merchant, and who takes a check on the bank for the purchase price, is sufficiently in privity with the purchaser to enforce the bank's liability on such agreement, though not suing thereon. York v. Farmer's Bank [Mo. App.] 79 S. W. 968.

46. Exception in case he was the child of the promisee. In some states the exception has been extended to include contracts made by the husband for the benefit of his wife. Haefelin v. McDonald, 89 N. Y. S. 395.

47. See Hammon on Contracts, § 351 et seq., for discussion of this question.

In Georgia, it is held that where the promisor merely agrees to pay a debt owing by the promisee to a third person, the latter cannot maintain an action thereon. Under assumption by railroad company of liabilities of another, one having claim against former cannot sue latter thereon [Ga. Civ. Code 1895, § 4939]. Hawkins v. Central of Georgia R. Co., 119 Ga. 159, 46 S. E. 82. Demurrer to petition in action for breach of contract sustained for failure to show privity between plaintiff and defendant. Alleged that defendant had assumed in writing obligations of company with whom the contract was made. Guthrie v. Atlantic Coast Line R. Co., 119 Ga. 663, 46 S. E. 824. As a general rule, an action on a contract must be brought in the name of the party in whom the legal interest therein is vested, and against the party who made it in person or by agent [Ga. Civ. Code, 1895, § 4939]. Hawkins v. Central of Georgia R. Co., 119 Ga. 159, 46 S. E. 82.

In Michigan, a contract cannot be enforced in law by one not a party thereto (Palmer v. Bray [Mich.] 98 N. W. 849); but in a suit in equity, a person for whose benefit a promise is made may enforce it in his own name (Id.). A promise by a son on receipt of property from his father to pay a certain sum of money to a daughter on the father's death cannot be enforced by the daughter. Ebel v. Piehl [Mich.] 95 N. W. 1004.

In Pennsylvania, where one takes over the entire stock of another and publishes a notice that he has assumed the debts for goods purchased by the former owner, creditors of such owner may sue him in their own names, as being parties to the consideration or on the ground that notice is estopped as to parties led to believe that claims were within consideration. Sargent v. Johns, 206 Pa. 386, 55 A. 1051.

48. In Indiana, one who is a beneficiary under, though not a party to, a contract may maintain an action thereon. McCoy v. McCoy [Ind. App.] 69 N. E. 193. No notice of acceptance or demand other than the commencement of suit by such third person is necessary, and no consideration need move from him to either of the contracting parties. Grantee to pay sum to third person as part consideration for deed. Id.

In California, a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it. Agreement by purchaser of mines to pay advances made by third parties under agreement with vendors [Cal. Civ. Code, § 1559]. Washer v. Independent Min. & Development Co., 142 Cal. 702, 76 P. 654.

In Virginia, a person for whose sole benefit a contract is made may maintain an action thereon in his own name, though he is not a party thereto. Where contract requires city to deduct certain sum from amount due sewer contractor for each day's delay and to pay same to city engineer superintending the work, the engineer may maintain an action thereon in his own name [Code 1887, § 2415]. City of Newport News v. Potter [C. C. A.] 122 F. 321.

In Alabama, it is held that on a promise, supported by a valuable consideration, made by one to discharge a pecuniary obligation of the promisee to a third person, the latter, if assenting thereto while the promise remains in force, is entitled to sue in his own name, though he may not otherwise have been a party to the contract. Moore v. First Nat. Bank, 139 Ala. 595, 36 So. 777. It is immaterial, in such case, whether the plaintiff has relinquished his claim against the promisee. Id. An express contract to transport freight at preferential rates is one for services and hence not within a statute authorizing the maintenance of actions for the payment of money by the real party in interest. Action for breaches during shipper's lifetime could be brought only by executors after his death [Ala. Code 1896, § 28]. Sullivan v. Louisville & N. R. Co., 138 Ala. 650, 35 So. 694. Where one member of a partnership, in consideration of a sale of the other member's interest to him, agrees to pay a firm debt, a firm creditor may release the promisee and enforce his claim against the promisor (Georgia Home Ins. Co. v. Boykin, 137 Ala. 350, 34 So. 1012); but this right is subject to be defeated, at any time before it becomes fixed by such release, by the rescission of the contract between the partners (Id.).

when there is some legal or equitable duty owing from the promisee to the beneficiary.[49]

One may enforce at law a promise made directly to himself on a consideration furnished by a third person.[50]

At common law, if one joint contractor died, an action at law could not be prosecuted against his executor or administrator.[51] If the contract was several or joint and several, the executor or administrator could be sued separately, but not jointly with the other contractors.[52] A provision that plaintiff may join in the same action all or any persons severally or jointly and severally liable on the same note should not be construed so as to exclude joint parties.[53]

49. In Connecticut, it is held the mere fact that one would receive a direct benefit from the performance of a contract to which he was not a party does not enable him to maintain an action at law upon it. Contract by executor with widow and son of deceased to collect policy of insurance on life of deceased, payable to such widow and son, and to pay proceeds to a creditor of deceased who had presented a claim against the estate, cannot be enforced at law by such creditor, it not appearing that the relation of principal and agent existed between him and the widow and son, or that he stood in such relation of privity with them as to make them merely nominal promisees, or that he knew or was to be informed of the agreement, or that the transaction was in the nature of a family settlement. Atwood v. Burpee [Conn.] 58 A. 237.

In New York, it is held that where a party to a contract undertakes, upon a consideration moving to him from the other party thereto, to pay a sum of money to a third person not a party to the contract, which sum the party giving the consideration was bound to pay, such third person may enforce the obligation. Haefelin v. McDonald, 89 N. Y. S. 395. There must, in such case, be a legal or equitable obligation on the part of the promisee to such third person. The fact that enforcement would benefit the promisee or that he owes a moral obligation to such third person is insufficient. Property owner could not enforce covenants whereby contractor agreed to become liable to city for all damages resulting to abutting property by the method in which construction work on subway should be done. Damage resulting from negligence of subcontractor for which city was not liable. Id. It must have been entered into for his benefit, or such benefit must be the direct result of performance and within the contemplation of the parties, and there must be some legal or equitable duty owing from the promisee to the beneficiary. Wait v. Wilson, 86 App. Div. 485, 83 N. Y. S. 834. Agreement by wife that, in consideration of her being made her husband's residuary devisee, all her property would go to his son at her death, is not enforceable by the son, he not being a party thereto, or an infant, or one to whom his father owed any legal or equitable obligation. Id. An agreement by the grantee in a deed to pay materialmen's claims may be enforced by them. Hurd v. Wing, 86 N. Y. S. 907. An agreement by a surviving partner, in consideration of the sale to him by the widow of the deceased partner of her interest in the business, to pay a firm debt due her mother, may be enforced by the widow as her mother's executrix. Flagg v. Fisk, 87 N. Y. S. 530.

In New Jersey, it is held that ordinarily an action for breach of contract must be brought by one who is a party thereto or for whose benefit it is made. The mere fact that he may be incidentally benefited thereby is not sufficient. One contracting with city to maintain temporary footbridge and light and watch the same, and to assume all risks relating to its use, is not liable under such contract to a person injured by reason of failure to properly light such bridge. Styles v. Long Co. [N. J. Err. & App.] 67 A. 448.

In Nevada, it is held that an action on contract whereby defendant promised, on becoming executrix, to make certain payments, may be maintained by one for whose benefit it was made, though he was not a party thereto. Painter v. Kaiser [Nev.] 76 P. 747.

Holdings in Federal courts: A third person may enforce a contract made by others for his benefit whenever it is manifest from the nature or terms of the agreement that the parties intended to treat him as the person primarily interested, and when there is some obligation or duty owing to him from the promisee (Barker v. Pullman's Palace Car Co., 124 F. 555); though his benefit need not be the sole object thereof (Id.). An agreement, made on a valid consideration, by one with another to pay money to a third person, can be enforced by the latter in his own name. An agreement to "satisfy and discharge the indebtedness and liabilities" of a company whose assets, etc., defendant purchased "of any and every kind, which may be unsatisfied at the time of the transfer" and assuming all contracts, authorizes a creditor to enforce such a provision against the promisor. Id. It also authorizes a party to an existing contract with the selling company to maintain an action against the buyer for its reformation on the ground of mistake, though the buyer knew nothing of such mistake. Id.

50. Children of mortgagor to whom principal of mortgage note was made payable could enforce it, though consideration paid by third person. Palmer v. Bray [Mich.] 98 N. W. 849. Ga. Civ. Code 1895, § 3664, codifying common-law rule. Hawkins v. Central of Georgia R. Co., 119 Ga. 159, 46 S. E. 82.

51. Against survivor only. Providence County Sav. Bank v. Vadris [R. I.] 55 A. 754.

52, 53. Providence County Sav. Bank v. Vadrais [R. I.] 55 A. 754.

The contract and the incidental duties arising therefrom are binding only on the parties thereto.[54] And a suit for negligent failure to perform an implied duty growing out of a contract relation cannot be maintained against one upon whom such duty does not rest.[55]

Pleading and proof.[56]—In order to recover on a contract, plaintiff must allege and prove performance on his part,[57] including performance of all conditions precedent or an excuse for nonperformance.[58] The complaint must also show an offer to perform concurrent conditions.[59] But it is not necessary to allege the existence of a condition made precedent to performance where the other party has absolutely and in toto repudiated the contract.[60] Waiver must be specially pleaded.[61]

If the contract is in writing, the consideration need not be pleaded.[62] Fraud, illegality or immorality of consideration,[63] and invalidity under the statute of frauds, are affirmative defenses, which must be pleaded and proved.[64] The invalidity of a contract under a statute providing for the protection of the parties thereto, and the benefits of which may be waived, must be pleaded;[65] but where the general public is affected by the violation of the statute, or the contract is against public policy, illegality need not be pleaded.[66]

In an action to recover damages for breach of contract, the particular breach must be alleged.[67] A general allegation of damages is sufficient where they are the natural result of the breach complained of,[68] but where they are not, they

54. Cobb v. Everett Clark Co., 118 Ga. 483, 45 S. E. 305.

55. Contractor not liable to plaintiff for negligence in constructing party wall between plaintiff's building and that of adjoining owner, under contract between plaintiff and such owner. Cobb v. Everett Clark Co., 118 Ga. 483, 45 S. E. 305. Provision in construction contract that construction company shall protect adjacent walls cannot be enforced by adjoining landowner in suit to compel protection of his buildings, particularly where it is not referred to in his petition. Carpenter v. Reliance Realty Co. [Mo. App.] 77 S. W. 1004.

56. See 1 Curr. L. 690.

57. Must allege forbearance to enter judgment on note, which was consideration for contract of guaranty sued on. Hall v. Little, 89 App. Div. 524, 85 N. Y. S. 653. Where the contract consists of reciprocal promises to be concurrently performed, a failure to allege and prove performance or a tender thereof before bringing action is fatal to recovery. Sale of corn. Lapham v. Bossemeyer Bros. [Neb.] 98 N. W. 699. As against a general demurrer, an averment that the work was done under the contract presupposes that the terms of the contract were complied with. Acceptance need not be alleged. Harrison v. Wilson Lumber Co., 119 Ga. 6, 45 S. E. 730. Contract in regard to purchase and sale of realty. Walker v. Sawyer's Estate [Ind. App.] 70 N. E. 540. A general allegation, in a complaint on a contract in which attachment has issued, that plaintiff has performed a contract on his part, does not necessarily show or imply that plaintiff intended to discharge the contract or defendant's liability thereunder. Hale Bros. v. Milliken, 142 Cal. 134, 75 P. 653.

58. Waiver of condition precedent. Action on contract for hiring convicts. Griffith v. Newell [S. C.] 48 S. E. 259. Statutory permission to plead performance of conditions precedent generally does not, in its application to contracts of indemnity, extend to the very loss for which the insurer is to be liable. Includes only conditions upon which depends responsibility for loss after it occurs. Taylor v. New Jersey Title Guarantee & Trust Co. [N. J. Law] 56 A. 152. In declaring on a resolution of a city to credit on accrued taxes, moneys paid to it or else to pay back the cash, it must be alleged that no taxes were due or the money cannot be recovered. Murphy v. Omaha, 1 Neb. Unoff. 488, 95 N. W. 680.

59. Allegation that plaintiff was ready and willing to return stock insufficient [Mont. Civ. Code, § 1955]. Porter v. Plymouth Gold Min. Co. [Mont.] 74 P. 938.

60. Flagg v. Fisk, 87 N. Y. S. 530.

61. N. Y. Code Civ. Proc. § 500. Grant v. Pratt, 87 App. Div. 490, 84 N. Y. S. 983.

62. Ala. Code 1896, § 1800. Georgia Home Ins. Co. v. Boykin, 137 Ala. 350, 34 So. 1012.

63. Note for money loaned. Hines v. Union Sav. Bank & Trust Co. [Ga.] 48 S. E. 120. Representations of lessor that building was adapted to purposes of lessee. Prahar v. Tousey, 87 N. Y. S. 845. In canceling agreement to underwrite bonds, whereby one contracting to advertise them was deprived of his compensation. Barron v. International Trust Co., 184 Mass. 440, 68 N. E. 831. See Fraud and Undue Influence, § 4, 2 Curr. L. 108.

64. Young v. Ledford, 99 Mo. App. 565, 74 S. W. 443. If a pleading does not show a contract to have been in writing, it will be presumed that it was in parol. Bell v. Bitner [Ind. App.] 70 N. E. 549. See Frauds, Statute of, § 11, 2 Curr. L. 115.

65. Drake v. Lauer, 93 App. Div. 86, 86 N. Y. S. 986.

66. Agreement to secure contract for public work through favoritism of officials. Drake v. Lauer, 93 App. Div. 86, 86 N. Y. S. 986.

must be specially pleaded.[69] Damages for breach cannot be shown in an action for recovery of the contract price, on the theory of full performance.[70]

Subsequent modifications of a parol contract become a part of it and are properly pleaded as such.[71]

In an action on a contract, defendant may claim such damages as he has sustained by reason of plaintiff's failure to comply therewith.[72] A complaint, in an action to recover damages for breach of a contract, may be amended so as to include damages accruing between the commencement of the action and the trial,[73] and may also be amended at the close of the trial so as to increase the amount of damages claimed.[74] Where the declaration is on a joint obligation, but the proof shows that one of the defendants is not liable, there can be no recovery against the others.[75] All causes of action arising ex contractu against the same defendant may be joined in one petition.[76] The claim that the contract was not performed within a reasonable time is a matter of defense, which cannot be raised by general demurrer.[77] A special demurrer, founded on a contract not pleaded or referred to in the petition, will not be considered.[78] When the legal effect of a written contract is pleaded, the omission of any of its conditions is cured by defendant setting out the whole contract in his answer.[79] In an action on a contract to transfer options on real estate, where the answer is a general denial, failure of plaintiff to prove that he had such options shows a want of consideration and precludes recovery, though defendant did not plead fraud or misrepresentation.[80] Failure to demand interest in the complaint in an action for breach of a contract to pay money renders a judgment therefor erroneous.[81] Facts tending to establish the validity of a contract void on its face must be pleaded.[82] The petition need not allege that the contract sued on was stamped in accordance with

67, 68. Ward v. American Health Food Co., 119 Wis. 12, 96 N. W. 388.

69. Ward v. American Health Food Co., 119 Wis. 12, 96 N. W. 388. The items of damage for breach of contract, claimed by way of recoupment or set off, should be sufficiently averred. Special defense in action for goods sold held insufficient. Beck Duplicator Co. v. Fulghum, 118 Ga. 836, 45 S. E. 675. Counts alleging loss of profits as damages, which are remote and speculative and incapable of proof with any degree of certainty, are demurrable. Breach of contract to deliver shingle timber. Nichols v. Rasch, 138 Ala. 372, 35 So. 409.

70. Ward v. American Health Food Co., 119 Wis. 12, 96 N. W. 388.

71. Good v. Smith [Or.] 76 P. 354. In order to recover on a written contract as modified by a subsequent parol agreement, the contract as modified must be declared on, and every substantive fact, which plaintiff must prove to maintain his action, must be alleged. Otherwise cannot show modification. Harrington v. Brockman Commission Co. [Mo. App.] 81 S. W. 629. Held error, in action for breach of contract, to admit subsequent agreement in regard to same subject-matter, made after breach, for purpose of showing whether contract had been entered into, no rescission or modification having been pleaded. Roberts v. Pacific & A. R. & Nav. Co. [C. C A.] 121 F. 785.

72. Action on promissory note given for painting wagon. Affidavit of defense on ground of breach held sufficient. Kettcrer Mfg. Co. v. Baltic Brew. Co., 22 Pa. Super. Ct. 210. If plaintiff claims damages growing out of the contract, defendant may deny its liability or default and, as a counterclaim, establish the liability and default of plaintiff and recover its damages. Answer in action on contract to furnish electrical energy held sufficient. Hudson River Power Transmission Co. v. United Traction Co., 43 Misc. 205, 88 N. Y. S. 448. Breach of contract may be set up as counterclaim in action against telephone company for failure to furnish connection [S. C. Code 1902, § 171]. Gwynn v. Citizens' Telephone Co. [S. C.] 48 S. E. 460.

73, 74. Dunham v. Hastings Pavement Co., 88 N. Y. S. 835.

75. Sale of lumber. Spann v. Grant [Miss.] 35 So. 217.

76. Claim for damages for breach of contract to saw timber and claim for work done thereunder. Harrison v. Wilson Lumber Co., 119 Ga. 6, 45 S. E. 730.

77. To obtain release of adverse claims to land. Gummer v. Mairs, 140 Cal. 535, 74 P. 26.

78. Haber, Blum, Bloch Hat Co. v. Southern Bell Tel. & T. Co. [Ga.] 45 S. E. 696.

79. Complaint held to state cause of action. Antonelle v. Kennedy & S. Lumber Co., 140 Cal. 309, 73 P. 966.

80. McLaurin v. Cuba Co., 87 App. Div. 558, 84 N. Y. S. 526.

81. B. & C. Comp. § 67, providing that, in actions for recovery of money or damages, the amount thereof shall be stated. Ferguson v. Reiger, 43 Or. 505, 73 P. 1040.

82. No presumptions indulged in to sustain marriage brokerage contract. Jangraw v. Perkins [Vt.] 56 A. 532.

the internal revenue law.[83] To constitute a bar to an action on a contract by setting up a highly penal statute, there must be a precise averment of sufficient facts to bring the case within it.[84] All facts essential to the cause of action or defense alleged must be pleaded,[85] but ordinarily they may be set out in general

83. Matter of defense to be specially pleaded. Baumhoff v. Oklahoma City Elec. & Gas & Power Co. [Okl.] 77 P. 40.

84. Cannot be based on inference. Allegheny Co. v. Allen, 69 N. J. Law, 270, 55 A. 724.

85. **Pleadings held sufficient. Complaint:** Complaint in action on contract, whereby purchasers of property agreed to pay larger sum therefor on the grantor's procuring a renunciation of adverse claims, held to sufficiently show performance of conditions precedent as against a general demurrer. Gummer v. Mairs, 140 Cal. 535, 74 P. 26. In action on contract to pump mine. Fisk Min. & Mill Co. v. Reed [Colo.] 77 P. 240. In action on grading contract. Lewis v. Utah Const. Co. [Idaho] 77 P. 335. In action for breach of contract of employment as school teacher. Henry School Tp. v. Meredith [Ind. App.] 70 N. E. 393. Allegations of fraud and undue influence in complaint in suit to annul deed given in consideration of future support. Tomlinson v. Tomlinson [Ind.] 70 N. E. 881. In action for breach of contract to furnish and care for horses to be used in grading railroad. Colbroth v. Flick & J. Const. Co., 90 Minn. 489, 97 N. W. 375. Allegation of original promise by defendant to pay for goods sold to his employes by plaintiff. Hefferlin v. Karlman [Mont.] 74 P. 201. All allegation of time "on the day and year aforesaid" sufficiently specific when precise day is stated in clause immediately preceding. Taylor v. New Jersey Title Guarantee & Trust Co. [N. J. Law] 55 A. 152. Declaration in action on contract held to sufficiently aver breach for failure to furnish materials, "in such manner as not to delay the material progress of the work." Pinkerton Const. Co. v. Schweyer [N. J. Law] 58 A. 112. In action for breach of contract to sell stock for certain sum within certain time. Gause v. Com. Trust Co., 89 N. Y. S. 723. Petition in action on contract providing for sale of stock of gas company when its franchise should be amended in a manner to be mutually agreed upon, not demurrable on ground that contract is indefinite in regard to amendments, where it is alleged that such amendments were made in a manner satisfactory to purchaser, and that he has tendered performance. Baumhoff v. Oklahoma City Elec. & Gas & Power Co. [Okl.] 77 P. 40. In action on contract to indemnify plaintiff for expenses and attorney's fees in certain negotiations. Manary v. Runyon, 43 Or. 495, 73 P. 1028. Complaint in action to recover money, which defendant agreed to pay plaintiff on his surrender to him of stock of merchandise previously purchased from defendant conditionally, held sufficient after verdict. Ferguson v. Reiger, 43 Or. 505, 73 P. 1040. Complaint in action for sale of interest in invention held to sufficiently allege issuance of patent. Landers v. Foster, 34 Wash. 674, 76 P. 274.

Answer or affidavit of defense: Answer in suit on note given for purchase price of timber held good as plea of failure of consideration. Butler & Co. v. McCall, 119 Ga. 503, 46 S. E. 647. In action for services where expenses and pay in addition to that provided for in a written contract were asked, affidavit of defense which avers that they were unauthorized, held sufficient. Van Zandt v. Winters, 22 Pa. Super. Ct. 131. Affidavit of defense, since facts showed that loss to plaintiff was due to failure of third parties to reach agreement and not to breach of contract by defendant. Chase v. Provident Life & Trust Co., 207 Pa. 24, 56 A. 231.

Pleadings held insufficient. Complaint: Bill in action to recover interest in subsidies granted for building a railroad on ground that one S., when contracting with defendants in regard to building said road, was acting for plaintiffs, held not to state cause of action, since it affirmatively appeared therefrom that S. never became entitled to any share of the profits under such contract. Moore v. Hammond [C. C. A.] 121 F. 759. In action on contract to give plaintiff half-interest in gold discovered on certain land, held demurrable for failure to allege amount of gold discovered. Brown v. Bowman, 119 Ga. 153, 46 S. E. 410. In a suit to avoid a commutative contract, where it appears that defendant has, in the past, done all that the contract required of him, and it is not alleged that he is unable or unwilling to do all that may be required of him in the future, an exception of no cause of action is properly sustained. Wartelle v. Bradford, 111 La. 701, 35 So. 819. In an action of assumpsit upon an account annexed, an allegation that "plaintiffs entered into a written contract with defendants," a copy of which is referred to, does not sufficiently show a promise by defendants, and is demurrable. Brown v. Starbird, 98 Me. 292, 56 A. 902. In action on agreement to secure payment of note. Omaha Brew. Ass'n v. Tillenburg, 2 Neb. Unoff. 277, 280, 96 N. W. 107. An allegation that defendant became indebted to plaintiff on a special contract without an allegation of the facts on which such indebtedness arose is bad. Taylor v. New Jersey Title Guarantee & Trust Co. [N. J. Law] 55 A. 152. In action on contract for furnishing electrical energy, held insufficient in failing to show that admitted deficiencies in amount furnished arose in some excusable manner. Hudson River Power Transmission Co. v. United Traction Co., 43 Misc. 205, 88 N. Y. S. 448. Complaint in action for damages for failure to furnish engine agreed on, held not to allege a cause of action on the warranty, but one for nonperformance of contract. Smith v. Lazier Gas Engine Co., 88 N. Y. S. 590.

Answer: Answer in action for rent, claiming set off for improvements under contract between defendant and former owner, held demurrable, it not alleging any lien on the rents or personal liability on the part of plaintiffs, and no attempt to enforce lien on realty. Bell v. Bitner [Ind. App.] 70 N. E. 549. Defenses and counterclaim on ground of fraud and false representations, in action

terms.[86] As in other actions, the pleading and proof must correspond.[87] Thus excuses for nonperformance cannot be shown under an allegation of performance.[88] Plaintiffs cannot recover as on a disaffirmance of an illegal contract, where the complaint shows a reliance thereon and performance on their part.[89] Evidence of the invalidity of the contract is admissible under a general denial.[90] The fact that one pleads an agreement to pay a particular sum for services does not prevent his recovering their actual value, even though he fails to prove such agreement.[91] While the contract remains executory, the plaintiff, in an action thereon, must declare specially,[92] but when it has been fully performed and nothing remains to be done but to pay the amount due the plaintiff, he may declare

for breach of contract to dispose of stock for agreed price, held insufficiently pleaded. Gause v. Com. Trust Co., 89 N. Y. S. 723.

86. Lack of circumstantial details not ground for demurrer where facts essential to right of action are pleaded in general terms. Taylor v. New Jersey Title Guarantee & Trust Co. [N. J. Law] 56 A. 152.

87. An allegation that defendant agreed to invest plaintiff's money in stock and pay him half the profits is not supported by proof that defendant, as plaintiff's agent, made such a contract with a third person, which plaintiff afterwards ratified. Sherman v. Jones [Colo. App.] 74 P. 799. When it is apparent from the reading of a written contract that its meaning and purport, as pleaded, are identical with the original, there is no variance, even though the writing as pleaded is different from the instrument itself. Word "heretofore" in place of "hereafter." Mulligan v. Smith [Colo.] 76 P. 1063. Promise in letter to reimburse town for expenses in caring for defendant's mother, held collateral to that alleged in writ and letter held not to support allegation. Inhabitants of Freeman v. Dodge, 98 Me. 531, 57 A. 884. Where the petition alleges a joint contract, plaintiff can only recover on proof of such joint contract, notwithstanding the fact that the evidence may disclose a right to recover on some other cause of action not pleaded. Evidence insufficient to show joint contract with railroad company and their tie contractors for sale of ties. Variance. Bagnell Timber Co. v. Missouri, etc., R. Co. [Mo.] 79 S. W. 1130. Allegations in a complaint seeking to recover for goods sold to defendant's employes on his promise to pay therefor and deduct the amount from their time checks are not supported by proof that plaintiffs cashed the time checks of such employes, nor is such evidence admissible thereunder. Hefferlin v. Karlman [Mont.] 74 P. 201. There is no variance between a petition declaring on an oral contract and an unsigned written memorandum attached thereto, alleged to have been made by the party to be charged. Brown v. Silver, 2 Neb. Unoff. 164, 96 N. W. 281. In an action for breach of a contract of employment, evidence of facts justifying a dismissal of the employe is inadmissible under a general denial. Schreiber v. Ash, 84 N. Y. S. 946. Evidence that a breach has not been committed is inadmissible under answer admitting a breach. Grant v. Pratt, 87 App. Div. 490, 84 N. Y. S. 983. Complaint held not to authorize proof of a contract independent of and disconnected with the written one referred to therein. Contract to give reduced switching rates. Thompson v. Erie R. Co., 89 N. Y. S. 92. Proof that defendant's testator purchased stock from plaintiff at a certain price is not fatally variant from an allegation that he took the stock as bailee under a guaranty to obtain the same price for it. Linden v. Thieriot, 89 N. Y. S. 273. There is substantial variance between an allegation that one agreed to pay a certain sum to another, who agreed to purchase land at a judicial sale and to convey it to third persons, and proof that the purchaser was to advance any additional sum necessary and to convey the land when repaid. Dickens v. Perkins, 134 N. C. 220, 46 S. E. 490. Plaintiff, suing for breach of warranty of the capacity of a well, was not entitled to recover the amount of notes given by him to defendants in payment therefor, in the absence of an allegation that they had been negotiated and that he was liable thereon. Low, H. & G. Water Co. v. Hickson [Tex. Civ. App.] 74 S. W. 781.

88. Sickness as excuse. Schaaf v. Chotzen, 85 N. Y. S. 1026. Declaration by advertiser of bonds alleging performance of advertising contract by which he was to be paid by underwriters out of money received from subscriptions will not let in proof that underwriters broke contract by fraudulently canceling underwriting agreement and refunding subscriptions. Barron v. International Trust Co., 184 Mass. 440, 68 N. E. 831. Waiver in action on bond to secure performance. Burr v. Union Surety & Guaranty Co., 86 App. Div. 545, 83 N. Y. S. 756. Excuses for failure to procure architect's certificate cannot be shown under such allegation. Rowe v. Gerry, 86 App. Div. 349, 83 N. Y. S. 740.

89. Glass v. Basin & B. S. Min. Co. [Mont.] 77 P. 302.

90. That contract with city was ultra vires and that public officer was interested therein. Town of Morgan City v. Dalton, 112 La. 9, 36 So. 208.

91. Yuells v. Hyman, 84 N. Y. S. 460. In Missouri, when the petition counts on contract, there can be no recovery on a quantum meruit, unless the suit originates before a justice of the peace. Not sufficient, in action on contract to pay commission for sale of land, to show production of purchaser, without showing promise to pay commission. McDowell v. Stephenson [Mo. App.] 77 S. W. 766.

92. McArthur Bros. Co. v. Whitney, 202 Ill. 527, 67 N. E. 163.

generally in indebitatus assumpsit.[93] The complainant must establish the essential facts of his cause of action for rescission of a contract with clearness and certainty.[94] A plea of rescission must aver all the facts necessary to constitute a good rescission in law.[95]

Evidence.[96]—In an action on a contract, the burden is on plaintiff to establish its existence and its terms and conditions,[97] and his damages for its breach.[98] In the absence of a plea of non est factum in a suit on a written contract, plaintiff is not required to prove its execution.[99] The burden of proving a modification of a contract,[1] excuses for nonperformance,[2] or that a party was induced to execute a written contract through fraud and mistake, is on the party alleging it.[3] Fraud must be proved by clear and convincing evidence.[4] Where a different consideration than the one expressed in the contract is attempted to be shown, the burden is upon the party asserting it.[5] Failure of a party to produce or account for the absence of written evidence of a transaction between parties residing on different continents may create a presumption that such writings, if produced, would be unfavorable to his case.[6] In some states, contracts involving more than a certain sum must be proved by at least one credible witness, and other corroborative circumstances.[7]

If the writing on its face appears to be a complete legal agreement, it will, in the absence of fraud, accident or mistake, be conclusively presumed to contain the entire agreement,[8] and parol evidence of prior or contemporaneous negotiations, representations, or statements is not admissible to vary, add to, or take from, the written instrument.[9] This rule applies only to the parties to the con-

93. Grading contract. McArthur Bros. Co. v. Whitney, 202 Ill. 527, 67 N. E. 163.

94. Judicial sale. Files v. Brown [C. C. A.] 124 F. 133.

95. Answer in action for goods sold insufficient. Beck Duplicator Co. v. Fulghum, 118 Ga. 836, 45 S. E. 675.

96. See 1 Curr. L. 696.

97. Error to order that, upon defendant's failure to produce paper evidencing contract, it should be taken as being in accordance with plaintiff's claim, where defendant denied that it would have such effect and alleged that it was lost. Romero v. New Iberia Mill. & Development Co. [La.] 36 So. 907.

98. Advertising contract. Haynes & Co. v. Nye [Mass.] 70 N. E. 932. In an action to recover on a contract for manufacturing shingles, the burden is on defendant to prove damages claimed by way of recoupment for failure to return boiler and engine in good condition and to employ watchman in accordance with terms of contract. Instructions approved. Truax v. Heartt [Mich.] 97 N. W. 394.

99. For sale of timber. Garrison v. Glass, 139 Ala. 512, 36 So. 725.

1. Contract for room and board. Whalen v. Oswald, 85 N. Y. S. 816. That contract for services has been modified by parol agreement. Manning v. Seaboard Paint Co., 87 N. Y. S. 232

2. Under an allegation in a bill for specific performance of an agreement not to practice medicine within a certain district that defendant was not forced to return through an unforeseen necessity, as the contract provided he might do, the burden is on defendant to show that such necessity existed. Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781. That performance of contract to install elevator was prevented by other party. Marx v. Marvin, 85 N. Y. S. 376.

3. Horn v. Carroll, 25 Ky. L. R. 2305, 80 S. W. 518.

4. Evidence insufficient to show fraud in procuring modified contract. Pittenger v. Pittenger, 208 Ill. 582, 70 N. E. 699. See Fraud and Undue Influence, 2 Curr. L. 104; Id., 108, § 4.

5. Deed. Harraway v. Harraway, 136 Ala. 499, 34 So. 836.

6. Agreement between firm in Scotland and one in Louisiana as to investment of money advanced involving over $50,000. Hannay v. New Orleans Cotton Exch., 112 La. 998, 36 So. 831.

7. In Louisiana, contracts above $500 in value [Civ. Code, art. 2277]. Hannay v. New Orleans Cotton Exch., 112 La. 998, 36 So. 831.

8. Bullard v. Brewer, 118 Ga. 918, 45 S. E. 711. Presumed that every item agreed upon was incorporated in contract. Sutton v. Baker [Minn.] 97 N. W. 420. To merge all prior negotiations and to express the final agreement of the parties. Catterlin v. Lusk, 98 Mo. App. 182, 71 S. W. 1109. Agreement that note is to be collected at maturity merged in note waiving notice of extension. First Nat. Bank v. Wells, 98 Mo. App. 573. 73 S. W. 293. N. D. Rev. Codes 1899, § 3888. Reeves & Co. v. Bruening [N. D.] 100 N. W. 241. A complaint in an action on a written contract alleging breach of a prior parol agreement in regard to same subject is demurrable. Kenney v. Foster & Bros. Co. [R. I.] 56 A. 680; Stickney v. Hughes [Wyo.] 75 P. 945. See Merger, § 6, ante.

9. Bullard v. Brewer, 118 Ga. 918, 45 S. E. 711. No extraneous evidence, parol or writ-

tract, or their privies and representatives, and to cases where the enforcement of

ten, is admissible to vary or qualify its terms, in the absence of fraud, accident or mistake. To show guaranty as to performance of air compressor. Oil Creek Gold Min. Co. v. Fairbanks, Morse & Co. [Colo. App.] 74 P. 543. If contract is unconditional and unambiguous. Morris v. Chesapeake & O. S. S. Co., 125 F. 62. Order for medicines. Georgia Medicine Co. v. Hyman & Co., 117 Ga. 851, 45 S. E. 238. Compromise agreement as to payment of debt. Ellis v. Conrad Seipp Brewing Co., 207 Ill. 291, 69 N. E. 808. An ordinary passenger ticket is not necessarily a contract within the rule excluding oral evidence of the contents of a written instrument. Coine v. Chicago, etc., R. Co., 123 Iowa, 458, 99 N. W. 134. Right to drill and operate for oil and gas. Rose v. Lanyon Zinc Co. [Kan.] 74 P. 625. Note. Torpey v. Tebo, 184 Mass. 307, 68 N. E. 223. Warranty in contract of sale. Case Threshing Mach. Co. v. Hall [Tex. Civ. App.] 73 S. W. 835. Where contract is complete. Harrington v. Brockman Commission Co. [Mo. App.] 81 S. W. 629. Evidence held to show that conversations in regard to agreement to purchase sugar beets did not constitute contract, but were part of negotiations leading up to and merged in written contract. Norfolk Beet Sugar Co. v. Berger, 1 Neb. Unoff. 151, 95 N. W. 336. If contract expresses whole agreement. Rooney v. Thomson, 84 N. Y. S. 263; Putnam Foundry & Mach. Co. v. Caulfield [R. I.] 56 A. 1033; Stickney v. Hughes [Wyo.] 75 P. 945.

Parol evidence held inadmissible: Statements of parties prior to and contemporaneous with agreement to submit fire loss to appraisal. Rutter v. Hanover Fire Ins. Co., 138 Ala. 202, 35 So. 33. To add provision to contract for sawing timber that mill should be kept busy. Harrison v. Wilson Lumber Co., 119 Ga. 6, 46 S. E. 730. Parol statements made at time of employment as teacher. Henry School Tp. v. Meredith [Ind. App.] 70 N. E. 393. Of contemporaneous agreement as to price of goods sold. Piano Mfg. Co. v. Eich [Iowa] 97 N. W. 1106. As to negotiations looking to a lease. Waived by failure to object and referring question to jury. Cady v. Coates, 101 Mo. App. 147, 74 S. W. 424. Of prior parol agreement as to royalties. Part performance of the contract does not affect the rule. Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 S. W. 1008. To vary terms of agreement by which it was sought to establish partnership. Agnew v. Montgomery [Neb.] 99 N. W. 820. Of oral agreement that appliances which contract provided should be furnished free were to be paid for. Rooney v. Thompson, 84 N. Y. S. 263. To explain meaning of word "plant" where plaintiff sold exclusive right to use certain discoveries and appliances and agreed to erect four "plants." Id. Under a contract reading "I hereby accept your offer" of a quantity of copper slags, which defined terms of payment and was signed by both parties, to show understanding that quality was to be suitable for a required purpose. Atwater v. Orford Copper Co., 86 N. Y. S. 426. To vary terms or legal import of bills of lading by proof of instructions as to routing of goods. Bessling & Co. v. Houston & T. C. R. Co. [Tex. Civ. App.] 80 S. W. 639. To vary terms of contract ticket signed by passenger by adding provision that he is to be carried entire distance in same car Missouri, etc., R. Co. v. Harrison [Tex.] 80 S. W. 1139. Of oral statements and promises made by plaintiff just prior to signing of contract. McCall Co. v. Jennings, 26 Utah, 459, 73 P.

To show: Understanding of parties as to meaning of contract when it was executed. Swift v. Occidental Min. & Petroleum Co., 141 Cal. 161, 74 P. 700. Contemporaneous agreement that work should be done to satisfaction of defendant's wife or he need not pay for it. Pitcairn v. Philip Hiss Co. [C. C. A.] 126 F. 110. That person who appears to have been party to contract was not. Gill v. General Elec. Co. [C. C. A.] 129 F. 349. Authority to take three payment notes for machinery instead of two, as provided in written contract. Plano Mfg. Co. v. Eich [Iowa] 97 N. W. 1106. That note, unconditional in its terms, was to become void upon happening of certain contingency. Central Sav. Bank v. O'Connor [Mich.] 94 N. W. 11. Prior agreement to collect note when due when it contained waiver of notice of extension, or to show that one signed as surety. First Nat. Bank v. Wells, 98 Mo. App. 573, 73 S. W. 293. That note, absolute in its terms, was to be paid contingently. Third Nat. Bank v. Reichert, 101 Mo. 242, 73 S. W. 893. Agreement that tenant under lease under seal might occupy building rent free until it was torn down. Kaven v. Chrystie, 84 N. Y. S. 470. That "grasshopper eaten" tobacco was not to be excluded under contract providing that tobacco was "to be delivered free from any damage." Gray v. Meyer, 88 App. Div. 359, 84 N. Y. S. 613. That, under lease fixing rent at $3,000, "for the first three years," parties intended to fix rent at $3,000 per year, instead of $3,000 for the full term. Liebeskind v. Moore Co., 84 N. Y. S. 850. That amount paid at execution of lease was to be applied in payment of or reserved as security for payment of any subsequently accruing rent, it appearing from lease that at the time of its execution plaintiff paid an amount equal to three monthly instalments of yearly rent reserved. Marrotto v. McCotter, 85 N. Y. S. 431. Agreement made before execution of contract that builder was to be given old materials, where contract provides for money payments only. Abramson-Engesser Co. v. McCafferty, 86 N. Y. S. 185. That contract, whereby defendant agreed to give special switching rates for two furnaces to be operated by a designated company, its successors or assigns, applied to furnace thereafter erected by one not a party to, or an assignee or successor of, a party to the contract. Thompson v. Erie R. Co., 89 N. Y. S. 92. That party stated that agreement to have a gas contract executed to purchaser meant only that if owner acquired such a contract he would assign it to purchaser without further compensation, and that he was thereby influenced to sign. Fry v. National Glass Co., 207 Pa. 605, 56 A. 1063. Communications respecting writing made prior to and explanatory of it, so as to add condition clearly excluded by its terms. Sale of tomatoes. Newell v. New Holstein Canning Co., 119 Wis. 635, 97 N. W. 487.

the contract is the basis of the cause of action.[10] It is a rule of substantive law and not one of evidence.[11] Hence the fact that such evidence was admitted without objection does not affect the right and duty of the court in instructing the jury to pass upon its competency and legality.[12] When the contract is ambiguous, parol evidence is admissible to explain the meaning of the language used;[13] so too, where the written contract does not contain all the terms of the agreement, it is admissible to supply the deficiencies.[14] An independent verbal contract relating to the same subject-matter but not inconsistent with the written contract may be shown, if made contemporaneously with it,[15] and parol evidence is admissible to show a subsequent modification of a written contract.[16] A completed instrument may be shown by parol to have been delivered on a condition which has not been performed.[17] The acceptance and adoption of a contract by a party not signing it,[18] and the actual relation of parties whose names appear on a note, may be shown.[19] In general, such evidence is admissible to show fraud[20] or mistake,[21] intimidation,[22] illegality,[23] want of due execution,[24] want of

10. In action on appeal bond given by defendant in unlawful detainer action, plaintiff may show that, though he has deeded the land to another, possession and right to rents were reserved to him by oral agreement. Carmack v. Drum [Wash.] 73 P. 377. Not to third persons not parties thereto. Oral agreement as to reassignment of note and mortgage. Wilson v. Mulloney [Mass.] 70 N. E. 448.

11. Pitcairn v. Philip Hiss Co. [C. C. A.] 125 F. 110.

12. Particularly in Federal court where written instrument cannot be reformed in action at law. Pitcairn v. Philip Hiss Co. [C. C. A.] 125 F. 110.

13. To apply contract to subject-matter. Contract of sale of air compressor not obscure. Oil Creek Gold Min. Co. v. Fairbanks, Morse & Co. [Colo. App.] 74 P. 543. To explain ambiguities. Ga. Civ. Code 1895, § 5202. In contract for sale of business, providing for payment of certain sum "as hereafter agreed," to show date when source from which, and conditions on which, payment was to be made. Morrison v. Dickey, 119 Ga. 678, 46 S. E. 863. Where plaintiff represented himself as sole proprietor of appliances in use at certain place, to show whether a motor and alternator were part of appliances so in use. Rooney v. Thomson, 84 N. Y. S. 263. To show how parties, during a period of seven years, had construed contracts, ambiguous in their terms and incomplete as to vital matters necessary to render them working contracts. Consolidated Dental Mfg. Co. v. Holliday, 131 F. 384.

14. To show that corporation which plaintiff was employed to promote was to be organized to take over brewery, and that owners agreed to transfer it. Locke v. Wilson [Mich.] 98 N. W. 400. Where teacher hired for term beginning at specified time to show length thereof, which was not stated. Henry School Tp. v. Meredith [Ind. App.] 70 N. E. 393. To supply omitted terms where, from an inspection of the writing, it appears upon its face that it is not intended to be a complete contract, or does not express their entire agreement. Inadmissible in action on charter party, providing for three voyages to designated port at fixed rate, to show agreement that one voyage might be made to intermediate port. Not a "rough memorandum." Johnson v. Bibb Lumber Co., 140 Cal. 95, 73 P. 730. Evidence not in conflict with terms, where contract incomplete on its face. Agreement to pay taxes as part of consideration for assignment of land contract, where assignment does not recite consideration. Bell v. Wiltson [Neb.] 98 N. W. 1049.

15. Cook v. Littlefield, 98 Me. 299, 56 A. 899. Not admissible to show agreement that charterer of ship was authorized to make one trip to intermediate port instead of to the one designated in the contract. Johnson v. Bibb Lumber Co., 140 Cal. 95, 73 P. 730. Admissible to show supplemental oral agreement as to time of payment for work called for by written contract which was silent on the subject. Putnam Foundry & Mach. Co. v. Canfield [R. I.] 56 A. 1033.

16. Putnam Foundry & Mach. Co. v. Canfield [R. I.] 56 A. 1033. That written contract was verbally modified where new agreement has been fully performed. Agel v. Patch Mfg. Co. [Vt.] 58 A. 792. See Modification and Merger, § 6, ante.

17. Condition that agreement to purchase claims of creditors was not to take effect until three-fourths of them had assented thereto. Elastic Tip. Co. v. Graham [Mass.] 71 N. E. 117. That signature to what purports to be a perfected agreement was to take effect on its being signed by others, and that they have not signed. Id. In court of equity may show that option to purchase stock was not to be enforced unless other party elected to carry out option to purchase realty. Reynolds v. Hooker [Vt.] 56 A. 988.

18. Sale of realty. Forthman v. Deters, 206 Ill. 159, 69 N. E. 97.

19. Mere form immaterial. Helvie v. McKain [Ind. App.] 70 N. E. 178.

20. Stickney v. Hughes [Wyo.] 75 P. 945. In action for damages for fraud and deceit, whereby plaintiff was induced to enter into a written contract to show false representations made in negotiations leading up to it. Exchange of lands. Summerour v. Pappa, 119 Ga. 1, 45 S. E. 713. An allegation that plaintiff signed the contract upon the assurance of defendant that it contained the provisions agreed upon is insufficient to authorize the

capacity,[25] want or failure of consideration,[26] and to show who the actual contracting parties were.[27] The erroneous admission of parol evidence as to a written contract is not prejudicial where it neither contradicts nor varies its terms.[28] The acts of both parties involved in or connected with the subject-matter of the contract, both before and after its breach, are admissible to enable the jury to determine what the contract was actually worth to the plaintiff.[29] All the writings executed at the same time as the contract and relating to the same subject-matter are admissible.[30]

The usual rules in regard to the admissibility of evidence apply to actions on contract. Particular applications will be found in the notes.[31]

introduction of parol evidence to vary its terms, in the absence of a prayer for rescission or reformation. Contract to saw timber. Harrison v. Wilson Lumber Co., 119 Ga. 6, 45 S. E. 730. In an action on a contract, it is proper to permit defendant to testify as to whether he would have signed it if he had known that it varied in its terms from the preceding oral negotiations, and that he signed, relying on the other party's statement that it conformed thereto. Advertising contract. Frank V. Strauss & Co. v. Welsbach Gas Lamp Co., 42 Misc. 184, 85 N. Y. S. 367. It is competent for defendant to prove that he was induced to enter into the contract by fraudulent representations by the plaintiff of material facts going to the consideration, on the faith of which he acted. As to acreage of timber sold. Atherholt v. Hughes [Pa.] 58 A. 269. Such testimony is not for the purpose of altering or varying the terms of the writing, but to show a failure of consideration. Id.

21. Stickney v. Hughes [Wyo.] 75 P. 945. To show what the real agreement was where one of the parties did not know what he was signing. Because could not read English. Melle v. Candelora, 88 N. Y. S. 385. Introduction of evidence to show note stamped "paid" is in fact still due is not attempt to reform the instrument and admissible without special pleading. Ashburn v. Evans [Tex. Civ. App.] 72 S. W. 242.

22, 23, 24, 25. Stickney v. Hughes [Wyo.] 75 P. 945.

26. See Consideration, § 2, ante.

27. To show that party signing was acting as trustee for other obligors. Landers v. Foster, 34 Wash. 674, 76 P. 274.

28. Introduced before contract was produced. Alexander v. Wade [Mo. App.] 80 S. W. 19.

29. Dunham v. Hastings Pavement Co., 88 N. Y. S. 835. Cost of instruments to be furnished under contract of sale, number defendant could make and whether could furnish them during remainder of term. Parker v. McKannon Bros. & Co. [Vt.] 56 A. 536.

30. Letter, and conversations referred to therein, in which employe agreed not to associate with certain woman, admissible in explanation of clause giving employer right to discharge him for wrongful conduct. Gould v. Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896. Letters which were beginning of negotiations leading to modification of contract are admissible. Strahl v. Western Grocer Co. [Neb.] 98 N. W. 1043.

31. To show fact that contract was made and its terms: In an action to enforce an alleged contract for the sale of land, a letter from the vendor to his attorney in regard to the sale is admissible. Niles v. Hancock, 140 Cal. 157, 73 P. 840. Statement that consideration for transfer of property was agreement to pay certain notes is statement of fact, not a conclusion. Baltes Land, Stone & Oil Co. v. Sutton [Ind. App.] 69 N. E. 179. In an action by a trainer on a contract for half the amount recovered by the owner for injuries to a race horse, a contract whereby the former agreed to train and manage it during the racing season for a share of the profits is admissible. Instructions approved. Hess v. Lucas, 122 Iowa, 517, 98 N. W. 466. Letters also admissible on question as to whether agreement was to share expenses of trial of suit for damages for injuries to horse. Id. A decedent's promise to pay his daughter-in-law for personal services need not be proved by positive evidence, but may be inferred from circumstances and facts detailed by witnesses. Allen v. Allen, 101 Mo. App. 676, 74 S. W. 396. In action by daughter-in-law to recover for personal services rendered deceased, his will, providing that the amount of claims allowed to any child should be deducted from any bequests made to him, held inadmissible, plaintiff not being a child of deceased, or provided for in the will. Id. Competent to show that deceased had expressed to third persons his intention to pay both plaintiff and her husband in order to prove a promise to pay plaintiff for her services. Id. Agreement endorsed on back of contract held evidence that no previous binding agreement as to amount due plaintiff had been made. Hart v. Garrett Co., 87 N. Y. S. 574. The execution of a contract is shown by proof that it was sent to defendant's place of business with a request for its signature, and that it came back by mail, signed by the same signature used by the corporation in its business dealings. Corwin v. Breakstone, Grossman & Co., 88 N. Y. S. 364.

To show performance: In action on contract, whereby defendant agreed to pay a debt owed by a contractor to plaintiff in consideration of contractor abandoning negotiations for construction of building, and confessing judgment in favor of defendant, the record showing such confession, and an uncompleted contract resulting from contractors' negotiations held admissible in evidence. Moore v. First Nat. Bank, 139 Ala. 595, 36 So. 777. In action to recover possession of land for failure to perform covenants of oil lease as to development, evidence as to the amount expended for that purpose admissible on issue of performance. Swift v. Occidental Min. & Petroleum Co., 141 Cal. 161,

(§ 9) *F. Procedure at trial; verdict and judgment. Questions of law and*

74 P. 700. Catalogue inadmissible to show heating capacity of hot air plant. Stagg v. St. Jean [Mont.] 74 P. 740. In action for breach of contract to install elevator before a certain date, evidence of an attempt to install it within a reasonable time is irrelevant and inadmissible. Marx v. Marvin, 85 N. Y. S. 376. In an action against an executor on a contract whereby deceased agreed to receive stock and sell it at a certain price, entries in books of deceased made without plaintiff's knowledge, and relating solely to other transactions between the parties held inadmissible as part of the res gestae, or as admissions against interest. Admission held prejudicial error. Linden v. Thieriot, 89 N. Y. S. 273. Plaintiff's conversations with third persons admissible to show compliance with agreement to obtain purchaser for defendant's property. Good v. Smith [Or.] 76 P. 354. In an action on contract whereby plaintiff agreed to procure for defendant a contract between it and a third party, held not error to permit plaintiff to testify as to conversations between himself and defendant tending to show his efforts to carry out his contract, he not being a party to the contract with the third party. Corbin v. Oriental Trading Co., 32 Wash. 668, 73 P. 781.

As to renewal or extension of contract: Evidence that lessee under oil lease expected to renew inadmissible. Swift v. Occidental Min. & Petroleum Co., 141 Cal. 161, 74 P. 700. On the question as to whether a contract between a village and an electric lighting company was renewed by accepting services thereunder after its expiration, evidence that the company had refused to enter into a new contract for less than the old price and for a shorter period than five years, and a resolution of the village council refusing to again contract with the company were admissible. Howell Elec. L. & P. Co. v. Howell [Mich.] 92 N. W. 940. Payment of interest is not of itself evidence of a contract to extend a note. First Nat. Bank v. Wells, 98 Mo. App. 573, 73 S. W. 293.

As to compensation and payment: Testimony as to what another employe received inadmissible to show agreement to pay plaintiff the same amount or what his services were worth. Gill v. Staylor, 97 Md. 665, 55 A. 398. Where a debtor and creditor enter into a valid settlement fixing the amount of the creditor's claim, the creditor cannot show that his claim is larger, nor the debtor that it is less, than the amount fixed in such settlement. Powers v. Hambrick, 25 Ky. L. R. 30, 74 S. W. 660. In action on contract to reimburse plaintiff for expenses incurred in negotiations for purchase of stumpage, letter of defendant advising plaintiff of its sale to another and agreeing to send check for expenses, and evidence as to extent of land and quantity of timber involved, held admissible. Manary v. Runyon, 43 Or. 495, 73 P. 1028. Receipt for half the cost of drilling gas well, and evidence of settlement of claims between the parties, and that connection was made with well for purpose of testing it and that it was found of no value and settlement was made on that basis, held admissible in action to recover on contract for drilling it, where compensation depended on whether or not gas was struck. Neely v. Rochester Tumbler Co., 207 Pa. 388, 56 A. 942.

As to breach: Evidence as to plaintiff's manner of living and appearance and condition of his clothing inadmissible to prove nonpayment of wages. Gill v. Staylor, 97 Md. 665, 55 A. 398. Defendant, in an action on a contract whereby plaintiff agreed to advertise his business by means of cuts, may show that the bicycle trade was an important feature of his business for the purpose of proving that a failure to supply cuts representing the bicycle business was a material breach of the agreement. Hellinger v. Marshall, 92 App. Div. 607, 86 N. Y. S. 1051.

As to damage: Where parties to an oral contract differ as to the terms thereof, evidence of the actual cost of the work performed is admissible, as it may afford reasonable ground for believing that the contract was for the price nearest the cost. Contract for grading. Lewis v. Utah Const. Co. [Idaho] 77 P. 336. In an action on a contract to divide profits realized by a contractor, his books relating thereto are admissible. Smythe's Estate v. Evans, 209 Ill. 376, 70 N. E. 906. And an expert accountant may show the jury the results of footings, etc., but cannot state the amount of such profits. Id. A claim presented to defendant stating plaintiff's damages for breach of the contract to be a certain sum, though not conclusive on plaintiffs, may be considered as original evidence in the nature of an admission, as to the amount of such damage. Gulf, etc., R. Co. v. Combes [Tex. Civ. App.] 80 S. W. 1045.

Evidence held sufficient: Evidence of failure of defendant to do printing, which was consideration for sale of printing outfit, sufficient to convert plaintiff's claim therefor into a money demand, and to support judgment therefor. Wroughton v. Waffle, 122 Iowa, 486, 98 N. W. 307. To justify direction of verdict for plaintiff on issue of fraud and negligence in execution of promissory note. King & Co. v. Hansing, 88 Minn. 401, 93 N. W. 307. To sustain verdict that plaintiff agreed, in consideration of a renewal note, to remit the amount of an alleged credit in favor of defendant to third party. Bank of Fisher v. Adams, 88 Minn. 421, 93 N. W. 607. To entitle daughter-in-law to recover for services rendered to deceased father-in-law. Allen v. Allen, 101 Mo. App. 77, 74 S. W. 896. To warrant verdict in action for breach of lease of ice cream privilege at exposition. Cady v. Coates, 101 Mo. App. 147, 74 S. W. 424. To establish prima facie case for plaintiffs in action on contract for services in furnishing trucks and laborers. Norton v. Farley, 87 N. Y. S. 830. To require submission to jury of question whether defendant, in consideration of plaintiff's refraining from asserting her claimed legal rights, expressly promised to give her money and property which his wife had promised to will to her. Lawrence v. Cammeyer, 89 N. Y. S. 220. To justify submission to jury of issue as to existence of agreement, alleged to have been made by defendant's testator, to receive certain stock and sell it at a certain price, and as to whether had turned such stock over to him. Linden v. Thieriot, 89 N. Y. S. 273.

To show: Contract of employment as

fact.[32]—The question as to whether writings constitute a contract,[33] and as a gen-

school teacher. Polk v. Board of Education of Santa Barbara, 140 Cal. xvii, 74 P. 47. That plaintiff had not disabled herself from complying with contract to convey land or elected to rescind for nonperformance. Sharp v. Bowie, 142 Cal. 462, 76 P. 62. That complainant made contract to assign patent to defendant in consideration of employment at specified salary, to terminate on his discharge for cause. Schmitt v. Nelson Valve Co. [C. C. A.] 125 F. 754. Release of lease. Conant v. Jones [Ga.] 48 S. E. 234. That there was in fact a consideration for deed. Jacobson v. Nealand, 122 Iowa, 372, 98 N. W. 158. Binding contract for the sale of land. Gough v. Loomis, 123 Iowa, 642, 99 N. W. 295. That plaintiff did not comply with her contract to furnish deeds to certain property to enable defendant to redeem from a foreclosure sale thereof, and was not entitled to half defendant's profits on his purchase of sheriff's certificate therefor. Temple v. Pennell, 123 Iowa, 729, 99 N. W. 567. That defendant was induced to sign notes by misrepresentations of plaintiff as to her legal liability thereon. Merchants' & Farmers' Bank v. Cleland, 25 Ky. L. R. 1169, 77 S. W. 176, 719. That note sued on had been paid by execution of new one. Moore v. Potter, 25 Ky. L. R. 1216, 77 S. W. 367. That contract valid on its face was entered into to enable plaintiff to conduct house of ill fame. McDonald v. Born [Mich.] 97 N. W. 693. Oral agreement to extend time of payment of mortgage debt. Hauser v. Capital City Brew. Co. [N. J. Eq.] 57 A. 722. That coats were not made in workmanlike manner as required by contract, and not to sustain verdict for plaintiff. Long v. Gingold, 84 N. Y. S. 194. Agreement by defendant to collect money and turn it over to plaintiff. Glettner v. Blauner, 85 N. Y. S. 374. Agreement of father to settle certain sum on illegitimate child in consideration of mother caring for and supporting him until a certain date. Rosseau v. Rouss, 91 App. Div. 230, 86 N. Y. S. 497. That defendant authorized plaintiff to repair elevator and knew he was doing the work. James Reilly's Sons Co. v. Aaron, 86 N. Y. S. 732. Misrepresentations and failure to fully and fairly disclose matters affecting plaintiff's rights. Spier v. Hyde, 92 App. Div. 467, 87 N. Y. S. 285. Extension of time on note. Bitter v. Butchers' & Saloon Men's Ice Mfg. Ass'n [Tex. Civ. App.] 77 S. W. 423. Execution of agreement to release son from obligation to support father. Rutherford v. Rutherford [W. Va.] 47 S. E. 240. Breach of contract giving plaintiffs exclusive right to sell stone for defendants, by sales made directly by defendants. Taylor Co. v. Bannerman [Wis.] 97 N. W. 918.

To support finding: That defendant promised to pay for draining mine. Fisk Min. & Mill. Co. v. Reed [Colo.] 77 P. 240. That new oral contract for broker's commission was substituted for written one. Kidman v. Garrison, 122 Iowa, 215, 97 N. W. 1078. That defendant had failed to perform contract to send out first class canvassers. Plano Mfg. Co. v. Eich [Iowa] 97 N. W. 1106. On quantum meruit for services if no contract. Gill v. Staylor, 97 Md. 665, 55 A. 398. That agreement was not a new lease by exercise of option to renew old one. Wood v. Edison Elec. Illuminating Co., 184 Mass. 523, 69 N. E. 364. That consideration for a contract was not agreement to refrain from prosecuting defendant's son. Henry v. Dussell [Neb.] 99 N. W. 484. Of promise to reimburse plaintiff for expenses incurred in certain negotiations, if he would allow his offer to remain open. Manary v. Runyon, 43 Or. 495, 73 P. 1028. That defendant agreed to pay plaintiff $250 on taking back a stock of goods which he had previously sold him under a contract giving plaintiff the right to rescind. Ferguson v. Reiger, 43 Or. 505, 73 P. 1040. That defendant entered into any oral agreement to pay plaintiff a commission for selling land. Good v. Smith [Or.] 76 P. 354. That time for commencement of performance of advertising contract was not postponed. Ward v. American Health Food Co., 119 Wis. 12, 96 N. W. 388. That defendant did not exercise reserved right to cancel it. Id. And that there was no mistake in reducing contract to writing. Id. That plans were tendered to defendant by architects. Graf v. Laev [Wis.] 97 N. W. 898.

To sustain verdict for plaintiff: In action on contract for railroad grading. Lewis v. Utah Const. Co. [Idaho] 77 P. 336. In action on contract to install hot air plant. Stagg v. St. Jean [Mont.] 74 P. 740. Where it was sought to defend an action on a contract on the ground of no consideration and fraud. Henry v. Dussell [Neb.] 99 N. W. 484. In action on contract, whereby plaintiff agreed to procure for defendant a contract with a third party to procure laborers for it, for which plaintiff was to receive certain commissions. Corbin v. Oriental Trading Co., 32 Wash. 668, 73 P. 781. In action by real estate broker in action on contract to pay him commission for selling land. Ober v. Stephens [W. Va.] 46 S. E. 195.

Evidence held insufficient: To sustain finding that lessees of land had prosecuted work of developing mines as required by terms of lease. Swift v. Occidental Min. & Petroleum Co., 141 Cal. 161, 74 P. 700. In action on quarry contract to support verdict for plaintiff for not furnishing water and derrick as required. Wilson v. Freedley, 125 F. 962. To support plea of no consideration for note. Cox v. Cox's Ex'r, 25 Ky. L. R. 1934, 79 S. W. 220. To establish contract by father to give illegitimate son an heir's share in his estate if he would live with and work for him during minority. McElvain v. McElvain, 171 Mo. 244, 71 S. W. 142. To justify submission to jury of question whether execution of lease procured by fraudulent representations of lessor that building was suitable to purposes of lessee. Prahar v. Tousey, 87 N. Y. S. 845.

To show: That one of the indorsers of a note agreed to save the others harmless. Tinker v. Catlin, 205 Ill. 108, 68 N. E. 773. In action to enforce agreement not to practice medicine in certain locality that defendant was forced to return through an unforeseen necessity. Ryan v. Hamilton, 205 Ill. 191, 68 N. E. 781. That note was obtained by fraud or duress. Powers v. Hambrick, 25 Ky. L. R. 30, 74 S. W. 660. Insanity of party to sale of realty. Hoffman v. Colgan, 25 Ky. L. R. 98, 74 S. W. 724. Contract to pay com-

eral rule the construction of a written contract, are questions of law for the court.[34] But where the terms of the contract are ambiguous, the intention of the parties is a question for the jury.[35] If it is partly in writing and partly parol, then it is for the jury to determine what the agreement actually was.[36]

If the agreement is in writing or there is no dispute as to its terms, the question as to whether it is against public policy is one of law for the court;[37] but where the terms of the agreement are in dispute, to be determined from conflicting evidence, the question should be submitted to the jury under proper instructions.[38]

Whether there was a subsequent parol modification of a written contract,[39] which of two writings evidences the contract entered into,[40] the amount of damages resulting from a breach of contract,[41] and to which of two plans a contract refers, are questions of fact for the jury.[42]

What is a reasonable time is a question of law.[43] Waiver[44] and fraud are generally questions of fact.[45]

mission for finding purchaser for land. McDonnell v. Stephenson [Mo. App.] 77 S. W. 766. Termination of contract allowing plaintiff to charge bills of corporation to defendant. Lewis v. Worrell [Mass.] 71 N. E. 73. Sale of goods to defendant's employes upon his promise to pay therefor. Hefferlin v. Karlman [Mont.] 74 P. 201. That plaintiff paid and defendant accepted specified sum in consideration of agreement to transfer lease. Moscow v. London, 83 App. Div. 637, 82 N. Y. S. 359. Failure of consideration for indorsement of note. Waterman v. Waterman, 42 Misc. 195, 85 N. Y. S. 377. Breach of agreement not to make paper weights for anyone but defendant. Gorodes v. Bruml, 86 N. Y. S. 18. That agreement to settle sum on illegitimate child was induced by false and fraudulent representations as to paternity. Rosseau v. Rouss, 91 App. Div. 230, 86 N. Y. S. 497. Breach of contract giving defendant renewal of insurance policies. Vogel v. Hawthorne, 88 N. Y. S. 1046.

32. See 1 Curr. L. 701.

33. Negotiations for sale of land. Niles v. Hancock, 140 Cal. 157, 73 P. 840. Correspondence. Roberts v. Pacific & A. R. & Navigation Co. [C. C. A.] 121 F. 785.

34. Durand v. Heney, 33 Wash. 38, 73 P. 775. When a party relies upon a writing or a number of writings to establish a contract, it is for the court to determine whether or not a contract was entered into, and if so, what the contract was. Harmless error to submit question of existence to jury where they find what the court should have found. Nelson v. Hirsch & Sons' Iron & Rail Co., 102 Mo. App. 498, 77 S. W. 590. If wholly in writing, construction is for the court. Joseph Joseph Bros. Co. v. Schonthal Iron & Steel Co. [Md.] 58 A. 205. Where the evidence as to the alleged breach of a contract is all contained in letters, and there is no conflict as to their contents, it is for the court to determine their legal effect. Hixson Map Co. v. Nebraska Post Co. [Neb.] 98 N. W. 872. The meaning of a written contract is a question of law, and its construction must be determined by the court, though there is parol evidence that it was superseded by another contract. Danziger v. Pittsfield Shoe Co., 204 Ill. 145, 68 N. E. 534. Where a contract is free from ambiguity and clearly expresses the intention of the parties, it is error to submit the question of what contract the parties made to the jury. Russell & Co. v. McSwegan, 84 N. Y. S. 614.

35. Exchange of land. Summerour v. Pappa, 119 Ga. 1, 45 S. E. 713. The meaning of a provision that a monument is to be completed by a certain date, "or very soon thereafter," and whether the work was performed in that respect, is one of fact, to be determined from the evidence and the facts and circumstances of the case. Harrison Granite Co. v. Lambie, 88 N. Y. S. 862. If the contract is uncertain in its meaning, it is for the jury to decide what was meant by the disputed expression, taking into consideration the situation of the parties and the circumstances surrounding the transaction. Reedy Elevator Mfg. Co. v. Mertz [Mo. App.] 80 S. W. 684. Where the contract is ambiguous and parol evidence is admitted to show the circumstances surrounding the parties and the meaning of the words used, its construction is for the jury. As to meaning of contract to carry freight. Durand v. Heney, 33 Wash. 38, 73 P. 775. What the contract is in its terms and extent is ordinarily for the jury under all the evidence. Erie Forge Co. v. Pennsylvania Iron Works Co., 22 Pa. Super. Ct. 550. Its force and legal effect is a matter of law for the court. Id.

36. Joseph Joseph Bros. Co. v. Schonthal Iron & Steel Co. [Md.] 58 A. 205.

37, 38. Mulligan v. Smith [Colo.] 76 P. 1063.

39. Taylor Gas Producer Co. v. Wood [C. C. A.] 125 F. 337. Whether the time for performance has been extended by a subsequent modification of the contract. Bass v. Rublee [Vt.] 57 A. 965.

40. Which of two writings evidenced the contract for the performance of which defendant gave bond, held, under the evidence, a question for the jury. Contract to repair steamship boiler. United States Fidelity & Guaranty Co. v. Damskibsaktieselskabet Habil, 138 Ala. 348, 35 So. 344.

41. Error to instruct that it is the contract price where circumstances from which jury might have found that it was less. Haynes & Co. v. Nye [Mass.] 70 N. E. 932.

42. Cook v. Littlefield, 98 Me. 299, 56 A. 899.

43. In contract giving right to charge bills to one "for the present," 15 months held not

Instructions.[46]—The usual rules in regard to instructions apply to actions on contracts.[47]

Verdict and judgment.[48]

CONTRACTS VOID BECAUSE INTERFERING WITH THE PUBLIC SERVICE.*

[SPECIAL ARTICLE.]

Agreements promotive of dereliction of duty.—If an agreement is promotive of dereliction in public or private duty, it is, for that reason, contrary to public policy, and accordingly void. Any contract by a public officer which tends to interfere with the unbiased and faithful discharge of his duty to the public in the exercise of his office is against public policy and void.[1] An illustration of the rule occurs in the case of an agreement whereby an officer is to receive a greater compensation than is prescribed by law for the performance of his duties. Such an agreement will not be enforced;[2] but if he agrees to do more than the law requires of him, he may lawfully stipulate for compensation therefor.[3]

unreasonable. Lewis v. Worrell [Mass.] 71 N. E. 73.

44. Question whether drawee of a draft waived condition that he should pay it only on shipment to him of two cars of stock held for jury. First State Bank v. Thuet, 88 Minn. 364, 93 N. W. 1. Question whether acceptance of payments provided for in contract for furnishing formula for, and instructing employes in manufacture of varnish and manufacturing same was waiver of condition requiring manufacture held for jury, payment for furnishing formula being due in any event. Grant v. Pratt & Lambert, 87 App. Div. 490, 84 N. Y. S. 983.

45. Statute (Minn. Gen. St. 1894, § 2239), providing that the question whether a promissory note was obtained by fraud, or through negligence of maker is one of fact, does not apply unless there is some competent evidence on those issues. O'Gara King & Co. v. Hansing, 88 Minn. 401, 93 N. W. 307. Question whether defendant, who purchased from plaintiff the right to maintain an ice cream stand on exposition grounds was misled by copy of contract between plaintiff and the exposition company shown him, there being evidence that such copy had been changed, held for the jury. Cady v. Coates, 101 Mo. App. 147, 74 S. W. 424.

46. See 1 Curr. L. 703.

47. Instructions as to interest on amount allowed plaintiff and as to recoupment by defendant approved. Joplin Waterworks Co. v. Joplin, 177 Mo. 496, 76 S. W. 960. Instruction as to effect of tender of books under contract for their purchase approved. Barrie v. King, 105 Ill. App. 426.

48. Verdict not erroneous because contains findings of specific sum of damages under each separate head alleged in complaint. Wilson v. Freedley, 125 F. 962. In action for breach of oral contract, findings that payments were to be made on sixty day drafts, except occasionally on ten day draft, held not to be material variance from complaint. Morton v. Ciark, 184 Mass. 555, 69 N. E. 309. See 1 Curr. L. 704.

1. Spence v. Harvey, 22 Cal. 336; Howell v. Fountain, 3 Ga. 176; State v. Windler, 166 Ind. 648; Caton v. Stewart, 76 N. C. 357. A note given to an officer to induce him to relinquish or to forbear making a levy under process is not unlawful as being based upon his neglect of duty. Foster v. Ciark, 19 Pick. [Mass.] 329. A note given by a prisoner for his fine and the costs, in order to obtain his discharge, is illegal and void, because taken in violation of the duty of the officer detaining him. Bills v. Comstock, 12 Metc. [Mass.] 468. **Contra,** Town of Stonington v. Powers, 37 Conn. 439. See Hammon, Cont. p. 476, as to the validity of a promise to indemnify an officer against liability arising from a contemplated neglect of duty.

2. Morrell v. Quarles, 35 Ala. 544; Buck v. City of Eureka, 109 Cal. 504, 30 L. R. A. 409; Neustadt v. Hall, 58 Ill. 172; Randolph Co. v. Jones, Breese, 103; Adams Co. v. Hunter, 78 Iowa, 328; Fawcett v. Eberly, 58 Iowa, 544; Trundle's Adm'r v. Riley, 17 B. Mon. [Ky.] 396; Carroll v. Tyler, 2 Har. & G. [Md.] 54; Evans v. Inhabitants of City of Trenton, 24 N. J. Law, 764; Callagan v. Hallett, 1 Caines [N. Y.] 104; Weaver v. Whitney, Hopk. Ch. [N. Y.] 13; Tappan v. Brown, 9 Wend. [N. Y.] 175; Hatch v. Mann, 16 Wend. [N. Y.] 44; McCandless v. Allegheny Bessemer Steel Co., 152 Pa. 139; Bona v. Davant, 2 Hill Eq. [S. C.] 528. An agreement to pay a greater toll for grinding at a public mill than that fixed by statute is invalid. State v. Edwards, 86 Me. 102, 25 L. R. A. 504. Thus a promise of reward to an officer for aiding in the discovery, apprehension, arrest, or conviction of a criminal is not enforceable if the duties of his office require him to do the desired act. Marking v. Needy, 8 Bush [Ky.] 22; Davies v. Burns, 5 Allen [Mass.] 349; Day v. Putnam Ins. Co., 16 Minn. 408 [Gil. 365]; Kick v. Merry, 23 Mo. 72; Gilmore v. Lewis, 12 Ohio, 281; Smith v. Whildin, 10 Pa. 39; Stamper v. Temple, 6 Humph. [Tenn.] 113. If a reward is offered for information leading to the discovery of a criminal, an officer may not evade the rule above announced by giving the requisite information to a private person, who is in turn to give it to the person making the offer, and recover the reward. Dunham v. Inhabitants of Stockbridge, 133 Mass. 233.

3. Trundle's Adm'r v. Riley, 17 B. Mon. [Ky.] 396; Carroll v. Tyler, 2 Har. & G. [Md.] 54; Evans v. Inhabitants of Trenton, 24 N. J.

*Adapted from Hammon on Contracts.

An agreement which involves the abandonment, in whole or in part, by a public or a quasi public corporation, of the duties devolving upon it as such, is contrary to the public welfare and cannot be sustained,[4] and the same is true of an agreement which merely tends to obstruct such a corporation in the performance of its duties.[5]

Agreements involving traffic in offices.—Traffic of any sort in public offices being illegal, a promise to appoint a man to office,[6] or to procure his appointment to office,[7] is not enforceable, and the same is true of an agreement for the sale or the exchange of offices.[8] While an officer may employ a deputy or a clerk to

Law, 764; McCandless v. Allegheny Bessemer Steel Co., 152 Pa. 139. Thus, a promise to pay a reward to a police officer for the apprehension of one who has committed a crime in another state is valid if it is not the officer's duty to arrest fugitives from other states. Morrell v. Quarles, 35 Ala. 544.

4. Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24; Gibbs v. Consolidated Gas Co. of Baltimore, 130 U. S. 396; Thomas v. West Jersey R. Co., 101 U. S. 71; Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co., 121 Ill. 530; Peoria & R. I. R. Co. v. Coal Valley Min. Co., 68 Ill. 489; Gulf, etc., R. Co. v. Morris, 67 Tex. 692.

The insurance of a carrier against liability for injuries to passengers is not contrary to public policy, as relieving the carrier of its duty to carry safely. American Casualty Ins. Co.'s Case, 82 Md. 535, 38 L. R. A. 97; Kansas City, M. & B. R. Co. v. Southern Railway News Co., 151 Mo. 373, 45 L. R. A. 380; Trenton Passenger Ry. Co. v. Guarantors' Liability Ind. Co., 60 N. J. Law, 246, 44 L. R. A. 213.

5. Woodstock Iron Co. v. Richmond & D. Extension Co., 129 U. S. 643; State v. Hartford & N. H. R. Co., 29 Conn. 538; City of Jackson v. Bowman, 39 Miss. 671. Thus, an agreement by a carrier to perform its service as such for a certain person at a cheaper rate than is charged the public is void as against public policy. Western Union Telegraph Co. v. Union Pac. R. Co., 1 McCrary, 418, 3 F. 1; Messenger v. Pennsylvania R. Co., 36 N. J. Law, 407. And see Sandford v. Catawissa, etc., R. Co., 24 Pa. 378. This rule cannot be evaded by making a contract of shipment at the regular rates, and inserting a provision for a rebate. Indianapolis, etc., R. Co. v. Ervin, 118 Ill. 250; Scofield v. Lake Shore & M. S. R. Co., 43 Ohio St. 571. Again, subscriptions or donations in favor of a railroad company, conditioned upon the establishment of a depot upon certain premises, have been held to be illegal, as against the public interest (Mobile & O. R. Co. v. People, 132 Ill. 559; Pacific R. Co. v. Seely, 45 Mo. 212. See, also, Fuller v. Dame, 18 Pick. [Mass.] 472), but by the weight of authority, perhaps, such a condition is valid if it does not prohibit the company, either expressly or impliedly, from locating a depot elsewhere, and rendering proper service to the public (Louisville, etc., R. Co. v. Sumner, 106 Ind. 55; Harris v. Roberts, 12 Neb. 631; Texas & St. L. R. Co. v. Robards, 60 Tex. 545. See Taylor v. Cedar Rapids & St. P. R. Co., 25 Iowa, 371). However this may be, the company cannot restrict itself to building a station upon a site agreed on. Whether or not it is bound by a promise to build on a certain site, it cannot limit itself to that site exclusively. Such a limitation is against public policy. Florida Cent. & P. R. Co. v. State, 31 Fla. 482; Williamson v. Chicago, etc., R. Co., 53 Iowa, 126; St. Joseph & D. C. R. Co. v. Ryan, 11 Kan. 602.

A condition prohibiting the company from building a side track at a certain town on its line is illegal. Pueblo & A. V. R. Co. v. Taylor, 6 Colo. 1. A promise to pay money or to donate property to a railroad corporation may lawfully be conditioned upon the location of the road to a certain point or over a certain route. First Nat. Bank of Cedar Rapids v. Hendrie, 49 Iowa, 402; McClure v. Missouri River, etc., R. Co., 9 Kan. 373; Berryman v. Trustees of Cincinnati Southern R., 14 Bush [Ky.] 755; Baltimore, etc., R. Co. v. Ralston, 41 Ohio St. 573; Cumberland Valley R. Co. v. Baab, 9 Watts [Pa.] 458.

6. Blachford v. Preston, 8 Term R. 89. An agreement whereby, in the event of the promisor's election to office, the promisor is to appoint the promisee to office under him, is illegal. Robertson v. Robinson, 65 Ala. 610; Stout v. Ennis, 28 Kan. 706. And see Morse v. Ryan, 26 Wis. 356. A promise by an officer to appoint the promisee as deputy is against public policy, and void. Hager v. Catlin, 18 Hun [N. Y.] 448. And see O'Rear's Adm'rs v. Kiger, 10 Leigh [Va.] 622. **Contra,** Stout v. Ennis, 28 Kan. 706.

7. Meguire v. Corwine, 101 U. S. 108, Williston's Cas. 216; Haas v. Fenlon, 8 Kan. 601; Faurie v. Morin's Syndics, 4 Mart. [La.] 39; Gray v. Hook, 4 N. Y. 449; Filson's Trustees v. Himes, 5 Pa. 452. A promise to resign an office in favor of another, and to use influence in obtaining the latter's appointment thereto, is illegal. Edwards v. Randle, 63 Ark. 318, 36 L. R. A. 174; Meacham v. Dow, 32 Vt. 721. The text applies also to the quasi public office of administrator. Porter v. Jones, 52 Mo. 399.

8. Sale: Hopkins v. Prescott, 4 C. B. 578; Waldron v. Evans, 1 Dak. 11; Hall v. Gavitt, 18 Ind. 390; Lewis v. Knox, 2 Bibb [Ky.] 453; Carleton v. Whitcher, 5 N. H. 196. Exchange: Stroud v. Smith, 4 Houst. [Del.] 448. A town collector of taxes is not a public officer, within the meaning of this rule. Accordingly, the office may be sold by the town before election at auction. Alvord v. Collin, 20 Pick. [Mass.] 418. **Contra,** Cardigan v. Page, 6 N. H. 182; Tucker v. Aiken, 7 N. H. 113, 129. **Contra,** as to constable, Groton v. Inhabitants of Waldoborough, 11 Me. 306; Meredith v. Ladd, 2 N. H. 517. And see Thetford v. Hubbard, 22 Vt. 440, 446. A promise to resign an office in the promisee's favor, or a reciprocal promise based thereon, is illegal, even though the promisor does not agree to exert his influence to procure the promisee's appointment in his stead. Eddy v. Capron, 4 R. I. 394.

assist him in performing his duties,[9] he may not delegate the performance of those duties generally, and, accordingly, his promise to pay another for performing them in his stead is illegal; and the same is true of the appointee's promise to pay money in consideration of the deputation.[10] It seems that, in an office where the compensation arises from fees and is hence uncertain, if the principal, upon appointing a deputy, reserves a sum certain out of the fees, the agreement is valid; but where the deputy's agreement is not to pay the principal out of the profits of the office, but to pay generally, and a certain sum at all events, the promise is illegal and void.[11]

Agreements involving traffic in emoluments of office or public contracts.— Public policy forbids that there shall be any traffic in the emoluments of a public office, since it tends to produce dereliction in the public service. For this reason, an agreement in effect creating a partnership in the emoluments of an office is void.[12] Thus, a promise by a candidate for office to share the emoluments with one who advances money or exerts influence to aid in his election is against public policy, and void.[13] So, also, is a promise by one candidate to share the fees with another candidate for the same office if the latter will withdraw.[14] While a public officer may, unless specially prohibited, assign and transfer his claim to compensation on account of services rendered in the past, an assignment of his claim to compensation for future or continuing services is void, as tending to injure the public service.[15] An agreement whose necessary tendency is to stifle competition in the bidding for a public contract is contrary to public policy.[16] The most common form of this occurs where a prospective bidder agrees not to bid, in consideration of a promise made by another bidder to share the profits of the contract with him. Such an arrangement is unlawful.[17] If, however, the parties act in good faith and for a reasonable and lawful purpose, and the effect of the agreement is not necessarily to stifle competition, such an arrangement is valid.[18]

9. Price v. Caperton, 1 Duv. [Ky.] 207; Engle v. Chipman, 51 Mich. 524. See note 6, supra, as to validity of promise to appoint deputy.

10. Martin v. Royster, 8 Ark. 74, 81; Outon v. Rodes, 3 A. K. Marsh. [Ky.] 432, 13 Am. Dec. 193; Engle v. Chipman, 51 Mich. 524. The power to appoint deputies cannot be delegated by agreement. Schloss v. Hewlett, 81 Ala. 266.

11. Hall v. Gavitt, 18 Ind. 390; Ferris v. Adams, 23 Vt. 136, 139. And see O'Rear's Adm'rs v. Kiger, 10 Leigh [Va.] 622.

12. Meguire v. Corwine, 101 U. S. 108; Caton v. Stewart, 76 N. C. 357.

13. Martin v. Wade, 37 Cal. 168; Gaston v. Drake, 14 Nev. 175.

14. Gray v. Hook, 4 N. Y. 449; Hunter v. Nolf, 71 Pa. 282.

15. Schloss v. Hewlett, 81 Ala. 266; King v. Hawkins [Ariz.] 16 P. 434; Bangs v. Dunn, 66 Cal. 72; Field v. Chipley, 79 Ky. 260; State v. Williamson, 118 Mo. 146; Bowery Nat. Bank v. Wilson, 122 N. Y. 478; Bliss v. Lawrence, 58 N. Y. 442; Billings v. O'Brien, 14 Abb. Pr. [N. Y.; N. S.] 238; El Paso Nat. Bank v. Fink; 86 Tex. 303. **Contra,** State Bank v. Hastings, 15 Wis. 83. In Macomber v. Doane, 2 Allen [Mass.] 541, and Brackett v. Blake, 7 Metc. [Mass.] 335, assignments of salary were sustained, but the question of legality was not raised. The same rule applies to unascertained commissions of an executor. In re Worthington, 141 N. Y. 9. Nor can an officer create a lien upon unearned compensation. El Paso Nat. Bank v. Fink, 86 Tex. 303. The unearned pay of a retired army officer is not assignable. Schwenk v. Wyckoff, 46 N. J. Eq. 560, 19 Am. St. Rep. 438.

16. Gulick v. Ward, 10 N. J. Law, 87, 102; People v. Stephens, 71 N. Y. 527. And see Boyle v. Adams, 50 Minn. 255. Upon the same principle, a promise to pay a specific sum to a mail contractor, and save him harmless from the post-office department, if he will repudiate his contract for carrying the mail, is void. Weld v. Lancaster, 56 Me. 453. An agreement to sell the bid or interest of a successful bidder at judicial sale, before its confirmation, for more than the amount bid, is contrary to public policy, and void, unless the advance on the bid inures to the benefit of the parties to the suit. Camp v. Bruce, 96 Va. 521, 43 L. R. A. 146.

17. Hoffman v. McMullen, 48 U. S. App. 596, 45 L. R. A. 410; Woodruff v. Berry, 40 Ark. 261; Swan v. Chorpenning, 20 Cal. 182; Ray v. Mackin, 100 Ill. 246; Hannah v. Fife, 27 Mich. 172; Brooks v. Cooper, 50 N. J. Eq. 761, 21 L. R. A. 617; Atcheson v. Mallon, 43 N. Y. 147; King v. Winants, 71 N. C. 469. A secret agreement to share the proceeds of a public contract is void, even where it is not made until after the contract is secured. Osborne v. Williams, 18 Ves. 379.

18. Huntington v. Bardwell, 46 N. H. 492; Marsh v. Russell, 66 N. Y. 288; Breslin v. Brown, 24 Ohio St. 565. See, also, Jones v. North, L. R. 19 Eq. 426.

Agreements involving the corruption of public officials.—An agreement tending in its operation towards the shaping of legislation by personal influence or solicitation, or by corrupt means, or otherwise than by appeals to reason or other proper public motive, is illegal and void,[19] and this rule applies as well to the legislation of municipal bodies as to that of states and nations.[20] It is immaterial that the agreement does not contemplate the doing of anything wrongful, and that nothing wrongful is in fact done. It is enough to vitiate the agreement that it has an improper tendency, leading necessarily to tampering with members of the legislative body.[21] A common form of the agreement under consideration is known as a "lobbying contract." This consists in an agreement involving the rendering of services in securing or preventing legislation through personal influence or solicitation or corrupt means exerted upon the legislators individually. Such an agreement is illegal and void.[22] However, all persons whose interests may in any way be affected by any public or private act of the legislature have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees, as well as in courts of justice, and an agreement calling for services to be openly rendered for the purpose of inducing legislative action by proper means is therefore valid and enforceable,[23] but the agency must be open and acknowledged,[24] and the compensation must be payable absolutely and in a definite, fixed sum, not depending in whole or in part upon the contingency or extent of success.[25] The same policy that prohibits the exertion of a corrupt influence upon legislative officers applies with equal force to administrative officers,[26] as in the exercise of the pardoning

19. Egerton v. Brownlow, 4 H. L. Cas. 1; Cook v. Shipman, 51 Ill. 316; Spalding v. Ewing, 149 Pa. 375.

20. Crichfield v. Bermudez Asphalt Pav. Co., 174 Ill. 466. The law will not lend its aid to enforce an agreement which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. Legislators should act from high considerations of public duty. Public policy and sound morality imperatively require, therefore, that courts should put the stamp of their disapprobation on every agreement whose probable tendency is to sully the purity or to mislead the judgments of those to whom the high trust of legislation is confided. Marshall v. Baltimore & O. R. Co., 16 How. [U. S.] 314.

21. Houlton v. Dunn, 60 Minn. 26, 30 L. R. A. 737; Clippinger v. Hepbaugh, 5 Watts & S. [Pa.] 315.

22. Thorne v. Yontz, 4 Cal. 321; McBratney v. Chandler, 22 Kan. 692; Wood v. McCann, 6 Dana [Ky.] 366; Gil v. Williams, 12 La. Ann. 219; Frost v. Inhabitants of Belmont, 6 Allen [Mass.] 152; Mills v. Mills, 40 N. Y. 543; Sweeney v. McLeod, 15 Or. 330; Powers v. Skinner, 34 Vt. 274; Bryan v. Reynolds, 5 Wis. 200. Thus, an agreement for the sale of the influence and exertions of an agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, is contrary to public policy, and unenforceable. Trist v. Child, 21 Wall. [U. S.] 441, Huffcut & W. Am. Cas. Cont. 340.

23. Marshall v. Baltimore & O. R. Co., 16 How. [U. S.] 314; Trist v. Child, 21 Wall. [U. S.] 441, Huffcut & W. Am. Cas. Cont. 340; Miles v. Thorne, 38 Cal. 335; Denison v. Crawford Co., 48 Iowa, 211; McBratney v. Chandler, 22 Kan. 692; Chesebrough v. Conover, 140 N. Y. 382; Yates v. Robertson, 80 Va. 475; Bryan v. Reynolds, 5 Wis. 200. The same rule applies to bona fide agreements to influence corporate action. Workman v. Campbell, 46 Mo. 305.

24. Marshall v. Baltimore & O. R. Co., 16 How. [U. S.] 314; Denison v. Crawford Co., 48 Iowa, 211, 215; Wildey v. Collier, 7 Md. 273.

25. Marshall v. Baltimore & O. R. Co., 16 How. [U. S.] 314; Foltz v. Cogswell, 86 Cal. 542; Crichfield v. Bermudez Asphalt Paving Co., 174 Ill. 466, 42 L. R. A. 347; Coquillard's Adm'r v. Bearss, 21 Ind. 479; Jones v. Blacklidge, 9 Kan. 562; Wood v. McCann, 6 Dana [Ky.] 366; Gil v. Williams, 12 La. Ann. 219; Spalding v. Ewing, 149 Pa. 375; Chippewa Valley & S. R. Co. v. Chicago, etc., R. Co., 75 Wis. 224.

26. Egerton v. Brownlow, 4 H. L. Cas. 1; Smith v. Stotesbury, 1 W. Bl. 204; Lucas v. Allen, 80 Ky. 681; Hutchen v. Gibson, 1 Bush [Ky.] 270; Odineal v. Barry, 24 Miss. 9; Kansas City School Dist. v. Sheldley, 138 Mo. 672, 37 L. R. A. 406; Dudley v. Butler, 10 N. H. 281; Devlin v. Brady, 36 N. Y. 531; Honaker v. Board of Education, 42 W. Va. 170, 32 L. R. A. 413; Houlton v. Nichols, 93 Wis. 393, 33 L. R. A. 166. A promise to pay money to the state on condition that the governor and certain commissioners shall locate a certain public institution at a certain place is not illegal. State v. Johnson, 52 Ind. 197. Thus, a promise to pay for services to be rendered in clearing a man from a past or contingent military draft is illegal. O'Hara v. Carpenter, 23 Mich. 410; Bowman v. Coffroth, 59 Pa. 19. And the same is true of an agreement tending to influence the conduct of a prosecuting officer with reference to a criminal investigation. Wildey v.

power.[27] As to whether an agreement calling for services to be rendered in procuring a contract for another from the head of a governmental department is illegal, there is some doubt. If what is done is done openly as agent or attorney, and no corrupt means are employed, there would seem to be no reason why the agreement should not be sustained;[28] but if the services are rendered in using personal influence and solicitation, or ostensibly in the way of giving disinterested advice to the officers, or if the agent's compensation is contingent upon success, the agreement should be held unlawful,[29] and generally an agreement under which services are to be openly rendered for the purpose of inducing proper official action by lawful means is valid,[30] subject to the qualification before stated that the promise to pay must be absolute.[31]

CONTRIBUTION.

§ 1. General Principles (865).
§ 2. As Between Joint Tort Feasors and Persons in Particular Relations (866).

§ 1. *General principles.*[49]—Contribution is the right of a joint debtor who pays more than his share to reimbursement from his codebtors thereby benefitted.[50] The right does not accrue till actual payment is made,[51] and not if the payor is secured by his principal.[52] Joint debtors can only be called on for a moity equal to

Collier, 7 Md. 273; Ormerod v. Dearman, 100 Pa. 561; Barron v. Tucker, 53 Vt. 338; Wight v. Rindskopf, 43 Wis. 344.

27. Promise to pay for securing pardon ordinarily void. Marshall v. Baltimore & O. R. Co., 16 How. [U. S.] 314, 334; State v. Johnson, 52 Ind. 197, 205; Thompson v. Wharton, 7 Bush [Ky.] 563; Kribben v. Haycraft, 26 Mo. 396; Hatzfield v. Gulden, 7 Watts [Pa.] 152. This rule applies only where the conviction was legal, not where it was unauthorized and void, as where the court was without jurisdiction. Thompson v. Wharton, 7 Bush [Ky.] 563. The same principle applies to a promise to exert influence to secure judicial clemency in case of the conviction of one accused of crime. The promise is void. Buck v. First Nat. Bank of Paw Paw, 27 Mich. 293. However, it is not unlawful for a man to openly urge the granting of a pardon, and to seek to obtain one by all legitimate means, which includes appearing before the pardoning officer, and employing proper argument to that end. Therefore, a promise to pay for such services, if absolute and not contingent upon success, is not illegal. Formby v. Pryor, 15 Ga. 258; Moyer v. Cantieny, 41 Minn. 242; Chadwick v. Knox, 31 N. H. 226; Bremsen v. Engler, 17 Jones & S. [N. Y.] 172. And see Timothy v. Wright, 8 Gray [Mass.] 522. As to the contingency of success, it may be noted that in the Massachusetts and Minnesota cases, supra, the promises were sustained, although contingent.

The same rule applies where the pardoning power is vested in the legislature. Meadow v. Bird, 22 Ga. 246.

28. Beal v. Polhemus, 67 Mich. 130; Cummins v. Barkalow, 1 Abb. Dec. [N. Y.] 479, *43 N. Y. 514; Howland v. Coffin, 47 Barb. [N. Y.] 653; Winpenny v. French, 18 Ohio St. 469. The fact that the agent has intimate relations with the government officials, and can probably, therefore, influence their action much more readily than others, does not forbid his employment. Southard v. Boyd, 51 N. Y. 177, Huffcut & W. Am. Cas. Cont. 347.

29. Oscanyon v. Winchester Repeating Arms Co., 103 U. S. 261; Providence Tool Co. v. Norris, 2 Wall. [U. S.] 45; Elkhart County Lodge v. Crary, 98 Ind. 238; Hovey v. Storer, 63 Me. 486.

30. McBratney v. Chandler, 22 Kan. 692; Barry v. Capen, 151 Mass. 99; Lyon v. Mitchell, 36 N. Y. 235; Sedgwick v. Stanton, 14 N. Y. 289.

31. See Egerton v. Earl Brownlow, 4 H. L. Cas. 1. However, an agreement for legitimate professional services in prosecuting a claim against the government in one of the executive departments may provide for a contingent fee. Stanton v. Embrey, 93 U. S. 548. **Contra,** Jones v. Blacklidge, 9 Kan. 562

49. See 1 Curr. L. 704.

50. A partner paying part of the capital that should be paid by the other. Newman v. Ruby [W. Va.] 46 S. E. 172. A beneficiary of an insurance policy may call on co-beneficiaries for contribution. Stockwell v. Mutual Life Ins. Co., 140 Cal. 198, 73 P. 833. A co-tenant need contribute his share of improvements made by the other only when he is in receipt of a proportionate amount of the rents and profits. Eighmey v. Thayer [Mich.] 98 N. W. 734.

51. Whatever value the creditor accepts constitutes a complete payment when so accepted. Statutory action for taxes paid by holder of legal title against equitable owner. Montgomery v. Montgomery, 25 Ky. L. R. 1682, 78 S. W. 465; Bishop v. Smith [N. J. Law] 57 A. 874. Confession of judgment and giving secured notes is equivalent to payment. Id. Not allowed when paid by money given surety by principal. Linder v. Snow, 119 Ga. 41, 45 S. E. 732.

52. But if the security is worthless, he may compel contribution. Mason's Ex'r v. McKnight, 25 Ky. L. R. 903, 76 S. W. 509.

their aliquot share of the liability.[53] The complaint need not allege exhaustion of legal remedies.[54]

§ 2. *As between joint tort feasors and persons in particular relations.*[55]—No obligation to contribute arises in favor of one joint wrongdoer as against another where the former has been compelled to pay damages for the joint wrong,[56] except where the act though technically tortious is done in good faith;[57] and there must be some relation between the several tort feasors other than that one by payment relieves the others of liability.[58] When land is charged with the payment of a legacy or an estate with the portion of a posthumous child, every part is bound to make contribution.[59]

CONVERSION AS TORT.

§ 1. What Constitutes (866).
§ 2. Property Subject to Conversion (868). Elements Necessary to Maintenance of the Action (869). Demand and Refusal (870). Right to Maintain and Persons Liable (870). Defenses (871). Parties (872). Damages (874).

§ 1. *What constitutes.*[60]—Conversion is the exercise of unlawful dominion over[61] and the appropriation of goods of another,[62] in denial of his rights.[63] Intent is not element,[64] and it is not necessary that there be a manual taking,[65]

53. McAllister v. Irwin's Estate, 31 Colo. 253, 254, 73 P. 47; Bishop v. Smith [N. J. Law] 57 A. 874. Insolvents and nonresidents not counted. Merrill v. Prescott, 67 Kan. 764, 74 P. 259. Insolvency must be proved. McAllister v. Irwin's Estate, 31 Colo. 253, 254, 73 P. 47. Where one creditor on a void execution pays for all, and the others may be called on to contribute they are liable in proportion to the amount of their claims. First Nat. Bank v. Avery Planter Co. [Neb.] 95 N. W. 622. Where action is for more than aliquot part, it must be regarded as equitable. Thompson v. Hibbs [Or.] 76 P. 778. Surety of a joint obligor may sue the other obligor for contribution. In re Provost's Estate, 87 App. Div. 86, 84 N. Y. S. 29.

54. A complaint by a co-debtor to recover the excess over his proportionate share paid the creditor, held sufficient without alleging exhaustion of legal remedies against plaintiff's co-debtor. This action controlled by a Louisiana statute. Moore v. Hanover Nat. Bank, 80 App. Div. 67, 80 N. Y. S. 448.

55. See 1 Curr. L. 704.

56. Joint liability of principal and agent. Boston & M. R. Co. v. Brackett, 71 N. H. 494, 53 A. 304. Confederation of breach of trust. Sharp v. Call [Neb.] 95 N. W. 16. Conversion. Tompkins v. Morton Trust Co., 91 App. Div. 274, 86 N. Y. S. 520. Conspiracy to defraud. Ladd v. Ney [Tex. Civ. App.] 81 S. W. 1007.

57. Principal and agent. Hoggan v. Cahoon, 26 Utah, 444, 73 P. 512. Void attachment by several creditors. Contribution made in proportion to amount of claims. First Nat. Bank v. Avery Planter Co. [Neb.] 95 N. W. 622.

58. Paddock-Hawley Iron Co. v. Rice [Mo.] 78 S. W. 634.

59. Cyc. L. Dict. Posthumous grandchild. In re Ross' Estate, 140 Cal. 282, 73 P. 976. Rule applied where distributees overpaid in course of administration (McClung v. Sieg [W. Va.] 46 S. E. 210); but not when legatees for value. Legally given in lieu of dower. Wiggins v. Wiggins [N. J. Eq.] 56 A. 148.

60. See 1 Curr. L. 705.

61. Where a succeeding tenant removed and stored goods of a preceding tenant after demand for them. McGonigle v. Belleisle Co. [Mass.] 71 N. E. 569. Evidence held to show possession in judgment purchaser of conditional vendee at date of commencement of action. Friedman v. Phillips, 84 App. Div. 179, 82 N. Y. S. 96. Where one received from another checks to get cashed and failed to return the proceeds, evidence held to show a conversion. Cohen v. Ross, 88 N. Y. S. 515. Surety on mortgage note unlawfully took possession of mortgaged property. Mardis v. Sims [Ala.] 37 So. 243.

62. Cleaning and examining ice on a mill pond preparatory to cutting is not. Abbott v. Cremer, 118 Wis. 377, 95 N. W. 387. A bank which receives a draft and bill of lading of converted goods and after collection disburses the money is not liable in conversion. Walker v. First Nat. Bank, 43 Or. 102, 72 P. 635. A bank receiving a fund with notice of the person to whom it belongs is guilty of conversion if it refuses to pay it to the owner. York v. Farmers' Bank [Mo. App.] 79 S. W. 968. After a trade of a livery barn and stock for land, the liveryman substituted broken down horses and removed other property for which he made substitution. O'Neill v. Everham, 123 Iowa. 709, 99 N. W. 580. Evidence held to show that a sale had been rescinded, and one who took property consigned to him was liable in conversion. Lamkin v. Johnson [N. H.] 56 A. 750.

63. One with whom a soda fountain had been left by a lessee thereof refused to deliver it to the owner. Rosenkranz v. Saberski, 40 Misc. 650, 83 N. Y. S. 257.

64. Transferee of city warrants from one who had no title, collected and converted them. Casey v. Pinkington, 83 App. Div. 91, 82 N. Y. S. 525; Alexander v. Bowers [Tex. Civ. App.] 79 S. W. 342.

65. Direction by vendor to one in possession not to deliver it to vendee. McDonald v. Bayha [Minn.] 100 N. W. 679.

Note: Words spoken or written indicat-

but acts which do not of themselves imply an assertion of right of dominion do not constitute a conversion,[66] and one who has not the property in his control connot convert it.[67] It is a conversion to wrongfully remove soil,[68] or timber,[69] or crops,[70] or to wrongfully deal with goods rightfully in one's possession,[71] or to deprive one of a cause of action.[72] The refusal of a custodian in escrow to deliver the property on fulfillment of the conditions,[73] or the sale of a pledge, is a conversion,[74] unless made pursuant to an agreement.[75] The sale of goods of another,[76] or of property held as security,[77] or refusal by the vendor to redeliver property held under conditional contract of sale, is a conversion;[78] but the recording of a deed held as security, after payment of the indebtedness secured thereby, is not a conversion of the deed.[79] The mere purchase of property without change of possession is a conversion;[80] but it was otherwise held where a purchaser with notice did not take possession.[81] An act done in obedience to the mandate of a court is not conversion,[82] nor is the mere destruction of property.[83] The misappropriation of funds,[84] the settlement of a cause of action assigned as security,[85] the wrongful transfer on the stock register of corporate stock,[86] failure of brokers to deliver on demand stock sold on margin,[87] a wrongful levy of attachment,[88]

ing an intention to claim dominion is sufficient. Wintringham v. Lafoy, 7 Cow. [N. Y.] 735; Connah v. Hall, 23 Wend. [N. Y.] 462; Fonda v. Van Horne, 15 Wend. [N. Y.] 631, 30 Am. Dec. 77; Bolling v. Kirby, 90 Ala. 215, 24 Am. St. Rep. 799 and note.

66. Failure to redeliver a boat at place agreed. Direct Nav. Co. v. Davidson [Tex. Civ. App.] 74 S. W. 790.

67. Shares of corporate stock delivered to defendant and title placed in another. German-American Bank v. Brunswig [Mo. App.] 81 S. W. 461.

68. Taking gravel from land after a right to do so had been revoked by tax sale. Hunt v. Boston, 183 Mass. 303, 67 N. E. 244.

69. After revocation of license. Snyder v. East Bay Lumber Co. [Mich.] 97 N. W. 49.

70. Landlord cut crops of a tenant. Mueller v. Olson, 90 Minn. 416, 97 N. W. 115. A landlord sold leased land, then purchased the growing crop from the tenant; grantee cut the crop. Simanek v. Nemetz [Wis.] 97 N. W. 508. Grantee's notice of lease admissible. Id.

71. One had possession of a gasoline engine which he was to repair and sell and pay the owner a certain amount; he sent the engine out of the state on trial and could not get it back. Port Huron Engine & Thresher Co. v. Otto Gas Engine Works, 89 Minn. 393, 94 N. W. 1088.

72. Where notes were by mistake made to bear a higher rate of interest than agreed and inadvertently signed, and transferred by the payee with notice of the mistake. Story v. Gammell [Neb.] 94 N. W. 982.

73. Shares of stock to be delivered on final determination of a certain action. Clarke v. Eureka County Bank, 123 F. 922.

74. Brokers sold stock held as security for a loan. Learock v. Paxson, 208 Pa. 602, 57 A. 1097.

75. Pawnbroker sold without notice pursuant to agreement printed on ticket. Stern v. Leopold Simons & Co. [Conn.] 58 A. 696. Such an agreement is not contrary to public policy. Id.

76. A tenant by agreement had a right to remove fixtures; the landlord sold the premises without reservation. Smyth v. Stoddard, 105 Ill. App. 610.

77. One had possession under a bill of sale which was in effect a mortgage, assigned to another. Haynes v. Hobbs [Mich.] 98 N. W. 978.

78. V. S. § 2293. Clark v. Clement, 75 Vt. 417, 56 A. 94.

79. Knowles v. Knowles [R. I.] 56 A. 775.

80. One purchased at a void execution sale and appointed the debtor his agent, who remained in possession. Property belonged to a third person. Sperling v. Stubblefield [Mo. App.] 79 S. W. 1172.

81. The purchaser of lumber stopped in transitu wrongfully got possession and sold to one with notice. McGill v. Chilhowee Lumber Co. [Tenn.] 82 S. W. 210.

82. Receiver sold liquor tax certificate which did not belong to the debtor, but to one who had advanced the money to pay for it. Ernest Ochs v. Pohly, 87 App. Div. 92, 84 N. Y. S. 1. A trustee in bankruptcy selling goods procured by the bankrupt by fraud; the seller did not rescind for fraud until after proceedings had been instituted. In re Mertens, 131 F. 507.

83. Destruction of a derelict barge in order to dislodge it from the false work of a bridge. McKeesport Sawmill Co. v. Pennsylvania Co., 122 F. 184.

84. Where bank, having notice of conditions, applied check of officers of defunct corporation to payment of their individual debt. Kelsey v. Bank of Mansfield, 85 App. Div. 334, 83 N. Y. S. 281.

85. Curtis v. Curtis [Mich.] 96 N. W. 32.

86. Transfer agent made transfer on faith of forged power of attorney. Jennie Clarkson Home for Children v. Chesapeake & O. R. Co., 41 Misc. 214, 83 N. Y. S. 913.

87. Brokers pledged stock to one who sold it. Rothschild v. Allen, 90 App. Div. 233, 86 N. Y. S. 42. See Brokers, 1 Curr. L. 360.

88. On exempt property. Ahearn v. Connell [N. H.] 56 A. 189. Unless right to exemption has been waived. Williams v. Brown [Mich.] 100 N. W. 786. Evidence held to show no valid levy. Fred Krug Brew. Co. v. Healey [Neb.] 99 N. W. 489; Messenger v. Murphy, 33 Wash. 353, 74 P. 480.

leasing by landlord of furnishings,[89] or trade fixtures of a dispossessed tenant, which by contract he has a right to remove,[90] the sale by the mortgagor of chattels mortgaged,[91] or the taking possession by a mortgagee in any other manner than that provided by law,[92] is a conversion. To constitute conversion of a bailment, there must be such a deviation from the contract as would be tantamount to an assertion of dominion over it.[93] A sale by a bailee,[94] unless he does so with apparent authority,[95] or the failure to return a bailment at the time agreed,[96] or demand made under such an agreement, is a conversion,[97] and it is no defense that after the demand the property was stolen.[98] Where wheat is stored under an agreement that wheat of like grade shall be returned, there is no conversion so long as there is enough of such wheat on hand to satisfy the tickets.[99] The mere refusal to surrender on demand is at most but a technical conversion.[1] There is no conversion by a common carrier, unless there is an absolute refusal to return the goods or the excuses are unreasonable or made in bad faith;[2] but the refusal of a carrier to deliver without surrender of the bills of lading is conversion.[3] Where a trustee sells the trust estate, it is not a conversion as against his co-trustee.[4] If property held in common is severable in character, the retaining by one co-tenant of the whole, after demand, is a conversion.[5]

§ 2. *Property subject to conversion.*—Trover will lie for money, though not specifically earmarked,[6] unless it has passed to a bona fide holder;[7] but an estate in land is not subject to conversion.[8]

89. Wilson v. Hoffman, 123 F. 984.

90. Planking on a dock. Crerar v. Daniels, 209 Ill. 296, 70 N. E. 569.

91. Crop of wheat. Foreclosure not necessary. La Rue v. St. Anthony & Dakota Elevator Co. [S. D.] 95 N. W. 292.

92. See Chattel Mortgages, 1 Curr. L. 526. Marchand v. Ronaghan [Idaho] 72 P. 731; O'Neill Mfg. Co. v. Woodley, 118 Ga. 114, 44 S. E. 980. Evidence held sufficient to show a conversion where one sold a threshing machine on which he held a chattel mortgage, before maturity of the mortgage. Huber Mfg. Co. v. Gotchall, 1 Neb. Unoff. 548, 96 N. W. 611.

93. That bailee delivered a boat at a different place than agreed is insufficient. Direct Nav. Co. v. Davidson [Tex. Civ. App.] 74 S. W. 790.

94. Goods held not to be perishable under Laws 1899, c. 582. Haebler v. New York, etc., R. Co., 84 N. Y. S. 509.

95. On direction of servant of owner who delivered it to him. Burke v. Holmes [Tex. Civ. App.] 80 S. W. 564.

96. One borrowed jewelry to be pawned under promise to return it on a certain date. Chankalian v. Powers, 89 App. Div. 395, 85 N. Y. S. 753.

97. Proposed purchaser took diamond; after demand therefor, it was stolen. Lopard v. Symons, 85 N. Y. S. 1025.

98. Lopard v. Symons, 85 N. Y. S. 1026.

99. Elevator burned, evidence held to show such an agreement and that there was sufficient wheat on hand. Mayer v. Gersbacher, 207 Ill. 296, 69 N. E. 789.

1. One having notes for collection, claiming no ownership in them, title to which was asserted by adverse claimants. Stroup v. Bridger [Iowa] 100 N. W. 113.

2. Consignment was not accepted. Consignor sent postal to carrier instructing return of goods, which carrier denied receiving. Failure to return by certain date on second demand held not conversion. Rubin v. Wells Fargo Exp. Co., 85 N. Y. S. 1108.

Note: A carrier acting merely as a conduit is not liable. Gurley v. Armstrong, 148 Mass. 267, 12 Am. St. Rep. 555, 2 L. R. A. 80; Metcalf v. McLaughlin, 122 Mass. 84; McCarty v. Vickery, 12 Johns. [N. Y.] 348; Nanson v. Jacob, 93 Mo. 331, 3 Am. St. Rep. 531; Burditt v. Hunt, 25 Me. 419, 43 Am. Dec. 289; Smith v. Colby, 67 Me. 169. Contra, Mead v. Jack, 12 Daly [N. Y.] 65. Where he had notice. Thorp v. Burling, 11 Johns. [N. Y.] 285; Gaines v. Briggs, 9 Ark. 46.—Note to Bolling v. Kirby [Ala.] 24 Am. St. Rep. 795.

3. Bank held bills of lading as security. Refused to deliver part of the property. First Nat. Bank v. San Antonio & A. P. R. Co. [Tex.] 77 S. W. 410.

4. The trustees being authorized to sell. Goldschmidt v. Maier, 140 Cal. xvii, 73 P. 984.

5. Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195.

6. Where bank applied check of officers of defunct corporation to payment of invidual debt. Kelsey v. Bank of Mansfield, 85 App. Div. 334, 83 N. Y. S. 281.

Note: Every species of personal property subject to ownership may be converted. Money. Moody v. Keener, 7 Port. [Ala.] 218. Notes. Davis v. Funk, 39 Pa. 243, 80 Am. Dec. 519; Otisfield v. Maybury, 63 Me. 197; Penniman v. Winner, 54 Md. 127. Contracts. Hazewell v. Coursen, 45 N. Y. Super. Ct. 22. Certificates of stock. Kingman v. Pierce, 19 Mass. 247; Payne v. Elliott, 54 Cal. 339, 35 Am. Rep. 80. Copies of accounts. Fullam v. Cummings, 16 Vt. 697; O'Donoghue v. Corby, 22 Mo. 394. Writs of execution (Keeler v. Facett, 21 Vt. 539, 52 Am. Dec. 71), but not for records (Platt v. Potts, 11 Ired. [N. C.] 266), nor a chose in action after the

Elements necessary to maintenance of the action.—A general or special property interest in the plaintiff is necessary to maintain the action,[9] but a pledgee[10] or an assignee subsequent to conversion[11] has a sufficient interest, as has a mortgagor, even after condition broken.[12]

An immediate right of possession in the plaintiff is necessary.[13] The owner of goods in transit has possession,[14] and the right to possession in an agent is sufficient.[15] So also, a bailee,[16] or the finder of hidden treasure,[17] or the assignee of an assignee, may maintain the action.[18] One having the title and right to possession may maintain the action without joining a party having a beneficial interest therein.[19] Heirs cannot maintain the action if there is an administration pending or necessary,[20] and a joint owner cannot maintain the action alone,[21] nor can a partner against one holding title through his co-partner.[22] Where a chattel mortgagee has not the right to possession, he cannot maintain the action until the law day of the mortgage,[23] and he has the burden to show that the conversion occurred after his right of possession accrued;[24] but where a lessee for a

indebtedness has expired (Besherer v. Swisher, 3 N. J. Law, 748; Todd v. Crookshanks, 3 Johns. [N. Y.] 432). Contra (Stone v. Clough, 41 N. H. 290; Neal v. Hans, 60 Me. 84; Spencer v. Dearth, 43 Vt. 98), or if a note is founded on an illegal consideration (Morrill v. Goodenow, 65 Me. 178), nor if the thing converted be unlawful to have in one's possession; counterfeit coin (Spaulding v. Preston, 21 Vt. 9).—Bolling v. Kirby, 90 Ala. 215, and note 24 Am. St. Rep. 818.

Evidence held to show conversion of money by an executor. Hunnicutt v. Higginbotham, 138 Ala. 472, 35 So. 469.

7. One received in payment of a debt proceeds of converted goods. Walker v. First Nat. Bank, 43 Or. 102, 72 P. 635.

8. Leasehold. Goldschmidt v. Maier, 140 Cal. xvii, 73 P. 984.

9. Evidence held to show an assignment by plaintiff of stock pledged by her as collateral. Drew v. Salmon, 85 App. Div. 615, 82 N. Y. S. 922. Where a city marshal accepted money, to release a levy of attachment, evidence held not to show a conversion. Cafe Union v. Reordan, 84 N. Y. S. 994. In conversion for a dog, evidence held to show that plaintiff had parted with his title. Knox v. Cook, 119 Ga. 689, 46 S. E. 868. Evidence held to show not a conditional sale but a sale with warranty of fitness, and plaintiff had no title. Grier v. North & South Macon St. R. Co. [Ga.] 47 S. E. 898. Evidence held to show a sale to defendant and not a delivery to him as agent. South Bend Ironworks v. Wagner [Tex. Civ. App.] 74 S. W. 601.

10. One holding warehouse receipt for cotton [Civ. Code 1895, § 2956]. Farmers & Merchants Bank v. Bennett & Co. [Ga.] 48 S. E. 398.

11. Assignment of shares of stock held by broker on margin. Rothschild v. Allen, 90 App. Div. 233, 86 N. Y. S. 42. Where a final certificate has been canceled for fraud, the government can recover from vendees of the homesteader, who had notice of the fraud for timber taken from the land before cancellation. Potter v. U. S. [C. C. A.] 122 F. 49.

12. Mortgagee had not taken possession, goods stored in warehouse. Bigler v. Leonori [Mo. App.] 77 S. W. 324.

13. Where vendor of piano retained title and subsequently purchased the vendee's interest, he could maintain suit against attachment purchaser against the vendee. Friedman v. Phillips, 84 App. Div. 179, 82 N. Y. S. 96. Receipt acknowledging payment for firewood does not show title and right to possession of old furniture. Walker v. Farrell, 84 N. Y. S. 182. Evidence held to show that a second mortgagee who had taken possession jointly with first mortgagee had sufficient right to possession. Columbia Bank v. American Surety Co., 84 App. Div. 487, 82 N. Y. S. 1054. One who never owned goods executed a chattel mortgage thereon which was foreclosed. Syck v. Bossingham 120 Iowa, 363, 94 N. W. 920. One who sells mortgaged chattels on execution against the mortgagor after he is in default is liable to the mortgagee. Biehler v. Irwin, 84 N. Y. S. 574.

14. Rosencranz v. Swofford Bros. Dry Goods Co., 175 Mo. 518, 75 S. W. 445.

15. Samples of traveling salesman lost by innkeeper. Baehr v. Downey [Mich.] 94 N. W. 750.

16. Laundry agent. Langfelder v. Renouf, 84 N. Y. S. 236.

17. Boys digging in henhouse unearthed buried gold. Danielson v. Roberts [Or.] 74 P. 913.

18. One assigned a cause of action for conversion to another, who reassigned it to the original party's trustee in bankruptcy. Brunnemer v. Cook & Bernheimer Co., 89 App. Div. 406, 85 N. Y. S. 954.

19. A cashier purchased property in his own name for the benefit of the bank. Chamberlain v. Woolsey [Neb.] 95 N. W. 38. Evidence that another than plaintiff had an interest would not justify direction of verdict for defendant. Haynes v. Hobbs [Mich.] 98 N. W. 978.

20. Rylie v. Stammire [Tex. Civ. App.] 77 S. W. 626.

21. For proceeds of sale of cattle owned by plaintiff and another. Johnson v. St. Joseph Stockyards Bank, 102 Mo. App. 395, 76 S. W. 699.

22. Andrews v. Clark [Neb.] 98 N. W. 655.

23, 24. Johnson v. Wilson & Co., 137 Ala. 468, 34 So. 392.

term sells the property, the owner has immediate right of action, though the term has not expired.[25]

The true owner may be estopped from maintaining the action,[26] but an owner of goods levied on is not estopped by failure to notify the officer until the day following that the goods were not subject to levy,[27] and that one has stated that he was indebted to the defendant does not estop him.[28] The failure of a defendant in a replevin suit in which the verdict was in his favor to have the value of the property assessed does not preclude him from maintaining conversion.[29]

Demand and refusal.—Demand is necessary where the possession was lawfully obtained,[30] but otherwise where it was wrongful.[31] If conversion otherwise appear, demand and refusal are immaterial,[32] and though demand is required by statute, if it appears that it would have been unavailing, failure to make it is not fatal.[33] A demand for more property than is ultimately claimed is sufficient.[34] Where a vendee under a conditional bill of sale claims title, no demand is necessary.[35] A petition containing no allegation of demand and refusal is good against demurrer.[36]

Right to maintain and persons liable.[37]—The right of the government to maintain an action for conversion cannot be affected by a state statute.[38] A second mortgagee of chattels cannot maintain conversion against a first mortgagee in possession, unless the value of the property at the time of conversion exceeded the amount of the first mortgage.[39] An innocent purchaser of personal property from one having no title is liable in conversion,[40] as is a purchaser of land with notice of a right to remove fixtures,[41] in which case he is estopped to deny the

25. United Shoe Machinery Co. v. Holt [Mass.] 69 N. E. 1056.

26. French exporters consigned goods to a New York agent and made a consular declaration that he was a purchaser. They were estopped to set up as against a purchaser that he was their agent. Simar v. Shea, 89 App. Div. 84, 85 N. Y. S. 457.

27. Officer took goods of a third person. Execution defendant told him the goods belonged to another. Beaman v. Stewart [Colo. App.] 74 P. 342.

28. Statement to financial agency. Rosencranz v. Swofford Bros. Dry Goods Co., 175 Mo. 518, 75 S. W. 445.

29. Rev. St. §§ 3921, 3922. Mortgagee sued in replevin for the property, and judgment went against him, prior to which he had had the mules sold under the mortgage. Caldwell v. Ryan [Mo. App.] 79 S. W. 743.

30. Receiver received from president of defunct corporation canceled coupons, among which was included uncanceled coupons belonging to the president individually. Case v. Hudson Co., 91 App. Div. 613, 86 N. Y. S. 778.

31. One took possession of his son-in-law's furniture without his consent. Heyert v. Reubman, 86 N. Y. S. 797. That he did so to protect his daughter from ill-treatment was no defense. Heyert v. Reubman, 86 N. Y. S. 797; Friedman v. Phillips, 84 App. Div. 179, 82 N. Y. S. 96. Gravel taken from a lower depth than was granted by deed. Hunt v. Boston, 183 Mass. 303, 67 N. E. 244. Seizure by sheriff from a purchaser from a mortgagor in a void mortgage. Stevens v. Curran, 28 Mont. 366, 72 P. 753.

32. Being evidence only. Carper v. Risdon [Colo. App.] 76 P. 744.

33. Code Civ. Proc. §§ 549, 698 where property is taken under illegal process. Hunt v. Hammel, 142 Cal. 456, 76 P. 378.

34. Evidence of conversion of that part ultimately claimed. Carper v. Risdon [Colo. App.] 76 P. 744.

35. Error to grant nonsuit. Scarboro v. Goethe, 118 Ga. 543, 45 S. E. 413.

36. Farmers' & Merchants' Bank v. Bennett & Co. [Ga.] 48 S. E. 398.

37. Note: That one was acting as an agent is no defense to an action for conversion. Shilling v. Shilling [Tex. Civ. App.] 35 S. W. 420; Hill v. Campbell Com. Co., 54 Neb. 59. Of grain. Shearer v. Evans, 89 Ind. 400; Warder-Bushnell & G. Co. v. Harris, 81 Iowa, 153; Edgerly v. Whalen, 11 Allen [Mass.] 231. Though he be innocent. Porter v. Thomas, 23 Ga. 467; Miller v. Wilson, 98 Ga. 567, 58 Am. St. Rep. 319; Pernunter v. Kelly, 18 Ala. 716, 54 Am. Dec. 177.—From note to Bulling v. Kirby [Ala.] 24 Am. St. Rep. 795.

38. Code Civ. Proc. Mont. § 906, requiring notice. McKnight v. U. S. [C. C. A.] 130 F. 659.

39. Dempster Mill Mfg. Co. v. Wright, 1 Neb. Unoff, 666, 95 N. W. 806.

40. Ashton v. Allen [N. J. Law] 56 A. 165. Mortgagee of one who had no title. Lance v. Butler, 135 N. C. 419, 47 S. E. 488. One purchasing at sheriff's sale. Milner & Kettig Co. v. De Loach Mill Mfg. Co., 139 Ala. 645, 36 So. 765. Where one purchased sugar from a clerk who had stolen it from his employer. Ball-Barnhart-Putnam Co. v. Lane [Mich.] 97 N. W. 727.

41. Turner v. Faubion [Tex. Civ. App.] 81 S. W. 810.

tenant's ownership,[42] and his liability is unaffected by the nature of the instrument under which his predecessor held.[43]

A principal is liable for conversion by his agent,[44] and a sheriff for a conversion by his deputy,[45] and where an executor takes money which does not belong to the estate, he is individually liable.[46] After demand and refusal to pay, conversion will lie against one who has received money in a fiduciary capacity.[47] One who takes, in good faith, a negotiable instrument, wrongfully put in circulation is not liable.[48] A bank is not liable for paying checks on a forged indorsement, where the money is paid to its lawful owner.[49] A servant in passession of property of his master cannot maintain conversion against a vendee of his master.[50] Authority of the mortgagor to sell the property will estop the mortgagee to assert his rights against a purchaser, but mere authority to move the crop will not.[51]

Defenses.—Title and right to possession in a third party is a good defense,[52] and an open account for an animal's keep is a good counterclaim;[53] but it is no defense that the instrument converted is a gambling device,[54] or that the defendant had a lien on the property,[55] or a claim against the owner.[56] It is no defense to a mortgagee that the sale under the mortgage was void,[57] but a mortgagor's consent to the sale is a defense.[58]

The right of action is barred only by the general statute of limitations.[59]

The filing of a criminal complaint may be a condition precedent to the right to maintain the action,[60] and one who has voluntarily placed his goods in the hands of another, but has taken from such other goods belonging to him, must restore them;[61] but where brokers sell stock of a customer, which they hold in pledge, a tender is unnecessary before bringing conversion.[62]

42. Machinery and shaft house on mining claims. Carper v. Risdon [Colo. App.] 76 P. 744.

43. Purchaser at execution sale was notified that the property did not belong to execution debtor. Sperling v. Stubblefield [Mo. App.] 79 S. W. 1172.

44. Expressman took wrong property from storeroom of a hotel. Edwards v. American Exp. Co., 121 Iowa 744, 96 N. W. 740. A servant of the owner sold property of a former lessee, left by him on the premises with the owner's consent. McQuale v. North American Smelting Co., 208 Pa. 504, 57 A. 984.

45. Seizure under void execution. Stephens v. Head, 138 Ala. 455, 35 So. 565.

46. Hunnicutt v. Higginbotham, 138 Ala. 472, 35 So. 469. A person may be sued specifically as executor de son tort and judgment entered against him as such [Code 1893, § 3310]. Allen v. Hurst [Ga.] 48 S. E. 341.

47. Jackson v. Moore, 87 N. Y. S. 1101.

48. He has the burden to show good faith. Merchant Loan & Trust Co. v. Welter, 205 Ill. 647, 68 N. E. 1082.

49. A partner collected accounts and without authority indorsed the checks given in payment, deposited them to his individual account and gave the firm his own check. New York Brick & Pav. Co. v. Bronx Borough Bank, 42 Misc. 31, 85 N. Y. S. 557.

50. Servant notified master not to remove the goods until his wages had been paid. Van Lesslor v. Ann Arbor R. Co. [Mich.] 95 N. W. 710.

51. To haul it to a warehouse. Zorn v. Livesly [Or.] 75 P. 1057.

52. Where mortgagee brought conversion, it was error to exclude evidence that a mortgagor had sold to another. Civ. Code, § 3861, requiring record of chattel mortgages not having been complied with. Reynolds v. Fitzpatrick, 28 Mont. 170, 72 P. 510.

53. Gooch v. Isbell [Tex. Civ. App.] 77 S. W. 973.

54. Slot machine. Edwards v. American Exp. Co., 121 Iowa, 744, 96 N. W. 740.

55. Carrier assigned lien for freight to defendant. Rosencranz v. Swofford Bros. Dry Goods Co., 175 Mo. 518, 75 S. W. 445.

56. Where one wrongfully settled a cause of action held as security, he could not apply the proceeds to payment of another claim he held against the assignor. Curtis v. Curtis [Mich.] 96 N. W. 32.

57. Property at time of sale was in custodia legis. Caldwell v. Ryan [Mo. App.] 79 S. W. 743.

58. Where there was evidence of such consent, it was error to charge that there was conversion as a matter of law. Burroughs v. Butler-Ryan Co., 121 Iowa, 215, 96 N. W. 750.

59. Where a landlord enters before expiration of a lease and forbids the tenant to remove his fixtures. Eldridge v. Hoefer [Or.] 77 P. 874.

60. Where a tenant converted carpets before leaving the premises, there was no larceny. McNeal v. Macomber [R. I.] 56 A. 683.

61. Dispossessed tenant left furnishings which the landlord converted, but she took goods of the landlord. Hoffman v. Wilson [C. C. A.] 130 F. 694.

62. He reserving the right to sell when he desires. Learock v. Paxson, 208 Pa. 602, 57 A. 1097.

The owner may waive the tort and sue in assumpsit.[63]

A single conversion cannot be made the subject of several actions,[64] but the proof may extend to successive conversions.[65] An action sounding in conversion cannot be maintained in equity.[66]

Parties.—It may be required that all persons having an interest be made parties.[67]

The complaint must allege a general or special property interest,[68] a right to immediate possession,[69] the value of the property at the date of conversion,[70] a sufficient description of the property,[71] but one count in the declaration may refer to another for a description.[72] That defendant converted the property to his own use[73] must be alleged, but it is not necessary to allege that the property was "wrongfully" converted.[74] A complaint following the form of a statute is not subject to demurrer,[75] and it is sufficient to allege ownership, right to possession, and conversion.[76] An allegation of the date is sufficient,[77] and allegations more in the nature of evidential than of ultimate facts are proper.[78] Superfluous words may be rejected.[79] Where heirs bring suit for property belonging to the estate, they must allege that there is no administration pending and no necessity for one.[80] A complaint against an executor de son tort need not allege that no debts were due by the estate.[81] Where exemplary damages are not asked, an allegation of improper taking of the property is subject to exception.[82] A chattel mortgagee must allege that at the date of conversion, he was the owner of the notes in question and that they had not been paid.[83] An allegation that plaintiffs waived their alleged claim of the mortgage lien is a conclusion of law.[84] A complaint

63. One wrongfully took a horse and sold it. Owner sued for money had and received. Jester v. Knotts [Del. Super.] 57 A. 1094. For cotton converted. Farmers & Merchants Bank v. Bennett & Co. [Ga.] 48 S. E. 398.

64. A constable under one levy took several articles at different places and several actions were brought in justice court. Hesser v. Johnson, 13 Okl. 53, 74 P. 320.

65. Not limited to date alleged in declaration. Wilson v. Hoffman, 123 F. 984.

66. Action to recover bond deposited for specific uses. Sawyer v. Atchison, etc., R. Co. [C. C. A.] 129 F. 100.

67. Code, § 3462. Stroup v. Bridger [Iowa] 100 N. W. 113.

68. Harrington v. Stromberg-Mullins Co. [Mont.] 74 P. 413. Petition alleging special ownership held sufficient. Fred Krug Brew. Co. v. Healey [Neb.] 99 N. W. 489; Glass v. Basin & Bay State Min. Co. [Mont.] 77 P. 302.

69. Complaint held insufficient in an action to recover corporate stock. Glass v. Basin & Bay State Min. Co. [Mont.] 77 P. 302; Harrington v. Stromberg Mullins Co. [Mont.] 74 P. 413. It need not be alleged that plaintiff was entitled to possession at the commencement of the action. Hunt v. Hammel, 142 Cal. 456, 76 P. 378. An allegation that plaintiff was the owner of certain property and delivered the same to another for storage purposes alleges possession in the owner. State v. Sullivan, 99 Mo. App. 616, 74 S. W. 417.

70. Harrington v. Stromberg-Mullins Co. [Mont.] 74 P. 413. An allegation that property "to the value of $600.00 was converted, whereby plaintiff was damaged in the value of $600.00," held sufficient. Recht v. Glickstein [Ind.] 69 N. E. 667.

71. Description of a converted water melon held sufficient. Harper v. Richards [Ga.] 47 S. E. 899.

72. Wilson v. Hoffman, 123 F. 984.

73. An allegation that defendants converted and disposed of the property to their own use is sufficient to sustain a judgment. Stevens v. Curran, 28 Mont. 366, 72 P. 753.

74. "Converted" implies wrongful. Cordill v. Minnesota Elevator Co., 89 Minn. 442, 95 N. W. 306.

75. Rev. St. 1892, § 1058. Leon v. Kerrison [Fla.] 36 So. 173. Overruling exceptions to portion of petition alleging fraud held immaterial. Turner v. Faubion [Tex. Civ. App.] 81 S. W. 810.

76. Conversion of corporate stock delivered for a temporary use. Rockwell v. Day, 84 App. Div. 437, 82 N. Y. S. 993.

77. Precise hour and minute need not be alleged. Hunt v. Hammel, 142 Cal. 456, 76 P. 378.

78. Allegations of how one came into ownership and possession of stock converted. Rockwell v. Day, 84 App. Div. 437, 82 N. Y. S. 993.

79. Complaint alleging "or before" a certain date, plaintiff was owner and entitled to possession and that "about" that date property was converted, held sufficient. Recht v. Glickstein [Ind.] 69 N. E. 667.

80. Rylle v. Stammire [Tex. Civ. App.] 77 S. W. 626.

81. Code 1895, § 3310. Allen v. Hurst [Ga.] 48 S. E. 341.

82. In coarse and brutal manner calculated to intimidate. Rylle v. Stammire [Tex. Civ. App.] 77 S. W. 626.

83. Harrington v. Stromberg-Mullins Co. [Mont.] 74 P. 413.

84. Zorn v. Livesley [Or.] 75 P. 1057.

for a specified number of trees does not authorize a recovery on proof of amount of lumber received from the land.[85] Separate causes of action must be stated in separate paragraphs.[86]

An answer alleging title sets up a meritorious defense.[87] A plea that the goods were taken under an execution must show that the officer held an execution.[88] A denial of "wrongful" possession is not a denial of actual possession.[89] Title in a third party need not be set out in the plea,[90] but may be proved under a general denial.[91]

Dismissal as to one joint defendant does not affect the liability of the others,[92] and a judgment in favor of one defendant does not operate to discharge his co-defendant.[93] Where a counterclaim is set up, the action cannot be dismissed as to any of the co-plaintiffs.[94]

The burden is on the plaintiff to establish a wrongful taking.[95] Where an agent converts goods of his principal, the burden is on the principal to show the value of the goods.[96] And a general showing of the amount of goods converted shifts the burden on the agent to make a specific accounting.[97] For trees cut on government land, a prima facie case is made out by showing ownership of the land, the cutting and asportation of the trees, their value, and subsequent possession by the defendant.[98] The burden of proving the purpose for which the timber was taken is on the defendant.[99]

There must be evidence to identify the property.[1] Ownership is a fact to which a witness may always testify,[2] and ownership of a boat may be proved by parol.[3] The admissibility[4] or inadmissibility[5] of evidence to show a right of pos-

85. Barclay v. Smith [Miss.] 36 So. 449.

86. Complaint alleged three separate conversions in one paragraph [Code Civ. Proc. 483]. Whitney v. Wenman, 89 N. Y. S. 296.

87. Not error to overrule demurrer to answer. Knox v. Cook, 119 Ga. 689, 46 S. E. 868.

88. Stephens v. Head, 138 Ala. 455, 35 So. 565.

89. Yank v. Bordeaux [Mont.] 74 P. 77.

90. Under Rev. Rules of Practice, No. 7, requiring affirmative defenses to be set forth in a notice to be attached to the plea, does not apply to trover, where plaintiff does not allege his source of title. Williams v. Brown [Mich.] 100 N. W. 786.

91. Simar v. Shea, 89 App. Div. 84, 85 N. Y. S. 457. An answer that defendant claimed as assignee for benefit of creditors and that plaintiff never made a demand, but stood by and allowed him to dispose of the property, did not state a counterclaim. Babcock v. Maxwell [Mont.] 74 P. 64.

92. Carper v. Risdon [Colo. App.] 76 P. 744; Weisinger v. McDonald [Ky.] 81 S. W. 687.

93. Cunningham v. O'Connor [Mich.] 99 N. W. 25.

94. Gooch v. Isbell [Tex. Civ. App.] 77 S. W. 973.

95. Action by administrator of goods of deceased by his attending physician, evidence held insufficient. Cathers v. Damerell [Neb.] 97 N. W. 623.

96. Bartender failed to account for proceeds of sales, which was set off against wages due him. Lahr v. Kraemer [Minn.] 97 N. W. 418.

97. Lahr v. Kraemer [Minn.] 97 N. W. 418.

98. Notwithstanding Acts of Congress conferring authority to take for specified purposes [17 Stat. at L. c. 354; 19 Stat. at L. c. 126]. United States v. Denver, etc., R. Co., 191 U. S. 84, 48 Law. Ed. 106.

99. United States v. Denver, etc., R. Co., 191 U. S. 84, 48 Law. Ed. 106.

1. Evidence held sufficient to go to the jury. Error to direct nonsuit. Schleicher v. Wirth, 86 N. Y. S. 265. In conversion by mortgagees against purchasers of the property, evidence held to show nonpayment of the mortgage. Zorn v. Livesley [Or.] 75 P. 1057.

2. Plaintiff testified to his ownership. Hunnecutt v. Higginbotham, 138 Ala. 472, 35 So. 469.

3. Leon v. Kerrison [Fla.] 36 So. 173.

4. Mortgagor's knowledge that property wae being disposed of. Burroughs v. Butler-Ryan Co., 121 Iowa 215, 96 N. W. 750. Where one secured the property, its cost, and whether it had been paid for. Porter v. Hawkins, 27 Mont. 486, 71 P. 664. A letter written by attorney for defendant, asserting that defendant is the owner, and that plaintiff's claim is repudiated. Carper v. Risdon [Colo. App.] 76 P. 744. On an issue of ownership, evidence of leases. Eldridge v. Hoefer [Or.] 77 P. 874. Declarations of an officer making an illegal levy, going to show his knowledge that the property belonged to a third party. McKnight v. U. S. [C. C. A.] 130 F. 659. History of litigation in cause of action assigned as security admissible in conversion for wrongful settlement thereof. Curtis v. Curtis [Mich.] 96 N. W. 32. Statements of a third party as to grounds of refusal to deliver. McDonald v. Bayha [Minn.] 100 N. W. 679. Conditional bill of sale. Schleicher v. Wirth, 86 N. Y. S. 265. Custom of other pawnbrokers to sell pledges, not redeemed within six months.

session, or value of the property converted,[6] and the propriety of instructions,[7] are discussed in cases cited. Has the plaintiff been damaged is a proper interrogatory.[8]

On conflicting evidence, the case should go to the jury,[9] and if a plaintiff fails to prove his case, he should be nonsuited.[10]

The proof must identify the article,[11] establish its value,[12] and show a conversion thereof;[13] but proof that the property had come into hands of an innkeeper and his refusal to return it on demand is sufficient.[14]

A finding that goods were converted is a finding that the owner has been deprived of his dominion over it.[15]

Damages.—As a general rule, the measure of damages is the value of the property at the date of conversion, with interest;[16] but in Georgia, the plaintiff may elect

Stean v. Leopold, Simons & Co. [Conn.] 58 A. 696.

5. Declarations of ownership by an Indian of cattle issued by the government. Declarations of her husband. McKnight v. U. S. [C. C. A.] 130 F. 659. An offer to settle, pending trial. Gulf, etc., R. Co. v. Cleburne Ice & Cold Storage Co. [Tex. Civ. App.] 79 S. W. 836. Sale under illegal attachment; evidence that another had sold the goods to plaintiff in fraud of his creditors. Shoup v. Marks [C. C. A.] 128 F. 32. Taxation records of county treasurer are not admissible to show either ownership or value. Carper v. Risdon [Colo. App.] 76 P. 744. Where assignee of chattel mortgage sold the property, he was not entitled to show that he purchased the property outright and in good faith. Haynes v. Hobbs [Mich.] 98 N. W. 978. Where an answer alleged that defendant claimed as assignee for benefit of creditors, he could not prove that he was a creditor. Babcock v. Maxwell [Mont.] 74 P. 64. Correspondence relative to repairs incompetent to show ownership of a boat. Leon v. Kerrison [Fla.] 36 So. 173. Where, in the answer, possession is admitted, evidence that defendant had parted with the property. Defendant denied only "wrongful" possession. Yank v. Bordeaux [Mont.] 74 P. 77. Statement of a former owner against whom attachment issued that he had sold property to plaintiff. Lumm v. Howells [Utah] 74 P. 432. That defendant took the property under a prior unrecorded mortgage. Johnson v. Wilson & Co., 137 Ala. 468, 34 So. 392. In conversion for a horse, on defendant's counterclaiming, the plaintiff cannot show that defendant was part owner. Gooch v. Isbell [Tex. Civ. App.] 77 S. W. 973. Remarks by plaintiff that he would not have brought the action if a creditor had not been pressing him, immaterial. Stephens v. Head, 138 Ala. 455, 35 So. 565.

6. Evidence of the character of a house kept and rates paid are admissible on value of furnishings converted. Wilson v. Hoffman, 123 F. 984. Agreement to purchase back after an alleged foreclosure admissible to show fact of foreclosure, and value of tools converted. Lemon v. McBride [Mich.] 96 N. W. 453. Admission of memorandum of property converted no error. Babcock v. Maxwell [Mont.] 74 P. 64. Testimony of witness who had seen the standing crop, as to how much it would yield, not a mere guess. La Rue v. St. Anthony & Dakota Elevator Co. [S. D.] 95 N. W. 292. In conversion of household goods, it is competent for witness to read from written list in order to refresh his memory. Heyert v. Reubman, 86 N. Y. S. 797.

7. Instructions relative to bailee's right to deliver the bailment held proper. Burke v. Holmes [Tex. Civ. App.] 80 S. W. 564. Instructions relative to title of a dog held proper. Knox v. Cook, 119 Ga. 689, 46 S. E. 868. Where one converted his son-in-law's furniture, a charge that the jury might consider the family differences was proper. Heyert v. Reubman, 86 N. Y. S. 797. A charge that, when a landlord who had a lien on the crop, claimed it when in the field, and the tenant told him to attach it, this made it the landlord's cotton, was properly refused. Burke v. Holmes [Tex. Civ. App.] 80 S. W. 564. In an action for conversion and for trespass to realty, an instruction that the burden was on plaintiff to show his right to possession of property in controversy was error, since right to possession of land was not in question. Yoder v. Reynolds, 28 Mont. 183, 72 P. 417.

8. Where mortgagee under void mortgage sold the property. Lance v. Butler, 135 N. C. 419, 47 S. E. 488.

9. Peremptory instruction held error. Litell v. Pettit [Ky.] 81 S. W. 237. As to tender and foreclosure of a chattel mortgage. Lemon v. McBride [Mich.] 96 N. W. 453. Error to direct verdict where evidence preponderates in favor of one of the parties. Rosenkranz v. Saberski, 40 Misc. 650, 83 N. Y. S. 257.

10. Error to direct verdict. Rosenkranz v. Saberski, 40 Misc. 650, 83 N. Y. S. 257.

11. Held insufficient to identify cotton. Truss & Co. v. Byers, 137 Ala. 509, 34 So. 616. See, also, ante, 873, n. 1.

12. Grade of one load of wheat sufficient to show grade of entire crop. La Rue v. St. Anthony & Dakota Elevator Co. [S. D.] 95 N. W. 292. Testimony of mortgagee that from looks of crop it must have yielded 1,200 bushels from the 70 acres was prima facie proof of more than 10 bu. per acre. Id.

13. In conversion for trees, the proof must show with reasonable certainty what trees were severed by the defendante. Barclay v. Smith [Miss.] 36 So. 449.

14. Baehr v. Downey [Mich.] 94 N. W. 750.

15. Technical meaning of "conversion." Eureka County Bank v. Clarke [C. C. A.] 130 F, 325.

16. See 1 Curr. L. 706. Error to instruct that measure of damages was value at time of demand. Doyle v. Burns, 123 Iowa, 488,

to take the highest proven value between date of conversion and trial, or the value at the date of conversion with an election to take interest or hire to date of trial,[17] and after judgment entered, interest on the gross amount from date of entry,[18] and where the plaintiff elects to take a money verdict, the value at the time of conversion or at some period between conversion and trial must be proved.[19] The measure for the conversion of a note is prima facie the amount the paper calls for;[20] for logs cut by an inadvertent trespasser and sold to an innocent purchaser, is the value of the trees,[21] but where cut by a willful trespasser, the value of the logs at the date and place of conversion;[22] where a third person converts mortgaged chattels after the mortgagee's right to possession is complete, the entire value of the property;[23] where one appropriates and ships away property, the market value at time and place of conversion;[24] for the conversion of a matured policy of insurance, the face of the policy;[25] on conversion of property held by vendor under conditional sale, the value of the property at the time of the conversion less the sum remaining unpaid;[26] but a conditional purchaser may recover the full value of the property, though he has paid but a portion of the purchase price;[27] for conversion of stored goods by a warehouseman, the value of the goods;[28] where property is held under an invalid attachment, the difference between the value on the day the attachment was levied and the day it was dissolved;[29] for corporate stock converted, the highest price between time of conversion and time of trial plus interest and dividends;[30] where property is returned after action is begun, but before trial, the highest value between time of conversion and time of return, with interest to time of trial, less value at time of return with interest thereon to date of trial,[31] and not the value of its use while in the defendant's possession.[32]

The measure of damages is to be ascertained by the value of the goods in the local market,[33] and does not depend on what the article cost the plaintiff.[34] Where

99 N. W. 195. Tenant removing fixtures after expiration of lease. Smyth v. Stoddard, 105 Ill. App. 510. Judgment modified as to certain fixtures. Id., 203 Ill. 424, 67 N. E. 980. Gravel taken from land. Hunt v. Boston, 183 Mass. 303, 67 N. E. 244. For a car load of coal converted, the reasonable market value at place of conversion. Gulf, etc. R. Co. v. Cleburne Ice & Cold Storage Co. [Tex. Civ. App.] 79 S. W. 836. For property sold under illegal attachment, the value of the property at date of levy with interest to date of trial. Milner & Kettig Co. v. De Loach Mill Mfg. Co., 139 Ala. 645, 36 So. 765.

17. Code 1895, § 5335. O'Neill Mfg. Co. v. Woodley, 118 Ga. 114, 44 S. E. 980.

18. O'Neill Mfg. Co. v. Woodley, 118 Ga. 114, 44 S. E. 980.

19. Evidence of value several months before conversion not sufficient. Oxford v. Ellis, 117 Ga. 817, 45 S. E. 67.

20. Bank of Darlington v. Powers, 102 Mo. App. 415, 76 S. W. 732. This may be reduced by showing that that is not the real amount due. For instance part payment. Id.

21. Texas & N. O. R. Co. v. Jones' Ex'rs [Tex. Civ. App.] 77 S. W. 955.

22. Timber removed from government land by a homesteader under entry made in bad faith. Potter v. U. S. [C. C. A.] 122 F. 49.

23. Mortgagor in default. Biehler v. Irwin, 84 N. Y. S. 574.

24. Not selling price less cost of shipment. McGill v. Chilhowee Lumber Co. [Tenn.] 82 S. W. 210.

25. Stafford v. Lang [R. I.] 56 A. 684.

26. Clark v. Clement, 75 Vt. 417, 56 A. 94. Value of use of property from date of conversion should not be deducted to ascertain amount remaining unpaid. Id. Where vendor retained title until piano was paid for, measure of damage was value of piano at date of conversion less unpaid purchase price. Friedman v. Phillips, 84 App. Div. 179, 82 N. Y. S. 96. Where, after a trade of a livery stock for a farm, the liveryman substituted broken down horses for those traded, the measure of damages was the difference between the value of the horses. O'Neill v. Everham, 123 Iowa, 709, 99 N. W. 580.

27. From third person. Messenger v. Murphy, 33 Wash. 353, 74 P. 480.

28. State v. Sullivan, 99 Mo. App. 616, 74 S. W. 417.

29. Stock of merchandise. Engelke & Felner Mill. Co. v. Grunthal [Fla.] 35 So. 17.

30. Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195. Against stockbrokers by a customer for conversion of stock held as security. Learock v. Paxon, 208 Pa. 602, 57 A. 1097.

31. Flagler v. Hearst, 91 App. Div. 12, 86 N. Y. S. 308.

32. Eldridge v. Hoefer [Or.] 77 P. 874.

33. Where a lessee of lasting machines sold them to one who shipped to a foreign market. United Shoe Machinery Co. v. Holt [Mass.] 69 N. E. 1056. Evidence held for jury as to value of converted beans. Cunningham v. O'Connor [Mich.] 99 N. W. 25. Evidence held to sustain finding as to value of household articles converted. Messenger v. Murphy, 33 Wash. 353, 74 P. 480. Where one

the property has no market value, the plaintiff may testify as to its value to himself.[35] The use of the property from the date of the conversion until action brought may be considered in assessing damages,[36] but no greater sum than is declared for can be recovered.[37]

Nominal damages may be awarded where no special damages are shown[38] or for a technical conversion,[39] and punitive damages may be recovered where a person's rights have been willfully disregarded.[40] Where the issue of exemplary damages is raised, it is error to refuse to charge relative thereto,[41] and where punitive damages are not claimed, a void process under which defendant acted cannot be introduced in mitigation.[42]

Interest is an item of damages to which plaintiff is entitled as a matter of law;[43] but whether interest should be recovered from date of conversion to verdict rendered is for the jury to determine,[44] and on an issue as to whether plaintiff had been damaged, the jury may allow interest;[45] but not where a verdict for a lump sum is rendered.[46]

The admissibility of evidence to show damages is treated in the note.[47]

CONVERSION IN EQUITY.

§ 1. Definition and Nature of Doctrine (876).
§ 2. How Effected (877).
§ 3. Reconversion (877).
§ 4. Effect of Conversion (878).

§ 1. *Definition and nature of doctrine.*[48]—The doctrine is recognized only in equity.[49]

was entitled to recover for three out of 222 bales of cotton, failure to prove weight and classification was not failure to prove value. It might have been the fractional part of the entire amount. First Nat. Bank v. San Antonio & A. P. R. Co. [Tex.] 77 S. W. 410.

34. He got it at a nominal price. Beaman v. Stewart [Colo. App.] 74 P. 342. Where property is seized and sold under an illegal attachment, the price obtained at the sale is competent, but not conclusive evidence of the value. Shoup v. Marks [C. C. A.] 128 F. 32.

35. State v. Sullivan, 99 Mo. App. 616, 74 S. W. 417.

36. Conversion of horse and wagon. Davis v. Bowers Granite Co., 75 Vt. 286, 64 A. 1084.

37. Verdict may be reduced by remittitur. Davis v. Bowers Granite Co., 76 Vt. 286, 64 A. 1084.

38. Sheriff unlawfully retaining possession of warehouse. Yoder v. Reynolds, 28 Mont. 183, 72 P. 417.

39. Refusal to deliver on demand where possessor in good faith questions the ownership. Stroup v. Bridger [Iowa] 100 N. W. 113.

40. Where an attachment was maliciously levied on exempt property, mental and material damages could be recovered. Ahearn v. Connell [N. H.] 56 A. 189.

41. As to whether goods were taken by mistake. Gulf, etc., R. Co. v. Cleburne Ice & Cold Storage Co. [Tex. Civ. App.] 79 S. W. 836.

42. Stephens v. Head, 138 Ala. 465, 35 So. 565. Evidence of conversion of other goods of plaintiff held admissible on an issue of emplary damages. Gulf, etc., R. Co. v. Cleburne Ice & Cold Storage Co. [Tex. Civ. App.] 79 S. W. 836.

43. Not deprived of interest by stipulation that further proceeding should not be taken until determination of another action. Durham v. Commercial Nat. Bank [Or.] 77 P. 902. Where a custodian in escrow refuses to deliver the property on fulfillment of the conditions, and on suit brought against him sets up a defense, wholly without merit, on behalf of the other party, interest from date of conversion may be recovered. Clarke v. Eureka County Bank [Nev.] 123 F. 922.

44. Conversion by warehouseman. Bigler v. Leonori [Mo. App.] 77 S. W. 324.

45. Lance v. Butler, 136 N. C. 419, 47 N. E. 488.

46. Reversal not necessary; judgment may be reformed [Code, § 530]. Lance v. Butler, 135 N. C. 419, 47 S. E. 488.

47. Estimate of amount of lumber at a mill inadmissible, it not being shown where it came from. Barclay v. Smith [Miss.] 36 So. 449. Measurement of stumpage inadmissible where it is not shown who cut the trees. Id. Testimony of plaintiff as to what property cost him prior to conversion is inadmissible. Carper v. Risdon [Colo. App.] 76 P. 744. One who has handled house furnishings is incompetent to give expert testimony as to value of oil paintings. Ellis v. Thomas, 84 App. Div. 626, 82 N. Y. S. 1064. Evidence of one who had examined oil paintings two years prior to conversion, incompetent as to value where it was not shown that paintings examined were identical with those converted. Prejudicial error not to strike it out. Id. Estimates of appraisers who had viewed the stumps held sufficient to show value of timber converted. Snyder v. East Bay Lumber Co. [Mich.] 97 N. W. 49. Where plaintiff testified that value of goods converted was $185.00, competent on cross-

§ 2. *How effected. By will.*[48]—Whether a conversion is effected depends on the intention of the testator as gathered from the entire provisions of the will,[49] and that there may be an equitable conversion, there must be an imperative order to sell,[50] or such a blending of the real and personal estate in the will as to clearly show that the testator intended to create a fund out of both realty and personalty and to bequeath such fund as money,[51] and where power of sale given to executors is discretionary, there is no conversion unless it is absolutely necessary to carry out the scheme of the will.[54] If the will postpones the sale, the conversion is postponed.[55] Where realty converted by the will exceeds legacies bequeathed, the surplus descends as realty.[56]

By conveyance or contract.[57]—Real estate becomes personalty only where the intent to so treat it clearly appears.[58] Firm realty is considered as personalty in the settlement of partnership affairs,[59] but only for partnership purposes.[60]

§ 3. *Reconversion.*[61]—Property subjected to equitable conversion may be reconverted by an election of all the parties interested,[62] but not by one of several beneficiaries,[63] especially where some of them are infants,[64] and where the bene-

examination to have him identify certain tools, and the value he placed upon them. Lemon v. McBride [Mich.] 96 N. W. 453. Where damages claimed was $2,600.00, and a verdict was rendered for $2,100.00, it cannot be said that value of certain property not converted was not deducted. Wilson v. Hoffman, 123 F. 984.

48. See 1 Curr. L. 707.

49. Cannot be applied in proceedings for collection of inheritance tax. Connell v. Crosby [Ill.] 71 N. E. 350.

50. See 1 Curr. L. 707.

Note: Where there is a positive direction to sell, or where there is a power of sale and bequests of such a character as to indicate a testamentary intention that such power should be executed, or where the provisions of a will cannot be carried out without a conversion, a conversion takes place from the death of the testator. Chandler's Appeal, 34 Wis. 505; Dodge v. Williams, 46 Wis. 70; Milwaukee Protestant Home v. Becher, 87 Wis. 409; Hunt's Appeal, 105 Pa. 128; Given v. Hilton, 95 U. S. 591, 24 Law. Ed. 458; King v. Woodhull, 3 Edw. Ch. [N. Y.] 79; Roper, Legacies, 341. See Harrington v. Pier, 105 Wis. 485, collating cases.

51. Directing that property be sold and in the next clause bequeathing it in six equal parts, sufficient. In re Pforr's Estate [Cal.] 77 P. 825.

52. **Held not to constitute:** Provision to lease, if advantageous, otherwise to sell, is not. In re Cooper's Estate, 206 Pa. 628, 56 A. 67. Will directing payment to certain person of a trust estate, consisting partly of realty, after the death of a life beneficiary, did not contemplate a conversion, though the remainderman was an alien. State v. Thresher [Conn.] 58 A. 460.

Held to constitute: Imperative direction to sell for payment of debts and legacies. Thissell v. Schillinger [Mass.] 71 N. E. 300. Directing executors to sell and distribute as personalty. Talbot v. Snodgrass [Iowa] 100 N. W. 500. A provision that the testator "desires" his executors to sell is a conversion [Civ. Code, § 1338]. In re Pforr's Estate [Cal.] 77 P. 825.

53. In re Cooper's Estate, 206 Pa. 628, 56 A. 67.

54. A will creating a number of trusts for which personal property was insufficient and giving the trustees power to sell the realty, held not to operate as an equitable conversion of the testator's real property into personal property. In re Lee's Will, 85 App. Div. 295, 83 N. Y. S. 299. To lease or to sell. In re Cooper's Estate, 206 Pa. 628, 56 A. 67. Executors could postpone conversion in their discretion. Conditions not such as to make it imperative. Phoenix v. Trustees of Columbia College, 87 App. Div. 438, 84 N. Y. S. 897.

55. Notwithstanding Civ. Code, § 1338, providing it shall be from testator's death. Bank of Ukiah v. Rice, 143 Cal. 265, 76 P. 1020.

56. In re Weinstein's Estate, 89 N. Y. S. 535.

57. See 1 Curr. L. 707.

Note: If a firm holds lands by deed, impressed on its face to be partnership property, it is stamped so far as the partners are concerned with all the attributes of personalty and continues so until the firm is dissolved and its affairs settled. Du Bree v. Albert, 100 Pa. 483; Halladay v. Land & River Imp. Co., 57 F. 774; Riddle v. Whitehill, 135 U. S. 621; Murphy v. Abrams, 50 Ala. 293.—From brief to Harrington v. Pier [Wis.] 5 L. R. A. 307.

58. Mere purchase of land with partnership funds not sufficient. Jones v. De Camp, 2 Ohio N. P. (N. S.) 133.

59. See Partnership, 2 Curr. L. 1106.

60. Huber v. Case, 87 N. Y. S. 663.

61. See 1 Curr. L. 707.

62. To treat the property as realty. Atlee v. Bullard, 123 Iowa, 274, 98 N. W. 889. Commencement of an action for partition by vendee of interest of a beneficiary is proof of election for a reconversion. Bank of Ukiah v. Rice, 143 Cal. 265, 76 P. 1020. Beneficiary mortgaging his interest and subsequently executing a deed under a judgment foreclosing the mortgage is election for reconversion. Id.

63. In re Pforr's Estate [Cal.] 77 P. 825. Where there are several beneficiaries and value of the property would be impaired by a sale in fractional parts, a sale by one of his interest is not a reconversion for the

ficiaries claim a right to the property as it is, they must plead and prove an election.[65]

§ 4. *Effect of conversion.*[66]—Where an equitable conversion is effected, the property passes free from the restrictions placed upon it in its original condition,[67] but a conversion of real estate does not make it personalty, so far as concerns its liability for payment of debts of the estate.[68]

CONVICTS.[69]

A convict may be sued[70] and he may have a right to nominate an administrator for his wife's estate.[71] At common-law one convicted of a felony was disqualified from serving as a juror,[72] but statutes have superseded the common law.[73] A convict cannot be held liable for breach of service bond unless there is evidence to establish the allegations of the breach.[74]

COPYRIGHTS.

Acquisition and loss of copyright.—The provisions of the statute as to notice of copyright must be strictly followed; accordingly, where a work is twice published, with notice in one case of copyright by the publishers and in one of copyright by the author vitiates both copyrights.[75]

Infringement.—There must be infringement to a material extent,[76] and it must be such as will to some extent make defendant's work a substitute for complainant's.[77] The rule now seems well settled that the taking of the citations of sources of information from a copyrighted compilation, followed by independent verification, is not an infringement.[78] Publishers of a book cannot by notice to that effect make sales at less than a designated retail price an infringement of their copyright.[79] That complainant is a member of an illegal combination is no defense.[80]

benefit of his purchaser. Bank of Ukiah v. Rice, 143 Cal. 265, 76 P. 1020.

64. Where value of land would be impaired by a sale in fractional parts and some of the beneficiaries are infants. Bank of Ukiah v. Rice, 143 Cal. 265, 76 P. 1020.

65. Bank of Ukiah v. Rice, 143 Cal. 265, 76 P. 1020.

66. See 1 Curr. L. 708.

67. Personal property may be bequeathed in fee tail. Talbot v. Snodgrass [Iowa] 100 N. W. 500. Right to take as heirs at law is defeated, though the legatees were the only heirs. Nor can they maintain partition on death of life tenant. Bank of Ukiah v. Rice, 143 Cal. 265, 76 P. 1020.

68. A debt not a liability against the land is not a liability against the proceeds. Taylor v. Crook, 136 Ala. 354, 34 So. 905.

69. See 1 Curr. L. 708.

70. Under Rev. St. 1899, §§ 2921, 2382, a life convict may be sued for divorce. Gray v. Gray [Mo. App.] 79 S. W. 505.

71. Under Ball. Ann. Codes & St. § 248. In this case he was under arrest for a felony and was subsequently convicted. McLean v. Rolier, 33 Wash. 166, 73 P. 1123.

72. Commonwealth v. Wong Chung [Mass.] 71 N. E. 292.

73. Under Rev. Laws, c. 176, §§ 1, 4-9, one convicted of a felony, but released on condition, can serve as juror after expiration of his sentence. Commonwealth v. Wong Chung [Mass.] 71 N. E. 292.

74. Judgment was confessed for costs only [Code 1896, § 4751]. McQueen v. State, 138 Ala. 63, 35 So. 39.

75. Copyright in the publisher's name of a magazine in which a serial is published is lost as to such serial by its subsequent publication in book form with notice of copyright by the author. Mifflin v. White Co., 190 U. S. 260, 47 Law. Ed. 1040. And likewise the copyright on the book is lost by failure to give notice of the previous copyright. Id.

76. Appropriation of names and addresses from social register into work of more general character held material. Social Register Ass'n v. Murphy, 128 F. 116.

77. Rendition of part of a copyrighted song as part of an avowed imitation of the actress entitled to the use thereof is not a copyright. Bloom v. Nixon, 125 F. 977.

78. Citations in law book. Edward Thompson Co. v. American Law Book Co., 130 F. 639. Credit rating book. Dun v. International Mercantile Agency, 127 F. 173. Arithmetic. Colliery Engineer Co. v. Ewald, 126 F. 843.

79. Bobbs-Merrill Co. v. Snellenburg, 131 F. 530.

80. Scribner v. Straus, 130 F. 389.

Laches cannot be imputed without actual or constructive notice of the infringement.[81]

Remedies and procedure.—Rules of practice in actions under patent laws are applicable by analogy.[82] Where defendant alleges exhibition of a copyrighted painting without notice of copyright, complainant may show all the facts as to such exhibition without an amendment of the bill.[83] Where discovery is prayed with interrogatories, the waiver of answer under oath does not entitle defendant to answer by general denial.[84] The copyrighted article and the alleged infringement should be included in the proofs, comparisons by experts being mere aids to the court.[85] A temporary injunction will not issue on conflicting affidavits or where complainant's right is not clear,[86] but substantial identity casts the burden of proof on defendant.[87] It should be granted or withheld according as the greatest injury would result.[88] An injunction should be granted only against what has been appropriated or is so blended with appropriated matter that separation is impracticable.[89] A few sales by defendant's employes without knowledge of the injunction do not constitute contempt.[90] Recovery of damages is limited to the profits realized from the infringement.[91] There is no right of action for damages for infringement of copyright of maps, pictures, etc.,[92] and the forfeiture of the infringing publications cannot be enforced by replevin.[93] The statute prohibiting the affixing of a false notice of copyright has no extraterritorial effect and is not violated by affixing such a notice in a foreign country and the importation thereof before the amendment forbidding such importation.[94]

CORONERS.

The allowance of fees is regulated by statute.[95]

A statute requiring process to be directed to the coroner when the sheriff is a party is mandatory,[96] as is a statute providing that whenever a party shall file with the clerk of the proper court an affidavit of prejudice against the sheriff, the clerk shall direct the original or other process to the coroner; such a statute leaves no discretionary power in the court.[97]

81. Encyclopedia Britannica Co. v. American Newspaper Ass'n, 130 F. 460.

82. Scribner v. Straus, 130 F. 389.

83. Evidence that the exhibition was limited and exclusive admitted. Werckmeister v. American Lithographic Co., 126 F. 244.

84. John Church Co. v. Zimmerman, 131 F. 652.

85. Encyclopedia Britannica Co. v. American Newspaper Ass'n, 130 F. 460.

86. Dun v. International Mercantile Agency, 127 F. 173. Preliminary injunction denied where resemblance between two plays did not clearly show infringement. Hubges v. Belasco, 130 F. 388. Preliminary injunction should issue where complainant's case is clear. Encyclopedia Britannica Co. v. America Newspaper Ass'n, 130 F. 460.

87. Encyclopedia Britannica Co. v. American Newspaper Ass'n, 130 F. 460. Eleven common errors of citation in one volume state digest held to justify a preliminary injunction. Bisel Co. v. Welsh, 131 F. 564.

88. Injunction refused where delay in putting defendant's book on market would cause great loss and it gave indemnity bond. Sampson & Murdock Co. v. Seaver Radford Co., 129 F. 761.

89. Social Register Ass'n v. Murphy, 128 F. 116.

90. Encyclopedia Britannica Co. v. American Newspaper Ass'n, 130 F. 493.

91. Social Register Ass'n v. Murphy, 129 F. 148.

92. Rev. St. § 4965 gives only a penalty and there is no common-law right. Walker v. Globe Newspaper Co., 130 F. 593.

93. U. S. Comp. St. 1901, p. 3414. Gustin v. Record Pub. Co., 127 F. 603. See, also, 1 Curr. L. 709, n. 84.

94. Rev. St. § 4963, as amended by act March 3, 1891. McLoughlin v. Raphael Tuck & Sons Co., 191 U. S. 267, 48 Law. Ed. 178.

95. A statute (Code 1896, § 4573), providing that no fees shall be paid for an inquest when it is publicly known before the jury is summoned who caused the death of the deceased, does not prevent the allowance of fees when it was known before the inquest that death was caused by a collision between an engine and an electric car. Jefferson County v. Abernathy, 139 Ala. 264, 35 So. 881.

96. Service by a deputy in such case a nullity and judgment thereon set aside [Civ. Code 1895, § 4993]. Hillyer v. Pearson, 118 Ga. 815, 45 S. E. 701.

97. The court had no power to refuse a motion to have the coroner summon the jury, where counter-affidavits were filed by the ad-

Under a statute vacating the office of sheriff on the lynching of a prisoner, and requiring the coroner to exercise the duties of the office until the sheriff is reinstated or his successor elected or appointed, the coroner cannot maintain quo warranto to oust the sheriff from office.[98]

In Idaho, a coroner is not a judicial officer, his duty in holding an inquest being ministerial,[99] and his inquisition is not a sufficient basis for information by the public prosecutor.[1] It is the coroner's duty to hold an inquest when the circumstances are such as to indicate that death was caused by the criminal acts of another;[2] but his failure to do so is not a ground for the release of one charged with the murder of the deceased.[3]

The election of coroners in New York city is regulated by the city charter, and they are borough not county officers.[4] They have power to remove their clerks without assigning any reason or giving them an opportunity to be heard.[5]

CORPORATIONS.[6]

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verse party [Mills' Ann. St. § 869]. Litch v. People [Colo. App.] 75 P. 1083.

98. Because he has no "interest in the office," but merely in the duties pertaining to the office [Acts 1901, p. 311, c. 146. Rev. St. 1901, §§ 1145, 1146]. State v. Dudley, 161 Ind. 431, 68 N. E. 899.

99. In other states coroners' courts are sometimes denominated courts of inferior jurisdiction, but not of record. In re Sly [Idaho] 76 P. 766.

1. But at common law the finding of a coroner's jury is equivalent to the finding of a grand jury. In re Sly [Idaho] 76 P. 766.

2. Rev. St. 1887, § 8377. In re Sly [Idaho] 76 P. 766.

3. In re Sly [Idaho] 76 P. 766.

4. Constitutional, statutory and charter provisions construed. People v. Schaler, 87 N. Y. S. 1122.

5. People v. Schaler, 87 N. Y. S. 1122.

6. **This article treats** generally of domestic private corporations. Foreign Corporations (2 Curr. L. 40) are made the sub-

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§ 1. *Definition and nature of corporation.*[7]—A corporation exists as an entity distinct from its stock and property,[8] hence the holding of all the stock does not carry all the property rights and privileges of the corporation,[9] but a person cannot by organizing a corporation which he controls acquire the right to do in its name acts which he has as an individual been enjoined from doing.[10]

Whenever a corporation is legally formed, the right to exist and do business as such is known as the corporate franchise.[11]

§ 2. *Classification of corporations.*[12]—The character of a corporation is to be determined from its articles and the statute under which it is authorized.[13] An

ject of a later article. Taxation of corporate property is discussed in the article Taxes, 2 Curr. L. 1786. Consult for questions peculiar to corporations for particular purposes, Banking and Finance, 1 Curr. L. 289; Building and Loan Associations, 1 Curr. L. 387; Exchanges, etc., 1 Curr. L. 1176; Fraternal and Mutual Benefit Associations, 2 Curr. L. 79; Insurance, 2 Curr. L. 479; Mines and Minerals, 2 Curr. L. 893; Railroads, 2 Curr. L. 1382; Religious Societies, 2 Curr. L. 1502; Street Railways, 2 Curr. L. 1742; Telegraphs and Telephones, 2 Curr. L. 1843; Warehousing and Deposits, 2 Curr. L. 2029; Waters and Water Supply, 2 Curr. L. 2034. Related articles are Associations and Societies, 1 Curr. L. 233; Franchises, 2 Curr. L. 74.

The analysis here adopted is embraced in that of Clark and Marshall on Corporations. The searcher who so desires may therefore find all the American Cases on a proposition by using this article and that at 1 Curr. L. 710, in connection with Clark and Marshall.

7. See 1 Curr. L. 711.

8. The fact that one person owns all the stock does not merge the corporate entity in him. Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 A. 1001.

9. Crane & Co. v. Fry [C. C. A.] 126 F. 278; City of Louisville v. McAteer [Ky.] 81 S. W. 698.

10. Westervelt v. National Mfg. Co. [Ind. App.] 69 N. E. 169.

11. Bank of California v. San Francisco, 142 Cal. 276, 75 P. 832.

12. See 1 Curr. L. 711.

13. McLeod v. Lincoln Medical College [Neb.] 96 N. W. 265. "Buying, manufacturing and dealing in milk, cream, butter, cheese and other dairy products and pasteurizing and treating said milk and packing, storing and selling such products when so pasteurized and treated," is not exclusively a mechanical or manufacturing corporation freeing stockholders from liability under Const. art. 10, § 3. Meen v. Pioneer Pasteurizing Co., 90 Minn. 501, 97 N. W. 140. "To plant, harvest, store, purchase, manufacture, market, sell and deal in chicory" is a man-

educational institution is not rendered a corporation for pecuniary profit by the fact that it is empowered to charge tuition and to acquire and convey property necessary to the accomplishment of its object.[14]

An agricultural association,[15] an incorporation of individuals under the name of a park association to hold private game preserves,[16] and an incorporation of members of a national guard to erect an armory,[17] have been held private corporations.

§ 3. *Creation, name and existence of corporations, and the amendment, extension and revival of charters.*[18]—Substantial requirements with terms of the general incorporation law is prerequisite.[19] Corporate existence properly acquired is not lost by an invalid attempt to incorporate under a later statute.[20] Where the requirements of the statute are not complied with, a corporation does not become such de jure.[21] Variance in the corporate name in the certificate and the municipality's consent to the incorporation of a water company is not fatal.[22]

Special charters must like other enactments be properly entitled,[23] and are not repealed by later general laws save as so indicated.[24]

Under a statute conferring a right to sue "when organized," organization is a condition precedent.[25] Incorporation is of itself unavailing to purge a conveyance of fraud.[26]

Corporate name.[27]—Original incorporators under a general incorporation law, or at common law, have no right to select a name either intended or directly calculated to work a wrong.[28] The use of the name of an individual in a corporate name may be

ufacturing corporation within Comp. St. 1901, p. 380, c. 16, § 37. Bolton v. Nebraska Chicory Co. [Neb.] 96 N. W. 148.

Within Bankruptcy Act, a corporation doing a general ship building and repairing business is a "manufacturing and mercantile corporation." Columbia Iron Works v. National Lead Co. [C. C. A.] 127 F. 99. May be a manufacturing corporation, though the factory is not yet started. In re White Mountain Paper Co., 127 F. 180. A common carrier is not presumed to be a trading corporation. Philpot v. O'Brion [C. C. A.] 126 F. 167. Getting out of logs in suitable lengths for paper pulp and other preparations for manufacture brings a corporation within the Bankruptcy Act, as engaged principally in manufacturing [Act July 1, 1898, § 4b; 30 Stat. 547, c. 541]. White Mountain Paper Co. v. Morse & Co. [C. C. A.] 127 F. 643.

14. McLeod v. Lincoln Medical College [Neb.] 96 N. W. 265.

15. Isman v. Loder [Mich.] 97 N. W. 769.

16. Commonwealth v. Hazen, 207 Pa. 52, 56 A. 263.

17. Laws 1897, c. 101, p. 159. Subject to mechanic's lien laws. Arrison v. Company D, North Dakota National Guard, 12 N. D. 554, 98 N. W. 83.

18. See 1 Curr. L. 712.

19. Articles must be subscribed by members of aqueduct company [Comp. St. art. 85]. Lawrie v. Silsby [Vt.] 56 A. 1106.

20. Laws 1814, p. 112, c. 97; Laws 1797, p. 474, c. 51, relative to religious societies. Congregational Church of Chester v. Cutler [Vt.] 57 A. 387.

21. Attempted incorporation under Gen. St. 1894, §§ 2903, 2912, it did not appear that articles were recorded, no stock was subscribed, issued or paid for. Byronville Creamery Ass'n v. Ivers [Minn.] 100 N. W. 387.

22. Gen. St. p. 2199, §§ 2, 3. Kemble v. City of Millville, 69 N. J. Law, 637, 56 A. 311.

23. An act incorporating the "Bloomingdale Park Association" does not express in its title the intention to incorporate for the purpose of holding a private game preserve, nor does it express the location. Commonwealth v. Hazen, 207 Pa. 52, 56 A. 263.

24. A provision in a special charter of a street railway, requiring its road to be laid out as highways are laid out, is not repealed as inconsistent with a general law for the organization of such companies providing for the repeal of inconsistent special charters already granted. Lenoix v. Dover, etc., R. Co. [N. H.] 54 A. 1022.

25. Lawrie v. Silsby [Vt.] 56 A. 1106.

26. Fraudulent transferees incorporated but paid nothing for property. Holloway v. Brame [Miss.] 36 So. 1.

27. See 1 Curr. L. 714.

28. Philadelphia Trust, Safe Deposit & Ins. Co. v. Philadelphia Trust Co., 123 F. 534. American Glucose Sugar Refining Company infringes name Glucose Sugar Refining Company. Corporation Act, § 8; Laws 1896, p. 280, c. 185; and cannot be taken on the ground that complainant had first adopted a name not simply of words in common use, glucose sugar not describing any article of commerce. Glucose Sugar Refining Co. v. American Glucose Sugar Refining Co. [N. J. Eq.] 56 A. 861. Facts held to authorize a temporary injunction against the use of name "Philadelphia Trust Company," a Delaware corporation, in favor of Philadelphia Trust, Safe Deposit and Insurance Co., a Pennsylvania corporation, both on the ground of the Delaware Statute (21 Del. Laws, p. 445, c. 273), and as misleading and calculated to

enjoined.[29] Where the corporate name is changed, the rights of members are not affected.[30]

Purposes.[31]—The purposes of a corporation must be within the intendment of the statutes under which it is organized,[32] and not against the general policy of the law.[33] An attempted incorporation for incompatible purposes is ineffective to create a corporation.[34]

The question of whether a corporation is organized for an illegal purpose is determined by its charter and not the declarations of its officers and agents.[35]

Fees.[36]—The statutory fees must be paid according to the nature of the franchise taken.[37] The fact that a certificate is styled an amended certificate of incorporation will not relieve from fees imposed for extension of corporate existence.[38] A bonus required is applicable to subsequent incorporations or increase of stock by corporations already formed.[39] License or occupation taxes apply not to the purpose of the corporation but to the business so regulated.[40]

Proof of incorporation.[41]—Where the name of a party to a suit is such as to import that it is a corporation, there is a presumption to that effect which prevails till the contrary is shown;[42] so where defendant is sued as a corporation and answers in the name in which it is sued, it will in the absence of evidence be considered a corporation;[43] but denial of corporate existence places burden of proof on plaintiff.[44]

A statutory provision that plaintiff in a suit by or against a corporation need not prove incorporation unless denied in a verified answer applies to an action by

work a wrong. Philadelphia Trust, S. D. & Ins. Co. v. Philadelphia Trust Co., 123 F. 534. Injunction awarded against use of name American Watchman's Clock Company against a corporation junior to complainant's, though complainants had as co-partners filed a certificate of intention to do business under that name. Pettes v. American Watchman's Clock Co., 89 App. Div. 345, 85 N. Y. S. 900. Use of name "Co-operative Legal Aid Society" enjoined in favor of "Legal Aid Society." Legal Aid Soc. v. Co-operative Legal Aid Soc., 41 Misc. 127, 83 N. Y. S. 926.

29. Son of Thos. A. Edison held not to have the right to authorize use of name "Edison." Edison Storage Battery Co. v. Edison Automobile Co. [N. J. Eq.] 56 A. 861.

30. Change by act of General Assembly. South Carolina Mut. Ins. Co. v. Price [S. C.] 45 S. E. 173.

31. See 1 Curr. L. 712.

32. A corporation to act as insurance agent is a "business" or "enterprise" within Act No. 36 of 1888. State v. Michel [La.] 36 So. 869.

33. Charter to incorporate for purposes of public worship refused a body of Christian Scientists as against policy of law relating to the existence and treatment of disease. In re First Church of Christ, Scientist, 205 Pa. 543, 55 A. 536.

Evidence held insufficient to show that the Northern Securities Co. was formed for the purpose of acquiring and holding a majority of the stock of the Great Northern Co., as well as that of the Northern Pac. Co. State of Minnesota v. Northern Securities Co., 123 F. 692. See Combinations and Monopolies, 1 Curr. L. 535.

34. Mercantile business (Act No. 36, p. 27 of 1888) and works of public improvement (Rev. St. §§ 683-686, as amended by Act No. 164, p. 288 of 1902). Bayou Cook Navigation & Fisheries Co. v. Doullut, 111 La. 517, 35 So. 729.

35. State v. New Orleans Water Supply Co. [La.] 36 So. 117.

36. See 1 Curr. L. 714.

37. Railroad companies must pay the fee provided by Hurd's Rev. St. 1895, c. 53, § 10a. People v. Rose [Ill.] 71 N. E. 580. Under Civ. Code 1902, §§ 1861, 1888, the same fees are required on increase of capital stock as on the issuance or renewal of a charter, the fees being based on the amount of the increase. Pacolet Mfg. Co. v. Gantt [S. C.] 46 S. E. 1005.

38. Corp. Act 1896, p. 315, § 114. National Lead Co. v. Dickinson [N. J. Law] 57 A. 138.

39. Act May 3, 1899, P. L. 189, does not apply to railroads incorporated under Act Apr. 4, 1868, and authorized to increase stock by Act June 4, 1883. Commonwealth v. Buffalo & S. R. Co., 207 Pa. 154, 56 A. 409.

40. A corporation, though organized for the purpose of selling land and exempted from a license tax imposed on land agents, must pay such tax where it sells for persons other than members [Act Mar. 6, 1894; Acts 1893-94, pp. 723, 724, c. 620, §§ 1-3; Act Apr. 16, 1903, § 54; Acts 1902-04, pp. 155, 188, c. 148]. Immigration Soc. of Albemarle County v. Com. [Va.] 48 S. E. 609.

41. Proof of corporate seal, 1 Curr. L. 716.

42. "The Cable Company" imports incorporation. Holcombe v. Cable Co., 119 Ga. 466, 46 S. E. 671. "C. H. Perkins Company" imports a corporation. Perkins Co. v. Shewmake, 119 Ga. 617, 46 S. E. 832.

43. United Brotherhood of Carpenters and Joiners v. Dinkle [Ind. App.] 69 N. E. 707.

44. Pike, Morgan & Co. v. Wathen, 25 Ky. L. R. 1264, 78 S. W. 137.

an assignee of a corporation.[45] Official public recognition will make prima facie proof of incorporation,[46] but a mere official report relating the fact is hearsay.[47]

§ 4. *Effect of irregularities in organization, and of failure to incorporate. Stockholder as partner or agent.*[48]—A stockholder innocently mistaken is not as to the seller a partner with the officers who depreciate assets so as to prevent rescission of his purchase.[49] Stockholders are not liable as partners for torts committed by the corporation's agents simply because the corporation engages in a business it cannot lawfully pursue.[50] When there is a right of recovery against a de facto corporation, a judgment may be enforced against those holding themselves out as stockholders.[51]

Where an act of incorporation is declared invalid, the property of the association is again cast on the stockholders as individuals.[52]

De facto corporation. Collateral attack.[53]—Failure to file articles as required by statute may be proven in a collateral action to show invalidity of incorporation.[54] But where acts are sufficient to create a de facto existence, the validity of incorporation cannot be tested in a collateral and private suit.[55] The usual rule as to de facto corporations applies to a corporation doing a business which is not criminal, though it is subject to penalties.[56]

Estoppel to deny incorporation.[57]—One contracting with a corporation as such cannot question its incorporation collaterally,[58] so also persons acting as officers,[59] and a shareholder having participated in dividends cannot question the lawful existence or proper exercise of its powers by a corporation.[60]

One who is in no manner personally connected with or responsible for the conduct of an association in attempting to incorporate is not estopped to deny its de jure existence.[61]

45. Code Civ. Proc. § 1776. Crocker v. Muller, 40 Misc. 685, 83 N. Y. S. 189.

46. Recognized by the state and United States government by grants of land which the corporation assumes to convey as a body corporate. Altschul v. Casey [Or.] 76 P. 1083.

47. Yearly report of a secretary of state. Sanderfur-Julian Co. v. State [Ark.] 77 S. W. 596.

48. See 1 Curr. L. 716; see, also, 1 Curr. L. 718, for quo warranto and other procedure to determine validity of incorporation.

49. Not liable as partners for mismanagement barring rescission of the sale on discovery of the mistake, for the reason that the seller cannot be placed in statu quo. Bolton v. Prather [Tex. Civ. App.] 80 S. W. 666.

50. Mandeville v. Courtwright, 126 F. 1007

51. Evidence held to support recovery on a contract for services. Schaub v. Coffin [Mich.] 97 N. W. 968.

52. Commonwealth v. Hazen, 207 Pa. 525, 56 A. 263.

53. See 1 Curr. L. 716. Estoppel of corporation to deny incorporation, 1 Curr. L. 717.

54. Lusk v. Riggs [Neb.] 97 N. W. 1033.

55. Armour v. Bement's Sons [C. C. A.] 123 F. 56. In action in which the control of a corporation over a driver of a wagon causing an injury is at issue, evidence of the validity of the corporation and its right to exist as such is inadmissible. Werner v. Hearst, 177 N. Y. 63, 69 N. E. 221. Frauds in obtaining a charter must be directly attacked by quo warranto and cannot be urged collaterally in eminent domain proceedings. Holly Shelter R. Co. v. Newton, 133 N. C. 136, 45 S. E. 549.

56. Rev. St. § 3797, providing for the approval of the Attorney General before articles of incorporation of a savings bank can be registered is directory, and its violation would not be criminal and render the company or its agents subject to the penalties prescribed by 93 O. L. 401. Shawnee Commercial & Sav. Bank Co. v. Miller, 24 Ohio Circ. R. 198.

57. See 1 Curr. L. 717.

58. California Cured Fruit Ass'n v. Stelling, 141 Cal. 713, 75 P. 320. A purchaser of goods from a corporation is estopped to deny its corporate capacity, in an action for price. Raphael Weill & Co. v. Crittenden, 139 Cal. 488, 73 P. 238. A city which has granted franchises cannot question the validity of incorporation. Old Colony Trust Co. v. Wichita, 123 F. 782.

59. Cannot deny compliance with conditions to doing business. Tanner v. Nichols, 25 Ky. L. R. 2191, 80 S. W. 225. In suit to recover property taken as officer. Seven Star Grange, No. 73, Patrons of Husbandry v. Ferguson, 98 Me. 175, 55 A. 648.

60. Lincoln Park Chapter, No. 171, R. A. M. v. Swatek, 204 Ill. 228, 68 N. E. 429.

61. Person present at meeting of creamery association at which agreement was signed and he was chosen vice-president and took part from time to time, but withdrew before the association was completed and ready for business. Byronville Creamery Ass'n v. Ivers [Minn.] 100 N. W. 387.

§ 5. *Promotion of corporations; acts prior to incorporation; incorporation of partnerships, etc.*[62]—*Contracts before incorporation* may become binding by acts assuming the liability,[63] which may be done by treating purchased property as its own;[64] but a subsequently formed corporation is not bound by agreements between its promoters not ratified by it.[65] A corporation subsequently organized and composed of the members of a firm taking a fraudulent transfer of a bankrupt's property, without consideration and with notice, is liable to the trustee.[66] If a party looks to the proceeds of corporate securities offered for sale, he cannot recover from underwriters out of returnable moneys paid in on conditional subscriptions,[67] unless there was fraud in withdrawing the securities from market, and this he must prove.[68] The promoter may be concluded from denying that a contract is a corporate one.[69]

Fraud of promoters.[70]—Promoters may profit by transactions to which the corporation having knowledge does not object,[71] and a corporation cannot assert fraud on the part of its promoters and at the same time retain the benefits of their acts.[72] They have the burden of showing that the corporation has not paid them for purchases in its behalf.[73]

§ 6. *Citizenship and residence or domicile of corporation.*[74]—A corporation has its legal home and domicile within the state whose laws give it legal existence.[75] To acquire citizenship for purposes of Federal jurisdiction the corporation must be valid, a de facto existence being insufficient.[76]

A corporation is not a citizen within the meaning of the Fourteenth Amendment.[77]

§ 7. *Powers of corporations. A. In general.*[78]—The powers of a corporation are governed by its articles and the general incorporation law of the state.[79] It

62. See 1 Curr. L. 718.

63. Complaint held insufficient to show assumption. Averment of agreement to carry out existing contracts is not sufficient. Guenther v. American Steel Hoop Co., 25 Ky. L. R. 795, 76 S. W. 419.

64. A railroad after incorporation treated lots purchased by a promoter as terminals as part of its property. Seacoast R. Co. v. Wood [N. J. Eq.] 56 A. 337.

65. Martin v. Remington Martin Co., 88 N. Y. S. 573. Not bound from the mere fact that it takes title to and uses and enjoys property produced under such contracts, where the incorporators acted individually and not on behalf or credit of the corporation. Tryber v. Girard Creamery & Cold Storage Co., 67 Kan. 489, 73 P. 83. Not liable for a partnership debt by reason of the fact that the surviving partner applies the assets in payment of his stock subscription, there being no showing that the transfer is in fraud of creditors. National Bank of Md. v. Hollingsworth, 135 N. C. 556, 47 S. E. 618.

66. Holloway v. Brame [Miss.] 36 So. 1.

67, 68. Barron v. International Trust Co., 184 Mass. 440, 68 N. E. 831.

69. Acts of promoter held to preclude him from asserting that lots purchased as terminals were not part of projected railroad. Seacoast R. Co. v. Wood [N. J. Eq.] 56 A. 337.

70. See 1 Curr. L. 719.

71. Where promoters caused properties and cash to be conveyed to a company organized at their expense, in which they and their representatives only were interested, receiving therefor a certain amount of stock and with less than the amount of stock received, they procured the properties and cash to be conveyed and paid, they may retain the balance as profits, neither the corporation nor stockholders taking stock from them seeking a rescission. Hutchinson v. Simpson, 92 App. Div. 382, 87 N. Y. S. 369.

72. A corporation which agrees to pay commissions due a broker under a prior contract with another company and accepts the benefits of his services cannot repudiate the contract on the ground that it was misled by statements by its promoters, who are not shown to have authority to bind plaintiff. Heaton v. Clarke & Co., 122 Iowa, 716, 98 N. W. 597.

73. Where promoters had received compensation for services, evidence held to entitle railroad to hold terminals as beneficiary against the promoter and his creditors. Seacoast R. Co. v. Wood [N. J. Eq.] 56 A. 337.

74. See 1 Curr. L. 721.

75. Olson v. Buffalo Hump Min. Co., 130 F. 1017.

Matters dependent on domicile: Venue of actions, see post, § 10. See, also, Foreign Corporations, 2 Curr. L. 40. Citizenship as bearing on Federal jurisdiction, see Jurisdiction, 2 Curr. L. 604; Removal of Causes, 2 Curr. L. 1506.

76. Failure to pay in capital stock under the Mississippi statute is fatal. Gastonia Cotton Mfg. Co. v. Wells Co. [C. C. A.] 128 F. 369.

77. Aetna Ins. Co. v. Brigham [Ga.] 48 S. E. 348.

78. See 1 Curr. L. 721.

79. Traer v. Lucas Prospecting Co. [Iowa] 99 N. W. 290; Cumberland Tel. & T. Co. v. Evansville, 127 F. 187. A license to operate a manufacturing plant does not give a right to create a nuisance, there being nothing in

has only powers granted or necessarily implied.[80] It cannot by principles of comity be given powers in a foreign state which it does not possess in the state of its domicile.[81]

Quasi public corporations.[82]—Whenever privileges of a public character are granted a corporation, the grant is strictly construed in favor of the public, and nothing passes which is not granted in clear and explicit terms.[83] A corporation authorized to construct a dam across the outlet of certain ponds does not perform an ultra vires act by constructing the dam so as to flow land in another state, if it does not violate the law of that state, nor does it by the construction of the dam a reasonable distance from the ponds, though there is no authority to raise a stream forming the outlet.[84] The illegal use of granted powers is not ultra vires.[85]

(§ 7) *B. Power to take and hold property.*[86]—The corporation may own and hold its corporate property in absolute right as an individual may.[87] If it have a right to acquire a fee by purchase, it may acquire by adverse possession;[88] but by reason of its status as a corporation, it has no greater right than a private person to take land by force.[89] Devises and bequests to a corporation in excess of charter capacity to hold are voidable only, and whether they shall be declared void rests solely with the state.[90] A mercantile corporation cannot purchase land or be regarded as an innocent purchaser.[91] That a corporation is formed to carry on the business of a firm does not operate to convey land held by the firm to it.[92] If permitted by charter, transferable franchises and privileges may be acquired.[93]

(§ 7) *C. Power to transfer or incumber property and franchises.*[94]—Whether a corporation may dispose of all of its property depends on its charter.[95] It ac-

the charter which expressly or by implication confers that right. Charter to make, manufacture and burn bricks. Powell v. Brookfield Pressed Brick & Tile Mfg. Co. [Mo. App.] 78 S. W. 646. Corporation chartered to establish a cotton seed oil mill and ginnery, to compress cotton seed oil, to gin and compress cotton, to compound cotton seed meal into fertilizers, to buy cotton seed and sell its products, has no power to engage in a large buying and selling of guano. Richmond Guano Co. v. Farmers' Cotton Seed Oil Mill & Ginnery Co. [C. C. A.] 126 F. 712.

80. Bankers' Union of the World v. Crawford, 67 Kan. 449, 73 P. 79. Corporation chartered to aid in the formation and maintenance of organizations for the transaction of business in public exchanges may accept a subscription. Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. [Ill.] 71 N. E. 22. Corporation chartered to construct an office building may give a subscription securing erection of an advantageous building in the neighborhood. Id. Acting as surety in procuring license bond as a step toward securing a tenant and a customer held within implied powers of brewing corporation. Horst v. Lewis [Neb.] 98 N. W. 1046. Donations for political purposes are outside the purpose of a mining corporation. McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194.

81. Seattle Gas & Elec. Co. v. Citizens Light & Power Co., 123 F. 688.

82. See 1 Curr. L. 722. See, also, article Franchises, 2 Curr. L. 74.

83. City of Helena v. Helena Waterworks Co. [C. C. A.] 122 F. 1. An action in equity to restrain the raising of water by a dam and to assess damages may be maintained against a corporation whose charter does not give it exclusive water rights, and to which riparian and public rights are not surrendered. State v. Sunapee Dam Co. [N. H.] 55 A. 899.

84. Phillips v. Watuppa Reservoir Co., 184 Mass. 404, 68 N. E. 848.

85. Corporation with power to guaranty and negotiate paper for use in its own business did so and diverted proceeds to use of another corporation. Roosevelt v. Nashville, etc., R. Co., 128 F. 465. Usury in contract. Fletcher & Sons v. Alpena Circuit Judge [Mich.] 99 N. W. 748.

86. See 1 Curr. L. 722.

87. It does not hold as trustee for stockholders. Hearst v. Putnam Min. Co. [Utah] 77 P. 763.

88. Carter v. Ridge Turnpike Co., 22 Pa. Super. Ct. 162.

89. Freud v. Detroit & P. R. Co. [Mich.] 95 N. W. 559.

90. Brigham v. Peter Bent Brigham Hospital, 126 F. 796.

91. Rev. St. 1895, art. 665. Schneider v. Sellers [Tex. Civ. App.] 81 S. W. 126.

92. Schneider v. Sellers [Tex. Civ. App.] 81 S. W. 126.

93. Under Rev. St. 1898, §§ 1775, 1775a, a telephone corporation may take and acquire by purchase or assignment and thereafter hold and enjoy any privilege or franchise owned by another similar corporation. Badger Tel. Co. v. Wolf River Tel. Co. [Wis.] 97 N. W. 907.

94. See 1 Curr. L. 722. Power to lease, see 1 Curr. L. 722.

95. A corporation empowered to purchase

quires no such right independent of charter from a statute merely designating the powers with which corporations may be formed, among which are enumerated the purchase and disposal of property.[96] A deed unauthorized by the stockholders is void only as to the stockholders and those connected with the corporation's title.[97] A quasi public corporation cannot disable itself for the performance of its functions by the sale and transfer of all its property without legislative authority.[98]

Pledge of credit.[99]—A corporation cannot become an accommodation indorser in the absence of express or implied power,[1] and one manufacturing corporation cannot, as against its creditors, pledge its credit for another.[2]

(§ 7) *D. Power to contract and incur debts.*[3]—Independent of corporate powers, contracts are invalid if against public policy or in too great restraint of trade or of a monopolistic tendency.[4] A contract void in the state where made will not be enforced elsewhere.[5]

Corporations may, subject to statute or charter restrictions, borrow money and execute evidence of debt,[6] and pursuant thereto may issue bonds to take up outstanding obligations.[7] A guaranty of bonds purchased and sold is not a bonded debt,[8] and the assumption of a debt in taking over property has been held not an "increase."[9] A statute providing that bonds may be legally issued only for money, labor or property actually received is not operative to invalidate those paid for by promissory note.[10]

A corporation cannot make loans of money unless the exercise of its chartered powers ordinarily includes such loans.[11]

Mode of execution of contracts.[12]—The corporation acts through its officers and agents in contracting,[13] and must do so in the manner prescribed, if any, or if none, then in the manner of natural persons.[14] The contract must ordinarily

and own property and mineral rights in land and to prospect for coal and "to do any and all such other matters and things as may aid and promote its aforesaid purposes of organization" has power to sell all of its property, notwithstanding the dissent of any individual shareholder. Traer v. Lucas Prospecting Co. [Iowa] 99 N. W. 290.

96. Code, § 1609, par. 6. Traer v. Lucas Prospecting Co. [Iowa] 99 N. W. 290.

97. Galbraith v. Shasta Iron Co., 143 Cal. 94, 76 P. 901.

98. Telephone company. Cumberland Tel. & T. Co. v. Evansville, 127 F. 187; Badger Tel. Co. v. Wolf River Tel. Co. [Wis.] 97 N. W. 907.

99. See 1 Curr. L. 723.

1. Such action may be repudiated by stockholders free from acquiescence therein. McCampbell v. Fountain Head R. Co. [Tenn.] 77 S. W. 1070.

2. Indorsement. Ratification is not material. In re Prospect Worsted Mille, 126 F. 1011.

3. **Rights of creditors, bondholders and parties to dealings with corporations,** see post, §§ 8, 15, 16.

4. Contracts in restraint of trade and violation of public policy, see 1 Curr. L. 723; also, Contracts, 3 Curr. L. 805; and Combinations and Monopolies, 3 Curr. L. 706.

See article Contracts for validity of contracts in general.

5. Alleghany Co. v. Allen, 69 N. J. Law, 270, 55 A. 724.

6. Fidelity Trust Co. v. Louisville Gas Co. [Ky.] 81 S. W. 927.

7. Authority to borrow money [Shannon's Code, § 2054]. Obligation in purchase of corporate property. Big Creek Gap Coal & Iron Co. v. American Loan & Trust Co. [C. C. A.] 127 F. 625.

8. The amount so guaranteed exceeded the limit. Fidelity Trust Co. v. Louisville Gas Co. [Ky.] 81 S. W. 927.

9. Assumption of debt of a predecessor, it being incurred in the line of business for which the corporation was organized. [Const. Pa. art. 16, § 7]. Curtis v. Natalie Anthracite Coal Co., 89 App. Div. 61, 85 N. Y. S. 413.

10. Laws [New York] 1890, p. 1073, c. 564. Note was never paid and no benefit came from bonds. In re Waterloo Organ Co., 128 F. 517.

11. Charter to manufacture and sell or otherwise dispose of brake beams and other appliances. Leigh v. American Brake Beam Co., 205 Ill. 147, 68 N. E. 713.

12. See 1 Curr. L. 724.

13. See post, § 15. Hence a resolution authorizing a contract is not itself a contract. Cumberland, etc., R. Co. v. Shelbyville, etc., R. Co., 25 Ky. L. R. 1265, 77 S. W. 690.

14. 1 Clark & M., Corp. § 192. A notary who is an officer and stockholder in the corporation may take an acknowledgment of a mortgage to it. Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572, 73 P. 680.

be or purport to be that of the corporation,[15] and be executed by authorized or apparently authorized officers;[16] but it may suffice if they sign as executive officers, though the corporate name be not signed,[17] or if the corporate name alone be signed.[18] When executed by the president or proper officer, it is not invalidated by the fact that his authority is not on the face of the instrument.[19] Corporate records are not necessarily the best evidence of what was the contract.[20]

Aside from statute or charter provision,[21] a contract does not require the corporate seal, except as one would be required of a natural person's contract.[22] The true corporate seal if there be one is required.[23]

(§ 7) *E. Power to take and hold stock.*[24]—A corporation may purchase its own stock where the transaction is fair and in good faith, if it is free from fraud actual or constructive, if the corporation is not insolvent or in process of dissolution, and if the rights of creditors are in no way affected thereby;[25] so where not prohibited by statute, a solvent banking corporation may purchase its stock in payment of a stockholder's pre-existing debt to it.[26] Where a charter authorizes the conversion of the preferred stock and also the borrowing of money, the corporation may purchase its preferred stock with the proceeds of certificates of indebtedness and in turn issue common stock in exchange for the certificates.[27] Stocks of other corporations may be taken and held according as such is within the corporate powers and purposes.[28] When such power coexists with a power to sell and transfer all of its property, a corporation may so invest all of its property.[29] A contract of purchase of stock in another corporation, within the corporate powers otherwise, is not ultra vires because the manner of payment amounts to a guaranty of fixed dividends on the purchaser's stock.[30]

15. Contract of "D. of the" [corporation] examined and held not the contract of the corporation. Railway Speed Recorder Co. v. Chicago Pneumatic Tool Co., 126 F. 223. Use of "Mfg." for "Manufacturing" in a corporate signature is not a defect. Seiberling v. Miller, 207 Ill. 443, 69 N. E. 800.

That an undertaking was such that it could not be performed by an individual whose signature is affixed is evidence that it is a corporate obligation. Reed v. Fleming, 209 Ill. 390, 70 N. E. 667. Note held not to be that of officers individually. English & Scottish-Amer. Mortg. & Inv. Co. v. Globe Loan & Trust Co. [Neb.] 97 N. W. 612.

16. As to who are such, see post, § 15.

17. Graham v. Partee, 139 Ala. 310, 35 So. 1016. Signature of a deed by the president and secretary as such, the name of the corporation appearing in the granting clause and attestation is sufficient. Ismon v. Loder [Mich.] 97 N. W. 769.

18. Signature of note in corporate name only held not invalid. Buck v. Troy Aqueduct Co. [Vt.] 56 A. 285.

19. Deed of assignment. Hilliard v. Burlington Shoe Co. [Vt.] 56 A. 283.

20. Ellison v. Dunlap, 25 Ky. L. R. 1495, 78 S. W. 155, and see 1 Curr. L. 1143, n. 71.

21. 1 Clark & M. Corp. § 192g.

22. Seiberling v. Miller, 207 Ill. 443, 69 N. E. 800. Statutes providing that conveyances shall not fail for want of a seal are applicable to the conveyance of a private corporation. Ismon v. Loder [Mich.] 97 N. W. 769.

23. Since an agricultural corporation is not required to have a formal seal, a scroll may be given such effect [Comp. Laws 1897, § 9005]. Ismon v. Loder [Mich.] 97 N. W. 769. Seal set opposite signatures of president and secretary held to be intended as seal of corporation. Id.

24. See 1 Curr. L. 725. Purchase of corporation's own stock as reduction of capital, see post, § 14 B.

25. Porter v. Plymouth Gold Min. Co. [Mont.] 74 P. 938.

26. Such does not constitute a reduction of capital. Draper v. Blackwell, 138 Ala. 182, 35 So. 110.

27. Laws Wis. 1895, c. 244, p. 475. Weidenfeld v. Northern Pac. R. Co. [C. C. A.] 129 F. 305.

28. Purchase of bank stock is ultra vires a malting corporation. Hunt v. Hauser Malting Co., 90 Minn. 282, 96 N. W. 85. A railroad cannot subscribe for stock in a land company even by intervention of trustees. McCampbell v. Fountain Head R. Co. [Tenn.] 77 S. W. 1070. Mining corporations may own and vote stock in other mining corporations [Civ. Code, § 527. Sess. Laws 1899, p. 113]. MacGinniss v. Boston & M. Consol. C. & S. Min. Co. [Mont.] 75 P. 89.

29. Traer v. Lucas Prospecting Co. [Iowa] 99 N. W. 290.

30. Payment was to be made part stock and balance in cash, amounting to dividends for five years on the stock at fixed rates. The stock was deposited in trust, together with certificates of indebtedness to represent the cash payments, and dividends were to be paid the trustee and by him applied to the certificates until their discharge, when the trust was to terminate. Ingraham v. National Salt Co. [C. C. A.] 130 F. 676.

§ 8. *Effect of ultra vires and illegal transactions.*[31]—Contracts ultra vires in the strict sense are wholly void,[32] and are not protected by the contract clause of the Federal constitution.[33] Implied contracts may arise from ultra vires ones,[34] and the rule does not apply,[35] nor is it a defense to contracts entirely collateral.[36] As a general rule, the question cannot be raised by a private suitor or corporation whose private rights have not been invaded.[37] An apparent exception is made where the corporation invokes the aid of equity to protect it in maintaining a public nuisance,[38] for the reason that ultra vires cannot be pleaded where its effect will be to accomplish a legal wrong.[39]

Where a corporation is held to be violating the Sherman Act in holding stock of other corporations, it may be restrained from exercising any control thereover, with liberty to return the stock to those originally holding it as corporators or to their transferees.[40] It has been held that such decree does not require the specific stock delivered to be returned,[41] the owners being in pari delicto.[42]

Estoppel to assert ultra vires.[43]—The corporation cannot deny its power to make a contract fully executed by the other party,[44] and neither it[45] nor the op-

31. See 1 Curr. L. 726.

32. Cannot be validated by ratification or estoppel. Metropolitan Stock Exch. v. Lyndonville Nat. Bank [Vt.] 67 A. 101.

33. Westminster Water Co. v. Westminster [Md.] 66 A. 990.

34. Assumpsit for money had and received is a proper remedy. Leigh v. American Brake Beam Co., 205 Ill. 147, 68 N. E. 713.

35. Interstate Hotel Co. v. Woodward & Burgess Amusement Co. [Mo. App.] 77 S. W. 114.

36. The fact that a traffic agreement between railroads is ultra vires does not prevent contractual liability based thereon as to third persons. Harrill v. South Carolina & G. Extension R. Co., 135 N. C. 601, 47 S. E. 730.

37. Commonwealth only and not borough can assert that a lease of the tracks of a railroad is ultra vires, the railroad having the right to lay tracks without the borough's consent. Minersville Borough v. Schuylkill Elec. R. Co., 205 Pa. 402, 54 A. 1063. Bondholders cannot attack a sale of corporate stock as ultra vires or in restraint of trade. Only the state, parties, or stockholders may object. Weed v. Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885. A city made defendant in an action by a mortgage trustee in a suit to protect a franchise mortgaged cannot assert ultra vires in the transfer of the franchise by another corporation to the mortgagor corporation. Old Colony Trust Co. v. Wichita, 123 F. 762. A provision that a corporation shall not hold land longer than a certain period unless actually occupied in the exercise of its franchise can be enforced only at the instance of the public and cannot be availed of by a squatter [Const. art. 15, § 12]. Pere Marquette R. Co. v. Graham [Mich.] 99 N. W. 408. State only can complain of misuser or nonuser of powers. Lincoln Park Chapter No. 171, R. A. M. v. Swatek, 204 Ill. 223, 68 N. E. 429. A minority stockholder cannot have a decree in equity forfeiting the stock of another stockholder in the same corporation to the corporation on the ground that title thereto has been acquired and held in violation of the charter of the corporation. MacGinniss v. Boston & M. Consol. C. & S. Min. Co. [Mont.] 75 P. 89. A combination in violation of statute cannot be urged as a defense to an action by the corporation to enjoin a trespass [Ky. St. 1899, §§ 1808 (subsec. 3) 1812, 3915, 3917-19]. Wilson v. Sullivan, 26 Ky. L. R. 1110, 77 S. W. 193.

38. Nebraska Tel. Co. v. Western Independent Long Distance Tel. Co. [Neb.] 95 N. W. 18. Want of charter power may be questioned by a private person where he complains of unlawful transactions creating a public nuisance, and causing special and irreparable injury to him. May be basis of injunction against laying gas mains in front of complainant's property. Seattle Gas & Elec. Co. v. Citizens' Light & Power Co., 123 F. 588.

39. In re Waterloo Organ Co., 128 F. 517.

40. Northern Securities Co. v. U. S., 193 U. S. 197, 48 Law. Ed. 679.

41. Continental Securities Co. v. Northern Securities Co. [N. J. Eq.] 57 A. 876. Every stockholder in the holding company is entitled to have his proportionate share of each class of assets where there is a possible or probable difference in market value. Id. Where there is a right to distribute surplus, the securities in which it is invested may be distributed. Id.

42. Continental Securities Co. v. Northern Securities Co. [N. J. Eq.] 57 A. 876.

43. See 1 Curr. L. 726.

44. Guase v. Com. Trust Co., 89 N. Y. S. 723; York v. Farmers' Bank [Mo. App.] 79 S. W. 968; Board of Trustees of Charlotte Tp. v. Piedmont Realty Co., 134 N. C. 41, 46 S. E. 723. After compliance by the city, a corporation cannot assert that an agreement to bear a portion of the cost of a bridge erected by the city facilitating access to the corporate property was ultra vires. Id.

45. Where benefits have been received and retained by the corporation, it cannot assert ultra vires. Schrimplin v. Farmer's Life Ass'n, 123 Iowa, 102, 98 N. W. 613. Contract guaranteeing dividends. McVity v. Albro Co., 90 App. Div. 109, 86 N. Y. S. 144. A corporation acquiring property ultra vires is liable for the price in case return is impossible, the contract not being malum in se or fraudulent. Richmond Guano Co. v. Farm

posite party[46] may do so after benefits received or detriment suffered,[47] unless the application of such rule would give effect to a contract offensive to law or public policy.[48] The rule cannot be applied to part of an indivisible contract,[49] and may bind a corporate officer both as such and as stockholder.[50]

Ultra vires must be pleaded to be availed of as a defense.[51]

§ 9. *Torts, penalties and crimes.*[52]—Penal statutes will not be applied save to corporations clearly within their terms.[53] A corporation is liable for torts of its officers or agents within the scope of their authority or directed or ratified by it,[54] or for such neglect of duty as enables servants or others to individually perpetrate wrongs.[55] It may be liable in exemplary damages.[56]

A private or quasi public corporation undertaking to supply water for fire protection under contract with a city is not liable to property owners in tort for fail-

ers Cotton Seed Oil Mill & Ginnery Co. [C. C. A.] 126 F. 712. Investment company receiving money for investment cannot assert ultra vires against investor. Ring v. Long Island Real Estate Exch. & Inv. Co., 87 N. Y. S. 682. Where a corporation has held bank stock with knowledge and ratification of officers and stockholders, it cannot assert ultra vires to avoid stockholder's liability. Hunt v. Hauser Malting Co., 90 Minn. 282, 96 N. W. 85.

46. As a general rule, a person having the benefit of a contract cannot assert the corporation's lack of power to enter into it: A corporation's power to become a partner cannot be questioned by one contracting to purchase property purchased in part with corporate funds in the course of the ultra vires partnership business. Huguenot Mills v. Jempson & Co. [S. C.] 47 S. E. 687. Where a corporation purchased personalty and used it for several years and converted part of it, it is estopped to raise the want of authority in the officers of the selling corporation to sell. Badger Tel. Co. v. Wolf River Tel. Co. [Wis.] 97 N. W. 907. Stockholders in a corporation who have received the full benefit of loans cannot assert their invalidity on account of being in excess of authorized indebtedness. Traer v. Lucas Prospecting Co. [Iowa] 99 N. W. 290. Borrowing member of building association cannot defend his note on ultra vires in loan. Coggeshall v. Sussman, 84 N. Y. S. 1097. Ultra vires cannot be asserted by a debtor in action on the debt. Noah v. German-American Bldg. Ass'n, 31 Ind. App. 604, 68 N. E. 615.

47. Corporation cannot plead ultra vires against assumption of debt of predecessor where it has induced the creditor to continue dealings on the strength thereof. Curtis v. Natalie Anthracite Coal Co., 89 App. Div. 61, 85 N. Y. S. 413.

48. Chicago, etc., R. Co. v. Southern Ind. R. Co. [Ind. App.] 70 N. E. 843. Where the contract is utterly void, the person with whom it is made may assert its invalidity. Patrons of Industry Fire Ins. Co. v. Plum, 84 App. Div. 96, 82 N. Y. S. 550. Estoppel does not extend to a contract in violation of the spirit and letter of the statute under which the corporation is organized. Contract with mutual insurance corporation. Montgomery v. Whitbeck, 12 N. D. 385, 96 N. W. 327.

49. A contract of sale of stock with an agreement to repurchase at a time fixed if the buyer is not satisfied is indivisible, and the corporation cannot assert ultra vires as to the last provision and maintain the first. Porter v. Plymouth Gold Min. Co. [Mont.] 74 P. 938.

50. Where the president of a corporation has in such capacity asserted the validity of an agreement with a stockholder, changing stock from preferred to common, he cannot as an individual assert that the waiver was without authority or was ultra vires. Pendleton v. Harris-Emery Co. [Iowa] 100 N. W. 117.

51. Iowa Business Men's Bldg. & Loan Ass'n v. Berlau [Iowa] 98 N. W. 766; Mason v. Standard Distilling & Distributing Co., 85 App. Div. 520, 13 Ann. Cas. 264, 83 N. Y. S. 343.

52. See 1 Curr. L. 728. Liability of Officer for contempt, see post, § 15 Q. Penalties, see 1 Curr. L. 729.

53. A penalty under Gen. Laws 1897, c. 165, provided for surety companies, cannot be collected of the Pullman Co., though it forwards applications of employes for bonds to such a corporation. Davis v. Pullman Co. [Tex. Civ. App.] 79 S. W. 635.

54. Telephone company liable for entry on private property and injury to trees. Southwestern Tel. & T. Co. v. Branham [Tex. Civ. App.] 74 S. W. 949. Wrongful arrest. Cordner v. Boston & M. R. R. [N. H.] 57 A. 234. Evidence held insufficient to establish such authority in either an assistant secretary or an attorney to cause arrest imposing liability for malicious prosecution. Beiswanger v. American Bonding & Trust Co. [Md.] 57 A. 202. May be liable for negligence of an agent in an action for joint and concurrent tort. Riser v. Southern R. Co. [S. C.] 46 S. E. 47. Where a railroad operates its road conjointly with another, it is liable for an injury to an employe in the same manner that a natural person would be for the liabilities of a partnership of which he was a member. Harrill v. South Carolina, etc., R. Co., 135 N. C. 601, 47 S. E. 730.

55. Duty of carrier to protect passengers. See 3 Curr. L. 636.

56. Malicious assault by a servant. Sonnen v. St. Louis Transit Co., 102 Mo. App. 271, 76 S. W. 691. Malicious and fraudulent representations of an agent in the scope of his business with intent to deceive. Liability held to exist for representations of state agent as to solvency of debtor and validity of securities. Western Cottage Piano & Organ Co. v. Anderson [Tex. Civ. App.] 76 S. W. 945.

ure to do so.[57] A public corporation may be liable for negligence when performing a private or nonpublic function.[58]

In a prosecution previous complaint or binding over is not necessary; the finding of an indictment is the appropriate first step in the prosecution.[59]

§ 10. *Actions by and against corporations.*[60]—Suit should be entitled by the corporate name or the name of a subcorporation,[61] and a change of name without change of identity does not abate a pending suit.[62] The venue of actions is often enacted to be at any county where the corporation is found or where the cause of action arose.[63]

Actions pending at time of appointment of a receiver may go on to judgment without making him a party where there is no injunction or legislative provision to the contrary.[64]

Process.[65]—Jurisdiction over either foreign or domestic corporations must be secured in the manner prescribed by statute,[66] the form of process and manner of service being elsewhere treated.[67]

Pleading corporate existence.[68]—The rule that where the name of defendant imports incorporation, incorporation need not be specifically averred, applies, though incorporation is essential to the liability sued on.[69] Charters conferred by private acts will not on demurrer be noticed save as they appear on the face of the pleadings.[70]

Where the corporation is defendant, the state where it is incorporated need not be alleged in the complaint.[71] Defects in name can be taken advantage of by plea in abatement only in which the correct name is stated.[72]

57. Nichol v. Huntington Water Co., 53 W. Va. 348, 44 S. E. 290.

58. Roberts Bros. v. Dover [N. H.] 55 A. 895. See additional cases applying this rule in Highways and Streets, 2 Curr. L. 177; Municipal Corporations, 2 Curr. L. 940; Sewers and Drains, 2 Curr. L. 1628; Waters and Water Supply, 2 Curr. L. 2034.

59. United States v. Correspondence Institute of America, 125 F. 94.

60. See 1 Curr. L. 730.

Scope of this section: Actions against foreign corporations are treated in the article under that title, 2 Curr. L. 40. Merely general questions of procedure are here treated, special remedies being treated with the substantive law in the section relating thereto. Matters relating to practice generally is to be found in such topics as Parties, 2 Curr. L. 1092; Pleading, 2 Curr. L. 1178; Evidence, 1 Curr. L. 1136; Trial, 2 Curr. L. 1907, and the like.

61. An organized department of a corporation may be sued in its corporate name if its charter authorizes the suit, otherwise the suit must be brought against the department in the corporate name of the corporation. State v. Banking Department of Citizens' Bank [La.] 36 So. 921.

62. Must appear that there has in fact been a change in membership. Wilhite v. Convent of Good Shepherd, 25 Ky. L. R. 1375, 78 S. W. 138.

63. See Venue, 2 Curr. L. 2003.

64. Cooper v. Philadelphia Worsted Co. [N. J. Eq.] 57 A. 733. Except on dissolution, the appointment of a receiver does not abate a pending action by the corporation. Rooney v. Southern Bldg. & L. Ass'n, 119 Ga. 941, 47 S. E. 345.

65. See 1 Curr. L. 732.

66. Coolidge v. American Realty Co., 91 App. Div. 14, 86 N. Y. S. 318. Gen. Corp. Laws, § 48; 22 Del. Laws, p. 305, c. 167; Rev. Code 1893, p. 567, c. 70, § 6, does not limit service of legal process on corporations as therein provided to service on corporations created under the general act, but applies to pre-existing corporations. Bay State Gas Co. v. State [Del.] 56 A. 1114.

A corporation is a "person" against which writs of attachment of property may issue [Vt. St. §§ 1109, 21]. Gokey v. Boston & M. R., Co., 130 F. 994.

67. See Process, 2 Curr. L. 1259.

68. See 1 Curr. L. 733.

69. Burns' Rev. St. 1901, § 7083. "Ft. Wayne Gas Company" imports incorporation. Ft. Wayne Gas Co. v. Nieman [Ind. App.] 71 N. E. 59.

70. Jersey City v. Jersey City & B. R. Co. [N. J. Law] 57 A. 445.

71. Allegation held sufficient. Jones v. Pacific Dredging Co. [Idaho] 72 P. 956. Averment that defendant is a "domestic corporation, organized and existing under the laws of New York and having its principal office for the transaction of business in the northern district of New York," is a sufficient averment that the corporation is a citizen of New York. Sun Printing & Pub. Ass'n v. Edwards, 194 U. S. 377, 48 Law. Ed. 1027.

72. Cannot be raised by motion to quash return of process based on an affidavit silent as to true name. Wilhite v. Convent of Good Shepherd, 25 Ky. L. R. 1375, 78 S. W. 138. Use of "The" erroneously as part of corporate title is ground for plea in abatement. Lapham v. Philadelphia, etc., R. Co. [Del. Super.] 56 A. 366.

Denial of existence.[73]—A denial of liability as a corporation should be specific.[74]

Verification of pleadings.[75]—A director may verify a pleading.[76] The verification may be on information and belief,[77] unless of facts with which he must be presumed to be acquainted,[78] and he need not state the source of his information and belief in verifying a pleading.[79]

Variance.[80]—Proof of de facto existence of corporation under name alleged in the information is admissible.[81]

Defenses.[82]—The defense that a suit by a corporation was unauthorized by it is matter in abatement waived by pleas in bar which do not save the benefit of it.[83]

Evidence, production of books, witnesses.[84]—A corporation is not bound to produce its officer as an adverse witness.[85] Under the admiralty rules and practice, the officers of a corporation libelee may be interrogated. The information thus called for is that received in his official capacity.[86] Identity of plaintiff with corporation named in bond sued on may be inferred from identity of name.[87] A note, though not prima facie evidence of corporate indebtedness, may be admissible against it as part of a chain of evidence establishing a debt.[88]

Judgment and enforcement.[89]—A statute permitting a default to be entered against a corporation in actions on notes or other evidences of debt for absolute payment of money, unless an order directing trial of the issues be served with the copy of the answer or demurrer, is not applicable to actions before a justice.[90]

Attorney's fees. Mandamus.[91]—The giving of a statutory penalty will not prevent mandamus to compel performance of duties.[92] As to procedure to compel filing of certificate of stock, see the footnotes.[93]

73. See 1 Curr. L. 734.

74. Where a complaint seeks to impose liability for acts between 1887 and 1900, and the answer alleges that defendant was not incorporated until 1901, it is not a denial that it had been doing business under the corporate name or was identical with that asserted to be liable. Wilhite v. Convent of Good Shepherd, 25 Ky. L. R. 1375, 78 S. W. 138.

75. See 1 Curr. L. 734.

76. Code Civ. Proc. § 525. Eastham v. York State Tel. Co., 86 App. Div. 562, 83 N. Y. S. 1019.

77. A bill for an injunction is sufficiently verified by the affidavit of the president in which he recites his official capacity and belief that the allegations are true [Code 1887, § 3282]. Southern R. Co. v. Washington, etc., R. Co. [Va.] 46 S. E. 784.

78. Andrews v. Blue Ridge Packing Co., 206 Pa. 370, 55 A. 1059.

79. Code Civ. Proc. § 526. Henry v. Brooklyn Heights R. Co., 89 N. Y. S. 525.

80. See 1 Curr. L. 734.

81. Embezzlement from corporation. State v. Pittam, 32 Wash. 137, 72 P. 1042.

82. See 1 Curr. L. 734.

83. Granite Bldg. Corp. v. Greene [R. I.] 57 A. 649.

84. See general articles Evidence, 1 Curr. L. 1136; Discovery and Inspection, 1 Curr. L. 930; Witnesses, 2 Curr. L. 2163. Code Civ. Proc. §§ 914, 915, does not authorize compulsion of production of books and papers to be used as evidence. In re Lee, 85 N. Y. S. 224. An order for the production of corporate books should be limited to the minute book and all books and records in defendant's possession relating or referring to the instruments in suit or annexed to the complaint. De Brunoff v. McClure-Tissot Co., 83 App. Div. 540, 82 N. Y. S. 38. A subpoena for the production of books and papers under Sup. Ct. Rule 17 must be based on a showing of facts on which the court may see at least presumptively that they contain material entries. It is not sufficient to state merely that they are material. In re Lee, 85 N. Y. S. 224. In assumpsit by a corporation, an account kept by its president with it is inadmissible, he not being a party and it not being shown that the corporation had in any way approved the account or that it had been adjusted. Leigh v. American Brake Beam Co., 205 Ill. 147, 68 N. E. 713.

85. Only way to secure his attendance is by a subpoena duly served. Central Grain & Stock Exch. v. Board of Trade of Chicago [C. C. A.] 125 F. 463. A hearing before a master cannot be suspended and preliminary injunction granted until the officer is produced. Id.

86. Bock v. International Nav. Co., 124 F. 711.

87. Campbell & Zell Co. v. American Surety Co., 129 F. 491.

88. Agle v. Standard Drug Co. [Mont.] 74 P. 135.

89. Act Apr. 27, 1899, p. 120, § 834a; Burns' Rev. St. 1901, provides a proceeding quasi in rem in the nature of garnishment for the enforcement of judgment against railroad corporations, and there is no res until a writ has been issued against an agent and he has answered. Chicago, etc., R. Co. v. Witt, 160 Ind. 680, 67 N. E. 519.

90. Code Civ. Proc. § 1778. Center v. Hoosick River Pulp Co., 43 Misc. 247, 88 N. Y. S. 548.

91. See 1 Curr. L. 734.

§ 11. *Legislative control over corporations.*[94]—While legislative control or regulation must not deny or infringe corporate rights such as are protected by the constitutions,[95] or be found in invalidly framed and enacted laws,[96] large powers of regulation exist. Even these objections are removed by incorporating under or accepting attempted legislation,[97] and a corporation claiming an exemption must come within it.[98]

A reserved power to amend, annul or repeal the articles authorizes any alteration which will not defeat or substantially impair the object of the grant or rights vested under it,[99] but regulation cannot go to the extent of destroying franchises or impairing existing contracts.[1]

Any alterations or amendments of the general law under which a corporation is formed affect its charter rights where such power of alteration is reserved.[2] The trustees are not bound by meeting or otherwise to obtain the assent of members to the legislation.[3] Under a power to regulate, a power to require reports is comprehended.[4] A law is not retroactive because an existing corporation must in future report payments into its capital stock.[5] Public service corporations are subject to regulation in the exercise of franchises for such service.[6]

§ 12. *How corporations may be dissolved; forfeiture of charter; effect of dissolution; winding up under statutory provisions.*[7]—Dissolution under a general

92. Mandamus will lie to compel the filing of a certificate under § 23 Gen. Corp. Law, though a penalty is also provided under § 24. Bay State Gas Co. v. State [Del.] 56 A. 1120.

93. Mandamus to compel such certificate may be against the corporation as a sole defendant. Bay State Gas Co. v. State [Del.] 56 A. 1120. Petition for mandamus to compel certificate under Gen. Corp. Law, § 23, held defective in not sufficiently alleging a call after enactment of the statute or limiting the demand to payments after such enactment, and writ issued thereon held too general. Id.

94. See 1 Curr. L. 735.

95. See Constitutional Law, 1 Curr. L. 569.

96. See Statutes, 2 Curr. L. 1707.

97. A corporation accepting a statute by incorporation thereunder cannot question its constitutionality where it has no contract right to incorporate. Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 48 Law. Ed. 598. Specially chartered corporation becomes subject to general laws by accepting an amendment to its charter in which such control is reserved. Yates v. People, 207 Ill. 316, 69 N. E. 775.

98. Stockholders of a fire alarm and telegraph company held not excepted and hence subject to double liability under Ky. St. 1899, §§ 573, 547. Gamewell Fire-Alarm Tel. Co. v. Fire & Police Telegraph Co., 25 Ky. L. R. 1010, 76 S. W. 862.

99. A consolidation with other corporations by legislative act which amounts to a mere legislative recognition and sanction of existing relations between them is permitted. McKee v. Chautauqua Assembly [C. C. A.] 130 F. 536. A reserved power to alter a charter of a street railroad company justifies an act compelling it to extend its tracks. Metropolitan R. Co. v. Macfarland, 20 App. D. C. 421.

1. Rochester & L. O. Water Co. v. Rochester, 84 App. Div. 71, 82 N. Y. S. 455. The property of a private waterworks corporation may be taken by a municipality only under and in manner prescribed by legislative authorization. In re Board of Water Com'rs of White Plains, 176 N. Y. 239, 68 N. E. 348.

2. Removal of power of eminent domain. Boyd v. Winnsboro Granite Co., 66 S. C. 433, 45 S. E. 10; San Antonio Traction Co. v. Altgelt [Tex. Civ. App.] 81 S. W. 106.

3. McKee v. Chautauqua Assembly [C. C. A.] 130 F. 536.

4. Act May 10, 1901, Laws 1901, p. 124 is within Hurd's Rev. St. 1901, p. 455, c. 32, § 9, and applicable to existing corporations. People v. Rose, 207 Ill. 352, 69 N. E. 762. A statute requiring annual reports to facilitate taxation is not unconstitutional in providing that failure to report shall be evidence of nonuser. Such a statute (Act May 10, 1901, Laws 1901, p. 124) is not an attempt by the legislature to dissolve a corporation or to prescribe a state of facts under which it may be done through an administrative officer. Id. Though the charter of a company provides its duties on increase of capital stock, the legislature may by a subsequently enacted general law require a certificate in case of calls on capital stock showing the amount paid and manner of payment [General Corp. Law, § 23]. Bay State Gas Co. v. State [Del.] 56 A. 1120. The use of the words "active business" in a statute, requiring reports from "every incorporated company," does not restrict it to corporations for pecuniary profit [Act May 10, 1901; Laws 1901, p. 124]. People v. Rose, 207 Ill. 352, 69 N. E. 762.

5. Bay State Gas Co. v. State [Del.] 56 A. 1120.

6. See Franchises, 2 Curr. L. 74; Gas, 2 Curr. L. 139; Street Railways, 2 Curr. L. 1742; Electricity, 1 Curr. L. 996; Telegraphs and Telephones, 2 Curr. L. 1843; Waters and Water Supply, 2 Curr. L. 2034.

7. See 1 Curr. L. 735. See also post, § 16B, for general receivership and creditors' suits to wind up and dissolve.

act limiting corporate existence does not result if the corporation is not of the classes contemplated.[8] Taking away completely and permanently from a corporation the only function it can perform destroys it,[9] but until repeal of its charter or dissolution by legal proceedings, corporate existence continues for the purpose of suit.[10] Suspension of business may by statute work a de facto dissolution,[11] though not an unavoidable or temporary suspension.[12] A corporation cannot be dissolved in a suit to which it is not made a party.[13]

Dissolution by consent of stockholders or directors[14] must be in good faith to nonassenting corporators.[15] Assets must be equitably divided.[16]

An agreement acted on by stockholders may be sufficient to alter their liability to that of partners.[17]

Where, pursuant to agreement, persons are acting as trustees for dissolution, they are subject to an action by stockholders to recover a dividend which they have represented will be paid.[18] They cannot set off a voluntary payment of taxes,[19] or defend on the ground that the money for such payments is in the hands of a trust company, where it appears that the trust company is merely their agent, nor is the fact that the trustees wrongfully parted with possession a defense.[20]

Forfeiture of charter in proceedings by the state.[21]—The dissolution of a corporation resides primarily in the legislature and is conferred on courts only by explicit legislative authority,[22] and statutory modes must be followed.[23] Nonuser of powers will not warrant forfeiture, unless carried so far as to be a misuser of the franchise to be a corporation or to violate the condition on which the fran-

8. Rev. St. 1899, § 971 (Rev. St. 1855, c. 34, § 1), providing 20 years as a limit of existence when no limit is fixed by charter, does not apply to educational institutions. State v. Board of Trustees of Weetminster College, 175 Mo. 52, 74 S. W. 990.

9. De facto dissolution. Transfer of property of medical college. Succession of Hutchinson, 112 La. 656, 36 So. 639.

10. Railroad corporation, though it has been deprived by mortgage sale of all property including franchise, and holds no corporate meetings or elections. Williard v. Spartanburg, etc., R. Co., 124 F. 796. And see Youree v. Home Town Mut. Ins. Co. [Mo.] 79 S. W. 175.

11. Gen. St. 1889, § 1200, causing suspension of business to be regarded as dissolution, is not unconstitutional as not having subject expressed in title or not containing entire previous section as amended. Manley v. Mayer [Kan.] 75 P. 550. Cessation of business coupled with ouster of officers by quo warranto does not cause a corporation to be regarded as so far dissolved as to be incapable of suit by creditors. Assets were unadministered [Rev. St. 1899, § 976]. Youree v. Home Town Mut. Ins. Co. [Mo.] 79 S. W. 175.

12. Suspension of business on account of destruction of property by fire does not bring a corporation within Gen. St. p. 919, Corp. Act, § 64, fixing disposition of property on final dissolution. Miller v. Audenreid [N. J. Eq.] 57 A. 1076.

13. Cannot be so deprived of its property. Lincoln Park Chapter No. 177, R. A. M. v. Swatek, 105 Ill. App. 604.

14. See 1 Curr. L. 735.

15. Statutory permission to dissolve on vote of two-thirds of all stockholders does not authorize dissolution in bad faith to minority stockholders, the concern being solvent and going [1 Ball. Ann. Codes & Statutes, § 4275]. Thels v. Spokane Falls Gaslight Co., 34 Wash. 23, 74 P. 1004.

16. A dissolution scheme whereby the realty is to be distributed at arbitrary values in exchange for stock and the other assets among the remaining stockholders, with a provision for equalization in case the latter class receives more than the first, will not confer an indefeasible title on the stockholders taking realty and they may on failure of nonconcurring stockholders to receive their just share, be compelled to surrender any excess in value over the pro rata share they should have had. Craycraft v. National Bldg. & L. Ass'n, 25 Ky. L. R. 1340, 77 S. W. 923.

17. Agreement to cease doing business in the corporate name and to do business in another for mutual benefit. Robinson v. First Nat. Bank [Tex. Civ. App.] 79 S. W. 103.

18. Janeway v. Burn, 91 App. Div. 165, 86 N. Y. S. 628.

19. A foreign statute not pleaded, imposing personal liability on the trustees for such taxes, cannot be shown to prove the payment was not voluntary. Janeway v. Burn, 91 App. Div. 165, 86 N. Y. S. 628.

20. Such a suit is authorized by Laws 1892, p. 1811, c. 687. Janeway v. Burn, 91 App. Div. 165, 86 N. Y. S. 628.

21. See 1 Curr. L. 736.

22. Olds v. City Trust, Safe Deposit & Surety Co. [Mass.] 70 N. E. 1022.

23. Land of the Maryland Agricultural & Mechanical Association purchased with state aid may be sold for the benefit of the state only on dissolution. Not on cessation of exhibitions for 3 years [Acts 1867, c. 128; Acts 1870, c. 89; Acts 1890, c. 73]. State v. Maryland Agricultural & Mechanical Ass'n [Md.] 56 A. 484.

chise was granted.[24] For nonuser a corporation may be ousted from a distinct portion of its charter rights.[25]

The state has the burden of establishing grounds of forfeiture.[26] Allegations of misuse and nonuse of corporate powers and franchises and abandonment of purposes do not necessarily import actual dissolution.[27]

The Attorney General in some states must have leave of the supreme court before bringing an action to cancel a charter.[28] He may dismiss such a suit without consent of the relators.[29]

Proceedings to forfeit a charter on the ground of nonpayment of a license tax cannot be enjoined if the tax is not tendered or alleged to be invalid.[30]

Custody and sale of property.[31]—If several receivership or liquidation suits be contemporaneous, the ordinary rules respecting conflicts of jurisdiction commonly apply.[32] The receiver cannot take possession of assets in the possession of third persons who claim adversely and who are not parties.[33] After appointment of a receiver on the ground of insolvency, officers cannot make valid transfers of assets,[34] but on receivership of a foreign company, local operators of its manufacturing plants under leases were allowed to retain possession to complete contracts involving heavy work of construction.[35] The appointment of a trust company to close the business of a corporation does not as to stockholders render the assets trust funds to be administered in equity.[36] A receiver's sale passes only what title the corporation had.[37] He is not liable in tort to an employe of the receiver for an injury received during his operation of the road,[38] and after the term at which the sale was confirmed cannot refuse a deed because the judgment of sale does not describe the land.[39]

Statutory proceedings.—A purely statutory action for dissolution and distribution of the assets of a corporation cannot be joined with a stockholder's action

24. Nonaction with regard to a power to furnish electricity is not a usurpation, where charter is not exclusive. State v. Twin Village Water Co., 98 Me. 214, 56 A. 763.

25. State v. Twin Village Water Co., 98 Me. 214, 56 A. 763.

26. State v. Twin Village Water Co., 98 Me. 214, 56 A. 763. Showing issue of fictitious stock. Where the evidence is unsatisfactory, a nonsuit should be granted in an action to forfeit charter. State v. New Orleans Water Supply Co. [La.] 36 So. 117. A corporation authorized to supply water and electricity to towns and individuals and corporations will not be deemed to have abandoned the power as to electricity by nonuser until it appears that towns or their inhabitants in sufficient numbers to justify its exercise, desire or will take electric light or power. State v. Twin Village Water Co., 98 Me. 214, 56 A. 763. Where a corporation is required to have a portion of its works in operation within a limited time, a reasonable time is implied for the completion of the residue, no time being fixed. Id.

27. State v. Maryland Agricultural & Mechanical Ass'n [Md.] 56 A. 484.

28. Code, §§ 603, 604 (as amended by Laws 1899, p. 504, c. 533), 605, 2788. Attorney General v. Holly Shelter R. Co., 134 N. C. 481, 46 S. E. 959.

29. Suit under Shannon's Code, § 5165, subsec. 4. It is immaterial that considerable costs have accrued which will work a hardship on the relators. State v. Red River Turnpike Co. [Tenn.] 79 S. W. 798.

30. Proceedings against attorney general held against the state ousting jurisdiction of Federal courts. Morenci Copper Co. v. Freer, 127 F. 199.

31. General rights, duties and liabilities of receivers are treated fully in the article Receivers, 2 Curr. L. 1465.

32. See Equity, 1 Curr. L. 1048; Jurisdiction, 2 Curr. L. 604. See Anglo-American Land Mortg. & Ag. Co. v. Cheshire Prov. Inst., 124 F. 464; Knott v. Evening Post Co., 124 F. 342; Gallagher v. Asphalt Co. of America [N. J. Eq.] 58 A. 403; State v. New Orleans Water Supply Co. [La.] 36 So. 117.

33. Bank claiming set-off against deposit. Wheaton v. Daily Telegraph Co. [C. C. A.] 124 F. 61.

34. A warranty deed by the president thereafter of the land covered does not amount to an equitable assignment of a mortgage thereon, the title to the note having passed to the receiver. Brynjolfson v. Oethus, 12 N. D. 42, 96 N. W. 261.

35. Ships under way. Conklin v. United States Shipbuilding Co., 123 F. 913.

36. Knott v. Evening Post Co., 124 F. 342.

37. Is not void because a lienholder is not a party. Thompson v. Brownlie, 25 Ky. L. R. 622, 76 S. W. 172.

38. Though the purchaser took subject to all debts, obligations and liabilities of the receivers. Tobin v. Central Vermont R. Co. [Mass.] 70 N. E. 431.

39. Thompson v. Brownlie, 25 Ky. L. R. 622, 76 S. W. 172.

for equitable relief.[40] In such a proceeding the corporation must be the sole defendant, unless the remedy admits of more.[41] The statutory injunction which places the corporation under disabilities with regard to its franchises must be ordered before any statutory receiver can be appointed.[42] A mere restraining order or preliminary writ of injunction is not sufficient.[43] The proceeding on motion to show cause is not a mere motion for an interlocutory injunction, but what is really done is to conduct a final hearing of the cause and make a final decree therein.[44]

A proceeding under the New Jersey act involves a money controversy within Federal jurisdiction.[45]

A citizen of another state may obtain through the Federal courts relief which the state court of equity may afford,[46] but a simple contract creditor cannot come into a Federal court of equity to seize the property of a corporation and compel its application to his claims, though he has such right under the state statute.[47] The Federal courts will work out the relief granted according to their own rules of procedure.[48] Circuit courts in other districts will take ancillary jurisdiction and assist in carrying out the purpose of the Federal court at the place of domicile.[49] In ancillary proceedings in receivership of a foreign insolvent corporation, holding stock in domestic corporations, such corporations should be made parties where a question arises as to the transfer of their shares to the receiver.[50]

Effect of dissolution.[51]—A corporation after repeal of its charter may be regarded as still in existence to permit its previously incurred liabilities to be enforced.[52] But after dissolution of a corporation pending proceedings by it, it can be prosecuted or judgments enforced only under statutory authority or by virtue of some principle of equity requiring it.[53] It cannot appear by attorney[54] or appeal from a default judgment rendered against it,[55] though a decree of dissolution does not affect bankruptcy proceedings pending in another state,[56] or divest a lien on specific assets.[57] After dissolution for insolvency, pending per-

40. The latter only was considered. Pierce v. Old Dominion Copper Min. & Smelting Co. [N. J. Eq.] 58 A. 319.

41. Pierce v. Old Dominion Copper Min. & Smelting Co. [N. J. Eq.] 58 A. 319.

42. Hence where the Federal courts have allowed a creditor to proceed in a suit based on the statute so far as it is a proceeding to sequestrate assets for the benefit of creditors, and granted an ancillary injunction, a receiver would not get title under the statute, such not being the statutory injunction and the state court would have jurisdiction to grant the statutory injunction [P. S. 1829, p. 58]. Gallagher v. Asphalt Co. of America [N. J. Eq.] 58 A. 403.

43. The statutory injunction must be also ordered or already ordered [Laws 1828-29, p. 60, § 8. Corporation Act (Laws 1896, p. 298, c. 185), § 66]. Pierce v. Old Dominion Copper Min. & Smelting Co. [N. J. Eq.] 58 A. 319.

44. A summary final hearing cannot be had concurrently with a motion for an interlocutory order for a preliminary injunction [Laws 1896, p. 298, c. 185, §§ 65, 66]. Pierce v. Old Dominion Copper Min. & Smelting Co. [N. J. Eq.] 58 A. 319.

45. P. S. 1896, p. 298, § 65. Jacobs v. Mexican Sugar Co., 130 F. 589.

46. Jacobs v. Mexican Sugar Co., 130 F. 589. Though the statute confers on a state court jurisdiction which neither the state courts nor Federal courts had previously exercised. Conklin v. United States Shipbuilding Co., 123 F. 913. Corp. Act, N. J. Revision 1896, p. 298, §§ 66, 66, permitting appointment of a receiver of an insolvent corporation at the suit of a creditor or stockholder, may be enforced in the Federal courts where the requisite jurisdictional features of amount and parties are present. United States Shipbuilding Co. v. Conklin [C. C. A.] 126 F. 132.

47. Jacobs v. Mexican Sugar Co., 130 F. 589.

48. Land Title & Trust Co. v. Asphalt Co. of America [C. C. A.] 127 F. 1.

49, 50. Conklin v. United States Shipbuilding Co., 123 F. 913.

51. See 1 Curr. L. 738.

52. Ky. St. 1894, § 1897. Board of Councilmen of City of Frankfort v. Deposit Bank [C. C. A.] 124 F. 18.

53. Substitution must be made under the authority of statute and the action can no longer be carried on in the name of the corporation. MacRae v. Kansas City Piano Co. [Kan.] 77 P. 94.

54. Austen v. Columbia Lubricants Co., 87 N. Y. S. 497.

55. The judgment is null and can be attacked directly or by appeal or collaterally by a person in interest. Austen v. Columbia Lubricants Co., 87 N. Y. S. 497.

56. In re White Mountain Paper Co., 127 F. 180.

57. Dissolution of the corporation and

formance of construction contracts with it, the contractor must recover on a quantum meruit for services to the termination of the contract, and cannot have damages for breach.[58]

Stockholders after judgment of dissolution may sell their interest in the assets to a new corporation in consideration of shares of its stock, subject to payment of debts and costs of administration.[59]

Reopening of proceedings.—A court rendering a judgment of dissolution may, so long as its control over the proceedings continues under the usual course of judicial procedure, open and set aside the judgment for cause and reinstate the corporation in life to enable that to be done properly which was before improperly done.[60] The moving party must proceed with diligence.[61] It cannot be urged that the relief if granted would be of no benefit.[62] The setting aside of the judgment of dissolution because of wrongful concealment of a claim is not conclusive as to the validity of the claim.[63]

§ 13. *Succession of corporations; reorganization; consolidation.*[64]—Majority stockholders may in good faith consolidate despite the objection of the minority.[65] The mere fact that a holding company appoints both boards does not invalidate such action taken against objection of the minority.[66] The merger of corporations is unlawful if it creates a combination or monopoly under the law.[67]

The powers of a reorganization committee are limited by the terms of the bondholders' agreement creating it.[68] On an agreement for reorganization pending foreclosure, where bonds are to be deposited by the holders subject to the control of the committee, there is no implied agreement that the plan be filed before sale.[69] Ratification of a plan of reorganization may be conclusively given by fail-

failure to proceed to revive a judgment does not affect a judgment creditor's right to satisfaction from personal assets of the corporation on which he claims a lien, by an intervention in receivership before dissolution. Atlantic Trust Co. v. Dana [C. C. A.] 128 F. 209.

58. The same rule applies where the contractor is a director, and though the contractor afterward purchases the property and obtains the benefit of the improvement. Griffith v. Blackwater Boom & Lumber Co. [W. Va.] 48 S. E. 442.

59. State v. New Orleans Water Supply Co. [La.] 36 So. 117.

60. Final order in winding up set aside because of claims wrongfully concealed from the receiver by the officers. The property had been before dissolution transferred to another corporation under agreement to hold it harmless. Sullivan County R. Co. v. Connecticut River Lumber Co., 76 Conn. 464, 57 A. 287. A complaint sufficient to support a judgment setting aside a judgment of dissolution is not invalidated by the fact that averments of fraud unsustained by proof are incorporated in it by amendment to meet a demurrer sustained because of their absence. Id. It is sufficient showing of a claim authorizing the setting aside of a judgment of dissolution to show that claimant had an interest in a bridge destroyed by reason of a jam of logs belonging to the dissolved corporation, and that it asserted in good faith that the corporation was negligent in allowing the jam. Id.

61. Holder of claim is not guilty of laches preventing setting aside of a judgment of dissolution, where delay was caused by concealment of proceedings and institution of action by mistake against corporation not liable. On this issue a ruling as to the duty of corporate officers to acknowledge liability is immaterial. Sullivan County R. Co. v. Connecticut River Lumber Co., 76 Conn. 464, 57 A. 287.

62. The fact that a manufacturing company liable for a claim for damages has transferred all its property to another corporation under a contract making it principally responsible, and the manufacturing company a surety, does not prevent the setting aside of a judgment dissolving the manufacturing company on the ground that the claim was wrongfully concealed from its receiver. Sullivan County R. Co. v. Connecticut River Lumber Co., 76 Conn. 464, 57 A. 287.

63. Sullivan County R. Co. v. Connecticut River Lumber Co., 76 Conn. 464, 57 A. 287.

64. See 1 Curr. L. 739. Reorganization by bondholders, see post, § 16C.

65. Pierce v. Old Dominion Copper Min. & Smelting Co. [N. J. Eq.] 58 A. 319. Will not be enjoined merely because a prior consolidation was enjoined which embodied different plan. Id.

66. Where the boards are not shown to be "dummies." Pierce v. Old Dominion Min. & Smelting Co. [N. J. Eq.] 58 A. 319.

67. Combinations and Monopolies, 3 Curr. L. 706.

68. Plan held not in accordance with agreement wherefore dissent was not required. United Waterworks Co. v. Stone, 127 F. 587.

69. Failure to file such plan does not work injury where property is purchased by

ure to withdraw within a fixed time after notice of the plan.[70] A bondholder's right to object is lost by laches,[71] but participation in the plan does not prevent an accounting against trustees.[72] The corporation formed by the trustees is not a necessary party to such an accounting.[73] An association of bondholders engaged in reconstruction of an electric line under the receiver's permission may be liable for injury to an employe.[74] A sale on foreclosure to a reorganization committee is valid, though the committee is self-appointed.[75] The effect of a succession or consolidation depends largely on the statutory conditions peculiar to each case.[76] If their respective charters so permit and the general law does not forbid, charter powers, privileges and immunities of the constituent corporations pass to the consolidated company.[77] In determining the effect of a consolidation by legislative act creating at the same time a new corporation, the statute authorizing consolidation, only, is to be resorted to both as to the duties of the new corporation and the merged corporation.[78] A purchase of one by another does not confer on the purchaser powers beyond its charter,[79] nor can a successor newly formed under general laws take franchises against the policy of the law, though one of the predecessors exercised them.[80] Franchises do not pass as transferable "property" or "assets and effects."[81]

If there is a complete corporate succession[82] or a mere change in corporate name, but without change of identity,[83] liabilities of the old corporation rest on the new. A reorganized corporation may assume indebtedness of the old.[84] The articles of incorporation are not conclusive on the question of assumption.[85] Where there has been no assumption of the debts of the old corporation and the circumstances negative any such intent, it must appear that the new corporation is the same legal entity having a continued existence under a new name.[86]

The assuming company may be sued directly,[87] and a successor must be brought into a bill to remove a nuisance if the transfer was prior to suit.[88]

the committee and tendered the bondholders. Industrial & General Trust v. Tod, 87 N. Y. S. 687.

70. Industrial & General Trust v. Tod, 87 N. Y. S. 687.

71. A bondholder who with full knowledge of foreclosure proceedings, a reorganization committee and its acts and of everything before tranefer of title, remains silent, cannot a year and a half after the completion of all the transactions, insist on payment in full from proceeds of sale. Bill held not to disclose fraud or excuse laches. Cutter v. Iowa Water Co., 128 F. 505.

72. A bondholder is not prevented from seeking accounting against trustees purchasing for his benefit at foreclosure by the fact that he receives securities of a new corporation formed as part of the plan to purchase, and by laches where his bill avers that he has proceeded immediately on discovery of the facts. Dunning v. Bates [Mass.] 71 N. E. 309.

73. Dunning v. Bates [Mass.] 71 N. E. 309.

74. Standard Light & Power Co. v. Munsey [Tex. Civ. App.] 76 S. W. 931.

75. Cutter v. Iowa Water Co., 128 F. 505.

76. See 2 Clark & M. Corp. §§ 335-363.

77. Consolidated Gas Co. v. Baltimore County Com'rs [Md.] 57 A. 29. A corporation, the result of merger, acquires the right of merged companies to increase stock without payment of bonus [Act May 16, 1861, P. L. 702]. Commonwealth v. Buffalo & S. R. Co., 207 Pa. 164, 56 A. 409.

78. Succession of Hutchison, 112 La. 656, 36 So. 639.

79. A purchase of the entire property does not pass franchises on a corporation having no authority under its own charter to acquire franchises or carry on the business of others. Southern R. Co. v. Mitchell [Ala.] 37 So. 85.

80. Exclusive franchise. Shaw v. Covington, 194 U. S. 593, 48 Law. Ed. 1131.

81. Ky. St. §§ 555, 556. Shaw v. Covington, 194 U. S. 593, 48 Law. Ed. 1131.

82. A surety company which absorbs the assets and assumes the liabilities of another and is in all respects its corporate successor is liable on a bond issued by it. Manny v. National Surety Co. [Mo. App.] 78 S. W. 69.

83. Ky. St. 1903, § 560. Wilhite v. Convent of Good Shepherd, 25 Ky. L. R. 1375, 78 S. W. 138.

84. Laws 1892, pp. 1825, 1826, c. 688, §§ 3, 4. Klein v. East River Elec. Light Co., 90 App. Div. 92, 86 N. Y. S. 164. Evidence held sufficient prima facie to show assumption of mortgage by successor corporation. Id.

85. Klein v. East River Elec. Light Co., 90 App. Div. 92, 86 N. Y. S. 164.

86. A new corporation organized by the officers and stockholders of an old one to acquire its property, which it does at judicial sale, is not thereby rendered liable at law for the old. Armour v. Bement's Sons [C. C. A.] 123 F. 56.

87. One insurance company agreed to as-

§ 14. *Stock and membership.*[88]—*The scope of this section* is limited to the relations of the corporation and its members inter se. Equities of creditors may prevent the corporators and members from relying on rights sufficient as between themselves and may augment their liability. The statutory liability for the protection of creditors is also treated in a later section.[90]

(§ 14) *A. Membership in corporations in general.*[91]—One may become a stockholder without issuance of certificate by recognition when so acting.[92] In the case of incorporate societies, various qualifications are exacted of members.[93] The corporation may discipline or expel[94] its members for violation of terms of reasonable by-laws.[95] Methods provided by the corporation will be upheld unless void for unreasonableness or illegal.[96] A corporate tribunal to try offenses against its laws will not be interfered with by a court of equity on the ground that it may commit jurisdictional error, or on the ground that the charges are not sufficiently definite.[97] The member is entitled to notice of hearing and charges.[98] Submission to trial by the governing body may waive objections, or they may be cured by proper action before proceedings are brought at law.[99] Action of stockholders as such may be enjoined pending suit to ascertain their status.[1]

(§ 14) *B. Capital stock and shares of stock.*[2]—"Capital stock" is the money or property[3] paid in as distinguished from the shares of stock.[4] Shares of stock are choses in action.[5] They cannot be regarded as "money at interest,"[6] and a corporation is not for purposes of taxation regarded as a bailee in possession of its stock.[7] The property situs of shares for the purpose of jurisdiction has been held to be where the corporation was holding them pending an exchange for shares of other corporations.[8]

Whether the stock may or must be full paid at time of issue depends on the

sume the risks of another. Ruohs v. Traders' Fire Ins. Co. [Tenn.] 78 S. W. 85.

88. Action to require removal of a dam. Commonwealth v. Newton [Mass.] 71 N. E. 699. See title Abatement and Revival, 3 Curr. L. 1, as to the substitution of purchasers before action. See, also, Parties, 2 Curr. L. 1092.

89. Whom the creditors may regard as stockholders, see post, § 16E-F.

90. Consult post, § 16.

91. See 1 Curr. L. 744.

92. Delivery of certificate is not necessary to impose liability on contract of purchase where purchaser has been recognized and acted as a stockholder. Cotter v. Butte & R. Valley Smelting Co. [Mont.] 77 P. 609.

93. See Associations and Societies, 3 Curr. L. 346; Fraternal and Mutual Benefit Associations, 2 Curr. L. 79.

94, 95. See Associations and Societies, 3 Curr. L. 346; Fraternal and Mutual Benefit Associations, 2 Curr. L. 79. By-laws of an exchange in general language governing conduct of members will be held to cover dealings with nonmembers. Wood v. Chamber of Commerce, 119 Wis. 367, 96 N. W. 835.

96. Wood v. Chamber of Commerce, 119 Wis. 367, 96 N. W. 836; Board of Trade of City of Chicago v. Weare, 105 Ill. App. 289. Evidence held to show authority of committee to try a controversy between members de novo. People v. East Buffalo Live Stock Ass'n, 88 App. Div. 619, 84 N. Y. S. 795. Facts alleged held sufficient to state a cause of action to enjoin expulsion, notwithstanding a conclusion of law that plaintiff was entitled in common to corporate property. Williamson v. Wager, 90 App. Div. 186, 86 N. Y. S. 684.

97. Wood v. Chamber of Commerce, 119 Wis. 367, 96 N. W. 835.

98. Expulsion under Laws 1875, p. 264, c. 267. People v. East Buffalo Live Stock Ass'n, 88 App. Div. 619, 84 N. Y. S. 796.

99. People v. Old Guard of City of New York, 87 App. Div. 478, 84 N. Y. S. 766.

1. Action by stockholder. State v. Kennan [Wash.] 76 P. 616.

2. See 1 Curr. L. 744.

3. Letters patent purchased with an issue of capital stock become capital. Subject to taxation. American Mutoscope Co. v. State Board of Assessors [N. J. Law] 56 A. 369.

4. "Capital stock" as used in the New York tax law does not mean share stock; it is limited to the actual money or property paid in and possessed by the corporation as such. People v. Feitner, 92 App. Div. 618, 87 N. Y. S. 304.

5. Husband is entitled at common law. Johnson v. Hume [Ala.] 36 So. 421.

6. Stock is the holder's proportionate right in the corporation itself, to have its purposes carried on, to share in its profits and its assets on dissolution. Scrip is the evidence of the right to obtain shares. Sweetsir v. Chandler, 98 Me. 145, 56 A. 584.

7. Commonwealth v. Chesapeake & O. R. Co., 25 Ky. L. R. 1126, 77 S. W. 186.

8. Situs changes only when exchange is made. Fowler v. Jenks, 90 Minn. 74, 96 N. W. 914.

statutes, and particularly on the kind of corporation.[9] Any property which the corporation may hold may be taken as payment,[10] and binds the corporation, notwithstanding an overvaluation,[11] and by ratification may be binding on other stockholders as well.[12]

If a reissue is equitably distributed between stockholders, the question of over or under valuation cannot arise between them. Before issue, the stockholders owned the entire equity in the assets and all received their proportionate shares of the new issue.[13] A stockholder cannot object that a preferential right to subscribe was denied to stockholders of a different class.[14] He may lose his own preferential right by laches.[15] As to creditors, he may become estopped to deny that he subscribed,[16] and by voting for an increase is estopped from asserting the invalidity of it.[17]

An ante-corporate agreement does not limit a charter power to increase stock.[18] The amount of capital is not altered by transforming preferred into common stock.[19]

If the rights of creditors be not impaired, a corporation may in good faith buy back its shares from a stockholder.[20] A corporation prohibited from paying part of its capital to any stockholder cannot buy his stock,[21] but a co-operative trading corporation may provide that a withdrawing member shall be paid the par value of his stock on application to the directors.[22] A purchase by a corporation of its own stock is not a reduction of the capital stock in the absence of a showing of an intention to merge or extinguish it,[23] and when the stock is fully paid, such purchase is not void as allowing a subscriber secretly to withdraw his subscription.[24] In order to fix a breach of agreement to repurchase stock, a tender according to the terms is essential.[25]

The remedy prescribed by statute in Pennsylvania in case of illegal stock issue by railroads is exclusive.[26]

9. In the absence of legislative prohibition, a building and loan association may issue paid up stock. Bell v. Southern Home Bldg. & L. Ass'n [Ala.] 37 So. 237.

10. Stock in other corporation. Southern Trust & S. D. Co. v. Yeatman, 130 F. 798.

11. Voidable as to creditors or other stockholders prejudiced thereby. Parmelee v. Price, 208 Ill. 544, 70 N. E. 725.

12. Ratification held for jury where Maryland corporation accepted and retained such stock for two years, pledged it as collateral and collected dividends, and did not repudiate the agreement until after depreciation in value. Southern Trust & S. D. Co. v. Yeatman, 130 F. 798.

13. Facts held not to authorize a recovery of a sum paid stockholders from the sale of bonds to secure the transfer of stock given as bonus to the purchaser on the ground that such sum was assets wrongfully withdrawn. Great Western Min. & Mfg. Co. v. Harris [C. C. A.] 128 F. 321.

14. Preferred stockholders were not allowed. Weidenfeld v. Northern Pac. R. Co. [C. C. A.] 129 F. 305.

15. Shareholder who has delayed six months to make demand for the shares for which he has a right to subscribe cannot restrain others. Hoyt v. Shenango Valley Steel Co., 207 Pa. 208, 56 A. 422.

16. See post, § 16. Where stockholders file a certificate of increase of capital stock and issue a mortgage and bonds on the faith thereof, they will, in event they make no disposal of the increase of stock, be estopped to deny that they intended to take it themselves. Kreisser v. Ashtabula Gas Light Co., 24 Ohio Circ. R. 313.

17. Kreisser v. Ashtabula Gas Light Co., 24 Ohio Circ. R. 313.

18. A stockholder cannot object. Martin v. Remington-Martin Co., 88 N. Y. S. 573.

19. Retirement of preferred stock with certificates of indebtedness and issue of common stock to take up such certificates. Weidenfeld v. Northern Pac. R. Co. [C. C. A.] 129 F. 305.

20. Porter v. Plymouth Gold Min. Co. [Mont.] 74 P. 938.

21. Complaint held sufficient under 1 Ball. Ann. Codes & St. § 4265 to recover money paid a stockholder by the corporation for his stock, though it does not allege insolvency at the time of purchase or negative in terms that payment was from surplus earnings. Tait v. Pigott, 32 Wash. 344, 73 P. 364.

22. Such a by-law confers an absolute right and the measure of damages for refusal to so pay is the par value with interest from date of refusal. Lindsay v. Arlington Co-operative Ass'n [Mass.] 71 N. E. 787.

23. Civ. Code, § 438. Porter v. Plymouth Gold Min. Co. [Mont.] 74 P. 938.

24. Porter v. Plymouth Gold Min. Co. [Mont.] 74 P. 938.

25. Averment in suit for price that plaintiffs are "ready and willing" is insufficient, and an offer before the date fixed is prema-

As between the parties, a stockholder may waive the advantages accruing to preferred stock and agree with the corporation that it shall be treated as common,[27] and a subsequent taker of stock is bound.[28] Subsequent legislation may confer power to retire preferred stock which was issued in contemplation of such power.[29] After a retirement of preferred stock, the holder becomes a stranger to the corporation.[30]

One is not entitled to new stock in lieu of that which the corporation suffered to be sold under a pledge for its benefit.[31] He must prove a resolution granting such right,[32] and seasonably claim it,[33] and his assignee is in the same position.[34]

Reasonable conditions may be imposed to protect the company when a new certificate is asked in lieu of a lost one.[35] Correction of a mistake will be denied for laches.[36] Where a substitution of certificates is obtained by fraud, the holder may recover under the terms of those formerly held by him,[37] and evidence of statements of an agent as to the contents of the new certificates is admissible in proof of such fraud.[38]

(§ 14) *C. Subscriptions to capital stock, and other agreements to take stock.*[39]—A writing is necessary only as it would be in any contract.[40] Partial failure of consideration is no defense to a note given for stock.[41] If made on condition precedent, a subscription or payment thereon is not binding until the condition be fulfilled;[42] but a condition is waived by acceptance and sale of the stock.[43]

Stock subscriptions may be avoided where based on false representations of fact,[44] but false representations after subscription cannot be urged against liabil-

ture [Civ. Code, § 1950]. Porter v. Plymouth Gold Min. Co. [Mont.] 74 P. 938.

26. Attorney general must sue and not an individual stockholder under Act May 7, 1887, P. S. 94, § 4. Yetter v. Delaware Valley R. Co., 208 Pa. 485, 56 A. 57.

27. Pendleton v. Harris-Emery Co. [Iowa] 100 N. W. 117. A pledgor of stock may waive its character as preferred with the corporation subject to the pledgee's lien, and a third person cannot assert the invalidity of such a waiver. Id.

28. The possibility that an antecedent pledgee of the stock may assert right to treat it as preferred does not avail. Pendleton v. Harris-Emery Co. [Iowa] 100 N. W. 117.

29. Option to retire preferred stock was inserted in the certificates of both preferred and common stock [Laws Wis. 1897, p. 632, c. 294, Laws Wis. 1899, p. 296, c. 193, has such effect, were Laws Wis. 1895, c. 244, § 11, p. 475 inadequate]. Weidenfeld v. Northern Pac. R. Co. [C. C. A.] 129 F. 305.

30. Weidenfeld v. Northern Pac. R. Co. [C. C. A.] 129 F. 805.

31. He is a mere creditor. Dempster v. Rosehill Cemetery Co., 206 Ill. 261, 68 N. E. 1070.

32. Dempster v. Rosehill Cemetery Co., 206 Ill. 261, 68 N. E. 1070.

33. Failure for forty years to assert a right to be issued stock held laches. Dempster v. Rosehill Cemetery Co., 207 Ill. 261, 68 N. E. 1070.

34. Dempster v. Rosehill Cemetery Co., 206 Ill. 261, 68 N. E. 1070.

35. Acts 1885, p. 505, c. 265 is repealed by Acts 1901, c. 2, p. 37, § 95 and the corporation is not entitled to hold a certificate issued in place of a lost certificate for 5 years, but may now exact security. Travers & Co. v. North Carolina R. Co. [N. C.] 45 S. E. 651.

36. After 14 years and after death of parties to whom erroneous issue was made. Stock in exchange for land owned by organizers. In re Ridgway's Account, 206 Pa. 587, 56 A. 25.

37. Trinity Valley Trust Co. v. Stockwell [Tex. Civ. App.] 81 S. W. 793.

38. For purpose of showing fraud and not to vary contract. Trinity Valley Trust Co. v. Stockwell [Tex. Civ. App.] 81 S. W. 793.

39. See 1 Curr. L. 749.

40. A present subscription postponing only payment and issuance of a certificate beyond a year is not within the Statute of Frauds. Reed v. Gold [Va.] 45 S. E. 868.

41. Such a failure to carry out promise to make purchaser an officer. Brown v. Ohio Nat. Bank, 18 App. D. C. 598.

42. Notes given in payment for stock in a concern to be incorporated are without consideration when conditioned on the securing of bona fide subscriptions to a certain amount, which agreement is not complied with. State Bank of Indiana v. Cook [Iowa] 100 N. W. 72. Payments for additional stock conditioned on unanimous subscription of stockholders may be recovered from a trustee in bankruptcy, where all stockholders do not subscribe. In re North Carolina Car Co., 127 F. 178.

43. Wyman v. Bowman [C. C. A.] 127 F. 257.

44. That certain patents which the corporation was to be organized to acquire were the basic patents and that 480,000 shares of stock and $1,000,000 was to be paid. Ameri-

ity thereon.[45] The corporation cannot assert that the subscriber is guilty of laches in not investigating,[46] and the fact that the purchaser has dealt with other stock does not prevent his assertion of false representations inducing a purchase from the corporation.[47] Signature of a subscription contract containing false representations as an inducement is sufficient in the absence of evidence to the contrary to show the subscriber's reliance thereon.[48] When directors are sued, their character as such at the time of the fraud should be specifically pleaded.[49]

A rescission for fraud may be pleaded in an action at law to recover assessments on a subscription.[50] A tender for rescission may be good, though the purchaser has sold certain of his shares, but can replace them by purchase in open market.[51] Action for a rescission of a stock subscription obtained by fraud will lie against both the corporation and the directors making the misrepresentations.[52] Money paid on a subscription to stock cannot be recovered without rescission.[53]

A release of a written stock subscription may be in parol.[54] If it is made and valid in the state where the chief office is located, it is binding, though incorporation took place outside the state.[55] The rule against secret releases of subscribers does not apply to stock purchased full paid from the corporation.[56]

Payment must be made per contract until the directors actually suspend such obligation as stipulated.[57] As between the promoters and a subscriber, a promise that notes would be collected from dividends on the stock for which they were given in payment is a complete defense.[58]

Whether or not stocks are assessable is determinable by the laws of the domicile of the corporation, but if they be not pleaded, then by the law of the forum.[59] Where the time of payment is fixed by the subscription contract, calls

can Alkali Co. v. Salom [C. C. A.] 131 F. 46. False statements in a circular issued to induce purchase of stock and relied on by the purchaser furnish a basis for rescission. Value of a match machine owned by corporation. Mulholland v. Washington Match Co. [Wash.] 77 P. 497. Falsity of representations that the capital is to be $600,000 is not shown by a charter to do business on a minimum capital of $100,000 and a maximum of $600,000. Reed v. Gold [Va.] 45 S. E. 868. Where a stock subscription is represented to be genuine in order to secure other subscriptions, the fact that the subscriber is to pay but one-half the amount is ground for rescission of contracts of subscription made in reliance thereon. State Bank of Indiana v. Cook [Iowa] 100 N. W. 72. One induced to purchase stock by a managing committee may rescind where misled by false representations of the financial condition of the corporation, and recover the money paid to the sellers, they having knowledge that the committee negotiated the sale and being thereby bound by the representations. It is immaterial that a majority of the committee believed the representations true. Garrett Co. v. Clark, 42 Misc. 610, 87 N. Y. S. 579. Fraudulent new certificates canceled and old ones reinstated. Trinity Valley Trust Co. v. Stockwell [Tex. Civ. App.] 81 S. W. 793.

45. Reed v. Gold [Va.] 45 S. E. 868.

46. Failure to investigate until just before filing affidavit of defense in action to recover on subscription. American Alkali Co. v. Salom [C. C. A.] 131 F. 46. Purchasers of stock are not bound to investigate the fact of incorporation, it not having been questioned, and on discovery that it has not taken place, may rescind. Bolton v. Prather [Tex. Civ. App.] 80 S. W. 666.

47. Mulholland v. Washington Match Co. [Wash.] 77 P. 497.

48. American Alkali Co. v. Salom, 131 F. 46.

49. Complaint in action against directors for false representations inducing plaintiff to purchase and hold stock. Viner v. James, 92 App. Div. 542, 87 N. Y. S. 257.

50. American Alkali Co. v. Salom [C. C. A.] 131 F. 46.

51. In affidavit of defense to action on subscription. American Alkali Co. v. Salom [C. C. A.] 131 F. 46.

52. Mack v. Latta [N. Y.] 71 N. E. 97. See 1 Curr. L. 751, n. 11.

53. Existence of grounds under Civ. Code, § 2271, and compliance with conditions under § 2273, must be established. Cotter v. Butte & R. Valley Smelting Co. [Mont.] 77 P. 509.

54, 55. Scottish Security Co.'s Receiver v. Starks, 25 Ky. L. R. 1722, 78 S. W. 455.

56. Purchase back of full paid stock held not a withdrawal of subscription. Porter v. Plymouth Gold Min. Co. [Mont.] 74 P. 938.

57. Where a subscription contract provides that instalments shall be due every sixty days or "until by a sale of the lots of the company such payments shall be declared unnecessary by the board of directors," the obligation to pay when due causing limitations to run from that date is not removed by a circular in which the directors state they "confidently believe" the remainder due will be paid from earnings. Williams v. Taylor [Md.] 57 A. 641.

58. State Bank of Indiana v. Cook [Iowa] 100 N. W. 72.

are unnecessary.[60] A stockholder of record at the time of a call is liable therefor, though he transfers his stock before it is payable,[61] and the date of call, not that for payment of deferred instalments, fixes the entire liability.[62] An order for a call cannot be collaterally attacked by a stockholder,[63] nor disputed when he has participated in it.[64] A power of forfeiture of stock for nonpayment of calls may concur with a remedy in assumpsit.[65]

(§ 14) *D. Miscellaneous rights of stockholders. The right to dividends.*[66]—The action of the directors or majority stockholders in reserving profits instead of dividing them cannot be questioned by minority holders so long as the reservation is for the benefit of the whole company.[67] The declaration of dividends is compellable only when there has been bad faith or unfairness.[68] A certificate of indebtedness issued as a device to cover a guaranty to particular stockholders' dividends for a stated period, whether earned or not, is void.[69] Equitable relief by injunction against an illegally declared dividend will be denied if there is a legal remedy.[70] An application for injunction should not be delayed until it will work an unreasonable hardship.[71] The supporting affidavits should be of personal knowledge.[72] In adjusting present and future or special and general property rights, portions distributed out of current earnings are generally dividends and distributions of accumulated increment are generally principal.[73] While dividends accrue when declared and payable, the liability for retaining money dividends is reckoned from the time of receipt.[74]

A guaranty by which one corporation undertakes that another shall pay dividends thereon so long as the stock certificates should be outstanding, not exceeding the unexpired time for which the issuing corporation was chartered, is terminated by voluntary dissolution of the corporation, though the guarantors procure such dissolution.[75]

59. Gause v. Com. Trust Co., 89 N. Y. S. 723. To allege falsity of representation that stock was "full paid and nonassessable," it must be alleged that the law of the domicile made it assessable, despite a contrary recital in the certificate. Gause v. Com. Trust Co., 89 N. Y. S. 723.

60. Williams v. Taylor [Md.] 57 A. 641.

61. Corporation Law of New Jersey (Sess. 1896, p. 284, § 22). Campbell v. American Alkali Co. [C. C. A.] 125 F. 207. An issue of a new certificate to the transferee does not relieve the liability. Id.

62. Campbell v. American Alkali Co. [C. C. A.] 125 F. 207.

63. In assumpsit against the stockholder to collect it. Campbell v. American Alkali Co. [C. C. A.] 125 F. 207.

64. Participation and ratification by execution of a note therefor estops him [the president] from raising any irregularity in the call or notice thereof. Graebner v. Post, 119 Wis. 392, 96 N. W. 783.

65. New Jersey Sess. Laws 1896, p. 284, § 23. Campbell v. American Alkali Co. [C. C. A.] 125 F. 207.

66. See 1 Curr. L. 757.

67. Corp. Act, P. L. 1896, p. 293, § 47, provides for such reservation. Lillard v. Oil, Paint & Drug Co. [N. J. Eq.] 56 A. 254.

68. Directors ordered to pay a dividend on showing made. Crichton v. Webb Press Co. [La.] 36 So. 926.

69. National Salt Co. v. Ingraham [C. C. A.] 122 F. 40. Corporation cannot plead ultra vires to an agreement to guarantee dividends and also retain price of stock or compel retention of stock. McVity v. Albra Co., 90 App. Div. 109, 86 N. Y. S. 144.

70. There were no net profits. General Corp. Act, § 30, P. L. 1896, p. 287, providing for a joint and several liability of directors to the corporation and creditors in such case provides an adequate remedy at law. Schoenfeld v. American Can Co. [N. J. Eq.] 55 A. 1044.

71. Extended notice of dividend payable Sept. 30 was given Sept. 1 and complaint was filed Sept. 25. Schoenfeld v. American Can Co. [N. J. Eq.] 55 A. 1044.

72. An application for a preliminary injunction against the payment of a dividend on the ground of a fraudulent overissue of stock and of intended application of funds to the dividend property applicable elsewhere is not sufficiently supported by affidavits not on personal knowledge and based on knowledge of counsel of an officer's admissions. Schoenfeld v. American Can Co. [N. J. Eq.] 55 A. 1044.

73. Stock dividends are corpus as well as subscription rights incident to ownership of stock. DeKoven v. Alsop, 205 Ill. 309, 68 N. E. 930. See other cases in Life Estates, etc., 2 Curr. L. 744, n. 60; Trusts, 2 Curr. L. 1936, n. 47-55.

74. Dividends should be charged in an administrator's account as of date of receipt. Walworth's Estate v. Bartholomew's Estate [Vt.] 56 A. 101. See Estates of Decedents, 1 Curr. L. 1090; Trusts, 2 Curr. L. 1924.

75. Mason v. Standard Distilling & Distributing Co., 85 App. Div. 520, 13 Ann. Cas. 264, 83 N. Y. S. 843.

Right to inspect the books and papers of the corporation.[76]—The stockholder has a right to inspect corporate books, hence a new remedy may be given respecting existing corporations.[77] Proceedings by a stockholder will be dismissed if he ceases to be such.[78] Under the Delaware statute, the president is a proper respondent to mandamus.[79] The petition must plead demand and refusal and a right to relief.[80] Notice of rule and alternative writ are served as other process.[81] The respondents jointly returning must plead inability to produce books and not merely want of possession in one of them.[82]

Property.—In the absence of provision to the contrary in the certificates of stock or in the resolutions, by-laws or charter authorizing its issue, or other writing, stockholders are to be regarded as equal in right.[83] On reduction of capital stock, the corporation may retain a portion of its assets to represent the capital stock after reduction and distribute the remainder, which is not needed.[84] The ordinary rule of fixtures prevents a stockholder from removing that which he has attached to the corporate realty.[85]

Contracts between stockholders or directors and the corporation must be in the utmost good faith.[86]

An agreement between corporate officers that some of them would forbear to withdraw their support from the corporation if the other would assign rights necessary to reinforce its business is enforceable by the corporation against the latter.[87]

Remedies for injuries to stockholders or to the corporation.[88]—When sale works a practical dissolution, the minority stockholder may have (a) his share of proceeds; (b) his share of stock in the purchaser corporation; (c) the market value of his stock at date of sale; (d) may hold his stock and claim a pro rata share of profits from purchaser; (e) if the sale was in bad faith, set it aside and rehabilitate the original corporation.[89] The remedy for misapplication of moneys is a stockholder's suit on behalf of the corporation, not a receivership.[90] Stock-

76. Procedure on examination of officers and books by deposition, see Depositions, 1 Curr. L. 917, and forthcoming title Depositions. A statutory discovery cannot be joined. See Depositions, 1 Curr. L. 917, and cf. Discovery and Inspection, 1 Curr. L. 930; Witnesses, 2 Curr. L. 2163. See 1 Curr. L. 758.

77. General Corp. Laws, § 29, providing a remedy for securing inspection of books is applicable to a pre-existing corporation, though the corporation has never had its charter amended thereunder or filed an acceptance of the provisions of the constitution. Bay State Gas Co. v. State [Del.] 56 A. 1114.

78. Alleged that pending appeal from order denying mandamus to allow inspection of books relator has sold his stock. Remanded for proof. State v. New Orleans Maritime & Merchants' Exch., 112 La. 868, 36 So. 760.

79. State v. Bay State Gas Co. [Del. Super.] 57 A. 291. Misjoinder of an officer as defendant is not fatal. Bay State Gas Co. v. State [Del.] 56 A. 1114.

80. An allegation in the alternative writ of mandamus of mismanagement is immaterial and not a basis of objection. Bay State Gas Co. v. State [Del.] 56 A. 1114. So also an averment as to who was the custos of the books. Id.

81. Six days, exclusive of return of service, must elapse after service of rule [22 Del. Laws, p. 286, c. 167, § 48]. State v. Bay State Gas Co. [Del. Super.] 57 A. 291. Same service of alternative writ suffices. Id. Return of alternative writ and alias rule held sufficient in mandamus to compel inspection of books under 22 Del. Laws, p. 305, c. 167, § 48. Id.

82. Where the alternative writ runs to the corporation and its president, a return denying the possession of the president without denying his power to produce them is insufficient. State v. Bay, State Gas Co. [Del. Super.] 57 A. 291.

83. Shareholders in irrigation company have equal rights as to water. Richey v. East Redlands Water Co., 141 Cal. 221, 74 P. 754.

84. Continental Securities Co. v. Northern Securities Co. [N. J. Eq.] 57 A. 876.

85. Where the owner of the majority of the stock for his own benefit and advantage as a stockholder annexes personal chattels to real property owned by such corporation. Murray v. Bender [C. C. A.] 125 F. 705.

86. See 1 Curr. L. 759. See post, § 15. Foreclosure as fraud on stockholder, see post, § 17.

87. Anderson Carriage Co. v. Pungs [Mich.] 96 N. W. 563.

88. See 1 Curr. L. 760.

89. Tanner v. Lindell R. Co. [Mo.] 79 S. W. 155.

90. Alabama Coal & Coke Co. v. Shackelford, 137 Ala. 224, 84 So. 833.

holders cannot join in an action to recover against directors for an injury to the corporation causing damage to their several holdings.[91]

For injuries operating only through the corporation,[92] or to enforce rights derived only through it,[93] the stockholder may not sue as an individual.

Stockholders suing for corporation—As a general rule, the management of corporations cannot be interfered with by a court of equity except for fraud or collusion, or action in excess of a corporate power[94] or official authority,[95] or contrary to law,[96] which the corporation itself or its proper officers cannot or will not sue to protect,[97] and under circumstances which give a corporate right of action.[98] He may sue where the directors are acting in their own interest in a manner destructive of the interests of the corporation or stockholders.[99] The stockholder cannot sue

91. Loewenstein v. Diamond Soda Water Mfg. Co., 94 App. Div. 383, 88 N. Y. S. 313.

92. Injury to corporation depreciating stock. Loewenstein v. Diamond Soda Water Mfg. Co., 94 App. Div. 383, 88 N. Y. S. 313. A stockholder cannot maintain an action at law for conspiracy to ruin a corporation. Against officers and directors of another corporation. Converse v. United Shoe Machinery Co. [Mass.] 70 N. E. 444. Redress may be had only through the corporation or in its right. Loewenstein v. Diamond Soda Water Mfg. Co., 94 App. Div. 383, 88 N. Y. S. 313.

93. To cancel a conveyance by the corporation. On the theory that the transaction created a trust in their favor. Hearst v. Putnam Min. Co. [Utah] 77 P. 753.

94. Coss v. Mansfield Lodge, B. P. O. E., 4 Ohio C. C. (N. S.) 11. Stockholder's right to attack a sale by director to a corporation is secondary and his interference must be based on fraud or waste by the directors or the fact that they have exceeded their powers. Polhemus v. Polhemus, 43 Misc. 141, 88 N. Y. S. 273. **To prevent an ultra vires** transfer by the directors or to recover the corporate property. Forrester v. Boston & M. Consol. Copper & Silver Min. Co. [Kan.] 74 P. 1088. An action of the majority stockholders in organizing a new corporation and transferring the entire corporate assets to it for the purpose of disposing of the minority stockholders may be set aside. On suit by stockholders in their own name. McLeod v. Lincoln Medical College of Cotner University [Neb.] 98 N. W. 572.

Facts held to show that acts of directors in encouraging an exchange of stock by some of the stockholders for stock in another corporation were not injurious. Rosenbaum v. Rice, 86 App. Div. 617, 83 N. Y. S. 494. Where a prospecting company held property in the form of options, leases, etc., which it believed valuable, but was without means to fully develop and prospect, a transfer to another corporation for that purpose, was held not a fraud on minority stockholders. Traer v. Lucas Prospecting Co. [Iowa] 99 N. W. 290. **The holding of stock in a corporation by one person or another does not affect the rights of any other stockholder so long as the purposes of the corporation are being carried out for the benefit of all stockholders alike as long as the transaction by which the stock was obtained does not violate any statutory or constitutional provision.** MacGinniss v. Boston & M. Consol Copper & Silver Min. Co. [Mont.] 75 P. 89. Evidence held to show a transfer in good faith of the corporate assets to a new corporation. McLeod v. Lincoln Medical College of Cotner University [Neb.] 98 N. W. 265.

Directors dealing with themselves: Complaint in an action by a stockholder against directors pleading misrepresentation by directors avoiding their release by the receiver of the corporation held to state cause of action. Craig v. James, 41 Misc. 148, 83 N. Y. S. 939. That directors less than a majority of complainant's corporation own stock in a holding company which owns stock in a corporation with which the directors of complainant's corporation have undertaken to contract is not ground for an injunction. Pierce v. Old Dominion Copper Min. & Smelting Co. [N. J. Eq.] 58 A. 819.

95. May enjoin the execution of a contract by the president made under assumed authority given at a void directors' meeting. Rankin v. Southwestern Brewery & Ice Co. [N. M.] 73 P. 614.

96. May enjoin an attempt by the corporation and its officers to enter a trust which subjects its property and franchises to forfeiture and thus imperils his property rights. Facts held not to show intent to control prices [Const. art. 15, § 20. Pen. Code, § 321]. MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 75 P. 89. May enjoin a usurious contract where it is not inequitable for him to do so as between himself and other stockholders, and where he will suffer injury. Fletcher v. Alpena Circuit Judge [Mich.] 99 N. W. 748.

97. Equity may take jurisdiction where a stockholder can only claim assistance of courts because the corporation is controlled by those acting in bad faith and cannot or will not sue for its own protection. Cogswell v. Second Nat. Bank, 78 Conn. 252, 56 A. 574.

98. Must show that corporation had some right of action against some of defendants which its directors have refused to enforce and which he as a stockholder had a right to ask the court to enforce in favor of the corporation in which he is interested. Rosenbaum v. Rice, 86 App. Div. 617, 83 N. Y. S. 494. The stockholder cannot sue where the corporation is estopped. Kessler v. Ensley Co., 123 F. 546. Stockholders cannot restrain payment for benefits received under contracts causing corporate indebtedness to exceed limit. Rankin v. Southwestern Brewery & Ice Co. [N. M.] 73 P. 612.

99. Where the stock is not impaired in value but to the contrary is enhanced, a

where the act complained of is within the discretionary powers of the directors or majority stockholders,[1] or pursuant to law.[2] He cannot sue where the refusal of the corporation to sue is in good faith and discretionary.[3]

He must be a stockholder and not a mere contract holder,[4] and must have been injured or he cannot complain.[5] Plaintiff's ownership of stock may be attacked, but not his motive, save as ground for impeachment.[6] A stockholder need not offer to return property received by the corporation under an agreement which he seeks to set aside, where he alleges refusal of the corporation to institute suit or demand.[7]

The stockholder's right to relief may be lost by laches,[8] as where relief has become inequitable,[9] or he may be estopped by participation, consent or acquiescence.[10]

minority holder cannot complain of mismanagement. Purchase of land and making of ultra vires loans held not enough to afford relief, they not being attended with loss. Bixler v. Summerfield [Ill.] 70 N. E. 1059.

1. Remedy of stockholders is to supersede directors. McKee v. Chautauqua Aseembly [C. C. A.] 130 F. 536.

2. A member of a non-stock corporation cannot in the absence of impairment of his property rights complain of acts of the corporation in securing amendments of its charter under a power reserved in the legislature. Addition of privileges and features in harmony with primary objects, expansion of general powers by maintenance of schools, publication of books, changes in election of trustees, cannot be objected to by a leaseholder of Chautauqua Assembly. McKee v. Chautauqua Assembly, 124 F. 808. Where, by statute, majority stockholders may be given an absolute right to transfer the property and franchises to another corporation, such a transfer cannot be questioned by minority holdere unless in bad faith. Laws 1893, p. 1436, c. 638, § 33, as amended Laws 1901, p. 314, c. 130. Sale of property worth $250,000 for $66,000 to a corporation of which majority stockholders own a majority of stock is a breach of trust toward minority holders. Hinds v. Fishkill & M. Equitable Gas Co., 88 N. Y. S. 954.

3. Stockholders cannot maintain an action in behalf of the corporation where the corporation has honestly refused or is estopped. Kessler v. Ensley Co., 123 F. 546. A decision of the board of directors not to litigate is binding on the court unless the refusal will result in enforcing some ultra vires or illegal act of the corporation or evinces such recklessness and indifference to the rights of the corporation as amounts to bad faith or fraud, or will needlessly work the practical destruction of the corporate enterprise. Usual rule permitting a stockholder to maintain a suit in equity stated. Id. A stockholder may sue in behalf of the corporation where the decision of the directors not to sue would be considered improper and prejudicial to the corporation by all disinterested fairminded persons, or where it appears the directors have been negligent, have not deliberated, or have refused from some extraneous reason or mistaken view of the law. Averments of bill held to show acts due to personal reasons or mistaken view of law on part of directors. Id., 129 F. 397. Where a majority of the stockholders have approved a refusal of the board of directors to sue on account of a fraud against the corporation, minority stockholders have no right to sue in their own name for the corporation, without showing that the corporation has been wronged by the refusal. Id.

4. A holder of a so-called tontine diamond contract is not a stockholder entitled to appointment of a receiver on the ground of mismanagement. Mann v. German-American Inv. Co. [Neb.] 97 N. W. 600.

5. One purchasing stock cannot complain of illegal salaries paid a director prior thereto, though he may as to payments thereafter without his knowledge. Rankin v. Southwestern Brewery & Ice Co. [N. M.] 73 P. 614. One who has refused to enter into a contract to exchange his stock for stock in another corporation cannot complain of fraud in inducing others to do so. Rosenbaum v. Rice, 86 App. Div. 617, 83 N. Y. S. 494.

6. MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 75 P. 89. Defendant directors sued by stockholders for an accounting may urge that plaintiffs are not bona fide holders and have not exhausted their remedies at law. Ward v. Smith, 88 N. Y. S. 700.

7. Edwards v. Mercantile Trust Co., 124 F. 881.

8. Right to assert ultra vires. McCampbell v. Fountain Head R. Co. [Tenn.] 77 S. W. 1070.

To excuse laches, it is not sufficient to aver ignorance until a short time before suit. It must be stated when the particular discovery was made, how, what it was and why not made sooner. Four years delay held fatal to bill to set aside conveyance. Kessler v. Ensley Co., 123 F. 546. General allegation of lack of knowledge held insufficient to excuse 8 years delay, where the facts disclosed placed complainant on inquiry. Edwards v. Mercantile Trust Co., 124 F. 381.

9. Minority stockholders cannot enjoin a transfer of the assets where by their laches they have made it impossible to grant the injunction without serious injury to the party enjoined. Tanner v. Lindell R. Co. [Mo.] 79 S. W. 155.

10. Acquiescence of majority stockholders in ultra vires acts is not binding on minority holders who do not take part or acquiesce

Demand on the corporation or board of directors to sue need not be made where it is apparent it would be useless,[11] or where the corporate franchises have been abandoned.[12] The demand for suit must be coupled with adequate information of the facts essential to the claim.[13] Under a statute authorizing service of an original notice on any officer, demand by a stockholder is sufficient where made on a secretary who is the sole officer;[14] and service by one director on two other directors of four in all, one of whom was such officer is sufficient.[15]

An action by a stockholder may be brought, though an action by a director has been brought for the same relief under the statute.[16] The exclusive control of the suit by stockholders suing as members of a class for an injunction ceases where other members come in and contribute to the expenses.[17]

The corporation is a necessary party to a suit by stockholders to set aside a corporate conveyance,[18] or to enforce a corporate right in protection of their equitable interest in the corporate assets.[19] A director who was not such at the time of fraudulent transactions or connected therewith is not a necessary party.[20] Where complaint is founded on a vital conflict of interest between the corporation and one or more of its stockholders, or between different stockholders or classes of stockholders, the corporation ceases to stand as a party representing all stockholders.[21] In the Federal courts, the parties must be so aligned as the jurisdiction requires.[22]

The bill is not defective merely because others for whom it is brought as well as complainant have no right to come in.[23] Fraud[24] and conspiracy by directors must be adequately particularized,[25] likewise misapplication of funds.[26] If the bill pleads only an injury remediable at law, it is bad and cannot be retained to award money relief on a basis repudiated by the averments and the prayer.[27] A

therein. McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194.

11. Facts held to excuse application. McCampbell v. Fountain Head R. Co. [Tenn.] 77 S. W. 1070. Facts held to excuse demand on directors for cancellation of contracts. Loewenstein v. Diamond Soda Water Mfg. Co., 94 App. Div. 383, 88 N. Y. S. 313. Allegations held to comply with Equity Rule 94. Edwards v. Mercantile Trust Co., 124 F. 381. Request need not be made before action to set aside a sale to the corporation of property belonging to a director, where the same directors are in office. Polhemus v. Polhemus, 43 Misc. 141, 88 N. Y. S. 273. Where the stockholder's action is against the trustees and office holders, the plaintiff is not required to first make demand on these officials that they bring suit against themselves. McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194.

12. Kidd v. New Hampshire Traction Co. [N. H.] 56 A. 465.

13. Facts on which it could be brought. Doherty v. Mercantile Trust Co., 184 Mass. 590, 69 N. E. 335.

14, 15. Code, § 3531. The Telegraph v. Lee [Iowa] 98 N. W. 364.

16. Code Civ. Proc. §§ 1781, 1782. Loewenstein v. Diamond Soda Water Mfg. Co., 94 App. Div. 383, 88 N. Y. S. 313. The trial of issues should be deferred until determination of the other action. Id.

17. Where a settlement is effected with the original complainants, the right to pursue the suit passes to those admitted pendente lite on condition of indemnity against farther expense and pro rata payment of those already incurred. McAlpin v. Universal Tobacco Co. [N. J. Eq.] 57 A. 418.

18. Morshead v. Southern Pac. Co., 123 F. 350.

19. Kidd v. New Hampshire Traction Co. [N. H.] 56 A. 465.

20. Suit by stockholder in behalf of corporation against the corporation, its officers and directors for fraudulent conversion. Mulheran v. Gebhardt, 93 App. Div. 98, 86 N. Y. S. 941.

21. A holding company is a necessary party to a stockholder's suit attacking the validity of a conversion of preferred stock to common, where the holding of a majority of the common stock by the holding company is the real ground of complaint. Weidenfeld v. Northern Pac. R. Co. [C. C. A.] 129 F. 305.

22. See Jurisdiction, 2 Curr. L. 604; Removal of Causes, 2 Curr. L. 1506.

23. McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194.

24. Allegations of fraud preventing payment of dividends held sufficient. Edwards v. Mercantile Trust Co., 124 F. 381.

25. A general charge of conspiracy is too broad in a bill to cancel stock issued directors in consideration of a transfer of patents. Insurance Press v. Montauk Fire Detecting Wire Co., 83 App. Div. 259, 82 N. Y. S. 104.

26. Complaint in action by stockholder for accounting held insufficient for want of definite averments of misapplication of funds. Phillips v. Sonora Copper Co., 90 App. Div. 140, 86 N. Y. S. 200.

27. A bill by minority stockholders to set aside a sale to another corporation

plea of no property in the state is argumentative and goes to all the issues of a bill to recover property transferred by the corporation in fraud of its stockholders.[28]

Accounting from a transferee may be sought in a bill for a receiver,[29] and contracts made by a usurping majority may be reformed or a division of profits be equalized.[30]

A judgment in an action by stockholders suing in behalf of the corporation is conclusive on other stockholders in another action on the same facts for the same relief;[31] but an adjudication in a prior action that there was no demand shown does not work an abatement.[32]

Costs and allowances.—A stockholder who brings an action purely as such to protect corporate interests is entitled to a reasonable attorney's fee from the money recovered for the corporation,[33] though not where the action is unnecessary.[34]

Where a suit is brought by certain stockholders to redress wrongs against the corporation, costs and disbursements should be apportioned among the plaintiffs per capita and not in the ratio of their stock holdings.[35] A stockholder who refrained from objection or protest against that which he sues to redress should not be awarded costs, even though his standing suffices to enable him to sue.[36]

Receivers and injunctions.—For misapplication of funds,[37] or fraud,[38] or irregularities and usurpations threatening his rights and not otherwise remediable,[39] a stockholder may procure a receivership. None will be appointed where it will serve no substantial purpose.[40] The appointment is a matter in which every stockholder and creditor is a party in interest.[41]

must allege either injury to the corporation or that complainants were denied the privilege of participating on equal terms. Where the sale is expressly repudiated, the bill should not be retained to afford complainants relief based on its affirmance. Tanner v. Lindell R. Co. [Mo.] 79 S. W. 155.

28. Plea that corporation has no property in state is argumentative. Kidd v. New Hampshire Traction Co. [N. H.] 56 A. 465.

29. Complaint praying a receiver and an accounting from another corporation held to state but one cause of action. Case v. Hudson Co., 41 Misc. 51, 83 N. Y. S. 577.

30. Where majority management objected to by a minority holder on account of adverse interest of the majority is disapproved by a court of equity, relief may extend to the reformation of contracts with the majority or revising the basis of division of profits. Crichton v. Webb Press Co. [La.] 36 So. 926.

31. Hearst v. Putnam Min. Co. [Utah] 77 P. 753.

32. Judgment on appeal after trial de novo, reversing a prior suit by the same parties on the ground that demand had not been shown. The Telegraph v. Lee [Iowa] 98 N. W. 364.

33. Lilliard v. Oil, Paint & Drug Co. [N. J. Eq.] 58 A. 188. Minority stockholders successful in a suit against directors to prevent transfer of property may have attorney's fees. Success is indicated by a confession of judgment on the part of the directors. Such fees may be taxed as costs and are not premature, though the decree contains a further provision for accounting. The entire property may be considered in determining the amount, and where the allowance is supported by credible evidence, it will not be disturbed on appeal. Forrester v. Boston & M. Consol. Copper & Silver Min. Co. [Kan.] 74 P. 1088.

34. Attorneys for minority stockholders are not entitled to compensation from an amount realized from a sale of the assets, where not sufficient to satisfy lien creditors where at the time their bill was filed, the property was in the hands of a receiver, they brought no new assets into his hands and were unable to establish fraud which they alleged, though they secured a resale at which a greater sum was realized. Lamar v. Hall [C. C. A.] 129 F. 79.

35. Edwards v. Bay State Gas Co., 130 F. 242.

36. Loewenstein v. Diamond Soda Water Mfg. Co., 94 App. Div. 383, 88 N. Y. S. 313.

37. Evidence held insufficient to authorize appointment of a receiver at suit of stockholder who is also a creditor, on the ground of misapplication of funds and acts prejudicial to his rights. Sheehan v. O'Rourke Iron Works, 112 La. 461, 36 So. 495.

38. Where no fraud is shown, a minority stockholder cannot have a receiver, though the corporation's assets are transferred to an agent to be sold and administered in winding up, the corporate existence being on the eve of expiration. No express method being provided by statute. Knott v. Evening Post Co., 124 F. 342.

39. Held not grounds: Fact that directors are holding over on default of election of successors. Whatever the cause of failure to elect. Alabama Coal & Coke Co. v. Shackleford, 137 Ala. 224, 34 So. 833. Action of board of directors in refusing principal stockholder control of the body. Id. Failure of directors to disclose material facts connected with the corporate business. Id. Refusal to allow access to books and papers. Id.

A temporary injunction cannot be granted where there is no demand for permanent relief which a court of equity can afford.[42] One having been allowed will not be dissolved pending a bill which may revise a distribution of assets and on final hearing entitle complainants to an injunction.[43]

Contribution between stockholders.—Where a resident stockholder sues others for contribution for debts paid, insolvent and nonresident stockholders should be excluded in determining the amount due from defendants.[44] An action to determine such questions and adjust the equities is equitable, and a jury trial cannot be had as of right.[45]

(§ 14) *E. Transfer of shares.*[46]—The ordinary rules of sales and other contracts, and of transactions by agents, apply to transfers of stock.[47] On a sale of stock according to book value of the corporation, a deposit as indemnity against mistake in the computation of value is valid and not wagering.[48] If a mere option is made, no title passes.[49] Whether the sale be ex dividend is controlled by intention.[50]

A director or managing officer of a corporation cannot purchase the stock of one not actively engaged in the management of its affairs without disclosing its condition,[51] or at least not if he conceals it,[52] though it has also been held that in such a purchase he is acting outside the business of the corporation and is not a trustee bound to disclose.[53]

A contract for the pooling of stock under which the members are to share profits places on the manager the duty of dealing in good faith and fairly account-

40. As where minority stockholders seeking appointment could sue without, or for the reason the receiver could better secure inspection of the books. Hallenborg v. Cobre Grande Copper Co. [Ariz.] 74 P. 1052.

41. Supersedeas bond must therefore be sufficient to cover the value of the order to all creditors and stockholders and not merely to the plaintiffs in the main suit. Home Sav. & Trust Co. v. District Court of Polk County, 121 Iowa, 1, 95 N. W. 522.

42. Where there is a disagreement between the majority stockholder and individuals who though minority stockholders are a majority of the board of directors, the majority stockholder cannot, where permanent relief is not sought, secure a temporary injunction preventing sale of treasury stock sufficient to pass the control. Gillette v. Noyes, 92 App. Div. 313, 86 N. Y. S. 1062.

43. Suit to obtain a decree as to the validity of proceedings as to the distribution of assets pending at the filing of this bill and also such other injunction as to distribution of assets as they may be entitled to at final hearing. Edwards v. National Window Glass Jobbers' Ass'n [N. J. Eq.] 58 A. 527.

44, 45. Merrill v. Prescott, 67 Kan. 767, 74 P. 259.

46. See 1 Curr. L. 754.

47. See Contracts, 3 Curr. L. 805; Sales, 2 Curr. L. 1527.

Offer to sell stock within a specified time at a specified price is revocable at any time before acceptance. Worthington v. Herrmann, 89 App. Div. 627, 88 N. Y. S. 76.

Evidence held insufficient to establish fraud inducing sale of corporate stock, the parties having, previous to incorporation, been partners. Sullivan v. Pierce [C. C. A.] 125 F. 104.

A recital of the corporation's debts and assets attached to an offer to sell stock **held not a warranty.** Worthington v. Herrmann, 89 App. Div. 627, 88 N. Y. S. 76. Agreement to hold as collateral for unpaid balance satisfies **Statute of Frauds.** Cooper v. Bay State Gas Co., 127 F. 482.

Construction of escrow agreement and rights of custodian of stock thereunder. Clarke v. Eureka County Bank, 123 F. 922.

See **Agency,** 3 Curr. L. 68. Sale by undisclosed agent. Jones v. Western Mfg. Co., 32 Wash. 375, 73 P. 359.

48. A deposit to secure a purchaser of stock against loss in case stock treated as common in determining book values should in fact prove to be preferred. The purchaser cannot resort thereto unless he sustains loss on the stock proving to be preferred. Pendleton v. Harris-Emery Co. [Iowa] 100 N. W. 117.

49. Contract held to evidence completed sale and not option with liquidated forfeiture. Cooper v. Bay State Gas Co., 127 F. 482.

50. Sale by a corporation to its directors of stock held by it has been construed ex-dividend, though the dividend was subsequently declared, it being an unusual dividend, to enable them to pay for stock. Hartley v. Pioneer Iron Works, 87 App. Div. 107, 84 N. Y. S. 79.

51. He is so far a trustee. Stewart v. Harris [Kan.] 77 P. 277.

52. Concealment of contemplated sale held to authorize rescission. Oliver v. Oliver, 118 Ga. 362, 45 S. E. 232.

53. O'Neile v. Ternes, 32 Wash. 528, 73 P. 692.

ing for receipts and protecting the rights of associates. He is not, however, bound to account for shares in which a member has no interest.[54]

Where a party having a direct interest in certain pooled shares and a contingent interest in the remainder of the pool enters into an agreement to take for his interest a specified per cent of the profits, he may have such percentage no matter what changes the pooled stock may go through in carrying out a plan of reorganization, whether such profits are in stock or cash.[55]

Where stock is delivered for a certain purpose in aid of a corporation, it is held in trust by the officer.[56] If there is fraud, the bar runs from discovery.[57] On an agreement to hold stock in trust to transfer to the persons who by the terms of the agreement are the equitable owners, an action may be brought to which the trustee, beneficiary and corporation may be made parties, and statutory notice to nonresident defendants, authorizing a judgment binding on them requiring the corporation to give the aid necessary to invest the true owners with title.[58]

A lien of the corporation does not affect a transferee without notice of the by-law creating it.[59] This notice may be imputed from the face of the certificate,[60] but a recital that the certificate is transferable only in the books of the corporation does not do so.[61]

Mode of transferring shares, registration, new certificates.[62]—No particular form of transfer is required. Thus it need not be on back of scrip;[63] and indorsement of the certificate is not essential to an executed gift.[64]

Transfer on books may be refused where certificate is not produced[65] or the demandant has no legal right[66] or proof thereof;[67] but by-laws requiring a surrender of the original certificate are waived by the issuance of a new certificate to a transferee.[68] A transfer may be good between parties without registration on corporate books.[69] Where the corporation denies the validity of a stock certificate,

54. Evidence held to avoid settlement with member on the ground of false representations. Spier v. Hyde, 92 App. Div. 467, 87 N. Y. S. 285. Receivership held unnecessary on interlocutory judgment of accounting for profits of stock pool. Id.

55. Spier v. Hyde, 92 App. Div. 467, 87 N. Y. S. 285. A pooling contract which recognizes a member's ownership of a specific number of shares, fixes the price at which all shares are to be accounted for to the pool and provides that in event of sale below a certain price, the party is to receive the difference between the two prices on his shares, and in event of sale above the latter price, an equal share in all profits gives the owner of the specific shares a contingent interest in the whole. Id.

56. Equity has jurisdiction for an accounting. If the officer never intended to use it for the purpose represented, the contract may be rescinded and a return compelled also in equity. Slayback v. Raymond, 87 N. Y. S. 931.

57. Right of action of stockholder induced by fraud to surrender stock for a specific purpose is not barred until 6 years after discovery of fraud [Code Civ. Proc. § 382, subd. 5]. Slayback v. Raymond, 87 N. Y. S. 931.

58. Patterson v. Farmington St. R. Co., 76 Conn. 628, 57 A. 853. Complaint held insufficient in specific performance of contract to convey stock held in trust. Id.

59, 60, 61. Bank of Culloden v. Bank of Forsyth [Ga.] 48 S. E. 226.

62. See 1 Curr. L. 755.

63. Statement in collateral note, giving a power of sale, held to confer title on purchaser under power. Bank of Culloden v. Bank of Forsyth [Ga.] 48 S. E. 226.

64. Evidence held sufficient. Bond v. Bean [N. H.] 57 A. 340.

65. Order for transfer from record owner is not sufficient. Isbell v. Graybill [Colo. App.] 76 P. 550.

66. One who has taken a certificate of stock does not by a promise without consideration to surrender it and have it reissued as two certificates, one for himself and one for the promisee, confer a right on the promisee to sue the corporation for issuance. Griffin v. Knoblock [Colo. App.] 77 P. 370.

67. Evidence of general partnership in mining ventures held insufficient to enable one partner to demand of the corporation a certificate of stock representing his share of partnership property sold the corporation by his co-partner for stock. Griffin v. Knoblock [Colo. App.] 77 P. 370.

68. Evidence held not to show violation of such by-law. Richardson v. Longmont Supply Ditch Co. [Colo. App.] 76 P. 546.

69. Legal title may pass without registration, the question being governed by the intent of the parties. Civ. Code, 1902, § 1894. Registration is for benefit of corporation. Maxwell v. Foster [S. C.] 45 S. E. 927; Bank of Culloden v. Bank of Forsyth [Ga.] 48 S. E. 226. Evidence held to show transfer of bank stock by delivery without assignment on

a demand of registration is not a prerequisite to an action by the equitable owner against the corporation for recognition of his rights.[70]

The measure of damages for failure to issue a new certificate to a purchaser and transfer on the books is value of stock at time of demand.[71] A corporation is not liable for the transfer of its stock, the property of a married woman to her husband at her request, without order of court, unless before the transfer or before the stock gets into the hands of an innocent purchaser it has knowledge of the marital relation.[72] An officer on whom the compulsory process need not act is not a necessary party to an action to compel transfer,[73] and if he be impleaded, the action need not be brought to issue with him.[74]

In Virginia, the statutory remedy for issuance of a new certificate will not avail a purchaser without the certificate subsequent to a pledgee holding the certificate.[75]

Pledge or mortgage of shares.[76]—A pledge of stock must be accompanied by delivery of the certificate.[77] Where stock pledged is not full paid and is deposited as collateral for the amount due, the pledgor is entitled to its possession when dividends received by the pledgee amount to full payment;[78] until then, the pledgee is entitled to the dividends to be applied to the debt.[79]

A pledgee of stock cannot bring suit to compel its transfer on the corporate books and the issuance of new certificates to him without showing that he has become the owner under the conditions contemplated in the contract.[80] Where pledged stock is purchased by the creditor on enforcement of the pledge, he takes an quitable title by deed from the trustee of the pledge.[81]

The title of a resident corporation in stocks and bonds pledged a foreign corporation is subject to the jurisdiction of the courts of the state.[82] An agreement between two corporations to hold stock as collateral security for bonds of a third does not render the third a necessary party to a suit involving ownership ousting a Federal court of jurisdiction.[83]

A trustee of stock must as to the cestui que trust confine his dealings with the stock to what is authorized.[84] An unauthorized transfer may be enjoined.[85]

books. In re Hertzler's Estate, 22 Pa. Super. Ct. 592.

Under statutes requiring registration of transfers registration in the name of the transferee or a demand and default of the corporation to transfer must be shown to avail against creditors of the transferror. 1 Mills' Ann. St. § 508. Evidence held insufficient to show that transferee had done all in his power to secure transfer. Isbell v. Graybill [Colo. App.] 76 P. 550.

70. Richardson v. Longmont Supply Ditch Co. [Colo. App.] 76 P. 546.

71. Bank of Culloden v. Bank of Forsyth [Ga.] 48 S. E. 226.

72. Bigby v. Atlanta, etc., R. Co., 119 Ga. 685, 46 S. E. 827.

73, 74. It is sufficient to join merely the officer against whom process must be directed. Cashier of a bank need not be joined where the president is also a party. Johnson v. Hume [Ala.] 36 So. 421.

75. Facts held not to raise the question of whether Code 1887, § 1133, providing the manner of transfer of stock, applied to court charters. Downing v. Thompson [Va.] 48 S. E. 506.

76. See 1 Curr. L. 757. See, also, Pledge, 2 Curr. L. 1243.

77. Evidence held not to show delivery. Robertson v. Robertson [Mass.] 71 N. E. 571.

78, 79. Reid v. Caldwell [Ga.] 48 S. E. 191.

80. A possible inference arising from the pledgee's evidence that the pledgor desires the transfer gives no reason to go in to the merits of a question as to the right of the holder to pledge raised by the corporation. State v. North American Land & Timber Co., 112 La. 441, 36 So. 488.

Under statute providing that the owner of pledged stock may continue to vote it, the pledge should be enforced by a sale and not by bill to compel transfer on the books and to restrain payment of dividends to the pledgor. 1 Ball. Ann. Codes & St. § 4264. Such statute does not authorize a conditional transfer to the pledgee. American Bonding & Trust Co. v. Pacific Brewing & Malting Co., 34 Wash. 10, 74 P. 826.

81. Richardson v. Longmont Supply Ditch Co. [Colo. App.] 76 P. 546.

82. Kidd v. New Hampshire Traction Co. [N. H.] 56 A. 465.

83. Edwards v. Mercantile Truet Co., 124 F. 381.

84. A trustee of stock, with the privilege of placing it in the name of another of its own selection and with the stipulated right in itself to pay assessments thereon and recoup the amount thereof with interest, cannot permit the stock to be sold for delinquency and bought in by the corporation,

Issuance of stock certificate to a person as trustee is sufficient to place a purchaser on inquiry.[88]

Effect of transfers.[87]—A bona fide purchaser takes certificates indorsed in blank free from equities of which he has no notice.[88] The effect of indorsement in blank may be overcome by actual knowledge.[89] Wherefore stock certificates illegally issued in payment for director's services are of no greater validity in the hands of a transferee with notice.[90] The assignees of stock are bound by the previous assent of their assignors to ultra vires acts, but are not bound as to subsequent acts, though under the authority previously conferred by their assignors.[91]

§ 15. *Management of corporations. A. Control of a corporation by the stockholders or members. Power of the majority.*[92]—The management of corporations is usually vested by law or charter in a governing body.[93] Otherwise, it is vested in the stockholders or members, who act by the will of a majority,[94] single stockholders having no power of management.[95] By the doctrine of estoppel, acts binding all the stockholders toward another are binding on the corporation, public policy not being infringed.[96]

Stockholders may become subject to the same trust relations as directors by attempting to carry on the corporate business.[97]

(§ 15) *B. Dealings between a corporation and its stockholders.*[98]—Defrauded creditors only may attack a contract between the corporation and all the stockholders.[99]

(§ 15) *C. By-laws.*[1]—By-laws may be adopted[2] or modified[3] by conduct of the directors indicating such an intent, though some statutes allow such adoption only until the next annual meeting.[4]

other stock of which it holds, without notice to the cestui que trust either of the assessment or of the person in whose name it has caused the trust stock to be placed. Agreement construed. Moore v. Bank of British Columbia [C. C. A.] 125 F. 849.

Averments in an **action to compel account** as trustee of stock that defendant has arbitrarily and wrongfully manipulated the affairs of the corporation and has disputed complainant's rights are mere conclusions of law. Petty v. Emery, 88 N. Y. S. 823.

85. Injunction pendente lite against disposal held justified in action against corporation and trustee to secure possession of stock. MacDonald v. Gerrick [Mont.] 74 P. 1083.

86. Stock certificate so ran. Johnson v. Amberson [Ala.] 37 So. 273.

87. See 1 Curr. L. 754.

88. Maxwell v. Foster [S. C.] 45 S. E. 927.

89. Goodwin v. Hampton Transp. Co. [Mich.] 94 N. W. 729.

90. Grafner v. Pittsburg, etc., R. Co., 207 Pa. 217, 56 A. 426.

91. Where not necessary to protect rights acquired by third persons before the assignment. McCampbell v. Fountain Head R. Co. [Tenn.] 77 S. W. 1070.

92. See 1 Curr. L. 764.

93. A mere stockholder is not entitled to possession of the property as against a regularly qualified trustee who is also president. Oudin & B. Fire Clay Min. & Mfg. Co. v. Conlan, 34 Wash. 216, 75 P. 798. A stockholder has no power to employ an attorney to represent the corporation. Breathitt Coal, Iron & Lumber Co. v. Gregory, 25 Ky. L. R. 1507, 78 S. W. 148.

94. A stockholder present participating and assenting to the action of the majority in authorizing a sale of the property cannot thereafter repudiate its terms and refuse to accept payment for his stock in accordance. Facts held to bind stockholder to accept stock of purchasing company. Carr v. Rochester Tumbler Co., 207 Pa. 392, 56 A. 945.

95. The corporation cannot be bound by the separate and individual consent of its members. Demarest v. Spiral Riveted Tube Co. [N. J.] 58 A. 161.

96. Corporate obligation to one stockholder. Breslin v. Fries-Breslin Co. [N. J. Err. & App.] 58 A. 813. Where the unanimous consent and acquiescence of stockholders has been acted on by one party, legal informalities cannot be asserted to his detriment with regard to a matter of internal concern affecting only the interest of the stockholders. Id.

97. Crichton v. Webb Press Co. [La.] 36 So. 926.

98. See 1 Curr. L. 764.

99. Great Western Min. & Mfg. Co. v. Harris [C. C. A.] 128 F. 321.

1. See 1 Curr. L. 764. Revocability of resolutions, see 1 Curr. L. 765, n. 54.

2. Graebner v. Post, 119 Wis. 392, 96 N. W. 783.

3. Change in board of directors from 5 to 3. Buck v. Troy Aqueduct Co. [Vt.] 56 A. 285.

4. Code Pub. Gen. Laws, art. 23, § 55. Darrin v. Hoff [Md.] 58 A. 196.

(§ 15) *D. Corporate meetings and elections. Notice.*[5]—Presence and participation of stockholders may cure absence of notice.[6]

Elections.[7]—Under the Maryland statutes, directors other than for mining corporations may be elected at meetings at which less than a majority of the stock is represented,[8] and a by-law to the contrary, making a majority of the stock a quorum, is void.[9] A master in chancery cannot be appointed to conduct a corporate election before a decree.[10] Under the New Jersey statute, authorizing review of corporate elections by the supreme court, such relief will be granted as accords with the substantial rights and equities.[11]

(§ 15) *E. The right to vote.*[12]—The corporation is not affected by any agreement among the stockholders as to how it shall be managed or who shall be entitled to vote the shares of stock.[13] Where shares are wrongfully held, then voting may be enjoined.[14]

Proxies.[15]—A stockholder can vote by proxy only where authorized by statute or the articles or by-laws of the corporation.[16] General proxies do not authorize a vote to wind up.[17]

(§ 15) *F. Appointment, election and tenure of officers.*[18]—The acts of a de facto board of directors are binding in the absence of special restrictions in the charter or by-laws.[19] Such acts cannot be annulled by the president alone.[20] Terms of officers are not terminated by failure to elect successors.[21] Sale of his stock does not ipso facto vacate the office of a director and president,[22] but where a statute requires a trustee to be a stockholder, the trustee ceases to be such on transfer of his stock.[23] On termination of his office, an officer has no further

5. See 1 Curr. L. 765.

6. Capital stock increased [Const. art. 12, § 8, Rev. St. 1899, § 962]. State v. Cook, 178 Mo. 189, 77 S. W. 559. Assignment for creditors. State Nat. Bank v. Duncan [Miss.] 35 So. 569.

7. Act Mar. 14, 1883 (17 Del. Laws, p. 225, c. 147, § 24) is repealed by General Corp. Law, Mar. 10, 1899 (21 Del. Laws, p. 445, c. 273), as amended in 1901, as to corporations organized under that act. In re Powell [Del. Super.] 68 A. 831. See 1 Curr. L. 765.

8. Code Pub. Gen. Laws, art. 23, §§ 57, 6, 7, 144. Darrin v. Hoff [Md.] 68 A. 196.

9. Code Pub. Gen. Laws, § 57. Darrin v. Hoff [Md.] 58 A. 196.

10. A decree being essential to appointment under equity rule 60, as amended Jan. 15, 1894. Yetter v. Delaware Valley R. Co., 206 Pa. 485, 56 A. 57.

11. Where directors elected by a majority of the stock had rendered themselves ineligible by failure to produce the stock book as required by § 33, but every share of stock was voted and it did not appear that fraud had been exercised or that harm resulted, a new election will be ordered instead of seating the directors receiving the minority vote [P. S. 1896, p. 291, Gen. Corp. Act, § 42]. Stratford v. Mallory [N. J. Err. & App.] 58 A. 347.

12. See 1 Curr. L. 766. Voting trusts, see 1 Curr. L. 767, n. 81-83. Cumulative voting; voting by pledgee or trustee, see 1 Curr. L. 766.

13. Hence a corporation cannot be compelled to refund moneys and surrender property on failure of one of its stockholders to perform an agreement with plaintiff. Kennedy v. Monarch Mfg. Co., 123 Iowa, 344, 98 N. W. 796.

14. Complaint held sufficient to support an injunction against voting stock wrongfully obtained under a claim that the holder was entitled under a resolution of a predecessor company, and also other shares held under a wrongful claim that they were obtained for a consideration. United Gold & Platinum Mines Co. v. Smith, 88 N. Y. S. 67.

15. See 1 Curr. L. 767.

16. McKee v. Home Sav. & Trust Co., 122 Iowa, 731, 98 N. W. 609.

17. Notice by the holder that he will consider himself so authorized in case no response is made by the donors to his request for a special proxy does not cause their silence to raise a presumption of assent. McKee v. Home Sav. & Trust Co., 122 Iowa, 731, 98 N. W. 609.

18. See 1 Curr. L. 767.

19. Cannot be shown to be fraudulent by an offer to prove that they were a dummy board, had no real interest and that there was a contest in the company. Collier v. Consolidated R. Lighting & Refrigerating Co. [N. J. Err. & App.] 57 A. 417.

20. Collier v. Consolidated R. Lighting & Refrigerating Co. [N. J. Err. & App.] 57 A. 417.

21. Youree v. Home Town Mut. Ins. Co. [Mo.] 79 S. W. 175.

22. Howle v. Scarbrough, 138 Ala. 148, 35 So. 113.

23. 1 Ball. Ann. Codes & St. § 4255. Oudin & B. Fire Clay Min. & Mfg. Co. v. Conlan, 34 Wash. 216, 75 P. 798.

control of the corporate property in such capacity.[24] By statute in some jurisdictions, stockholders are given power to remove officers or directors at any time.[25]

(§ 15) *G. Salary or other compensation of officers.*[26]—The board of directors has no inherent power to vote salaries to officers,[27] nor have they any implied right to compensation for their own services;[28] but a director who is also a general manager is entitled to a salary on agreement to such effect.[29] The action of directors or stockholders voting themselves salaries is voidable if unfair to minority holders.[30] So the fixing of his salary by the sole vote of a majority stockholder is subject to review in equity and will not be allowed to stand if fraudulent or oppressive,[31] and his powers are still more limited where his salary is fixed by alteration in the by-laws.[32] The question is what the services are reasonably worth, not what could be earned by the director in other employments.[33]

A contract for compensation of a director being merely voidable may be ratified,[34] and objection to annual salaries must be made during the current year.[35]

The innocent recipient of an unlawful salary is not liable to minority stockholders.[36]

A manager entitled to salary may assert it as a counterclaim in an action against him by the corporation for money had and received.[37]

(§ 15) *H. How directors must act; directors' meetings. Records and stock books.*[38]—A formal action of the directors is not in all cases required but individual indication of assent by a majority may be substituted.[39] A majority of the board

24. A treasurer whose term of office has expired is not justified in retaining corporate funds by the fact that the corporation has voted to apply them to the claims of certain creditors. Seven Star Grange No. 73, Patrons of Husbandry v. Ferguson, 98 Me. 176, 56 A. 648.

25. Ky. St. 1903, § 542 confers power on the board of directors to discharge a treasurer at any time without cause and without rendering itself liable in damages unless a contract for longer employment is violated. O'Neal v. Neider Co., 25 Ky. L. R. 2279, 80 S. W. 451. Evidence held not to show such a contract. Id.

26. See 1 Curr. L. 768.

27. Such action based on by-laws passed through efforts and votes of interested officers is void, the resolution being passed by a majority created by the votes of the same officers [Civ. Code §§ 2970, 2976]. McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194.

28. Grafner v. Pittsburg, etc., R. Co., 207 Pa. 217, 56 A. 426.

29. Bevier Black Diamond Coal Co. v. Watson [Mo. App.] 80 S. W. 287. Evidence held to show agreement by treasurer and general manager to work without salary while learning business. Harvard Brew. Co. v. Pratt [Mass.] 70 N. E. 435.

30. Crichton v. Webb Press Co. [La.] 36 So. 926. Members cannot vote themselves compensation for attending meeting of executive committee. Marshall v. Industrial Federation, 84 N. Y. S. 866. Where the salary of the president or of any other member of the board of directors for his personal services in general management of the business of the company is fixed by the directors, the amount is not final against any dissenting stockholder promptly applying for relief. Burden of establishing value of services is on directors. Lillard v. Oil, Paint & Drug Co. [N. J. Eq.] 56 A. 254.

31. Burden is on objecting stockholder. Lillard v. Oil, Paint & Drug Co. [N. J. Eq.] 56 A. 254.

32. By-laws held not made in good faith. Lillard v. Oil, Paint & Drug Co. [N. J. Eq.] 56 A. 254.

33. $18,000 held excessive by $5,000 as annual salary of director, involving duties as manager of trade journals. Lillard v. Oil, Paint & Drug Co. [N. J. Eq.] 56 A. 254. Evidence held not to show payment of excessive salaries to majority stockholder. Bixler v. Summerfield [Ill.] 70 N. E. 1059.

34. May be ratified by majority vote of stockholders as a body and director involved may vote as a stockholder. Lillard v. Oil, Paint & Drug Co. [N. J. Eq.] 56 A. 254.

35. Delay held not explained. Lillard v. Oil, Paint & Drug Co. [N. J. Eq.] 56 A. 254.

36. Directors may be held. McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194.

37. Bevier Black Diamond Coal Co. v. Watson [Mo. App.] 80 S. W. 287.

38. See 1 Curr. L. 769.

39. Separate assent of a majority of the board of directors is sufficient to ratify an employment of a physician for an injured employe by the secretary. Knowledge of the directors may be shown where coupled with evidence of express assent. Scott v. Superior Sunset Oil Co. [Cal.] 77 P. 817. Where one of an executive committee of three orders supplies and another member makes no objection when shown the bill, there is a majority action binding the corporation as far as in the power of the committee. Roebling's Sons Co. v. Barre & M. Traction & Power Co. [Vt.] 56 A. 530. Where the president and directors, owning

may bind the minority in the transaction of ordinary business without notice to the minority members.[40] To constitute a quorum[41] the specified number must join in the act of voting.[42]

Evidence.[43]—Oral evidence of the passage of a resolution is not admissible where there is no error or omission in the records as kept.[44] Where no records are kept, official acts may be proved by oral testimony but not by hearsay.[45] Separate sheets of paper pinned to the leaves of a record book are not sufficiently identified as minutes.[46] A statute providing that acts and proceedings of corporations may be proved by sworn copy of the record does not permit books of account to be used in a manner different from those of natural persons.[47]

Penalties for refusal of inspection of stock book.—Where the corporation does not keep a stock book its secretary cannot be held liable for a penalty fixed for refusal to exhibit it.[48] A stockholder cannot recover a penalty to be forfeited to the people.[49]

(§ 15) *I. Powers of the directors or trustees.*[50]—A board of directors cannot in general terms be given power to control and dispose of property without regard to the will of the corporation itself.[51] It has no power to move the entire official business of the corporation beyond the state.[52] It may delegate to an executive committee authority to perform such duties as are required in the usual and ordinary conduct of its business.[53]

A board of directors cannot ratify acts at an illegal meeting after an action begun attacking such acts,[54] but a ratification by stockholders of the acts of the directors in issuing bonds and executing a mortgage is equivalent to an original authorization.[55]

(§ 15) *J. Powers of other officers and agents than the directors or trustees.*[56]

a large majority of the stock, agree to make a conveyance of certain property as soon as the president should convey it to the corporation, he holding it in trust for himself and the directors, and the transferee takes possession, the corporation receiving the consideration, they cannot afterward, on neglecting to make conveyance, assert title in another transferee. Harrison Land & Min. Co. v. Nashville, etc., R. Co., 25 Ky. L. R. 523, 76 S. W. 9.

40. Borrowing money and giving note therefor for repair of property of aqueduct company. Buck v. Troy Aqueduct Co. [Vt.] 56 A. 285.

41. Unless otherwise shown a majority will be presumed a quorum of an executive committee. Marshall v. Industrial Federation, 84 N. Y. S. 866.

42. North Louisiana Baptist Ass'n v. Milliken, 110 La. 1002, 35 So. 264.

43. Minutes held sufficient to show authorization of mortgage by directors of agricultural society. Ismon v. Loder [Mich.] 97 N. W. 769.

44. Ehrlich v. Chevra Agudas Achin Aushi Wizna, 86 N. Y. S. 820.

45. Evidence of subsequent declarations as to action, made by the president held not admissible as an admission or estoppel. Childs v. Ponder, 117 Ga. 553, 43 S. E. 986. Parol evidence is admissible to show a vote of the directors authorizing a mortgage where the law does not require a record thereof. Comp. Laws 1897, § 5974. Mortgage by agricultural society. Ismon v. Loder [Mich.] 97 N. W. 769.

46. McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194.

47. Burns' Rev. St. 1901, § 474, does not permit a copy of the account to be introduced by a building and loan association to foreclose a mortgage. Coppes v. Union Nat. Sav. Loan Ass'n [Ind. App.] 69 N. E. 702.

48. Laws 1892, p. 1831, c. 688, § 29. Billingham v. Gleason Mfg. Co., 88 N. Y. S. 398.

49. Penalty to be forfeited "the people" under Laws 1892, p. 1831, c. 688, § 29, on failure to keep stock book open to inspection, can only be recovered by state. Billingham v. Gleason Mfg. Co., 88 N. Y. S. 398.

50. See 1 Curr. L. 769.

51. North Louisiana Baptist Ass'n v. Milliken, 110 La. 1002, 35 So. 264.

52. Evidence held not to show advantage to corporation from maintenance of foreign office [Comp. St. 1887, c. 25, div. 5]. McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194.

53. Purchase of material and supplies. Notwithstanding by-law requires assent of directors to make acts binding on them. Roebling's Sons Co. v. Barre & M. Traction & Power Co. [Vt.] 56 A. 530.

54. First meeting was outside state. McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194.

55. Minority stockholder cannot have injunction without showing invalidity of the meeting. McAlpin v. Universal Tobacco Co. [N. J. Eq.] 57 A. 802.

56. See 1 Curr. L. 770.

—Express or implied authority must be proven to bind the corporation by the act of one claiming to act for it.[57]

The president.[58]—The president has no power from the mere possession of the office to bind the corporation or control its property. His power is limited to that given by the by-laws or implied from the course of dealing;[59] but within the scope of its ordinary business, he is sometimes deemed a general agent.[60] He is not presumed to have power of his own motion to alter the requirements of a sealed instrument made by the corporation with due formality,[61] or to contract to extend time or to refrain from sale of collateral.[62]

The vice-president[63] acting as presiding officer may confess judgment[64] or employ counsel to appear.[65]

The treasurer[66] has no inherent managing authority,[67] and a by-law that the treasurer "shall have charge of securities" does not imply authority to dispose of them without consent or authority of the corporation.[68]

The cashier.[69]—The powers of a bank cashier do not extend farther than the usual business of such corporations.[70]

Business managers, salesmen, etc.[71]—The general rule is that in the absence of express restrictions on his powers, with actual or constructive notice thereof to the persons dealing with him, an officer or agent of the corporation, intrusted with the general management and control of its business, has implied authority to make any contract or do any other act which is necessary or appropriate in the ordinary business of the corporation.[72] In the absence of habit or custom with the sanction

57. Coney Island Automobile Race Co. v. Boyton, 87 App. Div. 251, 84 N. Y. S. 347. Proof of authority is necessary to bind corporation on contract to pay commissions for lease signed with corporate name by an individual described as secretary and treasurer. Greene v. Iroquois Hotel & Apartment Co., 84 N. Y. S. 591.

58. See 1 Curr. L. 770.

59. Oral consent to stocking of streams with trout given by president of lumber company does not make a charge on the company's land. Rockefeller v. Lamora, 89 N. Y. S. 1. A corporation is not liable on a promise made by its president that it shall pay his debts. William Allen & Co. v. Somerset Hotel Co., 88 N. Y. S. 944. Hence the president, treasurer and general manager, though he owns almost all the stock, cannot contract for the corporation outside the course of its ordinary business. Demarest v. Spiral Riveted Tube Co. [N. J.] 58 A. 161.

60. Rapp v. Hutchinson Stair Elevator Co., 87 N. Y. S. 459. Where a corporation is engaged in a business in which it receives notes from its agents and customers, its president is presumed to have authority to discount and transfer them. Iowa Nat. Bank v. Sherman & Bratager [S. D.] 97 N. W. 12.

61. Waiver of conditions of lease. Granite Bldg. Corp. v. Greene [R. I.] 57 A. 649.

62. Bank. Arbogast v. American Exch. Nat. Bank [C. C. A.] 125 F. 518.

63. See 1 Curr. L. 771.

64. Confession of judgment by vice-president and presiding member is not void on its face where accompanied by his affidavit setting out his official capacity. Manley v. Mayer [Kan.] 75 P. 550. Where, in favor of an executor, it is not avoided for all purposes by individual interest of the officer in the estate as legatee. Id.

65. Fernald v. Spokane & British Columbia Tel. & T. Co., 31 Wash. 672, 72 P. 462.

66. See 1 Curr. L. 771.

67. The treasurer is not an officer clothed with inherent general authority for the management of the business, rendering an agreement signed by him under the corporate seal, to pay a portion of the proceeds of certain claims if collected, admissible without a showing of special authority. Backer v. United States Gas Fixture Co., 84 N. Y. S. 149.

68. Jennie Clarkson Home for Children v. Chesapeake & O. R. Co., 41 Misc. 214, 83 N. Y. S. 913; Id., 92 App. Div. 491, 87 N. Y. S. 348. A broker is liable to a corporation for bonds sold by him for its treasurer, where he knows the corporation's ownership and the necessity of its express authorization of a sale by its treasurer. It is immaterial that the transfer agent of the corporation executing the bonds has been induced to indorse them to "bearer" by a forged power of attorney. Id., 41 Misc. 214, 83 N. Y. S. 913.

69. See 1 Curr. L. 771.

70. Cashier of bank has no authority to accept a worthless check and charge bank with the amount. Van Buren County Sav. Bank v. Stirling Woolen Mills Co. [Iowa] 94 N. W. 945. See, also, Banking and Finance, 3 Curr. L. 408.

71. See 1 Curr. L. 772.

72. **Held within authority:** Contracts for labor. By-law giving general management held also to confer such power. Forked Deer Pants Co. v. Shipley, 25 Ky. L. R. 2299, 80 S. W. 476. Suit on a guaranty of the corporation's debt [Code, § 3459]. McKee v. Needles, 123 Iowa, 195, 98 N. W. 618. General agent held authorized by letter of attorney to execute bond guaranteeing repayment of advances to contractor. Power to

of a corporation, a general manager cannot even for a consideration convey the assets.[73] In an action on a guaranty to plaintiff as manager, the plaintiff suing in his own name need not add the description in the pleadings.[74]

Evidence of authority.[75]—Authority of the officer of a corporation assuming to act for the corporation need not accompany a remonstrance against a street improvement.[76] Where a general agent of a corporation authorizes another to use his best judgment in making a settlement, it is sufficient proof of authority.[77]

(§ 15) *K. Apparent authority of officers and agents and estoppel of the corporation and of others. Implied permission to act.*[78]—Where an officer or agent is intrusted with the general management of the business or a particular part of the business, he has apparent or implied authority to manage the same in the usual way and for such purpose to bind the corporation by his acts and contracts on its behalf.[79] An officer has no implied authority to act for his personal benefit.[80]

Where the transaction is within the authority of the corporation, one dealing with an officer is not bound to know the limits of the officer's authority.[81] A director and officer, however, is presumed to know the measure of powers delegated another officer.[82]

Acceptance of benefits.[83]—A corporation by acceptance of benefits is estopped to assert that a contract is illegal or invalid.[84] A corporation is not estopped to

guaranty "performance of contracts other than insurance contracts." Pacific Nat. Bank v. Aetna Indemnity Co., 33 Wash. 428, 74 P. 590. Evidence held to show authority of general manager to execute a note. Merchants' & Farmers' Cotton Oil Co. v. Lufkin Nat. Bank [Tex. Civ. App.] 79 S. W. 651. Authority of medical examiner of railroad relief department to employ surgeon held for jury. Haggerty v. St. Louis, etc., R. Co., 100 Mo. App. 424, 74 S. W. 455.

Held outside authority: A manager of a lumber company having general supervision of a flume has no authority to agree to make considerable and expensive alterations without authority from the board of directors. Centerville & K. Irr. Ditch Co. v. Sanger Lumber Co., 140 Cal. 385, 73 P. 1079. Managing agent of an insurance company has no authority to release the maker of a note to the company. Muller v. Swanton, 140 Cal. 249, 73 P. 994. General manager of a stockyards corporation has no authority to sign a paving petition charging the corporation's abutting realty. Power is in directors, and the burden is on the city to show due authorization of the manager. Trephagen v. South Omaha [Neb.] 96 N. W. 248. The superintendent of a manufacturing corporation has no implied power to agree practically to pension an injured employe for life. Contract held, in addition, too indefinite to be enforced. Smith v. Crum Lynne Iron & Steel Co., 208 Pa. 462, 57 A. 953.

73. Accept cancellation of insurance policy after loss. Cassville Roller Mill Co. v. Aetna Ins. Co. [Mo. App.] 79 S. W. 720.

74. McKee v. Needles, 123 Iowa, 195, 98 N. W. 618.

75. See 1 Curr. L. 772.

76. City of Sedalia v. Scott [Mo. App.] 78 S. W 276.

77. Russell & Co. v. Stevenson, 34 Wash. 166, 75 P. 627.

78. See 1 Curr. L. 773.

79. The corporation cannot deny the authority of an agent in charge of a mine to contract for drainage of the mine, which could not have been worked without, and in the absence of notice of limitations on his authority, he may also agree to pay for previous drainage. Fisk Min. & Mill. Co. v. Reed [Colo.] 77 P. 240. Where a railroad permits it to appear that its agent had power to dedicate a street, it is bound by his act. Southern Pac. Co. v. City of Pomona [Cal.] 77 P. 929. Whether a general manager had implied power to issue notes in a case of extreme necessity may be a question for the jury. Baines v. Coos Bay, etc., R. & Nav. Co. [Or.] 77 P. 400. A conductor while he may be authorized in an emergency to employ medical aid for an employe injured is not authorized to have him removed to another town and there contract for his food and shelter. Hunt v. Illinois Cent. R. Co. [Ind.] 71 N. E. 195. Real estate investment company is estopped from denying receipt of money by its secretary, the act being within the apparent scope of his duties and the president having knowledge and acquiescing. Ring v. Long Island Real Estate, Exch. & Inv. Co., 87 N. Y. S. 682. Proof of sale made by a person found in the usual place of business of a corporation, apparently engaged in his ordinary occupation, is prima facie evidence of a sale by the corporation. Infringement of patent. Badische Anilin & Soda Fabrik v. Klipstein & Co., 125 F. 543. Authority of salesman to modify contract must be proved. New York Metal Ceiling Co. v. Raub, 86 N. Y. S. 249.

80. Express authority must be shown to bind the corporation by contracts of its president and manager to divert corporate funds to a partnership of which he was a member. Leigh v. American Brake Beam Co., 205 Ill. 147, 68 N. E. 713.

81. Groeltz v. Armstrong [Iowa] 99 N. W. 128.

82. There can be no invocation of the doctrine of holding out. Baines v. Coos Bay, etc., R. & Nav. Co. [Or.] 77 P. 400.

83. See 1 Curr. L. 774.

84. Kessler & Co. v. Ensley Co., 129 F.

dispute plaintiff's employment where there is no evidence that his services were accepted by the corporation as such, or that they were of value to it as a corporation.[85]

Duty of third persons to take notice of powers.[86]—Knowledge that an officer is acting as an individual on the part of the opposite party will prevent the corporation from being bound by the officer's contracts purporting to bind it;[87] but the fact that one dealing with a corporation through its secretary has also had dealings with him in his capacity as a lawyer with reference to other matters does not prevent the corporation being bound by his acts.[88]

Allowing other party to act.[89]—A corporation is bound by a contract of employment entered into by its president, on which the employe has acted in relinquishing other employment.[90] Where the corporation does not receive the benefit, it is not liable on a note executed by its treasurer to a private bank in which he was interested after a resolution removing his authority.[91] The genuine attestation of the corporation's secretary may relieve the purchaser of a note from further inquiry as to authenticity.[92]

Acquiescence in similar acts.[93]—Where a person is in the habit of acting as business agent with knowledge and without objection from the corporation, the corporation will be bound.[94]

(§ 15) *L. Ratification of unauthorized acts.*[95]—Acts which the corporation had power to do, but were done by the wrong body or in the wrong way, may be cured by acquiescence or ratification.[96] A disinterested governing body or the ma-

397. A mortgage, though not authorized previous to its execution, is not void, but is binding to the extent that the corporation accepts money advanced in reliance thereon. Miller v. Gourley [N. J. Eq.] 55 A. 1083. Where the corporation asks for and receives releases of portions of property covered by a deed of trust and receives and uses the money it was given to secure it, it ratifies its president's act in executing it. Clark v. Elmendorf [Tex. Civ. App.] 78 S. W. 538. A corporation will be held to have ratified a lease executed by its principal officer where it collects the rent thereunder. Anderson v. Connor, 87 N. Y. S. 449. Receipt of benefits of the loan, continued silence and failure to offer to restore consideration, prevents assertion of invalidity of note. Curtin v. Salmon River Hydraulic Gold Min. & Ditch Co., 141 Cal. 308, 74 P. 851. Retention of benefits held to estop denial of contract of employment to rent property. Pescia v. Societa Co-operativa Corleonese Francesco Bentivegna, 91 App. Div. 506, 86 N. Y. S. 952. Where a corporation receives money for investment, it cannot defend its liability on the ground that the investor accepted from its officers a forged mortgage. Ring v. Long Island Real Estate Exch. & Inv. Co., 87 N. Y. S. 682. An offer in a bill to cancel a conveyance to credit the consideration on any judgment recovered in insufficient. Alaska & Chicago Commercial Co. v. Solner [C. C. A.] 123 F. 855.

85. Ehrlich v. Chevra Agudas Achin Aushi Wizna, 86 N. Y. S. 820.

86. See 1 Curr. L. 774.

87. German Sav. Bank v. Des Moines Nat. Bank, 122 Iowa, 737, 98 N. W. 606. Facts held not to show dealings with officer in individual capacity. Ring v. Long Island Real Estate Exch. & Inv. Co., 87 N. Y. S. 682. Evidence held insufficient to authorize a conclusion of law that an agreement was with officers as individuals. Anderson Carriage Co. v. Pungs [Mich.] 96 N. W. 563.

88. Ring v. Long Island Real Estate Exch. & Inv. Co., 87 N. Y. S. 682.

89. See 1 Curr. L. 774.

90. Egbert v. Sun Co., 126 F. 568.

91. Merchants' & Farmers' Cotton Oil Co. v. Lufkin Nat. Bank [Tex. Civ. App.] 79 S. W. 651. The fact that the corporation may offset a debt against the payee of a note executed without authority does not render it good in the hands of a bona fide holder. Id.

92. Note executed by treasurer. Merchants' & Farmers' Cotton Oil Co. v. Lufkin Nat. Bank [Tex. Civ. App.] 79 S. W. 651.

93. See 1 Curr. L. 775.

94. Though his authority is in writing and limited where neither he nor the party with whom he deals has knowledge of the limitations. Culver v. Pocono Spring Water Ice Co., 206 Pa. 481, 56 A. 29. Open and public exercise by a secretary as general manager may bind the corporation by his acts as such. Disposal of fruit by secretary of fruit exchange. Betts v. Southern California Fruit Exch. [Cal.] 77 P. 993.

95. See 1 Curr. L. 775.

96. Kessler v. Ensley Co., 123 F. 546. Where it is known that the president under his general authority has made a contract, the omission of the board of directors to make any inquiry amounts to a ratification of its terms. Egbert v. Sun Co., 126 F. 568. Payment of guaranteed dividends affirms the president's guaranty. McVity v. Albro Co., 90 App. Div. 109, 86 N. Y. S. 144. Acquiescence held to estop corporation from denying authority of secretary to convey land and bind it by his representations that the land was clear of incumbrances. Coolidge v. Schering, 32 Wash. 557, 73 P. 682. An un-

jority of stockholders may even ratify actual fraud, as to a matter intra vires, on the corporation by one of its own officers, by which he obtains some of its property.[97] Ratification must be obtained by fair means and on complete disclosure.[98] A board of directors accepting the benefits of a contract of the president are presumed to know its terms and conditions.[99]

Female stockholders will not be presumed to have knowledge and to have consented to acts of officers from the mere fact of relationship.[1]

A note originally invalid, but validated by the conduct of the corporation, may be sued on directly.[2]

(§ 15) *M. Notice to or knowledge of officers or agents as notice to or knowledge of corporation.*[3]—Notice to an officer or agent of a corporation in the course of his employment and with respect to a matter within his apparent authority is notice to the corporation.[4]

A corporation will be held to have constructive notice of only such facts as are brought to the actual notice of some of its officers or agents or to their constructive notice by actual notice of facts placing them on inquiry.[5]

Knowledge of a single officer or trustee or the president cannot be imputed to the corporation, unless it is affirmatively shown to have been brought home to the trustees, where by statute all corporate control is vested in the trustees.[6]

Evidence of knowledge of the president of two companies of the affairs of one is sufficient to show knowledge on the part of other officers of the second, such

authorized sale by an officer may be ratified by knowledge, silence and acquiescence of the board of directors for a reasonable time. Alaska & Chicago Commercial Co. v. Solner [C. C. A.] 123 F. 855.

97. Objection of single stockholder will not prevent. Kessler & Co. v. Ensley Co., 129 F. 397. A fraudulent act of the directors which would be set aside at the suit of the corporation may be ratified by a subsequent act of the stockholders so as to be binding on the minority holders, no fraud or undue influence being shown in the latter action. Bill to set aside conveyances held insufficient. Kessler v. Ensley Co., 123 F. 546.

98. Affirmance by vote of stockholders of a contract between the corporation and directors personally interested must not be brought about by unfair or improper means, and must not be illegal, fraudulent or oppressive toward those stockholders who oppose it. Burden is on objecting stockholder. Lillard v. Oil, Paint & Drug Co. [N. J. Eq.] 56 A. 254. Ratification by stockholders of illegal acts of directors cannot be based on a meeting called solely to elect directors at which but few stockholders were present, the wrongdoing directors holding a majority of the stock and it not being shown that the acts complained of were laid before the meeting. McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194.

99. Evidence held to show ratification of agreement by president to assume debt of predecessor corporation. Curtis v. Natalie Anthracite Coal Co., 89 App. Div. 61, 85 N. Y. S. 413.

1. Husbands and brothers. In re Prospect Worsted Mills, 126 F. 1011.

2. Curtin v. Salmon River Hydraulic Gold Min. & Ditch Co., 141 Cal. 308, 74 P. 851.

3. See 1 Curr. L. 776.

4. Knowledge of the president and certain directors of the necessity of election under a contract is sufficient, without notice brought to the board of directors and acted on in a formal way. Paul Steam System Co. v. Paul, 129 F. 757. Notice to section foreman is not notice to a railroad of a claim of right of passage under a bridge. Chicago, etc., R. Co. v. Hammond [Ill.] 71 N. E. 576. Notice to one employed in sweeping and caring for a station is not notice to a carrier of an insult to a passenger, the care of passengers not being part of the employe's duty. Tate v. Illinois Cent. R. Co. [Ky.] 81 S. W. 256. Where the president and general secretary having general charge of the finances of the company check up the accounts of a local secretary including those of a bank to which he has executed notes in settlement of overdrafts, and have knowledge of the overdrafts the corporation is liable. Hennessy Bros. & Evans Co. v. Memphis Nat. Bank [C. C. A.] 129 F. 557. A corporation is charged with notice from the terms of a policy of indemnity insurance that it has in its corporate capacity delivered a statement on which the policy issued and with notice of everything contained and also of statements for renewals. Issaquah Coal Co. v. U. S. Fidelity & Guaranty Co. [C. C. A.] 126 F. 89. Evidence held to sustain instruction as to notice to corporation from agent's knowledge of leaky condition of naphtha tanks. Standard Oil Co. v. Wakefield's Adm'r [Va.] 47 S. E. 830.

5. Fact that officers of one corporation are directors of another is not constructive notice. Iowa Nat. Bank v. Sherman [S. D.] 97 N. W. 12.

6. As bearing on representations securing fidelity insurance of secretary [Ball. Ann. Codes & St. Wash. § 4255]. American Bonding Co. v. Spokane Bldg. & Loan Soc. [C. C. A.] 130 F. 737.

affairs being connected with a contract between the two, which it was the duty of the president to disclose.[7]

A corporation is affected by the notice of overdrafts afforded by a bank passbook returned balanced to an agent, though the agent is dishonest.[8]

(§ 15) *N. Admissions, declarations, and representations of officers and agents.*[9]—Admissions within scope of authority and concerning matters entrusted to an officer or agent are binding on corporation;[10] they must also be with regard to matters within corporate powers.[11] A railroad corporation may controvert admission of its president and general manager as to liability for fire by showing his mistake.[12]

Matters within the knowledge of a deceased agent cannot be testified to by the person dealing with him.[13]

A corporation's employe is within the rule allowing an agent to testify to transactions with a person since deceased.[14]

(§ 15) *O. Delegation of authority by directors.*[15]

(§ 15) *P. Personal liability of officers and agents.*[16]—A promise by the president to pay the expenses of a person negotiating with the corporation in case the negotiations fail is binding on the president individually.[17] An officer purporting to act for the corporation cannot relieve himself from personal liability on the ground that the statute of frauds invalidates an oral agreement to answer for the debt or default of another.[18]

One concealing the fact that he is contracting for a corporation is bound personally, there being no evidence of knowledge on the part of the other party to the contract.[19]

Officers, directors, and stockholders of a corporation are not individually liable for the corporation's breach of contract,[20] or for mere nonfeasance of a duty which the corporation may have owed a third person.[21] Executive officers may rely on a statement of the corporation's affairs made by a bookkeeper and expert accountant and are not liable to a person misled thereby in an action of deceit though it is erroneous.[22] An officer may be personally liable for false representations in the negotiation of corporate bonds.[23] The officer need not be personally connected with

7. Sullivan County R. Co. v. Connecticut River Lumber Co., 76 Conn. 464, 57 A. 287.

8. Hennessy Bros. & Evans Co. v. Memphis Nat. Bank [C. C. A.] 129 F. 557.

9. See 1 Curr. L. 775.

10. White Hall Co. v. Hall [Va.] 46 S. E. 290. Vice-president. Patterson v. White Star Towing Co., 85 N. Y. S. 359. Statements of physician employed by it which aided claim agent in securing release of liability are binding. International & G. N. R. Co. v. Shuford [Tex. Civ. App.] 81 S. W. 1189. President cannot make admission of debt while not engaged in the business of the corporation out of which the indebtedness grew or as part of the res gestae. Robins Min. Co. v. Murdock [Kan.] 77 P. 596. Statements of a corporation foreman after an accident and not res gestae are inadmissible. Parker's Adm'r v. Cumberland Tel. & T. Co., 25 Ky. L. R. 1391, 77 S. W. 1109.

11. Representations by president of bank that a note is genuine which he has procured to be signed in order that another bank may lend money to a third party. Commercial Nat. Bank v. First Nat. Bank [Tex.] 80 S. W. 601.

12. Cheek v. Oak Grove Lumber Co., 134 N. C. 225, 46 S. E. 488.

13. Hoskins v. Rochester Sav. & Loan Ass'n [Mich.] 95 N. W. 566.

14. May testify to instructions. Parker's Adm'r v. Cumberland Tel. & T. Co., 25 Ky. L. R. 1391, 77 S. W. 1109.

15. See ante, § 15J, note 53.

16. See 1 Curr. L. 777.

17. Manary v. Runyon, 43 Or. 495, 73 P. 1028.

18. Groeltz v. Armstrong [Iowa] 99 N. W. 128.

19. Corporation's cash book and ledger are inadmissible though they show item paid plaintiff where payments were made by defendant personally or by checks not those of the corporation. Cook v. Williams, 85 N. Y. S. 1123.

20. Where a telegram is not delivered to the corporation attorney's fees in suits against the stockholders growing out of such nondelivery cannot be recovered against the telegraph company. Western Union Tel. Co. v. Noland [Tex. Civ. App.] 79 S. W. 632.

21. Panney v. Bryant [Neb.] 96 N. W. 1033.

22. In absence of fraudulent intent Worthington v. Herrmann, 89 App. Div. 627, 88 N. Y. S. 76.

23. Stickel v. Atwood [R. I.] 56 A. 687.

the particular transaction if he is the active agent of the fraud which results in the transaction.[24] Independent actions against directors for deceit should not be joined.[25] For precedents as to pleading, see the footnotes.[26]

An indictment of a director under the New Jersey law, punishing the giving of false statements inducing the intrusting of money to a corporation need not aver the particular person who was to be or was influenced by the statement.[27]

Contempt.—Officers may be personally liable for contempt where they fail to obey an order though they are not parties where they have power to compel the corporation to perform.[28]

(§ 15) *Q. Liability of officers for mismanagement.*[29]—Aside from statutory liability which creates a cause of action in favor of creditors as a class, directors of a corporation are not liable to creditors for mere nonfeasance.[30] One extending credit to a corporation cannot complain of prior mismanagement.[31]

The president and secretary are charged with knowledge of all expenditures, to whom made and for what purpose where the business is left entirely within their control.[32] Officers having management may be held for a conversion of the proceeds of a collection and also for a conversion by subordinates of which they had knowledge and acquiesced in.[33] Deposit of corporate money by the treasurer in his own name may be a conversion where the by-laws provide that money shall be drawn only on the order of the president and treasurer.[34]

Money converted by the corporation may be pursued as a trust fund on insolvency without prejudicing an action against officers for damages.[35]

The right of a corporation to enforce a cause of action against a director based on an illegal disposition of its capital is not affected by the fact that enforcement of the liability would benefit the stockholders more than had the directors complied with law.[36]

Though the directors have acted in good faith, an accounting may be had where an act is clearly ultra vires.[37]

A recital that a bond is "secured by all the property and assets of the company" imports a special security. Id.

24. Statements leading to purchase of the corporation's bonds. Stickel v. Atwood [R. I.] 56 A. 687.

25. Complaint held to state two causes of action notwithstanding allegation that both acts were part of a general conspiracy to mislead the public. Warner v. James, 88 App. Div. 567, 85 N. Y. S. 153.

26. Declaration need not aver that corporation had property where it is alleged that money advanced has been wholly lost. Action of deceit against officer for false representation that bonds sold were a lien. Stickel v. Atwood [R. I.] 66 A. 687. Declaration against officer for deceit in sale of bonds need not allege the nature of the security plaintiff was induced to rely on where it appears that he was induced to believe there was some kind of security where in fact there was none. Id. Where a plaintiff alleges he was defrauded by a conspiracy "that defendant corporation by and through its officers and agents did conspire" he may be compelled to restate if the officers referred to were the defendants and to give the names of the agents. Riker v. Erlanger, 87 App. Div. 137, 84 N. Y. S. 69. Complaint held to state a cause of action against directors for deceit in favor of depositors misled by misrepresentations of financial condition. Warner v. James, 88 App. Div. 567, 85 N. Y. S. 153. Order modified. Warner v. James, 87 N. Y. S. 976.

27. P. S. 1898, p. 842 (Crimes Act, § 175). State v. Ware [N. J.] 58 A. 595. On a trial under such act the state cannot show that the business of a co-partnership to which the corporation was the successor was held up as fraudulent by the newspapers. Id.

28. Heinze v. Butte & B. Consol. Min. Co. [C. C. A.] 129 F. 274.

29. See 1 Curr. L. 778.

30. See Banking and Finance for questions peculiar to bank directors. Stone v. Rottman [Mo.] 82 S. W. 76.

31. Commercial Bank of Augusta v. Warthen, 119 Ga. 990, 47 S. E. 536.

32. Stockholder's action for misappropriation. McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194.

33. Sweet v. Montpelier Sav. Bank & Trust Co. [Kan.] 77 P. 538.

34. Sanitary Can Co. v. Mullins, 86 App. Div. 460, 83 N. Y. S. 918.

35. Sweet v. Montpelier Sav. Bank & Trust Co. [Kan.] 77 P. 538.

36. Hutchinson v. Stadler, 86 App. Div. 424, 83 N. Y. S. 509.

37. Turning entire property including good will to the management of a rival company without restrictions for the protection of stockholders. Jacobus v. Diamond Soda Water Mfg. Co., 94 App. Div. 366, 88 N. Y. S. 302.

A trustee may sue to restrain and prevent a threatened and unlawful alienation of the corporation property by his co-trustees.[38] A receiver as representative of the corporation may sue directors for an accounting as to diverted assets.[39] His right to sue for negligence may be lost by laches,[40] and a compromise by him is binding on stockholders who seek to retain its benefits.[41] Where an accounting is sought against wrong-doing directors, a receiver may be appointed though the removal of directors or the election of successors is not demanded.[42]

A bill based on the individual rights of stockholders in the distribution of assets cannot be amended to charge the directors individually for wasted assets, the latter being a cause of action in which the stockholders sue in a representative capacity.[43]

Where directors secure the issuance of bonds to themselves to secure a bona fide debt but in bad faith to effect a sale of the stock and a transfer of the corporate property to a person seeking to acquire control, they may be held liable for damages to nonconsenting stockholders from their acts.[44] Laches cannot be imputed where the action is begun at once after the mortgage is executed.[45] A director may maintain the action though he had the same opportunity to share in the amount realized as the majority holders.[46] Defendants may have ceased to be directors,[47] and participating directors may be removed after appointment of a receiver.[48] Costs should not be imposed on directors not guilty of bad faith.[49]

(§ 15) *R. Dealings between a corporation and the directors or other officers and personal interest in transactions.*[50]—Directors are charged with the utmost good faith in their dealings with the corporation,[51] and their statements on their individual behalf will not be taken as mere opinion;[52] but contracts in which the directors act adversely to the corporation are voidable.[53] The rule prohibiting an offi-

38. Complaint held sufficient under Code Civ. Proc. §§ 1781, 1782. Green v. Compton, 41 Misc. 21, 83 N. Y. S. 588.

39. He being entitled to recover such sum as will pay expenses of receivership. Sale of assets to corporation of which they are sole stockholders. Hays v. Pierson [N. J. Eq.] 58 A. 728.

40. Failure of receiver to proceed against directors for negligence for 10 years and after death and settlement of estates of certain directors held laches though a successor to the receiver moved diligently. Ex parte Baker [S. C.] 45 S. E. 143.

41. Stockholders cannot still maintain an action against directors for mismanagement. Craig v. James, 89 App. Div. 541, 85 N. Y. S. 583.

42. Jacobus v. Diamond Soda Water Mfg. Co., 94 App. Div. 366, 88 N. Y. S. 302.

43. Edwards v. National Window Glass Jobbers' Ass'n [N. J. Eq.] 58 A. 527.

44. Court would be justified in cancelling bonds and mortgage. Jacobus v. Diamond Soda Water Mfg. Co., 94 App. Div. 366, 88 N. Y. S. 302.

45. Within a month. Jacobus v. Diamond Soda Water Mfg. Co., 94 App. Div. 366, 88 N. Y. S. 302.

46. Jacobus v. Diamond Soda Water Mfg. Co., 94 App. Div. 366, 88 N. Y. S. 302.

47. Code Civ. Proc. §§ 1781, 1782. Jacobus v. Diamond Soda Water Mfg. Co., 94 App. Div. 366, 88 N. Y. S. 302.

48, 49. Jacobus v. Diamond Soda Water Mfg. Co., 94 App. Div. 366, 88 N. Y. S. 302.

50. See 1 Curr. L. 778. Purchase of property after title has passed from corporation or at judicial sale, see 1 Curr. L. 780. Secret profits, 1 Curr. L. 779.

51. Fraud in sale of property to corporation. Shawnee Commercial & Sav. Bank Co. v. Miller, 24 Ohio Circ. R. 198. Directors voting on the part of the corporation to have the latter buy property from themselves at an exorbitant price is fraud per se. Id. Other contracts are voidable at the option of the corporation, its creditors or stockholders. Wyman v. Bowman [C. C. A.] 127 F. 257; Veeder v. Horstmann, 85 App. Div. 164, 83 N. Y. S. 99. Where there is no fraud, an officer may act also as agent for the lender in procuring a loan. Buck v. Troy Aqueduct Co. [Vt.] 56 A. 285. Where a fair contract has been entered into with a director which remains executory at insolvency, he is entitled to the same protection as if he had been a stranger. Griffith v. Blackwater Boom & Lumber Co. [W. Va.] 48 S. E. 442.

52. Where a corporation, through its directors, purchases property, it is entitled to the benefit of the independent judgment of its directors, in regard to the value and price to be paid therefor, and a statement made by a director and promoter as to the value of property owned by him is not a mere opinion, but is a statement of fact which the other directors have a right to rely on, even though the other members have equal means of discovering the falsity of the statement. Shawnee Commercial & Sav. Bank Co. v. Miller, 24 Ohio Circ. R. 198.

53. Directors cannot contract with another corporation of which they are directors and which they represent. McLeod v. Lincoln Medical College of Cotner University [Neb.]

cer to profit by a transaction in which his interests are or may be adverse may apply, though the contract when made was valid.[54] A treasurer cannot be allowed to retain profits of a transaction working a fraud on the corporation, though he had no intent to defraud.[55]

Purchase of corporate property.[56]—An officer cannot by a sale to himself cut off a lien on the products of the corporation.[57] An attempted transfer of the property of a Montana corporation to a New York corporation organized by the directors for that purpose is void.[58] Directors contemplating a purchase of stock are without the consent of all parties in interest disqualified to vote to allow a dividend, to allow them to pay for the stock, and to sell the stock to themselves.[59]

Purchase of corporate obligations.[60]—The president cannot purchase note payable to corporation and cause the corporation by himself as president to become indorser to himself individually as trustee.[61] A director under no duty to act for the corporation may purchase a valid claim against it, the rights of creditors not being prejudiced,[62] but officers of a corporation, having peculiar opportunity to know of its condition or those liable as stockholders to creditors or occupying a trust relation of any sort, cannot use their position to escape liability by the purchase of claims to be used as a set-off.[63]

Mortgages.[64]—A mortgage issued to allow persons in control of the corporation to purchase its property on foreclosure may be annulled at the suit of a director.[65]

Compensation secured for services not rendered for the corporation.[66]—One may be connected with a corporation as manager, director, stockholder and employe, and yet be at liberty to employ his talents and ability after the hours of the business day, provided he does not employ them in a way inconsistent with his obligations to or detrimental to the business of the company.[67]

Ratification of dealings.[68]—Where the body of the stockholders have knowledge of the agreement whereby the director makes a profit, it is not invalid.[69]

98 N. W. 672. A contract with a corporation which managers have secretly formed and are largely interested in will be set aside without regard to its fairness, where made without knowledge of the directors and stockholders. Attalla Iron Ore Co. v. Virginia Iron, Coal & Coke Co. [Tenn.] 77 S. W. 774. A trust agreement whereby the proceeds of corporate property are to be applied to the individual debt of an officer is invalid where not executed by the stockholders. Execution by the corporation is insufficient. Hayes v. Klock, 87 App. Div. 624, 84 N. Y. S. 363. Sale by director to corporation is voidable at its instance. Polhemus v. Polbemus, 43 Misc. 141, 88 N. Y. S. 273.

54. A contract of sale made and services performed when a vendee corporation was not in existence, where the interest under the contract was impossible, conflict with his duty as director assumed at the time of sale. Goldshear v. Barron, 42 Misc. 198, 85 N. Y. S. 395.

55. Purchase of obligations and payment to himself from corporate funds, secretly and without authority. The Telegraph v. Lee [Iowa] 98 N. W. 364.

56. Evidence held to show absence of consideration for transfer from corporation to its president. Johnson v. Stebbins-Thompson Realty Co., 177 Mo. 581, 76 S. W. 1021. See 1 Curr. L. 780.

57. He is charged with the corporation's knowledge of the incumbrance. Frellsen v. Strader Cypress Co., 110 La. 877, 34 So. 857.

58. The plan was to allow shareholders in the old company to exchange their stock for new. Forrester v. Boston & M. Consol. Copper & Silver Min. Co. [Kan.] 74 P. 1088.

59. Hartley v. Pioneer Ironworks, 87 App. Div. 107, 84 N. Y. S. 79.

60. See 1 Curr. L. 78.

61. It is immaterial that the transaction be fair, or that the by-laws authorize him to sign as president all instruments in writing and to act as general agent and manager [Civ. Code, §§ 2230, 2234, 2322]. Pacific Vinegar & Pickle Works v. Smith [Cal.] 75 P. 347 [Reported in advance sheets].

62. McIntyre v. Ajax Min. Co. [Utah] 77 P. 613.

63. Nix v. Ellis, 118 Ga. 345, 45 S. E. 404.

64. See 1 Curr. L. 780.

65. Evidence held sufficient [Code Civ. Proc. § 1781, 1782]. Jacobus v. Diamond Soda Water Mfg. Co., 94 App. Div. 366, 88 N. Y. S. 302.

66. See 1 Curr. L. 781.

67. Giveen v. Gans, 91 App. Div. 37, 86 N. Y. S. 450. An officer of a corporation who is also manager of the manufacturing department may, in the absence of claims of creditors, make a valid contract with the sole, other stockholder for the manufacture of cloth invented by the officer and for a large share in the profits thereof. Id.

68. See 1 Curr. L. 782.

Remedies in case of wrongful transactions.[70]—A corporation may attack the title to land bought from trustees for its benefit or the right to corporate funds paid on individual account, where it had not received the consideration, ratified the act, or been guilty of laches.[71] Where the conduct of directors is continuing, laches will not run against the stockholder from the first illegal act.[72] Knowledge of constructive fraud does not cause laches to be imputed against assertion of actual fraud.[73]

§ 16. *Rights and remedies of creditors of corporations. A. The relation of creditors.*[74]—If a money transaction is apparently within the corporate power, the creditor need not look to application of proceeds,[75] likewise an usurious contract is not ultra vires, but may be good in the hands of a bona fide holder.[76] The consideration for a debt may move to the corporation through a contract originally with a stockholder.[77] Proof of a payment to a corporation does not show that the payor is a creditor.[78]

The trust fund doctrine has no application while a corporation is solvent,[79] nor as between the corporation and stockholders claiming distributive rights on dissolution.[80] By repudiation of the trust fund doctrine, the courts intend only that it is not essential that creditors share pro rata.[81]

(§ 16) *B. Rights and remedies of creditors against the corporation.*[82]—This subsection relates only to such remedies and remedial rights as are peculiar to corporations in their relation to creditors.[83]

Voluntary preferences[84] may be made by a solvent corporation,[85] and though insolvent, the corporation has the same right to give preferences that a natural person has unless prohibited by statute;[86] hence a mortgagee without notice may hold his mortgage for the amount loaned at the time.[87] Statutes sometimes forbid it,[88] but apart from statute, fraud is essential to invalidate a transfer of corporate property[89] in view of insolvency.[90] Protest of corporate notes is not conclusive as to

69. Evidence of disclosure to the actual owner of the corporation held sufficient to go to the jury. Goldshear v. Barron, 42 Misc. 198, 85 N. Y. S. 395.

70. See 1 Curr. L. 782.

71. Kessler & Co. v. Ensley Co., 129 F. 397.

72. McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194.

73. Kessler & Co. v. Ensley Co., 129 F. 397. A bank with knowledge that a fund has been wrongfully appropriated to individual purposes by the officers, has no right to apply it to their individual debt. Kelsey v. Bank of Mansfield, 85 App. Div. 334, 83 N. Y. S. 281.

74. See 1 Curr. L. 783.

75. Railroad company empowered to guaranty paper did so and negotiated it and turned proceeds over to primary obligor. Roosevelt v. Nashville, etc., R. Co., 128 F. 465.

76. Fletcher & Sons v. Alpena Circuit Judge [Mich.] 99 N. W. 748.

77. Renewal notes given for those of a stockholder who transferred to the corporation the property for which they were given held supported by consideration. Flour City Nat. Bank v. Shire, 88 App. Div. 401, 84 N. Y. S. 810. Evidence held not to afford notice. Id.

78. Proceeding by stockholder and creditor to establish a claim. Evidence held insufficient to establish a loan rather than a payment for stock. Hollins v. American Union Elec. Co. [N. J. Eq.] 56 A. 1041.

79. New Hampshire Sav. Bank v. Richey [C. C. A.] 121 F. 956.

80. Knott v. Evening Post Co., 124 F. 342.

81. The assets nevertheless cannot be diverted from creditors or to directors. City Nat. Bank v. Goshen Woolen Mills Co. [Ind. App.] 69 N. E. 206.

82. See 1 Curr. L. 783. See, also, 1 Curr. L. 784 for compromise of claims.

83. Compare ante, § 10 and the general practice titles, such as Attachment, 1 Curr. L. 239; Pleading, 2 Curr. L. 1178; Creditor's Suits, 1 Curr. L. 826; Receivers, 2 Curr. L. 1465.

84. See 1 Curr. L. 784.

85. See for statement of rules, Wyman v. Bowman [C. C. A.] 127 F. 257.

86. Beaman v. Stewart [Colo. App.] 74 P. 344. Under the laws of Missouri, an insolvent corporation may in the absence of fraud prefer a bona fide creditor by a deed of trust, and such preference is not invalidated by an assignment on the same day. Smead v. Chandler & Co., 71 Ark. 505, 76 S. W. 1066.

87. P. L. p. 298, Corp. Law, § 64. Regina Music Box Co. v. Otto [N. J. Eq.] 56 A. 715.

88. A bill of sale executed in contemplation of insolvency will be set aside [Act Apr. 21, 1896 (P. L. 1896, p. 277)]. Holmes v. Sheridan [N. J. Err. & App.] 56 A. 308.

89. Evidence held not to show that mortgage of insolvent corporation was a prefer-

insolvency.[91] Suspension of business is not essential in insolvency.[92] Contemplation of the possibility of insolvency on a contingency which does not in fact happen is not contemplation of insolvency.[93] A transfer providing that the trustees shall certify and deliver bonds as ordered by the mortgagor is not fraudulent where the company is solvent and the mortgage is given for the security of a particular creditor,[94] nor is a power to sell after-acquired property.[95] A statute avoiding all conveyances by a corporation within a fixed time before suit by creditors will avoid its assignment for creditors.[96] A transgression of authority by officers making such a preference cannot be raised by the creditors.[97]

Priorities between claims.—All unpreferred creditors stand on an equal footing without regard to diligence under a statute requiring a just and fair distribution among fair and honest creditors.[98] Intervention by petition in the nature of creditor's bills in a receivership in a judgment creditor's suit operates as an equitable levy by the intervening judgment creditors.[99] No priority in particular assets can be gained by a suit which was not efficacious to reach them,[1] but the proceeding may be such as to enable all to benefit from exceptions by part only.[2]

Statutes in certain states give precedence to labor claims, except as against prior contract lien.[3] They can attach only under the terms provided by the statute.[4] Receivership does not defeat the right to a mechanic's lien.[5] Judgments in actions for personal injuries are not entitled to priority over mortgages in funds in the hands of the receiver, where the liability accrued before the receivership.[6] Though a corporation is authorized to engage in the storage of grain, storage receipts incident to its general milling business are not to be regarded as warehouse receipts, giving the holders preference on insolvency.[7]

ence entitling receiver to recover from foreclosure purchaser under Laws 1892, p. 1838, c. 688, § 48. Swan v. Stiles, 87 N. Y. S. 1089.

90. Evidence held to show insolvency. Holmes v. Sheridan [N. J. Err. & App.] 56 A. 308; Miller v. Gourlay [N. J. Eq.] 55 A. 1083.

91. Prima facie evidence. Regina Music Box Co. v. Otto [N. J. Eq.] 56 A. 715.

92. New Jersey statute invalidating mortgages executed by insolvent corporations, save as to actual valuable consideration [Gen. Corp. Act, § 64]. Miller v. Gourlay [N. J. Eq.] 55 A. 1083.

93. Facts held not to show contemplation. Regina Music Box Co. v. Otto [N. J. Eq.] 56 A. 715.

94, 95. Regina Music Box Co. v. Otto [N. J. Eq.] 56 A. 715.

96. Regardless of the intent with which it is made [Code 1883, § 685]. Fisher v. Western Carolina Bank, 132 N. C. 769, 44 S. E. 601.

97. Creditors cannot attack the authority of the president and general management to make an apportionment of its property among creditors. Directors and stockholders only may complain. Beaman v. Stewart [Colo. App.] 74 P. 344.

98. Code Civ. Proc. § 1793. People v. American Loan & Trust Co., 177 N. Y. 231, 69 N. E. 429.

99. Atlantic Trust Co. v. Dana [C. C. A.] 128 F. 209.

1. Thus where an assignment for creditors is avoided by operation of law on bringing of suit, creditors maintaining a suit to set aside such an assignment are not entitled to priority in the assets, since they have not brought in any increase [Code 1883, § 685]. Fisher v. Western Carolina Bank, 132 N. C. 769, 44 S. E. 601.

2. People v. American L. & T. Co., 171 N. Y. 231, 69 N. E. 1105.

3. Rev. St. 1899, § 3167 repeals so much of § 1005 as is in conflict, and gives claims for labor performed within 6 months and not to exceed $100 priority to all save mortgage liens on receivership. Cunningham v. Elm Grove Zinc & Lead Co. [Mo. App.] 76 S. W. 487. Statutes giving precedence to labor claims in earnings in the hands of receivers do not authorize payment from the corpus of the estate in precedence to a mortgage [B. & C. Comp. § 1083]. Security Sav. & Trust Co. v. Goble, etc., R. Co., 44 Or. 370, 75 P. 697.

4. Seizure of corporate property on any process of court or after it is placed in the hands of any receiver, assignee or trustee for the purpose of paying debts, does not include a seizure on a chattel mortgage [Code §§ 4019, 4020]. Wells v. Kelley, 121 Iowa, 577, 96 N. W. 1104.

5. A mechanic's lien is not defeated, though filed after appointment of a receiver, not against him but against the corporation; the claim need not demand priority if the right appear from the facts stated and may be enforced after the property has been sold free of incumbrances. Doty v. Auditorium Pier Co. [N. J. Eq.] 56 A. 720.

6. Not operating expenses. Atlantic Trust Co. v. Dana [C. C. A.] 128 F. 209.

7. Stored wheat was to be priced in the future, was never withdrawn, was not kept separate and was to be used in manufacture of flour [Code Pub. Gen. Laws, art. 14]. Washington County Nat. Bank v. Motter, 97 Md. 545, 55 A. 313.

Assets for creditors.—Creditors cannot recover dividends paid while a corporation is going and solvent.[8] Treasury bonds secured by mortgage are not personal property subject to a materialman's lien.[9]

A judgment creditor has no preferential claim on a sum deposited to indemnify a surety company which had entered into bond on a former appeal in the action in which a reversal was had.[10] The ordinary rule applies that subsequently acquired set-offs will be disallowed.[11] Corporate moneys knowingly taken on individual account may be recovered.[12] Notes paid after the corporation has ceased to do business and after protest are not paid in ordinary course of business, and the money may be recovered,[13] and that party who will have recourse must repay, not the one whose negotiation of the note would, if allowed to stand, discharge all the parties.[14]

A depositor of moneys may become estopped to deny that they are corporate property,[15] but where status of parties has not changed, a stockholder is not estopped by statements to the contrary from showing that a payment was in fact a loan.[16]

Winding up proceedings, assignments, receivership.—Dissolution at the instance of stockholders or others not referable to insolvency as a ground has been discussed in a prior section.[17] Numerous statutes invalidate a general assignment made in insolvency or under like conditions.[18]

The equitable power of a court to sequester the property and wind up the affairs of an insolvent corporation is not affected by the statutory regulations of its power to dissolve a corporation.[19] The statutory remedy in Wisconsin by sequestration is merely a provisional remedy for use in an action which, except as to form, exists independently of the statute, and is in effect a substitute for the common-law writ of sequestration,[20] and statutes providing for creditors' suits for administering the affairs of an insolvent corporation for the benefit of creditors are merely confirmatory of previously existing laws.[21] The Delaware statute in conferring on the chancellor authority, solely on the ground of insolvency, to appoint receivers for insolvent corporations and take possession of and fully distribute their assets, provides a purely equitable procedure for the enforcement of equitable

8. Great Western Min. & Mfg. Co. v. Harris [C. C. A.] 128 F. 321.

9. Code 1887, § 2485. Millhiser Mfg. Co. v. Gallego Mills Co., 101 Va. 579, 44 S. E. 760.

10. Malicki v. Bulkley, 206 Ill. 249, 69 N. E. 87.

11. A bank cannot set off a claim acquired after insolvency as against a deposit of the corporation. Miller v. Audenried [N. J. Eq.] 57 A. 1076.

12. Kelsey v. Bank of Mansfield, 85 App. Div. 334, 83 N. Y. S. 281.

13. Miller v. Audenried [N. J. Eq.] 57 A. 1076. Evidence held to show payments after insolvency. Id.

14. A discounting bank which had received money on notes after insolvency is not liable to repay where the payment also would discharge the contingent liability of an indorser who had not lost its remedy. Payee is liable to receiver. Miller v. Audenried [N. J. Eq.] 57 A. 1076.

15. One making a deposit with a debenture company and allowing it to be advertised as the property of the company is estopped from asserting any claim thereto until satisfaction of the purchasers of debentures who are misled. Christian v. Michigan Debenture Co. [Mich.] 96 N. W. 22.

16. Hollins v. American Union Elec. Co. [N. J. Eq.] 56 A. 1041.

17. See ante, § 12.

18. Facts held to warrant receivership where assignment was made to a director, no dividends had been earned and the corporation was on the verge of insolvency [P. L. 1899, p. 146, § 24]. Gilroy v. Somerville Woolen Mills [N. J. Eq.] 58 A. 651. The bringing of an action within 60 days does so. Fisher v. Western Carolina Bank, 132 N. C. 769, 44 S. E. 601.

19. Authorities that a court has no inherent power to dissolve a corporation do not apply to the question of its power in sequestration and winding up proceedings. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

20. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

21. Rev. St. 1898, § 3216. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

This opinion is a lengthy and exhaustive discussion of the rights and remedies incident to winding up a corporation. It also decides many collateral questions of practice in such proceedings. [Editor].

rights on the part of creditors and stockholders.[22] A statutory proceeding for the appointment of a receiver for an insolvent corporation on suit of creditors is not superseded by the National Bankrupt Act.[23]

Appointment of a receiver is largely within the court's discretion.[24] Though they have judicial power to do so, courts of equity will not generally render a corporation incapable of performing its corporate functions by sequestering its property and taking charge of its affairs.[25] Insolvency coupled with gross mismanagement[26] or fraud warrants[27] receivership.

As a general rule, the creditor must obtain a judgment and exhaust his remedy by execution before seeking a receiver,[28] unless the assets are in danger of loss and the corporation is insolvent.[29] A temporary receiver should not be allowed before final judgment, if not necessary to protect rights.[30] Holders of unmatured claims may procure a receivership when there is such a condition that their claims cannot be met.[31]

That a receiver has been a director and treasurer of the corporation is not sufficient to prevent his appointment or require his removal.[32]

In an action to administer the property of an insolvent corporation and enforce liabilities germane thereto as a trust fund for the payment of its debts, all persons possessing any part of such fund in a trust capacity, in any legitimate sense, and all persons contingently liable or liable only upon principles of equity, for the benefit of creditors as a class, are proper defendants.[33] Persons who have obtained property of an insolvent corporation in fraud of creditors are constructive trustees for creditors, and their liabilities as such may properly be determined in a creditor's suit.[34]

A receiver of an insolvent corporation in a creditors' action to administer its affairs for their benefit is a trustee of corporate assets in the right of the corporation for such creditors, and for the latter in their right as to all liabilities to which

22. Stat. Mar. 25, 1891 (19 Del. Laws, c. 181) applies to general unsecured creditors as well as those whose claims have been legally ascertained. Jones v. Mutual Fidelity Co., 123 F. 506.

23. Acts Apr. 21, 1896; P. L. p. 298, is not superseded by Act July 1, 1898, c. 541, 30 Stat. 544. Singer v. National Bedstead Mfg. Co. [N. J. Eq.] 55 A. 868.

24. United States Shipbuilding Co. v. Conklin [C. C. A.] 126 F. 132. Facts alleged held to authorize receiver of insolvent insurance company which had ceased business, had attempted to transfer assets, and whose officers had been ousted by quo warranto. Youree v. Home Town Mut. Ins. Co. [Mo.] 79 S. W. 175.

25. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

26. United States Shipbuilding Co. v. Conklin [C. C. A.] 126 F. 132.

27. Evidence held sufficient to show fraud in conduct of corporation for sale of debentures. Christian v. Michigan Debenture Co. [Mich.] 96 N. W. 22.

28. Holder of a "tontine diamond contract" has no right to impound the assets in equity before obtaining a judgment on his claim. Mann v. German American Inv. Co. [Neb.] 97 N. W. 600.

29. Petition held sufficient. Kentucky Racing & Breeding Ass'n v. Galbreaith, 25 Ky. L. R. 1212, 77 S. W. 371.

30. Cannot be appointed as of right under Code Civ. Proc. § 1788, on the allegations of the complaint, but such relief should not be awarded until final judgment, except where it satisfactorily appears that it is essential to the protection of the plaintiff's rights. Kieley v. Barron & C. Heating & Power Co., 87 App. Div. 317, 84 N. Y. S. 306.

31. Where a debenture company is insolvent, its scheme found to be fraudulent and impossible of performance and the treasurer claims its debenture fund, debenture holders are entitled to a receiver and an accounting though their debentures have not matured. Christian v. Michigan Debenture Co. [Mich.] 96 N. W. 22.

32. Townsend v. Oneonta, etc., R. Co., 86 App. Div. 604, 13 Am. Cas. 402, 83 N. Y. S. 1034. The attorney general with a person holding a bare majority of the bonds cannot secure a change in the appointment where practically all financially interested have concurred and the receiver has begun an action challenging the title of the objecting bondholders. Id., 84 N. Y. S. 119.

33. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

34. Clark v. Bauner & V. Printing Co., 50 Wis. 416, 7 N. W. 309, held to have been overruled and never followed so far as it holds that persons to whom property of an insolvent has been transferred in fraud of creditors can be made defendants in an administrative suit only for purposes of discovery. See Rev. St. Wis. 1898, § 3228. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

they may properly resort as a class, not enforceable by the corporation.[35] He is the representative of both the corporation, its stockholders and creditors.[36] His duties are wholly administrative in character.[37] If in an action in form to administer the property of an insolvent corporation, collusively brought, a receiver is fraudulently appointed to carry out the designs of the corporation or its officers, such receiver is to be deemed the agent of the adversaries of the creditors.[38] His powers are ordinarily coextensive with the territorial jurisdiction of the court.[39]

A general rule of practice yields to a special statute prescribing procedure in case of involuntary dissolution, whence one may have the benefit of exceptions in which he has not joined.[40] Admission of a claim after time has been sustained as proper discretion.[41] A petition by a creditor for an order directing the receiver to turn over property in the possession of defendant corporation at the time of his appointment will be held until the receiver appears by answer.[42]

A successor to the attorney general, incumbent when receivership in dissolution began, is bound by the acts of his predecessor, and where the predecessor had notice of all steps in the proceedings, the successor cannot have them vacated in the absence of a showing of fraud or that he was misled.[43] If a deputy attorney general has unauthorizedly accepted service, the remedy is motion by the attorney general to vacate the service.[44]

The corporation may confess bankruptcy, notwithstanding a receivership.[45]

The legitimate expenses of a creditor in instituting and prosecuting proceedings for sequestration and administration of an insolvent's property for the benefit of all creditors should be allowed as expenses of such administration,[46] and he should ordinarily recover full costs from the fund recovered, whose suing brought in additional assets,[47] and the receiver's expenses are subordinate to such an one.[48]

35. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. Where in sequestration proceedings it has been found that the assets of an insolvent corporation can in no case discharge the liabilities, and a judgment has been rendered against persons charged with the wrongful appropriation of property applicable to the payment of debts, the insolvent corporation, on an appeal from such judgment, is not an interested adverse party, so as to require service upon it of the notice of appeal, under the statute [Rev. St. 1898, § 3049]. Id.

36. Where a stockholder not having participated in a diversion of assets by the directors is entitled to sue them for an accounting, the receiver may. Hays v. Pierson [N. J. Eq.] 58 A. 728.

37, 38. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

39. A court cannot direct a receiver to sue in a court outside the state in the name of a corporation, except where the court by statute or otherwise is empowered to vest title in the receiver, or where the corporation or the court acting within its powers on behalf of the corporation or as the successor of its officers has authorized such transfer of title. Great Western Min. & Mfg. Co. v. Harris [C. C. A.] 128 F. 321.

40. Under Code Civ. Proc. § 1793, unpreferred creditors who have filed claims are entitled to ratable distribution, though they have not participated in exceptions to the referee's report urged by other unpreferred creditors, notwithstanding Sup. Ct. rule 30. People v. American Loan & Trust Co., 177 N. Y. 467, 69 N. E. 1105.

41. Allowing creditor to file claim with receiver after time fixed in proceedings to wind up a corporation under Gen. St. 1894, c. 76, held not an abuse of discretion. Straw & Ellsworth Mfg. Co. v. Kilbourne Boot & Shoe Co. [Minn.] 100 N. W. 100.

42. Cooper v. Philadelphia Worsted Co. [N. J. Eq.] 57 A. 733.

43. People v. U. S. Mut. Acc. Ass'n, 88 App. Div. 597, 85 N. Y. S. 137.

44. Townsend v. Oneonta, etc., R. Co., 84 N. Y. S. 117.

45. See Bankruptcy, 1 Curr. L. 311. In re Moench & Sons Co., 123 F. 965.

46. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

47. In proceedings for involuntary dissolution, creditors who have succeeded in recovering a disputed fund by appearance through their own attorneys, and have taken an active part in settling a basis of distribution, are entitled to costs of appeal from the fund. People v. American Loan & Trust Co., 177 N. Y. 467, 69 N. E. 1105. Costs of a successful appeal by unsecured creditors from an order retaining personalty within a mortgage lien and keeping it from general assets should not be paid by the receiver from the general assets. Cook v. Anderson Food Co. [N. J. Eq.] 55 A. 1042.

48. Where judgment creditors are made parties to foreclosure and also a subsequently appointed receiver and the creditors and receiver together defeat the mortgage as fraudulent, the attorney's fees of the receiver cannot be paid in priority to the creditors. The creditor's rights are prior to those of the receiver who took subject to existing

(§ 16) *C. Rights of corporate mortgagees and bondholders.*[49]—In so far as the mortgage is viewed as simply a mortgage, the general law applies, and it is not germane to this topic.[50] The law of corporate mortgages which is peculiar to particular kinds of corporations has in like manner been relegated to appropriate titles.[51]

A mortgage by a railroad or like corporation may cover after-acquired property.[52] The statutory proportion of the stockholders must assent to a mortgage[53] at a regularly convened and conducted meeting though the corporation may waive irregularities by retaining proceeds.[54] A mortgage fraudulently executed by an officer de facto is invalid where the mortgagee participated in the fraud.[55] The bondholders must be a party to the fraud to enable stockholders to impeach a mortgage on the ground that they have been fraudulently induced to surrender obligations for preferred stock on a reorganization.[56] A trustee cannot have a mortgage reformed to conform to the resolutions authorizing it where it is not alleged that the stockholders were mistaken in regard to the terms of the mortgage or that they knew anything concerning the resolutions.[57]

The mortgage lien attaches to every property embraced by the terms of the mortgage.[58] The lien of a mortgage on income attaches only to that earned after impounding it by a due assertion of the right on default,[59] and this may be done even pending receiver's custody under a general creditor's suit.[60] Where bondholders are not made parties to receivership, their mortgage lien cannot be displaced by his certificates,[61] nor can permanent improvements by a receiver under order of court to which the mortgagee is not a party be paid from mortgaged income earned after it is impounded by intervention of the mortgagee.[62]

A complaint is insufficient to recover for breach of a covenant for further assurance where there is no allegation of demand.[63]

The bonds.[64]—The corporation in issuing bonds[65] does not create equitable ownership by a mere option,[66] but on completion of an executory contract for the purchase of bonds, the purchasers are owners entitled to accrued interest coupons unless otherwise agreed.[67]

liens. North Side Bank v. John Good Cordage & Mach. Co., 89 N. Y. S. 656.

49. See 1 Curr. L. 789.

50. See **Mortgages,** 2 Curr. L. 905; **Frauds, Statute of,** 2 Curr. L. 108; **Usury** in corporate loans see Usury, 2 Curr. L. 1966. Sale of 6 per cent. bonds below par is usurious. Fletcher & Sons v. Alpena Circuit Judge [Mich.] 99 N. W. 748.

51. See Railroads, 2 Curr. L. 1382, and like titles.

52. Clauses of railroad mortgage held to so provide. Pere Marquette R. Co. v. Graham [Mich.] 99 N. W. 408, citing authorities. See, also, Railroads, 2 Curr. L. 1382.

53. Two-thirds of stock actually issued and owned. Stock Corporation Law, p. 1825, § 2. Stock absorbed by the corporation is not considered. Swan v. Stiles, 87 N. Y. S. 1089. Exchange for new issue, see 1 Curr. L. 790.

54. Big Creek Gap Coal & Iron Co. v. American Loan & Trust Co. [C. C. A.] 127 F. 625.

55. Lamb v. McIntire, 183 Mass. 397, 67 N. E. 320.

56. Big Creek Gap Coal & Iron Co. v. American Loan & Trust Co. [C. C. A.] 127 F. 625.

57. Trust Co. of New York v. Universal Talking Macb. Co., 90 App. Div. 207, 86 N. Y. S. 60.

58. Trust deed held sufficient to cover leaseholds of franchises. Old Colony Trust Co. v. Wichita, 123 F. 762.

59. But the lien is a vested right which cannot be displaced in favor of an unsecured creditor. Atlantic Trust Co. v. Dana [C. C. A.] 128 F. 209.

60. Where a receiver is in possession under a judgment creditor's suit, a mortgage creditor entitled to a lien on the income may effectuate such lien on income subsequently earned, by an intervention without appointment of a new receiver under its bill, or a formal extension of the existing receivership to its suit. Atlantic Trust Co. v. Dana [C. C. A.] 128 F. 209.

61. Code Civ. Proc. §§ 272, 273. Smiley v. Sioux Beet Syrup Co. [Neb.] 99 N. W. 263.

62. Atlantic Trust Co. v. Dana [C. C. A.] 128 F. 209.

63. Trust Co. of New York v. Universal Talking Mach. Co., 90 App. Div. 207, 86 N. Y. S. 60.

64. See 1 Curr. L. 789.

65. See 1 Curr. L. 789 as to validity of pledge by it rather than sale.

66. Patterson v. Farmington St. R. Co., 76 Conn. 628, 57 A. 853.

67. See for construction of underwriting agreement, Hudson Valley R. Co. v. O'Connor, 88 N. Y. S. 742.

Where a corporation under general charter has no power to issue coupon bonds transferable by delivery, transferees take subject to prior equities though bonds be payable "to bearer."[68] A statement in a bond that it is "secured on all the property and assets of the company" is not indefinite so as to call for inquiry.[69] Bondholders may be protected though the actual proceeds was never received and the law warranted issue of bonds only for money, labor, or property.[70] Stipulations for presentation of interest coupons pass with the bonds.[71] Where bonds are registered according to the provisions of the mortgage thus destroying their negotiability, the corporation is liable on payment to a transferee under forged authority;[72] but it may have an action over or provision in a joint judgment to that effect.[73]

A promise by a bondholder to see that enough is realized from sale to meet interest coupons paid on behalf of the corporation is without consideration where the holders of the coupons do not forego any rights in reliance thereon.[74]

Interest will run on coupons without presentation unless the corporation shows that it was prepared to pay on presentation.[75]

Powers and liabilities of trustee.[76]—A trustee represents the bondholders in all legal proceedings carried on by him affecting his trust to which they are not parties.[77] He may bring requisite actions for the protection of the property.[78] Failure on the part of the corporation to refile a corporate mortgage is not ground for an action by the trustee where no duty to file is shown and it is not alleged that by reason of failure in refiling any creditors acquired superior rights.[79] A statement by the president of a trustee corporation that he controlled the bonds is not evidence against the holders nor does it cast on them the burden of showing his lack of authority.[80] The same is true of an agreement not to foreclose.[81]

Default and demand.[82]—Foreclosure may be had for substantial defaults though other defaults alleged are impeached.[83] The trustee need not await complete exhaustion of a guaranty fund provided to meet interest payments.[84] A provision in second mortgage bonds that, on default in the first mortgage, they shall become due and payable immediately, means at the option of the holder.[85]

68. Bonds of water supply corporation organized under General Statutes. Georgetown Water Co. v. Fidelity Trust & Safety Vault Co.'s Trustee, 25 Ky. L. R. 1697, 78 S. W. 113.

69. Stickel v. Atwood [R. I.] 56 A. 687.

70. In re Waterloo Organ Co., 128 F. 517.

71. Abraham v. New Orleans Brew. Ass'n, 110 La. 1012, 35 So. 268.

72. Provisions of bond and mortgage examined. Jennie Clarkson Home v. Chesapeake & O. R. Co., 41 Misc. 214, 87 N. Y. S. 348; Id., 83 N. Y. S. 913.

73. Facts in action for value of bonds held to authorize recovery against both the issuing corporations and the broker, with a judgment over in favor of the corporations against the broker. Jennie Clarkson Home v. Chesapeake & O. R. Co., 41 Misc. 214, 83 N. Y. S. 913; Id., 87 N. Y. S. 348.

74. Morton Trust Co. v. Home Telephone Co. [N. J. Eq.] 57 A. 1020.

75. Bonds stipulated presentation. Abraham & Son v. New Orleans Brew. Ass'n, 110 La. 1012, 35 So. 268.

76. See generally, article Mortgages, 2 Curr. L. 905; also Railroads, § 6, 2 Curr. L. pp. 1407-1410. See 1 Curr. L. 790, n. 88 et seq.

77. Atlantic Trust Co. v. Dana [C. C. A.] 128 F. 209. Hence it is not necessary where bondholders intervene and one dies to have his personal representative made a party. Weed v. Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885.

78. Trustee may enjoin interference by city with wires of mortgaged telephone property where unlawful. Old Colony Trust Co. v. Wichita, 123 F. 762.

79. Trust Company of New York v. Universal Talking Mach. Co., 90 App. Div. 207, 86 N. Y. S. 60.

80, 81. Unity Co. v. Equitable Trust Co., 204 Ill. 596, 68 N. E. 654.

82. See 1 Curr. L. 790, n. 88 et seq.

83. Land Title & Trust Co. v. Asphalt Co. [C. C. A.] 127 F. 1.

84. Where a guaranty fund is provided from which the trustee may draw to meet interest payments on bonds, the corporation being bound to make good such withdrawals within a year, the trustee need not exhaust such fund before foreclosure, the corporation having failed to restore withdrawals already made, but may act according to its judgment for the best intereste of all parties. Land Title & Trust Co. v. Asphalt Co. [C. C. A.] 127 F. 1.

85. Baker v. Consolidated Gas & Elec. Co., 42 Misc. 95, 85 N. Y. S. 1030.

Persons holding bonds as a substitute for other security released have sufficient title to request foreclosure.[86]

Enforcement, intervention by stockholders, and effect of receivership.[87]—Trustees instead of sale under power may institute foreclosure and submit to the court the method of best protecting creditors.[88] An action in equity will not lie against a trustee by the beneficiary for issuance of bonds without requiring deposit to pay certain interest coupons thereon as required in the deed or for misrepresentations as to title.[89] An action of foreclosure against the corporation and to recover dividends paid stockholders from property on which the mortgage was not a lien cannot be joined in the same bill.[90]

A single bondholder may, on default and refusal of the trustee to act, foreclose for the benefit of all bondholders.[91]

Holders of uncanceled coupons which have been paid by moneys advanced to the corporation may enforce the mortgage subject to bondholders' rights,[92] and those of persons receiving the interest without notice.[93] The assignor of a lease to a corporation is not a necessary party to foreclosure of the corporation's mortgage of its interest therein.[94] Possession by the president of the corporation's bonds of a new series, a portion of which was to be exchanged for those of an old series for the purpose of sale, does not evince his ownership making him a necessary party to foreclosure of a trust deed securing the old series.[95] Stock and bondholders may intervene in foreclosure,[96] and fraud on them is a sufficient ground;[97] but fraud is not necessarily to be found from the fact that a committee of stockholders had requested foreclosure pursuant to a plan of reorganization.[98] Stockholders are in the same position as the corporation where they ask no affirmative relief in their own behalf.[99] A bondholder cannot intervene to litigate priority of his bonds over other holders, all bonds being valid as to the corporation,[1] nor is an individual certificate-holder entitled to present proof of his claim where it is presented with others of the same class by a trustee under a trust agreement.[2] In the absence of fraud, the decision of receivers representing all the stockholders not to interpose particular defenses in foreclosure cannot be questioned by individual stockholders.[3]

86. Mortgage held to confer power of sale on trustees without request. Etna Coal & Iron Co. v. Marting Iron & Steel Co. [C. C. A.] 127 F. 32.

87. See Foreclosure of Mortgages on Land, 2 Curr. L. 14. See, also, 1 Curr. L. 790.

88. Trust deed held to authorize such procedure. Land Title & Trust Co. v. Asphalt Co. [C. C. A.] 127 F. 1.

89. Remedy is at law. Sprigg v. Com. Title Ins. & Trust Co., 206 Pa. 548, 56 A. 33.

90. New Hampshire Sav. Bank v. Richey [C. C. A.] 121 F. 956.

91. Baker v. Consolidated Gas & Elec. Co., 42 Misc. 95, 85 N. Y. S. 1030.

92. Where third persons under an arrangement with the corporation have advanced money to pay interest on the bonds and as security are allowed to take up and retain uncanceled the coupons representing such interest presented by the bondholders, they are entitled to enforce the mortgage for their benefit as against the corporation, but not against bondholders who were in ignorance of the arrangement with the corporation. Subsequent notice is ineffective. Where the interest coupons are paid at a bank instead of the corporation's office, the holder may assume that they are paid by the corporation. Morton Trust Co. v. Home Telephone Co. [N. J. Eq.] 57 A. 1020.

93. A coupon holder who presents his coupons to the president of the corporation at its office and is paid has no reason to infer that the coupons are being purchased by the president. Morton Trust Co. v. Home Tel. Co. [N. J. Eq.] 57 A. 1020.

94, 95. Unity Co. v. Equitable Trust Co., 204 Ill. 595, 68 N. E. 654.

96. Central Trust Co. v. Washington County R. Co., 124 F. 813.

97. Allegations of fraud held insufficient to authorize intervention by stockholders. Land Title & Trust Co. v. Asphalt Co. [C. C. A.] 127 F. 1.

98. Land Title & Trust Co. v. Asphalt Co. [C. C. A.] 127 F. 1.

99. Big Creek Gap Coal & Iron Co. v. American Loan & Trust Co. [C. C. A.] 127 F. 625. Foreclosure cannot be prevented on intervention of a stockholder who alleges that default could have been obviated had unpaid instalments due on stock been called. Land Title & Trust Co. v. Asphalt Co. [C. C. A.] 127 F. 1.

1. Matter may be raised on distribution of proceeds. Mercantile Trust Co. v. U. S. Shipbuilding Co., 130 F. 725.

2, 3. Land Title & Trust Co. v. Asphalt Co. [C. C. A.] 127 F. 1.

Invalidity of execution of an answer by defendant corporation in foreclosure is immaterial, where if invalid complainants might have a decree pro confesso, and, being a pleading only, the answer does not prejudice interveners.[4] All the bonds need not be proved before decree of foreclosure.[5]

Receivership at mortgagee's instance.[6]—A mortgagee is not, because of an anticipated inability to continue much longer the conduct of the business, threatened attachments, etc., entitled to have a receiver appointed in an independent action for no other purpose, and have the corporate property sequestered and the business continued until sold by receiver subject to the mortgage.[7] Though there is a proper case for appointment of a receiver, execution purchasers in possession cannot be compelled to operate its property as a receiver without compensation.[8]

Effect of prior receivership.[9]—Where the corporation is not in actual or constructive possession of mortgaged property and the mortgagee is not a party to the appointment of the receiver, the mortgagee may seize the property not in the receiver's possession and covered by his mortgage and the receiver's remedies are those of a private individual.[10] A receiver is not authorized to prevent foreclosure by incurring other indebtedness on the same property.[11]

Sale.[12]—Sale must be fairly conducted[13] without improper delay.[14] The power of sale may be exercised without appraisement where so provided.[15] The trustees may bid under authorization of bondholders,[16] and may be authorized to purchase individually for bondholders.[17] A purchaser under foreclosure of a fraudulent mortgage may require the receiver who vacates the sale to repay him.[18] The mortgagor corporation becomes a stranger to the property after sale.[19]

Distribution of proceeds.—Holders of bonds share in proportion to the face of the bonds,[20] but a holder as pledgee of the corporation whose claim is not paid in full may reach a surplus resulting to the corporation after satisfying a similar pledgee.[21] A pledgee of a bond to which the pledgor, a corporator, held no title, takes so much of the share of the proceeds finally resulting to the corporator as is necessary to discharge the debt secured.[22] After permitting a decree and sale without demand, holders of scrip entitled to exchange it for mortgage bonds cannot demand participation in the fund realized at the sale as if such exchange had

4. Central Trust Co. v. Washington County R. Co., 124 F. 813.

5. Weed v. Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885.

6. See 1 Curr. L. 791.

7. Vila v. Grand Island Elec. Light, Ice & Cold Storage Co. [Neb.] 97 N. W. 613.

8. Georgetown Water Co. v. Fidelity Trust & Safety Vault Co., 25 Ky. L. R. 1739, 78 S. W. 113.

9. See 1 Curr. L. 791.

10. Kidder v. Beavers, 33 Wash. 635, 74 P. 819. Complaint by receiver seeking to enjoin foreclosure held insufficient for failure to aver ownership of corporation. Id.

11. Receiver of railroad corporation held unauthorized to borrow money on certificates made a first lien to secure money to meet interest payments on mortgage bonds preventing foreclosure and against the wishes of the trustee for bondholders. Townsend v. Oneonta, etc., R. Co., 88 App. Div. 208, 84 N. Y. S. 427.

12. See Foreclosure of Mortgages on Land, 2 Curr. L. 14.

13. Evidence held not to establish collusion with trustees invalidating foreclosure. Etna Coal & Iron Co. v. Marting Iron & Steel Co. [C. C. A.] 127 F. 32.

14. Evidence held not to show that sale was invalidated by delay. Etna Coal & Iron Co. v. Marting Iron & Steel Co. [C. C. A.] 127 F. 32.

15. Notwithstanding a defeasance clause. Construing Ohio statutes. Etna Coal & Iron Co. v. Marting Iron & Steel Co. [C. C. A.] 127 F. 32.

16. Enhancing price and competition. Etna Coal & Iron Co. v. Marting Iron & Steel Co. [C. C. A.] 127 F. 32.

17. Etna Coal & Iron Co. v. Marting Iron & Steel Co. [C. C. A.] 127 F. 32.

18. Swan v. Stiles, 87 N. Y. S. 1089.

19. It is not a proper or necessary party to a suit for personal injuries by a servant of a corporation operating the property under lease from the purchaser. Original owner cannot be charged with negligence. Williard v. Spartanburg, etc., R. Co., 124 F. 796.

20. Regardless of the sums which as pledge they secure. Georgetown Water Co. v. Fidelity Trust & Safety Vault Co., 25 Ky. L. R. 1739, 78 S. W. 113.

21, 22. Georgetown Water Co. v. Fidelity Trust & Safety Vault Co., 25 Ky. L. R. 1739, 78 S. W. 113.

been made since their action may have influenced other bondholders in bidding or not bidding at the sale.[23] A purchaser on execution subject to a mortgage may recover from the surplus left after payment of bonds which would otherwise be adjudged the corporation to the extent that betterments placed on the property by the execution purchasers enhanced the price.[24] Indorsement of a portion of bonds entitled to distribution does not make applicable the rule for marshalling two funds.[25]

Attorney's fees.—An agreement to pay attorney's fees in event of nonpayment covers any case in which the employment is necessitated by default in any payment.[26] The amount of such fees is not measured solely by matters presented in the pleadings.[27]

(§ 16) *D. Officers and stockholders as creditors; preferences.*[28]—Directors who are common creditors may secure satisfaction of their claims and are entitled to retain priority of judgments secured by common diligence,[29] and it has been held that an insolvent manufacturing corporation may lawfully prefer bona fide claims due to creditors who are also directors, where the vote of one or more of such directors is required to pass the order or resolution authorizing such preference;[30] but as a general rule, a contract between a corporation and majority directors who are creditors, whereby the directors secure a preference, while not void, is voidable at the option of creditors or stockholders.[31] A director will still be regarded as an officer in determining his right to a preference, where he resigns on the day a trust deed was executed after it was agreed on the same day he should resign and have a preference.[32] Directors held to account as trustees to other creditors as to preferential payments made to them by an insolvent corporation

23. Girard Trust Co. v. Summit Branch Coal Co., 22 Pa. Super. Ct. 495.

24. Though they were removable betterments. Georgetown Water Co. v. Fidelity Trust & Safety Vault Co., 25 Ky. L. R. 1739, 78 S. W. 113.

25. Indorser's liability and right to distribution was neither a liability of common debtor nor equally accessible to creditor. Weed v. Gainesville, etc., R. Co., 119 Ga. 676, 46 S. E. 885.

26. Provision so construed. Abraham v. New Orleans Brew. Ass'n, 110 La. 1012, 35 So. 268.

27. In determining the amount of solicitor's fees, an investigation of the question of ultra vires may be considered though the defense is made by objection to evidence and not by answer. Unity Co. v. Equitable Trust Co., 204 Ill. 595, 68 N. E. 654.

28. See 1 Curr. L. 792.

29. Campau v. Detroit Driving Club [Mich.] 98 N. W. 267.

30. City Nat. Bank v. Goshen Woolen Mills Co. [Ind.] 71 N. E. 662.

NOTE. Corporations, Insolvent—Preferring Creditors—Directors: "The defendant, an insolvent corporation, executed a deed to A., as trustee for certain creditors, and also confessed judgment in favor of certain preferred creditors. The plaintiff sought to cancel and set aside as fraudulent the deed executed to Arnold, and the judgments confessed, and asked for the appointment of a receiver. Held, that an insolvent manufacturing corporation may lawfully prefer bona fide claims due to creditors who are directors and officers of the corporation, though the vote of one or more such directors is required to pass the resolution authorizing such preference. City Nat. Bank v. Goshen Woolen Mills Co. [Ind.] 71 N. E. 652. In this decision, the court follows the precedent laid down in Nappannee Canning Co. v. Reid, Murdock Co., 159 Ind. 614, 69 L. R. A. 199. The holding very well illustrates the late harmful tendency of many courts practically to guarantee directors that their claims against an insolvent corporation shall be paid, disregarding all others. Warfield v. Marshall County Canning Co., 72 Iowa, 666, 34 N. W. 467, 2 Am. St. Rep. 263; Blair v. Illinois Steel Co., 159 Ill. 350, 42 N. E. 805. This is clearly against the former great weight of authority, and is strongly condemned by many writers. See Clark & M. Priv. Corp., § 787; 10 Cyc. 1254; Morawetz, Priv. Corp., § 787; Cook, Corp., § 602. In many decisions, even those courts which have repudiated the trust fund doctrine still maintain that the director of an insolvent corporation stands in a fiduciary relation to the creditor, and can take no undue advantage to himself. Olney v. The Conanicut Land Co., 16 R. I. 597, 27 Am. St. Rep. 767, 5 L. R. A. 361. Yet if the courts continue to change position as rapidly as during the past few years, no further question will be raised as to the power of directors of insolvent corporations to prefer themselves as creditors." 3 Mich. L. R. 73.

31. Wyman v. Bowman [C. C. A.] 127 F. 257. Directors of an insolvent corporation cannot prefer themselves or indebtedness on which a majority or all of them are indorsers. City Nat. Bank v. Goshen Woolen Mills Co. [Ind. App.] 69 N. E. 206.

32. City Nat. Bank v. Goshen Woolen Mills Co. [Ind. App.] 69 N. E. 206.

may share pro rata, they having acted in good faith.[33] They must account for property at its value when received, and not a depreciated value at which it was subsequently sold.[34] A director having obtained a judgment in good faith on a bona fide indebtedness may pursue the remedies afforded by law for the collection thereof.[35]

Rights as general creditors.—A clause providing for repayment to stockholders of a loan "from the first profits" does not indicate that in event of failure of profits repayment will not be made.[36] A director who participated in a mortgage and knew that his claim was included, but refused to come in under it, cannot, suing in the name of his fictitious assignee, call the mortgagee to account.[37]

A director who becomes a guarantor for the corporation, knowing its insolvency, is not entitled to notice of default from the creditor, but is bound to take notice.[38]

(§ 16) *E. Liability of stockholders on account of unpaid subscriptions and remedies.*[39]—At common law, stockholders are liable to creditors for unpaid balance on stock.[40] A provision in the articles of incorporation, making payment of subscription obligatory on the registered stockholders, is not in conflict with a statute imposing the duty on stockholders.[41]

A stockholder is bound by the terms of the certificate of incorporation, though not an original subscriber.[42] He may be liable as such, though there has been no formal subscription,[43] or though his certificate is irregular,[44] or has not yet been issued.[45] An actual bona fide transfer is necessary to release liability.[46] Notice to the corporation to transfer is not in itself sufficient.[47] Charter amendments limiting liability do not affect existing creditors,[48] but subsequent creditors cannot complain of the release of a subscriber.[49] A subscription cannot be so modified by parol as to release the person bound and substitute another.[50] As to creditors, a subscriber cannot say that the subscription was in promotion of a lottery,[51] nor

33, 34. Hill v. Standard Tel. Mfg. Co. [Pa.] 58 A. 147.

35. Judgment held not an unlawful preference on insolvency. Off v. Jack, 204 Ill. 79, 68 N. E. 427.

36. Busby v. Century Gold Min. Co. [Utah] 75 P. 725.

37. Facts held to estop a creditor repudiating an assignment from asserting a claim after sale of the property, close of trusteeship and payment of creditors. Maher v. Haste [Mich.] 98 N. W. 976.

38. Mamerow v. National Lead Co., 206 Ill. 626, 69 N. E. 504.

39. See 1 Curr. L. 793. Who may enforce, see 1 Curr. L. 796.

40. Hurd's Rev. St. 1893, c. 32, §§ 3, 25, is declaratory of the common law. Taylor v. Cummings [C. C. A.] 127 F. 108.

41. P. L. 1896, p. 277, §§ 19, 20. Brown v. Morton [N. J. Law] 58 A. 95.

42. Provision for liability on unpaid subscriptions. Brown v. Morton [N. J. Law] 58 A. 95.

43. Where there has been an acquiescence and acceptance of the benefits of membership. Clevenger v. Moore [N. J. Law] 58 A. 88.

44. Irregularity in that stock certificates are attested by the secretary instead of the treasurer as required by statute. Clevenger v. Moore [N. J. Law] 58 A. 88.

45. A corporation by acceptance of property under an agreement to give interests in capital stock confers on the parties entitled thereto ownership of the shares of capital stock provided, though no scrip was issued. Stockholder's liability until full payment [Stock Corp. Laws, § 54, Laws 1892, p. 1841]. Flour City Nat. Bank v. Shire, 88 App. Div. 401, 84 N. Y. S. 810.

46. Under a provision that after 10 per cent. was paid up the subscribers should be liable only on such shares as should stand of record in their names and only the holders of record should be liable for future assessments, the fact that subscribers direct that certificates be issued in the name of others does not relieve them from liability. American Alkali Co. v. Bean, 125 F. 823.

47. Registered stockholder must surrender his certificate and give the name of the purchaser. Brown v. Morton [N. J. Law] 58 A. 95.

48. Special act making stock full paid and nonassessable after payment of a certain per cent of the face and the holders not liable for assessments for debts thereafter contracted. Williams v. Taylor [Md.] 57 A. 641.

49. Where the stockholders all consent, there are no debts and the subscription was merely to enable incorporation. Scottish Security Co.'s Receiver v. Starks, 25 Ky. L. R. 1722, 78 S. W. 465.

50. That the subscription was as agents for others. American Alkali Co. v. Bean, 125 F. 823.

51. Proposed distribution of lots by drawing. Estoppel to deny subscription. Kreisser v. Ashtabula Gas Light Co., 24 Ohio Circ. R. 313; Reed v. Gold [Va.] 45 S. E. 863.

avail himself of representations as to when the subscription is payable, unless the written subscription is on condition.[52] A debtor who has taken an obligation from directors beyond their authority cannot look to stockholders.[53]

Fictitiously paid up stock.[54]—Issue of stock as full paid and nonassessable does not protect the purchaser.[55] As against creditors, a payment in services must have been in good faith and at a full, fair and bona fide valuation.[56] An honest mistake of judgment is not an overvaluation,[57] and a creditor seeking to show that property was taken at a fraudulent valuation in payment for stock has the burden.[58]

Set-off.[59]—Money advanced the corporation for attorney's fees, no other funds being available, may be set off against an amount due on stock subscription.[60]

Limitations.[61]—Limitations run from the time the stockholder's right accrues,[61] and if he has two remedies, from the time the right to proceed by either one accrues.[63] A creditor's bill and appointment of receiver for a corporation does not toll the statute,[64] though the receiver is given power to collect subscriptions,[65] and injunction of receiver's suit against particular stockholders does not suspend limitations as against others,[66] nor does filing a petition for rehearing suspend operation of decree directing receiver to sue.[67] Fraudulent concealment suspending the statute is not alleged by an averment of the creditor's ignorance of fraudulent acts.[68]

Procedure.[69]—Some statutes provide a remedy in equity,[70] other statutes allow garnishment.[71]

52. Tanner v. Nichols, 25 Ky. L. R. 2191, 80 S. W. 225.

53. An assessment is invalid which is made to meet an indebtedness growing out of an agreement by the directors transferring the corporate assets to another corporation to be administered, agreeing to make good any deficiency between assets and liabilities. Promoters Co-Op. Trust Co. v. Hazen, 21 Pa. Super. Ct. 130.

54. See 1 Curr. L. 793. Estoppel of stockholder, see 1 Curr. L. 794, n. 35, 36.

55. Holders are charged with knowledge where a person of average intelligence would know the facts. Garden City Sand Co. v. American Refuse Crematory Co., 205 Ill. 42, 68 N. E. 724. Evidence held to show knowledge of transferees of "full paid and nonassessable" stock, that it was a fraudulent overvaluation. Id.

56. Evidence held insufficient to show such payment. Clevenger v. Moore [N. J. Law] 58 A. 88.

57. Evidence held to show fraudulent or intentional overvaluation. Flour City Nat. Bank v. Shire, 88 App. Div. 401, 84 N. Y. S. 810. An overvaluation of assets, without intent to defraud, does not render holders of stock issued in lieu thereof as full paid liable to creditors for the discrepancy. Taylor v. Cummings [C. C. A.] 127 F. 108.

58. Action to enforce stockholders' personal liability for debts, where stock has been issued without payment. Payment by assignment of leases of mineral lands. McBride v. Farrington, 131 F. 797. Where there is nothing to show that leases of mineral land were not taken in good faith in payment for stock, a creditor who performs services without investigation of the financial standing of the corporation cannot recover of stockholders on the ground that stock has been issued for which the corporation has not received payment. Under Wisconsin Statute. Id.

59. See 1 Curr. L. 795.

60. Action by receiver. Graebner v. Post, 119 Wis. 392, 96 N. W. 783.

61. Liability of subscriber for unpaid subscriptions held barred. Weed v. Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885. Under Hurd's Rev. St. 1901, c. 32, § 25, limitations run against the stockholder's liability for unpaid subscriptions whenever the corporation ceases business, leaving debts unpaid and not from the time of return of execution against the corporation nulla bona. Parmelee v. Price, 208 Ill. 544, 70 N. E. 725. See 1 Curr. L. 796.

62. It cannot be contended that unpaid subscriptions are in the subscriber's hands a fund for the benefit of creditors, and therefore limitations do not apply. Parmelee v. Price, 208 Ill. 544, 70 N. E. 725.

63. Parmelee v. Price, 208 Ill. 544, 70 N. E. 725.

64. Where it does not seek to recover such subscriptions. Williams v. Taylor [Md.] 57 A. 641.

65. Virginia Act Dec. 22, 1897 [Acts 1897, 1898, p. 16, c. 20]. Williams v. Taylor [Md.] 57 A. 641.

66, 67. Gold v. Paynter, 101 Va. 714, 44 S. E. 920.

68. Parmelee v. Price, 208 Ill. 544, 70 N. E. 725.

69. See 1 Curr. L. 797.

70. Pub. St. 1891, c. 150, § 8; c. 151, § 1. Carter, Rice & Co. v. Samuel Hano Co. [N. H.] 58 A. 243. In Nebraska, the action to recover unpaid subscriptions must be by a bill in equity for the benefit of all creditors and against all stockholders whose subscriptions are unpaid. Reed v. Burg, 2 Neb. Unoff. 117, 96 N. W. 414.

71. The corporation need not have made a call [Code 1896, § 2182]. Enslen v. Nathan, 136 Ala. 412, 34 So. 929. On such garnishment, the face of the subscription fixes the subscriber's liability, where a privilege to discharge in property or services is not exercised. Id.

The corporation is a necessary party.[72]

The creditor has burden of establishing nonpayment.[73]

A statutory remedy to compel payment is not exclusive, and receiver may be sought,[74] refusal of the corporate officers to collect subscriptions being ordinarily good ground for a receiver.[75] A suit in equity may be brought by the receiver to avoid multiplicity of suits, where defenses are all on the same ground.[76] Under some statutes, he may proceed by motion for judgment.[77]

A transaction by which the corporation received the amount of an assessment from its directors and applied it to creditors will not be avoided in equity to allow the receiver to collect the assessment from original subscribers, unless the benefits are surrendered.[78] The validity of the assessment cannot be questioned collaterally.[79] Excess collected should be refunded.[80]

The trustee in bankruptcy.[81]—On bankruptcy, the trustee takes the corporation's right to enforce unpaid subscriptions, though the nonpayment is contested.[82] An order of restitution will not be awarded a trustee in bankruptcy against a solvent person to secure the return of money paid him by the corporation under mandamus proceedings which have been reversed.[83]

(§ 16) *F. Personal liability of stockholder for debts of corporation, and remedies.*[84]—Constitutional and statutory stockholder's liability cannot be waived by agreement.[85] To relieve stockholders from personal liability for corporate debts, statutory provisions sometimes require the filing of affidavits as to subscription and payment of stock.[86] Creditors may enforce this liability though they have dealt with the corporation as such.[87]

Persons liable as stockholders.[88]—A person cannot be held as a stockholder because his name has been entered on the stock book without his consent.[89] A corporation being a sole stockholder is nevertheless subject to double liability.[90] The

72. Commercial Bank of Augusta v. Warthen, 119 Ga. 990, 47 S. E. 536.

73. Evidence held insufficient [Code, § 1631]. Merrill v. Timbrell, 123 Iowa, 375, 98 N. W. 879. Evidence held to show that stock was secured by transfer from a holder and not as treasury stock without payment. Garden City Sand Co. v. American Refuse Crematory, 205 Ill. 42, 68 N. E. 724.

74. Rev. St. 1899, §§ 1338, 1339. Lamont v. Lamont Crystallized Egg Co. [Mo. App.] 81 S. W. 1269.

75. Rev. St. 1899, §§ 1338, 1339. Lamont v. Lamont Crystallized Egg Co. [Mo. App.] 81 S. W. 1269; Carter, Rice & Co. v. Samuel Hano Co. [N. H.] 58 A. 243.

76. To cancel assignments and releases of assessments on capital stock for fraud and to collect. Wyman v. Bowman [C. C. A.] 127 F. 257.

77. On motion for judgment by the receiver, delinquent stockholders cannot urge errors in the allowance of claims. Acts Gen. Assem. 1897-98, p. 16, c. 20. The matter must he determined in chancery. Reed v. Gold [Va.] 45 S. E. 868.

78. Wyman v. Bowman [C. C. A.] 127 F. 257.

79. Suit by trustee in bankruptcy in state court to recover amount due on stock subscription pursuant to an order of the United States district court, the decree of which recited notice to defendant. Clevenger v. Moore [N. J. Law] 58 A. 88.

80. In re New Iberia Cotton Mills Co. [La.] 37 So. 3.

81. See 1 Curr. L. 799.

82. Commercial Bank of Augusta v. Warthen, 119 Ga. 990, 47 S. E. 536. A trustee in bankruptcy may proceed at law in a state court to collect a stockholder's quota of an assessment ordered in proceedings in equity to wind up an insolvent corporation. Clevenger v. Moore [N. J. Law] 58 A. 88.

83. Money paid on subscription to stock which has heen returned to the subscriber. State v. Horton [Neb.] 97 N. W. 434.

84. See 1 Curr. L. 799. For what debts liable see 1 Curr. L. 800. What law governs 1 Curr. L. 799. Laws 1899, c. 272, p. 315, as to stockholder's liability, is binding on a previously incorporated company in Minnesota (Following state court). Robinson v. Brown, 126 F. 429.

85. Provision in mortgage bonds. Kreisser v. Ashtabula Gaslight Co., 24 Ohio Circ. R. 313.

86. Under Rev. St. 1892, § 2127, affidavits made before but filed after letters patent issue are not sufficient. Heinberg Bros. v. Thompson [Fla.] 37 So. 71.

87. Heinberg Bros. v. Thompson [Fla.] 37 So. 71.

88. See 1 Curr. L. 801.

89. Such entries are not evidence of ownership in a suit to enforce stockholder's liability without evidence of knowledge or assertion of ownership. Foote v. Anderson [C C. A.] 123 F. 659.

90. Gamewell Fire Alarm Tel. Co. v. Fire & Police Tel. Co., 25 Ky. L. R. 1010, 76 S. W. 862.

authorities are variant as to how far a direction to a proper officer to transfer stock which is not acted on by him will release the transferror.[91] A pledgee's failure to give notice for retransfer of stock to the pledgor on the corporate books will not impose liability on him as owner toward subsequent creditors.[92]

Ascertainment of corporate liability and exhaustion of remedy against it.—The corporation must be seasonably sued[93] and liability fixed, hence proceedings to enforce a foreign stockholder's liability cannot be begun until the liability has been ascertained in the state of the corporation's domicile.[94] Stockholders are concluded by such ascertainment though not parties,[95] but it has been held that an assessment in proceedings to enforce liability of stockholders of state banks under Gen. St. Minn. 1878, c. 33, § 21, Laws Minn. 1899, p. 315, c. 272, will not be enforced as a judgment in Wisconsin on a citizen not subject to the jurisdiction of the Minnesota court.[96]

It is sufficient to allege that the creditor has exhausted all efficient remedies.[97]

Limitations.[98]—The liability is within the statute[99] though prosecuted by a special statutory remedy.[1] Where the corporate obligation is on guaranty, limitations do not run against the stockholder's liability until the guaranty matures,[2] and the liability does not, in any event, accrue until the corporate assets are exhausted.[3] As against a plea of limitations, plaintiff may be permitted to show that part of the indebtedness merged in a judgment with other claims matured at such date that it is not barred.[4] The commencement of an action to enforce stockholder's liability does not stop the running of limitations as against those not summoned,[5] nor does pursuit of an alternative remedy toll limitations as to another.[6]

Parties.[7]—The receiver may sue to enforce statutory liability.[8] A single creditor cannot sue for failure to publish notice of debts.[9] All the stockholders need not be parties.[10]

91. Held released under Gen. St. 1894, § 2501. Hunt v. Seeger [Minn.] 98 N. W. 91. Code of Laws 1904, § 1894. White v. Commercial & Farmers' Bank [S. C.] 45 S. E. 94.

92. Civ. Code Ga. § 1888, act 1894, p. 76; Code 1882, § 1496. Brunswick Terminal Co. v. National Bank, 192 U. S. 386, 48 Law. Ed. 491.

93. Under Stock Corp. Law, § 55 (Laws 1892, p. 1841, c. 688), the bringing of an action within two years against a business corporation is a condition precedent to enforcement of stockholder's liability under Business Corp. Law, § 5 (Laws 1892, p. 2044, c. 691). Adams v. Slingerland, 87 App. Div. 312, 84 N. Y. S. 323.

94. Rhode Island court refused to entertain a bill by creditors of a Colorado corporation, under 1 Mills' Ann. St. Colo. § 533, such statute contemplating an action against all stockholders to establish a pro rata liability. Miller v. Smith [R. I.] 58 A. 634.

95. So that the receiver after ascertainment may sue foreign stockholders at law where they are domiciled. King v. Cochran [Vt.] 56 A. 657. A judgment against the corporation is admissible against stockholders [Comp. Laws 1897, § 7055]. Wineman v. Fisher [Mich.] 98 N. W. 404.

96. Hunt v. Whewell [Wis.] 99 N. W. 599.

97. Complaint held sufficient under Gen. Laws 1896, c. 180, § 22, without averment of return of execution unsatisfied. Andrews v. O'Reilly [R. I.] 55 A. 688.

98. See 1 Curr. L. 802.

99. Individual liability of a stockholder for his proportion of corporate debt is barred as other liabilities created by statute in three years [Code Civ. Proc. § 338]. Jones v. Goldtree Bros. Co. [Cal.] 77 P. 939.

1. A proceeding for execution against the stockholder under the Kansas statute is a civil action permitting a plea of limitations. Crissey v. Morrill [C. C. A.] 125 F. 878.

2. Gen. Statutes Kansas construed. Crissey v. Morrill [C. C. A.] 125 F. 878.

3. Under Const. Neb. art. 11b, § 4. Limitations do not run until corporate property is exhausted. Wyman v. Bowman [C. C. A.] 127 F. 257.

4. Crissey v. Morrill [C. C. A.] 125 F. 878.

5. Marriott v. C. S. & H. R. Co., 2 Ohio N. P. (N. S.) 231.

6. The Federal courts have held that under the Kansas statutes limitations are not suspended while the creditor is obtaining judgment as a precedent to charging a stockholder, where the corporation has suspended business, giving the creditor a right under another action to proceed before judgment against the corporation [Kansas Gen. St. 1899, c. 23, §§ 32, 44]. Whitman v. Atkinson [C. C. A.] 130 F. 759.

7. See 1 Curr. L. 802.

8. Creditors may be joined as parties plaintiff [Pub. Laws 1897, p. 473, c. 298]. Smathers v. Western Carolina Bank, 135 N. C. 410, 47 S. E. 893.

9. A single creditor cannot proceed at law against a part of the stockholders of an insolvent corporation for violation of a statute requiring notice of debts to be published an-

Defenses.[11]—As a general rule, an indebtedness from the corporation cannot be set off,[12] but where a nonresident creditor who owns stock seeks to subject the assets to payment of debts and to have a receiver, the plaintiff's liability as a stockholder may be asserted by counter claim.[13] A release which a stockholder obtained from the creditors by reason of his payments is not a defense except to the amount actually credited on the creditor's judgment by reason of such payment.[14] Where a compromise has been effected with certain creditors, the stockholders having taken assignments of the claims are entitled to have them pro rata with the claim of a nonassenting creditor.[15] A discharge in bankruptcy releases the stockholder where the decree fixing his liability had been entered in another state in an action to which he was not a party prior to the adjudication in bankruptcy,[16] but it is held that the burden is on a stockholder seeking to urge a discharge in bankruptcy as against liability for a corporate debt to show knowledge or notice to the creditor of the bankruptcy proceedings.[17]

Where the receiver has been authorized to levy an assessment, its necessity cannot be questioned.[18]

Procedure.[19]

Judgment.[20]—Judgment may be rendered in favor of creditors who have not filed written pleadings, where all are in general interest, are too numerous to be practicably allowed to appear and they have been enjoined by plaintiff prosecuting other actions and representatives appointed to appear for them and their claims have been filed.[21]

Interest does not run on individual liability of stockholder until he has notice that he is held for a specific corporate obligation.[22]

(§ 16) *G. Rights and remedies of creditors against directors and other officers.*[23]—One not a creditor in good faith cannot hold a director to account.[24]

Directors do not become liable to an action at law by other creditors because on insolvency they advise certain creditors to take steps within their legal rights which lead to a preference.[25] Directors may by special charter be removed from the operation of a general statute as to liability for excessive debt.[26] A stock-

nually. Comp. St. 1903, c. 16, § 136. Action is in equity by receiver for all creditors or by creditor in their behalf against all stockholders. Emanuel v. Barnard [Neb.] 99 N. W. 666.

10. Civ. Code, § 28. Gamewell Fire Alarm Tel. Co. v. Fire & Police Tel. Co., 25 Ky. L. R. 1010, 76 S. W. 862.

11. See 1 Curr. L. 803.

12. In proceedings under the Kansas statute by motion for execution. Crissey v. Morrill [C. C. A.] 125 F. 878. Under the Minnesota statute [Laws 1899, p. 315, c. 272]. Robinson v. Brown, 126 F. 429.

13. Ky. St. 1899, § 647; Civ. Code, § 96. Gamewell Fire Alarm Tel. Co. v. Fire & Police Tel. Co., 25 Ky. L. R. 1010, 76 S. W. 862.

14. Merrill v. Prescott, 67 Kan. 767, 74 P. 259.

15. Covington Stone & Sand Co. v. Rosedale Electric Light Jockey Club, 25 Ky. L. R. 963, 76 S. W. 606. Individual claims against the corporation prior to those of the creditors cannot pro rate where the management has been a fraud on creditors. Id.

16. See Bankruptcy, 1 Curr. L. 311. Dight v. Chapman, 44 Or. 265, 76 P. 585.

17. Act July 1, 1898, c. 541, § 17, 30 Stat. 550. Wineman v. Fisher [Mich.] 98 N. W. 404.

18. Laws Minn. 1899, c. 272, p. 316. Robinson v. Brown, 126 F. 429.

19. See 1 Curr. L. 803. Declaration in assumpsit against stockholders for labor performed held sufficient under Comp. Laws 1897, § 7065. Wineman v. Fisher [Mich.] 98 N. W. 404. Allegation in action by foreign receiver to enforce stockholder's liability held sufficient to show title and that the liability was an asset of the corporation. King v. Cochran [Vt.] 56 A. 667.

20. See Appeal and Review, 3 Curr. L. 167, for jurisdictional amount in suit to enforce stockholder's liability.

21. Gamewell Fire Alarm Tel. Co. v. Fire & Police Tel. Co., 25 Ky. L. R. 1010, 76 S. W. 862.

22. Manley v. Mayer [Kan.] 75 P. 650.

23. See 1 Curr. L. 804. Debts contracted before record of certificate, see 1 Curr. L. 804. Special charter liabilities. Id. Loans to shareholders, 1 Curr. L. 805. Payment of unlawful dividends, 1 Curr. L. 806. False certificate of payment of stock. Id.

24. Assignment of claim to plaintiff not bona fide. Maher v. Hastie [Mich.] 98 N. W. 976.

25. Emanuel v. Barnard [Neb.] 99 N. W. 666.

26. A director of a corporation organized under special charter Acts 1862, p. 87, No.

holder may have the benefit of a statutory personal liability of directors for payment of dividends not earned.[27] They may become liable under statutes requiring periodical reports.[28] Shareholders cannot to the exclusion of subsequent creditors use the notes and pledge the assets of the corporation toward paying their individual debts contracted in the purchase from others of such shares.[29]

Where a right to hold a director personally for corporate debts exists only by virtue of statute, the remedy prescribed must be followed.[30] Claims against a defendant in two capacities under two statutory provisions cannot be joined.[31] The limitations fixed in a statute imposing personal liability on directors failing to make annual reports are applicable in any jurisdiction where the liability is sought to be enforced.[32]

CORPSES AND BURIAL.[33]

Funeral expenses.—A surviving husband, being under legal obligation to bury the corpse of his deceased wife, he and not her estate is primarily liable for her funeral expenses.[34] But it was held that a husband, if compelled to pay such expenses, might reimburse himself out of his wife's separate estate, if she left any such estate.[35]

Burials and removals.—The paramount right to control the burial of the dead is first, in the surviving husband or widow, and second, if there is no surviving husband or widow, in the next of kin in the order of their relation to the decedent.[36] The same rules apply to a removal, with the presumption against removal growing stronger with the remoteness of connection with the decedent.[37] The rules may be modified in their application by the wishes of the decedent or by special circumstances.[38] The burial lot belongs to heirs and will not by implication be carried into a devisee whence it may be alienated.[39] The personal representative has no rights as against heirs to specify what inscription shall be on the grave stone, though he has purchased it by order of court.[40] It is the general rule that after dedication of land to the public for use as a cemetery, the owner cannot resume pos-

61, imposing personal liability for debts exceeding two-thirds of paid up capital, is not liable for debts contracted after the passage of Rev. St. 1894, V. S. 5463, which had the effect of removing specially chartered corporations from the operation of the general law. Rice & Co. v. Kennedy [Vt.] 57 A. 971.

27. Though the remedy is reserved to the corporation and creditors [Gen. Corp. Act, § 30, P. L. 1896, p. 287]. Schoenfeld v. American Can. Co. [N. J. Eq.] 55 A. 1044.

28. As to application of particular statutes of limitations to an action against directors for failure to file reports [Gen. St. Conn. 1888, § 1379; Comp. St. Mont. § 45; Civ. Code Mont. § 515, subd. 1, § 3482]. Davis v. Mills [C. C. A.] 121 F. 703.

29. In re Haas Co. [C. C. A.] 131 F. 232. Where documents referred to in certificate of indebtedness indicate that the purpose was an unlawful guaranty of dividends, they are subject to the same defenses in the hands of a holder for value that they were in the hands of the original holder. And the corporation is not estopped by the fact that it accepts the certificates from the transferee and issues him new ones in his own name. National Salt Co. v. Ingraham [C. C. A.] 122 F. 40.

30. Suit in equity will not lie under Gen. Laws 1896, c. 180. § 21 provides an action in case. Legg & Co. v. Dewing [R. I.] 57 A. 373.

31. As officer or stockholder under Gen. Laws 1896, c. 180, §§ 1-3, and as director under § 15. Legg & Co. v. Dewing [R. I.] 57 A. 373.

32. Mont. Code Civ. Proc. §§ 554, 451. Davis v. Mills, 194 U. S. 451, 48 Law. Ed. 1067.

33. Liability of decedent's estate, see Estates of Decedents, 1 Curr. L. 1090.

34. Kenyon v. Brightwell [Ga.] 48 S. E. 124.

35. Wife died while living separate from husband, leaving insurance for husband. He was liable to undertaker requested to act by a friend of deceased. Watkins v. Brown, 89 App. Div. 193, 85 N. Y. S. 820.

36. General doctrine of property rights in corpses discussed and authorities cited. Pettigrew v. Pettigrew, 207 Pa. 313, 56 A. 878.

37. Pettigrew v. Pettigrew, 207 Pa. 313, 56 A. 878.

38. Under the circumstances of this case, the widow was permitted to remove the body of her deceased husband to a grave beside their daughter's. Pettigrew v. Pettigrew, 207 Pa. 313, 56 A. 878.

39. In re Waldron [R. I.] 58 A. 453, discussing rights of property in places of sepulture with authorities cited.

40. McGann v. McGann [R. I.] 58 A. 458.

session and remove bodies interred therein, although he has received no consideration and interments have been made merely by his consent.[41] But when the circumstances are such as to take a case outside the principle[42] on which the rule is based, such removal may be permitted.[43] An ordinance making it unlawful to bury the dead body of any person within the city limits is not in conflict with provisions of the penal code devolving the duty of burial on certain persons therein specified.[44] Where, in an action to decide the custody of a body for burial, an injunction pendente lite is issued to restrain one party from interfering, the injunction should be continued, without an order awarding custody, until the end of the action.[45]

COSTS.

§ 1. Scope, Nature and Definition (940).
§ 2. Power to Award Costs (940).
§ 3. Security for Costs and Proceedings in Forma Panperis (940).
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C. Justice's Courts and Municipal Courts (948).
§ 7. Amount and Items; After Trial (948).
§ 8. Procedure to Tax Costs (952).
§ 9. Enforcement and Payment of the Cost Judgment (954).

§ 1. *Scope, nature and definition.*—Costs as allowed by statute in modern practice are the amount allowed the prevailing party in lieu of the common-law fines. The term is to be distinguished from "disbursements," which includes the amounts paid out by the prevailing party for certain purposes incident to the suit.[1]

§ 2. *Power to award costs.*[2]—The right to costs is created by statute,[3] none being allowed at common law,[4] unless recoverable as damages.[5] Statutes imposing costs do not deny "justice freely and without being obliged to purchase it."[6]

§ 3. *Security for costs and proceeding in forma pauperis.*[7]—Statutes requiring security for costs are not class legislation merely because it is more burden-

41. Little v. Presbyterian Church [S. C.] 47 S. E. 974.

42. There is no right of property in a dead body in the ordinary sense of the word "property," but the law recognizes a family right which descends from generation to generation, to protect the bodies of deceased relatives from indignity, and the ground in which they are interred from unnecessary invasion or disturbance. This is based on the principle that when the sentiments clustering round the graves of the dead have become associated and connected with a particular spot of ground by the invitation or consent of the owner, he shall not for any secular purpose disturb them. Little v. Presbyterian Church [S. C.] 47 S. E. 974.

43. Old church cemetery neglected, business had encroached on it, a railway ran near, and most of the members intended to remove their dead, as the church was to be sold. Little v. Presbyterian Church [S. C.] 47 S. E. 974.

44. Pen. Code, §§ 292, 297. Odd Fellows' Cemetery Ass'n v. San Francisco, 140 Cal. 226, 73 P. 987.

45. Butler v. Butler, 91 App. Div. 327, 86 N. Y. S. 586.

1. Cyc. Law Dict. 211.

As used in determining the scope of this article, however, it includes all statutory allowances to parties or their attorneys, etc., and allowances for disbursements in the action and allowance of statutory sums as "costs."

2. See 1 Curr. L. 808.

3. Spencer v. Mungus, 28 Mont. 357, 72 P. 663; McCormick v. Shea, 42 Misc. 555, 85 N. Y. S. 1029. Court has no power to award an attorney's fee in a taxpayer's action to restrain the issue of school warrants, in the absence of statute. Criswell v. Board of Directors of Everett School Dist. No. 24, 34 Wash. 420, 75 P. 984.

4. In the absence of statute, no costs were recoverable in a suit on an Illinois judgment in Missouri. Price v. Clevenger, 99 Mo. App. 536, 74 S. W. 894.

5. Demurrer properly overruled to paragraph of petition demanding attorney's fees because defendant had been stubbornly litigious. Macon, etc., R. Co. v. Stewart [Ga.] 48 S. E. 354.

6. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

7. See 1 Curr. L. 809.

some for some persons than for others to comply therewith.[8] A nonresident is usually required to give security for costs, unless he is suing by his next friend who is a resident,[9] or he is not named as a party to the action.[10] Security for costs to be approved by the clerk is commonly required in quo warranto,[11] and actions against officers,[12] and sometimes the court has discretion to require it in actions in which administrators,[13] or trustees in bankruptcy[14] are parties, or where it is reasonable and proper.[15] It can never be required of the United States or of any one acting under its direction.[16] Application for security for costs should be made promptly[17] before answer,[18] and if made later it may still be granted[19] if good cause exists[20] and no prejudice is shown.[21] If security for costs is voluntarily furnished, the surety may be questioned,[22] but additional security cannot be required.[23] Failure to furnish security will result in a nonsuit,[24] but irregularities in the order or bond may be disregarded,[25] or may be ordered corrected,[26] and are immaterial if plaintiff wins.[27] The undertaking required in replevin includes costs.[28] A party or administrator who is not a nonresident,[29] who files a pauper's oath which is accepted by the court,[30] will not be required to give security for costs,[31] or to pay the costs of a first action which was dismissed,[32] as a condition

8. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

9. The next friend is responsible for costs, and so security will not be required. Rauche v. Blumenthal [Del. Super.] 57 A. 368.

10. Attorney owning part of a cause of action by transfer before suit. International & G. N. R. Co. v. Reeves [Tex. Civ. App.] 79 S. W. 1099.

11. Code 1896, § 3421. Little v. State, 137 Ala. 640, 34 So. 620.

12. Assignee for benefit of creditors is not an officer. Ringenoldus v. Abresch, 119 Wis. 410, 96 N. W. 817.

13. Refusal to require held proper. Kelly v. Madigan, 88 App. Div. 138, 84 N. Y. S. 331.

14. Held discretionary. Cole v. Manson, 42 Misc. 149, 85 N. Y. S. 1011.

15. That in justice's court from which the case was appealed security was required is not conclusive of propriety. Simanek v. Nemetz [Wis.] 97 N. W. 508.

16. Not of a receiver of a national bank. Pepper v. Fidelity & Casualty Co., 125 F. 822.

17. Where defendant was first sued in a representative capacity and then by an amended summons and complaint personally, and defendant obtained an order staying the proceedings under the first, he was not precluded from moving for security for costs because of plaintiff's nonresidence. Boyd v. United States Mortg. & Trust Co., 89 App. Div. 615, 85 N. Y. S. 589.

18. Ampel v. Seifert, 86 N. Y. S. 17.

19. Plaintiffs were nonresidents and financially irresponsible. De Stefano v. Brown, 84 N. Y. S. 165.

20. Where application is because of nonresidence, it should be shown that party became a nonresident after the suit was started. Vohs v. Shorthill Co. [Iowa] 100 N. W. 495.

21. O'Brien v. Hearn, 125 F. 95.

22. Where defendant moved for security, and learning that one was on file, stipulated that the order therefor might be vacated, he did not waive his right to question the sufficiency of the surety. Ferroni v. Holbrook, C & D. Contracting Co., 86 N. Y. S. 82.

23. In a suit against an executrix, the court has no authority to order "additional" security for costs, where the first was voluntarily given. Dunk v. Dunk, 88 App. Div. 297, 85 N. Y. S. 25. Where nonresident's undertaking for costs was given on notice of motion, but without an order requiring it, under Code, § 3276, an additional undertaking cannot be required. Id., 177 N. Y. 264, 69 N. E. 539.

24. Taylor v. Dempsey, 66 S. C. 513, 45 S. E. 78.

25. Bond for costs is good, though the name of a city which was a nominal party was omitted from the title. McGee v. Smith [Mo. App.] 78 S. W. 305.

26. O'Connor v. Walsh, 83 App. Div. 179, 82 N. Y. S. 499.

27. International & G. N. R. Co. v. Reeves [Tex. Civ. App.] 79 S. W. 1099.

28. Campbell v. Laue, 2 Neb. Unoff. 63, 95 N. W. 1043.

29. Though an administrator may sue in forma pauperis, a nonresident cannot sue in forma pauperis, though he qualifies as an administrator, and a foreign notary cannot administer the pauper's oath. Fawcett v. Chicago, etc., R. Co. [Tenn.] 81 S. W. 839.

30. The filing of affidavit and indorsement of judge is not sufficient to enable a party to prosecute a writ of error without bond, as fact must be proved before the court in session. Sidoti v. Rapid Transit R. Co. [Tex. Civ. App.] 79 S. W. 326.

31. Bond for costs cannot be required in an election contest, where contestant filed a pauper's oath. Bailey v. Fly [Tex.] 79 S. W. 290. Where an infant wishes to sue as a poor person, he should make the petition to be verified by his guardian. Cohen v. Hautcharow, 84 N. Y. S. 573.

32. Camp v. Chicago Great Western R. Co. [Iowa] 99 N. W. 735. It is within discretion of court to allow a plaintiff to proceed in a second action, where she has not paid the costs of a first which was dismissed; and though the court made an order requiring plaintiff as a nonresident to give security for costs, it may permit her to sue as a poor person. Carrier v. Missouri Pac. R. Co., 175 Mo. 470, 74 S. W. 1002.

of continuing a second one, provided it was filed at the commencement.[33] But if the record shows that he or his guardian has property,[34] or that the statements in regard thereto are inconsistent,[35] he will not be allowed to sue as a poor person; but it was subsequently held in New York that an infant could sue as a poor person, though his guardian had property.[36] If the oath is untrue[37] or the action frivolous, the action will be dismissed.[38] In an action in forma pauperis, costs are paid to the attorney.[39] Criminal appeals cannot be prosecuted in forma pauperis in the Federal courts,[40] but may in the courts of some states.[41]

§ 4. *To whom and against whom the award should be made. A. On termination of actions.*[42]—Costs, including those incurred in previous trials[43] or appeals,[44] are, in the absence of error on his part,[45] awarded to the prevailing party[46] and not to his attorney,[47] on the final judgment,[48] though the other party may have actually benefited the prevailing party by his conduct,[49] or have established his own counterclaims,[50] or may have a contract right to recover the costs from another.[51]

33. Where first case was nonsuited and costs not paid, a plea in abatement to second case was properly sustained where the pauper affidavit was not filed at time of commencement. Johnson v. Central of Georgia R. Co., 119 Ga. 185, 45 S. E. 988.

34. Guardian ad litem worth $250. Sumkow v. Sheinker, 84 App. Div. 463, 82 N. Y. S. 995. Guardian ad litem worth $300. Wemyss v. Allan, 88 App. Div. 475, 85 N. Y. S. 91.

35. Where a guardian ad litem swore he was worth $250, and eleven days later in petition to sue as a poor person that he was only worth $100, the petition should have been denied. Cohen v. Hautcharow, 84 N. Y. S. 573. Where the guardian ad litem swore when he was appointed that he was worth $250, but on infant's motion to sue as a poor person, swore that he was only worth $100, it was proper to allow motion. Perlmutter v. Stern, 87 App. Div. 160, 84 N. Y. S. 58.

36. An infant may sue in forma pauperis, though the guardian ad litem is his father and is shown by his affidavit of qualification to be worth more than $100. Larsen v. Interurban St. R. Co., 89 N. Y. S. 649.

37. Woods v. Bailey, 122 F. 967.

38. U. S. Comp. St. 1901, p. 707. O'Connell v. Mason, 127 F. 435.

39. Code Civ. Proc. § 467. It is immaterial that in one stipulation the attorney agreed to act without compensation. Malkin v. Postal Typewriter Co., 88 N. Y. S. 403.

40. U. S. Comp. St. 1901, p. 706, as to suits by poor persons, does not authorize a defendant in a criminal case to prosecute a writ of error in forma pauperis. Bristol v. United States [C. C. A.] 129 F. 87.

41. Defendant in criminal case was allowed to prosecute an appeal in forma pauperis, but the court had no power to order the county to pay the expense of printing his brief. State v. Superior Court of Lewis County, 32 Wash. 80, 72 P. 1027.

42. See 1 Curr. L. 809.

43. Barson v. Mulligan, 89 N. Y. S. 704.

44. Where no costs were awarded in the appellate court, and judgment was reversed in the court of appeals with costs to abide the event, plaintiff on succeeding was entitled to costs in both courts. Smith v. Lehigh Valley R. Co., 82 N. Y. S. 674.

45. Where court on application of successful defendant erred in reopening a case, the costs thereof should be taxed against defendant. Hagerle v. Beebe, 123 Iowa, 620, 99 N. W. 303. Costs will not be allowed on motion for amendment of an order, which needed no amendment, the motion having been induced by opposition of the other party. In re Babcock's Estate, 86 App. Div. 563, 83 N. Y. S. 1020.

46. Where plaintiff sued to establish his lien to the total exclusion of a warehouseman's lien in favor of defendant, and the latter was allowed in part, plaintiff was not the prevailing party so as to be entitled to costs. Singer Mfg. Co. v. Becket, 85 N. Y. S. 391.

47. Costs belong to a party, and his attorney has no interest in them apart from his lien on the entire recovery, which is superior to another's right of set-off. Barry v. Third Ave. R. Co., 87 App. Div. 543, 84 N. Y. S. 830. As between attorney and client, costs belong to the latter, the former having only a lien thereon. McIlvaine v. Steinson, 90 App. Div. 77, 85 N. Y. S. 889.

48. In an action for trespass on land involving title to property, there must be final judgment in plaintiff's favor to carry costs, and finding of jury that premises belonged to plaintiff, but that there was no trespass is insufficient. Hill v. McMahon, 81 App. Div. 324, 81 N. Y. S. 431.

49. Where receiver took possession of defendant's property under an erroneous order, the latter cannot be charged even with the cost of preserving the property. Beach v. Macon Grocery Co. [C. C. A.] 125 F. 513.

50. Where plaintiff recovered on several counts and defendant was allowed his counterclaim, it was allowable to award full costs to plaintiff where defendant incurred no additional costs because of his counterclaim. Mayo v. Halley [Iowa] 100 N. W. 529.

51. Where a liability insurance company was authorized to control the defense and appealed from a judgment against the insured, it is liable for costs. Stephens v. Pennsylvania Casualty Co. [Mich.] 97 N. W. 686. Where a surety took an appeal, the obligor not joining, the undisclosed principal of the latter was not liable for costs. City Trust, S. D. & S. Co. v. American Brew. Co., 88 App. Div. 383, 84 N. Y. S. 771.

They cannot be charged against one not a party to the suit.[52] An amendment will not subject the prevailing party to costs up to the time of amendment,[53] but if it entirely changes the cause of action, it will deprive him of all costs.[54] Defendant[55] and garnishee[56] are entitled to costs on a dismissal, and to a reference to determine them,[57] even where plaintiff prevailed in another proceeding on the same cause of action,[58] but not where the dismissal was for want of jurisdiction in the Federal court,[59] or because the cause of action no longer existed[60] or had been settled,[61] or where defendant himself was at fault.[62]

(§ 4) *B. In interlocutory or special proceedings.*[63]—The court has discretion[64] to impose costs on motions,[65] but costs should be refused where the losing party was not at fault.[66] They may be included in an interlocutory judgment.[67] Where amended answer is filed, setting up subsequent facts extinguishing plaintiff's cause of action, the latter is entitled to costs already incurred.[68]

52. In mandamus against the city council, the city cannot be charged with costs. People v. Common Council of Mt. Vernon, 88 N. Y. S. 493.

53. Keae v. Gordy [Tex. Civ. App.] 78 S. W. 386.

54. Where plaintiff in an action to redeem from a mortgage had to amend her complaint in order to conform to proof. Conlon v. Minor, 94 App. Div. 458, 88 N. Y. S. 224.

55. A defendant appearing for the sole purpose of moving a dismissal for want of sufficient service, and his motion being sustained, is entitled to costs, as the prevailing party under Rev. St. 1883, c. 82, § 130. Thomas v. Thomas, 98 Me. 184, 56 A. 651. Where plaintiff voluntarily discontinues in the municipal court, it is obligatory to render judgment for costs for defendant. Probst v. Leggett, 84 N. Y. S. 211.

56. Where a suit was dismissed, the garnishee was entitled to have his costs and attorney's fees. Hamburg-Bremen Fire Ins. Co. v. Bailey [Tex. Civ. App.] 77 S. W. 294.

57. Where defendants unsuccessfully moved to have an injunction vacated, and then plaintiffs dismissed the action, defendants are entitled to a reference as to damages and to recover counsel fees. McGown v. Barnum, 42 Misc. 585, 87 N. Y. S. 605.

58. Where a party petitioned for mandamus and certiorari for the same wrong, and the first was granted and the second dismissed in consequence, he was chargeable with the costs of dismissal. Akerman v. Cartersville, 119 Ga. 27, 45 S. E. 725. Where selectmen proceeded by a suit in equity and by mandamus to enforce an order against a street railway, they were not entitled to costs in the latter proceeding, as the former proceeding under the statute provided an adequate remedy. Inhabitants of Gardner v. Templeton St. R. Co. [Mass.] 68 N. E. 340. It was error not to allow defendant costs when a first cause of action was dismissed, as the second was on a contract which arose long after the first, and so was not substantially the same cause of action under Code Civ. Proc. § 3234. Cook v. Casler, 87 App. Div. 8, 83 N. Y. S. 1045.

59. International Wireless Tel. Co. v. Fessenden, 131 F. 493.

60. A writ of error involving a contest to an office which pending decision expired. Elbon v. Hamrick [W. Va.] 46 S. E. 1029. Where one maintaining a private hack stand under a license which expired before trial, brought suit with others to enjoin the usage of the space by others. Odell v. Bretney, 87 N. Y. S. 665. In a suit to restrain defendant from interfering with plaintiff's land, the fact that defendant purchased the land from plaintiff's grantee after the issue was found against him did not relieve him from costs. Christoffersen v. Craghead, 26 Utah, 483, 73 P. 639. Where a cause of action does not survive the death of the plaintiff, it does not survive even for the determination of costs. Jones v. Miller [Wash.] 77 P. 811.

61. Where defendant settled claim in full and attachment was vacated by consent, he was not entitled to counsel fees under attachment bond. Braunstein v. American Bonding Trust Co., 84 N. Y. S. 982. Where there was a rule to show cause why the clerk should not deliver a transcript of appeal, and he did deliver the transcript before hearing, the rule was discharged, with costs taxed against the clerk. State v. Estorage, 110 La. 479, 34 So. 643.

62. Defendant not entitled to costs on dismissal of bill where he was erroneously made a party. Crossman v. Griggs [Mass.] 71 N. E. 560.

63. See 1 Curr. L. 810.

64. The imposing of costs on plaintiff's withdrawal of a motion for resettlement, not an abuse of discretion. Allen v. Becket, 84 N. Y. S. 1009.

65. Motion to retax costs overruled with $15 motion costs. Crane v. Odegard, 12 N. D. 135, 96 N. W. 826.

66. Petitioners in certiorari charged with costs of motion to dismiss, which was made because of misnomer of parties in the printed record, where there was no misnomer in original record. Fitch v. Board of Auditors of Claims [Mich.] 94 N. W. 952.

67. Costs may be taxed and included in an interlocutory judgment, and execution may issue therefor. Maeder v. Wexler, 43 Misc. 19, 87 N. Y. S. 402.

68. Defendant set up that it had satisfied a judgment in another state for the same trespass. Petit v. Western Coal & Min. Co., 123 F. 840. Where defendant wished leave to file a supplemental answer setting up an accord and satisfaction just made, it was only proper to receive it on condition that defendant pay all costs, with leave to plaintiff to discontinue without costs. Pickrell v. Mendel, 87 App. Div. 163, 84 N. Y. S. 70.

(§ 4) *C. Several co-parties.*[69]—Where several defendants severally appeal from a judgment against them, and succeed, such of the appellants as are united in interest are to be deemed as one prevailing party, for purposes of taxation of costs, though they may have separate appeals;[70] but where the actions were all separate, they are each entitled to costs,[71] until the court consolidates them.[72] The court has discretion to reduce costs among parties identical in interest,[73] or to allow more to those appearing[74] and contesting,[75] if done in good faith,[76] or to impose them on only a part of defendants.[77] Costs should not be taxed on a mere stockholder,[78] or one not a party to the controversy.[79]

(§ 4) *D. Parties in special capacity or qualified interest.*[80]—Where an executor or an administrator brings or defends a suit reasonably[81] or in good faith,[82] or the suit concerns a matter in which he is protected by an order of court,[83] he may be entitled to an allowance,[84] and will not be chargeable with costs,[85] even though he has given security,[86] or has stipulated for a reference.[87] The court has

69. See 1 Curr. L. 810.

70. Rev. St. Wis. 1898, § 2949. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

71. Where plaintiff began 25 cases against as many defendants, who each successfully appealed from an order, they were each entitled to statutory costs, in the absence of an agreement or order for the cases to abide the result of any one case. Kelly v. Oksall [S. D.] 97 N. W. 11. Each member of a partnership being liable for debts, one recovering judgment against any partner is entitled to have full statutory costs taxed against him. Moore v. Dickson [Wis.] 99 N. W. 322.

72. When suits are consolidated, court should determine what costs if any should be charged to parties to original suits, and thereafter costs were only chargeable in single action. Handley v. Sprinkle [Mont.] 77 P. 296.

73. Where the rights of two infant plaintiffs were identical with the rights of two infant defendants, an allowance of costs to all equally 10 per cent. of amount recovered was excessive and would be reduced to 5 per cent. Grannemann v. Grannemann, 88 N. Y. S. 405.

74. In a liquidation suit, only part of the creditors appeared by counsel; it was no error to allow attorney's fees to those who did appear. Gamewell Fire-Alarm Tel. Co. v. Fire & Police Tel. Co., 25 Ky. L. R. 1010, 76 S. W. 862.

75. Creditors who appeared by attorney in proceedings attending the involuntary dissolution of a corporation and took active part in securing funds are entitled to have costs of appeal paid out of the fund. People v. American Loan & Trust Co., 177 N. Y. 467, 69 N. E. 1105.

76. In bankruptcy, where a contest over a claim was entirely between creditors for the purpose of controlling the election of the trustee, costs would not be allowed out of the estate. In re Worth, 130 F. 927.

77. Where plaintiff is entitled to costs as of course, and there are a number of defendants, the right of a successful defendant to costs is dependent on the discretion of the court. Union Bank v. Case, 84 N. Y. S. 551. A judgment against plaintiff and one defendant in favor of other defendants for costs is proper where that defendant filed a cross complaint. Summerville v. Stockton Mill. Co., 142 Cal. 529, 76 P. 243.

78. A bank which withheld money under instructions from another, but offering to pay under direction of court, was not chargeable with costs. Barnett v. Pyle [Tex. Civ. App.] 79 S. W. 1093.

79. A purchaser at a sale is not chargeable with costs where the controversy as to its confirmation was between the owner and lienholder only. Gleason v. Kentucky Title Co. [Ky.] 80 S. W. 814. Where an action by a bank against partners was consolidated with one between the partners, the bank was not chargeable with the costs of an appeal, where the erroneous feature of the judgment arose from the claims of the partners. Blackwell v. Farmers' & Merchants' Nat. Bank [Tex.] 79 S. W. 518.

80. See 1 Curr. L. 810.

81. Plaintiff is not entitled to costs in an action against an executor where the claim was reduced from $5,040 to $3,000, his resistance not being unreasonable, and when no proof that he failed to consent to a reference. Holcombe v. Nettleton, 85 N. Y. S. 12.

82. Where donee of a life insurance policy sued the administrator who was named as beneficiary, the costs should be paid out of the estate. Opitz v. Karel, 118 Wis. 527, 95 N. W. 948.

83. Administrator entitled to costs in a suit to hold him liable personally on a mortgage which he executed by order of court. Wisconsin Trust Co. v. Chapman [Wis.] 99 N. W. 341.

84. In an action under Code Civ. Proc. § 2653a, attacking the validity of a will, the court may order extra allowances to defendant executors. Haughian v. Conlan, 86 App. Div. 290, 83 N. Y. S. 830.

85. Will held void in a suit against executors, and costs ordered paid out of estate. Trunkey v. Van Sant, 83 App. Div. 272, 82 N. Y. S. 94.

86. Notwithstanding that an administrator voluntarily gave a bond for costs, he may secure a certificate under Rev. Code 1892, § 881, that there was probable cause for bringing the action, so that neither he individually, nor his sureties, will be liable. Nichols v. Gulf, etc., R. Co. [Miss.] 36 So. 192.

87. Where plaintiffs had not filed their claims as required by law, they were not entitled to costs against the executors, though there was a stipulation that costs of reference were to be taxed as the costs of

discretion,[88] and if his conduct gave rise to the cause of action,[89] or he unreasonably resists, it may charge him with costs.[90] It is constitutional to make guardians ad litem liable for costs,[91] but frequently it is left to the discretion of the court.[92] Costs are awarded against receivers,[93] but not against public officers, unless they are chargeable with gross negligence[94] or acted without authority of law,[95] or under an unconstitutional statute;[96] but may be charged against the county.[97]

(§ 4) *E. Waiver of right and effect of tender or offer of judgment.*[98]—The right to costs may be waived by the parties,[98] or by their attorneys,[1] or by failure to make demand in certain actions, as actions to quiet title[2] or to collect a tax[3] and replevin.[4] In a suit to set aside a tax deed[5] or a conveyance,[6] failure to tender taxes or amount of a lien will bar costs. A tender or offer of judgment will not bar costs where the court has no jurisdiction,[7] nor where it is not more favorable than the judgment actually recovered, making allowance for interest,[8] counter-

the case. Nichols v. Moloughney, 85 App. Div. 1, 82 N. Y. S. 949.

88. To allow an administrator his costs or to tax them against him personally. Matthews v. Sheehan, 76 Conn. 654, 57 A. 694.

89. Where an administrator was sued on a note that he had signed, costs and attorney's fees were properly taxed against him as an individual. Glisson v. Weil & Co., 117 Ga. 842, 45 S. E. 221.

90. Costs allowed against an executor personally, where there was no such doubt as to justify him in resisting claim of a legatee. Wiggins v. Wiggins [N. J. Eq.] 56 A. 148.

91. Rev. St. 1898, § 2931, making guardians ad litem liable for costs, which might be enforced by attachment, was not unconstitutional as imprisonment for debt, or denying them equal protection of law, though executors, administrators, and trustees were not so liable. Burbach v. Milwaukee Elec. R. & L. Co., 119 Wis. 384, 96 N. W. 829.

92. Fees of a guardian ad litem not in all cases taxable on adverse party, but in the discretion of court, were taxed on minor. In re Mason [Neb.] 94 N. W. 990.

93. A receiver in bankruptcy who had sued in replevin in state court and sureties on receiver's recognizance were personally liable. Unmack v. Douglass, 75 Conn. 633, 55 A. 12.

94. In proceedings relating to their official duties, gross negligence or bad faith was not shown where a certain salary had been paid for twelve years without protest. O'Connor v. Walsh, 83 App. Div. 179, 82 N. Y. S. 499.

95. Where defendant recovered costs in an action brought by school trustees without authority for the collection of a tax, the trustees were liable personally, even though they were not the original ones, providing they had carried on the suit. Beck v. Kerr, 87 App. Div. 1, 83 N. Y. S. 1057.

96. Where a penitentiary commission was threatening to remove a superintendent and turn the penitentiary over to a sheriff under an unconstitutional statute, they were chargeable with costs, but not the sheriff, as he had not acted. Corscadden v. Haswell, 88 App. Div. 158, 84 N. Y. S. 597.

97. Under Code, § 4459, providing costs in habeas corpus, where plaintiff is discharged and defendant is an officer, shall be taxed to the county, the costs should be charged to county whose court ordered the commitment. Hughes v. Applegate, 123 Iowa, 230, 98 N. W. 645.

98. See 1 Curr. L. 811.

99. Action settled by parties and no costs awarded. Dr. Shoop Family Medicine Co. v. Schowalter [Wis.] 98 N. W. 940.

1. Defendant, without the knowledge of his attorney, stipulated that a case should be dismissed without costs, and the stipulation was enforced. Paulson v. Lyson, 12 N. D. 354, 97 N. W. 533.

2. Where plaintiff mailed defendant a quit-claim deed to execute with draft for $125, it was a sufficient demand to enable him to recover costs in a suit to quiet title. Shay v. Callanan [Iowa] 100 N. W. 55. Under Code, § 4226, unless a plaintiff in an action to quiet title first demands a quit-claim deed from defendant, he is not entitled to costs, and where he joins such an action with an action for breach of warranty, each party may be required to pay his copy and witness fees. Mock v. Chaistrom, 121 Iowa, 411, 96 N. W. 909.

3. Costs not allowed where no evidence of demand for payment of tax before suit instituted. Inhabitants of Eliot v. Prime, 98 Me. 48, 56 A. 207.

4. A constable who has levied in good faith is not liable for costs of an action of replevin brought by a third party, unless demand was made. Littlefield v. Wilson, 1 Neb. Unoff. 581, 95 N. W. 677.

5. Where a tax deed was set aside, it was error not to allow defendant costs, where plaintiff before suit had made no tender of taxes and interest. Glos v. Adams, 204 Ill. 546, 68 N. E. 398. Where there was no tender of amount of taxes and interest before instituting a suit to set aside a tax deed, there can be no recovery of costs. South Chicago Brew. Co. v. Taylor, 205 Ill. 132, 68 N. E. 732.

6. In a suit to set aside a conveyance for fraud and to recover securities held by respondents subject to a lien, the appellants were not entitled to costs where they had made no tender of amount of lien. Ingersoll v. Cunningham, 88 N. Y. S. 711.

7. Where judgment was absolutely reversed because court had no jurisdiction, appellant was entitled to costs, notwithstanding that respondent had by written stipulation offered to allow judgment to be reversed without costs. Faruolo v. Rafanelli, 84 N. Y. S. 549.

8. Where plaintiff recovers judgment

claims,[9] and costs.[10] The rule as to offers of judgment applies to appeals from the justice to the county court,[11] and where there is an offer of judgment, the amount of the judgment is always material.[12]

§ 5. *Right dependent on minimum amount of demand or recovery.*[13]—In actions which might have been brought in justice court,[14] or in the municipal court,[15] costs are not allowed unless plaintiff recovers at least a certain sum, unless the action is founded on a tort,[16] or is equitable;[17] but this does not restrict a defendant's recovery of costs on a counterclaim.[18]

§ 6. *Right affected by character of litigation or proceeding. A. In equity and equitable code actions.*[19]—All costs are in the discretion of the judge in equity suits,[20] or in special proceedings,[21] and may be refused altogether,[22] or charged against one,[23] or apportioned,[24] but are generally awarded to the prevailing party in mandamus,[25] quo warranto,[26] actions to quiet title,[27] in partition,[28] to reform,[29]

greater than the amount offered by defendant, but less than that amount with interest, he is entitled to costs. Rose v. Wells, 92 App. Div. 75, 86 N. Y. S. 889.

9. Where defendant offered to settle for $130, and then filed a counterclaim for $25, on a distinct contract, and plaintiff recovered $129, he was entitled to costs as a more favorable judgment. Smith v. Sheldon, 87 N. Y. S. 1099.

10. Where tender was made after suit was begun, but it did not include costs, defendant was chargeable with costs and interest. Bagnell Timber Co. v. Brooks [Ark.] 79 S. W. 764.

11. Code Civ. Proc. §§ 3070-3073. Lawson v. Speer, 91 App. Div. 411, 86 N. Y. S. 915.

12. Dietz & Co. v. Miller, Sears & Walling Co., 84 N. Y. S. 510.

13. See 1 Curr. L. 811.

14. In an action which might be brought in justice court where less than $50 is recovered, no costs will be allowed unless title to real estate is involved. Fleshman v. McWhorter [W. Va.] 46 S. E. 116.

15. Under Municipal Court Act, § 332, where plaintiff's recovery is less than $100, he cannot be allowed more than $10 costs. Brendon v. Traders' & Travelers' Acc. Co., 84 App. Div. 530, 82 N. Y. S. 860.

16. In an action for the conversion of corn raised under a cropper's contract, though plaintiff recovered only $47, he was entitled to costs, as the action sounded in tort. Black v. Golden [Mo. App.] 78 S. W. 301.

17. An action to foreclose a laborer's lien is one in equity, so plaintiff may have costs, though he recovers less than $300. Clark v. Brown, 141 Cal. 93, 74 P. 548.

18. Code Civ. Proc., § 1852, allowing costs to defendant on judgment in his favor, is not controlled by § 1853, providing that no costs shall be allowed plaintiff where he recovers less than $50, and so defendant is entitled to costs on recovering $35 on a counterclaim. Spencer v. Mungus, 28 Mont. 357, 72 P. 663.

19. See 1 Curr. L. 811.

20. Jennings v. Parr, 66 S. C. 385, 44 S. E. 962. Not allowed prevailing party as matter of course. Porter v. Trompen, 2 Neb. Unoff. 76, 96 N. W. 226. Costs to defendant discretionary in a suit to foreclose a mortgage. Brown v. Skotland, 12 N. D. 445, 97 N. W. 543.

21. In a proceeding to ascertain the compensation to be paid for change in grade of a street, the allowance of costs previous to the appointment of commissioners cannot be taxed by clerk, but is discretionary with the court [Code Civ. Proc. § 3240]. Bley v. Hamburg, 84 App. Div. 23, 82 N. Y. S. 35. In a special proceeding, the award of costs is discretionary, and when awarded, § 3240 Code Civ. Proc., provides that they shall be at the rates allowed on an appeal to the same court, and that includes disbursements. In re Babcock's Estate, 86 App. Div. 563, 83 N. Y. S. 1020.

22. Under Rev. St. 1899, § 3792, allowing court to apportion costs, it may refuse to award any, in an action to restrain defendant from interfering with plaintiff's irrigation ditch. Rutherford v. Lucerne Canal & Power Co. [Wyo.] 75 P. 445.

23. Malone v. Waukesha Elec. Light Co. [Wis.] 98 N. W. 247.

24. Kittredge v. Chillicothe Loan & Bldg. Ass'n [Mo. App.] 77 S. W. 147. Under Civ. Code, §§ 4581-4603, in reference to fees of auditors and masters, the judge in his discretion could apportion the fee equally between the parties. Moore v. Dickenson, 117 Ga. 887, 45 S. E. 241. Where a bill was referred to a master for impertinence, and the contention only partly sustained, the costs were apportioned, one-fourth on complainant, and three-fourths on respondent. Hall v. Bridgeport Trust Co., 122 F. 163.

25. Where a demand was made on town to levy tax for drainage assessment, before beginning mandamus proceedings against town to compel the levy, judgment for costs against the town was proper. Commissioners of Highways v. Big Four Drainage Dist., 207 Ill. 17, 69 N. E. 576. Where pending mandamus proceedings against a city council to enforce payment of a judgment, the judgment is vacated, it is error to dismiss mandamus with costs to relator, as he was unsuccessful. People v. Common Council of City of Mt. Vernon, 88 N. Y. S. 493. A proceeding by mandamus against public officers, though not begun by summons, is an action under Rev. St. 1898, § 2595, so that on failure, defendant is entitled to costs. State v. Board of Trustees of Policemen's Pension Fund [Wis.] 98 N. W. 954.

26. An unsuccessful election contestant is liable for costs of contest and of quo warranto which was begun by his opponent and

or set aside deeds,[30] partnership suits,[31] or suits for an accounting,[32] unless he is at fault.[33] One who disclaims[34] or interpleads[35] is entitled to costs, but not one who on being sued pays money into court.[36] In will contests costs may be charged against the estate,[37] but the case will be strictly scrutinized.[38] In condemnation proceedings, the costs may be paid by the county.[39]

(§ 6) *B. On appeal, error, etc.*[40]—An appellant will not be allowed the costs of appeal, though successful, where the judgment was merely corrected for some clerical error,[41] to which he had made no exception,[42] or had not applied to have

consolidated with it. Hull v. Eby, 123 Iowa, 257, 98 N. W. 774.

27. Where plaintiff sued to quiet title, defendant denying plaintiff's title to all of the land, and plaintiff recovered as to part, it was error to refuse costs, as it was the prevailing party. Sierra Water & Min. Co. v. Wolff [Cal.] 77 P. 1038.

28. Where bill for partition correctly set forth title and was amended when certain deeds were placed on record, the plaintiff's solicitor's fees, if properly proved, should not be refused on account of failure of original bill to state title. Mehan v. Mehan, 203 Ill. 180, 67 N. E. 770. In partition suits, defendants are liable for all costs of contesting the rights of successful plaintiffs. Powell v. Naylor [Tex. Civ. App.] 74 S. W. 338.

29. An action to reform a mortgage executed by plaintiff. Allis v. Hall, 76 Conn. 322, 56 A. 637. In a suit to reform a deed, where complainant was successful, though he was required to pay defendant a certain sum, there was no abuse of discretion in requiring defendant to pay two-thirds of the costs. Stanley v. Marshall, 206 Ill. 20, 69 N. E. 58.

30. In an action to set aside a separation agreement, the wife will not be entitled to an extra allowance for setting aside deeds to firm real estate, where the dower right was not shown to be of any value. Hauptmann v. Hauptmann, 91 App. Div. 197, 86 N. Y. S. 427.

31. On a partnership accounting, where voluminous testimony was taken because of defendant's denial of partnership, and failure to keep satisfactory books, two-thirds of costs of successful appeal were taxed against him. Rowan v. Lamb [Miss.] 35 So. 427. In a suit by managing partner for dissolution of partnership and an accounting, costs were divided, the matter resting in the sound discretion of the court. Hart v. Hart, 117 Wis. 639, 94 N. W. 890.

32. In an action for an accounting, complainants were charged with expenses of certain litigation of which they derived the benefit. Maney v. Casserly [Mich.] 96 N. W. 478.

33. In an action to redeem land, where the defendant refused to account, the court could allow plaintiff costs, though the balance of account was in defendant's favor. De Leonis v. Walsh, 140 Cal. 175, 73 P. 813.

34. Where a defendant disclaims in ejectment, and issue is not joined, he is entitled to costs, and judgment will be corrected and not reversed on appeal for failure to allow him costs. Webb v. Reynolds, 139 Ala. 398, 36 So. 15.

35. One who interpleads in good faith may be allowed his costs and attorney's fees out of the fund, which may be charged to the unsuccessful claimant thereof. Soversign Camp Woodmen of the World v. Wood, 100 Mo. App. 655, 75 S. W. 377. In an action to compel an insurance company to make a loan, which it was willing to do, except for a claim of a divorced wife, the insurance company was a mere stakeholder and entitled to costs. Hatch v. Hatch [Tex. Civ. App.] 80 S. W. 411. Where defendant deposited money in court, and judgment was in accordance with his claim, there was no error in ordering costs to be paid out of the fund. Kruegel v. Kitchen, 33 Wash. 214, 74 P. 373.

36. Where defendant admitted owing the debt sued for, but there being other claimants, paid it into court, it was not entitled to costs. Scharff v. Supreme Lodge K. H., 89 N. Y. S. 168. Where defendant had offered a reward for arrest of a burglar and on being sued paid the money into court to be apportioned among the claimants, it was not entitled to have its costs paid out of the money. Kinn v. First Nat. Bank, 118 Wis. 537, 95 N. W. 969.

37. Under Code Civ. Proc. § 1664, the court has discretion in apportioning costs among those claiming an estate, and may impose them on petitioner who failed in his claim to the entire estate. Lindy v. McChesney, 141 Cal. 351, 74 P. 1034. Where proponent put forward a will in good faith and did not know the contents, he was not chargeable with costs, though contestant was successful. Lingle v. Lingle, 121 Iowa, 133, 96 N. W. 708.

38. An action seeking to have a trust clause in will declared void and of an accounting of the property held under it is not an action for the construction of will, so that the costs will be ordered paid out of the fund, notwithstanding a stipulation to that effect. Becker v. Chester, 115 Wis. 90, 91 N. W. 650.

39. Where, under Rev. Laws, p. 1485, c. 165, § 54, commissioners are to be paid by the county, it is error in condemnation proceedings to tax their compensation as costs against either party. Gloucester Water Supply Co. v. Gloucester [Mass.] 70 N. E. 1015.

40. See 1 Curr. L. 812.

41. Poerschke v. Horowitz, 84 App. Div. 443, 82 N. Y. S. 742.

42. Where plaintiff was allowed interest on the damages, but defendant made no exception, he was not entitled to costs when, on appeal, the interest was remitted. Anderson v. Adams, 43 Or. 621, 74 P. 215. Appellants made no objection to inclusion of attorney's fees in judgment. June & Co. v. Doke [Tex. Civ. App.] 80 S. W. 402. Where a party permits a decree of dismissal to be entered without objection, and it is modified

corrected in the lower court.[43] An appellant is a prevailing party where he succeeds in reducing the amount of the judgment against him,[44] and is entitled to costs unless he failed to make a tender[45] or offer.[46] So he will be taxed with costs of appeal from an assessment in condemnation proceedings, if the judgment recovered is not more favorable to him.[47] Costs are discretionary in certiorari and may be taxed against the successful party.[48]

(§ 6) *C. Justices' courts and municipal courts.*[49]—In justices' courts, costs must be awarded the prevailing party,[50] and may be for a larger sum in suits to establish liens.[51] They are the same in municipal courts as in justices' courts, where the actions could have been brought in the latter.[52] An appellant may not be awarded costs, though he succeeds in reducing the judgment against himself.[53]

§ 7. *Amount and items; after trial.*[54]—Items of costs are taxed according to the statutes of the forum,[55] and interest will not be allowed on them.[56] The

on his appeal. Frye v. Miley [W. Va.] 46 S. E. 135.

43. Where a judgment contains a clerical error which would have been corrected by court on application. Broll v. Wishert [Tex. Civ. App.] 79 S. W. 1089. Where appellant did not attempt to have the judgment corrected in the lower court, because a portion of the verdict was allowed plaintiff's attorneys. Shippers Compress & Warehouse Co. v. Davidson Co. [Tex. Civ. App.] 80 S. W. 1032. Where a certain item was mistakenly included in judgment, it would not entitle appellant to costs, as respondent would have corrected it, if his attention had been called to it. Andresen v. Upham Mfg. Co. [Wis.] 98 N. W. 518.

44. Where a beneficial association was sued on a certificate of $2,000, $1,500 payable to plaintiff, and there was another certificate outstanding payable to another, and judgment was entered for both, the beneficial association was entitled to costs of appeal where only one liability was enforced. Fanning v. Supreme Council of Catholic Mut. Ben. Ass'n, 84 App. Div. 205, 82 N. Y. S. 733.

45. Yazoo, etc., R. Co. v. Baldwin [Tenn.] 81 S. W. 599.

46. Though appellant secures a modification of judgment and costs in appellate court, he cannot recover the costs charged against him in the lower court, where he made no offer of judgment for that amount. Vogt v. Hecker, 118 Wis. 306, 95 N. W. 90.

47. A proceeding to condemn a private passway. Barrall v. Quick, 24 Ky. L. R. 2393, 74 S. W. 214. Under Code, § 2007, providing that railroad in condemnation proceedings should pay costs of appeal, including reasonable attorney's fee, unless a less amount of damages was awarded than that allowed by commissioners, it was error to tax attorney's fees where verdict was for a much less amount. Wormely v. Mason City, etc., R. Co., 120 Iowa, 684, 95 N. W. 203. Under Pub. Acts 1899, No. 272, p. 459, § 6, providing that in case an appeal from an assessment of claims shall be sustained by the board of review, the probate judge shall determine the costs, gives the latter no authority to fix coste, where the assessment was not sustained. Huxtable v. Kirby [Mich.] 97 N. W. 391. Landower is entitled to recover full costs where compensation awarded by commissioners exceeds the amount, with interest, offered by corporation seeking to condemn the land. In re Brooklyn Union El. R. Co., 176 N. Y. 213, 68 N. E. 249.

48. Code 1896, § 2831. Louisville & N. R. Co. v. Solomon, 138 Ala. 151, 34 So. 1025. Code 1897, § 3853, providing that costs shall be recovered from the losing party, is applicable to certiorari from an order to punish for contempt, yet the matter is discretionary, and here, though plaintiffs were improperly convicted, they were held liable for costs. Coffey v. Gamble [Iowa] 94 N. W. 986.

49. See 1 Curr. L. 813.

50. Error to award judgment to plaintiff and to tax him with costs in justice court. Burton v. Frame [Del. Super.] 58 A. 804. Where a justice adjourned a case where defendant did not appear, and there was no return of the constable, it was an error of law, and defendant was entitled to costs. Moore v. Taylor, 88 App. Div. 4, 84 N. Y. S. 518.

51. Comp. Laws 1897, § 838, limiting costs in justice courts to $10, does not apply to suits to establish liens for labor, Comp. Laws 1897, § 10767, nor is such discrimination unconstitutional. La Goo v. Seaman [Mich.] 99 N. W. 393.

52. Defendant may be allowed his costs on discontinuance of summary proceedings to recover real property, at the rate allowed in justice courts. Cohen v. Melle, 43 Misc. 79, 86 N. Y. S. 514. Where appeal was taken from justice to county court and plaintiff recovered more than $50, he was entitled to costs as if action had been begun there. Rose v. Wells, 92 App. Div. 75, 86 N. Y. S. 889.

53. Gen. St. 1902, § 770 is not mandatory, and court may still refuse to give appellant costs. Palmer v. Smith, 76 Conn. 210, 56 A. 516. Where defendant appeals from a judgment in plaintiff's favor in a justice's court, though the judgment is reduced, defendant is still liable for costs. Lovel v. Joyce [Idaho] 74 P. 1073.

54. See 1 Curr. L. 813.

55. Where items of costs accrued in a foreign jurisdiction and the foreign laws were not proved, it was error to tax according to them, as they were presumed to be the same as the laws of the forum in the absence of proof. Dignan v. Nelson, 26 Utah, 186, 72 P. 936.

56. Ashworth v. Trammell [Va.] 47 S. E. 1011.

expense of the record,[57] unless unduly voluminous,[58] of the taking of depositions,[59] trial,[60] and jury fees,[61] the mileage and fees of witnesses,[62] except of an excessive number,[63] parties,[64] the fees of referees,[65] and officers,[66] may be taxed; but a sheriff cannot have the expense of messages sent to witnesses to attend a trial taxed as costs,[67] nor are stenographer's fees usually allowed.[68] The fee in New York for a voluntary dismissal is the same as for a nonappearance.[69] Attorney's fees have

57. In the absence of express rule, court may allow the costs of pleadings and decree in accordance with the state statute, but the printing of pleadings and evidence will not be allowed in the absence of special order of printing. Matheson v. Hanna-Schoelkopf Co., 128 F. 162. Plaintiff allowed to tax costs for copies of manifests and revenue stamps as the testimony was relevant and not objected to. New Orleans, etc., R. Co. v. Louisiana Const. & Imp. Co. [La.] 36 So. 918.

58. Where counsel of both sides have vied with each other in padding the record, the costs will be apportioned between them. Royal Metal Mfg. Co. v. Art Metal Works [C. C. A.] 130 F. 778. Costs were not excessive, though the findings and judgment were voluminous, as they were presumably drawn under the direction of the trial judge. Lentz v. Eimermann, 119 Wis. 492, 97 N. W. 181.

59. Though they were not used at the trial, unless they were actually unnecessary. Lundy v. McChesney, 141 Cal. 351, 74 P. 1034. Where witnesses were orally examined before a master, though their evidence was reduced to writing, a fee of $2.50 allowed for depositions cannot be taxed. Kissinger-Ison Co. v. Bradford Belting Co. [C. C. A.] 123 F. 91. The cost of taking irrelevant testimony before a master will be taxed on the party introducing it. Terry v. Naylor, 125 F. 804. Testimony of a witness taken before a master and thereafter admitted in evidence before master and court is a deposition authorizing the taxing of $2.50 costs. Matheson v. Hanna-Schoelkopf Co., 128 F. 162. Where a foreign deposition was taken, defendant cannot tax as costs what was charged defendant by foreign attorney for professional services in execution of commission. Topken v. Cunard S. S. Co., 88 N. Y. S. 394.

Contra: The expense of taking a deposition cannot be taxed as costs by the successful party. Almand v. Atlantic Coast Line R. Co., 118 Ga. 468, 45 S. E. 302.

60. Where infant's answer was general issue, the inquiry which resulted, though there was no cross-examination in the infant's behalf, was a trial for the purpose of taxing costs. Wandell v. Hirschfeld, 40 Misc. 527, 82 N. Y. S. 879. Where plaintiff did not appear and the complaint was dismissed, and then the case was restored to the calendar and plaintiff had judgment on the merits, she was not entitled to two trial fees. Engberman v. North German Lloyd S. S. Co., 84 N. Y. S. 199. Where defendant asked for an adjournment and court stated that the case was to be considered on trial, defendant was liable for costs of $10 for trial occupying more than 2 days. Goodkind v. Metropolitan St. R. Co., 89 N. Y. S. 703.

61. Where a mistrial resulted from plaintiff's procuring the case to be tried as a short cause, he was not entitled to a jury fee, though he subsequently prevailed. Finck v. Stachelberg, 86 N. Y. S. 20.

62. Fees of witnesses may be taxed who were subpoenaed but did not testify, if satisfactory reason shown. Bechtel v. Evans [Idaho] 77 P. 212. Costs on account of witnesses, occasioned by an erroneous ruling which appellant induced the court to make, will not be taxed against the party against whom the ruling was made. Southern Ind. R. Co. v. McCarrell [Ind.] 71 N. E. 156. Proper to tax mileage of necessary witnesses, though they came from without the state. Casley v. Mitchell, 121 Iowa, 96, 96 N. W. 725. Pol. Code, § 4648, allowing witnesses 10 cents a mile each way, applies to all witnesses who testified regardless of whether they were subpoenaed. McGlauflin v. Wormser, 28 Mont. 177, 72 P. 428. Fees of witnesses at the various preliminary hearing as to necessity of survey in mining contest and expense of survey and map are taxable as costs. King v. Allen [Mont.] 73 P. 1107. A charge for attendance of witnesses improperly allowed, where there was no affidavit as to number of days of actual attendance [Muncipal Court Act, § 344]. Topken v. Cunard S. S. Co., 88 N. Y. S. 394.

63. Where in equity suit, an excessive number of witnesses were examined, the court will limit the costs to the fees of those of a reasonable number. Kane v. Luckman, 131 F. 609.

64. Successful party may tax costs for travel and attendance. Waterman Co. v. Lockwood, 128 F. 174.

65. The court had discretion under § 768, Code Civ. Proc. to fix fees of referee, and was not bound by § 280, Practice Act, limiting fees to $5 a day. Mesnager v. De Leonis, 140 Cal. 402, 73 P. 1052.

66. The fees of a deputy sheriff, though only a de facto officer for serving papers, and the cost of printing copies by plaintiffs allowed as costs. Williamson v. Lake County [S. D.] 96 N. W. 702.

67. Egan v. Finney, 42 Or. 599, 72 P. 133.

68. Master in chancery should file an itemized statement of services and fees allowed by law; stenographer's fees for taking testimony cannot be included. Smyth v. Stoddard, 203 Ill. 424, 67 N. E. 980. Under Rev. Laws, c. 165, § 54, providing for an allowance by court to commissioners, assessors, referees, etc., the prevailing party cannot tax as costs sums voluntarily paid by him to them as compensation for services, or for hire of stenographer under agreement of counsel. Boston Belting Co. v. Boston, 183 Mass. 254, 67 N. E. 428. Defendant in action for separation after a mistrial should not be required to pay for stenographer's minutes, they not being necessary. Herrmann v. Herrmann, 88 App. Div. 76, 84 N. Y. S. 736. Where a stenographer was employed by a referee, the parties were liable. McReynolds v. Manger, 84 N. Y. S. 982.

69. The amount of costs not being fixed

been allowed[70] to a garnishee,[71] and have been given in stockholder's suits,[72] and partition,[73] except when party defended in good faith,[74] divorce,[75] injunction suits,[76] and suits against insurance companies,[77] and are commonly stipulated for on foreclosure,[78] and may also be recovered in a separate action;[79] but they have been refused in a taxpayer's action,[80] a suit for an accounting,[81] and actions ex contractu,[82] or in attachment.[83] In New York, additional allowances are made in difficult cases,[84] but the statute permitting the same is strictly construed.[85] Items may be divided where causes are tried together,[86] where recovery is had from only a part of the parties.[87] A party who incurs them is responsible for costs.[88]

by Laws 1902, p. 1561, c. 580, § 332. Blum, Jr. Sons v. O'Connor, 84 N. Y. S. 207.

70. Judgment for solicitor's fees taxed on reference to master may be sued on in another jurisdiction. Linton v. Jansen, 1 Neb. Unoff., 352, 95 N. W. 675.

71. Under Pa. P. L. 527, a garnishee which successfully contested plaintiff's claim is entitled to a reasonable counsel fee. New York Finance Co. v. Potter, 126 Fed. 432.

72. Minority stockholders who successfully sued to restrain a transfer of corporate property were entitled to have attorney's fees taxed as part of their costs, and in ascertaining the amount, the court should consider the labor and time involved, the importance of the litigation and unsuccessful intermediate appeals. Forrester v. Boston & M. Consol. Copper & Silver Min. Co. [Kan.] 74 P. 1088. Allowance of attorney's fee not premature where decree disposed of issues and left nothing but an accounting. Id. [Kan.] 76 P. 211.

73. In partition, solicitor's fees may be allowed unless defense made in good faith was substantial and necessary, and the skill and standing of counsel is to be taken into consideration, and decree may be made in favor of solicitor, though he is not a party to the suit. McMullen v. Reynolds, 105 Ill. App. 386. Under Chancery Act 1902, § 91, counsel fees may be awarded in a partition suit, but where a second reference was necessary because of mistake of counsel, it will affect the amount. McMullen v. Doughty [N. J. Eq.] 55 A. 115.

74. Joest v. Adel, 209 Ill. 432, 70 N. E. 638.

75. Where in divorce, the court refused to confirm the report of the referee in favor of the wife, and further reference is ordered, the wife will be allowed additional counsel fees. Bauer v. Bauer, 42 Misc. 557, 87 N. Y. S. 607.

76. In an injunction suit where over $2,000 was involved, $200 attorney's fees was not excessive. North Lumber Co. v. Gary [Miss.] 36 So. 2.

77. Plaintiff entitled to recover attorney's fees in action against insurance companies to be awarded in same action, chap. 4173 being constitutional. Hartford Fire Ins. Co. v. Redding [Fla.] 37 So. 62.

78. Complainant in bill to foreclose entitled to attorney's fees, though bill was taken pro confesso against mortgagor, where a co-defendant contested. Peacock, Hunt & West Co. v. Thaggard, 128 F. 1005. On foreclosure by receiver of an insolvent building and loan association, attorney's fees provided in the mortgage are properly allowed. Ottensoser v. Scott [Fla.] 37 So. 161.

79. Suit by attorneys for services and disbursements. Lewis v. Snook, 88 App. Div. 343, 84 N. Y. S. 634.

80. Criswell v. Board of Directors of Everett School Dist. No. 24, 34 Wash. 420, 75 P. 984.

81. In an action for an accounting, plaintiff cannot recover counsel fees, but only the statutory costs, which in contemplation of law are full indemnity. Rowland v. Maddock, 183 Mass. 360, 67 N. E. 347.

82. Under Civil Code 1895, § 3796, attorney's fees will not be allowed the successful party on an action ex contractu, where there was no bad faith in the transaction. Traders' Ins. Co. v. Mann, 118 Ga. 381, 45 S. E. 426. Attorney's fees will not be taxed in a suit on a note unless defendant is notified in writing ten days before suit is brought. Holcombe v. Cable Co., 119 Ga. 466, 46 S. E. 671. Counsel fees cannot be recovered as damages in a suit for breach of contract. Kaufmann v. Kirker, 22 Pa. Super. Ct. 201.

83. Where one succeeded in defending his right to property which was attached as that of another, he cannot recover his attorney's fees in an action against the attaching creditors. Bogard v. Tyler's Adm'r, 25 Ky. L. R. 1416, 78 S. W. 138.

84. $2,000 given as an additional allowance in a "difficult and extraordinary" case, where state sued for several hundred thousand dollars under game law and recovered nothing, it being not over 5% of amount claimed after eliminating causes of action to which demurrer had been sustained. People v. Bootman, 88 N. Y. S. 887.

85. Additional allowance of $2,000 not justified where verdict of $75,000 for death in an ordinary action for negligence. Standard Trust Co. v. New York, etc., R. Co., 178 N. Y. 407, 70 N. E. 925. An additional allowance of costs to the amount of $600 not allowed. Swan v. Stiles, 87 N. Y. S. 1089. Not allowed where nothing of value in litigation on which to base it. Hauptmann v. Hauptmann, 91 App. Div. 197, 86 N. Y. S. 427.

86. Where three cases were tried together, the witnesses were entitled to three fees, the $2.50 for deposition could be taxed in each case, and special examiner was entitled to three fees for each witness and exhibit, but the clerk was entitled to only one fee for supervising the record, and commissioner to one fee for deposition. Waterman Co. v. Lockwood, 128 F. 174.

87. Where appeal is joint as to both respondents, and appellant recovers of one only, he is entitled to one-half costs of appeal. McKenzie v. Royal Dairy [Wash.] 77 P. 680.

88. Under Sayles' Rev. Civ. St. art. 1421, each party is responsible to the officers of the court for costs incurred by himself, and

On appeal.[89]—The successful party to an appeal is entitled to tax costs for assignment of errors, briefs,[90] settling a case,[91] transcripts,[92] or for an amended abstract of testimony which supplies omissions[93] in each suit in which they are filed.[94] But he will be taxed with costs if they were filed too late,[95] or were unnecessary,[96] or prolix.[97] Costs cannot be taxed under an act passed after notice of appeal was served.[98] In Minnesota, the fee for an appeal bond can be taxed,[99] but in South Dakota, neither that nor stenographer's fees can be taxed.[1] Dismissal carries costs,[2] but not a fee for argument,[3] and a rehearing entitles party to additional costs.[4] Where a successful appellant subsequently loses, he may set

so court could refuse motion to have testimony transcribed, where defendant did not assure payment for it. Allen v. Hazzard [Tex. Civ. App.] 77 S. W. 266.

89. See 1 Curr. L. 814.

90. Where appellant in reply brief did not make any new argument, the costs would be taxed to him. Schoonover v. Petcina [Iowa] 100 N. W. 490.

91. Where defendant was finally successful, he was entitled to costs of making and serving a case on motion for new trial, notwithstanding that he also obtained leave to file an amended answer on paying costs as taxed in judgment roll. Ireland v. Harlam, 88 N. Y. S. 990.

92. Costs of making transcript of record are part of costs of appeal, and may be recovered by successful appellant, though final judgment goes against him. Dobson v. Southern R. Co., 133 N. C. 624, 45 S. E. 958. Under Laws 1893, p. 132, c. 61, § 29, the prevailing party may recover the amount actually paid a stenographer for making transcript not to exceed 10 cents a folio, and clerk may estimate the folios by taking the average of a few pages. Nelson v. McLellan, 34 Wash. 181, 75 P. 635.

93. Wilkie v. Sassen, 123 Iowa, 421, 99 N. W. 124.

94. Where plaintiff has adverse judgment rendered against him in three suits, he cannot bind the transcripts together and demand that the clerk, on payment of a single fee, shall docket them as one appeal. Rachofsky v. Benson [Colo. App.] 77 P. 862. Where parties stipulated that the briefs and abstract might be used in another appeal where their positions were reversed, it did not prevent respondents being taxed with full costs in this suit. McFarlane v. Cornelus, 43 Or. 513, 74 P. 468.

Contra: A party can only be allowed what he actually disburses, and where printed briefs in a set of cases were identical except for names of parties on the covers, he will not be allowed the customary rate of $1 a page. Kelly v. Oksall [S. D.] 97 N. W. 11.

95. Appellees' additional abstract was stricken from the files for delay. Ridgeway v. Jewell [Iowa] 95 N. W. 410. The expenses of filing an additional abstract by appellee (which contained the testimony in full), where a proper abstract had been filed by appellant, cannot be charged against the unsuccessful appellant. Gillett v. Gillett, 207 Ill. 136, 69 N. E. 942.

96. Unnecessary amendment of abstract. Farmers' Sav. Bank v. Independent School Dist. of Farmington, 122 Iowa, 99, 97 N. W. 988. Where appellee filed a long abstract of matter which was better stated in appellant's abstract, the cost of printing was charged to appellee, though judgment was affirmed. Wissler v. Atlantic, 123 Iowa, 11, 98 N. W. 131. Where brief of 283 pages was filed, consisting of long arguments, and extended quotations from cases, and other matters having no proper place in a brief, the prevailing party would not be allowed to recover the cost of printing. Finlen v. Heinze, 28 Mont. 548, 73 P. 123. A fee for a copy of bill of exceptions can only be taxed when it was necessary for the appeal, and Rev. St. 1899, §§ 10, 115 does not authorize a fee for preparing a bill of exceptions. Drumm-Flato Commission Co. v. Gerlach Bank [Mo. App.] 79 S. W. 714. Printing certain testimony which was unnecessary. Harris v. Davenport, 132 N. C. 697, 44 S. E. 406.

97. Where assignments of error which might have been included in 14 pages covered 114 pages, the cost of printing the 100 pages would be charged to the successful appellant. Dorr Cattle Co. v. Des Moines Nat. Bank [Iowa] 98 N. W. 918. Appellee filed a prolix amendment of abstract. Warren v. Miller & Sons [Iowa] 99 N. W. 127. Where appellee's additional abstract set out by question and answer the evidence in the abstract, it would be stricken out. Wunderlin v. Wunderlin [Iowa] 100 N. W. 37. Appellant incorporated in transcript the formal parts of pleadings. Greene v. Montana Brewing Co., 28 Mont. 380, 72 P. 751. Though appellants prevailed, they were allowed to recover only one-third of cost of printing abstract, as it contained matter relating to judge's charge to which no exception was taken, and to other irrelevant matters. Moore v. Dickson [Wis.] 99 N. W. 322.

98. An appeal is taken when notice of intention to appeal is served. Saverance v. Lockhart, 66 S. C. 539, 45 S. E. 83.

99. The reasonable sum paid to a surety company for an appeal bond. Wadleigh v. Duluth St. R. Co. [Minn.] 100 N. W. 362.

1. No statutory authority. Elfring v. New Birdsall Co. [S. D.] 96 N. W. 703.

2. Where defendant appealed from a decree in divorce and in the meanwhile secured a new trial and decree in her favor, the appeal would be dismissed with costs to appellant, as her action amounted to an abandonment of appeal. Belding v. Belding [Iowa] 97 N. W. 1112.

3. Where an appeal is dismissed as the result of a preliminary motion, respondent cannot tax a fee for argument. In re George Wray Drug Co., 87 N. Y. S. 676.

4. On rehearing, party entitled to recover same amount of costs as at original hearing, including printing of additional

off the costs of appeal,[5] which may not include disbursements.[6] An additional amount of damages will be given where writ of error[7] or an appeal[8] was taken merely for delay, and not in good faith,[9] unless the judgment was for costs only[10] or in rem.[11]

In criminal proceedings.[12]—Counsel are not entitled to fees for a dilatory criminal appeal,[13] nor are officials entitled to fees for acts which they failed to do[14] or did in an illegal manner.[15] Officers cannot be deprived of their fees by ordinance,[16] but neither can they sue the city[17] except as provided by statute.[18]

§ 8. *Procedure to tax costs.*[19]—Statements of costs must be filed within the time limited,[20] and it then becomes the clerk's duty to tax them,[21] if there is

briefs served by leave of court. Crane v. Odegard, 12 N. D. 135, 96 N. W. 326.

5. Where defendant wins on appeal, but loses on a second trial, he is only entitled to set off against the verdict the costs which are necessary to bring the case up, but does not include costs in lower court of entering verdict, judgment and motion for new trial. Central of Georgia R. Co. v. Glascock [Ga.] 47 S. E. 910.

6. Where an order was reversed on appeal to the supreme court "with costs" that did not include disbursements. Wilson v. Lange, 84 N. Y. S. 519.

7. 10% damages allowed under rule 28. Chicago Terminal Transfer R. Co. v. Bomberber [C. C. A.] 130 F. 884.

8. Where an appeal from the appellate court to the supreme court is prosecuted for delay, 5% damages will be added. East St. Louis Connecting R. Co. v. Altgen [Ill.] 71 N. E. 377.

9. Damages for delay necessitated by an appeal (§ 557 B. & C. Comp.) will not be allowed where appeal was taken in good faith. Manary v. Runyon, 43 Or. 495, 73 P. 1028.

10. Civ. Code, § 764, providing 10% damages on amount superseded shall be awarded against appellant on affirmance of a judgment for the payment of money, does not apply where the only judgment for money was for costs. Oberdorfer v. White [Ky.] 80 S. W. 1099.

11. 10% damages will not be awarded on the affirmance of a judgment to enforce an assessment for street improvement, as the judgment superseded was in rem. Orth v. R. B. Park & Co. [Ky.] 81 S. W. 251.

12. See 1 Curr. L. 814.

13. Where appeal was taken by one under sentence of death solely for delay, no counsel fees would be awarded his counsel under Code Cr. Proc. § 308. People v. Triola, 175 N. Y. 407, 67 N. E. 968.

14. A jailer is not entitled to fees for court he did not attend. Threlkeld v. Livingston County Fiscal Court [Ky.] 80 S. W. 1095.

15. Where a deputy sheriff inserted the names of twelve additional witnesses in the subpoena, it was error to include their expense in the cost bill. Manuel v. State [Tex. Cr. App.] 74 S. W. 30. Where the arrest made by sheriff is illegal, the costs cannot be taxed against defendant. Ex parte Sykes [Tex. Cr. App.] 79 S. W. 538.

16. Mayors of cities in Ohio are entitled to retain fees and costs collected in criminal cases tried before them, and a city ordinance requiring such fees and costs to be paid into the city treasury is invalid as in conflict with the statute [Rev. St. § 1309]. City of Piqua v. Cron, 2 Ohio N. P. (N. S.) 165.

17. Provision that prisoners were to work out their fees due to officers and that city was not liable does not authorize suit against city, especially in absence of showing that prisoners in fact worked out their fees. Fortner v. Higginsville [Mo. App.] 80 S. W. 983. Fees of officers in prosecution of violations of city ordinances cannot be collected in suit from city in the absence of any statute. Kreader v. Fremont [Neb.] 96 N. W. 616. In a small-offense case before a justice, where costs have been taxed against defendant, and for failure to pay he has been committed to the work house, the costs to be collectible of the county must be ratified by the judge of the circuit court and the attorney general as in other criminal cases. Musgrove v. Hamilton County [Tenn.] 77 S. W. 779.

18. Clerk of circuit court proper party to mandamus comptroller to honor his requisition to pay money for witnesses before the grand jury, which the state and not the county pays. State v. Croom [Fla.] 37 So. 303.

19. See 1 Curr. L. 815.

20. Where party failed to file statement of costs within 5 days of judgment, he was precluded from recovering costs [Laws 1903, p. 209]. McFarlane v. McFarlane, 43 Or. 477, 75 P. 139. Failure to file statement of costs within 5 days of judgment prevents recovery of disbursements, but not of costs, $15 attorney's fee and $10 clerk's fee, allowed of course. Anderson v. Adams, 44 Or. 529, 76 P. 16. B. & C. Comp. § 568, as amended, requiring service on such adverse parties as are entitled to notice, and filing with clerk of statement of disbursements within 5 days of judgment, or if after that time that it must be served whether adverse party appeared or not, does not require service if statement is filed within the 5 days. Egan v. North American Sav. L. & Bldg. Co. [Or.] 77 P. 392. Where parties filed their first cost bill in time, the court had the right to permit the filing of a supplemental bill. Dignan v. Nelson, 26 Utah, 186, 72 P. 936.

21. Where judgment was reversed with costs to abide a new trial which resulted in appellant's favor, his rights to costs became fixed, and it was the clerk's duty to tax them. Beck v. Kerr, 87 App. Div. 1, 83 N. Y. S. 1057. The costs including fees of referee and stenographer and allowances to assignee for benefit of creditors should be taxed by clerk, but where all parties have been notified and there is no dispute, the

error,[22] or no notice; a motion for new taxation[23] or for retaxation[24] should be made to entitle party to a review.[25] In some states, an appeal is not allowed,[26] and mandamus is the proper remedy to review a retaxation.[27] In others an appeal should be taken from the judgment,[28] or the court may review the matter regardless of how it came up,[29] provided it is not too late.[30] Attorney's fees need not be demanded in the complaint,[31] but they should be awarded to the attorneys separately,[32] and testimony as to their value should be taken at the hearing.[33] The right to them may be lost by the lapse of time.[34] A judgment is necessary to collect costs,[35] and the amount should be stated therein,[36] and itemized in the execution.[37] Execution therefor may be enjoined in case of doubt.[38]

court will allow them. In re Oakley, 85 N. Y. S. 227. It is duty of clerk, Rev. St. 1895, art. 2324, to tax costs in every case after final judgment, this being a ministerial duty, and a court may retax costs which were omitted by his mistake, though the judgment has been paid. Patton v. Cox [Tex.] 77 S. W. 1025.

22. Where sums were due a receiver who was improperly appointed, it was error to tax them as costs against the complainants without giving them a chance to be heard. Wills Valley Min. & Mfg. Co. v. Galloway, 139 Ala. 276, 35 So. 850.

23. Where costs were taxed without notice by clerk and defendant gave immediate notice of retaxation, but failed to appear at the hearing, and the proceedings were dismissed, plaintiff's remedy was to move for a new taxation, and not to compel defendants to retax their costs. Talcott v. Jonasson, 87 N. Y. S. 521.

24. A petition to retax under Code 1896, § 1369, as a charge was made for each figure instead of for each amount, but not alleging that costs accrued after adoption of section, is insufficient. Russell v. Puryear, 139 Ala. 568, 36 So. 722. Motion to retax costs dismissed as too indefinite. Casto v. Eigeman [Ind.] 70 N. E. 807.

25. Errors in taxation of costs cannot be reviewed unless a motion for retaxation was made in the court below and overruled. Topping v. Douglas [Iowa] 96 N. W. 1085.

26. No appeal from award of costs in circuit court, though erroneous. Fleshman v. McWhorther [W. Va.] 46 S. E. 116.

27. Where judgment was given for costs, the clerk cannot disregard it, the remedy being a writ of error, nor could circuit court on appeal from clerk disallow certain items where no exception was taken and its action could be reviewed on mandamus. Schmidt v. Donovan [Mich.] 99 N. W. 877.

28. An order refusing to disallow defendant's costs made after final judgment is only reviewable on appeal from judgment of which the costs were a part. Spencer v. Mungus, 28 Mont. 357, 72 P. 663. No appeal lies from order taxing costs, but only from the judgment, and memorandum served by party claiming costs is prima facie evidence of their being proper. King v. Allen [Mont.] 73 P. 1107. Case is appealable, though only judgment is for costs. Crebbin v. Shinn [Colo. App.] 74 P. 795.

29. Whether proper items of costs and disbursements have been taxed by the clerk should be raised by appeal, though the court will review the acts of the clerk, regardless of the manner in which they are presented for review. Kelly v. Oksail [S. D.] 97 N. W. 11.

30. Where appellant's coats were scaled down by the chancellor and no appeal was taken, the costs would not be retaxed after the lapse of a year. Palsley v. Jones [Miss.] 34 So. 567. Where a petition for specific performance was dismissed without costs, the court cannot amend by a nunc pro tunc judgment and award costs, as that is not supplying evidence or correcting clerical errors. In re Potter's Estate, 141 Cal. 424, 75 P. 850.

31. Under Code Civ. Proc. § 1195, providing for reasonable attorney's fees in the superior and supreme courts, no allegation was necessary in the complaint. Ah Louis v. Harwood, 140 Cal. 500, 74 P. 41.

32. Where attorneys employed were not partners, the court must allow them compensation separately out of the fund recovered, and on appeal the whole question as to amount was reopened. Glidden v. Cowen [C. C. A.] 123 F. 48.

33. In foreclosure proceedings, where deed provides for solicitor's fees, it is proper to take proof of value of services already rendered, and to be rendered, at the close of the testimony in chief. Unity Co. v. Equitable Trust Co., 204 Ill. 595, 68 N. E. 654. Vice-chancellor should hear the parties on the question of amount of counsel fees. McMullen v. Doughty [N. J. Eq.] 55 A. 115.

34. Under Rev. St. 1899, § 9378, authorizing the county to employ attorneys in suits for taxes and allowing them fees, the court cannot three years after term at which judgment was entered tax their fees. State v. Keokuk & W. R. Co., 176 Mo. 443, 75 S. W. 636.

35. A sheriff's deed based on an execution for costs in a criminal case where no judgment for costs was entered is void. Hendon v. Delvichio, 137 Ala. 594, 34 So. 830. The decree awarding divorce and costs is sufficient to sustain the latter, though the findings were not sufficient to sustain the rest of the decree. Musselman v. Musselman, 140 Cal. 197, 73 P. 824. Where party is entitled to costs as a consequence of a decision, the record should show a judgment therefor, and if it does not, the court has power to remedy the defect. Thomas v. Thomas, 98 Me. 184, 56 A. 651.

36. As matter of form, the final decree should state the amount of costs, but it will not be set aside for a mere matter of form. East Tennessee Land Co. v. Leeson [Mass.] 69 N. E. 351.

37. An execution for costs where the witness fees were not itemized is void [Code 1896, §§ 1337, 1340, 1833]. Stephens v. Head, 138 Ala. 455, 35 So. 565.

§ 9. *Enforcement and payment of the cost judgment.*[39]—Costs may be collected on an attachment,[40] or on an execution against the person.[41] Judgment may be summarily entered against the sureties on the bond.[42] The clerk may refuse to perform an act until the cost is paid,[43] except where the state is a party.[44] The granting of motions may be expressly conditioned on the payment of costs,[45] though one is not in contempt for failure to do so.[46] Failure to pay commonly operates as a stay to any progressive action by the party,[47] but this may be waived by the other.[48] A second action for the same cause will be stayed until the costs of the first are paid,[49] unless one was legal and the other equitable.[50] A state may recover from unsuccessful defendants the costs which it has incurred.[51]

COSTS IN THE CIRCUIT COURT OF APPEALS.*

[SPECIAL ARTICLE BY WALTER A. SHUMAKER.]

Right to costs and against whom taxable.—On affirmance, the rules provide

38. Where the evidence was conflicting, it was proper for judge to enjoin a certain cost fi. fa. issued in a contested election case. until a hearing could be had on the issues raised by the pleadings. McLeod v. Reid [Ga.] 48 S. E. 315.

39. See 1 Curr. L. 815.

40. Where an attachment is a valid lien, it secures the costs, which should be paid in full from the proceeds, the same as the original debt. Bories v. Union Bldg. & Loan Ass'n, 141 Cal. 79, 74 P. 554.

41. In an action of tort where if plaintiff succeeded defendant is liable to arrest, a judgment in favor of defendant may be enforced by execution against the person. Saffier v. Haft, 86 App. Div. 284, 13 Ann. Cas. 318, 83 N. Y. S. 763. Where defendant, a woman, was entitled to costs, execution against the person of plaintiff should not be granted, since he could not have it against her. Allen v. Becket, 84 N. Y. S. 1009.

42. Under Code, § 3852, after final judgment the court may render judgment summarily against sureties for costs, they not being entitled to jury trial or change of venue. Rogers v. Western Mut. Life Ass'n, 123 Iowa, 722, 99 N. W. 589. On dismissal of an action, court may enter judgment against sureties on bond for costs, and this though the bond had been lost, but a copy had been filed under Rev. St. 1899, § 4560. Jordan v. Vaughn [Mo. App.] 78 S. W. 316.

43. Refusal to print portion of record containing evidence in equity suit. Allis v. Hall, 76 Conn. 322, 56 A. 637.

44. In an action by a tax collector on behalf of a state and a parish to recover a license, the clerk had no right to withhold the transcript of appeal until costs were paid. State v. Estorage, 110 La. 479, 34 So. 643.

45. Motion was denied with right to renew it on payment of costs previously incurred. Murphy v. Kelly, 89 App. Div. 619, 85 N. Y. S. 912. The granting of a new trial may be conditional on the payment of costs. Connor Co. v. Goodwillie [Wis.] 98 N. W. 528.

46. Plaintiff was ordered to pay costs by next term or action would be dismissed. Ex parte Colley [Ala.] 37 So. 232.

47. Defendant cannot have an order vacating another order where he was already in default in payment of costs of previous orders [Code Civ. Proc. § 779]. Albany Brass & Iron Co. v. Alton, 84 N. Y. S. 180. Plaintiff may appeal from an order granting a motion of defendant, though previous costs were not paid and action was stayed, as this was not a progressive step on his part. Allen v. Becket, 84 N. Y. S. 1011. Code Civ. Proc. § 779, requiring costs of motion to be paid at time fixed by order, or otherwise within 10 days of service of order or proceedings will be stayed, does not operate as a stay until default occurs. Wasserman v. Benjamin, 91 App. Div. 547, 86 N. Y. S. 1022. Under Code Civ. Proc. § 779, staying proceedings until costs on interlocutory costs are paid, the stay does not operate until servive of copy of order, and if none is served and the case is put on the calendar, the court cannot strike it off. Sire v. Shubert, 87 N. Y. S. 891.

48. Where defendant obtained leave to have a default judgment vacated on payment of costs, and the trial began without their full payment, the plaintiff waived the stay. Dout v. Brooklyn Heights R. Co., 84 App. Div. 618, 82 N. Y. S. 996.

49. Where plaintiff brought a suit in a different county from the one where the first was dismissed, the defendant could not have an injunction to restrain the suit until the costs of the first were paid, as the court in which the second action was pending had power to stay the suit. Wabash R. Co. v. Sweet [Mo. App.] 77 S. W. 123. A second suit for the same cause of action was stayed until the costs of the first suit where plaintiff defaulted were paid. Fransioli v. Boorman, 84 N. Y. S. 128. Failure to pay costs where action had been dismissed after demurrer resulted in order to dismiss second action. Hadwin v. Southern R. Co. [S. C.] 45 S. E. 1019.

50. Where plaintiff lost an action at law on the ground that his relief was equitable, his suit in equity would not be stayed until the costs of the former were paid. Johnson v. Amberson [Ala.] 37 So. 273.

51. A state may recover costs which it has incurred from unsuccessful defendants. State v. New Orleans Debenture Redemption Co., 112 La. 1, 36 So. 205.

*Acknowledgment is due to the valuable work of Mr. Gunckel on Costs in Federal Courts, from which many citations were taken.

that costs shall be allowed to the defendant in error or appellee, and on *reversal* to the plaintiff in error or appellant, unless otherwise ordered by the court.[53] The fact that a decree is affirmed on grounds other than those assigned by the court below does not impair the appellee's right to costs.[54] An exception is made in case of the United States, and costs are not allowed for or against it,[55] and this exemption has been extended to a collector of a port, sued in his official capacity;[56] but the contrary rule has also been held.[57]

In case of dismissal, it is provided that costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties, except where the dismissal is for want of jurisdiction.[58] In the eighth circuit, the exception as to dismissals for want of jurisdiction is not made. In event of *modification,* the question of costs is subject to the order of the court, which may divide the costs,[59] allow costs to neither party,[60] or allow full costs.[61] The allowance of

53. Rule 31, §§ 2, 3 (In the 7th Circuit this rule is numbered 29). A successful appellant has been charged with costs because responsible for delay in proceedings. The Ethel [C. C. A.] 66 F. 340.

54. Post v. Beacon Vacuum Pump & Elec. Co. [C. C. A.] 89 F. 1. The court said: "The appellants insist that costs are not to be allowed when the bill is disposed of on new grounds of demurrer assigned ore tenus. * * * It does not follow that, because the appellate court maintains a decree of the court below on grounds other than those assigned by the latter court, the appellees are not entitled to their costs on appeal, especially where, as in the case at bar, the appellate court has not found it necessary to go to the extent of considering the reasons for which the court below decided the case."

55. Rule 31, § 4.

56. Marine v. Lyon [C. C. A.] 62 F. 153. The court below taxed costs against a collector of the port of Baltimore. A petition on behalf of the United States was then filed, asking reformation of the judgment as to costs. The court said: "The act of 1890, legislating on this same subject, and providing a substitute for the proceeding allowed in that section, and for a suit and appeal thereon, repeals the section, but says nothing whatever as to interest and costs. It is impossible to escape the conclusion that congress either did not intend that the United States should pay costs in the cases provided for, or that it omitted to insert such intention, and that this omission defeats the claim for costs."

57. De Bary v. Carter [C. C. A.] 102 F. 130. The suit was commenced in a state court in Louisiana to recover from the collector of internal revenue taxes illegally assessed and collected. The district attorney contended that no costs could be taxed against defendant, because the United States was the real defendant, and cited section 4 of rule 31 of the circuit court of appeals. The court said: "We are unable to see the applicability of section 4 of our rule 31 in the present case. The United States are not a party to the record. The general rule and practice is to allow costs to the prevailing party, and section 3 of our rule 31 is in accord with this general practice." After citing Howard v. American Dairy & Commercial Co., 10 Chi. Leg. News, 22, Fed. Cas. No. 6,753; Scripps v. Campbell, 22 Int. Rev. Rec. 250, Fed. Cas. No. 12,562; Field v. Schell, 4 Blatchf. 435, Fed. Cas. No. 4,771, and section 3220, Rev. St. La., the court said: "This statute seems to contemplate that, in suits similar to the present one, costs will be awarded against the government officers, and that, in due course, they will be paid by the United States. In our opinion, it would be an injustice to require a party who is compelled to pay an illegal assessment to bear all the burden of the successful litigation necessary to recover the same. The motion is denied."

58. Rule 31, § 1.

59. Donnell v. Amoskeag Mfg. Co. [C. C. A.] 118 F. 10; Hohorst v. Hamburg-American Packet Co. [C. C. A.] 91 F. 665; Hatch Storage Battery Co. v. Electric Storage Battery Co. [C. C. A.] 100 F. 975. The court said: "As we have already said, the only claims in issue are 1, 2, 3, 9, 10, and 12, but the decretal order taken by the complainant below covered all the claims in the patent. Considering the uses to which decrees and decretal orders in patent cases are applied, and the frequent inability of the great public with which they are used to ascertain the circumstances under which they issue, we have several times cautioned parties complainant that they must be careful to limit their decrees and decretal orders to precisely what was determined by the court. * * * The decretal order appealed from is modified so as to limit it to the third claim, and, as so modified, is affirmed, and each party shall pay one-half of the costs of appeal."

60. Packard v. Lacing-Stud Co. [C. C. A.] 70 F. 66. "The defendant below appealed against the whole decree. He succeeds in reversing it in some substantial parts, but not in the most important particular. Neither party has wholly prevailed here. Therefore we will follow Mason v. Graham, 23 Wall. [U. S.] 261, 278, where the circumstances, in that the case was in equity, and there was a substantial modification of the decree below, were more akin to the case at bar than those in Washington & G. R. Co. v. Harmon's Adm'r, 147 U. S. 571, 590, 13 S. Ct. 557. The decree of the circuit court will be modified so as to stand in favor of the plaintiff below on the third claim of the patent in suit, and in favor of the defendant below on the first, sixth, and seventh claims. The case is remanded to that court for further proceedings accordingly, and

costs on ordinary dismissals is in accordance with the settled practice;[62] but while costs on dismissal for want of jurisdiction are not allowable under the rule,[63] costs incident to the motion to dismiss have been allowed,[64] and on a reversal for want of jurisdiction, the court has exercised its power under the rule relating to reversal to determine whether costs shall be allowed,[65] and this rule has been

neither party will recover costs in this court." New England R. Co. v. Carnegie Steel Co. [C. C. A.] 76 F. 64. "As the appellant has not succeeded in reversing the decree below, although it appealed against the whole of it, but only in modifying it in a minor particular, we will follow the order as to costs adopted by this court in Packard v. Lacing-Stud Co. [C. C. A.] 70 F. 66, 68. The decree of the circuit court is modified so as to allow petitioner interest only from February 4, 1896, and, as thus modified, is affirmed, and neither party will recover costs in this court."

61. Northern Trust Co. v. Snyder [C. C. A.] 77 F. 818. The court said: "Without undertaking to go further than the case before us requires, we are of opinion that the appellant is entitled to the costs of this appeal. The appellant has succeeded in reversing the decree in the most important part, so far as the amount of money is concerned. It is true the appeal was from the entire decree, and that the appellant contested the right of the appellee to the recovery for any amount. We think, however, it would be a harsh rule that would deprive an appellant of the statutory costs of an appeal unless success attended the whole contention. This would be to require a party, at the peril of payment of the costs of the appeal, to correctly forecast the judgment of the appellate court, or to forego a review upon any doubtful question. Where the appeal has substantially prevailed, we perceive no reason to deny to the appellant the statutory costs which have been incurred in the successful attempt to assert a right." Tefft v. Stern [C. C. A.] 74 F. 755. The court said: "The third motion, asking for an apportionment of the costs, is impracticable, and would throw upon the court the burden of separating and apportioning the costs, as between the plaintiffs in error and the defendant, in all cases where a part of the judgment of the lower court was adjudicated to be correct, and other parts erroneous, and a reversal had thereon. Defendant in error's motion will be therefore overruled."

62. In Barr v. Pittsburgh Plate Glass Co. [C. C. A.] 67 F. 86, Wales, J. (page 142), said: "But here the plaintiff has not succeeded in proving his charges, and the rule appears to be settled that, where a bill charges fraud, and the bill is dismissed, the plaintiff must pay the costs." Fisher v. Boody, 1 Curt. 206, Fed. Cas. No. 4,814. Dismissal of second and unnecessary writ of error. St. Louis, etc., R. Co. v. McLelland [C. C. A.] 62 F. 118. Dismissal for failure to docket case. Rosebrugh v. Holman, 78 O. G. 1258.

63. Wetherby v. Stinson [C. C. A.] 62 F. 173. The court said: "Upon the facts as they are, the lack of jurisdiction is clear, and it follows that the decree dismissing the bill for want of equity should be set aside, and a dismissal for want of jurisdiction should be entered, but without costs. Mayor v. Cooper, 6 Wall. [U. S.] 247; Barney v. Baltimore City, 6 Wall. [U. S.] 280; Hornthal v. Collector, 9 Wall. [U. S.] 560; Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 4 S. Ct. 510; Grace v. American Cent. Ins. Co., 109 U. S. 278, 3 S. Ct. 207; Northwestern Fuel Co. v. Brock, 139 U. S. 216, 11 S. Ct. 523. We think, too, that costs should not be allowed in this court." Auer v. Lombard [C. C. A.] 72 F. 209. The court said: "As the circuit court had no jurisdiction for the reasons stated, no costs can be allowed in that court; and inasmuch as our disposal of the case in no way involves the merits of the controversy, the bill must he dismissed without prejudice. In these two particulars, the orders in Peper v. Fordyce, 119 U. S. 469, 472, 7 S. Ct. 287, and in Wetherby v. Stinson [C. C. A.] 62 F. 173, are in accordance with the settled practice of the supreme court. The decree of the circuit court is modified, and the case is remanded to that court, with directions to dismiss the bill, without prejudice, for want of jurisdiction, with the costs of this court in favor of the respondents, but without costs in that court for either party." Dickson v. Wyman [C. C. A.] 111 F. 726 (in hankruptcy). The court said: "The common rule is that, when a proceeding is dismissed for want of jurisdiction, neither party recovers costs. Ordinarily the only exception to that rule is that, on a proceeding in an appellate tribunal, the costs incident to a motion to dismiss for want of jurisdiction are allowed when dismissal follows. In this case there has been no motion to dismiss. "With reference to costs on the appeal, the proposition on which the case now turns was brought forward of our own motion; also the party appealed against is a quasi officer of the law. Combining the two facts, there is no equity in favor of the allowance of costs to either party."

64. Patten v. Cilley [C. C. A.] 50 F. 337. The court said: "We think that there has been no final decision in the circuit court, and that this court has no jurisdiction in error in the present stage of the case. Under the decision of the supreme court in Bradstreet Co. v. Higgins, 114 U. S. 262, 5 S. Ct. 880, the defendant in error is entitled to a judgment for the costs arising on the motion to dismiss. It is accordingly ordered that the writ of error be dismissed, with costs for the defendant incident to the motion to dismiss, including the printing of the record."

65. Grand Trunk R. Co. v. Noyes' Adm'r [C. C. A.] 59 F. 727. The court found that the record, at the time of removal, did not show the requisite citizenship of parties, though the circuit court had proceeded to judgment on the merits. It was held: "The judgment of the circuit court will therefore be reversed, with costs against the plaintiff in error, and the cause will be remanded to the circuit court, with directions

applied on reversal of judgments because of improper removal from the state to the Federal court.[66] Where the ground of dismissal is obviated by an amendment, the costs abide the event.[67] In admiralty and bankruptcy, the courts exercise an extended discretion in the matter of costs,[68] and a like discretion is exercised in patent cases.[69]

to enter judgment against the plaintiff in error for the costs of the circuit court and of this court, and thereupon to remand the cause to the state court, whence it came." In Tug River Coal & Salt Co. v. Brigel [C. C. A.] 67 F. 625, the court said: "On reversal for want of jurisdiction, the general rule is to allow costs against the party improperly instituting or removing the suit, for the reason that it was the duty of such party to place on record the facts necessary to sustain the jurisdiction of the court. Kellam v. Keith, 144 U. S. 568, 12 S. Ct. 922; Bradstreet Co. v. Higgins, 114 U. S. 263, 5 S. Ct. 880; Peninsular Iron Co. v. Stone, 121 U. S. 631, 7 S. Ct. 1010; Horne v. Hammond Co., 155 U. S. 393, 15 S. Ct. 167; Chappell v. Waterworth, 155 U. S. 102, 15 S. Ct. 34. It was held, however, in Peper v. Fordyce, 119 U. S. 471, 7 S. Ct. 287, that, 'upon a reversal for want of jurisdiction in the circuit court, this court may make such order in respect to the costs of the appeal as justice and right shall seem to require.' * * * Appellant made no objection to jurisdiction in the circuit court, and did not call the court's attention to lack of jurisdiction. While the defendant appellant must recover costs in the court below, we do not think it should be allowed full costs in this court. The costs of the appeal will be divided equally."

In Sneed v. Sellers [C. C. A.] 68 F. 729, the court said: "As the judgment of the circuit court was reversed, and the cause remanded with instructions to dismiss for want of jurisdiction, all of the costs, both of this and the circuit court, should be paid by the plaintiff below, plaintiff in error here. Mansfeld, etc., R. Co. v. Swan, 111 U. S. 379, 388, 4 S. Ct. 510." There was a failure to properly allege diversity of citizenship, but the case went to trial in the circuit court, and was appealed by defendant. New counsel in the court of appeals discovered the defect, and the bill was dismissed. The court said: "It is settled that, when a decree or judgment of the circuit court is reversed for want of jurisdiction in this court, we make such order in respect to the costs as justice and right may seem to require. Mansfield, etc., R. Co. v. Swan, 111 U. S. 379, 388, 4 S. Ct. 510; Hancock v. Holbrook, 112 U. S. 229, 5 S. Ct. 115; Peper v. Fordyce, 119 U. S. 469, 7 S. Ct. 287. * * * The proceedings by writ of error were therefore superfluous, and order will be taken that plaintiffs in error, who instituted them, should pay the costs therefor." Hunt v. Howes [C. C. A.] 74 F. 657. In Houston v. Filer & Stowell Co. [C. C. A.] 104 F. 163, and 105 F. 538, the court said: "If the time of the court is taken, either for a great or a short while, in the hearing of a case upon a declaration which does not show jurisdiction, blame necessarily belongs to the plaintiff, and the costs, therefore, may be justly charged against him." There was no averment of the amount in controversy, but the circuit court had dismissed the bill for a different reason. The court of appeals held that the dismissal had been upon the merits, and was erroneous, and said: "The decree is reversed, at the cost of the appellant, and the cause is remanded, with a direction to the court below to dismiss the bill." Cochran v. Childs [C. C. A.] 111 F. 433.

66. Southwestern Tel. & T. Co. v. Robinson [C. C. A.] 48 F. 769. There was no proper averment of citizenship, and the court said: "As the plaintiff in error brought the case into the circuit court, as well as to this court, he should not be allowed to recover costs, but should be condemned to pay them. See Hancock v. Holbrook, 112 U. S. 229, and Timmons v. Elyton Land Co., 139 U. S. 378. The decree of the circuit court is reversed, and the cause is ordered returned to that court, with instructions to remand it to the state court from which it was removed. All costs of this and the circuit court are to be adjudged against the plaintiff in error." In Craswell v. Belanger [C. C. A.] 56 F. 529, the court said "that, where the record, as in this case, does not affirmatively show that the circuit court of the United States had jurisdiction, the judgment will be reversed without any inquiry into the merits; but where it appears, as it does here, that the fault of the improper removal of the case rests solely with the plaintiff in error in failing to state in his petition for removal the necessary jurisdictional facts, the reversal must be at his costs. Mansfield, etc., R. Co. v. Swan, 111 U. S. 379, 4 S. Ct. 510; Hancock v. Holbrook, 112 U. S. 229, 5 S. Ct. 115; Halsted v. Buster, 119 U. S. 341, 7 S. Ct. 276; Clay v. Huntsville College, 120 U. S. 223, 7 S. Ct. 555; Menard v. Goggan, 121 U. S. 253, 7 S. Ct. 873; Stevens v. Nichols, 130 U. S. 230, 9 S. Ct. 518; Graves v. Corbin, 132 U. S. 590, 10 S. Ct. 196. These authorities conclusively show that the state court had no authority to remove this case, and that the circuit court had no jurisdiction in the premises. The judgment of the circuit court is therefore reversed, with costs against the plaintiff in error (defendant in the court below), and this case is remanded, with directions to the circuit court to enter a judgment against him for the costs incurred in the circuit court and in this court, and thereupon to remand the case to the state court from whence it came."

67. In Tug River Coal & Salt Co. v. Brigel [C. C. A.] 86 F. 818, the court said: "Where a final decree in an equity suit has been reversed by the court of appeals for want of the diverse citizenship necessary to the jurisdiction of Federal courts, and the bill is subsequently amended so as to obviate that difficulty, and made a case proper for the court to proceed with, the general costs of the cause in the court below should be adjudged by the court on final hearing, just as in the ordinary case."

68. Union Ice Co. v. Crowell [C. C. A.] 55 F. 87; Pettis v. Boston Tow-Boat Co. [C. C.

Amount of costs and what may be taxed.—By statute,[70] it is provided that a table of costs and fees shall be adopted by the circuit court of appeals, and that such table shall be thereafter revised and rendered uniform by the supreme court. Pursuant thereto, such a table was established by the supreme court on January 10, 1898.[71]

Docket fee.—An attorney's docket fee of $20 is expressly provided in the table of fees, and prior to its adoption, such a fee was allowed in analogy to the practice of the supreme court,[72] though under peculiar circumstances the court often interposed its discretion.[73]

A.] 49 F. 464. In Munson v. Straits of Dover Steamship Co. [C. C. A.] 102 F. 926 (in admiralty), the court said: "In admiralty, as in equity, it is within the discretion of the court to dismiss a suit where the party is entitled to nominal damages only, without costs, as was done in this case." In this circuit, general rule 31 has been adopted as an admiralty rule. In Hutchinson v. Le Roy [C. C. A.] 113 F. 202 (in bankruptcy), the court said: "No formal motion has been made to dismiss the appeal for lack of jurisdiction, and therefore no costs should be allowed thereon. In re Dickson [C. C. A.] 111 F. 726."

69. Shute v. Morley Sew. Mach. Co. [C. C. A.] 64 F. 368. The court said: "The patent in suit contains eighteen claims, and the prayers of the bill relate to the patent as a whole. The decree below directed that an injunction issue 'according to the prayer of the bill,' although only claims two and thirteen were in issue. It has been many times urged that the public has an incidental interest in patent litigation, which throws a duty on the court to notice certain matters of its own motion. This is one of them; and in a patent cause, a decree should not go which is broader than the findings of the court. Heretofore we have been content merely to correct the decree below, but, as the duty of drawing out a proper decree rests on the solicitor for the complainant, we will hereafter endeavor to protect the court by a proper adjustment of costs. As the appellant assigned no error on this account, he is not entitled to costs in this behalf. The decree of the court below will be modified so as to be expressly limited to claims two and thirteen, and, as thus modified, is affirmed. Neither party will recover any costs of appeal." In Blair Camera Co. v. Eastman Co. [C. C. A.] 64 F. 491, the court below held that certain claims only had been infringed. The court of appeals held: "We refer to the opinion in Shute v. Morley Sew. Mach. Co., 64 F. 368, passed down this day, touching modifications of the decree and the order as to costs. The decree below will be modified so as to be expressly limited to the claims specifically passed on by the circuit court, and, as thus modified, is affirmed. Neither party will recover any costs of appeal."

70. Act Feb. 19, 1897.

71.

Docketing a case and filing the record	$5.00
Entering an appearance	.25
Transferring a case to the printed calendar	1.00
Entering a continuance	.25
Filing a motion order or other paper	.25
Entering any rule, or making or copying any record or other paper, for each one hundred words	.20
Entering a judgment or decree	1.00
Every search of the records of the court and certifying the same	1.00
Affixing a certificate and a seal to any paper	1.00
Receiving, keeping, and paying money, in pursuance to any statute or order of court, one per cent. on the amount so received, kept, and paid.	
Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index	.25
Making a manuscript copy of the record, when required by the rules, for each one hundred words (but nothing in addition for supervising the printing)	.20
Issuing a writ of error and accompanying papers, or a mandate or other process	5.00
Filing briefs for each party appearing	5.00
Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed five dollars in the whole for any copy)	1.00
Attorney's docket fee	20.00

72. Kansas City, etc., R. Co. v. McDonald [C. C. A.] 60 F. 522; Shillito Co. v. McClung [C. C. A.] 66 F. 22; Northern Trust Co. v. Snyder [C. C. A.] 77 F. 818.

73. In The State of Missouri [C. C. A.] 76 F. 376, the court said: "The decree of the court awarded the claimants 'all their costs by them respectively herein expended.' The forty claimants appeared by the same proctors. The clerk taxed the sum of $800 for proctors' fees, being $20 upon each of the forty claims. A motion to retax was overruled by the court, and that ruling is assigned for error. These cases could all have been presented by one petition. The proofs were not taken in each case separately. There were but eleven depositions, which covered all the testimony affecting all the claims. The statute (section 824, Rev. St.) provides that, on a final hearing in equity or admiralty, a docket fee of $20 may be allowed. Costs in the admiralty are wholly within the control of the court, and are allowed or denied upon equitable considerations. They are sometimes denied to one who recovers his demand, and are sometimes given to a libelant who fails to recover anything, if he was led to commence suit by the act of the other party; and in prize and salvage cases, the property is

Printing record and briefs.—The original rules adopted were substantially the same in all the circuits, and rule 23 provided for the printing of the record, and that, "in case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given." Substantially this language is preserved in the amended rule 23 in all the circuits, and in the 1st, 5th, 6th, and 7th there is added: "And shall be inserted in the body of the mandate or other proper process." The power of the court is often interposed, however, to disallow the cost of printing unnecessary matter in the record.[74] By the table of fees, the clerk is entitled to twenty-five cents per page for attending to the printing of the record, amendments in several circuits having finally made the rules uniform in requiring the record to be printed under his supervision instead of by the parties.

Rule 24 of the original rules requires briefs to be printed, but with a single exception the rules are silent as to the expense of printing.[75] It is accordingly held that the expense of printing is not taxable.[76]

Other disbursements.—The cost of procuring an appeal and stay bond cannot be taxed.[77]

COUNTERFEITING.

The resemblance to a genuine coin need not be exact, but only sufficient to deceive persons of ordinary intelligence.[52]

COUNTIES.

§ 1. Creation and Organization (960).
§ 2. Officers, Personal Rights and Liabilities (961).
§ 3. Public Powers, Duties and Liabilities (963). Torts (966). Contracts (966). Bonds (968). Presentation, Allowance, Enforcement, and Payment of Claims (968). Issuance of Warrants (969).

The law of counties in respect to matters common to other public corporations is treated in topics relating to public securities,[53] contracts,[54] facilities,[55] and officers.[56] Taxation is also dealt with in a separate article.[57]

sometimes acquitted on payment of the costs by the claimant. The general rule is that costs follow decree, but circumstances of equity, of hardship, of oppression, or of negligence induce the court to depart from the rule in many cases. * * * The decree will be reversed and the cause remanded, with directions to the court below to enter a decree for the damages heretofore found, and for proper costs, which shall include but one proctor's fee of $20." In The Rabboni [C. C. A.] 84 F. 681, there were two appeals and two cross appeals, and the clerk taxed four docket fees. The appeals and cross appeals were entered separately, but heard together. The court said: "The practice in the supreme court is to tax one fee only in case of an appeal and a cross appeal. Uniformity in matters of this kind is desirable, and for this reason we adopt the practice of the supreme court, although for a considerable period a different practice has obtained in this circuit. The taxation should be modified according to these views, and it is therefore ordered that the taxation shall include two docket fees only."

74. No costs will be allowed for printing in the record matters pertaining to a discretionary ruling which could not be reviewed. Nederland L. Ins. Co. v. Hall [C. C. A.] 86 F. 741. Where record contains much irrelevant matter and the responsibility therefor cannot be apportioned, the court will divide the cost of printing. The Sarah [C. C. A.] 52 F. 233. Only that part of the record which the parties stipulated should be sent up may be taxed. Lamb Knit Goods Co. v. Lamb Glove & Mitten Co. [C. C. A.] 120 F. 267.

75. Rule 15, § 3 of the admiralty rules of the second circuit allows the expense of printing briefs to be taxed.

76. In Lee Injector Mfg. Co. v. Penberthy Injector Co. [C. C. A.] 109 F. 964, the court said: "It has never been the practice of either the supreme court or this court to allow as costs the disbursements of counsel for printing briefs." In Kursheedt Mfg. Co. v. Naday [C. C. A.] 108 F. 918, the court said: "The rule in this court for many years has been not to allow the sum paid for printing briefs or arguments as part of the taxable costs or disbursements, except when specially provided for by rule. In this respect the practice conforms to that of the supreme court."

77. Edison v. American Mutoscope Co., 117 F. 192; In re Hoyt, 119 F. 987.

52. Copper cent covered with silver wash passed for dime. Glass v. State [Tex. Cr. App.] 78 S. W. 1068.

53. See Municipal Bonds, 2 Curr. L. 931.

54. See Public Contracts, 2 Curr. L. 1280.

§ 1. *Creation and organization.*[58]—Counties are involuntary corporations, organized as political subdivisions of the state for governmental purposes.[59] In the absence of constitutional restrictions, the legislature has plenary power in respect to their creation,[60] and may either at the time it carves out a new county from the territory of an old one, or by subsequent legislation, adjust the property rights and equities existing between the two.[61] It may divide a county into districts, beats or precincts,[62] and alter or abolish such divisions at will.[63] A separate county government within the territorial limits of a city may exist,[64] or the two governments may be united.[65]

Courts will take judicial notice of the counties of a state and their boundaries,[66] and a legislative act creating a new county will be treated like a patent, and though one of the calls is inaccurate, if the true description can be ascertained, the act will be sustained.[67]

Though the steps taken to organize a county may fall short of creating a de jure county, they may nevertheless result in a de facto organization,[68] not subject to collateral attack.[69]

55. See Public Works and Improvements, 2 Curr. L. 1328; Bridges, 1 Curr. L. 355; Highways and Streets, 2 Curr. L. 177; Sewers and Drains, 2 Curr. L. 1628; Toll Roads and Bridges, 2 Curr. L. 1872.

56. See Officers and Public Employes, 1 Curr. L. 1069; Elections, 1 Curr. L. 981.

57. See Taxes, 2 Curr. L. 1786.

58. See 1 Curr. L. 816.

59. Gaare v. Board of County Com'rs, 90 Minn. 530, 97 N. W. 422; Duncan v. Willits [Del. Super.] 57 A. 369. A county is one of the civil divisions of the state for political and judicial purposes, created by the sovereign power of the state, of its own will, without the consent of the people who inhabit it. Independent Pub. Co. v. Lewis and Clarke County [Mont.] 75 P. 860.

60. Whether the general assembly in creating a new county has violated constitutional provisions is a judicial question. Zimmerman v. Brooks, 25 Ky. L. R. 2284, 80 S. W. 443. A county government act providing that in all townships there shall be two constables, except that in townships of less than 6,000 there shall be but one, is not unconstitutional as special and local legislation. Davidson v. Von Detten, 139 Cal. 467, 73 P. 189.

61. City Council of Denver v. Adams County Com'rs [Colo.] 77 P. 858. Creating the city and county of Denver did not destroy the identity of the county. The general assembly has the same control over its county funds that it has over the funds of other counties. Id. Under a legislative enactment that if any incorporated town be annexed to another the town so annexing shall be bound for all the debts of the other, a town annexing unincorporated territory assumes no obligation. Carpenter v. Central Covington [Ky.] 81 S. W. 919. County cannot be adjudged liable for the payment of bonds issued (before the county was created) by a township which at the time was a body corporate, forming part of another county, but which was dissolved on being incorporated in the new county. Folsom v. Greenwood County, 130 F. 730. The abolition of a township by constitutional amendment does not relieve the people of the township from the obligation of raising taxee for the payment of bonds lawfully voted. Ex parte Folsom, 131 F. 496.

62. Hinton v. Perry County Sup'rs [Miss.] 36 So. 565. In a county where the board has failed, in terms, to establish justices' precincts, but has designated all precincts established as election precincts, and such precincts are treated as justices' precincts, and two justices of the peace and one constable are elected therein, such precincts will be held to be justices' precincts as well as election precincts. State v. Vineyard [Idaho] 72 P. 824. The fact that commissioners appointed to divide a county into justice districts only allotted to a city two magistrates, while five were allotted to the county outside the city, is no ground for enjoining a tax, no exception having been taken to the report of the commissioners. McInerney v. Huelefeld, 25 Ky. L. R. 272, 75 S. W. 237.

63. Since they are established, either by the county commissioners under legislative authority, or by direct enactment. State v. Sawyer, 139 Ala. 138, 36 So. 545.

64. McInerney v. Huelefeld, 25 Ky. L. R. 272, 75 S. W. 237.

65. City Council of Denver v. Adams County Com'rs [Colo.] 77 P. 858. The constitutional amendment for consolidating the governments of Denver city and Arapahoe county, in the state of Colorado was regularly adopted. People v. Sours, 31 Colo. 369, 74 P. 167.

66. Zimmerman v. Brooks, 25 Ky. L. R. 2284, 80 S. W. 443.

67. Zimmerman v. Brooks, 25 Ky. L. R. 2284, 80 S. W. 443; Mariposa County v. Madera County, 142 Cal. 50, 75 P. 572; Robinson v. State [Neb.] 98 N. W. 694. The Texas statute (Sayles' Rev. Civ. St. 1897, art. 808a), giving the district court power to determine the location of the boundary line of counties, confers power to determine all matters incident to the existence of such line. Presidio County v. Jeff Davis County [Tex. Civ. App.] 77 S. W. 278.

68. State v. District Court, 90 Minn. 118, 95 N. W. 591. See 1 Curr. L. 816, n. 2. A precinct, for taxation purposes, actually formed and organized, will be deemed a de facto organization whether the meeting of the county commissioners at which it was

The location or change of a county seat is a legislative function, usually delegated to the board of county commissioners.[70] Their action is usually invoked by the petition of a prescribed number of freeholders,[71] that the question be submitted to a vote of the qualified electors of the county,[72] and of which election due notice must be given.[73] Injunction will lie to prevent unauthorized action by county authorities on a petition for a change of county seat.[74]

§ 2. *Officers, personal rights and liabilities.*[75]—The qualifications, mode of selection, number and tenure of commissioners and other county officers, are usually prescribed by statute.[76] An officer, however, holds his office until his successor is elected, or appointed and qualifies, whatever his term,[77] and qualifications prescribed by the constitution cannot be altered or increased by statute.[78] A county officer cannot at the same time hold more than one office,[79] nor make a valid contract with his county involving pecuniary benefits;[80] but a statute pro-

made was lawfully held or not. City of South Omaha v. O'Rourke [Neb.] 97 N. W. 608.

69. State v. District Court, 90 Minn. 118, 95 N. W. 591. See 1 Curr. L. 816, n. 2.

70. The power of the legislature to legislate in reference to the location of county seats does not include an implied power to provide for and regulate the building of a county court house. Board of Com'rs of Newton County v. State, 161 Ind. 616, 69 N. E. 442. Where a meeting of a board of county commissioners to consider a petition for the change of a county seat is declared illegal, another meeting of the board and valid action on the same petition may be had. Gile v. Stegner [Minn.] 100 N. W. 101. Constitutionality of legislation for building of new court house sustained. Dickinson v. Board of Chosen Freeholders of Hudson County [N. J.] 58 A. 182.

71. A voter who has petitioned for a special election on the question of relocating the county seat, and has then signed a remonstrance and request that he be not considered a petitioner, may, before final action, again change his mind and recall such remonstrance. Hoffman v. Nelson, 1 Neb. Unoff. 215, 95 N. W. 347.

Contra: Willing v. Rye, 123 Iowa, 471, 99 N. W. 158, where it is said the question is foreclosed by statute. A remonstrance to the relocation of a county seat may be circulated and signed before the petition is actually presented to the board. Willing v. Rye, 123 Iowa, 471, 99 N. W. 158.

72. An act providing that a county seat shall not be removed unless on a vote of two-thirds of the vote cast for governor in the next preceding election is violative of a constitutional provision that there must be a two-third vote of the qualified electors of the county. Lindsay v. Allen [Tenn.] 82 S. W. 171. The chancery court may go behind the findings of the county court and determine for itself whether in fact two-thirds of the qualified voters of a county voted in favor of the removal of the county seat. Id.

73. In a contest under a county seat removal act, the filing of an affidavit with the county auditor previous to the meeting of the board, showing that certain notices of a special election were posted, is a necessary prerequisite to the authority of the board. The omission to file such affidavit cannot be supplied by affidavits filed subsequent to the special election. Tucker v. Lincoln County Com'rs, 90 Minn. 406, 97 N. W. 103.

74. Gile v. Stegner [Minn.] 100 N. W. 101.

75. See 1 Curr. L. 816.

76. A county surveyor who at the time of his election as such did not hold a license, but who obtains one before his term of office commences, may lawfully qualify. Ward v. Crowell, 142 Cal. 587, 76 P. 491. Where the number of commissioners was increased to five and the people acquiesced therein, and thereafter elected this number, the regularity of the proceedings increasing the number cannot be questioned at the instance of individuals trying the title to office of some of the commissioners. People v. Long [Colo.] 77 P. 251. Under a statute relieving the county treasurer from liability in the collection of taxes and placing it upon a collector, the latter became a county officer. Commonwealth v. Connor, 207 Pa. 263, 56 A. 443. Under the Texas Code, a county attorney pro tem may be appointed [1 Code Cr. Proc. 1895, art. 38]. Daniels v. State [Tex. Cr. App.] 77 S. W. 215. A provision that if the official bond is not given and the oath of office taken on or before the day the term of office begins, it shall be vacant, applies only to offices which are to be filled for the full term. Jones v. Sizemore, 25 Ky. L. R. 1957, 79 S. W. 229.

77. A tie vote does not render the office vacant. The previous incumbent is entitled to hold over until his successor is elected and qualified. State v. Acton [Mont.] 77 P. 299. So an auditor's agent, under the Kentucky statute, holds until removed, even though the auditor's term may have expired. Sebree v. Com., 25 Ky. L. R. 121, 74 S. W. 716.

78. The office of county school superintendent being a constitutional office in Montana, it was incompetent for the legislature to prescribe additional qualifications for the office. State v. Acton [Mont.] 77 P. 299. A statute placing a court house and grounds in charge of a court crier is violative of the Maryland constitution in that it indirectly imposes on the judges who appoint the crier nonjudicial functions. Prince George's County Com'rs v. Mitchell, 97 Md. 330, 55 A. 673.

79. A county judge may not also hold the office of supervisor of roads. Daviess County v. Goodwin, 25 Ky. L. R. 1081, 77 S. W. 185. See 1 Curr. L. 817, n. 5.

80. County attorney for extra official services. Wilson v. Otoe County [Neb.] 98

viding a penalty for the buying in of claims against the county by county officials at less than face value does not apply to an official who does so not on his own behalf, but at the direction of the county commissioners.[81]

The interest of a county officer seeking the advice of his state courts is official and not personal in the sense entitling one to a writ of error from the Federal supreme court to review the judgment of the state court.[82]

The compensation of county officers is entirely a matter of statutory regulation.[83] In many states it is now the practice to compensate county officers by the payment of a stated salary, the fees of the office, if any, to be covered into the county treasury.[84] Salaries once fixed cannot, as a rule, be changed during the term of office,[85] and the imposition of duties within the scope of the office does not carry with it the right to additional compensation.[86] Other cases affecting the right to compensation and the amount thereof will be found collated in the note.[87] There is no warrant in law for the allowance of extra salary to the chairman of a board of county commissioners.[88]

N. W. 1050. But in Hanna v. Chalker [Mich.] 98 N. W. 732, it is held that a county board may employ one of its number in any capacity not pertaining to or inconsistent with his duties as a member of the board. See 1 Curr. L. 817, n. 6.

81. State v. Garland, 134 N. C. 749, 47 S. E. 426.

82. Smith v. Indiana, 191 U. S. 138, 48 Law. Ed. 125.

83. A statute which fixes the per diem compensation of assessors but limits the number of days in counties of stated population is constitutional. Board of Com'rs of Whitley County v. Garty, 161 Ind. 464, 68 N. E. 1012. See 1 Curr. L. 817, n. 16.

84. Unless there is (special) statutory authority therefor, a county clerk who receives a salary is not entitled, in Indiana, to special compensation for added duties (Comer v. Board of Com'rs of Morgan County Sup'rs [Ind. App.] 70 N. E. 179), and in Pennsylvania, county treasurers are not entitled to commissions on the personal property tax and on municipal loans collected by them (City of Philadelphia v. McMichael, 208 Pa. 297, 57 A. 705). The sum of $5.00 which an applicant for liquor license is required to pay to the clerk of quarter sessions is a fee belonging to the county. Schuylkill County v. Shoener, 205 Pa. 592, 55 A. 791. So also fees for mercantile licenses. Luzerne County v. Kirkendall [Pa.] 58 A. 156. In Nebraska, compensation paid to county clerk for services as clerk of county board must be accounted for as fees of his office. Holcombe v. Dawson County, 1 Neb. Unoff. 743, 95 N. W. 835; Mitchell v. Clay County [Neb.] 98 N. W. 662. But a county officer is not required to account to his county for money received by him in payment for services performed for another, by private agreement, which are no part of the duties of his office, and which are not incompatible with, and are not included within, his official duties. State v. Holm [Neb.] 97 N. W. 821.

85. Butler County v. James, 25 Ky. L. R. 801, 76 S. W. 402. See 1 Curr. L. 818, n. 17. The adoption of the report of a committee fixing the salary of a county treasurer, though no formal resolution fixing the salary is passed, the assumption by the parties thereafter that such action was effectual to fix the salary is conclusive upon them. People v. Steuben County, 85 N. Y. S. 244. See 1 Curr. L. 818, n. 18.

86. The designation of a county treasurer as ex officio a supervisor of assessments does not create a new office so as to justify additional salary (Foote v. Lake County, 206 Ill. 185, 69 N. E. 47), and the sheriff of a county court is not entitled to extra compensation for attending a commissioners' court of which he is ex officio an officer (Robinson v. Smith County [Tex. Civ. App.] 76 S. W. 584); nor is he entitled to fees for attendance at court when in fact no court was held or other service rendered (People v. Board of Sup'rs of Livingston County, 89 App. Div. 152, 85 N. Y. S. 284). But extra compensation may be awarded where there is statutory authority therefor. Board of Com'rs of Pulaski County v. Hayworth, 161 Ind. 503, 69 N. E. 159. See 1 Curr. L. 817, n. 16.

87. Moneys collected by a county treasurer, for the use of a city, which represent liquor license fees, must be paid over by the treasurer to the city without any deduction of fees for services rendered. Allentown v. Hartman, 22 Pa. Super. Ct. 400. The commission of 1 per cent allowed by the Colorado statutes to county treasurers does not apply to moneys paid to the treasurer on account of redemptions from tax sales. Mitchell v. Wheeler [Colo. App.] 77 P. 361. A county treasurer is not entitled to commissions for receiving and repaying money borrowed by the county to meet ordinary current expenses. Hall v. Greene County, 119 Ga. 253, 46 S. E. 69. The drawing of warrants and taking receipts therefor on delivery to the owners is not a settlement of account within a statute allowing the clerk a fee of 10c. for "making settlements of each account with the county." Greene County v. Light [Ark.] 77 S. W. 915. A county clerk is not entitled to fees for searching papers on file in his office in the interest of a municipality. Wuest v. New York, 89 App. Div. 262, 85 N. Y. S. 933. But a county auditor is entitled to the statutory commissions on back taxes notwithstanding that a tax inquisitor aided him in getting the property upon the rolls. State v. Godfrey, 24 Ohio Circ. R. 455. Compensation to members of board of review. Seiler v. State, 160

County treasurers and others having custody of county funds and property are held to strict accountability,[89] but auditing officers are liable to the county only for an intentional and willful disregard of duty.[90] Members of a county board in auditing a claim involving discretion are not liable for mere mistake made in passing judgment, they being entitled to the same immunity as other judicial officers.[91] For wrongful acts done by color of the office as well as those done by virtue of the office,[92] and, generally speaking, for any breach of official duty,[93] the officer and his sureties are liable.[94]

§ 3. *Public powers, duties and liabilities.*[95]—The performance of discretion-

Ind. 605, 67 N. E. 448. Fees for indexing records. State v. Godfrey, 24 Ohio Circ. R. 455; People v. Steuben County, 85 N. Y. S. 244.

88. Otoe County v. Stroble [Neb.] 98 N. W. 1065.

89. The relation of a county treasurer to his county is not that of a bailee, nor is it that of a debtor, within the ordinary meaning of the term. He is responsible for the public moneys intrusted to him, which continue to be public funds (Poole v. Burnet County [Tex.] 76 S. W. 425), and is liable for the price of land sold by him at private sale on credit, for which the purchaser never paid (Montmorency County v. Putnam [Mich.] 97 N. W. 399). Where he accepts and receipts for as money a check of a bank for the purchase price of bonds sold by the county, the proceeds of which he was required to keep in his official capacity, and deposited such check in the bank on which it was drawn, receiving credit therefor and charging himself with the amount, he becomes responsible for the full amount of the check. Montgomery County v. Cochran [C. C. A.] 126 F. 456. See same case 1 Curr. L. 818, n. 19. An action may be maintained against him for moneys unlawfully diverted or retained by him (Town of Walton v. Adair, 89 N. Y. S. 230), although the county auditors have settled with him and allowed credit for the fees retained (Allentown v. Hartman, 22 Pa. Super. Ct. 400). A full and complete settlement of a county officer with county commissioners having authority to make the same, in the absence of fraud, mistake or imposition, is conclusive. Wilcox v. Perkins County [Neb.] 97 N. W. 236. But settlements of a county treasurer with the county cease to afford prima facie evidence of the correctness of the charges made therein, when undisputed evidence shows them to be incorrect. Montmorency County v. Putnam [Mich.] 97 N. W. 399. In Pennsylvania, the report of an auditor filed with the court of common pleas may be appealed from nunc pro tunc where fraud is made to appear. In re Zeigler's Petition, 207 Pa. 131, 66 A. 419.

90. Where, by the action of the board, a warrant is drawn upon the county treasury without any legal authority to do so, each member of the board voting for such illegal claim is jointly and severally liable to the county for the amount of money so disbursed. Otoe County v. Stroble [Neb.] 98 N. W. 1065. The fact that county commissioners have made a settlement with the treasurer by which he is allowed to retain fees in excess of the statutory limit does not of itself render the commissioners liable for the excess. A fraudulent participation on the part of the commissioners, with corrupt knowledge, in a wrong to the county, or else a change in the situation owing to their negligence in failing to bring an action, which would prevent a recovery from the treasurer, would be necessary. Otoe County v. Dorman [Neb.] 98 N. W. 1064.

91. Crouch v. Pyle [Neb.] 96 N. W. 1049. In an action for the collusive allowance of illegal claims by a board of supervisors, there must be direct allegations of fraudulent conduct. Wallace v. Jones, 83 App. Div. 152, 82 N. Y. S. 449.

92. Tucker v. State [Ind.] 71 N. E. 140.

93. See 1 Curr. L. 818.

94. Though a bond may not technically conform to the statute, it may nevertheless be valid as a common-law obligation. Buhrer v. Baldwin [Mich.] 100 N. W. 468. The fact that an official bond of a county officer as executed is joint instead of joint and several, as required by statute, is no defense to the obligors in a suit upon the bond. Wilcox v. Perkins County [Neb.] 97 N. W. 236. Where a county treasurer conveys property to trustees to save harmless the sureties on his official bond, the deed inures to the benefit of persons having valid claims against the county, on his default. Jennings v. Taylor [Va.] 45 S. E. 913. A private citizen may prosecute an action on the bond of a county treasurer for a misappropriation of public funds, where the proper officers refuse upon demand to do so. State v. Holt [Ind. App.] 70 N. E. 387. But he cannot sue both on the relation of the public and in his private capacity. Id. And since the taxpayer as an individual has no such interest in the funds of the county as will enable him to sue on the bond, he cannot be reimbursed for costs and expenses incurred in the bringing an action as an individual. State v. Holt [Ind.] 71 N. E. 653. Certified copies of warrants, and indorsements thereon, in the office of the county comptroller, are admissible in an action on the county treasurer's bond, though it is not shown they are correct. Harper v. Marion County [Tex. Civ. App.] 77 S. W. 1044. The county court of Virginia has jurisdiction over a motion by a county treasurer on the bond of his deputy. Fidelity & Deposit Co. v. Beale [Va.] 46 S. E. 307. Where limitations begin to run in favor of the sureties of a public officer from the act done which fixes the liability, an action may be brought against the official and his sureties, though he is still in office. Montgomery County v. Cochran [C. C. A.] 126 F. 456. An action against officials for malfeasance in office is properly brought in the name of the county. Showers v. Caddo County [Okl.] 77 P. 189. Compare 1 Curr. L. 818, n. 19.

95. See 1 Curr. L. 818.

ary powers may not, but the performance of duties purely ministerial may be enforced by mandamus.[96]

A county is quasi corporate in character and can only act in the manner provided by law,[97] and can exercise only such powers as are expressly granted or necessarily implied by those expressed;[98] the extent of its duties and liabilities is measured by the same limitations,[99] and persons dealing with a county are bound to know its authority and the limitations thereon.[1] It may be and generally is liable for the expenses incurred by local boards of health for the general benefit,[2] for the defense of criminals unable to employ counsel for their own

96. Calling of meeting to consider petition for increase of commissioners. State v. Menzie [S. D.] 97 N. W. 745. Levy of tax to pay judgment. Guthrie v. Sparks [C. C. A.] 131 F. 443. Audit of claims. State v. Morris [S. C.] 45 S. E. 178; People v. Livingston County Com'rs, 89 App. Div. 152, 85 N. Y. S. 284. Issuance of warrant. American Bridge Co. v. Wheeler [Wash.] 76 P. 534; Hanna v. Chalker [Mich.] 98 N. W. 732. On appeal in mandamus against a board of county commissioners, it is not necessary to serve with process and make parties to the appeal new incumbents of the office of commissioner. State v. Clinton County Com'rs [Ind.] 68 N. E. 295. See 1 Curr. L. 818, n. 22.

97. When action on the part of a county must be had through one of its boards, such action must be by the board as an entity. Audit and certification of claims. Cooke v. Custer County Com'rs, 13 Okl. 11, 73 P. 270. Letting of contract. Williams v. Broadwater County Com'rs, 28 Mont. 360, 72 P. 755. A statute providing that any two county judges may for the county offer a reward for the arrest of a felon, the authorization of the offer by one of the judges over the telephone was regular and bound the county. Cummings v. Clinton County [Mo.] 79 S. W. 1127.

98. Green County v. Shortell, 25 Ky. L. R. 367, 75 S. W. 251; Independent Pub. Co. v. Lewis and Clarke County [Mont.] 75 P. 860. Under a constitutional provision that the compensation of county officials shall be regulated by the legislature, a board of supervisors has no power to engage extra clerical assistance. Agard v. Shaffer, 141 Cal. 725, 75 P. 343. Compare Roth v. Ness County Com'rs [Kan.] 77 P. 694. Sale of county real estate set aside for insufficient description. State v. McConnaughey, 33 Wash. 571, 74 P. 678. An excessive levy of taxes for county purposes cannot be ratified by subsequent legislation. Birmingham Mineral R. Co. v. Tuscaloosa County, 137 Ala. 260, 34 So. 951. But the legislature has power by a curative act to authorize the issuance of bonds when the provision violated in the original enactment was one that could have been dispensed with. Givens v. Hillsborough County [Fla.] 36 So. 88. Statute authorizing the commissioners' court to dispose of a judgment in favor of the county whenever the principal and sureties thereon are insolvent does not offend the Texas constitution. Lindsey v. State, 96 Tex. 586, 74 S. W. 750.

99. Independent Pub. Co. v. Lewis & Clarke County [Mont.] 75 P. 860. There is no authority for the practice which obtains in New York of publishing portions of the town abstracts in different newspapers throughout the county. A taxpayer therefore is entitled to an injunction restraining the payment of bills incurred for such publications. Rogers v. Westchester County Sup'rs, 77 App. Div. 501, 78 N. Y. S. 1081. Under the statutes of Kansas, a county is not liable for clerk hire in the office of its treasurer unless the board of commissioners make an allowance therefor. Roth v. Board of Com'rs of Ness County [Kan.] 77 P. 694. Compare Agard v. Shaffer, 141 Cal. 725, 75 P. 343. Employment of attorney to assist district attorney in civil cases. Santa Cruz County v. Barnes [Ariz.] 76 P. 621. The phrase "county business" has no prescribed or technical meaning. The building of a court house is county business. Board of Com'rs of Newton County v. State, 161 Ind. 616, 69 N. E. 442. Claim of attorney for compiling data in tax foreclosure suits. Card v. Dawes County [Neb.] 99 N. W. 662. A county cannot be burdened with expense or debt except so far as the power is given therefor, either expressly or by clear implication from some other power expressly given. Being the creature of statute, the extent of its action towards incurring liability must be limited by statute. National Bank of Jacksonville v. Duval County [Fla.] 34 So. 894. A county is liable at the suit of an administrator for a deposit belonging to the estate but deposited with the county treasurer in lieu of bail. Sutherland v. St. Lawrence County, 42 Misc. 38, 85 N. Y. S. 696. Counties in the erection of public buildings cannot be made liable upon an implied promise. Anderson v. Ripley County [Mo.] 80 S. W. 263.

1. Anderson v. Ripley County [Mo.] 80 S. W. 263; Perry County v. Engle, 25 Ky. L. R. 813, 76 S. W. 382; Jones v. Sunflower Co. [Miss.] 36 So. 188.

2. Where a chairman of the town board of supervisors, upon information of the secretary of the state board of health, received information that an epidemic of small pox was prevalent in his town, and incurred expenses to quarantine the persons afflicted therewith, but without receiving specific authority therefor from the town board of health, and the expenses were audited and paid by such board, the want of authority to order the quarantine was sufficiently ratified to authorize reimbursement from the county under the statutes in force at the time. Town of Iosco v. Waseca County Com'rs [Minn.] 100 N. W. 734. An allowance by a local board of health to a physician for services to a patient, for which the county is liable, is not invalid because he was a member of the board and participated in the allowance. Appeal of Board of Health of Buffalo Lake [Minn.] 95 N. W. 221; Cedar Creek Tp. v. Board of

defense,[6] and for the support of criminals, paupers and incompetents.[4] The disbarment of an attorney is a matter of public concern, and an attorney appointed by a court to institute and prosecute such a proceeding is entitled to recover of the county his compensation,[5] so where a prosecuting officer is disqualified, and an attorney is appointed in his stead.[6] A county is not liable to a tax sale purchaser for money invested by him in the purchase of real property delinquent for taxes levied by city authorities,[7] nor for a mistake of a city officer in certifying city assessments to the county treasurer.[8]

The county board is the general representative of the county in all fiscal and other administrative matters,[9] but as a rule, exercises only such powers as are conferred by the constitution or statutes of the state.[10] Hence its jurisdiction

Sup'rs of Wexford County [Mich.] 97 N. W. 409. The certification of a physician's claim for like services by the village trustees separately and not as a board furnishes no proof of bad faith on their part. Bay v. Monroe County, 121 Iowa, 302, 96 N. W. 854. In California, boards of county commissioners can only act upon items of indebtedness created by the board of health after such health board has audited and certified the same. Cooke v. Custer County Com'rs, 13 Okl. 11, 73 P. 270. A county is liable for quarantining persons though town incurs the expense at the direction of the county board. City of Bardstown v. Nelson County, 26 Ky. L. R. 1478, 78 S. W. 169. Decision of health board that disease treated at public expense was "dangerous to the public health" held conclusive. Cedar Creek Tp. v. Wexford County Sup'rs [Mich.] 97 N. W. 409. But a physician, under such circumstances, is not entitled to recover against the county in the absence of proof that the patients attended by him or those liable for their support were unable to pay. Compare with Michigan case holding finding of local board conclusive of certain things. Walker v. Boone County, 123 Iowa, 5, 97 N. W. 1077. Evidence held to sustain verdict of a jury fixing value of physician's services at $750 instead of $1,840. Rutherford v. Bath County [Ky.] 80 S. W. 815.

3. The appropriation of public moneys for the defense of one indicted for crime is not for the exclusive benefit of the individual so charged, but is for a county purpose, and therefore not in conflict with the N. Y. constitution. People v. Grout, 87 App. Div. 193, 84 N. Y. S. 97. In Montana, counties are not chargeable with any expense touching a criminal prosecution after its removal to the supreme court. Printing brief. Independent Pub. Co. v. Lewis & Clarke County [Mont.] 75 P. 860.

4. Provision made for the separate custody of a county prisoner afflicted with a contagious disease is at the expense of the county. In re Boyce, 43 Misc. 297, 88 N. Y. S. 841. In Pennsylvania, prisoners committed to the county jail by the mayor and aldermen of the city of Erie for violation of city ordinances are to be supported at the expense of the county. Burton v. Erie County, 206 Pa. 570, 56 A. 40. Where a drunkard is discharged from the insane hospital on habeas corpus, the county, the district court of which ordered his commitment, and not that in which the hospital is situated, is liable for the costs. Hughes v. Applegate, 123 Iowa, 230, 98 N. W. 645. A county is not liable for the support of an inmate of the California Home for the Care and Training of Feeble Minded Children, unless the court committing the inmate so orders and the trustees make certain arrangements authorized by statute [St. 1897, c. 188, §§ 1, 5]. State v. Sonoma County, 139 Cal. 264, 72 P. 1003.

5. Hyatt v. Hamilton County, 121 Iowa, 292, 96 N. W. 855.

6. Mathews v. Board of Com'rs of Lincoln County, 90 Minn. 348, 97 N. W. 101.

7. Kelley v. Gage County [Neb.] 99 N. W. 524.

8. Concordia Loan & Trust Co. v. Douglas County, 2 Neb. Unoff. 124, 96 N. W. 55.

9. It should suitably furnish county buildings and supply all county officers with record books, stationery, and other necessary articles. Board of Sup'rs of Choctaw County v. Hughes [Miss.] 36 So. 424. A county board having general supervision over the public roads of the county has authority to direct the road overseer to place a culvert across the highway. It is not necessary in such order to designate the specific point on the highway at which such culvert is to be placed. Fokenga v. Churchill, 2 Neb. Unoff. 304, 96 N. W. 143. In Michigan, boards of supervisors have power to order the construction of bridges situated partly in two or more townships and to apportion the expense among such townships. Board of Sup'rs of Ionia County v. Ionia Circuit Judge [Mich.] 96 N. W. 497. In Georgia, the county commissioners have authority to call upon the tax collector to account. Sayer v. Brown, 119 Ga. 539, 46 S. E. 649. An action involving the interests of the county, commenced and prosecuted to judgment without objection, in the name of three individuals designated as commissioners of the county, is binding upon the county. Union Pac. R. Co. v. Saline County Com'rs [Kan.] 76 P. 865.

10. 11 Cyc. Law Dict. 390, n. 56. In Louisiana, the powers of police juries are defined and controlled by article 291 of the constitution of 1898. Favalora v. Police Jury of Parish of St. Bernard, 112 La. 384, 36 So. 467. They may not issue negotiable paper. Glass v. Parish of Concordia [La.] 37 So. 189. Nor may they incur debt and issue bonds for parish road purposes. Favalora v. Police Jury of Parish of St. Bernard, 112 La. 384, 36 So. 467. But they are empowered to enforce ordinances relative to roads by indictment or information. State v. Nicholas, 109 La. 84, 33 So. 92.

will not be presumed, but its minutes must affirmatively shows the existence of jurisdictional facts,[11] though when the board acts in the line of duty there is a presumption that it acted in accordance with the forms prescribed by law, and hence that its official acts are regular.[12]

As a rule, ordinances of a county board take effect immediately upon adoption.[13]

At common law, a county could neither sue nor be sued,[14] but in modern practice, either by statute or otherwise, they may sue[15] and be sued, and a taxpayer may maintain an action to prevent a misappropriation of the county's funds,[16] or on behalf of the county to recover moneys unlawfully paid out by its officers.[17]

Torts.[18]—A quasi municipal corporation, like a county, is not liable in damages for the misfeasance, laches, neglect or other tort of its public officers, not authorized or ratified by it, unless expressly made so by statute,[19] and county authorities are not insurers of the safety of county bridges, but are only bound to exercise ordinary care in maintaining and repairing them.[20] The prosecution of legal proceedings brought on behalf of a county by one of its officers, though terminating unsuccessfully, is not a tort so as to relieve the county from the payment of costs.[21]

Contracts.[22]—Counties may contract only in the manner,[23] by the persons,[24]

11. Removal of seat of justice. Hinton v. Perry County Sup'rs [Miss.] 36 So. 665. Proceedings to require repair of town way. Inhabitants of South Berwick v. County Com'rs, 98 Me. 108, 66 A. 623. Defects in the action of a county board of supervisors which are not jurisdictional are not available to defeat their action in a collateral proceeding. Hinton v. Perry County Com'rs [Miss.] 36 So. 565.

12. State v. Woolfenden, 26 Utah, 167, 72 P. 690.

13. In California, by statute they do not take effect until 15 days after passage. Proulx v. Graves, 143 Cal. 243, 76 P. 1026.

14. An action ex contractu does not lie against a county in the absence of legislative enactment. Duncan v. Willits [Del. Super.] 57 A. 369. The Arkansas act providing that counties are not subject to be sued has reference solely to the prosecution of demands against counties, and does not apply to an action to quash orders of the county court calling in county warrants. Nevada County v. Williams [Ark.] 81 S. W. 384.

15. Money paid by a county without authority of law may be recovered of the payee. Heath v. Albrook, 123 Iowa, 559, 98 N. W. 619. Money unlawfully paid to officials. Comer v. Morgan County Com'rs, 32 Ind. App. 477, 70 N. E. 179; Tucker v. State [Ind.] 71 N. E. 140. Money wrongfully diverted from sinking fund and covered into state treasury. Ulster County v. State, 177 N. Y. 189, 69 N. E. 370.

Contra: Vindicator Printing Co. v. State, 68 Ohio St. 362, 67 N. E. 733. In an action by a county against an officer for conversion, the county's ability for breach of a special contract cannot be used as a set-off. Comer v. Morgan County Com'rs, 32 Ind. App. 477, 70 N. E. 179. An injunction against a sheriff to restrain the sale of land on execution in favor of the county is properly returnable in the county of the sheriff's domicile. Little v. Griffin [Tex. Civ. App.] 77 S. W. 635.

16. Daviess County v. Goodwin, 25 Ky. L. R. 1081, 77 S. W. 185.

17. State v. Holt [Ind. App.] 70 N. E. 387; Crouch v. Pyle [Neb.] 96 N. W. 1049; Wallace v. Jones, 83 App. Div. 152, 82 N. Y. S. 449. Where the public officers refuse to act. In such case a judgment in favor of the taxpayer is erroneous; it should be in favor of the county, but with costs to the taxpayer. Etsell v. Knight, 117 Wis. 540, 94 N. W. 290.

18. See 1 Curr. L. 822.

19. State v. Lamping, 31 Wash. 652, 72 P. 476. Injuries caused by construction of ditches. Nussbaum v. Bell County [Tex.] 76 S. W. 430. By discharge of surface waters from ditches constructed by the county authorities. Stocker v. Nehama County [Neb.] 93 N. W. 721. Failure to repair ditch. Gaare v. Clay County Com'rs, 90 Minn. 530, 97 N. W. 422. See 1 Curr. L. 822.

20. Warren County v. Evans, 118 Ga. 200, 44 S. E. 986. Planks piled on bridge in process of repair. Karl v. Juniata County, 206 Pa. 633, 56 A. 78.

21. State v. Lamping, 31 Wash. 652, 72 P. 476.

22. See 1 Curr. L. 819.

23. Unless the statute regulating the letting of contracts for the furnishing of county supplies is strictly complied with, the proceeding and consequent contract will be void. Woodruff v. Welton [Neb.] 97 N. W. 1037. Since a fence is a "building," a contract let for its construction without following the statutory requirement of soliciting bids is invalid. Swasey v. Shasta County, 141 Cal. 392, 74 P. 1031. But the award of a contract, being the evident expression of the honest discretion of the freeholders of a county, will not be disturbed because not let to the lowest bidder, there being no requirement so to do. Middle Valley Trap Rock & Min. Co. v. Board of Chosen Freeholders of Morris County [N. J. Law] 57 A. 268. A resolution of a county board employing one of its members will be presumed

and for the purposes expressly provided by statute.[25] But the valid contract of a county is just as sacred from interference or destruction, legislative or otherwise, as is one made between individual citizens,[26] and one who, in the absence of a statute expressly or by necessary implication denying the right, in good faith, though it be without a contract therefor, furnishes labor and material for the creation of a public work, may recover their reasonable value.[27] So a contract of employment, made by county commissioners with full authority, in the absence of collusion or bad faith attributable to either party, is binding upon the county.[28] Thus a county has power to enter into a contract for the discovery of taxable property omitted from taxation.[29] The constitutions of many states provide that counties may not contract or incur indebtedness beyond certain fixed limits,[30] and refunding bonds, the proceeds of which are to be applied to the payment of those outstanding, are within the terms of a constitutional limitation upon the power to contract indebtedness.[31] A contract being void, ratification thereof is ineffectual.[32] Making part payment of the amount due contractors for the erection of a court house after the time specified for the completion of the building, though the building was still incomplete, is not a waiver of the county's claim for liquidated damages on account of delay in completing the building.[33]

to have been without his vote, and to have been regularly and validly passed. Hanna v. Chalker [Mich.] 98 N. W. 732. The adoption of a resolution, being the only action taken respecting a contract embodied therein, must be accepted as conclusive of the terms of the contract. Heath v. Albrook, 123 Iowa, 559, 98 N. W. 619. Where a statute authorizes joint construction of bridges when a stream runs between two counties, the fact that a resolution passed by the board of one of such counties calling upon the other to join designates two bridges, while after the latter's refusal, a contract is let and recovery sought as to one only, is not fatal. Dodge County v. Saunders County [Neb.] 97 N. W. 617. A county board of health may bind the county for goods and services furnished without making a record of its contract, there being no statute to contrary. City of Bardstown v. Nelson County, 25 Ky. L. R. 1478, 78 S. W. 169. That the contract must be in writing. Cummings v. Clinton County [Mo.] 79 S. W. 1127.

24. In the absence of statutory authority, a district attorney cannot make a county liable by contracting with a surgeon to make an analysis of the stomach of one thought to have been poisoned. Jones v. Sunflower County [Miss.] 36 So. 188. In Indiana, the board of election commissioners being a special board, has no authority to incur expense in the printing of ballots in excess of the amount appropriated therefor. Board of Com'rs of Jasper County v. Babcock [Ind. App.] 71 N. E. 518.

25. Perry County v. Engle, 25 Ky. L. R. 813, 76 S. W. 382. A county board of commissioners having been given authority to appropriate money for the building of bridges, it is to be inferred that it may enter into contracts therefor. Bayne v. Wright County Com'rs, 90 Minn. 1, 95 N. W. 456. The requisite affirmative vote on "free" turnpikes is a vote in favor of incurring the necessary debt in purchasing turnpikes already existent. Chaplin v. B. Turnpike Road Co. v. Nelson County, 25 Ky. L. R. 1154, 77 S. W. 377.

26. Contract to investigate and discover taxable property which through fraud or otherwise has been omitted from taxation. Shinn v. Cunningham, 120 Iowa, 383, 94 N. W. 941.

27. Cass County v. Sarpy County [Neb.] 97 N. W. 352; Id. [Neb.] 100 N. W. 197. See same case 89 N. W. 291.

28. Youmans v. Wyandotte County Com'rs [Kan.] 74 P. 617.

29. Heath v. Albrook, 123 Iowa, 559, 98 N. W. 619; Reed v. Cunningham, 121 Iowa, 555, 96 N. W. 1119. See, also, 1 Curr. L. 820, n. 42.

30. A statute providing for the relocation of the county seat and the construction of a new court house creates a debt within such constitutional inhibition. Eaton v. Mimnaugh, 43 Or. 465, 73 P. 754. The limitation on the power of the county board to contract for bridge building to cost a sum not greater than the amount of money on hand in the county bridge fund, derived from a levy of previoue years and two-thirds of the levy of the current year, gives no authority to the board to take into account the levy for the current year prior to the actual making of such levy. Clark v. Lancaster County [Neb.] 96 N. W. 593. Contracting in excess of limit. Anderson v. Ripley County [Mo.] 80 S. W. 263; Sisk v. Cargile, 138 Ala. 164, 35 So. 114. In Nebraska, there is no authority for the letting of annual contracts for repairing bridges where the amount exceeds $100. Clark v. Lancaster County [Neb.] 96 N. W. 593. The county had authority to incur an indebtedness for the purchase of a turnpike road beyond the revenue for the current year, but was not authorized to issue and sell bonds therefor. Bardstown & L. Turnpike Co. v. Nelson County, 25 Ky. L. R. 1900, 78 S. W. 851. See, also, 1 Curr. L. 819, n. 32.

31. Reynolds v. Lyon County, 121 Iowa, 733, 96 N. W. 1096. Compare 1 Curr. L. 819, n. 35.

32. Anderson v. Ripley County [Mo.] 80 S. W. 263.

33, 34. Lawrence County v. Stewart Bros. [Ark.] 81 S. W. 1059.

Nor is authorization by the county to an officer to use an office in the building such a waiver.[34]

Bonds.[35]—Bona fide holders of invalid county bonds are entitled to be subrogated to the rights of warrant holders paid out of the funds raised by the sale of the bonds,[36] and counties as to them are estopped by recitals in bonds issued under proper authority;[37] but such holders are not entitled to extraordinary remedies unless expressly part of the contract.[38] In Colorado, an action to enforce payment of interest on funding bonds will not lie.[39] A complaint seeking to enjoin a county treasurer from paying interest on certain bonds sought to be invalidated is fatally defective if it fails to allege that the treasurer has funds and threatens to so apply them.[40]

Presentation, allowance, enforcement, and payment of claims.[41]—One who presents a claim against a county must comply with the statutory requisites,[42] and show some statute authorizing it, or some contract express or implied, upon which it arises, which itself finds authority of law.[43] The duties of the auditing board may be ministerial only,[44] or quasi judicial,[45] and where judicial discretion is called for, the board acts as any other judicial body, and its findings can be questioned and set aside only by an appeal from the decision.[46] Claims against

35. See 1 Curr. L. 820.

36. Board of Com'rs of Kearny County v. Irvine [C. C. A.] 126 F. 689.

37. Where there was statutory authority for a county to issue negotiable bonds, and it has issued such bonds, which have passed into the hands of bona fide purchasers for value, the county is estopped by recitals therein that they were issued in all respects in conformity to the statutes authorizing the same. Board of Com'rs of Henderson County v. Travelers' Ins. Co. [C. C. A.] 128 F. 817.

38. Hubbert v. Campbellsville Lumber Co., 191 U. S. 70, 24 S. Ct. 28.

39. The appropriate remedy is by mandamus against the treasurer or commissioners to enforce the method of payment prescribed. Board v. Gunnison County Com'rs v. Sims, 31 Colo. 483, 74 P. 457.

40. Henderson County Com'rs v. Williams, 135 N. C. 660, 47 S. E. 672.

41. See 1 Curr. L. 822.

42. Statutes providing that claims shall be reduced to writing, itemized and verified, must be given a reasonable construction and a substantial compliance therewith is all that is required. Verification. Bayne v. Wright County Com'rs, 90 Minn. 1, 95 N. W. 456. Itemization. Cedar Creek Tp. v. Wexford County Com'rs [Mich.] 97 N. W. 409. The claim of a village board of health may be presented and prosecuted in the name of the chairman of the board acting in his official capacity. Quarantining of persons afflicted with contagious disease. Appeal of Board of Health of Buffalo Lake [Minn.] 95 N. W. 221. See 1 Curr. L. 822, n. 63.

43. Santa Cruz County v. Barnes [Ariz.] 76 P. 621. The application of an agricultural society for assistance from the county funds is a "claim." Sheldon v. Gage County Soc. of Agriculture [Neb.] 98 N. W. 1045.

44. Whenever the course to be pursued or the amount to be allowed is prescribed by law, their action is ministerial only. Otoe County v. Stroble [Neb.] 98 N. W. 1065; Holcombe v. Dawson County, 1 Neb. Unoff. 743, 95 N. W. 835; Chase County v. Kelley [Neb.] 95 N. W. 865. Such a board has no power or jurisdiction to allow an amount in excess of the prescribed statutory compensation. Crouch v. Pyle [Neb.] 96 N. W. 1049. Action of board in reducing an allowance of $50.00 by the court, to an attorney for defense of indigent person, to $30.00, amount allowed by statute, affirmed. Board of Com'rs of Lake County v. Glynn [Colo. App.] 74 P. 339.

45. In passing upon claims against the county, if the action of the county board is not merely a formal prerequisite to the issuance of a warrant, but involves the determination of questions of fact upon evidence or the exercise of discretion in ascertaining or fixing the amount to be allowed, their decision is quasi-judicial. Mitchell v. Clay County [Neb.] 96 N. W. 673; Smith v. Clay County [Neb.] 96 N. W. 1002, 99 N. W. 501. County board fixing compensation of county clerk for services as clerk of board. Mitchell v. Clay County [Neb.] 98 N. W. 662.

46. Crouch v. Pyle [Neb.] 96 N. W. 1049. Compare Holcombe v. Dawson Co., 1 Neb. Unoff. 743, 95 N. W. 835. Under the Washington Code, the allowance of a claim by the county commissioners has the effect of a judgment [1 Ballinger's Ann. Codes & St. § 393]. American Bridge Co. v. Wheeler [Wash.] 76 P. 534. In other states it is said to be an administrative act and does not amount to a judgment. Ellis v. Barron County [Wis.] 98 N. W. 232; Tucker v. State [Ind.] 71 N. E. 140. Where a statute provides for an appeal from the disallowance of a claim by the county board on the filing within 20 days of an appeal bond duly approved, an approval after 8 months have elapsed is fatal to the appeal. Cedar County v. McKinney Loan & Investment Co., 1 Neb. Unoff. 411, 95 N. W. 605. Since the dismissal of an appeal from a decision of a county board disallowing a claim against the county is an "order" and not a "judgment," an appeal from it must be taken within 30 days. Ellis v. Barron County [Wis.] 98 N. W. 232.

a county must be audited before payment,[47] and claimants are entitled to the judgment of the board, not in gross, but upon each item of their claim.[48] In some states, by statute, certain claims are not enforceable where no appropriation for payment has been made,[49] but ordinarily the fact that the granting of a judgment against a county would embarrass it financially is not sufficient reason for refusing the judgment,[50] though a claim merged into judgment carries with it all the infirmities of want of authority of the county commissioners to levy a tax to pay such claim.[51] Where a claimant has a complete and adequate remedy, mandamus will not lie to compel the payment of a claim.[52] Many states prescribe as a condition precedent to the bringing of suit that a claim for the subject-matter of the suit be first presented and the county board given an opportunity to pass upon it,[53] and in such states a complaint against a county must aver presentation and disallowance of the claim.[54]

Under the South Carolina Code, money deposited by a county treasurer in a bank is a debt due the county, and on the failure of the bank, the county is entitled to a preference.[55]

Issuance of warrants.—A warrant is not "issued" until it is actually delivered into the hands of a person authorized to receive it.[56] A warrant drawn upon the verbal order of the county board is valid.[57] As a rule, the fund particularly charged with the payment of a warrant alone is liable.[58] Warrants appearing to have been regularly issued are prima facie valid,[59] and in Arkansas are receivable for county taxes, except for interest on the public debt and for sinking fund, and

47. Though the officers of a county may have power to bind it by contract, bills for work performed under such contract must nevertheless be audited before payment thereof can be made. Morrison v. Kent, [Mich.] 97 N. W. 46.

48. People v. Board of Sup'rs of Westchester County, 83 App. Div. 51, 82 N. Y. S. 504.

49. Burns' Rev. St. 1901, § 6594b1. Gish v. St. Joseph County Com'rs [Ind. App.] 68 N. E. 318. Judgment on appeal from disallowance by county board of a county officer's claim for fees can only be satisfied out of taxes collected for the year the indebtedness was incurred. Territory v. Beall [N. M.] 75 P. 38.

50. St. Louis Nat. Bank v. Marion County [Ark.] 79 S. W. 791.

51. Atchison, etc., R. Co. v. Territory [N. M.] 72 P. 14.

52. Scarbrough v. Watson [Ala.] 37 So. 281.

53. A claim for services is sufficiently presented, though the amount stated is that which the claimant will accept as a compromise instead of the amount claimed. Clarke v. Presidio County [Tex. Civ. App.] 79 S. W. 693. In Alabama, the claim must not only have been presented, but disallowed. Scarbrough v. Watson [Ala.] 37 So. 281. In order that the bringing of suit may constitute a presentation of the claim to the county officials, the petition must not only be filed, but served within the prescribed time. Pearson v. Newton County, 119 Ga. 863, 47 S. E. 180. In Nebraska, one may bring an original action against a county for the recovery of illegal taxes paid, without first filing a claim therefor before the board of commissioners. City of Omaha v. Hodgskins [Neb.] 97 N. W. 346; City of Omaha v. O'Rourke [Neb.] 97 N. W. 608. See 1 Curr. L. 822, n. 70.

54. Scarbrough v. Watson [Ala.] 37 So. 281.

55. Lockwood v. Lockwood [S. C.] 47 S. E. 441.

56. American Bridge Co. v. Wheeler [Wash.] 76 P. 534. Evidence held sufficient to justify finding of delivery of a warrant. Howard v. State [Ark.] 82 S. W. 196.

57. Fidelity & Deposit Co. v. State [Md.] 56 A. 361.

58. Under the Maryland Code, an order or warrant drawn on the insane and pauper fund is a warrant payable out of any funds in the hands of the collector not otherwise appropriated [Pub. Gen. Laws, art. 26, § 7, and art. 81, § 44]. Fidelity & Deposit Co. v. State [Md.] 56 A. 361. Where the county commissioners have allowed a claim and issued a warrant for its payment by the treasurer out of specific funds, it is his duty to pay if he has funds applicable to the claim. Martin v. Clark, 135 N. C. 178, 47 S. E. 397. See 1 Curr. L. 824.

59. Where county warrants have been issued many years, in order to defeat recovery thereon on the ground that they were unauthorized, the burden rests on the county to show by convincing proof that they were void. Board of Com'rs of Kearny County v. Irvine [C. C. A.] 126 F. 689. In a proceeding to restrain the payment of certain warrants issued for the erection of a court house, because the supervisors illegally issued warrants in excess of the authorized amount, a petition which fails to allege that the warrants sought to be enjoined are a part of the excess is subject to demurrer. Zerwekh v. Thornburg, 123 Iowa, 254, 98 N. W. 769.

are receivable for debts accruing to the county.[60] An action at law and not mandamus is the proper remedy to recover an amount due on warrants claimed by the county to be illegal and void.[61] In the absence of statute or valid agreement, county warrants do not bear interest even after demand and a refusal to pay them for want of funds.[62]

COURTS.[63]

§ 1. Creation, Change, and Alteration (970).
§ 2. Officers and Instrumentalities of Courts (970).
§ 3. Places, Terms and Sessions of Courts (971).
§ 4. Conduct and Regulation of Business (972).

§ 1. *Creation, change, and alteration.*[64]—Legislatures are frequently prohibited from establishing courts,[66] and always from abolishing certain courts,[66] but unless so prohibited, courts not provided for in the constitution may be created or abolished, especially those of inferior jurisdiction, at will,[67] and territory may generally be redistricted for judicial purposes, though the effect is to add to or take from the number of judges.[68] Federal court districts are not changed by state statutes changing the boundaries of counties.[69] A state court does not become Federal in acting under Federal statutes.[70]

§ 2. *Officers and instrumentalities of courts.*[71]—Criers are public officers in New York,[72] and bailiffs and criers of the United States courts are officers of the

60. St. Louis Nat. Bank v. Marion County [Ark.] 79 S. W. 791.

61. Custer County Bank v. Custer County [S. D.] 100 N. W. 424.

62. National Bank of Jacksonville v. Duval County [Fla.] 34 So. 894.

63. See, also, Judges, 2 Curr. L. 577.

64. See 1 Curr. L. 824.

65. A statute providing that where a municipality, on deciding to establish an electric lighting plant, refuses to buy a private plant already in operation, it may be compelled to do so, and providing a commission to adjudicate the price and terms of sale is not invalid as creating a court and appointing its judges, since the commission is not a court [Conn. Acts 1893, p. 386, c. 231, § 13]. Norwich Gas & Elec. Co. v. Norwich, 76 Conn. 565, 57 A. 746. In providing for a board of equalization of assessments, the legislature did not establish a "court" within the prohibition of the Kentucky constitution, § 135. Albin Co. v. Louisville, 25 Ky. L. R. 2055, 79 S. W. 274.

66. A statute does not abolish the county court of a county by redistricting it and abolishing some of the districts, thereby legislating out of office some of the justices of the peace, members of the county court, since the county court may exist with fewer members. State v. Akin [Tenn.] 79 S. W. 805.

67. The powers of a justice of the peace may be by statute conferred on a town clerk in Indiana, and such an act constitutes him a court. Baltimore & O. R. Co. v. Whiting, 161 Ind. 228, 68 N. E. 266. The legislature may redistrict a county and abolish the office of justice of the peace in the civil districts extinguished. State v. Akin [Tenn.] 79 S. W. 805. In New York, no inferior local court can be created having equity jurisdiction, or any greater jurisdiction in other respects than is conferred on county courts [Const. art. 6, § 18, not violated by Municipal Court Act, § 1, sub. 18, Laws 1902, p. 1489, c. 580]. Lehigh & N. E. R. Co. v. American Bonding & Trust Co., 40 Misc. 698, 83 N. Y. S. 191. A statute providing that town councils shall by ordinance provide a substitute police judge is not invalid as creating a court [Ky. St. 1899, § 3711]. Town of Grayson v. Bagby, 25 Ky. L. R. 44, 74 S. W. 659. Constitutionality of statute creating city of Greenhorn, providing for recorder's court with powers of justice of the peace reaffirmed. Adams v. Kelly, 44 Or. 66, 74 P. 399. A constitutional provision that the judges of the supreme court shall instruct juries does not prohibit the legislature from establishing inferior courts and authorizing the judges thereof to instruct the jury. In re Opinion of the Justices [R. I.] 58 A. 51.

68. State v. Akin [Tenn.] 79 S. W. 805; Lehigh & N. E. R. Co. v. American Bonding & Trust Co., 40 Misc. 698, 83 N. Y. S. 191. Where circumstances authorizing a change in the boundaries of a district exist, incidental changes in the boundaries of others may be made. People v. Rose, 203 Ill. 46, 67 N. E. 746. Where a district is divided, and pending cases, except those in which evidence has been taken before the judges, are transferred to the new district, a case in which the evidence has been taken before an examiner is transferred. Baldwin v. Rice, 89 N. Y. S. 738. A decision participated in by all the judges of the supreme court of a state is valid, notwithstanding the suit was begun in a district and the statute creating the districts is attacked as unconstitutional. Williams v. Stearns, 126 F. 211. The legislature of Mississippi may divide a county into judicial districts. Hinton v. Perry County Com'rs [Miss.] 36 So. 565.

69. Hyde v. Victoria Land Co., 125 F. 970.

70. Naturalization laws. United States v. Severino, 125 F. 949.

71. See 1 Curr. L. 824. See, also, Clerks of Court, 3 Curr. L. 702; Sheriffs and Constables, 2 Curr. L. 1640.

72. In re Buhler, 43 Misc. 140, 88 N. Y. S. 195.

court.[73] In Florida, the sheriff of the county in which the supreme court is held is the sheriff of the court,[74] and all the other sheriffs of the state are ex officio deputy sheriffs of the supreme court and required in person or by deputy to serve its process.[75] The office of court crier becomes vacant in New York when the boundary of the county is so changed as to set off the part where he lives into another county.[76] A statute placing the court house under the care and control of the court crier is invalid, in Maryland, in that it imposes nonjudicial functions on the court, and interferes with the court by requiring its officer to discharge other duties than those pertaining to his office.[77] Cases relative to the compensation of court officers are mentioned in the note.[78]

§ 3. *Places, terms and sessions of courts.*[79]—Statutes cannot provide that sittings be held elsewhere than at the county seat in Nevada,[80] but may in Kansas.[81] The seat of justice of a county judicial district may be removed in Massachusetts by the legislature on vote of the electors.[82] The chancery court in Mississippi can provide for itself only the necessary things which peculiarly belong to the proper administration of the chancery court, leaving the office and general necessaries to be furnished by the board of supervisors.[83]

The terms of court may be regulated by statute,[84] and when so regulated, the term begins on the day fixed by the statute.[85] A session or sitting of the circuit court is over after the final discharge of the jury for the term, though no formal adjournment is had until the next ensuing term begins, and special sittings are held after the discharge of the jury.[86]

Except in a few instances, usually statutory, the functions of a court can be exercised only when it is legally in session,[87] though a court has continuing power after adjournment for the term to correct its minutes and make them speak the truth.[88] Proceedings had while the court is not legally in session, because of improper or illegal adjournment or calling of special session, are void. The legality of sessions objected to for irregularity in calling or adjourning is discussed below.[89] Courts of record have inherent power to adjourn from day to day and

73. Rev. St. § 715. United States v. McCabe, 122 F. 653; Id. [C. C. A.] 129 F. 708.

74, 75. Johnson v. Price [Fla.] 36 So. 1031.

76. In re Buhler, 43 Misc. 140, 88 N. Y. S. 195.

77. Prince George's County Com'rs v. Mitchell, 97 Md. 330, 55 A. 673.

78. Fees of stenographers in Federal court. Swift v. U. S., 128 F. 763. Per diem and fees of deputy marshals and bailiffs. Id. Bailiffs and criers are entitled to per diem for attendance on days when the court is adjourned by written order of the judge. United States v. McCabe, 122 F. 653; Id. [C. C. A.] 129 F. 708.

79. See 1 Curr. L. 824. See, also, Dockets, Calendars and Trial Lists, 1 Curr. L. 953; Continuance and Postponement, 3 Curr. L. 801.

80. Const. art. 6, § 7. Wonacott v. Rice [Nev.] 73 P. 661.

81. Jurisdiction is not lost by failure to try at first term after enactment of statute. Sparks v. Galena Nat. Bank [Kan.] 74 P. 619. Adjournment. State v. Crilly [Kan.] 77 P. 701.

82. Hinton v. Perry County Com'rs [Miss.] 36 So. 565.

83. Board of Sup'rs of Choctaw County v. Hughes [Miss.] 35 So. 424.

84. A statute requiring four terms in some counties and two in others does not conflict with a constitutional provision requiring uniformity with respect to the jurisdiction, powers, proceedings and practice of the courts. Mulherin v. Kennedy [Ga.] 48 S. E. 437. A statute fixing terms, though given immediate effect, will not be construed as fixing a term prior to its enactment so as to authorize a session prior to the beginning of the first term after the passage of the act. Walker v. State, 139 Ala. 56, 35 So. 1011. A statute providing that quarterly courts shall be held monthly does not contravene a constitutional provision for a "quarterly court." Hamilton v. Spalding, 25 Ky. L. R. 847, 76 S. W. 517.

85. And an act required to be done before the term cannot be done on that day, though earlier in the day than the court is accustomed to, and does in fact meet. Barlow v. State [Tex. Cr. App.] 80 S. W. 375.

86. Hays v. Philadelphia, etc., R. Co. [Md.] 58 A. 439.

87. Conviction and punishment for contempt cannot be had in vacation. Mau v. Stoner [Wyo.] 76 P. 584.

88. Cribb v. State, 118 Ga. 316, 45 S. E. 396; Buchanan v. State, 118 Ga. 751, 45 S. E. 607. By the entry of an order which has in fact been made, or a judgment actually rendered, but which has been omitted from the minutes. Ft. Worth, etc., R. Co. v. Roberts [Tex.] 81 S. W. 25.

89. A special term may be held while a regular term is in session at another place

from week to week,[90] and an adjourned term is for all purposes a mere continuation of the regular term.[91] The judge may by oral order in open court fix the date of the adjourned session,[92] and an adjournment of the regular term on the last day thereof to the next secular day operates as a convening of a special session.[93] Special terms may be held by appointment of the governor in North Carolina, whenever it appears by certificate of a judge or the county commissioners to be necessary.[94]

§ 4. *Conduct and regulation of business.*[95]—Courts have power to make reasonable rules governing the procedure before them,[96] and when so made rules bind both court and suitors,[97] though a trial judge may at pleasure set aside a rule of his own making, if parties' rights are not prejudiced.[98] A mere statement in an opinion as to what future procedure should be has not the force of a regularly promulgated rule of practice.[99] Rules are construed as statutes would be construed,[1] whence the re-enactment of a rule will be held to have been made with intention to adopt the previous construction.[2] Chancery rules are construed liberally.[3] The general rules of practice of the supreme court of New York have the force and effect of statutes.[4] Authority of the court to adopt particular rules is discussed in the note.[5]

in the same district, there being two judges authorized to hold court. In re Stevenson, 125 F. 843. And where court is held alternately at two places in a county, an adjournment may be had at one place to a date after the beginning of the regular term at the other. State v. Crilly [Kan.] 77 P. 701. An order at a regular term that a special term be held in that county the week following that fixed for the regular term of another county is not objectionable as ordering a term to be held in one county at a time fixed by law for holding court in another. Peeples v. State [Fla.] 35 So. 223. A special or extra term is not rendered illegal by an error of the judge in designating it an adjourned term in his order calling it. Id. Where the regular term is adjourned to a day certain for the purpose of trying a particular case, the court is properly held on that day, notwithstanding an ad interim special term and adjournment thereof over the term. State v. Riddle [Mo.] 78 S. W. 606. Where the judge by oral order in open court fixes the date of the adjourned session, it is the duty of the clerk to make a note of such order on the minutes, but his failure so to do is not fatal to the validity of the adjourned session. The minutes may be corrected nunc pro tunc. Cribb v. State, 118 Ga. 316, 45 S. E. 396; Buchanan v. State, 118 Ga. 751, 45 S. E. 607.

90. Cribb v. State, 118 Ga. 316, 45 S. E. 396; Buchanan v. State, 118 Ga. 751, 45 S. E. 607.

91. Emrich v. Gilbert Mfg. Co., 138 Ala. 316, 35 So. 322.

92. Cribb v. State, 118 Ga. 316, 45 S. E. 396; Buchanan v. State, 118 Ga. 751, 45 S. E. 607.

93. In re Stevenson, 125 F. 843.

94. Court is not restricted to trying cases of the nature set forth in certificate. State v. Register, 133 N. C. 746, 46 S. E. 21.

95. See 1 Curr. L. 825.

96. Federal Court Rules need not strictly adopt state practice attachment. Gokey v. Boston & M. R. Co., 130 F. 992. In Florida, the equity rules observed are those promulgated by the supreme court of the United States, and in the absence of any such rule, the rules of the high court of chancery in England. Long v. Anderson [Fla.] 37 So. 216. Under a constitutional provision conferring appellate jurisdiction on the supreme court under the regulations prescribed by the legislature, the court may adopt rules for itself where the legislature fails to provide the necessary appellate procedure. Finlen v. Heinze, 27 Mont. 107, 69 P. 829.

97. Hoodless v. Jernigan [Fla.] 35 So. 656.

98. Rule relating to continuance. Loose v. State [Wis.] 97 N. W. 526.

99. Regarding making up statements of fact after adjournment. Ft. Worth & D. C. R. Co. v. Roberts [Tex.] 81 S. W. 25.

1. Hoodless v. Jernigan [Fla.] 35 So. 656.

2. Preston Nat. Bank v. Rohnert [Mich.] 100 N. W. 393.

3. Jackson v. Lemler [Miss.] 35 So. 306.

4. Smith v. Warringer, 41 Misc. 94, 83 N. Y. S. 655.

5. A rule providing that where counsel offers himself as a witness he shall not argue the case to the jury, except by permission of the court, is proper. Voss v. Bender, 32 Wash. 566, 73 P. 697. A rule providing that whatever is averred in the statement and not specifically denied in the answer, and whatever of new matter is stated in the answer and not specifically denied in the replication, shall be taken as admitted at the trial, does not violate the Pennsylvania procedure act [May 25, 1887, P. L. 271]. Easton Power Co. v. Sterlingworth R. Supply Co., 22 Pa. Super. Ct. 538. A rule requiring persons sued in a representative capacity to file affidavits of defense and directing judgment to be entered by default is valid. Helffrich v. Greenberg, 206 Pa. 516, 56 A. 45. Under a rule for compelling discovery of books, papers, etc., the applicant must show inability to procure them by subpoena duces tecum [Cir. Ct. Rule 50, subd. d (87 N. W. vi.)]. Preston Nat. Bank v. Rohnert [Mich.] 100 N. W. 393. A rule limiting the evidence of title to real estate to the documents mentioned in the abstract filed by the

The legislature has power to regulate the practice, though jurisdiction be conferred by the constitution,[6] and where the Federal statutes do not expressly indicate the practice to be followed by the Federal courts, resort must be had to the common law.[7]

COVENANTS FOR TITLE.[8]

§ 1. Making of Covenants; Persons and Estates Benefited or Bound (973).
§ 2. Performance or Breach (974).
§ 3. Enforcement of Covenants (974). Damages for Breach (975).

§ 1. *Making of covenants; persons and estates benefited or bound.*[9]—Power to execute a deed ordinarily includes power to include therein a covenant of general warranty.[10] There is no implied covenant of warranty in a deed,[11] though a warranty has been implied in a deed of voluntary partition,[12] and by statute in some states covenants are imported from the grant[13] or from particular words.[14] One may be estopped in matter of warranty, though it is not possible to call him in warranty.[15]

In some states, the heirs and devisees of a covenantor are answerable upon such covenant to the extent of the property descended or devised to them.[16] At common law, the covenant against incumbrances did not run with the land,[17] but the modern rule seems to be that it does run with the land,[18] since it is broken as soon as it is made, if the incumbrance then exists.[19] Where possession attends the conveyance, the covenant for quiet enjoyment runs with the land;[20] but in a deed from a life tenant, has the effect only of a personal covenant.[21]

plaintiff is beyond the court's authority. Pelz v. Bollinger [Mo.] 79 S. W. 146.

6. May regulate granting of injunctions. Wright v. Superior Court of Santa Clara County, 139 Cal. 469, 73 P. 145.

7. Scire facias on forfeited bail bond. Kirk v. U. S., 131 F. 331.

8. Restrictive covenants are treated in the topic Buildings and Building Restrictions, 3 Curr. L. 572; execution and effect of deeds in Deeds of Conveyance, 1 Curr. L. 908.

9. See 1 Curr. L. 825.

10. Resolution of a city council authorizing the mayor to "make deed" of land held to include power for him to include therein a covenant of general warranty. Abbott v. Galveston [Tex.] 79 S. W. 1064. Charter power to hold and convey real property authorizes the city to execute a deed with a covenant of general warranty. Abbott v. Galveston [Tex.] 79 S. W. 1064. Where a married woman has power to convey, she is liable on her covenants. McGuigan v. Gaines, 71 Ark. 614, 77 S. W. 52.

11. So as to render a grantor a necessary party to an action against a grantee affecting title to a part of property conveyed. Thompson v. Schenectady R. Co., 124 F. 274.

12. Reed v. Reed, 25 Ky. L. R. 2324, 80 S. W. 520. This implied warranty will cover the joint tenant's share of outstanding taxes, his own incumbrances, and his wife's inchoate right to dower, where she fails to join or to be joined in a sufficient manner to convey the same. Id.

13. Rotan v. Hays [Tex. Civ. App.] 77 S. W. 654.

14. By statute in Illinois, the word "warrants" imports full covenants [1 Starr & C. Ann. St. 1896 (2d Ed.) p. 924, § 11]. Roderick v. McMeekin, 204 Ill. 625, 68 N. E. 473.

15. Hardy v. Pecot [La.] 36 So. 992.

16. Burns' Ann. St. 1901, § 2597. The complaint must allege that defendants are heirs, devisees, or distributees of the covenantor, and had received property from the estate by descent or devise. Muller v. Fowler [Ind. App.] 71 N. E. 512.

17. **Note:** There is a conflict of authority as to whether this covenant runs with the land; Sayre v. Sheffield Coal Co., 106 Ala. 440; Logan v. Moulder, 1 Ark. 313, 33 Am. Dec. 338; Lawrence v. Montgomery, 37 Cal. 183; Davis v. Lyman, 6 Conn. 249; Blondeau v. Sheridan, 81 Mo. 545; Wilson v. Cochran, 46 Pa. 229, holding that it does not; and to the contrary, by virtue of statute, Dehority v. Wright, 101 Ind. 382; Security Bank v. Holmes, 68 Minn. 538; Foote v. Burnett, 10 Ohio, 317, 36 Am. Dec. 90; Cole v. Kimball, 52 Vt. 639; Knadler v. Sharp, 36 Iowa, 232; Worley v. Hineman, 6 Ind. App. 240; and also to the contrary, Allen v. Little, 36 Me. 170, and Clarke v. Priest, 42 N. Y. S. 766, under a statute making choses in action assignable.—Geiszler v. DeGraaf, 166 N. Y. 339, 59 N. E. 993, 82 Am. St. Rep. 664 and note.

18. Whittern v. Krick, 31 Ind. App. 577, 68 N. E. 694.

19. Dahl v. Stakke, 12 N. D. 325, 96 N. W. 353; Brass v. Vandecar [Neb.] 96 N. W. 1035.

20. Party dispossessed may bring suit for breach. Libby v. Hutchinson [N. H.] 55 A. 547. A vendor owes a guaranty not only to the buyer but to those who hold under him, and the buyer holds only the right his vendor had. Hardy v. Pecot [La.] 36 So. 992. One who holds under a warrantor is bound by his warranty. Id.

Note: Real covenants do not run with the equitable title. Wright v. Sperry, 21 Wis. 336; Carlisle v. Blamire, 8 East, 487; Beardsley v. Knight, 4 Vt. 471; Watson v. Blaine, 12 Serg. & R. [Pa.] 131, 14 Am. Dec. 669; Mygatt v. Cole, 142 N. Y. 78. Privity of

§ 2. *Performance or breach. Against incumbrances.*[22]—An incumbrance is any interest in the land which may subsist in a third person to the diminution of the value of the land;[23] thus an unexpired lease,[24] or a railroad right of way,[25] but not a highway,[26] nor a building restriction, personal to the grantor after his death.[27] It is broken where certain excepted tenancies were not ordinary tenancies,[28] but being a covenant in praesenti[29] it is not broken by a local assessment, the lien of which has not attached.[30] Being a specialty, the right to recover for the breach is not affected by matters resting in parol.[31]

Warranty and quiet enjoyment.[32]—This covenant relates to title and not to quantity unless so provided.[33] It does not apply to the street on which the property conveyed abuts.[34] There is no breach until eviction,[35] unless it appears that title to the land is in the government,[36] and a grantee may sue in equity for rescission,[37] even though he has not been evicted.[38]

§ 3. *Enforcement of covenants.*[39]—A county court[40] or a justice of the peace has jurisdiction to entertain an action for breach of a personal covenant.[41]

estate is essential to carry covenants of warranty. Mecklem v. Blake, 22 Wis. 495, 99 Am. Dec. 68; Wallace v. Pereles, 109 Wis. 316, 83 Am. St. Rep. 898, 63 L. R. A. 644.

21. Remainderman or reversioner not bound [Code, § 1334]. Hauser v. Craft, 134 N. C. 319, 46 S. E. 766.

22, 23. See 1 Curr. L. 826.

24. Brass v. Vandecar [Neb.] 96 N. W. 1035.

25. Though the deed will be reformed if included by mistake. Pierce v. Houghton, 122 Iowa, 477, 98 N. W. 306.

26. They are to be included in determining the acreage. Beach v. Hudson River Land Co. [N. J. Eq.] 56 A. 157.

27. Was not for the benefit of neighboring lots. Hazen v. Mathews, 184 Mass. 388, 68 N. E. 838. A covenant in one of the deeds under which a grantor deraigned title contained a covenant that no liquor saloon should be maintained on the premises, with a condition of reversion in case of breach, does not constitute a breach of the grantor's implied covenant against incumbrances in the absence of any eviction or disturbance of the grantee, or any damage suffered by him. Thurgood v. Spring, 139 Cal. 696, 73 P. 456.

28. Tenants were to have a month's rent free after they had been in a certain time. Toch v. Horowitz, 37 N. Y. S. 455.

29. Special assessments do not become liens until certain papers are filed [Code, § 816]. Cemansky v. Fitch, 121 Iowa, 186, 96 N. W. 754. See 1 Curr. L. 826, n. 35. There is no breach of warranty if a judgment becomes a liability against the land where a grantee has agreed to save his grantor harmless from debts of her grantor, which might become an incumbrance on the land. Cureton v. Cureton [Ga.] 48 S. E. 162.

30. Code, § 816, provides that such lien does not attach until publication of certain ordinances. Cemansky v. Fitch, 121 Iowa, 186, 96 N. W. 754.

31. Grantee's notice of incumbrance covenanted against. Whittern v. Krick, 31 Ind. App. 577, 68 N. E. 694. Covenant against incumbrances; grantee had knowledge of a lease on premises. Anthony v. Rockefeller, 102 Mo. App. 326, 76 S. W. 491. Nor can it be shown by parol contemporaneous evidence that the covenant was modified so as to relieve the grantor from such liability. Id. But evidence of negotiations between the parties prior to the execution of a deed is not an attempt to vary it by parol. Dubay v. Kelly [Mich.] 100 N. W. 677.

32. See 1 Curr. L. 826.

33. Description by metes and bounds and as containing so many acres. Maxwell v. Wilson [W. Va.] 46 S. E. 349. Parties to a deed contemplated the sale and purchase of land from a certain point to a fence, and put in the number of front feet as a designated number, supposing it to be correct; the grantor is not liable on his covenant of warranty, though the distance be less. Parrish v. Williams [Tex. Civ. App.] 79 S. W. 1097.

34. Where one conveyed a right of way over lands owned by him, it not appearing that he owned the street. Hot Springs R. Co. v. Williamson [Ark.] 77 S. W. 916.

35. Floor above plaintiff's was let to a noisy concern. Plaintiff did not move out. Greenwood v. Wetterau, 84 N. Y. S. 287. A purchaser cannot recover amount due on a mortgage, foreclosure not having been attempted and his possession not having been disturbed. Inderlied v. Honeywell, 88 App. Div. 144, 84 N. Y. S. 333. Not broken by an outstanding inchoate right of dower. People's Sav. Bank Co. v. Parisette, 68 Ohio St. 460, 67 N. E. 896. Adverse possession of another at the time of conveyance is equivalent to an eviction (Shankle v. Ingram, 133 N. C. 254, 45 S. E. 578), and failure to deliver immediate possession, and the removal of improvements by tenants before the grantee acquires possession constitute a breach of the covenant of general warranty (Anthony v. Rockefeller, 102 Mo. App. 326, 76 S. W. 491); but the tenant accepting a new lease from the grantee without reserving the right to remove such fixtures, such right is extinguished and a subsequent removal thereof by the tenant did not constitute a breach of the grantor's covenant (Id.).

36. Holloway v. Miller [Miss.] 36 So. 531.

37. Where grantor is insolvent. Matthews v. Crowder [Tenn.] 69 S. W. 779.

38. Matthews v. Crowder [Tenn.] 69 S. W. 779.

39. See 1 Curr. L. 826.

40. Within statutory limit of amount. Brass v. Vandecar [Neb.] 96 N. W. 1035.

The action must be commenced within the statutory period from the time the covenant was broken.[42] Before action can be maintained on a covenant for further assurance, demand for compliance must have been made.[43] Filing a claim against the estate of a decedent is not a condition precedent to recover for a breach of his covenant.[44]

For damages suffered by a breach of a covenant, the vendee must sue on such covenant;[45] but where one has paid off an incumbrance,[46] such damages may be pleaded by way of counterclaim[47] in an action for the purchase price, even though he has remained in continuous possession of the premises.[48] The burden is on the plaintiff to show an outstanding title paramount to that of his warrantor unless he yielded possession in consequence of proceedings of which his warrantor had notice and opportunity to defend.[49] In an action for a breach of covenant, it is no defense that the grantee knew that the grantor could not perform the conditions.[50]

An instruction must cover the evidence under all the allegations of the complaint.[51]

Damages for breach.[52]—Where there is an exchange of lands, the measure of damages is the value of the land he was to receive;[53] but the recital of the consideration in the deed is not conclusive.[54] The measure of damages for breach of covenant against incumbrances is the amount paid to discharge it not exceeding the purchase price,[55] and where an incumbrance consists of an unexpired lease, it is the value of the use of the premises during such term,[56] together with expenses incurred in litigation with the tenant.[57] Where the grantor requests the grantee to take steps to recover possession,[58] but if the grantor does not appear, judgment cannot be rendered against him for new cause of action set up in an

41. Quiet enjoyment. Holmes v. Seaman [Neb.] 100 N. W. 417.

42. For seisin within 10 years [Code, § 158]. Shankle v. Ingram, 133 N. C. 254, 45 S. E. 578. The cause of action on a covenant to pay taxes and assessments accrues when the taxes and assessments become due. Statute of limitations runs from this date. This is true, though the covenantee subsequently pays the taxes. Litchfield v. Cowley, 34 Wash. 566, 76 P. 81.

43. Complaint must allege that it has been done. Trust Co. of New York v. Universal Talking Mach. Co., 90 App. Div. 207, 86 N. Y. S. 60.

44. Under Burns' Rev. St. 1901, §§ 2465, 2470, 2597. Whittern v. Krick, 31 Ind. App. 577, 68 N. E. 694.

45. Breach of covenants against incumbrances. Thurgood v. Spring, 139 Cal. 596, 73 P. 456. Where the holder of an unrecorded deed to land which is subject to a remote vendor's lien is not made a party to proceedings to foreclose the lien, her remedy for loss sustained is on the warranties she holds. Friend v. Means [Ky.] 78 S. W. 164.

46. Dahl v. Stakke, 12 N. D. 325, 96 N. W. 353.

47. Thurgood v. Spring, 139 Cal. 596, 73 P. 456. The incumbrance being a mortgage, a release thereof, filed on trial, is sufficient to defeat the counterclaim. Id.

48. Dahl v. Stakke, 12 N. D. 325, 96 N. W. 353.

49. Calling on the warrantor to produce a paramount title is insufficient. McMullen v. Butler & Co., 117 Ga. 845, 45 S. E. 258. Where vendee never had possession, evidence of prior trials for eviction held insufficient to show that grantor had admitted a paramount title. Id.

50. That before purchasing, the grantee was informed by third parties that the grantor had parted with title to certain water, which constituted the breach alleged, held no defense. Bailey v. Murphy [Colo. App.] 74 P. 798.

51. Where complaint in action for breach of warranty alleges in one paragraph execution of deed and failure of title to a portion of the land, and in a second, fraud in misrepresenting the number of acres conveyed, instructions as to verdict should cover both claims of the complaint. Ludwick v. Petrie, 32 Ind. App. 550, 70 N. E. 280.

52. See 1 Curr. L. 826.

53. Breach of covenant of quiet enjoyment. Holmes v. Seaman [Neb.] 100 N. W. 417.

54. Real consideration may be proved by parol. Holmes v. Seaman [Neb.] 100 N. W. 417.

55. Dahl v. Stakke, 12 N. D. 325, 96 N. W. 353.

56. Brass v. Vandecar [Neb.] 96 N. W. 1035. Where a covenant excepting certain monthly tenancies was broken by the existence of other than monthly tenancies, the vendee must prove that the rent reserved was less than the rental value. Toch v. Horowitz, 87 N. Y. S. 455.

57. Browning v. Stillwell, 42 Misc. 346, 86 N. Y. S. 707.

58. Proceedings unsuccessful. Brass v. Vandecar [Neb.] 96 N. W. 1035.

amended complaint.[59] Where title to a portion of the land fails, the measure of damages is such a proportion of the consideration paid as the value of that to which title has failed is of the entire value of the parcel conveyed, with interest.[60] Where there has been no eviction, only the damages actually sustained may be recovered.[61] The existence of a highway entitles the grantee at most to recover but the amount it reduced the value.[62]

CREDITORS' SUIT.[63]

§ 1. Nature and Grounds of Remedy (976). Grounds (976). Property Which May be Reached (977).
§ 2. Pleading and Procedure (977).
§ 3. General Creditor's Suits (978).

§ 1. *Nature and grounds of remedy.*[64] *Equity jurisdiction.*—Equity has undisputed jurisdiction to reach legal or equitable assets of a defendant, whether a corporation or a natural person, in aid of a legal remedy for a money demand.[65] But the exercise of that jurisdiction is not by way of substitution for, but only in aid of, the legal remedy, and it can only be resorted to after the plaintiff has exhausted such remedy.[66] Hence judgment for the demand must have been obtained, and usually execution must have been issued and returned unsatisfied.[67] The judgment must be valid.[68]

Grounds.—A creditors' bill is proper where defendants are alleged to have

59. Original petition was for such damages as are customary on breach of covenant of warranty. Amended petition sought special damages. Coreth v. McNatt [Tex. Civ. App.] 77 S. W. 33.

60. Not the difference between the value of the entire tract and its value with the gores cut out. Dubay v. Kelly [Mich.] 100 N. W. 677. In breach of warranty, mere proof that land from which plaintiff was evicted was essential to the use of water power on the land which was worth $10,000.00 and constituted one-half the value of the premises, did not show the value of the land to be $5,000.00, even though the water power be found worth that sum. Libby v. Hutchinson [N. H.] 55 A. 547. On eviction, a grantee is entitled to interest on the purchase price of the portion of the land to which title has failed. Rents collected may be set off against interest. British & American Mortg. Co. v. Todd [Miss.] 36 So. 1040.

61. Barnum v. Cochrane [Cal.] 77 P. 656. Where the vendee retains possession and perfects title, he can recover only the sums so paid, and any other damages caused by the breach. Not the price paid. Holloway v. Miller [Miss.] 36 So. 531. In an action for breach of warranty, evidence of costs taxed in an ejectment suit which defendant had been notified to defend is admissible, notwithstanding the abolition of the common-law action of voucher to warranty. Dubay v. Kelly [Mich.] 100 N. W. 677.

62. Beach v. Hudson River Land Co. [N. J. Eq.] 56 A. 157.

63. For statutory proceedings in aid of execution, see Executions, 1 Curr. L. 1178. For bills by creditors merely to set aside fraudulent conveyances, see Fraudulent Conveyances, 2 Curr. L. 116.

64. See 1 Curr. L. 826.

65. Jones v. Mutual Fidelity Co., 123 F. 506.

NOTE. Equity jurisdiction: "The original jurisdiction of courts of equity to aid a creditor holding a legal demand was limited to those cases in which there was some element of fraud affecting the remedy at law as to assets subject to execution, but for the interposition of fraud, and to those cases where there was some element of trust peculiarly entitling the creditor to subject a particular asset to the satisfaction of his demand; but, where neither trust nor fraud appeared, such courts had no jurisdiction to aid such creditor, even though he had exhausted his remedy at law." McKeldin v. Gouldy, 91 Tenn. 678, 20 S. W. 231. It was to remedy this defect that the Tennessee remedy of discovery was provided by statute. Id. Quoted in Bryan v. Zarecor [Tenn.] 81 S. W. 1252.

66. Jones v. Mutual Fidelity Co., 123 F. 506. The equity suit will be dismissed if it appears that plaintiff has an adequate legal remedy. Brumbaugh v. Jones [Neb.] 98 N. W. 54.

67. Jones v. Mutual Fidelity Co., 123 F. 506. A creditor is not entitled to maintain the suit until he has obtained a judgment, and execution thereon has been returned unsatisfied. Mere insolvency and inability to reach property by garnishment does not change the rule. Brumbaugh v. Jones [Neb.] 98 N. W. 54. Judgment and return of execution nulla bona are not essential prerequisites to a suit in equity by an attachment creditor having a specific lien to remove obstructions preventing a sale upon execution. Certain fraudulent conveyances vacated as preliminaries to a sale. Coulson v. Saltsman [Neb.] 98 N. W. 1055.

68. Judgment and execution thereon, acquired by administrator without surrogate's order, invalid and could not sustain creditor's action. Ditmas v. McKane, 92 App. Div. 344, 86 N. Y. S. 1083. A judgment by confession, void because improperly entered, will not support a creditor's bill. Wilhelm v. Locklar [Fla.] 35 So. 6.

property and conceal the same, so that it cannot be reached by an execution at law,[69] and to discover and subject property disposed of in fraud of creditors to the payment of a judgment.[70] A suit by general creditors to obtain a judgment against the debtor and to have equitable assets in the hands of others applied to satisfaction of that judgment is on the same footing as a judgment creditor's bill, when plaintiffs are clearly entitled to the judgment sought.[71] The Tennessee code provides a creditor's bill for discovery of any property, including stocks, choses in action, and money due the judgment debtor or held in trust for him.[72] The remedy provided by this statute is exclusive of any other authority for effecting the same end,[73] and a bill cannot be maintained under these sections of the code to reach property subject to execution at law without an averment of some acknowledged ground of equity jurisdiction.[74]

Property which may be reached.—Whatever interest a beneficiary has in trust property, and may dispose of,[75] and property conveyed in trust by the debtor,[76] may be reached by creditors with the aid of a court of equity. Property accumulated in a business belonging to the wife, though conducted and managed by her husband as her agent, cannot be reached by the husband's creditors.[77] In Kentucky, a creditor of a decedent or testator may reach property received by the representative, heir or devisee of an heir or devisee of the decedent.[78]

§ 2. *Pleading and procedure.*[79]—A creditor's bill need not allege that defendant has no other property liable to satisfy complainant's judgment, if it shows that complainant has exhausted his legal remedy.[80] It need not allege that at the time of a conveyance by the debtor, she did not retain enough money or property to pay her debts.[81] The petition of a trustee in bankruptcy asking to be substituted as plaintiff in a creditor's bill, filed by a creditor of the bankrupt who has filed his claim before the referee in bankruptcy, must allege that the creditor has waived his security.[82] A cause of action to have a transaction whereby a debtor extends his homestead declared fraudulent and void and to subject the added property to the lien of a judgment may be joined with a cause of action to have

69. Dimond v. Rogers, 203 Ill. 464, 67 N. E. 968.

70. Starr & C. Ann. St. 1896, c. 22, § 49. Dimond v. Rogers, 203 Ill. 464, 67 N. E. 968. A judgment was had against a nonresident on a money demand, service being by publication, and land attached was ordered sold. Plaintiff then brought equitable suit in nature of creditor's bill to set aside alleged fraudulent conveyance and subject land to the judgment. Held, suit would lie. Parmenter v. Lomax [Kan.] 74 P. 634. "Creditors' suit" to subject lands owned and others claimed to have been formerly owned by the debtor to the payment of judgments. "A judgment creditor who comes into a court of equity to enforce his lien upon land is not asserting an equitable right or seeking equitable relief. His judgment is a legal lien." Flanary v. Kane [Va.] 46 S. E. 312.

71. Bronson v. Thompson [Conn.] 58 A. 692.

72. Shannon's Code, §§ 6091-6095. Bryan v. Zarecor [Tenn.] 81 S. W. 1252.

73. Bryan v. Zarecor [Tenn.] 81 S. W. 1252.

74. Such as assertion of a lien, fraud, discovery, trust or an equitable interest in the property. Bryan v. Zarecor [Tenn.] 81 S. W. 1252.

75. Will gave $600 annually for ten years, with no provision against anticipation, alienation or attachment. Held, since he could assign such interest, the creditors could reach it. Bronson v. Thompson [Conn.] 58 A. 692.

76. After debt contracted. South Carolina Loan & Trust Co. v. Lawton [S. C.] 48 S. E. 282.

77. Shircliffe v. Casebeer, 122 Iowa, 618, 98 N. W. 486. Limitations begin to run against an action to subject property accumulated in a business belonging to the wife, but conducted by the husband, to a judgment against the insolvent husband from the time the alleged fraudulent business was started. Id.

78. John Shillito Co. v. Keith, 25 Ky. L. R. 770, 76 S. W. 371.

79. See 1 Curr. L. 827.

80. Bayley v. Bayley [N. J. Eq.] 57 A. 271. A sheriff's return on execution, showing only that there was no personal property, with no showing as to real property, and the bill itself failing to set out that there was no other property, is insufficient. Id.

81. These are mere evidentiary matters. Dimond v. Rogers, 203 Ill. 464, 67 N. E. 968.

82. Kohout v. Chaloupka [Neb.] 96 N. W. 173.

fraudulent conveyances set aside.[83] The return of the sheriff on an execution nulla bona is conclusive of the question that the creditor has exhausted his legal remedies and is entitled to maintain the bill,[84] and an allegation of a return of nulla bona is a prima facie showing that there was no property subject to the judgment at that time.[85]

The assignee of a judgment may maintain a creditor's suit in his own name.[86] Such assignee need not cause a new execution to be issued in his own name.[87] In a suit against heirs at law of a decedent to subject land to payment of claims of creditors, a nonresident claiming a life interest in the land is not a necessary party.[88] In a suit to subject to a judgment land alleged to have been fraudulently conveyed, one who intervenes, claiming a lien on the property for advancements made on the purchase price, should be permitted to be made party defendant.[89] The beginning of a creditor's suit gives a specific lien on property sought to be reached, which continues until final determination of the suit.[90] It is in the nature of an equitable execution and renders unnecessary the issuance of a general execution on the judgment during the pendency of the suit in order to keep the judgment alive, so far as the property equitably levied on in the suit is concerned.[91] A decree in a creditor's suit directing sale of land "as upon execution" sufficiently designates the sheriff as the one by whom the sale is to be conducted.[92] Such order of sale may be issued pending a motion for a new trial.[93]

§ 3. *General creditors' suits.*[94]—Statutes providing for general creditors' suits for administering the affairs of an insolvent corporation for the benefit of creditors are merely confirmatory of previously existing laws.[95] The broad principles governing such actions must control as to the subject-matter to be brought into the suit, and not the difficulties arising from the complicated character of the action.[96] Since in such action it is sought to administer the property of the corporation and enforce liabilities germane thereto as a trust fund for the payment of its debts, all persons possessing any part of such fund in a trust capacity, in any legitimate sense, and all persons contingently liable or liable only upon principles of equity, for the benefit of creditors as a class, are proper defendants.[97]

83. Hunt v. Dean [Minn.] 97 N. W. 574.

84. Coffield v. Parmenter, 2 Neb. Unoff. 42, 96 N. W. 283.

85, 86, 87. Dimond v. Rogers, 203 Ill. 464, 67 N. E. 968.

88. Coulson v. Saltman [Neb.] 98 N. W. 1055.

89. Rau v. Shaver [Va.] 45 S. E. 873.

90. Flint v. Chaloupka [Neb.] 99 N. W. 825.

91. Contra doctrine held in Minnesota, North and South Dakota said to be due to variance in statutes. Flint v. Chaloupka [Neb.] 99 N. W. 825.

92, 93. Cochran v. Cochran, 1 Neb. Unoff. 508, 95 N. W. 778.

94. See Corporations, 1 Curr. L. 710.

95. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

96. Applied to creditors' action in which they were permitted to enforce all liabilities to which the creditors as a class might properly resort for the satisfaction of their claims. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

97. Persons who have obtained property of an insolvent corporation in fraud of creditors are constructive trustees for creditors, and their liabilities as such may properly be determined in a creditors' suit. Clark v. Banner & V. Printing Co., 50 Wis. 416, 7 N. W. 309, held to have been overruled and never followed so far as it holds that persons to whom property of an insolvent has been transferred in fraud of creditors can be made defendants in an administrative suit only for purposes of discovery. See Rev. St. 1898, § 3228. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. If a defendant be charged as trustee of property belonging to the trust fund on the ground of fraud and the fraud fails, yet the proof shows that such person has property which belongs to the trust, the appropriate relief in that regard may be granted. Id. If, pending an administration suit, before final judgment, even after the property has been distributed by order of the court, it is claimed upon reasonable ground that the receiver was, by a fraud, introduced into the action to aid the officers of the insolvent to carry out a preconceived design to defraud its creditors while pretending to act as the agent of the court, it is permissible to make such receiver and his alleged guilty associates defendants in such suit as a method of requiring the receiver to account; and regarding him and his cowrongdoers as standing for matters germane to the subject of the action, as may properly be done, such practice is fully approved. Id.

The action may be maintained whether or not a receiver has been appointed.[98] Though a creditor cannot institute a proceeding to obtain a part of trust funds in the receiver's hands until it has been awarded him, he may maintain an action to enforce the trust so that an order of distribution may be made.[99] A receiver of an insolvent corporation in a creditors' action to administer its affairs for their benefit is a trustee of corporate assets in the right of the corporation for such creditors, and for the latter in their right as to all liabilities to which they may properly resort as a class, not enforceable by the corporation.[100]

The complaint, in the nature of a bill in equity, by which a creditor's action is commenced, under the Code, is the substitute for and in all respects performs the office of the creditor's bill under the old practice.[101] In such action the rendition of a judgment at law, the issuance of an execution thereon and the return thereof unsatisfied, should be alleged in the complaint, and a defect in that regard may be taken advantage of by demurrer ore tenus.[102]

The legitimate expenses of a creditor in instituting and prosecuting proceedings for sequestration and administration of an insolvent's property for the benefit of all creditors should be allowed as expenses of such administration.[103] A judgment for costs against creditors in bona fide litigation of matters respecting the final account of a receiver should be paid out of the trust fund, or if paid by creditors, they should be reimbursed therefor out of such fund.[104]

CRIMINAL LAW.

§ 1. **Elements of Crime (979).** Criminal Intent (980). Attempts (980). Felonies and Misdemeanors (981).
§ 2. **Defenses (981).**
§ 3. **Capacity to Commit Crime (982).**
§ 4. **Parties in Crimes (982).**
§ 5. **Former Adjudication and Second Jeopardy (983).**
§ 6. **Punishment of Crime (985).** Extent of Imprisonment (986). Place of Imprisonment (986). Second Offenses (987).
§ 7. **Rights in Property the Subject of Crime (987).**

§ 1. *Elements of crime. Sources of the criminal law.*[1]—The legislature has no authority to pronounce the performance of an innocent act criminal, when the public health, safety, comfort or welfare is not involved,[2] and a municipality may create offenses only when specially authorized,[3] and cannot make criminal, or provide a punishment for, acts which are indictable at common law or by statute.[4] Penal statutes can have no extraterritorial force,[5] and must not be ex post

98. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

99. The fact that the legal title to the trust fund in an administration suit is not in the creditors prosecuting the winding up action does not affect their right to an equitable remedy by action against the constructive trustee holders of the funds to be recovered and gathered into the hands of the agent of the court as their regular trustee. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

100. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

101. Hence it was proper to bring in new defendants and litigate as to them the matters alleged in the complaint. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

102, 103, 104. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

1. See 1 Curr. L. 827.

2. Hurd's Rev. St. 1901, p. 1793, relative to the selling of registered cans, bottles, etc., held invalid. Horwich v. Walker-Gordon Laboratory Co., 205 Ill. 497, 68 N. E. 938. A state may make it a criminal act for a contractor upon a public work to permit or require an employe to work more than eight hours per day [Gen. St. 1901, §§ 3827-3829]. Atkin v. State of Kansas, 191 U. S. 207, 24 S. Ct. 124. A legislature may make it a criminal offense for an employe without reasonable notice to suddenly quit his duties, where the public safety is concerned. Peonage Cases, 123 F. 671.

3. Regulation of pool rooms. City of Louisville v. Wehmhoff, 25 Ky. L. R. 995, 76 S. W. 876. Ordinance prohibiting gaming held unauthorized and void. State v. Godfrey [W. Va.] 46 S. E. 185. 18 Del. Laws, p. 277, c. 161, § 11, authorized a town to make it an offense to be drunk, noisy and disorderly within the town limits. McCaffrey v. Thomas [Del. Super.] 56 A. 382.

4. Municipality may prohibit disorderly conduct. State v. Taylor, 133 N. C. 755, 46 S. E. 5.

5. A violation of Burns' Rev. St. 1901, § 2178, on bunco steering, cannot be committed partly in Indiana and partly in Illinois.

facto.[6] The peonage act of congress overruled the state laws supporting such system.[7] Congressional adoption of state laws "now in force" respecting crimes on Federal territory refers to such as were in force at the time of the adoption of U. S. Revised Statutes in 1878.[8] A repeal without a saving clause abates pending prosecutions, but a general statute may operate as a saving clause to all repeals.[9]

Criminal intent.[10]—Every man of sane mind is presumed to intend the reasonable and natural consequences of his own acts,[11] and the commission of an act forbidden by law raises a presumption of intent to do the act;[12] but when an act is criminal only by reason of the intent, such intent must be proved.[13] A fraudulent intent is a necessary element of such crimes as larceny,[14] embezzlement,[15] and kindred offenses, and generally is an essential element in swindling, though the legislature may dispense with it in relation to conversion by a guardian,[16] and an intent to secure a personal benefit is not an essential element of the crime of using the mails for fraudulent purposes.[17] An admission of a previous commission of a misdemeanor is not evidence as to the intent in an alleged felony.[18]

Attempts.[19]—An act done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime.[20] One ac-

Cruthers v. State, 161 Ind. 139, 67 N. E. 930. A state cannot punish an illegal conveyance in another state of lands therein situated. Rev. St. 1899, § 1932 applies only to transfers within Missouri (State v. Clark, 178 Mo. 20, 76 S. W. 1007); nor punish the operator of a ferry who charges according to his franchise derived from another state, though his fees be excessive under the laws of the complaining state (State v. Faudre [W. Va.] 46 S. E. 269).

6. A retrospective penal law is ex post facto only when it alters the situation to defendant's disadvantage. State v. Tyree [Kan.] 77 P. 290. A law is not ex post facto, as applied to one convicted before its passage, which substitutes the penitentiary for the county jail as the place of confinement pending execution [Laws 1903, c. 99] (State v. Rooney, 12 N. D. 144, 95 N. W. 513), or which requires execution to be at the penitentiary instead of at the county jail [Laws 1903, c. 99] (Id.), or which extends the time within which the condemned must be executed. Any extension of one's privilege of living is to his advantage [Laws 1903, c. 99] (Id.). A statute requiring all dentists to register and procure licenses is not ex post facto. Such a statute is a reasonable exercise of the police power. State v. Chapman, 69 N. J. Law, 464, 55 A. 94.

7. U. S. Rev. St. §§ 1990, 5526. Peonage Cases, 123 F. 671.

8. United States v. Tucker, 122 F. 518.

9. People v. Scannell, 40 Misc. 297, 82 N. Y. S. 362.

10. See 1 Curr. L. 828.

11. Motive need not be shown on a murder trial. State v. Dull, 67 Kan. 793, 74 P. 235; Keady v. People [Colo.] 74 P. 892; Cupps v. State [Wis.] 97 N. W. 210. The taking of human life by an act naturally and probably calculated to cause that result supports a presumption that such result was intended and hence the accused may be found guilty of the highest offense of homicide, there being no evidence of excuse or justification. Cupps v. State [Wis.] 97 N. W. 210. Malice may be inferred from the use of a deadly weapon. State v. Dull, 67 Kan. 793, 74 P. 235; Keady v. People [Colo.] 74 P. 892. Upon proof of homicide by use of a deadly weapon, no justification appearing, the law implies malice, though there was no actual intent to injure any one. State v. Capps, 134 N. C. 622, 46 S. E. 730. Proof of homicide raises the presumption that it was malicious. Proof of a matter of defense on extenuation then lies on the defendant. Cupps v. State [Wis.] 97 N. W. 210. It is no defense in a prosecution for malicious trespass that defendant had no actual ill will toward the owner or any other person [Gen. St. 1901, §§ 2100, 2105]. State v. Boles [Kan.] 74 P. 630.

12. State v. McDonald, 133 N. C. 680, 45 S. E. 582. Under Rev. St. 1899, § 3032, making it unlawful to give away liquor in counties adopting local option, the criminal intent is completed when liquor is given away. State v. Handler, 178 Mo. 38, 76 S. W. 984.

13. State v. McDonald, 133 N. C. 680, 45 S. E. 582.

14. Goods taken with consent of a detective, agent of the carrier. State v. Waghalter, 177 Mo. 676, 76 S. W. 1028. Theft by a bailee. Smith v. State [Tex. Cr. App.] 76 S. W. 434.

15. State v. McDonald, 133 N. C. 680, 45 S. E. 582; State v. Hunt [R. I.] 54 A. 937.

16. Pen. Code 1895, § 948. Walls v. State [Tex. Cr. App.] 77 S. W. 8.

17. Rev. St. § 5480. Kellogg v. U. S. [C. C. A.] 126 F. 323.

18. State v. Wenzel [N. H.] 66 A. 918.

19. See 1 Curr. L. 828.

20. Defendant's solicitation of a detective to unlawfully remove public records held sufficient to sustain a conviction for an attempt [Pen. Code, § 34]. People v. Mills, 41 Misc. 195, 83 N. Y. S. 947. One who attempts to commit a crime but fails or is prevented or intercepted in the perpetration thereof is punishable for the attempt [Pen. Code, § 664]. People v. Oates, 142 Cal. 12,

cused of a crime cannot complain that he was indicted and convicted only of an attempt, when he might have been convicted of the principal crime.[21]

Felonies and misdemeanors.[22]—The common-law rule that one could not be convicted of a misdemeanor upon an indictment for a felony has been generally abrogated.[23] An indictment alleging a conspiracy and the appropriation by corporate officers of funds to their own use does not effect a merger of the conspiracy in the grand larceny, so as to prevent a prosecution for conspiracy.[24] In Illinois the common-law distinctions as to infamous crimes is superseded by a statutory enumeration,[25] and in Louisiana, a crime, the penalty for a commission of which is imprisonment for a term not to exceed two years, is a felony.[26] A state may make wife desertion a misdemeanor.[27]

§ 2. *Defenses.*[28]—The right of self defense permits one under all circumstances,[29] to repel with commensurate force an unlawful attack, really or apparently imminent.[30] As a general rule, the advice of counsel,[31] or the direction of one's employer, furnishes no excuse for a violation of the law;[32] and likewise, one's faith in prayer and his religious objections to physicians are no defense to a charge of manslaughter for neglecting to call medical assistance for his infant child.[33]

It has been held that one who acts in reliance on an existing statute cannot be held to a criminal charge because the statute is subsequently declared unconstitutional,[34] but this is doubted,[35] and the general rule is that mistake of law excuses no one, though it is otherwise as to mistake of fact going to the criminality of the offense.[36] Defendant's good character may be shown in every criminal case,[37] but is not necessarily so far defensive as to overcome the effect of circumstantial evidence.[38] Lapse of time may constitute a good defense.[39]

75 P. 337. One might in law be guilty of an attempt to commit a lewd act with the body of a child under fourteen years of age [Pen. Code, § 288]. People v. Stouter, 142 Cal. 146, 75 P. 780. In Wisconsin, an attempt to have sexual intercourse with one under the age of consent is punishable as an assault with intent to rape [Rev. St. 1898, § 4382]. Loose v. State [Wis.] 97 N. W. 526. In Missouri, one is not guilty of an attempt to bribe an officer, where the subject-matter is one that could not properly come before the officer in his official capacity [Rev. St. 1899, §§ 2084, 2089]. State v. Butler, 178 Mo. 272, 77 S. W. 560.

21. Pen. Code, § 685. People v. Mills, 91 App. Div. 331, 86 N. Y. S. 529.

22. See 1 Curr. L. 828.

23. Graff v. People, 208 Ill. 312, 70 N. E. 299.

24. People v. Rathbun, 89 N. Y. S. 746.

25. Christie v. People, 206 Ill. 337, 69 N. E. 33.

26. Act 107, p. 161; Laws of 1902. State v. Dalcourt, 112 La. 420, 36 So. 479.

27. State v. Cucullu, 110 La. 1087, 35 So. 300.

28. See 1 Curr. L. 828.

29. Hoy v. State [Neb.] 96 N. W. 228. On a prosecution for homicide, the state must show beyond a reasonable doubt that defendant was not acting in self defense. State v. Williams, 122 Iowa, 115, 97 N. W. 992.

30. One may use commensurate force against the nearest assailant, though the bodily harm is apprehended not from him but from his associates (Hoy v. State [Neb.] 96 N. W. 228), but one may not, as an act of self defense, shoot an officer who undertakes to arrest or search him in a rude manner (Keady v. People [Colo.] 74 P. 892).

31. State v. Hunt [R. I.] 54 A. 937.

32. Defendant drove piles and stakes in a navigable stream, while employed by the superintendent of a shooting club. State v. Poyner, 134 N. C. 609, 46 S. E. 500.

33. State v. Chenoweth [Ind.] 71 N. E. 197.

34. Kueney v. Uhl [Iowa] 98 N. W. 602.

35. Unconstitutional statute authorizing defendant to carry weapon held no defense. Swincher v. Com., 24 Ky. L. R. 1897, 72 S. W. 306.

36. Delivery of a bottle of liquor under the belief that it was cider [Pen. Code 1895, art. 46]. Patrick v. State [Tex. Cr. App.] 78 S. W. 947. It is no defense to one intending to commit homicide that he killed another whom he mistook for his intended victim. People v. Suesser, 142 Cal. 354, 75 P. 1093.

37. State v. Cather, 121 Iowa, 106, 96 N. W. 722.

38. Proof of character is only of such value as the jury see fit to give to it. State v. King, 122 Iowa, 1, 96 N. W. 712. It is entitled to just such consideration as the jury think best to give it under all the circumstances of the case. Cupps v. State [Wis.] 97 N. W. 210. The good custom and habit of a locality or state not to violate or attempt to nullify a provision of an act of congress cannot be pleaded to shield an offender against that law, because his acts are an exception to the prevailing rule of obedience to law in that state. Peonage Cases, 123 F. 671.

§ 3. *Capacity to commit crime.*[40]—According to the majority of the courts,[41] one who knows the right from the wrong of the act he is committing is responsible for his act;[42] accordingly, one adjudged insane is responsible for his acts committed during lucid intervals,[43] and insanity at the moment of crime and sanity immediately before and after is not a defense.[44]

Drunkenness is no defense except where a specific intent must be proved, and the drunkenness is sufficient to overcome the accused's capacity to form an intent.[45]

A boy of 13 is presumed incapable of committing crime.[46]

The presumption of coercion by the husband does not apply to a charge laid against husband and wife of keeping a house of ill fame.[47]

§ 4. *Parties in crimes.*[48]—The law does not distinguish between principals and accessories in misdemeanors.[49] Actual commission of a crime renders one a principal in the first degree,[50] while to be present, either actually or constructively, aiding or abetting its commission, constitutes a principal in the second degree,[51] both being ordinarily called principals and subject to the same or similar

39. Nuisance. If a civil action would not lie, defendant could not be convicted of a criminal offense. State v. Poyner, 134 N. C. 609, 46 S. E. 500. There is no general law in Georgia by which prosecutions in police courts or for violation of municipal ordinances will be barred by lapse of time. Battle v. Marietta, 118 Ga. 242, 44 S. E. 994.

40. See 1 Curr. L. 828.

41. State v. Keerl [Mont.] 75 P. 362.

42. If realizing the right and the wrong, it is no defense that his will power was so impaired that he could not resist the temptation to do wrong. State v. Berry [Mo.] 78 S. W. 611. An epileptic defendant prosecuted for murder cannot complain of an instruction that the proof must show that defendant knew right from wrong and was capable of governing his conduct accordingly. Quattlebaum v. State, 119 Ga. 433, 46 S. E. 677. Insanity must deprive of power to distinguish between right and wrong or of power to refrain from act. State v. Jack [Del. Gen. Sess.] 58 A. 833.

43. Quattlebaum v. State, 119 Ga. 433, 46 S. E. 677.

44. Evidence held to show merely "uncontrollable impulse." State v. Dunn [Mo.] 77 S. W. 848.

45. People v. Dowell, 141 Cal. 493, 75 P. 45; Bruen v. People, 206 Ill. 417, 69 N. E. 24. Excessive users of intoxicants are not necessarily, because of such excess, to be considered insane, so as to absolve them from responsibility for crime. Sharp v. State, 161 Ind. 288, 68 N. E. 286. The degree of intoxication may be considered as bearing on defendant's capacity to form a criminal intent. State v. Cather, 121 Iowa, 106, 96 N. W. 722. Intoxication is a defense when it prevents the forming of an intent to do the act complained of. State v. Williams, 122 Iowa, 115, 97 N. W. 992. Intoxication should be considered relative to the degree of the crime. Id. Voluntary intoxication, not resulting in a fixed or settled frenzy or insanity, either permanent or intermittent, does not excuse or mitigate any degree of unlawful homicide below murder in the first degree. Thomas v. State [Fla.] 36 So. 161. Intoxication of defendant has no bearing on the degree of crime in burglary. It may be considered relative to the intent with which the entry was made. People v. Dowell, 141 Cal. 493, 75 P. 45. Drunkenness voluntarily produced by one sort of liquor is no more an excuse for crime than that caused by any other intoxicating drink [Pen. Code 1895, § 39]. Cribb v. State, 118 Ga. 316, 45 S. E. 396; State v. Di Guglielmo [Del. Gen. Sess.] 55 A. 350.

46. The burden is upon the state to show him to have sufficient mental capacity to know right from wrong in reference to the offense of forgery charged. Harrison v. State [Ark.] 78 S. W. 763.

47. Husband and wife are equally guilty. State v. Jones, 53 W. Va. 613, 45 S. E. 916.

48. See 1 Curr. L. 829.

49. Defendant was one of a party engaged in unlawfully killing game during the closed season. McMahon v. State [Neb.] 97 N. W. 1035. Under Code, § 5299, one charged with committing an overt criminal act may be convicted upon proof that he was only an aider or abettor. State v. Berger, 121 Iowa, 581, 96 N. W. 1094. Pen. Code, § 1852. State v. De Wolfe [Mont.] 74 P. 1084. Acts which would constitute one an accomplice if the offense were a felony make him a principal if it is merely a misdemeanor. Caudle v. State [Tex. Cr. App.] 74 S. W. 545. An ordinance defining petit larceny and adopting the common-law definition carries with it all the common-law incidents of the crime. Reed v. State [Miss.] 35 So. 178. See 1 Curr. L. 829, n. 87.

50. 1 Clark & M. on Crimes, p. 350. One who helps to drive away and sell cattle known by him to be stolen is guilty of larceny. Murray v. State [Miss.] 36 So. 541. One who assists in a forcible entry and in the carrying away of stolen property is guilty of both burglary and larceny. State v. Peeblee, 178 Mo. 475, 77 S. W. 518.

51. 1 Clark & M. on Crimes, p. 350. Constructive presence is sufficient (Baldwin v. State [Fla.] 35 So. 220), except in Texas (McDonald v. State [Tex. Cr. App.] 79 S. W. 542). Mere presence without aiding or abetting is insufficient. Thornton v. State, 119 Ga. 437, 46 S. E. 640. But there may be an abetting without manual aid. Franklin v. State [Tex. Cr. App.] 76 S. W. 473.

punishment. An accessory before the fact is one who, being absent at the actual commission of the offense, has procured, counseled or commanded it,[52] and one who, knowing an offense to have been committed, receives, comforts or assists the perpetrator, is an accessory after the fact.[53] Generally, by statute, principals and accessories of all degrees are prosecuted and punished as principals.[54] Membership in a firm which has defrauded the government,[55] or mere presence at the perpetration of a crime does not render one a particeps criminis; there must be an actual participation.[56] One who could not be a principal may be guilty as an accessory.[57] An accessory before or after the fact may be indicted separately from the principal, either before or after the latter's conviction;[58] but by common law and in Florida, the conviction of the principal is an essential prerequisite, except in certain cases, to the punishment of the accessory.[59] An acquittal of one of two co-defendants on a charge of adultery does not prevent the conviction of the other.[60]

§ 5. *Former adjudication and second jeopardy.*[61]—When one has been placed on trial on a valid indictment or information, before a court of competent jurisdiction, has been arraigned and has pleaded and the jury has been impan-

At common law and generally by statute, one who stands watch while his associates perpetrate a crime is a principal. State v. Berger, 121 Iowa, 581, 96 N. W. 1094. Though not firing a shot, one may be guilty of murder who goes with another to a store with the preconceived design of homicide, and such other accomplishes the object. Mow v. People, 31 Colo. 361, 72 P. 1069. If one actually commits an offense and another is present, and knowing of the unlawful purpose, aids or encourages by acts, words or gestures, such other is a principal. Parks v. State [Tex. Cr. App.] 79 S. W. 637. One who conspires with another to kill a third person and any person who interferes is guilty in the same degree as other conspirator who actually committed the homicide. Chapman v. State [Tex. Cr. App.] 76 S. W. 477. Concert in a crime involves concert in a killing in course of its perpetration. Starks v. State, 137 Ala. 9, 34 So. 687. One indicted as an aider and abettor may be convicted as a principal [Ky. St. 1899, § 1128]. Leger v. Com., 25 Ky. L. R. 4, 74 S. W. 704. One charged with attempting to steal public records is not a principal where the only taking was by the district attorney, who took them for his own purposes. People v. Mills, 41 Misc. 195, 83 N. Y. S. 947.

52. 1 Clark & M. on Crimes, p. 351; Leger v. Com., 25 Ky. L. R. 4, 74 S. W. 704. Crim. Code 1873, § 1, as to one who is an aider, abettor or procurer of a crime. Lamb v. State [Neb.] 95 N. W. 1050. Under the Texas statute, one must render the principal some overt active assistance to constitute him an accessory [Pen. Code 1895, art. 86]. Chenault v. State [Tex. Cr. App.] 81 S. W. 971. One who advises a theft, but does not aid therein and is not present at the time thereof, is an accomplice and not a principal. McAlister v. State [Tex. Cr. App.] 76 S. W. 760.

53. 1 Clark & M. on Crimes, p. 351.

54. State v. Berger, 121 Iowa, 581, 96 N. W. 1094. Accessories before the fact [Ky. St. 1899, § 1128]. Leger v. Com., 25 Ky. L. R. 4, 74 S. W. 704. Pen. Code, § 29. People v. Mills, 41 Misc. 195, 83 N. Y. S. 947; People v. Mills, 91 App. Div. 331, 86 N. Y. S. 530. Pen. Code, § 29. Defendant knowingly allowed a portion of his premises to be used for selling pools and was present at a certain sale [Pen. Code, § 29] (People v. Canepi, 87 N. Y. S. 773); but an accomplice is not a "perpetrator," though by statute he be a principal [Pen. Code, § 31] (People v. Chin Yuen [Cal.] 77 P. 954). In Texas, an accomplice is not a principal. McAlister v. State [Tex. Cr. App.] 76 S. W. 760.

55. United States v. Cohn, 128 F. 615.

56. State v. Fox [N. J. Law] 57 A. 270. One who was merely present at the commission of manslaughter, but did not aid the criminal nor share the criminal intent, is not guilty as a principal in the second degree. Thornton v. State, 119 Ga. 437, 46 S. E. 640. Evidence that defendant was present, when an obstruction was placed upon a street car track, but was lying in a drunken stupor in no way assisting in the crime, is insufficient to sustain a conviction for obstructing the track. People v. Kuhn, 84 App. Div. 631, 81 N. Y. S. 1091.

57. Accessory to the crime of embezzlement. Bishop v. State, 118 Ga. 799, 45 S. E. 614.

58. If before, the indictment must aver the principal's guilt; if after, it may allege either the guilt of the principal or that he has been convicted, without averring his guilt. Daughtrey v. State [Fla.] 35 So. 397; Stone v. State, 118 Ga. 705, 45 S. E. 630. One is an accomplice only when he could be indicted either as a principal or an accessory. Subornation of perjury. Stone v. State, 118 Ga. 705, 45 S. E. 630. An accessory before the fact may be convicted, though the principal is not in custody. Begley v. Com. [Ky.] 82 S. W. 285.

59. And the conviction required includes the judgment. Daughtrey v. State [Fla.] 35 So. 397.

60. Conviction as to one because of his admissions. State v. Simpson, 133 N. C. 676, 45 S. E. 567.

61. See 1 Curr. L. 829.

eled and sworn, he is in jeopardy;[62] but the determination of a plea of misnomer in defendant's favor is not a bar to another prosecution upon a second affidavit.[63] A temporary postponement of the trial after the jury is selected, it being subsequently tried before the same jury, is not jeopardy.[64] A proper discharge of a jury, because of inability to agree,[65] or upon a demurrer to the indictment, is no bar to a second trial of the accused,[66] but an arbitrary discharge of the jury will in general sustain a plea of former jeopardy,[67] except where there could be no legal conviction under the former indictment.[68] A plea of former jeopardy must relate to the same offense,[69] but when an offense is a necessary element in and constitutes an essential part of another offense, and both are in fact one

62. Mahany v. People, 31 Colo. 365, 73 P. 26; Schrieber v. Clapp, 13 Okl. 215, 74 P. 316; State v. Brown, 110 La. 591, 34 So. 698. One who has not been called upon to plead to an indictment against him is not in jeopardy. State v. Michel, 111 La. 434, 35 So. 629.

63. Dillard v. State, 137 Ala. 106, 34 So. 851.

64. Prince v. State [Ala.] 37 So. 171.

65. Jury discharged after being out three hours held not an arbitrary act of the court. United States v. Jim Lee, 123 F. 741.

66. State v. Sherman, 71 Ark. 349, 74 S. W. 293.

67. Lovelace v. State [Tex. Cr. App.] 76 S. W. 756. An erroneous summary discharge of the jury and defendant after the evidence is in bars another prosecution of the defendant for the same offense. Schrieber v. Clapp, 13 Okl. 215, 74 P. 316. A discharge of two members of the jury after that body has been impaneled and sworn is good basis for a plea of former jeopardy. Defendant did not lose his rights by demanding a new venire after his objections to the discharge of jurors had been overruled. Tomasson v. State [Tenn.] 79 S. W. 802. The dismissal of an indictment with approval of the trial judge upon defendant's agreement to turn state's evidence is a bar to a subsequent prosecution for the same offense in another county also having jurisdiction. Young v. State [Tex. Cr. App.] 75 S. W. 23. Under the Washington statute, the dismissal of an information on motion of the state is a bar to a further prosecution for the same offense, if it be a misdemeanor [Ballinger's Ann. Codes & St. 6914-6916]. State v. Durbin, 32 Wash. 289, 73 P. 373.

68. Lovelace v. State [Tex. Cr. App.] 76 S. W. 756.

69. That defendant was put on trial for assault with intent to murder Perdee Taylor is no defense to a subsequent prosecution for assault with intent to murder Phillip McNish, though the plea avers in general terms that the assaults were the same. McNish v. State [Fla.] 36 So. 175. A plea of guilty of engaging in an affray is not a bar to a prosecution for aggravated assault. Stepp v. State [Tex. Cr. App.] 77 S. W. 787. Conviction for simple assault is no bar to a prosecution for aggravated assault. Heinen v. State [Tex. Cr. App.] 74 S. W. 776. Conviction for disturbance of the peace is not a bar to a prosecution for an assault though based on the same transaction. State v. Taylor, 133 N. C. 755, 46 S. E. 5. Conviction of illegal liquor selling is no bar to a prosecution for perjury in connection with such sales. The illegal selling and the making of a false affidavit relating thereto are distinct offenses. Anderson v. Van Buren Circuit Judge [Mich.] 96 N. W. 927. Subornation of perjury and contempt are distinct offenses and an acquittal or conviction of one is no bar to a prosecution for the other. Ricketts v. State [Tenn.] 77 S. W. 1076. Conviction for an offense in the second degree is no bar to a subsequent proseoution for the same offense in the first degree. Murder. State v. Tyree [Kan.] 77 P. 290. In Kansas, a reversal on defendant's appeal, of a verdict of manslaughter in the second degree is not a bar to a subsequent prosecution and conviction for murder. State v. Morrison, 67 Kan. 144, 72 P. 554. A conviction for shooting another is not a bar to a prosecution for burglary, though the two acts be part of one transaction. Mann v. Com., 25 Ky. L. R. 2281, 80 S. W. 438. Conviction for keeping a gambling house is not a bar to a prosecution for gambling [Code, §§ 4962, 4964]. State v. White, 123 Iowa, 425, 98 N. W. 1027. A conviction for burglary with intent to commit larceny is no bar to a prosecution for the larceny. Anderson v. Van Buren Circuit Judge [Mich.] 96 N. W. 927. An acquittal on an indictment for larceny of the property of T. is no bar to a prosecution for larceny of the same property from M. Sapp v. State [Tex. Cr. App.] 77 S. W. 456. A directed acquittal for stealing hogs from N. is not a bar to a prosecution for stealing hogs from B. Carter v. Com., 25 Ky. L. R. 688, 76 S. W. 337. A prosecution for the theft of property belonging to A. I. Martin is not a bar to a prosecution for the theft of property belonging to A. Martin. Lovelace v. State [Tex. Cr. App.] 76 S. W. 756. Conviction of keeping a bawdy house in violation of a municipal ordinance is not a bar to a prosecution under the state law for the same offense. State v. Sanders [S. C.] 47 S. E. 55. Conviction of assault with a weapon does not bar a prosecution for carrying such weapon concealed. Brown v. State [Ala.] 37 So. 408. An acquittal of larceny of other goods is no bar, though the larceny charged in the second indictment was proved on trial of the first to show a conspiracy. State v. Hankins [N. C.] 48 S. E. 593. Acquittal of larceny of cattle no bar to prosecution for altering brands thereon. People v. Kerrick [Cal.] 77 P. 711. Conspiracy with other persons to do a similar act at a different time not identical. Gallagher v. People [Ill.] 71 N. E. 842. Offense must be same or necessarily included. State v. Day [Del. Gen. Sess.] 58 A. 946.

transaction, a conviction or acquittal of one is a bar to the prosecution of the other.[70] The removal from office of a city official pursuant to statute, is not a bar to a criminal prosecution,[71] and a personal conviction for illegal liquor selling is not a bar to a destruction of the liquor.[72] The pendency of a former indictment for the same offense is not a bar to prosecution, though the accused may have been arraigned thereon and have filed a plea.[73] Conviction for default in annual occupation tax bars a second prosecution during the current year.[74] If the former sentence is not legal, one is not put in jeopardy a second time, and his constitutional rights are not abridged by being compelled to serve a full term under a legal sentence.[75] Second jeopardy is not created by an increase of sentence because of a second or third conviction.[76] The right to object to a second jeopardy may be waived either expressly or impliedly.[77] In Utah, where a plea of autrefois acquit is interposed, the jury must find specifically upon it.[78] Whether a proceeding in a Cuban court for misappropriation of funds is a bar to a subsequent action by the Unites States to recover the amount embezzled was held an improper question, to be finally disposed of on a motion to dismiss the action.[79] An acquittal is no bar to prosecution for perjury in testimony by defendant on his own behalf.[80]

§ 6. *Punishment of crime.*[81]—Several statutes authorizing punishment are considered in the note.[82] A sentence imposing an excessive fine will be modified and held good as for the proper amount.[83] A sentence imposing an excessive

70. State v. Staton, 133 N. C. 642, 45 S. E. 362. One may be convicted under an indictment for breaking and entering a dwelling with intent to commit rape, though the evidence shows the greater crime of common-law burglary, as the conviction would sustain a plea of former jeopardy on an indictment for burglary on the same facts. Id. In Washington, an acquittal for a minor offense included in a greater is a bar to a prosecution for the greater. Under Ball. Ann. Codes & St. §§ 6914-6916, the dismissal on motion of the prosecuting attorney of an information for assault and battery is a bar to a prosecution for attempting to commit mayhem, founded on the same facts. State v. Durbin, 32 Wash. 289, 73 P. 373. A second prosecution is barred if what is set out in the second indictment, had it been proven under the first, could have warranted a conviction. Conviction for keeping a gambling house is not a bar to a prosecution for gambling. State v. White, 123 Iowa, 425, 98 N. W. 1027. A conviction for flourishing and using a deadly weapon is a bar to a prosecution for shooting at random on the highway. Carman v. Com., 25 Ky. L. R. 651, 76 S. W. 1078. A prosecution for keeping liquor for unlawful sale is barred by a former acquittal on a charge of keeping liquor with intent to sell in violation of law [Code, §§ 2382, 2413, 2415]. State v. Cobb, 123 Iowa, 626, 99 N. W. 299.

71. Rev. St. 1899, § 2346. State v. Kelly [Mo. App.] 77 S. W. 996.

72. State v. Cobb, 123 Iowa, 626, 99 N. W. 299.

73. Irwin v. State, 117 Ga. 706, 45 S. E. 48.

74. State v. Roberson [N. C.] 48 S. E. 696.

75. One who has served a portion of an illegal sentence may be properly resentenced. State v. Tyree [Kan.] 77 P. 290.

76. Pen. Code 1895, art. 1014, held valid. Kinney v. State [Tex. Cr. App.] 78 S. W. 226.

77. Where a verdict is so defective that no judgment can be entered upon it, the defendant who might have had it perfected when rendered is considered as consenting to it and as waiving any objections to being again put upon trial. Mahany v. People, 31 Colo. 365, 73 P. 26.

78. Rev. St. 1898, § 4891. State v. Creechley [Utah] 75 P. 384.

79. United States v. Neely, 126 F. 221.

80. State v. Vandemark [Conn.] 58 A. 715, citing many cases. People v. Albers [Mich.] 100 N. W. 908.

81. See 1 Curr. L. 829.

82. Act Feb. 7, 1901, § 11, making judgments of Montgomery city court final, does not apply to prosecutions; hence hard labor for nonpayment of fine may be imposed more than 30 days after sentence. Seelye v. State, 138 Ala. 83, 36 So. 27. General law authorizes a provision that accused be committed until payment of fine, though statute creating offense is silent as to commitment [Code Pub. Gen. Laws, art. 38, § 1]. Dean v. State [Md.] 66 A. 481. A statute requiring execution in the state penitentiary does not apply to a conviction on a warrant issued prior to such act, or require a new warrant where the defendant appealed and the judgment was affirmed after the act was passed [Gen. Laws 1903, p. 66]. State v. Armstrong [Or.] 74 P. 1025. In California, a judgment sentence of fine or imprisonment may be discharged by payment of so much of the fine as is not satisfied by imprisonment at $2.00 per day. Ex parte Riley, 142 Cal. 124, 76 P. 665. One charged with challenging to a duel but convicted of simple assault may receive only such punishment as a justice of the peace could impose, the justice having jurisdiction of the latter offense. State v. Fritz, 133 N. C. 725, 45 S. E. 957.

83. Const. art. 6, § 14, provides that no fine shall exceed $50.00 unless assessed by

fine will be modified and held good as for the proper amount.[84] Where it is the duty by law of the warden to execute a judgment of death, the fact that the warrant of execution directs him to execute the defendant is mere surplusage and does not invalidate the warrant.[85]

Extent of imprisonment.[86]—The accused has a right to be sentenced under the law in existence at the time of his criminal act.[87] Excessive punishment cannot be inflicted,[88] but sentences within the limits fixed by law are within the discretion of the trial judge,[89] though in Nebraska, the appellate court may reduce the term of imprisonment.[90] An attempt to commit a crime may be punished by imprisonment for a definite term of years, though the crime, if accomplished, is punishable by a term which may be for life.[91] Release of a prisoner, before expiration of sentence, for "good time," is conditional upon good behavior until a full expiration of the sentence.[92] In some states, penal statutes must provide both a maximum and minimum punishment.[93] Cases involving indeterminate sentences are collected in the note.[94]

Place of imprisonment.[95]—A law is not ex post facto, as applied to one convicted before its passage, which substitutes the penitentiary for the county jail as the place of confinement pending execution.[96] Where the manner of serving a sentence lies within the discretion of the trial court, one sentenced to the penitentiary cannot complain that he was not sentenced to work upon the roads.[97] In Alabama, a justice of the peace cannot sentence one to hard labor for nonpayment of costs.[98] By statute, one may be sentenced to the jail of another county than

a jury; fine of $100.00 assessed by the court reduced to $50.00. State v. Fritz, 133 N. C. 725, 45 S. E. 957.

84. Shoun v. State [Tenn.] 78 S. W. 91.

85. Under Pen. Code Cal. § 1217, providing that the warrant shall designate the date of execution and require the sheriff to deliver the defendant to the warden for execution. People v. Chew Lan Ong, 141 Cal. 550, 75 P. 186.

86. See 1 Curr. L. 829.

87. A law allowing convicts "good time" existing at the time of defendant's criminal act was not superseded, as to defendant, by an indeterminate sentence law enacted after such criminal act and before sentence. State v. Tyree [Kan.] 77 P. 290.

88. Imprisonment for twenty years is not excessive for murder in the second degree. State v. Capps, 134 N. C. 622, 46 S. E. 730. A sentence by a state court of ten years imprisonment for conspiracy to defraud is not so cruel or unusual as to be reversed by the Federal court. Howard v. Fleming, 191 U. S. 126, 48 Law. Ed. 121. A minimum penalty must not be so severe as to be out of all just proportion to the offense. Acts 1902, p. 107, No. 90, § 68, imposing a minimum fine of $300.00 for illegal liquor selling, held valid. State v. Constantine [Vt.] 56 A. 1101. Eight years imprisonment for assault with intent to rape reduced to five on appeal. State v. Miller [Iowa] 100 N. W. 334.

89. Sentence of a $600.00 fine or eighteen months imprisonment for keeping a bawdy house sustained. State v. Sanders [S. C.] 47 S. E. 55.

90. Code Cr. Proc. 509A. Ford v. State [Neb.] 98 N. W. 807.

91. People v. Stouter, 142 Cal. 146, 75 P. 780.

92. One convicted before the expiration of one year and ten months, his "good time" may be held a like time in connection with the immediate sentence for his later offense. In re Walters, 128 F. 791.

93. Act No. 64, p. 90, Acts 1902; Rev. St. 1876, § 932. State v. Pearson, 110 La. 387, 34 So. 575. A statute providing for its violation a fine not exceeding $100.00 or imprisonment not exceeding one year fulfills a constitutional requirement as to a statement of both minimum and maximum. Under such a statute the minimum fine is the least amount of money recognized by law, and the minimum imprisonment the least recognized subdivision of time. State v. Cucullu, 110 La. 1087, 35 So. 300. In Vermont, however, a statute is not invalid because it provides no maximum penalty for its violation. State v. Constantine [Vt.] 56 A. 1101.

94. An indeterminate sentence is for the maximum period. State v. Tyree [Kan.] 77 P. 290. Under the Indiana indeterminate sentence law, the punishment is for the maximum period, subject to a termination by the board of managers before that time. Burns' Rev. St. 1901, § 1906b. Discretion of the board of managers is not subject to control by the court. Terry v. Byers, 161 Ind. 360, 68 N. E. 596. In Kansas, one convicted of burglary in the second degree may be sentenced for an indeterminate term. In re Nolan [Kan.] 75 P. 1026. The Kansas indeterminate law is not invalid as encroaching upon the judicial power of the courts or the pardoning power of the governor [Laws 1903, c. 375, p. 571]. State v. Stephenson [Kan.] 76 P. 905.

95. See 1 Curr. L. 830.

96. Laws 1903, c. 99. State v. Rooney, 12 N. D. 144, 95 N. W. 513.

97. N. C. Laws 1887, § 4, c. 355, p. 631. Howard v. Fleming, 191 U. S. 126, 48 Law. Ed. 121.

98. Hence, violation of a contract for

that of the conviction,[99] and one guilty of a violation of Federal statutes, the penalty being imprisonment for more than one year, may be sentenced to any jail or penitentiary used by the government, within the district where convicted.[1] Sentence to the state prison at hard labor does not begin to run while one is confined in a county jail.[2] A county jailer cannot refuse to receive prisoners committed by a court of competent jurisdiction, though the commitment should have been to another prison.[3]

Second offenses.[4]—An increase of punishment for a second or third conviction is not unconstitutional,[5] and the requirement of a bond for "good behavior" upon a conviction for a second offense is not invalid for uncertainty nor as imposing a double punishment.[6] In a prosecution for a second offense, the indictment must aver the previous conviction for an offense of like character.[7] One is liable as for a "second or subsequent conviction" only upon conviction of an offense committed after conviction for the previous offense,[8] but he may be sentenced as for a second offense, though his previous convictions were before the enactment of the second offense statute.[9] One is not serving a term when detained in prison without warrant of law.[10] One who was improperly sentenced to prison on a previous conviction cannot be considered as serving a second term.[11]

§ 7. *Rights in property the subject of crime.*[12]—That a duly indorsed certified check was stolen and had no valid delivery is no defense in an action by a bona fide holder against the bank on which it is drawn.[13] Money obtained of a third person by means of a forged instrument cannot be recovered of the wrongdoer by the person whose name is forged on the theory that a constructive trust in his favor arises.[14]

CURTESY.[15]

A husband has curtesy in any estate or inheritance of which the wife was seized during coverture,[16] but not in an estate which she held per autre vie[17]

service made with a surety on confession of judgment before a justice of the peace is not punishable [Code 1896, § 4631]. Simmons v. State, 139 Ala. 149, 36 So. 728.

99. Gen. Laws 1896, c. 285, § 45. Dawley v. Wilcox [R. I.] 55 A. 753.

1. For earlier offense, relator was sentenced to Erie county penitentiary and for his later offense to Sing Sing prison [Rev. St. U. S. § 5541]. In re Walters, 128 F. 791.

2. Sentence for two years at hard labor at state prison from Oct. 16, 1901; from that date until April 13, 1903, defendant was in a county jail by his own appeal and review proceedings; held, the sentence began to run from actual removal to the state prison. Dimmick v. Tompkins, 194 U. S. 540, 48 Law. Ed. 1110.

3. City of Lexington v. Gentry, 25 Ky. L. R. 738, 76 S. W. 404.

4. See 1 Curr. L. 830.

5. Nor does it place defendant twice in jeopardy for the same offense [Pen. Code 1895, art. 1014]. Kinney v. State [Tex. Cr. App.] 78 S. W. 226.

6. Acts 1902, p. 42, c. 14. Huyser v. Com., 25 Ky. L. R. 608, 76 S. W. 174.

7. It is not sufficient to follow the statute in alleging a previous conviction for "the same offense" [Pen. Code 1895, art. 1014]. Kinney v. State [Tex. Cr. App.] 79 S. W. 570.

8. Huyser v. Com., 25 Ky. L. R. 608, 76 S. W. 174. Pen. Code 1895, art. 1014 does not warrant the cumulation of a number of cases occurring simultaneously. Kinney v. State [Tex. Cr. App.] 79 S. W. 570.

9. Laws 27th Gen. Assemb. Iowa, p. 58, c. 109. State v. Jones, 128 F. 626.

10. The sentence to prison on a former conviction was beyond the authority of the sentencing officer. In re Harney [Mich.] 96 N. W. 795.

11. In re Harney [Mich.] 96 N. W. 795.

12. See 1 Curr. L. 830.

13. Notice to the bank of the loss of the check, and an order to stop payment does not affect the rights of the bona fide holder. Poess v. Twelfth Ward Bank, 43 Misc. 45, 86 N. Y. S. 857.

14. Brown v. Hooks [Tex. Civ. App.] 76 S. W. 606.

15. See Curtesy, 1 Curr. L. 830; Dower, 1 Curr. L. 956.

16. Comp. St. 1885, c. 23, prior to amendment of 1887. Withnell v. Withnell [Neb.] 96 N. W. 221. Where one dies intestate, seised in fact of an estate of inheritance, and one of his heirs is a married woman and dies, she has seisin in fact. Bragg v. Wiseman [W. Va.] 47 S. E. 90. Actual possession of land descended to several heirs by some of the coparceners gives actual possession to a married woman coparcener. Id. Where the wife's grantor reserved rents

or in trust,[18] nor in her equitable separate estate which he has created for her benefit,[19] nor in an estate of which she was seized only of a remainder.[20] Curtesy exists, however, where the wife alone has conveyed away a life estate.[21]

CUSTOMS AND USAGES.

§ 1. General Requisites (988).
§ 2. Application to Contracts and Other Dealings (988).
§ 3. Pleading and Proof (989).

§ 1. *General requisites.*[22]—Usage of trade is a course of dealing, a mode of conducting transactions of a particular kind.[23] A usage tending directly to fraud and questionable practices is against public policy.[24]

§ 2. *Application to contracts and other dealings.*[25]—Usage or custom cannot make a contract when parties themselves have made none.[26] While a trade custom cannot be proved to contradict the plain terms of a contract,[27] or add new terms,[28] or vary its legal import as made,[29] yet proof of a general custom is

and profits during his life, and occupied the property until after the grantee's death, she was never seised of an estate in possession. Dozier v. Toalson [Mo.] 79 S. W. 420.

17. Wife held an estate for the life of her husband. Folwell v. Folwell [N. J. Eq.] 55 A. 117.

18. She was to hold the estate until all her children attained majority, when it was to be divided among herself and them [Ky. St. 1903, §§ 2134, 2148]. Rivers v. Morris [Ky.] 78 S. W. 196.

19. Ratliff v. Ratliff [Va.] 47 S. E. 1007. A deed from husband to wife to her sole and separate use, with full power in her to sell, destroys his right to curtesy. Bingham v. Weller [Tenn.] 81 S. W. 843.

20. Life estate did not terminate until after death of wife. Collins v. Russell, 89 N. Y. S. 414.

Note: The estate to which it will attach must be a freehold of inheritance. Mullany v. Mullany, 4 N. J. Eq. 16, 31 Am. Dec. 238. Seisin of the wife is essential, but receiving rents and profits is sufficient (Davis v. Mason, 26 U. S. 508; Rawlings v. Adams, 7 Md. 54; Houghton v. Hapgood, 13 Pick. [Mass.] 154; Alexander v. Warrance, 17 Mo. 228), as is seisin in law (Merritt v. Horne, 5 Ohio St. 307, 67 Am. Dec. 298; Wass v. Bucknam, 38 Me. 356; Day v. Cochran, 24 Miss. 261; Stephens v. Hume, 25 Mo. 349), or right of entry where premises are in adverse possession of another (Storlfoos v. Jenkens, 8 Serg. & R. [Pa.] 175; Borland v. Marshall, 2 Ohio St. 308; Redus v. Hayden, 43 Miss. 624; Bush v. Bradley, 4 Day [Conn.] 298). Curtesy becomes initiate on birth of a child capable of inheriting and is not affected by its subsequent death. Witham v. Perkins, 2 Me. 400; Comer v. Chamberlain, 6 Allen [Mass.] 166; Watson v. Watson, 13 Conn. 83; Jackson v. Johnson, 5 Cow. [N. Y.] 74, 15 Am. Dec. 433.—Note to Goff v. Anderson [Ky.] 11 L. R. A. 825.

21. One left a wife and children surviving. The children conveyed a life estate in property they inherited to their mother; one of the children died, leaving husband and children. Valentine v. Hutchinson, 43 Misc. 314, 88 N. Y. S. 862.

22. See 1 Curr. L. 830.

23. Ames Mercantile Co. v. Kimball S. S. Co., 125 F. 332.

24. Custom of brokers to employ subagents to assist in securing purchasers for mining claims and to allow them a commission out of the first payment is contrary to public policy. Chilberg v. Lyng [C. C. A.] 128 F. 899.

25. See 1 Curr. L. 830.

26. **NOTE: Office of usage.** "The proper office of usage or custom is to explain technical terms in contracts, to which peculiar meanings attach; to make certain that which is indefinite, ambiguous, or obscure; to supply necessary matters upon which the contract itself is silent; and generally to elucidate the intention of the parties when the meaning of the contract cannot be clearly ascertained from the language employed." Mr. Justice Burch, in McSherry v. Blanchfield [Kan.] 75 P. 121, citing, among other authorities, Lawson, Usage and Customs, §§ 18, 19; National Bank v. Burkhardt, 100 U. S. 686, 25 Law. Ed. 756; Tilly v. County of Cook, 103 U. S. 155, 25 Law. Ed. 374; McClusky v. Klasterman, 20 Or. 108, 25 P. 365, 10 L. R. A. 735; Barnard v. Kellog, 10 Wall. [U. S.] 383, 19 Law. Ed. 987.

27. Morris v. Supplee, 208 Pa. 253, 57 A. 566; Kalamazoo Corset Co. v. Simon, 129 F. 144. Express brokerage contract. King v. Hammond, 84 N. Y. S. 121. Contract clearly expressed in bill of lading. Portland Flouring Mills Co. v. British & Foreign Marine Ins. Co. [C. C. A.] 130 F. 860. Where there was an unambiguous contract with brokers for sale of mining claims, a custom of brokers in Seattle could not be shown. Chilberg v. Lyng [C. C. A.] 128 F. 899. Evidence of a custom whereby oil prospectors burned oil produced in their work held insufficient to modify terms of an oil lease. Swift v. Occidental Min. & Petroleum Co., 141 Cal. 161, 74 P. 700. Mere proof of a custom of issuing renewal receipts in advance, whether premium was paid or not, is inadmissible to cast the burden on a plaintiff to show actual payment he having made a prima facie showing by producing such receipt. O'Connell v. Fidelity & Casualty Co., 87 App. Div. 306, 84 N. Y. S. 815.

28, 29. Kalamazoo Corset Co. v. Simon, 129 F. 144.

admissible, in the absence of express stipulations, or where the meaning of the parties is uncertain from the language used.[30] To be binding, a custom or usage must be known to the party sought to be charged,[31] or must be so notorious that knowledge of it will be presumed.[32] The custom sought to be proved must be certain and definite,[33] and applicable to the transaction in issue.[34]

Liability of a master[35] may be fixed by showing a duty arising out of cus tom.[36] While a negligent act of a master will not be excused by the fact that it is customary, proof of the custom is admissible, though not conclusive,[37] in the absence of rules covering the act in question.[38]

§ 3. *Pleading and proof.*[39]—A local or particular custom must be specially pleaded[40] and proved, as courts will not take judicial notice of such a custom, however extensive.[41] Usage is a matter of fact, not of opinion,[42] and is proved by

30. Kalamazoo Corset Co., 129 F. 144. Evidence of brokers' customs admitted to explain terms of contract made by telegraph. McKown v. Gettys, 25 Ky. L. R. 2070, 80 S. W. 169. Custom of pawnbrokers to sell goods pawned, after six months, admitted to explain transaction. Stern v. Leopold Simons & Co. [Conn.] 58 A. 696. Trade meaning of "cash basis, note at 60 days from date of shipment —— interest added," permitted to be proved in suit on contract for future delivery of cotton. Morris v. Supplee, 208 Pa. 253, 57 A. 566.

NOTE: "While there are some cases holding that no such [particular trade] usage can be shown in connection with an express contract (Sweeney v. Thomason, 9 Lea [Tenn.] 359, 42 Am. Rep. 676), the better doctrine seems to be that such a custom or trade usage may be shown as a means of ascertaining the intention of the parties to a contract, but never to thwart or control such intention (Kendall v. Russell, 5 Dana [Ky.] 501, 30 Am. Dec. 696)."—From Bixby v. Bruce [Neb.] 95 N. W. 34.

31. McSherry v. Blanchfield [Kan.] 75 P. 121; Bixby v. Bruce [Neb.] 95 N. W. 34. A local custom is not binding on one residing elsewhere, who had no notice or knowledge of it. Kenyon v. Charlevoix Imp. Co. [Mich.] 97 N. W. 407. A client of a stock broker, who gives an order to the broker's agent, is not bound by the rules of the exchange, as constituting the custom of the business of which he has no knowledge. Newman v. Lee, 87 App. Div. 116, 84 N. Y. S. 106. In the absence of proof that a custom generally recognized as prevailing in a given city was known to a nonresident, such custom cannot be held to have become, by implication, a part of a contract entered into between a citizen and such nonresident. McCall v. Herrin, 118 Ga. 522, 45 S. E. 442, citing Hendricks v. Middlebrooks Co., 118 Ga. 131, 44 S. E. 835.

32. McSherry v. Blanchfield [Kan.] 75 P. 121. And the parties presumed to have contracted with reference to it. Bixby v. Bruce [Neb.] 95 N. W. 34. The custom must be known to the contracting parties or so open and notorious that the parties must in law be held to have contracted with reference to it. Kenyon v. Charlevoix Imp. Co. [Mich.] 97 N. W. 407. An insurance company which attached a rider to a policy permitting a sawmill to remain idle during the "winter season" presumed to know the local meaning of "winter season," there being no evidence to the contrary. Barker v. Citizens' Mut. Fire Ins. Co. [Mich.] 99 N. W. 866. Custom of suspending business on the 4th of July is notorious, so that a shipper will be bound, without actual knowledge, by a custom of a carrier not to give notice of the arrival of goods or make delivery on that day. Pennsylvania R. Co. v. Naive [Tenn.] 79 S. W. 124.

33. Kalamazoo Corset Co. v. Simon, 129 F. 144.

34. Kalamazoo Corset Co. v. Simon, 129 F. 144. In prosecution for violating liquor law, a custom of others telephoning to a certain place for whisky could not be shown. Sinclair v. State [Tex. Cr. App.] 77 S. W. 621. A custom to the effect that lessors pay brokers for negotiating a lease of real estate is not binding on an owner who merely consents to a lease of his property. Brady v. American Mach. & Foundry Co., 86 App. Div. 267, 83 N. Y. S. 663. Where it was shown that a broker was working in the interests of the purchaser, a custom under which the seller pays the broker could not be shown. Downing v. Buck [Mich.] 98 N. W. 388.

35. Custom of exchanging power admissible to show two electric companies were operating as one. Dallas Elec. Co. v. Mitchell [Tex. Civ. App.] 76 S. W. 935.

36. Custom showing duty of master to examine the place of work of servant. Thayer v. Smoky Hollow Coal Co., 121 Iowa, 121, 96 N. W. 718.

37. Applied to act of master in selecting tools and appliances for employes. Anderson v. Fielding [Minn.] 99 N. W. 357.

38. Custom as to lights on engines shown in action by engineer to recover for injuries. Central of Georgia R. Co. v. Goodson, 118 Ga. 833, 45 S. E. 680.

39. See 1 Curr. L. 831.

40. Harnett v. Holdrege [Neb.] 97 N. W. 443.

41. A letter and certain testimony held only to amount to an opinion as to the existence of a custom. Morris v. Jamieson, 205 Ill. 87, 68 N. E. 742. A court cannot charge the jury as to a general custom not shown by the evidence. Kenyon v. Charlevoix Imp. Co. [Mich.] 97 N. W. 407.

42. Ames Mercantile Co. v. Kimball S. S. Co., 126 F. 332. When a witness is shown to be competent on account of observation and experience, his statement of a usage is a statement of a fact, not an opinion. Thayer v. Smoky Hollow Coal Co., 121 Iowa, 121,

witnesses testifying to its existence and uniformity from their knowledge, obtained by observation of their own practice and that of others, in the trade to which it relates.[43] Foundation for proof of a particular custom must be laid by showing knowledge of it by the party against whom it is to be proven;[44] but a presumption of knowledge may arise from proof of a general custom.[45] This presumption, however, is one of fact for the jury.[46]

CUSTOMS LAWS.

§ 1. Interpretation and Operation of Customs Laws in General (990).
§ 2. Dutiable Articles and Classification of the Same (991).
§ 3. Administration of Customs Laws, In General (992). Entry (994). Liquidation (994). Remedies and Procedure (994).
§ 4. Violations of Customs Laws and Consequences Thereof (995). Passengers' Baggage (996). Criminal Prosecutions (996).

§ 1. *Interpretation and operation of customs laws in general.*[47]—Imported merchandise is subject to the duties fixed by law at the time it is imported,[48] and it is to be deemed imported when it arrives at the port of entry, and not before.[49] Hence goods shipped from the Philippine Islands,[50] or from Porto Rico,[51] before the treaty of Paris became effective, but not arriving at ports of entry in the United States until after the treaty became effective, were not subject to duty.[52] For tariff purposes, the treaty was regarded as becoming effective at the beginning of the day on which ratifications were exchanged,[53] so that goods arriving at any time during that day were exempt.[54] Goods in bonded warehouse are dutiable as of the time of withdrawal.[55] While in bond, the goods are subject to new tariff legislation.[56] Hence goods imported from Porto Rico and placed in bond before the passage of the Foraker act and delivered to the importer after

96 N. W. 718. · Proof of the local meaning of the term "winter season" as applied to sawmills was proof of a fact. Barker v. Citizens' Mut. Fire Ins. Co. [Mich.] 99 N. W. 866.

43. Ames Mercantile S. S. Co., 125 F. 332. Custom of stowing inflammable goods on deck sufficiently proven by witnesses who had had 40 and 12 years' experience in loading and stowing cargoes and had observed what they and others did. Tower Co. v. Southern P. Co., 184 Mass. 472, 69 N. E. 348. One who says he knows what a custom was in certain localities, but admits he does not know the general custom in the United States, is not competent to testify as to such general custom. Edwards v. Davidson [Tex. Civ. App.] 79 S. W. 48.

44. Chilberg v. Lyng [C. C. A.] 128 F. 899. When there was no offer to show knowledge by plaintiffs of a custom, proof of it against them was properly excluded. Bourbonnais v. West Boylston Mfg. Co., 184 Mass. 250, 68 N. E. 232.

45. Held it was unnecessary to prove actual knowledge by plaintiff. Tower Co. v. Southern Pac. Co., 184 Mass. 472, 69 N. E. 348. Custom or usage being shown by competent evidence, the defendant was presumed to have knowledge of it, and a showing on that point was unnecessary. Thayer v. Smoky Hollow Coal Co., 121 Iowa, 121, 96 N. W. 713.

46. A. J. Tower Co. v. Southern Pac. Co. 184 Mass. 472, 69 N. E. 348.

47. See 1 Curr. L. 831.

48, 49. American Sugar Refining Co. v. Bidwell, 124 F. 677.

50. Shipped March 14, 1899, and arrived at New York October 13, 1899. American Sugar Refining Co. v. Bidwell, 124 F. 677.

51. Shipped April 8, 1899, and arrived at New York April 17, 1899. American Sugar Refining Co. v. Bidwell, 124 F. 683.

52. It will be noted that in both the preceding cases the goods arrived after the exchange of ratifications, April 11, 1899, but before the passage of the Foraker act (see post) April 12, 1900. It has been held in the so-called "Insular Cases" that the Philippines and Porto Rico ceased to be "foreign" after the treaty of Paris, and that consequently there was no tariff law under which goods from these islands were dutiable. The Foraker act provided a tariff law under which goods from Porto Rico were dutiable.

53. But goods arriving before that day, even though after the treaty had been signed and ratified by Spain and the United States separately, were subject to duty. Armstrong v. Bidwell, 124 F. 690.

54. Howard v. Bidwell, 124 F. 688.

55. Customs administration act of June 10, 1890, c. 407. De Pass v. Bidwell, 124 F. 615; Mosle v. Bidwell [C. C. A.] 130 F. 334. A carrier paying such duties and transporting the goods has a lien thereon for the amount of charges paid. Wabash R. Co. v. Pearce, 192 U. S. 179, 42 Law. Ed. 397.

56. Section five of the Foraker act, providing that goods imported from Porto Rico before the passage of the act, but remaining in bonded warehouse after its passage, are subject to the duties imposed by the act, is constitutional, since the duties imposed by it are uniform, and the constitutional prohibition against ex post facto laws does not apply to customs laws [Act April 12, 1900, c.

the enactment of that law are subject to the duties imposed by it.[57] The Dingley tariff act, however, did not apply to importations arriving the same day, but before the hour at which it became effective.[58] Congress will be presumed to have enacted tariff laws with reference to existing regulations of the treasury department.[59] A reciprocal trade agreement cannot legally extend the scope of a tariff law provision under which it is made.[60] The agreement between the United States and France, proclaimed August 22, 1902, making the commercial treaty of May 20, 1898, applicable to Algeria, was intended to have a prospective operation only.[61]

The fact that a tax is placed on articles manufactured for export does not render it an export duty and therefore unconstitutional.[62] It is an export duty and unconstitutional to require stamps on manifest and clearance papers.[63]

§ 2. *Dutiable articles and classification of the same.*[64]—For purposes of classification or in determining whether a given article is subject to, or free from, duty, the customs laws are liberally construed in favor of the importer.[65] Intent of the importer is not an element in determining the proper classification.[66] The predominant use to which an article is put will not control so as to change it from an enumerated to a nonenumerated article.[67] The use of a commercial designation of an article is not conclusive in determining the intent of congress as to its classification.[68] Cases in which the classification of particular imports is decided or discussed are grouped in the notes. Unless otherwise indicated, these adjudications are under the Dingley Tariff act.[69]

191, 31 Stat. 77]. De Pass v. Bidwell, 124 F. 615.

57. De Pass v. Bidwell, 124 F. 615.

58. Construing section 33 of that act, and deciding that certain importations of lumber from Canada were subject to duty under the former tariff law of 1894. Hartwell Lumber Co. v. U. S., 128 F. 306.

59. United States v. Bartram Bros. [C. C. A.] 131 F. 833.

60. United States v. Julius Wile Bro. & Co. [C. C. A.] 130 F. 331.

61. Goods of Algerian origin imported before the amendatory agreement in 1902 were not entitled to the reduced rates of duty. United States v. Tartar Chemical Co. [C. C. A.] 127 F. 944.

62. A tax was laid on filled cheese, whether or not it was made for export. Cornell v. Coyne, 192 U. S. 418, 42 Law. Ed. 504.

63. War revenue act of 1898. New York & Cuba S. S. Co. v. U. S., 125 F. 320.

64. See 1 Curr. L. 831.

65. Applied in regard to certain casts of sculpture by a religious society for religious purposes, which were found to be entitled to free entry. Benziger v. U. S., 192 U. S. 38, 48 Law. Ed. 331.

66. Johnson v. U. S., 123 F. 997.

67. Dodge v. U. S., 130 F. 624.

68. The context must be considered when the article is described. Hahn v. U. S., 131 F. 1000.

69. **Agricultural and vegetable products and provisions:** Sandalwood logs. George Lueders & Co. v. U. S., 131 F. 655. Grass piquets for millinery purposes. Herman v. U. S. [C. C. A.] 128 F. 420. Halved lemons in brine. Hills Bros. Co. v. U. S. [C. C. A.] 123 F. 477. Sea grass. In re Myers & Co., 123 F. 952. Lily buds dutiable as lilies. Vandegrift & Co. v. U. S., 123 F. 1002. Nut oil. Hills Sons & Co. v. U. S., 127 F. 970. Canary seed. Nordlinger v. U. S. [C. C. A.] 127 F. 683. Fresh leaves and roots of aconite, belladonna and bryonia, in alcohol. Boericke & Runyon Co. v. U. S., 126 F. 1018. Arrowroot starch. Leaycraft & Co. v. U. S., 124 F. 999. Pepper shells. United States v. Leggett, 124 F. 1015. Pickled limes. Brennan v. U. S., 129 F. 837. Cracked ginger root. Lewis German & Co. v. U. S., 128 F. 467. Cocoanut oil and cocoa butterine. U. S. v. Oriental American Co., 129 F. 249. Cherries in alcohol. Voight v. Mihalovitch, 125 F. 78. Foxberries imported in casks filled with water. Boak v. U. S. [C. C. A.] 125 F. 599. Figs preserved whole. Reiss v. U. S., 126 F. 578. Edible wafers. Leggett & Co. v. U. S., 131 F. 817. Cream of codfish. Teed & Co. v. U. S., 126 F. 447. Sardels in salt in wooden packages. Meyer v. U. S., 124 F. 293. Anchovies and fluid extract of meat, in glass bottles. Smith & Co. v. U. S. [C. C. A.] 130 F. 104. Fish imported by an American corporation but caught by a Canadian corporation in Canadian fresh waters, with nets owned by the importers, are free of duty. Under act of Oct. 1, 1890. Detroit Fish Co. v. U. S., 125 F. 801. Canned turtle meat prepared on board a registered American vessel, owned by a corporation composed of American citizens, and manned by an American crew, who caught and canned the turtles, is a product of an American fishery and entitled to free entry [Tariff Act Aug. 27, 1894]. Downing v. U. S., 124 F. 107. The polariscopic test of raw sugars required by the act of 1897 is not necessarily the common commercial test, but means the method considered by the treasury department to be the best and most scientific. United States v. Bartram Bros. [C. C. A.] 131 F. 833.

Animals and animal products: The right of free importation of animals for breeding purposes is not restricted to citizens of the

§ 3. *Administration of customs laws,*[10] *in general.*—When it appears that administrative details have been confided by congress to the sound discretion of

United States, nor to those importing them for their own use and not for sale. Importation of Percheron stallions and mares by a breeder of British Columbia for sale in the United States. In re Page, 128 F. 317. Hog hair sweepings for fertilizers. Shallus v. U. S., 129 F. 845. Skins of the cabretta (cross between sheep and goats), with the wool on. Lawrence, Johnson & Co. v. U. S., 124 F. 1000. Long haired Russian calfskins. Weil v. U. S., 124 F. 1006. Sheepskins for morocco. Helmrath v. U. S., 125 F. 634. Ornamental crude peacock feathers. George Silva & Co. v. U. S., 127 F. 781.

Art goods and toys: Marble figure of Christ. Sibbel v. U. S., 124 F. 105. Mythological paintings on copper in the form of an ancient ewer and tray. Amerman v. U. S., 124 F. 298. "Haussegen" or wall mottoes. Kaufmann v. U. S., 128 F. 468. Celluloid ping-pong balls. United States v. Strauss Bros. & Co., 128 F. 473. Toy magic lanterns. Borgfeldt v. U. S., 124 F. 457. Toy musical instruments. Id., 124 F. 473.

Beverages: Sake—Japanese alcoholic beverage—dutiable as an unenumerated manufactured article. Nishimiya v. U. S., 131 F. 650. Cordials held to be within reciprocity treaty with France, made under Dingley act. United States v. Julius Wile Bro. & Co. [C. C. A.] 130 F. 331. Absinthe. United States v. Luyties, 124 F. 977.

Books and paper: Portfolios of prints and pictures and printed matter in German. Downing v. U. S., 130 F. 393. Children's books printed in German. Petry & Co. v. U. S. [C. C. A.] 127 F. 115. Printing paper. Hensel, Bruckmann & Lorbacher v. U. S., 126 F. 576. Gummed paper. United States v. Hunter, 124 F. 1005. Handmade printing paper. Miller v. U. S., 128 F. 469.

Chemicals and medicines: Phtalic anhydride and tetrachlorphtalic anhydride [Tariff act Oct. 1, 1890. Free list]. Heller & Merz Co. v. U. S., 124 F. 299. Composition pumice stone. Waddell & Co. v. U. S., 124 F. 301. Carbolineum. Downing v. U. S., 123 F. 1000. Finings—gelatin. Sonoma Wine & Brandy Co. v. U. S., 123 F. 999. Lithofone, known commercially as sulphide of zinc white. Gabriel v. U. S. [C. C. A.] 123 F. 296. Borate of manganese. Hempstead v. Thomas [C. C. A.] 129 F. 907. Gladuol. Merck & Co. v. U. S., 126 F. 438. Enamel paint. Pomeroy v. U. S., 126 F. 583. "Coal-tar preparations" is more specific than "chemical compounds." Lysol is a coal-tar preparation. United States v. Lehn, 124 F. 87. Soluble creosote. Schoellkopf v. U. S., 124 F. 89. "Borate material" means borates of any other substance. Borate of manganese. Hempstead & Son v. U. S., 123 F. 346. Guarana is a crude drug. Cowl v. U. S., 124 F. 475. Albolene. Ropes & Co. v. U. S., 123 F. 990. "Medicinal preparations" are such articles as are of use or fairly and honestly believed by the prescriber or user to be of use in curing, alleviating or preventing disease. Orange flower water and rose water. Dodge v. U. S., 130 F. 624. "Medicinal preparations containing alcohol, or in the preparation of which alcohol is used," includes chloral hydrate and salol, though manufactured sometimes with and sometimes without the use of alcohol. United States v. Schering [C. C. A.] 123 F. 65. Antiseptic preservative, made of boracic acid and borax. Borth Levi & Co. v. U. S., 126 F. 420. Anthrax or blackleg vaccine. Pasteur Vaccine Co. v. U. S., 123 F. 846.

Minerals, metals and manufactures thereof: Drilled "bart" diamonds are free of duty. United States v. Fifteen Drilled Diamonds, 127 F. 753. Magnesic brick, glazed. Fleming v. U. S., 124 F. 1014. Welsh quarries—dutiable as "brick, other than fire brick." Traitel Bros. v. U. S., 131 F. 994. Dishes and other articles of jade. Tiffany & Co. v. U. S., 126 F. 255. Copper matte or copper regulus. Spencer v. Philadelphia Smelting & Refining Co., 124 F. 1002. Nickel plated zinc sheets. Victor v. U. S., 128 F. 472. "Flitters" made of copper and zinc. Meier & Co. v. U. S., 128 F. 472; Baer v. U. S., 130 F. 391. Zinc dust. United States v. Klipstein, 123 F. 996. Iron in "muck bars." Moorhead Bro. & Co. v. U. S., 127 F. 779. Steel strips or cold rolled steel. Boker v. U. S. [C. C. A.] 124 F. 59. Copper wire switch board cable. Salt v. U. S., 127 F. 890. Iron alloys. United States v. Roessler & Hasslacher Chemical Co., 131 F. 576. In order that lead bullion may be imported free of duty, 90 per cent. of the metal as imported must be set aside for exportation. Not 90 per cent. of the refined metal, after smelting and refining the bullion. Section 29 of 1897 tariff act. In re Guggenheim Smelting Co. [C. C. A.] 126 F. 728.

Miscellaneous manufactures: Bone size known as "Vicker's." Sheldon & Co. v. U. S., 127 F. 494. Flat envelopes. Hunter v. U. S., 126 F. 894. Sawed cabinet wood. Williams & Sons v. U. S., 126 F. 838. Miniature model steamships. Boas v. U. S., 128 F. 470. Carbon sticks for electric lighting in incomplete form. United States v. Downing [C. C. A.] 129 F. 90. Shotgun barrels made under Whitworth patent process. United States v. Baldwin, 125 F. 156. Smokers' articles. Steinhardt & Bro. v. U. S., 126 F. 443. Watch movements, with certain parts lacking. Hipp, Didisheim & Bro. v. U. S., 123 F. 998. Umbrella sticks, celluloid handles. United States v. Borgfeldt, 124 F. 304. Soap pencils. United States v. American Exp. Co., 131 F. 656. Leather watch guards. Veil Bros. v. U. S., 128 F. 471. Silver hand bags or purses. Tiffany v. U. S., 131 F. 398.

Packing cases and coverings: Patent tea caddies for transportation of tea. Customs administrative act of 1890. Jackson v. Siegfried, 126 F. 837. Fancy chocolate boxes. Cure v. U. S., 123 F. 994. Printed paper bags. Kraut v. U. S., 130 F. 392. Glassware. Perfume bottles. Utard v. U. S., 124 F. 997; Id. [C. C. A.] 128 F. 422. Glass bottles marked by sandblast process with firm name. McMullen & Co. v. U. S., 123 F. 847. Porcelain or china bottle stoppers with firm name or trademark printed thereon. U. S. v. Borgfeldt, 123 F. 196. Glass bottles filled with anchovies and fluid extract of meat. Smith & Co. v. U. S., 124 F. 291. Chemical apparatus of glass consisting of thermometers, Koch and Woulf flasks, molded glass spatulas and rods and etched glassware. Elmer v. U. S., 126 F. 439. Polished cylinder glass, beveled. Riegelman v. U. S., 127 F. 493.

[To be concluded.]

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the secretary of the treasury,[71] the courts will not interfere with them,[72] in the absence of any showing that he has exercised his power arbitrarily or unreasonably.[73]

The date of consular certification is only prima facie evidence of the date of exportation.[74] The place of origin of the goods is usually the place of exportation.[75] For purposes of revenue acts, the consignee is deemed the owner of imported goods,[76] and he cannot escape liability for duties because the consignor has failed to obey instructions or to carry out the terms of his contract.[77] But this principle does not apply in case a shipment is made without authority from the consignee.[78] To determine at what time a vessel arrives in a port, reference must be had to the circumstances peculiar to the particular port.[79]

The collector is an executive officer whose duties are ministerial, and who has little discretionary and no judicial power.[80] He is the legal custodian of imported goods until the duties are paid, and his duties as such must be performed within his own district.[81] Removal of goods from such district by the treasury department for appraisal may be enjoined.[82]

Blown-glass blanks. United States v. Durand, 127 F. 624.

Pearls: Hahn v. U. S., 131 F. 1000. Drilled pearls. Neresheimer v. U. S., 131 F. 977.

Textiles and manufactures thereof; wearing apparel: Wool robes or dress patterns. Thomas v. Wanamaker [C. C. A.] 129 F. 92. Partly made dresses or robes. Meyer v. U. S., 124 F. 296. Embroidered woolen dress goods. Hall v. U. S., 131 F. 648. Hemstitched cotton lawns; galloons. Meyer v. U. S., 124 F. 296. "Drawn work" composed of flax. Simon & Co. v. U. S., 131 F. 649. Portieres made of pile fabrics of flax. Ryer Son & Co. v. U. S., 126 F. 246. Cravenette cloths. Brown v. U. S., 126 F. 446. Cotton hat bands. United States v. Graef & Co. [C. C. A.] 127 F. 688. Woven fabrics of flax includes piece goods and made up articles. Schulemann v. U. S., 123 F. 1002. Cotton damask doilies and table covers ready for use. Douglass v. U. S., 123 F. 993. Ruffled cotton curtains. Brill v. U. S., 123 F. 845. Unfinished cotton portieres and table covers are cotton "fabrics." Stern v. U. S., 123 F. 192. Women's and children's dress goods. United States v. Wanamaker, 123 F. 193. Silk fabrics partly boiled off. Rice v. U. S., 123 F. 848. Woolen clippings. United States v. Pearson, 131 F. 571. Silk ribbons. Gartner v. U. S., 131 F. 574. Woven fabrics of silk and cotton. Hoeninghaus v. U. S., 131 F. 570. Figured cotton cloth. George Riggs & Co. v. U. S., 131 F. 568. Wool traveling rugs. United States v. Haynes, 124 F. 295.

Lace neckwear: "Neckwear" and "neckties" are not terms of commercial designation as used in the tariff act. Goldenberg Bros. & Co. v. U. S., 124 F. 1003. Embroidered leather gloves. United States v. Robinson, 124 F. 1013. Copper wire gauze used as bolting cloth for milling purposes. United States v. Markt, 124 F. 1012.

70. See 1 Curr. L. 832. Under Customs Administrative Act of June 10, 1890.

71. The polariscopic test of sugars required by the act of 1897 means the best and most scientific test, in the secretary's discretion. United States v. Bartram Bros. [C. C. A.] 131 F. 833.

72. United States v. Bartram Bros. [C. C. A.] 131 F. 833.

73. Requiring proof of the registry of grandsires and granddams of imported breeding animals to entitle them to free entry is not in contravention of the statute. Borden v. U. S., 132 F. 205.

74. The actual date may be shown, and when shown, governs in the estimation of the value of foreign coins in money of the United States. Lawrence v. U. S., 127 F. 750.

75. Absinthe made in France, but shipped from Basle, Switzerland, via Antwerp to New York, is a French exportation, within the reciprocity agreement with France. United States v. Luyties, 124 F. 977. Where merchandise was bought in Canton, shipped to Hong Kong, and thence in another vessel to the United States, the invoice being certified by the consul at Canton, Canton was held the place of exportation. Lawrence v. U. S., 127 F. 750.

76. Rev. St. § 3058, as amended by act Feb. 23, 1887, c. 221, 24 Stat. 415. United States v. Bishop [C. C. A.] 125 F. 181; Derobert v. Stranahan, 126 F. 581.

77. It was claimed the consignor had promised to pay the duties. United States v. Bishop [C. C. A.] 125 F. 181.

78. Goods of a different character from those ordered were shipped. United States v. O'Neill [C. C. A.] 129 F. 909. On showing that the shipment was without authority, such consignee is not liable for duties on the goods, and is under no obligation to make entry or take possession of them for any purpose [Customs Regulations 1899, art. 1231]. Id.

79. Vessels arrive in the port of Chicago when inside the limits within which the city has been given jurisdiction, by the statutes of Illinois. Hartwell Lumber Co. v. U. S., 128 F. 306.

80. Derobert v. Stranahan, 126 F. 581.

81, 82. Bruhl Bros. & Co. v. Wilson, 123 F. 957.

Entry.—Though the bill of lading is the best evidence of the right to make entry, it is not indispensable, and the collector may be justified in delivering goods to an apparent consignee without it.[83] A tender of entry of merchandise may be sufficient, though made before the vessel carrying the merchandise has been reported at the custom house.[84] But a tender after arrival of the merchandise in the collection district, but before it reaches port, is invalid and may properly be rejected.[85] Closing the custom house or refusal of the customs officers to receive tender of entry cannot affect the importer's right to make it.[86] Where entry is made on an incorrect invoice and the error is seasonably called to the attention of the collector, he should make an allowance therefor without entry on a pro forma invoice or bond for a corrected invoice.[87]

Liquidation.—For purposes of liquidation of entries, the value of foreign coins is estimated in money of the United States, on the basis of the pure metal found therein,[88] and the fluctuation of ten per cent in the value of foreign coins since the last proclamation of value, giving the secretary power to order a liquidation of an entry at a different value, means a fluctuation in the metallic, not the exchange or commercial value.[89] The internal revenue imposts of France, known as the *octroi* tax and *droit de ville,* are not to be included in determining the market value of imports from that country.[90] A collector may not arbitrarily include commissions in the appraised value of goods and assess duty thereon.[91] Since the customs law does not provide a method of apportioning the cost of the casing or covering on imported goods, the court must adopt such method as seems most equitable and just.[92] The collector may lawfully reliquidate duties within one year from the time of entry, and even after the goods have been delivered to the owner.[93]

Remedies and procedure. Protest.—Customs duties voluntarily paid without protest cannot be recovered.[94] A protest against a classification of goods for duties must contain a distinct and clear specification of each substantive ground of objection to the payment of duties demanded.[95] A protest which refers, for the ground of its objection, to sections of the statute inapplicable to the goods in question, is insufficient, even though the goods are found to be entitled under another section, to free entry.[96] Such a protest cannot be amended, on appeal to the board of ap-

83. Where one who appears from the ship's manifest and a certified invoice to be the consignee of goods pays the duty and receives the goods from the collector, the latter is not liable to a transferee of the bill of lading who holds it as collateral for a draft for the price which the consignees have refused to pay. Derobert v. Stranahan, 126 F. 581.

84. Entry was repeatedly tendered but refused because the vessel had not been reported. The tariff laws were changed after the vessel arrived in port but before the tender was renewed. It was held that since entry might properly have been made under the old law as soon as the vessel arrived, and the conduct of the customs officers justified the importers in supposing a tender would not be accepted until the vessel was reported, their tender was sufficient to entitle the goods to entry under the old law—1894. Hartwell Lumber Co. v. U. S., 128 F. 306.

85, 86. Hartwell Lumber Co. v. U. S., 128 F. 306.

87. Gillespie v. U. S., 124 F. 106.

88. Tariff Act Aug. 28, 1894, c. 349, § 25, 28 Stat. 552. Stone v. Whitridge, White & Co. [C. C. A.] 129 F. 33.

89. An estimation by the secretary on the exchange value may be reviewed by the board of appraisers. Stone v. Whitridge, White & Co. [C. C. A.] 129 F. 33.

90. These taxes are not collected on exported merchandise, and they are not general in their application, but vary with the locality. United States v. Downing & Co., 131 F. 653.

91. The collector, upon a mere inspection of the invoice, without a hearing, liquidated an entry and included commissions after the appraiser had marked the commissions nondutiable. United States v. Lahey, 132 F. 181.

92. Rice v. U. S., 123 F. 195.

93. Neresheimer v. U. S., 131 F. 977.

94. Sugar from Philippine Islands. Flint Eddy & American Trading Co. v. Bidwell, 123 F. 200.

95. United States v. Bayersdorfer & Co. [C. C. A.] 126 F. 732. Protest sustained as sufficient, though referring to improper paragraphs of the tariff act. United States v. Fleitmann & Co., 131 F. 396.

96. United States v. Bayersdorfer & Co.

praisers, by referring to different sections,[97] nor will other protests by the same importers be considered in construing protests which are the subject of the appeal.[98] If the last of the ten days after liquidation of an entry within which a protest must be filed is a holiday, on which the custom house is closed, a protest filed on the following day is in time.[99] Upon a reliquidation, the previous liquidation is abandoned, and the time to protest does not begin to run until such reliquidation.[1]

The board of general appraisers is an independent tribunal, empowered by law to pass on certain controversies between the government and importers, and for this purpose is not subordinate to the treasury department.[2] It has authority and is required to decide the question of the validity of a protest, in determining whether it has jurisdiction.[3] The board may change a finding of the local appraiser and reverse the collector's decision based thereon without taking additional proof;[4] but in the absence of evidence to the contrary, the presumption that the collector has made a correct classification will prevail.[5]

On appeal from the board of general appraisers, the circuit court has power to take additional testimony and hear the case de novo.[6] But importers who fail to appear before the board of appraisers cannot have its decision reviewed,[7] unless the government has waived the default,[8] or the importers' failure to appear was excusable.[9] Findings of fact by the board of appraisers will be reviewed by the circuit court only when unsupported by the evidence, or clearly against the weight of the evidence, or where new evidence, not considered by the board, is before the court.[10] The assignments of error must contain a concise statement of the errors of law and fact complained of,[11] and any defect not assigned as error will be deemed waived.[12]

§ 4. *Violations of customs laws and consequences thereof. Penalties and forfeitures.*[13]—The forfeiture of smuggled property is absolute and complete immediately upon its illegal importation.[14] Failure to declare goods subjects them to forfeiture, even though they would have been entitled to free entry, if properly declared.[15] An innocent purchaser of smuggled property is under no liability for du-

[C. C. A.] 126 F. 732; United States v. Knowles & Son [C. C. A.] 126 F. 737.

97, 98. United States v. Bayersdorfer & Co. [C. C. A.] 126 F. 732.

99. Boston custom house closed on June 17—locally observed as "Bunker Hill day." Frost v. Saltonstall, 129 F. 481.

1. Dickson v. U. S., 131 F. 573. A protest filed after reliquidation for the purpose of including a damage allowance, the duty on the charges not having been affected by the reliquidation, was filed in time. Sgobel v. Robertson, 126 F. 577.

2. The board, on protest, may review an erroneous estimation of the value of foreign coins, on which a reliquidation of an entry has been ordered. Stone v. Whitridge [C. C. A.] 129 F. 33.

3. Under Customs Administrative Act of June 10, 1890. United States v. Brown [C. C. A.] 127 F. 793.

4. United States v. Strauss Bros. & Co., 128 F. 473.

5. United States v. Schering [C. C. A.] 123 F. 65.

6. In re Myers & Co., 123 F. 952.

7. John Donat & Co. v. U. S., 124 F. 463. Importers who have defaulted and failed to produce evidence before the board of appraisers will not be permitted to produce evidence on appeal to the circuit court. Allen & Co. v. U. S., 127 F. 777.

8. A default is waived by failure of the government to object to an order directing further testimony to be taken and by taking part in such proceedings. In re Myers & Co., 123 F. 952.

9. Cowl v. U. S., 124 F. 475.

10. Neresheimer v. U. S., 131 F. 977. When the evidence is conflicting, the finding of the board of appraisers will not be disturbed. Gabriel v. U. S. [C. C. A.] 123 F. 296; Hipp v. U. S., 123 F. 998.

11. The requirement is not met by a general statement that the board "erred as a matter of law." United States v. Brown [C. C. A.] 127 F. 793.

12. Failure to make a statement of error as to the sufficiency of a protest on which proceedings before the board were based constitutes a waiver of any defects in the protest. United States v. Brown [C. C. A.] 127 F. 793.

13. See 1 Curr. L. 833.

14. United States v. One Dark Bay Horse, 130 F. 240.

15. Six parcels of placer gold from Mexico. The fees charged for the official acts belong to the government; hence the omission of the act and consequent loss of the fees is injurious. Six Parcels of Placer Gold v. U. S. [Ariz.] 76 P. 473.

ties, and his payment of them, or failure to pay, would have no effect on the forfeiture already incurred.[16] The proceeding to enforce forfeiture of goods for violation of the customs laws is at common law.[17] It may be barred by limitations.[18] To maintain it, an intent to defraud the government must be shown,[19] but such intent is not essential to the maintenance of an action to recover additional duties on goods which have been undervalued.[20] A forfeiture or penalty cannot be enforced unless the practice prescribed by the statute has been followed in the custom house.[21]

Passengers' baggage.[22]—Returning residents of the United States must declare articles purchased by them abroad, without regard to their value, and articles not declared are forfeitable,[23] whether or not an intent be shown to defraud the revenue.[24] Passengers' baggage will not be forfeited where there was a disclosure of dutiable articles sufficient to put the revenue officers on inquiry.[25] Since there are separate statutes concerning forfeiture of imported merchandise and passengers' baggage, an information charging violation of one will not admit proof of violation of the other.[26]

Criminal prosecutions.—Irregular or illegal practices of customs officers[27]

16. United States v. One Dark Bay Horse, 130 F. 240.

17. The losing party pays costs. United States v. 150 Head of Cattle & 52 Calves [Ariz.] 77 P. 489.

18. The mere fact that customs officers were ignorant of an illegal importation, without a showing that the smuggler was absent or the property absent or concealed, will not prevent the barring of an action for forfeiture by limitations. United States v. One Dark Bay Horse, 130 F. 240.

19. Previous to the customs administrative act of 1890, no fine, penalty or forfeiture for violation of the revenue laws could be enforced unless an intent to defraud the government was found [Act June 2, 1874, c. 391, § 16 (18 Stat. 188, 189)]. United States v. 150 Head of Cattle & 52 Calves [Ariz.] 77 P. 489. This provision of the earlier law was repealed by the administrative act of 1890, under which a fraudulent intent was immaterial. Six Parcels of Placer Gold v. U. S. [Ariz.] 76 P. 473. But in 1897 (Act July 24, c. 11, § 32. 30 Stat. 212), the old law as to intent was re-enacted. United States v. Bishop [C. C. A.] 125 F. 181. Where importers presented an entry and invoice together, the former stating only the value of the merchandise, omitting the packing boxes, but the latter including both, the omission appearing to be a clerical error and no intent to evade the law appearing, the goods were held not subject to an increased penal valuation. Lawder & Sons v. Stone, 125 F. 809.

20. Hence good faith and innocence constitute no defense in such action. United States v. Bishop [C. C. A.] 125 F. 181.

21. United States v. Rosenthal, 126 F. 766.

22. **NOTE. Forfeiture of dutiable articles in passengers' baggage:** Failure of a passenger from a foreign country to mention dutiable articles in the statement of his baggage (U. S. Rev. Stat. § 2799) will subject them to forfeiture under § 2802, though he mentions them when a new entry is required, after discovery of the articles, notwithstanding § 2801, which provides that after such discovery due entry shall be made and duties paid. United States v. One Pearl Necklace [C. C. A.] 111 F. 164. Intent to defraud the revenue is not necessary to work a forfeiture in such case. Id. As to the effect of such intent, see The Robert Edwards, 6 Wheat. 187, 5 Law. Ed. 238. Concealment of dutiable articles subjects them to forfeiture, what constitutes a concealment being a question of fact depending on the circumstances of each case. United States v. Two Trunks, 6 Ben. 218, Fed. Cas. No. 16,591; United States v. Twenty-six Diamond Rings, 1 Sprague, 294, Fed. Cas. No. 16,572. Omission from the vessel's manifest is given much weight in determining whether a forfeiture is to be declared. Lewey v. U. S., 15 Blatchf. 1, Fed. Cas. No. 8,309. A permit for the unlading of personal baggage does not authorize the unlading of dutiable articles with such baggage. United States v. Three Cases, 6 Ben. 558, Fed. Cas. No. 16,498; Four Packages v. U. S., 97 U. S. 404, 24 Law. Ed. 1031. See note to United States v. One Pearl Necklace [C. C. A.] 111 F. 164 in 56 L. R. A. 130.

23. The exemption of articles costing less than $100 does not relieve the passenger from the duty of declaring them. Dodge v. U. S. [C. C. A.] 131 F. 849. And in forfeiture proceedings, the court need not appraise the articles to ascertain what portion would have been entitled to free entry had the proper declaration been made. United States v. Harts, 131 F. 886.

24. Under U. S. Rev. St. § 2802. United States v. Harts, 131 F. 886. Articles found in handbag after passenger had declared other dutiable articles subject to forfeiture and treble duties, though no fraudulent intent was proved. Dodge v. U. S. [C. C. A.] 131 F. 849.

25. A woman wore pearl necklace, which was visible under silk shirt waist. Held, a finding that she had done nothing to inform the officers was not sustainable. One Pearl Chain v. U. S. [C. C. A.] 123 F. 371.

26. A pearl necklace, purchased abroad and worn by the passenger on arriving, was passengers' baggage, and not imported "merchandise." One Pearl Chain v. U. S. [C. C. A.] 123 F. 371.

27. The practice of having importers sign

constitute no defense in criminal prosecutions for violations of the customs laws.[28] An indictment charging conspiracy to defraud the revenue must allege to some extent the means intended to be used.[29] To constitute the criminal offense of effecting an entry of goods at less than the true weight, the entry must be a completed one on which the duty was liquidated, and the defendant must have effected it, and used the false invoice to effect it, knowingly.[30] But the indictment charging this offense need not allege that the United States was in fact deprived of duties by defendants' acts.[31] A mere showing that defendant is a member of a firm shown to have been concerned in a conspiracy to defraud the United States, without showing actual participation and knowledge of the offense by him, is insufficient.[32]

DAMAGES.[33]

§ 1. Kinds of Damages and Their Characteristics (997). Exemplary Damages (999). Statutory, Double and Treble Damages (1001).

§ 2. General Principles for Ascertaining (1002). Limitations to Natural and Proximate Consequences (1002). Speculative and Prospective Damages (1003). Loss of Profits (1003). Difficulty of Proof of Amount as Bar (1004). Avoidable Consequences (1004). Mitigation and Aggravation of Damages (1004).

§ 3. Recovery as Affected by Status of Plaintiff or Limited Interest in Property Affected (1005).

§ 4. Measure of Damages for Breach of Contract (1006).
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- C. Breach of Covenant as to Title (1008).
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- E. Contracts for Sale or Purchase of Goods or Chattels (1008).
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- G. Contracts for Services (1012).
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§ 5. Measure and Elements of Damages for Torts (1013).
- A. Miscellaneous Torts (1013). Alienation of Affections (1014). False Imprisonment (1014). Malicious Prosecution (1014). Infringement of Patents and Trade-marks and Unfair Competition (1014). Interference with Water Rights (1014). Expulsion from Association (1014).
- B. Loss or Injuries to Property (1014).
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§ 6. Excessive and Inadequate Damages (1020).

§ 7. Pleading, Evidence and Procedure (1022).
- A. Pleading (1022).
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- D. Trial (1033).
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§ 1. *Kinds of damages and their characteristics.*[34]—*Special damages* are such as result naturally but not necessarily from the wrong complained of, and as to which there can be no recovery without special averment;[35] such injuries

blank forms which are falsely certified by notaries, as sworn declarations of the importers, when in fact filled in by customs officials, is illegal, and to be condemned. United States v. Cohn, 128 F. 615.

28. Conspiracy to defraud the United States by effecting a fraudulent entry [Rev. St. § 5440]. United States v. Rosenthal, 126 F. 766. The fact that an examiner, bribed to approve a false invoice, had no legal right to perform that duty, was no defense to the one effecting an entry at less than the true weight. Id. A revenue officer who knowingly and corruptly aids an importer in effecting a fraudulent entry commits an indictable offense, even though performing a duty assigned him by a superior, but which he could not legally perform under the statute [Rev. St. § 5444]. Id.

29. As whether by smuggling, by false or forged invoices, etc. United States v. Grunberg, 131 F. 137.

30. Indictment held sufficient to charge the offense under Rev. St. § 5445. United States v. Rosenthal, 126 F. 766. An indictment good under this section is sustainable under section nine of the customs administrative act of 1890, if superseded by it. Id.

31. Customs administrative act of 1890, § 9. United States v. Rosenthal, 126 F. 766.

32. Verdict held contrary to the evidence. United States v. Cohn, 128 F. 615.

33. Assessment of damages on entry of default judgment, see Judgments, 2 Curr. L. 581.

34. See 1 Curr. L. 833.

35. Rules of pleading special damages, see post, § 8.

may be alleged in aggravation of damages and need not be the subject of a separate action.[36]

Nominal damages[37] are allowed for a wrong not shown to have resulted in pecuniary injury to plaintiff,[38] as where defendant after giving a check seizes and destroys it,[39] or where a bank through mistake fails to pay a check or note of its depositor when in funds.[40] The absence of an averment of special damages often limits recovery to nominal damages.[41] Where actual damages are shown, though uncertain in amount, a verdict merely for nominal damages is improper.[42]

Liquidated damages[43] are those whose amount has been determined by anticipatory agreement between the parties. When reasonable in amount and not disproportionate to the injury provided against, the injured party will not be allowed to recover more than the sum fixed,[44] and, on the other hand, he will be regarded as having suffered injury to the extent of the sum stipulated.[45] This principle is applied to provisions for forfeiture in building contracts,[46] to con-

36. Trespass by entry on land to lay out highway, allegation of tearing down sea wall and consequent subversion of soil and influx of sea. Hathaway v. Osborne [R. I.] 55 A. 700.

37. See 1 Curr. L. 834.

38. Only nominal damages can be recovered for delay in repairing a machine, where plaintiff found no fault with the delay and paid a bill for a portion of the services before completion of the repairs. Rau v. Weyand, 89 App. Div. 200, 85 N. Y. S. 916. The wrongful sale of a homestead on execution will not authorize a verdict for substantial damages where no money loss is shown. Whitworth v. McKee, 32 Wash. 83, 72 P. 1046. For mere constructive possession under void process, only nominal damages may be recovered under an allegation of the value of the property as an item of damages. Low v. Ne Smith [Tex. Civ. App.] 77 S. W. 32.

39. The debt still exists. Freeman v. Strobehn, 122 Iowa, 167, 97 N. W. 1094.

40. No averment of special damages. Clark Co. v. Mt. Morris Bank, 85 App. Div. 362, 83 N. Y. S. 447.

41. Where actual and punitive damages only are sued for, the rule allowing nominal damages for breach of contract does not apply. Haber, Blum, Bloch Hat Co. v. Southern Bell Tel. & T. Co. [Ga.] 45 S. E. 696. Where imputed knowledge of a defect is not charged and actual knowledge is not proved, the damages for a personal injury caused by the fall of an elevator can be only nominal. Downs v. Seeley, 76 Conn. 317, 56 A. 502.

42. More than nominal damages are recoverable for an assault resulting in a blackened eye. Schmitz v. Kirchan, 32 Wash. 546, 73 P. 678. Where a servant has a contract right to permanent employment, he is entitled to more than nominal damages for wrongful discharge. Daniels v. Boston & M. R. Co., 184 Mass. 337, 68 N. E. 337. See 1 Curr. L. 834, n. 5.

43. See 1 Curr. L. 834, n. 7.

44. Deduction in price of goods actually delivered on failure to deliver amount stipulated for. Jackson v. Hunt [Vt.] 56 A. 1010. Where a carrier limits his liability to $50 except in case of loss of the shipment through fraud or gross negligence, and neither is shown, only the sum stipulated may be recovered. Bernstein v. Weir, 40 Misc. 635, 83 N. Y. S. 48; Wilson v. Platt, 84 N. Y. S. 143. Express company cannot so limit liability where it takes an account for collection. Gowling v. American Exp. Co., 102 Mo. App. 366, 76 S. W. 712. Parties to a contract may agree upon the amount of damages for the breach thereof, when, from the nature of the case, it would be difficult to fix the actual damage. Rev. Civ. Code S. D. 1903, § 1275. Agreement for purchase of mining claims. Smith v. Detroit & D. Gold Min. Co. [S. D.] 97 N. W. 17. Provision for retention of six days' pay by employer until completion of contract held valid provision for liquidated damages in case of breach by employe, and not penalty. Wilson v. Godkin [Mich.] 98 N. W. 985. Damages for breach of contract relative to future interests in oil wells of unknown value may be fixed by mutual agreement under Civ. Code, § 1671. Escondido Oil & Development Co. v. Glaser [Cal.] 77 P. 1040.

45. An agency contract providing for commissions on sales by the agent and for a greater commission on sales in the agent's territory by the principal or other agents is not invalid as to the latter provision, as providing for a penalty. Benner v. Magee [Ind. App.] 70 N. E. 823. A provision in a contract of employment for the retention of six days' pay until the contract is completed is one for stipulated damages and not for a penalty. Wilson v. Godkin [Mich.] 98 N. W. 985.

46. Where a forfeit of a certain sum per day is provided in a contract for failure to complete a building or deliver machinery within the time set, the forfeit if reasonable is generally enforced (Carter & Co. v. Kaufman [S. C.] 45 S. E. 1017), $20 a day forfeit on a building costing $24,000 cannot be regarded a penalty (Davis v. La Crosse Hospital Ass'n [Wis.] 99 N. W. 351), $5 per day for oil mill machinery (Hardie Tynes Foundry & Mach. Co. v. Glen Allen Oil Mill [Miss.] 36 So. 262), and it may be stipulated that the damages shall be determined by the owner (Childs Lumber & Mfg. Co. v. Page, 32 Wash. 250, 73 P. 353); but in some states no recovery can be had unless the owner proves damages from the delay, and their

tracts not to engage in a particular business under pain of forfeiture,[47] to sales of property on the instalment plan, the payments made to be forfeited in case of breach,[48] and to an agreement to return an article or forfeit a certain amount.[49] The stipulated amount, however, must bear some reasonable relation to the injury,[50] especially where the amount of the damage can be computed.[51] Time is not ordinarily of the essence of a contract to repay money borrowed, and an agreement to forfeit or lose money or property much in excess of interest, during the delay on account of failure to pay a loan on the stipulated day, is a contract for a penalty for a failure to pay money, and is void, because compensation is the basic rule of damages, and interest during the delay is, under the law, full compensation therefor;[52] and if the sum stipulated increases as the contract draws near completion and the damages decrease, it will not be allowed.[53] The fact that a sum to be paid is called liquidated damages does not always control, but the courts will look to the nature and purposes of the agreement.[54] Courts incline to construe bonds as penal in character.[55]

Exemplary damages.[56]—Certain sums in addition to the actual damages recoverable for a wrong, termed "exemplary," "punitive" or "vindictive" damages, or "smart money," are allowed in cases of private tort or injury willfully or maliciously committed;[57] such as assault and battery,[58] willful trespass,[59] libel or

amount (Coen & Conway v. Birchard [Iowa] 100 N. W. 48), $5 a day for delay is a penalty where a house was constructed for rental purposes and was not worth over $25 per month (Id.). Where a building provides a "penalty" for delay and the rental value of the building is readily provable, proof must be made of the damages. Court will not judicially notice that the penalty provided is approximately the rental value. Small v. Burke, 92 App. Div. 338, 86 N. Y. S. 1066.

47. Where a party binds himself in a sum certain not to carry on or allow to be carried on a particular business within a certain territory, within a certain time, generally the sum mentioned will be regarded as liquidated damages (Augusta Steam Laundry Co. v. Debow, 98 Me. 496, 57 A. 845; Rucker v. Campbell [Tex. Civ. App.] 79 S. W. 627); but not where there are no specific allegations as to the damages suffered, or showing that the amount of the bond is not unreasonable, and no proof is taken on the subject (Disosway v. Edwards, 134 N. C. 254, 46 S. E. 501). See 1 Curr. L. 835, n. 13.

48. A provision under which the vendor of realty is entitled to retain all that has been paid on default of payments is one for liquidated damages, and not for a penalty. Keefe v. Fairfield, 184 Mass. 334, 68 N. E. 342. Deposit of money to be forfeited in case contract to purchase was not complied with held liquidated damages and not to secure the seller against loss. Garcin v. Pennsylvania Furnace Co. [Mass.] 71 N. E. 793.

49. National Cash Register Co. v. Caillias, 84 N. Y. S. 166.

50. Where parties stipulate that in case of a violation the party defaulting shall pay a stipulated sum as liquidated damages, the sum named will be so regarded only where it will no more than compensate the injured party for his loss. Lee v. Carroll Normal School Co., 1 Neb. Unoff. 681, 96 N. W. 65.

51. Rental value of building. Penalty for noncompletion. Small v. Burke, 92 App. Div. 338, 86 N. Y. S. 1066.

52. Manhattan Life Ins. Co. v. Wright [C. C. A.] 126 F. 82.

53. A provision in a contract to deliver logs, that a certain sum per thousand feet of those delivered shall be retained by the buyer to enforce the completion of the contract, will be construed as a penalty, not as liquidated damages. Stony Creek Lumber Co. v. Fields & Co. [Va.] 45 S. E. 797, good discussion of general rule.

54. Money put up to be forfeited in case street railway company failed to pave street in accordance with contract. Farson v. Fogg, 105 Ill. App. 572.

55. Disosway v. Edwards, 134 N. C. 254, 46 S. E. 501. Bond given to secure performance of contract held to provide for a penalty, not for stipulated damages. City of Madison v. American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097.

56. See 1 Curr. L. 835.

57. Greathouse v. Croan [Ind. T.] 76 S. W. 273. Where the injury is intentional and with a wanton disregard of plaintiff's rights punitive damages are recoverable. Gerwig v. Johnston Co., 207 Pa. 585, 57 A. 42. Definition of malice. Ickenroth v. St. Louis Transit Co., 102 Mo. App. 597, 77 S. W. 162. Held not recoverable. Georgia R. & Banking Co. v. Benton, 117 Ga. 785, 45 S. E. 70. See 1 Curr. L. 835, n. 14.

58. Blackmore v. Ellis [N. J. Err. & App.] 57 A. 1047. Allowable if assault is of a wanton, malicious or brutal nature. Ickenroth v. St. Louis Transit Co., 102 Mo. App. 597, 77 S. W. 162. Where street car conductor kicked a messenger boy as he was attempting to board a car. McNamara v. St. Louis Transit Co. [Mo. App.] 81 S. W. 880.

59. Where one's horses were maliciously driven from his land and lost, evidence held to sustain a recovery of exemplary damages. Waggoner v. Snody [Tex. Civ. App.] 82 S. W. 355. A trespasser, though acting

slander,[60] malicious prosecution,[61] and the malicious use of process in a civil suit;[62] and also where a negligent act is committed under such circumstances as show that entire want of care which will raise the presumption of a conscious indifference to consequences.[63] Such damages, however, are not allowed in cases of mere negligence,[64] breach of contract,[65] or private tort,[66] in the absence of willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care characterized as gross negligence,[67] and they are never recoverable except where actual damages are recoverable.[68] Exemplary damages may be awarded for wrongfully excluding plaintiff from a place of public amusement,[69] are recoverable in breach of promise if defendant was guilty of fraud, deceit, or was moved by evil motives in making the contract or in the breach thereof,[70] are allowable in certain cases for willful trespass on land, but not against a municipal corporation, except under exceptional circumstances,[71] and officers may be mulcted in punitive damages for wrongfully seizing plaintiff's goods after warning, though they are engaged in an effort to punish violators of the law.[72] Punitive damages are not re-

in honest belief as to his rights, may be so grossly negligent in ascertaining them that his attempt to make good his claim will be considered as a wanton invasion. Beaudrot v. Southern R. Co. [S. C.] 48 S. E. 106. For willful trespass. Id.

60. Wrege v. Jones [N. D.] 100 N. W. 705. Falseness of a libel is sufficient to warrant exemplary damages, but lack of malice on defendant's part may be shown in mitigation. Spolek Denni Hlasatel v. Hoffman, 105 Ill. App. 170.

61. Recoverable in malicious prosecution in all cases except where it is the unauthorized and unratified act of an agent. Eggett v. Allen, 119 Wis. 625, 96 N. W. 803.

62. Woodley v. Coker, 119 Ga. 226, 46 S. E. 89. May be recovered for malicious garnishment of exempt wages many times repeated, causing plaintiff to lose his employment. Instruction held to only permit, not direct allowance of punitive damages. Cooper v. Scyoc [Mo. App.] 79 S. W. 751.

63. Southern R. Co. v. O'Bryan, 119 Ga. 147, 45 S. E. 1000. Punitive damages are allowable in Kentucky where injuries are the result of gross negligence. South Covington, etc., R. Co. v. McHugh, 25 Ky. L. R. 1112, 77 S. W. 202. An instruction making the assessment of punitive damages, in case of gross or wanton negligence, compulsory and not discretionary, is erroneous. Louisville & N. R. Co. v. Satterwhite [Tenn.] 79 S. W. 106.

64. Greathouse v. Croan [Ind. T.] 76 S. W. 273. Not recoverable where complaint for negligence alleges no malicious, culpable or wanton misconduct (Hayden v. Fair Haven & W. R. Co., 76 Conn. 355, 56 A. 613), nor in malpractice (Baxter v. Campbell [S. D.] 97 N. W. 386). Held not recoverable in particular case. Nondelivery of telegram. Western Union Tel. Co. v. Spratley [Miss.] 36 So. 188. Delay in transmitting telegram. Western Union Tel. Co. v. Cross' Adm'r, 25 Ky. L. R. 646, 76 S. W. 162. A passenger is not entitled to recover punitive damages for delay of a train unless the carrier's conduct was willful and malicious. Miller v. Southern R. Co. [S. C.] 48 S. E. 99. A parent cannot recover exemplary damages for the negligent injury of a minor child. Bube v. Birmingham R. Light & Power Co. [Ala.] 37 So. 285.

65. Ford v. Fargason [Ga.] 48 S. E. 180. Exemplary damages are not recoverable for wrongful ejection from a street car, where plaintiff returns to the same car and pays his fare, and his counsel states that he claims only for breach of contract. Moon v. Interurban St. R. Co., 85 N. Y. S. 363. Refusal by a telephone company to a subscriber of a long distance connection, without aggravating circumstances, will not entitle a party to exemplary or punitive damages. Haber, Blum, Bloch Hat Co. v. Southern Bell Tel. & T. Co. [Ga.] 45 S. E. 696. A refusal to repay a sum due plaintiff, and the wrongful, forcible and malicious conversion thereof with intent to oppress plaintiff, will not give rise to exemplary damages. Malin v. McCutcheon [Tex. Civ. App.] 76 S. W. 586.

66. Wrongful sequestration of property. Lynch v. Burns [Tex. Civ. App.] 79 S. W. 1084. False imprisonment. Maher v. Wilson, 139 Cal. 514, 73 P. 418. Actual malice, as distinguished from implied or legal malice, is necessary to authorize punitive damages for libel or slander. Wrege v. Jones [N. D.] 100 N. W. 705. Owner of a runaway horse is not liable for punitive damages where it was negligently left by the driver unhitched in the street. Haywood v. Hamm [Conn.] 58 A. 695. Actual damages may be recovered by one injured. Id.

67. Southern R. Co. v. O'Bryan, 119 Ga. 147, 45 S. E. 1000; Baxter v. Campbell [S. D.] 97 N. W. 386. Where allegations that an act was done willfully and wantonly are not sustained, there can be no recovery for punitive damages for mental suffering. Aaron v. Southern R. Co. [S. C.] 46 S. E. 556.

68. Wrongful expulsion from plaintiff's room at hotel. Malin v. McCutcheon [Tex. Civ. App.] 76 S. W. 586. Wrongful suing out writ of sequestration. Rogers v. O'Barr [Tex. Civ. App.] 76 S. W. 593. Wrongful death. Adams v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 79 S. W. 79.

69. Greeneberg v. Western Turf Ass'n, 140 Cal. 357, 73 P. 1050.

70. Jacoby v. Stark, 205 Ill. 34, 68 N. E. 557.

71. Ostrom v. San Antonio [Tex Civ. App.] 77 S. W. 829.

72. Mediary v. McAllister, 97 Md. 488, 55 A. 461.

coverable for overvaluation of jewelry whereby plaintiff is induced to accept it from a third person as security for a loan.[73] In trover for the conversion of a car of coal, plaintiff may show that defendant has converted other cars of coal besides the one in suit, as bearing on the issue of exemplary damages,[74] but defendant is entitled to an instruction that if the car was taken in good faith in belief of ownership, exemplary damages are not recoverable.[75]

Exemplary damages in Michigan are not punitory in their character, but are only given to compensate injury to feelings caused by the wanton or reckless act of defendant.[76]

Exemplary damages are not recoverable against a principal or master for the unauthorized or unratified tort of his agent or servant,[77] except in some instances where the servant commits the wrong while in the discharge of his duty to his master,[78] as where servants of a railway company refuse to stop to take up passengers,[79] and in the case of assault by the servants of a carrier committed upon a passenger.[80]

Whether the case is one for exemplary damages is for the court,[81] but where punitive damages are allowable, their amount is peculiarly within the province of the jury.[82]

Statutory, double and treble damages.[83]—Double damages are allowed in Iowa against a railroad, where it fails after notice to pay for stock killed,[84] and defendant's tender of what it claimed to be the value of stock killed may be sufficient evidence of its value on which to base a verdict;[85] a concession by plaintiff that he is not entitled to double damages will not estop him from afterwards claiming them.[86]

Treble damages for waste are within the discretion of the court in California, and are not authorized where willfulness on the part of the tenant is not shown.[87]

Treble the value of a check cannot be recovered of one who seizes it and destroys it after having given it in execution of a contract, since if it represented a valid claim, the debt is not destroyed by the destruction of the check.[88]

73. Hoffman v. Gill, 102 Mo. App. 320, 77 S. W. 146.

74, 75. Gulf, etc., R. Co. v. Cleburne Ice & Cold Storage Co. [Tex. Civ. App.] 79 S. W. 836.

76. Civil damage case against saloon keeper. Bowden v. Voorheis [Mich.] 98 N. W. 406.

77. A sheriff is not liable for punitive damages for the unauthorized and unratified conduct of his deputy. Foley v. Martin, 142 Cal. 256, 75 P. 842.

78. Not recoverable against a railroad company because its ticket agent advised plaintiff to board a moving train. Pickett v. Southern R. Co. Carolina Division [S. C.] 48 S. E. 466. Not allowable for mere failure of motorman to stop on request, plaintiff's horse being frightened. Lexington R. Co. v. Fain, 25 Ky. L. R. 2243, 80 S. W. 463.

79. Reeves v. Southern R. Co. [S. C.] 46 S. E. 543; Yazoo & M. V. R. Co. v. Mitchell [Miss.] 35 So. 339; Northern Texas Traction Co. v. Peterman [Tex. Civ. App.] 80 S. W. 535. Failure to stop train sufficiently long to allow plaintiff to board. Facts authorizing punitive damages held not proved. Mobile & O. R. Co. v. Reeves, 25 Ky. L. R. 2236, 80 S. W. 471.

80. Assault by street car conductor. Ickenroth v. St. Louis Transit Co., 102 Mo. App. 597, 77 S. W. 162.

81. Lexington R. Co. v. Fain, 25 Ky. L. R. 2243, 80 S. W. 463. But the issue should be presented to the jury wherever plaintiff's evidence, however slight, warrants it. Mobile & O. R. Co. v. Reeves, 25 Ky. L. R. 2236, 80 S. W. 471.

82. Yazoo & M. V. R. Co. v. Mitchell [Miss.] 35 So. 339.

83. See 1 Curr. L. 836.

84. Notice of killing stock held not so variant from pleading and proof as to deprive owner of double damages. Boyer v. Chicago, etc., R. Co., 123 Iowa, 248, 98 N. W. 764.

85. Black v. Minneapolis & St. L. R. Co., 122 Iowa, 32, 96 N. W. 984.

86. Killing stock by railroad. Black v. Minneapolis & St. L. R. Co., 122 Iowa, 32, 96 N. W. 984.

87. Code Civ. Proc. § 732. Isom v. Rex Crude Oil Co., 140 Cal. 678, 74 P. 294. Loss of valuable improvements by cancellation of lease is material. Isom v. Book, 142 Cal. 666, 76 P. 506.

88. Freeman v. Strobehn, 122 Iowa, 157, 97 N. W. 1094.

§ 2. *General principles for ascertaining. Rule of strictness as between contracts and torts.*[89]—Plaintiff is entitled to recover all damages up to the time of the trial, where the action is for a breach of duty growing out of a contract,[90] but in tort for unliquidated damages, interest is not recoverable on the damages assessed, from the date of the commencement of the action to the rendition of the verdict.[91]

Limitations to natural and proximate consequences.[92]—For the breach of a contract, the measure of damages is the amount which will compensate the party aggrieved for detriment proximately caused thereby, or which in the course of things would be likely to result therefrom.[93] Damages which are not the natural and proximate consequence of the breach, or are not such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, are not recoverable.[94] Mental suffering of a husband caused by failure to arrive in time to view the remains of his dead wife,[95] and plaintiff's loss by selling at the price he did sell instead of at the price he would have sold had defendant made prompt delivery of telegrams, are not too remote and speculative for recovery,[96] but the expense of making an unnecessary trip which the prompt delivery would have prevented cannot be recovered as damages for failure to deliver the telegram.[97]

The damages recoverable for torts take a wider range, and damages to the fertility of land from overflowing are not too remote or speculative;[98] but those damages which result chiefly from some cause other than the injury complained of are not recoverable,[99] and in personal injury cases possible or even probable

89. See 1 Curr. L. 836.

90. Southern Bell Tel. & T. Co. v. Earle, 118 Ga. 506, 45 S. E. 319.

91. Lester v. Highland Boy Gold Min. Co. [Utah] 76 P. 341.

92. See 1 Curr. L. 836.

93. Occidental Consol. Min. Co. v. Comstock Tunnel Co., 125 F. 244; Silver Springs, etc., R. Co. v. Van Ness [Fla.] 34 So. 884. Rev. Civ. Code, 1903, § 2293. Hickok v. W. E. Adams Co. [S. D.] 99 N. W. 77. North Dakota Code 1899, § 4978, in similar terms is merely a statement of the common-law rule. Hayes v. Cooley [N. D.] 100 N. W. 250.

Injuries to fruit trees and the crop thereon are not too remote as an element of the damages for breach of a contract to furnish water for irrigation. Roberts v. Crafts, 141 Cal 20, 74 P. 281. Where a telegram advises a husband that his wife must immediately be operated upon for strangulated hernia, her death and the decomposition of her body so that her husband, by reason of tardy arrival, cannot view her remains before burial, is a result fairly and reasonably to be anticipated by the telegraph company in negligently failing to promptly deliver the message. Western Union Tel. Co. v. Hamilton [Tex. Civ. App.] 81 S. W. 1052.

94. Occidental Consol. Min. Co. v. Comstock Tunnel Co., 125 F. 244. Loss of grain by storms is too remote as an effect of breach of contract to thresh. Hayes v. Cooley [N. D.] 100 N. W. 250. Loss of flesh and growth of cattle and loss of pasturage caused by lack of water are too remote as an element of damages for breach of warranty of a wind mill. Cole v. Laird, 121 Iowa, 146, 96 N. W. 744. Money unnecessarily paid to avoid a threatened lawsuit cannot be recovered of a telephone company for failure to provide plaintiff with a long distance connection with his counsel. Haber, Blum, Bloch Hat Co. v. Southern Bell Tel. & T. Co. [Ga.] 45 S. E. 696. The breach of an agreement to lend money will not sustain a recovery of damages for injury to the reputation of the borrower from not getting it. Carsey & Co. v. Farmer, 25 Ky. L. R. 1965, 79 S. W. 245. In order for him to recover substantial damages based on mental suffering, it must appear that the company could reasonably have foreseen from the face of the message that such damages would result from a failure to transmit it. Where sender directed the addressee to have a certain doctor meet the sender at another city, he could not recover because a relative was prevented from obtaining medical attention en route. Williams v. Western Union Tel. Co. [N. C.] 48 S. E. 559, citing many cases.

95. Western Union Tel. Co. v. Hamilton [Tex. Civ. App.] 81 S. W. 1052.

96. Hocker v. Western Union Tel. Co. [Fla.] 34 So. 901.

97. Alexander v. Western Union Tel. Co., 126 F. 445.

98. Southern R. Co. v. Morris, 119 Ga. 234, 46 S. E. 85.

99. Injuries to credit, character or business are too remote in malicious prosecution by suing out attachment. Dorr Cattle Co. v. Des Moines Nat. Bank [Iowa] 98 N. W. 918. The malicious abuse of process by suing out successive garnishments until the debtor's employer discharges him will not authorize recovery for debtor's loss of time, the acts of the creditor not being the direct but only the remote cause of the discharge. Cooper v. Scyoc [Mo. App.] 79 S. W. 751. A passenger on his way to a place where he expects to be treated for disease cannot recover for the natural progress of the disease during

effects, not reasonably certain to flow from the injury, are too remote and speculative to form the basis of legal injury.[1] No recovery is allowed for injuries resulting from fright occasioned by negligence, in the absence of immediate personal injury, trespass to real estate or contract relation,[2] but where a physical injury results from fright and mental shock, recovery may be had for the injuries, together with expenses for medical attendance, medicine and nursing.[3] Where mental suffering is the result of some wrongful act against the sufferer, such mental suffering may be taken into consideration in assessing damages for the wrong, even though there may be no physical injury.[4] A publisher of race track news cannot recover for injury to his business by being wrongfully excluded from a public race course,[5] and in an action for wrongfully excluding one from a room assigned to him at a hotel, he may not recover as actual damages for loss of reputation and credit and mental anguish resulting from humiliation.[6]

Speculative and prospective damages.[7]—Remote or speculative damages based solely on conjecture are not recoverable,[8] but future damages which are imminent and reasonably certain to occur may be taken into account.[9] Where damages are susceptible of actual computation, the amount thereof should not be left to conjecture.[10]

Loss of profits.[11]—Damages for the loss of prospective profits may be recovered,[12] if not too uncertain and speculative,[13] but profits merely possible or probable from accretion of the business, and incapable of proof with any degree of certainty, are not recoverable;[14] neither are prospective profits which might have been earned while plaintiff's factory was rebuilding recoverable in an action for its destruction.[15] Anticipated profits are not recoverable for breach of a cove-

the time he is delayed by being wrongfully put off at a way station. Rattlesnake bite. Gulf, etc., R. Co. v. Moore [Tex. Civ. App.] 80 S. W. 426.

1. Chicago, etc., R. Co. v. De Clow [C. C. A.] 124 F. 142. Possibility that death may result from hernia. City of Chicago v. Lamb, 105 Ill. App. 204. Whether plaintiff's physical sufferings and condition are the result of his injury is for the jury. Smith v. Muncy Creek Tp., 206 Pa. 7, 55 A. 767. Cause of plaintiff's neurasthenia held not too conjectural to support recovery for injury. Wood v. Metropolitan St. R. Co. [Mo.] 81 S. W. 152.

2. Morse v. Chesapeake & O. R. Co., 25 Ky. L. R. 1159, 77 S. W. 361.

3. Denison, etc., R. Co. v. Barry [Tex. Civ. App.] 80 S. W. 634. Fright causing miscarriage. Stewart v. Arkansas Southern R. Co., 112 La. 764, 36 So. 676.

4. Wrongful expulsion from public amusement. Davis v. Tacoma R. & Power Co. [Wash.] 77 P. 209. Telegraph cases. Cowan v. Western Union Tel. Co., 122 Iowa, 379, 98 N. W. 281; Hurlburt v. Western Union Tel. Co., 123 Iowa, 295, 98 N. W. 794; Barnes v. Western Union Tel. Co. [Nev.] 76 P. 931.

5. Greeneberg v. Western Turf Ass'n, 140 Cal. 357, 73 P. 1050.

6. Malin v. McCrutcheon [Tex. Civ. App.] 76 S. W. 586.

7. See 1 Curr. L. 837.

8. For breach of a contract, plaintiff may recover such general damages as are shown by the testimony to have been necessarily occasioned by the breach, although the amount may not be made so absolutely clear and certain as to be easy of computation. Occidental Consol. Min. Co. v. Comstock Tunnel Co., 125 F. 244. That extra firemen are customarily promoted to regular runs is too speculative where the injury was to an extra fireman. Southern Indiana R. Co. v. Davis, 32 Ind. App. 569, 69 N. E. 550. Where flooding prevents the improvement of land, the rents that would have been earned had the improvement been made are too speculative as damages for the flooding. Mahoney v. Kansas City [Mo. App.] 79 S. W. 1168.

9. Hancock v. White Hall Tobacco Warehouse Co. [Va.] 46 S. E. 288.

10. Paxton v. Vaddoner, 1 Neb. Unoff. 776, 96 N. W. 378.

11. See 1 Curr. L. 837.

12. Parker v. McKannon [Vt.] 56 A. 536. Failure to furnish goods as agreed. Thorn v. Morgan & Whateley Co. [Mich.] 97 N. W. 43; Kenney v. Knight, 127 F. 403; Wolf Co. v. Galbraith [Tex. Civ. App.] 80 S. W. 648. A party may recover for gains prevented where such damages are certain and are the natural result of the wrong complained of. Tootle v. Kent, 12 Okl. 674, 73 P. 310; Silver Springs, etc., R. Co. v. Van Ness [Fla.] 34 So. 884; Kitchen Bros. Hotel Co. v. Philbin, 2 Neb. Unoff. 340, 96 N. W. 487.

13. Failure to manufacture as agreed. Iron City Toolworks v. Welisch [C. C. A.] 128 F. 693; Chisholm & M. Mfg. Co. v. U. S. Canopy Co. [Tenn.] 77 S. W. 1062. Profits plaintiff might have made had defendants advanced money to purchase tobacco as agreed are too precarious. Carsey & Co. v. Farmer, 25 Ky. L. R. 1965, 79 S. W. 245.

14. Nichols v. Rasch, 138 Ala. 372, 35 So. 409.

15. James McNeil & Bro. Co. v. Crucible Steel Co., 207 Pa. 493, 56 A. 1067.

nant to repair;[16] and where it is shown that the land itself was not damaged, recovery may not be had on the theory that flowage prevented planting.[17] Where profits are recoverable, the profits for a reasonable period preceding the injury may be taken as a basis of estimate,[18] and plaintiff is not obliged to prove with absolute certainty what they would have been, but only with such reasonable certainty as will satisfy a jury of the reasonableness of his demand and estimate.[19]

Difficulty of proof of amount as bar.[20]—Mere difficulty of proof of amount is never a bar to recovery either in contract[21] or tort,[22] but where plaintiff is entitled to recover for only a portion of certain expenditures made in bulk and there is no sufficient data for apportioning them, no recovery may be had.[23]

Avoidable consequences.[24]—A person against whom a wrong has been committed is under a duty to use ordinary care and diligence to lighten the consequential damages resulting therefrom,[25] and the rule applies as well to express contracts as torts,[26] and extends to such an outlay of money as is reasonable under the circumstances.[27] Hence plaintiff can recover only for the effect of personal injury properly treatcd, not for the damages arising from failure to apply proper treatment;[28] but where defendants wrongfully pulled down plaintiff's tent used as a residence, and scattered and destroyed his personal property therein, he owed them no duty of gathering up the fragments to reduce the damages.[29]

Mitigation and aggravation of damages.[30]—A repetition of a slander, even after suit begun, may be shown in aggravation,[31] and mitigation may arise from lack of malice and belief in the truth of the defamatory statement.[32]

In malicious prosecution and false imprisonment, the circumstances of plaintiff's family and the filthy condition of the jail in which he was imprisoned may

16. Godfrey v. India Wharf Brew. Co., 87 App. Div. 123, 84 N. Y. S. 90.

17. Texas, etc., R. Co. v. Looney [Tex. Civ. App.] 77 S. W. 254.

18. Landis v. Wolf, 206 Ill. 392, 69 N. E. 103. In a suit for damages for failure to haul a theatrical car, the jury may consider plaintiff's business and his profits for a reasonable period next preceding the time when the contract was violated. Illinois Cent. R. Co. v. Byrne, 205 Ill. 9, 68 N. E. 720. To determine plaintiff's damagee arising from the maintenance of a nuisance in front of his hotel, the amount of business done immediately before and during the injury may be shown. Bates v. Holbrook, 89 App. Div. 548, 85 N. Y. S. 673.

19. Remote or doubtful contingencies are insufficient to destroy the reasonableness of such demand. Barrett v. Raleigh Coal & Coke Co. [W. Va.] 47 S. E. 154.

20. See 1 Curr. L. 838.

21. Occidental Consol. Min. Co. v. Comstock Tunnel Co., 125 F. 244. Tests by rodding and boring may be sufficiently certain to form a basis for an award of damages for the value of a phosphate bed. Silver Springs, etc., R. Co. v. Van Ness [Fla.] 34 S. 884.

22. Though pain and suffering and physical disability are incapable of exact measurement, such a sum should be awarded as will compensate. Hill v. Union St. R. Co. [R. I.] 57 A. 374. The difficulty of estimating the damages arising from mental suffering is not an obstacle to their allowance. Cowan v. Western Union Tel. Co., 122 Iowa, 379, 98 N. W. 281. Where it appears with reasonable certainty that injury has resulted directly from the maintenance of a nuisance, damages may be recovered, notwithstanding uncertainty as to the amount. Bates v. Holbrook, 89 App. Div. 548, 85 N. Y. S. 673.

23. Snoqualmi Realty Co. v. Moynihan [Mo.] 78 S. W. 1014.

24. See 1 Curr. L. 838.

25. Tenant suing landlord for damages for failure to repair. Aikin v. Perry, 119 Ga. 263, 46 S. E. 93. Delay in delivering freight by carrier. Louisville & C. Packet Co. v. Bottorff, 25 Ky. L. R. 1324, 77 S. W. 920.

26. Brown v. Weir, 88 N. Y. S. 479.

27. $1,000 held not unreasonable to protect injury by flowing of land which with its contemplated improvements would be worth $3,000 per year. Mahoney v. Kansas City [Mo. App.] 79 S. W. 1168. When a contract is broken, it is the duty of the injured party to minimize the loss and injury, when it is practicable to do so by a reasonable outlay of money, but such outlay is to be allowed him as a part of his damages. Griffith v. Blackwater Boom & Lumber Co. [W. Va.] 48 S. E. 442.

28. Robertson v. Texas & P. R. Co. [Tex. Civ. App.] 79 S. W. 96. Instruction held not on weight of evidence. Missouri, etc., R. Co. v. Flood [Tex. Civ. App.] 79 S. W. 1106.

29. Eisle v. Oddie, 128 F. 941.

30. See 1 Curr. L. 838.

31. Spolek Denni Hlasatel v. Hoffman, 105 Ill. App. 170.

32. Dunlevy v. Wolferman [Mo. App.] 79 S. W. 1165; Spolek Denni Hlastel v. Hoffman, 105 Ill. App. 170.

be shown to aggravate the damages,[33] and defendant's honest mistake may mitigate;[34] but in an action for attempting to extort confession of crime from plaintiff by torture, facts from which defendants were led to suspect him are not admissible, either in justification or mitigation.[35]

In assault and battery, actual damages cannot be reduced by any evidence of provocation that does not amount to legal justification;[36] but exemplary damages may be so mitigated,[37] and in estimating the damages to a passenger from an assault by a conductor, the aggravating conduct of the passenger must be considered in mitigation.[38]

Seduction may be shown in aggravation in breach of promise, though not specially pleaded.[39]

Where the statute gives a wife an action for the damages sustained by her for illegal sales of liquor to her husband, her abuse of him, and attempts to destroy defendant's saloon are not relevant in mitigation.[40]

In an action for conversion, where punitive damages are not claimed, a void process under which defendant acted cannot be introduced in evidence in mitigation.[41]

In Tennessee, under the statute, contributory negligence of persons injured on railway tracks goes only in mitigation of damages.[42]

The remarriage of plaintiff widow is immaterial on the question of damages for her husband's death,[43] and that the injured person had collected on an accident policy,[44] or was more than reimbursed for his loss by fire by the proceeds of a popular subscription,[45] or that his employer, a third person, did not suspend his salary during the period of his disability, is of no benefit in mitigating the damages recoverable against defendant.[46] Where trespass is willful, no allowance should be made to the trespasser for labor expended to the improvement of the property.[47]

§ 3. *Recovery as affected by status of plaintiff or limited interest in property affected.*[48]—In Michigan, where a person injured by wrongful act survives for an appreciable time, his cause of action for the injury passes to his administrator, who can recover such damages as the injured person could have recovered had he survived to prosecute the action.[49]

Damages may be recovered for the destruction of property used in an un-

33. Stoecker v. Nathanson [Neb.] 98 N. W. 1061.
34. Dunlevy v. Wolferman [Mo. App.] 79 S. W. 1165.
35. Warner v. Talbot, 112 La. 817, 36 So. 743.
36. Barrette v. Carr, 75 Vt. 426, 56 A. 93.
37. Words of provocation may be considered in mitigation of punitive but not of compensatory damages. Mahoning Valley Ry. Co. v. De Pascale [Ohio] 71 N. E. 633. Not error to refuse to so instruct. Id.
38. Freedman v. Metropolitan St. R. Co., 89 App. Div. 486, 85 N. Y. S. 986.
39. Poehlmann v. Kertz, 105 Ill. App. 249.
40. Burns' Rev. St. 1901, § 7288. Gough v. State, 32 Ind. App. 22, 68 N. E. 1043.
41. Stephens v. Head, 138 Ala. 465, 35 So. 665.
42. Cincinnati, etc., R. Co. v. Davis [C. C. A.] 127 F. 933. Contributory negligence, too remote to bar recovery, must be considered in mitigation of damages. Merely permissive instruction is error. Memphis St. R. Co. v. Haynes [Tenn.] 81 S. W. 374.
43. Chicago, etc., R. Co. v. Driscoll, 207 Ill. 9, 69 N. E. 620.
44. Missouri, etc., R. Co. v. Flood [Tex. Civ. App.] 79 S. W. 1106.
45. Citizens' Gas & Oil Min. Co. v. Whipple, 32 Ind. App. 203, 69 N. E. 657.
46. International, etc., R. Co. v. Haddox [Tex. Civ. App.] 81 S. W. 1036. That a railway mail clerk has been granted leave of absence with pay during the time of his disability will not mitigate the damages recoverable from the railroad company for his injury. Nashville, etc., R. v. Miller [Ga.] 47 S. E. 959.
47. Liability for waste of mineral deposits is not reduced by the cost of mining. Sweeny v. Hanley, 126 F. 97. But see 1 Curr. L. 863, n. 48, 54, 55.
48. See 1 Curr. L. 839.
49. Kyes v. Valley Tel. Co. [Mich.] 93 N. W. 623; Olivier v. Houghton County St. R. Co. [Mich.] 96 N. W. 434. See 1 Curr. L. 839, n. 67.

lawful occupation,[50] and an owner may recover for the damages actually done to his property by flowage, whether at the time of the trial it has been restored to its former condition or not;[51] but a purchaser under an unrecorded contract is not entitled to damages for a change of street grade before he has paid sufficient of the purchase money to entitle him to a deed under the contract,[52] and good will cannot be recovered for as an element of damage, when the property to which it is attached has been voluntarily alienated.[53]

Where a father sues personally and as next friend for injuries to his minor son, he is entitled to recover both for the minor for his decreased capacity to earn after reaching the age of twenty-one, and for himself for whatever pecuniary benefit there is a reasonable expectation he will receive from the son after reaching that age,[54] but his own recovery for support of the child cannot extend beyond majority.[55] Parents cannot recover for their own services in nursing injured children,[56] nor for loss of time or injury and neglect of business resulting therefrom.[57]

An infant cannot recover for physician's services,[58] nor for loss of wages unless emancipated.[59]

A married woman living with her husband may recover for pain and suffering, but not for medical attendance and nursing,[60] nor for a loss of time or permanent impairment of her earning power, except in connection with her own separate business.[61]

Where the action is by a husband for injuries to his wife, the wages lost by a daughter not shown to be a minor are not recoverable.[62]

§ 4. *Measure of damages for breach of contract. A. Miscellaneous contracts.*[63]—Willfullness in the breach of a contract is not material on the question of damages,[64] and in South Dakota, by express provision of the Codes, a party may not recover a greater amount in damages for the breach of a contract than he would have gained by the full performance thereof on both sides.[65]

Interest as an element.[66]—Interest upon damages for a breach of a contract is generally recoverable,[67] but where the amount of goods to be included in the

50. Coppedge v. Goetz Brew. Co., 67 Kan. 851, 73 P. 908.

51, 52. McCartney v. Phila., 22 Pa. Super. Ct. 257.

53. Paxton v. Vaddonker, 1 Neb. Unoff. 776, 96 N. W. 378.

54. Pleading held not sufficient to found recovery of latter item. Gulf, etc., R. Co. v. Hall [Tex. Civ. App.] 80 S. W. 133.

55. Ceigler v. Hopper-Morgan Co., 90 App. Div. 379, 85 N. Y. S. 656.

56. Ceigler v. Hopper-Morgan Co., 90 App. Div. 379, 85 N. Y. S. 656; Heater v. Delaware, etc., L. & W. R. Co., 90 App. Div. 495, 85 N. Y. S. 524.

57. Ceigler v. Hopper-Morgan Co., 90 App. Div. 379, 85 N. Y. S. 656.

58. Koehler v. Interurban St. R. Co., 88 N. Y. S. 1056.

59. Nemorofskie v. Interurban St. R. Co., 87 N. Y. S. 463.

60. Kimmel v. Interurban St. R. Co., 87 N. Y. S. 466.

61. Gilson v. Cadillac [Mich.] 95 N. W. 1084. Instruction slightly confusing held in view of amount recovered to be unprejudicial. Abbitt v. St. Louis Transit Co. [Mo. App.] 81 S. W. 484. A married woman cannot recover for decreased earning capacity in the absence of evidence that she ever does any work outside her household duties. Kroner v. St. Louis Transit Co. [Mo. App.] 80 S. W. 915. A married woman may recover for impairment of earning power, though there is no evidence that she ever earned any money. Louisville & N. R. Co. v. Dick, 25 Ky. L. R. 1831, 78 S. W. 914. For personal injuries to a married woman, she and her husband may recover such reasonable sum as will compensate them for her pain and suffering, past and future, and her permanent injury. Jarrell v. Wilmington [Del. Super.] 56 A. 379.

62. Dundon v. Interurban St. R. Co., 87 N. Y. S. 460.

63. See 1 Curr. L. 840.

64. Kelley, Maus & Co. v. La Crosse Carriage Co. [Wis.] 97 N. W. 674.

65. Rev. Civ. Code 1903, § 2329. Hickok v. Adams Co. [S. D.] 99 N. W. 77.

66. See, also, the topic Interest, 2 Curr. L. 547.

67. Delay in transporting stock. Southern Pac. Co v. Arnett [C. C. A.] 126 F. 75. Injuries to live stock by a carrier. Texas & P. R. Co. v. Murtishaw [Tex. Civ. App.] 78 S. W. 953. Written contract to purchase chattels [Rev. St. 1899, § 3705]. Nelson v. Hirsch & Sons' Iron & Rail Co., 102 Mo. App. 498, 77 S. W. 590. Interest after breach of a contract to pay money is recoverable only as damages. Ferguson v. Reiger, 43 Or. 505.

sale is indefinite, and no demand is made on the defaulting buyer, the seller can recover interest on his damages only from commencement of suit.[68]

Newspaper and advertising contracts.[69]—The publisher's damages for breach of an advertising contract are generally the profits on the contract,[70] but in New York, unless it appears that the space could have been rented elsewhere, the damages are the contract price.[71]

Contracts referring to negotiable instruments,[72]—For failure of a bank through mistake to pay plaintiff's check, he having funds on deposit, he can recover only nominal damages in the absence of any pleading of special damages.[73]

Contracts with railroad companies.[74]—Where a railroad company breaches a covenant to establish a station on plaintiff's land, the difference in value of his adjoining land with and without the station may be recovered,[75] and for breach of a covenant in its right of way deed, to move its track so that the phosphate thereunder may be mined by the owner of the fee, the damages are the value of the phosphate that cannot be removed without letting down the track.[76] Where one moved a mill to a certain location on an agreement that a spur track would be built to it, the cost of moving from such place including rental value and actual losses during the time of idleness may be recovered.[77]

Stumpage contracts.—Where the true owner of land successfully replevies timber cut by a licensee, from one claiming to own the land, the licensee's damage is the value of the timber at the time and place of replevying, plus the expenses of the replevin suit, less the stumpage price.[78]

Charter party.—For breach of a charter by the charterer, the damages are the net amount that would have been earned less the amount actually earned or that might have been earned by diligence during the time the voyage would have occupied.[79]

Patent lease.—Where there is a breach by the licensee of a patent of an agreement to use no substitute for the patented article, the lessor's damages are the amount he would have received in royalties had the breach not occurred.[80]

(§ 4) *B. Contracts for sale or purchase of land.*[81]—The damages recoverable in a suit to enforce a contract for the sale of real estate will be the payments made and profits which plaintiff would have made.[82] For breach of contract to exchange, plaintiff cannot recover expenses of prior unsuccessful suit for specific performance.[83] For a deficiency, the purchaser may recover a proportionate part of the consideration,[84] and for falsely representing that real estate is leased at a

73 P. 1040. In an action under Ball. Ann. Codes and St. § 5262 to compel the delivery of personal property, interest cannot be allowed. Hill v. Gardner [Wash.] 77 P. 808.

68. Nelson v. Hirsch & Sons' Iron & Rail Co., 102 Mo. App. 498, 77 S. W. 590.

69. See 1 Curr. L. 840.

70. These may be the contract price, but the question is for the jury. Haynes & Co. v. Nye [Mass.] 70 N. E. 932. Advertising in cars. Ward v. American Health Food Co., 119 Wis. 12, 96 N. W. 388. Actual damage only recoverable. Mendell v. Willyoung, 42 Misc. 210, 85 N. Y. S. 647. See 1 Curr. L. 840, n. 84.

71. Railway Advertising Co. v. Standard Rock Candy Co., 83 App. Div. 191, 83 N. Y. S. 338.

72. See 1 Curr. L. 840.

73. Clark Co. v. Mt. Morris Bank, 85 App. Div. 362, 83 N. Y. S. 447.

74. See 1 Curr. L. 841.

75. Louisville, etc., R. Co. v. Whipps, 25 Ky. L. R. 2312, 80 S. W. 507.

76. Silver Springs, etc., R. Co. v. Van Ness [Fla.] 34 So. 884.

77. Martin v. Seaboard Air Line R. Co. [S. C.] 48 S. E. 616.

78. Pierce v. Banton, 98 Me. 553, 57 A. 889.

79. Cornwall v. Moore & Co., 125 F. 646. Charter sent ship to different port than that contracted for. Johnson v. Bibb Lumber Co., 140 Cal. 95, 73 P. 730.

80. Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co., 177 Mo. 559, 76 S. W. 1008.

81. See 1 Curr. L. 841.

82. Conner v. Baxter [Iowa] 99 N. W. 726; Goodman v. Wolf, 88 N. Y. S. 934.

83. Kaufmann v. Kirker, 22 Pa. Super. Ct. 201.

84. Proper measure of damages for loss of part of tract held applied by chancellor.

certain rental, he may recover the difference between the value of the property at the time the conveyance was made and the value it would have had if the representation had been true.[85]

(§ 4) *C. Breach of covenant as to title.*[86]—For breach of a covenant of warranty by an outstanding lease, the damages are the value of the term, plus attorney's fees incurred in litigation with the tenant.[87] A purchaser of land who, on finding that the title was in the United States, perfects title in himself, cannot recover from his vendor the price paid, but only the sum paid to perfect his title and his damages caused by breach of warranty.[88]

(§ 4) *D. Contracts to give lease, and liabilities as between lessor and lessee.*[89]—The landlord's damages for refusal to execute a lease as agreed, whereby he was obliged to rent at a loss, are the difference in rentals,[90] and on breach of a mining lease for a certain term, stipulating for royalty on a minimum tonnage per year, the lessor is entitled to recover, after expiration of the time limited, the minimum royalty for the whole period.[91]

Where a subtenant is kept out of possession by one holding the paramount title, he may recover from his lessor the value of the term over and above the rent reserved and unpaid, or to accrue, together with other damages naturally resulting from the breach.[92] For breach of covenant to repair, the lessee may recover the difference in rental value of the premises, anticipated profits not being recoverable,[93] but where the lessor of pasture land fails to keep up fences as agreed, the lessee may recover the damages he has had to pay adjoining owners for trespasses by his stock.[94]

(§ 4) *E. Contracts for sale or purchase of goods or chattels.*[95]—For failure to deliver goods as agreed, the purchaser may recover the difference between the contract price and the market value at the place of delivery,[96] but if no market exists at that place, the value in the most available market, with the cost of transportation added and the expense of making the repurchase, will measure the damages.[97] For failure to manufacture and deliver articles, the purchaser may re-

Leonard v. Welch, 25 Ky. L. R. 692, 76 S. W. 338. Deduction for deficiency is allowed in case of mutual mistake. Willard v. Sanford [Tex. Civ. App.] 77 S. W. 290. Though the price be stated as a lump sum, where the sale is understood to be by the acre, the purchaser can recover a ratable amount for a deficiency. Hall v. Ely, 25 Ky. L. R. 954, 76 S. W. 848.

85. Ettlinger v. Weil, 94 App. Div. 291, 87 N. Y. S. 1049.

86. See 1 Curr. L. 842. See, also, topic Covenants for Title, 3 Curr. L. 973.

87. Browning v. Stillwell, 42 Misc. 346, 86 N. Y. S. 707. Where an incumbrance is such as keeps the grantee out of possession for a time, his damages are the value of the use for the period and his expenses in an ineffectual attempt to gain possession incurred by direction of the covenantor. Brass v. Vandecar [Neb.] 96 N. W. 1035.

88. Holloway v. Miller [Miss.] 36 So. 531.

89. See 1 Curr. L. 842.

90. Silva v. Bair, 141 Cal. 599, 75 P. 162.

91. Berwind-White Coal Min. Co. v. Martin [C. C. A.] 124 F. 313.

92. Griesheimer v. Bothman, 105 Ill. App. 585.

93. Godfrey v. India Wharf Brew. Co., 87 App. Div. 123, 84 N. Y. S. 90.

94. Schenk v. Forrester, 102 Mo. App. 124, 77 S. W. 332.

95. See 1 Curr. L. 843.

96. A market value may exist at a particular place, whether the commodity be constantly kept in stock or not. Coxe Bros. & Co. v. Anoka Waterworks, Elec. Light & P. Co. [Minn.] 97 N. W. 459.

97. And it is immaterial that the plaintiff has not actually bought elsewhere. Nottingham Coal & Ice Co. v. Preas [Va.] 47 S. E. 823. For breach of contract to furnish a certain quality of feed to cattle, the difference in their value immediately before and after they became sick by reason thereof (Hartgrove v. Southern Cotton Oil Co. [Ark.] 77 S. W. 908), or the difference between their value before they became sick and their value after they recovered, plus a sum sufficient to compensate for loss of time, care and attention and other expenses caused by the sickness (Id.). For delivering inferior goods, the difference between the market value of the inferior at time and place of delivery and the market value at the same time and place of the grade called for by the contract. Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066; Bliss Co. v. Buffalo Tin Can Co. [C. C. A.] 131 F. 51.

cover the difference between the market and contract prices if they have a market value, and if not, then the value to the purchaser may be taken as their value.[98] Under the familiar rule that the damages will include all elements the parties may have reasonably anticipated at the time the contract was made, failure to deliver materials to a builder or manufacturer may include all the loss occasioned by its nondelivery,[99] such as the increased cost of obtaining elsewhere on short notice, material to take the place of that agreed upon,[1] damages from resulting inefficiency of plaintiff's factory and operatives, lessened utility of product, lacking the material in question, and lost profits.[2] For delay in furnishing materials for a heating plant, plaintiff may recover any increase in the cost of installing the plant caused by the delay and not the value of plaintiff's services during the delay.[3] For breach of a contract to furnish such goods as plaintiff shall sell, the damages are the profits on sales actually made and which would probably have been made during the term.[4]

For refusal to take goods ordered, where the seller does not resell,[5] or resells without notice to the buyer,[6] the damages are the difference between the market value at the time and place of delivery and the contract price.[7] The measure of damages for breach of contract to purchase stock at a certain time and price is the agreed price, the seller electing to sue for the price and hold the stock for the purchaser.[8] For breach of a contract to purchase the output of a factory for a definite term, loss of profits for the whole term, prospective as well as past, may be recovered,[9] and for breach of contract to purchase plaintiff's crop, causing its loss, the damages are the value of the crop estimated at the contract price, less the expense of harvesting that portion that was left unharvested by reason of the breach.[10] For breach of a contract to purchase a heating plant, plaintiff may recover his profits on putting in the plant, less the expense of furnishing repairs as agreed.[11] Where a contract to sell goods at private sale at retail is broken by sale of part at auction, the measure of damages is the difference between the auc-

98. Ideal Wrench Co. v. Garrin Mach. Co., 92 App. Div. 187, 87 N. Y. S. 41.

99. Expenses in taking orders after knowledge that goods could not be delivered may not be included. Thorn v. Morgan & Whateley Co. [Mich.] 97 N. W. 43. The seller of building material to a building contractor is not liable for the penalty provided against the contractor for delay, in the absence of knowledge on the seller's part of the liability the buyer is under. Wendell v. Walker, 87 N. Y. S. 142. For breach of contract to sell machinery, profits which the factory would have made if the machinery had been supplied cannot be recovered. Bliss Co. v. Buffalo Tin Can Co. [C. C. A.] 131 F. 51.

1. Christopher, etc., Foundry Co. v. Yeager, 105 Ill. App. 126. Expenses of good faith endeavors to procure elsewhere are recoverable. Kelley, Maus & Co. v. La Crosse Carriage Co. [Wis.] 97 N. W. 674.

2. Kelley, Maus & Co. v. La Crosse Carriage Co. [Wis.] 97 N. W. 674. The measure of damages for breach of a contract to furnish sufficient logs to supply a sawmill is the loss of profits which would have been realized had the logs been supplied. Rhodes v. Holladay-Klotz Land & Lumber Co. [Mo. App.] 79 S. W. 1145. For failure to deliver a machine sold to plaintiffs, lost profits, the direct result of the breach, and within contemplation of the parties, are recoverable. Wolf Co. v. Galbraith [Tex. Civ. App.] 80 S. W. 648.

3. Hickok v. W. E. Adams & Co. [S. D.] 99 N. W. 77.

4. Thorn v. Morgan & Whateley Co. [Mich.] 97 N. W. 43; Kenney v. Knight, 127 F. 403.

5. Belle of Bourbon Co. v. Leffler, 87 App. Div. 302, 84 N. Y. S. 385.

6. Where the seller of goods, on the buyer's repudiating the contract, resells without notice, the buyer is liable only for the difference between the contract price and market value, though the sale brought less than the market value. Nelson v. Hirsch & Sons' Iron & Rail Co., 102 Mo. App. 498, 77 S. W. 590.

7. Books. Houghton v. Furbush [Mass.] 70 N. E. 49. Where the purchaser of goods to be delivered from time to time terminates the contract, he is liable only for the difference between the market value of the goods and the purchase price. McCall Co. v. Jennings, 26 Utah, 459, 73 P. 639.

8. Cowan v. De Hart, 84 N. Y. S. 576.

9. Parker v. McKannon Bros. & Co. [Vt.] 56 A. 536.

10. Avery v. Segura Sugar Co., 111 La. 891, 35 So. 967.

11. City of Ludlow v. Peck-Williamson Heating & Ventilating Co., 25 Ky. L. R. 831, 76 S. W. 377.

tion price and the price the goods would have brought if sold as agreed.[12] Where a portion of a cause of action is assigned under agreement not to compromise it unless on a basis that will give the assignee a certain sum, his damages for breach, in the absence of proof of special damages, are the sum paid for the assignment.[13]

All damages sustained by breach of a warranty implied,[14] as well as express, may be recovered,[15] but the purchaser cannot recover for defects in articles manufactured and delivered, where they have been accepted and paid for, though he can recover for those paid for but returned as inferior.[16]

(§ 4) *F. Liability of bailees, carriers, and telegraph companies.*[17]—A passenger may recover for indignity, humiliation, wounded pride, and mental suffering involved in and resulting from his wrongful expulsion from a train, though the conductor was not actuated by malice.[18] A carrier owes his passengers the duty of protecting them from assault at the hands of its servants,[19] and where it does not so protect the passenger, he may recover, not only for physical injuries sustained, but for pain and suffering and for the disgrace and humiliation he is subjected to by reason of the assault.[20] For insulting language of a street car conductor, compensation for humiliation and injury to feelings may be recovered, but not for any injury to reputation resulting therefrom.[21] For failure of a railroad company to stop its train for a time sufficient to allow plaintiff to board, the damages should compensate for time lost, expense incurred, and personal inconvenience.[22] In Texas, recovery may be had for injury to passengers resulting from failure to properly heat waiting rooms for passengers.[23]

Damages for loss of goods are measured by their value at the point of destination,[24] and where household goods are injured in transit, the measure of damages is the difference in their actual value and not the difference in the value of similar goods at a nearest second hand store.[25] The value of wearing apparel carried as baggage by a traveler and lost by the carrier is not determined by its market value, but by its value to the owner,[26] and the damages for the loss by the initial carrier of articles carried as baggage are their value at the point of destination and not at the point where the initial carrier's line connects with the terminal carrier's.[27]

12. Paxton v. Vaddonker, 1 Neb. Unoff. 776, 96 N. W. 378.

13. O'Driscoll v. Doyle, 31 Colo. 193, 73 P. 27.

14. Queen City Glass Co. v. Pittsburg Clay Pot Co., 97 Md. 429, 55 A. 447. Where cattle are made sick by the use of improper feed furnished in breach of defendant's contract, plaintiff's damages may be the difference in value immediately before and immediately after the cattle were made sick, or immediately before being made sick and after recovery, plus the loss of time, care and expense of curing them. Hartgrove v. Southern Cotton Oil Co. [Ark.] 77 S. W. 908.

15. For breach of warranty of soundness of a cow which was diseased and infected the buyer's herd, the measure is the difference in value of the cow sound and unsound, and the loss suffered by the infection, including reasonable expenses in caring for and doctoring the herd. Cummins v. Ennis [Del. Super.] 56 A. 377. Where eggs are sold on a warranty of quality, the damages for the breach are the difference between the price they bring on resale and what they would have brought had they been as represented. Egbert v. Hanford Produce Co., 92 App. Div. 252, 86 N. Y. S. 1118.

16. Ideal Wrench Co. v. Garvin Mach. Co., 92 App. Div. 187, 87 N. Y. S. 41.

17. See 1 Curr. L. 845.

18. Colne v. Chicago & N. W. R. Co., 123 Iowa, 458, 99 N. W. 134.

19. Georgia R. & Elec. Co. v. Baker [Ga.] 48 S. E. 355; O'Donnel v. St. Louis Transit Co. [Mo. App.] 80 S. W. 315.

20. O'Donnel v. St. Louis Transit Co. [Mo. App.] 80 S. W. 315. Actual damages resulting from the humiliation and disgrace caused by an assault by a street car conductor may be recovered. Sonnen v. St. Louis Transfer Co., 102 Mo. App. 271, 76 S. W. 691.

21. Gillespie v. Brooklyn Heights R. Co., 178 N. Y. 347, 70 N. E. 857.

22. Mobile & O. R. Co. v. Reeves, 25 Ky. L. R. 2236, 80 S. W. 471. Compare Northern Tex. Traction Co. v. Peterman [Tex. Civ. App.] 80 S. W. 535.

23. Missouri, etc., R. Co. v. McCutcheon [Tex. Civ. App.] 77 S. W. 232. That passenger was cold when he arrived at the station is immaterial. Texas Midland R. Co. v. Little [Tex. Civ. App.] 77 S. W. 958.

24. Southern Pac. R. Co. v. D'Arcais, 27 Tex. Civ. App. 57, 64 S. W. 813.

25. Wells Fargo Exp. Co. v. Williams [Tex. Civ. App.] 71 S. W. 314.

For failure to haul a theatrical car, plaintiff may recover his additional expense, together with profits he would have made had the car been hauled in time to give the performance;[28] but where an express company refuses to deliver plaintiff's trunk except upon payment of an excessive charge which is not paid, plaintiff cannot recover for his loss of time and profits during the unlawful detention.[29]

Carriers of freight may stipulate for immunity beyond a certain amount unless the true value is stated or loss arises from gross negligence or fraud,[30] but an express company cannot so limit its liability where it takes an account for collection.[31]

For delay in transportation, damages reasonably in contemplation may be recovered.[32]

The measure of damages for live stock dying in transit through the carrier's negligence is their net value at the point of destination,[33] and for injury, plaintiff may recover the difference in value at the destination between the condition in which the stock arrived and that in which it should have arrived.[34] Interest is recoverable upon the damages arising from undue delay in transporting live stock.[35]

At common law, the weight of authority is that there can be no recovery for nondelivery of a telegram resulting in mental suffering unaccompanied by pecuniary loss or physical injury,[36] though the contrary rule prevails in several states,[37] and in Iowa, it is said that an action for the negligent transmission of a

26, 27. Galveston, etc., R. Co. v. Fales [Tex. Civ. App.] 77 S. W. 234.

28. Illinois Cent. R. Co. v. Byrne, 205 Ill. 9, 68 N. E. 720.

29. Brown v. Weir, 88 N. Y. S. 479.

30. $50. Express company. Wilson v. Platt, 84 N. Y. S. 143; Bernstein v. Weir, 40 Misc. 635, 83 N. Y. S. 48. See 1 Curr. L. 846, n. 49.

31. Gowling v. American Exp. Co., 102 Mo. App. 366, 76 S. W. 712.

32. Measure of damages for delay in delivering machine shipped. Louisville & C. Packet Co. v. Battorff, 25 Ky. L. R. 1324, 77 S. W. 920.

33. St. Louis, etc., R. Co. v. Burns [Tex. Civ. App.] 80 S. W. 104.

34. Texas & P. R. Co. v. Murtishaw [Tex. Civ. App.] 78 S. W. 953; St. Louis, etc., R. Co. v. Burns [Tex. Civ. App.] 80 S. W. 104; Chicago, etc., R. Co. v. Halsell [Tex. Civ. App.] 80 S. W. 140; Gulf, etc., R. Co. v. Ware [Tex. Civ. App.] 78 S. W. 961. Condition at destination is measure, not at defendant's terminus where they are delivered to connecting carrier. Texas & P. R. Co. v. White [Tex. Civ. App.] 80 S. W. 641. Sale price and contract price afford no measure where previous sale nor special damage is not alleged. St. Louis Southwestern R. Co. v. Musick [Tex. Civ. App.] 80 S. W. 673. Instruction held erroneous as authorizing double recovery. Id. Evidence as to the condition, history and shortage of cattle when placed in pasture at destination is admissible. Chicago, etc., R. Co. v. Carroll [Tex. Civ. App.] 81 S. W. 1020.

35. Southern Pac. Co. v. Arnett [C. C. A.] 126 F. 75. For breach of carrier's contract for through transportation of passengers, damages for inconvenience, annoyance and delay cannot be recovered in the absence of proof of actual physical or mental injury. Miller v. Baltimore & O. R. Co., 89 App. Div. 457, 85 N. Y. S. 883. For delay of a train, a passenger is not entitled to actual damage unless he shows some pecuniary or personal injury. Miller v. Southern R. Co. [S. C.] 48 S. E. 99. Where a train is delayed, a passenger is not entitled to recover actual damages unless the carrier's conduct was negligent and willful. Id. A passenger is not entitled to damages for loss of time, inconvenience and fatigue caused by delay of a train, unless it produced some pecuniary damage or personal loss. Id.

36. Federal court does not follow state law. Western Union Tel. Co. v. Sklar [C. C. A.] 126 F. 296; Alexander v. Western Union Tel. Co., 126 F. 445. Exhaustive monologue on "Liability of Telegraph Companies," see 42 Am. L. Reg. 715. Mental anguish caused by failure to deliver a telegram is not actionable. Western Union Tel. Co. v. Waters, 139 Ala. 652, 36 So. 773. See 1 Curr. L. 847, n. 61.

37. Western Union Tel. Co. v. Bowen [Tex. Civ. App.] 76 S. W. 613; Cowan v. Western Union Tel. Co., 122 Iowa, 379, 98 N. W. 281. Reviews many cases. Hurlburt v. Western Union Tel. Co., 123 Iowa, 295, 98 N. W. 794; Barnes v. Western Union Tel. Co. [Nev.] 76 P. 931; Bowers v. Western Union Tel. Co., 135 N. C. 504, 47 S. E. 597; Western Union Tel. Co. v. Ridenour [Tex. Civ. App.] 80 S. W. 1030. Where the telegram announces a death, the fact that deceased was only second cousin to plaintiff does not debar him from recovery. Hunter v. Western Union Tel. Co., 135 N. C. 459, 47 S. E. 745. Traveling expenses are not recoverable. Id. Mental suffering caused by husband's failure to meet wife at train held not recoverable. Western Union Tel. Co. v. Taylor [Tex. Civ. App.] 81 S. W. 69. Mental anguish resulting from inability of husband to arrive in time to view remains of dead wife held not too remote, contingent and speculative to form basis of recovery. Western Union Tel. Co. v. Hamilton [Tex. Civ. App.] 81 S.

telegram is not in contract but in tort, and the damages, therefore, are not limited to such as the tort feasor contemplated.[38] Likewise in Georgia, an action for the refusal of a telephone company to furnish service as agreed is regarded as action in tort and plaintiff is entitled to punitive damages on showing willful and wanton action by defendant,[39] but punitive damages are not recoverable in telegraph cases in Kentucky.[40] The rule that a common carrier cannot be relieved from the results of its negligence because the condition of the person affected thereby is unusual applies to the business of transmitting telegraph messages.[41] Delay in delivering a message bringing bad news cannot give rise to an action for mental distress,[42] and consequential damages are not recoverable for delay in transmitting business telegrams in cipher.[43]

(§ 4) *G. Contracts for services.*[44]—Where a building or similar contract is wrongfully terminated by the hirer, the damages are plaintiff's profits on the entire work,[45] unless the work be partly done, when plaintiff may recover the contract price for that already done and his profits on the balance.[46] The measure of damages for breach of a contract to employ plaintiff to cut cross ties is the reasonable profit he would have realized over the cost of cutting such ties.[47] The measure of damages for breach of a contract appointing plaintiff defendant's exclusive agent for sale of stone is the profits plaintiff would have made if the contract had not been broken.[48] For wrongful discharge without notice and inability to procure other employment, the damages are the salary for the unexpired portion of the term, though the contract provided for termination on two weeks' notice,[49] and where an architect performs in full except the superintendence of the building which the owner refuses to go on with, he can recover the full contract price, in the absence of evidence that he might have obtained employment elsewhere.[50] Where the employer is a corporation and the contract is terminated by

W. 1052. Exemplary damages held not recoverable in particular case. Western Union Tel. Co. v. Spratley [Miss.] 36 So. 188. In an action for mental anguish caused by failure to receive a telegram, plaintiff's failure to use other means within reach to secure the information sought may be considered in mitigation. Willis v. Western Union Tel. Co. [S. C.] 48 S. E. 538. Plaintiff can testify as to the particular apprehensions from which he suffered from failure to receive a telegram. Id. The mental anguish for which one can recover for delay in telegrams covers the period from the time plaintiff should have received the message and the time of positive information on the subject thereof. Id. Civ. Code 1902, § 2223, making telegraph companies liable for mental anguish for negligence in handling messages, gives damages for anxiety, negligence which prolongs anxiety, and other kinds of mental suffering. Id.

38. Cowan v. Western Union Tel. Co., 122 Iowa, 379, 98 N. W. 281. Compare Barnes v. Western Union Tel. Co. [Nev.] 76 P. 931.

39. Southern Bell Tel. & Tel. Co. v. Earle, 118 Ga. 506, 45 S. E. 319.

40. Western Union Tel. Co. v. Cross' Adm'r, 25 Ky. L. R. 646, 76 S. W. 162.

41. Western Union Tel. Co. v. Hamilton [Tex. Civ. App.] 81 S. W. 1052.

42. Gaddis v. Western Union Tel. Co. [Tex. Civ. App.] 77 S. W. 37.

43. Chicago, etc., R. Co. v. Douglass [Tex. Civ. App.] 76 S. W. 449. For failure to deliver a telegram consisting of a bid for the erection of a building, the difference between the amount of the bid and what it would have cost to erect the building. Texas & W. Tel. & T. Co. v. Mackenzie [Tex. Civ. App.] 81 S. W. 581. Where because of error in transmitting, a buyer of goods pays more than the intended price, the difference between the price stated in the message and the price paid is the measure. Hays v. Western Union Tel. Co. [S. C.] 48 S. E. 608.

44. See 1 Curr. L. 848.

45. Barrett v. Raleigh Coal & Coke Co. [W. Va.] 47 S. E. 154; Dunham v. Hastings Pavement Co., 88 N. Y. S. 835. For breach of a covenant to employ plaintiff to cut certain timber, the recovery may be only the profit plaintiff would have made on the work, and not the full contract price on the timber cut by others. Horn v. Carroll, 25 Ky. L. R. 2305, 80 S. W. 518.

46. Sullivan v. Moffatt [N. J. Law] 56 A. 304. Where the contract is to build a railroad and the owner fails to procure all the right of way as agreed, the contractor can recover for what he has built and the profits he would have made on the part unbuilt. Altoona Electrical, Engineering & Supply Co. v. Kittanning, etc., R. Co., 126 F. 559.

47. Horn v. Carroll, 25 Ky. L. R. 2305, 80 S. W. 518.

48. Sales by defendant in violation of agreement. Taylor Co. v. Bannerman [Wis.] 97 N. W. 918.

49. Leslie v. Roble, 84 N. Y. S. 289.

50. Graf v. Laev [Wis.] 97 N. W. 898.

its insolvency, besides pay for work already done, the contractor may recover his outlay in tools, machinery, and preliminary work incurred specially for performing the contract.[51]

Where a building contractor has failed to do a portion of the work, the damages are the difference between the contract price and the price plaintiff will have to pay to have it done,[52] but the difference between the contract price and what was paid to others for doing work cannot be recovered in the absence of evidence that the price paid was reasonable.[53] For breach of a contract to furnish power, plaintiff may recover the cost of obtaining it elsewhere.[54] For breach of a contract to furnish water to irrigate a crop, plaintiff may recover the profit he would have made on such crop,[55] and where a water company furnishes water of less pressure and quantity than contracted for, the city can deduct the difference between the value of the service supplied and that contracted for.[56] For failure to compress and ship plaintiff's cotton as agreed, he can recover his loss in being obliged to repurchase at an advance to fill his contracts and also his loss from the subsequent decline of the market during defendant's delay.[57] Where the vendor agrees to deepen a well on the boundary between the land sold and that retained by him, so that it shall supply sufficient water, and fails to do so, the purchaser's damages are the reasonable cost of having it deepened, or in case the vendor prevents deepening, the cost of digging one on purchaser's own land.[58] Where plaintiff found no fault with the delay in the repair of a machine beyond the time set by the contract, he cannot recover for its use during the overtime.[59] An employe after leaving his employment without cause may recover on the quantum meruit for services actually performed, less the employer's damages for the breach,[60] and a contractor who has defectively performed can recover the contract price, less deductions for defective work.[61]

(§ 4) *H. Promise of marriage.*[62]—The money value or worldly advantage of the marriage,[63] and all the facts and circumstances of the case and particularly the conduct of the defendant in his whole intercourse with and treatment of plaintiff, are to be considered,[64] and exemplary damages are recoverable if defendant was guilty of fraud or deceit or was moved by evil motives in making the contract or in its breach.[65]

§ 5. *Measure and elements of damages for torts. A. Miscellaneous torts. Injuries to animals.*[66]—The owner of an animal killed by another's negligence is entitled to the value of the animal at the time of the injury, plus the sum expended in a bona fide and judicious attempt to effect a cure,[67] and while interest

51. Griffith v. Blackwater Boom & Lumber Co. [W. Va.] 48 S. E. 442. For breach of architect's contract to supervise the construction of a building, such sum as will leave the builder as well off as he would have been had they performed their contract. Straus v. Buchman, 89 N. Y. S. 226.

52. New York Metal Ceiling Co. v. City Homes Imp. Co., 88 N. Y. S. 232. Where a contractor who has been paid fails to perform in full, the owner's damages are the necessary cost of completing the work. Hebb v. Welch [Mass.] 70 N. E. 440.

53. Zimmermann v. Marrin, 86 N. Y. S. 112.

54. Citizens' Elec. Light & Power Co. v. Gonzales Water Power Co. [Tex. Civ. App.] 76 S. W. 577.

55. Raywood Rice, Canal & Mill. Co. v. Wells [Tex. Civ. App.] 77 S. W. 253.

56. Joplin Waterworks Co. v. City of Joplin, 177 Mo. 495, 76 S. W. 960.

57. Loeb v. Homer Compress & Mfg. Co., 111 La. 726, 35 So. 843.

58. Plunkett v. Meredith [Ark.] 77 S. W. 600.

59. Rau v. Weyand, 89 App. Div. 200, 85 N. Y. S. 916.

60. Murphy v. Sampson, 2 Neb. Unoff. 297, 96 N. W. 494.

61. Shultz v. Seibel [Pa.] 57 A. 1120.

62. See 1 Curr. L. 848.

63. Jacoby v. Stark, 205 Ill. 34, 68 N. E. 557.

64. Seduction and ineffectual attempt to prove incontinence with others. Poehlmann v. Kertz, 105 Ill. App. 249.

65. Jacoby v. Stark, 205 Ill. 34, 68 N. E. 557.

66. See 1 Curr. L. 849.

67. Atwood v. Boston Forwarding &

on the amount is not recoverable eo nomine, the jury may consider the time that has lapsed between the injury and the trial.[68] For a permanent injury to a horse, the damages are the reasonable hire during the period of disability, plus the diminution of market value for the permanent injury (the aggregate of these amounts not being greater than the market value at the time of injury, with interest) plus any expenses incurred in keeping and treating the animal.[69]

Alienation of affections.[70]—A husband's damages may include the value of his wife's services and compensation for breaking up his home.[71]

False imprisonment.[72]—The damages recoverable for false imprisonment include in addition to actual expenses incurred, compensation for loss of time, interruption of business, bodily or mental suffering and humiliation and injury to feelings,[73] but in the absence of malice or actual damages, nominal damages only are recoverable.[74]

Malicious prosecution.[75]—For suing out an attachment maliciously and without probable cause, the law presumes injury and awards at least nominal damages.[76] Loss of employment by reason of the arrest may be recovered for,[77] but injuries to credit, character or business are too remote and speculative.[78]

Infringements of patents and trade-marks and unfair competition.[79]—Where defendant has wrongfully used a manufacturing machine, the right to use similar machines belonging solely to plaintiff, the cost of manufacture by use of the machine and without it may be shown,[80] and the damages are defendant's profits therefrom, taking into consideration his entire business and the expenses connected therewith.[81] A patentee may recover the entire net profits from the sale of the infringing article, where the patented feature is the foundation of its salability.[82]

Interference with water rights.—Where a defendant diverts water from a stream to the injury of a lower proprietor, by filling a reservoir during the rainy season with water that would otherwise have gone to waste, the damages are only for the actual available amount diverted.[83]

Expulsion from association.—For wrongful expulsion from an unincorporated association, the damages may include deprivation of the use and enjoyment of the society's property and privileges of membership, and the mental suffering occasioned by the manner in which expulsion was effected.[84]

(§ 5) *B. Loss or injuries to property.*[85]—Where a wagon is injured, the expense of repairs,[86] and the sum expended for another to take its place, may be

Transfer Co. [Mass.] 71 N. E. 72. For negligence in care of street resulting in death of team, their value is the measure of damages. Colburn v. Wilmington [Del. Super.] 56 A. 605. That a mare killed was with foal may be considered as affecting the damages. Boyer v. Chicago, etc., R. Co., 123 Iowa, 248, 98 N. W. 764.

68. Atwood v. Boston Forwarding & Transfer Co. [Mass.] 71 N. E. 72.

69. Telfair County v. Webb, 119 Ga. 916, 47 S. E. 218; Montgomery St. R. Co. v. Hastings, 138 Ala. 432, 35 So. 412.

70. See 1 Curr. L. 849.

71. Rudd v. Dewey, 121 Iowa, 454, 96 N. W. 973.

72. See 1 Curr. L. 849.

73. Mihalyik v. Klein, 22 Pa. Super. Ct. 193.

74. Maher v. Wilson, 139 Cal. 514, 78 P. 418.

75. See 1 Curr. L. 849.

76. Door Cattle Co. v. Des Moines Nat. Bank [Iowa] 98 N. W. 918.

77. Stoecker v. Nathanson [Neb.] 98 N. W. 1061.

78. Dorr Cattle Co. v. Des Moines Nat. Bank [Iowa] 98 N. W. 918.

79. See 1 Curr. L. 849.

80. Westervelt v. National Mfg. Co. [Ind. App.] 69 N. E. 169.

81. New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., 92 App. Div. 427, 87 N. Y. S. 200.

82. Plaget Novelty Co. v. Headley, 123 F. 897.

83. Lonsdale Co. v. Woonsocket [R. I.] 56 A. 448.

84. Lahiff v. St. Joseph's Total Abstinence & Benevolent Soc., 76 Conn. 648, 57 A. 692.

85. See 1 Curr. L. 850.

86. Rogers v. Interurban St. R. Co., 84 N. Y. S. 974; Montgomery St. R. Co. v. Hastinge, 138 Ala. 432, 35 So. 412.

recovered,[87] and for destruction of a wagon, its value can be recovered, but not the expense of hiring another to take its place.[88] For negligently destroying a boat, the damages are the value of the boat without allowance for the value of its use during the time of rebuilding.[89]

For obstruction of the entrance to plaintiff's place of business, by building railroad tracks, plaintiff may recover his loss of profits, and not merely the difference in rental value of the premises,[90] but where a passway to residence property is obstructed, the damages are the diminution, if any, of the value of the use of the house and land during the time of the obstruction.[91]

The damages recoverable under the Pennsylvania statute[92] for injuries to property resulting from the building of a sewer are such as are the direct, immediate and necessary or unavoidable consequences of the act of eminent domain itself, irrespective of care or negligence,[93] and the rule which limits a private owner's liability for damages for depriving his neighbor's land of support, to the injury to the land without regard to the buildings, does not apply to a municipality which in the construction of a sewer deprives land of support and injures a building thereon.[94]

The measure of damages to land by flowing is not the difference in market value before and after the injury,[95] but must be established by evidence tending to show actual injury to the property and a decrease in its rental value.[96] Where property can be restored to its former condition and the cost of such restoration would be less than the difference in values before and after, the measure of damages is the cost of restoration.[97] For a temporary obstruction of a waterway injuring an upper estate, the damages are the value of the crop lost and not the diminished value of the land.[98]

The damages recoverable for injuries caused by the construction of a public improvement are the difference between the value of the property before and after the construction,[99] but the reasonable cost of regrading plaintiff's lot is a proper element of damage from change of street grade.[1]

For burning grass land, the damages are the diminution of the market value of the land,[2] and the damages for burning a part of a meadow are the expense of reseeding, together with the value of its product for the time it is idle, based on what the remainder produced, not the mere rental value of land in the vi-

87. Rogers v. Interurban St. R. Co., 84 N. Y. S. 974.

88. Rels v. Long Island R. Co., 88 App. Div. 611, 84 N. Y. S. 881.

89. Ft. Pitt Gas Co. v. Evansville Contract Co. [C. C. A.] 123 F. 63.

90. That plaintiff was a lessee and could have declined to rent, or could have terminated his lease, is immaterial. International etc., R. Co. v. Capers [Tex. Civ. App.] 77 S. W. 39.

91. Louisville & N. R. Co. v. Carter, 25 Ky. L. R. 1303, 77 S. W. 719.

92. Act May 16, 1891, P. L. 75.

93. Removal of lateral support causing injury to building. Fyfe v. Turtle Creek Borough, 22 Pa. Super. Ct. 292.

94. Fyfe v. Turtle Creek Borough, 22 Pa. Super. Ct. 292.

95. McCartney v. Phila., 22 Pa. Super. Ct. 257.

Contra: San Antonio, etc., R. Co. v. Kiersey [Tex. Civ. App.] 81 S. W. 1045. The measure of damages for flooding land by a railroad embankment is the injury actually occasioned to the date of the suit, and not the difference between the market value of the property before and after the erection of the embankment. Atlanta, etc., R. Co. v. Higdon [Tenn.] 76 S. W. 895.

96. Mahoney v. Kansas City [Mo. App.] 79 S. W. 1168; McCartney v. Phila., 22 Pa. Super. 257. Instruction authorizing recovery for diminution in rental value, held not prejudicial. Southern R. Co. v. Morris, 119 Ga. 234, 46 S. E. 85.

97. Injury to real estate caused by clogging up a gutter and water overflowing. City of Cincinnati v. Wright, 2 Ohio N. P. (N. S.) 53. Flowage of land. Post v. Merritt, 85 App. Div. 239, 83 N. Y. S. 611.

98. Jones v. Kramer & Bros. Co., 133 N. C. 446, 45 S. E. 827.

99. Wheeler v. Bloomington, 105 Ill. App. 97.

1. Pickles v. Ansonia, 76 Conn. 278, 56 A. 552.

2. Jackson v. Missouri, etc., R. Co. [Tex. Civ. App.] 78 S. W. 724.

cinity.[3] Interest may be added by the jury to the damages allowed for negligent fire in most states,[4] but not in Kansas.[5]

For destruction of ornamental trees, the damages are the difference between the market value of the property with and without the trees,[6] and damages for the destruction of fruit trees may be determined by ascertaining their value as a distinct part of the land, if susceptible of such measurement, or by ascertaining the difference in the value of the land before and after their destruction.[7] For destruction of growing crop, the damages are the value of the crop at the time of its destruction, and not its probable value at maturity,[8] or its probable value at maturity less the expense of maturing and harvesting it.[9] For withdrawal of waters from land, recovery cannot be had for the loss of a crop planted with knowledge that it would be lost, where another crop would have yielded a good return.[10] For wrongfully pasturing on plaintiff's land, the damages are the value of the pasturage or grass eaten or destroyed and the injury, if any, to the freehold.[11]

(§ 5) *C. Maintaining nuisance.*[12]—For improperly flushing its sewers, whereby noxious gases are emitted to the damage of surrounding property, a city may be liable in damages.[13] For a nuisance in front of plaintiff's residence, consisting of pools of water and decaying wood, caused by unsightly piles of railway ties, he may recover for all discomforts arising therefrom, including vile odors, whether causing mental or bodily pain or both, but not for unsightly appearance nor marring the view.[14] For damages to a boarding house caused by a nuisance, the reduction in rental value of the rooms exposed may be recovered,[15] and the damages to the lessee of a hotel from a nuisance maintained in the adjacent street are measured by the injury to its usable value, or the value of its use to him as distinguished from its rental value.[16] Though the lessee of a hotel cannot recover rents and profits as such, of which he is deprived by reason of the maintenance of a nuisance in its vicinity, the loss of these may be considered in determining the injury to the usable value of the premises.[17]

(§ 5) *D. Trespass on lands.*[18]—For trespass to real property, the damages are such an amount as will compensate for the injury done, excluding exemplary damages except in exceptional cases,[19] and in an action against a municipal corporation do not include vexation, humiliation and annoyance,[20] but for breaking into plaintiff's house to take away a gas meter, compensatory damages are not limited to the actual damage to the house, but may include the injury, insult, and invasion of the privacy and interference with the comfort of plaintiff and

3. Black v. Minneapolis, etc., R. Co., 122 Iowa, 32, 96 N. W. 984.

4. Burning meadow. Black v. Minneapolis, etc., R. Co., 122 Iowa, 32, 96 N. W. 984. Burning factory. Louisville & N. R. Co. v. Fort [Tenn.] 80 S. W. 429. Burning barn. Gulf, etc., R. Co. v. Sheperd [Tex. Civ. App.] 75 S. W. 800.

5. Union Pac. R. Co. v. Holmes [Kan.] 74 P. 606.

6. Donahue v. Keystone Gas Co., 90 App. Div. 386, 85 N. Y. S. 478.

7. Atchison, etc., R. Co. v. Geiser [Kan.] 75 P. 68.

8. Lester v. Highland Boy Gold Min. Co. [Utah] 76 P. 341.

9. Catlin Consol. Canal Co. v. Euster [Colo. App.] 73 P. 846. Where a crop having no market value is only partially destroyed, the measure is the probable value of the entire crop less the expense of maturing, preparing and marketing. San Antonio, etc., R. Co. v. Kiersey [Tex. Civ. App.] 81 S. W. 1045.

10. Good case. Westphal v. New York, 75 App. Div. 252, 78 N. Y. S. 56.

11. Sheep. Pacific Live Stock Co. v. Murray [Or.] 75 P. 1079.

12. See 1 Curr. L. 852.

13. Kolb v. Knoxville [Tenn.] 76 S. W. 823.

14. Houston, etc., R. Co. v. Reasonover [Tex. Civ. App.] 81 S. W. 329; Houston, etc., R. Co. v. Simpson [Tex. Civ. App.] 81 S. W. 353.

15. Hoffman v. Edison Elec. Illuminating Co., 87 App. Div. 371, 84 N. Y. S. 437.

16, 17. Bates v. Holbrook, 89 App. Div. 548, 85 N. Y. S. 673.

18. See 1 Curr. L. 853.

19, 20. Ostrom v. San Antonio [Tex. Civ. App.] 77 S. W. 829.

his family.[21] For trespass in removing soil, the damages are the depreciation in the value of the land,[22] and the measure of damages for one unlawfully taking oil from the land of another is the difference between its market value and the cost of production.[23] Where timber is cut under belief of right and manufactured and sold to an innocent purchaser, the owner's damages against the purchaser are the value of the trees, not of the manufactured lumber.[24] Interest on damages for a continuing trespass is not to be compounded.[25] In North Carolina, all damages up to the time of the trial may be recovered.[26]

(§ 5) *E. Conversion.*[27]—The measure of damages for the conversion of property is its reasonable value at the time and place of taking,[28] with interest,[29] and where it has been shipped away and sold, the cost of shipment cannot be deducted.[30] Where a landlord has wrongfully converted his tenant's growing crop, he is not entitled to deduct his expense of harvesting.[31] The damages for conversion by a third person of mortgaged chattels after the mortgagee's right of possession is complete are the value of the chattels, their value over the debt being subject to an accounting between the mortgagor and mortgagee.[32] If plaintiff is entitled to recover only a portion of bales of cotton sued for and it appears that they are of different value, he may recover the pro rata value of his portion in the absence of proof that his was the least valuable part.[33] Where a conditional seller converts the goods, the buyer's damages are the value of the goods at the time of conversion less the amount of purchase price still unpaid, without deduction for the value of the use of the property.[34] The damages for converting works of art, the property of the artist who made them, are not the price usually charged for similar works, but the expense to him of reproducing them,[35] and in an action by an artist for damages for the conversion of pieces of his own work, alleged to have no market value, an instruction that the dam-

21. Reed v. New York & R. Gas Co., 93 App. Div. 453, 87 N. Y. S. 810.

22. Brinkmeyer v. Bethea, 139 Ala. 376, 35 So. 996.

23. Crawford v. Forest Oil Co., 208 Pa. 5, 57 A. 47. Compare Isom v. Rex Crude Oil Co., 140 Cal. 678, 74 P. 294; Isom v. Book, 142 Cal. 665, 76 P. 506.

24. Texas & N. O. R. Co. v. Jones' Ex'rs [Tex. Civ. App.] 77 S. W. 955.

25. Lonsdale Co. v. Woonsocket [R. I.] 56 A. 448.

26. Dale v. Southern R. Co., 132 N. C. 705, 44 S. E. 399.

27. See 1 Curr. L. 853.

28. Defendant refusing wrongfully to deliver stock deposited in escrow on fulfillment of the conditions is liable for its value, the accumulated dividends and interest from the date of conversion. Clarke v. Eureka County Bank, 123 F. 922.

Measure: For conversion by wrongful levy of attachment, the value of the property with interest from date of levy until trial. Milner & Kettig Co. v. De Loach Mill Mfg. Co., 139 Ala. 645, 36 So. 765. For conversion of timber under an honest mistake as to one's rights, the stumpage value plus interest from date of conversion. Lewis v. Virginia Carolina Chemical Co. [S. C.] 48 S. E. 280. For conversion of an article which has been returned and accepted, its value at the time of conversion with interest thereon until trial, less its value when returned with interest thereon from that date. Eldridge v. Hoefer [Or.] 77 P. 874. For conversion of timber where the trespass was not willful, the stumpage value at the time the trees were cut, but if the trespass was willful, their value at time and place of demand or suit brought. Trustees Dartmouth College v. International Paper Co., 132 F. 92. Burden of proving that the trespass was unintentional is on the trespasser. Id. Where an innocent trespasser cut timber, danger of fire from brush heaps left is not an element of damages. Chase v. Clearfield Lumber Co. [Pa.] 58 A. 813. For conversion of a carload of corn, the value thereof at time of conversion with interest. Fordyce v. Dempsey [Ark.] 82 S. W. 493.

29. Where defendant's action is a virtual appropriation of plaintiff's property, they are liable for the value thereof from the date of its appropriation with interest, the latter being the measure of damages. Car of coal. Gulf, etc., R. Co. v. Cleburne Ice & Cold Storage Co. [Tex. Civ. App.] 79 S. W. 836; Smyth v. Stoddard, 105 Ill. App. 510.

30. McGill v. Chilhowee Lumber Co. [Tenn.] 82 S. W. 210. The damage for converting machines and shipping them abroad is their local value and not their foreign value, less the expense of returning them. United Shoe Machinery Co. v. Holt [Mass.] 69 N. E. 1055.

31. Fagan v. Vogt [Tex. Civ. App.] 80 S. W. 664.

32. Biehler v. Irwin, 84 N. Y. S. 574.

33. First Nat. Bank v. San Antonio, etc., R. Co. [Tex.] 77 S. W. 410.

34. Clark v. Clement, 75 Vt. 417, 56 A. 94.

35, 36. Ladd v. Ney [Tex. Civ. App.] 81 S. W. 1007.

ages would be its value to him if it was impracticable to replace it is improper, there being no evidence of impracticability.[36]

(§ 5) *F. Wrongful taking or detention of property.*[37]—For wrongful attachment, the damages are the depreciation in value of plaintiff's goods while the attachment was undissolved,[38] and where a wrongful levy destroys a saloon business, plaintiff's license valuable to no one else may be considered as an element of the damages,[39] and he may recover reasonable clerk hire which under contract he has been obliged to pay.[40] For the wrongful seizure of a stock of goods under chattel mortgage, where the owner afterward procures the appointment of a receiver, the damages are first, the depreciation in value of the stock prior to the receiver's receipt of them; second, loss of probable profits for the same period; third, loss of financial standing and credit; fourth, exemplary damages if malice is shown.[41] Where defendant in replevin cannot re-deliver, plaintiff's damages may be assessed at the value of the property at the time of the trial,[42] without interest,[43] and if that be less than at any time previous, since the conversion, damages for the depreciation.[44] Good faith defendants in ejectment are entitled, on assessment of mesne profits, to have deducted therefrom taxes, insurance, improvements, necessary repairs, and agents' commissions.[45] Though the owner of property retained possession, if he was deprived of its use by the levy of a void process, he can recover the value of such use.[46] Where the rate of interest is lowered by statute pending suit in replevin, plaintiff will recover interest at the old rate up to the time of the change, and at the new rate thereafter.[47]

(§ 5) *G. Libel and slander.*[48]—Where the words spoken are slanderous per se, malice is conclusively presumed for the purpose of recovering actual or compensatory damages.[49] Such malice, however, is not the actual malice necessary to be shown to authorize punitive damages,[50] and defendant may show his good faith, his motive and the circumstances prompting the utterance of the slanderous words, to relieve himself of the liability for punitive damages.[51] Mental suffering resulting from libel may be considered in estimating damages.[52]

(§ 5) *H. Personal injuries.*[53]—The damages recoverable for negligence resulting in personal injuries must be compensatory,[54] excluding exemplary or punitive damages, and including remuneration for necessary expenditures, loss of time, mental and physical pain and suffering, and permanent disability where

37. See 1 Curr. L. 854.
38. Engelke & F. Mill. Co. v. Gruntbal [Fla.] 35 So. 17.
39, 40. Hooks v. Pafford [Tex. Civ. App.] 78 S. W. 991.
41. Tootle v. Kent, 12 Okl. 674, 73 P. 310.
42. La Vie v. Crosby, 43 Or. 612, 74 P. 220; Nolen v. Sevine [Tex. Civ. App.] 81 S. W. 990.
43, 44. La Vie v. Crosby, 43 Or. 612, 74 P. 220.
45. Muthersbaugh v. McCabe, 22 Pa. Super. Ct. 587.
46. Low v. Ne Smith [Tex. Civ. App.] 77 S. W. 32.
47. Saling v. Bolander [C. C. A.] 125 F. 701.
48. See 1 Curr. L. 855.
49. Wrege v. Jones [N. D.] 100 N. W. 705; Covington v. Roberson, 111 La. 326, 35 So. 586.
50. Wrege v. Jones [N. D.] 100 N. W. 705; Covington v. Roberson, 111 La. 326, 35 So. 586. In an action for libel, an instruction that it was within the power of the jury to award punitive damages, but in the judgment of the court it was not a case for such damages, was not prejudicial where such damages were not given. Butler v. Barret, 130 F. 944.
51. Wrege v. Jones [N. D.] 100 N. W. 705.
52. Butler v. Barret, 130 F. 944.
53. See 1 Curr. L. 855.
54. Hill v. Union R. Co. [R. I.] 57 A. 374; Chicago & N. W. R. Co. v. De Clow [C. C. A.] 124 F. 142; Fries v. American Lead Pencil Co., 141 Cal. 610, 75 P. 164; Cameron Mill & Elevator Co. v. Anderson [Tex. Civ. App.] 78 S. W. 8; Nashville, etc., R. Co. v. Witherspoon [Tenn.] 78 S. W. 1052; City of Pueblo v. Timbers [Colo.] 72 P. 1059. "Actual" damages held properly described in instruction. Hutchison v. Summerville, 66 S. C. 442, 45 S. E. 8. Instruction placing the only limitation on the amount awarded, the amount demanded in the complaint is erroneous. Kansas City, etc., R. Co. v. Thornhill [Ala.] 37 So. 412.

that is shown as a result.[55] Plaintiff may recover for such injuries as the evidence shows are reasonably certain to result from the injury,[56] but possible or even probable future effects are too remote and speculative to form any basis of legal injury.[57] Impairment of mind by an accident may be considered as an element of damages,[58] but mental annoyance or humiliation is not an element.[59] Recovery may be had for future pain and suffering in a proper case, though no impairment of earning power is shown,[60] but it may only be on the basis of plaintiff's expectancy of life considering the injury, not on his expectancy before the injury.[61] Injuries attributable to previous dissipation are not recoverable for,[62] but recovery may be had for the aggravation of an existing infirmity of which plaintiff was ignorant and which did not interfere with his general health, where the effect of the aggravation is to partially disable.[63] An invalid passenger in-

55. Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087.

Loss of time and wages may be recovered. Glenn v. Philadelphia & W. C. Traction Co., 206 Pa. 135, 55 A. 860. Plaintiff held not entitled to compensation for loss of earnings because not actually incapacitated. Schreck v. Jersey City, etc., R. Co. [N. J. Law] 55 A. 650.

Past and future damages: Past and future pain and suffering may be recovered for. Jarrell v. Wilmington [Del. Super.] 56 A. 379; Maguire v. St. Louis Transit Co. [Mo. App.] 78 S. W. 838; Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087; Buce v. Eldon, 122 Iowa, 92, 97 N. W. 989; Hallum v. Omro [Wis.] 99 N. W. 1061. Future loss of time. Stanley v. Cedar Rapids, etc., R. Co., 119 Iowa, 526, 93 N. W. 489; Cotant v. Boone Suburban R. Co. [Iowa] 99 N. W. 115.

Impairment of earning power: Effect on former occupation only need be considered. Barnett & Record Co. v. Schlapka, 208 Ill. 426, 70 N. E. 343. Plaintiff's previous earnings may be shown, though not working at his trade at the time of injury. West Chicago St. R. Co. v. Dougherty, 209 Ill. 241, 70 N. E. 586; Missouri, etc., R. Co. v. Flood [Tex. Civ. App.] 79 S. W. 1106. Impairment held sufficiently shown. Cotant v. Boone Suburban R. Co. [Iowa] 99 N. W. 115. Earning capacity at time of injury is not conclusive. Galveston, etc., R. Co. v. Appel [Tex. Civ. App.] 77 S. W. 636.

Medical attendance and nursing: Plaintiff's liability determines that of defendant, though physician testifies that he does not know who owes him. Chicago, etc., R. Co. v. Wise, 206 Ill. 463, 69 N. E. 500. Married woman cannot recover for attendance procured by her husband. Gilson v. Cadillac [Mich.] 96 N. W. 1084. She may be liable, however. Lawson v. Seattle & R. R. Co., 34 Wash. 500, 76 P. 71. Evidence sufficient to show that plaintiff's daughter was entitled to compensation. Wissler v. Atlantic, 123 Iowa, 11, 98 N. W. 131. Plaintiff's promise to reimburse poor officers for his care warrants his recovery. Vedder v. Delaney, 122 Iowa, 583, 98 N. W. 373. That part of the expense was incurred in another state is immaterial. Id. Medical services and nursing cannot be recovered for in the absence of any evidence that plaintiff has paid for or incurred any liability therefor. Heater v. Delaware, etc., R. Co., 90 App. Div. 495, 85 N. Y. S. 624. Evidence of expenditure and liability held sufficient. Campbell v. Stanberry [Mo. App.] 78 S. W. 292. Evidence held sufficient to base recovery. Ball v. Gussenhoven [Mont.] 74 P. 871. Not where no proof is made of amount or value. Waldopfel v. St. Louis Transit Co., 102 Mo. App. 524, 77 S. W. 128. Or reasonableness of charge. Missouri, etc., R. Co. v. Harrison [Tex. Civ. App.] 77 S. W. 1036. Error, if any, in allowing recovery for medicines is harmless where the verdict is less than the undisputed evidence of other elements. Abbitt v. St. Louis Transit Co. [Mo. App.] 79 S. W. 496.

Mental suffering growing out of apprehensions for plaintiff's own life. Ft. Worth Iron Works v. Partin [Tex. Civ. App.] 76 S. W. 236.

Disfigurement: Future pain and anguish may be recovered for, though there is no disfigurement of the body. Bi ten v. St. Louis Transit Co., 102 Mo. App. 285, 76 S. W. 727; Kennedy v. St. Louis Transit Co. [Mo. App.] 78 S. W. 77.

56. Need not appear from preponderance of the evidence to be reasonably certain. Cameron Mill & Elevator Co. v. Anderson [Tex. Civ. App.] 78 S. W. 8. May recover for future suffering "reasonably apparent." Harrison v. Incorporated Town of Ayrshire, 123 Iowa, 528, 99 N. W. 132.

57. Chicago & N. W. R. Co. v. De Clow [C. C. A.] 124 F. 142; Briggs v. New York, etc., R. Co., 177 N. Y. 59, 69 N. E. 223; Schwend v. St. Louis Transit Co. [Mo. App.] 80 S. W. 40. "Likely" future pain not recoverable. Albin v. Chicago, etc., R. Co. [Mo. App.] 77 S. W. 153.

58. Baumann v. Reiss Coal Co., 118 Wis. 330, 95 N. W. 139.

59. Chicago City R. Co. v. Mauger, 105 Ill. App. 579.

60. Chicago Union Traction Co. v. Chugren, 209 Ill. 429, 70 N. E. 573. Where, without a surgical operation, an injury would remain unchanged, the pain one would undergo from an operation if one should become necessary may be considered. Beattie v. Detroit [Mich.] 100 N. W. 574. Instruction to consider as elements, loss of time, pain, necessary expenses, and whether or not injuries were permanent, is correct. Illinois Terminal R. Co. v. Thompson [Ill.] 71 N. E. 328.

61. Howell v. Lansing City Elec. R. Co. [Mich.] 99 N. W. 406.

62. Ford v. Kansas City [Mo.] 79 S. W. 923.

63. Atlantic & B. R. Co. v. Douglas, 119 Ga. 658, 46 S. E. 867.

jured by a carrier is entitled to recover for an increase of existing ailments thereby occasioned, in Missouri,[64] but in Michigan, if a pre-existing disease is aggravated by the injury, plaintiff cannot recover therefor, though he may recover for all injuries resulting solely from the accident, though his disease makes him more susceptible to injury,[65] and generally, plaintiff's susceptibility to a particular injury will not deprive him of his damages.[66] Mental suffering need not be shown by direct proof when the injury is serious and permanent,[67] but may be inferred from evidence of physical suffering,[68] and where bodily injuries are alleged and proved, mental anguish, distinguished from physical pain, is a proper element of damage, though not declared on, and though there is no disfigurement of the person.[69] Mental suffering naturally attending and incident to physical pain, prolonged by the failure of a physician to discover the seat of an injury, is a proper element of damage in an action for malpractice.[70] Plaintiff with a broken ankle and consequent weakness thereof is entitled to compensation for future pain and impairment of earning power, though he remains in the same employment as before the injury.[71] For an assault, the damages should be such a sum as will compensate for injuries to the person, for physical and mental pain suffered therefrom and for loss of time sustained by reason of the injuries.[72] Where there has been complete destruction of earning capacity, the pecuniary loss is estimated by the capital, which at a fair rate of interest will produce a sum equal to average wages likely to be earned during the injured person's expectancy of life, less such a sum as at compound interest for the same period will equal and offset such sum.[73]

§ 6. *Excessive and inadequate damages.*[74]—Verdicts showing willful disregard of the testimony will not be permitted to stand, whether excessive or inadequate,[75] except in Kentucky, where inadequacy of recovery in personal injury cases is remediless,[76] unless insufficient to cover the actual pecuniary injury sustained.[77] The court, however, will not interfere with a verdict on account of excessiveness or inadequacy of damages, unless the amount is so out of proportion to the injury as to indicate passion or prejudice on the part of the jury, and cannot be accounted for in any other manner.[78] Where the trial has been

64. Mathew v. Wabash R. Co. [Mo. App.] 78 S. W. 271.

65. Hunter v. Durand [Mich.] 100 N. W. 191.

66. Galveston, etc., R. Co. v. Butchek [Tex. Civ. App.] 78 S. W. 740.

67. Galveston, etc., R. Co. v. Hubbard [Tex. Civ. App.] 76 S. W. 764.

68. Galveston City R. Co. v. Chapman [Tex. Civ. App.] 80 S. W. 856; Gagnier v. Fargo, 12 N. D. 219, 96 N. W. 841. Not from attack of chills and fever. Houston, etc., R. Co. v. Reasonover [Tex. Civ. App.] 81 S. W. 329; Houston, etc., R. Co. v. Simpson [Tex. Civ. App.] 81 S. W. 353. Pain and suffering for which compensation is allowed is not confined to mere physical aches, but includes mental anguish, the sense of loss and burden, inconvenience and embarrassment. Rice v. Council Bluffs [Iowa] 100 N. W. 506.

69. Kennedy v. St. Louis Transit Co. [Mo. App.] 78 S. W. 77.

70. Manser v. Collins [Kan.] 76 P. 851.

71. Duffy v. St Louis Transit Co. [Mo. App.] 78 S. W. 831.

72. Beavers v. Bowen [Ky.] 80 S. W. 1165.

73. Peterson v. Roessler Chemical Co., 131 F. 156.

74. See 1 Curr. L. 857.

75. Hill v. Union St. R. Co. [R. I.] 57 A. 374; Tathwell v. Cedar Rapids, 122 Iowa, 50, 97 N. W. 96; Hurley v. Metropolitan St. R. Co., 87 App. Div. 66, 83 N. Y. S. 1082; Farley v. Missouri, etc., R. Co. [Tex. Civ. App.] 77 S. W. 1040; Kennedy v. St. Louis Transit Co. [Mo. App.] 78 S. W. 77. Verdicts in assault and battery in Vermont may be set aside as well for inadequacy as for excessiveness. Barrette v. Carr, 75 Vt. 425, 56 A. 93.

76. Code, § 341. Stroh v. South Covington & C. St. R. Co., 25 Ky. L. R. 1868, 78 S. W. 1120. May be set aside if excessive. Mobile, etc., R. Co. v. Reeves, 25 Ky. L. R. 2236, 80 S. W. 471.

77. Loss of time is such a loss as must be compensated. Verdict of one cent for injuries entailing loss of time worth $800 set aside. Barles v. Louisville Elec. Light Co., 25 Ky. L. R. 2303, 80 S. W. 814.

78. Occidental Consol. Min. Co. v. Comstock Tunnel Co., 125 F. 244; Indianapolis St. R. Co. v. Schmidt [Ind.] 71 N. E. 201; Denver Consol. Elec. Co. v. Lawrence, 31 Colo. 301, 73 P. 39. Prejudice, partiality and corruption must be apparent. Southern Ind. R. Co. v. Davis, 32 Ind. App. 569, 69 N. E. 550. Inadequacy of recovery. Tathwell v. Cedar Rapids, 122 Iowa, 50, 97 N. W. 96. $10 for

brought on too soon to determine whether injuries will be permanent, a verdict awarding damages suitable to a permanent serious injury will be set aside,[79] and where the verdict exceeds the amount established by plaintiff's evidence, it will be reduced to correspond.[80] In an action for wrongful death in West Virginia, a verdict for less than $10,000 will not be set aside unless clearly the result of passion, prejudice, partiality or corruption.[81] An excessive verdict may be cured by a remittitur,[82] unless so grossly excessive as to indicate passion, partiality, or misconception of the evidence,[83] in which case a remittitur is not allowable, and the verdict should be set aside and a new trial granted.[84] The excessiveness of the verdict cannot be considered on appeal where it is not pointed out wherein it is excessive, and the evidence bearing on the extent and nature of the injury is not in the record;[85] an assignment of error that the damages are excessive presents no question for consideration in an action arising on contract,[86] and a mere general assignment of excessiveness is ineffective in any case in Texas.[87] Holdings on the excessiveness and adequacy of recovery are collected and classified in the footnote.[88] Fractures, dislocations and injuries to and loss of limbs.[89]

damages for change of grade of street, causing water to stand in front of plaintiff's premises, does not show passion or prejudice. Howard v. Lamoni [Iowa] 100 N. W. 62. The assessment of damages for personal injuries is peculiarly for the jury, and unless the amount of the verdict clearly indicates passion or prejudice, it cannot properly be set aside. Rice v. Council Bluffs [Iowa] 100 N. W. 506.

79. Kanen v. Philadelphia & R. Co. [N. J. Law] 57 A. 268. Surgical operation intervening, doubt as to its beneficial effect. Searles v. Elizabeth, etc., R. Co. [N. J. Law] 57 A. 134.

80. Leavy v. Manhattan Delivery Co., 87 N. Y. S. 499; Kimmel v. Interurban St. R. Co., 87 N. Y. S. 466. A judgment for the conversion of property for a sum greater than any testimony shows the value of the property to have been cannot be sustained. Nolen v. Sevine [Tex. Civ. App.] 81 S. W. 990.

81. Thomas v. Wheeling Electrical Co., 64 W. Va. 395, 46 S. E. 217.

82. Chicago City R. Co. v. Gemmill [Ill.] 71 N. E. 43; Chicago, etc., R. Co. v. Krayenbuhl [Neb.] 98 N. W. 44; Lynch v. Burns [Tex. Civ. App.] 79 S. W. 1084; Coxe Bros. & Co. v. Anoka Waterworks, Elec. Light & Power Co. [Minn.] 97 N. W. 469; Ft. Worth, etc., R. Co. v. Linthicum [Tex. Civ. App.] 77 S. W. 40; Chicago, etc., R. Co. v. Rhodes [Tex. Civ. App.] 80 S. W. 869; Landry v. New Orleans Shipwright Co., 112 La. 650, 36 So. 548.

83. Chicago City R. Co. v. Gemmill [Ill.] 71 N. E. 43. $18,000 may be reduced to $9,000. Chicago, etc., R. Co. v. Krayenbuhl [Neb.] 98 N. W. 44.

84. Remittitur of $450 of a $600 verdict held improper. Plaunt v. Railway Transfer Co., 90 Minn. 499, 97 N. W. 433.

85. City of Pueblo v. Timbers, 31 Colo. 216, 72 P. 1059.

86. Conner v. Andrews Land, Home & Improvement Co. [Ind.] 70 N. E. 376.

87. Dist. Ct. Rule 68 (67 S. W. xxv). International & G. N. R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991. Excessiveness may be considered on appeal, notwithstanding generality of assignment of error. Galveston, etc., R. Co. v. Appel [Tex. Civ. App.] 77 S. W. 635.

88. RECOVERIES HELD NOT EXCESSIVE. Breach of contract: $6,000 (board, room and care in sickness for 10 years, recipient suggesting $1,000 a year as a proper allowance). Tridell v. Munhall, 124 F. 802. $6,000 (misrepresentation as to leases in effect on real estate sold). Ettlinger v. Weil, 94 App. Div. 291, 87 N. Y. S. 1049. $500 (against bank for dishonoring check). American Nat. Bank v. Morey, 25 Ky. L. R. 2151, 80 S. W. 157.

Breach of marriage promise: $2,500 (aggravated by seduction and effort to prove incontinence with others). Poehlmann v. Kertz, 105 Ill. App. 249.

Torts in general: $2,000 for injuries to a wharf caused by a vessel running into it, where it would take 15 to 30 days to repair at a loss of time amounting to $500 and the cost of repairs amounting to from $1,300.00 to $1,800.00. Alaska S. S. Co. v. Collins [C. C. A.] 127 F. 937. $400 (injuries to building estimated at from $50 to $600). Cumberland Tel. & T. Co. v. Foster, 26 Ky. L. R. 1465, 78 S. W. 150. $800 (injuries to hack, killing horse and destroying harness). South Covington, etc., R. Co. v. McHugh, 25 Ky. L. R. 1112, 77 S. W. 202. $115 (injury to goods by water, proof being $165). Rubenstein v. Hudson, 86 N. Y. S. 750.

Wrongful ejection of passenger: $1,000 (ejection from train on wet day resulting in sickness and rheumatism, impairing earning power). Pennsylvania R. Co. v. Palmer [C. C. A.] 127 F. 956. $250 (being put off at sundown six miles from station at which plaintiff was to take another train. No hotel). Houston, etc., R. Co. v. McNeel [Tex. Civ. App.] 76 S. W. 206. $1,000 (Passenger wrongfully put off at way station on journey to procure medical treatment). Gulf, etc., R. Co. v. Moore [Tex. Civ. App.] 80 S. W. 426.

Assault: $1,000 (against carrier for assault by its servant, kicking out three teeth). O'Donnel v. St. Louis Transit Co. [Mo. App.] 80 S. W. 315. $225 (For blackened eye from assault). Schmitz v. Kirchan, 32 Wash. 546, 73 P. 678.

§ 7. *Pleading, evidence and procedure. A. Pleading.*[90]—General averments of damage are sufficient to found recovery for all damages necessarily resulting

Malicious prosecution: $1,000. Eggett v. Allen, 119 Wis. 625, 96 N. W. 803. $7,500 (Nolle pros. entered after several adjournments). National Surety Co. v. Mabry, 139 Ala. 217, 35 So. 698. $25,000.00 ($5,000 attorneys' fees incurred). Rawson v. Leggett, 90 N. Y. S. 5.

False imprisonment: $500 (Compelling plaintiff to return on crowded street to defendant's store on charge of shoplifting). Dunlevy v. Wolferman [Mo. App.] 79 S. W. 1165.

Trespass: $150 (Breaking into house to take out gas meter, actual damage to door being nominal). Reed v. New York & R. Gas Co., 93 App. Div. 453, 87 N. Y. S. 810.

Nondelivery of telegram: $1,316 (Mental anguish to husband for telegraph company's failure to promptly deliver telegram announcing serious illness of wife, her death and burial occurring before his arrival). Western Union Tel. Co. v. Hamilton [Tex. Civ. App.] 81 S. W. 1052. $1,975 (Nondelivery of telegram announcing death of father). Western Union Tel. Co. v. Bowen [Tex. Civ. App.] 76 S. W. 613.

Personal injuries: $1,600 (For severe permanent injury to child of six). Richter v. Excelsior Brew. Co. [N. J. Law] 56 A. 236. $1,000 (Housekeeper 35 years old. Injuries causing 3 months' confinement to bed). McNamara v. St. Louis Transit Co. [Mo. App.] 80 S. W. 303. $585 (Aged man confined to his bed several weeks, sustained money loss of $160 and doctor's bill of $26). City of Covington v. Miles [Ky.] 82 S. W. 281. $450 (Lame for several days as a result of being bitten by a dog). Murray v. Hulbert [Conn.] 58 A. 3. $16,000 (Railroad brakeman, 27; total physical wreck). Galveston, etc., R. Co. v. Appel [Tex. Civ. App.] 77 S. W. 635. $2,810 (Woman seriously injured, five years would elapse before she fully recovered). Evans v. Iowa City [Iowa] 100 N. W. 1112. $665 (Injury to leg of blind man who had paid $100 doctor's bill). Hill v. Glenwood [Iowa] 100 N. W. 522. $250 (Injury causing 6 months' sickness, disability reducing earning power from $1.00 to 35 cents per day). West Kentucky Tel. Co. v. Pharis, 25 Ky. L. R. 1838, 78 S. W. 917. $1,500 (Loss of services of son of 19 earning $11 per week. Recovery not complete). Scamell v. St. Louis Transit Co. [Mo. App.] 77 S. W. 1021. $600 (To husband for injuries to wife. Ill 8 weeks and $219.50 paid for medical attendance). Tandy v. St. Louis Transit Co., 178 Mo. 240, 77 S. W. 994. $5,000 (Serious and perhaps permanent injury to young man of 22). Luckel v. Century Bldg. Co., 177 Mo. 608, 76 S. W. 1035. $4,000 (Permanent injury to man 54 reducing earning power from $1,000 to $350 annually). Jordan v. Cedar Rapids & M. C. R. Co. [Iowa] 99 N. W. 693. $9,000 (Female 18 years old for permanent injuries incapacitating from work). Michigan City v. Phillips [Ind.] 71 N. E. 205. $2,000 (Dislocation of shoulder and fracture of an arm and permanent injury to nerves). Rice v. Council Bluffs [Iowa] 100 N. W. 506. $9,000 (No showing as to expectancy of life or earning capacity and evidence as to permanence being in conflict). Michigan City v. Phillips [Ind. App.] 69 N. E. 700. $9,000 (Man in middle life, permanently incapacitated for labor and sexual powers destroyed). Jones v. Bunker Hill & S. Min. & Concentrating Co., 124 F. 675. $3,258 (Man 45, receiving permanent mental and physical injury from electric wire). Spires v. Middlesex & M. Elec. Light, Heat & Power Co. [N. J. Law] 57 A. 424. $1,500 (Injuries to back, spine and head, loss of sexual power). St. Louis Southwestern R. Co. v. Kennemore [Tex. Civ. App.] 81 S. W. 802. $250 actual and $750 punitive (Street car conductor kicked a boy over the heart). McNamara v. St. Louis Transit Co. [Mo.] 81 S. W. 880.

Injuries to head: $1,800 (Injuries resulting in scar on forehead, and consequent pain; girl 4 years old). Travers v. Murray, 87 App. Div. 552, 84 N. Y. S. 558. $5,500 (Injury to neck and head causing unconsciousness and ultimately neurasthenia). Wood v. Metropolitan St. R. Co. [Mo.] 81 S. W. 152. $9,000 (Injuries to head, hearing and sight, loss of hair and one leg left shorter than the other). Graham v. Bauland Co., 89 N. Y. S. 595. $2,250 (Broken nose, woman of 25. Disfigurement and injury to health). Kentucky & I. Bridge & R. Co. v. Shrader [Ky.] 80 S. W. 1094. $5,000 (Fireman of 24, earning $75 to $100 per month. Permanent disability to side, head, ankle and shoulder). International & G. N. R. Co. v. Walters [Tex. Civ. App.] 80 S. W. 668. $1,999 (Strong man of 26 earning $36 per month, ear and head injured, arm split, and injured in back). Texas & P. R. Co. v. Watts [Tex. Civ. App.] 81 S. W. 326. $1,600 (Injuries to leg and head of man of 61. Not recovered after 8 months). Louisville R. Co. v. Meglemery, 25 Ky. L. R. 1587, 78 S. W. 217.

Sight and hearing: $8,500 (Injury to head, loss of one eye and impairment of other). Wysocki v. Wisconsin Lakes Ice & Cartage Co. [Wis.] 98 N. W. 950. $2,500 (Destruction of eye; no mitigating circumstances). Orschein v. Scott [Mo. App.] 80 S. W. 982. $7,500 (Male medical student. Fracture of skull, destroying one eye; destroying intended career). City of Louisville v. Keher, 25 Ky. L. R. 2003, 79 S. W. 270. $7,500 (Man 20, receiving $35 a month, permanent injury impairing mind and sight). International & G. N. R. Co. v. Pina [Tex. Civ. App.] 77 S. W. 979. $1,020 (Permanent impairment of vision of one eye). Shinkle v. McCullough, 25 Ky. L. R. 1143, 77 S. W. 196. $14,400 (Loss of vision by young man). Vant Hul v. Great Northern R. Co., 90 Minn. 329, 96 N. W. 789. $5,000 (Young mechanic, loss of eye). Cleveland, etc., R. Co. v. Lehan, 4 Ohio C. C. (N. S.) 145.

Spinal and nervous injuries: $1,500 (Sprain of back, resulting in permanent injury to man earning $60 per month). Ray v. Manhattan Light, Heat & Power Co. [Minn.] 99 N. W. 782. $30,000 (Spinal injury resulting in paralysis. Man 54, earning $100 to $125 per month). Texas & N. O. R. Co. v. Kelly [Tex. Civ. App.] 80 S. W. 1073. $7,500 (Man 21, earning $60 per month, injuries to back and head, broken leg, permanent injury destroying sexual power). International & G. N. R. Co. v. Reeves [Tex. Civ. App.] 79 S. W. 1099. $2,500 (Paralysis of leg, curvature of spine). Robinson v. St. Louis & S. R. Co.

from the injury complained of or which ordinarily result from the breach of a contract;[91] but unless special circumstances authorizing damages other than ordi-

[Mo. App.] 77 S. W. 493. $20,000 (Locomotive engineer of 38, earning $140 to $150 per month, totally disabled). International & G. N. R. Co. v. Moynahan [Tex. Civ. App.] 76 S. W. 803. $4,000 (Woman, sprained ankle and fracture of coccyx resulting in nervous disorder). The City of Portsmouth, 125 F. 264. $5,000 (Robust man 69 years old, earning $75 per month. Injuries to mind, spine, nervous system and arm). Atchison, etc., R. Co. v. Keller [Tex. Civ. App.] 76 S. W. 801. $2,000 (Nervous system and shoulder of woman injured). Heyde v. St. Louis Transit Co., 102 Mo. App. 537, 77 S. W. 127.

Internal injuries: $3,000 (Injury to shoulder, resulting in neuralgia or tuberculosis which would shorten life). Paauhau Sugar Plantation Co. v. Palapala [C. C. A.] 127 F. 920. $5,000 (Hernia. Laboring man 32 years old, earning $1.40 per day, incapacitated ⅛ to ¾). Galveston, etc., R. Co. v. Butchek [Tex. Civ. App.] 78 S. W. 740. $7,000 (Permanent injuries, causing sleeplessness and pain in head, kidneys and bladder). International, etc., R. Co. v. Mercer [Tex. Civ. App.] 78 S. W. 562. $7,500 (For rupturing ligaments connecting spine and hip bone, permanently injuring back, spine and pelvic organs). Longan v. Weltmer [Mo.] 79 S. W. 655. $500 (Fractured rib piercing lung, sickness for one month, pain for a longer period, $50 doctor bill). City of Covington v. Jones, 25 Ky. L. R. 1983, 79 S. W. 243.

Injuries peculiar to women: $675 (To strong woman for injuries resulting in two weeks' sickness and inability to perform many household duties). Buce v. Eldon, 122 Iowa, 92, 97 N. W. 989. $7,500 (Injuries to healthy woman of 39, resulting in chronic inflammation of ovaries and resulting permanent disability). O'Neill v. Kansas City, 178 Mo. 91, 77 S. W. 64.

Burns and scalds: $4,000 (Serious and permanent injury to boy of 13). Houston, etc., R. Co. v. Bulger [Tex. Civ. App.] 80 S. W. 743.

Fractures, dislocations and injuries to and loss of limbs: $2,000 (Boy nine years old for injury severing femoral artery, and permanent impairment of limb). Euting v. Chicago & N. W. R. Co. [Wis.] 98 N. W. 944. $2,500 (Injury to shoulder blade). Chicago, etc., R. Co. v. Barrett [Tex. Civ. App.] 80 S. W. 660. $2,000 (Badly sprained ankle and dislocated shoulder, possible permanency). Norton v. Kramer [Mo.] 79 S. W. 699. $2,500 (Loss of leg, boy 13 years old). City of San Antonio v. Talerico [Tex. Civ. App.] 78 S. W. 28. $8,500 (Woman, compound fracture of foot and leg; great suffering; two operations; permanent injury). Goldsmith v. Holland Bldg. Co. [Mo.] 81 S. W. 1112. $11,500 (Loss of left arm. Locomotive engineer 34 years old, earning $125 to $150 per month). Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 80 S. W. 1038. $3,500 (Serious impairment of use of leg, severe pain, ultimate recovery doubtful). Maguire v. St. Louis Transit Co. [Mo. App.] 78 S. W. 838. $2,000 (Fracture of leg resulting in permanent disability of son. $500 expended for treatment). Baxter v. St. Louis Transit Co. [Mo. App.] 78 S. W. 70. $2,500 (Permanent injury to ankle). Mitchell v. Wabash R. Co., 97 Mo. App. 411, 76 S. W. 647. $5,000 (Loss of foot. Negro brakeman 24 years old earning $1.00 to $1.25 per day). Southern R. Co. v. Oliver [Va.] 47 S. E. 862. $15,000 (Permanent disability of right leg and ankle. Switchman 26 years old earning $90 per month). Missouri, etc., R. Co. v. Stinson [Tex. Civ. App.] 78 S. W. 986. $3,000 (Boy of 18 learning trade at which he would soon have earned $15 per week. Loss and injury to fingers on both hands, incapacitating for trade). Gammel-Statesman Pub. Co. v. Monfort [Tex. Civ. App.] 81 S. W. 1029. $7,000 (Loss of left arm. Man 23 years old, earning $75 to $80 per month). Atchison, etc., R. Co. v. Sledge [Kan.] 74 P. 1111. $2,500 (Breaking collar bone, injury to arm and hand; permanent; man 53 years old). Clarke v. Philadelphia & R. Coal & Iron Co. [Minn.] 100 N. W. 231. $1,500 (Use of arm impaired). Wagner v. Metropolitan St. Ry. Co., 79 App. Div. 591, 80 N. Y. S. 191. $10,885.62 (Mason of 45 earning from $3 to $5 per day, one hand practically ruined). Sesselmann v. Metropolitan St. R. Co., 76 App. Div. 336, 78 N. Y. S. 482. $7,750 (Injury to boy 14, resulting in amputation of leg below knee). Perry v. Tozer, 90 Minn. 431, 97 N. W. 127. $1,000 (Woman for badly broken arm). Pomerene & Co. v. White [Neb.] 97 N. W. 232. $300 (Reduced from $500 to father for injury to son 17 years old, sawing hand). Bredeson v. Smith Lumber Co. [Minn.] 97 N. W. 977. $2,500 (Reduced from $3,500, injury to boy of 17 by sawing hand). Id. $9,000 (Reduced from $18,000 for loss of foot; boy 4 years old). Chicago, etc., R. v. Krayenbuhl [Neb.] 98 N. W. 44. $3,500 (To R. R. fireman for injury resulting in weakness and soreness of ankles). Southern Ind. R. Co. v. Davis, 32 Ind. App. 569, 69 N. E. 550. $2,800 (To strong man for injury obliging use of crutch or cane). Walker v. Ontario, 118 Wis. 564, 95 N. W. 1086. $3,250 (Loss of thumb of left hand and index finger of right). Bernier v. St. Paul Gas Light Co. [Minn.] 99 N. W. 778. $12,000 (Loss of arm, six year old girl). Lafferty v. Third Ave. R. Co., 85 App. Div. 592, 83 N. Y. S. 405. $17,793.33 (Boy 19, injury causing amputation of arm and leg). Mendizabal v. New York, etc., R. Co., 89 App. Div. 386, 85 N. Y. S. 896. $3,000 (Injury permanently shortening leg, causing stiff joint, six weeks in hospital). Bente v. Metropolitan St. R. Co., 90 App. Div. 213, 86 N. Y. S. 85. $8,000 (Injuries resulting in amputation of foot of car repairer). Quinn v. Brooklyn Heights R. Co., 91 App. Div. 489, 86 N. Y. S. 883. $1,500 (Broken arm, laborer 28 years old). Selby v. Vancouver Waterworks Co., 32 Wash. 522, 73 P. 504. $8,000 (Loss of right forearm, young man of 19). Henderson v. Kansas City, 177 Mo. 477, 76 S. W. 1045.

Bruises and shock: $750 (Fall on sidewalk, resulting in shock, fever, pain and suffering and general impairment of health and $125 doctor's bill). Ruscher v. Stanley [Wis.] 98 N. W. 223. $3,000 (Bruise on head and nervous shock to plaintiff's wife entailing disability that will gradually increase). Houston Transfer Co. v. Renard [Tex. Civ. App.] 79 S. W. 838. $1,500 (Woman claiming permanent injury). City of Richmond v. Martin, 25 Ky. L. R. 1516, 78 S. W. 219. $2,000 (Bruises and shock to woman. Con-

narily result from a breach of contract are pleaded and proved, they cannot be recovered.[92]

flict of evidence as to permanence). Batten v. St. Louis Transit Co., 102 Mo. App. 285, 76 S. W. 727. $2,000 (Man thrown from street car). Dawson v. St. Louis Transit Co., 102 Mo. App. 277, 76 S. W. 689. $1,000 (To woman for external bruises, internal injuries, pain and confinement to bed six weeks). Duncan v. Grand Rapids [Wis.] 99 N. W. 317.

RECOVERIES HELD EXCESSIVE. Breach of contract: $250 (Difference in value of estate as described in deed and as owned by grantor not amounting to over $50). McCutcheon's Heirs v. Rawleigh, 25 Ky. L. R. 549, 76 S. W. 50. Breach of marriage promise, $22,500 against man owning $70,000 worth of property, incumbered for $20,000. Good faith offer to marry after suit begun, seduction not proved. McCarty v. Heryford, 125 F. 46.

Torts in general: $2,000 (Expulsion from train with abuse and cursing. Reduced to $1,000). Alabama & V. R. Co. v. Livingston [Miss.] 36 So. 256. $718 (Compensatory damages for obstruction for 10 months of passway from highway to land of the annual value of $600). Louisville & N. R. Co. v. Carter, 25 Ky. L. R. 769, 76 S. W. 364. $750 (Accosting respectable woman for purpose of excluding her from public amusement place, followed by apology). Davis v. Tacoma R. & Power Co. [Wash.] 77 P. 209.

Libel and slander: Over $600 for slander in charging merchant with being a "rum seller." Davis v. Starrett, 97 Me. 568, 55 A. 516. $4,500 (Libel published in good faith and induced by plaintiff's acts). Evening Post Co. v. Rhea [Ky.] 81 S. W. 273.

False imprisonment: Over $1,000 (False imprisonment of woman by floorwalker in store for shop lifting). Cobb v. Simon, 119 Wis. 597, 97 N. W. 276.

Flowage of land: $800 (Flowage of 20 acres worth $60 before and $55 after injury). Mulvehill v. Thompson, 122 Iowa, 229, 97 N. W. 1077.

Fright: $2,500 (Negligence causing fright resulting in miscarriage. Reduced to $1,000). Stewart v. Arkansas Southern R. Co., 112 La. 764, 36 So. 676.

Personal injuries: $18,000 (Impossible for experts to say whether permanent). Kanen v. Philadelphia & R. R. Co. [N. J. Law] 57 A. 268. $4,000 (Female nurse aged 63, extent and duration of injuries vague and uncertain. Reduced to $2,000). City of Jackson v. Carver [Miss.] 35 So. 157. $8,040 (Injuries to woman. Disability in part resulting from surgical operation before accident. Reduced to $5,000). Gallamore v. Olympia, 34 Wash. 379, 75 P. 978. $9,000 (Woman 55 years old, nurse and housekeeper. Reduced to $6,000). Stone v. Seattle, 33 Wash. 644, 74 P. 808.

Injuries to head: $5,500 (Reduced to $3,500, injuries to woman, conflict of evidence as to permanence). Wadleigh v. Duluth St. R. Co. [Minn.] 100 N. W. 104. $1,600 (Six weeks' sickness and impairment of hearing resulting). Baldwin v. Thompson [N. J. Law] 57 A. 331. $1,000 (Trifling cut over eye requiring stitches. No surgeon's fee shown. Reduced to $250). Central Tex., etc., R. Co. v. Gibson [Tex. Civ. App.] 79 S. W. 351.

Sight and hearing: $1,500 (Boy 10 years old, slight injury to hearing). Baldwin v. Thompson [N. J. Law] 57 A. 331.

Spinal and nervous injuries: $15,000 to husband and wife for an injury to the wife of whom physicians hope for recovery. Searles v. Elizabeth, etc., R. Co. [N. J. Law] 57 A. 134.

Internal injuries: $25,000 (Young man, $10,000 remittitur ordered). Springer v. Schultz, 106 Ill. App. 544. $12,500 (Injuries to man's pelvic tissues of speculative permanency. Reduced to $8,000). Morrison v. Northern Pac. R. Co., 34 Wash. 70, 74 P. 1064. $25,000 (Injury to breast, resulting in 3 years' detention from business. No permanent disability, though there could be no recovery. Reduced to $20,000). Smith v. Metropolitan St. R. Co., 92 App. Div. 213, 86 N. Y. S. 1087.

89. $1,500 for loss of part of two fingers held too great to justify presumption of harmlessness of instructions. American Car & Foundry Co. v. Clark, 32 Ind. App. 644, 70 N. E. 828. $13,000 (Loss of arm. Car inspector 34 years old). Louisville & N. R. Co. v. Lowe, 25 Ky. L. R. 2317, 80 S. W. 768. $6,000 (Injury stiffening two fingers. Reduced to $4,000). San Antonio, etc., R. Co. v. Turney [Tex. Civ. App.] 78 S. W. 256. $1,100 (Loss of finger). Louisville R. Co. v. O'Mara, 25 Ky. L. R. 819, 76 S. W. 402. $9,000 (Switchman 36 years old, earning $75 per month. Loss of three fingers of left hand. Reduced to $7,500). International, etc., R. Co. v. Shaughnessy [Tex. Civ. App.] 81 S. W. 1026. $20,000 (Man of 62 for injury requiring amputation of leg below knee. Reduced to $10,000). Newcomb v. New York, etc., R. Co. [Mo.] 81 S. W. 1069. $12,000 (Physician earning $6,000 per year, injuries to leg resulting in pecuniary loss. Recovery reduced to $7,783). Herold v. Metropolitan St. R. Co., 89 App. Div. 596, 86 N. Y. S. 660. $1,600 reduced to $750 (Broken leg, man 65 years old earning $1.50 per day). Johnson v. Heath [Neb.] 98 N. W. 832. $1,025 reduced to $675 (Broken arm from assault). Rees v. Rasmussen [Neb.] 98 N. W. 830. $15,000 (To woman for fracture of thigh resulting in shortness). Chicago v. Merwin, 105 Ill. App. 168. $18,000 (Loss of foot, boy 4 years old; reduced to $9,000). Chicago, etc., R. Co. v. Krayenbuhl [Neb.] 98 N. W. 44.

ADEQUACY OF RECOVERY. Torts: $10 inadequate (Assault and battery where that much paid out for care of wounds). Barrette v. Carr, 75 Vt. 425, 56 A. 93. $500 inadequate (Taking young man into woods and making demonstration of hanging to extort confession of arson. Increased by court to $5,000). Warner v. Talbot, 112 La. 817, 36 So. 743. $171 inadequate (Permanent injury in strength and working power, 4 months' lost time at $60 per month, $250 expenses). Hurley v. Metropolitan St. R. Co., 87 App. Div. 66, 83 N. Y. S. 1082. $200 inadequate (Where only fair compensation for medical attendance, and time lost worth much more). Hill v. Union R. Co. [R. I.] 57 A. 374. $10,000 adequate (Milk driver aged 36, earning $12 per week, leaving widow and daughters 9 and 12). Stevens v. Union R. Co., 75 App. Div. 602, 78 N. Y. S. 624. $1,000 not so inadequate as to require reversal (Fractures

In a tort action, damages for injuries not necessarily resulting from the wrongful act, but flowing therefrom as a natural and proximate consequence, must be specially pleaded.[98] Evidence is admissible, however, of any special damage, the immediate and necessary result of the injury complained of,[94] and where a diseased condition of certain organs is pleaded, proof of the necessary effect of such condition on other organs may be shown;[95] likewise a general averment of internal injury will admit proof of injury to any internal organ in the absence of a special exception requiring a definite statement of injuries;[96] but ordinarily allegations of injury to back and hip, making plaintiff sick, sore, lame and disabled, will not support evidence of resulting kidney disease, in the absence of proof that it was necessarily and directly caused by the injury.[97] Plaintiff's injuries, however, need not be specifically described as permanent,[98] and physical pain and mental suffering need not be pleaded nor specially proved, but are taken to follow as a necessary consequence of physical injury and to be inseparably connected therewith.[99] A specific allegation of loss of time by a personal injury is not necessary,[1] and expense of nursing and medical attendance may in some states,[2]

and bruises resulting in permanent injury). Farley v. Missouri, etc., R. Co. [Tex. Civ. App.] 77 S. W. 1040. $4,000 (Not so inadequate as to require reversal; permanent injury to skull and shortening leg. Girl 11 years old.) St. Louis, etc., R. Co. v. Bolton [Tex. Civ. App.] 81 S. W. 123.

90. See 1 Curr. L. 859.

91. A claim in a bill of particulars of $5,000 damages for "loss of bargain," being for general damage, not susceptible of division into parts, is sufficiently definite, in an action for breach of a contract to convey land. Goodman v. Wolf, 88 N. Y. S. 934. An allegation that plaintiff is "endamaged to the amount of $1,000" is sufficient to admit proof of actual damages, where the cause of action is admitted by demurrer. Disosway v. Edwards, 134 N. C. 254, 46 S. E. 501.

92. Hayes v. Cooley [N. D.] 100 N. W. 250. A bank is liable for no more than nominal damages to its depositor for failure to pay a check or note when in funds, in the absence of any averment of special damages. Clark Co. v. Mt. Morris Bank, 85 App. Div. 362, 83 N. Y. S. 447. An allegation of the expense of erecting a windmill to take the place of one failing to fulfill warranty will not support proof of the expense of removing the warranted mill. Cole v. Laird, 121 Iowa, 146, 96 N. W. 744. Pleading held proper statement of amount of injury to cattle in shipment. Chicago, etc., R. Co. v. Halsell [Tex. Civ. App.] 80 S. W. 140.

93. Eisele v. Oddie, 128 F. 941. Pleading held not sufficient to support recovery by father for pecuniary loss by injuries to son, based on probable contributions by son to father after majority. Gulf, etc., R. Co. v. Hall [Tex. Civ. App.] 80 S. W. 133.

94. Amount of injury to spine admits proof of its paralyzing effect. Grady v. St. Louis Transit Co., 102 Mo. App. 212, 76 S. W. 673. Amount of injury may support evidence of susceptibility to colds caused thereby. Missouri, etc., R. Co. v. Crum [Tex. Civ. App.] 81 S. W. 72. Evidence of shortening of leg by injury described in petition held admissible. Southern Pac. Co. v. Martin [Tex. Civ. App.] 81 S. W. 77. General averment of injury from electric shock held sufficient to admit proof of injuries of a specific kind. Denver Consol. Elec. Co. v. Lawrence, 31 Colo. 301, 73 P. 39. Where the complaint alleges that plaintiff's eye was blown out and the ulna of one of his arms blown away, evidence that the wearing of an artificial eye is painful and that ulceration of his arm was likely to occur is admissible. Currelli v. Jackson [Conn.] 58 A. 762.

95. Missouri, etc., R. Co. v. McCutcheon [Tex. Civ. App.] 77 S. W. 232. Where the complaint counts on destruction of the right eye, resulting injuries to the left are not also admissible in the absence of evidence that they are the immediate and necessary result of the injury to the right eye. Dittman v. Edison Elec. Illuminating Co., 87 App. Div. 68, 83 N. Y. S. 1078. General allegations of injury to head and other parts held sufficient to found proof of fits or spasmodic attacks as result of congestive condition of brain, and of impairment of sight. International, etc., R. Co. v. Pina [Tex. Civ. App.] 77 S. W. 979.

96. Womb. Houston Elec. Co. v. McDade [Tex. Civ. App.] 79 S. W. 100.

97. Lockwood v. Troy City R. Co., 92 App. Div. 112, 87 N. Y. S. 311.

98. Springer v. Schultz, 105 Ill. App. 544. Whether or not the declaration specifically alleges that the injuries are permanent, if they are described generally, recovery may be had to the whole extent of the injury. Springer v. Schultz, 205 Ill. 144, 68 N. E. 753.

99. Gagnier v. Fargo, 12 N. D. 219, 96 N. W. 841; Galveston, etc., R. Co. v. Hubbard [Tex. Civ. App.] 76 S. W. 764; Galveston City R. Co. v. Chapman [Tex. Civ. App.] 80 S. W. 856.

1. Nashville, etc., R. Co. v. Miller [Ga.] 47 S. E. 959. In an action for assault and battery, plaintiff may show the time during which he was unable in consequence of his injuries to follow his usual avocation, though the damages laid are merely bodily pain and mental distress. Jones v. Peterson, 44 Or. 161, 74 P. 661. An averment that plaintiff, because of the injury received, "has been and is unable to do any kind of work," is insufficient to authorize recovery for lost

though not in others,[3] be shown on a general allegation of damages. Bills of particulars are allowed.[4] Punitive damages are recoverable in Georgia, though not specifically prayed,[5] and an averment that defendant's negligent act was "reckless" is equivalent to a charge that it was willful, so as to justify punitive damages.[6] Personal injury cases involving the sufficiency of allegations to support recovery of special damages are collected in the note.[7]

Evidence of injuries not pleaded may be admissible for purposes other than to enhance damages,[8] and where such evidence is admitted without objection, defendant cannot object, after verdict, that there is no averment on which to base recovery for such elements.[9]

In breach of promise cases, exemplary damages for improper motives in entering into the contract are recoverable on general allegation of damages,[10] and seduction may be shown in aggravation, though not specially pleaded.[11]

Amendments enlarging the amount claimed[12] and alleging exemplary damages may be permitted.[13]

The fact that special damages could have been recovered under a count in the petition, if alleged therein, does not cure the error of overruling a count alleging such special damages,[14] and an admission by plaintiff's attorney that the complaint does not contain any allegation of actual damages, coupled with a contention that recovery thereof is proper, does not estop him on appeal from maintaining that the issue should have been submitted, it having been in fact well pleaded and proved.[15]

time. Baries v. Louisville Elec. Light Co., 25 Ky. L. R. 2303, 80 S. W. 814. An averment that plaintiff has become greatly incapacitated from performing any kind of manual labor amounts to an allegation of loss of time from work and labor. International, etc., R. Co. v. Shaughnessy [Tex. Civ. App.] 81 S. W. 1026.

2. Wissler v. Atlantic, 123 Iowa, 11, 98 N. W. 131.

3. While damages for medical care, nursing, attendance and medicine must be specially alleged, they need not be itemized and the amount of each separately stated. Turney v. Southern Pac. Co., 44 Or. 280, 75 P. 144. The amount of plaintiff's expenditures for medicine may be shown, though more than the amount alleged; but defendant in such case is entitled to an instruction limiting the recovery to the amount pleaded. Testimony as to amount held not too vague and uncertain. Texas Portland Cement & Lime Co. v. Ross [Tex. Civ. App.] 81 S. W. 94.

4. As to the injuries that plaintiff's claims are permanent, and as to length of time he was confined to his house. O'Neill v. Interurban St. R. Co., 87 App. Div. 556, 84 N. Y. S. 505.

5. Southern R. Co. v. Phillips, 119 Ga. 146, 45 S. E. 967.

6. Pickett v. Southern R. Co. [S. C.] 48 S. E. 466. Pleading in personal injury case held sufficient to sustain recovery both of actual and punitive damages. Steedman v. South Carolina & G. E. R. Co., 66 S. C. 542, 45 S. E. 84.

7. Petition in personal injury case held sufficient to authorize evidence of defendant's profits prior to his injury. Jordan v. Cedar Rapids, etc., R. Co. [Iowa] 99 N. W. 693. Allegations that plaintiff's injuries are permanent and will leave him in a crippled condition for life are sufficient to support evidence of impairment of earning capacity. Terre Haute Elec. Co. v. Watson [Ind. App.] 70 N. E. 993. Future suffering held sufficiently alleged. Evans v. Elwood, 123 Iowa, 92, 98 N. W. 584. Permanency of injuries held sufficiently averred. Id. Pleading held sufficient to found evidence of value of plaintiff's services. Pecos & N. T. R. Co. v. Bowman [Tex. Civ. App.] 78 S. W. 22. Allegation held sufficient to authorize recovery for mental pain. Nashville, etc., R. Co. v. Miller [Ga.] 47 S. E. 959.

8. Evidence of bruises on the head admissible to show force of collision and speed of car, though such injuries were not specified in the bill of particulars. Greenbaum v. Interurban St. R. Co., 84 N. Y. S. 588. Evidence of injuries not pleaded is admissible, where brought out by defendant on cross-examination of plaintiff. Texas & P. R. Co. v. Murtishaw [Tex. Civ. App.] 78 S. W. 953.

9. Abbitt v. St. Louis Transit Co. [Mo. App.] 79 S. W. 496.

10. Jacoby v. Stark, 205 Ill. 34, 68 N. E. 557.

11. Poehlmann v. Kertz, 105 Ill. App. 249.

12. Amendment on appeal from justice may be permitted to specify more particularly the items of damage and enlarge the amount. City of Van Alstyne v. Morrison [Tex. Civ. App.] 77 S. W. 655. In an action on a contract and for damages for its breach, plaintiff is entitled to amend the complaint at the conclusion of the trial, increasing the amount of damages claimed. Dunham v. Hastings Pavement Co., 88 N. Y. S. 835.

13. Willett v. Johnson, 13 Okl. 563, 76 P. 174.

Averments in an answer that will tend to reduce the damages are relevant and material, though not presenting a complete defense.[16]

(§ 7) *B. Evidence as to damages. In general.*[17]—Plaintiff must show that the injuries complained of are the result of the wrongful act complained of.[18] Damages cannot be assessed where there is no proof as to their amount,[19] the burden of establishing which is upon plaintiff,[20] and evidence of expenses or the cost to plaintiff is not sufficient in the absence of evidence of reasonableness;[21] but the market value of live stock is sufficiently shown by evidence of the price it sold for at the National Stock Yards in the usual manner.[22] Testimony as to value is peculiarly within the province of experts,[23] but a physician is not necessarily competent to testify as to what is reasonable and customary compensation for a nurse.[24] Generally, testimony as to the amount of damages sustained by plaintiff in a lump sum is inadmissible,[25] and plaintiff cannot state his judgment as to their amount,[26] but all facts material to show the extent of plaintiff's dam-

14. Groeltz v. Armstrong [Iowa] 99 N. W. 128.

15. Steedman v. South Carolina, etc., R. Co., 66 S. C. 542, 45 S. E. 84.

16. Suit on an attachment bond: Allegations that plaintiff (defendant in attachment) procured the release of the attached property shortly after its seizure. Anvil Gold Min. Co. v. Hoxsie [C. C. A.] 125 F. 724.

17. See 1 Curr. L. 862.

18. Physical condition of plaintiff, a woman, held not shown to be result of injury counted on. Lawson v. Seattle & R. R. Co., 34 Wash. 500, 76 P. 71. Repairs to canal boat held not necessitated by defendant's failure to unload promptly and freezing in. Scott v. International Paper Co., 92 App. Div. 615, 86 N. Y. S. 785. Nervous prostration held sufficiently shown to be result of shock produced by burns. Powell v. Hudson Valley R. Co., 88 App. Div. 133, 84 N. Y. S. 337. Simulation of hysteria accompanied by contracture of the foot. Stackpole v. Northern Pac. R. Co., 121 F. 389.

19. Orient Min. Co. v. Freckleton [Utah] 74 P. 652. The expenses caused plaintiff by the injury cannot be recovered for in the absence of proof as to their amount. Hobbs v. Marion, 123 Iowa, 726, 99 N. W. 577. Mere proof that a certain parcel of land from which plaintiff was evicted was essential to the use of a water power on the whole tract purchased for $10,000, and that the water power was worth one-half the value of the whole tract, does not establish that the eviction damaged plaintiff $5,000. Libby v. Hutchinson [N. H.] 55 A. 547. A statement as to value by one who does not appear to have ever bought a horse, and by the owner as to what he paid for it a year and a half before, with an admission that he does not know its market value, are insufficient to sustain a finding as to value. Lee v. Callahan, 84 N. Y. S. 167. An allowance for plaintiff's earnings cannot be made in the absence of proof of their amount. Camparetti v. Union R. Co., 88 N. Y. S. 425.

20. City of Van Alstyne v. Morrison [Tex. Civ. App.] 77 S. W. 655.

21. Missouri, etc., R. Co. v. Harrison [Tex. Civ. App.] 77 S. W. 1036. Reasonableness held shown by payment. Abbitt v. St. Louis Transit Co. [Mo. App.] 79 S. W. 496. Pasturage, feed and care of stock during delay of carrier in furnishing cars. Texas & P. R. Co. v. Powell [Tex. Civ. App.] 79 S. W. 86. That plaintiff paid $50 for his clothing will not justify a judgment for that amount for its loss. Connolly v. Interurban St. R. Co., 86 N. Y. S. 213; Dunne v. Interurban St. R. Co., 86 N. Y. S. 260. Testimony of the cost of repairs is insufficient as to their value. Warshawsky v. Dry Dock, etc., R. Co., 86 N. Y. S. 748. Where a smoke nuisance compels plaintiff to have his laundry work done away from his house, the sum paid therefor cannot be considered in the absence of evidence of its reasonableness. Hoffman v. Edison Elec. Illuminating Co., 87 App. Div. 371, 84 N. Y. S. 437. The sum that plaintiff paid for a wagon to take the place of one broken by defendant is not recoverable in the absence of evidence that it is a reasonable charge. Rogers v. Interurban St. R. Co., 84 N. Y. S. 974. Plaintiff may testify that he was treated by a physician, though he has not paid him and does not know the reasonable value of his services. Such evidence is competent to form a basis for proof of value. Jones v. Peterson, 44 Or. 161, 74 P. 661. Plaintiff cannot recover for board, lodging and nursing of his son, where he has not paid for it and no reasonable value is shown. Fagan v. Interurban St. R. Co., 85 N. Y. S. 340.

22. St. Louis, etc., R. Co. v. White & Co. [Tex. Civ. App.] 76 S. W. 947.

23. Expert evidence of probable value of blood hound held competent. St. Louis, etc., R. Co. v. Philpot [Ark.] 77 S. W. 901. A qualified witness may answer a hypothetical question as to the value of a physician's services. McKnight v. Detroit & M. R. Co. [Mich.] 97 N. W. 772. Testimony tending to show that plaintiff's witnesses are experts as to the value of real estate in the neighborhood is relevant in an action for injuries to land by flowage, since that knowledge qualifies them to give an opinion as to the decrease in rental value. McCartney v. Phila., 22 Pa. Super. Ct. 257.

24. Cameron Mill & Elevator Co. v. Anderson [Tex. Civ. App.] 78 S. W. 971.

25. A witness cannot state the value of damage done to plaintiff's land by defendant's pasturing his animals thereon. Pacific Live Stock Co. v. Murray [Or.] 76 P. 1079.

26. Tenney v. Rapid City [S. D.] 96 N. W.

age[27] or its value may be shown.[28] Evidence of the value of goods to plaintiff as distinguished from their market value is inadmissible,[29] and plaintiff cannot state his estimate of the damages sustained by him by being driven from his home, apart from the value of the property lost by tearing down his house.[30] A statement by plaintiff as to what he will settle for is not conclusive on the amount of his damages.[31] In actions where exemplary or punitive damages are awarded, it is proper to admit evidence of defendant's wealth.[32] In an action for alienation of affections, the disposition of plaintiff's children as a consequence of breaking up his home may be shown.[33] Evidence as to plaintiff's probable length of life is pertinent to his damages for wrongful discharge from employment to which he has a permanent right under contract.[34] Words of common abuse are not actionable per se, but if an actionable wrong is committed, it can be shown that it was accompanied with words of common abuse to enhance the damages.[35] What another physician received for services similar to those in suit is immaterial.[36] The character and reputation of a female suing for an assault is material on the question of damages;[37] but a woman's reputation for chastity is immaterial in an action for negligent personal injury to her, there being evidence of her employment and earnings thereat.[38] Defendant may show that plaintiff and others had animals grazing on the land at the same time his animals were there, and that part of the injury complained of was done by them.[39] Elements of damage testified to but excluded by the court from consideration cannot be considered to support the recovery.[40]

96. Especially where the evidence shows he was not detained from his usual employment, and the action is for loss of time. Strait v. Eureka [S. D.] 95 N. W. 695.

27. Evidence that mares lost their foals after reaching their destination is admissible to show the extent of injuries received in shipment. Texas & P. R. Co. v. Murtishaw [Tex. Civ. App.] 78 S. W. 953. Evidence that plaintiff's expulsion from a railway train was talked about at his home held not prejudicial under circumstances. Coine v. Chicago & N. W. R. Co., 123 Iowa, 458, 99 N. W. 134.

28. In an action for breach of a contract to purchase instruments to be made during a certain term, evidence of facts tending to show the value of the contract is admissible. Cost of labor and material to make articles, number made per week, ability to furnish, etc. Parker v. McKannon [Vt.] 55 A. 535. All evidence tending to show the nature of plaintiff's damages arising from the nondelivery of material upon which the operation of his factory depended may be shown. Defendant's familiarity with the business, plaintiff's custom of manufacture, diminished efficiency of workmen and factory, inutility of parts manufactured and parts received from defendant, capacity of factory, amount of sales, profits, etc. Kelley, Maus & Co. v. La Crosse Carriage Co. [Wis.] 97 N. W. 674. Plaintiff may show that a mare killed had an especial value as a brood mare. May show the number and character of her foals. Campbell v. Iowa Cent. R. Co. [Iowa] 99 N. W. 1061. Evidence that plaintiff, a contractor, had subcontracted the work at a less price is admissible to show his loss of profit. Levenson v. Bollowa, 85 N. Y. S. 386. Where the action is for failure to irrigate a crop, evidence showing its condition and probable yield is admissible. Anderson v. Adams, 43 Or. 521, 74 P. 215. As bearing on the damage to plaintiff's adjoining land by breach of a covenant by a railroad company to establish a station, the value and advantage of location of it and neighboring lands may be shown. Louisville, etc., R. Co. v. Whipps, 25 Ky. L. R. 2312, 80 S. W. 507. Where cows, chiefly valuable for milk, are killed, plaintiff may testify to the quality and quantity of their milk. Taylor v. Spokane Falls & Northern R. Co., 32 Wash. 450, 73 P. 499. Plaintiff may testify as to the value of his wife's services in a suit for alienation. Rudd v. Dewey, 121 Iowa, 454, 95 N. W. 973.

29. Marcus v. Stein, 84 N. Y. S. 970.

30. Axtell v. Northern Pac. R. Co. [Idaho] 74 P. 1075.

31. South Covington, etc., R. Co. v. McHugh, 25 Ky. L. R. 1112, 77 S. W. 202.

32. King v. Hanson [N. D.] 99 N. W. 1085; Greeneberg v. Western Turf Ass'n, 140 Cal. 357, 73 P. 1050. Defendant himself may be sworn. Lawson v. Seattle & R. R. Co., 34 Wash. 500, 76 P. 71.

33. Rudd v. Dewey, 121 Iowa, 454, 96 N. W. 973.

34. Daniels v. Boston & M. R. Co., 184 Mass. 337, 68 N. E. 337.

35. Davis v. Tacoma R. & Power Co. [Wash.] 77 P. 209.

36. McKnight v. Detroit & M. R. Co. [Mich.] 97 N. W. 772.

37. Barton v. Bruley, 119 Wis. 326, 95 N. W. 815.

38. St. Louis, etc., R. Co. v. Smith [Tex. Civ. App.] 79 S. W. 340.

39. Pacific Live Stock Co. v. Murray [Or.] 76 P. 1079.

40. Evidence held insufficient to support recovery of $200 for injury to farm by re-

Evidence in action for personal injuries.[41]—Proof of permanent injury and present pain authorizes recovery for future pain,[42] and allegation and proof of injury to an infant are competent to sustain a claim for mental anguish on the part of a mother.[43] Where there is no claim that the verdict is excessive, evidence affecting merely the measure of damages cannot be complained of.[44] A married woman suing may show that she has been incapacitated from performing manual labor for the purpose of showing the nature and extent of her injuries,[45] and evidence as to injuries developing subsequent to former trials is proper.[46] A medical expert may state whether plaintiff's neurasthenia is the result of the injury,[47] whether plaintiff's injuries are liable to be permanent,[48] and after so testifying, may be asked if they will incapacitate him for his ordinary labor.[49] As evidence of resulting melancholia, plaintiff's threats of suicide may be shown.[50]

A minor's habits and disposition,[51] but not his morals, may be shown as bearing on his probable capacity and earning power, and on his probable continuance of life,[52] and his expressed purpose of contributing to the aid of his parents may be shown.[53] Plaintiff suing for injuries to his son may state his own earnings, as bearing on those likely to be earned by the son,[54] and in an action by the son of a farmer for the loss of an arm, the current wages of farm laborers may be shown.[55] Where a husband sues for injuries to his wife, testimony that he kept help as long as he was able, and that thereafter he and the children did the housework, is relevant.[56] Plaintiff may state the extent that his ability to work has been reduced,[57] and where he claims damages for injuries disabling him from attending to his business, he may state what his customary profits or earnings are.[58] He may show that by reason of lack of education or training he is unable to earn a living at any other business than that previously followed, and for which he has been incapacitated.[59] The number of plaintiff's children is immaterial.[60] A physician should be allowed to state the value of his services in treating plaintiff.[61]

Exclamations of present pain are admissible,[62] though they carry with them

fusal of railroad company to allow plaintiff to cultivate right of way. International, etc., R. Co. v. Wiegriffe [Tex. Civ. App.] 78 S. W. 704.

41. See 1 Curr. L. 863.

42. Jordan v. Cedar Rapids, etc., R. Co. [Iowa] 99 N. W. 693.

43. Gosa v. Southern Ry. [S. C.] 45 S. E. 810.

44. Cole v. St. Louis Transit Co. [Mo.] 81 S. W. 1138.

45. Pomerene Co. v. White [Neb.] 97 N. W. 232.

46. West Chicago St. R. Co. v. Dougherty, 209 Ill. 241, 70 N. E. 586.

47. Wood v. Metropolitan St. R. Co. [Mo.] 81 S. W. 152.

48. Palmer v. Warren St. R. Co., 206 Pa. 574, 56 A. 49; Hallum v. Omro [Wis.] 99 N. W. 1051.

49. Palmer v. Warren St. R. Co., 206 Pa. 574, 56 A. 49.

50. Cashin v. New York, etc., R. Co. [Mass.] 70 N. E. 930.

51. Obedient, industrious, economical and unaddicted to drink or the use of tobacco. Cameron Mill & Elevator Co. v. Anderson [Tex. Civ. App.] 78 S. W. 8, 971; Id. [Tex.] 81 S. W. 282.

52. Cameron Mill & Elevator Co. v. Anderson [Tex. Civ. App.] 78 S. W. 971.

53. Freeman v. Carter [Tex. Civ. App.] 81 S. W. 81. In an action for the death of a son, the parent may state that deceased had stated to them that it was his intention to always remain with them as long as they lived, as bearing on the issue of damages. Gulf, etc., R. Co. v. Brown [Tex. Civ. App.] 76 S. W. 794.

54. Fishburn v. Burlington & N. W. R. Co. [Iowa] 98 N. W. 380.

55. North. Tex. Const. Co. v. Bostick [Tex. Civ. App.] 80 S. W. 109.

56. Denison & S. R. Co. v. Powell [Tex. Civ. App.] 80 S. W. 1054.

57. Texas & P. R. Co. v. Watts [Tex. Civ. App.] 81 S. W. 326.

58. Muench v. Heinemann, 119 Wis. 441, 96 N. W. 800. Evidence that plaintiff has been compelled to employ a man in his place at $25 per week is evidence of his earning capacity. Galveston City R. Co. v. Chapman [Tex. Civ. App.] 80 S. W. 856.

59. Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 80 S. W. 1038.

60. Ft. Worth Ironworks v. Stokes [Tex. Civ. App.] 76 S. W. 231.

61. Nielson v. Cedar County [Neb.] 97 N. W. 826.

62. Buce v. Eldon, 122 Iowa, 92, 97 N. W. 989; Gosa v. Southern R. Co. [S. C.] 45 S. E. 810. That plaintiff, a child, cried a great

the idea of similar past pain,[63] and the appearance of plaintiff's face as indicating pain and suffering may be shown.[64]

Where there is no allegation of willful or wanton conduct on the part of defendant sued for negligence by his servant, and plaintiff disclaims punitive damages, evidence that defendant did not act maliciously or wantonly is properly excluded.[65] Where plaintiff claims that fainting fits are a result of her injury, evidence that she had them three years before the injury is proper.[66]

Expectancy life tables[67] are properly admitted, without proof of their correctness or that they are what they purport to be,[68] in actions for death,[69] and in actions for personal injury, where it is shown that the injuries sued for are permanent.[70] Witnesses familiar with table may testify to plaintiff's expectancy and that the table introduced is a mortality table stating the expectancy of men at different ages.[71] They are not admissible where there is no evidence that the injury is permanent,[72] but the fact that the disability is not entire is immaterial,[73] and they may be used, though the injured person was not an insurable subject.[74] The tables are not conclusive,[75] and expectancy based partly on mortality tables and on the hypothesis of family tendency to longevity may not be shown.[76]

Physical examination.[77]—Plaintiff may be permitted to exhibit his injuries to the jury,[78] having due regard to decency,[79] but in Oklahoma and Texas, the court will not compel plaintiff in an action for personal injuries to submit his person to examination before or during the trial of the case,[80] and the court will not compel a witness not a party to exhibit his injury to the jury to show the value of a physician's services in treating it.[81] Where examination is not compulsory, an unreasonable refusal to exhibit injuries may be considered as bearing on the good faith of plaintiff's claims.[82] In Kansas, an order for the examination of plaintiff's eyes, alleged to have been permanently injured, should be ordered when timely applied for, though it involves the use of drugs to dilate the pupils.[83]

Sufficiency of evidence is discussed in cases cited below.[84]

deal is admissible. Fishburn v. Burlington & N. W. R. Co. [Iowa] 98 N. W. 380.

63. Should not be considered as evidence of past pain. Cashin v. New York, etc., R. Co. [Mass.] 70 N. E. 930.

64. Fishburn v. Burlington & N. W. R. Co. [Iowa] 98 N. W. 380.

65. Currelli v. Jackson [Conn.] 58 A. 762.

66. Mullin v. Boston Elevated R. Co. [Mass.] 70 N. E. 1021.

67. See 1 Curr. L. 863.

68. Atlanta R. & Power Co. v. Monk, 118 Ga. 449, 45 S. E. 494.

69. Philip v. Heraty [Mich.] 97 N. W. 963.

70. Texas & N. O. R. Co. v. Kelly [Tex. Civ. App.] 80 S. W. 1073.

71. Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847.

72. Tenney v. Rapid City [S. D.] 96 N. W. 96. Permanence held sufficiently shown. International & G. N. R. Co. v. Reeves [Tex. Civ. App.] 79 S. W. 1099.

73. Gulf, etc., R. Co. v. Cooper [Tex. Civ. App.] 77 S. W. 263.

74. Delicate health. Pecos, etc., R. Co. v. Williams [Tex. Civ. App.] 78 S. W. 5. Unassigned reason. Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 80 S. W. 1038. Extra hazardous employment. International, etc., R. Co. v. Tisdall [Tex. Civ. App.] 81 S. W. 347.

75. Farrell v. Chicago, etc., R. Co., 123 Iowa, 690, 99 N. W. 578. Instruction held not to sufficiently limit effect of Carlisle tables, as proof of plaintiff's expectancy. Seifred v. Pennsylvania R. Co., 206 Pa. 399, 55 A. 1061.

76. Hamilton v. Michigan Cent. R. Co. [Mich.] 97 N. W. 392.

77. Physical examination of injured person to qualify defendant's experts, see Discovery and Inspection, 1 Curr. L. 930. See 1 Curr. L. 863.

78. Chicago, etc., R. Co. v. Krayenbuhl [Neb.] 98 N. W. 44; Missouri, etc., R. Co. v. Moody [Tex. Civ. App.] 79 S. W. 856.

79. City of Kingfisher v. Altizer, 13 Okl. 121, 74 P. 107.

80. City of Kingfisher v. Altizer, 13 Okl. 121, 74 P. 107; Austin, etc., R. Co. v. Cluck [Tex.] 77 S. W. 403; St. Louis & S. W. R. Co. v. Lindsey [Tex. Civ. App.] 81 S. W. 87.

81. McKnight v. Detroit & M. R. Co. [Mich.] 97 Mo. 772.

82. City of Kingfisher v. Altizer, 13 Okl. 121, 74 P. 107; Austin, etc., R. Co. v. Cluck [Tex.] 77 S. W. 403.

83. Atchison, etc., R. Co. v. Palmore [Kan.] 75 P. 509.

84. Evidence held insufficient to show that plaintiff had floating kidney rendering verdict excessive. Smith v. Brooklyn Heights

(§ 7) *C. Instructions.*[85]—Instructions should clearly define the measure of plaintiff's damages,[86] especially where the evidence is conflicting,[87] and should not by reference to the amount claimed in the complaint,[88] or reference to the statutory limit, in effect instruct the jury to find that amount.[89] An instruction correctly detailing the elements of damage is not erroneous for failure to state that findings on such matters must be based on the evidence.[90] Instructions defining two correct measures of damages and failing to distinguish between them are erroneous,[91]

R. Co., 88 N. Y. S. 432. Wife's damages held shown with sufficient definiteness to authorize recovery against saloon keeper selling to her husband. Bowden v. Voorheis [Mich.] 98 N. W. 406. Finding as to amount of injury to hotel from nuisance in street supported. Bates v. Holbrook, 89 App. Div. 548, 85 N. Y. S. 673. Evidence held not sufficient to base recovery of $50 for putting on metal ceiling. New York Metal Ceiling Co. v. City Homes Imp. Co., 88 N. Y. S. 233. Evidence held sufficient to justify recovery of damages for breach of contract to print reports. Gammel Book Co. v. Jones & Co. [Tex. Civ. App.] 78 S. W. 21. Value of blood hound held sufficiently shown to support verdict for $250. St. Louis, etc., R. Co. v. Philpot [Ark.] 77 S. W. 901. Damage to **earning capacity** held sufficiently shown. Batten v. St. Louis Transit Co., 102 Mo. App. 285, 76 S. W. 727; Robinson v. St. Louis & S. R. Co. [Mo. App.] 77 S. W. 493; Grady v. St. Louis Transit Co., 102 Mo. App. 212, 76 S. W. 673. Evidence of impairment of earning power held sufficiently shown to authorize instruction on future disability. Cotant v. Boone Suburban R. Co. [Iowa] 99 N. W. 115. In case of a young boy, proof of his inability to follow certain occupations because of his injury furnishes a sufficient basis for recovery for diminished earning capacity. Beaudin v. Bay City [Mich.] 99 N. W. 285.

Permanency of injuries held sufficiently shown. Cumberland Tel. & T. Co. v. Warner, 25 Ky. L. R. 1843, 79 S. W. 199; International, etc., R. Co. v. Reeves [Tex. Civ. App.] 79 S. W. 1099; Kelly v. United Traction Co., 89 App. Div. 283, 85 N. Y. S. 9. Conflict sufficient to take permanence of injury from black eye to jury. Schmitz v. Kirchan, 32 Wash. 546, 73 P. 678. See 1 Curr. L. 864.

85. See 1 Curr. L. 864.

86. In personal injury cases should not include mental humiliation. Chicago City R. Co. v. Mauger, 105 Ill. App. 579. Should not include medical attendance where none is shown. American Car & Foundry Co. v. Clark, 32 Ind. App. 644, 70 N. E. 828. Not erroneous as not limiting recovery to period within which plaintiff (a boy) would be entitled to his own earnings. Ittner Brick Co. v. Killian [Neb.] 93 N. W. 951. Instruction held to properly limit married woman's recovery to loss of time in connection with her own business. Gilson v. Cadillac [Mich.] 95 N. W. 1084. Failure to give any rule for measurement is error. Wrongful death. Coleman v. Himmelberger-Harrison Land & Lumber Co. [Mo. App.] 79 S. W. 981. Failure to furnish logs. Rhodes v. Holladay-Klotz Land & Lumber Co. [Mo. App.] 79 S. W. 1145. Instructions on the measure of damages for breach of contract held to state elementary principles and properly given where authorized by the evidence. Silver Springs, etc., R. Co. v. Van Ness [Fla.] 34 So. 884. Instructions to consider pecuniary circumstances and bad faith of parties are erroneous where punitive damages are not recoverable. Georgia R. & Banking Co. v. Benton, 117 Ga. 785, 45 S. E. 70. Where only actual damages for a personal injury are claimed, an instruction to consider defendant's intoxication is not objectionable as authorizing the jury to consider it on the question of damages. Knickerbocker Ice Co. v. Benedix, 206 Ill. 362, 69 N. E. 50. In a personal injury case, where punitive damages are not recoverable, and evidence has been introduced showing recklessness on defendant's part, an instruction defining the proper measure of damages and adding thereto that the jury may consider "all the facts and circumstances proven," is bad as authorizing them to swell the recovery by defendant's reckless conduct. Broadstreet v. Hall, 32 Ind. App. 122, 69 N. E. 415.

Contra: Chicago City R. Co. v. Gemmill [Ill.] 71 N. E. 43.

87. Muren Coal & Ice Co. v. Howell, 204 Ill. 515, 68 N. E. 456; Chicago City R. Co. v. Mead, 206 Ill. 174, 69 N. E. 19. Injuries to borrowed traction engine by running off bridge. Smith v. Stratton [Tex. Civ. App.] 78 S. W. 4.

88. Instruction held not erroneous. Ft. Worth, etc., R. Co. v. Partin [Tex. Civ. App.] 76 S. W. 236; Baltimore, etc., R. Co. v. Cavanaugh [Ind. App.] 71 N. E. 239; Gulf, etc., R. Co. v. Nelson [Miss.] 36 So. 158. Instruction to find damages according to evidence not exceeding the amount claimed in the petition is not error, though plaintiff's evidence shows that his damages are in some respects overstated in the petition. Tandy v. St. Louis Transit Co., 178 Mo. 240, 77 S. W. 994.

89. Muren Coal & Ice Co. v. Howell, 204 Ill. 515, 68 N. E. 456. An instruction describing the legal elements of damage for death and mentioning the statutory limitation of $10,000, and stating that the verdict if for plaintiff should be "in the amount indicated," is not a direction to find $10,000 and will not be so construed, though that amount was found. Pennsylvania Co. v. Paul [C. C. A.] 126 F. 157.

90. Stanley v. Cedar Rapids, etc., R. Co., 119 Iowa, 526, 93 N. W. 489.

91. Hartgrove v. Southern Cotton Oil Co. [Ark.] 77 S. W. 908. Instruction held objectionable as authorizing double recovery for personal injury. International & G. N. R. Co. v. Tisdale [Tex. Civ. App.] 81 S. W. 347. Instruction in action for personal injuries held not objectionable as allowing double damages. Texas, etc., R. Co. v. Kelly [Tex. Civ. App.] 80 S. W. 1073.

and where the evidence will authorize a verdict for general damages in amount greater than claimed in the petition, it is error to instruct to find for plaintiff according to his injuries, without limiting recovery by the pleadings, though no request is made in that respect, and the evidence is received without objection.[92] If a party desires a more explicit direction than is contained in the correct rule laid down in the general instructions, he should request it,[93] and failure to include a theory or fact favorable to the defense,[94] or an element of damage recoverable for is not reversible error in the absence of a request presenting it to the attention of the court.[95] As in other cases, instructions not supported by the issues or the evidence in the case, though stating correct abstract rules of law, should not be given.[96] Instructions should be considered as a whole.[97] Erroneous instructions are frequently cured by the verdict.[98] An instruction in a personal injury case that plaintiff is entitled to such damages as the jury "feel" he ought to have is erroneous,[99] and it is improper to inform the jury that they may estimate the amount of damages plaintiff "is entitled to recover"; they should be instructed to "compensate for the injury sustained";[1] but an instruction to render a verdict for such an amount as the jury "think" under the evidence plaintiff is entitled to is not bad for failure to use the word "believe" instead of "think,"[2] and the use of the words "reasonably apparent" instead of "reasonably certain," in an instruction relative to recovery for future pain and suffering, is not error, the terms

92. International, etc., R. Co. v. Shaughnessy [Tex. Civ. App.] 81 S. W. 1026.

93. Jury was not advised to return verdict for such a sum as would amount to "present compensation" for future pecuniary loss because of decedent's death. San Antonio, etc., R. Co. v. Brock [Tex. Civ. App.] 80 S. W. 422.

94. Failure to instruct that the jury should take into consideration the possibility of plaintiff widow's remarriage, where she sues for the death of her husband, is not error where no request on that subject was preferred. Hewitt v. East Jordan Lumber Co. [Mich.] 98 N. W. 992.

95. St. Louis Southwestern R. Co. v. Bolton [Tex. Civ. App.] 81 S. W. 123.

96. An instruction stating a correct rule of law, but referring to an element of damages neither pleaded nor proved is bad. McCall Co. v. Jennings, 26 Utah, 459, 73 P. 639. An instruction on the effect of a refusal of physical examination is properly refused where there is nothing to base it on. Plaintiff was asked on cross-examination whether he would consent if his counsel were willing, and objection to the question was sustained. Marquette Third Vein Coal Co. v. Dielie, 208 Ill. 116, 70 N. E. 17. The rule regarding punitive damages for malicious prosecution where the acts are done by an agent need not be stated where there is no such question in the case. Eggett v. Allen, 119 Wis. 625, 96 N. W. 803. Where there is no proof in the record as to what plaintiff's earnings were, a judgment in his favor based on an instruction to consider earnings as an element of damage cannot stand. Kane v. Metropolitan St. R. Co., 88 N. Y. S. 162. An instruction authorizing recovery for permanent injuries is error where counsel disclaims recovery on that ground. Southern R. Co. v. Clariday [Ga.] 47 S. E. 901. The probability of promotion may not be considered in the absence of evidence on that question. Galveston, etc., R. Co. v. Pendleton, 30 Tex. Civ. App. 431, 70 S. W. 996. The court properly refused to instruct that if the damages complained of could have been prevented by the plaintiff after notice of the insufficiency of the fence, he could not recover where the evidence showed that plaintiff kept two men riding for 33 days along three miles of fence. Perry v. Cobb [Ind. T.] 76 S. W. 289.

97. An instruction authorizing punitive damages in a breach of promise case need not expressly refer to the circumstances necessarily present to justify their award, where another instruction gives the absence of malice as a ground for the denial of such damages. Jacoby v. Stark, 205 Ill. 34, 68 N. E. 557.

98. A refusal to instruct that there was no evidence of any damage prior to bringing the action was harmless where the verdict was for nominal damages only. Dale v. Southern R. Co., 132 N. C. 705, 44 S. E. 399. Instructions authorizing the consideration of an erroneous element are harmless where the verdict shows that the element was not considered. Quinn v. Baldwin Star Coal Co. [Colo. App.] 76 P. 552. An instruction on exemplary damages will not be reviewed where none are allowed. Sonnen v. St. Louis Transfer Co., 102 Mo. App. 271, 76 S. W. 691. Where no cause of action is found, instructions erroneously defining the measure of damages are harmless. Nielson v. Cedar County [Neb.] 98 N. W. 1090; Zimmerman v. Denver Consol. Tramway Co. [Colo. App.] 72 P. 607; Wofford v. Buchel Power & Irrigation Co. [Tex. Civ. App.] 80 S. W. 1078.

99. Fries v. American Lead Pencil Co., 141 Cal. 610, 75 P. 164.

1. Nashville, etc., R. Co. v. Whitherspoon [Tenn.] 78 S. W. 1052.

2. Ilges v. St. Louis Transit Co., 102 Mo. App. 529, 77 S. W. 93.

being equivalent.[3] Holdings on various instructions complained of are collected below.[4]

(§ 7) *D. Trial.*—There is no error in allowing plaintiff to sit near the jury and weep during counsel's argument.[5]

(§ 7) *E. Verdicts.*[6]—Though in tort actions interest is not recoverable eo nomine, a verdict in trover, finding the sum due plaintiff on goods conditionally sold, at the amount of purchase money unpaid, and awarding him interest thereon, is not erroneous,[7] and where the jury in an action for negligent fire find the value of the property destroyed and allow its value with interest, the court properly computes the interest and includes it in the judgment.[8] The jury may properly be required to separate in their verdict the actual and exemplary damages, and if they find only one kind, to state which.[9] Where mental suffering is not recoverable for, a verdict for a lump sum including mental and physical suffering must be set aside.[10] Where double damages are recoverable under the statute, and the jury state that the sum they have found is only single damages, they may be permitted to retire and double their verdict.[11]

DEATH AND SURVIVORSHIP.

Presumption of death.[12]—Absence from one's usual place of abode for a long period of time without tidings raises a presumption of death, the length of time required being governed by statutory provisions and the circumstances of the case.[13] The presumption may be raised in less time, there being convincing

3. Harrison v. Ayrshire, 123 Iowa, 528, 99 N. W. 132.

4. Instruction on manner of arriving at verdict involving actual and exemplary damages held not mandatory as directing their manner of proceeding. Bowden v. Voorheis [Mich.] 98 N. W. 406. Instruction held not erroneous as allowing conjecture as to future damages for assault. Evans v. Elwood, 123 Iowa, 92, 98 N. W. 584. Instruction held to properly limit recovery to diminished earning capacity. Blaudin v. Bay City [Mich.] 99 N. W. 285. Instruction in personal injury case held not objectionable as allowing recovery for lost profits. Jordan v. Cedar Rapids, etc., R. Co. [Iowa] 99 N. W. 693. Instruction on recovery for permanent or temporary injuries held not misleading. City of Pueblo v. Timbers, 31 Colo. 215, 72 P. 1059. Instruction on compensatory and punitive damages held not erroneous as authorizing recovery without proof of tort. Reeves v. Southern R. Co. [S. C.] 46 S. E. 543. Instruction on measure of damages for wrongful ejection of passenger held unobjectionable. Houston, etc., R. Co. v. McNeel [Tex. Civ. App.] 76 S. W. 206. Failure to limit recovery for medical services to "reasonable" value held harmless under evidence. Grady v. St. Louis Transit Co., 102 Mo. App. 212, 76 S. W. 673. Instruction in action for death held not to call for verdict for more than enough to compensate. Ft. Worth, etc., R. Co. v. Linthicum [Tex. Civ. App.] 77 S. W. 40. Instruction held not erroneous as authorizing speculative damages for injuries resulting from cold and exposure. Pecos, etc., R. Co. v. Williams [Tex. Civ. App.] 78 S. W. 5. Instruction in favor of minor held not objectionable as authorizing recovery of damages recoverable only by father, or as giving undue prominence to items of damage. Cameron Mill & Elevator Co. v. Anderson [Tex. Civ. App.] 78 S. W. 8. Instructions held confusing as regards preexisting infirmity of plaintiff's wife. Dallas Consol. Elec. St. R. Co. v. Rutherford [Tex. Civ. App.] 78 S. W. 558. Instruction held not bad as assuming that plaintiff has suffered. Longan v. Weltmer [Mo.] 79 S. W. 655. Instructions held not objectionable as authorizing compensation for loss of time caused by physical and mental suffering, or as confining the compensation to past damages. International, etc., R. Co. v. Shaughnessy [Tex. Civ. App.] 81 S. W. 1026.

5. Chicago, etc., R. Co. v. Krayenbuhl [Neb.] 98 N. W. 44.

6. See 1 Curr. L. 864.

7. Fussell v. Heard, 119 Ga. 527, 46 S. E. 621.

8. Louisville & N. R. Co. v. Fort [Tenn.] 80 S. W. 429.

9. Northern Texas Traction Co. v. Peterman [Tex. Civ. App.] 80 S. W. 535.

10. Houston, etc., R. Co. v. Reasonover [Tex. Civ. App.] 81 S. W. 329.

11. Campbell v. Iowa Cent. R. Co. [Iowa] 99 N. W. 1061.

12. See 1 Curr. L. 865.

13. **Unexplained absence** of a single man for 43 years, he being at the time of his disappearance 30 years of age and in ill health, with evidence of an attempt to discover him, raises the presumption of death and that he left no heirs surviving him. McNulty v. Mitchell, 84 N. Y. S. 89. Nine years held to warrant presumption of death, absentee having been in ill health at the time of disappearance. In re Ross's Estate, 140 Cal. 282, 73 P. 976. Disappearance and silence for ten years is sufficient to warrant a wife in presuming her husband to be dead, though

though not actual proof of loss of life.[14] The presumption of death arising by lapse of time is rebuttable, and rights cannot be ignored on the strength of it.[15] There is no presumption that the party was alive at any time during the period of absence.[16]

DEATH BY WRONGFUL ACT.

§ 1. Nature and Elements of Liability and Release or Bar Thereof (1034).
§ 2. Who May Bring Action (1036).
§ 3. Beneficiaries of the Right of Action (1037).
§ 4. Damages (1038).
§ 5. Remedies and Procedure (1042).
§ 6. Distributive Rights in Amount Recovered (1045).

§ 1. *Nature and elements of liability and release or bar thereof.*[17]—The liability is purely a statutory one,[18] and does not exist under the general maritime law.[19] Such statutes are compensatory and not penal.[20] Being statutory, it rests only on such persons, if any, as are designated, and does not extend to those of similar occupation,[21] or to a death caused in a line of business collateral to that specified.[22] The statute must in its intention cover persons such as deceased.[23] Where the right of action is given for the benefit of certain persons, it cannot be maintained if there are no such persons.[24] It cannot be imposed on extra territorial acts,[25] but where the right of action has become fixed by the statutes of any state, the liability may be enforced in any court having jurisdiction,[26] and

she has made no effort to find him. In re Harrington's Estate [Cal.] 73 P. 1000.

14. Where men in a schooner were abandoned at sea by the vessel towing them, and the men were never heard from thereafter except that a schooner corresponding to the one lost was washed up on shore and the body of one of the men was found, others were assumed to be dead. Alaska Commercial Co. v. Williams [C. C. A.] 128 F. 362.

15. The right of an heir in the distribution of an estate cannot be disregarded, though he has been unheard of for many years. In re Sherwood's Estate, 206 Pa. 465, 56 A. 20.

16. Farrelly v. Emigrant Industrial Sav. Bank, 92 App. Div. 529, 87 N. Y. S. 54.

17. See 1 Curr. L. 865.

18. See 1 Curr. L. 865.

The fact that a provision of the statute limiting damages is unconstitutional does not invalidate the entire statute. Art. 10, § 4 Wyo. Constitution prohibits the enactment of a law limiting amount of recovery. Utah Sav. & Trust Co. v. Diamond Coal & Coke Co., 26 Utah, 299, 73 P. 524. This section of the constitution was passed after the act limiting the amount and is not prospective, so such Act Rev. St. 1887, § 2364b is valid and in force. Mestas v. Diamond Coal & Coke Co. [Wyo.] 76 P. 867. Acts 1899, p. 457, c. 213 is unconstitutional in that it does not recite the caption or substance of the act to be amended. Southern R. Co. v. Maxwell [Tenn.] 82 S. W. 1137.

An action not based on any statute cannot be maintained by a parent for loss of services owing to a child's death. Gregory v. Illinois Cent. R. Co. [Ky.] 80 S. W. 795. Given in Illinois only by Rev. St. c. 70. Mattoon Gaslight & Coke Co. v. Dolan, 105 Ill. App. 1. Laws 1885, p. 223, c. 11 and Laws 1887, p. 454, c. 71, providing for the action, were superseded by Pub. St. 1891, c. 191, §§ 8-13. Poff v. New England Tel. & T. Co. [N. H.] 55 A. 891.

Under Code 1896, § 27, an action may be maintained for the death of a servant caused by the negligence of the master. Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395. Under this section, recovery can be had for death of a railroad employe caused by failure of the company to comply with U. S. Comp. St. 1901, p. 3174, requiring railroads to use automatic couplers. Id. Not created by words "any person" in Code, § 2071, designating persons who may recover from railroad company. Seney v. Chicago, etc., R. Co. [Iowa] 101 N. W. 76.

19. Williams v. Quebec S. S. Co., 126 F. 591. See 1 Curr. L. 866.

20. Rev. St. 1899, § 2864. Action may be brought for less than the statutory amount. Marsh v. Kansas City Southern R. Co. [Mo. App.] 78 S. W. 284.

21. Telephone company not liable under a statute making carriers liable for negligence of their servants. Fisher v. Texas Tel. Co. [Tex. Civ. App.] 79 S. W. 50. Pub. St. 1882, c. 112, § 212 applies only to steam railways; not to street railways. Hudson v. Lynn & B. R. Co. [Mass.] 71 N. E. 66.

22. Under Rev. St. 1895, art. 3017, a railroad is not liable where a nurse employed in a hospital maintained by it went onto the street without disinfecting himself and communicated smallpox to one who died therefrom. Missouri, etc., R. Co. v. Freeman [Tex.] 79 S. W. 9. See 1 Curr. L. 866, n. 14.

23. Under Code, § 1498, an action may be maintained for the death of an infant 2½ years old. Davis v. Seaboard Air Line R. Co. [N. C.] 48 S. E. 591.

24. Illinois statute. Chicago & E. R. Co. v. La Porte [Ind. App.] 71 N. E. 166. See, also, post, § 3.

25. Do not confer right of action for injury inflicted in another state. Vaughn v. Bunker Hill & S. Min. & Concentrating Co., 126 F. 896.

26. Liability under New Jersey statute

may be maintained in one state for a death caused in another, where the statutes of such states are similar.[27] There must have been a wrongful act,[28] and it must have been the proximate cause of death.[29] Death caused by ordinary negligence gives a cause of action under the Kentucky statute.[30]

In some states, there is no liability if death was caused by the act of an employe, but defendant's own negligence must be found;[31] but his negligence may co-operate with and be effective through a servant's concurring negligence.[32] A municipal corporation is not liable if the death is caused by an act done in the performance of a governmental function.[33] The ordinary rules apply regarding liability of a master for his servant and as to acts within or without the scope of the servant's employment,[34] the negligence of fellow-servants of deceased,[35] and of independent contractors,[36] and negligence of parents imputable to children.[37]

Dependency or at least expectation of support is often made essential to a recovery,[38] though it has been held not so under the Civil Damage Acts.[39]

A parent by releasing his parental control over his child loses the right to

enforced by Federal court setting in New York, in action against New Jersey corporation for act committed on the high seas. International Nav. Co. v. Lindstrom [C. C. A.] 123 F. 475. If cause of action be foreign and for the benefit of "estate" as opposed to "heirs," "next of kin," etc., the suit will not lie. Sanbo v. Union Pac. Coal Co., 130 F. 52.

27. Action in New York for a death in Connecticut. Strauss v. New York, etc., R. Co., 91 App. Div. 583, 87 N. Y. S. 67.

28. Liability is to be determined by the rules of the common law as to negligence and contributory negligence and duty of a master toward his servant. Northern Alabama R. Co. v. Mansell [Ala.] 36 So. 459. The building of a gangway across the street without authority is an unlawful act. Shippers' Compress & Warehouse Co. v. Davidson [Tex. Civ. App.] 80 S. W. 1032. Proper to admit proof of want of permission to build the gangway. Id.

29. St. Louis Southwestern R. Co. v. Burke [Tex. Civ. App.] 81 S. W. 774; Godwin v. Atlantic Coast Line R. Co. [Ga.] 48 S. E. 139. It is sufficient if natural causes were accelerated by the wrongful act. Meekins v. Norfolk & S. R. Co., 134 N. C. 217, 46 S. E. 493. Where a brakeman was knocked from a car by a projection, cause of death held for the jury. Louisville & N. R. Co. v. Mulfinger's Adm'x [Ky.] 80 S. W. 499. Instruction as to proximate cause held proper. St. Louis S. W. R. Co. v. Burke [Tex. Civ. App.] 81 S. W. 774.

Where one was hit by a falling brick and subsequently fell into the river and died of pneumonia, the injury sustained by being hit by the brick was not the proximate cause. Koch v. Zimmerman, 85 App. Div. 370, 83 N. Y. S. 339.

30. Ky. St. 1903, § 6, providing for recovery in case of negligence and punitive damages in case of gross negligence. Southern R. Co. v. Otis' Adm'r, 25 Ky. L. R. 1686, 78 S. W. 480.

31. Under statute giving right of action in case death is "caused by the wrongful act of another" [Rev. St. 1887, § 2145, subsec. 2]. Don Yan v. Ah You's Adm'r [Ariz.] 77 P. 618. Rev. St. 1895, art. 3017, § 2. Shippers' Compress & Warehouse Co. v. Davidson [Tex. Civ. App.] 80 S. W. 1032.

32. Where one had unlawfully constructed a gangway across a street and his servant trucking a bale of cotton on it frightened the horse of a traveler so that it ran away and killed him, it was the negligent act of the employer that caused his death. Shippers' Compress & Warehouse Co. v. Davidson [Tex. Civ. App.] 80 S. W. 1032.

33. Under Ky. St. 1903, § 6, negligently maintaining a pest house. Twyman's Adm'r v. Board of Councilmen of Frankfort, 25 Ky. L. R. 1620, 78 S. W. 446. See Municipal Corporations, 2 Curr. L. 940.

34. Brakeman ejecting a trespasser, shot and killed him. Whether he had authority to eject was for the jury. Houston & T. C. R. Co. v. Bowen [Tex. Civ. App.] 81 S. W. 80.

35. Northern Alabama R. Co. v. Mansell [Ala.] 36 So. 459. Under Rev. St. 1899, § 2864, a master is not liable if death was caused by a fellow-servant. Jackson v. Lincoln Min. Co. [Mo. App.] 80 S. W. 727.

See generally, Master and Servant, 2 Curr. L. 801.

36. See Independent Contractors, 2 Curr. L. 303. Death caused by an independent contractor where the work was intrinsically dangerous. Excavating a street. Cameron Mill & Elevator Co. v. Anderson [Tex.] 81 S. W. 282.

37. Contributory negligence of parent of infant deceased is defense. Indianapolis St. R. Co. v. Antrobus [Ind. App.] 71 N. E. 971. In an action for the death of a child 2½ years old, the father's contributory negligence is a defense. Davis v. Seaboard Air Line R. Co. [N. C.] 48 S. E. 591.

38. Where a decedent had ceased to contribute anything to the support of his parents and they had no reasonable expectation of receiving future assistance from him, there can be no recovery for their benefit. Texas Portland Cement & Lime Co. v. Lee [Tex. Civ. App.] 82 S. W. 306.

39. No defense that deceased was shiftless and failed to support (action under Civil Damage Act). Knott v. Peterson [Iowa] 101 N. W. 173. See full treatment in Intoxicating Liquors, 2 Curr. L. 554.

sue for the value of his services;[40] but where a wife has not by her own acts forfeited the right to her husband's support, she may recover,[41] and where a mother of a minor child may maintain the action only in case the father is dead or has deserted his family, if the mother has secured a divorce on the ground of cruelty, it is sufficient.[42]

If deceased having survived would have been defeated as one in pari delicto,[43] or if while yet alive he gave a release under a statute giving a right of action in any case where the decedent might have maintained it had he lived,[44] there can be no recovery.

A beneficiary's release binds him when he later becomes personal representative.[45]

Since there can be but one recovery on a single cause of action, it has been held in California that an infant heir not in court was barred by his mother's recovery under an act allowing recovery by the "heirs."[46] In Louisiana, two causes of action arise,[47] but a judgment in the first in favor of the widow bars the right of the children to maintain an action for that cause.[48]

§ 2. *Who may bring action.*[49]—The action must be brought by those to whom the right is given[50] in the capacity in which they are entitled.[51] A right

40. Southern R. Co. v. Flemister [Ga.] 48 S. E. 160.

41. Though he has not for a long time fulfilled that duty. De Garcia v. San Antonio, etc., R. Co. [Tex. Civ. App.] 77 S. W. 275.

42. Code Civ. Proc. § 376. Delatour v. Mackay, 130 Cal. 621, 73 P. 454.

43. No cause of action accrues where one causes a woman to submit to a criminal operation which resulted in her death. Under Code Civ. Proc. § 1902. Laroque v. Conheim, 42 Misc. 613, 87 N. Y. S. 625.

44. Rev. St. 1895, arts. 3017, 3018, 3021. Thompson v. Ft. Worth, etc., R. Co. [Tex.] 80 S. W. 990. There can be but one recovery. Blount v. Gulf, etc., R. Co. [Tex. Civ. App.] 82 S. W. 305.

45. Under the New York Statute, a widow may release the cause prior to her appointment as her deceased husband's administratrix. Code Civ. Proc. N. Y. § 1902, providing an action exclusively for the benefit of the decedent's husband or wife, and next of kin. Mella v. Northern S. S. Co., 127 F. 416.

46. Under Code Civ. Proc. § 377, where a mother of an unborn child recovered, it was a bar to an action by the child, though the statute gave the right of action to either the heirs or personal representatives, and Civ. Code, § 29 provides that an unborn child is deemed in existence. The mother claimed to be sole heir and did not make known the existence of the child [Beatty, J., dissents]. Doubert v. Western Meat Co., 139 Cal. 480, 73 P. 244. See El Paso, etc., R. Co. v. Whatley [Tex. Civ. App.] 76 S. W. 589, holding that the record must show that the suit was for benefit of all.

47. Act No. 71, p. 94 of 1884. One lies for damages the decedent might have recovered and one for his death. Eichorn v. New Orleans & C. R. Light & Power Co., 112 La. 236, 36 So. 335.

48. The first cause the minor children or widow might have enforced. The widow brought the action and recovered judgment. Eichorn v. New Orleans & C. R. Light & Power Co., 112 La. 236, 36 So. 335.

49. See 1 Curr. L. 866.

50. Under St. 1866 (16 Del. Laws, p. 28, c. 31), § 2, as amended by 22 Del. Laws, p. 500, c. 210, giving right to widow or widower of decedent or if there be none, to his personal representatives, a father cannot recover for the death of a minor child. Kennedy v. Delaware Cotton Co. [Del. Super.] 58 A. 825.

Note: The right of action in "heirs" means "children" and does not include those entitled to share in the estate. Hendry v. Holt, 24 Colo. 464, 65 Am. St. Rep. 235, 39 L. R. A. 351; Jordan v. Cincinnati R. Co., 89 Ky. 40; Noble v. Seattle, 19 Wash. 133. **Contra,** St. Louis, etc., R. Co. v. Needham, 52 F. 371.

A widower cannot sue where the right of action is given to the widow and next of kin. Western Union Tel. Co. v. McGill, 57 F. 699; Dickens v. Ry. Co., 23 N. Y. 158; Drake v. Gilmore, 52 N. Y. 389.

"Next of kin" means blood relation and does not include husband or wife. Haradin v. Larabee, 113 Mass. 430. **Contra,** Steel v. Kurty, 28 Ohio St. 191.

A statute allowing a wife to sue for death of her husband does not give him a right of action for her death. Grosso v. Delaware, etc., R. Co., 50 N. J. Law, 317; Georgia R. Co. v. Wynn, 42 Ga. 331. And a right of action given to a mother does not include a father. Frazer v. Georgia R. Co., 96 Ga. 785. A personal representative cannot sue where the right is given to a widow (Litchfield Coal Co. v. Taylor, 81 Ill. 590), nor a widow where the right is given the personal representative (Weidner v. Rankin, 26 Ohio St. 522; Holston v. Coal, etc., Co., 95 Tenn. 521; Usher v. West Jersey R. Co., 126 Pa. 206, 12 Am. St. Rep. 863, 4 L. R. A. 261).

Where the right is given to the distributees, a personal representative cannot sue. Hulbert v. Topeka, 34 F. 510. Where a child may recover for the death of a parent, a

of action in the "next of kin" who would "take in case of intestacy" avails neither surviving husband nor son.[52] Under a statute giving the right of action to the heirs or personal representatives, an executor[53] or administrator[54] is entitled, but an infant son of decedent, by his next friend, cannot maintain an action lodged in the personal representative.[55] A recovery for the benefit of the "estate" cannot be prosecuted in a foreign state by an administrator there appointed,[56] but a foreign representative may if recognized sue in the state where the death was caused.[57] Under the Missouri statute, the right of the surviving husband or wife and the children is not concurrent,[58] but if the party first entitled to sue brings the action, it is a bar to an action by the others.[59] Where several parties are given the right to maintain the action, it must appear on the record that an action brought by one is for the benefit of all.[60] If the right of beneficiaries to sue is precedent to that of the personal representative, their sanction must appear at some stage in an action by him.[61]

Since the laws of Kansas enable the widow to sue where deceased was nonresident and the laws of Missouri enable the "person entitled to the proceeds" to sue on a foreign cause of action and permit a trustee to sue without the beneficiary, the widow of one killed in Kansas may sue alone in Missouri, she being substantially a trustee for the child who is also a beneficiary.[62] Under the Georgia statute, the children of the decedent, though adults, are necessary parties.[63]

§ 3. *Beneficiaries of the right of action.*[64]—The beneficiary must come within a statute giving a recovery.[65] Technical words like "heirs" or "next of kin" have

step-parent is not meant. Marshall v. Macon Sash Co., 103 Ga. 725, 68 Am. St. Rep. 140, 41 L. R. A. 211. Conversely a stepfather cannot sue for the death of a stepchild. Hennessy v. Bavarian Brew. Co., 145 Mo. 104, 68 Am. St. Rep. 554, 41 L. R. A. 386.—From note to Brown v. Electric R. Co. [Tenn.] 70 Am. St. Rep. 666.

51. Under Code Civ. Proc. Idaho, § 3165, giving right to "heirs or personal representatives," the action cannot be maintained by a widow in her own name. Vaughn v. Bunker Hill & Sullivan Min. Concentrating Co., 126 F. 895.

52. Husband is not next of kin. Son would not take in intestacy. Gottlieb v. North Jersey St. R. Co. [N. J. Law] 58 A. 1088. Explaining May v. West Jersey & S. R. Co., 62 N. J. Law, 63, 42 A. 163, as not a precedent.

53. Under Ball. Ann. Codes & St. §§ 4828, 4838. Copeland v. Seattle, 33 Wash. 415, 74 P. 582.

54. Under R. S. c. 70, giving the right of action to the administrator for benefit of widow and next of kin. "Administrator" means personal representative. Mattoon Gas Light & C. Co. v. Dolan, 105 Ill. App. 1.

55. Burns' Ann. St. 1901, § 285. Baltimore, etc., R. Co. v. Gillard [Ind. App.] 71 N. E. 58.

56. For wrongful death in Wyoming, an administrator appointed in Colorado cannot maintain the action in a Colorado court, since the distribution is according to Wyoming laws and Colorado courts lack jurisdiction. Sanbo v. Union Pac. Coal Co., 130 F. 52.

The court distinguishes the cases wherein recovery is for "next of kin" and the like. Id.

57. Under Wisconsin Rev. St. 1898, §§ 4255, 4256, where the action may be maintained by the personal representative appointed by a foreign state. Robertson v. Chicago, etc., R. Co. [Wis.] 99 N. W. 433. In Tennessee, a nonresident administrator qualifying within the state may sue [Acts 1901, p. 197, c. 126; Acts 1903, p. 1344, c. 501]. Southern R. Co. v. Maxwell [Tenn.] 82 S. W. 1137.

58. Rev. St. 1899, § 2864. Only husband or wife can sue during first six months after death; after that only the children. Packard v. Hannibal, etc., R. Co. [Mo.] 80 S. W. 951.

Where a child killed was but 12 years old evidence that she was unmarried is not required. Jett v. Central Elec. R. Co., 178 Mo. 664, 77 S. W. 738.

59. Though the wrong defendant was sued. Packard v. Hannibal, etc., R. Co. [Mo.] 80 S. W. 951.

60. Such a defect is not cured by other beneficiaries renouncing their claim for damages. El Paso, etc., R. Co. v. Whatley [Tex. Civ. App.] 76 S. W. 589.

61. Copeland v. Seattle, 33 Wash. 415, 74 P. 582.

62. Need not join her children [Gen. St. Kan. 1889, pars. 4518, 4519; Mo. Rev. St. 1899, § 457, and § 541, Practice Act (Rev. St. 1899, p. 238)]. Jones v. Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890.

63. Act 1887, p. 43, Civ. Code 1895, § 3828. Roberts v. Central of Georgia R. Co., 124 F. 471.

64. See 1 Curr. L. 867.

65. Husband cannot recover for wife's death. Seney v. Chicago, etc., R. Co. [Iowa] 101 N. W. 76. Code, § 2071, does not extend liability to "any person" other than those who could independent of it sue for injury. Id.

received various interpretations.[66] The word "heir" and "distributee" have been held to mean the same thing.[67] "Heirs" has been held to mean widow and children.[68] The right of an alien to avail of the statute has been denied in Indiana,[69] but sustained elsewhere, recently in New York[70] and Ohio.[71]

§ 4. *Damages.*[72]—Damages recoverable are strictly compensatory,[73] and are limited to the actual pecuniary loss sustained,[74] not to exceed the sum allowed by the statute,[75] in the state where the action was brought.[76] When the sole beneficiary is dead, it should be reckoned from the wrongful killing to the death of beneficiary.[77] A mortuary benefit is no ground for abatement of the pecuniary loss.[78] A statutory limitation does not make the recovery a penalty.[79] Such limitation is unconstitutional in Wyoming.[80] Loss of a parent's care and counsel[81] and of the husband's protection[82] may be recovered. A mother may show any personal services performed by deceased about the house to prove pecuniary loss.[83] There is a division in the courts as to whether mental anguish and loss of society are elements of damages.[84] The present worth of probable gross earnings is not the proper measure.[85]

Age, habits and earning power[86] at time of death,[87] and probable increase of

66. See note 50, ante.

67. Under Rev. St. 1893, § 2316. Kitchen v. Southern R. [S. C.] 48 S. E. 4. The statute making beneficiaries heirs at law "of" distributees, the word "of" should be read "or." Id.

68. A mother cannot sue for the death of an adult son under the Washington statute [Ball. Ann. Codes & St. § 4828], designating heirs and personal representatives. Only widow and children may sue. Manning v. Tacoma R. & Power Co., 34 Wash. 406, 75 P. 994.

69. Does not exist where persons entitled as next of kin are aliens. Cleveland, etc., R. Co. v. Osgood [Ind. App.] 70 N. E. 839, distinguishing the casee wherein the recovery is for the benefit of an estate or is in the nature of a penalty for benefit of persons dependent. The opinion follows the English cases which are in it collected and discussed.

70. The action may be maintained for the death of a resident alien for the benefit of a non-resident alien, next of kin. Under Code Civ. Proc. § 1902. Tanas v. Municipal Gas Co., 88 App. Div. 251, 84 N. Y. S. 1053, citing other authorities under statutes having same object in view.

71. Rev. St. §§ 6134 and 6135. Naylor v. Pittsburgh, etc., R. Co., 4 Ohio C. C. (N. S.) 437.

72. See 1 Curr. L. 868.

73. Probability of value of services increasing with age and experience may be considered. Barnes v. Columbia Lead Co. [Mo. App.] 82 S. W. 203.

74. San Antonio & A. P. R. Co. v. Brock [Tex. Civ. App.] 80 S. W. 422. In New York Code Civ. Proc. § 1904. Smith v. Lehigh Valley R. Co., 177 N. Y. 379, 69 N. E. 729. The instructions must so limit. Johnson County v. Carmen [Neb.] 99 N. W. 502.

75. Portsmouth St. R. Co. v. Peed's Adm'r [Va.] 47 S. E. 850.

76. A statute of another state, providing for recovery of damages for wrongful death of a citizen of such state, will be enforced in Ohio, but the amount recoverable will be governed by Ohio statute. Schell v. Youngstown Iron & Sheet Co., 4 Ohio C. C. (N. S.) 172.

77. Under Code Civ. Proc. §§ 1902, 1903, 1904, where the sole beneficiary died before trial, it is the injuries sustained between the date of the death for which the action is brought and date of death of the beneficiary. Pitkin v. New York, etc., R. Co., 94 App. Div. 31, 87 N. Y. S. 906.

78. Illinois Cent. R. Co. v. Prickett [Ill.] 71 N. E. 435.

79. Suit may therefore be brought for less [Rev. St. 1899, § 2864]. Marsh v. Kansas City Southern R. Co. [Mo. App.] 78 S. W. 284.

80. Const. Wyo. 1890, art. 10, § 4. Utah Sav. & Truet Co. v. Diamond Coal & Coke Co., 26 Utah, 299, 73 P. 524.

81. Services about the home, caring for and counseling children, may be considered. International, etc., R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991.

82. The wife's right to personal protection from the husband may be considered. Haines v. Pearson [Mo. App.] 81 S. W. 645.

83. Blauvelt v. Delaware, etc., R. Co., 206 Pa. 141, 55 A. 857.

84. Pro. Includes loss of care, society and comfort. Portsmouth St. R. Co. v. Peed's Adm'r [Va.] 47 S. E. 850. Loss of society, comfort and care of a father may be considered. Dyas v. Southern Pac. Co., 140 Cal. 296, 73 P. 972.

Contra, bereavement, mental suffering or solace on account of death. Johnson County v. Carmen [Neb.] 99 N. W. 502. Mental anguish. Houston & T. C. R. Co. v. Bowen [Tex. Civ. App.] 81 S. W. 80. Mental anguish and loss of society. Haines v. Pearson [Mo. App.] 81 S. W. 645. [Statute allows it in Missouri for killing child, see supra.]

85. Present worth of the gross amount decedent would have earned had he lived the time specified in the mortality tables cannot be recovered [Code Civ. Proc. § 1904]. Mix v. Hamburg-American S. S. Co., 85 App. Div. 475, 83 N. Y. S. 322.

86. Knott v. Peterson [Iowa] 101 N. W. 173. Earning capacity, probable duration

power,[88] or accumulation of property which the beneficiary would have inherited,[89] and the probable duration of life,[90] should be considered. Reasonable expectation of voluntary aid from deceased may be reckoned,[91] and it does not matter that plaintiff in turn would have given it away.[92]

The propriety of investigating the beneficiary's expectancy of life as a factor in his probable loss has been denied in Pennsylvania.[93] In Kansas, it was done without objection[94] and a charge was held erroneous because permitting a recovery for the deceased's expectancy which was longer than the beneficiary's.

Where the administrator is entitled to sue, such sum as will compensate the intestate's estate for the destruction of his power to earn money may be recovered,[95] though the damages are not limited to the actual pecuniary value of decedent to his estate estimated by his earnings and expectancy of life,[96] but where the statute allows recovery of the probable earnings of the intestate, none can be recovered for the period of his minority.[97]

Where the wife and children sue, the measure of damages is the pecuniary loss sustained by plaintiffs,[98] and on this question it is proper to consider decedent's earnings, his capacity to earn, his probable duration of life, the contingencies to which his life was subject, the amount of his earnings which would probably inure to his wife and children, and what the pecuniary value of his services to them would have been.[99] In an action by a wife, the measure of her damages is not his probable earnings but the probable amount thereof which she would have received had he lived,[1] and in Texas, the jury must be left free to decide whether a less sum presently paid would compensate her for his loss.[2] That plaintiff widow has remarried is immaterial in Illinois,[3] but in Michigan, the possibility

of life and the probable amount of his wages his family would have received may be considered. Jones v. Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890. Evidence that a minor was obedient, industrious and economical is admissible. Cameron Mill & Elevator Co. v. Anderson [Tex.] 81 S. W. 282.

87. Earnings immediately prior to death. Halverson v. Seattle Elec. Co. [Wash.] 77 P. 1058.

88. Probable increase of earning power with maturity of life. Barnes v. Columbia Lead Co. [Mo. App.] 82 S. W. 203.

89. Property which might have been accumulated by the deceased. New York, etc., R. Co. v. Roe, 4 Ohio C. C. (N. S.) 284.

90. Life tables are admissible. Knott v. Peterson [Iowa] 101 N. W. 173; Jones v. Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890.

91. Instruction that plaintiffs were entitled to recover present value of such aid as they had reasonable expectation of receiving held proper. St. Louis S. W. R. Co. v. Shiflet [Tex.] 81 S. W. 524; Ft. Worth & D. C. R. Co. v. Linthicum [Tex. Civ. App.] 77 S. W. 40.

92. The fact that decedent sent remittances in letters to his sister who lived with his parents, which money was used partially for her support, could not defeat the parents' right to recover the full amount of such contemplated contributions. Missouri, etc., R. Co. v. O'Connor [Tex. Civ. App.] 78 S. W. 374.

93. Emery v. Philadelphia, 208 Pa. 492, 57 A. 977.

94. Error to instruct to consider expectancy of life of deceased son where beneficiaries were aged parents. Fidelity Land & Improvement Co. v. Buzzard [Kan.] 76 P. 832.

95. Louisville & N. R. Co. v. Sullivan's Adm'r, 25 Ky. L. R. 854, 76 S. W. 525.

96. Louisville & N. R. Co. v. Mulfinger's Adm'x [Ky.] 80 S. W. 499.

97. Carney v. Concord St. R. Co. [N. H.] 57 A. 218.

98. San Antonio, etc., R. Co. v. Brock [Tex. Civ. App.] 80 S. W. 422. If defendant wants a more specific instruction, he must request it. Id. In assessing damages for wrongful death, the jury may consider the loss of opportunity to inherit property, which might have been accumulated by the deceased. New York, etc., R. Co. v. Roe, 4 Ohio C. C. (N. S.) 284. Not only the earning capacity of deceased, but his services in working about his home and premises, and in caring for and giving counsel to his children, are proper matters for consideration. International, etc., R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991.

99. Instruction on measure of damages for death of husband and father held not harmful in view of amount of verdict. $5,000. Jones v. Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890. Rule for determining damages from death. Expectancy, income, present worth, etc. Watson v. Seaboard Air Line R. Co., 133 N. C. 188, 45 S. E. 555; San Antonio, etc., R. Co. v. Brock [Tex. Civ. App.] 80 S. W. 422.

1. Reed v. Queen Anne's R. Co. [Del. Super.] 57 A. 529.

2. Houston & T. C. R. Co. v. Turner [Tex. Civ. App.] 78 S. W. 712.

3. Chicago & E. I. R. Co. v. Driscoll, 207 Ill. 9, 69 N. E. 620.

of her remarriage may be considered along with the expectancy tables as affecting her damages.[4]

For the death of a child, the damages are its earnings during minority, less the expense of its care and maintenance,[5] and in addition thereto, in Missouri, parents are entitled to damages for the loss of comfort, society and love of a child.[6] In California, where the father and mother of a child are its legal heirs, their damages for causing its death are the value in money to them of its life,[7] hence the value of comfort and society should not be limited to minority,[8] and where there is evidence that a child was earning wages when killed and helped her parents in other ways, there is a basis for substantial damages.[9] The value of an infant's services not of his earnings is to be taken,[10] less the cost of maintenance.[11] What that cost was at the child's late residence may be shown.[12]

A son aged 20 may recover damages for the death of his father, a strong healthy man aged 42.[13]

A husband's damages for the death of his wife, being limited to the monetary value of her services, her photograph, showing her to be a handsome woman, is inadmissible, since its only effect could be to introduce the personal element to enhance the damages.[14]

In an action for the killing and for injuries which resulted in death, decedent's administrator may recover for the pain and anguish suffered between the time of the injury and death, together with decedent's loss sustained by being deprived of his ability to labor during the time he would have lived but for the injury.[15] In New Hampshire, the damages are to be assessed on the basis of the loss suffered by the deceased and his estate.[16]

The presumption that a wife and children sustain pecuniary loss by the death of a husband and father does not obtain in the case of next of kin who are not dependent on the decedent,[17] and mere relationship is insufficient to sustain a recovery.[18] Expectancy may be shown by mortality tables,[19] but they are not conclusive,[20] and impending fatality from disease may be shown.[21] Earnings may be

4. Hewitt v. East Jordan Lumber Co. [Mich.] 98 N. W. 992.

5. Cleveland, etc., R. Co. v. Miles [Ind.] 70 N. E. 985. And an instruction so stating is not objectionable as depriving plaintiff of any recovery. Zimmerman v. Denver Consol. Tramway Co. [Colo. App.] 72 P. 607.

6. So under terms of statute. Sharp v. National Biscuit Co. [Mo.] 78 S. W. 787.

7. Hillebrand v. Standard Biscuit Co., 139 Cal. 233, 73 P. 163.

8. Quill v. Southern Pac. Co., 140 Cal. 268, 73 P. 991.

9. Hillebrand v. Standard Biscuit Co., 139 Cal. 233, 73 P. 163.

10, 11. Under Burns' Ann. St. 1901, § 267 (Horner's Ann. St. 1901, § 266), the damages a mother can recover for death of her son is the value of the child's services until he should have arrived at majority, less cost of maintenance. Southern Ind. R. Co. v. Moore [Ind. App.] 71 N. E. 516. It is not limited to earning when working for wages. Id. Recovery cannot be had for the value of a child's services independent of the expense of maintaining him during minority. Cleveland, etc., R. Co. v. Miles [Ind.] 70 N. E. 985.

12. Evidence of cost of board and clothing at place where deceased child resided is admissible. Southern Ind. R. Co. v. Moore [Ind. App.] 71 N. E. 516.

13. Utah Sav. & Trust Co. v. Diamond Coal & Coke Co., 26 Utah, 299, 73 P. 524.

14. Smith v. Lehigh Valley R. Co., 177 N. Y. 379, 69 N. E. 729.

15. Kyes v. Valley Tel. Co. [Mich.] 93 N. W. 623; Olivier v. Houghton County St. R. Co. [Mich.] 96 N. W. 434.

16. Under Pub. St. 1901, c. 191, § 8. Jury should be instructed that a minor is incapable of earning money for his estate during minority. Carney v. Concord St. R. Co. [N. H.] 57 A. 218.

17. Cleveland, etc., R. Co. v. Drumm, 32 Ind. App. 547, 70 N. E. 286.

18. Decedent contributed nothing towards support of his parents. Standard Light & Power Co. v. Munsey [Tex. Civ. App.] 76 S. W. 931.

19. Mortality table is admissible. International, etc., R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991; Philip v. Heraty [Mich.] 97 N. W. 963.

20. Carlisle tables. Farrell v. Chicago, etc., R. Co., 123 Iowa, 690, 99 N. W. 578.

21. Evidence that decedent would have died shortly from natural causes is admissible. Meekins v. Norfolk & S. R. Co., 134 N. C. 217, 46 S. E. 493.

proved by personal knowledge as well as by books of account,[22] and declarations by deceased evincing probable support may be shown.[23]

Exemplary damages are not recoverable unless there is actual damage.[24] An instruction that makes the assessment of punitive damages compulsory is erroneous.[25]

The amount of recovery must be determined from the evidence and not conjecture or personal experience,[26] and is a question for the jury,[27] whose verdict will stand if not so unreasonable or excessive as to indicate error, passion, or prejudice.[28] Some courts hold that no damages found can be deemed excessive, unless the verdict is the result of passion or prejudice.[29]

22. Wife who was in business with husband can testify as to earnings independent of books. Halverson v. Seattle Elec. Co. [Wash.] 77 P. 1058.

23. Parents may testify that decedent stated to them that it was his intention to remain with them as long as they lived. Gulf, etc., R. Co. v. Brown [Tex. Civ. App.] 76 S. W. 794.

24. Under Const. art. 16, § 26 and Rev. St. 1895, arts. 2901, 2903, providing for recovery of exemplary damages if death was caused by gross negligence. Adams v. San Antonio, etc., R. Co. [Tex. Civ. App.] 79 S. W. 79.

25. "If you find that the negligence was gross or wanton, you shall make proper additions." Louisville & N. R. Co. v. Satterwhite [Tenn.] 79 S. W. 106.

26. An instruction to estimate the amount from the facts proved in connection with their own knowledge and experience is erroneous. Cleveland, etc., R. Co. v. Drumm, 32 Ind. App. 547, 70 N. E. 286. A verdict cannot be based on estimates of probabilities or chances. Id.

27. Where decedent was a healthy man 42 years old and left a son 20 years old who was living with him. Utah Sav. & Trust Co. v. Diamond Coal & Coke Co., 26 Utah, 299, 73 P. 524.

28. **HELD REASONABLE. Children:** $1,200 for a boy three years old. Louisville & N. R. Co. v. Logsden's Adm'r, 25 Ky. L. R. 1656, 78 S. W. 409. $3,000 for a girl eight years old. Farrell v. Chicago, etc., R. Co., 123 Iowa, 690, 99 N. W. 578. $2,572 for two boys 18 and 19 years of age. Texas & P. R. Co. v. Shoemaker [Tex. Civ. App.] 81 S. W. 1019. $5,000 for a boy 12 years old earning $50 per month. Gulf, etc., R. Co. v. Brown [Tex. Civ. App.] 76 S. W. 794. $1,600 for death of a boy 18 years old leaving infant brothers and sisters partly dependent on him, and $900 for death of a boy 15 years old leaving only a father not dependent. The Charlotte, 124 F. 989. $1,000 (reduced from $3,000) to parents for 18½ year old boy earning $1.60 a day. Barnes v. Columbia Lead Co. [Mo. App.] 82 S. W. 203.

Adults: $20,000 for section foreman having an expectancy of 20 years. International, etc., R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991. $5,000 under a statute allowing $10,000, notwithstanding improper instructions. Gen. St. 1889, par. 4518. Jones v. Kansas City, etc., R. Co., 178 Mo. 528, 77 S. W. 890. $2,500 for husband 68 years old. Haines v. Pearson [Mo. App.] 81 S. W. 645. $10,416 for able bodied man 32 years old. Missouri, etc., R. Co. v. Jones [Tex. Civ. App.] 80 S. W. 852. $5,000. Reed v. Queen Anne's R. Co. [Del. Super.] 57 A. 529. $6,540 (Man 31, earning $1,000 per year, leaving widow 32 and children 2 and 8). Cameron v. Jersey City, etc., R. Co. [N. J. Law] 57 A. 417. $8,000 (Brakeman 23 years old in good health). Louisville & N. R. Co. v. Mulfinger's Adm'x [Ky.] 80 S. W. 499. $10,416 (Railway employe of 32 earning $45 per month, leaving wife and four small children). Missouri, etc., R. Co. v. Jones [Tex. Civ. App.] 80 S. W. 852. $5,000 (Son, locomotive fireman, supporting plaintiff, his mother). Chicago, etc., R. Co. v. Heerey, 105 Ill. App. 647. $1,600 (To mother 64 years old, for death of son paying her $25 per month of his wages). Chicago, etc., R. Co. v. Stephenson [Ind. App.] 69 N. E. 270. $25,000 (Fire chief earning $3,300 per year, sole support of wife and children aged 8 and 12). Lane v. Brooklyn Heights R. Co., 85 App. Div. 85, 82 N. Y. S. 1057.

$1,600 where one dependent on decedent had an expectancy of 14 years. Chicago & E. I. R. Co. v. Stephenson [Ind. App.] 69 N. E. 270.

HELD INADEQUATE: $3,250 for widow and child of man earning at least $1,200 a year. Usher v. Scranton R. Co., 132 F. 405.

HELD EXCESSIVE. Adults: Verdict of $18,000 reduced to $12,000 for death of driver 38 years old earning $720 per year, leaving wife and three children under 15 years of age. Hoffman v. New York, etc., R. Co., 42 Misc. 579, 87 N. Y. S. 617. Verdict of $20,000 reduced to $10,000 for husband earning $2,000 per year. Halverson v. Seattle Elec. Co. [Wash.] 77 P. 1058. $17,000 where evidence showed contributory negligence amounting in law to mitigation. Louisville & N. R. Co. v. Satterwhite [Tenn.] 79 S. W. 106. $10,000 (Man of wealth 73 years old leaving no dependents, should be reduced to $5,000). Stillings v. Metropolitan St. R. Co., 84 App. Div. 201, 82 N. Y. S. 726. $18,000 (Driver of brewery wagon aged 38, earning $720 per year, leaving wife and 3 children under 15. Reduced to $12,000). Hoffman v. New York, etc., R. Co., 42 Misc. 579, 87 N. Y. S. 617. $10,000. Frank v. Pennsylvania R. Co. [N. J. Law] 55 A. 691. $20,000 held excessive to widow without children, husband and wife having jointly earned $2,000 a year but having accumulated but little property. Halverson v. Seattle Elec. Co. [Wash.] 77 P. 1058.

Children: $3,000 to parents of infant 18½

§ 5. *Remedies and procedure.*—The ordinary rules of negligence are applicable in matters not specially prescribed.[30]

The action is to enforce a personal liability and is transitory,[31] and survives where the decedent was domiciled at the date of his death.[32] It must be brought within the time limited by the statute creating the right,[33] subject only to authorized extensions,[34, 35] and while the plaintiff's right in preference to another endures.[36] Such limitation being of the essence of the remedy is controlling in any court in which the action is brought.[37] The burden of proving timeliness is on the plaintiff.[38]

If a court has no power to make the decree required by a foreign statute, it is without jurisdiction to entertain the cause.[39] The amount sued for is the amount in dispute as regards appellate jurisdiction.[40]

Where a statute gives the right of action to the administrator for the benefit of the next of kin, his authority to control the suit or settle it is not exclusive.[41]

The statutory notice of claim has been held good, though it claims damages recoverable on the wrong to decedent and also on that to his heirs, etc.[42]

years old, earning $1.60 per day (reduced to $1,000). Barnes v. Columbia Lead Co. [Mo. App.] 82 S. W. 203. $18,000 for a boy nine years old. Illinois Cent. R. Co. v. Watson's Adm'r, 25 Ky. L. R. 1360, 78 S. W. 175. $2,500 where a boy 13 years old was earning but fifty cents per day and had been estranged from his parent. Cook v. American E. C. & Shultze Gunpowder Co. [N. J. Law] 66 A. 114.

29. Up to the limit allowed by the statute. Thomas v. Wheeling Electrical Co., 54 W. Va. 395, 46 S. E. 217, and cases cited.

30. See Carriers, 1 Curr. L. 459, § 26, 3 Curr. L. 591; Master and Servant, 2 Curr. L. 808, 820, 835, 863; Negligence, 2 Curr. L. 997, 1003; Electricity, 1 Curr. L. 996; Railroads, 2 Curr. L. 1426, et seq.; Shipping, 2 Curr. L. 1663; Street Railways, 2 Curr. L. 1750, et seq.

31. Action brought in Washington to recover for a death in Idaho. Smith v. Empire State-Idaho Min. & Development Co., 127 F. 462. On general principles it should be litigated in the state where the cause accrued. Id. Under Rev. St. Wyo. 1887, § 2364a, it may be maintained in the courts of another state. Utah Sav. & Trust Co. v. Diamond Coal & Coke Co., 26 Utah, 299, 73 P. 524. Citizen of Illinois killed in Pennsylvania. Action properly brought in Illinois under the Pennsylvania statute. Leman v. Baltimore & O. R. Co., 128 F. 191.

See, also, ante, § 2.

32. One domiciled in Vermont was killed in New Hampshire. Stockwell v. Boston & M. R. Co., 131 F. 153. Under Pub. St. N. H. 1901, c. 191, not in any place where an administrator should be appointed merely for the purpose of recovering damages. Id.

33. Under Pub. St. 1891, c. 191, § 10, the action must be brought within two years after the cause accrued. Poff v. New England Tel. & T. Co. [N. H.] 55 A. 891. Under Code 1896, § 25, cause of action for death of a minor child is not barred until two years. Louisville & N. R. Co. v. Robinson [Ala.] 37 So. 431.

34. Under Code Civ. Proc. N. Y. § 1902, time is not extended to cover appointment of administrator. Williams v. Quebec S. S. Co., 126 F. 591.

35. "Within one year from neglect complained of" (Pub. Acts 1903, p. 114, c. 149; Id. p. 149, c. 193, § 4) bars action after a year, though less than a year after letters of administration. Radezky v. Sargent & Co. [Conn.] 58 A. 709.

36. Under Rev. St. 1899, §§ 2864, 2865, providing that if a wife fails to sue within six months, the children may sue, a wife cannot sue after such time if there are minor children. Case v. Cordell Zinc & Lead Min. Co. [Mo. App.] 78 S. W. 62. Evidence held insufficient to show that a husband left no minor child. Id.

37. New Jersey statute requires action to be brought within one year. Such rule will prevail in a Federal court sitting in New York for death caused by a New Jersey corporation. International Nav. Co. v. Lindstrom [C. C. A.] 123 F. 475. Action accruing under the Montana statute brought in Minnesota. Negaubauer v. Great Northern R. Co. [Minn.] 99 N. W. 620.

38. Poff v. New England Tel. & T. Co. [N. H.] 55 A. 891.

39. Mexican law required that damages be awarded in the nature of alimony by a decree which contemplates periodical payments, subject to modification from time to time. Slater v. Mexican Nat. R. Co., 194 U. S. 120, 48 Law. Ed. 900.

40. Marsh v. Kansas City S. R. Co. [Mo. App.] 78 S. W. 284. Where an action was brought for $2,000 under a statute allowing a recovery of $5,000, the amount in controversy was not $5,000. Baltimore & O. R. Co. v. Ryan, 31 Ind. App. 597, 68 N. E. 923.

41. Sole beneficiary may settle under Rev. St. c. 70. Mattoon Gas Light & C. Co. v. Dolan, 105 Ill. App. 1.

42. A notice filed with the village, stating that petitioner intended to hold the village for such damages as had been sustained by deceased, his heirs, estate, representatives and next of kin, was not objectionable on the ground that a gross amount was demanded for several claims

An action may be joined with one to set aside a fraudulent judgment for the same death.[43] Where two causes of action result from a single death, they may be joined by setting forth counts under each statute.[44]

If the complaint states a cause of action on any theory, it is sufficient as against demurrer[45] and not barred on its face.[46] The wrong should be pleaded definitely[47] and as that of defendant.[48] If defendant was employer of deceased, the complaint must plead a negligence as employer.[49] Where the action is not brought under a statute, the complaint must allege loss of services during life of deceased.[50] The complaint must allege that there is a widow, next of kin or beneficiaries to take the recovery.[51] In Missouri, a petition by a parent alleging that deceased was under 21 years of age and unmarried is sufficient.[52] It need not be alleged that decedent left surviving him a widow or next of kin,[53] nor that those for whose benefit the action was brought had theretofore received any pecuniary benefit from the decedent,[54] nor according to the general opinion that there was absence of contributory negligence.[55] Allegations relative to parties not benefited by recovery may be stricken out.[56] A petition naming as plaintiffs the widow for herself and as next friend for her child does not make the child a party.[57] The act not being penal, it is proper to declare for less than the sum recoverable.[58]

[Under Comp. Laws 1897, § 2754]. Hunter v. Ithaca [Mich.] 97 N. W. 712.

43. And the parties who obtained such fraudulent judgment are not necessary parties. De Garcia v. San Antonio, etc., R. Co. [Tex. Civ. App.] 77 S. W. 275.

44. Rev. St. Fla. 1892, §§ 2342, 2343 gives cause of action to the administrator for loss to the estate, and Laws 1899, p. 114, c. 4722 authorizes an action by the father or mother for death of a minor child. Held, the father as administrator could sue in both capacities. Callison v. Brake [C. C. A.] 129 F. 196. Instructions under these statutes approved. Id.

45. Chicago, etc., R. Co. v. Barnes [Ind.] 68 N. E. 166. Complaint though not stating a cause of action under employer's liability act was sufficient under the statute, giving a right of action for unlawful death [Code 1896, c. 43, § 27]. Northern Alabama R. Co. v. Mansell [Ala.] 36 So. 459.

46. Complaint is demurrable if it shows that the negligence occurred over a year before [Pub. Acts 1903, p. 114, c. 149. Id. p. 149, c. 193, § 4]. Radezky v. Sargent & Co. [Conn.] 58 A. 709.

47. Where the complaint contains only general and indefinite charges of negligent acts, the complainant may be required to serve a bill of particulars or make it more definite [Code Civ. Proc. §§ 870, 871]. Rosney v. Erie R. Co., 124 F. 90.

48. Petition alleging that defendant caused car to be run against the decedent charges defendant and not his servant with negligence. Birmingham S. R. Co. v. Gunn [Ala.] 37 So. 329.

49. See Master and Servant, 2 Curr. L. 801.

Unless it so pleads, it is demurrable. State v. Chesapeake Beach R. Co. [Md.] 56 A. 385. Where death is caused by the negligence of a fellow-servant, failure to use due care in selection of such servant must be alleged. Id.

50. Loss of services from death and funeral expenses cannot be recovered. Ferguson v. Delaware & A. Tel. & T. Co. [N. J. Law] 58 A. 74.

51. Such defect can be taken advantage of by motion in arrest of judgment after verdict rendered. Southern R. Co. v. Maxwell [Tenn.] 82 S. W. 1137.

52. Rev. St. 1899, § 2864, providing that the action may be maintained by husband or wife, or if there be none or they fail to sue within six months, by minor children or parents. Jackson v. Lincoln Min. Co. [Mo. App.] 80 S. W. 727.

53. Under Illinois statutes. Chicago & E. R. Co. v. La Porte [Ind. App.] 71 N. E. 166. Such fact was a necessary inference from the averments. Zipple v. Sandford & Harris Co. [N. J. Law] 58 A. 176.

54. They being entitled to recover if they were likely to have received benefit from his continued existence. Louisville & N. R. Co. v. Summers [C. C. A.] 125 F. 719.

55. Baltimore & O. R. Co. v. Ryan, 31 Ind. App. 597, 68 N. E. 923. Under Burns' Rev. St. 1901, § 359a. Chicago, etc., R. Co. v. Stephenson [Ind. App.] 69 N. E. 270; Cleveland, etc., R. Co. v. Miles [Ind.] 70 N. E. 985. Complaint not insufficient for failing to allege that decedent took precautionary measures. Chicago, etc., R. Co. v. La Porte [Ind. App.] 71 N. E. 166; Elliott v. Canadian Pac. R. Co., 129 F. 163.

56. Under Tennessee statute, a right of action was complete if decedent left a widow. Allegations relative to children are irrelevant. Atlanta, etc., R. Co. v. Smith, 119 Ga. 667, 46 S. E. 853. Petition held sufficient under the Tennessee statute, but the children being improperly named as beneficiaries, their names should be stricken out. Atlanta, etc., R. Co. v. Wilson, 119 Ga. 781, 47 S. E. 366.

57. Jones v. Kansas City, etc., R. Co. 178 Mo. 528, 77 S. W. 890.

58. Marsh v. Kansas City S. R. Co. [Mo. App.] 78 S. W. 284.

An amendment substituting the proper party plaintiff does not constitute the commencement of a new suit nor work a discontinuance of the original one.[59] Where an action is brought under one statute and the complaint shows that the cause relied on was under another,[60] or that persons not parties would be entitled to share in the amount recovered,[61] the complaint may be amended, but not after verdict rendered,[62] though it is held that material allegations may be inserted at this time.[63]

A denial that the act was wrongfully done presents no issue of fact.[64] A plea that the negligence of plaintiff's intestate proximately contributed to his death is insufficient.[65] The right of a deserted wife to sue as parent for the wrongful death of a child can be challenged only in bar and not in abatement.[66] Under Lord Campbell's Act, the burden in the first instance is on the plaintiff to show that the act causing death was wrongful;[67] but the wrongfulness is to be determined by the law applicable to the act, and the circumstances which conditioned its performance,[68] and if an assault and battery or killing is admitted, the burden shifts to the defendant to show justification.[69]

Under a statute giving a right to recover for physical suffering of decedent, it is competent to show the condition and treatment of the deceased from date of injury to death.[70] Where the right of recovery is limited to persons entitled to share in decedent's estate, relationship may be shown,[71] but not an agreement to adopt children.[72] In Massachusetts, the degree of proof of diligence of one killed by a railroad but not a passenger is that required to show crime.[73]

An instruction must be given as to the rules by which to measure damages.[74] They must be so framed,[75] without repetition,[76] as not to mislead the jury.[77] It

59. An administrator in Illinois brought an action under the Pennsylvania statute, which could be maintained only by the widow. After demurrer to the complaint had been sustained, it was amended. Leman v. Baltimore & O. R. Co., 128 F. 191.

60. Action brought by administrator under Employers' Liability Act and cause relied on was under the statute giving right to next of kin. Silva v. New England Brick Co. [Mass.] 69 N. E. 1054. Amendment to a complaint by striking out recital of the section of a code under which no cause of action existed, and leaving a cause of action stated under a different section is proper. Different cause of action not stated. Louisville & N. R. Co. v. Robinson [Ala.] 37 So. 431.

61. Chicago & E. R. Co. v. La Porte [Ind. App.] 71 N. E. 166.

62. Under Burns' Ann. St. 1901, § 399. Baltimore, etc., R. Co. v. Gillard [Ind. App.] 71 N. E. 58.

63. Under Code Civ. Proc. § 194, complaint may be amended after judgment. Kitchen v. Southern R. Co. [S. C.] 48 S. E. 4.

Note: Although a complaint not naming beneficiaries is a nullity, an amendment may be added after the limitation period has elapsed. Hanie v. Chicago & A. R. Co., 9 Ill. App. 105; South Carolina R. Co. v. Nix, 68 Ga. 572—Brief in Love v. Southern R. Co. [Tenn.] 56 L. R. A. 471.

64. Rutherford v. Foster [C. C. A.] 125 F. 187.

65. Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395.

66. Chicago & B. Stone Co. v. Nelson, 32 Ind. App. 355, 69 N. E. 705.

67. Rutherford v. Foster [C. C. A.] 125 F. 187.

68. Not by opinions of the parties to the action. Rutherford v. Foster [C. C. A.] 125 F. 187.

69. Since a legal presumption arises that the act was wrongful. Rutherford v. Foster [C. C. A.] 125 F. 187. Instruction to this effect approved. Id.

70. Defendant sent him to a hospital against the wishes of his mother, where he died amid strangers. Wabash Screen Door Co. v. Black [C. C. A.] 126 F. 721.

71. Under Comp. Laws, § 10428, that a plaintiff was not decedent's lawful wife. Philip v. Heraty [Mich.] 97 N. W. 963.

72. Philip v. Heraty [Mich.] 97 N. W. 963.

73. Under St. 1886, p. 117, c. 140, same proof required. Hudson v. Lynn & B. R. Co. [Mass.] 71 N. E. 66.

74. Under Rev. St. 1899, §§ 2865, 2866. Coleman v. Himmelberger-Harrison Land & Lumber Co. [Mo. App.] 79 S. W. 981.

75. See Instructions, 2 Curr. L. 461.

76. Loss of protection and support need not be instructed upon where it has already been charged that the jury were to consider probable value of services during minority. Quill v. Southern Pac. R. Co., 140 Cal. 268, 73 P. 991.

77. Instruction held not so framed as to authorize the jury to consider anguish and bereavement. Illinois Cent. R. Co. v. Prickett [Ill.] 71 N. E. 436. Where there was no evidence of payment of doctors' bills, an instruction authorizing their recovery was error. Portsmouth St. R. Co. v. Peed's Adm'r [Va.] 47 S. E. 850. Instruction held not objectionable as requiring a verdict

is not prejudicial to instruct that there is a slight presumption that a parent, if able, will educate his child.[78] A charge on the capacity of a child to take care and exercise discretion is erroneous, if incapacity be not pleaded.[79] It is not proper to require the jury to itemize the elements of damages.[80] The question of the cause of death is for the jury.[81]

The judgment must follow the apportionment made in the verdict.[82] A judgment erroneous as giving recovery to parents not entitled may be reversed as to them and affirmed in so far as it is proper as to others.[83]

Where expenses of the action may be deducted from the amount recovered, it is proper to deduct expenses of procuring expert evidence.[84]

§ 6. *Distributive rights in amount recovered.*[85]—The amount recovered must be distributed according to the provisions of the statutes giving the right of action.[86] Improper distribution will be corrected on the defendant's appeal, though the verdict of the lower court did not affect him.[87] Guardians have the right to receive the amount apportioned to their wards.[88]

DEBT, ACTION OF.

Debt lies to recover a statutory penalty.[89]

DECEIT.[90]

§ 1. Nature and Elements (1046). Statute of Frauds (1046). | **§ 2. Actions and Procedure (1048).**

Scope of topic.—This topic includes fraud as ground for an action for damages, whether the action be in common law form for deceit or an equivalent action

for the full amount allowed by the statute. Pennsylvania Co. v. Paul [C. C. A.] 126 F. 157. An instruction that a recovery could be had only for damages sustained by reason of loss of contributions from earnings and not from income from other property, held not to have been cause of verdict for defendant, there being an issue of contributory negligence in the case. Proper v. Lake Shore, etc., R. Co. [Mich.] 99 N. W. 233.

78. Farrell v. Chicago, etc., R. Co., 123 Iowa, 690, 99 N. W. 578.

79. Indianapolis St. R. Co. v. Antrobus [Ind. App.] 71 N. E. 971.

80. Southern Ind. R. Co. v. Moore [Ind. App.] 71 N. E. 616.

81. Where decedent was found dead near a bursted pulley, but no one saw him struck down. Wabash Screen Door Co. v. Black [C. C. A.] 126 F. 721.

82. It was error for a court to enter judgment distributing the proceeds in a different manner than the verdict did, and apportioning a part to the attorneys the reasonableness of whose fees had not been determined. Shipper's Compress & Warehouse Co. v. Davidson [Tex. Civ. App.] 80 S. W. 1032.

83. Verdict was apportioned between a decedent's wife and his parents; the parents were not entitled to recover. Texas Portland Cement & Lime Co. v. Lee [Tex. Civ. App.] 82 S. W. 306.

84. Under Code Civ. Proc. § 1903, which provides that the amount recovered shall be distributed as unbequeathed assets. In re Snedeker, 88 N. Y. S. 847.

85. See 1 Curr. L. 873.

86. Code, §§ 1600, 1478. Action brought in North Carolina for death in that state of a citizen of South Carolina. Fund distributed according to the laws of North Carolina. Hartness v. Pharr, 133 N. C. 566, 45 S. E. 901. Under Shannon's Code, §§ 4025 to 4028 and §§ 4172, 4173, it is not an asset of the estate and cannot pass by will. Haynes v. Walker [Tenn.] 76 S. W. 902. Action in Illinois under the Pennsylvania statute. Leman v. Baltimore & O. R. Co., 128 F. 191, and cases cited. Under Rev. St. 1893, § 2316, providing that the amount recovered shall be divided among the parties entitled in such shares as they would have taken had deceased died intestate and the amount been personal assets, the recovery for the death of an unmarried son is equally divided between his father and mother, there being no brothers or sisters. Childs v. Bolton [S. C.] 48 S. E. 618.

87. But defendant will not be permitted to profit in the matter of costs. Shipper's Compress & Warehouse Co. v. Davidson [Tex. Civ. App.] 80 S. W. 1032.

88. Under Rev. St. 1895, arts. 2626, 2627, a guardian only has the right to receive the amount apportioned to minor children for death of their father. Shipper's Compress & Warehouse Co. v. Davidson [Tex. Civ. App.] 80 S. W. 1032.

89. Southern Car & Foundry Co. v. Calhoun County [Ala.] 37 So. 426.

90. See exhaustive monograph, 1 Curr. L. 873.

under the Codes. Fraud as ground for relief other than damages is elsewhere treated.[91]

§ 1. *Nature and elements. Persons liable.*—Any one knowingly aiding in a fraudulent transaction is liable.[92] As in other torts, an agent[93] or corporate officer[94] is personally liable, and a principal acquiescing in his agent's deceit is liable therefor.[95] Where a married woman is not liable on contract, she is not liable for deceit in connection therewith.[96]

The representations must be of fact, not mere opinions;[97] but it has been held that misrepresentation as to a matter of law will sustain an action.[98]

There must be some representation,[99] but the manner of making it is immaterial; thus misrepresentations in instruments made part of a contract are actionable.[1]

Statute of Frauds.—It is provided by statute that misrepresentation relative to certain matters, in order to be actionable, must be in writing.[2]

The representations must be false.[3] *The falsity must be willful and with intent to deceive;*[4] but a false assumption of knowledge[5] or statements recklessly

91. See Fraud and Undue Influence, 2 Curr. L. 104; Cancellation of Instruments, 1 Curr. L. 413; Reformation of Instruments, 2 Curr. L. 1492, and like topics.

92. Miller v. John, 208 Ill. 173, 70 N. E. 27.

93. An agent is personally liable for deceit practiced while acting in his representative capacity. Riley v. Beil, 120 Iowa, 618, 95 N. W. 170.

94. President of a corporation is personally liable for deceit committed in his official capacity. Stickel v. Atwood [R. I.] 56 A. 687.

95. Where vendor stands by and acquiesces in false representations made by his auctioneer. Dayton v. Kidder, 105 Ill. App. 107.

96. Brunnell v. Carr [Vt.] 56 A. 660.

97. Held of fact: Statement by one that he has a landlord's lien on certain property. Texas Cotton Produce Co. v. Denny Bros. [Tex. Civ. App.] 78 S. W. 557. Statements in a stock subscription contract relative to patents proposed to be acquired. American Alkali Co. v. Salom [C. C. A.] 131 F. 46. That an insurance company was authorized by statute to write a certain kind of policy. Harris-Emery Co. v. Pitcairn, 122 Iowa, 595, 98 N. W. 476. As to priority of trust deed. Kehl v. Abram [Ill.] 71 N. E. 347. By corporate directors as to solvency. Warner v. James, 88 App. Div. 567, 85 N. Y. S. 153. False statements with reference to a sale of real estate which indirectly refer to the rights of a person under a bid at a sheriff's sale and through which money was received are actionable. Newell v. Long-Bell Lumber Co. [Okl.] 78 P. 104.

Representations as to value: That certain brand of goods has a ready market value (Stoll v. Wellborn [N. J. Eq.] 56 A. 894), as to rental value of premises (Ettlinger v. Weil, 94 App. Div. 291, 87 N. Y. S. 1049), as to earning capacity and dividends of mine (Benedict v. Guardian Trust Co., 91 App. Div. 103, 86 N. Y. S. 370), as to value and situation of distant lands (Mountain v. Day [Minn.] 97 N. W. 883), have been held representations of fact; but where a vendee has an opportunity for inspection, representations as to value are regarded as mere expressions of opinion, unless based on special knowledge which he obtained by handling the property (McKibbon v. Day [Neb.] 98 N. W. 845).

98. That a fee was a life estate. Schneider v. Schneider [Iowa] 98 N. W. 159. See Deceit, 1 Curr. L. 881, n. 65.

99. Failure to repay an overdraft allowed by the depositary is not deceit. Mutual Alliance Trust Co. v. Greenberger, 86 N. Y. S. 729.

1. Stoll v. Wellborn [N. J. Eq.] 56 A. 894. Appraisements of land delivered with mortgage. Simonds v. Cash [Mich.] 99 N. W. 754.

2. Where the director of a bank acting as agent for another in discounting a note at the bank orally misrepresented his principal's financial standing, he was not liable under 3 Comp. Laws 1897, § 9518, providing that statements in regard to the credit of another must be in writing. St. Johns Nat. Bank v. Steel [Mich.] 97 N. W. 704. Evidence held for the jury. Id. Representations as to the financial condition of a corporation made to induce one to subscribe for stock are not within the meaning of Rev. L. c. 74, § 4, providing that false representations concerning the character, conduct, credit, trade or dealing of any other person in order to be actionable must be in writing. Walker v. Russell [Mass.] 71 N. E. 86. See 1 Curr. L. 882, n. 76, et seq.

3. See 1 Curr. L. 888. Halliwell Cement Co. v. Stewart [Mo. App.] 77 S. W. 124. Facts pleaded which tend to negative the falsity of the representations are proper matters of defense. Stratton's Independence v. Dines, 126 F. 968. It is the duty of a bank director selling stock of the bank to know the bank's condition, though mere failure to know will not conclude him on a charge of willful fraud. McCauley v. Brown, 99 Mo. App. 625, 74 S. W. 464. An allegation that defendant knew or by the exercise of ordinary care ought to have known does not state a cause of action. Wilkins v. Standard Oil Co. [N. J. Law] 57 A. 258. Error to instruct that if a bank president by the exercise of ordinary care ought to have known his statements to be false, he was liable. Cahill v. Applegarth [Md.] 56 A. 794.

4. See 1 Curr. L. 888, for exhaustive treatment.

made without knowledge, if false, will sustain an action,[6] unless the matter in hand was governed by a local custom,[7] and it is also held that there need not be an intent to deceive[8] or cause injury.[9]

The representations must be material and such as, had they been true, one would have been justified in acting upon them.[10]

The representations must have been relied on as an inducement to conduct resulting in injury,[11] so if made after the transaction is completed, they give no cause of action,[12] but are admissible in corroboration.[13]

They must have been made to the person seeking a recovery therefor,[14] but where many have suffered from the same act, they may assign their claims to one.[15]

They must have been such as he was entitled to rely on. In the absence of anything to put one on guard, he has a right to rely on representations of material facts;[16] but if he cannot, without substantially closing his eyes to what

5. Assuming to know that an indorsement on a note was genuine where it was a forgery. Commercial Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 77 S. W. 239. It is not necessary that the defendant actually knew the representations to be false if it was his duty to know. Hitchcock v. Gothenburg Water Power & Irrigation Co. [Neb.] 95 N. W. 638. Where one assumes to know and states as a fact that which turns out to be false, he is liable. Lewis v. Hoeldtke [Tex. Civ. App.] 76 S. W. 309. One cannot assert as a defense that he had no knowledge on the subject concerning which his representations were made. Riley v. Bell, 120 Iowa, 618, 95 N. W. 170.

6. Where one recklessly makes false statements of a matter about which he has no knowledge for a fraudulent purpose, and another relies thereon and is injured, the party making such statements is liable. Miller v. John, 208 Ill. 173, 70 N. E. 27.

7. Where there was a custom to accept "cattle notes" on the reputation of the makers and defendant represented them to be first class paper and it turned out that the mortgages were worthless, defendant was held not liable. People's Nat. Bank v. Central Trust Co. [Mo.] 78 S. W. 618.

8. Where one makes a false statement of a character calculated to deceive. Texas Cotton Products Co. v. Denny Bros. [Tex. Civ. App.] 78 S. W. 557. The intent or good faith of the party making the representations is immaterial where another has relied upon them to his damage. Bauer v. Taylor [Neb.] 98 N. W. 29.

9. Where president of a corporation falsely stated that it was solvent, that its bills were always paid when due and that which it proposed to give could be cashed at the bank, it was liable, though there was no specific intention of not paying the note. Fitchard v. Doheny, 93 App. Div. 9, 86 N. Y. S. 964.

10. Where a lease and sublease are made subject to sale and lessee obtains possession by false representations that he has purchased the property. Furneaux v. Webb [Tex. Civ. App.] 77 S. W. 828.

11. Provident Loan Trust Co. v. McIntosh [Kan.] 75 P. 498. A subscriber's signature to a stock subscription contract containing false representations is sufficient proof that he relied and acted upon them. American Alkali Co. v. Salom [C. C. A.] 131 F. 46. Where one goes on and performs a contract after learning that the representations which induced him to enter it were false, he cannot recover. Barber v. Morgan [Tex. Civ. App.] 76 S. W. 319. Answer setting up that plaintiff relied on information from an independent source states a good defense (Stratton's Independence v. Dines, 126 F. 968), but an answer which does not allege that plaintiff entered into the transaction with notice of the fraud does not (Blumenfeld v. Stine, 42 Misc. 411, 87 N. Y. S. 81). Where one purchased the sunken hull of a vessel, evidence as to whether the purchaser relied on false representations as to its condition was for the jury. McRae v. Lonsby [C. C. A.] 130 F. 17.

12. Soule v. Harrington [Mich.] 97 N. W. 357.

13. Lewis v. Hoeldtke [Tex. Civ. App.] 76 S. W. 309.

14. Any rights of a mortgagor because of having been induced by fraud to execute a chattel mortgage do not pass to a purchaser from him of the chattel. Soule v. Harrington [Mich.] 97 N. W. 357. Where the owner of mines organized a corporation which took the mines on his representations of what they were worth, the corporation cannot maintain an action for such representations made to his associates who took the stock. Stratton's Independence v. Dines, 126 F. 968.

15. Where 18 persons had a cause of action for deceit practiced on them in the sale of mining stock. Benedict v. Guardian Trust Co., 91 App. Div. 103, 86 N. Y. S. 370.

16. Rule of caveat emptor does not apply. Kaiser v. Nummerdor [Wis.] 97 N. W. 932. Where one exhibited letters purporting to come from the manufacturer of goods about to be sold, the purchaser had a right to rely on them. Stoll v. Wellborn [N. J. Eq.] 56 A. 894. One who has no experience in abstract business may rely on statements as to their value made by promoters of a corporation organizing to purchase them. Hess v. Draffen, 99 Mo. App. 580, 74 S. W. 440. Statements that a mortgagee would foreclose and the owner would lose her interest in the property, which induced her to sell for less than its value, is actionable fraud, though relied on without investigation. Fox v. Duffy, 88 N. Y. S. 401.

is before them, be ignorant, he will be presumed to rely on what is obvious;[17] so where means of knowledge are open and at hand, one will not be heard to say that he was deceived by misrepresentations;[18] but he is required to exercise only ordinary attention,[19] and he need not examine public records.[20]

It is essential that damage result,[21] but it is not necessary to allege or prove actual damages.[22]

§ 2. *Actions and procedure.*[23]—It is an action separate and distinct in its nature from an action for breach of warranty.[24] Under some circumstances, the tort may be waived and assumpsit brought,[25] and in such a case, the claim is provable in bankruptcy.[26] Relief must be sought promptly on discovery of the fraud.[27] The action must be in the name of the injured person.[28]

A complaint must allege that representations were made with a knowledge of their falsity and with intent to deceive,[29] but the former may be supplied by

17. Unless he is diverted by some artifice or further misrepresentation. Kaiser v. Nummerdor [Wis.] 97 N. W. 932. Evidence held to show that one purchasing a stock of goods had no right to rely on an inventory, where it showed an alteration on its face and the goods were before him. Id. Evidence held insufficient to show fraud in a sale of a logging contract and outfit to experienced lumbermen. Forsman v. Mace, 111 La. 28, 35 So. 372.

18. As to area of land where deed with a correct description was given the purchaser's agent to investigate and report upon. Shappirio v. Goldberg, 192 U. S. 232, 48 Law. Ed. 419. One signed a release for personal injuries without reading it. Osborne v. Missouri Pac. R. Co. [Neb.] 98 N. W. 685.

19. An instruction that one must use ordinary care and prudence is not erroneous, though technically the words "ordinary attention" would be better. Kaiser v. Nummerdor [Wis.] 97 N. W. 932. Where one relied on false representations, it is not necessary for him to prove that a reasonably prudent man would have done so under the circumstances. Riley v. Bell, 120 Iowa, 618, 95 N. W. 170. The fact that one refuses to sign a written statement as to the truth of his statements does not put the other party on inquiry. Ettlinger v. Weil, 94 App. Div. 291, 87 N. Y. S. 1049.

20. Blumenfeld v. Stine, 42 Misc. 411, 87 N. Y. S. 31. Where one induced a proposed purchaser not to obtain an abstract, he cannot afterwards assert that such person had no right to rely on his representations that the title was free from incumbrances. Riley v. Bell, 120 Iowa, 618, 95 N. W. 170. Where one exercised due care in relying on representations relative to the priority of a trust deed, it is immaterial whether he investigated the records. Kehl v. Abram [Ill.] 71 N. E. 347.

21. Complaint alleging that a corporation was insolvent and that money paid had been lost held to allege damage. Stickel v. Atwood [R. I.] 56 A. 687. Fraud in procuring a release of damages for personal injuries is not actionable. Lomax v. Southwest Missouri Elec. R. Co. [Mo. App.] 81 S. W. 225. Where a bank cashier and the maker of a note payable to the bank conspired to conceal such note until it was outlawed, there could be no recovery without proof that at the time it was concealed it was collectible and when it again appeared in the files of the bank it was worthless. Crawford v. Steel [Mich.] 100 N. W. 902.

22. Blumenfeld v. Stine, 42 Misc. 411, 87 N. Y. S. 31.

23. See 1 Curr. L. 902, n. 29.

24. Lies in cases where there is a warranty as well as in cases where there is none. Hitchcock v. Gothenburg Water Power & Irrigation Co. [Neb.] 95 N. W. 638. Recovery cannot be had on proof of mere breach of warranty. Halliwell Cement Co. v. Stewart [Mo. App.] 77 S. W. 124.

Joinder of actions: In Michigan, a count for deceit may be joined with the common counts in assumpsit [Comp. Laws 1897, § 10421]. First Nat. Bank of Independence v. Steel [Mich.] 99 N. W. 786. Under sec. 484 of the Code, two causes of action for deceit cannot be joined where both do not affect all the parties. Warner v. James, 88 App. Div. 667, 86 N. Y. S. 153. Complaint alleging in one count deceit and in another that defendants combining and confederating, then and there represented, etc., held not a misjoinder. Miller v. John, 208 Ill. 173, 70 N. E. 27.

25. See Election of Remedies and Rights, 1 Curr. L. 992.

26. A claim for deceit, if the tort could be waived and assumpsit maintained, is provable in bankruptcy. In re Filer, 125 F. 261.

27. Provident Loan Trust Co. v. McIntosh [Kan.] 75 P. 498. Three months was held a reasonable time within which to offer to rescind a sale of mortgages, where one party lived in Michigan and the other in Massachusetts. Simonds v. Cash [Mich.] 99 N. W. 754.

28. **A guardian** cannot maintain an action in his own name for deceit causing damage to his ward, even though after the action was brought the ward died and the guardian was the only heir at law. Brock v. Rogers, 184 Mass. 545, 69 N. E. 334.

29. Or even though the evidence shows fraud, a judgment cannot be sustained. Inderlied v. Honeywell, 88 App. Div. 144, 84 N. Y. S. 333. Allegation that "defendant corruptly and fraudulently, with the intent to cheat and defraud plaintiff," etc., is sufficient. Hoffman v. Gill, 102 Mo. App. 320, 77 S. W. 146. In order that an action for fraud will lie, knowledge of the false representation must be averred and proved. Wil-

intendment.[30] The exact nature of the fraud need not be alleged,[31] nor the exact language of the misrepresentation proved.[32]

Evidence.[33]—Fraud must be proven[34] by clear and satisfactory evidence,[35] but to warrant the court in taking the case from the jury, it must be such that all the reasonable probabilities are with the defendant.[36] Evidence tending to show that the representations were false,[37] and evidence of similar false representations, is admissible;[38] but not evidence of fraud not alleged.[39]

Questions for the jury.[40]—The question of what were and what were not material inducements to the transaction,[41] and of one's prudence in relying on false representations, is one of fact.[42]

Instructions.[43]—A defective offer of evidence may be cured by instructions.[44] It is error to instruct on matters not in issue.[45] The measure of damages is the loss caused,[46] and it is no defense that plaintiff got full value for his money.[47] Punitive damages cannot be recovered,[48] and the jury must determine whether

kins v. Standard Oil Co. [N. J. Law] 57 A. 258.

30. Commercial Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 77 S. W. 239.

31. Complaint by one who had purchased bonds falsely reciting that they were secured, need not allege the nature of the security plaintiff was led to rely on. Stickel v. Atwood [R. I.] 56 A. 687.

32. Proof of substance is sufficient. Cahill v. Applegarth [Md.] 56 A. 794.

33. See 1 Curr. L. 903.

34. Fraudulent warranty of a horse. Becker v. Atchason [N. J. Law] 56 A. 172.

35. Evidence held insufficient to show that fraudulent representations were made in **procuring one to sign a note.** Hubbard v. McLean [Wis.] 99 N. W. 465; Van Etten v. Flannagan, 2 Neb. Unoff. 59, 95 N. W. 1064. Evidence held insufficient to show fraudulent representations in sale of land. Reynolds v. Munch [Minn.] 98 N. W. 187. Evidence held to show deceit in **sale of cattle** (Hitchcock v. Gothenburg Water Power & Irrigation Co. [Neb.] 95 N. W. 638), and in a **sale of land** (Brier v. Davis, 122 Iowa, 59, 96 N. W. 983). Question whether false statements as to purchaser's financial standing had been made held for the jury. Nichols v. Coleman, 89 N. Y. S. 234.

36. Hubbard v. McLean [Wis.] 99 N. W. 465.

37. Where no disaster had happened to a corporation between the time stock was subscribed for and the time a receiver was appointed, proceedings instituted to have the receiver appointed were admissible on the value of stock at the time it was purchased. Walker v. Russell [Mass.] 71 N. E. 86. Letter written by defendant to his agent, containing the false representation, is admissible. Ettlinger v. Weil, 94 App. Div. 291, 87 N. Y. S. 1049. A conditional bill of sale is not explained by evidence as to the use of the property after it was made. Nichols v. Coleman, 89 N. Y. S. 234.

38. To show intent to deceive (Ettlinger v. Weil, 94 App. Div. 291, 87 N. Y. S. 1049), or to show the animus of the particular transaction (Cahill v. Applegarth [Md.] 56 A. 794).

39. No allegation of intent to deceive. McComb v. Brewer Lumber Co., 184 Mass. 276, 68 N. E. 222.

40. See 1 Curr. L. 903.

41. Kehl v. Abram [Ill.] 71 N. E. 847.

42. Representations as to priority of a trust deed. Kehl v. Abram [Ill.] 71 N. E. 347.

43. See 1 Curr. L. 903.

44. An objection to an offer of evidence that it did not propose to prove that representations were made with intent to deceive is cured by an instruction that such fact must have been proven. American Alkali Co. v. Salom [C. C. A.] 131 F. 46.

45. Cahill v. Applegarth [Md.] 56 A. 794. Instruction as to defendant's liability if representations amounted to mere expression of opinion properly refused, as it had no support in the evidence. Hoffman v. Gill, 102 Mo. App. 320, 77 S. W. 146.

46. For **breach of warranty** against incumbrances, the amount of the incumbrance. Brunnell v. Carr [Vt.] 56 A. 660. The measure of damages for misrepresentations as to **value and situation of land** is the difference between the actual value and purchase price. Mountain v. Day [Minn.] 97 N. W. 883. For deceit in the **sale of mining stock,** the difference between the value at the time of sale and what it would have been worth had the representations been true. Benedict v. Guardian Trust Co., 91 App. Div. 103, 86 N. Y. S. 370. For false representations **in the sale of property,** the difference between the value at the time of sale and its value had the representations been true. Ettlinger v. Weil, 94 App. Div. 291, 87 N. Y. S. 1049. Where one was induced to sell her interest in an estate for less than it was worth, the measure of damages is the difference between what it sold for and what it was worth. unenforceable, plaintiff having done nothing McMillan v. Reaume [Mich.] 100 N. W. 166. Where one falsely represented that he was the agent of the owner of property and **procured insurance** thereon, the measure of damages is the expense of making, issuing and delivering the policy. American Fire Ins. Co. v. Hart, 141 Cal. 678, 75 P. 334.

47. If he would have acquired a bargain had the representations been true, he is entitled to it. Drake v. Holbrook, 25 Ky. L. R. 1489, 78 S. W. 158.

48. Hoffman v. Gill, 102 Mo. App. 320, 77 S. W. 146.

interest can be recovered.[49] Where damages result from the misrepresentations as a whole, special interrogatories calling for findings on particular items must be refused.[50]

DEDICATION.[51]

§ 1. What is a Dedication (1050).
§ 2. The Right to Dedicate (1050).
§ 3. The Purposes of Dedicated Land (1050).
§ 4. Mode of Dedication (1050). Plats and Maps (1053). Evidence of Dedication and Questions of Law and Fact (1054).
§ 5. Effect of Dedication (1054).
§ 6. Remedies (1056).

§ 1. *What is a dedication.*[52]—Dedication is a giving of land by the owner for a public use.[53]

§ 2. *The right to dedicate.*[54]—The dedicator must have an estate compatible with that given and equal to or greater than it.[55] A state may dedicate its lands[56] and a railroad may dedicate land conveyed to it for railroad purposes.[57]

§ 3. *The purposes of dedicated land* embrace all public ways and places.[58] Land may be dedicated for a cemetery[59] or for railroad depot grounds.[60]

§ 4. *Mode of dedication. In general.*[61]—Dedication is either statutory or common law. A statutory dedication can result only from a compliance with the requirements of the statute,[62] but where a statutory dedication fails, a common-law dedication may result.[63]

A common-law dedication may be by parol,[64] and no particular form or ceremony is necessary, but only the essential facts of intention and acceptance, coupled with an identified place.[65] It may result from user superior to the owner's right,[66]

49. A court cannot allow it as a matter of law. Nichols v. Coleman, 89 N. Y. S. 234.

50. Brier v. Davis, 122 Iowa, 59, 96 N. W. 983.

51. The scope of this title is limited to dedication and does not treat of private ways or incorporeal rights (see Easements, 1 Curr. L. 962), nor of the law pertaining to highways and streets and their establishment (see Highways and Streets, 2 Curr. L. 177).

52. See 1 Curr. L. 903.

53. Cyc. Law Dict. "Dedication."

54. See 1 Curr. L. 903.

55. One sold lots with reference to a street over his neighbor's land. Klug v. Jeffers, 88 App. Div. 246, 85 N. Y. S. 423. After owner has granted a railroad right of way, he cannot by dedication establish streets across it. State v. Morgan's La. & T. R. & S. S. Co., 111 La. 120, 35 So. 482. One holding an easement only cannot dedicate. Inhabitants of South Berwick v. County Com'rs, 98 Me. 108, 56 A. 623.

56. Legislature dedicated a highway over land owned by the state. Knowles v. Knowles [R. I.] 55 A. 755.

57. Dedicate for use as highway. Southern Pac. Co. v. Pomona [Cal.] 77 P. 929. A railroad company is bound by the dedication of a street by an agent permitted by it to appear to possess authority to dedicate it. Id.

58. Note: Public squares and parks may be established in the same manner as streets. San Leandro v. Le Breton, 72 Cal. 175; Watertown v. Cohen, 4 Paige [N. Y.] 510, 27 Am. Dec. 80; Cincinnati v. White, 6 Pet. [U. S.] 431; Lennig v. Ocean City Ass'n, 41 N. J. Eq. 606.—From brief, Reuter v. Lowe [Wis.] 34 L. R. A. 733.

59. Equity will enjoin the owner of land dedicated for burial purposes from molesting the graves thereon. Wormley v. Wormley, 207 Ill. 411, 69 N. E. 865.

60. Kansas City & N. Connecting R. Co. v. Baker [Mo.] 82 S. W. 85.

61. See 1 Curr. L. 904.

62. Failure to record the town plats. Rock Island & P. R. Co. v. Johnson, 204 Ill. 488, 68 N. E. 549.

63. Plat not acknowledged. Owen v. Brookport, 208 Ill. 36, 69 N. E. 952. Recorded plat of a city was ineffectual to constitute a statutory dedication of streets shown thereon. Smith v. Beloit [Wis.] 100 N. W. 877. Plat not accepted by the public authorities. Corning & Co. v. Woolner, 206 Ill. 190, 69 N. E. 53. Plat was made by husband without wife's acknowledgment, but she duly executed deeds referring to it. City of Corsicana v. Zorn [Tex.] 78 S. W. 924.

64. Evidence held to show a dedication to the use of a turnpike company. Halley v. Scott County Fiscal Court, 25 Ky. L. R. 1471, 78 S. W. 149.

65. Where the owner of land recognized it for 50 years as a cemetery and buried his dead there and allowed others to do so. Wormley v. Wormley, 207 Ill. 411, 69 N. E. 865. A dedication may result from a prolongation of streets. Under 1 Starr & C. Ann. St. 1896, p. 689, c. 24, art. 5, par. 63, § 1, giving a village power to extend its streets. Village of Lee v. Harris, 206 Ill. 428, 69 N. E. 230.

66. An unrecorded road which has been used and worked as a public highway for 10 years becomes a public highway [Rev. St. 1898, § 1294]. Rhodes v. Halverson [Wis.] 97 N. W. 514. Where a road

but not from permissive user,[67] nor from user of a right of common.[68] Declaring a homestead does not change the adversary character of public user of a way.[69] It is provided by statute in California that user for a stated period shall dedicate,[70] and it has been said that the owner is "estopped" by long user,[71] though prescription would seem to be the more accurate term.[72]

A conveyance by the public, reserving streets according to a plat, dedicates them[73] and they become streets when made passable.[74] An instrument of dedication need not describe the way as "public."[75]

An intention[76] to dedicate is a question of fact and requires no declaration.[77] It may be inferred from circumstances,[78] but must clearly appear,[79] which it does not if the use is specifically granted to the abutters,[80] and in such case user by the public does not suffice.[81] A plat should show streets.[82] An undefined strip on its edge shows no intention to create one.[83] Acts of strangers can evince no intention unless the owner adopts or recognizes what they have done.[84]

had been used for 20 years. People v. Myring [Cal.] 77 P. 975. Dedication and acceptance of a passway will be presumed where there has been a continuous user for 15 years. Magruder v. Potter, 26 Ky. L. R. 1336, 77 S. W. 919. Where a road was used and the owners of the land assisted in working it for 50 years. Burks v. Ferriell [Ky.] 80 S. W. 483. Where a passageway to a spring had been used for 75 years. Larkin v. Ryan, 25 Ky. L. R. 613, 76 S. W. 168. User by the public of a passway for 70 years with the knowledge of the owner. Burrier v. Rice, 25 Ky. L. R. 661, 76 S. W. 169. Where the owner of land allowed a village to construct a sewer system over his land and use it for 10 years. Sherman Lime Co. v. Glens Falls, 42 Misc. 440, 87 N. Y. S. 95.

67. Use of land by the public as an approach to a railroad held permissive. Columbia, etc., R. Co. v. Seattle, 33 Wash. 613, 74 P. 670. Where coal miners had used a lane but whenever the general public attempted to assert any rights the owners interfered, evidence held insufficient to show a dedication. Quick v. Cotman [Iowa] 99 N. W. 301. The use of a strip of land for 10 years without objection by the owner negatives any presumption that the use was permissive. Hartley v. Vermillion, 141 Cal. 339, 74 P. 987.

68. The repeated use of a strip of an open common is the exercise of a right in common and does not make it a highway by prescription. McKay v. Reading, 184 Mass. 140, 68 N. E. 43.

69. Filing of a declaration of homestead as to certain land does not prevent a dedication of a highway through it. People v. Myring [Cal.] 77 P. 975.

70. Under Act Dec. 25, 1877 (St. 1877-78, p. 6, c. 10), declaring that land used as a highway by the public for five years shall be conceded a public highway, such use amounts to a dedication. Southern Pac. Co. v. Pomona [Cal.] 77 P. 929.

71. City of Corsicana v. Anderson [Tex. Civ. App.] 78 S. W. 261. Is estopped to deny a dedication. Riley v. Buchanan, 25 Ky. L. R. 863, 76 S. W. 527.

72. The court in Riley v. Buchanan, 25 Ky. L. R. 863, 76 S. W. 527, bases the rule on prescription and says it operates as an estoppel in pais.

73. Where a city conveyed land, excepting streets as shown by annexed maps, the exception and reference to the maps had the effect of designating the land covered thereby as dedicated to the use of the public. Knickerbocker Ice Co. v. Forty Second St., etc., R. Co., 85 App. Div. 530, 83 N. Y. S. 469; Id., 176 N. Y. 408, 68 N. E. 864.

74. In a deed of water lots reserving streets, rights of the public to use the streets accrue as soon as they are made passable. Knickerbocker Ice Co. v. Forty Second St., etc., R. Co., 85 App. Div. 530, 83 N. Y. S. 469; Id., 176 N. Y. 408, 68 N. E. 864.

75. Deed of dedication. Schlemmer Co. v. Steinman Furniture Co., 2 Ohio N. P. (N. S.) 293.

76. See 1 Curr. L. 904.

77. Evidence held to show that a street should extend to a river along which it ran. Owen v. Brookport, 208 Ill. 35, 69 N. E. 952.

78. See 1 Curr. L. 904, n. 53. Where an abutting owner expressed his willingness to have a street opened and highway commissioners made an order opening the road, evidence held to show a dedication. Finucan v. Ramsden, 88 N. Y. S. 430.

79. Klug v. Jeffers, 88 App. Div. 246, 85 N. Y. S. 423.

80. Evidence held to show no intention to dedicate an alley, where the deed to abutting owners gave them the use and control of it. Culmer v. Salt Lake City [Utah] 75 P. 620.

81. Nor did it become a highway under 1 Comp. Laws 1888, § 2066, providing that a dedication will be presumed from user by the public for 10 years. Culmer v. Salt Lake City [Utah] 75 P. 620.

82. In the absence of proof that land was ever thrown open to be used as a public highway or that the proprietor offered for sale lots with the representation that it was a highway, a common-law dedication cannot be shown. Town of Mt. Vernon v. Young [Iowa] 100 N. W. 694.

83. Under Sess. Laws 1850-51, pp. 260, 261, a plat not showing name or width of a strip along an extremity of a plat but within its limits did not show an intention to dedicate it as a street. Columbia & P. S. R. Co. v. Seattle, 33 Wash. 513, 74 P. 670.

84. Where land was platted by another than the true owner, who afterward recovered possession, the question whether street

Where a street is reserved in a deed, a construction favorable to the public will be given.[85] An intention to restrict the obvious uses of a place will not be found in a word on the plat indicating only one of such uses.[86]

Acceptance[87] is necessary[88] to a dedication by a private person, whether statutory or common law, and it must be of the streets as well as the plat.[89] A dedication by the state need not be accepted.[90]

In accepting a street, the public cannot subject itself to conditions against the exercise of sovereign prerogatives against the abutters or dedicators, but the addition of such a condition does not avoid the acceptance.[91] Where lots are sold with reference to a plat, an acceptance of the streets noted thereon is unnecessary to bind the dedicator.[92]

Acceptance may be manifested by some formal act[93] or implied from improving, repairing[94] or using the property,[95] or from any other act that clearly indicates an assumption of jurisdiction and dominion over it,[96] or recognition of its public character.[97] Thus use of a park may suffice, though it be not improved or beautified.[98]. It may be inferred from long user, though no public corporate act of

thereon had been dedicated depends on their acts, not his. City of Corsicana v. Anderson [Tex. Civ. App.] 78 S. W. 261.

85. Knickerbocker Ice Co. v. Forty Second St., etc., R. Co., 85 App. Div. 530, 83 N. Y. S. 469; Whitman v. New York, 85 App. Div. 468, 83 N. Y. S. 465.

86. Where several lots had no other means of egress except over a tract marked on the plat "levee," held its dedication included its use as a street as well as a landing place for boats. McAlpine v. Chicago Great Western R. Co. [Kan.] 75 P. 73.

87. See 1 Curr. L. 904, n. 63, et seq.

Note: A railroad may accept a dedication for the use of depot grounds. Railroad v. Railroad, 108 Mo. 298; Railroad v. Mining Co., 161 Mo. 684; Kansas City & N. Connecting R. Co. v. Baker [Mo.] 82 S. W. 85.

88. Unless accepted, the fee does not vest in the municipality. Owen v. Brookport, 208 Ill. 35, 69 N. E. 962. Before a municipality can acquire the easement dedicated. Kelsoe v. Oglethorpe [Ga.] 48 S. E. 366. The mere designation of a street upon a plat does not constitute a dedication. Russell v. Chicago & M. Elec. R. Co., 205 Ill. 155, 68 N. E. 727.

89. The mere acceptance of a plat by municipal authorities and inclusion of the territory covered thereby within the city limits is not an acceptance of the dedication of the streets. Russell v. Chicago & M. Elec. R. Co., 205 Ill. 155, 68 N. E. 727.

90. Highway on public land. Knowles v. Knowles [R. I.] 55 A. 755.

91. A city in accepting a deed of land for a street cannot agree that the grantor's land shall be exempt from assessment for improving the street. Leggett v. Detroit [Mich.] 100 N. W. 566, with full discussion.

92. City of Corsicana v. Zorn [Tex.] 78 S. W. 924. See, also, post, this section: **Sale with reference to plat.**

93. Hall v. Breyfogle [Ind.] 70 N. E. 883.

94. Extending its corporate limits to embrace an addition platted and causing a sidewalk to be improved for the entire length of the street. Hall v. Breyfogle [Ind.] 70 N. E. 883.

95. Where highway has been used by the public for a long period. Riley v. Buchanan, 25 Ky. L. R. 863, 76 S. W. 527. Evidence held to show an acceptance of streets by user. Village of Lee v. Harris, 206 Ill. 428, 69 N. E. 230. Use by public for 30 years of space between two blocks. Smith v. Beloit [Wis.] 100 N. W. 877. Public use of a strip of land for a period beyond that required to bar a right of action to recover it. Hartley v. Vermillion, 141 Cal. 339, 74 P. 987. Under Rev. St. U. S. § 2477 (U. S. Comp. St. 1901, p. 1567), providing that the right of way for the construction of highways over public lands is thereby granted, the desultory use of a logging road is insufficient. Town of Rolling v. Emrich [Wis.] 99 N. W. 464.

Where public had used a tract as a **pleasure ground** and the city had exercised authority over it, an acceptance was shown, though there had been no formal acceptance. Oregon City v. Oregon & R. Co., 44 Or. 165, 74 P. 924.

96. Hall v. Breyfogle [Ind.] 70 N. E. 883. Grading and controlling a street and granting track privileges. Owen v. Brookport, 208 Ill. 35, 69 N. E. 952. Resolution of acceptance and granting permission to a street railway company to lay its tracks therein, and conditioning its permission upon the grading and paving of the streets. People's Traction Co. v. Atlantic City [N. J. Law] 57 A. 972. Where commissioners surveyed a highway, made an order opening the same and a map conforming to the survey was filed. Finucan v. Ramsden, 88 N. Y. S. 430. Acts, suits and ordinance of a village with reference to land dedicated as a park. Village of Riverside v. Maclean [Ill.] 71 N. E. 408. Constructing roadway and issuing bonds to pay for same. Lowery v. Pekin [Ill.] 71 N. E. 626. Where a city adopted a map and prevented obstruction of the streets thereon designated. City of Corsicana v. Anderson [Tex. Civ. App.] 78 S. W. 261.

97. The mere omission to assess property dedicated for a street is not sufficient to show an acceptance. Fuller v. Belleville Tp. [N. J. Eq.] 58 A. 176.

98. The fact that a city had not improved or beautified a tract dedicated to it was not evidence of a failure of acceptance, where the land had been used by the public and the city had exercised control over it. Oregon

acceptance be shown,[99] that being required to charge the duty of keeping in repair.[1] The acceptance of some of the streets and alleys appearing on a plat is an acceptance of the entire system,[2] but a use or control evincing an acceptance must cover all parts of the street.[3]

In the absence of acceptance, abutters may have an easement but no rights as in a street.[4]

A sale of lots with reference to a plat[5] constitutes a dedication of the system of streets noted thereon[6] and is irrevocable,[7] even though the plat was not made by the owner of the land,[8] but lots sold with reference to a cul-de-sac is not a dedication thereof.[9] The grantor is concluded as to the grantees to deny dedication,[10] he having impliedly covenanted to keep open public streets.[11]

Plats and maps.[12]—Recording a plat according to the statute, on which certain land is designated as reserved for public use,[13] will, if such tract is definitely described and the dedicated portions indicated, amount to a dedication.[14]

City v. Oregon & R. Co., 44 Or. 165, 74 P. 924.

99, 1. Hughes v. Clark, 134 N. C. 457, 46 S. E. 956, and cases cited. Without corporate acceptance, a town is not chargeable with the condition of a street. Pence v. Bryant, 54 W. Va. 263, 46 S. E. 275, citing numerous precedents.

Note: Until a street is accepted, there is no obligation on the city to keep it in repair. Approval of plat is insufficient. Meiners v. St. Louis, 130 Mo. 284; Baldwin v. Springfield, 141 Mo. 205; Brenck v. Collier, 56 Mo. 166; Holmes v. Jersey City, 12 N. J. Eq. 229.—Cited in Downend v. Kansas City, 156 Mo. 60.

2. Unless a contrary intention is shown. Village of Lee v. Harris, 206 Ill. 428, 69 N. E. 230.

3. But will not be implied as to a portion of the street over which no control was exercised. Kelsoe v. Oglethorpe [Ga.] 48 S. E. 366.

4. Grantees of lots abutting on streets, the dedication of which has never been accepted, do not own the fee of the street though they have a right to have it kept open. Corning & Co. v. Woolner, 206 Ill. 190, 69 N. E. 53. Owner is estopped to assert that such streets are not for the use of the public. Id.

5. See 1 Curr. L. 903.

6. The making and recording of a plat upon which a system of streets is noted and the sale of lots as designated thereon operates as an irrevocable dedication (Burns' Ann. St. 1901, § 4412), so far as purchasers are concerned. Hall v. Breyfogle [Ind.] 70 N. E. 883. Where after dedication of a street the dedicators divided the abutting lots among themselves and sold them, the street became so dedicated as to be open to the public forever. Owen v. Brookport, 208 Ill. 35, 69 N. E. 952. One by making a plat of land describing the streets as deeded and accepted by the common council and thereafter recognizing the dedication by selling lots by the plat establishes public right in the street. Leggett v. Detroit [Mich.] 100 N. W. 566. Filing in county clerk's office of a map platted into streets and lots surrounding an open square marked "Liberty Place," and selling lots with reference to the map, constituted a dedication to the public. Fessler v. Union [N. J. Eq.] 56 A. 272.

Married woman conveyed lots with reference to a plat which she had never acknowledged. City of Corsicana v. Zorn [Tex.] 78 S. W. 924.

7. Hughes v. Clark, 134 N. C. 457, 46 S. E. 956.

8. Selling lots with reference to a plat recorded by another who did not own the land. Oregon City v. Oregon & R. Co., 44 Or. 165, 74 P. 924. He adopts such plat and his acts amount to a dedication of the streets. City of Corsicana v. Anderson [Tex. Civ. App.] 78 S. W. 261; Hall v. Breyfogle [Ind.] 70 N. E. 883.

9. Gilfillan v. Shattuck, 142 Cal. 27, 75 P. 646.

10. Hughes v. Clark, 134 N. C. 457, 46 S. E. 956, citing authorities. Where a town extends its limits to take in a platted tract, the nonacceptance of a street in such tract does not affect title thereto, but only the town's liability to keep it in repair. Id.

11. City of Corsicana v. Zorn [Tex.] 78 S. W. 924.

12. See 1 Curr. L. 906.

13. Recorded maps and plats designating certain portions of the land as parks and sale of lots with reference thereto shows dedication. Village of Riverside v. Maclean [Ill.] 71 N. E. 408. Where persons authorized to select a town site recorded a plat on which was reserved a tract for depot grounds, the use of such lands for the purpose indicated was an appropriation to a public use [Const. art. 12, § 14]. Kansas City & N. Connecting R. Co. v. Baker [Mo.] 82 S. W. 85. Such designation constituted a dedication under Rev. St. 1855, c. 158, § 8. Id.

14. Where a certain alley was as definitely marked on the recorded plat as the rest of the streets and alleys and as definitely described in the articles of dedication, a finding that the land had been dedicated was justified. Bonne v. Security Sav. Soc. [Wash.] 78 P. 38. Where a plat shows certain strips bearing names as streets and spaces are marked between lots in the blocks, there is a sufficient manifestation of an intent to dedicate. Village of Lee v. Harris, 206 Ill. 428, 69 N. E. 230. Where a plat showed a strip of land running through the town with streets and alleys opening onto it, but it was not marked in any way though other vacant tracts had been marked reserved, the strip was held dedicated. Ore-

Evidence of dedication[15] *and questions of law and fact.*—The burden is on the one asserting a dedication,[16] unless long continued user has caused it to shift,[17] to establish it by clear and unequivocal evidence.[18] Petition for laying out a highway[19] and highway signboards[20] constitute evidence of dedication. The failure of a municipality to open an improved part of a new street does not operate as a rejection of the part not opened or improved,[21] and the institution of condemnation proceedings is not conclusive against former dedication.[22]

Where the facts are undisputed, the question of dedication and acceptance is one of law, but where the intent to dedicate is to be drawn as an inference of fact, it is for the jury.[23]

§ 5. *Effect of dedication.*[24]—Under a statutory dedication, the fee of the land is often vested in the municipality,[25] while under a common-law dedication, the dedicator retains the legal title, but in trust for the use designated,[26] and the right of possession vests in the public, which holds a sort of a secondary title in trust.[27] The purchaser of a lot in a platted district acquires a vested right in the easement in all the streets therein.[28]

gon City v. Oregon & R. Co., 44 Or. 165, 74 P. 924. Plat held not defective for uncertainty of description. City of Columbia v. Bright [Mo.] 79 S. W. 151.

Description insufficient: Where a map filed for record dedicated as streets "all land described in the map as streets," a tract not named or otherwise expressly designated as a street is not included in the dedication. Town of Mt. Vernon v. Young [Iowa] 100 N. W. 694.

15. See 1 Curr. L. 907.

16. City claiming land as a public street. Town of Mt. Vernon v. Young [Iowa] 100 N. W. 694. Evidence held to show that land had been dedicated for a road where it had been used by the public for years. Pol. Code, § 2618, defining a public highway. Hartley v. Vermillion, 141 Cal. 339, 74 P. 987. Evidence held to show dedication of land for flowage purposes. Boye v. Albert Lea [Minn.] 100 N. W. 642.

17. Where the public has used a passway for 50 years. Magruder v. Potter, 25 Ky. L. R. 1336, 77 S. W. 919.

18. Town of Mt. Vernon v. Young [Iowa] 100 N. W. 694.

Evidence held insufficient to show a dedication of an extension of a street where the owner had fenced the outlying lands and none of it had been sold with reference to a plat. De George v. Goosby [Tex. Civ. App.] 76 S. W. 66. Where blind alley had been used only by tradesmen and visitors entering the premises. Gilfillan v. Shattuck, 142 Cal. 27, 75 P. 646. Owner said that whenever it was necessary to open a street he was willing to have it done. Town of Mt. Vernon v. Young [Iowa] 100 N. W. 694. Under the law in force at the time a tract was platted, a stone was required to be placed at some point in every street. Held that the mere finding of a stone at one of the corners of a tract of land was insufficient. Id. That a railroad company kept a private crossing in repair and that the public generally used such crossing does not show that a public right had been acquired. Marino v. Central R. Co., 69 N. J. Law, 628, 56 A. 306.

19. A petition for the laying out of a road and a grant of a right of way are admissible on an issue of dedication, where petitioner was being prosecuted for burning a bridge. People v. Myring [Cal.] 77 P. 975. Records of highway commissioners showing lines of a road which had been petitioned for is admissible on an issue as to the situs. Seidschlag v. Antioch, 207 Ill. 280, 69 N. E. 949.

20. A sign on the corner bearing the name of the street is evidence of the manner in which the thoroughfare was regarded. German Bank v. Brose, 32 Ind. App. 77, 69 N. E. 300.

21. Hall v. Breyfogle [Ind.] 70 N. E. 883.

22. For the laying out of a street and subsequent failure to work or control the land as a street. German Bank v. Brose, 32 Ind. App. 77, 69 N. E. 300.

23. Evidence of dedication of a street held for the jury. German Bank v. Brose, 32 Ind. App. 77, 69 N. E. 300. Held sufficient to sustain a finding of dedication. Id. Where owner allowed the public to use a four-foot strip for 35 years. Waters v. Philadelphia, 208 Pa. 189, 57 A. 523. Whether a strip of land along a highway has been dedicated for a part of the road. Gerhards v. Johnson, 105 Ill. App. 65. Conflicting testimony as to whether land had been dedicated for a highway held for the jury. Seidschlag v. Antioch, 207 Ill. 280, 69 N. E. 949.

24. See 1 Curr. L. 907, n. 93, et seq.

25. Under McClain's Code, § 996, acknowledgment and recording of a plat of land in a city as to land set apart for streets. City of Lake City v. Fulkerson, 122 Iowa, 569, 98 N. W. 376. Vendees of lots abutting on land dedicated by statutory dedication for a street acquire no title to any part of the street. Id. On vacation, title does not revert to the original owner [McClain's Code, § 996]. Id.

26. Where a city dedicated to the state for capitol grounds. City of Hartford v. Maslen, 76 Conn. 599, 57 A. 740. Title to the center of the street passes with a conveyance of an abutting lot. Owen v. Brookport, 208 Ill. 35, 69 N. E. 952; Smith v. Beloit [Wis.] 100 N. W. 877. A purchaser with reference to a plat cannot claim title to the center of the street and at the same time deny the dedication. Hall v. Breyfogle [Ind.] 70 N. E. 883.

The dedicator cannot affect the rights of the public or vested rights of individuals by subsequent acts,[29] nor can he retract, though there has been no official acceptance,[30] and land does not revert unless its use for the dedicated purpose has become impossible;[31] neither can a public resurvey[32] or grant,[33] or the acts of public grantees,[34] or assessment of the dedicated place for taxation,[35] have such an effect, nor will the powers of local authorities given for public benefit be cut down.[36]

The public cannot utilize any greater right than is dedicated,[37] but it may use the full area[38] or exercise all the uses indicated by the plat.[39] When land has been dedicated for a certain purpose, it cannot be used for any other,[40] though it has been held that it is within the power of the legislature to change the use,[41] unless private rights would be thereby infringed.[42] Where there is a dedication of a street

27. Fessler v. Union [N. J. Eq.] 56 A. 272. Where a dedication has been accepted by a town, it may proceed with the occupation and use thereof as public convenience requires. Hall v. Breyfogle [Ind.] 70 N. E. 883. Where a town was incorporated, the right to control a street previously dedicated passed to the corporate authorities. Owen v. Brookport, 208 Ill. 35, 69 N. E. 952.

28. To have them kept open. Hall v. Breyfogle [Ind.] 70 N. E. 883; Zeller v. Littell [N. J. Eq.] 58 A. 377. Though a dedication is void as a statutory dedication and there has been no acceptance on the part of the public, purchasers of lots with reference to streets shown on a plat are entitled to have such streets left open. Smith v. Beloit [Wis.] 100 N. W. 877.

See, also, ante, § 4, **Sale with reference to plats.**

29. Where the owner's unequivocal acts tend to show a dedication, he cannot subsequently deprive them of such effect. Seidschlag v. Antioch, 207 Ill. 280, 69 N. E. 949.

30. Pence v. Bryant, 54 W. Va. 263, 46 S. E. 275.

See, also, ante, § 4.

31. Not because of misuse or nonuse. McAlpine v. Chicago Great Western R. Co. [Kan.] 75 P. 73.

32. A resurvey narrowing a strip dedicated for a street is only effectual to limit the duty of the municipality to keep in repair such strip. Smith v. Beloit [Wis.] 100 N. W. 877.

33. By deed conveying land relieved from covenants which amounted to a dedication. Whitman v. New York, 85 App. Div. 468, 83 N. Y. S. 465; Knickerbocker Ice Co. v. Forty Second St., etc., R. Co., 85 App. Div. 530, 83 N. Y. S. 469.

34. A dedication of land for a street having as its terminus tide water cannot be defeated by filling in. Borough of Seabright v. Allgor, 69 N. J. Law, 641, 56 A. 287; Knickerbocker Ice Co. v. Forty Second St., etc., R. Co., 85 App. Div. 530, 83 N. Y. S. 469.

35. Erroneous acts of officials in taking a street cannot impair rights of the public. German Bank v. Brose, 32 Ind. App. 77, 69 N. E. 300.

36. Act Mch. 13, 1872, § 63, declaring a certain tract a park and giving the city a right to lease the same. This latter provision was not affected by Act of March 15, 1872. Harter v. San Jose, 141 Cal. 659, 75 P. 344.

37. Where right to maintain sewer system had been dedicated, and on account of increased sewage land of dedicator was overflowed. Sherman Lime Co. v. Glens Falls, 42 Misc. 440, 87 N. Y. S. 95. A dedication to a turnpike company as a site for a toll house is presumed to be a dedication of an easement only. Halley v. Scott County Fiscal Court, 25 Ky. L. R. 1471, 78 S. W. 149.

38. Where a map was drawn to a scale which showed that passageways should be 70 feet in width, purchasers with reference to the map were entitled to passageways of such width, though it was not noted on the map. Zeller v. Littell [N. J. Eq.] 58 A. 377.

39. **"Levee"** held to have been dedicated as a street for lots otherwise inaccessible. McAlpine v. Chicago G. W. R. Co. [Kan.] 75 P. 73.

40. Use portion of a park for a highway. Village of Riverside v. Maclean [Ill.] 71 N. E. 408. Abutting owners may enjoin such use, though no damage is shown. Id. The wrongful erection by a town of a building on a square dedicated to the public for use as a park is a breach of trust. Fessler v. Union [N. J. Eq.] 56 A. 272.

Note: Where land has been dedicated as a park, no portion of it can be converted into a highway. City of Jacksonville v. Jacksonville R. Co., 67 Ill. 540; Village of Princeville v. Anton, 77 Ill. 325; Guttery v. Glem, 201 Ill. 275; City of Chicago v. Ward, 169 Ill. 392, 61 Am. St. Rep. 185; Board of Education v. Kansas City, 62 Kan. 374; City of St. Paul v. Chicago, etc., R. Co., 63 Minn. 330; City of Llano v. Llano Co., 5 Tex. Civ. App. 132; Prince v. Thompson, 48 Mo. 361; United States v. Chicago, 7 How. [U. S.] 185, 12 Law. Ed. 660; Wellington, Petitioner, 16 Pick [Mass.] 87.—Cited in Village of Riverside v. Maclean [Ill.] 71 N. E. 408.

41. The legislature has power to authorize a city council to devote part of a public park to use as state capitol grounds. City of Hartford v. Maslen, 76 Conn. 599, 57 A. 740. Where the legislature authorized a city to dedicate a public park to the state for use as a capitol site, it was not necessary that the question whether such land should be so used should be submitted to popular vote. Id. Leasing of a part of a park for hotel purposes will not be enjoined at the instance of a citizen where such park was not dedicated by an individual. Harter v. San Jose, 141 Cal. 659, 75 P. 344.

42. Not to the detriment of one owning lots bordering on land dedicated. Fessler v. Union [N. J. Eq.] 56 A. 272.

across a railroad right of way, the public takes subordinate to the rights of the railroad company.[43]

A dedication may be abandoned by nonuser with that intent,[44] or the public may vacate streets and highways[45] on compensating for the ensuing property loss.[46] Land dedicated may be vacated and abandoned by act enabling a court to ascertain if the statutory grounds exist,[47] and persons procuring a vacation admit the power of those whom they move.[48]

§ 6. *Remedies.*—Equity has no jurisdiction to determine whether there has been a dedication.[49]

DEEDS OF CONVEYANCE.

§ 1. **Nature, Form and Requisites (1056).** Requisites (1057). Escrow (1060). Acceptance (1060). Validity of Assent (1061).
§ 2. **Recordation (1062).**
§ 3. **Interpretation and Effect (1062).** Covenants (1063). Designation of Parties (1064). Description of Property Conveyed (1064). Quantum of Estate Conveyed (1065). Conditions and Restrictions (1068). Extinguishment of Rights (1069).

§ 1. *Nature, form and requisites. Deeds distinguished from other instruments.*[50]—To be effective, a deed must take effect presently, though the enjoyment of the estate granted may be postponed or limited;[51] while in a testamentary disposition passing of title is postponed until the grantor's death,[52] and the grantor retains control of the instrument.[53] Such facts may be established by parol evidence.[54]

43. Chicago & A. R. Co. v. Hogan, 105 Ill. App. 136.

44. Control over land dedicated for a street may be relinquished by abandonment. Kelsoe v. Oglethorpe [Ga.] 48 S. E. 366. On abandonment of an easement, title reverts to the grantor, though no reverter is provided for in the grant. Halley v. Scott County Fiscal Court, 25 Ky. L. R. 1471, 78 S. W. 149.

Note: Nonuser, however long continued, does not operate as an abandonment. Reilley v. Racine, 61 Wis. 526; State v. Lever, 62 Wis. 393; Elliott, Roads & Streets, 89; Methodist Episcopal Church v. Hoboken, 33 N. J. Law, 1; Derby v. Alling, 40 Conn. 410; Meirs v. Portland C. R. Co., 16 Or. 500; Hinshaw v. Hunting, 1 Gray [Mass.] 210.—From brief, Reuter v. Lawe [Wis.] 34 L. R. A. 733.

45. See Highways and Streets, 2 Curr. L. 177.

46. See Eminent Domain, 1 Curr. L. 1002.

47. Under Gen. St. 1894, § 2315, the district court of Ramsey county has power to alter or vacate any part of the plat of the City of St. Paul, including streets and public squares. In re Vacation of Underwood's Second Addition [Minn.] 97 N. W. 977.

48. Where the original owner of land dedicated for a street joins with grantees of lots in a petition to have it vacated, they are thereafter estopped from questioning the right of the city to vacate it. City of Lake City v. Fulkerson, 122 Iowa, 569, 98 N. W. 376.

49. Whether the use of a passageway over ground for 21 years constituted a dedication. Scanlin v. Burgess, etc., of Conshohocken Borough [Pa.] 58 A. 122.

50. See 1 Curr. L. 908.

51. Instrument reciting that the grantor has given the grantee certain land, said land to belong to him at my [grantor's] death, is a deed. Brice v. Sheffield, 118 Ga. 128, 44 S. E. 843. Where grantor reserved control, with right to sell, grantees agreeing to execute deed at any time during his life. Durand v. Higgins, 67 Kan. 110, 72 P. 567. Where, after the granting clause, the grantor reserved rents and profits for life. Dozier v. Toalson [Mo.] 79 S. W. 420. Deeds given to another to be delivered after his death. St. Clair v. Marquell, 161 Ind. 56, 67 N. E. 693. The phrase "belonging to the separate estate of P." was held to distinguish the land and did not qualify the conveyance and prevent it from taking effect on delivery. Garner v. Boyle [Tex.] 79 S. W. 1066.

52. Where it appears that the grantor's intention was that the title should remain in him until death, the intention is testamentary. Culy v. Upham [Mich.] 97 N. W. 405. Where a deed contained a condition precedent to delivery that the grantee should support the grantor for life and it was given to a third person to be delivered after the grantor's death, held, the grantor's intention was to retain title until death. Id.

53. Deed from father to child, delivered to another child held to be a testamentary disposition. Wilenou v. Handlon, 207 Ill. 104, 69 N. E. 892. The fact that after recordation the grantor had the deed replaced among his papers rebuts presumption of delivery. Id. That the grantor had stated that he had conveyed to his children was not inconsistent with the view that he intended the deed to take effect at his death. Id. The fact that property was assessed in grantee's name did not show a present conveyance, where grantor did not know such fact. Id. Burden was on grantee to show that he knew such fact. Id.

54. Evidence is admissible to show that a deed absolute on its face was only to take effect at death of the grantor and on the condition that the grantee would support her. Wilson v. Wilson [Tex. Civ. App.] 79 S. W. 839.

A deed absolute on its face may be declared a mortgage[55] if made for the purpose of security,[56] but an intention to execute a mortgage cannot convert an absolute sale into one.[57] One claiming a deed absolute on its face to be a mortgage must establish it by clear proof;[58] inadequacy of price is insufficient.[59] An instrument once a mortgage is always a mortgage.[60]

An executory contract to convey does not affect the legal title.[61] Conveyance may be by decree,[62] or by any instrument which creates an estate;[63] but one conferring a power of attorney is not a conveyance.[64]

Requisites.[65]—A deed poll is as effectual as a formal indenture.[66]

A deed must be in writing.[67] Where made by an agent, he must have written authority,[68] and a deed by one in a representative capacity must be executed in that capacity,[69] and if its genuineness is questioned, it must be established.[70]

55. See Mortgages, 2 Curr. L. 905; Daniel v. Gardner, 71 Ark. 484, 76 S. W. 1063; Oberdorfer v. White, 25 Ky. L. R. 1629, 78 S. W. 436; Butler v. Carvin, 33 Wash. 621, 74 P. 813. Deed absolute and contemporaneous agreement to reconvey. Wells v. Geyer, 12 N. D. 316, 96 N. W. 289. Where one with an equity of redemption executed a deed of the property, evidence held to show a mortgage was intended. Malone v. Danforth [Mich.] 100 N. W. 445. Deed by ignorant negroes to their attorney held a mortgage. Burch v. Nicholas [Ky.] 80 S. W. 1132.

56. Rev. St. 1892, § 1891. Equitable Bldg. & Loan Ass'n v. King [Fla.] 37 So. 181. Agreement to reconvey held not a defeasance. Morrison v. Jones [Mont.] 77 P. 507. See Mortgages, 2 Curr. L. 905. Whether a conveyance with an agreement to reconvey is a legal conveyance, the controlling consideration is the intention of the parties. Luesenhop v. Einsfeld, 93 App. Div. 68, 87 N. Y. S. 268.

57. Where married woman executed an act of sale and took back a letter securing a right to redeem. Caldwell v. Trezevant, 111 La. 410, 35 So. 619.

58. Evidence held insufficient. Gannon v. Moles, 209 Ill. 180, 70 N. E. 689; Emery v. Lowe, 140 Cal. 379, 73 P. 981; Dwyer Pine Land Co. v. Whitman [Minn.] 99 N. W. 362. The burden is on one who asserts that a deed absolute is a mortgage, to prove it. Braun v. Vollmer, 89 App. Div. 43, 85 N. Y. S. 319. Equity will not declare an absolute deed to be a mortgage in the absence of fraud, unless a mutual mistake clearly appears. Forester v. Van Auken, 12 N. D. 175, 96 N. W. 301. Conflicting evidence held insufficient to show a deed absolute to be a mortgage. Philips v. Mo [Minn.] 97 N. W. 969.

59. Bonnette v. Wise, 111 La. 855, 35 So. 953; Forester v. Van Auken, 12 N. D. 175, 96 N. W. 301.

60. Where a deed absolute is a mortgage, title cannot be passed to the mortgagee by canceling the evidence of indebtedness. Keller v. Kirby [Tex. Civ. App.] 79 S. W. 82.

61. Estate remains in vendor until execution of a deed. Smith v. Gordon, 136 Ala. 495, 34 So. 838. Contract of sale, deed to be executed later, held not a conveyance. Nunngesser v. Hart, 122 Iowa, 647, 98 N. W. 505. See, also, Vendors and Purchasers, 2 Curr. L. 1976.

62. A decree of recession [Shannon's Code, § 6301]. Wilkins v. McCorkle [Tenn.] 80 S. W. 834.

63. Where a person entitled to a homestead entry granted all her right to another, reserving the right to occupy the premises for life, the agreement was held a conveyance of a life estate and not a lease. Mann v. Mann, 141 Cal. 326, 74 P. 995.

64. Instrument conferring power to represent and exercise rights of the owner. Angier v. Bocock [Tex. Civ. App.] 81 S. W. 543.

65. See 1 Curr. L. 909.

66. Fleming v. Cohen [Mass.] 71 N. E. 563.

67. Under Rev. Laws, c. 127, § 3, restrictions as to the use of lands must be in writing. McCusker v. Goode [Mass.] 71 N. E. 76. See Frauds, Statute of, 2 Curr. L. 108.

68. Daniel v. Garner, 71 Ark. 484, 76 S. W. 1063. A deed executed by an attorney in fact without written authority is void. Altschul v. Casey [Or.] 76 P. 1083. The presumption arises from long lapse of time that one who signed a deed as agent for another had authority though it is not shown. Boagni v. Pacific Imp. Co. [La.] 36 So. 129. Authority of a corporate grantor to execute a deed will be presumed after 30 years. Altschul v. Casey [Or.] 76 P. 1083.

Deed from a municipality to a bishop and his heirs is within the meaning of a resolution giving power to grant to the bishop and his successors. Wright v. Morgan, 191 U. S. 55, 48 Law. Ed. 89.

69. Where sole devisee and executor under a will executed a deed of deceased's lands, designating himself as grantor, the deed was admissible as his personal deed, though reciting that sale was made to pay debts of the estate. Brown v. Rawlings, 119 Ga. 937, 47 S. E. 198.

70. Affidavit that a deed is a forgery puts the opposite party on proof of its genuineness. Williamson v. Work [Tex. Civ. App.] 77 S. W. 266. Deed 27 years old is presumably genuine. Burden of proof is on the party assailing it. Evidence held insufficient. Elliott v. Sheppard [Mo.] 78 S. W. 627. Where a deed is on a blank printed long after grantor died, a finding that the deed is genuine is unwarranted. Bentley v. Crummey, 119 Ga. 94, 47 S. E. 209. Where grantor denied execution and the deed was never acknowledged and his signature was by mark and there was no proof of its execution, authenticity was not established. Abner v. Creech, 25 Ky. L. R. 1981, 79 S. W. 247. Evidence held to show that a deed was a forgery. Mavity v. Stover [Neb.] 94 N. W. 834. Evidence held to show that a deed had

There must be some title in the grantor,[71] words of description identifying the property,[72] apt words of conveyance,[73] though the precise words of a statutory form are not essential,[74] execution according to the statute,[75] delivery,[76] with the

been fully executed and not executed in blank. Williams v. Butterfield [Mo.] 77 S. W. 729.

71. Smith v. Gordon, 136 Ala. 495, 34 So. 838; Krueger v. Davis, 25 Ky. L. R. 845, 76 S. W. 389. A railroad company which has acquired a right of way cannot grant a telegraph company an easement. Hodges v. Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572. Deed of one holding a contingent remainder is ineffective where contingency never happens. Smith v. Smith, 25 Ky. L. R. 1960, 79 S. W. 223.

Tax deeds to Federal land is void. Campbell v. Spears, 120 Iowa, 670, 94 N. W. 1126.

72. **Held insufficient:** So vague and indefinite that a surveyor could not locate the land. Hoodless v. Jernigan [Fla.] 36 So. 656. See Deeds, 1 Curr. L. 909, n. 12. A deed purporting to convey a specific tract by a too indefinite description does not convey an undivided interest in the tract in which the deed stated the land lay. Adams v. Hopkins [Cal.] 77 P. 712. "Ten acres situated [in a certain district] where I now reside" is not too indefinite to be made certain by parol evidence. Brice v. Sheffield, 118 Ga. 128, 44 S. E. 843. Where there was no specific tract to which the description could apply. Edrington v. Hermann [Tex.] 77 S. W. 408.

Description held sufficient: Currier v. Jones, 121 Iowa, 160, 96 N. W. 766. Description by **governmental subdivisions** is sufficient, though it was further designated as situated in the wrong county. Risch v. Jensen [Minn.] 99 N. W. 628. Sufficient if **contained in several instruments** referring to each other. Lawler v. Bradford [La.] 37 So. 12. The words "being the same land owned and occupied by me," occurring immediately after a description by metes and bounds, does not create an ambiguity. Malette v. Wright [Ga.] 48 S. E. 229. "Two acres of land lying in the west half of section 24, T. 18, R. 29, situated on the S. W. part and on line of said property, known as Silas place, situated in Lee County," is not void on its face. Seymour v. Williams, 139 Ala. 414, 36 So. 187.

Note: A deed is sufficient if it is possible to identify the property and will be given effect if possible. Devlin, Deeds, § 1012. Scherber v. Kaoler, 49 Wis. 291; Gebbardt v. Reeves, 75 Ill. 301; Methodist Episcopal Church v. Hoboken, 33 N. J. Law, 22; Jarstadt v. Morgan, 48 Wis. 249—From brief, Reuter v. Lawe [Wis.] 34 L. R. A. 733.

73. Contract relative to right to string wires not a deed. Western Union Tel. Co. v. Pennsylvania Co., 125 F. 67. Letter containing no words of grant held insufficient. Reich v. Dyer, 91 App. Div. 240, 86 N. Y. S. 544.

74. The form of words prescribed by the statute need not be followed literally. Wilson Rev. & Ann. St. 1903, § 919. For quit claim deed. Mosier v. Momsen, 13 Okl. 41, 74 P. 905.

75. Where the execution is in dispute, it is a question for the jury. Glover v. Gasque [S. C.] 45 S. E. 113. Under Code 1896, § 1797, execution cannot be proved by declarations of the grantor that he had made the deed. Sledge v. Singley [Ala.] 37 So. 98. A deed was attested when executed by only one witness. Subsequently, the grantor acknowledged the deed before two witnesses, one of whom was a notary who attached his seal to the attestation. Held sufficient to entitle it to record. Vizard v. Moody, 119 Ga. 918, 47 S. E. 348.

The true **signature** is the mark, not what the notary wrote, and error in the name does not vitiate the signature. Notary wrote wrong name. Agurs v. Belcher, 111 La. 378, 35 So. 607. Where a witness wrote grantor's name and grantor made his mark and the witness wrote under that grantor could not write, it was prima facie but not conclusive evidence that the grantor executed the deed. Langenbeck v. Louis, 140 Cal. 406, 73 P. 1086. The fact that heirs of a man named "Clark" wrote their names "Clarke" to a deed to property inherited from him will not invalidate the deed. Altschul v. Casey [Or.] 76 P. 1083.

Revenue stamp not essential to validity. Dorr Cattle Co. v. Des Moines Nat. Bank [Iowa] 98 N. W. 918.

Seal not necessary in New York [Laws 1896, p. 593, c. 547]. Fitzpatrick v. Graham, 122 F. 401. Seal of corporate grantor is sufficiently represented by the letters "L. S." Altschul v. Casey [Or.] 76 P. 1083. Unsealed deed may convey an equitable title. Scott v. Jenkins [Fla.] 35 So. 101. Under Laws 1890, p. 98, the omission of the seal of a city treasurer to a deed of land sold for nonpayment of local assessment is not fatal. Kirby v. Waterman [S. D.] 96 N. W. 129. The failure of the record to show the presence of a seal is not affirmative evidence of the absence of the seal. Dana v. Jones, 91 App. Div. 496, 86 N. Y. S. 1000.

Acknowledgment not necessary as between the parties. Slattery v. Slattery, 120 Iowa, 717, 95 N. W. 201. See acknowledgments, 1 Curr. L. 17; Id. 3 Curr. L. 31.

Livery of seisin is not necessary. Beard v. White [Ga.] 48 S. E. 400.

A deed of a **wife's separate property** must be signed by both husband and wife [Rev. St. 1892, § 2208]. Equitable Bldg. & Loan Ass'n v. King [Fla.] 37 So. 181. Deed to **homestead** must be signed by both husband and wife [Hurd's Rev. St. 1899, p. 868, c. 52, § 4]. Strayer v. Dickerson, 205 Ill. 257, 68 N. E. 767. See Homesteads, 2 Curr. L. 210. A **deed of gift** executed on Sunday is valid. Dorough v. Equitable Mortg. Co., 118 Ga. 178, 45 S. E. 22. See Gifts, 2 Curr. L. 140. A **deed from husband to wife** is void, notwithstanding Acts 1869-70, p. 113, c. 99. Worrell v. Drake, 110 Tenn. 303, 75 S. W. 1015. See Husband and Wife, 2 Curr. L. 246. But a deed from husband to wife pursuant to an antenuptial contract held valid, though containing no words evincing an intention to create a separate estate. Barnum v. Le Master, 110 Tenn. 638, 75 S. W. 1045. A deed from a husband to wife of the homestead is void. Karsten v. Winkelman [Ill.] 71 N. E. 45. If the property deeded is of less value than $1,000, of which consideration recited in the deed is prima facie evidence. Id.

intention of passing title,[77] and in such a manner as to terminate the grantor's control over the instrument;[78] but a conditional delivery may be sufficient.[79]

Rights under a void deed whereby a married woman conveys alone may be lost by her laches after the bar of coverture is removed. Dickman v. Dryden, 90 Minn. 244, 95 N. W. 1120.

A deed of trust must designate its purpose and indicate the beneficiary [Burns' Rev. St. 1901, § 3391]. Christian v. Highlands, 32 Ind. App. 104, 69 N. E. 266. Under Code 1883, § 1335, a deed attempting to create a spendthrift trust must contain a declaration of trust. Gray v. Hawkins, 133 N. C. 1, 45 S. E. 363. Deed absolute by a spendthrift and bond executed by the trustee to pay the grantor an annuity and at his death a certain amount to his heirs, held to create an express trust. Anderson v. Kemper, 25 Ky. L. R. 538, 76 S. W. 122.

Note: A partition deed is not binding on any of the parties to it unless executed by all of them. Emeric v. Alvarado, 64 Cal. 529; Tewksbury v. O'Connell, 21 Cal. 60; Stewart v. Baker, 17 Tex. 417.—Note to Cottrell v. Griffitts [Tenn.] 57 L. R. A. 340. See Partition, 2 Curr. L. 1102.

76. Held sufficient: A deed is delivered whenever it comes into possession by the donee and is accepted by him. Cook v. Lee [N. H.] 58 A. 511. Evidence held insufficient to show that a deed had not been delivered to one who 28 years before had conveyed to another. Painter v. Campbell, 207 Pa. 189, 56 A. 409. There was a sufficient delivery as to living grantees, where after the death of one named, the grantor handed it to another and told him to have the name of deceased erased. Wetherington v. Williams, 134 N. C. 276, 46 S. E. 728. Evidence held to show that a deed had been signed and delivered. Slattery v. Slattery, 120 Iowa, 717, 95 N. W. 201. Where grantor placed deed in grantee's hand and said "This house and lot is yours, now go and put it in the bureau drawer," evidence held to show a delivery. Kenniff v. Caulfield, 140 Cal. 34, 73 P. 803.

Recording is a good delivery. Whitaker v. Whitaker, 175 Mo. 1, 74 S. W. 1029. Record held insufficient where grantor retained deed. Hooper v. Vanstrum [Minn.] 100 N. W. 229; Hogadone v. Grange Mut. Fire Ins. Co. [Mich.] 94 N. W. 1045. Deed to a grandchild 13 years old is sufficiently delivered, by recording it and delivering it to the child without direction to the mother with whom she lived. Chapin v. Nott, 203 Ill. 341, 67 N. E. 833.

Delivery to a life tenant of a deed conveying a life estate, with remainder to others, is sufficient. Chapin v. Nott, 203 Ill. 341, 67 N. E. 833. Where a deed contained two **acknowledgments,** there was no presumption that delivery did not take place until after the second one. Bogart v. Moody [Tex. Civ. App.] 79 S. W. 633. That a conveyance was beneficial to the grantee and he afterward dealt with the property as his own shows delivery. Benton Land Co. v. Zeitler [Mo.] 81 S. W. 193. An allegation that a deed has been executed is an allegation that it has been delivered. Wentworth v. Eichorn [Mass.] 69 N. E. 366.

Delivery held insufficient: Certificate of acknowledgment is no evidence of delivery where it is conceded that no delivery was made at time of acknowledgment. Van Der Aa v. Van Drunen, 208 Ill. 108, 70 N. E. 33. Testimony of a conveyancer that deeds were signed, acknowledged and witnessed in his presence does not show a delivery. Gardiner v. Gardiner [Mich.] 95 N. W. 973. A deed is not operative as a conveyance, nor available as a memorandum of a contract of sale until delivery. Schneider v. Vogler [Neb.] 97 N. W. 1018. Recitals therein are of no force or effect. Dohmen v. Schlief [Mo.] 78 S. W. 799. A grantor may change a deed as he sees fit, so long as it remains in his possession undelivered. Wetherington v. Williams, 134 N. C. 276, 46 S. E. 728. Condition precedent to delivery that grantee is to support the grantor is not waived where the grantor hands to a third person to be delivered to the grantee after his death. Culy v. Upham [Mich.] 97 N. W. 405.

77. Evidence held insufficient to show a delivery with intent to pass title. King v. Hill [Tex. Civ. App.] 75 S. W. 550. Delivery by one of two joint grantors is sufficient. Id. To constitute delivery, there must be **indicia either by acts or words** of the intent of the maker to deliver. Emmons v. Harding [Ind.] 70 N. E. 142. Statements by grantor to third person at time of delivery to a stranger held sufficient. Id.

78. Emmons v. Harding [Ind.] 70 N. E. 142. Deed executed to an infant retained by grantor until his death held inoperative. Bisard v. Sparks [Mich.] 95 N. W. 728.

Depositing with a third person with no intention of passing title is not sufficient. Tarwater v. Going [Ala.] 37 So. 330. The unauthorized transfer by the depositary to the grantee named was ineffective. Id. The intent with which a grantor delivers a deed to a third person for another is a question of fact to be determined from the circumstances. Kittoe v. Willey [Wis.] 99 N. W. 337. Where bedridden man handed it to his wife. If intent to deliver exists, it is effectual. Id. Handed to a third person to be delivered after the grantor's death. Emmons v. Harding [Ind.] 70 N. E. 142. Delivery by grantor to a third person with the understanding that he might recover it if he recovered from a sickness is insufficient (Ward v. Russell [Wis.] 98 N. W. 939); but if the grantor **reserves no right to recall** the deed, a delivery to a third person to be delivered to the grantee after his death is sufficient (Schreckhise v. Wiseman [Va.] 45 S. E. 745; Albrecht v. Albrecht, 121 Iowa, 521, 96 N. W. 1087). Delivery was binding, though the one to whom the deeds were delivered was unaware of the nature of the instrument. St. Clair v. Marquell, 161 Ind. 56, 67 N. E. 693. Executed to a member of the family and **placed in the family strong box** was insufficient. Garner v. Risinger [Tex. Civ. App.] 81 S. W. 343. Executed and placed in a tin box held ineffective. Clay v. Layton [Mich.] 96 N. W. 458. See Gifts, 2 Curr. L. 140.

Placed in hands of grantees to be held for the grantor until demanded. Bunn v. Stewart [Mo.] 81 S. W. 1091. That grantor remained in possession is important in determining whether deed was delivered. Wilenou v. Handlon, 207 Ill. 104, 69 N. E. 892.

Possession obtained by the grantee by artifice is not a delivery,[80] and is unavailing for any purpose.[81] Delivery to the agent of the grantor is not sufficient,[82] but otherwise if it is to the agent of the grantee.[83]

Escrow.—A deed deposited in escrow does not become operative until the performance of the conditions upon which it was to be delivered,[84] and possession obtained by the grantee before the conditions have been performed is ineffectual.[85] Unless time is of the essence of the contract, a delivery out of escrow after the date on which the conditions were to have been performed will pass title.[86] One co-tenant cannot alter the conditions of the escrow.[87] A deed cannot be delivered to the grantee in escrow.[88]

Acceptance.—The delivery must be accepted,[89] but acceptance of a beneficial conveyance is presumed.[90] Possession of grantor at the time of the conveyance may be essential as to third persons.[91]

79. If the deed is placed beyond the custody and control of the grantor, it is sufficient, though some condition is imposed precedent to delivery to the grantee. Kittoe v. Willey [Wis.] 99 N. W. 337. If wife died first, deed was to be destroyed. Tabor v. Tabor [Mich.] 99 N. W. 4.

80. Grantee procured deed executed in blank, and filled in his name. Westlake v. Dunn, 184 Mass. 260, 68 N. E. 212. Acts done by grantor in ignorance of the fraud did not operate as a ratification. Id. Taken from the grantor without her consent, there was no delivery, though they are recorded. Gardiner v. Gardiner [Mich.] 95 N. W. 973. Where parent executed deeds to his child and did not intend them to be delivered until after his death, but the child got them and had them recorded. Roup v. Roup [Mich.] 99 N. W. 389.

81. Property had been mortgaged by the one procuring the deed. Westlake v. Dunn, 184 Mass. 260, 68 N. E. 212. Where grantee unlawfully got possession of the deed and had it recorded, a grantee from her acquired no rights. Garner v. Risinger [Tex. Civ. App.] 81 S. W. 343.

82. One made a deed to his housekeeper and delivered it to his sister. Lange v. Cullinan, 205 Ill. 365, 68 N. E. 934. A delivery by the grantor to his agent leaves it subject to reclamation by him. Emmons v. Harding [Ind.] 70 N. E. 142.

83. Agent's authority need not be in writing. Dorr Cattle Co. v. Des Moines Nat. Bank [Iowa] 98 N. W. 918.

84. Flanagan Estate v. Great Cent. Land Co. [Or.] 77 P. 485. That subsequent to the time a deed was to have been delivered out of escrow, the grantee procured the grantor to execute a mortgage on the premises does not prove nondelivery. Swain v. McMillan [Mont.] 76 P. 943. Nor does the fact that the grantee procured the mortgage to be canceled of record show that he had no interest in the land. Id. Where a grantor asserts that conditions were not performed and the deed was never delivered and such facts are denied by the grantee, the grantor has the burden of proving nondelivery. Id.

85. A grantee is estopped from claiming under a deed delivered in escrow where the grantor had taken back the deed and executed notes which the grantee had accepted. Beamer v. Morrison [Ill.] 71 N. E. 402; Flanagan Estate v. Great Cent. Land Co. [Or.] 77 P. 485. See Escrows, 1 Curr. L. 1089. Where deed left in escrow is improperly delivered, the grantee acquires no rights, nor can a bona fide purchaser from him acquire any. Mays v. Shields, 117 Ga. 814, 45 S. E. 68. But if grantor learns of the delivery he must take prompt steps to recover possession or he will be estopped. Id.

86. Grantor did not attempt to withdraw the deed before the conditions were complied with, but on the day of delivery he deeded to another. Wright-Blodgett Co. v. Astoria Co. [Or.] 77 P. 599.

87. One co-tenant consented to the delivery out of escrow on payment to him of a less sum than was stipulated. Dupoyster v. Ft. Jefferson Imp. Co. [Ky.] 80 S. W. 800.

88. Parol evidence is inadmissible to show that it was delivered for a purpose contrary to the recitals therein. Mays v. Shields, 117 Ga. 814, 45 S. E. 68. See Escrows, 1 Curr. L. 1089.

89. Acceptance is shown where grantees kept the deed for seven years, and at the time of taking it executed purchase-money notes for the land. Wood v. Howk, 25 Ky. L. R. 2109, 79 S. W. 1184. Execution of a mortgage by the grantee held sufficient. McCoy v. McCoy [Ind. App.] 69 N. E. 193. Where beneficiary in a trust deed delivered to a third person to be delivered to trustees after the grantor's death assented to it when executed and accepted it after grantor's death. Albrecht v. Albrecht, 121 Iowa, 521, 96 N. W. 1087. A subsequent acceptance by the grantee of a deed delivered to a third person for delivery after grantor's death. Emmons v. Harding [Ind.] 70 N. E. 142. The fiction of relation which carries the acceptance of such a deed back to the date of delivery by the grantor cannot operate to the prejudice of strangers. Id. There is no acceptance of a deed given to a third person to be delivered after the grantor's death until the grantee elects to claim under the deed. Id.

90. Where grantor took her child to a notary and dictated and executed a deed in her favor and handed it to the notary to be sent to the register of deeds. Coulson v. Coulson [Mo.] 79 S. W. 473. Where grantees knew that a deed had been made to them and had claimed title shortly after the grantor's death. Coulson v. Coulson [Mo.] 79 S. W. 473; Whitaker v. Whitaker, 175 Mo. 1, 74 S. W. 1029. An absent mortgagee is entitled to the benefit of the mortgage without acceptance if it is recorded by the mort-

A consideration is unnecessary,[92] but if mentioned, it becomes a part of the deed.[93] A deed founded on an illegal consideration is void,[94] but has been held to be binding on the grantor.[95] The true consideration may be established by parol,[96] but where a consideration is expressed, parol evidence is not admissible to show that there was none.[97]

Validity of assent.—A deed like any contract may be invalid because of fraud or undue influence of one party on the other,[98] or of mutual mistake or accident,[99] or incapacity of parties,[1] which prevents any real assent. Elements and constituents of such defenses are discussed in topics cited.

gagor. In re Immanuel Presbyterian Church, 112 La. 348, 36 So. 408.

91. Under Rev. Codes, § 7002, within one year from date of the deed. Galbraith v. Paine, 12 N. D. 164, 96 N. W. 258. A deed by one who had not been in possession for over a year or collected rent during such period is void as against one in adverse possession of the land. Schneller v. Plankinton, 12 N. D. 561, 98 N. W. 77. See, also, Champerty and Maintenance, 1 Curr. L. 506.

92. Under Civ. Code, §§ 915, 916, conveyance without consideration is valid as between the parties. Bernardy v. Colonial & United States Mortg. Co. [S. D.] 98 N. W. 166. Consideration of love and affection will support a deed from husband to wife. Paulus v. Reed, 121 Iowa, 224, 96 N. W. 757. From parent to child. Driscoll v. Driscoll [Cal.] 77 P. 471; Russ v. Maxwell, 94 App. Div. 107, 87 N. Y. S. 1077. See Parent and Child, 2 Curr. L. 1089.

Inadequacy of consideration is not sufficient to invalidate a deed (Mueller v. Renkes [Mont.] 77 P. 512); but is evidence of fraud (Walker v. Shepard [Ill.] 71 N. E. 422). Deed from habitual drunkard for an inadequate consideration set aside. Hardy v. Dyas, 203 Ill. 211, 67 N. E. 852. Inadequacy of consideration, coupled with circumstances showing undue influence, and that grantor did not fully understand the nature of his acts. Id. Deed by ignorant and aged couple for inadequate consideration set aside. Shea v. Teufert, 207 Ill. 222, 69 N. E. 872. Where one acquired from his foster sister, deeds for an inadequate consideration, evidence held to show fraud. Walker v. Shepard [Ill.] 71 N. E. 422. Consideration held sufficient where a deed was attempted to be set aside for fraud and undue influence. Tichy v. Simicek [Neb.] 96 N. W. 629. On an issue of fraud, failure to instruct as to inadequacy of consideration was not cause for new trial. Thomas v. Brantley, 118 Ga. 588, 45 S. E. 449. Deed reciting a consideration of five dollars and love and affection, is not on its face a voluntary conveyance. Pierce v. Bemis [Ga.] 48 S. E. 128. That subscribing witness saw no money paid did not show that the conveyance was voluntary. Id. Deed to city reserving free access to any wharf upon a certain street is supported by a valuable consideration. Aden v. Vallejo, 139 Cal. 165, 72 P. 905.

93. Must be proven in case of lost deed. Capell v. Fagan [Mont.] 77 P. 65.

94. That grantee should live in a state of concubinage with grantor. Watkins v. Nugen, 118 Ga. 372, 45 S. E. 262.

95. Regardless of whether there is a change of possession, the grantor and those in privity with him are bound by a deed based on an immoral or illegal consideration. Beard v. White [Ga.] 48 S. E. 400.

96. Henry v. Zurflieh, 203 Pa. 440, 53 A. 243; Forester v. Van Auken, 12 N. D. 176, 96 N. W. 301; Halvorsen v. Halvorsen [Wis.] 97 N. W. 494; Lathrop v. Humble [Wis.] 97 N. W. 906. That the real consideration was the pledging of the grantee's credit in a deed reciting love and affection. Scudder & Co. v. Morris [Mo. App.] 82 S. W. 217. That one dollar and love and affection was not the only consideration. Edwards v. Latimer [Mo.] 82 S. W. 109. Where a consideration different from that expressed is attempted to be shown, the burden is on the one who asserts it. Harraway v. Harraway, 136 Ala. 499, 34 So. 836.

97. Davis v. Jernigan, 71 Ark. 494, 76 S. W. 564.

98. See Fraud and Undue Influence, 2 Curr. L. 104. Conveyance absolute by a paralytic set aside where there was an oral understanding that the property was to be managed for her support. Stevens v. Shaw [N. J. Eq.] 57 A. 1024.

99. See Mistake and Accident, 2 Curr. L. 903. Where a deed contains a mutual mistake, the remedy is reformation where unilateral rescission. Wirsching v. Grand Lodge [N. J. Eq.] 66 A. 713. Deed by a man 71 years old set aside because grantor did not understand nature of transaction. Id. Evidence held insufficient to show that a condition for support had been omitted from a deed by mutual mistake. Helms v. Helms, 135 N. C. 164, 47 S. E. 415.

1. Infants, 2 Curr. L. 392; Incompetency, 2 Curr. L. 295; Husband and Wife, 2 Curr. L. 246 (married women). It is sufficient to show a mental deficiency justifying the conclusion that the grantor did not exercise deliberate judgment. Not necessary to show insanity or idiocy. Paulus v. Reed, 121 Iowa, 224, 96 N. W. 767. Mere weakness of mind is insufficient to invalidate a deed. Paulus v. Reed, 121 Iowa, 224, 96 N. W. 757; Tichy v. Simicek [Neb.] 96 N. W. 629. The test is, did the grantor have any capacity to understand what he was doing. Sawyer v. White, 122 F. 223. The deed of an insane person is of full force until his option to declare it void is exercised. Blinn v. Schwarz, 177 N. Y. 252, 69 N. E. 542. Ratification after he regains his reason validates it. Id. A married woman cannot disaffirm a conveyance made during minority, in which her husband joined, without returning the consideration. Blair v. Whittaker, 31 Ind. App. 664, 69 N. E. 182. One about to be arraigned for murder made improvident conveyances, while out on bail she accepted payment thereunder; held a ratification. Sanderson v. Adams [Mich.] 94 N. W. 1063.

§ 2. *Recordation.*[2]—The sole purpose of recordation is notice,[3] and as between the parties, it is not essential.[4] Certain formalities of execution are ordinarily required to entitle a deed to record.[5] Recordation may operate as a delivery,[6] and is prima facie,[7] but not conclusive evidence of execution,[8] nor is it proof of date of execution.[9] A record, though ineffectual as notice, is admissible as evidence of the execution of a deed.[10]

§ 3. *Interpretation and effect.*[11] *General rules.*[12]—Where there is no latent ambiguity, the construction is for the court,[13] and its legal effect should be submitted to the jury.[14] It will be given effect if possible,[15] and where susceptible

2. See 1 Curr. L. 910. See, also, the topic Notice and Record of Title, 2 Curr. L. 1053. See, also, Evidence, 1 Curr. L. 1136, as to effect on admissibility in evidence.

3. See Notice and Record of Title, 2 Curr. L. 1053.

4. Shannon's Code, § 3749. Wilkins v. McCorkle [Tenn.] 80 S. W. 834; Blair v. Whittaker, 31 Ind. App. 664, 69 N. E. 182.

5. Patentee deeded before patent issued and deed was recorded. Held, a mortgagee after patent issued acquired no lien [Civ. Code, §§ 943, 989]. Bernardy v. Colonial & U. S. Mortg. Co. [S. D.] 98 N. W. 166. Rev. St. 1899, § 2418. Williams v. Butterfield [Mo.] 81 S. W. 615.

Acknowledgment is necessary to entitle a deed to record [Rev. St. 1889, § 2419]. Williams v. Butterfield [Mo.] 81 S. W. 615. The record of a deed without an acknowledgment is not constructive notice. Under Rev. 1889, § 3118, providing that a deed, though neither proved nor acknowledged, that has been recorded for one year, shall be notice, one recorded with a deficient acknowledgment is notice. Id. [Mo.] 77 S. W. 729. If the acts of a party in executing a deed have been free and voluntary, he may be compelled to acknowledge it. Southern Mo. & A. R. Co. v. Graves [Mo.] 81 S. W. 405. Entry of a decree of rescission on the record books of the court making a decree rescinding a deed operates as a registration. Wilkins v. McCorkle [Tenn.] 80 S. W. 834. An unwitnessed but recorded deed is an act sous seing prive. Boagni v. Pacific Imp. Co. [La.] 36 So. 129.

6. See ante, § 1.

7. Wetherington v. Williams. 134 N. C. 276, 46 S. E. 728.

8. Record of a deed held insufficient to show that it was executed or delivered. Eighmey v. Thayer [Mich.] 98 N. W. 734.

9. That a mortgage was recorded four minutes before a deed does not show that it was made before the deed was delivered. Wheeler v. Young, 76 Conn. 44, 55 A. 670.

10. Deed to lands in Rhode Island recorded in Massachusetts. Phillips v. Watuppa Reservoir Co., 184 Mass. 404, 68 N. E. 848. An unrecorded deed held admissible to explain the language of another deed, notwithstanding Pub. St. 1882, c. 120, § 4. In re Buttrick [Mass.] 69 N. E. 1044. The record of a deed may be shown without inquiry as to the original, whenever it appears that the original is not under the control of the one offering the proof. It is primary evidence. § 13, c. 73, Comp. St. 1901. Staunchfield v. Jeutter [Neb.] 96 N. W. 642.

11. See Estoppel, 1 Curr. L. 1130, for estoppel by deed.

12. See 1 Curr. L. 911.

NOTE: Title to standing timber passes at the time of the execution of a deed thereof. Mee v. Benedict, 98 Mich. 260, 39 Am. St. Rep. 543; Crane v. Patton, 57 Ark. 340; White v. Foster, 102 Mass. 375; Haskall v. Ayres, 35 Mich. 89; Walt v. Badwin, 60 Mich. 622, 1 Am. St. Rep. 551; Kingsley v. Holbrook, 45 N. H. 313, 86 Am. Dec. 173; McClintock's Appeal, 71 Pa. 365. And the purchaser acquires the right to enter on the land to remove them. Howe v. Batchelder, 49 N. H. 204; Matthews v. Mulvey, 38 Minn. 342; Wheeler v. Carpenter, 107 Pa. 271; McLeod v. Dial, 63 Ark. 10. And an interest in so much of the soil as is necessary to nourish the trees until cut. White v. Foster, 102 Mass. 375; Dexter v. Lathrop, 136 Pa. 565; Putnam v. Tuttle, 10 Gray [Mass.] 48. Where a time for removal is specified, all rights are forfeited in timber not removed at that time. Howard v. Lincoln, 13 Me. 122; Prentiss v. Ross, 96 Micb. 83; Saltonstall v. Little, 90 Pa. 422, 35 Am. Rep. 683; Morgan v. Perkins, 94 Ga. 353. **Contra,** Halstead v. Jessup, 150 Ind. 85; Irons v. Webb, 41 N. J. Law, 203, 32 Am. Rep. 193; Stukeley v. Butler, Hobart, 168, F. Moore, 880.—Note to McRea v. Stillwell [Ga.] 55 L. R. A. 513.

13. See 1 Curr. L. 911, n. 30, et seq. Construction on appeal constitutes the law of the case. Ashcraft v. Cox, 25 Ky. L. R. 1303, 77 S. W. 718; Glover v. Gasque [S. C.] 45 S. E. 113. A ruling of the supreme court as to an estate conveyed by a deed is binding on the court of civil appeals on subsequent appeal. White v. Simonton [Tex. Civ. App.] 79 S. W. 621.

14. Eddy v. Bosley [Tex. Civ. App.] 78 S. W. 565. The effect of a deed is for the jury where more than one inference can be drawn from its recitals. Glover v. Gasque [S. C.] 45 S. E. 113. On an issue whether a deed absolute is a mortgage, the court should submit the instrument to the jury. Bradford v. Malone [Tex. Civ. App.] 77 S. W. 22.

15. Deed from aged man to his housekeeper held to be a covenant to stand seised of the property for his own use during life and to her in fee at his death. Ricker v. Brown, 183 Mass. 424, 67 N. E. 353. Two deeds executed the same day covered the same land; held that the grantor's intention was to convey a strip off the opposite side of the tract by the latter deed. St. Clair v. Marquell, 161 Ind. 56, 67 N. E. 693. Such a mistake is mutual. Id. That written papers do not sufficiently convey a legal title is not sufficient to defeat an intention that they should where the contract has been performed. Luesenhop v. Einsfeld, 93 App. Div. 68, 87 N. Y. S. 268.

of two constructions, the one favorable to vested remainders should be adopted.[16] It will be construed favorably to the grantee,[17] but this rule cannot be invoked to defeat the intent which fairly appears from the instrument as a whole.[18] The first of repugnant clauses prevails.[19] Reference to other instruments makes them a part of the deed,[20] but there is no presumption that a deed executed to replace one that is lost runs to the same grantee.[21]

Where the consideration expressed in a deed is a valuable one, title is by purchase and not by gift.[22] The consideration is presumed to include compensation for the land and for all damages the grantor may suffer from use of premises conveyed.[23]

The intent of the parties cannot overcome the express terms of the conveyance,[24] and clear terms cannot be varied by parol.[25]

A grantor cannot subsequently by any act affect the estates created by his deed.[26]

Covenants.—There are no implied covenants,[27] and covenants cannot be inserted after delivery.[28]

Alterations and interlineations are presumed to have been made before execution,[29] and alterations subsequent to execution and delivery do not invalidate.[30]

A quit-claim deed takes priority over a sheriff's deed,[31] and a tax deed over an existing mortgage.[32] A deed from husband to wife is presumed to be a gift or advancement.[33]

16. Deed from husband to wife and children with provisions in case of the death of any of them. Fields v. Lewis, 118 Ga. 573, 45 S. E. 437. See Life Estates, Reversions and Remainders, 2 Curr. L. 741.

17. As to whether a provision is a covenant or condition subsequent. Silver Springs, etc., R. Co. v. Van Ness [Fla.] 34 So. 884; Chicago & A. R. Co. v. Hogan, 105 Ill. App. 136. Where a railroad company sold its poles and wires to a telegraph company, which erected a new line with larger poles carrying more wires, the conveyance could only be construed as an attempt to confer a right to maintain a line for general commercial purposes. Hodges v. Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572.

18. Negaunee Iron Co. v. Iron Cliffs Co. [Mich.] 96 N. W. 468.

19. Recitals in a deed take precedence over repugnant words in an agreement that the grantor is to have possession and control during life. Durand v. Higgins, 67 Kan. 110, 72 P. 567.

20. Conveying property subject to covenants contained in a certain recorded contract. Epworth League Training Assembly v. Olney [Mich.] 98 N. W. 860.

21. So the latter was not a bona fide purchaser. Waggoner v. Dodson, 96 Tex. 415, 73 S. W. 517.

22. Ossman v. Schmitz, 4 Ohio C. C. (N. S.) 502. A deed conveying property to be held in trust until the death of the grantor is not a gift. Rogers v. Richards, 67 Kan. 706, 74 P. 255. Deed reciting a consideration in hand paid cannot be declared a trust. Jacobson v. Nealand, 122 Iowa, 372, 98 N. W. 158; Hays v. Marsh, 123 Iowa, 81, 98 N. W. 604. The grantee is not a mere volunteer where the deed recites a consideration of one dollar and love and affection. St. Clair v. Marquell, 161 Ind. 56, 67 N. E. 693.

23. Conveyance for railroad. Chicago & A. R. Co. v. Hogan, 105 Ill. App. 136.

24. No conveyance intended. Griffith v. Alcocke [La.] 37 So. 47.

25. Where there was no ambiguity in any of the conveyances except that a grantor had conveyed to different parties the same tract, letters written to the latter grantee by the grantor preliminary to the conveyance were inadmissible to explain that the grantor meant to convey other land. McManus v. Chollar [C. C. A.] 128 F. 902. A mere allegation of fraud is not sufficient to justify the introduction of parol evidence to vary the recitals in a deed. Gulf, etc., R. Co. v. Fenn [Tex. Civ. App.] 76 S. W. 597. Where the deed does not disclose the fact that one is an original purchaser, parol evidence cannot establish such fact so as to make him personally liable on vendor's lien notes. Moore v. Boyd [Tex. Civ. App.] 79 S. W. 647. Parol evidence is admissible to show that an absolute deed was given that the grantee might hold the legal title in trust in Texas. Craig v. Harless [Tex. Civ. App.] 76 S. W. 594. But not in Iowa. Willis v. Robertson, 121 Iowa, 380, 96 N. W. 900.

26. By deed of correction. Ottomeyer v. Pritchett, 178 Mo. 160, 77 S. W. 62. Where, after granting a life estate to his wife, remainder to her children, grantor executed another deed. Smith v. Smith, 25 Ky. L. R. 1960, 79 S. W. 223.

27. Warranty. Thompson v. Schenectady R. Co., 124 F. 274. See, also, Covenants for Title, 3 Curr. L. 973.

28. Anthony v. Rockefeller, 102 Mo. App. 326, 76 S. W. 491.

29. Evidence held to show that they were made after delivery. Kalbach v. Mathis [Mo. App.] 78 S. W. 684.

30. Slattery v. Slattery, 120 Iowa, 717, 95 N. W. 201. See, also, Alteration of Instruments, 3 Curr. L. 154.

31. Judgment and execution against a debtor who it is not shown ever held title. Mosier v. Momsen, 13 Okl. 41, 74 P. 905.

32. Deeds executed for nonpayment of lo-

A deed of community property by a surviving spouse operates as a partition.[34] Though no rights are acquired under a void deed,[35] it constitutes color,[36] and is a cloud on the title,[37] and is admissible in evidence.[38]

One with no interest in the property cannot question the validity of a deed,[39] and an heir can avoid a deed of his ancestor only when it could have been avoided by him.[40] A deed in common form bars an entail.[41]

Designation of parties.[42]—The grantee must be designated,[43] and his name cannot be filled in without authority from the grantor.[44] A deed to a partnership vests title in the members whose names are designated,[45] and a deed to two persons as individuals, on its face, conveys to each an undivided half.[46] In Louisiana, property purchased in the name of either spouse is presumed to be community.[47] An ambiguity may be dispelled by parol.[48] "Bodily heirs" means "children."[49]

Description of property conveyed.[50]—A description of more land than the grantor owns conveys an integral fraction owned by him,[51] and a misdescription will pass the equitable title.[52] Ambiguous descriptions should be read to conform with each other where it can be done without giving violent construction to any description.[53] Restrictive words will not be rejected.[54] Evidence aliunde is admissible in all cases where there is doubt as to the true location of a survey or a question as to the application of a grant to its proper subject-matter;[55] but

cal assessments. Kirby v. Waterman [S. D.] 96 N. W. 129.

33. Where consideration is questioned. Strayer v. Dickerson, 205 Ill. 257, 68 N. E. 767.

34. As to heirs of the decedent. Eddy v. Bosley [Tex. Civ. App.] 78 S. W. 565. A deed of water rights in community property executed by the husband alone would give the grantee the right to take water as cotenant of the wife. Gulf, etc., R. Co. v. Fenn [Tex. Civ. App.] 76 S. W. 597.

35. Watkins v. Nugen, 118 Ga. 375, 45 S. E. 260.

36. Deed by one purporting to act as attorney in fact for another without written authority. Street v. Collier, 118 Ga. 470, 45 S. E. 294. Deed signed by administrator not purporting to have been executed under order of the court of ordinary. Street v. Collier, 118 Ga. 470, 45 S. E. 294. Deed from husband to wife prior to Act Dec. 13, 1866, p. 146. Id.

37. Watkins v. Nugen, 118 Ga. 372, 45 S. E. 262.

38. A deed, though ineffectual except as between the parties, is evidence of the nature of the use in reference to the rights claimed to be exercised thereunder by one claiming a prescriptive title. Phillips v. Watuppa Reservoir Co., 184 Mass. 404, 68 N. E. 848. Not signed by the husband. Williamson v. Work [Tex. Civ. App.] 77 S. W. 266.

39. Lund v. Thackery [S. D.] 99 N. W. 856.

40. Coulson v. Coulson [Mo.] 79 S. W. 473.

41. Rev. Laws, c. 127, § 24. Gilkie v. Marsh [Mass.] 71 N. E. 703.

42. See 1 Curr. L. 911.

43. Deed executed in blank is invalid for any purpose until the name is filled in. Lund v. Thackery [S. D.] 99 N. W. 856. Agent must be authorized in writing to fill in such name [Civ. Code, § 938]. Id.

44. Van Dyke v. Van Dyke, 119 Ga. 830, 47 S. E. 192. Evidence held to show that the name of the grantee was fraudulently inserted. McCue v. Stumpf [Mo.] 79 S. W. 661. Grantee who knows a deed was executed in blank acquires no rights through the unauthorized acts of the grantor's agent. Lund v. Thackery [S. D.] 99 N. W. 856.

45. Deed may be reformed to supply Christian names. Dwyer Pine Land Co. v. Whiteman [Minn.] 99 N. W. 362.

46. No presumption that it is partnership property, though grantees are partners. Lee v. Wysong [C. C. A.] 128 F. 833.

47. Declarations in the deeds to the contrary notwithstanding. Westmore v. Harz [La.] 35 So. 578.

48. To show that a grantee "Willis" was "Willie." White v. Simonton [Tex. Civ. App.] 79 S. W. 621.

49. Yokley v. Superior Drill Co. [Ky.] 80 S. W. 1153. Deed from husband to wife for life, remainder to his heirs by her "heirs" meant children. Shirey v. Clark [Ark.] 81 S. W. 1057.

50. See 1 Curr. L. 911. See, also Boundaries, 3 Curr. L. 518.

51. Risch v. Jensen [Minn.] 99 N. W. 628.

52. Quinn v. Baldwin Star Coal Co. [Colo. App.] 76 P. 552.

53. Description in several deeds in a line of title. Smith v. Trustees of Freeholders & Commonalty, 89 App. Div. 475, 86 N. Y. S. 34.

54. Deed of right of way to lands lying in Wise County is limited to lands in Wise County, though the grantor owns other lands, right of way over which would pass were it not for the limitation. Flanary v. Kane [Va.] 46 S. E. 312.

55. Trust deed in general terms did not describe by courses and distances. Peery's Adm'r v. Elliott, 101 Va. 709, 44 S. E. 919. Uncertainty in calls arising when an attempt is made to apply them to the land may be dispelled by parol. Sloan v. King [Tex. Civ. App.] 77 S. W. 48. Land attempted to be conveyed under a defective description cannot be identified by reference to an instrument not produced at the trial, which

if there was no consideration, a description will not be corrected.[56] Where the description is uncertain, the burden rests on those claiming under it to show to what it applies.[57] Calls in the deed must be followed if practicable,[58] and general description controls the area recited;[59] but calls for fractional parts of sections will yield to the expressed intent of the grantor to convey all the land.[60]

Quantum of estate conveyed.[61]—It is a general rule that unless restricted a deed carries all the grantor's interest;[62] but land, the beneficial interest of which is in another, will not pass.[63] All terms will be given effect,[64] and words are to be understood in their ordinary and popular sense.[65] The grantee will take the greatest estate consistent with the terms of a deed.[66] A fee cannot be limited after a fee.[67] The term "sell and convey" carries the fee.[68] The exclusive and

was not sworn to and not proved to have been executed prior to the defective deed. Johnston v. Case, 132 N. C. 795, 44 S. E. 617.

56. Strayer v. Dickerson, 205 Ill. 257, 68 N. E. 767.

57. Peery's Adm'r v. Elliott, 101 Va. 709, 44 S. E. 919. After 40 years, a description is presumed to be correct and cannot be disproved by slight evidence. Getman v. Harrison, 112 La. 435, 36 So. 486.

58. Description held sufficient. Wilson v. Chicago Lumber & Timber Co., 129 F. 636. See Deeds, 1 Curr. L. 911.

59. Crill v. Hudson, 71 Ark. 390, 74 S. W. 299. Deed from heirs of the tract on "Poor Fork" did not carry land on "Clover Fork," though the heirs did not know that their ancestor owned land on "Clover Fork." Smith v. Cornett [Ky.] 80 S. W. 1188.

60. Whitaker v. Whitaker, 175 Mo. 1, 74 S. W. 1029. Deed of "All the land now used as common," lying between L. and S. and A. street, conveys all the land lying there and not only such as is common. McKay v. Reading, 184 Mass. 140, 68 N. E. 43. A boundary indicated by words written on the margin of a plat with reference to which lots were sold cannot control the express terms of a deed which included the entire tract out of which the lots were carved. Fisk v. Ley, 76 Conn. 295, 56 A. 559.

61. See 1 Curr. L. 912.

62. Power to sell held to give power to convey a fee [Rev. St. 1899, § 4590]. St. Louis Land & Bldg. Ass'n v. Fueller [Mo.] 81 S. W. 414. Where one year before executed, a deed which had been lost which his heirs claimed only conveyed a life estate, but had afterwards executed a quit claim, it was held that the inference was that the first deed conveyed the same estate as the latter. Lyon v. Hyler [Mich.] 98 N. W. 858. Where the grantors in a deed "give, grant, bargain, sell and convey certain land, the deed shows that they intended to convey a fee. Flanary v. Kane [Va.] 46 S. E. 681. Deed held to convey a one-fifth locative interest in a league and labor survey and not merely the interest grantor alone had. Community of wife passed. Stipe v. Shirley [Tex. Civ. App.] 76 S. W. 307.

63. Where there is nothing on the face of the deed to indicate that it was intended to be embraced. Peery's Adm'r v. Elliott, 101 Va. 709, 44 S. E. 919.

64. Deed providing that the grantee should have the sole right to mine for his own use gave him no right to mine for exportation. Negaunee Iron Co. v. Iron Cliffs Co. [Mich.] 96 N. W. 468. Deed conveying all the rights of the grantor as heir held not to cover rights she otherwise had. Keith v. Woodruff, 136 Ala. 443, 34 So. 911. A quitclaim deed, after reciting that it conveys all the grantor's right, title and interest, recites that it is executed for the purpose of surrendering to grantee the title acquired from the grantee under a deed given as security, conveys no other title. Allen v. Hall, 31 Colo. 206, 73 P. 844.

65. Where a deed conveyed "one-tenth part thereof, less by 640 acres," the 640 acres was deducted from the tenth conveyed. Adams v. Hopkins [Cal.] 77 P. 712. A deed conveying "one-half of my interest," "meaning to convey three-fourths of one-twentieth of said ranches, less 320 acres," conveyed one-half the grantor's interest, where at the time his interest was three-fourths of one-half of a certain interest. Id. A deed conveying grantor's interest in 50 acres of a certain tract conveyed not 50 acres of his undivided interest, but his interest in 50 acres. Id. A deed conveying all the grantor's interest, being a portion of the lands granted him, held to convey an undivided one-half interest. Id. Deed conveying grantor's interest "to 320 acres, to be taken out of the interest which he now holds in a certain tract," conveyed not 320 acres, but the grantor's interest in such number of acres. Id.

66. Estate to grantee for life and if grantor died before her, grantee to have power to convey the same, gave an estate in fee on death of grantor before the grantee. Carr v. Field, 25 Ky. L. R. 2206, 80 S. W. 448. Deed from father to son for life, then to his issue and if there were none, to revert to children of the grantor and their issue, gave the son a conditional fee. Holman v. Wesner [S. C.] 45 S. E. 206. Trust deed providing that cestui qui trust should receive a certain amount per month from the income and if the income did not amount to such sum, from the principal vested in him, the fee of the income and principal to this amount. Fidelity Trust & Safety Vault Co. v. Walker, 25 Ky. L. R. 591, 76 S. W. 131. Deed of an undivided half to a mother for life, with power to sell and reinvest the proceeds, vests in her a life estate with power to sell. Dickey v. Barnstable, 122 Iowa, 572, 98 N. W. 368. "Heirs" not necessary to create equitable fee. Ball v. Woolfolk, 175 Mo. 278, 75 S. W. 410. See Life Estates, Reversions and Remainders, 2 Curr. L. 741.

67. Conveyance in fee to three; if any died before termination of a life estate, his

unrestricted use of land carries title.[69] A quit-claim deed conveys only such interest as the grantor has.[70] A deed of community property by one not qualified as a survivor would convey only his individual interest.[71] Deeds for specified purposes carry the fee.[72] Where the grantor of land abutting on the highway owns the fee thereof, there is a legal presumption that it passes.[73] A deed of a right of way conveys no greater estate than would have been acquired in condemnation proceedings.[74] A deed of an easement is not available for any other purpose.[75] A deed of a right to overflow lands implies a right to have the land left as part of the reservoir.[76] All appurtenances[77] if essential to the beneficial enjoyment,[78] and growing crops pass when there is no reservation;[79] but not personalty on the premises.[80] Subsequently acquired title inures to the benefit of a grantee of one who conveys by deed of general warranty,[81] but a deed of a certain interest will not carry other different interests afterwards acquired,[82] nor will this rule defeat the lien of a bona fide mortgagee.[83] Where the Rule in Shelley's Case prevails, a

interest was to vest in the others. Held each took a third in fee. Gray v. Hawkins, 133 N. C. 1, 45 S. E. 363.

68. St. Louis Land & Bldg. Ass'n v. Fueller [Mo.] 81 S. W. 414. Conveyance of right, title and interest, and warranting the title, is a conveyance of the land and not of a mere chance. Greer v. Willis [Tex. Civ. App.] 81 S. W. 1185.

69. Where grantor conveying lots along the beach included the right to use the beach. Cram v. Ward [Mich.] 100 N. W. 564.

70. By a life tenant. Chicago, etc., R. Co. v. Vaughn, 206 Ill. 234, 69 N. E. 113. A deed reciting that it conveyed all his right, title and interest transferred to him by order of court shows prima facie that the grantee took only such title as the grantor had. Slaughter v. Coke County [Tex. Civ. App.] 79 S. W. 863. Property had been formerly sold on execution. Atlee v. Bullard, 123 Iowa, 274, 98 N. W. 889.

71. Eddy v. Bosley [Tex. Civ. App.] 78 S. W. 565.

72. A deed to church trustees for burial purposes and other church purposes, for a valuable consideration. Methodist Episcopal Church v. Gamble, 4 Ohio C. C. (N. S.) 45. Deed to municipality "for city hall purposes." City of Huron v. Wilcox [S. D.] 98 N. W. 88.

73. Fee passes unless expressly reserved. Van Winkle v. Van Winkle, 89 N. Y. S. 26. A deed to land abutting on a street carries title to the center thereof. Palge v. Schenectady R. Co., 178 N. Y. 102, 70 N. E. 213.

74. A deed of an easement to survey, construct and repair a road gives a right to erect a telegraph line to be used in the operation of the road, but not for general commercial purposes. Hodges v. Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572. Where a railroad purchases by deed for a right of way, it has exclusive right of possession of all lands described as against adjacent owners, and it is judge of how much is necessary for right of way purposes. Hull v. Kansas City & O. R. Co. [Neb.] 98 N. W. 47.

75. Deed of an easement to be used as a public levee; grantee leased for manufacturing purposes. Sanborn v. Van Duyne, 90 Minn. 215, 96 N. W. 41. An instrument which "relinquished" certain described ground held to convey an easement only. Mitchell v. Bourbon County, 25 Ky. L. R. 512, 76 S. W. 16.

76. Is not a mere release of damages for overflowing. Phillips v. Watuppa Reservoir Co., 184 Mass. 404, 68 N. E. 848.

77. Fences pass with the land, though not mentioned. Bagley v. Rose Hill Sugar Co., 111 La. 249, 35 So. 539. Act of sale of a sugar mill "et cetera" carried all appliances. Id.

78. Whether a deed carries a water right depends on the intent of the grantor, and where the deed is silent as to it, the question whether such right is necessary to the beneficial enjoyment of the land determines. Bessemer Irr. Ditch Co. v. Woolley [Colo.] 76 P. 1053.

79. Kammrath v. Kidd, 89 Minn. 380, 95 N. W. 213; Marshall v. Homier, 13 Okl. 264, 74 P. 368.

80. It not being referred to in the conveyance. Taylor v. Plunkett [Del. Super.] 56 A. 384.

81. Civ. Code, § 947, where entryman conveyed before patent issued. Bernardy v. Colonial & United States Mortg. Co. [S. D.] 98 N. W. 166. Under Code, § 2915, where husband conveyed to his wife. Hays v. Marsh, 123 Iowa, 81, 98 N. W. 604. Where a grantor conveys by deed of general warranty, he is estopped to assert an after-acquired title or incumbrance existing at the time of conveyance. Flanary v. Kane [Va.] 46 S. E. 681. A deed by a life tenant purporting to convey a fee will carry her after-acquired interest. Archer v. Yazoo & M. V. R. Co. [Miss.] 34 So. 387. Where part of land conveyed was subject to an easement, on termination of the easement the land passed to the grantee and not to grantor. Mitchell v. Bourbon County, 25 Ky. L. R. 512, 76 S. W. 16.

82. Notwithstanding Sand. & H. Dig. § 699. Interest acquired as heir. Blanks v. Craig [Ark.] 78 S. W. 764. A habendum clause, "all the estate either now or which may be hereafter acquired," does not convey after-acquired property, but confirms in the grantee any estate in the land specifically granted which the grantor might thereafter acquire. Bessemer Irr. Ditch Co. v. Woolley [Colo.] 76 P. 1053.

83. After-acquired title does not inure to the grantee of one who had no title as against a mortgagee of such grantor after he acquired title. Wheeler v. Young, 76 Conn. 44, 55 A. 670.

deed to one for life remainder to his heirs passes to him a fee,[84] otherwise where the rule has been abolished.[85] When the "class doctrine" prevails, the rule favorable to vested remainders will be disregarded.[86]

A reservation[87] is the creation in behalf of the grantor of some new right issuing out of the thing granted,[88] and must be so definitely described that it may be ascertained.[89] A reservation will be construed favorably to the grantor,[90] but not to such an extent as to defeat the grantee's rights.[91] Contemporaneous facts and circumstances will be considered,[92] and ambiguous phrases may be explained by parol;[93] but clear terms cannot be varied.[94] Reservations of streets are construed favorably to the public,[95] and whether extensions are included depends on the circumstances.[96] A reserved way over a railroad cannot be obstructed by the company.[97] A reservation of timber is for the benefit of the grantor,[98] but it

84. Deed of trust to use of a married woman for life and at her death to the use of her heirs forever. Kennedy v. Colclough [S. C.] 45 S. E. 139. Deed to one for life, then to be distributed among her remaining heirs. Davenport v. Eskew [S. C.] 48 S. E. 223. Deed to a married woman and bodily heirs vests in her a fee. Bingham v. Weller [Tenn.] 81 S. W. 843. Where this property was sold by order of the court and the proceeds reinvested, the character of her estate was not changed. Id. Deed to "A." for life, then to such heirs as she may leave, but if she leaves no issue, to the heirs of "B.," gives her a life estate and the husband has no interest as her heir at law. This is not within the rule in Shelley's Case. Duckett v. Butler [S. C.] 45 S. E. 137.

85. In Arkansas, a deed creating a fee tail passes a life estate only [Sand. & H. Dig. § 700]. Black v. Webb [Ark.] 80 S. W. 367. Deed to "H. and her children" gives H. a life estate. The children take by purchase. McFarland v. Hatchett [Ky.] 80 S. W. 1185. Deed to "E." for life, remainder to her children by "G.," gives her only a life estate, though "G.," the purchaser, asked that the deed be made to her and she furnished the purchase money. Trumbo v. Fulk [Va.] 48 S. E. 525.

86. In Tennessee, where the "class doctrine" prevails, an estate to one for life remainder to her children vests the fee in the remaindermen as a class at the time of distribution. Sanders v. Byrom [Tenn.] 79 S. W. 1028.

87. See 1 Curr. L. 912.

88. Clause "reserving a right of way over a right of way granted" inserted after a granting clause constitutes a reservation. Porter v. Kansas City & N. C. R. Co. [Mo. App.] 77 S. W. 582.

89. Reservation of a way held sufficiently described. Jackson v. Snodgrass [Ala.] 37 So. 246.

90. A deed reserving from the grant lands "heretofore conveyed" reserved the legal title, the equitable title to which had been previously conveyed. Adams v. Hopkins [Cal.] 77 P. 712. Deed reserving sole use, control and occupation for life is a reservation of a life estate. Chicago, etc., R. Co. v. Vaughn, 206 Ill. 234, 69 N. E. 113. Where an easement for a way is reserved but the place is not designated, the grantor has a right to designate and locate. Callen v. Hause [Minn.] 97 N. W. 973. If the grantor fails to exercise this right it passes to his assigns. Id.

91. Right in grantee to erect cottages on certain excepted grounds and enjoy other rights with reference thereto held to create in it a permanent easement. Epworth League Training Assembly v. Olney [Mich.] 98 N. W. 860. Where a grantor reserves the right to use in common with the grantee, an appurtenant granted, and it afterward develops that the common use thereof is impracticable. Huffman v. Warden, 2 Ohio N. P. (N. S.) 127.

92. Expression in a reservation clause "grantee is to have all the hay," held to refer to future crops and not to hay in the barn. Howe v. Collins, 98 Me. 445, 57 A. 587. Where a reservation is indefinitely expressed. Callen v. Hause [Minn.] 97 N. W. 973.

93. Howe v. Collins, 98 Me. 445, 57 A. 587.

94. Where a deed reserves a life estate, it cannot be shown by parol that the reservation was intended as security for an agreement of support. Hall v. Small, 178 Mo. 629, 77 S. W. 733. Where a deed reserved one acre for a school district, the grantee could not claim an extra half acre from the district, though previous deeds had only reserved that quantity. Hughes v. South Bay School Dist. No. 11, 32 Wash. 678, 73 P. 778.

95. Where a deed excepted streets which were to be kept and maintained as public, a subsequent deed could not operate to convey the rights of the public. Knickerbocker Ice Co. v. Forty Second St., etc., R. Co., 85 App. Div. 530, 83 N. Y. S. 469. A reservation of so much of the premises as might then or thereafter be designated as a street covered a parcel of land that had been assigned and designated as a street before the grant was made, though such street was not laid out. Whitman v. New York, 85 App. Div. 468, 83 N. Y. S. 465.

96. A reservation of a street did not reserve an easement over land at its termination. Whitman v. New York, 85 App. Div. 468, 83 N. Y. S. 465. A reservation of streets as shown by maps held to include land over which they would pass when extended. Knickerbocker Ice Co. v. Forty Second St., etc., R. Co., 85 App. Div. 530, 83 N. Y. S. 469.

97. A railroad acquiring a right of way subject to the grantor's right of way thereover cannot interfere with the grantor's reserved right. Porter v. Kansas City & N. C. R. Co.

must be removed within the time limited.[99] A reservation can be in favor of the grantor only,[1] but he may convey the thing reserved,[2] and it may be rendered void by his subsequent acts.[3] A reservation of an easement runs with the land.[4]

Conditions and restrictions.[5]—By acceptance, the grantee assumes all conditions on him devolving.[6] Conditions subsequent are not favored,[7] but if clearly expressed will be given effect,[8] are deemed broken only when the terms are substantially violated,[9] and will be carried out in equity.[10] A condition against all alienation during the life of the grantee is void;[11] but conditions that a life estate shall be forfeited if alienated, or if the life tenant does not occupy the premises,[12]

[Mo. App.] 77 S. W. 682. That a railroad paid for a right of way and damages caused thereby to adjacent land is no defense for obstructing a way reserved by the grantor. Id. That the order of court authorizing a minor's curator to execute a deed did not contain the reservation did not affect the validity of a reservation in the deed. Id.

98. Where one granted sawmill privileges and provided that all timber not taken within 6 years should revert, and before the expiration of that time sold the land, reserving all timber theretofore granted, the timber remaining on the land at the end of six years belonged to him. Henry Levis & Co. v. Parrott Lumber Co., 119 Ga. 476, 46 S. E. 647.

99. Deed to standing timber with right to remove same within eight years passed all the timber subject to be defeated as to what remained standing at end of time limited. French v. Sparrow-Kroll Lumber Co. [Mich.] 97 N. W. 961. A deed of the land to another party prior to expiration of such time, reserving all the timber, passed all timber standing at end of eight years. Id. A reservation of a right to timber to be removed within two years gives title to all timber cut at that time, but standing timber reverts to grantee. Hodges v. Buell [Mich.] 95 N. W. 1078. But equity will not restrain grantor from removing standing timber, as that would be enforcing a forfeiture. Id. Reservation of an undivided half of all minerals which might be discovered held to carve the estate in two parts. Negaunee Iron Co. v. Iron Cliffs Co. [Mich.] 96 N. W. 468.

1. Persons not parties to a deed can acquire no rights in a reservation. Haverhill Sav. Bank v. Griffin, 184 Mass. 419, 68 N. E. 839.

2. Jackson v. Snodgrass [Ala.] 37 So. 246.

3. After reserving the entire property (beneficial interest therein), grantor handed deed to grantee, saying, "Here is your deed; take your land." Hamilton v. Jones [Tex. Civ. App.] 75 S. W. 554.

4. Gibbons v. Ebding [Ohio] 71 N. E. 720.

5. See 1 Curr. L. 912.

6. Proper to so instruct. Silver Springs, etc., R. Co. v. Van Ness [Fla.] 34 So. 884. Where grantees assume a mortgage, they are estopped to deny its validity. Christian v. John [Tenn.] 76 S. W. 906. Accepting a deed subject to certain mortgages held an assumption of the mortgages. Pike, Morgan & Co. v. Wathen, 26 Ky. L. R. 640, 76 S. W. 322.

7. Deed to a city for a cemetery held not to contain a condition that the land was to be so maintained in perpetuity. Thornton v. Natchez [C. C. A.] 129 F. 84. Provision relative to removing tracks to allow grantors to mine the property held a covenant. Silver Springs, etc., R. Co. v. Van Ness [Fla.] 34 So. 884. A clause following a statement of a nominal consideration "and for a further consideration of support," is not a condition subsequent. Helms v. Helms, 135 N. C. 164, 47 S. E. 416. Pencil memorandum of a restriction held ineffectual. McCusker v. Goode [Mass.] 71 N. E. 76. Where a deed stated that the grantees were to hold the land in trust and erect an institution thereon, it did not revert on their failure to perform the conditions of the trust. Davis v. Jernigan, 71 Ark. 494, 76 S. W. 654. Lots were advertised to be sold at auction under restrictions; only part of the lots were sold. Held, the advertisement had no effect on lots not sold. McCusker v. Goode [Mass.] 71 N. E. 76.

8. A clause setting forth conditions and providing that on breach thereof the grantor shall have a right of re-entry. Brown v. Tilley [R. I.] 57 A. 380. A condition attached to a legacy to a church, that its officers should annually visit testatrix's grave. Congregational Church v. Cutler [Vt.] 57 A. 387. Provision that if grantee failed to erect a depot on land conveyed it should revert is a condition subsequent, is not void, and on failure to comply with the same, title reverted. Griswold v. Minneapolis, etc., R. Co. [N. D.] 97 N. W. 538.

9. Deed to child on condition of support was not avoided where the father provoked a quarrel and went away. Woolcott v. Woolcott [Mich.] 95 N. W. 567. A deed made in consideration of the support of the grantors will be set aside only where there is an entire failure to perform the agreement. Pittenger v. Pittenger, 208 Ill. 582, 70 N. E. 699.

10. A parent deeded to her child in consideration of maintenance. The child died and her husband drove the parent from the place. Held, equity would not rescind the deed, but would administer the property for the benefit of the heirs of the grantee, subject to the rights of the grantor. Keister v. Cubine, 101 Va. 768, 45 S. E. 285. Where parent conveyed to a child in consideration that he pay certain sums to others and all grantor's debts at his death, held, the grantee was personally liable for the debts and the land would be subjected to their payment by equity. Matheny v. Ferguson [W. Va.] 47 S. E. 886.

11. Walker v. Shepard [Ill.] 71 N. E. 422.

12. Lewis v. Lewis, 76 Conn. 586, 57 A. 736.

or against the sale of intoxicants on the premises,[13] are valid. A wife's release of dower is subject to the conditions of the deed.[14]

A reversioner entitled to enter on breach of a condition subsequent cannot reenter after conveyance of his interest.[15] A breach of a condition subsequent is available to the grantor only,[16] and may be lost by laches,[17] or waived by acts of those entitled to the benefits.[18] They can be enforced against one with notice taking title from the grantee.[19]

Failure to perform a condition precedent renders the deed void.[20]

Restrictions are construed against the grantor,[21] and the duration is to be determined by construing the words in the light of attending circumstances.[22] A stipulation that possession shall not accompany the transference of the legal title controls the operation of the deed.[23]

Extinguishment of rights.[24]—The endorsement to another,[25] a subsequent return,[26] or the destruction of a deed, will not divest title;[27] but where such transaction is acted upon, the grantor regains the equitable title and can compel a reconveyance,[28] and the grantee may be estopped to assert his title.[29]

DEFAULTS.

§ 1. Elements and Indicia of Default (1069).
§ 2. Procedure on Default; Taking Judgment (1070).
§ 3. Opening Defaults (1071).
§ 4. Operation and Effect of Default and Proof of Damages (1074).

§ 1. *Elements and indicia of default.*[30]—Jurisdiction must have attached,[31]

13. Runs with the land and on breach grantor or heirs may claim a reversion. Jetter v. Lyon [Neb.] 97 N. W. 596.

14. On breach of condition subsequent, she may avoid the release. Brown v. Tilley [R. I.] 57 A. 380.

15. Lewis v. Lewis, 76 Conn. 586, 57 A. 735. And a grantee of the reversion cannot enter for a breach occurring prior to the conveyance [Gen. St. 1902, § 4051]. Id.

16. Condition of support. Helms v. Helms, 135 N. C. 164, 47 S. E. 415.

17. Condition subsequent broken eleven years prior to action commenced. Thornton v. Natchez [C. C. A.] 129 F. 84.

18. Condition in a trust deed that trustee shall convey only to persons designated by cestuis qui trustent is waived where cestuis qui trustent convey to one of their number and the trustee joins in the deed by that one to a grantee. Altschul v. Casey [Or.] 76 P. 1083.

19. By grantor's heirs. Brown v. Tilley [R. I.] 57 A. 380. Deed of right of way containing a covenant to construct crossings and fences. Held such covenant ran with the land. Could be enforced against subsequent grantee of right of way. Chicago, etc., R. Co. v. Wilson, 25 Ky. L. R. 525, 76 S. W. 138.

20. Deed to enable grantee to negotiate a loan and if no loan was negotiated, the deed to be void. Carloss v. Oxford [Ark.] 80 S. W. 144.

21. American Unitarian Ass'n v. Minot [Mass.] 71 N. E. 551.

22. Restriction held not to apply to buildings erected after the one first erected had been torn down. American Unitarian Ass'n v. Minot [Mass.] 71 N. E. 551.

23. Grantor can maintain forceable entry and detainer. Tucker v. McClenny [Mo. App.] 77 S. W. 151.

24. See 1 Curr. L. 913.

25. "For value received I convey the title vested in me by virtue of the within deed" signed, sealed, and acknowledged. Joines v. Johnson, 133 N. C. 487, 45 S. E. 828.

26. Tabor v. Tabor [Mich.] 99 N. W. 4. For correction. Barkey v. Johnson, 90 Minn. 33, 95 N. W. 583.

27. Holder v. Scarborough, 119 Ga. 256, 46 S. E. 93. Destroying a deed before it is recorded does not revest title in the grantor, nor can title be established by parol evidence that the grantee agreed to the rescission. Voiers v. Atkins Bros. [La.] 36 So. 974. The title of a feme covert cannot be affected except by her duly executed and acknowledged deed. White v. Simonton [Tex. Civ. App.] 79 S. W. 621.

28. Parker v. Parker [N. J. Eq.] 56 A. 1094. Bill to compel reconveyance may be amended on final hearing to meet the proof furnished. Stevens v. Shaw [N. J. Eq.] 57 A. 1024.

29. Where a grantee in a deed delivered to a third person to be delivered to her after the grantor's death, consents to its destruction and the substitution of a trust deed, she cannot insist that the deed absolute passed title to her. Albrecht v. Albrecht, 121 Iowa, 521, 96 N. W. 1087. Acceptance of the trust deed is a satisfaction of the agreement to convey absolutely. Id. If destruction of a deed will operate to revest, it must have been destroyed with that intention. Tabor v. Tabor [Mich.] 99 N. W. 4.

30. See 1 Curr. L. 913. Defined in Cyc. Law Dict., "Default."

31. An attachment being unwarranted and based upon insufficient proof, a default judgment thereon falls. Durkin v. Paten, 97 App.

though the right to contest the court's jurisdiction may be waived.[32] Process must be valid[33] and served,[34] and returned[35] in legal manner, but being irregular or incomplete, it may be amended.[36] Attachment or garnishment process must rest on sufficient affidavits.[37] Plaintiff must have a present right of action apparent on the record,[38] and his pleadings must be sufficient to sustain a judgment.[39] The full time to plead must have expired,[40] with the extensions given.[41] Default in appearance may consist in nonappearance after remand,[42] but not in failure to plead over after demurrer[43] or failure to answer a complaint amended without notice.[44] Retention of answer by plaintiff prevents his taking a judgment as on default for failure to serve with an answer an order for trial of issues.[45] Where there is a doubt, the court will not permit judgment to be taken at the first term on affidavit of demand.[46]

§ 2. *Procedure on default; taking judgment.*[47]—If default lies only in the insufficiency of a responsive pleading, the court must declare it.[48] On failure to answer, an order pro confesso should, in good practice, be taken before the final decree, but failure to so do is not reversible error.[49] A second default being taken in the same action, no new inquest need be taken.[50] In West Virginia, the office

Div. 139, 89 N. Y. S. 622. See 1 Curr. L. 913, n. 65.

32. Held not waived where the case was adjourned from time to time, and finally, no one appearing, dismissed; thereafter it was restored to the calendar on the written consent of defendant's attorneys and a default judgment taken. Delaney v. Bouse, 91 App. Div. 437, 86 N. Y. S. 880. See, also, Appearance, 3 Curr. L. 300; Jurisdiction, 2 Curr. L. 604; Process, 2 Curr. L. 1259.

33. Delaware Western Const. Co. v. Farmers' & Merchants' Nat. Bank [Tex. Civ. App.] 77 S. W. 628; Robinson v. Horton [Tex. Civ. App.] 81 S. W. 1044.

34. Tyler v. Blanton [Tex. Civ. App.] 78 S. W. 564; Foster v. Cimarron Valley Bank [Okl.] 76 P. 145. Affidavits alleging that the summons was served on a clerk of a corporation are insufficient to show that they were not served on the president. Guase v. Sterling Plano Co., 88 N. Y. S. 532. Such affidavits cannot be considered by the supreme court in the first instance. Id. See 1 Curr. L. 913, n. 65.

35. Robinson v. Horton [Tex. Civ. App.] 81 S. W. 1044; Jones v. Bibb Brick Co. [Ga.] 48 S. E. 25. On a motion to set aside the judgment as based on a defective return, the movant cannot rely on the incompleteness of the return, but must affirmatively show that the service actually made was not such as is required by the statute. Id.

36. Jones v. Bibb Brick Co. [Ga.] 48 S. E. 25. As to when it may be amended, see Process, 2 Curr. L. 1259.

37. To sustain a default judgment in attachment, the affidavits must be sufficient. Delaney v. Bouse, 91 App. Div. 437, 86 N. Y. S. 880. Garnishment. Work Bros. & Co. v. Waggoner [Miss.] 35 So. 137. See 1 Curr. L. 913, n. 70.

38. In order to take a default judgment upon an evidence of indebtedness, the instrument must admit upon its face an existing debt payable absolutely. Construing Code Civ. Proc. § 1778. Tautphoeus v. Harbor & S. Bldg. & Sav. Ass'n, 88 N. Y. S. 709.

39. Under Rev. St. 1895, art. 1191, petition must set out residence of defendant. Tyler v. Blanton [Tex. Civ. App.] 78 S. W. 564.

40. Oden & Co. v. Vaughn Grocery Co. [Tex. Civ. App.] 77 S. W. 967. Under Acts 1900-01, p. 1859, § 8, thirty days from the date of service must have expired. Ex parte Haynes [Ala.] 37 So. 286. Motion to verify must be disposed of or no default in failing to plead. Ewell v. Tye, 25 Ky. L. R. 976, 76 S. W. 875.

41. Littauer v. Stern, 177 N. Y. 233, 69 N. E. 538. Failure to amend within time given not a default which clerk may enter. Knight v. Dunn [Fla.] 36 So. 62; Gulf Lumber Co. v. Dunn [Fla.] 36 So. 63.

42. Judgment after the overruling of a demurrer is not one by default, and a motion to correct for judicial error, made after the close of the term at which the judgment was rendered is properly overruled. Second Nat. Bank v. Ralphsnyder, 54 W. Va. 231, 46 S. E. 206.

43. A confirmation of a special assessment being reversed and notice given of a motion to redocket the cause and for further proceedings, the objector failing to appear pursuant to the notice, it is proper to take a default before proceeding on the hearing of the objections. Gage v. Chicago [Ill.] 71 N. E. 877. See 1 Curr. L. 913, n. 64.

44. Coreth v. McNatt [Tex. Civ. App.] 77 S. W. 33.

45. Action on instrument for payment of sum certain. Tautphoeus v. Harbor & S. Bldg. & Sav. Ass'n, 88 N. Y. S. 709.

46. Davenport Co. v. Addicks [Del. Super.] 57 A. 532.

47. See 1 Curr. L. 914.

48. A court declining to strike a plea and enter a default and ordering the plea to be amended within a certain time, it is not proper for the clerk without further order to enter a default, as for want of a plea, after the expiration of that time. Knight v. Dunn [Fla.] 36 So. 62; Gulf Lumber Co. v. Dunn [Fla.] 36 So. 63. See 1 Curr. L. 914, n. 73.

49. Shannon's Code, § 6351. Sewell v. Tuthill & Pattison [Tenn.] 79 S. W. 376.

50. Greenberg v. Laeov, 84 N. Y. S. 930.

judgment becomes final and entry accordingly must be made unless defendant seasonably pleads to issue and tenders counter-affidavits.[51] By agreeing to a continuance, plaintiff may waive this benefit, and such continuance being entered of record, it will prevent such office judgment becoming final by operation of the statute, and it cannot afterwards become final until it is entered up as the judgment.[52]

Federal courts will follow the practice of the state courts.[53]

§ 3. *Opening defaults.*[54]—Statutes providing for the opening or vacating of default judgments are remedial and should be liberally construed, doubts being resolved in favor of the applicant.[55] A court has the inherent power,[56] in the exercise of a judicial discretion,[57] to set aside a default judgment and allow a defense, and where the discretion is exercised in setting aside the judgment, it is less apt to be interfered with on appeal than if the motion had been denied.[58] Defendant must show a clear case of diligence,[59] a meritorious defense,[60] and that he was

51. Plaintiff having filed his affidavit with his declaration at rules, the court has no authority to set aside the office judgment, regularly entered, until the defendant has pleaded to issue and filed his counter-affidavit with his plea; but it is the duty of such court, in the absence of such affidavit, to enter up judgment on the plaintiff's affidavit. Defendant failing to file such affidavit at the first term of court at which such office judgment becomes final, he cannot file it at any succeeding term of court. Hurlburt & Sons v. Straub [W. Va.] 46 S. E. 163. See 1 Curr. L. 914, 915.

52. Wm. James' Sons & Co. v. Gott & Ball [W. Va.] 47 S. E. 649. The court could not have, on its own motion, entered a continuance to have such effect. Id. Before such office judgment becomes final by such entry, the defendant may have the same set aside by filing his counter-affidavit and pleading to issue. Id.

53. Johnson v. Bridgeport Deoxidized Bronze & Metal Co., 125 F. 631.

54. See 1 Curr. L. 915.

Note. The opening of judgments for fraud, accident or mistake should also be consulted. See Judgments, 2 Curr. L. 581. The fact that a judgment was taken on default may be of persuasive force in applying these equitable grounds after judgment has become final so that the default cannot as such be opened. In some states the distinction between relief from a default and relief from the judgment is almost or wholly lost because of the nature of the procedure and the similarity of the grounds on which both reliefs must rest. [Editor].

55. Johnson v. Ware, 67 Kan. 840, 73 P. 99.

56. Acts 1902, p. 272, providing for filings on subsequent rule days, etc., prescribes procedure only. Court may open at same term if so advised. Jett v. Farmers' Bank, 25 Ky. L. R. 817, 76 S. W. 385.

57. Such motion is addressed to the sound legal discretion of the court, and unless it appears that such discretion has been wrongfully and oppressively exercised an appellate court will not interfere. Eggleston v. Royal Trust Co., 205 Ill. 170, 68 N. E. 709; Kapner v. Samuels, 84 N. Y. S. 195; O'Meara v. Interurban St. R. Co., 87 N. Y. S. 405; Stoll v. Pearl [Wis.] 99 N. W. 906; White v. Gurney [Minn.] 99 N. W. 889; Roberts v. Kuhrt, 119 Ga. 704, 46 S. E. 856; Pennsylvania Fire Ins. Co. v. Young & Co., 25 Ky. L. R. 1350, 78 S. W. 127; Hegaas v. Hegaas, 28 Mont. 266, 72 P. 656; Woodham v. Anderson, 32 Wash. 500, 73 P. 536; Greene v. Rowan [Mont.] 74 P. 456; Copper King of Arizona v. Johnson [Ariz.] 76 P. 594; McFarlane v. McFarlane [Or.] 77 P. 837. See 1 Curr. L. 916, n. 5.

In New York, the supreme court may in its discretion open default judgments. The right being exercised in the first instance at the special term, the action taken there being reviewable by the appellate division. The Lawson v. Adams, 85 N. Y. S. 863. The appellate division may reverse an order refusing to open such default judgment, though there has not been an actual abuse of discretion by the special term. Id.

58. Harkness v. Jarvis [Mo.] 81 S. W. 446.

59. Texas Fire Ins. Co. v. Berry [Tex. Civ. App.] 76 S. W. 219; Gage v. Chicago [Ill.] 71 N. E. 877.

Mutual Reserve Fund Life Ass'n v. Scott [N. C.] 48 S. E. 581. That the allegations of the complaint were false and fraudulent and that a witness was not properly sworn are no defenses, defendant knowing the facts at the time of trial. Id. Refused as to decree pro confesso four months after final decree and after recognition of it by contract and otherwise. Horner v. White [Fla.] 35 So. 662.

60. Eggleston v. Royal Trust Co., 205 Ill. 170, 68 N. E. 709; Hofman v. Burris [Ill.] 71 N. E. 584; Gage v. Chicago [Ill.] 71 N. E. 877; Klabunde v. Byron-Reed Co. [Neb.] 98 N. W. 182; Everett v. Tabor, 119 Ga. 128, 46 S. E. 72; McCall v. Miller [Ga.] 47 S. E. 920; Whitney v. Knowlton, 33 Wash. 319, 74 P. 469. Even though default and judgment did not result from defendant's fault or negligence. Gilchrist Transp. Co. v. Northern Grain Co., 204 Ill. 510, 68 N. E. 658. See 1 Curr. L. 916, n. 7, 9.

A meritorious defense is a claim of such merit that the court or jury may be asked to pass upon it. Bradley v. McPherson [N. J. Eq.] 66 A. 303; Boyd v. Williams [N. J. Law] 56 A. 135.

Illustrations. Pleadings: Counter-affidavits tending to show that the defense sought to be availed of by defendants in their answer would be unavailing, an order denying the motion is proper. Schrenkeisen v. Kroll, 85 N. Y. S. 1072. An answer to the application showing that defendant's claim to have been already adjudicated in a common-law action negatives defendant's right to the relief sought. Horner v. White [Fla.] 35 So. 662. Where affidavit of merits was made by at-

prevented from making such defense by fraud,[61] accident,[62] surprise,[63] mistake of fact,[64] or the acts of the opposite party,[65] wholly unmixed with any fault or negligence,[66] unless excusable[67] on his own part. Loss of a defense will justify a court of equity in setting aside a judgment where the defendant has been without fault and it appears that he has a meritorious defense.[68] Still a court of equity will not move where it appears that a motion to set aside the judgment has been passed on at law.[69] An exception to this rule exists where, after such motion has been disposed of, new matter, not urged in support of the motion, comes to the knowledge of defendant, and which, with the other facts urged, constitutes a sufficient ground for setting aside the judgment.[70] In some states, default judgments in divorce proceedings will not be opened.[71]

The default judgment inadvertently including a wrong party, the court may, on motion of plaintiff, made immediately after discovering the mistake, and before any one has been prejudiced thereby, vacate the judgment as to such party.[72]

The motion, in the absence of statutory provisions, must be made within a reasonable time,[73] and during the term in which the default judgment was ren-

torney and failed to state in what the defense consisted, or the belief of counsel that the party had such a defense, held insufficient. Copper King v. Johnson [Ariz.] 76 P. 594.

Facts: Fraudulent grantee admitting fraud has no such defense. Johnson v. Richardson, 67 Kan. 521, 73 P. 113. Decree of foreclosure pro confesso will not be opened to let in defense as to amount if a judgment at law has been had on the debt and no reason is given why it should be ignored. Horner v. White [Fla.] 35 So. 662.

61. Due to illiteracy. Klabunde v. Byron-Reed Co. [Neb.] 98 N. W. 182. Was prevented by the fraud of the other from entering an appeal or making a motion for a new trial. Everett v. Tabor, 119 Ga. 128, 46 S. E. 72.

62. Death of counsel. Snelling's Adm'r v. Lewis, 25 Ky. L. R. 1856, 78 S. W. 1124. Papers of attorneys thrown into confusion by reason of their moving their offices. Lawson v. Adams, 85 N. Y. S. 863.

63. Where cause was improperly or without notice transferred from one calendar to another. Roberts v. Kuhrt, 119 Ga. 704, 46 S. E. 856; Rosenberg v. Hassett, 86 N. Y. S. 865. Where, pending a suit to quiet title, the defendant died and each of his heirs and devisees retained separate counsel, and, owing to the confusion arising therefrom, no answer was filed, held surprise and default was opened. Bradley v. McPherson [N. J. Eq.] 56 A. 303.

64. Keenan v. Daniells [S. D.] 99 N. W. 853. The fact that one specially appeared and stood thereon for appeal does not constitute a mistake of law preventing the opening of the judgment. McFarlane v. McFarlane [Or.] 77 P. 837. See 1 Curr. L. 915, n. 2.

65. No notice of suit by attorney for fees. Truitt v. Darnell [N. J. Eq.] 55 A. 692.

66. Lindquist v. Maurepas Land & Lumber Co., 112 La. 1030, 36 So. 843; Hofmann v. Burris, 210 Ill. 587, 71 N. E. 584. Neglect of attorney. Brooks v. Delaware, etc., R. Co., 88 N. Y. S. 961; Baltimore & O. R. Co. v. Ryan, 31 Ind. App. 597, 68 N. E. 923; McAnally v. Vickry [Tex. Civ. App.] 79 S. W. 857; McCall v. Miller [Ga.] 47 S. E. 920. Neglect of agent to procure counsel has been held sufficient (Barlow v. Burns [N. J. Law] 57 A. 262), and also insufficient (Texas Fire Ins. Co. v. Berry [Tex. Civ. App.] 76 S. W. 219) to open the default judgment. Negligence in not being ready for trial (O'Meara v. Interurban St. R. Co., 87 N. Y. S. 405; Stoll v. Pearl [Wis.] 99 N. W. 906), and in moving for vacation of default judgment (Keenan v. Daniells [S. D.] 99 N. W. 853), are grounds for refusing to open such default. No excuse for absence of attorney being offered, the default will not be reopened. Greenberg v. Angerman, 84 N. Y. S. 244. Defendant appearing to contest the damages, the cause will not be reopened. Barlow v. Burns [N. J. Law] 57 A. 262. Failure of the court to specially assign a case for a particular day of the term at which it was noticed for trial is no excuse for plaintiff's failure to appear and prosecute the same on its being reached in its regular order. Stewart v. Gorham, 122 Iowa, 669, 98 N. W. 512.

67. Klabunde v. Byron-Reed Co. [Neb.] 98 N. W. 182. See 1 Curr. L. 915, n. 3.

Excuses held sufficient: Answer was lost in the mails. Boyd v. Williams [N. J. Law] 56 A. 135. Defendant, a married woman, knew nothing of the case but her husband managed same wholly without her knowledge. Aldrich v. Crump, 128 F. 984. Failure to appear and defend being unintentional. Johnson v. Ware, 67 Kan. 840, 73 P. 99. Where attorney had good ground for adjournment which he failed to present and judgment was taken by default held not abuse of discretion to open default on the showing of the ground for adjournment. Kapner v. Samuels, 84 N. Y. S. 195. Payment after action is brought authorizes the opening of a subsequent default, the interposition of an answer pleading full payment, and the dismissal of the complaint on proof thereof. United Wine & Trading Co. v. Platz, 86 N. Y. S. 260.

68, 69, 70. Hofmann v. Burris, 210 Ill. 587, 71 N. E. 584.

71. Ballinger's Ann. Codes & St. § 4880. Metler v. Metler, 32 Wash. 494, 73 P. 535.

72. Weston v. Citizens' Nat. Bank, 88 App. Div. 330, 84 N. Y. S. 743.

73. People v. Davis [Cal.] 77 P. 651. Un-

dered,[74] and after the expiration of such time, the judgment being valid on its face, the sole remedy of the aggrieved party is to be found in a new action in equity,[75] or proceeding under statute for relief from the judgment.[76] It must be prosecuted with diligence.[77] The motion being filed at the same term that the default is entered, it is not essential to the retention of power by the court to dispose of the motion at a succeeding term that the motion be taken under advisement until such subsequent term.[78] Neither motion nor notice to the adverse party is essential. The court has full power to take such action on its own motion and without the application of any one,[79] though in some states a motion,[80] supported by affidavits,[81] must be made. Neither a motion[82] nor a direct suit[83] to vacate a default judgment is the same as an application for a new trial. A default judgment against a co-defendant being vacated without notice to the other defendants jointly liable, the latter must object without delay.[84]

The affidavits of defendant showing a meritorious defense, the court is not authorized to try the merits of the case on affidavits.[85]

The court may on opening a default judgment restrict the further hearing.[86] The lien of the default judgment may be retained as security for the satisfaction of any judgment plaintiff may recover,[87] and a default judgment against an irresponsible defendant being opened, the defendant should also be required to give a bond for costs.[88] Defendant cannot complain that an order on his motion opening the default was not entered and served upon him.[89]

An application to open a default judgment being dismissed for defects in the answer tendered does not bar a new application in which such defects are remedied;[90] the first dismissal, however, bars another one on the same grounds as the first, unless it affirmatively appears from the record that such matters were not considered on their merits.[91]

Appeal.—In many states, by statute, an appeal lies from the refusal to open a default judgment,[92] and from the refusal to render a default judgment.[93] Affi-

der Code Civ. Proc. § 473, it must be made within one year. Id.

74. Cauley v. Wadley Lumber Co., 119 Ga. 648, 46 S. E. 852; Jett v. Farmers' Bank, 25 Ky. L. R. 817, 76 S. W. 385; Pennsylvania Fire Ins. Co. v. Young & Co., 25 Ky. L. R. 1350, 78 S. W. 127. See 1 Curr. L. 916, n. 15.

75. People v. Davis [Cal.] 77 P. 651. Order attempting to open such judgment after expiration of such time is void. Id.

76. See Judgments, 2 Curr. L. 581.

77. Keenan v. Daniells [S. D.] 99 N. W. 853. Where not supported by affidavit and not brought on for hearing until several months after the entry of final decree, and three months after defendant had entered into agreements recognizing the final decree held abandoned. Horner v. White [Fla.] 35 So. 662. See 1 Curr. L. 917, n. 24.

78. Rev. St. 1899, § 1611. Harkness v. Jarvis [Mo.] 81 S. W. 446.

79. People v. Davis [Cal.] 77 P. 651.

80. Code, § 274. Mutual Reserve Fund Life Ass'n v. Scott [N. C.] 48 S. E. 581; Foster v. Cimarron Valley Bank [Okl.] 76 P. 145.

81. Gage v. Chicago [Ill.] 71 N. E. 877.

82. Within the meaning of a statute requiring a motion for a new trial to be filed within four days after the rendition of judgment. Harkness v. Jarvis [Mo.] 81 S. W. 446.

83. Is not governed by the same statute of limitations, but by Rev. St. 1895, art. 3358. Rose v. Darby [Tex. Civ. App.] 76 S. W. 799.

84. Weston v. Citizens' Nat. Bank, 88 App. Div. 330, 84 N. Y. S. 743.

85. Gilchrist Transp. Co. v. Northern Grain Co., 204 Ill. 510, 68 N. E. 558.

86. Erwin v. Archenhold Co. [Tex. Civ. App.] 77 S. W. 823. An order providing that the case be opened for the purpose of hearing such matters of defense as go to the merits of the answer, and that the cause be tried on its merits, limits the hearing. Id. See 1 Curr. L. 916, n. 10-12.

87. Boyd v. Williams [N. J. Law] 56 A. 135.

88. Brickel v. Train, 86 N. Y. S. 292.

89. Greenberg v. Laeov, 84 N. Y. S. 930.

90, 91. Oakes v. Ziemer [Neb.] 98 N. W. 443.

92. An order denying a motion to open a default made in the municipal court is appealable under Laws 1902, p. 1486, c. 580. Schrenkeisen v. Kroll, 85 N. Y. S. 1072. The right to appeal from such judgment arises under Code Civ. Proc. § 3046, not from § 3057. Austen v. Columbia Lubricants Co., 85 N. Y. S. 362; Guase v. Sterling Piano Co., 88 N. Y. S. 532.

Contra: Leavitt v. Epstein, 86 N. Y. S. 208.

93. Tennessee River Land & Timber Co. v. Butler, 134 N. C. 50, 45 S. E. 956.

davits,[94] answer,[95] and other papers of defendant, to be available on appeal, must be made a part of the record. In New York, on appeal from a default judgment in the municipal court, the affidavit for reversal should be served with the notice of argument.[96] On appeal from a judgment rendered on default, the court will examine the evidence to see if it is sufficient to support the judgment.[97] The plaintiff objecting to a motion to set aside a default judgment solely on a denial of the power of the court to act on the motion, the exercise of the discretion of the court in setting aside the judgment is conclusive on appeal.[98]

§ 4. *Operation and effect of default and proof of damages.*[99]—Judgment being rendered by default, defendant is thereby concluded as to all the material allegations of the complaint,[1] save, where they are unliquidated, as to the amount of the damages.[2] In such a case, he may contest before the jury the amount of the damages, and to this end may not only rigidly cross-examine the witnesses for the plaintiff, but also introduce evidence in his own behalf,[3] and giving notice of his intention to default and move for a hearing in damages, upon removal of the cause to the Federal court, he need not file such notice a second time in that court.[4] A default judgment in a petitory action bars defendant from setting up any title which he then had to the property.[5] A judgment by default in an action of debt on judgment is generally interlocutory in its nature.[6] One purchasing without knowledge of or reliance on the judgment will not be protected upon the opening of the default.[7]

DEPOSITIONS.[8]

§ 1. Occasion or Necessity; Right to Take (1074).
§ 2. Procedure to Obtain Deposition (1075).
§ 3. Taking the Testimony or Evidence Adduced (1075). Notice of Hearing and Attendance of Witness (1076). Proceedings at Hearing (1076).
§ 4. Returning and Filing (1077).
§ 5. Suppression Before Trial (1078).
§ 6. Opening and Objections; Use as Evidence (1078).

§ 1. *Occasion or necessity; right to take.*[9]—The right is entirely statutory,[10] the court having no inherent or common-law power to order the taking of testi-

94. Whitney v. Knowlton, 33 Wash. 319, 74 P. 469.

95. Rejected on a motion to set aside the default judgment and file such answer. Jett v. Farmers' Bank, 25 Ky. L. R. 817, 76 S. W. 385.

96. Austen v. Columbia Lubricants Co., 85 N. Y. S. 362.

97. Brooks v. Delaware, etc., R. Co., 88 N. Y. S. 961.

98. Harkness v. Jarvis [Mo.] 81 S. W. 446.

99. See 1 Curr. L. 917.

1. Pittman v. Colbert [Ga.] 47 S. E. 948; Murphy v. Murphy, 141 Cal. 471, 75 P. 60; Dunfee v. Mutual Bldg. & Loan Ass'n, 206 Ill. 133, 68 N. E. 1052. No proof need be offered, the complaint being verified. Godding v. Rossiter [Colo. App.] 77 P. 1094. See 1 Curr. L. 917, n. 32.

Appealability: Default judgments are not as a rule appealable by the defaulting party, except that it may be done if there is a jurisdictional error so that default could not be taken. See Appeal and Review, 1 Curr. L. 92, n. 34-37.

2. Pittman v. Colbert [Ga.] 47 S. E. 948; Johnson v. Bridgeport Deoxidized Bronze & Metal Co., 125 F. 631, declaring the Connecticut rule.

3. Pittman v. Colbert [Ga.] 47 S. E. 948. See 1 Curr. L. 917, n. 34.

4. Johnson v. Bridgeport Deoxidized Bronze & Metal Co., 125 F. 631.

5. Lindquist v. Maurepas Land & Lumber Co., 112 La. 1030, 36 So. 843. This rule extends not only to an absolute title then existing, but to inchoate real rights which defendant then had in the property, which may ripen into a title of ownership under a then outstanding title of a person other than plaintiff. Id.

6. So held where a commissioner was appointed to assess the damages. Leonard v. Sibley [Vt.] 56 A. 1015.

7. Code, § 77. Randall v. Barker, 67 Kan. 774, 74 P. 240.

8. In some states, testimony given at the preliminary hearing of a criminal case stands on the same footing as a deposition [Pen. Code, § 686, subd. 3]. People v. Lewandowski [Cal.] 77 P. 467. See Indictment and Prosecution, 2 Curr. L. 307. The testimony of a witness before a master is a deposition within the meaning of U. S. Rev. St. § 824, providing for costs in specified cases. Matheson v. Hanna-Schoelkopf Co., 128 F. 162.

9. See 1 Curr. L. 917.

10. Davis Mach. Co. v. Robinson, 42 Misc. 52, 85 N. Y. S. 574.

mony.[11] There must be a suit pending,[12] but the return of an indictment is not deemed necessary in criminal cases under the Louisiana statute,[13] and in New York, issue need not be joined as to all defendants.[14]

The evidence sought to be obtained must be necessary, material[15] and relevant.[16] Thus, where the facts are disputed and the question wholly one of law, a commission will not issue.[17] There must be sufficient reason why the attendance of the witness cannot be procured.[18] Fictitious parties being included in the application as witnesses, the motion will be determined solely upon the right of the actual parties to have their testimony taken.[19] A commission will be denied where the applicant has been guilty of laches.[20] A conditional admission of the evidence sought to be obtained by the deposition is no ground for refusing a commission.[21]

§ 2. *Procedure to obtain deposition.*[22]—Depositions may be taken by commission, or, under statutes of many states, on notice, the length of notice being regulated by statute.[23] Impossibility of attending within the time given does not vitiate the proceeding,[24] but justifies the notary in ordering a continuance.[25]

§ 3. *Taking the testimony or evidence adduced.*[26] *Officers authorized to take.*—Judges generally have the power to take depositions,[27] including full authority

11. Examination of a witness not a party to the trial before trial. Davis Mach. Co. v. Robinson, 42 Misc. 52, 85 N. Y. S. 574.

12. Rev. St. 1899, § 2877. A proceeding for the discovery of assets belonging to a decedent's estate is "a suit pending." Ex parte Gfeller, 178 Mo. 635, 77 S. W. 552.

13. Construing Act No. 124, p. 179, of 1896. State v. Jackson, 111 La. 343, 35 So. 593.

14. Under Code Civ. Proc. § 888, subd. 5, the action need not be at issue as to all the defendants when the application was made. Boyes v. Bossard, 87 App. Div. 605, 84 N. Y. S. 563.

15. In a criminal case, the taking of depositions of nonresidents to show that defendant's character is good will not be allowed where the state stipulates not to attack defendant's character. People v. Goodman, 43 Misc. 508, 89 N. Y. S. 522; Boyes v. Bossard, 87 App. Div. 605, 84 N. Y. S. 563.

16. In a criminal case, the taking of a deposition to show that the complaining witness has been indicted and tried for murder will be refused. People v. Goodman, 43 Misc. 508, 89 N. Y. S. 522. In a criminal prosecution, a deposition will not be allowed in order to show that the complaining witness had obtained an unfair advantage over the defendant in a business transaction. Id. Examination of corporate officer not connected with corporation at time of transactions in question, refused. In re Thompson, 95 App. Div. 542, 89 N. Y. S. 4.

17. Action for breach of contract, terms of contract and acts alleged to constitute the breach not being in dispute. Wilcox v. Stern, 89 App. Div. 14, 85 N. Y. S. 159.

18. Generally the affidavit must show that the witness is about to depart from the state, or is so sick as to afford reasonable ground to believe that he will not be able to attend the trial [Construing Code Civ. Proc. § 872, subd. 5, and § 882]. Davis Mach. Co. v. Robinson, 42 Misc. 52, 85 N. Y. S. 574. The right to a dedimus potestatem exists, in the Federal courts, when there is a well-grounded apprehension of a failure or delay of justice. Rev. St. § 866. Where certain important witnesses had left the state and could not be found, and other witnesses might not be on hand at time of trial, dedimus granted. Zych v. American Car & Foundry Co., 127 F. 723. See 1 Curr. L. 918, n. 41. Depositions of resident witnesses under letters rogatory, with interrogatories attached, will be ordered taken, it appearing that the court of another state cannot do complete justice between the parties without such testimony. Shannon Mfg. Co. v. McCaulley & Son Co. [Del. Super.] 56 A. 367.

19. Wilcox v. Stern, 89 App. Div. 14, 85 N. Y. S. 159.

20. Held properly denied where by stipulation of plaintiff defendant had an opportunity during about four months to have his testimony taken by open commission, but took no steps in the matter until plaintiff had regularly moved and noticed the cause on the calendar. Wilcox v. Stern, 89 App. Div. 14, 85 N. Y. S. 159.

21. Where defendants sought to prove that certain persons were residents of a certain country which plaintiff agreed to admit, providing defendant admitted they were citizens of such country. Boyes v. Bossard, 87 App. Div. 605, 84 N. Y. S. 563.

22. See 1 Curr. L. 918.

23. The sufficiency of a notice to take depositions, as to time of service, is determined by the laws of the state where the action is pending, and not of the state where the depositions are to be taken. In re Wogan [Mo. App.] 77 S. W. 490.

24. That the notice given the adverse party is so short as to render it impossible for his attorney to be present is not conclusive evidence of bad faith on the part of those taking the depositions so as to invalidate the proceedings. In re Wogan [Mo. App.] 77 S. W. 490.

25. In re Wogan [Mo. App.] 77 S. W. 490.

26. See 1 Curr. L. 919.

27. In Massachusetts, justices of the peace. Lawson v. Rowley [Mass.] 69 N. E.

to commit a witness for contempt if he refuses to be sworn or give testimony in a proper case;[28] but such judge has no jurisdiction to compel, by attachment, the attendance as a witness of a nonresident of the state, who is beyond its boundaries, though served with a subpoena while temporarily within the state.[29] Notice of the taking of depositions before trial, being given under a state statute before the removal of the cause to a Federal court, a special commissioner appointed by the latter to take such testimony has the powers conferred by the state statute to enforce the attendance of witnesses.[30]

Notice of hearing and attendance of witness.—The attendance of the witness is compellable by citation or subpoena,[31] and where the commission or notice does not designate the time of taking, due notice must be given the adverse party thereof.[32]

A Federal court has power to issue a subpoena duces tecum to compel the production of books or papers by a witness being examined de bene esse within the district,[33] but it cannot be issued by the clerk or by the notary public before whom the deposition de bene esse is to be taken.[34] This subpoena does not issue as a matter of right, the court being obliged to inquire into the matter to determine if the evidence appears to be material, and if not satisfied on this point, will decline to issue the writ.[35] A subpoena ad testificandum will not be supplemented by a subpoena duces tecum except upon proof by the moving party that such books or papers are material upon the issues presented in the action;[36] they will be produced only for use in connection with the testimony of the witnesses,[37] and will not be produced in order that the adverse party may inspect them.[38] An officer of a corporation not appealing from an order ordering him to produce the corporation's books for the purpose of aiding his memory cannot refuse to produce such books on the ground that they would tend to incriminate him, and his refusal to so do is a contempt of court.[39]

Proceedings at hearing.—As to whether a notary public has the power to punish the witness for contempt, on his refusing to answer a question, there is a conflict of

1082. In Nebraska, a county judge has the eame jurisdiction and powers in taking depositions as a notary public. Olmstead v. Edson [Neb.] 98 N. W. 415. P. L. 279, providing for the taking of testimony of nonresidents to be used as evidence in "any of the civil courts of record" in the commonwealth, applies to the orphan's court. In re Irvine's Estate [Pa.] 58 A. 617.

28. In Nebraska, a county judge has this authority. Olmsted v. Edson [Neb.] 98 N. W. 415. In Massachusetts, justices of the peace have the power to take depositions but no power to commit a witness for contempt for his refusal to answer the questions put to him, though such witness may be compelled to answer the questions by a justice of the supreme or superior court. Lawson v. Rowley [Mass.] 69 N. E. 1082.

29. State v. Kennan, 33 Wash. 247, 74 P. 381.

30. Zych v. American Car & Foundry Co., 127 F. 723.

31. In Vermont, the citation for the taking of depositions must contain the name of the magistrate before whom they are to be taken. V. S. 1264. Where they failed to do so, held properly excluded. Chase v. Watson, 75 Vt. 385, 56 A. 10. A subpoena requiring a defendant in an action in another state to appear and give his deposition will not be set aside because notice was not given other defendants. In re Shawmut Min. Co., 94 App. Div. 156, 87 N. Y. S. 1059.

32. Under Code Prac. art. 430. Where the testimony of an infirm witness residing in the parish was to be taken under commission. Thibodeaux v. Thibodeaux, 112 La. 906, 36 So. 800. See 1 Curr. L. 919, n. 57-59. One interpleading after the depositions are on file in the case cannot have them excluded because no notice was given him of the taking thereof. Miller v. Campbell Commission Co., 13 Okl. 75, 74 P. 507.

Missouri Rev. St. 1899, § 2885 provides the method of serving notice of the time and place of taking depositions in case the adverse party and his attorney are residents of the state, and does not require the service of such notice at the place of their residence. Swink v. Anthony [Mo. App.] 81 S. W. 915.

33, 34, 35. Dancel v. Goodyear Shoe Machinery Co., 128 F. 753.

36. In re Lee, 85 N. Y. S. 224.

37. Code Civ. Proc. §§ 1914, 1915. In re Lee, 85 N. Y. S. 224.

38. In re Thompson, 95 App. Div. 542, 89 N. Y. S. 4.

39. Pray v. Todd, 88 N. Y. S. 650.

decisions, some courts holding that he has such power;[40] others that he has not,[41] and that a statute giving him such power is unconstitutional,[42] though in these latter states the court has the power to punish such witness.[43] Witnesses summoned to have their depositions taken for an action pending in another state must comply with the subpoena, where all the requirements of the state where the action is pending as to notice are complied with,[44] and can be compelled to answer questions.[45] The law will not permit a litigant to obtain the appointment of an officer to take the examination of certain witnesses, and, when they are produced, deny the right of the officer to proceed with the examination.[46]

In the absence of statute or rule, the presence of one of the counsel at the taking of the deposition is no objection to it.[47] That a deposition is taken through an interpreter does not affect its admissibility.[48] An interrogatory is not necessarily leading because it admits of a direct affirmative or negative answer; it must also suggest the desired answer.[49] The answers must be responsive to the questions or the deposition will be suppressed.[50] The deponent asking the officer taking the deposition how he should answer the interrogatories, the question should be taken as referring to the manner of answering, not what the answers should be,[51] and such testimony on objection will be excluded.[52] The opposite party should be allowed to cross-examine the deponent.[53] Statutes directing the manner of preserving exhibits produced at the taking of the deposition are generally mandatory,[54] and where such exhibit is not attached to the deposition as required by statute, it is within the discretion of the trial court whether or not to permit, after the commencement of the trial, the withdrawal of the deposition, and the attachment thereto of the exhibit.[55] The deposition must be taken and certified by the commissioner appointed by the court, and a deposition taken and certified by a stranger though with the consent of the parties, will be suppressed.[56] The court ordinarily will reserve all questions upon the settlement of interrogatories and cross interrogatories until the trial, yet where the right to cross-examine is abused the court will restrict the examination to that which is properly cross-examination.[57]

§ 4. *Returning and filing.*[58]—It is presumed that the official receiving a deposition has observed all requirements of the law.[59] The deposition being retained by the notary and personally mailed by him, it makes no difference whether he

40. Ex parte Gfeller, 178 Mo. 635, 77 S. W. 552. On habeas corpus by a witness thus committed, the notary's determination as to the relevancy and materiality of the evidence sought is conclusive. Id.

41, 42. Burns v. Superior Court of San Francisco, 140 Cal. 1, 73 P. 597.

43. Construing Code Civ. Proc. §§ 2021, 1209, 2035, 2036. Burns v. Superior Court of San Francisco, 140 Cal. 1, 73 P. 597.

44. In re Lee, 85 N. Y. S. 224.

45. In re Randall, 90 App. Div. 192, 85 N. Y. S. 1089.

46. Zych v. American Car & Foundry Co., 127 F. 723.

47. Hurd's Rev. St. 1899, c. 148 is independent of c. 51, and hence the presence of proponent's attorneys at the taking of the depositions of nonresident attesting witnesses to a will is no ground for striking it from the files. In re Arrowsmith's Estate, 206 Ill. 352, 69 N. E. 77.

48. People v. Lewandowski [Cal.] 77 P. 467.

49. Missouri, etc., R. Co. v. Baker [Tex. Civ. App.] 81 S. W. 67.

50. To the question as to how long, how often, and what kind of narcotics deponent had been taking, she replied that she had been sick for sometime, not able to wait on herself, had suffered all the time and had taken chloral when she suffered intense pain, held answer responsive to the question. Garner v. Risinger [Tex. Civ. App.] 81 S. W. 343.

51, 52. Shannon v. Marchbanks [Tex. Civ. App.] 80 S. W. 860.

53. Ewell v. Tye, 25 Ky. L. R. 976, 76 S. W. 875.

54. Rev. St. 1899, § 2903 is mandatory. Crane Co. v. Neel [Mo. App.] 77 S. W. 766.

55. Crane Co. v. Neel [Mo. App.] 77 S. W. 766.

56. Kroell v. State, 139 Ala. 1, 36 So. 1025.

57. Treadwell v. Greene, 89 App. Div. 60, 85 N. Y. S. 318.

58. See 1 Curr. L. 920.

59. That he has properly given notice to the parties. Simonds v. Cash [Mich.] 99 N. W. 754.

prepared the certificate to that effect before or after placing the deposition in the envelope.[60]

§ 5. *Suppression before trial.*[61]—A party cannot examine a witness for the purpose of eliciting favorable testimony, and at the same time retain the right to suppress his deposition if it strengthens the cause of his adversary.[62] Depositions taken by a person before he has properly become a party to the suit will generally be suppressed.[63] The deposition not being regularly and correctly taken and returned, the remedy is a motion to suppress.[64] Depositions not being returned before trial, the fact that the motion for their suppression was not made until then does not make their exclusion erroneous.[65] A deposition, taken under a notice served by mail, will be suppressed, it not appearing that proof of placing the notice in the post office in due season was made in the presence of the attorney of the other party and not repelled.[66]

§ 6. *Opening and objections; use as evidence.*[67]—Objections must be made within the time allowed by statute or they are waived.[68] It is always competent for a litigant to waive such objections to a deposition as the law enables him to make.[69] Parties may, by stipulation or silent acquiescence in the introduction of the statement or affidavit of a party, waive the right or opportunity to cross-examine him, and the prescribed forms of taking and certifying his testimony.[70] Objections may be waived and lost by not being seasonably taken upon trial.[71] An objection that the notice did not state the names of the witnesses to be examined is waived by the adverse party appearing and cross-examining the witnesses.[72] The waiver of an objection to the introduction of a deposition in chancery does not waive all objections to its admission and use in a subsequent action at law.[73] The objections must point out the particular parts challenged.[74] Overruling an objection to an answer to an interrogatory is not prejudicial where practically the same testimony is admitted without objection in answer to another interrogatory.[75] Objectionable questions and answers must be excepted to specifically,[76] and such exceptions must appear in the record in order to be available on

60. Riser v. Southern R. Co. [S. C.] 46 S. E. 47.

61. See 1 Curr. L. 920.

62. Babcock v. Ormsby [S. D.] 100 N. W. 759.

63. Where there were nonresident defendants who had only been served by publication and had not appeared. Riviere v. Wilkens, 31 Tex. Civ. App. 454, 72 S. W. 608.

64. Not by introducing the witness and permitting him to correct the statements made in the deposition. Hord v. Gulf, etc., R. Co. [Tex. Civ. App.] 76 S. W. 227.

65. Kroell v. State, 139 Ala. 1, 36 So. 1025.

66. Stokes v. Hardy [N. J. Law] 58 A. 650.

67. See 1 Curr. L. 921.

68. Under Comp. Laws 1897, §§ 10, 139, objections that certain exhibits were not attached to a deposition and that notice of the return was not given must be made within three days after notice of return, it not appearing affirmatively that the notice of return was not given. Simonds v. Cash [Mich.] 99 N. W. 754.

69. A party litigant having consented that the removal of a cause to the Federal court should not interrupt the taking of depositions then in progress is limited to the right to object to the testimony elicited before the commissioner on the trial of the case for the reasons mentioned in Rev. St. §§ 863, 865 [U. S. Comp. St. 1901, pp. 661, 663]. Zych v. American Car & Foundry Co., 127 F. 723.

70. United States v. Homestake Min. Co. [C. C. A.] 117 F. 481.

71. That the deposition contained incompetent matter and was not properly introduced. Hetzel v. Easterly, 96 App. Div. 517, 89 N. Y. S. 154. A deposition will not be quashed for irregularities after the trial has begun where sufficient opportunity was given to object thereto before [Code, § 1360]. Womack v. Gross, 135 N. C. 378, 47 S. E. 464.

72. Babcock v. Ormsby [S. D.] 100 N. W. 759.

73. Reed v. Gold [Va.] 45 S. E. 868.

74. Where the deposition covered five closely typewritten pages, and embraced many subjects, some matters therein being clearly admissible, an objection that the testimony is based on hearsay and on the witness' understanding held properly overruled. Ward v. Cameron [Tex.] 80 S. W. 69.

75. Missouri, etc., R. Co. v. Baker [Tex. Civ. App.] 81 S. W. 67.

76. Louisville & C. Packet Co. v. Bottorff, 25 Ky. L. R. 1324, 77 S. W. 920. The record of an objection to a deposition in that it was not taken in compliance with the stipulation for taking the same must point out

appeal.[77] The bill of exceptions must negative waiver of notice in order to render an objection to a deposition for lack of notice available on appeal.[78]

In the absence of a statute, failure of the officer taking the deposition to affix his official seal to the same will not justify the rejection of the deposition if the authority of the officer be otherwise sufficiently shown,[79] the prevailing practice being to admit a deposition in evidence if the court is satisfied that it was taken in the manner provided by law before an authorized officer, and has not been tampered with to the detriment of the adverse party.[80] A party being given full opportunity to obtain evidence to meet the effect of certain depositions, he cannot, on failing to obtain such evidence, object to the admission of the depositions on the ground that he was not a party to the action at the time of taking them.[81] Objections to the admission in evidence of a deposition on a ground going only to the time or manner of taking the same must be presented by a motion to suppress, and cannot be made for the first time at the trial;[82] such an objection being overruled, it is to be presumed on appeal that it was first made at trial.[83] A deposition being rejected in limine as invalid, it is not incumbent on the party offering it to give evidence of grounds for its admission.[84] No incompetency of a witness appearing, an objection to the reading of his deposition as a whole is without merit.[85]

In the absence of an agreement to the contrary, depositions taken in one suit cannot be used in another unless the parties are the same, or are in privity, and the subject-matter of the suits is also the same.[86]

It is a general rule, subject to exceptions, that an adverse party may read upon trial a deposition taken by the other;[87] this rule does not apply to incom-

wherein it differed in order to be available on appeal. Oliver v. Oregon Sugar Co. [Or.] 76 P. 1086.

77. Must appear in the bill of evidence. Louisville & C. Packet Co. v. Bottorff, 25 Ky. L. R. 1324, 77 S. W. 920. Must be stated in the bill of exceptions. Ward v. Cameron [Tex.] 80 S. W. 69.

78. Texas & P. R. Co. v. Murtishaw [Tex. Civ. App.] 78 S. W. 953.

79. Where notary's signature and seal were placed on the page preceding his certificate, held, construing Rev. Code Civ. Proc. §§ 520, 153, not a fatal defect. Kinkade v. Howard [S. D.] 99 N. W. 91.

80. Kinkade v. Howard [S. D.] 99 N. W. 91.

81. Kosmerl v. Mueller [Minn.] 97 N. W. 660.

82, 83. Oliver v. Oregon Sugar Co. [Or.] 76 P. 1086.

84. Womack v. Gross, 135 N. C. 378, 47 S. E. 464.

85. Louisville & C. Packet Co. v. Bottorff, 25 Ky. L. R. 1324, 77 S. W. 920.

86. Except by agreement, a deposition taken by the defendant in a suit brought by one creditor to set aside a fraudulent conveyance cannot be used by the defendant in another suit brought by another creditor to impeach the same conveyance. Miller v. Gillispie, 54 W. Va. 450, 46 S. E. 451. Prior to his death, decedent sued defendant for personal injuries caused by its negligence; after his death, his children filed an amended petition, claiming damages for his death, and for his injuries in the event that they did not produce his death. Held, deposition of decedent taken while the action was pending in his name was admissible on the trial of the action by his children. St. Louis Southwestern R. Co. v. Hengst [Tex. Civ. App.] 81 S. W. 832. Different parties. In re Edgerly's Estate [Minn.] 99 N. W. 896. A deposition taken in a chancery suit cannot be used after the deponent's death, in an action at law concerning the same transaction, the issues, however, being dissimilar. Reed v. Gold [Va.] 45 S. E. 868; Central Bank of Kansas City v. Thayer [Mo.] 82 S. W. 142.

NOTE. Use of deposition in another trial: A deposition taken in another and different cause is not competent evidence against one not a party to the suit in which it was taken to prove any fact, except it may be proper for the purpose of showing notice of the pendency of the proceeding in which it was used. Cookson v. Richardson, 69 Ill. 137.—From note to Fearn v. West Jersey Ferry Co. [Pa.] 13 L. R. A. 366.

87. Where deponent would have been a competent witness for plaintiff, his deposition taken by defendant may be read by plaintiff at the trial. St. Barnard Coal Co. v. Southard, 25 Ky. L. R. 638, 76 S. W. 167. When interrogatories are crossed, either party may use the deposition on the trial and the party taking the same cannot object to the answers to the questions though detrimental to his interest. First Nat. Bank v. Edwards [Tex. Civ. App.] 81 S. W. 541. Where the deposition was regularly taken and an answer to an interrogatory was responsive, there being nothing to show that the interrogatories were not crossed or that the deposition was not in such form that defendants had not the right to introduce the questions and answers in evidence, held defendants could introduce the answer

petent evidence.[88] A party by offering a deposition taken by his adversary adopts it as his own, and will not be allowed to deny its competency or legality, or to impeach the veracity of the witness.[89] A deponent being called by the opposite party to give affirmative testimony differing from that given in the deposition, he thereby becomes his witness, at least to the extent of the testimony given,[90] thus allowing the party procuring the deposition to impeach the testimony thus given.[91] Permitting the reading of a deposition after the deponent has testified on the trial lies in the discretion of the trial court,[92] and a ruling thereon will afford no ground for reversal unless it is made to appear that such discretion was abused to appellant's injury.[93] Such deposition may be read in evidence to sustain the deponent, an attempt having been made by the opposite party to impeach him.[94]

The deposition of one in court ready and willing to testify will be excluded,[95] except, in some states, in the case of an adverse party.[96] It appearing from the deposition of a witness that he is a nonresident of the county, it is unnecessary for the party offering the deposition in evidence to first prove that the witness is not present in the court room or in the county.[97]

Depositions taken under interrogatories are admissible against all parties notified to cross the interrogatories, though the cause is not at issue.[98] Federal statutes do not authorize the use of depositions of witnesses taken before trial in the Federal court, except on the showing of the circumstances prescribed by U. S. Rev. St. §§ 863, 866.[99] In a suit by a trustee in bankruptcy to set aside a transfer made by the bankrupt, it is error to admit in evidence as part of a deposition of the bankrupt a copy of testimony given by him before the referee, though he admits the same to be true and adopts it as part of his deposition.[1] A deposition cannot be introduced in a case in which it is not filed, no notice having been given the opposite party that it was expected to introduce it.[2] An answer to an interrogatory in a witness's deposition, containing pertinent and imper-

to such interrogatory as evidence in their favor. Everett v. Kemp [Tex. Civ. App.] 80 S. W. 534. In a suit against a surviving executor for an accounting, the executrix of a deceased executor being made a party on petition of the surviving one, depositions taken in the case before she became a party were properly used thereafter. Owens v. Owens' Estate [Miss.] 37 So. 149. See 1 Curr. L. 922, n. 7.

NOTE. Exceptions: In the class of cases in which these exceptions occur, the witness whose deposition is sought to be read is incompetent to testify in behalf of the party against whom he is called, but is made so by the party entitled to use him, first taking his deposition; or where the testimony is incompetent as against the adverse party, but made competent by the party offering it. See Sullivan v. Norris, 71 Ky. (8 Bush) 521.—From St. Barnard Coal Co. v. Southard, 25 Ky. L. R. 638, 76 S. W. 167.

88. First Nat. Bank v. Edwards [Tex. Civ. App.] 81 S. W. 541.

89. Von Tobel v. Stetson & Post Mill Co., 32 Wash. 683, 73 P. 788.

90. Hord v. Gulf, etc., R. Co. [Tex. Civ. App.] 76 S. W. 227.

91. Notary taking deposition allowed to testify as to correctness of same and answers given, such testimony also being admissible in order to show prior contradictory statements. Hord v. Gulf, etc., R. Co. [Tex. Civ. App.] 76 S. W. 227.

92, 93, 94. Wilson v. Wilson [Tex. Civ. App.] 79 S. W. 839.

95. Handy & Co. v. Smith [Conn.] 58 A. 694. The deposition of an employe of a corporation is not admissible in an action against such corporation, where the deponents are present at trial subject to be called and examined as witnesses. Also construing Rev. St. 1898, § 4096, as amended by Laws 1901, p. 328, c. 244, allowing such a deposition. Hughes v. Chicago, etc., R. Co. [Wis.] 99 N. W. 897. But see 1 Curr. L. 922, n. 16.

96. Code Civ. Proc. § 882. In a suit to foreclose a mortgage a defendant who had guaranteed the note in purported payment of which the mortgage was transferred to plaintiff is an adverse party as to her co-defendants. Hetzel v. Easterly, 96 App. Div. 517, 89 N. Y. S. 154.

97. Chicago, etc., R. Co. v. Krayenbuhl [Neb.] 98 N. W. 44. See 1 Curr. L. 922, n. 15.

98. Union Iron & Foundry Co. v. Sonnefield [La.] 37 So. 20.

99. Zych v. American Car & Foundry Co., 127 F. 723.

1. Bonnie & Co. v. Perry's Trustee, 25 Ky. L. R. 1560, 78 S. W. 208.

2. Central Bank of Kansas City v. Thayer [Mo.] 82 S. W. 142.

tinent matter, the court may exclude such part of the answer as is impertinent and admit the balance.[3] A deposition is not conclusive against the party taking it, even as to statements against his interest.[4] Depositions taken and read in inferior courts are generally admitted on appeal where the case is tried de novo.[5]

Generally, a deposition can only be used in criminal cases where the witness cannot with due diligence be found in the state, the question as to whether he can be so found being one of fact for the court.[6]

The sustaining of an objection to an answer to an interrogatory,[7] or the improper reception in evidence of a deposition, is not prejudicial, the deponent being called to the stand and testifying to the same facts.[8]

DESCENT AND DISTRIBUTION.

§ 1. Law Governing Descent (1081).
§ 2. Persons Entitled to Share or Inherit (1082). Proof of Heirship or Kinship (1084).
§ 3. Inheritable and Distributable Property (1085).
§ 4. Course of Descent and Distribution (1089).
§ 5. Quantity of Estate or Share Acquired (1091).
§ 6. Husband or Wife as Heir (1091). Widow's Quarantine (1093).

§ 1. *Law governing descent.*[9]—In some states, the term "succession" is used to denote the coming in of another to take the property of one who dies without disposing of it by will.[10] The right is wholly governed by statute.[11] The purpose of statutes of descent and distribution is to provide for the transmission of title at death in case of intestacy, and to regulate the division of estates among heirs.[12] One cannot change the distribution of his estate under the statute without a will.[13] An inheritance tax law is not a law of descent which is changeable only by general enactment.[14] The law in force at the time of intestate's death controls.[15]

The distribution of personalty is governed by the law of decedent's domicile, and of realty by the law of its situs.[16] Where the law of descent of a foreign nation is not pleaded, it will be presumed to be the same as that of the forum in which the trial is had.[17]

3. Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co. [Tex. Civ. App.] 77 S. W. 961.

4. Does not estop him to deny the truth of such statements. Von Tobel v. Stetson & Post Mill Co., 32 Wash. 683, 73 P. 788.

5. In re Arrowsmith's Estate, 206 Ill. 352, 69 N. E. 77.

6. Facts as to search made considered and held sufficient to allow the use of such deposition, also the allowance of subpoenas issued and returned unserved, as evidence on this point held correct [Pen. Code, § 686, subd. 3]. People v. Lewandowski [Cal.] 77 P. 467.

7. Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co. [Tex. Civ. App.] 77 S. W. 961.

8. Hetzel v. Easterly, 96 App. Div. 517, 89 N. Y. S. 154.

9. See 1 Curr. L. 922.

10. Cal. Code Civ. Proc. § 1383. In re Miner's Estate, 143 Cal. 194, 76 P. 968.

11. Stewart v. Skolfield [Me.] 58 A. 56. Right to take by descent arises solely by operation of law. Waldermeyer v. Loebig [Mo.] 81 S. W. 904.

12. Not primarily a homestead or exemption law and cannot restrict constitutional provisions in regard thereto. Cross v. Benson [Kan.] 75 P. 558.

13. By agreement with father, whereby latter is to distribute it. Rohn v. Rohn, 204 Ill. 184, 68 N. E. 369.

14. In re Magnes' Estate [Colo.] 77 P. 853.

15. Spurlock v. Burnett [Mo.] 81 S. W. 1221. Rights vested under laws of Cherokee Nation (Comp. Laws 1892, § 518, p. 267), not affected by repeal of such laws by the Curtis bill (Act June 28, 1898, c. 517, 30 Stat. 495). Nivens v. Nivens [Ind. T.] 76 S. W. 114. An alien's right to take real estate by descent is governed by the statutes in force at the time of the death of the owner thereof through whom he claims title. Stewart v. Russell, 91 App. Div. 310, 86 N. Y. S. 625. The New Jersey statute to prevent lapses (Act March 29, 1887, P. L. 63) does not operate in favor of a devisee's children, where he died before the act took effect. Reichle v. Steitz, 64 N. J. Eq. 789, 56 A. 741.

16. Distribution of property in New York, owned by resident of Switzerland is governed by law of latter country, subject to payment of debts and expenses of administration [N. Y. Code Civ. Proc. § 2694]. In re Barandon's Estate, 84 N. Y. S. 937.

17. Complaint showed that parties were

§ 2. *Persons entitled to share or inherit.*[18]—An heir is one upon whom the law casts an estate of inheritance immediately upon the death of the owner,[19] and the mere fact that he has been long unheard from cannot of itself divest such right.[20] One becomes an heir only on the death of the ancestor,[21] and his capacity to take by descent must exist at the time such descent occurs.[22]

The word "descendant" means one who proceeds from the body of another, however remotely, and is co-extensive with "issue."[23]

A contingent remainder descends to the heirs of the remainderman as they exist at the time of his death.[24] But if the contingency be as to the person to take, and that person is not in esse at the time when the contingency happens, his heirs do not take.[25] Executory devises and possibilities of reverter descend to those answering the description of heirs at the time of the death of the life tenant.[26] The right of next of kin is derived from the decedent at time of his death, though possession and exclusive ownership await distribution.[27]

There is a division of opinion on the right of a murderer to inherit from his victim.[28]

Heirship by adoption is unknown to the common law,[29] but by statute, in many states, a legally adopted child becomes the heir at law of the adopters.[30]

Quapaw Indians and answer failed to allege that they were sovereign nation with different laws. Ricknor v. Clabber [Ind. T.] 76 S. W. 271.

18. See 1 Curr. L. 923.

19. In re Milliken's Estate, 206 Pa. 149, 55 A. 853.

20. The rights of an heir cannot be disregarded in the distribution of an estate, though he has been unheard of for 29 years. In re Sherwood's Estate, 206 Pa. 466, 56 A. 20. Under the California code, there is no limit as to the time within which a citizen of the United States may claim property to which he has succeeded, so long as no judgment or decree in proceedings to escheat has been entered. In re Miner's Estate, 143 Cal. 194, 76 P. 968.

21. A guardian who is induced to exchange lands of her ward for a mortgage by false representations cannot maintain an action for the deceit in her own name, though the ward dies after such suit is commenced, and she is his sole heir at law. Brock v. Rogers, 184 Mass. 545, 69 N. E. 334. No one is the heir of a living person. Rice v. Bamberg [S. C.] 46 S. E. 1009.

22. Stewart v. Russell, 91 App. Div. 310, 86 N. Y. S. 625. Heirship established by circumstances existing at intestate's death. Grantham v. Statham [Miss.] 35 So. 423. One born after the death of the remainderman and before that of the life tenant does not inherit from the former. Kesterson v. Bailey [Tex. Civ. App.] 80 S. W. 97.

23. As used in W. Va. Code 1899, c. 78, § 13, relating to advancements. Waldron v. Taylor [W. Va.] 45 S. E. 336.

24. Ga. Civ. Code 1895, § 3101. Jossey v. Brown, 119 Ga. 758, 47 S. E. 350.

25. Where gift is to an unmarried woman for life with remainder to her husband in case she marries, there is no such uncertainty as to the person who is to take as husband as will prevent his interest from being descendible or devisable [Ga. Civ. Code 1895, § 3101]. Jossey v. Brown, 119 Ga. 758, 47 S. E. 350.

26. Jossey v. Brown, 119 Ga. 758, 47 S. E. 350.

27. Inheritance tax attaches. In re Millkin's Estate, 206 Pa. 149, 55 A. 853.

28. NOTE. Devolution of property through crime: A husband took out an insurance policy, providing that the proceeds should be payable to his wife in case she survived him, and if not, to his administrators. He assigned the policy to his wife and afterwards he murdered her before killing himself. Both the administrators of the husband and those of the wife claimed the insurance money. Held, that as the husband's estate could not be allowed to benefit by his crime, the wife's administrator was entitled to the insurance. Box v. Lanier [Tenn.] 79 S. W. 1042.

On the theory that to deprive one of property obtained indirectly through crime would be to enforce other punishment than prescribed by law, recovery has been allowed in such cases. Owens v. Owens, 100 N. C. 240; Shellenberger v. Ransom, 41 Neb. 631; James Carpenter's Estate, 170 Pa. 203. As against this theory is Riggs v. Palmer, 115 N. Y. 506, and a dictum in Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591. The Riggs case, however, seemed to turn on an implied condition read into the statute of descent. When the constitutional provision providing against forfeitures is considered, the former doctrine seems the sounder. Cooley's Const. Lim. (7th Ed.) p. 368.—IV. Columbia Law Rev. 513.

29. Albring v. Ward [Mich.] 100 N. W. 609. Heirship, except that based upon consanguinity, can be created only by a constitutional law, by which relations of paternity and affiliation are recognized as legally existing between persons not so related by nature. Id.

30. Jossey v. Brown, 119 Ga. 758, 47 S. E. 350. If the statute is void or is not complied with, the adoption fails and the adopted person obtains no interest in the estate of the adopting person. Evidence insufficient to show contract for heirship. Albring v. Ward [Mich.] 100 N. W. 609. Mich. Comp. Laws 1897, § 8780, subsec. 5. Van Derlyn v. Mack [Mich.] 100 N. W. 278. Adoption fixes a status and establishes the

He does not, however, thereby become the heir of the kindred of the person adopting him, so as to enable him to inherit from them by right of representation.[31] The adoption of a child in one state, according to the laws thereof, entitles him to inherit property left by the adopter in another state.[32]

By statute in many states, nonresident aliens are entitled to inherit land in the same manner as if they were residents of the United States.[33]

Bastards ordinarily inherit from the mother only,[34] but neither a bastard nor his issue can inherit from his mother's collateral kindred.[35] The mother inherits the property of an illegitimate child dying intestate and without children, or husband or wife.[36] Illegitimate children, legitimized as provided by statute, are capable of inheriting realty as heirs, and of receiving personalty as next of kin, both lineally and collaterally, in the same manner as if born in lawful wedlock.[37]

The children of Indians, married in accordance with the custom of their tribe, inherit land allotted in severalty to their parents.[38]

At common law and by statute, express words are necessary to disinherit an heir,[39] and in some states, children are entitled absolutely to a certain share in their parents' estate.[40]

fact that the person adopted is in law, as to the subject of inheritance, a child of the adopter. McColpin v. McColpin's Estate [Tex. Civ. App.] 77 S. W. 238. In Louisiana, an adopted child inherits in preference to all others save forced heirs. Civ. Code, art. 214. Act 1862 (Act No. 66, p. 43) gives him preference to collateral heirs. Cunningham v. Lawson [La.] 36 So. 107.

31. Van Derlyn v. Mack [Mich.] 100 N. W. 278.

Note: Whether or not the adopted child becomes legal inheritor by representation from kindred of the adopter depends on statute. Some statutes expressly exclude such a consequence. The others generally are so interpreted as to reach a like result unless a legislative intent to attach such a consequence is clear. See Van Derlyn v. Msck [Mich.] 100 N. W. 278.

32. McColpin v. McColpin's Estate [Tex. Civ. App.] 77 S. W. 238. See title Adoption of Children, § 2, 3 Curr. L. 46.

33. Under N. Y. Laws 1874, p. 317, c. 261, and Laws 1875, p. 32, c. 38, these statutes held to include heirs of those who died before as well as after their enactment. Kelly v. Pratt, 41 Misc. 31, 83 N. Y. S. 636. Including nonresident heirs of deceased resident aliens [Laws 1845, c. 115, § 4, p. 95, as amended by Laws 1874, p. 317, c. 261, and Laws 1875, p. 32, c. 38]. Richardson v. Amsdon, 85 N. Y. S. 342. The burden is on one claiming as heir of a deceased resident alien to show that deceased was such resident alien. Evidence insufficient to do so. Id. N. Y. Laws 1845, p. 95, c. 115, § 4, as amended by Laws 1875, p. 32, c. 38, providing that on the death of any citizen who has purchased and taken a conveyance of land, persons who would be his heirs under the laws of that state, whether citizens or aliens, take it by descent, has no application to lands acquired by descent. Stewart v. Russell, 91 App. Div. 310, 86 N. Y. S. 625. See title Aliens, § 2, 1 Curr. L. 68; 3 Curr. L. 133.

34. See title Bastards, 1 Curr. L. 339. An illegitimate sister of the full blood takes, in the right of her mother, the whole estate of her illegitimate brother dying without other heirs, to the exclusion of the father's next of kin, though the father legally adopted such son in a foreign country. Under N. Y. Code Civ. Proc. § 2732, subd. 9, providing that the relatives of the deceased on the part of the mother shall take in the same manner as if he had been legitimate, if his mother be dead. In re Lutz's Estate, 43 Misc. 230, 88 N. Y. S. 556. In South Carolina, bastards do not take by inheritance a fund recovered under the act of congress relating to the French spoliation claims, but it goes to the statutory next of kin of the injured party. Rutledge v. Tunno [S. C.] 48 S. E. 297.

35. At common law or under N. H. Pub. St. 1901, c. 196, §§ 4, 5. Reynolds v. Hitchcock [N. H.] 56 A. 745.

36. Shannon's Code Tenn. § 4166. Scott v. Wilson, 110 Tenn. 175, 75 S. W. 1091. In Tennessee, this rule is not changed by the fact that such child has been legitimized in the manner provided by statute. Id.

37. Shannon's Code Tenn. § 5408. Scott v. Wilson, 110 Tenn. 175, 75 S. W. 1091.

38. Under U. S. Statutes (23 Stat. 340, c. 319, 24 Stat. 390, c. 119, 26 Stat. 794, c. 383). Kalyton v. Kalyton [Or.] 74 P. 491. See title Indians, § 4, 2 Curr. L. 305.

39. See Wills, § 1, 2 Curr. L. 2077. In Louisiana, testator must express in his will the reasons why he disinherits his forced heir. La. Civ. Code, art. 1624. Statement that heir is disinherited because she married without testator's consent sufficient without stating that she was a minor. The latter fact will be presumed until the contrary is shown, since such cause of disinherison is applicable only to minors under Civ. Code art. 1621, par. 10. Stephens v. Duckett [La.] 36 So. 89.

40. In Louisiana, it is held that the children have a right to complain if their father disposes of his property to the prejudice of their legal rights by gratuitous dispositions in favor of persons having less claims upon him than they have, and, if he does so, may,

In some states, children born after the making of the will, and whose parents die without making any provision for them,[41] and pretermitted children, are given the same share in the estate that they would have been entitled to had deceased died intestate.[42] Such share is also subject to the same burdens that it would have been in case of intestacy.[43] The burden of proof is on a pretermitted child or grandchild to show that the omission was unintentional.[44]

The state does not take the property of one dying without heirs by way of succession, but by escheat.[45]

The descent of partnership property is treated elsewhere.[46]

Proof of heirship or kinship.—Heirship need not necessarily be proved by a finding of a judgment of the probate court to that effect, but may be established by any competent evidence.[47] In proceedings to determine heirship, every party

after his death, assert their claims against the donee. Griffith v. Alcocke [La.] 37 So. 47.

But this right is subordinate to the rights of the father's creditors. Cannot claim legitime in property donated to father's mother and by her mortgaged to secure payment of his debts, where it has been sold under decree of foreclosure. Griffith v. Alcocke [La.] 37 So. 47.

Forced heirs are entitled to enforce their legitime against property donated by their parents by act inter vivos to one not an heir and by him conveyed to a third person. Third person owes fruits or rents only from judicial demand. Stockwell v. Perrin, 112 La. 643, 36 So. 635. Such third person may retain the property by paying to the heirs the amount of their legitime. Id.

The children of an intestate by his first marriage are entitled to their legitime. Westmore v. Harz [La.] 35 So. 578.

41. Will expressly excluding after-born children makes provision for them within meaning of Ga. Code, § 2145. Thomason v. Julian, 133 N. C. 309, 45 S. E. 636. The words "testator" and "father" as used in such statutes will be held to include "testatrix" and "mother" so as to entitle such child to the same portion of his mother's estate as he would have been entitled to had she died intestate. 3 Gen. St. N. J. p. 3760, § 19, so construed under Act relative to statutes [Rev. St. 1874, p. 833]. Walker v. Hyland [N. J. Law] 56 A. 268. Where property was to be held in trust for certain length of time for widow and children and then divided between them, the widow's share to be in lieu of dower, held that the allowance for the value of the widow's dower deducted from the share of an after-born child should be held by the executors for the benefit of all the devisees, in the same proportion as they were entitled to the balance of the estate. In re Miner [N. J. Eq.] 55 A. 1102.

42. See Wills, § 1, 2 Curr. L. 2077. The statutes of Rhode Island giving to omitted children such share unless it appear that such omission was intentional (Gen. Laws 1896, c. 203, § 22) does not apply to wills made prior to Feb. 1, 1896. Roach v. Roach [R. I.] 56 A. 684.

Under the California statute, giving to pretermitted children and grandchildren the share they would have been entitled to had deceased died intestate (Civ. Code, § 1307), a child of testator's son is entitled to such share, though such son, who was dead when the will was made, was given a legacy therein under the mistaken belief of testator that he was still living. In re Ross' Estate, 140 Cal. 282, 73 P. 976. All devises and legacies must contribute to make up the share of a pretermitted child in proportion to their value, unless the obvious intention of the testator in relation to a specific devise or bequest would thereby be defeated [Civ. Code, § 1308]. Devise held not exempt from contribution. Id.

43. Subject to widow's right of dower in realty and her share as distributee of personalty under statutes of New Jersey (3 Gen. St. p. 3760, § 19), giving child same portion he would have been entitled to if his father had died testate, toward raising which each devisee and legatee shall contribute his proportional share. In re Miner [N. J. Eq.] 55 A. 1102.

44. Brown v. Brown [Neb.] 98 N. W. 718.

45. Action of escheat necessary under Cal. Code. In re Miner's Estate, 143 Cal. 194, 76 P. 968. See title Escheat, 1 Curr. L. 1089.

46. See Partnership, § 7 et seq., 2 Curr. L. 1122.

47. By testimony of parties in action of ejectment. Jetter v. Lyon [Neb.] 97 N. W. 596. A declaration or statement contained in an instrument executed by one since deceased is admissible on the subject of his pedigree. Where the issue was whether plaintiff's remote grantor was a son of the original patentee, a deed wherein such remote grantee stated that he was a son of the patentee was admissible. Wren v. Howland [Tex. Civ. App.] 75 S. W. 894. Evidence that the wife of the original patentee went to the grave of the remote grantor and said it was the grave of her son was admissible. Id. Pleadings in suit for divorce by wife of original patentee, in which she prayed for custody of a minor child, who was afterwards plaintiff's remote grantor, also admissible. Id. Also family bible of plaintiff's remote grantor identified by his son, for purpose of showing that such grantor was the son of the original patentee. Id. Also declarations of the mother of the grantor as to his pedigree and her relationship with the patentee, made long prior to the controversy. Id. In action to recover land, held no evidence to show that the one under whom plaintiffs claimed died intestate, without issue, or that plaintiffs, who were children of his sister, are his heirs at law, or have any interest in his land, mere proof that he has been absent from the state long enough to raise a presumption of his death being in-

is an independent actor, and a plaintiff as against all others whose claims are adverse.[48] In some states, the court is given discretion to apportion between the parties the costs of statutory proceedings to determine the rights of persons claiming as distributees of the estate of a decedent.[49] The question of heirship often arises in partition suits[50] or other actions for trial of title,[51] wherein title must be proven, and depends on legitimacy of birth,[52] which questions are appropriately treated in other titles.

§ 3. *Inheritable and distributable property.*[53]—The property, both real and personal, of one who dies without disposing of it by will, passes to his heirs, subject to the control of the courts, and to the possession of any administrator appointed by it, for purposes of administration.[54] The descent is cast by operation of law upon the heirs, and the personalty passes in accordance with the statute of distribution.[55] The heir takes whatever is undisposed of by will by rule of law,[56] including lapsed legacies,[57] and any interest which is devised or conveyed for purposes which the law will not permit to take effect, and whether the ancestor so intended or not.[58] The right to disaffirm an executed gift for undue influence is not property belonging to decedent's estate at the time of his death.[59] Money paid to the administrator of a decedent's estate, in pursuance of an appropriation of congress, on a claim of decedent against the United States, becomes part of the assets of the estate, and the representatives of deceased heirs should share with living heirs in its distribution.[60]

Land, with the right to possession, and its rents and profits, belongs to the heir or devisee,[61] and the title thereto vests in the heir immediately upon the

sufficient. Ironton Fire Brick Co. v. Tucker [Ky.] 82 S. W. 241.

48. In re Kasson's Estate, 141 Cal. 33, 74 P. 436. Under the laws of California (Civ. Code, § 1664), in proceedings to determine heirship, when the pleadings of all the parties are in, subsequent proceedings are the same as in ordinary civil actions. Hence it is proper to enter a nonsuit as to one claiming to be an heir, who fails to appear and introduce proof in support of such claim. Id.

49. Proper to tax unsuccessful petitioner claiming entire estate with all costs [Cal. Code Civ. Proc. § 1664]. Lindy v. McChesney, 141 Cal. 351, 74 P. 1034. Including expenses of taking depositions not used. Id.

50. See Partition, 2 Curr. L. 1097.

51. See Ejectment, 1 Curr. L. 972; Quieting Title, 2 Curr. L. 1366; Trespass (to try title), 2 Curr. L. 1905.

52. See Bastards, 3 Curr. L. 496; Marriage, 2 Curr. L. 795.

53. See 1 Curr. L. 923.

54. Cal. Civ. Code, § 1384. In re Miner's Estate, 143 Cal. 194, 76 P. 968.

55. Course of descent cannot be altered by words excluding particular heir or by any agreement of parties. Thus, where advancements of equal value are made to three children, and two of them execute releases relinquishing all claims to any share in the estate, but the third does not, and the parent dies intestate, all share equally in his estate. Headrick v. McDowell [Va.] 46 S. E. 804.

56. Casgrain v. Hammond [Mich.] 96 N. W. 510.

57. See Wills, §§ 5D 13, 5D 14, 2 Curr. L. 2162, 2154. Lapsed legacies descend as intestate property [2 Starr & C. Ann. St. 1896, p. 1433]. Lash v. Lash, 209 Ill. 595, 70 N. E. 1049. A statute for the prevention of lapses, providing that whenever a devisee or legatee, who is a child or grandchild of the testator, shall predecease him, the issue of such child shall take his share, applies to devises to a class. Devise to "my beloved children" [2 Starr & C. Ann. St. 1896 (2d Ed.) p. 1433, par. 11]. Rudolph v. Rudolph, 207 Ill. 266, 69 N. E. 834.

58. Casgrain v. Hammond [Mich.] 96 N. W. 510. Property conveyed to a trustee under a trust which is void as a perpetuity. Heir can maintain action to invalidate trust as cloud on his title, where invalidity can be shown only by evidence dehors the record, though he is not in actual possession. Id. Property devised under invalid trust vests in heirs at law at testator's death and cannot be divested by a subsequent statute making such trusts valid. Murray v. Miller, 85 App. Div. 414, 83 N. Y. S. 591. Where a will directs property to be sold and the proceeds to be invested for the benefit of the wife during her life, with a void devise over, the legal title to the estate vests in testator's heirs at his death. Could maintain ejectment and running of limitations not tolled by reason of widow being alive. Baumeister v. Silver [Md.] 66 A. 825.

59. Bishop v. Leonard, 123 F. 981.

60. Claim for property taken by troops in Civil War. Nutt v. Forsythe [Miss.] 36 So. 247. See, also, Rutledge v. Tunno [S. C.] 48 S. E. 297 (claim under French spoliation award).

61. He may rent or lease it. Brent v. Chipley [Mo. App.] 78 S. W. 270. See Estates of Decedents, § 6A, 3 Curr. L. ——. Griffith v. Rudisill [Ala.] 37 So. 83. Realty descends to the heirs incumbered only with such debts as were charged upon it by the

death of the ancestor.[62] He may enter upon and occupy the premises, subject to the widow's right to have dower assigned.[63] He takes only such title as the ancestor had at the time of his death,[64] and subject to all the conditions and burdens under which his ancestor held.[65] His interest is also subject to the power of the proper court to decree a sale for the purpose of paying the debts of the deceased and the expenses of administration, where there is not sufficient personalty for that purpose.[66] Statutes in some states authorize the executor or

ancestor during his lifetime. Waldermeyer v. Loebig [Mo.] 81 S. W. 904. Rents accruing under lease made by administrator by order of court held not assets of the estate, but to belong to the heirs. Vance v. Vance's Adm'r, 25 Ky. L. R. 741, 76 S. W. 370. Children cannot be divested of their share of their father's succession by a sale of property belonging thereto to pay the debts of his deceased wife. Sale a nullity and purchaser takes with notice, tender of purchase money not necessary prerequisite to suit to recover land. Sicard v. Schwab, 112 La. 475, 36 So. 500. The right to possession is in the heir or devisee until the administrator asserts his right under the statute. Kern v. Cooper [Minn.] 97 N. W. 648. A decree of distribution of an estate in the probate court is not essential to confer jurisdiction on the district court to entertain a suit in ejectment brought by the heir to recover possession of property belonging to the ancestor. Jenkins v. Jenkins [Minn.] 100 N. W. 7. Executors should be charged with the value of timber cut from land, where the will gives them no power to cut it. Finley's Ex'rs v. Pearson [Ky.] 76 S. W. 374. The administrator cannot, by any act of his, prejudice the rights of the heirs in the realty. Action by administratrix against person in whose name property stood, alleging fraud on the ground that he was in fact trustee for decedent and praying that, if he failed to convey to the heirs, she be adjudged a lien on the land for the purchase money, held not a bar to an action by the heirs in which they alleged the same facts and prayed that they be adjudged the owners of the land. Row v. Johnston, 25 Ky. L. R. 1799, 78 S. W. 906. Rents and profits accruing after the death of the intestate belong to the heirs. Clark v. Seagraves [Mass.] 71 N. E. 813.

62. Kern v. Cooper [Minn.] 97 N. W. 648; Demaris v. Parker, 33 Wash. 200, 74 P. 362. Rule applies to right to possession of personalty where a resident of Pennsylvania dies entitled to, but before she has received, a share of the personal estate of her brother, who died in another state; such share was in her constructive possession and was subject to the collateral inheritance tax [Act May 6, 1887; P. L. p. 79]. In re Milliken's Estate, 206 Pa. 149, 55 A. 853.

63. When dower has not been assigned and widow is not in possession, the heir may bring ejectment. Ricknor v. Clabber [Ind. T.] 76 S. W. 271. General denial held not to constitute denial of allegation in complaint in action by heir to recover possession of land owned by his ancestor, as to the death of the person under whom plaintiff claimed [Mansf. Dig. § 5032; Ind. T. Ann. St. 1899, § 3238]. Id. Complaint in action of ejectment, alleging that plaintiff's son acquired the land by patent, that he died after the death of his wife, leaving one child who was his only heir, and who died in infancy, unmarried and without issue, leaving plaintiff, his paternal grandmother, his only heir at law, held to sufficiently state facts showing that she was such heir. Id.

64. Can avoid deed made by ancestor only when he could have done so. Coulson v. Coulson [Mo.] 79 S. W. 473. If ancestor loses title to land by his own acts, his heirs can derive none by inheritance from him. Field's Heirs v. Napier [Ky.] 80 S. W. 1110. Cannot maintain an action to set aside a fraudulent conveyance made by his ancestor or testator. Davidson v. Dockery [Mo.] 78 S. W. 624. Subject to debts charged upon it by ancestor during his lifetime. Waldermeyer v. Loebig [Mo.] 81 S. W. 904. The heirs at law of the donor of an executed gift have no standing to maintain a suit in equity to recover the property on the ground that such gift was procured by fraud or undue influence. Cannot be vested by executor with right of disaffirmance nor does compromise agreement between them and executor and beneficiaries, whereby they were given half the property belonging to the estate, vest them with the right to maintain such suit. Bishop v. Leonard, 123 F. 981. In Louisiana, it is held that forced heirs have the right to have simulated contracts decreed void, and in its exercise are not restricted to their legitime [La. Civ. Code, § 2239]. Westmore v. Harz [La.] 35 So. 578.

65. In re Waldron [R. I.] 58 A. 453. Subject to all existing equities in favor of the estate and against heirs personally or against any of those through whom they inherit. Grandnephew's share liable for debt owed by their grandfather to deceased. Head v. Spier, 66 Kan. 386, 71 P. 833. One to whom mortgaged land descends takes subject to the lien of the mortgage and will be held to have knowledge of its terms and conditions. Fleming v. Hager, 121 Iowa, 205, 96 N. W. 752.

66. See Estates of Decedents, §§ 7, 8, 3 Curr. L. ——, for full discussion of right to subject realty to payment of debts [Wash. Laws 1895, p. 197, c. 105]. Demaris v. Parker, 33 Wash. 200, 74 P. 362; Waldermeyer v. Loebig [Mo.] 81 S. W. 904. To pay debts or make division. Griffith v. Rudisill [Ala.] 37 So. 83. Subject only to such powers to order a sale in course of administration as were then vested in the court. Rights could not be impaired or affected by subsequent legislation authorizing sale for new purposes. In re Newlove's Estate [Cal.] 75 P. 1083. Subject only to the right of possession by the administrator for the purposes of administration. Proof that plaintiff is the surviving wife of the owner of premises makes out a prima facie case entitling her to possession in an action in ejectment, de-

administrator to take possession of such lands under order of court, and to rent them for the purpose of paying the debts of the deceased[67] or to recover them from the heir for purposes of administration.[68]

Vested remainders, though the land never comes into the remainderman's possession,[69] the interest of a beneficiary in a resulting trust in lands,[70] the right to use water flowing in an irrigation ditch for purposes of irrigation,[71] and ground rents, all descend to the heirs.[72] An equitable interest in realty descends in the same manner as a legal one.[73] The interest of a vendee in possession of realty under a contract of sale, part of the purchase price of the estate having been paid, descends to his heirs at his death,[74] but an option given to decedent to purchase realty is revoked by his death.[75] Compensation for land held by intestate under a bond for a deed, which was taken for a railroad right of way, may be recovered by the heirs when the damages accrued before the vendor conveyed.[76] The inchoate rights of a deceased homestead claimant, who dies before the issuance of, or before he has acquired a right to demand, a patent, vest in his heirs or devisees, and cannot be sold for the payment of his debts.[77] Unpatented mining claims pass, on the death of the locator, to his administrator as part of his estate, and not to his heirs as grantees of the government.[78] A burial lot

fendant not claiming to be in possession as administrator. Jenkins v. Jenkins [Minn.] 100 N. W. 7. Where divorced wife died leaving one child, her realty descended to it, and on its death, to its father. One to whom he assigned it had a right to appeal from an order allowing a claim against the wife's estate, since he took subject to her debts, there not being sufficient personalty to pay them. Hammers v. Sanders [Mo. App.] 80 S. W. 16. A court of equity may, after the estate of a surety on an administrator's bond is finally closed, subject his land in the hands of his heirs to the payment of debts for which he was adjudged liable. Hall v. Cole, 71 Ark. 601, 76 S. W. 1076.

67. Executor who has not done so cannot collect rents which tenant had agreed to pay devisees, without their consent [Mo. Rev. St. 1899, § 130]. Brent v. Chipley [Mo. App.] 78 S. W. 270.

68. See Estates of Decedents, § 8, 3 Curr. L. ——. In Alabama, lands are made assets of the estate and representative's right to their possession is superior to that of the heir [Code 1896, §§ 66, 155-158]. Has absolute right to possession within one year after estate committed to administration and prima facie right thereafter. May redeem from mortgage foreclosure sale. Griffith v. Rudisill [Ala.] 37 So. 83. Under the laws of Minnesota (Gen. St. 1894, § 4496), the executor or administrator is, pending the settlement of the estate in the probate court, entitled to recover real estate in the possession of the heir or devisee. Until he does so, the right to possession is in the heir. Kern v. Cooper [Minn.] 97 N. W. 648. The administrator need not show that such recovery is necessary for the purpose of administration, but the burden is on the heir or devisee to show the contrary. Id.

69. Land devised in remainder to unborn child. Title vests when child is born alive and on its death descends to its heirs. Kesterson v. Balley [Tex. Civ. App.] 80 S. W. 97. Ga. Civ. Code 1895, § 3101. Fields v. Lewis, 118 Ga. 573, 45 S. E. 437. Under a conveyance to a grantee for life, with remainder to his heirs, where one of the heirs died leaving a child who also died prior to the grantee's death, held that such heir took a vested interest (Mich. Comp. Laws 1897, § 3795), which passed to the child and on its death to the father (§ 9064). Porter v. Osmun [Mich.] 98 N. W. 859.

70. Land purchased by husband with money furnished by wife. Shackleford v. Elliott, 209 Ill. 333, 70 N. E. 745.

71. Incorporeal hereditament. Gutheil Park Inv. Co. v. Montclair [Colo.] 76 P. 1050.

72. It descends under Rev. St. Ohio 1892, §§ 4158, 4159, and not under § 4163, relating to personalty. McCammon v. Cooper, 69 Ohio St. 366, 69 N. E. 658. Where minor inherits from father lands which came to him by deed of gift, and they are sold by order of probate court and proceeds invested in bonds, and bonds are subsequently sold and proceeds invested in ground rent, which is later redeemed, and fund is then invested in another ground rent, the latter, on the death of the minor intestate and without issue, descends to the next of kin of deceased under Rev. St. 1892, § 4159, and not to ancestor's next of kin under Laws 1890, p. 66. Id.

73. Ratliff v. Ratliff [Va.] 47 S. E. 1007; Brown v. Arkansas Cent. R. Co. [Ark.] 81 S. W. 613. Equity of redemption. Clark v. Seagraves [Mass.] 71 N. E. 813. See Homesteads, § 7, 2 Curr. L. 220.

74. Cutler v. Meeker [Neb.] 99 N. W. 514.

75. Option to purchase at stipulated price, within specified time, and given on credit of decedent, revoked by his death within such time. Sims v. Cordele Ice Co., 119 Ga. 597, 46 S. E. 841.

76. Brown v. Arkansas Cent. R. Co. [Ark.] 81 S. W. 613.

77. Under Rev. St. U. S. §§ 2290, 2291 (U. S. Comp. St. 1901, pp. 1389, 1390). Towner v. Rodegeb, 33 Wash. 153, 74 P. 50.

78. Under Rev. St. U. S. §§ 2318-2352 (U. S. Comp. St. 1901, pp. 1423-1441). O'Connell v. Pinnacle Gold Mines Co., 131 F. 106.

descends to the heirs as intestate property, and does not pass under the residuary clause in a will.[79] Money paid by an elevated railroad for damages to realty arising from its construction and operation, should be treated as proceeds of the sale of real estate and not as income.[80] Where land is conveyed subject to an easement, on the termination thereof it passes to the grantee and not to the grantor's heirs.[81] Upon the death of one for whose benefit property is held in trust, it goes to his heirs and not to the heirs of the trustee.[82] The legal title to property which intestate has agreed shall go to a third person on his death passes to his heirs, in trust for such person as equitable owner.[83] The surplus of the proceeds of the sale of the realty of a partnership, in which testator was interested, left after a payment of the partnership debts and the adjustment of the claims of the partners against each other, is distributable as realty.[84] Land will be regarded as inheritable or distributable as personalty according to whether it has been converted or reconverted.[85]

Personalty has no inheritable quality and does not descend to the heir.[86] Upon the decease of its owner, the title thereto is at once suspended and remains so until a personal representative is properly appointed and qualifies.[87] It then devolves upon him,[88] and a transfer from him in due course of law is necessary to pass title to another.[89] The equitable beneficial interest in all the property of a solvent estate, however, is in the legal distributees during the whole period of administration.[90] As a general rule, a suit to recover personal property belonging to the estate of a deceased person must be brought by the administrator,[91]

79. In re Waldron [R. I.] 58 A. 453.

80. In re Levy, 41 Misc. 68, 83 N. Y. S. 647.

81. Easement granted to turnpike company. Mitchell v. Bourbon County, 25 Ky. L. R. 512, 76 S. W. 16.

82. Williams v. Williams' Ex'r, 25 Ky. L. R. 836, 76 S. W. 413.

83. In re Demer's Estate, 84 N. Y. S. 1109.

84. Kennedy v. Dickey [Md.] 57 A. 621.

85. Bank of Ukiah v. Rice, 143 Cal. 265, 76 P. 1020. See, also, Conversion in Equity, 1 Curr. L. 707.

86. Common law rule. McKenney v. Minahan, 119 Wis. 651, 97 N. W. 489. See Estates of Decedents, § 4C, 3 Curr. L. ——. Weaver v. Meyer, 32 Ind. App. 587, 70 N. E. 409. Funds derived from a sale of realty belonging to the estate by the trustees under a general power given them by the will and invested in securities should be distributed as personalty. Kennedy v. Dickey [Md.] 57 A. 621. It is only the residue of the personalty remaining after the debts of deceased and the expenses of administration have been paid that descends to the heirs. Sharp v. Citizens' Bank of Stanton [Neb.] 98 N. W. 50.

87. McKenney v. Minahan, 119 Wis. 651, 97 N. W. 489.

88. McKenney v. Minahan, 119 Wis. 651, 97 N. W. 489; Rowell v. Rowell [Wis.] 99 N. W. 473. Legal title, except in case of heirlooms, goes to the executor or administrator, through whom the heir acquires it. Weaver v. Meyer, 32 Ind. App. 587, 70 N. E. 409. Heir has no right to collect or dispose of note belonging to intestate. Bishop v. Matney, 25 Ky. L. R. 1777, 78 S. W. 856. The heirs at law of a deceased member of a partnership are not entitled to sue for his share of an unadministered asset of the firm, but such action must be brought by the administrator of the partnership, or, he being dead, by his administrator de bonis non. Suit to recover stock. Petition demurrable. Pullis v. Pullis, 178 Mo. 683, 77 S. W. 753.

In North Dakota, the title to personalty passes to the heirs, subject to the control of the county court and the possession of the administrator. Rev. Codes 1899, § 3741. Stock of liquors. State v. McMaster [N. D.] 99 N. W. 58. Title to a claim against an estate, which the assignee in bankruptcy of claimant rejects, remains in the bankrupt and passes to his personal representatives on his death. Fleming v. Courtenay, 98 Me. 401, 57 A. 592.

89. An heir at law seeking to recover personalty belonging to his ancestor at the time of the latter's death must show that title thereto was duly transferred to him by the legal representative of the estate. No presumption to this effect. Maxim that all things are presumed to have been rightly and regularly done until the contrary is shown will not take the place of evidence to show such fact. McKenney v. Minahan, 119 Wis. 651, 97 N. W. 489. Failure to plead such fact is a defect going to the cause of action itself, and can be raised at any time. Not a matter to be raised by demurrer for want of legal capacity to sue, or for defect of parties plaintiff. Id.

90. Rowell v. Rowell [Wis.] 99 N. W. 473.

91. Rylie v. Stammire [Tex. Civ. App.] 77 S. W. 626. See, also, Estates of Decedents, § 5A, 3 Curr. L. ——. Action brought by son as next of kin for conversion of personalty should have been dismissed, there being no proof that deceased did not leave a widow and other next of kin, and no proof that there are no creditors, or that defendants ever admitted plaintiff's possession or right of possession. McKernan v. Thomas Conville Brew. Co., 86 N. Y. S. 191.

unless no administrator has been appointed and there is no necessity for one,[92] or unless the estate has been fully administered and all the debts have been paid,[93] or unless the administrator has acted fraudulently.[94] The heirs so suing must, however, allege and prove such facts.[95]

Rights of action which survive on the death of one of the parties are generally regarded as personalty and pass to the personal representatives rather than the heirs,[96] and this is true even in the case of actions in regard to rights in realty.[97] A right of action for wrongful death is in no sense an asset of the estate and cannot pass by the will of the deceased, but only under the provisions of the statute and as the personal property of an intestate.[98]

§ 4. *Course of descent and distribution.*[99]—An heir takes through and not from his ancestor.[1] The line of descent cannot be changed by showing by parol that the consideration expressed in the deed whereby the property was acquired was in fact a gift.[2] At common law, seisin in fact by the ancestor was necessary in order that the heir could inherit realty from him,[3] but this rule has generally been modified by statute so that it is sufficient if he is entitled to or has any interest in the property.[4]

Where personalty was devised to the widow for life with remainder to testator's son, who was made executor, the administrator de bonis non was the proper party to maintain an action for its conversion after the son's death, though the widow had been placed in possession of the property. Weaver v. Meyer, 32 Ind. App. 587, 70 N. E. 409.

92. Ryle v. Stammire [Tex. Civ. App.] 77 S. W. 626.

93. Heirs cannot recover newly discovered assets which are less than unpaid claims against the estate. Such assets are a trust fund in hands of administrator for payment of debts and costs of administration. Sharp v. Citizens' Bank of Stanton [Neb.] 98 N. W. 50.

94. Courts of equity will recognize such distributees as proper parties plaintiff in a suit to protect their interests against the fraudulent acts of the administrator. Where surviving partner of firm, who was administrator of deceased partner, used the latter's share in the business and fraudulently transferred it to a corporation, the deceased partner's beneficiaries could maintain an action to compel him to account for the value of their interest. Rowell v. Rowell [Wis.] 99 N. W. 473.

95. Complaint insufficient. Rylie v. Stammire [Tex. Civ. App.] 77 S. W. 626.

96. Upon the death of a judgment creditor intestate, title to the judgment devolves upon his administrator by operation of law, and the judgment debtor may interplead him with respect to it in the condition in which he finds it. Debtor may prosecute appeal by setting forth in petition for writ of error the fact of the creditor's death and the appointment of the administrator, and upon granting of writ, process will issue against such administrator. Judgment debtor cannot revive judgment in name of administrator under Va. Code 1887, § 3577, but permitting him to do so, held error without prejudice. City of Charlottesville v. Stratton's Adm'r [Va.] 45 S. E. 737.

97. The administrator, and not the devisee, of one of two plaintiffs in trespass, who dies pending the action, must be joined in order to entitle his estate to recover. A motion to dismiss for failure to substitute such administrator is not the proper remedy under the North Carolina statute [Clark's Code (3d Ed.) § 188; Acts 1887, c. 389]. Rowe v. Cape Fear Lumber Co., 133 N. C. 433, 45 S. E. 830. A suit for the purchase money of lands should be prosecuted by the administrator and not by the heirs at law. Ga. Civ. Code 1895, § 3353. Petition in suit by heirs demurrable, there being no allegation that there were no debts and no administration on the estate, and no other facts being set up which would authorize a suit by them. Bryant v. Atlantic Coast Line R. Co., 119 Ga. 607, 46 S. E. 829.

98. Passes to next of kin in accordance with §§ 4172, 4173 [Shannon's Code, §§ 4025-4028]. Haynes v. Walker [Tenn.] 76 S. W. 902.

99. See 1 Curr. L. 924.

1. Hence guardian may not, on strength of ward's heirship, sue to set aside fraudulent conveyance of ward's ancestor. Cook v. Lee, 72 N. H. 569, 58 A. 511.

2. Ossman v. Schmitz, 4 Ohio C. C. (N. S.) 502. Validity of laws changing rules of descent, see In re Magnes' Estate [Colo.] 77 P. 853.

3. Early v. Early, 134 N. C. 258, 46 S. E. 503; Bragg v. Wiseman [W. Va.] 47 S. E. 90.

4. Testator devised land to T., his son, after the death of M. M. survived testator, T. and T.'s son, who died intestate and without issue after T. Held that the mother of T.'s son, who was his only heir, inherited the remainder, and not T.'s brothers and sisters of the whole blood [Code N. C. c. 28, § 1281]. Early v. Early, 134 N. C. 258, 46 S. E. 503. N. C. Code 1883, § 1281, provides that one shall be deemed to have been seised of property if he has any right, title or interest in the inheritance. Weeks v. Quinn, 135 N. C. 425, 47 S. E. 596. Code of West Virginia, 1899, c. 78, § 1 passes all and whatever title, right, and interest of inheritance in land vested in an intestate to his heirs, including seisin in fact and law. If the ancestor is seised in fact, the heirs have seisin in fact without entry, and if one of them is a mar-

At common law, the inheritance could never lineally ascend, and on failure of lineal descendants of the person last seised, the inheritance went to his collateral relations of the blood of the first purchaser.[5] By statute in some states, the parents are looked upon as lineal relations in the ascending line, and where the person last seised shall have left no issue, nor brother or sister, nor issue of such, the inheritance vests in the father, if living, and if not, then in the mother.[6] In Texas, if there are no children, father or mother, or husband or wife, the estate is divided into two parts, one of which goes to the maternal, and the other to the paternal kindred.[7]

In some states, if an infant, having realty derived from one parent by gift, devise, or descent, dies without issue, the whole goes to such parent and his or her next of kin.[8] For the purpose of transmission of title through ascending heirs to collateral kindred, the statute of descents and distributions conceives the ancestors and those who receive the title from him as living.[9] If there is no widow, the children take the personalty in equal parts, children of a deceased child taking the share their parents would have taken if living.[10] The right of representation among collaterals is frequently limited to the descendants of brothers and sisters of the intestate.[11] The effect of this rule is that among more remote relatives, the closest in degree take as a class, per capita, to the exclusion of all others.[12] In New York, grandnephews and grandnieces take by representa-

ried woman, her surviving husband is entitled to curtesy in her share. Bragg v. Wiseman [W. Va.] 47 S. E. 90.

5. Weeks v. Quinn, 135 N. C. 425, 47 S. E. 596.

6. Rev. St. Ga. c. 38, rules 4 & 6. Weeks v. Quinn, 135 N. C. 425, 47 S. E. 596. In Kentucky, realty descends in parcenary to the intestate's children and their descendants, and if he has none, then to his father and mother in equal shares, and if either parent is dead, the whole passes to the other [St. 1903, § 1393]. Hagan v. Clemons [Ky.] 78 S. W. 899.

7. Under the statutes of Texas (Rev. St. 1895, art. 1688, subd. 4), providing that if intestate leaves no children, father, mother, or husband or wife, the estate shall be divided into two moieties, one of which shall go to the maternal and the other to the paternal kindred, and that if there be no surviving grandfather or grandmother, "the whole estate shall go to their descendants, and so on without end, passing in like manner to the nearest lineal ancestors and their descendants," held that each of such moieties becomes, for purposes of distribution, a separate estate. Witherspoon v. Jernigan [Tex.] 76 S. W. 445. Article 1695 of the same statute, providing that when relations of deceased standing in the "first and same degree," alone come into the partition, they shall take per capita, and that when a part of them are dead and a part living, the descendants of those dead, who have a right to partition, shall take only such portion as the parent through whom they inherit would be entitled to if alive, construed and held that the words "first and same degree" should be taken to mean "first or same degree," and that where decedent's only heirs on the paternal side were first cousins and children of deceased first cousins, such children took the shares of their deceased parents. Id.

8. Under statutes providing that if an infant, having real estate from one parent by descent, shall die without issue, the whole shall descend to such parent and his next of kin (Ky. St. 1899, § 1401), and providing that if the owner of real estate which has been sold by an administrator die during infancy the person who would have been entitled to the property shall take the proceeds (Civ. Code Proc. c. 14, § 494, subsec. 6), where one dies in infancy leaving the proceeds of an administrator's sale of land inherited from her father, such proceeds go to her paternal aunts and uncles, to the exclusion of her mother. Weisiger v. McDonald, 25 Ky. L. R. 1053, 76 S. W. 1080. Such statutes are strictly construed and apply only when the title actually comes from such parent [Ky. St. 1903, § 1401]. Hagan v. Clemons [Ky.] 78 S. W. 899. In Kentucky, property purchased by a mother with her own means, the deed reciting that it was for her and her minor children and that the property was to survive to the longest liver, where one of the minors proved the survivor, but died in infancy without issue, was held to pass to the surviving father (under Ky. St. 1903, § 1393), and not to the heirs of the mother (under § 1401), since the infant's title was derived, not from the mother, but from her vendor. Id. Statute does not apply to land inherited from grandparent which descends in same manner as if infant had been an adult [Ky. St. 1903, § 1401]. Turner's Trustee v. Washburn, 25 Ky. L. R. 2198, 80 S. W. 460.

9. Grandnephews therefore take subject to debts owed by grandfather to deceased. Head v. Spier, 66 Kan. 386, 71 P. 833.

10. Shannon's Code Tenn. § 4172. Haynes v. Walker [Tenn.] 76 S. W. 902.

11. Miss. Code 1892, § 1543. Grantham v. Stratham [Miss.] 35 So. 423.

12. Surviving uncles and aunts take to the exclusion of cousins. Grantham v. Stratham [Miss.] 35 So. 423.

tion the shares of their parents.[13] Under a statute giving the share of a legatee or devisee who dies before testator to his heirs, they take directly from the testator and not through the predeceased legatee.[14]

A half-brother cannot inherit while his mother and sister of the whole blood are alive.[15] Under the Pennsylvania statutes, a half-brother of an intestate by a common mother, their fathers being brothers, is entitled to land inherited by intestate from her father, to the exclusion of intestate's paternal uncles and aunts.[16]

§ 5. *Quantity of estate or share acquired.*[17]—Heirs of the same class share equally.[18] Where an intestate leaves as his sole heirs full brothers, half-brothers who are children of his father, and half-brothers who are children of his mother, each full brother inherits an equal share with each child of the father in the half estate descending through him, and also an equal share with each child of the mother in the half descending through her.[19] An heir who has accepted succession unconditionally and has been put in possession conjointly with his coheirs succeeds to the legal title of the intestate.[20] The shares of the heirs may be increased or decreased by transfers of property made between them and the ancestor during the latter's lifetime, depending upon whether such transactions are gifts,[21] or advancements.[22] A right of succession may take effect presently, though future in possession.[23]

§ 6. *Husband or wife as heir.*[24]—The husband or wife, in some states, inherits as the heir of the other spouse, where deceased leaves no children or the issue of children, or father or mother, or brothers or sisters, or their descendants surviving him.[25] In others, where the husband or wife dies without any child or other descendants in being capable of inheriting, the other spouse is entitled to

13. Amendment to Code Civ. Proc. § 2732, subd. 12, taking effect Sept. 1, 1898, extended rule to personalty. In re Ebbets' Estate, 43 Misc. 575, 89 N. Y. S. 544. Where deceased left surviving him nephews and nieces, and one grandnephew, the only surviving representative of a deceased sister, and one grandniece, the only surviving representative of a deceased brother, such grandnephew and grandniece were entitled to take by representation the shares of their parents in the personalty [Under Code Civ. Proc. § 2732, subd. 12, as amended in 1898]. In re Hadley's Estate, 43 Misc. 579, 89 N. Y. S. 545.

14. Iowa Code, § 3281. Where a son devised property to his mother and she predeceased him, leaving as her heirs a brother and sister of testator, they took directly from him and the property was subject to the collateral inheritance tax under § 1467. In re Hulett's Estate, 121 Iowa, 423, 96 N. W. 952; State v. Kiler [Iowa] 96 N. W. 952. The California statute (Civ. Code, § 1310), providing that the lineal descendants of devisees, who are related to testator and who die before he does, shall take the estate devised, applies only to devises as distinguished from bequests. In re Ross' Estate, 140 Cal. 282, 73 P. 976.

15. Rice v. Bamberg [S. C.] 46 S. E. 1009.

16. Act April 8, 1833, §§ 6, 9, P. L. 316. Banes v. Finney [Pa.] 58 A. 136.

17. See 1 Curr. L. 924.

18. Where intestate left as heirs his mother and six sisters, held that the estate would be divided into eight parts, of which the mother would take two and the sisters one each. Finding that deed of three sisters conveyed three-sixths held erroneous. Cronklite v. Strain, 210 Ill. 331, 71 N. E. 392.

19. Kan. Gen. St. 1901, §§ 2522, 2530. The provision in the latter section that children of the half blood shall inherit equally with children of the whole blood does not require that all the children of either or both parents shall receive equal shares. Tays v. Robinson [Kan.] 74 P. 623.

20. His assign is entitled in a petitory action to be recognized as owner of the undivided interest inherited and sold. Brian v. Bonvillain, 111 La. 441, 35 So. 632.

21. See Gifts, 2 Curr. L. 140.

22. See Estates of Decedents, § 17B, 3 Curr. L. ——

23. Tax may attach. In re Milliken's Estate, 206 Pa. 149, 55 A. 853.

24. As to property allowed widow pending administration, including right to occupy homestead, see Estates of Decedents, § 5D, 3 Curr. L. ——. See 1 Curr. L. 924.

25. Proof of death of owner of land, leaving widow, who has one child who has lived on land since owner's death and has rented it, does not show that she had no alienable interest therein, but only a right of quarantine so as to render her mortgage of it invalid, since the land embraced therein might have been assigned to her as dower, or she might have been her husband's heir under the above section [Ala. Code 1896, § 1453, subd. 6]. Penny v. Weems, 139 Ala. 270, 35 So. 883. On death of husband, a certificate entitling him to land from the government goes to the widow if there are no descendants. Whisler v. Cornelius [Tex. Civ. App.] 79 S. W 360.

half the estate, and this right cannot be defeated by the will of the decedent.[26] In others, if there are no issue, the survivor takes the whole estate.[27]

The wife has an inchoate right to occupy the homestead after her husband's death, which cannot be taken away from her except by her own act.[28] The election of a husband to take a homestead instead of his distributive share of his wife's estate, or even the allotment to him of such share, does not affect his interest in the estate as her heir, where she leaves no issue.[29] Land deeded to a husband in a division of the estate of his wife's father descends to the wife's children on her death, to the exclusion of the children of the husband by his second marriage.[30] In the absence of statute, a husband who waives the provisions of his wife's will is not entitled to a distributive share of her personalty.[31]

In Louisiana, where the community of acquets and gains is dissolved by the death of the wife, the interests of her heirs to one-half of the community property attach at once.[32] The fact that such interest is subject to the payment of community debts does not make their title contingent or conditional.[33] In California, the husband takes the community property on the death of his wife,[34] and any part of the estate of a widow, dying without kindred, which was a part of the community property of her deceased husband and herself, goes to the brothers and sisters of such husband or to the issue of any deceased brother or sister by right of representation.[35]

At common law, the choses in action of a deceased wife pass to her surviving husband,[36] and he is entitled to take as his own money left on deposit by her in

26. Final distribution not affected by §§ 105, 107, 111, providing that the survivor shall have certain specified articles and a certain sum of money from the estate of the deceased [Rev. St. 1899, §§ 2938, 2939]. Waters v. Herboth, 178 Mo. 166, 77 S. W. 306. The two sections are designed to place the husband and wife on an equal footing with regard to each other's property. § 2938 applies only to property owned by the wife at the time of her death. It applies to property acquired before its passage by a then married woman, but is not unconstitutional on that account. Spurlock v. Burnett [Mo.] 81 S. W. 1221. Such interest is in addition to her homestead rights. Adams v. Adams [Mo.] 82 S. W. 66. Wife's half interest given by Iowa Code, § 3379, in so far as it exceeds her dower interest, is subject to payment of debts and claims against the estate. Wild v. Toms, 123 Iowa, 747, 99 N. W. 700.

27. Civ. Code 1895, § 3354. Fields v. Lewis, 118 Ga. 573, 45 S. E. 437. Under the statutes of descent of the Cherokee Nation, providing that the property of one dying intestate shall descend in equal parts to his widow and children, the widow of one dying intestate and without issue takes the whole estate, including that inherited by intestate from his father [Comp. Laws Cherokee Nation 1892, § 518, p. 267]. Nivens v. Nivens [Ind. T.] 76 S. W. 114.

28. Takes it subject to mortgage in which she joined, which she is not entitled to have satisfied out of other property of the estate. Adams v. Adams [Mo.] 82 S. W. 66. A constitutional exemption of a homestead from forced sale under process of law may survive to the family of the owner after his death. Upon death of husband, wife continues to have right to occupy tract occupied by them jointly as homestead, free from forced sale under process of law for payment of his debts. Cross v. Benson [Kan.] 75 P. 558. In states requiring a declaration of homestead, the land will descend as intestate property unless such declaration is made. Declaration of homestead filed by widow after husband's death held a nullity under Ballinger's Ann. Codes & St. Wash. § 5246. Lloyd v. Lloyd [Wash.] 74 P. 1061.

29. Under Iowa Code, § 3379, plaintiff held entitled to one-sixth of wife's property as her heir. Hays v. Marsh, 123 Iowa, 81, 98 N. W. 604.

30. Williams v. Williams' Ex'r, 25 Ky. L. R. 836, 76 S. W. 413.

31. Prior to Pub. Laws 1903, c. 160, § 1, there was no statute in Maine giving to a widower a distributive share in his wife's personalty after he had waived the provisions of her will in his favor. Rev. St. 1883, c. 76, §§ 8, 9, apply only to intestate estates. Stewart v. Skolfield [Me.] 58 A. 56.

32, 33. Bossier v. Herwig, 112 La. 539, 36 So. 557.

34. Fact that deceased wife owed debts does not authorize her administrator to take community property from her husband for purpose of paying them [Belongs to him under Cal. Code Civ. Proc. § 1401]. Bollinger v. Wright, 143 Cal. 292, 76 P. 1108.

35. California Civ. Code § 1386, subd. 9, includes only such common property as remains undisposed of at the time of the husband's death, and not any which was conveyed by him to the wife during his life time. In re McCauley's Estate, 138 Cal. 546, 71 P. 458. Under this section, where a widow dies leaving no next of kin, property which she described in her inventory, as executrix of her husband, as community property, goes to her deceased husband's surviving nieces. Id.

36. Box v. Lanier [Tenn.] 79 S. W. 1042.

bank.[37] This rule does not apply where he makes himself her survivor by feloniously killing her.[38]

An absolutely divorced husband or wife is cut off from all rights of inheritance in the estate of his or her former spouse,[39] but the fact that one is divorced from his wife for his fault does not affect his right to take the estate of their deceased child as his heir.[40]

In Kansas, residence on the part of the wife is essential to claim rights in property which her husband has conveyed.[41] A widow who elects to take a child's part in the estate of her deceased husband is counted as a child in making distribution.[42]

Widow's quarantine.[43]—Under a statute authorizing the widow to hold and enjoy the husband's mansion house and the plantation belonging thereto, without liability for rent, until dower is assigned her, a mortgagee in possession thereof, who is also assignee of the widow's rights, is not required to account for rent on foreclosing the mortgage before the assignment of dower.[44] The widow's right of quarantine is assignable.[45] In Alabama, the mortgage of a widow holding land under her right of quarantine passes to the mortgagee nothing cognizable in a court of law.[46]

DIRECTING VERDICT AND DEMURRER TO EVIDENCE.

§ 1. Directing Verdict (1093). The Motion; Its Effect (1095). Effect of Ruling; Appeal; Waiver (1096).

§ 2. Demurrers to Evidence (1096). Effect (1096). Waiver (1097). Effect of Ruling (1097).

Insufficiency of evidence, while the most common ground for directed verdict or demurrer to evidence, is frequently raised in other ways. Accordingly resort must be had to topics dealing with the specific subject-matter for a full discussion of sufficiency of evidence on particular questions.

§ 1. *Directing verdict.*[1]—There cannot be a directed verdict under a system of procedure requiring the jury to respond to issues, no provision being made for a general verdict.[2] A directed verdict is proper where the party having the burden of proof fails to establish all the facts necessary to enable him to recover,[3]

37. Shugart v. Shugart [Tenn.] 76 S. W. 821.

38. Goes to her administrator, his representatives cannot recover as against hers the proceeds of a life policy assigned by him to her, which is payable to her if she survives him, and if not, to his executors, administrators or assigns. This is not contrary to U. S. Const. art. 1, §§ 9, 10, prohibiting bills of attainder, or § 12, providing that no conviction shall work a forfeiture of estate. Box v. Lanier [Tenn.] 79 S. W. 1042. See note, ante, § 2.

39. A husband cannot inherit from his divorced wife who dies during the six months next preceding the decree. Rendition of decree dissolves the marriage, though parties are forbidden to remarry within six months [Kan. Laws, 1889, c. 107, p. 145]. Durland v. Durland, 67 Kan. 734, 74 P. 274; Jacobs v. Gaskill [Kan.] 77 P. 550. Neither can such husband recover from her administrator money paid to her under a decree adjusting their property rights. Durland v. Durland, 67 Kan. 734, 74 P. 274.

40. Though such child inherited it from his mother. Hammers v. Sanders [Mo. App.] 80 S. W. 16.

41. Statute of Kansas (Gen. St. 1901, § 2510), providing that a wife shall not be entitled to any interest in the lands of her husband which he has conveyed, "when the wife at the time of the conveyance is not or never has been a resident of this state," construed and held that "or" means "and," and that the provision applies only in case the wife has never been a resident of that state. Kennedy v. Haskell, 67 Kan. 612, 73 P. 913.

42. If one other child, she takes half the estate after costs of administration are paid [Fla. Rev. St. 1892, § 1833]. Benedict v. Wilmarth [Fla.] 35 So. 84.

43. See, also, Estates of Decedents, § 5D, 3 Curr. L. ——.

44. N. J. Gen. St. p. 1276. Moffett v. Trent [N. J. Eq.] 56 A. 1035.

45. Moffett v. Trent [N. J. Eq.] 56 A. 1035.

46. Penny v. Weems, 139 Ala. 270, 35 So. 883.

1. See 1 Curr. L. 925. Peremptory instructions are also treated under this caption.

2. A request to charge that plaintiff could not recover was properly refused. Foy v. Winston, 135 N. C. 439, 47 S. E. 466.

3. Agnew v. Montgomery [Neb.] 99 N. W. 820; Sloss-Sheffield Steel & Iron Co. v. Mob-

or where his evidence is so slight as to amount to none.[4] A directed verdict is also proper when the evidence,[5] or facts,[6] and the reasonable inferences therefrom,[7] are undisputed, so that a verdict for one of the parties is clearly demanded.[8] A rule frequently applied is that the court may direct a verdict in any case where the evidence is of such a conclusive character that the court, in the exercise of sound judicial discretion, would be compelled to set aside a verdict in opposition to it,[9] because not supported by the evidence.[10] In an action for negligence, a verdict will be directed where the facts show contributory negligence as a matter of law.[11] Where a verdict is properly directed, the reasons assigned by the court for its ruling are immaterial.[12]

Since a motion for a directed verdict admits the truth of opposing evidence[13] for the purpose of denying its sufficiency in law,[14] a verdict should not be directed unless it can be said as a matter of law that no recovery can be had upon any reasonable view of the facts which the evidence tends to establish.[15] It is therefore held that a verdict will not be directed for a defendant if there is any evidence fairly tending to prove a cause of action for the plaintiff;[16] and it has been

ley, 139 Ala. 425, 36 So. 181. Answer in effect admitted right to recover unless the plea should be sustained, and there was no evidence to sustain the plea. Tilley v. Cox, 119 Ga. 867, 47 S. E. 219; Weed v. Chicago, etc., R. Co. [Neb.] 99 N. W. 827. Where evidence tends to show contributory negligence and the court submits the case to the jury, it must do so on the theory that there is sufficient evidence to support a verdict for plaintiff; and if the evidence is not so sufficient, the court should direct a verdict. Sattler v. Chicago, etc., R. Co. [Neb.] 98 N. W. 663.

4. Evidence so slight that reasonable minds could not arrive at different conclusions. Rickards & Co. v. Bemis & Co. [Tex. Civ. App.] 78 S. W. 239.

5. Neeley v. Southwestern Cotton Seed Oil Co., 13 Okl. 356, 75 P. 537; Whitley v. Clegg [Ga.] 48 S. E. 406. A peremptory instruction is not error when the testimony is uncontradicted, though a hypothetical instruction, based on the assumption of the truth of the testimony, would be more formally correct. Owens v. Meredith, 25 Ky. L. R. 1485, 78 S. W. 145.

6. Rice v. Bamberg [S. C.] 46 S. E. 1009. Facts being undisputed, there is only a question of law. Hendley v. Globe Refinery Co. [Mo. App.] 79 S. W. 1163. Facts undisputed and only issue the construction of a deed. Reid v. Courtenay Mfg. Co. [S. C.] 47 S. E. 718.

7. Gudfelder v. Pittsburg, etc., R. Co., 207 Pa. 629, 57 A. 70.

8. Uncontradicted evidence demands a finding. McGowan v. Brooks, 119 Ga. 494, 46 S. E. 626; Ward v. McQueen [N. D.] 100 N. W. 253; Wilson v. Alcatraz Asphalt Co., 142 Cal. 182, 75 P. 787; McCullough v. Pritchett [Ga.] 48 S. E. 148. A statute providing that "where there is no conflict in the evidence, and that introduced with all reasonable deductions or inferences therefrom demands a particular verdict, the court may direct the jury to find for the party entitled thereto" is not unconstitutional, as a denial of the right to a jury trial, or a deprivation of property without due process of law [Civ. Code 1895, § 5331]. Tilley v. Cox, 119 Ga. 867, 47 S. E. 219.

9. Shoup v. Marks [C. C. A.] 128 F. 32; Gentry v. Singleton [C. C. A.] 128 F. 679; Williams v. Belmont Coal & Coke Co. [W. Va.] 46 S. E. 802; Neeley v. Southwestern Cotton Seed Oil Co., 13 Okl. 356, 75 P. 537, citing numerous authorities.

10. Merrill v. Timbrell, 123 Iowa, 375, 98 N. W. 879; Asphalt Granitoid Const. Co. v. St. Louis Transit Co. [Mo. App.] 80 S. W. 741; Kentucky Refining Co. v. Purcell Cotton Seed Oil Mills, 13 Okl. 220, 73 P. 945; Truskett v. Bronaugh [Ind. T.] 76 S. W. 294; Boston & M. R. Co. v. Sargent [N. H.] 57 A. 688. In the Federal courts, the rule is that the court should direct a verdict, unless there is some evidence of such a character that the jury would be warranted in finding a verdict for the party producing it. New York, etc., R. Co. v. Difendaffer [C. C. A.] 125 F. 893.

11. Dunworth v. Grand Trunk Western R. Co. [C. C. A.] 127 F. 307. See, also, Master and Servant, 2 Curr. L. 801; Negligence, 2 Curr. L. 996.

12. Central Guarantee Trust & Safe Deposit Co. v. White, 206 Pa. 611, 56 A. 76.

13. Missouri Malleable Iron Co. v. Dillon, 206 Ill. 145, 69 N. E. 12.

14. Kaufman v. Bush, 69 N. J. Law, 645, 56 A. 291.

15. Neal v. St. Louis, etc., R. Co., 71 Ark. 445, 78 S. W. 220; Kentucky Refining Co. v. Purcell Cotton Seed Oil Mills, 13 Okl. 220, 73 P. 945. Under Code Civ. Proc. § 1104, the court should direct a verdict when the case presents only a question of law, but not otherwise. Michener v. Fransham [Mont.] 74 P. 448. A peremptory instruction is properly refused, in a personal injury action, unless after giving plaintiff the benefit of the most favorable construction of all the evidence and every reasonable inference in his favor that may be drawn therefrom, no other reasonable conclusion can be arrived at than that plaintiff was guilty of contributory negligence. Asphalt Granitoid Const. Co. v. St. Louis Transit Co. [Mo. App.] 80 S. W. 741.

16. On a trial by the court a peremptory instruction for defendant will not be given where there is evidence tending to prove plaintiff's case, either directly or by reasonable inference. Carr v. Ubsdell, 97 Mo. App. 326, 71 S. W. 112; Wrisley Co. v. Burke, 203

held that plaintiff's evidence need not show a prima facie case.[17] It is also error to direct a verdict if there is a conflict in the evidence,[18] so that a controverted question of fact is presented,[19] requiring a submission to the jury.[20] The credibility of witnesses is always for the jury.[21] The right of a party to go to the jury should not be denied because he has not introduced the best evidence, when secondary evidence has been admitted and permitted to remain in the case.[22]

The motion; its effect.[23]—The right to a peremptory instruction[24] or directed verdict[25] may be lost by failure to present a motion therefor in season. The motion should specify the ground on which it is based.[26] A request for a peremptory instruction will not be considered an objection to the sufficiency of the declaration.[27] As stated above, a motion for a directed verdict admits the truth of all opposing evidence, and all inferences which may be fairly and rationally drawn from it.[28] Where each party requests the court to direct a verdict, he thereby concedes that there is no question for the jury, and waives his right to a decision by the jury on every issue in the case.[29] When pursuant to such re-

Ill. 250, 67 N. E. 818; Missouri Malleable Iron Co. v. Dillon, 206 Ill. 145, 69 N. E. 12; Pittsburg, etc., R. Co. v. Banfill, 206 Ill. 553, 69 N. E. 499; Ewen v. Wilbor, 208 Ill. 492, 70 N. E. 575; Dill v. Marmon [Ind. App.] 71 N. E. 669. If there is evidence supporting plaintiff's allegations, it is error to direct verdict. Continental Ins. Co. v. Clark [Iowa] 100 N. W. 524. Code Civ. Proc. Mont. § 1104, calls for substantial evidence. Ball v. Gussenhoven [Mont.] 74 P. 871. Demurrer to evidence held properly overruled where evidence showed defendant to be the proper party to be charged with the negligence, in elevator injury case. Luckel v. Century Bldg. Co., 177 Mo. 608, 76 S. W. 1035.

17. Barnes v. Carter [Ga.] 48 S. E. 337.

18. Trentham v. Waldrop, 119 Ga. 152, 45 S. E. 988; Ford v. Fargason [Ga.] 48 S. E. 180; Underfeed Stoker Co. v. Hudson County 58 A. 296; Morel v. Stearns, 84 N. Y. S. 521; Blumberg v. Marks, 87 N. Y. S. 512; Schmitz v. Kirchan, 32 Wash. 546, 73 P. 678; Louisville & N. R. Co. v. Sullivan Timber Co., 138 Ala. 379, 35 So. 327; Bessemer Liquor Co. v. Tillman, 139 Ala. 462, 36 So. 40; Smith v. Klay [Fla.] 36 So. 54. Where the evidence clearly afforded adverse inferences upon every issue of fact presented by the pleadings, a request for an affirmative charge was properly refused. Garrison v. Glass, 139 Ala. 512, 36 So. 725; Alexander v. Von Koehring [Tex. Civ. App.] 77 S. W. 629; Louisville & C. Packet Co. v. Bottorff, 25 Ky. L. R. 1324, 77 S. W. 920. "Substantial" conflict. Oliver v. Iowa Cent. R. Co., 122 Iowa, 217, 97 N. W. 1072; Miller v. Shumway [Mich.] 98 N. W. 385; Pewonka v. Stewart [N. D.] 99 N. W. 1080; Wagner v. Einhorn, 88 N. Y. S. 370.

19. Sundheimer v. New York, 176 N. Y. 495, 68 N. E. 867; Farmers' State Bank v. Spencer, 12 Okl. 597, 73 P. 297; Sorrells v. Goldberg [Tex. Civ. App.] 78 S. W. 711; Spring Valley Coal Co. v. Robizae, 207 Ill. 226, 69 N. E. 925. Peremptory instruction refused. Crerar v. Daniels, 209 Ill. 296, 70 N. E. 669. Substantial evidence raising an issue of fact. Vincent v. Means [Mo.] 82 S. W. 96; City & Suburban R. v. Svedborg, 194 U. S. 201, 48 Law. Ed. 935.

20. Joplin Waterworks Co. v. Joplin, 177 Mo. 496, 76 S. W. 960; Luckel v. Century Bldg. Co., 177 Mo. 608, 76 S. W. 1035.

21. The court may not treat certain testimony as untrue as a matter of law and direct a verdict. Voss v. Smith, 87 App. Div. 395, 84 N. Y. S. 471.

22. Wilson v. Wilson [Mo. App.] 80 S. W. 711.

23. Note: On motion to direct a verdict, it is not the province of the court to "weigh the evidence and ascertain where the preponderance is, but it is limited strictly to determining whether there is or is not evidence from which, if believed, it may reasonably be inferred, in legal contemplation, that the fact affirmed exists, excluding the effect of all modifying or countervailing evidence; and on overruling the motion, no judgment is rendered against the moving party." Bass v. Rublee [Vt.] 57 A. 965, citing Bartelott v. International Bank, 119 Ill. 259, 9 N. E. 893.

24. A request for a peremptory instruction is too late after a motion for verdict has been denied, argument thereon refused, and other argument permitted. Ewen v. Wilbor, 208 Ill. 492, 70 N. E. 575.

25. A verdict will not be directed for defendant on the ground that the evidence fails to support the declaration, when defendant has pleaded issuably, and has permitted the evidence to be introduced without objection on that ground. Mohr Hardware Co. v. Dubey [Mich.] 100 N. W. 127.

26. Variance, allegations and proof. Zellers v. White, 208 Ill. 518, 70 N. E. 669.

27. It is too general an objection to raise that point. Yazoo, etc., R. Co. v. Schraag [Miss.] 36 So. 193.

28. Missouri Malleable Iron Co. v. Dillon, 206 Ill. 145, 69 N. E. 12. It admits the truth of testimony for the purpose of denying its sufficiency in law. Kaufman v. Bush, 69 N. J. Law, 645, 56 A. 291.

29. United States v. Bishop [C. C. A.] 125 F. 181. Decision of the court on questions of fact and credibility of witnesses is conclusive on appeal, in such case. Dearman v. Marshall, 88 App. Div. 41, 84 N. Y. S. 705. Where first defendant and then plaintiff asked for a directed verdict, and each attorney said he desired to stand on his motion, it was proper for the court to discharge the

quests, the court directs a verdict, both parties are estopped, on appeal, to assail the trial court's findings of fact.[30]

Effect of ruling; appeal; waiver.—On overruling a motion for a directed verdict, no judgment is rendered against the moving party.[31] A refusal to grant a peremptory instruction may be reviewed on appeal, even though the jury has found a verdict for the adverse party which is approved by the trial court.[32] Error, if any, in refusing to direct a verdict at the close of plaintiff's case, is waived when defendant offers testimony and does not renew his motion at the close of the testimony.[33]

§ 2. *Demurrers to evidence.*[34]—The same rules that govern the direction of a verdict control a demurrer to evidence,[35] so far as the mode of viewing the evidence is concerned,[36] but the required technicalities and procedure incident to the demurrer do not apply to a motion for a directed verdict.[37] Demurrers to evidence may be allowed in cases tried by the court as well as in jury cases.[38] A motion to have given, and an offer of, an instruction that the court finds the issues for the defendant, is in legal effect a demurrer to the evidence.[39]

Effect.[40]—A demurrer to evidence admits all facts which the evidence in the slightest degree tends to prove, and all the inferences which may be logically and reasonably drawn from the evidence,[41] and raises a question of law.[42] Hence,

jury and take entire control of the case, neither party objecting. There was a waiver of a jury trial. Bank of Park River v. Norton, 12 N. D. 497, 97 N. W. 860.

30. The parties are limited to two issues: Was there substantial evidence to sustain the findings? Was there any error in the trial court's declaration or application of the law? United States v. Bishop [C. C. A.] 126 F. 181. Both parties asked peremptory instructions and the court gave one. Phenix Ins. Co. v. Kerr [C. C. A.] 129 F. 723.

31. Bass v. Rublee [Vt.] 57 A. 965.

32. To do so no more invades the province of the jury than in reviewing evidence to ascertain whether or not there was evidence to warrant the giving or refusing of any other instruction. Asphalt Granitoid Const. Co. v. St. Louis Transit Co. [Mo. App.] 80 S. W. 741.

33. Ward v. McQueen [N. D.] 100 N. W. 253.

34. See 1 Curr. L. 929.

35. Bass v. Rublee [Vt.] 57 A. 966; 6 Enc. Pl. & Prac. 692. See ante, § 1, Directing Verdict. Thus, in Kentucky Refining Co. v. Purcell Cotton Seed Oil Mills, 13 Okl. 220, 73 P. 945, the court, in considering whether a demurrer to evidence had been properly sustained, follows a rule laid down by the Federal supreme court as to direction of the verdict.

36. Bass v. Rublee [Vt.] 57 A. 965. A demurrer to the evidence will not lie when the declaration is in two counts and there is evidence to support one of them. Portsmouth St. R. Co. v. Peed's Adm'r [Va.] 47 S. E. 850. If the evidence is such that the jury might have found for the plaintiff on the issues presented, the court, on demurrer to the evidence, must so find. Demurrer to evidence held properly overruled. Chesapeake & O. R. Co. v. Pierce [Va.] 48 S. E. 534. A demurrer to evidence should be sustained if the evidence, though conflicting, plainly and decidedly preponderates in favor of demurrant. Barrett v. Raleigh Coal & Coke Co. [W. Va.] 47 S. E. 154.

37. Bass v. Rublee [Vt.] 57 A. 966.

38. Wehe v. Mood [Kan.] 75 P. 476.

39. Crerar v. Daniels, 209 Ill. 296, 70 N. E. 569.

40. **NOTE. Admission of facts:** "The only purpose [of a demurrer to evidence] is to refer to the court questions of law arising from the facts ascertained. When the parol evidence is loose and indeterminate, which may be urged with more or less effect to a jury, or if the evidence is of circumstances, and is meant to operate beyond the proof of the existence of those circumstances and to conduce to proof of the existence of other facts, the defendant cannot demur to the evidence, and insist on a jury's being discharged from giving a verdict, and oblige plaintiff to join in the demurrer, without distinctly admitting upon the record every fact and every conclusion which the plaintiff's evidence conduced to prove." Mr. Justice Watson in Bass v. Rublee [Vt.] 57 A. 966.

NOTE. Effect on incompetent evidence: It is held by some courts that the demurrer waives all objections to the admissibility of the evidence to which it is addressed. Duneneck v. Kutzer [Tex. Civ. App.] 43 S. W. 540, and cases there cited. Contra: Bank v. Loar, 61 W. Va. 540, 41 S. E. 901; Megrue v. Lennox [Ohio] 62 N. E. 1022. In Gillet v. Burlington Ins. Co., 53 Kan. 108, 36 P. 52, it was said (par. 2 of syllabus): "Where incompetent testimony is received over objections, it is within the province of the court to correct such error at any time before the final disposition of the case; and, upon a demurrer to plaintiff's evidence, it is not improper for the court to strike out or to disregard such incompetent testimony." See Lee v. Missouri Pac. R. Co., 67 Kan. 402, 73 P. 110.

41. Citing Oklahoma and Kansas authorities. Edmisson v. Drumm-Flato Commission Co., 13 Okl. 440, 73 P. 958. The demurrer admits facts which the evidence most favorable to the adverse party tends to prove and all that might be fairly inferred from those

the court, in ruling on a demurrer, cannot weigh conflicting evidence, but will treat that most favorable to the party demurring as withdrawn,[43] and all portions of the evidence favorable to the adverse party as true.[44] The court may ignore evidence which though making a prima facie case is incompetent and was objected to[45] and it need not be first formally excluded or stricken.[46]

Waiver.—A demurrer to evidence is waived by the introduction of testimony by the demurrant.[47] A request for instructions on the theory of the case adopted by the opposing counsel and the court is not a waiver of a demurrer to evidence.[48]

Effect of ruling.[49]—Final judgment cannot be rendered on a demurrer to evidence where there is no joinder in demurrer on the record.[50] Sustaining a general demurrer to evidence as to only one of several defenses does not withdraw from the jury evidence applicable to remaining defenses.[51] A ruling on a demurrer to evidence is a decision of law occurring at the trial, subject to reconsideration on a motion for a new trial.[52]

DISCONTINUANCE, DISMISSAL AND NONSUIT.[53]

§ 1. **Voluntary Nonsuit or Discontinuance** (1097). When Right to Voluntary Nonsuit is Lost (1099). Discontinuance by Operation of Law (1100). Effect of Discontinuance (1100).
§ 2. **Involuntary Dismissal or Nonsuit** (1100). Want of Jurisdiction (1101). Defect in Pleadings; Parties (1101). Failure of Prosecution (1102). Nonsuit for Failure of Proof (1103). Motion for Nonsuit; Effect (1104). Effect of Dismissal or Nonsuit (1105). Practice on Appeal (1106).

§ 1. *Voluntary nonsuit or discontinuance.*[54]—Plaintiff may ordinarily dis-

facts. Buoy v. Clyde Milling & Elevator Co. [Kan.] 75 P. 466. Upon a motion to exclude all the testimony, not only the facts expressly testified to, but all inferences necessarily and logically to be deduced therefrom are to be taken as true, in favor of the party against whom such motion is interposed. Alexander v. Zeigler [Miss.] 36 So. 536.

42. Admitting evidence in favor of plaintiff to be true, the question is, does it, together with all legitimate conclusions to be drawn therefrom, fairly tend to sustain plaintiff's cause of action? Libby v. Banks, 209 Ill. 109, 70 N. E. 599.

43. Edmisson v. Drumm-Flato Commission Co., 13 Okl. 440, 73 P. 958.

44. On demurrer, the court cannot weigh conflicting evidence nor regard a case as though submitted by defendant on plaintiff's showing, but must consider as true all portions of the evidence tending to prove allegations of the petition. Wehe v. Mood [Kan.] 75 P. 476.

45, 46. Lee v. Missouri Pac. R. Co., 67 Kan. 402, 73 P. 110.

47. Tamblyn v. Johnston [C. C. A.] 126 F. 267; Brock v. St. Louis Transit Co. [Mo. App.] 81 S. W. 219. A demurrer to evidence is waived where the demurrant, after his demurrer has been overruled, proceeds to trial and takes the verdict of the jury on the facts which he claims the adverse party failed to prove. The status of proof at the close of plaintiff's case is immaterial on appeal, when defendant has so proceeded. Supreme Forest of Woodmen Circle v. Stratton [Kan.] 75 P. 472.

48. Brock v. St. Louis Transit Co. [Mo. App.] 81 S. W. 219.

49. Effect to bar subsequent action, see Former Adjudication, 2 Curr. L. 60.

50. Bass v. Rublee [Vt.] 57 A. 965.

51. Result is same as though one of several separate demurrers had been sustained and others overruled. Troutman v. Behotequy [Kan.] 76 P. 446.

52. Buoy v. Clyde Milling & Elevator Co. [Kan.] 75 P. 466. A ruling sustaining a demurrer to evidence cannot be reviewed on appeal when no motion for a new trial has been filed, since the demurrer raises the question of the legal sufficiency of the evidence to sustain the issue of fact in support of which it is offered. Coy v. Missouri Pac. R. Co. [Kan.] 76 P. 844.

53. See 1 Curr. L. 937, Dismissal and Nonsuit.

54. See 1 Curr. L. 937.

Note: Not only may a plaintiff who is solely interested discontinue, but one who brings an action on behalf of himself and others similarly situated who may come in and share in the expenses, has the right to control the action, including the right to discontinue, until a creditor similarly situated has procured an order to be made a party, or has served a notice of a motion to be brought in, or until interlocutory judgment is entered. Hirshfeld v. Fitzgerald, 157 N. Y. 166, 46 L. R. A. 839. That a plaintiff so situated may discontinue is also held in McDougald v. Dougherty, 11 Ga. 570; Thompson v. Fisler, 33 N. J. Eq. 480; Brinckerhoff v. Boetwick, 99 N. Y. 194, 1 N. E. 663; Salisbury v. Binghamton Pub. Co., 85 Hun, 99, 32 N. Y. S. 652; Piedmont & A. L. Ins. Co. v. Maury, 75 Va. 511. The last three cases cited also hold that after an interlocutory decree or order, plaintiff no longer has exclusive control, and may not discontinue

continue, on payment of costs, when no affirmative relief is asked by defendant,[55] or by an intervener,[56] and no interest of third parties has become involved;[57] but leave to discontinue,[58] and the terms on which a motion therefor may be granted,[59] are discretionary with the court, and the motion may properly be denied where it appears that to grant it would enable plaintiff to gain an unfair advantage.[60] It has been held that plaintiff may discontinue if he does not prove his cause of action,[61] or if no jurisdiction of defendants is obtained,[62] or if the cause is settled.[63] But if a settlement is collusive and fraudulent, the discontinuance will be allowed only on terms which will protect the parties affected.[64] In an action on a joint and several contract, plaintiff may discontinue as to one defendant,[65] but the court cannot, of its own motion, do so, or require or instruct the plaintiff to do so.[66] Where plaintiff's demands are inconsistent, he may withdraw a part of his cause of action before judgment.[67] A suit on information of relators in the name of the state for forfeiture of a charter may be dismissed by the attorney general without the consent of the relators.[68] The pendency of another suit involving the same issues may not be cause for dismissal by plaintiff.[69]

If affirmative relief is demanded[70] against plaintiff, he may not dismiss the entire cause,[71] and the granting of a voluntary nonsuit does not impair the right of a defendant or intervener to a trial of claims for affirmative relief.[72]

without the consent of the other parties interested.—From note to Hirshfeld v. Fitzgerald [N. Y.] 46 L. R. A. 839.

55. Tennessee River Land & Timber Co. v. Butler, 134 N. C. 50, 45 S. E. 956. Entry of retraxit by a usee, plaintiff in suit on bond held properly allowed. Fidelity & Deposit Co. v. Nisbet, 119 Ga. 316, 46 S. E. 444.

56. The plaintiff may dismiss as against an intervener as well as against a defendant if neither asks affirmative relief. Henry v. Vineland Irr. Dist., 140 Cal. 376, 73 P. 1061.

57, 58. Finkelstein v. Meenan, 43 Misc. 376, 87 N. Y. S. 502.

59. Not error for court to require payment of $25 costs instead of requiring payment of all taxable costs to date of motion. Susman v. Dangler, 88 N. Y. S. 527. The court may protect, by imposing conditions, the rights of parties affected by a voluntary discontinuance as to defendants not served. Chapman v. Wolf, 89 App. Div. 563, 85 N. Y. S. 638.

60. As, where a second action is brought for the same cause, reducing the damages sought so as to prevent removal to the city court, discontinuance of the first action may be denied. Finkelstein v. Meenan, 43 Misc. 376, 87 N. Y. S. 502.

61. In municipal court of New York. Mills v. Interurban St. R. Co., 88 N. Y. S. 361.

62. Bacon v. Abbey Press, 43 Misc. 345, 87 N. Y. S. 165. Plaintiffs have a right to discontinue an action at law as against defendants who have not been served, without costs. Chapman v. Wolf, 89 App. Div. 563, 85 N. Y. S. 638.

63. Dr. Shoop Family Medicine Co. v. Schowalter [Wis.] 98 N. W. 940. The action of a trial judge in making a case "settled" is equivalent to a discontinuance. Pomeranz v. Marcus, 87 N. Y. S. 941.

64. Where settlement was made to defraud an attorney, discontinuance was allowed on condition of payment of his costs. Pomeranz v. Marcus, 87 N. Y. S. 941. Where a case is settled by clients and there is no evidence of an intent to defraud the attorneys, an order of dismissal should not be conditioned upon payment of the attorney's fee, since the attorney's lien attaches to the proceeds of the settlement. Witmark v. Perley, 43 Misc. 14, 86 N. Y. S. 756. Dismissal of an action by the client, who employs another attorney, cannot defeat the lien of an attorney duly employed for services actually rendered under his contract, even though recovery is in another action by other attorneys. Gibson v. Chicago, etc., R. Co., 122 Iowa, 565, 98 N. W. 474.

65. As when one pleads a discharge in bankruptcy. Seymour v. Richardson Fueling Co., 205 Ill. 77, 68 N. E. 716.

66. Seymour v. Richardson Fueling Co., 205 Ill. 77, 68 N. E. 716.

67. Where insurance agents were sued for damages and premium for fraudulently issuing a policy below the regular rate, the company having been compelled to pay a loss thereunder, it was error to refuse to allow plaintiff to withdraw that part of its action demanding the premium, before judgment. Continental Ins. Co. v. Clark [Iowa] 100 N. W. 524.

68. That the relators are liable for costs does not change the public character of the suit. State v. Red River Turnpike Co. [Tenn.] 79 S. W. 798.

69. Where another suit for infringement of a patent was pending, plaintiff was not allowed to dismiss after all proofs had been taken, as they had not been in the other suit. To allow plaintiff to bring successive suits and dismiss after proof would be vexatious and injurious to defendant. Georgia Pine Turpentine Co. v. Biifinger, 129 F. 131.

70. See 1 Curr. L. 937. Plaintiff was entitled to take a nonsuit in an action to determine an adverse interest in real estate, where defendant merely asked to have an injunction, granted on plaintiff's motion, restraining defendant from trespassing on the

When right to voluntary nonsuit is lost.[73]—The common-law rule that a plaintiff may suffer a nonsuit on his own motion at any time before the jury have retired to consider their verdict has been changed,[74] and it is now held that a plaintiff can become nonsuit, as of right, at any time before the trial has begun, but not afterwards.[75] A hearing which results in evidence and cannot, per se, result in an adjudication, is not a trial within the meaning of this rule.[76] A motion by a plaintiff to dismiss after all the proofs are taken is addressed to the sound discretion of the court,[77] but will not be granted where such proceedings have been taken as entitle the defendant to a decree,[78] as where he would be prejudiced or put to a disadvantage by the granting of the motion.[79] A motion to dismiss without prejudice will not be entertained after a demurrer to evidence has been sustained,[80] or a verdict directed for defendant,[81] or application has been made by defendant for a removal of the cause;[82] but an application for a dismissal, made while the court is considering a demurrer but has not yet announced the decision,[83] or after the court has granted a motion to direct a verdict for defendant, but before the jury has actually been so instructed,[84] is in time. In Georgia, the rule that knowledge of the actual result of a case takes away the right to dismiss, while knowledge of the possible result does not, is applied.[85]

land, set aside and the suit dismissed. Olmsted v. Smith, 133 N. C. 584, 46 S. E. 953.

71. Plaintiff could not dismiss and terminate an action brought to construe a will and quiet title to property thereby devised, defendants having answered, asking affirmative relief. McKee v. McKee, 32 Wash. 247, 73 P. 358. Where in trespass to try title, defendant alleged that plaintiff was unlawfully withholding a certain other tract of land, not involved in the petition, and asked that title thereto be quieted in him, there was a demand for affirmative relief and plaintiff could not discontinue. Smithers v. Smith [Tex. Civ. App.] 80 S. W. 646. In the New York municipal court, plaintiff may discontinue as of right, before final submission, on payment of costs, though a counterclaim is filed. Rule is otherwise in supreme court. Nichols v. Williams, 42 Misc. 527, 86 N. Y. S. 136.

72. The withdrawal by plaintiff of his cause of action does not impair defendant's right to a trial of his defenses pleaded by way of set off. "Set offs" held to be included in statute, though "counterclaim" was the term used. Boothe v. Armetrong, 76 Conn. 530, 57 A. 173. Dismissal by plaintiff does not dismiss defendant's counterclaim already filed. McCormick Harvesting Mach. Co. v. Hill [Mo. App.] 79 S. W. 745. An intervention will not deprive a plaintiff of a right to take a nonsuit, the purpose of the intervener being merely to protect his own interests and the interests of those similarly situated, the nonsuit being subject to the intervener's right to be heard on his claim for affirmative relief. Bangs v. Sullivan [Tex. Civ. App.] 73 S. W. 74. Defendants, in suit for conversion of a horse, counterclaimed for the value of his keep, and it was held error to dismiss part of the plaintiffs from the case. Gooch v. Isbell [Tex. Civ. App.] 77 S. W. 973. It was error to refuse leave to defendant to amend his plea of counterclaim after sustaining a demurrer thereto and granting plaintiff a nonsuit. Blank v. Robertson [Tex. Civ. App.] 78 S. W. 564.

73. See 1 Curr. L. 937, "After submission of controversy to court or jury."

74. Even in England. Earl Carpenter & Sons v. New York, etc., R. Co. [Mass.] 68 N. E. 28. By statute (P. L. p. 682, § 160, of practice act of 1903), the plaintiff has not that right after the jury have retired. Greenfield v. Carey [N. J. Eq.] 57 A. 269.

75. Earl Carpenter & Sons v. New York, etc., R. Co. [Mass.] 68 N. E. 28, citing Massachusetts authorities.

76. A plaintiff may become nonsuit after a hearing before an auditor but before the filing of the auditor's report. Earl Carpenter & Sons v. New York, etc., R. Co. [Mass.] 68 N. E. 28.

77. Plaintiff cannot dismiss at will in such case. Georgia Pine Turpentine Co. v. Bilfinger, 129 F. 131.

78. Georgia Pine Turpentine Co. v. Bilfinger, 129 F. 131.

79. Suit for infringement of a patent not dismissed, since defendant's reputation and business standing would be prejudiced unless a decree were rendered. Georgia Pine Turpentine Co. v. Bilfinger, 129 F. 131.

80. Pugsley v. Chicago, etc., R. Co. [Kan.] 77 P. 579.

81. Pisel v. Mt. Vernon [Iowa] 99 N. W. 568.

82. After application has been made for removal from municipal to county court, and the sureties sworn in, the court has no jurisdiction before passing on the application for removal to grant a discontinuance. Meisen v. Rothfeld, 89 App. Div. 447, 85 N. Y. S. 923.

83. Pugsley v. Chicago, etc., R. Co. [Kan.] 77 P. 579. Where after a demurrer to the evidence the court said he was inclined to sustain the demurrer and plaintiff then took a nonsuit, such nonsuit was voluntary. A recital that plaintiff suffered an involuntary nonsuit is not conclusive. Carter v. O'Neill, 102 Mo. App. 391, 76 S. W. 717.

84. Pisel v. Mt. Vernon [Iowa] 99 N. W. 568.

85. The right of the plaintiff to voluntа-

Discontinuance by operation of law.—A change of party does not mark a discontinuance, if the cause of action remains the same.[86] An action brought in the state court against receivers appointed by the Federal court is not discontinued by a discharge of the receivers by the Federal court.[87]

Effect of discontinuance.[88]—When regularly discontinued, a cause is beyond the jurisdiction of the court,[89] save for the sole purpose of entering judgment for costs.[90] But it is in the discretion of the court to set aside a nonsuit claimed to have been taken by collusion, and allow another party to intervene.[91] A judgment of dismissal upon the request or with the consent of plaintiff is not appealable by plaintiff.[92]

A retraxit differs from a nonsuit, in that, when once entered by a plaintiff, it forever puts an end, not only to the pending suit, but to the cause of action involved.[93] Under the early English practice, a retraxit could not be entered by attorney, but the party must himself appear, in open court, to enter it;[94] and by analogy, under the present practice, the court will carefully scrutinize the circumstances attending the execution of such a document, when its validity is challenged.[95]

§ 2. *Involuntary dismissal or nonsuit.*[96] *Grounds in general.*—A court cannot dismiss a pending cause arbitrarily without notice or consent of the parties.[97] When the grounds for nonsuit or dismissal are specified in the statute, a court has no authority to grant a motion therefor on other grounds;[98] but when not designated by statute, the motion may be upon any sufficient ground.[99] A suit may be dismissed if it is in substance an effort to retry matters already passed on in a previous action,[1] or if it is brought prematurely.[2] A conditional order of dismissal may be granted where an absolute dismissal would be inequitable.[3]

rily dismiss exists in a case referred to an auditor and taken to the supreme court on appeal, until the trial judge announces its decision carrying into effect the decision of the supreme court. People's Bank of Talbotton v. Exchange Bank of Macon, 119 Ga. 366, 46 S. E. 416.

86. The amendment of a complaint by striking the name of a defendant who has died since the commencement of the suit does not operate as a discontinuance of the cause. Crosthwait v. Pitts, 139 Ala. 421, 36 So. 83. An amendment to a declaration, a demurrer to which has been sustained, by substituting the name of deceased's widow for that of the administrator, in an action for wrongful death, does not work a discontinuance. Leman v. Baltimore & O. R. Co., 128 F. 191.

87. Baer v. McCullough, 176 N. Y. 97, 68 N. E. 129.

88. See 1 Curr. L. 939. Effect as bar to subsequent action, see Former Adjudication, 2 Curr. L. 60.

89. The court has no discretionary power to restore a cause to the docket on oral motion, without notice to the adverse party, and a removal of a cause, improperly restored, involves no review of an exercise of discretion by the judge presiding when such cause was restored. O'Dell v. Cowles, 76 Conn. 293, 56 A. 519.

90. Code Civ. Proc. §§ 1004, 1008. Miller v. Northern Pac. R. Co. [Mont.] 76 P. 691.

91. Bangs v. Sullivan [Tex. Civ. App.] 73 S. W. 74.

92. Bacon v. Abbey Press, 43 Misc. 345, 87 N. Y. S. 165.

93. Waldron v. Angleman [N. J. Law] 58 A. 568.

94. Waldron v. Angleman [N. J. Law] 58 A. 568. And this is still the rule in the absence of statute to the contrary, since a retraxit is in the nature of a judgment on the merits and can be entered only with the consent of the plaintiff in the action. Forest Coal Co. v. Doolittle, 54 W. Va. 210, 46 S. E. 238.

95. Retraxit, entered by attorney, set aside because party was incompetent when he executed it, by reason of intoxication. Waldron v. Angleman [N. J. Law] 58 A. 568.

96. See 1 Curr. L. 940.

97. Teller v. Sievers [Colo. App.] 77 P. 261.

98. Hanna v. De Garmo, 140 Cal. 172, 73 P. 830.

99. Action properly dismissed upon ground that it was "impertinent, vexatious and contemptuous," when litigation on the issue involved had been prohibited by the supreme court. Kirby v. Pease, 33 Wash. 511, 74 P. 665.

1. Campbell v. Sherley, 25 Ky. L. R. 904, 76 S. W. 540.

2. A suit to set aside a fraudulent conveyance, instituted by a creditor at large on a legal demand before the debt is due, may be dismissed, if an attachment has not been sued out on it; but such dismissal should not be on the merits. Frye v. Miley, 54 W. Va. 324, 46 S. E. 185.

3. Where a street railway company obtained a right to use streets on condition of using guard wires, and the borough failed to enforce the condition for some years, it

Failure to perform the conditions on which a voluntary dismissal was granted is ground for an involuntary dismissal.[4] It is said that a judgment of nonsuit was warranted at common law if plaintiffs did not appear, when called, when the jury returned to the bar of the court to deliver their verdict;[5] but absence of parties when the verdict is returned is not now cause for a nonsuit.[6] A nonsuit is proper when the contract sued on is within the statute of frauds and not in writing.[7]

Want of jurisdiction.—If the sustainable cause of action is for an amount less than that necessary to confer jurisdiction on the court,[8] or for a sum exceeding that as to which the court has jurisdiction,[9] the action should be dismissed. But where, on the face of the pleadings, the court has jurisdiction, the case need not be dismissed, though the evidence tends to show a want of jurisdiction.[10]

Want of service of summons may be ground for dismissal, if not waived by an appearance,[11] as may want of notice of reinstatement of a cause after nonsuit, unless notice is waived.[12] Dismissal is proper for failure to perform conditions on which permission was granted to amend the summons.[13]

Defect in pleadings; parties.[14]—A suit is not to be dismissed merely because it does not fall technically under some special, fixed form of action.[15] Ordinarily a motion to dismiss will not lie on the ground that the complaint does not state facts sufficient to constitute a cause of action,[16] but the contrary practice seems to obtain in some states.[17] Lack of service of petition on defendant,[18] default

was held that a bill to enjoin use of the streets, filed without demand on the company to put up guard wires, would be dismissed if the company put up wires within a reasonable time. Conshohocken Borough v. Conshohocken R. Co., 206 Pa. 75, 55 A. 855.

4. Dismissal for failure to pay costs or show inability to pay is not prevented by an offer to pay, or payment, after the plea in abatement has been duly filed in the second suit. Wright v. Jett [Ga.] 48 S. E. 345.

5. Rollins v. Atlantic City R. Co. [N. J. Err. & App.] 58 A. 344, citing Bauman v. Whiteley, 57 N. J. Law, 487, 31 A. 982.

6. Common law practice changed in 1862 in New Jersey. See § 160 of practice act of 1903. Rollins v. Atlantic City R. Co. [N. J. Err. & App.] 58 A. 344.

7. A motion for a nonsuit on the ground that the contract could not be sued on, not being in writing, and being one not to be performed within a year, should be granted. Greenfield v. Carey [N. J. Law] 57 A. 269.

8. Dismissal of cause was proper where penalty claimed was not recoverable and amount claimed as damages was not within jurisdiction of the court. St. Louis Southwestern R. Co. v. Hill [Tex.] 80 S. W. 368. Or where the demand is reduced, a demurrer being sustained. Western Union Tel. Co. v. Arnold [Tex. Civ. App.] 77 S. W. 249; Malin v. McCutcheon [Tex. Civ. App.] 76 S. W. 586. An action should be dismissed when on exception to the pleadings, the only cause of action is for a claim below the jurisdiction of the court. Western Union Tel. Co. v. Arnold [Tex.] 79 S. W. 8. An action for rent will be dismissed where the amount claimed is barred by the statute of limitations, except a sum insufficient to confer jurisdiction on the court. Roller v. Zundelowitz [Tex. Civ. App.] 73 S. W. 1070.

9. Cross action by defendant dismissed. Sullivan & Co. v. Owens [Tex. Civ. App.] 78 S. W. 373.

10. There being no plea that avermente of the petitions have been fraudulently introduced to confer jurisdiction. Bridge v. Carter [Tex. Civ. App.] 77 S. W. 245.

11. Where summons was never served and defendant did not appear until five years after commencement, action was properly dismissed under Code Civ. Proc. § 581, subd. 7. Swortfiguer v. White, 141 Cal. 576, 75 P. 172.

12. Where plaintiff suffered a nonsuit, and paid the costs and had the action reinstated, without notice to defendants, who appeared generally and moved to dismiss for want of notice, such appearance was held to waive notice, and it was not error to refuse to dismiss. Turk v. Shein [W. Va.] 47 S. E. 253.

13. Horowitz v. Decker, 88 N. Y. S. 217.

14. See 1 Curr. L. 940, 941.

15. If there is a legal right, there is a remedy. But a judgment of dismissal construed as a nonsuit and affirmed, owing to the defective condition of the record. Citizens' Bank v. Marr, 111 La. 601, 35 So. 780. A complaint which asks for equitable relief, but shows plaintiff entitled to a legal remedy, should not be dismissed, but the case should be placed on the jury calendar. Gilbert v. Bunnell, 92 App. Div. 284, 86 N. Y. S. 1123.

16. A demurrer or objection to the introduction of evidence is the proper procedure. Thomas v. Issenhuth [S. D.] 100 N. W. 436. An objection that a complaint does not state facts sufficient to constitute a cause of action is not available on a motion to dismiss. Pacific Pav. Co. v. Vizelich, 141 Cal. 4, 74 P. 352.

17. A complaint to compel executors to sell land and account is to be dismissed, if it fails to state a cause of action, even

of plaintiff to plead over,[19] failure to file petition in the time allowed by law,[20] refusal to comply with an order requiring a petition to be made more specific,[21] and a fatal variance between allegations and proof,[22] have been held grounds for dismissal. Where plaintiff fails to reply to counterclaims, defendant is not entitled to an absolute dismissal of the complaint, but is entitled to proper judgment on the pleadings.[23] A cause should not be dismissed for failure to reply within the time allowed plaintiff to prepare for the cause.[24]

A motion to dismiss for failure to join a party will not be granted where the statute provides another remedy.[25] A motion to dismiss on the ground of nonresidence of the plaintiff must be made immediately upon discovery of the fact of nonresidence.[26]

Failure of prosecution.[27]—Failure to appear without good cause is ground for dismissal of nonsuit,[28] and such dismissal may be on the merits.[29] Unreasonable neglect to prosecute is ground for dismissal,[30] unless the delay be shown to have been excusable,[31] or waived by the other party.[32] When proceedings in a lower court are not stayed on appeal, failure of plaintiff either to obtain a stay or

though defendants have asked for a construction of the will. Levett v. Polhemus, 84 N. Y. S. 1049. So long as a judgment overruling a demurrer remains unreversed, a motion to dismiss on the ground that the petition fails to state a cause of action will not be entertained. Georgia Northern R. Co. v. Hutchins, 119 Ga. 504, 46 S. E. 659.

18. Rowland v. Towns [Ga.] 47 S. E. 681.

19. Lasswell v. Kitt [N. M.] 70 P. 661.

20. The court refused to dismiss, where after a demurrer to a petition was sustained, the amended petition was filed before demand for judgment was made [Under Code § 3788]. Redhead v. Iowa Nat. Bank, 123 Iowa, 336, 98 N. W. 806. Under a statute (Code, § 3516), providing that defendant may have the action dismissed if the petition is not filed by the date fixed in the notice, it was held that where an unsigned petition was filed, the attorney's name being on the cover, but a properly signed petition was filed after motion to dismiss, defendant was not entitled to a dismissal. First Nat. Bank v. Stone, 122 Iowa, 668, 98 N. W. 362.

21. This is an act of contempt for which a dismissal is proper. But it was held that the court erred in ordering the petition to be made more specific. Howard v. Western Union Tel. Co., 25 Ky. L. R. 828, 76 S. W. 387

22. Where there is a fatal variance between the complaint and the proof offered and seasonably objected to, the complaint is properly dismissed, especially when plaintiff refuses to avail himself of an offer of the court to allow a juror to be withdrawn on terms. Reilly v. Vought, 87 N. Y. S. 492. Advantage should be taken of a fatal defect in a petition, after proof of the allegations therein, by motion to dismiss, not for a nonsuit. Evans v. Josephine Mills, 119 Ga. 448, 46 S. E. 674.

23. Hunter v. Fiss, 92 App. Div. 164, 86 N. Y. S. 1121.

24. Hornick v. Holtrup, 25 Ky. L. R. 1030, 76 S. W. 874.

25. Motion to dismiss for failure to join administrator. Rowe v. Cape Fear Lumber Co., 133 N. C. 433, 45 S. E. 830.

26. Too late when made after jury was sworn and opening statement for plaintiff made. Traders' Mut. Life Ins. Co. v. Humphrey, 207 Ill. 540, 69 N. E. 875.

27. See 1 Curr. L. 943.

28. Where plaintiff had notice to appear at a hearing before an auditor and notice of six adjournments, and failed to appear, but tried to get a revocation of the order for the hearing, he was properly nonsuited. Hunt v. Hill [Mass.] 71 N. E. 529. One claiming to be an heir failed to appear and present her claim in a proceeding to establish heirship. Nonsuit properly entered. In re Kasson's Estate, 141 Cal. 33, 74 P. 436.

29. Dismissal of counterclaim. Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co., 126 F. 562.

30. Code Civ. Proc. § 822 and general rules of practice, 36. Fisher Malting Co. v. Brown, 92 App. Div. 251, 87 N. Y. S. 37. Lack of diligence in prosecuting authorizes dismissal. Neff v. Neff, 32 Wash. 82, 72 P. 1011. Failure to prosecute replevin action held to work a discontinuance. Rogers v. U. S. Fidelity & Guarantee Co., 84 N. Y. S. 203. Dismissal for failure to prosecute was proper when plaintiff, whose case was first on the docket and set for trial first, was absent on the morning and afternoon of the day when case was called, and also next morning. Bond v. Corbin [S. C.] 47 S. E. 374.

31. Mere "inadvertence" in not sooner serving notice of trial is no excuse for delay of three years. McMann v. Brown, 92 App. Div. 249, 87 N. Y. S. 38. Affidavit that notice of trial has been served is insufficient to excuse delay of three years if such notice is admitted to have been after the motion to dismiss had been made. Fisher Malting Co. v. Brown, 92 App. Div. 251, 87 N. Y. S. 37. It was improper to dismiss for delay of two years and one month in serving summons when the delay was caused by negotiations for compromise and an endeavor to find property attachable, suit being on an unpaid judgment. Ferris v. Wood [Cal.] 77 P. 1037.

32. The attorneys agreed to an adjournment of a motion to dismiss. Stowe v. White, 84 N. Y. S. 166.

prosecute his action is ground for dismissal.[33] Failure to revive a suit abated by death of plaintiff is not ground for a motion to dismiss for want of prosecution,[34] but defendant may, on proper notice, obtain an order requiring suit to be revived within a fixed time, or be dismissed.[35]

No notice need be given of a motion to dismiss for failure to prosecute.[36] A counterclaim or cross bill is not abated by dismissal of plaintiff's action for failure to appear; but defendant may proceed to trial on such counterclaim or cross bill,[37] unless the allegations of his pleading are purely defensive in character, no affirmative relief being demanded.[38]

Nonsuit for failure of proof.[39]—Failure of proof is ground for a nonsuit[40] or dismissal,[41] but a nonsuit or dismissal on this ground is not upon the merits, and does not bar a new action,[42] if brought within the time allowed by law.[43] Failure to make a prima facie case warrants a nonsuit, but not a directed verdict for defendant.[44] The opening statement of counsel as to what the evidence is expected to prove is not an admission binding on the client so as to warrant a nonsuit,[45] in the absence of an agreement of counsel to the contrary.[46]

A motion for a nonsuit should be denied if there is any evidence to support plaintiff's cause of action,[47] or if plaintiff has made a prima facie case,[48] or

33. Amorisia v. Rando, 88 N. Y. S. 356.

34, 35. Dillard's Adm'r v. Central Virginia Iron Co., 125 F. 157.

36. Bond v. Corbin [S. C.] 47 S. E. 374.

37, 38. Stewart v. Gorham, 122 Iowa, 669, 98 N. W. 512.

39. See 1 Curr. L. 942.

40. In an action for damages for the erection of a nuisance, the defendant denied the erection, and there was no evidence to prove defendant had erected it. Held, nonsuit proper. Blackstock v. Southern R. Co. [Ga.] 47 S. E. 902. Plaintiff properly nonsuited when case as laid was not proved. Ritter v. Fagan, 119 Ga. 848, 47 S. E. 188. A motion for a nonsuit does not present the question whether or not a cause of action has been pleaded by plaintiff, but whether or not he has proved his case as laid. Box v. Atlantic & B. R. Co. [Ga.] 48 S. E. 427. Where plaintiff relied on the testimony of one witness, and the direct examination warranted an inference supporting plaintiff's claim, but the cross-examination showed such inference unwarranted, a nonsuit was properly granted. Evans v. Schofield's Sons Co. [Ga.] 48 S. E. 358. Where motion for nonsuit is on the ground that there was no evidence of lack of contributory negligence, and the court directs a verdict for defendant of "no cause of action," this is equivalent to a nonsuit for insufficiency of evidence, not for insufficiency of the complaint. Romaine v. New York, etc., R. Co., 91 App. Div. 1, 86 N. Y. S. 248.

41. Complaint should have been dismissed where evidence showed there could be no recovery. Grabenstein v. Metropolitan St. R. Co., 84 N. Y. S. 261.

42. Where a nonsuit is granted for failure of proof, the judgment should not record that dismissal was on the merits. Hackett v. Masterson, 88 App. Div. 73, 84 N. Y. S. 751. Where suit for specific performance was based on an oral contract coupled with possession and the proof showed a written contract, dismissal should be without prejudice to plaintiff's right to enforce the written contract. Levandowski v. Althouse [Mich.] 99 N. W. 786. Dismissal for failure of proof should be without prejudice, not upon the merits. Soltz v. Newmark, 84 N. Y. S. 283.

43. One year in North Carolina. Hood v. Western Union Tel. Co., 135 N. C. 622, 47 S. E. 607. A statute limiting the time in which a new action may be commenced after a nonsuit is a limitation statute applying to all cases in which a nonsuit has been sustained. Meekins v. Norfolk & S. R. Co., 131 N. C. 1, 42 S. E. 333.

44. Barnes v. Carter [Ga.] 48 S. E. 387.

45. Fillingham v. St. Louis Transit Co., 102 Mo. App. 573, 77 S. W. 314.

46. Where, by consent of counsel, plaintiff's attorney makes a full statement of facts expected to be proved, a motion to dismiss thereafter is equivalent to such motion at the close of plaintiff's case, and a dismissal is erroneous, unless the opening shows facts which preclude possibility of recovery, or the pleadings present no cause of action. Kennedy v. White, 91 App. Div. 475, 86 N. Y. S. 852.

47. Idaho Comstock Min. & Mill. Co. v. Lundstrum [Idaho] 74 P. 975. In personal injury action, nonsuit properly refused where evidence tended to sustain allegations of the complaint. Ball v. Gussenhoven [Mont.] 74 P. 871. If there is any evidence or inference fairly deducible therefrom, tending to establish a material allegation of the complaint, a motion for a nonsuit should be denied. North Pacific Lumber Co. v. Spore, 44 Or. 462, 75 P. 890. There was some evidence on which jury might have based a finding against defendant; hence a nonsuit was error. Jackson v. Georgia R. & Elec. Co. [Ga.] 48 S. E. 420. In an action for negligence, it was error to nonsuit plaintiff when there was some testimony tending to show negligence. Adams v. South Carolina & G. Extension R. Co. [S. C.] 47 S. E. 693. It is not error to refuse a nonsuit when there is any material evidence to go to the jury. Hughes v. School Dist. No. 37, 66 S. C. 259, 44 S. E. 784.

48. Kroetch v. Empire Mill Co. [Idaho]

proved his case as laid,[49] or produced evidence sufficient to entitle him to a verdict.[50] A nonsuit will not be granted if the evidence is such as to require a submission to the jury, as where there is a conflict,[51] or a question of credibility of witnesses arises.[52] The jury should be allowed to pass upon the facts testified to, even though such facts appear to be physically and scientifically impossible,[53] unless the conclusion follows as a matter of law that no recovery could be had in any view which could be reasonably taken of the evidence.[54] Within the meaning of this rule, the evidence must tend to prove the allegations of the complaint and not some theory inconsistent therewith.[55]

Refusal to nonsuit for failure of proof is not error if the defect is supplied by evidence taken in the progress of the cause.[56] Error, if any, in refusing to grant a nonsuit, is waived by proceeding with the trial and introducing evidence.[57]

Motion for nonsuit; effect.—The motion will not be entertained until the plaintiff has put in or offered all his evidence and rested.[58] It will not be heard after the opening statement by plaintiff's counsel,[59] unless by agreement of counsel.[60] Failure to make the motion either at the close of plaintiff's evidence or at the close of the whole case concedes that there is a question for the jury.[61]

74 P. 868. A plaintiff who has established a prima facie case cannot be nonsuited by the rebutting testimony of a single witness, though uncontradicted. Davis v. Seaboard Air Line R. Co., 134 N. C. 300, 46 S. E. 515.

49. Unless, by cross-examination or otherwise, he proves other defensive facts such as to preclude a recovery. Evans v. Josephine Mills, 119 Ga. 448, 46 S. E. 674. Evidence held to have made out plaintiff's case as laid so as to withstand a motion for nonsuit, though allegations of petition were vague and indefinite. Atlanta R. & Power Co. v. Johnson [Ga.] 48 S. E. 389.

50. Freese v. Hibernia Sav. & Loan Soc., 139 Cal. 392, 73 P. 172. A nonsuit will not be granted when there is any evidence upon which a jury can properly find a verdict for the party producing it, upon whom the burden of proof is imposed. Lamkin v. Johnson [N. H.] 56 A. 750. It is error to grant a nonsuit if the evidence in plaintiff's behalf, while not sufficient to require a verdict, is sufficient to support a verdict if rendered. Akridge v. Central of Georgia R. Co. [Ga.] 47 S. E. 904. Where plaintiff's evidence alone entitled him to judgment, a nonsuit was error. Robinson v. Leatherbee Tie & Lumber Co. [Ga.] 48 S. E. 380.

51. Though a case is tried by the court without a jury, a nonsuit cannot be granted if there is a conflict in the evidence sufficient to require submission to a jury, had it been a jury trial. Weisberger v. Martin, 86 N. Y. S. 115.

52. The question of credibility being for the jury, a nonsuit should not be ordered when it could only be done by disregarding plaintiff's testimony. Metting v. North Jersey St. R. Co., 69 N. J. Law, 605, 55 A. 35. The court may not pass upon a question of credibility or ignore the testimony of a witness in order to order a nonsuit. Kaufman v. Bush, 69 N. J. Law, 545, 55 A. 291.

53. Where plaintiff claimed an injury caused by a live wire and was nonsuited on the ground that the facts testified to were physically and scientifically impossible, the nonsuit was held error and a new trial granted, so that the jury could pass on the question. Walters v. Syracuse Rapid Transit R. Co., 178 N. Y. 50, 70 N. E. 98.

54. Shaw v. New Year Gold Mines Co. [Mont.] 77 P. 515. Where in suit to set aside a sale of realty, the undisputed evidence showed acts of one plaintiff which had been held on a former trial to constitute a ratification of the sale, a nonsuit was properly granted as to such plaintiff. Carey v. Moore, 119 Ga. 92, 45 S. E. 998.

55. Shaw v. New Year Gold Mines Co. [Mont.] 77 P. 515.

56. Esler v. Camden & Suburban R. Co. [N. J. Law] 58 A. 113. Where a nonsuit has been refused and defendant's evidence, with plaintiff's, makes a case for the jury, the refusal of nonsuit will not be reversed, even though plaintiff's evidence in chief alone would not warrant submission to the jury. Koon v. Southern R. Co. [S. C.] 48 S. E. 86.

57. City of Port Townsend v. Lewis, 34 Wash. 413, 75 P. 982. An exception to a refusal to nonsuit the plaintiff is waived when defendant proceeds with the trial of the case and puts in his evidence, if at the close of the whole case a question for the jury is presented. Bopp v. New York Elec. Vehicle Transp. Co., 177 N. Y. 33, 69 N. E. 122. An exception to a refusal to grant a nonsuit at the close of plaintiff's evidence is waived by defendant's introducing evidence. Jones v. Warren, 134 N. C. 390, 46 S. E. 740. Refusal to sustain a challenge to evidence and motion to dismiss waived. Kane v. Kane [Wash.] 77 P. 842.

58. Rauh v. Oliver [Idaho] 77 P. 20. A case cannot be dismissed before plaintiff has finished his case, merely because of failure to obtain an interpreter to whom defendant would consent. Menella v. Metropolitan St. R. Co., 43 Misc. 5, 86 N. Y. S. 930.

59. Fillingham v. St. Louis Transit Co., 102 Mo. App. 573, 77 S. W. 314.

60. Kennedy v. White, 91 App. Div. 475, 86 N. Y. S. 852.

61. Lagville v. Interurban St. R. Co., 85 N. Y. S. 1027; Rapp v. Hutchinson Stair Elevator Co., 87 N. Y. S. 459.

The question presented on a motion for a nonsuit is one of law.[62] The motion admits as true all plaintiff's evidence, and all reasonable inferences therefrom,[63] but denies that a consideration thereof authorizes the jury to find a verdict for plaintiff.[64]

Effect of dismissal or nonsuit.[65]—A judgment dismissing an action without prejudice is not a final determination of the rights of the parties.[66] But an order of dismissal terminates a proceeding,[67] and a court, at a subsequent term, has no jurisdiction over a judgment previously entered after an order of discontinuance.[68] When an order of nonsuit is made as to certain defendants, leaving others before the court, it is proper for the court in its final judgment, to include a judgment of nonsuit as to those defendants.[69] A dismissal as to one of two joint defendants in conversion does not affect the liability of the other defendant.[70] Applications to reinstate cases dismissed on motion of the adverse party are, even when made in due time, addressed to the sound discretion of the court.[71]

62. Nord v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 75 P. 681.

63. North Pacific Lumber Co. v. Spore, 44 Or. 462, 75 P. 890; McCabe v. Montana Cent. R. Co. [Mont.] 76 P. 701; Boles v. Caudle, 133 N. C. 528, 45 S. E. 835; Edwards v. Firemen's Ins. Co., 43 Misc. 354, 87 N. Y. S. 507. Rule applied on appeal. Pritchard v. Brooklyn Heights R. Co., 89 App. Div. 269, 85 N. Y. S. 898. On appeal from nonsuit, plaintiff is entitled to the assumption that he might have proved all the facts contained in his offer of proof. O'Connor v. Moody, 90 App. Div. 440, 86 N. Y. S. 214. On the question whether or not there should have been a nonsuit, the evidence must be considered in its most favorable aspect to plaintiff. Duffy v. St. Louis Transit Co. [Mo. App.] 78 S. W. 831. On motion to nonsuit or dismiss, which is like a demurrer to evidence, the court cannot weigh the evidence, but must accept it as true and construe it most favorably to plaintiff. Brittain v. Westhall, 135 N. C. 492, 47 S. E. 616. Evidence drawn out by cross-examination of plaintiff's witnesses, and a deposition read by plaintiff, though taken by defendant, is a part of the evidence, which, if uncontradicted, is to be taken as true on motion for nonsuit. McDonough v. Grand Trunk R. Co., 98 Me. 304, 56 A. 913.

64. North Pacific Lumber Co. v. Spore, 44 Or. 462, 75 P. 890. A motion for a nonsuit has the effect of a demurrer to so much of the testimony as is favorable to plaintiff, admitting its truth in fact in order to deny its sufficiency in law. Kaufman v. Bush, 69 N. J. Law, 645, 56 A. 291. Defendant's motion at close of case to dismiss complaint for failure to show facts sufficient to constitute a cause of action was held to raise the question of sufficiency of evidence to sustain an arbitrary finding of the court on the value of a horse, for injury to which suit was brought. Lee v. Callahan, 84 N. Y. S. 167.

65. See 1 Curr. L. 944, Effect, and Opening and Setting Aside.

NOTE. Judgment of nonsuit as res judicata: It was held in Cartin v. South Bound R. Co., 43 S. C. 221, 49 A. S. R. 829, that a nonsuit granted, not for failure of evidence, but on the merits, and because plaintiff has no cause of action, is res judicata and binding in a subsequent suit between the same parties, based upon the same cause of action. It is said in a note, commenting on this decision, in 49 A. S. R. 831: "It has long been a well-settled and inflexible rule that judgment of nonsuit is, in no case, a judgment on the merits. * * * With the single exception of the principal case [supra], it has always been uniformly held that a judgment of nonsuit, whether voluntary or involuntary, is not a bar to another action for the same cause and does not deprive or estop a plaintiff of his right to try the same case a second time." Many authorities are cited, among which are Gummer v. Trustees of Omro, 50 Wis. 252; Taylor v. Larkin, 12 Mo. 103, 49 Am. Dec. 119; Hendrick v. Clonts, 91 Ga. 196; Clapp v. Thomas, 5 Allen [Mass.] 158-160; Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121; Moreland v. Gardner, 109 Pa. 116; Fleming v. Hawley, 65 Cal. 492; People v. Vilas, 36 N. Y. 459, 93 Am. Dec. 520.

66. Hence, action may be maintained on replevin bond, notwithstanding such judgment. Verra v. Costantino, 84 N. Y. S. 222.

67. A proceeding for divorce is terminated by an order dismissing the petition, notwithstanding the fact that no reference is made in the order to defendant's cross petition for alimony. Nauman v. Nauman, 4 Ohio C. C. (N. S.) 298.

68. Decree setting aside judgment refused. Jarvis v. Martin [Conn.] 58 A. 15.

69. Hanna v. De Garmo, 140 Cal. 172, 73 P. 830. One of several defendants, in whose favor a nonsuit is held, on appeal, to have been properly granted, should ask to have judgment entered in his favor on that decision. Granite Bldg. Corp. v. Greene [R. I.] 57 A. 649.

70. Carper v. Risdon [Colo. App.] 76 P. 744.

71. Southern R. Co. v. Empire Printing & Box Co. [Ga.] 47 S. E. 642. Where there appeared to be negligence of plaintiff or his attorney, a motion for a new trial after entry of judgment of dismissal for want of prosecution was held properly overruled. Fant v. Jones [Tex. Civ. App.] 81 S. W. 338. Where a case was dismissed because plaintiff was not ready to proceed, and on hearing of a motion to open the default, plaintiff's attorney did not know when he could proceed, the motion to open the default was

Practice on appeal.—No appeal lies from a refusal to dismiss[72] or grant a nonsuit.[73] But an order of dismissal is a final order from which an appeal may be taken.[74] The record must show an exception to the ruling of the trial court,[75] but, in Montana, the ground on which error is claimed need not be specified.[76] On appeal, the court will not review facts stated in affidavits filed on motion to rescind an order dismissing a case for want of prosecution.[77] In considering a refusal of a motion to nonsuit, it is proper to refer to evidence given after the ruling.[78] A motion for a nonsuit is properly considered on appeal, and a decision for defendant is proper, though all the evidence is not brought up, when plaintiff's showing on his own bill of exceptions is such that he could not recover.[79]

DISCOVERY AND INSPECTION.

§ 1. Discovery in Equity (1106).
§ 2. Production and Inspection of Books and Papers or Survey of Property (1107). Proceedings (1107).
§ 3. Examination or Interrogation of Party Before Trial (1108). Interrogatories Propounded with Pleadings (1110).
§ 4. Physical Examination to Prepare for Trial (1111).

§ 1. *Discovery in equity.*[80]—A bill cannot be maintained for the sole purpose of a discovery,[81] nor to fish for information,[82] nor to have discovery from mere prospective witnesses;[83] and a bill for discovery and relief must show that the plaintiff has cause for relief.[84] It will lie to determine which of two parties is liable to complainant.[85] A bill for discovery cannot be maintained against a corporation without making a proper officer of it a party,[86] and a corporation cannot demur to a bill on the ground that it seeks disclosure from its officers, the disclosure being to enable complainants to know who to examine as witnesses.[87] The bill must allege that the facts sought to be discovered are material and indispensable to complainant as proof, and that he is unable to establish them by other proof.[88]

properly denied. Audit Co. v. McNaught, 87 N. Y. S. 542. Though plaintiff's attorney was negligent in permitting dismissal, plaintiff may have the default opened on payment of costs and defendant's taxable fees for witnesses. Simon v. Borden's Condensed Milk Co., 84 N. Y. S. 476.

72. Tennessee River Land & Timber Co. v. Butler, 134 N. C. 50, 45 S. E. 956; Meekins v. Norfolk & S. R. Co., 131 N. C. 1, 42 S. E. 333.

73. Plumb v. Maher [Conn.] 56 A. 494.

74. Dismissal where summons was not returned or filed within three years, defendant not having appeared [Under Code Civ. Proc. § 581, subd. 7]. Pacific Pav. Co. v. Vizelich, 141 Cal. 4, 74 P. 352.

75. Carter v. O'Neill, 102 Mo. App. 391, 76 S. W. 717. Entry of nonsuit will not be reviewed on appeal unless properly excepted to. In re Kasson's Estate, 141 Cal. 33, 74 P. 436. The ruling of the court on a motion for a nonsuit presents a question of law and will not be reviewed on appeal unless the record shows an exception properly reserved. Hanna v. De Garmo, 140 Cal. 172, 73 P. 830.

76. The bill of exceptions need only show a proper exception [Code Civ. Proc. § 1173 and court rules]. Nord v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 75 P. 681.

77. Bond v. Corbin [S. C.] 47 S. E. 374.

78. Fales & J. Mach. Co. v. Browning [S. C.] 46 S. E. 545.

79. Herring-Marvin Co. v. Smith, 43 Or. 315, 73 P. 340.

80. See 1 Curr. L. 930.

81. De Bevoise v. H. & W. Co. [N. J. Eq.] 58 A. 91.

82. Will not lie where the sole purpose is to ascertain the names of alleged owners of stock of a corporation against whom complainant desires to bring actions for the collection of an assessment, the bill showing that defendants, one of whom is responsible, are also liable for such assessment [Construing Rev. St. §§ 858, 742]. Brown v. McDonald, 130 F. 964.

83. Brown v. McDonald, 130 F. 964.

84. Munson v. German-American Fire Ins. Co. [W. Va.] 47 S. E. 160.

85. Where a consignee had no means of knowing whether a railway company or a compress company had possession of certain cotton shipped to him, each company claiming the other was liable. Mississippi Cotton Compress & Warehouse Co. v. Levy & Co. [Miss.] 36 So. 281.

86. Munson v. German-American Fire Ins. Co. [W. Va.] 47 S. E. 160.

87. The corporation not being prejudiced by answers of corporate officers until the parties verify their disclosures under oath when examined as witnesses. Gulf Red

§ 2. *Production and inspection of books and papers or survey of property. Nature of remedy and right thereto.*[89]—The statutory remedy for inspection is designed as a substitute for a bill of discovery.[90] In most states inspection is allowed before trial for the purpose of preparing for the same,[91] or at the trial to be used as evidence.[92] It is generally held that inspection cannot be had if the information desired is otherwise procurable,[93] though there are contrary decisions.[94] Applicant must show that he has no copies of the documents,[95] that they are in the possession of the adverse party,[96] and that they are presently needed.[97] It will not be allowed in order that he may discover the amount due him under a contract,[98] nor to aid him in proving a fact not alleged in his complaint.[99] A partner is entitled to an inspection and discovery of firm books.[1]

Proceedings.[2]—The moving papers must affirmatively show all facts necessary to the right, as the pendency of an action when that is essential,[3] that the papers are in the possession of the adverse party[4] and facts showing the necessity of inspection.[5] Defects in an affidavit may be cured by counter affidavit,[6] and defective notice of the application is cured by appearance.[7] In Delaware, the practice is to grant an order for the production of papers without the issuance of

Cedar Co. v. Crenshaw, 138 Ala. 134, 35 So. 50.

88. Pollak v. Claflin Co., 138 Ala. 644, 35 So. 645.

89. See 1 Curr. L. 931.

90. Swedish-American Tel. Co. v. Fidelity & Casualty Co., 208 Ill. 562, 70 N. E. 768.

91. Hurd's Rev. St. 1901, c. 51, § 9. Where amount of premium to be paid on an indemnity policy rests upon the compensation paid by the assured to his employes, and the policy stipulated for an examination of the assured's books, held such an examination would be allowed and the books ordered produced where necessary to the insurer in preparing for trial. Swedish-American Telephone Co. v. Fidelity & Casualty Co., 208 Ill. 562, 70 N. E. 768. In **Minnesota** under Gen. St. 1894, § 5750, after the complaint and summons have been served. Harris v. Richardson [Minn.] 100 N. W. 92.

92. Hurd's Rev. St. 1901, c. 51, § 9. Swedish-American Tel. Co. v. Fidelity & Casualty Co., 208 Ill. 562, 70 N. E. 768. See, also, Evidence, 1 Curr. L. 1136.

93. Adverse party offered to allow the necessary examination upon certain reasonable conditions. Sutter v. New York, 89 App. Div. 494, 85 N. Y. S. 989. Adverse party gave full statement of account whose truthfulness was not denied. Fidelity & Casualty Co. v. Wendell & Evans Co., 87 N. Y. S. 477. Subpoena duces tecum, effective. Preston Nat. Bank v. Rohnert [Mich.] 100 N. W. 393.

94. State v. District Court of Silver Bow County [Mont.] 76 P. 206.

95. Application for a survey under Code Civ. Proc. § 1682. Sutter v. New York, 89 App. Div. 494, 35 N. Y. S. 989. Where in an action for an unlawful discharge the answer set up that a new contract had been entered into, held an inspection was improperly denied. Moore v. Encyclopaedia Britannica Co., 48 Misc. 618, 88 N. Y. S. 133.

96. Netter v. Stoeckle [Del. Super.] 56 A. 604.

The defendant being a partnership, the fact that one of the partners is an officer of a corporation does not render the corporation liable to an order forcing it to produce its books in the action. Ridgely v. Richard, 130 F. 387.

97. That he may subsequently need the information or the evidence in order to sustain his complaint upon trial is no ground for such an order. Dannenberg v. Heller, 88 App. Div. 548, 85 N. Y. S. 90. See 1 Curr. L. 932, n. 56.

98. Martin v. New Trinidad Lake Asphalt Co., 87 App. Div. 472, 84 N. Y. S. 711.

99. The complaint failing to allege the falsity of certain statements relied on to plaintiff's injury, held production of books, etc., would not be ordered in order to prove the falsity of such statements. Ridgely v. Richard, 130 F. 387.

1. Applied where the partners had entered into an agreement whereby the partnership was dissolved but the partner suing alleged such agreement to be void for fraud. Cohn v. Hessel, 88 N. Y. S. 1057.

In **New York,** the proceeding for the discovery of papers (Code Civ. Proc. §§ 803-809) is entirely distinct from that relating to the taking of depositions under § 870 et seq. and cannot be united under one order. Hart v. American Cotton Co., 84 N. Y. S. 1065.

2. See 1 Curr. L. 934.

3. Construing Code Civ. Proc. § 1810. State v. District Court of Second Judicial District [Mont.] 74 P. 1078. See. also, remarks of court in State v. District Court, 27 Mont. 441, 71 P. 602. See 1 Curr. L. 933, n. 59.

4. Ridgely v. Richard, 130 F. 387.

An affidavit that they were in his possession at a past date is insufficient. Netter v. Stoeckle [Del. Super.] 56 A. 604.

5. Averment of conclusion insufficient [Code Civ. Proc. § 1810]. State v. District Court Second Judicial Dist. [Mont.] 74 P. 1078.

6. As where the affidavit was upon information and belief and the counter affidavit failed to controvert any of the statements contained therein. State v. District Court of Silver Bow County [Mont.] 76 P. 206.

7. State v. District Court of Silver Bow County [Mont.] 76 P. 206.

a rule, any excuses for their nonproduction being made at the return of the order.[8] The order should not extend further than the necessities of the case require,[9] and should not afford an opportunity to acquire knowledge which might be used for improper purposes,[10] or interfere with the transaction of current business,[11] or authorize an unreasonable search or seizure,[12] though the protection this constitutional provision affords may be waived;[13] and in Montana must fix the time when the inspection shall begin and the time when it shall be completed.[14] Refusal to obey such order may be punished as for contempt,[15] but where the document is lost, the presumptions relating to spoliation cannot be applied.[16]

The trial court may, in its discretion, permit a party to produce, in lieu of the original document, a duly certified copy of a duplicate thereof required by law to be kept in a public office.[17] On application for the discovery of a deed, its production being ordered it should be placed in the custody of the county clerk with permission to the plaintiff to inspect it, and, if he desires, to have it photographed.[18] An amendment not changing the issues does not abate an order for inspection.[19] An order granting or refusing an order for inspection is not appealable.[20]

§ 3. *Examination or interrogation of party before trial.*[21]—The examination of a party before trial is discretionary, to be determined upon the peculiar circumstances of each case,[22] but this examination as provided for in the statutes of

8. Netter v. Stoeckle [Del. Super.] 56 A. 604.

9. An order allowing the inspection of original letters should not include letter-press copies, nor should it include private correspondence not absolutely necessary. State v. District Court of Silver Bow County [Mont.] 76 P. 206.

10. Defendant objecting to paying the charges of an accountant selected by the court in order to prevent plaintiff's acquirement of knowledge of the business for ulterior purposes, that portion of the order should be stricken out. Cohn v. Hessel, 88 N. Y. S. 1057.

11. If the owner desires, the inspection of current books should be made at his place of business and without their removal. Cohn v. Hessel, 88 N. Y. S. 1057.

12. Fourth amendment. An order issued under Hurd's Rev. St. 1901, c. 51, § 9, does not violate this provision. Swedish-American Tel. Co. v. Fidelity & Casualty Co., 208 Ill. 562, 70 N. E. 768.

13. Held that the assured in an indemnity policy stipulating that the insurer should have the right to examine the books of the assured so far as they relate to compensation paid the assured's employes becomes thereby estopped to assert that such an order violates the constitution. Swedish-American Tel. Co. v. Fidelity & Casualty Co., 208 Ill. 562, 70 N. E. 768.

14. State v. District Court of Silver Bow County [Mont.] 76 P. 206. See 1 Curr. L. 935, n. 84.

15. Under Hurd's Rev. St. 1901, c. 51, § 9, giving the court power to compel the production of books containing pertinent evidence. Swedish-American Tel. Co. v. Fidelity & Casualty Co., 208 Ill. 562, 70 N. E. 768.

16. Defendant being unable to produce a document as ordered by the court, it being lost and denying the terms to be as alleged by plaintiff, the court cannot assume the document to be as plaintiff alleges it to be, but the plaintiff must affirmatively establish the existence of the contract, its terms and conditions. Romero v. New Iberia Milling & Development Co. [La.] 36 So. 907.

17. Branan v. Nashville, etc., Ry. Co., 119 Ga. 733, 46 S. E. 882.

18. Defendant should not be required to produce the same for inspection at a photographer's studio. Beck v. Bohm, 88 N. Y. S. 584.

19. State v. District Court of Silver Bow County [Mont.] 76 P. 206.

20. Harris v. Richardson [Minn.] 100 N. W. 92.

21. See 1 Curr. L. 931.

22. Wagner v. Haight & Freese Co., 89 N. Y. S. 323.

NOTE. Granting of order as a matter of right: (New York Rule). If an action is pending, the Code says that the judge to whom the affidavit prescribed by the Code is presented "must" grant an order for the examination. Code Civ. Proc. § 873. If the language of the Code is to be taken literally, the right to an examination before trial would be almost a matter of course, both as to natural persons and corporations. Blocker v. Guild, 15 Daly [N. Y.] 348, 7 N. Y. S. 651. Notwithstanding this plain language, the rule is that the Code provision is not absolutely mandatory and not intended to deprive the judge of all discretion. He may refuse the order if from the nature of the action and the other facts disclosed, he can see that the examination is not necessary for the party seeking it. Jenkins v. Putman, 105 N. Y. 272. In other words, the discretion of the court will be exercised in determining whether there is some good reason for directing the examination to be had before the trial rather than at the trial. Williams v. Foster, 22 State Rep. 507, 5 N. Y. S. 211; Waters v. Shayne, 57 Hun, 587, 32 State Rep. 435, 10 N. Y. S. 772. Cases holding that the granting of the order, where a proper affidavit is sub-

New York cannot be required by a Federal circuit court sitting in that state.[23] The evidence desired must be necessary and such as will prove material on the trial,[24] the party sought to be examined having peculiar knowledge of the facts;[25] and the moving papers must show these facts,[26] and that it is either important or necessary that the examination take place before rather than at the trial.[27] One cannot be examined for the purpose of enabling a plaintiff to frame a complaint in an action not yet commenced,[28] nor to discover what his opponent's testimony will be in order that he may be prepared to contradict it.[29] Only so many of the

mitted, is a matter of right (Watts v. Wilcox, 43 State Rep. 417, 17 N. Y. S. 647; Webster v. Stockwell, 3 Abb. N. C. 115; Sweeney v. Sturgis, 24 Hun, 162), go too far as the rule is undoubtedly as stated above (See 5 Abb. Cyc. Dig. 271, 272, for collection of authorities). "If no action is pending," the judge must grant it if there is reasonable ground to believe that an action will be brought, as stated in the affidavit, and that the application is made in good faith to preserve the expected testimony (Code Civ. Proc. § 873). From Vol. II, Nichols' New York Prac., § 1377, p. 1778.

23. Hanks Dental Ass'n v. International Tooth Crown Co., 194 U. S. 303, 48 Law. Ed. 989.

24. Plaintiff having no need for further information or if needed it is obtainable without an examination, one will not be ordered. Tanenbaum v. Lippmann, 89 App. Div. 17, 85 N. Y. S. 122. One seeking to rescind a purchase of stock because of alleged false representations of the corporation's officers as to its financial condition, is not entitled to examine before trial officers who became such after purchase. Hart v. American Cotton Co., 84 N. Y. S. 1065. Where plaintiff sued for salary based on sales made in a certain territory whether by plaintiff or not, defendant being the sole surviving partner of the employing firm held an examination of him as a witness before trial proper. Gee v. Pendas, 87 App. Div. 157, 13 Ann Cas. 448, 84 N. Y. S. 32. In an action for deceit against the president of a corporation for fraudulently misrepresenting the value of stock the defendant may be examined before trial on the question of overcapitalization, the corporation not being a party to the action. McDonald v. Morse, 96 App. Div. 406, 89 N. Y. S. 176. In an action against a stock broker to recover money deposited on margins, fraud being alleged, held plaintiff was entitled to examine defendant before trial as to the prices at which stocks were bought and sold, and as to who were the buyers and sellers, and to have defendant's books produced to refresh the latter's memory. Wagner v. Haight & Freese Co., 89 N. Y. S. 323. Where a syndicate was formed profits to be divided according to liabilities assumed, the matters being placed in charge of two general managers, held an examination of the managers as to indirect profits made by them from sales proper before the trial of an action against them for an accounting. Weidenfeld v. Hollins, 84 N. Y. S. 1084. Motion for reargument dismissed (Weidenfeld v. Hollins, 85 N. Y. S. 217), holding that the answer did not introduce a new cause of action in favor of the answering defendant against the participating defendants so that such defendant might examine his co-defendants before trial.

NOTE. Necessity: (New York Rule) The rule is reiterated time after time, that necessity must be shown before an order will be granted for the examination of an adverse party after trial. In order to elucidate, necessity will be considered as to degree and the purpose for which the necessity must exist. As to degree, it is not indispensable that the examination be absolutely necessary. Schepmoes v. Bausson, 1 Abb. N. C. 481, 52 How. Pr. [N. Y.] 401. If the information can be obtained by other means but only after an expenditure of much money and time, it would seem that an examination will not ordinarily be refused. But if the applicant can easily acquire knowledge of the facts sought by following up the information on which his application is based, the order should be denied (Tanenbaum v. Lindheim, 54 App. Div. 188, 66 N. Y. S. 375), as well as where, from the nature of the controversy, it is apparent that the facts of the case are probably within the knowledge of the moving party (Leary v. O'Brien, 33 Misc. 499, 68 N. Y. S. 908). In other words the applicant must exhaust the "ordinary" avenues of information. Nathan v. Whitehill, 67 Hun, 398, 22 N. Y. S. 63; Sherman v. Beacon Const. Co., 58 Hun, 143, 33 State Rep. 881, 11 N. Y. S. 369. In the second place, the question arises, "necessity for what?" As a general rule, the courts hold that the necessity must relate to the framing of pleadings for use on the trial and not relate to "preparation" for trial. Shepmoes v. Bowsson, 52 How. Pr. 401, 1 Abb. N. C. 481; Dudley v. New York Filter Mfg. Co., 80 App. Div. 164, 80 N. Y. S. 529. From Vol. II Nichols' New York Prac., § 1378, p. 1779.

25. As to value of defendant's property at stated periods. Tanenbaum v. Lippmann, 89 App. Div. 17, 85 N. Y. S. 122. In an action by a principal against an agent to recover insurance moneys received by the agents for the destruction of goods while in their control, an examination of one of the agents before trial as to the manner of shipping and the companies paying insurance held proper. Garia Bro. & Co. v. Salomon, 84 N. Y. S. 508.

26. Affidavit. Hart v. American Cotton Co., 84 N. Y. S. 1065. See 1 Curr. L. 934, n. 76; also 1 Curr. L. 936, n. 77, 78.

27. Richardson & Boynton Co. v. Schiff, 93 App. Div. 368, 87 N. Y. S. 672.

28. Under Code Civ. Proc. §§ 870, 872, 876, one contemplating bringing an action on a contract is not entitled to examine the one with whom he contracted for the purpose of ascertaining who were the principals for whom the other acted in making the contract. Ellett v. Young, 88 N. Y. S. 661.

29. To enforce a mechanic's lien, information was easily obtainable elsewhere. Knight v. Morgenroth, 93 App. Div. 424, 87 N. Y. S. 693.

parties as are absolutely required in order that plaintiff may obtain the required information will be examined.[30] That defendant stated that he intended to be present at the trial will not defeat the application for such examination.[31] When necessary for the purpose of refreshing the recollection of the persons to be examined, the adverse party is entitled to have the former's books produced,[32] but such production should only be required in connection with the examination of a witness who is able to testify from them,[33] and this provision requiring one to produce his books in order to refresh his memory cannot be contained in the order requiring defendant to submit to examination.[34] The affidavit should be made by the party unless impracticable.[35] In New York, the order must be personally served within the state on the party to the action.[36] A party by being sworn and submitting to examination waives his right to move to vacate the order for the examination,[37] and in New York an order to vacate such an order is erroneously granted where it does not appear from the record that any defect or irregularity in the moving papers was pointed out.[38]

Interrogatories propounded with pleadings.[39]—In some states either party to a civil action may propound interrogatories, to be filed with the pleadings, relevant to the matter in controversy, and require the opposite party to answer the same under oath;[40] they may be proposed with a purpose to use the answers on the trial of the matter in controversy to which they relate, or to elicit answers on which to strike out the pleading of an opposite party as shown;[41] they may be filed at any time before the issues in the case are closed,[42] and may be propounded when the matter in controversy is presented by an answer in abatement,[43] and the defendant in the action by moving to strike out those interrogatories relating to the matters presented by the answer in abatement does not change his appearance from special to general.[44] Plaintiff cannot compel defendant to answer interrogatories asked to discover the latter's line of defense,[45] nor has defendant any right to inject into his answer self-serving, nonresponsive statements.[46] The order of the court directing interrogatories to be taken for confessed is not a judgment,[47] nor is a motion to have that order set aside an application for a new trial.[48] The court may in its discretion rescind, during trial, its order taking interrogatories for confessed.[49] Answers to interrogatories, being taken for confessed, are merely

30, 31. Tanenbaum v. Lippmann, 89 App. Div. 17, 85 N. Y. S. 122.

32. Held proper where the testimony concerned purchases and sales of stocks. Wagner v. Haight & Freese Co., 89 N. Y. S. 323; Hart v. American Cotton Co., 84 N. Y. S. 1065.

33. Book of a corporation should not be ordered produced where the witness became an officer after the transaction in question occurred [construing Code Civ. Proc. § 872, subd. 7]. Hart v. American Cotton Co., 84 N. Y. S. 1065.

34. The order will be modified. The proper course is a subpoena duces tecum if on examination the defendant is unable to testify from his memory. Gee v. Pendas, 87 App. Div. 157, 13 Ann. Cas. 448, 84 N. Y. S. 32. See 1 Curr. L. 934, n. 71.

35. Where defendant was in a foreign country, a positive affidavit by his attorney, the latter having actual knowledge and setting forth the sources and grounds of his belief and information held sufficient. Treadwell v. Greene, 87 App. Div. 425, 84 N. Y. S. 557.

36. Substituted service on his attorney is unauthorized [Construing Code Civ. Proc. §§ 870, 872, 874, 875]. Hall v. Redington, 84 N. Y. S. 279.

37. Schoenberg & Co. v. Loftus, 85 N. Y. S. 1117.

38. Gen. Rule of Prac. No. 37. Schoenberg & Co. v. Loftus, 85 N. Y. S. 1117.

39. See 1 Curr. L. 933, n. 64.

40. Burns' Rev. St. 1901, § 362. Paul v. Baltimore & O. R. Co. [Ind. App.] 69 N. E. 1024.

41, 42, 43, 44. See Paul v. Baltimore & O. R. Co. [Ind. App.] 69 N. E. 1024.

45. An employe of a railroad in an action for personal injuries cannot compel it to answer interrogatories disclosing confidential communications from its agent reporting or in regard to the accident. Cully v. Northern Pac. R. Co. [Wash.] 77 P. 202.

46. Garrison v. Glass, 139 Ala. 512, 36 So. 725.

47. Cusachs v. Dugue [La.] 36 So. 960.

48. Being refused it does not give to the order the force and effect of res judicata. Cusachs v. Dugue [La.] 36 So. 960.

49. May so do where the interrogatories were not answered through unintentional inadvertence, and the parties to whom they were propounded on the trial took the stand,

testimony to aid plaintiff in his attack, and their effect is held in abeyance until final judgment.[50] The taking of interrogatories for confessed does not preclude the party to whom they were propounded from taking the stand in his own behalf on the trial,[51] and when he does so voluntarily it does away with any presumed confession.[52] Defendant refusing to answer interrogatories believing in good faith that he is entitled to witness fees for so doing, which fees are not tendered, such refusal is not willful or contumacious.[53]

§ 4. *Physical examination to prepare for trial.*[54]—Some courts will compel plaintiff in an action for personal injuries to submit to an examination by physicians and allow the use of drugs in making the same, provided, however, that such examination does not produce serious discomfort or any deleterious consequence.[55] Other courts deny wholly the power to compel a physical examination.[56] Examination at the trial is elsewhere treated.[57]

DISORDERLY CONDUCT.

A common prostitute or street walker is guilty of disorderly conduct under the New York statute;[58] but to authorize commitment to an institution for misdemeanants, the charge must be of disorderly conduct.[59]

A New York statute makes it disorderly conduct to annoy another in a public place. The statute has been held valid,[60] and any public place is within its terms.[61] A licensed private detective is guilty of disorderly conduct in annoying a person in a public place,[62] and is guilty of such annoyance if he constantly follows such person and points him out to others;[63] but a detective following a person who is unconscious of the fact is not guilty.[64]

The Washington statute punishing conniving at prostitution or living from the earnings of a prostitute is constitutional.[65]

DISORDERLY HOUSES.

It is not an essential element of the offense of keeping a bawdy house that the public be disturbed.[66] One harboring prostitutes with the knowledge that they are plying their trade on the premises is guilty of keeping a house of ill fame.[67]

as witnesses, voluntarily. Cusachs v. Dugue [La.] 36 So. 960.

50. Action en declaration de simulation to defeat a written act of sale of real estate. Cusachs v. Dugue [La.] 36 So. 960.

51, 52. Cusachs v. Dugue [La.] 36 So. 960.

53. Donaldson v. Dobbs [Tex. Civ. App.] 80 S. W. 1084.

54. See 1 Curr. L. 936.

55. Allowed an examination of the eyes and the use of drugs to dilate the pupils. Atchison, etc., R. Co. v. Palmore [Kan.] 75 P. 509. See 1 Curr. L. 936, n. 89-94, for review of authorities pro and con.

56. City of Kingfisher v. Altizer, 13 Okl. 121, 74 P. 107; Austin & N. W. R. Co. v. Cluck [Tex.] 77 S. W. 403; St. Louis & S. W. R. Co. v. Lindsey [Tex. Civ. App.] 81 S. W. 87.

57. See Damages, 3 Curr. L. 997.

58. Laws 1882, p. 366, c. 410, is still in force. People v. Warden of City Prison, 44 Misc. 149, 89 N. Y. S. 830.

59. Conviction held not to be for disorderly conduct but for being a public prostitute. People v. Keeper of New York State Reformatory, 176 N. Y. 465, 68 N. E. 884.

60. People v. St. Clair, 90 App. Div. 239, 86 N. Y. S. 77.

61. The words "any other public place" are not restricted by the rule of ejusdem generis to places similar to railroad cars and others enumerated [Pen. Code, § 675]. People v. St. Clair, 90 App. Div. 239, 86 N. Y. S. 77.

62, 63. People v. St. Clair, 90 App. Div. 239, 86 N. Y. S. 77.

64. People v. Weiler [N. Y.] 71 N. E. 462.

65. The subject is expressed in the title and the act does not deny equal protection of the laws or abridge the privileges and immunities of citizens. State v. Graham, 34 Wash. 81, 74 P. 1058.

66. Walker v. Commonwealth, 25 Ky. L. R. 1729, 79 S. W. 191. See 1 Curr. L. 945, n. 14.

67. State v. Wilson [Iowa] 99 N. W. 1060. A house resorted to "for the purpose of prostitution and lewdness" is a house visited by persons of both sexes for the purpose of having sexual intercourse, or some other lewd purpose. Id.

The character of a disorderly house does not depend on the number of prostitutes inhabiting or visiting the same.[68] A husband and wife are equally guilty in keeping a house of ill fame in property used, occupied, and controlled by them both.[69] One who owns or controls a house, leasing it to another for the purpose of keeping a lewd house, or who knowingly allows it to be so used is indictable for maintaining and keeping a lewd house.[70] An indictment charging the keeping of a house of ill fame may be in the language of the statute,[71] but one charging the keeping of a disorderly house should specify what the disorder consisted in.[72] The guilt of defendant may be established by proof of the facts and circumstances from which the inference of guilt is so strong as to exclude a reasonable doubt.[73] Evidence of the general reputation of a house may be shown in order to establish its character.[74] Knowledge of the character of persons kept may be inferred from the fact that they are generally known and referred to as prostitutes.[75] That defendant was requested to move may be shown on the question of knowledge.[76] Facts which render the keeping of the particular house a graver offense than the ordinary commission of the crime may be shown.[77]

DISTURBANCE OF PUBLIC ASSEMBLAGES.

It is not necessary that every person in the assembly be disturbed.[78] Harmless error in instructions will not be ground for reversal.[79]

DITCH AND CANAL RIGHTS.*

[SPECIAL ARTICLE BY HASCAL R. BRILL, JR.]

§ 1. Acquisition of Right of Way (1112).
§ 2. Irrigation Companies (1114).
§ 3. Right of Way Over Public Lands (1114).
§ 4. Irrigation as a Public Use, and the Right of Eminent Domain (1115). Limitations on Right to Condemn (1116). Enlargement of Ditch Already Constructed (1116). Procedure to Condemn (1117). Objections and Defenses (1118). Assessment and Payment of Damages (1119).
§ 5. Easement or Title Vested in Ditch Owner (1119).
§ 6. Property in Ditches and Canals and Actionable Rights of Owner (1120). Co-ownership of Ditches and Water Rights (1122). Abandonment of Ditch Without Abandonment of Water Right (1123). Formalities of Conveyance (1123).
§ 7. Legislative Control (1124).
§ 8. Duty Respecting Ditches and Liability for Damages (1124). The Doctrine of Contributory Negligence (1126).
§ 9. Bridging Ditches Crossing Highways and Streets (1126).

§ 1. *Acquisition of right of way.*—The right to appropriate water for irri-

68. Bates v. State [Tex. Cr. App.] 76 S. W. 462.

69. The ordinary rule of coercion does not apply. State v. Jones, 53 W. Va. 613, 45 S. E. 916.

70. Kessler v. State, 119 Ga. 301, 46 S. E. 408. In proving ownership, deeds, tax records, and the fact that gas bills were charged to defendant, are admissible. Frazier v. State [Tex. Cr. App.] 81 S. W. 532. Under White's Ann. Pen. Code 1901, art. 361, prescribing the punishment of a tenant keeping a disorderly house on leased premises, to constitute tenancy such keeper must have a right of tenancy by virtue of a contract with the owner or landlord, a mere trespasser cannot be convicted. Bates v. State [Tex. Cr. App.] 76 S. W. 462.

71. State v. Jones, 53 W. Va. 613, 46 S. E. 916.

72. State v. Foster, 112 La. 746, 36 So. 670.

73. Though there is direct evidence as to only one act of prostitution. State v. Steen [Iowa] 101 N. W. 96.

74. Such evidence is sufficient to justify a jury in convicting in a doubtful case. State v. Steen [Iowa] 101 N. W. 96. Code, § 4944, allowing the introduction of such evidence is not thereby rendered unconstitutional. State v. Wilson [Iowa] 99 N. W. 1060. In a prosecution for keeping a disorderly house during a certain month, evidence of the reputation of the house for two or three years prior to said month, during all of which time

*The monograph here presented is related solely to irrigation ditches and canals. It has no application to sewers and drains, nor to the law of water rights or of water supply apart from the ditch or canal. [See Sewers and Drains, 2 Curr. L. 1628; Waters and Water Supply, 2 Curr. L. 2034.]

The valuable treatise of Mr. Joseph R. Long on Irrigation has been freely consulted and to some extent quoted in this article and to that author due acknowledgment is made.

gation purposes would be of little value, except to the owners of land lying adjacent to the stream from which the water is to be taken, unless accompanied with authority to secure a right of way over the lands of others for the construction of ditches or other works for the conveyance of the water to the place of intended use. A right of way over private lands may, of course, be obtained by contract.[1] It may also be acquired by implied grant[2] or prescription.[3] One who seeks to acquire an easement of maintaining a ditch over another's land by adverse user must maintain it, without material change of location, for the full statutory period.[4] The open and visible use thereof for six years is notice of the easement to a grantee of the servient tenement.[5] The owner of the easement is not pre-

it was occupied by defendant, is admissible. Frazier v. State [Tex. Cr. App.] 81 S. W. 532.

75. State v. Steen [Iowa] 101 N. W. 96.

76. Evidence that citizens had so petitioned defendant, and that she had continued her business as before, is competent on the question of defendant's knowledge that she was violating the law. Walker v. Commonwealth, 25 Ky. L. R. 1729, 79 S. W. 191.

77. That it was located near two public schools and a sanitarium is admissible. Walker v. Commonwealth, 25 Ky. L. R. 1729, 79 S. W. 191. Evidence that defendant took her prostitutes out walking and driving with her is competent. Id.

78. Disturbance of a considerable portion by noise that could be heard by all is sufficient. Clark v. State [Tex. Civ. App.] 78 S. W. 1078.

79. Instructions as to disturbance in or out of the building when the evidence showed that the disturbance was from within; and erroneous instructions as to imprisonment when the jury imposed only a fine, held harmless. Clark v. State [Tex. Civ. App.] 78 S. W. 1078.

1. Quinlan v. Noble, 75 Cal. 250, 17 P. 69. Under deed partioning land on creek between plaintiff's and defendant's grantors, providing that all water rights and rights to use irrigation ditches should forever remain in and inure to the benefit of the owners of the land, held that defendant had the right to maintain the ditches and certain tanks for watering stock as they existed when the partition was made. Stratton v. West [Tex. Civ. App.] 66 S. W. 244. Deed of right of way for ditch held to show intention of grantor to reserve right to use water of stream tapped by it to extent to which it usually entered his ditch during the mining season. Browning v. Lewis [Or.] 64 P. 304. Agreement held binding contract for conveyance of right of way to defendant and to entitle him to a conveyance thereof on payment of the balance of the purchase price. Roberts v. White River Water Power Co. [Wash.] 70 P. 1104. Where a license to construct a ditch is given on consideration that it shall be used jointly by the licensor and licensee, the licensee's rights can only be lost by abandonment. Patterson v. Mills [Cal.] 68 P. 1034. The construction of a ditch by one over another's land, in accordance with a parol agreement that the latter will give the right of way if the former will construct the ditch which is to be used by both, gives the former a vested right of way by purchase over the latter's land, which will be protected by injunction. Flickinger v. Shaw, 87 Cal. 126, 11 L. R. A. 134. Where plaintiffs enlarged an irrigation ditch under a verbal agreement with the owners that they were to have an interest in the water, and reduced their land to cultivation, the owners may not thereafter revoke the agreement. McPhee v. Melsey, 44 Or. 193, 74 P. 401. An oral contract giving one a right to construct a ditch over the land of another is not within the statute of frauds. Croke v. American Bank [Colo. App.] 70 P. 229.

2. Where ditch is constructed across one of two adjoining tracts owned by the same person for purpose of irrigating the other, and the owner subsequently conveys the two to different persons, they take the tracts, one subject to and the other entitled to such easement. Quinlan v. Noble, 75 Cal. 350, 17 P. 69. A mortgage and subsequent foreclosure on property which has been irrigated by water from a canal running through it and other tracts occupied by the mortgagor operates to create in the mortgagee an easement to the use of the canal and water to the same extent and in the same manner as it was used in connection with the land when the mortgage was made. Cal. Civ. Code, § 1104. The fact that the mortgagor did not acquire title to the other tracts until after the mortgage was given is immaterial. Pendola v. Ramm [Cal.] 71 P. 624.

3. Where the owner of land has conducted water for the irrigation thereof over the land of another for more than ten years, with the acquiescence of the owner of the servient estate, he acquires an easement therein by prescription, although the original grant of such easement may have been by parol. Coventon v. Seufert, 23 Or. 548, 32 P. 608. See, also, Miller v. Douglas [Ariz.] 60 P. 722. An irrevocable right to an easement for a water ditch cannot be acquired by a mere permissive use, not amounting to adverse user. Yeager v. Woodruff, 17 Utah, 361, 53 P. 1045.

4. That plaintiffs have had ditch somewhere on the land for ten years does not give them a right to maintain it in a new location or to use an extension thereof made within that period. Dunn v. Thomas [Neb.] 96 N. W. 142.

5. Croke v. American Nat. Bank [Colo. App.] 70 P. 229. Evidence sufficient to put defendant on notice of plaintiff's rights to an easement to maintain ditch over land purchased by defendant. McDougal v. Lame [Or.] 64 P. 864.

cluded by recitals and covenants in the deed, to which he was not a party, from showing such easement against the grantee.[6]

§ 2. *Irrigation companies* have only such powers in regard to the construction of works as are given them by statute or other charters.[7] They need not necessarily own irrigable land,[8] and need not show that they have acquired the water rights of the riparian owners along the stream which they propose to tap.[9]

§ 3. *Right of way over public lands.*—The act of congress of 1866 and the amendatory act of 1870 acknowledge and confirm a right of way for the construction of ditches and canals in favor of persons who, by priority of possession, have acquired vested rights to the use of water on the public domain, and, by the terms of the statute, all persons who acquire title to the land from the government after the construction of ditches or reservoirs used in connection with such water rights take the same subject to the burden of such easements. This statute constitutes a grant of a right of way over the public land for the purposes specified.[10] By the act of March 3, 1891, a right of way through the public lands and reservations is granted to ditch companies and others for ditches and reservoirs, subject to certain conditions, upon compliance with certain requirements as to the filing of proofs of organization of the company, map of canal, and so forth.[11] This act applies only to vacant and unoccupied land, and no rights can be claimed under it in respect to land to which private rights have previously attached.[12] A right of way or easement over public land under the acts of 1866 and 1870 can be claimed only for such ditches and reservoirs as are used in connection with vested and accrued water rights.[13] By the act of 1870, patents granted or preemptions or homesteads allowed are declared to be subject to rights to ditches and reservoirs used in connection with water rights acquired under the act of 1866. The act of 1866 contains a proviso that whenever any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable therefor to the party injured.[14] It is held that this proviso does not grant rights of way where none existed before, nor confer additional rights upon owners of ditches subsequently constructed. An appropriator cannot, as against

6. Croke v. American Nat. Bank [Colo. App.] 70 P. 229. Held that decree should make plaintiff's use of ditch subject to that of defendant in conformity to the findings. Id.

7. Company organized to construct canals to divert water from creek held not authorized to construct reservoirs for storage of water. Seeley v. Huntington Canal & Agricultural Ass'n, 27 Utah, 179, 75 P. 367.

8. A corporation which is not the owner or possessor of irrigable land may construct a dam, canal or other conduit and divert water from a stream for irrigation purposes (Slosser v. Salt River Val. Canal Co. [Ariz.] 65 P. 332), but it does not thereby become the owner or appropriator of the water so diverted (Id.). [Ownership and possession of land necessary to acquisition of right to appropriate under Ariz. Comp. Laws, c. 55, § 3].

9. Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 P. 635.

10. Rev. St. U. S. §§ 2339, 2340; U. S. Comp. St. 1901, p. 1434 et seq. Jennison v. Kirk, 98 U. S. 453; Broder v. Water Co., 101 U. S. 274; Tynon v. Despain, 22 Colo. 240, 43 P. 1039; Nippel v. Forker [Colo.] 56 P. 577, affirming 9 Colo. App. 106, 47 P. 766; Whitmore v. Pleasant Valley Coal Co., 27 Utah, 284, 75 P. 748. See, also, Bybee v. Oregon C. R. Co., 139 U. S. 663. A ditch constructed on unoccupied public land is held by grant, and the owner does not forfeit his right thereto by mere nonuser. Ada County Farmers' Irr. Co. v. Farmers' Canal Co. [Idaho] 51 P. 990. One may construct an irrigating ditch on unoccupied public land, and is not liable to a subsequent settler thereon for damages for digging the ditch. Shoemaker v. Hatch, 13 Nev. 261. See, also, Miller v. Douglas [Ariz.] 60 P. 722; Boglino v. Giorgetta, [Colo. App.] 78 P. 612; Crawford v. Hathaway [Neb.] 93 N. W. 781. Under these sections, one taking a homestead on which owner of adjoining land had cut a ditch through a bank of a spring so as to turn water into a swale through which it ran onto his premises will be restrained from interfering with such use of the water. Brosnan v. Harris [Or.] 65 P. 867.

11. 26 Stat. p. 1095, §§ 18-21. For text of this act, see Appendix to Long on Irrigation.

12. Nippel v. Forker [Colo.] 56 P. 577, affirming 9 Colo. App. 106, 47 P. 766.

13. Nippel v. Forker [Colo.] 56 P. 577.

14. Rev. St. U. S. §§ 2339, 2340. See Jennison v. Kirk, 98 U. S. 453.

a subsequent homestead settler, enter upon land in the possession of the latter, for the purpose of changing his point of diversion, or shifting the line of his ditch, and constructing new waterways, without the settler's consent.[15] A person in possession of public land, who has made improvements thereon, but has taken no steps to secure title to the land, is not entitled to compensation for any of the land taken or injured by the construction of an irrigating ditch by another, but the most he can claim is compensation for injury or damage to his improvements, caused by the construction of the ditch.[16] A right of way for an irrigating ditch on the public domain vests only upon the completion of the work, and a compliance on the part of the ditch owner with the local laws, customs, etc., although such right attaches as fast as the ditch is constructed.[17]

The right acquired is a mere easement for the purpose of maintaining the ditch, and the person acquiring it has no right to use the land for any other purpose.[18] It springs from necessity only, so that no right is acquired by one turning water on such land for mere convenience.[19] After the title has passed from the government, the land can be burdened with a right of way only by consent of the owner or by condemnation.[20] One who settles on unsurveyed public land and constructs a ditch across it while he has peaceable possession thereof acquires a right of way therefor, though when surveyed the land is found to be included within a railroad grant.[21] A purchaser from the railroad does not acquire title to the ditch.[22]

§ 4. *Irrigation as a public use, and the right of eminent domain.*—In many of the western states, irrigation is held to be a public use for the promotion of which the legislature may authorize a private person or corporation to exercise the power of eminent domain.[23] The exercise of the power of condemnation is justified in Colorado on the ground of necessity, and all lands in the state are declared to be held in subordination to the dominant right of others, who must necessarily pass over them to obtain a supply of water to irrigate their own lands. This servitude arises, not by grant, but by operation of law.[24] In some of the states,

15. McGuire v. Brown, 106 Cal. 660, 39 P. 1060.

16. Knoth v. Barclay, 8 Colo. 300, 6 P. 924. See, also, Farmers' High Line Canal & Reservoir Co. v. Moon, 22 Colo. 560, 45 P. 437.

17. Jarvis v. State Bank of Ft. Morgan, 22 Colo. 309, 45 P. 505.

18. Owner may remove material placed on right of way to be used in building saloon [U. S. Comp. St. 1901, p. 1535]. Whitmore v. Pleasant Valley Coal Co., 27 Utah, 284, 75 P. 748.

19. As to avoid building headgate required by Mills' Ann. St. § 2260. Boglino v. Giorgetta [Colo. App.] 78 P. 612.

20. Boglino v. Giorgetta [Colo. App.] 78 P. 612.

21, 22. Childs v. Sharal [Idaho] 69 P. 111.

23. Lake Koen N. R. & T. Co. v. Klein [Kan.] 65 P. 684. Utah statute constitutional [Rev. St. 1898, §§ 3588, 1277, 1278]. Nash v. Clark, 27 Utah, 158, 75 P. 371; Cummings v. Hyatt, 54 Neb. 35, 74 N. W. 411; Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 P. 635. Where the statute provides that before property can be taken for a public use, it must appear that the taking is necessary for such use, and the question as to the necessity of the taking is submitted to a jury, the court cannot disregard their verdict and find differently. Wilmington Canal & Reservoir Co. v. Dominguez, 50 Cal. 505. Ditches and canals constructed by an irrigation company may be designated by the legislature as "works of internal improvement." Cummings v. Hyatt, 54 Neb. 35, 74 N. W. 411; Ouray v. Goodwin [Ariz.] 26 P. 376; Ellinghouse v. Taylor, 19 Mont. 462, 48 P. 757; Paxton & Hershey Irr. Canal & Land Co. v. Farmers' & Merchants' Irr. & Land Co., 45 Neb. 884, 64 N. W. 343. Act March 27, 1889, held constitutional. Complaint in a proceeding to condemn a strip of defendant's land for a canal held to sufficiently aver a public use so as to bring the case within the provisions of Code Civ. Proc. Cal. § 1238, and Const. Cal. art. 14, § 1. Cummings v. Peters, 56 Cal. 593. Works of internal improvement. Statute constitutional [Comp. St. 1901, c. 93a, art. 2]. Crawford Co. v. Hathaway [Neb.] 93 N. W. 781.

24. Yunker v. Nichols, 1 Colo. 551. See, also, opinion of Thatcher, C. J., in Schilling v. Rominger, 4 Colo. 100. The statute granting a right of way for irrigating ditches over the land of others, now in force in Colorado (Mills' Ann. St. § 2257), was passed by the first legislative assembly of the then territory in 1861. In Yunker v. Nichols, 1 Colo. 551, Wells, J., in a concurring opinion, said: "It appears to me that this right must rest altogether upon the necessity, rather than upon the grant which the statute assumes to make, * * * and existed before the statute was enacted, and would still survive,

the right may be exercised, although the use of water for irrigation be a private one.[25]

Limitations on right to condemn.—While the irrigator is given the absolute right of way over the lands of others for the construction of his irrigating works, this privilege must be exercised with a due regard to the rights of the owners of the land thus burdened. By statute in some states, it is provided that no tract or parcel of improved or occupied land in the state shall, without the written consent of the owner, be burdened with two or more irrigating ditches for the conveyance of water to other lands, where all the water necessary to be conveyed through such property can be conveyed in a single ditch.[26] Such acts do not conflict with the constitutional provisions granting a right of way for the construction of ditches, but, while recognizing the privilege, simply undertake to regulate the exercise thereof, so as to inflict the least possible inconvenience and injury upon the owner of the servient estate.[27] It has been held that the Colorado statute was intended for the protection of private landowners, and cannot be invoked by an irrigation company in a proceeding by a rival company to condemn a right of way across the land of the former.[28] The Nebraska statute, which provides that "no tract of land shall be crossed by more than one ditch," etc., is somewhat more general in its terms than that of Colorado, and is held to include the property of corporations, as well as of natural persons.[29]

Another provision for the protection of the landowner is that the ditch shall be constructed over the shortest and most direct route practicable upon which it can be constructed with uniform grade, and discharge the water at a point whence it can be conveyed to the place of use.[30]

The appropriation of land previously appropriated for a public use is not permissible where such action would defeat the latter use, unless a public exigency requires that it be so taken.[31]

Enlargement of ditch already constructed.—The Colorado statute contains a provision prohibiting a person who has constructed a private ditch to convey water through the lands of another from prohibiting or preventing other persons from enlarging or using such ditch in common with him.[32] This applies only to ditches

though the statute were repealed." This case was decided before the adoption of the constitution in 1876.

25. See Const. Colo. art. 2, § 14. In Kansas, it is held that the fact that the company's charter powers embrace both public and private uses does not deprive it of the right. Lake Koen, N. R. & I. Co. v. Klein [Kan.] 65 P. 684.

26. Mills' Ann. St. Colo. § 2261. Laws Or. 1891, p. 56, §§ 12, 13. No tract can be burdened with more than one ditch for watering of same territory [Neb. Act 1895]. Paxton & H. Irr. Canal & Land Co. v. Farmers' & Merchants' Irr. & Land Co., 45 Neb. 884, 64 N. W. 343.

27. Tripp v. Overocker, 7 Colo. 72, 1 P. 695.

28. San Luis Land, Canal & Imp. Co. v. Kenilworth Canal Co., 3 Colo. App. 244, 32 P. 860.

29. Paxton & Hershey Irr. Canal & Land Co. v. Farmers' & Merchants' Irr. & Land Co., 45 Neb. 884, 64 N. W. 343.

30. Mills' Ann. St. § 2262. Downing v. More, 12 Colo. 316, 20 P. 766.

31. Land appropriated by a railroad for right of way [Const. art. 15, § 8]. Denver Power & Irr. Co. v. Denver, etc., R. Co. [Colo.] 69 P. 568. The fact that the site over which a railroad has a right of way is the only one at which the reservoir can be constructed does not authorize its appropriation where no public necessity for the reservoir is shown. Id. Where the land is not necessary for railroad purposes, it may be taken though it has been appropriated for a right of way. Finding that successor of company had constructed and was operating railroad thereon held not justified by evidence. Id. The people, through the attorney general, cannot intervene in the proceedings to determine whether the railroad company has forfeited its franchise and right to such right of way. Id. Where the petition alleges that the company and others claim the land, the petitioner cannot afterwards assert that they have no interest and change the proceeding to one to try title. Id. Judgment entered on the pleadings and evidence refusing to appoint commissioners is final and reviewable on writ of error. Id.

32. Mills' Ann. St. § 2263. See, also, Laws Or. 1891, p. 56, § 13. As to proceedings under the Colorado statute, see Sand Creek Lateral Irr. Co. v. Davis, 17 Colo. 326, 29 P. 742.

constructed through the lands of others, to convey water to other lands, and not to ditches constructed by a landowner on his own land for the irrigation of such land exclusively.[33] It refers only to strictly private ditches, such as are used to convey water across the land of another to irrigate the adjoining land of the person or corporation owning the ditch. A city cannot, by virtue thereof, acquire the right to enlarge and use, for the purpose of supplying its citizens with water, a ditch used for the carriage of water for hire to the public generally.[34] But the mere fact that the ditch is owned by an incorporated company does not exempt it from the operation of the statute, where it is used for private and not for public purposes.[35] The using or enlarging of the ditch of another without his consent is as much a taking or damaging of private property, within the meaning of the constitution, as would be appropriating a right of way therefor in the first instance, and the owner of such ditch is entitled to just compensation, to be determined in the manner required by law. And the section under consideration, though otherwise constitutional, has been held unconstitutional, in that, by providing for such enlargement or use upon the payment to the ditch owner of a reasonable proportion of the cost of construction of the ditch, it limits or directs the compensation to be paid for the property, instead of leaving this to be determined as provided by the state constitution. The rest of the act, however, stands as a valid statute, when taken in connection with other statutes and the constitutional provisions upon the same subject.[36] The enlargement or improvement of the ditch must be made at the expense of the person desiring it. The owner cannot be required to perform work or make expenditures for the purpose of adapting it to the use of another.[37] Where a ditch is enlarged and extended by others than the original owners, the cost of repairs upon the new ditch from the terminus of the old is not chargeable upon the original proprietors of the old, but the keeping of the headgate and the ditch to its original terminus in repair is the duty of both sets of owners, the expense to be adjusted upon an equitable basis.[38]

Procedure to condemn.—The statutes generally provide that land may be taken for the necessary canals, reservoirs and works upon the payment of just compensation therefor,[39] and prescribe the manner in which the right may be exercised.[40]

33. Downing v. More, 12 Colo. 316, 20 P. 766, modifying Tripp v. Overocker, 7 Colo. 72, 1 P. 695.

34. Junction Creek & N. D. D. & I. Ditch Co. v. Durango, 21 Colo. 194, 40 P. 356.

35. Sand Creek Lateral Irr. Co. v. Davis, 17 Colo. 326, 29 P. 742.

36. Tripp v. Overocker, 7 Colo. 72, 1 P. 695. As to compensation, see Sand Creek Lateral Irr. Co. v. Davis, 17 Colo. 326, 29 P. 742.

37. Sand Creek Lateral Irr. Co. v. Davis, 17 Colo. 326, 29 P. 742.

38. Patterson v. Brown & Campion Ditch Co., 3 Colo. App. 511, 34 P. 769.

39. The Colorado statute is not unconstitutional because providing that commissioners shall be appointed to determine the necessity of the taking. Gibson v. Cann, 28 Colo. 499, 66 P. 879.

In Colorado, right of way for construction and maintenance of ditch may be condemned. U. S. Freehold Land & Emigration Co. v. Gallegos, 89 F. 773. A corporation organized to procure and maintain a reservoir for the storage and use of water for power, irrigation and other purposes may condemn land therefor [Const. art. 2, § 14, Mills' Ann. St. § 1716]. Denver Power & Irr. Co. v. Denver, etc., R. Co. [Colo.] 69 P. 568. In proceedings to condemn land for a ditch and reservoir, the commissioners appointed to determine the necessity for the taking cannot consider whether the contemplated scheme is feasible or practicable. Gibson v. Cann, 28 Colo. 499, 66 P. 879.

Kansas: The power of eminent domain conferred by Kansas Laws 1899, cc. 95, 151 (Dassler's St. 1899, §§ 1325, 3642), authorizing the condemnation of land for the storage of water and for the use of irrigation, was not taken away by Dassler's St. 1899, §§ 1326, 1327. Lake Koen, N. R. & I. Co. v. Klein [Kan.] 65 P. 684.

40. Consult the etatutes in Appendix to Long on Irrigation. See Lindsay Irr. Co. v. Mehrtens, 97 Cal. 676, 32 P. 802; San Luis Land, Canal & Imp. Co. v. Kenilworth Canal Co., 3 Colo. App. 244, 32 P. 860; Paxton & H. Irr. Canal & Land Co. v. Farmers' & Merchants' Irr. & Land Co., 45 Neb. 884, 64 N. W. 343, 50 Am. St. Rep. 585; Albuquerque Land & Irr. Co. v. Gutierrez [N. M.] 61 P. 357. Under the California statutes, a ditch

The mere fact that a statute confers a right of way over the land of another does not authorize a person to go upon such land without the owner's consent and construct a ditch. Before such right may be exercised, it must be first definitely ascertained by a proper proceeding in eminent domain.[41] In some states, such proceedings cannot be instituted until a permit authorizing a diversion of water to specific lands has been obtained from the proper authorities,[42] and injunction will lie to prevent construction without it.[43]

In Colorado, the county court has concurrent jurisdiction with the district court to entertain condemnation proceedings to secure a right of way where the amount of damages and the value of the land taken are within the money limit placed upon its jurisdiction.[44] The statutes of New Mexico provide that where any public ditch or part thereof shall be destroyed and it is impossible to rebuild it in the same place, the mayordomo may, with the consent of a majority of the common laborers thereof, cut through the lands of any person by first obtaining his consent and offering to pay him the amount of compensation agreed on between him and the persons interested in the ditch.[45] In case he refuses to accept the compensation offered or demands exorbitant compensation, the mayordomo shall lay the case before the justice of the peace of the precinct, who shall appoint experts to fix the compensation to be paid.[46] The justice has no jurisdiction to appoint experts unless all the petition shows that all the prescribed conditions exist, and that the owner has notice of the application.[47] Certiorari is the proper remedy to bring up for review all the proceedings before the justice.[48]

Objections and defenses.—In proceedings to condemn land for a reservoir, a private owner cannot object that a part of it is within the limits of a forest reserve and that the consent of the government has not been obtained.[49]

company incorporated in one county cannot maintain an action to condemn lands in another county in connection with water rights claimed therein, where the ownership of such property is denied, and the question of ownership is therefore raised in the case, without first filing a copy of its articles of incorporation in such county. Emigrant Ditch Co. v. Webber, 108 Cal. 88, 40 P. 1061. The right of a purely private party to condemn a right of way for a ditch to convey water to his lands for domestic, agricultural, and mining purposes is guaranteed by the constitution of Colorado, and the manner of exercising the right is regulated by statute. Downing v. More, 12 Colo. 316, 20 P. 766. A complete system of procedure for the taking or damaging of private property, and determining the compensation therefor when such taking or damaging is authorized by law. Proceedings under the act are special proceedings, and differ in many respects from ordinary civil actions under the Code. The provisions of the Code are therefore inapplicable to such proceedings. Tripp v. Overocker, 7 Colo. 72, 1 P. 695; Knoth v. Barclay, 8 Colo. 300, 6 P. 924.

Utah statutes (Rev. St. §§ 3588, 3590, 3591) construed. In proceeding by power company to connect its flume with city canal, held not necessary to show that use to which power company will apply. It is more necessary than that of city, the city owning a mere easement for the canal. Salt Lake City, etc., P. Co. v. Salt Lake City, 25 Utah, 441, 71 P. 1067.

Nebraska Comp. St. 1901, art. 3, c. 93a, §§ 10, 39, 41, 48. Crawford Co. v. Hathaway [Neb.] 93 N. W. 781.

41. Emerson v. Eldorado Ditch Co., 18 Mont. 247, 44 P. 969; Toyaho Creek Irr. Co. v. Hutchins [Tex. Civ. App.] 52 S. W. 101.

42. Under Nebraska Irrigation Act of 1895, permit must be obtained from state board of irrigation. Lands to be irrigated must be specified in application. Castle Rock Irr. Canal & Water Power Co. v. Jurisch [Neb.] 93 N. W. 690. In Wyoming, permit must be obtained from the state engineer. Rev. St. §§ 873, 917, 919, 921, 928. Priority of appropriation dates from the filing of the application in the engineer's office [Rev. St. § 929]. Whalon v. North Platte Canal & Colonization Co. [Wyo.] 71 P. 995. Where, after a permit had been granted to defendant's assignors to construct a ditch, plaintiff filed an application which was not approved, held, in an action to enjoin construction of defendant's ditch, that evidence tending to show a survey of plaintiff's ditch and its partial construction was inadmissible to show priority of right. Id. Not admissible to show plaintiff's diligence where he was not charged with lack thereof. Id.

43. Castle Rock Irr., Canal & Water Power Co. v. Jurisch [Neb.] 93 N. W. 690.

44. Southwestern Land Co. v. Hickory Jackson Ditch Co., 18 Colo. 489, 33 P. 275; Otero Canal Co. v. Fosdick, 20 Colo. 522, 39 P. 332; Sievers v. Garfield County Court, 11 Colo. App. 147, 52 P. 634.

45. Comp. Laws 1897, § 25. Leyba v. Armijo [N. M.] 68 P. 939.

46. Comp. Laws 1897, § 26. Leyba v. Armijo [N. M.] 68 P. 939.

47, 48. Leyba v. Armijo [N. M.] 68 P. 939.

Assessment and payment of damages.—The mode of ascertaining the amount of compensation to be paid for property taken or injured for the construction of irrigating ditches, etc., is prescribed by the various statutes and constitutional provisions covering the law of eminent domain. And where the state constitution provides that the compensation for taking or damaging private property against the owner's consent must be ascertained in a particular manner, as by a jury or board of commissioners, this requirement is imperative, and the legislature is powerless to dispense with it.[50] All damages, present and prospective, that are the natural, necessary, or reasonable incident of the improvement, must be assessed in the condemnation proceedings, not including, however, such as may arise from the negligent or unskilful construction or use thereof. And where damages have been assessed, and payment made and accepted, there can be no subsequent recovery for an injury which should have been, but was not, considered. Thus, an injury to land resulting from seepage and leakage from a canal or reservoir ought to be anticipated, and damages therefor included in the original assessment, and no damages for such injury can be recovered in a subsequent action, except so far as the injury results from negligence or unskilfulness,[51] as in the case of faulty construction.[52] In Nebraska, a lower riparian owner cannot enjoin an irrigation enterprise by an upper riparian owner merely because his damages for injuries to his riparian rights have not been paid. His remedy is to sue at law therefor.[53]

§ 5. *Easement or title vested in ditch owner.*—The substitution of a pipe line for an open ditch is a substantial alteration of the method of enjoyment of an easement.[54] A ditch dug prior to the inception of another's appropriation cannot thereafter be changed to his prejudice.[55] It is to be noted that a person does not, by acquiring a right of way for a ditch across the land of another, acquire the right to subsequently enlarge such ditch, and if he so enlarges it without the consent of the landowner, he will be liable to the latter in damages.[56] The proceedings under the Wyoming statute are said to vest in the party instituting them the exclusive right, title and possession of the tract embraced in the right of way.[57]

Ditches used for utilizing spring or surface waters are governed by the same laws relating to priority as those constructed to utilize the waters of running streams.[58]

Appurtenant to the easement is a right to enter on servient lands to construct, protect or repair a ditch.[59] A right to enter another's premises to repair a ditch

49. Denver Power & Irr. Co. v. Denver, etc., R. Co. [Colo.] 69 P. 568.

50. Tripp v. Overocker, 7 Colo. 72, 1 P. 695.

51. Denver City Irr. & Water Co. v. Middaugh, 12 Colo. 434, 21 P. 565.

52. Turpen v. Turlock Irr. Dist., 141 Cal. 1, 74 P. 295.

53. McCook Irr. & Water Power Co. v. Crews [Neb.] 96 N. W. 996.

54. Oliver v. Agasse, 132 Cal. 297, 64 P. 401.

55. Bolter v. Garrett, 44 Or. 304, 75 P. 142.

56. Clear Creek Land & Ditch Co. v. Kilkenny, 5 Wyo. 38, 36 P. 819. As to enlargement by contract with the ditch owner, see Chicosa Irr. Ditch Co. v. El Moro Ditch Co., 10 Colo. App. 276, 50 P. 731.

57. Fact that proposed line conflicts with plaintiff's ditch at a point on his land immaterial [Wyo. Rev. St. 3084]. Whalon v. North Platte Canal & Colonization Co. [Wyo.] 71 P. 995.

58. One taking up public land will be restrained from interfering with plaintiff's use of the water of a spring thereon conducted to his land through a ditch and swale [Or. Sess. Laws 1893, p. 150]. Brosnan v. Harris [Or.] 65 P. 867.

59. Prior appropriator has right to go upon lands of subsequent appropriators and remove dams, etc., by which his flow of water is obstructed and diverted. Ennor v. Raine [Nev.] 74 P. 1. The right of way across the land of another for an irrigating ditch, however acquired, will necessarily include the right to enter upon the premises for the purpose of constructing the ditch or keeping it in repair. Thus, in California, it is held that the right to take water from or across the land of another for use on the premises of the person taking it is an

does not give a right to do anything to the ditch which will impair the rights of others entitled to use it.[60] If a landowner permits an appropriator of water to enter his inclosure for the purpose of changing his point of diversion, and to construct and keep up a dam for diverting water for a number of years, he will be estopped by such acquiescence from thereafter treating the appropriator as a trespasser, and denying his right of entry.[61]

§ 6. *Property in ditches and canals and actionable rights of owner.*—An irrigation ditch or canal is, of course, property, and will ordinarily constitute a part of the land through which it is constructed. The ownership of a water right, however, may be entirely separate from the land in connection with which it was acquired or the ditch in which the water is conveyed. Hence a conveyance of the ditch or land does not necessarily pass the water right, but either may be conveyed separately from the other.[62] The grantee takes subject to all rights and liens which were a charge on the grantor,[63] including easements of water rights therein of which he has notice.[64] A contract for the sale of a canal by the terms of which the vendor reserves a lien thereon for the payment of the balance of the purchase price may be foreclosed as a mortgage.[65]

easement founded on a grant, or on a prescription which presupposes a grant. Such an easement does not give its owner the right to commit a trespass upon the servient tenement, nor may he exercise it in any manner which happens to suit his pleasure. His right is measured by the terms of his grant, or, where the supposed original grant does not appear, by the prescriptive use. His right includes, however, secondary easements, such as the right to enter upon the servient tenement, and make repairs to his ditch, and to do such other things as may be necessary to the full exercise of his right. But these secondary easements must be exercised only when necessary, and in such a reasonable manner as not to increase needlessly the burden upon the servient tenement. Joseph v. Ager, 108 Cal. 517, 41 P. 422. See, also, Hargrave v. Cook, 108 Cal. 72, 41 P. 18. One who appropriates water from a stream on the public domain acquires, as against a subsequent purchaser from the United States of the land above him on the stream, as complete and perfect a right to maintain his ditch, and have the water flow to, in, and through the same, as though such right or easement had vested in him by grant, and such right carries with it implied authority to do all that is necessary to secure the enjoyment of such easement. Thus, where the stream has become obstructed, so as to prevent the water from flowing to his ditch, the appropriator has a right, as against such subsequent purchaser, to enter upon the land of the latter, and remove the obstructions from the bed of the stream, so as to permit the water to continue to flow in its original channel to the head of his ditch. Ware v. Walker, 70 Cal. 591, 12 P. 475. In Crisman v. Heiderer, 5 Colo. 589, it was held that the owner of a water right (in this case for milling purposes) had a right to enter the bed of the stream above his ditch, and to remove obstructions preventing the water from reaching his ditch, and, as an appropriator, had implied authority to do all that should become necessary to secure the benefit of his appropriation, and might acquire an easement in the adjoining lands, but that the right so acquired must be held to the narrowest limits compatible with the enjoyment of the principal easement, that is, the right to the use of the water. For discussion of right of appropriator to enter upon the land of an upper proprietor to clean out ditch, see note to Carson v. Gentner, 43 L. R. A. 130.

60. Blankenship v. Whaley, 142 Cal. 566, 76 P. 235.

61. Miller v. Douglas [Ariz.] 60 P. 722.

62. Strickler v. Colorado Springs, 16 Colo. 61, 26 P. 313; Oppenlander v. Left Hand Ditch Co., 18 Colo. 142, 31 P. 854; Arnett v. Linhart, 21 Colo. 188, 40 P. 355; Gelwicke v. Todd, 24 Colo. 494, 52 P. 788; Cache La Poudre Irr. Co. v. Larimer & Weld Reservoir Co., 25 Colo. 144, 53 P. 318; Ada Co. Farmers' Irr. Co. v. Farmers' Canal Co. [Idaho] 51 P. 990; Wold v. May, 10 Wash. 157, 38 P. 875; McPhail v. Forney, 4 Wyo. 556, 35 P. 773. See, also, Clifford v. Larrien [Ariz.] 11 P. 397; McLear v. Hapgood, 85 Cal. 555, 24 P. 788; Stocker v. Kirtley [Idaho] 59 P. 891. Where deed conveyed interest in ditch and water right "with appurtenances," held error to rule as a matter of law that lateral ditches, not mentioned in the deed and not shown by the terms thereof to be essential to the rights conveyed, were included as appurtenances, and to exclude oral testimony to the contrary. Carmen v. Standaker, 20 Mont. 364, 51 P. 738.

63. Contract of sale of canal provided that part of the consideration secured by a lien thereon should be paid in water rights issued to such persons as the vendor might designate, who were also to have a lien on the property for their protection. Held, on foreclosure of the contract and a sale of the property, the latter lien would continue as against the purchaser. Almeria Irr. Canal Co. v. Tzschuck Canal Co. [Neb.] 93 N. W. 174.

64. Where trust deed under which he buys and the articles of incorporation show existence of reserved perpetual water rights and ditch itself shows use for irrigation of

A conveyance of a ditch by means of which water is appropriated will take with it the water right as an appurtenance,[66] and a reservation of an interest in a ditch is a reservation of a like interest in the water right annexed thereto.[67] A right to conduct water across the land of another passes by a conveyance of the land irrigated as an appurtenance thereto.[68] Mechanics' liens for work and materials furnished in the construction or maintenance of ditches may be enforced according to the general laws governing the enforcement of such liens.[69] The rights of successive ditch corporations are distinct as in the case of other corporations.[70]

The owner of an irrigating ditch, like the owner of any other property, may maintain an action for an injury thereto,[71] the measure of damages for the destruction of such ditch being the difference in the value of the land without and with it.[72] The grantee of a strip of land for a right of way has no right to construct embankments so as to injure an irrigation ditch where sufficient soil can be obtained to raise the way to a height protecting it from overflow without damaging the ditch.[73]

Equity has jurisdiction of a suit to prevent the obstruction of an easement to carry water over the land of another in an irrigation ditch.[74] Injunction is the proper remedy to prevent one not having authority to do so from crossing the canal of another with a lateral for the purpose of carrying water to his land from another canal.[75] A complaint for the obstruction of an easement in a ditch and water right need only state plaintiff's ownership thereof and describe it, and need not state how it was acquired.[76] Where the petition in an action for diverting water alleges ownership of the ditch and such allegation is material to a recovery, defendant may, under a general denial, introduce a written contract tending to show joint ownership.[77]

The right to obstruct a ditch may be obtained by prescription.[78] A promise

lands covered thereby. Grand Val. Irr. Co. v. Lesher [Colo.] 65 P. 44.

65. Almeria Irr. Canal Co. v. Tzschuck Canal Co. [Neb.] 93 N. W. 174. The fact that the vendee connected the canal with another owned by it, thus making one system, did not prevent the foreclosure of the lien and a sale of the part of the canal covered thereby. Id. Parties purchasing water rights from the vendee along the second canal cannot intervene in the foreclosure proceedings. Id.

66. Williams v. Harter, 121 Cal. 47, 53 P. 405; Arnett v. Linhart, 21 Colo. 188, 40 P. 355.

67. Conveyance of land and half interest in ditch operates to convey half interest in water right and to reserve half interest in both. Arnett v. Linhart, 21 Colo. 188, 40 P. 355.

68. Nelson v. Clerf, 4 Wash. 405, 30 P. 716. Ditch on land of another. Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 P. 645, 20 Am. St. Rep. 217; Gould v. Stafford, 91 Cal. 146, 17 P. 543. Easement for maintenance of ditch held to have passed as appurtenance to dominant estate without specific mention in the deed. American Nat. Bank v. Hoeffer [Colo. App.] 70 P. 156. Right to use irrigation ditch held to have passed as appurtenance to land. Id. The grantee of one having a right to use a ditch over the land of another, being ignorant of her rights, leased the right to use it from the latter, but continued to use it for several years after the lease expired. Held, that the use was not in subordination to the owner of the land. Stufflebeem v. Adelsbach, 135 Cal. 221, 67 P. 140.

69. See Atlantic Trust Co. v. Woodbridge Canal & Irr. Co., 79 F. 39, 501, 86 F. 975; Jarvis v. State Bank, 22 Colo. 309, 45 P. 505; Greer v. Cache Val. Canal Co. [Idaho] 38 P. 653; Nelson v. Clerf, 4 Wash. 405, 30 P. 716.

70. Mortgagee of a ditch held not entitled to sell on foreclosure the ditch of a new company formed by officers of the mortgagor as after acquired property of the old company. Farm Inv. Co. v. Alta Land & Water Co. [Colo.] 65 P. 22.

71. Jacob v. Lorenz, 98 Cal. 332, 33 P. 119. One may own an irrigating ditch without owning a water right, and may protect it from injury. Stocker v. Kirtley [Idaho] 59 P. 891.

72. Denver, etc., R. Co. v. Dotson, 20 Colo. 304, 38 P. 322.

73. Plaintiff held entitled to injunction. Hotchkiss v. Young, 42 Or. 446, 71 P. 324.

74. Croke v. American Nat. Bank [Colo. App.] 70 P. 229.

75. Castle Rock Irr., Canal & Water Power Co. v. Jurisch [Neb.] 93 N. W. 690.

76. Complaint insufficient because not describing easement with sufficient definiteness. Carter v. Wakeman [Or.] 70 P. 393.

77. Mau v. Stoner [Wyo.] 67 P. 618.

78. Defendant held to have acquired a prescriptive right to maintain a flume across

by one who has obtained such a right to remove the obstruction does not change his rights and make him a mere licensee.[79] The right to maintain the obstruction is not affected by any subsequent change in the condition of the ditch.[80]

In several states, malicious injuries to irrigating ditches are, by statute, made punishable as misdemeanors.[81]

Co-ownership of ditches and water rights.—Several persons may together construct or own a dam, headgate or ditch, to be used for the diversion or conveyance of water, in which case they are, of course, tenants in common of the dam, headgate or ditch. But their common ownership of the means of diversion or conveyance does not necessarily involve a common right to the water diverted or conveyed, for, as we have seen, the ownership of the water right and that of the means of diversion or conveyance may be entirely distinct. Several appropriators, whose appropriations date from different times, may use the same ditch or headgate without losing their respective priorities. Such use, in the absence of an agreement to that effect, does not result in a merger of their rights, but the same irrigating ditch may have two or more priorities belonging to the same party, or to different parties.[82] Ordinarily, where two or more persons together construct a ditch, and appropriate water by means thereof, they become tenants in common of the ditch and water rights also; the respective quantities of water to which each is entitled being determined by the terms of the contract between the parties, and their mutual rights and obligations being determined by the general law of cotenancy.[83] In such case, the possession and use of one of the tenants in common is that of his co-tenants, and is presumed to be not adverse to, but in maintenance of, their rights, and in accordance with his own right as a tenant in common.[84] Tenants in common are equally bound to keep the ditch in repair, and where, through the failure of one of them to do so, the land of the other is overflowed, the latter has no right to fill up the ditch.[85]

defendant's ditch. Right of action against grantee of right to cross ditch for obstructing flow of water therein accrued and limitations began to run when flume was built. Centerville & K. Irr. Ditch Co. v. Sanger Lumber Co., 140 Cal. 385, 73 P. 1079.

79, 80. Centerville & K. Irr. Ditch Co. v. Sanger Lumber Co., 140 Cal. 385, 73 P. 1079.

81. Consult statutes in Appendix to Long on Irrigation.

82. Rominger v. Squires, 9 Colo. 327, 12 P. 213; Farmers' High Line Canal & Reservoir Co. v. Southworth, 13 Colo. 111, 21 P. 1028; Nichols v. McIntosh, 19 Colo. 22, 34 P. 278; Patterson v. Brown & Campion Ditch Co., 3 Colo. App. 511, 34 P. 769. See, also, Fitzell v. Leaky, 72 Cal. 477, 14 P. 198.

83. Lytle Creek Water Co. v. Perdew, 65 Cal. 447, 4 P. 426; Santa Paula Water Works v. Peralta, 113 Cal. 38, 45 P. 168; Schilling v. Rominger, 4 Colo. 100; Tucker v. Jones, 8 Mont. 225, 19 P. 571; Moss v. Rose, 27 Or. 595, 41 P. 666; Smith v. North Canyon Water Co., 16 Utah, 194, 52 P. 283. Water appropriated by three persons and conducted through ditch constructed jointly by them and used on lands owned by each separately may give them a joint ownership or ownership in common in the ditch. Miller v. Lake Irr. Co. [Wash.] 67 P. 998. May agree among themselves as to the manner in which they will enjoy their several appropriations. Biggs v. Utah Irrigation Ditch Co. [Ariz.] 64 P. 494. Where a number of persons entitled to take water from a common source make a joint diversion and carry the water in a common conduit, they remain owners in common of the works but the water rights remain several and private. Do not by delegating division and distribution to corporation dedicate it to public use under Cal. Const. art. 14, § 1; St. 1885, p. 95, c. 115. Hildreth v. Montecito Creek Water Co., 139 Cal. 22, 72 P. 395.

84. Moss v. Rose, 27 Or. 595, 41 P. 666; Smith v. North Canyon Water Co., 16 Utah, 194, 52 P. 283.

85. Moss v. Rose, 27 Or. 595, 41 P. 666. In this case, the parties were tenants in common of a ditch across defendant's land, and through the plaintiffs' neglect to keep the ditch in repair, the defendant's land was overflowed, whereupon he filled the ditch, thus cutting off the water from the plaintiffs' land, for which injury he was held liable. The court held, further, that "the plaintiffs will be allowed to appropriate one-half of the waters diverted, and required to bear one-half of the expense of maintaining the ditch across the defendant's lands, and, for the purpose of performing their part of the work, they must have the right of entry upon the said lands of defendant along the banks of the ditch. And, in case of the de-

The dam and ditch of an unincorporated irrigation ditch association is held by its members as tenants in common and each may sell his interest without tho consent of the others.[86]

Parties may agree to construct and maintain a system for the distribution of water in consideration of an interest therein,[87] and one may be given a right of way for the passage of a certain amount of water through a ditch in consideration of his contributing to the expense of repairing and maintaining it.[88] It would seem that where owners of different parcels of land conduct water across them and do not define the respective interests therein, their rights both in respect to the ditch and the water are to be determined as though they were riparian owners on a natural stream.[89]

Statutes in some states provide a method for determining the rights of persons owning ditches jointly.[90] In proceedings under the Wyoming statute to settle disputes as to water rights between joint owners of a ditch, the judgment of the court determining whether the parties are joint owners does not amount to a permanent adjudication and judicial settlement of the respective titles and interests of the parties in the ditch.[91]

Abandonment of ditch without abandonment of water right.—Since a water right and the ditch by which the water is conveyed are independent subjects of property, the ditch may be abandoned without an abandonment of the water right, as where old ditches are abandoned, and new ditches substituted therefor for the conveyance of the same water.[92] One owning a ditch over the land of another does not abandon it by taking water through other ditches entering his land at the same place, it not appearing that he has acquired any ownership over them or permanent right to use them or that his use was adverse.[93]

Formalities of conveyance.—An irrigating ditch being a part of the realty, title thereto, or any interest therein, can be acquired only by deed, prescription or condemnation. A verbal transfer is insufficient.[94] So, also, an interest in a ditch and water right should be transferred in the same manner, and with the same

fault of either party, the other may complete the necessary repairs, and thereupon the party in default shall be liable for one-half the expense thereof."

86. Conveyance of certificates issued by company is conveyance of interest of holder in ditch. Bigge v. Utah Irrigation Ditch Co. [Ariz.] 64 P. 494.

87. Agreement to pipe water construed. Use of pipe different from that specified held not to constitute breach authorizing other party to dig it up, the right to make time of the essence of the contract having been waived. Daly v. Ruddell [Cal.] 70 P. 784.

88. Where defendant was given a right of way for the passage of a certain amount of water through a canal in consideration of his paying a portion of the expense of repairing and maintaining it, he was liable for his proportion of the expense of a suit brought to restrain plaintiff from making changes necessary to prevent the appropriation of water by persons not entitled to it, and also for the expense of collecting the proportion of other parties who refuse to pay their share of the expense of maintenance and repair. Rogers v. Riverside Land & Irr. Co., 132 Cal. 9, 64 P. 95.

89. Outhouse-Cottel v. Berry, 42 Or. 593, 72 P. 584.

90. Wyoming Rev. St. §§ 908-914. Mau v. Stoner [Wyo.] 67 P. 618. These sections provide for the appointment of a person to take charge of the distribution of the water, and for a hearing before the judge or commissioner whose decision is made final. State v. Ausherman, 11 Wyo. 410, 72 P. 200.

91. Proceeding intended to provide a temporary remedy only and determination of joint ownership nothing more than the determination of a fact necessary to jurisdiction. Is not suit to quiet title [Rev. St. §§ 908-914]. State v. Ausherman, 11 Wyo. 410, 72 P. 200.

92. McGuire v. Brown, 106 Cal. 660, 39 P. 1060; Greer v. Heiser, 16 Colo. 306, 26 P. 770; Nichols v. McIntosh, 19 Colo. 22, 34 P. 278; New Mercer Ditch Co. v. Armstrong, 21 Colo. 357, 40 P. 989; Kleinschmidt v. Greiser, 14 Mont. 484, 37 P. 5.

93. Stufflebeem v. Adelsbach, 135 Cal. 221, 67 P. 140. Ditch owner agreed to allow landowner to fill up old ditch in consideration of his building a new one. Landowner filled up old ditch without ditch owner's knowledge, but did not build new one. Held, that after 3 years, ditch owner had not abandoned ditch so that landowner could prevent his opening it. Id.

94. Smith v. O'Hara, 43 Cal. 371; Burnham v. Freeman, 11 Colo. 601, 19 P. 761; Child v. Whitman, 7 Colo. App. 117, 42 P. 601.

formalities which attend conveyances of other real property.[95] The same principle will undoubtedly hold where the water right itself is sold independently of any interest in the land or ditch;[96] and the general rule may be laid down that any transfer of an irrigating ditch without the water right, or of the water right without the ditch, or of a ditch and water right together, should be by deed.[97] So, also, any agreement for a conveyance of a ditch and water right is within the statute of frauds and should be in writing.[98] The general rule above stated is subject to a modification where the ditch and water rights are considered simply as improvements upon the land, in the sense in which buildings and fences are improvements, and not as independent rights of property. In such case, any transfer that is sufficient to pass title to the land will vest in the purchaser the ditches and water rights thereon. Thus, where an appropriation is made by a settler on public lands, in whom the legal title has not yet vested, and whose right to the land, therefore, is merely possessory, and hence may be sold or transferred without any formal deed of conveyance, a verbal sale of such possessory title will carry with it the water right also as a necessary incident to the complete enjoyment of the land, unless such right be expressly reserved.[99]

As in the case of other deeds, conveyances of ditch and water rights are valid between the parties, though not acknowledged or recorded.[100] Such conveyances by the holders of permits to construct a ditch have been held valid as against one filing a conflicting application for a permit with the state engineer before such transfers were filed with him.[101]

§ 7. *Legislative control.*—Irrigation canals are works of internal improvement and are subject to public control and legislation,[102] and irrigation companies are liable to respond to all reasonable regulations in the manner of such public use as the legislature may thereafter prescribe.[103]

§ 8. *Duty respecting ditches and liability for damages.*—No recovery can be had for damages incident to the construction, existence and maintenance of an irrigating ditch, within the scope of the lawful authority under which such ditch was constructed and is maintained, or, in other words, where a ditch exists by lawful authority, its owner is not liable for damages resulting from its mere existence.[104] Thus, an irrigating ditch in a city street is not necessarily a nuisance.[105] A ditch owner is bound to use reasonable skill, judgment, and care

95. Child v. Whitman, 7 Colo. App. 117, 42 P. 601. No particular form of words necessary. Instruments held to show intention to convey right to construct ditch and to be sufficient to pass title. Whalon v. North Platte Canal & Colonization Co. [Wyo.] 71 P. 995.

96. See Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 P. 1054.

97. See Smith v. O'Hara, 43 Cal. 371; Burnham v. Freeman, 11 Colo. 601, 19 P. 761; Child v. Whitman, 7 Colo. App. 117, 42 P. 601; Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 P. 1054.

98. Hayes v. Fine, 91 Cal. 391, 27 P. 772.

99. McDonald v. Lannen, 19 Mont. 78, 47 P. 648; Wood v. Lowney, 20 Mont. 273, 50 P. 794; Hindman v. Rizor, 21 Or. 112, 27 P. 13; Low v. Schaffer, 24 Or. 239, 33 P. 678; Geddis v. Parrish, 1 Wash. 587, 21 P. 314.

100. Conveyance of right to construct ditch. Whalon v. North Platte Canal & Colonization Co. [Wyo.] 71 P. 995. Water rights. Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 P. 1054.

101. Whalon v. North Platte Canal & Colonization Co. [Wyo.] 71 P. 995.

102. Almeria Irr. Canal Co. v. Tzschuck Canal Co. [Neb.] 93 N. W. 174. Comp. St. 1901, art. 2, c. 93a. Crawford Co. v. Hathaway [Neb.] 93 N. W. 781.

103. Lake Koen, N. R. & I. Co. v. Klein [Kan.] 65 P. 684.

104. City of Denver v. Mullen, 7 Colo. 345, 3 P. 693; Platte & D. Ditch Co. v. Anderson, 8 Colo. 131, 6 P. 515; Walley v. Platte & D. Co., 15 Colo. 579, 26 P. 129; Bliss v. Grayson [Nev.] 56 P. 231.

105. City of Denver v. Mullen, 7 Colo. 345, 3 P. 693; Platte & D. Ditch Co. v. Anderson, 8 Colo. 131, 6 P. 515. Where an irrigation company constructed a canal through land subsequently included in a city, and maintained such canal some years before and after the incorporation of the city, whose officials recognized the existence of the canal, and received taxes thereon, and extensive works had been erected on account of the canal, and it appeared that the canal could be sunk below the surface of the street and covered up, so as not to be an obstruction

in the construction, maintenance and use of his ditches, and will be liable for damages caused by his failure to do so.[106] He is bound to keep them in good repair,[107] and to take proper precautions in their construction to prevent water therefrom from flowing over the land of another, to his injury.[108] Thus, a ditch company is bound to conduct its surplus water, in suitable ditches, back to its natural channel, when practicable, and to control and dispose of such water so that it will not injure the property of others, and will be liable for damages caused by its failure to do so.[109] Such companies are not insurers against all damages arising from their ditches, but are liable only when negligent.[110] They are required to anticipate and prepare to meet only such emergencies as may reasonably be expected to arise in the course of nature, and need not prepare for storms of such unusual violence as to surprise cautious and reasonable men.[111] But where a company is grossly negligent in attempting to carry water beyond the capacity of its ditch, it cannot escape liability for damages caused by a washout, on the ground that such damage was the result of unavoidable accident, as by the burrowing of gophers in the banks of the canal.[112] A ditch company cannot gain a prescriptive right to be negligent, nor can it excuse its negligence in the management of its ditch by showing that other companies manage their ditches in the same manner.[113] Nor can it, by a contract releasing it from liability for damages caused by unavoidable accidents,

thereto, it was held, in an action by the city to enjoin the maintenance of the canal, and to abate it as a nuisance, that a decree ordering it to be filled was error. Fresno v. Fresno Canal & Irr. Co., 98 Cal. 179, 32 P. 943.

106. Jenkine v. Hooper Irr. Co., 13 Utah, 100, 44 P. 829; Lisonbee v. Monroe Irr. Co., 18 Utah, 343, 54 P. 1009. See, also, Weiderkind v. Tuolumne County Water Co., 65 Cal. 431, 4 P. 415. An irrigation company is bound to so construct its works as not to trespass upon the rights of adjacent landowners, and its agents or servants committing such wrong are also personally liable. Bates v. Van Pelt, 1 Tex. Civ. App. 185, 20 S. W. 949. A city is liable for injuries caused by its negligence in the use of an irrigating ditch controlled by it. Levy v. Salt Lake City, 5 Utah, 302, 15 P. 598. Liable for all damages resulting to others from negligence or unskilfulness in the construction, whether in planning or in actual construction, or in the maintenance or use of the ditch. Chidester v. Consolidated Ditch Co., 59 Cal. 197; Greeley Irr. Co. v. House, 14 Colo. 549, 24 P. 329; Old v. Keener, 22 Colo. 6, 43 P. 127; Catlin Land & Canal Co. v. Best, 2 Colo. App. 481, 31 P. 391; Consol. Home Supply Ditch & Reservoir Co. v. Hamlin, 6 Colo. App. 341, 40 P. 582; Arave v. Idaho Canal Co. [Idaho] 46 P. 1024; Kearney Canal & Water Supply Co. v. Akeyson, 45 Neb. 635, 63 N. W. 921; Shields v. Orr Extension Ditch Co., 23 Nev. 349, 47 P. 194; Clear Creek Land & Ditch Co. v. Kilkenny, 5 Wyo. 38, 36 P. 819. See, also, Richardson v. Kier, 34 Cal. 63, 37 Cal. 363, in which the ditch involved was not an irrigating ditch. A person irrigating his land is subject to the maxim "sic utere tuo ut alienum non laedas," and he will be responsible for injuries caused to others by his negligence or unskilfulness, or those willfully inflicted in the exercise of his right of irrigating his land. But an action cannot be maintained against him for the reasonable exercise of his right, although an annoyance or injury may thereby be occasioned to others. Gibson v. Puchta, 33 Cal. 310. Liable for damage caused by seepage due to faulty construction. Turpen v. Turlock Irr. Dist., 141 Cal. 1, 74 P. 295. A corporation is liable for damages caused by employe opening waste gate and discharging surplus water on adjoining land. Stuart v. Noble Ditch Co. [Idaho] 76 P. 255. A director of a water company who consents to the location, plan and method of construction of a ditch cannot recover for damage from seepage which might have readily been foreseen (Id.), nor in any event until the company has had notice of such seepage and a reasonable time in which to make repairs (Id.).

107. Stuart v. Noble Ditch Co. [Idaho] 76 P. 255; Catlin Land & Canal Co. v. Best, 2 Colo. App. 481, 31 P. 391; Kearney Canal & Water Supply Co. v. Akeyson, 45 Neb. 635, 63 N. W. 921; Shields v. Orr Extension Ditch Co., 23 Nev. 349, 47 P. 194; Thomas v. Blaisdell [Nev.] 58 P. 903. The grantee of an easement for an irrigating ditch is bound to keep the ditch in repair. Bean v. Stoneman, 104 Cal. 49, 37 P. 777, 38 P. 39. May recover for damages resulting from defective waste gates. Stuart v. Noble Ditch Co. [Idaho] 76 P. 255.

108. Where permits water to percolate to and injuriously saturate adjoining lands when he could have prevented it by proper drains, he is liable for damages, and will be enjoined from permitting damage to continue. Parker v. Larsen, 86 Cal. 236, 24 P. 989. See, also, Boynton v. Longley, 19 Nev. 69, 6 P. 437.

109. Lisonbee v. Monroe Irr. Co., 18 Utah, 343, 54 P. 1009.

110. King v. Miles City Irr. Ditch Co., 16 Mont. 463, 41 P. 431.

111. Lisonbee v. Monroe Irr. Ditch Co., 18 Utah, 343, 54 P. 1009.

112. Greeley Irr. Co. v. House, 14 Colo. 549, 24 P. 329. See, also, Chidester v. Consolidated Ditch Co., 59 Cal. 197.

113. Jenkins v. Hooper Irr. Co., 13 Utah, 100, 44 P. 829.

exempt itself from liability for damage resulting from its gross and continued negligence.[114]

In an action against a ditch company, formed by the consolidation of two pre-existing companies, to recover for damage caused by a ditch constructed by one of such companies, the plaintiff is required to prove by which company the ditch in question was constructed.[115] In an action to abate a ditch, the company owning it is a necessary party, and although an officer of the company is personally liable for the tort in so placing the ditch as to injure adjacent property, it is error to order and compel the filling of the ditch in an action against him for the tort.[116] In an action against a ditch owner to recover damages for injuries caused by his negligence in maintaining it, the burden is on the plaintiff to show that such injury was caused by the defendant's negligence, and also the amount of such damage or the value of the property destroyed. The question of negligence is for the jury.[117] An action for damages caused by the negligent construction of a canal lawfully built is not an action for "waste or trespass upon land," within the meaning of a limitation statute.[118]

The doctrine of contributory negligence.—As a general rule, it is the duty of the ditch owner to prevent injuries to other persons from his ditch, and not the duty of such other persons to protect themselves therefrom. It seems that where the injury occurs unexpectedly, or is transitory, the landowner should go to some trouble to avoid or lessen the damage, if this can be done by some temporary expedient, or at slight expense; but where the ditch owner, with full knowledge of the danger, negligently permits the injury to occur and continue, when he could have prevented it, he cannot escape liability on the ground that the landowner might, at slight expense, have prevented the damage. In such case, no duty rests upon the latter to avoid the consequences of the ditch owner's negligence, and the doctrine of contributory negligence does not apply.[119]

§ 9. *Bridging ditches crossing highways and streets.*—In several states, the owners of ditches crossing public highways are required by statute to keep such highways open and safe for travel by the construction of proper bridges. Such a provision does not require the covering of ditches running parallel with a highway, but becomes applicable only where they cross it, or so encroach upon it as to interfere with travel.[120] And it has been held that a municipal corporation, which accepts the dedication of streets across which a ditch has been previously located and a right of way acquired, takes the same subject to the prior rights of the owners of the ditch, and that the duty to construct bridges, whenever and wherever the public necessity and convenience may require, and to keep the same in repair, devolves upon the city, and not upon the ditch owners.[121] A city may not charge to the owners the cost of reconstructing a flume across a street unless so empowered.[122]

114. Catlin Land & Canal Co. v. Best, 2 Colo. App. 481, 31 P. 391.

115. Colorado Consolidated Land & Water Co. v. Morris, 1 Colo. App. 401, 29 P. 302.

116. Bates v. Van Pelt, 1 Tex. Civ. App. 185, 20 S. W. 949.

117. Greeley Irr. Co. v. House, 14 Colo. 549, 24 P. 329.

118. Ball. Ann. Codes & St. Wash. § 4800, does not apply but action governed by § 4805. Suter v. Wenatchee Water Power Co., 35 Wash. 1, 76 P. 298.

119. McCarty v. Boise City Canal Co., 2 Idaho, 225, 10 P. 623; Shields v. Orr Extension Ditch Co., 23 Nev. 349, 47 P. 194.

120. Farmers' High Line Canal & Reservoir Co. v. Westlake, 23 Colo. 26, 46 P. 134. In Kansas, it is held that the duty of an irrigation company to restore streets and highways to the condition of usefulness and safety theretofore existing, and to build all bridges necessary to that end is imposed by the common law independent of statute. State v. Lake Koen N. R. & S. Co. [Kan.] 65 P. 681.

121. City of Denver v. Mullen, 7 Colo. 345, 3 P. 693.

122. City ordinance requiring water to be conveyed across streets in covered flumes construed and held not to render defendant liable for cost of such flumes constructed by city. Bountiful City v. Lee, 27 Utah, 183, 75 P. 368.

DIVORCE.

§ 1. Jurisdiction and Domicile of Parties (1127).
§ 2. **Causes for Divorce (1128).** Desertion (1129). Imprisonment (1130). Causes in Discretion (1131).
§ 3. **Defenses and Excuses (1131).**
§ 4. **Practice and Procedure (1132).** Pleading (1132). Evidence and Proof (1133). Reference (1134). Verdicts and Findings (1134). New Trial (1134). Decree, Vacation, and Modification (1134). Costs (1136). Review (1136).
§ 5. **Custody and Support of Children (1137).**
§ 6. **Adjustment of Property Rights (1138).**
§ 7. **Effect of Divorce (1139).**
§ 8. **Foreign and Tribal Divorces (1139).**

§ 1. *Jurisdiction and domicile of parties.*[1]—Jurisdiction of courts of the subject of divorce is confined to what is given them by the statutes providing for divorce and alimony, and cannot be conferred by appearance[2] or by the consent of the parties.[3] A decree rendered by a court whose jurisdiction has been fraudulently involved against a nonresident who fails or refuses to appear is void.[4] On a repeal of a divorce act, pending suits will not be dismissed where there is a saving clause.[5] The plaintiff must allege[6] and prove that he is a bona fide resident of the state[7] and county[8] where the action is brought, or by some laws that the offense was committed therein,[9] prior to the time suit was instituted.[10] A divorce may be granted a defendant on his cross petition, though he is a nonresident.[11] The domicile of the husband determines that of the wife,[12] and a temporary absence of the latter does not change it,[13] but after he abandons her, it depends on her actual residence.[14] Where defendant has left and moved away,

1. See 1 Curr. L. 945.

2. The residence of one of the parties in the county where the action is brought is essential, and where the record affirmatively shows this was not so, the judgment on the wife's cross petition is void and may be attacked collaterally. Aldrich v. Steen [Neb.] 100 N. W. 311.

3. Cizek v. Cizek [Neb.] 99 N. W. 28.

4. Where husband went to another state and at the end of the required period of residence at once applied for divorce on the ground of desertion, and when it was granted returned to his former home, and all the circumstances showed that he had no intent of permanently leaving it, the court acquired no jurisdiction over the parties. Beeman v. Kitzman [Iowa] 99 N. W. 171.

5. Code went into effect by which divorce could only be had for adultery, and a suit for divorce for desertion was dismissed, pending an appeal. Congress passed a saving act, and decree of dismissal was reversed. Dabney v. Dabney, 20 App. D. C. 440.

6. Suit on ground of adultery of wife, and no allegation that she was ever in the state, or that the husband was domiciled there. Blake v. Dudley [La.] 36 So. 203.

7. The complainant must have settled there with intention of making it her permanent home. Miller v. Miller [N. J. Err. & App.] 58 A. 188. Whether residence bona fide a question for the jury. Michael v. Michael [Tex. Civ. App.] 79 S. W. 74.

8. Under Rev. St. 1898, § 1208, providing that divorce proceedings may be begun in county where plaintiff has been a resident for a year, plaintiff may sue for divorce for adultery committed in another county, notwithstanding Const. art. 8, § 5, providing that all civil and criminal business arising in a county must be tried therein. Gibbs v. Gibbs, 25 Utah, 282, 73 P. 641.

9. No jurisdiction over suit for desertion if the petitioner was a nonresident, though the wife now in the jurisdiction, it not being shown that the intention to desert was not formed until she came there. Blandy v. Blandy, 20 App. D. C. 535. Shannon's Code, § 4203, requiring two years' residence of petitioner applies only where the ground for divorce arose outside of the state. Carter v. Carter [Tenn.] 82 S. W. 309.

10. Where plaintiff was allowed to file a supplemental petition setting up acts of her husband committed since suit was begun, a judgment based primarily thereon should be reversed. Freudenstein v. Freudenstein, 110 La. 424, 34 So. 589.

11. The plaintiff had resided in the state the full statutory period. Pine v. Pine [Neb.] 100 N. W. 938. Where a wife sued for divorce when she had not been in the state for a year, subsequently after she had been in the state for a year filed a cross bill to her husband's suit for divorce, the court had jurisdiction, as first suit was presumed to be abandoned. Kane v. Kane [Wash.] 77 P. 842.

12. Harris v. Harris, 83 App. Div. 123, 82 N. Y. S. 568; Michael v. Michael [Tex. Civ. App.] 79 S. W. 74.

13. Code Civ. Proc. § 1756 provides that to obtain a divorce on the ground of adultery, the party applying therefor must have been a resident of the state when the offense was committed, and when the action was begun. Harris v. Harris, 83 App. Div. 123, 82 N. Y. S. 568. Evidence showed that plaintiff was a resident of New York where she had an apartment and her safety deposit vault, though as an opera singer she was away a great deal of the time, and defendant was bound by his admission as to her residence in his answer. Doeme v. Doeme, 89 N. Y. S. 215.

14. Rev. St. 1895, art. 2978, requiring six

service must be made by publication,[15] unless he is personally served.[16] An error in the name in publication will render void the divorce based thereon.[17] Jurisdiction may be obtained over one serving a sentence in a penitentiary.[18] If plaintiff in a divorce action be a resident of the state, the fact that the action is brought in a county in which plaintiff does not reside is not jurisdictional.[19]

§ 2. *Causes for divorce.*[20]—It must always be remembered that the elements of a particular cause are found by interpretation of the particular statute defining that cause.

Cruel treatment is the intentional infliction of bodily or mental pain on the complainant, reasonably justifying an apprehension of danger to life or health.[21] Mere bad temper,[22] laziness,[23] dissatisfaction with surroundings,[24] or excessive sexual indulgence, where the party's health is not affected,[25] or the refusal of sexual intercourse,[26] has been held to be insufficient evidence[27] of cruel and inhuman treatment, but the use of vile names and threats,[28] evidently intended to be executed,[29] or accompanied with acts of physical injury,[30] harsh treatment,[31] acts of brutality resulting in broken bones,[32] constant quarreling,[33] drunkenness,[34] charges

months' residence in the county, means actual physical presence, but where an amended petition was filed three years later setting up a new cause of action, her statutory residence could be determined with reference to the time of the amendment. Michael v. Michael [Tex. Civ. App.] 79 S. W. 74.

15. Service on defendant by leaving copy of summons at her house where she had run away was ineffectual. Maiello v. Maiello, 43 Misc. 266, 86 N. Y. S. 643. Where defendant had lived with plaintiff until the day before suit was brought, and he had then moved to a foreign country, it was proper to make service by publication and to mail the summons to him in the foreign country, though he had not resided there for six weeks; provision, B. & C. Comp. § 822, that proof of publication shall be made within six months is directory merely. McFarlane v. Cornelius, 43 Or. 613, 73 P. 325.

16. Though the affidavit was not sufficient to warrant publication, it was immaterial where defendant was afterwards personally served. McKibben v. McKibben, 139 Cal. 448, 73 P. 143.

17. A divorce based on constructive service on Minnie Grober where her true name was Wilhelmina Grober and she was generally known as Mena, was void. Grober v. Clements, 71 Ark. 565, 76 S. W. 655.

18. Notwithstanding Rev. St. 1899, § 2382, suspends all civil rights of person during term of his sentence. Gray v. Gray [Mo. App.] 79 S. W. 505.

19. Cochran v. Cochran [Minn.] 101 N. W. 179.

20. See 1 Curr. L. 946.

21. The habitual and intemperate use of morphine is not such cruelty, nor is it "habitual intoxication." Ring v. Ring, 118 Ga. 183, 44 S. E. 861. Evidence that wife constantly quarreled with, abused and insulted her husband, thereby injuring his medical practice and that she was a morphine eater, properly rejected. Smith v. Smith, 119 Ga. 239, 46 S. E. 106.

22. Averments that a husband was cold and sullen, pouted and refused to speak, that he insisted the wife should transfer her property to him, refused to pay taxes on it and threatened divorce proceedings, did not state a case of extreme cruelty or wanton refusal to provide for wife. Downey v. Downey [Mich.] 97 N. W. 699.

23. That a wife swore, and that though she was big and strong she refused to cook, wash and mend for her husband, but was addicted to novel reading, was possessed of an ungovernable temper, was lazy and untidy, did not constitute cruel and inhuman treatment. Baier v. Baier [Minn.] 97 N. W. 671.

24. Evidence insufficient where the differences only began when husband lost his position and had to give up his home, so that he asked his wife to live again with his relatives, and it appeared that he was kind to her. Kemp v. McArthur, 110 La. 248, 34 So. 431.

25. Harkins v. Harkins [Iowa] 99 N. W. 164.

26. The persistent refusal of a wife, though strong and robust, to accede to her husband's request for sexual intercourse, where it was not shown that the husband was physically injured, was not cruelty. Varner v. Varner [Tex. Civ. App.] 80 S. W. 386.

27. Divorce refused husband. House v. House [Va.] 46 S. E. 299.

28. Calling wife vile names and threatening her in the presence of the children and failing to care for her when sick showed extreme cruelty. De Roche v. De Roche, 12 N. D. 17, 94 N. W. 767.

29. Benfield v. Benfield, 44 Or. 94, 74 P. 496.

30. McKibben v. McKibben, 139 Cal. 448, 73 P. 143.

31. That husband struck wife, and refused to support and pay her bills, and treated her harshly. Hill v. Hill, 112 La. 770, 36 So. 678.

32. Years of extreme brutality towards his wife, culminating in jerking her three times from a carriage when she was trying to accompany her children to a circus, and thereby breaking her ribs. Wolverton v. Wolverton [Ind.] 71 N. E. 123.

33. Husband secured divorce. Slaughter v. Slaughter [Mo. App.] 80 S. W. 3.

34. And abusive language of wife. O'Sullivan v. O'Sullivan [Wash.] 77 P. 806.

of unfaithfulness,[35] unless not made in the presence of others,[36] unhealthful sexual excess,[37] or any treatment which endangers the life or health of the other party, or which renders one's condition intolerable,[38] and their living together insupportable,[39] is sufficient evidence.[40] By allowing third parties to abuse and mistreat his wife, the husband becomes legally answerable for the same.[41]

Intolerable indignities, as a cause for divorce,[42] refer to a course of treatment rendering living together intolerable, and differs from cruelty, which may consist of a single act endangering life or health.[43]

Desertion.[44]—To constitute desertion, there must be an actual abandonment of the other party,[45] with an intent to desert,[46] which is not shown where correspondence is maintained, evincing mere absence,[47] or where the party originally left for a legitimate purpose,[48] unless proper search has been made.[49] A wife refusing to join her husband in his new home is guilty of desertion,[50] but she is deserted where she is abandoned without her fault,[51] though she acquiesces therein,[52] or is driven away,[53] and is entitled to a divorce unless her husband in good faith[54] makes a

35. Repeated false charges that his wife was unchaste and that he was not the father of her youngest child, which charges injured her health. Turner v. Turner, 122 Iowa, 113, 97 N. W. 997. To charge that his wife is unfaithful in the presence of his child and others is ground for separation. Smith v. Smith, 92 App. Div. 442, 87 N. Y. S. 137.

36. Harkins v. Harkins [Iowa] 99 N. W. 154.

37. To entitle a wife to a divorce on the ground of excessive sexual demands, constituting cruelty, it is not necessary to show unwillingness on her part, to prove that she used force or violent words. Ridley v. Ridley [Iowa] 100 N. W. 1122.

38. That a wife used abusive epithets, refused to cook, though well, got into violent fits of anger, complained of husband's cooking, and accused him of adultery and incest was sufficient to entitle a husband to a divorce. McGee v. McGee [Ark.] 80 S. W. 579.

39. Husband neglected his wife, ceased to provide clothes, applied vile epithets and even struck her. Duhon v. Duhon, 110 La. 240, 34 So. 428.

40. De Roche v. De Roche, 12 N. D. 17, 94 N. W. 767.

41. A husband who requires his wife to live with his mother, who treats her with extreme cruelty, is himself guilty of extreme cruelty. Dakin v. Dakin, 1 Neb. Unoff. 457, 95 N. W. 781.

42. The wife objected to farm work, early hours, and that she was not allowed to go to town. The husband had built her a house and treated her kindly, but she abused him, failed to care for him when sick, and divorce was allowed the husband. Shy v. Shy [Mo. App.] 78 S. W. 299. Unjust accusations of unfaithfulness are intolerable indignities, but are not ground for divorce where wife's indiscreet conduct caused them. Ashburn v. Ashburn, 101 Mo. App. 365, 74 S. W. 394.

43. Indignities justifying divorce, where wife was forced to submit to excessive sexual intercourse, in and out of season, by which her health was injured. Krug v. Krug, 22 Pa. Super. Ct. 572.

44. See 1 Curr. L. 946.

45. The commission of adultery by husband at places other than the dwelling place of the parties is not a constructive desertion by him. Lake v. Lake [N. J. Eq.] 56 A. 296.

46. Burden of proof on plaintiff to show it. Tillis v. Tillis [W. Va.] 46 S. E. 926.

47. Wife was left to shift for herself, and husband was on government service in the West Indies, but they had corresponded and she had acknowledged a Christmas gift. McDonough v. McDonough, 20 App. D. C. 46.

48. Husband left wife for express purpose of seeking employment, and there was no proof of any change of purpose, except his continued absence. Oliver v. Oliver [N. J. Eq.] 57 A. 1033.

49. Where husband left wife with nothing at the time to show that he did not intend to return, and it appeared that she had made proper search and inquiry for him, a decree would be granted. Alward v. Alward [N. J. Eq.] 55 A. 996.

50. A husband who establishes a new home, and requests and provides means for his wife to join him, is not guilty of desertion, nor is his subsequent failure to support his wife, who refuses to join him, a cause for divorce. Roby v. Roby [Idaho] 77 P. 213. Where a wife without just cause refuses to live with her husband, his failure to support her is not ground for divorce. Isaacs v. Isaacs [Neb.] 99 N. W. 268.

51. One year. Ky. St. 1903, § 2117. Husband sent wife away, though she was not at fault, and avowed that he would not live with her again. Hall v. Hall, 25 Ky. L. R. 1304, 77 S. W. 668.

52. Where a husband deserted because his wife refused to support him in idleness, her acquiescence therein would not necessarily bar her from obtaining a divorce, as the duty of a deserted wife to invite a return, differs from that of a deserted husband. Wilson v. Wilson [N. J. Eq.] 57 A. 552.

53. Failure of a husband to supply his wife with money or the necessaries of life does not warrant her leaving him and obtaining a divorce on the ground of desertion after the statutory period of separation has elapsed. Farrier v. Farrier [N. J. Eq.] 58 A. 1079.

54. Where a husband did not return after a summer vacation, feigning illness, and then after over a year sent a registered letter to his wife, stating that he had rented

reasonable effort to induce her to return.[55] Where the husband does make the effort,[56] or the facts show that it would be unavailing, he is entitled to the divorce.[57] Separation under a decree of court,[58] or that was mutually acquiesced in,[59] or that was the result of agreement,[60] unless such agreement was secured by coercion,[61] or that occurs while one of the parties is insane,[62] or while a divorce suit is pending,[63] cannot be counted as part of the period of desertion.[64] Persistent refusal of reasonable matrimonial intercourse is not desertion,[65] or evidence thereof, unless so made by statute, as in California.[66] In Louisiana, the statute requires notice of abandonment to be given.[67]

Habitual drunkenness is a cause for divorce in some states.[68]

Imprisonment.—In Minnesota, a subsequent sentence to imprisonment in the state prison is a cause of divorce,[69] and in Missouri, the conviction of a felony.[70]

Voluntary separation for the space of five years is a ground for divorce in Wisconsin.[71]

apartments and wanting her to move in, the question of the good faith of the offer was for the jury. Gordon v. Gordon, 208 Pa. 186, 57 A. 525.

55. Where wife leaves husband because of his cruelty, it is his duty within two years to apply to her to restore the marital relations, giving her reasonable assurance of his sincerity and of her safety. Allowing her to think that he was living in adultery would prevent his offer to return terminating the desertion. Lister v. Lister [N. J. Eq.] 55 A. 1093. The demand of a husband that his wife come and live with him should be corroborated to entitle him to a divorce for desertion. Gunther v. Gunther [N. J. Eq.] 57 A. 1015.

56. Husband entitled to divorce for desertion where wife left partly because of his unjustifiable conduct, but he had used every reasonable effort to induce her to return. Ashburn v. Ashburn, 101 Mo. App. 365, 74 S. W. 394.

57. Husband entitled to divorce from wife because of desertion, though he made no efforts to induce her to return, where facts showed she had a settled determination to leave, and that it was not the impulse of the moment. Hall v. Hall [N. J. Err. & App.] 55 A. 300.

58. A decree in a foreign state that a wife was living apart from her husband for justifiable cause prevented her absence from constituting desertion. Taylor v. Taylor [N. H.] 57 A. 654.

59. Where the parties lived apart for 18 years without either applying for divorce, it was proper to find that the desertion was with her consent, and her subsequent refusal to resume marital relations with her husband constituted desertion entitling him to a divorce. McMullin v. McMullin, 140 Cal. 112, 73 P. 808.

60. A wife cannot have a decree for desertion where they lived apart in consequence of a written agreement of separation. Power v. Power [N. J. Eq.] 55 A. 111. Where a wife leaves a husband on account of his cruelty, but continues to receive a competent support from him, there was no desertion to entitle her to a divorce. G—— v. G—— [N. J. Eq.] 56 A. 736. Where a wife after being abandoned receives monthly sums from her husband for seven years, in accordance with an agreement prepared by her attorney, she cannot sue for divorce because of desertion, on breach of agreement, but the husband's liability for maintenance revives. Barclay v. Barclay [Md.] 56 A. 804.

61. A husband who has separated from his wife may be guilty of desertion, though he continues to support her in accordance with articles of separation, if it is shown that he is the one who insisted on the separation. Power v. Power [N. J. Err. & App.] 58 A. 192.

62. Time wife was found insane cannot be included in computing the period of her desertion. Blandy v. Blandy, 20 App. D. C. 535. That defendant is insane will not bar plaintiff a divorce for desertion, where defendant was sane for the statutory three years after abandonment. Fisher v. Fisher, 54 W. Va. 146, 46 S. E. 118.

63. The time during which a divorce suit is pending cannot be considered in computing the length of desertion, as that is a justifiable separation. Quaere: If such proceedings break the continuity of the period of desertion. Johnson v. Johnson [N. J. Eq.] 56 A. 708.

64, 65. That a wife without physical excuse refuses to have sexual intercourse with her husband does not entitle him to divorce because of desertion, where she fulfilled all the other duties of the relation. Pratt v. Pratt, 75 Vt. 432, 56 A. 86.

66. Civ. Code, § 96, where health does not make the refusal necessary. Evidence of refusal by wife for four weeks immediately following her marriage, insufficient. Hayes v. Hayes [Cal.] 78 P. 19.

67. The summons and notices required to be given under art. 145, Civ. Code, in order that the abandonment of the wife shall appear, may be given at longer, but not at shorter, intervals than the code fixes. Derby v. Dancey, 112 La. 891, 36 So. 795.

68. Evidence sufficient which showed habitual drunkenness and that he was guilty of adultery which he did not deny. Million v. Million [Mo. App.] 80 S. W. 290.

69. But indefinite sentence to imprisonment in the State Reformatory is not. Dion v. Dion [Minn.] 100 N. W. 4.

70. Rev. St. 1899, § 2921. Gray v. Gray [Mo. App.] 79 S. W. 505.

71. Evidence sufficient. Williams v. Williams [Wis.] 99 N. W. 431.

Causes in discretion.—In Washington, a divorce may be granted for any other cause deemed by the court sufficient, and on being satisfied that the parties can no longer live together.[72]

§ 3. *Defenses and excuses.*[73]—In a suit for separation for cruel and inhuman treatment, the misconduct of plaintiff may be set up as a defense.[74]

Insanity of defendant is an excuse for her misconduct.[75]

A divorce may be refused because the matter is res judicata.[76]

Recrimination is a showing by defendant of any cause of action against plaintiff,[77] or of mutual guilt,[78] as proof of cruelty,[79] cruel and inhuman treatment,[80] desertion,[81] prostitution,[82] or adultery,[83] and is a good defense unless the offense has been condoned;[84] since to entitle one to a decree of absolute divorce the applicant must be an innocent party.[85]

Collusion is an agreement betweeen the parties to procure a divorce, which the court would not grant if the facts were known,[86] and it is proper to dismiss a petition in ex parte proceeding where testimony is such as to excite grave suspicion of collusion.[87]

Connivance is a defense[88] to an action for divorce for the particular act connived at.[89]

Condonement is conditional forgiveness,[90] and may be express or implied.[91]

72. Sodomy held sufficient cause [2 Ball. Ann. Codes & St. § 5716]. Poler v. Poler, 32 Wash. 400, 73 P. 372.

73. See 1 Curr. L. 947.

74. It was error to limit defendant's proof to acts occurring contemporaneously with the specific acts of cruelty set up in the complaint; he should be allowed to show what their previous married life was [Code Civ. Proc. § 1765]. Powers v. Powers, 84 App. Div. 588, 82 N. Y. S. 1022.

75. Evidence insufficient to show that the wife was not accountable for committing adultery by reason of mental weakness. Schieck v. Schieck [Neb.] 97 N. W. 474.

76. A wife who had failed in a suit to set aside a deed for fraud and for alimony for desertion was barred from suing to set aside deed and for divorce for same cause. Greer v. Greer, 142 Cal. 519, 77 P. 1106.

77. Civ. Code, § 170; charge of cruelty where divorce was asked for adultery. Bordeaux v. Bordeaux [Mont.] 75 P. 524.

78. Where each party charges the other with grossly improper conduct, inconsistent with conjugal duty and fidelity, the evidence tending to show that neither was innocent, both petition and cross bill are properly dismissed. Wells v. Wells [Mo. App.] 82 S. W. 1103.

79. Wife's conduct bars her from divorce because of cruelty. Weaver v. Weaver, 110 La. 265, 34 So. 438.

80. Divorce refused wife where it appeared that she was irritable and the parties were quite evenly matched, and "she thought that if it came right down to a rough and tumble fight, she could lick him." Jones v. Jones [Or.] 77 P. 134.

81. The husband's desertion of his wife for the statutory period will bar his securing a divorce because of her subsequent adultery, though the defense is not pleaded. Rapp v. Rapp [N. J. Eq.] 58 A. 167.

82. Though the husband defaults, as the state is a party under B. & C. Comp. § 554. Earle v. Earle, 43 Or. 298, 72 P. 976.

83. A wife guilty of adultery cannot obtain a divorce on the ground of abandonment. Eikenbury v. Burns [Ind. App.] 70 N. E. 837.

84. Where the adultery of the wife has been condoned, it will not bar her from securing a divorce because of his cruel and inhuman conduct. Wabeke v. Wabeke [Iowa] 98 N. W. 559.

85. Whether an absolute or limited divorce shall be granted depends not on the prayer of the pleading but lies in the discretion of the court considering their conduct. McKnight v. McKnight [Neb.] 98 N. W. 62.

86. That the parties compromised three independent actions for the recovery of the wife's property is insufficient to show that a divorce obtained on the ground of adultery was the result of collusion, where there was no evidence that the wife procured or connived at her husband's adultery, or had knowledge of it until long afterwards. Doeme v. Doeme, 96 App. Div. 284, 89 N. Y. S. 215. Divorce refused as evidence tended to show collusion. Galloway v. Galloway, 92 App. Div. 300, 86 N. Y. S. 1078.

87. Suit by husband for divorce for adultery, where it appeared he had left his wife a few days after marriage and she, pretending he was dead, had married another. Jones v. Jones, 20 App. D. C. 38.

88. In an action for divorce on the ground of adultery, the fact that petitioner has committed adultery, or has connived at or not done his best to prevent defendant from committing adultery, will prevent him from securing a decree. Thornton v. Thornton [N. J. Eq.] 58 A. 647.

89. Connivance by husband at an act of adultery of his wife will not bar divorce for subsequent act of adultery, but dismissal of suit for divorce for act of adultery will bar a suit for a prior act, unless it was not then known to plaintiff. Viertel v. Viertel, 99 Mo. App. 710, 75 S. W. 187.

90. Where a husband resumed abusing

A condonation of extreme and repeated cruelty was not inferred from a single act of sexual intercourse,[92] but a condonation of adultery was inferred from cohabitation for a month,[93] with full knowledge of the facts,[94] though there was no actual forgiveness.[95] Condoned cruelty may be revived by subsequent misconduct, even if such misconduct be not in itself sufficient to warrant a divorce.[96]

§ 4. *Practice and procedure. Practice in general.*[97]—It is bad practice to admit service of original writ.[98] In default cases, the trial judge represents the state.[99] The general public, even with the consent of the parties, cannot be excluded from the trial.[1]

The process must confer jurisdiction adequate to the relief sought;[2] for instance it must be in personam if alimony is to be decreed.[3]

Pleading.[4]—The complaint must well plead the particular cause relied on.[5] Where many averments in an action for separation for cruel and inhuman treatment relate to the general course of conduct, a bill of particulars will not be ordered.[6] Allegations defective before judgment may be sufficient afterward[7] or on appeal.[8] Defenses should be pleaded,[9] or if in evidence, the pleading will be amended[10] where there is no surprise.[11] Allegations sufficient to support alimony should be included if that relief be asked.[12] Defendant in a suit for separation and sep-

his wife the very next day after he claimed his cruel treatment had been condoned, there was no condonement. Ellithorpe v. Ellithorpe [Iowa] 100 N. W. 328. Reconciliation in Louisiana has the same effect as condonation in the common-law states. Hill v. Hill, 112 La. 770, 36 So. 678.

91. Failure to apply for divorce for marital offense implies condonation. McMullin v. McMullin, 140 Cal. 112, 73 P. 808. Where husband sued for divorce on ground of adultery, the wife cannot set up his impotency as a defense where she had not done so in a previous divorce suit, but had continued to receive support from him. G—— v. G—— [N. J. Eq.] 56 A. 736.

92. The fact that on returning home late at night with her husband, after several of her ribs had been broken because of his cruelty, she cohabited with him that night, but left the next morning and brought suit for divorce, did not show condonation. Wolverton v. Wolverton [Ind.] 71 N. E. 123.

93. Plaintiff knew of his wife's adultery within a few days of its commission, but continued to occupy the same room with her for a month longer. Bordeaux v. Bordeaux [Mont.] 75 P. 524.

94. Adultery is not condoned by cohabitation unless plaintiff did so with full knowledge of facts sufficient to warrant a belief as to defendant's guilt, which was not so here, where he explained the facts and denied his guilt. Harris v. Harris, 83 App. Div. 123, 82 N. Y. S. 568.

95. Where there is sexual intercourse between husband and wife, after the former's knowledge of the latter's adultery, though there is no forgiveness, the offense has been condoned. Rogers v. Rogers [N. J. Eq.] 58 A. 822.

96. Cochran v. Cochran [Minn.] 101 N. W. 179.

97. See 1 Curr. L. 948.

98. There should be personal service of the original writ in divorce cases. Where personal service cannot be had the return should be non est. Palmer v. Palmer [Del. Super.] 57 A. 533.

99. It is his right and duty to inquire of the parties themselves as to any matrimonial offenses. Eikenbury v. Burns [Ind. App.] 70 N. E. 837.

1. But persons of immature years may be so excluded. Harkins v. Harkins [Iowa] 99 N. W. 154.

2. See ante, § 1. Also see Process, 2 Curr. L. 1259.

3. See Alimony, 3 Curr. L. 146.

4. See 1 Curr. L. 948.

5. Allegations of adultery held sufficient. Lawrence v. Lawrence [Ala.] 37 So. 379.

6. Earle v. Earle, 79 App. Div. 631, 79 N. Y. S. 613.

7. A petition that defendant abused and taunted plaintiff and falsely accused him was defective before judgment as being in the nature of a conclusion of law, but was good afterwards. Slaughter v. Slaughter [Mo. App.] 80 S. W. 3.

8. Where plaintiff failed to demur and made no objection to the introduction of evidence in support of a cross bill, it was too late to question the sufficiency of the allegations on an appeal. Dakin v. Dakin, 1 Neb. Unoff. 457, 95 N. W. 781.

9. Recrimination is a countercharge which should be pleaded in order to be available, unless complainant in putting in his own case, himself shows his own guilt. Rapp v. Rapp [N. J. Eq.] 58 A. 167.

10. Matter in condonation having been admitted in evidence without objection, though not pleaded, a supplemental answer setting it up will be allowed. Wilkins v. Wilkins [N. J. Eq.] 58 A. 821.

11. Defendant was allowed to amend her pleading by setting up the connivance by petitioner in her adultery, no surprise being alleged. Thornton v. Thornton [N. J. Eq.] 58 A. 647.

12. To obtain the allowance, pending divorce proceedings, out of the husband's estate, the wife must set out, in her bill or answer, the estate of the husband, or that he has property out of which such allowance can be granted. Lawrence v. Lawrence

arate support cannot have his answer stricken out and be prevented from presenting a defense because of his contempt.[13] The practice of filing a cross petition for divorce is well established.[14]

Evidence and proof.[15]—The burden of proof must be met by a preponderance of evidence of the ground or defense pleaded.[16] Corroboration is necessary,[17] unless it is clear that there is no collusion.[18] The circumstantial evidence[19] necessary to show adultery need not be irreconcilable with the theory of innocence, but it is sufficient if there is a fair preponderance of evidence,[20] as by proof of circumstances which raise a presumption of unlawful intimacy, though the direct fact is not proved.[21] That one was discovered in a compromising situation,[22] or was suffering from venereal disease,[23] is sufficient. The resumption of marital relations is evidence of condonation,[24] but is not conclusive.[25] Confessions of a party may be of slight value,[26] but the testimony of either is competent.[27] Admissions are competent evidence for the purpose of defeating a divorce.[28] Proper foundation must be laid to render letters admissible.[29] Evidence of reputation is inadmissible where it is not questioned.[30] It is essential to prove a marriage.[31] Where a party marries

[Ala.] 37 So. 379. See Alimony, 3 Curr. L. 146.

13. Const. U. S. Amend. 14, against taking property without due process of law. Sibley v. Sibley, 76 App. Div. 132, 12 Ann. Cas. 135, 78 N. Y. S. 743.

14. Wilkins v. Wilkins [N. J. Eq.] 58 A. 821.

15. See 1 Curr. L. 948.

16. Evidence insufficient to show cruelty a cause of divorce. Flynn v. Dreyfus, 112 La. 861, 36 So. 758. Evidence sufficient to justify wife in leaving husband's home because of his cruel conduct. Baier v. Baier [Minn.] 97 N. W. 671. Evidence held sufficient to show willful desertion by the husband and no bona fide attempt to effect a reconciliation and resumption of the marital relation. Stevens v. Stevens, 210 Ill. 362, 71 N. E. 327.

17. Divorce for desertion cannot be granted on the uncorroborated evidence of the petitioner. Cotter v. Cotter [N. J. Eq.] 58 A. 73; Farrier v. Farrier [N. J. Eq.] 58 A. 1079.

18. McMullin v. McMullin, 140 Cal. 112, 73 P. 808.

19. Evidence sufficient to show adultery. —Harris v. Harris, 83 App. Div. 123, 82 N. Y. S. 568. Evidence insufficient to show adultery; dissent. Schulze v. Schulze, 83 App. Div. 375, 82 N. Y. S. 266; Gibert v. Randazzo, 112 La. 1055, 36 So. 852. Evidence held insufficient to prove adultery by the husband. Farrier v. Farrier [N. J. Eq.] 58 A. 1079. Evidence held sufficient in suit for divorce by the husband to show adultery by the wife. Matthews v. Matthews [N. J. Eq.] 58 A. 1047. Evidence insufficient to show wife mentally irresponsible when she committed adultery. Schieck v. Schieck [Neb.] 97 N. W. 474. Not reversible error to exclude competent evidence of wife's adultery when divorce was granted on that ground. Pauly v. Pauly [Okl.] 76 P. 148.

20. Evidence of adulterous act prior to one alleged is admissible to show desire. Roth v. Roth, 90 App. Div. 87, 85 N. Y. S. 640.

21. Heyman v. Heyman [Ill.] 71 N. E. 591.

22. Evidence sufficient that plaintiff on return home in early morning found his wife in bed with a boarder. Hall v. Hall, 43 Or. 619, 75 P. 141.

23. That husband was suffering from venereal disease and wife was not is sufficient evidence of the former's adultery, Thornton v. Thornton [N. J. Eq.] 58 A. 647.

24. Rogers v. Rogers [N. J. Eq.] 58 A. 822.

25. The fact that a wife resumed marital relations after knowledge that her husband was suffering from venereal disease which he claimed was a result of a sprain does not show condonation. Wilkins v. Wilkins [N. J. Eq.] 58 A. 821.

26. Evidence of confessions made by the wife of her adultery to a servant girl was insufficient where the latter was named as co-respondent by the wife in her answer. Jewell v. Jewell, 89 N. Y. S. 166.

27. A husband or wife is not compellable to give evidence in an action for divorce on account of adultery. Schaab v. Schaab [N. J. Err. & App.] 57 A. 1090.

28. Tillis v. Tillis [W. Va.] 46 S. E. 926.

29. In a suit for divorce for adultery, it was incompetent to admit letters without showing who wrote them, or that they were addressed to or received by defendant. Donnelly v. Donnelly, 25 Ky. L. R. 1543, 78 S. W. 182.

30. Evidence of witnesses who knew little of the actual conduct of the parties, that from their knowledge of the reputation of the parties, they did not believe the husband could safely live with his wife, was opinion evidence and inadmissible. House v. House [Va.] 46 S. E. 299. Proper to exclude evidence of reputation of defendant as a moral and law abiding man where it was not questioned, in an action for divorce for sodomy. Poler v. Poler, 32 Wash. 400, 73 P. 372.

31. Sufficiency of evidence in an action for separation and alimony by the wife, to show a legal marriage justifying a judgment of separation and allowance of alimony on a finding of abandonment and refusal to support, regardless of a prior marriage of plaintiff, the other party to which had disappeared and was supposed to be dead. Taylor v. Taylor, 173 N. Y. 266, 65 N. E. 1098. See note on proof of termination of former marriage, 89 Am. St. Rep. 198.

when her first husband is living, there is a presumption that the first marriage has been dissolved.[32] The judgment roll of a prior action for alimony is admissible in evidence, though an appeal is pending.[33]

Reference.[34]—Where the court refuses to confirm the report, leave to submit further proof should be given,[35] or further reference ordered before a new referee.[36]

Verdicts and findings.[37]—The issue of marriage need not be submitted to a jury,[38] but after a verdict, a party is entitled to notice of application for judgment.[39] Findings should be separate.[40] A judgment cannot be supported where the findings are not of the facts essential to the ground pleaded[41] or have been set aside,[42] unless they were immaterial.[43] When an application for divorce is on the ground of cruel treatment or habitual intoxication, it is discretionary with the jury to grant a total or partial divorce.[44]

New trial.[45]—A new trial may be granted for newly discovered evidence,[46] or may be had where fraud has been practiced on the court even after the lapse of a year, and where the party has married again,[47] or where a default has occurred without the party being at fault,[48] but it will be refused if there were conflicting affidavits,[49] or where there was only harmless error,[50] or where the alleged issue has been fairly tried already.[51]

Decree, vacation, and modification.[52]—A dismissal terminates the divorce proceeding.[53] It is sometimes required that the jurisdictional facts shall be recited in

32. Though no divorce was proved from first husband. McKibben v. McKibben, 139 Cal. 448, 73 P. 143.

33. Greer v. Greer, 142 Cal. 519, 77 P. 1106.

34. See 1 Curr. L. 949.

35. Where the court refused to confirm the report of the referee, believing that there was collusion, it should have given plaintiff leave to submit further proof, as there was no direct testimony as to any collusion. Galloway v. Galloway, 92 App. Div. 300, 86 N. Y. S. 1073.

36. The parties stipulated for a reference, but the report was not confirmed, and a new reference ordered before a new referee. Bauer v. Bauer, 42 Misc. 557, 87 N. Y. S. 607.

37. See 1 Curr. L. 950.

38. There is no statutory provision requiring an action for separation to be submitted to a jury, even though the validity of the marriage is involved. Packard v. Packard, 88 App. Div. 339, 84 N. Y. S. 1090.

39. Defendant's attorney is entitled to notice as a decision must be made before any judgment can be entered. Boller v. Boller, 96 App. Div. 163, 89 N. Y. S. 200.

40. Recital in decree that all the material allegations of the complaint are sustained does not satisfy the requirement of separate findings. Musselman v. Musselman, 140 Cal. 197, 73 P. 824.

41. Finding that "the acts of defendant * * * did not afflict upon the plaintiff grievous bodily injury or mental suffering" is insufficient, being a conclusion of law. Franklin v. Franklin, 140 Cal. 607, 74 P. 155.

42. Where jury's findings on charge of recrimination were set aside, and no other findings made, the judgment would be reversed, as such findings were material. Bordeaux v. Bordeaux [Mont.] 75 P. 524.

43. McKibben v. McKibben, 139 Cal. 448, 73 P. 143.

44. Civ. Code 1895, § 2427. Wolf v. Wolf [Ga.] 48 S. E. 691.

45. See 1 Curr. L. 950.

46. The judgment was mainly on plaintiff's evidence, who now by affidavit states that he was mistaken. Kennedy v. Kennedy [Nev.] 77 P. 597.

47. Code Civ. Proc. § 602, relating to new trials, applies to divorce proceedings and was not repealed by implication by Laws 1885, p. 248, c. 49, requiring appeals from divorces to be taken in six months. Schafer v. Schafer [Neb.] 99 N. W. 482. Where decree was entered on false affidavit of husband as to residence of wife, it will be set aside on her application. Elmgren v. Elmgren, 25 R. I. 177, 55 A. 322.

48. A default should be opened where the court forced a trial, notwithstanding the stipulation of the parties to postpone the trial on account of the illness of the defendant. Jewell v. Jewell, 89 N. Y. S. 166.

49. Here one of the parties had married again. Edge v. Edge [Neb.] 99 N. W. 644.

50. Where the evidence of cruel and inhuman treatment was strong, the erroneous admission of a letter from plaintiff to her father-in-law was harmless. Duryea v. Duryea, 91 App. Div. 101, 86 N. Y. S. 337.

51. The husband's petition alleged adultery, and the cross petition desertion, the first was found true, and motion to try the other issue, being practically for a rehearing, was refused. Gregory v. Gregory [N. J. Eq.] 58 A. 287.

52. See 1 Curr. L. 950.

53. Where a wife procured the dismissal of her suit in vacation, the court at the next term could not reinstate the case on the motion of her counsel, and for his own benefit. Welborn v. Welborn [Fla.] 36 So. 61. A proceeding for divorce is terminated by an order dismissing the petition, notwithstanding the fact that no reference is made in the order to defendant's cross petition for

the decree,[54] or that the decree shall be dated,[55] or that it shall not be made until after a certain period after the preliminary decree.[56] For reasons of public policy, divorce decrees must be governed by principles especially applicable thereto, and cannot be reopened in the same way as other decrees.[57] The pleadings and record need not show claim for alimony.[58] A divorce decree may be vacated at the term at which it was entered,[59] but cannot be reopened at a subsequent term,[60] though in Kentucky, it may be annulled.[61] The consent of the parties will not confer on the court jurisdiction to set aside a judgment,[62] but a decree will always be opened when it appears that the plaintiff had no residence in the state.[63] The court has discretion to open a decree or a part thereof,[64] on account of the illness or mistake of the party,[65] or because of fraud, as the state is an interested party;[66] but it will refuse to open a decree where justice does not require it,[67] or to allow one to defend because service was by publication.[68] Such application is addressed to the sound discretion of the court.[69]

alimony. Nauman v. Nauman, 4 Ohio C. C. (N. S.) 298.

54. A decree reciting that the allegations of the complaint are sustained, sufficiently shows jurisdiction where the allegations of the complaint were sufficient. Buelna v. Ryan, 139 Cal. 630, 73 P. 466.

55. Omission of date does not render decree void. Gen. St. 1901, § 5142, required date in order to prevent parties from remarrying within the prohibited term. Phillips v. Phillips [Kan.] 76 P. 842.

56. Two years after rendition of decree of separation and where there has been no reconciliation, party may apply for order for final divorce, and after answer filed, it is too late for defendant to except as to the time of bringing the suit. Raymond v. Carrano, 112 La. 869, 36 So. 787.

57. Solomon v. Solomon, 4 Ohio C. C. (N. S.) 321.

58. McKensey v. McKensey [N. J. Eq.] 55 A. 1073.

59. Before the situation of the parties is changed, the court may on notice vacate the decree where the cross complaint was insufficient. Greer v. Greer, 25 Ky. L. R. 655, 76 S. W. 166.

60. Rev. St. § 5355, relating to reopening of cases within five years where there was no other service than by publication, and defendant had no actual notice of the pendency of the action, does not apply to divorce cases. Solomon v. Solomon, 4 Ohio C. C. (N. S.) 321.

61. Under Civ. Code, § 426, it may be annulled on the verified petition of the parties, but it cannot be set aside. Hendrix v. Hendrix, 25 Ky. L. R. 632, 76 S. W. 165.

62. Under Civ. Code, § 426, oral consent of parties insufficient. Greer v. Greer, 25 Ky. L. R. 1247, 77 S. W. 703.

63. A decree for divorce on ground of adultery will be set aside on a bill of review, where it appears the complainant had no residence in the state, and had condoned his wife's adultery, and this though four years had elapsed and the husband had married again, when the wife was too ignorant and poor to secure her rights. Watkinson v. Watkinson [N. J. Eq.] 58 A. 384.

64. A decree awarding divorce and the custody of children may be reopened as to the latter where it was fraudulently procured. Trammell v. Trammell [Tex. Civ. App.] 80 S. W. 119.

65. Where default was entered when defendant was ill and a physician's certificate to that effect was not verified, it should have been opened on a proper showing, as it was not like defaults in ordinary actions, the state having an interest. Henderson v. Henderson, 83 App. Div. 449, 82 N. Y. S. 444.

66. A divorce decree for desertion will be reopened where the original case was weak, defendant had failed to answer because of illness of counsel, and though defendant had offered for a consideration to suffer a default, as the public was also interested, and complainant had not remarried. Richardson v. Richardson [N. J. Eq.] 58 A. 820. In actions for divorce, the court has inherent power to vacate a judgment where its jurisdiction is invoked by fraud or deceit, when application for relief is made in time. Scribner v. Scribner [Minn.] 101 N. W. 163. Findings that the wife did not become aware of divorce proceedings until long after the decree against her was rendered, and that she was prevented from acquiring such knowledge by the false representations of the husband, are sufficient on which to base an order vacating the decree. State v. Superior Court of King County [Wash.] 78 P. 198.

67. Where wife suffered a default on agreement that she should receive $500 which husband refused to pay, it was not error of law to refuse to vacate the decree, as it was not necessarily inconsistent with a finding that justice did not require such action. Melvin v. Melvin [N. H.] 58 A. 835. Vacation of decree denied, though plaintiff fraudulently gave a wrong address of defendant, where defendant did in fact know of the suit a month before the decree was entered and made no inquiries. McDonald v. McDonald, 34 Wash. 293, 75 P. 865.

68. Though service was obtained by publication, the court under Ball. Ann. Codes & St. § 4880, had no power after judgment to set it aside and to allow the defendant to defend. Metler v. Metler, 32 Wash. 494, 73 P. 535.

69. Where affidavits on which the application is based conflict, the trial court's decision will not be disturbed on appeal. Scribner v. Scribner [Minn.] 101 N. W. 163.

Costs.[70]—The husband must pay the costs of both parties unless wife at fault and has ample estate.[71] The amount of counsel fees is discretionary with the court,[72] and the payment of temporary alimony may be made a condition precedent to the husband's maintaining his action,[73] but none should be allowed after it appears the wife was not entitled to a divorce.[74] The trial court may order costs to be paid even after an appeal has been taken,[75] and a decree of divorce is sufficient to carry costs, though the findings do not support the disposition of property.[76] Judgment of costs is void where defendant, a nonresident with no property in the state, was served by publication.[77]

Review.[78]—A party will be deprived of his right of appeal if he has done anything to place it beyond the court's power to reverse the decree,[79] but furnishing an imperfect abstract,[80] or clerical errors, will not deprive a party of right of appeal.[81] The appellate court will not disturb findings based on conflicting evidence,[82] involving the credibility of witnesses,[83] unless the trial was entirely on depositions,[84] or it has the right to try de novo,[85] nor unless warranted by statute, will it review interlocutory decrees for alimony.[86] When the jury has granted a partial divorce, and the court below has overruled a motion for a new trial, the supreme court will not interfere.[87] After record is filed, the supreme court has power, when necessary to the complete exercise of its appellate jurisdiction, to make orders regarding the payment of costs.[88] The finality of a decree is not impaired by an abortive attempt to appeal.[89]

70. See 1 Curr. L. 951.

71. Ky. St. 1903, § 900. Donnelly v. Donnelly, 25 Ky. L. R. 1543, 78 S. W. 182. Where defendant appealed and subsequently obtained a new trial, the appeal would be dismissed and she would be chargeable with costs. Belding v. Belding [Iowa] 97 N. W. 1112.

72. The allowance of $1,000 solicitor's fees was with the sound discretion of the court, considering the circumstances of the parties. Benham v. Benham, 208 Ill. 98, 70 N. E. 30. Allowance of counsel fees was proper where a new trial was necessary to determine if there was a marriage. Herrmann v. Herrmann, 88 App. Div. 76, 84 N. Y. S. 736.

73. Reed v. Reed [Neb.] 98 N. W. 76.

74. Wald v. Wald [Iowa] 99 N. W. 720.

75. Roby v. Roby [Idaho] 74 P. 957.

76. Musselman v. Musselman, 140 Cal. 197, 73 P. 824.

77. Johnson v. Matthews [Iowa] 99 N. W. 1064.

78. See 1 Curr. L. 951.

79. The appeal of a husband from the judgment giving alimony, where he secured a divorce on his cross complaint, will be dismissed where he has married again pending appeal, as he has placed it beyond the court's power to reverse the decree of divorce. Rariden v. Rariden [Ind. App.] 70 N. E. 398.

80. Where, on appeal in divorce, the abstract is imperfect and appellee is not financially able to file an additional one, appellant should have been ruled to file an additional one, or to furnish the appellee money therefor. Benham v. Benham, 208 Ill. 98, 70 N. E. 30.

81. Error in the date of affidavit for appeal, where a mistake, will be corrected and appeal allowed. Viertel v. Viertel, 99 Mo. App. 710, 75 S. W. 187.

82. Findings as to residence and desertion. Harding v. Harding, 140 Cal. 690, 74 P. 284. Findings of chancellor in divorce proceedings will not be interfered with on appeal, when there is a conflict in the evidence. Radford v. Radford [Ky.] 82 S. W. 391. The evidence of cruelty was only the testimony of the wife, which was contradicted by that of the husband. Ashburn v. Ashburn, 101 Mo. App. 365, 74 S. W. 394. Evidence conflicting as to plaintiff's alleged misconduct and adultery. Million v. Million [Mo. App.] 80 S. W. 290.

83. Great weight given to decision of trial judge on question of fact which depended on the credibility of witnesses. Gibert v. Randazzo, 112 La. 1055, 36 So. 852. Where the court dismissed the complaint though there was evidence of adultery, it passed upon the credibility of the witnesses and its action would not be reversed; dissent. Schulze v. Schulze, 83 App. Div. 375, 82 N. Y. S. 266.

84. Where the trial was entirely on depositions, the appellate court will consider the same as if originally heard there. Roby v. Roby [Idaho] 77 P. 213.

85. Supreme court may try the action de novo when all the evidence is before it. Kane v. Kane [Wash.] 77 P. 842.

86. An interlocutory decree in divorce proceedings, allowing complainant alimony pendente lite, is not appealable. Lawrence v. Lawrence [Ala.] 37 So. 379. See Appeal and Review, 3 Curr. L. 167. In North Carolina, an appeal lies from an order granting alimony pendente lite. Barker v. Barker [N. C.] 48 S. E. 733, following Moore v. Moore, 130 N. C. 333, 41 S. E. 943.

87. Wolf v. Wolf [Ga.] 48 S. E. 691.

88. Roby v. Roby [Idaho] 74 P. 957.

89. An attempted appeal from a decree of divorce rendered for want of answer has no effect upon the finality of the decree as

§ 5. *Custody and support of children.*[90]—On application of either party, or of its own motion, the court before or after decree may make order respecting custody of children, and if it makes a mistake, it may correct the same,[91] or if it was procured by fraud, it may be set aside.[92] A decree awarding a child is binding on parties in another jurisdiction as to all facts existing up to the date of its rendition.[93] Not the guilt or innocence of the parents,[94] unless one of them continues to lead an immoral life,[95] but the best interests of the child, is the main consideration.[96] The husband may be ordered to support his child where he has abandoned his family,[97] and this may be enforced by contempt proceedings,[98] but it cannot be made a lien on his land.[99]

A statutory proceeding to charge an allowance for support of children under the New Jersey law[1] requires personal notice within the state or an appearance;[2] but in order to modify an allowance already made, such notice may be given as the chancellor directs.[3] If he directs personal notice, it may be served out of the state,[4] since under the decree the court retains custody of him[5] which he cannot divest by going beyond the state.[6] The proceeding to change the allowance is merely a continuation of the decree, therefore "due process" does not require the same notice as on the original application.[7] In a proceeding after divorce under

terminating the marriage relation. (Under B. & C. Comp. § 548, providing that no appeal lies from a decree rendered for want of answer). State v. Leasia [Or.] 78 P. 328.

90. See 1 Curr. L. 951.

91. Civ. Code, § 192. Child was awarded to wife, and on its being shown that she was immoral, the court reversed its action. Pearce v. Pearce [Mont.] 76 P. 289.

92. It is not res judicata. Trammell v. Trammell [Tex. Civ. App.] 80 S. W. 119.

93. A foreign divorce awarded child to father, with right for mother to have for one month a year provided she did not take her out of the jurisdiction. In habeas corpus by father to recover child who had been removed from jurisdiction, the decree was conclusive unless existence of changed conditions could be shown. Wilson v. Elliott, 96 Tex. 472, 75 S. W. 368.

Appealing from an order for custody with a "stay" bond does not continue appellant's right to custody unless the stay so provides. The mere stay suspends further proceedings only but not custody [Code Civ. Proc. § 941]. In re De Lemos, 143 Cal. 313, 76 P. 1115.

94. The divorce was denied, the children were not brought personally into court, and the mother with children had been residing in another state. Power v. Power [N. J. Eq.] 55 A. 111.

95. A wife, divorced for adultery, and who had married her paramour, was not entitled to custody of her infant daughter, after the husband's death, as against the latter's relatives. In re Steele [Mo. App.] 81 S. W. 1182. Where the husband obtained a divorce and the custody of the children because of his wife's adultery, it was error to modify the decree by giving her permission to see the children when she was still living with her paramour and leading a degrading life. Woodhouse v. Woodhouse, 89 App. Div. 88, 85 N. Y. S. 442. The awarding of children to wife where she obtained a divorce for adultery, although she herself was charged with adultery and the children were well cared for by the paternal grandparents, would not be disturbed considering that they were only four and six years old. Million v. Million [Mo. App.] 80 S. W. 290.

96. Children awarded to father, it being for their best interests, he being shown to be a fit person, and the mother was not a suitable custodian. Goodridge v. Goodridge, 25 Ky. L. R. 649, 76 S. W. 164. Infant daughter awarded to abandoned wife. Hall v. Hall, 25 Ky. L. R. 1304, 77 S. W. 668. Child of 5 years awarded husband, who was given divorce, as he lived with an aunt who was competent to care for the child. Ashburn v. Ashburn, 101 Mo. App. 365, 74 S. W. 394. Child awarded to deserted mother as for his best interest, though not so well off financially as husband's parents. Power v. Power [N. J. Err. & App.] 58 A. 192. Where parents were living apart principally because of difficulties with relatives, the court awarded the custody of a four year old boy to the mother, with right to father to visit. **Dissent,** as father acted within legal rights, and it was approving the wife's fault in leaving him. People v. Sinclair, 91 App. Div. 322, 86 N. Y. S. 539.

97. Wife can compel husband to provide for support of herself and child where he had abandoned her without justifiable cause, nor is she bound to return to his home when he is living with another woman. Fred v. Fred [N. J. Eq.] 58 A. 611.

98. In Michigan, "alimony" in Laws 1899, Act No. 230, includes support for children, and its payment may be enforced by contempt proceedings. Brown v. Brown [Mich.] 97 N. W. 396.

99. A decree in a divorce suit that "the support" of a minor child "is now here decreed a lien on the real estate" of the husband is not such a final judgment under Burns' Rev. St. 1901, § 617, or so definite as to become a lien, and under § 617 in no case could a lien last longer than 10 years, and a proceeding begun after 18 years is barred by laches. Matthews v. Wilson, 31 Ind. App. 90, 67 N. E. 280.

1. Divorce act, § 24.

2, 3, 4, 5, 6, 7, 8. White v. White [N. J. Err. & App.] 55 A. 739.

the New Jersey statute to charge an allowance for children, power to alter the allowance made may be reserved in the decree.[8]

§ 6. *Adjustment of property rights.*[9]—Generally, the guilty party forfeits all rights under the marriage,[10] and the wife when divorced for her misconduct loses her dower;[11] but in some jurisdictions, the guilty wife may have provision made for her.[12] Likewise a trust for a wife during the life of her husband will cease,[13] and property can no longer be inherited by one from the other.[14] In Minnesota, when a wife obtains a divorce because of the adultery of her husband, she is entitled to dower in his lands the same as if he were dead.[15] After decree of divorce, the husband has no right of possession in the separate property of the wife, occupied as a homestead while the marriage relation subsisted.[16]

Property rights in common may be adjusted.[17] In some jurisdictions, the title of real estate in fee cannot be altered.[18] The court cannot make any disposition of property outside of the state where jurisdiction is obtained on constructive service,[19] or adjust property rights not growing out of the marriage.[20] It never

9. See 1 Curr. L. 952. See, also, Alimony, 1 Curr. L. 70.

10. Where husband was given a divorce, it was error under Rev. St. 1899, § 2929, to give wife alimony. Slaughter v. Slaughter [Mo. App.] 80 S. W. 3. But this does not prevent guilty wife from enforcing judgment for alimony pendente lite, and her attorney has no power to compromise the judgment. Schlemmer v. Schlemmer [Mo. App.] 81 S. W. 636.

NOTE: Effect on life insurance in wife's favor: One having a life insurance policy payable to himself, his assigns, etc., or to his mother, her assigns, etc., assigned the policy to his wife after his marriage, with his mother's consent. Subsequently, there having been a divorce, both he and his wife claimed the insurance. Held, the wife had a lien on the policy to the amount of the premiums paid by her, but as her insurable interest had ceased, she had no right to the insurance. Hatch v. Hatch [Tex.] 80 S. W. 411. This jurisdiction is in the minority in requiring an assignee of an insurance policy to have an insurable interest. Schonfield v. Turner, 75 Tex. 324; Mutual Life Ins. Co. v. Allen, 138 Mass. 24, 52 Am. Rep. 245; May, Insurance, § 3984. Insurable interest is necessary only at the inception to prevent wagering, since life insurance is not a contract of indemnity. Rank v. American Mut. Life Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280; Dalby v. India Ins. Co., 15 C. B. 304. Since such interest existed in the principal case at the inception of the contract and at the time of assignment, there is no reason to deprive the wife of its benefits because that interest ceased on divorce. Conn. Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457.—IV. Columbia Law Review, 513.

11. Sand. & H. Dig. § 2527. But where a woman marries believing her husband had procured a valid divorce from her, which he had not in fact, she is not estopped from claiming dower. Grober v. Clements, 71 Ark. 565, 76 S. W. 555.

12. Alimony allowed though divorce for wife's adultery. Pauly v. Pauly [Okl.] 76 P. 148. Error to allow alimony to wife in absence of proof of her necessitous circumstances. Jackson v. Burns, 112 La. 854, 36 So. 756.

13. A trust for the benefit of a daughter to cease on the death of her husband was terminated by her divorce from him, as it was the evident intent to protect the property from the husband. In re Lee's Estate, 207 Pa. 218, 56 A. 425.

14. Where money was paid in accordance with decree and the wife died within the six months in which the parties were forbidden to marry, the money cannot be reclaimed nor the husband take under the statute of descents and distributions. Durland v. Durland, 67 Kan. 734, 74 P. 274.

15. The interest becomes absolute, subject to the husband's debts, though not subject to the lien of any judgment against him, and she is entitled to partition [Gen. St. 1894, § 4808]. Keith v. Mellenthin [Minn.] 100 N. W. 366.

16. Cizek v. Cizek [Neb.] 96 N. W. 657.

17. In statutory divorce proceedings in Texas, the court has jurisdiction to inquire into the community property and to make disposition thereof between the spouses, and this may be done in the final decree granting the divorce. Ex parte Latham [Tex. Cr. App.] 82 S. W. 1046. Where the court made partition of the community property and appointed a trustee to take charge of it, the husband agreeing to the appointment, the court was authorized to require the husband to turn over the community property to the trustee for distribution under the court's orders. Id. Where the husband alienates part of the community property after suit for divorce, the property alienated may be charged to him in the final division. Id.

18. Jurisdiction cannot be conferred by consent. Cizek v. Cizek [Neb.] 99 N. W. 28.

19. The court can only decree alimony out of his property within the state. Rea v. Rea, 123 Iowa, 241, 98 N. W. 787. A decree for alimony was void where defendant was a nonresident and had no property in the state, nor could it subsequently be confirmed on petition and made a lien on his share of his deceased father's estate. Johnson v. Matthews [Iowa] 99 N. W. 1064. Court has no power, even though defendant subsequently moves into the jurisdiction. McFarlane v. McFarlane, 43 Or. 477, 73 P. 203.

has power to affect the vested rights of others,[21] but it may disregard contracts between the parties.[22] Where, in an action for divorce and division of property, a demurrer is sustained to the cause of action for divorce, the court may, for cause shown, make a proper order for the control and equitable division of the property of the parties, or the property of either.[23]

The decree is res judicata only as to the issues involved,[24] but it may subsequently be modified.[25] A receiver may be appointed[26] where there is a real necessity for one.[27]

§ 7. *Effect of divorce.*[28]—It is constitutional to forbid the entry of decree until a certain time has elapsed,[29] or to forbid parties to marry again within a certain period.[30] In Alabama, the court may direct whether the person against whom the divorce is granted may marry again.[31] A marriage attempted contrary to such a decree is void;[32] but within the prohibited period, one may make a valid contract to marry at the expiration thereof.[33] A decree of separation does not affect the status of marriage.[34]

§ 8. *Foreign and tribal divorces.*[35]—A party may be enjoined from suing for divorce in another jurisdiction where her residence there was a mere sham,[36] and

20. Reed v. Reed [Neb.] 98 N. W. 76.

21. A judgment obtained against a husband on a community debt before judgment in divorce dividing community property became a lien on all of the community property, though lis pendens was filed. Mayberry v. Whittier [Cal.] 78 P. 16.

22. Divorce decree does not disturb vested interests except as expressed therein, and though property was conveyed to wife to hinder creditors, the court may order its return; after divorce, an estate in entirety becomes a tenancy in common, and an agreement that the husband shall receive all the profits and pay the wife a certain sum is consequently no longer binding. Buttlar v. Buttlar [N. J. Eq.] 56 A. 722. An antenuptial contract whereby husband gave wife a note in lieu of all her right to his estate did not prevent her from recovery of specific property from him as permanent alimony, where she obtained a divorce because of his adultery. Carter v. Carter [Vt.] 56 A. 989.

23. Under Gen. St. 1901, § 5136. Bowers v. Bowers [Kan.] 78 P. 430.

24. A husband may sue to recover property from his former wife which was not apportioned between the parties in the divorce decree, but not for such as was included in that decree, for the latter he should seek to enforce the original decree. Jackson v. Jackson [Mich.] 98 N. W. 260. A wife's interest in an insurance policy on the life of her husband ceases on divorce, except that she has a lien for any premiums that she may have paid; the decree of divorce which adjudicated the rights to property is only res judicata as to issues involved. Hatch v. Hatch [Tex. Civ. App.] 80 S. W. 411.

25. Where alimony was awarded according to defendant's agreement, but his circumstances subsequently became changed, the court would modify the decree. Parsons v. Parsons [Ky.] 80 S. W. 1187.

26. Where it appeared that the parties were partners in business, the decree granting divorce appointed a receiver and awarded the wife one-half of the proceeds. Heyman v. Heyman, 210 Ill. 524, 71 N. E. 591.

27. Improper for judge in vacation to appoint a receiver for the husband's property which consisted largely of real estate which he had been enjoined to sell, and where he had complied with the orders as to temporary alimony. Goff v. Goff, 54 W. Va. 364, 46 S. E. 177.

28. See 1 Curr. L. 952.

29. St. 1903, p. 75, c. 67, providing that decree for divorce shall not be entered until one year after interlocutory decree is not unconstitutional as a special law regulating judicial practice, as divorce is sui generis, nor as a special law where a general law was applicable, nor because a final decree could be entered immediately where a divorce was refused. Deyoe v. Superior Court of Mendocino, 140 Cal. 476, 74 P. 28.

30. Constitutional to forbid divorced parties to remarry within six months of the decree, but where one dies within the six months the other is not entitled to property under the statute of descents and distributions. Durland v. Durland, 67 Kan. 734, 74 P. 274.

31. Code 1896, § 1488. Barfield v. Barfield, 139 Ala. 290, 35 So. 884.

32. Where a wife who was not granted the right to marry again did marry again, she was not entitled to dower, and had committed a felony, even though her husband had married again. Barfield v. Barfield, 139 Ala. 290, 35 So. 884. Where decree provides that party shall not remarry for two years and he does and the parties cohabit, the second marriage will become binding at the end of the two years under St. 1895, p. 476, c. 427, providing that where one of the parties acted in good faith, the marriage shall be deemed binding from the removal of the impediment. Commonwealth v. Josselyn [Mass.] 71 N. E. 313.

33. Breach of promise case. Buelna v. Ryan, 139 Cal. 630, 73 P. 466.

34. Though the wife has been granted a decree a mensa et thoro, she cannot sue the husband on a bond assigned to her, as the decree did not affect their status of marriage, but merely justified their separation. Drum v. Drum, 69 N. J. Law, 557, 55 A. 86.

35. See 1 Curr. L. 952.

36. In divorce proceedings instituted by

a decree of divorce may be impeached collaterally in another state by proof that the court had no jurisdiction because of plaintiff's want of domicile,[37] and may be contested as fraudulent in any court, notwithstanding the "full faith and credit" clause of the constitution,[38] the simulation of a legal residence being such fraud.[39] The laws of another state regarding alimony will be presumed to be like those of the forum.[40] Foreign decrees will bar further proceedings,[41] unless in such proceedings the parties stipulated otherwise.[42] Divorces according to Indian customs are recognized.[43]

DOCKETS, CALENDARS, AND TRIAL LISTS.[44]

Right to go on calendar.—A cause cannot be placed on the calendar until issue is joined,[45] but parties to an action can waive the statutory time given in which to frame the issues for trial.[46] An amendment of pleadings ordinarily requires a new notice of trial, though it may be dispensed with by order of the court.[47]

Placing cause on calendar.[48]—Statutory provisions largely govern.[49] In some states, several causes of action being improperly joined, they may be separated on motion and docketed as distinct actions.[50] Failure of the court to specially assign a case for a particular day of the term at which it was noticed for trial, it being under no duty to so do, does not excuse a party from appearing and pros-

the husband, it appeared that the wife had no intent to make another state where she was suing for divorce her permanent home. Miller v. Miller [N. J. Err. & App.] 58 A. 188.

37. Even where the record purports to show jurisdiction and appearance of defendant. German Sav. & L. Soc. v. Dormitzer, 192 U. S. 125, 48 Law. Ed. 373.

38. Beeman v. Kitzman [Iowa] 99 N. W. 171. A divorce granted in another state will not be recognized where petitioner fraudulently concealed facts which would have adversely affected the judgment, or where he knew defendant's residence and yet gave no notice of suit to defendant. Davenport v. Davenport [N. J. Eq.] 58 A. 535.

39. Beeman v. Kitzman [Iowa] 99 N. W. 171.

40. Where a foreign divorce at the instance of the wife was vacated for fraud and she was allowed $5,000 alimony, in the absence of proof of the laws of that state, it would be presumed that that was not a final settlement. Fred v. Fred [N. J. Eq.] 58 A. 611.

41. Where a wife sued for alimony and on her husband suing for divorce in another jurisdiction, she appeared and asked for a divorce on the same grounds for which she sued for alimony, and the court found against her it was a bar to further proceedings in the alimony suit. Phillips v. Phillips [Kan.] 76 P. 842.

42. That defendant had stipulated in a suit for maintenance in another state for the purposes of that suit alone, that his wife was living apart from him without fault would not bar an action for divorce. Harding v. Harding, 140 Cal. 690, 74 P. 284.

43. Under Act Cong. Feb. 28, 1891, c. 383, 26 Stat. 794, making the issue of Indians who cohabited according to their customs legitimate, a divorce according to the Indian custom would be recognized. Kalyton v. Kalyton [Or.] 74 P. 491.

44. Calendars and dockets of appellate courts, see Appeal & Review, 3 Curr. L. 221. Rules for determining when issues are joined, also time to plead, see Pleading, 2 Curr. L. 1178; see, also, Removal of Causes, 2 Curr. L. 1506.

45. Sanders v. People's Co-op. Ice Co., 44 Misc. 171, 89 N. Y. S. 785.

A motion to strike a case from the calendar is properly denied where it does not appear from the moving papers that the attorney for the defendant who appeared and answered was attorney for the co-defendants, or that he knew that the latter had not been served, or that the case was not at issue by default. Bornstein v. Diskin, 84 N. Y. S. 248.

46. Darrah v. Juel, 1 Neb. Unoff. 834, 96 N. W. 166. By proceeding to trial by agreement or without objection, the time will be deemed to have been waived. Id.

47. Either by a direct order or by directing the cause to retain its place on the calendar. Miller v. Mestaniz, 84 N. Y. S. 503.

48. See 1 Curr. L. 953.

49. Under Sess. Acts 1901, pp. 85, 86, defendant having been served 15 though less than 30 days before the first day of the return term the cause must be tried before the first day of the return term, unless continued for cause. Miller v. Gordon, 96 Mo. App. 395, 70 S. W. 269. Civ. Code, § 364, providing that equitable actions shall stand for trial at any term beginning 60 days after issue joined applies only where there is an issue of fact. Hazelwood v. Webster, 25 Ky. L. R. 1388, 78 S. W. 123. Under such statute, the cause should not be dismissed before the expiration of such 60 days, though answer is filed and no reply is necessary. Hornick v. Holtrup, 25 Ky. L. R. 1030, 76 S. W. 874. Such statute is not repealed by Acts 1891, 1892, 1893, p. 422, c. 124. Id.

50. Burns' Rev. St. 1901, §§ 343, 344. Giller v. West, 162 Ind. 17, 69 N. E. 548.

ecuting the same on its being reached in its regular order.[51] In the absence of a rule of court or a statute requiring it, notice need not be given to defendant of the placing of a cause on the trial calendar,[52] but in most states, notice of trial and note of issue are essential. In New York, the note of issue must be filed after the cause is noted for trial,[53] and the notice of trial must be served after the cause is at issue.[54] Irregularities in the notice of trial and service thereof are waived by the presence of counsel when the cause is set for trial, no objection being made.[55] Though notice is required, publication is not generally essential.[56]

Passing or advancing causes.[57]—Counsel being actually engaged in the trial of another cause,[58] the court may pass the case for the time being, and where a mistrial is ordered for misbehavior of counsel, the case goes to the foot of the calendar.[59] By consent, the parties may in some states advance the trial term of a cause.[60] An amendment to a petition relating back to the beginning of the original suit does not change the trial term thereof.[61] In New York, an administrator being the plaintiff, he is entitled to a preference.[62] Where a defendant dies, the action does not stand for trial as to the other defendants until it has been revived against the representatives of the deceased defendant or abated as to them.[63]

An application for a preference is addressed to the discretion of the court,[64] and such motion being made upon the pleadings merely, without any showing by affidavit why the action should be preferred, cannot be granted.[65] The issues of fact must be joined.[66] In New York, a cause being placed upon the calendar, it must remain there until disposed of; hence one cannot subsequently change the position of the cause on the calendar by filing a new note of issue.[67] A motion for a preference resting on the same facts as a former one cannot be made without leave of court.[68] A motion for a preference cannot be withdrawn, without the order of the court or the consent of defendant, after the latter has opposed it.[69] The time within which application for the postponement of a cause must be made is largely a matter of statutory regulation.[70] Objections that the cause was tried

51. Stewart v. Gorham, 122 Iowa, 669, 98 N. W. 512.

52. Glos v. Gleason, 209 Ill. 517, 70 N. E. 1045. See 1 Curr. L. 953, n. 26-28.

53. Code Civ. Proc. § 977. McMann v. Brown, 92 App. Div. 249, 87 N. Y. S. 38. A cause in which the note of issue was filed before 1 o'clock on a certain day, and the notice of trial served at 4 on the same day, held not improperly on the docket. Lederer v. Adler, 88 N. Y. S. 1010.

54. Where, after service of notice of trial on a defendant served by publication, service of the complaint is made, the cause will be stricken from the calendar. Sanders v. People's Co-op. Ice Co., 44 Misc. 171, 89 N. Y. S. 785.

55. Cerussite Min. Co. v. Anderson [Colo. App.] 75 P. 158.

56. Notice fixing case in district court. State v. Fuller, 111 La. 85, 35 So. 395.

57. See 1 Curr. L. 953.

58. Rule 7 of the Gen. Rules for the trial term in the first dept., allowing the court to pass the cause for one day. Spero v. Supreme Council, A. L. H., 88 N. Y. S. 989.

59. May send the cause to the foot of the calendar. McCormick v. Shea, 42 Misc. 555, 85 N. Y. S. 1029.

60. In Georgia, first term in equity may become the trial term. Latimer v. Irish-American Bank, 119 Ga. 887, 47 S. E. 322.

61. Wells v. Wells, 118 Ga. 812, 45 S. E. 669.

62. An insurance company, a sole defendant, holding a fund which plaintiff, an administrator, claimed, interpleaded and made another claimant of the fund defendant; held, cause should be preferred. Vandewater v. Mutual Reserve Life Ins. Co., 44 Misc. 316, 89 N. Y. S. 845.

63. Ewell v. Tye, 25 Ky. L. R. 976, 76 S. W. 875.

64. Carroll v. Pennsylvania Steel Co., 96 App. Div. 165, 89 N. Y. S. 199.

65. Action by administrator. Carroll v. Pennsylvania Steel Co., 96 App. Div. 165, 89 N. Y. S. 199.

66. Where demurrer was undecided, held properly denied. New York Contracting & Trucking Co. v. Hawkes, 41 Misc. 125, 83 N. Y. S. 919.

67. Code Civ. Proc. § 977. Cannot use such new note of issue as the basis for the motion for a preference. Montgomery v. Daniell, 91 App. Div. 18, 86 N. Y. S. 344.

68. McCaffrey v. Butler, 87 App. Div. 535, 84 N. Y. S. 776.

69. McCaffrey v. Butler, 87 App. Div. 535, 84 N. Y. S. 776. Not by another motion to advance the trial on the same ground. Id.

70. In King's county, excuses for the postponement of trial must be presented while the case is on the reserve section, and

out of its regular order, and was not properly placed on the trial calendar may be waived.[71]

Transfer, correction or striking off.[72]—A cause being upon the wrong calendar, as upon the law calendar when it should be upon the equity,[73] or vice versa,[74] or on the motion calendar when it should be on the issue,[75] the court will not dismiss the case but will transfer it to the law calendar, though no motion to transfer being made, the court may retain the cause and try the same,[76] and one cannot object, for the first time on appeal, that the cause should have been transferred.[77] An erroneous transfer is not prejudicial if the court arrived at the only result which could have been reached in the proper forum.[78] A cause being prematurely noticed for trial will be stricken from the calendar.[79] A motion to strike a cause from the calendar must be made within due time.[80]

Short cause calendars.[81]—A stipulation by which a cause after dismissal is reinstated on the general calendar docs not preclude plaintiff, after an order reinstating the cause "on the several dockets of the court" has been entered, from having the cause placed on the short cause calendar.[82]

Reinstatement and restoration.—A cause having been regularly discontinued, the court has no discretion to restore it to the docket, on oral motion, without notice to the adverse party.[83] Orders of appellate courts in reinstating a cause must be obeyed.[84]

DOMICILE.[85]

Definition and elements.—The terms "residence," "abode," "domicile," and kindred terms differ somewhat in meaning, but when construing statutes, have frequently been held to be synonymous.[86] Every man must have a domicile somewhere and he can have but one at any moment of time.[87] To bring about a change

will not be considered after it has passed to the ready section of the day calendar. Burkart v. Johnson, 43 Misc. 419, 89 N. Y. S. 479.

71. Where the trial of a cause was postponed more than once on motion of defendant to a day certain and the trial was had on the day following the last day to which the trial had been postponed, held waived. Union Surety & Guaranty Co. v. Tenney, 200 Ill. 349, 65 N. E. 688.

72. See 1 Curr. L. 953.

73. Sand. & H. Dig. § 5619. Daniel v. Garner, 71 Ark. 484, 76 S. W. 1063; Davis v. Case Threshing Mach. Co. [Ky.] 80 S. W. 1145.

74. Chinchin v. Katzman, 89 App. Div. 595, 85 N. Y. S. 626; Gilbert v. Bunnell, 92 App. Div. 284, 86 N. Y. S. 1123; Davis v. Case Threshing Mach. Co. [Ky.] 80 S. W. 1145. Complicated accounts, cause should not be transferreed to common-law docket. Hely v. Fred Hoertz & Co. [Ky.] 82 S. W. 402. See 1 Curr. L. 953, n. 35.

75. Mandamus. Martin v. Clark, 135 N. C. 178, 47 S. E. 397.

76. Code, § 3437. Where one amended his pleadings in a suit in equity so as to transform the case into an action at law. Lough v. Estherville, 122 Iowa, 479, 98 N. W. 308. Only legal relief could be recovered however. Id.

77. Gerstle v. Vandergriffe [Ark.] 79 S. W. 776.

78. Rattray v. Talcott [Iowa] 100 N. W. 36.

79. Marvin v. Bowlby [Mich.] 98 N. W. 399.

80. A motion to strike a cause from the short-cause calendar, not made until the day of trial, nearly 3 months after the makers of the motion had been notified that the cause would be placed on the short-cause calendar, held properly denied because not made in time. Fortune v. Gilbert, 210 Ill. 354, 71 N. E. 442. See 1 Curr. L. 953, n. 32.

81. See 1 Curr. L. 954.

82. Eggleston v. Royal Trust Co., 205 Ill. 170, 68 N. E. 709.

83. O'Dell v. Cowles, 76 Conn. 293, 56 A. 519.

84. An order of an appellate court directing that a case "take its regular place on the calendar, and not be restored to the day calendar," the order of the special term directing that it should be placed on the call calendar preparatory to its being set down on the day calendar is erroneous. Diebold v. Walter, 89 App. Div. 80, 85 N. Y. S. 437.

85. See titles, Aliens, 1 Curr. L. 67; Citizens, 1 Curr. L. 526. Jurisdiction as dependent on domicile or citizenship of parties, see Jurisdiction, 2 Curr. L. 604.

86. Inheritance law. In re Moir's Estate, 207 Ill. 180, 69 N. E. 905. Statute as to descent of property of aliens. Richardson v. Amsdon, 85 N. Y. S. 342. See State v. Snyder [Mo.] 82 S. W. 12, 23, for a good discussion of the meaning of these terms.

87. In re Moir's Estate, 207 Ill. 180, 69 N. E. 905

of domicile, it is necessary that an intention to so do exists,[88] coupled with an exercise of volition in the selection of a place,[89] and followed by an actual abandonment of the old and location in the new place of residence.[90] A domicile once acquired remains until a new one is acquired facto et animo.[91] The domicile of a wife[92] and of minor children[93] is that of the husband or father.

Domicile for particular purposes.—As to third persons, one having no fixed abode is in some states treated as a resident of the county in which he is temporarily domiciled.[94]

Evidence and establishment.—A domicile being once established, the presumption is that it continues,[95] and the burden of proof is upon the party alleging a change to prove it.[96] The contemporaneous acts of the parties throw light on what they intend,[97] acts being more important than declarations.[98] One's domicile of origin is more easily regained than a new one is acquired.[99]

88. Eisele v. Oddie, 128 F. 941; Loeser v. Jorgensen [Mich.] 100 N. W. 450. No change of domicile where one went to another state for the temporary purpose of procuring medical aid. In re Moir's Estate, 207 Ill. 180, 69 N. E. 905. A man does not lose his domicile and residence because he goes to another state to engage in business, even though he have a permanent business office in such state. State v. Snyder [Mo.] 82 S. W. 12. See 1 Curr. L. 954, n. 41, 42.

89. A sailor in the active service of the United States navy does not lose his actual or legal residence. Radford v. Radford [Ky.] 82 S. W. 391.

90. In re Moir's Estate, 207 Ill. 180, 69 N. E. 905; Eisele v. Oddie, 128 F. 941. See 1 Curr. L. 954, n. 43, 44.

91. Ballard v. Puleston [La.] 36 So. 951.

92. Isaacs v. Isaacs [Neb.] 99 N. W. 268. Under pauper law V. S. 3171, wife cannot by leaving husband and agreeing to support herself acquire another residence. Town of Essex v. Jericho [Vt.] 56 A. 493. See 1 Curr. L. 954, n. 38.

NOTE. Exceptions to rule that domicile of a husband is the domicile of his wife: The rule that the domicile of a wife is determined by the domicile of her husband is based upon the legal identity of husband and wife, and upon her duty to reside with him. While the rule as stated is generally true, yet a wife living separate and apart from her husband may in certain cases establish an independent residence. Dutcher v. Dutcher, 39 Wis. 659; Chapman v. Chapman, 129 Ill. 386, 21 N. E. 806; In re Florence, 54 Hun, 328, 7 N. Y. S. 578. Thus a wife may after an agreement for separation, when necessary, acquire a separate domicile. Rundle v. Van Innegan, 9 Civ. Proc. R. 330. Or the husband having given cause for divorce, she may establish such a domicile. Ditson v. Ditson, 4 R. I. 87; Harteau v. Harteau, 14 Pick. [Mass.] 181, 25 Am. Dec. 372; Shute v. Sargent, 67 N. H. 305, 36 A. 282; Payson v. Payson, 34 N. H. 518; Moffatt v. Moffatt, 5 Cal. 280; Turner v. Turner, 44 Ala. 437; Arrington v. Arrington, 102 N. C. 491, 9 S. E. 200; Lyon v. Lyon, 30 Hun, 455.

An exception to the general rule that the domicile of the husband is that of his wife exists where she voluntarily absents herself, under circumstances amounting to a wrongful abandonment of her husband, and resides permanently in another state; in such case she is precluded after her husband's death from asserting a homestead right in his estate. Prater v. Prater, 87 Tenn. 78, 9 S. W. 361, 10 Am. St. Rep. 623.

It has been held in a few cases that a wife cannot, under any circumstances, acquire a domicile by separation from her husband and actual residence elsewhere, that she cannot change her domicile or acquire a separate one without his consent. Maguire v. Maguire, 7 Dana [Ky.] 181; Johnson v. Johnson, 12 Bush [Ky.] 485; Greene v. Greene, 11 Pick. [Mass.] 417. This latter case is directly opposed to Harteau v. Harteau, 14 Pick. [Mass.] 181, 25 Am. Dec. 372.—From note to McGrew v. Mutual Life Ins. Co. [Cal.] 84 Am. St. Rep. 20, 27.

93. Boyle v. Griffin [Miss.] 36 So. 141. See 1 Curr. L. 954, n. 39, 40.

94. Civ. Code of 1895, § 1825. Ginn v. Cannon, 119 Ga. 475, 46 S. E. 631.

95. In re Moir's Estate, 207 Ill. 180, 69 N. E. 905. Rule as stated above admitted, but following facts held to constitute an exception. Defendant denying plaintiff's right to act on the ground that testator was a nonresident, which was denied, proof that he was a nonresident three years before does not shift burden of proof to plaintiff. In re Smith's Estate, 43 Or. 595, 75 P. 133. See 1 Curr. L. 954, n. 45.

96. Eisele v. Oddie, 128 F. 941; In re Moir's Estate, 207 Ill. 180, 69 N. E. 905. See 1 Curr. L. 954, n. 45.

97. On an issue as to the residence of a chattel mortgagor, evidence that he told a certain supervisor that he had a homestead in F. and that he made and delivered to such supervisor a statement of his taxable property in that township held admissible. Loeser v. Jorgensen [Mich.] 100 N. W. 450. On the same issue, evidence that the day after the mortgage was given, the mortgagor appeared before the registration board at F. and claimed to be a resident of that township and entitled to vote there, and that he did vote there, is admissible. Id. Where one sold his home in Washington, moved to Oregon and voted there, held domiciled in latter state, though he returned to Washington frequently. In re Smith's Estate, 43 Or. 595, 75 P. 133. See 1 Curr. L. 955, n. 58-60.

98. Eisele v. Oddie, 128 F. 941. One returning to her domicile of origin, England, and living there for the 50 years immediately preceding her death, held domicile re-

DOWER.

§ 1. Nature of Right, Persons Entitled; Elections (1144).
§ 2. In What Dower May be Had (1144).
§ 3. Extinguishment, Release or Bar and Revival of Dower (1145).
§ 4. Liens and Charges on Dower (1146).
§ 5. Assignment of Dower and Money Awards (1146).
§ 6. Remedies and Procedure (1147).

§ 1. *Nature of right, persons entitled; elections.*[1]—During the life of the husband, the right is inchoate only,[2] but becomes consummate on his death.[3] At common law, it is a life estate when assigned,[4] whence a dowress is subject to impeachment for waste.[5] A tenant in dower unassigned may sue alone for injuries to the premises,[6] but a right of dower, consummate but unassigned, is no defense to an action of ejectment by heirs,[7] nor has the dowress an interest which she can lease so that covenants run with the land.[8] The dowress cannot dispute her husband's seisin.[9] The inchoate right may be defended in an action brought against her to quiet title.[10]

§ 2. *In what dower may be had.*[11]—Generally speaking, all lands[12] whereof the husband was seised[13] during coverture[14] of an estate of inheritance are dowable, though subject to paramount lien.[15] The dowress has no claim as against a purchase-money mortgage or vendor's lien[16] in the lands actually purchased,[17] but the lien must have been reserved,[18] nor in partnership realty until the equities of the partners are adjusted.[19] By some statutes, it has been extended to lands not inheritable and to chattel interests.[20] In Kentucky, she is dowable only in land of which the deceased spouse was seised of the fee and also entitled to the beneficial use,[21] and not as against a purchaser from her husband in improve-

sumed, though in deeds she recited her domicile as being in America, which was her domicile by adoption. Richardson v. Amsdon, 85 N. Y. S. 342.

99. Richardson v. Amsdon, 85 N. Y. S. 342.

1. See 1 Curr. L. 956.

2. Gives wife no right of possession, failure to exercise which works an estoppel. Beeman v. Kitzman [Iowa] 99 N. W. 171. No defense to an action for specific performance of a husband's sole contract to sell the land. Steadman v. Handy [Va.] 46 S. E. 380.

3. Wife may then sell by deed or contract. Hanna's Assignees v. Gay, 25 Ky. L. R. 1794, 78 S. W. 915.

4. A reservation by her of saw timber reserves nothing as against the reversioner. Garnett Smelting & Development Co. v. Watts [Ala.] 37 So. 201.

5. Cannot cut and sell timber on agricultural land. Hawpe v. Bumgardner [Va.] 48 S. E. 554.

6. Widow and infant son in possession. Infant need not be joined. Cumberland Telephone & Telegraph Co. v. Foster, 25 Ky. L. R. 1465, 78 S. W. 150.

7. Ricknor v. Clabber [Ind. T.] 76 S. W. 271.

8. Jackson v. O'Rorke [Neb.] 98 N. W. 1068.

9. McGuire v. Whitt, 25 Ky. L. R. 2275, 80 S. W. 474.

10. Though she could not maintain an affirmative action prior to her husband's death. Minneapolis, etc., R. Co. v. Lund [Minn.] 97 N. W. 452.

11. See 1 Curr. L. 958.

12. 2 Starr & C. Ann. St. 1896, c. 41. Land included by mistake in a bill against the husband alone to foreclose an equitable purchase-money mortgage. Lohmeyer v. Durbin, 206 Ill. 574, 69 N. E. 523. Evidence of such mistake held insufficient. Id.

13. Not in estates in expectancy. In New York, where a husband has a remainder expectant upon a life estate. Ward v. Ward, 131 F. 946. Under 1 Rev. St. [1st Ed.] p. 740, pt. 2, c. 1, tit. 3, in a vested remainder expectant on a life estate. Jackson v. Walters, 86 App. Div. 470, 83 N. Y. S. 696.

14. Not in land owned by the husband at the time of the contract to marry, but which she knew he voluntarily conveyed to defeat her right. Smith v. Erwin [Ky.] 82 S. W. 411.

15. Her dower in the excess remains a charge on the land where it is sold to satisfy a claim paramount to her right. Bassell v. Caywood, 54 W. Va. 241, 46 S. E. 159.

16. Where the husband had agreed to, but failed to execute a purchase-money mortgage, but the same had been decreed a lien upon the land. Lohmeyer v. Durbin, 206 Ill. 574, 69 N. E. 523.

17. Foreclosure it was alleged included other lands. Lohmeyer v. Durbin, 206 Ill. 574, 69 N. E. 523.

18. The mere fact that money is borrowed from one to pay for land does not give him a lien. Hogg v. Potter, 25 Ky. L. R. 492, 76 S. W. 35.

19. Hauptmann v. Hauptmann, 91 App. Div. 197, 86 N. Y. S. 427.

20. Under Rev. St. 1899, § 2933. Phillips v. Hardenburg [Mo.] 80 S. W. 891. Petition for dower need not allege that the husband was seised of an estate of inheritance. Id.

21. Under St. 1903, § 2134, not in land devised to one in trust for her and her children. Rivers v. Morris [Ky.] 78 S. W. 196.

ments added by him.[22] Also in that state she has dower in the homestead despite his power to sell it.[23] In Georgia, there is no dower in an equity of redemption of land whereof he did not die seised.[24]

§ 3. *Extinguishment, release or bar and revival of dower.*[25]—The right may be divested by the decree of a court,[26] unless fraudulently obtained,[27] but cannot be relinquished except by the voluntary act of the dowress,[28] in the mode provided by statute.[29] It is not affected by a sale of the realty to pay the debts of her deceased husband,[30] nor by execution sale under a judgment in favor of the state,[31] nor by the fact that she purchases at a bargain property of her husband at a sale of his estate in insolvency.[32] It may be relinquished by her deed[33] or by a post nuptial[34] or antenuptial agreement,[35] made in lieu of dower.[36] It may be barred by adverse possession[37] or limitation,[38] unless the heir not claiming adverse to her[39]

22. Under Ky. St. 1899, § 2139, net as against one claiming under an execution sale. Ewell v. Tye, 25 Ky. L. R. 976, 76 S. W. 876.

23. Under Ky. St. 1903, § 1706, a husband may sell the homestead subject to the wife's right of dower. Hanna's Assignees v. Gay, 25 Ky. L. R. 1794, 78 S. W. 915.

24. Husband borrowed money and gave an absolute deed, taking back a bond for title [Civ. Code 1895, § 4687]. McDonald v. McDonald [Ga.] 47 S. E. 918.

25. See 1 Curr. L. 959.

26. The right is divested by a decree in partition where the property is sold and her interest in the proceeds allotted to her [Laws 1902, p. 48, c. 18]. Reed v. Reed, 25 Ky. L. R. 2324, 80 S. W. 520.

27. A fraudulent judgment confessed for the purpose of barring dower rights will be opened. Waterhouse v. Waterhouse, 206 Pa. 433, 56 A. 1067.

28. Husband deeded to his assignee in bankruptcy, though the assignee paid him $1,000 in lieu of homestead which was applied to her use. Cravens v. Shippen, 25 Ky. L. R. 1322, 77 S. W. 929. Not by a decree of partition among coparceners where she was not a party to the action. Reed v. Reed, 25 Ky. L. R. 2324, 80 S. W. 520.

Note: The inchoate right to dower attaches at the moment the husband's interest in the realty becomes fixed, during coverture, and unless so provided by statute (see c. 33, Minn. Laws 1901, and Merrill v. Security Trust Co., 71 Minn. 61, 70 Am. St. Rep. 312) cannot be divested except by the voluntary act of the dowress. Thus a sale on execution to satisfy a mechanic's lien (Bishop v. Boyle, 9 Ind. 169, 68 Am. Dec. 615; Gove v. Cather, 23 Ill. 640; Mark v. Murphy, 76 Ind. 534; Van Vronker v. Eastman, 7 Metc. [Mass.] 157; Piper v. Ward, 8 Blackf. [Ind.] 252), nor by a sale by an assignee in bankruptcy (Re Angier, 4 Nat. Bankr. Reg. 619; Lazear v. Porter, 87 Pa. 513; Kelso's Appeal, 107 Pa. 7) will not defeat it; nor is there anything in the Bankrupt Act of the United States to bar it (Porter v. Lazear, 109 U. S. 87, 27 Law. Ed. 865). A foreclosure of a mortgage made by the husband alone will not bar it. McMahon v. Russell, 17 Fla. 698; Mooney v. Maas, 22 Iowa, 380, 92 Am. Dec. 395; Oleson v. Bullard, 40 Iowa, 14. **Contra,** Mosteller v. Gorrell, 41 Kan. 392; Sturdevant v. Norris, 30 Iowa, 66. It is defeated by a sale in partition, although she was not a party (Holley v. Glover [S. C.] 16 L. R. A. 776), but not by a sale on execution against the husband (Wright v. Tichenor, 104 Ind. 185; Dunham v. Osborne, 1 Paige [N. Y.] 634; Dayton v. Corser [Minn.] 18 L. R. A. 80; this case, however, is overruled by Merrill v. Security Trust Co., 71 Minn. 61, 70 Am. St. Rep. 312, and Minn. Laws 1901, c. 33).—From note to Flowers v. Flowers (Ga.) 18 L. R. A. 75.

29. Execution by the husband of an assignment for benefit of creditors has no effect. Hanna's Assignees v. Gay, 25 Ky. L. R. 1794, 78 S. W. 915. Where one had been decreed a right of dower in certain premises, it was error for the court to order a sale thereof clear of such right without his consent in writing [Hurd's Rev. St. 1901, c. 106, § 22], though he had previously executed a mortgage in which he had waived his right of dower. Joest v. Adel, 209 Ill. 432, 70 N. E. 638.

30. In re Smith's Estate, 43 Or. 595, 73 P. 336.

31. Fields' Heirs v. Napier [Ky.] 80 S. W. 1110.

32. Hogg v. Potter, 25 Ky. L. R. 492, 76 S. W. 35.

33. Hanna's Assignees v. Gay, 25 Ky. L. R. 1794, 78 S. W. 915. Under Rev. St. 1899, §§ 901, 902. Bush v. Piersol [Mo.] 81 S. W. 1224.

34. Under P. L. § 344, giving a married woman power to contract. In re Fennell's Estate, 207 Pa. 309, 56 A. 875.

35. Evidence held to show that this agreement was not procured by fraud. Cummings v. Cummings [R. I.] 57 A. 302.

36. Under Rev. St. 1899, § 2950, an instrument purporting to be a release but not declaring to be in satisfaction of dower is insufficient. King v. King [Mo.] 82 S. W. 101.

37. After a divorce, a son as equitable owner occupied the property without recognizing his mother's right of co-tenancy. Butcher v. Butcher [Mich.] 100 N. W. 604.

38. Where bill in equity for appointment of commissioners to assign dower was filed more than seven years after death of the husband [Civ. Code 1895, § 4689]. Crawford v. Watkins, 118 Ga. 631, 45 S. E. 482. Must be asserted within 10 years after death of husband. Harrison v. McReynolds [Mo.] 82 S. W. 120. Under Code Civ. Proc. § 1596, after 20 years unless the widow was during such time under disability. Wetyen v. Fick, 178 N. Y. 223, 70 N. E. 497. And the general provisions of the Code as to limitation of

or the dowress[40] is in possession. To bar dower by reason of acceptance of provisions of a will, it must appear that the testator intended such provisions to be in lieu of dower,[41] and an acceptance of homestead in lieu of dower must be clearly shown.[42] In some states, dower is denied where marriage is dissolved because of misconduct of the wife.[43] A wife is not estopped to claim dower by representations of her former attorney.[44]

Dower revives on the setting aside of a fraudulent conveyance,[45] and a release by deed is subject to the conditions therein contained.[46] Despite an election against dower, the devisees may assert it pro tanto against that share which an after-born child claims by descent.[47]

§ 4. *Liens and charges on dower.*[48]—The right of dower is free from expenses incident to the land accruing after the husband's death.[49] In Kentucky, if a widow elects to take dower instead of homestead, the children's homestead right attaches to it.[50]

§ 5. *Assignment of dower and money awards.*[51]—Where dower can be set off by metes and bounds, that method should be pursued,[52] and the right of a senior dowress should be first satisfied,[53] to which end their relative equities in rents received may be adjusted.[54] Where land is sold under execution, right of dower is to be determined by the law in force at the date of sale.[55] The dower right may rest in the terms of the widow's contract.[56] If she have dower subject to paramount claim, she may have a charge on surplus of the proceeds of the land.[57]

actions do not apply in this case, a specific limitation having been specifically prescribed. Id. And limitations are not prevented from running by the fact that the owners are nonresidents [Code, § 1597]. Id. Under Code Civ. Proc. § 438, the action may be brought though the owners are nonresidents and there is no occupant. Id.

39. Where an heir claimed under a tax deed acquired by him as agent for deceased. Grober v. Clements, 71 Ark. 565, 76 S. W. 555.

40. 10 year statute does not run while she is so in possession. Sperry v. Swiger, 54 W. Va. 283, 46 S. E. 125.

41. Sperry v. Swiger, 54 W. Va. 283, 46 S. E. 125. Where a devise is not in lieu of dower, it is not repugnant to the right. Lauby v. Gill, 42 Misc. 334, 86 N. Y. S. 718.

42. Remaining in possession by direction of a judgment is not an election. Hogg v. Potter, 25 Ky. L. R. 492, 76 S. W. 35.

43. The fact that a woman marries mistakenly believing her husband had procured a divorce does not conclude her under Sand. & H. Dig. § 2527. Grober v. Clements, 71 Ark. 565, 76 S. W. 555.

44. That the sale by the husband, whose attorney he then was, carried title free from such right. Beeman v. Kitzman [Iowa] 99 N. W. 171.

45. Bradshaw v. Halpin [Mo.] 79 S. W. 685.

46. On breach of condition subsequent, she can avoid her release. Brown v. Tilley [R. I.] 57 A. 380.

47. In re Miner [N. J. Eq.] 55 A. 1102.

48. See 1 Curr. L. 961.

49. Taxes, repairs and expenses of the sale. Wild v. Toms, 123 Iowa, 747, 99 N. W. 700. Not so her additional allowance under the statute. Code, §§ 3314, 3370, allow her one-half under certain conditions. Id.

50. Under Ky. St. 1903, § 1707. Hanna's Assignees v. Gay, 25 Ky. L. R. 1794, 78 S. W. 915.

51. See 1 Curr. L. 961.

52. Gen. Laws 1896, c. 264, § 2, providing when she shall be endowed of a third of the rents and profits, has no application in such a case. Arnold v. Probate Court of North Kingstown [R. I.] 56 A. 772. Nor does Gen. Laws 1896, c. 264, § 18, authorize a court to substitute rentals in such a case. Id. Failure to require commissioners appointed to divide an estate to allot dower, and if it could not be done consistently with the interests of the parties to appraise the value of each tract and report to the court is a violation of Hurd's Rev. St. 1901, c. 106, § 22. Joest v. Adel, 209 Ill. 432, 70 N. E. 638.

53. Where a divorced wife and a decedent's widow are both entitled to dower, the right of the former should be first satisfied, then one-third of what remains to the latter and in case she survived the former, one-third the portion assigned to her. Potter v. Clapp, 203 Ill. 592, 68 N. E. 81.

54. Rents received by the second wife should be divided by giving the first wife one-third and the second wife one-third of the remainder. Potter v. Clapp, 203 Ill. 592. 68 N. E. 81.

55. Hanley v. Kubli [Or.] 74 P. 224. A statutory enlargement of dower is not void as to a judgment lien acquired prior to its enactment [B. & C. Comp. Laws, § 5515]. Id.

56. A wife purchased lands of her husband at judicial sale. Decree of confirmation read $12,000, subject to dower, $15,000 without. She failed to pay the purchase money. Held, her dower in the equity of redemption was one-fifth the residue of $15,000, after deducting paramount liens. Miller v. Arthur [Va.] 46 S. E. 323.

57. Bassell v. Caywood, 54 W. Va. 241, 46 S. E. 159.

§ 6. *Remedies and procedure.*[58]—Demand is unnecessary where the widow remains in possession.[59] In Nebraska, the county court may assign dower if there be no contest.[60] Dower may be assigned in equity.[61] An action may be joined with one to have a trust declared with reference to the property.[62] A decree assigning dower must be reopened and disposed of before there can be a reassignment.[63] Filing by the widow of a suggestion of her husband's death pending a suit to annul his conveyance to her is insufficient to entitle her to dower.[64] Only claims arising out of the subject of the action can ordinarily be set up as a counterclaim.[65]

Costs.—An allowance for costs cannot be granted where the value of the dower interest at the time of the trial could not be determined.[66] A widow is not entitled to have attorneys' fees taxed against a purchaser from her husband.[67]

DUELING.

To constitute a duel, the fighting must be with deadly weapons.[68] On indictment for dueling, conviction of affray may be had,[69] though the court has no original jurisdiction of the latter offense.[70]

DURESS.

Duress affecting testamentary disposition is elsewhere treated.[71]

Duress to invalidate a contract must operate directly to its execution[72] and destroy the voluntary character of the transaction,[73] and that one acted under protest is not conclusive.[74] Means calculated to intimidate must have been used,[75] and it is frequently held that they must be sufficient to overcome ordinary firmness and courage,[76] but the advanced position and the test generally adopted is,

58. See 1 Curr. L. 962.

59. Second wife remained in possession by agreement with the heirs. Potter v. Clapp, 203 Ill. 592, 68 N. E. 81.

60. Where the facts upon which her right depends are not in dispute. Tyson v. Tyson [Neb.] 98 N. W. 1076. In order to oust the court of jurisdiction, an issue of fact must be raised which the court has not jurisdiction to try. Id.

61. Action in partition. Beeman v. Kitzman [Iowa] 99 N. W. 171. Where a decedent's widow was his only creditor and she and a divorced wife joined in a suit for the assignment of dower. Potter v. Clapp, 203 Ill. 592, 68 N. E. 81.

62. Phillips v. Hardenburg [Mo.] 80 S. W. 891.

63. Joest v. Adel, 209 Ill. 432, 70 N. E. 638.

64. Pending proceeding by trustee in bankruptcy to set aside a sale to the wife as fraudulent, the husband died. Gray v. Chase, 184 Mass. 444, 68 N. E. 676.

65. See Set-Off and Counterclaim, 2 Curr. L. 1624. A claim for damages against a widow as her husband's devisee is not a valid counterclaim to an action for admeasurement of dower [Code Civ. Proc. § 1221]. Burnett v. Burnett, 87 App. Div. 619, 83 N. Y. S. 760.

66. Hauptmann v. Hauptmann, 91 App. Div. 197, 86 N. Y. S. 427.

67. Beeman v. Kitzman [Iowa] 99 N. W. 171.

68. Fighting with fists by agreement constitutes an affray, if in a public place. State v. Fritz, 133 N. C. 725, 45 S. E. 957.

69. State v. Fritz, 133 N. C. 725, 45 S. E. 957.

70. State v. Fritz, 133 N. C. 725, 45 S. E. 957.

71. See Wills, 2 Curr. L. 2076.

72. Threats of personal violence made a year before a release was signed are insufficient. Parker v. Allen [Tex. Civ. App.] 76 S. W. 74. Evidence held to show that a contract was not executed by a mother because of threats to prosecute her son for bastardy. Henry v. Dussell [Neb.] 99 N. W. 484.

73. Evidence held insufficient to show duress by a wife and children in procuring a deed from the husband. Anderson v. Anderson [Wis.] 100 N. W. 829.

74. Redeeming from void tax sale. Anderson v. Cameron, 122 Iowa, 183, 97 N. W. 1085.

75. Not where a wife mortgages property to secure the return of property obtained by her husband under false pretenses, there being no threat to prosecute the husband. Kittel v. Schmeider, 89 App. Div. 618, 85 N. Y. S. 977.

76. **Note:** The threats must be such as would excite such a fear as would overcome the will of a person of ordinary courage, and such fear must be grounded upon reasonable belief that the person who threatens has at hand the means for carrying his threat into present execution. Youngs v. Simm, 41 Ill. App. 28; Harmon v. Harmon, 61 Me. 231; Seymour v. Prescott, 69 Me. 376;

were the means used sufficient to overcome the will of the injured party, whether he be above or below the average person in firmness and courage?[77] A malicious threat to prosecute for a crime constitutes duress[78] if the specific crime is designated,[79] but a bona fide prosecution is not necessarily duress,[80] nor is a threat in good faith to pursue a lawful civil remedy;[81] and generally, the doctrine of duress of goods is strictly limited.[82]

Facts constituting duress must be specifically pleaded.[83]

EASEMENTS.

§ 1. Nature and Creation (1148). Creation by Prescription (1150). Creation by Estoppel (1151). Natural Easements (1152).
§ 2. Location, Maintenance and Extent of Right (1153). Extent of Use (1153).
§ 3. Transfer and Assignment (1154).
§ 4. Extinguishment and Revival (1154). Merger and Revival (1155). Reverter (1155). Damages (1156). Entry and Removal (1156).
§ 5. Laches, Estoppel or Acquiescence (1156). Parties (1156). Form of Remedy (1157). Pleading and Evidence (1157).

§ 1. *Nature and creation.*[84]—An easement is the right to use the land of another for some purpose consistent with his general ownership.[85] It is distinct from the land itself.[86] The servient owner may use the land in any way that does not interfere with the easement.[87] The loss of a right of easement upon lands adjacent to those purchased constitutes a partial eviction.[88]

The right to maintain a sewer through the land of another is an easement in

Higgins v. Brown, 78 Me. 473; Buchanan v. Sahlein, 9 Mo. App. 652; Wolfe v. Marshall, 52 Mo. 167; Landa v. Obert, 45 Tex. 539; Boseley v. Shanner, 26 Ark. 280; United States v. Huckaber, 16 Wall. [U. S.] 414, 21 Law. Ed. 457; Morse v. Woodworth, 155 Mass. 233; Flanagan v. Minneapolis, 36 Minn. 406; Eadie v. Slemmon, 26 N. Y. 9, 82 Am. Dec. 395; Barrett v. French, 1 Conn. 364, 6 Am. Dec. 241. The age, sex, state of health of the party must be taken into consideration. Parmentier v. Pater, 13 Or. 121; Jordan v. Elliott, 12 Wkly. Notes Cas. [Pa.] 56. A threat of legal proceedings is not enough. Fisher v. Bishop, 36 Hun, 112.—From note to City Nat. Bank v. Kusworm [Wis.] 26 L. R. A. 48.

77. Evidence held to show duress where a sensitive man signed notes because of threats to institute criminal proceedings against his son-in-law. Nebraska Mut. Bond Ass'n v. Klee [Neb.] 97 N. W. 476.

78. Larceny of a void note and mortgage. Wheeler v. Pettyjohn [Okl.] 76 P. 117.

79. A threat of prosecution for an unspecified felony is not. Boggs v. Slack & G. Grocery Co., 53 W. Va. 636, 44 S. E. 777, citing Hammon Cont. § 136.

80. Marriage to escape punishment for seduction is not under duress. Blankenmiester v. Blankenmiester [Mo. App.] 80 S. W. 706.

81. Creditor of an estate threatened to file objections to a sale by an administratrix and an application for her removal unless she guaranteed payment of allowed claims. Wiggenhorn v. Fitzgerald [Neb.] 98 N. W. 1079.

82. The fact that one is unable to borrow money on account of a judgment against him does not render a satisfaction of such judgment void for duress. Signor v. Clark [N. D.] 99 N. W. 68. Where a publisher designated to publish election notices was required to sign written acceptance of a subsequent designation at a reduced rate in order to get the contract. Ford v. Delaware County Sup'rs, 92 App. Div. 119, 87 N. Y. S. 407. No duress shown where one gave another an order for money in consideration of the release of a lien. Creveling v. Saladino, 97 App. Div. 202, 89 N. Y. S. 835.

83. Parker v. Allen [Tex. Civ. App.] 76 S. W. 74.

84. See 1 Curr. L. 962.

85. Cyc. Law Dict. "Easement."

86. A grant of a water right, with right of way over the land to the water, is not such a conveyance of "land" forbidden by the U. S. homestead laws [U. S. Comp. St. 1901, p. 1390, §§ 2290, 2291]. Mt. Carmel Fruit Co. v. Webster, 140 Cal. 183, 73 P. 826.

87. In the absence of words or circumstances showing that the driveway is to be an open one, gates or bars may be put across it. Gibbons v. Ebding [Ohio] 71 N. E. 720. Sinking gas wells on railroad right of way. Consumers Gas Trust Co. v. American Plate Glass Co. [Ind.] 68 N. E. 1020. One co-owner of an easement may not use his part of the servient lands in a way destructive of the easement. Excavated joint alley for an area way on his side. Mershon v. Fidelity Ins. Trust & Safe Deposit Co., 208 Pa. 292, 67 A. 569. A grant to a railroad of a right of way across land conveys an easement, the fee remaining in the owner. Among the rights not granted, but remaining in the grantor and incident to his title in fee, is a right to a private crossing over the right of way, where it does not unreasonably interfere with the use of the right of way by the company for railroad purposes. Cincinnati, etc., R. Co. v. Wachter, 70 Ohio St. 113, 70 N. E. 974.

88. Loss of right to take water from a spring on lands adjoining the hotel property purchased by plaintiff through a foreclosure of mortgage on the lands having the spring. Sweet v. Howell, 96 App. Div. 45, 89 N. Y. S. 21.

real estate, and can only be acquired by written conveyance or its legal equivalent;[89] but an easement, though given verbally, may not be revoked where the beneficiary has gone to trouble and expense relying on same.[90] An easement by agreement may be used while a part of it relating to grading remains unperformed.[91]

A grant carries all easements appurtenant.[92] A grant not clearly showing a purpose will be an absolute conveyance,[93] but expressing a purpose will be so limited.[94] It must define the location of the easement.[95] A reservation of an easement may be found in words which express a purpose which under the circumstances is appropriate or necessary.[96] A right in land resting solely on a parol dedication will be an easement only.[97] No easement will be implied against full covenants of warranty.[98]

An easement by reservation will not avail to one who is not in privity of estate to the grantor.[99] A reservation by a guardian, though exceeding his authority, is valid as against the grantee who took subject to it.[1]

89. A verbal consent thereto is a mere revocable license, terminable by reasonable notice. Fonda, etc., R. Co. v. Olmstead, 84 App. Div. 127, 81 N. Y. S. 1041. The oral agreement by an owner of land to the laying of pipes across the land vests no irrevocable right. City of Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388.

90. Plaintiffs under a verbal agreement with the owners of an irrigation ditch, to give them an interest in the water, enlarged the ditch and reduced their land to cultivation. McPhee v. Kelsey, 44 Or. 193, 74 P. 401.

See post, Creation by estoppel.

91. Where part of the consideration of a deed is an agreement to open and maintain a certain way and fill it to the level of the street within a specified time, the grantee's failure to fill the way does not deprive the grantor of the right to use it in the meantime. Vanatta v. Waterhouse [Ind. App.] 71 N. E. 159.

92. The conveyance of a tract of land to which there is a private way, plain and continually used, carries with it an implied grant of the way to it, over the land retained by the grantor in which the way lies. No expression of it in the deed is necessary, and it is not required that the grantee's tract be entirely surrounded by lands of the grantor. Mosher v. Hibbs, 24 Ohio Circ. R. 375.

93. A conveyance of land to a railroad company, not showing it to be for a right of way or for railroad purposes, gives a title in fee which the company does not lose by nonuser. Watkins v. Iowa Cent. R. Co., 123 Iowa, 390, 98 N. W. 910. The words in a deed "relinquished to the president and directors" of a turnpike company do not convey a fee, but merely an easement. Mitchell v. Bourbon County, 25 Ky. L. R. 512, 76 S. W. 16.

94. A deed by owner of a pond, of land on the sides thereof "only for the purposes of being flowed," gives an easement only and the title of the land remains in the grantor. In re Brookfield, 176 N. Y. 138, 68 N. E. 138. A contract permitting the laying of a sewer on private property and the entry thereon for the purposes of repair does not allow such entry for the purpose of connecting the sewer with property elsewhere. State v. District Court of Ramsey County, 90 Minn. 540, 97 N. W. 425. Reservation of streets in grant of submerged lands restricted to those named. Whitman v. New York, 85 App. Div. 468, 83 N. Y. S. 465.

95. A deed conveying a lot, reciting "a stone, thence north along the south side of the ten foot alley," is not sufficient to show an easement in the grantee or to entitle him to enjoin the obstruction of the alley, where there is no showing that an alley of that width had been opened and dedicated to the owners of the property conveyed. The lot fronted on two streets and abutted on the alley connecting them. Milliken v. Denny, 135 N. C. 19, 47 S. E. 132. A deed by a city conveying certain land and "reserving so much as might then or thereafter be designated as a street" reserved a tract of land which had been so designated before the grant, though not legally laid out. Whitman v. New York, 85 App. Div. 468, 83 N. Y. S. 465.

96. Easement implied from reservation of "private alley way" across outside lots for access to inside lots which were too shallow to abut in the rear on public alley. Barber v. Allen [Ill.] 72 N. E. 33. A recital in a deed that a specific part of granted premises is to be used as a common driveway is a reservation of an easement. Gibbons v. Ebding [Ohio] 71 N. E. 720.

97. Dedication of land to a turnpike company for a toll-house site, which may be made by parol, is presumed to be a dedication of an easement only. Halley v. Scott County Fiscal Court, 25 Ky. L. R. 1471, 78 S. W. 149.

98. McSweeney v. Com., 185 Mass. 371, 70 N. E. 429.

99. He may subsequently convey the thing reserved. Jackson v. Snodgrass [Ala.] 37 So. 246. A grantor conveyed a lot to G. and subsequently an adjoining lot to H., reserving the right to run a drain across it from G.'s lot. At the date of second deed no drain had been made or any right thereto granted to G. Held, that G. could claim no right of easement under the deed to H. Haverhill Sav. Bank v. Griffin, 184 Mass. 419, 68 N. E. 839.

1. The order of the court authorizing a minor's curator to deed a right of way to a railroad company contained nothing in regard to a reservation, but crossing rights were reserved in the deed. Porter v. Kansas

A way of necessity[2] to a grantee of otherwise inaccessible land[3] will not be implied against intention,[4] or as against a stranger in title.[5] The granting of exterior lands retaining a tract partly surrounded by the tract granted and partly by land of a stranger implies a reservation of a right of way over the tract granted.[6] The right to use a way from necessity cannot be predicated where a landowner in enclosing his land has cut himself off from other ways of exit.[7] Easements by implied grant are those which are strictly necessary to the principal thing granted, and mere convenience is not enough.[8] A lease of property for certain purposes carries the implied easements necessary for the accomplishment of such purposes.[9] One's wagon way on his own land will not be continued as an easement of necessity across a subsequently constructed railroad, unless it is a necessity.[10]

Creation by prescription.[11]—Continuous[12] and adverse[13] use or possession[14] of another's land[15] for the statutory period[16] gives a prescriptive right.[17] The pre-

City & N. Connecting R. Co., 103 Mo. App. 422, 77 S. W. 582.

2. See 1 Curr. L. 963, n. 65-67.

3. Where a lot conveyed fronts on two streets, no implied easement by necessity in an alley connecting the streets arises in favor of the grantee. Milliken v. Denny, 135 N. C. 19, 47 S. E. 132.

4. Way of necessity rebutted by facts that grantor refused to incorporate it in deed and allowed temporary use which was afterward withdrawn. Golden v. Rupard, 25 Ky. L. R. 2125, 80 S. W. 162.

5. Where an owner of land was a stranger to the title of a lumber company, the company was not entitled to a way over the land as of necessity, which could only be given out of land granted or reserved by the grantor. Healy Lumber Co. v. Morris, 33 Wash. 490, 74 P. 681.

6. Holman v. Patterson [Tex. Civ. App.] 78 S. W. 989, citing Collins v. Prentice, 15 Conn. 43, 38 Am. Dec. 61, and other cases.

7. Hagerley v. Beebe, 123 Iowa, 620, 99 N. W. 303.

8. A drain for a dwelling and for surface water would not be held to have passed as an easement by implied grant, without evidence of its necessity. McSweeney v. Com., 185 Mass. 371, 70 N. E. 429. A water pipe connecting two lots owned by same grantor and furnishing water to both lots, which water is necessary to the enjoyment of the property, passes as an appurtenance under the warranty deed. Turner v. Clinton De Witt, 4 Ohio C. C. (N. S.) 434.

9. A lease of land near a pond for ice houses, with the right to cut and take ice, annexes as an easement the right to take ice to the leased premises. Walker Ice Co. v. American Steel & Wire Co., 185 Mass. 463, 70 N. E. 937.

10. Charleston & W. C. R. Co. v. Fleming, 118 Ga. 699, 45 S. E. 664.

11. See 1 Curr. L. 965.

12. Interruption to make repairs or changes or possession by claimant's receiver does not break continuity. Hindley v. Metropolitan El. R. Co., 42 Misc. 56, 85 N. Y. S. 561.

13. Where a grantor divides and gives his farm to his two sons and they each use the common road that crossed the whole farm, as an easement over the farm of the other for forty years, the quasi easement becomes an easement, and each has a private right of way over the other's farm. Winne v. Winne, 88 N. Y. S. 625.

Must not be permissive: Pennington v. Lewis [Del. Super.] 56 A. 378. A grantor of one claiming an easement in a private alley may testify that he never used the alley with a claim of right, but only by permission of its owner. Vandergrift v. Burke [Md.] 56 A. 602. Use of the opening under a railroad trestle for the passage of stock, the railroad being in continuous possession of the right of way, makes no presumption that use was hostile; and notice to a section foreman is not notice to the railroad of such a claim. Chicago, etc., R. Co. v. Hammond, 210 Ill. 187, 71 N. E. 576. City sewer on a person's land for 10 years, by permission alone, and not adverse. City of Chillicothe v. Bryan, 103 Mo. App. 409, 77 S. W. 465. Evidence sufficient to show that user was adverse and not by sufferance. Brown v. Barton [Ky.] 82 S. W. 405.

Recognition of superior title is fatal: The railway company had admitted, during its 20 years occupancy, that it must pay damages to the abutting owners for their consent to its maintenance. Hindley v. Metropolitan El. R. Co., 42 Misc. 56, 85 N. Y. S. 561.

Colorable title: Immaterial that grant of easement was from one having no title. Peden v. Crenshaw [Tex. Civ. App.] 81 S. W. 369.

Evidence held not to show such adverse possession as would give title by prescription. Golden v. Rupard, 25 Ky. L. R. 2125, 80 S. W. 162; Zook v. Illinois Cent. R. Co., 25 Ky. L. R. 2194, 80 S. W. 211; Riley v. Buchanan, 25 Ky. L. R. 863, 76 S. W. 527; Cavanaugh v. Wholey, 143 Cal. 164, 76 P. 979; Hagerle v. Beebe, 123 Iowa, 620, 99 N. W. 303; Chicago, etc., R. Co. v. Johnson, 205 Ill. 598, 68 N. E. 1112; Ross v. McGee [Md.] 56 A. 1128. The fact that no fences along a street, which was illegally widened by village authorities, prevented the use to the full increased width (though it was never so used) is insufficient to support the village's right thereto by prescription. Village of Watkins v. Welch Grape Juice Co., 96 App. Div. 114, 89 N. Y. S. 47.

14. Immaterial that actual possession was taken of only part of the tract granted by void grant. Peden v. Crenshaw [Tex. Civ. App.] 81 S. W. 369. An easement for a private road is acquired by one who uses a well defined track across the land of another in reaching land of his own, otherwise accessible, where such use has been adverse

scriber must keep the way in repair for the period of prescription.[18] The owner of the servient estate must have been able to assert his title against the use.[19] A prescriptive right to a passway may be acquired by the donee of land under parol gift and subsequent occupation over other lands of the donor, and the later acceptance of a deed cannot affect such right.[20] An easement may be acquired by prescription in a portion of a highway which has been discontinued as such[21] or over a railroad right of way.[22] Title to a portion of a public street or road cannot be acquired by prescription nor the right to have a ditch thereon remain in an unchanged condition.[23] A way by prescription is valid against the owner of the servient estate, though in other parts of the way there is only a permissive use.[24] A prescriptive right cannot be enlarged without consent to the enlarged use.[25]

One having a right of way as a way of necessity cannot acquire a title by prescription, at least where his user does not exceed his right.[26] The user of a right of way existing by necessity does not become adverse until the owner of the servient estate has notice of a hostile title, by reason of the termination of the necessity.[27]

A corporation may gain a right by prescription for a purpose within its powers.[28]

Creation by estoppel.[29]—A dedication[30] or public use under a notorious claim of right for a long period of years[31] creates an easement by estoppel; likewise the sale of lots by reference to a plat[32] or existing use.[33] It extends not only to his frontage but to the whole length of the street.[34] Permitting entry and the making

and continuous for more than twenty-one years. Bates v. Sherwood, 5 Ohio C. C. (N. S.) 63.

15. No prescription found from one's use of his own later devised in severalty. Evans v. Motley, 25 Ky. L. R. 1825, 78 S. W. 877.

16. In Georgia, seven years uninterrupted use through improved land, or twenty years over wild lands will give title by prescription. Watkins v. Country Club [Ga.] 47 S. E. 538.

17. See generally, Adverse Possession, 3 Curr. L. 51.

18. Charleston & W. C. R. Co. v. Fleming, 118 Ga. 699, 45 S. E. 664.

19. Graves v. Broughton, 185 Mass. 174, 69 N. E. 1083. Where a husband and wife own adjoining premises, the husband cannot acquire an easement in her premises by adverse use. A wife cannot make a valid grant to her husband of an easement in her premises, and the presumption of a grant which is the foundation of a title by prescription cannot therefore exist. Graves v. Broughton, 185 Mass. 174, 69 N. E. 1083.

20. Smith v. Smith, 25 Ky. L. R. 1790, 78 S. W. 884.

21. Oneida Tp. v. Allen [Mich.] 100 N. W. 441.

22. If such a right is threatened with permanent obstruction by the erection of a building by the railroad company, the court will grant a preliminary injunction restraining it. Bubenzer v. Philadelphia, etc., R. Co. [Del. Ch.] 57 A. 242.

23. Langley v. City Council of Augusta, 118 Ga. 590, 45 S. E. 486.

24. Anderson v. Southworth, 25 Ky. L. R. 776, 76 S. W. 391.

25. The railroad company had with the consent of the village trustees operated the track for 30 years and recently added another track. Stevens v. Skaneateles R. Co., 42 Misc. 145, 85 N. Y. S. 1005.

26. Ann Arbor Fruit & Vinegar Co. v. Ann Arbor R. Co. [Mich.] 99 N. W. 869.

27. Recitals in a deed from the owners of the dominant tenement are not notice. Ann Arbor Fruit & Vinegar Co. v. Ann Arbor R. Co. [Mich.] 99 N. W. 869.

28. Right of way for railroad. Louisville & N. R. Co. v. Smith [C. C. A.] 128 F. 1.

29. See 1 Curr. L. 964.

30. The owner, acting for the owner of an adjoining lot, drew up the deed for the lot, wherein his own land was described as a street, and took the grantor's acknowledgment, and employed a surveyor to make a map. Held, he was not estopped from denying the dedication of his land as a street. Klug v. Jeffers, 88 App. Div. 246, 85 N. Y. S. 423. See, also, Dedication, 3 Curr. L. 1050. In the absence of proof of intention on the part of the owner to dedicate his property to public use, the mere use of the passage by the public cannot supply a title or serve as the basis of prescription. Lawson v. Shreveport Waterworks Co., 111 La. 73, 35 So. 390.

31. Riley v. Buchanan, 25 Ky. L. R. 863, 76 S. W. 527; Magruder v. Potter, 25 Ky. L. R. 1336, 77 S. W. 919.

32. McKenzie v. Gleason, 184 Mass. 452, 69 N. E. 1076. Deed to lots abutting on alley and continued use give a right to each lot owner to passage through it. Walling v. Eggers, 25 Ky. L. R. 1563, 78 S. W. 428.

33. One who permits the city to construct the outlet of a sewer on his land, and who sells his lots with representations of the benefit of sewer connection, is estopped from obstructing the outlet. City of Chillicothe v. Bryan, 103 Mo. App. 409, 77 S. W. 465.

34. Healey v. Kelly, 24 R. I. 581, 54 A. 588.

of expenditures may work an estoppel.[35] A railroad company, which has not the power of eminent domain may thus acquire a right of way.[36]

The condemnation of private lands for private ways[37] is unconstitutional. No presumption is raised of public use by a statute authorizing the condemnation of land for a particular purpose, and the courts and not the legislature are to decide whether a contemplated use is public or private.[38] In Georgia, where such taking is upheld, the necessity of ingress to and egress from his own land must exist; there must be no other suitable outlet.[39] It must be indispensable to the enjoyment of the property by the party claiming it.[40] It cannot be taken for the sake of greater convenience,[41] or for a more direct and level route,[42] or because the other ways accessible are liable to be closed.[43] Compensation must be tendered.[44]

Public easements[45] are usually created by dedication.[46] The lack of jurisdiction to lay out a highway cannot be supplied by lapse of time, where the public has acquired no right by prescription or dedication.[47] An "alley" is not necessarily a street, and the public have not necessarily a right to its use.[48] The easement of the public in streets and public places is limited to the nature of the way.[49] The dedication of a square to the public as an open pleasure ground vests the right of possession in the municipality, but not to the extent of allowing it to erect a public building thereon.[50] As a rule, municipal corporations cannot acquire land or easements therein outside their corporate limits; but the right to perfect a system of drainage or sewerage is an exception to the rule.[51] An abutting property owner has no easement in a street, the fee of which is in the city for public highway purposes, for light, air and access, as against the public, which would enable him to enjoin the construction of a viaduct thereon, under authority of the legislature, in order to facilitate public travel.[52] Prescription does not run against a municipal corporation with respect to land granted to it for use of the public.[53]

Natural easements.—One's easement of natural drainage is not enlarged to an easement of artificial drainage merely because a ditch on the servient lands intercepted and carried the water,[54] nor does user make it so until prescription be complete.[55] The conveyance of lots carries by implication the easement of flowage for spring and surface water along natural channels, over other lots conveyed by the same grantor.[56]

35. Irrigation ditch. McPhee v. Melsey, 44 Or. 193, 74 P. 401.

36. Indiana R. Co. v. Morgan, 162 Ind. 331, 70 N. E. 368.

37. See Eminent Domain, 1 Curr. L. 1006, n. 37.

38. Laws 1899, c. 130, authorizing condemnation of land for log roads, is invalid. Healy Lumber Co. v. Morris, 33 Wash. 490, 74 P. 681.

Note: See recent cases on **What uses are public** in Eminent Domain, § 2, 1 Curr. L. 1004, 3 Curr. L. 1189. Private roads open to public use are for a public purpose. See Eminent Domain, 1 Curr. L. 1006, n. 37.

39, 40. Charleston & W. C. R. Co. v. Fleming, 119 Ga. 995, 47 S. E. 541.

41, 42, 43. Gaines v. Lunsford [Ga.] 47 S. E. 967.

44. Charleston & W. C. R. Co. v. Fleming, 119 Ga. 995, 47 S. E. 541.

45. See Highways and Streets, 2 Curr. L. 177.

46. See Dedication, 1 Curr. L. 903.

47. Epworth League Training Assembly v. Olney [Mich.] 98 N. W. 860.

48. Milliken v. Denny, 135 N. C. 19, 47 S E. 132.

49. A public highway belongs from side to side, and from end to end, to the public, who are entitled to a free passage along all of it not in actual use of some other traveler. This includes the sidewalk, and no abutting owner has a right to maintain an opening and stairs therein. Perry v. Castner [Iowa] 100 N. W. 84.

50. Nor can a property owner's consent to erect a public building on the square be construed as a consent to the erection of other buildings. Fessler v. Union [N. J. Eq.] 56 A. 272.

51. Contrary ruling in Loyd v. Columbus, 90 Ga. 20, 15 S. E. 818, criticised and doubted. Langley v. City Council of Augusta, 118 Ga. 530, 45 S. E. 486.

52. Sauer v. New York, 90 App. Div. 36, 85 N. Y. S. 636.

53. Kelsoe v. Oglethorpe [Ga.] 48 S. E. 366.

54, 55. Robertson v. Daviess Gravel Road Co., 25 Ky. L. R. 1114, 77 S. W. 189.

56. Riverside Cotton Mills v. Lanier [Va.] 45 S. E. 875.

Negative easements[57] are sometimes created by building restrictions.[58]

§ 2. *Location, maintenance and extent of right.*[59]—The width[60] and location[61] of a granted way will be determined from circumstances if the grant be silent. In conveying land over which a road used by the public passes, a stipulation that the road be kept open is a stipulation for the public.[62] The creation in a conveyance, of a way subject to a gate, is indivisible and charges the way with the perpetual servitude of a gate, which cannot be released except by the grantor or his successors in title.[63] A devisee charged to provide a way cannot burden it with a condition that gates be kept.[64]

The grantor of premises who reserves an easement of passageway has the right to locate the way; if he omits to exercise the right, it passes to the grantee, and the respective selections cannot be questioned if reasonably suitable.[65]

A right of way arising from necessity is limited in duration to the continuance of the necessity.[66]

Extent of use.[67]—The use of an easement must not be such as to infringe the rights of others.[68] The servient owner has no concurrent right of possession,[69] hence the dominant owner may make use of it concurrent with the easement.[70] An easement of way gives no right to mine or sink wells,[71] neither may the servient owner do so if it impairs the easement.[72] A joint easement includes mutual right to prevent the co-owner from misusing his part of the servient land.[73] In a grant or reservation of a water right, reference to an existing use is considered as a measure of quantity without regard to the particular use or place.[74]

Where the right of way of a railroad crosses[75] that of another, the new company should pay the expenses necessary to the safe construction of its tracks across those of the older company.[76]

Licenses or leases[77] and subsequent easements are subject to previously acquired easements.[78] The servient owner's grantee takes subject to the easement.[79] An innocent purchaser takes no easement not granted to his predecessor in title.[80]

57. See 1 Curr. L. 963.

58. See Buildings and Building Restrictions, 3 Curr. L. 574.

59. See 1 Curr. L. 965.

60. 18 feet found to be "sufficient" private alleyway across rear of short lots in business district. Barber v. Allen [Ill.] 72 N. E. 33.

61. The location may be determined by the grantee's occupancy with the consent of the grantor, the deed designating no particular route. Gaston v. Gainesville & D. Elec. R. Co. [Ga.] 48 S. E. 188.

62. Lawson v. Shreveport Waterworks Co., 111 La. 73, 36 So. 390.

63. Inhabitants of South Berwick v. County Com'rs, 98 Me. 108, 56 A. 623.

64. Evans v. Motley, 25 Ky. L. R. 1825, 78 S. W. 877.

65. Callen v. Hause [Minn.] 97 N. W. 973.

66. Ann Arbor Fruit & Vinegar Co. v. Ann Arbor R. Co. [Mich.] 99 N. W. 869.

67. See 1 Curr. L. 966.

68. A railroad piling ties on its right of way, so as to obstruct the view from plaintiff's premises, does not infringe any right of plaintiff for which he can recover. Houston, etc., R. Co. v. Simpson [Tex. Civ. App.] 81 S. W. 353.

69, 70. Land condemned by a railroad for a water station, flooded and dammed to catch surface water, and leased for short periods as a fishing, bathing and skating pond. Dillon v. Kansas City, etc., R. Co., 67 Kan. 687, 74 P. 251.

71, 72. A lessee of the land in railroad right of way for the purpose of sinking gas wells, though not entitled to sink wells on the right of way, may enjoin the sinking of wells thereon by others, since it diminishes the flow of gas from its own wells. Consumers' Gas Trust Co. v. American Plate Glass Co. [Ind.] 68 N. E. 1020.

73. Mershon v. Fidelity Ins., Trust & Safe Deposit Co., 208 Pa. 292, 57 A. 569.

74. Hartford Woolen Co. v. Bugbee [Vt.] 56 A. 344.

75 See, also, Eminent Domain, 1 Curr. L. 1002; Railroads, 2 Curr. L. 1382.

76. West Jersey & S. R. Co. v. Atlantic City & S. Traction Co. [N. J. Eq.] 56 A. 890.

77. One accepting a lease granting exclusive right to sink gas wells on certain property is charged with notice of the rights of a railroad company occupying the property as a right of way, and in case of a conflict, the rights of the railroad are paramount. Consumers' Gas Trust Co. v. American Plate Glass Co. [Ind.] 68 N. E. 1020.

78. The rights of a manufacturing company to flow and store hot water in a pond are subject to those of parties who had previously acquired the right to cut ice therefrom. Walker Ice Co. v. American Steel & Wire Co., 185 Mass. 463, 70 N. E. 937.

79. Conveyance of servient estate. See 1

Public easements[81] extend to every use which their nature contemplates, but when a use, e. g., street railways or telephones, becomes an additional servitude, it may be exercised only by consent.[82] The maintenance of steps in a street by one abutter to use the way in going from one street to another is not an exclusive possession of the way, and anyone entitled to use the street may use the steps.[83] An abutter on a street is entitled to an easement to its full length.[84]

A covenant in a grant of easement of free toll for the grantor's family is not broken by the road being made a free turnpike by the county authorities.[85]

§ 3. *Transfer and assignment.*[86]—If an easement be for the benefit of land, it runs therewith.[87] Whether an easement is thus appurtenant or is in gross[88] or purely personal[89] is to be found in the parties' intent and those circumstances which evince it. The statutory rule implying a fee without words of inheritance does not operate to enlarge a personal reservation.[90] A reservation of a right of way in a deed, amounting only to a personal privilege, cannot be assigned by the grantor in conveying his remaining property.[91] An agreement to grant an easement does not run with the land.[92] Though a grantor cannot effect a severance of easements of light and air by reservation,[93] wherefore the grantee may release them,[94] yet the releasee having notice is bound to the grantor[95] whose reservation is equivalent in operation to a lien.[96] A purchaser at a judicial sale may be compelled to accept a title to land, access to which is by a way over lands of a third person, which easement is valid by prescription and is a way of necessity.[97]

§ 4. *Extinguishment and revival.*[98]—Easements cannot be relinquished by mere promise[99] or by mere acquiescence in an obstruction,[1] nor is the right affected by a temporary interruption owing to the obstruction of the way.[2] It may be destroyed by a prescriptive hostile use.[3] Use by another that will destroy an easement of right of way in land acquired by grant must be exclusive of the interest of the grantee, and in open hostility to his claim.[4]

Curr. L. 967. Also, see Notice and Record of Title, 2 Curr. L. 1053.

80. Golden v. Rupard, 25 Ky. L. R. 2125, 80 S. W. 162.

81. See ante, p. 1152, n. 45 et seq.

82. See Eminent Domain, 1 Curr. L. 1002.

83, 84. Healy v. Kelly, 24 R. I. 581, 54 A. 588.

85. Mitchell v. Bourbon County, 25 Ky. L. R. 512, 76 S. W. 16.

86. See 1 Curr. L. 966.

87. Common driveway reserved in grant. Gibbons v. Ebding [Ohio] 71 N. E. 720.

88. A passway purchased by an owner of land having no outlet, who divides up same into lots and sells same with connections to the passway, is appurtenant and not in gross. Johns v. Davis [Ky.] 76 S. W. 187.

89. A clause "Reserving the privilege of using the water from the spring on the lot hereby conveyed" merely reserves to the grantor a personal privilege, which the grantor cannot assign with a conveyance of her remaining property. Ross v. McGee [Md.] 56 A. 1128.

90, 91. Ross v. McGee [Md.] 56 A. 1128.

92. An agreement to open a highway, contained in an option on land, is not enforceable against subsequent grantees, by one claiming under the original vendor. The agreement is an executory, personal one, collateral to the land and not binding on grantees who know nothing of it. Houston v. Zahm, 44 Or. 610, 76 P. 641.

93, 94, 95, 96. McKenna v. Brooklyn Union Elevated R. Co., 88 N. Y. S. 762.

97. The proof in such cases of the title by prescription should be clear and strong. Metzger v. Martin, 87 App. Div. 572, 84 N. Y. S. 494.

98. Unauthorized use: See 1 Curr. L. 967.

99. Promise to modify or abandon use does not destroy the right or make the promisor a mere licensee. The right to build a flume across an irrigating ditch was given; its construction impeded the water in the ditch, contrary to agreement, but by neglect the grantors allowed this to ripen into a prescriptive right. Centerville & K. Irr. Ditch Co. v. Sanger Lumber Co., 140 Cal. 385, 73 P. 1079.

1. To knowingly permit improvements on land granted without asserting the right of way over it which was impliedly reserved does not estop the grantor from afterwards claiming the easement. Holman v. Patterson [Tex. Civ. App.] 78 S. W. 989.

2. Cavanaugh v. Wholey, 143 Cal. 164, 76 P. 979.

3. The rights of a railroad company having an easement across a person's land are not adverse to the owner's right to a private crossing over such right of way, and the owner's right cannot be barred by the statute of limitations, though not exercised within the statutory period. Cincinnati, etc., R. Co. v. Wachter, 70 Ohio St. 113, 70 N. E. 974.

The termination of the necessity[5] extinguishes a right of way arising from necessity;[6] but where a right of way is by grant, it is sufficient if it be reasonably necessary to the enjoyment of the land granted and adds materially to its value; it is not thereafter to be defeated by the removal of the necessity.[7]

Abandonment[8] must be by intention[9] and nonuser.[10] Making use of the possession of land for purposes not within the easement but simultaneous with it is not an abandonment.[11] Abandonment is a mixed question of law and fact,[12] and a party should not be allowed to testify that an easement had been abandoned without giving the facts. It must be established by decisive and unequivocal evidence.[13]

A municipality may by abandonment relinquish its control over a street which has been dedicated to it for public use.[14]

Merger[15] *and revival.*—A way of necessity extinguished by a union of seisin is not revived by severance, but a new way is granted by implication if the necessity continues.[15]

Restrictive reservations,[17] in deeds as to easements in favor of adjoining premises may be released by written instrument.[18] They cease with the occasion for them.[19]

Reverter.[20]—Where land is conveyed to a town for a street, it reverts to the grantor on the closing or abandonment of the street[21] or to his grantee, not to his heirs.[22] Abandonment of a toll house and making the road free is not an abandonment of the land on which the house stood for turnpike purposes.[23]

Actionable obstructions or violations embrace every substantial diminution of interference with the right of easement.[24] The neglect to comply with the condi-

4. Andrus v. National Sugar Refining Co., 93 App. Div. 377, 87 N. Y. S. 671.

5. See 1 Curr. L. 967.

6. Ann Arbor Fruit & Vinegar Co. v. Ann Arbor R. Co. [Mich.] 99 N. W. 869.

7. A way by grant or implication is not divested by the subsequent purchase of other lands over which the grantee might have ingress and egress. Mosher v. Hibbs, 24 Ohio Circ. R. 375.

8. See 1 Curr. L. 967.

9. An easement of right of way in land acquired by grant cannot be lost by mere nonuser. Andrus v. National Sugar Refining Co., 93 App. Div. 377, 87 N. Y. S. 671.

Obstruction of a way does not amount to an abandonment, particularly if the width of the street is disputed and the lot owner sues to have obstruction removed, claiming it to be within his own line. Healey v. Kelly, 24 R. I. 681, 64 A. 688. One who has a right of easement does not break the continuity of the user, or abandon the right, by **temporary interruptions** of the user for his own benefit only. The right to maintain a dam and flood adjacent lands is not lost by letting the water out to float logs. Hall v. New York, 92 App. Div. 96, 87 N. Y. S. 338. The stoppage of trains to make **alterations and repairs** to elevated tracks is not an abandonment. Hindley v. Metropolitan El. R. Co., 42 Misc. 56, 85 N. Y. S. 561.

10. Nonuser of an easement for 22 years, a building having in the meantime been built across same, held easement abandoned. Tudor Boiler Mfg. Co. v. Greenwald Co., 5 Ohio C. C. (N. S.) 37.

11. Railroad right of way used as pond for pleasure purposes. Dillon v. Kansas City, etc., R. Co., 67 Kan. 687, 74 P. 251.

12, 13. Gaston v. Gainesville & D. Elec. R. Co. [Ga.] 48 S. E. 188.

14. Kelsoe v. Oglethorpe [Ga.] 48 S. E. 366.

15. See 1 Curr. L. 967, n. 24-27.

16. Bates v. Sherwood, 6 Ohio C. C. (N. S.) 63.

17. See Buildings and Building Restrictions, 3 Curr. L. 572.

18. Gebhard v. Addison, 87 App. Div. 375, 84 N. Y. S. 418.

19. The covenant to observe a building line of 20 feet from the street, in a residence block, ceases when the block becomes business property, nor will the restrictive covenant be continued under the changed conditions as a covenant for light and air. Deeves v. Constable, 87 App. Div. 352, 84 N. Y. S. 592.

20. See Life Estates, Reversions and Remainders, 2 Curr. L. 741.

21. An owner conveyed a lot by a plat on which was marked "street"; part of description being "to land marked 'street.'" The lot so marked had never been opened or used as a street. Held, that grantee did not take to center of lot marked "street," nor obtain any easement therein. Downes v. Dimock & Fink Co., 75 App. Div. 513, 78 N. Y. S. 348.

22. A grantee who takes land subject to an easement obtains full title on termination of the easement. Mitchell v. Bourbon County, 25 Ky. L. R. 512, 76 S. W. 16.

23. Mitchell v. Bourbon County, 25 Ky. L. R. 512, 76 S. W. 16.

24. Railroad company for obstructing a **right of way reserved** to a landowner over the railroad's right of way. Porter v. Kansas City & N. Connecting R. Co., 103 Mo. App. 422, 77 S. W. 582. Damages are recoverable for a temporary destruction of crossings by a railroad company. Georgetown & Lexington Traction Co. v. Mulholland, 25 Ky. L. R. 578, 76 S. W. 148. A single lot owner,

tions under which an easement is used is an invasion of the rights of the one who grants it.[26] Ancient drains may lose their artificial character and become like natural ones which may not be obstructed,[28] at least as to the flow in its original volume.[27]

Damages.[28]—The owner of land around a pond, who grants an easement for flowage purposes only, is entitled to substantial damages if the land is used by the grantee for other purposes.[29] The damage for loss of an easement is such part of the original price as bears the same ratio to the whole consideration that the value of the easement bears to the value of the whole premises.[30] The measure of damages for obstructing a passway from a house to a highway is the diminution, if any, of the value of the use of the house and land during the continuance of the obstruction.[31]

Entry and removal.[32]—Abutters may remove obstructions placed by other abutters.[33]

Demand[34] *and notice* to persons actually obstructing an easement, though they be agents and not principals, is sufficient.[35]

§ 5. *Laches, estoppel or acquiescence.*[36]—Proceedings to enjoin the obstruction of an easement must be brought within a reasonable time.[37]

Parties.[38]—One not abutting has no interest independent of grant to preserve a private way.[39] The owner of a freehold having an easement appurtenant thereto may maintain an action for an invasion or destruction of their right of easement, though not in possession.[40] An encroachment on a public square or obstruction of a street is an offense punishable by indictment only, and one of the public cannot maintain an action therefor unless he is individually and peculiarly injured thereby.[41] The owners of lots bounding on a public square have a private right, over and

enjoying an **easement in a lawn and beach, may** enjoin the building of a sea wall so far **out** as to deprive him of the use of the beach. That the accruing benefits exceeded any detriment is immaterial to his right, which is not affected by the fact that he is the only interested one who is dissatisfied with the proposed change. Fisk v. Ley, 76 Conn. 295, 56 A. 559. The obstruction by building of a **square dedicated to the public** is a breach of the trust under which the town holds the property, of which it can take no advantage unless acquiesced in by the cestui qui trust. Fessler v. Union [N. J. Eq.] 56 A. 272. A traction company having a **franchise along a street for railroad purposes** may compel an abutting owner to remove fences that interfere with such use. Georgetown & L. Traction Co. v. Mulholland, 25 Ky. L. R. 578, 76 S. W. 148. The owner of a lot abutting on a way may sue to remove an obstruction to **any part of the way.** McKenzie v. Gleason, 184 Mass. 452, 69 N. E. 1076.

25. Injunction to prevent owner of a right of way, granted with the reservation in the grantor of the right to maintain a gate at each end of the way, from using the way unless he closed the gates immediately after passing through them. Mendelson v. McCabe [Cal.] 77 P. 915.

26. One existed immemorially and abutting subsequent grantees used and improved it. Riverside Cotton Mills v. Lanier [Va.] 45 S. E. 875.

27. Abutters can not so improve as to increase flow. Riverside Cotton Mills v. Lanier [Va.] 45 S. E. 875.

28. See 1 Curr. L. 969, n. 52-54.

29. In re Brookfield, 176 N. Y. 138, 68 N. E. 138.

30. Not, as the lower court held, the difference between the purchase price and the value of the land without the easement. Sweet v. Howell, 96 App. Div. 45, 89 N. Y. S. 21.

31. Louisville & N. R. Co. v. Carter, 25 Ky. L. R. 1303, 77 S. W. 719.

32. See Nuisance, 2 Curr. L. 1062.

33. Walling v. Eggers, 25 Ky. L. R. 1563, 78 S. W. 428.

34. See 1 Curr. L. 968, n. 43.

35. Fisk v. Ley, 76 Conn. 295, 56 A. 559.

36. See 1 Curr. L. 968.

37. Two weeks' delay in bringing an injunction, after giving direct notice of violation of rights, is not unreasonable. Fisk v. Ley, 76 Conn. 295, 56 A. 559. A bill to remove a tower erected on a public square is brought with reasonable promptness if filed within 18 months after notice, a verbal protest having been made immediately thereafter. Fessler v. Union [N. J. Eq.] 56 A 272.

38. See 1 Curr. L. 968.

39. West v. Louisville & N. R. Co., 137 Ala. 568, 34 So. 852.

40. Zook v. Illinois Cent. R. Co., 25 Ky. L. R. 2194, 80 S. W. 211.

41. One who suffers an individual injury may maintain an action, and the fact that the adjoining lot owners similarly situated do not join in the suit nor bring suit themselves does not prejudice his rights. Fessler v. Union [N. J. Eq.] 56 A. 272. Obstruction of a public street by an individual is a pub-

above that of the public at large, to have the square kept open.[42] Adjoining owners may prevent each other from obstructing the way on which they abut.[43]

In suing to prevent obstruction of an easement, it is immaterial in whom vests the title to the land subject to the easement.[44] A claim for damages for the obstruction of a right of way survives the death of the person erecting the obstruction.[45]

Form of remedy.[46]—Equity has jurisdiction to prevent interference with easements or their destruction.[47] The jurisdiction to determine how conflicting rights of way across the same place shall be used is vested inherently in the court of chancery; it cannot be exercised by any other forum, or affected by any legislative franchise or charter.[48] Ejectment is the proper remedy to bring against a railroad by abutting owners owning to the center of the street, for locating an additional switch track on their side of the street.[49]

Pleading[50] *and evidence.*—The existence of the easement must be well pleaded as either public or private[51] and proved by plaintiff.[52]

The alleged source of one's title is admissible against his denial of an easement,[53] also deeds of surrounding land[54] and the adversary's oral testimony in harmony with them both.[55]

Criminal injury to a private way "laid out by authority of law" does not apply to one made by agreement.[56]

EJECTMENT (AND WRIT OF ENTRY).

§ 1. Cause of Action (1157).
§ 2. Defense (1160).
§ 3. Parties (1161).
§ 4. Pleading (1161).
§ 5. Evidence (1162).
§ 6. Trial and Judgment (1163).
§ 7. New Trial (1164).
§ 8. Mesne Profits and Damages (1164).
§ 9. Allowance for Improvement and Expenditures (1165).

§ 1. *Cause of action.*[1]—Ejectment is a possessory action and will lie wher-

lie nuisance to be abated at the instance of the county or municipality or by an abutting lot owner. Pence v. Bryant, 54 W. Va. 263, 46 S. E. 275. Where an abutting owner extends a platform partially over the pavement and uses the sidewalk to load his goods into wagons which continuously interfere with its use by pedestrians, an adjoining owner, suffering special loss to his business, may restrain such interference. Brauer v. Baltimore Refrigerating & Heating Co. of Baltimore City [Md.] 58 A. 21.

42. Fessler v. Union [N. J. Eq.] 56 A. 272.

43. Mershon v. Fidelity Ins., Trust & Safe Deposit Co., 208 Pa. 292, 57 A. 569; Brauer v. Baltimore Refrigerating & Heating Co. [Md.] 58 A. 21.

44. Fisk v. Ley, 76 Conn. 295, 56 A. 559.

45. Should be first presented as a claim. Randall v. Brayton [R. I.] 58 A. 734.

46. See 1 Curr. L. 968.

47. Injunction lies. Gibbons v. Ebding [Ohio] 71 N. E. 720. Whether acquired by prescription or grant. Bubenzer v. Philadelphia, etc., R. Co. [Del. Ch.] 57 A. 242. Will lie to prevent the continuous obstruction of a right of way. Jackson v. Snodgrass [Ala.] 37 So. 246. Will lie where building is erected on street. Pence v. Bryant, 54 W. Va. 263, 46 S. E. 275. Will lie to restrain use in violation of condition. Mendelson v. McCabe [Cal.] 77 P. 915. Will lie against a telephone company constructing poles and wires along a public highway without compensation. Gray v. New York State Tel. Co., 41 Misc. 108, 83 N. Y. S. 920. May lie against several if same right is asserted against each. Louisville & N. R. Co. v. Smith [C. C. A.] 128 F. 1.

48. West Jersey & S. R. Co. v. Atlantic City & S. Traction Co. [N. J. Eq.] 56 A. 890.

49. The railroad company had been operating a single track through the street, and added a new switch track on the west side thereof. Stevens v. Skaneateles R. Co., 42 Misc. 145, 85 N. Y. S. 1005.

50. See 1 Curr. L. 969.

51. Where a complaint in a suit to prevent the obstruction of an alley does not allege that the alley was dedicated to a public use, the judgment cannot be sustained on the ground of public rights in alley. Milliken v. Denny, 135 N. C. 19, 47 S. E. 132.

Prescriptive existence: The averment that one seeking to remove an obstruction of a right of way has been in "adverse" possession for the statutory period is sufficient, without the words "open, continuous, exclusive, notorious and hostile." Jackson v. Snodgrass [Ala.] 37 So. 246.

52. Vandegrift v. Burke [Md.] 56 A. 602.

53. Answer admitted. Holman v. Patterson [Tex. Civ. App.] 78 S. W. 989.

54, 55. Holman v. Patterson [Tex. Civ. App.] 78 S. W. 989.

56. Public highways are those which are located as such by the supervisors, or roads in public use recorded as such; private roads are such as are duly laid out by the public authorities, and roads established without

ever lawful possession[2] or right thereto is interfered with.[3] It may be maintained by the owner of the fee for a part of a highway illegally appropriated,[4] or to secure for the public,[5] or to protect its rights in a dedicated street;[6] but will not lie to protect an easement or license.[7] It will lie to oust the licensee after revocation of his license,[8] and may be maintained on breach of condition subsequent.[9] One co-tenant may maintain the action for the entire property as against strangers,[10] and it is the proper proceeding where in partition the party in possession challeges the title of the petitioner.[11] The owner may maintain the action against several persons illegally claiming and holding separate parcels.[12] Ejectment will not lie to recover possession of a "ditch."[13] Equitable rights cannot be asserted against the legal title.[14]

Title in plaintiff.[15]—The plaintiff must recover on the strength of his own title,[16] therefore when the defendant is in possession and the plaintiff fails to

authority for convenience of individuals are neither public nor private roads. Territory v. Richardson [Ariz.] 76 P. 456.

1. See 1 Curr. L. 969.

2. Where an adjoining owner projects the ornamental work of his building onto his neighbor's premises. Johnson v. Minnesota Tribune Co. [Minn.] 98 N. W. 321. Where an heir has accepted a succession and has been put in possession, his assign is the owner of the interest inherited by him. Brian v. Bonvillain, 111 La. 441, 35 So. 632.

3. The action may be maintained by one who acquires title while another is in possession under a lease, unless it is shown that the lessee's possession bas not become wrongful. Glos v. Patterson, 204 Ill. 540, 68 N. E. 443.

4. Steam railway laid longitudinally in a street. Bork v. United New Jersey R. & Canal Co. [N. J. Err. & App.] 57 A. 412. Recovery will be subject to the public easement. Id. Owner of land abutting on a street may bring ejectment for a burden inconsistent with the easement granted. An additional car track. Stevens v. Skaneateles R. Co., 42 Misc. 145, 85 N. Y. S. 1005.

5. Where land under water at terminus of a street was filled in. Borough of Seabright v. Allgor, 69 N. J. Law, 641, 56 A. 287. A city may maintain ejectment to recover a portion of the street, wrongfully obstructed, without having previously passed an ordinance relative to the removal of such obstruction. Hawkshurst v. Asbury Park [N. J. Eq.] 56 A. 697.

6. Under 1 Starr & C. Ann. St. 1896, p. 689, a city with exclusive right to use and control the streets may recover possession from one encroaching thereon. Village of Lee v. Harris, 206 Ill. 428, 69 N. E. 230. Evidence held to show that an easement of use as a street had been established over certain lots. Id. Right of passage over an alley. Walling v. Eggers, 25 Ky. L. R. 1563, 78 S. W. 428.

7. One who had the exclusive right of interment in a cemetery lot. Stewart v. Garrett, 119 Ga. 386, 46 S. E. 427. But see Wilkinson v. Strickland [Miss.] 35 So. 177.

8. A trespasser erected telegraph poles in the highway and the owner made no objection for a time. Little v. American Telephone & Telegraph Co., 96 App. Div. 559, 89 N. Y. S. 136.

9. By the grantor, if living, or his heirs if he is dead. Jetter v. Lyon [Neb.] 97 N. W. 596. On breach of condition subsequent to maintain a railroad depot. Griswold v. Minneapolis, etc., R. Co. [N. D.] 97 N. W. 538.

10. Griswold v. Minneapolis, etc., R. Co. [N. D.] 97 N. W. 538.

11. Partition cannot be retained as an action to quiet title under such circumstances. Ellis v. Feist [N. J. Eq.] 56 A. 369.

12. Bryant v. Stephens [Ky.] 82 S. W. 423.

13. Conveyance to plaintiff was "the exclusive privilege and use of," etc. Conover v. Atlantic City Sewerage Co. [N. J. Err. & App.] 57 A. 897.

14. By the remainderman of an estate granted by the holder of a primary school certificate against one who obtained the legal title by patent. Porter v. Osmun [Mich.] 97 N. W. 756.

15. See 1 Curr. L. 970.

16. Where the plaintiff's title failed, defendant's possession renders questions as to the validity of his title immaterial. New York, etc., R. Co. v. Horgan [R. I.] 56 A. 179; Humphries v. Sorenson, 33 Wash. 563, 74 P. 690. Averments in the complaint that defendant's possession rests upon an infraction by the United States of its treaty obligations do not add to plaintiff's title. Fillhiol v. Torney, 194 U. S. 356, 48 Law. Ed. 1014. Nor is it sufficient to bring the case within the jurisdiction of a Federal court. Id. But it is not error to instruct that defendant should recover if he had the better title, where both claimed from a common source. Reynolds v. Clowdus [Ind. T.] 76 S. W. 277. Plaintiff failed to show title. Waters v. Durrence, 119 Ga. 934, 47 S. E. 216. Evidence held insufficient to show title in one who claimed under a lost deed. Carter v. Wood [Va.] 48 S. E. 553. Where plaintiff claimed under a deed from which the tract in dispute had been expressly excepted. Chesterman v. Bolling [Va.] 46 S. E. 470. Evidence held to show that plaintiff had deeded his title away. Lytle v. Anchor Duck Mills, 117 Ga. 869, 45 S. E. 271. Under section 5904, Rev. Codes 1899, plaintiff having failed to show title or interest, judgment dismissing the action was proper. Conrad v. Adler [N. D.] 100 N. W. 722. Where plaintiff claimed under a deed describing a straight line. Bailey v. Twin Lake Ass'n, 91 App. Div. 204, 86 N. Y. S. 788. Where

prove his title, the defendant is entitled to judgment, though he fail to show title in himself.[17] Unless both parties claim from a common source,[18] or the plaintiff claims by dedication,[19] he must connect himself by an unbroken chain of title with the state, or make out a title by adverse possession;[20] but this rule does not apply where defendant is estopped to deny the plaintiff's title.[21] The title proven must be a consistent one,[22] and legal title cannot be established by parol evidence.[23]

One holding a tax title,[24] or a United States citizen holding the possessory right of an Indian, has sufficient title to maintain the action;[25] but one who is entitled to support only from certain land has not,[26] nor will a mere informality in a deed sustain the action.[27] As a general rule, an equitable title will not sustain the action,[28] but the contrary prevails in some jurisdictions.[29]

plaintiff suing as owner of a mining claim failed to establish a valid location thereof, he could not complain that defendant's location certificate did not cover the mine. Benton v. Hopkins, 31 Colo. 518, 74 P. 891. Where one claimed under an assignment of a lease, evidence held insufficient to show that it had ever been delivered to him. Malloy v. Benway, 34 Wash. 315, 75 P. 869. Where one attempted to impeach his own deed 28 years after it was made, on ground of nondelivery, evidence held insufficient. Painter v. Campbell, 207 Pa. 189, 56 A. 409. Evidence held insufficient to show that an oil lease had been forfeited because oil had not been found in paying quantities. Summerville v. Apollo Gas Co., 207 Pa. 334, 56 A. 876.

Evidence held to show title in one who claimed under a mortgage foreclosure by a corporation. Graham v. Partee, 139 Ala. 310, 35 So. 1016. Where one claimed under a deed which had been lost and a quitclaim had been executed to replace it containing no words of inheritance, it was held that the lost deed conveyed a fee. Lyon v. Hyler [Mich.] 98 N. W. 858. Evidence held to show that a mortgagee had taken possession after condition broken and had been evicted by the mortgagor. Angell v. Fletcher [Vt.] 57 A. 964. Where plaintiff claimed to have purchased the land at sheriff's sale and introduced the sheriff's deed and an exemplification of a valid judgment against defendant, he established a prima facie case. Sweeney v. Sweeney, 119 Ga. 76, 46 S. E. 76. Where plaintiff claimed as widow of her deceased husband and introduced evidence that she was a surviving wife, she established a prima facie case. Jenkins v. Jenkins [Minn.] 100 N. W. 7. Evidence held insufficient to show a mistake in the deed under which plaintiff claimed. Ottomeyer v. Pritchett, 178 Mo. 160, 77 S. W. 62.

17. This is so where a complaint stated an action in ejectement, though brought under Gen. St. 1902, § 4053, relating to actions to try title. Layton v. Bailey [Conn.] 58 A. 355.

18. Ronk v. Higginbotham, 54 W. Va. 137, 46 S. E. 128. Where the parties claim from a common source, the plaintiff need go no further back than the common source. Kilgore v. Kirkland [S. C.] 48 S. E. 44. Neither party can dispute the title of one through whom each claims as a common source. Chesterman v. Bolling [Va.] 46 S. E. 470; Tarvin v. Walker's Creek Coal & Coke Co., 25 Ky. L. R. 2246, 80 S. W. 504. Recitals of a grant in deeds introduced by complainant as links in his arraignment of title are insufficient as against one claiming by a title paramount and adverse. Swainson v. Scott [Tenn.] 76 S. W. 909. Evidence held to show title in plaintiff. Martin v. Brand [Mo] 81 S. W. 443; Weller v. Wagner [Mo.] 79 S. W. 941; Desverges v. Goette [Ga.] 48 S. E. 693. Plaintiff had title by accretion. Myers v. Schuchmann [Mo.] 81 S. W. 618. Where plaintiff claimed under a deed, reserving a life estate in the grantor, he was entitled to recover only on showing that the grantor was dead. Williams v. Woodruff, 138 Ala. 125, 35 So. 122.

19. Where defendant claimed a part of a street by adverse possession, it was sufficient for the city to prove title beginning with the owner who dedicated. Davis v. Clinton, 25 Ky. L. R. 2021, 79 S. W. 259. Where two links were lacking in plaintiff's chain of title and his proof failed to identify the property. Ronk v. Higginbotham, 54 Va. 137, 46 S. E. 128.

20. Summerfield v. White, 54 W. Va. 311, 46 S. E. 154. Instruction held to have submitted to the jury the principles of law applicable. Desverges v. Goette [Ga.] 48 S. E. 693.

21. Summerfield v. White, 54 W. Va. 311, 46 S. E. 154.

22. A dowress and her privies are estopped to assert her husband's seisin. McGuire v. Whitt, 25 Ky. L. R. 2275, 80 S. W. 474. See Dower, 1 Curr. L. 956.

23. Where one sought to establish title by abandonment and gift. Reynolds v. Clowdus [Ind. T.] 76 S. W. 277.

24. One claiming under tax deeds held to have title sufficient to enable him to maintain ejectment. Shepherd v. Kahle [Wis.] 97 N. W. 506.

25. As against another Indian who asserts that because of such transfer the premises became public domain. Williams v. Works [Ind. T.] 76 S. W. 246.

26. Borum v. Gregory, 119 Ga. 766, 47 S. E. 192. The administrator of one having a life interest in lands cannot maintain ejectment to recover the land after the life tenant's death. Id.

27. A deed executed by the mayor of a city instead of by a special commissioner. Wright v. Morgan, 191 U. S. 55, 48 Law. Ed. 89.

NOTE. Who may maintain: One co-tenant may recover the entire property as against an intruder (Telfener v. Dillard, 70

Prior possession is sufficient as against a trespasser,[30] and a civil possession, sufficient for the purposes of a possessory action, is preserved by the intention to possess, though the actual possession be terminated.[31] Constructive seisin is sufficient upon which to maintain the action.[32]

§ 2. *Defenses.*[33]—The action lies only against one in possession.[34] Title in defendant,[35] acquired since the institution of the suit,[36] or in a third person,[37] or that the deed under which plaintiff claims was procured by fraud, is a good defense;[38] but an outstanding deed of trust is not,[39] unless it has been foreclosed and title transferred to a purchaser.[40] That defendant is an unintentional intruder is no defense,[41] nor is a right of dower consummate but unassigned.[42] That

Tex. 139; Wheeling, etc., R. Co. v. Warrell, 122 Pa. 618), as also may one partner (Smith v. Smith, 80 Cal. 324), and one co-tenant who has been ousted may maintain the action against another in possession (Moulton v. McDermott, 80 Cal. 629; Whiteman v. Hyland, 40 N. Y. S. 575; Jordan v. Surghnor, 107 Mo. 520). An executor required to manage the estate may maintain the action (McAlpine v. Daniel, 101 N. C. 550, 8 S. E. 215), but otherwise if he is invested only with power to carry into effect the provisions of the will (Reynolds' Ex'r v. Boyd, 92 Ky. 249). An administrator may recover in Florida (Sanchez v. Hart, 17 Fla. 507), Montana (Black v. Story, 7 Mont. 238), Nebraska (Dundas v. Carson, 27 Neb. 634), Michigan (Kline v. Moulton, 11 Mich. 370), Minnesota (Miller v. Hoberg, 22 Minn. 249). A widow may recover dower in Michigan (Proctor v. Bigelow, 38 Mich. 282), and in New Jersey (White v. White, 16 N. J. Law, 214, 31 Am. Dec. 232).—Hancock v. McAvoy, 151 Pa. 460, and note 18 L. R. A. 789.

28. Virginia Iron, Coal & Coke Co. v. Crane's Nest Coal & Coke Co. [Va.] 46 S. E. 393.

29. Holder of the equitable title under a decree for specific performance. Skinner v. Terry, 134 N. C. 305, 46 S. E. 517. Under Ball. Ann. Codes & St. § 5500, the action may be brought by the holder of the equitable title. Johnstone v. Gerry, 34 Wash. 524, 76 P. 258.

NOTE. Title to support: The legal title only is recognized as the ground of the action (Leonard v. Diamond, 31 Md. 541; Eaton v. Smith, 19 Wis. 537; Morehouse v. Phelps, 21 How [U. S.] 294; Langdon v. Sherwood, 124 U. S. 74, 31 Law. Ed. 344; McKay v. Williams, 67 Mich. 547), though in some jurisdictions an equitable title is sufficient (Allen v. Logan, 96 Mo. 691; Dodge v. Spiers, 85 Ga. 585).

Right of possession is necessary to a recovery. Barco v. Fennell, 24 Fla. 378; Kirke v. Hamilton, 102 U. S. 68, 26 Law. Ed. 79; Herrick v. Churchill, 35 Minn. 318; Fears v. Merrill, 9 Ark. 559, 50 Am. Dec. 226; Greene v. Jordan, 83 Ala. 220, 3 Am. St. Rep. 711.—Hancock v. McAvoy, 151 Pa. 460, and note 18 L. R. A. 781.

30. Prior possession for 12 years without paper title. Anderson v. Moore [Miss.] 36 So. 520. Where one interfered with another's possession of a burial lot. Wilkinson v. Strickland [Miss.] 35 So. 177. But see Stewart v. Garrett, 119 Ga. 386, 46 S. E. 427. As against an intrusion by a stranger. Rhule v. Seaboard Air Line R. Co. [Va.] 46 S. E. 331. To recover land, title to which is in the state. Smith v. Hicks, 139 Cal. 217, 73 P. 144. The question of barriers sufficient to turn stock is immaterial. Id.

31. Whether there be inclosures or not. Sallier v. Bartley [La.] 37 So. 6.

32. Howdasheil v. Krenning [Va.] 48 S. E. 491.

33. See 1 Curr. L. 971.

34. Under Laws 1885, p. 482, the forest commission thereby established can have no possession in the absence of an overt act which would render it liable in ejectment. Raquette Falls Land Co. v. Middleton, 84 N. Y. S. 1081. While it might be in possession of forest preserve, it could not of land owned by another. Id.

35. Where both parties claimed from a common source, evidence held to show title in defendant by adverse possession, he having taken possession under a contract of sale prior to the execution of the deed to plaintiff. Myers v. Schuchmann [Mo.] 81 S. W. 618. Where the defendant sets up adverse possession, he assumes the burden of proving it. Altschul v. Casey [Or.] 76 P. 1083. Under a defense of limitations where the evidence showed the defendant went into possession as tenant of the true owner, verdict for plaintiff was sustained. Nelson v. Brisbin [Neb.] 98 N. W. 1057. The fact that one had a deed executed subsequent to an attachment under which demandant claimed did not affect his title under foreclosure of a mortgage executed by the attachment debtor prior to the attachment. Carlisle v. Libby, 185 Mass. 445, 70 N. E. 423.

36. The defendant may show that since the institution of the suit he has acquired title or right of possession. Cook v. Georgia Land Co. [Ga.] 48 S. E. 378.

37. A defendant can avail himself of an outstanding title in a third person without connecting himself therewith. Waters v. Durrance, 119 Ga. 934, 47 S. E. 216.

38. Wilcox v. Priester [S. C.] 46 S. E. 553. Where the defense is a deed from plaintiff's ancestor, plaintiff may impeach the deed for fraud. Babcock v. Clark, 93 App. Div. 119, 86 N. Y. S. 976.

39. As between parties not claiming under it. Benton Land Co. v. Zeitler [Mo.] 81 S. W. 193.

40. Such title will bar a recovery between parties not claiming thereunder. Benton Land Co. v. Zeitler [Mo.] 81 S. W. 193.

41. Hamilton v. Murray [Mont.] 74 P. 75.

42. Ricknor v. Clabber [Ind. T.] 76 S. W. 271.

one is in possession under a contract to purchase is a good defense,[43] unless the conditions of the contract have been broken,[44] and a right to reimbursement for improvements added,[45] or the satisfaction of a mortgage where the mortgagee is in possession, is a condition precedent to a right of recovery;[46] but reimbursement to one holding under a void tax deed is not.[47] A mere equity is not a defense against the legal title,[48] but the holder of the equitable title must assert it as a defense or be forever concluded.[49] An estoppel must be specially pleaded[50] and proved.[51]

§ 3. *Parties.*[52]—In Illinois, all occupants of the premises must be made parties,[53] but nonjoinder of defendants can be availed of only by plea or answer, where the defect does not appear on the face of the pleading.[54] In Washington, the action may be brought against one in possession or one claiming the legal title.[55]

§ 4. *Pleading.*[56]—The complaint must contain a description of the property,[57] allege a right to possession and a demand therefor,[58] and in Pennsylvania, be filed on or before the return day of the writ.[59] A motion for leave to file a verified plea denying possession must be made before the case is called for trial.[60] A cross complaint alleging title in the defendant is unnecessary,[61] and surplusage

43. Ejectment will not lie against persons in possession under a contract to purchase until default in the performance thereof. Hutchinson v. Coonley, 209 Ill. 437, 70 N. E. 686.

44. A contract to convey which defendant refused to perform does not constitute an equitable defense. Howard v. Hewitt, 139 Cal. 614, 73 P. 414. Where a vendee has forfeited his rights under a contract of sale, the fact that he has paid a part of the purchase money and made improvements is no defense. McAdams v. Felkner, 140 Cal. 354, 73 P. 1064.

45. One lawfully in possession of school lands. Brummett v. Campbell, 32 Wash. 358, 73 P. 403. Where one seeks to recover a certain tract on the ground that by mutual mistake another tract was described in the deed to him, he must disclaim any interest in the tract described as a condition of relief. Wieneke v. Deputy, 31 Ind. App. 621, 68 N. E. 921.

46. Hooper v. Young, 140 Cal. 274, 74 P. 140.

47. The owner need not as a condition of recovery pay any of the taxes, interest or penalties for which the property was illegally sold. Wade v. Crouch [Okl.] 78 P. 91.

48. Transferee of purchase-money notes. Nunnelly v. Barnes, 139 Ala. 657, 36 So. 763.

49. One holding possession under contract of sale. In re Dutton's Estate, 208 Pa. 350, 57 A. 719.

50. Golden v. Tyer [Mo.] 79 S. W. 143. A defendant is not estopped to dispute plaintiff's title by having accepted a deed from their mother after their father's death, it not appearing that her dower interest was assigned. Caudle v. Long, 132 N. C. 675, 44 S. E. 368.

51. Where defendant entered under an oral contract providing that if he cultivated the land 10 years it should be his, evidence held to show a complete performance. Riverside Land Co. v. Pietsch [Wash.] 77 P. 195.

52. See 1 Curr. L. 972.

53. Under Hurd's Rev. St. 1901, § 6, providing that all occupants shall be made defendants, failure to join a roomer being a mere technical error not prejudicial to any rights of other defendants, is not reversible error. Glos v. Patterson, 204 Ill. 540, 68 N. E. 443.

54. Glos v. Patterson, 204 Ill. 640, 68 N. E. 443. One not in possession made a party under Hurd's Rev. St. 1901, c. 45, was not injured by a motion denying him leave to file a verified plea denying possession. Id., 209 Ill. 448, 70 N. E. 911.

55. Under Ball. Ann. Codes & St. § 5600, providing that the action may be brought against a tenant in possession or against the person claiming title, the action is properly brought against one in possession claiming under the legal title. Johnston v. Gerry, 34 Wash. 524, 76 P. 268.

56. See 1 Curr. L. 973.

57. Under section 2729 of the Code of 1887, description is sufficient if the premises are described with such convenient certainty that possession thereof may be delivered. Rhule v. Seaboard Air Line R. Co. [Va.] 46 S. E. 331. If from the description possession of the property could be delivered, it is sufficient under section 2729, Code of 1887. Howdashell v. Krenning [Va.] 48 S. E. 491.

58. Complaint alleging that defendant was wrongfully in possession of plaintiff's property and demanding a recovery thereof held sufficient. Sims v. Cordele Ice Co., 119 Ga. 597, 46 S. E. 841. Under Alaska Code Civ. Proc. § 75 (31 St. 344), a complaint which alleges that pursuant to an oral contract of sale the defendant entered into possession and ousted plaintiff, sufficiently alleges delivery of possession. Pacey v. McKinney [C. C. A.] 125 F. 675.

59. Under Act May 8, 1901 (P. L. 142), a judgment cannot be entered in default of appearance of defendant. Lorenz v. Berry, 207 Pa. 296, 56 A. 926.

60. Glos v. Patterson, 209 Ill. 448, 70 N. E. 911.

61. Nelson v. O'Brien, 139 Cal. 628, 73 P. 469.

may be stricken.[62] All material facts relied on must be alleged,[63] but in New York, the plaintiff may without filing a reply impeach for fraud, a deed set up as a defense.[64]

§ 5. *Evidence.*[65]—The burden is on the plaintiff to establish his title or right to possession,[66] but where defendant sets up an affirmative defense, he must prove it.[67] Proof of demand for possession may be rendered unnecessary by default of the defendant.[68] Evidence is admissible to show a mistake in a deed,[69] or that its execution was procured by fraud,[70] or the extent of a devise under which one asserts title;[71] but a void deed is inadmissible.[72] Evidence is not admissible to show muniments of title not within the abstract attached to the petition,[73] but material evidence not within such abstract cannot be excluded.[74] Where

62. Where plaintiff alleges title in fee and the answer denies it, allegations in the answer relative to defective links in plaintiff's chain of title are surplusage. Nelson v. O'Brien, 139 Cal. 628, 73 P. 469.

63. A defendant cannot show that a deed in the plaintiff's chain of title was a mortgage unless such fact is alleged. Locklear v. Bullard, 133 N. C. 260, 45 S. E. 580. Where defendants stated as their grounds of defense that the plaintiff had no valid title as against them, it was sufficient to cover objections to the admission in evidence of a paper purporting to be a copy of the lost deed under which plaintiff claimed. Carter v. Wood [Va.] 48 S. E. 553.

64. Under Code Civ. Proc. § 514. Babcock v. Clark, 93 App. Div. 119, 86 N. Y. S. 976.

65. A deed to defendant reciting that land in dispute was owned by a third person is evidence of plaintiff's title where he shows a chain from such third person. Pere Marquette R. Co. v. Graham [Mich.] 99 N. W. 408. Where the defendant in his plea admits the execution of an instrument which appears in plaintiff's chain of title, it is not a good objection to its admissibility that its execution has not been proved. Vizard v. Moody, 119 Ga. 918, 47 S. E. 348.

A judgment was admissible, though it did not recite service of summons where the summons was in evidence and showed personal service. Kinkade v. Gibson, 209 Ill. 246, 70 N. E. 683. See 1 Curr. L. 974.

66. A party relying on a title bond to prove his title must establish its execution, even though it has been recorded. Burkhart v. Loughridge, 24 Ky. L. R. 815, 76 S. W. 397. The question of the rights of the parties was for the jury where plaintiff set up title by deed and the defendant by adverse possession, and both parties offered proof in support of their contentions. Altschul v. Casey [Or.] 76 P. 1083. Where one claimed by adverse possession and another under grant from a person since deceased, evidence held for the jury. Miller v. Shumway [Mich.] 98 N. W. 385. Evidence of possession held for the jury, notwithstanding Acts 1897, p. 155, c. 109, providing that plaintiff having introduced his evidence, defendant may move to dismiss. Bivings v. Gosnell, 133 N. C. 574, 45 S. E. 942. Where plaintiff alleges title in himself and wrongful withholding by defendant and the entire complaint is denied, the burden is on the plaintiff to prove the allegations. Bivings v. Gosnell, 133 N. C. 574, 45 S. E. 942. Where plaintiff neither claimed nor recovered land within a reserved tract, he was not required to prove that the land in controversy was not within such reservation. Howdashell v. Krenning [Va.] 48 S. E. 491. Where plaintiff's lessor introduces a deed to himself and supports it with evidence which the jury might construe as evidence of adverse possession, it is not error to refuse a nonsuit. Holder v. Scarborough, 119 Ga. 256, 46 S. E. 93. And where defendant's evidence shows that both parties claim under a common grantor, the refusal of nonsuit will not be overruled [Civ. Code 1895, § 5004]. Id.

67. Contract of purchase not established. Russell v. Gay, 33 Wash. 83, 73 P. 795.

68. Where complaint alleged that defendant unlawfully withheld the premises and such defendant defaulted, on trial against a co-defendant, proof of demand for possession was unnecessary. Glos v. Patterson, 209 Ill. 448, 70 N. E. 911. One not in possession but made a party because of a claim of interest in the premises cannot complain that no demand had been made on defendant in possession. Id. In an action to recover a street, defendant was not entitled to notice to remove under Ky. St. 1903, § 2326. Davis v. Clinton, 25 Ky. L. R. 2021, 79 S. W. 259.

69. Under Burns' Rev. St. 1901, § 1067, providing that evidence of every defense is admissible under a general denial, a mistake of description in a deed under which one's claims may be shown, though it could not be made the basis of affirmative relief. Wieneke v. Deputy, 31 Ind. App. 621, 68 N. E. 921. Evidence held sufficient to show a mutual mistake. Id.

70. Plaintiff can show that defendant procured the grant from him by fraud and his negligence in signing the grant without reading it is immaterial. Wilcox v. American Tel. & T. Co., 176 N. Y. 115, 68 N. E. 153.

71. Where one claimed a tract under a testamentary devise and another under a residuary clause, extrinsic evidence as to the extent of the devise was admissible. Crossen v. Carr [N. J. Law] 57 A. 158. The question was for the jury. Id. Evidence held to show that the tract in suit was not included in the devise. Id.

72. A deed by one through whom plaintiff claimed, purporting to pass title to another outside plaintiff's chain, is inadmissible where it had been litigated and declared void. Altschul v. Casey [Or.] 76 P. 1083.

73. The abstract may be amended to permit the introduction of such evidence. Lee

the defendant sets up adverse possession, plaintiff may show payment of taxes;[75] but where defendant had no title by limitation, payment of taxes by him was immaterial.[76] Where the answer stated no defense, evidence in support thereof was properly excluded.[77]

§ 6. *Trial and judgment.*[78]—The rights to be determined are those which exist at the time action is brought,[79] and only the issues made by the pleadings will be tried.[80] The jury should be instructed as to the value[81] and legal effect of the evidence.[82] The action is properly treated as one in equity where the defendants demand affirmative equitable relief;[83] but where an equitable defense is set up, it does not change the action to one in equity.[84] Where defendant pleads an equitable estoppel, it should be first passed upon by the court.[85] In some states, the party adjudged to have the better title may relinquish the land on payment of its value in an action to recover for improvements.[86] The service of a writ of ouster will not be enjoined where it appears that the petitioners for the injunction are claiming under subsequent but void condemnation proceedings.[87]

A verdict must respond to all material issues,[88] and contain a description of the land,[89] unless it is set forth in the complaint.[90] A verdict for damages is sufficient without setting forth the cause for which they were assessed.[91]

v. Houston [Ga.] 48 S. E. 129. A defendant relying on an equitable title through a title bond cannot be required to file his bond before trial under Civ. Code, § 128, providing that written evidence may be filed with the pleadings. Burkhart v. Loughridge, 24 Ky. L. R. 815, 76 S. W. 397. But if he does not, his adversary is entitled to a reasonable time to prepare his defense. Id.

74. A court has no power to make and enforce a rule that no evidence shall be admissible except the abstract and records and documents attached to the petition and referred to therein. Pelz v. Bollinger [Mo.] 79 S. W. 146.

75. Walling v. Eggers, 25 Ky. L. R. 1563, 78 S. W. 428.

76. Tax receipts not admissible. Klnkade v. Gibson, 209 Ill. 246, 70 N. E. 683.

77. Hall v. Small, 178 Mo. 629, 77 S. W. 733.

78. The time for filing the defense bond required by Code, § 237 may be extended in the discretion of the court. Tennessee River Land & Timber Co. v. Butler, 134 N. C. 50, 45 S. E. 956. See 1 Curr. L. 976.

79. Offer by vendor in open court to perform terms of a contract of sale is unavailing. Hutchinson v. Coonley, 209 Ill. 437, 70 N. E. 686.

80. Where defendant relies on a deed, an issue whether words therein limiting the title were inserted without defendant's knowledge is not involved. Allen v. Hall, 31 Colo. 206, 73 P. 844. Where defendant relies on a recorded but lost title bond of which he alleges his adversary had notice, he is entitled to have the issue of notice tried, though he does not produce the bond. Burkhart v. Loughridge, 24 Ky. L. R. 815, 76 S. W. 397.

81. Under a defense of adverse possession where the evidence was conflicting as to when a fence was built, the jury should be instructed as to the evidentiary value of the fence. Dawson v. Falls City Boat Club [Mich.] 99 N. W. 17.

82. Where a tax deed has been introduced and then proven to be void, the deed should not be stricken out but the jury should be instructed upon its legal effect. Ropes v. Minshew [Fla.] 36 So. 579.

83. Cancellation of the deed under which plaintiff claims. Myers v. Schuchman [Mo.] 81 S. W. 618. A defendant must present all his defenses and if any of them are exclusively cognizable in equity, he is entitled to transfer the cause to the equity docket [Sand. & H. Dig. § 5619]. Daniel v. Garner, 71 Ark. 484, 76 S. W. 1063. Where it was admitted that plaintiff had the legal title but the vital question was whether the defendants were entitled to equitable relief, it was no error for the court to direct a verdict for the defendant. Brummett v. Campbell, 32 Wash. 358, 73 P. 403.

84. Error to discharge the jury on the ground that the case was one in equity. Hall v. Small, 178 Mo. 629, 77 S. W. 733.

85. Compromise in an ejectment suit. Tarpey v. Madsen, 26 Utah, 294, 73 P. 411.

86. Under Rev. St. 1899, § 3072. Answer provided for in section 3075, making value an issue on the trial, will be held waived where the value is fixed by agreement between the parties. Kelly v. Gebhart [Mo.] 79 S. W. 427.

87. Board of Education of Stillwater v. Aldredge, 13 Okl. 205, 73 P. 1104.

88. Hamilton v. Murray [Mont.] 74 P. 75. A conditional verdict which does not pass on an issue made by defendant's plea of not guilty is insufficient. Howdashell v. Krenning [Va.] 48 S. E. 491. Where a statute provides that in an action against several defendants, each claiming distinct parcels, the verdict shall recite the description of each parcel, failure to so describe may be corrected after verdict rendered [Comp. Laws, § 10,973]. Townsend v. Kreigh [Mich.] 98 N. W. 388. Ball. Ann. Codes & St. § 5510, providing that if verdict be for defendant, the jury shall find that plaintiff is not entitled to possession, does not apply where only the boundary is in dispute. Simmons v. Jamieson, 32 Wash. 619, 73 P. 700.

89. Under section 1515, Rev. St. 1892, a

A judgment must be supported by the evidence,[92] be within the limits prescribed by law,[93] and contain a sufficient description to enable the property to be identified.[94] It should follow the verdict, and where the verdict is fatally defective it is error to enter judgment thereon.[95] It may be affirmed in so far as proper, and the case sent back for new trial as to other matters,[96] and where it will operate harshly and interfere with public interests, execution may be suspended.[97] Where judgment is entered under an ejectment clause in a lease, no second judgment can be entered thereunder, though the first one is void.[98] It is final as to issues involved,[99] and in equitable ejectment is conclusive;[1] but not binding on one not a party.[2] A writ of assistance to put the prevailing party in possession is void if beyond the issues of the case.[3]

§ 7. *New trial.*[4]—The party against whom judgment is entered is entitled to a new trial as a matter of right,[5] and the fact that the plaintiff includes in his petition a claim for rents or damages or that the defendant sets up an equitable defense does not take away this right.[6] This rule does not prevail in partition,[7] unless the only question litigated was the title.[8]

§ 8. *Mesne profits and damages.*[9]—At common law, after this action was adopted as a proceeding to try title, the plaintiff was obliged to resort to a second

verdict is fatally defective if it does not state the quantity and describe the land recovered. Hoodless v. Jernigan [Fla.] 35 So. 656.

90. Webb v. Reynolds, 139 Ala. 398, 36 So. 15.

91. Where damages for use and occupation are sought, a verdict assessing "damages for rent" is sufficient, since the jury are only required to assess the amount and the words "for rent" are surplusage. Webb v. Reynolds, 139 Ala. 398, 36 So. 15.

92. It was error to give judgment for plaintiff where there was no evidence showing the extent of his claim. Bradley v. Bailey, 25 Ky. L. R. 1953, 79 S. W. 233. A finding that plaintiff is the owner and entitled to the possession of lands is sufficient to sustain a judgment on the issue of ownership. Curtis v. Boquillas Land & Cattle Co. [Ariz.] 76 P. 612. A mere disclaimer of title is an insufficient basis for a judgment to rest upon. Grubbs v. Pierson, 111 La. 101, 35 So. 474.

93. A judgment beyond the limits of Rev. St. 1899, § 3072, authorizing a recovery for improvements made in good faith, is merely erroneous and not void. Kelly v. Gebhart [Mo.] 79 S. W. 427.

94. Cushing v. Conness [Neb.] 95 N. W. 855. Under section 1515, Rev. St. 1892, a judgment is fatally defective if it does not state the quantity of the estate and give a description of the land recovered. Hoodless v. Jernigan [Fla.] 35 So. 656.

95. Hoodless v. Jernigan [Fla.] 35 So. 656. A judgment following an erroneous description in the petition is void. Cushing v. Conness [Neb.] 95 N. W. 855. A judgment based on a verdict locating the land in a range different from the one stated in the declaration is erroneous. Ropes v. Minshew [Fla.] 36 So. 579.

96. Where a city recovered a portion of streets when entitled to all. Village of Lee v. Harris, 206 Ill. 428, 69 N. E. 230.

97. Ejectment of railway company from depot grounds. Griswold v. Minneapolis, etc., R. Co. [N. D.] 97 N. W. 538.

98. City of Philadelphia v. Johnson, 208 Pa. 645, 57 A. 1114.

99. Where plaintiff holds the legal title and defendant the equitable, a judgment for one determines the invalidity of the title of the other. In re Dutton's Estate, 208 Pa. 350, 57 A. 719. A judgment for the city is conclusive of the question as to whether an ordinance relative to the removal of obstructions is necessary to entitle the city to maintain ejectment. Hawkshurst v. Asbury Park [N. J. Eq.] 56 A. 697. Where the only question was as to the validity of mortgages given by an infant a finding by the court that they were valid rendered question of foreclosure immaterial. Shreeves v. Caldwell [Mich.] 97 N. W. 764.

1. Where a trustee in bankruptcy recovered from the wife of the bankrupt land bought by her with her husband's money, it was a bar to an action by her against the trustee for the same land. Rosenberg v. Mencke, 208 Pa. 331, 57 A. 716.

2. Where one of the defendants was not a party to the second count in a declaration, it was error to render judgment against him for a parcel of land therein described. Howdashell v. Krenning [Va.] 48 S. E. 491.

3. Shaffer v. Austin [Kan.] 74 P. 1118.

4. See 1 Curr. L. 978.

5. Where he makes demand by notice on the journal. Keller v. Hawk, 13 Okl. 261, 74 P. 106. One who has been induced to part with his property by imposition and fraud comes within Burns' Ann. St. 1901, § 1076. Tomlinson v. Tomlinson, 162 Ind. 530, 70 N. E. 881.

6. Keller v. Hawk, 13 Okl. 261, 74 P. 106.

7. Under section 5086, Gen. St. 1901. Moorehead v. Robinson [Kan.] 75 P. 503.

8. Where, under the petition, the action is only for partition but the sole litigated question was as to title to the land, the defeated party has a right to a new trial. McNulty v. Exchange Bank of Stockton [Kan.] 76 P. 395.

9. See 1 Curr. L. 979.

action to recover actual damages sustained; but this rule was early repudiated by the American courts and legislators, and in many of the states it is provided by statute that actual damages may be recovered.[10] All damages suffered, resulting from the wrong complained of may be recovered.[11] A recovery as damages of rents and profits for a term not exceeding six years means six years prior to the commencement of the action.[12]

§ 9. *Allowance for improvements and expenditures.*[13]—As a general rule, the right to recover for improvements added is limited to one in possession claiming title;[14] but it has been held that a trespasser may claim reimbursement.[15] A law allowing an occupant of land on being ejected, to recover for improvements made in good faith before notice of adverse title, is not unconstitutional as taking property for private use without consent of the owner.[16]

ELECTIONS.

§ 1. Statutory Authorization, Time, Place and Notice (1165).
§ 2. Eligibility and Registration of Electors (1167).
§ 3. Nominations by Convention or Petition (1168).
§ 4. Official Ballot (1170).
§ 5. Primary Elections (1170).
§ 6. Officers of Election (1171).
§ 7. Polling the Vote (1171).
§ 8. Irregularity and Ambiguity in Ballot (1172).
§ 9. Distinguishing Marks on Ballot (1172).
§ 10. Count, Canvass and Return (1173).
§ 11. Review by Court (1174). Rights and Remedies (1174). Jurisdiction (1174). Pleadings and Issues (1175). Dismissal (1175). Preservation and Production of Ballots (1175). Evidence (1176). Recount of Ballots (1176). Decision and Review Thereof (1177). Security (1177).
§ 12. Offenses Against Election Laws (1177).

§ 1. *Statutory authorization, time, place and notice.*[17]—An election law will not be held invalid on the ground that it may be so construed as to result in the

10. Gen. St. 1902, § 4052, declaring that if plaintiff elects to have title confirmed in defendant the court shall ascertain what he ought to be paid is inapplicable to an action by a life tenant whose estate is subject to conditions subsequent which limit his beneficial enjoyment of the premises. Lewis v. Lewis, 76 Conn. 586, 57 A. 735. Gen. St. 1902, § 4052, allowing a defendant to set off his improvements and providing that if the plaintiff shall elect to have title confirmed in defendant, the court shall determine what sum should be paid plaintiff, does not confer authority to compel defendant to take the premises. Lewis v. Lewis, 76 Conn. 586, 57 A. 735. Instruction under Rev. Laws, c. 179, § 12, relative to measure of recovery under a writ of entry, held proper. Hawks v. Davis, 185 Mass. 119, 69 N. E. 1072. Under Sand. & H. Dig. § 2592, not more than three years' rent can be recovered. Shirey v. Clark [Ark.] 81 S. W. 1057.

11. Under B. & C. Comp. § 326, plaintiff may show that the wrongful retention prevented him from constructing a building on the premises. Trotter v. Stayton [Or.] 77 P. 395. Where, pending the action, defendants were enjoined from working the mine on judgment entered in their favor, they were not entitled to damages occasioned by being prevented from selling the ore. Benton v. Hopkins, 31 Colo. 518, 74 P. 891. Where, by a judgment, defendant was not given a right to possession until March, 1901, and not then if plaintiff redeemed from a foreclosure sale by such date, plaintiff was entitled to rents and profits until such date. Dix v. Lohman [Mo. App.] 80 S. W. 51.

12. Recovery may also be had for the time that elapses before final judgment [Code Civ. Proc. §§ 1496, 1497]. Willis v. McKinnon, 178 N. Y. 451, 70 N. E. 962.

13. See 1 Curr. L. 980.

14. Where a broker expends time and money in negotiating a purchase and takes title in his own name and takes possession on judgment being rendered against him, his expenditures are a lien on the land. Johnstone v. Gerry, 34 Wash. 524, 76 P. 258.

15. Cost of clearing land. Sigur v. Burgueres, 111 La. 711, 35 So. 823. Also for such ameliorations as have added permanent value to the land. Id.

16. The owner is presumed to know of his ownership and the use of the land, and is precluded by permitting improvements to be made without giving notice of his title, under Const. art. 2, § 20. Tice v. Fleming, 173 Mo. 49, 72 S. W. 689. In Arkansas, the improvements for which one is entitled to compensation are measured by the increase in the value of the land [Sand. & H. Dig. § 2590]. Greer v. Fontaine, 71 Ark. 605, 77 S. W. 56.

17. The New York statute [Laws 1890, p. 467, c. 252], providing for a special town meeting to fill vacancy in office of supervisor, has been repealed. People v. Potter, 88 App. Div. 239, 85 N. Y. S. 460. A constitutional provision declaring that there shall be elected in each county at the time of holding general elections certain county officers, confers on the people the right to hold an election for the selection of successors of the incumbents at the general elec-

disfranchisement of electors, where such is not the natural and necessary construction.[18] The trustees and not the clerk of a village are the proper authorities to call a special election on failure to elect a president or trustees.[19]

Time.[20]—Inasmuch as a fixed and ascertained time for holding an election is indispensable to the full and effectual exercise of the right to vote, statutes relative to time are mandatory;[21] but slight variations will not invalidate an election.[22] Where statutes provide for the submission of a proposition for reincorporation upon petition to the village trustees, it is their duty to call the election within a reasonable time.[23]

Place.[24]—An election held at any other than the designated place is void.[25]

Precincts[26] may from time to time be changed as public convenience may require.[27]

Notices.[28]—The authority to hold elections being derived from the written law, which all persons are bound to know, provisions for notice are regarded as designed to give greater publicity, and therefore merely directory, particularly where the will of the public has been fairly expressed.[29] But the rule that where a

tion next preceding the expiration of the term of the incumbents, and the legislature cannot postpone the choice of successors to a subsequent general election. Gemmer v. State [Ind.] 71 N. E. 478. A legislative act incorporating a town which provides that named persons shall act as mayor and aldermen until their successors are elected and qualified is not opposed to a constitutional provision that "in all elections by the people the electors shall vote by ballot." Lambert v. Norman, 119 Ga. 351, 46 S. E. 433. Nor is the act unconstitutional for the reason that the General Assembly has no elective or appointive power of officers of towns to which they grant charters. Id. It is competent for the General Assembly to provide that the expenses connected with an election covering a particular locality shall be paid out of the general revenue funds of the municipality. City of Columbus v. Jeffrey, 2 Ohio N. P. (N. S.) 86. See 1 Curr. L. 981.

18. Applied to Brannock Law. Jeffrey v. State, 4 Ohio C. C. (N. S.) 494, 26 Ohio C. C. 591.

19. In re Travis, 87 App. Div. 654, 84 N. Y. S. 534.

20. See 1 Curr. L. 981.

21. Johnstone v. Robertson [Ariz.] 76 P. 465. A petition for an election to decide whether or not stock shall run at large was filed too late when filed on the day the term of court began, the statute providing that the election cannot be ordered at the term at which the petition is filed. Barlow v. State [Tex. Cr. App.] 80 S. W. 375.

22. A city election was properly held on the second Monday of the month, although the charter under which it was held did not go into effect until the 18th. Trafton v. Quinn [Cal.] 77 P. 164. The true test to be applied to departures from the requirements of statutes relating to the time and place of elections is as to whether or not the particular departure is of such a nature as to make it impossible or extremely difficult to determine, under the circumstances of the case, whether fraud has been committed, or anything done which would affect the result. Kenworthy v. Mast, 141 Cal. 268, 74 P. 841.

23. A delay of 8 months is unreasonable and an abuse of their discretion. People v. Daley, 89 App. Div. 156, 85 N. Y. S. 429.

24. See 1 Curr. L. 981.

25. Johnstone v. Robertson [Ariz.] 76 P. 465. An election for voting money held at the several precincts of a township does not comply with a requirement that it be at a town meeting. Chicago, etc., R. Co. v. People, 206 Ill. 296, 69 N. E. 93. But a special election held at a single place, a general city ordinance designating a place in each ward for the holding of elections, is valid, in the absence of a showing that there was not a fair expression. State v. Allen, 178 Mo. 656, 77 S. W. 868.

26. See 1 Curr. L. 982.

27. Where so changed that new precincts are added, the election officers may have new registry books prepared. Brome v. Dorsey [Md.] 58 A. 1020. Whether equity will take jurisdiction to restrain the redistricting of election precincts, such action being political or governmental in its nature, quaere. Id. Provisions of statute as to how and when election precincts may be changed must be strictly followed. Rexroth v. Schein, 206 Ill. 80, 69 N. E. 240.

28. See 1 Curr. L. 982.

29. Brown v. Street Lighting Dist. No. 1 [N. J. Err. & App.] 58 A. 339. Whether this rule obtains where the time and place are not fixed by law but by the notice of election itself, quaere. Ogburn v. Elmore [Ga.] 48 S. E. 702. Election laws are to be construed liberally, so as to preserve, if possible, and not defeat, the choice of the electors as expressed at an election. Failure to publish for the full period of ten days the mayor's proclamation of a special election to be held under §§ 4364-20a, Revised Statutes (Beal Local Option Election Law) is not fatal, there being no fraud or other irregularity, and knowledge of such election being general throughout the municipality. Fike v. State of Ohio, 4 Ohio C. C. (N. S.) 81. An ordinance passed a week before a special election, designating the polling places, will be held to have given sufficient notice thereof, an unusually large vote having been cast. O'Laughlin v. Kirkwood [Mo. App.] 81 S. W. 512. Where an

vacancy is to be filled for a regular term at a general election, the failure to give the notice provided by law will not invalidate the election, is applicable only where an election has been held and the great body of voters had notice in fact of the vacancy.[30] An election may be valid where the notice given called for the election of two officers, though but one is authorized by law.[31] An order of a city council ordering a special election need not be in the form of an ordinance.[32]

Mandamus[33] will not issue in anticipation of an omission of duty,[34] nor to compel the performance of a discretionary duty.[35] A board of elections will not be compelled to grant a petition of voters for the purchase of a voting machine where it does not appear that there are funds on hand applicable to payment.[36]

§ 2. *Eligibility and registration of electors.*[37]—Under our political system, the right to vote or to exercise the privilege of the elective franchise rests within the jurisdiction of the various states, to be exercised as to each may seem proper, provided always no discrimination is made between individuals in violation of the Federal constitution.[38] Where qualifications are prescribed by a constitution, they cannot be added to by statute or ordinance.[39] The right to vote is usually limited to citizens[40] or freemen,[41] and sometimes depends upon the payment of taxes.[42]

Residence.[43]—Residence for the purpose of voting remains until a new one is acquired.[44] State employes neither gain nor lose a residence by reason of residence at the place of their employment,[45] though in Kansas, an inmate of the National

order for a special election requires a notice of fifteen days, it is not necessary that the notice be published on each of the fifteen days. State v. Allen, 178 Mo. 555, 77 S. W. 868. And notice of an election to authorize the issuance of funding bonds by a city published only once and not three successive weeks has been held sufficient. Stone v. Chicago, 207 Ill. 492, 69 N. E. 970. Under a provision that two newspapers, one representing each political party, shall be designated to publish election notices, the order designating four papers of each party is without warrant and void. Publisher cannot recover payment for such publication. Ford v. Delaware County Sup'rs, 92 App. Div. 119, 87 N. Y. S. 407. Election of school trustees held valid, it being well known throughout the district that the election was being held, and all persons participating having done so in good faith, and there being no evidence that the result was not the expression of the will of the majority of the voters who would have voted if the statutory notice had been given and others had been candidates. Buchanan v. Graham [Tex. Civ. App.] 81 S. W. 1237.

30. State v. Chatterton [Wyo.] 73 P. 961.

31. Sanchez v. Fordyce, 141 Cal. 427, 75 P. 56.

32. State v. Allen, 178 Mo. 555, 77 S. W. 868; O'Laughlin v. Kirkwood [Mo. App.] 81 S. W. 512.

33. See 1 Curr. L. 982.

34. To compel purchase of voting machine not to be used for three months. State v. Board of Elections, 4 Ohio C. C. (N. S.) 398.

35. Where electors had voted affirmatively on a proposition to centralize schools, but negatively on the question of bonding to accomplish the centrallization, mandamus would not issue to compel the school board to take steps towards this end by levying a tax to the maximum limit. State v. Board of Education, 24 Ohio Circ. R. 383.

36. State v. Board of Elections, 4 Ohio C. C. (N. S.) 398.

37. See 1 Curr. L. 982.

38. Pope v. Williams, 193 U. S. 621, 48 Law. Ed. 817.

39. A requirement that a voter on registering shall receive and preserve a certificate of registration and exhibit the same when he presents himself to vote does not add to the qualifications prescribed by the Kentucky constitution. Yates v. Collins [Ky.] 82 S. W. 282. A constitutional provision that all freemen have a right to elect officers does not render invalid the rule of a city police department forbidding attendance and participation by members of the force at a political caucus. Brownell v. Russell [Vt.] 57 A. 103.

40. Where a father and minor son both born in a foreign jurisdiction come to this country and the father becomes a citizen through naturalization, the status of the son becomes that of the father [Rev. St. U. S. § 2172]. Rexroth v. Schein, 206 Ill. 80, 69 N. E. 240.

41. Brownell v. Russell [Vt.] 57 A. 103.

42. A legislative extension of the time for the payment of taxes beyond the day of election does not have the effect of relieving from a constitutional requirement that an elector shall have paid his poll tax on or before a certain date preceding the election. Black v. Pool [Tex.] 78 S. W. 922. Under the Maryland act incorporating the Upper Marlborough Academy, a voter was qualified to vote for trustees thereof if he had contributed the amount specified for the support thereof, whether he sent a pupil thereto or not. Ward v. Sasscer [Md.] 57 A. 208.

43. See 1 Curr. L. 982.

44. The idea of residence is compounded of fact and intention; to effect a change of it there must be an actual removal to another habitation, and there must be an intention of remaining there. Pope v. Williams [Md.] 56 A. 543.

Home for Disabled Volunteer Soldiers, while maintained therein at public expense, is not deprived of the right to acquire a residence there for voting purposes.[46] A person is a voter in the precinct wherein he resides, though he may be employed in another.[47]

Registration.[48]—Registration laws, or the failure of registering officers to observe them, cannot impair the voter's constitutional right to vote.[49] Valid requirements must be complied with,[50] and an election should not be held without giving to all voters the opportunity to register.[51] In some states, no right of appeal exists from a determination as to the qualifications of an applicant for registration.[52] Where officials are authorized to make inspections and ascertain information in connection with registration, it is no misdemeanor to refuse such officials information before the registration is begun.[53] A board of registration organized in violation of state or Federal constitutional provisions, since it is not legally constituted and therefore powerless to register persons at all, is not liable in damages for refusal to register a voter.[54]

§ 3. *Nominations by convention or petition.*[55]—Where the word "party" occurs in a statute relating to nominations, it should be construed to mean a number of persons united in opinion and organized in the manner usual to the then existing parties.[56] Nominations by mass[57] and independent conventions, unconnected with any regular party organizations within the state, are recognized or provided for by the laws of most states.[58] Doubts in regard to the construction

45. State officers or employes when they move to the capital or place where their official duties are performed become residents and electors of the latter places only if they so intend. Uhls v. Allard [Kan.] 77 P. 572.

46. Cory v. Spencer, 67 Kan. 648, 73 P. 920, overruling Lawrence v. Leidigh, 58 Kan. 594, 50 P. 600, 62 Am. St. Rep. 631.

47. Rexroth v. Schein, 206 Ill. 80, 69 N. E. 240.

48. See 1 Curr. L. 983.

49. The voter himself may waive the exercise of the right to vote and he does so whenever he stays away from the polls, or fails to offer to vote at the polls, or fails to properly apply for registration. Earl v. Lewis [Utah] 77 P. 235. Registration is not a constitutional qualification of voters. It is simply a reasonable method of identifying qualified voters, and in this view only is a registration law itself constitutional. People v. Worswick, 142 Cal. 71, 75 P. 663. The Maryland statute provides that no person coming into the state after the passage of the act can be registered as a legal voter until one year after his intent to become such shall be evidenced by entry in the record book of the clerk of the county. Code Pub. Gen. Laws, art. 33, § 25 b. This requirement merely establishes a rule of evidence in respect to the intention of the person coming into the state, and is not void as imposing additional qualifications on voters other than those prescribed by the constitution. Pope v. Williams [Md.] 56 A. 543. Nor is it in violation of the Fourteenth amendment to the Federal constitution. Pope v. Williams, 193 U. S. 621, 48 Law. Ed. 817. Neglect of election officers to provide proper registers. People v. Worswick, 142 Cal. 71, 75 P. 663. Though provisions as to registration are mandatory in the sense that if the registering officer fails or refuses to perform his duties he may be compelled by mandamus to do so, still such refusal or failure to act does not defeat the election. Earl v. Lewis [Utah] 77 P. 235.

50. In Louisiana, the applicant must have been "an actual bona fide resident" of the parish in which he proposes to register for one year. Ballard v. Puleston [La.] 36 So. 951. See 1 Curr. L. 983, n. 28. Where a personal property voter has not registered within the registration year in which the last assessment was in force, the board of canvassers should strike his name from the voting list on the expiration of 12 months from the date of the assessment of the last general town or city tax against him. Opinion to the Governor [R. I.] 58 A. 53. New registry books may be authorized and prepared where precinct has been added or changed. Brome v. Dorsey [Md.] 58 A. 1020. Sundays and legal holidays are included within the sixty days during which registration may be had in Louisiana. State v. Durand, 112 La. 754, 36 So. 672.

51. Failure to open the registration office as required is fatal to an election. Endom v. Monroe, 112 La. 779, 36 So. 681.

52. In Alabama to the state (State v. Crenshaw, 138 Ala. 506, 35 So. 456), and in Louisiana to the state and the applicant (State v. Gleason, 112 La. 612, 36 So. 608).

53. People v. Carleton, 85 N. Y. S. 22.

54. Giles v. Teasley, 193 U. S. 146, 48 Law. Ed. 655. See 1 Curr. L. 983, n. 30.

55. See 1 Curr. L. 983.

56. State v. Metcalf [S. D.] 100 N. W. 923.

57. The right to nominate by mass conventions provided for by section 30 of the Revised Statutes of 1898 was not abolished by chapter 341 of the Laws of 1899. State v. Stafford [Wis.] 97 N. W. 921, 1043.

58. Under the Pennsylvania statutes, any combination of electors with sufficient organization to act together for a common purpose and which organization has polled 2

of nomination laws must be resolved in favor of the elector.[59] An organized political party cannot have at one and the same time more than one candidate for the same office.[60]

Regularity of convention.[61]—A convention within the meaning of statutes relating to nominations is an organized assembly of delegates or electors representing a political party or principle.[62] Prior to the general adoption of the nomination and election law known in this country as the Australian Ballot Law, the courts took no notice of party organizations, caucuses, conventions, tickets, ballots and the like, relegating all disputes and controversies arising anterior to the election itself to the forum established by the voters themselves for the determination of such disputes. Adapting the old rule to new conditions, the policy of the courts is still against assuming jurisdiction over such controversies further than is absolutely necessary to give effect to the provisions of the statutes regulating the conduct of conventions and primary elections,[63] and the statute in some states designates a party tribunal to settle such controversies,[64] whose decisions are final and unimpeachable except for jurisdictional defects.[65]

per cent of the highest vote at the next preceding election is a political party entitled to put nominations on the ballot by certificate. "The next preceding election" means the last election, whether municipal or general. Independence Party Nomination, 208 Pa. 108, 57 A. 344. An aggregation of electors may act as an independent party, entitled to a place on the official ballot, as to county or local matters, though acting with one of the larger parties as to state or national matters. Id.

59. Where the right of suffrage is vouched in the constitution, it cannot be denied, qualified or restricted, and is subject only to such regulation as to the manner of exercise as is necessary for the peaceable and orderly exercise of the right. Independence Party Nomination, 208 Pa. 108, 57 A. 344.

60. State v. Metcalf [S. D.] 100 N. W. 923.

61. See 1 Curr. L. 983.

62. State v. Metcalf [S. D.] 100 N. W. 923.

63. The determination of disputes as to the regularity of conventions and party nominations is a political function, with which the courts, in the absence of statutory provision to the contrary, will not concern themselves. State v. Foster [La.] 36 So. 32; Jennings v. Election Com'rs [Mich.] 100 N. W. 995, citing Stephenson v. Election Com'rs, 118 Mich. 396, 76 N. W. 914. Although courts will not decide which of two rival conventions is the regular convention of the party when both were called and held in accordance with the precedents and usages of the party, since that is not a subject of judicial inquiry, yet the courts in a proper case will determine whether nominations were in fact made by a de facto convention of the party, even though to do so may lead to an investigation of political methods. State v. Metcalf [S. D.] 100 N. W. 923.

Note: Since the adoption of the Australian ballot law, the courts have frequently been called upon to settle disputes as to the regularity of nominations made by political conventions. The adjudications show little divergence of judicial opinion. The varying practice in the several states results mainly from statutory differences. Where two conventions are held, each claiming to be the authorized exponent of the same political party, the courts from an unwillingness to undertake the settlement of purely political controversies have generally required the nominees of each to be printed on the official ballot. Shields v. Jacob, 88 Mich. 164, 50 N. W. 105, 13 L. R. A. 760; Stephenson v. Board of Election Com'rs, 118 Mich. 396, 76 N. W. 914, 74 Am. St. Rep. 402, 42 L. R. A. 214; Sims v. Daniels, 57 Kan. 552, 46 P. 952, 35 L. R. A. 146; People v. District Court [Colo.] 31 P. 339; Phelps v. Piper, 48 Neb. 724, 67 N. W. 755, 33 L. R. A. 53; State v. Allen, 43 Neb. 651, 62 N. W. 35; State v. Piper, 50 Neb. 25, 69 N. W. 378. Where the statute forbids the printing of more than one set of nominees of the same party, and makes no provision for deciding which should be accepted as regular, when more than one are presented, the courts assume jurisdiction to determine the matter from necessity, there being no other way of settling the question. State v. Falley [N. D.] 83 N. W. 860; Williams v. Lewis [Idaho] 54 P. 619; McCoach v. Whipple [Colo.] 51 P. 164; In re Fairchild [N. Y.] 45 N. E. 943. But where the statute provides for the settlement of all such disputes by reference to some special tribunal, its decisions are held to be final. Chapman v. Miller, 52 Ohio St. 166, 39 N. E. 24; Cain v. Page [Ky.] 42 S. W. 336; Moody v. Trimble, 22 Ky. L. R. 692, 58 S. W. 504, 50 L. R. A. 810; People v. Baird [Ill.] 45 N. E. 1081; Burke v. Foster [La.] 36 So. 32; People v. District Court of Second Judicial Dist. [Colo.] 74 P. 896; Miller v. Clark, 62 Kan. 278, 62 P. 664.

64. It is competent for the legislature in authorizing an official ballot, and granting to party nominees a right to have their names placed thereon under the party designation, to subject that right, in case of controversy between two or more sets of nominees, each claiming such designation, to a decision of a party tribunal. State v. Houser [Wis.] 100 N. W. 964; Allen v. Burrow [Kan.] 77 P. 555.

65. People v. District Court of Second Judicial Dist. [Colo.] 74 P. 896. See 1 Curr. L. 983, n. 36. The decision of such tribunal is final when its action is characterized by good faith, and is free from fraud, corruption and oppression. Allen v. Burrow [Kan.] 77 P. 555. Bias, prejudice, partisanship and unfairness, imputed to the members of the tri-

Certificates and declinations and vacancies.[66]—The certificate must be in substantial compliance with the statute,[67] and filed at the proper time and place.[68]

§ 4. *Official ballot.*[69]—The official ballot must be in substantial compliance with the form prescribed by the statute.[70] Equity has no jurisdiction to issue an injunction to restrain a city clerk from putting on the official ballot names of persons mentioned in certificates of nomination.[71] In Indiana, where by reason of unexpected conditions arising when ballots are to be printed, it is impossible to have the work done for the amount appropriated therefor, statutory authority exists for an additional allowance by the county council.[72]

Use of party name.[73]—A party by unlawfully adopting a generic word at an election cannot acquire any exclusive right to such word as a party designation.[74] In New York, a body of voters acting independently may not incorporate in their party designation the name or any portion of the name of any political party then organized.[75]

§ 5. *Primary elections*[76] are not within a constitutional provision disqualifying an officer who has committed bribery to secure his election;[77] nor does an assessment laid on candidates to pay the cost of a primary,[78] nor failure on the part of the committee to take the oath previous to acting, in the absence of fraud, wrongful act or intent, render it void.[79] That a call for a primary states that persons coming of age in time to vote at the election may vote at the primary will not invalidate the primary in the absence of a showing that any such voted.[80] Party enrollment books for use at primaries are provided for in New York.[81] Under the New York primary election law, void ballots must be rejected, but protested ballots must be marked and counted;[82] and the board of elections can only canvass the statements of result filed with it by the board of primary inspectors.[83] The county executive committee of a party in declaring one nominated for an office necessarily finds that the votes cast for him were legal.[84]

bunal, cannot alone avoid such finality. State v. Houser [Wis.] 100 N. W. 964.

66. See 1 Curr. L. 984.

67. A statement signed by the officers of the convention, followed by the jurat of the officer administering the oath that it was sworn to is such compliance. Allen v. Burrow [Kan.] 77 P. 555. The certificate of an independent nomination, under the New York statutes, must not include the name of any organized political party. A certificate designating an independent party as "Independent Republican Party" is a violation of such statute. In re Smith, 85 N. Y. S. 14. So, also, the name "Independent Democrat Party." In re Carr, 94 App. Div. 493, 88 N. Y. S. 107.

68. A requirement that certificates of nomination for city offices shall be filed a certain length of time before the election will not be assumed merely because this is required in case of nominations for county offices. City of Annapolis v. Gadd, 97 Md. 734, 57 A. 941. Under the provisions of the Utah statutes, the clerk, in the absence of objection, must place the candidate's name on the official ballot, though the certificate of nomination was not filed in the required time. Failure to file because of absence of filing officer. Earl v. Lewis [Utah] 77 P. 235.

69. See 1 Curr. L. 984.

70. Stone v. Chicago, 207 Ill. 492, 69 N. E. 970. The fact that the ballot as prepared by the election officers contained a parallelogram instead of a square wherein to place the "X" will not vitiate the ballot. Lemaire v. Walsh [Nev.] 74 P. 801.

71. City of Annapolis v. Gadd, 97 Md. 734, 57 A. 941.

72. Jasper County Com'rs v. Babcock [Ind. App.] 71 N. E. 518.

73. See 1 Curr. L. 985.

74. "Socialist." In re Morledge [Minn.] 99 N. W. 355. See, also, 1 Curr. L. 985, n. 57.

75. In re Smith, 85 N. Y. S. 14; In re Carr, 94 App. Div. 493, 88 N. Y. S. 107. See, also, 1 Curr. L. 985, n. 58.

76. See 1 Curr. L. 985.

77. Gray v. Seitz, 162 Ind. 1, 69 N. E. 456.

78. Montgomery v. Chelf [Ky.] 82 S. W. 388.

79. Montgomery v. Chelf [Ky.] 82 S. W. 388. Primary election inspectors in New York are public officers bound to subscribe an oath for faithful performance of duties. Rabbitt v. Garand, 89 App. Div. 119, 85 N. Y. S. 473.

80. Montgomery v. Chelf [Ky.] 82 S. W. 388.

81. Mandamus will not lie to strike from the primary enrollment books names of persons enrolled on the ground that they are no longer residents of the district. People v. Voorhis, 84 N. Y. S. 848.

82. Laws 1899, p. 937, c. 473, § 8, subd. 1. In re Rush, 42 Misc. 70, 85 N. Y. S. 581.

83. Its duties being ministerial, it cannot be compelled by mandamus to recount ballots returned by boards of primary inspectors as void and protested, and determine whether such ballots were counted, and if not counted add them to the returns and canvass

Control by party committees.[85]—Primary elections are usually under the control of the party governing committee, subject to the law,[89] and members of a committee whose duty it is to call a primary election cannot delegate that duty, i. e., act by proxy, unless expressly provided by statute.[87]

Ballots for primaries.[88] *Review and contest of primary.*[89]—The decision of the party tribunal in some states is final,[90] but it is competent for the legislature to provide a summary remedy to review the action or neglect of inspectors and boards.[91] Contestants must follow the statutory procedure.[92]

§ 6. *Officers of election.*[93]—The Illinois act of June 19, 1885,[94] providing for the selection of judges and clerks of elections, their confirmation and imposing liability for contempt for misbehavior in office is constitutional. In New Jersey, the fees of election officers in the submission of constitutional amendments are regulated by the statute authorizing the submission of the amendments and not by the general election law.[95]

§ 7. *Polling the vote.*[96]—The votes of innocent electors are not to be rendered invalid by mere irregularities on the part of election officials, which do not affect or change the result of the election.[97] The voter must appear in person at the

them. In re Rush, 42 Misc. 70, 85 N. Y. S. 581.

84. State v. Abbay [Miss.] 35 So. 153.

85. See 1 Curr. L. 985.

86. Where a state central committee provided for the election of members of that body at the general state primary, to be conducted by the same commissioners and clerks, the parish committee had no power to adopt a rule providing in certain contingencies for the appointment of additional commissioners "to join in and act with the state commissioners" in the conduct of the election and the counting of the votes for members of the state central committee. State v. St. Paul, 111 La. 713, 35 So. 838. See 1 Curr. L. 985, n. 66, 67.

87. Montgomery v. Chelf [Ky.] 82 S. W. 388.

88. See 1 Curr. L. 986. See, also, Dapper v. Smitt [Mich.] 101 N. W. 60.

89. See 1 Curr. L. 986.

90. Kentucky. Beasley v. Adams [Ky.] 82 S. W. 249. In Louisiana, the courts are without jurisdiction to entertain an action contesting the validity or result of a primary election in the absence of express statutory authorization. State v. Foster [La.] 36 So. 200.

91. The inclusion and return by inspectors of a large number of ballots not voted at all but corruptly stuffed in the box and the ejection of watchers and others interested in the success of the opposition from the polling place, is such "action or neglect" as will confer jurisdiction. Rabbitt v. Garand, 89 App. Div. 119, 85 N. Y. S. 473.

92. A notice within the prescribed time of a contest at the next term of court is sufficient, though such next term be but an adjourned term. Montgomery v. Dorner [Mo.] 79 S. W. 913. Under a provision that the county executive committee of a party shall promptly receive evidence and correct wrongs in a primary election, a defeated candidate for nomination, who having knowledge of facts which he claims made the other candidate ineligible failed to present them to the committee at its first meeting, cannot afterwards compel it to reconvene and pass thereon. State v. Abbay [Miss.] 35 So. 153.

93. See 1 Curr. L. 986.

94. Hurd's Rev. St. 1901, c. 46. Sherman v. People, 210 Ill. 552, 71 N. E. 618.

95. Sares v. Trail [N. J. Law] 58 A. 107.

96. See 1 Curr. L. 986.

97. Rexroth v. Schein, 208 Ill. 80, 69 N. E. 240; Davis v. Grunig, 143 Cal. 336, 76 P. 1102.

Defects held not fatal: Failure of inspector to be sworn before assuming duties. Montgomery v. Chelf [Ky.] 82 S. W. 388. The failure of voter to exhibit his poll-tax receipt when he presents himself to vote. Stinson v. Gardner [Tex.] 78 S. W. 492. To avoid the result of an election because of irregularities in conducting it, it must be shown that some mandatory statute was violated, or that the election was conducted in such an illegal manner that the true sentiment of the electors was not expressed by it (O'Laughlin v. City of Kirkwood [Mo. App.] 81 S. W. 512), or that the election was conducted in such an illegal manner that the true sentiment of the electors was not expressed by it, or that such a number of legal voters were denied the privilege of voting as would have materially changed the result (Ex parte Wood [Tex. Cr. App.] 81 S. W. 529). Where it is alleged that certain persons were erroneously permitted to vote, it not being shown that their votes changed the result the allowance of the votes will not invalidate the election. Hoover v. Thomas [Tex. Civ. App.] 80 S. W. 859. But the exclusion solely on account of color of persons qualified and offering to vote, there being a sufficient number excluded to have altered the result, rendered the election void. Howell v. Pate, 119 Ga. 537, 46 S. E. 667. Failure to open polls on time because of temporary absence of election officers does not vitiate election, unless on a contest it be shown that voters were thereby deprived of their votes in number and amount sufficient to change the result of the election. Endom v. Monroe, 112 La. 779, 36 So. 681; Hoover v. Thomas [Tex. Civ. App.] 80 S. W. 859.

See an exhaustive note on irregularities avoiding elections. Patton v. Watkins [Ala.] 90 Am. St. Rep. 46.

voting place and present his ballot to the managers of the election.[98] In Texas, it is not necessary that he exhibit his poll-tax receipt, or in lieu thereof make affidavit that it is lost.[99]

§ 8. *Irregularity and ambiguity in ballot.*[1]—Defects in the ballots not interfering with the determination of the voter's choice will not vitiate a ballot, whether due to the election officers or the voter.[2] Under a statute forbidding the counting of a ballot where the names of two condidates for the same office remain thereon, a ballot having a line drawn underneath the name of one candidate leaving the name untouched should not be counted.[3]

The marks.[4]—The intent of the voter cannot be shown other than by what appears upon the face of the ballot.[5] In West Virginia, defacing marks to cancel the ticket not voted must be within the ticket column or its heading.[6] Though defacing lines do not pass entirely through a ticket or its heading, yet, if it is manifest that the voter did not intend to vote that ticket, the defacement is sufficient.[7]

The writing in of names.[8]—Though a candidate's name is written in the space above the office on a ballot, it will be held a vote for him for the office below his name, where the printed name for that office is erased, and that above the written name is not erased.[9]

§ 9. *Distinguishing marks on ballot.*[10]—An illegal mark upon a ballot, or a legal mark illegally placed, which may serve as a distinguishing mark, will invalidate the ballot, and necessitate its exclusion from the count,[11] but marks will not be held distinguishing unless it is apparent that they were placed upon the ballot for that purpose.[12] That a name is written in the ballot will not be regarded

98. He should not attach undue importance to the utterances of those he may meet on the street that his vote will not be received and in consequence stay away and fail to offer to vote. Endom v. Monroe, 112 La. 779, 36 So. 681.

99. Stinson v. Gardner [Tex. Civ. App.] 79 S. W. 354.

1. See 1 Curr. L. 986.

2. Failure of inspector to indorse initials. Rexroth v. Schein, 206 Ill. 80, 69 N. E. 240. The use by the voter of a pencil other than that provided in the election booth. Id. A provision of a statute requiring marks to be with pen or pencil is directory merely. A ballot from which some of the offices and names of candidates for them have been cut entirely out with a knife is a good ballot. Doll v. Bender [W. Va.] 47 S. E. 293.

3. Bailey v. Fly [Tex. Civ. App.] 80 S. W. 675.

4. See 1 Curr. L. 987.

5. Maddux v. Walthall, 141 Cal. 412, 74 P. 1026; Ott v. Brissette [Mich.] 100 N. W. 906.

6. Words only above the heading or elsewhere outside the ticket such as "I vote this ticket" do not select that ticket and cancel the others. Doll v. Bender [W. Va.] 47 S. E. 293.

7. Doll v. Bender [W. Va.] 47 S. E. 293.

8. See 1 Curr. L. 987.

9. Doll v. Bender [W. Va.] 47 S. E. 293.

10. See 1 Curr. L. 988.

11. Maddux v. Walthall, 141 Cal. 412, 74 P. 1026.

Contra: Doll v. Bender [W. Va.] 47 S. E. 293.

Marks regarded as distinguishing: Crosses entirely without and beyond the square or circle. Rexroth v. Schein, 206 Ill. 80, 69 N. E. 240. One of the lines of a cross paralleled by a third distinct line. Wheeler v. Caldwell [Kan.] 75 P. 1031. An erasure clearly apparent. Langley v. Head, 142 Cal. 368, 75 P. 1088. Placing a cross in the square opposite the words "No nomination" appearing under the designation of certain offices on the ticket constitutes a distinguishing mark. Maddux v. Walthall, 141 Cal. 412, 74 P. 1026; Merkley v. Trainor, 142 Cal. 265, 75 P. 656; Kincaid v. Reid, 142 Cal. 88, 75 P. 657. And the fact that a number of ballots are so marked and by reason thereof such mark does not identify any particular ballot does not validate the ballots so marked. McMenomy v. Ruch, 142 Cal. 77, 75 P. 661.

12. If it appears from the face of the ballot that marks or writings were placed thereon as the result of an honest effort on the part of the voter to indicate his choice of candidates and that he did not thereby intend or attempt to indicate who voted the ballot, it should not be rejected. Rexroth v. Schein, 206 Ill. 80, 69 N. E. 240. Where a voter in putting a cross in front of each candidate's name unwittingly votes for one, which cross he apparently attempts to erase and places a cross opposite and in an adjoining column, such erasure is not a distinguishing mark. Id. The mere fact that one of the lines of a cross mark on a ballot is shorter than the other one does not warrant the rejection of the ballot, where the shorter line actually crosses the longer one. Wheeler v. Caldwell [Kan.] 75 P. 1031. Compare Rexroth v. Schein, 206 Ill. 80, 69 N. E. 240.

Not distinguishing: Pencil marks so minute and light as not to be readily observable. Langley v. Head, 142 Cal. 368, 75 P.

as a distinguishing mark unless clearly so intended.[13] Where there is no evidence to explain how or when certain ballots were torn, they should be counted on the assumption that they were torn after the voters delivered them to the election officers.[14] Where subsequent to an election, provisions of law as to what constituted distinguishing marks were changed by the legislature, the test is whether the ballots were legal ballots on election day rather than on the day of trial.[15]

§ 10. *Count, canvass and return.*[16]—The duty of determining the voter's choice in the first instance is imposed upon the officer or officers whose duty it is to count the ballots.[17] But election inspectors have no power to determine the eligibility of a candidate, and having reached the determination that he is ineligible, disregard the vote for him and declare another elected.[18] Votes for O. H. Christian cannot be counted for Christian Ott.[19] Mandamus will lie to compel the count and canvass of votes.[20] The dismissal of a petition for a writ of prohibition to prevent the canvass of the votes cast at a congressional election cannot be reviewed in the Federal supreme court after the canvass has been made and certificates of election have been issued and the House of Representatives has admitted the parties holding the certificates to seats in that body.[21] Voters absenting themselves and those who, being present, abstain from voting, are considered as acquiescing in the result declared by a majority of those actually voting, even

1088; Rexroth v. Schein, 206 Ill. 80, 69 N. E. 240. Drop of candle grease on back of ballot. Langley v. Head, 142 Cal. 368, 75 P. 1088. Failure of election officers to remove the number of the ballot. Freshour v. Howard [Cal.] 77 P. 1101. Placing a cross under instead of "against" the word yes or no in a constitutional amendment. Hannah v. Green, 143 Cal. 19, 76 P. 708. Placing the cross on the word yes or no. Tout v. Hawkins, 143 Cal. 104, 76 P. 897.

13. Where ballots bore two dotted lines above one of which was printed the words "For justice of the peace" and above the other "For constable," the writing in of names of the persons voted for did not constitute a distinguishing mark, though no such officers were to be voted for. The dotted lines with the printed words above them would be understood by voters to indicate those offices were to be filled, and regarded as an invitation to write in the names of the persons of their choice. Rexroth v. Schein, 206 Ill. 80, 69 N. E. 240.

14. Pratt v. O'Neil, 140 Cal. 539, 74 P. 27; Langley v. Head, 142 Cal. 368, 75 P. 1088. It may be shown that certain alleged distinguishing marks were made by the election officers. Hannah v. Green, 143 Cal. 19, 76 P. 708. So, also, of blurs and blots. Langley v. Head, 142 Cal. 368, 75 P. 1088; Lemaire v. Walsh [Nev.] 74 P. 801; Rexroth v. Schein, 206 Ill. 80, 69 N. E. 240.

15. Trafton v. Quinn [Cal.] 77 P. 164.

16. See 1 Curr. L. 988.

17. Corbett v. Naylor [R. I.] 57 A. 303. To ascertain how many votes are cast upon a proposition in the absence of fraud or mistake, the legal and countable ballots found in the ballot box at the close of the polls upon which the voter has intelligently expressed himself is primarily determinate of the question. State v. Topeka [Kan.] 74 P. 647.

18. People v. Davis, 43 Misc. 397, 89 N. Y. S. 334. Where the majority of the electors vote for an ineligible candidate, they do not thereby throw away their votes, and the eligible candidate who receives the next highest number, being less than a majority is not entitled to the office. Sheridan v. St. Louis [Mo.] 81 S. W. 1082.

19. The names are not idem sonans. Ott v. Brissette [Mich.] 100 N. W. 906.

20. Moderator reopening ballots and counting as a legal ballot one that had been marked defective. Corbett v. Naylor [R. I.] 57 A. 303. Where it appears that boards of election inspectors failed in the performance of duties in the canvass of ballots, mandamus will not lie to compel the lower court to summarily proceed to determine the validity of the ballots. The court should first require the inspectors to perform their duties. In re Perry, 84 N. Y. S. 406. See 1 Curr. L. 988, n. 97. Where mandamus is asked for the protection or in aid of a private right of the relator, he must show a legal interest in himself in the result of the election. State v. Chatterton [Wyo.] 73 P. 961. Mandamus does not lie against the mayor and councilmen of a city to compel them to reconvene as a canvassing board and recanvass an election, their terms having expired when the writ is asked. Holdermann v. Schane [W. Va.] 48 S. E. 512. Mandamus awarded against certain officers by name to compel them to recanvass an election cannot be used for such relief against their successors in office. Id. Where election officers in canvassing a vote have failed to follow the method prescribed by statute, and the proof is not reasonably clear that the count was honest and correct, it is within the discretion of the court to issue a mandamus requiring the election officers to recanvass the vote. People v. Way, 92 App. Div. 82, 86 N. Y. S. 892.

21. Jones v. Montague, 194 U. S. 147, 48 Law. Ed. 913. Injunctive relief. Selden v. Montague, 194 U. S. 153, 48 Law. Ed. 915.

though in point of fact, but a minority of those entitled to vote really do vote.[22] Decisions relative to boards of canvassers and their duties are discussed below.[23]

Return.[24]—On an election contest, the court may gather the true result of the election by looking behind a defective return.[25] Refusal of precinct officers to certify the poll-books or the returns does not authorize rejection of the vote of the precinct, there being no question of the integrity of the poll-books or the honesty of the election.[26]

§ 11. *Review by court.*[27]—Under the New Jersey statutes, the "incumbent" against whom proceedings to contest an election before the circuit court are required to be taken is the person who is originally declared elected.[28] Consolidation of contests for the same office is allowable.[29]

Rights and remedies.[30]—The right to contest an election is not designed exclusively for the benefit of rival candidates,[31] but may be conferred upon any elector, acting in his private capacity.[32] Quo warranto instead of contest proceedings is not necessary where one has been merely declared elected.[33] It is not necessary that one who has been declared elected by the canvassing board qualify to confer jurisdiction upon the court to hear contest proceedings, nor can the court be divested of jurisdiction because of failure to do so.[34]

Jurisdiction.[35]—Appellate courts will exercise original jurisdiction where because of the exigencies of time there is no other adequate remedy.[36] Equity will not interfere in any matter growing out of an election which may be determined by contest proceedings prescribed by statute.[37] The jurisdiction of particular courts is discussed in the note.[38]

22. The rule applies whether those entitled to vote constitute a definite or an indefinite number. Rule applied to appointment of officer by common council. Murdoch v. Strange [Md.] 57 A. 628. A blank ballot cannot be considered in summing up a total vote, a majority of which a candidate must receive to be elected. Id. The words "a majority vote of the legal voters," in a statute requiring the submission of a question to popular vote, will be construed as meaning a majority of those voting, unless it clearly and unmistakably appears that such was not the intention of the legislature. Me. Special Act Feb. 26, 1903, incorporating water district. It will be presumed that those not voting assent in advance to the action of those who do. Foy v. Gardiner Water Dist., 98 Me. 82, 56 A. 201.

23. A town board of canvassers has no authority under the New York statute to reconvene and recount the votes in an election district on a charge by one of its members of violations of the statute after the ballot box has been locked and secured and given over to the proper custodian [Laws 1896, p. 893, c. 909]. People v. Way [N. Y.] 71 N. E. 756. The provision of the old Denver city charter making the city council a canvassing board is inapplicable to the newly created City and County of Denver. Hence, in the election for the choice of a charter commission, the clerk of Arapahoe county and two justices were the proper canvassing board. McMurray v. Wright [Colo. App.] 73 P. 257. County canvassers cannot determine which of two candidates for a city office receiving an equal number of votes is elected in Kentucky. Stack v. Com. [Ky.] 81 S. W. 917.

24. See 1 Curr. L. 988.

25, 26. O'Laughlin v. Kirkwood [Mo. App.] 81 S. W. 512.

27. See 1 Curr. L. 989.

28. Darling v. Murphy [N. J. Law] 57 A. 263.

29. Coghlan v. Alpers, 140 Cal. 648, 74 P. 145.

30. See 1 Curr. L. 989.

31. As far as they are concerned, their interest is exclusively a personal and pecuniary one. Paramount to their claims is the deep public concern involved as to who are entitled to hold office for which the suffrages of the electors have been cast. Sweeny v. Adams, 141 Cal. 558, 75 P. 182.

32. When so invoked, the contest is regarded as of a public nature. Sweeny v. Adams, 141 Cal. 558, 75 P. 182. It is entirely competent for the legislature to authorize that proceedings to contest an election may be instituted by an elector in his private capacity. Maddux v. Walthall, 141 Cal. 412, 74 P. 1026. Where defeated candidates could not have gained anything by contesting an election, it is their right in their capacity as citizens and taxpayers to institute quo warranto proceedings. Howell v. Pate, 119 Ga. 537, 46 S. E. 667. A male inhabitant of the state, over the age of 21, may sue to contest the constitutionality of a statute apportioning senators and representatives, though the wrong complained of does not exist in his own senatorial or representative district. Brooks v. State, 162 Ind. 568, 70 N. E. 980.

33, 34. Sweeny v. Adams, 141 Cal. 558, 75 P. 182.

35. See 1 Curr. L. 989.

36. By suit in equity. State v. Houser [Wis.] 100 N. W. 964. Elections by writ of

Pleadings and issues.[39]—The contestant must file a properly verified[40] petition or statement that definitely apprises the contestee of the charges relied on, so that he may be prepared to meet them with appropriate proof.[41] Misnomers and other insufficiencies should be taken advantage of by demurrer.[42] Amendments are to be construed by the rules applicable to an amendment to a complaint.[43] The reply may be so amended as to set up new matter without first showing reasons why it was not sooner urged.[44] A contestee who holds a certificate to the office, regularly issued to him by the canvassing board, and who asks no affirmative relief, his answer going only to defeat the allegations made by the contestor, is not required to plead that he is an elector of the county.[45] The scope of inquiry in election contests, as in every other action, is limited by the pleadings.[46]

Dismissal.[47]—Consolidation of several contests will not prevent dismissal by some of the contestants.[48] Where two persons were found on an election contest to have received an equal and the highest number of votes, the contest was properly dismissed.[49]

Preservation and production of ballots.[50]—Provisions for secrecy do not protect the ballot of an illegal voter, and officers of election may testify for whom such illegal voters voted, that the votes may be withdrawn from the candidate receiving them.[51] Where the result of an election for membership in the state legislature has been ascertained and the ballots so counted have been sealed up and delivered to the proper custodian, they are then beyond control of the canvassing officer and subject only to the action of the General Assembly.[52]

prohibition. People v. District Court of Second Judicial Dist. [Colo.] 74 P. 896.

37. Ogburn v. Elmore [Ga.] 48 S. E. 702.

38. In Idaho, jurisdiction to contest the election of officers for the irrigation district is lodged in the district courts of the state. Hertle v. Ball [Idaho] 72 P. 953. The provision of the Kentucky statute conferring jurisdiction upon the county judge and two justices of the peace to try election contests was not repealed. Shindler v. Floyd [Ky.] 81 S. W. 668. In New Jersey, the circuit court is without jurisdiction where the proceeding is initiated by the person originally declared elected, although his certificate of election has been subsequently revoked by a justice of the supreme court upon a recount. Darling v. Murphy [N. J. Law] 57 A. 263. An election contest, jurisdiction of which under the Illinois statutes is given to circuit courts, is not a civil case within the statute of that state, giving city courts concurrent jurisdiction with circuit courts in all civil cases [Laws 1901, p. 136]. Brueggemann v. Young, 208 Ill. 181, 70 N. E. 292. The fact that a statute provides that the board of council of a city shall judge of the eligibility and election returns of its members does not deprive the court of jurisdiction of an election contest under a code provision that the commonwealth may prevent the usurpation of an office by an action. Stack v. Com. [Ky.] 81 S. W. 917.

39. See 1 Curr. L. 989.

40. Verification sufficient though grounds of contest are alleged on information and belief. Murphy v. Levengood [Mont.] 77 P. 311.

41. Murphy v. Levengood [Mont.] 77 P. 311; Abbott v. Hartley [Cal.] 77 P. 410. Since the state board of canvassers can act only on the returns made to it, a petition which falls to allege the returns of the votes cast for petitioner were sent to the secretary of state is defective. State v. Chatterton [Wyo.] 73 P. 961. A petition alleging that certain persons desirous of defeating prohibitions in a county paid the poll-tax due by 500 voters of said county for the sole purpose of qualifying such persons to vote against prohibition, but which did not allege that the 500 voters, or any of them, voted against prohibition states no ground of protest. Stinson v. Gardner [Tex. Civ. App.] 79 S. W. 354; Stinson v. Gardner [Tex.] 78 S. W. 492. The fact that a statement of contest contains a separate allegation of malconduct as to each of 76 precincts will not warrant the granting of a motion to strike out such allegations, though the subject-matter thereof might have been more concisely stated. Merkley v. Trainor, 142 Cal. 265, 75 P. 656.

42. No motion to strike or make the statement more certain having been made at the contest, no complaint will be entertained on appeal. Lemaire v. Walsh [Nev.] 74 P. 801.

43. Doty v. Jenkins, 142 Cal. 497, 77 P. 1104.

44. Bailey v. Fly [Tex.] 79 S. W. 290.

45. Cory v. Spencer, 67 Kan. 648, 73 P. 920.

46. Coghlan v. Alpers, 140 Cal. 648, 74 P. 145. Jurisdiction limited to the question who was elected. Whether a person elected possesses the necessary qualifications can only be determined by quo warranto. Dilcher v. Schorik, 207 Ill. 528, 69 N. E. 807.

47. See 1 Curr. L. 990.

48. Coghlan v. Alpers, 140 Cal. 648, 74 P. 145.

49. Statute in such case provides for special election. Wright v. Ashton [Cal.] 77 P. 477

50. See 1 Curr. L. 990.

51. Montgomery v. Dormer [Mo.] 79 S. W. 913. See 1 Curr. L. 990, n. 17.

Evidence.[53]—A contestant in order to succeed must show title in himself.[54] The burden of proving lack of qualifications in a voter,[55] or an alteration or spoliation of ballots, is on the person who asserts it.[56] Where the ballots are preserved in strict accordance with the statutory requirements, they are admissible in evidence without further proof.[57] Noncompliance with the statutory requirements does not of itself, however, render the ballots inadmissible,[58] the burden in such case being cast upon the party offering them to show that they are the identical ballots cast at the election and that there is no reasonable probability that they have been disturbed or tampered with.[59] The question of the preservation of the ballots in their integrity is one largely within the discretion of the trial court, and its decision will not be disturbed if fairly supported by the evidence.[60] Where the original ballots are not available to a party, he may introduce the best secondary evidence available,[61] and copies of ballots instead of the originals may be inserted in the appeal record, there being neither an order of court nor agreement of counsel to the contrary.[62]

Recount of ballots.[63]—Questions relative to the propriety of counting or rejecting particular ballots are discussed in the note.[64]

52. Petition of Knowles [R. I.] 57 A. 303.

53. In an election contest, it was claimed that a certain person intimidated voters by stating that his tenants must move unless they voted for a certain person; one person voted contrary to his convictions, but testified that he was not intimidated. Held, a finding that he was not intimidated was proper. Bailey v. Fly [Tex. Civ. App.] 80 S. W. 675. See 1 Curr. L. 990.

54. Coghlan v. Alpers, 140 Cal. 648, 74 P. 145.

55. Rexroth v. Schein, 206 Ill. 80, 69 N. E. 240.

56. McMenomy v. Ruch, 142 Cal. 77, 75 P. 661.

57. When so admitted, they furnish the primary and controlling evidence of the number of votes cast for the respective candidates, and are sufficient to overthrow the returns of the canvassing officers. Averyt v. Williams [Ariz.] 76 P. 463.

58. Ballots used in a city election are not to be rejected on appeal to the courts because returned to the city clerk instead of the county clerk, and kept in his custody. The provisions of the statutes in this respect are not mandatory but directory. Averyt v. Williams [Ariz.] 76 P. 463. Failure to forward tally list and list attached thereto to the board of supervisors, the election being in other respects regular, will not preclude consideration of ballots on contest. Trafton v. Quinn [Cal.] 77 P. 164; Davis v. Grunig, 143 Cal. 336, 76 P. 1102.

59. The fact that they might possibly have been tampered with does not warrant their rejection. Averyt v. Williams [Ariz.] 76 P. 463. Where it appears that the ballots have been changed, or so exposed as to afford opportunity to be tampered with, or left in the custody of an officer or other person so personally interested in the result of the election as to be subjected to the temptation or inducement to alter them, the presumption of their integrity is lost, and they are not to be accepted in evidence. Hamilton v. Young [Ky.] 81 S. W. 682. So, where it appears that ballots were delivered to the contestant, who was the present incumbent of the office, and that a number of packages were unsealed, and were deliberately placed and kept in an unlocked telephone room in the clerk's office, which was unlocked and to which unauthorized persons had unrestricted access, the ballots were inadmissible. Farrell v. Larsen, 26 Utah, 283, 73 P. 227. Where at the time plaintiff filed his petition to contest defendant's election, the court was in session, and before defendant answered the court, by request of the parties, opened and counted the ballots, and made the result a matter of record, but it was expressly stated in the order that "the court was not asked to and did not pass on the legality of any ballot," there was no estoppel created. Hamilton v. Young [Ky.] 81 S. W. 682.

60. Hannah v. Green, 143 Cal. 19, 76 P. 708; Trafton v. Quinn [Cal.] 77 P. 164; Averyt v. Williams [Ariz.] 76 P. 463.

61. Montgomery v. Dormer [Mo.] 79 S. W. 913.

62. Shields v. McMahon [Tenn.] 81 S. W. 597.

63. See 1 Curr. L. 991.

64. Party affiliations raise the presumption that the voter cast his ballot for the nominees of the party of which he is a member, and where a ballot is to be deducted because illegally cast, it should be deducted from the party of which the voter was a member. Rexroth v. Schein, 206 Ill. 80, 69 N. E. 240. In the absence of statutory authority therefor, a ballot legal in form cannot be rejected merely because there is one more ballot in the ballot box than there are names written on the poll-books. Wheeler v. Caldwell [Cal.] 75 P. 1031. Where a board consisting of several members is elected on a blanket ballot and contest is made as to a part only of those declared elected, they are entitled to have all ballots for whomsoever cast counted, in order to show if possible that they were among those receiving the highest number of votes. Coghlan v. Alpers, 140 Cal. 648, 74 P. 145. Where a contestee rests his case on the question whether he or the contestant received the highest number of votes, he cannot require the counting of votes not cast for either on the theory that they would show a third person to have received more votes than the contestant. Id.

Decision and review thereof.[65]—The trial judge on a contest should so far as possible observe uniformity in his rulings, and reject or admit all of a class.[66] Where the court is required to order a new election in case of a tie, that one of the candidates is declared elected by a majority of but one vote will not justify a new election.[67] Findings of the trial court on questions of fact are conclusive on appeal,[68] except where the case on appeal is triable de novo.[69] The court, on certiorari to review the action of a city council in an election contest, cannot consider whether the evidence before the council justified its action, but is confined to the sole question of jurisdiction of the council of the subject-matter of the contest and of the parties thereto.[70] Error in refusing to allow contestee to prove certain distinguishing marks was harmless where more of excluded ballots were for contestant than for contestee.[71]

Security.[72]—Under the provisions of the Iowa Code,[73] an unsuccessful election contestant is liable for costs.

§ 12. *Offenses against election laws.*[74]—The offense of bribery in elections involves moral turpitude and falls within the class of crimes deemed infamous under a statutory provision excluding from the right of suffrage persons convicted of infamous crimes.[75] A bet made after an election has been held and the result finally ascertained and announced is not in violation of a statute punishing the betting on an election.[76] Mandamus will not lie to compel inspection of poll-books deposited in a public office at the suit of a private individual for the sole purpose of procuring evidence on which to base a prosecution.[77]

The indictment[78] must allege everything material constituting the offense with certainty and clearness.[79] Where an indictment, drawn under a statute punishing assaults on election officers, but since repealed, was sufficient to charge a general assault, a demurrer thereto should have been overruled.[80]

Questions for jury.[81]—In a proceeding for the illegal sale of liquor on an election day, the question whether the defendant assented to the taking of the liquor by the persons implicated is for the jury.[82]

ELECTION AND WAIVER.

§ 1. The General Doctrine (1178).
§ 2. Occasions for Election (1178).
A. Of Remedies (1178).
B. Of Rights and Estates (1179).
§ 3. Waiver (1179).
§ 4. Acts and Indicia of Election and Waiver (1179).
§ 5. Consequences of an Election or Waiver (1180).
§ 6. Pleading (1181).

This topic treats only of the general rules governing election and waiver; as to when the right to elect exists, see particular subjects.

65. See 1 Curr. L. 991.
66. Abbott v. Hartley [Cal.] 77 P. 410.
67. Bailey v. Fly [Tex. Civ. App.] 80 S. W. 675.
68. Finding of trial court as to residence of voters held to have support in testimony and therefore not reviewable on error. Wheeler v. Caldwell [Kan.] 75 P. 1031.
69. Shields v. McMahan [Tenn.] 81 S. W. 597.
70. City Council of Cripple Creek v. Hanley [Colo. App.] 75 P. 600.
71. Hannah v. Green, 143 Cal. 19, 76 P. 708.
72. See 1 Curr. L. 991.
73. Code, § 1217. Hull v. Eby, 123 Iowa, 257, 98 N. W. 774.
74. See 1 Curr. L. 991.
75. Christie v. People, 206 Ill. 337, 69 N. E. 33.
76. Commonwealth v. Leak, 25 Ky. L. R. 761, 76 S. W. 368.
77. Poll-books of an election deposited in the office of the clerk of county court are public documents which, under proper circumstances, may be inspected by persons having an interest in them. Payne v. Staunton [W. Va.] 46 S. E. 927.
78. See 1 Curr. L. 990.
79. An indictment which does not aver that failure to truly and properly count ballots was in itself willful, or whether the count was falsified for or against an amendment, or whether the count was exaggerated or reduced from the correct returns of the ballots cast at the election, is defective. State v. Gassard, 103 Mo. App. 143, 77 S. W. 473. An indictment for soliciting money from a candidate for public office with intent to influence the votes of others, is not ob-

§ 1. *The general doctrine. Definitions, elements and distinctions.*[88]—An election is the choice between two or more causes of action or rights by one who cannot enjoy the benefit of both,[84] and in order to compel an election, the party must be in court.[85] Unlike equitable estoppel, election does not depend upon detriment to the opposite party.[86]

§ 2. *Occasions for election. A. Of remedies.*[87]—Election goes not to the form, but to the essence of the remedy,[88] and a party having different remedies may select the form of action which will give him the relief he seeks,[89] but in order to require election, the remedies must be coexistent[90] and inconsistent.[91] An action being based upon facts inconsistent with those set up in a former action is inconsistent therewith.[92] The doctrine of election of remedies has also been applied to proceedings to secure a review.[93]

The rules pertaining to election between counts are designed to secure singleness of issues and are relegated to appropriate titles.[94]

jectionable for failure to allege that the person from whom the money was solicited was a legal candidate. Christie v. People, 206 Ill. 337, 69 N. E. 33.

80. State v. Murphy, 102 Mo. App. 680, 77 S. W. 157.

81. See 1 Curr. L. 992.

82. Emerson v. State [Tex. Cr. App.] 76 S. W. 436.

83. See 1 Curr. L. 992.

84. Allis v. Hall, 76 Conn. 322, 56 A. 637, citing Story, Eq. Jur. § 1075.

85. In re Overton's Estate [Ind. T.] 82 S. W. 766.

86. Barrell v. Newby [C. C. A.] 127 F. 656.

87. Election at trial between causes of action alleged in pleading, see Pleading, 2 Curr. L. 1178. Election between counts in indictment, see Indictment and Prosecution, 2 Curr. L. 307. See 1 Curr. L. 993.

88. Sweet v. Montpelier Sav. Bank & Trust Co. [Kan.] 77 P. 538.

89. Eisele v. Oddie, 128 F. 941. Under an instrument acknowledging a debt due decedent, which was to be considered as an advancement unless the executor should elect to treat the same as a debt due the estate, the executor may so elect, but he can recover interest only from the date of the election. Cole v. Andrews, 83 App. Div. 285, 82 N. Y. S. 152.

90. As assumpsit will not lie for the value of goods converted by defendant, and destroyed by fire after demand, but while in his possession, proceeding in assumpsit is not a waiver of the right to sue in tort. Whipple v. Stephens [R. I.] 57 A. 375. See 1 Curr. L. 993, n. 49.

91. German Nat. Bank v. Best & Co. [Colo.] 75 P. 398; Sweet v. Montpelier Sav. Bank & Trust Co. [Kan.] 77 P. 538; Whipple v. Stephens [R. I.] 57 A. 375. See 1 Curr. L. 993, n. 48.

ILLUSTRATIONS. Remedies held inconsistent [1 Curr. L. 993, n. 48]: One having a cause of action ex delicto may waive the tort and sue in assumpsit. Bermel v. Harnischfeger, 89 N. Y. S. 1029. Conversion may waive tort and sue in assumpsit. Bettis v. McNider, 137 Ala. 588, 34 So. 813; Farmers' & Merchants' Bank v. Bennett & Co. [Ga.] 48 S. E. 398. An agent making a contract for an undisclosed principal, the one with whom such contract is made must on discovering such fact elect which he will hold. Barrell v. Newby [C. C. A.] 127 F. 656. One intervening in attachment proceedings with full knowledge of the facts cannot, after the termination of such proceedings, maintain a suit for the recovery of the property. Paris v. Sheppard [Iowa] 101 N. W. 114.

Remedies held consistent [1 Curr. L. 993, n. 48]: Action on replevin bonds after demand and refusal to deliver the goods, and a subsequent action of replevin. Douglass v. Gaiwey [Conn.] 58 A. 2. An action for the conversion of chattels and one for the possession thereof. Moss v. Marks [Neb.] 97 N. W. 1031. Proceeding against receiver of corporation to recover converted funds as trust funds does not preclude action against parties by whose wrongful act the funds were converted. Sweet v. Montpelier Sav. Bank & Trust Co. [Kan.] 77 P. 538. A motion to require a partner suing for a settlement of the partnership, a sale of its assets to pay debts, and to compel contribution to satisfy a deficit, to elect which cause of action he will prosecute, is properly overruled. Goff v. Young, 25 Ky. L. R. 786, 76 S. W. 383. Under Code Civ. Proc. § 549, subd. 4, in a suit on a note, containing allegations that plaintiff was induced to discount the same by fraudulent representations made by defendant; such allegations do not change the nature of the action from contract to tort, so as to render the present action inconsistent with a prior action on the note. Citizens' Nat. Bank v. Wetsel, 88 N. Y. S. 1079. Claimants for supplies furnished a receiver who, after the consolidation of the action with a foreclosure suit, endeavored to have their claims decreed to be prior to the mortgage, may afterwards pursue the plaintiff in the original action who secured the receiver's appointment. German Nat. Bank v. Best & Co. [Colo.] 75 P. 398.

92. Suit on conveyance, second suit alleged rescission of conveyance prior to commencement of first suit. Renne v. Townsend [Iowa] 100 N. W. 48.

93. Where a party sues to vacate a judgment at law, and from a decree modifying the judgment prosecutes no appeal, he cannot prosecute error from refusal of motion to vacate the judgment. Kellogg & Co. v. Spargur [Neb.] 100 N. W. 1025.

94. In civil cases, Pleading, 2 Curr. L. 1178. In prosecutions for crime, Indictment, etc., 2 Curr. L. 307.

(§ 2) *B. Of rights and estates.*[95]—The doctrine of election as applied to rights and estates rests upon the same fundamental principle, i. e., that one must elect between inconsistent, coexistent things;[96] thus a devisee or legatee cannot claim both under a will and against it.[97] A surviving spouse cannot claim his or her statutory rights and also those devised him or her in lieu thereof;[98] the taking under a will does not, however, bar other rights not inconsistent.[99] If a remedy be given to one of several beneficiaries, or, if that one fails to sue within a stated time, then to others, the first one's election to sue cuts off the others, though the wrong person be sued.[1]

§ 3. *Waiver.*—Waiver is an intentional relinquishment of a known right.[2] One cannot waive statutory provisions, the violation of which is a crime or which prescribe the manner of doing a statutory right.[3] Waiver must be pleaded in order to be available as a defense.[4]

§ 4. *Acts and indicia of election and waiver.*—The election must be unequivocal[5] and must be made by the party or some one having power to bind him,[6] though the right being statutory, it can, as a general rule, only be exercised by those upon whom the right is expressly conferred by statute.[7] One being required to elect to take or reject particular property, failure to elect to take within a reasonable time will be deemed an election to reject.[8] In general, acts done with full knowledge of the facts, being inconsistent with a claim under one of the rights,

95. See 1 Curr. L. 994.

96. Vendor of land under executory contract of sale of land cannot cancel such sale and retain the benefits of a judgment for the unpaid purchase price and at the same time recover the land. Warren v. Ward [Minn.] 97 N. W. 886. An "assignee" in bankruptcy is required to elect within a reasonable time whether or not he will take any particular property of the estate. Fleming v. Courtenay, 98 Me. 401, 57 A. 592. See 1 Curr. L. 994, n. 58.

97. Land belonging to widow was devised to her subject to certain charges; also some personalty was bequeathed her. Tripp v. Nobles [N. C.] 48 S. E. 675. See 1 Curr. L. 994, n. 60.

98. In order to put a widow to her election as to dower, the will must contain a provision clearly intended to be in lieu of dower. Sperry v. Swiger, 54 W. Va. 283, 46 S. E. 125; In re Purcell [R. I.] 57 A. 377. Where a testator devised to his wife and children all the real estate of which he might die seised, to hold share and share alike, the widow must elect between the provision of the will and dower. Id. A grantor conveying with covenants of warranty, his widow claiming dower against the grantee and being in possession of an estate from her husband worth more than the dower claim, the latter will be rejected to avoid circuity of action. Saunders v. Hamilton [Ky.] 82 S. W. 630.

A will being invalid for want of the husband's consent, the husband cannot claim both the legacy therein given and also his statutory rights. Kelley v. Snow, 185 Mass. 288, 70 N. E. 89. See generally 1 Curr. L. 994, n. 61-66.

99. Where husband and wife each owned an undivided interest in the same real estate, the widow, by electing to take under her husband's will giving her all his real property for life, did not waive her right to the fee in her own undivided interest in the property. Owsley v. Price, 4 Ohio C. C. (N. S.) 273.

1. Packard v. Hannibal, etc., R. Co. [Mo.] 80 S. W. 951.

2. Griffith v. Newell [S. C.] 48 S. E. 259. Cannot waive the written authority required by Pen. Code, § 640d. Kronenberger v. Quinn, 86 N. Y. S. 139.

3. Statutes prescribing the only way in which a married woman can divest herself of title to property, such provisions cannot be waived. White v. Simonton [Tex. Civ. App.] 79 S. W. 621.

4. Grant v. Pratt, 87 App. Div. 490, 84 N. Y. S. 983.

5. A widow's election conditioned on the construction and legal effect to be given to the will is insufficient. Stearns v. Bemis, 185 Mass. 196, 70 N. E. 44. See 1 Curr. L. 995, n. 67.

6. Administratrix who represents only the personal estate cannot by any action of hers prejudice the rights of the real representatives. Row v. Johnston, 25 Ky. L. R. 1799, 78 S. W. 906. Remaindermen under will and heirs of life tenant are not bound by life tenant's election to claim under will from themselves electing to claim under testator's deed to life tenant, so as to avoid assessed inheritance tax on residuary interest. In re Mather's Estate, 90 App. Div. 382, 85 N. Y. S. 657. The personal representative of a railroad employe may bring an action for his wrongful death for benefit of minor children, though the widow has elected to accept the provisions of a relief certificate of which she is the beneficiary. Oyster v. Burlington Relief Department, 65 Neb. 789, 91 N. W. 699, 59 L. R. A. 291.

7. Right to accept or reject at the appraisement in partition. In re Ferguson's Estate, 204 Pa. 253, 53 A. 1092.

8. "Assignee" in bankruptcy electing as to what property of the bankrupt's estate he will take. Fleming v. Courtenay, 98 Me. 401, 57 A. 592.

show an intent to reject such right;[9] mere notice of an intent to do one or the other is not, however, sufficient,[10] and the acts being consistent with an assertion of either right, no election is shown.[11] One making a conditional sale of goods does not by subsequently accepting a mortgage on them and other goods elect to claim under the mortgage to the exclusion of his rights under the sale.[12] A subsequent action in another state cannot operate as an election of remedies so as to oust a prior suit.[13]

In equity, the acceptance of benefits which are less than what the party is equitably entitled to does not amount to an election to ratify an act.[14] An acceptance of the benefits of a transaction must be voluntary in order to constitute a ratification.[15]

Acceptance and retention of goods until after the lapse of a reasonable time for inspection waives breach of contract[16] and warranty,[17] unless a promise to remedy the defect is made,[18] though the retention of a void instrument[19] or canceled note[20] does not operate as a waiver of any rights. By the acceptance of a part of a debt, one does not waive his right to the remainder.[21] Whether knowledge amounts to acquiescence or not is generally a question for the jury.[22]

§ 5. *Consequences of an election or waiver.*—A choice between inconsistent remedies being once made with full knowledge of all the facts, the right to follow the other is forever gone;[23] but a mistaken and unsuccessful attempt to enforce the

9. Plaintiffs, making a contract with one acting for an undisclosed principal, bringing two actions, after knowledge of the identity of the principal, against the agent on the contract, in each of which they procured attachments and garnished persons owing money to the agent, held an election to hold the agent. Barrell v. Newby [C. C. A.] 127 F. 656. A widow having claimed and enjoyed exclusive possession for 17 years of premises formerly occupied by her husband as a homestead, it is presumed that she has elected to take a life interest therein instead of a distributive share. Huit v. Huit, 122 Iowa, 338, 98 N. W. 123. A widow obtaining an order for the sale of a homestead and retaining one-third of the proceeds elects to take a distributive share as provided for by Code 1873, §§ 2008, 2440. Edinger v. Bain [Iowa] 98 N. W. 568.

10. Seller's notice to buyer, after buyer's notice of refusal to accept, that the seller would store or sell the goods for the buyer's account, held not to constitute such an election as precluded the seller from treating the contract at an end and recovering damages for breach thereof. Habeler v. Rogers [C. C. A.] 131 F. 43. The presentation of a claim against an estate, without prosecuting it to final determination or judgment, cannot determine the right of election to pursue that and no other remedy. Hunnicutt v. Higginbotham, 138 Ala. 472, 35 So. 469.

11. Acts of a husband, after his wife's death, in completing a sale of the homestead made by the wife, held not to preclude him from electing to take the proceeds as a homestead, and not under the wife's will. Milner v. Davis, 120 Iowa, 231, 94 N. W. 511.

12. First Nat. Bank v. Reid, 122 Iowa, 280, 98 N. W. 107.

13. Lytle v. Crawford, 90 App. Div. 605, 86 N. Y. S. 90.

14. Timm v. Timm, 34 Wash. 228, 75 P. 879. See title Agency, 3 Curr. L. 68, 84.

15. The acceptance of benefit under a fraudulent contract must not be due to plaintiff's insistence of performance after defendant's repudiation of the agreement. Frank V. Strauss & Co. v. Weisbach Gas Lamp Co., 42 Misc. 184, 85 N. Y. S. 367.

16. Miller v. Blanchard Co., 84 N. Y. S. 585.

17. White Mfg. Co. v. De La Vergne Refrigerating Mach. Co., 84 N. Y. S. 192.

18. Huck v. Bischoff, 84 N. Y. S. 173.

19. Insured accepting bond issued by assessment life association for his proportion of surplus in terms contrary to its constitution. Knights Templars' & Masons' Life Indemnity Co. v. Vail, 206 Ill. 404, 68 N. E. 1103.

20. Retention of note taken by a life insurance company to extend the time for payment of a past-due premium, after cancellation by the company as evidence of nonpayment, is not a waiver of its rights under the contract. Sharpe v. New York Life Ins. Co. [Neb.] 98 N. W. 66.

21. Butler County v. James, 25 Ky. L. R. 801, 76 S. W. 402.

22. Grant v. Pratt, 87 App. Div. 490, 84 N. Y. S. 983.

23. Sweet v. Montpelier Sav. Bank & Trust Co. [Kan.] 77 P. 538; Paris v. Sheppard [Iowa] 101 N. W. 114; Citizens' Nat. Bank v. Wetsel, 88 N. Y. S. 1079; Chicago, etc., R. Co. v. Olson [Neb.] 97 N. W. 831; Whipple v. Stephens [R. I.] 57 A. 375. One electing to sue in tort cannot recover in assumpsit. Bermel v. Harnischfeger, 89 N. Y. S. 1029. A member of the relief department of defendant road electing to accept the benefit of such department is bound thereby. Chicago, etc., R. Co. v. Olson [Neb.] 97 N. W. 831. A plaintiff cannot declare upon a special contract with a carrier, and then, by amendment, claim that he is not bound by such special contract, and add a new and distinct cause of action. Southern R. Co. v. Parramore, 119 Ga. 690, 46 S. E. 822. An action on a contract on the theory that it ore-

claim by an inappropriate action upon which recovery cannot be had will not bar the other suit.[24] This rule that election of one right waives the other applies to the election of rights and estates[25] as well as to remedies. One electing to take under an agreement must conform to all the terms thereof.[26] Acceptance of that portion of the goods sold which conforms to the contract does not preclude the buyer from claiming damages for the failure of the rest of the goods to conform thereto.[27]

§ 6. *Pleading.*—It is sufficient to show that plaintiff had the right of election and has exercised it.[28]

ELECTRICITY.

Electric franchises.[1]—The furnishing of electric light and energy to private consumers is not a public duty or function.[2] Anyone has the right to produce and sell electricity as a commercial product without legislative authority,[3] but the use of streets to transmit electricity over poles and wires is an additional servitude,[4] and the right to so use them is a franchise which must be granted by the state or the municipal government acting under legislative authority.[5] Franchises are lim-

ated a partnership binds plaintiff so that he cannot during the pendency of such action sue on the same contract on the theory that it is one of employment. Sacker v. Marcus, 43 Misc. 8, 86 N. Y. S. 83. Where plaintiff denied defendant's right to enforce a guaranty on a particular ground, he cannot thereafter claim the contract unenforceable by reason of an entirely different and inconsistent ground. McCall Co. v. Eagan, 89 App. Div. 330, 85 N. Y. S. 792. Defendant having the option to use facts as a defense or affirmative cause, by availing himself of them for one of these purposes, waives his right to use them for the other. Brown v. First Nat. Bank [C. C. A.] 132 F. 450.

24. Chicago, etc., R. Co. v. Olson [Neb.] 97 N. W. 831; Lackmann v. Kearney, 142 Cal. 112, 75 P. 668. A counterclaim being overruled as premature, there is no election of remedies so as to preclude its being set up at the proper stage of the case. Tyler v. Bowen [Iowa] 100 N. W. 505. A mortgagee is not precluded from replevying mortgaged property by reason of a former suit on the note, which was signed by husband and wife as mortgagors, such suit being based on the erroneous theory that the husband merely acted as his wife's agent. First Nat. Bank of Independence v. Sweet [Mich.] 99 N. W. 861. Ratification of an assignment of patents procured by fraud cannot be urged as precluding suit to restore complainant to his rights in the absence of evidence that he had any knowledge of the fraud until it was developed during the trial. Felt v. Bell, 205 Ill. 213, 68 N. E. 794. Where a mortgagor, who was sued on the covenants of his mortgage, relied on a defense based on a construction thereof relieving him from liability, he cannot be held to have elected such position, to the loss of a right to assert a mutual mistake on which he sought a reformation on failing to establish his defense. Allis v. Hall, 76 Conn. 322, 56 A. 637. Election to disaffirm a contract induced by fraud, being rendered of doubtful advantage by act of the other party, will not bar an action based upon a subsequent affirmance of the contract. Montgomery v. McLaury, 143 Cal. 83, 76 P. 964. Ignorance of material facts is sufficient. Moss v. Marks [Neb.] 97 N. W. 1031; Lamb v. Rooney [Neb.] 100 N. W. 410. See 1 Curr. L. 994, n. 52, 53.

25. A widow renouncing her rights under her husband's will and receiving property as dower and homestead by decree of court, the rest of the land is free from those claims. Rice v. Bamberg [S. C.] 46 S. E. 1009.

26. Creditors agreeing to a dissolution of partnership debtor and assumption of liabilities by one of the partners. In re Worth, 130 F. 927.

27. Gilbert v. Alton, 88 App. Div. 62, 84 N. Y. S. 682.

28. Need not show an equitable estoppel. Barrell v. Newby [C. C. A.] 127 F. 656. One pleading an election as a defense, if he sets out the facts relied on as constituting such election, the question may be determined by the court on demurrer to the answer. Id.

1. See article Franchises, 2 Curr. L. 74. See, also, 1 Curr. L. 996.

2. Construing § 87 of the city charter of New Orleans, as amended. Strohmeyer v. Consumers' Elec. Co., 111 La. 506, 35 So. 723.

3. Purnell v. McLane [Md.] 56 A. 830.

4. Brown v. Radnor Tp. Elec. Light Co., 208 Pa. 453, 57 A. 904. See 1 Curr. L. 996, n. 79.

NOTE. Street railway poles and wires not an additional servitude: The placing of poles and wires in the street for the purpose of using electricity for street car propulsion does not impose a new servitude on the land in the street and may be authorized by legislative or municipal authority without compensation to the abutting owner of the land. Detroit City R. Co. v. Mills, 85 Mich. 634; Halsey v. Rapid Transit, etc., R. Co., 47 N. J. Eq. 380; Potter v. Saginaw Union, etc., R. Co., 83 Mich. 285; Barber v. Saginaw Union, etc., R. Co., 83 Mich. 299; Taggart v. Newport St. R. Co., 16 R. I. 668; Williams v. City Elec. St. R. Co., 41 F. 556.—From note to Chesapeake, etc., Tel. Co. v. Mackenzie [Md.] 28 Am. St. Rep. 219, 235. See, also, Parrish v. Hamilton, etc., Traction Co., 23 Ohio Circ. R. 527; Lonaconing Midland & T. R. Co. v. Consolidation Coal Co., 95 Md. 630. See 1 Curr. L. 996, n. 80.

5. Purnell v. McLane [Md.] 56 A. 830. One cannot compel the issuance of a permit, authorizing him to use conduits for the

ited by their terms,[6] and by valid statutory provisions.[7] In most states, companies dealing in electricity have a limited right of eminent domain to enable them to place their poles and wires.[8]

Contracts.[9]—An electric company's contract rights being uncertain, they may be protected by a temporary injunction while being rendered certain.[10]

Degree of care.[11]—While one furnishing electricity is not an insurer, yet as to the public he is obliged to use the utmost human care, vigilance, and foresight, reasonably consistent with the practical operation of his plant, to provide against all reasonably probable contingencies,[12] the care required in any particular case being proportional to the danger.[13] This includes the use of the best mechanical con-

placing of wires, under Baltimore City Ordinance 107, unless he has a franchise granted, allowing him to use the streets for such purpose. Id. Under P. L. 136 an electric light company may be incorporated in a township. Word "district" construed. Brown v. Radnor Tp. Electric Light Co., 208 Pa. 453, 57 A. 904. See 1 Curr. L. 996, n. 78.

6. City to have advantage of all improvements in the production of electricity means all improvements increasing the efficiency of the system then in use. Davenport Gas & Elec. Co. v. Davenport [Iowa] 98 N. W. 892. See 1 Curr. L. 996, n. 81.

7. The word "wires" as used in Laws 1890, c. 566, p. 1148, providing for the furnishing of light to all residents within 100 feet of the company's wires, means wires through which electricity is distributed to residences, not to those used for street lighting purposes. Moore v. Champlain Elec. Co., 88 App. Div. 289, 85 N. Y. S. 37. See 1 Curr. L. 996, n. 82-84.

8. P. L. 136. Brown v. Radnor Tp. Elec. Light Co., 208 Pa. 453, 57 A. 904. Under Rev. St. 1898, §§ 925-8, in the absence of an order from the board of public works designating the places where poles should be put, an electric light company cannot place a pole in front of a man's property without his consent. Malone v. Waukesha Elec. Light Co. [Wis.] 98 N. W. 247.

9. **Interpretation:** Current to develop "warranted capacity" of a motor need be that much only, though motor is capable of using more. Wofford v. Buchel Power & Irrigation Co. [Tex. Civ. App.] 80 S. W. 1078. The right of a purchaser of electric power to assign his contract, held not within clause in contract calling for submission of questions under the contract to arbitration. Hudson River Water Power Co. v. Glens Falls Gas & Elec. Light Co., 90 App. Div. 513, 85 N. Y. S. 577. One who had contracted to purchase electric power held entitled to assign his rights. Id. Plaintiff in an action for breach of contract to furnish electric power held not entitled to recover prospective profits. Hudson River Power Transmission Co. v. United Traction Co., 43 Misc. 205, 88 N. Y. S. 448. The sale of an electric lighting plant, doing public and private lighting under a public franchise, the obvious intention being to include the going business with the plant, impliedly includes the unfinished monthly contracts for lighting and the supplies on hand, as incidents of the plant. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. See 1 Curr. L. 996, n. 85.

10. Right to place wires in subway. West Side Elec. Co. v. Consolidated Tel. & Electrical Subway Co., 87 App. Div. 550, 84 N. Y. S. 1052.

11. See 1 Curr. L. 996.

12. Denver Consol. Elec. Co. v. Lawrence, 131 Colo. 301, 73 P. 39; Harter v. Colfax Elec. Light & Power Co. [Iowa] 100 N. W. 508; Brooks v. Consolidated Gas Co. [N. J. Err. & App.] 57 A. 396; Parsons v. Charleston Consol. R. Gas & Elec. Co. [S. C.] 48 S. E. 284; Spires v. Middlesex & M. Elec. Light, Heat & Power Co. [N. J. Law] 57 A. 424; Gilbert v. Duluth General Elec. Co. [Minn.] 100 N. W. 653; Daltry v. Media Elec. Light, Heat & Power Co., 208 Pa. 403, 57 A. 833; Burton Telephone Co. v. Gordon, 4 Ohio C. C. (N. S.) 1.

13. Colburn v. Wilmington [Del. Super.] 56 A. 605; Daltry v. Media Elec. Light, Heat & Power Co., 208 Pa. 403, 57 A. 833; Commonwealth Elec. Co. v. Melville, 210 Ill. 70, 70 N. E. 1052; Gilbert v. Duluth General Elec. Co. [Minn.] 100 N. W. 653; Richmond & P. Elec. R. Co. v. Rubin [Va.] 47 S. E. 834. See 1 Curr. L. 996, n. 86.

Illustrations.—Facts held to constitute negligence: Allowing the feed wire of another company to be fastened for a long time to the iron step of a pole, the insulation at the point of contact being worn and defective, is negligence in a case where a lineman was killed. Graves v. City & Suburban Tel. Ass'n, 132 F. 387. Failure to keep wire insulated whereby adjacent fallen wire became charged held negligence, the company being liable without regard to its actual knowledge of the fallen wire or diligence in discovering it. Parsons v. Charleston Consol. R. Gas & Elec. Co. [S. C.] 48 S. E. 284. Negligent in allowing insulation to become defective, where employe painting pole was injured. Bernier v. St. Paul Gas Light Co. [Minn.] 99 N. W. 778. Allowing a guy wire to become charged, through imperfect insulation or otherwise, establishes a prima facie case of negligence. City of Owensboro v. Knox's Adm'r, 25 Ky. L. R. 680, 76 S. W. 191. A guard wire should be used where there is a likelihood of the wire being broken by the falling of a limb of a tree. Spires v. Middlesex & M. Elec. Light, Heat & Power Co. [N. J. Law] 57 A. 424. There being intersecting wires, insulation, guard wires or some other device should be used. Richmond & P. Elec. R. Co. v. Rubin [Va.] 47 S. E. 834. Failure to use device to guard wires under a sidewalk the latter being built so that boys could crawl under, held negligence. Commonwealth Elec. Co. v. Melville, 210 Ill. 70, 70 N. E. 1052. Cable being left 8 to 14 years under a sidewalk, the latter being built so that boys could crawl un-

trivances and inventions in practical use,[14] perfect insulation at all places near which people have a right to go,[15] and it has been held, perfect insulation of all overhead wires strung through streets,[16] the consideration of climatic conditions,[17] and the maintenance of such a system of inspection as will insure reasonable promptness in the detection of defects.[18] This same degree of care is required of a municipality operating an electric light plant for public and commercial purposes,[19] and, whether the owner of the wire or not, if it constitutes an obstruction to traffic, the city is liable if it fails to have the same removed or repaired within a reasonable time, or to take proper precaution to notify travelers of the danger.[20] As to employes, however, only ordinary care is owed.[21] To be liable, a duty must be owed to the person injured.[22] This duty being incident to the operation and ownership of the plant,[23] it does not depend upon the ownership of the wire, negligence being shown,[24] though one furnishing electricity is not liable for injuries occasioned by defects in appliances in which it has no interest and over which it exercises no control;[25] the converse of this statement is also true.[26] Failure to exercise this duty cannot be excused by the existence of a custom,[27] nor can this duty be transferred.[28] Wires of

der, is negligence, the insulation having become defective and the cable having been out of repair at the particular place several times. Id. Where wires were permitted to sag four feet between poles which were 100 feet apart, it is negligence to place defectively insulated primary and secondary current wires on the same cross arm 16 inches apart. Wires became crossed and death resulted to consumer. Gilbert v. Duluth General Elec. Co. [Minn.] 100 N. W. 653. Negligent in cutting and permitting charged wire to swing near the ground. Daltry v. Media Elec. Light, Heat & Power Co., 208 Pa. 403, 57 A. 833. A converter being placed by the side of a dwelling house near a balcony with a tin floor, and having a gutter and leaders therefrom to the ground, ordinary insulation held insufficient, and reasonable provision must be made, there being a possibility that some one might use the balcony. Brooks v. Consolidated Gas Co. [N. J. Err. & App.] 57 A. 396.

14. City of Owensboro v. Knox's Adm'r, 25 Ky. L. R. 680, 76 S. W. 191; Richmond & P. Elec. R. Co. v. Rubin [Va.] 47 S. E. 834; Brooks v. Consolidated Gas Co. [N. J. Err. & App.] 57 A. 396. Transformer being of standard pattern and of approved design, held no negligence in that it burned out. Cosgrove v. Kennebec Light & Heat Co., 98 Me. 473, 57 A. 841.

15. Near a balcony on an opera house. Thomas v. Wheeling Electrical Co., 54 W. Va. 395, 46 S. E. 217.

16. Hebert v. Lake Charles Ice, Light & Waterworks Co., 111 La. 522, 35 So. 731.

17. The fact that insulation is less durable in higher altitudes must be taken into consideration by the company. Denver Consol. Elec. Co. v. Lawrence, 31 Colo. 301, 73 P. 39. See 1 Curr. L. 997, n. 90. Need not insulate against lightning (Phoenix Light & Fuel Co. v. Bennett [Ariz.] 74 P. 48), though in the construction and maintenance of its plant it must anticipate ordinary storms (Wolpers v. New York & Q. Electric Light & Power Co., 91 App. Div. 424, 86 N. Y. S. 845).

18. Denver Consol. Elec. Co. v. Lawrence, 31 Colo. 301, 73 P. 39; City of Owensboro v. Knox's Adm'r, 25 Ky. L. R. 680, 76 S. W. 191; Harter v. Colfax Elec. Light & Power Co. [Iowa] 100 N. W. 508. A disturbed condition of an electrical system indicating that a wire may be down, it is the duty of the owner to ascertain if the wire constitutes a dangerous obstruction in a street (City of Emporia v. Burns, 67 Kan. 523, 73 P. 94), and notice of the disturbance will be notice of the obstruction of the street (Id.). See 1 Curr. L. 997, n. 89.

19. City of Owensboro v. Knox's Adm'r, 25 Ky. L. R. 680, 76 S. W. 191.

Must keep its wires in such condition as not to interrupt or endanger public travel. Colburn v. Wilmington [Del. Super.] 56 A. 605.

20. Colburn v. Wilmington [Del. Super.] 56 A. 605.

21. Richmond & P. Elec. R. Co. v. Rubin [Va.] 47 S. E. 834. And see Master & Servant, 2 Curr. L. 801.

22. Company not liable to mere licensee. Cumberland Tel. & T. Co. v. Martin's Adm'r, 25 Ky. L. R. 787, 76 S. W. 394. Where both company and injured party were trespassers, company held liable. Daltry v. Media Elec. Light, Heat & Power Co., 208 Pa. 403, 57 A. 833. The wires of two companies being suspended on the same poles, one of the companies is bound to use ordinary care to prevent injury to the employes of the other while engaged in reconstructing wires of the latter. Dallas Elec. Co. v. Mitchell [Tex. Civ. App.] 76 S. W. 935; Standard Light & Power Co. v. Munsey [Tex. Civ. App.] 76 S. W. 931.

23. Standard Light & Power Co. v. Munsey [Tex. Civ. App.] 76 S. W. 931.

24. Daltry v. Media Elec. Light, Heat & Power Co., 208 Pa. 403, 57 A. 833.

25. Wires. Memphis Consol. Gas & Elec. Co. v. Speers [Tenn.] 81 S. W. 595.

26. A company furnishing light and agreeing to keep the lamps in repair is liable for injuries occasioned by reason of a defect in the lamp, though it did not own the latter. Fish v. Kirlin-Gray Elec. Co. [S. D.] 99 N. W. 1092.

27. Custom whereby contractors notified company when working on houses to which wires were attached does not excuse unnotified company from liability for injuries re-

two companies intersecting, it is immaterial to plaintiff's right to recover which company had the prior or superior right to erect their respective wires, it being the duty of both to exercise due care to see that their wires did not come in contact.[29] The negligence must be the proximate cause of the injury.[30] For injury resulting from an "act of God," the defendant is not liable,[31] unless negligent, and this negligence is one of the proximate causes of the injury.[32] The injured party must have been free from contributory negligence,[33] and to do this, he must have exercised the care of a reasonably prudent man,[34] though, in the absence of knowledge, one may assume that wires are insulated where they should be.[35] A consumer is not liable for a defective part[36] or intervening cause[37] over which he has no control, nor is he bound to anticipate that the company furnishing him the electricity will be negligent in any manner.[38] One wiring a building is bound only to the exercise of ordinary care and prudence as exercised by persons engaged in the same business, according to the state of the art and methods generally used at the time the work was done.[39]

celved from uninsulated wire. Barles v. Louisville Elec. Light Co., 25 Ky. L. R. 2303, 80 S. W. 814. Admission of evidence of such custom is ground for reversal. Id.

28. Cannot be delegated to foreman of crew. Standard Light & Power Co. v. Munsey [Tex. Civ. App.] 76 S. W. 931.

29. Richmond & P. Elec. R. Co. v. Rubin [Va.] 47 S. E. 834; Hebert v. Lake Charles Ice, Light & Waterworks Co., 111 La. 522, 35 So. 731.

30. Where deceased was removing one company's lines from the poles of another company, held negligence of latter company in not having its wires insulated proximate cause, not negligence of former company in not cutting off current. Standard Light & Power Co. v. Munsey [Tex. Civ. App.] 76 S. W. 931. Nor is such failure to cut off said current such an intervening cause as to relieve the former company of liability. Id. See 1 Curr. L. 997, n. 93.

31. Break by reason of sleet adhering to wire held act of God. Colburn v. Wilmington [Del. Super.] 56 A. 605.

32. Uninsulated wire broken by fall of wire above, the latter being broken by force of storm, held defendant liable in damages. Hebert v. Lake Charles Ice, Light & Waterworks Co., 111 La. 522, 35 So. 731.

33. Taking hold of wire after being warned held to bar recovery. Cosgrove v. Kennebec Light & Heat Co., 98 Me. 473, 57 A. 841. Lineman of experience knew or with the exercise of ordinary care should have known that insulation was worn off; held, there could be no recovery. Columbus R. Co. v. Dorsey, 119 Ga. 363, 46 S. E. 635. That a painter when found dead held one of the wires tightly grasped in his hand is not conclusive of contributory negligence. Brooks v. Consolidated Gas Co. [N. J. Err. & App.] 57 A. 396. Where injured party was warned. Colburn v. Wilmington [Del. Super.] 56 A. 605. That plaintiff stood on a metal register when turning on the light is not contributory negligence. Denver Consol. Elec. Co. v. Lawrence, 31 Colo. 301, 73 P. 39. Where plaintiff's horse stopped, and he jumped out stepping on a live wire and was injured, held no contributory negligence, it being early in the morning and dark, though plaintiff grabbed the wire in his fall. Wolpers v. New York & Q. Elec. Light & Power Co., 91 App. Div. 424, 86 N. Y. S. 845. See 1 Curr. L. 997, n. 94.

34. Instruction on this point is not objectionable in that no charge was made that deceased's negligence must have contributed to the accident. Buckley v. Westchester Lighting Co., 93 App. Div. 436, 87 N. Y. S. 763. An instruction that if deceased became preoccupied and failed to remain as alert as a reasonably prudent man, there can be no recovery, is not erroneous. Id.

NOTE. Degree of care required of injured person: A person brought in contact with electric wires is not required to exercise more care to avoid injury than is usual under similar circumstances among careful and prudent persons of the class to which he belongs, unless especially informed of the danger. A common laborer is not required to use as much care and prudence as is exacted of a better educated person. Girandi v. Elec. Imp. Co., 107 Cal. 120, 48 Am. St. Rep. 114; Perham v. Portland Elec. Co., 33 Or. 451, 72 Am. St. Rep. 730, 754, note. —From note to Bessemer Land & Improvement Co. v. Campbell [Ala.] 77 Am. St. Rep. 17, 29.

35. Thomas v. Wheeling Electrical Co., 54 W. Va. 395, 46 S. E. 217. Coming in contact with defectively insulated wire under such circumstances is not contributory negligence. Id.

36. Converter. Martinek v. Swift & Co., 122 Iowa, 611, 98 N. W. 477.

37. Evidence that a horseshoe was hanging over a wire in such a condition as possibly to induce a greater current on such wire held improperly admitted in the absence of any showing that defendant was responsible for the presence of the shoe. Martinek v. Swift & Co., 122 Iowa, 611, 98 N. W. 477.

38. Installation of a defective socket by a consumer will not bar recovery for injuries received by reason of company's negligence. Gilbert v. Duluth General Elec. Co. [Minn.] 100 N. W. 653. Use of a brass socket on an electric light held not negligence. Martinek v. Swift & Co., 122 Iowa, 611, 98 N. W. 477. A patron of a telephone company need not use such devices as will guard against the admission of an unusual and dangerous flow of electricity. Richmond & P. Elec. R. Co. v. Rubin [Va.] 47 S. E. 834.

Actions.[40]—Where different companies contribute to the injury, the liability is joint.[41]

Pleading.[42]—The general rules as to sufficiency of allegations apply.[43]

Evidence.[44]—Plaintiff need not prove the specific cause of the accident, but it is sufficient if he prove facts and circumstances from which the jury may fairly infer that there was either defective construction or negligent operation.[45] Artificial presumptions do not generally come into play where the evidence shows the condition under which the accident occurred.[46] The doctrine of res ipsa loquitur applies in some cases.[47] The case involving electrical phenomena, it should be sent to the jury, though the facts testified to by plaintiff and his witnesses are incredible and scientifically impossible, it not being shown that such testimony is false.[48] The general rules as to the admissibility[49] or sufficiency[50] of the evidence, and as to presumptions,[51] are applied.

Questions for the jury.[52]—The questions of whether proper care has been exercised by the one furnishing the electricity,[53] and of contributory negligence,[54] are

39. Herzog v. Municipal Elec. Light Co., 89 App. Div. 569, 85 N. Y. S. 712. Use of single cap molding to sustain wires on ceiling of top story held not negligence. Id.

40. See 1 Curr. L. 997.

41. Where a broken telephone wire is permitted to remain suspended across a trolley wire, both companies are liable. North Amherst Home Telephone Co. v. Jackson, 4 Ohio C. C. (N. S.) 386. In an action for injuries by an electric lineman against two electric companies and the receiver of one of them, an instruction held error as assuming a certain act as negligence on the part of one of the companies and authorizing a recovery against all of the defendants. Dallas Elec. Co. v. Mitchell [Tex. Civ. App.] 75 S. W. 935. In the same case an instruction impliedly authorizing a recovery against all, if all of the defendants did not use care to see that the electricity was cut off. Id. See 1 Curr. L. 997, n. 95.

42. See 1 Curr. L. 997.

43. Complaint in an action for injuries received in turning on an electric light held to state a good cause of action against defendant for negligence. Denver Consol. Elec. Co. v. Lawrence, 31 Colo. 301, 73 P. 39. Allegation of injuries held sufficient to admit proof of injuries of a specific kind. Id. Allegations of performance in an action for breach of a contract to supply electric power held insufficient. Hudson River Power Transmission Co. v. United Traction Co., 43 Misc. 205, 88 N. Y. S. 448.

44. See 1 Curr. L. 997.

45. Fallen wire. Wolpers v. New York & Q. Elec. Light & Power Co., 91 App. Div. 424, 86 N. Y. S. 845. Where plaintiff had no means of knowing what defects existed in defendant's appliances, and the transformer was taken away by defendant immediately after the accident. Denver Consol. Elec. Co. v. Lawrence, 31 Colo. 301, 73 P. 39.

46. In such case no presumption that line was properly constructed. Richmond & P. Elec. R. Co. v. Rubin [Va.] 47 S. E. 834.

47. Fallen wire affords prima facie case of negligence. Wolpers v. New York & Q. Elec. Light & Power Co., 91 App. Div. 424, 86 N. Y. S. 845; Hebert v. Lake Charles Ice, Light & Waterworks Co., 111 La. 522, 35 So. 731. As does defective insulation, where insulation is required. Thomas v. Wheeling Electrical Co., 54 W. Va. 395, 46 S. E. 217.

A guest in a hotel being injured by coming in contact with an electric wire, in an action against one furnishing the electricity, the doctrine of res ipsa loquitur does not apply in the absence of a showing that the accident was due to a dangerous current knowingly or negligently sent into the hotel by defendant. Harter v. Colfax Elec. Light & Power Co. [Iowa] 100 N. W. 508. See 1 Curr. L. 997, n. 99.

48. Shocked by falling of stay or guy wire. Walters v. Syracuse Rapid Transit R. Co., 178 N. Y. 50, 70 N. E. 98.

49. Opinion evidence is admissible to show for how long before an accident the insulation on the wires had been worn off. Bernier v. St. Paul Gas Light Co. [Minn.] 99 N. W. 778. Evidence that an elevator in a hospital near where the injury occurred stopped running at the time of the accident, the latter being caused by a fallen wire, is a circumstance to be considered on the question of defendant's negligence. Wolpers v. New York & Q. Elec. Light & Power Co., 91 App. Div. 424, 86 N. Y. S. 845. On an issue as to whether an insulator at a certain point was safe, evidence that other insulators of the same kind were ineffective held inadmissible, as it called on the other party to prove whether or not electricity did escape at other points. North Amherst Home Telephone Co. v. Jackson, 4 Ohio C. C. (N. S.) 386.

50. Where current did not burn out fuses in transformer, destroy meter, or the lights, held evidence insufficient to show amount of current dangerous. Harter v. Colfax Elec. Light & Power Co. [Iowa] 100 N. W. 508.

51. One being injured by the fall of an electric wire, the wiring not having been done by the company furnishing the electricity, no presumption of negligence arises against the furnishing company. Harter v. Colfax Elec. Light & Power Co. [Iowa] 100 N. W. 508.

52. See 1 Curr. L. 998.

53. Brooks v. Consolidated Gas Co. [N. J.

for the jury. It is only in exceptional cases, where the evidence is of such a conclusive character that only one reasonable inference can be drawn from it, that the question of negligence is one of law for the court.[55] Whether a storm is so extraordinary as to legally amount to an "act of God" is a question for the jury.[56]

EMBEZZLEMENT.

Elements.[57]—To constitute embezzlement, money or property must have been in the hands of defendant by virtue of an office[58] or employment,[59] and must have been converted[60] to the use of defendant or another than the owner,[61] with fraudulent intent;[62] but such intent need not be actually entertained, it is sufficient if the natural effect of defendant's acts was to defraud,[63] and it may be shown by circumstances.[64] The amount embezzled is immaterial unless the statute prescribes a minimum.[65] To constitute embezzlement by an employe of a national bank, there must be a breach of duty with respect to moneys of the bank lawfully in his custody as employe, and a wrongful appropriation of such moneys to his own use with intent to defraud.[66] Where defendant, being authorized to collect a check and loan the proceeds, embezzles such proceeds, he is properly convicted of embezzlement of the proceeds.[67] Embezzlement by a public administrator of funds of two estates constitutes two distinct offenses.[68]

Indictment[69] in the language of the statute is generally sufficient.[70] The indictment must show a fiduciary relation,[71] but the particulars thereof need not be alleged.[72] If embezzlement by an officer is charged, possession of an office known to

Err. & App.] 57 A. 396; Steindorff v. St. Paul Gas Light Co. [Minn.] 100 N. W. 221; Richmond & P. Elec. R. Co. v. Rubin [Va.] 47 S. E. 834; Wolpers v. New York & Q. Elec. Light & Power Co., 91 App. Div. 424, 86 N. Y. S. 845. Whether wires should have been safeguarded or not. Burton Telephone Co. v. Gordon, 4 Ohio C. C. (N. S.) 1.

54. Bernier v. St. Paul Gaslight Co. [Minn.] 99 N. W. 778; Steindorff v. St. Paul Gas Light Co. [Minn.] 100 N. W. 221. Where at point of contact between fallen wire and horse a bright flame appeared, question of whether or not driver was negligent in investigating cause, held not. Spires v. Middlesex & M. Elec. Light, Heat & Power Co. [N. J. Law] 57 A. 424.

55. Steindorff v. St. Paul Gas Light Co. [Minn.] 100 N. W. 221.

56. Richmond & P. Elec. R. Co. v. Rubin [Va.] 47 S. E. 834.

57. See 1 Curr. L. 998.

58. The office must be one known to the law and involve possession of money. People v. Shearer, 143 Cal. 66, 76 P. 813.

59. Hinds v. Territory [Ariz.] 76 P. 469. Evidence held to show mere failure to repay loan. Bowden v. State [Tex. Cr. App.] 79 S. W. 539. Fraudulently obtaining custody of money with intent to steal it without antecedent fiduciary relation is theft, not embezzlement. Johnson v. State [Tex. Cr. App.] 80 S. W. 621. Where the principal and not the factor was to collect the proceeds of sale, the factor is not guilty of embezzlement in collecting and converting such proceeds. People v. Dougherty [Cal.] 77 P. 466.

60. Where a bailee for a specific purpose makes other use of the property, a demand for return is not necessary. People v. Goodrich, 142 Cal. 216, 75 P. 796. Treasurer of benevolent society held relieved by accounting though he failed to pay over money. State v. Dunn, 134 N. C. 663, 46 S. E. 949.

61. Where defendant co-operated with others to embezzle, it is immaterial that he received none of the proceeds. McCracken v. People, 209 Ill. 215, 70 N. E. 749.

62. Larceny by bailee. Smith v. State [Tex. Cr. App.] 76 S. W. 434. That an agent may appear on a balancing of mutual accounts to be indebted to his principal does not constitute embezzlement. State v. Culver [Neb.] 97 N. W. 1015. Overdrafts made by a bank under an agreement entered into in good faith do not constitute embezzlement. United States v. Breese, 131 F. 915.

63. United States v. Breese, 131 F. 915.

64. State v. Laughlin [Mo.] 79 S. W. 401.

65. Commonwealth v. Smith [Ky.] 82 S. W. 236; State v. Cates [Me.] 58 A. 238.

66. Rev. St. § 5209. United States v. Breese, 131 F. 915.

67. Leach v. State [Tex. Cr. App.] 81 N. W. 733.

68. State v. Laughlin [Mo.] 79 S. W. 401.

69. See 1 Curr. L. 999.

70. Indictment sufficient. State v. Cates [Me.] 58 A. 238. Indictment substantially following statute as to employment, receipt of funds and fraudulent conversion thereof held sufficient. Schlitzbaum v. Commonwealth [Ky.] 80 S. W. 784. An indictment charging that defendant "did embezzle and fraudulently convert" is sufficient. Bell v. State, 139 Ala. 124, 35 So. 1021.

71. Indictment showing employment of defendant by one corporation and embezzlement of funds of another held insufficient. Hinds v. Territory [Ariz.] 76 P. 469.

72. Averment that defendant was en-

the law and involving possession of funds must be alleged.[78] Specific description of the money is not ordinarily required,[74] and in some states value need not be charged.[75] That the word "fraudulently" was misspelled does not vitiate the indictment.[76] Averment of property in one and proof that he held as guardian is no variance,[77] and an information charging embezzlement as agent is not a departure from an original complaint charging embezzlement as bailee.[78] A statute punishing "embezzling or secreting with intent to embezzle" defines but one crime, and an indictment charging that defendant secreted with intent to embezzle and did embezzle is not double.[79]

Evidence of other similar acts is admissible to show intent,[80] or when part of a system with that on trial.[81] Where embezzlement of a specific sum is charged, proof of a general shortage in defendant's accounts is inadmissible.[82] A compromise by a county treasurer after a defalcation is not admissible in mitigation.[83]

Sufficiency of evidence[84] is discussed in the cases collated in the note.[85] Where hired chattels are immediately taken to another county and disposed of, a finding of intent to convert formed in the county where the hiring took place is justified.[86]

A remark by the court on admitting a receipt given by defendant for the money that it was a high order of evidence is error.[87]

An instruction referring to evidence as "tending to show" embezzlement is on the weight of the evidence.[88] An instruction holding a county treasurer to payment in coin money is harmless where he made no effort to satisfy in any kind of money.[89]

Punishment being prescribed as that designated for larceny, the general offense and not special forms of larceny is intended.[90]

EMBLEMENTS AND NATURAL PRODUCTS.

Annual crops have been held to become personalty when matured,[91] and of

trusted with property for a purpose stated held sufficient. People v. Goodrich, 142 Cal. 216, 75 P. 796. An averment that money "had come into" defendant's possession is sufficient. People v. Walker, 142 Cal. 90, 75 P. 658. An indictment charging defendant's possession as bailee is sufficient without alleging the facts constituting the bailment. McCracken v. People, 209 Ill. 215, 70 N. E. 749.

73. Indictment alleging embezzlement by "county physician" held bad. People v. Shearer, 143 Cal. 66, 76 P. 813.

74. $3,000 in current money of the United States of the value of $3,000 is sufficient. Butler v. State [Tex. Cr. App.] 81 S. W. 743.

75. State v. Cates [Me.] 58 A. 238.

76. "Fraudelently." Bell v. State, 139 Ala. 124, 35 So. 1021.

77. Leach v. State [Tex. Cr. App.] 81 S. W. 733.

78. People v. Walker [Cal.] 77 P. 705.

79. State v. Cates [Me.] 58 A. 238.

80. United States v. Breese, 131 F. 915.

81. Leach v. State [Tex. Cr. App.] 81 S. W. 733.

82. People v. Walker, 142 Cal. 90, 75 P. 658.

83. Butler v. State [Tex. Cr. App.] 81 S. W. 743.

84. See 1 Curr. L. 1000.

85. Evidence of embezzlement by bailee securing money on agreement to support the owner held sufficient. McCracken v. People, 209 Ill. 215, 70 N. E. 749. Conviction of a public administrator is sustained by proof that he has received funds which he has not in possession and has not legitimately paid out. State v. Laughlin [Mo.] 79 S. W. 401.

86. Defendant having hired horse and buggy to use in county drove immediately to another county and pledged it. Wilson v. State [Fla.] 36 So. 580. Evidence held to sustain finding that intent to embezzle was formed in the county where the property was delivered to defendant, though it was delivered for the purpose of taking it to another county. People v. Goodrich, 142 Cal. 216, 75 P. 796.

87. Oliveros v. State [Ga.] 47 S. E. 627.

88. Leach v. State [Tex. Cr. App.] 81 S. W. 733.

89. Butler v. State [Tex. Cr. App.] 81 S. W. 743.

90. Wilson v. State [Fla.] 36 So. 580.

91. Failure to remove crop of corn standing when tenant's lease expired within a reasonable time does not vest title thereto in an incoming tenant. Meffert v. Dyer [Mo. App.] 81 S. W. 643. A crop of timothy seed is not a part of the realty. Wimp v. Early [Mo.] 78 S. W. 343. Compare Emblements, 1 Curr. L. 1002, n. 46.

course are personalty when severed from the soil.[92] Standing crops have been held, however, to pass under a mortgage foreclosure,[93] or by deed to the land unless reserved.[94] In Georgia, title to crops sold by a planter does not pass until paid for.[95] Rights as between landlord and tenant are determined by their contract construed according to the rules which govern the construction of contracts.[96] A lessee cultivating land for a share of the crop is not a mere laborer working for hire, but has an interest in the crop.[97] One who purchases a crop without notice that he is interfering with rights of the landlord is not liable for conversion.[98]

A trespasser who sows a crop acquires no right thereto.[99] A dowress has no interest in growing timber,[100] nor has a homestead entryman until final proof.[101]

Equity will entertain a bill for an accounting between tenants in common of a crop.[102]

92. One claiming a crop by virtue of a prior lease of an Indian allotment as against one in possession under a void lease. Wakefield v. Dyer [Okl.] 76 P. 151.

93. As against a chattel mortgagee whose mortgage was executed subsequent to the mortgage on the land, though prior to foreclosure. Penryn Fruit Co. v. Sherman-Worrell Fruit Co., 142 Cal. 643, 76 P. 484.

Note. As between a purchaser of land on foreclosure sale and the mortgagor's tenant, crops planted by the latter and mature when the sheriff's deed is executed do not pass. Hecht v. Dettman, 56 Iowa, 679, 41 Am. Rep. 131. And see Howell v. Schenck, 24 N. J. Law, 89; Shepard v. Philbrick, 2 Denio [N. Y.] 174; Jones v. Thomas, 8 Blackf. [Ind.] 428, when crops were not mature. But compare Lane v. King, 8 Wend. [N. Y.] 584, 24 Am. Dec. 105. In McLean v. Bover, 24 Wis. 295, 1 Am. Rep. 185, it was held that one who recovers in ejectment is entitled to a crop partly cut and partly uncut, which was planted after the action was commenced, citing Doe v. Wethericke, 3 Bing, 21; Hodgson v. Gascoigne, 5 Barn. & Ald. 88. See, also, Rankin v. Kinney, 7 Bradw. [Ill.] 215; Gillett v. Balcom, 6 Barb. [N. Y.] 370.—Note to Hecht v. Dettman [Iowa] 41 Am. Rep. 181.

94. Though the crop be matured. Firebaugh v. Divan, 207 Ill. 287, 69 N. E. 924. Compare Meffert v. Dyer [Mo. App.] 81 S. W. 643, containing statement of an inconsistent rule. Instruction to this effect was proper where only the landlord's share was in question. Abbott v. Abbott [Kan.] 75 P. 1040. A reservation of "all the hay" means future crops and not hay in the loft. Howe v. Collins, 98 Me. 445, 57 A. 587.

Note: A crop is considered as growing from seed time until it is harvested (Wilkinson v. Ketler, 69 Ala. 435), and passes by a sale of the land unless reserved (Crews v. Pendleton, 1 Leigh [Va.] 297, 19 Am. Dec. 750; Turner v. Cool, 23 Ind. 56; Gibbons v. Dillingham, 10 Ark. 9, 50 Am. Dec. 233; Coman v. Thompson, 47 Mich. 22, 41 Am. Rep. 706; Wilkins v. Vashbinder, 7 Watts [Pa.] 378). And see Pitts v. Hendrix, 6 Ga. 452, where a growing crop laid by before maturity was held to have passed. In Backenstoss v. Staler, 33 Pa. 251, 75 Am. Dec. 592, it was held that growing crops were personalty but passed as an appurtenant unless reserved, citing Bear v. Bitzer, 16 Pa. 178, and a crop of grain was held not to pass in Smith v. Johnstone, 1 Pen. & W. [Pa.] 471, 21 Am. Dec. 404.—From note to Dickey v. Waldo [Mich.] 23 L. R. A. 449.

95. Under Civ. Code 1895, § 3546, until such time he may recover the crop from a vendee of the purchaser. Butler, Stevens & Co. v. Georgia & A. R. Co. [Ga.] 47 S. E. 320. A planter is one engaged in the business of producing crops from the soil. Id.

96. Where landlord was to have one-half of certain crops, the tenant was entitled to the whole of any crop not specified. In re Luckenbill, 127 F. 984. Written lease cannot be varied by parol. Id. Where a tenant executes a trust deed authorizing the trustee to obtain possession of his share after condition broken, the trustee could maintain replevin against the landlord. Alexander v. Zeigler [Miss.] 36 So. 536.

97. Under Code §§ 1754, 1755, his widow after the crop has been allotted to her as a portion of her year's support under the statute may maintain conversion on the lessor's refusal to deliver. Parker v. Brown [N. C.] 48 S. E. 657. Under a lease providing that the lessor should furnish seed and the lessee the labor, the crop to be divided where the lessee died after planting but before harvest, his personal representatives can recover his interest less damage caused by his death. Id. Instruction to this effect held proper. Id. After the landlord recognized the widow's right, on gathering the crop, he held a portion of it in trust for her. Id. Even though at the time demand therefor was made, the crop had not been harvested. Id.

98. One who buys a tenant's crop knowing it to have been grown on demised premises incurs a liability to the landlord under Rev. St. 1899, § 4123, but is not guilty of conversion unless he knew of the landlord's lien. Crane v. Murray [Mo. App.] 80 S. W. 280.

99. Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856, citing other authorities.

100. A reservation thereof in a deed of her interest reserves nothing as against a reversioner. Garnett Smelting & Development Co. v. Watts [Ala.] 37 So. 201.

101. Title remains in the government until final proof. Anderson v. Wilder [Miss.] 35 So. 875.

102. A part of the crop had been misappropriated by one. Sowles v. Martin [Vt.] 56 A. 979. A purchaser from the tenant was a proper party. Id.

EMINENT DOMAIN.

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§ 1. *The power of the state and delegations of it.*[1]—The power of eminent domain is inherent in every sovereignty,[2] is inalienable,[3] and exists independent of and before constitutions.[4] Since the legislature cannot in every case supervise condemnation, it may confer the power upon agencies;[5] but the power thus conferred is always strictly construed, and will not be permitted to be exercised except where it is affirmatively granted.[6] The power may be granted to a foreign corporation, but cannot be exercised by it unless granted.[7] The legislature has power to impose the additional servitude of poles and wires on public highways and turnpikes, the fee of which is in abutting owners;[8] and the condemnation of particular

1. See 1 Curr. L. 1002.

2. Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co., 119 Ga. 354, 46 S. E. 422; Shively v. Lankford, 174 Mo. 535, 74 S. W. 835.

3. Hollister v. State [Idaho] 71 P. 541. See 1 Curr. L. 1002, n. 2.

4, 5. Shively v. Lankford, 174 Mo. 535, 74 S. W. 835; Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co., 119 Ga. 354, 46 S. E. 422.

6. Chestatee Pyrites Co. v. Cavender Creek Gold Min. Co., 119 Ga. 354, 46 S. E. 422; Georgia R. & Banking Co. v. Union Point, 119 Ga. 809, 47 S. E. 183. Power to a municipality to "establish and lay out new streets as public necessity requires" does not authorize it to exercise the power of eminent domain for that purpose. Georgia R. & Banking Co. v. Union Point, 119 Ga. 809, 47 S. E. 183. Power to require railroads to make street crossings does not authorize it to exercise the power of eminent domain to lay out new streets across the right of way. Id.

7. Cannot be exercised by foreign corporation whose status to exercise is founded on a violation of the state law. Illinois State Trust Co. v. St. Louis, etc., R. Co., 208 Ill. 419, 70 N. E. 357.

8. Electric light. Brown v. Radnor Tp. Elec. Light Co., 208 Pa. 453, 57 A. 904. In Ohio, a telephone company has the right by direct legislative grant to use any and all streets within a municipality. Fitzsimmons Telephone Co. v. Cincinnati, 2 Ohio N. P. (N S.) 51.

property may be authorized by special act.[9] Authority to have lands "laid out" and appraised does not authorize taking by mere entry and seizure, but means by condemnation proceedings.[10] Failure of the act of congress to provide for the collection of assessments of benefits in street extension cases in the District of Columbia does not invalidate assessments of damages under the act.[11]

Who may exercise the power.[12]—Municipal corporations, such as cities,[13] and levee boards,[14] and those private corporations whose business is of a public nature, such as railroad,[15] street railroad,[16] irrigation,[17] telephone,[18] and gas[19] companies, and cemetery companies and associations, are generally authorized to exercise the power,[20] and while foreign corporations cannot exercise the power unless expressly authorized,[21] authority may be conferred upon them.[22]

§ 2. *Purposes and uses of a public character.*[23]—The purpose or use for which the property is taken must be public,[24] and whether or not the use is public is a question of law,[25] though the determination of the legislature on the question is presumptively correct.[26] A city may be invested with authority to condemn

9. Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n [Conn.] 58 A. 467.

10. Town of Littleton v. Berlin Mills Co. [N. H.] 58 A. 877.

11. Todd v. Macfarland, 20 App. D. C. 176.

12. See 1 Curr. L. 1003.

13. City of Dallas v. Hallock, 44 Or. 246, 75 P. 204; State v. Superior Court of King County [Wash.] 77 P. 382.

14. A board of levee inspectors is a "corporation" within the eminent domain act of Arkansas. Archer v. Board of Levee Inspectors, 128 F. 125.

15. The lessee of the property and franchises of a railroad company may exercise the power for the lessor, though practically for the lessee's own benefit. Glaser v. Glenwood R. Co., 208 Pa. 328, 57 A. 713. See 1 Curr. L. 1004, n. 19.

16. Younkin v. Milwaukee Light, Heat & Traction Co. [Wis.] 98 N. W. 215.

17. Corporation organized under Tex. Rev. St. 1895, art. 642, subd. 23, for irrigation, milling, navigation and stock raising may exercise the power under arts. 704, 3125, 3126. Borden v. Trespalacios Rice & Irrigation Co. [Tex. Civ. App.] 82 S. W. 461.

18. Pennsylvania Tel. Co. v. Hoover [Pa.] 58 A. 922; New Union Tel. Co. v. Marsh, 96 App. Div. 122, 89 N. Y. S. 79.

19. Corporations organized for the production and distribution of natural gas may exercise the power. City of La Harpe v. Elm Tp. Gas, Light, Fuel & Power Co. [Kan.] 76 P. 448.

20. Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n [Conn.] 58 A. 467. Cemetery corporations are public in New York and entitled to exercise the right. In re Lyons Cemetery Ass'n, 93 App. Div. 19, 86 N. Y. S. 960.

21. Foreign private mining company cannot in Georgia under Pol. Code 1895, §§ 650-657. Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co., 119 Ga. 354, 46 S. E. 422.

22. Illinois State Trust Co. v. St. Louis, etc., R. Co., 208 Ill. 419, 70 N. E. 357. Foreign telegraph and telephone companies. Cumberland Tel. & T. Co. v. Morgan's Louisiana & T. R. & S. S. Co., 112 La. 287, 36 So. 352.

23. See 1 Curr. L. 1004.

24. Branch track to private manufacturing plant may be. Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 A. 1001. See 1 Curr. L. 1006, n. 36, 43. State v. Toledo R. & Terminal Co., 24 Ohio Circ. R. 321. Branch track to warehouse. Stockdale v. Rio Grande Western R. Co. [Utah] 77 P. 849. Branch track to mine is. New York Min. Co. v. Midland Min. Co. [Md.] 58 A. 217. See 1 Curr. L. 1006, n. 36. Branch track to quarry is. Francis Jones & Co. v. Venable, 120 Ga. 1, 47 S. E. 549. See 1 Curr. L. 1006, n. 36. Construction and operation of roads and tramways for the development and working of mines is public. Highland Boy Gold Min. Co. v. Strickley [Utah] 78 P. 296. Use of public electric light and power company is. Rockingham County Light & Power Co. v. Hobbs [N. H.] 58 A. 46. Private use of land for burial ground may be but is not strictly so. Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n [Conn.] 58 A. 467. Right to fish in inland lake is not. Albright v. Sussex County Lake & Park Commission [N. J. Err. & App.] 57 A. 398. See 1 Curr. L. 1007, n. 55. Taking right of way for water to irrigate a private farm is. Nash v. Clark, 27 Utah, 53, 75 P. 371. The Washington statute providing for the exercise of the power for irrigation has a sufficient title and provides sufficient notice to constitute due process of law [Laws 1899, p. 261, c. 131]. Weed v. Goodwin [Wash.] 78 P. 36. Texas act March 19, 1895, providing for irrigation companies is valid and creates a public use. Borden v. Trespalacios Rice & Irr. Co. [Tex. Civ. App.] 82 S. W. 461. A drainage ditch is public, though the overflowed area is only 160 acres. Laguna Drainage Dist. v. Charles Martin Co. [Cal.] 77 P. 933. A road chiefly valuable to applicant may be public. Heninger v. Peery [Va.] 47 S. E. 1013. An act for opening private ways held unconstitutional [Gen. St. 1901, §§ 6053-6055]. Clark v. Mitchell County Com'rs [Kan.] 77 P. 284.

25. Rockingham County Light & Power Co. v. Hobbs, 72 N. H. 531, 58 A. 46; Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 A. 1001; City of Dallas v. Hallock, 44 Or. 246, 75 P. 204.

26. Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 A. 1001.

lands and riparian rights for a system of waterworks,[27] and cities of the first class in Washington may condemn property for the maintenance of electric light plants.[28] Where a city is proceeding to acquire lands and riparian rights for waterworks, it is immaterial to a landowner whether provision has been made by tax for defraying the expense, or by pledging the tolls for supplying water.[29] The New York statute declaring Deer River a public highway for floating logs and timber and providing for the assessment of damages to riparian owners is not invalid, as limiting the use to condemnation petitioners.[30] A private corporation in Washington has no power to exercise the right of eminent domain to acquire the right to float logs in a stream by means of dams at times when it is not navigable for the purpose in its ordinary state.[31] Where an electric street railway runs through a country so sparsely settled that the traffic along the highway would not support it, the construction is not a public necessity and the power of eminent domain cannot be exercised by it.[32]

§ 3. *Property liable to appropriation and estate therein which may be acquired.*[33]—The question of the necessity, propriety, and expediency of appropriating a given property to a proposed public use and the extent to which it shall be taken rest wholly in legislative discretion, subject only to the restraint that just compensation shall be made.[34] A city cannot condemn railroad lands and so secure the removal of tracks, nor can a railroad company condemn its own lands.[35] Lands of the state cannot be condemned by a public agency of the state.[36] Where land is deeded to a railroad company for a right of way, reserving a ferry landing and right of way, the company can afterwards condemn the right of way and landing.[37] Where a statute authorizes a railroad company to condemn the right of crossing a canal in which the state is financially interested and which is in the custody of the court, it should be permitted to institute proceedings without interference from the trustees appointed by the court to manage the canal.[38] An electric street railroad cannot exercise the power as to the additional servitude of interurban traffic, though that is the only desired right it has to obtain.[39] Telephone companies have no right of eminent domain in Pennsylvania over the lands of private owners,[40] but in New York, a telephone company may condemn the

27. City of Dallas v. Hallock, 44 Or. 246, 75 P. 204.

28. Ordinance held sufficient. State v. Superior Court of King County [Wash.] 77 P. 382.

29. City of Dallas v. Hallock, 44 Or. 246, 75 P. 204.

30. Laws 1903, p. 1240, c. 565. In re Wilder, 90 App. Div. 262, 85 N. Y. S. 741.

31. Matthews v. Belfast Mfg. Co. [Wash.] 77 P. 1046.

32. Hartshorn v. Illinois Valley Traction Co., 210 Ill. 609, 71 N. E. 612.

33. See 1 Curr. L. 1006.

34. City of Dallas v. Hallock, 44 Or. 246, 75 P. 204; Atlantic & B. R. Co. v. Penny, 119 Ga. 479, 46 S. E. 665. A statute authorizing condemnation to widen railroads is not unconstitutional for indefiniteness in failing to limit them to a specific width. Dryden v. Pittsburgh, etc., R. Co., 208 Pa. 316, 57 A. 710. The levee board in Louisiana is invested with large powers and broad discretion in determining the area of land needed in constructing new levees or repairing old. Board of Levee Com'rs Orleans Levee Dist v Jackson's Estate [La.] 36 So. 912 Especially where its action is founded on the action of the state board of engineers. Id. Its determination is not conclusive, however, and a landowner is entitled to show that more land than is in fact needed is being expropriated to the great damage of the owner. Id.

35. Compensation to a private individual for the loss incident to a railroad company's removal of a switch over its own lands, maintained by contract with such individual for his benefit, cannot be given by way of condemnation proceedings instituted by the city under arrangement with which the removal was made or by the company itself. Since conceding that the individual in question has an easement in the lands, the city has no power to condemn railroad lands, nor can the company condemn its own lands. Swift v. Delaware, etc., R. Co. [N. J. Eq.] 57 A. 456.

36. People v. Sanitary Dist. of Chicago, 210 Ill. 171, 71 N. E. 334.

37. Kenny v. Pittsburg, etc., R. Co., 208 Pa. 30, 57 A. 74.

38. Chesapeake & O. Canal Co. v. Western Md. R. Co. [Md.] 58 A. 34.

39. Younkin v. Milwaukee Light, Heat & Traction Co. [Wis.] 98 N. W. 215.

40. Pennsylvania Telephone Co. v. Hoover [Pa.] 58 A. 922.

right to maintain its poles and wires in a street, the fee of which is in the abutting owners.[41] Where a cemetery corporation is authorized to acquire land forming "one continuous tract," the fact that the additional tract it is proposed to condemn is separated from the original plot by a public highway is immaterial.[42] The right to fish in an inland lake cannot be taken because the supply of fish therein is so small as to be incapable of meeting a public demand, and the object of acquiring such a right is not use which implies utility, but mere sport or pastime.[43] A city in Washington may condemn property for an electric light plant outside the city limits.[44]

Property exempt by law.[45]—A railroad company in Pennsylvania cannot condemn a dwelling house for original right of way,[46] but may for widening a right of way already in existence.[47]

Property in actual and necessary use for a public purpose.[48]—It is a general rule that land acquired under the right of eminent domain for a public use cannot be appropriated to a different public use inconsistent with that to which it was first appropriated, unless the intention of the legislature to so appropriate is plainly expressed;[49] but where the new use is not inconsistent with the old, authority to take for the new use may be inferred from slight indications of intention,[50] and land in public use may be condemned for the same use where its present owner will not need it for a long time to come,[51] or where the original acquirement was only colorable to prevent its beneficial use for the same purpose by others.[52] Lands held by a railroad company for right of way may be condemned as any other for the purpose of crossing them with a sewer,[53] and a road can be laid out over land of a railroad company outside the line of its road and within a location acquired for railroad purposes.[54] A proceeding to condemn land of which the state is the owner is a mere nullity, since the state cannot be sued and in any event would not sue itself.[55] It is competent for the legislature to authorize the taking of a waterworks system by the right of eminent domain, not-

41. New Union Tel. Co. v. Marsh, 96 App. Div. 122, 89 N. Y. S. 79.

42. In re Lyon's Cemetery Ass'n, 93 App. Div. 19, 86 N. Y. S. 960.

43. Albright v. Sussex County Lake & Park Commission [N. J. Err. & App.] 57 A. 398. See 1 Curr. L. 1007, n. 55.

44. State v. Superior Court of King County [Wash.] 77 P. 382.

45. See 1 Curr. L. 1007.

46. A constitutional provision empowering any association to build a railroad between any two points in the state does not repeal by implication a statute exempting dwelling houses from condemnation. [Pa. Const. 1874, art. 17, § 1; Act Feb. 19, 1849, § 10 (P. L. 83)]. Weigold v. Pittsburg, etc., R. Co., 208 Pa. 81, 57 A. 188.

47. Act Mch. 7, 1869 (P. L. 12). Dryden v. Pittsburg, etc., R. Co., 208 Pa. 316, 57 A. 710; Glaser v. Glenwood R. Co., 208 Pa. 328, 57 A. 713.

48. See 1 Curr. L. 1007.

49. Eldredge v. Norfolk County Com'rs, 185 Mass. 186, 70 N. E. 36. Land at a railroad crossing jointly used by both roads for station purposes cannot be condemned by one of the roads. Louisiana, etc., R. Co. v. Vicksburg, etc., R. Co., 112 La. 915, 36 So. 803. Land held and used for a public use, when needed for a different or inconsistent public use, may be condemned for the latter use, but a statute will not be so construed unless clearly applicable. Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n [Conn.] 58 A. 467. Under Ohio statutes, a railroad proposing to appropriate the land of another company longitudinally must establish an urgent necessity for the land. Steubenville & T. R. Co. v. Cleveland & P. R. Co., 2 Ohio N. P. (N. S.) 45.

50. Eldredge v. Norfolk County Com'rs, 185 Mass. 186, 70 N. E. 36. The legislature has power to interfere with property held for a public use, and authority also to occupy it for another public use when such other public use may be enjoyed without detriment to the public or without interfering with the prior use. In re City of Gloversville, 42 Misc. 559, 87 N. Y. S. 612.

51. Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n [Conn.] 58 A. 467. Under the Ohio statutes, where it is absolutely necessary for a railroad to have the land it seeks to appropriate in order to build its road, and the railroad company owning it will not need it for a long time to come, the right to appropriate exists. Steubenville & T. R. Co. v. Cleveland & P. R. Co., 2 Ohio N. P. (N. S.) 45.

52. Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n [Conn.] 58 A. 467.

53. In re City of Gloversville, 42 Misc. 559, 87 N. Y. S. 612.

54. Eldredge v. Norfolk County Com'rs, 185 Mass. 186, 70 N. E. 36.

55. People v. Sanitary Dist. of Chicago, 210 Ill. 171, 71 N. E. 334.

withstanding existing contracts with the municipality for which allowance may be made in awarding damages.[56]

Statutory authority to petitioner to choose his own location.[57]—That another suggested location is better adapted to the purpose is unavailing, for except as specially restricted by the legislature, those invested with the power of eminent domain for a public purpose can make their own location according to their own views of what is best or expedient, and this discretion cannot be controlled by the courts unless clearly abused.[58] Whether a railroad company in Georgia will take a strip 200 feet wide or less for its right of way is left to its own discretion,[59] and the amount of land it will take for terminals, stations and the like is also primarily within its own discretion, subject to control by the courts in case of abuse.[60] A statute authorizing the use of the power of eminent domain by railroad companies for the purpose of widening their rights of way is not invalid because no limit of width is set.[61]

Use or estate which may be exercised.[62]—A telephone company seeking to condemn the right to erect poles and wires in a street in front of an owner's property should only be permitted to acquire an easement for that purpose.[63]

§ 4. *What is a "taking" or "injuring" of property.*[64]—Any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed, is a taking requiring compensation,[65] though the title and possession of the owner remain undisturbed.[66] Where a municipal corporation, in pursuance of proper legislative authority, grants a valid franchise, privilege, or right to use or occupy a public street, common, or levee, or navigable waters adjacent thereto for a public purpose, such as the construction and maintenance of wharves in aid of commerce, water tanks for use in sprinkling streets, telegraph and telephone poles, railway tracks and the like, and the grantee, in reliance on such grant, expends money in the prosecution of his enterprise, he thereby acquires a property interest or right which can only be taken away under the power of eminent domain and after proper compensation.[67] The purpose or use, however, for which the license is granted must be public, and where the use is clearly private, as vault privileges under the street in favor of an abutting owner, no easement arises and the license may be withdrawn by the municipality at any time.[68] The fixing of a maximum rate to be charged for a public utility may be a taking,[69]

56. City of Leavenworth v. Leavenworth City & Ft. L. Water Co. [Kan.] 76 P. 451. See, also, City of Santa Barbara v. Gould [Cal.] 77 P. 151.

Note: To the same effect, see In re City of Brooklyn, 143 N. Y. 596, 38 N. E. 983; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 17 S. Ct. 718.

57. See 1 Curr. L. 1008.

58. 2 Lewis, Em. Dom. (2d Ed.) 891. City of Dallas v. Hallock, 44 Or. 246, 75 P. 204. See 1 Curr. L. 1009, n. 71. Board of Levee Com'rs v. Jackson's Estate [La.] 36 So. 912.

59, 60. Atlantic & B. R. Co. v. Penny, 119 Ga. 479, 46 S. E. 665.

61. Dryden v. Pittsburg, etc., R. Co., 208 Pa. 316, 57 A. 710.

62. See 1 Curr. L. 1009.

63. New Union Tel. Co. v. Marsh, 96 App. Div. 122, 89 N. Y. S. 79.

64. See 1 Curr. L. 1009.

65. Stockdale v. Rio Grande Western R. Co. [Utah] 77 P. 849. In Pennsylvania, damages to abutting property caused by a local improvement may be recovered for all injuries the direct, immediate and necessary or unavoidable consequences of the act of eminent domain itself, irrespective of care or negligence. Sewer. Removal of lateral support to injury of house. Fyfe v. Turtle Creek Borough, 22 Pa. Super. Ct. 292.

66. Stockdale v. Rio Grande Western R. Co. [Utah] 77 P. 849.

67. Mead v. Portland [Or.] 76 P. 347, citing 1 Dillon, Mun. Corp. (4th Ed.) §§ 110, 111; 29 Am. & Eng. Enc. Law (1st Ed.) 69; Portland & W. V. R. Co. v. Portland, 14 Or. 188, 12 P. 265, 58 Am. Rep. 299; Savage v. Salem, 23 Or. 381, 31 P. 832, 37 Am. St. Rep. 688, 24 L. R. A. 787; City of Des Moines v. Chicago, etc., R. Co., 41 Iowa, 569; Phillipsburg El. Co. v. Phillipsburg, 66 N. J. Law, 505, 49 A. 445; Langdon v. New York, 105 N. Y. 419, 11 N. E. 829; Kingsland v. New York, 110 N. Y. 669, 18 N. E. 435.

68. Lincoln Safe Deposit Co. v. New York, 88 N. Y. S. 912.

69. Boise City Irrigation & Land Co. v. Clark [C. C. A.] 131 F. 415; Stanislaus Coun-

but an assessment for a local improvement is not an invalid taking unless it is out of all proportion to the benefits conferred,[70] and a public nuisance may be abated, and the benefits of the abatement, if accruing to the owner of the land upon which it is situated, may be assessed against such owner, without making such abatement an exercise of the power of eminent domain.[71] Right of way over lands belonging to the public school fund of the state may be granted to railroads in Texas without payment,[72] and no exercise of the power of eminent domain is necessary where a railroad company desires to lay water conduits along its own right of way and across city streets, to supply its own buildings with water.[73] The extension by the legislature of the boundaries of a municipal corporation cannot be a taking.[74] A street railroad company may be compelled to extend its tracks along certain streets.[75] Where, relying on a contract and the lease of a city's water rights, a private owner has perfected a water system and installed distributing appliances at great expense, a decree holding the contract void and adjudging the property to be in the city takes the private owner's property without compensation.[76] Cases discussing particular injuries are collected in the note.[77]

ty v. San Joaquin & K. River Canal & Irr. Co., 192 U. S. 201, 48 Law. Ed. 406.

70. McMillan v. Butte [Mont.] 76 P. 203.

71. Drainage of swamp. Rude v. St. Marie [Wis.] 99 N. W. 460.

72. Texas Cent. R. Co. v. Bowman [Tex.] 79 S. W. 295.

73. City of Canton v. Canton Cotton Warehouse Co. [Miss.] 36 So. 266.

74. City of Little Rock v. North Little Rock [Ark.] 79 S. W. 785.

75. Metropolitan R. Co. v. Macfarland, 20 App. D. C. 421.

76. Ogden City v. Bear Lake & River Waterworks & Irr. Co. [Utah] 76 P. 1069.

77. A statute providing for the erection of partition fences by public authority and the enforcement of a lien on the land for the cost thereof is not invalid as taking property without just compensation [Burns' Rev. St. 1901, §§ 6564, 6569]. Tomlinson v. Bainaka [Ind.] 70 N. E. 155. For the operation of pumping plants and driven wells by a city, whereby the water level of lands is lowered and their fertility decreased, the owner is entitled to damages, though their amount is difficult of ascertainment. Dinger v. City of New York, 42 Misc. 319, 86 N. Y. S. 577. Compare Westphal v. New York, 177 N. Y. 140, 69 N. E. 369; Reisert v. New York, 42 Misc. 275, 86 N. Y. S. 576. An order for the examination of the underground workings of a mine, and to permit the use of its machinery and appliances on paying the cost of operation, is not a taking without compensation. State v. District Court of Silver Bow County [Mont.] 76 P. 206. Any change of the position of its track on the right of way, or of the position of a county highway on such right of way, or a change from a cut to a fill, may be made without further compensation to the owner of the servient estate. Brinkley v. Southern R. Co., 135 N. C. 654, 47 S. E. 791. Injury caused property by noise, smoke, cinders, and gas from engines on a railway near the property is such "damage" as to require compensation by the company. But it must be shown that the damage suffered is greater than that suffered by the public generally. Facts of this case did not show an estoppel to claim compensation. Missouri, etc., R. Co. v. Calkins [Tex. Civ. App.] 79 S. W. 852.

Pollution of streams: The discharge of sewage into a stream is a taking of the lower riparian owner's right to have the stream flow by or over his land in the natural manner. City of Waterbury v. Platt Bros. & Co., 76 Conn. 435, 56 A. 856; Matheny v. Aiken [S. C.] 47 S. E. 56. The enforcement of a rule by a sanitary board forbidding the pollution by an upper riparian proprietor of any stream used for water supply by a city is, in the absence of a prescriptive right, not a taking requiring compensation. Sprague v. Dorr, 185 Mass. 10, 69 N. E. 344.

Mill dams, and flowage of land: The flowage of land by a mill dam is a taking within the power of eminent domain (Ingram v. Maine Water Co., 98 Me. 566, 57 A. 893), but the appropriation of the water of a stream for a mill, though interfering with the natural rights of an upper or lower riparian proprietor, is not (Otis Co. v. Ludlow Mfg. Co. [Mass.] 70 N. E. 1009). The enlargement of a bridge pier which deflects the course of a stream, causing it to overflow and erode plaintiff's land and undermine his house, is a taking. Barron v. Memphis [Tenn.] 80 S. W. 832. But damages to land by flooding as the result of revetments erected by the United States along the Mississippi to prevent erosion of the banks from natural causes are consequential only and do not amount to a taking. Bedford v. U. S., 192 U. S. 217, 48 Law. Ed. 414.

Building restrictions: A prohibition against placing buildings within a certain distance from the street must provide for compensation to be valid (People v. Calder, 89 App. Div. 503, 85 N. Y. S. 1015), and a prohibition to erect bill boards on private property without regard to whether public safety requires it is an attempt to take without compensation (Bill Posting Sign Co. v. Atlantic City [N. J. Law] 58 A. 342).

Regulations of railways: Compelling a railroad company to establish stations at incorporated villages along its line is not a taking. Minneapolis, etc., R. Co. v. Minnesota, 193 U. S. 53, 48 Law. Ed. 614. A statute denouncing a penalty against a railroad failing to keep its right of way clear of dry vegetation, in favor of any one injured, does

Establishment or vacation of streets.[78]—Land taken for the purpose of opening or widening a street or highway thereon must be paid for,[79] and damages caused thereby to land not taken are allowed.[80] A street cannot be closed without compensation to abutting owners.[81]

Establishment or change of street grade.[82]—A change of street grade resulting in a permanent injury to an abutting owner's premises must be compensated.[83]

Railroads or other ways or structures on city streets.[84]—An abutting owner on a street, irrespective of whether he owns the fee, has the right to be compensated for any additional servitude placed on his property by any use of the highway not incidental or necessary to its full enjoyment as such by the public.[85] An elevated railroad[86] or a common passenger and freight railroad cannot be constructed upon the streets of a city without permission of abutting lot owners first had and obtained, or condemnation and payment of damages,[87] but the construction of a subway beneath city streets[88] or the operation of a street railroad is not an additional servitude,[89] except where a line extends from one city through another to a point beyond, in which case the line is an additional servitude on the streets of the intermediate city.[90] An electric light company has no right to set a pole in front of an abutting owner's property so as to require the trimming of his shade trees without his consent,[91] and water mains cannot be built in streets by a private corporation without compensation to the owner of the soil.[92] The consent of property owners along the line of a proposed street railroad is required in New Jersey.[93]

not devote private property to private use. McFarland v. Mississippi River, etc., R. Co., 175 Mo. 423, 75 S. W. 152.

78. See 1 Curr. L. 1010.

79. Scace v. Wayne County [Neb.] 100 N. W. 149. The widening of a street so as to encroach on abutting owners requires compensation. Village of Watkins v. Welch Grape Juice Co., 96 App. Div. 114, 89 N. Y. S. 47. The laying out and opening of a public street across the right of way and track of a railroad company without the consent of the company is a taking or damaging of private property for a public purpose which requires the exercise of the power of eminent domain. Georgia R. & B. Co. v. Union Point, 119 Ga. 809, 47 S. E. 183. Power to a municipal corporation to require railroads to make crossings does not empower it to open new streets across right of way without compensation. Id.

80. That a section line crosses a farm is immaterial on the question of damages for laying out a highway along such line. Scace v. Wayne County [Neb.] 100 N. W. 149. A landowner whose land is not taken is not entitled to damages because of an accumulation of surface water on his land on account of the grade of a parkway. McSweeney v. Com., 185 Mass. 371, 70 N. E. 429.

81. Laurel Imp. Co. v. Rowell [Miss.] 36 So. 543.

82. See 1 Curr. L. 1010.

83. Swope v. Seattle, 35 Wash. 69, 76 P. 517. For changing the level of a street without an ordinance establishing or changing the grade, a city is liable. Removal of sidewalk held change of grade. Caldwell v. Nashua, 122 Iowa, 179. 97 N. W. 1000.

84. See 1 Curr. L. 1011.

85. Poles and wires for street light are not additional servitude, though shade trees are trimmed. Town of Hazlehurst v. Mayes [Miss.] 36 So. 33; compare Malone v. Waukesha Elec. Light Co. [Wis.] 98 N. W. 247.

86. De Geofroy v. Merchants' Bridge Terminal R. Co., 179 Mo. 696, 79 S. W. 386.

87. Mordhurst v. Ft. Wayne & S. W. Traction Co. [Ind.] 71 N. E. 642; South Bound R. Co. v. Burton [S. C.] 46 S. E. 340. The placing of a steam railway track on a public street imposes an additional burden upon it, for which the abutting owners are entitled to compensation. Stockdale v. Rio Grande Western R. Co. [Utah] 77 P. 849. Though the track is on one side of the street, owners on both sides are "abutting owners" within this rule. Herzog v. Cincinnati, 2 Ohio N. P. (N. S.) 17. A statute giving abutting owners the right to damages for the maintenance of railway tracks in streets applies where the street becomes a city street subsequent to the building of the track [Ky. St. 1903, § 768]. Koch v. Kentucky & I. R. & Bridge Co. [Ky.] 80 S. W. 1133. Permitting the building of a switch track in a street will not estop the abutting owner from claiming damages. Id.

88. Sears v. Crocker, 184 Mass. 586, 69 N. E. 327.

89. The carriage of light express matter, passenger's baggage, and mail matter does not constitute a good ground of complaint. Mordhurst v. Ft. Wayne & S. W. Traction Co. [Ind.] 71 N. E. 642.

90. Younkin v. Milwaukee Light, Heat & Traction Co. [Wis.] 98 N. W. 215.

91. Malone v. Waukesha Elec. Light Co. [Wis.] 98 N. W. 247. Compare Town of Hazlehurst v. Mayes [Miss.] 36 So. 33.

92. Jayne v. Cortland Waterworks Co., 42 Misc. 263, 86 N. Y. S. 571.

93. Where the statute requires consent of abutting property owners before permission shall be granted to build a street railroad,

Use of rural highways for purposes other than general public travel.[94]—An electric railway is not an additional servitude on a highway, in Wisconsin or New Jersey.[95] Telephone poles are an additional servitude in New York,[96] but not in Kansas.[97]

Erection of public viaducts and bridges.[98]—In New York City, where new station houses for elevated railroads occupy more of the street than the original viaduct, and tend to deprive landowners of their easements of light, air and access, the landowners are entitled to damages.[99]

§ 5. *Right of appropriation as dependent on compensation, payment, deposit, or offer to purchase.—Compensation is necessary,*[1] and the legislature cannot authorize the taking of private property for public use without it.[2] Where a railroad terminal company is authorized to condemn lands below low water mark for a station and to extend certain streets, it cannot avoid paying the state for so much of the land as is opened for streets on the theory that the public rights of navigation and fishery are compensated by the new easement of way created by the extension of the streets.[3] A statute making a stream a public highway and providing for compensation to "riparian owners" cannot be declared invalid on the ground that it fails to compensate owners of the bed of the stream not "riparian," in the absence of proof that there are any such owners.[4] A railroad company in Tennessee acquires no rights by going upon land and commencing construction work without the owner's consent after filing petition for condemnation.[5]

Necessity of payment of compensation or deposit in court before taking property.[6]—Compensation must be paid or secured before taking, injury or destruction,[7] and injunction will lie to prevent taking or occupancy where no compensation has been made and no proceedings had to condemn,[8] but the improvement

the consent of an owner cannot bind his successors in title, and where an application to the town council is denied, the consents terminate and cannot be used on a future application without being regiven. Paterson & S. L. Traction Co. v. Wostbrock [N. J. Eq.] 56 A. 698. Consents are valid, though executed before the description and map are filed in the office of the secretary of state, but it cannot be presumed they were given with reference to a defective map previously filed. Mercer County Traction Co. v. United New Jersey R. & Canal Co. [N. J. Eq.] 56 A. 897. An agreement by the company to give a valuable option to purchase stock as a consideration of the landowner's consent is contrary to public policy and unenforceable. Montclair Military Academy v. North Jersey St. R. Co. [N. J. Err. & App.] 57 A. 1050.

94. See 1 Curr. L. 1012.

95. Younkin v. Milwaukee Light, Heat & Traction Co. [Wis.] 98 N. W. 215; Montclair Military Academy v. North Jersey St. R. Co. [N. J. Err. & App.] 57 A. 1050.

96. Gray v. York State Tel. Co., 92 App. Div. 89, 86 N. Y. S. 771.

97. McCann v. Johnson County Telephone Co. [Kan.] 76 P. 870.

98. See 1 Curr. L. 1012.

99. Ketcham v. New York & H. R. Co., 177 N. Y. 247, 69 N. E. 533.

1. Kime v. Cass County [Neb.] 99 N. W. 546; Swope v. Seattle, 35 Wash. 69, 76 P. 517. Nebraska Drainage act held constitutional within the rule [Cobbey's St. 1903, §§ 5500-5527]. Morris v. Washington County [Neb.] 100 N. W. 144. See 1 Curr. L. 1012.

2. Any statute attempting it is void. Enlargement of bridge pier deflecting course of stream eroding plaintiff's land and undermining his house. Barron v. Memphis [Tenn.] 80 S. W. 832. A statute providing that no damages shall be allowed for injury to an estate by the opening of a street where a building shall have been erected thereon after the plat thereof has been filed is invalid. St. 1891, p. 883, c. 323, § 9, and St. 1892, p. 467, c. 418, § 4. But the invalidity of that portion of the statute does not invalidate the remainder. Edwards v. Bruorton, 184 Mass. 529, 69 N. E. 328. A statute providing for compensation in a lump sum or a sum annually during continuance of the use must as to the latter provision be construed as permissive on consent of the landowner, as otherwise it would be invalid. City of Waterbury v. Platt Bros. & Co., 76 Conn. 435, 56 A. 856. Street grade. City of Houston v. Bartels [Tex. Civ. App.] 82 S. W. 323.

3. Commonwealth v. Boston Terminal Co., 185 Mass. 281, 70 N. E. 125.

4. In re Wilder, 90 App. Div. 262, 85 N. Y. S. 741.

5. Atlanta, etc., R. Co. v. Southern R. Co. [C. C. A.] 131 F. 657.

6. See 1 Curr. L. 1013.

7. Kime v. Cass County [Neb.] 99 N. W. 546; Shevalier v. Postal Tel. Co., 22 Pa. Super. Ct. 506.

8. Change of street grade. Swope v. Seattle, 35 Wash. 69, 76 P. 517.

Highways: Spurlock v. Dornan [Mo.] 81 S.

of a street cannot be enjoined because mere consequential damages to abutting property have not been paid.[9]

Necessity of securing consent or offer to purchase.[10]—In order to establish the failure to agree required by the Ohio statute, it must appear that an explicit offer was made of a definite amount of money for a definite amount of land.[11]

Release or waiver of damages.[12]—Where a landowner expressly consents or clearly acquiesces in the taking of right of way over his land for a railroad without payment, his right to hold the land is gone and he has only a personal claim against the company for the debt;[13] mere passive acquiescence, however, will not waive right to compensation,[14] and the absence of any agreement as to the price to be paid or the manner of determining it negatives a claim that the company was to be given credit, and the owner's right can only be extinguished by appraisal and payment.[15] The sale of land to a city for streets does not bar a claim for so constructing the streets as to cut off access to the owner's remaining property therefrom.[16] A subsequent purchaser may sue for compensation for a railroad right of way which has not been paid for.[17]

§ 6. *Measure and sufficiency of compensation.*[18]—The fair cash market value of property taken,[19] and the difference between such value immediately before and after injury as to property not taken,[20] may be awarded; and to determine this value, the uses to which the property is put by the owner, or to which it is adapted, are to be considered,[21] but not unless such uses actually affect its present value.[22] A railroad company takes only an easement in the surface of the soil, leaving the legal title and beneficial ownership as to all else in the owner of the fee, and therefore where the value of land condemned for railroad right of way consists chiefly in the minerals found below its surface, it is error to instruct that the measure of damages is the fair market value of the land,[23] since the fee tenant still retains the right to remove all minerals not necessary to support the plaintiff's tracks. Remote,[24] fanciful or speculative damages cannot be allow-

W. 412; Kime v. Cass County [Neb.] 99 N. W. 546.

Railroad: Wilson v. Alderman & Sons' Co. [S. C.] 48 S. E. 81; Shipley v. Western Md. Tidewater Co. [Md.] 56 A. 968.

Raising grade of tracks in street: Dean v. Ann Arbor R. R. Co. [Mich.] 100 N. W. 773.

9. Clemens v. Connecticut Mut. Life Ins. Co. [Mo.] 82 S. W. 1.

10. See 1 Curr. L. 1013.

11. Steubenville & T. R. Co. v. Cleveland & P. R. Co., 2 Ohio N. P. (N. S.) 45.

12. See 1 Curr. L. 1014.

13. Bibber-White Co. v. White River Valley Elec. R. Co., 131 F. 995.

14. Kenie v. Cass County [Neb.] 101 N. W. 2.

15. Bibber-White Co. v. White River Valley Elec. R. Co., 131 F. 995.

16. City of Houston v. Bartels [Tex. Civ. App.] 82 S. W. 323.

17. Beal v. Durham & C. R. Co. [N. C.] 48 S. E. 674.

18. See 1 Curr. L. 1014.

19. Conness v. Com., 184 Mass. 541, 69 N. E. 341; Kossler v. Pittsburgh, etc., R. Co., 208 Pa. 50, 57 A. 66; Missouri, etc., R. Co. v. Anderson [Tex. Civ. App.] 81 S. W. 781; Louisiana R. & Nav. Co. v. Jones [La.] 36 So. 877. See 1 Curr. L. 1014, n. 62.

20. South Bound R. R. v. Burton [S. C.] 46 S. E. 340; Louisiana R. & Nav. Co. v. Jones [La.] 36 So. 877. Not the cost of constructing a road to the part rendered inaccessible by the construction complained of. Red River, etc., R. Co. v. Hughes [Tex. Civ. App.] 81 S. W. 1235. See 1 Curr. L. 1014, n. 62.

21. Suitableness as manufacturing site. Conness v. Com., 184 Mass. 541, 69 N. E. 341. Salt well. Kossler v. Pittsburgh, etc., R. Co., 208 Pa. 50, 57 A. 66. Use of island as a shooting preserve. Muskeget Island Club v. Inhabitants of Nantucket, 185 Mass. 303, 70 N. E. 61. See 1 Curr. L. 1015, n. 63.

22. Illinois, etc., R. Co. v. Freeman, 210 Ill. 270, 71 N. E. 444. It is not a question of the value of the property to the owner or its adaptability to the uses of the owner, but of its market value; taking into account, however, all the considerations that would weigh at private sale. Louisiana R. & Nav. Co. v. Jones [La.] 36 So. 877.

23. Missouri, etc., R. Co. v. Schmuck [Kan.] 76 P. 836.

24. Danger to persons crossing tracks and from fire. Illinois, etc., R. Co. v. Freeman, 210 Ill. 270, 71 N. E. 444. Damages to railroad company from construction of telegraph line along right of way. Atlantic Coast Line R. Co. v. Postal Tel. Cable Co. [Ga.] 48 S. E. 15.

ed.[25] Where the part of a tract taken is of greater value as a part of the whole than standing alone, the measure of damages is its value as a part of the whole,[26] and any injury to the residue naturally resulting from the appropriation and the construction and operation of the work should be considered.[27] Failure of the applicant for condemnation to describe the whole of the tract cannot deprive the owner of his damages to the portion not described, where the whole is in fact a single property,[28] but where such undescribed portion is cut off from the rest by another railroad, and therefore less easy of access, that fact may be considered in estimating the damages.[29] Where plaintiff did not own the land at the time the road was built, he is entitled to nothing for incidental injury, his damages extending over to the value of the land taken.[30] The measure of damages where a telegraph company condemns an easement for its line along a railroad right of way is the value of the land actually taken and the extent to which the use of the right of way by the railroad company is diminished by its use by the railroad company.[31] Where a life tenant conveys a right of way to a railroad company, the remaindermen are entitled to recover for their contingent interest, the value of such interest at the time of taking with interest.[32] As in other cases, mere difficulty of proof of the amount of damages is no bar to their recovery.[33] Interest may not be recovered as damages eo nomine, but may be allowed as compensation, the jury being instructed to award such sum as will compensate for delay in paying the damages, not exceeding legal interest.[34] Cases involving the right to interest are discussed below.[35]

Benefits.[36]—The jury have a right to consider the benefits that will accrue to the owner's remaining land from the opening or improvement of a street, and if the benefits are greater than the damages, to refuse an award to him,[37] but the benefits to be considered must be confined to such as are direct and peculiar to the landowner, as distinguished from those benefits shared by him in common with other citizens,[38] and cannot include private improvements subsequently made

25. Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515.

26. Determined with the improvements on the balance of the farm. Illinois, etc., R. Co. v. Humiston, 208 Ill. 100, 69 N. E. 880; Lake Koen Nav., Reservoir & Irr. Co. v. McLain Land & Inv. Co. [Kan.] 76 P. 853. Two properties having no physical connection may be regarded as one in the assessment of damages for right of way, where they are so inseparably connected in the use to which they are applied that the injury or destruction of one must necessarily and permanently injure the other. Kossler v. Pittsburgh, etc., R. Co., 208 Pa. 50, 57 A. 66.

27. Railroad. Louisiana R. & Nav. Co. v. Jones [La.] 36 So. 877; White v. Cincinnati, etc., R. Co. [Ind. App.] 71 N. E. 276. Highway. Scace v. Wayne County [Neb.] 100 N. W. 149. Irrigation ditch. Statute held to contemplate such damages and to be therefore valid. Weed v. Goodwin [Wash.] 78 P. 36.

28, 29. Cook v. Boone Suburban Elect. R. Co., 122 Iowa, 437, 98 N. W. 293.

30. Whitecotton v. St. Louis & H. R. Co. [Mo. App.] 78 S. W. 318.

31. Atlantic Coast Line R. Co. v. Postal Tel. Cable Co. [Ga.] 48 S. E. 15.

32. Charleston & W. C. R. Co. v. Reynolds [S. C.] 48 S. E. 476.

33. Dinger v. New York, 42 Misc. 319, 86 N. Y. S. 577.

34. Shevalier v. Postal Tel. Co., 22 Pa. Super. Ct. 506.

35. Interest on general damages may be allowed from the date of condemnation, but the recovery should be reduced by the value, if any, to the owner of whatever subsequent possession and use of the land he may enjoy. Lake Koen Nav., Reservoir & Irr. Co. v. McLain Land & Inv. Co. [Kan.] 76 P. 853. On confirmation of an award in a street opening case, the landowner is entitled to interest from the date of the award to the date of the confirmation, not only on the amount awarded as the value of the property, but on the sum awarded as interest. In re Dorsett, 92 App. Div. 523, 87 N. Y. S. 308. Where a person makes a claim to the damages awarded to an unknown owner in a street opening case, a claim against the city does not arise so as to bear interest until the claimant establishes his claim in court. In re City of New York, 91 App. Div. 532, 86 N. Y. S. 1035. In New York City, where proceedings were begun and title vested while the consolidation act was in force, the landowner was entitled to interest until payment of the award. In re Opening of Cromwell Ave., 96 App. Div. 424, 89 N. Y. S. 180.

36. See 1 Curr. L. 1016.

37. Pittsburgh, etc., R. Co. v. Wolcott, 162 Ind. 399, 69 N. E. 451.

38. Heninger v. Peery [Va.] 47 S. E. 1013;

by neighbors.[39] In New York City, benefits for more than one-half the value of the property cannot be assessed in street opening cases,[40] but in the District of Columbia, the fact that more benefits than damages are assessed to a particular owner is not necessarily wrong, since only a small portion of an owner's land may have been taken and a large amount benefitted.[41] In New York, no part of the interest on an award allowed a property owner as compensation where his land has been taken before payment can be assessed back upon him as benefits.[42] The Indiana statute governing proceedings by railroads provides that no deduction shall be made for any benefit that may be supposed to result from the contemplated work.[43] In Tennessee, the damages for property taken are assessed without deduction, but incidental damages and benefits may be set off.[44]

Particular elements of damage.[45]—Where land is taken, its value for a special purpose, while not the test, may be considered along with other evidence, on the question of its fair market value;[46] whence riparian rights appurtenant to the land taken[47] and the value of a salt water well on the premises should be considered.[48] Where there are buildings or other structures on the land, they must be paid for as a part of the realty,[49] and the cost of their removal should not be considered;[50] but the value of mere trade fixtures should not be allowed.[51] Incidental damages accruing from the improper construction of a railroad cannot be recovered, the damages extending only to proper construction.[52] Where injury to an established business results, damages may be allowed based on the ordinary rules applicable to such injuries.[53] The destruction of a valuable frontage on another railroad right of way may be considered.[54]

The proper cost of regrading plaintiff's lot made necessary by a change of street grade,[55] and the depreciation in value if any of the entire tract, after deducting special benefits, is a proper element of damage, where a highway divides a tract into two parts.[56] Where a street is opened over railway tracks, the expense of planking the crossing[57] and the cost of removal of a water crane necessitated by the widening of a street across railway tracks should be considered in estimating the damages to the railroad company.[58]

Pickles v. Ansonia, 76 Conn. 278, 56 A. 552; City of Houston v. Bartels [Tex. Civ. App.] 82 S. W. 323.

39. Change of street grade. Pickles v. Ansonia, 76 Conn. 278, 56 A. 552.

40. Award held insufficient. In re Opening of Whitlock Ave., 85 N. Y. S. 550.

41. Clapp v. Macfarland, 20 App. D. C. 224.

42. In re City of New York, 44 Misc. 126, 89 N. Y. 769.

43. Chicago, etc., R. Co. v. Wysor Land Co. [Ind.] 69 N. E. 545.

44. Const. art. 1, § 21. Shannon's Code, § 1857. Wray v. Knoxville, etc., R. Co. [Tenn.] 82 S. W. 471.

45. See 1 Curr. L. 1015.

46. Value for a mill site. Conness v. Com., 184 Mass. 541, 69 N. E. 341.

47. Dolbeer v. Suncook Waterworks Co. [N. H.] 58 A. 504.

48. Not the profits from operating it, but its selling value. Kossler v. Pittsburg, etc., R. Co., 208 Pa. 50, 57 A. 66.

49. Machinery therein is included. White v. Cincinnati, etc., R. Co. [Ind. App.] 71 N. E. 276. Dwelling house. Stauffer v. Cincinnati, etc., R. Co. [Ind. App.] 70 N. E. 543. All structures and improvements which are a part of the realty itself pass by the transfer of the land and must be paid for. Railroad embankment and riprapping. Omaha Bridge & Terminal R. Co. v. Whitney [Neb.] 99 N. W. 525. Sheds erected by license of city on pier. In re Pier 15, East River, 88 N. Y. S. 905. An award by commissioners that all "land damages" shall be paid by a town on the widening of its street across railway tracks means that it shall pay as well the value of structures on the land as for the land itself. Bridge abutments and water crane and valve pit. New York, etc., R. Co. v. Blackstone, 184 Mass. 491, 69 N. E. 315.

50. White v. Cincinnati, etc., R. Co. [Ind. App.] 71 N. E. 276.

51. Omaha Bridge & Terminal Co. v. Whitney [Neb.] 99 N. W. 525.

52. Guinn v. Iowa & St. L. R. Co. [Iowa] 101 N. W. 94.

53. Sawyer v. Com., 185 Mass. 356, 70 N. E. 438.

54. Wray v. Knoxville, etc., R. Co. [Tenn.] 82 S. W. 471.

55. Pickles v. Ansonia, 76 Conn. 278, 56 A. 552.

56. Scace v. Wayne County [Neb.] 100 N. W. 149.

57. Baltimore & O. R. Co. v. Baltimore [Md.] 56 A. 790.

58. New York, etc., R. Co. v. Blackstone, 184 Mass. 491, 69 N. E. 315.

Obstruction of plaintiff's view and impairment of use of his windmill by a railroad embankment may be recovered for.[59]

As to streets, a city is not an adjoining owner within the familiar rule limiting the damages for removal of lateral support, and where the excavation for a sewer injures a building on abutting lands, all damages caused the owner are recoverable.[60]

For the operation of pumping plants and driven wells by a city, resulting in the lowering of the water level of surrounding lands, the measure of damages is the diminution of the rental value of the land and not the value of the crops which might otherwise be raised thereon.[61] Where his business carried on upon the land has been interrupted or destroyed, the owner may recover for that,[62] and he may recover the cost of deepening a well made necessary by the operations of the city.[63] A public water board taking one of two separate mill rights belonging to a corporation is not obliged to take the other also, the business conducted at the two plants being entirely separate.[64]

Accrual and period of damages.[65]—Where a telegraph company builds along a public road before condemning, its acts are a continual trespass, and on subsequent application for appraisal the damages for permanent occupancy should be assessed as of the time of the application.[66]

Taking rights in public ways.[67]—For a railway in a street, depreciation of value caused by smoke, noise, loss of light and air, increased risk of fire and material interference with ingress and egress are properly considered.[68]

Estate or interest appropriated.[69]—Where land has already been dedicated by its owner for street purposes, the damages to the abutting owner on acquisition of the fee by the city for similar purposes is not the value of the land taken, but the effect on the value of their property by the taking.[70]

Sufficiency of damages.[71]—Where a pent road is forced across the land of an owner to whom it is of no benefit, damages less than the sum it will cost him to fence it are insufficient.[72]

§ 7. *Who is liable for compensation.*[73]

§ 8. *Condemnation proceedings in general.*[74]—Condemnation proceedings are in rem,[75] and every jurisdictional fact therein must appear on the face of the record.[76] A judgment that a telephone company has no right to maintain

59. Choctaw, etc., R. Co. v. True [Tex. Civ. App.] 80 S. W. 120.

60. Fyfe v. Turtle Creek Borough, 22 Pa. Super. Ct. 292.

61. Reisert v. New York, 42 Misc. 275, 86 N. Y. S. 576; Westphal v. New York, 76 App. Div. 252, 78 N. Y. S. 66.

62. Dinger v. New York, 42 Misc. 319, 86 N. Y. S. 577.

63. Reisert v. New York, 42 Misc. 275, 86 N. Y. S. 576.

Note: For the operation of pumping plants whereby the water level of land is lowered and its productiveness decreased, permanent or fee damages may be allowed: Westphal v. New York, 177 N. Y. 140, 69 N. E. 369; Id., 75 App. Div. 252, 78 N. Y. S. 56. The measure of damages is the difference in value of the land with and without the water. Reisert v. New York, 35 Misc. 413, 71 N. Y. S. 965, affirmed in 174 N. Y. 196, 66 N. E. 731, where many cases are cited.

64. West Boylston Mfg. Co. v. Metropolitan Water Board, 183 Mass. 267, 67 N. E. 241.

65. See 1 Curr. L. 1018.

66. Shevalier v. Postal Tel. Co., 22 Pa. Super. Ct. 506.

67. See 1 Curr. L. 1018.

68. South Bound R. Co. v. Burton [S. C.] 46 S. E. 340; Missouri, etc., R. Co. v. Anderson [Tex. Civ. App.] 81 S. W. 781.

69. See 1 Curr. L. 1018.

70. In re City of New York, 89 App. Div. 490, 85 N. Y. S. 858.

71. Damages held not insufficient. Appropriation of land and raising grade of street. Goetz v. State, 90 App. Div. 616, 85 N. Y. S. 739. Award of nominal damages for elevated railroad in street held palpably erroneous. In re Brooklyn Union El. R. Co., 88 N. Y. S. 426. See 1 Curr. L. 1019.

72. Heninger v. Peery [Va.] 47 S. E. 1013.

73, 74. See 1 Curr. L. 1019.

75. Sweet v. Boston [Mass.] 71 N. E. 113.

76. Spurlock v. Dornan [Mo.] 81 S. W. 412. The judicial acts of such boards as municipal officers or county commissioners which may result in taking for public use the property of individuals, as in laying out highways, streets and sewers, must be done with due formality and entered of record;

its poles and wires in a street without consent of the abutting owner and without acquiring the right to do so in a lawful way is not a bar to proceeding by the company to condemn.[77] The filing of a petition by a railroad company gives it no rights as against another company which has received a deed of right of way from the landowner.[78] An injunctive order in condemnation proceedings restraining the landowner from continuing any action against plaintiff in such proceedings has no reference to an action for trespass on the land which accrued prior to the commencement of the proceedings.[79] Where a city and abutting property owners in good faith agree upon the damages to be paid for a street improvement, there is no occasion for submitting the question to the statutory tribunal.[80]

Applications by landowners for assessment of damages must be timely made,[81] but entry by a railroad company on land for survey and location is not an entry for location within the statute requiring that petition for compensation be brought within twelve months.[82] Limitations on the right to apply for assessment of damages may apply as well to nonresident infants as to other landowners.[83] Where a life tenant conveyed to a railroad company a right of way, he only conveyed the interest he had and not the remaindermen's interest, so that the statute began to run against the remaindermen only at the death of the life tenant.[84]

Conditions precedent; discontinuance or abandonment.[85]—Proceedings by a city[86] or by the United States to condemn lands may be dismissed at any time before actual acceptance of the property and payment therefor, without liability for costs or damages,[87] and without prejudice to a future application.[88] The right to abandon is not lost by obtaining a reassessment by a jury,[89] nor surrendered by a stipulation agreeing on the value and for judgment for plaintiff and that no judgment on further proceedings be had before the decision in another suit.[90] The court cannot dismiss of its own motion without notice,[91] and proceedings by a railroad company cannot be dismissed in Wisconsin after filing the award.[92]

Parties; bond.[93]—In a suit to condemn the right to erect telephones in a street, the fee of which is in abutting owners, the city is not a necessary party.[94] Where suit is brought against several owners, some of whom suffer default, and subsequently the action against those who answered is dismissed and proceedings recommenced under another statute, only those against whom judgment was not taken in the first suit need be joined.[95] That the mayor instead of the city council proceeds is immaterial, he having been ordered to proceed by the council.[96]

and parol evidence cannot supply, extend or modify the record and is inadmissible to prove the action of the board. Kidson v. Bangor [Me.] 58 A. 900.

77. New Union Tel. Co. v. Marsh, 96 App. Div. 122, 89 N. Y. S. 79.

78. Atlanta, etc., R. Co. v. Southern R. Co. [C. C. A.] 131 F. 657.

79. Wait v. Hudson Valley R. Co., 43 Misc. 304, 88 N. Y. S. 825.

80. Shelby v. Burlington [Iowa] 101 N. W. 101.

81. Presumption as to date of notice of opening of street. In re Whitby Ave., 22 Pa. Super. Ct. 526. Want of actual notice of taking is immaterial. Lancy v. Boston, 185 Mass. 219, 70 N. E. 88.

82. Civ. Code 1902, § 2196. Charleston & W. C. R. Co. v. Reynolds [S. C.] 48 S. E. 476.

83. Sweet v. Boston [Mass.] 71 N. E. 113.

84. Remaindermen minors. Charleston & W. C. R. Co. v. Reynolds [S. C.] 48 S. E. 476.

85. See 1 Curr. L. 1020.

86. City of Chicago v. Goodwillie, 208 Ill. 252, 70 N. E. 228.

87. United States v. Dickson, 127 F. 774.

88. City of Chicago v. Goodwillie, 208 Ill. 252, 70 N. E. 228.

89. State v. Fort [Mo.] 79 S. W. 167.

90. Southern California Mountain Water Co. v. Cameron, 141 Cal. 283, 74 P. 838.

91. Teller v. Seivers [Colo. App.] 77 P. 261.

92. Sprague v. Northern Pac. R. Co. [Wis.] 100 N. W. 842.

93. See 1 Curr. L. 1021.

94. New Union Tel. Co. v. Marsh, 96 App. Div. 122, 89 N. Y. S. 79.

95. In re Wilder, 90 App. Div. 262, 85 N. Y. S. 741.

§ 9. *Jurisdiction.*[97]—Condemnation proceedings may be removed to the Federal court, the requisite diversity of citizenship and amount in controversy appearing,[98] and upon such removal, further proceedings in the state court may be enjoined.[99]

§ 10. *Applications; petitions; pleadings.*[1]—A petition by a telephone company in proceedings to condemn land in a street for poles and wires should not be dismissed because it seeks to acquire a fee in the land instead of a mere easement for its poles and wires,[2] nor is it defective for failure to allege the municipality has consented to the erection.[3] A bill of particulars may be demanded.[4] Merely defective averments are waived by failure to demur.[5]

§ 11. *Process; notice, citation, publication.*[6]

§ 12. *Hearing and determination of right to condemn.*[7]—Where the owner objects that the quantity of land sought to be expropriated exceeds that which is necessary, the question presented, like the question of value, must be submitted to the jury and is subject to appeal.[8]

§ 13. *Commissioners or other tribunal to assess damages; trial by jury.*[9]—In New Jersey, an order of appointment of commissioners that does not fix the date on or before which they must file their report is defective.[10] Where an alleged abutting owner claims damages under the statute of New York for statutory change of grade and macadamization of a highway, and his ownership and the change of grade are both denied by the town, an issue is raised which must be settled before commissioners can be appointed to assess the damages.[11] In Louisiana, the district court may not increase the amount allowed by the commissioners, though it has statutory authority to "modify." It may set the report aside and refer it back to the same or new commissioners. The supreme court on appeal is not so restricted.[12] A statute providing that on condemnation all past damages shall be assessed by the committee must be construed as permissive merely on consent of the owner, as otherwise the statute would be invalid as interfering with jury trial.[13] An objection by a landowner to the assessment of damages by a committee where he has a right of jury trial is good, whether taken by demurrer to the application or otherwise.[14]

The right to jury trial in condemnation proceedings is constitutional in many states,[15] but not in Maine.[16] The general jury act of Louisiana did not repeal the provisions for juries in the expropriation law.[17] A landowner not satisfied with the award of the jury of seven in the District of Columbia is entitled to have a

96. Manning v. Bruce [Mass.] 71 N. E. 537.

97. See 1 Curr. L. 1021.

98. Atlanta, etc., R. Co. v. Southern R. Co. [C. C. A.] 131 F. 657.

99. St. Bernard Min. Co. v. Madisonville Traction Co., 130 F. 794. Defendant held entitled to contest as well the right to take the land as the amount of compensation. St. Bernard Min. Co. v. Madisonville Traction Co., 130 F. 789, 794.

1. Complaint held to sufficiently show that the property sought to be condemned was necessary for city water works. City of Dallas v. Hallock, 44 Or. 246, 75 P. 204. See 1 Curr. L. 1021.

2, 3. New Union Tel. Co. v. Marsh, 96 App. Div. 122, 89 N. Y. S. 79.

4. Missouri, etc., R. Co. v. Schmuck [Kan.] 76 P. 836.

5. Hollister v. State [Idaho] 77 P. 339.

6, 7. See 1 Curr. L. 1022.

8. State v. Ellis [La.] 37 So. 209.

9. See 1 Curr. L. 1024.

10. Statute so providing is mandatory not directory [Revision 1900; P. L. p. 79]. Doughty v. Atlantic City & Suburban Traction Co. [N. J. Law] 58 A. 101.

11. In re Borup, 89 App. Div. 183, 85 N. Y. S. 828.

12. Louisiana Western R. Co. v. Crossman's Heirs, 111 La. 611, 35 So. 784.

13, 14. City of Waterbury v. Platt Bros. & Co., 76 Conn. 435, 56 A. 856.

15. City of Waterbury v. Platt Bros. & Co., 76 Conn. 435, 56 A. 856. Where the constitution provides for trial by a jury of twelve, a statute providing for a jury of six is invalid. Arkansas. Archer v. Chicot County Levee Inspectors, 128 F. 125.

16. Ingram v. Maine Water Co., 98 Me. 566, 57 A. 893.

17. Acts 1898, p. 216, No. 135. Cumberland Tel. & T. Co. v. Morgan's Louisiana & T. R. & S. S. Co., 112 La. 287, 36 So. 352.

rehearing before a jury of twelve, though he accepts the award as to damages and appeals only as to benefits.[18] Where exceptions to the award of damages goes only to the amount of damages, a jury trial is proper.[19] On appeal from the award of assessors, the jury in Georgia cannot pass upon the necessity and propriety of the taking; the only question open to them is the amount of compensation.[20] For irregularity in drawing jury, the remedy is by challenge to array, in the absence of which the objection is waived.[21] All the owners of undivided interests in the tract constitute "one party," within the rule giving them peremptory challenges to each party.[22]

§ 14. *The trial, or inquest, and hearings on the question of damages.*[23]—The jury may resort, in determining the damages, to the result of their examination of the premises.[24] Where the condemnor allows the owner to assume the burden of proof as to damages, that being the only question litigated, it cannot afterward successfully claim the right to close the argument.[25]

Admissibility of evidence.[26]—Evidence as to the cost to the railroad company of filling up and improving the land to make it suitable for its purposes,[27] or that the land was of greater area than the owner or his vendor supposed it to be when sold, is immaterial on the question of damages for taking it.[28] Sales of neighboring pieces may be shown, but not by recitals in the deeds,[29] but where a witness has testified to value and stated that he based his opinion in part upon sales in the neighborhood, evidence of the prices of particular sales cannot be shown unless accompanied by proof that they were in fact different from what the witness understood them to be.[30] An assessment return made by the owner to the taxing officer is not admissible on the question of value.[31] Evidence of the value of similar property at a distance from that in suit is inadmissible in the absence of a showing that the conditions surrounding the two properties were similar, making their value equal.[32] Where a railroad cuts off a triangular piece of a farm, evidence of how similar injuries had affected other farms or how much the railroad company had paid for other similar pieces is immaterial.[33] Opinions of witnesses as to the incidental damages and benefits to the property that do not attach to other property are admissible.[34] Evidence that certain construction causing incidental damages was improper is admissible in behalf of the railroad company,[35] and where an embankment confining the waters of a lake has been improperly cut during the building of a railroad to the damage of the owner's lower lands, evidence as to what it would cost the company to restore the embankment is improper, the company not being liable in the condemnation suit for such damages.[36] Admission of evidence as to benefits is harmless where no damage is found,[37] and the exclusion

18. Todd v. MacFarland, 20 App. D. C. 176.

19. Chicago, etc., R. Co. v. Wysor Land Co. [Ind.] 69 N. E. 546.

20. Atlantic Coast Line R. Co. v. Postal Tel. Cable Co. [Ga.] 48 S. E. 15; Atlantic & B. R. Co. v. Penny, 119 Ga. 479, 46 S. E. 665.

21. New York Min. Co. v. Midland Min. Co. [Md.] 58 A. 217.

22. Illinois, etc., R. Co. v. Freeman, 210 Ill. 270, 71 N. E. 444.

23. See 1 Curr. L. 1025.

24. Railroad cutting off triangular piece of farm. Illinois, etc., R. Co. v. Humiston, 208 Ill. 100, 69 N. E. 880.

25. Chicago, etc., R. Co. v. Sullivan, 25 Ky. L. R. 2295, 80 S. W. 515.

26. See 1 Curr. L. 1026.

27. Brown v. Illinois, etc., R. Co., 209 Ill. 402, 70 N. E. 905.

28. White v. Boston [Mass.] 71 N. E. 75.

29. City of New Orleans v. Manfre, 111 La. 927, 35 So. 981.

30. Union Pac. R. Co. v. Stanwood [Neb.] 98 N. W. 656.

31. Wray v. Knoxville, etc., R. Co. [Tenn.] 82 S. W. 471.

32. City of Dallas v. Boise, 44 Or. 302, 75 P. 208.

33. Illinois, etc., R. Co. v. Humiston, 208 Ill. 100, 69 N. E. 880.

34. Wray v. Knoxville, etc., R. Co. [Tenn.] 82 S. W. 471.

35, 36. Guinn v. Iowa & St. L. R. Co. [Iowa] 101 N. W. 94.

37, 38. Marks v. Bradshaw Mountain R. Co. [Ariz.] 76 P. 470.

of competent evidence of value is harmless where other competent evidence as to the same value was received, was undisputed, and no issue thereon raised.[38]

Witnesses.[39]—A witness who knows the rental value of lands in the neighborhood may state it, though he does not know the market value,[40] and mechanical engineers without knowledge as to the general market value of land in the vicinity may be permitted to testify to the value of the parcel as a manufacturing site.[41]

Sufficiency of evidence.[42]—The amount for which sales of land in the neighborhood have been made is not the only factor in determining the weight of a witness' testimony, since he may take into consideration his own knowledge of the surroundings and the use and capabilities of the property.[43] Expert evidence as to whether a switch is an element of danger so as to require its removal on the opening of a street over the track at that point is not conclusive on the question so as to require that the expense of removal be allowed as an element of the damages.[44] A written instrument binding a landowner to convey a right of way to a railroad company on payment of a certain sum specified as liquidated damages, which is obtained by it with a view of constructing its road and under which it is allowed to enter upon and appropriate the land, is conclusive as to the amount of damages, though unilateral as not binding the company to do anything.[45]

Instructions.[46]—Argumentative instructions[47] and those not based upon the evidence,[48] or alluding to its weight, are properly refused.[49] A charge from which the inference that double damages are allowable is error.[50]

§ 15. *View of appropriated premises.*[51]

§ 16. *Verdict, report or award; judgment thereon, and lien and enforcement of judgment.*[52]—The report or award must be filed as provided by statute.[53] Where the owner expressly waives his right to compensation for the land taken, a finding that it had no value is proper.[54] A judgment of condemnation relates back to the time of commencement of proceedings, not to the time of passing the ordinance authorizing it.[55]

Sufficiency.[56]—Where the owner brings suit for damages for the appropriation of right of way, a judgment framed as in an ordinary action for damages for a trespass is improper.[57]

Validity.[58]—The verdict need not find the value of the land taken separately from the damages to the remainder of the tract.[59] The jury cannot allow dam-

39. Witness held qualified to testify as expert on value of land. Muskeget Island Club v. Inhabitants of Nantucket, 185 Mass. 303, 70 N. E. 61. See 1 Curr. L. 1027.

40. Cluck v. Houston & T. C. R. Co. [Tex. Civ. App.] 79 S. W. 80.

41. Conness v. Com., 184 Mass. 541, 69 N. E. 341.

42. Evidence held to show corporate capacity of plaintiff school district. School Dist. No. 35, Holt County v. Hodgins [Mo.] 79 S. W. 148. Evidence held insufficient to show necessity of divergence from highway by electric street railway. Hartshorn v. Illinois Valley Traction Co., 210 Ill. 609, 71 N. E. 612. See 1 Curr. L. 1027.

43. Illinois, etc., R. Co. v. Humiston, 208 Ill. 100, 69 N. E. 880.

44. Baltimore & O. R. Co. v. Baltimore [Md.] 56 A. 790.

45. Chicago, etc., R. Co. v. Douglass [Tex. Civ. App.] 76 S. W. 449.

46. See 1 Curr. L. 1028.

47. Measure of damages. Jacksonville & St. L. R. Co. v. Wilhite, 209 Ill. 84, 70 N. E. 583.

48. Instructions in railroad case approved. Oregon Short Line R. Co. v. Russell, 27 Utah, 457, 76 P. 345.

49. Measure where part of land is cut off from road. Red River, etc., R. Co. v. Hughes [Tex. Civ. App.] 81 S. W. 1235.

50. Depreciation in value of whole tract plus value of part taken. Red River, etc., R. Co. v. Hughes [Tex. Civ. App.] 81 S. W. 1235.

51, 52. See 1 Curr. L. 1029.

53. Discontinuance of highway. Schroeder v. Klipp [Wis.] 97 N. W. 909.

54. Marks v. Bradshaw Mountain R. Co. [Ariz.] 76 P. 470.

55. Ross v. Kendall [Mo.] 81 S. W. 1107.

56. See 1 Curr. L. 1030.

57. It should be so drawn as to fix definitely the land over which the road is located and its width. Beal v. Durham & C. R. Co. [N. C.] 48 S. E. 674.

58. See 1 Curr. L. 1030.

59. Chicago, etc., R. Co. v. Sullivan, 25 Ky. L. R. 2295, 80 S. W. 515.

ages for distinct items and reach the total amount by adding them together,[60] or by taking the average of the estimates of the witnesses.[61] Inconsistent special findings will be set aside.[62] The judgment is not subject to collateral attack for irregularity in filing the verdict.[63]

Effect or conclusiveness.[64]—In street opening proceedings in New York, the presentation of the report for confirmation by the corporation counsel is regarded as the furtherance of the proceedings by the usual procedure, and does not preclude his opposition, either at the hearing thereon or on appeal.[65]

§ 17. *Costs and expenses.*[66]—Where there are several owners of different parcels, the proceeding as to each is a separate suit in which separate judgments should be entered entitling the owners to costs as a matter of law.[67] An order requiring plaintiff to deposit a certain sum to apply on costs accrued and to accrue is unauthorized.[68]

§ 18. *Review of condemnation proceedings.*[69]—The bond should describe the land, but failure may be cured by express reference therein to the report of the commissioners.[70] Mandamus will not issue in Ohio to compel the probate judge to order a railroad company to deposit the amount of the award or pay it to the landowner, where the company has appealed from the award, filed the statutory bond and has not taken possession of the property.[71]

Right to appeal.[72]—No appeal lies in the absence of statutory or constitutional provision therefor,[73] and property owners who have accepted money paid into court on a judgment and executed receipt in full cannot appeal.[74] No appeal lies in Indiana from an order denying an application for appraisers in a proceeding by a railroad company to condemn land for right of way.[75] Prior to the amendment of 1903, where the applicant in New Jersey paid the amount awarded into court or to the landowner, its right of appeal was barred, and that amendment did not impair the right of the landowner to money previously paid.[76]

Decisions reviewable.[77]—An order determining the amount of damages but expressly declining to determine whether the claimant is the owner of the lands is not final or appealable,[78] and reversal by the common pleas of Ohio of the judgment of the probate court is not such a final judgment as is reviewable by the supreme court.[79]

Remedy for review; certiorari.[80]

Saving questions for review.[81]—Objection that proceedings should have been brought in the name of directors instead of a school district cannot be first raised

60. Kossler v. Pittsburgh, etc., R. Co., 208 Pa. 50, 57 A. 66.

61. Illinois & I. M. R. Co. v. Freeman, 210 Ill. 270, 71 N. E. 444.

62. Findings that owner is not devoting land and water to public use held inconsistent with other findings in case. City of Santa Barbara v. Gould [Cal.] 77 P. 151.

63. Filed after judgment rendered instead of before. Weiland v. Ashton [S. D.] 100 N. W. 737.

64. See 1 Curr. L. 1031.

65. In re City of New York, 89 App. Div. 490, 85 N. Y. S. 858.

66. See 1 Curr. L. 1032.

67. Schenectady R. Co. v. Lyon, 44 Misc. 275, 89 N. Y. S. 908.

68. Teller v. Sievers [Colo. App.] 77 P. 261.

69. See 1 Curr. L. 1033.

70. Under Laws 1899, p. 316, c. 151, § 1. Lake Koen Nav. Reservoir & Irr. Co. v. McLain Land & Inv. Co. [Kan.] 76 P. 853.

71. State v. Waite [Ohio] 71 N. E. 286.

72. See 1 Curr. L. 1033.

73. None from award of viewers under act of Apr. 4, 1899 (P. L. 25), to assess damages against a school district for the taking of land of a county poor farm. In re South Lebanon Tp. School Dist., 22 Pa. Super. Ct. 330. None where lower court has jurisdiction. New York Min. Co. v. Midland Min. Co. [Md.] 58 A. 217.

74. Parks v. Dallas Terminal R. & Union Depot Co. [Tex. Civ. App.] 78 S. W. 533.

75. Lafayette & I. Rapid R. Co. v. Butner, 162 Ind. 460, 70 N. E. 529.

76. Jersey City v. Hamilton [N. J. Law] 56 A. 670.

77. See 1 Curr. L. 1033.

78. Laying out road. Jones v. Daul [Neb.] 97 N. W. 1029.

79. State v. Judges of the Court of Common Pleas, 69 Ohio St. 372, 69 N. E. 659.

80, 81. See 1 Curr. L. 1034.

on appeal.[82] By allowing the evidence to go to the jury without objection, plaintiff admits its sufficiency to warrant an assessment of damages.[83]

Bringing up the cause; record.[84]—Rulings based on questions of fact can be reviewed only when the facts are properly before the court by bill of exception or otherwise.[85] In Utah, where the bill of exceptions and motion for new trial do not specify the particulars wherein the evidence is insufficient to support the verdict, the supreme court cannot consider the excessiveness of the award.[86]

Scope of review.[87]—The verdict of the jury is entitled to great weight,[88] and where rendered on conflicting evidence will generally be affirmed,[89] especially where the jury view the premises.[90] The constitutionality of a provision allowing entry by the condemnor before decree cannot be contested by an owner as to whom the jury have found no damages,[91] and defendant in proceedings to condemn land for a drainage ditch, whose land is outside the drainage district, cannot raise the constitutionality of the statute under which the district is organized on any ground going only to the manner of assessing benefits.[92] In Ohio, where the court of common pleas reverses on error the judgment of the probate court, it proceeds to trial of the case as though it had original jurisdiction thereof.[93] In Louisiana, the jurisdiction of the supreme court on appeal extends to all matters of both law and fact.[94]

Trial or hearing.[95]

Decision and determination.[96]—Where the evidence fails to show the legal existence of plaintiff corporation, the case will be reversed and remanded for further proof.[97] Where, after payment of the award the condemnor appeals and procures reversal and after lapse of several years redockets the case and secures a smaller award, restitution of the difference cannot be awarded against the owner who has had no notice.[98]

§ 19. *Remedy of owner by action or suit. A. Actions for tort, damages, or trespass; recovery of property.*[99]—Mere negligent or tortious injuries cannot be redressed by proceedings to assess damages, but must be remedied by an action for the trespass.[1] But the remedy by condemnation provided by the Code of South

82. School Dist. No. 35, Holt County v. Hodgins [Mo.] 79 S. W. 148.

83. Oregon Short Line R. Co. v. Russell, 27 Utah, 457, 76 P. 345.

84. See 1 Curr. L. 1035.

85. Clapp v. Macfarland, 20 App. D. C. 224. Record held to present sufficient proof that it contained the evidence taken before commission. In re City of New York, 89 App. Div. 490, 85 N. Y. S. 858.

86. Oregon Short Line R. Co. v. Russell, 27 Utah, 457, 76 P. 345.

87. See 1 Curr. L. 1035.

88. City of New Orleans v. Manfre, 111 La. 927, 35 So. 981; Board of Levee Com'rs v. Jackson's Estate [La.] 36 So. 912.

89. Brown v. Illinois, etc., R. Co., 209 Ill. 402, 70 N. E. 905; Oregon Short Line R. Co. v. Russell, 27 Utah, 457, 76 P. 345; Chicago, etc., R. Co. v. Sullivan, 25 Ky. L. R. 2295, 80 S. W. 515; Metropolitan R. Co. v. Macfarland, 20 App. D. C. 421; City of New Orleans v. Schroeder, 111 La. 653, 35 So. 800; City of New Orleans v. Morgan, 111 La. 851, 35 So. 951.

90. The verdict will not be set aside for excessiveness or inadequacy unless so palpably unjust as to show passion, prejudice or undue influence or improper means. Spohr v. Chicago, 206 Ill. 441, 69 N. E. 514; Illinois, etc., R. Co. v. Humiston, 208 Ill. 100, 69 N. E. 880; St. Louis & O. R. Co. v. Union Trust & Sav. Bank, 209 Ill. 457, 70 N. E. 651; Long Island R. Co. v. Reilly, 89 App. Div. 166, 85 N. Y. S. 875.

91. Marks v. Bradshaw Mountain R. Co. [Ariz.] 76 P. 470.

92. Laguna Drainage Dist. v. Charles Martin Co. [Cal.] 77 P. 933.

93. Rev. St. 1892, c. 8, tit. 2; Id. § 6438. State v. Judges of Court of Common Pleas. 69 Ohio St. 372, 69 N. E. 659.

94. Louisiana & N. W. R. Co. v. Vicksburg, etc., R. Co., 112 La. 915, 36 So. 803; Louisiana W. R. Co. v. Crossman's Heirs, 111 La. 611, 35 So. 784.

95, 96. See 1 Curr. L. 1036.

97. Cumberland Tel. & T. Co. v. Morgan's Louisiana & T. R. & S. S. Co., 112 La. 287, 36 So. 352.

98. Asher v. Louisville & N. R. Co. [Ky.] 81 S. W. 678.

99. See 1 Curr. L. 1036.

1. Unreasonable flowage by defendant's dam. Gordon v. International Paper Co., 72 N. H. 346, 56 A. 757. Conversion of personal property abandoned in street. Lincoln Safe Deposit Co. v. New York, 88 N. Y. S. 912. Where the carrying out of plan adopted for improvement of a city street results in dam-

Carolina for a person whose lands are injured by the discharge of sewage into a stream is exclusive and the land owner cannot bring suit for a tort or to abate it as a nuisance.[2] Where, pending proceedings, the condemnor takes possession and builds its railroad and subsequently dismisses the proceedings, it becomes a trespasser ab initio and the owner may so treat it and is not confined to the statutory writ of ad quod damnum.[3] The vendor is not a necessary party where suit is not brought until after the whole purchase price has been paid and the deed delivered, though the injury occurred before delivery of the deed,[4] and where a widow holds title in trust for herself and her husband's heirs, they may maintain a single action for damages.[5]

Right of action.[6]—A landowner whose property has been taken for public use without compensation may maintain an action at law to recover damages for the trespass,[7] but suit must be timely brought,[8] and after a lapse of 20 years, it will be presumed that the damages have been paid and in equitable ejectment the burden is on plaintiffs to prove the contrary.[9]

Pleading, issues and proof.[10]—If plaintiff desires to restrict the width of defendant railroad company's right of way, he must allege that full width is not necessary,[11] and in the absence of such averments, it will be presumed that the proceedings were intended to vest a right of way of the width fixed by defendant's charter.[12] In an action for damages from a change of street grade, the defense of special benefits need not be pleaded and proved as a special defense.[13]

Burden of proof; questions of fact; witnesses.[14]—The cost of regrading plaintiff's lot is admissible on the question of his damages for a change of grade of a street, in connection with facts showing its necessity and reasonableness.[15]

View of premises; instructions.[16]

Verdict, judgment and allowance of damages.[17]—Where the defendant was a trespasser, the cost of restoring the land to its former condition is the proper measure of damages where such cost is less than the diminution in its market value by the trespass, but if such cost is more than the diminution of market value, the latter is the measure.[18]

Appeal.[19]

(§ 19) *B. Suits in equity; injunction.*[20]—Condemnation proceedings will not be enjoined either in a state[21] or a federal court[22] on any ground that may be liti-

age to abutting owners, the remedy in Pennsylvania is by view under the statute, but the negligent execution of the work resulting in injury must be remedied by an action of trespass. Removal of lateral support by excavating for sewer. Fyfe v. Turtle Creek Borough, 22 Pa. Super. Ct. 292.

2. Matheny v. Aiken [S. C.] 47 S. E. 56.

3. Condemnor cannot defend on ground that its dismissal was ineffectual. Enid & A. R. Co. v. Wiley [Okl.] 78 P. 96.

4, 5. Brown v. Arkansas Cent. R. Co. [Ark.] 81 S. W. 613.

6. See 1 Curr. L. 1037.

7. Archer v. Chicot County Com'rs, 128 F. 125.

8. Action by abutting owner to recover for permanent injury by building railroad in street. Tietze v. International & G. N. R. Co. [Tex. Civ. App.] 80 S. W. 124. Actions for damages for building and operating an elevated railroad in a city street must be brought within 5 years in Missouri. De Geofroy v. Merchants' Bridge Ter. R. Co., 179 Mo. 696, 79 S. W. 386.

9. Carter v. Ridge Turnpike Co., 208 Pa. 565, 57 A. 988.

10. See 1 Curr. L. 1039.

11, 12. Beal v. Durham & C. R. Co. [N. C.] 48 S. E. 674.

13. Pickles v. Ansonia, 76 Conn. 278, 56 A. 552.

14. See 1 Curr. L. 1040.

15. Pickles v. Ansonia, 76 Conn. 278, 56 A. 552.

16. See 1 Curr. L. 1040.

17. Interference with ingress and egress from plaintiff's land by building of second track held not shown by evidence. Hogan v. Chicago & A. R. Co., 208 Ill. 161, 69 N. E. 853. See 1 Curr. L. 1040.

18. Enid & A. R. Co. v. Wiley [Okl.] 78 P. 96.

19, 20. See 1 Curr. L. 1041.

21. Cincinnati, etc., R. Co. v. Wabash R. Co., 162 Ind. 303, 70 N. E. 256. Whether corporation bringing suit is de facto or de jure, and if de facto only, whether such have a right to condemn. Boyd v. Logansport, R. & N. Traction Co., 161 Ind. 587, 69 N. E. 398.

gated in the proceeding itself. Injunction will lie to restrain the taking or use of private property where no compensation has been made or condemnation proceedings instituted,[23] provided it is sought before the public have acquired a prescriptive right to the land taken,[24] and is the proper remedy of an abutting owner for an additional servitude which the user has no power to condemn.[25] A railroad company in Ohio may enjoin the condemnation of land for streets across its right of way, where it shows that the opening of such streets will unreasonably interfere with its business.[26] Injunction will not issue against the vacation of streets by a city for the benefit of a railroad company, since, if the adjoining owner has any rights requiring compensation, his legal remedy is ample.[27]

Limitation and laches.[28]—Presumption of payment may arise from lapse of time,[29] and owners of land through which an irrigation canal is built cannot abate it by action nor destroy it where they have stood by and seen it built without protest and had a right to compensation, but made no move to obtain it.[30]

Parties.[31] *Pleading and issues.*[32]

Decree, judgment or order.[33]—Though the relief sought is abatement of the entire use of a street by a street railroad company, injunction may be granted to the extent to which complainant is entitled,[34] and where suit is brought to enjoin a continuing trespass and for damages for past injuries caused by a city's operation of wells and pumping stations, depriving plaintiff's land of its water supply, the judgment may properly award damages for the past injury and deny the injunction provided the city pays or tenders a sum awarded as damages for permanent injury to the fee.[35]

§ 20. *Payment and distribution of sum awarded; title or interest requiring compensation.*[36]—A purchaser on contract who has not made sufficient payments to entitle him to a deed is not an "owner" entitled to damages for a change of grade of a street dedicated by his vendor after his contract was made,[37] and a tenant at will who has been given reasonable notice on condemnation of the land cannot recover damages for injury to his property by destruction of the building,[38] but in an action for damages for change of street grade, it is no defense that plaintiff

22. Injunction will not be granted by a Federal court to restrain proceedings in a state court by a railroad company on the ground that the proposed use is not public, where that question may be litigated in the state court. Washington. Black Hills & N. W. R. Co. v. Tacoma Mill Co. [C. C. A.] 129 F. 312.

23. The taking of land for a highway. Spurlock v. Dornan [Mo.] 81 S. W. 412. A change in street grade that will permanently injure abutting owners. Swope v. Seattle, 35 Wash. 69, 76 P. 517. The raising of a railroad grade at a point where the road crosses a street at a very acute angle so as to cut off the access of an abutting owner from one direction on the street. Dean v. Ann Arbor R. R. [Mich.] 100 N. W. 773. The owners of the fee of a highway may prevent its use for a permanent telephone line. Gray v. York State Tel. Co., 92 App. Div. 89, 86 N. Y. S. 771. Injunction will lie to restrain the taking of private property by a railroad company which is not covered by its proceedings to condemn adjoining land. Shipley v. Western Maryland Tidewater R. Co. [Md.] 56 A. 968. A railroad company that has failed to comply with the statutes of the state in that it has failed to condemn the land on which it is building will be enjoined from building. Wilson v. Alderman & Sons Co. [S. C.] 48 S. E. 81.

24. Kime v. Cass County [Neb.] 99 N. W. 546.

25. Not condemnation. Interurban traffic by street railroad. Younkin v. Milwaukee Light, Heat & Traction Co. [Wis.] 98 N. W. 215.

26. Pittsburg, etc., R. Co. v. Greenville, 69 Ohio St. 487, 69 N. E. 976.

27. Vanderburgh v. Minneapolis [Minn.] 100 N. W. 668.

28. See 1 Curr. L. 1043.

29. 40 years. Louisville & N. R. Co. v. Smith [C. C. A.] 128 F. 1.

30. Crescent Canal Co. v. Montgomery, 143 Cal. 248, 76 P. 1032.

31, 32. See 1 Curr. L. 1043.

33. See 1 Curr. L. 1044.

34. Interurban traffic only enjoined. Younkin v. Milwaukee Light, Heat & Traction Co. [Wis.] 98 N. W. 215.

35. Westphal v. New York, 177 N. Y. 140, 69 N. E. 369.

36. See 1 Curr. L. 1044.

37. In re Fifth St., 22 Pa. Super. Ct. 214.

38. Lyons v. Philadelphia & R. R. Co. [Pa.] 58 A. 924.

purchased with notice that the order for the change had already been made.[39] Where at the time a lease is executed, an elevated railroad is in full operation in front of the premises, of which fact the lessee is aware, he cannot recover on account of the operation of the road during that term, though the lease be merely a renewal of a prior one, during the term of which he can recover;[40] but the owner of a building built on land under a perpetual lease subject to readjustment of rental may recover for injury by an elevated railroad, built prior to his purchase of it and prior to the last readjustment of rent.[41] One who holds land by devise to himself in trust as executor to himself and others may maintain action,[42] and where, pending suit, a tax lien on the land is foreclosed, the lien holder becoming vested with absolute title to the premises, he is entitled to the damages awarded.[43]

Sufficiency of payment.[44]

Distribution.[45]—Where there is a contest over the ownership of the money paid into court on condemnation, the court can order a portion of it withheld to satisfy special tax bills standing against the land.[46] Heirs in fact entitled to a share in the land, though not so appearing, are entitled to their share of the award,[47] and where a lease provides for removal of the buildings at the end of the term, the lessee is entitled to that portion of the award allowed for buildings.[48]

Lien and enforcement.[49]—Execution cannot issue on the award of commissioners which has been set aside, the question of damages having been referred to a jury.[50]

§ 21. *Ownership or interest acquired.*[51]—The petitioner acquires no land or interest therein not specifically described in his petition,[52] but takes buildings on the land.[53] The quantity of interest which a railroad company takes is measured by the terms of the statute authorizing exercise of the power,[54] generally an easement in the surface, the landowner retaining title to the fee including the right to remove all minerals not needed for the support of the surface.[55] Where a railroad company acquires right of way across lands and a private road thereon belonging to the owner of the lands, it has the same title to its road crossing that it has to the other lands.[56] A telegraph company acquires only an easement in the right of way of a railroad company condemned for the purpose of constructing and operating a telegraph line thereon.[57]

§ 22. *Transfer of possession and passing of title.*[58]—Where the condemnor has tendered the amount of the award, the owner cannot prevent its taking possession by appeal and filing a supersedeas bond.[59] Occupation cannot be enjoined pending appeal, where a railroad seeking to cross another has paid the amount of the award into court, and the ground alleged is one that makes it voidable at most.[60]

39. Pickles v. Ansonia, 76 Conn. 278, 56 A. 552.
40. Child v. New York El. R. Co., 89 App. Div. 598, 85 N. Y. S. 604.
41. Storms v. Manhattan R. Co., 178 N. Y. 493, 71 N. E. 3.
42. Bean v. Com. [Mass.] 71 N. E. 784.
43. In re Condemnation of Lands in Ramsey County [Minn.] 100 N. W. 650.
44, 45. See 1 Curr. L. 1045.
46. Ross v. Kendall [Mo.] 81 S. W. 1107.
47. Legg v. Legg, 34 Wash. 132, 75 P. 130.
48. Poillon v. Gerry [N. Y.] 71 N. E. 262.
49. See 1 Curr. L. 1045.
50. State v. Fort [Mo.] 79 S. W. 167.
51. See 1 Curr. L. 1046.
52. Owner's fee to center of street or bordering stream. Shipley v. Western Md. Tidewater R. Co. [Md.] 56 A. 968.
53. Though the building is a dwelling house and the appropriation is for a railroad right of way. Stauffer v. Cincinnati, etc., R. Co. [Ind. App.] 70 N. E. 543. Compare White v. Same [Ind. App.] 71 N. E. 276.
54. May be fee. Currie v. New York Transit Co. [N. J. Err. & App.] 58 A. 308.
55. Missouri, etc., R. Co. v. Schmuck [Kan.] 76 P. 836.
56. Charleston & W. C. R. Co. v. Fleming, 118 Ga. 699, 45 S. E. 664.
57. Atlantic Coast Line R. Co. v. Postal Tel. Cable Co. [Ga.] 48 S. E. 15.
58. See 1 Curr. L. 1047.
59. Shirley v. Southern R. Co. [Ky.] 81 S. W. 268.
60. Cincinnati, etc., R. Co. v. Wabash R. Co., 162 Ind. 303, 70 N. E. 256.

§ 23. *Relinquishment or abandonment of rights acquired.*[61]—Property taken for public use reverts to the owner on abandonment;[62] mere nonuser, however, will not operate as an abandonment of railroad right of way; there must be some decided act indicative of an intention to abandon.[63]

EQUITY.[64]

§ 1. Nature of, and General Principles Controlling, Equity (1210).
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§ 11. Bill of Review (1235). Time for Bill and Laches (1236). Grounds (1236). Application and Proceedings (1236).
§ 12. Other Equitable Remedies for Which no Specific Title is Provided (1236).

This topic treats of the general rules of equity and of procedure in equity in those states where the adoption of a code has not changed equitable forms and procedure, and also of such matters of procedure as remain under the codes.[65] The jurisdiction of equity over particular subject-matters is retained, but the equitable jurisdiction of particular courts is elsewhere treated.[66] The question of the legal or equitable character of a controversy sometimes arises in determining the right to a jury,[67] or in determining upon what calendar the cause shall be placed for trial,[68] and in many other matters of procedure especially under the codes.[69]

§ 1. *Nature of, and general principles controlling, equity.*[70]—Equities are rights which are established and enforced in accordance with the principles of equity jurisprudence under some general principle or acknowledged rule governing courts of equity. Thus, while equity is based upon moral right and natural justice, it is not coextensive with them.[71]

§ 2. *Equity jurisdiction and occasion for relief. A. In general.*[72]—The jurisdiction of courts of equity is defined by principles, not by precedents; the former

61. See 1 Curr. L. 1047.
62. City of Waterbury v. Platt Bros. & Co., 76 Conn. 435, 56 A. 856; Canton Co. of Baltimore v. Baltimore & O. R. Co. [Md.] 57 A. 637.
63. Canton Co. of Baltimore v. Baltimore & O. R. Co. [Md.] 57 A. 637.
64. See 1 Curr. L. 1048 for classified list of notes in "L. R. A." and "Am. St. Rep.".
65. Specific equitable remedies are treated under appropriate titles, such as Cancellation of Instruments, 1 Curr. L. 413; Injunction, 2 Curr. L. 397; Receivers, 2 Curr. L. 1465; Reformation of Instruments, 2 Curr. L. 1492; Specific Performance, 2 Curr. L. 1678, etc.
66. See Jurisdiction, 2 Curr. L. 604.
67. See Jury, 2 Curr. L. 633.
68. See Dockets, Calendars and Trial Lists, 1 Curr. L. 953.
69. See Pleading, 2 Curr. L. 1178; Parties, 2 Curr. L. 1092, and like topics.
70. See 1 Curr. L. 1049.
71. Steger v. Traveling Men's Bldg. & Loan Ass'n, 208 Ill. 236, 70 N. E. 236.
72. See 1 Curr. L. 1049.

govern, the latter illustrate.[73] Whether a cause of action is equitable or legal in its nature depends upon the relief prayed for,[74] and which, under the facts, can be granted.[75] The cause being of either legal or equitable cognizance, a court of equity may acquire jurisdiction by the consent of the parties,[76] and once rightfully obtaining full jurisdiction, it will retain such jurisdiction to the end of the controversy,[77] and to the exclusion of the law court,[78] but equity will not intervene where the case has been determined by a law court having jurisdiction.[79] Courts of equity having concurrent jurisdiction, the jurisdiction of the court first taking actual cognizance of the controversy, is exclusive in the absence of any peculiar equitable grounds to the contrary.[80]

A defendant is entitled to raise by plea the jurisdiction of a court of equity, and to demand in limine the judgment of the court whether he should answer the bill.[81] Such plea showing lack of jurisdiction over the defendant need not generally designate another tribunal in which he may be sued.[82] Lack of jurisdiction appearing on the face of the bill, the question must be raised by demurrer.[83]

The distinctions between the jurisdiction of courts of law and courts of chancery, as recognized and practiced in the Federal courts, are not mere distinctions in name or in form, but are fundamental differences of substance.[84] A statute of a state creating an equitable right, capable of enforcement by proceedings in conformity with the pleadings and practice in equity, the right will be enforced in the courts of the United States[85] if the latter have jurisdiction of the cause.[86]

The right to proceed at law or in equity.[87]—Though one of the parties be estopped to claim that the suit is legal in its nature, the court is not bound thereby.[88] A court of general equity jurisdiction on appeal from a court having no equitable jurisdiction cannot try the cause as one in equity.[89] Failure to set up the facts relied on, in a bill in equity, as an equitable defense to an action by defendant, does not bar plaintiff from obtaining relief in his suit.[90] Courts observing the distinction between legal and equitable rights, an equitable defense cannot be maintained in an action brought on the law side of the court;[91] this does not, however, seem to be the rule where the mixed system of jurisprudence prevails.[92]

Effect of code or statutory provisions.[93]—In states where the distinction be-

73. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

74. Fowler v. Davis, 120 Ga. 442, 47 S. E. 951. A petition which prays for a dissolution of a partnership, an accounting, and an injunction makes an equitable case. Id. The answer or cross bill asking affirmative equitable relief, the court may properly treat the case as one in equity. Myers v. Schuchmann [Mo.] 81 S. W. 618.

75. That the parties classify it as one or the other does not affect the question. Thompson v. Hibbs [Or.] 76 P. 778.

76. Varick v. Hitt [N. J. Eq.] 55 A. 139.

77. Mutual Life Ins. Co. v. Blair, 130 F. 971. Equity having jurisdiction of a bill, several distinct parties being necessary, a party defendant cannot file a petition at law for the same purpose as the suit in equity. In re Mifflinville Bridge [Pa.] 58 A. 1072.

78. A bill to compel removal of buildings alleged to be on a highway held not to lie until title to land had been determined at law. Coward v. Llewellyn [Pa.] 58 A. 1066.

79. May v. Boyd, 97 Me. 398, 54 A. 938.

80. Sprigg v. Com. Title Ins. & Trust Co., 206 Pa. 548, 56 A. 33.

81, 82, 83. Wilson v. American Palace Car Co. [N. J. Err. & App.] 65 A. 997.

84. Mutual Life Ins. Co. v. Blair, 130 F. 971. See 1 Curr. L. 1066, n. 1.

85. Appointment of a receiver for a corporation. United States Shipbuilding Co. v. Conklin [C. C. A.] 126 F. 132. See 1 Curr. L. 1049, n. 9.

86. Anthony v. Burrow, 129 F. 783.

87. See 1 Curr. L. 1050.

88. Weldon v. Brown, 89 App. Div. 586, 85 N. Y. S. 599.

89. Johnson v. Stephens [Mo. App.] 82 S. W. 192.

90. Gargano v. Pope, 184 Mass. 571, 69 N. E. 343.

91. Federal courts sitting in Texas. McManus v. Chollar [C. C. A.] 128 F. 902.

92. Highlands v. Philadelphia & R. R. Co. [Pa.] 58 A. 660. The defense to be successful must be supported by proof of a character and degree that will satisfy the conscience of a chancellor. Id. Rev. Laws, c. 173, §§ 28, 32, authorizing the pleading of equitable defenses in suits at law, do not apply to probate courts. Bailey v. Dillon [Mass.] 71 N. E. 538.

93. See 1 Curr. L. 1050.

tween actions at law and suits in equity have been abolished, the distinction between legal and equitable principles is still retained,[94] and one court has jurisdiction of both legal and equitable actions; in an action partly legal and partly equitable, both legal and equitable principles are applied.[95] In some states, equitable principles may be applied in certain law actions.[96]

(§ 2) *B. Principles and maxims controlling application of equitable relief. General maxims.*[97]—New principles of equity are not to be added by judicial policy, but old ones are subject to development to meet new conditions.[98]

He who comes into equity must come with clean hands,[99] but this maxim requires only that the plaintiff must not be guilty of reprehensible conduct with respect to the subject-matter of his suit.[1]

He who seeks equity must do equity.[2] This maxim applies only to a party asserting equitable rights or seeking equitable relief,[3] and a defendant can set up

94. Equity will not assume jurisdiction where there is an adequate remedy at law. Wilson v. Green, 135 N. C. 343, 47 S. E. 469.

95. Bentley v. Crummey, 119 Ga. 94, 47 S. E. 209.

96. Action to correct errors of taxing officers. Jefferson County v. Trumbull, 34 Wash. 276, 75 P. 876. See 1 Curr. L. 1050, n. 18.

97. See 1 Curr. L. 1050.

98. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

99. Illustrations: Plaintiff's case being tainted with fraud on his part, equity will not aid him. Craig v. Craig, 54 W. Va. 183, 46 S. E. 371; Poling v. Williams [W. Va.] 46 S. E. 704. Though an agreement between husband and wife to separate and live apart is void, equity will not give relief from a conveyance by him to her in consideration of such agreement, the conveyance being voluntary and not procured by fraud. Anderson v. Anderson [Wis.] 100 N. W. 829. Specific performance or an accounting will not be granted in order that complainants may avail themselves of the proceeds of an unlawful act. Illingworth v. Bloemecke [N. J. Eq.] 58 A. 566. One who is himself obstructing a highway by means of a fence cannot maintain a suit in equity to enjoin another from maintaining a fence in the highway. Brutsche v. Bowers, 122 Iowa, 226, 97 N. W. 1076. A board of trade cannot invoke the aid of equity to protect its claimed property right in quotations. Christie Grain & Stock Co. v. Board of Trade of City of Chicago [C. C. A.] 125 F. 161.

Contra: Board of Trade of City of Chicago v. Kinsey Co. [C. C. A.] 130 F. 507. Plaintiff, by secret agreement obtaining commissions from vendor for sale of property, held, that he was not entitled to specific performance to collect commissions from vendee. York v. Searles, 90 N. Y. S. 37. That deeds were executed by complainant for a wrong purpose does not deprive equity of jurisdiction to cancel them where the defendants were guilty of a breach of trust whereby the deeds were recorded. Bunn v. Stewart [Mo.] 81 S. W. 1091. Where a champertous contract for attorneys' services was entered into between the attorneys and their client, the client is not debarred from relief in equity. Gargano v. Pope, 184 Mass. 571, 69 N. E. 343. See 1 Curr. L. 1051, n. 21.

1. Kinner v. Lake Shore & M. S. R. Co., 69 Ohio St. 339, 69 N. E. 614. Equity will enjoin the sale by "scalpers" of nontransferable excursion tickets, though the complainant railroad agreed with other carriers to reduce the rates and impose the conditions for the excursion. Id. See 1 Curr. L. 1051, n. 22.

2. Thompson v. Williamson [N. J. Eq.] 58 A. 602; Farmers' Loan & Trust Co. v. Denver, etc., R. Co. [C. C. A.] 126 F. 46. See 1 Curr. L. 1051, n. 23.

Illustrations: To rescind a transaction, one must place the other party in statu quo (Barker v. Fitzgerald, 204 Ill. 325, 68 N. E. 430; Edwards v. Mercantile Trust Co., 124 F. 381; Wyman v. Bowman [C. C. A.] 127 F. 257), hence where consideration was a preexisting indebtedness, it need not be returned (Jenkins v. Jonas Schwab Co., 138 Ala. 664, 35 So. 649). One claiming property must pay for improvements bona fide placed thereon, and with complainants' knowledge and acquiescence. Hunter v. McDevitt, 12 N. D. 505, 97 N. W. 869. One is not liable for entering a default judgment by mistake, the mistake being caused by the neglect of the judgment debtor. Clark v. Smith, 90 App. Div. 477, 86 N. Y. S. 472. An injunction will not be allowed on account of the mere failure of the taxing officers to fulfill the requirements of the statute in the levy and assessment, but it must appear that the tax itself was inequitable for the reason that the property was not taxable. Horton v. Driskell [Wyo.] 77 P. 354. A bill by stockholders to set aside an alleged fraudulent sale of property by the corporation to defendants, which alleges that they have sold a portion of the property to bona fide purchasers, prays an accounting by defendants, and offers to allow them credit for any sums expended which will inure to the benefit of the corporation, contains a sufficient offer to do equity. Kessler & Co. v. Ensley, 129 F. 397. Adverse equities growing out of or being closely connected with the subject-matter of the suit are protected by giving plaintiff his relief only on condition that he recognizes the equities of defendant. Lynch v. Burt [C. C. A.] 132 F. 417.

3. Does not apply to the enforcement of a judgment lien against grantees of a judgment debtor. Flanary v. Kane [Va.] 46 S. E. 312.

an equitable defense so far, and so far only, as equity on the whole transaction requires.[4]

Where equities are equal, the law prevails.[5] The equities of the United States appeal to a court of chancery with the same but with no greater force than those of an individual in like circumstances.[6]

Equity acts in personam and not in rem.[7]

Equity regards that as done which in good faith ought to be done.[8]

Existence of an adequate remedy at law.[9]—There being an adequate remedy at law, equity has no jurisdiction of the cause.[10] The mere fact that a legal remedy exists is insufficient to deprive equity of jurisdiction, unless the legal remedy is as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.[11] As to whether or not there is an adequate remedy

4. Suit by judgment creditor to set aside alleged fraudulent conveyances by debtor, defense was that judgment was based on a gaming transaction, held equity would apply the rule of In pari delicto as applied to gambling. Thompson v. Williamson [N. J. Eq.] 58 A. 602.

5. A court of equity will not interfere at the suit of a holder of a prior equitable title or claim to deprive an innocent purchaser for value of a junior equitable estate of a legal estate or advantage which he has subsequently bought or obtained after notice. United States v. Detroit Timber & Lumber Co. [C. C. A.] 131 F. 668.

6. United States v. Detroit Timber & Lumber Co. [C. C. A.] 131 F. 668.

7. Wilson v. American Palace Car Co. [N. J. Err. & App.] 55 A. 997.

8. Will regard taxing records as amended when they ought to be amended. Jefferson County v. Trumbull, 34 Wash. 276, 75 P. 876.

9. See 1 Curr. L. 1052.

10. Seymour Water Co. v. Seymour [Ind.] 70 N. E. 514; Sprinkle v. Duty, 54 W. Va. 559, 46 S. E. 557. See 1 Curr. L. 1052, n. 28-30.

11. Twin City Power Co. v. Barrett [C. C. A.] 126 F. 302; Rochester German Ins. Co. v. Schmidt, 126 F. 998; Wiemer v. Louisville Water Co., 130 F. 246; Holst v. Savannah Elec. Co., 131 F. 931; Driscoll v. Smith, 184 Mass. 221, 68 N. E. 210; Meyer v. Boonville, 162 Ind. 165, 70 N. E. 146; Gulf Red Cedar Co. v. Crenshaw, 138 Ala. 134, 35 So. 50.

ILLUSTRATIONS. Cases in which the legal remedy is held to be adequate.

Accounting: See 1 Curr. L. 1053. The accounts being unilateral and no discovery being sought, equity will not entertain jurisdiction. Sprigg v. Conf. Title Ins. & Trust Co., 206 Pa. 548, 56 A. 33; London Guarantee & Accident Co. v. Doyle, 130 F. 719. Thus equity has no jurisdiction where the suit was to discover the exact amount paid by defendant to his employes during a period of one year. Id. Where the items for which plaintiff seeks to recover are simply items of charges for services rendered and expenses incurred and damages suffered, while the various counterclaims relate to specific claims by defendant against plaintiff for damages by way of tort or breach of contract. Mayo v. Halley [Iowa] 100 N. W. 529. So where a defendant sued for a balance due on account for goods sold and money loaned who pleads a set-off and asks for a judgment for the balance. Jones v. Baker [Ark.] 81 S. W. 607.

Contracts in general: See 1 Curr. L. 1053. Equity will not decree the specific performance of a contract for the sale to plaintiff of a number of cows at a stated price per head, where there is no evidence to show that the cows have any distinctive or peculiar value, which cannot be determined in an action at law for damages, or that defendant is insolvent. Kane v. Luckman, 131 F. 609. Agreement not to engage in certain business in a particular locality, where by the agreement a certain sum is stipulated as liquidated damages. Rucker v. Campbell [Tex. Civ. App.] 79 S. W. 627. Right of a subcontractor to receive payment, he having waived his statutory lien. McCabe v. Rapid Transit Subway Const. Co., 127 F. 465. All cases involving the mere expenditure of money or the performance of services upon a parol agreement for an interest in land. McKinley v. Lloyd, 128 F. 519.

Damages: The mere fact that proof of damages is difficult does not give equity jurisdiction. Sawyer v. Atchison, etc., R. Co. [C. C. A.] 129 F. 100.

Estates of decedents: Under B. & C. Comp. § 385, an executor de son tort has an adequate remedy at law to recover payments made by him in the rightful course of administration. Slate v. Henkle [Or.] 78 P. 325.

Insurance: See 1 Curr. L. 1053, Contracts. Before loss under a policy of insurance, the company which issued it has no adequate remedy at law for fraud, false representations, or concealments which procured its issue. Riggs v. Union Life Ins. Co. [C. C. A.] 129 F. 207. After loss, the company has an adequate remedy at law. Id. The fact that the action at law on the policy will be brought in a state court does not render the remedy at law in the Federal court inadequate. Id. Nor does the fact that the license of the company to do business in the state in which the action at law is to be commenced will be revoked if the company removes that action to a Federal court. Id. That the insured died pending the suit does not deprive the court of equity of jurisdiction. Mutual Life Ins. Co. v. Blair, 130 F. 971.

Leases: See 1 Curr. L. 1053, Contracts. Bill by a lessee against his lessor and a subsequent lessee for relief from a forfeiture of the lease on the ground of nonpayment

at law depends upon the character of the case as disclosed by the pleadings,[12] and

of royalties due at a certain time, though alleging that complainant had paid all the royalties due. Howison v. Baird, 138 Ala. 129, 35 So. 62.

Mandamus will not issue in the absence of an allegation of insolvency or that the property is likely to be removed. Ohio v. Chambers, 5 Ohio C. C. (N. S.) 57.

Mortgages: See 1 Curr. L. 1054, Penalties. Will not cancel instrument, payment being alleged. Dorman v. McDonald [Fla.] 36 So. 52. The right of a mortgage creditor to sue and collect rents from a tenant held inadequate where the creditor is entitled to such rents until the payment of his entire debt, and the rents to accrue under the outstanding lease will be insufficient to extinguish his claim. De Berrera v. Frost [Tex. Civ. App.] 77 S. W. 637. In a suit to enjoin the holder of chattel mortgages and judgments from enforcing them, defendant cannot, by cross bill, recover a sum paid for attorney's fees in connection with the assignment to him of one of the judgments. Miller v. De Yoe [N. J. Eq.] 58 A. 179.

Pledges: Suit to redeem stock held by a bank as collateral security and sold for an inadequate price. Arbogast v. American Exch. Nat. Bank [C. C. A.] 125 F. 518.

Political questions: The general rule is that equity will not interfere in any matter growing out of an election which may be determined by a contest prescribed in the statute providing for the election. Ogburn v. Elmore [Ga.] 48 S. E. 702. In a factional dispute in a political party, the time not having arrived when the secretary of state was required to make certification of nominations, held no adequate remedy at law to determine which person was entitled to such certification. State v. Houser [Wis.] 100 N. W. 964.

Releases: Suit to avoid a release on ground of fraud. Such v. Bank of State of New York, 127 F. 450.

Remedies against corporations, officers, or stockholders: See 1 Curr. L. 1054. Suit to hold a director personally liable for the debts of a corporation. Gen. Laws 1896, c. 180, § 21, providing that the remedy shall be an action on the case. Legg & Co. v. Dewing [R. I.] 57 A. 373. Rescission of a franchise will not be granted for noncompliance with conditions. Seymour Water Co. v. Seymour [Ind.] 70 N. E. 514. Minority, dissenting, nonparticipating stockholders cannot maintain a suit in equity to have a sale of corporation's property enjoined on the ground that it broke an implied contract between the stockholders and the corporation, in that the latter should be operated for the purposes for which it was incorporated. Tanner v. Lindell R. Co. [Mo.] 79 S. W. 155.

Right of property or possession: See 1 Curr. L. 1053. Suit to recover money held in trust. Downs v. Downs' Ex'r, 75 Vt. 383, 56 A. 9. Will not enjoin the wrongful removal of personal property where such property can be recovered at law and the tort feasor is not insolvent. Kistler v. Weaver, 135 N. C. 388, 47 S. E. 478.

Action of ejectment as an adequate remedy to try the legal title in a partition suit. Ellis v. Feist [N. J. Eq.] 56 A. 369. Suit for an injunction, and reformation of a deed. Marshall v. Homler, 13 Okl. 264, 74 P. 368. Issues of adverse possession (Tudor Boiler Mfg. Co. v. Greenwald Co., 5 Ohio C. C. [N. S.] 37), to determine the rights to royalties on gas and taken from the land (Zinn v. Zinn, 54 W va. 483, 46 S. E. 202), or abandonment (Tudor Boiler Mfg. Co. v. Greenwald Co., 5 Ohio C. C. [N. S.] 37), even though equitable remedies are necessary. Where whole question was whether use of a passageway amounted to a dedication or was only permissive. Scanlin v. Conshohocken Borough [Pa.] 58 A. 122. Partial ouster of possession by a co-tenant. Brown v. Reed [Neb.] 100 N. W. 143.

Torts or criminal acts: See 1 Curr. L. 1053. Wrongful destruction of a building. Wilson v. Wilson [R. I.] 56 A. 773. Libel or slander. Edison v. Edison, Jr., Chemical Co., 128 F. 957. Nuisance. Dennis v. Mobile & M. R. Co., 137 Ala. 649, 35 So. 30. Will not compel a railroad company to restore a crossing over its track. Louisville & N. R. Co. v. Smith, 25 Ky. L. R. 1459, 78 S. W. 160. Wrongful seizure of property to enforce the payment of taxes. City of Jacksonville v. Massey Business College [Fla.] 36 So. 432. Sale of nontransferable railroad tickets. New York, etc., R. Co. v. Reeves, 85 N. Y. S. 28.

Trespass: See 1 Curr. L. 1054. Continuing trespass. Christman v. Howe [Ind.] 70 N. E. 809.

Cases in which the legal remedy is held inadequate.

Accounting and bill of discovery: Equity has jurisdiction where the accounts are mutual, complicated, and a discovery is sought. Gulf Red Cedar Co. v. Crenshaw, 138 Ala. 134, 35 So. 50; Davis v. Wilson [N. J. Eq.] 56 A. 704; Mayo v. Halley [Iowa] 100 N. W. 529; Western Union Tel. Co. v. American Bell Tel. Co. [C. C. A.] 125 F. 342. The cause being transferred to the equity docket as involving a complicated account, the fact that the cause is subsequently simplified by agreement will not oust the equity side of the court of jurisdiction, no motion to remand being made. Ellison v. Dunlap, 25 Ky. L. R. 1495, 78 S. W. 155. Revision 1898, § 118 does not deprive a court of chancery of its jurisdiction of a suit for an accounting. Evans v. Evans [N. J. Eq.] 57 A. 872. **Applied in:** Partnership account. Schulsinger v. Blau, 84 App. Div. 390, 82 N. Y. S. 686. Where one held property in a fiduciary capacity. Slayback v. Raymond, 93 App. Div. 326, 87 N. Y. S. 931. Suit to recover share of profits from joint adventure. Weldon v. Brown, 89 App. Div. 586, 85 N. Y. S. 599. Accounting between cotenants. Gulf Red Cedar Co. v. Crenshaw, 138 Ala. 134, 35 So. 50.

Equity has jurisdiction of a bill of discovery. Rochester German Ins. Co. v. Schmidt, 126 F. 998.

Discovery: Where consignee did not know who was liable for conversion of goods shipped. Mississippi Cotton Compress & Warehouse Co. v. M. Levy & Co. [Miss.] 36 So. 281.

Contracts: An action for damages for the breach of a stipulation that an action at law which has passed to judgment shall abide the final decision of another action is

such defense to be available must be pleaded[13] unless the case is one not cognizable in equity.[14] The adequacy of the legal remedy depending upon a pure question of law, the court may determine such question either in its equitable or legal capacity.[15] An objection that plaintiff has an adequate remedy at law is jurisdictional,[16] and the court may, either on objection or of its own motion, dismiss the bill at any stage of the cause.[17] In New York, transferring the cause to the

not as practical and efficient to attain the ends of justice as a suit in equity for specific performance of the contract, where the final decision of the other action requires a reversal of the judgment. Brown v. Arnold [C. C. A.] 131 F. 723.

Cancellation, rescission or reformation of contracts: See 1 Curr. L. 1055. Suit to have contract under which property was delivered to another in trust rescinded. Slayback v. Raymond, 93 App. Div. 326, 87 N. Y. S. 931.

Enforcement of contracts: See 1 Curr. L. 1055. Specific performance will be decreed to enforce a family agreement. Clawson v. Brewer [N. J. Eq.] 58 A. 598. A suit to enforce an annuity contract issued as payment for an insurance policy held cognizable in equity, as under the contract, the deceased's children had at that time no present right of action. Mutual Life Ins. Co. v. Blair, 130 F. 971.

Enforcement of claims in bankruptcy: See 1 Curr. L. 1056. A trustee in bankruptcy may recover an alleged preferential payment made by the bankrupt. Pond v. New York Nat. Exch. Bank, 124 F. 992. See Bankruptcy, 3 Curr. L. 434.

Mandamus: The fact that a writ of mandamus might be appropriate to the facts alleged in a bill will not oust the court of equity of jurisdiction. Wiemer v. Louisville Water Co., 130 F. 246.

Matters relating to corporations: See 1 Curr. L. 1056. Where members of a membership corporation were illegally expelled. Stein v. Marks, 44 Misc. 140, 89 N. Y. S. 921. Where a shareholder in a national bank sues as such and as a cestui que trust, for the appointment of a receiver. Cogswell v. Second Nat. Bank, 76 Conn. 252, 56 A. 574.

Mortgages: Will redeem property from a mortgage after default in the payment of the mortgage debt. Manhattan Life Ins. Co. v. Wright [C. C. A.] 126 F. 32. Sequestration held an inadequate remedy to collect rents for mortgage creditor. De Berrera v. Frost [Tex. Civ. App.] 77 S. W. 637. That plaintiffs, in an action to set aside a mortgage procured by fraudulent representations, have an adequate remedy by way of defense to an action to foreclose the mortgage, will not defeat the plaintiff's equitable remedy. Hill v. Gettys, 135 N. C. 373, 47 S. E. 449.

Multiplicity of suits: See 1 Curr. L. 1055. A multiplicity of actions being necessary, the remedy at law is inadequate. Mutual Life Ins. Co. v. Blair, 130 F. 971; Wiemer v. Louisville Water Co., 130 F. 246. Suit by property owners to enjoin the laying of street car tracks in the street. Holst v. Savannah Elec. Co., 131 F. 931. An action for rents against tenant held insufficient as involving a multiplicity of suits. De Berrera v. Frost [Tex. Civ. App.] 77 S. W. 637.

Pledges: Equity has jurisdiction to enforce pledges and other liens securing obligations. Ingersoll v. Coram, 127 F. 418. Suit to redeem stock unfairly sold by the pledgor. Hagan v. Continental Nat. Bank [Mo.] 81 S. W. 171.

Trespass and other injuries to real property, or the possession or enjoyment thereof or rights therein: See 1 Curr. L. 1055. Continuous interference with plaintiff's right of passage over a certain street. Driscoll v. Smith, 184 Mass. 221, 68 N. E. 210. A bill by a railroad company against a number of defendants, alleging that as owners of lands through which its road runs they are interfering with its right of way, denying its right to the same, threatening suits and preventing it from keeping its roadbed in repair. Louisville & N. R. Co. v. Smith [C. C. A.] 128 F. 1. Will enjoin interference with easements or their disturbance or destruction, actual or threatened. Id. A remainderman may, during the existence of the particular estate, maintain a suit in equity to have a cloud removed from his title. Keyes v. Ketrick [R. I.] 56 A. 770.

Will compel a railroad company to replace a farm crossing to which the owner of the land is entitled. Louisville & N. R. Co. v. Brooks, 25 Ky. L. R. 1307, 77 S. W. 693. Where a railroad company, under an agreement with a cotton compress company, delivered to a consignee cotton compress tickets calling, not for specific bales, but for an equal number of similar bales and there was a shortage in a shipment. Mississippi Cotton Compress & Warehouse Co. v. M. Levy & Co. [Miss.] 36 So. 281. Village has no adequate remedy at law for the construction of a railroad over its main street at grade without approval of the railroad commissioners, when one-fourth of the expense of a subsequent change of the route would fall on it. Village of Bolivar v. Pittsburg, etc., R. Co., 88 App. Div. 387, 84 N. Y. S. 678. Where injury is irreparable. Palatka Waterworks v. City of Palatka, 127 F. 161.

Other Torts: See 1 Curr. L. 1055, Trespass, etc. Will restrain brokers from dealing in nontransferable railroad tickets. Illinois Cent. R. Co. v. Caffrey, 128 F. 770.

12. Twin City Power Co. v. Barrett [C. C. A.] 126 F. 302; Racey v. Racey, 12 Okl. 650, 73 P. 305. Some reasons for equitable interference must always be shown in a bill or complaint for cancellation, where the remedy is not sought for the protection of an equitable estate, interest or right. Seymour Water Co. v. Seymour [Ind.] 70 N. E. 514.

13. Rooney v. Bodkin, 93 App. Div. 431, 87 N. Y. S. 800.

14. Toledo, etc., R. Co. v. St. Louis, etc., R. Co., 208 Ill. 623, 70 N. E. 715.

15. Rooney v. Bodkin, 93 App. Div. 431, 87 N. Y. S. 800.

16. Kane v. Luckman, 131 F. 609.

17. On objection: Kane v. Luckman, 131 F. 609.

On its own motion: Varrick v. Hitt [N. J. Err. & App.] 57 A. 406.

jury trial calendar is the proper procedure.[18] No objection being made, the court may, in the exercise of a sound discretion, retain the cause.[19]

In order to sue in equity one must have diligently pursued[20] and exhausted[21] his legal remedies.

Doing complete justice.[22]—A court of equity having jurisdiction of the parties and the subject-matter, it will retain the case to do complete justice and grant complete relief.[23] This power is plenary,[24] but its exercise is limited by the scope of the allegations of the bill or other pleadings;[25] and to authorize legal relief some special and substantial ground of equitable jurisdiction must be alleged and proved.[26]

Multiplicity of suits.[27]—Equity has jurisdiction to prevent a multiplicity of suits.[28] This doctrine rests upon the inadequacy of the legal remedy.[29] There is no hard and fast rule by which jurisdiction in equity on the ground of the avoidance of a multiplicity of suits may be determined,[30] but generally where a number of suits arise out of the same transaction and the decision in each depends upon the same principles of law, equity has jurisdiction of the combined suit.[31] A court

18. Gilbert v. Bunnell, 92 App. Div. 284, 86 N. Y. S. 1123.

19. Varrick v. Hitt [N. J. Err. & App.] 67 A. 406.

20. Racey v. Racey, 12 Okl. 650, 73 P. 305. See 1 Curr. L. 1057, n. 39.

21. Suit by bondholder of a railroad against purchaser of said railroad for payment of his bonds. Sawyer v. Atchison, etc., R. Co. [C. C. A.] 129 F. 100. See 1 Curr. L. 1057, n. 39.

22. See 1 Curr. L. 1057.

23. Whaley v. New York, 81 N. Y. S. 1043; Redner v. New York Fire Ins. Co. [Minn.] 99 N. W. 886; Harrigan v. Gilchrist [Wis.] 99 N. W. 909; Sprinkle v. Duty, 54 W. Va. 559, 46 S. E. 557; Latimer v. Irish-American Bank, 119 Ga. 887, 47 S. E. 322; Hagan v. Continental Nat. Bank [Mo.] 81 S. W. 171; McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194; Guthiel Park Inv. Co. v. Montclair [Colo.] 76 P. 1050; Bessemer Irr. Ditch Co. v. Woolley [Colo.] 76 P. 1053; Ingersoll v. Coram, 127 F. 418. Where the jurisdiction was conferred by statute. Carter, Rice & Co. v. Samuel Hano Co., 72 N. H. 549, 58 A. 243. Will grant legal relief. Toledo, etc., R. Co. v. St. Louis, etc., R. Co., 208 Ill. 623, 70 N. E. 715; Bourke v. Hefter, 202 Ill. 321, 66 N. E. 1084. When incidental to the determination of some equitable question. India Rubber Co. v. Consolidated Rubber Tire Co., 117 F. 354. Will not grant discovery in an action for breach of contract. Id. Stout v. Phoenix Assur. Co. [N. J. Eq.] 56 A. 691. On a bill to set aside an appraisement of insured property destroyed by fire, the court will not retain jurisdiction, the appraisement being set aside, to determine the extent of the liability of the insurer, or whether the insurer is entitled to a new appraisement. Id. See 1 Curr. L. 1058, n. 43.

Applications of rule: Will determine in a suit for assignment of dower the rights of all parties in a decedent's estate. Potter v. Clapp, 203 Ill. 592, 68 N. E. 81. Where one obtains property by virtue of a fiduciary relation, equity will raise a trust by construction. Ackley v. Croucher, 203 Ill. 530, 68 N. E. 86.

Damages will be awarded. Toledo, etc., R. Co. v. St. Louis, etc., R. Co., 208 Ill. 623, 70 N. E. 715; Slayback v. Raymond, 93 App. Div. 326, 87 N. Y. S. 931; Montgomery v. McLaury, 143 Cal. 83, 76 P. 964; Whaley v. New York, 81 N. Y. S. 1043. Where after commencement of a suit to restrain a nuisance and for damages, the nuisance is abated, a request by complainant to amend his bill so as to only ask for damages for past injuries will be refused as unnecessary. Id. The fact that a complaint demands judgment for a sum of money does not necessarily stamp the action as one at law. Schulsinger v. Blau, 84 App. Div. 390, 82 N. Y. S. 686.

Procedure: When necessary will supply omissions and defects of legal procedure. Wardell v. Wardell [Neb.] 99 N. W. 674. Whether a suit to enjoin the collection of a judgment is in effect a new trial or not the chancellor may retain the case and finally dispose of the cause. Headley v. Leavitt [N. J. Eq.] 57 A. 510.

24. Bunel v. O'Day, 125 F. 303, 316.

25. Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603. See 1 Curr. L. 1058, n. 44; also 1 Curr. L. 1059, n. 45-47. See post § 10, subd. C.

26. Toledo, etc., R. Co. v. St. Louis, etc., R. Co., 208 Ill. 623, 70 N. E. 715. Mere statements in a bill upon which the chancery jurisdiction might be maintained, but which are not proved, will not authorize a decree upon such parts of the bill as, if standing alone, would not give the court jurisdiction. Id.

27. See 1 Curr. L. 1059.

28. Wiemer v. Louisville Water Co., 130 F. 246. See 1 Curr. L. 1059, n. 51. State v. Sunapee Dam Co., 72 N. H. 114, 55 A. 899. [By a divided court.]

29. De Berrera v. Frost [Tex. Civ. App.] 77 S. W. 637. See ante, § 2, subd. B. Existence of an adequate remedy at law, and note thereto.

30. Wyman v. Bowman [C. C. A.] 127 F 257.

31. Hightower v. Mobile, etc., R. Co. [Miss.] 36 So. 82; Wyman v. Bowman [C. C. A.] 127 F. 257. See 1 Curr. L. 1059, 1060, n. 52-55.

of equity will not intervene, however, unless a probability of a multiplicity of suits is shown,[32] and in the case of questions triable by a jury, it is an appeal to the grace of the court.[33]

(§ 2) *C. Occasions for, and subjects of, equitable relief.*[34]—Fraud[35] and misrepresentation[36] save where a judgment for damages affords adequate relief,[37] mistake,[38] trusts,[39] impending irreparable injuries,[40] protection of the rights of members of a corporation,[41] reasonableness of salaries paid corporate officers,[42] winding up the affairs of an insolvent corporation,[43] the protection of minors, incompetents, and lunatics,[44] removing clouds from title,[45] and determining the use of conflicting easements,[46] are subjects of equitable jurisdiction. Equity has no jurisdiction to prevent impending injuries unless it be shown that the wrong which is feared will probably result from the wrongful acts of the parties before the court, without the intervention of persons to the court unknown.[47]

Equity is conversant only with matters of property and the maintenance of civil rights,[48] and has no criminal jurisdiction.[48]

Illustrations: Has jurisdiction of the combined suit of 57 persons, who executed notes to induce a railroad to build through a certain town, to have the notes set aside for fraud. Hightower v. Mobile, etc., R. Co. [Miss.] 36 So. 82. Will take jurisdiction to determine the extent of the legal rights of the various riparian owners in a body of water. State v. Sunapee Dam Co., 72 N. H. 114, 55 A. 899 [By a divided court]. Has jurisdiction of a suit which dispenses with nine actions at law. Wyman v. Bowman [C. C. A.] 127 F. 257. The fact that several lots are claimed under the same title does not alone give equity jurisdiction to determine the title in order to avoid a multiplicity of actions. It must further appear that an action at law will not fully determine the question. Burroughs v. Cutter, 98 Me. 178, 56 A. 649. A bill alleging a contract, by its terms still in force, under which complainant is furnishing water for defendant city and its citizens, and the passing of an ordinance by defendant fixing much lower rates than provided by the contract, makes a case for equity jurisdiction. Palatka Waterworks v. Palatka, 127 F. 161.

32, 33. Tudor Boiler Mfg. Co. v. Greenwald Co., 5 Ohio C. C. (N. S.) 37.

34. See 1 Curr. L. 1060.

35. Clark v. Seagraves [Mass.] 71 N. E. 813; Fire Ass'n v. Allesina [Or.] 77 P. 123; Hightower v. Mobile, etc., R. Co. [Miss.] 36 So. 82. Champerty. Gargano v. Pope, 184 Mass. 571, 69 N. E. 343. Fraud as to property covered by trust deed. Nelson v. Hall [Mo. App.] 79 S. W. 500. Meritorious defense lost by fraud. Ailis v. Hall, 76 Conn. 322, 56 A. 637. Bill to avoid subscriptions of stock to a corporation. Wyman v. Bowman [C. C. A.] 127 F. 257. Fraud perpetrated upon innocent purchaser by a copurchaser. Jones v. Draper, 4 Ohio C. C. (N. S.) 105. Where agent misrepresented purchase price of land to principal, thus obtaining more money than he is otherwise entitled to. Kroll v. Coach [Or.] 78 P. 397.

36. Cooper v. Hunt, 103 Mo. App. 9, 77 S. W. 483.

37. Montgomery v. McLaury, 143 Cal. 83, 76 P. 964.

38. Barker v. Fitzgerald, 204 Ill. 325, 68 N. E. 430. Reformation of deed. Ferrell v. Ferrell, 53 W. Va. 515, 44 S. E. 187.

39. Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195. In the absence of statutes, such jurisdiction is exclusive. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. Where creditors of an insured are as such made beneficiaries under his life policy, they to pay in a certain way, the insurance in excess of their debts, they are trustees, so that an action against them for settlement thereof should be transferred to equity. Wrather v. Stacy [Ky.] 82 S. W. 420.

40. Nuisance. State v. Sunapee Dam Co., 72 N. H. 114, 55 A. 899 [By a divided court]. Reese v. Wright [Md.] 56 A. 976. Trespass. Toledo, etc., R. Co. v. St. Louis, etc., R. Co., 208 Ill. 623, 70 N. E. 715. Will enjoin the laying of railroad tracks above the established grade of the street in which they are sought to be laid. Zook v. Pennsylvania R. Co., 206 Pa. 603, 56 A. 82.

41. Members of a membership corporation illegally excluded from meetings, etc. Stein v. Marks, 44 Misc. 140, 89 N. Y. S. 921.

42. Especially where the salary was fixed by the vote of a majority stockholder for his own benefit. Lillard v. Oil, Paint & Drug Co. [N. J. Eq.] 56 A. 254.

43. Reed v. McCormick & Gold [Va.] 45 S. E. 868. Appoint a receiver. United States Shipbuilding Co. v. Conklin [C. C. A.] 126 F. 132.

44. Equity will set out the portion of a widow who has elected to take a statutory share in a testate estate some of the beneficiaries whereof are minors and incompetents. Benedict v. Wilmarth [Fla.] 35 So. 84.

45. Failure to pay royalties does not create a cloud on the title to patents, hence suit to quiet title is not maintainable in equity. Henderson v. Dougherty, 95 App. Div. 346, 88 N. Y. S. 665.

46. West Jersey & S. R. Co. v. Atlantic City & S. Traction Co. [N. J. Eq.] 56 A. 890. This right, while inherent in the court, is protected by art. 6, § 1, of the New Jersey Constitution. Id. It is not affected by legislative franchises or charters. Id.

47. New York, etc., R. Co. v. Reeves, 85 N. Y. S. 28.

48. Will not undertake to supervise the acts and management of a political party for

By answering to the merits of the bill and going to hearing without objection, defendant waives the right to object that the suit is not cognizable in equity, the subject-matter being within general equitable jurisdiction.[50]

Among the peculiar remedies of equity are specific enforcement of contracts[51] and the reformation of instruments.[52]

Separate articles pertaining to each of the several subjects of equitable jurisdiction, and to each equitable remedy, should be consulted.[53]

§ 3. *Laches and acquiescence.*[54]—Laches will bar equitable relief,[55] the principle resting on the ground of public policy and the repose of property rights,[56] acquiescence,[57] and the protection of innocent third persons.[58] Laches is inexcusable delay in enforcing a right,[59] by reason of which the condition or relation of the property or persons has become so changed as to render the enforcement of plaintiff's claim inequitable.[60] Mere lapse of time, except where analogous statutes of limitation are applied, is not of itself sufficient,[61] nor need the delay be for the period fixed by the analogous statute of limitations,[62] though, in the absence of special circumstances, a less period is never deemed a bar.[63] Laches is an equitable defense, taking the place of a statute of limitations,[64] and is controlled by equitable considerations,[65] and depends upon the facts and circumstances of each case.[66] The doctrine of nullum tempus does not apply where the

the protection of a purely legal right. Winnett v. Adams [Neb.] 99 N. W. 681. Has no jurisdiction to enjoin officers of a state from issuing a certificate of nomination to a candidate for representative in Congress. Anthony v. Burrow, 129 F. 783. See 1 Curr. L. 1062, n. 69.

49. Will not interfere for the purpose of granting a new trial in a criminal case on the ground of newly-discovered evidence. Hubbard v. State [Neb.] 100 N. W. 153. See 1 Curr. L. 1062, n. 69.

50. Altoona Electrical, Engineering & Supply Co. v. Kittanning, etc., R. Co., 126 F. 559.

51. Altoona Electrical, Engineering & Supply Co. v. Kittanning, etc., R. Co., 126 F. 559. See 1 Curr. L. 1062.

52. Ferrell v. Ferrell, 53 W. Va. 515, 44 S. E. 187. See 1 Curr. L. 1062.

53. See titles like Cancellation of Instruments, 1 Curr. L. 413; Contribution, 1 Curr. L. 704; Discovery and Inspection, 1 Curr. L. 930; Injunctions, 2 Curr. L. 397; Trusts, 2 Curr. L. 1924, etc.

54. See 1 Curr. L. 1063.

55. Ryan v. Woodin [Idaho] 75 P. 261. See 1 Curr. L. 1063, n. 77.

56. Dempster v. Rosehill Cemetery Co., 206 Ill. 261, 68 N. E. 1070.

57. Lillard v. Oil, Paint & Drug Co. [N. J. Eq.] 56 A. 254.

58. Allis v. Hall, 76 Conn. 322, 56 A. 637.

59. Cresap v. Cresap, 54 W. Va. 581, 46 S. E. 582; Sinclair v. Auxiliary Realty Co. [Md.] 57 A. 664; Maher v. Aldrich, 205 Ill. 242, 68 N. E. 810; Cahill v. Superior Court of San Francisco [Cal.] 78 P. 467. Hence the question of relationship is entitled to great weight where the question is one of laches in taking hostile steps. Arkins v. Arkins [Colo. App.] 77 P. 256.

60. London & San Francisco Bank v. Dexter Horton & Co. [C. C. A.] 126 F. 593; Potter v. Kimball [Mass.] 71 N. E. 308; Cresap v. Cresap, 54 W. Va. 581, 46 S. E. 582; Arkins v. Arkins [Colo. App.] 77 P. 256; Tanner v. Lindell R. Co. [Mo.] 79 S. W. 155. See 1 Curr. L. 1063, n. 79.

61. Arkins v. Arkins [Colo. App.] 77 P. 256; Potter v. Kimball [Mass.] 71 N. E. 308; Cahill v. Superior Court of San Francisco [Cal.] 78 P. 467 [See this case for short but clear discussion]. Williams v. Williams' Ex'r, 25 Ky. L. R. 836, 76 S. W. 413. See 1 Curr. L. 1063, n. 79.

62. Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195 [dicta]; Sinclair v. Auxiliary Realty Co. [Md.] 57 A. 664.

63. Gulf Red Cedar Co. v. Crenshaw, 138 Ala. 134, 35 So. 60.

64. Where one is vested with legal title to land, laches will not defeat a suit for it when the right is not yet barred by limitations. Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603.

65. Cresap v. Cresap, 54 W. Va. 581, 46 S. E. 582.

66. Madison v. Madison, 206 Ill. 534, 69 N. E. 625; Sinclair v. Auxiliary Realty Co. [Md.] 57 A. 664. See 1 Curr. L. 1063, n. 82.

Conduct amounting to laches: See 1 Curr. L. 1063. Delay by a bank of over four years before bringing an action to recover money paid by fraud on notes. German Sav. Bank v. Des Moines Nat. Bank, 122 Iowa, 737, 98 N. W. 606. Delay in questioning right of grantee of a deed of five years after the deed was recorded. Booker v. Booker, 208 Ill. 529, 70 N. E. 709. Unexplained delay for five years to bring a suit to enforce a contract. Bauer v. Lumaghi Coal Co., 209 Ill. 316, 70 N. E. 634. Eleven years delay to sue to recover land. Thornton v. Natchez [C. C. A.] 129 F. 84. Incorporator did not receive amount of stock to which he was entitled, did not sue for 14 years. In re Ridgway's Account, 206 Pa. 587, 56 A. 25. Silence, by one interested in property, for 20 years after notice of sale thereof. Mason v. Odum, 210 Ill. 471, 71 N. E. 386. 24 years held to bar suit to recover land. Chouteau v. Klapmeyer [Kan.] 75 P. 1009. Delay of 26 years in suing to recover personal property held

government is suing for the use and benefit of an individual or for the prosecution of a private or proprietary right.[97]

to bar suit, though delay was due to plaintiff's difficulty in establishing the title thereto as against a third party. Kase v. Burnham, 206 Pa. 208, 55 A. 1028. Indian grantor whose deed was not approved by the secretary of the interior held, by delay of 30 years, to have lost right to question validity of deed. Pope v. Falk, 66 Kan. 793, 72 P. 246. Delay of 40 years to compel reissuance of lost stock. Dempster v. Rosehill Cemetery Co., 206 Ill. 261, 68 N. E. 1070. Delay of 45 years after repudiation of trust by trustee. Thorne v. Foley [Mich.] 100 N. W. 905. Laches in allowing term "Vichy" to become generic held to prevent enjoining use of such word by competitors. La Republique Francaise v. Saratoga Vichy Spring Co., 191 U. S. 427, 48 Law. Ed. 247. Acquiescence in destruction of railroad crossing will bar equitable relief to have it restored. Louisville & N. R. Co. v. Smith, 25 Ky. L. R. 1459, 78 S. W. 160. Failure to seasonably file specifications of objections in bankruptcy proceedings. In re Upson, 124 F. 980. Stockholders by whose authorization ultra vires acts are done cannot afterwards avoid the same in equity. McCampbell v. Fountain Head R. Co. [Tenn.] 77 S. W. 1070. A vendor selling off an estate in lots with restrictions upon the use thereof, he will lose his right in equity to enforce the restrictions against one grantee if he knowingly permits other grantees to materially violate the same restriction. Ocean City Ass'n v. Chalfant [N. J. Eq.] 55 A. 801. Suit for reformation of a mortgage, in that a mutual mistake had been made, held could be maintained after judgment of law court construing the mortgage, thus making the mistake apparent. Allis v. Hall, 76 Conn. 322, 56 A. 637. Where a minor distributee of an estate filed a motion to reinstate on the docket, an appeal in an action against an administrator brought by all the distributees and asked for her share of the judgment recovered against the appealing administrator, she became a party and was charged with notice of an instrument filed acknowledging settlement with the administrator. Bridgens v. West [Tex. Civ. App.] 80 S. W. 417.

Conduct not amounting to laches: See 1 Curr. L. 1064. It is not laches for the owner of the legal title to fail to assert his equities therein until his legal title is assailed in a court of chancery. Farmers' Loan & Trust Co. v. Denver, etc., R. Co. [C. C. A.] 126 F. 46; Hays v. Marsh, 123 Iowa, 81, 98 N. W. 604. Suit for land the adverse claimant not being in actual possession. Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603. Action to determine water rights, plaintiff or his predecessors having continuously exercised their rights for the 25 years immediately preceding. Miller v. Thompson, 139 Cal. 643, 73 P. 583. Neglect to act with reference to a void judgment until some attempt is made to enforce the same. Cooley v. Barker, 122 Iowa, 440, 98 N. W. 289. Suit to restrain infringement of a trade-mark, the evidence not showing that plaintiff knew of such infringement until just prior to suing. Gaines & Co. v. Whyte Grocery, Fruit & Wine Co. [Mo. App.] 81 S. W. 648. Suit commenced immediately on discovering fraud. Walker v. Shepard, 210 Ill. 100, 71 N. E. 422. Where bill to enforce trust was filed within a few months after the repudiation of the trust by the trustee. Maher v. Aldrich, 205 Ill. 242, 68 N. E. 810. An appeal being immediately taken from an order and dismissed on the ground that the order was not appealable, mandamus proceedings instituted within one year after the order was entered, held not barred by laches. Cahill v. Superior Court of San Francisco [Cal.] 78 P. 467. Laches is not to be imputed to a wife for failing to sue to establish a resulting trust in her favor in land held by her husband, where there is positive evidence that he always recognized her rights. Madison v. Madison, 206 Ill. 534, 69 N. E. 625. 13 years in bringing suit for fraud of relative. Arkins v. Arkins [Colo. App.] 77 P. 256. Where it was impossible to perform the conditions of a lease, which fact did not become apparent until a year and a few months after the execution of the lease, a suit to rescind on the ground of mistake brought about two years after the execution of the lease is not barred by laches. Barker v. Fitzgerald, 204 Ill. 325, 68 N. E. 430. Where abutting property owner immediately applied for an injunction against a railroad track in street on learning of its permanent character. Rock Island & P. R. Co. v. Johnson, 204 Ill. 488, 68 N. E. 549. A widow will not be held barred by laches from maintaining a suit to set aside an antenuptial agreement for fraud, instituted at once after the unsuccessful termination of a prior suit for its reformation, which was commenced within a year after her husband's death, and where she at all times asserted the invalidity of the agreement. Russell v. Russell, 129 F. 434. Delay of two years after maturity of note to bring suit to foreclose trust deed securing it. Murto v. Lemon [Colo. App.] 75 P. 160. Acquiescence to one separate illegal or invalid act does not bind one to submit to a continuance of similar illegal or invalid acts. Lillard v. Oil, Paint & Drug Co. [N. J. Eq.] 56 A. 254. Where a series of illegal acts by a corporation's officers and directors, continuing over a period of several years, is pursued till the commencement of an action against the officers and directors therefor by minority stockholders, laches cannot be predicated of the plaintiff's delay in bringing suit. McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194. A party is not chargeable with laches in presenting a prior adjudication as a bar, where it was set up by a petition filed before final decree, and within a month after the dismissal by the supreme court of a petition for a writ of certiorari to review the decree so pleaded. Penfield v. Potts & Co. [C. C. A.] 126 F. 475. An owner of bonds issued by a village, who commenced an action thereon within the period of limitation, is not guilty of laches in suing in equity two years after the rendering of judgment in such prior action and one year after a judgment is rendered dissolving the village. Pepin Tp. v. Sage [C. C. A.] 129 F. 657. Equity will not interpose to enjoin one from reaping the benefits of a judgment at law for reasons which might have been presented as defenses to the ac-

Laches is a matter of defense, the burden of proving which is upon defendant,[68] and in some states should be raised by answer.[69]

Excusable delay.[70]—Lack of knowledge, the circumstances not demanding inquiry, excuses delay.[71]

Application of analogous statutes of limitation.[72]—Under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous limitation at law,[73] though this rule may be changed by circumstances rendering the application of the rule inequitable.[74] The suit being brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches;[75] suit being brought after the statutory time, the burden is on the complainant to show in his bill that it would be inequitable to apply it to his case.[76] A legal demand sued on in equity is subject to the statute of limitations, and not laches.[77]

§ 4. *Practice and procedure in general.*[78]—Rules of procedure in chancery should be liberally construed.[79] Jurisdiction must attach,[80] and a defendant appearing conditionally and contesting the question of jurisdiction must confine himself, in his pleadings, strictly to this issue. If he pleads to the merits, he submits himself to the jurisdiction of the court.[81] No jurisdictional error in regard to the subject-matter can be committed so long as there is no prejudicial departure from established practice.[82] The right to consolidate several equitable actions, which might have been brought as one, into one exists independent of statutory authority.[83] A chancery suit can only be begun by filing a bill.[84] The original

tion. Allis v. Hall, 76 Conn. 322, 56 A. 637. Laches cannot be imputed to a married woman to defeat her suit for land not her separate estate. Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603. Where a husband who holds realty as trustee for his wife continues to occupy it after her death as tenant by the curtesy, the claim of their child as heir of the mother does not thereby become stale. Williams v. Williams' Ex'r, 25 Ky. L. R. 836, 76 S. W. 413. Where plaintiff, prior to his marriage, executed certain deeds of his property, but did not deliver the same to the grantees, plaintiff is not precluded from maintaining a suit to cancel the deeds, which the grantees procured to be recorded against plaintiff's protest. Bunn v. Stewart [Mo.] 81 S. W. 1091. Suit to set aside certain alleged fraudulent conveyances, facts considered and held no laches. Sinclair Auxiliary Realty Co. [Md.] 57 A. 664.

67. La Republique Francaise v. Saratoga Vichy Spring Co., 191 U. S. 427, 48 Law. Ed. 247. See 1 Curr. L. 1063, n. 80.

68. Murto v. Lemon [Colo. App.] 75 P. 160. See 1 Curr. L. 1080.

69. Is not ground for demurrer. Ogilvy Irrigating & Land Co. v. Insinger [Colo. App.] 75 P. 598. See 1 Curr. L. 1080, n. 64-67.

70. See 1 Curr. L. 1064.

71. A stockholder has no implied notice of corporate acts so as to be guilty of laches. Kessler & Co. v. Ensley Co., 129 F. 397. See 1 Curr. L. 1064, 1065, n. 84, 85.

72. See 1 Curr. L. 1065.

73. Wyman v. Bowman [C. C. A.] 127 F. 257; Brown v. Arnold [C. C. A.] 131 F. 723. Where in a suit to recover lands and set aside a sale thereof for fraud, it appeared that the period of limitations had not expired, it was not proper to submit the issue of laches. Slaughter v. Coke County [Tex. Civ. App.] 79 S. W. 863.

In a suit in equity to enjoin the infringement of a trade-mark, Rev. St. 1899, §§ 4272, 4273, prescribing the period of limitations, held inapplicable. Gaines & Co. v. Whyte Grocery, Fruit & Wine Co. [Mo. App.] 81 S. W. 648. See 1 Curr. L. 1065, n. 89.

74. Wyman v. Bowman [C. C. A.] 127 F. 257. See 1 Curr. L. 1065, n. 90.

75, 76. Wyman v. Bowman [C. C. A.] 127 F. 257.

77. Maxwell v. Wilson, 54 W. Va. 495, 46 S. E. 349. Both law and equity having jurisdiction, if the statute of limitation is a bar to an action at law, it is a bar to a suit for the same object in equity. Tucker v. Linn [N. J. Eq.] 57 A. 1017.

78. See 1 Curr. L. 1066.

79. Jackson v. Lemler [Miss.] 35 So. 306; Hinnershitz v. United Traction Co., 206 Pa. 91, 55 A. 841.

80. Suit affecting property outside the jurisdiction of the court and defendant not being subject to its jurisdiction, jurisdiction can only be acquired by service of process or notice within the state, or by the voluntary appearance of the defendant. Wilson v. American Palace Car Co. [N. J. Err. & App.] 55 A. 997.

81. Byers v. Byers, 208 Pa. 23, 57 A. 62; Altoona Electrical, Engineering & Supply Co. v. Kittanning, etc., R. Co., 126 F. 559.

82. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

83. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

NOTE. Consolidation of causes: There is considerable confusion concerning the

bill being lost or destroyed, a copy may be filed, the suit being begun as of the date of filing the first bill.[85] Illegal service of a subpoena will not be set aside on motion.[86] In Georgia, the first term of an equity case may, by consent of the parties, become the trial term.[87]

§ 5. *Parties.*[88]—A suit in equity cannot be in the name of the nominal for use of the real party in interest,[89] and all persons legally or beneficially interested in the subject-matter must be joined.[90] The application

right of courts of equity to consolidate causes pending therein, without the consent of the parties, or certain of the parties, to such causes. In some jurisdictions, it is held that the question is purely one of practice, and that courts of equity have inherent power, in their discretion, to consolidate causes pending therein for the purpose of avoiding multiplicity of suits and trials, where the consolidation can work no injury to any party, and that the power is essential to the proper administration of justice, and does not depend upon any statute for its exercise. Biron v. Edwards, 77 Wis. 477, 46 N. W. 813; Burnham v. Dalling, 16 N. J. Eq. 310; Beach v. Woodyard, 5 W. Va. 231; Patterson v. Eakin, 87 Va. 49, 12 S. E. 144; Keighley v. Brown, 16 Ves. 344; Woodburn v. Woodburn, 123 Ill. 608, 14 N. E. 58, 16 N. E. 209; Portwood v. Huntress, 113 Ga. 815, 39 S. E. 299; India Rubber Co. v. Smith & Sons Co., 75 Ill. App. 223; Oldfather v. Zent, 11 Ind. App. 430, 39 N. E. 221. By other cases it is held that because the books of equity practice were entirely silent on the subject, it may be fairly inferred that no such practice existed, and consequently it is said that a court of chancery has no power to consolidate independent suits, contrary to the wishes of the parties. Knight v. Ogden, 3 Tenn. Ch. 409; Claiborne v. Gross, 7 Leigh (Va.) 331; Forman v. Blake, 7 Price, 654; Ogburn v. Dunlap, 9 Lea [Tenn.] 162. For practice in the Federal courts see: Lant v. Kinne, 75 F. 636; Mercantile Trust Co. v. Missouri, etc., R. Co., 41 F. 8; Andrews v. Spear, 4 Dill. 470, Fed. Cas. No. 379; Davis v. St. Louis, etc., R. Co., 25 F. 786; Deering v. Winona Harvesting Works, 24 F. 90; Central Trust Co. v. Virginia, T. & C. Steel & Iron Co., 55 F. 769; Toledo, etc., R. Co. v. Continental Trust Co., 95 F. 497. Where the courts allow consolidation of causes, it is held that the matter is always addressed to the discretion of the court. Beach v. Woodyard, 5 W. Va. 231; Lewis v. Daniel, 45 Ga. 124; McRae v. Boast, 3 Rand. (Va.) 481.—From Fletcher Eq. Pl. & Pr. 474, § 455.

84. Admitted in Miller v. Rich, 204 Ill. 444, 68 N. E. 488. See 1 Curr. L. 1066, n. 97.

85. Miller v. Rich, 204 Ill. 444, 68 N. E. 488.

86. Service does no harm. Puster v. Parker Mercantile Co., 64 N. J. Eq. 599, 55 A. 817.

87. Civ. Code 1895, § 4848. Latimer v. Irish-American Bank, 119 Ga. 887, 47 S. E. 322.

88. See 1 Curr. L. 1066.

89. First Nat. Bank v. Cook [W. Va.] 46 S. E. 1027.

90. Ratliff v. Sommers [W. Va.] 46 S. E. 712; Suburban R. Co. v. Chicago, 204 Ill. 306, 68 N. E. 422. Accounting. Evans v. Evans [N. J. Eq.] 57 A. 872.

ILLUSTRATIONS. Assignments: An assignment being absolute and unconditional, leaving no equitable interest whatever in the assignor, and the intent and validity of the assignment not being doubted or denied, and there being no remaining liability in the assignor to be affected by the decree, it is not necessary to make the latter a party. O'Shaugnessy v. Humes, 129 F. 953. Heirs at law of a decedent who assigned an undivided interest in their shares of his estate to another, who agreed, in consideration thereof, to employ and pay counsel to contest the will, and do all things proper to that end, it being expressly stipulated that the assignors should not be subjected to further liability, are neither necessary nor proper parties to a suit to establish a lien upon their shares for services rendered by counsel under employment by the assignee. Ingersoll v. Coram, 127 F. 418.

Leases: A person having a leasehold interest in real estate which he has assigned to another is not a necessary party to a suit to foreclose a trust deed given by the assignee, though he may be liable for the rent on the original lease. Unity Co. v. Equitable Trust Co., 204 Ill. 595, 68 N. E. 654.

Matters concerning corporate interests: In a shareholders' suit to enforce a corporate right in protection of their equitable interest in the corporate assets, the corporation is a necessary party (Kidd v. New Hampshire Traction Co., 72 N. H. 273, 56 A. 465), but stockholders in a foreign corporation may maintain a suit for the property of the corporation within the court's jurisdiction though the corporation neither appears nor is served with process within the jurisdiction (Id.).

Mortgages: In an action by a mortgagor's vendee to enforce a trust against the mortgagee, the widow of the mortgagor, under an agreement, having an interest in the equity of redemption is a proper party. Phillips v. Hardenburg [Mo.] 80 S. W. 891. Suit by mortgagee to restrain interference by third persons with mortgaged property held mortgagor not a necessary party. Ex parte Haggerty, 124 F. 441. Where one is attempting to foreclose a mortgage against the holder of the legal title, with knowledge that another was the equitable owner of the premises and that complainant had acquired the property by breach of the purpose for which it was created, held a court of equity would stay the proceedings at any stage of their progress short of the actual intervention of a bona fide purchaser. Consolidation Nat. Bank v. Larkins [N. J. Eq.] 57 A. 727.

NOTE. Distinction between parties at law and in equity: The doctrine as to parties constitutes one of the most striking differences between the proceedings in courts of law and the proceedings in courts of equity.

of this rule generally rests in the discretion of the court,[91] and if the joinder of an interested party would oust the court of jurisdiction, he need not be made a party providing a final decree, consistent with equity and good conscience, can be made between the parties before the court,[92] or the court lacking jurisdiction over certain parties, it may proceed without them as far as justice dictates,[93] and new parties may be joined even after reversal of final judgment on appeal, the cause being remanded.[94] A bill is not defective for want of parties if in any one state of facts charged the parties would not be necessary.[95] A motion to dismiss a bill for want of a necessary party cannot be granted unless the defect is so radical that the court of its own motion would hold the suit until the defect could be remedied, or if irremediable, would dismiss the suit.[96] In order to make one a party to the suit, the bill must contain some allegation showing his interest or claim to interest in the subject-matter in controversy.[97] The cause of action being several as well as joint, the absence of one joint obligor will not prevent the interference of the court.[98] In most states a suit in chancery survives the death of any of the parties if the right survives,[99] but the subsequent proceedings must be conducted against those in privity with the deceased.[1]

Bringing in new parties; intervention.[2]—One having an interest in the subject-matter of the suit may intervene and become a party to the suit.[3]

§ 6. *Pleading. A. General rules.*[4]—A pleading is construed most strongly against the pleader.[5] Where a plea in bar is filed to a suit in equity before answer and its averments are in conflict with those in the bill, the averment in the bill will control though the plea is verified.[6] The federal conformity act by its terms does not apply to equity causes, in which the federal courts are governed by the rules of equity pleading, regardless of the local practice.[7] Equity rule 94 that the bill of a stockholder, founded on rights of the corporation, shall be verified by oath, is only applicable to a bill originally filed in a federal court.[8]

(§ 6) *B. Original bill, petition, or complaint.*[9]—An original bill to set aside

Courts of law usually require no more than the parties directly and immediately interested in the subject-matter of the suit, and whose interests are of a strictly legal nature, shall be parties to it. At law, a disputed issue alone is contested. The immediate disputants alone are bound by the decision, and they alone are proper parties to the action. All other persons who have merely an equitable or remote interest are not only not required to be parties, but are excluded from being parties, and, if any are improperly joined, the fault may be fatal to the suit. Story, Eq. Pl. § 76. In equity, however, a decree is asked, and not a decision only; and it is therefore requisite that all persons should be before the court whose interests may be affected by the proposed decree, or whose concurrence is necessary to a complete arrangement. Story, Eq. Pl. § 76a; Meek v. Spracher, 87 Va. 162, 12 S. E. 397; Foster Eq. Pr. (3rd Ed.) § 42. Thus, for example, at law, the executor and the heir cannot join or be joined in an action, although each may have an interest in the controversy, but in equity they may both join and be joined, and both are often necessary and proper parties. Story Eq. Pl. § 76; Knight v. Knight, 3 P. Wms. 333.—From Fletcher, Eq. Pl. & Pr. 34, § 18.

91. Suburban R. Co. v. Chicago, 204 Ill. 306, 68 N. E. 422.

92. Ex parte Haggerty, 124 F. 441.

93. In the absence of consent. Wilson v. American Palace Car Co. [N. J. Err. & App.] 55 A. 997; Id. [N. J. Eq.] 58 A. 195.

94. Bolsen v. Barber Asphalt Pav. Co. [Ky.] 82 S. W. 972.

95. Kidd v. New Hampshire Traction Co., 72 N. H. 273, 56 A. 465.

96. Wilson v. American Palace Car Co. [N. J. Eq.] 58 A. 195.

97. Insertion of name in caption of bill is insufficient, and renders the bill demurrable, and the demurrer being overruled such nominal party may appeal. Preston v. West [W. Va.] 47 S. E. 152.

98. Tort. Kidd v. New Hampshire Traction Co., 72 N. H. 273, 56 A. 465.

99. Sinclair v. Auxiliary Realty Co. [Md.] 57 A. 664.

1. Such as his devisee, executor, administrator, or legatee. Sinclair v. Auxiliary Realty Co. [Md.] 57 A. 664.

2. See 1 Curr. L. 1067.

3. Ackley v. Croucher, 203 Ill. 530, 68 N. E. 86.

4. See 1 Curr. L. 1068.

5. International Silver Co. v. Rogers Corp. [N. J. Eq.] 57 A. 725; Pinney v. Pinney [Fla.] 35 So. 95. See 1 Curr. L. 1068, n. 19.

6. Mutual Life Ins. Co. v. Blair, 130 F. 971.

7. United Cigarette Mach. Co. v. Wright, 132 F. 195.

8. Maeder v. Buffalo Bill's Wild West Co., 132 F. 280.

9. See 1 Curr. L. 1068.

a decree cannot be maintained on the ground of irregularities and errors which might have been corrected on appeal or by a bill of review.[10] The adequacy of a complaint as a bill of discovery is destroyed by waiving answer under oath.[11]

Sufficiency of allegations.[12]—Prolixity and verbosity do not warrant striking the bill from the files, when the redundant matter can to a large extent be eliminated on exceptions.[13] Impertinent allegations will be stricken out.[14] Complainant must allege, clearly and definitely, in his bill, every fact that is necessary to relief;[15] such allegations must not be mere pretexts,[16] though it is unnecessary that the cause of action or the evidence of it be specifically set out.[17] The question of whether a petition states a cause of action, or discloses grounds of equitable relief, may be raised at any stage of the proceedings in the appellate court, up to and including the filing of a motion for a rehearing,[18] though, in the absence of a demurrer or motion, unless there is a total omission to allege some essential fact, the petition will be held good upon an objection to the introduction of any evidence.[19] The bill must show that some ground for equitable intervention exists,[20] and that complainant has exhausted his legal remedies.[21] The allegations must not be inconsistent with the relief sought.[22] There being a delay in bringing the action, the complaint must show reasonable diligence.[23] If any one ground alleged is sufficient, the cause will be retained.[24] An allegation of a demand that suit be instituted for the recovery of personal property will include the taking of the necessary steps as conditions precedent to the bringing of the suit.[25]

Multifariousness.[26]—Several causes of action arising from a common cause may be joined in a bill directed against several defendants, though their several

10. Cocke v. Copenhaver [C. C. A.] 126 F. 145.

11. McFarland v. State Sav. Bank, 132 F. 399.

12. See 1 Curr. L. 1069.

13. Polk v. Mutual Reserve Fund Life Ass'n, 128 F. 524.

14. Polk v. Mutual Reserve Fund Life Ass'n, 128 F. 524. In a bill filed against an insurance association by members to secure its dissolution on the ground of insolvency and the illegality of a reincorporation, specific allegations of fraud on the part of officers who are not parties and as to whom no relief is asked are impertinent. Id. In a suit to enjoin infringement of a trade-mark, allegations in the answer alleging that plaintiff was violating the anti-trust law, held impertinent and irrelevant. Independent Baking Powder Co. v. Boorman, 130 F. 726.

15. City of Jacksonville v. Massey Business College [Fla.] 36 So. 432; Pinney v. Pinney [Fla.] 35 So. 95. If he omits such facts or states such facts as show that he is not entitled to equitable relief, he must suffer the consequences from so doing. Id. A bill to set aside a decree disposing of an award for land taken for highway purposes must allege that defendants were parties to such agreement, or bound thereby, or misled or deceived complainants. Wilson v. Wilson [R. I.] 56 A. 773. It must also show that complainants had an interest in the real estate taken. Id. See 1 Curr. L. 1069, n. 32.

16. Allegations of irreparable injury. Zinn v. Zinn, 54 W. Va. 483, 46 S. E. 202.

17. Sinclair v. Auxiliary Realty Co. [Md.] 57 A. 664.

18. Vila v. Grand Island Elec. Light, Ice & Cold Storage Co. [Neb.] 97 N. W. 613.

19. Marshall v. Homier, 13 Okl. 264, 74 P. 368.

20. A bill alleging that the indebtedness secured by a chattel mortgage has been paid, but that the mortgagee still holds it against the mortgagor, and demands payment thereof, and praying a decree that it be surrendered, states no ground for the intervention of equity. Dorman v. McDonald [Fla.] 36 So. 52.

21. Creditor's bill. Bayley v. Bayley [N. J. Eq.] 57 A. 271.

22. One bringing suit in equity for relief from a forfeiture at law may not claim that there was no forfeiture at law. Gordon v. Richardson, 185 Mass. 492, 70 N. E. 1027.

23. Where there was a delay of 5 years in bringing a suit to set aside a judgment and a sheriff's deed based thereon. Ryan v. Woodin [Idaho] 75 P. 261. General allegations in a bill that the fraud on which it is based was not sooner discovered are not sufficient. Cutter v. Iowa Water Co., 128 F. 505. General averments of ignorance are insufficient to sustain a plea of excusable laches. Edwards v. Mercantile Trust Co., 124 F. 381. See 1 Curr. L. 1069, n. 39; Id. 1070, n. 40; Id. 1080, § 6, K.

24. One of the grounds in the bill being within equitable jurisdiction, the bill will be retained though as to the others there are adequate remedies at law. Lyon v. Clark [Mich.] 100 N. W. 611.

25. Is a sufficient compliance with equity rule 94. Edwards v. Mercantile Trust Co., 124 F. 381.

26. See 1 Curr. L. 1070.

interests have no connection, and are not co-extensive with the interests of the others. Such a bill is not multifarious.[27] The question of when a bill is multifarious is largely one of judicial discretion and depends upon the circumstances of each case.[28] A bill setting up two or more equitable causes of action between

27. Coatesville, etc., R. Co. v. West Chester R. Co., 206 Pa. 40, 55 A. 844; Reese v. Wright [Md.] 56 A. 976; Jewish Colonization Ass'n v. Solomon, 125 F. 994; Illinois Cent. R. Co. v. Caffrey, 128 F. 770; Boyd v. Schneider [C. C. A.] 131 F. 223; Baumgartner v. Bradt, 207 Ill. 345, 69 N. E. 912; Van Dyke v. Van Dyke [Ga.] 48 S. E. 380. A demurrer to a bill, involving the claims of different owners to different parcels of land as multifarious will be overruled where the case depends on one question, i. e., the construction of similar language in the different deeds. Brown v. Tilley [R. I.] 57 A. 380. See 1 Curr. L. 1070, n. 48.

The interests of the parties need not be equal. Jewish Colonization Ass'n v. Solomon, 125 F. 994; Louisville & N. R. Co. v. Smith [C. C. A.] 128 F. 1; Gulf Red Cedar Co. v. Crenshaw, 138 Ala. 134, 35 So. 50.

28. Reese v. Wright [Md.] 56 A. 976; Charles Simon's Sons Co. v. Maryland Tel. & T. Co. [Md.] 57 A. 193.

Bills held multifarious: See 1 Curr. L. 1070. Where a bill brought against a trustee for an alleged breach of trust for an accounting, and to restrain the transfer of trust property, an action against members of an executive committee, appointed to manage such trust property, charging conspiracy with the trustee to effect the alleged transfer, cannot be joined therewith. Moody v. Flagg, 125 F. 819. A bill of intervention filed in a suit to foreclose a mortgage on an interstate railway asserting two distinct and inconsistent rights to a preferential lien by the intervener. State Trust Co. v. Kansas City, etc., R. Co., 128 F. 129. A bill joining the questions of the right of ownership, and relief which depends on such ownership. Inman v. New York Interurban Water Co., 131 F. 997. A bill by a beneficiary of a trust fund for an accounting seeking to enforce the complainant's rights against a surviving trustee and the administrator of a deceased trustee who had failed to account to the surviving trustee. Evans v. Evans [N. J. Eq.] 58 A. 904. A bill for an accounting, for the removal of a trustee appointed in a suit for divorce, and seeking to review a consent decree for alimony and for the adjustment of certain partnership matters between the parties. Bonney v. Lamb, 210 Ill. 95, 71 N. E. 375. A claim by a creditor against defendant as an officer and stockholder of a corporation cannot be joined with one against him as a director. Legg & Co. v. Dewing [R. I.] 57 A. 373. A complaint in a suit by a railroad company to restrain some 60 ticket brokers from selling return round trip excursion tickets, such persons having no connection with each other. New York, etc., R. Co. v. Reeves, 85 N. Y. S. 28. Contra, Illinois Cent. R. Co. v. Caffrey, 128 F. 770.

Bills held not multifarious: See 1 Curr. L. 1071. A person holding a fiduciary and also a personal interest in the subject-matter may, as plaintiff, join such claims in his bills. Cresap v. Cresap, 54 W. Va. 581, 46 S. E. 582. Suit by owner of destroyed property against several insurance companies. Redner v. New York Fire Ins. Co. [Minn.] 99 N. W. 886. A bill alleging that defendant telephone company and defendant village were conspiring together to drive complainant out of the telephone business in said village. Village of London Mills v. White, 208 Ill. 289, 70 N. E. 313. A bill in which several property owners seek relief against the same injury upon the same grounds. Baumgartner v. Bradt, 207 Ill. 345, 69 N. E. 912. A bill to require an accounting from defendant as an agent is not multifarious because different and separate transactions are set out, all growing out of the agency, and a discovery and accounting demanded as to each, nor because as to some of such transactions, if stated alone, complainant would have a sufficient remedy at law. United Cigarette Mach. Co. v. Wright, 132 F. 195. Where the right of each of several depositors of an insolvent national bank to recover against several of the bank's directors, made parties to the bill, was based on the same theory. Boyd v. Schneider [C. C. A.] 131 F. 223. A bill to establish a lien, and also seeking to establish the personal liability of the persons whose indebtedness the lien secures. Ingersoll v. Coram, 127 F. 418. Bill in which defendant was sued for breaches of trust while acting as trustee and as manager of the business of an association operating the trust property. Moody v. Flagg, 125 F. 819. A bill to restrain defendants from utilizing a trade secret alleging that one of the defendants had, by the help of all the other defendants, erected a plant for the utilization of such secret, it is proper to unite all such defendants in the bill. Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 58 A. 290. In a suit by a beneficiary for an accounting against a surviving trustee and the administratrix of a deceased trustee, an allegation that the complainant has been appointed substituted administrator for his brother, who was also a beneficiary, does not render the bill multifarious. Evans v. Evans [N. J. Eq.] 57 A. 872. A bill by several parties to enjoin a telephone company for charging them higher rates than a city ordinance permits, though it alleges a contract by each of them with the company. Charles Simon's Sons Co. v. Maryland Tel. & T. Co. [Md.] 57 A. 193. A bill against two defendants to enjoin the continuance of a nuisance by each on a common alley. Reese v. Wright [Md.] 56 A. 976. A bill to set aside, as fraudulent as to creditors several deeds of land conveyed by the judgment debtor to distinct grantees, it not appearing how many of such deeds are to be set aside, or in what order. Warwick v. Perrine [N. J. Err. & App.] 55 A. 738. Where defendants, in cutting timber on land in which they were tenants in common with plaintiff unintentionally trespassed on and cut timber from adjacent land owned by plaintiff alone, and he sues for an accounting as to all the cutting, which was substantially one transaction. Gulf Red Cedar Co. v. Crenshaw, 138 Ala. 134, 35 So. 50.

the same parties is multifarious,[29] but a bill uniting a purely legal demand with an equitable demand is not multifarious.[30] An objection to a bill as multifarious must be made by special demurrer,[31] though the court may on final hearing require the complainant to elect between the two claims, and dismiss the bill as to the other.[32]

(§ 6) *C. Amended and supplemental bills, complaints, or petition.*[33]—The right to amend rests in the discretion of the court,[34] but the discretion is liberally exercised,[35] amendments being allowed at almost any stage of the proceeding if the complainant has proved a case by which he is entitled to equitable relief.[36] Greater caution is exercised in regard to amendments to verified bills,[37] and to answers.[38]

Where a railroad company under an agreement with a cotton compress company would deliver, to a consignee of cotton, compress tickets calling for an equal number of similar bales, not the specific bales, there is such privity between the railroad and compress company as to entitle the consignee to equitable relief against both companies for the loss of cotton shipped. Mississippi Cotton Compress & Warehouse Co. v. Levy & Co. [Miss.] 36 So. 281. A bill by a beneficiary under a will against the executor and other beneficiaries to have the suit removed from the probate to the chancery court, to have an accounting and the trusts administered. Noble v. Tait [Ala.] 37 So. 278. Power to sell land devised in trust becoming absolute, a bill by an heir against the other heirs and their purchasers praying for the removal of the administration to the chancery court and for the sale of the land held not multifarious. Pratt Land & Imp. Co. v. Robertson [Ala.] 37 So. 419. Petition to enforce a trust against a mortgagee, and asserting the right of the mortgagor's widow to dower in the premises. Phillips v. Hardenburg [Mo.] 80 S. W. 891. Different landowners may be joined as defendants in a single suit by a railroad company to enjoin interference with its use of its right of way and with the maintenance of its track, where the right asserted is the same against each defendant. Louisville & N. R. Co. v. Smith [C. C. A.] 128 F. 1. Promoters of a combine entering into a secret arrangement with certain vendors of property to such combine, a bill by other vendors for an accounting, joining the corporation, the promoters, and all vendors with whom the secret agreement was made, is not multifarious. Shutts v. United Box, Board & Paper Co. [N. J. Eq.] 58 A. 1075. One may join in the same suit causes of action for infringement of a trade-mark and for unlawful competition. Jewish Colonization Ass'n v. Solomon, 125 F. 994. Suit to restrain brokers from dealing in nontransferable railroad tickets. Illinois Cent. R. Co. v. Caffrey, 128 Fed. 770. Contra, New York, etc., R. Co. v. Reeves, 85 N. Y. S. 28.

29. Sprinkle v. Duty, 54 W. Va. 559, 46 S. E. 557.

30. Allegations as to the legal demand confer no jurisdiction and are treated as surplusage. Sprinkle v. Duty, 54 W. Va. 559, 46 S. E. 557. See 1 Curr. L. 1071, n. 49-51.

31. Rusk v. Hill, 117 Ga. 722, 45 S. E. 42. Where a petition is dismissed on such grounds, a refusal to reinstate the same, on a motion alleging that it was not subject to the demurrer, is clearly not erroneous. Van Dyke v. Van Dyke [Ga.] 48 S. E. 380.

32. State Trust Co. v. Kansas City, etc., R. Co., 128 F. 129.

33. See 1 Curr. L. 1072.

34. Ratliff v. Sommers [W. Va.] 46 S. E. 712; Thompson v. Hibbs [Or.] 76 P. 778.

35. Thompson v. Hibbs [Or.] 76 P. 778; Stevens v. Shaw [N. J. Eq.] 57 A. 1024; Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414. Where several depositors of an insolvent national bank filed a bill against its directors for a breach of their implied contract to see that the bank's assets were used according to law, but the bill failed to allege the time when complainants' deposits were made, complainants were entitled to leave to amend in that respect. Boyd v. Schneider [C. C. A.] 131 F. 223. Where complainants in a proceeding in chancery claim part of the assets of a corporation as stockholders, bring proceedings at law on their claims as creditors, they are entitled to file an amended and supplemental bill setting up the proceedings in law. Edwards v. National Window Glass Jobbers' Ass'n [N. J. Eq.] 58 A. 527. Amendment relating to germane matters held properly allowed. Ray v. Pitman, 119 Ga. 678, 46 S. E. 849. An amendment to a bill of review, so as to cause it to appear that one of the plaintiffs sued as trustee, held properly allowed. Ferguson v. Morrison [Tex. Civ. App.] 81 S. W. 1240.

36. Final hearing. Stevens v. Shaw [N. J. Eq.] 57 A. 1024. Amendments to a bill, in a suit to require reconveyance of property on the ground of actual fraud, allowed. Id. In Michigan, a bill may be amended without leave after the time limited for appearance has expired and a decree pro confesso has been entered. Bowers v. Chippewa Circuit Judge [Mich.] 99 N. W. 394. In Florida, no replication having been filed, the complainant may, on motion or petition, without notice, obtain leave from the court to amend his bill before the next succeeding rule day, upon payment or nonpayment of costs as the court may direct. Long v. Anderson [Fla.] 37 So. 216.

37. Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414. The court may in Illinois permit a sworn bill to be amended, the amendments merely enlarging and amplifying the statements of the bill, alter the prayer, and omit certain words descriptive of the parties, without an affidavit showing valid excuse for failure to incorporate in the original bill the matter introduced by the amendments. Village of London Mills v. White, 208 Ill. 289, 70 N. E. 313.

The facts set up by the amendment must not be inconsistent with those already pleaded,[39] must not establish new rights or a new case,[40] and must not render the bill multifarious.[41] Amendments to a verified bill need not be sworn to when they merely amplify a statement in the bill.[42] An amendment in the form of a substituted bill is a permissible practice.[43] Laches may bar the right to serve a supplemental pleading.[44] The failure of a defendant to answer an amendment does not authorize the court or the jury to treat the allegations in the amendment as being admitted,[45] but an amendment not setting up any fact affecting the cause of action, but relating to that which transpired in the presence of the court, or to a disposition by consent of the res in the hands of the court, or to a change in the condition of the property involved in the litigation, when such amendment is not traversed, may be treated as true by the court.[46]

(§ 6) *D. Cross bill or petition.*[47]—The office of a cross bill is to enable defendant to obtain affirmative relief,[48] except where the maxim "He who seeks the aid of equity must do equity" applies, the general rule being that it is the only way in which such relief can be granted.[49] The relief asked must be upon the case as stated in the bill;[50] it can only be filed between the parties to the original suit,[51] and the matters set up therein must be germane to the subject involved in the original bill.[52] Defendant may set up any defense, legal or equitable, which he may have,[53] and the grounds upon which he relies must be stated with the same strictness as is required of plaintiff in the original bill.[54] The defendant in a law

38. Ratliff v. Sommers [W. Va.] 46 S. E. 712.

39. Stevens v. Shaw [N. J. Eq.] 57 A. 1024.

40. Town of Bristol v. Bristol & W. Waterworks [R. I.] 55 A. 710. See 1 Curr. L. 1073, n. 54.

41. In a proceeding in chancery based on stockholders' individual rights to stockholders of a corporation, an amendment seeking to impose a liability on the directors for misappropriating funds is not allowable. Edwards v. National Window Glass Jobbers' Ass'n [N. J. Eq.] 58 A. 527.

42. Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414.

43. Jones v. Bright [Ala.] 37 So. 79.

44. A few months' delay in filing a supplemental answer setting up a judgment of another court in a distant state held no laches. Rio Tinto Copper Min. Co. v. Black, 85 N. Y. S. 1116.

45, 46. Hudson v. Hudson, 119 Ga. 637, 46 S. E. 874.

47. See 1 Curr. L. 1074.

48. Paine v. Sackett [R. I.] 57 A. 376; Reaves v. Meredeth [Ga.] 48 S. E. 199. See 1 Curr. L. 1074, n. 76.

49. Farmers' Loan & Trust Co. v. Denver, etc., R. Co. [C. C. A.] 126 F. 46; Bessemer Irr. Ditch Co. v. Woolley [Colo.] 76 P. 1053; Corbin v. Taussig & Co., 132 F. 662; Parrott v. Crawford [Ind. T.] 82 S. W. 688.

50. Paine v. Sackett [R. I.] 57 A. 376.

51. Bunel v. O'Day, 125 F. 303, 319. It cannot bring new parties into the controversy. Id.

52. Paine v. Sackett [R. I.] 57 A. 376. Where the matters embraced in a cross bill filed by a defendant against his co-defendant are not involved in the litigation between complainant and defendants, have never been placed in issue, and are not presented to the court or decided, the decree cannot affect the relative rights of defendants, or adjudicate the equities between them. Jackson v. Lemler [Miss.] 35 So. 306. An answer to a suit by a trustee to have a certain portion of the trust estate distributed assuming the character of a cross bill and alleging misbehavior and incapacity in the complainant trustee, and praying that he be removed, such allegations will be stricken out. Paine v. Sackett [R. I.] 57 A. 376. Demurrer to a cross bill by second mortgagee in suit to have first mortgage foreclosed asking for the surplus, sustained. Jackson v. Dutton [Fla.] 35 So. 74. In a suit by an insurance company to enjoin the insurance superintendent from denying that complainant was licensed by the department of insurance, or refusing to grant complainant the same privileges granted other companies, the defendant is entitled to file a cross bill asking for an injunction restraining complainant from further prosecuting its business, and for the appointment of a receiver. Yates v. Continental Ins. Co., 207 Ill. 512, 69 N. E. 779. Where a bill to quiet title draws in question the existence and extent of defendant's claim to the property, a cross bill setting up defendant's mortgage and asking to foreclose the same, does not involve a departure from the original case. Jenkins v. Schwab Co., 138 Ala. 664, 35 So. 649.

53. Reaves v. Meredeth [Ga.] 48 S. E. 199. In a suit to enjoin sheriff from putting the purchaser at a sheriff's sale in possession of the property, defendant may in his cross bill deny the validity of the deed under which plaintiff claims. Id. In such a suit defendant may by cross bill and answer make such issues as to fraudulent and collusive title as necessarily would arise in an action of ejectment between the same parties. Id.

54. Bessemer Irr. Ditch Co. v. Woolley [Colo.] 76 P. 1053.

action, having a defense requiring the interposition of a court of equity, may, upon filing his answer, also as plaintiff file a cross bill, which shall stay the proceedings at law until the issues presented by the cross bill are disposed of,[55] and it is no objection to such cross bill that defendant set up a defense in his answer, unless such defense is as adequate as the one obtainable in equity.[56] The answer and cross bill in equity should be separate pleadings, although they may be filed under one cover,[57] except in those states where the cross bill has been abolished.[58] A verified cross bill may be amended, the verification not being required by law.[59] A cross bill may be filed against a co-defendant, and, in such a case, the doctrine of laches has no application to a statutory right to amend the cross bill before such co-defendant answers.[60] A cross bill not being objected to by complainant, but treated as a proper pleading by answering it, is properly made the basis of a decree.[61] The bill being dismissed, the cross bill, in certain cases, must also be dismissed,[62] but the dismissal of the cross bill being caused by the entry of a default judgment before the process was served on the original complainant, the cross bill will be reinstated and amendments allowed upon the setting aside of the default decree.[63]

(§ 6) *E. Demurrer. Grounds.*[64]—A demurrer will only lie for defects apparent on the face of the pleadings;[65] hence a speaking demurrer, or one setting up facts extrinsic to the bill, cannot be sustained.[66] A general demurrer will be overruled if the bill contains any ground of equitable relief.[67] A special demurrer is indispensable when the objection is to the defects of the bill in point of form.[68] The defense of laches cannot generally be made by demurrer.[69] Fraud being alleged in the bill, a general demurrer will not be allowed, unless it is accompanied by an answer which denies fraud.[70] A demurrer cannot be sustained because the bill

55, 56. Fire Ass'n v. Allesina [Or.] 77 P. 123.

57. United Cigarette Mach. Co. v. Wright, 132 F. 195.

58. In these states the matters formerly available by cross bill may be set up in the answer. Latimer v. Irish-American Bank, 119 Ga. 887, 47 S. E. 322.

59. Ackley v. Croucher, 203 Ill. 530, 68 N. E. 86.

60. Jackson v. Lemler [Miss.] 35 So. 306. Under Code 1892, § 543, allowing a complainant to amend his bill as of course, without appealing to the court, "at any time before defendant has made a defense," a defendant who has neglected to make a defense cannot urge that a co-defendant who has filed a cross bill has been guilty of laches in amending the same. Id. Under Code 1892, §§ 536, 537, 543, 549, a defendant who has filed a cross bill against a co-defendant, which such co-defendant has not answered, has the right to amend without leave after decree has been entered for complainant in the original bill. Id.

61. Ackley v. Croucher, 203 Ill. 530, 68 N. E. 86.

62. The dismissal because of estoppel by former decree of a bill filed by the United States to avoid certain patents of land on the ground that they were within an Indian reservation, requires the dismissal of a cross bill seeking to enjoin the allotments of such lands. United States v. California & O. Land Co., 192 U. S. 355, 48 Law. Ed. 476.

63. Bosworth v. Sandlin [Fla.] 35 So. 66.

64. See 1 Curr. L. 1075.

65. Defect of parties. Wilson v. American Palace Car Co. [N. J. Eq.] 58 A. 195. Imputing laches from staleness of claim. Sinclair v. Auxiliary Realty Co. [Md.] 57 A. 664. In disposing of a demurrer to a bill in equity, a copy of decree in former case and which was not a part of the bill, held unavailable. Lindsay v. Allen [Tenn.] 82 S. W. 171.

66. O'Shaugnessy v. Humes, 129 F. 953; Teeter v. Veitch [N. J. Eq.] 57 A. 160.

67. Little Co. v. Woodward Ave. Cemetery Ass'n [Mich.] 97 N. W. 682; Futch v. Adams [Fla.] 36 So. 575; Hudson v. Hudson, 119 Ga. 637, 46 S. E. 874. Though the jurat is defective. Wormley v. Wormley, 207 Ill. 411, 69 N. E. 865; Maeder v. Buffalo Bill's Wild West Co., 132 F. 280. A demurrer on the ground of limitations to the whole bill is bad, the entire claim not being barred. Gulf Red Cedar Co. v. Crenshaw, 138 Ala. 134, 35 So. 50. See 1 Curr. L. 1075, n. 85.

68. A defect in a petition resulting from a nonjoinder of proper parties cannot be taken advantage of by general demurrer. Ray v. Pitman, 119 Ga. 678, 46 S. E. 849. An objection that the complaint in an equitable proceeding for the appointment of a receiver for a national bank fails to show any effort by plaintiff, a stockholder, to get redress within the corporation, can be raised only on a special demurrer. Cogswell v. Second Nat. Bank, 76 Conn. 252, 56 A. 574.

69. Scoville v. Brock [Vt.] 57 A. 967. See 1 Curr. L. 1075, n. 91, 95.

70. Johnston v. Forsyth Mercantile Co., 127 F. 845.

contains a superfluous prayer.[71] To a complaint which is purely equitable in its nature, and in which only equitable relief can be afforded, a defense that the plaintiff has an adequate remedy at law is insufficient, and its insufficiency can be raised by demurrer.[72]

Form.—In the Federal courts, a demurrer not supported by a certificate and affidavit is fatally defective.[73]

Effect of, and procedure on, demurrer.[74]—A demurrer admits the truth of the facts narrated in the bill,[75] or a consistent prior amendment thereto;[76] but not the truth of mere conclusions of the pleader,[77] such as fraud.[78] By demurring to an amended bill, respondent is estopped from claiming that certain letters attached as exhibits were not a part of the bill.[79] A decree, disposing of the main issue of the cause, making no mention of the demurrer, the demurrer will be regarded as overruled.[80] Defendant by allowing his general answer to stand after the overruling of his demurrer thereby waives his right to assign error to such overruling, unless on the whole case complainant is not entitled to the relief sought.[81] A demurrer, incorporated in the answer to an amended bill, not being brought forward for hearing, will be treated as waived.[82] Defendant demurring to a bill, his failure to be present at each stage of the subsequent proceedings to see and insist that the issue presented by the demurrer was disposed of does not constitute a waiver thereof.[83] When a petition has been dismissed on demurrer, the plaintiff may, during the same term, move to reinstate the case.[84] A court will not on demurrer construe an instrument set up in the pleading demurred to, and determine the rights of the parties thereunder, when it is obscure and ambiguous in its language, and so uncertain in meaning that it cannot be fairly interpreted without a knowledge of the surrounding facts and circumstances.[85] It is within the sound discretion of a circuit court of the United States sitting in equity, when promotive of justice, to decline to decide a suit on demurrer to a bill and to overrule the demurrer and require an answer, reserving to the defendant the right to claim and take by answer whatever advantage might otherwise have been secured by the demurrer.[86]

(§ 6) *F. Plea.*[87]—The proper office of a plea in equity is to set forth new matter not apparent in the bill.[88] The plea must be responsive to the bill,[89] and

71. Carter, Rice & Co. v. Hano Co. [N. H.] 58 A. 243.

72. Edmonds v. Stern, 89 App. Div. 539, 85 N. Y. S. 665.

73. Under equity rule 31. Dupree v. Leggett, 124 F. 700. Such a defect cannot be waived. Id. Such a demurrer being interposed, a decree pro confesso may be entered. Id.

74. See 1 Curr. L. 1076.

75. Teeter v. Veitch [N. J. Eq.] 57 A. 160; Sinclair v. Auxiliary Realty Co. [Md.] 57 A. 664. When an amended bill is demurred to, the amendments cannot be objected to on the ground that they are unverified, as the demurrer admits their truth. Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414. See 1 Curr. L. 1076, n. 99.

76. American Trading & Storage Co. v. Gottstein, 123 Iowa, 267, 98 N. W. 770.

77. Thornton v. Natchez [C. C. A.] 129 F. 84; Edison v. Edison, Jr., Chemical Co., 128 F. 957.

78. A demurrer does not admit the truth of general allegations of fraud, but only the facts set forth as constituting the alleged fraud and all reasonable deductions from them. Edison v. Edison, Jr., Chemical Co., 128 F. 957; Kessler & Co. v. Ensley, 129 F. 397.

79. Fowler v. Fowler, 204 Ill. 82, 68 N. E. 414.

80. Craig v. Craig, 54 W. Va. 183, 46 S. E. 371; Savings Bank of Richmond v. Powhatan Clay Mfg. Co. [Va.] 46 S. E. 294. See 1 Curr. L. 1076, n. 6.

81. Cline v. Cline, 204 Ill. 130, 68 N. E. 545.

82. Congregational Church of Chester v. Cutler [Vt.] 57 A. 387.

83. Joest v. Adel, 209 Ill. 432, 70 N. E. 638.

84. Van Dyke v. Van Dyke [Ga.] 48 S. E. 380.

85. O'Shaugnessy v. Humes, 129 F. 953.

86. Rankin v. Miller, 130 F. 229.

87. See 1 Curr. L. 1076.

88. A plea setting up nothing except what appears on the face of the bill is bad and should be overruled. Keen v. Brown [Fla.] 35 So. 401.

89. Complainants not alleging that they represented defendant in entering into an agreement, a plea denying that defendant authorized anyone to so represent him is not responsive. Wilson v. Wilson [R. I.] 56 A.

must not be argumentative.[90] Greater strictness is required in framing pleas in bar than is exacted in declarations,[91] and in the Federal courts such a plea must be supported by an answer.[92] The sufficiency of a plea to a bill without equity is not determinable.[93] In equity, there is no demurrer to a plea; if the plea wants form the plaintiff must move to set it aside, or take it off the files. He cannot make the objection on argument. A demurrer to a plea may, however, be treated as a motion to set it aside.[94] By setting the pleas down for argument, the complainant admits the facts, but not the conclusions pleaded therein,[95] and upon the argument, every fact stated in the bill and not denied by the answer, in support of the plea, must be taken to be true;[96] and the answer must be full and clear, or the court will intend the matter against the pleader.[97]

(§ 6) *G. Answer.*[98]—The defect not being apparent on the face of the bill, it should be pointed out by plea or answer.[99] In strictness, defendant cannot avail himself of any matter of defense not stated in his answer, even though it appear in his proofs.[1] Exceptions to an answer being sustained the court will not permit defendant to file a supplemental answer which does not contain a new, valid ground for defense.[2]

Verification and sufficiency.[3]—The answer must be a full reply to all the allegations and charges in the bill, and all of the interrogatories incident to and founded upon them,[4] and this rule is not changed, in the Federal courts, by waiver of verification,[5] though the answer is only insufficient when a portion of the bill to which the complainant is entitled to an answer has not been answered.[6] A general denial may take the place of a specific response to an allegation of the bill.[7] The chancellor, in his discretion, may permit an answer in chancery, not properly sworn to or signed, to be sworn to or signed, no decree pro confesso having been entered,[8] and leave being granted to a party to swear to his answer, the mere omission of the clerk to place the file mark on such affidavit does not require the court to strike such answer or affidavit on motion of the complainant.[9]

Effect of answer; as evidence; admissions.[10]—A responsive answer[11] in equity

773. A plea in equity setting up a former judgment in bar must set forth so much of the pleadings or proceedings in the former suit as will suffice to show that the same point was there in issue as in the pending suit. Keen v. Brown [Fla.] 35 So. 401.

90. A plea that a corporation, against whom its stockholders have brought a suit in equity, has no property in the state, held bad as argumentative. Kidd v. New Hampshire Traction Co., 72 N. H. 273, 56 A. 465.

91. In pleading a promise which must be in writing, the declaration need not aver that it is in writing, but a plea in bar must. International Silver Co. v. Rogers Corp. [N. J. Eq.] 57 A. 725.

92. Equity rule 32. United Cigarette Mach. Co. v. Wright, 132 F. 195.

93. Dennis v. Mobile & M. R. Co., 137 Ala. 649, 35 So. 30.

94. Kidd v New Hampshire Traction Co., 72 N. H. 273, 56 A. 465.

95. General Elec. Co. v. New England Elec. Mfg. Co. [C. C. A.] 128 F. 738.

96, 97. Kidd v. New Hampshire Traction Co., 72 N. H. 273, 56 A. 465.

98. See 1 Curr. L. 1077.

99. Wilson v. American Palace Car Co. [N. J. Eq.] 58 A. 195.

1. New Jersey Bldg., Loan & Investment Co. v. Lord [N. J. Err. & App.] 58 A. 186.

2. People v. Globe Sav. Bank, 211 Ill. 99, 71 N. E. 820.

3. See 1 Curr. L. 1077.

4. New Jersey Bldg., Loan & Investment Co. v. Lord [N. J. Err. & App.] 58 A. 185. See 1 Curr. L. 1077, n. 26.

5 A general denial is subject to exceptions. John Church Co. v. Zimmermann, 131 F. 652.

6. Steepy v. Public Service Corp. [N. J. Eq.] 56 A. 127. It is not insufficient because not presenting an equitable defense. Id.

7. Robinson v. American Car & Foundry Co., 132 F. 165. When the answer concludes with the general denial, it is sufficient to make an issue on material allegations in the bill not admitted in the answer, and to which no special response is made, and such statements must be proved by at least a preponderance of the testimony. Pinney v. Pinney [Fla.] 35 So. 95.

8. Jackson v. Dutton [Fla.] 35 So. 74. Appellate court will not interfere unless discretion is abused. Id.

9. Jackson v. Dutton [Fla.] 35 So. 74.

10. See 1 Curr. L. 1078.

11. A verified answer is not evidence for defendant in so far as it sets up new facts by way of discharge or avoidance of the matter averred in the bill. Pennsylvania Co. v. Cole, 132 F. 668.

can only be overcome by the testimony of two witnesses, or of one witness and corroborating circumstances.[12] If there is no replication to an answer, it is taken as true for all its material allegations.[13] An answer to an original bill being filed subsequent to the filing of an amended and supplemental bill, without any notice thereof, will not be regarded as an answer to such amended and supplemental bill, nor as a waiver of the right to demur thereto.[14]

(§ 6) *H. Replications, exceptions, and motions.*[15]—When a replication is filed to an answer, it thereby puts in issue all the matters alleged in the bill and not admitted in the answer, as well as those matters contained in the answer which are not responsive to the bill.[16] In states where special replications can only be filed by leave of court, or the judge thereof, for cause shown, a special replication filed without such leave may be treated as a general replication.[17] Generally replications to answers in chancery need not be filed under oath.[18] In states where replications are abolished, facts which could have been so pleaded may be set up in the original bill or in an amendment, when made necessary to a defense set up in the answer.[19] Exceptions to an amended answer on the ground that defendant does not set up any matter constituting a defense are in the nature of a special demurrer.[20] Where exceptions to a part of an answer are sustained, and the defendant does not ask leave to amend his answer, it is not error to proceed to hear the case on the bill, and so much of the answer as is not excepted to.[21]

(§ 6) *I. Issues, proof, and variance.*[22]—The only issues to be passed upon in a suit in equity are those raised by the pleadings.[23] The proof need only substantially conform to the allegations.[24] Where equities are equal, the defendant prevails.[25] Defendant must prove the nonresponsive parts of his answer by a preponderance of testimony.[26]

(§ 6) *J. Objections and waiver thereof.*[27]—By answering, defendant waives an objection of multifariousness in the bill,[28] and by going to trial on the merits, without objection, defendant waives all objections to the sufficiency of plaintiff's pleadings,[29] also objections that complainant has an adequate remedy at law.[30] In equity one must stand upon his motion to dismiss if he would reap advantage from it.[31] Defendant by answering a bill of chancery after the overruling of his demurrer thereto, waives the demurrer, except so far as he may have the same advantage on final hearing, and he cannot assign for error the ruling upon the demurrer.[32]

12. McGary v. McDermott, 207 Pa. 620, 57 A. 46. Answers were sworn to. Jacobs v. Van Sickle [C. C. A.] 127 F. 62; Pinney v. Pinney [Fla.] 35 So. 95. See 1 Curr. L. 1078, n. 31-33.

13. Sansom v. Blankership, 53 W. Va. 411, 44 S. E. 408. The only facts which can be considered as established by the complaint are those set out in the bill, which are not properly negatived by the answer. Robinson v. American Car & Foundry Co., 132 F. 165. See 1 Curr. L. 1078, n. 35.

14. Bonney v. Lamb, 210 Ill. 95, 71 N. E. 375.

15. See 1 Curr. L. 1078.

16, 17, 18. Pinney v. Pinney [Fla.] 35 So. 95.

19. Jenkins v. Dewar [Tenn.] 82 S. W. 470.

20. Yates v. Continental Ins. Co., 207 Ill. 512, 69 N. E. 779.

21. Cresap v. Cresap, 54 W. Va. 581, 46 S. E. 582.

22. See 1 Curr. L. 1079.

23. Zook v. Pennsylvania R. Co., 206 Pa. 603, 56 A. 82.

24. Fraud. Walker v. Shepard, 210 Ill. 100, 71 N. E. 422. See 1 Curr. L. 1079, n. 48.

25. United States v. Detroit Timber & Lumber Co. [C. C. A.] 131 F. 668.

26. Pinney v. Pinney [Fla.] 35 So. 95.

27. See 1 Curr. L. 1079.

28. Lyon v. Clark [Mich.] 100 N. W. 611; Pierce v. Old Dominion Copper Min. & Smelting Co. [N. J. Eq.] 58 A. 319. See 1 Curr. L. 1079, n. 54.

29. Complaint. Brown v. Gillett, 33 Wash. 264, 74 P. 386. Waives allegations in his answer that the bill did not state a case that entitled him to relief in equity. Driscoll v. Smith, 184 Mass. 221, 68 N. E. 210. That the complaint is uncertain and ambiguous. Montgomery v. McLaury, 143 Cal. 83, 76 P. 964.

Replication. Unity Co. v. Equitable Trust Co., 204 Ill. 595, 68 N. E. 654.

30. Driscoll v. Smith, 184 Mass. 221, 68 N. E. 210.

31. Kane v. Kane [Wash.] 77 P. 842.

32. Baumgartner v. Bradt, 207 Ill. 345, 69 N. E 912.

In Georgia objections to the pleadings on both sides must be made at the first term.[33]

§ 7. *Taking bill as confessed or on default.*[34]—A decree pro confesso cannot be taken until answer day has passed,[35] nor while a demurrer is pending.[36] An answer not putting in issue any material facts, a decree pro confesso may be allowed.[37] A bill being confessed, matters alleged with certainty are taken as true, all others must be proven.[38] A complainant, after the entry of a decree pro confesso, is entitled only to such final decree as is authorized by the allegations of his bill.[39] A court will open, much as a matter of course, mere orders pro confesso, the defendant showing surprise and a meritorious defense.[40] A statute requiring "reasonable notice to the opposite party" of a motion to reverse a decree upon a bill taken for confessed, demands such notice to any party who has an interest in the maintenance of the decree, whether plaintiff or defendant.[41]

§ 8. *Trial by jury of special issues.*[42]—A federal court of equity will not, on remand, after the joining of issues by the pleadings, but before the evidence has been taken in accordance with the usual practice in equity, frame issues to be submitted to a jury, it not being known at that stage of the case that such issues will be decisive or even material.[43]

Right to jury trial.[44]—In most of the states there is no constitutional right to a jury trial in equity,[45] the granting of such trial resting entirely in the discretion

33. Latimer v. Irish-American Bank, 119 Ga. 887, 47 S. E. 322.

34. See 1 Curr. L. 1080.

35. Where no time was stated within which answer must be filed. Sheffield v. Friedberg [Miss.] 36 So. 242.

36. Joest v. Adel, 209 Ill. 432, 70 N. E. 638.

37. Where exceptions to an answer are allowed, and the remainder of the answer presents no material issue, and the defendant makes no further answer, it is proper to decree that the bill be taken as confessed. Yates v. Continental Ins. Co., 207 Ill. 512, 69 N. E. 779.

38. Sewell v. Tuthill [Tenn.] 79 S. W. 376.

39. Dorman v. McDonald [Fla.] 36 So. 52. See 1 Curr. L. 1080, n. 73.

40. Attorneys were confused by common-law rule 11 and equity rule 31 of the court as to the necessity of affidavits to the demurrer, which was consequently held insufficient, held decree pro confesso would be opened. McFarland v. State Sav. Bank, 129 F. 244.

NOTE. Nature and effect of orders pro confesso: There is a difference between orders that bills be taken pro confesso and actual decrees pro confesso. The latter are considered, when compared with the former, more sacred, and to be disturbed only for weighty reasons. Robertson v. Miller, 3 N. J. Eq. 451; Knight v. Young, 2 Ves. & B. 184. The only effect of an order pro confesso is to enable a case to be proceeded with ex parte against the defendant as to whom it is taken. When such an order is entered, the cause must be brought to a hearing, as well as in other cases. 1 Barbour, Ch. Pr. 369; Rose v. Woodruff, 4 Johns. Ch. [N. Y.] 547; Lockhart v. Horn, 3 Woods, 542, Fed. Cas. No. 8,446. It is said that an order for a bill to be taken pro confesso is interlocutory, and intended to prepare the case for the final decree. Its effect is similar to that of a default in an action at common law, by which defendant is deemed to have admitted all that is well pleaded in the declaration. The defendant has lost his standing in court, but the matters set forth in the bill do not pass in rem judicatum until the final decree. The bill is still to be read, that the court may then determine whether there is cause, upon the allegations, to decree for the complainant, and it by no means follows that such will be the decree. Rose v. Woodruff, 4 Johns. Ch. [N. Y.] 547, 1 N. Y. Ch. Rep. (Law. Ed.) 932, note; Russell v. Lathrop, 122 Mass. 300; Forbes v. Tuckerman, 115 Mass. 115. Under the English chancery practice, it was necessary that an order taking a bill for confessed be entered before a decree pro confesso could be rendered. Shields' Heirs v. Bryant, 3 Bibb [Ky.] 525; Grace v. Field, 13 Ga. 29; 1 Daniell Ch. Pl. & Pr. (4th Ed.) 518. See Albright v. Texas, etc., R. Co., 8 N. M. 422, 46 P. 448. In some jurisdictions it is held that the omission to enter a formal order that the bill be taken pro confesso against the defendants will not affect the regularity of the final decree, or make it any the less absolute. Linder v. Lewis, 1 F. 378; Savage v. Berry, 2 Scam. [Ill.] 545; Bank of United States v. White, 8 Pet. (U. S.) 262. It would seem to be the better practice to enter such an order prior to the rendition of the final decree. Linder v. Lewis, 1 F. 381; Bank of St. Marys v. St. John, 25 Ala. 566; Long v. Long, 9 Md. 348; Stephenson v. Parkins, 2 Edw. Ch. [N. Y.] 218; Thomson v. Wooster, 114 U. S. 104.—From Fletcher, Eq. Pl. & Pr. 192, § 150.

41. Code 1899, c. 134, § 5. Morrison & Co. v. Leach [W. Va.] 47 S. E. 237.

42. See 1 Curr. L. 1080.

43. Fenno v. Primrose, 125 F. 635.

44. See 1 Curr. L. 1081. See title Jury, 2 Curr. L. 633.

45. State v. Sunapee Dam Co., 72 N. H. 114, 55 A. 899 [By a divided court]; Hagan

of the chancellor,[46] and should never be granted unless essential to the speedy determination of the case or the proper administration of justice.[47] In states where but one form of action is provided, it is generally held that issues of fact raised by pleadings in actions for the enforcement of equitable rights must be tried by jury unless waived.[48]

§ 9. *Hearing or trial; rehearing. A. In general.*[49]—There being a misjoinder of causes of action, complainant will not be allowed to proceed at the final hearing in both aspects of the case, though no objection is made by defendant.[50] The suit covering numerous accounts the court should not proceed to a final hearing until an account has been stated by a master in chancery, and objections thereto settled by him.[51]

(§ 9) *B. Dismissal.*[52]—A court of equity has the power, in a proper case, to dismiss a complaint or proceeding in equity on motion of the defendant.[53] A motion to dismiss does not, however, reach amendable defects,[54] and should be granted where the complaint fails to show any ground for equitable relief.[55] While a complainant in an equity suit may dismiss his bill at any time before the hearing, he cannot do so without an order of the court.[56] This practice implies a certain discretion on the part of the court to refuse such order, if a dismissal would be prejudicial to the rights of defendant.[57] The dismissal of an amended and supplemental bill amounts to the dismissal of the original bill,[58] and of a cross bill containing substantially the same averments, and praying for the same relief as the dismissed bill.[59] A court entering an order unconditionally dismissing the cause loses jurisdiction over the cause and the parties, and it cannot resume jurisdiction, at or after the adjournment of a subsequent term, by mere motion.[60]

Revival of action.—In the Federal courts to revive a suit in equity one must file a bill of revivor or a bill in the nature of a bill of revivor.[61] The failure to revive a suit which has abated by the death of plaintiff is not ground for a motion by defendant to dismiss for want of prosecution, but he may, on proper notice, obtain an order requiring the suit to be revived within a time fixed or be dismissed.[62]

v. Continental Nat. Bank [Mo.] 81 S. W. 171; Evans v. National Broadway Bank, 88 App. Div. 619, 85 N. Y. S. 101. See 1 Curr. L. 1081, n. 76.

46. To assess damages. State v. Sunapee Dam Co., 72 N. H. 114, 55 A. 899 [By a divided court]; Slaughter v. Danner [Va.] 46 S. E. 289; Evans v. National Broadway Bank, 88 App. Div. 549, 85 N. Y. S. 101. See 1 Curr. L. 1081, n. 77.

47. Evans v. National Broadway Bank, 88 App. Div. 549, 85 N. Y. S. 101. Should not be allowed in a settlement of partnership accounts where the evidence and accounts are all before the court. Slaughter v. Danner [Va.] 46 S. E. 289.

48. Boles v. Caudle, 133 N. C. 528, 45 S. E. 835.

49. See 1 Curr. L. 1082.

50. Where the rules of evidence in the two proceedings were entirely different. Pierce v. Old Dominion Copper Min. & Smelting Co. [N. J. Eq.] 58 A. 319.

51. Fitchburg Steam Engine Co. v. Potter, 211 Ill. 138, 71 N. E. 933.

52. See 1 Curr. L. 1082.

53. Though the statutory motion for nonsuit does not apply to suits in equity. O'Neile v. Ternes, 32 Wash. 528, 73 P. 692.

54. Is not the equivalent of a demurrer. Jones v. Bright [Ala.] 37 So. 79. See 1 Curr. L. 1082, n. 2.

55. Where the insufficiency of a bill lies in the absence from its statement of facts such as could form a basis of relief whether taken as well or illy pleaded, it is properly dismissed on motion, though the result be to cut off further right to amend the same. Bell v. Southern Home Bldg. & Loan Ass'n [Ala.] 37 So. 237. See 1 Curr. L. 1082, n. 99, 1.

56. Long v. Anderson [Fla.] 37 So. 216. After the filing of an answer by defendant the mere filing of a praecipe for dismissal by the complainant, no order of the court being made thereon, cannot operate as a dismissal of the bill. Id. There is no statute or equity in force in Florida regulating the dismissal of bills in chancery by the complainant, the practice of the high court of chancery of England governing. Id.

57. Long v. Anderson [Fla.] 37 So. 216.

58. Bonney v. Lamb, 210 Ill. 375, 71 N. E. 375.

59. Bonney v. Lamb, 210 Ill. 95, 71 N. E. 375. See 1 Curr. L. 1083, n. 12, 13.

60. Welborn v. Welborn [Fla.] 36 So. 61.

61. Equity rule 56. Dillard's Adm'r v. Central Virginia Iron Co., 125 F. 157.

Verdict or findings and effect thereof.[68]—The verdict or findings of the jury is advisory only,[84] and may be adopted, or amended and adopted, as the findings of the court, or the court may make its findings independent thereof;[85] hence, the conduct of counsel and jury,[68] and the charge of the court are not subject to review on appeal.[67] Nor is it error to refuse to instruct on general principles of law applicable to the case but inapplicable to the determination of the questions submitted.[88]

(§ 9) *C. Evidence and its introduction.*[69]—The court will not permit the testimony of a witness given at a former trial of the issues to be read, where such testimony is irrelevant,[70] or where the witness is fully examined on both trials.[71] It is not competent, on the hearing of the cause, for the court to hear or consider evidence that was not before the master.[72] The equity rule prevailing in some states that depositions alone shall be used in the trial of suits does not apply to cases tried by a jury.[73] In some states, in order that the witnesses may be examined in open court, a written agreement to that effect must be entered into, or a notice to that effect filed in the cause,[74] and having given such notice, he cannot subsequently withdraw it and demand a continuance, the opposite party having refrained from the taking of depositions in reliance on such notice.[75] The extension of time for the taking of testimony rests in the discretion of the court,[76] and where, owing to the absence of the master, defendant is unable to take the testimony within such extended time, a further extension should be granted.[77] An objection to the sufficiency of the evidence being overruled, any error in such ruling is cured if the party making the objection introduces evidence in his own behalf.[78] The practice of hearing evidence subject to objection, reserving the ruling until the decision of the case, is erroneous, and is ground for reversal if the evidence is material and exception is preserved,[79] and, even when exception is not taken, if the evidence is incompetent and is of such a character as is justly calculated to influence the mind, the fact that it was received and retained while the cause was held under advisement is a fact to be weighed by the appellate court.[80] The plaintiff need only prove enough of the facts alleged to constitute a cause of action,[81] but the proof must correspond to the allegations,[82] and the defense must stand on the issues made by the pleadings.[83] Positive testimony must be met by testimony of the same character.[84] In the absence of a demurrer or motion, an introduction

62. Dillard's Adm'r v. Central Virginia Iron Co., 125 F. 157.

63. See 1 Curr. L. 1084.

64. Pittenger v. Pittenger, 208 Ill. 582, 70 N. E. 699; Curtis v. Kirkpatrick [Idaho] 75 P. 760; Bick v. Williams [Mo.] 80 S. W. 885. See 1 Curr. L. 1081, n. 86.

65. Curtis v. Kirkpatrick [Idaho] 75 P. 760.

66. First Nat. Bank v. McCarthy [S. D.] 100 N. W. 14.

67. Pittenger v. Pittenger, 208 Ill. 582, 70 N. E. 699; First Nat. Bank v. McCarthy [S. D.] 100 N. W. 14.

68. Shanks v. Pearson [Kan.] 78 P. 446.

69. See 1 Curr. L. 1083.

70, 71. Beamer v. Morrison, 210 Ill. 443, 71 N. E. 402.

72. Bolter v. Kozlowski, 211 Ill. 79, 71 N. E. 858. This rule is not violated by the hearing of evidence to determine whether, and what, unauthorized alterations had been made in the transcript since it had left the hands of the master. Id.

73. White v. Jones [Miss.] 35 So. 450. See 1 Curr. L. 1083, n. 19.

74. Oral testimony in proceedings to show why a person should not turn over property to an administrator in the absence of such an agreement or notice [Code 1892, § 1764]. Winner v. Brandon [Miss.] 35 So. 192.

75. Lessly v. Ogden [Miss.] 35 So. 825.

76. Long v. Anderson [Fla.] 37 So. 216. Is only reviewable for an abuse of such discretion. Id.

77. Long v. Anderson [Fla.] 37 So. 216.

78. Kane v. Kane [Wash.] 77 P. 842.

79, 80. Asbury v. Hicklin [Mo.] 81 S. W. 390.

81. Gaines & Co. v. Whyte Grocery, Fruit & Wine Co. [Mo. App.] 81 S. W. 648.

82. Pinney v. Pinney [Fla.] 35 So. 95.

83. Not on argument based on matters suggested from the evidence only, and not even referred to in the pleadings. Myers v. Steel Mach. Co. [N. J. Eq.] 57 A. 1080.

84. One answering interrogatories concerning facts necessarily within his own knowledge, on information and belief, the testimony is not positive. Marvel v. Fralinger [N. J. Eq.] 55 A. 818.

to the objection of evidence should be overruled if the court can find from all the pleadings that plaintiff has a cause of action.[85] The successful party will only be allowed as costs the fees and costs of examination of such a number of witnesses as the court deems reasonable.[86]

Verdicts and findings and effect thereof.[87]—Findings not within the issues made by the pleadings will not support a decree.[88]

§ 10. *Decree, judgment or order. A. In general; requisites and sufficiency.*[89]—The form of the judgment in all actions of an equitable nature is governed by established principles of equity jurisprudence, where no statutes are applicable.[90] Plaintiff must establish his right to equitable relief in order to obtain a judgment.[91] The bill containing both a legal and equitable remedy, the decree of a court of equity dismissing the bill after a full hearing must save to plaintiff his legal rights.[92]

(§ 10) *B. Effect and construction.*[93]—An order directing the preparation of a decree in accordance with the findings is not a final decree.[94] It is only parties and their privies who are precluded by judgments and decrees.[95]

(§ 10) *C. Measure of relief.*[96]—A court of equity obtaining jurisdiction of the suit, it has power to grant full relief, legal as well as equitable,[97] such relief must, however, be warranted by the facts and be within the issues made by the pleadings;[98] nor is the power to grant such relief defeated by denial of the specific relief asked.[99] Hence the court may condition its grant of relief sought by a com-

85. Marshall v. Homier, 18 Okl. 264, 74 P. 368.

86. Kane v. Luckman, 131 F. 609.

87. See 1 Curr. L. 1084.

88. Largey v. Leggat [Mont.] 75 P. 950.

89. See 1 Curr. L. 1084.

90. Wisconsin statutes do not provide forms for judgments, with a few exceptions. Rev. St. 1898, §§ 2883, 3217, 3245 referred to. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

91. An award of damages incident to the enforcement of equitable rights cannot alone sustain judgment in an equitable action, where plaintiff fails to establish his right to equitable relief. Clark v. Smith, 90 App. Div. 477, 86 N. Y. S. 472.

92. Sprinkle v. Duty, 54 W. Va. 559, 46 S. E. 557.

93. See 1 Curr. L. 1084.

94. Is not appealable. Watkins v. Hughes, 206 Pa. 526, 56 A. 22.

95. Cope v. Payne [Tenn.] 76 S. W. 820. Suit being brought for the use of another, costs cannot be taxed against the beneficiary. First Nat. Bank v. Cook [W. Va.] 46 S. E. 1027.

96. See 1 Curr. L. 1085.

97. State v. Sunapee Dam Co., 72 N. H. 114, 55 A. 899 [By a divided court]. Manhattan Life Ins. Co. v. Wright [C. C. A.] 126 F. 82. The relief within the power of equity jurisdiction to afford, where legal remedies are inadequate or do not exist at all, is limited only by the wrongs to be redressed or the rights to be protected; this not extending, however, to mere violations of moral obligations. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

98. Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603; Butler v. Brown, 205 Ill. 606, 69 N. E. 44. See 1 Curr. L. 1085, n. 43, 44.

Illustrations: A complaint or defense not set up by the pleadings cannot be availed of. Steadman v. Handy [Va.] 46 S. E. 380. In a suit by the vendor of property for specific performance, the court may decree a redeeding or cancel the deed. Block v. Donovan [N. D.] 99 N. W. 72. In a suit to set aside a sale of land on the ground of fraud, interest may be allowed on sums paid the vendor, though none was prayed for. Slaughter v. Coke County [Tex. Civ. App.] 79 S. W. 863. A bill not stating facts entitling one to the relief asked, it will not be retained to award complainant's other relief depending on the affirmance of a contract which the bill expressly repudiates. Tanner v. Lindell R. Co. [Mo.] 79 S. W. 155. A court of equity, reviewing the reasonableness of a corporate officer's salary, on a bill filed by a stockholder, the latter is only entitled to have the resolution fixing the salary set aside, with an accounting for any excess of salary received for the year commencing next after the filing of the bill up to the hearing and submission of the cause. Lillard v. Oil, Paint & Drug Co. [N. J. Eq.] 56 A. 254. Where, in an action to determine water rights, each defendant answered, setting up affirmatively his rights to the water and to have the same adjudicated, a decree determining the relative rights of the defendants among themselves was within the issues, notwithstanding the rights of such defendant were not urged by way of cross complaint. Miller v. Thompson, 139 Cal. 643, 73 P. 583. In an action between principal and agent for wrongful act of latter in taking a conveyance of land, where the agent conceded in his answer his principal's right to the land, and prayed merely for an accounting and judgment for a specific sum against the principal and a lien on the land for that sum, it is not error to direct a conveyance of the land to the principal, and retain the settlement of accounts and liens for further adjudication. Hoskins v. Morton, 25 Ky. L. R. 1089, 77 S. W. 195.

99. State v. Sunapee Dam Co., 72 N. H. 114, 55 A. 899 [By a divided court].

plainant with the enforcement of a claim or equity held by a defendant, which the latter could not enforce in any other way.[1] It may assess the damages to be recovered,[2] or the chancellor may decree and enforce equitable relief and at the same time transfer the question of damages to the law side of the court.[3] Under a prayer for general relief, one can get relief not specifically asked for, provided the facts alleged in the bill and the nature of the case warrant it.[4] A prayer for general relief will sustain a personal judgment.[5] But the subject-matter and purpose and nature of a suit not being such as to warrant a given decree, the decree is void.[6] A court of equity has jurisdiction to compel a defendant, by means of an injunction specially worded, to do a substantive act.[7]

(§ 10) *D. Modification and amendment; vacation and setting aside; collateral attack.*[8]—After a final decree at one term, giving the full relief warranted by the facts stated in the bill, the court has no further jurisdiction of the subject-matter or parties, and all orders and decrees at a later term are null and void.[9] In New Jersey, the chancellor will, in all ordinary cases, decline to review the decision of a vice chancellor, thus leaving the objecting party to obtain relief by appeal.[10] The chancery court has authority to amend the record of its decrees, at a subsequent term, so as to make it speak the truth; but it cannot do so without notice being first given to the party against whom it is made.[11] A consent decree cannot be set aside or revoked except by consent.[12] A decree being procured by fraud which is not discovered until after the decree is entered on the record, and after the adjournment of the term at which it was entered, it can only be set aside by an original bill in a new suit.[13] A motion to set aside a judgment may in certain cases be treated as a motion for a new trial.[14]

Satisfaction, lien and enforcement.[15]—On an interlocutory decree of sale of defendant's property, the report of sale showing a balance due complainant after application of the proceeds, the court has jurisdiction to render a personal judgment therefor.[16]

§ 11. *Bill of review.*[17]—A bill of review must join as parties all of the par-

1. Farmers' Loan & Trust Co. v. Denver, etc., R. Co. [C. C. A.] 126 F. 46.
2. State v. Sunapee Dam Co., 72 N. H. 114, 55 A. 899 [By a divided court]. As incident to relief by injunction. Reese v. Wright [Md.] 56 A. 976.
3. Bourbon Stockyard Co. v. Wooley, 25 Ky. L. R. 477, 76 S. W. 28.
4. Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603; Vila v. Grand Island Elec. Light, Ice & Cold Storage Co. [Neb.] 97 N. W. 613; State v. Sunapee Dam Co., 72 N. H. 114, 55 A. 899 [By a divided court]. In a suit by the mortgagee to have the right of redemption cut off, held the court could decree a general foreclosure and a resale of the property under a prayer for general relief. London & S. F. Bank v. Horton & Co. [C. C. A.] 126 F. 593.
5. American Trading & Storage Co. v. Gottstein, 123 Iowa, 267, 98 N. W. 770.
6. Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603.
7. Reese v. Wright [Md.] 56 A. 976. Whether such injunction be merely ancillary to the relief prayed for by the bill, or the ultimate object of the suit. Id.
8. See 1 Curr. L. 1086.
9. Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603.
10. Gregory v. Gregory [N. J. Eq.] 58 A. 287. It seems, however, that the chancellor will review such decisions in two cases, when necessary to prevent discordant adjudications, or to prevent an injury resulting from a refusal of a rehearing, when such injury cannot be redressed on appeal. Id.
11. Simpson v. Talbot & Co. [Ark.] 79 S. W. 761. The record being silent the presumption is that notice was given. Id.
12. Town of Bristol v. Bristol & W. Waterworks [R. I.] 55 A. 710.
13. Not by a bill of review. Law v. Law [W. Va.] 46 S. E. 697. A bill of review, being filed to annul such decree, being changeable by amendment into an original bill, the court should allow such amendment. Id.
14. Where made within 15 days after the rendition of judgment, held in effect a motion for a new trial. Aulbach's Ex'r v. Read, 25 Ky. L. R. 1130, 77 S. W. 204.
15. See 1 Curr. L. 1087.
16. American Trading & Storage Co. v. Gottstein, 123 Iowa, 267, 98 N. W. 770. A decree finding that defendant is indebted to complainant in a certain sum, for which complainant has a lien on certain property, and ordering the master, on default in payment, to sell the property, and out of the proceeds satisfy the lien and costs, and hold the remainder subject to the final order of the court, is an interlocutory decree. Id.
17. See 1 Curr. L. 1087.

ties to the original bill,[18] and must set forth the interests of each.[19] While inadvertent errors in a decree may be corrected, the general rule is that a bill of review will not lie against a consent decree.[20]

Time for bill and laches.[21]—The fact that an appeal is pending does not prevent a bill of review in the lower court on matters not theretofore in the record and which do not involve the same matter involved in the appeal.[22] A bill of review must be filed within the time allowed for an appeal from the decree sought to be reviewed.[23] Minors may file a bill of review at any time before the attainment of majority, or afterwards within the time within which they could successfully prosecute a writ of error to reverse a decree.[24]

Grounds.[25]—A bill of review which contains no claim of newly discovered evidence can only be maintained for errors of law appearing on the record.[26] Newly discovered evidence, contradictory or cumulative in its nature, to be sufficient to sustain a bill of review must be so indisputable as to be decisive of the case,[27] and plaintiff must show that such evidence could not have been discovered by due diligence.[28]

Application and proceedings.[29]—A favorable decree on the bill of review should first grant leave to reopen and review the former decree, and then, by proper orders, indicate to what extent, if any, the rights and interests of the parties should be affected by such review.[30] Where a bill of review by minors averred that no process had been served on them, it is error, in sustaining a demurrer for defects in parties, to dismiss the bill, though leave to amend was not asked.[31]

§ 12. *Other equitable remedies for which no specific title is provided. Bill quia timet.*—A bill to quiet possession lies against an unlawful judgment of restitution of lands.[32]

ESCAPE AND RESCUE.

One who escapes from a constituted place of imprisonment for violation of municipal ordinances is in Georgia guilty of a misdemeanor.[33] The writing of cipher letters preparatory to "sending information facilitating an escape" is an

18. Barber v. Armistead [Miss.] 35 So. 199. Where an original bill in equity was brought against a firm, and after decree dismissing the bill the firm was dissolved by the death of a nonresident partner, the personal representatives of such partner, who were not within the jurisdiction of the court, were not indispensable parties to a bill of review. Perkins v. Hendryx, 127 F. 448.

19. Barber v. Armistead [Miss.] 35 So. 199.

20. Latimer v. Irish-American Bank, 119 Ga. 887, 47 S. E. 322.

21. See 1 Curr. L. 1087.

22. Such a bill of review may be allowed when resting on new evidence. Ruley v. Foley, 54 W. Va. 493, 46 S. E. 348.

23. Cocke v. Copenhaver [C. C. A.] 126 F. 145. A bill of review to review a decree appealable to the circuit court of appeals only can only be filed within the six months allowed for such appeal. Id. The time of the pendency of an appeal from a decree is not to be excluded in computing the period of limitation to a bill of review based on newly discovered evidence. Ruley v. Foley, 54 W. Va. 493, 46 S. E. 348.

Quaere: In excluding the time of the pendency of an appeal in computing time limiting a bill of review for error of law, does the exclusion begin at the allowance of the appeal, or the date of the bond required to perfect it? Ruley v. Foley, 54 W. Va. 493, 46 S. E. 348.

24. Fletcher, Eq. Pl. & Pr. 986, § 926. A petition in the nature of a bill of review to set aside a judgment must be brought within two years after the majority of plaintiff, who was a minor when his right of action accrued. Ferguson v. Morrison [Tex. Civ. App.] 81 S. W. 1240.

25. See 1 Curr. L. 1088.

26. Cocke v. Copenhaver [C. C. A.] 126 F. 145. See 1 Curr. L. 1088, n. 80.

27. Brown v. Nutter, 54 W. Va. 82, 46 S. E. 375. It being of such doubtful character as only to open up the case for further litigation, it will not sustain a bill of review. Id. See 1 Curr. L. 1088, n. 82-83.

28. Brown v. Nutter, 54 W. Va. 82, 46 S. E. 375. See 1 Curr. L. 1088, n. 84.

29. See 1 Curr. L. 1088.

30. Joest v. Adel, 209 Ill. 432, 70 N. E. 638.

31. Barber v. Armistead [Miss.] 35 So. 199.

32. Cope v. Payne [Tenn.] 76 S. W. 820.

33. Pen. Code 1895, § 314. Collins v. State [Ga.] 48 S. E. 312.

attempt at that crime[34] but not the crime itself.[35] "Information" essential in such a crime means such as will aid and facilitate an escape.[36]

Rescue or "jail delivery" may be committed from a public place of confinement, privately owned[37] and outside the corporate limits.[38]

ESCHEAT.

Escheat is the reversion of land[39] to the state by reason of failure of heirs or of the owners' incapacity to hold.[40] The refusal to allow a husband who murders his wife to take the proceeds of a life insurance policy belonging to her does not operate to escheat the property to the state.[41]

In some states, aliens who have not declared their intention of becoming citizens are not entitled to hold realty and any which they may acquire escheats to the state.[42] The state does not take escheated property by succession.[43] In every case an action is necessary to vest title in the state.[44] It is generally made the duty of the attorney general to institute investigation for the discovery of such property and to institute suit to escheat it.[45] In California, a person not a party or privy to proceedings for escheat may within twenty years after the judgment therein file a petition in the superior court showing his claim to the property or its proceeds.[46] Until then an alien has good title as against everyone.[47] If he becomes

34, 35, 36. Pen. Code, § 87, declares it a felony to send information to prisoners convicted of a felony, with intent to effect or facilitate their escape, whether or not the escape is effected or attempted. A letter containing a cipher code by which information was to be imparted to facilitate an escape by fellow prisoners of the recipient constituted only an attempt to send information. People v. Buckley, 91 App. Div. 586, 87 N. Y. S. 191.

The sending of the letter was an overt act sufficient to sustain conviction for an attempt, but not for the crime charged. People v. Buckley, 91 App. Div. 586, 87 N. Y. S. 191.

Note: The sending of tools fitted for a prison breach was held to be the statutory crime of conveying tools designed to aid an escape; but not to be an attempt at rescue. Patrick v. People, 132 Ill. 539.—4 Ill. Cyc. Dig. 229.

37, 38. Building used as a jail was situated on land not within the limits of an incorporated town, and did not belong to the county, having been built by private subscription. Irvington v. State [Tex. Cr. App.] 78 S. W. 928. Cf. title Prisons, Reformatories, and Jails, 4 Curr. L. —, for the law of prison breach.

39. By statute any balance remaining in the hands of an executor or administrator upon final settlement belonging to a nonresident distributee or legatee, or to one not in a position to receive it, or who does not appear and claim it [Rev. St. 1899, § 7381]. Union Trust Co. v. Glover, 101 Mo. App. 725, 74 S. W. 436. See 1 Curr. L. 1089, n. 15.

It is the duty of an executor, administrator, assignee, sheriff or receiver to pay any such balance into the state treasury within one year after final settlement, upon order of the court in which such settlement was made, the money so received to be credited to a fund known as escheats [Rev. St. 1899, § 7382]. Union Trust Co. v. Glover, 101 Mo. App. 725, 74 S. W. 436.

40. Cyc. Law Dict. "Escheat." The property of one dying intestate and leaving no one capable of inheriting it escheats to the state [Rev. St. 1899, § 7381]. Union Trust Co. v. Glover, 101 Mo. App. 725, 74 S. W. 436.

Lands purchased by the state on sale for delinquent taxes are not acquired by escheat. Sale under Neb. Laws 1903, c. 75, p. 480. Do not go to school fund. Woodrough v. Douglas County [Neb.] 98 N. W. 1092.

41. Goes to her administrator. Box v. Lanier [Tenn.] 79 S. W. 1042.

42. Mo. Rev. St. 1899, §§ 4764-4766. Pembroke v. Huston [Mo.] 79 S. W. 470. See title Aliens, § 2, 3 Curr. L. 138.

43. In the event that there are no persons entitled to come into the property of a decedent by succession. In re Miner's Estate, 143 Cal. 194, 76 P. 968. In California, used for support of common schools [Civ. Code, § 1386]. Id.

44. Pol. Code, § 474; Code Civ. Proc. §§ 1269-1272, construed. Rule applies to realty and personalty. In re Miner's Estate, 143 Cal. 194, 76 P. 968. An order of the probate court reciting that there are no heirs or claimants to an estate and directing the county treasurer with whom the proceeds thereof had been deposited by the public administrator on his discharge, to pay the same into the state treasury, does not ipso facto vest title thereto in the state as on a decree in an action to escheat the same. Id.

45. Cal. Pol. Code, § 474. In re Miner's Estate, 143 Cal. 194, 76 P. 968.

46. Statute does not apply where no action has been brought or judgment rendered in favor of the estate [Code Civ. Proc. §§ 1269-1272]. In re Miner's Estate, 143 Cal. 194, 76 P. 968.

47. Pembroke v. Huston [Mo.] 79 S. W. 470.

a citizen or otherwise becomes qualified to hold the land, before a forfeiture is declared, his title becomes perfect even as against the state or government.[48] Where an alien cannot take title to land by purchase, the heirs of a resident citizen who conveys by warranty deed to an alien are estopped, in an action by the state to escheat the land, from claiming the land conveyed or the proceeds of the sale.[49] In an action by the state to escheat the land, the rights of claimants thereto may be determined as against the state, though in a former action, to which the state was not a party, relief has been denied to them as among themselves.[50]

ESCROWS.

A deed deposited in escrow does not become operative until the performance of the conditions,[51] and consent to a prior delivery must be by all the grantors.[52] Where time is not of the essence, the performance of the conditions for payment at any time and a delivery out of escrow passes title[53] beyond power of revocation.[54] If the grantee consents to a cancellation and substitution, he cannot claim title.[55] The burden of proof is on a grantor who asserts nonperformance of the conditions and nondelivery and seeks relief from the deed.[56]

ESTATES OF DECEDENTS.

§ 1. Necessity or Occasion for Administration and Kinds Thereof (1239). "Independent" or Nonjudicial Administration (1240).

§ 2. Jurisdictions and Courts Controlling Administration (1241).

§ 3. The Persons Who Administer and Their Letters (1245).

A. Selection and Nomination (1245).

B. Procedure to Obtain Administration and Grant of Letters (1247).

C. Security or Bond (1248).

D. Removals and Revocation of Letters (1248).

§ 4. The Authority, Title, Interest and Relationship of Personal Representatives (1249).

A. In General (1249).

B. Contracts, Conveyances, Charges and Investments (1251). Conveyances (1253). Investments (1254).

C. Title, Interest or Right in Decedent's Property (1254).

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48. An alien's contract for sale of land held not absolutely void, as his title could have been perfected by his naturalization. Hence he was not justified in abandoning the property and seeking to rescind the contract as made under a mistake as to his legal rights and a mistake of the other party as to his alienage. Pembroke v. Huston [Mo.] 79 S. W. 470.

49. Action under Kansas alien land law [Laws 1891, c. 3, p. 7]. Madden v. State [Kan.] 75 P. 1023.

50. Madden v. State [Kan.] 75 P. 1023.

51. Flanagan's Estate v. Great Cent. Land Co. [Or.] 77 P. 485.

NOTE. Increment during escrow: Since an escrow pending payment on or before a time stated passes no title until payment, the transferee of corporate stock does not become entitled to dividends on the stock declared between times of deposit and payment. Clark v. Campbell [Utah] 54 L. R. A. 508, following the rule that dividends belong to one who owns the stock at the time they are declared. Southwestern R. Co. v. Papot, 67 Ga. 675; Goodwin v. Hardy, 57 Me. 143; Rose v. Barkley [Pa.] 45 L. R. A. 392, and note.

52. A deed deposited in escrow by cotenant grantors is not operative as against one where another consents to its delivery before the performance of the conditions. Dupoyster v. Ft. Jefferson Imp. Co. [Ky.] 80 S. W. 800.

53, 54. Wright-Blodgett Co. v. Astoria Co. [Or.] 77 P. 599.

55. He is said to be "estopped" to assert title. Beamer v. Morrison, 210 Ill. 443, 71 N. E. 402.

56. Such facts being denied by the grantee. Swain v. McMillan [Mont.] 76 P. 943.

Note: There is authority in conflict with the rule here broadly laid down. Black v. Shreve, 13 N. J. Eq. 455. The question as to burden of proof is properly dependent upon the pleadings and substantive law in the particular case. See Thayer, Prel. Treat. Ev. 371. The rule, as usually stated, is to the effect that he has the burden who has the affirmative of an issue to maintain. Central Bridge Co. v. Butler, 2 Gray [Mass.] 130. To apply this test it is necessary to determine in every instance the essential allegations in each party's case and pleading. The case under discussion being practically a statutory modification of a bill to quiet title, the plaintiff makes all essential allegations when he avers his own title and the defendant's adverse claim; it is then for the defendant to plead and prove his title. See Ely v. New Mexico, etc., R. Co., 129 U. S. 292. And as a deed in escrow delivered without performance of conditions is null, the defendant should prove performance. Possession by the grantee is, however, prima facie evidence of such performance, and the case may be supported upon the theory that the plaintiff's evidence did not rebut this presumption. See Hare v.

§ 5. The Property; Its Collection, Management, and Disposal by Personal Representatives (1255).
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A. The Right and Duty (1304).
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§ 14. Discharge by Personal Representatives (1315).
§ 15. Probate Orders and Decrees (1316).
§ 16. Appeals in Probate Proceedings (1320).
§ 17. Rights and Liabilities Between Beneficiaries of Estate (1323).
A. In General (1323).
B. Advancements (1324).
§ 18. Rights and Liabilities Between Beneficiaries and Third Persons (1326).

§ 1. *Necessity or occasion for administration and kinds thereof.*[57]—Administration being the management of the estate of a decedent[58] is called for when action is necessary for the collection of assets belonging to the estate,[59] for the estate cannot be a party to an action except by representative.[60] The death of decedent is a necessary and jurisdictional fact.[61] The succession to and distribution of the estate of an intestate is governed by the law of the domicile.[62] The will must be adjudicated upon before a representative of the estate can legally act in collecting and distributing the assets.[63] In Louisiana, successions accepted under benefit of inventory must be administered when creditors or heirs of age demand it,[64] but an administrator will not be appointed where the largest claim against the estate is made by an heir, all the heirs are majors, and one of the heirs offers to give bond to pay the other debts, which are insignificant.[65] In some states the granting of administration on the estate of one dead more than a specified number of years is a matter within the discretion of the court.[66]

Horton, 2 Nev. & M. 428.—XVIII Harvard Law R. 66.

57. See 1 Curr. L. 1090.

58. Cyc. Law Dict. "Administration," citing 2 Bl. Comm. 494, and defining the various kinds of administration.

59. Necessary to collection of promissory note. Appeal of Colburn, 76 Conn. 378, 56 A. 608.

60. Guernsey's Estate v. Pennington [Ind. App.] 70 N. E. 1008; Dallam v. Stockwell's Estate [Ind. App.] 71 N. E. 911.

61. See post, § 2.

62. Maas v. German Sav. Bank, 176 N. Y. 377, 68 N. E. 658.

63. In re Ogden's Estate, 41 Misc. 158, 83 N. Y. S. 977.

64. Should be ordered where some of the heirs are beneficiary and there are debts, and creditors or major heirs demand it. Succession of Bulliard, 111 La. 186, 35 So. 508.

65. Succession of Wintz, 111 La. 40, 35 So. 377.

66. Under Connecticut Gen. St. 1902, § 321, 10 years. Granting administration held not an abuse of discretion. Appeal of Colburn, 76 Conn. 378, 56 A. 608. Court of probate, and superior court on appeal, for the purpose of determining whether it will grant the application, has power to determine whether claim on which it is based is an existing and available one. Should not be granted where claim has no foundation, or

The sole distributee of a decedent's estate may appropriate it without administration when there are no debts.[67] Administration is not necessary to enable one heir to litigate his rights which are in no way dependent on the decedent's rights as co-heir,[68] nor is it necessary where decedent's only property is a life estate with power of disposition to pay living expenses.[69] No administration is needed to transmute property which the law devolves directly, e. g., community rights,[70] or to perform functions relating to property devised which are included in the estate given.[71] The fact that there was no administration authorizes the presumption that decedent left no property subject thereto.[72]

"Independent" or nonjudicial administration.—By statutes in some states the will may provide that no other action shall be had in the probate court in relation to the settlement of the estate than the probating and recording of the will and the return of an inventory, appraisement and list of claims against the estate.[73] The representative, in such case, is known as an independent executor.[74]

A temporary administrator may be appointed pending the appointment of one entitled by law to permanent letters.[75]

An administrator ad litem may in some states be appointed when the estate must be represented in litigation and there is no regular administrator.[76] The decree appointing him establishes the necessity of the appointment.[77]

An ancillary administrator[78] represents the estate in the state in which he is appointed.[79]

administration would be unavailing, or will be used for an illegitimate or improper purpose. Id.

67. Dickinson v. Hoes, 84 N. Y. S. 152.

68. Continuance pending administration refused. Ward v. Du Pree, 16 S. D. 500, 94 N. W. 397.

69. Distributees giving widow life estate with such power are entitled to property on her death, in accordance with terms of will, after paying her debts and expenses of administration. Hinn v. Gersten [Wis.] 99 N. W. 338.

70. Community property belongs to the surviving husband without administration [Cal. Code Civ. Proc. § 1401]. Bollinger v. Wright, 143 Cal. 292, 76 P. 1108. Statement of wife that land was hers not admissible in action by husband against her administrator to quiet title thereto. Id. A husband's statements in his petition for letters of administration on his deceased wife's estate that she was the owner of certain property does not thereafter estop him from claiming it as community property. Id.

71. Collection of rents, where the will gave testator's widow "during her life the use of all my interest" in a coal mine. In re Duffy's Estate [Pa.] 58 A. 840.

72. That, in legal contemplation, he died insolvent. Evidence in action to enforce vendor's lien on realty insufficient to overcome such presumption. Johnson v. Burks, 103 Mo. App. 221, 77 S. W. 133.

73. Texas [Rev. St. 1895, art. 1995]. Altgelt v. Alamo Nat. Bank [Tex. Civ. App.] 79 S. W. 582.

74. Altgelt v. Alamo Nat. Bank [Tex. Civ. App.] 79 S. W. 582. Will held not to create independent executor. Glover v. Coit [Tex. Civ. App.] 81 S. W. 136. Matters which may be left in hands of county court are not restricted by this section, but it merely designates those that must be. Will held to provide for independent administration. Epperson v. Reeves [Tex. Civ. App.] 79 S. W. 845.

In Washington, after the probate of a nonintervention will and the filing of an inventory showing the estate to be solvent, it may be settled outside the probate court [Ballinger's Ann. Codes & St. § 6196]. In re Smith's Estate, 43 Or. 595, 75 P. 133.

75. Georgia [Civ. Code, § 3359]. Bailey v. McAlpin [Ga.] 48 S. E. 699.

In New York, the surrogate may appoint a temporary administrator when, for any cause, delay necessarily occurs in the granting of letters testamentary or of administration or in probating a will. Code Civ. Proc. § 2670. May do so on reversal of decree admitting will to probate with direction for jury trial on issue of revocation. In re Hopkins' Will, 41 Misc. 83, 83 N. Y. S. 890. Applies only when some proceeding for the probate of a will or for the issuance of letters of administration in chief is pending. In re Hill, 43 Misc. 583, 89 N. Y. S. 552.

76. Alabama [Code 1896, §§ 352, 353] Keith v. McCord [Ala.] 37 So. 267.

77. Where decree is not appealed from, an appeal from a subsequent decree appointing another in his place does not raise the question of the necessity of such appointment. In re Davenport [N. J. Eq.] 56 A. 295.

78. See 1 Curr. L. 1091.

79. Egan v. Wirth [R. I.] 58 A. 987. Is merely the substitute in the state of his appointment for the representatives in the state of domicile. Hence a judgment against the administrator in the state of domicile is a bar to an action by ancillary representatives in the state of their appointment against the representatives of the same defendant on the same cause of action. Baldwin v. Rice, 44 Misc. 64, 89 N. Y. S. 738. In respect to foreign wills filed or recorded on

An administrator de bonis non[80] may be appointed after the discharge, resignation or removal of the original representative where new assets are discovered,[81] or there are debts of the estate remaining unpaid.[82]

An executor de son tort is one who wrongfully intermeddles with the goods of the deceased, or, unauthorized, does any other act characteristic of the office.[83] What facts will constitute one an executor de son tort is a question of law for the court,[84] but the determination of the facts, if in controversy, is for the jury.[85]

§ 2. *Jurisdictions and courts controlling administration.*[86]—The jurisdiction and powers of courts in administering upon the estates of decedents are fixed by the statutes of the various states. The courts of probate are in most states courts of record and possessed of special, superior, and original jurisdiction to administer any relief pertinent to probate and administration, including appropriate equitable powers.[87] In consequence of this there is a concurrence of jurisdiction in respect of some matters and exclusiveness as to some.[88] The general rules controlling precedence and conflict in jurisdiction are reserved to another title.[89]

production of an exemplified record of probate in a foreign state, the authority of the surrogate is limited to the issuance of ancillary letters testamentary or ancillary letters of administration with the will annexed [Code Civ. Proc. § 2695. Sections 2642, 2643 do not apply]. Id.

80. See 1 Curr. L. 1091.

81. Missouri Laws 1903, p. 52, does not require appointment of such administrator to sell estate in remainder in homestead assigned to widow, since it cannot be regarded as assets discovered. Derge v. Hill, 103 Mo. App. 281, 77 S. W. 105.

82. A debt within the meaning of the Massachusetts statute authorizing appointment when there is a debt due from the estate exceeding $20 in amount (Rev. Laws, c. 137, § 8) is one which is enforceable in such a way that the estate may be liable to pay it. Does not include one against which the special statute of limitations has run (Rev. Laws, c. 138, § 9; c. 141, § 9), in the absence of a showing that the creditor is entitled to equitable relief under Rev. Laws, c. 141, § 10. In re Hubbard, 185 Mass. 22, 69 N. E. 349. There is no statutory authority in Missouri for the appointment of an administrator de bonis non to administer on the estate of a partnership, though the surviving partner refuses to do so and the administrator of the deceased partner has been discharged without doing so. Heirs may compel accounting by survivor in such case. Rev. St. 1899, § 61, provides for administration by survivor or administrator of deceased partner only. Rev. St. § 46 does not authorize appointment of administrator de bonis non after final settlement and discharge of administrator. Byers v. Weeks [Mo. App.] 79 S. W. 485.

83. Generally necessary to charge such intermeddling as would indicate intention to perform such acts as can only be performed by legal representative. Allen v. Hurst [Ga.] 48 S. E. 341. A paper left by deceased recited that he turned over his property to C. to sell and dispose of as he saw fit, to pay his debts and care for his children. C. sold the property. Held that he was not an executor de son tort, but a trustee for the children, and could be sued by them personally. Did not take the property individually. Gibson v. Draffin, 25 Ky. L. R. 1332, 77 S. W. 928. By statute in Georgia, one who converts the property to his own use is regarded as an executor in his own wrong [Ga. Civ. Code 1895, § 3310]. Allen v. Hurst [Ga.] 48 S. E. 341. Any person who, without authority, intermeddles with the estate by doing such acts as properly belong to the office of executor or administrator. Slate v. Henkle [Or.] 78 P. 325.

84. Rohn v. Rohn, 204 Ill. 184, 68 N. E. 369.

85. Rohn v. Rohn, 204 Ill. 184, 68 N. E. 369. For liability of executor de son tort, see post, § 9a.

86. See 1 Curr. L. 1092.

For matters relating to the conclusiveness of probate orders and decrees and their liability to collateral attack, see post, § 15.

87, 88. **In California** the superior court sitting in probate is not, in the absence of express statutory authority, authorized to decide controversies not strictly within the probate proceedings. In re Ryder's Estate, 141 Cal. 366, 74 P. 993.

In Colorado the county court has original and unlimited jurisdiction in the settlement of the estates of deceased persons [Const. art. 6, § 23]. New York Life Ins. Co. v. Brown [Colo.] 76 P. 799.

In Connecticut such jurisdiction is committed, and its exercise in the first instance confined to the probate court, which is an inferior court of limited jurisdiction. Appeal of Beach, 76 Conn. 118, 55 A. 596.

In Idaho probate courts are courts of record having original jurisdiction of all matters of probate, settlement of estates of deceased persons, and appointment of guardians [Const. art. 5, § 21]. Clark v. Rossier [Idaho] 78 P. 358.

In Illinois it is held that a probate court when adjudicating upon matters relating to the settlement of estates has authority to exercise the powers of a court of equity. Heppe v. Szczpanski, 209 Ill. 88, 70 N. E. 737.

In Indian Territory the probate court has only such powers as are given it by statute. In re Overton's Estate [Ind. T.] 82 S. W. 766.

In Montana district court sitting in probate has only such powers as are conferred

The court acquires jurisdiction to appoint an administrator on presentation to it by a proper person of a petition for such appointment, reciting the necessary jurisdictional facts.[90] The death of the owner is a fundamental prerequisite to the granting of letters testamentary or of administration upon his estate.[91] In some states statutes provide for administration upon the estates of persons presumed to be dead by reason of long continued absence.[92] The residence of decedent and

upon it by statute. In re Ford's Estate [Mont.] 74 P. 735.

In New Mexico it is held that probate courts have such power and jurisdiction as were given them by the common law of England as indorsed or modified by the courts of this country, except as limited or enlarged by statute. Caron v. Old Reliable Gold Min. Co. [N. M.] 77 P. 63.

In New York the surrogate's court is of limited jurisdiction and has only such powers as are given it by statute. In re Hopkins' Will, 41 Misc. 83, 83 N. Y. S. 890; In re Ferrigan's Estate, 92 App. Div. 376, 87 N. Y. S. 16; In re Gilman's Estate, 92 App. Div. 462, 87 N. Y. S. 128. Has only such powers as are expressly conferred upon it or necessarily incident thereto. Baldwin v. Rice, 44 Misc. 64, 89 N. Y. S. 738. As to sale of realty to pay debts. Early v. Korn, 89 N. Y. S. 392.

In Oregon county courts are given the jurisdiction pertaining to courts of probate. They also have limited civil and criminal jurisdiction [Const. art. 7, § 12]. In re Morgan's Estate [Or.] 77 P. 608.

In Pennsylvania the orphans' court has exclusive jurisdiction to ascertain the amounts of estates of decedents, and to order their distribution among those entitled thereto, including creditors, and distributees and legatees. Ellwanger v. Moore, 206 Pa. 234, 55 A. 966. Where the executors were directed to sell the estate and hold the proceeds under a spendthrift trust for the benefit of testator's sons and their survivors, with a void remainder over, an attaching creditor of one of the sons has no right to a fieri facias on his judgment and to sell the undetermined interest accruing to one of the sons by reason of the failure of the remainder, but must pursue his remedy in the orphans' court. Id. The orphans' court also has concurrent jurisdiction with the court of common pleas of all actions for the recovery of legacies [Act Feb. 24, 1834, § 47; P. L. 82]. Wilson v. Smith [C. C. A.] 126 F. 916.

In South Carolina the probate court which first takes cognizance of the settlement of the estate of a decedent has jurisdiction thereof to the exclusion of all other probate courts [2 Code Civ. Proc. § 48] (Phoenix Bridge Co. v. Castleberry [C. C. A.] 131 F. 175), and the first grant of letters of administration cannot be collaterally attacked, even when made by a court not having jurisdiction of the particular estate. Can be attacked on such ground in the federal courts (Id.).

In Texas the county court has exclusive jurisdiction of estates in course of administration, and the control and management of the estate by the administrator cannot be interfered with by any other court. One suing to foreclose mortgage on live-stock belonging to estate in course of administration cannot, in such suit, secure an injunction restraining use of animals by administrator. Dunovant's Estate v. Stafford & Co. [Tex. Civ. App.] 81 S. W. 101. When its jurisdiction has once attached to a particular estate, it becomes exclusive. Tiboldi v. Palms [Tex. Civ. App.] 78 S. W. 726.

In Washington the several superior courts have jurisdiction of all matters of probate [Const. art. 4, § 6]. McLean v. Roller, 33 Wash. 166, 73 P. 1123.

In Wyoming jurisdiction over probate matters is given to the district court, which is a court of superior and general jurisdiction. It is a court of record exercising original jurisdiction at law and in equity [Const. art. 5, § 10. Rev. St. 1899, § 4531]. Lethbridge v. Lauder [Wyo.] 76 P. 682.

89. See Jurisdiction, 2 Curr. L. 604.

90. Jurisdictional facts stated in petition required under Ballinger's Ann. Codes & St. §§ 6087, 6141. Affidavit stating names of heirs and that deceased did not leave a will, required by Id. § 6142, not jurisdictional. McLean v. Roller, 33 Wash. 166, 73 P. 1123.

91. Cunnius v. Reading School Dist., 206 Pa. 469, 56 A. 16. A jurisdictional fact. Appeal of Beach, 76 Conn. 118, 55 A. 596. County court has no jurisdiction to grant letters on estate of one not a resident of the county. Appointment a nullity. Slate v. Henkle [Or.] 78 P. 325. An administration upon the estate of a living person is void. Sale of headright certificate thereunder held void. Buster v. Warren [Tex. Civ. App.] 80 S. W. 1063. A finding by the board of land commissioners of the death of the grantee in an original conditional headright certificate, in passing on the application of his administrator for the issuance of an unconditional certificate, is not conclusive on his heirs in an action to recover the land. Id.

92. North Dakota statute providing for the appointment of a special administrator for the estate of one who is shown to have disappeared under circumstances affording reasonable ground to believe that he is dead, or has been secreted, confined, or otherwise unlawfully done away with [Rev. Codes 1899, § 6325, subd. 2], is invalid when applied to the property of a living person as depriving him of his property and its possession without notice and due process of law, though such administrator is given no power to administer the estate generally. Clapp v. Houg, 12 N. D. 600, 98 N. W. 710. The fact that notice of the application for the appointment of a general administrator is given and that the appointment of a special administrator follows on failure to sufficiently prove death, without additional notice, is not sufficient notice to validate the proceedings. Id.

Pennsylvania statute authorizing the appointment of administrators for the estates of persons presumed to be dead by reason of long absence is constitutional. Pa. Act June 24, 1885 (P. L. 155). Does not deprive

the situs of the property fix the jurisdiction of the probate courts of particular counties,[93] and the existence of assets within the state is generally held to be a necessary prerequisite to administration on the estates of nonresidents.[94] Service of process must be made in the manner provided by statute.[95] The court appointing the ancillary administrator has no jurisdiction of the domiciliary administrator and cannot determine his official responsibilities or duties.[96]

As a general rule, probate courts have no jurisdiction to try and determine the title to real estate,[97] or to determine decedent's right or title to property claimed by the representative as against third persons.[98]

persons of their property without due process of law. Cunnius v. Reading School Dist., 206 Pa. 469, 56 A. 16. Appointment of such administrator is valid until revoked by the direct proceedings therein provided for. Id.

93. In Rhode Island the municipal court of the city of Providence has no authority to appoint an administrator of an estate unless decedent left property in such city. Williams v. Ripley [R. I.] 56 A. 777.

In Alabama administration begun in the probate court of one county cannot be removed to a court of equity in another county. If matter can be removed to equity at all, must be to a court in same county. Patton v. Monroe, 139 Ala. 482, 36 So. 512. It is the policy of the law to require administration to be taken in the county where deceased lived, died, and owned property. Id.

In Connecticut deceased must have owned property within the probate district. A claim by a creditor of a nonresident decedent that property in Connecticut purchased by decedent's son was bought with money belonging to the father held not property in Connecticut belonging to deceased, justifying the appointment of an administrator in that state, nor did the mere purchase of such land, in the absence of proof that the father had any interest therein, authorize such appointment. Appeal of Beach, 76 Conn. 118, 55 A. 596.

In New York the surrogate of the county in which deceased died has jurisdiction to appoint an administrator for his estate. Tanas v. Municipal Gas Co., 88 App. Div. 251, 84 N. Y. S. 1053.

94. Connecticut [Gen. St. (Rev. 1902) § 3181]. Appeal of Beach, 76 Conn. 118, 55 A. 596.

In Nebraska administration proceedings cannot be instituted upon the estate of a deceased nonresident of that state for the purpose of collecting a tax levied on a partnership, of which deceased was a member, in a county other than that in which such proceedings were begun. Remedy provided for collection of taxes exclusive. Board of Com'rs of Dawes County v. Furay [Neb.] 99 N. W. 271.

In New York it is held that the claim of an administrator residing in Rhode Island against an estate being administered in New York, the validity of which was being determined in the surrogate's court of the latter state at the time of his death, is assets of the administrator's estate so as to give the courts of such state jurisdiction of such estate. In re Flynn, 92 App. Div. 379, 87 N. Y. S. 18.

95. The Nebraska statute in regard to service of process in the probate court [Comp. St. 1903, c. 20, § 22] does not authorize such court to order personal service on nonresident minors in proceedings to vacate a judgment or order thereof in probate proceedings, in the absence of an affidavit that service cannot be made in that state. Personal service outside state under Code Civ. Proc. § 81 is a nullity in absence of affidavit for publication. Boden v. Mier [Neb.] 98 N. W. 701. See general law of process. Process, 2 Curr. L. 1259.

96. Egan v. Wirth [R. I.] 58 A. 987.

97. Best v. Gralapp [Neb.] 99 N. W. 837.

In Arkansas cannot entertain suit by widow to recover homestead of deceased from his heirs who hold it adversely to her claim. James v. James [Ark.] 80 S. W. 148.

In Connecticut cannot pass upon questions of title except in so far as may be necessary to enable it to exercise its jurisdiction in appointing an administrator. Sufficient that intestate was apparent owner. Determination not binding beyond necessities of the purpose for which it is made. Appeal of Beach, 76 Conn. 118, 55 A. 596.

Georgia: Mulherin v. Kennedy [Ga.] 48 S. E. 437.

In Massachusetts the probate court has concurrent jurisdiction with the superior court to partition lands of a decedent whose estate has been settled or is in course of settlement therein. Pub. St. 1882, c. 178, §§ 45, 48. On petition of any interested party. McCarty v. Patterson [Mass.] 71 N. E. 112. The court in which such proceedings are lawfully commenced retains jurisdiction. Pub. St. 1882, c. 178, § 64. When petition is dismissed in probate court at request of petitioners and without prejudice and no appeal is taken, they may then apply to superior court. McCarty v. Patterson [Mass.] 71 N. E. 112.

Nebraska [Const. art. 6, § 16]. Tyson v. Tyson [Neb.] 98 N. W. 1076. This provision does preclude county court from construing a will in proper case and determining the effect and meaning of a devise of land so far as is necessary to give proper directions to the executor. Such directions, however, cannot be used as the basis of or to defeat a recovery of the property by anyone. Youngson v. Bond [Neb.] 95 N. W. 700.

In New Mexico probate courts have no jurisdiction to hear and determine contested claims of title to mining leases between an estate and a stranger. Caron v. Old Reliable Gold Min. Co. [N. M.] 78 P. 63.

In New York the surrogate's court has no jurisdiction over realty or its avails unless by virtue of the will or a statute giving it authority for a particular purpose. Pending partition action is proper place for adjustment of rents and expenses of management

Federal courts have no original jurisdiction in respect to the administration and general settlement of decedents' estates.[99] A debt against a decedent may be established in such court, but it must then take its place among the claims against the estate and be administered by local law.[1] A bill in equity by a creditor of decedent, filed in the federal court, to compel an accounting by the executor is not maintainable where a suit in equity, to which complainant was not made a party, has already been begun in the state court under a state statute for a similar purpose.[2] The federal courts cannot enjoin proceedings in a court of probate.[3] A suit founded on a claim against the estate of a decedent and which was originally filed in the probate court comes within the removal act.[4]

Equity will not ordinarily take upon itself the settlement of estates of deceased persons, but may do so in proper cases.[5]

of realty. If made in surrogate's court allowance for such expenses must be from personalty. In re Ogden's Estate, 41 Misc. 158, 83 N. Y. S. 977.

98. Insurance policy payable to his daughter, the proceeds of which he attempted to dispose of differently by will. In re Overton's Estate [Ind. T.] 82 S. W. 766.

99. Thiel Detective Service Co. v. McClure, 130 F. 55.

1. Hall v. Bridgeport Trust Co., 123 F. 739; Thiel Detective Service Co. v. McClure, 130 F. 55. Federal courts, in enforcing claims against executors and administrators of a decedent's estate, are administering the laws of the domicile, and are governed by the same rules that govern the local tribunals. Stratton's Independence v. Dines, 126 F. 968. An unsecured creditor of decedent, having a mere legal demand which has not been reduced to judgment, is not a cestui que trust in such sense as to be entitled, in the absence of fraud, gross wrong, or unreasonable delay, to maintain a bill in equity for an accounting in a federal court against the officer of the probate court having the estate in course of administration. Debtors entitled to jury trial. Creditor must first establish his claim at law. Thiel Detective Service Co. v. McClure, 130 F. 55.

2. Thiel Detective Service Co. v. McClure, 130 F. 55.

3. Will not entertain suit for specific performance of contract by which intestate decedent agreed to make complainant his sole heir, while insolvent estate is in process of administration in state probate court [Rev. St. U. S. § 720 (U. S. Comp. St. 1901, p. 581)]. Hall v. Bridgeport Trust Co., 123 F. 739. A federal court will not, in a suit to establish and enforce a lien on the interest of defendants in funds belonging to the estate of a decedent in the hands of an ancillary administrator, enjoin the local probate court from directing that the funds within its control be remitted to the court of probate jurisdiction at the place of domicile. Ingersoll v. Coram, 132 F. 168. In such cases the federal court can only act in subordination to whatever proceedings the local probate court may take in the exercise of its proper jurisdiction. Id. It may, however, enjoin the persons whose interest is sought to be reached from receiving any portion under a decree of distribution by either probate court, pending the determination of such suit. Id.

4. An heir who contests a claim in a state probate court and goes to trial on the merits cannot thereafter remove the cause from the appellate court to which he has taken it. Schneider v. Eldredge, 125 F. 638. Where a claim presented by an administrator is contested by an heir, who appeals from an order of the probate court allowing it, the question of diverse citizenship necessary to authorize a removal to a federal court is to be determined upon the citizenship of such heir and not upon that of an administrator pro tem. appointed to defend for the estate. Appointed under Hurd's Rev. St. Ill. 1899, c. 3, § 72. Id.

5. Potter v. Clapp, 203 Ill. 592, 68 N. E. 81. Bill to have administration removed from probate to chancery court and to have estate and special testamentary trusts administered, and to compel accounting by surviving partner, held to present case for court of equity, and not to be demurrable for multifariousness. Noble v. Tait [Ala.] 37 So. 278. A court of equity may, in a suit by the widow for the assignment of dower, to which all persons interested in the estate are parties, adjust all claims and matters in difference between the parties relative thereto, and determine their interest therein, where the whole estate consists of realty and the widow is the only creditor. May adjust rents received by widow and improvements. Potter v. Clapp, 203 Ill. 592, 68 N. E. 81. Where a decree correcting a trust deed and foreclosing it was rendered in a suit affecting lands belonging to the estate of a decedent, whose administrator was a party thereto, by a court obtaining jurisdiction of the cause as a case in equity, a contention that the judgment was void because the proceedings were not brought in the probate court was untenable. Court had all powers of court of equity to do complete justice and render decree it did. Rodney v. Gibbs [Mo.] 82 S. W. 187. As a general rule equity will not require an executor to give bond for the faithful management of the estate, or, upon refusal, enjoin him from administering and appoint a receiver, in the absence of an unequivocal allegation of his insolvency, notwithstanding the fact that there are general allegations of mismanagement. Petition alleging mismanagement in general terms and threats to misappropriate funds, but not showing any specific acts of mismanagement, or any indebtedness to the estate on account thereof, and not praying for discovery, should be dismissed on de-

§ 3. *The persons who administer and their letters. A. Selection and nomination.*[6]—The first judicial act of the probate court in the administration of a decedent's estate is the grant of letters of administration.[7] Naming one as executor in a will does not make him such on testator's death, but merely gives him a right to the appointment on compliance with the statutory provisions relating thereto.[8] The court may, in its discretion, reject the nomination where circumstances make it for the best interests of the estate to do so.[9]

Statutes providing who shall be entitled to letters are generally held to be mandatory,[10] and letters issued in contravention thereof may be revoked on application of the persons therein named.[11] They will not, however, be construed as requiring the appointment of one personally unfit for the position.[12] In such case all presumptions are in favor of the claimant, and letters should not be refused unless the testimony produces a strong and abiding conviction that such grant would defeat rather than promote the ends of administration.[13]

Persons convicted of a felony or a misdemeanor involving moral turpitude are generally disqualified.[14] Minors cannot serve, but their guardians may as their representatives.[15] One otherwise entitled to administer is not necessarily disqualified by the fact that he has an adverse claim to property claimed by the estate.[16] Males will be preferred to females.[17]

In many states the administration will be first granted to the surviving husband or wife.[18] One who is not a relative of, and is a stranger in blood to, de-

murrer. Gould v. Glass, 120 Ga. 50, 47 S. E. 505.

6. See 1 Curr. L. 1092.

7. It is taking cognizance of the settlement of the estate within meaning of the South Carolina statute in regard to jurisdiction [2 Code Civ. Proc. § 48]. Phoenix Bridge Co. v. Castleberry [C. C. A.] 131 F. 175.

8. In re Van Vleck's Estate, 123 Iowa, 89, 98 N. W. 557. Iowa Code, § 3290, providing that if one nominated as executor refuses to accept or neglects to appear within ten days after his appointment, the office shall be vacant does not apply to the right to appointment of one named in the will, who has never actually been appointed. Id.

9. Where, after testator's death, conditions have so changed that, had he anticipated them, he would, in all reasonable probability, as a prudent person have selected another as executor. Executor who puts himself in position antagonistic to will and those for whose benefit it was made, in effect renounces executorship. Id.

10. Disobedience thereof is error, reviewable by the appellate court. Wis. Rev. St. 1898, § 3807. Court has no right to appoint public administrator on petition of creditors over seasonable application of sole heir. Welsh v. Manwaring [Wis.] 98 N. W. 214.

11. In California where letters of administration have been issued to another than the husband or wife or next of kin who are entitled thereto by statute any one of the persons so entitled may obtain their revocation on petition [Code Civ. Proc. § 1383]. In re Gordon's Estate, 142 Cal. 125, 75 P. 672. Petition must allege that the petitioner is a bona fide resident of the state and is of age, but it need not allege that he has not been convicted of an infamous crime or that he is not improvident or wanting in capacity, etc. [Code Civ. Proc. § 1369] there being a presumption in favor of petitioner in regard to them. Objector must set up such facts. Id. Letters issued to creditor will be revoked on application of nonresident brother of deceased who had no notice of proceedings leading to his appointment. In re Tyers' Estate, 84 N. Y. S. 934.

12. Shannon's Code Tenn. § 3939, providing that next of kin shall be appointed if he applies and if not the largest creditor not mandatory in that sense. Fitzgerald v. Smith [Tenn.] 78 S. W. 1050. One who cannot support his family and continually borrows money should not be appointed [Code Civ. Proc. § 2661]. In re Ferguson, 84 N. Y. S. 1102. Widow entitled under Civ. Code S. C. § 2512. Ex parte Small [S. C.] 48 S. E. 40. Where widow and sons of decedent by former marriage are antagonistic and cannot agree, a disinterested third person should be appointed. In re Warner's Estate, 207 Pa. 580, 57 A. 35.

13. Ex parte Small [S. C.] 48 S. E. 40. The person claiming incompetency must allege and prove it. In re Gordon's Estate, 142 Cal. 125, 75 P. 672.

14. Ballinger's Ann. Codes & St. § 6195. McLean v. Roller, 33 Wash. 166, 73 P. 1123.

15. Cal. Code Civ. Proc. §§ 1368, 1369. In re Turner's Estate [Cal.] 77 P. 144.

16. In re Brundage's Estate, 141 Cal. 538, 75 P. 175. In Louisiana it is held that an heir in adverse possession of property belonging to the community should not be given preference in the appointment of an administrator of the wife's estate over his co-heirs. Miguez v. Delcambre [La.] 36 So. 888.

17. Son preferred to trust company which was assignee of a daughter's interest [Cal. Code Civ. Proc. § 1366]. In re Brundage's Estate, 141 Cal. 538, 75 P. 175.

18. **In Washington** administration will first be granted to the surviving husband or

ceased,[19] or a relative who will not succeed to any of his personalty is not entitled to letters as a matter of right.[20] One acquiring a legatee's or devisee's right by assignment is in no better position in regard to the right to administer than his assignor.[21] In many states trust companies may be appointed.[22]

Legatees will be given preference in the granting of letters of administration with the will annexed,[23] and the executor of a sole legatee has a prior right to letters cum testamento annexo on the estate of the original testator.[24] The right of nonresidents[25] and aliens to act or to nominate others depends upon the statutes of the various states.[26] Failure to make application within the time limited by law is a waiver of the right to appointment.[27]

wife or to such person as he or she may request to have appointed, in case application therefor is made within a specified time [Ballinger's Ann. Codes & St. § 6141]. McLean v. Roller, 33 Wash. 166, 73 P. 1123. The fact that the survivor is himself disqualified does not deprive him of his right to nominate an appointee. Convicted felon. Id. In case such application is not made the court may then appoint any suitable and competent person [Ballinger's Ann. Codes & St. § 6141]. Id.

In Rhode Island the husband has the right to administer on his wife's estate [Gen. Laws 1896, c. 212, § 9]. Providence Co. Sav. Bank v. Vadnais [R. I.] 58 A. 454.

In Pennsylvania other things being equal, the widow will be preferred as administratrix of her husband's estate. In re Warner's Estate, 207 Pa. 580, 57 A. 35.

In Louisiana the surviving husband or wife is entitled to administration in preference to all natural relations of decedent save those of the descending line. Where application of widow in community is opposed by one alleging that decedent was his brother, there being no children, the opponent must prove lawful filiation. In re Nereaux's Estate, 112 La. 572, 36 So. 594. The beneficiary heir, of age, present or represented in the state, is preferred to the surviving husband or wife [La. Civ. Code, arts. 1042, 1121]. Succession of Bulliard, 111 La. 186, 35 So. 508; Miguez v. Delcambre [La.] 36 So. 888.

19. Under Mo. Rev. St. 1899, §§ 7-11. In re Hill's Estate, 102 Mo. App. 617, 77 S. W. 110.

20. Son who has conveyed his interest in mother's estate before her death not entitled to administer as against daughter. Fact that he might come into some portion of estate as heir of his deceased father to whom he had conveyed immaterial [Cal. Code Civ. Proc. § 1365]. In re Edson's Estate [Cal.] 77 P. 451. The New York statute (Code Civ. Proc. § 2643) providing that when there is no executor qualified to act and the residuary, principal, or specified legatee entitled to letters c. t. a. does not exist or will not act, letters should issue to the next of kin, should be limited to next of kin entitled to share in the unbequeathed assets and who are interested therein. In re Goggin's Estate, 43 Misc. 233, 88 N. Y. S. 557.

21. In re Brundage's Estate, 141 Cal. 538, 75 P. 175.

22. Ga. Acts 1898, p. 78, constitutional. Mulherin v. Kennedy [Ga.] 48 S. E. 437. Cannot act in Ohio. Rev. St. §§ 3821c, 3821f. Attempting to give them authority to do so in certain counties is unconstitutional, it being of a general nature, and not of uniform operation throughout the state. Schumacher v. McCallip, 69 Ohio St. 500, 69 N. E. 986.

23. A beneficiary of a trust is not a legatee within the meaning of Code Civ. Proc. § 2643. In re Ferguson, 84 N. Y. S. 1102.

24. Code Civ. Proc. § 2660, subd. 9, should be read into § 2643 as affecting right to letters c. t. a. and not applying to granting of letters in case of intestacy. In re Goggin's Estate, 43 Misc. 233, 88 N. Y. S. 557.

25. **In Georgia** a nonresident cannot be appointed administrator of the estate of a nonresident who dies leaving property in that state. Jones v. Smith [Ga.] 48 S. E. 134.

In New York nonresidence does not bar the right of a claimant to letters, provided he is by law otherwise entitled thereto. In re Tyers' Estate, 84 N. Y. S. 934.

In Illinois a nonresident next of kin has a right to nominate to the probate court a competent person to act as administrator, notwithstanding the fact that he is himself incapable of serving by reason of such nonresidence [4 Starr & C. Ann. St. 1902, c. 3, par. 6]. Strong v. Dignan, 207 Ill. 385, 69 N. E. 909.

In California one who is himself not entitled to letters of administration as a nonresident executor of a foreign will or nonresident heirs, legatees and devisees, are not entitled to nominate an administrator with the will annexed. Can only be granted on written request of person entitled [Code Civ. Proc. § 1379]. In re Brundage's Estate, 141 Cal. 538, 75 P. 175.

26. In Georgia only citizens of the United States who are residents of that state may be appointed administrators [Ga. Civ. Code 1896, § 3365]. Jones v. Smith [Ga.] 48 S. E. 134. Nonresident having interest in estate of deceased resident may be appointed under certain conditions [Ga. Civ. Code 1895, § 3366]. Id.

In New York a nonresident alien cannot obtain letters of administration for himself or for another upon a petition filed by him for that purpose. Code Civ. Proc. 2661, expressly prohibits him from obtaining them for himself and not a person contingently entitled thereto under § 2662 so as to authorize petition by him. In re Ferrigan's Estate, 92 App. Div. 376, 87 N. Y. S. 16; In re Flynn, 92 App. Div. 379, 87 N. Y. S. 18. But the fact that one otherwise qualified is an alien does not render him incapable of acting as administrator, where he is a resident of the state [Code Civ. Proc. § 2661].

Where there are several persons equally entitled, letters may be granted to one or more of them,[28] and a co-administrator may be appointed to act with the administrator with the latter's consent.[29] The selection of an administrator pendente lite is a matter within the discretion of the court.[30]

Ancillary letters can only be issued to the person named in the foreign letters, or otherwise entitled to the possession of decedent's personalty, or to one authorized by him to receive them,[31] and they should not be issued where applicant and deceased are both nonresidents, and there are no resident creditors and no personalty within the state, and the estate is solvent.[32]

Statutes in some states provide for a public administrator whose duty it is to take charge of the estates of persons dying intestate and without known heirs.[33]

(§ 3) *B. Procedure to obtain administration and grant of letters.*[34]—There can be no valid appointment of an administrator except under an order of court.[35] Anyone absolutely or contingently entitled by law to letters may petition the court for the appointment of himself or such other person as has a prior right thereto,[36] and any interested person may appear and object.[37]

Tanas v. Municipal Gas Co., 88 App. Div. 251, 84 N. Y. S. 1053.

27. Husband or wife. McLean v. Roller, 33 Wash. 166, 73 P. 1123.

28. Letters may be granted to the guardian of a minor brother to the exclusion of an adult brother [Cal. Code Civ. Proc. § 1367]. In re Turner's Estate [Cal.] 77 P. 144.

29. Fact that he is called "special administrator" does not vitiate his appointment. Lethbridge v. Lauder [Wyo.] 76 P. 682.

30. Cannot be reviewed on appeal. In re Davenport [N. J. Eq.] 56 A. 295.

31. Attempted appointment of any one else is void and may be collaterally attacked [Code Civ. Proc. § 2697]. Baldwin v. Rice, 44 Misc. 64, 89 N. Y. S. 738.

In New York the surrogate has authority to issue them only upon the petition of the person to whom letters have issued in another state or upon that of a resident creditor [Code Civ. Proc. §§ 2643, 2695]. In re Gennert's Estate, 96 App. Div. 8, 89 N. Y. S. 37.

In California in case of a foreign will, the nonresident executor is primarily entitled to letters testamentary [Code Civ. Proc. §§ 1322-1324]. In case he does not apply letters of administration with the will annexed will be granted as in case of intestacy [Code Civ. Proc. § 1350]. In re Brundage's Estate, 141 Cal. 538, 75 P. 175.

32. Purpose of ancillary letters, under Code Civ. Proc. §§ 2698, 2699, 2701, is to protect resident creditors. In re Gennert's Estate, 96 App. Div. 8, 89 N. Y. S. 37.

33. Mo. Rev. St. 1899, § 292. In re Hill's Estate, 102 Mo. App. 617, 77 S. W. 110.

In Missouri where the public administrator of his own motion takes charge of the estate under the conditions provided for by statute and gives the required notice of that fact, his appointment by the probate court is not necessary. Notice required under Mo. Rev. St. 1899, § 295. In re Hill's Estate, 102 Mo. App. 617, 77 S. W. 110; Strode v. Bierman, 102 Mo. App. 617, 77 S. W. 110.

In New York the public administrator is entitled to letters of administration on the estate of a decedent whose only next of kin are nonresident aliens [Code Civ. Proc. § 2660]. In re Ferrigan's Estate, 92 App. Div. 376, 87 N. Y. S. 16; In re Flynn, 92 App. Div. 379, 87 N. Y. S. 18.

In Wisconsin it is held that the statute providing for the appointment and granting of letters to the public administrator in certain cases until administration shall be granted to some person entitled thereto (Rev. St. 1898, § 3819), authorizes his appointment only until those authorized to administer (section 3807) apply for letters. Welsh v. Manwaring [Wis.] 98 N. W. 214.

The Illinois statute [4 Starr & C. Ann. St. 1902, c. 3, p. 6], providing for the granting of letters to the public administrator in certain cases and in counties having a certain population is unconstitutional as special legislation. Strong v. Dignan, 207 Ill. 385, 69 N. E. 909.

In Georgia before letters can be granted to the county administrator as such, the estate must not only be unrepresented, but it must appear that it is not likely that any one else will apply for administration [Civ. Code, § 3381] (Bailey v. McAlpin [Ga.] 48 S. E. 699), which fact must appear after publication of the citation required by statute. Cannot be appointed under statutes relating to appointment of temporary administrator (Id.). He qualifies permanently because no one else will be appointed. Id.

34. See 1 Curr. L. 1092.

35. Letters issued without such order are void. Miguez v. Delcambre [La.] 36 So. 888. The letters themselves furnish prima facie evidence of the existence of an order of appointment. Evidence held to show no order. Id.

36. Code Civ. Proc. § 2662. In re Ferrigan's Estate, 92 App. Div. 376, 87 N. Y. S. 16; In re Flynn, 92 App. Div. 379, 87 N. Y. S. 18. A creditor should have letters issued where the next of kin do not petition therefor within a reasonable time. Hoiles v. Riddle, 4 Ohio C. C. (N. S.) 449.

37. One who has acquired the entire interest of an heir is interested in preventing waste incident to unnecessary administration. Fact that he is neither heir nor creditor is immaterial. Dierks v. Smith, 119 Ga. 859, 47 S. E. 203. In California, any inter-

An order for the publication and the publication of the application are essential prerequisites of an order of appointment.[38] In California, a jury trial may be allowed on proper demand therefor.[39]

Where a citation is issued on petition for letters, the probate court may appoint another than the petitioner without a second citation.[40] Unless good cause is shown, the acts of a clerk of court in vacation in granting letters testamentary should be ratified.[41]

An executor derives his authority from the will, and confirmation thereof by the court, followed by the filing of the proper bond is equivalent to taking out letters.[42]

(§ 3) *C. Security or bond.*[43]—The giving of a bond is a necessary prerequisite to the right of the representative to act as such.[44] An objection to the sufficiency of the administrator's bond does not raise a jurisdictional question,[45] and if the judgment appointing him is valid, no one not interested in the assets of the estate can question the legality or sufficiency of the security on his bond which has been accepted by the court.[46] In some states, where the value of the estate is so great that the court deems it inexpedient to require security for the full amount thereof, he may direct that any of the securities shall be deposited with a trust company, and need not consider the value of securities so deposited in fixing the amount of the bond.[47]

The right to accept foreign surety companies as sureties depends upon statute.[48]

The security to be required of an administrator pendente lite is a matter within the discretion of the court.[49]

(§ 3) *D. Removals and revocation of letters.*[50]—Letters of administration will be revoked where the person appointed was or has since become disqualified to act.[51] Persons interested in the estate,[52] including creditors, have a right to

ested person may contest the petition for letters, or assert his own rights thereto. In the latter case he must file a petition and give the notice required for the original petition and the court must hear the two together [Code Civ. Proc. § 1374]. Where widow filed petition and others thereafter filed petitions contesting her right and praying for letters, and thereafter widow filed amended petition contesting others but stating no jurisdictional fact, held that court had jurisdiction to hear all petitions on date set for hearing widow's original petition. In re Turner's Estate, 142 Cal. 549, 77 P. 1099.

38. Miguez v. Delcambre [La.] 36 So. 888. Plaintiff held not estopped by his acts to deny validity of administrator's appointment. Id.

39. Code Civ. Proc. §§ 1716, 1717, 1312. In re Heaton's Estate, 139 Cal. 237, 73 P. 186.

40. Purpose of citation required by Civ. Code, S. C. § 2516, is to give all interested an opportunity to be heard. Ex parte Small [S. C.] 48 S. E. 40.

41. Brown's Rev. St. Ind. 1901, § 2398. Barricklow v. Stewart [Ind. App.] 68 N. E. 316.

42. Letters merely authentic evidence of power conferred by will. Bank of Montreal v. Buchanan, 32 Wash. 480, 73 P. 482. He is qualified to act as such on filing his bond [2 Ball. Ann. Codes & St. § 6200]. Id.

43. See 1 Curr. L. 1093.

For rights of sureties and actions on bonds, see post, § 9 G.

44. Executor qualified to act on filing bond. 2 Ball. Ann. Codes & St. § 6200. Letters merely authentic evidence of power conferred by will. Bank of Montreal v. Buchanan, 32 Wash. 480, 73 P. 482. In New Hampshire, orders of the probate court appointing executors are not absolute until the required bond is given, whether they so state or not [Pub. St. 1901, c. 188, § 12]. Davis v. Davis. 72 N. H. 326, 56 A. 747.

45. Beresford v. American Coal Co. [Iowa] 98 N. W. 902.

46. Persons claiming land which administrators seek to recover. Jones v. Smith [Ga.] 48 S. E. 134.

47. N. Y. Code Civ. Proc. § 2595. Ditmas v. McKane, 92 App. Div. 344, 86 N. Y. S. 1083.

48. In Indiana, foreign surety companies may be received as sureties on the bonds of executors and administrators [Burns' Rev. St. 1901, § 5494]. Barricklow v. Stewart [Ind. App.] 68 N. E. 316.

49. Cannot be reviewed on appeal. In re Davenport [N. J. Eq.] 56 A. 295.

50. See 1 Curr. L. 1093.

51. Becomes disqualified by application of one having a prior right [Code Civ. Proc. § 2685]. In re Tyers' Estate. 84 N. Y. S. 934.

52. Persons not interested cannot institute proceedings before the ordinary to vacate and set aside a judgment appointing an administrator. Persons claiming land which administrators are seeking to recover. Jones v. Smith [Ga.] 48 S. E. 134.

petition for revocation of letters[53] or the removal of the representative.[54] The reversal of an order appointing an administrator necessarily carries with it a revocation of the letters.[55]

An executor or administrator who fails to manage the estate in the manner in which a prudent man would conduct his own affairs,[56] or who is guilty of misconduct in relation thereto, will be removed.[57] The fact that the estate has suffered no loss is immaterial.[58] The fact that an executor gives an invalid bond is no ground for his removal.[59] An administrator will not be dismissed after he has filed his final account when such action could in no way benefit creditors or heirs.[60] So long as the petition for removal contains sufficient allegations upon which to base the finding, it will be presumed that the petition was for the reasons presented.[61]

§ 4. *The authority, title, interest and relationship of personal representatives.* *A. In general.*[62]—Administrators have only such powers as are given them by statute,[63] and executors are bound to obey the directions of the will which they have undertaken to execute.[64] The duties of executors and administrators are to

53. Code Civ. Proc. § 2685. Sutherland v. St. Lawrence County, 42 Misc. 38, 85 N. Y. S. 696. A petition stating that the executor is a fugitive from justice and has absconded authorizes a hearing without the issuance of a citation. Id. It is the province of the surrogate, in such case, to determine whether or not petitioner is a creditor, and his judgment in that regard, though improvidently made, cannot be collaterally attacked. Id.

54. The curator of an interdict and not his wife is the proper party to demand the removal of the administrator. Succession of Conery, 111 La. 113, 35 So. 479. Contention that a demurrer to a petition filed by next of kin, reciting that the bond filed by the executor was invalid and praying for his removal on the ground that such petition did not state facts constituting a cause of action or entitle petitioner to the ouster prayed for, should not have been considered because the petition did not pretend to be a cause of action or a complaint, held immaterial, since petition asked for removal, by whatever name it was called. Barricklow v. Stewart [Ind. App.] 68 N. E. 316.

55. Ex parte Small [S. C.] 48 S. E. 40.

56. Removed for transferring property of estate upon payment of a part only of the purchase price and on unsecured promise to pay balance, and for refraining, by agreement, from recording mortgage given to secure payment of money loaned by estate. In re Marsh's Will [N. J. Eq.] 56 A. 886.

57. **Held to constitute ground:** Procuring check from co-executor for ostensible purpose of paying claim which had never been presented. In re Patterson, 41 Misc. 46, 83 N. Y. S. 649. Two executors, who had become largely indebted to the estate, were insolvent, had disposed of their business in which a part of the funds of the estate were invested, and refused to disclose to their co-executor the disposition made of it, or to furnish an account between the estate and their insolvent firm at the time of decedent's death, held properly removed. In re Sharpless' Estate [Pa.] 57 A. 1128.

Evidence insufficient to justify removal of administratrix c. t. a. on ground of neglect of duty or fraud in not opposing claim against estate. In re Cannon [Del. Super.] 58 A. 1039. Executrix absent from the state for the greater part of the year following the issuance of letters, where she is the sole beneficiary, has performed all her statutory duties, and the year has not yet expired and no account is due from her. In re Magoun, 84 N. Y. S. 940. Participation in and payment of money to form a new corporation to take over the affairs of an embarrassed and unprofitable corporation in which the estate was interested, the executor agreeing that the estate should share its portion of the loss in case the venture was unsuccessful, he having acted in good faith, and it not being shown that the transaction was not for the best interests of the estate. Houghteling v. Stockridge [Mich.] 99 N. W. 759. Held not to show waste or bad faith in relation to sale of land. In re Rinkel's Estate [Mo. App.] 80 S. W. 716.

58. That loss was made up by him out of his own funds, or that, by a fortunate concurrence of circumstances, the estate gained a profit by the transaction. In re Marsh's Will [N. J. Eq.] 56 A. 886.

59. Most that can be required is giving of new bond. Barricklow v. Stewart [Ind. App.] 68 N. E. 316.

60. For wrongfully withdrawing funds on deposit, where he acted in good faith and no loss resulted. Succession of Conery, 111 La. 113, 35 So. 479.

61. Executor defaulted and there was no finding that the allegations of the petition were true. Fitts v. Probate Court of East Greenwich [R. I.] 58 A. 801.

62. See 1 Curr. L. 1094.

63. Cannot contract with tenant to make improvements consisting of ditches, etc., and for lumber, paint and papering, for building barns or assisting in sale of lands. No such authority given him by Rev. St. 1895, arts. 1983, 1984, authorizing repairs, and the carrying on of the plantation, manufactory or business of decedent in certain cases. Rice v. Conwill [Tex. Civ. App.] 80 S. W. 393.

64. Not in position to claim property as his own or dispute title of testator, or object to disposition of proceeds of insurance policy which was drawn so as to give de-

preserve the estate, pay the debts of deceased and the expenses of administration and put the estate in condition for distribution to those entitled to it.[65] The only pecuniary interest which they have therein is the amount of their commissions.[66] The acts of a representative in his individual capacity do not affect his rights as representative.[67]

The powers of a special administrator are limited to those necessary to collect and preserve the estate for the executor or administrator to be regularly appointed.[68]

A secondary administrator takes the place of the original representative,[69] and may do only such things as are necessary to complete the administration.[70] A judgment against an administrator in the state of domicile is a bar to an action by ancillary representatives in the state of their appointment against the same defendant on the same cause of action.[71]

Acts which are ministerial or mechanical may be committed by the administrator to an agent,[72] but not matters involving the exercise of his discretion.[73]

cedent a right to dispose of them by will. Succession of Henderson [La.] 36 So. 904.

65. Not to make payments of legacies, etc. In re Willey's Estate, 140 Cal. 238, 73 P. 998. To take possession of the personalty of the deceased, to collect the debts due him, to sell so much of the personalty as may be necessary to pay the debts, pecuniary legacies and expenses of administration, and to distribute the residue of the assets to the persons entitled to them under the will. Jones v. Probate Court [R. I.] 55 A. 881. To preserve estate for heirs and creditors. In re Wood's Estate [Cal.] 77 P. 481. To take possession of, settle and distribute the estate. All that legatees have a right to expect, so far as specific legacies of stock are concerned, is a delivery of such stock to them or their assigns on settlement of the estate. O'Neile v. Ternes, 32 Wash. 528, 73 P. 692.

66. Missouri supreme court has no jurisdiction of appeal in mandamus proceedings to compel appointment of one of the relators as administrator of a nonresident decedent, where amount of his commissions, if appointed, would not equal the jurisdictional amount. Amount relators will receive as devisees immaterial, as they will get that in any event. State v. Guinotte [Mo.] 79 S. W. 166.

67. The fact that the widow consented to the acts of intestate's father in taking possession of the estate did not estop her from afterwards suing as administratrix to charge him as executor de son tort. Loss cannot be taken from her individual share in such action at law by way of counterclaim. Remedy is in equity. Rohn v. Rohn, 204 Ill. 184, 68 N. E. 369.

68. Mont. Code Civ. Proc. § 2500. In re Ford's Estate [Mont.] 74 P. 735. Has no authority without a showing made to the probate court of necessity under existing exigencies to pay taxes on realty. Not entitled to allowance for taxes paid on land afterwards sold under mortgage foreclosure and lost to estate. Appeal of McAlpine [Minn.] 100 N. W. 233.

69. A judgment recovered by an administrator in chief is conclusive upon an administrator de bonis non of the same estate subsequently appointed, and cannot be collaterally attacked by him. On ground that it was obtained by fraud and collusion. Action for wrongful death of intestate. Logan v. Central Iron & Coal Co., 139 Ala. 548, 36 So. 729.

70. Administrator d. b. n. can act only as to things not yet administered. McCreery v. First Nat. Bank [W. Va.] 47 S. E. 890. A complaint alleging that an executor had managed an estate as such until his death and had never separated or set apart the income from the body of the estate sufficiently shows that he had not so far executed his trust that the money and securities had ceased to belong to the estate and that an administrator de bonis non could not maintain an action against persons wrongfully converting such property. Weaver v. Meyer, 32 Ind. App. 587, 70 N. E. 409. In an action by an administrator de bonis non to recover property belonging to the estate which the widow had wrongfully conveyed to defendants, the record of a suit in which her deceased son had secured a divorce and in which the legitimacy of his child had been determined was admissible for the purpose of explaining the widow's action, as an attempt to prevent such child from inheriting from testator. Id.

71. Baldwin v. Rice, 44 Misc. 64, 89 N. Y. S. 738.

72. Rice v. Conwill [Tex. Civ. App.] 80 S. W. 393. An independent executor may employ an agent to sell realty and pay him an agreed commission therefor. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227. Evidence held sufficient to sustain finding that son was carrying on business on his own account with consent of executrix and not as her agent. Question whether she was estopped by her conduct to deny that he was her agent held for jury. American Tube Works v. Tucker, 185 Mass. 236, 70 N. E. 59.

73. Rice v. Conwill [Tex. Civ. App.] 80 S. W. 393. An independent executor cannot delegate to an agent a discretion as to the terms of sale of realty (Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227), or give him authority to agree at his discretion with a subagent as to the commission the latter shall receive. As against special exception, petition held not to show that agent had authority to make agreement with subagent as to latter's commission. Executrix could authorize agent to sign agreement for amount fixed by her or ratify agreement after he had made it (Id.).

An administrator cannot ratify acts of an agent which he himself had no authority to do.[74]

Admissions of administrators in regard to the estate made while performing their duties as such are admissible against the estate, though not conclusive on it.[75] The same rule applies to their acts in omitting property from the inventory.[76]

Where the will provides for the administration of a trust fund without specifying who shall act as trustee, the executor becomes the trustee.[77] If the will gives him the powers and duties appropriate to the office, he will be regarded as a trustee in executing them and not as an executor.[78] In such case he occupies a double capacity and his powers in relation to each are distinct.[79] His duties as executor are primary to those as trustee, and if he exercises the latter inopportunely, he is liable for losses to creditors resulting therefrom.[80]

The reversal of a decree admitting a will to probate operates to destroy the authority of executors acting under letters testamentary, unless by express order of the court.[81]

The personal representative of a deceased administrator does not take and administer his trust, but proceeds at once to settle his account, and pay over the balance in his hands to his successor.[82]

(§ 4) *B. Contracts, conveyances, charges and investments.*[83]—Ordinarily executors and administrators cannot bind the estate by their executory contracts based upon a new and independent consideration, even though made in the interest and for the benefit of the estate,[84] but this rule does not prevent the recovery from them as such of funds received by them in their official capacity, in pursuance of a contract which they did not perform, and of which the estate had the benefit.[85]

74. Rice v. Conwill [Tex. Civ. App.] 80 S. W. 393.

75. Of one of two administrators as to ownership of property found in possession of deceased. Crouse v. Judson, 84 N. Y. S. 755.

76. Crouse v. Judson, 84 N. Y. S. 755.

77. Executor, as such, handles the funds and administers trust as directed by the will. Marshall v. Myers, 96 Mo. App. 643, 70 S. W. 927.

78. Jones v. Probate Court [R. I.] 55 A. 881; Jewett v. Schmidt, 83 App. Div. 276, 82 N. Y. S. 49. Upon the death of a testamentary trustee, the supreme court should appoint some person as its representative to carry out the terms of the trust. N. Y. Laws 1896, c. 547, cannot appoint trustee. Jewett v. Schmidt, 83 App. Div. 276, 82 N. Y. S. 49.

79. Held that executor who was also trustee could in latter capacity, sell note, the income of which had been bequeathed. Marshall v. Myers, 96 Mo. App. 643, 70 S. W. 927; Currier v. Johnson [Colo. App.] 73 P. 882. As to the rights, duties and liabilities of testamentary trustees, see Trusts, 2 Curr. L. 1924.

80. Marshall v. Myers, 96 Mo. App. 643, 70 S. W. 927.

81. Code Civ. Proc. § 2582. In re Hopkins' Will, 41 Misc. 83, 83 N. Y. S. 890.

82. Should be an accounting as of the date of his death. Walworth's Estate v. Bartholomew's Estate [Vt.] 56 A. 101.

83. See 1 Curr. L. 1094.

84. Caridco v. Austin, 88 App. Div. 35, 84 N. Y. S. 777; Painter v. Kaiser [Nev.] 76 P. 747. Notes with the abbreviation "Ex." following the signature are the personal obligations of the maker. Sutherland v. St. Lawrence Co., 42 Misc. 38, 85 N. Y. S. 696. An executor who, without authority under the will, executes an oil and gas lease of lands belonging to the estate after having individually acquired the interest of one of the legatees in such lands, and who thereafter acquires the interest of another legatee, held, in an action for partition, estopped from denying that his interest was subject to such lease. Lanyon Zinc Co. v. Freeman [Kan.] 75 P. 995. Agreement to pay claims due from estate to third party to whom it had been assigned renders administratrix liable individually to amount of assets in her hands. Carpenter v. Lindauer [N. M.] 78 P. 57. An executor cannot impose liability on the estate by making a promissory note. Renewal notes do not create new obligation against estate though maker intended to execute them in capacity of executor. Bank of Montreal v. Buchanan, 32 Wash. 480, 73 P. 482. Executor of estate, the principal assets of which are notes payable to decedent's widow, on which he is personally liable, for the purpose of protecting him may pay his own money to his surety and stipulate with him for its repayment to the executor upon death of decedent's widow. Brown's Ex'r v. Dunn's Estate, 75 Vt. 264, 55 A. 364. If contract was with reference to notes being assets of estate and executor's liability to account, as such, for them, the question whether they belonged to estate or widow and whether money paid to third person was assets of estate before its payment to him was immaterial for purpose of determining surety's liability to estate. Id.

85. Liable for money paid them as part of purchase price of realty under contract

Liabilities contracted by them for services or otherwise are their personal liabilities and not claims against the estate,[86] and the persons contracting with them must look to them alone for their compensation.[87] But where the representative is a nonresident, the person rendering the services may proceed in equity against the property of decedent in the state without first exhausting his legal remedies against the executor.[88] Disbursements made by reason thereof, when reasonable in amount and for necessary services, will constitute a charge in favor of the representative against the estate,[89] but the probate court has no jurisdiction to adjudicate between the personal representative and the claimant.[90] An administrator is not personally liable on a mortgage and notes secured thereby, executed by him in his representative capacity on the realty of decedent, under order of the court and for the purpose of paying decedent's debts.[91]

A special administrator has no authority to make contracts which will interfere with or prejudice the duties or powers of the general administrator, to be thereafter appointed, or incumber the rights and privileges of the heirs or beneficiaries.[92]

The court will not by injunction aid an administrator in completing a contract of his intestate unless his right to do so is clearly established.[93]

not carried out because of defective title, but not for sum paid by purchaser for examination of title. Carideo v. Austin, 88 App. Div. 35, 84 N. Y. S. 777.

86. Estate not liable for services rendered administrator by attorney. Clark v. Sayre, 122 Iowa, 591, 98 N. W. 484. Whether he will be reimbursed is question for probate court on settlement of estate. Executrix personally liable on contract made by her before appointment whereby, for purpose of settling disputes, she agreed when appointed to make certain payments out of funds of estate to heirs and distributees. One for whose benefit contract was made and partly executed could maintain action thereon, though not a party thereto. Painter v. Kaiser [Nev.] 76 P. 747.

87. Attorney and administrator. In re Kruger's Estate, 143 Cal. 141, 76 P. 891. Ordinarily one employed in any capacity by an executor must look to the person employing him for compensation, and has no lien on the property being administered. Gates v. McClenahan [Iowa] 100 N. W. 479. Under contract made by heirs and administrator with agent to sell realty for fixed commission, the latter has no claim against the estate. Ex parte Simmons [S. C.] 48 S. E. 279. Attorneys for administrator not creditors of estate. In re Sawyer's Estate [Iowa] 100 N. W. 484. Representative should pay them and claim credit therefor in her account. Vaughn v. Walsh [Wis.] 100 N. W. 840; Smith v. Rhodes, 68 Ohio St. 500, 68 N. E. 7; Stephens v. Cassity [Mo. App.] 77 S. W. 1089. Allowance must be made to representative and not to attorney, though latter agreed to accept amount allowed by court. He has no claim against estate, and is not a party interested in allowance of accounts so as to be entitled to file exceptions thereto. In re Kruger's Estate, 143 Cal. 141, 76 P. 891. In New York, an attorney has a lien on the estate for services rendered to the executor in the surrogate's court. Code Civ. Proc. § 66, as amended in 1899. Part of expenses of administration. In re Crough's Estate, 84 N. Y. S. 936. See, also, In re Crouch's Estate, 44 Misc. 485, 89 N. Y. S. 465.

88. Attorneys rendering services for foreign executors in recovery of land in Iowa entitled to recover fees from land. Fact that executors were also appointed to administer estate in Iowa by courts of that state, immaterial. Gates v. McClenahan [Iowa] 100 N. W. 479.

89. Clark v. Sayre, 122 Iowa, 591, 98 N. W. 484. An allowance should not be made directly to the persons rendering services to the administrator, but it should be made to the latter as for expenses incurred by him. In re Willard's Estate, 139 Cal. 501, 73 P. 240. The probate courts alone have jurisdiction to adjudicate such matters on settlement made with the representative. Mo. Rev. St. 1899, § 223. The statute giving the circuit court jurisdiction to establish demands against the estates of decedents (Id. § 191) does not authorize it to adjust claims of representatives for services and expenses against the estate. Stephens v. Cassity [Mo. App.] 77 S. W. 1089. Attorney's fees cannot be recovered in action against executor until so allowed. Id. See post, § 9 D.

90. Iowa Code 1897, §§ 3347, 3415, do not change these rules. Clark v. Sayre, 122 Iowa, 591, 98 N. W. 484.

91. Purchasers of notes, showing on their face that they were executed in representative capacity, could not claim that they relied on administrator's personal liability. Wisconsin Trust Co. v. Chapman [Wis.] 99 N. W. 341.

92. Appointed under Minn. Gen. St. 1904, § 4484. Cannot enter into contract with third party to protect property from trespassers or to sell land, to continue for a number of years beyond probable duration of his authority. Appeal of McAlpine [Minn.] 100 N. W. 233.

93. Defendant's right to collect rent for pianos held not taken away by fact that complainant's intestate had right to commission on amount collected. Ivins v. Jacob [N. J. Eq.] 58 A. 941.

An executor or administrator, in the absence of authority therefor, is not permitted to use any part of the estate in trade or manufacturing, or in stock speculation, or other business venture whereby the trust fund is put at hazard.[94] His doing so is a breach of trust rendering him personally liable for resulting losses, while incapable of sharing in accruing gains.[95] It is his duty to settle speculative accounts of deceased within a reasonable time.[96]

In the absence of a statute[97] or a provision in the will directing him to do so, he has no authority to continue a business in which decedent was engaged at the time of his death.[98] Ancillary administrators, within the state in which they are appointed, have the same rights in this regard as a regular representative would have.[99] Beneficiaries cannot prevent the execution of a direction to continue a business on the ground that such action may put the fund to the hazard incident to any trade venture.[1] A minor heir is not bound by the action of an administrator in continuing a commercial business with no other authority than the consent of the other heirs.[2]

Conveyances.—The deed of an executor who is not authorized to make a sale, either by will or by the probate court, passes no title.[3] It is no valid objection to an administrator's deed that the land was not included in the original inventory of the estate.[4] The deed should recite the authority of the representative.[5] A deed from one only of two executors, when both have qualified and are acting, is void.[6] Parties taking a mortgage made by an executor on realty belonging to the

94, 95. Matthews v. Sheehan, 76 Conn. 654, 57 A. 694.

96. Administrators held not to have settled speculative accounts with stock brokers within a reasonable time. Matthews v. Sheehan, 76 Conn. 654, 57 A. 694.

97. Statutes authorizing him to continue the business do not give him authority to continue a partnership of which decedent was a member [Tex. Rev. St. 1895, art. 1984]. Altgelt v. Sullivan & Co. [Tex. Civ. App.] 79 S. W. 333. Independent executor may carry on business when will says nothing in regard to the matter. Altgelt v. Alamo Nat. Bank [Tex. Civ. App.] 79 S. W. 582. This section embraces a mercantile business. Persons furnishing money for carrying on such business may establish their claims therefor against the estate. It is not incumbent on them to see that money is used for that purpose or to inquire whether business was being conducted at a loss. Id. An independent executor having authority to carry on such business has power to do everything necessary for that purpose. May borrow money and execute notes bearing interest and providing for attorney's fees in case they are not paid, and issue renewal notes therefor. Id. Where the executor has power to incur debts in respect to the assets of the estate, the fact that some one may have a remote claim of title in or to the property cannot defeat debts which he sees fit to contract in the course of his administration. Id.

98. Guaranty required by will before testator's son should be allowed to carry on certain business bequeathed to him held to be for benefit of beneficiaries and not to give one dealing with him right of action against executrix for permitting him to take charge of such business before giving guaranty. American Tube Works v. Tucker, 185 Mass. 236, 70 N. E. 59. Where decedent's attorney in fact, who was also one of his executors, continued the business under a power from the other executors, though not authorized to do so by will, the executors were personally liable for money borrowed by him in goor faith and used to pay debts incurred in such business. Howe v. Richardson [Mass.] 71 N. E. 543.

99. An ancillary administrator has all the powers with respect to a partnership of which decedent was a member which are devolved on the representatives of deceased by the articles of co-partnership. Where he has right to purchase interest of surviving partner, he has a right to an accounting of the business from the date of the last account rendered by the survivor to the heirs and approved by them. Egan v. Wirth [R. I.] 58 A. 987.

1. Thorn v. De Breteuil, 86 App. Div. 405, 83 N. Y. S. 849.

2. Succession of Wiemann, 112 La. 293, 36 So. 354. As to him the administrator is, on accounting, entitled to be credited only with such disbursements as should have been made and incurred if he had settled the succession according to law. Id. Minors not estopped to hold him and his sureties liable for the consequences by reason of their consent. Wiemann v. Mainegra, 112 La. 305, 36 So. 358.

3. Demaris v. Barker, 33 Wash. 200, 74 P. 362.

4. Presumption is that supplemental inventory was filed. Jamison v. Dooley [Tex. Civ. App.] 79 S. W. 91.

5. A deed to land reciting authority to transfer "securities" is void on its face. Pratt v. Worrell [N. J. Eq.] 57 A. 450. Executor's deed held sufficient as execution of power of sale given him by will, he having no individual interest in the property. Carpenter v. Webb [Del. Super.] 55 A. 1011.

6. Limitations begin to run against ac-

estate, with knowledge that the executor is acting wrongfully and does not intend that the estate shall in any way benefit by the transaction, cannot enforce it against the estate.[7] An administrator cannot subject the estate in his charge to a judgment for damages suffered through any false representations which he may have made while acting in his behalf.[8] In such case the remedy is against him personally.[9]

Investments.—There can be no change in an investment directed by the will except with the consent of all parties interested.[10] Statutes in some states provide the class of securities in which the funds of the estate should be invested.[11] In such cases, the representative should, within a reasonable time, in the absence of anything to the contrary in the will, sell securities and reinvest the proceeds in those designated.[12]

An executor who is directed by the will to invest a fund for the benefit of the estate is not relieved from liability by a return of the principal thereof without accounting for his failure to realize a profit on the investment.[13] The retention of funds by an administrator for his own use will not be treated as an investment of them under the terms of the will, so as to relieve him from liability therefor as administrator, without a specific order of the court to that effect.[14]

In some states, the court has power to order a sale of securities in danger of depreciation and a reinvestment of the proceeds.[15]

(§ 4) *C. Title, interest or right in decedent's property.*[16]—An executor or administrator has only such interest in property under his control as decedent had.[17]

The legal title to personalty goes to the executor or administrator.[18] He may sell the same or mortgage or pledge it to raise money or secure debts,[19] and a trans-

tion by executors to recover possession at once. Brown v. Doherty, 93 App. Div. 190, 87 N. Y. S. 563.

7. Persons entering into partnership with executor and advancing money for the undertaking on security of mortgage executed by him on trust estate, knowledge of fraud not imputed to corporation of which mortgagees were officers so as to render mortgage invalid in its hands. Camden Safe Deposit & Trust Co. v. Lord [N. J. Eq.] 58 A. 607.

8. Sale of land alleged to have been made through false representations of administrator. Andrews v. Platt [Conn.] 58 A. 458.

9. Andrews v. Platt [Conn.] 58 A. 458.

10. Thorn v. De Breteuil, 86 App. Div. 405, 83 N. Y. S. 849.

11. In re New York Life Ins. & Trust Co., 86 App. Div. 247, 83 N. Y. S. 883.

12. Executor not liable for loss of profits due to the fact that he sold stocks at a time when war was liable to depreciate all classes of securities and invested proceeds in government bonds. In re New York Life Ins. & Trust Co., 86 App. Div. 247, 83 N. Y. S. 883.

13. Cheever v. Ellis [Mich.] 96 N. W. 1067.

14. Fact that lower court approved setting aside of fund for payment of annuities does not release administrator or sureties, where such fund was, in fact, never set apart or invested and no specific investment was approved. Ellyson v. Lord [Iowa] 99 N. W. 582.

15. In Ohio, the probate court has power to order the sale by an administratrix with will annexed, of securities in danger of depreciation and reinvestment of the proceeds therefrom. Guthrie v. Cincinnati Gas & Elec. Co., 2 Ohio N. P. (N. S.) 117.

16. See 1 Curr. L. 1095.

17. Mortgagor conveyed property to mortgagee by deed, reciting that two titles were not to merge, but that mortgage was to be held as protection to the title. Mortgagee devised title subject to her debts and funeral expenses. Held, that her executor could not foreclose mortgage to obtain money to pay debt. Coon v. Smith, 43 Misc. 112, 88 N. Y. S. 261.

18. Title comes to legatee or distributee through him. Weaver v. Meyer, 32 Ind. App. 587, 70 N. E. 409. See Descent and Distribution, § 3, 3 Curr. L. 1081. Byers v. Weeks [Mo. App.] 79 S. W. 485; McCreery v. First Nat. Bank [W. Va.] 47 S. E. 890. Choses in action. Logan v. Central Iron & Coal Co., 139 Ala. 548, 36 So. 729. Title suspended until the appointment and qualification of a personal representative. McKenney v. Minahan, 119 Wis. 651, 97 N. W. 489. Personal property of deceased persons, not distributed and in the hands of executors or administrators, should be assessed to such executors or administrators [Rev. St. Me. c. 16, § 14, par. 8]. Inhabitants of Eliot v. Prime, 98 Me. 48, 56 A. 207. A sole administrator is entitled to the possession of all decedent's personalty. Freese v. Hibernia Sav. & Loan Soc., 139 Cal. 392, 73 P. 172. Heir has no right to collect or dispose of choses in action. Bishop v. Matney, 25 Ky. L. R. 1777, 78 S. W. 856.

19. McCreery v. First Nat. Bank [W. Va.] 47 S. E. 890. The California Code (Code Civ. Proc. § 1524), giving executors and adminis-

fer from him in due course of law is necessary to pass the title to another.[20] A bona fide purchaser for value and without notice acquires a good title, though the representative intends to and actually does convert the proceeds to his own use.[21] The representative's title is not absolute, however, but he holds merely as trustee for the creditors and distributees, and after the payment of debts, the residue descends to the heirs at law.[22] The presumption is that representatives have acted legally and in good faith,[23] and that sales of personalty made by them were ordered and approved by the proper court.[24] Trust powers for minors do not pass to the minor or his guardian.[25]

§ 5. *The property; its collection, management, and disposal by personal representatives. A. Assets.*[26]—Ordinarily realty passes to the heirs or devisees, subject only to the right of the probate court to order a sale thereof for the purposes fixed by statute, and the representative has no interest therein.[27] By stat-

trators power to sell interests in personal property pledged in certain cases, merely gives them a right to sell it subject to the interest of the pledgee, and does not affect the right of the latter to sell it upon demand and notice. Bell v. Mills [C. C. A.] 123 F. 24.

20. Heir seeking to recover personalty must show such transfer. Maxim "All things are presumed to have been rightly and regularly done until the contrary is shown" does not apply. McKenney v. Minahan, 119 Wis. 651, 97 N. W. 489. Failure to plead such transfer is a defect going to the cause of action and can be raised at any time. Cannot be reached by demurrer for want of legal capacity to sue or defect of parties plaintiff. Id.

21. Certificates of bank stock reissued in name of executor and pledged as collateral for notes made by him in due course of administration cannot be recovered by the administrator d. b. n. c. t. a. McCreery v. First Nat. Bank [W. Va.] 47 S. E. 890.

22. Byers v. Weeks [Mo. App.] 79 S. W. 485. Newly discovered assets of the estate are a trust fund in the hand of an administrator for the payment of the debts and costs of administration and do not descend to the heirs until such payment has been made. Heirs cannot prosecute action to recover them in their individual capacity until such claims have been paid, where estate is insolvent. Sharp v. Citizens' Bank of Stanton [Neb.] 98 N. W. 50. Hence the heirs at law of a deceased partner may in their own names compel an accounting by the surviving partner who has failed to administer the partnership estate, where decedent's administrator has received his final discharge without doing so and there is no authority for the appointment of an administrator de bonis non. Byers v. Weeks [Mo. App.] 79 S. W. 485.

23. Persons dealing with them may assume so. McCreery v. First Nat. Bank [W. Va.] 47 S. E. 890.

24. Presumption on appeal from an order allowing the final account of a special administrator, and in the absence of a showing to the contrary. In re Ford's Estate [Mont.] 74 P. 735. Complaint in action on notes assigned to plaintiff by an executor need not allege that he was authorized by probate court to make such assignment. An allegation that it was made imports its validity. Keen v. Brooks [Colo. App.] 73 P. 1092.

25. Burroughs v. Cutter, 98 Me. 178, 56 A. 649.

See general discussion of trust powers in title Trusts, 2 Curr. L. 1924.

26. See 1 Curr. L. 1096.

27. See title Descent and Distribution, § 3, 3 Curr. L. 1085. Griffith v. Rudisill [Ala.] 37 So. 83. Has no right to sell or incumber it except as authorized by court under the statute. Wisconsin Trust Co. v. Chapman [Wis.] 99 N. W. 341. If he holds proceeds must be considered as doing so as agent of the heirs, and this will be construed as their having received same within meaning of statute making them liable for decedent's debts. Jones v. Comer, 25 Ky. L. R. 773, 76 S. W. 392. Rents accruing under lease by administrator made by order of court to raise money to pay debts go to the heirs, though land could be sold to pay debts. Vance v. Vance's Adm'r, 25 Ky. L. R. 741, 76 S. W. 370. Cannot recover treasure trove buried in land belonging to testator and discovered and removed by lessees. It goes to devisees. Burdick v. Chesebrough, 94 App. Div. 532, 88 N. Y. S. 13. The administrator represents only the personal estate and cannot, by any action of his, prejudice the rights of the heirs in the realty. Action by administratrix against person in whose name property stood alleging fraud on ground that he was in fact trustee for decedent and praying that if he failed to convey to the heirs she be adjudged a lien thereon for the purchase money held not a bar to an action by the heirs in which they alleged same facts and prayed that they be adjudged the owners of the land. Row v. Johnston, 25 Ky. L. R. 799, 78 S. W. 906. A probate court has nothing to do with the real estate of deceased, or its rents, until the proper legal steps have been taken to place such property in the hands of the executor or administrator for the necessary purpose of settling the estate. Not until personalty has been exhausted in payment of debts and legacies, except as otherwise directed by will. Jones v. Probate Court [R. I.] 55 A. 881. The functions of a substituted administrator, under the statutes of New Jersey (Laws 1901, p. 303), are confined to the personal estate of the decedent. Hoagland v. Cooper [N. J. Eq.] 56 A. 705. Naked power of sale given executor by will does not vest title in him. Indiana R. Co. v. Morgan, 162 Ind. 331, 70 N. E. 368.

In New York a temporary administrator

ute in some states it is made assets in the hands of the executor or administrator for the payment of debts.[28] In others he has a right to the possession of the realty, and may collect the rents thereof until the debts are paid, and the estate is finally settled.[29] Where it is the duty of the administrator to administer realty as well as personalty, a judgment in a suit brought by him in regard to the realty binds the heirs.[30]

At common law an executor or administrator could not redeem realty mortgaged by his intestate,[31] but this rule has been changed by statute in some states.[32] Where he is permitted to do so it is not necessary for him to take out a license to sell realty,[33] but where no license to sell realty for the payment

may be authorized by the surrogate to do any acts with respect to the realty which may, in his opinion, be necessary to carry out the provisions of the will or to preserve the property, except to sell it or lease for a longer period than a year. Code Civ. Proc. § 2675. Supreme court will not, in action for partition, appoint a receiver pendente lite where surrogate has appointed temporary administrator. Weiher v. Simon, 41 Misc. 202, 83 N. Y. S. 927.

28. **In Alabama** lands are made assets of the estate for the payment of debts, and the representative's right to their possession dominates that of the heir [Ala. Code 1896, §§ 66, 155-158]. Griffith v. Rudisill [Ala.] 37 So. 83. The heir cannot resist his claim if made within one year after the estate is committed to administration. Id. If made after that time, the representative has only a prima facie right to possession. Id.

In Arkansas same rule prevails. Hopson v. Oxford [Ark.] 79 S. W. 1051. Representative is entitled to possession until the debts are paid and the administration is closed, and may maintain and defend ejectment to enforce such right. Heirs may not maintain ejectment before that time against one in possession by consent of administrator, who is paying rent which is treated by administrator as assets for payment of debts. Id.

29. **Nebraska** Comp. St. 1901, c. 23, § 202. Jackson v. O'Rorke [Neb.] 98 N. W. 1068. Has no authority to lease the lands of intestate after the payment of the debts and the final settlement of the estate. Heirs may proceed against him as against any other trespasser. Id. The interest of the administrator c. t. a. extends only to possession of the land and the disposition of the rents and profits in settlement of the estate. Youngson v. Bond [Neb.] 95 N. W. 700.

In Iowa an administrator, as such, is not responsible to the heirs for rents collected by him (In re Pennock's Estate, 120 Iowa, 622, 98 N. W. 480), and in no event is he liable to a widow for rents until her distributive share is set aside (Id.).

In Minnesota the administrator is entitled to recover realty in the possession of the heir or devisee, pending the settlement of the estate in the probate court. Until he does so right of possession is in heir [Gen. St. 1894, § 4496]. Kern v. Cooper, 91 Minn. 121, 97 N. W. 648. He need not show that such recovery is necessary for the purpose of administration, but the burden is on the heir to show the contrary. Id.

In Missouri the executor or administrator may take possession of and lease lands belonging to the devisees or heirs when ordered to do so by the probate court for the purpose of paying debts. Rev. St. 1899, § 130. Executrix who has not done so cannot without the devisees' consent, collect rents which the tenant has agreed to pay them. Brent v. Chipley [Mo. App.] 78 S. W. 270.

In California the executor is entitled to possession of the realty until the estate is settled or delivered over to the heirs or devisees by order of the court. Code Civ. Proc. § 1452. Entitled to possession after death of life tenant to whom decree had given possession. Bank of Ukiah v. Rice, 143 Cal. 265, 76 P. 1020.

In Florida realty is not assets but descends to heir or devisee and remains in his possession until representative takes possession or sells the same under order of court for the payment of debts [Fla. Rev. St. 1892, § 1917]. Scott v. Jenkins [Fla.] 35 So. 101. Order must be pleaded even if it alone were sufficient to render heirs unnecessary parties to suit to foreclose mortgage. Id. Heirs at law and devisees necessary parties to suit to cancel conveyances of realty to decedent where will does not vest the title in the executor and no order has been made by a competent court directing him to take possession of it. Decree against executor alone will be reversed. Steere v. Tention [Fla.] 35 So. 106.

30. Gunn v. James [Ga.] 48 S. E. 148.

31. Survived to heirs. Clark v. Seagraves [Mass.] 71 N. E. 813.

32. Heirs and widow not thereby deprived of their right to redeem. Statute covers case of absolute deed intended as mortgage [Rev. Laws, c. 187, § 33]. Clark v. Seagraves [Mass.] 71 N. E. 813. A bill may be maintained against one as administratrix to have a deed absolute in form declared a mortgage and to redeem therefrom without a previous trial in the probate court of the question whether the deed belonged to her individually or in her representative capacity, she being made defendant in both capacities. May be determined in suit. Id. Where the conveyances and assignments from which a redemption is sought were made to an administrator individually, but were for the benefit of the estate, she must account for rents and profits accruing after the death of the intestate. Id.

In Alabama the executor may redeem for purposes of administration. Griffith v. Rudisill [Ala.] 37 So. 83.

33. Clark v. Seagraves [Mass.] 71 N. E. 813.

of debts is granted, the result of such redemption inures exclusively to the benefit of the widow and heirs.[34] The heirs at law of a deceased mortgagor are necessary parties to an action to foreclose a mortgage on realty.[35] In Texas a sale made by a trustee after the death of the maker of the trust deed and pending the administration of his estate, or if there is no administration, during the time within which administration might have been had, is void.[36] In the latter case the power of the trustee to sell revives after the expiration of such period.[37]

Since the legal title to and the right to possession of the personalty is in the representative,[38] suits for its recovery must be brought by him[39] unless there is no administrator and no necessity therefor,[40] or the representative fails or refuses to act,[41] or the estate has been finally administered and all the debts have been paid, in which case they may be brought by the next of kin.[42]

It must appear that decedent actually had title to the property at the time of his death.[43] An executor or administrator taking possession of property which

34. Conveyance should be to heirs, subject to widow's right of dower. Heirs determined by law of intestate's domicile where land was situated. Clark v. Seagraves [Mass.] 71 N. E. 813.

35. Scott v. Jenkins [Fla.] 35 So. 101. Where mortgagor died pending suit to foreclose and her administrator was substituted complainants acquired no vested interest in the powers which administrators had in regard to realty so that on the passage of a law taking away such rights, pending the suit and before final decree (Fla. Rev. St. 1892, § 1917), the heirs became necessary parties defendant. Id.

36. Tiboldi v. Palms [Tex. Civ. App.] 78 S. W. 726.

37. Four years. Does not revive if there has been an administration. Hence, beneficiary who did not file his claim secured thereby or appear in administration proceedings could not, after the discharge of the administrator, enforce his lien on the land which had been assigned to the minor heirs as a homestead. Tiboldi v. Palms [Tex. Civ. App.] 78 S. W. 726.

38. See § 4C, ante; also title Descent and Distribution, § 3, 3 Curr. L. 1085.

39. Though legatee was in possession. Weaver v. Meyer, 32 Ind. App. 587, 70 N. E. 409. To collect claims due estate. Matheny v. Ferguson [W. Va.] 47 S. E. 886. To recover horses, etc. Rylie v. Stammire [Tex. Civ. App.] 77 S. W. 626. Has sole right to bring all actions that may be necessary to collect the assets of the estate. V. S. 2445. Heir of deceased partner cannot maintain bill for partnership accounting, in absence of fraud, collusion, or irretrievable loss. Mason v. Hicks [Vt.] 56 A. 1011. A suit for the purchase money of land. Where there ars no averments that there was no administration, and no debts. Bryant v. Atlantic Coast Line R. Co., 119 Ga. 607, 46 S. E. 829. The administrator is the proper party to sue on a note coming into his hands as assets of the estate, notwithstanding the fact that recovery is sought for the benefit of the widow. Widow not necessary party though money intended to be applied to payment of her statutory allowances. Burge v. Burge's Adm'r, 25 Ky. L. R. 979, 76 S. W. 873. The fact that personalty of deceased was sold by his widow under a mutual mistake of law by herself and the buyer does not affect the right of the administrator to recover the same, he not having been a party to the transaction. Snyder v. Jack, 140 Cal. 584, 74 P. 139. Next of kin cannot maintain action for conversion of personalty, there being no proof that deceased did not leave a widow, that there are not other next of kin equally entitled to the property, that there are no creditors, or that defendants have admitted that plaintiff had possession or a right thereto. McKernan v. Thomas Conville Brew. Co., 86 N. Y. S. 191. Heirs not necessary parties to suit to foreclose chattel mortgage. Scott v. Jenkins [Fla.] 35 So. 101.

40. Heirs or next of kin must allege and prove such facts. Rylie v. Stammire [Tex. Civ. App.] 77 S. W. 626.

41. Matheny v. Ferguson [W. Va.] 47 S. E. 886. In an action by a legatee to recover funds belonging to her testator alleged to have been entrusted by the executrix to defendant's testator and for which it is alleged such executrix refuses to sue, the executrix is a necessary and proper party. Rathbun v. Brownell, 43 Misc. 307, 88 N. Y. S. 833. Action properly brought in county where such executrix resides [Code Civ. Proc. § 984]. Id.

42. Only residue, after payment of debts and expenses, goes to heirs. Sharp v. Citizens' Bank of Stanton [Neb.] 98 N. W. 50.

43. Evidence held to show that note and mortgage were assets of the estate. Ambrose v. Drew, 139 Cal. 665, 73 P. 543. Notes held to be property of payees and to have been held by deceased for their beneficial use under a declaration of trust. In re Richardson's Estate [Iowa] 100 N. W. 797. Bank account held to belong to daughter of deceased personally and not to be assets of the estate for which she was bound to account as administratrix. In re Barefield, 177 N. Y. 387, 69 N. E. 732. Certificates of deposit given away by deceased during his lifetime does not pass to his representative as assets. Burge v. Burge's Adm'r, 25 Ky. L. R. 979, 76 S. W. 873. The mere fact that a note, not payable to bearer and not indorsed, is found among the effects of decedent who was not the payee raises no presumption that he owned it. Evidence insufficient to show ownership. Hair v. Edwards [Mo. App.] 77 S. W. 1089. The fact that stock stands on the books of the corporation in decedent's name is not conclusive evidence

does not belong to the estate is liable therefor to the owner in his individual capacity.[44] Property pledged by a decedent,[45] or given to his executors in trust is not assets of the estate in the hands of the representative.[46] Life insurance cannot be relinquished to the estate by an instrument lacking a consideration.[47]

Deposits in banks,[48] the excess received on mortgage foreclosure sale,[49] and a cropper's prospective rights to his share of the crop,[50] have been held to be assets in the hands of the representatives. The subject of a gift causa mortis is an apparent asset in the hands of the administrator and a reference may be had under a statute authorizing references to determine disputed claims, though there is no other property.[51] An executor takes securities discovered in decedent's strong box in his representative capacity, and not as "finder."[52]

(§ 5) *B. Collection and reduction to possession.*[53]—An administrator who has been appointed and has properly qualified in the state of the domicile may receive payment of debts owing the intestate and take possession of the assets wherever the debtors may be.[54] An ancillary administrator is entitled to the assets of the estate in the state where he is appointed, and to collect debts there owing deceased,[55] but a voluntary payment to a foreign administrator, made in good faith, and without knowledge of the appointment of an ancillary administrator, is valid, there being no creditors in the state.[56]

It is the duty of an administrator to convert the assets of the estate into money as soon as he can reasonably do so, for the purpose of paying the debts and making a distribution of the balance.[57] In so doing he is bound to exercise the diligence and prudence which a prudent man of intelligence and discretion in such matters ordinarily employs in his own like affairs.[58]

that it belongs to his estate. Evidence held to show that he held it as collateral. Van Winkle v. Blackford, 54 W. Va. 621, 46 S. E. 589. The fact that a mortgage is assets of an estate is sufficient consideration to support its transfer to the estate. Ambrose v. Drew, 139 Cal. 665, 73 P. 543.

44. Hunnicutt v. Higginbotham, 138 Ala. 472, 35 So. 469. The mere fact that the owner presents a claim therefor to the executor does not amount to an election on his part to rely on it as a claim against the estate and not against defendant individually. Claim against estate not insisted on or prosecuted. Money given to decedent to keep which was in her possession on her death. Id. The surrogate has no jurisdiction, upon a summary application, to compel the administrator to deliver to a claimant property taken possession of by him as assets of the estate. Code Civ. Proc. § 2472, subds. 3, 4, do not give him authority to direct return of securities or money deposited with decedent. Case v. Spencer, 86 App. Div. 454, 83 N. Y. S. 697.

45. Not entitled to possession since pledgee's power of sale continues. Bell v. Mills [C. C. A.] 123 F. 24.

46. Where the income of a sum was to be paid to testator's son and on his death the principal was to be paid to the son's executors and administrators and go to his heirs, the principal did not constitute assets of the son's estate in the hands of his executors, but was held by them in trust for his heirs. Thayer v. Fairchild [R. I.] 56 A. 773.

47. Saling v. Bolander [C. C. A.] 125 F. 701.

48. Bank held to notice of revocation by death of power of attorney to withdraw deposits. Hoffman v. Union Dime Sav. Inst., 85 N. Y. S. 16.

49. Where administratrix bids in property for amount in excess of mortgage debt and costs she is entitled to conveyance on payment of latter amount. Burroughs v. Howell County [Mo. App.] 79 S. W. 682.

50. A cropper's prospective right to his share is reckoned as part of his estate. Parker v. Brown [N. C.] 48 S. E. 657.

51. N. Y. Civ. Code, § 2718. Dickinson v. Hoes, 84 N. Y. S. 152.

52. Case v. Spencer, 86 App. Div. 454, 83 N. Y. S. 697.

53. See 1 Curr. L. 1097.

54. Whether within or without the state. Maas v. German Sav. Bank, 176 N. Y. 377, 68 N. E. 658.

55. Maas v. German Sav. Bank, 176 N. Y. 377, 68 N. E. 658.

56. Ancillary administrator cannot enforce another payment where he remains silent and permits administrator of domicile to collect deposit of deceased in bank, and does not notify bank of his appointment or make demand on it. Maas v. German Sav. Bank, 176 N. Y. 377, 68 N. E. 658. The fact that such appointment is a matter of record in the surrogate's office is not constructive notice of such appointment to debtors of the estate. Id.

57. Reasonable time depends upon circumstances. Administrator not controlled by directions of one of next of kin as to time for making such conversion, even to extent of her share. In re Thompson, 84 N. Y. S. 1111.

In some states the husband has the right to administer upon the wife's intestate estate and to take to himself the surplus after the payment of her debts.[59] But until he has reduced her choses in action to possession by a suit as administrator, there is no surplus belonging to him so as to be subject to attachment in a suit against him.[60]

The representative has a general and in many respects an absolute power over debts and claims in favor of the estate.[61] He may, in the absence of fraud or collusion, release, compromise, or discharge them subject only to his liability for any loss resulting from his mismanagement.[62] He may recover bonds put up as collateral by paying the claim secured thereby prior to its allowance.[63] He should not take realty in payment of debts if its proceeds may be had instead.[64] The administrator of a surety may and should pay the debt of the prinicpal when the latter becomes insolvent.[65]

Statutes in some states provide that the court may direct that any securities for the payment of money belonging to the estate may be deposited with a trust company.[66] In such case the representative has no further control over them.[67]

The personal representatives of a deceased partner have an equitable right to have the assets of the partnership applied to the payment of firm debts, and to the distribution of any surplus.[68] On a proper showing, they may compel an accounting by him, but cannot enforce claims or maintain actions to reduce to possession the assets of the partnership.[69]

58. Not liable for decline in value of stocks within 50 days after their appointment, it not having occurred by their fault. In re Thompson, 84 N. Y. S. 1111. Account will be surcharged with amount of claim for services which he could have collected but against which he allowed limitations to run. In re Northrup's Will, 92 App. Div. 5, 87 N. Y. S. 318.

Liability for failure to collect assets, see post, § 9a.

59. R. I. Gen. Laws 1896, c. 212, § 9. Providence County Sav. Bank v. Vadnais [R. I.] 58 A. 454.

60. Cannot charge insurance company as garnishee by reason of a policy on life of wife. Providence County Sav. Bank v. Vadnais [R. I.] 58 A. 454.

61. McCleary v. Chipman, 32 Ind. App. 489, 68 N. E. 320.

62. Independent of statutes, has authority to compromise and adjust claims either against or in favor of the estate. Personally liable only in case action is not approved by the court. In re Gilman's Estate, 92 App. Div. 462, 87 N. Y. S. 128. His release of a judgment which is a lien on realty is valid when supported by a consideration and in the absence of a showing of fraud, collusion, or the wasting of assets. McCleary v. Chipman, 32 Ind. App. 489, 68 N. E. 320. Claim for alleged wrongful death of intestate. Logan v. Central Iron & Coal Co., 139 Ala. 548, 36 So. 729. He may fully protect himself by obtaining authority therefor from the probate court. Ala. Code 1896, § 138. This statute does not prohibit settlement without order of court. Id. In New York the surrogate has power to authorize the compromise and settlement of a claim against the estate. Code Civ. Proc. § 2719. Claim held properly compromised. In re Gilman's Estate, 92 App. Div. 462, 87 N. Y. S. 128. Legatees are not estopped to contest the validity of the discharge of a debtor by an agreement amounting to a pretermission of the claim in the absence of a showing of prejudice to the alleged debtor. Norwood v. Tyson [Ala.] 36 So. 370.

63. Houghteling v. Stockbridge [Mich.] 99 N. W. 759.

64. In re Northup's Will, 92 App. Div. 5, 87 N. Y. S. 318. Executors held justified in making settlement with testator's son giving him certain income out of the estate in consideration of his refraining from insisting on right to become member of firm to which deceased belonged. Testator endeavored to make him partner and his insistence would have resulted in dissolution of firm and consequent loss of profits to estate. In re Meyer, 88 N. Y. S. 798.

65. Van Winkle v. Blackford, 54 W. Va. 621, 46 S. E. 589.

66. Where value of estate so great that surrogate deems it inexpedient to require security for the full amount thereof [N. Y. Code Civ. Proc. § 2595]. Ditmas v. McKane, 92 App. Div. 344, 86 N. Y. S. 1083.

67. Ditmas v. McKane, 92 App. Div. 344, 86 N. Y. S. 1083. The administrator has no right to possession of or control over a note so deposited or to receive a payment thereon, or to sue or enforce a judgment for the amount thereof without the consent of the surrogate. Such judgment cannot be a basis for a creditor's suit by him. Judgment not validated by fact that on distribution of estate the note was assigned to him individually. Id.

68. Cannot maintain action to recover fund belonging to firm in hands of third persons having no right to it as against the surviving partner, it not appearing that the firm debts have been paid and that there is a surplus in the survivor's hands. Secor v. Tradesmen's Nat. Bank, 92 App. Div. 294, 87 N. Y. S. 181.

Statutes in some states provide for proceedings for the discovery of assets alleged to have been concealed or embezzled.[70] In Mississippi in proceedings in chancery to compel a third person to turn over to the administrator property belonging to the estate, oral evidence is inadmissible in the absence of an agreement for its admission or a notice that it will be presented.[71]

As a general rule the representative cannot assail for fraud the conveyance of his decedent.[72] But in case of a contest between general creditors and one asserting a particular claim, the executor or administrator represents the former,[73] and hence may maintain an action to avoid a conveyance made by decedent in fraud of his creditors, where a recovery of the property is necessary to pay his debts.[74] In Louisiana he may maintain an action to set aside a tax sale of realty belonging to the succession where the estate owes debts and a sale of the property in dispute is necessary to pay them.[75]

In the absence of a statute to the contrary an administrator de bonis non succeeds only to such assets as have not been administered by his predecessor, or are capable of identification as decedent's property, and such debts due decedent as remain unpaid.[76] He may maintain an action against his predecessor and his bondsmen for assets of the estate received by him.[77]

Pending an appeal from a decree granting letters of administration, the appointee has the custody of the property of the estate, and debts may be collected by, and notices of claims filed with, him.[78] The statutory right of an administrator to sue for tortious killing of his intestate is not strictly administrative and is treated elsewhere.[79]

69. Secor v. Tradesmen's Nat. Bank, 92 App. Div. 294, 87 N. Y. S. 181. See Partnership, § 7 E, 2 Curr. L. 1127.

70. Mo. Rev. St. 1899, § 74. Some person interested must file an affidavit of his belief that some one has concealed or embezzled assets. Ex parte Gfeller, 178 Mo. 635, 77 S. W. 552. Such proceeding is "a suit pending" within the statutes providing for the taking of depositions (Rev. St. 1899, § 2877) even though embezzlement is charged. Id. Where there are no children, the husband, being entitled to half his deceased wife's estate (Rev. St. 1899, § 2938), is a person interested. Id. The decision of the probate court that the husband is interested so as to be entitled to file such affidavit is not open to review on habeas corpus to release a witness refusing to answer questions in such proceeding. Id.

71. Code 1892, § 1764, applies even in matters which would have been of probate jurisdiction before the adoption of the constitution of 1869. Winner v. Brandon [Miss.] 35 So. 192.

72. Realty. Stam v. Smith [Mo.] 81 S. W. 1217. Unless in fraud of creditors. Farrell v. Puthoff, 13 Okl. 159, 74 P. 96.

73. Hemley v. Harmon, 103 Mo. App. 233, 77 S. W. 136. Where estate is insolvent he cay sue to set aside chattel mortgage given by decedent which is void as to creditors because not properly recorded. Id. Represents them in suit to set aside sale of equity of redemption. Judgment as to distribution of estate binding on creditors not parties to suit where administrator was. Moore & Co. v. Sloan [Ark.] 76 S. W. 1058.

74. When it is fraudulent as to all the creditors and the estate is insolvent, he may, after a decree in his favor, treat the property as if no conveyance had been made, and sell so much thereof as may be necessary to pay such debts and the expenses of administration, including the costs of such suit. Cook v. Lee [N. H.] 58 A. 511.

75. Defendant entitled to reimbursement for taxes and necessary expenditures. Succession of Williams v. Chaplain, 112 La. 1075, 36 So. 859.

76. McCreery v. First Nat. Bank [W. Va.] 47 S. E. 890. Where a trustee under the will filed his final account, transferred the trust estate and all rights of action belonging thereto to the administrator with the will annexed, and was discharged, such administrator took title to pledged stock formerly held by the trustee for the benefit of a legatee since deceased and was entitled to maintain a demand for their return against the pledgee. Bristol Sav. Bank v. Holley [Conn.] 58 A. 691.

77. Provisions as to appointment of successor to executor when there is a vacancy (Iowa Code, §§ 3290-3292) held to apply to administrators under Code § 48, par. 21, providing that "executor" may include "administrator," and vice versa. Ellyson v. Lord [Iowa] 99 N. W. 582. If he had reported moneys in his hands as proceeds of property sold, he could not deny holding as representative. Id.

78. Ancillary administrator proper party for surviving partner to eerve with notice of his determination to discontinue the business under the articles of copartnership [R. I. Gen. Laws 1896, c. 210, §§ 16-18]. Egan v. Wirth [R. I.] 58 A. 987.

79. See Death by Wrongful Act, 1 Curr. L. 865

(§ 5) *C. Inventory and appraisal.*[80]—Statutes in some states require an administrator to file an inventory of the estate within a certain time after his appointment and qualification,[81] and provide that he shall forfeit, to any one suing therefor, a penalty for each month's delay, unless before suit is brought he shall make excuse therefor acceptable to the court.[82]

It is the duty of the executor to charge himself in the inventory with all property which is part of the assets of the estate, including any that he may have delivered to legatees.[83] Omission to inventory the property does not affect the legal rights of the usufructuary,[84] and the fact that land was not included in the original inventory will not invalidate a subsequent conveyance thereof by the administrator.[85] Recitals in the inventory as to the ownership of property are binding on the executor or administrator.[86]

The appraisement of realty is only prima facie evidence of its value.[87] In the absence of statutory authority, a special administrator cannot have appraisers appointed.[88]

(§ 5) *D. Property allowed widow or children.*[89]—In some states, the widow is entitled to retain possession of the dwelling house in which her husband most usually dwelt next before his death, free from molestation or rent until her dower is assigned to her.[90] The widow's right of quarantine is assignable.[91]

The widow and children have an extended estate of homestead in land occupied by decedent as homestead, free from liability for debts, except such as he charged thereon.[92] In some states, the probate court has power to set apart premises as a homestead for the use of the surviving wife during the period of administration and until the final distribution of the estate.[93]

80. See 1 Curr. L. 1098.

81. Conn. Gen. St. 1888, § 578. Atwood v. Lockwood, 76 Conn. 555, 57 A. 279.

82. Under Conn. Gen. St. 1888, § 579, providing for monthly penalty, each month's neglect is an offense in itself. All more than a year old when suit commenced are barred by Gen. St. 1902, § 1120, and all for which a recovery may be had may be included in one count in a complaint. Atwood v. Lockwood, 76 Conn. 555, 57 A. 279. The excuse contemplated must be made to and accepted by the court, and entered in its records, and can be proved only by such records. An oral excuse made to and accepted by probate judge insufficient. Id.

83. American Tube Works v. Tucker, 185 Mass. 236, 70 N. E. 59. Evidence held not to show that inventory was false and fraudulent. Littell v. Hackley [C. C. A.] 126 F. 309.

84. Thomas v. Blair, 111 La. 678, 35 So. 811. The presumption of consideration for a note and mortgage arising from their execution and positive testimony that they were given from money borrowed from the estate is not overcome by the fact that neither they nor the money were mentioned in the inventory of the administrator, which was filed before such note and mortgage were transferred to him by the attorney to whom they were originally given. Ambrose v. Drew, 139 Cal. 665, 73 P. 543.

85. Will be presumed that supplemental inventory was filed. Jamison v. Dooley [Tex. Civ. App.] 79 S. W. 91.

86. Description of property as community property in inventory made by widow as executrix of her husband's estate binding in determining its course of descent after her death. In re McCauley's Estate, 138 Cal. 546, 71 P. 458.

87. Lloyd v. Lloyd, 34 Wash. 84, 74 P. 1061.

88. Will not be allowed expenses incurred by him in so doing. In re Ford's Estate [Mont.] 74 P. 735.

89. See 1 Curr. L. 1098.

90. **Florida** Rev. St. 1892, § 1834. Heir may institute proceedings for its assignment. Palmer v. Palmer [Fla.] 35 So. 983.

91. Under N. J. Statute (Gen. St. p. 1276), giving the widow the right to hold her husband's mansion house and the plantation thereto belonging until dower is assigned her and without liability for rent, a grantee of the dower rights, who is also a mortgagee in possession, need not account for rent on foreclosing the mortgage before dower is assigned. Moffett v. Trent [N. J. Eq.] 56 A. 1035.

92. Also entitled to excess received on mortgage foreclosure sale. Where she bids in property for more than mortgage debt and costs, she is entitled to conveyance from sheriff on payment of the latter amount. Fact that she is also administratrix does not deprive her of right to bid in property [Mo. Rev. St. 1879, § 2693; Rev. St. 1899, §§ 5439, 3620]. Burroughs v. Howell County [Mo.] 79 S. W. 682. See title Homesteads, § 7, 2 Curr. L. 220.

93. **In California:** Must be suitable and proper for residence purposes, and property which could have been selected as a homestead during decedent's lifetime [Homestead defined by Cal. Civ. Code, § 1237]. In re Levy's Estate, 141 Cal. 646, 75 P. 301. There

The surviving husband or wife is also generally entitled to certain of decedent's personalty free from liability for his or her debts,[94] or a money equivalent in lieu thereof.[95] The setting apart of exempt property is to the widow alone and vests complete title in her[96] immediately on the death of her husband.[97] This right may be waived.[98]

By statute in many states, the widow is given a certain allowance for her support and that of her family.[99] Such allowance vests in her[1] or in her and the

is no specified limitation of value, the rights of creditors, heirs, devisees and legatees being subordinate to the right of the family. Id. The court may, on motion, set aside and vacate an order setting apart certain premises to petitioner as a homestead, it appearing that the same was unjust and that it was obtained through the inadvertence, surprise, and excusable neglect of the executors and heirs [Cal. Code Civ. Proc. § 473]. Levy v. Superior Court of San Francisco, 139 Cal. 590, 73 P. 417.

In Nebraska, a county court has jurisdiction to set aside a homestead to a widow by virtue of its general jurisdiction in matters of probate and settlement of estates. Tyson v. Tyson [Neb.] 98 N. W. 1076.

94. In New York a proceeding for an accounting and to require an executor to set apart exempt property is barred if not brought within 6 years after expiration of 18 months from issuance of letters. Code Civ. Proc. § 2724, providing for setting off exempt property on judicial settlement of account is for benefit of surviving husband or wife or child and executor of deceased husband cannot claim that it is an equitable action so that 10 year statute of limitations applies. In re Campbell's Estate, 96 App. Div. 561, 89 N. Y. S. 569. The widow is not entitled to avoid a gift inter vivos made by decedent to his son on the ground that she is prejudiced thereby because there is no other property out of which her exemptions may be assigned, where there are no allegations that the gift was made to defraud her or that it had that effect. Burge v. Burge's Adm'r, 25 Ky. L. R. 979, 76 S. W. 873.

95. In Texas, minor children by a former wife are entitled to share in an allowance made to the widow, who was decedent's second wife, in lieu of exemptions [Tex. Rev. St. 1895, arts. 2037-2041, 2046-2051]. Wilson v. Brinker [Tex. Civ. App.] 76 S. W. 213.

In New York, the surrogate courts are in conflict as to whether a money equivalent will be allowed in such cases under Code Civ. Proc. § 2713, subd. 3. Allowed. In re Hulse, 84 N. Y. S. 220. **Contra,** In re Keough's Estate, 42 Misc. 387, 86 N. Y. S. 807.

96. Under Ky. Gen. St. c. 31, art. 36, § 11, subd. 5. Harris v. Adams, 25 Ky. L. R. 1492, 78 S. W. 156. In New York, it is held that the right to the articles enumerated in Code Civ. Proc. § 2713, subd. 5, vests in the widow and passes to her administrator on her death before they are transferred to her. In re Hulse, 84 N. Y. S. 220.

97. Appraisal not necessary to fix her rights, where only assets exclusive of judgment in favor of deceased are insufficient to make up such exemptions and to pay preferred claims, and the balance necessary to do so will exhaust such judgment, the judgment debtor can not set off a judgment against decedent purchased by him prior to filing of appraisal in which allowance to widow was set out. Thompson v. Thompson, 25 Ky. L. R. 1626, 78 S. W. 418.

98. Where husband does so by refusing tender thereof, his executor cannot thereafter claim them. In re Campbell's Estate, 96 App. Div. 561, 89 N. Y. S. 569. Widow's right to an allowance is not waived by returning as administratrix, an inventory containing no claim therefor. In re Hulse, 84 N. Y. S. 220.

99. In California, a temporary order for family allowance made before the return of the inventory ceases to be operative when such return is made. Fact that allowance is directed to be paid until further order of the court, immaterial. In re Bell's Estate, 142 Cal. 97, 75 P. 679. Creditors not prevented from contesting payments after return by the fact that court impliedly recognized the continuance of the order and the court, the executors and certain other creditors acted under the mistaken belief that it was still effective. Id.

In Georgia, the widow and minor children are entitled to a year's support for each year the estate is to be kept together. Civ. Code 1895, § 3466. The mere fact that litigation is pending over the widow's right to dower will not alone authorize the granting of a second year's support. Smith v. Foster, 119 Ga. 376, 46 S. E. 425. It is an expense of administration and a first charge upon the estate. It may be waived. Ehrlich v. Silverstein [Ga.] 48 S. E. 703. Where decedent's sole estate consists of property which has been set apart as a homestead for the benefit of himself and his family, and his widow lives upon the property for several months until her death without applying for a year's support or indicating an intention to do so, she will be held to have elected to take the homestead rather than the year's support, and her administrator cannot have the property set apart to the estate as a year's support. Id. A creditor may object to the report of appraisers appointed to set it apart. On the ground that allowance is excessive and that condition of estate as to solvency was not considered. Mulherin v. Kennedy [Ga.] 48 S. E. 437. An appeal to the superior court from a judgment of the ordinary, approving such report and setting apart the property, suspends the judgment, and the widow has no vested right to the property in fee until the appeal is determined. Only effect of judgment is to prevent alienation of the property [Ga. Civ. Code 1895, §§ 5340, 5352]. Id. Where subsequently to such appeal, the administrator files an equitable petition to marshal the assets of the estate, praying that the creditors claiming portions of the land set apart and the widow be interplead-

children absolutely on the death of her husband.[2] The order setting it apart should describe the property allowed with reasonable certainty,[3] and the allowance will be presumed to be in addition to, and not in substitution for, a provision for that purpose in the will.[4] The widow's right to her statutory allowances is not barred by an antenuptial contract giving her nothing in lieu thereof,[5] and such a contract cannot affect the rights of the children.[6] The fact that she had separated from her husband and was living apart from him at the time of his death does not affect her right.[7]

Where the widow elects to take a child's part in lieu of dower, her interest is subordinate to the debts and expenses of administration.[8]

Equity will, in certain cases, set out the portion of the widow who has elected to take a statutory share in the estate.[9]

(§ 5) *E. Management, custody, control, and disposition of estate.*[10]—The management and disposal of property under testamentary trusts, though the same persons act as executors and trustees, is treated in the article on trusts.[11]

ed, a decree finding that the title to such property was in the creditors at the husband's death is binding on the administrator and the heirs of the deceased widow, though widow, who died pending the litigation, was dismissed from the bill before decree. Id.

In Illinois, the widow has a right to have the realty belonging to the estate, other than the homestead, sold to pay the amount of her award. Reinhardt v. Scaman, 208 Ill. 448, 69 N. E. 847. She may bid at the sale. Dower becomes merged in fee thus acquired. Id. The statute of Illinois (1 Starr & C. Ann. St. 1896 [2d Ed.], p. 313, c. 3, par. 77), providing that, when deceased is at the time of his death a housekeeper and the head of a family and leaves no widow, there shall be allowed to the children then residing with him, including all males under 18 years of age and all females, the same amount of property as that allowed to the widow by statute, applies to all female children, irrespective of age, and whether dependent or not. Daughter held to be member of family and allowance made to her held reasonable. Gillett v. Gillett, 207 Ill. 136, 69 N. E. 942.

In Texas, it is held that a landlord's statutory lien on the crop of the tenant for supplies and advances during the year in which the crop was raised is superior to a claim for an allowance of a year's support to the widow and minor children of the deceased tenant. Walker v. Patterson's Estate [Tex. Civ. App.] 77 S. W. 437. Widow having no knowledge of proceedings to sell land held not to have waived her right to allowance for year's support and to be entitled to recover from the administrator the amount realized therefrom, where it did not equal the amount of such allowance and there was no other property out of which it could be paid. Clark v. English [Tex. Civ. App.] 82 S. W. 325.

In Utah, the widow has an absolute right to a family allowance during the administration of the estate of her deceased husband, notwithstanding the fact that her share of the realty has been set apart to her [Rev. St. Utah 1898, § 3846]. In re Pugsley's Estate, 27 Utah, 489, 76 P. 560. The amount to be allowed is in the discretion of the court. Id. The age, social position, and health of the survivors, the education of the children, the value of the estate, and its solvency or insolvency should be considered. Id.

1. In North Carolina, the widow becomes the owner of property validly allotted to her and may maintain an action against one converting it. Cropper's interest in crops. Parker v. Brown [N. C.] 48 S. E. 657.

In Tennessee, the year's support allowed to the widow vests absolutely in her and the court should not interfere with her management of it unless to prevent gross injustice and wrong to the children. Children of decedent by former marriage held not entitled to have part of year's support set apart to them under the circumstances. Major v. Major [Tenn.] 76 S. W. 817.

2. Ga. Civ. Code 1895, § 3465. Ehrlich v. Silverstein [Ga.] 48 S. E. 703. If set apart to them jointly vests in them jointly, but the widow has the exclusive control and management of the property. Where widow sold land, not for the support and maintenance of the family, the children could not recover the land from the vendee in an action in the form of a complaint for land, in which she was not a party. Boozer v. Nash, 120 Ga. 406, 47 S. E. 908.

3. Allotment of year's support to widow by commissioners under N. C. Code, § 2123, held sufficiently definite to allow its admission in action by widow for conversion of the property so allotted. Parker v. Brown [N. C.] 48 S. E. 657.

4. Until contrary intent clearly proved. Houghteling v. Stockridge [Mich.] 99 N. W. 759.

5. Allowances given under Mo. Rev. St. 1899, §§ 105-107, 109. Coulter v. Lyda, 102 Mo. App. 401, 76 S. W. 720.

6. Allowed under Ky. St. 1903, § 1403. Applies to children by her and by his first wife. Brown v. Brown's Adm'r, 25 Ky. L. R. 2264, 80 S. W. 470.

7. In re Taylor's Estate [Ind. T.] 82 S. W. 727.

8. Benedict v. Wilmarth [Fla.] 35 So. 84.

9. Where widow is also executrix where some of beneficiaries are minors and incompetents. Benedict v. Wilmarth [Fla.] 35 So. 84.

10. See 1 Curr. L. 1100.

11. See Trusts, § 7, 2 Curr. L. 1940.

It is the duty of executors and administrators to manage estates in a manner such as would be adopted by a prudent man in the conduct of his own affairs.[12] They must assume the responsibility and exercise the discretion of their office, and must also, within reasonable limits, perform the actual manual labor required by the due execution of their trust.[13] They are not bound by the directions of the next of kin as to the management of the estate,[14] but the latter may compel the administrator with the will annexed to execute a trust created by the will.[15] Where the heirs have not accepted a succession, an administrator may stand in judgment for the purposes of a suit pending against the de cujus at the date of his death for the recovery of realty.[16] The administrator of a guardian may recover money belonging to the wards from an agent who has embezzled the same, where the state has been compelled to account to the wards therefor.[17] An administratrix, in erecting a monument over the grave of deceased under an order of the probate court, does not act as such administratrix in a way to preclude the heirs from having any title thereto, or rights or equities therein.[18] The fact that the survivor of the community is administratrix neither adds to nor abridges her power to administer community property as between it and community creditors.[19] The representative may keep property belonging to the estate outside the state.[20] Executorial acts should be so done as to designate the estate represented.[21]

An executor has no authority to pay out of the general property of the estate a mortgage on property given by testator to his wife before his death,[22] or to sell a note, the income of which has been bequeathed by testator.[23]

The representative may keep the buildings belonging to the estate in tenantable repair, extraordinary casualties excepted.[24] Statutes in some states authorize him to carry on decedent's plantation,[25] and, in certain cases, to improve property held by him in trust.[26]

12. In re Marsh's Will [N. J. Eq.] 56 A. 886.

13. Cannot charge estate for services of another in connection with duties devolving upon her. In re Ogden's Estate, 41 Misc. 158, 83 N. Y. S. 977.

14. As to when assets should be converted into money. In re Thompson, 84 N. Y. S. 1111.

15. In re Sill's Estate, 84 N. Y. S. 213.

16. Vicksburg, etc., R. Co. v. Tibbs, 112 La. 51, 36 So. 223.

17. Bill by administrator of guardian's estate against guardian's agent and surety alleging that he collected money belonging to the wards and converted it to his own use and that a decree on final accounting has been rendered against the guardian's estate in favor of the wards for such sum, held defective for failure to allege whether such decree has been paid; since if it has, the money belongs to the estate, but otherwise it belongs to the wards. Rowan v. Decell [Miss.] 36 So. 8.

18. McGann v. McGann [R. I.] 58 A. 458.

19. Carpenter v. Lindauer [N. M.] 78 P. 57.

20. An executrix is within her rights in taking assets of the estate outside the state during the year following her appointment, no account being due until after the expiration of that period. In re Magoun, 84 N. Y. S. 940.

21. Trust company held justified in refusing to pay check, reciting that it is drawn in pursuance of an order of supreme court, and payable to order of certain administrators or their attorney which does not name the decedent, it appearing that the order required payment to be made to the administrators of a named decedent or their attorney. Holt v. Colonial Trust Co., 97 App. Div. 305, 89 N. Y. S. 955.

22. Hetzel v. Easterly, 96 App. Div. 517, 89 N. Y. S. 154.

23. Marshall v. Myers, 96 Mo. App. 643, 70 S. W. 927.

24. Tex. Rev. St. 1895, art. 1983. Rice v. Conwill [Tex. Civ. App.] 80 S. W. 393.

25. Texas Rev. St. 1895, art. 1984. May use mortgaged live stock for that purpose. Stafford & Co. v. Dunovant's Estate [Tex. Civ. App.] 81 S. W. 65. Cannot be presumed that court, in authorizing their use, intended to interfere with mortgagee's rights, she not having applied for an order authorizing their sale. Id. If right is being abused her remedy is by proper proceedings in county court and not by certiorari and trial de novo of the application of the administrators to use them. Id.

26. Under a statute authorizing executors or trustees holding land in trust for any person or persons for life, or until the happening of some event, to improve the same and erect buildings thereon in certain cases (N. J. Laws 1897, p. 190), an executrix is not entitled to use trust funds of the estate to erect buildings on land subject under the will to a legal life estate, with remainder to

An executor has such authority in relation to the management of the estate as is given him by the will.[27] A naked power to sell realty to pay legacies or make distribution given to the executor by the will does not vest the title in him, but it remains in the heir, who is entitled to the rents and profits until such power is exercised.[28] Where the power of sale is discretionary, the court cannot order its exercise in the first instance, but it may, on an accounting, charge the executor with any loss to the estate resulting from his negligence or bad faith in relation thereto.[29] A creditor may sue in equity to compel an executor to exercise a testamentary power of sale for the purpose of paying debts, when there is not sufficient personalty for that purpose.[30] If a will directs property to be sold but appoints no one to make the sale, it can only be sold by application to a court of equity.[31] A sale by an executor passes only such interest in and title to the property as the decedent had at the time of his death.[32] An administrator de bonis non may execute a power to sell in order to bring the land into a course of administration, but not to execute a trust for a collateral purpose.[33]

An independent executor is entirely a creation of statute and his powers and duties are fixed and limited thereby.[34] He may do without the order of the court every act which an ordinary executor could do under such order.[35]

the life tenant's children, though the life estate is subject to charges for the benefit of the remaindermen (In re Arnot [N. J. Eq.] 58 A. 556); nor on lands acquired by her as executrix with the funds of the estate (Id.); nor to erect new buildings on the land in place of those which have burned to their foundations (Id.).

27. Executor authorized to operate farm held properly credited with amount paid for tenant's interest in crops, where they threatened to abandon them on account of threatened failure. Lambertson v. Vann, 134 N. C. 108, 46 S. E. 10. See Wills, § 5 E, 2 Curr. L. 2157. Also for amount paid by him for certain personalty bid in by him for use on such farm, and not amount for which it was afterwards sold by receiver. Lambertson v. Vann, 134 N. C. 108, 46 S. E. 10.

28. Where beneficiary is remainderman he can prevent stranger from doing any injury which he could prevent life tenant from doing. Indiana R. Co. v. Morgan, 162 Ind. 331, 70 N. E. 368.

29. Complaint to compel them to sell and to account properly dismissed in the absence of allegation of malfeasance or bad faith. Levett v. Polhemus, 84 N. Y. S. 1049. An executor is not liable for depreciation of realty due to his failure to sell it as directed by the will where the evidence shows that testator's title was worthless at the time of his death. In re Irvine's Estate [Pa.] 58 A. 617. Discretion controlling in absence of fraud [Cal. Code Civ. Proc. § 1561]. In re Wickersham's Estate, 139 Cal. 652, 73 P. 541. The New Jersey statute in regard to the sale of land by administrators with the will annexed (2 Gen. St. p. 1429) does not give them power to sell real estate which by the will was devised to executors upon trusts to be performed by them as trustees. Varick v. Smith [N. J. Eq.] 58 A. 168.

30. Holly v. Gibbons, 176 N. Y. 520, 68 N. E. 889. Dismissal by the surrogate of the creditor's petition for an accounting with the statement that the proceeding is barred by limitation is not a bar to such suit. Id. The devisee of the realty is a necessary party and a judgment in plaintiff's favor will be reversed where such devisee was not properly served with process. Id. A direction that the realty be sold by the referee is improper where there is no finding that the executor was unfit or unable to make the sale. Id. The effect of the reversal of the judgment under which the land was sold to the plaintiff was to entitle the executor to a restitution of the property so sold, with an accounting for rents and profits, after deductions for taxes and ordinary repairs. Remittitur amended [N. Y. Code Civ. Proc. § 1323]. Id., 177 N. Y. 401, 69 N. E. 731.

31. Baumeister v. Silver [Md.] 56 A. 825.

32. Under power in will. Does not affect rights of adverse claimants. In re Wickersham's Estate, 139 Cal. 652, 73 P. 541. One in possession of realty as owner cannot enjoin a probate sale thereof on the ground that the succession has no interest therein. Sale passes only such title as estate has and plaintiff's rights are not affected thereby. Rapides Lumber Co. v. Hartiens, 111 La. 793, 35 So. 910.

33. Where executors were given power to manage and sell testator's estate as trustees, and they died after the personal estate had been fully administered and nothing remained to be done except to pay over the income of the realty to the beneficiaries of the trust and to sell such realty in accordance with the terms of such trust, a trustee appointed by the court in the place of such administrator, and not an administrator de bonis non was the proper party to make such sale. Gehr v. McDowell, 206 Pa. 100, 55 A. 851; Strite v. Norton, 206 Pa. 100, 55 A. 851.

34. Altgelt v. Alamo Nat. Bank [Tex. Civ. App.] 79 S. W. 582.

35. May carry on decedent's business under provisions of Tex. Rev. St. 1895, art. 1984. Altgelt v. Alamo Nat. Bank [Tex. Civ. App.] 79 S. W. 582. May after his qualification ratify notes executed by him before such qualification in conduct of testator's

Sales made by an executor under a power in a will must in some states be confirmed by the probate court.[36] With this exception the purchaser deals with the executor in the same manner as he would with any other vendor.[37] The fact that the sum realized will not be sufficient to pay all the legacies cannot be raised by an unsuccessful bidder on appeal from an order confirming the sale, it not being a legatee, and none of the legatees having appealed.[38] It is no ground of objection to the confirmation of the sale that it is not for the best interests of a particular heir,[39] or of the estate,[40] or that others have an interest in the property.[41] A curative act cannot validate an executor's sale which is not authorized either by the will or by an order of court.[42] The sale of lands is not ordinarily a part of the duties of the administrator.[43]

The probate court has no authority to order the administrator to borrow money to complete an unfinished building commenced by decedent, for the construction of which no contract existed at the time of his death.[44] The person lending the money in such case can only be subrogated to the rights of the contractors, and has no lien therefor on the land.[45] In some states realty may be sold to pay legacies and to raise a fund to pay annuities charged on the estate, where there is not sufficient personalty for that purpose.[46]

One paying the debts of the estate,[47] or loaning money to an executor to pay them is entitled to be subrogated to the rights of creditors so paid.[48] Administrators paying a claim against an estate with their notes are entitled to a corresponding credit as of the date thereof.[49] Land held by decedent with a power

business. Id. In making of notes and contracts in conduct of business. Ellis v. Howard Smith Co. [Tex. Civ. App.] 80 S. W. 633. For definition of independent executor, see ante, § 1.

36. Sales to pay debts, see post, § 7. In re Robinson's Estate, 142 Cal. 152, 75 P. 777; Bank of Ukiah v. Rice, 143 Cal. 265, 76 P. 1020. Mont. Rev. St. 1879, § 209, p. 233; Comp. St. § 209, p. 328. Goodell v. Sanford [Mont.] 77 P. 522. Beneficiary vendees under trust agreement held estopped to question validity of sale by executrix under power in will. Id.

37. In re Robinson's Estate, 142 Cal. 152, 75 P. 777. Vendee bound to examine title and point out objections thereto. Goodell v. Sanford [Mont.] 77 P. 522. In California the sale must be confirmed unless the price bid is disproportionate to the value of the property and it is made to appear that an increased bid of ten per cent. may be obtained [Code Civ. Proc. § 1552]. In re Robinson's Estate, 142 Cal. 152, 75 P. 777. Same is true in Montana [Code Civ. Proc. §§ 2685, 2687]. May also ascertain whether sale was legally and fairly conducted. Goodell v. Sanford [Mont.] 77 P. 522.

38. In re Robinson's Estate, 142 Cal. 152, 75 P. 777.

39. In re Wickersham's Estate, 139 Cal. 652, 73 P. 541.

40. Question is left to discretion of executors [Cal. Code Civ. Proc. § 1561]. In re Wickersham's Estate, 139 Cal. 652, 73 P. 541.

41. Sale passes only decedent's interest. In re Wickersham's Estate, 139 Cal. 652, 73 P. 541.

42. Texas Rev. St. 1895, art. 1879a, validating sales made under wills probated in other states does not, in the absence of proof of administration and an order of sale by a probate court, validate an executor's deed made under such a will which does not exempt the estate from administration in the probate court, or authorize the sale of such land. Recitals therein of grantee's equitable interest in the property inadmissible to show any equitable title in him in absence of showing that he had a contract with testator in relation thereto. Land transferred in satisfaction of claim. League v. Williamson [Tex. Civ. App.] 77 S. W. 435.

43. Ex parte Simmons [S. C.] 48 S. E. 279.

44. Not within Mo. Rev. St. 1899, §§ 100, 101, authorizing the employment of labor to preserve the estate. Waldermeyer v. Loebig [Mo.] 81 S. W. 904. A trust deed on the premises executed to secure its repayment is void and is properly canceled. Id.

45. As they had no legal basis for mechanic's lien, he has none. Waldermeyer v. Loebig [Mo.] 81 S. W. 904.

46. Under Iowa Code, § 3323, providing for sale for payment of debts and legacies. Will did not specifically direct sale, but evidently contemplated that it might be made under order of court if necessary. Ellyson v. Lord [Iowa] 99 N. W. 582.

47. The husband was interested in speedy payment of the debts of his deceased wife and hence had the right to pay them to avoid the costs of suits thereon. Having done so he was subrogated to the rights of creditors whose debts he had paid and was entitled to a lien for the amount thereof. Riddle v. Riddle [Ky.] 80 S. W. 1129.

48. Even though mortgage given to secure the loan was unauthorized. Taliaferro v. Thornton's Ex'rs [Ky.] 80 S. W. 1097.

49. Without inquiring as to whether at that time estate had funds to pay the claim. Walworth's Estate v. Bartholomew's Estate [Vt.] 56 A. 101.

to sell for support is assets of which the executor holds possession until outstanding debts for support are paid.[50] It is the duty of executors to discharge liens on property worth more than the amount secured thereby, where they were given to secure the personal and primary obligations of the testator.[51]

The executor or administrator may apply to a court of equity for instructions when the affairs of the deceased are so involved that he cannot otherwise safely administer the estate.[52] The court will also lend its aid where circumstances are such that injustice to the representative or injury to the estate will otherwise result.[53] Equity has jurisdiction to establish a right under a will and to compel performance of their duties by executors as incident thereto.[54] In proper cases equity will instruct a trustee[55] and incident to this power it will construe a will.[56] In some states the probate court also has authority to construe the will for the purpose of instructing the representative.[57] The executor can not be interfered with in the administration of the estate by the appointment of a receiver in a suit to contest the will.[58]

Any one of several executors may settle an account with a person accountable to the estate.[59]

§ 6. *Debts and liabilities of estate; their establishment and satisfaction. A. Claims provable.*[60]—As a general rule when a debtor dies, creditors must enforce their claims in the probate court and cannot, within the time allowed by law for the issuance of letters of administration, maintain an action against the heirs or devisees.[61] But this rule does not apply where it is shown that there are no other debts and there is no necessity for an administration.[62] The only claims provable against the estate in the probate court are such as were existing demands against decedent during his lifetime.[63]

50. Hinn v. Gersten [Wis.] 99 N. W. 338.

51. Where they were required by will to do so and fund was provided for that purpose held that payment worked a discharge of the liens, and they could not be maintained as liens by their assignment to the executors and a subsequent assignment by them to persons chargeable with notice of the facts. Fact that other debts were payable out of same fund immaterial. Hetzel v. Easterly, 96 App. Div. 517, 89 N. Y. S. 154.

52. In such case may institute suit against all the creditors for adjustment of their claims and a final decree settling the order of payment of the assets. Bill held not to show facts entitling executor to equitable relief. Hanna v. Galford [W. Va.] 47 S. E. 359.

In New York executors may by statute apply to the proper court for directions as to the custody and management of the assets of the estate. Code Civ. Proc. § 2602. Surrogate may adjourn such proceedings on condition that the property be delivered to the party entitled to it. In re Bodkin's Estate, 88 App. Div. 33, 84 N. Y. S. 552.

53. Hanna v. Galford [W. Va.] 47 S. E. 359.

54. Executors will be enjoined at the suit of devisees, from conveying to a railroad company a right of way through land of their testator, where they have no authority to do so. McClane v. McClane, 207 Pa. 465, 56 A. 996.

55. See Trusts, § 7, 2 Curr. L. 1941.

56. See Wills, § 5 G, 2 Curr. L. 2160.

57. Youngson v. Bond [Neb.] 95 N. W. 700. See Wills, § 5 G, 2 Curr. L. 2160.

58. Burgess v. Sullivant, 2 Ohio N. P. (N. S.) 327.

59. Egan v. Wirth [R. I.] 58 A. 987.

60. See 1 Curr. L. 1101.

61. Floyd v. Watkins [Tex. Civ. App.] 79 S. W. 612. See post, § 6 B.

62. Floyd v. Watkins [Tex. Civ. App.] 79 S. W. 612. A court may foreclose a mortgage against the heirs where there are no other debts, though deceased left a will which had been established in probate court, and though the time allowed for the issuance of letters of administration had not elapsed. Application for administration refused on ground that there was no necessity therefor. Id. Fact that pleading by mortgagee alleges probate proceedings and appointment of administrator who did not qualify insufficient to rebut presumption of validity, since pleading may have been amended to show that administration was not necessary. Id. The presumption is that the judgment of foreclosure was valid and it will be sustained on collateral attack unless it appears from the record that there were other debts and administration was necessary. Id.

63. Claim by former representatives for counsel fees incurred in defending suit brought against them after death of testator and when they were not acting in such capacity. In re Currier's Estate [Colo. App.] 74 P. 340. A claim for funeral expenses is a charge against the estate rather than a debt due from decedent and hence cannot be made the subject of a reference as a claim against him under Code Civ. Proc. § 2718, though administratrix assents thereto. Ge-

A contingent claim is one that cannot be proved or allowed as a debt because the liability is dependent upon some uncertain future event, and therefore cannot be determined within the time allowed by law for proving claims.[64] It does not become absolute within the meaning of statutes in regard to filing claims until it is in shape to be presented to the probate court for final adjudication against the estate.[65] The mere fact that the time of payment is uncertain does not make the claim contingent where it is sure to arrive.[66] By statute in some states demands payable at a future day may be allowed at their present value, and payment may thereafter be made according to the terms and at the time specified in the contract.[67]

One is a creditor, within the meaning of statutes providing for the filing of claims and bringing actions thereon, who has a cause of action against the deceased which by law survives.[68]

Tortwise liabilities may be enforced if they survive.[69] A claim for damages for obstructing a right of way which survives the death of the party causing the obstruction should be presented to the administrator before suit is brought thereon.[70]

A claim against deceased as a surety on a note may be proved against his estate though the remedy against the principal is barred by limitations.[71] In states where partnership debts are regarded as joint and several partnership creditors may enforce full payment of their demands against the estate of a deceased partner, without waiting until the firm affairs are wound up.[72] Prior to a settlement of the partnership affairs, the surviving partner cannot, in the probate court, recover from the administrator of a deceased partner a balance alleged to be due him from the firm.[73] A contention by parties jointly liable on a claim filed against an estate that such estate should pay the whole debt and that their liability to it should not exceed half such amount is not a claim which must be filed and proven against the estate.[74]

A debt secured by a mortgage executed after a will devising the land is a debt

net v. Willock, 98 App. Div. 588, 87 N. Y. S. 938.

Note: The reader should consult such titles as Contracts, Implied Contracts and titles treating of particular kinds of contracts such as Sales, Vendor and Purchaser. He should also consult the various titles treating of specific torts such as Negligence, Trespass, etc.; also those treating of obligations not contractual as Taxes; also he should consult Abatement and Revival upon all questions of survivability. It would be confusing because improper to collate cases here merely because the question arose as against a decedent's estate. [Editor.]

64. Within meaning of V. S. 2517. Brown's Ex'r v. Dunn's Estate, 75 Vt. 264, 55 A. 364.

65. Within meaning of Neb. Comp. St. 1901, c. 23, §§ 258-263. Claim for stockholders' liability not absolute until judgment is rendered thereon in the district court. Hazlett v. Blakely [Neb.] 97 N. W. 808. The vendee of land sold by decedent is not precluded from recovering against his heirs at law for a breach of warranty, to the extent of the property received by them, notwithstanding the fact that he did not file a claim against the estate, where no steps to satisfy the liens against such land were taken until after the estate was closed, he not having been a creditor before that time [Burns' Rev. St. 1901, §§ 2465, 2470, 2597, 3344, construed]. Whittern v. Krick, 31 Ind. App. 577, 68 N. E. 694.

66. Agreement to repay money on death of life tenant. Brown's Ex'r v. Dunn's Estate, 75 Vt. 264, 55 A. 364.

67. V. S. 2428. Brown's Ex'r v. Dunn's Estate, 75 Vt. 264, 55 A. 364.

68. Claimant under a bond to which deceased was a party is a creditor within meaning of R. I. Gen. Laws 1896, c. 215, § 2, and Id. c. 218, § 9, where claim arose during decedent's lifetime. Municipal Court v. Whaley [R. I.] 57 A. 1061.

69. See Abatement and Revival, § 3, 3 Curr. L. 10.

70. Randall v. Brayton [R. I.] 58 A. 734.

71. Not barred against estate because death of surety suspended running of limitations. Charbonneau v. Bouvet [Tex.] 82 S. W. 460.

72. Where the liability is joint only, the opposite is true. No evidence to show partnership. Altgeit v. Alamo Nat. Bank [Tex. Civ. App.] 79 S. W. 582.

73. Comp. Laws 1897, § 2657, in relation to jurisdiction of chancery courts does not apply. Gillett v. Chavez [N. M.] 78 P. 68.

74. Pratt v. Fishwild, 121 Iowa, 642, 96 N. W. 1089.

of the estate of the mortgagor,[75] and a mortgage may be enforced after the death of the mortgagor without probating his estate or presenting a claim for the mortgage debt to his executor or administrator.[76]

The acceptance by the widow of a legacy given her in lieu of dower makes her a creditor of the estate.[77]

Illegal debts[78] and those barred by limitations are not provable.[79] The formal discharge of an executor or administrator contained in the decree on final accounting is in itself no bar to the presentation and allowance of a claim against the estate.[80]

(§ 6) *B. Exhibition, establishment, allowance and enforcement of claims.*[81] —As a general rule, the courts having jurisdiction of probate matters are given authority to hear and determine claims against the estate.[82] Courts of general

75. Hunt v. Hinshaw [Ind. App.] 70 N. E. 825.

76. Gleason v. Hawkins, 32 Wash. 464, 73 P. 533.

77. Is payable, like other debts, first out of personalty and then out of realty, and where personalty is insufficient, provision for its payment should be made in action for partition of realty. Wilmot v. Robinson, 42 Misc. 244, 86 N. Y. S. 575.

78. Debts of honor. In re Hull, 97 App. Div. 258, 89 N. Y. S. 939.

79. An executor is responsible to legatees for the amount of a claim paid by him without authority of law and after it had become barred by limitations. Testator left money to daughter with provision that if she refused to become member of executor's family it should go to executor's son. Executor paid it to son and when sued by daughter claimed that she had refused to become member of his family. On appeal it was held that he had no right to do so. He then claimed that son had claim against estate for more than amount paid him, but such claim had never been proved though suit was not brought until 10 years after testator's death. Held that such defense was after-thought and of no avail. Finley v. Keinningham, 25 Ky. L. R. 1955, 79 S. W. 236.

80. Contingent claim which did not become absolute until after such accounting. Hazlett v. Blakeley [Neb.] 97 N. W. 808.

81. As to deduction of debts owed by legatee or distributee to estate from his share, see post, § 12. See, also, 1 Curr. L. 1104.

82. **In Colorado,** the county court has such jurisdiction. Includes claim of surety for contribution from estate of deceased cosurety. McAllister v. Irwin's Estate, 31 Colo. 253, 254, 73 P. 47.

In Illinois, county courts sitting in probate have jurisdiction of both legal and equitable claims against a decedent. Starrett v. Brosseau, 208 Ill. 408, 70 N. E. 354. A right of action at law against a person remains an action of the same nature against his legal representatives. Simple money demand in action by principal against agent's executor, not involving breach of trust or requiring an accounting. Id. It may either be prosecuted in the circuit court as an action at law against them or may be filed in the county court as a claim against the estate. In latter case, it is regarded as action at law in so far as Illinois practice act is concerned, and appellate court is the final court of appeal as to controverted questions of fact [Hurd's Rev. St. 1899, c. 110, § 89]. Id.

Maryland: Where, in a suit for the sale of land and a division of the proceeds among the heirs, it was agreed that a decree of sale might be entered and that afterwards a claim of one of the heirs for services rendered deceased might be submitted to the auditor and passed upon by him in the distribution of the proceeds, upon such testimony as might then be produced, the proceeding was to that extent converted into a creditor's bill and the court had jurisdiction, after the sale, to order the auditor to take testimony in regard to the claim. Duckworth v. Duckworth [Md.] 56 A. 490.

In New York, the surrogate has no power to determine the validity or decree the payment of a disputed claim except with the written consent of the parties. Must dismiss without prejudice and creditor may then bring action [Code Civ. Proc. §§ 1882, 2722]. Holly v. Gibbons, 176 N. Y. 520, 68 N. E. 889. Only upon the judicial settlement of the accounts of the executor or administrator and upon the written consent of the parties [Code Civ. Proc. §§ 2743, 1822, as amended in 1895]. Clark v. Hyland's Estate, 88 App. Div. 392, 84 N. Y. S. 640. May try an issue as to whether the executrix received and accepted a written statement of claim, but not the issue raised merely by the claim and its rejection. In re Reinach's Estate, 41 Misc. 78, 83 N. Y. S. 651. Under Code Civ. Proc. § 2606, he may require the executor of a deceased administrator to account to a creditor for moneys received by the decedent in his representative capacity. In re Hull, 97 App. Div. 258, 89 N. Y. S. 939.

In Oregon, county courts have jurisdiction to hear and determine claims without the formality of technical pleadings [B. & C. Comp. § 1161]. In re Morgan's Estate [Or.] 77 P. 608. The pecuniary limitation imposed on the jurisdiction of such courts by Const. art. 7, § 12, does not apply. Id.

In Pennsylvania, the orphans' court has no jurisdiction to settle complicated accounts growing out of numerous transactions between a claimant and decedent, involving mutual obligations and requiring an accounting. Miller v. Fulton, 206 Pa. 595, 56 A. 74.

jurisdiction cannot ordinarily enforce a claim against the estate by attachment proceedings during the course of its administration in the probate court.[83]

Limitations do not run against decedent's creditors during the time administration on his estate is delayed,[84] but the death of a creditor does not operate to prevent the running of limitations against his heirs on a claim maturing before his death, notwithstanding administration is not had on his estate.[85] Where a debt becomes due at the death of the debtor and administration is not taken out by the next of kin, it is the duty of the debtor to have letters issued within a reasonable time.[86] Limitations cannot be tolled by mere failure to present a claim.[87] Where the statute forbids suit against the executor or administrator during a certain period after his appointment, limitations will not run during such time.[88] An executor may prevent the running of the statute by making payments on the claim,[89] but the fact that he repeatedly promises to pay a claim will not have such effect where it was not barred at the time of decedent's death and the creditor takes no steps to have the estate properly administered, even though no notice to creditors to present claims is published.[90] The fact that no execution can issue on a judgment because of lapse of time does not prevent its enforcement against the estate of the judgment debtor at any time before limitations have run against it.[91]

In some states, no suit can be commenced against the representative to recover a debt owed by decedent until the expiration of a certain time after his qualification.[92] In Washington, if a person against whom an action could have been brought dies before the time limited for its commencement and the action

83. Judgment of district court sustaining attachment and directing sale of goods to pay plaintiff's debt void and may be vacated at any time on motion. O'Loughlin v. Overton [Kan.] 74 P. 604.

84. Stanton v. Gibbins [Mo. App.] 77 S. W. 95.

85. Heirs cannot prolong limitations in their own favor by delaying to take out letters. Stanton v. Gibbins [Mo. App.] 77 S. W. 95. Where the orphans' court assumes, without jurisdiction, to adjudicate certain items of a claim which was the proper subject of an accounting, such claim does not thereby become seated on the fund so as to toll limitations. Miller v. Fulton, 206 Pa. 595, 56 A. 74. A provision requiring claims to be presented within one year after publication of a notice to that effect does not operate to extend the general statute of limitations. Fact that no notice was published as required by 2 Ball. Ann. Codes & St. §§ 6226, 6228, immaterial. Bank of Montreal v. Buchanan, 32 Wash. 480, 73 P. 482. The Virginia statute providing that the time during which a party is out of the state shall not be computed in determining whether the statute of limitations has run (Code 1887, § 2933, as amended by Laws 1897-98, p. 441, c. 404) does not apply to deceased persons or their estates, so as to prevent limitations running against claim against nonresident decedent which did not accrue until after his death. Templeman's Adm'r v. Pugh [Va.] 46 S. E. 474. Notes given by independent executor in renewal of others given by him for money borrowed for purpose of carrying on business of decedent are not barred by limitations when presented to the administrator de bonis non for allowance, and on their rejection, suit is brought to establish them as a claim against the estate within four years after they become due. Altgelt v. Alamo Nat. Bank [Tex. Civ. App.] 79 S. W. 582.

86. Hoiles v. Riddle, 4 Ohio C. C. (N. S.) 449.

87. In re Morgan's Estate [Or.] 77 P. 608.

88. In Oregon, an action cannof be maintained against an executor or administrator until six months after the granting of letters. B. & C. Comp. § 387. In re Morgan's Estate [Or.] 77 P. 608. Where no indorsement of rejection is made as required by Id. § 1161, the statute will not run during time between filing of claim and date claimant required notice of its rejection. Id.

89. Holly v. Gibbons, 176 N. Y. 520, 68 N. E. 889.

90. Bank of Montreal v. Buchanan, 32 Wash. 480, 73 P. 482.

91. In South Carolina may be enforced at any time within 20 years after its rendition. Ex parte Goldsmith [S. C.] 47 S. E. 984.

92. In Georgia, twelve months. Such provision is for benefit of representative. Claimant of property on which judgment recovered during such time is sought to be enforced cannot question its validity on that ground. Hill v. Julian, 119 Ga. 607, 46 S. E. 834. In Texas in suit for money not required to plead until expiration of 12 monthe from probate of will. Rev. St. 1895, art. 1996. Applies only to suits on claims instituted against estate and not to suits pending at testator's death. Altgelt v. D. Sullivan & Co. [Tex. Civ. App.] 79 S. W. 333. A voluntary appearance waives this right. Id. Right is in nature of a personal privilege, and fact that judgment is entered within a year does not render it void. Ross v. Drouilhet [Tex. Civ. App.] 80 S. W. 241.

survives, it may be brought against his representatives after the expiration of such time and within one year after the issuance of letters to them.[93] Statutes limiting the time within which actions may be brought against executors and administrators are imperative and cannot be waived by them.[94]

Presentation of claims.[95]—All claims must be filed or presented to the executor or administrator[96] within the time fixed by statute, or they will be barred.[97] Where no time is fixed, they must be presented within a reasonable time.[98]

93. Confirmation of executor's authority by court and filing bond equivalent to taking out letters [2 Ball. Ann. Codes & St. § 4810]. Bank of Montreal v. Buchanan, 32 Wash. 480, 73 P. 482. Frew v. Clark, 34 Wash. 561, 76 P. 85. Such section keeps alive claim on note so that it may be enforced against personalty where letters of administration were not taken out for 20 years, though it is barred against realty [§§ 4798, 4642]. Gleason v. Hawkins, 32 Wash. 464, 73 P. 533. Presentation to administrator of notes not barred at time of testator's death within year after his appointment is commencement of action within meaning of this section and claim not barred, though would otherwise have been under general statute of limitations. Frew v. Clark, 34 Wash. 561, 76 P. 85. Section 4810 does not extend general statute of limitations as to foreclosure of a mortgage on decedent's realty [Id. §§ 4798, 4642]. Gleason v. Hawkins, 32 Wash. 464, 73 P. 533.

94. Failure to bring suit on claim within time extinguishes it, though administrator allowed and promised to pay it when it was presented to him. Thompson v. Hoxsie [R. I.] 55 A. 930. A judgment against an executrix, obtained in an action commenced more than five years after the death of decedent, is not a lien on the realty of the estate and is not entitled to participate in a fund arising out of sale thereof on the foreclosure of a mortgage given by deceased during his lifetime. Bowman v. Knorr, 206 Pa. 270, 272, 55 A. 976. The administration of an administrator de bonis non is a continuation of that of the executor and the statute limiting the time within which suits may be brought against executors and administrators begins to run from the appointment and qualification of such executor [R. I. Gen. Laws 1896, c. 218, § 14]. Suit must be commenced against administrator de bonis non within three years (Pub. St. 1882, c. 189, § 8) after appointment and qualification of executor. Thompson v. Hoxsie [R. I.] 55 A. 930.

95. Claims provable, § 6A, ante.

96. Cannot otherwise be made basis of suit. One who presents a claim for a definite sum for services rendered decedent during a definite period cannot sue for a greater sum, or for services rendered outside such period [R. I. Gen. Laws 1896, c. 215, § 2]. Anderson v. Williams [R. I.] 58 A. 251. Where a note, which testator signed as joint maker, was not presented as a claim against his estate, though his liability was capable of being ascertained during its settlement and there was sufficient personalty to pay all claims, a bill in equity to which the executor was not made a party, could not be maintained by the other signers against testator's heirs and devisees for the purpose of relieving them from liability thereon. Tinker v. Babcock, 204 Ill. 571, 68 N. E. 445.

In Missouri this is done by serving written notice stating amount and nature of claim with a copy of writing, instrument or account on which it is founded. Rev. St. 1899, § 188. Exhibition not containing copy of note held insufficient. Woltemahr v. Doye [Mo. App.] 76 S. W. 1053. Should be sufficiently explicit to appraise representatives of facts on which claim is based so they can be prepared to protect interests of estate. May be amended under Id. § 4079, when not so barren as to be a nullity. Statement of claim founded on receipts held insufficient. Corson v. Walter [Mo. App.] 78 S. W. 656. If claim is not exhibited or suit is not brought thereon within two years, it is barred. Rev. St. 1899, §§ 184, 185. If suit is brought either in circuit or probate court and administrator is properly served or appears, no exhibition is necessary. Woltemahr v. Doye [Mo. App.] 76 S. W. 1053. Evidence held to sustain finding that notice of claim was insufficient, and hence claim properly placed in sixth class. Mason v. Galther's Estate [Mo. App.] 80 S. W. 277.

In Kentucky, interest will not be allowed on claims which have not been verified and demanded of the administrator within one year after his appointment [Ky. St. 1903, § 3884]. Cox v. Higginbotham's Adm'r, 25 Ky. L. R. 1057, 76 S. W. 1079. The question whether this has been done cannot be raised for the first time on appeal, where the record simply fails to show affirmatively, without plea calling it out, that the demand was so made. Lyon's Ex'x v. Logan Co. Bank's Assignee, 25 Ky. L. R. 1668, 78 S. W. 454. Demand may be waived by the representative either before or after suit by the creditor, if he is the only person to be affected thereby. Waived by telling creditors that there would be no assets unless he recovered on insurance policy and that they need not present their claims until he notified them to do so. Officers of corporation competent to prove waiver of demand by deceased administrator. Cox v. Higginbotham's Adm'r, 25 Ky. L. R. 1057, 76 S. W. 1079; Lyon's Ex'x v. Logan Co. Bank's Assignee, 25 Ky. L. R. 1668, 78 S. W. 454.

97. An action cannot be maintained against an executor or administrator in the Federal court on a claim against the estate of a decedent, after the expiration of the time allowed by the state statute for the presentation of such claims to the probate court for allowance, where it was not so presented, and no excuse for the failure is alleged. Schurmeier v. Connecticut Mut. Life Ins. Co. [C. C. A.] 124 F. 865.

A claim arising from an assessment of stock must be presented for allowance in administration of the shareholders' estate,

The proceeding is in rem and, the statutory requirements as to notice having been complied with, is binding on all the world.[99] Generally the statutory period for filing claims does not begin to run until after the administrator gives notice of his appointment.[1] Want of actual notice on the part of a creditor will not prevent the running of limitations where statutory notice by publication was given.[2] The failure of the administrator to publish such notice in no way affects the validity or conclusiveness of the orders of the probate court made in course of administration,[3] but merely renders him liable to creditors for any losses resulting to them therefrom.[4] A special administrator has no authority to pay debts, and hence cannot limit the time for the presentation of claims.[5]

Statutes in some states provide that no action shall be brought on a claim against the estate until a demand has been made on the personal representatives.[6] In others, notice must be given him before issuing execution on a judgment against his decedent.[7]

and where it becomes absolute and is not filed before the closing of the estate, the heirs are not liable [Gen. St. 1894, §§ 5918 et seq. 4511, 4514]. Hunt v. Burns, 90 Minn. 172, 95 N. W. 1110. Presentation of a claim to an administrator de bonis non after expiration of the time allowed by law for presentation of claims gives the claimant no standing to enforce it by action. Thompson v. Hoxsie [R. I.] 55 A. 930.

California Code Civ. Proc. § 1493. MacGowan v. Jones, 142 Cal. 593, 76 P. 503.

Connecticut: Facts showing merely that at an unknown time and in an unknown manner, and either with or without purpose, knowledge of the existence of a claim under a note passed from plaintiff to the executor, held insufficient to support finding that claim was exhibited. Dime Sav. Bank v. McAlenney, 76 Conn. 141, 55 A. 1019. Payments of interest on a mortgage note, made by the executor after the expiration of the time allowed for presentation of claims, do not amount to a seasonable exhibition of a claim based on such note. Id.

In Missouri (Rev. St. 1899, § 185) must be exhibited within two years from the granting of letters. Cause of action against deceased as surety accruing within such two years must be exhibited before expiration of such period. State v. Browning, 102 Mo. App. 455, 76 S. W. 719.

In Oregon, no action can be commenced against an executor or administrator on a claim against the estate until the same has been presented and disallowed [B. & C. Comp. § 388]. Goltra v. Penland [Or.] 77 P. 129; In re Morgan's Estate [Or.] 77 P. 608. A claim which the administrator neither allows nor rejects within a reasonable time will be deemed disallowed. Immaterial whether failure to act is due to affirmative refusal or not. Goltra v. Penland [Or.] 77 P. 129. The question as to what is a reasonable time is for the court where the length of time is undisputed and no excuse is offered for the delay. Deemed disallowed after six months. Instructions disapproved. Id.

98. Claim for deficiency judgment on mortgage, foreclosure represented in final account of independent executrix, held presented to her successor within a reasonable time. Bell's Estate v. Farmers' & Merchants' Nat. Bank [Tex. Civ. App.] 76 S. W. 798.

99. MacGowan v. Jones, 142 Cal. 593, 76 P. 503.

Query whether such a proceeding can properly be called "in rem." See Cyc. Law Dict. "In Rem"; 17 Am. & Eng. Enc. Law [2d Ed.] 763.

1. Iowa Code, § 3304. Eliyson v. Loró [Iowa] 99 N. W. 582. A plea that a claim was not presented to the executors, or filed in the office of the probate clerk, within six months from the date of the first advertisement of notice of their qualification (R. I Gen. Laws 1896, c. 215, § 2) and that the action was not commenced within two years from such date (Gen. Laws 1896, c. 218, § 9), is defective if it fails to allege that any such notice was published. Municipal Court v. Whaley [R. I.] 57 A. 1061. Such defect may be cured by amendment and is not raised by a substantial demurrer. Id. On demurrer to such pleas, plaintiff cannot argue that he did not know of the breach of the bond on which the claim was founded until after decedent's death, and after limitations had run, where they do not state such fact. Id. The publication of the notice to creditors and of the petition for final settlement and not the filing of proof thereof are the jurisdictional facts. Statutes requiring filing directory [B. & C. Comp. § 1159]. In re Conant's Estate, 43 Or. 530, 73 P. 1018.

2. Claimant a resident of the state. Hawkeye Ins. Co. v. Lisker, 122 Iowa, 341, 98 N. W. 127. The fact that claimant directed its traveling collector to look after this with other claims, and that he reported on the others but not on this, does not show such diligence on plaintiff's part as to entitle it to equitable relief. Id.

3. All interested parties required to take notice of administration proceedings regularly begun. Tiboldi v. Palms [Tex. Civ. App.] 78 S. W. 726.

4. Tiboldi v. Palms [Tex. Civ. App.] 78 S. W. 726.

5. Not entitled to allowance for expenses incurred in publishing notice to creditors. In re Ford's Estate [Mont.] 74 P. 735.

6. Applies only to actions against representatives and not to a suit by surety who has paid deceased principal's debt to enforce mortgage given to secure debt and protect the surety [Ky. St. 1903, § 3872]. Cook v. Landrum [Ky.] 82 S. W. 585.

Creditors who fail to file their claims after the giving of the notice required by statute and within the time allowed by law have no claim against the representative who has paid out and distributed the assets,[8] nor can they compel contribution from creditors who have participated in the distribution.[9] A notice of the expiration of the time for filing claims published prior to the making of the order fixing such time is a nullity.[10]

Statutes in some states provide that equitable relief may be granted to persons who fail to file their claims within the time allowed by law, where they are entitled thereto on account of peculiar circumstances,[11] but such relief will not be granted where the failure is due to claimant's negligence.[12] In other states, the probate court may extend the time on a proper showing.[13] Statutes generally provide for the relief of creditors who, by reason of absence from the state during the period of publication of notice to creditors, had no notice of the proceedings.[14] Statutes in relation to the filing of claims do not apply where the estate is administered by an independent executor without bond.[15]

Claims should be stated in detail,[16] and must be properly proven.[17] In some states, they must be supported by an affidavit of the claimant that they are justly

7. Notice must be personal. Evidence held to show notice [Hurd's Rev. St. 1899, pp. 1048-1053]. Kinkade v. Gibson, 209 Ill. 246, 70 N. E. 683. See, also, Executions, 1 Curr. L. 1178.

8. Where representative gives statutory notice, he is conclusively presumed to have notified all creditors. Hill v. Mayes, 25 Ky. L. R. 2023, 79 S. W. 276. Representative is not chargeable with any assets he may have theretofore paid on lawful claims. Code Civ. Proc. § 2718. This does not apply where executrix has distributed the funds in her hands to creditors before the expiration of such period. In re Gill, 42 Misc. 457, 87 N. Y. S. 252.

9. Their only remedy is against heirs or distributees, notwithstanding they did not have actual notice [Ky. Civ. Code Prac. §§ 428, 430, 432-434]. Hill v. Mayes, 25 Ky. L. R. 2023, 79 S. W. 276.

10. Does not affect right to file claims thereafter. Ribble v. Furmin [Neb.] 98 N. W. 420.

11. Iowa Code, § 3349. Bentley v. Starr, 123 Iowa, 657, 99 N. W. 555. Under the statute of New Hampshire (Pub. St. 1901, c. 191, § 27), providing that one having a claim against a decedent, which has not been prosecuted within the time limited by law, may present it to the supreme court at a trial term by petition, and that the court may give him judgment for the amount due if satisfied that he is not chargeable with culpable neglect, and that justice and equity require it, held that where the questions of neglect and justice have been settled in the superior court, they are not subject to review in the supreme court. Libby v. Hutchinson, 72 N. H. 190, 55 A. 547. Such statute applies to contingent claims on which suit could not have been brought, and to claims coming into existence after the expiration of the time limit. Id.

12. Facts held to show such negligence as to prevent equitable relief. Bentley v. Starr, 123 Iowa, 657, 99 N. W. 555. Fact that claim had been filed with decedent's guardian prior to his death, he being insane, held not to excuse delay in filing claim with administrator, though same party held both positions. Id.

13. The discretionary power to do so should not be arbitrarily exercised, but time must be extended as the circumstances may require, when proper and timely application and showing are made. Neb. Comp. St. 1901, c. 23, § 218. Evidence held to show sufficient excuse for not filing claim and to entitle claimant to an order allowing her claim to be filed and directing a hearing thereon. Ribble v. Furmin [Neb.] 98 N. W. 420.

14. One who knew of decedent's death was in state during first two publications, and returned and had actual notice of publication for more than a month prior to expiration for time of filing claims, not entitled to relief under this statute [Cal. Code Civ. Proc. § 1493]. MacGowan v. Jones, 142 Cal. 593, 76 P. 503.

15. Claim for deficiency judgment on foreclosure of mortgage not filed within statutory period held not postponed to others so filed (Mo. Rev. St. 1895, §§ 2068, 2078, 2091), where estate was being administered by independent executrix when it accrued, who represented it in her report on her resignation, and it was thereafter presented to her successor within a reasonable time. Bell's Estate v. Farmers' & Merchants' Nat. Bank [Tex. Civ. App.] 76 S. W. 798. Where there is a nonintervention will and the estate is settled outside the probate court, a notice to creditors will not operate to bar claims not presented within the time limited [Bail. Ann Codes & St. Wash. § 6228 does not apply where estate settled under § 6196]. In re Smith's Estate, 43 Or. 595, 75 P. 133. The administration on his resignation is in the nature of an administration de bonis non. Bell's Estate v. Farmers' & Merchants' Nat. Bank [Tex. Civ. App.] 76 S. W. 798. The court is bound to take notice of proceedings already had by the executor and shown in his report. Id.

16. N. M. Comp. Laws 1897, § 1967. Gutierrez v. Scholle [N. M.] 78 P. 50.

In Indiana, the statement is sufficient if it apprises defendant of the nature of the claim and the amount demanded, and con-

due and that no payments have been made thereon and that there are no offsets thereto.[18] It may be made by an agent or other person on claimant's behalf.[19] A substantial compliance with the statute is sufficient,[20] and it does not apply when the creditor pleads his claim by way of set-off in a suit brought by the administrator against him.[21]

In some states, a notice to the administrator or executor of plaintiff's intention to present the claim to the probate court for allowance is necessary,[22] unless the same is waived.[23]

Statutes in some states provide that where the will empowers executors as to the payment of debts its provisions in regard thereto shall be followed,[24] and in such cases, where the will creates an express trust for the payment of debts, the executors are justified in paying unprobated claims.[25]

Contests on claims.—It is the duty of the executor to make a proper defense under penalty of being charged with any loss resulting from his negligence or failure to do so.[26] Only those having an interest in the estate may contest the allowance.[27] Where the presentment is by filing in court, no petition or other formal pleading is usually necessary,[28] and strict conformity of proof is not required.[29] The law interposes a general denial to all claims filed.[30]

tains enough substantial matter to bar another action for the same demand. Statement by surety of claim for money paid on notes held sufficient. Christian v. Highlands, 32 Ind. App. 104, 69 N. E. 266.

In Mississippi, where a claim is not based on an itemized account, it is sufficient if a statement of the claim in writing is presented. Miss. Code 1892, § 1932, construed. Statement of claim for legal services held sufficient. Foster v. Shaffer [Miss.] 36 So. 243.

17. In Maryland, proper vouchers must be produced before allowance of preferred claims, as for rent, etc. [Code Pub. Gen. Laws, art. 93, § 89]. Maynadier v. Armstrong [Md.] 56 A. 357.

18. In Washington: 2 Ball. Ann. Codes & St. § 6229. Original affidavit must be presented. Ash v. Clark, 32 Wash. 390, 73 P. 351.

In Kentucky, the demand and affidavit required by the statutes (Ky. St. 1903, §§ 3870-3872) are waived by failure to object before answer filed. Lyon's Ex'x v. Logan County Bank's Assignee, 25 Ky. L. R. 1668, 78 S. W. 454. Claim for services held properly proved under such statute. Green's Ex'r v. Green [Ky.] 82 S. W. 1011.

In Missouri: Affidavit presenting note with credits for payments endorsed thereon not defective for failing to state amount due [Rev. St. 1899, § 195]. Woltemahr v. Doye [Mo. App.] 76 S. W. 1053.

Montana Code Civ. Proc. § 2604. Empire State Min. Co. v. Mitchell [Mont.] 74 P. 81.

In New Mexico, the claim must be verified. Comp. Laws 1897, § 1967. Failure to verify is not jurisdictional, but merely appealable error. Gutierrez v. Scholle [N. M.] 78 P. 50.

19. Must set forth the reason why it is so made [Code Civ. Proc. § 2604]. Empire State Min. Co. v. Mitchell [Mont.] 74 P. 81. The claim of a bank may be verified by its cashier, who is its managing agent and familiar with its books and accounts, where the president is the administrator of the estate. Cox v. Higginbotham's Adm'r, 25 Ky. L. R. 1057, 76 S. W. 1079. Where affidavits have been lost, it will be presumed, on appeal, that they sustained the claim. Id.

In Missouri (Rev. St. 1899, § 196) may be made by agent but is defective if it does not state that fact. Such defect may be cured by amendment. Not defective for failure to state that agent had management of business out of which claim grew, or had means of knowing the verified facts. Dawson v. Wombles [Mo. App.] 78 S. W. 823.

20. Affidavit by attorney stating that claimant is a corporation and that none of its officers except its attorneys reside in the county held sufficient. Empire State Min. Co. v. Mitchell [Mont.] 74 P. 81.

21. Del. Rev. Code, p. 677, c. 89, § 29. Jester v. Knotts [Del. Super.] 57 A. 1094. Probates of notes, introduced in evidence without objection under a plea of set-off, produced at the close of the testimony on both sides and after a motion to exclude the notes for want of probates, are produced in time. Id.

22. Notice not containing copy of note on which claim was founded held defective [Mo. Rev. St. 1899, § 197]. Woltemahr v. Doye [Mo. App.] 76 S. W. 1053.

23. Voluntary appearance without objecting thereto waives defects [Mo. Rev. St. 1899, § 199]. Woltemahr v. Doye [Mo. App.] 76 S. W. 1053.

24. Miss. Rev. Code 1892, § 1838. Gordon v. McDougall [Miss.] 37 So. 298.

25. Both under general principles applicable to such trusts and the Mississippi statute (Rev. Code 1892, § 1838), providing that testamentary provisions as to payment of debts shall be followed. Gordon v. Mc Dougall [Miss.] 37 So. 298.

26. Hanna v. Galford [W. Va.] 47 S. E. 359.

27. Appellant held to have no interest in the estate and hence not entitled to contest. In re Semper's Estate [Minn.] 100 N. W. 663.

28. Harrison v. Harrison [Iowa] 100 N. W. 344.

29. Mutual expectation of payment may be proved under allegation of agreement of

Statutes in some states require satisfactory evidence other than that of the claimant to establish a claim against decedent's estate which has been disallowed by the executor or administrator.[31] Claims which are withheld during the lifetime of an alleged debtor and sought to be enforced after his death should be carefully scrutinized, and only admitted upon satisfactory proof.[32] A credit given for a payment in a statement of claim filed in probate court is no evidence of payment by deceased as against his representatives.[33] In an action on a promissory note alleged to have been executed by deceased, proof of his signature, the due presentation of the note as a claim against the estate, its rejection, and the introduction of the note in evidence, make out a prima facie case against the administratrix.[34] The fact that the representative does not defend upon all the grounds he has does not entitle claimant to judgment in the absence of satisfactory proof.[35] The competency of witnesses to testify in regard to the transactions on which the claim is based is treated elsewhere.[36]

A set-off is generally allowed in case of mutual debts between the intestate and his debtor or creditor.[37]

father to pay daughter for services. Harrison v. Harrison [Iowa] 100 N. W. 344.

In Kentucky in the absence of objection, the court may allow the proof on exceptions to claims to be made orally. Cox v. Higginbotham's Adm'r, 25 Ky. L. R. 1057, 76 S. W. 1079.

30. In an action against a decedent's estate on a claim for money had and received, evidence that plaintiff appropriated to his own use personal property owned by decedent and that he enjoyed the rents and profits of his land, is admissible under such general denial. Dunton v. Dawley, 122 Iowa, 512, 98 N. W. 307. Evidence as to the value of the use of such land is inadmissible, there being no evidence tending to show that the money claimed was paid thereon. Id.

In Indiana, on a claim founded on a written instrument, the administrator is entitled, without answer, to every defense except set-off or counter-claim, including non est factum. Burns' Ann. St. 1901, § 2479. Burden on plaintiff filing note indorsed by one member of nontrading partnership against estate of other partner to prove authority for its execution. Schele v. Wagner [Ind.] 71 N. E. 127.

31. Oregon: Claim by daughter of ownership of money buried by decedent and alleged to have been given to her by him is not a claim against estate within meaning of this statute [B. & C. Comp. § 1161]. Waite v. Grubbe, 43 Or. 406, 73 P. 206. Issue as to whether claim has been presented to administrator and rejected not within this statute. Goltra v. Penland [Or.] 77 P. 129.

In New Mexico in a suit by or against heirs, executors, administrators, or assigns of a deceased person, plaintiff cannot recover on his own uncorroborated evidence in respect to any matter occurring before decedent's death. Comp. Laws 1897, § 3021. Evidence insufficient to establish claim. Gillett v. Chavez [N. M.] 78 P. 68.

32. Evidence held to sustain finding that bar of limitations had not been removed by payments. Gregory v. Filbeck's Estate [Colo. App.] 77 P. 369. A claim for rent by a nephew, who never made claim therefor during testator's lifetime, should be carefully scrutinized and admitted only upon very satisfactory proof. Claim disallowed. Genet v. Willock, 93 App. Div. 588, 87 N. Y. S. 938. Where a son worked for his father for many years on a farm, dividing the crops and never making any claim for extra services and no member of the family knew of such claim, it should not be allowed against the father's estate without clear and satisfacory proof from disinterested sources. Duckworth v. Duckworth [Md.] 56 A. 490. Claims under contracts alleged to have been made with deceased persons should be regarded with suspicion, and the evidence in relation thereto closely scrutinized, and should only be allowed when supported by strong and convincing evidence. Evidence insufficient to establish contract to leave claimant certain sum in consideration of services. Roberge v. Bonner, 94 App. Div. 342, 88 N. Y. S. 91. Note held sufficient evidence of contract by deceased father to pay his son for his board. Leahy v. Lillard [Ky.] 80 S. W. 1112.

33. Smythe's Estate v. Evans, 209 Ill. 376, 70 N. E. 906.

34. Burden of proving lack of consideration on defendant under Cal. Code Civ. Proc. § 1963, subd. 21. Thompson v. Thompson, 140 Cal. 545, 74 P. 21.

35. McKenney v. Minahan, 119 Wis. 651, 97 N. W. 489.

36. See Witnesses, 2 Curr. L. 2163.

37. Set-off authorized in actions brought by administrators, in case of mutual debts between intestate and defendant. Rev. Code Del. c. 106, § 22, p. 794. Where, in assumpsit by an administrator, defendant pleads notes as a set-off, a replication to the plea to the effect that there are no assets in the hands of the administrator and that there are prior claims against the estate will be stricken out. Jester v. Knotts [Del. Super.] 57 A. 1094. An action may be maintained by the owner of a judgment against an intestate to set off the same against a judgment recovered against such owner in an action instituted by intestate and continued in the name of the administrator, where the court, in its dis-

A formal entry of judgment on the allowance or disallowance of a claim is not absolutely necessary.[38] The approved allowance of a claim by an administrator is attended with the same presumptions as a judgment and cannot be attacked by exceptions to his final report.[39] Claims properly allowed in the probate court are in the nature of audited and adjudged demands, which are a lien on the assets of the estate in the hands of the executor or administrator.[40] It is only where the court has allowed claims against the estate, made a finding that there are assets in the hands of the administrator for the purpose of paying them, and has made an order directing a distribution of such assets, that the order of distribution creates a personal liability against the administrator and has the effect of a judgment.[41] Hence the mere allowance of a claim against an insolvent estate does not operate as a judgment which will be barred by the statute of limitations as against newly discovered assets.[42] A judgment rendered against the representative upon a claim for money against the deceased operates only to place it among the allowed claims,[43] and it may thereafter be contested on the settlement of his accounts in the same manner as though allowed in the probate court.[44] In the absence of a showing to the contrary, it will be presumed on appeal that all proceedings to have a claim allowed were regular.[45]

(§ 6) *C. Classification, preferences and priorities.*[46]—Classification of claims depends upon statute.[47] It does not affect the issue of priority as between claims of the same class.[48] Ex parte orders approving and classifying claims of administrators for expenses of administration have not the effect of final judgments, but are subject to rejection and revision as long as the administration remains open.[49] Taxes[50] and funeral expenses are generally made preferred claims.[51] The representative has no right to prefer claims.[52]

cretion, finds that justice and equity will be promoted thereby. Martin County Nat. Bank v. Bird [Minn.] 99 N. W. 780. It is not necessary that such judgment be first proved as a claim in the probate court. Complaint prima facie to set forth facts entitling plaintiff to such relief, and to require administrator to answer and defend on the merits. Id.

38. Sufficient if it plainly indicates intention to allow or disallow it. In re Currier's Estate [Colo. App.] 74 P. 340.

39. Allowance by special administrator of claim of administrator, approved by court, cannot be attacked by exceptions to the final report of the administrator. No fraud and no objections to allowance. In re Pennock's Estate, 122 Iowa, 622, 98 N. W. 480.

40. Sharp v. Citizens' Bank [Neb.] 98 N. W. 50.

41. Sharp v. Citizens' Bank [Neb.] 98 N. W. 50. A judgment of allowance is not a complete and effective judgment until the administrator is ordered to pay the same. Hence a proceeding to obtain such order is not an action on the judgment of allowance within the meaning of the statute of limitations [N. M. Comp. Laws 1897, § 2914]. Gutierrez v. Scholle [N. M.] 78 P. 50.

42. Sharp v. Citizens' Bank [Neb.] 98 N. W. 50.

43. Only establishes it in same manner as if it had been allowed in probate court [Cal. Code Civ. Proc. § 1504]. Hall v. Cayot, 141 Cal. 13, 74 P. 299.

44. Cal. Code Civ. Proc. § 1636. Hall v. Cayot, 141 Cal. 13, 74 P. 299. Consequently plaintiff is not entitled to a judgment on a claim which has been regularly allowed, proved and filed after the commencement of the action, except possibly for costs. Id. Conclusiveness of judgments, see post, § 15. Appeals, § 16, post.

45. N. M. Comp. Laws, 1897, § 2015. Gutierrez v. Scholle [N. M.] 78 P. 50.

46. See 1 Curr. L. 1109.

47. Under Tex. Rev. St. 1895, art. 2091, a vendor's lien note held by the administrator is properly placed in the third class. Hardcastle's Estate v. Archer [Tex. Civ. App.] 81 S. W. 368.

48. Hardcastle's Estate v. Archer [Tex. Civ. App.] 81 S. W. 368.

49. Applies to erroneous classification of claim of administrator on vendor's lien note as claim of second class which includes only expenses of administration [Tex. Rev. St. 1895, art. 2091], notwithstanding fact that action of approving or disapproving claim is given effect of final judgment from which appeal will lie [Id. § 2085]. Hardcastle's Estate v. Archer [Tex. Civ. App.] 81 S. W. 368.

50. N. Y. Rev. St. 1131, § 172. Kelly v. Pratt, 41 Misc. 31, 83 N. Y. S. 636. The Illinois statute (3 Starr & C. Ann. St. 1896, p. 3510, par. 258), making agents personally liable for taxes on the property of their principals in certain cases, does not apply to executors so as to render them personally liable for taxes on property omitted from assessment by their testator during his lifetime. Scott v. People, 210 Ill. 594, 71 N. E. 582.

51. See post, § 9D. The lien of a mortgage upon personalty is superior to funeral

(§ 6) *D. Funds, assets, and securities for payment.*[53]—The personal estate is the primary fund for the payment of debts unless the will shows a contrary intention.[54] Therefore the widow may call on it for the exoneration of her dower.[55] Devisees must contribute ratably to the payment of debts where there is not sufficient undevised property for that purpose.[56] In most states, in the absence of a special provision in the will, undisposed of personalty and then undisposed of realty must be used to pay the debts of the testator before taking property specifically bequeathed.[57]

A charge of a legacy[58] or of debts on the realty constitutes an equitable lien on the lands in the hands of the devisees.[59] The devisee of land encumbered by a mortgage cannot, after the general residuary fund has been exhausted, compel either the general or specific legatees to contribute to its satisfaction.[60] The right of a mortgagee to enforce his lien on the realty is not affected by the death of the mortgagor.[61]

By reason of the doctrine of marshaling assets, a secured creditor who has partially realized can prove as a general creditor for the unpaid balance only.[62]

expenses, the statute making the latter preferred claims applying only to assets for distribution in the hands of the personal representatives. Ky. St. 1899, § 3868, making funeral expenses preferred claims. Cox v. Higginbotham's Adm'r, 25 Ky. L. R. 1057, 76 S. W. 1079. A claim for funeral expenses of the deceased bears interest from the date of its allowance. In re Cummins' Estate [Cal.] 77 P. 479.

52. An administrator d. b. n. c. t. a. of an insolvent estate has no authority to stipulate that, as between different classes of creditors, a claim on a contract for the conveyance of realty shall be given priority. Agreement to turn land into money and that if it is decided by arbitrators that one has right to specific performance of such a contract made by deceased, he shall have a money judgment for the right, which shall be a preferred claim, is valid against creditors only to the amount received for the land. Harriman v. Tyndale, 184 Mass. 534, 69 N. E. 353.

53. Right to subject property in hands of heirs or devisees, see § 8, post. See 1 Curr. L. 1109.

54. If debts not charged on realty, assets will not be marshaled in favor of general legatees so as to throw burden of debts upon lands passing under residuary devise. Turner v. Mather, 86 App. Div. 172, 83 N. Y. S. 1013. In the absence of anything to the contrary in the will. Burden is on legatee to show that personalty should be exempt. Wiggins v. Wiggins [N. J. Eq.] 56 A. 148.

55. Where the wife joined her husband in the execution of certain mortgages on his land, thereby conveying her dower interest therein, she had the right to require that the proceeds of a life insurance policy payable to his estate be applied to the payment of the mortgage debts. Portion of realty thereby released so she could claim dower therein. Bickel v. Bickel, 25 Ky. L. R. 1945, 79 S. W. 215.

56. Including devise stated to be in satisfaction of devisee's claim against testator, which is more than sufficient for that purpose. [Cal. Code Civ. Proc. §§ 1563, 1564, 1516. Civ. Code, § 1359]. In re Thayer's Estate, 142 Cal. 453, 76 P. 41.

57. A declaration that there is no personal estate of the debtor to pay the debts, as by the terms of the will all of the personalty was given to the testator's wife, held insufficient to show that the personal estate is not subject to the payment of debts [Burns' Ann. St. 1901, § 2743]. Hunt v. Hinshaw [Ind. App.] 70 N. E. 825.

58. In Kentucky, when land is devised subject to the payment by the devisee to another of a sum of money, the latter person has a lien on the legacy therefor. Where will provided that land was to be sold and after payment of debts remainder of proceeds was to go to children, creditors have, on recording of will, a lien of record on the land for amount of their claims [Ky. St. 1899, § 2066]. Hurst v. Davidson, 25 Ky. L. R. 555, 76 S. W. 37.

59. Such lien is not barred by limitations until the debt is barred. Smith v. Moore [Va.] 46 S. E. 326. Where a sale of land is directed by the will and the estate is charged with the payment of debts, the right of the devisees to take the land instead of the proceeds and to divide it among themselves is subject to the rights of creditors. Hurst v. Davidson, 25 Ky. L. R. 555, 76 S. W. 37.

60. Where testator devised all his realty to his son after payment of his debts, and the only substantial debt was secured by a mortgage thereon, such debt should be paid by him. Wiggins v. Wiggins [N. J. Eq.] 56 A. 148.

61. Right is barred after running of general statuts of limitations. Frew v. Clark, 34 Wash. 561, 76 P. 85; Banker of Montreal v. Buchanan, 32 Wash. 480, 73 P. 482.

62. Decedent became indebted for fertilizers under contract providing that proceeds of their resale should belong to seller until debt was paid, decedent guaranteeing payment of accounts on resales. He died insolvent, owing balance on debt, and administrator collected accounts for resales and turned proceeds over to seller, receiving credit therefor. Held, that decedent's debt was thereby reduced pro tanto and seller was not entitled, as against general creditors, to receive dividend from estate on amount of debt as it stood at time of decedent's death. Virginia-Carolina Chemical Co. v. Edwards [N. C.] 48 S. E. 568.

The proceeds of a policy of life insurance are not subject to the payment of debts.[63]

A deposit which a legatee takes by purchase under the will of her grandfather as heir of her father and not by descent as her father's heir at law never becomes a part of the estate of her father and is not liable for his debts or the expenses of administering his estate.[64]

(§ 6) *E. Payment and satisfaction.*[65]—The representative is not bound to pay allowed claims until directed to do so by the probate court.[66] He should not pay claims against the estate until they are established in some appropriate legal manner,[67] but may do so for the purpose of obtaining bonds put up as collateral security therefor.[68] Payment must be made to the party actually entitled thereto.[69] If he pays creditors in full before the expiration of the time for presenting claims, he is liable to other creditors for their pro rata share of the assets.[70] A life tenant, who is also executrix under the will, may anticipate and discharge a pecuniary obligation of the estate to a remainderman, payable after her death.[71]

§ 7. *Subjection of realty to payment of debts under order of court. A. Right to resort to realty.*[72]—All of decedent's property is liable for his debts.[73] Realty may be sold under order of court for the payment of debts and expenses of administration where the personalty is insufficient for that purpose,[74] but no sale can be had until the personalty is exhausted,[75] and then only so much of it can be sold as is necessary to pay the balance of the indebtedness.[76]

Rents and profits of realty,[77] and the surplus remaining after a sale thereof on mortgage foreclosure sale may be used under similar circumstances.[78] In some states the realty will not be sold if any interested party gives bond to pay all liabilities eventually due from the estate, with charges of administration in

63. Rule applies where payable to representatives, where not specifically disposed of by the will [Shannon's Code Tenn. §§ 4030, 4231]. Cooper v. Wright, 110 Tenn. 214, 75 S. W. 1049.

64. Thayer v. Fairchild [R. I.] 56 A. 773.

65. See 1 Curr. L. 1110.

66. Gutierrez v. Scholle [N. M.] 78 P. 50.

67. Hanna v. Galford [W. Va.] 47 S. E. 359. As to proof required, see § 6B, ante.

68. To sell them for benefit of estate. Houghteling v. Stockridge [Mich.] 99 N. W. 759.

69. The administrator has no right to pay an allowed claim to the assignor after notice of an assignment. Contention that assignment was to secure another person and that assignor was real party in interest not available to estate. In re Cummins' Estate [Cal.] 77 P. 479. Assignment to attorney to secure claim for services not void under Code Civ. Proc. § 161. Id.

70. In re Gill, 42 Misc. 457, 87 N. Y. S. 252.

71. Remainderman accepting and retaining payment cannot compel her to again account therefor when making a final settlement of the estate. In re Pope's Estate [Minn.] 97 N. W. 1046.

72. See 1 Curr. L. 1110. Right to subject realty in hands of heirs or devisees, see post, § 8.

73. In re Hatch, 90 N. Y. S. 33.

74. Ky. Civ. Code Prac. § 429. Auxier v. Clarke [Ky.] 82 S. W. 605; In re Gill, 42 Misc. 457, 87 N. Y. S. 252. The balance remaining may be applied to the payment of the expenses of administration. In re Hatch, 90 N. Y. S. 33. Where it is admitted that the realty is the only property of decedent in the state, the objectore cannot complain on appeal that it was not proven that the personalty was exhausted. In re Smith's Estate, 43 Or. 595, 75 P. 133. Duty of administrator to sell where no realty. Id.

The estate in remainder in the homestead of the widow is subject to sale for the payment of debts. Derge v. Hill, 103 Mo. App. 281, 77 S. W. 105. Is assets in hands of administrator. Williams v. O'Neal, 119 Ga. 175, 45 S. E. 978. Order to sell held to give administratrix no authority to sell the reversionary interest in lands set apart to widow as dower. Ousler v. Robinson [Ark.] 80 S. W. 227.

75. Ky. Civ. Code Prac. § 429. Auxier v. Clarke [Ky.] 82 S. W. 605.

76. Amount of personalty must first be deducted from amount of debts [Ky. Civ. Code Prac. § 429]. Auxier v. Clarke [Ky.] 82 S. W. 605.

77. Administrator has nothing to do with realty without order or direction of court [Iowa Code, §§ 3333, 3334]. In re Pennock's Estate, 122 Iowa, 622, 98 N. W. 480.

As to the right of executor to take possession of realty, see ante, § 4C.

78. The proceeds of a sale of decedent's realty in a partition suit may not be ordered paid into the surrogate's court to be subjected to the payment of a judgment in a creditor's suit commenced more than three years after the granting of letters of administration [Code Civ. Proc. §§ 1538, 2749, 2750, 2751, 2797, 2798, construed]. Early v. Korn, 89 N. Y. S. 392.

so far as the personalty is insufficient for that purpose.[79] Creditors who, knowing that there is a deficiency of assets, do not compel a sale and permit the final settlement of the estate and the discharge of the administrator without objection cannot thereafter obtain the appointment of an administrator de bonis non for that purpose.[80]

Delay in procuring letters will bar the right to sell realty where such right would have been forfeited by a like delay in making an application to do so after letters had been granted.[81] The question as to what amounts to laches in such cases depends upon circumstances.[82] The right will generally be held to be barred where the realty is so changed as to ownership or physical conditions as to render it inequitable to the owner to grant the relief,[83] or by analogy, where the statute of limitations has run so as to bar the right to present the claim or recover the realty.[84]

In some states no sale may be had unless letters testamentary or of administration are taken out within a specified period after decedent's death.[85] This of course does not affect the right of a mortgagee to foreclose a mortgage given by testator at any time before the general statute of limitations has run against it.[86] In other states claims cease to be a lien on the realty unless suit is brought thereon,[87] or a petition for its sale is filed within a specified time.[88]

Only property belonging to decedent,[89] and which is not exempt from liability for debts, may be sold.[90] As a general rule the sale is made subject to the widow's

79. Burns' Rev. St. Ind. 1901, § 2527. Davis v. Kendall, 161 Ind. 412, 68 N. E. 894. Such statute is not complied with by an offer, in an answer to a petition for the sale, of judgment that the pleader give such bond (Id.), or by an offer therein to pay the personal debts of decedent made before the expiration of the time allowed for filing claims (Id.). Michigan Comp. Laws, § 9087, does not apply to sale pursuant to power given by will to widow to dispose of land absolutely for her use and benefit. Dexter v. Gordon [Mich.] 98 N. W. 1016.

80. Derge v. Hill, 103 Mo. App. 281, 77 S. W. 105.

81. In re Smith's Estate, 43 Or. 595, 75 P. 133.

82. Delay of 10 years in procuring letters and filing petition to sell held not such laches as to bar right to make change where ownership or condition of realty has not changed and the statute of limitations has not run against the claim. In re Smith's Estate, 43 Or. 595, 75 P. 133.

83, 84. In re Smith's Estate, 43 Or. 595, 75 P. 133.

85. In Washington within six years [2 Ballinger's Ann. Codes & St. §§ 4798, 4642]. Debt secured by mortgage. Gleason v. Hawkins, 32 Wash. 464, 73 P. 533.

86. Gleason v. Hawkins, 32 Wash. 464, 73 P. 533.

87. In Pennsylvania within two years after decedent's death [Act June 8, 1893; P. L. 392]. In re Cooper's Estate, 206 Pa. 628, 56 A. 67. Nor are such claims payable out of the proceeds of realty thereafter sold under the terms of the will. Id. In Pennsylvania after five years land in the hands of heirs or devisees, or their alienees becomes their absolute property, free from the debts of decedent not debts of record. Act Feb. 24, 1834 (P. L. 79, § 24). Hence, a surplus resulting from a sheriff's sale of decedent's land made 17 years after his death, under foreclosure of a mortgage given by him should be distributed to the devisees or their alienees and not to the executor under section 33 of the above act. Fidelity Ins. Trust & Safe Deposit Co. v. Sampson [Pa.] 58 A. 273.

88. In New York creditors have three years from the issuance of letters in which to present a petition for sale of realty for payment of debts (Code Civ. Proc. § 2750), during which period debts are lien on the realty. Richmond v. Freeman's Nat. Bank, 86 App. Div. 152, 83 N. Y. S. 632.

89. Evidence in proceeding to sell realty to pay debts held to show that house and lot belonged to decedent's daughter and was not part of his estate. Liter v. Johnson's Ex'r, 25 Ky. L. R. 1783, 78 S. W. 905. Sale of property belonging to husband's succession to pay debts of deceased wife void. Tender of purchase price not necessary prerequisite to suit to recover land. Sicard v. Schwab, 112 La. 475, 36 So. 500. The purchaser liable for the rents of the land during his occupancy and will be credited with the taxes paid and the value of improvements made by him. Id.

90. The homestead is not subject to sale for the payment of decedent's debts. Iowa Code, §§ 2972, 2978. Fact that surviving husband who elects to occupy homestead for life in lieu of dower (under section 2985) attempted to plat a homestead including a part of the original homestead and a part of his own land adjacent thereto did not affect the descent of the original homestead to the heirs of the wife free from her debts. Porter v. Perkins [Iowa] 99 N. W. 160. In Nebraska, cannot be sold at an administrator's sale either for the discharge of incumbrances thereon or for payment of decedent's debts. License issued by district court authorizing such sale is absolutely

right of dower[91] unless she consents to the sale of her interest,[92] and it does not cut off estates subsequently vesting in parties by a different right.[93]

Equity will enjoin the sale because of fraud in obtaining the order, or for accident, surprise, or other adventitious circumstances beyond the control of the petitioner.[94]

The advisability of the sale[95] and whether the property should be mortgaged or sold are questions largely within the discretion of the court.[96] Beneficiaries whose rights are not affected thereby cannot question the validity of a mortgage given to secure a loan for the payment of debts.[97]

The doctrine of marshaling assets applies.[98] The sale of property to pay debts under a decree of court cannot be construed as a sale under the power contained in the will.[99]

A sale can only be had for the purposes designated by the statutes in force at the time of decedent's death.[1]

(§ 7) *B. Procedure to obtain order.*[2]—The courts having jurisdiction,[3] and the procedure to obtain the order of sale depend upon the statutes of the various states. A petition by the representative or a creditor[4] showing the necessity

void. Administrator has no interest in or duty to perform with respect to homestead. Tindall v. Peterson [Neb.] 98 N. W. 688. See Homesteads, 2 Curr. L. 210. The inchoate rights of a deceased homestead claimant, who dies before the issuance of, or before he has acquired a right to, a patent, vest in his heirs and cannot be sold by the administrator for the payment of his debts under Rev. St. U. S. §§ 2290, 2291 (U. S. Comp. St. 1901, pp. 1389, 1390). Towner v. Rodegeb, 33 Wash. 153, 74 P. 50. See Public Lands, § 4A. 2 Curr. L. 1315.

91. In re Smith's Estate, 43 Or. 595, 73 P. 336.

In Indiana it is the duty of the administrator first to apply all the personalty in his hands to the payment of liens on the land, even to the exclusion of all general creditors, and also the proceeds of the sale of two-thirds of the realty, under 2 Rev. St. Ind. c. 10, § 89, p. 269 and 1 Rev. St. 1852, c. 27, § 17, pp. 250, 251. If the fund so raised is insufficient for the purpose, he may then, upon proper application, sell the widow's interest also. Fry v. Lawson, 32 Ind. App. 364, 69 N. E. 1038.

92. Judgment deprives the widow, who is made a party to the proceedings and consents thereto, of all interest in the land and in the proceeds of the sale. Widow also estopped, under the circumstances, to claim interest in proceeds. In re Pennock's Estate, 122 Iowa, 622, 98 N. W. 480. See Dower, 1 Curr. L. 956.

93. Decree barring widow's estate and estate inherited by her from devisee. Rice v. Bamberg [S. C.] 46 S. E. 1009.

94. Complaint held sufficient on demurrer. Demaris v. Barker, 33 Wash. 200, 74 P. 362.

95. Owing to pendency of suit involving portion of land. In re Newlove's Estate, 142 Cal. 377, 75 P. 1083.

96. None of interested parties had means. Income from estate would not be sufficient to pay interest. Held correct to order sale. In re Newlove's Estate, 142 Cal. 377, 75 P. 1083. An heir who contests the application of the administrator to mortgage property for the payment of debts, and thereafter assents to the approval of his final account and accepts the partition of the estate giving her the mortgaged property subject to the mortgage, is thereby estopped from questioning the regularity of the proceedings by which the mortgage was authorized in an action to foreclose it. Wisconsin Trust Co. v. Chapman [Wis.] 99 N. W. 341.

97. Where the principal legatee, having an interest prior to all the others and whose interest is greater than the part of the estate mortgaged by the executor to secure a loan to pay debts, joins in such mortgage, the rights of the other beneficiaries are not affected and it is immaterial as to them whether such mortgage was authorized or not. Taliaferro v. Thornton's Ex'rs [Ky.] 80 S. W. 1097.

98. The burden of paying debts will fall upon those who, according to their several rights, should discharge it. Grantees and incumbrancers of deceased held entitled to have assets marshaled for payment of his debts and those of his testatrix. New York Life Ins. Co. v. Brown [Colo.] 76 P. 799.

99. Rice v. Bamberg [S. C.] 46 S. E. 1009.

1. Rights of heirs could not be impaired by subsequent legislation giving power of sale for new and different purposes. In re Newlove's Estate, 142 Cal. 377, 75 P. 1083.

2. See 1 Curr. L. 1111.

3. The county court in Colorado has authority to entertain proceedings to sell realty for the payment of debts. 2 Mills' Ann. St. §§ 4751, 4758, 4760, 4761. Limitation in Const. art. 6, § 23, does not apply. New York Life Ins. Co. v. Brown [Colo.] 76 P. 799. Its authority extends to the adjudication of all questions involving the rights of those before the court, interested in such realty, except that no defendant may there contest decedent's title [2 Mills' Ann. St. § 4758]. Id. It may determine the rights of incumbrancers and grantees claiming under decedent, who are proper parties defendant. Equities between parties interested must be recognized and enforced. Id.

4. Contract creditors. Code Civ. Proc. 2750. Hence have interest in having surplus on foreclosure sale properly applied to

therefor is generally required.[5] It must substantially comply with the statutory requirements.[6]

All persons interested in the estate must be made parties,[7] guardians ad litem being appointed for minor heirs who have no general guardians.[8] One acquiring a lien from a devisee after the commencement of the proceedings is bound by the decree therein, though not a party thereto, he not having intervened or filed a claim, and being chargeable with knowledge of the proceedings.[9]

A hearing must be had[10] and the evidence must show the lands to be such as are subject to sale.[11]

(§ 7) *C. The order.*[12]—The order must properly describe the land to be sold.[13]

payment of debts. Powell v. Harrison, 88 App. Div. 228, 85 N. Y. S. 452.

5. In order to authorize sale of all realty, including widow's interest for payment of purchase money, under 2 Rev. St. Ind. 1852, c. 10, § 89, p. 269, must show what amount was due thereon, and that administrator had received insufficient assets to pay same. Fry v. Lawson, 32 Ind. App. 364, 69 N. E. 1038.

6. Petition held to sufficiently state value and condition of property under Cal. Code Civ. Proc. § 1537. In re Levy's Estate, 141 Cal. 639, 75 P. 317. Where sale was not for purpose of paying family allowance failure to state amount due thereon does not render petition defective on appeal (Code Civ. Proc. § 1537). Id. Failure to state that parties named were only heirs (Code Civ. Proc. § 1537) does not render order of sale, which so states, fatally defective. Id. Defects of form or uncertainty can only be taken advantage of by special demurrer in the trial court. Id.

7. The petition should contain the names of creditors, the heirs and devisees and all persons claiming under them or either of them. Code Civ. Proc. § 2752. A chose in action or indebtedness against a devisee, which has not yet ripened into a lien, does not entitle the creditor to be made a party. Richmond v. Freeman's Nat. Bank, 86 App. Div. 152, 83 N. Y. S. 632. In New York the surrogate may make inquiry as to matters not within knowledge of petitioners [Code Civ. Proc. § 2753], and must then issue a citation to necessary parties who have been omitted [section 2754]. Interested persons who have been omitted may intervene [section 2755]. Id. The widow is not a necessary party to an appeal from an order directing a sale for the payment of a note signed by decedent and his wife. Not necessary party to proceeding. In re Smith's Estate, 43 Or. 379, 73 P. 336. The interests of minor heirs not made parties are not affected by the sale. Rice v. Bamberg [S. C.] 46 S. E. 1009. Service of notice of petition to sell realty on minor heirs by leaving copy with widow who was real complainant held insufficient, the proceedings being fraudulent and collusive (1 Starr & C. Ann. St. Ill. 1896, p. 326, c. 3, par. 103), and the decree of sale held void as to them. Heppe v. Szezepanski, 209 Ill. 88, 70 N. E. 737. The New York statute requiring service of citation in matters before the surrogate at least eight days before the hearing (Code Civ. Proc. § 2520) does not apply to service by publication. Petition for sale of realty for payment of debts. In re Denton, 86 App. Div. 359, 83 N. Y. S. 778.

8. For intestate's minor children. Rice v. Bolton [Iowa] 100 N. W. 634. A failure to appoint and serve notice on a guardian ad litem for minor heirs in accordance with the provisions of Wash. Code 1881, § 1497, renders the sale void. Ball v. Clothier, 34 Wash. 299, 75 P. 1099. The curative act in regard to administrator's sales (2 Ballinger's Ann. Codes & St. § 6474) relates only to irregularities and does not go to the jurisdiction of the court, and consequently does not validate such sale. Id. Heirs not precluded from impeaching sale by joining in petition for discharge of administrator de bonis non and distribution of estate after reaching majority, where he was not required to and did not include such sale in his final account, and the account of the administrator making the sale was settled during their minority. Id. Were not estopped to contest by accepting a part of the estate on reaching majority, not knowing of their rights. Id.

9. Inquiry as to persons interested to be made by surrogate [Code Civ. Proc. §§ 2753, 2754] precedes issuance of citation and cannot avail one acquiring lien thereafter. Might have made himself a party [Id. § 2755]. Richmond v. Freeman's Nat. Bank, 86 App. Div. 152, 83 N. Y. S. 632.

10. In New York the surrogate may appoint a referee to take and report the evidence with his opinion thereon. Code Civ. Proc. § 2546. Referee has same power to pass upon admissibility of evidence as one appointed by supreme court to try an issue of fact. In re Walker's Estate, 43 Misc. 475, 89 N. Y. S. 459.

11. Evidence held sufficient to show prior lien of execution land sought to be sold. Wilson v. Brown, 134 N. C. 400, 46 S. E. 762. Finding that lands were liable for payment of debts cannot be construed as finding that they are liable for payment of purchase money. Fry v. Lawson, 32 Ind. App. 364, 69 N. E. 1038.

12. See 1 Curr. L. 1112.

For conclusiveness of order and liability to collateral attack, see post, § 15.

Appeals from orders, see post, § 16.

13. Though after a sale the county court was without jurisdiction to correct the orders, notice, and deeds, the original proceeding remains in full force and effect as to lands properly described. Sale would not be set aside at suit of heirs after many years on account of irregularities or cor-

Though a sale of a part only will provide sufficient funds, the court may order a sale of the whole tract where it cannot be otherwise partitioned, or where it appears to be for the best interests of the estate.[14] The principal duty of the court is to conserve the estate, and its orders and judgments to that end will not be disturbed unless they appear to have been mistakenly made or disclose an abuse of discretion unjustly injurious to a party in interest.[15]

(§ 7) *D. The sale.*[16]—Only lands described in the order may be sold.[17] Misdescription of the property in an advertisement of the sale[18] or misrepresentations in regard to the property, though innocently made, release the purchaser.[19] The sale is rendered invalid by the act of the purchaser in deterring others from bidding on the property.[20]

The purchaser ordinarily only acquires such title as the administrator was authorized to convey,[21] and the rule of caveat emptor applies.[22]

The sale must be reported to[23] and confirmed by the court before the representative can convey title.[24] All objections thereto are open to consideration, and it will be set aside if it is not in all respects fair and proper.[25] Inadequacy of price alone does not authorize the court to set aside the sale.[26] But in case of great inadequacy of price where the interests of infants are involved, the chancelor will consider any evidence showing irregularities in addition thereto.[27] Confirmation operates to cure previous irregularities.[28]

rupt practices, even though no statute of limitations has run, except where equity requires it. Mason v. Odum, 210 Ill. 471, 71 N. E. 386. In a suit to set aside an administrator's sale, the description of the lands in the order of sale will be presumed to have exemplified exactly what was intended in the absence of an allegation to the contrary. Rice v. Bolton [Iowa] 100 N. W. 634.

14. Under Code Civ. Proc. § 1542, prior to amendment of 1893, where part of testator's land was sold to pay debts, the entire tract should be sold when to the interest of the interested parties. In re Newlove's Estate, 142 Cal. 377, 75 P. 1083. Under Code Civ. Proc. § 1542, prior to the amendment of 1893, a finding and evidence that the residue of a decedent's real estate could not be partitioned after the sale of a part was sufficient to sustain an order to sell the whole, without aid from a finding that a sale of a part would injure the residue. Id.

15. Granting application for resale on higher price being offered. In re Parker's Estate [Neb.] 101 N. W. 233.

16. See 1 Curr. L. 1113. As to effect of purchase by representative at his own sale, see post, § 9.

17. A right of action on behalf of intestate's heirs to recover the reversionary interest in lands assigned to the widow as dower, which had been wrongfully sold by the administratrix does not accrue until the termination of the widow's life estate. Action commenced within two years thereafter not barred. Ousler v. Robinson [Ark.] 80 S. W. 227. Description of property sold by administrator under order of court held sufficient to pass title. Boslet v. Thomas [Tex. Civ. App.] 80 S. W. 115.

18. Statement that ground rent is on "Calverton stockyards" when it is not. Fact that lot is correctly described by metes and bounds is immaterial where sale takes place at a distance from the premises. Doyle v. Whitridge, 97 Md. 711, 55 A. 459.

19. That certain responsible party was tenant, where leasehold had been sold without landlord's knowledge. Doyle v. Whitridge, 97 Md. 711, 55 A. 459.

20. Evidence insufficient to sustain allegation that purchaser deterred persons from bidding at sale. Sicard v. Schwab, 112 La. 475, 36 So. 500.

21. The receipt, by children of decedent's first wife, of money derived from an unwarranted sale of realty does not estop them from claiming one-third of such land on the death of the second wife (they being entitled to her share under 1 Rev. St. 1852, c. 27, § 24, p. 251), they having no estate when the sale was made and not being in a position to object thereto. Fry v. Lawson, 32 Ind. App. 364, 69 N. E. 1038. Takes only such interest as deceased had. Sicard v. Schwab, 112 La. 475, 36 So. 500.

22. Towner v. Rodegeb, 33 Wash. 153, 74 P. 50.

23. An administrator's report on the sale of realty reciting that he had received cash for the same was not rendered fraudulent by the fact that he only received a receipt from the widow acknowledging the payment to her of the amount of her award. Reinhardt v. Scaman, 208 Ill. 448, 69 N. E. 847.

24. For confirmation of sales made under authority in will, see ante, § 5E. Condition precedent to the right of the executor or administrator to convey title. Conveyance otherwise passes no title. Joyner v. Futrell [N. C.] 48 S. E. 649.

25. Doyle v. Whitridge, 97 Md. 711, 55 A. 459.

26. Auxier v. Clarke [Ky.] 82 S. W. 605.

27. Personalty disregarded in fixing amount to be sold. Auxier v. Clarke [Ky.] 82 S. W. 605.

28. Clark v. Rossier [Idaho] 78 P. 358.

Statutes generally limit the time within which sales may be attacked for informalities.[29] They bar only irregularities and illegalities which do not reach matters of substance and do not affect the substantial rights of interested parties or defeat the object of the sale.[30] A sale for less than the appraised value or the required proportion thereof will be regarded as a mere informality, where neither fraud nor injury is shown, and it does not appear that the price obtained was less than could have been reasonably expected at a forced sale.[31] The same is true of a failure to appraise.[32] But where the price is less than the actual value under all the circumstances, the opposite is true.[33]

The sale may be valid despite informalities in the approval of the statutory bond.[34] Where many years elapse after the sale and possession taken under the same, there is a presumption that the court had jurisdiction of the person of defendant and that it acted within its jurisdiction and proceeded according to law.[35]

Sales are not generally open to collateral attack except for want of jurisdiction,[36] but in an action for partition by the purchaser of an undivided interest in realty at a sale to pay decedent's debts, defendants may inquire into the validity of the sale.[37] Where an administrator's sale is set aside for want of jurisdiction, purchasers in good faith will be allowed the purchase price, and will have a lien on the land for taxes paid by them,[38] but will not be allowed for permanent improvements.[39]

§ 8. *Subjection of property in hands of heirs or beneficiaries to payment of debts.*[40]—The title acquired by heirs, devisees, and legatees is subject to the payment of decedent's debts,[41] and they will be held liable to creditors to the extent

29. Under La. Civ. Code, art. 3543, five years. Thibodeaux v. Thibodeaux, 112 La. 906, 36 So. 800.

30. Sale of land upon first offering. Thibodeaux v. Thibodeaux, 112 La. 906, 36 So. 800.

31. Thibodeaux v. Thibodeaux, 112 La. 906, 36 So. 800.

32. Required by La. Civ. Code arts. 1101, 1106. Thibodeaux v. Thibodeaux, 112 La. 906, 36 So. 800.

33. Sale for less than one-tenth of actual value. Thibodeaux v. Thibodeaux, 112 La. 906, 36 So. 800. Amount received on sale of land for payment of debts held not so inadequate as to furnish ground for avoiding the sale. Reinhardt v. Scaman, 208 Ill. 448, 69 N. E. 847. Right to attack sale for informalities held barred by statute of limitations. Sicard v. Schwab, 112 La. 475, 36 So. 500.

34. Sale held not invalidated by the fact that the sale bond given pursuant to Neb. Comp. St. 1903, c. 23, § 75, was approved by the clerk of the district court instead of by the judge. Melcher v. Schluter [Neb.] 98 N. W. 1082.

35. Mason v. Odum, 210 Ill. 471, 71 N. E. 386. Heirs held barred by delay of 32 years from maintaining suit to set aside sale for payment of debts. Griffin v. Caldwell [Ark.] 81 S. W. 611.

36. See post, § 15. The fact that no orders were made by the court in regard to the administration of an estate will not avail, on collateral attack, to defeat a subsequent sale of realty under order of court to pay expenses of administration, it not appearing that the administration had been closed. Not affirmatively shown how much time had elapsed or that all orders were before the court. Boslet v. Thomas [Tex. Civ. App.] 80 S. W. 115. Possession under an administrator's deed is full protection to an action of ejectment brought by an heir in which the validity of the sale by the administrator is contested, in the absence of any of the irregularities specified in Mich. Comp. Laws, § 9129. Upton v. Gerber [Mich.] 98 N. W. 854. Heirs can only attack private sale in direct proceeding after accounting and discharge of administrator. Lyles v. Knoll, 112 La. 169, 36 So. 311. After the final account and the entry of a judgment homologating the administrator's accounts and discharging him, the heirs can only attack a private sale in a direct proceeding. Id.

37. Evidence admissible to show value of property at date of sale, and failure of plaintiff to comply with terms of sale and to take possession. Thibodeaux v. Thibodeaux, 112 La. 906, 36 So. 800.

38. Ball v. Clothier, 34 Wash. 299, 75 P. 1099.

39. Value of improvements only allowed by way of set-off against damages [Ballinger's Ann. Codes & St. § 5511]. Ball v. Clothier, 34 Wash. 299, 75 P. 1099.

40. See 1 Curr. L. 1103.

41. Creditors of decedent have preferred claim over those of devisee. Richmond v. Freeman's Nat. Bank, 86 App. Div. 152, 83 N. Y. S. 632. Creditors may recover money deposited as bail by party having use of whole estate for life, where county had no right to receive it. Sutherland v. St. Lawrence Co., 42 Misc. 38, 85 N. Y. S. 696. Heirs take subject to debts. New York Life Ins. Co. v. Brown [Colo.] 76 P. 799. Including

of the property received by them.[42] Realty in their hands may be subjected by creditors to the payment of their claims,[43] after the personalty has been exhausted.[44] A voluntary conveyance by the devisee is no bar to such right.[45]

Ordinarily all should be made parties,[46] but each is liable up to the amount

land which he and his wife lived on but in regard to which they filed no declaration of homestead. Declaration of homestead filed by widow after husband's death a nullity [Bailinger's Ann. Codes & St. § 5246]. Lloyd v. Lloyd, 34 Wash. 84, 74 P. 1061. Estate descending from wife to husband through child is subject to wife's debts in hands of purchaser from husband. Hammers v. Sanders [Mo. App.] 80 S. W. 16. Contract by his heirs to convey by "a good deed free from all incumbrance" imposes on them duty to exonerate land from payment of claims allowed against decedent's estate. Forthman v. Deters, 206 Ill. 159, 69 N. E. 97; Dearing v. Moran, 25 Ky. L. R. 1545, 78 S. W. 217. The interest of the widow as heir of her husband, where there are no issue, in so far as it exceeds her dower interest, is subject to all claims against the estate, including decedent's debts, the expenses of administration, and the widow's allowance. Interest given under Iowa Code, § 3379, subject to expenses of sale of realty. Dower interest is not. Wild v. Toms, 123 Iowa, 747, 99 N. W. 700.

42. Claimant held not guilty of inexcusable delay in enforcing his claim. Smith v. Moore [Va.] 46 S. E. 326. Liable to non-appearing creditor under Ky. Civ. Code Prac. § 434. Hill v. Mayes, 25 Ky. L. R. 2033, 79 S. W. 276. A husband taking under the will cannot claim a homestead in land devised to him by his wife as against her creditors. Dearing v. Moran, 25 Ky. L. R. 1545, 78 S. W. 217. An administrator who, after distribution, is compelled to pay a debt against the estate of which he had no notice, may, in the absence of fraud, sue in equity to compel the legatees or distributees to refund the sum so paid with the costs and expenses incurred by him in contesting the claim. Notwithstanding fact that he has taken no refunding bond. Same rule applies to ancillary administrator who has turned property over to principal administrator, who has made complete or partial distribution. McClung v. Sieg, 54 W. Va. 467, 46 S. E. 210. A widow and executrix is liable for the debts of her husband to the extent of his separate property coming into her hands. Flannery v. Chidgey [Tex. Civ. App.] 77 S. W. 1034.

43. Kentucky [St. 1899, § 2088]. Shillito Co. v. Keith, 25 Ky. L. R. 770, 76 S. W. 371. Under this statute a suit against the administrator and heirs of a decedent on a contract made by him cannot be dismissed though no demand was made on the administrator because it was claimed that his appointment was unauthorized. It is not material that it should appear that the representative has no assets. Proceeds of realty held by him regarded as distributed. Jones v. Comer, 25 Ky. L. R. 773, 76 S. W. 392. The heir has the same right to interpose the plea of limitations as decedent would have had (claim against deceased surety on guardian's bond). Bybee's Ex'r v. Poynter, 25 Ky. L. R. 1251, 77 S. W. 698. A creditor who sued to set aside a fraudulent conveyance may amend after the grantor's death to meet the new facts resulting from a devise from grantor to grantee and may seek judgment against the grantee as devisee. Shillito Co. v. Keith, 25 Ky. L. R. 770, 76 S. W. 371.

In New York heirs of a decedent are respectively liable for his debts to the extent of any interest in realty descending to them from him [Code Civ. Proc. § 1843]. Should be made parties to suit to foreclose mortgage given by decedent in order to render them liable for deficiency judgment [Id. § 1627]. Rowley v. Nellis, 84 N. Y. S. 841. Where only administrator was joined and mortgagee led heirs to believe that no deficiency judgment would be entered against them, and the property was sold for much less than its value, the mortgagee's executrix could not, without leave of court, maintain a new action to enforce deficiency judgment against heirs, especially where mortgagor left no personalty and had other debts and heirs had in good faith conveyed much of the property that had descended to them. Id.

In South Carolina the right of action against the heirs ordinarily accrues when a return of nulla bona has been made on an execution against the executor or administrator (Williams v. Weeks [S. C.] 48 S. E. 619), but such return is not necessary where the record in a suit in which the land was partitioned among them shows that he had no assets (Id.). The lands of a deceased surety on an official bond, in possession of his heirs after partition, may be sold to satisfy his liability thereon where there are no assets in the hands of his administrator. Id.

In Arkansas equity will decree satisfaction of the liability of a deceased surety on an administrator's bond out of his realty, in possession of his heirs after his estate has been finally closed. Cause of action accrued after discharge of administrator. Hall v. Cole, 71 Ark. 601, 76 S. W. 1076.

In Virginia where the estate has been distributed and there are no assets in the hands of the personal representatives out of which a debt against it may be satisfied, it is proper to decree against each of distributees or devisees for his proportion thereof. Smith v. Moore [Va.] 46 S. E. 326.

44. McClung v. Sieg, 54 W. Va. 467, 46 S. E. 210.

45. Dearing v. Moran, 25 Ky. L. R. 1545, 78 S. W. 217.

In Kentucky land in the hands of bona fide purchasers for value from devisees is not liable unless suit is instituted within six months after decedent's death. Ky. St. 1899, § 2087. Mere partition of land by devisees does not render them bona fide purchasers. Statute does not apply where land devised to pay debts and distribute balance. Hurst v. Davidson, 25 Ky. L. R. 555, 76 S. W. 37.

46. Must contribute ratably among themselves. McClung v. Sieg, 54 W. Va. 467, 46 S. E. 210. Under the laws of Nebraska a

received by him from the estate.[47] Where some of them are nonresidents, only those within the jurisdiction of the court need be joined.[48] If all are nonresidents, the property of any of them within the state may be seized under attachment.[49]

The liability does not extend to one taking as creditor[50] or purchaser,[51] or as a legatee for value.[52]

A general creditor of deceased has no right to intervene in an action to partition land among his heirs, and claim the land, where he has no lien thereon.[53]

§ 9. *Rights and liabilities between representative and estate. A. Management of, and dealings with, estate.*[54]—The estate is not chargeable with the illegal acts of the representative.[55]

Prima facie the executor or administrator is chargeable with and must account for all the assets of the estate,[56] including rents and other funds collected by him after filing his final account.[57] He is responsible for losses resulting from his want of reasonable dilligence,[58] or his unauthorized acts or omissions;[59] as

nonresident who claims a life estate in lands located in that state by virtue of a will which has never been probated in such state is not a necessary party. Coulson v. Saltsman [Neb.] 98 N. W. 1055.

47. Right not limited to specific property received but any property may be subjected up to value of that received. McClung v. Sieg, 54 W. Va. 467, 46 S. E. 210.

48. McClung v. Sieg, 54 W. Va. 467, 46 S. E. 210.

49. Ancillary administrator not compelled to sue them in foreign state. McClung v. Sieg, 54 W. Va. 467, 46 S. E. 210.

50. Ky. Civ. Code Prac. § 434, does not apply to children who take as creditors of father's estate and not as heirs. Hill v. Mayes, 25 Ky. L. R. 2033, 79 S. W. 276. Evidence sufficient to support finding that legatee did not elect to take as creditor instead of under the will. In re Thayer's Estate, 142 Cal. 453, 76 P. 41.

51. Purchaser of land on foreclosure of mortgage given by testator, for sum not exceeding the mortgage debt. Byrne v. Condon [N. J. Law] 53 A. 385.

52. Widow who accepts bequest in lieu of dower cannot be called on by devisee of mortgaged property to contribute to payment of mortgage, particularly when she would thereby lose both her dower and all she received under the will. Wiggins v. Wiggins [N. J. Eq.] 56 A. 148.

53. Rice v. Donald, 97 Md. 396, 55 A. 620.

54. See 1 Curr. L. 1114.

55. Costs of suit to recover realty which he wrongfully takes possession of. Rooney v. Bodkin, 93 App. Div. 431, 87 N. Y. S. 800.

56. Van Winkle v. Blackford, 54 W. Va. 621, 46 S. E. 589. An administrator is liable to account, as such, for funds which it was his duty to preserve for the payment of annuities under the will. Ellyson v. Lord [Iowa] 99 N. W. 582. Final account of administrator held properly surcharged with amount of note and mortgage belonging to deceased and transferred to her surviving husband. In re Ryan's Estate [Minn.] 100 N. W. 380. Where a husband and wife made a loan of $600, of which he advanced $500 and she the balance, and she received a payment of $200 thereon during her lifetime, he, as administrator of her estate, should not be charged with further payments made to him after her death. Jones v. Probate Court [R. I.] 55 A. 881. Nor should he be charged with money found in the wife's shoe after her death, when there was evidence to support a finding by the jury that it belonged to him. Id. Evidence held to show that administrator received certain sums belonging to the estate for which he failed to account. Thomas v. Hawpe [Tex. Civ. App.] 80 S. W. 129. Burden on him to account for failure to collect notes. Walworth's Estate v. Bartholomew's Estate [Vt.] 56 A. 101. The presumption of negligence arising from the fact that three notes in the hands of the administrator were barred by the statute of limitations is rebutted by proof that the mortgage by which they and other notes were secured was foreclosed, and the property, which was worth the amount of all the notes, was taken possession of and disposed of for the benefit of the estate, though such notes were not included in the foreclosure. Id. Accountable for assets. Brown's Ex'r v. Dunn's Estate, 75 Vt. 264, 55 A. 364.

57. Succession of Conery, 111 La. 113, 35 So. 479. Executors who, after accounting but before a decree settling their accounts is entered, sell property for double its inventoried value and pay over to themselves as trustees only the inventoried value as shown by the decree, must account for the balance as executors. In re Mitchell, 85 N. Y. S. 288.

58. Executor held wanting in diligence in management of estate and his account surcharged with losses resulting therefrom. Cheever v. Ellis [Mich.] 96 N. W. 1067. Not relieved from liability by employment of agent to manage estate though testator imposed great confidence in him. Id. Account will be surcharged with loss resulting from defect in title to realty taken in payment of debt, particularly where he could have collected claim in cash. In re Northrup's Will, 92 App. Div. 5, 87 N. Y. S. 318.

59. Calnan v. Savidge [Kan.] 75 P. 1010. Will be charged with value of timber which will gave him no authority to cut. Finley's Ex'rs v. Pearson, 25 Ky. L. R. 766, 76 S. W. 374.

for the value of assets which he negligently fails to collect,[60] and for failure to collect rents from persons occupying premises belonging to the estate.[61] He is not entitled to credit for the amount paid on illegal claims,[62] claims not properly proven,[63] or claims barred by the statute,[64] or for payments of income made to persons not entitled thereto.[65] The fact that valid claims against the estate were not filed as required by law is not in itself sufficient ground for refusing him credit for sums paid thereon.[66] He is chargeable with the whole amount of losses resulting from unwarranted investments of the funds of the estate,[67] but not with losses resulting from investments in regard to which the will gives him a discretionary power, in the absence of a showing of bad faith, dishonesty, or culpable negligence.[68] He may also be charged with costs incurred by reason of his failure to perform a duty required of him.[69]

The representative is not chargeable, in his account as such, with rents of realty which he holds as trustee for the beneficiaries under the will.[70] An actual appropriation or transfer to a trustee by an executor of funds which are to be a part of the trust fund, with a rendering of a probate account containing a statement of such fact, and the final allowance of that account in court, works a discharge of the executor's liability as such,[71] but the fact that executors transfer securities in which they have invested funds of the estate to a testamentary trustee,

60. Executors held guilty of gross negligence in failing to collect note given by wife of one of them. Hallway v. Eckler [Mo. App.] 80 S. W. 46.

61. Grandchildren of the de cujus who are not called to the inheritance of their grandfather's succession, their father being alive. Succession of Conery, 111 La. 113, 35 So. 479. Evidence insufficient to show negligence of executors in failing to rent property so as to render them liable for reasonable rentals. Owens v. Owens' Estate [Miss.] 37 So. 149. Liable for loss resulting from negligence in failing to collect notes which could have been collected by exercise of reasonable diligence. Brown's Ex'r v. Dunn's Estate, 75 Vt. 264, 55 A. 364.

62. See ante, § 6A.

63. See ante, § 6B. An administrator of his wife's estate should not be credited with a claim alleged to be due him under an agreement between them, when all testimony in regard to such agreement consisted of communications between them, which were inadmissible in evidence. Jones v. Probate Court of East Greenwich [R. I.] 55 A. 881.

64. See ante, § 6A.

65. For payments made to a legatee after notice that he has assigned income to secure advances made to him, where it is insufficient to satisfy the debt so secured. Stewart v. Fallon [N. J. Eq.] 58 A. 96.

66. Notes which were conceded to be valid claims against estate. In re Pennock's Estate, 122 Iowa, 622, 98 N. W. 480.

67. Expenditure of $80,000, in advancing money to purchasers of lots costing $11,000, for purpose of enabling them to build houses thereon, the advances being secured by mortgages, resulting in loss of over half such sum, held unwarranted. Brigham v. Morgan, 185 Mass. 27, 69 N. E. 418. Entitled to credit for the value of the property actually turned over by him to the trustee. Id. Investment in land company on promise that the company would issue bond for the money, without taking a mortgage or other security therefor, held unwarranted. Id. Evidence that they were such investments as men of prudence and intelligence were making at the time, inadmissible. Id. Investments not justified by evidence that testator had told one executor that such investments were to be made and that the other executor understood the scheme, in view of the provisions of the will. Id. Executors held guilty of maladministration and bad faith in making false reports as to investments. Id. Chargeable only with the loss actually sustained. In re Rowe, 42 Misc. 172, 86 N. Y. S. 253. An executor and testamentary trustee is not liable for more than the actual interest received for a loan of the trust funds to a corporation of which he was a stockholder, it appearing that he acted honestly and in good faith and that the transaction was beneficial to the estate. Id. The act of an executor in collecting bonds and mortgages and reinvesting the proceeds when the will gives him no authority to do so but bequeathes them to testamentary trustees, amounts in law to a conversion thereof, and renders him liable to account for the value of the original assets to the trustees in cash. Where he has acted in good faith and has taken new securities in name of testatrix, the decree should require trustees to vest title thereto in him. In re Ryer, 94 App. Div. 449, 88 N. Y. S. 52.

68. In re Hunt's Estate, 41 Misc. 72, 83 N. Y. S. 652.

69. Trial court may adjudge costs against administrator in action by heirs to compel him to account, but not costs which may accrue in future in appellate courts in anticipation of appeal. Order assessing costs against heirs held final [Batt's Ann. Civ. St. art. 2251]. Thomas v. Hawpe [Tex. Civ. App.] 80 S. W. 129.

70. Rents collected before sale of land directed by will to be sold and proceeds divided. Jones v. Probate Court [R. I.] 55 A. 881.

71. Accounts reopened held not to have such effect. Brigham v. Morgan, 185 Mass. 27, 69 N. E. 418.

who agreed when the investment was made to receive them at the value of the investment and gave his receipt at such value, does not relieve them from liability for losses resulting from such investment, it appearing that both they and he acted in bad faith.[72] This rule applies where the same person acts in both capacities.[73]

He is not chargeable with losses which he could not have prevented by the exercise of due diligence and vigilance,[74] as those resulting from the depreciation of securities or other assets,[75] nor with the value of uncollectible assets,[76] nor with expenditures which the will directs him to make.[77] Where the same persons are both executors and trustees it is sufficient for them, in an action for the settlement of the estate, to show that they applied the estate as directed by the will, though some of their acts in so doing may not have been executorial.[78] The representative is entitled to credit for the amount expended by him in payment of a mortgage under order of court, and in accordance with the terms of the will.[79] He is not liable for money expended by him in good faith in the purchase of necessaries for the support of decedent's helpless minor children, where they have no guardian and the expenditures are such as a guardian would have made.[80] An executor is not entitled to credit for sums paid by him to defray the expenses of his wife, who is residuary legatee, incurred on a trip,[81] nor for taxes paid on her land.[82] Taxes should ordinarily be allowed in the probate court.[83]

Personal dealings by an executor or administrator with the property of the estate are prohibited.[84] The rule applies to a surviving partner who is also administrator of the estate of a deceased partner,[85] but does not forbid him from dealing individually with an ancillary administrator appointed in another state.[86] An executor or administrator cannot purchase property at his own sale either personally or through third parties.[87] Such sale is voidable at the option of the

72. Brigham v. Morgan, 185 Mass. 27, 69 N. E. 418. Where the executor is guilty of maladministration by investing the funds of the estate in improper securities, and such securities are improperly received from him by the testamentary trustee and unwarrantably placed in the trust fund both the executor and the trustee are answerable for losses resulting therefrom. Trustee received mortgages not worth amount invested in them, in pursuance of understanding with executors, and inventoried them at face value and carried them through several accounts at such value. Id.

73. Brigham v. Morgan, 185 Mass. 27, 69 N. E. 418.

74. Van Winkle v. Blackford, 54 W. Va. 621, 46 S. E. 589.

75. Due to panic. Van Winkle v. Blackford, 54 W. Va. 621, 46 S. E. 589. Should not be charged with the difference between the face value of a mortgage, at which it was inventoried, and the amount actually realized therefrom. Horton v. Howell [N. J. Eq.] 56 A. 702.

76. Must make reasonable showing that they are uncollectible. Hallway v. Eckler [Mo. App.] 80 S. W. 46.

77. Where the will expressed testator's desire that a comfortable dwelling house be provided for his family and authorized the executors to sell a part of the realty for that and other purposes, and they did not sell it but used a part of the personalty, which was to go to the same persons as the realty, instead, testator's children could not require them to repay the amount so expended. Finley's Ex'rs v. Pearson, 25 Ky. L. R. 766, 76 S. W. 374. Where executors were directed to place the proceeds of testator's personalty at interest and use the proceeds for the education of his minor children, they should be credited on settlement of the estate with bills paid for the tuition of the children amounting to less than the interest charged to them on the personalty. Id.

78. Finley's Ex'rs v. Pearson, 25 Ky. L. R. 766, 76 S. W. 374.

79. Mortgagee did not prove claim. Will directed that all debts were to be paid from personalty. In re Patrick's Estate [Neb.] 100 N. W. 939.

80. Calnan v. Savidge [Kan.] 75 P. 1010.

81, 82. Bean v. Bean, 135 N. C. 92, 47 S. E. 232.

83. Minn. Laws 1895, c. 97, p. 221. Appeal of McAlpine [Minn.] 100 N. W. 233.

84. Kelly v. Pratt, 41 Misc. 31, 83 N. Y. S. 636. The estate of an administrator, who has transferred to himself stock belonging to the estate of his decedent, should be charged with dividends received on it after his death as of the date of their receipt, so as to carry interest. Walworth's Estate v. Bartholomew's Estate [Vt.] 56 A. 101.

85, 86. Egan v. Wirth [R. I.] 58 A. 987.

87. Cannot purchase individually what he sells in his official capacity, or purchase in such capacity what he sells individually. Littell v. Hackley [C. C. A.] 126 F. 309. An administrator who permits lands of the estate to be sold for taxes, though he has sufficient personalty in his hands to pay them,

heir,[88] who may either ratify it[89] or, within a reasonable time,[90] bring an equitable action to set it aside.[91] The fact that the representative acts honestly and without actual fraud is immaterial.[92] An executor may purchase from a legatee a specific legacy of stock given her by the will of his testator.[93] He is guilty of no wrong in inducing a company to purchase a plant owned by a corporation in which the estate owned stock, though he personally took stock in the purchasing corporation, which he afterwards sold at a reasonable profit, the transaction being in good faith and for the best interests of the estate;[94] nor in purchasing a note due the estate when it was in need of money and the collateral securing it was of less value than the amount due thereon;[95] nor, with others, in purchasing stock in a corporation in which the estate was interested, and in giving a bond in which the corporation was principal and they were sureties, conditioned to save the seller harmless under the laws of the corporation's domicile.[96]

Annual accountings by the representative do not preclude inquiry into losses resulting from his negligence,[97] nor can the probate court relieve him from liability for funds of the estate by ex parte orders directing their disposition.[98]

The persons solely interested in the estate may release the representative from a liability to account or from any liability owed solely to themselves,[99] and may

and takes from the city in his own name an assignment of the tax lease, is guilty of an actual fraud. Under Code Civ. Proc. § 382, subd. 5, descendants of nonresident aliens entitled to inherit such lands have six years from discovery of fraud in which to bring action for recovery of land. Kelly v. Pratt, 41 Misc. 31, 83 N. Y. S. 636. An executor who forecloses a mortgage belonging to the estate and bids in the property for the amount of the debt takes title in his representative, and not in his individual, capacity. Evidence, independent of above rule, held to show that he actually purchased as executor. Aulbach's Ex'r v. Read, 25 Ky. L. R. 1130, 77 S. W. 204. Administrator furnished money to son who purchased property at less than its value, and then transferred it to his mother, who later transferred it to administrator. Miller v. Rich, 204 Ill. 444, 68 N. E. 488. Deed does not give color of title in good faith. Id. Will be regarded as a trustee, and as such is entitled to have an account stated in which he should be charged with the rents and profits received from the property, and credited with moneys paid out in discharge of valid debts against the estate and for taxes, and such improvements as have substantially benefited the estate. Id.

88. Griffin v. Stephens, 119 Ga. 138, 46 S. E. 66. Where the arrangements for the purchase of a part of the estate by the executor individually are made by the beneficiaries, and they voluntarily execute conveyances therefor, the sale is at most voidable. Littell v. Hackley [C. C. A.] 126 F. 309.

89. Evidence held to show ratification by heir who received and retained her share of purchase price. Heir's husband could not testify as to whether she intended to ratify. Carey v. Moore, 119 Ga. 92, 45 S. E. 998. Where proceeds exceed reasonable value of the land, sale may be ratified by acquiescence. Rights of widow and heirs barred by statute of limitations. Mason v. Odum, 210 Ill. 471, 71 N. E. 386.

90. Should ordinarily be brought within seven years of date of sale unless heir under disability, and then within seven years from removal of disability. Election held not made within reasonable time and petition properly dismissed on demurrer. Griffin v. Stephens, 119 Ga. 418, 46 S. E. 66. If attacked within a reasonable time, it will be set aside upon proof that the executor has fraudulently used his position of trust and confidence to take undue advantage of the beneficiaries by securing the property at less than it was fairly worth. Sale of property to executor in individual capacity with consent of sole legatee, and which was not attacked for twelve years held fair and binding. Littell v. Hackley [C. C. A.] 126 F. 309.

91, 92. Miller v. Rich, 204 Ill. 444, 68 N. E. 488.

93. Evidence held not to show fraud. O'Neile v. Ternes, 32 Wash. 538, 73 P. 692.

94, 95, 96. Houghteling v. Stockbridge [Mich.] 99 N. W. 759.

97. Cheever v. Ellis [Mich.] 96 N. W. 1067.

98. Would show his good faith but are not even evidence of validity or legality of payment. In re Bell's Estate, 142 Cal. 97, 75 P. 679.

99. Tillinghast v. Brown University [R. I.] 55 A. 758. An agreement whereby residuary legatees released the surviving executors from all liability to the estate except whatever claim there might be, if any, against them on account of any loss that might come on a claim against the estate of their deceased co-executor, who was largely indebted to the estate at his death, held to have discharged the surviving executors from liability for the deceased executor's defalcation, except for the balance remaining unpaid on final settlement of his estate, and hence no action could be maintained against them to recover such sum until such settlement. Id. The fact that the final account of an executor, which was accompanied by an affidavit signed by the sole legatee showing a complete settlement of the estate and reciting a discharge of the executor by the legatee, and was indorsed with a release by the legatee, was not filed, is immaterial.

contract with him in regard to his compensation and the manner in which the property shall be managed;[1] but an agreement by an executor with a beneficiary to resign for a consideration is contrary to public policy and void.[2]

As a general rule executors and administrators are amenable for their executorial acts only to the proper tribunals of the state in which they are appointed,[3] but an executor who has been appointed, qualified, and received assets in a foreign state which he brings into another state, may be sued and compelled to account in the latter state, though he has never qualified or received assets there.[4] The nature and extent of his rights in such case must be determined by the laws of the state in which he received his appointment.[5]

Prescription cannot run in favor of the executor against the estate he represents.[6]

Executors de son tort.—At common law an executor de son tort was liable to the extent of the assets which he had received,[7] and could be sued by the representative, creditors, legatees, or, if all the debts had been paid, by a distributee.[8] By statute in some states one who officiously intermeddles with the property of a decedent is responsible only to his legal representative for the value of all property taken or removed and for all injury caused by his interference therewith.[9]

He is subject to all the liabilities of an ordinary representative without being entitled to any of his privileges,[10] and is bound to exercise the same diligence in the collection of assets as if he were the regularly appointed administrator,[11] and to hold and account for the estate in the proportions fixed by statute.[12] The fact that he acts honestly and in good faith in attempting to distribute it in a different manner is immaterial.[13] He may prove, in mitigation of damages, payments made by him in the rightful course of administration.[14] By statute in some

Littell v. Hackley [C. C. A.] 126 F. 309. Evidence held to show that an executor fully accounted for all the property of decedent which came into his hands. Id. The assent by beneficiaries to the allowance of the accounts of an executor does not relieve him from liability for loss resulting from unwarranted investments stated therein, when such assent is due to fraud and false representations. Representations that money had been received for sale of land and that interest on mortgages given to secure purchase money and advancements had been paid. Willfully untrue as to one executor and fraud in law as to other, he having stated in his report that facts were true of his own knowledge when he did not know that they were true. Brigham v. Morgan, 185 Mass. 27, 69 N. E. 418. Where an executor or administrator acts in good faith and with ordinary care and prudence for the benefit of the estate, beneficiaries, who consent thereto, cannot charge him with losses resulting from a deviation from the strict line of his duty. Is accountable for losses resulting to a beneficiary who did not consent to continuing speculative accounts. Matthews v. Sheehan, 76 Conn. 654, 57 A. 694.

1. Where the husband is the sole heir of his wife and there are no debts, a contract between him and the plaintiff that the latter should be appointed and act as administrator for a fixed compensation, but that his duties should be formal only and that he should not interfere with the management of the property, is valid. In re Field's Estate, 33 Wash. 63, 73 P. 768.

2. Notes given as consideration unenforceable. Currier v. Clark [Colo. App.] 75 P. 927.

3. Falke v. Terry [Colo.] 75 P. 425.

4. It must be shown that he has brought assets from such foreign state. Evidence insufficient. Falke v. Terry [Colo.] 75 P. 425.

5. Court can direct that assets be properly safeguarded or disposed of as the will provides or the laws of the foreign state require. Cannot give a money judgment to legatee for legacy to which he is not entitled under the will, or adjudicate title to realty in foreign state. Falke v. Terry [Colo.] 75 P. 425.

6. Limitation of one year does not apply to penalty for failure to deposit funds. In re Dimmick's Estate, 111 La. 655, 35 So. 801.

7. Slate v. Henkle [Or.] 78 P. 325. For definition of executor de son tort, see ante, § 1.

8. Slate v. Henkle [Or.] 78 P. 325.

9. B. & C. Comp. § 385. Slate v. Henkle [Or.] 78 P. 325.

10. One appointed under void letters. Slate v. Henkle [Or.] 78 P. 325.

11. Liable for negligence in collection of note. Rohn v. Rohn, 204 Ill. 184, 68 N. E. 369.

12. Father taking possession of son's estate under previous arrangement with him for purpose of avoiding administration. Rohn v. Rohn, 204 Ill. 184, 68 N. E. 369.

13. Rohn v. Rohn, 204 Ill. 184, 68 N. E. 369.

14. Administrator appointed under void order who is interested in estate may set off

states he is liable to the creditors, heirs, or legatees for double the value of the property taken or converted by him, where the estate has no legal representative.[15] He may be sued specifically as executor de son tort and judgment may be entered against him as such,[16] and it is not necessary to allege that there are no debts and no necessity for administration.[17] In some states an executor de son tort cannot be called to account in the probate court.[18]

(§ 9) *B. Representative as creditor or debtor.*[19]—The individual claim of an executor or administrator against the estate must be presented for allowance[20] and established by legal evidence in the same manner as those of other claimants.[21] He will be held to strict proof[22] and his claim will be carefully scrutinized.[23] The same is true in regard to the claim of his attorney.[24]

An executor is properly chargeable with any just debt which the testator had against him, and is liable for the same as so much money in his hands at the time the same becomes due.[25] It has been held, however, that this rule does not apply if he was at all times, from and after his qualification, insolvent.[26]

(§ 9) *C. Interest on property or funds.*[27]—An executor or administrator who is guilty of bad faith in making investments,[28] or is guilty of negligence in

such payments in action against him by rightful administrator, and hence not entitled to equitable relief. Slate v. Henkle [Or.] 78 P. 325.

15. Ga. Civ. Code 1895, § 3310. Allen v. Hurst [Ga.] 48 S. E. 341.

16. Allen v. Hurst [Ga.] 48 S. E. 341. Under the old practice, he was charged generally as executor. Id.

17. Must allege that there is no legal representative. Allen v. Hurst [Ga.] 48 S. E. 341.

18. Under the New Hampshire statutes no person can be considered as having the trust of a decedent's estate until he has given bond [Pub. St. 1901, c. 188, § 12]. Davis v. Davis, 72 N. H. 326, 56 A. 747. Hence the probate court has no jurisdiction to consider or allow any administration accounts presented by one to whom letters have issued, but who has not given bond, nor to require him to account for property of decedent lost through his negligence. Is liable for double the value of the property intermeddled with [Pub. St. 1901, c. 188, § 16]. Id.

19. See 1 Curr. L. 1116.

20. County court has no jurisdiction to allow it otherwise, and hence its order doing so is subject to a writ of review. Petition for writ sufficient [B. & C. Comp. § 1167]. Farrow v. Nevin, 44 Or. 496, 75 P. 711.

21. Evidence insufficient to support claim for services. In re Furniss, 86 App. Div. 96, 83 N. Y. S. 530. Claim on firm notes insufficiently proved. In re Gill, 42 Misc. 457, 87 N. Y. S. 252. The inventory, account current and orders for the distribution of assets, when accompanied by the petitions upon which they are based, are admissible in evidence in an action by the administrator to recover on such claim. The fact that he made distribution without objection and thereby reduced the assets in his hands below the amount necessary to pay it are inconsistent with the existence of such claim. Smythe's Estate v. Evans, 209 Ill. 376, 70 N. E. 906. Bill for an injunction restraining proceedings in probate court to determine whether an executor was liable for money borrowed from testatrix, alleging that indebtedness was discharged by her but that legatees claimed discharge was procured by undue influence, held demurrable, since complainant had adequate remedy at law in probate court by way of defense. Norwood v. Tyson [Ala.] 36 So. 370.

22. In re Dimmick's Estate, 111 La. 655, 35 So. 801.

23. Evidence must be very satisfactory. In re Furniss, 86 App. Div. 96, 83 N. Y. S. 530.

24. Has no right to retain money belonging to the estate to satisfy a debt alleged to be due him from decedent, but must file claim. In re Thresher [Mont.] 73 P. 1109.

25. Must distribute it as part of assets and may be punished for contempt for failure to obey order directing him to do so [Code Civ. Proc. § 2714]. In re David's Estate, 44 Misc. 337, 89 N. Y. S. 927; Buckel v. Smith's Adm'r [Ky.] 82 S. W. 1001. By accepting office yields all controversy as to the debt and treats it as an asset of the estate. Bassett v. Fidelity & Deposit Co., 184 Mass. 210, 68 N. E. 205. Administrator charged with amount of money of his own received during course of administration which he could have applied on debt which he owed estate, the evidence being insufficient to show indebtedness to his wife to the payment of which he claimed to have applied part of it [Cal. Code Civ. Proc. § 1615]. In re Thomas' Estate, 140 Cal. 397, 73 P. 1059. Hill's Ann. Laws Or. 1892, § 1117. United Brethren First Church of Eugene v. Akin [Or.] 77 P. 748.

26. Applies if he was solvent part of the time. In re David's Estate, 44 Misc. 337, 89 N. Y. S. 927. **Contra,** Hill's Ann. Laws, Or. 1892, § 1117. United Brethren First Church of Eugene v. Akin [Or.] 77 P. 748. For liability of sureties in such cases, see post, § 9 G.

27. See 1 Curr. L. 1116. See, also, title Interest, § 1, 2 Curr. L. 547.

Liability of executor or administrator for interest on legacies or distributive shares which he does not pay over, see post, § 12.

collecting[29] or accounting for funds of the estate, will be charged with interest thereon.[30] Where he mingles funds of the estate with his own, he will be charged with interest on such moneys remaining in his hands uninvested.[31]

The amount of interest to be charged a representative who borrows the money of the estate depends upon whether he acts in good or bad faith.[32] Where he acts in bad faith, the highest legal rate should be charged.[33] Otherwise it rests in the discretion of the court to charge a less rate when justice can be done thereby.[34]

Where a balance for any year appears against a representative who is in no sense at fault, the interest thereon stands over until final settlement, or until sufficient disbursements have been made to discharge it after having extinguished the balance of principal due.[35] But when the debts have been paid or there has been time to pay them, and he has only legacies and distributive shares to deal with, the representative is treated as settled with in respect to interest on the principles governing settlements between ordinary debtors and creditors, except that under peculiar circumstances he may become chargeable with compound interest.[36] The interest on a balance due the representative for any year is carried into the account for subsequent years except when by so doing he would be allowed interest on interest.[37]

In Louisiana, the statute imposes a penalty of twenty per cent. on administrators who withdraw the funds of the estate from deposit without an order of the court,[38] or who fail to deposit funds received by them in a chartered bank of that state allowing interest on deposits.[39] The statute is mandatory and the penalty will be enforced whether loss results to the estate therefrom or not.[40] It can be computed only on funds actually received,[41] and may be waived by the parties in interest.[42] The sum accruing therefrom must, on distribution of the estate, go to the heirs on whose share it has accrued.[43] The penalty cannot be barred by

28. Six per cent charged. Brigham v. Morgan, 185 Mass. 27, 69 N. E. 418.

29. Balance due on contract for sale of land not collected within reasonable time. In re Stanton, 84 N. Y. S. 46. Executors, without excuse, left sum in hands of debtors for 15 years, not collecting it until compelled to do so in proceedings for accounting. Held not chargeable as guardians. Owens v. Owens' Estate [Miss.] 37 So. 149.

30. Charged with interest from date of testator's death on funds owed by him to estate. Bassett v. Fidelity & Deposit Co., 184 Mass. 210, 68 N. E. 205. Action of county court in charging administrator interest cannot be disturbed by circuit court on writ of review, since court had jurisdiction to do so. Farrow v. Nevin, 44 Or. 496, 75 P. 711. Account of personal representative of deceased administrator will be considered settled as of the date of his death, where the delay is not due to his method of handling the estate or chargeable to the estate, and his estate charged with simple interest only on the balance in his hands at that time. Walworth's Estate v. Bartholomew's Estate [Vt.] 55 A. 101.

31. Charged 4 per cent with annual rests, where it appears that he acted honestly and in good faith. In re Stanton, 84 N. Y. S. 46. Where he loans some of the mingled funds for more than 6 per cent interest, he or his estate will be charged with annual interest thereon. Walworth's Estate v. Bartholomew's Estate [Vt.] 56 A. 101.

32. An executor who in good faith borrows money from the estate on notes at five per cent should not be charged with six per cent interest. In re Downs, 39 Misc. 621, 80 N. Y. S. 659.

33. In re Downs, 39 Misc. 621, 80 N. Y. S. 659. Where knowingly does so. Evidence held to justify charging interest. Thomas v. Hawpe [Tex. Civ. App.] 80 S. W. 129.

34. In re Downs, 39 Misc. 621, 80 N. Y. S. 659.

35, 36, 37. Van Winkle v. Blackford, 54 W. Va. 621, 45 S. E. 589.

38. Will be imposed for technical violations [Civ. Code, art. 1150]. Succession of Conery, 111 La. 113, 35 So. 479; In re Dimmick's Estate, 111 La. 555, 35 So. 801.

39. Civ. Code, art. 1150. In re Dimmick's Estate, 111 La. 555, 35 So. 801.

40. In re Dimmick's Estate, 111 La. 555, 35 So. 801. Fact that he acts in good faith and withdraws fund to invest it for benefit of heir and later redeposits it is immaterial. Succession of Conery, 111 La. 113, 35 So. 479.

41. Cannot be imposed on amount of debt due by executor individually which is not shown to have been actually paid. In re Dimmick's Estate, 111 La. 555, 35 So. 801.

42. Therefore does not accrue on funds coming to executor himself, or controlled by him as tutor, or belonging to those heirs who have consented to his acts. In re Dimmick's Estate, 111 La. 555, 35 So. 801.

43. In re Dimmick's Estate, 111 La. 555, 35 So. 801.

prescription,[44] but if the representative has been derelict in this respect and also in respect to the filing of annual accounts, only one penalty may be imposed.[45]

(§ 9) *D. Allowances for expenses, costs, counsel fees and funeral expenses.*[46] —The estate must bear the cost of its administration[47] and the executor or administrator will be given credit for necessary expenditures made for its benefit,[48] including expenses of necessary litigation.[49] What are necessary expenditures depends upon the circumstances of each particular case.[50] They should be gauged with reasonable reference to the amount involved, in order to preserve the trust fund as nearly unimpaired as possible.[51]

He will be reimbursed for expenditures made on account of necessary attorney's fees.[52] In some states, the same result is accomplished by ordering the

44. Limitation of one year does not apply. In re Dimmick's Estate, 111 La. 655, 35 So. 801.

45. Is in nature of running interest and hence only 20 per cent can be imposed. In re Dimmick's Estate, 111 La. 655, 35 So. 801.

46. See 1 Curr. L. 1117.

47. Including lien of attorney for services rendered executor. In re Crough's Estate, 84 N. Y. S. 936. The reasonable and necessary expenses of administering the estate is a charge thereon to be paid before distribution can be had. In re Hatch, 97 App. Div. 496, 90 N. Y. S. 33. Under N. Y. Code Civ. Proc. § 2793, subd. 6, providing that, after certain designated payments, any sum found due the representative on a judicial settlement of his account shall be paid out of the balance, after applying thereon the proceeds of the personalty. Id. They may be paid from the balance of a sum received on the sale of realty for the payment of debts. Fact that personalty has been reduced by expenses of litigation so that it was insufficient to pay legacies is no reason why realty should not be resorted to to the amount of such expenses. Horton v. Howell [N. J. Eq.] 56 A. 702.

48. Facts held to authorize allowance to administrator for services rendered by broker in sale of realty belonging to estate. In re Willard's Estate, 139 Cal. 501, 73 P. 240. Will be allowed necessary expenses [Cal. Code Civ. Proc. § 1616]. In re Kruger's Estate, 143 Cal. 141, 76 P. 891. For all just and reasonable expenses incurred by him in behalf of the estate [Code Civ. Proc. § 2730]. In re Pond's Estate, 42 Misc. 165, 85 N. Y. S. 1080. Allowance to husband of executrix for protecting and caring for property until appointment of temporary administrator held proper. In re Ogden's Estate, 41 Misc. 158, 83 N. Y. S. 977. Certain allowances made for doctor's services to deceased. Id. Item for traveling expenses of executor held properly disallowed. Succession of Henderson [La.] 36 So. 904. An independent executor has authority to incur reasonable and proper expenses in the management and disposition of the estate in accordance with the terms of the will. Dyer v. Winston [Tex. Civ. App.] 77 S. W. 227. Expense of settling disputed line and building disputed line fence disallowed. In re Stanton, 84 N. Y. S. 46.

49. An administrator recovering for the wrongful death of his intestate for benefit of next of kin under Code Civ. Proc. § 1903. Expenses incurred in procuring necessary medical expert testimony. In re Snedeker, 88 N. Y. S. 847. Executor not allowed expenses of fruitless and unnecessary litigation, though suits were brought under advice of counsel. In re Stanton, 84 N. Y. S. 46. The reasonable expenses incurred by the executrix in contested probate proceedings are chargeable against the estate. Notwithstanding fact that half the property was given to the executrix personally and balance was not disposed of. In re Ogden's Estate, 41 Misc. 158, 83 N. Y. S. 977. Where an executor defends a will and the suit results in a verdict upholding the will, he should be allowed counsel fees, without regard to the fact that the verdict was the result of a compromise between the parties in interest. Union Sav. Bank & T. Co. v. Smith, 4 Ohio C. C. (N. S.) 237. For costs in probate proceedings, see Wills, § 4 L, 2 Curr. L. 2106. Also, § 5 G, p. 2160.

50. In re Willard's Estate, 139 Cal. 501, 73 P. 240.

51. In re Sawyer's Estate [Iowa] 100 N. W. 484.

52. In re Ogden's Estate, 41 Misc. 158, 83 N. Y. S. 977. One who was named as executor in a will, and after the rejection of said will was appointed administrator of the estate, held entitled after full distribution of the assets of the estate, to maintain an action against persons entitled to a share therein, for attorney's fees incurred by him in an attempt to prove such will, he not having been reimbursed before distribution because of certain adverse decisions not involving the merits of his claim. Held further, that he was entitled to a lien on certain bonds of the estate deposited by the heirs as security for the payment of the claim if found valid. Blair v. Blair, 42 Misc. 79, 85 N. Y. S. 722. Will be allowed for attorney's fees for discovering assets unknown to heirs and in procuring appointment of administratrix. Administratrix not entitled to recover expenses of litigation between her and attorney as to the amount of his fees growing out of a contract made by her with him before her appointment. In re Pond's Estate, 42 Misc. 165, 85 N. Y. S. 1080. He is only entitled to recover such sum for counsel fees as was reasonably necessary. Not necessarily the reasonable value of services of counsel employed. Allowance held excessive. In re Sawyer's Estate [Iowa] 100 N. W. 484. Fees allowed attorneys held excessive. Bickel v. Bickel, 25 Ky. L. R. 1945, 79 S. W. 215. Evidence held to authorize allowance of $500 to curator's attorney. Root v. Green [Ky.] 81 S. W. 243. Fees of attorneys held improperly reduced, there being no objection to the

amount of the fee to be paid directly to the attorney.[53] In determining what is a reasonable attorney's fee, the court should take into consideration the amount of the estate, the character of the services rendered, and the amount of work done.[54] He will not be allowed attorney's fees for services which he should have performed personally,[55] for services rendered to the heirs, creditors, devisees[56] or adverse parties,[57] nor for services in relation to realty in regard to which he had no duties to perform,[58] nor in some states, for services in procuring letters of administration.[59] An administrator appointed under a void order will not be reimbursed for attorney's fees paid by him unless the services were rendered in preserving the estate.[60]

Attorney's fees for services of benefit to two estates should be divided between them.[61] A temporary administrator is not entitled to an allowance for the fees of an attorney representing him on appeal of the heirs from an order fixing his compensation.[62] The attorney may maintain an action against the administrator personally, as for money had and received, for a sum allowed him by the county court as fees, in accordance with a request contained in the final account.[63]

In so far as the services and expenses of one's administrators in settling his accounts as administrator of another estate are made necessary by his misconduct, the loss falls on his estate; in so far as they are not, they will be charged against the other estate.[64]

Costs and expenses incurred by one appointed administrator of the estate of a living person are not a charge against the latter or his estate.[65]

A special administrator is not entitled to an allowance for the amount ex-

amount thereof stated in the account. Succession of Henderson [La.] 36 So. 904. Attorneys are entitled to an allowance for services rendered to the estate, though never employed by the administrators in such a manner as to bind them personally, where the services were rendered with their knowledge and without their objection, and it was expected that the estate would pay for such services as were beneficial to it. Marx v. McMorran [Mich.] 99 N. W. 396.

53. In re Officer's Estate, 122 Iowa, 553, 98 N. W. 314.

54. Clarke v. Garrison, 25 Ky. L. R. 1999, 79 S. W. 240. The allowance to be made for that purpose is largely in the discretion of the court, and is based upon the services which are necessarily and properly rendered to the executor or administrator in the administration of the estate. In re Straus' Estate [Cal.] 77 P. 1122. May consider the character of the services and the record as well as the opinions of witnesses. Allowance held too small. Callender's Adm'r v. Callender [Ky.] 82 S. W. 372.

55. In re Pond's Estate, 42 Misc. 165, 85 N. Y. S. 1080. Attorney's fees paid for simple and nonprofessional services, which a person of ordinary business ability might have performed. In re Ogden's Estate, 41 Misc. 158, 83 N. Y. S. 977.

56. Not entitled to fees from estate for services rendered widow and son in suit against her on her notes, or for filing claim against estate in favor of son's wife. Allowance reduced. Clarke v. Garrison, 25 Ky. L. R. 1999, 79 S. W. 340. As where attorneys represent creditors and act solely under the employment by their clients, though their services benefited estate. Investigated estate, induced administrator to resign, and the widow and heirs to waive exemptions. In re Officer's Estate, 122 Iowa, 553, 98 N. W. 314. Not allowed for services by attorneys for creditors, who render services primarily for them but are permitted by the order of the court to use the name of the administrator for the purpose of having all parties represented. Allowed to appear for administrator, who determined not to defend claims, which were finally allowed. Id.

57. In re Northup's Will, 92 App. Div. 5, 87 N. Y. S. 318.

58. Where half was devised to her personally and balance was undisposed of, and there was sufficient personalty to pay debts and expenses. In re Ogden's Estate, 41 Misc. 158, 83 N. Y. S. 977.

59. Bowman v. Bowman [Nev.] 76 P. 634.

60. Slate v. Henkle [Or.] 78 P. 325.

61. For services rendered to an executor of a deceased trustee, who is also a substituted trustee, which were beneficial to both estates. In re Rowe, 42 Misc. 172, 86 N. Y. S. 253.

62. Bell v. Goss [Tex. Civ. App.] 76 S. W. 315.

63. She may counterclaim for balance due on note of plaintiff held by her. Vaughn v. Walsh [Wis.] 100 N. W. 840.

64. Walworth's Estate v. Bartholomew's Estate [Vt.] 56 A. 101.

65. Administration on estate of one presumed to be dead. N. D. Rev. Codes 1899, § 6325, subd. 2 invalid when applied to estates of living persons. Costs and disbursements incurred by such administrator, though acting in good faith, are not a charge against the person whose property is taken or his estate. Clapp v. Houg, 12 N. D. 600, 98 N. W. 710.

pended by him in procuring a revenue stamp for his bond,[66] or for expenses incurred by him in doing acts beyond his authority.[67]

The administrator or executor has the burden of proving the justice and necessity of disbursements made by him to cover the expenses of administration,[68] and persons interested may show that the services for which an allowance is claimed have been so negligently performed as to cause damage to the estate.[69]

An administrator appointed under a void order cannot recover the amount paid by him to a surety company for becoming surety on his bond,[70] nor for appraisers' fees, or fees paid justices for taking acknowledgments.[71]

Matters relating to expenses of testamentary trustees are treated elsewhere.[72]

Funeral expenses are generally considered a part of the expenses of administration,[73] but the administrator is not liable when it appears that the credit therefor was extended to a third person on the latter's express promise to pay the bill.[74] Where their allowance is made discretionary with the court, it is not proper to submit the question of their allowance to a jury.[75] There is a conflict of authority as to whether the funeral expenses of a married woman are a debt of her estate.[76]

(§ 9) *E. Rights and liabilities of co-representatives.*[77]—Executors, however numerous, are regarded in law as a single person.[78] Joint administrators are jointly liable for joint acts and severally liable for their own acts.[79] Thus where property or funds come into the joint control or possession of both, each is personally liable for their proper appropriation,[80] and one of two administrators who receives money belonging to the estate and pays it over to his co-administrator is liable for the latter's default.[81] But one joint executor or administrator is

66. In re Ford's Estate [Mont.] 74 P. 735.

67. In appraising estate and publishing notice to creditors to present claims. In re Ford's Estate [Mont.] 74 P. 735.

68. In re Ogden's Estate, 41 Misc. 158, 83 N. Y. S. 977. The burden is on executors, claiming credit for sums deducted by surviving partners from the purchase price of the estate's interest in the firm as payments made by such firm for the benefit of the estate, to show that such sums were actually disbursed by the surviving partners for the estate's benefit. In re Meyer, 88 N. Y. S. 798.

69. In re Kruger's Estate, 143 Cal. 141, 76 P. 891.

70, 71. Slate v. Henkle [Or.] 78 P. 325.

72. See Trusts, § 8, 2 Curr. L. 1948.

73. Funeral should be in accordance with station in life of deceased. Executrix held entitled to credit for funeral expenses as claimed. In re Ogden's Estate, 41 Misc. 158, 83 N. Y. S. 977.

74. Kenyon v. Brightwell [Ga.] 48 S. E. 124.

75. Under Md. Code Pub. Gen. Laws, art. 93, § 5. Maynadier v. Armstrong [Md.] 56 A. 357.

76. In Georgia, they are not unless made so by will, but it is duty of husband to bury her body, though statute provides that such expenses shall be given priority [Ga. Civ. Code 1895, § 3424]. Kenyon v. Brightwell [Ga.] 48 S. E. 124.

In New York, the husband may recover from the wife's estate the reasonable expenses incurred by him in connection with her burial. New York municipal court has jurisdiction. Pache v. Oppenheim, 93 App. Div. 221, 87 N. Y. S. 704: reversing Pache v. Oppenheim, 84 N. Y. S. 926, on question of jurisdiction.

77. See 1 Curr. L. 1117.

78. Transfer of assets to co-executor under order of court does not deprive attorney of lien for services to estate. In re Crough's Estate, 84 N. Y. S. 936. See, also, In re Crouch's Estate, 44 Misc. 485, 89 N. Y. S. 465.

79. Administratrix signing joint checks with co-administrator is jointly liable for money which he is thereby enabled to misappropriate, though he represented to her that it was to be used to pay debts. Palmer v. Ward, 91 App. Div. 449, 86 N. Y. S. 990.

80. In re Hunt, 88 App. Div. 52, 84 N. Y. S. 790. Where all of assets were put into safe-deposit vault which could only be opened when all were present, and all joined in account and decree on accounting charged all with balance in their hands, one of two surviving executors liable for conversion by other of assets which he had allowed to pass into his hands. In re Dougherty's Estate, 43 Misc. 468, 89 N. Y. S. 549. Both executors held liable for losses resulting from advancements made to purchasers of lots to enable them to build thereon, where both signed the checks and drafts, though mortgages given as security ran to one executor only, it being understood that upon his qualifying as testamentary trustee he was to receive them as part of the trust fund. Brigham v. Morgan, 185 Mass. 27, 69 N. E. 418.

81. Is not where he merely receives check and indorses it over to other, the indorsement of a check not being equivalent to receipt of money. In re Provost's Estate, 87 App. Div. 86, 84 N. Y. S. 29. Not liable for checks but is liable for money so received and turned over. In re Johnson, 43 Misc. 651,

not liable for assets which come into the hands of the other, nor for the laches, waste, devastavit or mismanagement of the other, unless he consents to or joins in an act resulting in loss to the estate.[82] An indebtedness to the estate of a decedent from one of two administrators will be considered as having come into the joint possession of both, and as between themselves and the surety on their joint bond, they are both principals.[83] It is proper for one of two joint executors to allow the other to collect and pay out income.[84] A contract not under seal, purporting to be executed by two executors but signed by only one of them, is binding on both where the one not signing authorized and directed the other to act for him.[85]

A surviving administrator may be compelled to account as such by a surety on the bond of his deceased co-administrator.[86] One executor, who is also a legatee, may sue the other and the sureties on their joint and several bond.[87] The rights of executors and trustees and their sureties as between themselves will not be determined in proceedings to settle their respective accounts.[88] On the resignation of one of several representatives, it is his duty to account to the others for all assets of the estate in his hands.[89]

(§ 9) *F. Compensation.*[90]—In many states, the compensation of executors and administrators is fixed by statute, and in such case is generally based on the amount of estate accounted for by them.[91] The amount allowed may vary with the character and amount of services performed.[92]

87 N. Y. S. 733. Where all qualified and caused inventory and appraisal to be made, and one thereafter took and retained full possession and control of property until his death, with consent of others, sole survivor was chargeable with amount misappropriated by him. In re Hunt, 88 App. Div. 52, 84 N. Y. S. 790. The innocent party will be allowed his commissions and the cost of preparing the account. In re Dougherty's Estate, 43 Misc. 468, 89 N. Y. S. 549.

82. In re Johnson, 42 Misc. 651, 87 N. Y. S. 733. One of several administrators, who remains passive and does not obstruct the collection by the others of money belonging to the estate, is not liable for the latter's waste. In re Provost's Estate, 87 App. Div. 86, 84 N. Y. S. 29. One of two administrators, who indorses a check payable to their joint order and delivers it to her co-administrator for deposit to the account of the estate, is not liable for the latter's conversion of the money in the absence of a showing of negligence on her part. No presumption of negligence. Palmer v. Ward, 91 App. Div. 449, 86 N. Y. S. 990.

83. Dorger v. Woodward, 4 Ohio C. C. (N. S.) 623.

84. Where the one doing so defaulted, other charged with two per cent. interest from discovery of default. In re Dougherty's Estate, 43 Misc. 468, 89 N. Y. S. 549.

85. Contract for sale of land which had authority under the will to make. Roe v. Smith, 42 Misc. 89, 85 N. Y. S. 527.

86. Surety not bound by survivor's assertion of facts tending to release him from liability. In re Provost's Estate, 87 App. Div. 86, 84 N. Y. S. 29.

87. Municipal Court v. Whaley [R. I.] 55 A. 750.

88. Brigham v. Morgan, 185 Mass. 27, 69 N. E. 418.

89. On application of an executor and testamentary trustee to account and resign, held, that he was not guilty of contempt for refusal to answer questions put to him by co-executors on hearing before referee in regard to secret formulas for the manufacture of a medicine which he was making under an unexpired license from testator, he claiming that they had no right to such formulas. Authority given court by Code Civ. Proc. § 2602, relating to joint custody or deposit of assets, is discretionary, and where account is pending, neither under that section nor under § 2472, giving general power to control executors, will the court compel answer to such question. In re Freligh's Estate. 42 Misc. 11, 85 N. Y. S. 830.

90. See 1 Curr. L. 1118.

91. Cal. Code Civ. Proc. 1618. In re Straus' Estate [Cal.] 77 P. 1122. Suit was brought on certain vendor's lien notes against decedent during his lifetime and his administrator was substituted on his death. The latter sold the land on which the notes were a lien, together with other property, and the purchaser surrendered the notes and receipted bills for the costs of the suit in part payment of the purchase price. Held, that the administrator was entitled to commissions on the amount of such notes and costs, though the notes had never been formally presented to or allowed by him. Wolf's Estate v. Wolf [Tex. Civ. App.] 81 S. W. 90. Executor held entitled to commissions on amounts expended for improvements on farm. Lambertson v. Vann, 119 N. C. 351, 46 S. E. 10. Moneys received from sale of collateral paid directly to the creditor and not passing through the administrator's hands should not be considered in fixing his compensation. Bickel v. Bickel, 25 Ky. L. R. 1945, 79 S. W. 215.

92. Where, on final accounting, one executrix was absent from state and did not join in petition, but was made a party and the

Commissions will not be allowed on the transfer of realty to an heir,[93] or on the value of realty not actually sold;[94] but will be allowed on the proceeds of property bequeathed which it is necessary to sell in order to make the required division.[95]

Ordinarily, the representative is only entitled to the statutory fees,[96] but further compensation may be allowed for necessary and extraordinary expenses and services upon good reasons clearly shown to the court.[97] Where the fees are not fixed by statute, he will be allowed a reasonable amount.[98] The compensation of temporary administrators is in the discretion of the court.[99]

A trust company which has acted as an administrator is entitled to compensation therefor, notwithstanding the invalidity of the act under which the appointment was made,[1] and the measure of such compensation is the amount allowed by statute to legally appointed executors and administrators.[2] Executors, as such, are not entitled to commissions for services imposed on them as trustees,[3] nor are they entitled to be twice compensated for the same services where they act in both capacities.[4] A bequest to an executor and testamentary trustee of a certain sum in full of all commissions, disbursements, and charges relating to the settlement of the estate precludes him from accepting commissions either as executor or trustee;[5] but he will be allowed compensation, though the will provides that he shall receive none, where it appears that such provision was inserted because of an advantage given him in the division of the estate which he is prevented from receiving.[6]

An administrator appointed under a void order is not entitled to compensa-

accounting involved the final estate, and it appeared that the principal services were rendered by two executors but the executrix had rendered some services, held, that the accounting was complete and that the executors should receive full commissions and the executrix a half commission. In re Meyer, 88 N. Y. S. 798. Executor held to be entitled to three per cent. commission, for management and attention beyond the mere labor of custody and distribution [Cal. Code Civ. Proc. § 1618]. In re Towne's Estate [Cal.] 77 P. 446.

93. In re Hull, 97 App. Div. 258, 89 N. Y. S. 939.

94. Code Civ. Proc. § 2730. In re McGlynn's Estate, 41 Misc. 156, 83 N. Y. S. 975. The New York statute as to the commissions of executors and administrators (Code Civ. Proc. § 2730) applies to accounting testamentary trustees. Where trust fund in personalty exceeds $100,000, each of three trustees entitled to commissions on annual income received and disbursed. In re Hunt's Estate, 41 Misc. 72, 83 N. Y. S. 652.

95. Stocks. In re Fisher, 93 App. Div. 186, 87 N. Y. S. 567.

96. Iowa Code, § 3415. In re Sawyer's Estate [Iowa] 100 N. W. 484.

97. In re Sawyer's Estate [Iowa] 100 N. W. 484. An ancillary administrator who, unnecessarily and without an order of the probate court appointing him, removes the property of decedent to the state of the domicile and there asks and receives a maximum commission for a minimum of labor, will not be allowed additional compensation by the former court. Porter v. Long [Mich.] 98 N. W. 990.

98. A finding by a committee, to whom an administrator's accounts were referred, that the charges made by him for his services are reasonable, is sufficient, in the absence of anything to show that it committed an error of law in so doing. Need not report evidence on which such finding was based. Matthews v. Sheehan, 76 Conn. 654, 57 A. 694. In Michigan, the allowance to administrators for services rests with the probate judge or the circuit judge on appeal. Nowland v. Rice's Estate [Mich.] 101 N. W. 214.

99. Not entitled to statutory fees fixed for regular administrators. Bell v. Goss [Tex. Civ. App.] 76 S. W. 315. May allow compensation to special administrator, though no statutory provision therefor. In re Ford's Estate [Mont.] 74 P. 735. Evidence held to authorize allowance of $1,000 to curator who had charge of estate pending the appointment of an administrator. Root v. Green [Ky.] 81 S. W. 243.

1. Law allowing trust companies to act as administrators void as of a general nature and not uniform in operation. Union Sav. Bank & T. Co. v. Smith, 4 Ohio C. C. (N. S.) 237.

2. Union Sav. Bank & T. Co. v. Smith, 4 Ohio C. C. (N. S.) 237.

3. Not on value of land which they have power to sell as trustees only. In re McGlynn's Estate, 41 Misc. 156, 83 N. Y. S. 975.

4. See Trusts, 2 Curr. L. 1924.

5. Does not preclude allowance for attorney's fees. In re Rowe, 42 Misc. 172, 86 N. Y. S. 253.

6. Son prevented from receiving advantage on account of widow's refusal to take under will. Frazer v. Frazer, 25 Ky. L. R. 473, 76 S. W. 13.

tion as such,[7] but may be allowed for services in preserving or caring for the property of the estate and resulting in a benefit thereto.[8]

Matters relating to the compensation of testamentary trustees are treated elsewhere.[9]

An agreement on the part of the representative not to charge commissions,[10] or limiting the amount to be charged, is valid and enforceable against him,[11] and a sole legatee, who has agreed to the allowance of extra compensation to the executor for extraordinary services, cannot object thereto after the allowance of his final account.[12] Where an executor refuses to accept commissions and returns them to the estate, they should be divided equally among all the beneficiaries.[13] When the estate consists of income producing property and the circumstances are such that its settlement covers a number of years, it is within the discretion of the probate court to credit the services of the administrator for each year at the end of the year, even where no accounts have been rendered until the final settlement.[14] An executor has no power to pay or reserve commissions to himself until they have been allowed in the manner provided by statute.[15]

Fraud or misconduct on the part of the executor or administrator,[16] or a failure to account for funds received by him, may justify the court in refusing to allow him compensation for his services;[17] but the omission by an executor to seek a construction of the will is not a ground for withholding commissions otherwise earned.[18] Where one of two joint executors defaults and the accounts of the innocent ones are surcharged with the amount of the loss, the latter will nevertheless be allowed commissions and costs of preparing the account to be paid from the estate.[19]

(§ 9) *G. Rights and liabilities of sureties and actions on bonds.*[20]—The liability of the sureties on an executor's or administrator's bond is coextensive with that of the principal.[21] It becomes fixed upon the entry of an order that he

7, 8. Slate v. Henkle [Or.] 78 P. 325.

9. See Trusts, § 8, 2 Curr. L. 1948.

10. Agreement not to charge commissions held valid and binding on administrator. In re Dimmick's Estate, 111 La. 655, 35 So. 801.

11. In re Field's Estate, 33 Wash. 63, 73 P. 768.

12. Part of compensation given to relative who received nothing under the will. Littell v. Hackley [C. C. A.] 126 F. 309.

13. Where it appears that he did not intend to make donation to children, widow should be given her share. Owens v. Owens' Estate [Miss.] 37 So. 149.

14. Walworth's Estate v. Bartholomew's Estate [Vt.] 56 A. 101.

15. Not to be made until settlement of estate [Code Civ. Proc. § 2730]. In re Furniss, 86 App. Div. 96, 83 N. Y. S. 530.

16. Allowed to retain commissions already awarded where no loss resulted. In re Morris' Estate [N. J. Eq.] 56 A. 161. Not entitled to compensation for caring for funds which he has used for his own profit (Walworth's Estate v. Bathoiomew's Estate [Vt.] 56 A. 101), but forfeiture should not be extended so as to include compensation for services in regard to other property of the estate (Id.). Use of funds in own concerns. In re Morris' Estate [N. J. Eq.] 56 A. 161.

17. Where does so knowingly and wrongfully. Thomas v. Hawpe [Tex. Civ. App.] 80 S. W. 129. In West Virginia, an executor or administrator forfeits his commissions by failure to make a settlement of his accounts within six months after the end of each year, unless he can show that he has given to the parties entitled to the money received by him during that year a statement thereof and actually settled with them therefor [Code 1899, c. 87, § 7]. Van Winkle v. Blackford, 54 W. Va. 621, 46 S. E. 589.

18. Though it results in failure to pay anything to beneficiaries thereunder based on plausible but erroneous construction. In re Ingersoll, 88 N. Y. S. 698.

19. In re Dougherty's Estate, 43 Misc. 468, 89 N. Y. S. 549.

20. See 1 Curr. L. 1118.

21. United Brethren First Church v. Akin [Or.] 77 P. 748. Obligation of surety is obligation of principal. Bassett v. Fidelity & Deposit Co., 184 Mass. 210, 68 N. E. 205. An executor under a will, giving him no express power to sell the land and vesting in him no discretion of a personal nature, but merely directing the executors in a general way to set apart and invest a fund sufficient to produce certain annuities, so that such powers can only be exercised with the approval and under the direction of the court, is charged in his official capacity and not as personal trustee with the preservation of such fund, and the sureties on the official bond of an administrator appointed, on his refusal to serve, are liable for his defalcation with respect thereto. Ellyson v. Lord [Iowa] 99 N. W. 582.

account for and pay over the money in his hands,[22] and such order or decree is generally held to be conclusive as to the rights and liabilities of the sureties in the absence of fraud or collusion.[23] In Louisiana, however, a contrary rule prevails, and the judgment is not conclusive on the surety either as to the fact or the extent of the breach,[24] though both it[25] and the record of the succession are admissible in evidence against him.[26]

In some states, an action will lie on an administrator's bond at any time after breach, although there has been no settlement of the administrator's account or decree of distribution in the probate court.[27] In others, no cause of action accrues against the sureties until there is a final order by the probate court directing a distribution of the funds and a violation of such order by the representative.[28] In Louisiana, an heir must make a judgment with an unsatisfied writ of execution against the administrator the basis of an action against his sureties.[29] The liability of the surety does not constitute a debt until after there has been a breach of the bond.[30] The sureties on the bond of a county administrator are not responsible for his acts and defaults under an appointment as temporary administrator.[31] A surety is not discharged, with respect to a prior breach

22. Thereupon it becomes debt drawing interest. Ellyson v. Lord [Iowa] 99 N. W. 582. The sureties are liable for his failure to pay attorney's fees allowed and ordered paid by the court. Smith v. Rhodes, 68 Ohio St. 500, 68 N. E. 7. It is no defense to the sureties that exceptions to the account of the administrator filed by a creditor were withdrawn in consideration of the payment of a part of his claim by the administrator. Id.

23. See, also, § 15, post. Decree settling administrator's accounts binding on him and his sureties. Smith v. Moore [Va.] 46 S. E. 326. In the absence of fraud or collusion, they are bound by any decree of the probate court which binds him. Consequently they are liable for amount of his indebtedness to the estate, though they had no knowledge thereof or of his insolvency. Executor liable under Hill's Ann. Laws 1892, § 1117. United Brethren First Church v. Akin [Or.] 77 P. 748. The decree settling the account fixes the amount of their liability. Bassett v. Fidelity & Deposit Co., 184 Mass. 210, 68 N. E. 205; In re Sill's Estate, 84 N. Y. S. 213. Former decree held conclusive that party possessed litigable interest. Probate Court of Westerly v. Potter [R. I.] 55 A. 524. Conclusive unless reversed on error or vacated by appeal. Smith v. Rhodes, 68 Ohio St. 500, 68 N. E. 7. The pendency of an appeal from a judgment recovered by the widow against the executor for her interest in the estate is no bar to a subsequent action by her against the executor's surety, where judgment could not have been rendered against the surety in the first action for the reason that it could not then be determined for what amount the executor had defaulted. Frazer v. Frazer, 25 Ky. L. R. 473, 76 S. W. 13. The fact that judgment in the first action was not rendered against the estate or against the administrator d. b. n. c. t. a. after the executor's death is no defense. Id. The first judgment held conclusive on surety as to whether widow had elected to take under the will. Id. Judgment against administrator cannot be collaterally attacked in action against sureties. Bonner v. Gorman, 71 Ark. 480, 77 S. W. 602.

24. Must be obtained in proceeding to which he is not a party. Judgment on settlement of account. Wiemann v. Mainegra, 112 La. 305, 36 So. 358.

25. Because no judgment could be entered against them without it and without execution and return thereunder; also for purpose of fixing maximum amount of their liability. Wiemann v. Mainegra, 112 La. 305, 36 So. 358.

26. To show manner and result of administration. Wiemann v. Mainegra, 112 La. 305, 36 So. 358.

27. Judge of Probate v. Lee, 72 N. H. 247, 56 A. 188. See Bonds, § 4, 3 Curr. L. 514.

28. Limitations do not begin to run until then. Hall v. Cole, 71 Ark. 601, 76 S. W. 1076. The supreme court will not take judicial notice of an old judgment of the probate court directing a partial distribution of the estate for the purpose of determining whether limitations have run against an action on his bond. Id. In Pennsylvania, a judgment at law or a decree of the orphans' court, ascertaining the amount of an administrator's personal responsibility and to whom, is all that is necessary as a prerequisite to a suit against the surety. A decree nisi adjudicating the account of an administrator and directing a distribution which was later "confirmed absolute" fixed his liability and that of sureties on his bond so that claim therefor could be proved in bankruptcy against estate of latter by administrator d. b. n. Hibberd v. Bailey [C. C. A.] 129 F. 575.

29. Unauthorized judgment reversed on devolutive appeal will not support such an action brought pending such appeal [La. Civ. Code, art. 3066]. Wiemann v. Mainegra, 112 La. 305, 36 So. 358.

30. Provable in insolvency proceedings. McIntire v. Cottrell, 185 Mass. 178, 69 N. E. 1091. Becomes debt upon entry of order directing administrator to pay over moneys in his hands. Ellyson v. Lord [Iowa] 99 N. W. 582.

31. Bailey v. McAlpin [Ga.] 48 S. E. 699.

of the bond, by an ex parte judgment, or one rendered in a controversy with the administrator alone.[32]

Sureties undertake only that the representative will diligently and honestly do what can be done in collecting the assets of the estate.[33] A stipulation in an administrator's bond that he will administer according to law all the personal estate of deceased that may come into his hands implies that he shall pay debts if he has assets.[34] But there is no violation of this stipulation as to any debt until it has been reduced to a judgment which the administrator has refused to pay on demand.[35] The fact that the assets have been used according to law is a good defense to an action on the bond.[36] An executor charged with the investment of a fund for a particular purpose does not relieve himself and his sureties from liability therefor until such investment is actually made.[37]

The bond of an executor or administrator is security for the final accounting by him for all funds coming into his hands during the administration,[38] and it is immaterial whether the funds for which he fails to account come into his hands before or after its execution.[39] Sureties on an additional bond of an administrator with the will annexed are liable for funds already misappropriated and not finally accounted for.[40]

The sureties on the bond of an executor or administrator who is indebted to the estate are chargeable with the amount of the debt.[41] In some states, it is held that this rule does not apply where the representative was at all times insolvent.[42] The sureties on the general bond of the administrator are liable for the proceeds of the sale of realty after they have become a part of the assets of the estate, where the special sale bond provided for by statute is not given.[43]

Sureties of joint administrators are liable for their joint acts and for the individual defaults of each.[44] One executor, who is also a legatee, may sue the

32. Law provides for discharge of surety only with respect to subsequent acts and liability of principal [La. Civ. Code, arts. 3069, 3070]. Wiemann v. Mainegra, 112 La. 305, 36 So. 358.

33. Buckel v. Smith's Adm'r [Ky.] 82 S. W. 1001.

34. McIntire v. Cottrell, 185 Mass. 178, 69 N. E. 1091.

35. Liability contingent on failure to pay on demand until such demand; it is not a debt provable in insolvency [Pub. St. 1882, c. 143, § 10; Rev. Laws, c. 149, § 20]. McIntire v. Cottrell, 185 Mass. 178, 69 N. E. 1091.

36. McIntire v. Cottrell, 185 Mass. 178, 69 N. E. 1091.

37. Ellyson v. Lord [Iowa] 99 N. W. 582.

38. Breach is failure to make final account. Ellyson v. Lord [Iowa] 99 N. W. 582.

39, 40. Ellyson v. Lord [Iowa] 99 N. W. 582.

41. Bassett v. Fidelity & Deposit Co., 184 Mass. 210, 68 N. E. 205. Though they had no knowledge of his insolvency. United Brethren First Church v. Akin [Or.] 77 P. 748. Cannot defend on the ground that no demand was made on the principal, since it is the duty of the executor to make the demand, and he will not be permitted to say that he could make no demand on himself. Bassett v. Fidelity & Deposit Co., 184 Mass. 210, 68 N. E. 205.

42. Buckel v. Smith's Adm'r [Ky.] 82 S. W. 1001. As to liability of executor or administrator in such cases, see ante, § 9, B.

43. Ellyson v. Lord [Iowa] 99 N. W. 582. Sureties could not take advantage of the fact that the order appointing him and his letters described him as administrator instead of administrator with the will annexed, where they were chargeable with notice of the fact that deceased died testate, and the bond so recited. Id. Sureties on additional bond given after sale of realty cannot defend on ground that assets in hands of administrator were largely proceeds of sale which court had improperly sanctioned, where the records of the probate proceedings disclosed all the facts, and they were chargeable with knowledge of the receipt of such funds and the purpose for which they were held. Id. Sureties cannot defend on the ground that the funds misappropriated were proceeds of an unauthorized sale of realty, where court had approved such sale and administrator had admitted receipt of proceeds. Id. Administrator cannot defend on ground that there are no debts and hence his is bound only to account to annuitants and heirs under the will, where no notice of the appointment of an administrator was ever given, and hence the statutory period for filing claims has not expired [Iowa Code, § 3304]. Id.

44. Palmer v. Ward, 91 App. Div. 449, 86 N. Y. S. 990. May become liable for the joint administration of an estate by two administrators under an arrangement that one of them should do no more than sign all papers presented by the other, and if they do so, they cannot hold such administrator in

other and the sureties on their joint and several bond.[45] Two heirs in whose favor a judgment has been rendered against an administrator may join in an action thereon against his sureties.[46]

Sureties of administrators may maintain a suit against them and their successor to compel them to account and to have a judgment for the amount found due the estate by reason of the default of one of their number entered against defendants in the first instance, and the sureties decreed to be secondarily liable, and to enjoin their successor from prosecuting the bond.[47] A surety on the bond of a deceased administrator may compel the surviving administrator to account as such.[48] In Pennsylvania, an administrator de bonis non may maintain an action against a surety on the bond of his predecessor to recover money due and belonging to the estate of decedent.[49] In an action on the bond of a deceased administrator by the representatives of a distributee, the estate need not be represented by an administrator, where it appears that all the debts have been paid;[50] neither is a distributee who has been paid in full a necessary party;[51] but if the administrator was also a distributee, the rule is otherwise.[52]

An executor, who is also residuary legatee, who gives a bond to pay debts and legacies, is responsible to legatees for the amount of their legacies, notwithstanding the fact that he was mistaken as to the amount of assets, and that the clerk of court did not inform him that he was assuming any personal liability to the legatees.[53] An order of the probate court, settling and allowing an administrator's account and distributing the estate which requires repayment by distributees who have received their share prior to such accounting on giving bond for repayment, does not operate as a judgment against the sureties on such bonds.[54] They can only be rendered liable on a direct proceeding by the executor or administrator.[55]

An action may be brought on an administrator's bond from which the penalty has been omitted without reformation.[56]

Where the sum due exceeds the penalty of the bond, plaintiff is entitled to interest on the penal sum from the date of the writ.[57]

default as to them for acting accordingly. Evidence sufficient to show such agreement. Id.

45. Municipal Court v. Whaley [R. I.] 55 A. 750.

46. Where on devolutive appeal, it is held that the judgment was unauthorized as to one of them, the action will be dismissed as to her only. Wiemann v. Mainegra, 112 La. 305, 36 So. 358.

47. Palmer v. Ward, 91 App. Div. 449, 86 N. Y. S. 990.

48. In re Provost's Estate, 87 App. Div. 86, 84 N. Y. S. 29. See, also, § 9E, ante.

49. Act Feb. 24, 1834 (P. L. 78). Hibberd v. Bailey [C. C. A.] 129 F. 575.

50. Under Ala. Code 1896, § 670, providing that plaintiff may proceed against one or more of the persons liable without joining the others. Keith v. McCord [Ala.] 37 So. 267.

51. Keith v. McCord [Ala.] 37 So. 267.

52. Court may appoint administrator ad litem [Ala. Code 1896, §§ 352, 353]. Keith v. McCord [Ala.] 37 So. 267.

53. Clerk did not represent legatees and creditors and they were not responsible for his failure to give information. Adams v. Probate Court of Central Falls [R. I.] 58 A. 782. Bond of a residuary legatee to pay the debts of the estate is a lien as against such legatee upon realty conveyed in trust for the protection of the surety on the bond. Tidd v. Bloch, 4 Ohio C. C. (N. S.) 216.

54. Not parties on whom notice of appeal must be served unless judgment actually entered against them. Bonds given under Pierce's Code, § 2671. Noble v. Whitten, 34 Wash. 507, 76 P. 95.

55. Pierce's Code, § 2678. Noble v. Whitten, 34 Wash. 507, 76 P. 95.

56. May recover on bond as sealed instrument, where complaint contains allegations authorizing either legal or equitable relief and demands both and plaintiff shows himself entitled to former, though action for reformation is barred by statute of limitations. McManus v. Harrigan, 85 N. Y. S. 220. As to effect of irregularities and omissions, see Bonds, § 1, 3 Curr. L. 507.

57. Bassett v. Fidelity & Deposit Co., 184 Mass. 210, 68 N. E. 205. Where amount due exceeds penalty of bond, sureties are liable for full amount with interest from date of order to administrator to pay over money in his hands. Ellyson v. Lord [Iowa] 99 N. W. 582. See Bonds, § 4, 3 Curr. L. 518.

§ 10. *Actions by and against representatives and costs therein.*[58]—Executors or administrators cannot ordinarily sue or be sued prior to their qualification as such,[59] or in a state other than that of their appointment.[60] The latter rule has been changed by statute in some states.[61] Statutes in some states provide that a nonresident qualifying therein as executor or administrator of a person dying or leaving assets in such state shall be treated as a citizen thereof for the purpose of suing or being sued.[62]

A suit against the estate must be carried on in the name of the representative as such.[63] In order to charge the estate in an action against the representative, facts showing his appointment and that he is acting in that capacity must be alleged.[64] The complaint must also clearly show whether defendant is charged individually or as representative.[65] The defense that one is not executor must be raised by a plea in abatement.[66] The plea of ne unques executor or administrator is a plea in bar, which requires no verification.[67] A properly appointed administrator has legal capacity to sue, though he may not be entitled to maintain the action for other reasons.[68] It is not necessary to plead the existence of assets.[69] Where a cause of action accrues to an executor or administrator after the death of decedent, he may sue thereon either in his representative or individual character, and the complaint is sufficient if it states a cause of action in either capacity.[70] If the representative brings an action which he has no authority to maintain, the court may order the heirs, who are parties to the proceeding, to be substituted as plaintiffs.[71]

An executor or administrator may bring an action in forma pauperis when the estate is insolvent and recovery is problematical.[72] When the action is on

58. See 1 Curr. L. 1120.

59. Action for fraud in sale of mine [Mills' Ann. St. Colo. § 4687 et seq.] Stratton's Independence v. Dines, 125 F. 968.

60. Skiff v. White, 127 F. 175.

61. The Kansas statute (Gen. St. 1901, § 3009) providing that foreign executors or administrators may sue or be sued in that state in like manner as other nonresidents authorizes the enforcement of the contract obligations of a nonresident, who dies owning realty in that state, by attachment in a suit against a nonresident executor and is constitutional. Manley v. Mayer [Kan.] 75 P. 550.

62. Tenn. Acts 1903, p. 1344, c. 501. May bring action in forma pauperis under Acts 1901, p. 197, c. 126. Southern R. Co. v. Maxwell [Tenn.] 82 S. W. 1137.

63. Dallam v. Stockwell's Estate [Ind. App.] 71 N. E. 911.

64. Judgment to foreclose lien entitled against one individually and as administratrix not binding on estate though general appearance entered by defendant in both capacities where there were no allegations touching estate of deceased and none of appointment or qualification of administratrix. Flinn v. Gouley, 139 Cal. 623, 73 P. 542. Complaint held to sufficiently set forth that deceased left a last will which was duly admitted to probate, and that defendant was therein named as executrix and was duly appointed and qualified as such. Pache v. Oppenheim, 84 N. Y. S. 926. Where the averments of the complaint are such as to affix to plaintiff a representative character and standing in the litigation and to show that the cause of action devolved upon him solely in that character, the omission in the title of the word "as" between his name and the words descriptive of his representative capacity does not prevent his claiming that the action is brought in such capacity. Action on judgment recovered by plaintiffs as executors. Willets v. Haines, 88 N. Y. S. 1018.

65. A statement of claim in trespass, which charges negligence on the part of defendants as executors, as individuals, and jointly as executors and individuals is demurrable for failure to set out facts informing defendant in which capacity they are charged. Skivington v. Richards, 208 Pa. 385, 57 A. 768.

66. Waived by pleading the general issue. Fact that a brief statement that he is not such executor follows such plea is immaterial. Stewart v. Smith, 98 Me. 104, 56 A. 401.

67. Ala. Code 1896, § 3296. Logan v. Central Iron & Coal Co., 139 Ala. 548, 36 So. 729.

68. Secor v. Tradesmen's Nat. Bank, 92 Ala. Div. 294, 87 N. Y. S. 181.

69. Code Civ. Proc. § 1824. Pache v. Oppenheim, 84 N. Y. S. 926.

70. In action on note payable to plaintiff as executor need not prove his representative character. Allegations in regard thereto in complaint may be treated as surplusage. Sears v. Daly, 43 Or. 346, 73 P. 5.

71. Action to set aside conveyance made by decedent. Farrell v. Puthoff, 13 Okl. 159, 74 P. 96.

72. Within N. C. Code § 210. Action for death by wrongful act. Christian v. Atlantic, etc., R. Co. [N. C.] 48 S. E. 743.

a contract or other claim due decedent, or to recover property belonging to the estate in order that he may do so it must appear that the beneficiaries cannot give bond for costs,[73] but in case the suit is for death of decedent by wrongful act, the rule is otherwise.[74]

Causes of action in favor of[75] or against[76] an executor or administrator personally and in his representative capacity may be joined provided they arise out of transactions connected with the same subject-matter and do not require different modes of trial. In such case he may appear in each capacity by a different attorney.[77] A person suing in his individual capacity cannot amend his complaint so as to maintain the suit as executor.[78] There is a conflict of authority as to whether a judgment can be rendered against him personally in a suit brought against him as representative.[79] One instituting a suit as administrator cannot complain of the fact that judgment is rendered against him as such.[80] An administrator who, in the trial court in an action to settle decedent's estate, sets up no individual claim to realty involved cannot make such claim for the first time on appeal.[81]

An administrator, in the trial of his case, must regard the rules of law regulating the practice in court.[82] The question of the competency of the administrator and the heirs or beneficiaries as witnesses is treated elsewhere.[83]

In Tennessee nonresident qualifying in that state as representative of person dying or leaving assets therein is citizen [Acts 1903, p. 1344, c. 501] within meaning of act limiting right to sue in forma pauperis to citizens [Acts 1901, p. 197, c. 126]. Southern R. Co. v. Maxwell [Tenn.] 82 S. W. 1137.

73, 74. Christian v. Atlantic, etc., R. Co. [N. C.] 48 S. E. 743.

75. In a suit in equity to settle accounts and to construe the will. Not guilty of laches. Cresap v. Cresap, 54 W. Va. 581, 46 S. E. 582. Plaintiff held entitled to sue on behalf of himself and as executor of his mother for the cancellation of a mortgage given by him to a building and loan association to secure a usurious loan, he having transferred the mortgaged premises to her, and, for the purpose of extinguishing the debt, to have all payments applied on the amount of the original debt and interest thereon. Epping v. Washington Nat. Bldg., Loan & Investment Ass'n, 44 Or., 16, 74 P. 923. An executrix suing in her representative capacity to set aside assignments of certain mortgages executed by testator cannot, in the same action, litigate her right as an individual to a lien on property alleged to have been purchased by testator with her money for defendant. Peirson v. McNeal [Mich.] 100 N. W. 458. A joint cause of action cannot exist in favor of one as an individual based upon fraudulent representations to her alone, and also in favor of the same person as representative of another for a fraud practiced upon decedent. Complaint insufficient to show fraud practiced by defendant on decedent in obtaining stock. Groh v. Flammer, 89 App. Div. 28, 85 N. Y. S. 305.

76. Code Civ. Proc. § 1815. Applies to suit for accounting against successors of agent to invest principal's funds who have discharged agent's duties both as his personal representatives and under individual agreements with the principal. May also be joined under § 484, subd. 9, because they arise out of same subject of action. Rogers v. Wheeler, 89 App. Div. 435, 85 N. Y. S. 981.

77. Executor held not in default, he having filed notice of appearance as executor and also individually. Roche v. O'Connor, 88 N. Y. S. 968.

78. No identity between one suing in his individual capacity on a cause of action accruing to himself and the same person suing as executor upon a cause accruing to the estate of his decedent. Fleming v. Courtenay, 98 Me. 401, 57 A. 592.

79. In Connecticut cannot in action for false representations. Conn. Gen. St. 1902, § 739, authorizing suits against an administrator for money paid or services rendered the estate, and providing that if the claim is found to be just and such as equitably ought to be paid out of the estate, judgment may be rendered to that effect, does not authorize such action. Andrews v. Platt [Conn.] 58 A. 458.

In Pennsylvania if one be charged as executor or administrator, and after trial the proof shows an individual liability, the word "executor" or "administrator" may be stricken out, and judgment be entered accordingly. Word "executor" or "administrator" may be stricken out. Skivington v. Richards, 208 Pa. 385, 57 A. 768.

80. Whether he or estate is liable is not determined by form of decree in action for accounting for proceeds of farm carried on by defendant at the halves. Sowles v. Sartwell [Vt.] 56 A. 282.

81. Hiles v. Hiles [Ky.] 82 S. W. 580.

82. Cannot complain of errors in instructions which he himself invites. Farnsworth v. Fraser [Mich.] 100 N. W. 400. The courts of common pleas of Philadelphia held to have power to make a rule requiring persons sued in a representative capacity to file affidavits of defense, and to direct judgment to be entered against them in case of default. Helffrich v. Greenberg, 206 Pa. 516, 56 A. 45.

83. See Witnesses, § 4, 2 Curr. L. 2169.

Failure to serve one of two independent executors at most renders a judgment recovered against the estate voidable.[84] The fact that an officer of a corporation who confesses judgment against it in favor of an executor is a legatee under the will does not render the judgment invalid.[85] Statutes in some states authorize suits and executions against the estates of decedents in the hands of independent executors.[86] In New York, municipal courts have jurisdiction of contract actions against representatives when the amount in controversy does not exceed a specified amount.[87]

No judgment can legally be entered against a deceased defendant until his representative has been substituted as a party.[88]

The death of a party to a judgment renders it dormant.[89] Its revivor in the name of the representative restores it to full force and affords a new starting point for the running of the statute of limitations as to dormancy.[90] Where the representative is appointed in a foreign state he must, in some states, give bond that he will dispose according to law of any property he may receive thereunder before execution will issue to him.[91] Bills to construe[92] and suits to contest[93] or set aside wills are treated of elsewhere.[94]

Costs.[95]—An administrator bringing suit to assert some right which belonged to his intestate, or to redress some wrong done to him, during his lifetime, is not personally liable for costs if unsuccessful.[96] He will be where the action is for an alleged injury to the administrator in the conduct of the business incident to the settlement of the estate,[97] or on an obligation running against him,[98] or where he unreasonably defends.[99]

In an action on a claim against the estate, the executor is exempt from the payment of costs unless the demand of the plaintiff was property presented and payment thereof was unreasonably resisted or neglected, or in New York unless

84. In a suit to recover taxes. Ross v. Drouilhet [Tex. Civ. App.] 80 S. W. 241.

85. Manley v. Mayer [Kan.] 75 P. 550.

86. Texas statute (Sayles' Rev. Civ. St. art. 1996) held constitutional. Epperson v. Reeves [Tex. Civ. App.] 79 S. W. 845.

87. $500 (Laws 1902, p. 1489, c. 580, tit. 1, § 1, subd. 18). Pache v. Oppenheim, 84 N. Y. S. 926. An action against an executor by a husband for expenses incurred in the sepulture of his wife arises ex lege and hence municipal courts have no jurisdiction over it. Not within Laws 1902, p. 1487, c. 580, tit. 1, § 1, subd. 1. Id.

88. May be substituted on motion [Cal. Code Civ. Proc. § 385]. De Leonis v. Walsh, 140 Cal. 175, 73 P. 813. A court may, when such action is necessary to justice, direct that its findings of fact and conclusions of law thereon be filed as of a date anterior to the death of a party defendant against whom judgment is thereby ordered (Id.), but such action cannot operate to deprive the representatives and successors of the decedent of the right to appeal, or to shorten the time within which such appeal may be taken (Id.). Where a promissory note was transferred by the payee after suit had been commenced thereon, and such suit was continued in the name of the original payee, his administrator could not be substituted for him on his death, since the note was not assets of the estate. Transferee and not administrator should be substituted under Cal. Code Civ. Proc. § 385. Daneri v. Gazzola, 139 Cal. 416, 73 P. 179. Upon the death of a party defendant, plaintiff is entitled to have an administrator appointed and substituted for him, whether issues have been joined or not [Burns' Rev. St. 1901, § 273]. Trent v. Edmonds [Ind. App.] 70 N. E. 169.

89. Manley v. Mayer [Kan.] 75 P. 550. The death of the plaintiff suspends proceedings on a judgment until the qualification of a personal representative and the issuing of an execution in his name. McDonald v. Stembridge's Adm'r, 25 Ky. L. R. 961, 76 S. W. 845.

90. Manley v. Mayer [Kan.] 75 P. 550.

91. Execution issued to him suspends running of limitations though he fails to give bond [Ky. Civ. Code Prac. § 404]. McDonald v. Stembridge's Adm'r, 25 Ky. L. R. 961, 76 S. W. 845.

92. See Wills, § 5G, 2 Curr. L. 2160.

93. See Wills, § 4J, 2 Curr. L. 2104.

94. See Wills, § 4K, 2 Curr. L. 2105.

95. See 1 Curr. L. 1121, n. 87 et seq.

96. Ivins v. Jacob [N. J. Eq.] 58 A. 941. Defense of life insurance proceeds where "administrator" was named beneficiary. Opitz v. Karel, 118 Wis. 527, 95 N. W. 948.

97. As in suit for injunction to restrain defendant from collecting rents for certain pianos which administrator alleged he had the right to collect. Ivins v. Jacob [N. J. Eq.] 58 A. 941.

98. Charged against him personally in suit on a note which he signed. Glisson v. Weil & Co., 117 Ga. 842, 45 S. E. 221.

99. Resisting undoubted claim. Wiggins v. Wiggins [N. J. Eq.] 56 A. 148.

the executor did not consent to a reference according to law.[1] It is largely discretionary whether to charge him personally.[2]

An executor is entitled to costs on final judgment in his favor in an action brought against him by a legatee to recover a general legacy, in which he demands a money judgment only,[3] and will be charged therewith where he is not justified in resisting the claim of the legatee.[4] He will also be charged with costs incurred by reason of his failure to perform a duty required of him,[5] or by reason of his wrongful acts,[6] and with the costs of a suit brought by him as administrator in which it is determined that he has no capacity to sue as such.[7]

Costs will be awarded a representative who successfully resists a claim that he is personally liable on mortgage notes given under order of the court to raise money to pay debts.[8]

In an action by or against an administrator the court may, in its discretion, require the plaintiff to give security for costs,[9] and in some states where he has done so may certify his good faith and diligence.[10]

The question of costs in suits to construe,[11] or to prove, contest, or set aside the will, is treated elsewhere.[12]

§ 11. *Accounting and settlement by representatives.*[13] *A. The right and duty.*[14]—Statutes generally fix the time when an accounting must be had,[15] and in some states prescribe a penalty for the failure of an administrator to file annual accounts.[16] The latter statutes have been held to be mandatory, and the penalty

1. Code Civ. Proc. §§ 1822, 1835, 1836, 3246. Provisions of § 1836 are alternative. Executor has 6 months and 20 days after rejection of claim in which to file consent to reference (§ 1836) and costs will not be allowed where suit commenced before that time. Evidence held to show unreasonable resistance. Certificate of justice as to allowance of costs held sufficient. Pauley v. Millspaugh, 88 N. Y. S. 565. Resistance not unreasonable where claim reduced 40 per cent on trial. Holcombe v. Nettleton, 85 N. Y. S. 12. Justified in resisting action on notes where excess interest had been paid and question arose whether they were usurious or whether excess should be applied on principal. Bosworth v. Kinghorn, 94 App. Div. 187, 87 N. Y. S. 983. A refusal to refer a claim to a referee for determination does not subject an executor personally or the estate to costs in a proceeding to enforce it [Code Civ. Proc. § 1836 as amended by Laws 1897, p. 605, c. 469]. Holcombe v. Nettleton, 85 N. Y. S. 12. Failure to present is fatal even though costs of reference were stipulated to abide the event. Nichols v. Moloughney, 85 App. Div. 1, 82 N. Y. S. 949.

2. Matthews v. Sheehan, 76 Conn. 654, 57 A. 694.

3. Action under § 1819 is one at law though it incidentally involves construction of will [Code Civ. Proc. § 3229]. Ladies' Union Benev. Soc. v. Van Natta, 43 Misc. 217, 88 N. Y. S. 1083.

4. An executor, who is the only other beneficiary, is personally chargeable with the costs of a suit brought against him by a legatee to establish her legacy free from testator's debts, where there is no such doubt in regard to the construction of the will as justified him in resisting. Wiggins v. Wiggins [N. J. Eq.] 56 A. 148.

5. Trial court may adjudge costs against him in action to compel accounting, but not costs which may be incurred in future appeal [Batt's Ann. Civ. St. art. 2251]. Thomas v. Hawpe [Tex. Civ. App.] 80 S. W. 129.

6. Executors who take possession of realty, though they have no legal duties to perform in connection therewith, are chargeable personally with the costs of a suit by the devisee to recover its possession. Rooney v. Bodkin, 93 App. Div. 431, 87 N. Y. S. 800.

7. Baldwin v. Rice, 89 N. Y. S. 743.

8. Wisconsin Trust Co. v. Chapman [Wis.] 99 N. W. 341.

9. Held not to have abused discretion in refusing to do so in suit by administrator to recover certificates of deposit left by deceased [Code Civ. Proc. § 3271]. Kelly v. Madigan, 88 App. Div. 138, 84 N. Y. S. 331.

10. Although he gave a cost bond an administrator may have a certificate that he acted in good faith [Rev. Code 1892, § 881]. Nichols v. Gulf, etc., R. Co. [Miss.] 36 So. 192.

11. See Wills, § 5G, 2 Curr. L. 2160. The allowance of a solicitor's fee to executors defending a will contest is a matter within the discretion of the trial court. Graham v. Deuterman, 206 Ill. 378, 69 N. E. 237.

12. See Wills, § 4L, § 2106.

13. Conclusiveness of orders and decrees on accounting, see post, § 15.
Appeals, see post, § 16.

14. See 1 Curr. L. 1121.

15. In New York no account is due until after the expiration of a year from the issuance of letters. In re Magoun, 84 N. Y. S. 940. The Kentucky statute providing that no suit can be commenced against an executor until six months after his appointment does not apply to actions to settle the estate [Ky. St. 1903, § 3847]. Linthecum v. Vowel's Ex'r [Ky.] 80 S. W. 1090.

16. Rev. St. La. §§ 9, 1465, imposes penalty of 10 per cent. per annum on all funds

will be imposed whether loss results to the estate or not.[17] It will not, however, be imposed on opposition to the final account long after the failure occurred.[18] The proper remedy upon failure to file an annual account is by application to the court for an order compelling the representative to do so, and on failure, to demand his removal.[19]

An ancillary administrator should finally account to the domiciliary administrator.[20]

A testator may fix a time for the settlement of his estate different from that provided by statute so as to bind his devisees.[21]

Administrators will only be compelled to file supplemental accounts for matters occurring after the settlement of their final accounts.[22] In Louisiana the setting aside of a judgment discharging the representative is a condition precedent to a demand for a further accounting.[23]

(§ 11) *B. Who may require.*[24]—A substituted administrator under some statutes,[25] or anyone interested in the estate may require an accounting by the representatives of a deceased executor or administrator.[26]

All persons interested in the estate should be made parties.[27] If not cited they may voluntarily appear and make themselves parties.[28] An assignee of a legatee of a specific chattel cannot compel an accounting when there are no debts.[29] Lapse of time is no bar to the right of the heirs to compel an accounting where the administration has not been closed.[30]

(§ 11) *C. Scope and contents of account.*[31]—The representative need not account for the realty,[32] and the probate court has no jurisdiction to pass upon his accounts in regard to money belonging to another which has wrongfully come into his hands.[33]

Charges against the estate in the representative's accounts must be itemized.[34]

for which they may be responsible. In re Dimmick's Estate, 111 La. 655, 35 So. 801.

17. In re Dimmick's Estate, 111 La. 655, 35 So. 801.

18, 19. Succession of Conery, 111 La. 113, 35 So. 479.

20. Egan v. Wirth [R. I.] 68 A. 987.

21. Will not bind creditors. Linthecum v. Vowel's Ex'r [Ky.] 80 S. W. 1090.

22. In re Irvine's Estate [Pa.] 58 A. 618.

23. Succession of Dauphin [La.] 36 So. 941.

24. See 1 Curr. L. 1121.

25. Under the New Jersey Statutes a "substituted administrator" is entitled to call upon the representatives of the estate of the deceased executor of the will of his decedent to account for and pay over to him all of the personal estate of such decedent, which has not been properly paid out and distributed [Laws 1901, p. 303]. Hoagland v. Cooper [N. J. Eq.] 56 A. 705. The executors of a deceased executrix will not be required to account to a substituted administrator, where it appears that an interest in the personal estate of testator vested in a deceased daughter, no representative of whom is a party to the suit, and it further appears that such daughter's interest vested on her death, in said executrix. Id.

26. Can then require executor to account to claimant for moneys received by deceased administrator in his official capacity. In so doing may determine validity of claim and amount of payments made thereon [Code Civ. Proc. § 2606]. In re Hull, 89 N. Y. S. 939.

27. Failure to notify minor heirs of an application for the settlement of the final account and the discharge of the executor is immaterial where the order was favorable to them in that a release of a portion of the widow's award was thereby approved [1 Starr & C. Ann. St. Ill. 1896, pp. 336, 337, c. 3, par. 112]. Heppe v. Szczepanski, 209 Ill. 88, 70 N. E. 737.

28. Surrogate may determine whether they are such [Code Civ. Proc. § 2723]. In re Thompson, 41 Misc. 223, 83 N. Y. S. 983. All parties interested in the final settlement may interpose objections thereto at any time during the term at which it was made, even though such settlement has been approved and the administrator discharged. Held that application by widow for allowances should have been granted. Coulter v. Lyda, 102 Mo. App. 401, 76 S. W. 720.

29. Not within those included in sections 2626, 2627, Code Civ. Proc. Remedy is by action under section 1819. In re Egan's Estate, 89 App. Div. 565, 85 N. Y. S. 663.

30. Tex. Rev. St. 1895, art. 1882. Thomas v. Hawpe [Tex. Civ. App.] 80 S. W. 129.

31. See ante, § 9. Items of charge or credit.

32. Fact that she is also devisee does not change rule. In re Gill, 42 Misc. 457, 87 N. Y. S. 252.

33. Royalties on coal which widow had right to collect under the will, there being no debts. In re Duffy's Estate [Pa.] 58 A. 840.

34. Under Tex. St. 1895, art. 2248, charges for extra services and interest which are not

The second account should commence with the balance due on the first.[35] Decedent's share in a partnership is not a proper subject of inquiry on an accounting by his executor, who is also one of the surviving partners.[38]

(§ 11) *D. Procedure.*[37]—A court of chancery has jurisdiction over the settlement of the accounts of executors,[38] but equity will not entertain an action against representatives when complete relief can be had in the probate court.[39]

The representatives, creditors and all persons having an interest in decedent's property must be made parties to an action for the settlement of his estate.[40]

The court in adjusting the accounts of executors or administrators is governed by the broad principle of equity, and the representative may at all times show the fairness of his dealings and the real nature of his transactions, and restrict his liability to that which equity demands.[41] In New York on the final judicial settlement of accounts, the surrogate can exercise all powers given him by statute and necessary incidental powers.[42] Having all interested parties before him, he may settle and determine all questions concerning any claim, debt, legacy, bequest, or distributive share, to whom the same shall be payable, and the amount to be paid to each person.[43]

The court may, in his discretion, permit the filing of exceptions to an executor's report raising objections passed upon in considering former exceptions where they are filed before the final approval of the report and bring to the attention of the court provisions of the will not previously considered.[44] The fact that exceptions are filed one day too late may be disregarded by the court.[45] An administrator, against whom the next of kin has instituted proceedings for an accounting, alleging that he was indebted to intestate at the time of her death in a trust

properly itemized will be disallowed. McShan v. Lewis [Tex. Civ. App.] 76 S. W. 616.

35. Order allowing first account conclusive on him if not appealed from. Nowland v. Rice's Estate [Mich.] 101 N. W. 214.

36. Court's determination thereon is of no force but finding should, nevertheless, be limited to matters actually contained in account, and decree should recite that claims as to partnership interests were not passed upon. In re Irvin, 87 App. Div. 466, 84 N. Y. S. 707.

37. See 1 Curr. L. 1122.

38. Hoagland v. Cooper [N. J. Eq.] 56 A. 705. An action for an accounting by testamentary trustees, who were also executors, brought by residuary legatees, to which all the devisees were parties and in which fraud was alleged and the construction of the will and a settlement of the legal title to the estate were involved, is cognizable only by a court of equity. District court and not county court has jurisdiction under Const. Colo. art. 6 [Mills' Ann. St. Vol. 1, p. 265, § 11]. Currier v. Johnson [Colo. App.] 73 P. 882.

39. Levett v. Polhemus, 84 N. Y. S. 1049.

40. Petition omitting any of them is defective as to parties [Ky. Civ. Code Prac. § 428]. Linthecum v. Vowell's Ex'r [Ky.] 80 S. W. 1090. The executrix of a deceased executor is properly made a party. Owens v. Owens' Estate [Miss.] 37 So. 149. Sureties on the bond of an administrator, who have been discharged on the giving of a new bond, are necessary parties to a subsequent voluntary accounting by him, and may file objections to the account [Code Civ. Proc. § 2728]. In re Sill's Estate, 84 N. Y. S. 218.

41. In re Pope's Estate [Minn.] 97 N. W. 1046. Item in account of executrix held sufficiently definite for purposes of trial in the district court on appeal, in the absence of a demand that it be made more specific or for a bill of particulars. Id.

42. In re Robinson, 42 Misc. 169, 85 N. Y. S. 1087.

43. In re Robinson, 42 Misc. 169, 85 N. Y. S. 1087. Must inquire into the allegation of payments made by the representative. May determine right of administrator to set off debt owing by next of kin against his share, though the existence of such debt is denied. Id. May pass upon every item of disbursements for which allowance is claimed. May determine validity of compromise agreement and settlement made by them with testator's son in regard to his interest in assets of partnership of which deceased was a member. In re Meyer, 88 N. Y. S. 798. Upon an accounting by executors of a deceased executor for assets received by him in his official capacity, he may, where all parties interested are before the court, turn the proceedings into a judicial settlement. Has same jurisdiction he would have had had letters of deceased executor been revoked and he had been called upon to deliver assets remaining in his hands [Code Civ. Proc. § 2606 as amended by Laws 1901, p. 1096, c. 409]. In re Furniss, 86 App. Div. 96, 83 N. Y. S. 530.

44. In re Overton's Estate [Ind. T.] 82 S. W. 766.

45. No substantial right affected. In re Overton's Estate [Ind. T.] 82 S. W. 766.

capacity, may set up the statute of limitations at any time before the close of the evidence on the hearing before the referee.[46] Exceptions to supplemental accounts should be confined to matters contained therein.[47] It is the duty of the court to reject improper items on its own motion.[48] Parties who elect to try the right of the administrator to an allowance for certain items in the probate court cannot thereafter require issues for the determination thereof to be sent to a court of law.[49]

A reference[50] may be ordered on accounting, and an auditor may be appointed on final accounting, though accounts previously filed have been approved.[51] A referee's findings will be presumed to have been based on all the evidence.[52] His report is not final, but is subject to confirmation, modification or rejection by the court.[53]

Depositions of witnesses may be taken and used as in other actions.[54] An ex parte affidavit of the executor made out of court is insufficient evidence to support a judgment homologating his account.[55] The objector must prove allegations of new and affirmative matter in his exceptions.[56] The representative may be asked whether he has ever received any money or property not embraced in his account.[57]

A rehearing should be granted to parties who because of a referee's ruling have been dissuaded from adducing further proofs.[58]

46. In re Rothschild's Estate, 42 Misc. 161, 85 N. Y. S. 1084. Held error for referee to dismiss the proceedings on deciding that the statute of limitations was a bar to the administrator's liability, it being for him to determine whether, on all the facts, the administrator was chargeable with any sum of money. Id.

47. Court will not consider items adjudicated under former accounts, where final decree has been entered and executors have been discharged. In re Irvine's Estate [Pa.] 58 A. 618.

48. In re Willey's Estate, 140 Cal. 238, 73 P. 998.

49. Where parties have elected to try and are actually engaged in the trial before the orphans' court of the question whether the administrator should be allowed for certain items, they may not require issues for the determination thereof to be sent to a court of law under Md. Code Pub. Gen. Laws, art. 93, §§ 249, 250, Maynadier v. Armstrong [Md.] 56 A. 357. Payment of claims as preferred. Id.

50. See general practice title Reference, § 2, 2 Curr. L. 1484.

51. Mass. St. 1889, p. 1007, c. 311, § 1. Brigham v. Morgan, 185 Mass. 27, 69 N. E. 418.

52. Held error for surrogate on exceptions to referee's report in proceedings for accounting to assume that referee had not taken a certain deposit into consideration in determining the value of firm assets. In re Muller, 88 N. Y. S. 673.

53. The report of a referee appointed under the New York statute (Code Civ. Proc. § 2546) to examine the accounts of an administrator is not final but is subject to confirmation, modification, or rejection by the surrogate. May pass upon it after expiration of period fixed by such section. In re Barefield, 177 N. Y. 387, 69 N. E. 732.

54. The Pennsylvania orphans' court is a civil court of record and hence the statute provided for taking depositions of nonresident witnesses (Act June 25, 1895; P. L. 279) applies to proceedings therein. In re Irvine's Estate [Pa.] 58 A. 617. Depositions taken before the executrix of a deceased executrix was made a party were properly used thereafter. Owens v. Owens' Estate [Miss.] 37 So. 149.

55. Succession of Le Sage, 112 La. 857, 36 So. 757.

56. Where exceptions allege receipt of money with which administratrix has not charged herself, contestant must support them by evidence and administratrix not bound to show in the first instance that such fact is not true. In re Vance's Estate, 141 Cal. 624, 75 P. 323. Where the administratrix claims property individually under a transfer from decedent, the question of the validity of such transfer cannot be raised on objection to the allowance of her final account, in the absence of allegations in the exceptions of facts showing that such property belonged to the estate. Id. The question whether an administratrix held property, transferred to her by decedent, in trust, cannot be determined on exceptions to her final account but must be determined in a personal action against her to enforce the trust. Id.

57. In re Rothschild's Estate, 42 Misc. 161, 85 N. Y. S. 1084.

58. Held error to deny rehearing on ground of further evidence as to existence of partnership between testator and executor, where surrogate surcharged executor's account on holding that evidence introduced before referee was insufficient to establish such partnership and the referee had held that it was, and thus induced parties to refrain from offering further proof. In re Muller, 88 N. Y. S. 673. See title Reference, §§ 9, 10, 2 Curr. L. 1488, 1489.

In Georgia on hearing of a citation for settlement against a representative neither the ordinary, nor the superior court on appeal, can allow him credit for items accruing after the last return and not specially pleaded in the answer.[59]

(§ 11) *E. The decree or order.*[60]—Judgment should not be rendered in favor of parties making no opposition to the allowance of the account.[61] The findings on the hearing of the account should state what items the court allows and what items he rejects.[62] In a suit against them for the settlement of the estate, where their removal is not sought and no grounds therefor are stated, executors and testamentary trustees should be required to pay over to the master commissioner only such sums as the adult children are entitled to under the will.[63] Where, in an insolvent succession, the executor's account shows a specific sum for distribution the amounts to be allowed the distributees must necessarily be fixed and the amount made definite.[64]

Credits for payments made by executors under the terms of the will are not to be given him on settlement of his accounts but will be considered only on the distribution of the estate.[65] The same is true in regard to the determination of the rights of parties claiming an interest in the estate.[66]

The court may in his discretion charge the executor personally with all costs and expenses of proceedings on objections to his account,[67] or of proceedings to compel him to account.[68]

The statute of limitations governing suits on implied contracts applies to actions for the recovery of unaccounted-for moneys charged against the representative individually.[69]

§ 12. *Distribution and disposal of funds.*[70]—The administration of an estate is never complete until all the assets have been turned over to those rightfully entitled to them.[71] The rights of devisees and legatees are fixed by the decree of distribution and not by the will.[72] The decree creates no new title, but merely declares the one accruing under the law or the will.[73] Orders and judgments of

59. Tate v. Gairdner, 119 Ga. 133, 46 S. E. 73.

60. See 1 Curr. L. 1124. For conclusiveness of orders and decrees on accounting, see post, § 15.

61. Should not be rendered against him in favor of heirs who have filed no oppositions. Succession of Wiemann, 112 La. 293, 36 So. 354. A judgment directing that a sum found due the estate from the administrator be paid to the heirs rather than the creditors held proper where the latter did not join in the suit to compel an accounting, had never contested administrator's accounts, and had remained inactive and acquiesced in his action for over 25 years, and the estate is insolvent. Thomas v. Hawpe [Tex. Civ. App.] 80 S. W. 129.

62. Nowland v. Rice's Estate [Mich.] 101 N. W. 214.

63. Finley's Ex'rs v. Pearson, 25 Ky. L. R. 766, 76 S. W. 374.

64. Judgment creditor allowed interest up to date of filing account has no reason to complain. Succession of Henderson [La.] 36 So. 904.

65. In re Willey's Estate, 140 Cal. 238, 73 P. 998.

66. Particularly where items in account to which his right to object is questioned are manifestly improper. In re Willey's Estate, 140 Cal. 238, 73 P. 998.

67. Proper to do so where account is surcharged with amounts lost through his negligence in failing to collect claims. In re Northup's Will, 92 App. Div. 5, 87 N. Y. S. 318.

68. Batt's Ann. Civ. St. art. 2251. Thomas v. Hawpe [Tex. Civ. App.] 80 S. W. 129.

69. An action in which plaintiff claims that certain sums of money belonging to her as administratrix were received by defendant's decedent as executor and not accounted for and demands a money judgment is based on an implied contract to pay over such money and hence the six years' statute of limitations applies. Constantine v. Constantine, 91 App. Div. 607, 87 N. Y. S. 139.

70. For conclusiveness of decrees of distribution, see post, § 15. For matters in regard to appeals therefrom, see post, § 16. See, also, 1 Curr. L. 1125.

71. Bristol Sav. Bank v. Holley [Conn.] 58 A. 691.

72. Can only be determined on distribution, and hence questions as to payments of income by executors, who are also testamentary trustees under terms of will, cannot be determined in an account in advance thereof. In re Willey's Estate, 140 Cal. 238, 73 P. 998.

73. Merely declares who are entitled to the property unde law or will and does not affect rights of persons claiming under them. Coats v. Harris [Idaho] 75 P. 243.

the probate court directing a distribution of the estate are provisional only, and do not authorize the administrator to make such distribution before the expiration of the time allowed for an appeal therefrom.[74] In North Carolina, any person interested may bring an action against the representative for the settlement of the estate at any time after two years from his qualification[75] and within ten years after the right of action accrues.[76]

Legacies should be paid from the personalty, unless the testator indicates a different fund,[77] or a statute makes them a charge on land.[78] In paying legacies, some of which are charged and others not, the fund charged should be resorted to in order to avoid a deficiency.[79] General legacies abate in equal proportions to make up a deficiency of assets.[80] The share of a pretermitted child should first be taken from the estate not disposed of by will.[81] If that is not sufficient, so much as may be necessary must then be taken from all the devisees and legatees in proportion to the value of the shares they respectively receive under the will, unless the obvious intention of the testator in relation to some specific provision would thereby be defeated.[82]

Interest will be allowed on legacies from time when they become due.[83] It is allowed as incident to the principal demand, and is not imposed upon the executor for his neglect.[84] The representative is personally chargeable with interest on legacies or distributive shares which he refuses or neglects to pay over to those entitled thereto[85] and for damages resulting from his delay or refusal.[86]

74. Payment before that time no defense to claims of persons interested on trial do novo on appeal. Coulter v. Lyda, 102 Mo. App. 401, 76 S. W. 720.

75. No demand and refusal necessary [Code, §§ 1488, 1402]. Edwards v. Lemmond [N. C.] 48 S. E. 737.

76. Accrues two years after qualification [Code, § 158]. Edwards v. Lemmond [N. C.] 48 S. E. 737.

77. The indication of a particular fund or the charging of legacies on realty is always a question of intention, and hence is treated in the title Wills. See Wills, § 5D, 10, 2 Curr. L. 2146.

78. In Connecticut, pecuniary legacies are a charge on real estate not specifically devised. Proceeds of sale may be used to pay them [Gen. St. 1902, § 295]. Blakeslee v. Pardee, 76 Conn. 263, 56 A. 503.

79. Where personalty insufficient to pay all legacies. Blakeslee v. Pardee, 76 Conn. 263, 56 A. 503.

80. Loring v. Thompson, 184 Mass. 103, 68 N. E. 45. See Wills, § 5F, 2 Curr. L. 2158.

81. In re Ross' Estate, 140 Cal. 282, 73 P. 976. Rights of pretermitted children, see Descent and Distribution, § 2, 3 Curr. L. 1082.

82. Devise held not exempt [Cal. Civ. Code, § 1308]. In re Ross' Estate, 140 Cal. 282, 73 P. 976.

83. Loring v. Thompson, 184 Mass. 103, 68 N. E. 45. From one year after his death where testator did not stand in loco parentis to legatee (Graham v. Whitridge [Md.] 58 A. 36), unless will shows contrary intention (Gaston v. Hayden, 98 Mo. App. 683, 73 S. W. 938). Interest was properly allowed on a special legacy to a trustee, for the period between the time the distribution should have been made by the terms of the will and the time when it was made, where the trustees as purchasers of the estate charged themselves with interest for the same period on the amount to be paid by them on account of the purchase. Kennedy v. Dickey [Md.] 57 A. 621.

84. Loring v. Thompson, 184 Mass. 103, 68 N. E. 45.

85. Distributees should be allowed interest from the date of final settlement where the administrator refuses to pay over their shares and compels them to resort to the courts for the enforcement of their rights. Preston v. Davis' Ex'rs [Va.] 45 S. E. 865. Executors held chargeable with legal interest on moneys which they failed to distribute, but left on deposit in their own bank for more than ten years, there being no reason why distribution should not have been made. Owens v. Owens' Estate [Miss.] 37 So. 149. Where widow was awarded benefits she would have received had she taken under the statute as of the time such benefits would have reached her in that event, and was required to account for property received as of the time of the receipt thereof, she was entitled to interest from the time she should have received the principal of her property had she taken under the statute. Ludington v. Patton [Wis.] 99 N. W. 614. In the absence of proof of special difficulty or complication, the law regards one year as a sufficient time in which to collect assets and pay debts. Lowman v. Lowman [S. C.] 48 S. E. 636. Where the will directs the executor, who is also a devisee, to pay debts as soon as it can be conveniently done, and directs him to thereafter pay certain legacies out of the devise to him, he is chargeable with interest on such legacies after one year. Id.

86. Unexcused delay in distribution and frivolous appeal from order for partial distribution. In re Straus' Estate [Cal.] 77 P. 1122. The necessity for retaining funds to pay legacies due at the death of testator's

The indebtedness of a legatee or distributee to the estate may be deducted from his legacy or distributive share.[87] There is a conflict of authority as to whether this rule applies to debts barred by the statute of limitations.[88] The transfer tax may also be deducted.[89] In equity, a debt due to an administrator individually from a distributee may be allowed as a payment on such distributee's share of the estate,[90] but it cannot be brought into the administration as a credit upon the shares of the other distributees.[91] The ademption of legacies and the satisfaction of debts by legacies being questions of intention are treated elsewhere.[92]

The rights of all the heirs should be preserved,[93] and the decree should dispose of the property and the whole title thereto and estate therein.[94] Estates will be equitably distributed so as to procure equality of shares.[95] Where the widow elects to take a child's part, the estate should be equally divided between her and the children after the payment of the debts and the expenses of administration up to and including the distribution.[96] Such share is superior to legacies.[97] On an issue as to whether a distributee has received his share of the estate, a full showing of what he and the other heirs have received is proper.[98] Statutes in some states authorize proceedings to determine the interest of all persons in an estate in process of administration.[99] In others on the filing of the final account and notice

widow furnishes the executor no excuse for delaying the settlement of the balance of the estate and the payment of all legacies which are due, there being sufficient funds for both purposes. Brown v. Ferren [N. H.] 58 A. 870.

87. Liability of surviving partner to estate for assets collected by him and not accounted for, though not a debt contracted with decedent or with his executor within meaning of Ala. Code 1896, § 239. Noble v. Tait [Ala.] 37 So. 278. From distributee or party from whom he claims by right of representation. Boden v. Mier [Neb.] 98 N. W. 701. Debts of deceased parent will be deducted from share of issue taking by right of representation under statutes for prevention of lapses [Ohio Rev. St. 1892, § 5971]. Baker v. Carpenter, 69 Ohio St. 15, 68 N. E. 577. A debtor heir will be required to account to the estate for the debt he owes, and the amount he is to receive will depend upon the accounting; debt evidenced by promissory notes; interest thereon. Tobias v. Richardson, 5 Ohio C. C. (N. S.) 74. Where debt exceeds legacy, need not pay it, but may give legatee credit for the amount; but executor cannot, as trustee under same will, apply income of testamentary trust to payment of debt. In re Bogert's Estate, 85 N. Y. S. 291. See Wills, § 5 D 10, 2 Curr. L. 2148.

88. **In Alabama,** mere lapse of time is no bar. Noble v. Tait [Ala.] 37 So. 278.

In Nebraska, debts barred by the statute cannot be deducted. Boden v. Mier [Neb.] 98 N. W. 701.

89. In re Ogden's Estate, 41 Misc. 158, 83 N. Y. S. 977. See title Taxes, § 15, 2 Curr. L. 1838, for full discussion of transfer taxes.

90. Preston v. Davis' Ex'rs [Va.] 45 S. E. 865.

91. Agreement by distributees approving manner of administration held not to authorize such action. Preston v. Davis' Ex'rs [Va.] 45 S. E. 865.

92. See Wills, § 5F, 2 Curr. L. 2158; Id., § 5D 4, 2133.

93. The rights of an heir cannot be disregarded, though he has been unheard of for 29 years. In re Sherwood's Estate, 206 Pa. 465, 56 A. 20. A decree directing distribution to two brothers, one of whom has been absent and unheard of for thirty years, will not be modified so as to give the whole estate to the other, in the absence of proof of death of the first. In re Mitchell's Estate, 85 N. Y. S. 103.

94. Where will gives fee to children subject to trust, decree should make distribution to them subject to trust. In re Reith's Estate [Cal.] 77 P. 942.

95. Held that son who had received certain payments under compromise agreement with executors could not be regarded as creditor of estate so as not to be entitled to share of profits in partnership of which deceased was a member. In re Meyer, 88 N. Y. S. 798. Income divided where estate could not be divided as directed by will. Id. Where bequests are made in trust to pay the income to beneficiaries and the principal cannot be paid to the trustees at testator's death, the beneficiaries are entitled until it is so paid to the income merely, that is the amount which the fund earns if properly invested, and if not, the amount it would have earned if so invested. Under Mass. Rev. Laws, c. 141, § 24, providing that if income is given in trust for benefit of one for life, he is entitled to receive it from testator's death. In determining amounts which shall abate for deficiency of assets, such income should be added to bequests in trust. Loring v. Thompson, 184 Mass. 103, 68 N. E. 45.

96. May take such part in lieu of dower [Fla. Rev. St. 1892, § 1833]. Benedict v. Wilmarth [Fla.] 35 So. 84.

97. Benedict v. Wilmarth [Fla.] 35 So. 84.

98. Perdue v. Perdue [Mo. App.] 81 S. W. 633.

99. Order adjudging persons not appearing after notice in default, held not to deprive court of jurisdiction by reason of recital therein that it was without prejudice to those who had filed petitions for distribu-

to heirs, devisees and legatees, they must appear and prove their heirship or other title to the surplus.[1]

Surplus moneys received on foreclosure of a mortgage should be distributed by the probate court on notice to all parties,[2] and commissions which an executor refuses to accept and returns to the estate should be divided among all the beneficiaries.[3] The allowance for the value of the widow's dower deducted from the share of an after-born child, for whom no provision was made in the will, should be held by the representatives for the benefit of all the devisees in proportion to their respective shares.[4] Any surplus remaining after a sale of lands to pay debts should be distributed as realty.[5]

Ordinarily the only questions on distribution are as to who are the heirs, legatees and devisees and what property they are entitled to as such.[6] In the absence of statute,[7] the probate court has no jurisdiction to determine controversies between heirs or devisees and third parties claiming under them.[8] A provision authorizing distribution to the assignees of such persons does not apply to conveyances made by an heir apparent before the death of decedent.[9]

Upon the hearing for distribution, the court can adjust all matters between the legatees or distributees and the executors, and credit to the latter all advances made by them to the former under the terms of the will.[10] Contracts between the heirs,[11] and between the heirs and the representatives in regard to the distribution of the

tion [Cal. Code Civ. Proc. § 1664]. In re Sutro's Estate [Cal.] 77 P. 402. Provision in such section as to time of filing complaint held directory only, and failure to file within such time held not to deprive court of jurisdiction. Id.

1. Petition filed by legatee need not show that executor has assets applicable to payment of his legacy [Burns' Ann. St. Ind. 1901, § 2562]. Coulter v. Bradley [Ind.] 71 N. E. 903.

2. Order of supreme court directing distribution to particular creditors, made without notice to all creditors, properly modified by requiring repayment into court subject to further orders, should be distributed by surrogate on notice to all parties. Powell v. Harrison, 88 App. Div. 228, 85 N. Y. S. 452. A judgment of foreclosure of a mortgage given by decedent should direct that the surplus moneys derived therefrom should be paid into the surrogate's court having jurisdiction of the estate. Code Civ. Proc. § 2798, 2799. Contract creditor, though not party to action entitled to move for amendment of order so as to have fund held subject to order of surrogate court rather than supreme court. Id.

3. Widow should be given her share where it appears that he did not intend to donate them to the children. Owens v. Owens' Estate [Miss.] 37 So. 149.

4. In re Miner [N. J. Eq.] 55 A. 1102.

5. Power of sale in will does not amount to a conversion. In re Raleigh's Estate, 206 Pa. 451, 55 A. 1119.

6. In re Ryder's Estate, 141 Cal. 366, 74 P. 993.

7. **In Utah** has jurisdiction (Rev. St. 1898, § 3691). Snyder v. Murdock, 26 Utah, 233, 73 P. 22.

In New York, the estate will be distributed to those having legal title thereto, and parties claiming adversely thereto under equitable titles will be remitted to other tribunals. Code Civ. Proc. § 2743. Surrogate has no jurisdiction where validity of equitable assignment is disputed. In re Lattan's Estate, 42 Misc. 467, 87 N. Y. S. 246.

8. **In South Dakota,** the county court has no jurisdiction of an action to set aside release by legatee on ground of fraud. Ward v. Du Pree, 16 S. D. 500, 94 N. W. 397.

In Maine, it is held that the question of the validity of an assignment by an heir of his distributive share does not arise in the probate court or in the supreme court of probate, but must be settled in the common law courts, and the decree of distribution should be made irrespective thereof. In re Cote's Estate, 98 Me. 415, 57 A. 584; Appeal of Stilphen [Me.] 58 A. 916. [Advance sheets only.]

9. Where grantor inherits property which he previously conveyed without title, grantee may not have it distributed to him in probate proceedings [Cal. Code Civ. Proc. § 1678]. In re Ryder's Estate, 141 Cal. 366, 74 P. 993.

10. In re Willey's Estate, 140 Cal. 238, 73 P. 998.

11. Evidence held to show agreement between decedent's mother and his widow whereby the latter agreed to take certain property in full satisfaction of her interest. Wright v. Breckenridge [Iowa] 101 N. W. 111. Receipt by widow in which she acknowledged full satisfaction of her claims held admissible for purpose of showing agreement of settlement. Id. Where the widow, who had renounced under the will, made no claim to the balance of the land for more than 12 years, she could not thereafter claim any interest in it, though she had never conveyed her interest to decedent's mother, to whom the land was devised. Id. Agreement as to distribution of realty held to operate as conveyance and to control the rights of the parties. Howells v. McGraw, 97 App. Div. 460, 90 N. Y. S. 1.

estate, will be enforced if otherwise valid,[12] but one heir cannot bargain away the rights of the others.[13] Legatees who, without objection, permit the representatives to pay annuities, cannot thereafter complain that the annuities given to them are entitled to preference.[14] A contract to dispose of one's property in a particular way by will may be enforced against his heirs, devisees or personal representatives.[15]

The attachment of a legacy by a creditor of the legatee gives him the same rights in relation thereto as the legatee had.[16] The representative may be made a garnishee in a suit in attachment where it appears on filing his final account that the legacy or a part thereof will probably be paid.[17]

Statutory notice of proceedings for distribution must be given.[18] The administrator represents the intestate,[19] and is an adverse party as to all persons claiming the right to share in the personalty.[20] Where there is a contest as to who is the next of kin, the right to open and close rests in the discretion of the court.[21] Only those having an interest in the estate can question the disposition made of the property.[22] One is not estopped from claiming that he is a universal legatee by a claim in the same pleadings as usufructuary.[23]

The court of the ancillary jurisdiction may, in its discretion, award payment to a resident legatee or distributee before ordering remission of the balance.[24] Where decedent's next of kin is a nonresident alien, the public administrator may be directed to turn over the balance of his estate to the consul general of the

12. See ante, § 9A. An agreement to expedite the distribution of the estate, though amounting to a pretermission of a doubtful claim, is not unfair or oppressive. Norwood v. Tyson [Ala.] 36 So. 370. Equity will enforce an agreement by a legatee that advances made to her by an administrator personally, when he has no funds belonging to her in his hands, shall be set off against her share of the proceeds of lands belonging to the estate. Will allow administrator to reimburse himself therefrom. Horton v. Hill [Ala.] 36 So. 465. Equity has jurisdiction to compel specific performance of a contract whereby legatees and the executor agree upon a division of the estate, the giving of receipts and the discharge of the executor. Will enjoin proceedings to compel executor to account in probate court where division was made but receipts were not filed according to the agreement. Bill not demurrable because receipt evidential against allegation of full settlement. Norwood v. Tyson [Ala.] 36 So. 370.

13. Hughes v. Miller, 205 Pa. 627, 55 A. 793. A mortgage on a lot owned by deceased was foreclosed and the lot was bid in by a creditor for a certain sum. On agreement between the creditor and the widow that the sale should be set aside, the property was again put up for sale and purchased by the widow for a less sum, the creditor being given judgment for the amount of his claim. Held that the sheriff was entitled to recover from the creditor for the benefit of the estate the difference between his bid and the amount for which the widow purchased. Id. The sum so recovered should be distributed as part of the estate, but the portion to which the widow would be entitled should be paid to the creditor. Id.

14. The widow, who has made no claim that an annuity given her by the will was entitled to preference and did not complain of the course adopted by the executor until he commenced suit for the construction of the will, could not then complain of his conduct in leaving a part of her annuity unpaid and making payments on other annuities, particularly when there were sufficient funds to pay them all with interest on deferred payments. Houghteling v. Stockridge [Mich.] 99 N. W. 759.

15. See Wills, § 1, 2 Curr. L. 2077, for a full discussion of this question.

16. Must wait until orphans court determines amount due legatee. Ellwanger v. Moore, 206 Pa. 234, 55 A. 966.

17. Orlopp v. Schueller, 4 Ohio C. C. (N. S.) 611.

18. Only notice necessary on decree of distribution is that required by Kan. Gen. St. 1901, § 2957. Id. § 2974 does not apply. Scruggs v. Scruggs [Kan.] 77 P. 269.

19. Sorensen v. Sorensen [Neb.] 98 N. W. 837.

20. Within meaning of Neb. Code Civ. Proc. § 329, in regard to witnesses in actions wherein representatives of decedents are parties. Sorensen v. Sorensen [Neb.] 98 N. W. 837. As to his competency as a witness, see title Witnesses, § 4, 2 Curr. L. 2169.

21. Sorensen v. Sorensen [Neb.] 98 N. W. 837. Disaffirming rule announced in Id. [Neb.] 94 N. W. 540. Former opinion adhered to. Id. [Neb.] 100 N. W. 930.

22. Cunningham v. Lawson [La.] 36 So. 107.

23. Decree recognizing both demands harmless error. Thomas v. Blair, 111 La. 678, 35 So. 811.

24. Wilson v. Smith [C. C. A.] 126 F. 916. But it will not do so where questions exist which can only be properly determined under the law of the decedent's domicile. Statutes authorizing legatees to bring action against executors to recover their legacies, where there are sufficient assets to pay legacies and debts (Pa. Act Feb. 24, 1834, §§ 50, 53, 55) does not extend to foreign assets distributable under the laws of, and by the courts of another state. Id.

country in which he resides, instead of citing him and making payment to him directly.[25]

A life tenant or usufructuary may be required to give bond unless the will provides otherwise.[26]

The court may order,[27] or the next of kin may agree to, a distribution of assets in kind for the purpose of avoiding loss.[28] On the settlement of the executor's account, a sufficient sum should be set apart to pay annuities and legacies not yet due.[29] Where an accumulation for the benefit of children is for a longer period than that allowed by law, distribution should be made to each upon his arrival at majority.[30] The doctrine of acceleration of estates is founded upon the desire of courts of equity to give effect to the manifest intention of the testator, and it will be denied when such intention would be frustrated by allowing it.[31]

Statutes in some states allow distribution before final settlement on the execution of bonds for repayment, if required.[32] In Pennsylvania, where distribution is made under an order of court, the administrator has no right to demand a refunding bond from the legatees or distributees, and is not liable for a failure to do so.[33] On application for a partial distribution, the court should direct the retention of a sufficient sum to pay commissions, attorney's fees and the expenses of closing up the estate.[34] In California, an order for the payment of a dividend on an accounting by an administrator may be made without notice or application therefor,[35] but it cannot be made until after the account is settled.[36] It is not, strictly speaking, a part of the proceeding for the settlement of the account, or of the adjudication respecting the claims reported therein.[37] An appeal from the order settling the account suspends the order for a dividend, and prevents its enforcement against the will of the administrator.[38]

A legatee may follow the assets of the estate to recover the amount of his legacy.[39] In some states, legatees[40] and distributees may maintain actions against

25. The public administrator appointed to administer upon the estate of an Italian subject dying a resident of New York. In re Davenport, 43 Misc. 573, 89 N. Y. S. 537.

26. Maguire v. Maguire, 110 La. 279, 34 So. 443.

27. As where they consist largely of stocks and bonds which have depreciated in value. In re Thompson, 84 N. Y. S. 1111.

28. In re Thompson, 84 N. Y. S. 1111.

29. Where pecuniary legacies do not become payable until the death of testator's widow, and in the meantime the net income of the money required to pay them goes to her, a sufficient sum for the purpose should be set aside upon the settlement of the executor's account, and transferred to him as trustee, upon his giving bond as such. Will then he discharged for it in his capacity as executor. Brown v. Ferren [N. H.] 58 A. 870.

30. Until children reached age of 25 years. Thorn v. Thorn, 86 App. Div. 405, 83 N. Y. S. 849.

31. Distribution could not be accelerated by release of widow's life interest, where children took vested interests under the will, defeasible as to any one of them on his death during life of widow, in which event his share would go to his children, and the will fixed the time for division at the death of the widow, since it would be impossible before that time to ascertain who would be entitled to take the remainder on the happening of that event. In re Rogers' Trust Estate, 97 Md. 674, 55 A. 679.

32. Pierce's Code, § 2671. Noble v. Whitten, 34 Wash. 507, 76 P. 95.

33. In re Piper's Estate, 208 Pa. 636, 57 A. 1118.

34. Evidence sufficient to sustain order for partial distribution. Amount left held sufficient. In re Straus' Estate [Cal.] 77 P. 1122. Objection on petition for partial distribution that court had no jurisdiction over controversy between executor and petitioner in regard to profits of partnership business held untenable, there being no such controversy. Id.

35. Cal. Code Civ. Proc. § 1647. In re McDougald's Estate [Cal.] 77 P. 443.

36. When made on same day may be included in same entry in minutes with order settling account and immediately following it. May be made on same or subsequent day. In re McDougald's Estate [Cal.] 77 P. 443.

37. Parties to whom dividends are payable do not thereby become parties to accounting. In re McDougald's Estate [Cal.] 77 P. 443.

38. Hence it is proper to defer order for dividend until time for appeal from order settling account has expired or appeal therefrom has been determined. In re McDougald's Estate [Cal.] 77 P. 443.

39. Plaintiffs as legatees of testator may follow assets of his estate into hands of persons receiving them in distribution of intes-

the representative for their legacies or distributive shares.[41] A solicitor has no capacity to sue to recover for the benefit of the distributees money paid to the clerk of the superior court by decedent's administrator for the benefit of such distributees.[42] An action cannot be maintained to recover a distributive share of the estate under a decree annulled by the probate court.[43] In a suit in equity to establish the lien of a legacy on certain realty, the burden is on plaintiff to prove that the legacy is a subsisting lien and is unpaid.[44]

The statute of limitations does not begin to run in favor of a personal representative against the distributees until a court having jurisdiction directs a distribution,[45] and against the right of an heir, devisee or legatee to recover his distributive share of the estate until the executor files his final account.[46]

One of two or more devisees may maintain an action for partition against the others and the executor at any time after the expiration of the time for filing claims, though the estate has not been settled and there has been no decree of distribution, provided the executor has on hand sufficient funds to pay the debts and expenses of administration.[47] A statute authorizing the sale of a decedent's realty freed from any contingent remainders or executory devises limited thereon, or any entailment thereof, without the consent of the interested parties, is constitutional.[48] A devisee may prosecute ejectment during the pendency of probate proceedings.[49]

Courts of general jurisdiction may partition property owned jointly by decedent and another,[50] or quiet title in an heir without regard to pending probate proceedings.[51]

Equity will not interfere with a decree of the probate court directing a distribution of the estate to beneficiaries in accordance with the conditions specified in the will.[52]

The pendency of proceedings for the revocation of probate does not preclude the making of an order directing the payment of a sum to a legatee who is also

tate estate of his widow, who was also his executrix, both under N. Y. Code Civ. Proc. § 1837 and independent thereof. Trustees of Methodist Episcopal Church & Soc. v. Reeve, 79 App. Div. 65, 79 N. Y. S. 1102.

40. Complaint should state that there is property of testator applicable to its payment. Failure to do so cured by finding to that effect. Coulter v. Bradley [Ind. App.] 69 N. E. 710.

In Pennsylvania, the statute authorizes suits by legatees against executors having in their hands sufficient funds to pay debts and legacies, to recover their legacies [Pa. Act Feb. 24, 1834, § 50 et seq. (P. L. 83)]. Wilson v. Smith [C. C. A.] 126 F. 916.

In New York, an assignee of a legatee of a specific chattel may maintain an action against the executor to recover the same [Code Civ. Proc. § 1819]. In re Egan's Estate, 89 App. Div. 565, 85 N. Y. S. 663.

41. **California** (Code Civ. Proc. § 1666). Le Mesnager v. Variel [Cal.] 77 P. 988. Executor's appearance, answer and demurrer sufficiently shows court's jurisdiction over his person. Id.

In Georgia, heirs at law cannot ordinarily sue in their own names to recover their distributive share in personalty without alleging that there was no administration and no necessity for any [Ga. Civ. Code 1895, § 3353]. Allen v. Hurst [Ga.] 48 S. E. 341.

42. It is proper in such case to direct that the distributees be substituted as plaintiffs and that the pleadings be reformed. Brooks v. Holton [N. C.] 48 S. E. 737.

43. Drew v. Provost, 98 Me. 422, 57 A. 587.

44. Whether suit be deemed one under Code Civ. Proc. § 1819, or ordinary one in equity. Conkling v. Weatherwax, 90 App. Div. 585, 86 N. Y. S. 139. Declarations of devisee are incompetent to prove nonpayment as against his mortgagee. Id. Mere proof of demand for payment is not proof of nonpayment. Id.

45. Smith v. Moore [Va.] 46 S. E. 326.

46. Right of one who was entitled to a share on remarriage of decedent's husband. Edwards v. Kelly [Miss.] 35 So. 418.

47. Schick v. Whitcomb [Neb.] 94 N. W. 1023.

48. Order of orphans' court directing sale of heavily incumbered property held for best interests of all parties concerned [Pa. Act Apr. 18, 1853 (P. L. 503)]. In re Smith's Estate, 207 Pa. 604, 57 A. 37.

49. Beer v. Plant, 1 Neb. Unoff. 372, 96 N. W. 348.

50. The district court has jurisdiction to partition property owned jointly by two brothers who had been in partnership before the death of one of them, which was not partnership property. Raynsford v. Holman [Kan.] 74 P. 1128.

51. Altgelt v. McManus, 30 Tex. 382, 70 S. W. 460.

52. Kauffman v. Gries, 141 Cal. 295, 74 P. 846.

a next of kin, for his support.[53] Where, upon the settlement of an administrator's accounts, the balance in his hands was ordered paid to the person entitled thereto, it will be presumed on appeal that all debts have been paid.[54]

The fee of a guardian ad litem, appointed to represent minor heirs in an equity suit involving the distribution of the estate, is properly charged against the estate as an expense of administration.[55] Legacies of property, which it is necessary to sell in order to make the required division, should bear their proportion of the commissions incurred in administering the whole estate.[56]

In some states, the court is given discretion to apportion between the parties the costs of proceedings to determine the rights of persons claiming as distributees of the estate of a decedent.[57]

Family settlements must be between parties in interest.[58] In Louisiana, if the decision of a family meeting advising a sale of property belonging to the estate be homologated, the tutor of the minor heirs has authority to provoke a sale.[59] The fact that only one of several lots directed by the meeting to be sold for purposes of distribution was sold does not release the purchaser.[60]

§ 13. *Enforcement of orders and decrees by attachment as for a contempt.*[61]—In New York the surrogate may punish the executor by fine and imprisonment as for a contempt for failure to pay over money as directed by a decree.[62]

§ 14. *Discharge of personal representatives.*[63]—The office of an executor ceases when he turns over the property to the testamentary trustee and makes a final settlement.[64] The mere judicial settlement of the representative's accounts does not work his discharge, but he continues as executor with respect to assets not turned over.[65] In some states it is held that an executor or administrator may resign with the consent of the probate court, or may be removed for cause, but that the court has no right to discharge him from his trust merely on the settle-

53. Will be charged to him as legatee or next of kin, according to result of proceedings. Functions of executor not thereby destroyed but only suspended in certain particulars [Code Civ. Proc. § 2650]. In re Hughes' Estate, 41 Misc. 75, 83 N. Y. S. 646.

54. Lethbridge v. Lauder [Wyo.] 76 P. 682.

55. Benedict v. Wilmarth [Fla.] 35 So. 84.

56. In re Fisher, 93 App. Div. 186, 87 N. Y. S. 567.

57. Cal. Code Civ. Proc. § 1664. Lindy v. McChesney, 141 Cal. 351, 74 P. 1034. In a proceeding, under the California Code (Code Civ. Proc. § 1664), to determine the rights of persons claiming as distributees of the estate of a decedent, it is proper to tax an unsuccessful petitioner, claiming the entire estate as against devisees, with all the costs. Expenses of taking depositions not used held properly included. Id.

58. Agreement by widow with testator's father to give a child a larger share of personalty than it would be entitled to under the will held without consideration, the father taking nothing under the will and hence not being a party in interest and not entitled either to contest the will or to participate in a family settlement. House v. Callicott [Miss.] 35 So. 761.

59. Friedrich v. Friedrich, 111 La. 26, 35 So. 371.

60. No concern of hers whether all the property was sold, and the proceedings as to the lot purchased by her being regular, she is bound to comply with the terms of the sale. Friedrich v. Friedrich, 111 La. 26, 35 So. 371.

61. See 1 Curr. L. 1127.

62. Code Civ. Proc. § 2555. Money owed by him to testator with which he is chargeable under § 2714. In re David's Estate, 44 Misc. 337, 89 N. Y. S. 927. The surrogate may, under his general power to enforce the distribution of decedents' estates and the payment by administrators of money belonging thereto, order the payment by the administrator of the amount of a judgment recovered against him, on which execution has issued from the supreme court, on order obtained from the surrogate, and has been returned unsatisfied, and may enforce such order by a proceeding for contempt. Code Civ. Proc. § 2472. Order of surrogate under § 2552 makes conclusive the fact that administrator has funds applicable thereto. In re Mahoney's Estate, 88 App. Div. 140, 84 N. Y. S. 329.

63. See 1 Curr. L. 1127. See Removals, § 3D, ante.

64. One appointed after his resignation as administrator de bonis non and trustee has not authority in the former capacity to convey the trust property. Cox v. Shelby County Trust Co. [Ky.] 80 S. W. 789.

65. Where not in terms discharged not precluded from suing on judgments formerly recovered by them in their representative capacity which they had not assigned to themselves as trustees. Willets v. Haines, 88 N. Y. S. 1018.

ment of his so-called final account.[66] Pending litigation is no ground for refusal to approve the final report of the executor and order his discharge, where the effectiveness of any decree in the action will not be impaired thereby.[67]

The formal discharge contained in the decree on final accounting applies only to the accounts of the parties up to that time.[68] The chancery court's jurisdiction to settle estates and determine the liability of executors, where questions arise beyond the competency of the probate court, includes power to discharge the executor.[68]

§ 15. *Probate orders and decrees.*[70]—Courts having charge of the administration of estates are generally held to be courts of general jurisdiction in regard to probate matters.[71] Hence their judgments and decrees are as binding on parties and their privies,[72] and, until vacated or reversed, set aside or modified on

66. Hazlett v. Blakely [Neb.] 97 N. W. 808.

67. As pendency of suit by attorney who assisted in will contest, against executor and trustee to have his fee declared lien on judgment therein. Hallett v. Lathrop [Colo. App.] 77 P. 1096.

68. Does not bar presentation and allowance of claim otherwise provable. Hazlett v. Blakely [Neb.] 97 N. W. 808. Executors of a deceased trustee who have been formally discharged and have accounted for and distributed all the funds coming into their hands cannot be required to account further in their executorial capacity in respect to the trust funds or for the acts of deceased in relation thereto, it not appearing that they knew of such trust, or that any such funds came into their hands, or that any claims therefor were filed, or that they had funds out of which such claims could be paid. Rosen v. Ward, 96 App. Div. 262, 89 N. Y. S. 148. An administratrix, who had commenced action for death of her intestate, was thereafter discharged and her final account was approved by the county court, and she then had her action dismissed without prejudice. Thereafter she was appointed administratrix de bonis non, and the action was revived. Held that the only effect of such discharge was to approve her account up to that time, and that she continued to be administratrix notwithstanding. The appointment and revivor of the action as administratrix d. b. n. were unnecessary and improper, but were not prejudicial to her right to continue the action. Union Pac. R. Co. v. Smith [Neb.] 99 N. W. 813.

69. Question of specific performance of contract for division of estate. Norwood v. Tyson [Ala.] 36 So. 370.

70. Collateral attack on sales to pay debts, see ante, § 7 D. For conclusiveness of decree on accounting as to rights and liabilities of sureties, see ante, § 9 G.

71. See Jurisdiction, §§ 9, 11 A, 11 C, 2 Curr. L. 620, 622, 625.

72. See Former Adjudication, §§ 3, 4, 2 Curr. L. 64, 67.

Order appointing administrator is in rem and a judgment therein is binding and conclusive upon all persons as to every matter necessarily involved. Sorensen v. Sorensen [Neb.] 98 N. W. 837. An administratrix, representing all the heirs as their guardian, who consents to the appointment of a special administrator cannot thereafter object to such appointment on the ground that she had never been removed, the rights of creditors not being involved. Lethbridge v. Lauder [Wyo.] 76 P. 682. In regard to matters involved in collateral litigation therein, between particular parties and not necessarily involved in a judgment of the character rendered, it is binding only on those who actually litigated such matters and their privies. In a proceeding for the distribution of the assets of an intestate one claiming as heir at law on the ground that he is the issue of a marriage between his mother and intestate held not concluded on the question of the marriage of his alleged parents by a finding in proceedings for appointment of administrator that they had never been married. Mother did not represent him in that proceeding. Sorensen v. Sorensen [Neb.] 98 N. W. 837. See, also, Id. [Neb.] 100 N. W. 930.

Decree settling accounts. Unless corrected in the probate court for fraud or want of notice, or reversed on appeal. Bassett v. Fidelity & Deposit Co., 184 Mass. 210, 68 N. E. 205. Decree on accounting approving action of executor in keeping alive and transferring liens of certain mortgages paid by him held not binding on non resident parties having no notice thereof. Hetzel v. Easterly, 96 App. Div. 517, 89 N. Y. S. 154. Binding on representative and sureties. Smith v. Moore [Va.] 46 S. E. 326. The order of the probate court allowing the representative's first account is conclusive upon him, if not appealed from. Cannot reopen it after 12 years on ground that it is erroneous. Nowland v. Rice's Estate [Mich.] 101 N. W. 214.

Decree of distribution: Distribution by the orphans' court of a balance shown by the account of an executor or administrator is a quasi proceeding in rem, binding upon the whole world, and especially upon those who are actually parties thereto or who might have been but for their own laches. In re Piper's Estate, 208 Pa. 636, 57 A. 1118. Mortgagees cannot recover either from legatees or executors a deficiency resulting on foreclosure sale made after a decree of distribution, where interest was paid for more than thirty years after the mortgage became due and no claim was made on the mortgage bond at the audit of the executors' account and no notice thereof was ever given them. In re Piper's Estate, 208 Pa. 636, 57 A. 118; Snyder v. Murdock, 26 Utah, 233, 73 P. 22. Not binding on one claiming under

appeal, as conclusive as to matters necessarily involved in their determination as those of any other court.[73] The existence of all facts necessary to give jurisdiction will be presumed until the contrary appears,[74] and such judgments cannot be

devisee and not made a party. Coates v. Harris [Idaho] 75 P. 243. Distributees are parties to the administration proceedings and chargeable with notice of the judgment settling the estate and discharging the administrator, and reciting a settlement by him with the distributees. Minor distributee held to have been party to proceedings. Bridgens v. West [Tex. Civ. App.] 80 S. W. 417. Code Civ. Proc. § 2743. Decree requiring assets in hands of executors to be thereafter held by them as trustees under the will is conclusive on adult duly cited as to propriety of investments made by them as executors. In re Halsted's Estate, 85 N. Y. S. 301. A decree by a probate court having jurisdiction, assigning the residue of the estate is in the nature of a judgment in rem, and is conclusive upon all persons interested in the estate. Chadbourne v. Hartz [Minn.] 101 N. W. 68.

73. See Former Adjudication, § 3, 2 Curr. L. 64.

Order appointing administrator. Sorensen v. Sorensen [Neb.] 98 N. W. 837; Tanas v. Municipal Gas Co., 88 App. Div. 251, 84 N. Y. S. 1053; Van Gaasbeek v. Staples, 85 App. Div. 154, 83 N. Y. S. 225. In an action by an administrator de bonis non to recover property which the widow had conveyed to defendants to conceal it, the record of the proceedings in which such administrator was appointed, the widow having appeared and objected thereto, was conclusive on defendants as to the facts there in issue. Weaver v. Meyer, 32 Ind. App. 587, 70 N. E. 409. Granting of letters of administration to an alleged widow is not conclusive as to the fact of her widowhood, and such question may be raised in a collateral proceeding by one taking no part in the proceedings resulting in her appointment, but it is conclusive as to her right to administer. Phillips v. Heraty [Mich.] 100 N. W. 186.

Judgment allowing award to widow is conclusive as to the question of her marriage arising in a proceeding for the assignment of dower and homestead to her, as against heirs who contested such question in the probate court. Potter v. Clapp, 203 Ill. 592, 68 N. E. 81.

Order setting aside homestead to minor heirs. Tiboldi v. Palms [Tex. Civ. App.] 78 S. W. 726. An order setting aside premises occupied by the widow as her home and homestead during the administration of the estate and granting the widow a monthly allowance is not res adjudicata on the question of homestead so as to estop the administrator from selling it under an order of the probate court for the payment of debts. Lloyd v. Lloyd, 34 Wash. 84, 74 P. 1061. A decree of the surrogate setting apart a fund to provide an income to meet the expenses of maintaining the homestead, which the will directed were to be defrayed from the general estate, is, until vacated, final on the executors in so far as to require them to use the income and not the principal of such fund. Must restore any part of principal used from funds of general estate. In re Stewart, 88 App. Div. 23, 84 N. Y. S. 719.

Order allowing claims: Mason v. Gaither's Estate [Mo. App.] 80 S. W. 277.

Decrees on accounting as to matters not litigated and questions not directly passed upon is not res adjudicata in subsequent proceedings of the same nature. Fact that it was erroneous as to such matters does not create binding precedent or require repetition of errors in subsequent accounting. In re Hunt's Estate, 41 Misc. 72, 83 N. Y. S. 652. Judgments in actions by executors for the adjudication of their accounts are not res adjudicata as to the validity of clauses in a will not passed upon and not necessarily involved therein. Thorn v. De Breteuil, 86 App. Div. 405, 83 N. Y. S. 849. A judgment on the merits dismissing the petition in an action by a legatee in the orphans' court to compel a foreign executor, to whom ancillary letters had issued, to account for ancillary assets collected by him for the purpose of compelling payment of a legacy, is res adjudicata as to the possession of assets applicable to its payment, and precludes the maintenance of a subsequent action in the court of common pleas to recover the legacy. Have concurrent jurisdiction. Wilson v. Smith [C. C. A.] 126 F. 916.

An order for an accounting secured by an administrator de bonis non in independent proceedings against the executors of his predecessor, all parties being before the court, is conclusive of the right of such executors to revive an accounting of their testator, pending at his death, they having had a right to litigate the right to such revivor in such action. In re Treadwell's Estate, 85 App. Div. 570, 83 N. Y. S. 242.

Decree of distribution whereby interests of certain heirs distributed to one of their judgment creditors and from which no appeal was taken held binding on heirs and their assignee for creditors. Snyder v. Murdock, 26 Utah, 233, 73 P. 22. A decree directing an executor to pay over a certain sum is, until revoked, conclusive evidence that there are sufficient assets in his hands for that purpose. Money which he owed testator. In re David's Estate, 44 Misc. 337, 89 N. Y. S. 927. The California rule making the decree of distribution conclusive as to the construction of the will does not prevent the consideration on appeal of an item of the will, contained in such decree, for the purpose of arriving at testator's intention. In re Merchant's Estate [Cal.] 77 P. 475.

74. See Jurisdiction, § 14, 2 Curr. L. 631. By statute in Wyoming facts essential to the jurisdiction of the district court need not be recited in its orders and decrees [Rev. St. 1899, § 4542]. Lethbridge v. Lauder [Wyo.] 76 P. 682. The granting of letters by the probate court must, in another proceeding, be presumed regular in all respects unless the defect appears affirmatively on the face of the record. Statute provides that jurisdiction, in so far as it depends on residence, shall not be attacked except on appeal unless defect appears in

collaterally attacked[75] except for want of jurisdiction appearing on the face of the record,[76] or fraud or collusion.[77] The rule applies to orders appointing an executor or administrator,[78] judgments on petition for his removal,[79] judgments and decrees allowing claims,[80] or allowing or disallowing the representative's accounts,[81] orders setting aside property to minor heirs as a homestead,[82] decrees directing the sale of realty,[83] and decrees of distribution.[84]

Ex parte orders approving the representative's annual accounts are prima facie correct only, and do not as a rule prevent a re-examination of items contained therein.[85] The same is true of ex parte final accounts filed with the clerk.[86] The

record [S. C. Code Civ. Proc. § 49]. Also provides that in case deceased was nonresident, administration is to be granted in county where greater part of his estate is situated [Id. § 39]. Held that where record shows that deceased had property in county jurisdiction to appoint administrator cannot be attacked because record does not affirmatively show that greater part of his property was there. Will be presumed that evidence showed that fact. Dunlap v. Savings Bank of Rock Hill [S. C.] 48 S. E. 49.

In Georgia it is held that the court of ordinary is a court of general jurisdiction as to matters of administration and hence it is presumed, in favor of one of its judgments, that every fact necessary to make it valid and binding upon the parties thereto and their privies was before the court. Judgment to sell realty to pay debts need not set out facts upon which it was founded. Not ground to set it aside as void that estate owed no debts. Williams v. O'Neal, 119 Ga. 175, 46 S. E. 978; Jones v. Smith [Ga.] 48 S. E. 134. In Idaho probate court has general jurisdiction over probate matters and is court of record (Const. art. 5, § 21), and hence its judgments import verity. Clark v. Rossier [Idaho] 78 P. 358.

75. See Judgments, § 8, 2 Curr. L. 594. In Georgia judgments of court of ordinary cannot be collaterally attacked because the record is silent in regard to them. Jones v. Smith [Ga.] 48 S. E. 134.

In Wyoming decrees of a probate court cannot be collaterally attacked because of any error or irregularity. Lethbridge v. Lauder [Wyo.] 76 P. 682.

76. If want of jurisdiction appears on the face of the record the judgment is void and may be collaterally attacked at any time by anyone whose rights are sought to be affected thereby. As in case of appointment of nonresident administrator on estate of nonresident. In such case where record is ambiguous as to residence of decedent he will, in a collateral proceeding, be presumed to have been a resident. Jones v. Smith [Ga.] 48 S. E. 134. Only for want of jurisdiction appearing on the face of the proceedings. Lethbridge v. Lauder [Wyo.] 76 P. 682.

In New York decrees of surrogate may always be collaterally attacked for want of jurisdiction. Baldwin v. Rice, 44 Misc. 74, 89 N. Y. S. 738.

77. Where letters issued upon sufficient affidavit that deceased was resident of county at time of his death [Code Civ. Proc. § 2473]. Van Gaasbeek v. Staples, 85 App. Div. 271, 83 N. Y. S. 225.

78. Tanas v. Municipal Gas Co., 88 App. Div. 251, 84 N. Y. S. 1053; Van Gaasbeek v. Staples, 85 App. Div. 271, 83 N. Y. S. 225. Orders appointing a special administrator cannot be collaterally attacked for failure to show the removal, suspension, or resignation of the prior administrator. Lethbridge v. Lauder [Wyo.] 76 P. 682; Beresford v. American Coal Co. [Iowa] 98 N. W. 902. In Iowa where the appointment of an administrator is made by the clerk of the district court, his act and judgment stand as that of the court unless proper and timely exception is taken thereto in that tribunal [Iowa Code, §§ 250, 251]. Id.

79. Judgment that petitioner is a creditor. Sutherland v. St. Lawrence Co., 42 Misc. 38, 85 N. Y. S. 696.

80. Gutierrez v. Scholle [N. M.] 78 P. 50. A decree of the probate court accepting a commissioner's report allowing claims cannot be collaterally attacked for fraud on the part of such commissioner, but the proper remedy is by appeal. Pub. St. N. H. c. 193, § 4. Action on administrator's bond. Judge of Probate v. Lee, 72 N. H. 247, 56 A. 188.

81. Judgment against administrator on settlement cannot be collaterally attacked in action against sureties. Bonner v. Gorman, 71 Ark. 480, 77 S. W. 602. Order of the probate court allowing the representative's accounts is conclusive as to the validity of payments theretofore made by him and included therein. In re Bell's Estate, 142 Cal. 97, 75 P. 679. An administratrix who, in her final account, presents to the county court the question of how much she should pay her attorney, thereby waives any question of jurisdiction of her person, and the court may then render a judgment fixing such amount. Vaughn v. Walsh [Wis.] 100 N. W. 840. Such judgment is not open to collateral attack by the administratrix in an action brought against her by the attorney for such sum. Id.

82. Cannot be attacked by creditor. Tiboldi v. Palms [Tex. Civ. App.] 78 S. W. 726.

83. Cannot be attacked for failure to set off homestead. Reinhardt v. Seaman, 208 Ill. 448, 69 N. E. 847. Cannot be collaterally attacked by action to declare trust and compel reconveyance of property where court had jurisdiction. Remedy in probate court or by appeal. Clark v. Rossler [Idaho] 78 P. 358.

84. In re Piper's Estate, 208 Pa. 636, 57 A. 1118; Scruggs v. Scruggs [Kan.] 77 P. 269.

85. Burden of showing incorrectness on party claiming it. Calnan v. Savidge [Kan.] 75 P. 1010. Do not prevent re-examination. McShan v. Lewis [Tex. Civ. App.] 76 S. W. 616. Do not have the force of a judgment so as to preclude the heirs from contesting

allowance of a representative's final account is not a bar to further inquiry in regard to matters accidentally or fraudulently omitted.[87] Ex parte decrees sending legatees into possession are prima facie valid.[88] An order made upon the ex parte application of the executor authorizing him to pay taxes which had accrued subsequent to testator's death cannot be construed as an adjudication of the amount of taxes due, and is not binding upon him or the county.[89]

The right of the court to vacate or modify its former decrees depends upon the statutes of the various states.[90] The right to have defects of form in a decree corrected is waived by taking an appeal therefrom.[91]

the same in an action to compel an accounting. Account held not final. Thomas v. Hawpe [Tex. Civ. App.] 80 S. W. 129.

In Georgia the returns of executors or administrators to the ordinary become, after approval by him, stated accounts. Tate v. Gairdner, 119 Ga. 133, 46 S. E. 73. The party rendering them is bound thereby in the absence of a showing that there has been a mistake in the account or that certain items have been omitted. Must be shown to same extent and with same degree of certainty as courts of equity require in order to correct mistakes. Id.

86. No bar to suit against him for accounting. Jones v. Sugg [N. C.] 48 S. E. 575. N. C. Code, §§ 1399, 1402. Not conclusive on representative or any one adversely interested but merely shifts burden of proof of correctness to one attacking it. Bean v. Bean, 135 N. C. 92, 47 S. E. 232.

87. Thomas v. Hawpe [Tex. Civ. App.] 80 S. W. 129.

88. Thomas v. Blair, 111 La. 678, 35 So. 811.

89. In re Morgan's Estate [Iowa] 101 N. W. 127.

90. In California the court may, on a sufficient showing, relieve a beneficiary from the effects of a decree of distribution on the ground of inadvertence or excusable neglect. Petition, made within a month after entry of decree of distribution, asking that it be set aside on ground that a minor child of a deceased son of testator was not represented in the proceedings held sufficient to authorize such relief under Civ. Code, § 473. In re Ross' Estate, 140 Cal. 282, 73 P. 976. May amend a decree of settlement of account and final distribution so as to correct a mistake therein. Allowance made to broker rendering services to administrator instead of to administrator for him. Amendment not such a judicial error as could only be remedied by motion for new trial. In re Willard's Estate, 139 Cal. 501, 73 P. 240. May vacate an order setting apart a homestead [Code Civ. Proc. § 473]. Cahill v. Superior Court of San Francisco [Cal.] 78 P. 467.

In Illinois the probate court, in the exercise of its equitable powers, has authority to set aside and vacate, at a subsequent term, an order discharging an executor on account of mistake of widow in releasing her award. Heppe v. Szczepanski, 209 Ill. 38, 70 N. E. 737.

In Maine the court may at a later term and upon application of an interested party and notice to all concerned, annul and revoke a decree of distribution made at a former term, for manifest errors of fact in regard to matters not considered or determined, when such decree has not in any way been acted upon. Errors as to amount in administrator's hands and share to which distributees entitled. New petition for order of distribution held to have, by necessary implication, effect of petition for revocation of previous decree. In re Cote's Estate, 98 Me. 415, 57 A. 584.

In Maryland the orphans' court has authority to rescind an order ratifying an administrator's account allowing preferred claims not properly proven. Maynadier v. Armstrong [Md.] 56 A. 357.

In Missouri the statute provides for the vacating of orders allowing claims in certain cases and the trial of the matter anew [Rev. St. 1899, § 214]. Mason v. Gaither's Estate [Mo. App.] 80 S. W. 277.

In New Jersey orphans' court may reopen any account, passed and allowed by it, for mistake. N. J. Laws 1898, p. 761, § 127. Proper to refuse to reopen because certain items with which executor should have been charged were omitted where it appeared that they were at least equaled by disbursements proved to have been omitted. In re Morris' Estate [N. J. Eq.] 56 A. 161.

In New York a surrogate has power to do so in proper cases and without limitation as to time. Code Civ. Proc. § 2481, subd. 6. Limitation in Id. § 1290, does not apply to surrogate's court. Order assessing transfer tax. In re Mather's Estate, 84 N. Y. S. 1105.

In Rhode Island irregularities may be corrected by probate court [Gen. Laws, 1896, c. 209, § 13]. Fitts v. Probate Court [R. I.] 58 A. 801.

In Washington it is held that the superior court, being a court of general equity jurisdiction, has inherent power to review and set aside its judgments in probate matters for apparent error or fraud. Also has statutory authority under 2 Ballinger's Ann. Codes & St. § 5153. May vacate judgments of old probate court, to which it succeeded (Const. art. 27, § 10), for want of jurisdiction. Ball v. Clothier, 34 Wash. 299, 75 P. 1099.

In Oregon the county court cannot at a subsequent term set aside its final decree settling an estate and discharging the administrator where it had jurisdiction to make such decree. Can do so if had not. In re Conant's Estate, 43 Or. 530, 73 P. 1018. Evidence insufficient to justify setting aside final decree for fraud. Id.

In Washington a decree denying a petition to sell realty to pay debts can only be vacated in the manner prescribed for vacating judgments. In re Barker's Estate, 33 Wash. 79, 73 P. 796.

91. Removing executor. Fitts v. Probate Court of East Greenwich [R. I.] 58 A. 801.

A proceeding will lie in the supreme court for mandamus to compel a judge of the superior court to entertain and consider a motion to vacate an order in probate, where his refusal is based solely on the ground of want of jurisdiction as a matter of law and not upon the evidence or a question of fact and is not reviewable on appeal.[92]

The settlement of an administrator after confirmation may be surcharged and falsified in chancery,[93] and equity may set aside a decree procured by fraud.[94] It will not, however, set aside a decree from which no appeal was taken.[95]

§ 16. *Appeals in probate proceedings.*[96]—The jurisdiction of the appellate court is fixed by the statutes of the various states.[97]

Appeals are generally allowed from all final orders or decrees of the court having jurisdiction of probate matters,[98] and may be taken by anyone having an inter-

92. Under Cal. Code Civ. Proc. § 1085, relating to mandamus. Order setting apart homestead. Right to writ held not barred by laches. Cahill v. Superior Court [Cal.] 78 P. 467.

93. Bonner v. Gorman, 71 Ark. 480, 77 S. W. 602. Rule does not apply to the correction of alleged errors on the part of the probate court. Such errors, however gross, will be regarded as mere errors of judgment to be corrected by appeal or other direct proceedings. Bonner v. Gorman, 71 Ark. 480, 77 S. W. 602.

94. Decree settling final account. Not deprived of this right by B. & C. Comp. § 911, giving county court in first instance, exclusive jurisdiction to conduct and settle accounts of administrators (Froebrich v. Lane [Or.] 76 P. 351), nor by Id. § 103, providing for relief from such judgments by courts rendering them, where such remedy has not been invoked (Id.). Evidence held to show fraud in procuring decree in regard to compensation therein allowed administrator. Id. That suit was not commenced until more than eight months after entry of decree held not such laches as to bar plaintiff. Id. Where the decree approves and settles the account it is a final adjudication so as to give equity power to relieve against it, though distribution has not been made or the administrator discharged. Id.

95. Plaintiff not having appealed from the judgment in suit to recover distributive share in hands of executor cannot maintain suit in equity to set it aside. Such attack indirect. Judgment in suit to recover distributive share. Le Mesnager v. Variel [Cal.] 77 P. 988.

96. For matters relating to appeals from orders admitting or refusing to admit the will to probate or in actions to contest or set aside the will and the like, see Wills, § 4 H, 2 Curr. L. 2102.

97. **In Kentucky,** the court of appeals has no jurisdiction of an appeal from a judgment allowing a claim of less than $200. The fact that the judgment is for the settlement of the estate and involves claims aggregating more than that amount is immaterial. No distribution of funds ordered. Cox v. Higginbotham's Adm'r, 25 Ky. L. R. 1057, 76 S. W. 1079.

In Louisiana, where it is made to appear that the dative executor will be called upon to settle a large succession, the amount carried on his final account from which an appeal is taken will not control in determining the jurisdiction of the appellate court. Such amount less than that required to give jurisdiction, but question as to validity of appointment of dative executor involved. Succession of Dauphin, 112 La. 103, 36 So. 941.

In Texas, the supreme court has jurisdiction of an appeal from the court of civil appeals in a contest over a claim against a decedent's estate, it being a probate matter [Tex. Rev. St. 1895, arts. 940, 946, subd. 1]. Charbonneau v. Bouvet [Tex.] 82 S. W. 460.

In Virginia, it is held that a decree against a distributee or devisee for his share of a claim is substantially a decree against the estate, and an appeal will lie therefrom if the aggregate amount exceeds the jurisdictional sum. Smith v. Moore [Va.] 46 S. E. 326.

98. **Orders and decrees held appealable:** Order appointing an administrator. Ex parte Small [S. C.] 48 S. E. 40. Order denying the right of administration to the next of kin on ground of unsuitableness. Schumacher v. McCallip, 69 Ohio St. 500, 69 N. E. 986. Order denying the right to file a claim [Neb. Comp. St. 1901, c. 20, § 42]. Ribble v. Furmin [Neb.] 98 N. W. 420. Order allowing or disallowing a claim [Tex. Rev. St. 1895, art. 2091]. Hardcastle's Estate v. Archer [Tex. Civ. App.] 81 S. W. 368. Decree denying petition to sell realty to pay debts, entered after contest involving a construction of the will. In re Barker's Estate, 33 Wash. 79, 73 P. 796. Final judgment in proceedings to sell realty to pay debts is reviewable on error [Colo. Const. art. 6, § 23; Mills' Ann. St. § 1091]. New York Life Ins. Co. v. Brown [Colo.] 76 P. 799. Order awarding counsel fees to former representative and directing their payment out of the estate. In re Currier's Estate [Colo. App.] 74 P. 340. The allowance of attorney's fees is subject to review. Callender's Adm'r v. Callender [Ky.] 82 S. W. 372. Order, decision or decree allowing and settling a final account of an administrator. Nev. Comp. Laws 1900, § 3041. Document held to be such decision and decree. Notice of appeal held sufficient. Bowman v. Bowman [Nev.] 76 P. 634. The denial of a motion to refer in an action against an administrator for an accounting, on the ground that the answer was a sufficient plea in bar when in fact it was not. Involves a substantial right. Jones v. Sugg [N. C.] 48 S. E. 575. In New York, the surrogate's decision on referee's report in proceedings on accounting is the first binding decree and the only one from

est in the estate,[99] who is aggrieved thereby.[1] One is not aggrieved by the decree unless he is thereby concluded from asserting his claims of personal or property rights in any proper court.[2] A person's representative has the same right to appeal as he himself would have had.[3] In Minnesota, the objection that a party appealing as a creditor from an order of the probate court allowing an administrator's account was not a creditor of the estate cannot be raised for the first time in the supreme court.[4] The appeal need not be taken in the name of the executor or administrator.[5] A distributee consenting to the allowance of an account cannot thereafter appeal from its allowance because of alleged errors therein.[6] Where the probate court allows a portion and disallows the balance of a claim single in

which an appeal may be taken. In re Barefield, 177 N. Y. 387, 69 N. E. 732. In Minnesota, an order of the probate court discharging an order directing the executrix to show cause why the testator's homestead should not be sold to pay debts can be reviewed by appeal only, and not upon certiorari. Is order refusing to direct sale of real estate within meaning of Gen. St. 1894, § 4665, subd. 3. In re Wilson's Estate [Minn.] 97 N. W. 647.

99. Husband having no interest in wife's estate on account of antenuptial agreement cannot appeal from order allowing administrator's account. Williams v. Cleaveland, 76 Conn. 426, 56 A. 850.

1. Conn. Gen. St. 1902, § 406. Williams v. Cleaveland, 76 Conn. 426, 56 A. 850. Mo. Rev. St. 1899, § 278, gives right to any heir, devisee, legatee, creditor or other person having an interest in the estate. Hammers v. Sanders [Mo. App.] 80 S. W. 16. Me. Rev. St. c. 65, § 28. Appeal of Stilphen [Me.] 58 A. 916. [Advance sheets.] Cal. Code Civ. Proc. § 936. In re Heaton's Estate, 139 Cal. xix, 73 P. 185. Hill's Ann. Laws Or. 1892, § 535. In re Smith's Estate, 43 Or. 595, 75 P. 133.

The sole heir of decedent, though a minor, is a person aggrieved by an order allowing an administrator's account. The law authorizing minors to appeal within 12 months after reaching majority does not prevent them from doing so by next friend or guardian before that time. Williams v. Cleaveland, 76 Conn. 426, 56 A. 850.

The assignee of an heir's interest in the estate may appeal from an order of the probate court allowing a claim against the estate, where the personalty is less than the debts (Hammers v. Sanders [Mo. App.] 80 S. W. 16), but not from decree ordering distribution of funds in the hands of the administrator (Id.). Distribution must be made to heirs as though no assignment existed. Appeal of Stilphen [Me.] 58 A. 916 [Advance sheets].

Devisees may appeal from order setting aside homestead for use of widow pending administration. In re Levy's Estate, 141 Cal. 646, 75 P. 301.

Distributees under husband's will, though not parties to the record, may appeal from a judgment of replevin in favor of an administrator of a widow against the administrator d. b. n. c. t. a. of her husband. Hinn v. Gersten [Wis.] 99 N. W. 338.

Persons claiming an interest in the property of decedent ordered sold for the payment of debts are parties aggrieved. New York Life Ins. Co. v. Brown [Colo.] 76 P. 799.

Representatives held to have a right to appeal: From order setting aside a homestead for the use of the widow pending administration. In re Levy's Estate, 141 Cal. 646, 75 P. 301. Special administrator from an order settling his accounts and directing him to pay over the balance in his hands to his successor. Is aggrieved if order erroneous, and hence a hearing on the merits is necessary to determine whether he is or not. Court will not decide whether judgment is erroneous on motion to dismiss. In re Heaton's Estate, 139 Cal. xix, 73 P. 185. From order denying him a license to sell realty to pay a claim which he has allowed. Represente creditors. In re Smith's Estate, 43 Or. 595, 75 P. 133. An administrator is a party aggrieved by proceedings prejudicial to the interests of the heirs of the deceased within the meaning of the appeal statutes [Wis. Rev. St. 1898, §§ 4031, 4035]. McKenney v. Minahan, 119 Wis. 651, 97 N. W. 489.

Representatives held not to have right to appeal: From a decree ordering a distribution of funds in his hands. Appeal of Stilphen [Me.] 58 A. 916 [Advance sheets]. Administratrix from an order denying her motion to set aside the whole estate to her as widow. Appeal dismissed in individual capacity for want of bond and in representative capacity because not aggrieved. Order of benefit to estate and so to her as administratrix. In re Wood's Estate [Cal.] 77 P. 481. On account of creditors whose claims have been rejected in whole or in part. Order settling accounts binding on creditors who do not appeal. Succession of Henderson [La.] 36 So. 904. Under laws of Indian Territory (Mansf. Dig. § 1267; Ind. T. Ann. St. 1899, § 769), giving right to appeal to either party, the executor may appeal from an order modifying his report and directing a distribution in a manner contended by him to be contrary to the will. In re Overton's Estate [Ind. T.] 82 S. W. 766.

2. Appeal of Stilphen [Me.] 58 A. 916 [Advance sheets].

3. Heir's administrator. Hammers v. Sanders [Mo. App.] 80 S. W. 16.

4. No objection in district court. Appeal of McAlpine [Minn.] 100 N. W. 233.

5. In Illinois, any person other than the administrator appealing from an order of the probate court may do so in his own name. Schneider v. Eldredge, 125 F. 638.

6. A distributee attaching to administrator's account a formal statement under seal declaring that he has examined it and praying that it be confirmed. In re Sherwood's Estate, 206 Pa. 465, 56 A. 20.

character, though consisting of several items, an appeal must be taken from the decision of the court on the claim as originally presented.[7] The statutes providing the manner in which an appeal shall be taken must be complied with.[8] The name of the representative of the estate must be set out in the assignment of errors.[9] An assignment of error, on an appeal from a decree on final accounting, complaining because the executor was held liable for the value of a bond, is immaterial where such bond was accounted for after the appeal was taken.[10] By statute in some states, executors and administrators are not required to give bond on appeals or writs of error taken by them in their fiduciary capacity.[11]

Neither the county court nor the judge thereof is a necessary or proper party to a proceeding to review its action in the matter of the settlement of the estate.[12] Notice of appeal from an order allowing an account need not be served on persons not appearing and taking part in the proceedings, though interested in the estate.[13] In Louisiana, interested creditors are necessary parties to an appeal from a judgment homologating the executor's accounts taken by petition and citation out of term time.[14] In that state in probate proceedings, the evidence must be taken down in writing and a list made of all documentary evidence offered for use on appeal.[15]

It is not competent for a party to enlarge or renew the statutory period for appeal from a decree of distribution by a petition for a bill of review on grounds that were available and should have been presented at the original hearing.[16]

It is not the province of a court of probate to decide whether an appeal ought to be taken from its own decrees,[17] or whether the circumstances of a particular case are such as to permit a minor to prosecute it by next friend instead of by guardian, nor whether such next friend was a suitable person to act, but such questions are for the consideration of the superior court to which the process of appeal is returnable.[18] The proper method of obtaining a review of an order of the probate court disallowing an appeal is by application for a writ of mandamus.[19]

In those states where an appeal lies to a court of general jurisdiction, the issues are usually tried de novo,[20] and final judgment entered in the latter court.[21]

7. Appeal from that part disallowing a portion is defective and does not confer jurisdiction on district court. In re Stellmacher's Estate [Minn.] 100 N. W. 473.

8. Appeal dismissed for failure to file appeal bond as required by Burns' Ann. St. Ind. 1901, §§ 2609, 2610, relating to probate appeals. Appeal from judgment refusing to allow claim will not lie under general appeal statutes. Dallam v. Stockwell's Estate [Ind. App.] 71 N. E. 911.

9. Assignment against estate of S. without naming representative, held insufficient under Indiana appellate court, rule 6 (27 N. E. iv). Dallam v. Stockwell's Estate (Ind. App.] 71 N. E. 911.

10. Owens v. Owens' Estate [Miss.] 37 So. 149.

11. Administrator's interest personal, and hence required to give bond on appeal from order of probate court dismissing proceedings for administration as void for want of jurisdiction, where there were no creditors [Tex. Rev. St. 1895, arts. 2257, 1408]. Holman v. Klatt [Tex. Civ. App.] 78 S. W. 1088.

12. Farrow v. Nevin, 44 Or. 496, 75 P. 711.

13. Though dividend ordered to be paid to them. In re McDougald's Estate [Cal.] 77 P. 443; In re Scott's Estate [Cal.] 77 P. 446.

14. Where they are not cited, appeal will be dismissed. Succession of Le Sage, 112 La. 857, 36 So. 757.

15. If such evidence is absent from the transcript on appeal and there was an agreement of counsel as to what should be included in the transcript, it will be presumed that it was in existence and was left out in pursuance to such agreement [Code Prac. art. 1042]. Succession of Wegmann, 110 La. 930, 34 So. 878.

16. In re Sherwood's Estate, 206 Pa. 465, 56 A. 20.

17. Williams v. Cleaveland, 76 Conn. 426, 56 A. 850.

18. Williams v. Cleaveland, 76 Conn. 426, 56 A. 850. The fact that a minor, who appeals by next friend, has a guardian, is only pleadable in abatement in the superior court, and is not sufficient reason for refusing to allow such appeal. Id.

19. Allowance may be compelled if it appears that a party aggrieved has properly requested it within the statutory time and has given bond. Williams v. Cleaveland, 76 Conn. 426, 56 A. 850.

20. **In Michigan,** disputed questions of fact on appeal must, if either party so asks, be tried by a jury. Nowland v. Rice's Estate [Mich.] 101 N. W. 214.

In Tennessee, on appeal to circuit court in

In other states, an order or decree of the probate court is not vacated by an appeal, but is simply suspended, and upon its affirmance takes effect and operates as a decree of that court, and any intermediate action which has been taken thereunder is valid.[22] An order appointing a receiver to take charge of the estate on petition of the beneficiaries is not superseded by an appeal.[23]

In North Carolina, a referee's findings of fact, on the final accounting by an executor adopted by the court, are conclusive on appeal.[24] In New York, the appellate court may supply essential findings of fact omitted from the referee's report and the surrogate's decree based thereon.[25] In the latter state, a surrogate's decree will not be reversed for errors in the rejection of evidence unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby.[26] In Louisiana, a devolutive and not a suspensive appeal lies from a judgment refusing to appoint an administrator.[27] The allowance of costs to a representative on appeal from an order of the probate court settling his accounts is a matter within the discretion of the superior court.[28]

§ 17. *Rights and liabilities between beneficiaries of estate.*[29] *A. In general.*[30] —Contracts between the heirs or distributees in regard to the distribution of the estate will be enforced if otherwise valid,[31] even though some heirs are strangers.[32] Heirs may thereby work a virtual partition.[33]

action to set aside letters of administration. Fitzgerald v. Smith [Tenn.] 78 S. W. 1050.

In Rhode Island, on appeal to court of common pleas from order removing executor. Fitts v. Probate Court of East Greenwich [R. I.] 68 A. 801. The appellate court may ignore any want of jurisdiction appearing on the face of the papers, if the lower court in fact had jurisdiction of the subject-matter, and may enter such decree as justice may require. Gen. Laws 1896, c. 248, § 7. Should consider evidence as well as verdict. Where jury found that deceased left property in state, but the evidence established the fact that it was located in certain city, which was necessary to give lower court jurisdiction, the decree should so state, and the decree of the lower court denying jurisdiction should be reversed. Williams v. Ripley [R. I.] 66 A. 777.

In Missouri, an appeal from an order or judgment of the probate court directing a distribution is tried de novo in the circuit court without regard to any error or defect in the previous proceedings [Rev. St. 1899, § 285]. Coulter v. Lyda, 102 Mo. App. 401, 76 S. W. 720.

In Minnesota, a probate case on appeal is to be tried and determined on the same principles as would govern in the probate court itself. In re Pope's Estate [Minn.] 97 N. W. 1046.

In New Jersey, on an appeal from a decree of the orphans' court refusing to open an executor's accounts on the ground of mistake, the prerogative court should review both questions of law and of fact. In re Morris' Estate [N. J. Eq.] 66 A. 161.

21. In Nebraska, the district court should finally settle all matters brought to it on appeal or error from the county court. Ribble v. Furmin [Neb.] 98 N. W. 420. On appeal from an order refusing to permit the filing of a claim, the district court acquires jurisdiction of the whole matter and should finally determine the validity of the claim in the same manner as though the order had been one disallowing the claim upon hearing before the county court.. Not proper to direct hearing in lower court. Id.

22. Massachusetts: Such intermediate action must, however, be such as is allowed by law at the time it is taken as action taken prior to the appeal. Sale could not be made under decree of probate court where exceptions were allowed to decision of single justice affirming it until expiration of time for filing exceptions or determination of question of law raised thereby. License to sell inoperative in meantime. Tyndale v. Stanwood [Mass.] 71 N. E. 83.

In Maine, an appeal from a decree of distribution stays it pending such appeal. Action cannot be maintained to recover distributive share thereunder until appeal is decided. Drew v. Provost, 98 Me. 422, 57 A. 587.

23. Ky. Code, § 298, relating to receivers, applies. Thompson v. Page, 25 Ky. L. R. 667, 76 S. W. 128.

24. Lambertson v. Vann, 134 N. C. 108, 46 S. E. 10.

25. Code Civ. Proc. § 993, as amended by Laws 1903, p. 237, c. 85. Code Civ. Proc. § 2586. Finding as to value of services of medical expert in suit by administratrix for wrongful death of intestate. In re Snedecker, 95 App. Div. 243, 88 N. Y. S. 847.

26. Prejudicial error to refuse to permit witness for claimant to answer question as to whether or not he had originally been prepared to contest claim [Code Civ. Proc. § 2545]. In re Steenwerth, 97 App. Div. 116, 89 N. Y. S. 654.

27. Where appeal is suspensive in form it will be treated as devolutive. Succession of Wintz, 111 La. 40, 35 So. 377.

28. Matthews v. Sheehan, 76 Conn. 664, 57 A. 694.

29. Heirs as co-tenants, see Tenants in Common, etc., 2 Curr. L. 1862.

30. See 1 Curr. L. 1129.

31. An heir who enters into an agreement with the other heirs in pursuance of

All sums received by an heir during the course of administration over and above the amount to which he was entitled should be treated as at interest against him,[34] and sums paid to legatees by the executor out of the funds of the estate before distribution bear interest from the date of payment until distribution.[35] As between the heirs insurance should be apportioned so that each shall pay the reasonable cost of protecting his insurable interest in the property.[36]

A widow occupying a flat as a homestead should account to the heirs for the rents of the rest of the building.[37]

In Louisiana heirs of decedent's first wife suing a representative and universal legatee after his discharge to recover property alleged to belong to them and to have been converted by him cannot, after the evidence has been closed, file a supplemental petition asking that the succession be reopened and that a dative temporary successor be appointed to whom defendant shall be compelled to account.[38]

(§ 17) *B. Advancements.*[39]—An advancement is that bestowment of property by one standing in loco parentis to another, in anticipation of the latter's share in the donor's estate.[40]

which he receives a certain part of the proceeds of a sale of a part of decedent's land on partition in consideration of the final adjustment and settlement of all his claims against the estate, is bound by a decree in that suit reciting such facts. Is binding as an agreement if not as an adjudication. Perdue v. Perdue [Mo. App.] 81 S. W. 633.

32. A release as between part of heirs has no necessary dependency on the rights of others. Ward v. Du Pree, 16 S. D. 500, 94 N. W. 397.

33. See Partition, 2 Curr. L. 1097. In Louisiana an heir who has accepted a succession unconditionally and has been put in possession conjointly with his co-heirs succeeds to the legal title of the intestate, and his assign is entitled, in a petitory action, to be recognized as the owner of such undivided interest. Brian v. Bonvillain, 111 La. 441, 35 So. 632.

34. Ludington v. Patton [Wis.] 99 N. W. 614.

35. Payments made with consent of widow, who had right to whole income, but did not use it or require executor to keep all the funds invested. In re Davidson's Estate, 204 Pa. 379, 54 A. 272.

36. Ludington v. Patton [Wis.] 99 N. W. 614.

37. Particularly where she agreed to rent premises and that rights of herself and heirs should be subsequently adjudicated. Potter v. Clapp, 203 Ill. 592, 68 N. E. 81.

38. Where certain heirs of decedent's first wife sue the universal legatee, ten years after she has been discharged as executrix and sent into possession, to recover for their own benefit certain property alleged to have belonged to the first community and to have been fraudulently abstracted by her and converted to her own use, on the theory that the matter can be litigated directly between them, they cannot, after the evidence has been closed, file a supplemental petition asking that the judgment in the succession proceedings be annulled and the succession reopened and a dative temporary successor be appointed to whom defendant shall be compelled to account. Would be ingrafting new suit on pending one. Nor can such new suit be ingrafted by intervention of alleged heirs of forced heir of deceased. Succession of Dauphin, 112 La. 103, 36 So. 287; Id. [La.] 36 So. 941.

39. 1 Curr. L. 1129, n. 18-27.

40. Owsley v. Owsley, 25 Ky. L. R. 1194, 77 S. W. 394. It is proper to dismiss a bill claiming that defendant should be charged as an advancement with a house conveyed to his wife by decedent, it appearing that she had only a life estate therein and was dead. Justis v. Justis [Md.] 57 A. 23. An irrevocable gift by a parent to a child of the whole or a part of what it is supposed he will be entitled to on the death of the parent, who afterwards dies intestate. Conveyance of farm to son in consideration of his giving up his business and making his home thereon held not an advancement. In re Allen's Estate, 207 Pa. 325, 56 A. 928. Son is not incompetent to testify as to matters occurring in father's lifetime in regard to such transaction. Id. An irrevocable gift by a parent in his lifetime to his child on account of such child's share of the estate after the parent is dead. Where daughter conveyed land to father upon his agreement on its sale by him to pay her a certain sum "as an advancement," held that she could recover the money as a debt and that the mere fact that he designated it an advancement did not make it such. Schweitzer v. Schweitzer [Ky.] 82 S. W. 625. An advantage gained by an heir by collusion with his father can be charged against him as an advancement only in the distribution of any surplus of his father's or mother's undevised estate. The fact that one of the tenants in remainder purchased the land at a judicial sale for $2,000 less than its real value, under a collusive agreement with one of the life tenants, did not authorize such sum to be charged against him as an advancement from the surplus of the undevised estate of the life tenant. Francis v. Million [Ky.] 80 S. W. 486. An heir using land of his father must account for the rental value thereof as an advancement. Garrott v. Rives, 25 Ky. L. R. 2165, 80 S. W. 519. Where writing executed by son acknowledged that he owed father a certain sum which might be collected by his father's representative after his death either by treating it as a loan or

Contracts whereby, for a sufficient consideration, an heir relinquishes any further share in his ancestor's estate to which he may be entitled are, if otherwise valid, enforceable in equity.[41] Strictly speaking, advancements are confined to cases of intestacy,[42] but they may exist, though subsequently a will is made by the parent.[43] In such case the will governs in determining whether they are to be so regarded.[44]

Whether a gift shall be regarded as an advancement or not depends upon the intention of the donor,[45] which may be ascertained by parol evidence of his declarations made at the time,[46] or of the donee's admissions afterwards,[47] or by proof of facts and circumstances from which the facts may be inferred.[48] The question is one of fact.[49] Gifts made as advancements or otherwise cannot thereafter be treated by the donor as debts or payments on his liabilities to the donees.[50]

Statutes in some states provide that no gift or grant shall be deemed an advancement, unless it is stated therein that it is so made, or unless it is charged in writing by the intestate as such, or acknowledged in writing as such by the party to whom it is made.[51] In some states advancements must be estimated according to the value of the property when given.[52]

They will be regarded as part of the assets of the estate for the purpose of adjusting the rights of devisees in relation thereto.[53] The heirs may waive the right to have one of their number charged with advancements.[54]

as an advancement to be deducted from his share of the estate, the son is liable for interest thereon only from the time when the representatives elect which remedy they will pursue. Cole v. Andrews, 176 N. Y. 374, 68 N. E. 641.

41. Must be in writing under statute of frauds. Riddell v. Riddell [Neb.] 97 N. W. 609.

42. In re McKibbin's Estate, 207 Pa. 1, 56 A. 62. Donor must die totally or partially intestate, and the gift must in fact have been made with a view to a portion or a settlement in life upon the donee. Ky. St. 1899, § 1407. Will be regarded as advancement though donor intended it as a gift, if he dies intestate and it is of the nature fixed by the statute. Owsley v. Owsley, 25 Ky. L. R. 1194, 77 S. W. 394.

43. In re McKibbin's Estate, 201 Pa. 1, 56 A. 62.

44. Money given children and evidenced by notes, though intended as advancements when paid, held not to be treated as such in view of terms of subsequent will. In re McKibbin's Estate, 201 Pa. 1, 56 A. 62. Where a deed to a child would operate to give him a greater share of the estate than that given by the grantor's will, executed previously, in which he gave all his children an equal share in the estate, the burden was on such child to show that the grantor wished such deed to operate in addition to the share given him by the will. Evidence insufficient to show such fact. Krause v. Krause [N. J. Eq.] 55 A. 1095. See Wills, § 5D, 4, 2 Curr. L. 2131.

45. Justis v. Justis [Md.] 57 A. 23. Gift must have been made with a view to a portion or settlement in life upon the donee [Ky. St. 1899, § 1407]. Owsley v. Owsley, 25 Ky. L. R. 1194, 77 S. W. 394.

46. Justis v. Justis [Md.] 57 A. 23. Declarations of a testator at the time of taking a note from a son-in-law are admissible to show that it was taken as a receipt for an advancement. Note held receipt. Strode v. Beall [Mo. App.] 79 S. W. 1019. Question of advancements is one of intention. Id.

47. Justis v. Justis [Md.] 57 A. 23.

48. Gifts held not intended as advancements. Justis v. Justis [Md.] 57 A. 23.

49. Evidence held to sustain findings that transfer of property by decedent to his son-in-law was not intended as an advancement to his daughter. Carpenter v. Coats [Mo.] 81 S. W. 1089.

50. Owsley v. Owsley, 25 Ky. L. R. 1194, 77 S. W. 394.

51. **Nebraska:** Cannot be established by parol [Comp. St. 1903, c. 23, § 34]. Boden v. Mier [Neb.] 98 N. W. 701; Riddell v. Riddell [Neb.] 97 N. W. 609.

In Wisconsin, under a similar statute (Rev. St. 1898, § 3959), it is held that the delivery of property must be given the character of an advancement when made, and that a declaration in a will that certain gifts previously made shall be deemed advancements is insufficient. Ludington v. Patton [Wis.] 99 N. W. 614.

Under the **Illinois** statute (Hurd's Rev. St. 1899, c. 39, § 7), items in an account book merely charging children with money paid them from time to time, and ordinary deed to property held not to show that the sums paid and land conveyed were advancements. No essential or material part of the proof can be by parol. Young v. Young, 204 Ill. 430, 68 N. E 532.

52. Intention does not control, the object of the statute being to secure equity in the distribution [Ky. St. 1903, § 1407]. Garrott v. Rives, 25 Ky. L. R. 2165, 80 S. W. 519.

53. Schick v. Whitcomb [Neb.] 94 N. W. 1023.

54. Instrument signed by other heirs of intestate in consideration of plaintiff joining in project for improvement of the property held waiver of their right on subsequent partition of the property. Hoerle v. Hoerle, 94 App. Div. 615, 87 N. Y. S. 1007.

The presumption is that a deed from husband to wife is a gift or advancement, when the consideration therefor is called in question.[55]

The district court may, in proper cases, adjust advancements in a suit for the partition of land.[56]

The doctrine of hotchpot is based upon the principle of doing equal justice to all the decedent's children.[57] There is a conflict of authority as to whether advancements should be brought into hotchpot notwithstanding the fact that some of those receiving them have executed releases of all interest in the inheritance.[58]

§ 18. *Rights and liabilities between beneficiaries and third persons.*[59]—Persons dealing with representatives about estate property,[60] or purchasers from them,[61] bear the same liability towards beneficiaries as in other trusts,[62] and are protected if bona fide and without notice.[63]

Heirs cannot treat as an absolute nullity a notarial act to which they were parties, and which on its face shows that they received the consideration for the sale of their interest in the succession to the purchaser named in the deed.[64] They cannot have the sale set aside without offering to return the same.[65]

One cannot, in right of a family settlement, recover specific property of a decedent without showing that it came to his share.[66]

Persons who without authority collect from an administrator the distributive share of an heir thereby become trustees of a resulting trust in his favor.[67] One who, after the death of the mortgagor, without authority, pays the balance due on the mortgage debt, cannot recover the sum so paid from his estate.[68] A mortgagee of a devisee's interest may satisfy his claim out of the proceeds of an unnecessary sale of the property, to pay a family allowance, made for the purpose of defrauding him.[69]

55. Strayer v. Dickerson, 205 Ill. 257, 68 N. E. 767.

56. Advancements not established. Boden v. Mier [Neb.] 98 N. W. 701. In an action for partition brought by one devisee against the others and the executor, the district court has jurisdiction to determine every question involved, including the adjustment of advancements received by any devisees. Schick v. Whitcomb [Neb.] 94 N. W. 1023.

57. Justis v. Justis [Md.] 57 A. 23.

58. In Virginia it is held that where a father made equal advancements to his children all share equally in his estate on his death intestate, notwithstanding the fact that two of them released their interest to the father when such advancements were made while the third did not. Headrick v. McDowell [Va.] 45 S. E. 804, citing cases pro and con.

59. See 1 Curr. L. 1129.

60. A bank is liable for using funds of an estate, deposited by an administrator to pay his individual debt to it only, when it has knowledge that they were deposited by him in his representative capacity. Bank held justified, as against heirs, in treating funds deposited by administrator as belonging to him individually, though they belonged to estate and heirs of whom he was curator. Sparrow v. State Exch. Bank, 103 Mo. App. 338, 77 S. W. 168.

61. The purchaser of lands devised in trust to be sold generally or for a specific purpose is not bound to look to the application of the purchase money unless so expressly required by the conveyance or devise. Ky. St. 1899, § 4846. Applies to devise to one for life with power to sell and convey on the express condition that the proceeds shall be invested in other good property to be held under same condition and limitation. Miller v. Stagner, 25 Ky. L. R. 650, 76 S. W. 160. A deed by an executor empowered to sell realty held in trust and reinvest the proceeds passes title and the purchaser is not required to see to the reinvestment of the proceeds [Ky. St. 1899, § 4846]. Robinson v. Pence, 25 Ky. L. R. 732, 76 S. W. 368.

62. See Trusts, 2 Curr. L. 1924.

63. See Notice and Record of Title, 2 Curr. L. 1053. The mere addition of the word "administrator" to the depositor's name is not notice to the bank that they were trust deposits. Sparrow v. State Exch. Bank, 103 Mo. App. 338, 77 S. W. 168.

64. Lyles v. Knoll, 112 La. 169, 36 So. 311.

65. Sale to pay debts. Lyles v. Knoll, 112 La. 169, 36 So. 311.

66. Bishop v. York, 124 F. 959. Plaintiffs cannot maintain an action to recover property given by decedent, during her lifetime, to defendant, where their sole right is based on a compromise agreement between them and decedent's executors and devisees, whereby plaintiffs were given half the property devised, it not being shown that the property in suit was a part of that devised. Id.

67. Claim against them barred by limitations. Bridgens v. West [Tex. Civ. App.] 80 S. W. 417.

68. Falls v. Jones [Mo. App.] 81 S. W. 455.

69. Decedent's son mortgaged his interest in decedent's property which was not to be

An attorney employed in place of one with whom the heirs have an agreement in regard to fees for carrying on litigation in regard to the estate is entitled to his share of the agreed compensation,[70]

A sale of land made by order of court in an action to settle a decedent's estate cannot be set aside on motion of one having no interest in the estate or the property.[71]

ESTOPPEL.

§ 1. General Principles (1327).
§ 2. Kinds of Estoppel (1327).
§ 3. By Deed (1328).
§ 4. In Pais (1329).
§ 5. Extent (1333).

Scope of title.—Many common applications of the doctrine of estoppel are so closely related to other subject-matters that it is deemed best to treat them elsewhere; the more important being estoppel to claim that a corporation acted ultra vires, or to aver want of authority in a corporate officer or agent,[72] to deny partnership,[73] to question the existence or scope of an agent's authority,[74] and the estoppel of a tenant to dispute his landlord's title.[75]

§ 1. *General principles.*—Estoppels are not favored by the law.[76] An estoppel operates against a person only in the capacity in which the act was committed.[77] One being estopped to deny a certain fact, he is estopped to urge anything which would negative such denial.[78] Estoppel against an estoppel sets the matter at large.[79] One cannot estop himself from claiming an exemption resting in public policy.[80]

§ 2. *Kinds of estoppel. By record.*[81]—Estoppel by judgment is treated elsewhere,[82] and the conclusiveness of judicial and official records, being more a question of evidence than of estoppel, is excluded.[83] One may become estopped by

distributed until the youngest child reached his majority, and turned the proceeds over to the executrix for the support of the family. The mortgagee foreclosed and bid in the son's interest. Thereafter, by fraudulent representations that the money received by her had been insufficient to support the family and by concealing the facts as to such loan, and in pursuance of an intention on her part to defraud the mortgagee, the executrix procured an order for the sale of all decedent's property for the payment of a family allowance. Held that the mortgagee could reach the proceeds of such sale, and that limitations did not begin to run against him until such sale. Savings Bank of Santa Rosa v. Schell, 142 Cal. 505, 76 P. 250.

70. Where heirs agreed in writing to the appointment of two attorneys to carry on certain litigation for the estate, they to receive 25% of the amount recovered, and, upon one of them declining to act, a third, who did not know of the agreement, was employed, with the knowledge of the administrator, to take his place, held that the latter was entitled to half the fee. In re McGee's Estate, 205 Pa. 590, 55 A. 776.

71. Third person desiring to purchase part of property sold. Mouser v. Bogwell, 25 Ky. L. R. 1042, 76 S. W. 826.

72. See Corporations, 1 Curr. L. 710.

73. See Partnership, 2 Curr. L. 1106.

74. See Agency, 1 Curr. L. 43.

75. See Landlord and Tenant, 2 Curr. L. 668.

76. This is especially true when the rights of the public are involved. City of Mobile v. Sullivan Timber Co. [C. C. A.] 129 F. 298.

77. A judgment creditor, to whose lien a homestead was subject, by selling the same as "receiver" and reinvesting the proceeds, taking a deed to himself as "trustee and receiver," is not estopped from enforcing his judgment against the land as bought. Johnson v. Thomason [Ga.] 48 S. E. 137.

78. United States Fidelity & Guaranty Co. v. Ettenheimer [Neb.] 99 N. W. 652.

79. One who executes a bond under circumstances that would estop him to assert its invalidity for want of consideration cannot, in an action upon the bond, avoid liability on the ground that plaintiff is estopped to assert that there was any consideration for the bond. United States Fidelity & Guaranty Co. v. Ettenheimer [Neb.] 99 N. W. 652. Purchasers of land retaining part of the purchase price on the assumption that the acreage stated in the deed might be incorrect are estopped to resist an action for balance due on the price because of an overplus of land. See v. Mallonee [Mo. App.] 82 S. W. 557.

80. The fact that one as surety stated in the justification clause that his property was not exempt does not raise such an estoppel. King v. Warren, 42 Misc. 317, 86 N. Y. S. 609. See, however, Dowling & Allgood v. Wood [Iowa] 101 N. W. 113, where the opposite of this rule is announced.

81. See 1 Curr. L. 1131.

82. See Former Adjudication, 2 Curr. L. 60.

83. See Evidence, § 5, 1 Curr. L. 1144.

allegations in his pleadings,[84] or by introducing records in evidence,[85] or by admissions in court,[86] to deny the facts thus shown to exist. One cannot generally be estopped by a void proceeding,[87] or by acts of others of which he had no notice,[88] or where no prejudice results.[89]

§ 3. *By deed.*[90]—The recital of a material fact in a deed[91] is binding and conclusive upon the parties and those claiming under them as privies in blood, in estate, or in law,[92] in all matters involving the property conveyed by such deed,[93] the person claiming the estoppel being a bona fide purchaser who has relied on such recital to his prejudice,[94] and the burden is on him to prove this fact.[95] General recitals, however, do not estop the parties from disputing the statements made in them,[96] nor does this doctrine of estoppel apply where the deed is incomplete.[97] Third persons are not estopped by recitals.[98] One conveying property with a warranty of title,[99] or attempting to convey a particular estate,[1] an after-acquired title

84. One pleading that a tract of land was his homstead is estopped to assert that such land was at the same time the homestead of another. Linn v. Ziegler [Kan.] 75 P. 489.

85. A defendant in a petitory action setting up, as a muniment of title, a government survey, he cannot deny the facts shown by the plat thereof. Hall v. Board of Com'rs of Bossier Levee Dist., 111 La. 913, 35 So. 976.

86. In an action for a balance alleged to be due for goods sold, a waiver by plaintiff of its claim for an amount which defendant claimed as a rebate was not an admission that such amount was due defendant, so as to preclude plaintiff on a subsequent trial from litigating the question. R. E. Dietz Co. v. Miller, Sears & Walling Co., 88 N. Y. S. 322.

87. Property owner held not estopped to question validity of assessment, no notice being given. Pennsylvania Co. v. Cole, 132 F. 668.

88. An owner of land procuring the same to be assessed for taxes, it not being shown that he had any knowledge of the description by which the clerk attempted to describe the land, or that he adopted such description, is not estopped from claiming that a tax deed containing the same description as that by which the land was assessed is void for uncertainty of description. Alleman v. Hammond, 209 Ill. 70, 70 N. E. 661.

89. A husband's statement, in his petition for letters of administration on his wife's estate, that she was the owner of an interest in certain land, does not estop him from thereafter claiming the land as community property. Bollinger v. Wright, 143 Cal. 292, 76 P. 1108.

90. See 1 Curr. L. 1131.

91. Estoppels created by recitals of interest. See 1 Curr. L. 1131, n. 57. Recitals of particular estates. Van Winkle v. Van Winkle, 95 App. Div. 605, 89 N. Y. S. 26. Omaha Bridge & Terminal R. Co. v. Whitney [Neb.] 99 N. W. 525. Husband and wife executing a mortgage conveying all their interest in a lot, the wife is estopped after husband's death to assert that they only intended to convey the latter's life estate. Simmons v. Reinhardt, 25 Ky. L. R. 1804, 78 S. W. 890. Husband signing mortgage stipulating that in case of foreclosure the surplus purchase money should be paid to his wife, her heirs or assigns, held estopped to assert that mortgaged property was community property. Hoeck v. Greif, 142 Cal. 119, 75 P. 670.

By recitals as to boundaries. See 1 Curr. L. 1131, n. 59. Defendant held estopped by a deed to claim that a tract of land conveyed did not lie in a certain position with reference to other land as described in the deed. Board of Park Com'rs of Louisville v. Marrett, 25 Ky. L. R. 2081, 80 S. W. 166.

92. Van Winkle v. Van Winkle, 95 App. Div. 605, 89 N. Y. S. 26; Omaha Bridge & Terminal R. Co. v. Whitney [Neb.] 99 N. W. 525. Children of a deceased purchaser of land, not being parties to the grantor's deed to their mother, and not offering the deed in evidence, are not bound by a recital that it was conveyed to their mother at their request. Brown v. Arkansas Cent. R. Co. [Ark.] 81 S. W. 613. See 1 Curr. L. 1131, n. 54.

NOTE. Effect of estoppel by deed: A recital of a fact in a deed is, as against the grantee in such deed and all persons claiming under him through that deed, evidence of the facts recited therein, so as to save the necessity of further proof thereof by the grantor or those who claim under him. Demeyer v. Legg, 18 Barb. [N. Y.] 20; Champlain & St. L. R. Co. v. Valentine, 19 Barb. [N. Y.] 488; Atlantic Dock Co. v. Leavitt, 54 N. Y. 40, 13 Am. Rep. 556; 50 Barb. [N. Y.] 140.—From note to Boone v. Clark [Ill.] 5 L. R. A. 276, 278.

93. Recital of relationship held not to create an estoppel in a case where the property was not involved. Stone v. Salisbury, 209 Ill. 56, 70 N. E. 605. One selling property with warranty of title and guaranty against debts and claims is not estopped to claim from the vendee rent for his occupation prior to the time of purchase. Woodcock v. Baldwin, 110 La. 270, 34 So. 440.

94, 95. Grant v. McCarty, 117 Ga. 188, 43 S. E. 401.

96. Brian v. Bonvillain, 111 La. 441, 35 So. 632.

97. Van Dyke v. Van Dyke, 119 Ga. 830, 47 S. E. 192.

98. Recitals in a grant that lands had been confiscated by the state were inadmissible against strangers to the conveyance. Davis v. Moyles [Vt.] 56 A. 174.

99. Real estate conveyed by deed. Clark v. Lambert [W. Va.] 47 S. E. 312; Hays v. Marsh, 123 Iowa, 81, 98 N. W. 604. By mortgage. Logue v. Atkeson [Tex. Civ. App.] 80 S. W. 137. Personal property. **Piano sold.**

[To be concluded.]

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ESTOPPEL.—Cont'd.

inures to the benefit of the grantee to the extent of the estate sought to be conveyed. But this rule does not apply where the title is taken in a different right[2] or the grantee will not be prejudiced thereby,[3] and, in some states, where the deed is that of a married woman.[4] With some exceptions, a grantee may deny his grantor's title.[5]

§ 4. *In pais.*[6]—A waiver of rights or an election between rights may of course be manifested by acts constituting an estoppel in pais. They may also be manifested, however, by acts lacking one or more of the elements of an estoppel.[7] Whence it has happened that the term "estoppel" has frequently been loosely applied to acts constituting a waiver or election but lacking in some element of a true estoppel. Election and waiver of rights and remedies is treated under an appropriate title,[8] but some instances of the misuse of the term "estoppel" are collated in the footnote.[9]

Coolidge v. Ayers [Vt.] 57 A. 970. See 1 Curr. L. 1131, n. 62.

1. Flanary v. Kane [Va.] 46 S. E. 681. Grantor cannot assert an incumbrance existing upon the land at the time of the conveyance and which he subsequently acquired. Id. Where the grantor's estate was recited as being a fee simple. Owen v. Brookport, 208 Ill. 35, 69 N. E. 952. Purchaser at mortgage sale sold all right, title and interest to oil under land purchased, before procuring sheriff's deed. Glendenning v. Superior Oil Co., 162 Ind. 642, 70 N. E. 976. Sale of crops. Butler v. Stark, 25 Ky. L. R. 1886, 79 S. W. 204. Trade secret assigned. Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 58 A. 290. Lease executed by executor without authority. Lanyon & Zinc Co. v. Freeman [Kan.] 75 P. 995.

Entryman conveying land before receiving patent, on receiving latter title inures to grantees. Smith v. Beloit [Wis.] 100 N. W. 877. Where conveyance purported to grant a fee simple. Civ. Code § 947, subd. 4. Bernardy v. Colonial & United States Mortg. Co. [S. D.] 98 N. W. 166. Timber conveyed by entryman. Anderson v. Wilder [Miss.] 35 So. 875.

2. Deed of an interest acquired in a particular way does not estop the grantor from setting up an interest acquired in another way. Cronkhite v. Strain, 210 Ill. 331, 71 N. E. 392. See 1 Curr. L. 1132, n. 64.

3. As against one obtaining a deed to land without giving any valuable consideration, the true owner is not estopped to assert title. Miller v. Wireman, 25 Ky. L. R. 2300, 80 S. W. 517.

4. The deed of a married woman, joined by her husband does not operate on an after-acquired title. Morrison v. Balzer [Tex. Civ. App.] 80 S. W. 248.

5. A purchaser of crops is not estopped to show that the vendor had no title thereto when he executed a mortgage thereon. Karter v. Fields [Ala.] 37 So. 204. For cases wherein grantee was held estopped, see 1 Curr. L. 1131, n. 60.

6. See 1 Curr. L. 1132.

7. See III Mich. Law Rev. 9, for a monograph on the law of waiver pointing out the distinction between waiver and estoppel showing how a waiver may be founded either on estoppel or on contract. See, also, Barrell v. Newby [C. C. A.] 127 F. 656.

8. See Election & Waiver, ante, pp. 1178, 1179.

9. A modification of a written contract being made at defendant's instance, he is "estopped" to set up want of consideration. Putnam Foundry & Machine Co. v. Canfield [R. I.] 56 A. 1033. An illiterate person signing a contract is "estopped" by failure to inform himself of its contents by having it read him from avoiding the contract because of ignorance of its contents. Wilson, Close & Co. v. Pritchett [Md.] 58 A. 360. A woman who had obtained a judgment for breach of marriage promise sued in equity to uncover realty conveyed by the debtor, but on his promise to obtain a reconveyance, so that her marital rights and their child's rights as heir would attach, she discontinued the suit and married him. He failed to procure a reconveyance, and on his death she sued to avoid the conveyance. Held her knowledge of the conveyance did not, as a matter of law, estop her. Cook v. Lee [N. H.] 58 A. 511. An insured stipulating in the policy that the insurer should have the right to examine his books is "estopped" from asserting that an order authorizing such examination is unconstitutional as authorizing an unreasonable search and seizure. Swedish-American Tel. Co. v. Fidelity & Casualty Co., 208 Ill. 562, 70 N. E. 768. Parties contenting themselves with a simple protest, and then standing by in silence and watching valuable and extensive improvements progress are "estopped" to seek equitable relief. McKee v. Grand Rapids [Mich.] 100 N. W. 580. A purchaser assuming that an apparent tax lien is valid and having the amount of the same deducted from the purchase price is "estopped" to deny the validity of such taxes in a suit to enjoin their collection. Eddy v. Omaha [Neb.] 101 N. W. 25. A deed reciting that the property is subject to a specific tax lien, which the grantee agrees to pay as part of the consideration, the latter is "estopped" to have the tax set aside as invalid. Id. A debtor directing his creditors to garnishee his earnings is "estopped," upon their commencing such proceedings, from relying upon Code § 4011 exempting the earnings of a debtor

An equitable estoppel is as available at law as in equity.[10] A conveyance being required by statute, title cannot pass by an estoppel in pais.[11] A mistaken idea as to the law forms no basis for an estoppel in pais.[12] Whether one is estopped by his conduct is a question of fact to be determined from the evidence,[13] though the following elements are essential:

There must be a false representation or concealment of a material fact,[14] though

for his personal services from garnishment. Dowling & Allgood v. Wood [Iowa] 101 N. W. 113. For a correct ruling on this question, see King v. Warren, 42 Misc. 317, 86 N. Y. S. 609. Plaintiff setting up a trust deed as one of the foundations of his title and introducing it in evidence cannot deny that such deed ever became operative. Schreyer v. Schreyer, 97 App. Div. 39, 89 N. Y. S. 508. Plaintiff introducing a policy in evidence and stating that deceased had signed the application therefor, is "estopped" from introducing proof that insured never signed the application. Berry v. Metropolitan Life Ins. Co., 43 Misc. 670, 88 N. Y. S. 140. By filing notes taken for the price of goods sold in bankruptcy proceedings against the vendee, one is not "estopped" to sue in tort on the ground that the goods were obtained by false representations. Standard Sewing Mach. Co. v. Alexander [S. C.] 47 S. E. 711. A contention on an appeal that the offense created by an ordinance was not an offense at all does not estop the one making it from arguing on the rehearing that the ordinance was void. City of Louisville v. Wehmoff, 25 Ky. L. R. 1924, 79 S. W. 201. Parties recovering a judgment by suing for discovery in aid of execution thereon are "estopped" to question the validity of the judgment. Kelly v. Bramblett [Ky.] 81 S. W. 249. A railway company claiming land under a congressional land grant held "estopped" to assert title against one who had been in possession of said land for over 10 years after a decision of the Land Department awarding the land to the railway, the person in possession having no knowledge of such decision. Iowa Railroad Land Co. v. Fehring [Iowa] 101 N. W. 120. One joining in a petition to a city to have the latter vacate a street is thereafter "estopped" from questioning the right of the city to exercise the power to vacate the street. City of Lake City v. Fulkerson, 122 Iowa, 569, 98 N. W. 376. A libelant who was requested by the owner pro hac vice of a tug involved in a collision to proceed against her while in his possession, answering that he did not intend to sue, is estopped to maintain a suit against such owner after he has surrendered possession of the tug, and after such delay as to render it doubtful whether, under its terms, he could recover on his policy insuring him against liability for damages by collision. The New York Central No. 19, 127 F. 473.

10. Breslin v. Fries-Breslin Co. [N. J. Err. & App.] 58 A. 313; Hoge v. Fidelity Loan & Trust Co. [Va.] 48 S. E. 494. May be set up in an action of ejectment. Cheatham v. Edgefield Mfg. Co., 131 F. 118.

11. Married women. Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603; White v. Simonton [Tex. Civ. App.] 79 S. W. 621.

12. Brian v. Bonvillain, 111 La. 441, 35 So. 632. Expression of an opinion by one of the parties. Ward v. Ward, 131 F. 946. An estoppel does not result from all parties mistakenly assuming that a supersedeas stays the operation of an injunction. Green Bay & M. Canal Co. v. Norrie [C. C. A.] 128 F. 896.

13. Di Nola v. Allison, 143 Cal. 106, 76 P. 976.

14. Brian v. Bonvillain, 111 La. 441, 35 So. 632; Rock Island Plow Co. v. Maynard Sav. Bank, 123 Iowa, 640, 99 N. W. 298. The doctrine cannot be invoked where there are no false representations. Koenig v. Dohm, 209 Ill. 468, 70 N. E. 1061; Ayres v. Nixon [Neb.] 97 N. W. 621. An infant receiving income from the proceeds of property sold by an executor and trustee, held not estopped from afterwards claiming the property. Schreyer v. Schreyer, 43 Misc. 520, 89 N. Y. S. 508. See 1 Curr. L. 1132, n. 67.

Representations held to create estoppel: Statement by mortgagee that her mortgage was paid, made to one taking a mortgage on the property. Peirson v. Peirson [Mich.] 100 N. W. 457. Mortgagee by charging a certain rate of interest on overdue principal held estopped to claim a higher rate. Barnard v. Paterson [Mich.] 100 N. W. 893. Statement by owner that he had sold land pledged as security thereby inducing pledgee to release security. Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856. Representation as to existence of an alley. Wright v. Williams, 25 Ky. L. R. 1377, 77 S. W. 1128. Statement by mortgagor that time of payment would be extended. Hauser v. Capital City Brewing Co. [N. J. Eq.] 57 A. 722. Directors of a corporation acting as such are estopped, in an action to enforce their stockholders' liability, to claim that the corporation was not incorporated (Tanner v. Nichols, 25 Ky. L. R. 2191, 80 S. W. 225), or had not complied with the provisions of the law of the state before doing business in it (Id.).

Representations as to ownership: Denial of interest in property to one about to take a mortgage thereon. McCroskey v. Mills [Colo.] 75 P. 910. Allowing another to have bill of lading. Third Nat. Bank v. Smith [Mo. App.] 81 S. W. 215. Representations of husband that wife is owner of property, thereby inducing another to perform labor. Multz v. Price, 91 App. Div. 116, 86 N. Y. S. 480. Holder of record title by bidding at tax sale held estopped to assert his title against a higher bidder purchasing his property. Spence v. Renfro, 179 Mo. 417, 78 S. W. 597. A grantor urging another to buy property from his grantee is estopped to assert that such grantee had no title owing to the invalidity of the deed. Morrison v. Balzer [Tex. Civ. App.] 80 S. W. 248. One representing to another that he is the owner of standing timber and giving him license to cut it, which he does, is estopped to assert that he had no title. Welever v. Advance Shingle Co., 34 Wash. 331, 75 P. 863.

silence or acquiescence,[15] or misleading conduct,[16] may take the place of an affirmative misrepresentation. The representations may be made by one having author-

15. Acquiescence in assignment of contract held to estop one party from objecting thereto. Hudson River Water Power Co. v. Glens Falls Gas & Electric Light Co., 90 App. Div. 513, 85 N. Y. S. 577. One making no claim under mortgage of insolvent's property for benefit of creditors until property has been sold, held estopped to require mortgagee to account. Maher v. Haste [Mich.] 98 N. W. 976. Accepting damages for property condemned estops one to claim damages on account of an additional servitude imposed thereby. Ilgenfritz v. Toledo & M. Ry. [Mich.] 99 N. W. 878. Husband allowing affidavit by wife, stating that he was indebted to her, to remain on record until after her death, held estopped to deny such claim as against the heirs. Kronenberger v. Hopkins, 111 La. 405, 35 So. 618. Acquiescence in trespass by cattle held to create an estoppel to claim damages for the entire time. Adair v. Curry [Mo. App.] 80 S. W. 967. Secret society allowing another society to use its ritual in other states, held estopped from using such ritual in the latter states. Great Hive of Ladies of Maccabees v. Supreme Hive of Ladies of Maccabees of the World [Mich.] 97 N. W. 779. A vendee acquiescing in an appraisement of property and paying part of the purchase price held estopped to claim the appraisement incorrect. Perry Bros. v. Farrimond [Ind. T.] 82 S. W. 674. Payment of assessments for several years after insufficient notice of local improvement. City of Louisiana v. McAllister [Mo. App.] 78 S. W. 314.

Property owner silently acquiescing in construction of a canal (Crescent Canal Co. v. Montgomery, 143 Cal. 248, 76 P. 1032), or street railway (Indiana Ry. Co. v. Morgan, [Ind.] 70 N. E. 368), is estopped, after its completion, to assert any right which would injure such work, and by failing to object to assessment for street improvements until the latter are finished is estopped to enjoin the collection of any part of his assessment (Treat v. Chicago [C. C. A.] 130 F. 443).

One signing an instrument as witness (Brian v. Bonvillain, 111 La. 441, 35 So. 632), or conveying land as agent (American Freehold Land Mortg. Co. v. Walker, 119 Ga. 341, 46 S. E. 426), without giving notice of his rights in the subject-matter of the contract, is estopped from asserting such rights. Mother of incompetent being present when the latter executed a deed and failing to notify the grantee of the grantor's incompetency is estopped from afterward, as heir of the daughter, suing to avoid the deed for incompetency. Coburn v. Raymond, 76 Conn. 484, 57 A. 116.

One being the owner of (where owner received part of the purchase price. Manning v. Kansas & T. Coal Co. [Mo.] 81 S. W. 140), **or having a lien on** (landlord's lien on crops. T. W. Johnson & Son v. Kincaid [Tex. Civ. App.] 81 S. W. 536. Judgment creditor remaining silent at an execution sale of debtor's property. Brady v. Carteret Realty Co. [N. J. Eq.] 57 A. 814), **property, by silently acquiescing in its sale loses his rights.**

Similar acts in the delivery of goods which are not complained of do not show an estoppel, in the absence of any evidence that there was any irregularity in such former acts (Fordyce & Swanson v. Dempsey & Beasley [Ark.] 82 S. W. 493). See 1 Curr. L. 1132, n. 68; Id., 1133, n. 70.

16. One dedicating a street is estopped to deny its existence. Owen v. Brookport, 208 Ill. 35, 69 N. E. 952; Smith v. Beloit [Wis.] 100 N. W. 877. Payee requesting different place of payment than that specified in note is estopped to claim default by reason of maker's failure to pay at place specified in note. Lawrance v. Ward [Utah] 77 P. 229. Assignor of note cannot complain of assignee's delay in suing thereon caused by his own conduct. Smallhouse v. American Nat. Bank, 25 Ky. L. R. 1435, 77 S. W. 1113. See 1 Curr. L. 1132, n. 69 et seq.

Clothing another with apparent authority: See 1 Curr. L. 1133, n. 69. Owner allowing title to remain in another is estopped as against an innocent third party relying thereon. Getman v. Harrison, 112 La. 435, 36 So. 486. As against a mortgagee. Yokley v. Superior Drill Co. [Ky.] 80 S. W. 1153; Atlanta Nat. Building & Loan Ass'n v. Gilmer, 128 F. 293. Held estopped to question foreclosure sale. Field's Heirs v. Napier [Ky.] 80 S. W. 1110.

Receiving benefits: See 1 Curr. L. 1134, n. 75. One joining in a petition for the vacation of a street is estopped to deny town's title thereto. City of Lake City v. Fulkerson, 122 Iowa, 569, 98 N. W. 376. By filing a claim for damages caused by the location of a public road and accepting the compensation allowed, one is estopped to thereafter maintain an action for damages caused by opening such road, no negligence in construction or maintenance being shown. Stocker v. Nemaha County [Neb.] 100 N. W. 308. Street railway company by locating its track on street held estopped to deny existence of street. Bedenbaugh v. Southern R. Co. [S. C.] 48 S. E. 53. One selling patent is thereby estopped to deny its validity. Continental Wire Fence Co. v. Pendergast, 126 F. 381. One signing a deed of trust authorizing payment of incumbrances and receiving benefits thereunder held estopped to deny such authority. Continental Building & Loan Ass'n v. Wilson [Cal.] 78 P. 254. One receiving benefits from a contract for the sale of land held estopped to deny that at the time of the execution of the contract the title to the land was in another. Ohio Telephone & Telegraph Co. v. Graham, 2 Ohio N. P. [N. S.] 302. One claiming as a distributee of one who adopted a child and received the benefit of the relation is estopped to question the validity of the adoption proceedings. In re McKeag's Estate, 141 Cal. 403, 74 P. 1039. One giving a mortgage to a corporation is estopped to deny its corporate existence (Citizens' Bank v. Jones, 177 Wis. 446, 94 N. W. 329), but one participating in organization of corporation and elected an officer thereof, but severing his connection therewith before the completion of the enterprise, is not estopped from asserting that the corporation is not one de jure. Byronville Creamery Ass'n v. Ivers [Minn.] 100 N. W. 387. Services not being of value to a corporation, and it not accepting them it is

ity to so act.[17] Grantor keeping possession of deed where it was accessible is not estopped, by his negligence in so keeping it, to deny delivery to grantee who took it without permission.[18]

The representation or concealment must have been with full knowledge.[19]

The representations must have been relied on. If the person claiming the estoppel had full knowledge of the facts,[20] or equal knowledge with the other party, of all the facts and circumstances leading up to the transaction,[21] there is no estoppel, though negligence may take the place of such knowledge.[22]

The representations must have been made with intent that they be acted on,[23] or with knowledge that they would be acted on,[24] though this is not necessary if the act, in the absence of an estoppel, would amount to constructive fraud.[25]

They must have been acted on to the prejudice of the party misled[26] from the

not estopped to dispute plaintiff's employment. Ehrlich v. Chevra Agudas Achin Aushi Wizna, 86 N. Y. S. 820.

17. By agent. Exchange Real Estate & Building Co. v. Schuchman Realty Co., 103 Mo. App. 24, 78 S. W. 75. But the statements must be within the apparent scope of the agent's authority, thus: Agent having power to sell land has no apparent authority to staie that other land did not belong to principal. Iowa Railroad Land Co. v. Fehring [Iowa] 101 N. W. 120. Contract of stepmother for sale of crops held not to bind minors owning land. Butler v. Stark, 25 Ky. L. R. 1886, 79 S. W. 204.

18. Garner v. Risinger [Tex. Civ. App.] 81 S. W. 343.

19. Owner of land dedicated for a street and vacated by the city listing the same for taxation as his own but in such a way as to conceal its location, the acceptance of payment of taxes by the city for six years does not estop the latter to claim title to the street. City of Lake City v. Fulkerson, 122 Iowa, 569, 98 N. W. 376. Silence held not to estop a widow from claiming property which she mistakenly thought belonged to others. Harrison v. McReynolds [Mo.] 82 S. W. 120. The owner of personal property in possession of a third party is not estopped from asserting ownership as against an attaching creditor, when the declarations of title by the party in possession are unknown to the owner. Wright v. Tanner [Minn.] 99 N. W. 422. A co-tenant by witnessing an agreement by the other co-tenant to sell the property and by wishing the buyer success when he saw him after the latter had received a deed of the entire premises, is not thereby estopped from claiming his part, he not knowing that the deed purported to convey the entire property. Faubel v. McFarland [Cal.] 78 P. 261. Action for commissions for sale of realty held no estoppel. Theobald v. Hopkins [Minn.] 101 N. W. 170. See 1 Curr. L. 1134, n. 73.

20. Hoffman v. Auditor General [Mich.] 100 N. W. 180; Underwood v. Deckard [Ind. App.] 70 N. E. 383; Andrews v. Clark [Neb.] 98 N. W. 655. The grantee of a deed having knowledge that the grantor is not the guardian of the owner, the latter is not estopped to assert title to the property though he, with knowledge of its contents, signed the deed as witness. Driscoll v. Brooklyn Union Elevated Co., 42 Misc. 120, 85 N. Y. S. 1000. The holder of a saloon license, who permits other parties to conduct a business under it in his name, is not estopped to deny purchasing the liquor where the seller has full knowledge of all the facts and deals with such parties on their own credit. Walter Moise & Co. v. Krug [Neb.] 99 N. W. 816. Declaration by one that he has no interest in land held not to create an estoppel the other party having knowledge that the former held title by deed. Helms v. Helms, 135 N. C. 164, 47 S. E. 415. A grantee whose deed excepts from its warranty taxes for certain years is not thereby informed that they were unpaid. Koffman v. Auditor General [Mich.] 100 N. W. 180.

21. Hiskey v. Pacific States Savings, Loan & Building Co., 27 Utah, 409, 76 P. 20; Driscoll v. Brooklyn Union Elevated Co., 42 Misc. 120, 85 N. Y. S. 1000.

22. Failure to examine public records held not to create an estoppel. Blumenfeld v. Stine, 42 Misc. 411, 87 N. Y. S. 81.

23. See 1 Curr. L. 1133, n. 71.

Where deed was not delivered but was taken from drawer without grantor's permission, held latter not estopped to sue for cancellation. Garner v. Risinger [Tex. Civ. App.] 81 S. W. 343.

24. Iowa Railroad Land Co. v. Fehring [Iowa] 101 N. W. 120; Rock Island Plow Co. v. Maynard Sav. Bank, 123 Iowa, 640, 99 N. W. 298.

25. Wife signing deed of trust relying on husband's false representations is estopped to deny its validity as against beneficiary. Hyatt v. Zion [Va.] 48 S. E. 1.

26. Hollins v. American Union Electric Co. [N. J. Eq.] 56 A. 1041. Sworn statements by plaintiff held not conclusive. Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195. A petition alleging estoppel because of representations whereby plaintiff had been induced to neglect bankruptcy proceedings against a third person till it was too late must show facts which would sustain involuntary bankruptcy proceedings. Rock Island Plow Co. v. Maynard Sav. Bank, 123 Iowa, 640, 99 N. W. 298; Ashworth v. Trammell [Va.] 47 S. E. 1011; Underwood v. Deckard [Ind. App.] 70 N. E. 383; American Freehold Land Mortg. Co. v. Walker, 119 Ga. 341, 46 S. E. 426; Hiskey v. Pacific States Savings, Loan & Building Co., 27 Utah, 409, 76 P. 20. See 1 Curr. L. 1133, n. 71, 72.

ILLUSTRATIONS. Prejudice shown: Depositor is not estopped to controvert entries in bank book, unless bank is prejudiced by his neglect to examine same. Kemble v. National Bank of Rondout, 94 App. Div. 544, 88

act of the party sought to be estopped.[27] The doctrine of equitable estoppel applies to the internal concerns of stock corporations.[28]

The rules in regard to estoppel by way of laches are analogous to those governing laches.[29] Election between counts,[30] estoppel to claim appellate review,[31] waiver and election between objections,[32] the doctrine of election between inconsistent positions, and the related questions of ratification and waiver,[33] are treated elsewhere.

§ 5. *Extent. Persons benefited or bound.*[34]—In general, the estoppel is effective only between the parties and their privies,[35] though the latter are in some states relieved by statute.[36]

N. Y. S. 246. An obligor upon an appeal bond retaining possession of the premises is estopped to claim that the statute authorizing the appeal is unconstitutional. United States Fidelity & Guaranty Co. v. Ettenheimer [Neb.] 99 N. W. 652. Extension of time of payment of indebtedness, taking note without an indorser and surrendering indorsed notes, held sufficient to estop one from denying validity of deed of trust. Hyatt v. Zion [Va.] 48 S. E. 1. Plaintiff in partition joining in the action a judgment creditor of plaintiff's grantor, he is thereby estopped to assert that, owing to a decree of court made while the action was pending, that such judgment could not be enforced owing to lapse of time, he took free from the lien of such judgment. Le Boeuf v. Gray [Sup.] 87 N. Y. S. 597. A surety purchasing his principal's share in a tract on execution sale and on partition impliedly agreeing to accept reimbursement in full satisfaction of his claim is estopped, after other claimants have acted on such concession, to claim the entire fund. Atlee v. Bullard, 123 Iowa, 274, 98 N. W. 889. Owner of land, allowing one having an option thereon to build a pipe line across same, there being an understanding if the land was not taken under the option the pipe line should be sold to the highest bidder, is estopped on the expiration of the option to claim the pipe line. Nesmith v. Martin [Colo.] 75 P. 590.

No prejudice: Oral consent of owner to conveyance of land by another, held ineffectual to create an estoppel, the grantee not relying on any representations as to title. Kuteman v. Carroll [Tex. Civ. App.] 80 S. W. 842. Widow by accepting what she is legally entitled to creates an estoppel. Harrison v. McReynolds [Mo.] 82 S. W. 120. Agreement to convey land not acted on cannot estop grantor of deed placed in escrow to deny delivery. Gatt v. Shive [Tex. Civ. App.] 82 S. W. 303. Admissions inconsistent with ownership made by one in possession of land after acquiring title by adverse possession do not constitute an estoppel. Murphy v. Roney [Ky.] 82 S. W. 396. Adoption of answer of one defendant by another held not to estop the latter defendant, in a subsequent suit between the two, from setting up facts inconsistent with the answer. Water Supply Co. v. City of Georgetown [Ky.] 81 S. W. 660. Claimant of attached property by purchasing same at sale by order of the court is not estopped from asserting his right of ownership. Hagar v. Haas [Kan.] 71 P. 822. Payment of interest on a loan secured by a mortgage by one who claims title to the property adversely to the mortgagor, pending an adjudication of their rights, does not estop such claimant from contesting the validity of the mortgage. Whitlock v. Cohn [Ark.] 80 S. W. 141. In a sheriff's interpleader suit, a finding of estoppel precluding execution plaintiff from claiming under an assignment held not to follow from a further finding that the execution was levied under instructions from the execution plaintiff, no prejudice being shown. Lackmann v. Kearney, 142 Cal. 112, 75 P. 668. Where plaintiff claimed certain chattels under a bill of sale, defendants' admission of the execution of such bill does not preclude him from attacking it as fraudulent or improperly executed. Culver v. Randle [Or.] 78 P. 394.

27. Harrigan v. Advance Thresher Co. [Ky.] 81 S. W. 261. One owning a mortgage is not estopped from setting it up against the mortgagor to whom it was surrendered on the faith of the latter's false representations. Higgins v. Jamesburg Mut. Bldg. & Loan Ass'n [N. J. Eq.] 58 A. 1078.

28. Stockholders may bind themselves inter sese and in favor of the corporation by their acts. Breslin v. Fries-Breslin Co. [N. J. Err. & App.] 58 A. 313. And what will bind all the stockholders with respect to an obligation from the company to one of its members will bind the company as such. Id.

29. See generally, Lewis v. Lewis, 76 Conn. 586, 57 A. 735; Dunbar v. Green, 66 Kan. 557, 72 P. 243. As to what constitutes laches, see title Equity, 1 Curr. L. 1048.

30. See Pleading, 2 Curr. L. 1178.

31. See Appeal and Review, 1 Curr. L. 85.

32. See Saving Questions for Review, 2 Curr. L. 1590.

33. See Election of Remedies and Rights, 1 Curr. L. 992.

34. See 1 Curr. L. 1135.

35. Grantees estopped by actions of grantors. Crescent Canal Co. v. Montgomery, 143 Cal. 248, 76 P. 1032. Heirs inheriting land bound by act of ancestor in allowing title to be in another. Yokley v. Superior Drill Co. [Ky.] 80 S. W. 1153. Original owner and his grantees estopped to deny existence of street dedicated by the former. Owen v. Village of Brookport, 208 Ill. 35, 69 N. E. 952. Vendor of patent being subject to an estoppel, all co-operating with him in infringement of patent are subject to same estoppel. Continental Wire Fence Co. v. Pendergast, 126 F. 381. Husband signing mortgage whereby wife was declared owner of an estate, held estopped as against mortgagee and wife to claim property. Hoeck v. Greif, 142 Cal. 119, 75 P. 670. Heirs of grantor of land, by warranty deed to an alien, held estopped to claim same in an action by the state to escheat the land. Madden v. State [Kan.] 75 P. 1023. See 1 Curr. L. 1135, n. 84.

36. Though a husband be estopped from

Application to government or municipalities.[37]—While estoppel does not ordinarily apply to governmental bodies,[38] yet it has been held to operate against a municipality;[39] but in no case can a governmental body be estopped to deny an act which it had no power to do.[40]

Pleading.[41]—An estoppel must be specially pleaded[42] with such certainty and particularity that the court may see from the pleadings what facts are relied upon to work the estoppel.[43] As to whether or not an estoppel in pais need be specially pleaded, there is an apparent conflict.[44] Most courts hold that it is sufficient if the essential facts appear in the petition.[45] In some states estoppel may be set up as a plea in bar by amendment to the answer.[46]

EVIDENCE.

§ 1. Necessity and Duty of Adducing Evidence (1335).
A. Judicial Notice (1335).
B. Presumptions and Burden of Proof (1337).
§ 2. Relevancy and Materiality (1339).
§ 3. Competency or Kind of Evidence in General (1345).
§ 4. Best and Secondary Evidence (1345).
§ 5. Parol Evidence to Explain or Vary Writings (1348).
§ 6. Hearsay (1355).
A. General Rules (1355).
B. Res Gestae (1357).
C. Admissions or Declarations Against Interest (1359).

denying that property purchased during his marriage belongs to his wife, yet his children are entirely relieved from such estoppel by Act No. 5, p. 12 of 1884. Westmore v. Harz [La.] 35 So. 578.

37. See 1 Curr. L. 1136.

38. The state can only be estopped from asserting her right to her own property by legislative enactment or resolution. State v. Paxson & Cannon, 119 Ga. 730, 46 S. E. 872. A city is not estopped, by failure to object to the construction of expensive works in a river by a riparian owner, to deny such owner's right to continue to occupy the same. City of Mobile v. Sullivan Timber Co. [C. C. A.] 129 F. 298. Held not to operate, no valuable improvements having been made. Markham v. City of Anamosa, 122 Iowa, 689, 98 N. W. 493.

39. City estopped to declare forfeiture of franchise of gas company, the latter having made large expenditures, the municipality acquiescing therein. Columbus v. Federal Gas Co., 2 Ohio N. P. [N. S.] 277. See 1 Curr. L. 1136, n. 85.

40. Ex parte Heyman [Tex. Cr. App.] 78 S. W. 349. Unlawfully leased highway to individual for private use. Lowery v. City of Pekin, 210 Ill. 575, 71 N. E. 626.

41. See 1 Curr. L. 1136.

42. Pennsylvania Co. v. Cole, 132 F. 668; Watkins v. Iowa Cent. Ry. Co., 123 Iowa, 390, 98 N. W. 910; Haag v. Andrus [Iowa] 100 N. W. 490; Fidelity & Deposit Co. of Maryland v. Nisbet, 119 Ga. 316, 46 S. E. 444; Continental Ins. Co. v. Clark [Iowa] 100 N. W. 524; Hilton v. Colvin, 25 Ky. L. R. 1808, 78 S. W. 890; Golden v. Tyer [Mo.] 79 S. W. 143; Thomas v. Blair, 111 La. 678, 35 So. 811. See 1 Curr. L. 1136, n. 89.

NOTE. Pleading an estoppel: The rule requiring an estoppel to be pleaded does not apply in cases where there has been no opportunity given to plead it. In such cases it is admissible in evidence with the same conclusive effect as if it had been pleaded. Clink v. Thurston, 47 Cal. 21; Campbell v. Goodall, 8 Ill. App. 276; Phillips v. Blair, 38 Iowa, 649; Towne v. Sparks, 23 Neb. 142; Wood v. Jackson, 8 Wend. [N. Y.] 9, 22 Am. Dec. 603; Guest v. Guest, 74 Tex. 664; Isaacs v. Clark, 12 Vt. 692, 36 Am. Dec. 372; Carroll County v. Collier, 22 Grat. [Va.] 302; Davis v. Thomas, 5 Leigh [Va.] 1; Gans v. St. Paul, F. & M. Ins. Co., 43 Wis. 108, 28 Am. Rep. 535.

A plea of estoppel must have a formal commencement and conclusion, to mark its special character and quality, and to distinguish it from an ordinary plea in bar. City of E. St. Louis v. Flannigen, 34 Ill. App. 596; Whittemore v. Stephens, 48 Mich. 573; 2 Herman, Estoppel, § 1275.—From note to Tyler v. Hall [Mo.] 27 Am. St. Rep. 337, 344.

43. A contract being relied on, its terms should be fully set forth. Porter v. Armstrong, 134 N. C. 447, 46 S. E. 997. A judgment being relied on the suit in which it was rendered should be shown. Id. Where representations were not pleaded, evidence thereof held incompetent. Hilton v. Colvin, 25 Ky. L. R. 1808, 78 S. W. 890. One claiming an estoppel by reason of a recital in a deed must show that he is a bona fide purchaser and did some act in reliance on such recital. Grant v. McCarty, 117 Ga. 188, 43 S. E. 401. The question of estoppel to impeach a decree of distribution cannot arise on the face of the complaint where the proceedings are set out merely to show the source of defendant's claim, and the complaint does not allege that plaintiffs took under the decree, but alleges its invalidity, and that it was made without their knowledge or consent. Alcorn v. Brandeman [Cal.] 78 P. 343.

44. That it need not. Perry Bros. v. Farrimond [Ind. T.] 82 S. W. 674. **That it must.** Is not available under a general denial. Webb v. Hancock Mut. Life Ins. Co., 162 Ind. 616, 69 N. E. 1006.

45. Anderson v. New York Life Ins. Co., 34 Wash. 616, 76 P. 109. In equity after trial. Carlyle v. Sloan, 44 Or. 357, 75 P. 217. In such case question may be raised by demurrer. Stone v. Cook, 179 Mo. 534, 78 S. W. 801.

46. Right to amend rests in clerk. Porter v. Armstrong, 134 N. C. 447, 46 S. E. 997.

§ 7. Documentary Evidence (1364).
A. In General; Private Writings (1364).
B. Books of Account (1366).
C. Public and Judicial Records and Documents (1367).
D. Proceeding to Procure Production of Documents (1368).
§ 8. Evidence Addduced in Former Proceedings (1369).
§ 9. Expert and Opinion Evidence (1370).
A. Conclusions and Nonexpert Opinions (1370).
B. Subjects of Expert Testimony (1373).
C. Qualification of Experts (1375).
D. Basis of Expert Testimony and Examination of Experts (1376).
§ 10. Real or Demonstrative Evidence (1380).
§ 11. Quantity Required and Probative Effect (1381).

Scope of article.—This article treats specifically of the competency of evidence; the competency of witnesses and the rules governing their examination being entirely excluded,[1] and questions of relevancy and sufficiency of evidence, except so far as they illustrate some general rule, being excluded to titles dealing with the particular subject or issue to which the evidence is addressed. Evidence in criminal prosecutions is also treated elsewhere,[2] though occasional holdings of undoubted general application have been included.

§ 1. *Necessity and duty of adducing evidence. A. Judicial notice.*[3]—Courts take judicial notice of their own records,[4] so far as they appertain to the case in hand,[5] and of signatures to documents in such records, other than original process.[6] An appellate court will take judicial notice of the reversal, pending the appeal, of another judgment on which the decree of the lower court is based.[7] In general, an appellate court will notice judicially whatever the court of original jurisdiction is bound to notice judicially.[8]

Judicial notice is taken of the branches of the government,[9] of their rules and regulations,[10] and of the constitutional and statutory methods of their administration,[11] of public statutes, state[12] and Federal,[13] but not, generally, of special acts[14] or city ordinances.[15] Foreign laws cannot be judicially noticed,[16]

1. Witnesses, 2 Curr. L. 2163; Examination of Witnesses, post, p. ——.

2. Indictment and Prosecution, 2 Curr. L. 307.

3. See 1 Curr. L. 1137.

4. Goldman v. Floter, 142 Cal. 388, 76 P. 58.

5. McNish v. State [Fla.] 36 So. 176; Pelz v. Bollinger [Mo.] 79 S. W. 146. But they will not take notice, in deciding one case, of the record of another and distinct case, unless the latter is made a part of the record of the case under consideration. McNish v. State [Fla.] 36 So. 176.

6. Genuineness of defendant's signature judicially noticed on notice of appeal, but not on original process by which he is brought into court. Tischner v. Rutledge [Wash.] 77 P. 388.

7. On plea of res judicata. Hennessy v. Tacoma Smelting & Refining Co. [C. C. A.] 129 F. 40.

8. Tischner v. Rutledge [Wash.] 77 P. 388.

9. Taxing branch of the government, state and municipal; and that officers of this branch are public officers. City of New York v. Vanderveer, 91 App. Div. 303, 86 N. Y. S. 659.

10. Of the executive branch of the government; regulations regarding Indian affairs. Zevely v. Weimer [Ind. T.] 82 S. W. 941.

11. Methods of raising revenue, but not of the amount raised and received. Stein v. Morrison [Idaho] 75 P. 246.

12. Statutory obligations. Cronan v. Woburn, 185 Mass. 91, 70 N. E. 38. Act 1904, c. 66, empowering a railway to construct bridges in which the state is interested, and authorizing the condemnation of land is so far a public act that the court should take judicial notice of it. Chesapeake & O. Canal Co. v. Western Maryland R. Co. [Md.] 58 A. 34. Courts take judicial notice of statutes, though local in nature, such as an act preventing stock from running at large in a certain county. Davis v. State [Ala.] 37 So. 454. In an action involving the title to realty, the court took judicial notice of colonial and earlier laws bearing on the title. Townsend v. Trustees of Freeholders & Commonalty of Brookhaven, 97 App. Div. 316, 89 N. Y. S. 982. Courts cannot judicially know that a general law for working public roads has been put in operation by vote in a certain county. State v. Burkett [Miss.] 36 So. 689.

13. Metropolitan Stock Exch. v. Lydonville Nat. Bank [Vt.] 57 A. 101. Of the "Safety Appliance Act" of Congress. Kansas City, etc., R. Co. v. Flippo, 138 Ala. 487, 35 So. 457; Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395. Of statutes by which the common law doctrine of fellow servants is in force in Indian territory. Overton v. McCabe [Tex. Civ. App.] 79 S. W. 861.

14. Railway charter. Jersey City v. Jersey City & B. R. Co. [N. J. Law] 57 A. 445. Private statutes and city ordinances must be pleaded. Garlich v. Northern Pac. R. Co. [C. C. A.] 131 F. 837.

Contra: The courts will take judicial notice of a special legislative act authorizing a railroad company to purchase a railroad and to assume the latter's liabilities. In-

nor will the courts of one state judicially notice the laws of another state.[17] Federal courts take judicial notice of treaties and of their effect.[18]

State courts take judicial notice of the counties of the state and their boundaries[19] and location,[20] of the county in which a city of the state is located,[21] and of the streets of a city, their relation and direction.[22]

All courts take judicial notice of facts of common knowledge,[23] of matters of history,[24] and of coincidence of days of the week and of the month.[25]

ternational & G. N. R. Co. v. Hall [Tex. Civ. App.] 81 S. W. 82.

15. O'Brien v. Woburn, 184 Mass. 598, 69 N. E. 350; International & G. N. R. Co. v. Hall [Tex. Civ. App.] 81 S. W. 582. Nor of existing provisions of the New York health department (Department of Health of New York v. City Real Property Investing Co., 86 N. Y. S. 18), while state courts of general jurisdiction do not take judicial notice of city ordinances (Boston v. Abraham, 91 App. Div. 417, 86 N. Y. S. 863). Municipal courts, and circuit courts in trying cases de novo on appeal from the former, will take judicial notice of city ordinances, and such journals and records of a common council as affect their validity, meaning and construction, in like manner and for like purposes, as state courts judicially notice state public statutes and records of the state lawmaking body. City of Portland v. Yick, 44 Or. 439, 75 P. 706.

16. British admiralty law was not considered by the court because it was neither pleaded nor proven. The Matterhorn [C. C. A.] 128 F. 863. Probably judicial notice should be taken of the historical fact that the civil law is the basis of Mexican jurisprudence; but such notice should not include the details of the system. Banco De Sonora v. Banker's Mut. Casualty Co. [Iowa] 100 N. W. 532.

17. Equitable Bldg. & Loan Ass'n v. King [Fla.] 37 So. 181; Lassiter v. Norfolk & C. R. Co. [N. C.] 48 S. E. 642. Laws of another state must be pleaded and proven. Louisville & N. R. Co. v. Sullivan's Adm'r, 25 Ky. L. R. 854, 76 S. W. 525.

18. Courts of the United States take judicial notice that under the treaty of Paris, signed December 10, 1898, the Philippine Islands became a part of our territory; that at that time the inhabitants were in a state of insurrection against our government; and that the insurrection had not ended in the island of Mindanao in 1902. La Rue v. Kansas Mut. Life Ins. Co. [Kan.] 75 P. 494.

19. As fixed by statute and the public surveys. Zimmerman v. Brooks, 25 Ky. L. R. 2284, 80 S. W. 443.

20. The district and supreme courts of Oklahoma will take judicial notice that a given county is not within the free-range district, under the cattle laws. Lewis v. Rasp [Okl.] 76 P. 142.

21. Baily v. Birkhofer, 123 Iowa, 59, 98 N. W. 594.

22. Stealy v. Kansas City, 179 Mo. 400, 78 S. W. 599. But not of the names of streets or public places in towns or cities of the state (Baily v. Birkhofer, 123 Iowa, 59, 98 N. W. 594), nor that a street outside the city is within a certain distance of the city limits (Stealy v. Kansas City, 179 Mo. 400, 78 S. W. 599).

23. The existence of a rule of carriers that persons without tickets, and who will not or cannot pay fare, must be ejected from trains. Galveston, etc., R. Co. v. Scott [Tex. Civ. App.] 79 S. W. 642. That comparatively few travelers take advantage of special privileges allowed on unlimited and denied on limited tickets. Edson v. Southern Pac. R. Co. [Cal.] 77 P. 894. That no spark arrester can be so constructed that some sparks will not escape. White v. New York, etc., R. Co., 90 App. Div. 356, 85 N. Y. S. 497. That double, swinging storm doors of ordinary construction are not dangerous appliances when used with due care. Dolan v. Callender, McAuslan & Troup Co. [R. I.] 58 A. 655. That the manufacture of clothing in improperly ventilated, unsanitary and overcrowded apartments is likely to promote or engender disease. State v. Hyman [Md.] 57 A. 6. That the great grain fields of this country lie west of the Hudson river. Soper v. Tyler [Conn.] 58 A. 699. That the usual way of cancelling or erasing a written word is by drawing a line through it. Samberg v. American Exp. Co. [Mich.] 99 N. W. 879. That land is never assessed for taxation at its real cash market value. Wray v. Knoxville, etc., R. Co. [Tenn.] 82 S. W. 471. That there is no generally recognized way of determining whether oil exists under certain lands other than by putting down wells. Consumers' Gas Trust Co. v. Littler, 162 Ind. 320, 70 N. E. 363. That gas no longer exists in a territory formerly controlled by a gas company in quantities sufficient to furnish fuel for heating purposes to inhabitants of Indianapolis. State v. Indianapolis Gas Co. [Ind.] 71 N. E. 139. Judicial notice is taken of a custom or usage so general and notorious as to be a matter of common and general information. State v. Metcalf [S. D.] 100 N. W. 923. The nature of "okolihoa" being so well known that the supreme court of Hawaii spoke of it as "a well known, spirituous liquor, of great strength, and very intoxicating," proof of the nature of the liquor was unnecessary. The Kawailani [C. C. A.] 128 F. 879.

24. The customs and usages governing the creation and existence of organized political parties in this country. State v. Metcalf [S. D.] 100 N. W. 923. The court will take judicial notice of the historical fact that on a certain day the governor of the state ordered out a military force to maintain order in a certain city and issued a proclamation ordering mobs to disperse. Bosworth v. Union R. Co. [R. I.] 58 A. 982. Courts know, as a matter of history, that the Indians embraced in the different tribes or nations, originally occupied the territory now included within the United States and territories. Zevely v. Weimer [Ind. T.] 82 S. W. 941.

25. Baltimore & O. R. Co. v. Butler Pass. R. Co., 207 Pa. 406, 56 A. 959.

(§ 1) *B. Presumptions and burden of proof.*[26]—The only presumptions of fact recognized in law are immediate inferences from facts proved.[27] A party in whose favor a presumption arises is entitled to its benefit whether the facts upon which it depends were elicited by himself or the adverse party.[28] Among the inferences or logical deductions commonly recognized are the presumptions that a state of facts, or a condition, once shown to exist, will continue;[29] that suppressed evidence, if produced, would be unfavorable to the party withholding or suppressing it,[30] that a letter duly addressed, stamped and mailed, and not returned, has been received.[31]

Among the presumptions recognized by the courts on grounds of public policy are the presumption that judicial proceedings have been regular,[32] and that courts vested with judicial power by the constitution are courts of general jurisdiction;[33] that persons acting as public officers are properly and regularly in office;[34] that official acts and duties have been regularly and legally performed;[35]

26. See 1 Curr. L. 1138. The so-called conclusive presumptions, being mere rules of law, are not treated in this article; and only those rebuttable presumptions of general application are here illustrated.

27. A presumption of fact cannot be based upon other presumptions. Cunard S. S. Co. v. Kelley [C. C. A.] 126 F. 610. Hence the court cannot reasonably raise presumptions from the assumed existence of facts, proof of which it would not permit, such as similar occurrences at different times to show negligence of defendant. Nichols v. Baltimore & O. S. W. R. Co. [Ind. App.] 71 N. E. 170. The presumption of extension of time of payment of a note, arising from proof of payment of interest in advance, is one of fact, not of law. Guerguin v. Boone [Tex. Civ. App.] 77 S. W. 630.

28. Nichols v. Baltimore, etc., R. Co. [Ind. App.] 71 N. E. 170.

29. It may be rebutted by circumstantial as well as direct evidence. Atchison, etc., R. Co. v. Lloyd [Kan.] 75 P. 478. Baggage delivered to a carrier in perfect condition is presumed to continue in that condition. Strong v. Long Island R. Co., 91 App. Div. 442, 86 N. Y. S. 911. The rule that mental unsoundness, once shown, is presumed to continue, applies only when such unsoundness appears to be of a permanent character; it does not apply to mental unsoundness shown to be due to a transitory cause, such as sickness, injury, or intoxication. Branstrator v. Crow, 162 Ind. 362, 69 N. E. 668. Held a fair presumption that changes in the beach and shifting of inlets of Rockaway Beach, Long Island, shown to be going on at the present time, were going on in 1725. Sandiford v. Hempstead, 97 App. Div. 163, 90 N. Y. S. 76.

30. Westervelt v. National Mfg. Co. [Ind. App.] 69 N. E. 169. Where a party is sworn but does not testify, all the presumptions must be taken most strongly against him. Anker v. Smith, 87 N. Y. S. 479. Where a party fails to produce the best evidence, or explain its absence, the presumption is that, if produced, it would be adverse to him. Galbraith v. Starks, 25 Ky. L. R. 2090, 79 S. W. 1191. An attempt to suppress evidence is not an admission that the party so doing is asserting an unjust or false claim; but only an admission that the evidence, if given would be unfavorable to the party attempting to suppress it. Harrison v. Harrison [Iowa] 100 N. W. 344.

But where the court refused to enforce an order to produce correspondence, and plaintiff was fully examined as to its contents, its nonproduction raised no such presumption. Roberts v. Francis [Wis.] 100 N. W. 1076.

31. Planters' Mut. Ins. Ass'n v. Green [Ark.] 80 S. W. 151. Mere evidence that a person wrote a letter to another does not authorize a presumption that the latter received it, without proof that such letter was duly addressed, stamped and mailed. National Bldg. Ass'n v. Quin, 120 Ga. 358, 47 S. E. 962. The presumption attending evidence that three notifications were sent a consignee of goods, being duly mailed and addressed, is not rebutted by testimony of plaintiff's bookkeeper that he never received them. Roth Clothing Co. v. Maine S. S. Co., 44 Misc. 237, 88 N. Y. S. 987. Where a letter containing a birth certificate is duly addressed and mailed to a board of health, evidence that the clerk in charge searched the records and failed to find said certificate is not evidence that it was not received. Department of Health of New York v. Owen, 42 Misc. 221, 85 N. Y. S. 397. Under Iowa laws, an affidavit that notice of forfeiture of a life insurance policy was duly addressed and mailed is presumptive evidence of such notice. Summit v. United States Life Ins. Co., 123 Iowa, 681, 99 N. W. 563. While the mailing of a notice creates no legal presumption that it was received by the addressee, the fact is proper evidence on the question. Bloom v. Wanner, 25 Ky. L. R. 1646, 77 S. W. 930.

32. This presumption applies to special statutory proceedings, as to establish heirship. In re Marchant's Estate [Wis.] 99 N. W. 320. It will be presumed that a justice court, as a committing court, had not adjourned at the time it approved a bond. Crumpecker v. State [Tex. Cr. App.] 79 S. W. 564. Presumptively a term of a trial court ends on the day before the beginning of a new term. Doran v. Lose, 3 Ariz. 284, 73 P. 443.

33. Circuit courts of Ohio. Poll v. Hicks, 67 Kan. 191, 72 P. 847.

34. Regular appointment presumed. City of Monterey v. Jacks, 139 Cal. 542, 73 P. 436. That public officer has given proper bond.

that children are legitimate, the marriage relation being in existence;[36] that men are sane,[37] that their acts and dealings as private individuals are fair and legal,[38] and that they have exercised ordinary care;[39] that death resulted from natural causes and was not voluntary or illegal.[40]

In the absence of proof of a statute, the common law is presumed to prevail in a foreign state[41] once subject to the laws of England;[42] but this presumption does not obtain as to states or countries in which English laws and institutions have not been established.[43] The rule that the law of a foreign state will, in the absence of contrary proof, be presumed to be the same as that of the forum, is applied in many states, even though statutes have been enacted modifying the common law;[44] others hold that it will not be presumed that a foreign state has enacted statutes similar to those of the forum.[45]

Van Winkle v. Blackford, 54 W. Va. 621, 46 S. E. 589.

35. Election commissioners are sworn officers of the law and must be presumed to have done their duty. Motley v. Wilson [Ky.] 82 S. W. 1023. Election judges. Rexroth v. Schein, 206 Ill. 80, 69 N. E. 240. Tax officials. City of New York v. Vanderveer, 91 App. Div. 303, 86 N. Y. S. 659. That the current revenue of a city for each year, if properly collected and applied, would have been sufficient to meet current expenses. City of Tyler v. Jester & Co. [Tex.] 78 S. W. 1058. That public officials will adopt the true construction of a statute. Jeffrey v. State, 4 Ohio C. C. (N. S.) 494. That failure to file a remittitur was because the fee had not been paid or tendered, or for some other sufficient cause. Mabb v. Stewart [Cal.] 77 P. 402. That a clerk of court has made up a complete record and fully performed his duty in that regard. Gardner v. U. S. [Ind. T.] 82 S. W. 704. This presumption obtains when officers seek to justify their acts under process in legal proceedings to which they are parties. McKinstry v. Collins [Vt.] 56 A. 985. But the presumption that public officers have done their duty will not supply proof of a substantive fact. Davis v. Moyles [Vt.] 56 A. 174.

36. Lewis v. Sizemore [Ky.] 78 S. W. 122. While the presumption is not conclusive, nothing short of a showing that paternity of the husband was impossible can overthrow it. Bunel v. O'Day, 125 F. 303. That brothers and sisters are brothers and sisters of the full blood and legitimate. Ossman v. Schmitz, 4 Ohio C. C. (N. S.) 502.

37. In re Knox's Will, 123 Iowa, 24, 98 N. W. 468. But insanity, once being shown, is presumed to continue, and the burden is then upon him who asserts a return to sanity. Id.

38. That actions are legal. Clifton v. Weston, 54 W. Va. 250, 46 S. E. 360. Contract presumed valid. Rooney v. Southern Bldg. & Loan Ass'n, 119 Ga. 941, 47 S. E. 345. That a regular practicing physician has a license. Cather v. Damerell [Neb.] 99 N. W. 35. Fraud will not be presumed; the presumption is that dealings are fair. McNaughton v. Smith [Mich.] 99 N. W. 382. Fiduciaries are presumed not to have committed breaches of faith. McCreery v. First Nat. Bank [W. Va.] 47 S. E. 890. A court will take judicial notice of the fact that an electric lighting company could not maintain its fixtures and equipment in a city's streets without authority from the city. Nelson v. Narragansett Elec. Lighting Co. [R. I.] 58 A. 802.

39. That a traveler killed at a railway crossing was exercising due care. Reed v. Queen Anne's R. Co. [Del. Super.] 57 A. 529. Persons of mature years and ordinary intelligence and education are presumed to have read contracts executed by them or to have otherwise made themselves acquainted with their contents. David Bradley & Co. v. Basta [Neb.] 98 N. W. 697. Persons old enough to be safely trusted in the streets must be presumed to have sufficient intelligence and judgment to avoid obvious dangers. Dolan v. Callender, McAuslan & Troup Co. [R. I.] 58 A. 655. Many states have held that there is no presumption of contributory negligence in cases of injuries caused by collisions at railroad crossings. See authorities cited in Nichols v. Baltimore, etc., R. Co. [Ind. App.] 71 N. E. 170. In jurisdictions where the plaintiff must affirmatively prove want of contributory negligence, the presumption is that he was guilty of contributory negligence; but where plaintiff does not have such burden of proof, there is no such presumption. The latter rule obtains in Indiana. Id. See Railroads, 2 Curr. L. 1382; Street Railways, 2 Curr. L. 1742.

40. Presumptions are against death by suicide. Ross-Lewin v. Germania Life Ins. Co. [Colo. App.] 78 P. 305. When a person is found dead from unexplained causes, the presumption is that death was natural or accidental, and not voluntary. In an action on an insurance policy, the burden of proving suicide was on the insurance company. Chambers v. Modern Woodmen of America [S. D.] 99 N. W. 1107. Upon proof of death by a gunshot wound, the presumption is that the injury causing death was accidentally, not illegally inflicted, and defendant, alleging an intentional infliction by a third person, has the burden of proving it. Stevens v. Continental Casualty Co., 12 N. D. 463, 97 N. W. 862.

41. Baltimore, etc., R. Co. v. Hollenbeck, 161 Ind. 452, 69 N. E. 136; Nenno v. St. Louis & S. F. R. Co. [Mo. App.] 80 S. W. 24; Klenke v. Noonan [Ky.] 81 S. W. 241.

42. Columbian Bldg. & Loan Ass'n v. Rice [S. C.] 47 S. E. 63.

43. The presumption does not obtain as to Mexican law. Banco De Sonora v. Bankers' Mut. Casualty Co. [Iowa] 100 N. W. 532.

44. Marriage laws of Michigan presumed to be the same as statutory provisions in California. In re Harrington's Estate, 140 Cal. 244, 73 P. 1000. Laws of Arizona as to adults presumed same as those of Iowa. Banco De Sonora v. Bankers' Mut. Casualty

The burden of proof[46] rests at all times upon him who affirms, and is not changed by presumptions of fact arising during the trial.[47]

§ 2. *Relevancy and materiality.*[48]—Evidence which, if true, tends within reasonable probabilities to establish a matter in dispute, is relevant.[49] Evidence

Co. [Iowa] 100 N. W. 532. Laws of Indiana presumed to be same as those of Iowa relative to transportation of property by railway and express companies. McMillan v. American Exp. Co., 123 Iowa, 236, 98 N. W. 629. Statute of Missouri relating to usury presumed to be similar to Kansas usury statute. Mutual Home & Sav. Ass'n v. Worz, 67 Kan. 506, 73 P. 116. Ohio statutes respecting the effect of an appeal presumed to be the same as those of Kansas on that subject. Poll v. Hicks, 67 Kan. 191, 72 P. 847. Montana law presumed same as that of South Dakota as to nonnegotiability of note by inclusion of "other costs." Baird v. Vines [S. D.] 99 N. W. 89. Pennsylvania law presumed same as Tennessee statute requiring notice by carriers to consignee of goods received. Pennsylvania R. Co. v. Naive [Tenn.] 79 S. W. 124. Arkansas law presumed same as that of Texas requiring written evidence of trusts. Boyd v. Boyd [Tex. Civ. App.] 78 S. W. 39. That law of Oklahoma in reference to community property is same as that of Texas. Ex parte Latham [Tex. Cr. App.] 82 S. W. 1046. Courts of Indian Territory will presume the statute of frauds of Oklahoma Territory to be the same as that of Indian Territory. Wilhite v. Skelton [Ind. T.] 82 S. W. 932.

Note: In Wilhite v. Skelton [Ind. T.] 82 S. W. 932, the case of Meuer v. Chicago, etc., R. Co. [S. D.] 59 N. W. 945, 49 Am. St. Rep. 898, 25 L. R. A. 81, is cited, and a part of the opinion quoted as follows: "There is some conflict in the decisions of the different courts upon the question as to whether or not the court will presume that the law of another state is the same as the statute law of the state where the action is tried, but the weight of authority seems to support this view." Citing Palmer v. Atchison, etc., R. Co., 101 Cal. 187, 35 P. 630, and other California cases, and Furrow v. Chapin, 13 Kan. 107.

45. Nenno v. St. Louis & S. F. R. Co. [Mo. App.] 80 S. W. 24. The presumption that the law of a foreign state is the same as that of the forum does not apply to positive statutory law. Waters v. Spencer, 44 Misc. 15, 89 N. Y. S. 693.

46. See 1 Curr. L. 1140.

47. See in this opinion a good discussion of "presumptions," "burden" and "shifting" of proof. Gibbs v. Farmers' & Merchants' State Bank, 123 Iowa, 736, 99 N. W. 703. In an action on contract, the burden of proof is not shifted from plaintiff by his making a prima facie case. Polstein v. Blauner, 86 N. Y. S. 794. The burden is upon a defendant to establish the averments of a plea to jurisdiction which raises an issue of fact. Pyron & Son v. Ruohs [Ga.] 48 S. E. 434. The burden is on defendant to sustain a set off pleaded. Western Coal & Min. Co. v. Hollenbeck [Ark.] 80 S. W. 145. The rule (Civ. Code, § 526) that the burden of proof in the whole case lies on the party who would be defeated if no evidence were introduced, applied. Walling v. Eggers, 25 Ky. L. R. 1563, 78 S. W. 428. When a prima facie case has been made out is a question for the court. Henning v. Stevenson [Ky.] 80 S. W. 1135.

48. Only the most general holdings are here given, the relevancy of evidence to a particular issue being considered as peculiar to that subject-matter and treated under the appropriate title. See, also, 1 Curr. L. 1140.

49. The court, however, gives the above as the test of "competency." The question was whether evidence of the condition of a horse nine months previous was too remote. Kavanaugh v. Wausau [Wis.] 98 N. W. 550. To be relevant, evidence must bear some logical relation to a fact in issue. Heller v. Heine, 42 Misc. 188, 85 N. Y. S. 389. Evidence tending to establish material issues made by the pleadings. Stuart v. Noble Ditch Co. [Idaho] 76 P. 255. Evidence of any facts having probative force on an issue is relevant. Wheeler v. Metropolitan Stock Exch., 72 N. H. 315, 56 A. 754. Evidence of a fact which is not in controversy is immaterial. Duggan v. Ryan, 211 Ill. 133, 71 N. E. 848.

ILLUSTRATIONS. Held relevant: Opinion of expert as to value of work admissible on probability of execution of a contract specifying a certain price therefor. Guglielino v. Cahill, 185 Mass. 375, 70 N. E. 435. Where an express contract for work was testified to but the parties differed as to the contract price, evidence of the actual cost of the work was admissible, as tending to show that the contract was for the price nearest the cost. Lewis v. Utah Const. Co. [Idaho] 77 P. 336. Evidence of a precipitate on the sidewalks of a city in which a smelter was located was admissible to prove that sulphur fumes from the smelter caused a scum on the irrigation water on plaintiff's farm a mile away. Rowe v. Northport Smelting & Refining Co., 35 Wash. 101, 76 P. 529. In an action for damages caused on plaintiff's farm by sulphur fumes from defendant's smelter, admission of evidence as to the effect of the fumes at other farms was proper, it having appeared that conditions were the same. Id. On an issue of negligence in furnishing an engineer an unsafe engine, evidence as to when the engine was built, the number of miles traveled, 500,000, and that it once collided with another engine, was admissible. Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435. In showing the degree of care required of street car employes, evidence that a street at the place where an accident occurred was much traveled was admissible. Denison & S. R. Co. v. Powell [Tex. Civ. App.] 80 S. W. 1054. In an action on a note past due, entries in defendant's books showing charges against and credits to plaintiff were relevant. Blackshear v. Dekle [Ga.] 48 S. E. 311. That a testatrix wore gowns that required a great deal of laundering admissible on issue of value of services of a domestic. Elwell v. Roper, 72 N. H. 585, 58 A. 507. Testimony of a plaintiff that he "took chances in going along the passage way" where he was injured was admissible to show a knowledge of danger. Consumer's Cotton Oil Co. v.

of collateral facts which would furnish no legal inference as to facts in dispute, and which the adverse party is not bound to be prepared to meet, is excluded as too remote.[50]

Jonte [Tex. Civ. App.] 80 S. W. 847. Testimony of a lawyer that his firm usually did the legal work for a decedent and that they had not drawn up his will was admissible on the issue whether the will was forged. Dolan v. Meehan [Tex. Civ. App.] 80 S. W. 99. Evidence of the number and character of foals produced by a mare was admissible on the issue of the value of the mare. Campbell v. Iowa Cent. R. Co. [Iowa] 99 N. W. 1061. In a suit against a marshal for value of goods seized on attachment, the return to the writ showing seizure and sale of goods, and price received, is competent evidence tending to establish the value of the goods. Shoup v. Marks [C. C. A.] 128 F. 32. In an action for damages for killing cows, evidence of what plaintiff had been offered for the cows was relevant but not conclusive on the issue of their value. Taylor v. Spokane Falls & N. R. Co., 32 Wash. 450, 73 P. 499. On an issue of the market value of potatoes, the price at which they were actually sold is admissible. Garlington v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 78 S. W. 368. What plaintiff paid for ponies admissible on their value. Gulf, etc., R. Co. v. Anson [Tex. Civ. App.] 82 S. W. 785. In an action for malpractice, the treatment given by the physician succeeding defendant may be shown. Bower v. Self [Kan.] 75 P. 1021. It was proper for a physician to testify that when he was called by another physician to attend a patient, it was not the first time other physicians had called him, when an attempt was made to show a conspiracy between the testifying physicians. Denison & S. R. Co. v. Powell [Tex. Civ. App.] 80 S. W. 1054. Statements and acts of defendant in suit for alienation of affections, after the wife had left her husband, admissible to show previous intimacy. Christensen v. Thompson, 123 Iowa, 717, 99 N. W. 591. Record of a suit against a corporation in which a receiver was appointed, admissible to show diligence in pursuing debtor, in subsequent suit against the corporation and guarantors of its debt. Fales & J. Mach. Co. v. Browning [S. C.] 46 S. E. 545. Where defendant set up a counterclaim, evidence of a compromise between the parties was admissible to show that defendant had not presented his present claim at that time, as bearing on the nonexistence of such claim. Stock v. Crawford [Iowa] 101 N. W. 89.

Held irrelevant: How far subsequently a person may go for testimony to show a person's mental condition at a given time is largely discretionary with the trial court. McCoy v. Jordan, 184 Mass. 575, 69 N. E. 358. An opinion as to defendant's sanity cannot be re-enforced by showing that witness had, a few days subsequent to the date in question, given defendant a power of attorney involving the care and disposition of witness' property. Allis v. Hall, 76 Conn. 322, 56 A. 637. Financial condition of devisees five years after making of the will properly excluded, when offered on the issue of testamentary capacity. Henning v. Stevenson [Ky.] 80 S. W. 1135. Assignment of an account after commencement of suit and on day of trial inadmissible, since the claim could not be used as set-off. Ewen v. Wilbor, 208 Ill. 492, 70 N. E. 575. Where an action is based on a contract, an undated assignment thereof, shown to have been in fact executed after commencement of the suit, was incompetent evidence. Liberty Wall Paper Co. v. Stoner Wall Paper Mfg. Co., 178 N. Y. 219, 70 N. E. 501. An offer of books of a firm properly excluded when no item therein was shown to have any bearing on the claim in issue or to contradict a ledger account already in evidence. Flagg v. Fisk, 93 App. Div. 169, 87 N. Y. S. 530. Proof tending to show boiler plans suitable for small boilers from 10 to 25 horse power, is irrelevant on the issue of their suitability for a 60 horse power boiler. Watson v. Bigelow Co. [Conn.] 58 A. 741. Evidence of the chastity of the wife before marriage and after birth of a child eleven months after marriage is irrelevant on an issue of the legitimacy of the child. Kennington v. Catoe [S. C.] 47 S. E. 719. Entries made by a decedent in a book of opinions on treatment of horses is irrelevant on an issue whether decedent promised to pay for plaintiff's services on his death. Roberge v. Bonner, 94 App. Div. 342, 88 N. Y. S. 91. Conversations and communications between plaintiff and executors as to a claim against the estate are irrelevant on an issue whether plaintiff made a contract with decedent. Id. Where a lease provided for payment of five per cent. of the cash value of the vacant ground, evidence of the cost of improvements and their rental value and the value of leaseholds in the vicinity was inadmissible. Springer v. Borden, 210 Ill. 518, 71 N. E. 345. On an issue whether work was done in a workmanlike manner, it appearing that a certain mechanic did most of the work, evidence that he got drunk and was put in jail did not tend to prove he was incompetent as a mechanic. Matthews v. Farrell [Ala.] 37 So. 325. That plaintiff paid a certain amount for the loss of certain goods in his possession is not evidence of the value of the goods. Peyser v. Lund, 89 App. Div. 195, 85 N. Y. S. 881. Evidence as to what plaintiff paid for property is not evidence as to its value at the time of its subsequent conversion. Carper v. Risdon [Colo. App.] 76 P. 744. Expert and opinion evidence as to the safer method of letting rails into a mine is inadmissible when the relative safety of different methods is not in issue. Johnson v. Union Pac. Coal Co. [Utah] 76 P. 1089. The fact that no objection to a claim was made cannot be established by negative proof. Weller v. Wagner [Mo.] 79 S. W. 941. Evidence of what stockholders were willing to take for certain property is inadmissible on issue of value of lease and option on the property. Conant v. Jones [Ga.] 48 S. E. 234.

50. Burnside v. Everett [Mass.] 71 N. E. 82; Watson v. Bigelow Co. [Conn.] 58 A. 741. Whether evidence is too remote to be competent is left to the discretion of the court. Kendall v. Flanders, 72 N. H. 11, 54 A. 285.

Illustrations: The filing of one paper cannot be proved by proving the filing of an-

Thus, on the issue of negligence, evidence of other similar occurrences or accidents is usually excluded,[51] unless the conditions are shown to be similar.[52] But on the issue whether or not a certain act is negligent, it has often been held proper to show what is usually done under the same circumstances,[53] but the

other paper physically similar to it. Cooper v. Nisbet, 119 Ga. 752, 47 S. E. 173. Evidence of the number of boxes of oranges witness could pack in a given time is inadmissible to show how many defendant could pack in that time. People v. Miller [Cal.] 78 P. 227. In an action to recover for medical services, evidence that the physician treated others at the same house during the period covered by the claim is irrelevant. Kwiecinski v. Newman's Estate [Mich.] 100 N. W. 391. In an action by a physician to recover for services from a railway corporation, rendered at time of a wreck, evidence of what another physician received for his services was irrelevant. McKnight v. Detroit & M. R. Co. [Mich.] 97 N. W. 772. In an action for damages for unlawful search of plaintiff's home, evidence regarding character and pedigree of blood hounds used in getting to the house was inadmissible as were photographs of the hounds. McClurg v. Brenton, 123 Iowa, 368, 98 N. W. 881. In an action for assault, declarations of defendant on other occasions, tending to show his intention to avoid trouble with plaintiff, were inadmissible. Evans v. Elwood, 123 Iowa, 92, 98 N. W. 584. Evidence that other boys had been seen playing on the crossing where a boy had been injured was inadmissible on the issue of contributory negligence. Williams v. Southern R. Co. [S. C.] 47 S. E. 706. Fires in the vicinity of the one in controversy, set by duly equipped engines on other railroads, could not be shown. Norfolk & W. R. Co. v. Briggs [Va.] 48 S. E. 521. Evidence of the speed of a train about two miles from the place where the locomotive is claimed to have caused a fire is irrelevant. Id. In an action based on killing of ponies by railroad train, evidence that witness reported the train as running too fast at a point two miles away, and that he had seen a train running at a high rate of speed, was inadmissible. Gulf, etc., R. Co. v. Anson [Tex. Civ. App.] 82 S. W. 785. That cogwheels in another mill were boxed was irrelevant, there being no attempt to show a general custom. Marks v. Harriet Cotton Mills, 135 N. C. 287, 47 S. E. 432. Putting four witnesses on the stand and asking each his age, in order to allow the jury to compare them with alleged minors to whom liquor had been sold, was improper. Poynor v. Holzgrat [Tex. Civ. App.] 79 S. W. 829. That defendant did not call on plaintiff after an accident for which plaintiff held defendant responsible could not be shown, since its only purpose could be to prejudice the jury. Austin v. Bartlett, 178 N. Y. 310, 70 N. E. 855.

51. Nichols v. Baltimore, etc., R. Co. [Ind. App.] 71 N. E. 170. Evidence of previous accidents caused by an unguarded stairway in a store, and of warnings to defendant as to the danger. Potter v. Cave, 123 Iowa, 98, 98 N. W. 569. In an action for injuries caused by a municipality allowing a street to be obstructed, evidence that other streets were also allowed to be obstructed was inadmissible. Radichel v. Kendall [Wis.] 99 N. W. 348. In action for loss of timber fired by spark from engine, evidence that same engine caused a timber fire at another place a year later, inadmissible. Cheek v. Oak Grove Lumber Co., 134 N. C. 225, 46 S. E. 488. Where a certain railway engine had been identified as having caused a fire, evidence of other fires along defendant's right of way was inadmissible, without connecting them with this engine. Norfolk & W. R. Co. v. Briggs [Va.] 48 S. E. 521. In an action for wrongful ejection from a train, evidence of the ticket agent tending to show he had made a mistake in issuing plaintiff's ticket, testimony that he had made similar mistakes before was irrelevant. Southern Ry. Co. v. Bunnell [Ala.] 36 So. 380. In an action for damages for overflow of a sewer system, evidence of a similar overflow two years before was too remote. Burnside v. Everett [Mass.] 71 N. E. 82.

Held admissible: In an action against the city for alleged wrongful death caused by an explosion of fireworks permitted by the city, evidence that other similar exhibitions had been given without accident should have been admitted. Landau v. New York, 90 App. Div. 50, 85 N. Y. S. 616.

52. In an action for damage to butter in storage, evidence that other butter of the same kind kept well in plaintiff's private storeroom, and that butter of the same kind belonging to others was damaged in defendant's storeroom at the same time as plaintiff's was admissible. Rudell v. Grand Rapids Cold-Storage Co. [Mich.] 99 N. W. 756. In an action for wrongful death caused by the bursting of a pulley, the fact of the previous bursting of two other pulleys, made the same way, was admissible to show knowledge by the company that the pulley was defective and unsafe. Wabash Screen Door Co. v. Black [C. C. A.] 126 F. 721. In action for wrongful death of a workman, evidence of a similar accident three or four weeks before was inadmissible without a showing that conditions were materially the same. Gustafson v. Young, 91 App. Div. 433, 86 N. Y. S. 851. In an action for damages for burning of mills alleged to have been caused by sparks from a railroad engine, evidence as to the burning of other mills, conditions not being shown to be the same, was inadmissible. Conner v. Missouri Pac. R. Co. [Mo.] 81 S. W. 145.

53. Stewart v. Galveston, etc., R. Co. [Tex. Civ. App.] 78 S. W. 979. Proof of custom is evidence, but not conclusive, as to whether an act is negligent. Anderson v. Fielding [Minn.] 99 N. W. 357. Evidence that some of defendant's trains ran "pretty fast" in the vicinity of the place of a collision admissible to show a custom of running at a high rate of speed at that point, on the issue of negligence. Gulf, etc., R. Co. v. Anson [Tex. Civ. App.] 82 S. W. 785. In an action by a section foreman for injuries, testimony that it was customary for foremen to ride on the front of handcars, as plaintiff was riding, was proper. Galloway v. San Antonio & G.

occurrence of specific alleged acts of negligence cannot be proven by showing a custom,[54] nor is evidence of a person's habitual use of intoxicants proof of his condition as to sobriety on a particular occasion.[55] To prove an alleged defective or dangerous condition as the cause of injury, evidence of the existence of such condition before[56] or after[57] the accident in question is admissible, if it appears that there had been no change, but not otherwise.[58] Proof of subsequent re-

R. Co. [Tex. Civ. App.] 78 S. W. 32. In suit by fireman to recover for injuries alleged to have been caused by negligence of the engineer, the general practice of firemen traveling with the engineer, as to the position of the fireman while taking coal on the engine, could be shown to establish notice by the engineer of the fireman's position. Cleveland, etc., R. Co. v. Bergschicker, 162 Ind. 108, 69 N. E. 1000. Evidence of the number of men commonly used by a defendant in skidding logs, and the number necessary to do that work with safety, was admissible on issue of master's negligence. Dell v. McGrath [Minn.] 99 N. W. 629. The general custom of well regulated and prudently managed railroad companies, as to the time and manner of inspecting boilers, could be shown. Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435. Proof of the common and general use of a particular appliance is competent on the question of its reasonable safety as between a master and servant. Anderson v. Fielding [Minn.] 99 N. W. 357. In action for damages for injury caused by a bridge breaking down with an engine, a general custom not to take such engines on the bridge was admissible on the issue of contributory negligence. Comstock v. Georgetown Tp. [Mich.] 100 N. W. 788. In an action for injuries received while going through a passageway, evidence that other workmen used the passageway was admissible to show its customary use on the issue of contributory negligence. Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847. Evidence that passengers had previously ridden on certain seats in a street car is admissible on an issue whether that seat was one for passengers and used with the knowledge and consent of employes. Fitch v. Mason City & C. L. Traction Co. [Iowa] 100 N. W. 618. On an issue whether or not a car stopped for a passenger, in an action for injuries, a rule of the company adopted the day before, requiring cars to stop at the point in question, and evidence that cars did in fact stop there, was admissible. Nassau Elec. R. Co. v. Corliss [C. C. A.] 126 F. 355. Average or ordinary lateral play of drawbars could be shown, as tending to prove a coupler defective. Belt R. Co. v. Confrey, 209 Ill. 344, 70 N. E. 773. In an action for death of a brakeman caused by being crushed between two cars while coupling, evidence that another had made a coupling was admissible to show there was space enough between the cars to do it safely. Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395.

Held inadmissible: In action against a railway company, evidence that the engineer never ran by a flag station when signalled to stop was inadmissible, the nature of the action not being such as to put his character in issue, and he not being charged with willful misconduct. Reeves v. Southern R. Co. [S. C.] 46 S. E. 543.

54. Customary manner of handling cars at a given point. Stewart v. Galveston, etc., R. Co. [Tex. Civ. App.] 78 S. W. 979.

55. Bedenbaugh v. Southern R. Co. [S. C.] 48 S. E. 53.

56. Where plaintiff was injured by the falling of a building in course of construction, its condition six weeks previous was not too remote to be admissible on its condition at the time. Nelson v. Young, 91 App. Div. 457, 87 N. Y. S. 69. Evidence, in an action for wrongful death, that the derrick which caused the accident was unsafe five years before, when an accident occurred, and that no repairs had since been made, was relevant. Dyas v. Southern Pac. Co., 140 Cal. 296, 73 P. 972. Evidence, extending over a period some three years before and some time after an accident, of a generally defective condition of a sidewalk, was competent on the question of notice of a particular defect, which caused an accident. Mere remoteness in time does not make such evidence inadmissible. Hallum v. Omro [Wis.] 99 N. W. 1051.

57. Testimony concerning the condition of a sidewalk after an accident by one who had examined it was admissible, there being other evidence that its condition was the same as at the time of the accident. Harrison v. Incorporated Town of Ayrshire, 123 Iowa, 528, 99 N. W. 132. Conditions existing several hours after an accident could be shown when there was no evidence of a change since the accident, the presumption being that conditions had remained unchanged. Meyers v. Highland Boy Gold Min. Co. [Utah] 77 P. 347. On an issue whether a sidewalk was built of suitable materials, and whether it had been washed out by surface water, evidence that rain had since washed another hole in the same walk, the conditions being the same, was relevant. City of Columbus v. Anglin [Ga.] 48 S. E. 318. Admission of evidence of the condition of a cattle guard the day after stock was killed was not error when it was subsequently proved that its condition was the same as on the previous days. Johnson v. Detroit & M. R. Co. [Mich.] 97 N. W. 760. Subsequent condition of a railway track could be shown when such as to warrant an inference as to its condition at the time of an accident caused by an alleged defect. Jackson Lumber Co. v. Cunningham [Ala.] 37 So. 445. Evidence that changes had been made in a track was admissible in connection with evidence identifying certain decayed timbers as those in a track at the time of a derailment. Id.

58. Condition of a brakebeam a year after the accident in question could not be shown, it being admitted that the catch plate thereon was a different one. Bernard v. Pittsburg Coal Co. [Mich.] 100 N. W. 396. Condition of a railroad track 13 months after wreck irrelevant. Cronk v. Wabash R. Co., 123 Iowa, 349, 98 N. W. 884.

pairs[59] or other precautions[60] is usually excluded, sometimes on the ground of public policy.[61]

When the dealings of parties are matters of contract, custom[62] or transactions with other parties[63] cannot usually be shown, nor is proof of other similar transactions admissible,[64] unless to show fraud[65] or conspiracy;[66] but proof of the usual course of business is sometimes admitted.[67]

The value of realty may be proven by showing prices at which property in the vicinity has been selling;[68] but proof of independent sales is excluded,[69] and

59. See v. Wabash R. Co., 123 Iowa, 443, 99 N. W. 106; La Porte Carriage Co. v. Sullender [Ind. App.] 71 N. E. 922. But evidence of a subsequent erection of a guard was admissible to show that a machine was of such a character that it could be guarded. Id. Evidence of subsequent changes when a railing was replaced on a bridge was held admissible, as rebuttal, when defendant had put in evidence that the railing had been replaced and that it was safe. McDonald v. Duluth [Minn.] 100 N. W. 1102.

60. The discharge of a co-servant the day after an accident was inadmissible to show the incompetency of the servant at that time. Winters v. Naughton, 91 App. Div. 80, 86 N. Y. S. 439. In an action by a brakeman for injury by collision with a toolhouse, evidence that after the accident the toolhouse was moved farther from the track was inadmissible. Russell v. New York, etc., R. Co., 96 App. Div. 151, 89 N. Y. S. 429. Evidence that a ditch had been braced up after a wall had caved in, injuring plaintiff, held inadmissible. Schermer v. McMahon [Mo. App.] 82 S. W. 535.

61. Changes and repairs by a railroad company, after the overflow causing the damages sued for, held admissible; but it is said that evidence of subsequent repairs is held, usually, inadmissible on grounds of public policy, in such damage suits, because its admission would tend to deter the making of repairs in which the public is interested. Chicago, etc., R. Co. v. Longbottom [Tex. Civ. App.] 80 S. W. 542.

62. Moss Tie Co. v. Huff, 32 Ind. App. 466, 70 N. E. 86. A custom in a shop whereby workmen signed certain rules could not be shown to prove plaintiff signed them, and that he had notice of them. Quinn v. Brooklyn Heights R. Co., 91 App. Div. 489, 86 N. Y. S. 883.

63. That defendant had made a particular contract with a third person does not tend to show he made a similar contract with plaintiff. Beakley v. Rainier [Tex. Civ. App.] 78 S. W. 702. In action on contract, evidence of prices paid under other similar contracts, irrelevant. Nugent v. Armour Packing Co. [Mo. App.] 81 S. W. 506.

64. On an issue whether a landlord, by his agent, had waived a crop lien, evidence of waivers of liens on other crops was inadmissible. Wimp v. Early [Mo. App.] 78 S. W. 343. In an action for goods sold and delivered, evidence that defendant had been "short" in his accounts at other times and with other persons was inadmissible. Fleck v. Neerenberg, 85 N. Y. S. 379. On an issue of breach of warranty of a machine, evidence that witness had set up many other machines of the same make and had never had complaints made was inadmissible. Haynie v. Plano Mfg. Co. [Tex. Civ. App.] 82 S. W. 532. Evidence of other transactions inadmissible to prove that an order was given as security only. Held v. Caldwell-Easton Co., 97 App. Div. 301, 89 N. Y. S. 954.

Held admissible: Where a defense to a note was that defendant paid plaintiff's expenses on a European trip, evidence that on former occasions plaintiff had invited defendant to become his guest and paid all expenses was admissible to show plaintiff was an invited guest on the European trip. Zane v. De Onativia, 139 Cal. 328, 73 P. 850.

65. Where a transaction is assailed as fraudulent, evidence of other and contemporaneous transactions of a similar fraudulent nature is admissible to prove the fraudulent intent. Ettinger v. Weil, 94 App. Div. 297, 87 N. Y. S. 1049.

66. In a civil case based on a conspiracy to defraud plaintiff and steal his money, other similar transactions of the alleged conspirators may be shown, to establish a common enterprise and show the fraudulent nature of the act. Wright v. Stewart, 130 F. 905.

67. The usual form of release of attachment could be shown to prove the signing of such a release. Hesser v. Rowley, 139 Cal. 410, 73 P. 156. A course of dealing by which debts evidenced by notes were charged as items of a book account could not be shown by a few entries, unexplained, remote in date from the debts in issue. Freehart v. Stanford [Vt.] 58 A. 790.

68. City of New Orleans v. Manfre, 111 La. 927, 35 So. 981. On the value of land, evidence of what contiguous land sold for, the conditions surrounding the land, and the added value by locating a depot on a portion of it is admissible. Louisville, etc., R. Co. v. Whipps, 25 Ky. L. R. 2312, 80 S. W. 507. Market value of lands in the vicinity may be shown on an issue of land values, though the other lands are not identical in location and quality with the land in question. Dady v. Condit, 209 Ill. 488, 70 N. E. 1088. Sales of land in vicinity and boom conditions increasing land value, may be shown; and such evidence, though rendered of less weight, is not made inadmissible by a showing that the boom collapsed, and sales were not in fact carried out. Id. An opinion as to the value of land may be based on recent sales of similar land in the neighborhood, and in addition, the uses and capabilities of the property, its situation, productiveness, etc. Illinois, etc., R. Co. v. Humiston, 208 Ill. 100, 69 N. E. 880. A showing that other lands in the vicinity were of the same kind and quality was a sufficient predicate for evidence of the prices at which those lands had been sold. Tennessee Coal, Iron & R. Co. v. State [Ala.] 37 So. 433.

mere offers cannot be shown.[70] In condemnation proceedings,[71] the damages to, or the value of, other property can be shown only when conditions are shown to be similar. On issues of ownership, the acts and declarations of the parties, nature of their possession, and the relationship between the alleged owner and party in possession have been held admissible.[72]

Proof of reputation of a party is usually excluded in civil actions,[73] except in certain cases, such as assault, where defendant's disposition may be shown;[74] but proof of character or reputation has been held admissible on an issue as to the degree of care exercised on a given occasion,[75] or as to the value of services.[76] Evidence that a defendant is indemnified against loss is inadmissible to defeat a recovery or diminish a claim.[77] If evidence is relevant and material, it is ad-

Evidence that other coal land in the vicinity had been leased at a certain royalty per ton of coal held inadmissible; but evidence that, with the lease, was given an option to buy at a certain price, held admissible. Id. An assessment blank, proved by deputy assessor, containing valuation of a number of lots, including the one in question, inadmissible on value of land condemned. Wray v. Knoxville, etc., R. Co. [Tenn.] 82 S. W. 471. The amount for which land sold at execution sale is incompetent on the issue of the value of the land, if the surrounding circumstances show the price was too large. Rickards & Co. v. Bemis & Co. [Tex. Civ. App.] 78 S. W. 239.

69. Union Pac. R. Co. v. Stanwood [Neb.] 98 N. W. 656.

70. Sharp v. U. S., 191 U. S. 341, 48 Law. Ed. 211. Offers to buy similar lands inadmissible. Tennessee Coal, Iron & R. Co. v. State [Ala.] 37 So. 433.

71. See Eminent Domain, 1 Curr. L. 1002. In an action for damages to a lot by grading a street, the value of other abutting lots similarly affected may be shown (City of Columbus v. McDaniel, 117 Ga. 823, 45 S. E. 59); but the fact that the owner of the lot found a purchaser for it after the grading, having failed before, is not evidence on the issue whether the lot had been damaged or benefited (Id.). In condemnation proceedings, the value of water powers two miles distant from the one to be condemned is inadmissible on the value of the latter, without a showing that their values would be equal. City of Dallas v. Boise, 44 Or. 302, 75 P. 208. In an action to recover damages to a lot caused by construction of a railroad, the value of a lot across the street was inadmissible on the amount of damages, the lots not being shown to be substantially similar in the particulars affecting value. Newbold v. International, etc., R. Co. [Tex. Civ. App.] 78 S. W. 1079. On the issue of damages to farm land by the crossing of a railway, evidence of the effect on the value of other similar farms of railroads crossing them in a similar manner was properly excluded. Illinois, etc., R. Co. v. Freeman, 210 Ill. 270, 71 N. E. 444.

72. To prove ownership of land in a husband, and that it was put in wife's name to defraud creditors, a judgment against him, and a lease signed by him and wife, and receipts by him, were admissible. Burtiss v. Lanyon Zinc Co. [Kan.] 75 P. 1030; Wright v. Tanner [Minn.] 99 N. W. 422. To prove ownership, evidence that a party and his ancestors always claimed land as against the adverse party and listed and paid taxes thereon is admissible. Walling v. Eggers, 25 Ky. L. R. 1563, 78 S. W. 428. That one did not return land for taxes tended to show he did not claim to own it. Doe ex dem. Anniston City Land Co. v. Edmondson [Ala.] 37 So. 424. On an issue as to who was one of the parties to a boom contract, where plaintiff introduced evidence tending to show long use of the boom by defendants and collection by them of money for its use by others, defendant's evidence that sums so collected were accounted for to another company was relevant. Crane & Co. v. Fry [C. C. A.] 126 F. 278. Where several persons used steam for a boiler, the understanding of one of them as to ownership of coal used could be shown. Union Hosiery Co. v. Hodgson, 72 N. H. 427, 57 A. 384.

73. Evidence as to the former history of, and charges against, a party, inadmissible. Donaldson v. Dobbs [Tex. Civ. App.] 80 S. W. 1084. In an action for illegal sale of liquor to minors, evidence that one was and had the reputation of being a gambler was inadmissible. Poynor v. Holzgart [Tex. Civ. App.] 79 S. W. 829.

74. In an action for assault, the defense being that it was only a friendly scuffle, evidence of a subsequent act was admissible as tending to show defendant's disposition. Lee v. Longwell [Mich.] 99 N. W. 379.

75. Where an engineer and fireman were both killed by the explosion of a boiler, evidence, in an action for wrongful death of the engineer, that he had the reputation of being a careful and competent engineer and sober man, was admissible, tending to show that he exercised ordinary care on the occasion under investigation. Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435.

76. In an action for the value of services of a son, permanently injured, evidence that he was sober, obedient, industrious, and economical, and did not drink intoxicants or use tobacco was admissible; but not of his good morals. Cameron Mill & Elevator Co. v. Anderson [Tex. Civ. App.] 78 S. W. 971.

77. Blumberg v. Marks, 87 N. Y. S. 514. Evidence of mortuary benefits accruing from a collateral source, wholly independent of defendant, is inadmissible, on the amount of plaintiff's claim, in an action for wrongful death. Insurance from policies on husband's life. Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435. But evidence that a constable was indemnified to make a levy and sale was admissible in an action against him, to show notice of a lien on the prop-

missible, though its admission incidentally lets in other irrelevant matter.[78] The materiality of evidence is a question solely for the court.[79]

§ 3. *Competency or kind of evidence in general.*[80]—Evidence offered by one party, having been admitted over objection, similar evidence by the other party is admissible in rebuttal.[81] Telephone conversations are admissible if the parties talking are identified.[82]

§ 4. *Best and secondary evidence.*[83]—What is the best evidence in particular instances depends upon the nature of the case.[84] Until their nonproduction is in some way accounted for, original written documents[85] and records[86] are the

erty sold. Burton v. Dangerfield [Ala.] 87 So. 350.

78. In showing a condition of a substructure for a derrick, the fact that repairs were being made, after an accident, was incidentally disclosed. Dyas v. Southern Pac. Co., 140 Cal. 296, 73 P. 972.

79. Nickey v. Zonker, 31 Ind. App. 88, 67 N. E. 277.

80. Includes only a few miscellaneous decisions as to competency not covered by the general rules treated in following sections. See 1 Curr. L. 1142.

81. Farmers' High Line Canal & Reservoir Co. v. White [Colo.] 75 P. 415. One who has been permitted to go behind a land patent and introduce parol evidence of the location of a mining claim cannot complain of oral evidence in rebuttal, showing the senior location of another mine. Jefferson Min. Co. v. Anchoria-Leland Min. & Mill. Co. [Colo.] 75 P. 1070. Plaintiffs having introduced certain by-laws over objection, and claiming they were not legally adopted, defendants had the right to introduce the others. McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194. Where a lease was admitted in an action for conversion as an admission of ownership, rebuttal evidence to explain why the lease was made should have been admitted. Eldridge v. Hoefer [Or.] 77 P. 874. When a return to a writ of execution is competent evidence, the clerk's docket is competent to prove issuance of the writ. Shoup v. Marks [C. C. A.] 128 F. 32. A portion of a conversation being admitted, the remainder is admissible. Aetna Ins. Co. v. Eastman [Tex. Civ. App.] 80 S. W. 255. A physician having referred to medical authorities in his direct examination, a question regarding those authorities was proper in cross-examination. Cronk v. Wabash R. Co., 123 Iowa, 349, 98 N. W. 884. Where part of a correspondence is put in evidence, the other party may introduce the entire correspondence relating to the same subject. Gosnell v. Webster [Neb.] 97 N. W. 1060. Where letters constituting part of a correspondence are introduced, the other party is entitled to introduce the entire correspondence relative to the issue. Buedingen Mfg. Co. v. Royal Trust Co., 90 App. Div. 267, 85 N. Y. S. 621. Part of a doctor's letter relating to an injury having been introduced, the entire letter was admissible. Missouri, etc., R. Co. v. Criswell [Tex. Civ. App.] 78 S. W. 388. Where defendant gave evidence showing that a railing on a bridge had been replaced after an accident, and that it was safe, plaintiff could, in rebuttal, show that changes had been made when the railing was replaced; though generally evidence of subsequent repairs is inadmissible to show negligence. McDonald v. Duluth [Minn.] 100 N. W. 1102.

82. Where a witness testifies positively that a telephone conversation was with defendant and there was no cross-examination as to witness' means of identifying defendant, the submission to the jury of evidence of the conversation was proper. Lillie v. State [Neb.] 100 N. W. 316. When plaintiff testified that a certain telephone conversation was with defendant, what plaintiff said could be proven by a witness present in the room, though witness did not know with whom plaintiff was talking at the time. McCarthy v. Peach [Mass.] 70 N. E. 1029.

83. See 1 Curr. L. 1142.

84. **Illustrations:** Proof of a custom is not the best evidence if it is practicable to call all those affected by it. McGarrity v. New York, etc., R. Co. [R. I.] 55 A. 718. A family record of a birth is not the best evidence when the one who made it is living and competent to testify. Loose v. State [Wis.] 97 N. W. 526. A mechanic's lien statement is not evidence of the contract on which the lien claim is based. Jose v. Hoyt [Mo. App.] 81 S. W. 468. Original lien statement is best evidence of fact of making and filing such a statement. Wheelock v. Hull [Iowa] 100 N. W. 863. Ownership of a boat may be shown by parol; a bill of sale is not necessary. Leon v. Kerrison [Fla.] 36 So. 173. The constable's return on garnishment summons, and not his indorsement thereof on a writ of execution, is the original evidence of the service of the summons. Cooper v. Scyoc [Mo. App.] 79 S. W. 751. A book containing rules governing conduct of workmen, prepared since the accident on which suit was based, inadmissible to prove rules contained in a book alleged to have been lost. Quinn v. Brooklyn Heights R. Co., 91 App. Div. 489, 86 N. Y. S. 883. Extraneous evidence inadmissible to show whether a paper was printed, written or typewritten, as the paper itself was the best evidence on the point. Rose v. Harllee [S. C.] 48 S. E. 541. The statement of a witness that a schedule of rates was on file with the interstate commerce commission is not the best evidence of the fact. Summers v. Wabash R. Co. [Mo. App.] 79 S. W. 481. When a copy of a letter and not the original was the subject of a conversation between defendant and plaintiff's agent, the copy was properly admitted. Simonds v. Cash [Mich.] 99 N. W. 754. Assessment books are the best evidence of whether a person returned certain property for taxation, since the tax lists from which the books are made up are not required by law to be kept. Doe ex dem. Anniston City Land Co. v. Edmondson [Ala.] 37 So. 424.

best evidence of their contents; but since only the best evidence available is required to be produced, secondary evidence is admissible when a proper predicate has been laid therefor by showing loss or destruction of the original,[87] and that dili-

85. Letters. Post v. Leland, 184 Mass. 601, 69 N. E. 361. Insurance policy. Waller v. Cockfield, 111 La. 595, 35 So. 778; Tilley v. Cox, 119 Ga. 867, 47 S. E. 219. Alleged printed copy of a private contract not competent. Chicago, W. & V. Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38. Secondary evidence of a written contract inadmissible. Commonwealth v. Parlin & Orendorff Co. [Ky.] 80 S. W. 791. Oral and documentary evidence of the contents of a note and the character in which parties signed, inadmissible. Merrill v. Timbrell, 123 Iowa, 375, 98 N. W. 879. Secondary evidence of writ of execution excluded. Stephens v. Head, 138 Ala. 455, 35 So. 565. Where an agent acted under a written commission, testimony that her contract was on a blank like one shown her was incompetent. Getchell & M. Lumber & Mfg. Co. v. Peterson [Iowa] 100 N. W. 550. Copies of a telegram, furnished by agents at sending and receiving stations, inadmissible. Western Union Tel. Co. v. Kapp [Tex. Civ. App.] 80 S. W. 840. Secondary evidence of the contents of a telegram, received at its destination, inadmissible without proof of its authenticity and loss of the original. Yeiser v. Cathers [Neb.] 97 N. W. 840. Secondary evidence as to how a person voted inadmissible in absence of showing that ballot voted by him could not be identified. Lane v. Bailey [Mont.] 75 P. 191. A copy of a letter written by witness to defendant is inadmissible without proof of loss of the original, though witness has used the copy to refresh his memory in testifying. New England Mortg. Security Co. v. Anderson [Ga.] 48 S. E. 396. Testimony regarding an order sent by letter was improperly admitted when the letter was not produced or accounted for. Hart v. Godkin [Wis.] 100 N. W. 1057. Press copies of waybills held inadmissible in action between third parties, when originals were not accounted for, and the person who issued the waybills and made the copies was not shown to be dead. Haas v. Chubb, 67 Kan. 787, 74 P. 230.

86. County assessor's books. Hicks v. Pogue [Tex. Civ. App.] 76 S. W. 786. Assessment rolls best evidence of increase in valuation. Carlisle v. Chehalis County, 32 Wash. 284, 73 P. 349. Record required by law to be kept by distillers. Brown v. Harkins [C. C. A.] 131 F. 63. Proof of a judgment must be by the record of the court in which it was rendered, or a duly authenticated copy of such record. Northrop v. Chase, 76 Conn. 146, 56 A. 518. Record of court best evidence of a judgment (Nelson v. Brisbin [Neb.] 98 N. W. 1057), or order (Cummings v. Brown [Mo.] 81 S. W. 158). Record of proceedings in bankruptcy court is best evidence of appointment of receivers and reasons therefor. Blue Mountain Iron & Steel Co. v. Portner [C. C. A.] 131 F. 57. A judgment creditor cannot prove his claim by a transcript of the docket of the judgment; the judgment roll is necessary. Lauby v. Gill, 42 Misc. 334, 86 N. Y. S. 718. Original deedbooks in clerk of court's office were admissible, in place of certified copies. Davis v. Clinton, 25 Ky. L. R. 2021, 79 S. W. 259. Matters of which a record is required by law to be kept by a board of health cannot be established by parol, in the absence of a showing of the loss or destruction of the record. Cooke v. Custer County Com'rs, 13 Okl. 11, 73 P. 270. The record of school board meetings being the best evidence of its acts, the unsworn statement out of court of one of its members was incompetent to prove a contract awarded by the board, absence of the record not being explained. Mendel v. School Dist. No. 6 of Wauwatosa [Wis.] 98 N. W. 932. When a train dispatcher testified that he could not tell the number of cars ordered at different points without reference to his records, and the records were available, his testimony was properly excluded. Texas & P. R. Co. v. Smith [Tex. Civ. App.] 79 S. W. 614. A copy of the journal of the general assembly, as filed with the secretary of state, is not evidence for any purpose. Town of Wilson v. Markley, 133 N. C. 616, 45 S. E. 1023.

87. If the original of an instrument is lost, a copy is admissible in evidence, not because it imports the agreement, but to make proof of an original which did. Wright v. Michigan Cent. R. Co. [C. C. A.] 130 F. 843. Release lost. Conant v. Jones [Ga.] 48 S. E. 234. Copy of memorandum of chattels sold. Brunnemer v. Cook, 89 App. Div. 406, 85 N. Y. S. 954. Parol evidence of contents of lost letters. First Nat. Bank v. Wright [Mo. App.] 78 S. W. 686. Secondary evidence to show contents of a paper showing financial condition of a company. Drake v. Holbrook, 25 Ky. L. R. 1489, 78 S. W. 158. Report of commissioners to partition estate. Johnson v. Franklin [Tex. Civ. App.] 76 S. W. 611. Under the statute, affidavits of the destruction of deeds and records admit copies of abstracts to show chain of title. Glos v. Patterson, 209 Ill. 448, 70 N. E. 911. After showing the loss of the original judgment and papers in a cause, a copy, testified to as a true one, is admissible. Houston, etc., R. Co. v. De Berry [Tex. Civ. App.] 78 S. W. 736. In an action on a judgment of a justice of the peace, the docket of the justice being lost, a certified copy of the judgment roll was admissible. Wise v. Keer Thread Co. [Miss.] 36 So. 244. Existence, genuineness and contents of lost deed proved by certified copy of the record, deed having been properly and legally probated for record. Bentley v. McCall, 119 Ga. 530, 46 S. E. 645. A copy properly certified as a "copy of the original copy" is admissible to the same extent as a copy of the original. McLanahan v. Blackwell, 119 Ga. 64, 45 S. E. 785. A certificate of entry having been lost, a certified copy of the record was the best evidence, and parol testimony of its contents was inadmissible. Martin v. Brand [Mo.] 81 S. W. 443. Where memoranda of sales, after being copied into a book, were destroyed, the book entries were competent as secondary evidence. Rathborne v. Hatch, 90 App. Div. 151, 85 N. Y. S. 768. A written contract with a corporation having been lost, secondary evidence of its contents was admissible without the production of the minutes showing acceptance of

gent but fruitless search has been made for it,[88] or that it is in the possession of the adverse party,[89] who has failed to produce it after notice to do so.[90] The question of the sufficiency of preliminary proof to admit secondary evidence rests largely in the discretion of the court.[91] A document, claimed to have been lost, must be shown to have been in existence before secondary evidence is admissible.[92]

the contract by the corporation. Ellison v. Dunlap, 25 Ky. L. R. 1495, 78 S. W. 155. When an order for the sale of realty by an administrator stated that all the requirements of law had been complied with, parol evidence was admissible to show the filing of a schedule of debts, that it had been lost, and of its contents. Rhodus v. Heffernan [Fla.] 36 So. 572. Contents of a lost or destroyed written order vacating a highway may be shown by parol evidence of the members of the town board of supervisors which passed it. Schroeder v. Klipp [Wis.] 97 N. W. 909. Where an inventory of insured goods was destroyed with the goods, by fire, parol evidence of the amount and value of the stock was admissible. Hanna & Co. v. Orient Ins. Co. [Mo. App.] 82 S. W. 1115.

88. Letter. Kelley, Maus & Co. v. La Crosse Carriage Co. [Wis.] 97 N. W. 674. Note. Randolph v. Hudson, 12 Okl. 516, 74 P. 946.

89. Receipt of a letter having been shown, a copy is competent evidence for the sender. Dick v. Zimmerman, 207 Ill. 636, 69 N. E. 754; Supreme Council A. L. H. v. Champe [C. C. A.] 127 F. 541. Letterpress copy of letter inadmissible without notice to addressee to produce it, or other predicate laid for its introduction. King v. Cisco Compress Co. [Tex. Civ. App.] 81 S. W. 114. Where there is no reason to suppose a letter is in plaintiff's possession, it having been sent to and received by defendant, secondary evidence is admissible, its loss being shown, without notice to plaintiff to produce it. Kelley, Maus & Co. v. La Crosse Carriage Co. [Wis.] 97 N. W. 674.

90. Aaron v. Southern Ry. [S. C.] 46 S. E. 556. A predicate for the admission of copies of proofs of loss must be laid by showing notice to the insurer to produce the original. Underwriters' Fire Ass'n v. Henry [Tex. Civ. App.] 79 S. W. 1072; Hartford Fire Ins. Co. v. Enoch [Ark.] 77 S. W. 899. Secondary evidence inadmissible to show an alleged assignment of a lease, without a showing that the instrument was ever in defendant's possession or that notice to produce the document had been served. Landt v. McCullough, 206 Ill. 214, 69 N. E. 107. Where plaintiff would not be expected to have a certain lease in his possession, secondary evidence of its contents was admissible without notice to him to produce it. Cooley v. Collins [Mass.] 71 N. E. 979.

91. It is for the court to determine whether, in a given case, secondary evidence should be admitted. Cooley v. Collins [Mass.] 71 N. E. 979.

Proof of loss: Loss of instrument must be shown by best obtainable evidence. Liles v. Liles [Mo.] 81 S. W. 1101. Proof of loss, without proof of diligent search, insufficient. Avery v. Stewart, 134 N. C. 287, 46 S. E. 519. Showing of loss and search for written assignment held sufficient. Everett v. Hart [Colo. App.] 77 P. 254. Sufficiency of evidence of loss or destruction of a deed so as to admit a certified copy from the registry of it, when the deed is not between parties litigant. Cox v. McDonald, 118 Ga. 414, 45 S. E. 401. Mere statement that book is lost insufficient to show that there are not other books that constitute the best evidence of the fact in issue. Galbraith v. Starks, 25 Ky. L. R. 2090, 79 S. W. 1191. In the case of writings not likely and not intended to be preserved, slight evidence of loss is sufficient to lay a foundation for the admission of secondary proof. Tags on ties with printed and written matter thereon. Atchison, etc., R. Co. v. Palmore [Kan.] 75 P. 509. Secondary evidence of the contents of railway tickets was admissible after a showing that they had been turned over to the superintendent of another road, that its accounting department could not find them, and that they were probably lost. Chiles v. Southern R. Co. [S. C.] 48 S. E. 252. An affidavit of a party that a certain deed, not between the parties litigant, was not in affiant's possession, power or custody, and that affiant believed it had been lost or destroyed, was insufficient to admit a certified copy of the record of it. Cox v. McDonald, 118 Ga. 414, 45 S. E. 401.

Sufficiency of search: Secondary evidence to prove the contents of written contracts, alleged to be lost, will be admitted only on a showing that reasonable diligence has been exercised in an effort to find the lost papers, or to find a missing person to whose custody the missing papers have been traced (Koehler v. Schilling [N. J. Law] 57 A. 154), together with the fact that a bona fide and diligent search has been unsuccessfully made in the place where it is most likely to be found (Brown v. Harkins [C. C. A.] 131 F. 63; Prussing v. Jackson, 208 Ill. 85, 69 N. E. 771). In libel suit, secondary evidence of a letter was inadmissible, there being no proof of effort to produce the reporter who last had the letter. Prussing v. Jackson, 208 Ill. 85, 69 N. E. 771. Secondary evidence is inadmissible to prove a deed when the subscribing witnesses live in the state, though not in the county, and no effort has been made to obtain their testimony except a telegram, after objection to secondary proof. Johnson v. Franklin [Tex. Civ. App.] 76 S. W. 611. A showing that search for a lost deed had been made in the place where it was last seen and inquiry made of the only other person having access to it is sufficient to admit secondary proof of its contents. Kenniff v. Caulfield, 140 Cal. 34, 73 P. 803. Held, reasonable efforts had been made to produce original letters, and letterpress copies had been sufficiently identified to admit the latter in evidence. Nelson Mfg. Co. v. Shreve [Mo. App.] 79 S. W. 488.

An admission that a letter contained the

In the case of duplicates, each is original evidence, and the loss of one need not be shown, to render the other admissible.[93] A written contract relating to a merely collateral issue need not be produced; oral evidence of its contents is sufficient.[94] Statutes often provide for the admission of secondary evidence in specified instances.[95]

§ 5. *Parol evidence to explain or vary writings.*[96]—When a written contract imports on its face to be a complete expression of the whole agreement, it is presumed that the parties have introduced into it every material item and term,[97] and that all prior negotiations[98] and contemporaneous agreements[99] have been merged therein; hence the well settled rule that evidence of prior or contemporaneous oral agreements is inadmissible to vary or contradict the terms of a valid written instrument.[1] But if the contract is incomplete[2] or ambiguous or

facts as published in an alleged libelous article is not sufficient to let in secondary evidence of the contents of the letter. Prussing v. Jackson, 208 Ill. 85, 69 N. E. 771.

92. Rice v. Bamberg [S. C.] 46 S. E. 1009. Proof of existence of a letter held sufficient to admit proof of its loss and of its contents by parol. State v. Leasia [Or.] 78 P. 328. An unauthenticated copy of a deed by the alleged grantor's son, who did not know grantor's handwriting, without proof of the execution and genuineness of the alleged original, was inadmissible. Carter v. Wood [Va.] 48 S. E. 553.

93. Wright v. Michigan Cent. R. Co. [C. C. A.] 130 F. 843. A certified copy of a railroad lease, a duplicate of which was required to be kept on file in the executive department, was primary evidence. Branan v. Nashville, etc., R. Co., 119 Ga. 738, 46 S. E. 882. Duplicate original of bankruptcy schedule, prepared under bankruptcy act (Fales & Jenks Mach. Co. v. Browning [S. C.] 46 S. E. 545), and a certified copy of bankruptcy record, are original evidence under bankruptcy law (Id.). Certified copies of papers in bankruptcy proceedings are admissible, whether certified by the clerk of the court or the referee in bankruptcy. McLanahan v. Blackwell, 119 Ga. 64, 45 S. E. 785.

94. Morgan v. Garretson-Greason Lumber Co. [Mo. App.] 79 S. W. 997.

95. A statute permitting copies of certain specified papers and records to be used as evidence does not apply to private contracts. Chicago, W. & V. Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38. Rule 42 of the superior courts of Georgia, permitting the registry copy of a deed to be introduced on the oath of a party that the original has been lost or destroyed, etc., applies only to deeds between parties litigant. Cox v. McDonald, 118 Ga. 414, 45 S. E. 401. A statute authorizing acts and proceedings of corporations to be proved by sworn copy does not authorize proving the contents of the corporation's books of account by affidavit of the secretary. Coppes v. Union Nat. Sav. Loan Ass'n [Ind. App.] 69 N. E. 702. See post, Documentary Evidence, § 7C.

96. See 1 Curr. L. 1144.

97. Union Selling Co. v. Jones [C. C. A.] 128 F. 672; Holcombe v. Cable Co., 119 Ga. 466, 46 S. E. 671. Verdict cannot be based on understanding not expressed in written contract. Courier-Journal v. Howard, 119 Ga. 378, 46 S. E. 440. "In the absence of fraud or mistake, a complete written contract is a merger of all antecedent or simultaneous agreements between the parties, and affords conclusive evidence of knowledge and assent on the part of the parties to its contents, terms and conditions." Harrington v. Brockman Commission Co. [Mo. App.] 81 S. W. 629.

98. Arnold v. Malsby [Ga.] 48 S. E. 132; Ellis v. Conrad Seipp Brewing Co., 207 Ill. 291, 69 N. E. 808; Telluride Power Transmission Co. v. Crane Co., 208 Ill. 218, 70 N. E. 319; Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869; Singer Mfg. Co. v. Witt [Ky.] 80 S. W. 1124. Civ. Code, § 2186. Largey v. Leggat [Mont.] 75 P. 950; Abramson-Engesser Co. v. McCafferty, 86 N. Y. S. 185; Toledo Paper Box Co. v. American Roll Wrapping Paper Co., 4 Ohio C. C. (N. S.) 17; Hatfield v. Thomas Iron Co., 208 Pa. 478, 57 A. 950; Vito v. Birkel [Pa.] 58 A. 127; Kenney v. Foster & Bros. Co. [R. I.] 56 A. 680; McCall Co. v. Jennings, 26 Utah, 459, 73 P. 639; Hindle v. Holcomb, 34 Wash. 336, 75 P. 873; Coman v. Wunderlich [Wis.] 99 N. W. 612; Vogt v. Shienebeck [Wis.] 100 N. W. 820.

99. Plano Mfg. Co. v. Eich [Iowa] 97 N. W. 1106; Oppenheimer v. Kruckman, 84 N. Y. S. 129. Contemporaneous oral waiver of forfeiture clause in fire insurance policy. Maupin v. Scottish Union & Nat. Ins. Co., 53 W. Va. 557, 45 S. E. 1003. Contemporaneous verbal statements, agreements and understandings cannot be shown to establish assent to additional insurance, prohibited by the terms of the policy. Calmenson v. Equitable Mut. Fire Ins. Co. [Minn.] 100 N. W. 88. The terms of written lease cannot be contradicted by proving an oral contemporaneous agreement by the lessor to make certain repairs. Hallenbeck v. Chapman [N. J. Law] 58 A. 1096.

Contemporaneous written agreements are admissible, though they vary the writing in question, when all the writings are to be construed as one contract. Cobb v. Doggett, 142 Cal. 142, 75 P. 785; Gould v. Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896.

1. Gill v. General Elec. Co. [C. C. A.] 129 F. 349; Burlee Dry Dock Co. v. Besse [C. C. A.] 130 F. 444; Prouty v. Adams, 141 Cal. 304, 74 P. 845; American Harrow Co. v. Dolvin, 119 Ga. 186, 45 S. E. 983; Thomas v. Bagley & Co., 119 Ga. 778, 47 S. E. 177; Henry School Tp. of Henry Co. v. Meredith, 32 Ind. App. 607, 70 N. E. 393; McKee v. Needles, 123 Iowa, 195, 98 N. W. 618; Haynes v. Hobbs [Mich.] 98 N. W. 978; Johnson v. Bean

uncertain[3] on its face, parol evidence is admissible to explain it. The rule does

[Minn.] 99 N. W. 893; Neville v. Hughes [Mo. App.] 79 S. W. 735; Nebraska Land & Feeding Co. v. Trauerman [Neb.] 98 N. W. 37; Agnew v. Montgomery [Neb.] 99 N. W. 820; Reeves & Co. v. Bruening [N. D.] 100 N. W. 241; Atwater v. Orford Copper Co., 85 N. Y. S. 426; Marrotto v. McCotter, 85 N. Y. S. 431; Lillis v. Mertz, 89 App. Div. 289, 86 N. Y. S. 800; Moorehead v. Davis, 13 Okl. 166, 73 P. 1103; Fry v. National Glass Co., 207 Pa. 505, 56 A. 1063; Homewood People's Bank v. Heckert, 207 Pa. 231, 56 A. 431; Cape Fear Lumber Co. v. Evans [S. C.] 48 S. E. 108. A written contract can only be changed by writing or an executed oral agreement. Halsell v. Renfrow [Okl.] 78 P. 118. Under a statute (Rev. Codes 1899, § 3936), providing that a written contract may be altered by a contract in writing or an executed oral agreement, and not otherwise, a written contract for the sale of real estate cannot be modified by an unexecuted oral agreement, although the modification pertains only to the performance of the contract. Cughan v. Larson [N. D.] 100 N. W. 1088. The rule that a written contract cannot be varied by parol extends to the legal import or intendment of the contract, as well as the terms or words in which it is expressed. Union Selling Co. v. Jones [C. C. A.] 128 F. 672. While "there is much apparent and some real conflict in the numerous cases" applying this rule, it is certain that the testimony of a defendant alone cannot contradict the plain terms of a note. Fuller v. Law, 207 Pa. 101, 56 A. 333.

Mortgage. Belcher Land Mortg. Co. v. Norris [Tex. Civ. App.] 78 S. W. 390. Written contract between employer and striking employes. Eden v. Silberberg, 89 App. Div. 259, 85 N. Y. S. 781. Drummer's written order for goods. Succession of Welsh, 111 La. 801, 35 So. 913. Parol inadmissible to add to terms of written lease. Moore-Cortes Canal Co. v. Gyle [Tex. Civ. App.] 82 S. W. 350. A clear, unambiguous, reasonable release cannot be varied by parol, even though the asserted oral agreement is claimed to have been the inducement to the execution of the release. Atchison, etc., R. Co. v. Vanordstrand, 67 Kan. 386, 73 P. 113. Undisclosed intention of one party to a contract cannot be shown. Camardella v. Holmes, 97 App. Div. 120, 89 N. Y. S. 616. Where an executory contract showed on its face that it was not to be delivered in escrow, parol evidence of such a delivery is inadmissible. Martin v. Witty [Mo. App.] 78 S. W. 829. Parol evidence of the understanding of the parties held inadmissible to contradict a written agreement between the Delaware and Cherokee Indian Nations, made April 8, 1867. Delaware Indians v. Cherokee Nation, 193 U. S. 127, 48 Law. Ed. 646. A certificate of the oath of witnesses taken for the purpose of proving a will showed the oath was taken after the will was admitted. Parol evidence was inadmissible to explain the discrepancy. Godfrey v. Phillips, 209 Ill. 584, 71 N. E. 19. Trainmen's interpretation of a dispatcher's orders are incompetent on the question of interpretation of those orders, or on the question whether or not they were ambiguous. Wallace v. Boston, etc., R. Co., 72 N. H. 504, 57 A. 913. A written unqualified order for goods cannot be varied by showing a verbal agreement whereby the vendee was to sell what he could and be liable only for such an amount. Grabfelder v. Vosburgh, 90 App. Div. 307, 85 N. Y. S. 633. A provision in a contract for the purchase of a soda fountain against countermanding cannot be contradicted by showing a verbal agreement that the vendee need not take it unless satisfied. Harris-Hearin Fountain Co. v. Pressler [Tex. Civ. App.] 80 S. W. 664. A warranty cannot be imported into a written contract by parol. Neale v. American Elec. Vehicle Co. [Mass.] 71 N. E. 566. Parol inadmissible to show a sale contract absolute on its face was in fact conditional. Bass Dry Goods Co. v. Granite City Mfg. Co., 119 Ga. 124, 45 S. E. 980. A contemporaneous oral agreement that title was to pass cannot be received to contradict a written conditional sale contract. Forbes v. Taylor, 139 Ala. 286, 35 So. 865. Parol evidence inadmissible to show certain buildings were not intended to be included in a bill of sale, the validity of the instrument not being in issue [Civ. Code, § 4430; Code Civ. Proc. §§ 3132, 3136]. Hogan v. Kelly [Mont.] 76 P. 81. Parol evidence is inadmissible to show that at the time of a conveyance the grantee agreed to hold title in trust for the grantor, as this would contradict the deed. Richardson v. McConaughey [W. Va.] 47 S. E. 287. Verbal agreement to submit loss to arbitration could not be shown to contradict fire **insurance policy.** Rutter v. Hanover Fire Ins. Co., 138 Ala. 202, 35 So. 33. The effect of a clause in a written **lease** cannot be limited by a parol agreement. Woodward v. Ft. Worth, etc., R. Co. [Tex. Civ. App.] 79 S. W. 896. A written lease being unambiguous, and there being no averment or proof that certain provisions had been omitted therefrom by accident, fraud or mistake, it could not be varied by parol. In re Luckenbill, 127 F. 984. The accommodation maker of a **note** cannot set up, when sued on the note, a parol agreement by the bank that discounted it, to look solely to the one for whose accommodation the note was made, for payment. Earle v. Enos, 130 F. 467. Parol evidence was inadmissible to show that the place of payment of a note was a bank, though such place was insufficiently described in the note. Baily v. Birkhofer, 123 Iowa, 69, 98 N. W. 594. Parol testimony was inadmissible, in action by an indorsee of a note, to show that payment should be made only as the whisky for which it was given was delivered. Beattyville Bank v. Roberts, 25 Ky. L. R. 1796, 78 S. W. 901. Where a note shows one as an indorser, he cannot be proved a surety by parol. Barringer v. Wilson [Tex. Civ. App.] 81 S. W. 533. Where a **tax deed** misdescribed the land, parol evidence was inadmissible to prove that the sheriff intended to describe the land involved in the suit. Talley v. Schlatitz [Mo.] 79 S. W. 162. It is not competent to show by parol that land was sold for taxes of a different year from the year stated in a tax deed. Bower v. Chess & Wymand Co. [Miss.] 35 So. 444.

Held not to contradict writing: A mistake in the date of a deed may be shown by

not exclude parol or extrinsic proof of the fact of execution of a writing,[4] or the

parol. Bower v. Chess & Wymand Co. [Miss.] 35 So. 444. In an action for damages for delay in shipment, based on the tort and not on the contract of shipment, evidence was admissible to prove a previous intention to ship by another road. International, etc., R. Co. v. McGehee [Tex. Civ. App.] 81 S. W. 804. Oral testimony is admissible to show the terms of an alleged oral contract, when an issue in the case is whether the contract in suit was oral or written. Chicago, etc., R. Co. v. Halsell [Tex. Civ. App.] 81 S. W. 1241. Where defendant, in a suit to recover a certificate representing a seat in a stock exchange, claimed title through a written assignment, and also by virtue of an oral agreement of which the transfer of the certificate was the consummation, the oral agreement, executed, could be shown. Hamblen v. German, 93 App. Div. 464, 87 N. Y. S. 642.

2. Letters showed on their face that they did not constitute a completed contract. Courtney v. Knabe & Co. Mfg. Co., 97 Md. 499, 55 A. 614. The correspondence not containing all the terms of the agreement, parol evidence was admissible to supply the deficiency. Locke v. Wilson [Mich.] 98 N. W. 400. Written contract for sale of stone held complete, rendering inadmissible parol evidence as to freight charges. Minnesota Sandstone Co. v. Clark [Wash.] 77 P. 803. Parol evidence admitted to explain a written unsigned memorandum of a sale contract, since such memorandum was not an instrument within the rule excluding parol explanation. Messenger v. Woge [Colo. App.] 78 P. 314. A railroad passenger ticket does not express all the terms and conditions of the contract of carriage. Ames v. Southern Pac. Co., 141 Cal. 728, 75 P. 310.

Contra: When the contract of carriage was evidenced by a railroad ticket, its terms could not be added to by showing a verbal agreement to carry plaintiffs to their destination in the same car throughout the journey. Missouri, etc., R. Co. v. Harrison [Tex.] 80 S. W. 1139.

Terms on which writing is silent: Where a written contract left it uncertain what services were to be performed thereunder, or what recovery was contemplated, or how payment was to be made, oral or written contemporaneous statements in reference thereto were admissible. Barcus v. Gates, 130 F. 364. Where an insurance policy was silent as to what mortality tables were used in calculating extended insurance, parol evidence is admissible on the point, it being presumed the parties contracted with reference to tables then in use. Provident Sav. Life Assur. Soc. v. Bailey, 25 Ky. L. R. 2251, 80 S. W. 452. Where several writings refer to the same indebtedness but contain no provision in regard to the order of payment, an oral agreement as to the application of payments may be shown. Grogan v. Valley Trading Co. [Mont.] 76 P. 211. Parol evidence is admissible to supply a description of leased property and its condition, and the purpose for which it was leased, when these matters were in issue, and the lease was silent in regard thereto. Landt v. Schneider [Mont.] 77 P. 307. Where a contract made in one state, to be performed in another, does not specify the law which is to govern, parol evidence is admissible to show the intention of the parties in regard thereto. Davis v. Tandy [Mo. App.] 81 S. W. 457. A written sale contract being silent on the question of payment of freight, an oral agreement in regard thereto may be shown. Robert Buist Co. v. Lancaster Mercantile Co. [S. C.] 47 S. E. 978. Where a contract is partly written and partly oral, parol evidence is admissible as to terms on which the writing is silent, so long as the written portion is not varied or contradicted. Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co. [Tex. Civ. App.] 77 S. W. 961. A cablegram from the owner of property to an attorney in fact was admissible to explain a general power of attorney, when the written power was not thereby varied. Muir v. Westcott, 34 Wash. 463, 75 P. 1107. Where several owners of land make a joint gas and oil lease, the contract being silent as to the division of royalties among them, an agreement as to such division may be shown by parol. Rymer v. South Penn. Oil Co., 54 W. Va. 530, 46 S. E. 559.

Contra: Terms concerning which the contract is silent cannot be added by parol. Union Selling Co. v. Jones [C. C. A.] 128 F. 672. And it is held that the term or duration of a contract of employment cannot be shown by parol. Eichenauer v. Rentz Candy Co., 43 Misc. 151, 88 N. Y. S. 260. Teaching contract. Henry School Tp. v. Meredith, 32 Ind. App. 607, 70 N. E. 393. Contract of agency. Davis v. Fidelity Fire Ins. Co., 208 Ill. 375, 70 N. E. 359.

Writings other than the contract in suit: Written memorandum, not made a part of a contract and not signed by the parties, could be explained or varied by parol. Smith v. Williams, 90 App. Div. 507, 85 N. Y. S. 506. A letter written by one of the parties to an oral agreement, stating the writer's understanding of the contract, is not the contract, and may be contradicted by parol evidence of the other party. Huxford v. Meinhart, 119 Ga. 610, 46 S. E. 852. An incomplete memorandum to show a shipment and consignee and intended to be signed and returned as a receipt, but in fact not signed, while admissible to show the agreement between the parties, will not exclude parol evidence in regard to the agreement. Ronan v. 155,453 Feet of Lumber, 131 F. 345.

3. Held ambiguous: Clause in written contract providing for payment of a certain sum "as hereafter agreed." Morrison v. Dickey, 119 Ga. 698, 46 S. E. 863. A stipulation that a contract for sale of corn was "on Kansas City weights and grades." Fort Grain Co. v. Hubby [Tex. Civ. App.] 79 S. W. 363. Where contracts were ambiguous and incomplete, the construction placed on them by the parties during preceding years could be shown. Consolidated Dental Mfg. Co. v. Holliday, 131 F. 384. Subsequent conversations of the parties showing contemporary construction placed on contract were admissible. New York House Wrecking Co. v. O'Rourke, 92 App. Div. 217, 86 N. Y. S. 1116. Surrounding facts and circumstances and construction placed on grant of right of way by parties could be shown. Missouri, etc., R. Co. v. Anderson [Tex. Civ. App.] 81 S. W. 781. Parol evidence admissible to show "shares"

circumstances surrounding the execution,[5] when such proof serves to identify the subject matter,[6] or to show the actual relation of the parties to the contract.[7]

referred to in written agreement meant "pool shares" on which certificates were not to be issued until after the expiration of five years. Williams v. Ashurst Oil, Land & Development Co. [Cal.] 78 P. 28. Where the description in a deed of partition is ambiguous, parol evidence is admissible to show the boundaries and extent of ownership of each tenant. Graves v. Broughton, 185 Mass. 174, 69 N. E. 1083. Extrinsic evidence is admissible to explain language in a writing ambiguous because of unexpressed terms. Hebb v. Welsh, 185 Mass. 335, 70 N. E. 440. Where after two retainers, differing in terms, had been executed, and the attorney then withdrew from the case, but was later reemployed on the "original terms," parol evidence was admissible to show which retainer contained such terms. McIlvaine v. Steinson, 90 App. Div. 77, 85 N. Y. S. 889. Where a testator's intention in executing a codicil to his will was obscure, a letter written to the residuary legatees three days before executing the codicil was admissible to show his intention. Ladies' Union Benev. Soc. v. Van Netta, 88 N. Y. S. 413. Where a memorandum of a contract for the sale of lands described the property as situated on a certain street between two other streets, parol evidence was admissible to show that at that time defendant owned only one lot so situated, which had been conveyed to her on a foreclosure sale, the deed being on record. Miller v. Tuck, 88 N. Y. S. 495. Where there were two persons bearing similar names in the neighborhood, a shipper could show by parol to which one he shipped and consigned goods, the ownership of the goods being in issue. Newberry v. Norfolk & S. R. Co., 133 N. C. 45, 45 S. E. 356.

Held unambiguous: Pringle v. King [Ariz.] 78 P. 367; Neale v. American Elec. Vehicle Co. [Mass.] 71 N. E. 566. "Quality guaranteed." Union Selling Co. v. Jones [C. C. A.] 128 F. 672. Terms "f. o. b. cars." Vogt v. Shienebeck [Wis.] 100 N. W. 820. "Ready for occupancy," in written lease. Gerry v. Siebrecht, 88 N. Y. S. 1034. A charter party. Johnson v. Bibb Lumber Co., 140 Cal. 95, 73 P. 730. Clause in lease guaranteeing payment of rent for four months after ceasing to pay according to the stipulations of the lease. Rieger v. Royal Brewing Co. [Mo. App.] 80 S. W. 969. The term "legal representatives," used in a contract to limit the meaning of the term "assigns," is not ambiguous. Sullivan v. Louisville & N. R. Co., 138 Ala. 650, 35 So. 694. Parol evidence inadmissible to extend contract to include other parties. Thompson v. Erie R. Co., 96 App. Div. 539, 89 N. Y. S. 92. Evidence of reputation as to the location of a lost ancient monument is inadmissible if the description in the deed is sufficient to show the location. Smith v. Trustees of Freeholders & Commonalty of Brookhaven, 89 App. Div. 475, 86 N. Y. S. 34. The lines and corners of grants, established by survey, cannot be changed by parol, when the field notes of the survey are unambiguous and can be applied to the ground. Jamison v. New York & T. Land Co. [Tex. Civ. App.] 77 S. W. 969. Where a grantor made several absolute conveyances of the same tract of land to different grantees, all deeds being unambiguous and containing good descriptions, letters of grantor to last grantee were inadmissible to explain his deed. McManus v. Chollar [C. C. A.] 128 F. 902. The statement of a borrowing member of a loan association, who was also a local agent of the association, was inadmissible on the meaning of the contract. Coppes v. Union Nat. Sav. Loan Ass'n [Ind. App.] 69 N. E. 702. Written articles of adoption being clear and unambiguous, extraneous evidence of statements by parties and their feeling toward complainant was inadmissible. Bowins v. English [Mich.] 101 N. W. 204.

Custom and usage cannot be shown, ordinarily, if the contract is plain. Bill of lading. Portland Flouring Mills Co. v. British & Foreign Marine Ins. Co. [C. C. A.] 130 F. 860. Proof of a general usage inadmissible. Kalamazoo Corset Co. v. Simon, 129 F. 144. Broker's custom. Chilberg v. Lyng [C. C. A.] 128 F. 899.

Evidence that it was customary and reasonably necessary to turn back hot water into a pond, in the operation of a steam plant, was inadmissible to contradict the terms of a lease of the pond. Walker Ice Co. v. American Steel & Wire Co., 185 Mass. 463, 70 N. E. 937. Proof of usage or custom is incompetent to impose a limitation of liability of a carrier, not included in the contract of shipment. McMillan v. American Exp. Co., 123 Iowa, 236, 98 N. W. 629. But proof of a general usage is admissible to explain a contract either in the absence of express stipulations or where the meaning of the parties is uncertain from language used and the usage affords an explanation. Kalamazoo Corset Co. v. Simon, 129 F. 144.

4. Testifying to the fact of execution of a deed to a person named is not testifying to the contents of the deed. Baltes Land, Stone & Oil Co. v. Sutton, 32 Ind. App. 14, 69 N. E. 179. The purchase of a railroad may be shown by parol. International, etc., R. Co. v. Hall [Tex. Civ. App.] 81 S. W. 82.

5, Stickney v. Hughes [Wyo.] 75 P. 945; Bancroft v. Union Embossing Co., 72 N. H. 402, 57 A. 97. To explain uncertain or ambiguous terms. Union Selling Co. v. Jones [C. C. A.] 128 F. 672.

6. Extrinsic evidence as to conditions and circumstances surrounding a testator at the time of making his will is admissible to show the true application of a devise to the subject-matter, designated as the "house and lot where I now reside." Crossen v. Carr [N. J. Law] 57 A. 158. Extrinsic evidence admissible to locate land received under a will. Price v. Price, 133 N. C. 494, 45 S. E. 855. Lease referred to indefinitely in an assignment may be identified by parol. Ascarete v. Pfaff [Tex. Civ. App.] 78 S. W. 974. Conversations regarding boundary lines before execution of a deed are not inadmissible if not introduced to dispute the terms of the deed. Dubay v. Kelly [Mich.] 100 N. W. 677. Character of subject-matter of sale contract could be shown in order to determine what passed by the sale. Bagley v. Rose Hill Sugar Co., 111 La. 249, 35 So. 539. In an action to enforce a vendor's lien on nonpayment of a note for the purchase price,

Agreements collateral to the obligation imported by the written contract, and not inconsistent therewith,[8] and subsequent agreements,[9] may be shown by

the facts surrounding the sale, and the identity of the land sold may be shown by parol. Cavin v. Wichita Valley Town Site Co. [Tex. Civ. App.] 82 S. W. 342.

Where a sufficient description of land is given in a written contract regarding it, parol evidence is admissible to fit the description to the land. Halsell v. Renfrow [Okl.] 78 P. 118. But where the description is wanting or insufficient, parol evidence cannot both supply the description and apply it to the land. Id.

7. The actual relations to a note of parties whose names appear thereon may be shown by parol. Helvie v. McKain, 32 Ind. App. 507, 70 N. E. 178. Parol evidence admissible to show one signing as a witness to a written agreement was the real party in interest. Curran v. Holland, 141 Cal. 437, 75 P. 46. That a contract made by a corporation agent was for the corporation's benefit, though the contract does not suggest such fact on its face. Escondido Oil & Development Co. v. Glaser [Cal.] 77 P. 1040. That a judgment rendered in favor of one person was by virtue of another's right, by agreement between them. Jones v. Robb [Tex. Civ. App.] 80 S. W. 395. Whether two joint grantees in a deed are husband and wife. McLaughlin v. Rice, 185 Mass. 212, 70 N. E. 52.

As to notes: When one not a payee indorses a note before delivery, his real relation to the instrument may be shown. Herrick v. Edwards [Mo. App.] 81 S. W. 466. Extrinsic evidence is admissible to show the holder of a note indorsed in blank to be the trustee of an express trust. Graham v. Troth [Kan.] 77 P. 92. The time when, or the order in which, indorsements were placed on a note, may be proved by parol. Redden v. Lambert, 112 La. 740, 36 So. 668.

Partnership contracts: It is competent to show by parol that one partner signed letters, constituting a contract, on behalf of the firm. Huguenot Mills v. Jempson & Co. [S. C.] 47 S. E. 687. Or that notes jointly executed by partners are firm debts. In re Weisenberg & Co., 131 F. 517. As between partners, real estate purchased with partnership funds may be shown to be partnership property, though the deed is made to individuals as tenants in common (Cundey v. Hall, 208 Pa. 325, 57 A. 761); but such proof is inadmissible as against a third person (Id.). After proof by book accounts that transactions had been with a firm, parol evidence is inadmissible to show that one member only had been the real party thereto. State v. Elmore [S. C.] 46 S. E. 939.

8. An independent verbal contract relating to the same subject-matter, but not inconsistent with the written contract. Cook v. Littlefield, 98 Me. 299, 56 A. 899; Hamblen v. German, 93 App. Div. 464, 87 N. Y. S. 642. An agreement by a grantee to pay a mortgage on the land. Mowry v. Mowry [Mich.] 100 N. W. 388. The existence of a separate oral agreement relating to distinct subject-matter, on which the writing is silent, and which is not inconsistent with the writing. Stickney v. Hughes [Wyo.] 75 P. 945. Though a bill of sale is complete, a parol agreement that timber on the land should pass with the mill sold, may be shown. Welever v. Advance Shingle Co., 34 Wash. 331, 75 P. 863. A recital in a deed of a portion of mortgaged property that in case of foreclosure, the tract conveyed should be first sold, does not preclude showing an oral agreement that the grantor's title and possession of 80 acres retained by him should be protected. First Nat. Bank v. Bower [Neb.] 98 N. W. 834. Parol evidence as to a transfer of stock was admissible, though a deed of land was executed as a part of the same transaction and the consideration named therein covered also the other property transferred. Lathrop v. Humble [Wis.] 97 N. W. 905. A contract between the insured under a fire policy and the insurance broker who has advanced premiums, as to the disposition of unearned premiums to be returned in case of cancellation, does not vary the contract of insurance, and may be shown by parol. Miller v. Home Ins. Co. [N. J. Law] 58 A. 98. An agreement at the time of procuring a policy that plaintiff, though having no insurable interest in the life of the assured, should pay the premiums and take the proceeds, could be shown in an action on the policy. Hinton v. Mutual Reserve Fund Life Ass'n, 135 N. C. 314, 47 S. E. 474. Parol proof of an agreement to apply a certain anticipated fund on a note does not vary or contradict the note, as the agreement is collateral to the promise to pay. New York Life Ins. Co. v. Smucker [Mo. App.] 80 S. W. 278. A verbal agreement with a carrier's agent to have certain cars ready for a shipper at a certain time held not merged in a subsequent written contract of shipment, limiting the agent's power to make verbal contracts. Gulf, etc., R. Co. v. Combes [Tex. Civ. App.] 80 S. W. 1045. An assignment of a contract for sale of land being silent thereon, a parol agreement to apply part of the proceeds of the assignment to satisfaction of liens on the property may be shown, this being really a collateral agreement. Bell v. Wiltson [Neb.] 98 N. W. 1049. Though a lease is assigned by a written instrument, parol evidence is admissible to show the assignment was as security only. Gross v. Heckert [Wis.] 97 N. W. 952. A bill of sale may be shown by parol proof to be a chattel mortgage. Rogers v. Nidiffer [Ind. T.] 82 S. W. 673. Parol evidence is admissible to show that a mortgage was given to secure future advances as well as past debts recited therein. Kirby v. Raynes, 138 Ala. 194, 35 So. 118. A deed is not contradicted when it is shown that the grantee agreed to hold title in trust for a third person. Richardson v. McConaughey [W. Va.] 47 S. E. 287. A written instrument reciting the terms of a contract of sale, the receipt of earnest money, and that the money will be returned if title is not satisfactory, is not varied by testimony that the purchaser is ready, willing and able to purchase when the title is shown to be satisfactory. Wilson v. Clark [Tex. Civ. App.] 79 S. W. 649. The cashier of a trust company agreed with the drawer of a draft to discount it for the drawee, and the drawee sent the draft to the cashier to be discounted according to such agreement. The conversation between

parol, unless such proof is in conflict with the statute of frauds.[10] Since the purpose and meaning of a mere receipt may be shown by parol,[11] the recital, in a contract, of the receipt of a valuable consideration, is subject to parol modification to show the true consideration;[12] but if the recital of consideration is contractual, and not a mere receipt, it cannot be contradicted by parol.[13] Extrinsic evidence is admissible to show that a writing, purporting to be a contract, never became effective as such,[14] or was void ab initio,[15] or was induced by fraud;[16] and where,

the cashier and drawer was admissible. Birmingham Trust & Sav. Co. v. Whitney, 88 N. Y. S. 578.

9. Rutter v. Hanover Fire Ins. Co., 138 Ala. 202, 35 So. 33; Cook v. Littlefield, 98 Me. 299, 56 A. 899; Putnam Foundry & Mach. Co. v. Canfield [R. I.] 56 A. 1033. An oral modification of a contract may be shown, if executed. Reeves & Co. v. Bruening [N. D.] 100 N. W. 241. A verbal agreement, subsequent to execution of contract, fixing time of payment, could be shown, the written contract being silent on that point. Putnam Foundry & Mach. Co. v. Canfield [R. I.] 56 A. 1033.

10. Putnam Foundry & Mach. Co. v. Canfield [R. I.] 56 A. 1033; Strahl v. Western Grocer Co. [Neb.] 98 N. W. 1043. See Frauds, Statute of, 2 Curr. L. 108.

11. Hennessy v. Kennedy Furniture Co. [Mont.] 76 P. 291.

12. Baltes Land, Stone & Oil Co. v. Sutton, 32 Ind. App. 14, 69 N. E. 179; Neville v. Hughes [Mo. App.] 79 S. W. 735; Scudder & Co. v. Morris [Mo. App.] 82 S. W. 217; Holmes v. Seaman [Neb.] 100 N. W. 417; McGary v. McDermott, 207 Pa. 620, 57 A. 46; Wilcox v. Priester [S. C.] 46 S. E. 553; Pickett v. Mercer [Mo. App.] 80 S. W. 285. That there was no consideration. Stickney v. Hughes [Wyo.] 75 P. 945. Failure of consideration for a note, or a set-off against the same. Brown v. Smedley [Mich.] 98 N. W. 856. That other lands were part of the consideration, where the deed recited a consideration of "love and affection and one dollar." Edwards v. Latimer [Mo.] 82 S. W. 109. That consideration was not to be paid until title was perfected. Johnson v. Bean [Minn.] 99 N. W. 893. Acknowledgment of payment of consideration in a deed is a mere receipt which may be contradicted by parol. Fowlkes v. Lea [Miss.] 36 So. 1036. Consideration of a contract is always open to inquiry in suit for enforcement. Butler & Co. v. McCall, 119 Ga. 503, 46 S. E. 647. Parol evidence is admissible to show the real consideration of a conveyance, if consistent with the expressed consideration. Butt v. Smith [Wis.] 99 N. W. 328. Parol evidence is admissible to show a grantee assumed a mortgage, though the warranty deed makes no mention of it. Brosseau v. Lowy, 209 Ill. 405, 70 N. E. 901. Where the expressed consideration was one dollar and assumption of debts by the grantor, and it appeared there were no debts, parol evidence was admissible to show the real inducement leading to the conveyance. Medical College Laboratory v. New York University, 178 N. Y. 153, 70 N. E. 467. A recital in a bill of lading of a reduction in the usual freight rate is not conclusive on the issue of a consideration for a special contract of carriage, but the real transaction may be shown by parol. Lake Erie & W. R. Co. v. Holland, 162 Ind. 406, 69 N. E. 138. Where consideration in a lease was recited as a certain amount to be worked out at one dollar a day, parol evidence was admissible to show the character of the work and when it was to be done. Ingram v. Dailey, 123 Iowa, 188, 98 N. W. 627. That the real consideration for a release was a promise of future employment may be shown by parol, though a small money consideration be expressed in the writing. Rapid Transit R. Co. v. Smith [Tex. Civ. App.] 82 S. W. 788. Recital of number of acres conveyed by a deed yields to description by metes and bounds, and true acreage may be shown by parol. See v. Mallonee [Mo. App.] 82 S. W. 557.

13. See v. Mallonee [Mo. App.] 82 S. W. 557. As where the consideration is made a part of the contract itself. Neville v. Hughes [Mo. App.] 79 S. W. 735. Terms of a written lease providing for payment of annual rent of $200 could not be changed by parol to call for $160. Merchants' State Bank v. Ruettell, 12 N. D. 519, 97 N. W. 853. Where a deed recited that it was in consideration of "the debt and trust hereinafter mentioned and created and the sum of one dollar," parol evidence was inadmissible to show no consideration. Wishart v. Gerhart [Mo. App.] 78 S. W. 1094. Parol evidence, offered to show the true consideration, but which in fact contradicts the writing, is inadmissible. Stickney v. Hughes [Wyo.] 75 P. 945. Where a written contract recites a pecuniary consideration, the true consideration may be shown by parol; an expressed consideration other than of a pecuniary nature is conclusive and cannot be changed by parol. Anderman v. Meier, 91 Minn. 413, 98 N. W. 327.

14. Real intention of parties in executing the writing may be shown. Humphrey v. Timken Carriage Co., 12 Okl. 413, 75 P. 528. It may be shown by parol that deed by a widow to the tenant of her homestead was made under an agreement that she would sell to him if she had the legal right to do so. Moore v. Moore [Ky.] 78 S. W. 141. Where one party to a deed was ignorant and illiterate and reposed confidence in the other party, parol evidence was admissible to show an agreement that the deed was not to take effect until the grantor's death, and that grantee was to support grantor during her life. Wilson v. Wilson [Tex. Civ. App.] 79 S. W. 839.

Conditions precedent and nonperformance thereof may be shown, as that a completed instrument was to have been delivered. Elastic Tip Co. v. Graham [Mass.] 71 N. E. 117. That neither of two written options was to be enforced unless the other was also carried out. Reynolds v. Hooker [Vt.] 56 A. 988. That a signature to what purports to be a completed instrument was to take effect only on its being signed by others, and

through fraud[17] or mistake,[18] the writing does not embody the real agreement of the parties, the intended contract may be shown. The rule excluding parol evidence of writings may not be invoked by,[19] nor is it binding upon, a third person not a party to the contract.[20]

The rule applies with special force to contracts required by the statute of frauds to be in writing,[21] and to public records.[22]

that they have not signed. Elastic Tip Co. v. Graham [Mass.] 71 N. E. 117. A certificate being delivered with the understanding that there is to be a sale if another party, acting as agent, has not already sold it, such agreement may be shown. State v. Chamber of Commerce [Wis.] 98 N. W. 930. Parol evidence showing a condition expressed in a written instrument had been met by the person on whom it was imposed is admissible and does not vary or contradict the writing. Henry v. Herschey [Idaho] 75 P. 266. But when a written contract is to take effect from delivery, and is delivered, an agreement that it is to terminate on the happening of a condition subsequent cannot be shown by parol. State v. Chamber of Commerce [Wis.] 98 N. W. 930.

15. Stock gambling contract. Wheeler v. Metropolitan Stock Exch., 72 N. H. 315, 56 A. 754. The true consideration for a note making it a "peddler's note" and hence void under the statute may be shown by parol evidence, even though the writing is contradicted. Burns v. Sparks [Ky.] 82 S. W. 425.

16. McCrary v. Pritchard, 119 Ga. 876, 47 S. E. 341; Wilcox v. Priester [S. C.] 46 S. E. 553; Hallwood Cash Register v. Berry [Tex. Civ. App.] 80 S. W. 857; Trinity Valley Trust Co. v. Stockwell [Tex. Civ. App.] 81 S. W. 793; O'Connor v. Lighthizer, 34 Wash. 152. 75 P. 643. Fraudulent misrepresentations of material facts going to the consideration, on the faith of which a party entered into the contract. Atherholt v. Hughes [Pa.] 58 A. 269. A condition in an application for life insurance that no statement of the soliciting agent shall be binding on the company unless reduced to writing could not be contradicted by showing alleged false representations by parol. Blanks v. Moore, 139 Ala. 24, 36 So. 733. Parol evidence is admissible in behalf of one who has title to property by authentic act, to prevent its being taken from her on a charge of fraud. Cusachs v. Dugue [La.] 36 So. 960.

17. A parol agreement between the parties before and at the time of the execution of the written one, omitted from the latter by fraud, accident or mistake, the omission resulting in damage may be shown. Fry v. National Glass Co., 207 Pa. 505, 56 A. 1063. Parol evidence is admissible to show mistake, imperfection, illegality or fraud, in connection with the execution of a written contract. Code Civ. Proc. §§ 2186, 3132. Sathre v. Rolfe [Mont.] 77 P. 431. Parol evidence admissible to show a beneficiary could not read, and the agent did not disclose statements contained in a written application for benefit insurance, and that beneficiary was ignorant of such statements until death of insured. Home Circle Soc. No. 1 v. Shelton [Tex. Civ. App.] 81 S. W. 84.

18. Mutual mistake. Jones v. Warren, 134 N. C. 390, 46 S. E. 740. One party ignorant of what he was signing. Melie v. Candelora, 88 N. Y. S. 385. That name written as "Willis" as grantee in a deed was intended for "Willie." White v. Simonton [Tex. Civ. App.] 79 S. W. 621. Field notes admissible to show a mistake in patent in relation to name of grantee. New York & T. Land Co. v. Dooley [Tex. Civ. App.] 77 S. W. 1030. An entry on land being shown to have been made, evidence as to having seen the certificate in a certain person's possession was admissible, tending to show the certificate and patent had been issued in the wrong name. Martin v. Brand [Mo.] 81 S. W. 443.

19. In an action against a railway to recover for buildings burned, the defendant could not object to testimony by the grantee in a deed that the buildings did not pass by the deed, but title remained in the grantor; the grantee thereby precluded herself from a recovery for their destruction. Olmstead v. Oregon Short Line R. Co., 27 Utah, 515, 76 P. 557.

20. Wilson v. Mulloney, 185 Mass. 430, 70 N. E. 448; Carmack v. Drum [Wash.] 73 P. 377; Corbin v. Oriental Trading Co., 32 Wash. 668, 73 P. 781. The parol evidence rule is limited by statute in California (Code Civ. Proc. § 1856) to parties to the agreement, their representatives and successors in interest. Bickerdike v. State [Cal.] 78 P. 270. Where defendant agreed to pay certain of plaintiff's debts to a third person, and the written agreement between plaintiff and third person did not state fully plaintiff's obligations, parol evidence was admissible to show what debts defendant agreed to pay. Fosha v. Prosser [Wis.] 97 N. W. 924. Where estates of two tenants conflict, conversations of the lessor and one tenant are admissible to show the nature and extent of the tenancy at will, and this does not vary the other written lease. Walker Ice Co. v. American Steel & Wire Co., 185 Mass. 463, 70 N. E. 937.

21. Nesmith v. Martin [Colo.] 75 P. 590. Under Nebraska statute, an advancement cannot be proved by parol. Boden v. Mier [Neb.] 98 N. W. 701. A wife cannot make a binding oral contract with her husband for an equal share in the profits arising from land held by them in entirety, since such agreement would change the legal effect of the deed creating the tenancy. Morrill v. Morrill [Mich.] 101 N. W. 209.

Trusts required by the statute of frauds to be in writing cannot be established by parol. Hill v. Warsawski, 93 App. Div. 198, 87 N. Y. S. 551; Boyd v. Boyd [Tex. Civ. App.] 78 S. W. 39. Trust deed could not be changed by parol to mortgage to secure other debts. Christian v. Highlands, 32 Ind. App. 104, 69 N. E. 266. A trust arising by operation of law may be proved by parol or inferred from circumstances. Lyons v. Berlau, 67 Kan. 426, 73 P. 52.

Where a deed contains the usual habendum clause of a fee simple deed, parol evidence is competent to show a trust in favor of third parties (Mee v. Mee [Tenn.] 82 S. W. 830);

§ 6. *Hearsay. A. General rules.*[23]—Unsworn statements, out of court, by persons not parties to the action, are inadmissible,[24] and testimony based on

but if the deed contains provisions expressly authorizing the grantee to dispose of the property conveyed at the grantee's discretion, parol proof of a trust in favor of third persons is inconsistent with such terms, and incompetent (Id.)

Legal title cannot be proved by parol (Reynolds v. Clowdus [Ind. T.] 76 S. W. 277), unless ownership of the land is merely a collateral and incidental issue (Garrison v. Glass, 139 Ala. 512, 36 So. 725). Parol evidence is inadmissible to establish the intended legal effect of a void deed. Boyd v. Boyd [Tex. Civ. App.] 78 S. W. 39. A waiver of a condition precedent in a deed cannot be shown by parol, since any verbal agreement changing such condition would be void under the statute of frauds. Culy v. Upham [Mich.] 97 N. W. 405. Parol evidence is inadmissible to show that property bought by a third person was in reality bought by complainant's debtor, since the effect would be to bring into the debtor's estate property that had not previously belonged to it. Hoffmann v. Ackermann, 110 La. 1070, 35 So. 293. An agreement that part of the land conveyed for park purposes was to be used as a street was incapable of parol proof, because it would contradict the granting clause and limit the estate conveyed. Pickett v. Mercer [Mo. App.] 80 S. W. 285. Answers to interrogatories on facts and articles, relied on to establish simulation or agency in real estate transfer, cannot be contradicted by parol, nor can writings insufficient per se to establish title be eked out by the testimony of witnesses. Ackerman v. Peters [La.] 36 So. 923. When a deed, absolute in form, is given to secure a debt, a subsequent oral agreement and destruction of the note cannot pass legal title to the mortgagee by the original instrument. Keller v. Kirby [Tex. Civ. App.] 79 S. W. 82. Parol evidence is inadmissible to show that any other than the grantee named in a **conveyance** is bound by the obligations of the instrument. Moore v. Boyd [Tex. Civ. App.] 79 S. W. 647.

A party to a written contract for the sale of land may waive his rights thereunder by parol, and the contract may be annulled, abandoned and extinguished by parol. Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856. The statute of frauds does not prevent proving an executed sale of personalty by parol. Lathrop v. Humble [Wis.] 97 N. W. 905.

22. Parol evidence is inadmissible to supply, extend or modify the records of judicial acts of boards of municipal officers or county commissioners. Parol evidence of a mayor to show authority to construct a sewer excluded, when the record did not show such authority. Kidson v. Bangor [Me.] 58 A. 900.

Journals of the general assembly cannot be contradicted (State v. Armour Packing Co., 135 N. C. 62, 47 S. E. 411), or varied or explained by extraneous evidence (Town of Wilson v. Markley, 133 N. C. 616, 45 S. E. 1023). An ambiguity in the description of land in an assessment roll cannot be explained by parol. Leavenworth v. Greenville Wharf & Storage Co. [Miss.] 35 So. 138. Parol evidence is inadmissible to show a governor first approved and filed a bill, and then withdrew, vetoed, and refiled it, the records showing the bill was vetoed. People v. McCullough, 210 Ill. 488, 71 N. E. 602. The record showing adjournment of a common council to a certain day, parol evidence was inadmissible to show adjournment in fact to a different day. Chippewa Bridge Co. v. Durand [Wis.] 99 N. W. 603. Declaration of a judge who signed an order appointing receivers inadmissible to show grounds on which he entered the order. Blue Mountain Iron & Steel Co. v. Portner [C. C. A.] 131 F. 57. Oral evidence was admissible to show the vote by which an ordinance was passed, the record simply stating the passage, without recording the vote. Gove v. Tacoma, 34 Wash. 434, 76 P. 73.

Corporate records: Since the law does not required a record of the vote of the directors of an agricultural society, negotiating a loan, parol evidence is admissible to show such vote. Ismon v. Loder [Mich.] 97 N. W. 769. Where minutes of a meeting are silent as to a transaction claimed to have occurred, oral evidence is admissible to prove the transaction. Ehrlich v. Chevra Agudas Achin Aushi Wizna, 86 N. Y. S. 820. But oral evidence is inadmissible to prove an alleged transaction, unless an omission or error in the record be shown. Id.

Note: "Parol evidence may be received in some cases to supplement a record (Inhabitants of West Bath v. County Com'rs, 36 Me. 74; Smith v. County Com'rs, 42 Me. 395), and to show to what subject the action of a corporation applies (Baker v. Inhabitants of Windham, 13 Me. 74). It is also admissible in special proceedings, instituted for the purpose, to correct errors in a record (Willard v. Whitney, 49 Me. 235); or, if the record is destroyed or lost, to prove its purport (Gore v. Elwell, 22 Me. 442)." But the general rule is as stated in Kidson v. City of Bangor [Me.] 58 A. 900 (above) from which this excerpt is taken.

23. See 1 Curr. L. 1148.

24. McClurg v. Brenton, 123 Iowa, 368, 98 N. W. 881; Smith v. Lawrence, 98 Me. 92, 56 A. 455; Roberts v. Bidwell [Mich.] 98 N. W. 1000; Torreyson v. Turnbaugh [Mo. App.] 79 S. W. 1002; Westfeldt v. Adams, 135 N. C. 591, 47 S. E. 816; Donaldson v. Dobbs [Tex. Civ. App.] 80 S. W. 1084; Bell v. Bates [Tex. Civ. App.] 81 S. W. 551; Wilmington Sav. Bank v. Waste [Vt.] 57 A. 241.

Illustrations—Excluded as hearsay: What plaintiff told her father and aunt she had heard defendant say. Ranck v. Brackbill [Pa.] 58 A. 884. Statements by a third person when delivering a deed to the grantee, Schaefer v. Anchor Mut. Fire Ins. Co. [Iowa] 100 N. W. 857. Testimony that a grantor, since deceased, had told witness he had not paid a certain debt. McGowan v. Davenport, 134 N. C. 526, 47 S. E. 27. Evidence that testatrix said she intended to give a servant something more if she stayed during life of testatrix. Elwell v. Roper, 72 N. H. 585, 58 A. 507. Conversations, not in plaintiff's presence, between other parties, and a private letter of which plaintiff had no notice. Bell v. Staacke, 141 Cal. 186, 74 P. 774. Evidence that acquaintances of injured person had

hearsay, and not on the personal knowledge of the witness, is also excluded.[25] The hearsay rule, however, does not exclude so-called "traditionary evidence" of matters of public or general interest,[26] nor proof of age and pedigree by family

never heard of her having hernia before an accident. Pelly v. Denison & S. R. Co. [Tex. Civ. App.] 78 S. W. 542. Reports to a company's officer of prior similar accidents. Allen v. St. Louis Transit Co. [Mo.] 81 S. W. 1142. The report of a grand jury on the unsafe condition of a theater. Oppenheimer v. Clunie, 142 Cal. 313, 75 P. 899. Manufacturers' catalogue inadmissible to prove capacity of hot air plant. Stagg & Conrad v. St. Jean [Mont.] 74 P. 740. Recital of consideration in a deed is not conclusive, and as to a stranger to the deed, it is hearsay. Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515. The recitals of consideration in deeds of land are mere unsworn statements, and inadmissible as proof of the value of land in the vicinity where the land transferred is situated. City of New Orleans v. Manfre, 111 La. 927, 35 So. 981. A receipt acknowledging payment of money is generally inadmissible against a stranger to it as proof of payment, being hearsay only. But when admitted without proper objection, it is sufficient to support a finding based thereon. Beebe v. Redward [Wash.] 77 P. 1052. In an action against defendant for causing plaintiff's discharge by his employer, plaintiff's testimony that his boss had received a letter from defendant, seeking the discharge, and that his employer's superintendent told him the same thing, was hearsay. Holder v. Cannon Mfg. Co., 135 N. C. 392, 47 S. E. 481. In libel action, testimony of one in the district attorney's office that he had investigated the alleged libellous charges and had reported against dismissal, and that in his opinion the case had been "fixed" (Carpenter v. New York Evening Journal Pub. Co., 96 App. Div. 376, 89 N. Y. S. 263), and conversation between a reporter and an attorney as to certain alleged libellous charges was hearsay and inadmissible to show justification (Id.).

25. U. S. Fidelity & Guaranty Co. v. Damskibsaktieselskabet Habil, 138 Ala. 348, 35 So. 344; Barclay v. Smith [Miss.] 36 So. 449. One who testified he did not know what certain lumber inspection rules were could not testify as to the grading of lumber thereunder. Bray v. John L. Roper Lumber Co., 132 N. C. 695, 44 S. E. 403. Recitals in preliminary proofs of death, based on hearsay, and necessarily conclusions, are not admissions so as to prevent a showing of the true facts on the trial. Stevens v. Continental Casualty Co., 12 N. D. 463, 97 N. W. 862. Mercantile agency reports are inadmissible to prove a partnership when not shown to be based on reports authorized by the person sought to be bound, or that knew of them. Marks v. Hardy's Adm'r, 25 Ky. L. R. 1770, 78 S. W. 864. The report of a commercial agency is rendered admissible by testimony by the agent that the facts therein were told him by the merchant concerned. Courtney v. Wm. Knabe & Co. Mfg. Co., 97 Md. 499, 55 A. 614.

Held admissible: Witnesses having personal knowledge of transactions may testify in regard thereto though they refer at times to matters not entirely within their own knowledge. Bright v. Carter, 117 Wis. 631, 94 N. W. 645. Testimony as to the market price of lemons was not incompetent merely because the knowledge of witness was derived from information furnished by others. Betts v. Southern California Fruit Exch. [Cal.] 77 P. 993. In an action to recover commissions, evidence of conversations between plaintiff and owners of the property other than defendant, and a prospective purchaser of the property, though not binding on defendant, were held competent to show that plaintiff had carried out his contract. Good v. Smith, 44 Or. 578, 76 P. 354.

General reputation in a community is inadmissible to prove partnership. Marks v. Hardy's Adm'r, 25 Ky. L. R. 1770, 78 S. W. 864. Or unchastity of a wife before and at the time of marriage. Kennington v. Catoe [S. C.] 47 S. E. 719. Or character of house of ill fame. Ramsey v. Smith, 138 Ala. 333, 35 So. 325. Or condition of insured's health when she became a member of a beneficial organization. Home Circle Soc. No. 1 v. Shelton [Tex. Civ. App.] 81 S. W. 84. Or that plaintiff was a prostitute. St. Louis & S. F. R. Co. v. Smith [Tex. Civ. App.] 79 S W. 340.

But general reputation is sometimes competent evidence, thus: The fact of knowledge may be proved by circumstances and general reputation as to the fact, notice of which is sought to be shown. Continental Ins. Co. v. Cummings [Tex.] 81 S. W. 705. Evidence of a person's reputation for paying his debts is admissible on an issue of notice of his insolvency. Hooks v. Pafford [Tex. Civ. App.] 78 S. W. 99 . Proof of the general reputation and belief in the existence of a fact is admissible to show knowledge thereof by one in the neighborhood. Wright v. Stewart, 130 F. 905. Evidence that cattle were generally recognized and spoken of in the community as belonging to a person held admissible on ownership issue. Drumm-Flato Commission Co. v. Gerlach Bank [Mo. App.] 81 S. W. 503. On an issue of adverse possession, a general understanding in the neighborhood as to ownership may, it seems, be shown, to prove the notoriety of the adverse possession; but the exclusion of such evidence was held not prejudicial error in this case. Miller v. Shumway [Mich.] 98 N. W. 385. Evidence that a person was treated by a negro and mulatto woman, husband and wife, as their child, was competent on the issue whether he was a negro; as was the reputed race of his reputed parents. Locklayer v. Locklayer, 139 Ala. 354, 35 So. 1008.

26. When the public records covering the acquisition of certain land by Hartford, and a tender of it by the city to the state were before the court, "traditionary evidence," consisting of the discussion of citizens in a public meeting, and a newspaper article, at the time, was inadmissible to prove the general understanding as to the legal effect of the transactions. City of Hartford v. Maslen, 76 Conn. 599, 57 A. 740. Where two persons who signed a deed as trustees of the city of Monterey were dead and a third mentally and physically incapacitated, evidence of common repute was admissible to show they

history and tradition;[27] nor statements introduced for a purpose other than to prove the facts stated.[28]

(§ 6) *B. Res gestae.*[29]—Contemporaneous acts and declarations, explanatory of the act, transaction or condition which is the subject of controversy, and growing naturally therefrom, are admissible as a part thereof.[30]

acted as trustees at the date of execution of the deed. City of Monterey v. Jacks, 139 Cal. 542, 73 P. 436.

Note: "The exception to the general rule excluding hearsay evidence, which permits, in certain cases, the reception of what is called 'traditionary evidence' concerning facts of public or general interest, affecting public or private rights, is limited to proof of declarations of deceased persons, or persons supposed to be dead, or who are not available as witnesses, as to ancient rights of which they are presumed or are shown to have had competent knowledge, and which rights are incapable of proof in the ordinary way by living witnesses; and this exception is not to be favored or extended." Hall, J., in City of Hartford v. Maslem [Conn.] 57 A. 740, citing 1 Greenleaf, Ev. (13th Ed.) §§ 128-130; Thayer's Cases on Evidence, pp. 409-428; Merwin v. Morris, 71 Conn. 555, 572, 42 A. 855; Southwest School District v. Williams, 48 Conn. 505-507; Wooster v. Butler, 13 Conn. 308-315.

27. Members of a family are permitted to testify to matters pertaining to pedigree, such as descent and relationship, the facts of birth, marriage and death, and the times when they occurred. A wife who had lived twenty years with her husband was competent to testify to his age, though the original source of her information was hearsay. Grand Lodge A. O. U. W. v. Bartes [Neb.] 98 N. W. 715. Anyone who has arrived at an age making him competent as a witness may testify to his own age; that witness' knowledge is based on what is told him by his parents does not render it hearsay. Loose v. State [Wis.] 97 N. W. 526; McCollum v. State, 119 Ga. 308, 46 S. E. 413. A member of a family living therein is presumptively qualified as a witness to prove the age and pedigree of the others, unless a cross-examination shows that the knowledge is not derived from family tradition and repute, but from the statements of a stranger. Grand Lodge A. O. U. W. v. Bartes [Neb.] 96 N. W. 186. Statement of insured's father that insured had consumption when she became a member of a beneficial association was admissible. Home Circle Soc. No. 1 v. Shelton [Tex. Civ. App.] 81 S. W. 84.

Declarations of a deceased person, related to the family in question, are competent evidence in matters of pedigree, providing declarant's relationship is first shown by evidence independent of the declarations. Davis v. Moyels [Vt.] 56 A. 174. Since they are admitted "upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth" (Lord Eldon), it must appear that such declarations were ante litem motam. Id. To constitute lis mota, it is not essential that a suit be pending; the existence of a controversy, capable of being litigated, and of a nature likely to bias the mind of declarant, is sufficient. Id. A recital in a petition to a legislature was not evidence of heirship of one named therein as heir, when there was no evidence of the petitioner's relationship to the family. Id.

Public registers and reports, such as health boards and census reports, are competent evidence in matters of age and pedigree. Murray v. Supreme Hive Ladies of Maccabees of the World [Tenn.] 80 S. W. 827. But baptismal records required to be kept by a church, while they are evidence of the fact and date of baptism, are not evidence of the date of birth, because such entry must have been based on hearsay. Bailey v. Fly [Tex. Civ. App.] 80 S. W. 675.

28. As for purpose of impeachment. Belt Ry. Co. v. Confrey, 209 Ill. 344, 70 N. E. 773. See Witnesses, 2 Curr. L. 2163. Or to fix a date in the mind of a witness. North Amherst Home Tel. Co. v. Jackson, 4 Ohio C. C. (N. S.) 386. Conversations between testator and witness on day of testator's death competent on issue of sanity. Pattee v. Whitcomb, 72 N. H. 249, 56 A. 459. Conversation between a lawyer and one since deceased at the time of drafting a contract was admissible on the issue of mental capacity to contract. Grimshaw v. Kent, 67 Kan. 463, 73 P. 92.

29. See 1 Curr. L. 1149.

30. Evidence of what occurred at the time of an accident, including the acts of a companion of deceased. Proper v. Lake Shore & M. S. R. Co. [Mich.] 99 N. W. 283. In an action by a wife for alienation of her husband's affections, the relations between defendant and the husband two years before. Linck v. Linck [Mo. App.] 79 S. W. 478. Trainmen's interpretation of dispatcher's orders competent to show why they moved trains as they did. Wallace v. Boston & M. R. R., 72 N. H. 504, 57 A. 913. In an action for assault and battery by a conductor, evidence of profane language used by the parties. Birmingham R. L. & P. Co. v. Mullen, 138 Ala. 614, 35 So. 701. Question asked by eight year old boy of his mother while he was being taken from under a street car which had run over him. Di Prisco v. Wilmington City R. Co. [Del.] 57 A. 906. Statements of bystanders made during the transaction are admissible (Seawell v. Carolina Cent. R. Co., 133 N. C. 515, 45 S. E. 850), and may be testified to by the person who made them (Gulf, C. & S. F. R. Co. v. Hall [Tex. Civ. App.] 80 S. W. 133. Statement of ranch boss as he was driving off cattle, that if they were found in defendant's pasture again they would be scattered so that they could never be found. Waggoner v. Snody [Tex. Civ. App.] 82 S. W. 355. Statement of street car conductor when fact was called to his attention that a passenger had fallen off the car and was lying in the street. South Covington & C. St. R. Co. v. Riegler's Adm'r [Ky.] 82 S. W. 382. Statements of one in possession of property, claimed to have been converted by another, tending to explain

Complaints of present pain and suffering[31] are admissible as a part of the res gestae.[32] Statements prior[33] or subsequent to the transaction in issue, unless intimately connected therewith,[34] are usually excluded.[35]

such possession. McDonald v. Bayha [Minn.] 100 N. W. 679. Statements of one who had possession of a will, made when he produced it, explaining his possession and the reason for its production, held admissible, in a will contest, forgery of the will being alleged. Dolan v. Meehan [Tex. Civ. App.] 80 S. W. 99. Where father and son bore the same name, acts and declarations of the father, as a party to the transaction, were admissible to show which was the intended grantee in a deed. Matthews v. E. Eppstein & Co. [Tex. Civ. App.] 80 S. W. 882. Declarations of a landowner showing an intent to keep a lane open as a private way were admissible in suit to enjoin obstruction of the way as a public road. Quick v. Cotman [Iowa] 99 N. W. 301. The declarations of a father when delivering a certificate of deposit to his daughter were admissible as a part of the res gestae to show whether he was acting in his own behalf or as agent of his wife. Johnson v. Cole, 178 N. Y. 364, 70 N. E. 873. Declarations of a debtor in possession of land, claimed by a creditor to have been fraudulently conveyed to another, are admissible as part of the fraud against the claimant and for the creditor. Banks v. McCandless, 119 Ga. 793, 47 S. E. 332. Where a workman was killed by being struck with a block of wood which a foreman had negligently thrown on a car, so that it fell into a shaft of a mine, the foreman's statement, when warned, while the block was falling, was admissible. Strode v. Conkey [Mo. App.] 78 S. W. 678.

The declarations must be a part of the acts which they tend to explain. In suit against a husband for goods furnished the wife who was living apart from him, her declaration that she received the goods, not a part of the transaction, was inadmissible on the issue of delivery of the goods. Meyer v. Jewell, 88 N. Y. S. 972. A pauper's declarations regarding his intent as to his place of residence can be received in evidence only if a part of acts which they explain, and from which his intention may be inferred. Inhabitants of Knox v. Montville, 98 Me. 493, 57 A. 792. A person's intention can only be shown by his words and acts, but a mere expression of intent disconnected with any relevant circumstances would be too remote to be admissible in evidence. Id.

31. See 1 Curr. L. 1150, n. 9.

32. Nashville, C. & St. L. R. Co. v. Miller, 120 Ga. 453, 47 S. E. 959; Buce v. Eldon, 122 Iowa, 92, 97 N. W. 989; Potter v. Cave, 123 Iowa, 98, 98 N. W. 569; Robinson v. Halley [Iowa] 100 N. W. 328; Gosa v. Southern R. [S. C.] 45 S. E. 810; International & G. N. R. Co. v. Cain [Tex. Civ. App.] 80 S. W. 571; St. Louis S. W. R. Co. v. Burke [Tex. Civ. App.] 81 S. W. 774. Plaintiff's words, "My back and hip hurts me," could be shown. Cleveland, etc., R. Co. v. Carey [Ind. App.] 71 N. E. 244. Expressions of pain or suffering, groans and inarticulate cries, indicating such a condition admissible without showing exact language used. Indianapolis St. R. Co. v. Schmidt [Ind.] 71 N. E. 201. Evidence that plaintiff cried all afternoon and complained of pain next morning admissible. Montgomery St. R. Co. v. Shanks [Ala.] 37 So. 166. Statements or declarations of present, existing pain, and describing the location of such pain, are admissible, whether made at the time of or after the injury which caused the pain. Battis v. Chicago, R. I. & P. R. Co. [Iowa] 100 N. W. 543. But the injured person's account of the injury cannot be given in connection with his expressions of pain. Southern Ind. R. Co. v. Davis, 32 Ind. App. 569, 69 N. E. 550. A statement of plaintiff, overheard by his wife, that he would commit suicide "if he didn't have children" was admissible as a verbal act, showing a mental condition, melancholia, claimed to have resulted from an accident. Cashin v. New York, N. H. & H. R. Co., 185 Mass. 543, 70 N. E. 930. Complaints of present pain are, however, admissible only to show the injured person's condition at the time, and are inadmissible to show past similar pain. Id.

But expressions of present pain, to be admissible, must be the natural effusions of one who knows the truth and speaks on an occasion when there is no temptation to exceed or fall short of the truth. Hence it was held that a physician called to examine plaintiff with a view to having him testify could not state how plaintiff acted during the examination, tending to show pain. Comstock v. Georgetown Tp. [Mich.] 100 N. W. 788. Also that statements of a patient to his physician regarding subjective symptoms were not admissible when made both for purpose of treatment and to have physician testify as an expert. Kath v. Wisconsin Cent. R. Co. [Wis.] 99 N. W. 217. But it was held elsewhere that statements of a sick person made to a physician during or prior and with a view to treatment, or as a part of the res gestae, are competent even though suit has been instituted to recover damages for the injury. Chicago City R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28.

33. Declarations of an assured, after the assignment of the policy, and a short time before he was found dead, held inadmissible as res gestae, especially since they did not clearly indicate a suicidal intent. Ross-Lewin v. Germania Life Ins. Co. [Colo. App.] 78 P. 305.

34. Statements of an injured servant, and his conversation with another, regarding the manner in which the accident happened, within five minutes after the occurrence, and three hours before he died, while suffering great pain, were admissible. Missouri, etc., R. Co. v. Jones [Tex. Civ. App.] 80 S. W. 852. Statements by injured person a few minutes after the accident admissible. Gulf, C. & S. F. R. Co. v. Willoughby [Tex. Civ. App.] 81 S. W. 829.

35. Statement of injured servant to physician as to how he got hurt. Missouri, etc., R. Co. v. Smith [Tex. Civ. App.] 82 S. W. 787. Declarations of a railway employe, after an injury to another person. Columbus R. Co. v. Peddy [Ga.] 48 S. E. 149. Declarations of conductor of train after collision. Nelson v. Georgia, C. & N. Ry. [S. C.] 47 S. E. 722. Statements of bystander after accident.

(§ 6) *C. Admissions or declarations against interest,*[36] when made by a

Gosa v. Southern R. [S. C.] 45 S. E. 810. Declarations of the driver of a wagon after a collision. Burns v. Borden's Condensed Milk Co., 93 App. Div. 566, 87 N. Y. S. 883. Declarations of the person injured as to how the accident occurred, made to persons coming to his help immediately after the accident. Williams v. Southern R. [S. C.] 47 S. E. 706. Statements several minutes after street car accident and after car had left. Hot Springs St. R. Co. v. Hildreth [Ark.] 82 S. W. 245. Admissions by a street car conductor, after he had walked a block, after an accident. Boone v. Oakland Transit Co., 139 Cal. 490, 73 P. 243. Declaration of one who was injured by falling into a sewer excavation that there was no light there, made ten minutes after the accident. Guild v. Pringle, [C. C. A.] 130 F. 419. Statements several hours after the death of deceased that death resulted from an overdose of morphine. Goulding v. Phillips [Iowa] 100 N. W. 516. Declarations day after accident. Clancy v. Barker [Neb.] 98 N. W. 440. Conversations regarding the death of the person the day after the death occurred. Knott v. Peterson [Iowa] 101 N. W. 173. The statement of a street railway superintendent to a foreman of the car barns, the morning after an accident, that the motorman was incompetent. Havens v. Rhode Island Sub. R. Co. [R. I.] 58 A. 247. Statements as to incompetency of engineer, made by defendant's superintendent the day after the accident, while taking injured person to town to have wounds dressed. Cook v. Stimson Mill Co. [Wash.] 78 P. 39. Statement of a mine "bank boss" made some time after an accident causing a servant's death, regarding a previous act, tending to show notice of a dangerous condition. McFarland's Adm'r v. Harbison & Walker Co. [Ky.] 82 S. W. 430. Conversation between witness and motorman some time after the occurrence in which plaintiff was injured inadmissible as substantive evidence. Butler v. Detroit, etc., R. [Mich.] 101 N. W. 232. Declarations of a maker of a note two days after making, tending to show that an accommodation indorser, sued by a bona fide holder, indorsed a note for $200, while suit was on a note for $2,200. Union Trust Co. v. Leighton, 83 App. Div. 568, 82 N. Y. S. 7. Admissions of company's foreman that he neglected to inform servant of danger and instruct him, made several days after accident. Parker's Adm'r v. Cumberland Tel. & T. Co., 25 Ky. L. R. 1391, 77 S. W. 1109. Statements of plaintiff, who had injured her foot in a defective sidewalk, on her return home, and again six months later. Fallon v. Rapid City [S. D.] 97 N. W. 1009. Declarations of defendant's son, left in charge of a horse, which being left unhitched, ran away, injuring plaintiff, made shortly after the accident. Haywood v. Hamm [Conn.] 58 A. 695. Declarations by defendant's superintendent, after an accident, tending to show knowledge of a servant's intemperate habits before the accident, were incompetent as original evidence of notice of such incompetency, being mere narrations of past occurrences. White v. Lewiston & Y. F. R. Co., 94 App. Div. 4, 87 N. Y. S. 901.

36. Illustrations: Declarations of an alleged negro, since deceased, as to his race. Locklayer v. Locklayer, 139 Ala. 354, 35 So. 1008. Declarations as to source and character of title. Jones v. Robb [Tex. Civ. App.] 80 S. W. 395. In an action for false arrest and imprisonment against a U. S. marshal, evidence of a conversation between the marshal and a third person while plaintiff was in custody. Bailey v. Warner [C. C. A.] 118 F. 395. In an action for conversion of property by an officer making a levy, the officer's declarations tending to show knowledge by him of ownership of the property by a third person, at least that he was put on inquiry. McKnight v. United States [C. C. A.] 130 F. 659. In an action on a note, the consideration for which was a promise to convey land, an admission by the one holding legal title that he had verbally authorized plaintiff to sell. Northington v. Granade, 118 Ga. 584, 45 S. E. 447. In an action for purchase price of goods, declarations of defendant that he would pay for materials used in building a house. Myer-Neville Hardware Co. v. Spann [Miss.] 35 So. 177. A statement of a member of an alleged partnership that he wanted to settle a claim but would be liable to garnishment if he did so. Tapp v. Dibrell, 134 N. C. 546, 47 S. E. 51. Declarations of one struck by a train, a few hours after the accident, and a short time before he died, that he was asleep when struck. Smith v. International & G. N. R. Co. [Tex. Civ. App.] 78 S. W. 566. Statements of testator's wife showing illwill toward disinherited sons were admissible as admissions against interest on the issue of undue influence by her in will contest. Powers' Ex'r v. Powers, 25 Ky. L. R. 1468, 78 S. W. 152. Statements of a wife, acting as agent for her husband, that he was not the owner of property on which they lived, were admissible against her; not being inadmissible as privileged communications. Leyner v. Leyner, 123 Iowa, 185, 98 N. W. 628. Admissions in proofs of death, made in behalf of beneficiaries, are admissible against them, in an action on an insurance policy. Fey v. I. O. O. F. Mut. Life Ins. Soc. [Wis.] 98 N. W. 206. Where a parent takes a promissory note from his child, payable to himself, his declarations at the time, or subsequently, that the note was a mere receipt or memorandum of an advancement, are admissible as against declarant's interest. Strode v. Beall [Mo. App.] 79 S. W. 1019. Statements and admissions made during life to a stranger that deceased was liable for one-half an indebtedness evidenced by a certain note, are admissible in an action against his administrator to recover one-half the debt. Miller v. McDowell [Kan.] 77 P. 101. A verbal sale to plaintiff and declarations of a person that he had no title or interest, previous to a sale to defendant, such declarations being continued up to the time of declarant's death, are admissible to show an abandonment of an irrigation ditch. Griseza v. Terwilliger [Cal.] 77 P. 1034. Upon an issue of the existence of a partnership, declarations of one sought to be charged as partner to the effect that he was a member of the firm are admissible, whether made to the party seeking to charge him or to a third party, and whether communicated to the party seeking to hold him or not. Barwick

party,[37] or by his authorized agent,[38] are admissible as original evidence, and

v. Alderman [Fla.] 35 So. 13. Where husband and wife are joint parties, the declarations of either, though inadmissible against the other spouse, are admissible against the declarant. Chaslavka v. Mechalek [Iowa] 99 N. W. 154.

Silence of a party may be construed as an admission of what is said in his presence, but it must appear that the fact admitted or inference to be drawn from his silence was material to the issue. Thayer v. Usher, 98 Me. 468, 57 A. 839. On the issue of forgery of a will, evidence that one of the subscribing witnesses, who was one of the parties charged with fraud, remained silent when inquiries were made as to decedent's papers, though he had the alleged will in his possession, and was present, was admissible. Dolon v. Meehan [Tex. Civ. App.] 80 S. W. 99. Silence cannot be construed as an acquiescence in the truth of written statements, as where an indorsee did not answer letters relative to his promises to pay, written him by the holder of the note. State Bank of St. Johns v. McCabe [Mich.] 98 N. W. 20.

Written admissions: A claim for damages for injuries to stock is admissible, in an action for damages, as an admission against interest as to the real damage suffered; but is not, of course, conclusive. Gulf, etc., R. Co. v. Combes [Tex. Civ. App.] 80 S. W. 1045. An affidavit of claims for damages to a shipment of stock, omitting certain items sued for, and containing others for which other roads had settled, was admissible. Pecos, etc., R. Co. v. Lovelady [Tex. Civ. App.] 80 S. W. 867. Depositions of defendants, introduced as admissions, were not rendered incompetent because the witnesses afterwards testified to facts inconsistent with the depositions. Vollkommer v. Cody, 177 N. Y. 124, 69 N. E. 277. An oral admission by the maker of a payment on a note, and a memorandum in her book of the same, were admissible to take the note out of the statute of limitations. Fowles v. Joslyn [Mich.] 97 N. W. 790.

In pleadings: Where defendant's original plea containing admissions of plaintiff's allegations was withdrawn, and an amended plea denied the allegations, the original plea was admissible as admissions in court. Alabama Midland R. Co. v. Guilford, 119 Ga. 523, 46 S. E. 655. Abandoned pleadings containing admissions against interest are admissible, though such pleadings are not signed or sworn to by the party sought to be bound. Texas & P. R. Co. v. Coggin [Tex. Civ. App.] 77 S. W. 1053. Where an abandoned pleading is introduced as an admission by plaintiff, he may show that the declaration in such pleading was not in fact his, but that of counsel. Galloway v. San Antonio & G. R. Co. [Tex. Civ. App.] 78 S. W. 32. A petition in another action containing an admission of liability held admissible, though prepared by counsel and unsigned by defendant; its weight as evidence was for the jury. L. Greif & Bro. v. Seligman [Tex. Civ. App.] 82 S. W. 533. Complaint in another action inadmissible against plaintiff when the issues in that action were not material to the one on trial and would not bar the present plaintiff. Murtagh v. Dempsey, 85 App. Div. 204, 83 N. Y. S. 296. Whether an original declaration, which has been since amended, is admissible as an admission against plaintiff, is doubtful; but having been admitted, plaintiff could prove by a letter written to his counsel that it was not an admission. Bernard v. Pittsburg Coal Co. [Mich.] 100 N. W. 396. See 1 Curr. L. 1150.

37. Admissions against interest are admissible only when made by a party to the suit, either on the record or otherwise, in complete control of the litigation. A mere contingent or collateral interest in the outcome is not sufficient. H. C. Judd v. New York & T. S. S. Co. [C. C. A.] 128 F. 7. An oral admission is admissible against the party making it, though it relates to the contents of a written paper. Cooley v. Collins [Mass.] 71 N. E. 979. An insurance company, which had made a provisional loan or payment on a loss of goods by alleged negligence of a carrier, to be repaid only in case an action against the carrier for recovery of the loss was successful, was not such a party to the suit that admissions by it would be competent to relieve defendant carrier from liability. Id. Statements of an attorney made to counsel for the adverse party, not in the presence of the party affected, are inadmissible. Cable Co. v. Parantha, 118 Ga. 913, 45 S. E. 787. A plea of guilty by a defendant in a criminal action may be used as an admission against him in another action involving the same facts, but is not conclusive against him. Wesnieski v. Vanek [Neb.] 99 N. W. 258. The recitals on printed tags on ties are inadmissible as admissions of the tie company without showing knowledge of the recitals by the company. Atchison, etc., R. Co. v. Palmore [Kan.] 75 P. 509. Where two brothers acted jointly in a land deal, the admissions, by letter, of one were admissible against the other, the latter being the only nominal party to the contract. Maier v. Rebstock, 92 App. Div. 587, 87 N. Y. S. 85. Proof of death of the insured furnished an insurance company is inadmissible as an admission of one suing on the policy without a showing of the circumstances surrounding the making of such proof and the authorship thereof. Barnett v. Prudential Ins. Co., 91 App. Div. 435, 86 N. Y. S. 842.

38. Declarations and admissions of an agent, as well as his acts, may be proven as original evidence against the principal, when the existence of the agency has been otherwise proven (Fowler v. Iowa Land Co. [S. D.] 99 N. W. 1095; Axtell v. Northern Pac. R. Co. [Idaho] 74 P. 1075; Bay City Irr. Co. v. Sweeney [Tex. Civ. App.] 81 S. W. 545), and the admissions are shown to have been made as a part of the transaction—a part of the res gestae—in which the agent was then acting for his principal, with authority (National Bldg. Ass'n v. Quin, 120 Ga. 358, 47 S. E. 962; Butters Salt & Lumber Co. v. Vogel [Mich.] 97 N. W. 757; King v. Atlantic City Gas & Water Co. [N. J. Err. & App.] 58 A. 345; Goltra v. Penland [Or.] 77 P. 129; Havens v. R. I. Sub. R. Co. [R. I.] 58 A. 247; Waggoner v. Snody [Tex. Civ. App.] 82 S. W. 355; Continental Ins. Co. v. Cummings [Tex.] 81 S. W. 705).

Declarations of an alleged partner are inadmissible to prove existence of the part-

the declarations of one in possession of property are admissible to limit his

nership; but partnership having been otherwise proven, one partner's declarations are admissible to prove liability of the firm. Robinson v. First Nat. Bank [Tex.] 82 S. W. 505. See Partnership, 2 Curr. L. 1106; Agency, 1 Curr. L. 43.

Declarations against interest, made by one acting as agent, are admissible against declarant personally. Leyner v. Leyner, 123 Iowa, 185, 98 N. W. 628.

Illustrations.—Held admissible: Letter of general insurance agent admissible against company. Knarston v. Manhattan Life Ins. Co., 140 Cal. 57, 73 P. 740. Letters purporting to have been written by freight claim agent admissible against the railway company. St. Louis S. W. R. Co. v. McIntyre [Tex. Civ. App.] 82 S. W. 346. Local telephone manager held to have such authority that his declaration was admissible against the company. Texas & P. Telephone Co. v. Prince [Tex. Civ. App.] 82 S. W. 327. Statements of a conductor and ticket agents to a passenger as to the route she was to take were admissible when her ticket contained no information as to the route and did not inform her of a rule that passengers must travel by the most direct route. Illinois Cent. R. Co. v. Harper [Miss.] 35 So. 764. Statements of a general agent while attempting to repair machinery that it was old and worthless and not that ordered by plaintiff are admissible against the company. Standefer v. Aultman & Taylor Mach. Co. [Tex. Civ. App.] 78 S. W. 552. Statement of defendant's foreman that the servant who caused the injury was a new man and had not been instructed as to giving warning signals, made a few minutes after the accident, and while the speaker was in charge of the servants, was admissible. Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847. Statements of a village president subsequent to an accident, showing he had notice of the condition causing an injury, were admissible. Radichel v. Kendall [Wis.] 99 N. W. 348. Evidence that plaintiff asked a street car conductor to let her off at a certain street and that he said he would was competent in an action for injuries received in alighting from a street car. Chicago City R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28. Where a shipment contract did not state the time within which stock would be delivered, a statement of the carrier's agent as to when delivery would be made was competent as an admission to show the usual and reasonable time required. Southern R. Co. v. Railey Bros. [Ky.] 80 S. W. 786.

Held inadmissible: Declarations of an agent as to past events are not admissible to prove such events. Kamp v. Coxe Bros. & Co. [Wis.] 99 N. W. 366; Hogan v. Kelly [Mont.] 75 P. 81. The unsworn statements of an agent outside the scope of his agency are not proof of the matters indicated therein as regards his principal. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. The declaration of a bank cashier that a bond had not been filed there was inadmissible, not being in the usual course of business. Equitable Mfg. Co. v. Howard [Ala.] 37 So. 106. One authorized to drive another's horse is not thereby authorized to make binding admissions as to the animal's habit of running away. Haywood v. Hamm [Conn.] 58 A. 695. A servant sent to repair a gas stove could not bind his master by a statement that something was wrong with it. King v. Atlantic City Gas & Water Co. [N. J. Err. & App.] 58 A. 345. Admissions of a hotel manager not binding and inadmissible against his employer. Clancy v. Barker [Neb.] 98 N. W. 440. Declarations of an agent in possession of realty for the mere purpose of managing it are not admissible to disparage the principal's title. Sweeney v. Sweeney, 119 Ga. 76, 46 S. E. 76. Declarations of a janitor as to the cause of disagreeable odors in a house were inadmissible without a showing of the janitor's authority to make them. Diehl v. Watson, 89 App. Div. 445, 85 N. Y. S. 851. Conductor, not shown to have authority, could not bind company by admissions of negligence in handling of cattle. St. Louis, etc., R. Co. v. Carlisle [Tex. Civ. App.] 78 S. W. 553. An admission of the vice-president of a corporation as to the ownership of a tugboat causing an injury could not be proven against the corporation when not a part of the res gestae, and the officer was not shown to have authority to so bind the corporation. Patterson v. White Star Towing Co., 85 N. Y. S. 359. Testimony of employes of a corporation on a former trial is inadmissible against the corporation on a subsequent trial, since an agent's declarations on the witness stand are not binding on the principal. Vohs v. A. E. Shorthill Co. [Iowa] 100 N. W. 495. A declaration of one on whose premises building materials had been delivered, defendant not being present, that a payment by him was on defendant's account, was inadmissible to show a sale to defendant. Copp v. Gabler, 88 N. Y. S. 440.

Relations other than agency: Debtor and garnishee: Admissions of the principal debtors are inadmissible against garnishee defendants, setting up a defense in their own interests. Seitz v. Starks [Mich.] 98 N. W. 852.

Principal and surety: Declarations of a principal are inadmissible against the surety unless a part of the res gestae, made during transaction of the business for which the surety is bound. Declarations of an alleged embezzler, subsequent to the embezzlement, were inadmissible against his surety. Wieder v. Union Surety & Guaranty Co., 42 Misc. 499, 86 N. Y. S. 105. Declarations of a principal are inadmissible against his surety, unless a part of the res gestae. Knott v. Peterson [Iowa] 101 N. W. 173.

Corporations and members: As a general rule, admissions of individuals, affecting the interests of a corporation of which they are members, cannot have the effect of an admission by the corporation. Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n [Conn.] 58 A. 467. But declarations against interest of individuals are admissible against them to show their purpose in forming a corporation. Id.

Referee: One who refers another to a third person for information, as in regard to the sufficiency of a bond, is bound by the referee's admissions. Equitable Mfg. Co. v. Cooley & Speers [S. C.] 48 S. E. 267.

Guardian and ward: Guardians cannot

rights.[39] The declarations of a former owner, subsequent to the transfer of title

make admissions binding on infant wards. Knights Templar & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066. Admissions regarding death of insured not admissible against the minor beneficiaries under an accident policy. Stevens v. Continental Casualty Co., 12 N. D. 463, 97 N. W. 862. Where a policy of insurance provided that it became void if the insured committed suicide, a statement of the guardian of the infant beneficiaries that the immediate cause of death was suicide could not be treated as an admission of the infants. Knights Templar & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066.

Co-conspirators: Declarations of a conspirator, in pursuance of the common purpose, are admissible against his co-conspirators. Lane v. Bailey [Mont.] 75 P. 191. The existence of a conspiracy having been shown, the acts and declarations of a conspirator made pursuant to and in furtherance of the conspiracy are admissible against all. Standard Oil Co. v. Doyle [Ky.] 82 S. W. 271. A letter written in pursuance of a conspiracy, admitted to be genuine, was admissible, though its authorship was not proved. Ramsey v. Flowers [Ark.] 80 S. W. 147. Fraudulent representations of a co-conspirator are admissible against other conspirators, though not made in their presence. Miller v. John, 208 Ill. 173, 70 N. E. 27. Where there is a prior dishonest combination between parties to a conveyance declarations and admissions of the grantor, after execution of the deed, are admissible against the grantee to prove a fraudulent intent. Walker v. Harold, 44 Or. 205, 74 P. 705. In libel suit based on charges in a challenge against a minister to keep him out of a convention, declarations showing a purpose to challenge plaintiff's seat, but not showing that the alleged libellous matter was to be used, were inadmissible as declarations of a conspirator. Cranfill v. Hayden [Tex.] 80 S. W. 609. Evidence of defendant's illegal occupation, and of a statement by a co-conspirator that plaintiff was an objectionable man in the community, made before the conspiracy, is admissible in an action for malicious prosecution by a conspiracy, to show motive. Ramsey v. Flowers [Ark.] 80 S. W. 147. Acts and declarations of a conspirator after the completion of the purpose for which the conspiracy was formed are admissible only against declarant. Standard Oil Co. v. Doyle [Ky.] 82 S. W. 271. The declaration of a conspirator, not made in the prosecution of the enterprise, is inadmissible against co-conspirators. Seitz v. Starks [Mich.] 98 N. W. 852.

The old rule that a conspiracy must be established before evidence of declarations of co-conspirators, made in a defendant's absence, could be introduced against him, is not now in vogue; such evidence is now admissible in the first instance, the prosecution undertaking to show a conspiracy. If a conspiracy is shown, the evidence of such declarations becomes competent; if not, it will be excluded. Bowen v. State [Tex. Cr. App.] 82 S. W. 520. If there is proof of the conspiracy, either in the first instance or in the course of the evidence, all acts or declarations of co-conspirators made during the pendency of and in furtherance of the conspiracy are admissible. Id.

39. The declarations of one in possession of realty that he is acting as agent. Murphy v. Dafoe [S. D.] 99 N. W. 86. Acts and declarations of one in possession of land admissible to show character and extent of possession. Woodlief v. Woodlief [N. C.] 48 S. E. 583. In an action involving the title to real estate, the declarations of a predecessor in title of either party, made while in possession, and against interest, and relating to matters which must be proved by parol, are admissible, as when such declarations relate to the nature, character and extent of declarant's possession, identity and location of boundaries and monuments called for in the deed, or the physical condition or use of the property. Phillips v. Laughlin [Me.] 58 A. 64. But such declarations of a predecessor in title as to the invalidity of a deed apparently sufficient and genuine, and duly recorded, are not admissible. Id.

Declarations of a landowner showing a lane over a neighbor's land to be a private way are admissible against a subsequent grantee, in a suit to enjoin obstruction of the road. Quick v. Cotman [Iowa] 99 N. W. 301. Letters of a trustee, before he and his wife conveyed property, that he had invested trust funds in the property, are admissible against a grantee, who is in privity of estate with the trustee. Lang v. Metzger, 206 Ill. 475, 69 N. E. 493. Declarations of one who had paid and subscribed for stock and who held it were admissible to show that he held as trustee. Johnson v. Amberson [Ala.] 37 So. 273.

Declarations of one in possession of personalty as to its ownership are not admissible unless a part of the res gestae. McKnight v. U. S. [C. C. A.] 130 F. 659. Declarations of an Indian woman as to ownership of cattle issued to her by the government, which she had no power to dispose of, were inadmissible against the government in an action by it for conversion of the cattle. Id. Declarations of plaintiff's assignor, who had never been in possession of the property in question, were inadmissible. Newberry v. Norfolk & S. R. Co., 133 N. C. 45, 45 S. E. 356.

Note: The court proceeds partly upon the ground that admissions by a privy in estate are not receivable in evidence to contradict a record title. That the weight of authority is in support of this proposition cannot be doubted. Gibney v. Marchay, 34 N. Y. 301. Nevertheless, the decision seems contrary to the general principles of the law of evidence. In favor of the decision, it is argued that the policy of our recording laws demands that bona fide purchasers should have a right to rely upon the record as showing the exact facts. See Cook v. Knowles, 38 Mich. 316, 330. On the other hand, it has been held repeatedly that where an innocent purchaser buys land from a grantee who has fraudulently procured a deed from one with whom it has been deposited in escrow and has placed the same on record, he acquires no title. Everts v. Agnes, 6 Wis. 453. So here it seems clear that if the deed to the defendant's grantor

by him, are inadmissible as against any subsequent successor to the title.[40] Offers of compromise or settlement are usually excluded on grounds of public policy,[41] but admissions of distinct facts therein are admissible.[42] Self-serving declarations are inadmissible.[43] An admission, introduced in evidence, must be taken as an entirety.[44]

was forged, the defendant never acquired title; and that any fact tending to prove such forgery was entirely relevant to the issue. The evidence offered did tend to prove such forgery, and regarded either as an admission or as a declaration against interest, came within the exceptions to the hearsay rule. Cf. Dickerson v. Chrisman, 28 Mo. 134; Currier v. Gale, 14 Gray [Mass.] 504, 77 Am. Dec. 343.—XVIII Harvard L. R. 65.

40. The admissions of one in possession of land are inadmissible against a bona fide purchaser from him. Banks v. McCandless, 119 Ga. 793, 47 S. E. 332. Declarations of grantor, after delivery of deed and in the absence of grantees, are inadmissible to affect title of grantees, by showing of fraud. Stam v. Smith [Mo.] 81 S. W. 1217. Statement of grantor to witness, not in presence of grantee, that a deed was without money consideration, was hearsay. Pierce v. Bemis [Ga.] 48 S. E. 128. Declarations of a grantor in a trust deed, subsequent to its execution, impugning the title of the land conveyed, are not evidence against the grantee. Lang v. Metzger, 206 Ill. 475, 69 N. E. 493. The declarations of a mother, after transfers of property to children, were inadmissible on the issue whether such transfers were absolute gifts or advancements. Johnson v. Cole, 178 N. Y. 364, 70 N. E. 873. Statements of a former owner of property, in disparagement of his title, made after sale of the property on mortgage foreclosure are incompetent except for the purpose of impeaching the witness. Severson v. Gremm [Iowa] 100 N. W. 862.

The declarations of a grantor of realty or donor or assignor of personalty, made after a deed, gift or sale, are incompetent to defeat the claim or title of the grantee, donee or assignee. Declarations of donor causa mortis, after the gift, held incompetent. Scheps v. Bowery Sav. Bank, 97 App. Div. 434, 90 N. Y. S. 26. The declarations of one who has parted with the title and possession of personal property are inadmissible to defeat the title of a subsequent vendee. Woods v. Faurot [Okl.] 77 P. 346. A declaration of an assignor of an insurance policy, subsequent to the assignment, is inadmissible against the assignee. Barnett v. Prudential Ins. Co., 91 App. Div. 435, 86 N. Y. S. 842. Admissions of an assignor after the assignment are not competent to prove that goods came into a party's hands as assignee. Finance Co. v. Josephson, 88 N. Y. S. 707. Declarations of a devisee are incompetent to prove nonpayment of a legacy in an action to establish the lien of a legacy as against the devisee's mortgagee. Conkling v. Weatherwax, 90 App. Div. 585, 86 N. Y. S. 139.

41. Teasley v. Bradley, 120 Ga. 313, 47 S. E. 925. Since compromises are favored in the law. Kroetch v. Empire Mill Co. [Idaho] 74 P. 868. Admission of evidence of defendant's offer to settle held error. Musselman Grocer Co. v. Casler [Mich.] 100 N. W. 997. Where, in an action on a debt, a written release was relied on in defense and denied, evidence tending to show the release not genuine was not objectionable because tending to show an offer of compromise. List's Ex'x v. List [Ky.] 82 S. W. 446.

42. Matthews v. Farrell [Ala.] 37 So. 325. If the evidence offered is an admission of liability, such admission is not rendered inadmissible by an offer to pay a sum less than that due. Teasley v. Bradley, 120 Ga. 373, 47 S. E. 925.

43. Austin v. Bartlett, 178 N. Y. 310, 70 N. E. 855; Griffin v. Train, 90 App. Div. 16, 85 N. Y. S. 686; Jamison v. Dooley [Tex.] 82 S. W. 780. Book entries made without the knowledge of the other party, and relating to property other than that in dispute. Linden v. Thieriot, 96 App. Div. 251, 89 N. Y. S. 273. Statements in a diary of decedent. Elliott v. Sheppard, 179 Mo. 382, 78 S. W. 627. For the reason that a party can never make evidence for himself, his own statements relative to the cause, extent or effect of an injury cannot be given either by the attending physician or a non-professional witness. Fallon v. Rapid City [S. D.] 97 N. W. 1009. Where the law does not require a presentation of a claim for damages before bringing a personal injury action against a city, a sworn statement of a claim, explained by attorneys, and submitted to a city council, is inadmissible for plaintiff. Id. A letter written by plaintiff confirming and containing terms of an oral contract made the day before, not replied to by defendant, was not inadmissible because a self-serving declaration of the plaintiff, especially since it did not differ from his oral testimony. Wilmoth v. Hamilton [C. C. A.] 127 F. 48. A declaration of a wife that property belonged to her, not being against interest, was inadmissible in an action by her husband against her administrator. Bollinger v. Wright, 143 Cal. 292, 76 P. 1108. In a suit on liquor dealer's bond for permitting minors in his saloon, declarations of the boys that they were 21 were inadmissible except to contradict their evidence on the subject. State v. Dittfurth [Tex. Civ. App.] 79 S. W. 52. A statement made in a conversation by a defendant in a suit on a bond as to his understanding of the liability to be incurred thereunder was inadmissible because a self-serving declaration and also because not communicated to plaintiff. Graham v. Middleby, 185 Mass. 349, 70 N. E. 416. The wife intervened in an action in which property was attached as her husband's, claiming the property. Held, the husband's self-serving declaration on a former occasion that he owned it was inadmissible against the wife. Vermillion v. Parsons [Mo. App.] 80 S. W. 916. Permitting husband of plaintiff to give his own declaration that "his wife was thrown off a car" was prejudicial error. Wimmer v. Metropolitan St. R. Co., 92 App. Div. 258, 86 N. Y. S. 1052. A declaration by plaintiff as to the

§ 7. *Documentary evidence. A. In general; private writings.*[45]—When their contents are relevant and material, private writings, such as letters[46] and contracts,[47] are competent evidence,[48] their authenticity[49] and due execution[50]

source of his alleged title to property, not being a claim of ownership, or res gestae, was inadmissible. Couch v. Couch [Ala.] 37 So. 405. Statements of a bank officer in his own interest and against the interest of the bank are inadmissible against the latter, even though a part of the res gestae. Supreme Tent Knights of Maccabees of the World v. Port Huron Sav. Bank [Mich.] 100 N. W. 898. The self-serving declaration of a policy holder, after an unpaid premium had become payable, that he intended to keep up his insurance, was inadmissible. Brown v. Pacific Mut. Life Ins. Co. [Mo. App.] 82 S. W. 1122. Plaintiff could not testify that after a controversy arose as to property, he claimed it as his own, such claim being post litem motam. Couch v. Couch [Ala.] 37 So. 405. A letter written by a party will not be received in evidence for him unless the circumstances clearly indicate that it was written voluntarily and spontaneously, so nearly in the presence of the transaction to which it relates as necessarily to exclude the idea of design or deliberation in order to create evidence for himself. Bowen v. White [R. I.] 58 A. 252.

44. The rule applies to statements of account introduced to secure the effect of admissions against interest contained therein. Each side of such account qualifies and limits the other. Simpson v. First Nat. Bank [C. C. A.] 129 F. 257. Letter of defendant referred to in part in cross-examination should have been admitted. Lombard v. Chaplin, 98 Me. 309, 56 A. 903. Where plaintiff introduced evidence of defendant on a former trial as containing admissions, defendant was entitled to introduce other portions of the evidence, if explanatory of such admissions. Taft v. Little, 178 N. Y. 127, 70 N. E. 211. A conversation having been introduced in part, the other party may prove the entire conversation, to explain alleged admissions, even though an offer of settlement is thereby proved. Chicago City R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28. But only those portions of the conversation relating to the same subject may be brought out. Pettis v. Green River Asphalt Co. [Neb.] 99 N. W. 235.

45. See 1 Curr. L. 1153.

46. Letter. Ward v. Cameron [Tex. Civ. App.] 76 S. W. 240. Letters and release. Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195. Letters denying liability on contract of insurance. Prudential Ins. Co. v. Devoe [Md.] 56 A. 809. Letter from defendant replying to one he had never seen, but whose contents had been told him. N. O. Nelson Mfg. Co. v. Shreve [Mo. App.] 79 S. W. 488. Letter written in reply to another relating to the terms of a contract between the parties. Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co. [Tex. Civ. App.] 77 S. W. 961. A bill sent by broker for a commission admitted in suit for commission. Bradley v. Gorham [Conn.] 58 A. 698. Two letters being offered together to establish a modification of a contract, the fact that one alone would have been incompetent was immaterial. Washington Iron Works v. McNaught, 35 Wash. 10, 76 P. 301. Letters from a claimant to a defendant, before suit was brought, relating to the claim and amount demanded for injuries received were admissible as showing genuineness and extent of injuries. Snow v. New York, etc., R. Co., 185 Mass. 321, 70 N. E. 205.

47. Policy of insurance on which action is based is competent. Prudential Ins. Co. of America v. Devoe [Md.] 56 A. 809. That notes are merged in a judgment does not destroy their admissibility as evidence in a collateral proceeding. Brown v. Schintz, 203 Ill. 136, 67 N. E. 767. A promissory note, in the hands of a payee, even after maturity, is evidence of the existence of a debt. Goff v. Byers Bros. & Co. [Neb.] 96 N. W. 1037.

48. A court rule requiring the filing of an abstract of title in actions concerning title to realty, and excluding as evidence all documents or records not mentioned in the abstract held void because unreasonable and arbitrary. Pelz v. Bollinger [Mo.] 79 S. W. 146.

49. Letters incompetent when there is no showing as to who wrote or who received them. Donnelly v. Donnelly, 25 Ky. L. R. 1543, 78 S. W. 182. An autograph letter purporting to contain only the substance of portions of conversations were inadmissible, when witness could not swear positively as to the facts therein stated. Southern L. & T. Co. v. Benbow, 135 N. C. 303, 47 S. E. 435. Typewritten letters not signed by the author, not shown to have been correctly transcribed after dictation, nor positively identified, are incompetent. Id. A postal registry receipt for a letter written to an insurance company, bearing the name of the corporation, and under it the name of a person, held inadmissible, without proof that the person signing the corporation's name had authority to do so. Underwriters' Fire Ass'n v. Henry [Tex. Civ. App.] 79 S. W. 1072. Defendant directed her daughter to write a letter in response to one received, but did not instruct her what to write nor learn what she wrote. The letter was received in evidence. Skidmore v. Johnson [N. J. Err. & App.] 57 A. 450. A letter dictated by a general manager of a corporation, shown to have authority in the matter in question, written and signed by the stenographer the same as other letters, was admissible against the corporation. Henderson v. Raymond Syndicate, 183 Mass. 443, 67 N. E. 427. Letters held relevant, and sufficient foundation held to have been laid by introduction of other writings admitted to have been executed by defendant, so that jury could determine genuineness of signatures. Vizard v. Moody, 119 Ga. 918, 47 S. E. 348.

After a witness has denied the genuineness of a signature, his ability to identify his own handwriting is a proper subject of cross-examination. Brown v. Woodward, 75 Conn. 254, 53 A. 113. In testing a witness' ability to identify his signature on cross-examination, the witness must be given a fair opportunity to make a full examination of the signatures, but the manner of showing the documents to which the signatures

having been shown. Ancient documents are admitted in evidence without preliminary proof of execution;[51] but the rule applies only to originals,[52] the execu-

are attached rests largely in the discretion of the court. Id.

An affidavit is not self proving and is inadmissible without proof of execution by the affiant. Locklayer v. Locklayer, 139 Ala. 354, 35 So. 1008. A writing purporting to have been made by a party, referred to in and filed with a pleading of the adverse party, may be read as genuine against him, unless its genuineness is denied by affidavit before trial [Civ. Code § 527]. Provident Sav. Life Assur. Soc. v. Bailey, 25 Ky. L. R. 2251, 80 S. W. 452. The constitution and by-laws of a benefit society, purporting to be published by the supreme council of the order, and furnished to the local order by the organizer, and used by the order, are admissible without direct proof of their adoption by the supreme council or local order. Home Circle Soc. No. 1 v. Shelton [Tex. Civ. App.] 81 S. W. 84. Minutes of a meeting on separate sheets, pinned to the leaves of the record book are not sufficiently identified to be admissible in evidence. McConnell v. Combination Min. & Mill. Co. [Mont.] 76 P. 194.

Where witness testified he was familiar with the location of lands in question, was with the surveyor who made the survey and plat, and knew the plat was correct, the plat was not sufficiently authenticated to be admissible as original evidence, witness not being a surveyor. Smith v. Bunch, 31 Tex. Civ. App. 541, 73 S. W. 559.

Alterations: It is the civil law doctrine that erasures or interlineations in the substantial part of an instrument are presumed to be false or forged and must be satisfactorily accounted for to render the instrument admissible. Wheadon v. Turregano, 112 La. 931, 36 So. 808. The English rule, adopted in some states, seems to be different; but when circumstances are suspicious, the burdent of removing the suspicion is upon the party seeking to use the instrument. Id. A lease in which there were material interlineations and erasures held inadmissible without an explanation of the alterations. Landt v. McCullough, 206 Ill. 214, 69 N. E. 107. It was error to exclude a contract on the ground of alteration when it was shown that the alteration, if made, was without authority. Forbes v. Taylor, 139 Ala. 286, 35 So. 855. A bond and two contracts were simultaneously executed and delivered. In the typewritten bond the letter "s" was added to the word "contract," making the bond applicable to both contracts. It was held that the bond was properly admitted in evidence without requiring an explanation of the alteration. Graham v. Middleby, 185 Mass. 349, 70 N. E. 416. Witness could identify an instrument, not yet in evidence, though it was mutilated and torn in three pieces. Baltes Land, Stone & Oil Co. v. Sutton, 32 Ind. App. 14, 69 N. E. 179.

50. Proof of execution of deed held sufficient. Vizard v. Moody, 119 Ga. 918, 47 S. E. 348. If proof of execution of a deed is sufficient, the fact that it is not under seal will not make it inadmissible in evidence. Vizard v. Moody, 119 Ga. 918, 47 S. E. 348. A deed is not admissible as a recorded instrument unless properly acknowledged. Johnson v. Franklin [Tex. Civ. App.] 76 S. W. 611. A deed is not rendered inadmissible by the fact that the certificate of acknowledgment is dated prior to the date of the deed, where the conflict in dates is shown to have been a mere clerical error. Mosier v. Momsen, 13 Okl. 41, 74 P. 905. A chattel mortgage is inadmissible against one not a party to it without proof of its execution as at common law. Becker v. Bowen [Tex. Civ. App.] 79 S. W. 45. Even though registered. Peterson v. W. J. Martinez & Bros. [Tex. Civ. App.] 78 S. W. 401. A note is admissible against one who does not deny execution of it, without proof of such execution; but execution must be proved if denied. Horner v. Plumley, 97 Md. 271, 54 A. 971. Under a statute (Code 1896, § 1797), providing for proof of execution of attested writings by the maker, without the witnesses, a chattel mortgage was properly proved by the mortgagor, without calling the attesting witnesses or accounting for their absence, and the mortgage so proved was admissible. Ballow v. Collins, 139 Ala. 543, 36 So. 712. A contract pleaded and not denied by the adverse party is admissible, though not signed by the parties at the end. Missouri, etc., R. Co. v. Clark [Tex. Civ. App.] 79 S. W. 827.

51. Since the death of the attesting witnesses is presumed. O'Neal v. Tennessee Coal, Iron & R. Co. [Ala.] 37 So. 275. A city plat pasted in an original deedbook in 1829, and in the office of the clerk of the county court ever since, was admissible as an ancient document. Davis v. Clinton, 25 Ky. L. R. 2021, 79 S. W. 259. A deed purporting to be 27 years old and regular on its face is prima facie true and valid. Elliott v. Sheppard, 179 Mo. 382, 78 S. W. 627. When an ancient deed (1776) was found in possession of an heir and the probate records showed possession and claim of title had been in conformity to the deed for a number of years, proof of its execution was unnecessary to render it admissible. In re Butrick, 185 Mass. 107, 69 N. E. 1044. After a lapse of thirty years, a deed, showing on its face that it was executed by a corporation, will be presumed to have been executed with authority, especially when its validity has been since recognized in litigation. Altschul v. Casey [Or.] 76 P. 1083. Transfers of land certificates held to have been shown to have come from the proper custody and to be admissible as ancient instruments. Ward v. Cameron [Tex. Civ. App.] 76 S. W. 240. Original transfer of a certificate issued in lieu of a headright, coming from the proper custody, more than 30 years old, and no circumstances casting suspicion on it being shown, was admissible as an ancient document. Simmonds v. Simmonds [Tex. Civ. App.] 79 S. W. 630. If an affidavit of forgery is filed, a certified copy of the record of a deed is not evidence of the genuineness of the original, even though 30 years old. Bentley v. McCall, 119 Ga. 530, 46 S. E. 645.

52. The presumption of genuineness of ancient documents does not apply to copies. Bentley v. McCall, 119 Ga. 530, 46 S. E. 645.

tion of which is prima facie sufficient and legal;[53] and there is no presumption that the recitals in such documents are true.[54] Ancient documents are admissible as such only when a part of the transaction to which they relate.[55]

Instruments made inadmissible in evidence in the Federal courts,[56] if not stamped according to the war revenue act of 1898,[57] were not rendered admissible by the repeal of the act.[58] A law dictionary is competent evidence on definitions of terms of foreign law.[59] Hospital records, not required by law to be kept, are incompetent.[60] Standard mortality tables are competent to show expectancy of life.[61]

(§ 7) *B. Books of account.*[62]—Original entries in books of account,[63] regu-

53. It does not apply to a deed signed by a grantor's mark only, and not witnessed or acknowledged as required by law. O'Neal v. Tennessee Coal, Iron & R. Co. [Ala.] 37 So. 275.

54. Though the documents are presumed genuine. Gwin v. Calegaris, 139 Cal. 384, 73 P. 851.

55. Recitals in ancient petitions and legislative grants were not evidence of the facts recited, since they were mere narrations of a past transaction. Davis v. Mayles [Vt.] 56 A. 174.

56. The act does not apply to state courts. Frank v. Bauer [Colo. App.] 75 P. 930.

57. A contract or conveyance made during the period when stamps were required to be placed on such instruments, and bearing a stamp, is admissible, the presumption, in the absence of contrary evidence, being that it was stamped at the proper time, by the proper person, and in the proper sum. Glaser v. Glaser, 13 Okl. 389, 74 P. 944.

58. Unstamped certificate of acknowledgment. Sackett v. McCaffrey [C. C. A.] 131 F. 219. Decisions of state courts that the Federal act does not apply as to them have no bearing on the rule of evidence in the Federal courts, where the act must control. Id.

59. Banco De Sonora v. Bankers' Mut. Casualty Co. [Iowa] 100 N. W. 532.

60. Hospital records, not required by law to be kept, are inadmissible to show a patient's condition, unless supported by testimony of the person who made them, if such person can be produced. Cashin v. New York, N. H. & H. R. Co., 185 Mass. 543, 70 N. E. 930. A hospital record showing that at a certain time a person, whose name and address corresponded with those of plaintiff's decedent, was brought to a hospital, and containing a statement of her injuries, made by the physician who brought her there, is incompetent in a personal injury action, the identity of such injured person being in issue. Kemp v. Metropolitan St. R. Co., 94 App. Div. 322, 88 N. Y. S. 1. A "hospital temperature chart" containing "bedside notes" inadmissible as evidence of the facts stated therein. Griebel v. Brooklyn Heights R. Co., 88 N. Y. S. 767.

61. In actions for death or permanent injury. Knott v. Peterson [Iowa] 101 N. W. 173; Texas & N. O. R. Co. v. Kelly [Tex. Civ. App.] 80 S. W. 1073; International & G. N. R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991; Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 80 S. W. 1038. The Northampton tables of mortality admissible as works of exact science. Quattlebaum v. State, 119 Ga. 433, 46 S. E. 677. Standard mortality tables are not rendered inadmissible by the fact that plaintiff was not an insurable subject in some of the companies on whose reports the tables were based. Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 80 S. W. 1038; Pecos & N. T. R. Co. v. Williams [Tex. Civ. App.] 78 S. W. 5. Evidence of mortality tables was not inadmissible in an action for injuries to a section hand, on the ground that the life expectancies therein given related to persons engaged in ordinary vocations and not to hazardous occupations. International & G. N. R. Co. v. Tisdale [Tex. Civ. App.] 81 S. W. 347. The Carlisle Tables are admissible to show expectation of life of a deceased, but not to show expectation of life of the plaintiff, suing for the wrongful death. Emery v. Philadelphia, 208 Pa. 492, 57 A. 977. A witness, familiar with American Mortality Tables, could testify as to plaintiff's life expectancy, and that the table introduced was a mortality table, that stated the life expectancy of men at different ages. Consumers Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847.

62. See 1 Curr. L. 1155.

63. Smythe's Estate v. Evans, 209 Ill. 376, 70 N. E. 906. Entries of weight of cattle, made from scale tickets, the tickets being given the buyers of cattle. Drumm-Flato Comm. Co. v. Gerlach Bank [Mo. App.] 81 S. W. 503. Books of account need not be kept in any particular language or form, if they comply with the statutory requirements otherwise. Cather v. Damerell [Neb.] 99 N. W. 35. Book of account properly admitted where entries were consecutive and original, though accounts poorly kept. Anderson v. Kannon [Neb.] 99 N. W. 824. A sheriff's books, in which were entered memoranda of proceedings of himself and deputies, were admissible as books of original entries, as to facts not provable by writs and returns. Hesser v. Rowley, 139 Cal. 410, 73 P. 156. An entry in an agent's account books of a payment to him for the principal, made at the time and shown to be correct, is admissible to show such payment as against the payor. Hastie v. Burrage [Kan.] 77 P. 268. A broker made a memorandum of each sale of stock when made, gave it to a clerk, who telephoned it to another clerk, who entered it in a book. Both clerks afterwards compared such memoranda with the book entries and found them correct. Held, the book entries were competent evidence of the transactions. Rathborne v. Hatch, 90 App. Div. 151, 85 N. Y. S. 768. Time book kept by contractor and his agents was admissible to prove time of completion of contract. Cornell v. Standard Oil Co., 91 App. Div. 345, 86 N. Y. S. 633.

larly kept in the usual course of business,[64] and shown to be correct,[65] are competent evidence of the facts of the particular transactions to which they relate.[66] But such evidence is merely auxiliary to the testimony of witnesses,[67] and is inadmissible when witnesses are shown to have a distinct recollection of the facts.[68] Entries of cash transactions[69] and entries in private account books[70] and diaries[71] are inadmissible in favor of the party making them.

(7) *C. Public and judicial records and documents.*[72]—Public and judicial records[73] and properly certified[74] or duly authenticated private[75] copies thereof, are admissible in evidence.

64. Montgomery County v. Bean [Ky.] 82 S. W. 240. Daybooks and ledger admissible as evidence of nonpayment, the books being regularly kept, and showing no credits. H. L. Handy & Co. v. Smith [Conn.] 58 A. 694. Entries in book account, made when goods in question were delivered, admissible to show payment by delivery of goods, the book account being the only one kept by party. Id.

Entries foreign to the regular business in which the accounts are kept are inadmissible. Galbraith v. Starks, 25 Ky. L. R. 2090, 79 S. W. 1191. Items regarding notes in a book of account excluded as not proper subjects of a book charge. Freehart v. Stanford [Vt.] 58 A. 790. A book which is not one of the regular books of a firm, but contains entries of an account with only one person, and those entries not being contemporaneous with the work done, is inadmissible as a book of original entries. McKnight v. Newell, 207 Pa. 562, 57 A. 39. In action to recover for stock, entries made without the knowledge of the other party, and relating to stock other than that in dispute, are inadmissible. Linden v. Thieriot, 96 App. Div. 256, 89 N. Y. S. 273.

When an item in the books of an adverse party is introduced against him, the party offering it need not show the manner in which the books were kept, or a regular course of dealing. Fowles v. Joslyn [Mich.] 97 N. W. 790.

65. Bookkeeper testified he kept the books, that they were correct, and that entries of sales were made from memoranda made by the clerks who actually sold the goods. Entries admissible in connection with witness' testimony. Rogers v. O'Barr & Dinwiddie [Tex. Civ. App.] 81 S. W. 750. A statement of an account is inadmissible unless authenticated in the manner prescribed by law for books of account. United States Paper Co. v. Gruhn, 86 N. Y. S. 730. Where plaintiff kept a bookkeeper, but no clerk, and entries in the books were based upon reports to him, and there was sufficient evidence that the books were correctly kept, and where other parties testified they had settled accounts made from the books and always found them correct, the books of account were admissible. Hurley v. Macey, 94 App. Div. 9, 87 N. Y. S. 924. In an action on the bond of an embezzling cashier, the books of the bank were competent evidence, certain false entries being shown to have been made by the cashier, and other entries made by others being shown correct. State Bank v. Brown, 96 App. Div. 441, 89 N. Y. S. 381.

66. Galbraith v. Starks, 25 Ky. L. R. 2090, 79 S. W. 1191.

67. Cullinan v. Moncrief, 90 App. Div. 538, 85 N. Y. S. 745. While books of account are the best evidence of their contents, they are not necessarily the best evidence of the income of a business; the bookkeeper or any other person with knowledge of such income may testify thereto independently of the books. Halverson v. Seattle Electric Co. [Wash.] 77 P. 1058. A physician is competent to prove the reasonableness of charges proved by his own account book. Kwiecinski v. Newman's Estate [Mich.] 100 N. W. 391. When a witness has testified that he has no present recollection of a fact aside from knowledge gained from memoranda, and his testimony regarding the fact is admitted, the memoranda should also be admitted as a part of his evidence. Hart v. Godkin [Wis.] 100 N. W. 1057. See Examination of Witnesses, 1 Curr. L. 1165.

68. When a druggist said he distinctly remembered sales on certain days, slips from his cash register were inadmissible. Cullinan v. Moncrief, 90 App. Div. 538, 85 N. Y. S. 745. Where witness testified fully and positively as to the return of certain silk, a book memorandum of such transaction was inadmissible, even though an original entry. Rosenberg v. Klein, 43 Misc. 652, 88 N. Y. S. 134.

69. Brown v. Bronson, 93 App. Div. 312, 87 N. Y. S. 872. Slips from a cash register held not books of account, but only memoranda in the vendor's interest. Cullinan v. Moncrief, 90 App. Div. 538, 85 N. Y. S. 745.

70. Private account book entries were incompetent to prove payments for a decedent, as a set-off in action on a note payable to him. Proctor v. Proctor's Adm'r [Ky.] 81 S. W. 272. Plaintiff's account book inadmissible to show to whom he credited payments of rent. Cooley v. Collins [Mass.] 71 N. E. 979.

71. A diary of a decedent, not identified, and not shown to have been in decedent's possession on the day on which an entry therein, offered in evidence, purports to have been made, is inadmissible. Elliott v. Sheppard, 179 Mo. 382, 78 S. W. 627.

72. See 1 Curr. L. 1156.

73. Legislative: The journals of the general assembly, required by law to be deposited in the office of the secretary of state, or duly certified copies thereof, are the only evidence of the procedure followed in passing a law. State v. Armour Packing Co., 135 N. C. 62, 47 S. E. 411; Brown v. Stewart, 134 N. C. 357, 46 S. E. 741. Records, books, papers and rolls of the senate and house of the general assembly, on file in the office of the secretary of state, are evidence of the facts which they recite [Sand. & H. Dig. § 3171]. Rogers v. State [Ark.] 82 S. W. 169. The town record is the only

(§ 7) *D. Proceedings to procure production of documents.*[76]—The production of documentary evidence will be ordered[77] only on a showing that the desired

competent evidence of the acts of the voters at a town meeting. Cincinnati, I. & W. R. Co. v. People, 205 Ill. 538, 69 N. E. 40. A pamphlet purporting to be a digest of city ordinances was inadmissible without proof that it was printed and published by authority of the city council. International & G. N. R. Co. v. Hall [Tex. Civ. App.] 81 S. W. 82. A book of township ordinances, required by law to be kept by the township clerk is prima facie proof of the existence and proper adoption of the ordinances. Ackerman v. Nutley [N. J. Law] 57 A. 150. Books containing session laws published by authority of the state are presumptive evidence of such laws [Code, § 4651]. Summitt v. U. S. Life Ins. Co., 123 Iowa, 681, 99 N. W. 563.

Judicial: A transcript of a judgment is not inadmissible because it does not bear a revenue stamp. Tomlin v. Woods [Iowa] 101 N. W. 135. Court records are inadmissible without other proof of identification than the mere word of counsel that they are the originals. Azzara v. Waller, 88 N. Y. S. 1040; Levy v. Fidelity & Deposit Co., 87 N. Y. S. 487. Where a judgment is in evidence, an execution is inadmissible which does not conform to the judgment. Kinkade v. Gibson, 209 Ill. 246, 70 N. E. 683. Judgment admissible though it did not recite service of summons, where summons, showing personal service, was also in evidence. Id. Where certain papers, attached together, were sufficient to constitute a judgment roll, and counsel for plaintiff so denominated it, and an execution and satisfaction of judgment are a part of such record, no further foundation need be laid to admit the judgment roll in evidence. Turner Tp. v. Williams [S. D.] 97 N. W. 842. Portions of record in probate proceedings admissible on issue of a claim against the estate. Smythe's Estate v. Evans, 209 Ill. 376, 70 N. E. 906. When a judgment of a court of a foreign state is valid, though not signed by the judge, a duly exemplified copy is entitled to credit as evidence the same as in such foreign state. Waters v. Spencer, 44 Misc. 15, 89 N. Y. S. 693. A transcript of a foreign judgment, properly certified as a copy of the record, will be presumed to be a full copy of the entire record. Shilling v. Seigle, 207 Pa. 381, 56 A. 957. Probate of a foreign will held properly authenticated so as to be admissible in evidence. Dusenberry v. Abbott, 1 Neb. Unoff. 101, 95 N. W. 466. A certificate of a transcript of a judgment of a justice of the peace of California held properly attested under Iowa statutes so as to be admissible in evidence. Tomlin v. Woods [Iowa] 101 N. W. 135. Duly certified transcript of constable's bond, as recorded in office of judge of probate, admissible. Burton v. Dangerfield [Ala.] 37 So. 350.

Verdict of a coroner's jury is not competent original evidence on the issue of death by suicide of an assured in an action on the policy. Chambers v. Modern Woodmen of America [S. D.] 99 N. W. 1107. A letter, or copy, written by the assured before his death, to his wife, was inadmissible against the beneficiary under the policy, as a record in the case, or as evidence at the coroner's inquest. Id.

Contra: The verdict in a coroner's inquest is competent evidence in an action on the policy of insurance to show cause of death. Knights Templar & Masons' L. Indem. Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066. In Wisconsin, the admissibility of a verdict of a coroner's jury is said to be a matter of doubt. Fey v. I. O. O. F. Mut. L. Ins. Soc. [Wis.] 98 N. W. 206.

Executive and administrative: Police records are not evidence of the facts stated therein, but are admissible on the question of malice in publication of alleged libellous charges. Carpenter v. New York Evening Journal Pub. Co., 96 App. Div. 376, 89 N. Y. S. 263. Reports of a city treasurer required by law are competent evidence in an action against sureties on his bond. City of Philipsburg v. Degenhart [Mont.] 76 P. 694. A plat, not offered as an official survey, is not open to the objection that it was not made in accordance with the statutory provisions. Garrison v. Glass, 139 Ala. 512, 36 So. 725. By Acts 1902, No. 44, p. 49, no public record of births, marriages or deaths, required by law to be kept, nor any certified copy thereof, is competent evidence of any fact stated therein, except the fact of birth, marriage or death. McKinstry v. Collins [Vt.] 56 A. 985. Hence a copy of a record of a certificate of death was inadmissible to show cause of death. Id.

Records of instruments: When it is shown that a deed, duly acknowledged and recorded, is not within the power of the party wishing to use it, the record thereof is admissible. Rev. St. 1899, § 933. Patton v. Fox, 179 Mo. 525, 78 S. W. 804. By statute in California (Code Civ. Proc. § 1951), original records of instruments [as release] affecting real estate are admissible without further proof. Adams v. Hopkins [Cal.] 77 P. 712. Sufficient predicate held to have been laid to admit in evidence the record of a deed, under Comp. Laws 1887, § 5308. Reeder v. Wilber [S. D.] 100 N. W. 1099. Record of assignment of patent and deed held admissible, though the instruments were not entitled to record because not properly acknowledged. Schultz v. Tonty Lumber Co. [Tex. Civ. App.] 82 S. W. 353. County clerk's record of the cancellation of leases of state lands is admissible to show such cancellation. Valentine v. Sweatt [Tex. Civ. App.] 78 S. W. 385.

74. Copies of official records to be admissible in evidence must be certified according to law. City of New York v. Vanderveer, 91 App. Div. 303, 86 N. Y. S. 659. Certified copies of the minutes of any court of record are admissible. Rev. St. 1892, § 1109. Hoodless v. Jernigan [Fla.] 35 So. 656. A certified transcript of proceedings before a U. S. commissioner is evidence of the truth of matters therein recited. Ramsey v. Flowers [Ark.] 80 S. W. 147. Documents offered as copies of orders and proceedings of a Federal court in another state inadmissible when not certified according to act of Congress. A. Lehman & Co. v. Rivers, 110 La. 1079, 35 So. 296. Public records of sister states, other than court records, to be ad-

evidence is competent and material,[78] and is in the possession or under the control of the adverse party.[78] A notice to produce papers must be definite as to the documents desired to be produced, and must not be unreasonably extensive.[80]

§ 8. *Evidence adduced in former proceedings.*[81]—Where a witness has since died, or for some other reason is not present in court,[82] his testimony, given at a former proceeding,[83] is admissible[84] in a subsequent action between the same

missible in Washington, must be certified in accordance with Federal statutes; and a sealed certificate of the record of an instrument of adoption made by the keeper of the record in a foreign state was inadmissible to prove the instrument was recorded. James v. James [Wash.] 77 P. 1080.

Certified copy of a report to an insurance commissioner admissible. Ky. St. 1903, § 1627. Provident Sav. L. Assur. Soc. v. Bailey, 25 Ky. L. R. 2251, 80 S. W. 452. Statement of an account of a county treasurer, kept in the state treasurer's office and certified by him to be correct, is admissible. Harper v. Marion County [Tex. Civ. App.] 77 S. W. 1044. Certified copies of warrants and indorsements thereon, in the county comptroller's office, held admissible, though not proved correct, and though the certifying officer had no personal knowledge of the facts recited therein. Id. The fact that transfers of school lands had become part of the archives of the general land office was sufficient to make certified copies of the transfers admissible. Tolleson v. Wagner [Tex. Civ. App.] 80 S. W. 846. Certificates of surveys, and plats of lands were inadmissible to show boundaries, when the purpose of the survey was not shown, and the identity and authenticity of the documents not established. Cowles v. Lovin, 135 N. C. 488, 47 S. E. 610. Corporate organization of plaintiff properly proven by copy of certificate of incorporation, certified by the secretary of state, the legal keeper of such records. Western Iron Works v. Montana Pulp & Paper Co. [Mont.] 77 P. 413.

A certified copy from the land office of an affidavit, made by a stranger years before that one claiming under a transfer of a headright certificate was the owner was admissible. Simmonds v. Simmonds [Tex. Civ. App.] 79 S. W. 630. Under statutes making leases and all papers relating to leases of public lands records in the commissioner's office, a certified copy of a release of a lease was admissible. Trevey v. Lowrie [Tex. Civ. App.] 78 S. W. 18. To render a certified copy of a recorded instrument admissible, it must be filed three days before commencement of the action, and an affidavit filed stating the original is lost or cannot be procured; the rule applies to all recorded instruments. Valentine v. Sweatt [Tex. Civ. App.] 78 S. W. 385. Certified copies of papers relating to sales of lands, on record in the office of the commissioner of the general land office, are admissible in evidence, by statute. Trevey v. Lowrie [Tex. Civ. App.] 78 S. W. 18.

75. Copy of a public record by a private person from personal examination, such person testifying that the copy was so made and is correct, is admissible. Smithers v. Lowrance [Tex. Civ. App.] 79 S. W. 1088. In the absence of a statute making certified copies the only method of proof of public records, such records are provable either by certified or examined copies. Texas statutes, however, do not change this common-law rule. Id.

76. See 1 Curr. L. 1157.

77. After statutory notice and filing of an affidavit for an order for the production of papers, a rule to show cause need not be issued, in Delaware. Netter v. Stoeckle [Del.] 56 A. 604.

78. A subpoena duces tecum will issue only on such showing. Dancel v. Goodyear Shoe Mach. Co., 128 F. 753. A mere general averment in an application for the production of a large mass of private books and papers, that such evidence was "material and necessary for" use is insufficient. Id.

79. The affidavit on which order is based must so state. Netter v. Stoeckle [Del.] 56 A. 604. It was not an abuse of discretion to refuse to enforce an order for the production of correspondence, where the order was served on plaintiff's counsel, plaintiff being out of the state, and not learning of it until his examination at the trial, and counsel having made affidavit that he could not produce it; and where plaintiff was fully examined as to the contents of the correspondence. Roberts v. Francis [Wis.] 100 N. W. 1076.

80. Branan v. Nashville, C. & St. L. R. Co., 119 Ga. 738, 46 S. E. 882.

81. See 1 Curr. L. 1157.

82. A stenographer's notes of evidence taken in a circuit court is admissible in a subsequent case only when the witness is not present and his testimony cannot otherwise be procured. Beavers v. Rowen [Ky.] 80 S. W. 1165. Evidence of a witness at a former trial, preserved by bill of exceptions, may be read at a subsequent trial when the witness is beyond the jurisdiction, without showing an effort to procure his deposition. Ross-Lewin v. Germania Life Ins. Co. [Colo. App.] 78 P. 305. Under a statute providing that the shorthand notes of evidence on a former trial shall be admissible under the same rules as govern depositions, a transcript of such evidence could not be read when the witnesses who gave the evidence on the former trial were present in court. Lanza v. Le Grand Quarry Co. [Iowa] 100 N. W. 488. But a translation of evidence given on a former trial is admissible on a subsequent trial if the witnesses who gave it are not present in court. Fitch v. Mason City & C. L. Traction Co. [Iowa] 100 N. W. 618.

83. Within the code rule allowing evidence of a deceased witness taken at a former trial to be introduced where the parties against whom the testimony was offered had the opportunity to cross-examine the witnesses, testimony of a witness before a referee is admissible in a second hearing before another referee, the witness and former referee both having died. Taft v. Little, 178 N. Y. 127, 70 N. E. 211.

Held not within the rule: Evidence taken at a coroner's inquest is generally exclud-

parties[85] and relating to the same matter.[86] A stenographic report of such testimony must be shown to be genuine and correct.[87]

§ 9. *Expert and opinion evidence. A. Conclusions and nonexpert opinions.*[88]—Mere conclusions of a witness,[89] or the opinions of nonexperts on issues

ed, even where the verdict of the coroner's jury is held admissible. Chambers v. Modern Woodmen of America [S. D.] 99 N. W. 1107. Depositions used in coroner's inquest are incompetent in subsequent action on life insurance policy to show cause of death; only admissible for contradiction. Knights Templar & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066.

A stenographer's minutes of an examining trial before a magistrate are incompetent for any purpose. Cr. Code Prac. § 64. Beavers v. Bowen [Ky.] 80 S. W. 1165.

A statement of a witness made during the taking of a deposition, and immediately stricken out is inadmissible on the trial. Young v. Valentine, 177 N. Y. 347, 69 N. E. 643. Such a statement is not a part of witness' testimony; nor is it admissible as testimony of a deceased witness taken on a former trial. Id.

Evidence may not be elicited in one action for the sole purpose of using it in another. In re Shawmut Min. Co., 94 App. Div. 156, 87 N. Y. S. 1059.

84. When the party against whom it is offered had full opportunity to cross-examine the witness on the former trial.

Contra: Testimony at former trial of witness since deceased not admissible. Meekins v. Norfolk & S. R. Co. [N. C.] 48 S. E. 501; Wiilsen v. Metropolitan St. R. Co., 88 N. Y. S. 597.

85. A statement of a defendant since deceased in a former action is inadmissible against a defendant in a subsequent action, who was not a party to the first. Murphy v. Cuff, 177 N. Y. 314, 69 N. E. 607.

86. The testimony of a witness on a former trial is admissible only when the action was between the same parties and related to the same matter. Leggat v. Carroll [Mont.] 76 P. 805.

87. Barksdale v. Security Inv. Co., 120 Ga. 388, 47 S. E. 943.

NOTE. Preliminary showing necessary: To render admissible testimony given on a former trial, it must first appear that the evidence was regularly and judicially taken (Bryant v. Owen, 2 Stew. & P. 134); that the action was between the same parties and for the same cause of action (Neff v. Smith, 91 Iowa, 87, 58 N. W. 1072; Beals v. Guensey, 8 Johns. 446, 5 Am. Dec. 348); that the witness has died since the former trial (Rooker v. Parsley, 72 Ind. 497; Woolen v. Whiteacre, 91 Ind. 502; Jackson v. Bailey, 2 Johns. 17), or is unable to attend the trial (Edwards v. Edwards, 93 Iowa, 127, 61 N. W. 413). And the witness called to give the testimony of another at a former trial must be able to give at least the substance of his entire testimony, including the cross-examination (Harrison v. Charlton, 42 Iowa, 573). For exhaustive note on "Admissibility of Evidence given on former trial in civil cases," see 91 Am. St. Rep. 192.

88. See 1 Curr. L. 1157.

89. "The opinions of witnesses on the substance of an issue should never be resorted to, except when the subject is beyond the knowledge and experience of ordinary men." Numerous authorities cited in Meyers v. Highland Boy Gold Min. Co. [Utah] 77 P. 347; Gentry v. Singleton [C. C. A.] 128 F. 679; National Surety Co. v. Mabry, 139 Ala. 217, 35 So. 698; Matthews v. Farrell [Ala.] 37 So. 325; Riley v. Camden & T. R. Co. [N. J. Err. & App.] 57 A. 445; Oakes v. Prather [Tex. Civ. App.] 81 S. W. 557; Bath v. Houston & T. C. R. Co. [Tex. Civ. App.] 78 S. W. 993; Norfolk & W. R. Co. v. Briggs [Va.] 48 S. E. 521. A witness may not testify as to a matter as to which he states that he is merely guessing. Reichert v. International & G. N. R. Co. [Tex. Civ. App.] 72 S. W. 1031.

Held mere conclusions: Whether trainmen knew their train was on the schedule time of another train. Central of Georgia R. Co. v. Martin [Ala.] 36 So. 426. Husband's opinion as to wife's intention in a real estate transaction. Carey v. Moore, 119 Ga. 92, 45 S. E. 998. What a wagon wheel would do under certain circumstances. See v. Wabash R. Co., 123 Iowa, 443, 99 N. W. 106. Whether defendant thought he could use certain wells or water therefrom. Dubois v. Williamson, 93 App. Div. 361, 87 N. Y. S. 645. That a man could not acquire knowledge of the handling of rails by working around railroad shops and yards. Bonn v. Galveston, H. & S. A. R. Co. [Tex. Civ. App.] 82 S. W. 808. Whether plaintiff "just assumed the risk and went under" the bale of cotton which caused his injury. Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847. Plaintiff could not testify, in action for injuries sustained in getting off a train, that he could have alighted safely if the train had moved in the usual manner, because he thus would give an opinion on his own negligence. Texas Southern R. Co. v. Long [Tex. Civ. App.] 80 S. W. 114. Opinion of witnesses that from their knowledge of a wife, her husband was in danger of bodily harm, and could not safely live with her. House v. House [Va.] 46 S. E. 299. Whether plaintiff did not know that if he had reported a defect in machinery an accident would not have occurred. Carson v. Southern R. Co. [S. C.] 46 S. E. 525. A physician who has testified to the physical and mental condition of a person at a given time may not give an abstract opinion as to the person's ability to transfer property. Langenbeck v. Louis, 140 Cal. 406, 73 P. 1086. In a libel action, testimony of one in the district attorney's office, introduced to establish a justification for publication of the charges, that he had investigated the charges, and had reported against dismissal of the case was a mere opinion on the merits of the charge. Carpenter v. New York Evening Journal Pub. Co., 96 App. Div. 376, 89 N. Y. S. 263.

Held statements of fact: That the defective condition of a cover of a sewer catchbasin could only be discovered by a personal inspection. Allen B. Wrisley Co. v. Burke, 203 Ill. 250, 67 N. E. 818. Testimony regarding the condition of a sidewalk before

which are for the court,[90] or jury,[91] or the subject-matter of which requires ex-

and after an accident by witnesses who examined it. Harrison v. Incorporated Town of Ayrshire, 123 Iowa, 528, 99 N. W. 132. An estimate of the value of contents of a plumbing shop. N. O. Nelson Mfg. Co. v. Shreve [Mo. App.] 79 S. W. 488. That a noise sounded to plaintiff like a collision of two street cars. Binsbacher v. St. Louis Transit Co. [Mo. App.] 82 S. W. 546. What would have been the value of stock if it had reached its destination in "good condition." Texas & P. R. Co. v. White [Tex. Civ. App.] 80 S. W. 641. That plaintiff was a hardworking woman. St. Louis & S. F. R. Co. v. Smith [Tex. Civ. App.] 79 S. W. 340. That a hole in a sidewalk was big enough to let in witness' foot. City of San Antonio v. Talerico [Tex. Civ. App.] 78 S. W. 28. That papers, placed with a third person for safe keeping, were all subject to the owner's call and control. Gatt v. Shive [Tex. Civ. App.] 82 S. W. 303. Statements of witnesses who saw a handhold after an accident that the screws had pulled out of the wood. International & G. N. R. Co. v. Gready [Tex. Civ. App.] 82 S. W. 1061. That a train was making less noise than usual. International & G. N. R. Co. v. Villareal [Tex. Civ. App.] 82 S. W. 1063. Ownership of property is a fact to which a witness may always testify. Hunnicutt v. Higginbotham, 138 Ala. 472, 35 So. 469. A corporation's president may state, as a fact, whether the corporation received certain rents. Hendrickson v. Dwyer [N. J. Err. & App.] 57 A. 420. A witness having given an incomplete description of a cattle guard, a question whether he noticed any other defect did not call for a conclusion. Johnson v. Detroit & M. R. Co. [Mich.] 97 N. W. 760. A question whether sales were authorized to a certain person did not call for a conclusion, when understood as meaning whether there were any others to whom sales were directed to be made. Wendel v. Mallory Comm. Co., 122 Iowa, 712, 98 N. W. 612. Testimony of an engineer in a suit for damages for injuries that he was incapacitated from continuing his former occupation was a statement of fact; or if considered as an opinion, he was competent to give it, after stating the facts. Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 80 S. W. 1038. A letter of an attorney stating that he knew no reason why insurance policies should not be paid in full, held not to express a mere legal opinion; and otherwise competent. Aetna Life Ins. Co. v. Fitze [Tex. Civ. App.] 78 S. W. 370.

Witnesses may state the appearance of things or persons coming under their observation. That the speed of a car "looked fast" to witness. Montgomery St. R. Co. v. Shanks [Ala.] 37 So. 166. That a person "appeared to be suffering." St. Louis S. W. R. Co. v. Burke [Tex. Civ. App.] 81 S. W. 774. A nonmedical witness may state whether an injury appeared to be recent or not. Robinson v. Halley [Iowa] 100 N. W. 328. Witness could state that an insured, when she became a member of a beneficial society could not speak above a whisper, and was weak and emaciated. Home Circle Soc. No. 1 v. Shelton [Tex. Civ. App.] 81 S. W. 84. Testimony of witness, "I could not tell who he was looking at, but he looked to me like he was looking at M.," held admissible. Gulf, C. & S. F. R. Co. v. Miller [Tex. Civ. App.] 79 S. W. 1109. One who has observed the acts, appearance and speech of a person may state an opinion of his condition as to intoxication; what constitutes a proper foundation for such an opinion rests in the discretion of the trial court. Clarke v. Philadelphia & R. Coal & Iron Co. [Minn.] 100 N. W. 231.

A statement of a "collective fact" is not objectionable as a conclusion. The court permitted witness to answer the question: "Was it not the agreement between plaintiff and defendant, at Hausman's office, that he would accept a prorate of what should be left after the houses were completed?" E. E. Shafer & Co. v. Hausman, 139 Ala. 237, 35 So. 691.

A positive statement of fact is admissible, though witness does not explain the source of his knowledge, when it does not appear that he did not know. Ellis v. Lewis [Tex. Civ. App.] 81 S. W. 1034. Giving reasons for positive statements does not make the latter inadmissible, if the statements and reasons therefor can be separated. Filden v. Gordon & Co., 34 Wash. 92, 74 P. 1016.

Intent, knowledge or understanding: A person may testify to his own mental state in a certain transaction and that he acted in good faith. Thompson v. Glover, 120 Ga. 440, 47 S. E. 935. Parties to a contract may testify to their intentions in executing it. Wheeler v. Metropolitan Stock Exch., 72 N. H. 315, 56 A. 754. Plaintiff, pleading fraud in the execution of a release, could testify that he did not understand it. Galloway v. San Antonio & G. R. Co. [Tex. Civ. App.] 78 S. W. 32. Witness may testify that he relied on another's statement in taking a chattel mortgage, since his mental process was a fact as to which his direct testimony was admissible. Strasser v. Goldberg [Wis.] 98 N. W. 554. Plaintiff, in personal injury action, may testify that he relied on the foreman's statement that he was going to close down the mill while repairs were being made. Mathews v. Daly West Min. Co., 27 Utah, 193, 75 P. 722.

But undisclosed intentions or purposes are inadmissible. Party's unexpressed intentions in making a contract and writing a letter excluded. Nugent v. Armour Packing Co. [Mo. App.] 81 S. W. 506. Real estate broker cannot state for whom he was acting in negotiating a sale, this being a statement of his undisclosed purpose. Downing v. Buck [Mich.] 98 N. W. 388. That a loan was made to a firm and not to the partners jointly cannot be shown by the intention and understanding of the bank cashier, but only by the facts of the transaction. In re L. B. Weisenberg & Co., 131 F. 517. A question of a father whether he consented to his son's employment in a foundry called for a fact and not an "uncommunicated mental status." Dimmick Pipe Works v. Wood, 139 Ala. 282, 35 So. 885. A question, how much land a party claiming title by adverse possession in ejectment had been claiming called for a fact, not an undisclosed intention. Dorlan v. Westervitch [Ala.] 37 So. 382.

Computations: A witness may summarize testimony as to purchases from third par-

pert skill or knowledge,[92] are inadmissible; but the opinions of nonexperts are received in regard to matters knowledge of which does not require special skill or experience,[93] when the witness, in connection with such opinion, states the

ties, where the calculations are intricate. Wilson v. Alcatraz Asphalt Co., 142 Cal. 182, 75 P. 787. Where books of a bank contain accounts so complicated and voluminous that they could not be conveniently examined in court, an accountant who had examined them could state the result of his computations, but not his inferences, therefrom. Mendel v. Boyd [Neb.] 99 N. W. 493. While a bookkeeper or accountant may show footings or mathematical calculations from books of account in evidence, he cannot estimate profits as a result of his examination of the books as that would be a mere conclusion. Smythe's Estate v. Evans, 209 Ill. 376, 70 N. E. 906. Where counsel for defendant did not demand the production of books and declined to examine when afforded the opportunity, because of the magnitude of the task, plaintiff was properly allowed to state the general result of his examination of all the books of a corporation, without producing them. Louisiana Purchase Expo. Co. v. Kuenzel [Mo. App.] 82 S. W. 1099. On an issue of the value of a stock of goods destroyed by fire, plaintiff was properly permitted to give an estimate of his total purchases since he had occupied the place, and the amount of his annual sales. Norfolk & W. R. Co. v. Briggs [Va.] 48 S. E. 521.

90. Construction of writings. Granite Bldg. Corp. v. Greene [R. I.] 57 A. 649. Construction of contract. Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co. [Tex. Civ. App.] 77 S. W. 961. Construction of contract of insurance. Prudential Ins. Co. v. Devoe [Md.] 56 A. 809. Testimony that witness had had a letter in his possession and that it "bore upon its face indications of being genuine." Gress Lumber Co. v. Georgia Pine Shingle Co. [Ga.] 48 S. E. 115. Testimony by an alleged assignee that a contract was "sold" or "transferred" to him was a mere conclusion, the validity of the transfer being a question of law. Mardowitz v. Goldberg, 87 N. Y. S. 234.

91. A. A. Cooper Wagon & Buggy Co. v. Barnt, 123 Iowa, 32, 98 N. W. 356.

Illustrations.—Held inadmissible: Whether an ordinarily prudent person could have seen a ditch. Huachuca Water Co. v. Swain [Ariz.] 77 P. 619. Whether a stick, exhibited to the jury, was a weapon likely to produce death. Moran v. State [Ga.] 48 S. E. 324. That witness did not think a gate in a right of way sufficient to keep cattle out. Collins v. Chicago, etc., R. Co., 122 Iowa, 231, 97 N. W. 1103. Opinion of one from whom plaintiff bought supplies as to whether the clothing bought was a liberal provision for his children. McCloskey v. Pulitzer Pub. Co. [Mo. App.] 80 S. W. 723. That other people who dug ditches similar to the one in question always braced them. Schermer v. McMahon [Mo. App.] 82 S. W. 535. That certain rules were necessary to workman's safety. Lane v. New York Cent., etc., R. Co., 93 App. Div. 40, 86 N. Y. S. 947. Whether or not a trench was a safe place to work. Winters v. Naughton, 91 App. Div. 80, 86 N. Y. S. 439. That cogwheels should have been boxed. Marks v. Harriet Cotton Mills, 135 N. C. 287, 47 S. E. 432. Witness cannot give an opinion on the merits of a case (Black v. Rocky Mountain Bell Tel. Co., 26 Utah, 451, 73 P. 514), or which would require him to pass on credibility of witnesses (Davis v. Collins [S. C.] 48 S. E. 469). Where self-defense was set up in an action for assault, defendant could not testify that he acted in self-defense. Evans v. Elwood, 123 Iowa, 92, 98 N. W. 584. In an action by a servant to recover damages for personal injuries from the master, the sufficiency of light at the place where plaintiff was at work was not a proper subject for opinion evidence. Meyers v. Highland Boy Gold Min. Co. [Utah] 77 P. 347. Opinion evidence is inadmissible when the facts and circumstances on which the opinion is based are capable of being clearly shown to the jury. Central of Georgia R. Co. v. Goodwin, 120 Ga. 83, 47 S. E. 641. Where all the surrounding circumstances could have been shown, a witness could not state whether it was necessary for him to pass over a pit into which he fell and was injured. Aetna Powder Co. v. Earlandson [Ind. App.] 71 N. E. 185.

Damages: A witness may state facts from which the jury may estimate damages, but cannot give an opinion as to their amount. McCrary v. Pritchard, 119 Ga. 876, 47 S. E. 341; Tootle v. Kent, 12 Okl. 674, 73 P. 310; Pacific Live Stock Co. v. Murray [Or.] 76 P. 1079. Unless a statement of the amount follows as a mere mathematical deduction. Chicago, R. I. & T. R. Co. v. Halsell [Tex. Civ. App.] 80 S. W. 140. Permitting plaintiff to state his total loss held harmless error. Ingram v. Wishkah Boom Co. [Wash.] 77 P. 34.

92. Nonexpert witnesses cannot give opinions as to the mental condition of one whose sanity is called in question. McCoy v. Jordan, 184 Mass. 575, 69 N. E. 358. Nonexperts cannot testify to the general health and physical condition of one before and after an injury. Fallon v. Rapid City [S. D.] 97 N. W. 1009. Admission of opinion evidence by nonexperts in regard to signatures to notes alleged to have been forged held to be reversible error. Wilmington Sav. Bank v. Waste [Vt.] 57 A. 241.

93. A nonexpert may give an opinion as to the speed of a street car at a given time. Omaha St. R. Co. v. Larson [Neb.] 97 N. W. 824; Chicago City R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28; Aston v. St. Louis Transit Co. [Mo. App.] 79 S. W. 999. Or whether under certain circumstances he would have heard locomotive signals. Gosa v. Southern Ry. [S. C.] 45 S. E. 810. Whether or not one is sick or in a nervous condition may be proved by any one who knows it, and does not require expert evidence. Chicago City R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28. The opinion of defendant's foreman that he regarded the servant who caused an injury to a fellow-servant as a reliable man was admissible. Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847.

Estimates of value: Value of farm labor. North Texas Const. Co. v. Bostick [Tex. Civ. App.] 80 S. W. 109. Decrease in value of

facts on which it is based.[94] The qualification of witnesses to give such nonexpert opinions is a question for the trial court.[95]

(§ 9) *B. Subjects of expert testimony.*[96]—Expert opinion is admissible in regard to matters, adequate knowledge of which presupposes special skill, experience or investigation;[97] it is inadmissible as to matters, knowledge of which does

a horse caused by a cut in its side. Montgomery St. R. v. Hastings, 138 Ala. 432, 35 So. 412. Opinion evidence admissible on incidental benefits and damages to land, not attaching to other property, by the construction of a railroad, in condemnation proceedings. Wray v. Knoxville, L. F. & J. R. Co. [Tenn.] 82 S. W. 471. Neighbors and friends of an intestate and one who was claiming compensation for services, who professed to know the nature of the services rendered and their value were competent witnesses on the value of such services. Green's Ex'r v. Green [Ky.] 82 S. W. 1011.

94. Allowing nonexpert witnesses to state conclusions is not ground for reversal if the facts are also stated. Galloway v. San Antonio & G. R. Co. [Tex. Civ. App.] 78 S. W. 32. A witness may not testify that an easement has been abandoned without giving the facts. Gaston v. Gainesville & D. Electric R. Co. [Ga.] 48 S. E. 188. Nonexpert witnesses could state whether cracks in broken stay bolts of an exploded boiler were old or new, in connection with their statement of the facts on which they based their conclusion. Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435.

Mental capacity: Where a nonexpert testifies to facts showing a basis for his opinion as to a testator's sanity, and has had opportunity to observe his capacity, he should be permitted to state his opinion. Stutsman v. Sharpless [Iowa] 101 N. W. 105. Where it appeared that witnesses had testified as to facts and circumstances warranting the expression of an opinion as to testamentary capacity of testator, the admission of opinions was proper. Spencer v. Terry's Estate [Mich.] 94 N. W. 372; Roberts v. Bidwell [Mich.] 98 N. W. 1000. Plaintiff's wife and an intimate acquaintance held competent to give opinions as to his mental capacity to make a release, in connection with their statement of facts. Galloway v. San Antonio & G. R. Co. [Tex. Civ. App.] 78 S. W. 32. Nonexpert witnesses, who by close relations with a person had opportunity to observe her conduct could give opinions as to her capacity to contract, at the time of execution of the contract. Grimshaw v. Kent, 67 Kan. 463, 73 P. 92. Intimate social acquaintances of a testatrix who had conversed with her before and after execution of her will could testify as to her mental capacity. Code Civ. Proc. § 1870, subd. 10. In re McKenna's Estate [Cal.] 77 P. 461. Nonexperts properly allowed to give opinions on genuineness of will when they qualified by testifying they had seen testatrix write and were familiar with her handwriting. Yelton v. Black [Ky.] 82 S. W. 634.

95. Pattee v. Whitcomb, 72 N. H. 249, 56 A. 459. A witness cannot state a conclusion, not being shown to be in a position to draw such conclusion. Hayden v. Fair Haven & W. R. Co., 76 Conn. 355, 56 A. 613. An assessor who can only give the amount land was taxed for cannot give an opinion as to the value of land, since an assessment of taxes is not of itself evidence of market value. Spink v. New York, etc., R. Co. [R. I.] 58 A. 499. When witness could only state his individual preference, and what others told him, as to value of land after a railway occupied a neighboring street, his opinion was incompetent. Eastern Texas R. Co. v. Scurlock [Tex.] 78 S. W. 490. Witnesses who simply described what they saw at the scene of a boiler explosion were not experts, and it was not necessary to qualify them as such. Illinois Cent. R. Co. v. Behrens, 208 Ill. 20, 69 N. E. 796.

96. See 1 Curr. L. 1159.

97. Any subject wherein a person may become specially learned or skilled is within the broad field of opinion evidence; such evidence is not confined to mere matters of professional or scientific knowledge. Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066. Expert opinion is admissible when the nature of the question at issue is such that men of ordinary experience and intelligence may be supposed incapable of drawing conclusions from the evidence without the assistance of some one who has special skill or knowledge in the premises. Conley v. Portland Gaslight Co. [Me.] 58 A. 61. Race distinctions. United States v. Hung Chang, 126 F. 400. Whether a signature was traced. Dolan v. Meehan [Tex. Civ. App.] 80 S. W. 99. Propensity of young stallions to jump fences. Kittredge v. City of Cincinnati, 2 Ohio N. P. (N. S.) 6. Condition of potatoes at time of delivery. Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066. The proper conduct of a log boom and what is practicable, and what not, to be done. C. Crane & Co. v. Fry [C. C. A.] 126 F. 278. The expense, risk and responsibility attending execution of a contract for the manufacture of whiskey in a distillery. Allen v. Field [C. C. A.] 130 F. 641. Whether a lead in a mine is such that a reasonably prudent person would be justified in following it, and expending time and money in so doing. Wilson v. Harnette [Colo.] 75 P. 395. Transportable condition of cattle, proper conditions of carriage, and the usual time required to make a shipment. Chicago, etc., R. Co. v. Carroll [Tex. Civ. App.] 81 S. W. 1020. Opinion evidence by farmers and stockmen, as to whether a mare was with foal. Boyer v. Chicago, etc., R. Co., 123 Iowa, 248, 98 N. W. 764. Analyses and comparisons of expert witnesses in a case of alleged infringement of copyrights are admissible. Encyclopaedia Britannica Co. v. American Newspaper Ass'n, 130 F. 460. Expert testimony that forcing a hard or frozen stick of dynamite into a drill hole in a rock with a stick is a dangerous operation, contrary to sound practice, was properly admitted. Currelli v. Jackson [Conn.] 58 A. 762. The opinion of one who had qualified as an expert was admissible on the sufficiency of a fence to keep out cattle of ordinary disposition with reference to breaking fences. Trammell v.

not require special qualification,[98] or on issues exclusively for the court[99] or jury.[1]

Turner [Tex. Civ. App.] 82 S. W. 325. One qualified by long experience could testify to a condition of cattle as showing they had been driven hard. Kennon v. State [Tex. Cr. App.] 82 S. W. 518.

Machinery, construction, engineering: Whether a guard could have been placed over an emery belt so as to protect workmen from flying particles. La Porte Carriage Co. v. Sullender [Ind. App.] 71 N. E. 922. An experienced and practical machinist may testify to the danger attending the cutting of steel rails with chisels and the precautions taken by experienced men to avoid the danger. Vohs v. A. E. Shorthill Co. [Iowa] 100 N. W. 495. An expert machinist could testify that a joiner was not dangerous if operated with the safety board on. Vollman Buggy Body Co. v. Spry [Ky.] 80 S. W. 1092. When a machine is not easily described and the danger not readily understood, an expert may state whether its operation is attended with danger, and state his reasons. Gammel-Statesman Pub. Co. v. Monfort [Tex. Civ. App.] 81 S. W. 1029. Expert testimony admissible on custom of putting experienced men to work on certain machines used in a particular trade, and the term of an apprentice in the trade, is admissible. Id. Expert testimony was competent to show that the boilers of a plant running in the ordinary way could not have used up the amount of steam indicated by the meter, as showing the water meter incorrectly registered the amount of water passing through it. Underfeed Stoker Co. v. Detroit Salt Co. [Mich.] 97 N. W. 959.

The proper construction of a derrick. Dyas v. Southern Pac. Co., 140 Cal. 296, 73 P. 972. Usual manner of putting up hoisting apparatus. Parlett v. Dunn [Va.] 46 S. E. 467. Whether 27 feet was an unusually long span (in building construction). Nelson v. Young, 91 App. Div. 457, 87 N. Y. S. 69. Insulation of electric wires and how long before an accident insulation was worn off. Bernier v. St. Paul Gas Light Co. [Minn.] 99 N. W. 778. Whether an insulator in use at a certain point was a safe one. North Amherst Home Tel. Co. v. Jackson, 4 Ohio C. C. (N. S.) 386. Whether breakages in bicycle materials were not due to use of castings instead of forgings, and not to inherent defects in materials used. Frederick Mfg. Co. v. Devlin [C. C. A.] 127 F. 71. Whether a pulley made of certain materials combined in a certain way is safe or unsafe. Wabash Screen Door Co. v. Black [C. C. A.] 126 F. 721. Expert evidence is admissible in regard to the roadways and entries of a mine, their adaptability to the intended use and their condition as to safety. Henrietta Coal Co. v. Campbell, 211 Ill. 216, 71 N. E. 863.

Proper method of putting in a railway switch point. Buckalew v. Quincy, etc., R. Co. [Mo. App.] 81 S. W. 1176. What was indicated by the fact that an air-hose (part of air brake equipment) was jerked out of brakeman's hand when he uncoupled it. International & G. N. R. Co. v. Mills [Tex. Civ. App.] 78 S. W. 11. The condition of a cattle guard and whether it would keep out stock proper subject for expert opinion by railway roadmaster. Johnson v. Detroit & M. R. Co. [Mich.] 97 N. W. 760. The efficiency of a spark arrester to prevent the escape of sparks sufficient to set fire to nearby property may be testified to by an experienced engineer. Kansas City, Ft. S. & M. R. Co. v. B. F. Blaker & Co. [Kan.] 75 P. 71. The necessity of constructing ditches along a railway right of way is a proper subject of expert inquiry. Guinn v. Iowa & St. L. R. Co. [Iowa] 101 N. W. 94.

Scientific and professional: Suitability of apparatus for removing dust from sandblast room. Skinner v. E. F. Kerwin Ornamental Glass Co., 103 Mo. App. 650, 77 S. W. 1011. When injuries are of such a character as to require skilled and professional men to determine their cause and extent, the question is one of science, and only expert testimony is proper. Willet v. Johnson, 13 Okl. 563, 76 P. 174. Family physician could testify as an expert as to the permanent effects of a spinal injury. Walden v. Jamestown, 178 N. Y. 213, 70 N. E. 466. Physician testified as an expert that an internal injury to plaintiff would shorten her life expectancy one-half unless a dangerous operation was performed. Houston Electric Co. v. McDade [Tex. Civ. App.] 79 S. W. 100.

98. The length of time required to assess a township and how much of the work could be done in a day. Board of Com'rs of Clay County v. Redifer, 32 Ind. App. 93, 69 N. E. 305. Whether a man could state that he was going to shut down a mill a given length of time for repairs. Mathews v. Daly West Min. Co., 27 Utah, 193, 75 P. 722.

99. Whether an instrument is a duplicate of another within the meaning of a statute, the construction of the instrument being involved, is for the court. Wright v. Michigan Cent. R. Co. [C. C. A.] 130 F. 843. Expert testimony as to the danger of mining is not admissible in determining whether a law regulating that occupation is a valid exercise of the police power. State v. Cantwell, 179 Mo. 245, 78 S. W. 569. A patent lawyer cannot give an expert opinion on the sufficiency of a patent license, the question being for the court. Rankin v. Sharples, 206 Ill. 301, 69 N. E. 9.

1. Safety of a railing on a bridge at a certain time and in a certain condition, its construction not being complicated. McDonald v. Duluth [Minn.] 100 N. W. 1102. That a boy sixteen years old would not appreciate the danger of operating a machine without the safety appliance. Vollman Buggy Body Co. v. Spry [Ky.] 80 S. W. 1092. Whether a ditch should have been braced while being dug was for the jury, from facts and conditions shown. Schermer v. McMahon [Mo. App.] 82 S. W. 535. Construction and plan of car having been shown, whether it was dangerous for plaintiff to ride standing on a footboard was not the subject of expert testimony. Allen v. St. Louis Transit Co. [Mo.] 81 S. W. 1142. Testimony of physicians that an injury to plaintiff's foot was caused by coming in contact with two uneven surfaces was not expert testimony, but was direct testimony as to a fact to be found by the jury. Illinois Cent. R. Co. v. Smith,

(§ 9) *C. Qualification of experts.*[2]—There is no well defined rule by which the qualifications of an expert may be measured, and the determination of the question must be left largely in the discretion of the court.[3] The usual tests applied are familiarity with the subject under investigation, experience, and professional skill and training.[4] Expert capacity is a matter wholly relative to the subject of a particular question.[5]

208 Ill. 608, 70 N. E. 528. Expert opinion is inadmissible on the question which of two or more causes produced an injury, when the circumstances are such that they can be placed before the jury so that the jury can understand them and form an intelligent opinion on the question. Meehan v. Great Northern R. Co. [N. D.] 101 N. W. 183.

2. See 1 Curr. L. 1161.

3. Halverson v. Seattle Electric Co. [Wash.] 77 P. 1058; La Porte Carriage Co. v. Sullender [Ind. App.] 71 N. E. 922. The court's decision is conclusive, unless erroneous in law. Muskeget Island Club v. Inhabitants of Nantucket, 185 Mass. 303, 70 N. E. 51. The court may exclude further inquiry, when satisfied, after inquiry to some extent, that the witness is incompetent. Brunnemer v. Cook & Bernheimer Co., 89 App. Div. 406, 85 N. Y. S. 954. The court need not pass on the capacity of a witness as an expert until the question calling for expert testimony has been put to the witness. Conley v. Portland Gaslight Co. [Me.] 58 A. 61. The ruling of the court on the capacity of one to testify as an expert is ipso facto a decision that witness is qualified on that subject and that the subject is one proper for expert testimony. Id.

4. Where parol evidence is admissible to prove the unwritten laws of a country, it must be given by persons familiar with such laws, or in a situation rendering knowledge thereof probable. Banco De Sonora v. Bankers' Mut. Casualty Co. [Iowa] 100 N. W. 532. On the question of fixing the salary of a judicial officer, only witnesses sufficiently acquainted with the duties of the office to testify understandingly should be permitted to testify as to their value. Daniel v. Bullitt County, 25 Ky. L. R. 159, 74 S. W. 1057. Members of the bar, masters in chancery, and others familiar with the matter, may testify as to the time required by a master in chancery to make a report. Fitchburg Steam Engine Co. v. Potter, 211 Ill. 138, 71 N. E. 933. An expert, otherwise qualified, is not disqualified by the fact that he is a party in interest. Standefer v. Aultman & Taylor Machinery Co. [Tex. Civ. App.] 78 S. W. 552.

Miscellaneous illnstrations.—Held competent: Opinion of one who had bred and sold bloodhounds admissible on question of value of one killed, in the absence of better evidence. St. Louis, etc., R. Co. v. Philpot [Ark.] 77 S. W. 901. One who had ridden frequently on trains, observing the speed and timing trains between stations, and had observed the speed of the train in question, being a passenger thereon, was competent to express an opinion as to its speed. Cronk v. Wabash R. Co., 123 Iowa, 349, 98 N. W. 884. One qualified to give expert testimony regarding oil controlling valves may testify as to valves in which crude oil was used, though he had never used crude oil himself, since the other party may show the inapplicability of such evidence, if it is not applicable. Carr v. American Locomotive Co. [R. I.] 58 A. 578. A shipper of cattle, familiar with the business, could state the usual time required to ship cattle from a Texas station to St. Louis. International & G. N. R. Co. v. McGehee [Tex. Civ. App.] 81 S. W. 804. In an action for damages for injury to a shipment of bees, the plaintiff, knowing what he had sold them for, their condition before and after shipment, and being familiar with their market value, could testify as to the extent of his loss. International & G. N. R. Co. v. Aten [Tex. Civ. App.] 81 S. W. 346. One who had had 13 years experience working on a machine similar to the one causing an injury was qualified to give an opinion as to whether it was dangerous for a minor to work on it. Punkowski v. New Castle Leather Co. [Del.] 57 A. 559. One who had been a farmer 30 years and had run threshers 17 years was a competent expert on the condition of a threshing outfit when delivered. Standefer v. Aultman & Taylor Machinery Co. [Tex. Civ. App.] 78 S. W. 552. Opinion of an expert with 25 years' experience with emery belts could be rebutted by testimony of witnesses who had used such belts and were familiar with and understood them. La Porte Carriage Co. v. Sullender [Ind. App.] 71 N. E. 922. A **motorman** of sixteen months' experience, familiar with the line in question, could testify as to the distance in which a car could be stopped. Heinzle v. Metropolitan St. R. Co. [Mo.] 81 S. W. 848. A witness who testified that he had been a motorman on a street car line for six or seven months, knew the character of the line, was familiar with the speed of cars, and that the car at the time of the accident in question was running seven or eight miles an hour, was competent to give an opinion as to the rate at which a car could be run into a certain curve in the line with safety to the passengers. Halverson v. Seattle Elec. Co. [Wash.] 77 P. 1058. A motorman with several years experience, who had run the car by which plaintiff was injured over the same line and under the same conditions could testify as to the running of the car and the distance in which it could be stopped. South Covington & C. St. R. Co. v. Weber [Ky.] 82 S. W. 986.

Railway employes: Men employed number of years in track department of railway qualified as experts on proper manner of putting in switch point. Buckalew v. Quincy, etc., R. Co. [Mo. App.] 81 S. W. 1176. An engineer with fourteen months experience could testify how far ahead on the track he could see objects while going at a certain rate. Missouri, etc., R. Co. v. Jones [Tex. Civ. App.] 80 S. W. 852. A head brakeman and practical railway man qualified, though not an engineer, to give an opinion as to

(§ 9) *D. Basis of expert testimony and examination of experts.*[6]—The opinion of an expert may be based directly on his personal knowledge of the

whether a switch could have been placed in a safer location. Morisette v. Canadian Pac. R. Co. [Vt.] 56 A. 1102.

Held incompetent: One who acquired his knowledge of race distinctions from the reading of magazine articles, from association with alleged Chinese, and from three months' experience as government Chinese inspector was not qualified as an expert on an issue whether or not a person was a Chinese. U. S. v. Hung Chang, 126 F. 400. One whose only knowledge of a person's handwriting is based on letters which he has seen, purporting to come from such person, cannot testify as to such handwriting from his recollection of it, and by comparing his recollection with other proved writings. Gress Lumber Co. v. Georgia Pine Shingle Co. [Ga.] 48 S. E. 115. A witness, not shown to have made an investigation or to have any special knowledge, cannot testify as to the depth and size of a sewer system and capacity to carry sewage from a given district. Chicago & M. Elec. R. Co. v. Mawman, 206 Ill. 182, 69 N. E. 66. A day laborer who had only seen and heard explained apparatus for manufacture of water gas could not give expert testimony as to the nature of and danger incident to the manufacture of that gas. Conley v. Portland Gaslight Co. [Me.] 58 A. 61. A witness who testified to a knowledge of the general surroundings of a culvert, but did not appear to have any actual knowledge of its size and dimensions, could not testify as to the capacity of the culvert. Missouri, etc., R. Co. v. Huddleston [Tex. Civ. App.] 81 S. W. 64. A witness who, called one day, stated he did not know as to the common use of a certain fuse, could not give an opinion thereon the next day, after stating that he had made inquiries. Richmond & P. Elec. R. Co. v. Rubin [Va.] 47 S. E. 834.

As to values: One who had resided in a town 60 years, had farmed 26 years, had bought and sold land in the vicinity, had acted as assessor, and had seen and knew the situation and general character of the land in question, was qualified as an expert on the value of the land. Muskeget Island Club v. Nantucket, 185 Mass. 303, 70 N. E. 61. A resident acquainted with lots and knowing their value can testify in an action for damages caused by grading. Robinson v. St. Joseph, 97 Mo. App. 503, 71 S. W. 465. A witness who knew that land was used for pasturage and what the rental value of land in the vicinity used for that purpose was, could testify to the rental value of the land in question. Cluck v. Houston, etc., R. Co. [Tex. Civ. App.] 79 S. W. 80. On the question of value of mining property, evidence by members of a corporation of investigations by them and their opinion that the lands were not worth opening was admissible. Cooper v. Maggard [Tex. Civ. App.] 79 S. W. 607. Witnesses residing in the vicinity and familiar with land and its productiveness could give opinions on the amount of cotton land would have produced if it had not been overflowed. Chicago, etc., R. Co. v. Longbottom [Tex. Civ. App.] 80 S. W. 542. One engaged in buying and selling timber, and who knew current prices and market price at the time in question, was competent as an expert on timber values. A witness deriving his knowledge from market reports and newspapers may testify as to the market value of cattle at a certain place on a certain day. Chicago, etc., R. Co. v. Halsell [Tex. Civ. App.] 81 S. W. 1241.

Incompetent: Beaudry v. Duquette [Minn.] 99 N. W. 635. One who had never seen a horse before an accident in which it was injured could not testify to its value. Manning v. Interurban St. R. Co., 88 N. Y. S. 386. In suit for injuries to a farm and mill site by refuse deposited in a stream, one whose knowledge was limited to the value of farm lands in the vicinity could not testify as to the value of the property as a whole. Bachert v. Lehigh Coal & Nav. Co., 208 Pa. 362, 57 A. 765. Witnesses who state that they do not know the value of lands with peach orchards in the vicinity of the lands in question are incompetent to express an opinion on the value of the latter. Texas & N. O. R. Co. v. Smith [Tex. Civ. App.] 80 S. W. 247. Mere observation of a piece of real estate, though continued and attentive, is not sufficient to qualify one as an expert respecting its value. Riley v. Camden & T. R. Co. [N. J. Err. & App.] 57 A. 445.

Physicians: A practicing physician is competent to testify that treatment of alleged magnetic healers was unskillful, though he does not claim to possess the powers claimed by such magnetic healers. Longan v. Weltmer [Mo.] 79 S. W. 655. A physician who had practiced chiefly as a surgeon six years and had performed 100 to 200 operations for appendicitis was qualified to testify that an injury could have caused appendicitis. Sullivan v. Boston Elev. R. Co. [Mass.] 71 N. E. 90. Opinion of a physician as to the cause of an injury to plaintiff's eye was competent, though his examination was long after the accident alleged to be the cause. West Chicago St. R. Co. v. Dougherty, 209 Ill. 241, 70 N. E. 586. A surgeon of 35 years experience may testify as to what ligaments would have to be severed in removing a certain bone from the hand, without a preliminary question as to whether he could determine the question without an inspection of the hand, especially when the witness had examined the hand. Johnson v. Winston [Neb.] 94 N. W. 607. In an action for malpractice, a physician is entitled to have the question of his care and skill in surgical operations and medical treatment determined by opinions of physicians who are members of his own school (Henslin v. Wheaton, 91 Minn. 219, 97 N. W. 882); but this rule does not apply to care and skill of a physician in using the X-ray machine, the opinion of a scientific expert, a professor of physical sciences, being competent in such case (Id.).

5. A witness may be qualified as an expert for one question and wholly unqualified for the next. Conley v. Portland Gaslight Co. [Me.] 58 A. 61. A witness who had had 20 years experience in blasting with dynamite, but had had only one experience with frozen dynamite, was not qualified to give an expert opinion on dynamite in that condition. Currelll v. Jackson [Conn.] 58

facts,[7] or on the evidence adduced at the trial,[8] or on both;[9] or on a hypothetical question.[10] When a hypothetical question is asked, it must be so framed as to

A. 762. A physician who is not a nurse and has no personal knowledge of compensation paid them cannot testify as to the reasonable value of a nurse's services in a given city. Cameron Mill & Elev. Co. v. Anderson [Tex. Civ. App.] 78 S. W. 971. A handwriting expert may testify as to whether a signature was traced without knowledge or familiarity with the signature to be examined. Dolan v. Meehan [Tex. Civ. App.] 80 S. W. 99. The opinions and testimony of experts must be limited to the particular matters as to which they are qualified by experience. Allen v. Field [C. C. A.] 130 F. 641.

6. See 1 Curr. L. 1162.

7. Summerlin v. Carolina & N. W. R. Co., 133 N. C. 550, 45 S. E. 898. The opinions given by experts should be based upon facts within their actual knowledge and which they are prepared to state. Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515. A veterinary surgeon who examined a horse just after an accident and testified that he could determine the horse's condition before the accident from such examination, was competent to give an opinion on the condition and value of the horse, though he had not seen him before the accident. Perine v. Interurban St. R. Co., 43 Misc. 70, 86 N. Y. S. 479. A physician may give an opinion as to plaintiff's injuries based on the previous history of the patient's case as learned from the patient, and his own diagnosis and treatment. Holloway v. Kansas City [Mo.] 82 S. W. 89. An expert who had examined plaintiff and knew the history of her case, and her previous condition, allowed to testify that neurasthenia could be, and in his opinion, was caused by plaintiff's fall. Wood v. Metropolitan St. R. Co. [Mo.] 81 S. W. 152. A physician was competent to testify as to the condition of a leg which he amputated, when he saw the results of a dissection, though did not see the actual dissection. Steinacker v. Hills Bros. Co., 91 App. Div. 521, 87 N. Y. S. 33. A physician who has attended an injured person, and learned from her the circumstances attending the injury, after testifying to such facts and those he had himself learned in his treatment, may state his opinion as to the cause of the injury. Missouri, etc., R. Co. v. Criswell [Tex. Civ. App.] 78 S. W. 388. A physician who had observed plaintiff walk could give an opinion as to the probable cause of her inability to control one of her limbs. Hallum v. Omro [Wis.] 99 N. W. 1051. An expert medical witness cannot state what he learns entirely from medical works, unsupported by practical experience of his own. Kath v. Wisconsin Cent. R. Co. [Wis.] 99 N. W. 217.

But an expert cannot state his own practice in putting up hoisting apparatus. Parlett v. Dunn [Va.] 46 S. E. 467.

8. Where there is no conflict. St. Louis S. W. R. Co. v. Hall [Tex. Civ. App.] 81 S. W. 571. Proper in action for wrongful death to show physical condition of woman before and after an injury alleged to have caused her death and to receive opinion evidence based on facts shown by the evidence as to her symptoms and condition. McKinstry v. Collins [Vt.] 56 A. 985. A standard of comparison must first be established before an expert may testify as to the genuineness of a signature by the use of other signatures. Wilmington Sav. Bank v. Waste [Vt.] 57 A. 241.

NOTE. Proof of handwriting: The editor of a note on "Comparison of Handwriting," appended to University of Illinois v. Spalding, 71 N. H. 163, in 62 L. R. A. 817, gives seven modes of proving the origin of disputed handwriting, as follows: First, proof of admission of the act. Second, proof by witnesses who saw the pen form the letters. Third, proof by witnesses who know the handwriting of the author from having seen him write. Fourth, proof by witnesses who know the handwriting from correspondence with the author, on which he has acted. Fifth, proof by witnesses who know the handwriting from familiarity with authentic documents. Sixth, comparison by witnesses in court with genuine specimens of the handwriting of the same person. Seventh, comparison by the court or jury with the same genuine specimens.

Standards of comparison. In jurisdictions where proof of handwriting by comparison with other specimens is permitted, whether the comparison is by the court, jury, or witnesses, there must be preliminary proof of the genuineness of the specimens or standards. At common law, the genuineness of the standard must be established, in civil cases, by a fair preponderance of the evidence; in criminal cases, beyond a reasonable doubt.

Competency of standards: Copies of genuine letters, made by a letter press or other mechanical process, are incompetent. Commonwealth v. Eastman, 1 Cush. [Mass.] 189, 48 Am. Dec. 596. Photographic copies are now usually held competent though there is a conflict, especially in the earlier cases. Such copies must of course be proved to have been correctly made. People v. Mooney, 132 Cal. 13, 63 P. 1070; United States v. Ortiz, 176 U. S. 422, 44 Law. Ed. 539. Traced copies, or copies otherwise made by hand, are inadmissible. Howard v. Russell, 75 Tex. 171, 12 S. W. 525; White Sew. Mach. Co. v. Gordon, 124 Ind. 495, 24 N. E. 1053, 19 Am. St. Rep. 109. Writings made as exhibits in the case are inadmissible. Commonwealth v. Allen, 128 Mass. 46, 35 Am. Rep. 356. Nor is a signature to a paper in the record competent. Travers v. Snyder, 38 Ill. App. 379. But writings made post litem motam are admissible against the party making them. People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193. For further discussion of the topic, see note to Gambrill v. Schooley, 95 Md. 260, in 63 L. R. A. 427.

And on the general subject of proof of handwriting, see, also, notes in 63 L. R. A. 937, 963; 64 L. R. A. 303; 65 L. R. A. 95, 151.

9. Holloway v. Kansas City [Mo.] 82 S. W. 89.

10. A purely hypothetical question to an expert is the better form, but other forms of questions are sometimes permitted, the

include the essential facts relating to the matter on which the opinion is sought.[11] It should include all[12] or substantially all[13] the facts which the evidence tends to prove,[14] but should not assume facts not in evidence.[15] It should not call for conclusions of fact[16] or law,[17] or for a speculative opinion.[18] The extent of the

matter being largely discretionary with the trial court. Burnside v. Everett [Mass.] 71 N. E. 82. Questions put to an expert on direct examination must be framed hypothetically, unless there is no conflict of evidence as to the facts, or the witness is personally acquainted with them. City of Chicago v. Lamb, 105 Ill. App. 204.

11. Gasink v. New Ulm [Minn.] 99 N. W. 624; Ruscher v. Stanley [Wis.] 98 N. W. 223; Parrish v. State, 139 Ala. 16, 36 So. 1012. A hypothetical question should be so framed as to clearly express the actual facts on which the opinion is to be based. Shoemaker v. Elmer [N. J. Err. & App.] 58 A. 940. A question based on the testimony of certain witnesses, without specifying particular facts testified to, is objectionable because it permits the witness to select the facts he considers material; and it affords no opportunity for objection, amendment or rejection. Id. Unless based on facts before the jury which are readily recognized and easily grasped, the question must state all the facts on which the opinion is based; an opinion cannot be based on undisclosed facts within the expert's own knowledge. Western Union Tel. Co. v. Morris, 67 Kan. 410, 73 P. 108. A question as to the mental capacity of a testator, which was based on hypothetical findings of fact from certain testimony, held proper, where there was a conflict in the evidence. In re Peterson's Will [N. C.] 48 S. E. 561. The error in omitting from a hypothetical question to an expert as to the space in which a car could be stopped, the element whether the car was empty or loaded is cured, where on cross-examination, the expert said it would make no difference whether the car was empty or loaded. Meeker v. Metropolitan St. R. Co., 178 Mo. 173, 77 S. W. 58. An opinion of a qualified witness on the damage to stock is admissible if it appears to embrace only legitimate and recoverable elements of damage. Ft. Worth & D. C. R. Co. v. Waggoner Nat. Bank [Tex. Civ. App.] 81 S. W. 1050.

12. All facts on which evidence has been admitted. Fowler v. Iowa Land Co. [S. D.] 99 N. W. 1095.

13. Substantially all the facts admitted or proved. Smith v. Minneapolis St. R. Co., 91 Minn. 239, 97 N. W. 881. "The essential" facts of the case. Heinzle v. Metropolitan St. R. Co. [Mo.] 81 S. W. 848. "A fair summary" of the facts which the evidence tends to prove held sufficient. Buce v. Eldon, 122 Iowa, 92, 97 N. W. 989. A hypothetical question addressed to an expert witness is not improper simply because it includes only a part of the facts in evidence, provided there is evidence tending to support the facts which are embodied in the question. Chicago, etc., R. Co. v. Wallace, 202 Ill. 129, 66 N. E. 1096.

14. Hypothetical questions may assume issuable facts if the evidence tends to prove such facts. International, etc., R. Co. v. Mills [Tex. Civ. App.] 78 S. W. 11; City of Aledo v. Honeyman, 208 Ill. 415, 70 N. E. 338; Chicago City R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28; Summerlin v. Carolina & N. W. R. Co., 133 N. C. 550, 45 S. E. 898. A hypothetical question to a physician regarding plaintiff's injuries was properly based on plaintiff's own testimony. Longan v. Weltmer [Mo.] 79 S. W. 655. The opinion of a professional medical expert may be based upon the physical conditions of a person which have been detailed in evidence. Gasink v. New Ulm [Minn.] 99 N. W. 624. An expert may be asked his opinion on a hypothetical case, though the facts assumed are the same as those shown by the evidence. Central of Georgia R. Co. v. McClifford, 120 Ga. 90, 47 S. E. 590. A hypothetical question as to the effect of a puncture by a surgical instrument, not properly sterilized, was proper, though the only evidence that the instrument in question was in a septic condition was that it had not been dipped in boiling water. Bower v. Self [Kan.] 75 P. 1021.

15. Bennett v. Incorporated Town of Mt. Vernon [Iowa] 100 N. W. 349; Roche v. Baldwin, 143 Cal. 186, 76 P. 956; Dallas Consol. Elec. St. R. Co. v. Rutherford [Tex. Civ. App.] 78 S. W. 558; State v. Brown [Mo.] 79 S. W. 1111. Expert testimony must be based upon supposed facts of the existence of which there is evidence before the court. Goken v. Dallugge [Neb.] 99 N. W. 818. An expert cannot give the result of a test of borings for bicycle handles, to determine whether of steel or malleable iron, unless the materials used in the test are identified as those in controversy. Fredrick Mfg. Co. v. Devlin [C. C. A.] 127 F. 71. A hypothetical question whether locomotor ataxia could be caused by an electric shock such as plaintiff claimed he received was improper when there was no evidence that plaintiff was suffering from that disease. Harter v. Colfax Elec. Light & Power Co. [Iowa] 100 N. W. 508. Expert testimony as to latent defects in a brake which might have caused an accident was inadmissible, there being no evidence of the nature of the alleged actual defect. East Tennessee, etc., R. Co. v. Lindamood [Tenn.] 78 S. W. 99. An expert opinion must be rejected unless the facts stated hypothetically in the question are established by the evidence. Held error to instruct the jury that the weight to be given expert opinion depended on the extent to which the facts assumed, on which the opinion was based, were justified by the evidence. Stutsman v. Sharpless [Iowa] 101 N. W. 105. But it was elsewhere held that error in allowing a hypothetical question embracing facts not proven is cured by an instruction that the value of such testimony is limited by the facts proven and embraced in the question. Thomas v. Dabblemont, 31 Ind. App. 146, 67 N. E. 463.

16. Summerlin v. Carolina & N. W. R. Co., 133 N. C. 550, 45 S. E. 898. Hypothetical questions asking for a simple negative or

direct[19] or cross-examination[20] of experts is largely discretionary with the court. On cross-examination, a wide range of inquiry is permitted,[21] covering the extent of the expert's knowledge and the elements of which his judgment is made up.[22]

affirmative answer but really calling for conclusions of fact, some of which were not the subject of expert opinion, were improper. Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 P. 164. A question should not be so framed as to cover the very question submitted to the jury. In an action for damages for injuries to horses while being shipped, the evidence tending to show they had become timid and unmanageable, a veterinary surgeon could not give his opinion, based on the evidence, as to what was the matter with the horses. Keyes-Marshall Bros. Livery Co. v. St. Louis & H. R. Co. [Mo. App.] 80 S. W. 53. Physician could not state whether the shock of a certain collision caused a stated injury. Riser v. Southern R. Co. [S. C.] 46 S. E. 47.

Contra: A hypothetical question is not objectionable, though it calls for deductions of facts which are to be made by the jury, if otherwise proper. International, etc., R. Co. v. Mills [Tex. Civ. App.] 78 S. W. 11.

17. Physician could not testify that hernia was a contributing cause of an injury. Travelers' Ins. Co. v. Thornton, 119 Ga. 455, 46 S. E. 678.

18. A question to a medical expert whether certain injuries would be likely to produce a certain condition was improper as calling for speculative evidence of damages. Higgins v. United Traction Co., 96 App. Div. 69, 89 N. Y. S. 76.

Experts may properly testify to the probabilities of the case, as that injuries "were liable to be permanent." Hallum v. Omro [Wis.] 99 N. W. 1051. A medical expert may testify as to the probable result of a present physical condition. Rosenblatt v. Cohen House Wrecking Co., 91 App. Div. 413, 86 N. Y. S. 801. Opinion of physician that plaintiff's heart trouble might have been caused by the accident in question and might have come from other causes was sufficiently certain. Moritz v. Interurban St. R. Co., 84 N. Y. S. 162. An expert opinion that improvement in eyesight was not "likely" was not too indefinite and speculative. Graham v. Bauland Co., 97 App. Div. 141, 89 N. Y. S. 595. Expert medical witness could state whether he thought plaintiff's condition at the trial could have resulted from an injury. Id. A purely speculative question, not based on any evidence in the case, is incompetent. Happer v. Empire City Subway Co., 78 App. Div. 637, 79 N. Y. S. 904.

19. An expert having been thoroughly examined, it was proper for the court, in its discretion to end such examination. Stroh v. South Covington, etc., R. Co., 25 Ky. L. R. 1868, 78 S. W. 1120. In an action for malpractice, a medical expert may be asked the preliminary question whether there was any remedy for the necrosis except by removing the bone. Johnson v. Winston [Neb.] 94 N. W. 607. Where experts had testified as to the symptoms of a disease of the brain from which it was alleged a testatrix had suffered, and had given their opinion on her testamentary capacity, there was no abuse of discretion in refusing to allow them to go over the will, pointing out the alleged defects which indicated that testatrix was afflicted with such disease. Henning v. Stevenson [Ky.] 80 S. W. 1135.

20. Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515.

21. Coman v. Wunderlich [Wis.] 99 N. W. 612. The compensation received by an expert and his relation to the party for whom he testifies may be shown. Chicago City R. Co. v. Handy, 208 Ill. 81, 69 N. E. 917; Brown v. Interurban St. R. Co., 94 App. Div. 374, 87 N. Y. S. 461. If a hypothetical question omits facts claimed to have been proven by the adverse party, such party may call the witness' attention to such omitted facts on cross-examination (Chicago, etc., R. Co. v. Wallace, 202 Ill. 129, 66 N. E. 1096), and ask a hypothetical question based on his view of the proven facts (Chicago City R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28; City of Aledo v. Honeyman, 208 Ill. 415, 70 N. E. 338; Parrish v. State, 139 Ala. 16, 36 So. 1012). When one party has examined a witness as an expert, the adverse party may properly ask an expert opinion of him in cross-examination. McGarrity v. New York, etc., R. Co. [R. I.] 55 A. 718.

22. Carr v. American Locomotive Co. [R. I.] 58 A. 678. An expert who has testified that if a boiler and pipes of a heating plant had been covered with asbestos, better results would have been obtained, may state on cross-examination, whether it was customary to use asbestos if not specified in the contract. Matthews v. Farrell [Ala.] 37 So. 325. Experts having testified to the competency of one claimed to have been insane were properly cross-examined as to her ability to care for herself and her property, unassisted. In re Daniels, 140 Cal. 335, 73 P. 1053. A witness who has given an estimate of the damage per acre to farm land by the crossing of a railway may be cross-examined as to his knowledge and the elements of his judgment, but may not be asked why he did not estimate the value in a different stated sum. Illinois, etc., R. Co. v. Freeman, 210 Ill. 270, 71 N. E. 444. Where an expert has testified as to what danger he could see and appreciate in a cotton picking machine, it was proper to ask him on cross-examination if he had taken steps to learn what danger a man of less than ordinary intelligence, like plaintiff, could see and appreciate in the same machine. Kasjeta v. Nashua Mfg. Co. [N. H.] 58 A. 874. One who testified that goods received were brass and not gold as ordered could be asked to say whether a given article shown him was brass or gold. Coman v. Wunderlich [Wis.] 99 N. W. 612.

It is improper for the judge to ask of a witness who has testified as an expert such questions as to indicate an opinion that the testimony is improbable or erroneous. City of Columbus v. Anglin [Ga.] 48 S. E. 318.

Books of science: A medical work is inadmissible to contradict a medical expert. Mitchell v. Leech [S. C.] 48 S. E. 290. Books of science and art are inadmissible to prove the opinion of experts stated therein. Quattlebaum v. State, 119 Ga. 433, 46 S. E. 677.

§ 10. *Real or demonstrative evidence.*[23]—Real evidence is admissible[24] if relevant,[25] and exhibition of injuries to the jury is permitted in nearly all jurisdictions.[26] But a demonstration of the alleged effects of an inquiry, under the sole control of the witness, is improper.[27] Photographs and diagrams are admissible when shown to be correct,[28] unless the subject is entirely capable of verbal

Medical works are hearsay and inadmissible, as are recitals of their contents by witnesses. But specific works may be referred to on cross-examination of experts who base their testimony upon them. Baily v. Kreutzmann, 141 Cal. 519, 75 P. 104.

23. See 1 Curr. L. 1163.

24. Torn garment admissible on issue of manner in which death was caused in an accident. Northern Alabama R. Co. v. Mansell [Ala.] 36 So. 459. A brakebeam, introduced merely to show operation of the brake and not a defect therein, is admissible without a showing that it was in the same condition as at the time of the occurrence in question. Bernard v. Pittsburg Coal Co. [Mich.] 100 N. W. 396.

25. In action for injury caused by a defective burner valve, another valve, not a burner valve, could not be exhibited to show wherein the burner valve was defective. Carr v. American Locomotive Co. [R. I.] 58 A. 678. Putting four witnesses on the stand and asking each his age, in order to allow the jury to compare them with alleged minors to whom liquor had been sold, was improper. Poynor v. Holzgrat [Tex. Civ. App.] 79 S. W. 829.

26. Not error to permit plaintiff to exhibit his injured limb to the jury. Chicago, etc., R. Co. v. Krayenbuhl [Neb.] 98 N. W. 44. It is proper for plaintiff, while testifying, to exhibit his injuries to the jury, when such examination is not such as to prejudice or unduly influence them. Missouri, etc., R. Co. v. Moody [Tex. Civ. App.] 79 S. W. 856. It is improper to permit examination of a man's private parts by the jury. Garvik v. Burlington, etc., R. Co. [Iowa] 100 N. W. 498.

27. The allowing of a witness to exhibit himself to the jury in the act of writing his name and of taking a drink of water, for the purpose of showing a nervous affection alleged to be the result of the injuries complained of, is beyond the ordinary tests of examination, and unfair and improper. Being a matter of discretion, it is not reversible by N. Y. court of appeals. Clark v. Brooklyn Heights R. Co., 177 N. Y. 359, 69 N. E. 647.

28. Photographs of place where an injury occurred were admissible on a showing that they correctly represented the street at the time of the injury. City of Huntington v. Lusch [Ind. App.] 70 N. E. 402. Photographs of decedent before and after the accident, in action for wrongful death. Davis v. Seaboard Air Line R. [N. C.] 48 S. E. 591. In prosecution for burning a building with intent to defraud the insurer, a photograph, properly verified, of the burned building, was admissible, though it contained other buildings, some partially burned in a previous fire, the court limiting the jury to inferences concerning the one building mentioned in the indictment. Commonwealth v. Fielding, 184 Mass. 484, 69 N. E. 216. Photographs of defective sidewalk taken two months after accident admissible when it was shown that its condition was unchanged. City of San Antonio v. Talerico [Tex. Civ. App.] 78 S. W. 28. Photographs of repairs in a sidewalk some months after an accident were admissible, the fact of the repairs having been shown by defendant, to show the extent of the defect. Id. A photograph of plaintiff inadmissible because there was no proof of its correctness. Martin v. Moore [Md.] 57 A. 671. A diagram shown to be a correct representation of the thing to be described is admissible, though not prepared by the witness testifying. Koon v. Southern R. [S. C.] 48 S. E. 86.

Evidence showing photographs to be correct representations of a defective walk at the time of an accident was admissible. City of Antonio v. Talerico [Tex. Civ. App.] 78 S. W. 28. A photograph of a place where an accident occurred may be shown to be correct by a witness familiar with the locality, though not present when the picture was taken. Hebbe v. Maple Creek [Wis.] 99 N. W. 442.

NOTE. Photographs as evidence: Judicial cognizance is taken of the fact that photography is the art of producing facsimiles or representations of objects by the action of light on a prepared surface (Luke v. Calhoun County, 52 Ala. 118), and that civilized communities rely upon photographic pictures (Cowley v. People, 83 N. Y. 464, 38 Am. Rep. 464). As to the character of photographs as evidence and the reasons why they are competent as such, see Franklin v. State, 69 Ga. 42, 47 Am. Rep. 748; Kansas City, etc., R. Co. v. Smith, 90 Ala. 25, 24 Am. St. Rep. 753.

Photographs are usually considered merely secondary evidence (Bliss v. Johnson, 76 Cal. 597), and a foundation must be laid for their admission by showing them to be correct (Reddin v. Gates, 52 Iowa, 210; Blair v. Pelham, 118 Mass. 421; Leidlein v. Meyer, 95 Mich. 586), and that the objects photographed are not, and cannot be, produced in court (Maclean v. Scripps, 52 Mich. 214; Eborn v. Zimpelman, 47 Tex. 503, 26 Am. Rep. 319), or that a view by the jury of the premises photographed was impracticable (Omaha Southern R. Co. v. Beeson, 36 Neb. 361; Church v. Milwaukee, 31 Wis. 512).

Following are illustrative cases in which photographs have been admitted in evidence: First, of premises or places. Archer v. New York, etc., R. Co., 106 N. Y. 598; Church v. Milwaukee, 31 Wis. 512; Locke v. Sioux City, etc., R. Co., 46 Iowa, 109. Second, of persons. (a) To prove identity. United States v. A Lot of Jewelry, 59 F. 684. (b) To prove paternity. A photograph of the putative father, who was dead, was admitted, for the purpose of comparison with child in court in Shorten v. Judd, 56 Kan. 44, 54 Am. St. Rep. 587. But such evidence is said to be entitled to little weight in Re Jessup's Estate, 81 Cal. 408, 6 L. R. A. 594. (c) To show a physical injury. People v. Fish, 125

description.[29] Permission to perform experiments in the presence of the jury cannot be demanded as a right, but is discretionary with the court.[30] Such experiments are permissible only when such a similarity of conditions has been made to appear as will insure a reasonably just and accurate comparison.[31] Evidence of experiments or tests, not made in court, is admissible only after a showing that the experiments were fairly and honestly made,[32] and that the conditions surrounding such experiments were similar to those surrounding the occurrence in question.[33]

§ 11. *Quantity required and probative effect.*[34]—The probative tendency of evidence is for the court; its probative force for the jury.[35] A preponderance[36] of evidence is all that is required to maintain an issue of fact in a civil action,[37] though based on acts which constitute a crime.[38] A prima facie case will support a verdict, if uncontroverted,[39] and in the absence of evidence,[40] or where the evidence is evenly balanced,[41] the decision should be against the party having the burden of proof. Evidence may be sufficient to sustain a cause of action, though circumstantial.[42] A proposition is not proved until the evidence becomes incon-

N. Y. 136; Alberti v. New York, etc., R. Co., 118 N. Y. 77, 6 L. R. A. 765. Third, of documents. Arthur v. Roberts, 60 Barb. [N. Y.] 580; Duffin v. People, 107 Ill. 113, 47 Am. Rep. 431. Fourth, of handwriting. Marcy v. Barnes, 16 Gray [Mass.] 161, 77 Am. Dec. 405; Rowell v. Fuller, 59 Vt. 688; Howard v. Russell, 75 Tex. 176.

X-ray photographs have also been admitted in evidence. Smith v. Grant, 29 Chicago Leg. News, 145; Bruce v. Beall, 99 Tenn. 303.

For further discussion of the subject, see notes in 75 Am. St. Rep. 468, and note to Hampton v. Norfolk & Western R. Co. [N. C.] 35 L. R. A. 808.

29. Photograph of personal injuries held inadmissible. Cirello v. Metropolitan Exp. Co., 88 N. Y. S. 932.

30. Carr v. American Locomotive Co. [R. I.] 58 A. 678.

31. Error to permit experiments, in action for damages to plaintiff's farm by sulphur fumes from defendant's smelter, in absence of proof that the elements which combined to produce the experimental results were the same as those which caused the alleged damage at plaintiff's farm. Rowe v. Northport Smelting & Refining Co., 35 Wash. 101, 76 P. 529.

32. Evidence of experiments in running street cars around a curve at high speed shown to have been made by experts, and fairly conducted, were admissible to sustain the experts' opinions. Cheetham v. Union R. Co. [R. I.] 58 A. 881. A foundation must be laid for evidence of an experiment by an onlooker, by showing it was made by a competent person, with suitable apparatus in proper condition, and that the experiment was honestly and fairly made. Stopping a street car. Omaha St. R. Co. v. Larson [Neb.] 97 N. W. 824.

33. Experiments in running street cars around a curve could not be testified to, when it appeared they were not made under the same conditions as those attending the accident in question. Halversen v. Seattle Elect. Co. [Wash.] 77 P. 1059. Conditions of experiments in running an engine round a curve in order to test the extent of vision of the track ahead, held sufficiently similar to those of the accident in question, to render evidence thereof admissible. Olivaras v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 77 S. W. 981. Evidence of experiments held properly excluded when no attempt was made to show similarity of conditions. La Porte Carriage Co. v. Sullender [Ind. App.] 71 N. E. 922.

34. See 1 Curr. L. 1164.

35. Southern Loan & Trust Co. v. Benbow, 135 N. C. 303, 47 S. E. 435. The weight of testimony and credibility of witnesses is for the jury. Nickey v. Zonker, 31 Ind. App. 88, 67 N. E. 277. See, also, the topics Directing Verdict and Demurrer to Evidence, 3 Curr. L. 1093; Discontinuance, Dismissal and Nonsuit, 3 Curr. L. 1097.

36. The preponderance of the evidence which must be produced by the party having the burden of proof in civil cases is that superior weight of the evidence upon the issues involved which is sufficient to incline a reasonable or impartial mind to one side of the issue rather than the other. Supreme Conclave Knights of Damon v. Wood, 120 Ga. 328, 47 S. E. 940.

37. Davidson's Estate v. Davidson [Neb.] 97 N. W. 797; Link v. Campbell [Neb.] 100 N. W. 409; Colburn v. Wilmington [Del.] 56 A. 605.

38. Civil suit for assault and battery. Blackmore v. Ellis [N. J. Err. & App.] 57 A. 1047.

39. Klein v. East River Elec. Light Co., 90 App. Div. 92, 86 N. Y. S. 164.

40. Dieterle v. Bekin [Cal.] 77 P. 664.

41. Indianapolis St. R. Co. v. Schmidt [Ind.] 71 N. E. 201. Where plaintiff's case rested on his own uncorroborated testimony and defendant's witnesses testified to facts which if true would prevent a recovery, and the probabilities favored defendant's theory, a verdict for plaintiff was against the weight of the evidence. Reilly v. Interurban St. R. Co., 87 N. Y. S. 423.

42. Wabash Screen Door Co. v. Black [C. C. A.] 126 F. 721. To entitle a jury to draw inferences of fact from circumstantial evidence, the circumstances must be proved as facts and cannot be themselves presumed. Cunard S. S. Co. v. Kelley [C. C. A.] 126 F. 610.

sistent with the negative.[43] The quantity of proof required in particular cases may be fixed by statute.[44]

An expert opinion is not, of course, conclusive,[45] even though uncontradicted,[46] and cannot overcome positive, uncontradicted testimony to a fact.[47]

The rule that affirmative testimony is to be preferred to negative is not absolute and does not require the rejection of negative testimony, unless inconsistent with the affirmative.[48] The undisputed,[49] reasonable evidence of one witness, though a party interested, should control as to a question of fact.[50] Where the testimony of several witnesses relates to separate transactions, the entire proof is no stronger than the testimony of the strongest witness.[51] Irrelevant evidence, if admitted, is ineffective.[52]

Testimony, where received, in regard to transactions with a person since deceased,[53] mere casual admissions,[54] and statements of mere sense impressions or judgments as to time,[55] are said to be entitled to little weight.

Public records[56] and affidavits attached thereto as required by law[57] are conclusive. Maps of a coast line are entitled to little weight, when changes are shown to be constantly taking place.[58] Standard mortality tables are not con-

43. Smith v. Lawrence, 98 Me. 92, 56 A. 455.

44. Contracts or agreements above $500 in value, and mandates, must be proved by at least one credible witness and other corroborative circumstances [Civ. Code, art. 2277]. Hannay v. New Orleans Cotton Exch., 112 La. 998, 36 So. 831.

45. Opinions of handwriting experts said to be valuable only when supported by satisfactory reasons. In re Burtis' Will, 43 Misc. 437, 89 N. Y. S. 441. On questions of mental capacity, the opinions of experts without personal knowledge of the individual in question is not entitled to greater weight than the opinions of nonexperts who have personally known and observed the individual. In re Peterson's Will [N. C.] 48 S. E. 561.

46. An expert opinion as to the necessity of moving a dangerous switch is not binding on a jury, though uncontradicted. Baltimore & O. R. Co. v. Baltimore [Md.] 56 A. 790.

47. Western & A. R. Co. v. Robinson, 119 Ga. 331, 46 S. E. 425. Opinions of physicians as to testator's capacity, based on their observation, could not prevail against evidence of acts by him showing testamentary capacity. In re Klein's Estate, 207 Pa. 191, 56 A. 422. Two witnesses having testified to an inspection and test of a chain and to finding it sound, the opinions of two experts that there must have been a crack in the chain at the time of the inspection were insufficient to discredit the previous testimony and show negligence. Johnston v. Turnbull [C. C. A.] 130 F. 769.

48. The rule rests upon common experience and is applied as a means of determining the relative weight of conflicting testimony. Chicago & N. W. R. Co. v. Andrews [C. C. A.] 130 F. 65. The situation of the witnesses testifying negatively and affirmatively may be such that their testimony may not be in conflict. Chicago & N. W. R. Co. v. Andrews [C. C. A.] 130 F. 65.

49. Direct testimony of a witness, though not contradicted, is not necessarily undisputed evidence. Lewis v. Lewis, 76 Conn. 586, 57 A. 735.

50. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. The positive statement of a witness that a certain person executed an instrument is not overcome by a showing that it was not signed in his presence. Bauer v. State [Cal.] 78 P. 280.

51. Grantham v. Gossett [Mo.] 81 S. W. 895.

52. Its admission is not ordinarily cause for granting a new trial. Travelers' Ins. Co. v. Thornton, 119 Ga. 455, 46 S. E. 678.

53. Parol testimony as to transactions with one long since dead is the weakest species of evidence. Hannay v. New Orleans Cotton Exch., 112 La. 998, 36 So. 831. Testimony relating to conversations with persons since deceased must be received with caution. Grantham v. Gossett [Mo.] 81 S. W. 895. Contracts alleged to have been made with deceased persons, to be enforced after death, must be established by clear and convincing proof. Roberge v. Bonner, 94 App. Div. 342, 88 N. Y. S. 91.

54. Mere casual admissions are to be received with caution; sworn admissions are entitled to great weight, but are not conclusive. Anderson v. Davis [W. Va.] 47 S. E. 157. Casual verbal admissions, uncorroborated, after a great lapse of time should be given little probative force. Roberge v. Bonner, 94 App. Div. 342, 88 N. Y. S. 91.

55. Statement of a witness that within two seconds after hearing a cry he pushed a button, shutting off power. Desrosiers v. Bourn [R. I.] 58 A. 627.

56. Blue Mountain Iron & Steel Co. v. Portner [C. C. A.] 131 F. 57.

57. The affidavit of the deputy tax commissioner, and certificate of the board of taxes and assessments of New York City, required by law to be attached to the assessment roll, are conclusive of the facts recited therein. City of New York v. Vanderveer, 91 App. Div. 303, 86 N. Y. S. 659.

58. Old maps of Long Island Beach were slight evidence of the condition of the beach 50 years earlier, though shown to be correct when made, when changes were shown to be constantly taking place in the outline

clusive as to expectancy of life.[59] A statement of account containing credit and debit items proves its balance only.[60]

The recitals in public legislative acts are evidence of the facts recited; recitals in private acts are not.[61]

One who introduces a pleading of the adverse party[62] or a deposition taken by him[63] makes the evidence his own.

EXAMINATION OF WITNESSES.

§ 1. General Rules of Examination (1383). Refreshing Memory (1386). Responsiveness (1387).

§ 2. Cross-examination (1387). Limitation to Scope of Direct Examination (1388). Limitation to Issues (1390). Examination Going to Credibility of Witness (1391). As to Probability of Testimony (1393). Examination as to Documents (1394).

§ 3. Redirect Examination (1394).

§ 4. Recalling of Witness for Further Examination (1395).

§ 5. Privilege of Witness (1396).

§ 1. *General rules of examination.*[64]—It is within the sound discretion of the court to control the detailed examination of witnesses.[65] Questions asked with a purpose of leading the jury to infer something not admissible should be prohibited.[66] Questions should be definite,[67] and contain a single interrogatory.[68]

Proof of experiments to illustrate testimony,[69] and permission to perform them in the presence of the jury, is discretionary.[70]

The court may question a witness,[71] though his questions are in the nature

and inlets of the beach. Sandiford v. Hempstead, 97 App. Div. 163, 90 N. Y. S. 76.

59. Carlisle tables. Farrell v. Chicago, etc., R. Co., 123 Iowa, 690, 99 N. W. 578.

60. Other evidence relative to the subject-matter of an account is considered, and neither side is conclusive evidence of what it discloses. Simpson v. First Nat. Bank [C. C. A.] 129 F. 257.

61. Since all persons are, in contemplation of law, privy to the making of public, but not of private, acts. Davis v. Moyels [Vt.] 56 A. 174. Petitions to the general assembly of Vermont and private acts passed pursuant to such petitions, granting certain lands, all reciting confiscation of the lands by the state, are not evidence of such confiscation so as to show title in the state, and through it in plaintiff, as against a stranger to the title by grant. Id.

62. A party introducing in evidence the pleadings of the adverse party is bound by the allegations therein. Yates v. People, 207 Ill. 316, 69 N. E. 775. A plaintiff who introduces in evidence a paragraph of defendant's answer is not bound by it in its entirety, but may rebut the parts unfavorable to him; and the jury may believe or disbelieve such parts. Christian v. Macon R. & Light Co., 120 Ga. 314, 47 S. E. 923.

63. A party introducing a deposition taken by his adversary makes it his own and the adverse party is not bound by it. Von Tobel v. Stetson & Post Mill Co., 32 Wash. 683, 73 P. 788.

64. See 1 Curr. L. 1165.

65. And unless an abuse of this judicial discretion is shown, it will not be controlled on appeal. Fields v. State [Fla.] 35 So. 185. The examination of a bankrupt's wife must be allowed a certain latitude, that it may be determined whether a business conducted by her is her husband's. In re Worrell, 125 F. 159. It is not an abuse of discretion to allow the stenographer to read three times, and in the presence of the jury, certain testimony of plaintiff, given in his own behalf, and to allow him to correct a statement therein while he is still upon the stand. Equitable Life Assur. Soc. v. Maverick [Tex. Civ. App.] 78 S. W. 560. See 1 Curr. L. 1165, n. 1.

66. Streeter v. Marshalltown, 123 Iowa, 449, 99 N. W. 114; Lassig v. Barsky, 87 N. Y. S. 425.

67. "What did you do" without more is objectionable. Fredrick Mfg. Co. v. Devlin [C. C. A.] 127 F. 71. Exclusion of questions so indefinite as to offer no means of determining their relevancy is not error. Roche v. Baldwin, 143 Cal. 186, 76 P. 956. A question that can be answered as well by illegal as by legal testimony is too general. Beall Bros. v. Johnstone [Ala.] 37 So. 297. An impeaching question whether witness' testimony is the same as on a former trial is too indefinite. Mitchell v. State [Ala.] 37 So. 76. See 1 Curr. L. 1165, n. 2. A question so indefinite that impertinent facts would be responsive to it is properly overruled. Ross v. State, 139 Ala. 144, 36 So. 718.

68. Question to expert answerable by yes or no but calling for his opinion on several propositions. Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 P. 164. See 1 Curr. L. 1165, n. 3.

69. Lillie v. State [Neb.] 100 N. W. 316.

70. Carr v. American Foundry Co. [R. I.] 58 A. 678. See 1 Curr. L. 1165, n. 5.

71. Unfair question held cured by reply. State v. Lyons [N. J. Err. & App.] 58 A. 398. Question held proper. Perry v. Cobb [Ind. T.] 76 S. W. 289. Not error to ask a witness during cross if she understands the meaning of a word used. Washington v. State [Tex. Cr. App.] 79 S. W. 811. See 1 Curr. L. 1166, n. 6.

of a cross-examination,[72] and the court may repeat a question to a witness and require an answer after he has been stood aside where he failed to answer when asked.[73]

Expert witnesses may be instructed by the court to make their answers as concise as possible,[74] and it is not prejudicial for the district attorney to state to the witness, "This is an important matter and you must be positive."[75]

Questions should not assume facts not proved[76] or controverted,[77] especially where the witness denies them, and proof is essential as a basis for further inquiry;[78] nor should questions call for conclusions,[79] especially as to the merits of the case,[80] or involving the credibility of other witnesses,[81] except as to matters provable only by expert testimony.[82]

In a proper case, the court may enter a rule excluding from the court room all witnesses except the one testifying.[83]

A witness refusing to answer proper questions may be committed for contempt.[84]

Where plaintiff's wife is called as a witness for defendant, plaintiff's counsel should not be permitted to converse with her before testifying,[85] but where a co-defendant not on trial is called by defendant as a witness, he is properly allowed private conversation with his counsel before testifying, though counsel for defendant are properly refused a like privilege,[86] and the court in its discretion may refuse defendant permission to consult with his counsel during cross-examination.[87] A witness stating an inability to state the exact amount may be asked to estimate.[88] The sustaining of an objection to a question which has been answered does not take the answer away from the jury.[89]

Repetitions[90] of questions previously asked and allowed are properly disal-

72. Fitzjohn v. St. Louis Transit Co. [Mo.] 81 S. W. 907.

73. Eekhout v. Cole, 135 N. C. 583, 47 S. E. 655.

74. State v. Carpenter [Iowa] 98 N. W. 775.

75. Cruse v. State [Tex. Cr. App.] 77 S. W. 818.

76. Currelli v. Jackson [Conn.] 58 A. 762; Roche v. Baldwin, 143 Cal. 186, 76 P. 956; White v. Boston [Mass.] 71 N. E. 75; State v. Williams, 111 La. 205, 35 So. 521. Question on redirect is not bad for assuming fact that was assumed in questions on direct and cross. Newcomb v. New York, etc., R. Co. [Mo.] 81 S. W. 1069. See 1 Curr. L. 1166, n. 8.

77. Plaintiff in personal injury case should not be asked what was her condition at a certain time "as a result of the injury." Fallon v. Rapid City [S. D.] 97 N. W. 1009. Question held not improper as assuming plaintiff's injury. Cronk v. Wabash R. Co., 123 Iowa, 349, 98 N. W. 884.

78. Bernstein v. Lester, 84 N. Y. S. 496.

79. Coldren v. Le Gore, 118 Iowa, 212, 91 N. W. 1066; Sothman v. State [Neb.] 92 N. W. 303; State v. Evans, 122 Iowa, 174, 97 N. W. 1008. "Was he ever there when he did not have any business there, at night, that you know of?" held under circumstances not to call for conclusion. Christensen v. Thompson, 123 Iowa, 717, 99 N. W. 591. "What was the first point at which the train could be seen on account of the bushes?" does not call for a conclusion. Kansas City, etc., R. Co. v. Weeks, 135 Ala. 614, 34 So. 16. Condition, and inferences to be drawn from condition of electric cut off boxes. Dallas Elec. Co. v. Mitchell [Tex. Civ. App.] 76 S. W. 935. See 1 Curr. L. 1166, n. 9.

80. Whether plaintiff was negligent, the issue being contributory negligence vel non. Black v. Rocky Mountain Bell Tel. Co., 26 Utah, 451, 73 P. 514.

81. Davis v. Collins [S. C.] 48 S. E. 469.

82. Hedlun v. Holy Terror Min. Co., 16 S. D. 261, 92 N. W. 31. A question addressed to an expert is not objectionable as calling for a conclusion, though he is plaintiff in the case. International, etc., R. Co. v. Collins [Tex. Civ. App.] 75 S. W. 814.

83. Exception may be made in favor of deputy sheriff called as a witness for state. Lax v. State [Tex. Cr. App.] 79 S. W. 578. Unintentional violation of rule unknown to party or counsel should not prohibit witness from testifying. Clemmons v. Clemmons, 1 Neb. Unoff. 880, 96 N. W. 404.

84. In re Bishop, 40 Misc. 64, 81 N. Y. S. 252; King v. Ashley, 96 App. Div. 143, 89 N. Y. S. 482. A banker is not privileged as to the amount of a depositor's balance. In re Davies [Kan.] 75 P. 1048; In re Briggs, 135 N. C. 118, 47 S. E. 403.

85. Vanderbilt v. Central R. Co. [N. J. Law] 58 A. 91.

86. State v. Gosey, 111 La. 616, 35 So. 786.

87. Pettis v. State [Tex. Cr. App.] 81 S. W. 312.

88. Bullock v. White Star S. S. Co., 30 Wash. 448, 70 P. 1106.

89. North Pacific Lumber Co. v. Spore, 44 Or. 462, 75 P. 890.

90. See 1 Curr. L. 1166.

lowed,[91] even on cross-examination,[92] though it is not error to allow the reiteration of a question on cross-examination where a witness is being probed as to previous contradictory statements.[93]

Leading questions[94] are those which suggest to the witness the answer desired.[95] Their allowance is discretionary,[96] and the rule against their use is frequently relaxed in favor of females asked embarrassing questions,[97] or where the witness testifies through an interpreter,[98] or has an imperfect command of the vernacular.[99] And a leading question may be proper on redirect, to call forth an explanation of matters brought out on cross,[1] or to direct attention to a previous statement,[2] or to probe a hostile or reluctant witness;[3] but a witness who is neither unwilling nor adverse should not be led by reference to his former testimony,[4] though where it fairly appears that the witness is evasive, he may be probed by leading questions, though he states that he is friendly to the questioner.[5] Leading questions may be asked of a grand juror as on cross-examination, where he is examined under the statute to contradict a witness who has appeared before the jury.[6] Questions addressed to experts are not objectionable as leading,[7] but a party testifying should not be led by his counsel.[8] The rejec-

91. Deitch v. Feder, 86 N. Y. S. 802; State v. Roller, 30 Wash. 692, 71 P. 718; Finlen v. Heinze, 28 Mont. 548, 73 P. 123; Ries v. St. Louis Transit Co. [Mo.] 77 S. W. 734. Repetition on redirect of testimony in chief is not permissible. Hayes v. Metropolitan St. R. Co., 84 N. Y. S. 271. See 1 Curr. L. 1166, n. 10.

92. Parrish v. State, 139 Ala. 16, 36 So. 1012; People v. Linares, 142 Cal. 17, 75 P. 308. It is not error to sustain an objection to a question asked a witness tending to show his interest in the result of the prosecution, where sufficient similar questions have been asked and answered to place the matter before the jury. Asking a witness whether he was after the conviction of the defendant or the reward offered. Porter v. People, 31 Colo. 508, 74 P. 879. Court may refuse cross question whether witness has not testified thusly, though specific objection is not interposed. McCartney v. Washington [Iowa] 100 N. W. 80.

93. Entries in memorandum diary. People v. Dowell, 141 Cal. 493, 75 P. 45.

94. See 1 Curr. L. 1166.

95. Dallas Electric Co. v. Mitchell [Tex. Civ. App.] 76 S. W. 935; St. Louis & S. W. R. Co. v. Hall [Tex. Civ. App.] 81 S. W. 571. Questions to plaintiff injured while riding on a car "Did you afterwards see what it was that ran into the car?" (Brand v. Borden's Condensed Milk Co., 88 N. Y. S. 460), to a physician, "Then, in your judgment, if I understand you, on examination on the second day you found no evidence that the condition you found existed prior to the time she was hurt" (Denison & S. R. Co. v. Powell [Tex. Civ. App.] 80 S. W. 1054), what plaintiff did "with reference to going directly to his boss" (Galveston, etc., R. Co. v. Walker [Tex. Civ. App.] 76 S. W. 228), and whether insured ever consulted a physician within 5 years prior to a certain date (Brock v. United Moderns [Tex. Civ. App.] 81 S. W. 340), have been sustained as not leading.

"This is the only instance that you know of isn't it?" (City of Huntington v. Lusch [Ind. App.] 70 N. E. 402); "When D. was drinking, is it not true he was a fussy overbearing man?" (Gordon v. State [Ala.] 36 So. 1009); "From your experience as a cattleman, were the cattle more than ordinarily breachy or more apt than the general run of cattle to break through fences?" (Perry v. Cobb [Ind. T.] 76 S. W. 289); and a question to plaintiff suing for fall on sidewalk "Did the things you had in your arms as you have described them have any effect on your attention?" (Lyon v. Grand Rapids [Wis.] 99 N. W. 311) are leading.

96. Hiersche v. Scott [Neb.] 95 N. W. 494; Von Tobel v. Stetson & Post Mill Co., 32 Wash. 683, 73 P. 788; Hefferlin v. Karlman [Mont.] 74 P. 201; People v. Nunley, 142 Cal. 441, 76 P. 45; O'Dell v. State, 120 Ga. 152, 47 S. E. 577; Richmond & P. Elec. R. Co. v. Rubin [Va.] 47 S. E. 834; Koon v. Southern R. Co. [S. C.] 48 S. E. 86; Norfolk & W. R. Co. v. Briggs [Va.] 48 S. E. 521; State v. Williams, 111 La. 205, 35 So. 521.

97. A question strictly leading may be asked a woman to relieve her of the necessity of using the language. Missouri, etc., R. Co. v. McCutcheon [Tex. Civ. App.] 77 S. W. 232. Conviction of rape not reversed on account of leading questions to prosecutrix, a child, timid and embarrassed. Ham v. State [Tex. Cr. App.] 78 S. W. 929. Prosecutrix in rape may be led in a proper case. State v. Burns, 119 Iowa, 663, 94 N. W. 238.

98. Indiana R. Co. v. Maurer, 160 Ind. 25, 66 N. E. 156; Josephson v. Sigfusson [N. D.] 100 N. W. 703.

99. Christensen v. Thompson, 123 Iowa, 717, 99 N. W. 591.

1. State v. Botha, 27 Utah, 289, 75 P. 731.

2. Gulf, etc., R. Co. v. Hall [Tex. Civ. App.] 80 S. W. 133.

3. Blair v. State [Neb.] 101 N. W. 17.

4. Sylvester v. State [Fla.] 35 So. 142.

5. Missouri, etc., R. Co. v. McAnaney [Tex. Civ. App.] 80 S. W. 1062.

6. Dean v. Com., 25 Ky. L. R. 1449, 78 S. W. 1112.

7. St. Louis S. W. R. Co. v. Hall [Tex. Civ. App.] 81 S. W. 571. Though the person

tion of a proper question on the ground that it is leading is rendered harmless by subsequently showing the same fact by the witness.[9]

Refreshing memory.[10]—A witness may refresh his memory from a memorandum which he has participated in making and of the accuracy of which he has knowledge,[11] though he has no independent recollection of all the facts therein stated.[12] Where the witness has a clear and independent recollection after refreshing his memory, it is immaterial that the instrument used was a copy made some time after the original,[13] or that the memorandum was not made by the party testifying.[14] But a newspaper article which witness had no part in preparing cannot be used on cross-examination.[15] A witness may refer to a transcript of his evidence at a former trial,[16] and where a party is surprised by the testimony of his own witness, he may interrogate him with reference to previous contradictory statements with a view to test his recollection and lead him if mistaken to review what he has said.[17] But where a witness fails to testify as expected, counsel cannot refresh his memory by reading from the transcript of his former testimony and then ask him if it is not true.[18] Defendant may read to plaintiff's witness from the stenographic report of his testimony at a former trial.[19] The memorandum used by the witness may be shown in evidence,[20] not as independent proof, but to supply the details of what the witness has sworn to generally,[21] and where papers are so used on direct examination, their production for the use of the cross-examiner should be compelled;[22] but a memorandum proper to be used to refresh witness' recollection but not in fact so used cannot be used as original evidence,[23] and where it is not shown that the memorandum was contemporaneously made and known to be correct, its introduction is error.[24] The court may control the mode of refreshing a witness by his previous testimony so as to prevent his being seemingly impeached.[25]

qualifying is plaintiff in the case. International, etc., R. Co. v. Collins [Tex. Civ. App.] 75 S. W. 814. Witness giving estimates as to value of property in burned barn should not be led. St. Louis Southwestern R. Co. v. Crabb [Tex. Civ. App.] 80 S. W. 408.

8. Vanderbilt v. Central R. Co. [N. J. Law] 58 A. 91.

9. Lyles v. U. S., 20 App. D. C. 559.

10. See 1 Curr. L. 1167.

11. Taft v. Little, 178 N. Y. 127, 70 N. E. 211; First Nat. Bank v. Yeoman [Okl.] 78 P. 388. Inventory prepared under direction of witness, the secretary of a corporation. Wells Whip Co. v. Tanners' Mut. Fire Ins. Co. [Pa.] 58 A. 894. Inventory of goods seized on replevin. Rogers v. U. S. Fidelity & Guarantee Co., 84 N. Y. S. 203. List of household furniture converted. Heyert v. Reubman, 86 N. Y. S. 797. A memorandum from which a contract was made may be used by plaintiff where defendant denies ever having made a contract and plaintiff claims defendant has it. Simpson v. Weise, 34 Wash. 360, 75 P. 973. Memorandum of items of cost of repacking cotton after fire. Southern R. Co. v. Wilson, 138 Ala. 510, 35 So. 561. See 1 Curr. L. 1167, n. 19.

12. Mayberry v. Holbrook, 182 Mass. 463, 65 N. E. 849. See 1 Curr. L. 1167, n. 20.

13. Transcript of stenographer's notes used by stenographer. Davis v. State [Fla.] 36 So. 170. A copy of a copy may be used, it being shown to be true. Brinkley Car Works Mfg. Co. v. Farrell [Ark.] 80 S. W. 749. See 1 Curr. L. 1168, n. 25.

14. Taft v. Little, 178 N. Y. 127, 70 N. E. 211. See 1 Curr. L. 1168, n. 23.

15. U. P. Steam Baking Co. v. Omaha St. R. Co. [Neb.] 94 N. W. 533.

16. Portsmouth St. R. Co. v. Peed's Adm'r [Va.] 47 S. E. 850. A state's witness may read the statement made and signed by him before the grand jury. Smith v. State [Tex. Cr. App.] 81 S. W. 936.

17. State v. Williams, 111 La. 179, 35 So. 505.

18. Commonwealth v. Bavarian Brew. Co. [Ky.] 80 S. W. 772.

19. Southern R. Co. v. Shelton, 136 Ala. 191, 34 So. 194.

20. Referee is entitled to have contents of books so used stated and shown to him. Holt v. Howard [Vt.] 58 A. 797.

21. The witness being unable to give the details. First Nat. Bank v. Yeoman [Okl.] 78 P. 388.

22. Schwickert v. Levin, 76 App. Div. 373, 12 N. Y. Ann. Cas. 96, 78 N. Y. S. 394.

23. Hottle v. Weaver, 206 Pa. 87, 55 A. 838; Zwangizer v. Newman, 87 App. Div. 64, 83 N. Y. S. 1071. Transcript of testimony. Beavers v. Bowen [Ky.] 80 S. W. 1165. See 1 Curr. L. 1168, n. 26.

24. First Nat. Bank v. Yeoman [Okla.] 78 P. 388.

25. Leading questions overruled. Sylvester v. State [Fla.] 35 So. 142.

Interpreters[26] may be used when necessary,[27] and may be appointed by the court against the objection of the opposite party.[28]

Responsiveness.[29]—The objection of want of responsiveness is available only to the party propounding the question.[30] Immaterial and incompetent matter volunteered in reply to a proper question should be stricken out as unresponsive,[31] a motion for that purpose being the proper remedy, rather than objection to the question.[32] The remedy where testimony is volunteered without a question is also by motion to strike.[33] A mere prefatory statement by the witness, though neither pertinent nor responsive, will not justify reversal of a conviction.[34]

Character witnesses cannot be asked on direct what their relations with the person under investigation are,[35] nor whether they are acquainted with the general character of the person as a turbulent, violent and boisterous man.[36]

§ 2. *Cross-examination.*[37]—The limits within which cross-examination will be allowed rest very largely in the discretion of the trial judge, and his action will not be disturbed in the absence of a manifest abuse of such discretion.[38] A full and fair cross-examination of the witness, however, upon the subjects of the direct examination is a right, not a privilege,[39] and where it is not extended be-

26. See 1 Curr. L. 1168.

27. Indiana R. Co. v. Maurer, 160 Ind. 25, 66 N. E. 156.

28. Party impeding presentation of evidence by opposing use of interpreter cannot take advantage of lack of evidence of age of child. Menella v. Metropolitan St. R. Co., 43 Misc. 5, 86 N. Y. S. 930.

29. See 1 Curr. L. 1168.

30. Christensen v. Thompson, 123 Iowa, 717, 99 N. W. 591.

31. Question whether witness dealt with property as owner; answer, "Yes and as agent." Cooper Wagon & Buggy Co. v. Barnt, 123 Iowa, 32, 98 N. W. 356. Cross question. In re McKenna's Estate [Cal.] 77 P. 461. Answer as to how trap doors covering winze in mine and forming part of tram track were put in held not unresponsive. Tanner v. Harper [Colo.] 75 P. 404. The answer of a witness that the motorman was "doing all he could to stop" is not responsive to the question "Did you see him do anything to stop?" and should be excluded. Birmingham R. & Elec. Co. v. Jackson, 136 Ala. 279, 34 So. 994. Question "Didn't you say this was a sporting house?" Answer, "It had that reputation," is unresponsive. Ramsey v. Smith, 138 Ala. 333, 35 So. 325. Voluntary statement held not prejudicial where abundant evidence of same fact is produced. O'Neill v. Kansas City, 178 Mo. 91, 77 S. W. 64. Description of custom of oil brokers as to capacity of tanks held not responsive to question how many barrels it would take to fill order. Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co. [Tex. Civ. App.] 77 S. W. 961.

32. Nelson v. Young, 91 App. Div. 457, 87 N. Y. S. 69; Germinder v. Machinery Mut. Ins. Ass'n, 120 Iowa, 614, 94 N. W. 1108; People v. Cole, 141 Cal. 88, 74 P. 547. Overruling motion addressed to both is proper, the question being proper. Southern Ind. R. Co. v. Davis [Ind. App.] 68 N. E. 191.

33. Southern R. Co. v. Crowder, 135 Ala. 417, 33 So. 335.

34. State v. Brown, 111 La. 170, 35 So. 501.

35. Reputation of deceased for peace and quietude. State v. Crea [Idaho] 76 P. 1013.

36. Ross v. State, 139 Ala. 144, 36 So. 718.

37. See 1 Curr. L. 1169.

38. Josephson v. Sigfusson [N. D.] 100 N. W. 703; Forrester v. Boston & M. Consol. Copper & Silver Min. Co., 29 Mont. 397, 74 P. 1088; Wilson v. U. S. [Ind. T.] 82 S. W. 924. Mere repetitions of questions previously asked may be overruled. People v. Linares, 142 Cal. 17, 75 P. 308. Plaintiff in ejectment may be permitted to introduce defendant's deeds to his land on cross-examination of defendant, to show that no title to the land in dispute was conveyed by them. Patton v. Fox, 179 Mo. 525, 78 S. W. 804. It is not error to excuse a witness over the objection of counsel where said witness has been cross-examined for over three hours and the examination at the time she was sent from the stand was on matters upon which she had been fully examined. Washington v. State [Tex. Cr. App.] 79 S. W. 811. Code Civ. Proc. § 593. Not error for court to stop cross-examination after it has proceeded far enough to fully develop witness's knowledge. Fuqua v. Com. [Ky.] 81 S. W. 923.

39. The allowance is discretionary only after the right has been fairly exercised. Resurrection Gold Mining Co. v. Fortune Gold Mining Co. [C. C. A.] 129 F. 668; Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515; Chicago City R. Co. v. Creech, 207 Ill. 400, 69 N. E. 919. It is discretionary to refuse a thin cross-examination. Howard v. Com., 25 Ky. L. R. 2213, 80 S. W. 211. Defendant should be allowed to cross-examine plaintiff as to the items of the account sued on. Smith v. Castle, 81 App. Div. 638, 81 N. Y. S. 18. An officer suing a corporation for services performed outside his regular duties should be cross-examined as to what his regular duties are. Stout v. Security Trust & Life Ins. Co., 82 App. Div. 129, 81 N. Y. S. 708. Motive, interest or animus of witness for state in criminal case. Fields v. State [Fla.] 35 So. 185.

yond its proper scope, the fact that it tends to establish a defense to the action is no ground for its refusal.[40] Where a witness has been fully cross-examined as to a matter, it is not error to refuse further cross-examination as to the same matter when the witness is called in rebuttal.[41]

The right of the party calling him to cross-examine an adverse witness in chief does not extend to immaterial matters,[42] and where a party calls his opponent under the statute for cross-examination, whether the witness may be further examined by his own attorney at that time and as a part of his case, is discretionary with the court.[43]

Browbeating and insinuating questions not tending to elicit any valuable facts are not allowable,[44] and the use of the privilege as a means of conveying inadmissible matter to the jury warrants reversal.[45]

A witness cannot be asked whether he wrote a letter referred to in a letter in evidence, unless the letter referred to is put in evidence.[46] A stipulation that plaintiff is competent to testify as to value will not preclude his cross-examination by defendant on the subject of value.[47] A party cannot object to evidence he himself elicits on cross-examination.[48] Where a witness on cross-examination refuses to answer pertinent questions relating to testimony given on direct examination his testimony in chief should be stricken out.[49]

Limitation to scope of direct examination.[50]—Ordinarily in this country, cross-examination can only relate to facts and circumstances connected with matters shown on direct examination,[51] and if a party wants to go into other mat-

40. Resurrection Gold Min. Co. v. Fortune Gold Min. Co. [C. C. A.] 129 F. 668; Garlich v. Northern Pac. R. Co. [C. C. A] 131 F. 837. Inquiry into defendant's course of dealing with a corporation for which he was security. Thompson v. Purdy [Or.] 77 P. 113. Plaintiff in an action to set aside a will who has gone to great length into the question of what impression a subscribing witness had of the circumstances cannot object to his statement on cross-examination that he thought at the time that it was decedent's will. Mock v. Garson, 84 App. Div. 65, 82 N. Y. S. 310. Matters prejudicial to plaintiff suing as undisclosed principal in cross-examination of agent as witness for plaintiff. Hogen v. Klabo [N. D.] 100 N. W. 847.

41. Interest in case. State v. Pyscher, 179 Mo. 140, 77 S. W. 836.

42. Roche v. Llewellyn Iron Works Co., 140 Cal. 563, 74 P. 147.

43. Olson v. Aubolee [Minn.] 99 N. W. 1128.

44. State v. Miller, 43 Or. 325, 74 P. 658. The trial judge may raise objections to insinuating questions on his own motion, but it is not error for him to omit to do so until objection has been made by counsel. Hindle v. Holcomb, 34 Wash. 336, 75 P. 873.

45. Information that defendant in a personal injury case is insured against such losses. Lassig v. Barsky, 87 N. Y. S. 425. Compare Streeter v. Marshalltown, 123 Iowa, 449, 99 N. W. 114. Asking defendant's father what he gave a witness for testifying. Burks v. State [Ark.] 82 S. W. 490.

46. Simonds v. Cash [Mich.] 99 N. W. 754.

47. Chankalian v. Powers, 89 App. Div. 395, 85 N. Y. S. 753.

48. State v. Trusty, 122 Iowa, 82, 97 N. W. 989; Urdangen & G. Bros. v. Doner, 122 Iowa. 533, 98 N. W. 317.

49. Gallagher v. Gallagher, 92 App. Div. 138, 87 N. Y. S. 343.

50. See 1 Curr. L. 1169.

51. Black v. First Nat. Bank, 96 Md. 399, 54 A. 88; Resurrection Gold Min. Co. v. Fortune Gold Min. Co. [C. C. A.] 129 F. 668; Roche v. Baldwin, 143 Cal. 186, 76 P. 956; Fields v. State [Fla.] 35 So. 185; Stutsman v. Sharpless [Iowa] 101 N. W. 105; Garlich v. Northern Pac. R. Co. [C. C. A.] 131 F. 837; Dick v. Zimmerman, 207 Ill. 636, 69 N. E. 754; Horn v. State [Wyo.] 73 P. 705; Smith v. Shook [Mont.] 75 P. 513; Woods v. Faurot [Okl.] 77 P. 346. Though the trial court has a wide discretion, the appellate court will grant a new trial even for a relaxation of the rule when necessary to prevent serious injury to the rights of a party. O'Connell v. Pennsylvania Co. [C. C. A.] 118 F. 989. Exhibits should not be identified on cross except as they relate to the examination in chief. Kroetch v. Empire Mill Co. [Idaho] 74 P. 868. Where the testimony of a witness on a former trial is read from the shorthand notes of his testimony, while he is present in court, and he is called to the stand for further cross-examination, it is error to limit his cross-examination to matters not covered by his original testimony on the former trial. Lanza v. Le Grand Quarry Co. [Iowa] 100 N. W. 488.

Questions held proper: Cross-examination of architect held fairly within scope of direct as to responsibility of general contractor. Nelson v. Young, 91 App. Div. 457, 87 N. Y. S. 69. A witness testifying to intoxication of insured may be asked on cross-examination as to complaints made by insured as to pains in his head and chest. Union Life Ins. Co. v. Jameson, 31 Ind. App. 28, 67 N. E. 199. Where defendant in malpractice testifies to plaintiff's condition and that he administered proper remedies, he

ters, he must make the witness his own,[52] or does so by the mere fact of so pursuing the inquiry, and both deprives himself of the privilege of contradiction and empowers his adversary to develop the whole matter on redirect.[53] The rule, however, in England and some of our states is that a witness called to a particular fact may be cross-examined on all matters material to the issue,[54] and the general rule has its qualifications and will not be applied so strictly as to defeat the real object of cross-examination.[55] Thus cross-examination is proper, though

may be required on cross to state in detail what medicines he administered. Thomas v. Dabblemont, 31 Ind. App. 146, 67 N. E. 463. Undue latitude in examining plaintiff discharged from defendant's employ for immoral conduct held not allowed. Gould v. Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896. Questions to witness as to prevention of explosions arising from defects in staybolts of steam boilers held germane to direct examination. Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435. Where the mother of one accused of rape testifies she accompanied A. to see prosecutrix's mother about the case, she may be cross-examined as to what she said to A. on the trip. People v. Rich [Mich.] 94 N. W. 375. Motorman having testified to speed of car may be required to state whether it was not the fastest car on the line and whether he had power lever in fastest position. Hanlon v. Milwaukee Elec. R. & Light Co., 118 Wis. 210, 95 N. W. 100. Cross-examination of adversary held not prejudicial. Price of goods rejected. Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 P. 162. Accused who has testified to the circumstances leading up to the homicide may be cross-examined as to a difficulty with accused two months before and as to bad terms between them. State v. Miller, 43 Or. 325, 74 P. 658. Cross-examination of defendant in rape case as to his presence at his place of business held not to transgress the limits of proper cross. People v. Scalamiero, 143 Cal. 343, 76 P. 1098. Witnesses testifying that the residence of defendant was in a certain place may be examined as to the place of defendant's arrest and circumstances tending to show his residence there. State v. Rogers [Mont.] 77 P. 293. Where a witness testifies as to the amount due on a lease, it is proper on cross to show it to him and ask him if in fact the amount due was not a less sum. Ramsey v. Smith, 138 Ala. 333, 35 So. 325. A witness who has testified that defendant was drunk and staggering may be interrogated as to the condition of the railroad track where defendant was walking at the time. Cook v. State [Fla.] 35 So. 665. Witness who has testified that he did not see deceased make a movement to draw a gun may be cross-examined to show that from his position and circumstances it might have happened without his seeing it. Poole v. State [Tex. Cr. App.] 76 S. W. 565. Defendant's daughter, wife of deceased, may be cross-examined by the prosecution as to her father's movements respecting deceased on a previous day. Parker v. State [Tex. Cr. App.] 80 S. W. 1008.

Questions held improper: Witness in special assessment case who has not testified at all as to benefits should not be asked whether he had ever known of a case where property was worth more after a street was paved. Jones v. Chicago, 206 Ill. 374, 69 N. E. 64. Where a medical witness has been thoroughly cross-examined as to his manner of conducting the examination in question, it is not error to refuse questions as to his usual method or manner of conducting such examinations. Pittsburg, etc., R. Co. v. Banfill, 206 Ill. 553, 69 N. E. 499. Testimony as to one quarrel does not authorize cross-examination as to another distinct one. State v. Evans, 122 Iowa, 174, 97 N. W. 1008. Where prosecutrix in rape was not asked on direct whether defendant had made her presents, she could not be interrogated as to presents on cross. People v. Edwards [Cal.] 73 P. 416. A defendant who on direct has denied having any conversation with an alleged accomplice cannot be asked on cross whether he did not say "there is no use both of us going up for this thing." People v. Morton, 139 Cal. 719, 73 P. 609. A witness to the condition of a sidewalk cannot be cross-examined as to plaintiff's injuries. Bailey v. Seattle R. R. Co., 32 Wash. 640, 73 P. 679. Where, in the testimony of a witness for defendant in a personal injury case, there is no intimation that plaintiff was not in defendant's employ, cross-examination as to defendant's carrying employer's liability insurance is improper. Roche v. Llewellyn Iron Works Co., 140 Cal. 563, 74 P. 147. Attorney testifying for his client as to the presentation of the claim against decedent's estate cannot be cross questioned as to conversations with decedent. Goltra v. Penland [Or.] 77 P. 129. Plaintiff suing for commissions as broker cannot be asked if he was ever requested to sell any other property for defendant. Bertelson v. Hoffman [Wash.] 77 P. 801.

52. Black v. First Nat. Bank, 96 Md. 399, 54 A. 88. Party held not bound by witness' statements on cross-examination. Fourth Nat. Bank v. Albaugh, 188 U. S. 734, 47 Law. Ed. 673. State cannot extend cross-examination of witness for defense beyond the limits of the direct. State v. Gosey, 111 La. 616, 35 So. 786.

53. Though it involves a transaction with a party since deceased. Lange v. Klatt [Mich.] 97 N. W. 708. Witness in liquor case testifying on cross-examination that he bought liquor for medicinal purposes may be asked on redirect what his ailments were. People v. Robinson [Mich.] 98 N. W. 12. See post, § 3, Redirect examination.

54. Black v. First Nat. Bank, 96 Md. 399, 54 A. 88.

55. Bank cashier interrogated as to discounting two notes may be shown one of them on cross-examination and the note introduced. Black v. First Nat. Bank, 96 Md. 399, 54 A. 88. An assignee having been used as a witness to prove the delivery of an assignment in trust may be cross-examined as to the purposes for which it was made.

it calls for facts not testified to in chief but relative to the same subject-matter and bearing upon the main fact toward which the examination in chief was directed, such facts as give to the direct testimony the effect of false testimony.[56]

Where a portion of a conversation or transaction is brought out on direct, the cross-examiner is entitled to the remainder of it,[57] and all the circumstances surrounding it, though the witness is the defendant in a criminal prosecution,[58] and the cross question tends to disclose another offense.[59] A party who avails himself of incompetent evidence cannot complain if his adversary is permitted to go into the same subject-matter on cross-examination,[60] and a cross-examiner who calls out immaterial matter not referred to in the examination in chief cannot complain of the court's failure to strike it out suo motu.[61]

Limitation to issues.[62]—Except for certain purposes and in certain circumstances, chiefly, in testing recollection and attacking credibility, cross questions as to immaterial matters are not allowed;[63] and when a witness is cross-examined on a matter collateral to the issue, he cannot, as to his answer, be subsequently contradicted by the party putting the question.[64] The test whether a fact in-

and his testimony does not become that of the cross-examiner so as to preclude showing admissions out of court contradictory to his statements on the stand. Fourth Nat. Bank v. Albaugh, 188 U. S. 734, 47 Law. Ed. 673. A witness may be cross-examined as to his direct testimony in all its bearings, and as to whatever goes to explain or modify or discredit what he has stated in his direct examination. Chicago City R. Co. v. Creech, 207 Ill. 400, 69 N. E. 919.

56. Hogen v. Klabo [N. D.] 100 N. W. 847.

57. Though it constitutes an affirmative defense. Resurrection Gold Min. Co. v. Fortune Gold Min. Co. [C. C. A.] 129 F. 668. Price of article sued for. Smith v. Castle, 81 App. Div. 638, 81 N. Y. S. 18. Witness testifying to efforts to get plaintiff and wife together again cannot be asked by defendant in alienation case what the wife said at such interview about plaintiff having accused her of undue intimacy with others than defendant. Christensen v. Thompson, 123 Iowa, 717, 99 N. W. 591. A witness for divorce, defendant stating that a witness for plaintiff had told him he knew nothing against the character of defendant, may be asked if in the same conversation he did not say that if A did not have improper relations with her he missed a good chance. Hopkins v. Hopkins, 132 N. C. 25, 43 S. E. 506. Witness used to show that plaintiff had knowledge of his deputy's default may be asked whether he suggested to plaintiff that the deputy was embezzling. American Bonding & Trust Co. v. Milstead [Va.] 47 S. E. 853.

58. May be examined as to the events leading up to the fatal quarrel which he has described. People v. Teshara, 141 Cal. 633, 75 P. 338.

59. Saloon keeper on trial for murder; question tending to disclose violation of liquor law. People v. Farrell [Mich.] 100 N. W. 264. Where defendant on trial for homicide swears that deceased did not tell him he was an officer, it is proper on cross to ask him about a prior attempt of deceased to arrest him and his escape. People v. Morales [Cal.] 77 P. 470.

60. Cronk v. Wabash R. Co., 123 Iowa, 349, 98 N. W. 884.

61. State v. Mortensen, 26 Utah, 312, 73 P. 562, 633.

62. See 1 Curr. L. 1169.

63. Witness in suit on bond of officer asked whether officer was intoxicated on certain days. American Bonding & Trust Co. v. Milstead [Va.] 47 S. E. 853. Witness who has testified that defendant appeared excited cannot be asked if he appeared more excited than other men with families suddenly losing a job. Sylvester v. State [Fla.] 35 So. 142. Murder case. Defense that killing was not perpetrated by defendant. State's witnesses cannot be asked if deceased was not a fugitive from justice. State v. Gosey, 111 La. 616, 35 So. 786. Where, in the examination in chief, evidence of a conversation is properly excluded, it is error to allow questions on cross calling for portions of that conversation. Thompson v. State [Miss.] 36 So. 389. A street car motorman testifying for his employer should not be cross-examined as to other accidents to the car under his control on another line. Munroe v. Hartford St. R. Co., 76 Conn. 201, 56 A. 498. A witness who has testified to seeing a part of an affray and its circumstances cannot be asked on cross if he did not say it was as cold blooded a murder as he ever saw. State v. Crea [Idaho] 76 P. 1013. Prosecutor cannot ask defendant's son whether he had not stated that he suspected his father of other similar offenses, and that he could not go against his father even if he was guilty. State v. Irwin [Idaho] 71 P. 608. A witness testifying that sacks for goods sold were waived by the buyer may not be cross-examined as to their value. Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 P. 162.

64. Ferguson v. State [Neb.] 100 N. W. 800; Bailey v. Seattle & R. R. Co., 32 Wash. 640, 73 P. 679; Fields v. State [Fla.] 35 So. 185. The right to contradict or impeach turns upon the materiality of the statement (Vroman v. Kryn, 86 N. Y. S. 94; Horn v. State [Wyo.] 73 P. 705); or the propriety of the cross-examination (Perine v. Interurban St. R. Co., 43 Misc. 70, 86 N. Y. S. 479). Where a witness denies refusing to disclose to a party's agent his knowledge of the case without payment and states that the agent

quired of is collateral is, would the cross-examiner be entitled to prove it as a part of his own case.[65] A party may be asked as to his own motives and intention, when these are material.[66] A party who has not opened his own case will not be permitted to introduce it to the jury by cross-examination of the witnesses of his adversary.[67]

Examination going to credibility of witness.[68]—A large discretion is necessarily left to the trial judge in determining the range proper to be allowed counsel in cross-examining witnesses to test their credibility and accuracy,[69] and much latitude is allowed in the examination of parties testifying in their own behalf,[70] persons accused of crime,[71] accomplices,[72] and prosecuting witnesses.[73] The wit-

offered him a certain sum, the party cannot contradict the statement, the witness not being the agent of the opposite party and the matter not having been touched upon on direct. Goldberg v. Metropolitan St. R. Co., 84 N. Y. S. 211. Prosecutor is concluded by statement on cross-examination of wife of defendant on trial for incestuous rape as to relations of defendant with his other daughters. State v. Carpenter, 32 Wash. 254, 73 P. 357.

65. Ferguson v. State [Neb.] 100 N. W. 800; Bailey v. Seattle & R. R. Co., 32 Wash. 640, 73 P. 679. Where the action is for an explosion of gas, defendant's witness may be asked if he was employed by defendant as a gas fitter. United Oil Co. v. Miller [Colo. App.] 73 P. 627. Where defendant's factory superintendent testifies that he called a certain physician to attend plaintiff after telephoning C., he may be required to state that C. was the agent of an insurance company from which defendant had an employe's accident policy. Wabash Screen Door Co. v. Black [C. C. A.] 126 F. 721.

66. Litton v. Com., 101 Va. 833, 44 S. E. 923. Cross-examination of defendant in a murder case as to his motive in striking deceased is proper. Eatman v. State, 139 Ala. 67, 36 So. 16.

67. The rule applies to such matters as the cross-examiner has pleaded affirmatively in defense, and not to matters by which he aims merely to disprove the case his adversary has made. Hogen v. Klabo [N. D.] 100 N. W. 847. Such questions are properly excluded, though tending in some degree to test his recollection or be of use in some other way to defendant. Roche v. Baldwin, 143 Cal. 186, 76 P. 956. Plaintiff's witnesses cannot be cross-examined to establish an affirmative defense. City of Port Townsend v. Lewis, 34 Wash. 413, 75 P. 982.

68. See 1 Curr. L. 1170.

69. Cross-examination of expert as to value of real estate held not unduly restricted. Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515; Dady v. Condit, 209 Ill. 488, 70 N. E. 1088. Question to defendant's sewer foreman whether a similar damage had not occurred two years before held properly excluded. Burnside v. Everett [Mass.] 71 N. E. 82. A witness testifying for the prosecution against his father for incestuous rape need not be compelled to state whether he has contributed anything towards the defense. State v. Roller, 30 Wash. 692, 71 P. 718. A wide latitude is allowable to test the memory of the witness. State v. Brown, 111 La. 170, 35 So. 501. A witness who has testified for defendant, a soldier accused of murder, and stated that he taught school at the post and lent money to the soldiers may be asked on cross what rate of interest he charged. Kipper v. State [Tex. Cr. App.] 77 S. W. 611. A witness may be asked about the terms of a written contract to test his knowledge and recollection, though the terms would not be provable in that manner. United States Fidelity & Guaranty Co. v. Damskibsaktieselskabet Habil, 138 Ala. 348, 35 So. 344.

70. Plaintiff may be questioned in regard to an amendment of his complaint inconsistent with the original. Blake v. Malliet, 84 N. Y. S. 161. Plaintiff may be asked whether he did not know that if he got off the car while in motion he could not recover. Grabenstein v. Metropolitan St. R. Co., 84 N. Y. S. 261; Kramer v. Metropolitan St. R. Co., 86 N. Y. S. 33. Party may be asked what he was doing in the house of correction and how long he had been there. Martin v. Moore [Md.] 57 A. 671. Where defendant, sued on a contract of sale, testifies that he thought the contract when he signed it was a consignment on commission, he may be asked whether he ever thought of the subject consignment and the word commission till after suit was brought. Standard Mfg. Co. v. Slot [Wis.] 98 N. W. 923. Plaintiff sung as an undisclosed principal may be asked if his alleged agent was not entirely insolvent and worthless where the effect is to discredit his claims. Hogen v. Klabo [N. D.] 100 N. W. 847. Plaintiff suing for injuries to his wife may be asked if he has any objection to having her examined by X rays, but on objection answer may be deferred until he has consulted his counsel. Dallas Consol. Elec. St. R. Co. v. Rutherford [Tex. Civ. App.] 78 S. W. 558.

71. A question to a witness as to his prior conviction of crime need not be specific as to the particular crime or conviction. State v. Fox [N. J. Law] 57 A. 270. Defendant on trial for burglary may be cross-examined as to prior conviction for burglary and indictment for burglary and theft. Scoville v. State [Tex. Cr. App.] 77 S. W. 792. Defendant in criminal case offering himself as witness may be asked whether he did not swear falsely in justifying on a certain bond. People v. Gray [Mich.] 98 N. W. 261. Defendant charged with rape may not be asked as to his relations with other females and whether he has not been sued therefor. People v. Dowell [Mich.] 99 N. W. 23. Defendant in murder trial may be asked as to drawing his pistol on others as affecting his credibility as to self defense. People v. Farrell [Mich.] 100 N. W. 264. A criminal

ness may be asked as to previous contradictory statements,[74] and be contradicted if he denies them,[75] and inconsistencies between present and previous testimony may be developed.[76] Bias or interest of the witness may be inquired into,[77] as a

defendant taking the stand in his own behalf is subject to the ordinary rules of cross-examination. Ferguson v. State [Neb.] 100 N. W. 800. Defendant accused of crime testifying that he has never been arrested before except for disturbing the peace years ago may be asked how many times he has been arrested and on what charges. People v. Buckley [Cal.] 77 P. 169. Defendant may be asked whether he was intending to shoot J. whether he saw his pistol or not. Litton v. Com., 101 Va. 833, 44 S. E. 923. Defendant may be examined as to matters within his own breast, his intentions, etc. Wilson v. State [Fla.] 36 So. 580. It is competent to ask the defendant on cross-examination whether he had married the prosecuting witness on the day before the trial to raise the inference that he did it to suppress her testimony against him. Moore v. State [Tex. Cr. App.] 75 S. W. 497. Defendant may be asked if he did not know it was wrong to shoot at the time and place, though it calls for a conclusion. Montgomery v. State [Tex. Cr. App.] 77 S. W. 788. Defendant on trial for murder who has shown association with a certain witness may be asked if he had not heard that witness had been convicted of train robbing and murder and sent up for life and pardoned. Long v. State [Ark.] 81 S. W. 387. Defendant in prosecution for violation of local option law cannot be made to answer that he is under indictment for several other violations. Hays v. State [Tex. Cr. App.] 82 S. W. 511. Defendant in homicide may be asked whether he did not live with a certain woman, no attempt being made to elicit any impropriety in his relations with her. Havens v. Com. [Ky.] 82 S. W. 369.

72. May be asked what promises had been made. People v. Moore, 96 App. Div. 56, 89 N. Y. S. 83.

73. Where a prosecutrix for rape has disclosed on cross-examination matters that were not brought out on direct, it is not error to overrule a question whether she had disclosed such matters on her examination in chief. State v. Carpenter [Iowa] 98 N. W. 775. After witness for prosecution admits misleading counsel for defense in prior conversation, he cannot be asked whether he is not perfectly willing to swear to a lie now and whether he feels at liberty to falsify whenever his interests are at stake. State v. Roller, 30 Wash. 692, 71 P. 718. Prosecuting witness may be asked if he had not offered to withdraw his affidavit because made through error. State v. Dalcourt, 112 La. 420, 36 So. 479. Questions which answered in the affirmative would discredit prosecutrix, and answered in the negative could be contradicted for impeachment should not be overruled. De Yampert v. State, 139 Ala. 53, 36 So. 772.

74. Brown v. State [Fla.] 35 So. 82; Parrish v. State, 139 Ala. 16, 36 So. 1012. Impeaching questions must be definite as to time and place. Stancliff v. U. S. [Ind. T.] 82 S. W. 882. Such statements held not new matter within the rule prohibiting contradiction. Perine v. Interurban St. R. Co., 43 Misc. 70, 86 N. Y. S. 479. Defendant in rape denying having seen prosecutrix that evening may be asked if he had not stated that he did see her. People v. Scalamiero, 143 Cal. 343, 76 P. 1098. Prosecutrix in statutory rape testifying as to her age may be asked as to statements to others of greater age. People v. Howard, 143 Cal. 316, 76 P. 1116. A witness for defendant in a murder case who has testified to seeing a part of the affray cannot be asked if he did not afterwards state that it was a cold blooded murder. State v. Crea [Idaho] 76 P. 1013. Written statements held admissible to contradict. Illinois Cent. R. Co. v. Wade, 206 Ill. 523, 69 N. E. 565. Witness for minor contestant of will may be confronted by prior contest filed by witness as next friend. In re Townsend's Estate, 122 Iowa, 246, 97 N. W. 1108. The statute of Michigan (Comp. Laws, § 3846), providing that no tax statement made by a taxpayer shall be used for any other purpose, is violated by its use to show to a witness on cross-examination to affect the credibility of his testimony as to the value of property. Williams v. Brown [Mich.] 100 N. W. 786. Conductor testifying to facts showing that a brakeman was negligent may be asked if he did not state that "deceased lost his life doing his duty." Northern Alabama R. Co. v. Mansell [Ala.] 36 So. 459. Where plaintiff and defendant differ as to the terms of a contract between them, defendant's statement in regard to it to a third person is material and may be drawn from defendant on cross-examination, though mendacious in part and tending to discredit him before the jury. Wilmoth v. Hamilton [C. C. A.] 127 F. 48.

75. Brunnemer v. Cook & B. Co., 89 App. Div. 406, 85 N. Y. S. 954; Black v. Rocky Mountain Bell Tel. Co., 26 Utah, 451, 73 P. 514.

76. Where it is claimed that a witness has changed his testimony since testifying before the examining magistrate, it is no abuse of discretion to refuse to permit him to be asked on cross-examination if he does not know that the matter alleged to be new was important to defendant. State v. Carpenter [Iowa] 98 N. W. 775.

77. Amount of witness' claim against defendant. Taylor & Co. v. Metropolitan St. R. Co., 84 N. Y. S. 282. No predicate is necessary as in impeachment. Alford v. State [Fla.] 36 So. 436. It may be shown that witness, a physician attending plaintiff at defendant's request, was recommended and paid by an insurance company insuring defendant against accidents to its employes. Wabash Screen Door Co. v. Black [C. C. A.] 126 F. 721. Medical witness may be asked who sent him to examine plaintiff and who paid him. Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087. Witness for claimant against estate changing position after being paid for his own claim by claimant. In re Steenwerth, 97 App. Div. 116, 89 N. Y. S. 654. Witness for defendant in murder case may be asked if he had not stated his intention of "fixing the thing up" for defendant. State v. Crea [Idaho] 76 P. 1013. It

matter of right in a criminal case, and the witness contradicted as to such matters,[78] and it is permissible to inquire whether and to what extent a witness has conversed with counsel or others in regard to the case.[79] Religious belief cannot be inquired into,[80] and questions relative to the general character of the witness[81] and immaterial questions having no purpose except to degrade and discredit the witness are not allowable.[82] Any question, however, tending to throw light on his character for truth and veracity is permissible, such as complicity or conviction of an infamous crime,[83] and a witness may be asked whether he has ever been in an insane asylum.[84]

As to probability of testimony.[85]—A large latitude is allowed the cross-examiner in testing the probability of the direct testimony,[86] and a witness may be

is not error to overrule a question whether witness has not done all she could to secure defendant's conviction. People v. Rice [Mich.] 99 N. W. 860. A witness testifying to the insanity of defendant accused of crime may be asked questions tending to show that he was a member of the conspiracy resulting in the crime. State v. Howard [Mont.] 77 P. 50. A state's witness cannot be asked what it cost him to come to the place of trial and who paid his expenses. Parrish v. State, 139 Ala. 16, 36 So. 1012. Further cross-examination of witness called in rebuttal as to matters fully covered by previous cross-examination when witness was called in chief is properly denied. State v. Pyscher, 179 Mo. 140, 77 S. W. 836. Details of circumstances going to show witness' friendship for party held prejudicial. Hooks v. Pafford [Tex. Civ. App.] 78 S. W. 991. Cross-examination of defendant's witness to show that he attempted to have the prosecution dropped and did not arrest defendant, though an officer, is proper. Pace v. State [Tex. Cr. App.] 79 S. W. 531.

78. Fields v. State [Fla.] 35 So. 185.

79. Streeter v. Marshalltown, 123 Iowa, 449, 99 N. W. 114. The witness may be asked whether he has talked with other witnesses. Alford v. State [Fla.] 36 So. 436. A witness may be asked if he has had any conversation in regard to the case with another in order to determine whether he is testifying from his own recollection or from the promptings of another. Ontario-Colo. Gold Min. Co. v. MacKenzie [Colo. App.] 74 P. 791.

80. Louisville & N. R. Co. v. Mayes [Ky.] 80 S. W. 1096.

81. Witness in murder case cannot be asked whether she kept a disorderly house, sold liquor in violation of law, and allowed gambling there, or questions reviewing her career. Commonwealth v. Williams [Pa.] 58 A. 922. The character of a witness for chastity is not examinable on cross-examination for the purpose of discrediting her. Kennington v. Catoe [S. C.] 47 S. E. 719. It may be shown by a female witness that she keeps a dance hall. Flores v. State [Tex. Cr. App.] 79 S. W. 808. A question to a witness whether she has been arrested and tried for whipping a certain person is properly overruled as having no tendency to affect her character for truth and veracity. O'Connor v. St. Louis Transit Co. [Mo. App.] 80 S. W. 304.

82. Intention of witness and defendant of committing a crime other than that under investigation. State v. Rogers [Mont.] 77 P. 293. Asking female witness whether her daughter keeps a house of ill fame. Burks v. State [Ark.] 82 S. W. 490.

83. A witness for defendant accused of murder may be asked on cross if he has not been convicted of complicity in the same crime in another county and the prosecution dismissed in a third. Kipper v. State [Tex. Cr. App.] 77 S. W. 611. A witness may not be asked if he had not been accused of burning a barn on cross examination by plaintiff in an action on a fire insurance policy, one defense being that plaintiff burned the property. Germinder v. Machinery Mut. Ins. Ass'n, 120 Iowa, 614, 94 N. W. 1108. A witness for defendant in a criminal prosecution who testifies on direct that he has been in the penitentiary and is now in jail may be asked cross questions that tend to elicit what he is now confined for. State v. Howard [Mont.] 77 P. 50. An infamous offense only can be inquired about to discredit a witness. Fine in police court cannot be asked about. O'Connor v. St. Louis Transit Co. [Mo. App.] 80 S. W. 304.

84. Hendricks v. Mechanics' Bank, 88 N. Y. S. 176.

85. See 1 Curr. L. 1172.

86. A property owner stating how much his property has been depreciated may be asked if he will take the sum named. Eastern Tex. R. Co. v. Scurlock [Tex.] 78 S. W. 490. It is discretionary with the court to require a government witness in a liquor case to state from where his observations were made. Commonwealth v. Foster, 182 Mass. 276, 65 N. E. 391. An agent of a railroad company who testifies in support of a statement written by him and signed by plaintiff that plaintiff did not stop and listen may be asked if he knew at the time he wrote that it was necessary to stop and look and listen. Kansas City, etc., R. Co. v. Weeks, 135 Ala. 614, 34 So. 16. Defendant who seeks to justify carrying pistol by lawless state of society and that his brother was shot there may be cross-examined as to the particular character of the lawlessness and that his brother was shot at night under different circumstances from those under which defendant shot deceased. Montgomery v. State [Tex. Cr. App.] 77 S. W. 788. Where defendant in a murder case has testified that at the moment of killing, an eye witness shouted a warning to him, he may be asked on cross if he instructed his attorney at the examination to ask the witness about the warning. Long v. State [Ark.] 81 S. W. 387. Where witness has testified that he picked up a valve stem and

asked as to knowledge and conduct inconsistent with his testimony.[87] Experts,[88] persons testifying to opinions and conclusions generally,[89] and witnesses testifying as to value, may be asked any question which tends to throw light on their knowledge of the matters testified to.[90] Where defendant's agent interviewed plaintiff and made shorthand notes from which he drew up a written statement that plaintiff signed, it is proper on cross-examination of the agent to require him to produce the original shorthand notes that they may be compared with the statement prepared from them.[91]

Examination as to documents.[92]—*Character witnesses*[93] can be asked on cross-examination what their relations are with the person under investigation,[94] and whether they know of his being arrested for disturbance of the peace.[95] They may be asked to test their credibility, whether they have heard of his committing specific acts of bad conduct pertinent to his general reputation, but not as to their knowledge of such acts.[96]

§ 3. *Redirect examination.*[97]—Witness may explain on redirect what he said on cross-examination,[98] especially where there is a seeming contradiction be-

put it back in the valve after the accident, he may be asked on cross-examination whether the stem was in place when the machine was next started. Carr v. American Locomotive Co. [R. I.] 58 A. 678. Where a witness has described a particular valve alleged to be defective, and claims he can identify it, the cross-examiner should be permitted to show him the valve with others for identification. Id. A nonexpert who has testified to the genuineness of a party's signature from familiarity with his handwriting should not be compelled to select from many signatures on other papers the genuine from the spurious. Wilmington Sav. Bank v. Waste [Vt.] 57 A. 241. A witness who has testified that he bought and drank beer in defendant's place cannot be required to drink from an unidentified bottle and say whether it contains beer. State v. Snyder, 67 Kan. 801, 74 P. 231. A witness who has testified that defendant told him he intended to kill deceased cannot be asked why if he was so good a friend to deceased he did not tell him, since it assumes the fact of friendship and that he did not tell. Stewart v. State, 137 Ala. 33, 34 So. 818.

87. Officers of union testifying to its peaceful attitude may be questioned as to its purpose regarding non union workmen, payment of counsel defending members arrested for assault, etc. State v. Stockford [Conn.] 58 A. 769. Witness testifying to value may be cross-examined as to offers he made on behalf of another. Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 74 P. 162. A witness testifying to the good reputation for peace and quietness of defendant accused of murder may be asked if he knows of defendant being arrested for disturbing the peace. People v. Moran [Cal.] 77 P. 777. A witness who has testified to defendant's insanity, there being also evidence of intoxication, may be asked on cross whether he ever noticed any difference in defendant's actions when sober and when drinking. Porter v. State [Ala.] 37 So. 81. A state's witness whose testimony is favorable to accused and who has not been shown to have made previous conflicting statements cannot be asked on cross if officers have not told her that if she testified to certain facts favorable to accused she would be arrested. Ex parte McCoy [Tex. Cr. App.] 82 S. W. 1044.

88. Carr v. American Locomotive Co. [R. I.] 58 A. 678; Parrish v. State, 139 Ala. 16, 36 So. 1012. The cross-examiner is entitled to demand a free disclosure, minutely and in detail of all the facts and circumstances upon which the expert's opinion has been grounded. Value of real estate. Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515. Where a medical witness states on direct that his experience and reading confirm a certain statement, a cross question as to whether the authorities did not state the opposite is not objectionable as calling for the contents of medical books. Cronk v. Wabash R. Co., 123 Iowa, 349, 98 N. W. 884. A medical witness who has testified to his conclusion as to plaintiff's disease may not be asked if other surgeons might not reach a different conclusion. Root v. Boston El. R. Co., 183 Mass. 418, 67 N. E. 365. After a medical witness for defendant in a personal injury case has been required to state how far he required a patient to disclose the history and symptoms of a disease, a question as to whether he then disclosed such knowledge to others is within the limits of reasonable cross-examination. Id.

89. Where a witness testifies that a car was in perfect order, he may be asked questions calculated to test his knowledge of cars. Terre Haute Elec. Co. v. Watson [Ind. App.] 70 N. E. 993.

90. Filbert v. Dechert, 22 Pa. Super. Ct. 362; Spohr v. Chicago, 206 Ill. 441, 69 N. E. 515; Dady v. Condit, 209 Ill. 488, 70 N. E. 1088.

91. City & Suburban R. Co. v. Svedborg, 20 App. D. C. 543.

92. See 1 Curr. L. 1172.

93. See 1 Curr. L. 1173.

94. Reputation of deceased for peace and quietude. State v. Crea [Idaho] 76 P. 1013.

95. People v. Moran [Cal.] 77 P. 777.

96. Cook v. State [Fla.] 35 So. 665; State v. Brown [Mo.] 79 S. W. 1111.

97. See 1 Curr. L. 1173.

98. Hayes v. Metropolitan St. R. Co., 84 N. Y. S. 271. Where defendant in a sidewalk case asks plaintiff what he thought as

tween the direct and cross,[99] and conduct elicited on cross seemingly inconsistent with the direct testimony may be explained;[1] but refusal to permit him to restate his direct testimony is not error.[2] A prior statement out of court conflicting with a witness's direct testimony and called to his attention on cross may be stated on redirect to have been falsely made,[3] and the witness may be asked on redirect if he did not immediately after the transaction relate it as shown by his direct testimony.[4] A matter only partly disclosed on cross-examination may be fully developed on redirect,[5] though it involves a transaction with a party since deceased;[6] but the inquiry cannot extend to other similar matters.[7] Where the cross-examiner interrogates plaintiff as to his testimony on a former trial, it is not error to allow him on redirect to repeat all of such testimony.[8]

§ 4. *Recalling of witness for further examination*[9] is within the court's discretion,[10] though it is for the purpose of laying a foundation for his impeach-

he approached a known dangerous place, defendant cannot complain of a question on redirect whether he did not think he could pass in safety. Houseman v. Belle Plaine [Iowa] 100 N. W. 343. Where defendant attempts to show a conspiracy among physicians to testify for plaintiff in a personal injury case, it is proper to allow one of them to state that this was not the first time he had been called on by other physicians. Denison & S. R. Co. v. Powell [Tex. Civ. App.] 80 S. W. 1054.

99. O'Donnell v. Interurban St. R. Co., 88 N. Y. S. 1016.

1. People v. Glover, 141 Cal. 233, 74 P. 745. Where the sheriff on cross-examination by defendant states that he ordered his deputy to arrest defendant, he may state on redirect that he ordered the arrest on information received from the deputy. Weaver v. State [Tex. Cr. App.] 81 S. W. 39.

2. Hayes v. Metropolitan St. R. Co., 84 N. Y. S. 271.

3. People v. Glover, 141 Cal. 233, 74 P. 745.

4. Kipper v. State [Tex. Cr. App.] 77 S. W. 611.

5. Injuries to other property than that in suit. Robinson v. New York El. R. Co., 175 N. Y. 219, 67 N. E. 431. Matter presenting new issue. California Elec. Light Co. v. California Safe Deposit & Trust Co. [Cal.] 78 P. 372. Where an affidavit made by witness is used on cross to affect his credibilty, he may be further questioned on redirect to show consistency between it and his testimony. Strebin v. Lavengood [Ind.] 71 N. E. 494. Witness for people in liquor case testifying on cross that he bought liquor for medicinal purposes may be asked on redirect what his ailments were. People v. Robinson [Mich.] 98 N. W. 12. Conversation by claimant with executor. Kinney v. McFaul, 122 Iowa, 452, 98 N. W. 276. Witness may state that deceased had said she feared defendant, her husband, would kill her, where witness has been asked on cross if she ever stated why she left home. State v. Botha, 27 Utah, 289, 75 P. 731. Where defendant on cross has asked if witness saw deceased have a pistol, he may be asked on redirect if defendant did not have a pistol during the same quarrel. Kroell v. State, 139 Ala. 1, 36 So. 1025. Witness asked if deceased's brother ran a saloon may be asked on redirect whether the brother owned or clerked in saloon. Parrish v. State, 139 Ala. 16, 36 So. 1012. Witness for state may state that prosecuting attorney had authorized him to offer immunity to any accomplice who would disclose the facts. Kipper v. State [Tex. Cr. App.] 77 S. W. 611. Witness for the state may explain how he paid $5 towards the prosecution. Id. Where defendant on trial for murder of illegitimate child questions the mother about her relations with her she may be asked on redirect as to the details of such relations. Lax v. State [Tex. Cr. App.] 79 S. W. 578. Where evidence of the commission by defendant of a distinct crime against prosecuting witness is first brought out on his cross-examination, the state is entitled on redirect to show the whole transaction. Obtaining money under false pretenses. People v. Noblett, 96 App. Div. 293, 89 N. Y. S. 181. Where the defense, on cross-examination of a state's witness, elicits new matter prejudicial to the prosecution, the witness may be fully interrogated thereon upon redirect. State v. Williams, 111 La. 179, 35 So. 505. Where the prosecuting witness on cross has been asked if he did not cause defendant's arrest because of information from "A" and he has answered affirmatively in part, he may be asked on redirect "Just state why you had him arrested." People v. Cole, 141 Cal. 88, 74 P. 547. Where a witness on direct has testified to one conversation with defendant, allowing him to relate another on redirect, is discretionary. People v. Mojoine [Cal.] 77 P. 952.

6. Testimony in former suit brought out on cross may be explained by detailing whole transaction, though involving transaction with one since deceased. Lange v. Klatt [Mich.] 97 N. W. 708.

7. Robinson v. New York El. R. Co., 175 N. Y. 219, 67 N. E. 431.

8. Illinois Steel Co. v. Wierzbicky, 206 Ill. 201, 68 N. E. 1101; Aetna Ins. Co. v. Eastman [Tex. Civ. App.] 80 S. W. 255. Where part of a witness' testimony at a coroner's inquest is called out on cross-examination, the whole relative to that matter may be shown on redirect. Sexton v. Onward Const. Co., 93 App. Div. 143, 87 N. Y. S. 550.

9. See 1 Curr. L. 1173.

10. Though party has closed his case. Chicago City R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087. Where a child has been called by the state, but not examined and respond-

ment,[11] and the witness is defendant in a criminal prosecution.[12] Where, after defendant has rested, plaintiff recalls him, he stands as plaintiff's own witness.[13]

§ 5. *Privilege of witness*[14] is not available to the officers of a corporation in a creditor's suit in Wisconsin.[15] A witness who states that he is jointly indicted and has not been tried and without prompting claims his privilege is properly excused.[16] Where a mistress is asked who is the father of her children, the court should instruct her as to her right to decline to answer a question that will incriminate herself.[17]

Waiver of privilege.[18]

EXCHANGE OF PROPERTY.[19]

Title does not pass until the terms of the exchange are agreed upon and the conditions fulfilled,[20] but an exchange may become irrevocable, though some of the provisions remain unsettled,[21] and though as to whichever part is in excess a lease shall result of the excess.[22] It may be rescinded if induced by fraud,[23] and where one party suffers a partial failure of consideration, he is entitled to an equitable lien to such amount on the land conveyed by him.[24]

ent's counsel declines to examine her, it is not error to refuse to recall her on defendant's request that she may be cross-examined as a witness for the state. People v. Hossler [Mich.] 97 N. W. 764. Where plaintiff suing for injury to her ankle denied on cross-examination previous trouble with her ankles, and a witness is subsequently produced who testifies that she told of being injured in that manner when a child, she may be recalled to show that the prior injury was to the other ankle. Bailey v. Seattle & R. R. Co., 32 Wash. 640, 73 P. 679. Where a witness has failed to answer a question before being directed to stand aside, the court may repeat it to him and require an answer. Eekhout v. Cole, 135 N. C. 583, 47 S. E. 655.

11. Thomas v. State [Fla.] 36 So. 161; State v. Brown, 111 La. 696, 35 So. 818; Vann v. State [Ala.] 37 So. 158.

12. State v. Brown, 111 La. 696, 35 So. 818.

13. Cullinan v. Quinn, 88 N. Y. S. 963.

14. See 1 Curr. L. 1174.

15. Rev. St. Wis. 1898, § 3228, providing that in creditor's suits against a corporation, the officers thereof may be compelled to testify, creates a rule of evidence to the end that a party guilty of fraud on creditors of the insolvent corporation may, when called to testify, be incapable of shielding himself by pleading the ordinary privilege of witnesses as to self-incriminating matters. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

16. Howard v. Com., 25 Ky. L. R. 2213, 80 S. W. 211.

17. Ivy v. State [Miss.] 36 So. 265.

18. See 1 Curr. L. 1175; also, 2 Curr. L. 2195.

19. See 1 Curr. L. 1175; also, Sales, 2 Curr. L. 1527.

20. In an exchange of land for hotel property, there had been no bill of sale made of the personal property of the hotel nor had possession been delivered and the owner of the real estate had not completed his abstract. Bowdie v. Jencks [S. D.] 99 N. W. 98.

Note: Where one party to an oral agreement for exchange of lands has executed and delivered his deed and the other has refused to fulfill his agreement, an action for money had and received cannot be maintained against the latter, though he has since sold the land. Basford v. Pearson, 9 Allen [Mass.] 387, 85 Am. Dec. 764. Taxes on lands mutually exchanged by warranty deeds which the parties agree shall be set off against each other are a part of the consideration, and such agreement may be established by parol evidence. Robins v. Lister, 30 Ind. 142, 95 Am. Dec. 674.

21. Value of the respective pieces of land left to arbitration. Arbitrator died before award became final. Parsons v. Ambos [Ga.] 48 S. E 696.

22. A provision in a contract for the exchange of possession and estates in land that in case the area of the estate of one exceeded that of the other such other should pay rent therefor did not change such contract from a contract of exchange into a lease. Singleton v. Houston [Tex. Civ. App.] 79 S. W. 98.

23. In an exchange of a quantity of whiskey for land, the owner of the whiskey fraudulently represented that it had a certain market value at which it would readily sell. Stoll v. Wellborn [N. J. Eq.] 56 A. 894. Where in an exchange of estates in land one party misrepresented his rights therein, such representations, though innocently made, amount to legal if not actual fraud. Singleton v. Houston [Tex. Civ. App.] 79 S. W. 98. In an exchange of land for a leasehold interest, misrepresentations that the leasehold contained valuable minerals and that mines were being operated on the premises. Cooper v. Maggard [Tex. Civ. App.] 79 S. W. 607.

24. One was compelled to discharge a lien on the land acquired. Griffin v. Gingell, 26 Ky. L. R. 2031, 79 S. W. 284. Such lien is subject to a mortgage executed by his grantee to one without notice. Id.

EXCHANGES AND BOARDS OF TRADE.

Membership, rights and dealings.[25]—A committee being appointed to hear and determine the question of expulsion, it is its duty to give the accused member proper notice of the proceedings, so that he may be heard.[26] The committee must not exceed its powers.[27]

Property and contract rights of board.[28]—The right of property in market quotations and the right to be protected in such property are not affected by the fact that such quotations may be used for unlawful as well as for lawful purposes,[29] nor does the fact that such board of trade permits gambling on its exchange deprive it of its right to this protection in courts of equity.[30]

EXECUTIONS.[31]

§ 1. Definition (1397).
§ 2. The Right to Have Execution (1398).
§ 3. Stay and How Procured (1398).
§ 4. Procedure to Procure Issuance of Writ (1399).
§ 5. Power and Authority to Issue or Allow Issuance of Writ (1399).
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§ 8. The Levy (1400).
A. Leviable Property and Order of Leviability (1400).
B. Mode of Making Levy (1401).
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E. Conflicting Levies and Liens and Priorities Between Them (1401).
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G. Release of Property on Receipts or Forthcoming or Delivery Bonds (1402).
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§ 9. Claims of Third Persons (1403).
§ 10. Appraisement (1404).
§ 11. Execution Sales (1404).
§ 12. Return or Certification of Sale to Court and Confirmation (1404).
§ 13. Redemption (1405).
§ 14. Deeds and Title Under Sales (1406).
§ 15. Remedies Against Defective Levy or Sale (1407). Injunction (1408).
§ 16. Restitution on Reversal of Judgment (1408).

§ 1. *Definition.*—An execution on a judgment is a proceeding to enforce it.[32]

25. See 1 Curr. L. 1176, n. 1-17.

26. People v. East Buffalo Live Stock Ass'n, 88 App. Div. 619, 84 N. Y. S. 795. The fact that accused member admitted that he was indebted to another in a certain amount by reason of his improper conduct does not warrant his expulsion without a hearing. Id.

27. Evidence examined and held to show that the committee was appointed to "hear, try and determine" the controversy. People v. East Buffalo Live Stock Ass'n, 88 App. Div. 619, 84 N. Y. S. 795.

28. See 1 Curr. L. 1177, n. 18-21.

29. Largely used in gambling contracts. Board of Trade of Chicago v. Kinsey Co. [C. C. A.] 130 F. 507.

30. Board of Trade of Chicago v. Kinsey Co. [C. C. A.] 130 F. 507. See 1 Curr. L. 1177, n. 18.

The fact that contracts for the sale and purchase of commodities for future delivery are settled daily does not render them illegal unless it was the intention and understanding of both parties that there should be no delivery. Board of Trade of City of Chicago v. Kinsey Co. [C. C. A.] 130 F. 607. It makes no difference whether or not they are settled daily by payment of differences, or by canceling out and substituting other contracts by what are known as the "direct" or the "ring" methods of settlement. Id.

Cf. title Gambling Contracts, 2 Curr. L. 129.

31. This title relates to the ordinary writ of execution or final process on a money judgment to enforce it by levy and sale. The **procedure to aid execution** is discussed in the titles Civil Arrest (body execution) 3 Curr. L. 700; Creditors' Suit, 3 Curr. L. 976; Garnishment, 2 Curr. L. 130; Supplementary Proceedings, 2 Curr. L. 1774. Writs in **execution of judgments not for money** are discussed in Assistance, Writ of, 3 Curr. L. 345; Possession, Writ of, 4 Curr. L. ——, and titles of possessory actions e. g. Ejectment (and Writ of Entry), 3 Curr. L. 1157; Trespass (to try title) 2 Curr. L. 1891; Forcible Entry, etc. (writ of restitution) 2 Curr. L. 11; Quo Warranto (writ of ouster), 2 Curr. L. 1377; Replevin, 2 Curr. L. 1614.

The lien, dormancy and revivor of judgments are discussed in Judgment, 2 Curr. L. 581.

Compare Attachment, 3 Curr. L. 353.

Procedure for collection of judgments against representatives, receivers, and fiduciaries, see Receivers, 2 Curr. L. 1465; Estates of Decedents, 3 Curr. L. 1238; Guardianship, 2 Curr. L. 148; Trusts, 2 Curr. L. 1924.

32. Accordingly, an execution is within Civ. Code, § 295, providing the remedy for assessing damages on dissolution of an injunction to stay proceedings on a judgment. Mason, G. & H. Co. v. Mechanics' Lien & Trust Co. [Ky.] 82 S. W. 290.

§ 2. *The right to have execution.*[33]—There must be a valid judgment,[34] but the making of the judgment roll is not generally a prerequisite.[35] Mandamus generally takes the place of an execution to enforce judgments against a municipality.[36] Death of a judgment creditor after judgment for a cause which abates does not affect the right to collect it by execution.[37] In some states the judgment must be revived before the writ will issue,[38] and in some the right is suspended pending administration of a judgment debtor's estate,[39] or leave is necessary.[40]

§ 3. *Stay and how procured.*[41]—Execution may be stayed by agreement between the parties, but such agreement must have the elements of a contract.[42] Neither the motives of the judgment creditor nor the hardships of the debtor will be considered.[43] That the property sought to be sold is claimed by another,[44] or that the judgment debtor may in a certain contingency have a set-off against the judgment,[45] do not warrant a stay in execution. A surety on a forthcoming bond allowing his property to be sold under execution thereon, neither the bankrupt principal nor the other sureties can enjoin the sale.[46]

A petition for a stay should clearly and concisely set out the facts relied on,[47] and should be verified by an affidavit.[48] On presentation of the petition, the court should grant a rule to show cause and an answer should be filed by plaintiff, an issue being thus formed.[49] The petition stating a ground for a stay, defendant's rights should be determined before the sale.[50]

33. See 1 Curr. L. 1178.

34. Under Consolidation Act, § 1297, debtor must be so described in judgment as to render his identification possible. Goldberg v. Markowitz, 94 App. Div. 237, 87 N. Y. S. 1045. See 1 Curr. L. 1178, n. 23.

35. Construing Code Civ. Proc. §§ 1210, 1196. Burton v. Kipp [Mont.] 76 P. 563.

36. Will lie to compel city authorities to set aside any revenues in excess of current expenses to pay judgment in preference to the claims of unsecured creditors. City of Anniston v. Hurt [Ala.] 37 So. 220. See 1 Curr. L. 1178, n. 25.

37. City of Anniston v. Hurt [Ala.] 37 So. 220.

38. Vogt v. Daily [Neb.] 98 N. W. 31. Under Hurd's Rev. St. 1899, pp. 1048 to 1053, on the death of a judgment debtor, execution can be issued and will become a lien, while the title remains in the heirs, at any time within 7 years after the entry or revivor of the judgment, not including the 12 months delay on account of the death of the judgment debtor. Kinkade v. Gibson, 209 Ill. 246, 70 N. E. 683.

NOTE. Necessity of revivor in case of sole judgment creditor: At common law, revival of the judgment by scire facias is necessary before execution can be issued, after a sole plaintiff's death, in order to bring in his legal representative, who may then issue the writ. Earl v. Brown, 1 Wils. 302; Mercer v. Lawrence, 26 Week. Rep. 506. See, also, note to Jefferson v. Morton, 2 Wm. Saund. 6. This rule has been adopted in some states in all its strictness. Stewart v. Nuckols, 15 Ala. 225, 50 Am. Dec. 127; Smith v. Alevander, 80 Ala. 251; Seeley v. Johnson, 61 Kan. 337, 59 P. 631, 78 Am. St. Rep. 314; Morgan v. Taylor, 38 N. J. Law, 317. See, also, Lavell v. McCurdy, 77 Va. 763. However most of the courts hold that revival by scire facias, or in any other manner is unnecessary. Armstrong v. McLaughlin, 49 Ind. 370; Mavity v. Eastridge, 67 Ind. 211; Rook v. Williams, 13 La. Ann. 374; Gaston v. White, 46 Mo. 486.

The same common-law rule obtains where the sole judgment debtor dies. Harwood v. Philips, O. Bridg. 473; Heapy v. Parris, 6 Term R. 368. This rule exists in some of the states. Cunningham v. Burk, 45 Ark. 267; Smith v. Reed, 52 Cal. 345; Boyle v. Maroney, 73 Iowa, 70, 35 N. W. 145, 5 Am. St. Rep. 657; Walden v. Craig, 14 Pet. [U. S.] 147, 10 L. Ed. 393 [Kentucky rule]. Some states hold that a sale without revivor is voidable only. Elliott v. Knott, 14 Md. 121, 74 Am. Dec. 519; Drake v. Collins, 5 How. [Miss.] 256. The subject is now generally regulated by statute.—From note to Hatcher v. Lord [Ga.] 61 L. R. A. 353.

39. See Estates of Decedents, § 6, 3 Curr. L. 1238.

40. See Post, § 4.

41. See 1 Curr. L. 1178.

42. An agreement not to enforce judgment until claim of third party was settled held too indefinite as to time to be enforceable. Burton v. Kipp [Mont.] 76 P. 563.

Same agreement held not to be based upon a consideration. Burton v. Kipp [Mont.] 76 P. 563. See, also, 1 Curr. L. 1178, n. 31.

43. Brady v. Carteret Realty Co. [N. J. Eq.] 57 A. 814.

44. White v. Smith [N. J. Eq.] 58 A. 817.

45. Bucki & Son Lumber Co. v. Atlantic Lumber Co. [C. C. A.] 128 F. 332.

46. Terry v. Johnston [C. C. A.] 129 F. 354.

47, 48, 49. Lewis v. Linton, 207 Pa. 320, 56 A. 874.

50. Petition alleged payment of judgment, and that plaintiffs were foreign executors and were not legally authorized to issue execution. Petition was verified, and no answer was filed; held, that the determination of defendant's rights should not have been

If execution is void,[51] it may be enjoined.[52]

§ 4. *Procedure to procure issuance of writ.*[53]—The right to the writ may in some cases he enforced by mandamus.[54]

A proceeding for leave to issue execution is an "action" within the meaning of the statute of limitations.[55] In Illinois, the notice to an administrator before issuing execution on a judgment against the decedent must be personal.[56]

§ 5. *Power and authority to issue or allow issuance of writ.*[57]—A judgment validly rendered[58] by an inferior court may in some states be transcribed to a higher court on a return of nulla bona and execution issued thereon,[59] to do so statutory record in the upper court is prerequisite.[60] In Illinois, judgments for fines are not transcribable.[61]

§ 6. *Form and contents of writ.*[62]—An execution must conform to the judgment,[63] must describe the judgment debtor,[64] and if the execution be a special one against property, must describe the property to be levied on,[65] so that identification is possible.

In Alabama, an unitemized execution for costs is void.[66] The clerk's signature must be official.[67] The indorsement or backing must conform to statutory requirements.[68]

postponed until after sale of his real estate. Lewis v. Linton, 207 Pa. 320, 56 A. 874.

51. Under Code Proc. art. 400, a sheriff's sale made pending a third opposition asserting ownership is void if the opposition be sustained. In re Immanuel Presbyterian Church, 112 La. 348, 36 So. 408.

52. A court may enjoin, on bond filed, pendente lite, the collection of an execution against the surety on a criminal recognizance, the bill alleging facts, which if true, render the execution void. Kirk v. U. S. [C. C. A.] 130 F. 112.

53. See 1 Curr. L. 1178.

54. A Federal circuit court of appeals will grant a writ of mandamus to compel a circuit court to obey the former's mandate to issue execution on a new trial for the costs of the appellate court. Bucki & Son Lumber Co. v. Atlantic Lumber Co. [C. C. A.] 128 F. 332. And, such court having the full record relating to the ruling on the plea before it, it will treat the proceeding as in effect one on a writ of error. Id. That there is a remedy by appeal will not prevent the issuance of a writ of mandamus against the trial court to compel issuance of execution. Holtum v. Greif [Cal.] 78 P. 11. But mandamus will not lie to compel the clerk to issue execution, though the right to a new trial has been denied by the trial court. Id.

55. In North Carolina, is barred after lapse of 10 years. Ex parte Smith, 134 N. C. 495, 47 S. E. 16.

56. Kinkade v. Gibson, 209 Ill. 246, 70 N. E. 683. Evidence that the notice was mailed to the administrator, who testified that he received the same, held sufficient to show compliance with the statute. Id.

57. See 1 Curr. L. 1179.

58. Under Rev. St. 1899, § 4019, the fact that, at the time that a justice's judgment was rendered, defendant was not a resident of the county, the issuance of an execution to a constable of the township in which judgment was rendered does not impair the right of the circuit court to issue an execution based on a transcript and nulla bona return. Mathewson v. Kilburn [Mo.] 81 S. W. 1096.

59. Rev. St. 1899, § 4019. Littlefield v. Ramsey [Mo.] 80 S. W. 949. See 1 Curr. L. 1179, n. 36.

60. Under Civ. Code Proc. § 723, judgment of quarterly court must be recorded before execution can issue from the circuit court. Moseley v. Stroud [Ky.] 80 S. W. 1182.

61. Under Hurd's Rev. St. 1903, c. 79, §§ 134, 135, 170, 171, where a judgment is rendered in a justice court, imposing a fine, there is no authority for filing a transcript thereof in the circuit court and levying on real estate thereunder. Cox v. Spurgin, 210 Ill. 398, 71 N. E. 456. See 1 Curr. L. 1179, n. 36.

62. See 1 Curr. L. 1179.

63. A judgment having been admitted in evidence, it is error to admit an execution varying therefrom in an essential particular. Kinkade v. Gibson, 209 Ill. 246, 70 N. E. 683. See 1 Curr. L. 1179, n. 39. It is no objection to an execution on a revived judgment that it was based on the original judgment. Littlefield v. Ramsey [Mo.] 80 S. W. 949.

64. Under Consolidation Act, § 1297, an execution directing the officer to collect from J. G., "first name fictitious," is invalid. Goldberg v. Markowitz, 94 App. Div. 237, 87 N. Y. S. 1045.

65. A levy upon a lot of land identified only by number when there are several lots of the same number is void for uncertainty. Miller v. Brooks, 120 Ga. 232, 47 S. E. 646.

66. Code 1896, §§ 1337, 1340, 1833. Stephens v. Head, 138 Ala. 455, 35 So. 565.

67. In Florida, failure of clerk to add the word "County" before the word "Clerk" after his signature does not render the execution void. Lewis v. Russell [Fla.] 36 So. 166.

68. The following "backing," held sufficient under Civ. Code 1895, § 4160: "Georgia, Warren County, 425 Dist. G. M. To all and singular the constables of Warren county. F. H. Howell, N. P. & Ex. J. P." Wilcher v. Pool [Ga.] 48 S. E. 956.

§ 7. *Quashal of writ.*[69]—A motion to quash must allege the grounds.[70] In Kentucky, the county in which the judgment was rendered is the proper forum for quashing the execution issued to another county for failure to comply with the statute.[71]

§ 8. *The levy. A. Leviable property and order of leviability.*[72]—The property must belong to the execution debtor,[73] though the latter having only the apparent title, a creditor may in certain cases levy thereon.[74] One cannot levy on property in the custody of the law,[75] nor on exempt property.[76] Property of a municipal corporation used for public purposes or charged with a public use is not subject to execution sale,[77] but the private property of the municipality used for profit may be sold.[78] A vested remainder may be levied on.[79]

Equitable interests like that of a vendee under an executory contract of sale,[80] or of the holder of a bond for title,[81] the interest of a grantor of a fraudulent conveyance,[82] or a mortgagor's interest or other redemptive right,[83] are subject to levy or not depending upon the nature of the right according to the common law or statute of the state governing the controversy.[84] Under the laws of some states, one's income, not exempt[85] and presently belonging to him[86] is leviable.

69. See 1 Curr. L. 1180.

70. Hence a motion to quash an execution which fails to specify any infirmity in the judgment or proceedings leading up to it, or any defect in the execution, is insufficient. Buzzard v. Robertson [Mo. App.] 81 S. W. 914.

71. Gorman v. Glenn, 25 Ky. L. R. 1755, 78 S. W. 873.

72. See 1 Curr. L. 1180.

73. Wrongful levy on property belonging to Indian ward. McKnight v. U. S. [C. C. A.] 130 F. 659.

In proof of ownership of liquor taken under execution, mortgages given thereon by the claimant, his affidavit attached to one of them and his application on a liquor tax certificate are admissible. Cafe Central v. Readon, 84 N. Y. S. 863. On the question of ownership of buildings, testimony as to where lumber, of which they were constructed was obtained and cost thereof held competent. Porter v. Hawkins, 27 Mont. 485, 71 P. 664.

74. Under Code 1892, § 4234, property of undisclosed principal in hands of agent may be so levied on. Dale & Co. v. Harrahan [Miss.] 37 So. 458.

75. Sheriff has no right to levy on property which by reason of a prior constable's levy is already in the custody of the law. Camp v. Williams Bros., 119 Ga. 152, 46 S. E. 66. See 1 Curr. L. 1181, n. 72.

76. Coxwell v. Goddard, 119 Ga. 359, 46 S. E. 412. Real property held in lieu of homestead may be sold and is not subject to sale upon execution in satisfaction of a judgment obtained against the grantor prior to the conveyance [Rev. St. 5441]. Genell v. Hirons, 70 Ohio St. 309.

77. Kerr v. New Orleans [C. C. A.] 126 F. 920. A sworn bill to restrain levy of execution against a city alleging that the property was dedicated to a public use, facts as to advertisement of property for sale by the city considered and the granting of a preliminary injunction held not improvident. Id. Waterworks held in trust by a board for the use of city held not subject to be sold for city's indebtedness. Brockenbrough v. Board of Water Com'rs of Charlotte, 134 N. C. 1, 46 S. E. 28.

78. Kerr v. New Orleans [C. C. A.] 126 F. 920.

79. Roach v. Dance [Ky.] 80 S. W. 1097. As to contingent remainder, see 1 Curr. L. 1180, n. 58.

80. Before notice of forfeiture or before cancellation. Hook v. Northwest Thresher Co., 91 Minn. 482, 98 N. W. 463.

81. Not leviable interest in land. The rule being changed by Civ. Code 1895, §§ 5432-5434. Shumate v. McLendon [Ga.] 48 S. E. 10.

82. Holding it is not: Ind. T. Ann. St. 1899, § 2115. Parrott v. Crawford [Ind. T.] 82 S. W. 688.

Holding it is: Where the title and ownership remain in grantor. Lynch v. Burt [C. C. A.] 132 F. 417. This is true, not only of conveyances directly from the debtor, but also upon transfers whereby his title and ownership are passed to another for the like dishonest purpose through the agency of a judicial sale. Id. See 1 Curr. L. 1181, n. 68.

83. Holding affirmative: Under Ky. St. 1903, § 1709. Where owner had conveyed by deed absolute, taking a written defeasance. Ebelharr v. Tennelly, 25 Ky. L. R. 2257, 80 S. W. 459. A judgment debtor having the right of possession and the legal title during the existence of the right to redeem, his interest is subject to sale on execution [Construing Rev. Code N. Dak. 1899, §§ 5541, 5544, 5548, 5507]. Lynch v. Burt [C. C. A.] 132 F. 417.

Holding negative: Until redemption is made. Shumate v. McLendon [Ga.] 48 S. E. 10. The debtor or his subsequent judgment creditor may redeem. If the latter redeems, he can compel a reconveyance by the grantee so as to revest the legal title in the debtor and make the land subject to sale under the creditor's judgment. Id. The interest of the grantor is not affected by a transfer of the debt or of the title. He acquires no leviable interest until the debt is paid to the transferee. Id.

84. Consult Fraudulent Conveyances, 2 Curr. L. 116; Fraud and Undue Influence, 2 Curr. L. 104; Foreclosure of Mortgages on

(§ 8) *B. Mode of making levy.*[87]—Levy must be by a party disinterested in the action.[88] It should not be made until the writ is delivered to the officer,[89] who must take the goods with intent to levy.[90] Statutory provisions as to demanding payment must be strictly followed.[91] Statutory notice to a firm on taking a partner's interest must be served on some one of authority other than defendant.[92] In some states, the debtor failing to designate his homestead, the officer making the execution sale may do so.[93]

(§ 8) *C. Duty to make levy. Indemnification of officer.*[94]—The officer must execute the writ and may be compelled to do so, but not by mandamus where there is a plain and adequate ordinary remedy.[95] Delay being caused by the judgment creditor or his attorney, the sheriff is not liable for loss occasioned thereby.[96] Statutory provisions generally govern the execution of indemnity bonds, and a provision for them is to be regarded as concurrent with one for interpleader.[97]

(§ 8) *D. Extent and adequacy of levy.*[98]—No more than is necessary should be levied on,[99] and equity will grant relief from an unjust and oppressive levy.[1] An execution in rem against specific property may be levied on the entire property covered thereby, though the value of the property greatly exceed the amount of the execution, but where the property is susceptible of division only so much should be sold as is necessary to satisfy the execution.[2]

(§ 8) *E. Conflicting levies and liens and priorities between them.*[3]—Ordinarily a writ of execution is a lien upon the personal property of the judgment debtor from the time of its delivery to the officer;[4] but where, at the instance of

Lands, 2 Curr. L. 14; Mortgages, 2 Curr. L. 905.

85. White v. Koehler [N. J. Law] 57 A. 124. Salary of a judgment debtor for his personal services is "income." Id.

86. Under a will giving property to defendant's children, but providing that it shall not be distributed so long as he lives, but till his death the income shall be subject to a reasonable support of him and his family, none of the income is subject to be taken by his creditors. Kelsey v. Webb, 94 App. Div. 571, 88 N. Y. S. 4. The complaint in an action against an employer [under Code Civ. Proc. § 1391], for refusing to pay the statutory percentage of the judgment debtor's wages to satisfy a judgment recovered wholly for necessaries, is insufficient unless it alleges the nonexistence of a prior unsatisfied and outstanding execution of the same kind. Rosenstock v. New York, 89 N. Y. S. 948.

87. See 1 Curr. L. 1181.

88. In re Stephanian [R. I.] 56 A. 1034.

89. Objection cannot be made for the first time on appeal. Flynn v. Kalamazoo Circuit Judge [Mich.] 98 N. W. 740.

90. The handing of a notice to defendant is not a levy, it being immediately returned to the officer who subsequently decides not to make the levy unless an indemnity bond is given which is refused. Adoue v. Wettermark [Tex. Civ. App.] 82 S. W. 797.

91. Failure to demand payment 30 days before levy as required by 1 Starr & C. Ann. St. 1896, pp. 1076, 1077, c. 33, § 28, sale set aside. Henderson v. Kibble, 211 Ill. 556, 71 N. E. 1091.

92. Under Rev. St. 1895, art. 2352, to levy on a partner's interest, the notice must be left with a partner other than the execution defendant, or with a clerk of the firm. Adoue v. Wettermark [Tex. Civ. App.] 82 S. W. 797.

93. Hook v. Northwest Thresher Co., 91 Minn. 482, 98 N. W. 463.

94. See 1 Curr. L. 1181.

95. Where the defendant is solvent and the property is not likely to be removed beyond the reach of the sheriff during the life of the writ, the remedy at law is adequate. Ohio v. Chambers, 5 Ohio C. C. (N. S.) 57.

96. Ankele v. Elder [Colo. App.] 75 P. 29.

97. A statute providing for the execution of an indemnifying bond is not impliedly repealed by an act providing for interpleader [Construing Laws 1855, p. 464 and Rev. St. 1889, § 572]. State v. O'Neil Lumber Co., 170 Mo. 7, 70 S. W. 121. And the first mentioned law, not being inconsistent with the state constitution, is continued in force by 1 Rev. St. 1889, p. 110. Const. Sched. § 1. Id.

98. See 1 Curr. L. 1182.

99. A levy upon the debtor's interest in two tracts, the interest in either being sufficient is excessive. Henderson v. Kibble, 211 Ill. 556, 71 N. E. 1091. Objection that a levy is excessive should be prompt. Glaucke v. Gerlich, 91 Minn. 282, 98 N. W. 94.

1. But one seeking such relief, who admits that part of the sum covered by the execution is justly due, must, to prevail, offer to do equity by paying into court the amount admitted to be due. Wilkinson v. Holton, 119 Ga. 557, 46 S. E. 620.

2. Wilkinson v. Holton, 119 Ga. 557, 46 S. E. 620.

3. See 1 Curr. L. 1182.

4. Ankele v. Elder [Colo. App.] 75 P. 29. See 1 Curr. L. 1182, n. 84, for rule in Kentucky.

the creditor or his attorney, it lies inactive in the officer's hands, its lien is subordinated to that of a creditor securing himself upon the property before the levy.[5] In California, a judgment not being a lien on a leasehold, a purchaser's rights under an execution not levied thereon dates from the time of sale or from the giving of notice thereof.[6] Appointment of a receiver for the judgment debtor before the attaching of the lien under the levy prevents such lien from coming into existence.[7] The execution lien is inferior to all prior valid liens,[8] and may in some cases lose priority over the lien of a subsequent bona fide lienor.[9]

(§ 8) *F. Relinquishment and dissolution of levy.*[10]—The levy remains until discharged by satisfaction or in some other legal manner.[11] In some states an order discharging a levy is not appealable.[12] Sureties are discharged by release of leviable property.[13]

(§ 8) *G. Release of property on receipts or forthcoming or delivery bonds.*[14]—A valid undertaking being filed, the defendant is entitled to the property.[15] Suit may be brought on a forthcoming bond in the name of the officer to whom the bond was made payable, though he may have retired from office prior to the bringing of the action.[16] In such suit the execution need not be set out in the petition nor attached thereto as an exhibit,[17] nor can any issue be raised as to the title to the property involved.[18]

(§ 8) *H. Liability of officer for loss of property levied upon.*[19]—The levy being void, the sheriff is not liable to the execution creditor for the property.[20]

(§ 8) *I. Liability for wrongful levy.*[21]—A sheriff is liable for his own wrongful levy[22] and also that of his deputy.[23] An execution void on its face is

5. Ankele v. Elder [Colo. App.] 75 P. 29.

6. Summerville v. Kelliher [Cal.] 77 P. 889. See, also, Summerville v. Stockton Milling Co., 142 Cal. 529, 76 P. 243.

7. Under Mills' Ann. St. §§ 2583, 2585, such lien does not attach to realty until the certificate of levy is filed in the recorder's office. People v. Finch [Colo. App.] 76 P. 1120.

8. Is inferior to prior recorded chattel mortgage. Hayes v. First State Bank [Neb.] 98 N. W. 423. Is superior to subsequent equitable assignments, but inferior to previous ones. Third Nat. Bank v. Atlantic City, 126 F. 413. A corporation issued bonds secured by a mortgage, these bonds were then used by the corporation as collateral to raise money; the property was then sold on execution, the purchaser taking subject to the mortgage, the purchaser added improvements and the mortgage was then foreclosed. Held, that the holder of the bonds as collateral was first entitled to the amount of his loan, the execution purchaser was then entitled to the value of the improvements placed by him on the property and the balance of the proceeds from the mortgage foreclosure sale went to the payment of the balance due on the bonds after deducting the amount of the loan for which they were held as collateral. Georgetown Water Co. v. Fidelity Trust & Safety Vault Co.'s Trustee, 25 Ky. L. R. 1739, 78 S. W. 113.

9. The answer to a bill, filed by an execution purchaser to set aside a mortgage executed subsequent to the sale by the judgment debtor must allege that the mortgagee parted with value without notice of plaintiff's rights [Ky. St. 1903, § 2358a, subsec. 2]. Gorman v. Glenn, 25 Ky. L. R. 1755, 78 S. W. 873.

10. See 1 Curr. L. 1182.

11. A sheriff's return of an execution as satisfied will not discharge the levy, where the sale is set aside as void. Campau v. Detroit Driving Club [Mich.] 98 N. W. 267.

12. Such order in the municipal court is not. Hyman v. Segal, 88 N. Y. S. 1036.

13. See Suretyship, 2 Curr. L. 1776. The judgment creditor releasing nonexempt property of his debtor from the levy, the value of such property will be credited on the judgment before the latter is enforced against one secondarily liable. Mayberry v. Whittier [Cal.] 78 P. 16.

14. See 1 Curr. L. 1182.

15. On the day property was taken under execution, defendant filed a bond under Municipal Court Act, § 314, and served a notice of appeal, and served a copy of the undertaking on the sheriff; thereafter he filed a bond under Code Civ. Proc. § 1311; held, an order requiring the marshal to turn over all the property levied on was proper. Hyman v. Segal, 88 N. Y. S. 1036.

16, 17. O'Neill Mfg. Co. v. Harris, 120 Ga. 467, 47 S. E. 934.

18. Petition is not defective for failing to allege that the property in controversy is that of the plaintiff in execution. O'Neill Mfg. Co. v. Harris, 120 Ga. 467, 47 S. E. 934.

19. See 1 Curr. L. 1182.

20. The property being in custodia legis at the time of the levy, the sheriff is not liable to the execution creditor for allowing the property to be taken by a purchaser at a judicial sale, nor is it his duty to resist such sale for invalidity. Camp v. Williams Bros., 119 Ga. 152, 46 S. E. 66.

21. See 1 Curr. L. 1183.

22. Wrongful levy on property belonging to Indian ward. McKnight v. U. S. [C. C. A.] 130 F. 659.

of no protection to the officer.[24] The motive which actuates plaintiff to sue the sheriff is immaterial.[25] Claimant by being present at sale and not objecting may lose his right to sue the sheriff.[26] A tenant on shares has sufficient interest in a crop to enable him to maintain an action for damage thereto by reason of a wrongful levy thereon.[27] The property being sold, the measure of damages is the value of the property with interest from the date of levy.[28] The price obtained by an officer at forced sale under execution while not conclusive[29] is competent evidence of the value of the property,[30] and the issuance of the execution may be proven by the clerk's docket.[31] Proof that by reason of the wrongful levy, the property was destroyed, will support a verdict for actual as well as nominal damages.[32]

As against the execution creditor, a statutory levy on land does not authorize a recovery, in the absence of a showing of special damages therefrom.[33] Exemplary damages cannot be recovered, the levy being procured in good faith, though under a mistake of law,[34] nor are they recoverable in the absence of actual damages.[35]

§ 9. *Claims of third persons.*[36]—In most states, the officer levying execution is not liable to interposing claimants unless notice was served on him,[37] and if disputed, they must prove title.[38] The judgment lien once attaching, the property is subject to execution in whosesoever hands it later comes.[39] Execution lien levied upon an indeterminate estate is invalid as against a conveyance under a deed executed after the estate vested.[40] A person's property being levied on for the debt of another, the proper remedy in Georgia is the interposing of an ordinary claim.[41] A claimant may attack the execution on any ground which could have been urged by the defendant.[42] The proceeding is statutory and is so construed as to give sense to the statute.[43] The suit should be determinative as to all the property.[44] In Louisiana, a third opponent obtaining a

23. Stephens v. Head, 138 Ala. 455, 35 So. 565.

24. Stephens v. Head, 138 Ala. 455, 35 So. 565. Execution directed officer to collect from J. G. "first name fictitious.". Goldberg v. Markowitz, 94 App. Div. 237, 87 N. Y. S. 1045.

25. Stephens v. Head, 138 Ala. 455, 35 So. 565.

26. Plea setting up such facts held insufficient, it failing to show that the sheriff held an execution against the judgment debtor. Stephens v, Head, 138 Ala. 455, 35 So. 565.

27. This notwithstanding the landlord's lien for his share and for supplies furnished the tenant. Parker v. Hale [Tex. Civ. App.] 78 S. W. 555.

28. Milner & K. Co. v. De Loach Mill Mfg. Co., 139 Ala. 645, 36 So. 765.

29. Where bid was made by young employee, held not evidence of value. Rickards & Co. v. Bemis & Co. [Tex. Civ. App.] 78 S. W. 239.

30. Return showing price held competent evidence of value. Shoup v. Marks [C. C. A.] 128 F. 32.

31. The return being competent evidence. Shoup v. Marks [C. C. A.] 128 F. 32.

32. Parker v. Hale [Tex. Civ. App.] 78 S. W. 555.

33, 34, 35. Adoue v. Wettermark [Tex. Civ. App.] 82 S. W. 797.

36. See 1 Curr. L. 1183.

37. Under Code, § 3991, reading notice and leaving copy is insufficient, the receipt by the officer of the notice itself is necessary. Frazier v. Hill, 123 Iowa, 116, 98 N. W. 569.

38. Record evidence of the capacity in which an executor conveyed, held admissible, also that executor paid all debts of testatrix from proceeds of sale. Brown v. Rawlings, 119 Ga. 937, 47 S. E. 198.

39. Ansley Co. v. O'Byrne [Ga.] 48 S. E. 228.

40. Swerer v. Ohio Wesleyan University Trustees, 2 Ohio N. P. [N. S.] 333.

41. Lanier v. Bailey [Ga.] 48 S. E. 324.

42. Ansley v. O'Byrne [Ga.] 48 S. E. 228.

43. In Rev. St. 1892, §§ 1177, 1200, providing that in claim proceedings the court, if the verdict is for plaintiff, shall award recovery against defendant and his sureties, the plaintiff referred to is the plaintiff in execution, and the defendant and his sureties referred to are the claimants in the claim proceedings. Strobhar v. Jesse French Piano & Organ Co. [Fla.] 37 So. 177. Under this statute a judgment against the sureties alone is erroneous. Id.

44. Verdict, in trial of claim interposed to fi. fa., not mentioning part of the property, does not determine the leviability of same. Pritchett v. Samuel Weichselbaum Co., 119 Ga. 293, 46 S. E. 99.

money judgment for improvements against the purchaser, the latter has his recourse for reimbursement against defendant in execution.[45]

§ 10. *Appraisement,*[46] when essential, must be made by persons of qualified age for that purpose.[47]

§ 11. *Execution sales. In general.*[48]—Generally, an execution plaintiff cannot enforce his lien in a manner other than that provided by statute, but a court of equity acquiring jurisdiction of the parties, it may grant complete relief by enforcing the execution.[49] A judgment creditor will be enjoined from offering his debtor's property for sale on execution, and at the same time claiming that he will have title as against the purchaser.[50] The law presumes in favor of executions and sales that officials have done their duty,[51] and that property was such as to be salable in the manner adopted.[52]

Notice and advertisement.[53]—Notice of the sale must be given,[54] the length of time being governed by statutory provisions,[55] though in Montana, failure to give notice does not invalidate the sale, the remedy against the officer being exclusive.[56]

Bids and acceptance thereof.[57]—A surety may purchase his principal's property at sale.[58]

Proceeds.[59]—Failure of the officer to pay into court, as required by law, the amount realized from the sale does not avoid the latter,[60] though the sheriff is liable for such failure. The sheriff is not required to decide the question of conflicting claims to the proceeds, but may retain the money until the claims are judicially determined, and in so doing he is not liable to the statutory penalty for failing to pay over the same.[61] If he pay it to one claimant upon the execution of an indemnity bond, such claimant may contest the other's right to recover the penalty,[62] and in action the burden is generally on the plaintiff to show the invalidity of defendant's claim.[63]

§ 12. *Return or certification of sale to court and confirmation. Return.*[64]—The sheriff's return must identify the property levied on with reasonable cer-

45. Code Prac. art. 711 et seq. In re Immanuel Presbyterian Church, 112 La. 348, 36 So. 408.

46. See 1 Curr. L. 1185.

47. That one is under 21 years (White v. Laurel Land Co. [Ky.] 82 S. W. 571), or over 60 years (Flynn v. Kalamazoo Circuit Judge [Mich.] 98 N. W. 740) of age does not disqualify him from so acting.

48. See 1 Curr. L. 1185.

49. Gorman v. Glenn, 25 Ky. L. R. 1755, 78 S. W. 873.

50. Brady v. Carteret Realty Co. [N. J. Eq.] 57 A. 814.

51. That the clerk required the affidavit required by Ky. St. 1903, § 1656, to be filed. Gorman v. Glenn, 25 Ky. L. R. 1755, 78 S. W. 873. Sheriff's levy on land. White v. Laurel Land Co. [Ky.] 82 S. W. 571. Purchaser taking possession held after lapse of 35 years that it would be presumed that the sheriff had executed deed in accordance with sale. Manning v. Kansas & T. Coal Co. [Mo.] 81 S. W. 140. Code Civ. Proc. § 3266. Sale of land, composed of two parcels, in gross. Considering Code Civ. Proc. § 1227. Burton v. Kipp [Mont.] 76 P. 563.

52. Where an execution was levied on two lots, and the court ordered only so much to be sold as would satisfy the execution, it is to be presumed that the property was divisible. Gorman v. Glenn, 25 Ky. L. R. 1755, 78 S. W. 873.

53. See 1 Curr. L. 1185.

54. Evidence as to lack of notice considered and held not to impeach the sufficiency of such notice. White v. Laurel Land Co. [Ky.] 82 S. W. 571.

55. Under Ky. St. 1903, § 1682, subsec. 2, requiring the sale to be advertised for 15 days, a judgment granting possession to the purchasers at a sale advertised but 10 days is erroneous. Scott v. Powers Little & Co., 25 Ky. L. R. 1640, 78 S. W. 408.

56. Code Civ. Proc. §§ 1225, 1226. Burton v. Kipp [Mont.] 76 P. 563.

57. See 1 Curr. L. 1186.

For effect of inadequacy of price, see post, § 15, a. Setting aside sale.

58. Though he has not asserted a claim of suretyship in the action. Atlee v. Bullard, 123 Iowa, 274, 98 N. W. 889.

59. See 1 Curr. L. 1186.

60. Flynn v. Kalamazoo Circuit Judge [Mich.] 98 N. W. 740. See 1 Curr. L. 1186, n. 48.

61, 62. Rickards & Co. v. Bemis & Co. [Tex. Civ. App.] 78 S. W. 239.

63. That such claim was based on false representations. Rickards & Co. v. Bemis & Co. [Tex. Civ. App.] 78 S. W. 239.

64. See 1 Curr. L. 1186.

tainty;[65] but this is qualified by the rule that that is certain which can be made certain.[66] It should show a full and explicit compliance with statutory provisions, any omission in this respect rendering the sale voidable.[67] The return being incorrect, the proper practice is to move to have the same amended,[68] though there is a conflict as to the power of the court to compel such amendment.[69] It would seem as though the return is not amendable after the death of the sheriff.[70] So long as it stands, the return is conclusive on the parties.[71] The return may be directly attacked,[72] but lapse of time may remedy the defects.[73]

Confirmation.[74]—A mortgagee must show that his security is endangered in order to prevent confirmation of a sale subject to the mortgage.[75]

§ 13. *Redemption.*[76]—Redemption is generally effected by paying to the purchaser, or officer making the sale, the amount of the purchase price and any taxes paid by the purchaser after the sale, with interest on both amounts, and in default of a redemption in accordance with law, the sheriff is required to immediately deliver a deed to the purchaser or his assignee.[77] The right is wholly statutory.[78] The legal remedy being wrongfully obstructed or inadequate, the right may be enforced by a bill in equity seasonably brought.[79] Where a court in confirming the sale, erroneously orders a deed to issue at once, without providing for any redemption, such error may be corrected at the same term on motion of any one substantially interested in the matter and on notice to the purchaser.[80] The purchaser at execution sale may redeem from a subsequent sale

65. Buckner v. Vancleave [Tex. Civ. App.] 78 S. W. 541. Miscalling mortgagor's interest an "equity of redemption" held not fatal. Ebelharr v. Tennelly, 25 Ky. L. R. 2257, 80 S. W. 459.

66. Buckner v. Vancleave [Tex. Civ. App.] 78 S. W. 541.

67. Hazen v. Webb [Kan.] 74 P. 1111. Failed to show when or how long notice of sale was published. Id.

68. It is mistaken practice to attempt to contradict it by affidavit on a motion to vacate the sale. Flynn v. Kalamazoo Circuit Judge [Mich.] 98 N. W. 740.

69. That the court has such power. Osborne & Co. v. Hughey [Okl.] 76 P. 146.

That it has not. Flynn v. Kalamazoo Circuit Judge [Mich.] 101 N. W. 222. See 1 Curr. L. 1187, n. 54.

70. Entry on tax execution made by deputy held not amendable after death of sheriff, the deputy having gone out of office. Miller v. Brooks, 120 Ga. 232, 47 S. E. 646.

71. Flynn v. Kalamazoo Circuit Judge 98 N. W. 740. As between the purchaser at an execution sale and one claiming under a deed from the execution debtor, the sheriff's return that the purchase price has been paid is conclusive. Mason v. Perkins [Mo.] 79 S. W. 683. A defense that the sheriff had at first refused to levy because of plaintiff's failure to furnish an indemnifying bond, but had finally filed a certificate of levy on real estate, is not allowable in an action against the sheriff for a false return of nulla bona. People v. Finch [Colo. App.] 76 P. 1120. Nor, under Mills' Ann. St. § 2537, is it a defense to such an action that a sheriff of another county had sold the property under another writ of execution obtained by the same judgment creditor. Id. Under Mills' Ann. St. § 2538, an officer having received the writ and taken possession of the property cannot defend a false return of nulla bona by showing that the court had subsequently appointed a receiver who had been ordered to take charge of all the debtor's property. Id.

72. Return showing service of notice, evidence that there was no service is admissible. Moore v. Snowball [Tex. Civ. App.] 82 S. W. 330.

73. In the absence of fraud, the sheriff's return cannot after a lapse of 9 years be impeached by the testimony of the appraisers. White v. Laurel Land Co. [Ky.] 82 S. W. 571.

74. See 1 Curr. L. 1187.

75. Georgetown Water Co. v. Fidelity Trust & Safety Vault Co.'s Trustee, 25 Ky. L. R. 1739, 78 S. W. 113.

76. See 1 Curr. L. 1187.

77. Lynch v. Burt [C. C. A.] 132 F. 417. Evidence held not to support a finding that defendant, on receiving a sum less than due, agreed to accept it as full redemption from an execution sale. Wilson v. Eddy, 122 Iowa, 415, 98 N. W. 150.

78. Lynch v. Burt [C. C. A.] 132 F. 417.

79. Lynch v. Burt [C. C. A.] 132 F. 417. Payment, into registry of the Federal court of amount due, by owner of land sold under execution issuing from a state court, the purchaser at the sale having brought the suit in the Federal court to have a former conveyance by the owner declared fraudulent and void, held not equivalent of redemption, and equity would not relieve from the failure to redeem within the statutory time. Id. A fraudulent grantee who took title prior to the execution sale, seeking to avoid the latter, held redemption could not be enforced in equity after expiration of statutory period. Id. See 1 Curr. L. 1188, n. 72.

80. Though the sheriff's deed has already been executed, delivered and recorded, no rights of third parties having intervened. Porter v. Watson [Kan.] 76 P. 841.

under a prior judgment,[81] nor is this right lost by the fact that a deed is issued to such purchaser at a time when he is only entitled to a certificate of sale.[82] A purchaser of the grantee after levy failing to redeem cannot attack the title of the one redeeming on the ground of the invalidity of the judgment.[83] A judgment creditor redeeming from a prior execution sale acquires simply the rights of the creditor from whom he redeems.[84]

§ 14. *Deeds and title under sales.*[85]—The deed must identify the land with reasonable certainty.[86] An incorrect description renders the purchaser's title an equitable one.[87] Trivial errors working no prejudice are immaterial.[88] A purchaser at the sale acquires only the title of the judgment debtor,[89] except where he acquires rights as a bona fide purchaser.[90] He takes no title to that portion of the property which is exempt.[91] By buying personalty with notice of another's title thereto, the purchaser is guilty of conversion.[92] A stranger to the action purchasing at the execution sale, his title will not be affected by a subsequent reversal;[93] the rule is otherwise where a party to the action purchases the property,[94] and the title of one purchasing from such "party" while the action is pending on appeal will be defeated by a reversal.[95] In New York, the person entitled

81, 82. Porter v. Watson [Kan.] 76 P. 841.

83. Roose v. Gove [Colo.] 77 P. 246.

84. The prior execution sale is not vacated thereby. Roose v. Gove [Colo.] 77 P. 246.

85. See 1 Curr. L. 1188.

86. Buckner v. Vancleave [Tex. Civ. App.] 78 S. W. 541.

That is certain which can be made certain. Buckner v. Vancleave [Tex. Civ. App.] 78 S. W. 541.

87. Manning v. Kansas & T. Coal Co. [Mo.] 81 S. W. 140.

88. Clerical error in date of record. Mason v. Perkins [Mo.] 79 S. W. 683.

89. The debtor having no interest, no title passes to the purchaser. Milner & Kettig Co. v. De Loach Mill Mfg. Co., 139 Ala. 646, 36 So. 765. Under 3 Gen. St. p. 2980, § 7, a sheriff's deed passes the same title as one of bargain and sale. Brady v. Carteret Realty Co. [N. J. Eq.] 57 A. 814. Where the execution debtor's interest consisted solely of an equity of redemption, a purchaser under the execution sale acquires only the right to redeem, which, if not exercised, is barred by lapse of time. Jones v. Herrick [Wash.] 77 P. 798. Purchaser buying a vested remainder takes a fee on death of life tenant. Roach v. Dance [Ky.] 80 S. W. 1097. Debtor cannot set up against purchaser outstanding title consisting of a prior deed of trust after forfeiture, nor can the holder of such title claim the benefit thereof. Littlefield v. Ramsey [Mo.] 80 S. W. 949. The sale does not prejudice the rights of third persons claiming title. White v. Smith [N. J. Eq.] 58 A. 817. Purchaser has no greater right than debtor to attack prior recorded mortgage. Ismon v. Loder [Mich.] 97 N. W. 769. Grantee under quitclaim deed has superior title to grantee under sheriff's deed, there being no evidence that judgment debtor had title to property. Mosier v. Momsen, 13 Okl. 41, 74 P. 905. See 1 Curr. L. 1188, n. 83.

90. Judgment creditor purchasing at sale in reliance on debtor's legal and apparent equitable title is such a purchaser, and will not be postponed to grantee of an unrecorded deed. Sanger Bros. v. Collum [Tex. Civ. App.] 78 S. W. 401. Purchaser having knowledge of fraud is not such a purchaser. Sterling v. Sterling, 90 N. Y. S. 306. See 1 Curr. L. 1189, n. 84-87; Id. 1189, n. 96; Id. 1190, n. 99.

91. Under Ky. St. 1903, § 1709, a judgment creditor purchasing homestead property acquires a lien thereon, subject to existing incumbrances and the homestead estate. Weber v. Gardner [Ky.] 80 S. W. 481. See 1 Curr. L. 1189, n. 93.

NOTE. Homestead—Excess of amount allowed by law: Although a homestead is in excess of the statutory value, the levy of an execution thereon merely lays the foundation for proceedings for the admeasurement of the excess in value. Lubbock v. McMann, 82 Cal. 226, 16 Am. St. Rep. 108. It does not subject the whole premises to sale under execution. Hargadine v. Whitfield, 71 Tex. 482. Where a homestead exceeds the statutory limit in value, the sheriff cannot sell part of it, but must proceed under the provisions of the statute to set apart the exemption before selling the part not exempt. Rhyne v. Guevara, 67 Miss. 139; Stone v. McCann, 79 Cal. 460; Meyer v. Nickerson, 100 Mo. 599.—From note to Sanders v. Russell [Cal.] 21 Am. St. Rep. 26.

92. Sperling v. Stubblefield [Mo. App.] 79 S. W. 1172.

93, 94. Di Nola v. Allison, 143 Cal. 106, 76 P. 976.

95. Code Civ. Proc. § 1049. Di Nola v. Allison, 143 Cal. 106, 76 P. 976. Such purchaser has no equity, on reversal of the judgment, to claim protection from the restitution plaintiff would be required to make under Code Civ. Proc. § 957. Id.

NOTE. Reversal of judgment: A judgment creditor purchasing at his own execution sale is chargeable with notice of all irregularities in the proceeding, and he is not such a bona fide purchaser for value as to be relieved of the effect of notice of irregularities. Smith v. Huntoon, 134 Ill. 24, 24 N. E. 971, 23 Am. St. Rep. 646; Boos v. Morgan, 130 Ind. 305, 30 N. E. 141, 30 Am. St. Rep. 237. His title is divested by the reversal, and his grantee, though not a party to the

to the deed dying before its delivery, the sheriff must deliver the same to such person's personal representative.[96] An heir's possibility of reverter, on breach of conditions subsequent, is not extinguished by an execution sale of the land.[97] Delay in issuing deed for a length of time sufficient to raise a presumption inconsistent with the validity thereof renders the deed void.[98] A purchaser of fixtures as personal property is not to be deemed in possession of the realty by merely placing a custodian in possession of the goods.[99] In Kentucky, a writ of possession can only be granted after conveyance has been made.[1] The sheriff's deed is prima facie evidence of the facts recited therein.[2]

§ 15. *Remedies against defective levy or sale. Setting aside sale.*[3]—The action to set aside a sheriff's deed must be brought within a reasonable time.[4] The purchase price being paid and the deed delivered, the sale can only be set aside on the ground of fraud,[5] except where the court has the power to set aside the judgment;[6] but the court cannot, even in this latter case, defeat the title of an innocent purchaser for value.[7] The sale being void, the execution debtor need not tender the amount paid at the sale.[8] The judgment debtor seeking to set aside a valid sale for inadequacy of price must return to the execution purchaser that part of the price paid by the latter which is proportionate to the debtor's interest in the property.[9] Either the execution defendant or any claimant may prove the judgment to be void or discharged,[10] but neither can go behind the judg-

action, nor cognizant of the defect in title, is not a purchaser in good faith, and acquires no greater rights than the judgment plaintiff had. Singly v. Warren, 18 Wash. 434, 51 P. 1066, 63 Am. St. Rep. 896; Stroud v. Casey, 25 Tex. 740, 78 Am. Dec. 556; Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459. Contra, McAusland v. Pundt, 1 Neb. 211, 93 Am. Dec. 358.—From note to Hacker v. White [Wash.] 79 Am. St. Rep. 945.

96. Code Civ. Proc. § 1473. Deed delivered to assignee of deceased purchaser's heirs is void. Dixon v. Dixon, 89 App. Div. 603, 85 N. Y. S. 609.

97. Hence on breach of the conditions by the execution purchaser, the heir may join in enforcing a forfeiture against such purchaser. Brown v. Tilley [R. I.] 57 A. 380.

98. Lapse of 42 years raising presumptions that judgment had been satisfied and also that redemption had been effected. Dixon v. Dixon, 89 App. Div. 603, 85 N. Y. S. 609.

99. Seiberling v. Miller, 207 Ill. 443, 69 N. E. 800.

1. Under Ky. St. 1903, § 1689, the granting of such writ is erroneous, the record not disclosing a conveyance. Scott v. Powers, Little & Co., 25 Ky. L. R. 1640, 78 S. W. 408.

2. Rev. St. 1899, § 3210, establishes a prima facie case of right to possession in action of ejectment. Cummings v. Brown [Mo.] 81 S. W. 158. Where existence of valid judgment and loss of execution issued thereon was shown, held prima facie evidence of title (Sweeney v. Sweeney, 119 Ga. 76, 46 S. E. 76), and of truth of recitals of execution and sale of property thereunder. Id. Sufficiency of evidence to prove loss of execution (Id.). Under Code Civ. Proc. § 1471, a sheriff's deed is not presumptive evidence of the facts stated therein unless it has been recorded for 20 years. Dixon v. Dixon, 89 App. Div. 603, 85 N. Y. S. 609.

3. See 1 Curr. L. 1190.

4. A delay of five years, held complaint must contain allegations showing reasonable diligence. Ryan v. Woodin [Idaho] 75 P. 261. A sale of realty upon execution cannot be set aside on motion of defendant made 2 years after confirmation, no reason for the delay being shown, and no grounds for relief other than those determined by the order of confirmation being shown. Hill v. Gatliff [Kan.] 76 P. 428. Five years delay, no change of possession occurring, and the debtor not having knowledge of the sale, does not preclude him from having the same set aside. Henderson v. Kibbie, 211 Ill. 556, 71 N. E. 1091.

5. The court has no power to set aside the sale on a rule to show cause, and it makes no difference that the judgment upon which the sale was founded has been reversed. Lengert v. Chaninel, 208 Pa. 229, 57 A. 561. Sale on execution against husband set aside where property was bought with wife's money, and she, being unable to read or write English, did not know title was in husband's name, there being no delay after she discovered the same. Kurz v. Kurz [Wis.] 97 N. W. 900.

6. English v. Otis [Iowa] 101 N. W. 293.

7. English v. Otis [Iowa] 101 N. W. 293. Neither the attorneys for the execution creditor, the latter, nor an assignee of the certificate of sale are such innocent purchasers. Id.

8. Cox v. Spurgin, 210 Ill. 398, 71 N. E. 456. The same rule prevails where the suit is for the cancellation of a deed executed by the purchaser at the sale. Id. See 1 Curr. L. 1191, n. 17.

9. Moore v. Snowball [Tex. Civ. App.] 82 S. W. 330.

10. Ansley v. O'Byrne [Ga.] 48 S. E. 228. An execution issued from a court of general jurisdiction is not void on its face for want of jurisdiction, but may be proven so by the record. Id.

ment for the purpose of showing that it ought never to have been rendered.[11] A voidable execution cannot be collaterally attacked.[12] A sale may be validated by legislation, no constitutional guaranty being infringed.[13]

Mere inadequacy of price, not attended by fraud, mistake or surprise tending to influence the result, does not invalidate the sale,[14] but the sheriff incorrectly stating the amount of the debt and selling for an inadequate price, the sale is void.[15] It is no defense in a suit to set aside the sale that the contract between complainant and his attorney is champertous.[16]

Invalidity of judgment must be pleaded as a fact, not a conclusion.[17]

Complainant questioning the propriety of being required to pay a certain sum as a condition precedent to the relief asked, and defendant denying complainant's right to relief in any case, the costs should be divided, unless complainant fails to comply with the decree.[18]

Injunction.[19]—Equity will not enjoin the sale of land under an execution, where there is an adequate remedy at law,[20] or the consummation of the sale is not actually threatened.[21] The judgment debtor cannot go behind the judgment to enjoin the sale.[22] An appellant not being permitted to give bond to stay execution, an injunction to stay the execution until the appeal can be heard is properly awarded.[23]

§ 16. *Restitution on reversal of judgment.*[24]—Defendant, on securing a reversal of a judgment under which his property was sold to plaintiff and pending the appeal was sold by plaintiff to a purchaser, does not need an order of restitution from the court to enable him to assert his right against such purchaser.[25] In Pennsylvania, the judgment being reversed after sale, the purchase money not the property should be restored.[26]

EXEMPTIONS.

§ 1. The Right to Exemptions Generally (1408).
§ 2. Persons Who May Claim (1409).
§ 3. Goods and Other Chattel Properties Exempted (1409).
§ 4. Debts and Liabilities Inferior or Superior to Right of Exemption (1411).
§ 5. Loss of Exemption Rights (1411).
§ 6. Selling or Transferring Exempt Property (1411).
§ 7. How the Right Is Claimed and Enforced (1411).
§ 8. Recovery for Selling Exempt Property or Evading Exemption Laws (1412).

§ 1. *The right to exemptions generally.*[27]—Exemption laws should be con-

11. Ansley v. O'Byrne [Ga.] 48 S. E. 228. Cannot go behind a justice's judgment by default, and show that only a verified account was introduced in evidence, whereon a default judgment could not have been legally entered. Brown v. Webb [Ga.] 48 S. E. 917.

12. Fulkerson's Adm'x v. Taylor, 102 Va. 314, 46 S. E. 309.

13. Sale defective for not containing seal of court validated by Sess. Laws 1899, p. 145. Burton v. Kipp [Mont.] 76 P. 563.

14. Under Code Civ. Proc. § 1227, providing for sale to highest bidder. Burton v. Kipp [Mont.] 76 P. 563. The judgment creditor being the purchaser, the sale will not be held fraudulent, against one whose property is secondarily liable for the judgment, merely because of inadequacy of price. Mayberry v. Whittier [Cal.] 78 P. 16. See 1 Curr. L. 1191, n. 20.

15. Scott v. Powers, Little & Co., 25 Ky. L. R. 1640, 78 S. W. 408.

16. Henderson v. Kibbie, 211 Ill. 556, 71 N. E. 1091.

17. An allegation that an execution was issued before judgment was properly entered, held a conclusion of law. Burton v. Kipp [Mont.] 76 P. 563.

18. Henderson v. Kibbie, 211 Ill. 556, 71 N. E. 1091.

19. See 1 Curr. L. 1191.

20. To try title against the purchaser. Brown v. Ikard [Tex. Civ. App.] 77 S. W. 967. Holder of equitable title is not for that reason alone entitled to an injunction restraining sale of land on execution directed against stranger to legal title. Id. See 1 Curr. L. 1191, n. 21.

21. Where sheriff had refused to issue deed, held no cause of action. Young v. Hatch, 30 Colo. 422, 70 P. 693.

22. Cannot have an injunction on the ground that his debt was infected with usury. Wilkinson v. Holton, 119 Ga. 557, 46 S. E. 620.

23. Barker v. Baker [N. C.] 48 S. E. 733.

24. See 1 Curr. L. 1192.

25. Nor do his rights in this regard de-

strued equitably and liberally so as to effect the purpose of their enactment.[28] They have no extraterritorial effect,[29] and unless the contrary appears, it will be assumed that the common-law rule prevails in a foreign state.[30]

§ 2. *Persons who may claim.*[31]—Exemption laws are generally limited to certain classes,[32] such as heads of families[33] and laborers,[34] and are for the benefit of residents of states enacting them.[35]

§ 3. *Goods and other chattel properties exempted.*[36]—Exemption laws enumerate the articles to which they apply; most states exempt[37] the homestead[38] or

pend on Code Civ. Proc. § 957. Di Nola v. Allison, 143 Cal. 106, 76 P. 976.

26. 1 Smith's Laws, p. 61, § 9. Lengert v. Chaninel, 208 Pa. 229, 57 A. 561.

27. See 1 Curr. L. 1192.

28. Bretz v. Moore, 4 Ohio C. C. (N. S.) 556.

29. Baltimore, etc., R. Co. v. Hollenbeck, 161 Ind. 452, 69 N. E. 136.

30. As to wage claims. Baltimore, etc., R. Co. v. Hollenbeck, 161 Ind. 452, 69 N. E. 136.

31. See 1 Curr. L. 1193.

32. See 1 Curr. L. 1193, n. 45, 46.

33. A person furnishing a home and providing for his mother, minor brothers and invalid sister is the head of a family. Jarboe v. Jarboe [Mo. App.] 79 S. W. 1162. One is the head of a family if there is a condition of dependence on the part of the other members and a moral obligation on his part to support them. Rolator v. King, 13 Okl. 37, 73 P. 291. One who has a widowed mother and two sisters dependent on him and with whom he resides is the head of a family within Okl. St. § 2844. Id. Under Rev. St. 1899, § 4335, a married woman may claim all exemptions given to the head of a family, though her husband be such head. White v. Smith [Mo. App.] 78 S. W. 51. Under § 5441, Rev. St., a widow not the owner of a homestead is not entitled to hold exempt from levy and sale in lieu thereof, $500 worth of real or personal property, unless she has in good faith the care and maintenance of a minor child. Her right under this section is the same as that of an unmarried female. Brown v. Parham, 4 Ohio C. C. (N. S.) 344.

34. Night watchman of private corporation with authority to make arrests is not a laborer. Tabb v. Mallette, 120 Ga. 97, 47 S. E. 587.

NOTE. Who are laborers: A farm overseer (Caraker v. Mathews, 25 Ga. 571; contra, Flourney v. Shelton, 43 Ark. 168; Whittaker v. Smith, 81 N. C. 340, 31 Am. Rep. 503); a mine foreman (Cullins v. Flagstaff Min. Co., 2 Utah, 219, 104 U. S. 176; McClaren v. Bearnes, 80 Mich. 275; Pennsylvania Coal Co. v. Costella, 33 Pa. 241), but not a factory boss (Kyle v. Montgomery, 73 Ga. 337), nor a superintendent and time keeper for a railroad company (Missouri, etc., R. Co. v. Baker, 14 Kan. 564), nor a secretary for a manufacturing company (Coffin v. Reynolds, 37 N. Y. 640), nor its president (England v. Beatty Organ Co., 41 N. J. Eq. 470), nor the assistant general manager of a railroad company (State v. Rusk, 55 Wis. 465; but see Pendergast v. Yandes, 124 Ind. 159). A locomotive engineer (Sanner v. Shivers, 76 Ga. 335), but not a conductor (Miller v. Dugas, 77 Ga. 386, 4 Am. St. Rep. 90). Money due for a threshing job is not wages (Johnstone v. Barrills, 27 Or. 251), nor for sawing logs per thousand feet (Campfield v. Lang, 25 F. 128). A mail carrier is a laborer (Farinhold v. Luckhard, 90 Va. 936, 44 Am. St. Rep. 953), as is a school teacher (Hightower v. Slaton, 54 Ga. 108; contra, Schwacke v. Langton, 12 Phila. [Pa.] 402; Seymour v. Over River School Dist., 53 Conn. 502). As are architects. Mutual Ben. Co. v. Rowland, 26 N. J. Eq. 389; Knight v. Norris, 13 Minn. 475; Mulligan v. Mulligan, 18 La. Ann. 21; Stryker v. Cassidy, 76 N. Y. 50. 32 Am. Rep. 262 and extended note; **contra,** Price v. Kirk, 90 Pa. 47; Raeder v. Bensberg, 6 Mo. App. 445.—From note to Oliver v. Macon Hardware Co. [Ga.] 58 Am. St. Rep. 300.

35. Under §§ 5438 and 5441, a nonresident is not entitled to exemptions in lieu of homestead therein provided. Campbell v. Bennington, 4 Ohio C. C. (N. S.) 447.

NOTE. Right of nonresidents thereto: Where the statutes do not make any distinction between residents and nonresidents, no such distinction exists, and if the statutes do not restrict the exemption of property for the payment of debts to residents, the statutes will apply to nonresidents. Rood, Garnishment, § 92; Missouri P. R. Co. v. Maltby, 34 Kan. 125; Bell v. Indian Live Stock Co. [Tex.] 3 L. R. A. 642; Hewitt v. Allen, 54 Wis. 583; Lowe v. Stringham, 14 Wis. 222; Wright v. Chicago, etc., R. Co., 19 Neb. 175, 56 Am. Rep. 747; Kansas City, etc., R. Co. v. Gough, 35 Kan. 1; Pettit v. Muskegon Boom Co., 74 Mich. 214; Mineral Point R. Co. v. Barron, 83 Ill. 365; Wabash R. Co. v. Dougan, 142 Ill. 248, 34 Am. St. Rep. 74; Haskill v. Andrews, 4 Vt. 609, 24 Am. Dec. 645; Hill v. Loomis, 6 N. H. 263; Sproul v. McCoy, 26 Ohio St. 577; Bond v. Martin [Or.] 44 L. R. A. 430, holding that Hill's Ann. St. § 282 are for the benefit of nonresidents.—From brief to Bond v. Martin [Or.] 44 L. R. A. 430.

36. See 1 Curr. L. 1193.

37. See 1 Curr. L. 1193, n. 43, et seq.

38. The constitutional exemption of the homestead survives to the family of the owner after his death. Cross v. Benson [Kan.] 75 P. 558. A bankrupt is entitled to his homestead, though valued in excess of the limit of exemption upon paying such excess. In re Manning, 123 F. 180. Under the constitution and statutes of California, an insolvent debtor may use his funds to purchase a homestead or to discharge a lien thereon. In re Wilson [C. C. A.] 123 F. 20. An insolvent debtor may, as against his creditors, make a payment to relieve his homestead from an incumbrance. Such payment does not constitute a preference. Gray v. Brunold, 140 Cal. 615, 74 P. 303. In Arkansas, one who six days before

proceeds derived from the sale thereof;[39] personal property of a certain value,[40] if it has been paid for;[41] wages earned within a specified period,[42] except as against a judgment in an action for necessaries;[43] the library of a professional man;[44] the salary of public officers;[45] household furniture;[46] tools of trade;[47] wearing apparel;[48] live stock;[49] proceeds of life insurance policies,[50] if within the purview

and in contemplation of bankruptcy moved from a rented house to a room in his store building thereby makes that building a homestead and renders it exempt. In re Irvin [C. C. A.] 120 F. 733. There is no provision of law allowing the exemption of cash or the investment of cash for the benefit of a family under § 2867, Civ. Code 1895, which provides for the "short homestead." Rosser v. Florence, 119 Ga. 250, 45 S. E. 975.

39. Where used to buy property nonexempt, taken jointly in the name of the wife and the husband, his share passes to his trustee after paying the ratable part of the unpaid purchase price. Bohannon v. Clark, 25 Ky. L. R. 1710, 78 S. W. 479.

40. A bankruptcy court has power in Georgia to allow a bankrupt who has taken his statutory exemption prior to bankruptcy, and which at the date of his bankruptcy was of little value to supplement the same from funds in the hands of the trustee. In re Reinhart, 129 F. 510. Under Code Pub. Gen. Laws, art. 83, § 10, a judgment debtor is entitled to an exemption of $100.00 on a sale of an equity of redemption in two tracts covered by three mortgages. Fowler v. State [Md.] 58 A. 444. Under Rev. St. 1899, § 3159, a judgment which was the only property the plaintiff in an action had was not subject to have set off against it a judgment against the plaintiff held by defendant. Caldwell v. Ryan [Mo. App.] 79 S. W. 743.

41. A bankrupt in South Carolina is not entitled to a personal property exemption out of property or the proceeds of property for which he has not paid. Cannon v. Dexter Broom & Mattress Co. [C. C. A.] 120 F. 657.

42. Personal earnings of within three months past if less than $150.00, under Rev. St. §§ 6489, 6680-1, where one is the head of a family or has a widowed mother wholly dependent on him for support. Duffey v. Reardon [Ohio] 71 N. E. 712. Money due on a contract for work for a total sum for the job is exempt under a statute exempting wages, though others aided in doing the work. Rikerd Lumber Co. v. Chrouch [Mich.] 98 N. W. 739. Monthly wages of locomotive engineer not subject to garnishment. Smith v. Walker, 119 Ga. 615, 46 S. E. 831. Wages of a locomotive engineer who is paid according to the amount of work done and not according to the time he works. Johnson v. Hicks, 120 Ga. 1002, 48 S. E. 383. Moore v. Hendry, 111 Ga. 863, 36 S. E. 921, where a contractor's wages were held not exempt, reconciled. Under Civ. Code 1895, § 4732, daily, weekly and monthly wages of a railway brakeman are exempt from garnishment. Franklin v. Southern R. Co., 119 Ga. 855, 47 S. E. 344. Under Ball. Ann. Codes & St. (Wash.) §§ 5981-5983, persons working for a bankrupt within 60 days of the appointment of a receiver are entitled to wages earned within that period not to exceed $100. In re Holden, 127 F. 980. In **Washington**, under Ball. Ann. Codes & St. § 5412, a bankrupt having a family dependent upon him may claim $100 for services rendered as exempt and under another section of the statutes, $250 in lieu of certain domestic animals. Wages earned before the amendment of § 5412 reducing this exemption are not affected by said amendment. Id.

43. Under Pub. St. 1901, c. 245, § 20, trustee process may be maintained against one indebted for wages to a judgment debtor in a sum less than $20.00. Garside v. Colby, 72 N. H. 544, 58 A. 50.

44. Books used and needed by a minister of the gospel for the purposes of his calling. State v. St. Paul, 111 La. 71, 35 So. 389.

45. Watchman employed by private corporation is not a municipal officer, though he has power to arrest and is subject to the control of the police department. Tabb v. Mallette, 120 Ga. 97, 47 S. E. 587.

46. Furniture in the proprietor's living rooms of a boarding house is household furniture within the meaning of Rev. Laws, c. 102, § 53. Glidden v. Nason [Mass.] 71 N. E. 304.

47. A dentist's chair is not exempt as a common tool of trade, nor as a household chair under Civ. Code 1895, § 2866. It may be exempt under § 2827. Burt v. Stocks Coal Co., 119 Ga. 629, 46 S. E. 828.

48. A sword and belt of Masonic regalia are not exempt under the laws of Vermont, but a hat belonging thereto is exempt as wearing apparel, nor are a watch and chain exempt as tools for the barber's trade where the bankrupt has a clock, though he has turned the latter over to his trustee. In re Everleth, 129 F. 620.

49. Unbroken colts are not work horses within the meaning of a homestead exemption. Durke v. Crane, 112 La. 156, 36 So. 306. Under Rev. St. 1899, § 3159, exempting two work animals, a mare used as a work animal is exempt. White v. Wilson [Mo. App.] 80 S. W. 692. Under Rev. St. 1895, art. 2395, exempting two horses, such horses may be the separate property of either spouse or community property. McClelland v. Barnard [Tex. Civ. App.] 81 S. W. 591. Where head of the family has four horses in his possession, two of which are community property and two the separate property of his wife, he may select any two as exempt under Rev. St. 1895, art. 2395. Id. Under Ball. Ann. Codes & St. § 5412, certain domestic animals or $250.00 in lieu thereof. In re Holden, 127 F. 980.

50. Under § 6489, Cobbey's Ann. St. 1903, proceeds of a certificate of a fraternal benefit association until payment to person entitled thereto. Coleman v. McGrew [Neb.] 99 N. W. 663. A claim for nursing decedent during his last illness is a debt within Rev. Code 1892, § 1965, exempting proceeds of life insurance policies from debts, but funeral expenses are not. Dobbs v. Chandler [Miss.] 36 So. 388.

of the statute,[51] but exemptions cannot be claimed from partnership property.[52] Proceedings for ascertaining exempt property may be maintained in equity.[53]

§ 4. *Debts and liabilities inferior or superior to right of exemption.*[54]—The nature of the claim for which judgment was entered may give it priority.[55] Exempt property is liable for funeral expenses.[56] Exempt wages are not liable to a judgment for alimony,[57] but are inferior to an attorney's lien.[58]

§ 5. *Loss of exemption rights.*[59]—The decisions are in conflict as to whether exemptions may be waived[60] or lost by estoppel.[61]

§ 6. *Selling or transferring exempt property.*[62]—The exemption which the law gives in lieu of homestead is an absolute exemption which may be sold.[63]

§ 7. *How the right is claimed and enforced.*[64]—The right is personal and must be claimed by the debtor or his privies.[65] Delay in making demand therefor is immaterial,[66] and in some cases demand is timely if made after sale of the property;[67] but bankrupts must make their selection of specific articles at the time of filing their schedules.[68]

51. A gratuity fund provision, providing for the division of a certain surplus among the widows of members dying during the year, in the organization of a chamber of commerce does not render such corporation an assessment insurance company within the meaning of the Wisconsin statute, and hence a member thereof is not entitled to hold his certificate of membership therein exempt. In re Neimann, 124 F. 738. The dividend accumulations of a tontine policy are not within Rev. St. 1898, § 2347, exempting a life policy payable to a married woman. Ellison v. Straw, 119 Wis. 502, 97 N. W. 168.

52. In Pennsylvania, a partnership being adjudged a bankrupt. In re Prince, 131 F. 546.

53. Under Rev. St. 1892, § 2007, equity has jurisdiction to ascertain if property has been concealed, to determine what property shall be exempt and pending proceedings, to ascertain whether property has been concealed, to enjoin an officer from setting apart exempt property levied upon. Camp v. Mullen [Fla.] 35 So. 399.

54. See 1 Curr. L. 1194.

55. Under Rev. Code Civ. Proc. § 364, a debtor can claim nothing but absolute exemptions as against a judgment on a debt for goods obtained under false pretenses, but the judgment should recite the nature of the action. Paxton & G. Co. v. McDonald [S. D.] 99 N. W. 1107.

56. Proceeds of insurance policy not exempt therefrom under Rev. Code 1892, § 1965. Dobbs v. Chandler [Miss.] 36 So. 388.

57. Jarboe v. Jarboe [Mo. App.] 79 S. W. 1162.

58. Money collected by an attorney was a claim for his client's wages and exempt as to third persons but not as against the attorney's lien for services. Halsell v. Turner [Miss.] 36 So. 531.

59. See 1 Curr. L. 1194.

60. A waiver of exemptions as to the homestead will constitute a waiver as to the proceeds of a sale thereof (Rosser v. Florence, 119 Ga. 250, 45 S. E. 975); but not where a debtor moves to dissolve an attachment without first making a claim for his exemptions (State v. Gardner, 32 Wash. 550, 73 P. 690). In Georgia, homestead exemptions cannot be waived. In re Reinhart, 129 F. 510.

61. A parol representation or its equivalent, a justification of bail reciting property nonexempt, cannot waive or bar land exemptions. King v. Warren, 42 Misc. 317, 86 N. Y. S. 609. An agreement by the debtor that a creditor may garnishee his exempt wages though invalid as an agreement may become effective as an estoppel where the creditor incurs expense in bringing suit in reliance thereon. Dowling v. Wood [Iowa] 101 N. W. 113.

Query: Was not the transaction in this case equivalent to an executory disposal of exempt chattels and for that reason valid? [Editor].

62. See 1 Curr. L. 1195.

63. Rev. St. 5441. Not subject to judgments against the vendor, when he conveys it. Genell v. Hirons, 70 Ohio St. 309.

64. See 1 Curr. L. 1195.

65. See 1 Curr. L. 1195, n. 78. Point cannot be raised by a garnishee. Seitz v. Starks [Mich.] 98 N. W. 852. Evidence held insufficient to show that an attorney claiming an exemption on behalf of his client had no authority to act. Fowler v. State [Md.] 58 A. 444.

66. See 1 Curr. L. 1195, n. 69. Code Gen. Pub. Laws, § 10, art. 83, allowing $100.00 from proceeds of sale of real estate. Fowler v. State [Md.] 58 A. 444. A claim of exemption asserted as soon as the levy is made and before sale is timely. White v. Wilson [Mo. App.] 80 S. W. 692. Under Rev. St. 1899, § 4340, a wife whose husband dies pending a suit on a judgment for necessaries is not required to claim her exemptions in such suit on pain of losing her right. Id.

67. Where property is attached, the debtor may demand his exemptions when the warrant is levied or wait until final process is issued and the property is about to be appropriated by sale, or after it has been sold as perishable. Virginia-Carolina Chemical Co. v. Sloan [N. C.] 48 S. E. 577.

68. Under Bankr. Act, July 1, 1898, the trustee has no power to pay the exemption to them out of the proceeds of the sale of bankrupt property. In re Prince, 131 F. 646.

How claimed.[69]—The manner of claiming is generally regulated by statute.[70] The question cannot be raised by motion to modify a judgment in an action to set aside a fraudulent conveyance,[71] nor is such question presented on the evidence where it is not assigned as a reason in the motion for a new trial.[72]

§ 8. *Recovery for selling exempt property or evading exemption laws.*[73]—Recovery may be had from a purchaser with notice of the character of the property.[74] Mandamus is the proper remedy to procure the release of exempt property unlawfully held under levy of execution.[75] Grounds of recovery relied on in the pleadings cannot be shifted at the trial.[76] In an action on a bond given to contest a claim of exemptions, the complaint must allege a failure to prosecute the contest and damages sustained.[77]

EXHIBITIONS AND SHOWS.

A license to run a theater at a place designated will not justify the conducting of such business in a manner offensive to decency and public morals.[78] It is within the police power of the state to make the right to temporarily sell provisions within a reasonable distance of a fair dependent upon the consent of the society conducting the same.[79]

EXPLOSIVES AND INFLAMMABLES.

Blasting with dynamite is justifiable if conducted with reasonable care,[80] and reasonable warning of coming explosions is given to persons lawfully in the vicin-

69. See 1 Curr. L. 1195.

70. Under 2 Ball. Ann. Codes & St. § 5255, where a debtor claims certain property as exempt and delivers to an officer, making a levy an itemized list of all his personal property, and the creditor made no demand for an appraisement, the officer is required to return the property as exempt. American Paper Co. v. Sullivan, 34 Wash. 391, 75 P. 991.

71, 72. Bass v. Citizens' Trust Co., 32 Ind. App. 583, 70 N. E. 400.

73. See 1 Curr. L. 1196.

74. White v. Wilson [Mo. App.] 80 S. W. 692. Under Rev. St. 1899, §§ 3435, 3162, a creditor has no right to garnish a debtor's wages where he has notice that they are exempt, and he is liable for malicious abuse of process if he institutes successive garnishments. Cooper v. Scyoc [Mo. App.] 79 S. W. 751.

75. Where a sheriff refuses after the expiration of a reasonable time after demand to surrender exempt property levied on. State v. Gardner, 32 Wash. 550, 73 P. 690. Under 2 Ball. Ann. Codes & St. § 5255, a sheriff holding property by virtue of levy of execution is required to release the property when the debtor has furnished him a list of property claimed as exempt and the creditor made no demand for an appraisement. Id. Release of exempt property from execution levied thereon may be procured by filing an affidavit in the original cause, claiming it to be exempt and asking an order on the creditor and sheriff to show cause why it should not be released. American Paper Co. v. Sullivan, 34 Wash. 391, 75 P. 991.

76. Where a debtor objects to his property being seized on execution because it is exempt, objects to its sale and brings action for its recovery on the same ground, he cannot at the trial assert the sale to be void on other grounds. Redinger v. Jones [Kan.] 75 P. 997.

77. Retainer fee and expenses of attending court are elements of damages to be recovered. Kirby v. Forbes [Ala.] 37 So. 411.

78. Reaves v. Territory, 13 Okl. 396, 74 P. 951.

79. Gen. St. 1902, § 1358, making the distance one mile, held valid. State v. Reynolds [Conn.] 58 A. 755. Such statute extends only to a sale while a fair is being held, and does not apply to the usual and ordinary business of any one. Id.

80. Removing rock from railroad right of way. Cary Bros. v. Morrison [C. C. A.] 129 F. 177.

Note: The defendants worked a stone quarry on their land in a city and by means of the concussion of earth and air, injured plaintiff's house, though using all care. Held, since defendants' use of their land for a quarry was an extraordinary use and the blasting extended over a long period of time, plaintiff may recover. Longtin v. Persells [Mont.] 76 P. 699. The preponderance of authority seems to be that for injuries caused by concussion where care is used the test is whether the defendant is making a reasonable use of his land. Where this is the case, there is no recovery (Booth v. Rome, etc., R. Co., 140 N. Y. 267, 37 Am. St. Rep. 552; Simon v. Henry [N. J. Law] 41 A. 692), while if the use is unreasonable, the defendant is liable (Cotton v. Onderdonk, 69 Cal. 155, 58 Am. Rep. 556). It has been held, apparently, that liability will attach regardless of reasonableness. The Fitz-

ity,[81] and it is the duty of such persons to heed such warning.[82] The degree of care required in handling and guarding explosives is such care as careful and prudent persons whose business requires the use of such explosives ordinarily exercise.[83] The care required in the use of dynamite is greater than that required in the use of less dangerous explosives.[84] The keeping of explosives contrary to law is a nuisance,[85] but unless it is a nuisance per se to keep explosives, one

Simmons & C. Co. v. Braun, 199 Ill. 390. It would seem that where such serious injury as the demolition of adjoining houses is caused, the question of reasonable use by defendant should not be considered. IV. Columbia Law Rev. 515. If a person be placed in danger through the negligence of another in exploding a blast, he need only make an effort to protect himself and if he errs in judgment in seeking safety, he is not guilty of negligence. Blackwell v. Lynchburg, etc., R. Co., 111 N. C. 151, 32 Am. St. Rep. 786. See note to Bessemer Land, etc., Co. v. Campbell [Ala.] 77 Am. St. Rep. 29, where it is stated that the degree of care required in handling explosives is the same degree as is required of common carriers of passengers.

81. Cary Bros. v. Morrison [C. C. A.] 129 F. 177.

82. If they do not, it constitutes contributory negligence and is fatal to an action for damages for injuries sustained. Cary Bros. v. Morrison [C. C. A.] 129 F. 177. Evidence of contributory negligence held for the jury where one was killed by a rock. The blasting crew having given warning and decedent being familiar with the work being conducted. Id. Evidence of contributory negligence was for the jury where a city employe was killed by an explosion of gas naphtha while he was unloading the tank. Standard Oil Co. v. Wakefield's Adm'r, 102 Va. 824, 47 S. E. 830.

83. Lanza v. Le Grand Quarry Co. [Iowa] 100 N. W. 488.

Exploding a charge of dynamite within a foot of a water pipe is negligence (Wheeler v. Norton, 92 App. Div. 368, 86 N. Y. S. 1095), and is the proximate cause of damage caused by the escape of water, though the pipe was laid on rock in violation of the rules of the fire department (Wheeler v. Norton, 92 App. Div. 368, 86 N. Y. S. 1095). It is negligence to discharge a toy cannon into a public street in a populous part of the city, and one so doing is liable for injuries resulting, though he did not intend to shoot any one. Combs v. Thompson [Kan.] 74 P. 1127. A company shipping gas naphtha is liable for a death caused by the negligent manner in which it had closed the discharge pipe of the tank. Standard Oil Co. v. Wakefield's Adm'r, 102 Va. 824, 47 S. E. 830. Such negligence was the proximate cause of the death of a city employe which resulted from an explosion which occurred when an attempt was made to unload the tank. Id. That a vendor may be liable for an explosion of impure and adulterated oil, it must appear that he knew or ought to have known and have informed the vendee of the character of the oil. Wilkins v. Standard Oil Co. [N. H. Law] 57 A. 258. Nor can a recovery be had for deceit unless it be alleged that the vendor knew his representations as to the quality of the oil to be false. Id. The mere fact that a signal torpedo was found on a railroad track is not evidence of negligence on the part of the company. Obertonl v. Boston & M. R. Co. [Mass.] 71 N. E. 980. There being no evidence that the employe who left it there was at the time acting in the course of his employment. Id. It is not negligence for a master to give a servant a gasoline torch in good repair, to use while engaged at work inside a boiler where its use was proper. Purcell v. Hoffman House, 97 App. Div. 307, 89 N. Y. S. 975. Evidence that one maintained a gas well 50 feet from plaintiff's premises and that gas accumulated in plaintiff's cellar, causing an explosion and that gas was found in water wells within a radius of 200 feet from the gas well was insufficient to show that the gas came from defendant's well or that he was negligent. Maxwell v. Coffeyville Mining & Gas Co. [Kan.] 75 P. 1047. See Gas, 2 Curr. L. 139. Evidence held insufficient to show negligence in a gas company, no leaks in pipes being discovered, and gasoline being stored in the cellar where an explosion occurred. Lodge v. United Gas Imp. Co. [Pa.] 58 A. 925. A carrier is under no positive duty to examine a shipment of sulphuric acid to see that the tanks are in good condition. Evidence held not to show negligence of carrier. Means v. Southern California R. Co. [Cal.] 77 P. 1001.

Note: If the manufacture or care of explosives is such as to amount to a nuisance, one is liable for all damages occasioned thereby, even though he be not guilty of negligence and regardless of the care exercised. McAndrews v. Collerd, 42 N. J. Law, 189, 36 Am. Rep. 508; Laflin Powder Co. v. Tearney, 131 Ill. 322, 19 Am. St. Rep. 34; Judson v. Giant Powder Co., 107 Cal. 549, 48 Am. St. Rep. 146; Cheatam v. Shearon, 1 Swan [Tenn.] 213, 55 Am. Dec. 734; Wilson v. Phoenix Powder Co., 40 W. Va. 413; Emory v. Hazard Powder Co., 22 S. C. 476, 53 Am. Rep. 730; Heig v. Licht, 80 N. Y. 579, 36 Am. Rep. 654; Comminge v. Stevenson, 76 Tex. 642; Lounsbury v. Foss, 80 Hun [N. Y.] 296; Wier's Appeal, 74 Pa. 230.—From note to Kinney v. Koopman [Ala.] 67 Am. St. Rep. 134.

84. Evidence held for the jury where a quarry employe was injured by an explosion of which he was not warned. Lanza v. Le Grande Quarry Co. [Iowa] 100 N. W. 488. Where one exploded a blast of dynamite by hammering on an adjacent rock, he is not chargeable with negligence in not having first examined the ledge of rock to see whether another blast which had exploded six feet away had not produced a fissure leading to the hole drilled for the unexploded blast, so as to make his hammering the possible occasion for the second explosion. Murphy v. Hallinan, 92 App. Div. 48, 86 N. Y. S. 927.

85. Both at common law and under New

is not liable for damages caused by an explosion not the result of his negligence.[86] A city is not liable for an injury caused by the explosion of fireworks where such display is not licensed.[87] Where an explosion causes material to be thrown onto adjacent premises, it is a trespass irrespective of negligence.[88] The right to recover damages for injuries caused by an explosion of oil may be regulated by statute.[89]

EXTORTION.

The taking of illegal fees embraces the taking of fees for each of several official receipts, only one being requisite or proper,[90] and that it was done in good faith and honest mistake is no defense to a penal action under a statute omitting such an exception,[91] however it might be under a different statute making the "knowing" taking a misdemeanor.[92] A complaint for a penalty for exaction of illegal fees must allege all the facts made prerequisite under the statute.[93] The penal laws declaring the crime of extortion and the punishment do not exclude the remedy by statutory penal action.[94]

"Extortion" by threats of prosecution[95] does not embrace a "settlement" according to statutory authority[96] by a public officer who without corrupt or malicious intent[97] procures an offender to pay legal penalties by telling him he will be prosecuted if he does not pay.[98] The fact that authority rests in a superior is immaterial if no discretion is delegated.[99]

EXTRADITION.

§ 1. International (1414). § 2. Interstate (1414).

§ 1. *International.*[1]—The preliminary examination must be in the state where the arrest was made.[2] Extradition proceedings are directly reviewable in the supreme court, though the construction of statutes as well as treaties is involved.[3]

§ 2. *Interstate.*[4]—One who having committed a crime in one state is found in another is a "fugitive from justice."[5] The finding of an indictment in the

York City Charter (3 L. 1897, p. 265, c. 378), where a contractor kept in the populous part of a city dynamite in quantity in excess of its permit. Ricker v. McDonald, 89 App. Div. 300, 85 N. Y. S. 825. Laws 1891, p. 3, c. 4, relative to rapid transit railways, does not confer authority to store dynamite in the heart of the city contrary to ordinances. Ricker v. McDonald, 89 App. Div. 300, 85 N. Y. S. 825. It was a question for the jury whether the display of fireworks constituted a nuisance. Landau v. New York, 90 App. Div. 50, 85 N. Y. S. 616.

86. Where the owner of a building moved a box of dynamite from his tenant's shelf into a common hallway, where it was exploded, the tenant's act of having the dynamite was not the proximate cause of an injury resulting. Georgetown Tel. Co. v. McCullough's Adm'r [Ky.] 80 S. W. 782.

87. Ordinance relating to discharge of fireworks had been suspended during a political campaign. Landau v. New York, 90 App. Div. 50, 85 N. Y. S. 616. Resolution suspending such ordinance could not be construed as a license. Id. Evidence that similar exhibitions with the same kind of materials had been given many times without accident was admissible. Id.

88. Where a water pipe was broken and water caused damages to premises of another. Wheeler v. Norton, 92 App. Div. 368, 86 N. Y. S. 1095.

89. Gen. St. 1901, c. 72a, makes no provision for the recovery of damages to persons or property resulting from the explosion of illuminating oil, except where such oil has been sold without having been tested and inspected. National Oil Co. v. Rankin [Kan.] 75 P. 1013.

90, 91, 92. Plyley v. Allison [Tenn.] 82 S. W. 475.

93. Complaint held insufficient. Mitchell v. Wheeler [Colo. App.] 77 P. 361.

94. Construing Code, §§ 6353, 6714, Acts 1901, p. 357, c. 174, § 72. Plyley v. Allison [Tenn.] 82 S. W. 475.

95. See Threats, 2 Curr. L. 1871.

96. Collection of penalties for having in possession "short" lobsters. State v. Hanna [Me.] 58 A. 1061.

97, 98, 99. State v. Hanna [Me.] 58 A. 1061.

1. See 1 Curr. L. 1199.

2. Under treaty with England and act of Aug. 18, 1894. Pettit v. Walshe, 194 U. S. 205, 48 Law. Ed. 938.

3. Pettit v. Walshe, 194 U. S. 205, 48 Law. Ed. 938.

4. See 1 Curr L. 1199.

demanding state is not prerequisite.[6] Disputed facts cannot be reviewed on habeas corpus,[7] and evidence that defendant was not in the demanding state at the time charged raises only a question as to guilt and not as to flight.[8] Nor will the technical sufficiency of the indictment be considered.[9] It will be presumed that the acts charged constitute an offense against the laws of the demanding state.[10] Pendency of habeas corpus to review a commitment to await extradition made by a magistrate under a state statute does not bar an application to the governor for a requisition.[11] The Federal courts will not interfere except in plain cases.[12] One brought into a state by requisition is privileged from service of civil process until he has had a reasonable time after discharge to leave the state.[13]

FACTORS.[14]

The relation of factor to consignor.—A factor is an agent employed to sell or to purchase and sell goods intrusted to his possession, for commission.[15] It is not necessary that the goods should have been consigned directly to him,[16] but only that he shall be possessed of the property with authority to sell.[17] In Wisconsin, he is trustee of an express trust.[18] The rights and liabilities of factor and consignor must be found in the terms of their contract.[19] As a general rule,

5. In re Strauss [C. C. A.] 126 F. 327.

6. Rev. St. U. S. § 5278. In re Strauss [C. C. A.] 126 F. 327.

7. In re Strauss [C. C. A.] 126 F. 327. Affidavit held to sufficiently charge obtaining goods by false pretenses under Ohio statute. Id. An affidavit charging a person, before a criminal court judge, with being a fugitive from justice and evidence being adduced as to his identity, is sufficient to warrant the court in ordering him to be turned over to the officer having a warrant for his arrest. State v. Aucoin, 111 La. 51, 35 So. 381.

8. In re Palmer [Mich.] 100 N. W. 996.

9. In re Renshaw [S. D.] 99 N. W. 83.

10. In re Renshaw [S. D.] 99 N. W. 83. The burden is on defendant to show a statute of the demanding state under which he claims the indictment is insufficient. The statute will not be presumed to be like that of the forum. Id.

NOTE. Defense of statute of limitations: The petitioner was held under an extradition warrant for a crime committed five years previously. In habeas corpus proceedings, it was proved that in the demanding state an indictment must be brought within two years of the commission of the offense, except in the case of persons fleeing from justice. The petitioner had not spent two years in that state since the crime. Held, that the prisoner may be extradited, irrespective of the motive with which he left the demanding state. In re Bruce, 132 F. 390.

The words "fleeing from justice" in extradition statutes do not require willful or conscious flight. In re White, 55 F. 54. There seems little reason for a different reading of similar phraseology in criminal statutes of limitation, since the important fact in either case is that the accused consciously puts himself outside the jurisdiction. Yet the consciousness of flight is generally considered in this case. United States v. O'Brian, 3 Dill. [U. S.] 381. See Streep v. U. S., 160 U. S. 128. But upon extradition proceedings, the inquiry is mainly whether the defendant is substantially charged with crime and is a fugitive from justice in the sense of the extradition statutes. Roberts v. Reilly, 116 U. S. 80. He is substantially charged in the Federal court, although the indictment shows that the statute of limitation has run; for the statute constitutes a mere defense of fact for the jury. United States v. Cook, 17 Wall. [U. S.] 168. It follows that the accused may only show by this defense in extradition proceedings that he was within the demanding state for the statutory period, and hence did not leave it as a fugitive from justice, as that phrase is interpreted in the extradition laws.—XVIII. Harv. L. R. 228.

11, 12. In re Strauss [C. C. A.] 126 F. 327.

13. The service will be vacated on motion. Murray v. Wilcox, 122 Iowa, 1087, 97 N. W. 1087.

14. See Agency, 3 Curr. L. 68; Brokers, 3 Curr. L. 535; Factors, 1 Curr. L. 1200.

15. Beardsley v. Schmidt [Wis.] 98 N. W. 235. Where a commission merchant requested a party to ship him goods to complete a sale already effected at a certain price for which the former was to receive a certain commission, the relation of factor and principal existed after the delivery of the goods. Betts v. Southern Cal. Fruit Exch. [Cal.] 77 P. 993. One who merely forwarded goods held to be an agent and not a factor. Bills v. Schliep [C. C. A.] 127 F. 103.

16, 17. Beardsley v. Schmidt [Wis.] 98 N. W. 235.

18. Under § 2607, Rev. St. 1898, he may enforce a contract in his own name. Beardsley v. Schmidt [Wis.] 98 N. W. 235.

19. The contract of a principal with one factor is no evidence of the character of his contract with another. Beakley v. Rainier [Tex. Civ. App.] 78 S. W. 702. One is not shown to be a del credere factor by the fact that he does not disclose names of customers to his principal. Cushman v. Snow [Mass.] 71 N. E. 529.

he is bound to obey the orders of his principal,[20] but in cases of emergency, he may be justified in assuming extraordinary powers.[21] A factor must exercise reasonable care over goods consigned to him.[22] By common law principles, he has a special property in the goods and in the proceeds of a sale thereof,[23] but title remains in the principal,[24] and he may control litigation relative thereto, saving the rights of the factor; unless the latter's charges exceed the amount recoverable,[25] and where a factor refuses to redeliver on demand[26] or deals with them in an irregular manner, it amounts to a conversion.[27]

Lien.[28]—A factor's lien is a purely personal privilege and is not the proper subject of sale or assignment.[29] It does not attach until he acquires possession,[30] and does not extend beyond the amount due him for commissions or funds advanced.[31]

A purchasing factor may recover from his principal funds advanced to make purchases.[32]

20. Where a factor contrary to orders pays the proceeds of the sale of goods to another than the true owner, he is personally liable. Post v. Houston Rice Mill. Co. [Tex. Civ. App.] 80 S. W. 1025. Where a factor disobeyed his instructions and loss resulted, he was liable to his principal. Betts v. Southern California Fruit Exch. [Cal.] 77 P. 993. A consignor is entitled to have his goods paid for at the price invoiced to the consignee or returned in as good condition as reasonable care will permit. Ives v. Freisinger [N. J. Err. & App.] 57 A. 401.

21. In an action for commissions, it was no defense that he sold perishing property contrary to instructions. Lippman v. Brown, 43 Misc. 632, 88 N. Y. S. 141.

22. If goods be returned damaged, the burden is on him to show that ordinary care has been exercised. Ives v. Freisinger [N. J. Err. & App.] 57 A. 401. Where goods are damaged through the negligence of a factor, the consignor is entitled to recover the difference in value between the articles returned and their value undamaged. Id. Value to be determined from the price they would bring at a fair sale, viz., a sale of such articles in the usual course of trade. Id.

23. May sell the property in his own name and sue to recover the purchase price. Beardsley v. Schmidt [Wis.] 98 N. W. 235.

24. He is the real party in interest in an action for the purchase price, whether his name was disclosed when the sale was made or the terms thereof submitted for his approval. Beardsley v. Schmidt [Wis.] 98 N. W. 235. Title does not pass to a del credere factor who becomes indebted to his principal for goods consigned. Cushman v. Snow [Mass.] 71 N. E. 529. If he mingles his own goods with goods of his principal, title of principal attaches to the whole until the value of his goods are accounted for or returned to him. Lance v. Butler, 135 N. C. 419, 47 S. E. 488. See Accession and Confusion of Property, 3 Curr. L. 15.

NOTE. Consignments: Generally title does not pass to a consignee when goods are consigned to be sold and accounted for at a given price, and the goods are not liable for the consignee's debts. Colorado Soap Co. v. Burns, 2 Colo. App. 89; Converseville Co. v. Chambersburg Woolen Co., 14 Hun [N. Y.] 609; Walker v. Butterick, 105 Mass. 237; Blood v. Palmer, 11 Me. 414, 26 Am. Dec. 547.—From note to Barnes Safe & Lock Co. v. Block Bros. Tobacco Co. [W. Va.] 22 L. R. A. 851.

25. Beardsley v. Schmidt [Wis.] 98 N. W. 235.

26. Anker v. Smith, 87 N. Y. S. 479.

27. A factor who sells goods of his principal with similar goods of his own without keeping record of quantity, price or to whom sale was made, and accepts a note for the gross purchase price, is guilty of conversion. Kennesaw Guano Co. v. Wappoo Mills, 119 Ga. 776, 47 S. E. 205.

28. See 1 Curr. L. 1201.

29. Where money was advanced to a firm with which to purchase goods to be consigned to the party making the advances, for sale, under an agreement that the latter was to have a lien for such advances and also for commissions, etc., such lien was an equitable one and passed to an assignee. Cincinnati Tobacco Warehouse Co. v. Leslie & Whitaker's Trustees, 25 Ky. L. R. 1570, 78 S. W. 413.

30. See 1 Curr. L. 1201, n. 69. A factor who holds the lease of premises occupied by a subfactor has no lien on goods in such premises purchased by the subfactor, though advances had been made thereon by the principal. Ryttenberg v. Schefer, 131 F. 313. Where a lien is attempted to be created without possession of the goods being transferred, an equitable lien will not arise, though such contract was made in good faith. Id.

31. Damages arising from his refusal to receive goods purchased by them which on such refusal their vendor had resold leaving a claim for damages against them. Beakley v. Rainier [Tex. Civ. App.] 78 S. W. 702.

32. Factors purchased several car loads of pecans for their principal. They brought action for money advanced to purchase a particular car load. Held, in the absence of proof of the actual purchase price and identity of the car, only average rate per pound paid for all nuts purchased could be recovered. Beakley v. Rainier [Tex. Civ. App.] 78 S. W. 702. Where a factor refuses to receive goods which he has not ordered, but by agreement with the indorsee of a draft drawn on him, he accepts the draft

Proceeds.[33]—The obligation of a factor for goods intrusted to him is of a fiduciary character.[34] A consignor may follow the money received from the sale of his goods into the hands of any person receiving it with notice of its character.[35]

FALSE IMPRISONMENT.

§ 1. What Constitutes, Persons Liable, and Justification (1417).
§ 2. The Action to Recover Damages (1418).

§ 1. *What constitutes, persons liable, and justification.*[36]—Every restraint on a person's liberty is an imprisonment, whatever be the manner in which it is effected,[37] and is actionable if unlawful.[38] All persons who aid or assist in an unlawful confinement are liable;[39] thus one who without authority signs a complaint on which a person is arrested,[40] or an officer who makes an arrest upon a process void on its face;[41] but if a warrant is sufficient to authorize the arrest, the officer executing it is not liable,[42] and an officer who arrests without a war-

and disposes of the goods to the best advantage, he can recover from such indorsee the difference between the proceeds of sale and amount of the draft. Groos & Co. v. Brewster [Tex. Civ. App.] 78 S. W. 359.

33. See 1 Curr. L. 1201.

34. See 1 Curr. L. 1201, n. 71. The proceeds of sales, except his commissions are a trust fund in his hands. Lance v. Butler, 135 N. C. 419, 47 S. E. 488. Where consignors notified factors to report sales of certain goods to them direct, after which time the forwarder of such goods became bankrupt, the consignors could recover from the factors, though they mingled such funds with the proceeds of sales of other consignments. Bills v. Schliep [C. C. A.] 127 F. 103.

35. Bills v. Schliep [C. C. A.] 127 F. 103. Where del credere factors become indebted to their principals for goods consigned and sold on credit, the principal may pursue both the purchaser and the factor. Cushman v. Snow [Mass.] 71 N. E. 529.

36. See 1 Curr. L. 1201.

37. Where an officer told a person he would have to go with him before a magistrate, and followed him there, though he did not lay hands on him. Goodell v. Tower [Vt.] 58 A. 790. Where a merchant under the impression that a customer had taken goods which she had not paid for, followed her into the street, took hold of her shoulder and said "you will have to go back to the store." Dunlevy v. Wolferman [Mo. App.] 79 S. W. 1165. Complaint alleging that plaintiff was inveigled, kidnapped and carried away against his will, and sets forth as an item of damages, "detention and imprisonment, alleges false imprisonment." Bellezzire v. Camardella, 88 N. Y. S. 807.

NOTE: To constitute false imprisonment, no actual force is necessary (Smith v. State, 7 Humph. [Tenn.] 43; Johnson v. Tompkins, 1 Bald. [U. S.] 571-602; Comer v. Cowles, 17 Kan. 441) where a comprehensive definition is given. Words are sufficient (Pike v. Hanson, 9 N. H. 491), preventing one from going in any direction he desires (Harkins v. State, 6 Tex. App. 452). Arrest not necessary (Brushaber v. Stegemann, 22 Mich. 267; Hildebrand v. McCrum, 101 Ind. 61; Ahern v. Collins, 39 Mo. 145; Bonesteel v. Bonesteel, 28 Wis. 245), but there must be some sort of personal coercion (Hill v. Taylor, 50 Mich. 549; Greathouse v. Summerfield, 25 Ill. 296).—Note to Tryon v. Pingree [Mich.] 67 Am. St. Rep. 408.

38. A county judge has full authority to commit a witness for refusing to be sworn or give testimony in a proper case. Olmsted v. Edson [Neb.] 98 N. W. 415.

39. Goodell v. Taylor [Vt.] 58 A. 790. One who directs an officer to make an unlawful arrest. McMorris v. Howell, 89 App. Div. 272, 85 N. Y. S. 1018. Claimant to possession of real property cannot make an arrest without warrant in an effort to maintain a momentary occupancy gained during the opposing claimant's temporary absence. Id.

Note: A justice who issues a warrant under an unconstitutional ordinance is not liable (Brooks v. Mangan, 86 Mich. 576, 24 Am. St. Rep. 137), nor is a person who makes a complaint in such a case (Gifford v. Wiggins, 50 Minn. 401), nor is a town which enacts such an ordinance nor an officer who executed the warrant (Trammell v. Russellville, 35 Ark. 105). Cities are not liable for acts of their police officers in the enforcement of police regulations and ordinances, nor can they make themselves liable by ratification. Calwell v. Boone, 51 Iowa, 687, 33 Am. Rep. 154; Odell v. Schroeder, 58 Ill. 353; Tresescott v. Waterloo, 26 F. 593. A jailor holding a prisoner as agent for a sheriff must stand or fall on the sheriff's defenses (Arteaga v. Connor, 88 N. Y. 404), otherwise if he has been received under a mittimus or its equivalent (Boaz v. Tate, 43 Ind. 60), but a jailor is liable where he holds a prisoner under a sentence pronounced in an action in which the court had no jurisdiction (Patterson v. Prior, 18 Ind. 440, 81 Am. Dec. 367).—From note to Tryon v. Pingree [Mich.] 67 Am. St. Rep. 424.

40. Officer of humane society had no authority under V. S. 5001. Goodell v. Taylor [Vt.] 58 A. 790.

41. Complaint showed that a justice did not have jurisdiction to issue the warrant. Goodell v. Tower [Vt.] 58 A. 790. An officer is bound to know the invalidity of a warrant issued by a justice who has no jurisdiction. Heller v. Clarke [Wis.] 98 N. W. 952.

42. See Arrest and Binding Over, 1 Curr. L. 214; Id. 3 Curr. L. 312. Description of

rant is not liable unless he delays an unreasonable length of time in taking the prisoner before a magistrate.[43] The fact that an officer is justified does not excuse the person who procures him to make the arrest.[44] A judicial officer is not liable when the imprisonment is ordered, however erroneously, by a judgment in a proceeding in which he has jurisdiction,[45] but otherwise if he is without jurisdiction.[46] A master is not liable for the imprisonment of a person by his servant unless he directed him to make the arrest or ratified the act, or unless the servant was acting within the scope of his authority.[47]

Justification.—What amounts to probable cause in cases of malicious prosecution will amount to reasonable grounds to arrest on suspicion for felony.[48] It may be a question for the jury.[49]

Damages.[50]—The question as to the measure of damages is for the jury.[51] Compensation for loss of time and for mental suffering can be recovered, though not specially alleged.[52] To this end bad jail conditions may in some states be shown.[53] Unless malice is shown, exemplary damages cannot be had,[54] and malice not imputable to defendant has no effect.[55] Honest mistake[56] and admissions of guilt may be considered in mitigation.[57]

§ 2. *The action to recover damages.*[58]—The petition must set out facts showing that detention was unlawful,[59] but duration of imprisonment need not be alleged.[60] Where malice is alleged, it must be proved.[61]

the person. Cox v. Durham [C. C. A.] 128 F. 870.

43. Under Baltimore City Charter, detention from 1:15 p. m. until between three and five o'clock the same afternoon is not unreasonable. Brish v. Carter [Md.] 57 A. 210.

44. Grinnell v. Weston, 88 N. Y. S. 781.

45. A justice of the peace is a judicial officer. McVeigh v. Ripley [Conn.] 58 A. 701. Where a justice committed one for a crime when he should have adjudged that there was probable cause for holding him for trial by a higher tribunal, he was not liable. Id. Where a justice issued a warrant for arrest of a peddler on an affidavit informally and inartificially drawn, but which stated facts constituting a misdemeanor under Town Laws 1888, c. 538, §§ 184, 187. Gilbert v. Satterlee, 43 Misc. 292, 88 N. Y. S. 871.

46. Justice issued a warrant on a complaint insufficient to authorize it. Goodell v. Tower [Vt.] 58 A. 790. Where a justice issued a warrant for an offense over which he had no jurisdiction and one was taken into custody thereunder. Heller v. Clarke [Wis.] 98 N. W. 952.

47. A street car conductor wearing the badge of a special policeman who arrested a person by direction of the city police was not acting by direction of the company. Cordner v. Boston, etc., R. Co., 72 N. H. 413, 57 A. 234. Where a street car conductor wearing the badge of a special policeman went while off duty in search of a man and arrested him, he was not acting within the scope of his employment [Pub. St. 1901, c. 160, § 32]. Id.

48. See Malicious Prosecution, 2 Curr. L. 767. Where one had a horse in his possession substantially answering the description of one that had been stolen. Brish v. Carter [Md.] 57 A. 210. There was probable cause for arrest where a landowner objected to the opening of a highway and forcibly obstructed a road overseer in the performance of his duties. Richardson v. Dybedahl [S. D.] 98 N. W. 164. A discharge under habeas corpus proceedings is a final adjudication that the detention was illegal, but not that the arrest was illegal so as to make the officer a trespasser ab initio. Friesenhan v. Maines [Mich.] 100 N. W. 172.

49. Where one procured an arrect because he believed the person to be one against whom he had preferred a criminal charge. Grinnell v. Weston, 88 N. Y. S. 781.

50. See 1 Curr. L. 1203.

51. Whether one who admitted his guilt of the offense charged could recover the cost of habeas corpus proceedings in which he was discharged because his detention without hearing was reasonable. Friesenhan v. Maines [Mich.] 100 N. W. 172.

52. Goodell v. Tower [Vt.] 58 A. 790. $500 held not excessive where a merchant followed a customer into the street, accused her of taking goods she had not paid for and told her she would have to go back to the store. Crowd present. Dunlevy v. Wolferman [Mo. App.] 79 S. W. 1165.

53. The condition of the prison as to cleanliness and odors may be shown. Fuqua v. Gambill [Ala.] 37 So. 235.

54. Causing an arrest on suspicion that the person was one who had committed a crime. Grinnell v. Weston, 88 N. Y. S. 781.

55. One procuring an arrest is not responsible for the wanton and oppressive conduct of the officer after the arrest. Grinnell v. Weston, 88 N. Y. S. 781.

56. A merchant under the impression that a customer had taken goods which she had not paid for. Dunlevy v. Wolferman [Mo. App.] 79 S. W. 1165.

57. Where one was discharged in habeas corpus proceedings because his detention was illegal. Friesenhan v. Maines [Mich.] 100 N. W. 172.

58. See 1 Curr. L. 1203.

59. Action against a county judge for

Probable cause[62] and facts constituting justification must be specially pleaded.[63] The plaintiff is not required to show want of probable cause.[64] *Instructions* without foundation in the evidence may be refused.[65]

FALSE PRETENSES AND CHEATS.[66]

Elements of offense.[67]—To constitute the crime of obtaining property of another by means of false pretenses, the representations[68] made must have been false,[69] to the knowledge of the party making them,[70] and made with the intent to defraud.[71] The false pretenses must have been believed and relied on by the party alleged to have been defrauded,[72] to his pecuniary damage,[73] and must have re-

commitment of a witness for refusing to testify. Olmsted v. Edson [Neb.] 98 N. W. 415.

60. Complaint except as to this followed Code 1896, p. 946, form 19. Mitchell v. Gambill [Ala.] 37 So. 402.

61. Though allegations are unnecessary. Fuqua v. Gambill [Ala.] 37 So. 235.

62. Cannot be shown under the general issue. Thompson v. Bucholz [Mo. App.] 81 S. W. 490. Where evidence thereof was admitted without objection, the court was not required to mention it in the instructions. Id.

63. Where an officer was not authorized to arrest without a warrant, a plea alleging that plaintiff violated an ordinance but which does not allege that the offense was committed in the presence of the officer or that he had a warrant is bad. Mitchell v. Gambill [Ala.] 37 So. 402.

64. Thompson v. Bucholz [Mo. App.] 81 S. W. 490.

65. Thompson v. Bucholz [Mo. App.] 81 S. W. 490.

66. Includes false pretenses proper and also analogous statutory crimes like cheating and swindling, and confidence games, though denominated "larceny" by statute. See 1 Curr. L. 1204.

NOTE. False pretenses, larceny and embezzlement distinguished: Where, by means of fraud, conspiracy or artifice, the possession of property is obtained with a felonious intent, and the title as well as possession is parted with, the crime is that of obtaining property by false pretenses. See People v. Tomlinson, 102 Cal. 19, 36 P. 506; People v. De Graaf, 127 Cal. 676, 60 P. 429; Haley v. State, 49 Ark. 147, 4 S. W. 746; Pease v. State, 94 Ga. 615, 21 S. E. 588; Stewart v. People, 173 Ill. 464, 50 N. E. 1056, 64 Am. St. Rep. 133; People v. Lawrence, 137 N. Y. 517, 33 N. E. 547. If the owner does not part with title, the offense is larceny. Embezzlement is committed where one honestly receives goods upon trust and afterwards fraudulently converts them to his own use. See cases above cited, particularly People v. Tomlinson, 102 Cal. 19. —From note on "Larceny" in 88 Am. St. Rep. 572.

67. See 1 Curr. L. 1204.

68. Note: The false pretense may be in regard to one's credit. People v. Wasservogle, 77 Cal. 173. Or a false statement of agency [N. C. Code, § 1025]. State v. Dixon, 101 N. C. 741; Bobbitt v. State, 87 Ala. 91. The fraudulent pretense on sale of property may relate to quality, quantity, nature or other incident of property offered for sale, by which the purchaser, relying thereon, is defrauded. Jackson v. People, 126 Ill. 139. See State v. Matthews [Kan.] 10 L. R. A. 308.

69. One cannot be convicted of the offense of cheating and swindling by procuring credit through false representations as to ownership of cattle, unless such representations are proved to be false. Lee v. State, 120 Ga. 194, 47 S. E. 545. But it is enough if a material part of the pretense be false. A representation that there was "nothing against property to hurt," when part of the property was owned by, and the rest heavily mortgaged to, another, held sufficiently false. Wilkerson v. State [Ala.] 36 So. 1004.

70. Hunter v. State [Tex. Cr. App.] 81 S. W. 730.

71. Wilkerson v. State [Ala.] 36 So. 1004. But an intent to defraud is not an element of the offense of swindling in Texas. Representations must be false, or fraudulently made, with intent to acquire property or money, for the purpose of appropriating the same, or of destroying or impairing the rights of the party entitled thereto; and such party must have relied on the representations. McPearson v. State [Tex. Cr. App.] 79 S. W. 522.

72. State v. Bohle [Mo.] 81 S. W. 179. Pretenses must actually mislead. Wilkerson v. State [Ala.] 36 So. 1004. The question of reliance on false representations having been submitted to the jury, a special requested instruction that defendant would not be guilty unless the party defrauded, believed the representations and relied on them, though the jury found them false and fraudulent, was properly refused. McPearson v. State [Tex. Cr. App.] 79 S. W. 522. Where mortgagees were induced to part with money by false representations that there were no other liens on the security, it was no defense that the advances were actually made some time after the mortgage was executed. Wilkerson v. State [Ala.] 36 So. 1004. A connection must be shown between the false pretenses and the obtaining of the property. Hunter v. State [Tex. Cr. App.] 81 S. W. 730. An insured disappeared and the beneficiary made proof of loss and collected on the policy by a judgment, the insurance company denying insured's death. Insured was later found and prosecuted for false pretenses. Held, there could be no conviction, since the alleged false pretense of death was not shown to have been made to any one, and the company did not believe insured was dead. Hunter v. State [Tex. Cr. App.] 81 S. W. 730.

73. The false pretenses alone do not con-

lated to a past or existing fact.[74] Where the loss was occasioned by a recovery of judgment by an innocent person, there is no causal connection between the fraud and the loss.[75] The pretenses or representations may be by acts or conduct as well as by words.[76]

Statutory cheats.—Among the offenses of this character created by statute are the making of a contract of service to procure advance wages and without intent to perform,[77] prohibiting confidence games,[78] or impersonating Federal officers,[79] the presentation of a false and fraudulent claim to a public officer,[80] or prohibiting the pretending to exercise the art of dealing with spirits.[81] Under the New York statute, many acts in the nature of cheats are denominated larceny.[82]

The place of the crime is the place where the false pretenses are made and the goods actually obtained.[83]

stitute the crime; the obtaining of chattels thereby is also necessary. Commonwealth v. Schmunk, 207 Pa. 544, 56 A. 1088. Pretenses must induce party alleged to be wronged to part with property. Wilkerson v. State [Ala.] 36 So. 1004; Hunter v. State [Tex. Cr. App.] 81 S. W. 730. One cannot be convicted of cheating and swindling, under Pen. Code 1895, § 670, unless the person alleged to have been defrauded is shown to have sustained some pecuniary loss. Busby v. State [Ga.] 48 S. E. 314. The execution of a note and chattel mortgage in an assumed name for the goods was no defense. State v. Bohle [Mo.] 81 S. W. 179. The Nebraska act relating to false pretenses makes criminal the act of fraudulently obtaining signatures to written instruments conveying title to realty. Moline v. State [Neb.] 100 N. W. 810.

74. A false pretense is a false representation, relating to some existing or past fact. "A promise, not meant to be kept is not a false pretense." Wilkerson v. State [Ala.] 36 So. 1004. Any representation, assurance or promise relating to a future transaction, however false and fraudulent, is not within the meaning of the statute. Cook v. State [Neb.] 98 N. W. 810.

75. As where an insurance company was sued on a policy and judgment rendered against it, though it denied the death of insured. Insured could not be convicted of swindling for falsely pretending death, since the insurance was collected by innocent beneficiary, through the court. Hunter v. State [Tex. Cr. App.] 81 S. W. 730.

76. Hunter v. State [Tex. Cr. App.] 81 S. W. 730.

77. Statute (Acts Gen. Assem. 1903, p. 90), providing that a person who contracts for services with intent to procure money and not to preform the services shall be deemed a common cheat and swindler and be guilty of a misdemeanor, is not unconstitutional as providing imprisonment for debt; as the punishment is for the fraudulent intent with which money is procured and not for failure to comply with the obligation. Lamar v. State, 120 Ga. 312, 47 S. E. 958.

78. The phrase "three card monte" as used in Rev. St. 1899, § 2216, making it a crime to play or practice the game, defined. State v. Edgen [Mo.] 80 S. W. 942. Evidence held sufficient to warrant conviction for playing the three card monte game, though prosecutor lost no money. Id. One who induced prosecutor to bet on a three card monte game played by a confederate was punishable as an accessory before the fact. Id.

79. Where defendant falsely represented himself as a United States secret service officer, and, ten months later, as a traveling salesman, and presented a worthless check and obtained money thereon, it was held that defendant might be held on the common law offense of obtaining money by false pretenses, but could not be convicted under the Federal act prohibiting persons from pretending to be Federal officers and obtaining property as such. United States v. Farnham, 127 F. 478.

80. The chairman of a town board of supervisors caused two orders to be issued on the treasurer for unauthorized claims, which he negotiated at a bank and which were later paid by the treasurer. Held guilty of offense under Gen. St. 1894, § 6812. State v. Peebles [Minn.] 101 N. W. 306.

81. One pretending to exercise the art of dealing with spirits, in order to cure disease, is guilty of an infraction of the statute prohibiting any person from pretending to exercise the art of witchcraft, conjuration, fortune-telling, or dealing with spirits [Rev. Code 1852, amended in 1893, p. 961, c. 132, § 7]. State v. Durham [Del. Gen. Sess.] 58 A. 1024.

82. Where several parties combined to dispose of worthless stock by means of a false and fraudulent device, they were all guilty of grand larceny under Pen. Code, § 528. People v. Putnam, 90 App. Div. 125, 85 N. Y. S. 1056. An alleged false representation by a purchaser of materials to the effect that he had a large order for the goods when manufactured, from a responsible party, held not a representation as to the purchaser's means and ability to pay, but that the seller was to be assured by the bills payable of the prospective purchaser; hence such representation was not one required to be in writing and signed, under Pen. Code, § 544, but constituted a crime under Pen. Code, § 528, though oral. People v. Rothstein, 88 N. Y. S. 622. Reversing Id., 42 Misc. 123, 85 N. Y. S. 1076, on this point, a certificate of doubt having been issued, and affirming conviction.

83. False pretenses were written in Allegheny county, Pennsylvania, and mailed there to New York, and goods were consigned, on the faith of the false pretenses, to defendant, who actually obtained them in Allegheny county. Held, the crime was

Defenses.—That defendant was at the time of the alleged offense suffering from serious physical injuries is a good defense to a prosecution for swindling based on failure to perform contract for services.[84] In Arizona, it was held that the fact that money was obtained from county officers by virtue of a custom which was not warranted by law was no defense.[85]

The indictment[86] is usually sufficient if it alleges the elements of the offense in the language of the statute defining it.[87] It must allege that the false pretenses were relied on, unless the fact of such reliance is necessarily implied,[88] and that the party alleged to be wronged parted with something of value.[89] Where a statute does not define the acts constituting the particular crime defined, the indictment must allege the facts relied on to constitute it.[90] If the alleged false tokens or instruments used are otherwise sufficiently described, they need not be set out in detail.[91]

An accusation under the Georgia statute relating to fraudulent contracts for services must state specifically what the advances obtained consisted of,[92] and must sufficiently allege the fraudulent intent.[93]

Evidence and proof.[94]—Evidence of other similar transactions is admissible,[95]

committed in that county. Commonwealth v. Schmunk, 207 Pa. 544, 56 A. 1088.

84. Under Acts 1903, p. 90. Hart v. State [Ga.] 48 S. E. 925.

85. One who, knowing of a custom whereby a county paid for services of interpreters in criminal cases before justices of the peace, presents a claim for such services and obtains payment, though he never rendered any services, is guilty of obtaining money by false pretenses, though the custom of so paying interpreters is not warranted by law. Berreyesa v. Territory [Ariz.] 76 P. 472.

86. See 1 Curr. L. 1205.

87. An information stating the acts constituting the offense in the language used by the statute in defining the crime of obtaining money, etc., by false pretenses, is sufficient. State v. Ryan, 34 Wash. 597, 76 P. 90. An indictment which in substance charges defendants with willfully conspiring to cheat and defraud sufficiently names and describes the crime within Pen. Code, §§ 168, 276. People v. Rathbun, 44 Misc. 88, 89 N. Y. S. 746. An indictment charging that defendant unlawfully and feloniously played and practiced the confidence game or swindle known as "three card monte," and then and there feloniously attempted to obtain a large sum of money from a named person, is sufficient, following the language of Rev. St. 1899, § 2216. State v. Edgen [Mo.] 80 S. W. 942. An indictment charging that defendant by means of fraud and false pretenses obtained signatures to a certain warranty deed, held sufficient, and to charge but one offense. Moline v. State [Neb.] 100 N. W. 810. An indictment substantially charging defendants with conspiring to cheat and defraud a named company by drawing checks and drafts against it in favor of another company, for debts which did not exist, and appropriating the proceeds, held to sufficiently charge the unlawful agreement necessary to constitute a conspiracy. People v. Rathbun, 44 Misc. 88, 89 N. Y. S. 736. The indictment does not charge two crimes, conspiracy and grand larceny, by setting out the acts by which the fraud was accomplished. Id. The offense charged was conspiracy, and that offense was not merged in the grand larceny so as to prevent a prosecution for conspiracy. Id.

88. A specific averment that the false pretenses were relied on is unnecessary, if it be alleged that the property was obtained by means of the false pretenses, with intent to defraud the owner. State v. Ryan, 34 Wash. 597, 76 P. 90.

89. An allegation that "twenty dollars" was paid defendant is a sufficient averment that the informant parted with something of value. State v. Ryan, 34 Wash. 597, 76 P. 90. An indictment for cheating and swindling is fatally defective if it does not allege that the cheating caused pecuniary loss to the party defrauded. Busby v. State [Ga.] 48 S. E. 314.

90. An indictment for presenting a false or fraudulent claim to a county or city officer for allowance (under Pen. Code, § 72) must state the facts showing wherein the claim is fraudulent. People v. Mahony [Cal.] 78 P. 354.

91. Information held to sufficiently describe a worthless bank bill, the "false token" used, without setting it out in haec verba, or stating the particulars in which it was false and invalid. State v. Ryan, 34 Wash. 597, 76 P. 90. An indictment charging a conspiracy to cheat and defraud by drawing checks and drafts for debts which did not exist need not set out the checks and drafts. People v. Rathbun, 44 Misc. 88, 89 N. Y. S. 746.

92. Acts 1903, p. 90. Campbell v. State [Ga.] 48 S. E. 920.

93. An accusation charging that the acts were "with intent to procure said advances * * * and not comply with said contract" sufficiently charges the fraudulent intent, though the exact language of the statute is not followed. Campbell v. State [Ga.] 48 S. E. 920.

94. Conviction for presenting a false claim to county commissioners reversed because the evidence failed to connect defendant with the crime charged. State v. Adams [Idaho] 75 P. 258. Evidence that defendant request-

usually to prove the fraudulent intent.[96] Admissions of a defendant are admissible against him, though not made in the presence of the party defrauded.[97] If a conspiracy to commit the offense is proven, declarations of a conspirator in furtherance of the common purpose are admissible against the co-conspirators.[98]

FENCES.

Laws compelling the maintenance of partition fences,[1] and delegating to an officer the fixing of their sufficiency,[2] are valid. Such a law is not void for uncertainty because it calls for recording in a record not denominated with technical accuracy.[3]

Railroad companies are not required in Ohio to fence against persons.[4] An agreement between adjoiners that one of them should build a line fence carries with it by implication the right to do such things as are necessary for the accomplishment of the undertaking.[5]

For injuries attributable to breach of one's duty to keep up a fence, he is liable.[6] A fence of unsightly proportions may be a violation of the rights of an

ed delivery of goods to a certain address, and that he knew of their transfer to another place and told the officer where they were, was sufficient proof of delivery of the goods. State v. Bohle [Mo.] 81 S. W. 179 In California (Pen. Code, § 1110), where a false pretense is expressed in language, unaccompanied by a false token or writing, or some note or memorandum in writing subscribed by defendant, the pretense must be proved by two witnesses, or one witness and corroborating circumstances. Conviction reversed where representation as to ownership of stock and fixtures was proved by only one witness, and there was no writing. People v. Chrones, 141 Cal. xviii, 75 P. 180.

95. Evidence of similar representations to other persons, for similar purposes, admissible against defendant to prove his statement of account or representations as to his financial standing false. People v. Noblett, 96 App. Div. 293, 89 N. Y. S. 181. Where evidence as to a subsequent similar fraudulent transaction was first brought out on cross-examination, the transaction could be fully brought out on the redirect examination. Id.

96. Evidence of an exactly similar fraudulent transaction was admissible against defendant, though he was not a party thereto, where the others, combined with him in the offense charged, were parties to the other crime. People v. Putnam, 90 App. Div. 125, 85 N. Y. S. 1056.

97. Statements of defendant in regard to alleged false claims for personal injuries were admissible, though the party against whom the claim was made was not present. McPearson v. State [Tex. Cr. App.] 79 S. W. 522.

98. In such case, the order of proof is immaterial; the existence of the conspiracy may be proven after the declarations have been admitted. People v. Putnam, 90 App. Div. 125, 85 N. Y. S. 1056.

1. Under Burns' Rev. St. 1901, §§ 6564-6569, not a taking of property without due process. Tomlinson v. Bainaka [Ind.] 70 N. E. 155.

2. Under Burns' Rev. St. 1901, § 6565, a township trustee may limit the kinds of fence to be erected to those varieties most commonly used in the township. Tomlinson v. Bainaka [Ind.] 70 N. E. 155. Such statute is not unconstitutional because not providing for a tribunal to determine the sufficiency of a fence built by an adjoiner after notice, or the sufficiency of an existing fence. Id.

3. Provision in such law requiring contractor who builds the fence to record statement of township trustee in mechanics' lien record does not render such provision ineffective because there was not such record. It may be recorded where mechanics' liens are recorded. Tomlinson v. Bainaka [Ind.] 70 N. E. 155.

4. The fence required by section 3324, Rev. St. 1892 is one sufficient to turn stock. Lake Shore, etc., R. Co. v. Lildtke, 69 Ohio St. 384, 69 N. E. 653.

5. Cut branches from the trees. Newberry v. Bunda [Mich.] 100 N. W. 277. Whether it was necessary to cut branches in this case was for the jury. Id.

6. **NOTE. Division fences:** One is liable for injuries to an adjoining owner's stock proximately resulting from his failure to keep up a partition fence which it is his duty to maintain; hence where cattle passed through and over defendant's land onto a railroad track. Pitzner v. Shinnock, 41 Wis. 676. But where a colt strayed through and got down in a natural hollow on the defendant's land, he was held not liable (Fales v. Cole, 153 Mass. 322), and failure to keep a fence around a growing crop does not render the owner liable for injuries to cattle resulting from the eating thereof (Fennell v. Sequin St. R. Co., 70 Tex. 67). In contradistinction to Fales v. Cole, 153 Mass. 322, see Rooth v. Wilson, 1 Barn. & Ald. 59, where a recovery was allowed under about the same state of facts; see, also, Powell v. Salisbury, 2 Younge & J. 391, where a recovery was denied where a horse was killed by a haystack falling upon it. —From note to Wilder v. Stanley [Vt.] 20 L. R. A. 479.

Where cattle pass through defendant's portion of a fence, he is liable, though the plaintiff's portion is also defective. Osburn

adjoining owner,[7] and one over the line is a trespass.[8] A railroad may be liable under fence laws for injury to animals coming from remote fields if it has made the injury possible by failure to keep up its fences.[9]

An action under the Indiana law by one adjoiner to foreclose a lien for the erection of a partition fence being equitable,[10] a jury may be denied.[11] The plaintiff must prove all facts necessary to give the township trustee authority to contract for the building of the fence.[12]

Crimes and penalties.—In Texas, destruction of fences is an injury to the possessory rights,[13] and that one has some title or claim to the land does not justify the destruction of a fence thereon.[14] One who destroys his own fence or fences enclosing premises of which he is in the actual possession cannot be convicted of unlawfully injuring the fence of another.[15] Ownership of a fence may be shown by evidence that one claiming it built it and has been in unmolested possession of the land for several years.[16]

FERRIES.

A state has the right to grant a privilege to ferry from its shores across a navigable river between two states,[17] and to regulate the fares to be charged,[18]

v. Adams, 70 Ill. 291. An owner who fails to keep up his divlsion fence cannot recover for damages, caused by trespassing animals resulting therefrom. Webber v. Closson, 35 Me. 26; D'Arcy v. Miller, 86 Ill. 102, 29 Am. Rep. 11; Rangler v. McCreight, 27 Pa. 95; Phelps v. Cousins, 29 Ohio St. 135; Shepard v. Hees, 12 Johns. [N. Y.] 433; Roach v. Lawrence, 56 Wis. 478; Cowles v. Balzer, 47 Barb. [N. Y.] 562.—From note to Bulpit v. Matthews [Ill.] 22 L. R. A. 62.

7. See Adjoining Owners, 1 Curr. L. 21; Id., 3 Curr. L. 39. Giller v. West, 162 Ind. 17, 69 N. E. 548.

8. Building a fence on an adjoining owner's land gives a cause of action for trespass but not for an injunction. Giller v. West, 162 Ind. 17, 69 N. E. 548.

9. NOTE. Railroads.—Liability for damage to animals; Fencing statutes: A statute required railroad companies to fence their rights of way and provided that failure to comply should render them liable in damages to the owners of injured cattle. The plaintiff's colt escaped from its owner, traveled several miles along a highway, broke through a fence into the field of a third party, and thence through the defendant railroad's defective fence to its track, where it was run over by the defendant's engine. Held, that the defendant is liable. Rinehart v. Kansas, etc., R. Co. [Mo.] 80 S. W. 910. In interpreting statutes similar to the Missouri enactment, courts have differed, and even in Missouri the decisions are conflicting. See Ferris v. St. Louis, etc., R. Co., 30 Mo. App. 122. Certainly one object of such enactments is the protection of the traveling public. Dickson v. Omaha, etc., R. Co., 124 Mo. 140, 46 Am. St. Rep. 429. As to the owners of animals, in England and some eastern states, only those whose animals were rightfully upon property adjoining the right of way, and were injured through the railroad's failure to fence, can recover. Eames v. Salem, etc., R. Co., 98 Mass. 560, 96 Am. Dec. 676. Many western jurisdictions, however, hold with the principal case that the railroad is liable even to owners of trespassing animals. McCall v. Chamberlain, 13 Wis. 637. In the former jurisdictions, the common law rule generally prevails, requiring the owner of animals to keep them in at his peril. In some western states, this rule is not in force, stock being allowed to graze at large. Wagner v. Bissell, 3 Iowa, 396. This in part accounts for the conflict in interpretation, and makes it possible to support both lines of authority without violating the principle that to recover under a statute, the plaintiff must show that he is one of the class which the legislature intended to protect.—XVIII Harvard Law R. 69. See full discussion in Railroads, 2 Curr. L. 1382.

10, 11. Under Burns' Rev. St. 1901, §§ 6564-6569. Tomlinson v. Bainaka [Ind.] 70 N. E. 155.

12. Burns' Rev. St. 1901, § 6566. Tomlinson v. Bainaka [Ind.] 70 N. E. 155. A complaint in an action to foreclose a lien for erecting a fence was not insufficient because not alleging that the fence was sufficient to retain stock. Id.

13. Under Pen. Code 1895, art. 794, one in actual peaceable possession may maintain action therefor. Pate v. State [Tex. Cr. App.] 81 S. W. 737. Defendant may introduce a deed of the property to his wife to show that the prosecutor was not in actual peaceable possession at the time of the commission of the offense. Id. Evidence as to title was inadmissible where only right to possession was in dispute. Kalklosch v. State [Tex. Cr. App.] 80 S. W. 85. Evidence held insufficient to warrant an instruction that if defendant had been in peaceable possession of the land, etc., he should be acquitted. Id.

14. Smith v. State [Tex. Cr. App.] 79 S. W. 34.

15. Instruction approved. Smith v. State [Tex. Civ. App.] 79 S. W. 34.

16. Kalklosch v. State [Tex. Cr. App.] 80 S. W. 85.

17. Ohio has the right to fix the fare her

but the transportation of railroad trains across the Mississippi river at a point constituting one of the gateways between the east and the west, is not the maintenance of a ferry in the proper sense of that term, but interstate commerce.[19] Texas statutes providing that ferries shall be licensed applies to ferries on rivers wholly within the state.[20] And an interstate ferry cannot be assessed unless it appears that a license is required by the state on the opposite shore.[21] In Kentucky, a nonresident who acquires a ferry privilege is required by law to transfer it to a resident within one year, but failure to do so renders it voidable only at the instance of his grantor or in a direct proceeding instituted by the state.[22] Apart from the starboard hand rule, a ferry boat is entitled to space requisite for her proper manoeuvre in leaving and entering her slip.[23] Where a ferry boat is moored and the gates are open, assurance is given that it is safe to embark.[24] A ferryboat which affords its passengers a means of landing which had been employed by it and other ferries for years and had never been found dangerous or ineffective is not negligent.[25]

FINES.[26]

When a sentence for a fine recites that it is "inclusive of costs," the entire amount will be construed a fine.[27]

A common method of securing the satisfaction of a judgment for a fine for a misdemeanor is by imprisonment.[28] If a judgment provides for satisfaction in

ferries shall charge for ferriage to the West Virginia shore. State v. Faudre, 54 W. Va. 122, 46 S. E. 269. A police jury has power to grant exclusive privilege of establishing a ferry within its limits (Rev. Laws. § 1501), but not an interstate ferry, and though an absolute privilege relative to the latter may be ultra vires, it is not absolutely void. Prince v. Police Jury of Concordia Parish, 112 La. 257, 36 So. 342.

18. West Virginia cannot punish one acting under an Ohio franchise for charging a passenger coming from the Ohio shore more than is allowed by the Virginia law for ferriage over that river. State v. Faudre, 54 W. Va. 122, 46 S. E. 269.

19. Rev. Laws Illinois 1874, c. 55, penalizing such carrying without a license, is unconstitutional, where such statute makes the granting of a license discretionary, citizens of Illinois preferred, and compels the licensee to conduct a general ferry business. St. Clair County v. Interstate Sand & Car Transfer Co., 192 U. S. 454, 48 Law. Ed. 518.

Note: A ferry franchise is a privilege to take tolls for transporting men, cattle and vehicles across a body of water; it differs in no essential from a bridge franchise. Hunter v. Moore, 44 Ark. 184, 51 Am. St. Rep. 589; State v. Wilson, 42 Me. 9; Broadnax v. Baker, 94 N. C. 675, 55 Am. Rep. 633. Ferry distinguished from a bridge. Parrott v. Lawrence, 2 Dill. 332, Fed. Cas. No. 10,772. But a boat equipped exclusively for the transportation of railroad cars and which carries no baggage, passengers or freight was held not a ferry (New York v. New England Transfer Co., 14 Blatchf. 159, Fed. Cas. No. 10,197), and a boat maintained by one for the accommodation of guests at a pleasure ground, though passengers were also conveyed for hire, is not a ferry (People v. Mayo, 69 Hun, 559, 23 N. Y. S. 938). —From note to Sisterville Ferry Co. v. Russell [W. Va.] 59 L. R. A. 513, where cases on Definition, Establishment, Landings, Exclusiveness of Right, Regulation and Supervision, Transfers and Contracts, Rights and Duties of Ferryman, and Extinguishment of the Privilege, are gathered and discussed.

20. Under Rev. St. 1895, arts. 1537, 4797, 4798, an interstate ferry cannot be licensed. Parsons v. Hunt [Tex. Civ. App.] 81 S. W. 120.

21. Under Rev. St. 1895, art. 4799, unless it so appears, it will be assumed that no such tax is charged. Parsons v. Hunt [Tex. Civ. App.] 81 S. W. 120.

22. Ky. St. 1903, § 1808, subd. 3. Paynter v. Miller, 25 Ky. L. R. 2222, 80 S. W. 469. The failure to transfer within a year cannot be attacked after a nonresident has transferred his privilege to a resident with the consent of a county court. Id.

23. Steamboat held in fault for a collision, for proceeding too close to the shore, want of proper lookout and not keeping her course under the starboard hand rule. City of New York v. New York & E. R. Ferry Co., 130 F. 397. See, also, Shipping, etc., 2 Curr. L. 1648.

24. Not having the gang plank up is negligence. Dougherty v. New York, etc., R. Co., 86 N. Y. S. 746.

25. Scribner v. Long Island R. Co., 88 N. Y. S. 351.

26. Includes only enforcement and disposition. Propriety of particular punishments treated in Criminal Law, 1 Curr. L. 827; procedure for their imposition in Indictment and Prosecution, 2 Curr. L. 307.

27. The costs of a criminal prosecution always rest on the convicted defendant, and it is highly improper to include such costs in estimating the fine. Parish Board of Directors v. Hebert, 112 La. 467, 36 So. 497.

28. See Rev. St. § 7327. Smith v. State, 4 Ohio C. C. (N. S.) 101. Under a judgment sentencing a defendant to pay a fine

that manner and it is so satisfied, defendant's property is not liable to execution to satisfy it.[29] A capias pro fine may issue, though the verdict of the jury and the judgment pursuant thereto simply find defendant guilty and assess his fine, without expressly providing for his confinement in case the fine is not paid.[30]

A judgment for a fine for maintaining a liquor nuisance upon certain property is a lien on the property.[31]

A violation of a contract for services with a surety for a fine[32] is not punishable unless the court imposing the fine had authority to sentence to hard labor.[33] A statute permitting the hiring out of persons convicted of misdemeanors does not authorize the hiring out of persons convicted of a felony.[34]

In Tennessee, a defendant has the right, when a fine is assessed, to confess judgment for the fine and costs, with sureties.[35] He must tender more than one surety, and such tender may be to the court or clerk.[36] Attorneys are competent sureties.[37] Where a defendant under sentence of fine and imprisonment gives a bond pending appeal for the performance of such sentence, and the judgment is affirmed, his sureties are not relieved from paying the fine by his performance of the imprisonment.[38]

FIRES.

§ 1. Rights and Duties Respecting Fires (1425). | § 2. Remedies and Procedure (1427).

§ 1. *Rights and duties respecting fires.*[39]—The use of fire is lawful,[40] and

of $30, or to serve 15 days in the county jail, defendant will be entitled to a discharge when it appears that he has paid so much of his fine as is not satisfied by imprisonment at $2 a day. Ex parte Riley, 142 Cal. 124, 75 P. 665.

NOTE. Fines as debts: It is said to be almost universally held that fines and penalties imposed for violation of state laws are not debts within the meaning of constitutional provisions prohibiting imprisonment for debt, and that imprisonment for nonpayment of fines is therefore constitutional. Lee v. State, 75 Ala. 29, 30; United States v. Walsh, Deady, 281, 285, 1 Abb. (U. S.) 66; In re Sanborn, 52 F. 583; Kennedy v. People, 122 Ill. 649, 652; Jackson v. Boyd, 53 Iowa, 536, 539; State v. Mace, 5 Md. 337, 350; State v. Cannady, 78 N. C. 539, 544. The same doctrine is held respecting fines imposed for violation of city ordinances. Brown v. Jerome, 102 Ill. 371; Hardenbrook v. Ligonier, 95 Ind. 70; Lane County v. Oregon, 7 Wall. [U. S.] 71, 19 Law. Ed. 101.—From note on "Constitutionality of Imprisonment for Debt," in Carr v. State [Ala.] 34 L. R. A. 634, at page 651.

29. Where a judgment of a justice of the peace court recited that defendant was fined $100, and failing to pay it, was remanded to be confined in jail at the ratio of one day for every two dollars of the fine, such judgment was under § 2707 of the Penal Code, providing for satisfaction of the judgment by the imprisonment; and defendant, having been confined 50 days, discharged the fine, and his property could not be seized under execution to satisfy the judgment, under § 2227 of the Penal Code. Petelin v. Kennedy, 29 Mont. 466, 75 P. 82.

30. Farris v. Dozier [Ky.] 82 S. W. 615.

31. It is not essential to the validity of the lien that the indictment specifically describe the premises on which the nuisance is maintained. Jasper County v. Sparham [Iowa] 101 N. W. 134.

32. Affidavit for breach of service contract with surety for fine held sufficient on general demurrer. McQueen v. State, 138 Ala. 63, 35 So. 39.

33. A justice of the peace has no such authority. Simmons v. State, 139 Ala. 149, 36 So. 728.

34. As of seduction; though punishment is imprisonment or a fine of $5,000. Ex parte Biela [Tex. Cr. App.] 81 S. W. 739.

35. Shannon's Code, § 7214, providing that where a fine is assessed the court may allow defendant to confess judgment for the fine and costs, with good sureties, is mandatory; since the next section provides for imprisonment unless the fine and costs are paid, or judgment confessed, or defendant is otherwise discharged. Halfacre v. State [Tenn.] 79 S. W. 132.

36. Need not be to the clerk exclusively. Halfacre v. State [Tenn.] 79 S. W. 132.

37. The fact that attorneys are prohibited by statute from signing bonds or entering into recognizances as sureties for an appearance in a criminal case does not prevent them from becoming sureties for fines and costs of a defendant. Halfacre v. State [Tenn.] 79 S. W. 132. A town ordinance providing that a marshal may enter any public resort, if the keeper thereof refuse him admission, and imposing a fine upon any person resisting the entrance of the marshal, held constitutional. People v. Croot [Colo. App.] 78 P. 310.

38. People v. Connolly, 88 App. Div. 302, 84 N. Y. S. 617.

39. See 2 Curr. L. 1, and for the statutory and common liability of railroads for fires originating on the right of way, and for failure to use spark arresters see Railroads,

unless there is a failure to exercise ordinary care,[41] commensurate with the circumstances of each particular case,[42] no liability is incurred.[43] Failure to have a spark arrester on a stationary engine is not per se negligence,[44] but otherwise in the case of railway locomotives.[45] Mere ownership[46] or control of land does not render one liable for damages caused by a fire originating thereon.[47]

The measure of damages[48] is the value of the property destroyed,[49] and such measure cannot be enhanced by allowing salvage to go to waste,[50] nor diminished by the fact that a fire sufferer had been aided by popular subscription.[51] Where more than one method of ascertaining the damage is adopted, the measure must be determined by the jury from all the evidence.[52] Statutes allowing multifold damages are penal in nature and are strictly construed.[53] The jury have a dis-

2 Curr. L. 1446. See, also, Negligence, 2 Curr. L. 998, n. 22.

Note: Many states have undertaken to regulate the use of fire and have prescribed conditions under which liability shall attach. A statute making one liable absolutely for setting fire to woods, marshes or prairies does not apply to other property (Emerson v. Gardiner, 8 Kan. 452), but the question of negligence is immaterial as regards the things enumerated. Conn v. May, 36 Iowa, 241. A statute relative to prairie or timber land does not apply to cultivated fields (Brunnell v. Hopkins, 42 Iowa, 429). If one sets a prairie fire at a time prohibited by statute, he is liable for injury resulting regardless of negligence (Burton v. McClellan, 3 Ill. 434), and though one is within the exception of the statute he must show justification (Johnson v. Barber, 10 Ill. 426, 50 Am. Dec. 416). If a back fire adds to the damage caused, one setting it is liable. Thoburn v. Campbell, 80 Iowa, 338.—From note to Brown v. Brooks [Wis.] 21 L. R. A. 261.

40. In clearing land unless negligence is shown, one is not liable for its spread. Hitchcock v. Riley, 44 Misc. 260, 89 N. Y. S. 890.

41. What is ordinary care is a question for the jury. Louisville & N. R. Co. v. Fort [Tenn.] 80 S. W. 429. Where a fire was started by sparks thrown from a hot box and there was evidence that the train crew had notice of the fire but paid no heed to it, evidence was held sufficient to warrant that it was negligently started and negligently allowed to spread. Clark v. San Francisco, etc., R. Co., 142 Cal. 614, 76 P. 507. The prima facie case made by showing that a fire was started by sparks from an engine is rebutted by showing that the engine was equipped with spark arresters which were properly operated. Olmstead v. Oregon Short Line R. Co., 27 Utah, 515, 76 P. 557. Where proof showed that engine was equipped with proper spark arresters carefully operated, proof of other fires started by the same engine and that cinders escaped which would not pass through the netting unless it was out of repair was sufficient to take the case to the jury. Id.

42. Collins v. George, 102 Va. 509, 46 S. E. 684. Running trains in time of drought and wind. Louisville & N. R. Co. v. Fort [Tenn.] 80 S. W. 429. Where a railroad sets fire on its right of way adjacent to buildings, it is incumbent on it to guard the fires so long as they exist. Brister & Co. v. Illinois Cent. R. Co. [Miss.] 36 So. 142. The degree of care required in handling natural gas is such care, skill and diligence as is called for by the difficulty, delicacy and dangerousness of the business. Citizen's Gas & Oil Min. Co. v. Whipple, 32 Ind. App. 203, 69 N. E. 557. It is not negligence to leave a gas stove burning at night if it is properly turned down and adjusted. Id.

43, 44. Collins v. George, 102 Va. 509, 46 S. E. 684.

45. Kimball v. Borden, 95 Va. 203, 28 S. E. 207. The railroad company is liable, even though the road is operated by an independent contractor. Brady v. Jay [La.] 36 So. 132. Evidence held to show that engines not equipped with spark arresters, and burning wood, caused the fire. Id.

46. Railroad company owned land used by city as a dumping ground. The company exercised no control over it. City of Denver v. Porter [C. C. A.] 126 F. 288.

47. A city is not liable for damages occasioned by the spread of fire originating in its dumping ground unless it omitted to exercise ordinary care in the management of the dump. City of Denver v. Porter, 126 F. 288.

48. See 2 Curr. L. 3.

49. In an action for burning trees, evidence of the value of the wood if put to its best use is admissible. Spink v. New York, etc., R. Co. [R. I.] 58 A. 499. An instruction limiting damages to the "outcome of the fire" is proper. Id. For destruction of grass roots, turf and sod grass, the difference in the market value of the land before and after burning. Jackson v. Missouri, etc., R. Co. [Tex. Civ. App.] 78 S. W. 724.

50. Evidence that burnt trees which subsequently became useless could soon after the fire have been sold for piles and poles is admissible. Spink v. New York, etc., R. Co. [R. I.] 58 A. 499.

51. Had received a greater sum than his loss by fire. Citizen's Gas & Oil Min. Co. v. Whipple, 32 Ind. 203, 69 N. E. 557.

52. For the destruction of fruit trees, their value as a distinct part of the land, and the difference in value of the land before and after destruction. Atchison, etc., R. Co. v. Geiser [Kan.] 75 P. 68.

53. Evidence held insufficient to sustain a recovery of treble damages under Pol. Code, § 3344, for negligently setting fire to one's woods or suffering it to extend beyond one's own land. Clark v. San Francisco, etc., R. Co., 142 Cal. 614, 76 P. 507.

cretionary power to allow interest.[54] Where the value of property destroyed exceeds the amount received from an insurance company, the insured may recover in his own name the full amount of the loss.[55]

§ 2. *Remedies and procedure. Pleading.*[56]—Allegations that defendant negligently set fire on its own premises and negligently allowed it to spread to plaintiff's premises states a cause of action at common law.[57] An allegation that a fire was caused by the negligent act of a principal includes an act of an employe or agent.[58] An amendment increasing the amount of damages demanded should be made before the case is submitted for decision.[59]

Evidence and burden of proof.[60]—The plaintiff must establish by a preponderance of evidence the negligence of the defendant,[61] and that it was the proximate cause of the fire.[62] Circumstantial evidence is sufficient.[63] Evidence of other fires caused by defendant's appliances is admissible,[64] if not too remote.[65] All evidence tending to show freedom from negligence is admissible under a general denial.[66]

Instructions[67] should conform to the evidence[68] and contributory negligence should not be assumed.[69]

54. When allowed, the trial judge may compute and include it in the judgment. Louisville & N. R. Co. v. Fort [Tenn.] 80 S. W. 429.

55. Kansas City, etc., R. Co. v. Blaker & Co. [Kan.] 75 P. 71.

56. See 1 Curr. L. 3.

57. Without regard to Pol. Code, § 3344, providing for a recovery of treble damages. Clark v. San Francisco, etc., R. Co., 142 Cal. 614, 76 P. 507. Complaint showing that defendant furnished gas to plaintiff and that by reason of its negligence in failing to regulate the flow and pressure, plaintiff's stove became overheated and caused a fire, held to state a cause of action. Citizen's Gas & Oil Min. Co. v. Whipple, 32 Ind. App. 203, 69 N. E. 557. An allegation that defendant "neglected to have used upon a smokestack a spark catcher," etc., did not confine the negligence to a failure to equip, but alleged a failure to use a spark arrester. Wager v. Lamont [Mich.] 98 N. W. 1.

58. Within Code Laws 1902, § 2135. Brown v. Carolina Midland R. Co. [S. C.] 46 S. E. 283.

59. Not after verdict rendered where the amount awarded is not supported by the evidence. Clark v. San Francisco, etc., R. Co., 142 Cal. 614, 76 P. 507.

60. See 2 Curr. L. 4.

61. Chesapeake & O. R. Co. v. Heath [Va.] 48 S. E. 508. The fact that after a fire changes were made in a spark arrester is not evidence that it was defective prior thereto. Wager v. Lamont [Mich.] 98 N. W. 1. Instruction held not objectionable as imposing upon plaintiff the burden of proving by more than a preponderance of evidence that the fire originated on the right of way from spark emitted from an engine. Jackson v. Missouri, etc., R. Co. [Tex. Civ. App.] 78 S. W. 724.

NOTE. Presumption as to negligence: The destruction of property by fire either upon the premises where it starts or is kindled, or on other property to which it is communicated, does not raise a presumption of negligence either as to kindling or management. Catron v. Nichols, 81 Mo. 80, 51 Am. Rep. 222; Lansing v. Stone, 37 Barb. [N. Y.] 15; Bryan v. Fowler, 70 N. C. 596. In all such cases the burden is on the plaintiff to show that the damage was caused by the negligence of the party kindling the fire. Sturgis v. Robbins, 62 Me. 289; Tourtelott v. Resebrook, 11 Metc. [Mass.] 460; McCully v. Clarke, 40 Pa. 399, 80 Am. Dec. 584. Whether there was negligence is a question for the jury. Powers v. Craig, 22 Neb. 621; Jordan v. Lassiter, 6 Jones [N. C.] 130; Dewey v. Leonard, 14 Minn. 153; De France v. Spencer, 2 G. Greene [Iowa] 462.—From note to McNally v. Colwell [Mich.] 30 Am. St. Rep. 502.

62. There must be proof that the negligence in not equipping engines with spark arresters was the proximate cause of the fire. Cheek v. Oak Grove Lumber Co., 134 N. C. 225, 46 S. E. 488. Where a fire when discovered was burning on the inside of a building, evidence held insufficient to show that it was caused by sparks from an engine. Chesapeake & O. R. Co. v. Heath [Va.] 48 S. E. 508. Where a fire might have resulted from one of two causes for one of which the defendant is not responsible, there can be no recovery. Id.

63. That fire originated in sparks from a passing locomotive. Kansas City, etc., R. Co. v. Blaker & Co. [Kan.] 75 P. 71.

64. Evidence that the locomotives operated by the company had within a few weeks before and after the fire in question caused other fires as far from the track as the place where plaintiff's property stood. Louisville & N. R. Co. v. Fort [Tenn.] 80 S. W. 429.

65. Evidence that a year later the same engine caused another fire. Cheek v. Oak Grove Lumber Co., 134 N. C. 225, 46 S. E. 488.

66. In an action for negligently failing to regulate the flow of gas, thereby causing fire. Citizen's Gas & Oil Min. Co. v. Whipple, 32 Ind. 203, 69 N. E. 557. Proof that a stove was defective is admissible under an allegation that fire was communicated to plaintiff's property from a depot. Brown v. Carolina Midland R. Co. [S. C.] 46 S. E. 283.

67. See 1 Curr. L. 5.

68. Instruction held not to proceed on the

The verdict must be based on the entire evidence and not on any part thereof.[70]

FISH AND GAME LAWS.[71]

§ 1. Public Control of Fish and Game (1428). Fishery Regulations (1429). Game Laws (1430).
§ 2. Offenses; Penalties; Prosecutions (1430).
§ 3. Private Rights in Fish and Game (1431).

§ 1. *Public control of fish and game.*[72]—The control of fish and game of a state is vested in its lawmaking body,[73] which may impose such terms and conditions as to capture, use, and disposition, as it chooses, within constitutional limits.[74] This power to regulate the right to take fish and game is coextensive with the territorial limits of the state,[75] and may with propriety be specially ap-

theory that regulators were out of order or repair, but on the theory that they were not properly adjusted. Citizen's Gas & Oil Min. Co. v. Whipple, 32 Ind. 203, 69 N. E. 557. Instruction held not to state what must be proven but to define what would be negligence on the part of a company furnishing natural gas. Id.

69. An instruction that if the owners could have prevented the burning they could not recover is erroneous, as assuming that the owners had notice of the fire. Brister & Co. v. Illinois Cent. R. Co. [Miss.] 36 So. 142.

70. In an action by an insurance company, an instruction that plaintiff could not recover unless the insured could and if the jury believed from "any part of the evidence" that the insured was guilty of contributary negligence, etc. Brister & Co. v. Illinois Cent. R. Co. [Miss.] 36 So. 142.

71. See 2 Curr. L. 6.

72. NOTE. Theory of game laws: "The protection of wild animals suited for the purpose of food from indiscriminate slaughter by hunters has been the object of legislation from the most ancient times. The theory upon which the lawmaking power assumes to act is that all wild game belongs to the state in its sovereign capacity as a trustee for the whole of the public, and that consequently the state may, as a proper exercise of its police power, adopt such rules and regulations with reference to its preservation, and such penalties with reference to a violation of such regulations, as are necessary to accomplish the end desired, the preservation to the people of the state of the pleasure, sport and profit derived from the hunting, pursuit, and capture of the wild animals living therein." Extract from opinion in McConnell v. McKillip [Neb.] 99 N. W. 505.

Property in fish and game: Fish and game in their natural state are not the subject of private property. At common law, they were a part of the royal prerogative. 2 Bl. Comm. p. 410 et seq. and p. 14. In the American states, the general ownership of wild animals, inciuding fish and game, so far as they are capable of ownership, is in the state, not, indeed, in ordinary proprietorship, but in its sovereign capacity, as the representative of and in trust for the benefit of its people in common. State v. Price [N. J. Law] 58 A. 1015. For historical discussion of the subject, see opinion of Mr. Justice White in Geer v. Connecticut, 161 U. S. 519, 40 Law. Ed. 793. See, also, People v. Booth Co., 42 Miss. 321, 86 N. Y. S. 272; Ex parte Maier, 103 Cal. 476, 37 P. 402, 42 Am. St. Rep. 129; Hornbeke v. White [Colo. App.] 76 P. 926.

73. Regulation of fishing and hunting is a matter entirely within the discretion of the state. Brooks v. Tripp, 135 N. C. 159, 47 S. E. 401. A state legislature has power to forbid nonresidents from taking shellfish from any county in the state. Ownership of fish and game being in the state, license to hunt and fish is not an immunity or privilege of citizens of the state. Id. The state has "the right of control over fisheries, whether the fish be migratory, free swimming fish, or fish attached to or imbedded in the soil." State v. Price [N. J. Law] 58 A. 1015, quoting from Manchester v. Mass., 139 U. S., at p. 258.

74. People v. Booth & Co., 42 Misc. 321, 86 N. Y. S. 272.

Validity of laws: Game laws of Colorado prohibiting possession of game without permission as provided by law, held constitutional, because of the state's property in game, the legislature having vested the ownership of game in the state as proprietor; and as a valid exercise of the police power of the state [Sess. Laws 1899, pp. 187-209, c. 98]. Hornbeke v. White [Colo. App.] 76 P. 926. "An act to protect and promote the shellfish industry of Brunswick," providing for enforcement of laws protecting shellfish during the close season, held a valid exercise of the police power. Brooks v. Tripp, 135 N. C. 159, 47 S. E. 401. A game law prohibiting possession of game is unconstitutional so far it provides penalties for possession of game lawfully held by a person at the time the law went into effect, because it amounts to a confiscation of private property without compensation [Applied to Laws 1902, p. 1236, c. 517]. People v. Cohen, 86 N. Y. S. 475. Hurd's Rev. St. 1901, c. 61, § 32, is unconstitutional so far as it authorizes persons to hunt without a license at the invitation of landowners, other than bona fide owners of farm lands; since only owners of farm lands have themselves the right to hunt without the resident license required by the law. Cummings v. People, 211 Ill. 392, 71 N. E. 1031.

75. State v. Price [N. J. Law] 58 A. 1015. Dominion of state for purpose of protecting fish in its waters extends to all waters within it, private as well as public, if such pri-

plied to local areas therein.[76] It was first held in New York that fish and game laws had no application to fish or game taken outside the state,[77] and that legislation attempting to so extend such regulations was unconstitutional as an unlawful interference with liberty and property rights, and with interstate commerce.[78] But the court of appeals subsequently held that the legislature had power to make the possession of imported game unlawful,[79] and that since the "Lacey Act" of Congress, such legislation is not unconstitutional as interfering with interstate commerce.[80] A fish or game law is not rendered invalid by providing for a tax to defray the expense of its administration, though such tax be not laid by uniform rule.[81]

Fishery regulations. Maine.—In the absence of legislative authority, the inhabitants of a town have no power to adopt by-laws or regulations controlling the subject of seashore fisheries.[82] The policy of the laws of Maine regulating the canning industry is to protect the fishing industry by preventing the decimation of herring on the coast;[83] and statutes will be construed so as to carry out this policy.[84] Under statutes prohibiting possession of short lobsters, the commissioner of sea and shore fisheries has authority to settle offenses thereunder without suit or prosecution, and may even advise or urge settlement.[85] While a warden of the commissioner has no authority to make or advise settlement, he may be given such authority by his superior.[86]

vate waters are connected with the public by passageways used by the fish. People v. Miles [Cal.] 77 P. 666.

76. Statute regulating the taking and cultivating of oysters and clams under tidal waters of Ocean county, New Jersey, held not unconstitutional as special legislation. State v. Price [N. J. Law] 58 A. 1015.

77. Laws prohibiting the selling (Laws 1900, p. 30, c. 20, § 40) or transportation within the state (Laws 1900, p. 34, § 60) of trout, held not to apply to trout imported from Canada. People v. Booth & Co., 42 Misc. 321, 86 N. Y. S. 272. Game laws of 1900, c. 20, §§ 22, 23, 28, with amendments thereto, held to apply only to game unlawfully taken within the state; so that the sale or possession in the close season of birds taken in another state, the ownership of which has been acquired, and which has been lawfully imported into the state, is not a violation of such laws. People v. Bootman, 88 N. Y. S. 887. Affirmed, though on a different ground, in Id. [N. Y.] 72 N. E. 505.

78. Laws 1902, p. 487, c. 194, § 141, prohibiting possession, during New York closed season, of trout taken outside the state, is void. People v. Booth & Co., 42 Misc. 321, 86 N. Y. S. 272. See, also, Id., 88 N. Y. S. 887. Trout taken and shipped from Canada in violation of Canadian game laws, and imported into the United States, are none the less property, and when articles of interstate commerce, cannot be interfered with by state law. People v. Booth & Co., 42 Misc. 321, 86 N. Y. S. 272.

79. Laws 1902, p. 487, c. 194, amending previous acts, expressly provides that the prohibition of possession of game extends to that coming into the state from without. People v. Bootman [N. Y.] 72 N. E. 505.

80. Act May 25, 1900, c. 553 (31 Stat. 187) provides that foreign game coming into a state shall be subject to the state game laws, and shall not be exempt therefrom by reason of its importation in original packages. Consequently state game laws now apply equally to imported game. People v. Bootman [N. Y.] 72 N. E. 505.

81. Laws 1903, p. 723, c. 414, to protect the shellfish industry, not invalid, though it provided a tax on oysters and clams "shipped out of the county" by which the salaries of commissioner and assistants was to be paid, and the balance, if any, to be turned into state treasury. Brooks v. Tripp, 135 N. C. 159, 47 S. E. 401. Such tax held not unconstitutional as an export tax. Id.

82. Town regulations requiring nonresidents to obtain a license before taking clams within the town limits unauthorized. State v. Bunker, 98 Me. 387, 57 A. 95. There is no statute in Maine prohibiting the taking of clams within the limits of a town by a nonresident, or requiring nonresidents to obtain a license before taking clams from beds within the limits of a town. Pub. Laws 1901, c. 284, p. 300 repeals previously existing law and does not contain any such provisions. Id.

83. State v. Kaufman, 98 Me. 546, 57 A. 886.

84. Maine law prohibiting the packing of sardines of any description between certain dates applies to the canning of herring, though the fish used are more than eight inches in length and are sold as brook trout [Pub. Laws 1901, c. 240, held violated]. State v. Kaufman, 98 Me. 546, 57 A. 886.

85. Rev. St. c. 14, § 17. State v. Hanna [Me.] 58 A. 1061.

86. It was not extortion for a warden to demand payment of a penalty for the possession of short lobsters, stating as an alternative that the case would go to the grand jury, when the warden was acting under the commissioner's orders. State v. Hanna [Me.] 58 A. 1061.

On appeal from a decision of the shellfish commissioners of *Rhode Island* on application for the leasing of oyster fisheries, the judgment of the common pleas division of the supreme court, to which such appeal is taken is final and conclusive.[87]

New Jersey statutes require the culling of oysters taken within certain prescribed limits.[88]

In *Washington,* rights under contracts for the sale of oyster lands are forfeited on default of the purchaser.[89]

Game laws.—In Vermont, the law prohibits the killing of deer without horns at any season; and in the open season only deer with horns may be killed.[90] New York statutes prohibiting capture or possession at any time of birds for which there is no open season applies only to birds as to which the law expressly provides there shall be no open season.[91]

§ 2. *Offenses; penalties; prosecutions.*[92]—The intent to sell is an essential element of the crime of having wild game in one's possession with intent to sell.[93] Colorado laws provide for the seizure of game or any part thereof found in one's unlawful possession.[94] Game laws cannot provide for the summary forfeiture, without a hearing, of property, innocent in nature, which has been used to violate the law.[95] Statutes providing for cumulative sentences for violation of game laws, graduating the punishment according to the quantity of game, are not invalid as inflicting cruel and unusual punishments.[96] On prosecution for unlawful dredging of oysters, the state need not prove that the oyster bed in question had been marked, buoyed or staked by or under the supervision of the state oyster commission.[97]

87. Petition for new trial will not lie. Hopkins v. Commissioners of Shell Fisheries [R. I.] 57 A. 372.

88. Defendants held guilty of refusing or neglecting to cull oysters taken within certain prescribed limits, under P. L. 1901, p. 307. Test applied held proper. State v. Hand [N. J.] 58 A. 641.

89. A contract for sale of oyster lands by the state, providing for forfeiture if payment of principal and interest is not made as therein stated, is subject to summary cancellation after notice by the state land commissioner, without an action by the state, where the purchaser has been in default a year and nine months. Frazier v. Wilson [Wash.] 77 P. 1064. Where there was a contest between plaintiff, in default on contract for purchase of oyster lands, and another applicant for the same land, a decision by the land commissioners in favor of contestants and stamping "Canceled" on plaintiff's contract, held to constitute a forfeiture, without a formal declaration thereof. Frazier v. Wilson [Wash.] 77 p. 1064.

90. Construing Acts 1896, p. 74, No. 94, §§ 1, 2. State v. Jewett [Vt.] 58 A. 725.

91. Laws 1900, p. 28, c. 20, § 33, as amended in 1900, 1901 and 1902, does not apply to snow buntings. People v. Cohen, 86 N. Y. S. 475.

92. See 2 Curr. L. 7.

Penal statutes construed: No offense to place a seine in waters of Lee county, Arkansas, that county being exempted [Acts 1897, p. 112, No. 46] from the provisions of the statute prohibiting such acts [Sand. & H. Dig. § 3421]. Rennau v. State [Ark.] 81 S. W. 605. In prosecution for selling a "wild deer and part of a wild deer" contrary to Acts 1896, p. 74, the state must not only prove possession and sale of meat, but that it was part of a "wild" animal. Crosby v. State [Ga.] 48 S. E. 913. It is held under Hurd's Rev. St. 1903, c. 61, requiring residents to procure licenses to hunt, that lands owned by a domestic shooting club and used as a game reservation are not within the proviso in § 25, permitting owners of farm lands or their children or tenants to hunt on such lands without a license. Cummings v. People, 211 Ill. 392, 71 N. E. 1031. Nor is a stockholder in such incorporated club an owner of land within the proviso in § 25. Id.

93. Certain evidence held admissible and sufficient to establish such intent in the case of one defendant, but not in case of another. State v. Poole [Minn.] 100 N. W. 647.

94. Seizure of 300 deer hides by game warden held justifiable under Colorado game laws. Hornbeke v. White [Colo. App.] 76 P. 926.

95. Game warden seized three guns, used in hunting prairie chickens out of season. Comp. St. 1901, c. 31, art. 3, § 3. Held invalid so far as it provides for such forfeiture without due process of law. McConnell v. McKillip [Neb.] 99 N. W. 505.

96. So held where defendant had 2,000 wild ducks in his possession with intent to sell them, the statute (Laws 1903, c. 336, § 45, p. 606) providing a fine of $10 to $25 or imprisonment for 10 to 30 days for each duck. State v. Poole [Minn.] 100 N. W. 647.

97. Conviction sustained under P. L. 1901, p. 317. State v. Lee [N. J. Law] 57 A. 142.

§ 3. *Private rights in fish*[98] *and game.*—The owner of the soil has the exclusive privilege of hunting, including the unqualified right to control and protect the wild game thereon.[99] These rights are not surrendered to the public by the granting to it of an easement of way across the land.[1]

Fishery rights[2] must be so exercised as not to obstruct navigation.[3] Ownership of land bordering on the sea does not carry with it private or exclusive rights as to fishing or bedding oysters.[4] But such rights may be vested in individuals, apart from the ownership of the land, by the lawmaking power of the state.[5] A right to set apart one species of fish for the owner's sole use within certain metes and bounds, granted by a royal patent, and recognized as a vested property right in Hawaiian law, will be enforced, though not familiar to common law.[6]

Inland waters.—The right to fish in an inland lake in New Jersey cannot be separated from the private ownership thereof and taken under the power of eminent domain.[7] If a body of water, owned privately, is connected, even for a part of the year, with public waters, so as to permit migration of fish between the private and public waters, the public has the right to take fish from the privately owned waters,[8] and the owner of such waters has no greater rights than the public as to the manner of taking fish, but is bound by the statutes regulating the same.[9] The stocking with fish of private waters, by the state, with the owner's consent, results in a charge on the land, which is fixed when the consent is given and the waters stocked; and such charge cannot be extended to other lands near

98. Note: See note to State v. Shaw [Ohio] 60 L. R. A. 481, for exhaustive treatment of "Right to Fish," covering public and private rights of fishery and public regulation thereof.

99. Realty Co. v. Johnson [Minn.] 100 N. W. 94.

1. Hence the public does not acquire the right to pursue or kill game temporarily passing over a highway across the land, in which the public has only an easement, with the rights strictly incidental thereto. Realty Co. v. Johnson [Minn.] 100 N. W. 94.

2. See 2 Curr. L. 8.

3. Pound nets in navigable sound held public nuisance. Reyburn v. Sawyer, 135 N. C. 328, 47 S. E. 761.

4. The rights of use and control of the water front do not include such fishing rights. Barataria Canning Co. v. Ott [Miss.] 37 So. 121. Lease and deed construed as to rights in oyster beds in waters bordering the lands in question. Id.

5. Legislature empowered county boards of supervisors to grant by ordinance exclusive right of bedding, planting and cultivating oysters, in waters within the territorial limits of the county. Barataria Canning Co. v. Ott [Miss.] 37 So. 121.

6. A definite "fishing right in the adjoining sea," described in royal grant as "attached to this land," held to be included in the grant, though the habendum clause was to have and to hold "the above granted land," which, standing alone, did not include a fishing right. Damon v. Hawaii, 194 U. S. 154, 48 Law. Ed. 916.

7. First, because the natural supply of fish therein is too small to meet a public demand; second, the object of acquiring the right is not use, which implies utility, but mere sport or pastime. The court further suggests that there is no criterion by which compensation for such a right could be determined. Albright v. Sussex County Lake & Park Comm. [N. J. Err. & App.] 57 A. 398. Since that part of P. L. 1901, p. 333, which authorizes the acquisition of a common right to fish, in privately owned fresh-water lakes, by the exercise of the power of eminent domain, is unconstitutional, the entire statute is invalid. Albright v. Sussex County Lake & Park Comm. [N. J. Err. & App.] 59 A. 146.

Note: But a fishery right is capable of separate alienation by the owner of the upland, who has a right of fishery adjacent to his shore (Fitzgerald v. Faunce, 46 N. J. Law, 536), or by the owner of the soil beneath the water, who may convey his fishing privileges separate from the upland (Matthews v. Treat, 75 Me. 594).—See Gratz v. Land & River Improvement Co. [U. S.] 40 L. R. A. 393, note.

8. People v. Horling [Mich.] 100 N. W. 691.

9. Owner of lake connected with Grand river, Mich., for a part of each year, convicted of fishing with nets on his own land, though he had himself stocked the waters with fish. People v. Horling [Mich.] 100 N. W. 691. The dominion of the state for the purpose of protecting the fish in its waters extends to all waters within the state, public or private, in which fish resort for spawning or other purposes, and through which they have freedom of passage to and from public fishing grounds of the state. Waters furnishing such passageways are deemed public for this purpose, though privately owned. People v. Miles [Cal.] 77 P. 666. The condition of the water, whether quiet or moving in a current, held immaterial, so far as the use of set nets therein, prohibited by statute, is concerned. Id.

those stocked with fish by the state, by reason of the fact that such lands are owned by the same person.[10]

FIXTURES.

§ 1. Definition (1432).
§ 2. Annexation and Intent (1432).
§ 3. Title of Third Persons (1433).

§ 1. *Definition.*[11]—A fixture is a chattel so annexed to the realty as to become a part thereof.[12] A right to the product of a fixture does not create a lien on the realty to which it is attached.[13]

§ 2. *Annexation and intent.*[14]—There must be either physical or constructive annexation.[15] The intent to annex is necessary.[16] It appears whenever chattels have been placed in or annexed to a building as part of the means by which to carry out the purposes for which the building was erected or to which it has been adapted, with the intention of permanently increasing its value for that purpose.[17] There can be no intent to annex when it is understood that the thing already attached to the soil is personalty.[18]

It is presumed that things annexed by a vendee in possession under a contract of purchase become a part of the realty,[19] and the same is true of an owner;[20] but otherwise if annexation is by a tenant.[21] Intent may lie in relinquishment of a right to remove, thus a tenant must remove fixtures during his term,[22]

10. Under New York statutes permitting the laying out of private parks under certain conditions, but providing that waters stocked with fish by the state shall not be so laid out, and that if the waters of any private park be stocked with fish by the state, with the owner's consent, the provisions of the private park act shall not apply thereto. Laws 1900, c. 20, § 200. Rockefeller v. Lamora, 96 App. Div. 91, 89 N. Y. S. 1.

11. See 2 Curr. L. 9.

12. Title to fixtures vests in the owner of the land. Lessee acquires no right thereto. Linden Oil Co. v. Jennings, 207 Pa. 524, 56 A. 1074.

13. Sale of fruit trees with agreement for payment out of crops. Butler v. Stark, 25 Ky. L. R. 1886, 79 S. W. 204.

14. See 2 Curr. L. 9.

15. Furniture used on a theater stage, chairs not fastened to its floor, a portable sectional dance floor stored when not in use. Security Trust Co. v. Temple Co. [N. J. Eq.] 58 A. 865. Held a question of fact whether planking nailed on stringers partly embedded in the earth but not fastened to a dock were fixtures or movable by the lessee of the dock for a year. Crerar v. Daniels, 209 Ill. 296, 70 N. E. 569.

16. See 2 Curr. L. 9, n. 98.

17. Machinery. Knickerbocker Trust Co. v. Penn Cordage Co. [N. J. Err. & App.] 58 A. 409. Gas logs, gas chandeliers and window screens. Cunningham v. Seaboard Realty Co. [N. J. Eq.] 58 A. 819. Gas chandeliers, though only screwed on. Security Trust Co. v. Temple Co. [N. J. Eq.] 58 A. 865.

Contra, Condit v. Goodwin, 44 Misc. 312, 89 N. Y. S. 827. Gas fixtures held to be personalty. Stage scenery used in connection with stage fittings attached to the building, though kept in a storeroom especially provided for them when not in use. Security Trust Co. v. Temple Co. [N. J. Eq.] 58 A. 865. Elevator and Appurtenances. Condit v. Goodwin, 44 Misc. 312, 89 N. Y. S. 827.

Between vendor and purchaser: A leather belt which transmits the power from an engine to a main shaft for the operation of machinery. Giddings v. Freedley [C. C. A.] 128 F. 355. Ponderous machinery for generating electricity installed with the intention that it should remain until worn out or replaced by more modern appliances is taxable as realty. Detroit United R. Co. v. Board of State Tax Com'rs [Mich.] 98 N. W. 997.

18. A cotton press understood to belong to a third person. Tenniswood v. Smith [Ark.] 82 S. W. 834.

19. Building and manufacturing machinery cannot be removed without the consent of the owner of the legal title. Seiberling v. Miller, 207 Ill. 443, 69 N. E. 800.

20. If a building be erected on land by the owner of an estate therein, it becomes a part of the realty. Chattel mortgagee acquired no rights. In re Rogers, 132 F. 560.

21. Donnelly v. Frick & Lindsay Co., 207 Pa. 597, 57 A. 60. Trade fixtures attached to leased property may be removed at any time during the term. Radey v. McCurdy [Pa.] 58 A. 558. Intention of making a gift of them to the landlord is to be imputed to the tenant only when he leaves, during the term, without removing them. Donnelly v. Frick & Lindsay Co., 207 Pa. 597, 57 A. 60.

22. Donnelly v. Frick & Lindsay Co., 207 Pa. 597, 57 A. 60. A building erected by one holding under a contract that he should have the use of the land so long as he used it for a certain purpose, ceasing which it should revert, becomes a fixture if not removed before the reverter occurs. Montgomery County v. Bean [Ky.] 82 S. W. 240.

or before he surrenders possession,[23] but the right to remove is not affected by his holding over, with permission of the landlord, though there be no formal renewal or extension of the lease,[24] or reservation of a right to remove in a renewal lease.[25]

By agreement[26] *or estoppel,*[27] the character of personalty may be impressed on annexed things.

The right to remove, if it exists by contract, can be exercised only by performance as a condition precedent.[28]

§ 3. *Title of third persons.*[29]—The fact that one who annexes chattels to the realty of another has no title to them will not prevent them from becoming fixtures,[30] but where a chattel to which the owner of the realty has no title is annexed by him, its character as personalty is not changed.[31] Persons taking liens on annexed chattels are charged with notice of vendor's rights,[32] but a grantee takes without notice of a chattel mortgage.[33] Notice to a purchaser that a fixture is not the property of the vendor preserves its character as personalty.[34]

FOOD.

Validity and construction of statutes.—Congress has power to impose a tax on artificially colored oleomargarine, and the fact that the enforcement of such tax will destroy or restrict the manufacture of that article does not render an act imposing the tax invalid.[35] It is not a denial of due process of law that artificially colored butter is free from any tax.[36]

Doubt as to whether certain articles are fixtures is resolved in favor of the landlord, where the articles are not removed within the term of the tenancy or within a reasonable period thereafter. Johnson v. Wooding, 4 Ohio C. C. (N. S.) 160.

NOTE. Annexation by abandonment: The plaintiff, a railroad company, having abandoned its right of way, sought to enjoin the servient tenant's vendee from removing the rails. Held, the injunction would not be granted, as the title to the rails, which were real property, rested in the owner of the fee upon the abandonment. Missouri Pac. R. Co. v. Bradbury [Mo. App. 79 S. W. 966.

At common law, anything attached to the realty became a part thereof. Henry's Case, Y. B. 20 Hen. VII, 13 pl. 24; Richardson v. Copeland, 6 Gray [Mass.] 536, 66 Am. Dec. 424. This rule has been modified, however, to meet modern business demands, and "trade fixtures" may be removed by the tenant as personalty any time before the expiration of his term. Thresher v. Water Works Co., 2 Barn. & C. 608; Lowe v. Brown, 22 Ohio St. 463. Under the tests of permanency, intention to improve the land permanently for the use contemplated, together with the fact of abandonment, the result reached on the principal case would be justified. Van Keuren v. Central R. Co., 38 N. J. Law, 165; Hunt v. Iron Co., 97 Mass. 279; **contra,** Wagner v. Cleveland & T. R. Co., 22 Ohio St. 563. See II Columbia Law Rev. 407. —IV Columbia Law Rev. 514.

23. Radey v. McCurdy [Pa.] 58 A. 558.

24. Held that tenant was justified in believing he had permission to hold over, and hence had the right to remove fixtures after expiration of his term. Donnelly v. Frick & Lindsay Co., 207 Pa. 597, 57 A. 60.

25. Where fixtures were left on the premises, they can be removed at the expiration of the renewal lease. Radey v. McCurdy [Pa.] 58 A. 558.

26. Evidence held to show an implied contract that rails of a logging road might be removed. Grider v. Three States Lumber Co. [Ark.] 79 S. W. 763. A judgment in equity as to the title of land is not res judicata against the right to remove buildings erected under an agreement that they should remain personalty. Deceil v. McRee [Miss.] 35 So. 940. See 2 Curr. L. 10.

27. Where, after the expiration of a lease giving the right to remove, an agent of the landlord represented to the purchaser of the lease that he had a right to remove. Exchange Real Estate & Bldg. Co. v. Schuchman Realty Co., 103 Mo. App. 24, 78 S. W. 75. See 2 Curr. L. 10.

28. Little Falls Water Power Co. v. Hausdorf, 127 F. 442.

29. See 2 Curr. L. 10.

30. Contractor installed a heating plant which he procured under conditional sale, the vendor being aware that it was to be placed in a building of which the contractor was not the owner. Jermyn v. Hunter, 93 App. Div. 175, 87 N. Y. S. 546.

31. Heating plant held under recorded conditional sale. Condit v. Goodwin, 44 Misc. 312, 89 N. Y. S. 827.

32. Church v. Lapham, 94 App. Div. 550, 88 N. Y. S. 222.

33. Smyth v. Stoddard, 105 Ill. App. 510. Compare Notice and Record of Title, 2 Curr. L. 1053.

34. A cotton press. Tenniswood v. Smith [Ark.] 82 S. W. 834.

35. Taxing power discussed and Federal act imposing tax on artificially colored oleomargarine construed. McCray v. U. S., 195 U. S. 27, 49 Law. Ed. —. The motives of pur-

Laws prohibiting the production or sale of adulterated food products within a state are a valid exercise of the police power of the state to protect the people against fraud and deception, even though such laws incidentally affect interstate commerce.[37] Such statutes are not rendered inoperative as to articles imported through channels of foreign commerce by Federal statutes prohibiting the importation of adulterated food products.[38] Statutes prohibiting the sale of oleomargarine which is the color of butter are constitutional,[39] even when construed to include substances known as oleomargarine, which contain no ingredient, the sole function of which is coloration.[40] Oleomargarine which is colored by the use of artificially colored butter is not "free from artificial coloration" within the meaning of the proviso to the Federal act imposing a tax on oleomargarine so colored.[41]

The New York statute requiring the tagging of carcasses of veal applies to every shipment to or from any part of the state, or to a point in another state; whether or not the animal when slaughtered was within the age of four weeks;[42] it does not violate the interstate commerce provisions of the Federal constitution; nor is it an unreasonable interference with private rights and property.[43]

The statute prohibiting sale of renovated butter which is not plainly branded or labelled in the original form in which it is put up for sale is not violated by the sale of an unlabelled portion taken from a branded tub, when there was no attempt at deceit and the purchaser was not in fact deceived.[44] It is constitutional.

Tort liability.—An officer who connives at the sale of impure food in order to prosecute the purchaser for reselling may be liable in tort,[45] but not as for malicious prosecution.[46]

Offenses.[47]—Statutes making the sale of impure or adulterated foods a penal offense[48] are violated, regardless of the intent with which the sale is made.[49]

poses of congress in exercising this power are not open to judicial inquiry. Id.

36. McCray v. United States, 195 U. S. 27, 49 Law. Ed. —.

37. New York Laws 1893, c. 661, § 41 held valid and not a "regulation" of interstate commerce. Crossman v. Lurman, 192 U. S. 189, 48 Law. Ed. 401. When this statute was involved, evidence that there was a demand in some parts of the country for adulterated coffee was irrelevant, because not tending to show that article a legitimate article of commerce, and therefore beyond the operation of state laws. Id.

38. 26 St. at L. 414, c. 839 (U. S. Comp. Stat. 1901, p. 3185). Crossman v. Lurman, 192 U. S. 189, 48 Law. Ed. 401.

39. State v. Armour Packing Co. [Iowa] 100 N. W. 59.

40. Sale of substance made of oleo oil, neutral lard, milk and cream and butter, and having the butter color, but containing no ingredient solely to give it that color, held a violation of Iowa statutes. State v. Armour Packing Co. [Iowa] 100 N. W. 59.

Evidence: Whether a substance is the color of true dairy butter is not a subject of expert evidence. State v. Armour Packing Co. [Iowa] 100 N. W. 59.

41. Act of Aug. 2, 1886, § 8, 24 St. at L. 209. c. 840, construed. McCray v. U. S. 195 U. S. 27, 49 Law. Ed. —.

42, 43. Laws 1902, p. 59, c. 30, §§ 70E, 70F. People v. Bishopp, 44 Misc. 12, 89 N. Y. S. 709.

44. Laws 1893, p. 663, c. 338, § 27, as amended by Laws 1900, p. 1245, c. 534. People v. Mack, 97 App. Div. 474, 89 N. Y. S. 1004.

45, 46. A complaint charging a state dairy commissioner with conniving with a dairy in selling impure milk to plaintiff, and then causing the arrest of plaintiff for selling the same milk, does not state a cause of action for malicious prosecution as against the commissioner; since in making the arrest he was doing his duty, and there was probable cause. McKenzie v. Royal Dairy [Wash.] 77 P. 680. But such complaint does state a cause of action, as against a general demurrer, against the commissioner as a joint tort feasor with the dairy. Id.

47. See 2 Curr. L. 10.

48. Affidavit charging a person with selling and delivering oleomargarine containing butter yellow held sufficient under Bates' Ann. St. § 4200-16-19-20. State v. Arata, 69 Ohio St. 211, 68 N. E. 1046. The word "dealer" used in Ohio statute relating to the sale of skimmed milk includes one who sells milk obtained from his own cows. Guilder v. State, 4 Ohio C. C. (N. S.) 73.

49. Selling oleomargarine containing coloring matter to a person desiring it only for analysis was a violation of section 4200-16, Bates' Ann. St., making the sale of that substance a penal offense. State v. Rippeth [Ohio] 72 N. E. 298. No defense that oleomargarine was sold as such, no attempt be-

FORCIBLE ENTRY AND UNLAWFUL DETAINER.[50]

§ 1. Civil Rights and Remedies (1435).
A. The Cause of Action (1435).
B. Procedure (1436). Parties (1436). Pleading (1437).
§ 2. Criminal Responsibility (1437).

§ 1. *Civil rights and remedies. A. The cause of action.*[51]—It is a forcible entry to dispossess one actually in possession under a claim of right.[52] Constructive possession is sufficient,[53] and it is not necessary that the land be enclosed.[54] Generally there must be such acts of violence used or threatened as to give those in possession reason to apprehend personal danger or tend directly to cause a breach of the peace;[55] but the injured party need not have resisted to the point of physical struggle.[56] It is generally provided that one unlawfully detaining premises is guilty;[57] but a lessee who has assigned his lease and surrendered possession cannot be.[58] In Georgia, one in possession claiming title in good faith cannot be evicted.[59]

Damages.—Some statutes provide for double damages.[60] Error committed by the jury in the assessment of damages, due to a misunderstanding of the law, may be treated as an informality and an opportunity afforded them to correct it.[61] Where the damage recoverable is the loss sustained by being kept out of possession, the measure is the rental value of the premises during the time possession was unlawfully withheld together with any other damage proximately resulting.[62]

Defenses.—Neither the title nor right to possession is in controversy,[63] therefore it is no defense that plaintiff has no title,[64] nor can the defendant justify by showing title or right of entry.[65] Where an unlawful entry is not asserted,

ing made to conceal its real character. Williams v. State, 4 Ohio C. C. (N. S.) 193.

50. See 2 Curr. L. 11. Summary possessory actions by lessors generally, see Landlord and Tenant, 2 Curr. L. 668. See, also, Ejectment, 3 Curr. L. 1157.

51. See 2 Curr. L. 11.

52. Though the owner was also in possession for general purposes. Under Ky. statute. Clark v. Langenbach [C. C. A.] 130 F. 755.

53. Owner of uninclosed land. Tenant in constructive possession colluded with another to deprive the owner of his possession. Mansfield v. Northcut [Tenn.] 80 S. W. 437.

54. Geoghegan v. Turner [Ky.] 82 S. W. 244.

55. Under Mills' Ann. St. § 1970, defining it as an entry by force or strong hand or multitude of people, etc., it is not sufficient to show an entry without force or threats. Defendant peaceably went on the land and seeded it. Goad v. Heckler [Colo. App.] 76 P. 542. Where a tenancy has ended and the tenant has consented that the landlord shall take possession. Robinson v. Marshall, 25 Ky. L. R. 1785, 78 S. W. 904.

56. Ky. Civ. Code 1900, § 452, defining forcible entry as an entry without the consent of the person having the actual possession. Clark v. Langenbach [C. C. A.] 130 F. 755.

57. Under Ind. T. Ann. St. 1899, § 2281, an instruction that the gist of the action was the forcible entry is too narrow. Moore v. Girten [Ind. T.] 82 S. W. 848.

58. Under Code Civ. Proc. § 1174. Ben Lomond Wine Co. v. Sladky, 141 Cal. 619, 75 P. 332.

59. In a proceeding under Civ. Code 1895, § 4808, against intruders. Thompson v. Glover, 120 Ga. 440, 47 S. E. 935. A party may testify as to his mental state and that he claims in good faith. Id. Where a plaintiff claimed as grantee and defendant as heir because of incapacity of the grantor at the time of execution of the deed and there was no evidence to contradict his claim, a finding for the plaintiff was contrary to the evidence. Id.

60. Ball. Ann. Codes & St. § 5542, where the detainer is after default in payment of rent due. Bond v. Chapman, 34 Wash. 606, 76 P. 97.

61. Verdict of one dollar returned where premises of the rental value of $150 per month had been detained 6 months. The court refused to accept the verdict, but after they reconsidered the case accepted their second verdict for $900. Ver Steeg v. Becker-Moore Paint Co. [Mo. App.] 80 S. W. 346.

62. Under Ind. T. Ann. St. 1899, § 2296. Osteen v. Stovall [Ind. T.] 82 S. W. 710. Under Civ. Code Proc. § 464, providing that a traverser who fails to prosecute his traverse is liable on his bond for damages for withholding, the reasonable rents and profits may be recovered in an action on the bond. Caldwell v. McVean [Ky.] 82 S. W. 992.

63. See 2 Curr. L. 12. The only issue is, has there been a forcible entry. Stewart v. Miles [Mo. App.] 79 S. W. 988.

64. Under Code Civ. Proc. § 452, defining it as an entry without the consent of one having actual possession. Caldwell v. McVean [Ky.] 82 S. W. 992.

65. Under Civ. Code Proc. § 452. Robin-

a license to enter is no defense.[66] An equitable action in which temporary orders have been made relative to the rights of the parties in the premises, pending further orders of the court is a bar to an action of forcible entry and detainer for the same premises.[67] If a lessor's title has been declared void by law, his lessee is not estopped to deny it.[68]

(§ 1) *B. Procedure.*[69]—*The proceeding* is designed only to enable one to speedily recover possession.[70]

The action being legal in its nature,[71] it is not competent to interpose an equitable defense.[72] Questions of title cannot be litigated,[73] nor can the action be converted into one to try title by an answer putting the title in issue,[74] and if in order to determine the right of possession the court must determine which party has the paramount legal or equitable title, the rights of the parties cannot be litigated.[75] Where, however, it is provided that evidence of title to show right of possession is admissible, it is error to refuse it.[76] It is the proper remedy for a homestead entryman whose rights have been finally determined, as against one whose claim has been canceled by the land department.[77]

Jurisdiction[78] once acquired remains until final disposition of the case.[79]

Parties.[80]—The action must be brought by the person entitled to the possession.[81] The purchaser under a deed of trust may maintain the action after foreclosure.[82]

The statutory requirements relative to demand for rent and notice to quit must be complied with,[83] but unless otherwise provided, a demand for possession

son v. Marshall, 25 Ky. L. R. 1785, 78 S. W. 904.

66. In unlawful detainer, it is inadmissible. Ver Steeg v. Becker-Moore Paint Co. [Mo. App.] 80 S. W. 346.

67. Lowry v. Mitchell [Okl.] 78 P. 379.

68. Where a lease to Indian lands has ben declared void by act of congress, a sublessee may take the title of his lessee. Owens v. Eaton [Ind. T.] 82 S. W. 746.

Note: The tenant cannot show that his lessor had no title or that it was defective. McLean v. Spratt, 20 Fla. 115. The doctrine of estoppel may be invoked against the tenant. Emerick v. Travener, 9 Grat. [Va.] 220, 58 Am. Dec. 217; Lutheran Church v. Arkle, 49 W. Va. 92; Thomas v. Sass, 3 Ind. T. 545, 64 S. W. 531; Knowles v. Murphy, 107 Cal. 107. He cannot show that his landlord's title has terminated or that he has acquired ownership from him. Davis v. Pou, 118 Ala. 443. And he is not even permitted to show fraud. Nicrosi v. Phillipe, 91 Ala. 299. —From note to Davis v. Williams [Ala.] 89 Am. St. Rep. 114.

69. See 2 Curr. L. 12.

70. Cannot be taken advantage of to recover damages for breach of covenant. Ben Lomond Wine Co. v. Sladky, 141 Cal. 619, 75 P. 332.

71. See 2 Curr. L. 12.

72. That while defendant was in possession under a lease, the owner agreed that he should remain until an agreement by which he was bound to convey to defendant was performed. Bond v. Chapman, 34 Wash. 606, 76 P. 97.

73. Jones v. Seawell, 13 Okl. 711, 76 P. 154. The action will not lie where questions of title only are involved. Id.

74. Hackney v. McKee, 12 Okl. 401, 75 P. 535.

75. Rights of lessees under school land leases. Jones v. Sewell, 13 Okl. 711, 76 P 154.

76. Under Ind. T. Ann. St. 1899, § 2281, plaintiff may introduce lease of Indian lands under which he claims. Moore v. Girten [Ind. T.] 82 S. W. 848.

77. Hackney v. McKee, 12 Okl. 401, 75 P. 535.

78. See 2 Curr. L. 13.

79. Where a city court made a void order certifying the case to the district court for trial, jurisdiction remains in the city court and may be resumed without issuance of service or new process. Armour Packing Co. v. Howe [Kan.] 75 P. 1014.

80. See 2 Curr. L. 12.

81. Under Code Civ. Proc. § 2235, the trustee of a school district is the proper party to maintain the action for district property, but in this case the trustee was not lawfully elected. School Dist. No. 23 of Town of Mooers v. Raymond, 86 N. Y. S. 182. After a lease of Indian land has been declared void, the lessee cannot maintain the action against his sublessee holding over. Owens v. Eaton [Ind. T.] 82 S. W. 746.

82. Wishart v. Gerhart [Mo. App.] 78 S. W. 1094.

83. Laws 1882, p. 369, c. 303, requiring a landlord to give a tenant at will, five days' notice to quit, and Code Civ. Proc. § 2231, requiring three days' notice in case of non payment of rent, cannot be evaded by sending notice one day before the termination of the term, that rent will be increased. Miller v. Lowe, 86 N. Y. S. 16. Notice to quit prepared by a clerk to which, by direction of his employer he signed the name of the owner and the name of his employer as her agent, held sufficiently signed by the

the day before filing the complaint is sufficient.[84] A justice's summons defective for insufficient description of the property may be amended on appeal to the circuit court when substantial justice will be thereby promoted.[85]

Pleading.[86]—The strict and technical rules of pleading are not applied,[87] but ordinarily a complaint in the language of the statute is sufficient.[88] Under a statute declaring that unlawful detainers shall be cognizable before any justice of the county in which they are committed, it is not necessary to allege that the property was in the city ward of the justice before whom it was filed.[89] Where a case is removed to the circuit court by certiorari, the complaint may be amended so as to increase the amount of damages demanded and the sum averred as to rent.[90] It is too late to object to the sufficiency of the allegation of interest after answer filed and jury drawn.[91]

The warrant[92] may be amended after traverse and appeal by addition of an allegation essential to its validity.[93]

Limitations run against the action only from the date the party seeking to enforce it acquired title.[94]

The judgment of the justice, however erroneous, is conclusive of the controversy,[95] but does not affect the title.[96] Judgments rendered in the court of general jurisdiction on appeal from a justice are further appealable unless the statute excepts them from its operation.[97]

§ 2. *Criminal responsibility.*[98]—Forcible entry is the violently taking possession of lands and tenements with menaces, force and arms and without authority of law.[99] There must be some show of violence,[100] but it is not necessary that the person in possession should offer such resistance that the entry was accomplished by actual violence.[101] As against a tenant at sufferance, the owner may forcibly enter if unnecessary force is not used.[102]

owner or her attorneys. Bond v. Chapman, 34 Wash. 606, 76 P. 97.

84. Tenancy at will. Beauchamp v. Runnels [Tex. Civ. App.] 79 S. W. 1105.

85. Drinkard v. Hepinstall [W. Va.] 47 S. E. 72.

86. See 2 Curr. L. 13.

87. Since the action is cognizable before a justice of the peace, it was never so intended. Armour Packing Co. v. Howe [Kan.] 75 P. 1014.

88. Armour Packing Co. v. Howe [Kan.] 75 P. 1014. An allegation of ownership in fee simple and that plaintiff is entitled to possession is sufficient under Code Civ. Proc. § 2235, requiring petitioner to describe his interest. Mauterstock v. Williams, 42 Misc. 402, 86 N, Y. S. 804.

89. Rev. St. 1899, § 3323. Wishart v. Gerhart [Mo. App.] 78 S. W. 1094.

90. Under Rev. St. 1899, § 3324, the fact that there was no new verification did not deprive the court of jurisdiction. Ver Steeg v. Becker-Moore Paint Co. [Mo. App.] 80 S. W. 346. Where the judgment of the justice of the peace is reversed by the common pleas court and the cause retained for trial, plaintiff should file a petition in that court; but it is not error to found a judgment on a statement in the bill of particulars in the justice court when the parties proceed to trial thereon without objection. Pope v. Miller, 4 Ohio C. C. (N. S.) 564.

91. Mauterstock v. Williams, 42 Misc. 402, 86 N. Y. S. 804.

92. See 2 Curr. L. 13.

93. Under Code, § 134, permitting amendments in the discretion of the court, it is an abuse of discretion not to allow the addition of an allegation that at the time of entry plaintiff was in the peaceable possession. Hord v. Sartin [Ky.] 80 S. W. 794.

94. Under Laws 1899, p. 335, c. 79, one year. Weatherford v. Union Pac. R. Co. [Neb.] 98 N. W. 1089.

95. Res judicata as to the rights of landlord and tenant in the premises. Rankin v. Hooks [Tex. Civ. App.] 81 S. W. 1005. See Former Adjudication, 3 Curr. L. —.

96. Roby v. Calumet & C. Canal & Dock Co., 211 Ill. 173, 71 N. E. 822.

97. Dechenbach v. Rima [Or.] 77 P. 391.

98. See 2 Curr. L. 14.

99. Under Pen. Code 1895, § 338, there need only be such a number of persons or show of force as is calculated to deter the person in possession from undertaking to retain his possession. Williams v. State [Ga.] 48 S. E. 149.

100. Not sufficient under Code, § 1028, where one in the absence of a tenant at sufferance changed the lock on the door and entered without breaking anything or doing any violence. State v. Leary [N. C.] 48 S. E. 570.

101. If circumstances show a terror tending to a breach of the peace, it is sufficient. Williams v. State [Ga.] 48 S. E. 149.

102. In the absence of such tenant, the owner took off the door locks and entered. State v. Leary [N. C.] 48 S. E. 570.

FORECLOSURE OF MORTGAGES ON LAND.

§ 1. Right to Foreclose and Remedies Available Therefore (1438).
§ 2. Foreclosure by Scire Facias or Executory Process (1438).
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A. Right to Sell (1439).
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§ 6. Redemption (1452). Time (1452). Amount (1453). Who May Redeem (1453). Mode (1454). Action to Redeem (1454). Effect (1454).

§ 1. *Right to foreclose and remedies available therefor.*—The right to foreclose accrues on condition broken, and this may be either by default in the principal sum[1] or in an instalment, if a right to thereupon declare tthe whole to be due is reserved;[2] but such right does not exist unless stipulated.[3] Several different modes of foreclosure are usually provided by statute,[4] and the mortgagee may elect which he will pursue.[5]

§ 2. *Foreclosure by scire facias or executory process.*[6]—In foreclosure by scire facias sur mortgage, one not summoned, though in possession, does not become a party by the posting of a copy of the writ upon the mortgaged premises.[7] The sheriff's return when defendant cannot be found therein should be not "non est invitus" but "nihil habet" to conform with the practice in serving writs of scire facias.[8]

In some states, foreclosure may be had under executory process where the debt is fixed.[9]

In Louisiana, in order to obtain a writ of seizure and sale, three days notice must be given to the debtor if he resides on the spot, adding a day for every twenty miles between the place of his residence and the residence of the judge to whom the petition has been presented.[10] The distance must be computed by the public road and not by railroad.[11] The statutory prescription of five years cures irregularities resulting from the issuance of the writ prematurely, or from a premature publication of the advertisement, provided the full time allowed by law intervenes between the seizure and the sale.[12] It also cures the failure of the

1. Default as to one of several debts secured is sufficient. Meetz v. Mohr, 141 Cal. 667, 75 P. 298.
2. There must be a declaration of intention to exercise such right. Klingenfeldt v. Houghton [Neb.] 96 N. W. 76.
3. Hinton v. Jones [N. C.] 48 S. E. 546.
4. See post, §§ 2-5.
5. In Illinois, a creditor by note and mortgage may proceed personally against the debtor upon the note, or, after condition broken, he may obtain possession by ejectment, or he may file a bill for foreclosure and sale, or, the mortgage being recorded, he may proceed by scire facias upon the record. Brown v. Schnitz, 109 Ill. App. 598. These remedies are successive or concurrent at his election. Id.
6. See 2 Curr. L. 14.
7. Nevil v. Heinke, 22 Pa. Super. Ct. 614.
8. In re Walsh [Del.] 58 A. 945.
9. Debt is sufficiently fixed where the amount of principal and interest is certain, though costs must be determined later (Huber v. Jennings-Heywood Oil Syndicate, 111 La. 747, 35 So. 889), or where the right is reserved to pay by delivery of timber (Iberia Cypress Co. v. Christen, 112 La. 451, 36 So. 491).
10. Means one day for every 20 miles and not for every 20 miles or fraction thereof [Code Prac. § 735]. Nagel v. Clement [La.] 36 So. 935.
11, 12, 13. Nagel v. Clement [La.] 36 So. 935.

sheriff to keep the property constantly in possession, provided no one else has gone into possession, and the purchaser goes into possession without objection.[13] Whether the purchase of the equity of redemption on foreclosure of the junior mortgage by one holding both it and the senior mortgage operates as a merger and a payment of the debt secured by the latter depends on the intention of the parties.[14]

§ 3. *Sale by trustee in deed or under power. A. Right to sell.*[15]—Where a mortgage is given to secure several debts, it may be foreclosed under a power therein contained before default on all.[16] Where by terms of the notes in case of default in one instalment, the whole may be declared due at the option of the mortgagee, there must be some declaration of intention to make all due,[17] in which event interest runs to the time of foreclosure and not to the date of maturity of the notes;[18] but the default on one does not make the whole debt due unless so provided.[19] Where the trustee applies to the mortgage debt the rents and profits which he receives to an amount equal thereto, it is discharged;[20] but after a default, foreclosure can be had, though some money which should be applied to the debt still remains in the hands of the trustee.[21] As between a chattel mortgagee of the crops and beneficiary of a trust deed, the latter has the right to the crops if the chattel mortgage was executed after the trust deed, though prior to the trustee's sale.[22] A substituted trustee, though appointed by parol, has a right to sell,[23] and an agent may exercise a power given to a corporation.[24] Generally the trustee has no power to extend the time of payment called for in the deed, but such extension is good where he is secretly the beneficiary thereof.[25] The right to foreclose by advertisement or under a power is unaffected by the power to sue on the indebtedness,[26] though it may be by estoppel or laches;[27] but in states where sale under a power is limited as to time by statute, where a sale is void, a new sale cannot be had when barred by statute,[28] and where the trustee will act, the effect of the statute of limitations is immaterial.[29]

(§ 3) *B. Notice.*[30]—The procedure in foreclosure under a power contained in a mortgage must strictly follow the terms of the statute or the instrument, both as to specifying in the notice the time of sale and the amount due,[31] and being signed by the party foreclosing,[32] and time for publication of notice of sale.[33]

14. Will not do so where there was express agreement that senior mortgage should be held until certain advances were paid. Continental Title & Trust Co. v. Devlin [Pa.] 58 A. 843.

15. See 2 Curr. L. 15.

16. Meetz v. Mohr, 141 Cal. 667, 75 P. 298.

17. Klingenfeld v. Houghton [Neb.] 96 N. W. 76.

18. Hardy v. Pecot [La.] 36 So. 992.

19. Provision for payment of interest and one-tenth of principal each year. Hinton v. Jones [N. C.] 48 S. E. 546.

20. Benton Land Co. v. Zeitler [Mo.] 81 S. W. 192.

21. Land Title & Trust Co. v. Asphalt Co. of America [C. C. A.] 127 F. 1.

22. Penryn Fruit Co. v. Sherman-Worrell Fruit Co., 142 Cal. 643, 76 P. 484.

23. But not to execute deed. Daniel v. Garner, 71 Ark. 484, 76 S. W. 1063. Deed provided in absence of trustee sheriff should be substituted as such. Held to mean sheriff in office at time of default. McNutt v. Mutual Ben. Life Ins. Co. [Mo.] 79 S. W. 703.

24. Long v. Powell [Ga.] 48 S. E. 185.

25. Dunnaway v. O'Reilly [Mo. App.] 79 S. W. 1004.

26. Menzel v. Hinton, 132 N. C. 660, 44 S. E. 386; Miller v. Coxe, 133 N. C. 578, 45 S. E. 940; Brinkerhoff v. Goree [Tex. Civ. App.] 79 S. W. 592. Rule applies where the time specially limiting time of bringing action to foreclose is enacted [Civ. Code 1883, § 152]. Menzel v. Hinton, 132 N. C. 660, 44 S. E. 385. See, also, post § 6.

27. Stevens v. Osgood [S. D.] 100 N. W. 161.

28. Ford v. Nesbitt [Ark.] 79 S. W. 793.

29. Peacock v. Cummings [Tex. Civ. App.] 78 S. W. 1002.

30. See 2 Curr. L. 16.

31. Washington Nat. Bldg. & Loan Ass'n v. Westfall [W. Va.] 47 S. E. 74.

32. Where by terms of the mortgage the notice must be signed by person making the sale, the name of the deceased mortgagee is insufficient. Ford v. Nesbitt [Ark.] 79 S. W. 793.

33. Code Civ. Proc. § 639, provides for publication for six successive weeks; § 2445 provides that "successive weeks" mean calendar weeks, and a publication in any day

(§ 3) *C. Sale.*[34]—The title conveyed by a foreclosure by advertisement is one on which the purchaser may maintain ejectment even against third parties not claiming under it.[35] To prevent the foreclosure by a trustee, the proper remedy is by an injunction, but this cannot be had unless it is accompanied by a tender of the amount due,[36] nor where the ground therefor is so insignificant as to be inequitable.[37] Where by terms of the deed the trustee need not sell the property in parcels, his failure to do so is not an abuse of his discretion,[38] but this may be required by statute.[39] The fact that the mortgagor must redeem from all the parcels,[40] or that the beneficiary of a trust did not wish the foreclosure, is no ground on which to set the sale aside.[41]

(§ 3) *D. Costs and attorneys' fees.*[42]—Where the note provides for an attorney's fee for collection, though such stipulation is absent from the mortgage, it becomes part of the debt for which the mortgage may be foreclosed;[43] but such allowance may not be had by the trustee when the attorneys employed are the firm of which he is a member,[44] though if another attorney is engaged with him a pro rata share can be recovered.[45, 46] Where the mortgagee has successfully made a defense of fraud,[47] or where the mortgage is foreclosed, not because of the default of the debtor, but because of the insolvency of the mortgagee corporation, it is entitled to no allowance for the stipulated attorney's fees.[48]

(§ 3) *E. Defective foreclosures and rights under them.*[49]—In Ohio, on execution of a deed by a trustee of a trust deed, the legal title passes at once to the purchaser, irrespective of appraisal or public sale, but it is a title subject to be set aside by decree of the courts.[50] Where a sale is void because of an insufficient notice, a court of equity cannot remedy it;[51] but where, however, the vendee is in possession, he cannot be ousted till the debt is paid.[52] Though the sale by a substituted trustee appointed by parol is good, he has no authority to convey by deed.[53] After a resale is completed after default of the original purchaser at

is a publication for that week; hence six publications once each week is good, though but thirty seven days has elapsed between the first publication and sale. Thomas v. Issenhuth [S. D.] 100 N. W. 436. Terms of a trust deed prescribe that on default the trustee shall sell after advertising for ten days. Publication in a weekly newspaper for three successive weeks. Held, that as last notice appeared within ten days of sale, it sufficiently complies with the terms of the deed. Vizard v. Moody [Ga.] 47 S. E. 348.

34. See 2 Curr. L. 16.

35. Benton Land Co. v. Zeitler [Mo.] 81 S. W. 193.

36. Meetz v. Mohr, 141 Cal. 667, 75 P. 298.

37. An injunction cannot be had to restrain the foreclosure of a purchase-money mortgage for $35,000 on 20,000 acres of land, because the title to five acres worth ten dollars is questioned. Sidney Land & Colony Co. v. Milner, Caldwell & Flowers Lumber Co., 138 Ala. 185, 35 So. 48.

38. Benton Land Co. v. Zeitler [Mo.] 81 S. W. 193.

39. Three adjacent houses conveyed to mortgagor by three deeds must be sold separately [Comp. Laws, § 11,139]. O'Connor v. Keenan [Mich.] 94 N. W. 186. Where offered separately and no bidders, the statute is sufficiently complied with if later sold in one parcel. The sheriff is not obliged to try combinations of parcels [Code Civ. Proc. § 694]. Anglo-Californian Bank v. Cerf, 142 Cal. 303, 75 P. 902.

40. Anglo-Californian Bank v. Cerf, 142 Cal. 303, 75 P. 902.

41. Weir v. Jones [Miss.] 36 So. 533.

42. See 2 Curr. L. 17.

43. Bailey v. Butler, 138 Ala. 153, 35 So. 111.

44. Elkin v. Rives [Miss.] 35 So. 200.

45, 46. Gantzer v. Schmeltz, 206 Ill. 560, 69 N. E. 584.

Reasonable attorney's fees not error: Court may fix these at $2,000, though evidence presented shows they were worth $3,000. Pollard v. American Freehold Land Mortg. Co., 139 Ala. 183, 35 So. 767.

Allowed for actual expenses though decree taken pro confesso. Peacock, Hunt, West & Co. v. Thaggard, 128 F. 1005.

47. North Side Bank v. John Good Cordage & Mach. Co., 97 App. Div. 79, 89 N. Y. S. 656.

48. Union Trust Co. v. Shilling, 30 Ind. App. 543, 66 N. E. 699.

49. See 2 Curr. L. 17.

50. Etna Coal & Iron Co. v. Marting Iron & Steel Co. [C. C. A.] 127 F. 32.

51. Ford v. Nesbitt [Ark.] 79 S. W. 793.

52. Daniel v. Garner, 71 Ark. 484, 76 S. W. 1063; Chambers v. Bookman [S. C.] 46 S. E. 39.

53. Daniel v. Garner, 71 Ark. 484, 76 S. W. 1063.

sale by trustee, he is not liable to suit by the beneficiary.[54] The purchaser may refuse to accept the premises when they are erroneously described in the notice of sale.[55] Where the beneficiary of a trust deed owns other liens on the deeded premises with which he fails to acquaint the purchaser at the time of foreclosure, he is estopped from later asserting them.[56]

§ 4. *Remedy by entry and possession, and strict foreclosure.*[57]—In Maine, where foreclosure may be had by entry and possession, a peaceable entry by the mortgagee in the absence of the mortgagor is sufficient, and the according the latter thereafter permission to cut grass and commit waste does not give him the right to pay the debt.[58]

A decree determining the amount due creditors who are beneficiaries under a trust deed authorizes them to call upon the trustee to bring ejectment for the possession of the land.[59] The fact that an appeal has been taken therefrom does not affect the right.[60] Such decree is res adjudicata as to the amount due.[61] Where the amount due is unliquidated, an accounting is necessary,[62] and, since a court of equity is the forum in which it should be had, such court will enjoin an ejectment until such amount is ascertained.[63, 64]

Strict foreclosure, being an extraordinary and harsh remedy will only be granted by courts in special instances.[65] The defendant must have a reasonable time to make the necessary payments,[66] and no payments not yet matured can be required.[67] The ordinary statutory provisions as to redemption do not apply to a decree for strict foreclosure.[68]

§ 5. *Foreclosure by action and sale. A. Right of action. Title of mortgagor necessary to suit.*[69]—That the title of the parties to the mortgaged premises is doubtful and even in litigation, is no bar to an action for foreclosure,[70] and a provision mortgaging after-acquired property gives a good right to foreclose the same,[71] and so an unrecorded mortgage to secure future advances is good except as against a junior incumbrancer, though after mortgage but before advances,[72] and so where mortgage is to secure indorsee on long outstanding notes.[73] Where the mortgagor has granted the rights to timber and then conveyed to the mortgagee, the latter can only foreclose on the interest of the grantee.[74] The mortgagee cannot by buying in the outstanding tax deeds cut out the rights of the mortgagor.[75]

Foreclosure.—Where a mortgage was satisfied by mistake, an action to foreclose may be begun without a decree setting aside the instrument of satisfaction.[76] Recovery may be had on the agreement in the mortgage to pay the debt,[77] and that the mortgage was executed to secure the debt of another seems to be no de-

54, 55. Jackson v. Binnicker [Mo. App.] 80 S. W. 682.

56. Alston v. Piper [Tex. Civ. App.] 79 S. W. 357. See ante, p. 1439, n. 14.

57. See 2 Curr. L. 18.

58. Holbrook v. Greene, 98 Me. 171, 56 A. 659.

59, 60, 61, 62, 63, 64. Brown v. Schnitz, 109 Ill. App. 598.

65, 66, 67, 68. Flanagan Estate v. Great Cent. Land Co. [Or.] 77 P. 485.

69. See 2 Curr. L. 18.

70. Cook v. Weigley [N. J. Eq.] 57 A. 805.

71. Farmers' Loan & Trust Co. v. Denver, etc., R. Co. [C. C. A.] 126 F. 46; Pere Marquette R. Co. v. Graham [Mich.] 99 N. W. 408.

72. Peacock, Hunt & West Co. v. Thaggard, 128 F. 1005.

73. Griffin v. Stone River Nat. Bank [Tex. Civ. App.] 80 S. W. 254.

74. Rothschild v. Bay City Lumber Co., 139 Ala. 571, 36 So. 785.

75. First Nat. Bank v. McCarthy [S. D.] 100 N. W. 14.

76. White v. Stevenson [Cal.] 77 P. 828. Neglect for two years to set aside an illegal release of a trust deed is not barred by laches. Murto v. Lemon [Colo. App.] 75 P. 160.

77. Lincoln University v. Polk, 1 Neb. Unoff. 403, 95 N. W. 611.

fense.[78] Where the mortgagee has bought in the taxes from time to time and it is the duty of the mortgagor to pay the same, he may add them to the mortgage debt.[79] A bill, premature because of an extension wherein accrued interest was treated as part of a new principal, cannot be supported as on a default of interest.[80]

Defenses.[81]—The defense of usury can always be set up in an action to foreclose,[82] and that the note sued on is a renewal of a usurious note is sufficient to taint it with usury.[83] Duress[84] and fraud[85] are good defenses,[86] as is tender[87] or payment of the amount due,[88] or a release or discharge of the debt,[89] or an extension of the time of payment.[90] The personal liability cannot be denied by one who assumes a mortgage lien,[91] or purchasing subject to it, makes no effort to have it set aside.[92] Neglect to record an extension agreement is no defense to an action thereon,[93] but a purchaser of incumbered real estate cannot set up an unrecorded deed to contest a foreclosure by a bona fide holder of the unpaid secured notes,[94] or where deed and defeasance clause are separate the defense that one's grantee of the holder of the deed depends on his good faith.[95] Laches, however, may be a defense.[96] Where the execution and delivery of the notes evidencing the mortgage debt are denied, the unexplained possession of them is not sufficient.[97] The burden is on the plaintiff to prove execution, delivery[98] and ownership[98] of the notes. Paying interest pending suit does not estop defendant

78. Huber v. Jennings-Heywood Oil Syndicate, 111 La. 747, 35 So. 889.

79. First Nat. Bank v. McCarthy [S. D.] 100 N. W. 14.

Suspension and stay of proceedings: An order of the court merely correcting minor errors in papers is not a judgment from which the mortgagor is entitled to reckon his statutory stay of a year. Hart v. Schiltz Brew. Co. [Wis.] 98 N. W. 526.

80. This is especially true where the bill itself seeks an accounting as to payments made in order to find what if any interest is due. Hauser v. Capital City Brewery Co. [N. J. Eq.] 58 A. 171.

81. See 2 Curr. L. 19.

82. Missouri Real Estate Syndicate v. Sims, 179 Mo. 679, 78 S. W. 1006. Cannot be raised by demurrer to a complaint to foreclose a mortgage for both principal and interest of the debt, where it works a forfeiture of interest only. Petterson v. Berry [C. C. A.] 125 F. 902.

83. First Nat. Bank v. McCarthy [S. D.] 100 N. W. 14. Place of payment of interest not decisive as to lex loci where usury law under consideration; parties presumed to intend locus where contract is valid. Whitlock v. Cohn [Ark.] 80 S. W. 141.

84. False representations of husband to wife do not amount to duress. Kittel v. Schmieder, 89 App. Div. 618, 85 N. Y. S. 977.

85. North Side Bank v. John Good Cordage & Mach. Co., 97 App. Div. 79, 89 N. Y. S. 656. Knowledge obtained by one member of a law firm cannot be imputed to the trustee because he happens to be a member thereof. Tennent Shoe Co. v. Birdseye [Mo. App.] 78 S. W. 1036.

86. Where mortgage represented to be for $30,000 and in fact for $15,000, it is not void except as to excess. Kittel v. Schmieder, 89 App. Div. 618, 85 N. Y. S. 977.

87. Whole amount due must be tendered. Schieck v. Donohue, 92 App. Div. 330, 87 N. Y. S. 206.

88. In absence of any statements by mortgagor, payments made by him are applied to the senior incumbrance. Moss v. Odell, 141 Cal. 335, 74 P. 999. The acquisition of title at a tax sale by mortgagee does not constitute payment. Ex parte Powell [S. C.] 47 S. E. 440. In absence of directions on part of debtor, the creditor is not bound to apply payments to the secured claims. Montague v. Best [S. C.] 48 S. E. 248. Payment by junior lienor with consent of mortgagor. Bowen v. Gilbert, 122 Iowa, 448, 98 N. W. 273. The possession of the notes on which the foreclosure is based in the mortgagor raises a presumption of payment. Murto v. Lemon [Colo. App.] 75 P. 160.

89. Evidence held to show invalidity of release. List's Ex'x v. List [Ky.] 82 S. W. 446.

90. Evidence held not to show extension. Salomon v. Stoddard, 107 Ill. App. 227.

91. McGregor v. Eastern Building & Loan Ass'n [Neb.] 99 N. W. 509.

92. Omaha Loan & Trust Co. v. Omaha [Neb.] 99 N. W. 650.

93. Rev. St. 1901, c. 30, providing for record of all deeds, mortgages and other instruments in writing, does not apply. Kraft v. Holzmann, 206 Ill. 548, 69 N. E. 574.

94. Heintz v. Klebba [Neb.] 98 N. W. 431.

95. Rountree v. Finch [Ga.] 48 S. E. 132.

96. "No hard and fast rule has ever been laid down by the courts which can be said to govern all cases where the defense of laches is involved * * * not only must there be a seemingly unnecessary delay, but by reason of some change it would be inequitable to permit the claim to be enforced." London & San Francisco Bank v. Dexter Horton & Co. [C. C. A.] 126 F. 593.

97. Stoddard v. Lyon [S. D.] 99 N. W. 1116.

98. Bruce v. Wanzer [S. D.] 99 N. W. 1102.

99. Overholt v. Dietz, 43 Or. 194, 72 P. 695.

from denying the rights of the mortgagee.[1] The acceptance of a partial payment by the mortgagee does not preclude him, upon failure to pay the balance, from enforcing his mortgage to collect the same at any time thereafter until barred by limitations.[2]

Other suits or action pending.[3]—Foreclosure will not be decreed where it appears a writ of sequestration has been issued for the collection of the mortgage debt, unless it is made clear what was done under that writ;[4] but presentation to probate court is not sufficient to operate as a bar.[5] A void judgment of foreclosure is not a bar to a new action to foreclose.[6]

Bar by limitation.[7]—The statute of limitations does not prevent the foreclosure of a mortgage, but only the collection of the mortgage debt unless a sufficient period has elapsed to give rise to a presumption of payment;[8] and payments on account of interest or principal will rebut this presumption and toll the statute,[9] but not to the detriment of a judgment creditor without his consent.[10] In some states, where the debt is barred by statute, foreclosure is barred.[11] Under these statutes, however, when by payment the debt is taken from out the statute, the mortgage is taken out as well.[12]

Jurisdiction.[13]—Courts of equity alone have jurisdiction of actions to enforce liens.[14] Where a party stipulates for a stay in an action, it constitutes an appearance.[15] A Federal court has jurisdiction over foreclosure proceedings where the mortgagor and mortgagee are residents of different states, though by subsequent addition of parties defendant some residents of state of mortgagee are added.[16]

The bankruptcy of the mortgagor is no defense to foreclosure in the state court.[17]

(§ 5) *B. Parties and process. Who may sue.*[18]—Where a trustee of a trust deed refuses to act, any beneficiary may commence foreclosure proceedings after default for the common benefit.[19] A mortgagee who has resorted to his legal remedy of ejectment under a security deed may, if he finds he cannot discharge the debt out of rents and profits, thereafter sue in equity to sell the land to pay the balance due after accounting for rents and profits.[20] Where a mortgage was executed in favor of a third person as trustee or representative of certain cred-

1. Whitlock v. Cohn [Ark.] 80 S. W. 141.
2. Salomon v. Stoddard, 107 Ill. App. 227.
3. See 2 Curr. L. 19.
4. Henne v. Moultrie [Tex. Civ. App.] 78 S. W. 11.
5. First Nat. Bank v. Glenn [Idaho] 77 P. 623.
6. Ludwig v. Murphy [Cal.] 77 P. 150.
7. See 2 Curr. L. 20.
8. Twenty years. Bailey v. Butler, 138 Ala. 153, 35 So. 111; Ludwig v. Murphy [Cal.] 77 P. 150.
9. MacMillan v. Clements [Ind. App.] 70 N. E. 997; Bailey v. Butler, 138 Ala. 153, 35 So. 111. Payment of interest; prima facie evidence of extension of time. Revell v. Thrash, 132 N. C. 803, 44 S. E. 596.
10. De Vöe v. Rundle, 33 Wash. 604, 74 P. 836.
11. Civ. Code, § 294. San Jose Safe Deposit Bank of Savings v. Bank of Madera [Cal.] 78 P. 5; Cowan v. Mueller, 176 Mo. 192, 75 S. W. 606. Mortgage to secure a parol debt barred in two years. San Jose Safe Deposit Bank of Savings v. Bank of Madera [Cal.] 78 P. 5. The limitation of actions against an administrator is not sufficient to limit time of foreclosure of mortgage. Cowan v. Mueller, 176 Mo. 192, 75 S. W. 606.
12. MacMillan v. Clements [Ind. App.] 70 N. E. 997; Kraft v. Holzman, 206 Ill. 548, 69 N. E. 574.
13. See 2 Curr. L. 20.
14. Action on note and to foreclose mortgage is suit in equity, and hence motion for new trial not necessary prerequisite to review of evidence on appeal. List's Ex'x v. List [Ky.] 82 S. W. 446.
15. Godfrey v. White, 32 Ind. App. 265, 69 N. E. 688.
16. Peacock, Hunt & West Co. v. Thaggard, 128 F. 1005.
17. Vance v. Lane's Trustee [Ky.] 82 S. W. 297.
18. See 2 Curr. L. 20.
19. Baker v. Consolidated Gas & Elec. Co., 42 Misc. 95, 85 N. Y. S. 1030.
20. Ray v. Pitman, 119 Ga. 678, 46 S. E. 849. Whether the original mortgagor who is husband of the owner of equity of redemption and the original mortgagee are necessary parties query. Id. See Wilkins v. Gibson, 113 Ga. 33, 58, 38 S. E. 374, 84 Am. St. Rep. 204.

itors of the mortgagor, the creditors may maintain an action to foreclose the mortgage, in case he fails to do so, and to have adjudicated the amount of their various claims and the amount of the compensation and expenses of the trustee, and to distribute the proceeds.[21] Presumably the right to enforce the mortgage security passes to the assignee of the mortgage debt.[22]

Mortgagors cannot come in and contest foreclosure after everything has been done but to confirm sale,[23] nor can other claimants, not being original parties, intervene at that time to adjudicate rights against strangers which would not be concluded by the decree.[24]

Necessary parties.—The holder of the principal note to which he has no title is a necessary party to a foreclosure suit on the mortgage secured thereby.[25] When the payees of a note bring an action to foreclose, the former mortgagee is a necessary party.[26] Generally the beneficiary is not a necessary party by a suit to foreclose brought by his trustee.[27] Both the trustee and the beneficiaries of a trust deed, which is a subsequent lien on the property, must be made parties unless the latter are so numerous as to render such a course impracticable;[28] but it is held that a trustee for the investment of funds of minors must bring in the guardians of the minors.[29] Joinder of the heirs of deceased devisees of a deceased mortgagor is necessary;[30] but in the absence of debts, the administrator of the deceased mortgagor need not be joined.[31] A mortgagor who has conveyed away all his interest is not a proper party.[32]

Where, after commencement of the action, it is known that the mortgagor has disposed of his interest in the property, his grantee is not a necessary party but is bound by the appearance of the mortgagor.[33] The administrator of the deceased husband of a mortgagor, though her separate property alone is involved, is a necessary party to foreclosure;[34] but a widow having no interest in premises covered by a purchase-money mortgage is neither a necessary nor proper party to a suit to foreclose the same,[35] and so the conditional vendees of trade fixtures were not proper parties to the suit.[36] The holder of a tax title adverse to the mortgage is not a proper party to a foreclosure suit, since he cannot be compelled to litigate his rights in that action.[37] An assignee alone can object to his being joined in an action of foreclosure of mortgages in which he no longer has an interest.[38] Where proper parties defendant join as plaintiffs, there is no defect in parties.[39] The lower court may bring in additional parties to give complete justice in the distribution of the surplus after sale,[40] and the appellate court

21. Complaint held to state facts sufficient to constitute cause of action. First State Bank v. Sibley County Bank [Minn.] 101 N. W. 309.

22. Barlow v. Cooper, 109 Ill. App. 375.

23, 24. Sulek v. McWilliams [Ark.] 78 S. W. 769.

25. Wasserman v. Metzger, 102 Va. 837, 47 S. E. 820.

26. Swenney v. Hill [Kan.] 77 P. 696.

27. Vance v. Lane's Trustee [Ky.] 82 S. W. 297.

28. Rodman v. Quick, 211 Ill. 546, 71 N. E. 1087.

29. Hansen v. Mortensen, 2 Neb. Unoff. 229, 96 N. W. 216.

30. Mote v. Morton [Fla.] 35 So. 656.

31. Floyd v. Watkins [Tex. Civ. App.] 79 S. W. 612.

32. Rothschild v. Bay City Lumber Co., 139 Ala. 571, 36 So. 785.

33. Hibernia Sav. & Loan Soc. v. Cochran, 141 Cal. 653, 75 P. 315.

34. McGowan v. Davenport, 134 N. C. 526, 47 S. E. 27. The husband of a mortgagor of her separate property, which subsequent to the execution of the mortgage became a homestead, is a necessary party. Ludwig v. Murphy [Cal.] 77 P. 150.

35. 2 Starr. & C. Ann. St. (1896), c. 41, par. 4, providing a wife has no interest in property acquired by husband under a purchase-money mortgage. Lohmeyer v. Durbin, 206 Ill. 574, 69 N. E. 523.

36. Condit v. Goodwin, 44 Misc. 312, 89 N. Y. S. 827.

37. Brown v. Atlanta Nat. Bldg. & Loan Ass'n [Fla.] 35 So. 403; Tinsley v. Atlantic Mines Co. [Colo. App.] 77 P. 12.

38. Buckheit v. Decatur Land Co. [Ala.] 37 So. 75.

39. MacMillan v. Clements [Ind. App.] 70 N. E. 997.

40. Montague v. Marunda [Neb.] 99 N. W. 653.

send suit back for amendment to bring in necessary parties.[41] A creditor of the defendant mortgagor cannot become a party to a foreclosure proceeding.[42]

(§ 5) *C. Pleading, trial and evidence. Bill, complaint or petition.*[43]—The complaint in an action to foreclose should set forth the conditions of the mortgage and the breach thereof by mortgagor;[44] but the estate of the several defendants must be set out with an allegation that they are subordinate to that of the plaintiff.[45] Where the mortgagor is a party, an averment that the note and mortgage were assigned to plaintiff is sufficient.[46] The court may grant a deficiency judgment on a prayer for general relief contained in the complaint,[47] but will not allow the appointment of a receiver unless asked.[48] Complainant need not allege that there has been no waiver of the conditions contained in the mortgage.[49]

Answer.—The defense of fraud may be raised by a judgment creditor to an action to foreclose,[50] but not the statute of limitations.[51] Usury must be pleaded specifically.[52]

In a proceeding to foreclose a trust deed, a cross bill by some of the defendants for the purpose of determining who has the equity of redemption in the mortgaged promises is germane to the original bill.[53] A defendant filing a cross complaint to foreclose another mortgage on the same property will be treated, as to the mortgagors, as though he had brought an independent and separate action for that purpose.[54]

Issues, proof, etc.[55]—Where the pleadings set forth that one of the defendants agreed to assume the mortgage debt, objection to a decree taken pro confesso cannot be had at time of motion for a deficiency judgment.[56] Where the Civ. Code requires issues of fact and law to have a certain form of trial, they cannot be disposed of by a peremptory order of dismissal.[57] Unless substantial rights be impaired, what would be fatal defects in pleading must be objected to at the time of trial.[58]

Complainant must establish by proof that the notes held by him are the ones described in and secured by the instrument sought to be foreclosed.[59] The burden is on defendant to prove the illegality of the mortgage.[60]

Where a party is made defendant in a bill to foreclose, under an allegation that he has or claims to have some interest in or lien on the premises which is

41. Wasserman v. Metzger, 102 Va. 837, 47 S. E. 820.

42. Bouden v. Long Acre Square Bldg. Co., 92 App. Div. 325, 86 N. Y. S. 1080.

43. See 2 Curr. L. 21.

44. That mortgage is filed and of record will not cure this defect. Miller v. McConnell [Ky.] 80 S. W. 1103. An allegation that defendants refused to pay attorney's fee unnecessary for collection. Damon v. Quinn, 143 Cal. 75, 76 P. 818.

45. Denial on information and belief of the rights of the defendant insufficient. Selph v. Cobb [Fla.] 36 So. 761.

46. Buckheit v. Decatur Land Co. [Ala.] 37 So. 75.

47. Smith v. Allen [Neb.] 100 N. W. 129; State v. Superior Court of King County, 34 Wash. 643, 76 P. 282.

48. Civ. Code, § 580. Garretson Inv. Co. v. Arndt [Cal.] 77 P. 770. An allegation that "a homestead was not occupied as such at this time" refers to time of execution of the mortgage. Delaney v. Walker [Tex. Civ. App.] 79 S. W. 601.

49. Sufficient to allege that mortgagor "has broken his covenant in said deed contained," and the facts upon which such allegation is based. Salomon v. Stoddard, 107 Ill. App. 227.

50. North Side Bank v. John Good Cordage & Mach. Co., 97 App. Div. 79, 89 N. Y. S. 656.

51. De Voe v. Rundle, 33 Wash. 604, 74 P. 836.

52. Washington Nat. Bldg. & Loan Ass'n v. Westfall [W. Va.] 47 S. E. 74.

53. Powell v. Sampson, 107 Ill. App. 230.

54. Webb v. John Hancock Mut. Life Ins. Co. [Ind.] 69 N. E. 1006.

55. See 2 Curr. L. 23.

56. Smith v. Allen [Neb.] 100 N. W. 129.

57. Civ. Code Proc. § 965. Farmers' Loan & Trust Co. v. Hoffman House, 96 App. Div. 301, 89 N. Y. S. 281.

58. Civ. Code, § 734. Miller v. McConnell [Ky.] 80 S. W. 1103.

59. Evidence insufficient. Santee v. Day, 111 Ill. App. 495.

60. To prove coverture and execution of mortgage by her as surety and knowledge of such fact by mortgagee. Webb v. Hancock Mut. Life Ins. Co. [Ind.] 69 N. E. 1006.

inferior to the mortgage, it is his duty to set up his interest by way of answer and establish it by proof.[61]

Where a bill for the foreclosure of trust deeds involves the adjustment of many different accounts covering transactions with a number of different parties for several years, the court should not proceed to a hearing until an account has been stated by the master and objections thereto settled by him.[62] The chancellor may on his own motion set aside the report of the register to whom the cause has been referred to ascertain the amount due the mortgagee, and either order another reference or himself ascertain the amount of the debt.[63]

(§ 5) *D. Decree or judgment.*[64]—An interlocutory judgment giving time for the payment of the money found due is not required, but final judgment may be entered in the first instance.[65] A decree in a suit to foreclose a mortgage is a judgment,[66] and an order of sale or special execution issued by the plaintiff in the decree to enforce the same will prevent a money judgment in favor of one defendant against another from becoming dormant, if the fact of its recovery and the amount thereof is recited or referred to in the order of sale.[67] A decree directing that the land be sold in accordance with the provisions of the law sufficiently directs the manner and mode of the sale.[68] The decree should designate some one to make the sale,[69] and should provide for the disposition of any surplus.[70] In case this is not done, the officer making the sale should report the existence of any surplus to the court, who may then order its payment to defendant.[71] A decree foreclosing trust realty under a mortgage for a debt of the cestuis que trustent cannot as against the trustee adjudicate more than liability of the land.[72] An order for seizure and sale in an action to foreclose a mortgage is not a judgment for all purposes, since it is but a decree in aid of execution which by law is given the effect of a judgment.[73] The foreclosure sale will not be set aside because court refused in its discretion to issue a stay. The mortgagor has no right unless he files a supersedeas bond.[74] Clerical errors in the decree may be corrected either before or after appeal.[75]

An appeal from a judgment in foreclosure does not invalidate the sale.[76] When the time of redemption expires, pending appeal, the lien still continues.[77] On an appeal from a judgment of foreclosure, questions not raised before the court below will not be considered.[78] Appeal from an order overruling objections

61. One averring prior judgment lien does not thereby set up adverse title. Illinois Nat. Bank v. Trustees of Schools, 14 Ill. App. 189.

62. Fitchburg Steam Engine Co. v. Potter, 211 Ill. 138, 71 N. E. 933.

63. Richardson v. Horton, 139 Ala. 350, 35 So. 1006. Evidence held to sustain finding that certain sum was due from mortgagor. Id.

64. See 2 Curr. L. 24.

65. Mansf. Dig. §§ 5168-5170; Ind. T. Ann. St. 1899, §§ 3373-3375. Griffin v. Smith [Ind. T.] 82 S. W. 684.

66. Watson v. Keystone Iron Works Co. [Kan.] 78 P. 156.

67. Kan. Gen. St. 1901, § 4895. Watson v. Keystone Iron Works Co. [Kan.] 78 P. 156.

68. Griffin v. Smith [Ind. T.] 82 S. W. 684.

69. In Indian Territory, if this is not done, the clerk may make sale by virtue of his general powers as commissioner of the court under Mansf. Dig. § 538. Griffin v. Smith [Ind. T.] 82 S. W. 684.

70, 71. Griffin v. Smith [Ind. T.] 82 S. W. 684.

72. Edmonston v. Carter [Mo.] 79 S. W. 459.

73. Huber v. Jennings-Heywood Oil Syndicate, 111 La. 747, 35 So. 889.

74. Code, § 352. Muckenenfuss v. Fishburne [S. C.] 46 S. E. 537.

75. Decree of injunction in mortgage foreclosure enjoining A. M. Q. instead of M. Q. corrected after appeal. Fay v. Stubenrauch, 141 Cal. 573, 75 P. 174. Decree fixing time to "redeem" from prior liens construed as merely fixing priorities and right to redeem in case of foreclosure in the future, the prayer for foreclosure in the suit having been eliminated by the pleadings. First Nat. Bank v. Campbell, 123 Iowa, 37, 98 N. W. 470.

76. State Mut. Bldg. & Loan Ass'n v. O'Callaghan [N. J. Eq.] 57 A. 496.

77. Matz v. Arick, 76 Conn. 388, 56 A. 630.

78. Williston v. Haight, 76 Conn. 497, 57 A. 170. Objections to the amount of ref-

to a judgment in foreclosure stays the sale, but if it has taken place, it is not set aside.[79] If the appellant does not give notice of his appeal from judgment of foreclosure, the bona fide purchaser is not bound by the results thereof.[80]

A decree partitioning the property and foreclosing the mortgage cannot be collaterally attacked by the mortgagor or the purchaser at the sale in so far as it provides the order in which the property shall be sold.[81]

(§ 5) *E. Sale. Order of sale.*[82]—A sale will not be set aside because the mortgaged premises are sold in one rather than several parcels, where it injures no one, though a separate sale is ordered in the decree;[83] but where each parcel is worth more than the amount adjudged due, a court will order a new sale, notwithstanding that the mortgagor was negligently absent at the time of the sale.[84] Where two tracts are subject to the same mortgage and the purchaser of one has agreed to pay the same, the mortgagor may demand that the one so conveyed be sold first,[85] and on the same theory, where two tracts of land have been mortgaged to secure the purchase price of one of them, the mortgagor is entitled to have the one on behalf of which the debt was incurred first sold.[86] The judgment creditors cannot, however, object to the order of sale in separate parcels when a sale in one tract is ordered.[87] Where the interest of the deceased mortgagor's wife has been severed and vested in her, the court may order that the remaining portion be first sold.[88] So also where the mortgagor has been divested of his interest in a part of the land, the balance may be sold first.[89]

A copy of the decree need not be attached to the order for sale, nor does the absence of the signature of the presiding judge give grounds for setting the sale aside.[90]

Notice.[91]—The published notice of the sale need not state the amount decreed to be due on the mortgaged debt.[92] Objections to appraisement must be made before sale.[93] The appraisers need not be upon the lands at the time they make the appraisement, provided they are familiar with the premises.[94] The sale must be made in accordance with the terms of the decree.[95]

A rule requiring the person bidding in the premises to pay the sheriff $50 earnest money is reasonable,[96] or that bids shall be in gold coin of the United

eree's fees cannot be taken first on appeal. Kraft v. Holzmann, 206 Ill. 548, 69 N. E. 574.

79. Hidden v. Godfrey, 92 App. Div. 373, 87 N. Y. S. 14.

80. State Mut. Bldg. & Loan Ass'n v. O'Callaghan [N. J. Eq.] 57 A. 496.

81. Smith v. Sparks, 162 Ind. 270, 70 N. E. 253.

82. See 2 Curr. L. 26.

83. Summerville v. March, 142 Cal. 554, 76 P. 388.

84. Gleason v. Kentucky Title Co., 25 Ky. L. R. 1546, 78 S. W. 170. But see Aukam v. Zantzinger [Md.] 56 A. 820, to effect that a mortgagor has no relief who failed to attend a properly advertised sale.

85. Mowry v. Mowry [Mich.] 100 N. W. 388.

86. Griffin v. Gingell, 25 Ky. L. R. 2031, 79 S. W. 284.

87. The only ground on which they may object is that the method of sale brought in too small a piece and inadequacy of price is never a ground for setting aside a judicial sale. Summerville v. March, 142 Cal. 554, 76 P. 388.

88. Smith v. Sparks, 162 Ind. 270, 70 N. E. 253.

89. Held proper to order sale of tracts not claimed by third persons to be sold first and proceeds applied to payment of mortgage debt before ordering sale of tract claimed by them, the title to which was no longer in mortgagor's name, he having been divested thereof in ejectment. Greene v. Healy [Kan.] 78 P. 416.

90. Gallentine v. Cummings [Neb.] 96 N. W. 178.

91. See 2 Curr. L. 26.

92. Gallentine v. Cummings [Neb.] 96 N. W. 178. Affidavit showing publication in "Worker's Gazette" sufficiently describes the "Tri-City Weekly Gazette" when no other paper by that name published in the county. Michigan Mut. Life Ins. Co. v. Klatt [Neb.] 98 N. W. 436. See ante § 3 B.

93. Stein v. Parrotte, 2 Neb. Unoff. 351, 96 N. W. 155.

94. Evidence held to show familiarity. Crook v. Moore [Neb.] 98 N. W. 713.

95. Where sale made in solido contrary to terms of decree. Smith v. Sparks, 162 Ind. 270, 70 N. E. 253.

96. Michigan Mut. Life Ins. Co. v. Klatt [Neb.] 98 N. W. 436.

States when so provided in the judgment does not affect the validity of the mortgage sale.[97]

Where, owing to default of former purchaser, it is necessary to resell the premises, the sale is at his expense, but he cannot complain if at second sale it was not sold in separate tracts;[98] but where the setting aside the sale and the resale is at the application of the mortgagee, the purchaser cannot be held for any deficiency in price on the second sale.[99]

Confirmation and setting aside sale.[1]—In jurisdictions where a tender of the purchase price is a condition precedent to a suit setting aside sale, such tender is unnecessary where sale is made on credit.[2] The sale may be avoided or set aside in an action instituted for that purpose on account of the misconduct of the officer, or irregularities in making it, where the rights of the complainant were prejudiced thereby,[3] but it will not be set aside for mere irregularities not affecting the rights of the parties;[4] but where, however, there is a conspiracy to defraud and mislead the purchaser by having irresponsible persons bid in the tracts first offered for sale, it will be set aside.[5]

Inadequacy of price is not a valid ground for setting aside sale.[6]—Every presumption is in favor of the validity of an order confirming sale,[7] and mere technical objections to the order will be disregarded,[8] nor at the time of confirmation may the objector raise any questions than those as to the legality of the sale itself.[9] While as a rule objections to sale should be raised at the time of confirmation, yet a complaint in an action to set it aside, filed three days after hearing, is not of necessity barred by laches.[10] In New York, the failure of the court to confirm the sale does not invalidate it after the referee has issued the deed and received the consideration.[11]

Rights of the purchaser.[12]—The purchaser has no right to the rents and profits of the premises pending redemption,[13] though in most jurisdictions a re-

97. Anglo-Californian Bank v. Cerf, 142 Cal. 303, 75 P. 902.

98. Aukam v. Zantzinger [Md.] 56 A. 820.

99. Lowndes v. Fishburne [S. C.] 48 S. E. 264.

1. See 2 Curr. L. 29.

2. Huber v. Jennings-Heywood Oil Syndicate, 111 La. 747, 35 So. 889.

3. Rights of widow whose interest had been severed and vested in her prejudiced by sale of tract in solido contrary to decree. Smith v. Sparks, 162 Ind. 270, 70 N. E. 253.

4. That a referee who at the time of appointment was a resident of the judicial district where land lay, but subsequently and before sale removed from the state, is no ground for setting aside sale. Val Blatz Brew. Co. v. Dalrymple [S. D.] 99 N. W. 851. Mistake in recital as to time of sale by clerk of court not required by statute. Phoenix Mut. Life Ins. Co. v. Sparks, 2 Neb. Unoff. 215, 96 N. W. 214. A harmless error not sufficient to avoid sale. Harte v. Wedge [Neb.] 97 N. W. 1035. A stipulation to permit confirmation without notice waives all irregularities of the sale. Val Blatz Brewing Co. v. Dalrymple [S. D.] 99 N. W. 851.

5. Ex parte Cooley [S. C.] 48 S. E. 92.

6. Jones v. Stairs [Neb.] 97 N. W. 1017; Aukam v. Zantzinger [Md.] 56 A. 820. That the amount due is disputed does not invalidate the sale where the purchaser acted in good faith. State Mut. Bldg. & Loan Ass'n v. O'Callaghan [N. J. Eq.] 57 A. 496.

7. Phoenix Mut. Life Ins. Co. v. Sparks, 2 Neb. Unoff. 215, 96 N. W. 214.

8. Mere technical objections to order confirming sale will be disregarded. Vradenburg v. Johnson [Neb.] 98 N. W. 54.

9. Validity of the decree of foreclosure may not be questioned. Sulek v. McWilliams [Ark.] 78 S. W. 769; Stein v. Parrotte, 2 Neb. Unoff. 351, 96 N. W. 155. A former order of sale cannot be questioned by the former purchaser at the confirmation of resale. Dartmouth Sav. Bank v. Foley [Neb.] 97 N. W. 1033. Where the mortgagor has litigated the case before the court, he cannot at this stage question its jurisdiction. Clevenger v. Figley [Kan.] 75 P. 1001. A decree of the court confirming the report of a referee does not determine the questions passed on by him but not properly within his jurisdiction. Farmers' Loan & Trust Co. v. Hoffman House, 96 App. Div. 301, 89 N. Y. S. 281.

10. Senft v. Vanek, 209 Ill. 361, 70 N. E. 720.

11. Ward v. Ward, 131 F. 946.

12. Changes in the law regulating the rights of purchasers at foreclosure sale are not such as to impair the obligations of contracts, for purchaser is not a party to the mortgage contract, and they affect the remedy thereon merely. Hooker v. Burr, 194 U. S. 415, 48 Law. Ed. 1046. See 2 Curr. L. 30.

13. Ray v. Henderson, 210 Ill. 305, 71 N. E. 579; Haigh v. Carroll, 209 Ill. 576, 71 N. E. 317. Where the mortgage contains clause

ceiver may be appointed where the security is inadequate to apply the profits to the mortgaged debt.[14] The execution of a deed to a purchaser pursuant to a final judgment in foreclosure vests in him the legal title to the property if no redemption is made under the equity of redemption;[15] but prior to the expiration of the period of redemption, his rights are those of a lienor only.[16] Generally, the purchaser on foreclosure sale is held to receive "a good merchantable title,"[17] though where partnership property is foreclosed and the value of the interest conveyed depends on parol evidence, he may be relieved from his bid.[18] The purchaser at a foreclosure sale acquires all rights of the mortgagor at the time of the execution of the mortgage,[19] but often in railroad foreclosures by terms of sale,[20] or otherwise title is taken subject to liabilities of the mortgagor.[21]

Possession and restitution.[22]—After obtaining the title, the purchaser may maintain action for possession of the foreclosed property any time within the statutory period.[23] Where the sale is set aside and the purchaser is in possession, he has the estate of a mortgagee in possession,[24] and tender of the amount due is a condition precedent to possession,[25] and after possession for forty years, he cannot be compelled to restore the premises to the mortgagee.[26] A mortgagee in possession of property is entitled to credit for that portion of the gross rental he expends in permanent betterments, for taxes paid and interest thereon, but not for taxes paid by its supposed vendee; in the absence of willful or gross negligence, he is not chargeable for inadequacy in the amount of rents received.[27] He is not entitled to compensation for his care of the property,[28] but may have to account for the cutting of trees as waste,[29] and where the mortgagee in possession is the assignee of one having the right of possession, no accounting can be had.[30] A writ of possession is not exhausted by one execution.[31]

(§ 5) *F. Deficiency and liability therefor.*[32]—It is only by virtue of statute that a money decree can be rendered by a court of equity in a foreclosure proceeding, and it can be for a deficiency only.[33] In some states, it may be rendered

pledging the rents and profits pending redemption, the purchaser is entitled to them irrespective of the adequacy of the security. Sage v. Mendelson, 42 Misc. 137, 85 N. Y. S. 1008.

14. See post, § 5 G.

15. Marshall v. United States Trust Co., 93 App. Div. 252, 87 N. Y. 747.

16. Dolan v. Midland Blast Furnace Co. [Iowa] 100 N. W. 45. The ownership of the equity of redemption and the fee respectively of two adjoining lots is insufficient to extinguish a party wall agreement as by common ownership. Springer v. Darlington, 207 Ill. 238, 69 N. E. 946.

17. Dana v. Jones, 91 App. Div. 496, 86 N. Y. S. 1000.

18. Huber v. Case, 93 App. Div. 479, 87 N. Y. S. 663.

19. Code Civ. Proc. § 700. Leet v. Armbruster [Cal.] 77 P. 653. Eastments connected with mill and mill site. Johnson v. Sherman County Irrigation, Water Power & Improvement Co. [Neb.] 98 N. W. 1096.

20. Liability to honor outstanding tickets. Erie R. Co. v. Littell [C. C. A.] 128 F. 546.

21. Legislative control and regulation of franchise. Union Pac. R. Co. v. Mason City, etc., R. Co. [C. C. A.] 128 F. 230.

22. See 2 Curr. L. 31.

23. Stovall v. Haynes, 25 Ky. L. R. 1789, 78 S. W. 895.

24. Jones v. Standiferd [Kan.] 77 P. 271. The court will protect a party who became so by purchasing at a foreclosure sale which was held void, although the proceedings prior to the sale were regular, by fixing a time for redemption, at the expiration of which time, he may resell under foreclosure proceedings. O'Connor v. Keenan [Mich.] 94 N. W. 186. No obligation on part of a bona fide purchaser to learn whether sale is valid. Walter v. Brugger, 25 Ky. L. R. 1597, 78 S. W. 419. A law depriving purchaser of his title if he has not obtained a deed within a certain time is an impairment of the obligation of the contract and void. Bradley v. Lightcap, 195 U. S. 1, 24, 49 Law. Ed. —.

25. And see ante § 3 E.

26. R. S. §§ 6054, 6055. Risch v. Jensen [Minn.] 99 N. W. 628.

27. Pollard v. American Freehold Land Mortg. Co., 139 Ala. 183, 35 So. 767.

28. Moss v. Odell, 141 Cal. 335, 74 P. 999.

29. Pollard v. American Freehold Land Mortg. Co., 139 Ala. 183, 35 So. 767.

30. Mortgagee in possession as assignee of widow under dower right. Moffett v. Trent [N. J. Eq.] 56 A. 1035.

31. Smith v. State [Tex. Cr. App.] 81 S. W. 936.

32. See 2 Curr. L. 31.

33. Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800.

Only for balance remaining due after sale has failed to produce full amount found

either conditionally at the time the decree of foreclosure and sale is entered, or after the sale and ascertainment of the balance due.[34] A statute abolishing the right to deficiency judgments does not apply to mortgages executed prior to its passage.[35]

Persons liable.[36]—There is no personal liability on a mortgage executed by an administrator under order of the court,[37] or a trustee,[38] and a decree against them can be for the sale alone.[39] Where the assumption of the mortgage debt is part of the consideration, the grantee is liable for any deficiency.[40]

Defenses.[41]—Where the mortgagee covenated with his assignee that there would be no deficiency, he is liable if one arises irrespective of whether his assignee neglected to force the mortgagor to keep the premises insured against fire.[42] It is a good defense to an action for deficiency that the principal debt is barred by the statute of limitations,[43] or that the judgment was obtained on service by publication.[44] Where the time for presentation of claims against estates of deceased persons is limited by statute, a deficiency judgment is barred;[45] but where the time for taking a deficiency judgment after foreclosure is limited by statute, does not apply where mortgage is void.[46] A deficiency judgment in another state is final as to the liability of the mortgagor and cannot be resisted on the ground that there is a valid defense to it in the state where it is sought to be enforced.[47] The order for a deficiency judgment, however, is appealable,[48] and is bad if granted against a defendant who has mortgaged his property to secure the debt of another;[49] but where a deficiency judgment is asked for in the complaint, the defendant who fails to answer cannot object at the time of motion for granting such deficiency.[50] A prayer for general relief justifies the rendering of a deficiency judgment.[51]

(§ 5) *G. Receivership in foreclosure.*[52]—A stipulation in the mortgage giving the mortgagee a lien on the rents and profits of the mortgaged land authorizes the appointment of a receiver in the discretion of the court without regard to the solvency of the mortgagor.[53] In the absence of such a stipulation, a receiver will not be appointed unless it is made to appear that the mortgaged premises are insufficient security for the debt and the person liable for the debt is insolvent or at least of very questionable responsibility.[54] A receiver should not be appointed without

to be due [Ill. Rev. St. c. 95, § 16]. Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800.

34. Ill. Rev. St. c. 95, § 16. Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800.

35. Act 1897, c. 95. Hunter v. Lang [Neb.] 98 N. W. 690.

36. See 2 Curr. L. 31.

37. Wisconsin Trust Co. v. Chapman [Wis.] 99 N. W. 341.

38. Edmonston v. Carter [Mo.] 79 S. W. 459.

39. Where mortgagor conveys title to the agent of a purchaser, the agent incurs no personal liability by a clause assuming the debt in the mortgage. Arnold v. Randall [Wis.] 98 N. W. 239.

40. Brosseau v. Lowy, 209 Ill. 405, 70 N. E. 901.

41. See 2 Curr. L. 32.

42. Willard v. Welch, 94 App. Div. 179, 88 N. Y. S. 173.

43. Cady v. Usher [Neb.] 98 N. W. 651; In re Piper's Estate, 208 Pa. 636, 57 A. 1118; Overholt v. Dietz, 43 Or. 194, 72 P. 695.

44. Greenway v. DeYoung [Tex. Civ. App.] 79 S. W. 603.

45. Rev. St. § 3344. Pereles v. Leiser, 119 Wis. 347, 96 N. W. 799.

46. A statute limiting the time in which a deficiency judgment shall be sought is not applicable to an action on a bond alleged to be secured by a mortgage which is avoided by the fact that the mortgagor is without title at the time of execution [P. L. 1881, p. 184]. Pruden v. Savage [N. J. Law] 56 A. 690.

47. Le Herisse v. Hess [N. J. Eq.] 57 A. 808.

48. Pereles v. Leiser, 119 Wis. 347, 96 N. W. 799.

49. Garretson Inv. Co. v. Arndt [Cal.] 77 P. 770.

50. Smith v. Allen [Neb.] 100 N. W. 129.

51. State v. Superior Court for King County, 34 Wash. 248, 75 P. 809.

52. See 2 Curr. L. 33.

53. West v. Adams, 106 Ill. App. 114. To collect rents and profits until expiration of redemption period. Pringle v. James, 109 Ill. App. 100.

54. West v. Adams, 106 Ill. App. 114. To collect rents during redemption period and apply them on debt. Pringle v. James, 109 Ill. App. 100.

notice to defendants.[55] In California, the appointment must be asked for in the complaint and it will be set aside even where a provision for such appointment is inserted in the mortgage.[56]

The rents and profits of mortgaged property collected by the receiver are not to be applied to the debt unless so adjudicated,[57] and the mortgagee still has the right in most jurisdictions to the net returns from the property.[58] Where the appointment of a receiver is improperly denied, the mortgagor is none the less entitled to the rents and profits pending redemption.[59]

(§ 5) *H. Distribution of proceeds and surplus.*[60]—The surplus above the amount due the mortgagee with costs received at the foreclosure sale belongs to the mortgagor or his assignee,[61] and the court brings in all necessary parties to enable it to make a proper distribution of the proceeds.[62] The surplus on foreclosure of a mortgage after the death of the mortgagor will be treated as realty.[63] A provision in a mortgage executed by a husband and wife, directing the surplus to be paid to them, means only that payment shall be made to them as their several interests may appear, and is not a conveyance of any interest by one mortgagor to the other.[64]

If the wife's land is mortgaged to secure the husband's debt, on sale thereof after her death the entire value of the husband's curtesy interest therein should be applied to its payment in exoneration of the wife's interest.[65] If the debt was that of both jointly, then only half of it should be paid out of the husband's interest.[66]

Where the junior mortgagee redeems and thereafter makes a sale pursuant thereto and bids the amount previously deposited by him with the master, and such additional amount as in his opinion the value of the property justifies, and pays the costs in cash, and there is no excess over the amount due him under his decree, nothing remains for distribution.[67]

(§ 5) *I. Effect of proceedings.*[68]—On the foreclosure sale, the equity of redemption is terminated and there exists then only the statutory right to redeem.[69] The lien of the judgment, however, relates back to the date of execution of the mortgage;[70] but a purchaser under a questionable sale must show he took in good faith to claim statutory right to have the lien kept alive till judgment of foreclosure set aside.[71] When the mortgage is set aside as void, the judgment in no way prevents recovery on the notes.[72]

Persons not joined as parties.[73]—The title and rights of persons holding interests in mortgaged premises is not affected where they are not parties to the suit.[74]

55. Appointment of receiver without notice held harmless. Wilkie v. Reynolds [Ind. App.] 72 N. E. 179.

56, 57. Garretson Inv. Co. v. Arndt [Cal.] 77 P. 770.

58. Boyce v. Continental Wire Co. [C. C. A.] 125 F. 740; Haigh v. Carroll, 209 Ill. 576, 71 N. E. 317. Purchaser cannot object that where property sold for full amount of debt, the judgment improperly directed the receiver to give profits to mortgagee. Id.

59. Georgetown Water Co. v. Fidelity Trust & Safety Vault Co.'s Trustee, 25 Ky. L. R. 1739, 78 S. W. 113. Party in possession cannot be compelled to act as receiver without compensation. Id.

60. See 2 Curr. L. 35.

61. Civ. Code, § 2899 provides that where the mortgagor has sold part of the mortgaged premises that part shall be sold last on foreclosure. Held that, where there is no appearance on his part at the sale and the land is all sold in one tract, he is merely entitled to a share of the proceeds. Summerville v. Marsh, 142 Cal. 554, 76 P. 388.

62. Montague v. Marunda [Neb.] 99 N. W. 653.

63, 64, 65, 66. Harrington v. Rawls [N. C.] 48 S. E. 571.

67. Illinois Nat. Bank v. Trustees of Schools, 111 Ill. App. 189.

68. See 2 Curr. L. 36.

69. Hartman Mfg. Co. v. Luse, 121 Iowa, 492, 96 N. W. 972.

70. Boyer v. Webber, 22 Pa. Super. Ct. 35.

71. Civ. Code, § 82. McGregor v. Eastern Bldg. & Loan Ass'n [Neb.] 99 N. W. 509.

72. Curtin v. Salmon River Hydraulic Gold Min. & Ditch Co., 141 Cal. 308, 74 P. 851.

73. See 2 Curr. L. 36.

74. Grantees of mortgagor. Adams v. Hopkins [Cal.] 77 P. 712. In absence of lis pendens or actual notice, an attaching creditor still has right to redeem after foreclosure. London & San Francisco Bank v. Dexter Horton & Co. [C. C. A.] 126 F. 593. Judgment creditor not a party continues to have

Where, in such case, the mortgagee purchases at the sale, the proceedings amount to no more than an entry for condition broken, so far as the rights of parties not joined are concerned.[75] If the purchaser is a stranger, he will, as to them, take an equitable assignment of the mortgage.[76] Where the plaintiff as trustee forecloses a mortgage on property on which he holds a junior lien, he is bound whether he is a party or not.[77] A purchaser of a mortgage subject to a prior lien takes subject thereto, and only such estate as is covered by the mortgage.[78] The purchaser at an execution sale of the interest of a mortgagor where a judgment for foreclosure was entered became merely the assignee of the mortgagor,[79] and if there were subsequent judgment liens, the effect of the sale was to cut out the others.[80]

(§ 5) *J. Costs.*[81]—Where an administrator successfully defends an action against him for personal liability, he may recover costs.[82] As a general rule, interest is not allowed on costs.[83] Where the mortgage provides for the allowance of a reasonable solicitor's fee, the court should allow a reasonable amount for that purpose.[84]

§ 6. *Redemption. Nature of the right.*[85]—Irrespective of statute, there exists a right on part of the mortgagor to redeem from a mortgage; on sale under foreclosure, this right is terminated and there exists in its place only the statutory right to redeem.[86] The statutory redemption is from the sale and not from the mortgage,[87] and may be made on payment of the amount bid by the purchaser, with interest.[88] An equitable redemption by action is from the mortgage and not from the sale.[89] In such case, the party redeeming must do equity by paying the amount due under the mortgage.[90] The right to redeem is assignable,[91] but the right of redemption and the right of possession are separate rights and the sale of one does not carry with it by necessity the right to the other,[92] and the purchaser generally has no right to possession.[93]

Time.[94]—The right to foreclose and the right to redeem are reciprocal, and an action to redeem may be brought at any time before the statutory bar is complete.[95] A judgment creditor purchasing the rights of the mortgagor after foreclosure has the time allowed to him as junior lienor as well as in which to redeem,[96] and so the owner of a junior lien foreclosing the same still has the same period in which to

right to redeem irrespective of foreclosure. Stastny v. Pease [Iowa] 100 N. Y. 482. A foreclosure to which the mortgagor or person having an equity of redemption is not made a party is, as to him, a mere nullity. Rodman v. Quick, 211 Ill. 546, 71 N. E. 1087.

75, 76. Rodman v. Quick, 211 Ill. 546, 71 N. E. 1087.

77. Walsh v. Robinson [Mich.] 97 N. W. 55.

78. Fidelity Loan & Investment Ass'n v. Lash, 135 N. C. 405, 47 S. E. 479.

79. London & San Francisco Bank v. Dexter Horton & Co. [C. C. A.] 126 F. 593.

80. Francestown Sav. Bank v. Silver, 122 Iowa, 685, 98 N. W. 498.

81. See 2 Curr. L. 37.

82. Wisconsin Trust Co. v. Chapman [Wis.] 99 N. W. 341.

83. Ashworth v. Trammell, 102 Va. 852, 47 S. E. 1011.

84. Notwithstanding no specific amount designated. Salomon v. Stoddard, 107 Ill. App. 227.

85. See 2 Curr. L. 37.

86. Hartman Mfg. Co. v. Luse, 121 Iowa, 492, 96 N. W. 972; Cooper v. Maurer, 122 Iowa. 321, 98 N. W. 124. A statutory right and hence a harmless error is provision for redemption omitted from decree. Sweeney v. Hill [Kan.] 77 P. 696. Decree may authorize redemption without necessary statutory formalities [2 Starr & C. Ann. St. 1896, c. 77, p. 20]. Morava v. Bonner, 205 Ill. 321, 68 N. E. 707. See, also, Mortgages, 2 Curr. L. 905.

87, 88, 89. Rodman v. Quick, 211 Ill. 546, 71 N. E. 1087.

90. May include taxes, repairs and betterments, and mortgagee in possession may be required to account for rents and profits actually received or which could have been received by exercise of reasonable care and diligence. Rodman v. Quick, 211 Ill. 546, 71 N. E. 1087.

91. Cooper v. Maurer, 122 Iowa, 321, 98 N. W. 124.

92. Hartman Mfg. Co. v. Luse, 121 Iowa, 492, 96 N. W. 972.

93. Dolan v. Midland Blast Furnace Co. [Iowa] 100 N. W. 45.

94. See 2 Curr. L. 38.

95. 10 years. Dickson v. Stewart [Neb.] 98 N. W. 1085.

96. Aetna Life Ins. Co. v. Beckman, 210 Ill. 394, 71 N. E. 452.

redeem that he would if he had retained his lien in its original form.[97] Subsequent lienors should be given a reasoinable time in which to redeem.[98] Where an appeal is taken pending final judgment, the mortgagor may redeem.[99] A parol agreement extending time to redeem will be enforced;[1] but not if the proofs of such agreement are doubtful or conflicting.[2] After his time for redemption expires, a subsequent lienor cannot complain that one junior to him has redeemed.[3]

Amount.[4]—To redeem, the whole amount due must be tendered,[5] and if the purchaser of the certificate of sale takes wrongful possession of the property, the rents and profits may be deducted from the amount necessary to redeem.[6] Junior mortgagees not made parties to the foreclosure proceedings are only bound to pay the purchaser the amount due on the mortgage under which he purchased, and not the costs of such foreclosure.[7]

Where each of several conveyances was a separate transaction, each may be redeemed separately on paying the amount it was given to secure.[8]

Interest must be paid from the time the security is given, where the bar of limitations against the debt has been waived.[9]

Who may redeem.—A judgment lienor[10] or junior mortgagee may redeem.[11] The rights of subsequent lienors to redeem are not affected by a foreclosure under a prior mortgage to which they were not made parties.[12]

The grantee of the mortgagor's interest in the standing timber on an estate has a right to redeem from the mortgage,[13] but the purchaser at a foreclosure sale who fails to record his certificate has no right to redeem from a creditor who has redeemed from the mortgage.[14] A creditor secured by a trust deed who agrees to bid in a portion of the property and hold it subject to the debtor's right to redeem cannot avoid the contract on the ground that the debtor intended thereby to defraud other creditors where the latter retained sufficient property to satisfy the other claims.[15]

The owner of an undivided interest may redeem,[16] but must redeem the land sold as an entirety.[17]

The right to redeem from a deed absolute in form survives,[18] and the equity of

97. Witham v. Blood [Iowa] 100 N. W. 558; Gustafson v. Durst [Iowa] 99 N. W. 738.

98. Ninety days held not unreasonably short under circumstances. Rodman v. Quick, 211 Ill. 546, 71 N. E. 1087.

99. Ashworth v. Trammell, 102 Va. 852, 47 S. E. 1011.

1. Second mortgagees in possession. Davis v. Greenwood, 2 Neb. Unoff. 317, 96 N. W. 526.

2. Norman v. Gunton, 127 F. 871.

3. MacGregor v. Pierce [S. D.] 95 N. W. 281.

4. See 2 Curr. L. 38.

5. Dunning v. Gaige [Mich.] 100 N. W. 267; Clark v. Seagraves [Mass.] 71 N. E. 83.

6. Dolan v. Midland Blast Furnace Co. [Iowa] 100 N. W. 45. A third person cannot raise question of nonpayment of required amount. Morava v. Bonner, 205 Ill. 321, 68 N. E. 707.

7. Rodman v. Quick, 211 Ill. 546, 71 N. E. 1087.

8, 9. Clark v. Seagraves [Mass.] 71 N. E. 813.

10. Only after 12 and within 15 months of sale, if he has made no levy and sale. If he has, then within 12 months. Illinois Nat. Bank v. Trustees of Schools, 111 Ill. App. 189.

11. Illinois Nat. Bank v. Trustees of Schools, 211 Ill. 500, 71 N. E. 1070.

12. Rodman v. Quick, 211 Ill. 546, 71 N. E. 1087.

13. Rothschild v. Bay City Lumber Co., 139 Ala. 571, 36 So. 785.

14. Gustafson v. Durst [Iowa] 99 N. W. 738.

15. Evidence held to show that debtor retained sufficient property. First Nat. Bank v. Moor [Tex. Civ. App.] 79 S. W. 53. Evidence held to show agreement between purchaser at foreclosure sale and plaintiff that latter should have right to redeem. Id. Debtor held to have right to redeem property bid in by secured creditor by reason of representations of creditor that such privilege would be accorded him whereby creditor secured land on more favorable terms than he otherwise would have. Id.

16. Burn's Rev. St. Ind. 1901, § 781. Smith v. Sparks, 162 Ind. 270, 70 N. E. 253.

17. Burn's Rev. St. Ind. 1901, § 781. Smith v. Sparks, 162 Ind. 270, 70 N. E. 253.

18. On ground that defendant has property in his hands as distinguished from a liability to respond in damages. Clark v. Seagraves [Mass.] 71 N. E. 813.

redemption is an estate in land which descends to the heir.[19] At common law, the administrator could not redeem, but he has by statute in many states been given the right to do so.[20] In such case, he need not take out a license to sell realty, but if he does not do so, the result inures exclusively to the benefit of the widow and heirs.[21]

One purchasing land at a foreclosure sale under an agreement with the owner whereby he is to reconvey it to the latter on his refunding the purchase price will be deemed a trustee for his benefit, the deed being treated merely as security for the loan, and the contract will be specifically enforced.[22] A provision for forfeiture, in case of nonpayment, in a contract to reconvey which is in fact a defeasance in a transaction amounting to a mortgage, does not deprive the instruments of their mortgage character, or cut off the right to redeem.[23]

Mode.[24]—The redemption must be made to the persons to whom the interest and principal are due and not to one alone.[25] Where the statute provides that the redemption money may be paid to the clerk of the court, alleged evasion by the purchasers is no ground for extending time of redemption.[26] A tender of the required amount would seem good.[27] Land sold separately may be redeemed separately.[28]

Action to redeem.[29]—A bill to redeem from a deed absolute in form is one for relief against fraud, and not one dealing with the title to an estate in land.[30] Hence it may be entertained, though the land is outside the state, particularly where the deed was made within the state and both parties were citizens thereof.[31]

A purchaser at a foreclosure sale is not entitled to improvements made after the action to redeem commenced,[32] and if defeated, he is not entitled to interest pending the decree.[33]

The register's conclusions of fact as to the value of the use of the premises are presumed to be correct and will not be disturbed when based on conflicting evidence where there is evidence supporting them from which different persons might draw different inferences.[34]

Effect.[35]—On redemption by the mortgagor, the effect is as if the sale had never been made,[36] and on redemption, what was before a secondary lien now becomes a first lien,[37] and this is true where the redemptioner is the purchaser of the equity of redemption from the mortgagor.[38] A junior mortgagee who redeems from the senior mortgage or pays it off thereby becomes subrogated to all the rights of the holder of the prior incumbrance.[39] In such case, the person discharging the su-

19. Clark v. Seagraves [Mass.] 71 N. E. 813.

20. Includes right to redeem from deed absolute in form [Mass. Rev. Laws, c. 187, § 33]. Clark v. Seagraves [Mass.] 71 N. E. 813.

21. Clark v. Seagraves [Mass.] 71 N. E. 813.

22. Dickson v. Stewart [Neb.] 98 N. W. 1085.

23. Barlow v. Cooper, 109 Ill. App. 375.

24. See 2 Curr. L. 39.

25. Mortgage made with payment of interest to sister-in-law of mortgagor for life and principal to son. Palmer v. Bray [Mich.] 98 N. W. 849.

26. Stewart v. Winner [Kan.] 75 P. 491.

27. Leet v. Armbruster [Cal.] 77 P. 653.

28. Burns' Rev. St. Ind. 1901, § 780. Smith v. Sparks, 162 Ind. 270, 70 N. E. 253.

29. See 2 Curr. L. 39.

30, 31. Clark v. Seagraves [Mass.] 71 N. E. 813.

32, 33. Benson v. Bunting, 141 Cal. 462, 75 P. 59.

34. Williams v. Norton, 139 Ala. 402, 36 So. 11. Court held not justified in altering register's findings as to value of use of premises by mortgagee under voidable foreclosure sale. Id.

35. See 2 Curr. L. 40.

36. Ejectment may be maintained after tender [Civ. Code §§ 703, 704]. Leet v. Armbruster [Cal.] 77 P. 653.

37. Stastny v. Pease [Iowa] 100 N. W. 482.

38. Walsh v. Robinson Mich.] 97 N. W. 55. Ignorance of docketed judgment no excuse. Stastny v. Pease [Iowa] 100 N. W. 482. But see where time for redemption by judgment creditors has expired. Cooper v. Maurer, 122 Iowa, 321, 98 N. W. 124.

39. Must be paid amount so expended on redemption by mortgagor [Hurd's Rev. St. 1903, c. 77, § 18]. Illinois Nat. Bank v. Trustees of Schools, 211 Ill. 500, 71 N. E. 1070.

perior lien will be treated as its purchaser or assignee, unless the facts show that it was intended as an absolute payment.[40]

The redemption by one of several mortgagors inures to the benefit of all;[41] but this rule does not hold where the right of redemption was expressly given by judicial decree.[42]

By the acceptance of the redemption money, the purchaser is estopped from objecting to the redemption,[43] and so where the redemption is premature and the purchaser accepts the amount due, the redemptioner becomes the equitable assignee of the purchaser's rights which will in due course ripen into title.[44]

FOREIGN CORPORATIONS.[45]

§ 1. Status, Privileges and Regulation (1445). Statutory Regulations (1456). Operation and Construction of Statutes (1456). Noncompliance; Effect (1458). Right to Transact Business; Comity. Special Article (1459).
§ 2. Powers (1461).
§ 3. Actions by and against; Jurisdiction of Courts (1462). Liability to be Sued (1462). Jurisdiction of Courts Over Subject Matter (1463). Service of Process (1464). Venue (1465). Removal of Causes (1465). Limitations (1465).

§ 1. *Status, privileges and regulation.*[46]—A corporation has its legal home and domicile[47] and is a citizen only of the state which created it, and has no right, merely by virtue of its incorporation, to exercise its franchise in any other jurisdiction;[48] but it is the policy of most states to accord to foreign corporations, by comity, full and complete privilege to exercise their corporate franchises within their limits, subject only to limitations imposed by express legislation.[49] But foreign corporations cannot, through comity, be accorded any other or greater rights or privileges than those to which they are entitled under the laws of the state which created them.[50]

The assignee of a junior incumbrancer depositing, within the time allowed by law, the amount bid at the sale with interest thereby renders the certificate of purchase null and void and becomes subrogated to the rights of the original purchaser, subject to the obligation to sell the premises under his decree. Illinois Nat. Bank v. Trustees of Schools, 111 Ill. App. 189. May do so at any time within twelve months from date of sale, where he was party to foreclosure and his lien was recognized in decree. Id.

40. Illinois Nat. Bank v. Trustees of Schools, 211 Ill. 500, 71 N. E. 1070.

41. Witham v. Blood [Iowa] 100 N. W. 558.

42. Morava v. Bonner, 205 Ill. 321, 68 N. E. 707.

43. MacGregor v. Pierce [S. D.] 95 N. W. 281.

44. Finnegan v. Effertz, 90 Minn. 114, 95 N. W. 762.

45. This article treats of the status, powers, rights, and liabilities of foreign corporations. For general corporation law, see Corporations, 3 Curr. L. 881; for taxation of foreign corporations, see Taxes, 2 Curr. L. 1786; for questions peculiar to foreign corporations of a particular kind, see Railroads, 2 Curr. L. 1382; Building and Loan Associations. 3 Curr. L. 561; Insurance, 2 Curr. L. 479; Indemnity, 2 Curr. L. 298, etc.

46. See 2 Curr. L. 40.

47. Olson v. Buffalo Hump Min. Co., 130 F. 1017. A foreign lighting corporation, having no franchise in New Jersey, has no standing in New Jersey to demand of a domestic gas company that it be furnished with gas for its lamps; the foreign corporation not being a householder or resident in New Jersey. Public Service Corp. v. American Lighting Co. [N. J. Eq.] 57 A. 482.

48. Chicago Title & Trust Co. v. Bashford [Wis.] 97 N. W. 940.

49. Chicago Title & Trust Co. v. Bashford [Wis.] 97 N. W. 940. A corporation organized in New Jersey will not be denied the right to do business in Missouri, on the ground that an attempt has been made to evade Missouri laws, upon a mere showing that all but one share of stock is owned in Missouri, and its property and business are located almost entirely in that state; when the corporation has complied with conditions prescribed for foreign corporations [Laws Mo. 1903, § 121, construed]. State v. Cook [Mo.] 80 S. W. 929.

50. Hiskey v. Pacific States Sav. Loan & Bldg. Co., 27 Utah, 409, 76 P. 20. See Building and Loan Associations, 1 Curr. L. 387. A corporation created in Kansas to deal in lands in Oklahoma will not be recognized as having such power in Oklahoma, since it was granted no rights whatever in Kansas. Myatt v. Ponca City Land & Improvement Co. [Okl.] 78 P. 185.

Note: It is the general rule that corporations formed under the laws of one state may carry on business in another. Bank of Augusta v. Earle, 13 Pet. [U. S.] 519. This rule includes corporations which, though authorized to act in the states where they are chartered, transact the greater part of their

A corporation created by Federal laws is a domestic corporation of each state where it is engaged in business.[51] Two corporations, incorporated in different states, but conducting a business as one, remain dual in character; and neither one of the states nor the corporations themselves can make them one and a citizen of the other state, for jurisdictional purposes.[52] Compliance with statutory conditions by a foreign corporation does not make it a domestic corporation.[53]

Statutory regulations.[54]—Except as to matters of interstate commerce,[55] statutory requirements prescribed by law as conditions on which foreign corporations may do business in the state are discretionary with the state,[56] and statutes prescribing such conditions are valid[57] and do not conflict with the power of congress to regulate interstate commerce,[58] even though applied to corporations engaged solely in interstate commerce;[59] and a foreign corporation cannot be heard to question their constitutionality.[60]

Operation and construction of statutes.[61]—Statutes providing conditions precedent to the exercise within the state of the franchise of a foreign corporation, and disabilities for default in performance of such conditions, have a prospective operation only.[62] Statutes providing for service on state officers when foreign corpora-

business elsewhere. Hanna and Finley v. International Petroleum Co., 23 Ohio St. 622. Some courts have made no exception in cases in which the corporations were authorized to do nothing in the states by which they were created. Lancaster v. Amsterdam Improvement Co., 140 N. Y. 576. The view taken by the court in Myatt v. Ponca City Land & Improvement Co. [Okl.] 78 P. 185, that the doctrine of comity does not require that one state should be given unlimited power to dispose of the franchise of acting as a corporation in another seems sound, however, and is supported by some authority. Hill v. Beach, 12 N. J. Eq. 31. It would seem, moreover, that the facts in the case are not essentially different from those upon which a Kansas court has held that a foreign corporation empowered by its charter to act anywhere except in the state of its creation is not entitled to recognition. Land, etc., Co. v. Coffey County Com'rs, 6 Kan. 245. —XVIII Harv. L. R. 226.

51. In re Cushing's Estate, 40 Misc. 505, 82 N. Y. S. 795.

52. Alabama & G. Mfg. Co. v. Riverdale Cotton Mills [C. C. A.] 127 F. 497.

53. Illinois Cent. R. Co. v. Hibbs, 25 Ky. L. R. 1899, 78 S. W. 1116.

54. See 2 Curr. L. 41. In Virginia, foreign as well as domestic corporations are under the jurisdiction of the state corporation commission, which may impose fines for doing business in the state without the statutory license. The charter fee, required before a license is issued, need only be paid once; the license tax is annual [Code 1887, § 1104, as amended in 1903; const. art. 12, § 156a, and Acts 1902-4, p. 360, construed]. American Surety Co. v. Com., 102 Va. 841, 47 S. E. 994.

55. Provision for service of process on agents. Frawley v. Pennsylvania Casualty Co., 124 F. 259.

56. Hartford Ins. Co. v. Perkins, 125 F. 502. If not repugnant to fundamental laws. State v. Insurance Co. of North America [Neb.] 99 N. W. 36. Foreign corporations seeking to do business in a state other than that of their creation must comply with whatever conditions the state sees fit to impose. State v. Fleming [Neb.] 97 N. W. 1063.

57. Pub. Laws 1901, p. 66, § 1, requiring foreign corporations to have an officer or agent in the state on whom service of process may be made, and providing for service on the secretary of the corporation commission in default thereof, is constitutional. Fisher v. Traders' Mut. Life Ins. Co. [N. C.] 48 S. E. 667. Section 2 of these laws applies to all corporations doing, or who have done, business in the state, whether or not they have property therein at the time of service. Id.

58. Ky. St. 1903, § 571, requiring all corporations doing business in the state to file a statement with the secretary of state, giving the name of a resident agent on whom process may be served, applies only to corporations having an established place of business in the state, and not to those making sales through drummers, and hence is not a regulation of interstate commerce. Commonwealth v. Parlin & Orendorff [Ky.] 80 S. W. 791.

59. Denial of the use of the state courts to enforce claims does not interfere with Congress' power to regulate interstate commerce. John Deere Plow Co. v. Wyland [Kan.] 76 P. 863.

60. Applied to South Dakota law, prohibiting combinations of insurance companies. Hartford Fire Ins. Co. v. Perkins, 125 F. 502. See Insurance, 2 Curr. L. 479. A foreign corporation doing business in a state is presumed to have assented to the conditions imposed by the state on foreign corporations. Frawley v. Pennsylvania Casualty Co., 124 F. 259.

61. See 2 Curr. L. 41. Since Acts 1895, p. 132, c. 81, amending Acts 1891, p. 264, c. 122, §§ 2-4, a foreign corporation need only file a copy of its charter with the secretary of state; an abstract in each county in which it does business is no longer necessary. Nichols & Shepherd Co. v. Loyd [Tenn.] 76 S. W. 911.

62. Rev. St. 1898, § 1770b. Chicago Title & Trust Co. v. Bashford [Wis.] 97 N. W.

tions have failed to appoint an agent for that purpose as required by law operate until debts of the corporation to citizens are paid, even though the corporation may have ceased to do business in the state.[63]

The question whether a foreign corporation is doing business in the state, within the meaning of regulatory statutes, must be decided by reference to the facts of each particular case[64] and to the particular statute involved. Illustrative holdings are given in the notes.[65] The question is one of general law.[66]

940. They do not prevent enforcement of contracts made prior to their enactment. Lewis Pub. Co. v. Lenz, 86 App. Div. 451, 83 N. Y. S. 841. Act May 8, 1901, (P. L. 150), requiring payment of bonus of ⅛ of one per cent. on capital of foreign corporations actually employed in Pennsylvania, has prospective operation only. Commonwealth v. Danville Bessemer Co., 207 Pa. 302, 56 A. 871.

63. Applied to Pub. Laws 1901, p. 66, § 5. Fisher v. Traders' Mut. Life Ins. Co. [N. C.] 48 S. E. 667.

64. Whether a foreign corporation is doing business in the state must be proven by showing what was done, not by the conclusion of an agent of the corporation. Huey Co. v. Rothfeld, 84 N. Y. S. 883. The question of fact, whether a corporation was doing business in a state at a given time, is for the jury. Audenried v. East Coast Mill. Co., 124 F. 697.

65. Held within the statute: Keeping goods in another state to be sold there by a factor. United States Rubber Co. v. Butler Bros. Shoe Co., 132 F. 398. Proof that a foreign corporation was doing business in the state through agents who had an established place of business therein, and not through drummers, is sufficient to sustain a prosecution for the penalty prescribed for doing business in the state without filing the statement required by Ky. St. 1903, § 571. Commonwealth v. Parlin & Orendorff Co. [Ky.] 80 S. W. 791. A New Jersey corporation, having its principal office in New York city, engaged in buying and selling stocks and bonds, held to employ capital in New York and to be liable to a license tax thereon. People v. Mills, 90 App. Div. 560, 86 N. Y. S. 386. Maintaining resident agents who solicit orders and to whom goods are shipped for delivery. John Deere Plow Co. v. Wyland [Kan.] 76 P. 863.

Held not within the statute: Merely making a contract with a resident company for the sale by it of cement made by a foreign corporation, no sales being made. Commercial Wood & Cement Co. v. Northampton Portland Cement Co., 87 App. Div. 633, 84 N. Y. S. 38. Making of contract and bond by foreign book corporation with State Text-Book Commission held not a doing of business prohibited by Kansas statutes. The text-book law invites foreign corporations to bid for such contracts. State v. American Book Co. [Kan.] 76 P. 411. The mere taking of a note in Pennsylvania by a North Carolina corporation which had not complied with Pennsylvania statutes, while an act of business, was held not a transaction prohibited and declared void in Pennsylvania so as to be unenforceable in New Jersey. Alleghany Co. v. Allen, 69 N. J. Law, 270, 55 A. 724. The fact that a corporation engaged exclusively in selling goods in foreign countries maintained headquarters in New York did not change the nature of the business from one essentially foreign to one transacted in the state, so as to make it liable to a license tax on its capital, there being actually no capital employed in New York. People v. Miller, 90 App. Div. 545, 85 N. Y. S. 849. See Licenses, 2 Curr. L. 730; Taxes, 2 Curr. L. 1786. An agent of a foreign corporation had an office in New York, but did not have exclusive control of its business, kept no accounts, and made no sales, simply reporting business to the home office in Philadelphia. A carload of coal, first sold to a nonresident and refused, was then sold to a resident. Held, the corporation was not doing business in the state, and could recover for the coal, though it had not complied with statutory conditions. Penn Collieries Co. v. McKeever, 93 App. Div. 303, 87 N. Y. S. 869. A corporation chartered in New Jersey to transport and mine coal is not "doing business" in Pennsylvania, within the latter's statutes, by making a loan in that state; and it may foreclose a mortgage therein without performing the statutory conditions for doing business in the state. New York & S. Const. Co. v. Winton, 208 Pa. 467, 57 A. 955. Purchase of note or mortgage is not doing business in the state so that failure to file copy of articles and appoint agent for service of process would bar suit thereon under Laws 1899, p. 100, c. 58. Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572, 73 P. 680. Passively continuing to hold liens or titles acquired previous to the enactment of a regulating statute held not prohibited thereby [Rev. St. 1898, § 1770B]. Chicago Title & Trust Co. v. Bashford [Wis.] 97 N. W. 940. Nor prosecuting suit to enforce such liens. Id. Where rights were vested previous to prohibitory statutes, the mere succession thereto by a corporation formed by the consolidation of two others was no violation of such statutes. Id.

Note: In the case of John Deere Plow Co. v. Wyland [Kan.] 76 P. 863, the court takes an extreme position in construing the statute as applying to corporations engaged wholly in interstate commerce. By the great weight of authority "doing business in the state," within the meaning of the state statutes regarding foreign corporations, does not include the transaction of the business of interstate commerce. Cooper Mfg. Co. v. Ferguson, 113 U. S. 727. However, the court maintains that the restriction of the statute is laid not upon the doing of business, but upon the use of the local courts. That a state can lawfully make such restrictions upon foreign corporations not engaged in interstate commerce is not to be denied. To the contrary, foreign corporations cannot be excluded from suing in the state courts upon transactions of interstate

Isolated, independent transactions, incidentally necessary to the business of a foreign corporation as conducted at its domicile,[67] or single acts of business,[68] are held not to bring a corporation within the terms of such statutes; but a single transaction may constitute a doing of business in the state if it is of such a nature as to indicate a purpose to engage in business and make the state a part of the field of its corporate operations.[69]

The general law regulating foreign corporations does not apply to special kinds of corporations regulated by special statutes.[70]

Noncompliance; effect.[71]—Statutory disabilities for noncompliance with conditions can be enforced only by the state; but individuals may plead them in bar of actions brought against them.[72]

Contracts by foreign corporations who have not complied with statutory requirements are void[73] only if the statute so expressly provides;[74] but they are unenforceable in the state whose laws have been disregarded,[75] though they may be elsewhere enforced.[76] Compliance subsequent to the making of a contract may be sufficient to enable the corporation to perform it.[77] Noncompliance will not relieve the corporation from liability on a contract made by it.[78]

commerce. Cone Export & Com. Co. v. Poole, 41 S. C. 70; Miller v. Goodman, 91 Tex. 41; Pasteur Vaccine Co. v. Burkey, 22 Tex. Civ. App. 232, 54 S. W. 804; Gale Mfg. Co. v. Finkelstein, 22 Tex. Civ. App. 241, 54 S. W. 619; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28; Clark & M. Priv. Corp. § 845E; Cook, Corp. §§ 696-700. In Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611, it was held that a similar statute as applied to the facts in that case, did not interfere unlawfully with interstate commerce. But the decision rested upon the fact that the contract called for carrying on of business in Wisconsin, and it was left to chance whether the commerce should go outside of the state.—3 Mich. L. R. 72.

66. Statutes or decisions of particular locality cannot determine it. Frawley v. Pa. Casualty Co., 124 F. 259.

67. Gen. St. 1901, § 1283. Sigel-Campion Live Stock Commission Co. v. Haston [Kan.] 75 P. 1028.

68. The doing of a single act of business is not "carrying on" business within the meaning of the act of congress regulating foreign corporations in Indian Territory [Act Feb. 18, 1901, c. 379, § 4 (31 Stat. 795)]. Ammons v. Brunswick-Balke Collender Co. [Ind. T.] 82 S. W. 937 (with full discussion).

69. Taking of note for purchase price of machinery sold through salesman in Kansas. John Deere Plow Co. v. Wyland [Kan.] 76 P. 863.

70. Surety companies doing business in Indiana are governed by Burns' Rev. St. 1901, §§ 5480-5494, not by laws applicable to foreign corporations generally. Barricklow v. Stewart [Ind. App.] 68 N. E. 316. See Indemnity, 2 Curr. L. 298.

71. See 2 Curr. L. 42.

72. The duty of regulating foreign corporations rests upon the state; private individuals have no power to interfere, except to plead noncompliance with statutory conditions in bar of actions against them. State v. American Book Co. [Kan.] 76 P. 411. The fact that a corporation paid a license tax and received a certificate from the state after the time prescribed by the law could not be set up by a third party to defeat an action by the corporation. Only the state could object to the action on that ground. Dunbarton Flax Spinning Co. v. Greenwich & J. R. Co., 87 App. Div. 21, 13 Ann. Cas. 370, 83 N. Y. S. 1054.

73. Defendant association had not filed statement with secretary of state. Code 1896, § 1316. Held, bond and mortgage given it should be canceled. Hanchey v. Southern Home Bldg. & Loan Ass'n [Ala.] 37 So. 272.

74. Contracts made by a foreign corporation before it has complied with statutory requirements are not void or subject to cancellation at the suit of a party, unless the statute expressly so provides. Laws 1898, p. 27, c. 10, and Laws 1901, p. 233, c. 125 do not make such contracts void. Policy of similar statutes discussed and many authorities cited. State v. American Book Co. [Kan.] 76 P. 411; Hamilton v. Reeves & Co. [Kan.] 76 P. 418.

75. Laws 1899, p. 68, c. 69. Sherman Nursery Co. v. Aughenbaugh [Minn.] 100 N. W. 1101; United States Rubber Co. v. Butler Bros. Shoe Co., 132 F. 398. Contract made before procuring a certificate from the secretary of state nonenforceable under Gen. Corp. Law, § 15, as amended by Laws 1901, p. 1326, c. 538. South Amboy Terra Cotta Co. v. Poerschke, 90 N. Y. S. 333. Brewing company incorporated in Pennsylvania could not maintain action on sales in New Jersey prior to filing copy of charter, etc., with secretary of state, as required by P. L. 1896, p. 307, § 97, especially since Pennsylvania statutes contain same requirement as to foreign corporations doing business there [P. L. 1896. p. 308, § 101]. Wolf v. Lancaster [N. J. Law] 56 A. 172.

76. The laws of one state declaring that its courts will not enforce contracts there made, of a foreign corporation, which has not complied with its statutes, but not expressly declaring such contracts void, do not prevent enforcement by courts of another state. Contract made in New York by North Carolina corporation which had not complied with New York statutes enforced in

Though failure to comply with statutory conditions may deprive a corporation, under the statute, from maintaining an action on contract, it does not otherwise deprive it of the protection of the law.[79]

After a foreign corporation has complied with a judgment of a state court, excluding it from doing business in the state until it had performed the statutory conditions, the Federal supreme court will not review the judgment on a writ of error.[80]

RIGHT TO TRANSACT BUSINESS; COMITY.[81]

[SPECIAL ARTICLE.]

Although a corporation may have the power or capacity to act in another state or country than that by which it was created, it does not follow that it has the right to do so whether the other state or country consents or not. On the contrary, it is thoroughly well settled that a corporation created by one state or country cannot act in another state or country without the latter's consent, express or implied. If no constitutional provision is violated, a state may exclude a foreign corporation altogether, and refuse to recognize it at all, or it may impose any terms or conditions it may see fit on allowing it to do business within its limits.[82] In some of the cases it has been contended that it is contrary to public policy for one state to recognize a corporation created by the laws of another state, and to allow it to make contracts within its limits and to maintain actions in its courts, but the contrary is well settled. By the law of comity among nations, which prevails also as between the states, a corporation created by the laws of one state or country is permitted to do business and make contracts in another state or country, and to sue in its courts, unless there is some express statutory prohibition or unless the recognition of the corporation by such other state or country is contrary to its public policy, as established by the general course of its legislation or the adjudications of its courts. This law of comity is not a vague idea only, which the courts may regard or disregard as they may see fit, but is a part of the common law, and is obligatory to the courts. They are as much bound to give it effect as they are to give effect to any other rule of the common law.[83] In accordance with this doctrine, a corporation may go into an-

New Jersey. Alleghany Co. v. Allen, 69 N. J. Law 270, 55 A. 724.

77. When the corporation has complied with the provisions of the statute, it cannot be enjoined at the suit of the state from performing contracts made before its compliance with statutes. State v. American Book Co. [Kan.] 76 P. 411.

78. Barricklow v. Stewart [Ind. App.] 68 N. E. 316. A foreign corporation which has failed to obtain a license cannot assert lack of corporate capacity against one who has dealt with it as a corporation. Fisher v. Traders' Mut. Life Ins. Co. [N. C.] 48 S. E. 667.

79. Corporation, sued in tort for collision between one of its automobiles and plaintiff's vehicle, was not a trespasser, so that it could not plead contributory negligence though it had not filed a certificate as required by Laws 1901, p. 1327, c. 538, § 15. Bischoff v. Automobile Touring Co., 97 App. Div. 17, 89 N. Y. S. 594.

80. Even though that judgment has been pleaded in another similar suit in a state court as decisive of all or some of the issues involved. American Book Co. v. Kansas, 193 U. S. 49, 48 Law. Ed. 613.

81. From Clark & M. Corp. § 838.

82. Bank of Augusta v. Earle, 13 Pet. [U. S.] 519; Paul v. Virginia, 8 Wall. [U. S.] 168; Central R. & Banking Co. v. Carr, 76 Ala. 388; Utley v. Clark-Gardner Lode Min. Co., 4 Colo. 369; Western Union Tel. Co. v. Mayer, 28 Ohio St. 521; Demarest v. Flack, 128 N. Y. 205.

83. **United States:** Bank of Augusta v. Earle, 13 Pet. 619; Cowell v. Colo. Springs Co., 100 U. S. 55; American & Foreign Christian Union v. Yount, 101 U. S. 356.

Alabama: Hitchcock's Heirs & Adm'r v. U. S. Bank of Pa., 7 Ala. 386.

Delaware: Fidelity Ins., Trust & Safe-Deposit Co. v. Niven (Deringer's Adm'r v. Deringer's Adm'r) 6 Houst. 416, 1 Am. St. Rep. 150.

Florida: Duke v. Taylor, 37 Fla. 64, 53 Am. St. Rep. 232.

Georgia: Wood Hydraulic Hose Mfg. Co. v. King, 45 Ga. 34.

Illinois: Stevens v. Pratt, 101 Ill. 206; Reichwald v. Commercial Hotel Co., 106 Ill. 439; Saint Clara Female Academy v. Sullivan, 116 Ill. 375.

Indiana: Wright v. Bundy, 11 Ind. 398; Elston v. Piggott, 94 Ind. 17.

Kansas: Kansas City Bridge & Iron Co. v.

other state, if not prohibited by its constitution or statutes, and make any contract or acquire any property which is within the powers conferred upon it by its charter, and which a similar domestic corporation might make or acquire, and may, to the same extent as a domestic corporation, maintain actions to enforce its rights. And it is entitled, unless excluded by statute, to the benefit of all general laws of the state giving liens and providing remedies. Thus, a foreign corporation is entitled to the benefit of a statute giving any person a mechanic's lien, unless there is something to show an intention to exclude them.[84] The law of comity between states, however, does not require a state to allow a foreign corporation to do business or hold property within its limits, or require the courts to enforce its contracts made within the state, or otherwise recognize it, when to do so would either violate any express provision of the constitution or laws of the state, or be contrary to the principles of its common law, or contrary to its public policy as established or shown by the general course of its legislation or by the adjudications of its courts.[85] It has been held, therefore, that a foreign corporation will not be allowed to come into a state and exercise powers which, although conferred upon it by its charter, are denied by the laws or public policy of the state to its own corporations, and, if it attempts to do so, the courts must refuse to recognize it, or to enforce its contracts.[86] Nor will a foreign corporation be allowed to do business in a state where its law prohibits the formation of corporations of such a character or for such purposes.[87] An intention to exclude a foreign corporation, however, or to prohibit it from doing business and making contracts in a state, is not to be implied from the mere fact that the laws of the state do not provide for the formation of similar corporations, or from the fact that it permits corporations to be formed only under general laws.[88] The fact that the statutes of a foreign state authorize a building and

Wyandotte County Com'rs, 35 Kan. 557; State v. Topeka Water Co., 61 Kan. 547.

Kentucky: Lathrop v. Commercial Bank of Scioto, 8 Dana, 114, 33 Am. Dec. 481; Martin v. Mobile & Ohio R. Co., 7 Bush. 123.

Louisiana: Williamson v. Smoot, 7 Mart. 31, 34, 1 Cum. Cas. 32; Frazler v. Wilcox, 4 Rob. 517.

Maryland: Lycoming Fire Ins. Co. v. Langley, 62 Md. 196.

Massachusetts: Kennebec Co. v. Augusta Ins. & Banking Co., 6 Gray, 204; Hutchins v. New England Coal Min. Co., 4 Allen 580.

Michigan: Thompson v. Waters, 25 Mich. 214, 12 Am. Rep. 243.

Mississippi: Williams v. Creswell, 51 Miss. 817.

Missouri: Connecticut Mut. Life Ins. Co. v. Albert, 39 Mo. 181; Blair v. Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129; Ferguson v. Soden, 111 Mo. 208, 33 Am. St. Rep. 512.

Montana: King v. National Min. & Exploring Co., 4 Mont. 1; Garfield Min. & Mill. Co. v. Hammer, 6 Mont. 53, 65.

Nevada: State v. McCullough, 3 Nev. 202.

New York: Bard v. Poole, 12 N. Y. 495; Stoney v. American Life Ins. Co., 11 Paige, 635; Merrick v. Van Santvoord, 34 N. Y. 208; Mumford v. American Life Ins. & Trust Co., 4 N. Y. 463; Demarest v. Flack, 128 N. Y. 205, 15 Daly, 337; Lancaster v. Amsterdam Improvement Co., 140 N. Y. 576, 72 Hun, 18, 1 Keener's Cas. 522.

Ohio: Bank of Ashland v. Jones, 15 Ohio St. 145; Newburg Petroleum Co. v. Weare, 27 Ohio St. 343.

Rhode Island: Oakdale Mfg. Co. v. Garst, 18 R. I. 484, 49 Am. St. Rep. 784.

South Dakota: Wright v. Lee, 2 S. D. 596.

Tennessee: Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co., 11 Humph. 1, 53 Am. Dec. 742; Talmadge v. North American Coal & Transp. Co., 3 Head, 337; Lane v. Bank of West Tenn., 9 Heisk, 419.

Wisconsin: Connecticut Mut. Life Ins. Co. v. Cross, 18 Wis. 109.

84. Chapman v. Brewer, 43 Neb. 890, 47 Am. St. Rep. 779.

85. Land Grant R. & Trust Co. v. Coffey County Com'rs, 6 Kan. 245; Empire Mills v. Alston Grocery Co. [Tex.] 4 Willson, Civ. Cas. Ct. App. § 221, 15 S. W. 200, 505; Hazleton Boiler Co. v. Hazelton Tripod Boiler Co., 142 Ill. 494; Harding v. American Glucose Co., 182 Ill. 551, 635, 74 Am. St. Rep. 189, 228; Fowler v. Bell, 90 Tex. 150, 59 Am. St. Rep. 788.

86. Clarke v. Central R. & Banking Co., 50 F. 338; People v. Howard, 50 Mich. 239; United States Mortg. Co. v. Gross, 93 Ill. 483; Carroll v. East St. Louis, 67 Ill. 568, 16 Am. Rep. 632; Stevens v. Pratt, 101 Ill. 206; Fowler v. Bell, 90 Tex. 150, 59 Am. St. Rep. 788; Toomey v. Supreme Lodge Knights of Pythias of the World, 74 Mo. App. 507; Falls v. U. S. Sav. Loan & Bldg. Co., 97 Ala. 417, 38 Am. St. Rep. 194; Empire Mills v. Alston Grocery Co. [Tex.] 4 Willson, Civ. Cas. Ct. App. § 221, 15 S. W. 200, 505; White v. Howard, 46 N. Y. 144.

87. Empire Mills v. Alston Grocery Co. [Tex.] 4 Willson, Civ. Cas. Ct. App. § 221, 15 S. W. 200, 505; Land Grant R. & Trust Co. v. Coffey County Com'rs, 6 Kan. 245; Carroll v. East St. Louis, 67 Ill. 568, 16 Am. Rep. 532.

loan association organized thereunder to have a larger capitalization than is permitted domestic associations does not make it contrary to public policy to admit the foreign association.[89] The law of comity does not allow one state to create and send forth corporations into other states to do business there, when the state creating them will not allow them to do business within its own boundaries. Where a corporation, therefore, was created by the laws of Pennsylvania, and its charter provided that it might do business anywhere "except in the state of Pennsylvania," it was held by the Kansas court that it could not do business in that state.[90] A comity between states does not require the courts of a state to recognize as valid a corporation formed by its citizens in another state, either in evasion or fraud of its own laws, or in fraud of the laws of the other state.[91] Whether such a step is a fraud upon the laws of either state depends upon the circumstances. According to the better opinion, the mere fact that the citizens of a state go into another state and form a corporation under its laws for the purpose of doing business as a foreign corporation in the state in which they reside, instead of incorporating under the laws of the latter state, does not of itself render the incorporation a fraud upon or evasion of the laws of either state, and is no ground for refusal to recognize the corporation and allow it to do business, like any other foreign corporation, in the state in which the corporators reside.[92] The question whether a corporation was formed in fraud or evasion of the laws of the state in which it was organized or of another state in which it seeks to do business, is a question of law for the court, and not a question of fact to be submitted to a jury.[93]

§ 2. *Powers.*[94]—Subject to the limitation that foreign corporations cannot do acts forbidden by law to citizens of the state engaged in similar business,[95] the powers of a foreign corporation are to be determined by the law of the state under which it was organized,[96] and which conferred its charter.[97] Statutes authorizing domestic corporations to exercise certain rights,[98] or providing for the dissolution of domestic corporations,[99] do not apply to foreign corporations.

88. Calwell v. Colo. Springs Co., 100 U. S. 55; Stevens v. Pratt, 101 Ill. 206.

89. MacMurray v. Sidwell, 155 Ind. 560.

90. Land Grant R. & Trust Co. v. Coffey County Com'rs, 6 Kan. 245.

91. Demarest v. Flack, 128 N. Y. 205; Merrick v. Brainard, 38 Barb. [N. Y.] 574; Hill v. Beach, 12 N. J. Eq. 31; Cleaton v. Emery, 49 Mo. App. 345; Carroll v. East St. Louis, 67 Ill. 568, 16 Am. Rep. 632; Land Grant R. & Trust Co. v. Coffey County Com'rs, 6 Kan. 245; Empire Mills v. Alston Grocery Co. [Tex.] 4 Willson, Civ. Cas. Ct. App. § 221, 15 S. W. 200, 505.

92. Demarest v. Flack, 128 N. Y. 205; Lancaster v. Amsterdam Improvement Co., 140 N. Y. 576, 72 Hun, 18, 1 Keener's Cas. 522; Oakdale Mfg. Co. v. Garst, 18 R. I. 484, 49 Am. St. Rep. 784; State v. Topeka Water Co., 61 Kan. 547. Compare, however, Hill v. Beach, 12 N. J. Eq. 31.

93. Demarest v. Flack, 128 N. Y. 205.

94. See 2 Curr. L. 43.

95. Skinner v. Southern Home Bldg. & Loan Ass'n [Fla.] 35 So. 67.

96. A resident of New York, dealing there with an Ohio corporation held not chargeable with knowledge of Ohio law. McVity v. Albro Co., 90 App. Div. 109, 86 N. Y. S. 144. The incorporation of a foreign corporation and its capacity to sue is settled, and must be proven by the laws of the state or country creating the corporation. Testimony of experts in German law as to incorporation of complainant, a German corporation, held to make a prima facie case. Badische Anilin & Soda Fabrik v. Klipstein & Co., 125 F. 543. It is proper for a foreign corporation, raising the defense of ultra vires, when sued on a contract, to plead the foreign statute under which it was created, to show its powers and limitations. Mason v. Standard Distilling & Distributing Co., 85 App. Div. 520, 13 Ann. Cas. 264, 83 N. Y. S. 343.

97. A New Jersey corporation organized under general laws and not under the gas act of New Jersey cannot engage in the business of manufacturing and selling gas in the state of Washington. Seattle Gas & Elec. Co. v. Citizens' Light & Power Co., 123 F. 588.

98. Statutes authorizing domestic mining corporations to exercise the right of eminent domain do not apply to similar foreign corporations. Chestatee Pyrites Co. v. Cavenders Creek Gold Min. Co., 119 Ga. 354, 46 S. E. 422.

99. Massachusetts statutes continuing the existence of a corporation for the purpose of settling its affairs three years after its dissolution do not apply to foreign corporations. Olds v. City Trust, Safe Deposit & Surety Co., 185 Mass. 500, 70 N. E. 1022. Whether a foreign corporation has been legally dissolv-

While the authority of a corporation to do certain acts can as a rule be questioned only by the state, yet where a foreign corporation seeks to divest title of an individual to property, the individual may deny corporate capacity to hold the property as a defense.[1]

The validity of a contract of a foreign corporation is determined by the law of the place where it was made,[2] not by its charter.[3]

§ 3. *Actions by and against; jurisdiction of courts*[4]*—Right to sue.*—A corporation, not exercising its corporate franchise in a foreign state, may sue in its courts, by virtue of comity,[5] without complying with statutory conditions imposed on foreign corporations engaged in business in the state.[6] But a foreign corporation which has subjected itself to the laws of a state by engaging in business therein must comply with such laws before it can maintain an action in the courts of the state.[7] For this purpose, compliance at any time before commencement of the action,[8] or before trial[9] is usually, though not everywhere,[10] held sufficient.

In New York, compliance with statutory conditions must be alleged in the complaint;[11] in Kansas, this is held to be matter of defense,[12] and defendant, asserting noncompliance, has the burden of proof on that issue.[13]

Liability to be sued.[14]—In New York, if jurisdiction is secured in the man-

ed must be determined by reference to the laws of the state where the dissolution was decreed and the jurisdiction of the court rendering the decree. Id.

1. Capacity of Kansas corporation, organized to deal in Oklahoma lands, to hold lands in Oklahoma may be there questioned by one whose title the corporation seeks to divest. Myatt v. Ponca City Land & Improvement Co. [Okl.] 78 P. 185.

2. Release of stock subscription to West Virginia corporation held valid under Kentucky laws, the corporation being engaged in business in the latter state. Scottish Security Co.'s Receiver v. Starks, 25 Ky. L. R. 1722, 78 S. W. 455.

3. Skinner v. Southern Home Bldg. & Loan Ass'n [Fla.] 35 So. 67.

4. See 2 Curr. L. 44, 45, 46. For extended note on "Jurisdiction of Foreign Corporations," see Abbeville Elec. Light & Power Co. v. Western Electrical Supply Co. [S. C.] 85 Am. St. Rep. 905.

5. New Jersey corporation permitted to foreclose a mortgage in Pennsylvania. New York & S. Const. Co. v. Winton, 208 Pa. 467, 57 A. 955.

6. The bringing of an action on a negotiable instrument is not doing business in the state so as to require a compliance with statutory conditions, and such action may be maintained by a foreign corporation, just as by a domestic concern [Code Civ. Proc. § 1779]. Citizens' State Bank v. Cowles, 89 App. Div. 281, 86 N. Y. S. 38. Foreign corporation may sue to foreclose mortgage in Nebraska, though it has not filed copy of charter in accordance with Comp. St. 1901, p. 433, c. 16, § 215. Holt v. Rust-Owen Lumber Co., 2 Neb. Unoff. 170, 96 N. W. 613. A foreign corporation may sue to enforce claims against citizens of Minnesota without complying with Laws 1899, p. 68, c. 69, which apply only to corporations doing, or intending to do business in the state. National Life & Trust Co. v. Gifford, 90 Minn. 358, 96 N. W. 919.

7. See ante, § 1. "Noncompliance; effect." An action by a foreign corporation will not be dismissed because of technical insufficiency of compliance, when an honest effort to comply with law has been made. Jordon v. Western Union Tel. Co. [Kan.] 76 P. 396.

8. Chattel mortgage enforced when foreign corporation had complied with Laws 1901, p. 233, c. 125 before bringing action. Hamilton v. Reeves & Co. [Kan.] 76 P. 418. Suit may be maintained by a foreign corporation on a contract made before act of Feb. 16, 1899, providing that contracts previously made shall be valid on complying with its provisions within nlnety days, where the statutory requirements were met before suit was brought, but not within ninety days after passage of the act. Sutherland-Innes Co. v. Chaney [Ark.] 80 S. W. 152. Foreign corporation permitted to recover for goods sold by agent before filing of certificate, such certificate being filed before the order was sent in or the goods delivered. Lewis Pub. Co. v. Palmer, 84 N. Y. S. 141.

9. Obtaining required certificate from secretary of state before trial, but after commencement of the suit, was sufficient compliance with statute to permit maintenance of suit. Creelman Lumber Co. v. De Lisle [Mo. App.] 82 S. W. 205.

10. Compliance before commencement of suit unavailing. South Amboy Terra Cotta Co. v. Poerschke, 90 N. Y. S. 333.

11. Complaint in action on sales in the state demurrable, the procuring of a certificate from secretary of state not being alleged [Laws 1892, p. 1805, c. 687, as amended by Laws 1901, p. 1364, c. 558]. Welsbach Co. v. Norwich Gas & Elec. Co., 96 App. Div. 52, 89 N. Y. S. 284.

12. Petition showed plaintiff to be a foreign corporation. Jordon v. Western Union Tel. Co. [Kan.] 76 P. 396.

13. Must prove that foreign corporation has not filed with secretary of state papers required by Gen. St. 1901, § 1283. Osborne & Co. v. Shilling [Kan.] 74 P. 609.

14. Note: Statutes in general terms authorizing suits against, or service of process upon, corporations, have in some instances

ner prescribed by statute, an action against a foreign corporation may be maintained by a resident on any cause of action,[15] and by a nonresident if the cause of action arose in the state.[16] A nonresident may sue a foreign corporation, in Texas, if the corporation is engaged in business in the state;[17] in North Carolina, if the cause of action arose in the state.[18]

Jurisdiction of courts over subject matter.[19]—Courts have no jurisdiction to compel, by mandamus, an inspection of the books and records of a foreign corporation, on application of a stockholder.[20] The courts of a state have jurisdiction over the property of a foreign corporation situated therein,[21] and, upon the necessary showing, may appoint a receiver for such property;[22] but a court will not appoint a receiver of a foreign corporation whose domicile and property are both without the jurisdiction.[23] Though a court has obtained jurisdiction, by appearance, of a corporation having no property in the state and transacting no business therein, it will not enter a decree which it cannot enforce against it.[24]

The liability of directors of a foreign corporation doing business in New York may be enforced in the courts of that state.[25]

been construed as applying to domestic corporations only. People v. Judge of Wayne Circuit Court, 24 Mich. 38. The decided weight of authority now declares otherwise, and maintains that such general statutes apply not only to domestic corporations but also to foreign corporations doing business within the state, and having officers or agents therein, upon whom service may be made. Eagle L. Ass'n v. Redden, 121 Ala. 346, 25 So. 779; Sill v. Bank of U. S., 5 Conn. 102; Gross v. Nichols, 72 Iowa, 239, 33 N. W. 653; Chicago, etc., R. Co. v. Manning, 23 Neb. 552, 37 N. W. 462; Societe Fonciere, etc., v. Milliken, 135 U. S. 304, 10 S. Ct. 823.—From extended note on "Jurisdiction of Foreign Corporations," in Abbeville, Elec. Light & Power Co. v. Western Electrical Supply Co. [S. C.] 85 Am. St. Rep. 905.

15. If on a cause of action arising outside the state, papers on which order for publication is sought must show that plaintiff is a resident [Code Civ. Proc. § 1780]. Haight v. Le Foncier De France et Des Colonies, 84 N. Y. S. 135.

16. Attachment against foreign corporation invalid because moving papers did not show plaintiff a resident, or that cause arose in state. Coolidge v. American Realty Co., 91 App. Div. 14, 86 N. Y. S. 318. Jurisdiction can only be secured in the manner prescribed by statute. Id. A foreign corporation held its meetings in New York, and defendant held certain stock as trustee for plaintiff. Held, plaintiff may maintain suit in New York to enjoin defendant from voting or transferring the stock, until plaintiff's claim as to ownership of the stock could be litigated. Harper v. Smith, 93 App. Div. 608, 87 N. Y. S. 516. Foreign corporation, holding meetings in New York cannot, under Code Civ. Proc. § 1780, be enjoined at instance of a nonresident from receiving or recognizing a vote of stock of a certain third person. Id.

17. Action in personam. Western Union Tel. Co. v. Shaw [Tex. Civ. App.] 77 S. W. 433. Resident of Indian Territory injured in the territory, may sue railway doing business in Texas in the courts of that state. St. Louis & S. F. R. Co. v. Smith [Tex. Civ. App.] 79 S. W. 340. See, also, Atchison, etc., R. Co. v. Keller [Tex. Civ. App.] 76 S. W. 801.

18. Code, § 194 (2). Bryan v. Western Union Tel. Co., 133 N. C. 603, 45 S. E. 938.

19. See 2 Curr. L. 44.

20. A New Jersey corporation, doing business and having its records in Texas, can be compelled to produce them only by courts of New Jersey. Mitchell v. Northern Security Oil & Transportation Co., 44 Misc. 514, 90 N. Y. S. 60.

21. Their determination of rights relating to such property is binding on the corporation, thought there has been no service of process on it in the jurisdiction, if the statutory notice (Pub. St. 1901, c. 219, § 9) has been given. Suit by stockholders. Kidd v. New Hampshire Traction Co., 72 N. H. 273, 56 A. 465. Stocks and bonds fraudulently transferred by a foreign to a domestic corporation, and the right of action of a foreign against a domestic corporation, held property of the foreign corporation within the jurisdiction of the state. Id.

22. New York courts will, under certain circumstances, appoint a receiver of the property of a foreign corporation when necessary to protect creditors or stockholders; but misconduct of directors or officers is not a ground for such action. Phillips v. Sonora Copper Co., 90 App. Div. 140, 86 N. Y. S. 200.

23. As to domestic lands, complainants had an adequate remedy at law and so were not entitled to the appointment of a receiver. American Tribune New Colony Co. v. Schuler [Tex. Civ. App.] 79 S. W. 370.

24. Court refused to continue an injunction against New Jersey and Louisiana corporations, restraining them from in any manner recognizing a cancellation of a lease; especially since plaintiff had commenced another action for a receiver in the Federal court. Jacobs v. Mexican Sugar Refining Co., 44 Misc. 409, 89 N. Y. S. 1000.

25. A director of a foreign corporation may, in the state in which such corporation has its principal office and is engaged in business, maintain an action for an accounting against other directors or officers of the corporation. New York statute (Code Civ. Proc. § 1782) providing for such actions, ap-

Service of process.[26]—Service of process on foreign corporations must be in the manner provided by statute.[27] If two methods are prescribed service by either is sufficient.[28] Service of process on an agent is service on the foreign corporation only when the latter has an office or property in the state,[29] and is engaged in business therein,[30] and the agent served has authority in law to receive process,[31] and

ply alike to domestic and foreign corporations. Miller v. Quincy [N. Y.] 72 N. E. 116. New Jersey statutes making directors liable to the corporation for dividends unlawfully paid out of the capital stock cannot be enforced in New York, where the New Jersey corporation is engaged in business, since the liability is not contractual, and does not grow out of common law principles. Hutchinson v. Stadler, 85 App. Div. 424, 83 N. Y. S. 509. But such a liability may be enforced under similar New York laws, by virtue of the New York statute providing that a foreign corporation, engaged in business in that state, may enforce such liability against its directors to the same extent as it could be enforced against directors of a domestic corporation. Id.

26. See 2 Curr. L. 49.

27. Summons not served in accordance with P. L. 1903, p. 255, § 17; no jurisdiction acquired. Roake v. Pennsylvania R. Co. [N. J. Law] 57 A. 160. Where petition described defendant as a New York corporation, and the sheriff undertook to serve the writ as upon a foreign corporation, his return need not describe defendant as a foreign corporation. Newcomb v. New York, etc., R. Co. [Mo.] 81 S. W. 1069. Where service of process is by a trick, the court does not acquire jurisdiction. Frawley v. Pennsylvania Casualty Co., 124 F. 259.

28. Service of process on a foreign fraternal beneficial association may be either on a local agent under general laws regulating service on foreign corporations, or the insurance commissioner, under Laws 1899, p. 195, c. 115. Bankers' Union of the World v. Nabors [Tex. Civ. App.] 81 S. W. 91. Under Pub. Laws 1901, p. 66, c. 5, providing for service on the secretary of the corporation commission, when a foreign corporation doing business in the state has no agent therein for service of process, and acts 1899, p. 175, c. 54, § 64, relating to foreign insurance companies, service on a foreign insurance company may be by service on the secretary of the corporation commission or on the insurance commissioner. Fisher v. Traders' Mut. Life Ins. Co. [N. C.] 48 S. E. 667.

29. Under Code Civ. Proc. § 432, subd. 3, service upon an officer or managing agent is authorized only when the corporation has property in the state. Fontana v. Post Print. & Pub. Co., 87 App. Div. 233, 84 N. Y. S. 308.

30. Central Grain & Stock Exch. of Hammond v. Board of Trade of Chicago [C. C. A.] 125 F. 463. Service on the president of an Illinois corporation, who was temporarily in Iowa attempting to settle the difference, was not valid service on the corporation, when it had no property, office or agency in Iowa, and did no business there. Louden Machinery Co. v. American Malleable Iron Co., 127 F. 1008. Service on assistant secretary, resident in Pennsylvania, of a Virginia railway corporation, was not service on the latter so as to give Federal court for Pennsylvania jurisdiction; it being held that such corporation was not doing business in Pennsylvania. Earle v. Chesapeake & O. R. Co., 127 F. 235. Pennsylvania casualty company negotiated, by mail, four policies in Wisconsin, the business connected therewith being all done at home office. Held, not a sufficient transaction of business in Wisconsin. Frawley v. Pennsylvania Casualty Co., 124 F. 259. Jurisdiction of a foreign corporation cannot be acquired by service of process on agents or officers in a state in which the corporation has no office and transacts no business. Martin v. New Trinidad Lake Asphalt Co., 130 F. 394. Where a corporation had made a number of sales in Connecticut, besides the contract in issue, it was held to be doing business in that state, though it had no permanent office or agent there, so that service on an authorized agent in the state on business of the corporation gave the court jurisdiction. New Haven Pulp & Board Co. v. Downingtown Mfg. Co., 130 F. 605. Railway corporation was not doing business in the state by maintaining an agent there to advertise the advantages of the road. Rich v. Chicago, etc., R. Co., 34 Wash. 14, 74 P. 1008. Service of subpoena on vice president of foreign corporation, casually in the state on private business, ineffective to give jurisdiction; being harmless, motion to set service aside denied. Puster v. Parker Mercantile Co., 64 N. J. Eq. 599, 55 A. 817. An agent having only such powers as the statute requires to be conferred on him by a foreign corporation, as a condition upon which it may do business in the state, cannot accept service for the corporation in any action not concerning its property in the state, or business or transactions therein. Thus foreign corporation could not be brought to Washington, by such service, to respond to personal injury action. Olson v. Buffalo Hump Min. Co., 130 F. 1017.

31. Central Grain & Stock Exch. v. Board of Trade of Chicago [C. C. A.] 125 F. 463. A plea in abatement to quash service on ground that person served had no authority must allege lack of such authority at the time of service. Scott v. Stockholders' Oil Co., 129 F. 615. Where service on a foreign corporation was on an alleged resident agent, a plea in abatement, by the person served, alleging the corporation had no resident agent on which service could be made, was insufficient, since it showed on its face that it was made without authority. Id.

Service on agent held sufficient: Service on qualified agent, temporarily in the state on business of the corporation. New Haven Pulp & Board Co. v. Downingtown Mfg. Co., 130 F. 605. New York mining corporation, maintaining its principal office in Washington, deemed to have consented to be bound by Washington statute requiring foreign corporations to have resident agents on

service is at the corporation's place of business.[32] A corporation cannot defeat service upon it by service on a state auditor, as provided by statute, by removing its agents and business from the state.[33] A foreign corporation may, by laches and acquiescence in service, be barred from setting up its invalidity.[34]

Venue.[35]—A foreign corporation which has rendered itself subject to the jurisdiction of the court by appearing may plead its privilege of being sued in the proper county.[36] In Florida, suit against a foreign corporation may be instituted in any county where it maintains an agent or representative.[37]

Removal of causes.[38]—Compliance with statutory requirements by a foreign corporation does not make it a domestic corporation so as to deprive it of the right to remove a suit against it to the Federal courts.[39]

Limitations.—The right to avail of limitations is admitted by some and denied by some states.[40] Where a corporation sets up limitations, it must affirma-

whom service of process may be made; and service on secretary at such office conferred jurisdiction in Wasbington to enforce liability for negligence in Idaho. Smith v. Empire State-Idaho Min. & Development Co., 127 F. 462. Massachusetts statute (Rev. Laws Mass. c. 170, §§ 2, 3), authorizing service of writ in a cross action, on the attorney of a nonresident appearing in the state to prosecute the original action, is applicable to the case of a foreign corporation appearing to prosecute an action in the Federal court. Arkwright Mills v. Aultman & Taylor Machinery Co., 128 F. 195. Where a foreign corporation does business in the state through another corporation, the latter may be served with process as the agent of the foreign corporation. Under Rev. St. 1899, § 570. Newcomb v. New York, etc., R. Co. [Mo.] 81 S. W. 1069. President of local lodge of fraternal association held "local agent" of the association within the meaning of a statute permitting service of process on local agents of foreign corporations. Bankers' Union of the World v. Nabors [Tex. Civ. App.] 81 S. W. 91. Return showing service on "vice-president and managing agent" of foreign corporation sufficient under B. & C. Comp. § 55, when person served was in fact resident managing agent. Coast Land Co. v. Oregon Pac. Colonization Co., 44 Or. 483, 75 P. 884.

Held insufficient: A traveling agent, in the state soliciting advertisements for McClure's magazine is not transacting the business of the McClure Co. so that service upon him is service on the corporation, under Minnesota statutes. Boardman v. McClure Co., 123 F. 614. Bank cashier collecting one renewal premium for Pennsylvania Casualty Co. was not authorized. Wisconsin agent to receive process, notwithstanding Rev. St. Wis. 1898, §§ 2637, 1977. Frawley v. Pennsylvania Casualty Co., 124 F. 259. A traveling salesman and solicitor for a certain territory in Missouri of a foreign portrait concern held not an agent to receive process for the corporation under Missouri statutes. Strain v. Chicago Portrait Co., 126 F. 831. An agent authorized to solicit advertising for a foreign publisher was not a managing agent authorized to receive process, within Code Civ. Proc. § 432. Fontana v. Post Print. & Pub. Co., 87 App. Div. 233, 84 N. Y. S. 308. Under Rev. St. 1895, art. 1223, providing for service of process on officers, general manager, or "any local agent," service on "an agent for the state" was not valid. Western Cottage Piano & Organ Co. v. Anderson [Tex.] 79 S. W. 516. A mere advertising agent for a foreign railway corporation with no power to sell tickets, make rates, or otherwise obligate the company, could not receive process for it. Rich v. Chicago, etc., R. Co., 34 Wash. 14, 74 P. 1008.

32. A return showing service on an agent not at the place of business held insufficient. Newcomb v. New York, etc., R. Co. [Mo.] 81 S. W. 1069.

33. Arkansas statute (Acts 1901, p. 52, § 1), providing for service of process against foreign corporations by service on the state auditor, is constitutional as to causes of action accruing while the corporation was doing business in the state after the passage of the act. Davis v. Kansas & Tex. Coal Co., 129 F. 149.

34. Where corporation knew of service and thereafter attempted to arrange differences with plaintiff, and moved to vacate the decree for invalidity of service four months thereafter, it was held barred by laches. Coast Land Co. v. Oregon Pac. Colonization Co., 44 Or. 483, 75 P. 884.

35. See 2 Curr. L. 47.

36. Where a foreign and a domestic railway corporation were co-defendants, they could not, against objection, be sued in a county in which neither had a line of railroad. Atchison, etc., R. Co. v. Forbis [Tex. Civ. App.] 79 S. W. 1074.

37. Rev. St. 1892, § 1001. Hocker v. Western Union Tel. Co. [Fla.] 34 So. 901.

38. See 2 Curr. L. 48.

39. Under Ky. St. 1903, § 841. Illinois Cent. R. Co. v. Hibbs, 25 Ky. L. R. 1899, 78 S. W. 1116. But even under former holding, in Kentucky (see Davis' Adm'r v. Chesapeake & O. R. Co., 24 Ky. L. R. 1125, 70 S. W. 857), compliance with statutory requirements must appear in the record in order to defeat the right of removal (Illinois Cent. R. Co. v. Hibbs, 25 Ky. L. R. 1899, 78 S. W. 1116).

40. Admitted in Nebraska and Iowa. Taylor v. Union Pac. R. Co., 123 F. 155. Denied in Kansas. Williams v. Metropolitan St. R. Co. [Kan.] 74 P. 600. If the right be claimed in respect of a cause of action of foreign origin, but transitory nature, the limitation of the forum applies, and where the law of the forum attaches the same limitation to foreign causes of action as that

tively plead and prove that during the period it maintained an agent in the state on whom process could be served.[41] The New York statute providing that actions to enforce common law or statutory liabilities of directors or stockholders of a moneyed corporation must be brought within three years applies to actions of that character brought in the state against directors or stockholders of foreign corporations.[42]

FOREIGN JUDGMENTS.[43]

§ 1. Recognition and Mode of Proving (1466).
§ 2. Matters Adjudicated and Concluded by Foreign Judgments (1467).
§ 3. Actions on Foreign Judgments (1467).

§ 1. *Recognition and mode of proving.*[44]—The full faith and credit clause of the constitution and Federal statutes in pursuance thereof[45] establish a rule of evidence rather than one of jurisdiction.[46] In this sense, foreign judgments are entitled to the same faith and credit given them in the state where rendered,[47] and the presumptions indulged in support of judgments of courts of record are applicable to foreign as well as domestic judgments.[48] So when proper copies of the

of the place of origin, it will be so applied in favor of the foreign corporation provided the foreign state is one which permits foreign corporations to plead the bar. Accident occurred in Iowa (2 years bar) was sued on in Nebraska (4 years bar) and law of Iowa was applied in favor of foreign corporation defendant. Taylor v. Union Pac. R. Co., 123 F. 155.

41. Taylor v. Union Pac. R. Co., 123 F. 155.

42. Held, also, that a Kansas trust company was a "moneyed corporation" within the meaning of the statute [N. Y. Code Civ. Proc. § 394]. Platt v. Wilmot, 193 U. S. 602, 48 Law. Ed. 809. Held, further that the double liability of a stockholder of a corporation, while contractual in nature, is a common law or statutory liability within the meaning of this statute; and the action to enforce it is therefor controlled by § 394, and not by § 382. Id.

43. See, also, Judgments, 2 Curr. L. 581; Former Adjudication, 3 Curr. L. 1476, and Divorce, 3 Curr. L. —- (foreign divorce).

44. See 2 Curr. L. 50.

NOTE. Conclusiveness of judgment rendered in foreign country: It is held in Hilton v. Guyot, 159 U. S. 113, 40 Law. Ed. 95 (opinion by Mr. Justice Gray) that an executory judgment rendered in a foreign country—France—in favor of a citizen or resident thereof against a foreigner is not in all cases conclusive against the latter in an action brought in his own country to enforce the judgment. The rule of reciprocity, as a part of international law, is adopted with respect to foreign judgments: that the same effect only should be given them as the courts of the foreign country allow to judgments of the country where the judgment in question is sought to be executed. Hence the case holds that a judgment rendered in France against a citizen of this country is only prima facie evidence of the justice of plaintiff's claim, in the absence of any statute or treaty on the subject, when suit is brought in this country, since by the laws of France, judgments of other countries are reviewable on the merits. The authorities are reviewed in an elaborate opinion. See, also, notes on the subject in Dunstan v. Higgins [N. Y.] 20 L. R. A. 668, and Brown v. Fielding [Conn.] 32 L. R. A. 236.

45. Const. U. S. art. 4, § 1, and Rev. St. § 905 [U. S. Comp. St. 1901, p. 677].

Note: See Monograph on "full faith, and credit" clause in IV. Colum. L. R. 470.

46. **Note:** While they make the record of a judgment rendered after due notice in one state conclusive evidence in the courts of another state or the United States of the matter adjudged, they do not affect the jurisdiction. A judgment rendered in one state does not carry with it, in another state, the efficacy of a judgment upon property or person, to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there, and can only be executed in the latter as its law may permit. The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it, and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of examining into the validity of the claim), from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it. Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 32 Law. Ed. 239. Thus the court will determine whether the claim is of a civil or criminal nature, since a judgment for a penalty is not enforced extraterritorially. Israel v. Israel, 130 F. 237.

47. A duly exemplified copy of an unsigned judgment rendered in Illinois held competent evidence in New York. Waters v. Spencer, 44 Misc. 15, 89 N. Y. S. 693.

48. Collins v. Maude [Cal.] 77 P. 945. The doctrine that the presumptions are that a court of general jurisdiction had jurisdiction in a given case, when the record does not disclose a lack thereof, and that a judgment in such case cannot be collaterally attacked, applies to foreign judgments. "Full faith and credit" clause of constitution, and Code Civ. Proc. Cal. § 1963, subd. 16, applied.

judgment records are produced, it is presumed that the foreign court, if one of general jurisdiction, had jurisdiction of the defendant.[49]

While the "full faith and credit" clause of the constitution does not require one state to enforce penal laws or police regulations of another state,[50] yet a judgment for a sum of money for a penalty prescribed by such laws is entitled to full faith and credit in a sister state,[51] though it is said that it cannot be made the basis of a claim in the Federal courts, not being a controversy of a civil nature.[52]

§ 2. *Matters adjudicated and concluded by foreign judgments.*[53]—Questions of fact or law determined by a foreign judgment cannot be re-examined in an action thereon,[54] but the defendant may show that the court rendering the judgment did not have jurisdiction of his person.[55] That the action in which a judgment was recovered was barred by the statute of limitations is no defense in an action on the judgment in another state.[56]

§ 3. *Actions on foreign judgments.*[57]—The lex fori governs as to procedure,[58] and the action may be barred by the limitation statute of the forum.[59] The existence of the judgment sued on must be established by a properly certified transcript.[60] Such a transcript is admissible in evidence, though it does not bear a revenue stamp.[61]

Whether a state court had jurisdiction of a foreign corporation in rendering a judgment against it is a Federal question, and in actions on such judgments in another state, the decisions of the United States supreme court, and not of the state court, must be followed.[62]

An action in debt may be maintained in one state to recover judgment on a decree for alimony rendered in a sister state,[63] though the sum adjudged is an accruing allowance.[64] So much of a claim for alimony as has been reduced to judg-

McHatton v. Rhodes, 143 Cal. 275, 76 P. 1036. See Judgments, 2 Curr. L. 581.

49. Johnston v. Mutual Reserve Fund Life Ins. Co., 43 Misc. 251, 87 N. Y. S. 438. Where records disclosed that foreign court had jurisdiction of defendant, the result was not affected by receiving evidence aliunde regarding jurisdiction, defendant having tendered that issue. Johnston v. Mutual Reserve Life Ins. Co., 90 N. Y. S. 539. That the facts adduced to prove jurisdiction were not required to be made a part of the record does not render them incompetent evidence. Johnston v. Mutual Reserve Fund Life Ins. Co., 43 Misc. 251, 87 N. Y. S. 438.

50. Schuler v. Schuler, 209 Ill. 522, 71 N. E. 16. Federal courts, also, take cognizance only of suits of a civil nature between citizens of different states. Israel v. Israel, 130 F. 237.

51. Schuler v. Schuler, 209 Ill. 522, 71 N. E. 16.

52. A decree for alimony is, however, not regarded as a cause of action of a criminal nature. Israel v. Israel, 130 F. 237.

53. See 2 Curr. L. 51.

54. Waters v. Spencer, 44 Misc. 15, 89 N. Y. S. 693.

55. In an action brought in Massachusetts on an Illinois judgment, defendant could show he was not served with process and did not authorize an appearance, and so defeat the action. Chicago Title & Trust Co. v. Smith, 185 Mass. 363, 70 N. E. 426. Art. 4, § 3, of the Federal constitution and Rev. St. § 905, are not violated by permitting defendant to show that a judgment was rendered without service on him, or an appearance authorized by him; since such a proceeding is wanting in due process of law. National Exch. Bank v. Wiley, 25 S. Ct. 70.

56. Tomlin v. Woods [Iowa] 101 N. W. 135.

57. See 2 Curr. L. 52.

58. Question of plaintiff's right to sue in his own name. Waters v. Spencer, 44 Misc. 15, 89 N. W. S. 693.

59. Action on foreign judgment in Illinois barred after five years from the time the right of action accrued. Schuler v. Schuler, 209 Ill. 522, 71 N. E. 16.

Note: A state has full power to fix the time within which a suit on a foreign judgment must be brought within the state. Bacon v. Howard, 20 How. [U. S.] 22, 15 Law. Ed. 811; Bank of Alabama v. Dalton, 9 How. [U. S.] 522, 13 Law. Ed. 242. The limitation statute of the forum, and not that of the place where the judgment was rendered, governs, in an action on the judgment. Fanton v. Middlebrook, 50 Conn. 44; Rice v. Moore, 48 Kan. 590, 30 P. 10, 16 L. R. A. 198; Miller v. Brenham, 68 N. Y. 83; Mowray v. Cheesman, 6 Gray [Mass.] 515.—From note to Brunswick Terminal Co. v. National Bank [U. S.] 48 L. R. A. 625.

60. Certificate held sufficient. Casety v. Jamison [Wash.] 77 P. 800.

61. Held properly attested. Tomlin v. Woods [Iowa] 101 N. W. 135.

62. Johnston v. Mutual Reserve Fund Life Ins. Co., 43 Misc. 251, 87 N. Y. S. 438.

63. Schuler v. Schuler, 209 Ill. 522, 71 N. E. 16.

64. Decree in equity rendered in Massachusetts for an accruing allowance for alimony enforced by court of law in Rhode

ment in a state court will be given full faith and credit in an action to enforce it in a Federal court,[65] and a claim for future alimony, not reduced to judgment, is a claim of a civil nature enforceable in Federal courts, if other jurisdictional facts exist.[66]

A plea in a suit to enjoin enforcement of a foreign judgment, that a statute of the foreign state affords an ample legal remedy, is unavailing without proof of the statute.[67]

FORESTRY AND TIMBER.

§ 1. Protection and Regulation of Forests and Trees (1468).
§ 2. Logs and Lumbering; Booms and Flotage (1468). Liens (1471).

§ 1. *Protection and regulation of forests and trees.*[68]—Statutes in some states provide for the protection and preservation of ornamental and shade trees in highways,[69] but such trees being private property, their preservation cannot be compelled except on compensation to the owner.[70]

Cutting timber growing on another's land is in some states prohibited under penalty.[71] Plaintiff's ownership and lack of consent,[72] defendant's complicity,[73] and either willfulness or recklessness[74] must be shown.

§ 2. *Logs and lumbering; booms and flotage.*[75]—Standing timber is a part of the realty.[76] Hence contracts conveying it must be executed with the same formalities required in the conveyance of real estate.[77] An attempted sale by parol amounts to a license,[78] and as such is revocable except in so far as it has been acted on.[79] The right to go on the land to fell trees and the payment of the purchase price do not operate as part performance of a parol contract for the sale of timber so as to take it out of the statute of frauds.[80]

Stumpage contracts, therefore are executory contracts for the sale of the timber after cutting, as personal property, coupled with a license to enter and cut.[81] A provision in such a permit that the grantor shall retain full and complete ownership and control of all the timber until a settlement shall be had and the agreed stump-

Island. Wagner v. Wagner [R. I.] 57 A. 1058.

65, 66. Israel v. Israel, 130 F. 237.

67. Weed v. Hunt [Vt.] 56 A. 980.

68. See 2 Curr. L. 52.

69. N. H. Laws 1901, p. 592, c. 98, provides for appointment of tree wardens, gives towns control over trees, and provides for their purchase or condemnation. Bigelow v. Whitcomb, 72 N. H. 473, 57 A. 680.

70. Action for penalty for removing trees designated for preservation (N. H. Laws 1901, p. 592, c. 98) cannot be maintained against landowner until he has been divested of title pursuant to such act. Bigelow v. Whitcomb, 72 N. H. 473, 57 A. 680.

71, 72. Therrell v. Ellis [Miss.] 35 So. 826.

73. Evidence insufficient to show that person doing cutting was defendant's agent. Therrell v. Ellis [Miss.] 35 So. 826.

74. Evidence insufficient to show recklessness or lack of proper precaution to determine boundaries of defendant's land. Therrell v. Ellis [Miss.] 35 So. 826.

75. See 2 Curr. L. 53.

76. Peshtigo Lumber Co. v. Ellis [Wis.] 100 N. W. 834; Mine La Motte Lead & Smelting Co. v. White [Mo. App.] 80 S. W. 356.

77. Peshtigo Lumber Co. v. Ellis [Wis.] 100 N. W. 834. In Missouri, memorandum of sale must be signed by owner or agent having written authority. Rev. St. 1899, § 3414. Memorandum insufficient. Mine La Motte Lead & Smelting Co. v. White [Mo. App.] 80 S. W. 356. A contract not under seal ordinarily will convey an equitable title only. General demurrer to complaint in action to establish equitable title in plaintiff properly sustained where contract time for cutting timber expired between commencement of suit and serving demurrer, since plaintiff's title was thereby divested and a judgment that it had existed would have benefitted no one. Peshtigo Lumber Co. v. Ellis [Wis.] 100 N. W. 834.

78. Welever v. Advance Shingle Co., 34 Wash. 331, 75 P. 863.

79. Even though a contract for the sale of standing timber, which is insufficient to pass title under the statute of frauds, may amount to a license, such license is revocable at any time in so far as it is unexecuted, though the licensee has expended money and labor in reliance thereon. Mine La Motte Lead & Smelting Co. v. White [Mo. App.] 80 S. W. 356.

80. Constructive possession held to have remained in vendor. Mine La Motte Lead & Smelting Co. v. White [Mo. App.] 80 S. W. 356.

81. Pierce v. Banton, 98 Me. 553, 57 A. 889.

age be paid amounts to a warranty of title on his part,[82] and one who represents to another that he owns standing timber and gives him a license to cut it is estopped to deny that he has title after the timber is cut.[83] One having a tax deed fair on its face of land from which timber is cut, and possession of lumber made therefrom, has sufficient title to maintain replevin therefor against a mere trespasser who takes possession of it.[84] In such case, the fact that the land was in possession of a stranger is immaterial.[85]

The timber must be cut and removed within the time fixed by contract,[86] but equity may relieve from a failure to do so on a proper showing, as where such action was prevented by the other party.[87] A conveyance of all the timber on a certain tract of land of and above a certain size when cut, which gives the purchaser a certain time in which to cut and remove the same, includes all timber attaining the specified size within such time.[88] In the absence of a local or general custom to the contrary, a contract for the sale of timber of and above a certain number of inches in diameter requires a measurement from outside to outside, including the bark,[89] and a standing tree must be measured at the stump.[90] An agreement that timber sold shall be measured by a certain rule will be enforced without regard to customary deviations therefrom.[91] Under a contract giving the purchaser a specified time in which to cut and remove the timber, the cutting need not be continuous.[92]

Under a contract for the sale of trees of specified sizes on a tract of land, those included to be ascertained by subsequent tests, the vendee takes title to no particular trees.[93]

On a sale of growing timber, if the purchase is per acre, a deficiency in the number of acres may be apportioned in the price, even though both parties have an equal opportunity to judge of the acreage and act in good faith.[94] If in such case a part of the purchase price is paid in advance and, on a survey in accordance with the terms of the contract, it appears that the price of the actual number of acres contained in the tract is less than the sum so paid, the vendee may recover the difference.[95]

82. Is assertion of title and as effectual to create warranty as actual possession. Pierce v. Banton, 98 Me. 553, 57 A. 889. In case the grantor has not good title and the logs are replevied by the true owner, the measure of damages is their value at the time when and the place where they were replevied, together with all costs to which the grantee was subjected in the replevin suit, less the stumpage price, with interest on the balance from the date of the taking. Id.

83. Welever v. Advance Shingle Co., 34 Wash. 331, 75 P. 863.

84. Evidence of invalidity of deed immaterial where defendant does not offer to connect himself with a superior title. Dresser v. Lemma [Wis.] 100 N. W. 844.

85. Dresser v. Lemma [Wis.] 100 N. W. 844.

86. Peshtigo Lumber Co. v. Eilis [Wis.] 100 N. W. 834.

87. Where plaintiff acquired equitable title to timber only and owner conveyed without reserving it, equity will not grant relief for failure to remove it within contract time on mere showing that subsequent purchaser of the land notified plaintiff not to cut roads or remove timber and that he would be held liable if he did so in the absence of a claim that the person giving the notice was an innocent purchaser or falsely represented himself to be. Peshtigo Lumber Co. v. Eilis [Wis.] 100 N. W. 834.

88. Hardison v. Dennis Simmons Lumber Co. [N. C.] 48 S. E. 588.

89. "Of and above the size of 12 inches in diameter on the stump." Hardison v. Dennis Simmons Lumber Co. [N. C.] 48 S. E. 588.

90. Sale of oak trees not exceeding 12 inches in diameter, the purchaser to work all laps of larger trees. Leonard v. Holland, 25 Ky. L. R. 2009, 79 S. W. 227.

91. "Doyle rule." This rule adopted as standard in Louisiana. Act No. 87, p. 111, of 1892 and Act No. 64, p. 89, of 1898. The rule is as follows, "Take four off the diameter of the log and multiply the square of half the remainder by the length of the log; divide the product by four; the quotient will show the number of feet in the log." The average diameter is used. Bulkley v. Whited & Wheless [La.] 37 So. 5.

92. Fifteen years. Hardison v. Dennis Simmons Lumber Co. [N. C.] 48 S. E. 588.

93. One purchasing from vendor trees cut on land of size which would have passed under contract is not liable to vendee. Instructions erroneous. Ayer Lord Tie Co. v. Davenport [Ky.] 82 S. W. 177.

94. Ga. Civ. Code 1895, § 3542. Martin v. Peddy [Ga.] 48 S. E. 420.

95. Provisions of Ga. Civ. Code 1895, §§

While severed timber becomes personalty, the title still remains in the owner of the land,[96] who may maintain replevin therefor or for lumber manufactured therefrom,[97] even though it cannot be identified because it has been intermingled with other lumber of the same kind and value.[98]

The ordinary rules in regard to interpretation,[99] rescission,[1] abandonment,[2] and modification of contracts, apply to those for the sale of timber.[3]

The determination of what is dead and down timber within the meaning of a contract for the cutting of logs on an Indian reservation involves the exercise of judgment and discretion,[4] and when such discretion has been honestly exercised by the agents to whom the supervision of the cutting has been intrusted, their action is binding on the government.[5] A provision that the contract shall be forfeited in case the vendee fails or refuses to pay all of the purchase money within a specified time is a reservation for the vendor's benefit and may be waived by him.[6]

Two suits to recover different instalments on a timber contract are properly consolidated.[7] Since a deed to land constitutes prima facie evidence of title thereto

3974, 3983, 3984, as to when equitable relief will be granted for mistake of fact are not applicable. Martin v. Peddy [Ga.] 48 S. E. 420.

96, 97, 98. Mine La Motte Lead & Smelting Co. v. White [Mo. App.] 80 S. W. 356.

99. See Contracts, § 4, 3 Curr. L. 827. Under contract whereby defendant agreed to furnish logs to mill and sell lumber and to "log the mill to its capacity, limited only by the amount of lumber" he should "be able to sell at satisfactory prices," held that defendant could not arbitrarily determine the quality to be supplied or what were satisfactory prices, but was bound to furnish logs which could be manufactured into salable lumber and make reasonable efforts to sell lumber at fair profit. Rhodes v. Holladay-Klotz Land & Lumber Co. [Mo. App.] 79 S. W. 1145. Plaintiff held required to saw lumber in workmanlike manner in dimensions required by defendant. Id. Indorsement by tie company on contract of sale of timber held merely a release of its lien thereon and not to render it liable for acts of vendor in wrongfully cutting trees. Ayer & L. Tie Co. v. Davenport [Ky.] 82 S. W. 177. Persons submitting construction of contract to jury by their instructions are bound by its interpretation. Creelman Lumber Co. v. Le Lisle [Mo. App.] 82 S. W. 205. Lumber contract construed and held that there was a delivery to the vendee and title passed to him on the lumber being stacked, estimated, marked, and the agreed advance being made. Id. Contract whereby plaintiff was to receive all the proceeds of logs delivered by one of defendants to the other, after deducting advances made by the latter, held to entitle him to net proceeds only, after payment of raftage and boomage. Moss Point Lumber Co. v. Thompson [Miss.] 35 So. 828. Contract for sale of logs, which were unmeasured and scattered along a river, held to have been executory and not to have passed title to purchaser, and hence were properly assessed for taxation against the vendor. State v. Meehan [Minn.] 100 N. W. 6. In a contract of sale of growing timber, the words "one certain lot of yellow pine lumber for sawmill purposes" mean timber suitable for sawmill purposes. Martin v. Peddy [Ga.] 48 S. E. 420. Contract held to give defendant a mere right to cut certain timber and pay for it at a certain price as cut and not to amount to a sale thereof. Gatlin v. Serpell [N. C.] 48 S. E. 631. Limitation as to size in contract for sale of "all timber that can be made into railroad ties, consisting of white oak, post oak and chestnut oak, no limit in size of post oak and chestnut oak, that will measure in size not over twelve inches," held to refer to white oak only. Leonard v. Holland, 25 Ky. L. R. 2009, 79 S. W. 227. Plaintiff held entitled to credit for the value of timber cut by defendant in excess of the agreed size and for the amount he would have received for the timber cut by him had it been cut by defendant, and defendant entitled to value of timber cut by plaintiff. Id.

1. See Contracts, § 8, 3 Curr. L. 844. Sale of timber rescinded on ground of false representations made by defendant's experts. Chess & Wymond Co. v. Simpson [Ky.] 82 S. W. 601.

2. See Contracts, § 8, 3 Curr. L. 844. An injunction restraining defendant from cutting timber larger than that which he had a right to cut under his contract was no excuse for his ceasing work altogether. Leonard v. Holland, 25 Ky. L. R. 2009, 79 S. W. 227. Defendant's cessation of operations held not an abandonment of the contract. Id.

3. See Contracts, § 5, 3 Curr. L. 834. Modification of contract for cutting timber held based on valid consideration and binding on plaintiff. Gatlin v. Serpell [N. C.] 48 S. E. 631.

4. United States v. Bonness [C. C. A.] 125 F. 485.

5. Bound by acts of logging superintendents, and cannot charge parties to whom it agreed to sell logs after they were cut and banked with liability beyond contract price on the ground that some of those of which purchaser took possession were cut from living trees. United States v. Bonness [C. C. A.] 125 F. 485.

6. Waived by suing for amount not paid. Garrison v. Glass, 139 Ala. 512, 36 So. 725.

7. Ala. Code, § 3318. Garrison v. Glass, 139 Ala. 512, 36 So. 725.

and to the logs cut therefrom in the grantee, the burden of showing the contrary is on the one alleging it.[8]

The ordinary rules as to the admissibility of evidence[9] and as to the sufficiency and effect of the verdict and findings apply. Particular illustrations will be found in the notes.[10]

The measure of damages for breach of a contract to furnish sufficient logs to supply a sawmill is the loss of profits which the owner of the mill would have realized had the contract been carried out.[11]

Raftage and boomage are charges incident and necessary to the delivery of logs, which must be paid before possession can be obtained.[12] "Raftage" is the expense of floating and running logs.[13] "Boomage" is a fixed charge on logs payable at the place of delivery.[14]

Liens.[15]—Statutes giving laborers engaged in the manufacture of lumber a lien thereon for their wages will be liberally interpreted.[16] Receipts by laborers merely acknowledging receipt in full for all services performed on certain logs do not amount to a release of their lien on the lumber manufactured during the period of their service.[17] Slabs are not included within the terms of a statute giving a lien on lumber and timber.[18]

A sawmill man's lien can be enforced only when the evidence establishes that the party claiming it has substantially complied with the terms of his contract.[19] In the trial of a proceeding to foreclose such a lien, the issue is lien or no lien,[20] and plaintiff cannot recover unless he produces evidence which will authorize the jury to find that he is entitled to a lien.[21] A finding in favor of one claiming a sawmill man's lien for a given sum is equivalent to a finding in favor of the lien set up, especially when such sum is the full amount demanded.[22] The better prac-

8. To show fraud or resulting trust. Dresser v. Lemma [Wis.] 100 N. W. 844.

9. See Contracts, § 9 E, 3 Curr. L. 847; Evidence, 1 Curr. L. 1136. Where defendant alleged that failure to furnish logs was due to inability to sell lumber owing to defects in manufacture, and plaintiff in his reply alleged that defects were due to the fact that logs furnished were rotten, evidence to show latter fact held properly admitted, though it was not alleged in the petition. Rhodes v. Holladay-Klotz Land & Lumber Co. [Mo. App.] 79 S. W. 1145. Evidence as to the value of the timber sold is irrelevant where the suit is to recover the contract price and the defense is want and failure of consideration and fraud. Garrison v. Glass, 139 Ala. 512, 36 So. 725. A plat of the land not offered as an official survey was not objectionable because not made by the county surveyor. Id. Where defendant offered evidence tending to show that the survey of the timber land included some open land, plaintiff could show in rebuttal that it was not a part of the tract covered by the contract. Id. In an action for conversion of lumber claimed under contract of sale, evidence tending to show violation of contract by plaintiff in tearing down other piles of lumber belonging to vendor held inadmissible, since the answer alleged no specific violation and no counterclaim. Creelman Lumber Co. v. De Lisle [Mo. App.] 82 S. W. 205. Oral evidence held admissible to show that seller of shingle mill agreed that standing timber on land should pass under bill of sale. Welever v. Advance Shingle Co., 34 Wash. 331, 75 P. 863.

10. Special finding as to amount of timber cut by plaintiff held not to warrant judgment for defendant in any amount. Leonard v. Holland, 25 Ky. L. R. 2009, 79 S. W. 227.

11. See Damages, 1 Curr. L. 833. Rhodes v. Holladay-Klotz Land & Lumber Co. [Mo. App.] 79 S. W. 1145.

12, 13, 14. Moss Point Lumber Co. v. Thompson [Miss.] 35 So. 828.

15. See, also, title Mechanic's Liens, 2 Curr. L. 869.

16. Engl v. Hardell [Wis.] 100 N. W. 1046. Services rendered in making such repairs to the machinery of a mill as are usually incident to the business are incident to the manufacture of lumber and are included. Where employer is to deduct certain amount from their wages for board, they are entitled to have amount for which they have no lien so applied. Id.

17, 18. Engl v. Hardell [Wis.] 100 N. W. 1046.

19. Held error to exclude evidence as to manner in which timber was cut and its condition and salability, and evidence that it had not been stacked according to contract. Hawkins v. Chambliss [Ga.] 48 S. E. 169.

20. Hawkins v. Chambliss [Ga.] 48 S. E. 169.

21. Hawkins v. Chambliss [Ga.] 48 S. E. 169. Evidence sufficient to sustain verdict giving plaintiff lien for amount claimed. Eubanks v. West, 119 Ga. 804, 45 S. E. 194.

22. Eubanks v. West, 119 Ga. 804, 47 S. E. 194.

tice, however, is for the verdict to contain a distinct finding in favor of the lien as well as a finding of the amount due.[23]

One taking possession of lumber belonging to another has no possessory lien for expenses incurred by him in logging and sawing the same.[24] Possession is essential to such lien.[25]

In some states, parties furnishing supplies for use in a sawmill are given a lien on the mill and timber there manufactured for the purchase price.[26] It of course only attaches to timber manufactured at the mill for the use of which the supplies were furnished.[27]

FORGERY.

Elements of offense.[28]—To constitute forgery, there must be such a false making, with fraudulent intent,[29] as to make the instrument purport to be the act of another.[30] A forged writing need not be the counterpart of the genuine one,[31] nor such as, if genuine, would be legally valid.[32] If it is calculated to deceive, and is intended to be used for a fraudulent purpose, it is enough;[33] but an instrument invalid on its face cannot be the subject of forgery.[34] It is not necessary

23. Hawkins v. Chambliss [Ga.] 48 S. E. 169.

24. Defendant whose only relation was possibility that plaintiff's agent had wrongfully used some of his money had no lien. Dresser v. Lemma [Wis.] 100 N. W. 844.

25. Dresser v. Lemma [Wis.] 100 N. W. 844.

26. Ga. Civ. Code, §§ 2808, 2809, 2816. Weichselbaum Co. v. Pope, 119 Ga. 182, 45 S. E. 991.

27. Evidence held to show that timber levied on was manufactured at another mill. Weichselbaum v. Pope, 119 Ga. 182, 45 S. E. 991. Evidence held not to make prima facie case for plaintiff. Weichselbaum Co. v. Farmers' Supply Co. [Ga.] 45 S. E. 991.

28. See 2 Curr. L. 57.

29. The vital element of forgery is the intent to defraud. United States v. McKinley, 127 F. 166; Hale v. State, 120 Ga. 183, 47 S. E. 531. Prosecution for a forged mortgage. Instruction that if defendant owned the property at the time of executing the mortgage, and intended to make the latter a lien on the land, he was not guilty, held correct. Beal v. State, 138 Ala. 94, 35 So. 58. See 2 Curr. L. 57, n. 5.

30. A check or draft drawn by defendant on a bank not indebted to him, and signed with the name by which he was generally known, held not a forgery. Harrison v. State [Ark.] 78 S. W. 763. One who negotiates a draft payable to another person of the same name and the possession of which he has secured by fraud is not guilty of forgery. Heavey v. Commercial Nat. Bank, 27 Utah, 223, 75 P. 727.

31. State v. Woods, 112 La. 617, 36 So. 626. Misspelling "Greer," "Grier" does not prevent act from being forgery. Hale v. State, 120 Ga. 183, 47 S. E. 531.

32. People v. McGlade, 139 Cal. 66, 72 P. 600. Forgery of homestead applications and affidavits, description failed to name meridian. United States v. McKinley, 127 F. 166. Indictment need not allege that the payee of a forged order had a valid claim. People v. McGlade, 139 Cal. 66, 72 P. 600; State v. Hauser, 112 La. 313, 36 So. 396.

NOTE. What instruments are subject to forgery: An instrument to be a subject of forgery must be such that if it were genuine it would have some apparent legal efficacy. Abbott v. Rose, 62 Me. 194, 16 Am. Rep. 427; Dixon v. State, 81 Ala. 61; Shannon v. State, 109 Ind. 407; Reg. v. Boult, 2 Car. & K. 604. By legal efficacy is meant that it may possibly injure another. People v. Rathbun, 21 Wend. [N. Y.] 509; Williams v. State, 61 Ala. 33; Com. v. Linton, 2 Va. Cas. 476. It is not necessary that an instrument have actual legal efficacy in order to be a subject of forgery; it is sufficient that if genuine it might apparently have such efficacy, or serve as the foundation of a legal liability. State v. Johnson, 26 Iowa, 407, 96 Am. Dec. 158; Rudicel v. State, 111 Ind. 595. The writing being unintelligible and imperfect without reference to extrinsic facts, the latter must be averred, and the averment must show that the instrument has the capacity of effecting fraud. Hobbs v. State, 75 Ala. 1; People v. Farrington, 14 Johns. [N. Y.] 348; Abbott v. State, 59 Ind. 70; Dixon v. State, 81 Ala. 61. It is not, however, necessary that the instrument be perfect in order to be a forgery; it is sufficient if it bears such a resemblance to the document it is intended to represent as is calculated to deceive. State v. Ferguson, 35 La. Ann. 1042; Garmire v. Indiana, 104 Ind. 444; Com. v. Linton, 2 Va. Cas. 476; State v. Dousden, 13 N. C. 443; Peete v. State, 2 Lea [Tenn.] 53; Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767; Com. v. Stephenson, 11 Cush. [Mass.] 81, 59 Am. Dec. 154. An instrument to be the subject of forgery need not be one upon which, if genuine, an action might be maintained. It is sufficient if it is one which could be used as proof either against the person whose act it purports to be or against any other person. State v. Boasso, 38 La. Ann. 202; State v. Johnson, 26 Iowa, 407, 96 Am. Dec. 158; Downing v. Brown, 3 Colo. 571.—From note to People v. Munroe [Cal.] 24 L. R. A. 33.

33. United States v. McKinley, 127 F. 166; State v. Woods, 112 La. 617, 36 So. 626.

34. Written consent of parent to marriage

that the instrument be full and complete on its face; it is sufficient if the known and accustomed dealings between the parties renders it complete.[35]

An order[36] or request[37] for money or other property, even though conditional,[38] is subject to forgery. In Texas, a will is not subject to forgery during the lifetime of the purported testator,[39] nor can there be any illegal uttering of the will during such time.[40] Statutory provisions must be consulted.[41] Forging and uttering are in some states separate offenses.[42]

To constitute the offense of uttering a forged instrument, the latter must be passed as genuine,[43] but the mere tender of a check is a representation that it is genuine.[44]

Defenses.[45]—That forger hoped for ratification is no defense,[46] nor is agency, the act being beyond the agent's authority.[47] Being assisted in the forgery does relieve accused from liability as a principal if he utters the instrument as true.[48]

The indictment.[49]—Intent[50] or facts from which it may be inferred[51] must be alleged, though the indictment is sufficient without naming the person to be defrauded.[52] Forgery of the entire instrument being charged, it is not necessary to aver that the signatures were forged.[53] The indictment must set out[54] or describe[55] the instrument. The latter being set out in full, it is immaterial what

of minor daughter being void on its face for lack of witnesses and was not identified and proven under oath on presentation to clerk. Pearson v. Com., 25 Ky. L. R. 1866, 78 S. W. 1128. That one may be convicted of forgery of a convict bond, the bond must have been approved by the county judge, so as to make it a valid obligation. Crayton v. State [Tex. Cr. App.] 80 S. W. 839.

35. Construing Rev. St. of 1876, § 833. State v. Hauser, 112 La. 313, 36 So. 396.

36. Rev. St. 1892, §§ 2479, 2480. "Mr. Alex. Sapp Please let Jim have $1.00 in trade and oblige, C. H. Rogers. $1.00. P. S. Will pay Thursday." held an order for money or other property. Johnson v. State [Fla.] 36 So. 166.

37. A certain demand "on the treasury of the city and county of San Francisco" for money due for labor performed for the city and county is within a statute (Pen. Code, § 470), enumerating a "request for the payment of money" as a subject of forgery. People v. McGlade, 139 Cal. 66, 72 P. 600.

38. Order on city treasury containing the clause, "after deducting therefrom all taxes and fines due from bearer to said city." Held subject to forgery. State v. Pine [W. Va.] 48 S. E. 206.

39. Pen. Code 1895, arts. 530, 636, 537. Huckaby v. State [Tex. Cr. App.] 78 S. W. 942.

40. Nor can one be convicted of having the same in his possession with intent to utter. Huckaby v. State [Tex. Cr. App.] 78 S. W. 942.

41. The forgery of an affidavit by a pensioner, to be used in contesting his deserted wife's claim for one-half of his pension, is not an offense within Rev. St. U. S. § 6421 [U. S. Comp. St. 1901, p. 3667], there being no attempt to obtain money from the United States. United States v. Swan, 131 F. 140.

42. Code 1887, § 3737. Johnson v. Com., 102 Va. 927, 46 S. E. 789. See 2 Curr. L. 68, n. 9.

43. Statements by defendant to the person to whom he passed it that the drawer's name was signed by his son, the drawer not being at home, held insufficient to show that defendant did not pass the check as the genuine check of the drawer. People v. Walker, 140 Cal. 163, 73 P. 831.

44. People v. Walker, 140 Cal. 163, 73 P. 831.

45. See 2 Curr. L. 68.

46. Evidence thereof inadmissible. People v. Weaver, 177 N. Y. 434, 69 N. E. 1094. For case below see 2 Curr. L. 58, n. 12.

47. Where the defense was agency, evidence as to certain efforts which defendant had put forth to sell lands of such makers about the time the note was negotiated did not tend to show authority to sign or dispose of the note. State v. Rivers [Iowa] 98 N. W. 785. See 2 Curr. L. 68, n. 16. Authorizing agent to procure money at a certain bank does not authorize him to execute a note to himself, sign his principal's name thereto, and raise money thereon by indorsing it to the bank, unless it was understood and contemplated by the parties that the money should be procured in that manner. Id.

48. Indictment recited such facts. State v. Hauser, 112 La. 313, 36 So. 396.

49. See 2 Curr. L. 68.

50. People v. Elphis, 139 Cal. xix, 72 P. 838. Indictment charging accused with having "made" a "false" bill or "order for the payment of money" with intent to cheat and defraud, and that he feloniously published this false bill as true, sufficiently charges scienter. State v. Hauser, 112 La. 313, 36 So. 396.

51. That defendant knew check was fraudulent. People v. Elphis, 139 Cal. xix, 72 P. 838.

52. Crayton v. State [Tex. Cr. App.] 80 S. W. 839. See 2 Curr. L. 68, n. 21.

53. Giving instructions relating to forgery of such signatures is not erroneous. People v. McGlade, 139 Cal. 66, 72 P. 600.

54. Indictment setting out "raised" check and check before "raised" held sufficient. Franklin v. State [Tex. Cr. App.] 78 S. W. 934. See 2 Curr. L. 68, n. 16.

55. An indictment charging the forgery of

it is called.[56] Parts of the instrument constituting no part of the forgery need not be alleged.[57] The indictment must show that the act purported to be that of one other than defendant.[58] The indictment setting out a banking institution as payee on the forged note, it need not allege whether such payee is a corporation, partnership, or joint stock company.[59] The instrument not showing on its face that it is the subject of forgery, but such fact being capable of proof by extrinsic evidence, the extrinsic or explanatory facts must be alleged.[60] Forgery and the uttering of the instrument may be charged in the same[61] or separate counts.[62] Objection that there is a variance between the instrument proved and that copied in the indictment cannot be considered on appeal, the former not being set out in the record.[63]

Presumptions.[64]—Burden of showing intent[65] or want of authority[66] is upon the state.

Admissibility of evidence.[67]—A written admission is admissible.[68] Bad faith of prosecuting witness may be shown.[69] Evidence of other forgeries, while not admissible to show defendant's guilt of the crime charged,[70] is competent as tending to show defendant's intent or motive as to the forgery charged,[71] or to show a system.[72] This rule does not apply where the forgery is confessed.[73] Accused becoming a witness, isolated facts of falsifying are not admissible to prove his credibility.[74]

Writings of defendant and of the person whose signature is forged, when proven genuine, are admissible for the purpose of comparison by experts.[75] Under the common law rule, the only papers admissible for the purpose of proving by a comparison of handwriting that the alleged forgery was committed by defendant are such as are in evidence in the case for some other relevant purpose, and

an indorsement on a school warrant issued by the school board of the parish, for a certain sum of money, payable to a certain person, sufficiently described the forged instrument. It is not essential to charge that the warrant was payable to order. State v. Woods, 112 La. 617, 36 So. 626. Indictment setting out forged voucher held insufficient in the absence of explanatory statements. Joiner v. State [Tex. Cr. App.] 80 S. W. 531.

56. People v. McGlade, 139 Cal. 66, 72 P. 600. In Louisiana, description of instrument by "any name usually known" suffices [Rev. St. § 1049]. State v. Woods, 112 La. 617, 36 So. 626.

57. Indorsements on bond. Crayton v. State [Tex. Cr. App.] 80 S. W. 839.

58. Where instrument is set out according to its tenor, and there is no similarity of names, it is not necessary to allege that it purported to be the act of one other than defendant. Huckaby v. State [Tex. Cr. App.] 78 S. W. 942.

59. Usher v. State [Tex. Cr. App.] 81 S. W. 309.

60. An indictment for forging a will must allege that the purported testator was possessed of an estate subject to be disposed of by will, and that he was dead at the time of the forgery. Huckaby v. State [Tex. Cr. App.] 78 S. W. 942. See 2 Curr. L. 58, n. 17.

61. Hale v. State, 120 Ga. 183, 47 S. E. 531; People v. McGlade, 139 Cal. 66, 72 P. 600. See 2 Curr. L. 59, n. 29.

62. Johnson v. Com., 102 Va. 927, 46 S. E. 789.

63. Beal v. State, 138 Ala. 94, 35 So. 58. See 2 Curr. L. 59, n. 30.

64. See 2 Curr. L. 59.

65. Intent to present forged check. People v. Walker, 140 Cal. 153, 73 P. 831.

66. City clerk forging order on city treasury. State v. Pine [W. Va.] 48 S. E. 206.

67. See 2 Curr. L. 59.

68. People v. Weaver, 177 N. Y. 434, 69 N. E. 1094.

69. Prosecuting witness may be asked if he did not swear out a warrant against defendant for selling the property covered by the alleged forged mortgage. Beal v. State, 138 Ala. 94, 35 So. 58.

70. Wright v. State, 138 Ala. 69, 34 So. 1009; People v. Weaver, 177 N. Y. 434, 69 N. E. 1094. Reference in the evidence to another check is not prejudicial to defendant where there is nothing to indicate that the latter check was forged, or that any one had tried to pass it. People v. Walker, 140 Cal. 153, 73 P. 831.

71. Wright v. State, 138 Ala. 69, 34 So. 1009; People v. McGlade, 139 Cal. 66, 72 P. 600; Taylor v. State [Tex. Cr. App.] 81 S. W. 933; People v. Weaver, 177 N. Y. 434, 69 N. E. 1094.

72. Taylor v. State [Tex. Cr. App.] 81 S. W. 933.

73. Joiner v. State [Tex. Cr. App.] 80 S. W. 531.

74. Held error to admit evidence of false statements in advertisements and of particular fraudulent transactions. Dysart v. State [Tex. Cr. App.] 79 S. W. 534.

75. Johnson v. Com., 102 Va. 927, 46 S. E. 789.

which are admitted or proved to be in the handwriting or to bear the signature of the defendant,[76] or such as form a part of the record in the case of the genuineness of which the court may take judicial notice.[77] Where a comparison is permissible, it may be made by the court or jury, with or without the aid of expert witnesses.[78] Writings being admissible, enlarged photographs thereof are admissible.[79] In general, all material or relevant facts[80] tending to prove the commission of the act,[81] guilty intent or knowledge,[82] or the weakness of any defense, as authority,[83] are admissible. Letters pertaining to the case and directly traceable to defendant are admissible.[84] Wrongful exclusion of evidence is not reversible error in the absence of prejudice.[85]

Sufficiency of evidence[86] to show want of authority, see note.[87]

Trial.—The court may submit the alleged forged instrument to the jury to be passed on subject to the instructions.[88]

Instructions.[89]—The instruction must not be misleading.[90] An instruction substantially conforming to the language of the statute is good.[91] Defendant's con-

76. Withaup v. U. S. [C. C. A.] 127 F. 530.

77. As a pleading or recognizance bearing defendant's signature. Withaup v. U. S. [C. C. A.] 127 F. 530. The court cannot in such case take judicial notice of the genuineness of the signatures to papers filed in other cases, although a part of its own records, and their admission as standards of comparison is error. Id.

78. Withaup v. U. S. [C. C. A.] 127 F. 530.

79. Johnson v. Com., 102 Va. 927, 46 S. E. 789.

80. The forgery and uttering of the instrument being complete long before payment, the fact of payment is not admissible in evidence. Jonier v. State [Tex. Cr. App.] 80 S. W. 531. Proof of payment is not necessary to show inability to produce the instrument because of its loss or for other reason. Id. On trial for forgery, testimony as to transactions relating to certain debts of defendant to secure which notes were given, and as to dealings between defendant and her husband, requiring the execution of the note, was inadmissible. People v. Weaver, 177 N. Y. 434, 69 N. E. 1094. Where the defense was agency, testimony as to the amount of time which defendant had given to the business of such purported makers was incompetent and immaterial. State v. Rivers [Iowa] 98 N. W. 785. Testimony of witness as to what he knew concerning the alleged employment of defendant as agent is properly excluded, there being nothing to indicate that what witness did know was competent and material. Id. Testimony of prosecuting witness as to whether or not defendant called him by his first name, held irrelevant. Wright v. State, 138 Ala. 69, 34 So. 1009.

81. Evidence that the purported signer did not sign nor authorize the signature is admissible. People v. McGlade, 139 Cal. 66, 72 P. 600.

82. Forgery of an indorsement on a pension check, vouchers and postal card received at Pension Office held admissible. Withaup v. U. S. [C. C. A.] 127 F. 530. Forgery of a convict bond, the state may prove that, at the time the bond was received by the judge, defendant was indebted to the county on a judgment of conviction in a certain cause, which judgment the judge intended to describe in the bond. Crayton v. State [Tex. Cr. App.] 80 S. W. 839. Evidence that defendant had worked for the drawer held competent as explaining how he same to have the check, and being a part of what he said about it in response to the questions of the person to whom he passed it held admissible. People v. Walker, 140 Cal. 153, 73 P. 831.

83. The defense being authorization, it may be shown that defendant had committed other forgeries in the same person's name. Usher v. State [Tex. Cr. App.] 81 S. W. 309.

84. Taylor v. State [Tex. Cr. App.] 81 S. W. 933.

85. The exclusion of an answer as to the absence of fraudulent intent was not prejudicial, where the subsequent testimony of the same witness negatived any imputation of fraud. State v. Rivers [Iowa] 98 N. W. 785.

86. See 2 Curr. L. 59.

87. The signature of one J. S. being forged to a demand on a city for work done, proof that a J. S. once lived at the address given, but could not be found, and that he had never worked for the city, and the testimony of one J. S. who worked for the city that he did not sign such demand, held sufficient to prove that J. S. did not authorize the signature. People v. McGlade, 139 Cal. 66, 72 P. 600.

88. State v. Hauser, 112 La. 813, 36 So. 396.

89. See 2 Curr. L. 60.

90. Where the necessity of proof beyond a reasonable doubt was emphasized in different paragraphs of the charge, the inadvertant use of the phrase "preponderance of evidence" in another paragraph while inappropriate, could not have misled the jury, State v. Rivers [Iowa] 98 N. W. 785. The evidence showing that the defendant represented in passing the check that the name of the drawer was signed by the latter's son, an instruction that, if the jury found that defendant stated to the person to whom he passed the check, that the drawer did not sign the check, then they should find defendant not guilty, was misleading, and properly refused. People v. Walker, 140 Cal. 153, 73 P. 831.

91. An instruction "that a malicious and guilty intent, from the deliberate commis-

nection with the forgery being merely circumstantial, defendant is entitled to an instruction on circumstantial evidence;[92] but not where the commission of the offense is admitted.[93] Defendant being found guilty of forgery, failure of the court to instruct with reference to uttering is immaterial.[94] Erroneous but nonprejudicial instructions are not grounds for reversal.[95]

Punishment.[96]—A sentence erroneously imposed under the Michigan indeterminate sentence law for a term which the court was entitled to impose is valid, as against a writ of habeas corpus, to the extent of the minimum term imposed.[97] In California, on reversal of a conviction for uttering a forged check for insufficiency in the indictment, the defendant being in custody is entitled to a discharge.[98]

FORMER ADJUDICATION.

§ 1. **The Doctrine in General (1476).**
§ 2. **Adjudication as Bar of Causes of Action or Defenses (1479). Scope of Adjudication (1482).**
§ 3. **Adjudication as Estoppel of Facts Litigated (1484).** Matters concluded (1487).
§ 4. **Pleading and Proof (1488).**

To be distinguished from former adjudication are the doctrines that a decision of an appellate court is binding in all subsequent proceedings in the same case,[1] and that decisions on questions of law will be observed as precedents.[2]

§ 1. *The doctrine in general.—The doctrine of former adjudication is that whatever matters have been finally determined*[3] *on the merits,*[4] *in any action or*

sion of an unlawful act for the purpose of injuring another, is a conclusive presumption, under our law," is a substantial compliance with Code Civ. Proc. § 1962, subd. 1. People v. McGlade, 139 Cal. 66, 72 P. 600.

92. "Raised" check. Dysart v. State [Tex. Cr. App.] 79 S. W. 534.

93, 94. Usher v. State [Tex. Cr. App.] 81 S. W. 309.

95. Evidence of other forgeries was admitted, instruction was that to convict defendant, he must be connected with every transaction. Taylor v. State [Tex. Cr. App.] 81 S. W. 933.

96. See 2 Curr. L. 60.

97. In re Lambrecht [Mich.] 100 N. W. 606.

98. Pen. Code, § 1262. People v. Elphis, 139 Cal. xix, 72 P. 838.

1. See Appeal and Review, 3 Curr. L. 167.

2. See Stare Decisis, 2 Curr. L. 1698.

3. **Must be final judgment:** Turk v. Shein [W. Va.] 47 S. E. 253; Weidner v. Lund, 105 Ill. App. 464. Judgment in habeas corpus to obtain custody of child held final. Cormack v. Marshall, 211 Ill. 519, 71 N. E. 1077. Deficiency judgment in foreclosure proceedings, held final. Pereles v. Leiser [Wis.] 101 N. W. 413. See 2 Curr. L. 60 n. 46.

An attempt to resist a motion to confirm a sheriff's sale because the land is a homestead will not bar an action to remove the sheriff's deed as a cloud. Best v. Grist, 1 Neb. Unoff. 812, 95 N. W. 836.

Interlocutory rulings not final: A ruling on an interlocutory motion or petition, e. g. for temporary alimony, if based partly on discretion or facts and not wholly on law is not adjudicative of facts involved. Sumner v. Sumner [Ga.] 48 S. E. 727.

Order overruling motion to quash attachment. Simmons v. Simmons [W. Va.] 48 S. E. 833. Orders in partition proceedings and decree of sale held not final. Reed v. Reed, 25 Ky. L. R. 2324, 80 S. W. 520. Order directing interrogatories to be taken for confessed. Cusachs v. Dugue [La.] 36 So. 960. Nor is a motion to set aside such order to be treated as an application for a new trial, which being refused gives to the original order the force and effect of res judicata. Id. Order authorizing executor to pay assessments based on an ex parte order held not final. In re Morgan's Estate [Iowa] 101 N. W. 127. Arrest of judgment [Construing V. S. 1214]. Baker v. Sherman [Vt.] 59 A. 167.

Verdict without judgment not final: Stubbings v. Durham, 210 Ill. 542, 71 N. E. 586; Ortiz v. First Nat. Bank [N. M.] 78 P. 529; City of Chicago v. Goodwillie, 208 Ill. 252, 70 N. E. 228.

Effect of appeal: The doctrine has no application to judgments superseded by pending appeal. Columbia Nat. Bank v. Dunn, 207 Pa. 548, 56 A. 1087; Harvin v. Blackman, 112 La. 24, 36 So. 213. See 2 Curr. L. 61, n. 49. Final when no supersedeas bond was given. Rodney v. Gibbs [Mo.] 82 S. W. 187. Reversal of a judgment completely destroys its efficacy as an estoppel. Hennessy v. Tacoma Smelting & Refining Co. [C. C. A.] 129 F. 40; Stubbings v. Durham, 210 Ill. 542, 71 N. E. 586; Spring Valley Coal Co. v. Patting, 210 Ill. 342, 71 N. E. 371. See 2 Curr. L. 64, n. 86. Decree of reversal is res judicata of matters necessarily adjudicated by it. Rowan v. Chenoweth [W. Va.] 47 S. E. 80; Clark v. Knox [Colo.] 76 P. 372. Determination of matter by trial court on new trial does not render the question res judicata. Lusk v. Chicago, 211 Ill. 183, 71 N. E. 878.

The parties are not concluded as to questions which are left open by the appellate opinion, though passed on by the court below. Russell v. Russell, 129 F. 434. Where appellate court tries the case de novo. Gentry v. Pacific Live Stock Co. [Or.] 77 P. 115; Trotter v. Stayton [Or.] 77 P. 395.

Effect of suit or proceeding to correct

proceeding[5] *in a court having jurisdiction,*[6] *or before an officer or board exercising*

judgment: A suit to correct a mutual mistake in an instrument upon which judgment has been rendered prevents finality as to matters involved. Silliman v. Taylor [Tex. Civ. App.] 80 S. W. 651. Statutory right to new trial as to rights of title and possession does not prevent finality as to other issues. Gray Cloud Land Co. v. Security Trust Co. [Minn.] 101 N. W. 605.

A void judgment is no bar: Ludwig v. Murphy [Cal.] 77 P. 150.

Error does not prevent binding effect: In re Elting, 93 App. Div. 516, 87 N. Y. S. 833; Rankin v. Hooks [Tex. Civ. App.] 81 S. W. 1005; Lamb v. Wahlenmaier [Cal.] 77 P. 765; Clevenger v. Figley [Kan.] 75 P. 1001; Gordon v. Ware Nat. Bank [C. C. A.] 132 F. 444; Lindquist v. Maurepas Land & Lumber Co., 112 La. 1030, 36 So. 843. Suit pressed to judgment prematurely. Lockhart v. Leeds [N. M.] 76 P. 312. Proper relief not asked. Id.

Failure to appoint guardian: That the one against whom the judgment was rendered was an incompetent does not prevent the application of the doctrine of res judicata, even though no guardian or committee had been appointed. Sterling v. Sterling, 90 N. Y. S. 306.

Judgment of another jurisdiction. A Federal judgment is binding in state courts, though the latter would have otherwise decided the question involved. Rew v. Independent School Dist. [Iowa] 98 N. W. 802.

NOTE. As to binding effect of conclusions of law of another court: "The claim that a mere conclusion of law announced by one court with reference to a matter before it is not binding in a subsequent suit between the same parties involving the same matter is plausible only under a superficial conception of the principle of res judicata. It is not the findings of facts which constitute an adjudication, but it is the conclusion of the court as to the effect of those facts determined as a matter of law. It is the determination of the issues presented which constitutes the adjudication. That determination may consist principally of findings of fact which lead to the result reached or rules of law which are not disputed between the parties, or it may consist of conclusions as to disputed questions of law as applied to facts about which there is no controversy leading to the result announced. Every judgment necessarily involves the application of principles of law to the facts of the case. The dispute as between the parties may be as to the facts, or as to the law, or as to both, but the judgment is conclusive as to the entire matter involved; that is, as to the case presented, and not simply as to the particular question in regard to which the parties are in controversy. * * * Bissel v. Spring Valley Township, 124 U. S. 225, 31 Law. Ed. 411; Linton v. National L. Ins. Co. [C. C. A.] 104 F. 584; City of Paterson v. Baker, 51 N. J. Eq. 49, 26 A. 324; Southern Pac. R. Co. v. U. S., 168 U. S. 1, 48, 42 Law. Ed. 355; United States v. California & O. Land Co., 192 U. S. 355, 48 Law. Ed. 476; Deposit Bank v. Board of Councilmen, 191 U. S. 499, 48 Law. Ed. 276; New Orleans v. Citizens' Bank, 167 U. S. 371, 42 Law. Ed. 202." See opinion, Rew v. Independent School Dist. [Iowa] 98 N. W. 802.

4. Judgment must be on the merits: Weidner v. Lund, 105 Ill. App. 454; State v. Hartford St. R. Co., 76 Conn. 174, 56 A. 506. Before the rights of the public can be concluded by any citizen acting as a champion of public rights, there must be a reasonably fair presentation of the case to a court of competent jurisdiction, and a consideration and determination of the matter by the court. Lindsay v. Allen [Tenn.] 82 S. W. 171. See 2 Curr. L. 62, n. 72. Decision that police officer's discharge was illegal, held not to be res judicata of subsequent action for salary. Aucoin v. Police Board of New Orleans, 111 La. 745, 35 So. 888. Reversal of judgment on one assignment without considering the other assignments is not res judicata as to the latter. Gage v. People, 207 Ill. 61, 69 N. E. 635. Two separate appeals being taken from the decree, the fact that the appellate court in disposing of one determines the other is not an adjudication of the latter. Probate Court of Westerly v. Potter [R. I.] 58 A. 661.

Dismissal, discontinuance or nonsuit not on merits: Nonsuit. Guthiel v. Gilmer, 27 Utah, 496, 76 P. 628; Spring Valley Coal Co. v. Patting, 210 Ill. 342, 71 N. E. 371; Packard v. Hannibal & St. J. R. Co. [Mo.] 80 S. W. 951. Involuntary nonsuit if before cause is finally submitted. Hudson-Kimberly Pub. Co. v. Young, 90 Mo. App. 505. See 2 Curr. L. 62, n. 73. Dismissal. Maeder v. Wexler, 90 N. Y. S. 598. Dismissal on pleadings. State v. McEldowney, 54 W. Va. 695, 47 S. E. 650. Dismissal because petitioner for establishment of road failed to sign petition. Kirkhart v. Roberts, 123 Iowa, 137, 98 N. W. 562. Dismissal of application to open decree based on defects in answer tendered. Oakes v. Ziemer [Neb.] 98 N. W. 443. Voluntary dismissal on part of complainant. Lindsay v. Allen [Tenn.] 82 S. W. 171. Plaintiff announced in open court that it would no longer prosecute the suit. Logan v. Stephens County [Tex. Civ. App.] 81 S. W. 109. Dismissal by consent. Lindsay v. Allen [Tenn.] 82 S. W. 171. Plaintiff's action dismissed for want of evidence. Hood v. Western Union Tel. Co., 135 N. C. 622, 47 S. E. 607; Goldman v. Tobias, 88 N. Y. S. 991. Dismissal of action because barred by lapse of time. Vincent v. Mutual Reserve Fund, Life Ass'n [Conn.] 58 A. 963. Action dismissed as prematurely brought. Lauer v. Smith, 24 Ohio Circ. R. 47. Suit by stockholders for benefit of corporation. The Telegraph v. Lee [Iowa] 98 N. W. 364. See 2 Curr. L. 63, n. 74-81. Dismissal of proceeding as brought under the wrong act. Lusk v. Chicago, 211 Ill. 183, 71 N. E. 878. Discontinuance before trial. Cook v. Lee, 72 N. H. 569, 58 A. 511.

Dismissal is res judicata on the questions actually determined: Dismissal of complaint, filed by trustee in bankruptcy to determine ownership of insurance policies alleged to have been preferentially transferred by the bankrupt, on the ground that the allegations were not true nor sustained by the evidence, an affirmative judgment being entered, bars subsequent action by trustee to recover fund. Engel v. Union Square Bank, 94 App. Div. 244, 87 N. Y. S. 1070. On an issue as to whether promoter had been

judicial functions[7] *are concluded by such adjudication and cannot again be liti-*

paid for certain lots, dismissal of former suit, the answer in which showed that the value of these lots was included in the estimate be presented as a basis on which he was paid, held conclusive. Seacoast R. Co. v. Wood [N. J. Eq.] 56 A. 337. Appellate court dismissing suit without an adjudication on the merits, the decision of the trial court on the merits is not res judicata thereof. The Telegraph v. Lee [Iowa] 98 N. W. 364. A case being dismissed, the record must affirmatively show that the merits were not considered. Dismissal of application to reopen decree. Oakes v. Ziemer [Neb.] 98 N. W. 443.

Judgment on plea in abatement is not: Because plaintiff had not paid the costs of a previous suit. Sweeney v. Sweeney, 119 Ga. 76, 46 S. E. 76. Demurrer to counterclaim as prematurely set up being conceded correct by defendant. Tyler v. Bowen [Iowa] 100 N. W. 505.

Denial of motion or application is not: Denial of mandamus. Hoffman v. Silverthorn [Mich.] 100 N. W. 183.

Decision of motion for leave to file a petition in the nature of intervention. Hamilton Nat. Bank v. American Loan & Trust Co. [Neb.] 100 N. W. 202. Motion to set aside order discharging receiver denied because not the proper remedy. Williams v. Des Moines Loan & Trust Co. [Iowa] 101 N. W. 277. See 2 Curr. L. 63, n. 82.

Summary refusal to allow petition exhibited and attached to motion to intervene to be filed. Hamilton Nat. Bank v. American Loan & Trust Co. [Neb.] 100 N. W. 202. Summary overruling of objections to discharge of receiver in prior action. Id. Denial of application for compulsory reference. Hart v. Godkin [Wis.] 100 N. W. 1057. Denial of motion of executor to compel his attorney to pay money into court. Reilly v. Provost, 90 N. Y. S. 591. Order to show cause in mandamus proceeding why money should not be returned. State v. Horton [Neb.] 99 N. W. 501.

Judgment on demurrer is not on merits (Probate Court of Westerly v. Potter [R. I.] 58 A. 661); **but judgment on failure to plead over is** (Lockhart v. Leeds [N. M.] 76 P. 312). See 2 Curr. L. 64, n. 85.

A judgment on demurrer, until reversed, concludes the parties upon all questions necessarily involved in the decision of the points raised in the demurrer. Georgia Northern R. Co. v. Hutchins, 119 Ga. 504, 46 S. E. 659. Is also conclusive of whether petition states a cause of action. Id.

Judgment on default is on merits: Third Nat. Bank v. Atlantic City [C. C. A.] 130 F. 751. Failure of a bankrupt to apply for a discharge from provable debts in proceedings under a petition in bankruptcy renders the question res judicata in proceedings under a subsequent petition. Kuntz v. Young [C. C. A.] 131 F. 719. Where a lease provided for the execution of a deed to the lessee upon its completion, held lessee being a party to a suit in ejectment, is bound by a decree pro confesso entered against him therein holding that he was only entitled to the property for a designated time, and is res judicata in a subsequent suit for specific performance. Hartman v. Pickering [Miss.] 36 So. 529. Defendant answering though not appearing, the court may render judgment on the merits concluding him on a counterclaim set up. Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co., 126 F. 552.

Consent judgment is on merits: See Fidelity & Deposit Co. v. Nisbet, 119 Ga. 316, 46 S. E. 444.

NOTE: As to effect of consent judgments, see Jenkins v. Robertson, L. R. 1 H. L. Sc. 117, 122. See Kelly v. Town of Milan, 21 F. 842, 863; Nashville, etc., R. Co. v. U. S., 113 U. S. 261; Hoover v. Mitchell, 25 Grat. [Va.] 387; Bank of Commonwealth v. Hopkins, 2 Dana [Ky.] 395; Bishop v. McGillis, 82 Wis. 120. Cited in XVIII. Harvard L. R. 60.

5. Mandamus against auditor general to compel him to cancel sale of land bid in for taxes and issue certificate of purchase to relator. Hoffman v. Silverthorn [Mich.] 100 N. W. 183. To compel city officers to issue warrants. Valley Bank v. Brodie [Ariz.] 76 P. 617. See 2 Curr. L. 62, n. 65.

Habeas corpus: Cormack v. Marshall, 211 Ill. 519, 71 N. E. 1077.

Contra, Rogers v. Superior Court of San Francisco [Cal.] 78 P. 344. See 2 Curr. L. 62, n. 63.

Garnishment: As to ownership of fund garnished. City of Wichita v. Rock Island Lumber & Mfg. Co. [Kan.] 75 P. 463.

Partition: Binds as to quantity of interest. Carter v. White, 134 N. C. 466, 46 S. E. 983. See 2 Curr. L. 62, n. 64.

Proceedings to open decree: Oakes v. Ziemer [Neb.] 98 N. W. 443.

Proceedings to adjust priorities in water: Held res judicata of volume awarded to a certain ditch. Platte Valley Irr. Co. v. Central Trust Co. [Colo.] 75 P. 391.

Supplementary proceedings: Order of justice to one, who on examination in proceedings in aid of execution, admits indebtedness to judgment debtor to pay the same to judgment creditor, renders the question of the indebtedness res judicata in subsequent action by judgment creditor to enforce such order. Carlin v. Hower, 24 Ohio Circ. R. 153.

6. Rodney v. Gibbs [Mo.] 82 S. W. 187; Gordon v. Ware Nat. Bank [C. C. A.] 132 F. 444. Though mandamus did not show that relator did not have an adequate remedy at law, held judgment of title by supreme court was res judicata in subsequent suit of trespass to try title. Tolleson v. Wagner [Tex. Civ. App.] 80 S. W. 846. General judgment was rendered against town for work done on a public improvement instead of a judgment payable out of a special fund. Town of Cicero v. People, 105 Ill. App. 406. See 2 Curr. L. 61, n. 55.

Probate courts: Chadbourne v. Hartz [Minn.] 101 N. W. 68. Final accounting of a testamentary trustee. In re Elting, 93 App. Div. 516, 87 N. Y. S. 833. Decree of surrogate as to distribution of trust fund and discharge of executors held not res judicata of antenuptial contract over which the surrogate had no jurisdiction. Phalen v. U. S. Trust Co., 44 Misc. 57, 89 N. Y. S. 699. The division of a testamentary trust estate into five separate trusts, disclosed in an accounting by the trustee and passed upon and approved by the surrogate over

gated between the same parties. That service was legally made by publication does not affect the conclusiveness of the judgment as to questions actually decided.[8] The doctrine does not apply in a suit to set aside and reopen the judgment claimed as a bar.[9]

§ 2. *Adjudication as bar of causes of action or defenses.*[10]—*As a general proposition, it is stated that to constitute a prior adjudication a complete bar to a cause of action or defense, there must concur, identity of parties;*[11] *identity of*

objection, is res judicata. Id. Proceedings brought by electric railway company to appropriate a right of way over tracks of steam railway. Dayton & Union R. Co. v. Dayton & M. T. Co., 4 Ohio C. C. (N. S.) 329.

Distribution of a balance shown by the account of an executor, in orphans' court. In re Piper's Estate, 208 Pa. 636, 57 A. 1118.

See, also, critical note on decrees of distribution as res judicata, post, p. 1489.

As between courts of law and equity: Courts of law and equity having concurrent jurisdiction over a question, and such question is decided at law, equity will not re-examine it (Hofmann v. Burris, 210 Ill. 587, 71 N. E. 584); but the adjudication of a court of law does not bar the use of purely equitable defenses in a court of equity to enjoin collection of law judgment (Headley v. Leavitt [N. J. Err. & App.] 55 A. 731). Such defendant is not first required to test the correctness of the law court's decision by writ of error. Id. Judgment in law action based on the ground that plaintiff would be entitled to relief only in equity does not bar equitable suit. Johnson v. Amberson [Ala.] 37 So. 273. Judgment in suit to enforce a mechanic's lien showing on its face that plaintiff's right to recover for breach of contract and for work and materials, for which he was not entitled to a lien, had not been passed on. Koeppel v. Macbeth, 96 App. Div. 299, 89 N. Y. S. 969.

As between courts of different jurisdictions: The doctrine applies to an adjudication by the court of another jurisdiction than that wherein the second suit is brought. Hudson-Kimberly Pub. Co. v. Young, 90 Mo. App. 505. Judgment of Federal court held res judicata in subsequent suit in state court. Baldwin v. Rice, 44 Misc. 64, 89 N. Y. S. 738. Vice versa. Eau Claire Nat. Bank v. Benson [C. C. A.] 128 F. 277. See 2 Curr. L. 62, n. 60-62. A Federal court will not, however, treat the decision of a state court as res judicata where it would not so operate under the rule of the highest court of the state. First Nat. Bank v. Covington, 129 F. 792.

7. **Patent officials:** Decisions of the officials of the patent office as to the sufficiency of the disclosure in an original application to support the invention, defined in the counts of the issue of an interference, will be accepted as conclusive by the court considering the question of priority of invention (Stone v. Pupin, 19 App. D. C. 396), and also that the claims constituted a part of the invention intended to be covered by the original patent (Austin v. Johnson, 18 App. D. C. 83).

Referee: Mills v. Allen [R. I.] 58 A. 622.

Surveyor: Establishing a road. Shanline v. Wiltsie [Kan.] 78 P. 436.

Ecclesiastical tribunals: Bonacum v. Murphy [Neb.] 98 N. W. 1030. See Religious Societies. 2 Curr. L. 1504, § 6.

Decision of water commissioner not binding on courts: Commissioner appointed under Rev. St. 1899, § 888 et seq. to determine priorities of different appropriators. Ryan v. Tutty [Wyo.] 78 P. 661.

8. Salemonson v. Thompson [N. D.] 101 N. W. 320.

9. Divorce decree tainted with fraud. Trammell v. Trammell [Tex. Civ. App.] 80 S. W. 119.

10. See 2 Curr. L. 64.

NOTE. Distinction between the effect of a judgment as a bar or estoppel: "There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered on the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * * If such defenses were not presented in the action and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defense never existed. The language therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined." See the leading case of Cromwell v. County of Sac, 94 U. S. 351, 24 Law. Ed. 195.

11. Importers' & Traders' Nat. Bank v. Lyons [Pa.] 58 A. 148; Hays v. Marsh, 123 Iowa, 81, 98 N. W. 604; First Nat. Bank v.

issues[12] *and identity of subject-matter,*[13] *or the cause of action as it has been termed.*[14]

Yewinson [N. M.] 76 P. 288; Equitable Mortg. Co. v. McWaters, 119 Ga. 337, 46 S. E. 437; Brenau Ass'n v. Harbison [Ga.] 48 S. E. 363; Jefferson County v. Board of Valuation & Assessment, 25 Ky. L. R. 1637, 78 S. W. 443; Smith v. Cornett [Ky.] 80 S. W. 1188; Chapman v. Greene [S. D.] 101 N. W. 351; Bowdle v. Jencks [S. D.] 99 N. W. 98; Commonwealth v. Newton [Mass.] 71 N. E. 699. Failure to set up defense of adultery in divorce action does not bar action against third person for alienation of wife's affections. Knickerbocker v. Worthing [Mich.] 101 N. W. 540. Suit against one railroad for wrongful death does not bar suit against another railroad not a party thereto. Packard v. Hannibal & St. J. R. Co. [Mo.] 80 S. W. 951. One filing a motion to be made a party defendant but withdrawing it before trial is not bound by the judgment rendered in the case. Rieschick v. Klingelhoefer, 91 Mo. App. 430. Wife entering into defense of action of ejectment against her husband held bound by decree therein. Carpenter v. Carpenter [Mich.] 99 N. W. 395. Verdict of jury in attachment held not res judicata of a suit in equity by a third party who had an attachment suit pending against the same parties for the same cause at the time verdict was rendered. Ortiz v. First Nat. Bank [N. M.] 78 P. 529. See 2 Curr. L. 64, n. 87.

12. Rights under contracts: Settlement of accounts and discharge of guardian held not to bar surety on bond from enforcing a claim under indemnifying mortgage. Howe v. White, 162 Ind. 74, 69 N. E. 684. Judgment in favor of seller in action against buyer as to kind and quality of goods ordered does not bar subsequent action by buyer for the wrongful detention of goods. Minkoff v. Lipschuetz, 88 N. Y. S. 139. Judgment of foreclosure against plaintiff on notes given for purchase price of machinery does not bar plaintiff's right of action for breach of warranty. Standefer v. Aultman & Taylor Machinery Co. [Tex. Civ. App.] 78 S. W. 552.

Rights affecting property: Judgment that telephone company had no right to erect poles and wires in street without consent of abutting property owner does not bar condemnation proceedings. New Union Telephone Co. v. Marsh, 96 App. Div. 122, 89 N. Y. S. 79. Mortgagee by taking judgment against the original mortgagors for the amount of the mortgage debt is not precluded from insisting upon foreclosure of mortgage. Civil Code 1897, § 848, as amended, did not apply to this case. Heintz v. Klebba [Neb.] 98 N. W. 431. Reversal of judgment against property owner as winner held not res judicata in an action to make the judgment against his lessees a lien on the property. Trout v. Marvin, 24 Ohio Circ. R. 333. Judgments that vendor of right to take ice from pond had right to draw off water from pond, and that vendee could not interfere with flood gates held not to bar action by vendee to restrain vendor from obstructing ditch by which water flowed into pond. McCollum v. Williamson, 96 App. Div. 638, 89 N. Y. S. 119.

Rights affecting stockholders: Creditor's suit to enforce stockholder's liability and suit by stockholders to have receiver appointed. Hamilton Nat. Bank v. American Loan & Trust Co. [Neb.] 100 N. W. 202. An order restraining the consolidation of corporations on the ground that the plan contemplated an excessive issue of stock is not res judicata against a consolidation under a plan eliminating such excessive issue. Pierce v. Old Dominion Copper Min. & Smelt. Co. [N. J. Eq.] 58 A. 319.

Decisions on the pleadings: Dismissal of petition not showing that interests of tutrix conflicted with those of the minor, held not res judicata of a petition showing such conflict. Alba v. Provident Sav. Life Assur. Soc., 112 La. 550, 36 So. 587.

13. Importers' & Traders' Nat. Bank v. Lyons [Pa.] 58 A. 148; State v. McEldowney, 54 W. Va. 695, 47 S. E. 650. See 2 Curr. L. 64, n. 91.

Rights affecting real property: Judgment in partition does not bar subsequent suit between the two parties concerning title to land not shown to be identical with the land which was in controversy in the partition suit. In re Simon's Estate, 20 Pa. Super. Ct. 450. Ouster proceedings by landlord at instance of lessee against the latter's sublessee held not res judicata of the sublessee's action against the original lessee. Calvert v. Hobbs [Mo. App.] 80 S. W. 681. Judgment against parties to contract holding it invalid held res judicata of right to recover rent under it. Cook v. Des Moines [Iowa] 101 N. W. 434. Suit for damages for maintenance of dam, held to bar similar suit for damages for maintenance of dam replacing the dam considered in the former suit. Stults v. Huntington Waterworks Co. [Ind. App.] 71 N. E. 172.

Rights affecting personal property: Suit against nonresident sheriff for conversion of goods wrongfully seized and kept without the state does not bar replevin suit for such of the goods as are found within the state. Levy v. Solomon, 207 Pa. 478, 56 A. 1007. Judgment against railroad and shipper for destruction of storehouse does not bar action by railroad against shipper for loss of cars, both losses resulting from the same negligent act. Boston & M. R. Co. v. Sargent, 72 N. H. 455, 57 A. 688. Where in an action for the price of goods the purchaser admits owing the seller a certain amount, judgment for the purchaser is a bar to the seller's recovering that amount and erroneous. Flower City Plant Food Co. v. Roberts, 81 App. Div. 249, 80 N. Y. S. 1060.

14. Is conclusive where same cause of action as for judgment in replevin (Ginsburg v. Morrall, 105 Ill. App. 213), or for an injunction (Maloney v. King [Mont.] 76 P. 939; Atlanta Trust & Banking Co. v. Nelms, 119 Ga. 630, 46 S. E. 851), is stated in second action as was set out in the former. Also dismissal of petition on general demurrer bars subsequent suit on similar petition stating same cause of action. Gunn v. James [Ga.] 48 S. E. 148. Judgment in suit to have mine location held void, held to bar suit to have property held in trust for plain-

Identity of parties[15] does not require that they stand in the same relation as plaintiff and defendant as in the former action,[16] nor that they be parties to the record;[17] but requires that they sue or be sued in the same capacity.[18]

Privies of a party are equally bound with him.[19]

The identity of cause of action[20] need only be substantial; thus one is not

tiff, the same agreement and averments of fraud being the basis of both actions. Lockhart v. Leeds [N. M.] 76 P. 312.

15. See 2 Curr. L. 64, n. 90.

16. Owner setting up payment of mechanics' liens as a counterclaim to suit by building contractor held judgment for plaintiff was a bar to subsequent action by owner against surety on contractor's bond. Lamb v. Wahlenmaier [Cal.] 77 P. 765.

17. Rieschick v. Klingelhoefer, 91 Mo. App. 430.

18. Judgment against one as executor does not bind him when sued individually, Lauby v. Gill, 42 Misc. 334, 86 N. Y. S. 718. Action against one as maker of a note held not to bar subsequent action against him as a guarantor. Hill v. Combs, 92 Mo. App. 242. Judgmsnt dismissing a bill by the United States to avoid, by way of forfeiture, certain patents of land issued in pursuance of the wagon road grant, is a bar to a subsequent suit by the United States against the same defendant to avoid the patents on the ground that the lands were within an Indian reservation. United States v. California & O. Land Co., 192 U. S. 355, 48 Law. Ed. 476. See 2 Curr. L. 64, n. 89.

19. **Administrators:** Administrator is in privity with his intestate. Gordon v. Ware Nat. Bank [C. C. A.] 132 F. 444. Judgment in suit by administrator concerning property of the estate binds the heirs as well as the administrator. Gunn v. James [Ga.] 48 S. E. 148.

Attorney and client: That one's legal adviser appears as amicus curiae in a suit does not make such person a party thereto. McWilliams v. Gulf States Land & Imp. Co. [La.] 35 So. 514.

Creditors and trustee in bankruptcy: A finding on a creditor's petition that a transfer by an alleged bankrupt was not a preference does not bind a trustee in bankruptcy subsequently appointed in another court, in a suit brought by him against the alleged preferred creditor to recover the property. In re Sears, Humbert & Co. [C. C. A.] 128 F. 275.

Grantees and judgment debtors: A voluntary grantee, with notice of the facts, is in privity with judgment debtor. Johnson v. Stebbins-Thompson Realty Co., 177 Mo. 581, 76 S. W. 1021. Grantees of a judgment debtor not parties to the action in which the judgment was rendered are not concluded thereby. Thompson v. Williamson [N. J. Eq.] 58 A. 602.

Husband and wife: A judgment in favor of defendant in an action by a wife against a carrier for injuries does not bar an action by the husband for loss of her services. Brierly v. Union R. Co. [R. I.] 58 A. 451. Judgment in favor of married woman for personal injuries is not conclusive of defendant's negligence in favor of husband in action by latter for loss of wife's services. Berg v. Third Ave. R. Co., 89 N. Y. S. 433.

Lienors: Judgment in action to quiet title is not binding on a judgment lienor not a party to the action. Jasper County v. Sparham [Iowa] 101 N. W. 134.

Manufacturer and user: Suit for infringement of patent by user of article, held not barred by an adverse decision in a suit against manufacturer. Eldred v. Breitwieser, 132 F. 261.

Minors: Infants answering by guardians ad litem are bound by the judgment. Thorn v. De Breteuil [N. Y.] 71 N. E. 470; Fiene v. Kirchoff, 176 Mo. 516, 75 S. W. 608.

Mortgagors, mortgagees and the latter's grantees: A deficiency judgment fixes, as against the mortgagor, the status of the mortgages as judgment creditor. Le Herisse v. Hess [N. J. Eq.] 57 A. 808. A deficiency judgment is conclusive on the fraudulent grantee of the mortgagor as to the validity of the mortgage and debt on which judgment is founded. Id. Judgment upholding validity of mortgage and sale thereunder is res judicata of suit by mortgagor against grantee of purchaser of sale. Sadler v. Henderson, 112 La. 618, 36 So. 549.

Municipality and citizen: Adjudication of right of city to mandamus bars similar suit by a citizen. State v. Hartford St. R. Co., 76 Conn. 174, 66 A. 506. Judgment dismissing suit by property owner to compel adjoining owners to build sidewalks at certain grade is not res judicata of suit by such adjoining owners to enjoin city from lowering grade. Kemp v. Des Moines [Iowa] 101 N. W. 474.

Principal and agent: Suit by agent in his own name for benefit of principal held to bar suit by latter. Stearns v. Shepard & Morse Lumber Co., 91 App. Div. 49, 86 N. Y. S. 391.

Stockholders and corporation: Stockholder is in privity with corporation. Johnson v. Stebbins-Thompson Realty Co., 177 Mo. 581, 76 S. W. 1021; Verner v. Simpson [S. C.] 47 S. E. 729. Judgment in suit by stockholders in the right of the corporation bars subsequent suit by other stockholders for same purpose. Hearst v. Putnam Min. Co. [Utah] 77 P. 753.

Successors in interest in waterworks, held parties the same. Stults v. Huntington Waterworks Co. [Ind. App.] 71 N. E. 172.

Testamentary trustee: A remainderman not in esse at the time of a decree approving the final account of a testamentary trustee is concluded thereby. In re Elting, 93 App. Div. 616, 87 N. Y. S. 833.

Vendor and vendee: Suit against the vendor of property after sale does not bind the vendee who is not a party to the suit. McWilliams v. Gulf States Land & Imp. Co. [La.] 35 So. 614.

Witnesses: Judgment does not bind a witness in the action. Weston v. Elliott, 72 N. H. 433, 57 A. 336; Rieschick v. Klingelhoefer, 91 Mo. App. 430. See 2 Curr. L. 67, n. 20.

20. See 2 Curr. L. 64.

barred from claiming land[21] or the profits thereof[22] by a former suit based on a different right than that under which he now claims. One claiming under the same right, it matters not that the form of the action[23] or property[24] is different, or that the relief sought in the two actions differs in extent.[25] Judgment in habeas corpus[26] or of exemption of land from taxation[27] bars subsequent action so long as the same conditions exist. A judgment upon a note is not the same cause of action as the note.[28]

Scope of adjudication.[29]—If parties and issues be identical, the adjudication is binding not only as to matters actually adjudicated,[30] but as to everything which might have been litigated under the issues as made,[31] unless a party was

21. Suit determining that one is not the sole owner of property held not to bar him from asserting an undivided interest therein. Selbie v. Graham [S. D.] 100 N. W. 756. Judgment in trespass for use of a way does not estop defendant from asserting in a subsequent action of trespass a right to the way for the benefit of another tract of land. Norman v. Sylvia [R. I.] 59 A. 112. Judgment for defendant in a suit of trespass to try title held not a bar to plaintiff's right to recover in a subsequent suit for a reconveyance. Rev. St. 1895, art. 6276 held not to affect the case. Moore v. Snowball [Tex.] 81 S. W. 6. Judgment in forcible entry and detainer held to bar action for damages for wrongful eviction. Rankin v. Hooks [Tex. Civ. App.] 81 S. W. 1005. Judgment in action to have a deed declared fraudulent and the question whether the delivery of the deed antedated attachment decided, held not to bar subsequent suit to remove cloud on title, caused by the attachment, to land embraced in the deed, previously considered, but not involved in the former action. Clark v. Knox [Colo.] 76 P. 372.

22. Action for recovery of rent not barred by previous action for recovery of possession and for mesne profits. Linke v. Walcott, 5 Ohio C. C. (N. S.) 54.

23. Judgment denying plaintiff's right to have surplus of trust fund for benefit of defendant applied to plaintiff's judgment is conclusive of his right to have execution issued against such income. Neuman v. Mortimer, 90 N. Y. S. 524.

24. Judgment for defendant in an action by trustee in bankruptcy to determine ownership of insurance policies transferred by the bankrupt after loss bars subsequent action by trustee to recover fund on same ground. Engel v. Union Square Bank, 94 App. Div. 244, 87 N. Y. S. 1070.

25. That the defense of usury in a loan secured by a mortgage falls short of the annulment of the mortgage lien which was demanded in the former suit. Belcher Land Mortg. Co. v. Norris [Tex. Civ. App.] 78 S. W. 390.

26. Habeas corpus proceeding to obtain custody of child held res judicata. Cormack v. Marshall, 211 Ill. 519, 71 N. E. 1077.

27. Judgment holding land of railroad exempt owing to its condition and use. Chicago, etc., R. Co. v. Nelson [Wis.] 100 N. W. 1033.

28. First Nat. Bank v. Lewinson [N. M.] 76 P. 288.

29. See 2 Curr. L. 66.

30. Action on claim for work performed; issue being joined on workmanlike manner of job, bars subsequent action for damages for improper performance of work. Goldberg v. Schlessinger, 86 N. Y. S. 209. Judgment as to fraud in a deed bars subsequent action involving the bona fides of the deed, but as to other land conveyed thereby but not involved in the former action. Clark v. Knox [Colo.] 76 P. 372. Decision of referee of amount which intervenor in foreclosure proceedings should be required to pay by reason of its bid at foreclosure proceedings held not res judicata of defense raised by the petition of intervention in the foreclosure proceedings. Farmers' Loan & Trust Co. v. Hoffman House, 96 App. Div. 301, 89 N. Y. S. 281. Judgment in ejectment in favor of plaintiff bars subsequent suit by defendant against plaintiff in which right to land is claimed under a contract. McCarthy v. Birmingham [Neb.] 99 N. W. 266. Judgment as to validity of claim asserted by one as executor held a bar to an action for the same purpose in another jurisdiction by one claiming as administrator with the will annexed. Baldwin v. Rice, 44 Misc. 64, 89 N. Y. S. 738. Judgment, in replevin to recover possession of chattel security, resulting in the payment of the debt, is res judicata as to any further attempt to enforce payment thereof. Nichols & Shepard Co. v. Trower [Okl.] 78 P. 575.

31. Allen v. Davenport [C. C. A.] 132 F. 209; Gordon v. Ware Nat. Bank [C. C. A.] 132 F. 444; Brown v. First Nat. Bank [C. C. A.] 132 F. 450; In re Assessment of Property of Northwestern University, 206 Ill. 64, 69 N. E. 75; Cresap v. Cresap, 54 W. Va. 581, 46 S. E. 582; Latimer v. Irish-American Bank, 119 Ga. 887, 47 S. E. 322; Werner v. Cincinnati, 23 Ohio Circ. R. 475. Judgment in an action by writ of entry. In re Buttrick, 185 Mass. 107, 69 N. E. 1044. Judgment declaring conveyance fraudulent, held party could not in subsequent action to quiet title claim that pleadings in former action were untrue. Strow v. Allen [Iowa] 98 N. W. 141. Judgment cannot be gone behind, in an action on an appeal bond, for the purpose of showing a defense to the action in which the judgment was rendered. Stewart v. Miles [Mo. App.] 79 S. W. 988. See 2 Curr. L. 66, n. 1-2.

ILLUSTRATIONS. Actions affecting.—Estates of decedents: Suit for construction of will held res judicata of validity of trust created thereby. Thorn v. De Breteuil [N. Y.] 71 N. E. 470. Judgment in action for construction of will held conclusive as to questions in respect to a certain bequest, though not specifically presented by the pleadings. Jewett v. Schmidt, 45 Misc. 34.

prevented from presenting the same by reason of fraud, accident, or act of the adverse party, unmixed with any fraud or negligence on his own part.[82] The facts constituting an affirmative cause of action, the judgment does not work such a bar,[83] unless he interposes a part of such claim in the action.[84] The judgment does not extend to defenses which could not have been set up,[85] nor is one obliged to change his cause of action in order to set up such matter.[86] A defense being

90 N. Y. S. 848. A final decree of a surrogate barring all claims against a decedent's estate not presented within the time limited in the notice pursuant to Revision 1898, p. 764, § 62, is a bar against any creditor failing to present his claim within such time. Seymour v. Goodwin [N. J. Eq.] 59 A. 93.

Mechanic's lien: Judgment of bankruptcy court as to what was due mechanic lienor from the bankrupt's estate, bankrupt was building contractor, held to bar action against owner for unpaid portion of lien. Southern Planing Mill & Lumber Co. v. Doerhoefer's Ex'r, 25 Ky. L. R. 1834, 78 S. W. 882. Failure of a surety on a contractor's bond, when defending mechanic's lien proceeding, to set up that the lien was not filed in time, bars the use of such defense by such surety when sued by the owner of the house, against whom the mechanic's lien judgment was rendered and who paid the same. Manny v. National Surety Co., 103 Mo. App. 716, 78 S. W. 69.

Mortgaged property: Debtor defaulting in foreclosure suit is concluded from litigating in another suit defenses which should have been litigated in the foreclosure suit. Le Herisse v. Hess [N. J. Eq.] 57 A. 808. Judgment of foreclosure against plaintiff on notes given for purchase price of machinery bars his right to rescind the contract. Standefer v. Aultman & T. Machinery Co. [Tex. Civ. App.] 78 S. W. 552. Judgment in action to cancel mortgage in that mortgagor was not the owner of the property, adjudging mortgage valid, bars defense that mortgage was usurious to foreclosure action. Belcher Land Mortg. Co. v. Norris [Tex. Civ. App.] 78 S. W. 390. An indorser who secures the indulgence of the holder of a note until after a foreclosure suit, and the maker and a former indorser are exhausted, cannot claim that the foreclosure suit is res adjudicata as to him. Sessions & Co. v. Isabel, 2 Ohio N. P. (N. S.) 288.

Municipalities: Judgment in suit to invalidate ordinance for failure to comply with the statute bars subsequent attack in that ordinance created a monopoly. Lusk v. Chicago, 211 Ill. 183, 71 N. E. 878. Failure to plead defense in suit to enjoin assessment held res judicata in suit to enforce the assessment. Allen v. City of Davenport [C. C. A.] 132 F. 209.

Negligence: Judgment in suit against joint defendants for loss occasioned by their negligence held res judicata on all questions but concurrent negligence. Boston & M. R. Co. v. Sargent, 72 N. H. 455, 57 A. 688.

Property: Right of wife rendered res judicata by creditor's bill. Baldwin v. Hanecy, 104 Ill. App. 84. Adjudication as to title of intervener in suit where title to property was involved. Klenke v. Noonan [Ky.] 81 S. W. 241. Judgment in an action for rent held res judicata in an action for a subsequent instalment. Franke v. Adams, 86 N. Y. S. 293. Party to partition suit is barred from setting up after acquired title against former co-tenants. Carter v. White, 134 N. C. 466, 46 S. E. 983. Plaintiff in ejectment having the legal title and defendant the equitable, failure by the latter to set up such title concludes his rights thereunder as against plaintiff, and a judgment for plaintiff determines the invalidity of defendant's title. In re Dutton's Estate, 208 Pa. 350, 57 A. 719. Judgment against a defendant, in a petitory action, who makes no answer or stands on possession, bars his subsequently setting up any title he then had. This rule extends to inchoate real rights. Lindquist v. Maurepas Land & Lumber Co., 112 La. 1030, 36 So. 843.

Public officers: Action on official bond for specific breach bars subsequent actions for other breaches existing at the time but not in issue in the first suit. State v. Sandifer [S. C.] 46 S. E. 1006. Under Code, § 616, as amended, failure of plaintiff to recover fees and salary in the action adjudging his right to office is a bar to a subsequent action for fees and salary. McCall v. Webb, 135 N. C. 356, 47 S. E. 802.

Trespass: Judgment in action for damages for trespass held to bar action for damages for continuing same. Baxter v. Thede, 103 Ill. App. 57. Where an injunction was not sought in suit to quiet title and for damages for trespass, held plaintiff was not entitled to an injunction in a subsequent suit. Maloney v. King [Mont.] 76 P. 939.

32. Latimer v. Irish-American Bank, 119 Ga. 887, 47 S. E. 322. See 2 Curr. L. 66, n. 3.

33. Brown v. First Nat. Bank [C. C. A.] 132 F. 450. Defendant in ejectment, making no claim for the value of improvements but relying on right thereto under contract, is not barred from claiming the value thereof. Deceil v. McRee [Miss.] 35 So. 940.

34. Brown v. First Nat. Bank [C. C. A.] 132 F. 450. One who avails himself by action or defense of a part of an indivisible claim or cause of action is thereby barred from maintaining an action or defense founded upon it. Id. See 2 Curr. L. 66, n. 9-11,

35. Court having no equity jurisdiction, right to pursue equitable rights not barred by judgment. McMahan v. Whelan, 44 Or. 402, 75 P. 715. Judgment in suit by life tenant to set aside sale of his interest in land held not res judicata of remaindermen's right to vacation of sale of their remainder to pay certain cost bills. Henderson v. Kibbie, 211 Ill. 556, 71 N. E. 1091. The pleadings of the first suit must have been such that the party could have had the matter proven and passed. State v. McEldowney, 54 W. Va. 695, 47 S. E. 650.

36. Dismissal of action on contract for nonperformance does not bar action for quantum meruit. Maeder v. Wexler, 43 Misc. 16, 87 N. Y. S. 400. Judgment in an action to cancel a mortgage, usury not being set

available in law or in equity, failure to set it up in a law action bars its use in equity.[37] Failure to intervene after notice of suit in a foreign court does not render the judgment res judicata as against the one having right to intervene.[38] Defenses to a judgment cannot be set up in a suit upon that judgment.[39] One cannot split his cause of action and have successive recoveries.[40] It appearing from the record that the judgment might have been rendered on any one of several distinct matters, the whole subject-matter of the action will be at large, and open to a new contention unless the uncertainty be removed.[41] Mere expressions of opinion by the court,[42] or recitals in judgments,[43] are not conclusive in a second suit, nor are matters which can only be inferred by argument or inference from the judgment concluded thereby.[44] Judgment for damages for a definite period is not res judicata of plaintiff's right to recover damages after the termination of such period.[45]

§ 3. *Adjudication as estoppel of facts litigated.*[46]*—Though there be no identity of issues and subject-matter,*[47] *an adjudication is conclusive between the parties*[48] *and their privies,*[49] *as to all matters in issue*[50] *and decided*[51] *or necessarily*

up, is not res judicata of question in subsequent suit to foreclose. Norris v. Belcher Land Mortg. Co. [Tex.] 82 S. W. 500.

37. Cannot use it to enjoin collection of judgment of law court. Hoge v. Fidelity Loan & Trust Co. [Va.] 48 S. E. 494.

38. Plaintiff's failure to intervene and set up title to logs taken from his land and sold to defendant in a suit by the trespasser against defendant does not bar plaintiff from recovering their value of defendant. Jones Lumber Co. v. Gatliff [Ky.] 82 S. W. 295.

39. Statute of limitations. Tomlin v. Woods [Iowa] 101 N. W. 135. That summons was defective, though not void. Id.

40. Action wherein damages were recovered for breach of contract to deliver goods, held to bar subsequent actions for damages for failure to deliver goods thereunder at subsequent time. Pakas v. Hollingshead, 42 Misc. 287, 86 N. Y. S. 560. See 2 Curr. L. 67, n. 9-11. See, also, Pleading, 2 Curr. L. 1178.

41. Fulton v. Gesterding [Fla.] 36 So. 56.

42. Suit to recover damages from capsizing of tug due to negligence, expression of opinion by court that capsizing was due to sea perils held not conclusive in second suit. Williamson v. McCaldin Bros. Co. [C. C. A.] 122 F. 63. That mandamus would issue against comptroller general to issue warrant for salary of judge, if there was any money in treasury. State v. Jennings [S. C.] 47 S. E. 683. An appellate court by holding that the lower court has no power to modify a decree does not render plaintiff's rights under such modification res judicata. Barkman v. Barkman, 209 Ill. 269, 70 N. E. 652.

43. Recital in judgment of commissioners' court. Tarrant County v. Butler [Tex. Civ. App.] 80 S. W. 655.

44. Weidner v. Lund, 105 Ill. App. 454.

45. Candler v. Asheville Electric Co., 135 N. C. 12, 47 S. E. 114.

46. See ante, § 2, for note on distinction between the effect of a judgment as a bar or estoppel. See, also, 2 Curr. L. 67.

47. First Nat. Bank v. Covington, 129 F. 792; Chicago, etc., R. Co. v. Cass County [Neb.] 101 N. W. 11.

48. Agnew v. Montgomery [Neb.] 99 N. W. 820; Hart v. Manson, 119 Ga. 855, 47 S. E. 345; Harrison v. Ottman, 111 La. 730, 35 So. 844; German Protestant Orphan Asylum v. Barber Asphalt Pav. Co. [Ky.] 82 S. W. 632. See 2 Curr. L. 67, n. 19.

ILLUSTRATIONS: An adjudication that certain bonds of a city were invalid does not annul other bonds of the same issue sold to other parties. City of Ironwood v. Wickes, 93 App. Div. 164, 87 N. Y. S. 554. Judgment not admissible in evidence against a stranger. Lang v. Metzger, 206 Ill. 475, 69 N. E. 493.

Criminal proceedings: A judgment in a criminal case cannot be used in a civil action to establish the facts on which such judgment rests. Risdon v. Yates [Cal.] 78 P. 641. But where a defendant has pleaded guilty in a criminal case, the plea and judgment may be received in evidence as an admission, but are not conclusive. Id.

Estates of decedents: Grant of letters of administration to alleged widow is not conclusive of latter's marriage to deceased as against one not taking part in the administration proceedings. Phillips v. Heraty [Mich.] 100 N. W. 186.

Judgments as to title: A party acquiring rights after foreclosure but before sale, not being a party to the foreclosure proceeding, is not bound by the decree therein. Thompson v. Schenectady R. Co. [C. C. A.] 131 F. 577. The title of grantees who are not made parties to a subsequent foreclosure suit is unaffected by such suit. Adams v. Hopkins [Cal.] 77 P. 712. City not a party to a suit to quiet title is not bound by determination as to location of street. Dows Real Estate & Trust Co. v. Emerson [Iowa] 99 N. W. 724. Judgment in suit against alleged owner of land cannot be interposed as res judicata in suit against another claiming ownership. Duff v. Cornett [Ky.] 82 S. W. 1004.

49. **THOSE IN PRIVITY.—Agency:** Owner of paper in common with another, the latter having notice of the suit. Glass v. Parish of Concordia [La.] 37 So. 189.

Assignor and assignee subsequent to institution of suit. Lockhart v. Leeds [N. M.] 76 P. 312. Assignee for benefit of creditors. In re Roberts, 90 N. Y. S. 731.

Cestuis que trustent, as to judgment against

involved in the decision made.[52] *Persons concluded.*—One may be bound, though

trustee as to the latter's duty to account. Felkner v. Dooly, 27 Utah, 350, 75 P. 854.

Grantor and fraudulent grantee as against judgment creditor. Salemonson v. Thompson [N. D.] 101 N. W. 320.

Principal and surety: See 2 Curr. L. 68. On contractor's bond. Friend v. Ralston [Wash.] 77 P. 794. Surety on condemnation money bond given by defendant in distress warrant proceedings. Price v. Carlton [Ga.] 48 S. E. 721. Determination of liability of administrator is res judicata in suit on appeal bonds of latter. McDonald v. Holdom, 208 Ill. 128, 70 N. E. 21.

Probate proceedings held to bind all parties and all persons whose interests were derivative from the rights of any party so concluded. Jewett v. Schmidt, 45 Misc. 34, 90 N. Y. S. 848.

Public officers: An estoppel by judgment against a public officer as such operates upon the office and binds his successor. State v. Clinton County Com'rs, 162 Ind. 580, 70 N. E. 373.

Purchasers at judicial sales: Judgment in action on note that land securing it is subject to sale is res judicata of same question in action of ejectment by grantee of purchaser at judicial sale. Edmonston v. Carter [Mo.] 79 S. W. 459.

Trustee in bankruptcy is in privity with creditors. Des Moines Sav. Bank v. Morgan Jewelry Co., 123 Iowa, 432, 99 N. W. 121.

THOSE NOT IN PRIVITY. Grantor and fraudulent grantee: Judgment rendered subsequently to the conveyance is not conclusive upon the grantee as to the existence or amount of the debt at the time of the transfer. Lynch v. Burt [C. C. A.] 132 F. 417.

Husband and wife: See 2 Curr. L. 68. Suit as to title to property. Baxter v. Brown [R. I.] 59 A. 73.

Mortgagor and creditors: Hopkins v. Cofoid, 103 Ill. App. 167. Judgment creditor. Stastny v. Pease [Iowa] 100 N. W. 482.

Mortgagor and mortgagee: Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co. v. Dawson, 130 F. 152.

Mother and son: In proceedings for distribution of an estate. Sorensen v. Sorensen [Neb.] 98 N. W. 837.

Stockholders, not of the same class, in a building and loan association. Ottensoser v. Scott [Fla.] 37 So. 161. See 2 Curr. L. 68.

Tenants in common: Allred v. Smith, 135 N. C. 443, 47 S. E. 597.

Vendor and vendee: Latter is not bound by judgment in subsequent action of trover against his vendor. Washington Exch. Bank v. Holland & Co. [Ga.] 48 S. E. 912. See 2 Curr. L. 68.

50. State v. McEldowney, 54 W. Va. 695, 47 S. E. 650; Agnew v. Montgomery [Neb.] 99 N. W. 820. Judgment in partition suit held not to estop widow from asserting homestead rights in the property. Penn v. Case [Tex. Civ. App.] 81 S. W. 349. A sale of cotton being rescinded and a new sale entered into in the carrying out of which the buyer converted the cotton, the setting up of such conversion in an action held not to render the judgment therein res judicata of the rescission of the original contract. Lytle v. Crawford, 90 App. Div. 605, 86 N. Y. S. 90. Judgment of divorce adjudicating property rights of wife held not res judicata of wife's rights as assignee of an insurance policy on life of husband. Hatch v. Hatch [Tex. Civ. App.] 80 S. W. 411. Action for service held conclusive as to amount and validity of claim, but not of judgment creditor's right to a preference from his debtor's insolvent estate. In re Roberts, 90 N. Y. S. 731. Adjudication that one is the holder of the legal title is not res judicata on the questions as to whether he held it for another or upon an implied trust. First Nat. Bank v. Leech, 207 Ill. 215, 69 N. E. 890. See 2 Curr. L. 70, n. 31.

Collateral matters not embraced: Judgment in suit to enjoin use of mining property held not res judicata on question of conspiracy raised therein, so as to bar subsequent suit to restrain the carrying out of such conspiracy. Campbell v. Milliken [Colo. App.] 78 P. 620. Decree directing receiver of bank to turn over certain bonds to the transferee is not res judicata on the right of the transferee to interest collected by the receiver merely because the decree did not mention interest. People v. Globe Sav. Bank [Ill.] 71 N. E. 820. In a suit to set aside a conveyance of land, the only question determined was whether the town officers had authority to buy the land, held a dismissal of the bill was not res judicata as to the validity of contracts to sink wells on the land and which were incidentally introduced in the suit. Smith v. Inhabitants of Stoughton, 185 Mass. 329, 70 N. E. 195.

51. Gentry v. Pacific Life Stock Co. [Or.] 77 P. 115; Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co. v. Dawson, 130 F. 152; Harper, Hollingsworth & Darby Co. v. Mountain Water Co. [N. J. Eq.] 56 A. 297; Stearns v. Shepard & Morse Lumber Co., 91 App. Div. 49, 86 N. Y. S. 391. A litigant denying a certain proposition of law and fact he cannot afterward assert what he has denied, a judgment having been rendered sustaining his denial. Vicksburg, etc., R. Co. v. Tibbs, 112 La. 51, 36 So. 223.

ILLUSTRATIONS. Judgments deciding facts affecting alimony: Judgment granting husband divorce held to bar action by wife for alimony on any of the grounds decided against her in the divorce proceeding. Phillips v. Phillips [Kan.] 76 P. 842.

Commercial paper: Determination of question of fraud in suit to enjoin sale of collateral given to secure a note held res judicata in a subsequent action on the note. Mills v. Allen [R. I.] 58 A. 622. Judgment in an action on one of a series of notes that there was a failure of consideration bars granting subsequent motion to open a default judgment entered in suit upon another of the notes, the affidavit setting up the same consideration as considered in the other action. Amshel v. Hosenfeld, 20 Pa. Super. Ct. 373.

Contract rights: Judgment for back rent up to a certain date, held not to estop defendant from showing payment of rent up to a prior date. Hieronymus Bros. v. Bienville Water Supply Co. [Ala.] 36 So. 453. A finding in a suit for agreed compensation for services that the services were not rendered is conclusive in a subsequent suit to recover the reasonable value of the serv-

not a party where he has negligently failed to become a party,[53] or where the sub-

ices. Randall v. Carpenter [R. I.] 57 A. 865. Judgment held conclusive as to the amount of water defendants were entitled to withdraw from plaintiff's canal feeder, but not as to the means adopted by plaintiffs to restrict defendant's quantity to the right amount. Merrifield v. Canal Com'rs of Illinois & M. Canal [Ill.] 72 N. E. 405.

Debts: Former judgment held conclusive evidence of debt and amount in action by judgment creditor against fraudulent grantee of debtor. Salemonson v. Thompson [N. D. 101 N. W. 320.

Tenancy: Judgment for tenant in summary proceedings for damages for wrongful eviction does not bar landlord from showing in a subsequent action the value of the crop, and what portion of it he was entitled to retain for advancements made before eviction. Burwell v. Brodie, 134 N. C. 540, 47 S. E. 47.

Municipal improvements: Determination of question of benefits, held res judicata in subsequent proceeding to levy supplemental assessment. Town of Cicero v. Green, 211 Ill. 241, 71 N. E. 884.

Negligence: Williamson v. McCaldin Bros. Co. [C. C. A.] 122 F. 63. Conclusive evidence of defect, lack of contributory negligence, and amount recovered in suit for personal injuries. Tolmie v. Fidelity & Casualty Co., 88 N. Y. S. 717.

Question of liability: The question of liability being determined, it cannot again be raised at a hearing to assess damages, or by a request for a ruling by the court on a motion for a new trial. National Mach. & Tool Co. v. Standard Shoe Machinery Co. [Mass.] 70 N. E. 1038. Judgment against principal and surety held conclusive of principal's liability in action against him by his surety who paid judgment. Reed v. Humphrey [Kan.] 76 P. 390.

Real property: Determination of ownership in suit to enjoin ejectment held res judicata in action of ejectment. Rausch v. Briefer [Mich.] 101 N. W. 523. Title passed on in an action for trespass, held res judicata in a subsequent action of ejectment. Herschbach v. Cohen, 207 Ill. 517, 69 N. E. 932. Determination of nondelivery of deed in an action wherein the complaint alleges ownership and wrongful entry by defendant, held conclusive in action to remove cloud on title and recover possession. Storrs v. Robinson [Conn.] 58 A. 746. Title of mortgagor determined. Fiene v. Kirchoff, 176 Mo. 516, 75 S. W. 608. Judgment in suit for general accounting that contract was one for rent of premises and finding the amount due thereunder is binding in a subsequent distress warrant proceeding between the parties. Price v. Carlton [Ga.] 48 S. E. 721. Judgment in partition that no part of a payment to redeem land from mortgage foreclosure was a lien on plaintiff's interest, held conclusive in a subsequent suit to recover plaintiff's share of such payment. Ivancovich v. Weilenman [Cal.] 78 P. 268. Judgment in partition proceedings that adoption proceedings were valid is res judicata thereof in another suit for partition of other land. Brack v. Boyd, 211 Ill. 290, 71 N. E. 995. Brack v. Boyd, 211 Ill. 290, 71 N. E. 995. Right of wife to property rendered res judicata by judgment in a creditor's suit. Baldwin v. Hanecy, 104 Ill. App. 84. Liability of property to taxation depending on the existence of a specific fact. Chicago, etc., R. Co. v. Cass County [Neb.] 101 N. W. 11. Unsuccessful attempt to foreclose mortgage in equity suit, there being an improper joinder of causes of action, held not to bar mortgagee from claiming, in a subsequent action of ejectment, the rights of a mortgagee in possession. Stroup v. Pepper [Kan.] 76 P. 825. Recital in decree in partition as to parentage of party, the question not being in issue, held not res judicata in subsequent suit to set aside a will. Stone v. Salisbury, 209 Ill. 56, 70 N. E. 605.

Sale of goods: Determination of question of payment held res judicata in subsequent suit to recover price paid for undelivered portion. Borches & Co. v. Arbuckle Bros. [Tenn.] 78 S. W. 266.

Taxation: Question of exemption held res judicata in suit involving taxes levied for a different year or under a different statute. Georgia R. & Banking Co. v. Wright, 132 F. 912.

Trusts: In a suit concerning property, a relation of trust being established between the parties, the judgment is res judicata on the subject of the relationship in a suit by the trustee to recover for services rendered with reference to such property. Hazard v. Coyle [R. I.] 58 A. 987. Findings in divorce suit, of existence and terms of agreement under which land of one party was conveyed held conclusive in a subsequent action to recover the price on the ground of a different consideration. Caseday v. Lindstrom, 44 Or. 309, 75 P. 222.

See 2 Curr. L. 67, n. 15.

52. Stocker v. Nemaha County [Neb.] 100 N. W. 308. Though trial judge makes no findings of fact and does not mention the contention in his memorandum. Fayerweather v. Ritch, 25 S. Ct. 58. Verdict establishing nuisance held to conclude fact of nonexistence of clay stratum with, which the nuisance could not exist. Harper, Hollingsworth & Darby Co. v. Mountain Water Co. [N. J. Eq.] 56 A. 297. Decision that action to recover realty was not barred by Code Civ. Proc. § 318, held to establish that plaintiff or his predecessors had been seized of the property within 5 years. Baum v. Roper [Cal.] 78 P. 466. Judgment decreeing sale of goods and payment therefor is res judicata of a claim subsequently set up by the seller when sued by the buyer to recover purchase price for goods not delivered. Borches & Co. v. Arbuckle Bros. [Tenn.] 78 S. W. 266. Where in scire facias sur mortgage there was no defense that plaintiff had defaulted in making advances agreed upon for the improvement of the land, no such defense could be set up in an action to foreclose another mortgage between the same parties. Continental Title & Trust Co. v. Devlin [Pa.] 58 A. 843. A judgment of conviction is conclusive evidence of probable cause in a subsequent action for malicious prosecution. Kruegel v. Stewart [Tex. Civ. App.] 81 S. W. 365. Judgment of eviction against tenant is conclusive of the relation of landlord and tenant, of the existence and validity of the lease, and of the landlord's right to regain possession.

ject is regulated by statute,[54] or where the judgment constitutes a link in a chain of title,[55] or where the proceeding is in rem;[56] but this does not include judgments quasi in rem.[57] The person sought to be bound need not have been a necessary party to the former adjudication.[58] One voluntarily becoming a party to the litigation is bound thereby.[59] One protesting, by counsel, against a proceeding but not intervening therein, is not a party thereto so as to be bound thereby.[60] Appellant by dismissing his appeal does not in any way affect an intervener whose rights have been concluded by the judgment.[61] The parties must claim in the same right,[62] and it is immaterial what views the parties championed in the first suit.[63] One being dismissed from the action before final judgment, the latter is not binding on him,[64] and if dismissed by the final judgment, decisions in ancillary proceedings are not res judicata as to him.[65] Both parties must be bound by the former judgment,[66] and must have been and continue to be adverse,[67] though they need not occupy the same relation as plaintiff or defendant.[68]

Matters concluded.[69]—Estoppel by res judicata cannot be predicated on a decision of a question of law,[70] nor does it extend to immaterial and unessential facts,[71]

Harvin v. Blackman, 112 La. 24, 36 So. 213. A judgment roll in summary proceedings for nonpayment of rent, held conclusive evidence as to all facts necessary to support a recovery except the amount of rent due. Goetschius v. Shapiro, 88 N. Y. S. 171. As to what facts are rendered conclusive and what are not by judgment, under Rev. St. § 4275, against winners at gaming, see Trout v. Marvin, 24 Ohio Circ. R. 333.

53. Distribution by the orphan's court of a balance shown by the account of an executor or administrator. In re Piper's Estate, 208 Pa. 636, 57 A. 1118.

54. Unknown heirs. Under Pasch. Dig. art. 5460. Houston, etc., R. Co. v. De Berry [Tex. Civ. App.] 78 S. W. 736.

55. Chapman v. Greene [S. D.] 101 N. W. 351; Harrison v. Ottmon, 111 La. 730, 35 So. 844. Adjudication of one's homestead rights held binding in a suit between such person and a stranger to the former action in a subsequent suit of forcible entry and detainer. Merki v. Merki [Ill.] 72 N. E. 9.

56. Sorensen v. Sorensen [Neb.] 98 N. W. 837; Chapman v. Greene [S. D.] 101 N. W. 351 [Dicta]. A decree by the probate court having jurisdiction, assigning the residue of the estate of a deceased person is conclusive upon all persons interested in the estate. Chadbourne v. Hartz [Minn.] 101 N. W. 68.

57. Judgment setting aside deed. Allred v. Smith, 135 N. C. 443, 47 S. E. 597.

58. Mortgagee of bankrupt intervening in bankruptcy proceedings. Des Moines Sav. Bank v. Morgan Jewelry Co., 123 Iowa, 432, 99 N. W. 121.

59. As to amount of costs. State v. New Orleans Debenture Redemption Co., 112 La. 1, 36 So. 205. One claiming half interest in a note intervening in action thereon, held concluded by judgment. Kline v. Mohr, 142 Cal. 673, 76 P. 650. Where an attorney employed by a receiver joins the receiver in submitting his claim for services to the court, the court's award is binding upon him, until properly set aside, though the receiver is personally liable to him. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

60. Protested against scheme for settling affairs of insolvent building and loan association. Ottensoser v. Scott [Fla.] 37 So. 161.

61. Intervener's appeal had been dismissed. Kline v. Mohr, 142 Cal. 673, 76 P. 650.

62. **Not in same right:** One selling property as executrix may claim same on subsequently inheriting it. Rice v. Bamberg [S. C.] 46 S. E. 1009.

63. Borches & Co. v. Arbuckle Bros. [Tenn.] 78 S. W. 266.

64. Decree in partition dismissing holder of sheriff's deed as a party defendant, held judgment in such suit not res judicata on his right to the property. Atlee v. Bullard, 123 Iowa, 274, 98 N. W. 889. See 2 Curr. L. 69, n. 25.

65. Attachment proceedings. Fred Krug Brew. Co. v. Healey [Neb.] 101 N. W. 329; Id. [Neb.] 99 N. W. 489.

66. Allred v. Smith, 135 N. C. 443, 47 S. E. 597. Judgment allowing partition binding on those who were parties to the suit, but not on one not a party. In re Buttrick, 185 Mass. 107, 69 N. E. 1044. A finding of unseaworthiness in an action by the owner of goods against the owner of a scow for loss of cargo does not bind the latter party in a suit against the insurer of the cargo. Chesapeake Lighterage & Towing Co. v. Western Assur. Co. [Md.] 58 A. 16.

67. Fiene v. Kirchoff, 176 Mo. 615, 75 S. W. 608.

68. Defendant in former action became plaintiff in subsequent one, and vice versa. Storrs v. Robinson [Conn.] 58 A. 746. Were both defendants in the former action. Baldwin v. Hanecy, 104 Ill. App. 84. See 2 Curr. L. 64, n. 90.

69. See 2 Curr. L. 70.

70. That bridge was "part of continuous line of road" within meaning of Comp. St. 1899, p. 954, c. 77, art. 1. Chicago, etc., R. Co. v. Cass County [Neb.] 101 N. W. 11. See Wilsie v. Common Council [Mich.] 100 N. W. 605, where the court holds that a decision of law is not binding in a subsequent suit between different parties.

71. Finding in suit to have deed canceled as fraudulent that it had never been delivered, held not conclusive in subsequent par-

but an issue being presented by the pleadings and urged by counsel, the decision of the court is conclusive, though it was not necessary to the decision.[72] The estoppel extends only to the facts as they were at the time judgment was rendered.[73] That the judgment might have been based upon a different ground does not affect its conclusiveness,[74] and being based upon two grounds, it is conclusive as to the existence of both or either.[75] The judgment, either expressly[76] or as a necessary implication,[77] leaving the matter open, the question is not thereby rendered res judicata. Provision in judgment in law court that it should be without prejudice to other remedies of plaintiff does not affect the conclusiveness, as an estoppel, of a former judgment in equity.[78]

§ 4. *Pleading and proof.*[79]—Former adjudication to be available must be pleaded,[80] though if not, the judgment is still admissible in evidence, but is not a conclusive bar to the action.[81] The former adjudication fully appearing in the complaint[82] or answer,[83] a party is not generally required to again plead the same. In such a case the question of res judicata may be raised by demurrer;[84] in all others it should be raised by plea.[85] Plaintiff cannot set up res judicata in his reply when to do so would render the latter inconsistent with the complaint.[86] The plea should refer to the particular suit relied on with such particularity that an issue can be drawn;[87] it must show the identities between the two actions;[88] and that there was a final judgment on the merits by a court of competent jurisdiction.[89] Though failing in this regard, it may be amended providing that a new cause of action is not thereby set out.[90]

The burden is on the party setting up the plea of res judicata to prove it.[91] In

tition suit. Russ v. Maxwell, 94 App. Div. 107, 87 N. Y. S. 1077.

72. Clark v. Knox [Colo.] 76 P. 372.

73. Vincent v. Mutual Reserve Fund Life Ass'n [Conn.] 58 A. 963. That defendants continued in possession after adverse judgment in trespass to try title held not to affect conclusiveness of judgment as to title prior to date of its rendition. Weisman v. Thomson [Tex. Civ. App.] 78 S. W. 728.

74, 75. First Nat. Bank v. Covington, 129 F. 792.

76. A judgment declaring that a title is not in issue, it is not res judicata thereof. Vicksburg, etc., R. Co. v. Tibbs, 112 La. 51, 36 So. 223. See State v. New Orleans Debenture Redemption Co., 112 La. 1, 36 So. 205, where judgment leaving question of appointment of receiver open held not to have the effect of reversing the prior judgment as to costs.

77. If a material fact is such that it must be stated in a bill, a decree dismissing the bill and not stating the fact will not bar a second bill properly stating such fact. State v. McEldowney, 54 W. Va. 695, 47 S. E. 650.

78. Lockhart v. Leeds [N. M.] 76 P. 312.

79. See 2 Curr. L. 71.

80. Sumner v. Sumner [Ga.] 48 S. E. 727; Smith v. Bean [Tex. Civ. App.] 82 S. W. 793; Stearns v. Shepard & M. Lumber Co., 91 App. Div. 49, 86 N. Y. S. 391; Werner v. Cincinnati, 23 Ohio Circ. R. 475. The former judgment being referred to only for the purpose of sustaining a claim for the expenses of such suit is insufficient to raise the question of res judicata. Norris v. Belcher Land Mortg. Co. [Tex.] 82 S. W. 500. See 2 Curr. L. 71, n. 40.

81. Werner v. Cincinnati, 23 Ohio Circ. R. 475; Smith v. Bean [Tex. Civ. App.] 82 S. W. 793.

82. Strow v. Allen [Iowa] 98 N. W. 141. Where the former proceedings constituted plaintiff's cause of action. Woods v. Allen, 122 Iowa, 695, 98 N. W. 499. Bill set out the motion in the law court, the affidavits in support thereof, and the action of the court thereon, held sufficient. Hofmann v. Burris, 210 Ill. 587, 71 N. E. 584. See 2 Curr. L. 71, n. 41.

83. The answer of a garnishee denying indebtedness to and possession of property of the defendant is sufficient, under § 1673 Rev. St. 1892, to enable the garnishee to avail himself of the defense of res judicata without specially pleading such defense. Fulton v. Gesterding [Fla.] 36 So. 56.

84. Lockhart v. Leeds [N. M.] 76 P. 312. See 2 Curr. L. 71, n. 41.

85. Reid v. Caldwell [Ga.] 48 S. E. 191.

86. Flannery v. Campbell [Mont.] 75 P. 1109.

87. Porter v. Armstrong, 134 N. C. 447, 46 S. E. 997.

88. Fulton v. Gesterding [Fla.] 36 So. 56; Belcher Land Mortg. Co. v. Norris [Tex. Civ. App.] 78 S. W. 390. A plea of res judicata in an action relating only to cotton taken by defendant in 1893 is bad, it alleging that the former suit was for cotton alleged by plaintiff to have been purchased in 1892 or 1893. Karter v. Fields [Ala.] 37 So. 204.

89. Ortiz v. First Nat. Bank [N. M.] 78 P. 529; Belcher Land Mortg. Co. v. Norris [Tex. Civ. App.] 78 S. W. 390.

90. Amendment as to date held proper. Karter v. Fields [Ala.] 37 So. 204.

91. Campbell v. Milliken [Colo. App.] 78 P. 620; Selbie v. Graham [S. D.] 100 N. W.

determining the scope of the former adjudication, the record controls,[92] but the record not showing this, it may be supplied by extrinsic evidence.[93] The decree being ambiguous or failing to show upon which of several issues it is founded, the opinion may be examined to determine what point was actually decided.[94] In order to sustain the contention of res judicata, the complete record of the former suit, including the judgment therein, should be produced.[95] Oral testimony of the trial judge six years after rendering of decree is inadmissible to show what was decided.[96] The effect of a former adjudication as conclusive evidence is not impaired by the fact that plaintiff offered other unnecessary evidence on the issue determined by the judgment, and did not offer the judgment until after he had rested.[97]

Defense being a former adjudication, it seems that the court should direct a verdict instead of refusing to proceed with the trial.[98] A question being res judicata, the remedy, in case of newly discovered evidence, is a motion for a new trial.[99] One cannot collaterally attack a judgment in order to prove that though the court had jurisdiction, there was in fact no trial upon the merits.[100] The institution of a former partition proceeding, no partition resulting, does not raise the presumption that the right to partition was then waived or decided adversely to the right.[101]

FORMER DETERMINATION OF TITLE IN DISTRIBUTION DECREES.

[Special Article.]

From the superior nature of jurisdiction of courts of probate in the United

755. To prove that estoppel was mutual. Westinghouse Elec. & Mfg. Co. v. Jefferson Elec. Light, Heat & Power Co., 128 F. 751.

92. State v. McEldowney, 54 W. Va. 695, 47 S. E. 650; Trout v. Marvin, 24 Ohio Circ. R. 333. Direction of verdict may be looked to. Borches & Co. v. Arbuckle Bros. [Tenn.] 78 S. W. 266. The judgment is the record, and controls in respect to what is decided by the trial court. Burwell v. Brodie, 134 N. C. 540, 47 S. E. 47. The scope of an adjudication in the municipal court of New York City may, in general, be determined by resort to the minutes of the trial. Stecher v. Independent Order Free Sons of Judah, 90 N. Y. S. 332.

93. Fulton v. Gesterding [Fla.] 36 So. 156; Hamilton Nat. Bank v. American Loan & Trust Co. [Neb.] 100 N. W. 202. Extrinsic evidence offered and received consisted of the file in the former case, and the judge's charge to the jury in such case. Storrs v. Robinson [Conn.] 58 A. 746. Parol evidence allowed to show similarity of issues. Herschbach v. Cohen, 207 Ill. 517, 69 N. E. 932. See 2 Curr. L. 72, n. 47-48.

NOTE. What evidence is admissible to show the issues in the former suit: Upon this subject the decisions are exceedingly meager. The judgment record is clearly admissible, and if it speaks clearly it is conclusive. There are also other writings which, though they have not the verity of a judgment record are also admissible. Among these are the report of the judge who tried the former action, stating the proceedings there taken before him. Eastman v. Cooper, 15 Pick. [Mass.] 276, 26 Am. Dec. 600; Duren v. Kee, 41 S. C. 171. The statement of the case and the opinion of the court as contained in the printed volume of the reports. Hood v. Hood, 110 Mass. 463. The opinion of the trial judge filed in the cause and stating the grounds of his decision. Legrand v. Rixey, 83 Va. 862; New Orleans, etc., R. Co. v. New Orleans, 14 F. 373; Serong v. Grant, 2 Mackey [D. C.] 218. The finding of the referee upon which the decision of the court was based. White v. Chase, 128 Mass. 158. The charge of the judge at the trial, by which it appeared that he restricted the attention of the jury to certain issues. Duren v. Kee, 41 S. C. 171, 172. While the evidence taken in the former action should not all be submitted to the jury on the trial of a subsequent controversy, if it would be prejudicial to one of the parties, yet so much of it may be received as will prove upon what issues testimony was offered and admitted in the trial of the action. Stone v. St. Louis S. Co., 155 Mass. 267. Briefs of counsel having been offered for the purpose of showing that but one point was contested, and having been rejected, the action of the trial court was determined not to have been erroneous, because it was said that there were often points involved in a case which were not discussed in the briefs of the counsel. Greenlee v. Lowing, 35 Mich. 63.—From note to Fahey v. Esterley Mach. Co. [N. D.] 44 Am. St. Rep. 554, 570.

94. Gentry v. Pacific Live Stock Co. [Or.] 77 P. 115.

95. Not incomplete or detached portions thereof. Fulton v. Gesterding [Fla.] 36 So. 56.

96. Fayerweather v. Aitch, 25 S. C. 58.

97. Stearns v. Shepard & Morse Lumber Co., 91 App. Div. 49, 86 N. Y. S. 391.

98. Hatch v. Frazer [Mich.] 101 N. W. 228.

99. Franke v. Adams, 86 N. Y. S. 293.

100. Hatch v. Frazer [Mich.] 101 N. W. 228.

101. Miller v. Lanning, 211 Ill. 620, 71 N. E. 1115.

States and their being generally courts of record,[1] it follows that by their decrees made in the exercise of a proper jurisdiction, all matters necessarily involved are concluded as to every person on whom the decree operates just as judgments of courts of general jurisdiction are conclusive.[2] Because of the limited scope of the adjudication on partial distribution,[3] there can seldom be any adjudication of title.

The question of conclusiveness in its application to final decrees of distribution depends on a variety of circumstances. Among these are the character and kind of property on which the administration is had, and the kind and character of the things which distribution is to accomplish. In a number of the states, the personal representative has a statutory right to the possession and control of the real estate, and takes the rents and profits for purposes of administration;[4] but the title goes direct to the heir or devisee subject to this provision.[5] The personalty on the other hand is in the legal ownership of the representative and the legal title can pass to the heirs only by decree of distribution and transfer pursuant thereto.[6] Because of these facts, the jurisdiction of courts of administration is not generally extended to adjudication of real property titles, and it exists if at all usually by virtue of express statute.[7] But in those states which give the personal representative possession of the realty for purposes of administration, there are usually statutes directing the probate court to decree the persons entitled to the realty and order surrender of possession to them.[8]

While the decree of distribution declaring title to personalty is broadly speaking conclusive as to all parties interested as to everything involved therein,[9] great uncertainty exists as to the effect of findings of title in decrees for the delivery of possession of land to the persons "entitled."[10] There are cases which seem to hold that not only the right to possession from the representative and the question of heirship or deviseeship, but also the kind, quality and quantum of estate acquired are determined by such a decree and concluded as against all persons claiming under the decedent's estate.[11] In some states, the proceeding is by statute made a settlement of titles inherited.[12] Some of the courts call the distribution a proceeding in rem,[13] or in the nature of one in rem, whence they argue conclusiveness on all

1. Woerner, Adm'n [1st Ed.] p. 329, enumerating the states and their respective decisions so holding. See, also, 3 Curr. L. 1241, 1316.

2. Freeman, Judgm. [4th Ed..] § 319b; Woerner, Adm'n, p. 329. See 3 Curr. L. 1316.

3. It does not determine that there were no other distributable assets. State v. Berning, 6 Mo. App. 105. Inequalities produced by nonappearance of some distributees may be adjusted on final decree. Grim's Appeal, 109 Pa. 391.

4, 5. Woerner, Adm'n [1st Ed.] pp. 712, 713.

6. Woerner, Adm'n [1st Ed.] pp. 592, 1241.

7. Such statutes as those giving probate jurisdiction to entertain petition for sale of lands to pay debts and to quiet title to such lands. Apart from statute, the court of chancery entertains a bill for that purpose. Woerner, Admn. [1st Ed.] p. 1022. It cannot enforce a trust power to sell land. Wilson v. Holt, 83 Ala. 528. Questions of title cannot be passed on by orphan's court. Liddell v. McVicker, 11 N. J. Law, 44, 19 Am. Dec. 369. The decree admitting to or refusing probate is generally held to be prima facie and not conclusive as to real estate. Statutes in many states give it such conclusiveness after a stated time. See note to Sly v. Hunt [Mass.] 21 L. R. A. 683.

8. This is necessary in order to get possession out of administration and into heirs. See Meeks v. Kirby, 47 Cal. 169, cited 19 Enc. Pl. & Pr. 1099.

9. 19 Enc. Pl. & Pr. 1093, note 2, citing many cases. Decree is conclusive that widow was the only party interested in the estate as found; the real next of kin is barred. Lowry v. McMillan, 35 Miss. 119, 72 Am. Dec. 119.

10. In Hess's Will, 97 Wis. 244, the court refused to say whether it was conclusive or prima facie of title as between parties.

11. Greenwood v. Murray, 26 Minn. 259.

12. So in Utah and California, see post, notes 14, 16.

13. It is a decree in rem as conclusive as a decree in admiralty. Dictum in Ladd v. Weiskopf, 62 Minn. 29; In re Piper's Estate, 208 Pa. 636, 57 A. 1118; Snyder v. Murdock, 26 Utah, 233, 73 P. 22, citing William Start, C. J., in Kurtz v. St. Paul & D. R. Co., 61 Minn. 18, points out the fact that the courts of probate of Massachusetts, Michigan, Wisconsin and Minnesota are courts of superior jurisdiction to sell land for debts by reason of a statute originated in Massachusetts and adopted in turn by the others; and by reason of the laws declaring such courts to be of superior jurisdiction respecting administration matters.

parties;[14] but unless the title as well as the possession has come into the representative or the court of probate for purposes of administration, it would appear demonstrable that the res is only the possessory right and not the title, and that the only question of title involved is that which must be decided before the representative can justifiably surrender possession.[15] The California cases are of doubtful if any value in other states as precedents on the present question, for there the statute is construed as authorizing an adjudication of titles which it declares to be conclusive, and the court of probate in that state is a division of the court of general jurisdiction.[16] Among the other states an extreme position seems to have been taken by Minnesota, but the cases in that state do not seem entirely consistent. The leading case in that state[17] declares that the decree is conclusive on real as well as personal property titles, but the opinion explains that the power to declare in assigning the residue, the persons entitled to the estate and the part belonging to each was given

Hill Co. v. Lawler [Cal.] 48 P. 323. There is great conflict as to whether probate and administration decrees are in rem or in personam. The cases discussing the nature of orders admitting wills to probate and granting letters are collected in a valuable note to Sly v. Hunt [Mass.] 21 L. R. A. 680. See, also, 3 Curr. L. 1316, et seq.

14. Conclusive on widow's rights as community survivor. Cunha v. Hughes, 122 Cal. 111, 68 Am. St. Rep. 27. Conclusive as to rights of heirs, legatees and devisees. Estate of Hudson, 11 Law J. P. C. 446; McClelland v. Downey, 11 Law J. P. C. 448; Freeman v. Rohm, 8 Law J. P. C. 126; Dean v. Superior Court, 11 Law J. P. C. 535, cited in note to 48 Am. Dec. 746. In Estate of Hinckley, 58 Cal. 457, the court assumes that the decree would have become conclusive without an appeal saying "It is within the province of [our] court to define the rights of all who have * * * any interest * * * in the estate whether * * * present * * * or contingent." In Utah, the statute (Rev. St. 1898, § 3961) authorizes adjudication of titles between heirs and their grantees, hence an heir's assignee for creditors is concluded. Snyder v. Murdock, 26 Utah, 233, 73 P. 22. Not binding on devisee's grantee not made party. Coates v. Harris [Idaho] 75 P. 243.

15. See definition of judgments in rem, Freeman, Judgm. § 606. Probate decrees and grants of letters as decrees in the nature of decrees in rem. See Freeman, Judg. §§ 608, 609, and note to Street v. Augusta Ins. Co. [S. C.] 75 Am. Dec. 722.

16. In Goad v. Montgomery [Cal.] 63 Am. St. Rep. 145, the court said: "Section 1665 of the Code of Civil Procedure requires the court, in making distribution of the estate, to distribute the residue of the estate in the hands of the executor 'among the persons who by law are entitled thereto,' and the provision in section 1666 that the court must name in the decree 'the persons and the proportions or parts to which each shall be entitled' requires the court in making such decree to give a construction to the terms of the will. The further provision in the same section that 'such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal,' precludes all right to impeach the decree except upon an appeal, and causes the decree to supersede the will and to prevail over any provision therein which may be thought inconsistent with the decree. The decree is conclusive, not only as to the persons who have any rights in the estate, but also as to the extent and limitation of their rights. Whether the distribution is to individuals in their own right, or to hold for others under specified trusts, the rights of all parties interested in the estate are determined by the decree, and thereafter it becomes immaterial to consider whether the will has received a proper construction. The court may incorporate the provisions of the will in its decree, either in express terms or by reference thereto, as was the case in Goldtree v. Thompson, 79 Cal. 613, where the decree distributed the property to the trustees to hold in the manner named and set forth in the will, 'and to which reference is hereby particularly made as a guide to the trustees in the discharge of their trust.' In such a case, the terms of the will become the language of the decree, but it is still the decree, and not the will, by which the rights of the parties are determined. If the plaintiffs herein had felt that the decree of distribution was erroneous or defective, in not giving to them the powers which, in their opinion, the terms of the will authorized to be conferred upon them, they could have appealed therefrom and had the decree corrected, but by their failure to appeal the decree has become conclusive upon them, and they can no longer contend for a different construction than such as its terms import:" Citing Estate of Garraud, 36 Cal. 277; Daly v. Pennie, 86 Cal. 552, 21 Am. St. Rep. 61; William Hill Co. v. Lawler, 116 Cal. 359.

Followed in Estate v. Trescony, 119 Cal. 568. Accord. Crew v. Pratt, 119 Cal. 131; Goldtree v. Allison, 119 Cal. 344. The latest case in California (In re Merchants' Estate [Cal.] 77 P. 475) holds that though the decree is conclusive, yet such parts of the will as are in the decree may be examined to find what was testator's intent; and that this does not conflict with Goad v. Montgomery, 119 Cal. 552, 63 Am. St. Rep. 145.

17. A trustee who was as such awarded the property was as against the beneficiaries concluded by the decree to say that the trust being invalid, he took a legal fee. Greenwood v. Murray, 26 Minn. 259.

in view of the possible derangement of inheritable rights by a charge or a sale for debts. Hence, says the court, this proceeding enables the court to equalize the interests so impaired. In two later cases[18] the same judge limits the broad dictum of the earlier decision and denies the power to settle titles as between heirs or devisees and their transferees. The most extreme position taken in that state is that the decree assigning the residue is a conclusive adjudication of titles by succession to decedent's land, whether of estates in possession or in expectancy, or vested or contingent, on all persons interested, whether in being or not.[19] The reasons given in that case will not bear close analysis,[20] and the doctrine leads to highly mischievous results.[21] The later decisions in Minnesota trend back from this extreme position of Ladd v. Weiskopf and recognize numerous limitations of the conclusiveness of such decrees.[22]

In the absence of statutes like those in California, the correct rule seems to be that the decree is conclusive of all questions of title necessarily decided in divesting the possession of the personal representative and determining to whom it belongs, and what "parts" each shall receive.[23] Jurisdiction to allot or assign does not include

18. Farnham v. Thompson, 34 Minn. 330. The court determines who are the heirs and what is the part after administration to be assigned to each. Id. Followed by Dobberstein v. Murphy, 44 Minn. 526, holding that a decree assigning the widow her statutory third was not conclusive that a prior deed by her to her co-heirs had or had not validity.

19. The decree found certain real estate in the hands of the personal representative, found that the will gave a life estate to the widow and a vested remainder in the named children and assigned a life estate and remainders respectively. It was urged that the decree was not a conclusive construction of the will on the question whether the remainder was vested or contingent. The opinion runs—whether the decree of distribution was a correct construction or not "it is conclusive and binding on all parties * * * whether in being or not." If the remainder were contingent, says the court, "there could be no assignment of the property until the death of the [life tenant] for until then it could not be determined who a single one of the remaindermen would be. When the jurisdiction of the [probate] court was invoked * * * it became his duty to construe the will, determine its legal effect and assign the property" accordingly. Ladd v. Weiskopf, 62 Minn. 29.

20. If the decree of distribution is only to close the administration and deliver over the possession of the land, it may be asked why project the adjudication into the future and determine expectant titles? Why should it concern the probate court who will be remaindermen when the life estate falls in? What "purposes of administration" require such an adjudication. (See reasons stated in preceding note.) The Minnesota statute for the assignment of residue does not direct an adjudication of titles to land. It uses words importing possession and identification of land e g. "porportion or part," "description" of land. It expresses the purpose of the assignment, viz.: "that such persons may demand and recover their shares" etc. ["In such decree the court shall name the persons and the proportion or parts to which each is entitled, and if real estate, give a description as near as may be of the land to which each is entitled, and such persons may demand and recover their respective shares from the executor or administrator, or any other person have the same"]. Lawe 1901, c. 284, § 229.

21. It practically enables the probate court to settle intricate questions of land titles before they arise and enables it to administer a broader relief in respect to titles than the courts of general jurisdiction can apply in an action between opposing parties.

22. Decedent's grantees are strangers not bound. Kosmeri v. Snively, 85 Minn. 228. Decree is conclusive that the persons to whom the real estate was assigned were heirs. Chadbourne v. Hartz, 101 N. W. 68, distinguishing the earlier cases into several classes, to-wit: Those where the present adversary was a stranger. Backdahl v. Grand Lodge A. O. U. W., 46 Minn. 61. Those where the former probate decree did not properly embrace the matter now in controversy. Dawson v. Helmes, 30 Minn. 107; Burrell v. Railroad Co., 43 Minn. 363. Those where the res—land in the state—was not before the court—a foreign one. Morin v. St. Paul, etc., R. Co., 33 Minn. 176.

23. A decree finally distributing as corpus certain income which had been turned back into the fund instead of paid to the life beneficiary concludes the life tenant as against the remainderman but not as against the trustee. The reason is that the sole purpose of the decree was to judicially sanction the division of residue. Hence, though the court confirmed an account in which such payments by the trustee appeared, it was not conclusive because not necessary. Lawrence v. Security Co. [Conn.] 1 L. R. A. 342. The court remarks that no statute required the life beneficiary to take notice that the liabilities of her trustee would be adjudicated in making the distribution. Id.

The only effect was "to determine that the land passed on the death of [decedent] to [the heir] discharged from administration." Farnham v. Thompson, 34 Minn. 330. Decree for distribution of trust fund and discharge of executors held not res adjudicata as to ante-nuptial contract as to which the surrogate had not jurisdiction. Phalen v. United States Trust Co., 44 Misc. 57, 89 N. Y. S. 699. A remainderman is concluded by a

jurisdiction to try title.[24] Beyond transferring possession the decree has no object, if it be true that the title passes to the heirs and devisees by decedent's death.[25] The conclusiveness of decrees of courts of probate rests on the rule that where any matter belongs so peculiarly to the jurisdiction of one court, that others take cognizance of the same subject incidentally and indirectly only, the adjudication by the court of peculiar jurisdiction is binding.[26] It would be corollary to this that when the court of probate exercising its peculiar jurisdiction decides matters which are merely incidental to its jurisdiction, the decision should not bind courts to which such matters primarily pertain.[27] If the proceeding to distribute and assign the estate is a different "cause of action" from that wherein the question of title usually afterward arises, it is conclusive only on what was actually adjudicated between the same parties.[28] Applying this general rule,[29] no adjudication of title to land should

decree approving the accounts of a testamentary trustee, though not in esse at the time. In re Elting, 93 App. Div. 516, 87 N. Y. S. 833.

As to what adjudications of title are necessarily incidental to distribution, see 19 Enc. Pl. & Pr. 1086.

Compare Dickinson v. Hayes, 31 Conn. 417, where it was held that a decree admitting a will of realty and personalty to probate without qualification was not conclusive on the heirs as against the devisees that testator was of competent age to devise real estate, though the heirs had never appealed therefrom. Confirmation of guardian's sale is no proof that he was guardian. "It merely adjudicated * * * that the sale was a proper one to be made and that the price * * * was adequate. Burrell v. Railroad Co., 43 Minn. 363. Following Dawson v. Helmes, 30 Minn. 107. Numerous cases wherein such orders of court have been considered will be found cited in 19 Enc. Pl. & Pr. 1099.

Mr. Freeman says it "is a conclusive adjudica if upon sufficient notice that the persons to whom distribution is so made are the only persons entitled * * * as such heirs, devisees or legatees (Loring v. Steineman, 1 Metc. [Mass.] 204; Exton v. Zule, 14 N. J. Eq. 501; Judge of Probate v. Robins, 5 N. H. 246; Kellogg v. Johnson, 38 Conn. 269); but does not estop third persons from asserting * * * conveyances * * * made to them by the distributees, before entry of the decree (Chever v. Ching Hong Poy, 82 Cal. 68).

24. A probate court empowered to assign or set out homstead cannot try disputed titles. James v. James [Ark.] 80 S. W. 148. In such case the probate court does not transmit title, but only segregates the property. See 15 Am. & Eng. Enc. Law, 721 and cases cited.

25. Necessary to get possession out of administration and into heirs. Meeks v. Kirby, 47 Cal. 169. "Possession" cannot be transferred from the executor without a decree of distribution. In re Scheffer's Estate, 58 Minn. 29.

26. So held in the leading case of McPherson v. Cunliff, 11 Serg. & R. [Pa.] 422, 14 Am. Dec. 642, with note.

27. Thus the division of personalty and the transfer of the possession of realty from the representative to the person entitled thereto is of probate jurisdiction, but the determination of land titles in assigning possession is incidental.

28. A former judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action for the same cause of action between the same parties. The parties are concluded by the judgment, not only upon all the issues which were actually tried, but upon all issues which might have been tried in the former action; so that a new action for the same cause of action, between the same parties, cannot be maintained or defended on grounds which might have been tried and determined in the former action. But when the second action between the same parties is upon a different cause of action from the first, then the judgment in the former action is conclusive only upon those issues which were actually tried and determined. What these issues were may appear from the record, or may not; but when extrinsic evidence is necessary in order to determine what issues were actually tried and determined, or to determine the identity of the parties or of the subject-matter, such evidence must be submitted to the jury, with appropriate instructions; and only such issues as they find by evidence to have been actually tried and determined, and on which the judgment was rendered, or such issues as by reasoning are essential to and necessarily involved in the former verdict and judgment are to be considered as conclusively determined between the parties. It may be that in the former action there were distinct defenses or distinct grounds on which it might have been maintained, and that evidence was introduced and submitted to the jury on more than one issue, and that a general verdict was returned on which judgment was entered; so that it becomes impossible to determine, in a subsequent action, either by reasoning or by evidence, what issues were actually tried and determined in the former action." Per Field, J., in Foye v. Patch, 132 Mass. 110, citing Lea v. Lea, 99 Mass. 493, 96 Am. Dec. 772; Burlen v. Shannon, 99 Mass. 200, 96 Am. Dec. 733; Hawks v. Truesdell, 99 Mass. 557; Cromwell v. County of Sac, 94 U. S. 351.

29. If there be any uncertainty as to what was decided, the whole subject-matter will be at large unless the uncertainty be removed by extrinsic evidence or otherwise. Russell v. Peace, 94 U. S. 606; Cook v. Burnley, 45 Tex. 97; McDowell v. Langdon, 3 Gray [Mass.] 513; Chrisman v. Harman, 29

be found in a decree of distribution and assignment unless clearly made and necessary to the decision.

A foreign assignment of lands should not be conclusive as to titles[30] and hence it has been held not even conclusive as to who were heirs.[31]

FORMS OF ACTION.

This topic includes holdings of general application as to the distinctions between particular forms or kinds of actions; grounds for particular actions being excluded to the title appropriate to each action. The common-law forms of personal actions, now abolished in many states, will be found treated under appropriate heads.[32] The forms of actions merely, not the substance thereof, as regards the essential of the remedy, are abolished by the codes,[33] hence we still have legal[34] and equitable actions,[35] which distinction is important as it sometimes confers valuable rights, as for instance the right to a jury trial.[36] The distinction between civil[37] and criminal[38] actions, between those ex delicto[39] and ex contractu,[40] is often important in matters of procedure,[41] and frequently

Grat. [Va.] 494; Downer v. Shaw, 22 N. H. 277; Colwell v. Bleakley, 1 Abb. App. Cas. [N. Y.] 400, and many other cases cited in note to Lea v. Lea [Mass.] 95 Am. Dec. 772, 786. See, also, Freeman, Judg. §§ 257, 258.

30, 31. In an action of ejectment (Morin v. St. Paul, etc., R. Co., 33 Minn. 176), the Minnesota court denied that a Michigan decree assigning the realty to the persons entitled to it was conclusive that such persons were heirs as found.

32. See Assumpsit, 1 Curr. L. 236; Trespass, 2 Curr. L. 1891, etc.

33. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. Under the code, whether a plaintiff plants his cause of action at law or in equity from the aspect of common-law procedure does not, if properly planted, raise a jurisdictional question in the strict sense of the term; only a question of practice. Id. The rules of law which govern and control the manner of enforcing a cause of action must, of necessity, still depend upon the nature of the cause of action sought to be enforced. Carbondale Inv. Co. v. Burdick, 67 Kan. 329, 72 P. 781. One's action being at law, he cannot recover on an equitable theory. Johnson v. Stephens [Mo. App.] 82 S. W. 192. In an equity suit the rule that exceptions which do not affect the merits are disregarded still obtains. Brunnemer v. Cook & Bernheimer Co., 89 App. Div. 406, 85 N. Y. S. 954. See 2 Curr. L. 72, n. 53.

34. Action against agent for an alleged error in a single transaction held action at law. Starrett v. Brosseau, 208 Ill. 408, 70 N. E. 354. Action to recover subscriptions because of breach of contract is at law, not in equity, though an accounting is prayed. Akins v. Hicks [Mo. App.] 83 S. W. 75.

35. Action by stockholder to recover excess paid to the corporation involving an accounting is a suit in equity, though overpayments were induced by fraud of corporation's agent. Beach v. Guaranty Sav. & Loan Ass'n, 44 Or. 530, 76 P. 16. Action at law originally tried before a jury cannot be regarded as a suit in equity because subsequently tried before a referee. Lexow v. Belding, 89 App. Div. 622, 85 N. Y. S. 918. An action by a receiver in supplementary proceedings to avoid a chattel mortgage is an equity action. Brunnemer v. Cook & Bernheimer Co., 89 App. Div. 406, 85 N. Y. S. 954. See title Equity, 3 Curr. L. 1210.

36. Though defendant be estopped to insist that the action is one in equity, the court may refuse to try it before a jury if a court of equity only could grant relief. Weldon v. Brown, 89 App. Div. 585, 85 N. Y. S. 599. See 2 Curr. L. 73, n. 54.

37. Under the Wash. statute bastardy proceedings are civil. State v. Tieman, 32 Wash. 294, 73 P. 375. Proceeding to expel or exclude aliens under the Federal law is civil in its nature. United States v. Moy You, 126 F. 226.

38. Contempt of court in a criminal offense. In re Heinze [C. C. A.] 127 F. 96. See 2 Curr. L. 73, n. 55.

39. The plaintiff complaining of damages to property, held statement of cause of action in tort. Bermel v. Harnischfeger, 97 App. Div. 402, 89 N. Y. S. 1029. Right of action for flooding land held in tort, though there was an unfulfilled agreement allowing partial flooding. Post v. Merritt, 85 App. Div. 239, 83 N. Y. S. 611. Though master promises to repair defect, action for damages for injury caused thereby is one in tort. Louisville Hotel Co. v. Kaltenbrun [Ky.] 80 S. W. 1163. Cause of action from entry on premises and removal of property held in trespass. Niles v. Brown [R. I.] 56 A. 1030. Complaint alleging letting of team and improper use of same held to state an action on the case. Walker v. Mellish [Mich.] 98 N. W. 2. A cause of action to compel an unfaithful trustee and those colluding with him in wasting a trust fund to account therefor is not one sounding in tort, though the facts may be such that an action for damages for the wrong might lie. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. See 2 Curr. L. 73, n. 57.

40. An action for breach of a bond given to indemnify a constable against damage resulting from a levy of an attachment placed in his hands is ex contractu. Leader v. Mattingly [Ala.] 37 So. 270. Ac-

affects one's right of recovery.[42] There may be innominate actions.[43] The principal forms of real actions are treated under appropriate heads.[44]

The nature of the action is determined from the gravamen of the complaint,[45] but the character of the action not clearly appearing therefrom, the prayer for relief generally governs.[46]

By amendments to his pleadings, one may convert an action commenced in equity into one at law and vice versa;[47] but an amendment changing a cause of action from tort to contract is not allowed,[48] nor can one by his answer change an action of forceable entry and detainer into one to try title.[49] One may waive his right to object to the form of the action.[50]

FORNICATION.

Conviction of fornication cannot be had on an indictment for adultery.[51]

FRANCHISES.

§ 1. Definition and Elements (1495).
§ 2. Grant of Franchise and Regulation of Its Exercise (1496).
§ 3. Powers and Duties Under Franchises (1497).
§ 4. Duration and Extension of Term (1498).
§ 5. Transfer of Franchises (1499).
§ 6. Revocation and Forfeiture (1499).
§ 7. Taxation (1499).

The rights and privileges here treated constitute a class entirely distinct from and independent of the corporate franchise.[52]

§ 1. *Definition and elements.*—A franchise is a special privilege conferred by a government on individuals or corporations, and which does not belong to the citizens of a country generally by common right.[53] It is an incorporeal

tion by bailor against bailee for damages for the latter's failure to collect insurance covering the bailed property, held one ex contractu. Johnston v. Charles Abresch Co. [Wis.] 101 N. W. 395. See 2 Curr. L. 73, n. 57.

41. Counts in tort and contract cannot be joined in same declaration. Zeiser v. Cohn, 44 Misc. 462, 90 N. Y. S. 66. Assumpsit and case cannot be so joined. Davis v. Smith [R. I.] 58 A. 630. But trover and case may be joined. Mutual Life Ins. Co. v. Allen [Ill.] 72 N. E. 200. See 2 Curr. L. 73, n. 58. For cases on this subject, see title Pleading, 2 Curr. L. 1178.

42. Judgment of nonsuit entered where one sued in tort when he should have sued on a covenant. Knowles v. Knowles [R. I.] 56 A. 775. See 2 Curr. L. 73, n. 59.

43. That a suit does not fall technically under the definition of some special action controlled as to its requirements by fixed rules of practice is no cause for its dismissal. Citizens' Bank v. Marr, 111 La. 601, 35 S. 780.

44. See Ejectment, 3 Curr. L. 1157; Waste, 2 Curr. L. 2034; Forcible Entry and Unlawful Detainer, 2 Curr. L. 11.

45. Specific allegations do not govern. Price v. Parker, 44 Misc. 582, 90 N. Y. S. 98; Jones v. Leopold, 95 App. Div. 404, 88 N. Y. S. 568. Complaint for conversion of rents held to sound in tort, though demanding judgment for a liquidated amount, with interest from a specified date, instead of damages. Frick v. Freudenthal, 90 N. Y. S. 344.

46. Zeiser v. Cohn, 44 Misc. 462, 90 N. Y. S. 66; Frick v. Freudenthal, 90 N. Y. S. 344.

47. Lough v. Estherville, 122 Iowa, 479, 98 N. W. 308. See 2 Curr. L. 74, n. 65.

48. Zeiser v. Cohn, 44 Misc. 462, 90 N. Y. S. 66.

49. Hackney v. McKee, 12 Okl. 401, 75 P. 535.

50. Defendant held to waive such right by a plea of not guilty and by ruling plaintiff to file a bill of particulars. Welker v. Metcalf [Pa.] 58 A. 687.

51. Pena v. State [Tex. Cr. App.] 80 S. W. 1014.

52. Bank of California v. City & County of San Francisco, 142 Cal. 276, 75 P. 832. For the law relating to corporate franchises, see title Corporations, 3 Curr. L. 880.

53. Rhinehart v. Redfield, 93 App. Div. 410, 87 N. Y. S. 789. The right to produce and sell electricity is not a franchise (Purnell v. McLane [Md.] 56 A. 830), in the absence of the right of eminent domain (State v. Twin Village Water Co., 98 Me. 214, 56 A. 763). Nor is the right to do a banking business (Bank of California v. City and County of San Francisco, 142 Cal. 276, 75 P. 832). But the right to use the streets of a municipality for delivering electricity to a consumer (Purnell v. McLane [Md.] 56 A. 830; Cumberland Tel. & T. Co. v. Evansville, 127 F. 187), or to construct and operate a street railway, are franchises (Thompson v. Schenectady R. Co. [C. C. A.] 131 F. 577). See 2 Curr. L. 74, n. 67.

Note: A "franchise" tax fixed by the amount of business done during the last preceding year was held not to apply to moneys received after but falling due be-

hereditament.[54] A distinction must in some cases be made between the franchise and the acquisition of an easement necessary to its fulfillment.[55] The right granted must be of benefit to the public.[56]

§ 2. *Grant of franchise and regulation of its exercise.*[57]—The power to grant franchises involving the use of public streets and places is vested in the legislature absolutely,[58] though it may delegate such power to a municipal corporation;[59] but to be available such power must be clearly conferred,[60] though it may arise as a necessary incident to other powers granted.[61] Courts cannot generally grant this right.[62] The legislature may grant a franchise in the streets of a city without providing for the payment of compensation;[63] the mutual rights and benefits arising from the agreement are, however, a sufficient consideration.[64] Statutory conditions must be strictly complied with.[65] The grantor

fore the tax law was passed. People v. Miller, 32 N. Y. L. J. 303. Criticised XVIII. Harv. L. R. 233, as confusing "franchise" with business done thereunder.

54. Belington & N. R. Co. v. Alston, 54 W. Va. 597, 46 S. E. 612.

55. Assent from town council to a railroad company authorizing the occupation of the streets of such town under § 10, c. 52, Code 1899, is not a franchise within the meaning of chap. 29, p. 82, acts 1901. Belington & N. R. Co. v. Alston, 54 W. Va. 597, 46 S. E. 612.

56. The power to "regulate all matters connected with * * * all parts, places and streets of the city" is not a power to grant a perpetual franchise to two persons, their successors and assigns, to open and use streets for the purpose of laying and maintaining conduits for supplying gas generated from ammonia for the purposes of refrigeration [Construing Laws of New York 1888, p. 958, c. 583, tit. 2, § 12]. Rhinehart v. Redfield, 93 App. Div. 410, 87 N. Y. S. 789. Test as to whether switch track is or is not a public utility held to be, will any and all persons and business institutions who may have occasion to do so be permitted to use it; if so it is a public utility. Stockdale v. Rio Grande Western R. Co. [Utah] 77 P. 849.

57. See 2 Curr. L. 74.

58. Rhinehart v. Redfield, 93 App. Div. 410, 87 N. Y. S. 789. To lay pipes in streets to transport natural gas. City of La Harpe v. Elm Tp. Gas, Light, Fuel & Power Co. [Kan.] 76 P. 448.

59. Rhinehart v. Redfield, 93 App. Div. 410, 87 N. Y. S. 789. Under Code 1873, § 473 and the amendments thereto, a city has the power to grant an electric lighting franchise covering a period of 25 years. Davenport Gas & Elec. Co. v. Davenport [Iowa] 98 N. W. 892. City council may grant franchises to railroad companies authorizing them to make reasonable use of streets for transportation purposes. Stockdale v. Rio Grande Western R. Co. [Utah] 776 P. 849. See 2 Curr. L. 74, n. 69.

60. Either expressly or as a direct and necessary implication from the terms of the statute. Purnell v. McLane [Md.] 56 A. 830.

61. A city having the power to supply water to its inhabitants, and for fire protection, it possesses the power to grant the use of its streets for such purpose. Mercantile Trust & Deposit Co. v. Columbus Waterworks Co., 130 F. 180.

62. A probate court has no power under either section 3461, or any other section of the statutes to grant to a telephone company the right to put its wires underground. Cincinnati v. Queen City Tel. Co., 2 Ohio N. P. (N. S.) 349.

63. City of La Harpe v. Elm Tp. Gas, Light, Fuel & Power Co. [Kan.] 76 P. 448.

64. Right to run line through village, company promising to carry passengers within the town free, held not void for lack of consideration. Question arose on suit on certified check deposited with bid. Hattersly v. Waterville, 4 Ohio C. C. (N. S.) 242.

65. Under Burns' Rev. St. 1901, § 4443R, a franchise for lighting purposes can only be granted by ordinance. Such section and § 4357 are pari materia and must be construed together. Meyer v. Boonville, 162 Ind. 165, 70 N. E. 146. The emergency provision of Burns' Rev. St. 1901, § 4357, has no application to an ordinance granting a franchise for the establishment of a lighting plant. Id. Under these sections, an ordinance granting a franchise for the establishment of a lighting plant is void where no publication or posting is made. This publication is not dispensed with by the ordinance declaring an emergency. Id. Required subscriptions for stock in a telephone company must be paid in before the probate court can grant a decree fixing mode of use of the streets. City of Cincinnati v. Queen City Telephone Co., 2 Ohio N. P. (N. S.) 349. In Ohio, natural gas company may be allowed franchise by municipality in which there is already an artificial gas company, without a vote of the qualified voters of the city being taken [Construing Rev. St. 1892, § 3551]. Circleville Light & Power Co. v. Buckeye Gas Co., 69 Ohio St. 259, 69 N. E. 436. Baltimore City Charter, § 6 and Ordinance No. 107 presuppose the existence of a special franchise, and applicant not having such franchise, cannot compel issuance of permit authorizing him to use conduits for electric wires. Purnell v. McLane [Md.] 56 A. 830. An act providing that if the successful bidder for a franchise fails to perform certain conditions, it should be sold to the "next highest bidder," held this last phrase refers to bids made and pending at the time of the default [Construing Cal. act March 11, 1901, § 5]. Pacific Elec. R. Co.

may impose conditions on the use of the franchise,[66] which conditions must be fully complied with;[67] and by accepting a franchise on condition, one becomes estopped to deny the reasonableness[68] or validity[69] of the condition. The grantee accepting and acting on the franchise, the latter becomes a contract[70] which neither the grantor[71] nor the grantee[72] can abolish or alter without the consent of the other. In some states a municipal corporation cannot, during the term of the franchise, release the grantee from any obligation or liability imposed thereby.[73] The right to a franchise is not to be presumed in proceedings based on the existence of such right.[74]

§ 3. *Powers and duties under franchises.*[75]—A franchise carries with it an implied obligation to perform all the objects for which the charter was granted,[76] but this duty should be construed with some reference to actual conditions and needs.[77] Public service corporations are bound to serve the public on reasonable terms and reasonable rates;[78] the opposite of this rule is also true.[79] A franchise is to be construed most strongly against the grantee,[80] though the rules as to the

v. Los Angeles, 194 U. S. 112, 48 Law. Ed. 896. See 2 Curr. L. 75, n. 70-74.

It has been held, however, that acceptance before publication does not invalidate the franchise. Hattersly v. Waterville, 4 Ohio C. C. (N. S.) 242.

66. Under Code Pub. Loc. Laws, art. 4, § 819a, providing that mayor and city council may regulate use of streets by telephone companies, they have authority to impose on such company, as a condition of such use, limitations as to rates to be charged for telephone service. Charles Simon's Sons Co. v. Maryland Tel. & T. Co. [Md.] 57 A. 193. Construing Code Pub. Gen. Laws 1903, art. 23, §§ 334-338. Id.

67. Condition that if no portion of work was in operation by a certain time, forfeiture would result, held any portion being in operation at such time the corporation became vested with full corporate powers. State v. Twin Village Water Co., 98 Me. 214, 56 A. 763.

68. Charles Simon's Sons Co. v. Maryland Tel. & T. Co. [Md.] 57 A. 193. See 2 Curr. L. 75, n. 79.

69. Power of revocation being expressly reserved, grantee, after accepting and acting on franchise, cannot say that such preservation was unauthorized and of no force and effect. Delaware, etc., R. Co. v. Oswego, 92 App. Div. 551, 86 N. Y. S. 1027.

70. Mercantile Trust & Deposit Co. v. Columbus Waterworks Co., 130 F. 180; Armour Packing Co. v. Metropolitan Water Co. [C. C. A.] 130 F. 851; Hattersly v. Waterville, 4 Ohio C. C. (N. S.) 242.

71. Northwestern Tel. Exch. Co. v. Anderson, 12 N. D. 585, 98 N. W. 706. Franchise for consolidated lines held to create a contract right to charge a 5 cent fare, so that the rate could not be reduced over a portion of the line, under authority of a right to regulate fares, reserved in an ordinance adopted before the consolidation, granting a renewal franchise to the corporation which then owned that portion of the line. City of Cleveland v. Cleveland City R. Co., 194 U. S. 517, 48 Law. Ed. 1102. See 2 Curr. L. 75, n. 80; Id. 76, n. 81.

72. Contract between city and street railway, whereby the latter was permitted to permanently discontinue its railway on a certain street, held void, the state not consenting thereto. Thompson v. Schenectady R. Co. [C. C. A.] 131 F. 577.

73. A municipal franchise which became a contract, securing a fare of 5 cents over the lines of a consolidated street railway, held not to violate Bates' Ohio Ann. St. 1897, § 2502, providing that a municipal corporation shall not during the term of a street railway grant release the grantee from any obligation or liability imposed thereby, though in this case the municipality had formerly the power to regulate fares over a portion of the consolidated lines. City of Cleveland v. Cleveland City R. Co., 194 U. S. 517, 48 Law. Ed. 1102; City of Cleveland v. Cleveland Elec. R. Co., 194 U. S. 538, 48 Law. Ed. 1109.

74. Therefore every assertion of such right must, to be efficacious, be distinctly supported by clear and unambiguous legislative enactment. Purnell v. McLane [Md.] 56 A. 830.

75. See 2 Curr. L. 76.

76. State v. Twin Village Water Co., 98 Me. 214, 56 A. 763.

77. Water and electric power company, held should not be ousted from latter portion of franchise for nonuser, there being no demand for electricity in town. State v. Twin Village Water Co., 98 Me. 214, 56 A. 763. The obligation of a gas company to furnish one gas is subject to the limitation that there must exist a reasonable expectation that the consumption of gas will warrant the necessary preliminary expenditure. Public Service Corp. v. American Lighting Co. [N. J. Eq.] 57 A. 482. That company shall furnish gas by cubic feet to light streets held unreasonable. Id.

78. City may offer reasonable price, if refused, mandamus will lie if the supply has not been commenced, or it may sue in equity to enjoin stoppage of a supply being furnished. Public Service Corp. v. American Lighting Co. [N. J. Eq.] 57 A. 482.

79. Public Service Corp. v. American Lighting Co. [N. J. Eq.] 57 A. 482.

80. City of Helena v. Helena Waterworks Co., 122 F. 1; Circleville Light & Power Co. v. Buckeye Gas. Co., 69 Ohio St. 259, 69 N. E. 436; Town of Washburn v. Washburn Waterworks Co. [Wis.] 98 N. W. 539; Rhine-

construction of contracts apply.[81] No company can, under ordinary circumstances, assert and maintain a right to the exclusive enjoyment of a public street in a city.[82] A franchise not being exclusive, the granting body may itself construct and maintain a system for the same purpose,[83] though the contrary has been held.[84] A franchise is no protection for injuries to, or interference with, private property.[85] No time being fixed within which the franchise should be used, the law requires it to be done within a reasonable time.[86] A provision in a franchise allowing the future occupancy of other states is not void for uncertainty.[87] The use of a franchise to use the streets is subject to the control of the police power of the state,[88] but is paramount to extraordinary uses of the street by private parties.[89] Where a franchise limits the rate to be charged by a telephone company, an individual may maintain a suit to enjoin the company from charging him a higher rate.[90]

§ 4. *Duration and extension of term.*[91]—A city being prohibited from granting a franchise for a longer period than twenty years, an ordinance granting a franchise for twenty years from the date of its taking effect is not rendered invalid by the fact that it was passed several months before that date.[92] A franchise may be renewed prior to the expiration of the original grant.[93] The extension of a franchise does not amount to the granting of a new franchise.[94] Where a franchise allows a company an exclusive privilege for a certain term, subse-

hart v. Redfield, 93 App. Div. 410, 87 N. Y. S. 789.

81. Armour Packing Co. v. Metropolitan Water Co. [C. C. A.] 130 F. 851.

Words and phrases in franchises construed: Municipality granting waterworks franchise for 25 years and leasing fire hydrants from the grantee "during such term," such phrase refers to the period of 25 years; rent, however, to commence with the water service. Also that the leasehold period and franchise period were co-extensive. Town of Washburn v. Washburn Waterworks Co. [Wis.] 98 N. W. 539. The municipality in such a franchise agreeing to pay all taxes assessed on the property "for the first ten years," these last words are used in the sense of the 10 years subsequent to the date of the franchise. Id. In such case, the words "taxes assessed" refer to all the proceedings requisite to charge the property or the owner thereof with the payment of taxes, culminating not earlier than when the taxes might be paid, and it is immaterial whether taxes were assessed during the first of such years, as regards what were the last taxes to be paid. Id. Lighting franchise providing that at the end of each 5 year period the city might require the machinery and appurtenances to be in good condition and of approved design, so as to give the city advantage of all improvements, held that the city could only have advantage of all improvements increasing the efficiency of the system then in use. Davenport Gas & Elec. Co. v. Davenport [Iowa] 98 N. W. 892. Franchise requiring water rates to be the same as those given in another town by same company, held not to refer to prices charged in such town after the latter municipality had purchased the waterworks. Armour Packing Co. [C. C. A.] 130 F. 851.

82. A telephone company cannot assert an exclusive franchise to occupy the streets of a city with its poles and wires, as against another telephone company obtaining the same right from city authorities. American Tel. & T. Co. v. Morgan County Tel. Co. [Ala.] 36 So. 178.

83. Waterworks. City of Helena v. Helena Waterworks Co. [C. C. A.] 122 F. 1.

84. Mercantile Trust & Deposit Co. v. Columbus Waterworks Co., 130 F. 180.

85. Switch track. Stockdale v. Rio Grande Western R. Co. [Utah] 77 P. 849.

86. State v. Twin Village Water Co., 98 Me. 214, 56 A. 763. See 2 Curr. L. 76, n. 91-92.

87. Thurston v. Huston, 123 Iowa, 157, 98 N. W. 637.

88. A gas company allowed to lay mains in a highway in such a street as to occasion the least inconvenience to the city or its inhabitants may be compelled to shift its mains to permit construction of sewers, and its franchise not being lessened in value, the case falls under the rule of damnum absque injuria. New Orleans Gaslight Co. v. Drainage Commission, 111 La. 838, 35 So. 929.

89. Telephone company can recover damages to wires, etc., caused by one moving a house on a street. Northwestern Tel. Exch. Co. v. Anderson, 12 N. D. 585, 98 N. W. 706.

90. Charles Simon's Sons Co. v. Maryland Tel. & T. Co. [Md.] 57 A. 193.

91. See 2 Curr. L. 77.

92. State v. Excelsior Coke & Gas Co. [Kan.] 76 P. 447.

93. This is so under Bates Ohio Ann. St. 1897, § 2501, providing that "the council may renew any such grant at its expiration." City of Cleveland v. Cleveland City R. Co., 194 U. S. 517, 48 Law. Ed. 1102.

94. Franchise expressly provided for extension. Thurston v. Huston, 123 Iowa, 157, 98 N. W. 637. See 2 Curr. L. 77, n. 96.

quent permission allowing the company to extend and use other streets does not amount to an extension of the time for exclusive privilege.[95]

§ 5. *Transfer of franchises.*[96]—A corporation organized for a public purpose cannot by sale or lease transfer its entire property and privileges and so abrogate the performance of its duties to the public.[97] And the corporation being chartered by the state the consent of the municipality to the sale does not render the latter valid.[98] The grantor of the franchise is entitled to question the validity of any transfer or attempted transfer of the same by the grantee.[99]

§ 6. *Revocation and forfeiture.*[100]—A corporation may be ousted from distinct and separate branches of its corporate rights.[101] Abandonment is a question of intention.[102] Nonuser is a fact in determining it, its weight depending upon the intention to be drawn from its duration, character, and accompanying circumstances.[103] In Ohio a city solicitor has power to bring an action for forfeiture of a public franchise.[104]

§ 7. *Taxation.*[105]—The franchise is taxable as such,[106] and, for the purpose of taxation, is not synonymous with the term "intangible property."[107]

FRATERNAL MUTUAL BENEFIT ASSOCIATIONS.

§ 1. Nature, Organization and Powers (1500). Legislative Control as to Insurance (1500). Protection of Ritual and Individuality (1501). Status of Local Lodges and Relation to Supreme Body (1501).
§ 2. Foreign Associations (1502).
§ 3. Officers, Agents, Organizers, Physicians, etc. (1502).
§ 4. Members and Discipline (1502). Arbitration of Disputes and Claims (1503).
§ 5. Membership and Contract Securing Benefits (1504).
A. Application (1504).
B. Certificate (1505).
C. Nature and Construction of Contract (1505).
D. Charter and By-laws as Part of Contract (1507).
§ 6. Dues and Assessments (1510).
§ 7. Forfeiture and Suspensions; Reinstatement (1510). For Nonpayment of Dues and Assessments (1511).
§ 8. The Beneficiary. Designation (1513). Right to Change Beneficiary (1514). Assignment of Benefits (1514). Status of Beneficiary (1515). Exemption of Benefits From Liability for Debts (1515).

95. Thurston v. Huston, 123 Iowa, 157, 98 N. W. 637. Code, §§ 955, 956, does not apply to mere extensions or enlargements of the facilities which the franchise holder employs in exercising the power originally granted. Id.

96. See 2 Curr. L. 77.

97. Such power is not conferred by charter provisions allowing it to take, hold and convey real estate necessary to carry on its business, or to borrow money for corporate purposes and mortgage its property and franchises as security. New Albany Waterworks v. Louisville Banking Co. [C. C. A.] 122 F. 776. 2 Burn's Rev. St. Ind. 1901, § 3424; Thornton's Rev. St. 1897, § 3491, does not grant general authority for the consolidation of corporations. Id. Such sale is absolutely void, cannot be validated by grant of franchise by a city to the purchaser. Cumberland Tel. & T. Co. v. Evansville, 127 F. 187.

98. New Albany Waterworks v. Louisville Banking Co. [C. C. A.] 122 F. 776.

99. Cumberland Tel. & T. Co. v. Evansville, 127 F. 187.

100. See 2 Curr. L. 78.

101. Water and electric light company, held could be ousted from latter without interfering with former. State v. Twin Village Water Co., 98 Me. 214, 56 A. 763.

102. State v. Twin Village Water Co., 98 Me. 214, 56 A. 763. Turning over turnpike road to county held not an abandonment under Ky. St. 1903, § 4732, making failure to charge tolls an abandonment. Bardstown & L. Turnpike Co. v. Nelson County, 25 Ky. L. R. 1900, 78 S. W. 851. County fiscal court has no jurisdiction to litigate such question. Id.

103. There being no demand for electricity, held no abandonment of franchise to furnish same. State v. Twin Village Water Co., 98 Me. 214, 56 A. 763. Nine years nonuser of permission to lay tracks in street, then obtaining same permission, again followed by seven years nonuser, when permission was again obtained, held abandonment of rights acquired under first permission. Delaware, etc., R. Co. v. Oswego, 92 App. Div. 551, 86 N. Y. S. 1027.

104. Rev. St. § 1536-667. Columbus v. Federal Gas Co., 2 Ohio N. P. (N. S.) 277. For general rule see 2 Curr. L. 79, n. 20-21.

105. See ante, note 81. Words and phrases construed.

106. Bank of California v. San Francisco, 142 Cal. 276, 75 P. 832 [dicta]. The franchise is personal property, and all things of a proprietary nature connected therewith, whether land or movables, partake of its character, and the value of that which is created by the combination of tangible and intangible things forms the legitimate basis of taxation. Town of Washburn v. Washburn Waterworks Co. [Wis.] 98 N. W. 539.

107. Coulter v. Weir [C. C. A.] 127 F. 897. See 2 Curr. L. 79, n. 22-23.

§ 9. Maturity and Accrual of Benefits (1515).
§ 10. Proofs of Death or Right to Benefits (1517).
§ 11. Payment of Benefits (1517).
§ 12. Procedure to Enforce Right to Benefits (1518). Pleading (1519). Evidence (1519). Judgments (1519).

Scope of title.—This title deals only with the law peculiarly applicable to fraternal and mutual benefit societies and their contracts of insurance. Matters relating to insurance companies or insurance contracts generally, or which are common to all corporations or associations, are treated elsewhere.[1]

§ 1. *Nature, organization and powers.*[2]—The distinction between "benefit" and "benevolent" societies lies in whether or not periodical payments are required from prospective beneficiaries.[3] They are limited in their powers by articles and by-laws,[4] of which limitations persons dealing with them must take notice.[5] Such societies must have a representative form of government;[6] they cannot accept members above the age limit or without a medical examination,[7] must not make improper allowances to officers,[8] or divert funds from the purposes for which they are contributed,[9] and the books and records must show the true condition of their business and finances, including assessments and liabilities.[10]

The assets of such societies do not consist in cash and tangible securities and property alone, and they cannot be said to be insolvent when it is reasonably probable that by its authorized assessments it can provide sufficient funds to meet its just liabilities.[11]

By the laws of Nebraska, fraternal benefit associations are required to file annual reports with the auditor,[12] which must show all claims for death losses.[13] On failure to do so or to comply with other provisions of the statute, the attorney general on report of the auditor is required to sue to enjoin it from continuing business.[14] The court cannot in such proceedings order the appointment of a receiver and the winding up of its affairs,[15] and if the act complained of shall be corrected, and costs are paid by defendant, it will be reinstated.[16]

Legislative control as to insurance.—Beneficial societies are usually exempted from the provisions of the general insurance laws.[17] The exemption applies to foreign societies authorized to do business in the state.[18]

1. See titles Insurance, 2 Curr. L. 479; Corporations, 3 Curr. L. 880; Foreign Corporations, 3 Curr. L. 1455; Associations and Societies, 3 Curr. L. 346.

2. See 2 Curr. L. 79.

3. A benefit society is one which receives periodical payments from its members and holds them as a fund to be loaned or given to those of its members needing pecuniary relief or to the families or relatives of deceased members. State v. Dunn, 134 N. C. 663, 46 S. E. 949. A benevolent association is one which confers benefits without requiring an equivalent from those benefited. Id.

4. An association having power to raise and expend money for the payment of sick benefits to members may employ a physician to attend them in time of sickness. Flaherty v. Portland Longshoremen's Benev. Soc. [Me.] 59 A. 58. But where the by-laws provide that the funds of the society can be appropriated only for certain other designated purposes, it cannot lawfully vote to pay a salary to such physician. Id.

5. Articles and by-laws of relief association held not to authorize or justify employment by officer of physician to attend for indefinite period member injured at fire. Defendant not liable therefor. Acts of trustee held not to constitute estoppel as against defendant. Legault v. Minneapolis Fire Dept. Relief Ass'n [Minn.] 100 N. W. 666.

6. Directors or other officers having general charge and control of its property and business and management of its affairs must be chosen by members. State v. Bankers' Union of the World [Neb.] 99 N. W. 531.

7. Not indirectly by purchasing and consolidating with itself other societies. State v. Bankers' Union of the World [Neb.] 99 N. W. 531.

8, 9, 10, 11. State v. Bankers' Union of the World [Neb.] 99 N. W. 53.

12. Laws 1897, p. 266, c. 47, § 10. State v. Bankers' Union of the World [Neb.] 99 N. W. 531.

13. State v. Bankers' Union of the World [Neb.] 99 N. W. 531.

14. Laws 1897, p. 266, c. 47, § 16. State v. Bankers' Union of the World [Neb.] 99 N. W. 531.

15. State v. Bankers' Union of the World [Neb.] 99 N. W. 531.

16. Court will not direct auditor to reinstate defendant in such action. State v. Bankers' Union of the World [Neb.] 99 N. W. 531.

17. Mo. Rev. St. 1899, art. 11, c. 12. Hudnall v. Modern Woodmen, 103 Mo. App. 356.

Protection of ritual and individuality.[19]—Rights in name or ritual will not be determined until a controversy arises.[20] Similarity of name must be substantially misleading.[21]

Status of local lodges and relation to supreme body.[22]—The relation of the central governing body to the subordinate lodges is to be determined by the constitution and by-laws.[23]

The supreme governing body is generally given power to enact a constitution and by-laws for the association and to amend the same.[24] The sovereign body of the society is not liable for injuries inflicted by subordinate lodges on candidates during their initiation, in the absence of a showing of a relation of principal and agent or master and servant between the sovereign and subordinate lodges in respect to the initiation.[25] Where such relation exists, however, the sovereign body will be held responsible, though it did not authorize the acts resulting in the injury.[26] The issuance of a certificate to a member of a lodge which by operation of the by-laws has forfeited its right to affiliate with the association, without notice to him of such default, is a waiver by the association of such default, and it is thereby estopped to deny the continued membership of the lodge and the agency of its officers.[27]

Where the governing body is, by statute, given power to provide for holding its meetings in any state where it has subordinate lodges, and adopts a resolution changing the place of meeting from that designated in the by-laws, a meeting so held is authorized and its proceedings are not thereby rendered invalid.[28]

Matters relating to the winding up and dissolution of such associations are treated elsewhere.[29]

77 S. W. 84. By Texas Rev. St. 1895, art. 3096, general laws do not apply to mutual relief associations having no capital stock whose relief funds are created by assessments on its members, provided that the principal officer shall make annual statement to insurance department. Supreme Council, A. L. H. v. Story [Tex.] 78 S. W. 1.

18. Applied to provisions as to liability in case of suicide [Mo. Rev. St. 1899, §§ 1408-1410]. Hudnall v. Modern Woodmen, 103 Mo. App. 356, 77 S. W. 84. Tex. Rev. St. 1895, art. 3096. Art. 3071, providing penalty for nonpayment of policies by life insurance companies, does not apply unless required statement is not made. Burden of showing failure is on beneficiary suing on certificate. Supreme Council, A. L. H. v. Story [Tex.] 78 S. W. 1.

19. See 2 Curr. L. 79.

20. Where it has been determined on appeal that one secret beneficial society has no right to use the same ritual, secret work, badges and paraphernalia as another, the court will not, on settling the decree, investigate and determine whether the proposed new ritual and work of the former substantially differs from that of the latter, but will wait until a controversy actually arises. Great Hive Ladies of Maccabees v. Supreme Hive of Ladies of Maccabees [Mich.] 99 N. W. 26. An injunction will not issue to protect the exclusive rights on one society in a particular state where they have not been threatened. Id.

21. The use of the letters "L. O. T. M. M.," signifying "Ladies of the Modern Maccabees," does not interefere with the rights of another society using the letters "L. O. T. M.," meaning "Ladies of the Maccabees." Great Hive of Ladies of Maccabees v. Supreme Hive of Ladies of Maccabees [Mich.] 99 N. W. 26.

22. See 2 Curr. L. 79.

23. Parliament of Prudent Patricians v. Marr, 20 App. D. C. 363. In such case the constitution and by-laws of the society should be construed by the court for the purpose of determining the agency of the local lodge. Error in allowing jury to construe same held not prejudicial to the society. Mitchell v. Leech [S. C.] 48 S. E. 290.

24. Supreme circle held to have full authority to enact constitution and by-laws for the association and to amend the same. Protected Home Circle v. Tisch, 24 Ohio Circ. R. 489.

25. Part of ceremony resulting in injury not prescribed by ritual adopted by sovereign camp. Jumper v. Sovereign Camp Woodmen [C. C. A.] 127 F. 635.

26. Where the local lodges and their members are under the complete direction and control of the sovereign body, which issues and pays death certificates, they will be regarded as its agents, and it will be held liable for injuries resulting from use of mechanical goat. Injured by mechanical goat. Mitchell v. Leech [S. C.] 48 S. E. 290.

27. Parliament of Prudent Patricians v. Marr, 20 App. D. C. 363.

28. Kan. Laws 1898, c. 23, § 8, as amended by Laws 1899, c. 147. Miller v. National Council Knights & Ladies of Security [Kan.] 76 P. 830.

29. See Corporations, § 12, 3 Curr. L. 893; Receivers, 2 Curr. L. 1465.

§ 2. *Foreign associations.*[30]—The Texas statute relating to foreign beneficial societies and requiring them to appoint the insurance commissioner as agent on whom process may be served does not repeal the general law authorizing service on local agents of foreign corporations, but the two are cumulative and service may be made on either.[31] The Maine statute providing for service of process on the insurance commissioner in actions against foreign insurance companies applies only to such companies as have obtained a license to do business in that state.[32] For a full discussion of the rights, duties and liabilities of foreign associations, see the titles Insurance[33] and Foreign Corporations.[34]

§ 3. *Officers, agents, organizers, physicians, etc.*[35]—Officers and directors alike are limited in their powers by the articles.[36] Fidelity bonds of the president of a mutual life insurance company may be enforced by any one for whose benefit they were executed, though running to the association.[37] One officer is not ordinarily liable for the defalcation of another,[38] but the officer responsible for money is not relieved because it was embezzled by another officer.[39] The treasurer's book entries are, as between himself and the company, mere declarations in his favor, and are not competent to disprove receipts given by him.[40] Settlements between a lodge and its treasurer are governed by the ordinary rules relating to such transactions.[41]

§ 4. *Members and discipline.*[42]—An expelled member may abandon all claims to reinstatement and resort to an action for damages for the injury sustained thereby.[43] Such suit is not a waiver of the illegality of the expulsion.[44] The loss sustained by plaintiff in being deprived of the use and enjoyment of the property of the society and the privileges of membership are proper elements of damage.[45] So also is his mental suffering caused by such expulsion and the manner in which it was effected.[46] Where the expelled member has declined a tender of the premiums paid by him, a decree denying him reinstatement need not provide for their repayment.[47]

Where the association has authority to sanction the disssolution of a local

30. See 2 Curr. L. 81.

31. President of subordinate lodge held local agent within meaning of such general law [Laws 1899, p. 195, c. 115]. Bankers' Union of the World v. Nabors [Tex. Civ. App.] 81 S. W. 91.

32. Rev. St. c. 49, §§ 79-84, 92, construed. Greenleaf v. National Ass'n of Ry. Postal Clerks, 130 F. 209.

33. Insurance, § 2B, 2 Curr. L. 483.

34. Foreign Corporations, 2 Curr. L. 40.

35. See 2 Curr. L. 81.

36. While the business of the association is under the management of the board of directors and the president is subject to its control, both are governed by the articles of incorporation and the statutes defining and limiting their respective duties and powers. Sherman v. Harbin [Iowa] 100 N. W. 629. Any act of the president contrary thereto, though directed or acquiesced in by the board, constitutes a breach of his duty. Id.

37. Given under Iowa Code, § 1787. Sherman v. Harbin [Iowa] 100 N. W. 622.

38. He is not, in the absence of knowledge thereof, liable on his bond for the error of a bonded cashier in depositing money received from investments to the credit of a fund to which it did not belong. Sherman v. Harbin [Iowa] 100 N. W. 622.

39. On the insolvency of a mutual benefit association, it is not a ground to release the treasurer who stood charged with moneys that they were in fact misappropriated by the secretary who failed to turn them over. Hudson v. Baker, 185 Mass. 122, 70 N. E. 419.

40. Hudson v. Baker, 185 Mass. 122, 70 N. E. 419.

41. Agreement of settlement made by lodge with treasurer alleged to be short in his accounts held binding on lodge. Bedford v. Simono [Tex. Civ. App.] 79 S. W. 97.

42. As affecting right to benefits, see post, § 7. See 2 Curr. L. 82.

43. Lahiff v. St. Joseph's Total Abstinence & Benevolent Soc., 76 Conn. 648, 57 A. 692. A voluntary association is responsible for the illegal expulsion of one of its members at a special meeting not called for that purpose, where it afterwards in effect approves such action by refusing him admission to its meetings and debarring him from all the rights and privileges of membership. Id.

44, 45, 46. Lahiff v. St. Joseph's Total Abstinence & Benevolent Soc., 76 Conn. 648, 57 A. 692.

47. Contract provided for forfeit of premiums in case of false representations. Murray v. Supreme Hive, Ladies of Maccabees. [Tenn.] 80 S. W. 827.

lodge, the mere fact that its officers may have been influenced by improper motives in doing so is insufficient to constitute a cause of action against it for conspiracy to deprive one of his membership therein.[48] So is the fact that they fail to invite him to join a new lodge at the same place.[49]

A member has an interest in the funds of the association.[50] He is entitled to the protection of the by-laws and may maintain a bill to enjoin their violation.[51]

Arbitration of disputes and claims.—In order to preclude a member or beneficiary from resorting to the courts to enforce his contract with the association, there must be an express and specific contract shown for some other mode of settlement.[52] An agreement to submit disputes or claims to tribunals of the order under the prescribed procedure is valid, and is a complete defense to an action thereon.[53] In such case the same principles apply as where controversies are submitted to arbitrators,[54] and where the prescribed forms are observed, the decision of such tribunal is final in the absence of fraud or bad faith.[55] It is not the province of the court to determine whether a correct result was reached,[56] but the conclusiveness of the decision may be questioned in a court of law when set up as a defense to an action on the certificate.[57] Errors of procedure not objected to will be deemed to have been waived.[58] A request by the member for a rehearing is a waiver of previous irregularities.[59] Such tribunals may determine as to the competency and the weight of the evidence offered.[60] They will not be held to the strict rules of evidence applicable in courts of law,[61] the only rule for

48. Evidence insufficient to show conspiracy. Grand Lodge Order Hermann's Sons v. Schuetze [Tex. Civ. App.] 83 S. W. 241.

49. Grand Lodge Order Hermann's Sons v. Schuetze [Tex. Civ. App.] 83 S. W. 241.

50, 51. Flaherty v. Portland Longshoremen's Benev. Soc. [Me.] 59 A. 58.

52. Clause merely prohibiting institution of actions except through "regular channels of the order" insufficient in absence of showing what substitute has been established. Parliament of Prudent Patricians v. Marr, 20 App. D. C. 363.

53. Policy provided that in case of certain injuries claims should be addressed to the benevolence of the order and should not be the basis of any legal liability, but should be determined by beneficiary board. Pool v. Brotherhood of Railroad Trainmen [Cal.] 77 P. 661. Findings to be final. Derry v. Great Hive Ladies of Modern Maccabees [Mich.] 98 N. W. 23.

54. Pool v. Brotherhood of Railroad Trainmen [Cal.] 77 P. 661.

55. Pool v. Brotherhood of Railroad Trainmen [Cal.] 77 P. 661. The decision when made in good faith and after giving the parties the hearing to which they are entitled is binding. Barker v. Great Hive Ladies of Modern Maccabees [Mich.] 98 N. W. 24. In a suit by an expelled member to be reinstated, the court will uphold the laws of the organization and restrict its investigation to the inquiry as to whether such laws have been enforced fairly and without oppression. Murray v. Supreme Hive Ladies of Maccabees [Tenn.] 80 S. W. 827.

56. Barker v. Great Hive Ladies of Modern Maccabees [Mich.] 98 N. W. 24.

57. Dick v. Supreme Body of International Congress [Mich.] 101 N. W. 564.

58. One cannot object to the finding of such tribunal on the ground that evidence was produced by affidavit only where neither party requested that the witnesses be produced and examined orally (Derry v. Great Hive Ladies of Modern Maccabees [Mich.] 98 N. W. 23), nor because the proof consisted of ex parte affidavits where claimant himself used similar evidence (Barker v. Great Hive Ladies of Modern Maccabees [Mich.] 98 N. W. 24), nor because his claim was determined by a committee where he made no request that the hearing should be before the lodge as a whole (Derry v. Great Hive Ladies of Modern Maccabees [Mich.] 98 N. W. 23). An objection to the consideration of a physician's certificate because claimant had no opportunity to cross-examine him is not well taken where claimant's proofs were taken without affording the association the same right. Barker v. Great Hive Ladies of Modern Maccabees [Mich.] 98 N. W. 24.

59. Expulsion of member. Murray v. Supreme Hive Ladies of Maccabees [Tenn.] 80 S. W. 827.

60. Evidence tending to show false representations as to age held properly considered. Murray v. Supreme Hive Ladies of Maccabees [Tenn.] 80 S. W. 827, and cases therein cited.

61. Murray v. Supreme Hive Ladies of Maccabees [Tenn.] 80 S. W. 827; Barker v. Great Hive Ladies of Modern Maccabees [Mich.] 98 N. W. 24. Claimant held not prejudiced by reference to hearsay statements of third persons, where the association's attorney told the members of the tribunal that they could not consider them. Derry v. Great Hive Ladies of Modern Maccabees [Mich.] 98 N. W. 23. Where the bill alleges that the association acted without any information on the subject, it may

its admission and exclusion being that of common fairness,[62] and strict rules of procedure are not enforced.[63] But they have no right to violate any positive law of evidence.[64] A rule providing for appeals from the action of the executive committee giving the supreme tribunal "power to take additional proofs" implies that it may consider proofs taken before such committee.[65]

§ 5. *Membership and contract securing benefits. A. Application.*[66]—As in all insurance, material misrepresentations in the application avoid the contract[67] irrespective of whether the applicant knew of their materiality;[68] but the association is charged with the knowledge of the agent taking the application,[69] unless the applicant knew that the agent wrote down untrue answers.[70] Where the agent, knowing that the applicant can neither read nor write, undertakes to read to him the application, the applicant is not bound by statements therein which the agent fails to read.[71] The test of materiality is whether the knowledge or ignorance of the fact sought to be elicited would materially influence the action of the insurer in entering into the contract.[72] Statements in the printed form not responsive to questions are not a part of the contract.[73]

Officers and agents of mutual associations may waive the provisions of the articles and by-laws with reference to the making of contracts of insurance to the same extent as though they were acting for an insurance company.[74] The subordinate lodge or an officer thereof whose duty it is to perform some service for or

marshall the information on which it acted notwithstanding technical objections thereto. Murray v. Supreme Hive Ladies of Maccabees [Tenn.] 80 S. W. 827; Dick v. Supreme Body of International Congress [Mich.] 101 N. W. 564.

62. Barker v. Great Hive Ladies of Modern Maccabees [Mich.] 98 N. W. 24. Rejection of evidence on reasonable grounds affords no just ground of complaint. Murray v. Supreme Hive Ladies of Maccabees [Tenn.] 80 S. W. 827; Dick v. Supreme Body of International Congress [Mich.] 101 N. W. 564.

63. The claimant is not deprived of the hearing to which he is entitled because the tribunal does not have the proofs read to it, but contents itself with listening to counsel's statement. Counsel's duty to properly present case and his ignorance of fact that affidavits were accessible not chargeable to association. Barker v. Great Hive Ladies of Modern Maccabees [Mich.] 98 N. W. 24. The validity of the decision cannot be affected by such irregularities as the absence of claimant's counsel at the time of the final determination of the claim. Id.

64. As where it is based on evidence admitted in violation of Mich. Comp. Laws 1887, § 10,181, forbidding a physician to disclose information acquired in attending a patient. Dick v. Supreme Body International Congress [Mich.] 101 N. W. 564.

65. Barker v. Great Hive Ladies of Modern Maccabees [Mich.] 98 N. W. 24.

66. See 2 Curr. L. 86.

67. Evidence sufficient to sustain finding of jury that insured did not make misrepresentations as to his age and was not over the prescribed age when admitted to membership. Instructions approved. Grand Lode A. O. U. W. v. Bartes [Neb.] 98 N. W. 715. New trial on ground of newly discovered evidence held properly denied. Id. Evidence sufficient to warrant direction of verdict for defendant on ground that deceased was ineligible because beyond the age limit when he applied for membership. Meehan v. Supreme Council Catholic Benev. Legion, 88 N. Y. S. 821. Under terms of policy held that misrepresentation in order to be bar must be material to risk. Offiner v. Brotherhood of American Yeoman [Mo. App.] 83 S. W. 67. Purpose of questions as to use of intoxicants held to be to ascertain to what extent insured used them and not whether he used them at all, and that association could not have been misled by answers. Endowment Rank Supreme Lodge K. P. v. Townsend [Tex. Civ. App.] 83 S. W. 220. Evidence held to show that death was not caused by use of intoxicants. Id.

68. Mattson v. Modern Samaritans, 91 Minn. 434, 98 N. W. 330.

69. As to occupation of insured. Mattson v. Modern Samaritans, 91 Minn. 434, 98 N. W. 330. Where defendant's director had full notice of the ownership of the property insured, defendant could not escape liability on the ground that the application written by the director contained a misstatement of interest. Loomis v. Jefferson County Patron's Fire Relief Ass'n, 92 App. Div. 601, 87 N. Y. S. 5.

70. Evidence held to make insured's knowledge a question for the jury. Mattson v. Modern Samaritans, 91 Minn. 434, 98 N. W. 330.

71. Evidence as to such facts held admissible under pleadings. Home Circle Soc. No. I. v. Shelton [Tex. Civ. App.] 81 S. W. 84.

72. Mattson v. Modern Samaritans, 91 Minn. 434, 98 N. W. 330.

73. Robson v. United Order of Foresters [Minn.] 100 N. W. 381.

74. Agent issuing certificate on application which he knows was made and signed by insured's brother held to have waived provision requiring application to be signed by applicant personally. Thornberg v. Farmers' Life Ass'n, 122 Iowa, 260, 98 N. W. 105.

on behalf of the supreme lodge is generally regarded as an agent of the governing body for the purpose of receiving members and collecting assessments and dues.[75] And if, with full knowledge of an applicant's false answers or statements, a local lodge receives or admits him as a member,[76] or if, after his admission, the officer whose duty it is to collect assessments learns of such statements and thereafter receives such assessments and remits them to the supreme order, the society will, as a general rule, be held estopped from pleading such statements or representations as a defense to an action on the benefit certificate.[77] The association may waive the requirement that applicants must be in good health by knowingly and customarily accepting persons who are not.[78] It may also waive the medical examination of the assured,[79] and requirements that applications must be made personally[80] and on prescribed forms.[81]

A provision in the application waiving the statutory provisions prohibiting a physician from disclosing any information acquired from his patient is unenforceable.[82]

(§ 5) *B. Certificate.*[83]—The certificate is a contract between the holder and the association, restricted only by the rules and regulations of the association and the law under which it was organized,[84] and is enforceable by either against the other according to its terms.[85] A certificate is not issued until delivered to the member and accepted by him.[86] It need not be signed by the insured in order to be binding on him.[87] His acceptance thereof is shown by his payment of assessments and the suit thereon by his beneficiaries.[88]

The last certificate taken out fixes the rights of the parties, and by-laws then in force become a part of the contract.[89]

A provision that a lost certificate may be replaced by a duplicate which shall operate to cancel the original is valid, and after the issuance of such duplicate, the original certificate has no further force or effect.[90]

(§ 5) *C. Nature and construction of contract.*[91]—The relation existing between the member and the association is a contractual one, and the ordinary

75, 76. Whigham v. Supreme Court, I. O. F., 44 Or. 543, 75 P. 1067.

77. Society held not estopped to declare forfeiture for breach of warranty by reason of fact that officers of subordinate lodge admitted him and received his assessments, knowing of his intemperate habits, where physician before whom answers were made did not know him personally, and forwarded his application to head office without submitting it to local lodge, whose officers were ignorant of its contents. Whigham v. Supreme Court I. O. F., 44 Or. 543, 75 P. 1067.

78. Home Circle Soc. No. I. v. Shelton [Tex. Civ. App.] 81 S. W. 84.

79. By executing contract agreeing to become obligated by certificate of another association from which plaintiff was transferred. Weber v. Ancient Order of Pyramids [Mo. App.] 78 S. W. 650.

80. Where one is directed to make application for membership in an association for another and does so in good faith, making proper answers to questions and signing the principal's name thereto, and the principal thereafter ratifies his acts, the association is bound by the certificate issued in response thereto, though the by-laws provide that the application must be signed by the applicant personally. Where agent knew insured's physical condition and latter thereafter submitted to medical examination. Thornburg v. Farmers' Life Ass'n, 122 Iowa, 260, 98 N. W. 105.

81. By executing contract. Weber v. Ancient Order of Pyramids [Mo. App.] 78 S. W. 650.

82. Must be expressly waived by representative of deceased patient at trial under N. Y. Code Civ. Proc. § 836. Meyer v. Supreme Lodge K. P., 173 N. Y. 63, 70 N. E. 111.

83. See 2 Curr. L. 83.

84. Bunyan v. Reed [Ind. App.] 70 N. E. 1002. See post, § 5D.

85. Brown v. Grand Lodge A. O. U. W., 208 Pa. 101, 57 A. 176.

86. Within meaning of provision that member shall be liable for dues for month in which his certificate is "issued or dated." Logsdon v. Supreme Lodge of Fraternal Union, 34 Wash. 666, 76 P. 292.

87, 88. Feiber v. Supreme Council A. L. H., 112 La. 960, 36 So. 818.

89. As to suicide. Clement v. Clement [Tenn.] 81 S. W. 1249.

90. Dexter v. Supreme Council Royal Templars, 97 App. Div. 546, 90 N. Y. S. 292.

91. See 2 Curr. L. 83.

rules in regard to contracts apply.[92] The contract of insurance will be strictly construed against the company preparing it, and liberally as against the insured,[93] and will be enforced in accordance with the laws of the state where it is accepted.[94] Any ambiguity in regard to persons who may be named as beneficiaries will be construed so as to make valid rather than to avoid a contract between the corporation and one of its members, and so as to carry into effect the manifest intention of the member as to the disposition of the endowment fund.[95] When the contract contains contradictory or ambiguous provisions in regard to the effect of misrepresentations in the application, the court will avoid a construction which will put upon the insured the obligation of warranty.[96] The articles of incorporation are to be construed liberally.[97]

A provision of the constitution of a police benefit society entitling members to receive a benefit on dismissal from the force is against public policy and void.[98]

The construction of particular contracts will be found in the notes.[99]

92. Logsdon v. Supreme Lodge of Fraternal Union, 34 Wash. 666, 76 P. 292.

93. As to forfeiture in case of suicide. Robson v. United Order of Foresters [Minn.] 100 N. W. 381. In case of ambiguity that construction should be adopted which will give the insured protection under his certificate. Word "shaft," referring to part of human bone, construed. Peterson v. Modern Brotherhood of America [Iowa] 101 N. W. 289.

94. Certificate issued through officers of association in Chicago to member in New York on which was printed acceptance which was signed by applicant in New York, the conditions providing that it was to take effect when acceptance was executed, held a New York contract to be enforced under laws of that state. Meyer v. Supreme Lodge K. P., 178 N. Y. 63, 70 N. E. 111.

95. Sheehan v. Journeymen Butchers' Protective & Benevolent Ass'n, 142 Cal. 489, 76 P. 238.

96. Held that in order to be bar misrepresentation must have been essential or material to the risk. Offiner v. Brotherhood of American Yeomen [Mo. App.] 83 S. W. 67.

97. As to designation of beneficiaries. Sheehan v. Journeymen Butchers' Protective & Benevolent Ass'n, 112 Cal. 489, 76 P. 238.

98. McCormick v. McCarton, 95 App. Div. 426, 88 N. Y. S. 722.

99. Where association was empowered to make provision for any one dependent on deceased members and policy was payable to "J. (wife)," held that the word "wife" was merely descriptio personae, and her dependency on the assured was not controlled by the legality of her marriage. James v. Supreme Council of Royal Arcanum, 130 F. 1014. Safety clause in policies providing that under certain conditions the association might draw from its surplus or reserve to meet deficiencies or call upon members for their pro rata share thereof, held not to limit the amount payable under policies to sum collected from members, or relieve association from liability for full amount of policy. Sherman v. Harbin [Iowa] 100 N. W. 622. Amendment of by-laws as to kind of certificates which might be issued held to have reference only to the different plans of raising money to meet losses and not to have changed associations method of doing business. Id. Provision in by-laws that under certain conditions payment should be made to decedent's brothers and sisters "or their living issue according to the right of representation" construed and "living issue" held to mean living lienal descendants of deceased brothers and sisters. Children and grandchildren of deceased sisters held to take parent's share. Hemenway v. Draper, 91 Minn. 235, 97 N. W. 874. Word "orphans," as used in the rules relating to beneficiaries, held to mean "children." Fischer v. Malchow [Minn.] 101 N. W. 602. Held that under its conditions, policy could not be forfeited by mere failure to pay per capita tax when due, but there must be a failure to pay both it and the assessment within 30 days after notice of both. Hyatt v. Loyal Protective Ass'n [Mo. App.] 81 S. W. 470. An accident resulting in the loss of the use of a hand, though it is not entirely amputated, is within the meaning of a provision covering the loss of a hand. Sisson v. Supreme Court of Honor [Mo. App.] 78 S. W. 297. A by-law providing that at the request of the insured the policy may be made payable to the mortgagee as his interest may appear is not obligatory, and hence a failure to make it so payable does not release the association. Loomis v. Jefferson County Patrons' Fire Relief Ass'n, 92 App. Div. 601, 87 N. Y. S. 5. Policy provided that it should be void if insured was killed while acting as "Railroad freight brakeman." Held "District" yard brakeman came within the provision. Snow v. Modern Woodmen of America, 4 Ohio C. C. (N. S.) 68. In a life insurance policy, it was provided that the policy should be void if the insured was killed while acting as a "railroad freight brakeman." Held that a "district yard brakeman" came within the provision. Id. A policeman who, though on the pension roll, was subject to call by day or night for active service, held entitled to pay dues and to receive benefits in a police relief association as an active member of the force. Nickerson v. Providence Police Ass'n [R. I.] 57 A. 1057. Under policy and constitution of order, held that interest of wife named as beneficiary did not, on her death before the insured and his failure to name a new beneficiary, pass to his estate under the laws of descent, but passed to his children who were the next class of beneficiaries named therein. Deacon v. Clarke [Tenn.] 79 S. W. 383.

(§ 5) *D. Charter and by-laws as part of contract.*[1]—The contract evidenced by the certificate is to be construed in connection with the constitution and by-laws, though they are not specifically made a part thereof.[2] Where no certificate is issued, the by-laws in existence at the time one becomes a member constitute the contract between the parties.[3] So also any promise an association makes in its organic law to pay its members benefits becomes a contract between it and them.[4] So long as they are not illegal, immoral or against public policy, the association itself may determine what rules and regulations will best promote the purposes for which it was organized.[5] The fact that the constitution and by-laws purport to have been published by the supreme body of the order and are sent by it to the subordinate lodges and used by them makes out a prima facie case of their adoption by the order.[6] The constitution and by-laws of the association constitute the law of the organization which controls the issuing of its benefit certificates, and the disposition of its benefit fund[7] and the rights and duties of the members must be enforced strictly in conformity therewith.[8] They become a part of the contract of insurance, and both the insured and the beneficiary are bound thereby,[9] and are presumed to have knowledge thereof.[10] Statutes in some states provide that unless a copy of the by-laws, constitution and application are contained in or attached to the policy, they shall not be considered a part of the policy or contract, or be received in evidence in any controversy between the parties thereto.[11] It has been held that such statutes establish a rule of evidence only, and hence merely relate to the remedy and are not unconstitutional as interfering with contract rights.[12]

A condition in the certificate that the member will, in every particular, comply with all the laws, rules and requirements of the order is an agreement to abide by all reasonable rules thereafter adopted.[13] A member of a local lodge cannot

1. See 2 Curr. L. 83.
2. Home Circle Soc. No. 1 v. Shelton [Tex. Civ. App.] 81 S. W. 84.
3. Zinna v. Saveria Friscia Soc., 88 N. Y. S. 404.
4. Provision in constitution for payment of death benefits. United Brotherhood of Carpenters & Joiners v. Dinkle, 32 Ind. App. 273, 69 N. E. 707.
5. United Brotherhood of Carpenters & Joiners v. Dinkle, 32 Ind. App. 273, 69 N. E. 707.
6. Home Circle Soc. No. I. v. Shelton [Tex. Civ. App.] 81 S. W. 84.
7. As to change of beneficiary. Brown v. Grand Lodge A. O. U. W., 208 Pa. 101, 57 A. 176.
8. Brown v. Grand Lodge A. O. U. W., 208 Pa. 101, 57 A. 176.
9. Supreme Lodge Knights of Honor v. Jones [Ind. App.] 69 N. E. 718. Held, that the contract of insurance must, under the circumstances, be ascertained from the application, the policy, the by-laws, and the answers of the insured to all questions contained in the medical examination, in regard to her physical condition. Robson v. United Order of Foresters [Minn.] 100 N W. 381. The beneficiary is subject to the contract made by the insured as to hearing of claims. Derry v. Great Hive Ladies of Modern Maccabees [Mich.] 98 N. W. 23; Miller v. National Council Knights & Ladies of Security [Kan.] 76 P. 830; Deacon v. Clarke [Tenn.] 79 S. W. 383. One voluntarily remaining member agrees to comply therewith. Forfeiture of benefits for nonpayment of dues. United Brotherhood of Carpenters & Joiners v. Dinkle, 32 Ind. App. 273, 69 N. E. 707. Provision authorizing board of directors to cancel membership held to give them power to do so on ground that insured had lost an eye, which rendered him a more hazardous risk. Travelers' Protective Ass'n v. Dewey [Tex. Civ. App.] 78 S. W. 1087. One becoming a member thereby consents and agrees to by-laws, and the application and certificate issued to him as the contract which is to govern him and the other members in adjusting their rights among themselves. Cochran v. Boleman [Ind.] 71 N. E. 47; Bunyan v. Reed [Ind. App.] 70 N. E. 1002; Littleton v. Wells & M. Council No. 14 [Md.] 66 A. 798; Protected Home Circle v. Tisch, 24 Ohio Circ. R. 489.
10. Bunyan v. Reed [Ind. App.] 70 N. E. 1002; Home Circle Soc. No. I. v. Shelton [Tex. Civ. App.] 81 S. W. 84; Protected Home Circle v. Tisch, 24 Ohio Circ. R. 489.
11. Provision mandatory. Where certificate issued before enactment of statute contained no reference to suicide, a by-law thereafter enacted limiting liability in such cases, which was not attached to the policy and not called to insured's attention was not binding on him [Ky. St. 1903, § 679]. Hunziker v. Supreme Lodge K. P., 25 Ky. L. R. 1510, 78 S. W. 201.
12. Hunziker v. Supreme Lodge K. P., 25 Ky. L. R. 1510, 78 S. W. 201.
13. Miller v. National Council Knights & Ladies [Kan.] 76 P. 830.

be held to have authorized the representatives thereof in the supreme body to assent to unreasonable amendments, and their consent will not operate as a waiver of his rights.[14] Agreements to comply with future by-laws and regulations refer only to such as relate to the insured's duties as a member of the association.[15] Amendments thereto, to be valid, must be reasonable,[16] and the association cannot, without the express consent of the member, change or modify the essentials of the contract of insurance,[17] or deprive him of vested rights thereunder.[18] Thus an amendment to its by-laws reducing the amount of insurance to be paid to a sum less than the amount stipulated for in his certificate,[19] or depriving him of sick benefits, is void as to him.[20] Such amendments, unless consented to or acquiesced in,[21] operate as a repudiation of the contract[22] and, as in other contracts, the member is excused from further performance on his part, and may at once maintain an action for damages occasioned by such repudiation without waiting until the time fixed for performance,[23] or he may sue for a rescission of the contract and recover payments made by him.[24] He need not continue to pay assessments or otherwise maintain his good standing.[25] He must, however, exercise his option to treat the contract as repudiated within a reasonable time,[26] what is a reasonable time being ordinarily a question for the jury.[27] It is not to be determined so much by lapse of time as by considering the circumstances of the parties and the effect produced by the delay.[28] Facts showing that the asso-

14. Deceased held not to have assented to amendment striking out time limit as to suicide. Fargo v. Supreme Tent of Knights of Macoabees, 96 App. Div. 491, 89 N. Y. S. 65.

15. Sisson v. Supreme Court of Honor [Mo. App.] 78 S. W. 297.

16. Zinna v. Savaria Friscia Soc., 88 N. Y. S. 404. An amendment including switching in the list of extra hazardous occupations is reasonable. Gilmore v. Knights of Columbus [Conn.] 68 A. 223. Where a member agrees in his application to be bound by the by-laws then in existence or which may thereafter be adopted, he is bound by all future amendments which are reasonable. By amendment including switching in list of extra hazardous occupations. Also agreed not to engage in any occupation deemed extra hazardous by the then directors or their successors. Id. Amendment held to be retroactive in effect and to apply to all members. Id. May make any reasonable amendment to its constitution in furtherance of the objects of its organization. Amendment increasing dues and benefits and limiting amount of sick benefits to be paid members held reasonable and valid and not to impair vested rights. Berg v. Badenser Understuetzungs Verein von Rochester, 90 App. Div. 474, 86 N. Y. S. 429.

17. A member not bound by by-law limiting right to recover in case of injury. Sisson v. Supreme Court of Honor [Mo. App.] 78 S. W. 297.

18. Simon v. Supreme Council A. L. H., 91 App. Div. 390, 86 N. Y. S. 866; Zinna v. Savaria Friscia Soc., 88 N. Y. S. 404.

19. Simon v. Supreme Council A. L. H., 91 App. Div. 390, 86 N. Y. S. 866; Supreme Council A. L. H. v. Batte [Tex. Civ. App.] 79 S. W. 629.

20. Immaterial that contract contained in by-laws instead of certificate. Zinna v. Saveria Friscia Soc., 88 N. Y. S. 404.

21. Acquiescence in amendment changing time of payment, and giving national council larger proportion. National Council of Knights & Ladies v. Dillon [Ill.] 72 N. E. 367. Where a member consents to the adoption or acquiesces in the enforcement of by-laws, they are binding on his beneficiary, notwithstanding the meeting at which they were adopted was illegally held because sufficient notice thereof was not given, or the fact that vested rights of the assured were thereby impaired. Evidence held to show that assured knew of amendment limiting amount of benefits to be paid and assented thereto by acquiescence. Allen v. Merrimack County Odd Fellows' Mut. Relief Ass'n, 72 N. H. 525, 57 A. 922. Both a member, who for many years and with full knowledge of the facts acquiesces in an amendment increasing the amount of dues and benefits, and limiting the amount of sick benefits, and his administrator are precluded from contesting its validity. Berg v. Badenser Understuetzungs Verein von Rochester, 90 App. Div. 474, 86 N. Y. S. 429.

22. O'Neill v. Supreme Council A. L. H. [N. J. Law] 57 A. 463.

23. As where association adopts by-law limiting the amount of death benefits to be paid in future to sum less than amount of plaintiff's certificate. O'Neill v. Supreme Council A. L. H. [N. J. Law] 57 A. 463.

24. Lippincott v. Supreme Council A. L. H., 130 F. 483. Treat contract as rescinded and recover amount paid. McAlarney v. Supreme Council A. L. H., 131 F. 538; Supreme Council A. L. H. v. Batte [Tex. Civ. App.] 79 S. W. 629.

25. O'Neill v. Supreme Council A. L. H. [N. J. Law] 57 A. 463.

26. O'Neill v. Supreme Council A. L. H. [N. J. Law] 57 A. 463; Lippincott v. Supreme Council A. L. H., 130 F. 483.

27. O'Neill v. Supreme Council A. L. H. [N. J. Law] 57 A. 463.

28. Lippincott v. Supreme Council A. L. H., 130 F. 483. The fact that during three years which elapsed between breach and plaintiff's

ciation has altered its position to its prejudice must be set out in detail.[29] Payments of the reduced assessments in such cases, though made under protest, are nevertheless voluntary, and cannot be recovered on rescission of the contract,[30] but do not amount to an acquiescence in the action taken so as to bind him thereby,[31] in the absence of notice that the reduction was solely occasioned by the reduction in the amount of insurance.[32] The question as to whether they amount to an election to treat the contract as still in force is one of fact.[33] A declaration of an intention to insist on performance does not constitute an irrevocable election so as to preclude the party making it from afterwards rescinding the contract and recovering the payments previously made, where the association was not misled or prejudiced thereby.[34] An action for repudiation or rescission is not subject to a time limitation arising solely out of the terms of the repudiated contract.[35] A member has such an interest in the enforcement of a benefit certificate payable on his death as will entitle him to maintain an action for damages for its repudiation.[38] A condition that the member will comply with all by-laws thereafter to be enacted will be construed as referring only to reasonable by-laws and amendments in furtherance of the contract, and not to such as would overthrow it or materially alter its terms.[37] Where plaintiff elects to rescind by bringing suit for recovery of the amounts paid by him, the defendant cannot afterwards compel him to accept performance or agree to a reinstatement of the provisions of the contract.[38] The beneficiary may treat such an amendment as void, and after the death of the insured, recover on the original contract.[39] It has been held in New York that where the contract provides that the insured shall conform in all respects to the by-laws then in force or which may thereafter be adopted, an amendment reducing the amount to be paid in case of death is valid if essential to the life of the association.[40] It has also been held under a similar contract that a member is bound by subsequently passed by-laws changing and increasing his monthly assessment, if the same were reasonable and necessary in order to carry out the purposes of the association.[41] Where the original contract and by-

election to rescind many new members joined the order who had no knowledge of his claim, and that many old members died or withdrew did not constitute such a change of position on defendant's part as to preclude recovery on account of laches. McAlarney v. Supreme Council A. L. H., 131 F. 538. Right not lost by delay of two years and three months where member did not recognize the illegal action by the payment of assessments or do anything to mislead the association to its prejudice. Supreme Council A. L. H. v. Daix [C. C. A.] 130 F. 101.

29. McAlarney v. Supreme Council A. L. H., 131 F. 538; Daix v. Supreme Council A. L. H., 127 F. 374.

30. Lippincott v. Supreme Council A. L. H., 130 F. 483.

31. Payments for two years where he refused to assent to reduction and gave notice that intended to enforce original contract. Lippincott v. Supreme Council A. L. H., 130 F. 483.

32. Action by beneficiary on certificate. Smith v. Supreme Council A. L. H., 94 App. Div. 357, 88 N. Y. S. 44.

33. Evidence held to show that payments were made with expectation that by-law might be repealed, and to sustain finding that they did not amount to such an election. Supreme Council A. L. H. v. Batte [Tex. Civ. App.] 79 S. W. 629.

34. Declaration of intention more than two years before action for rescission and payment of reduced premiums under protest during that time held not bar to rescission. Lippincott v. Supreme Council A. L. H., 130 F. 483.

35. Provision as to time within which action must be brought on certificate held to apply only in case of death of member. O'Neill v. Supreme Council A. L. H. [N. J. Law] 57 A. 463. Provision not applicable to action to rescind contract and recover payments. Supreme Council A. L. H. v. Daix [C. C. A.] 130 F. 101.

36. O'Neill v. Supreme Council A. L. H. [N. J. Law] 57 A. 463.

37. Not bound by by-law reducing amount of death benefits. O'Neill v. Supreme Council A. L. H. [N. J. Law] 57 A. 463. Cannot destroy vested rights. Smith v. Supreme Council, A. L. H., 94 App. Div. 357, 88 N. Y. S. 44.

38. McAlarney v. Supreme Council A. L. H., 131 F. 538.

39. Supreme Council A. L. H. v. Batte [Tex. Civ. App.] 79 S. W. 629.

40. Evans v. Southern Tier Masonic Relief Ass'n, 94 App. Div. 541, 88 N. Y. S. 162.

41. Miller v. National Council Knights & Ladies [Kan.] 76 P. 830.

laws are silent on the subject, an amendment reducing the amount to be paid in case of suicide has been held binding on one who became a member before its enactment.[42] Where the constitution and by-laws provide that the same may be amended and the insured in his application agrees to be bound by laws then in existence or thereafter adopted, an amendment providing that suicide shall work a forfeiture of all benefits is valid and applies to a certificate theretofore issued under such application.[43] In New York, it has been held that the association has no power to make an amendment to its by-laws, striking out all time limit as to suicide so as to bind persons previously insured and the beneficiaries of members committing suicide while insane.[44]

§ 6. *Dues and assessments.*[45]—The legislature has power to determine what mortuary assessment rates must be adopted by fraternal insurance associations.[46] It may provide that they must adopt rates not lower than those specified in a specified mortality table, the fact that it was prepared by outside parties being immaterial.[47]

Only members of the class to which deceased belonged can be assessed to pay the amount of his certificate.[48]

Notice.—Where the constitution provides that members shall be notified of assessments, they must in fact be actually notified before their rights can be forfeited for failure to pay such assessments.[49] It devolves upon the order to prove that the notice was actually received, the mere placing it in the postoffice properly addressed being insufficient.[50] Notices of assessments are generally required to state the objects to which the money to be raised is to be devoted.[51]

§ 7. *Forfeiture and suspensions; reinstatement.*[52]—Fines and penalties imposed, if not illegal, immoral or against public policy, will be enforced.[53] Provisions in regard to them, however, will be construed in favor of the assured and, when possible, a construction will be adopted which will prevent a forfeiture.[54]

42. No such thing as vested right to commit suicide, and law reads into contract provision against suicide while sane. Mitterwallner v. Supreme Lodge Knights & Ladies, 86 N. Y. S. 786.

43. Protected Home Circle v. Tisch, 24 Ohio Circ. R. 489.

44. When deceased became member, by-laws provided that there could be no recovery in case of suicide within certain time after admission. Fargo v. Supreme Tent of Knights of Maccabees, 96 App. Div. 491, 89 N. Y. S. 65.

45. See 2 Curr. L. 88. Forfeiture for nonpayment, see post, § 7.

46. Question not necessarily one to be determined by the courts. Wash. Laws 1901, p. 356, c. 174, fixing such rates, held constitutional. State v. Fraternal Knights & Ladies [Wash.] 77 P. 500.

47. State v. Fraternal Knights & Ladies [Wash.] 77 P. 500.

48. Where certificate entitled beneficiary to participate to extent of one assessment on members of women's class not exceeding certain sum, and subsequently discontinued such class and provided for transfer of its members to general class, held that where member died after change without being transferred, that beneficiary was only entitled to amount received from assessment on members of special class. Kennedy v. Iowa Legion of Honor [Iowa] 99 N. W. 137. Where an advance assessment was made on members of a class to which deceased belonged in contemplation of a future loss and the class was thereafter discontinued under a provision for the transfer of members to the general class, her beneficiary, on the member's death before her transfer, was not affected by such discontinuance, and was not entitled to more than the proceeds of such assessment. Id.

49. Crockett v. Order of Red Cross, 24 Ohio Circ. R. 421. Provision as to notices of calls for assessments held not to require notice to members of calls for regular monthly assessments. Feiber v. Supreme Council A. L. H., 112 La. 960, 36 So. 818.

50. Fact that member knew of assessment immaterial. Evidence held insufficient to show proper notification. Crockett v. Order of Red Cross, 24 Ohio Circ. R. 421; Id., 4 Ohio C. C. (N. S.) 519.

51. Under Iowa Code, § 1788, relating to notices of assessments, and the by-laws of an association, held that moneys collected from assessments could only be applied to particular loss for the payment of which the assessment, or a particular proportion thereof was levied. Sherman v. Harbin [Iowa.] 100 N. W. 622.

52. See 2 Curr. L. 88. See, also, ante, § 4.

53. United Brotherhood of Carpenters & Joiners v. Dinkle, 32 Ind. App. 273, 69 N. E. 707.

54. Logsdon v. Supreme Lodge of Fraternal Union, 34 Wash. 666, 76 P. 292.

The association is not liable for death benefits on the decease of a suspended member,[55] or of one engaging in an extra hazardous occupation contrary to the provisions of the by-laws.[56]

The beneficiary is entitled to recover from the association sums received by it from funeral benefit associations on account of the death of a member, though the latter was in arrears at the time of his death, he having had no notice or knowledge of such fact.[57]

For nonpayment of dues and assessments.[58]—The officer charged with receiving assessments from members and remitting them to the grand lodge will be regarded as the agent of the latter, though the laws of the order declare that he is the agent of the local lodge.[59] He cannot, however, bind the grand lodge by acts beyond the scope of his authority.[60] Thus he does not bind it by receiving and remitting past due assessments, in the absence of knowledge and a ratification of his acts by it.[61] Where a lodge has authority to appoint an assistant clerk to collect dues and assessments, the order cannot question the validity of the appointment of one acting in that capacity in order to enforce a forfeiture of its contract, whether payments made to him finally reached the supreme body or not.[62]

As between the assured and the association, it is immaterial that his assessments were not sent by the local lodge to the central body before his death,[63] or that the local lodge was suspended after failure to make punctual remittances of assessments.[64]

A provision that a failure to pay assessments on the day when due shall ipso facto work a suspension and a forfeiture of all rights under the benefit certificate is valid and binding.[65] But there can be no forfeiture for nonpayment where the amount of the assessment was tendered to the proper officer before the day when it became due,[66] nor where the member was ready and willing to pay it at the proper time, but the officer whose duty it was to receive it refused to do so,[67] nor where the association had in its hands sufficient funds belonging to the mem-

55. Deceased suspended prior to his death. Winter v. Independent Order Ahawas Israel, 88 N. Y. S. 354.

56. By-laws provided that one engaging in extra hazardous occupation should ipso facto forfeit his membership. Gilmore v. Knights of Columbus [Conn.] 58 A. 223.

57. Having received such sum, association will be held to have waived rights arising from nonpayment of dues. Littleton v. Wells & M. Council No. 14 [Md.] 56 A. 798.

58. See 2 Curr. L. 89.

59. Supreme Lodge Knights of Honor v. Jones [Ind. App.] 69 N. E. 718. Officers chosen by the local lodges and designated by the central body as the proper and only persons by whom assessments are to be collected and remittances are to be made to it are the agents of the latter, notwithstanding a provision in the by-laws that they shall be deemed solely the agents of the local lodges and its members. Parliament of Prudent Particians v. Marr, 20 App. D. C. 363. The fact that a local lodge uses one as its officer to make collections and remittances for it, he being accountable to it alone, does not make him an agent of the grand lodge so as to bind the latter by any custom he may establish in relation to the time when assessments may be paid, or so as to impart notice to it of such custom. Lavin v. Grand Lodge A. O. U. W. [Mo. App.] 78 S. W. 325.

60. Supreme Lodge Knights of Honor v. Jones [Ind. App.] 69 N. E. 718. An officer of a subordinate lodge who is not even the agent of the grand lodge cannot waive a by-law of the order. As to payment of assessments. Lavin v. Grand Lodge A. O. U. W. [Mo. App.] 78 S. W. 325.

61. Receipt of draft by officer held not waiver of forfeiture for nonpayment. Supreme Lodge Knights of Honor v. Jones [Ind. App.] 69 N. E. 718.

62. Conduct held to constitute party assistant clerk. Supreme Forest of Woodmen Circle v. Stratton [Kan.] 75 P. 472.

63, 64. Parliament of Prudent Patriclans v. Marr, 20 App. D. C. 363.

65. Lavin v. Grand Lodge A. O. U. W. [Mo. App.] 78 S. W. 325. Assessment cannot be paid after member's death. Feiber v. Supreme Council A. L. H., 112 La. 960, 36 So. 818.

66. Lavin v. Grand Lodge A. O. U. W. [Mo. App.] 78 S. W. 325; Boyce v. Royal Circle [Mo. App.] 79 S. W. 495.

67. Officer doubtful of his authority on account of attempted dissolution of the lodge. Foresters of America v. Hollis [Kan.] 78 P. 160.

ber to meet the assessment.[68] The enforcement of a law to insure prompt payment of assessments may be waived by the association.[69] Hence it cannot claim a forfeiture for nonpayment of assessments at specified times where, by the adoption of a custom or the course of its conduct, it has led its members honestly to believe that they will be received after the appointed day.[70] The fact that the association has attempted to make unauthorized changes in regard to the payment of assessments does not ordinarily relieve the member from liability to pay according to his contract.[71]

Where all payments are made within the time stipulated in the constitution and by-laws, a demand for a health certificate as a condition of accepting payment is arbitrary.[72]

A provision that a member in arrears shall not be entitled to benefits until the expiration of a certain time after such arrearage is paid is not unreasonable.[73]

Payment of dues by the insured's agent after his death cannot vitalize the forfeited contract or work his reinstatement,[74] unless they are accepted and retained by the grand lodge with full knowledge of the facts.[75]

The mere fact that a member announces to an officer of the order that he intends to drop his insurance does not affect his status as such, but he remains a member until a forfeiture is worked by his nonpayment of assessments.[76]

A provision that in case of any concealment, misrepresentation or untrue statement made by an applicant, all assessments paid by him shall be forfeited to the order, is valid.[77]

A member giving his dues to another member to pay to the financial secretary constitutes him his agent and takes the risk of their not being paid within the time fixed by the by-laws.[78]

Courts of law will not ordinarily concern themselves with the question of the good standing of members, where the same depends on matters of morals, religion, conduct and the like, but will do so where it depends on the payment of dues.[79]

68. Held that payment of assessment should be applied to month of September in which degree of fraternity was conferred instead of to August in which month certificate was dated, and hence deceased was not in default. Logsdon v. Supreme Lodge of Fraternal Union, 34 Wash. 666, 76 P. 292.

69. Lavin v. Grand Lodge A. O. U. W. [Mo. App.] 78 S. W. 325.

70. Foresters of America v. Hollis [Kan.] 78 P. 160. Held that under constitution dues and assessments were entered and became payable on first of month, but that members had month in which to pay without becoming delinquent. United Brotherhood of Carpenters & Joiners v. Dinkle, 32 Ind. App. 273, 69 N. E. 707.

71. National Council of Knights & Ladies v. Dillon [Ill.] 72 N. E. 367. See ante, § 5D.

72. Boyce v. Royal Circle [Mo. App.] 79 S. W. 495.

73. A by-law providing that no member owing thirteen weeks dues shall receive benefits until thirteen weeks after paying all arrears. Littleton v. Wells & M. Council No. 14 [Md.] 56 A. 798. Provision that when member owes sum equal to three months dues he will be suspended from benefits and will not be reinstated until three months after his arrearage is paid in full held valid. Exclusion from benefits not a forfeiture of membership and were other objects in becoming member. United Brotherhood of Carpenters & Joiners v. Dinkle, 32 Ind. App. 273, 69 N. E. 707. Such provision held not to mean merely arrearage of three months regular dues of 50 cents a month, but of a sum equal to that amount Id.

74. Supreme Lodge Knights of Honor v. Jones [Ind. App.] 69 N. E. 718.

75. Tender of money to defendant after commencement of suit not admission that it was so received by national council. National Council of Knights & Ladies v. Dillon [Ill.] 72 N. E. 367.

76. Fact that he intentionally stopped payments immaterial. Hyatt v. Loyal Protective Ass'n [Mo. App.] 81 S. W. 470. Letter held admissible as tending to show that member had abandoned the order. Lavin v. Grand Lodge A. O. U. W. [Mo. App.] 78 S. W. 325.

77. Whigham v. Supreme Court I. O. F., 44 Or. 543, 75 P. 1067.

78. Not agent of the council. Fact that he is officer of lodge immaterial. Littleton v. Wells & M. Council No. 14 [Md.] 56 A. 798.

79. Insured held to have been in good standing. Parliament of Prudent Patricians v. Marr, 20 App. D. C. 363.

§ 8. *The beneficiary. Designation.*[80]—Statutes in some states provide that payments of benefits may be made only to certain designated classes of beneficiaries.[81] In such case only persons belonging to such classes have an insurable interest in the life of the member, and they alone may receive death benefits.[82] Hence one not belonging to any such classes cannot indirectly participate by an agreement whereby one who is eligible is named as beneficiary under an agreement to act as trustee for him.[83] Nor can the society waive such statutory provisions.[84] The general and main purpose of the association to provide for certain named classes of persons is not violated by a designation of any person in any of such classes, though he does not belong to the one first named.[85]

The fact that the constitution provides that the object of the society is to relieve the distress of widows and orphans does not render invalid a provision allowing the designation of certain other persons as beneficiaries.[86] The fact that the policy does not name the claimant as beneficiary is immaterial where the application, which is made a part of it, does so.[87]

Provisions for the distribution of the proceeds in event that the designation of a beneficiary by the member shall fail, and he makes no other designation, are valid and controlling.[88] By statute in some states, where there is no selection of a beneficiary,[89] or the one selected is not eligible, the fund goes to the heirs at law of the insured.[90]

Public policy prevents a recovery of the amount of the certificate by a beneficiary who feloniously murders the insured,[91] but does not, in such case, prevent a recovery by the heirs of the insured, there being nothing to the contrary in the contract.[92] In the absence of a provision to the contrary, the designation of a beneficiary is unaffected by the member's subsequent marriage.[93]

The date of eligibility as a beneficiary is, in the absence of a provision to the contrary, the date of the designation in the certificate and not the date of

80. See 2 Curr. L. 93.

81. Hurd's St. 1895, c. 73, par. 258. Supreme Lodge Knights & Ladies of Honor v. Menkhausen, 209 Ill. 277, 70 N. E. 567. A statute authorizing the society, on the death of a member to levy an assessment on the living members to be paid to the "nominee" of the deceased is a limitation on its power to dispose of the fund, so that only such nominee is entitled to recover it [Cal. St. 1873-74, p. 745, c. 510, § 3]. Sheehan v. Journeymen Butchers' Protective & Benevolent Ass'n, 142 Cal. 489, 76 P. 238. Where the society had power to provide for any persons dependent upon deceased members, it could issue a certificate payable to one married to a member and in good faith living with him as his wife and dependent upon him for support, though she was not in fact his legal wife. James v. Supreme Council of Royal Arcanum, 130 F. 1014.

82, 83, 84. Gillam v. Dale [Kan.] 76 P. 861.

85. A brother not dependent on the member may be named to the exclusion of a dependent widow, notwitstanding fact that constitution stated that object of the order was a payment to the member, or his wife, or his children, or blood relations, etc. Donithen v. Independent Order of Foresters [Pa.] 58 A. 142.

86. Under Cal. St. 1873-74, p. 745, c. 510, §§ 1-3. Sheehan v. Journeymen Butchers' Protective & Benevolent Ass'n, 142 Cal. 489, 76 P. 238.

87. Hyatt v. Loyal Protective Ass'n [Mo. App.] 81 S. W. 470.

88. Surviving wife held entitled to proceeds instead of children of deceased former wife designated in certificate. Supreme Council Royal Arcanum v. Bevis [Mo. App.] 80 S. W. 739. Where by-laws provide that in case one of several beneficaries dies, his share shall be distributed pro rata among the others, heirs of deceased beneficiary have on interest, though party was made such to secure debt due him from member. Bunyan v. Reed [Ind. App.] 70 N. E. 1002.

89. Supreme Lodge Knights & Ladies of Honor v. Menkhausen, 209 Ill. 277, 70 N. E. 567.

90. Under Ill. Statutes (Laws 1887, p. 205, § 1; Hurd's St. 1895, c. 73, par. 258), as where beneficiary designated murders insured. Supreme Lodge Knights & Ladies of Honor v. Menkhausen, 209 Ill. 277, 70 N. E. 567.

91. Supreme Lodge Knights & Ladies of Honor v. Menkhausen, 209 Ill. 277; 70 N. E. 567.

92. In Illinois, suit is properly brought in names of heirs rather than in that of administrator. Supreme Lodge Knights & Ladies of Honor v. Menkhausen, 209 Ill. 277, 70 N. E. 567.

93. Sheehan v. Journeymen Butchers' Protective & Benevolent Ass'n, 142 Cal. 489, 76 P. 238.

the death of the member.[94] Where the name of a person is inserted as beneficiary without his knowledge, with the intention that he shall hold the fund as trustee for another, the trust will be enforced at the instance of the latter.[95] Such trust may be shown by parol as against the trustee.[96]

Right to change beneficiary.[97]—The certificate or policy ordinarily creates no vested interest in the beneficiary, but only an expectancy, which cannot become a vested or absolute right to the proceeds thereof until the death of the assured.[98] The member may exercise the power of appointment without the consent of the beneficiary, and without any restriction other than such as may be imposed by organic law or the rules and regulations of the association.[99] Unless restricted by the constitution or by-laws,[1] or unless the beneficiary has obtained a vested interest therein, he may ordinarily change the beneficiary at will.[2] He must do so in the manner prescribed by the laws of the association,[3] unless a compliance therewith is waived.[4]

Assignment of benefits.[5]—The certificate or policy is, even before the death of the insured, a chose in action.[6] It cannot be gratuitously assigned to one having no insurable interest in the life of the assured,[7] but rights acquired under an assignment for value may operate as a valid, enforceable agreement when such interest has ripened into an existing right by the death of the assured, and the condition of the parties remains unchanged by any intervening rights of third parties or other equities.[8] Where the assignment is made as collateral se-

94. Divorced wife named as beneficiary held entitled to recover amount of policy which had remained in her possession, she having been eligible when it was issued and the by-laws merely declaring who may be designated and not providing that such person must belong to one of the designated classes at the time of the member's death. Brown v. Grand Lodge A. O. U. W., 208 Pa. 101, 57 A. 176.

95. Evidence held to show that member's brother was made beneficiary as trustee for member's minor wife. Donithen v. Independent Order of Foresters [Pa.] 58 A. 142.

96. Donithen v. Independent Order of Foresters [Pa.] 58 A. 142.

97. See 2 Curr. L. 94.

98. Brown v. Grand Lodge A. O. U. W., 208 Pa. 101, 57 A. 176; Bunyan v. Reed [Ind. App.] 70 N. E. 1002, and cases cited; Fischer v. Malchow [Minn.] 101 N. W. 602.

99. Bunyan v. Reed [Ind. App.] 70 N. E. 1002, and cases there cited.

1. Brown v. Grand Lodge A. O. U. W., 208 Pa. 101, 57 A. 176; Bunyan v. Reed [Ind. App.] 70 N. E. 1002. Evidence held not to show that change of beneficiaries was induced by fraud. Demurrer to defendant's evidence properly sustained. Broderick v. Broderick [Kan.] 77 P. 534.

2. Fact that husband named as beneficiary voluntarily paid wife's dues does not give him vested interest so as to prevent change. Preusser v. Supreme Hive of Ladies of Maccabees [Wis.] 101 N. W. 358.

3. Only with the consent of the society and in conformity with its rules and regulations. Kemper v. Modern Woodmen of America [Kan.] 78 P. 452. A provision that a change may be made only by the surrender of the old certificate and the issuing of a new one, and that the change shall not be effective until the new certificate is delivered to him, is valid. Fact that member has surrendered old certificate and done everything incumbent on him is immaterial. Id. After his death, both the first beneficiary and the association may insist that it shall have been so done. Brown v. Grand Lodge A. O. U. W., 208 Pa. 101, 57 A. 176. Method prescribed is exclusive. Id.

4. Waived by issuing new certificate. Fischer v. Malchow [Minn.] 101 N. W. 602.

5. See 2 Curr. L. 95.

6. Coleman v. Anderson [Tex. Civ. App.] 82 S. W. 1057. The beneficiary acquires no vested rights which may be assigned. Dexter v. Supreme Council Royal Templars, 90 N. Y. S. 292.

7. Coleman v. Anderson [Tex. Civ. App.] 82 S. W. 1057.

8. Dexter v. Supreme Council Royal Templars, 90 N. Y. S. 292. Interest of the beneficiary may be transferred, so as to be binding in equity, by a contract made in good faith and for a valuable consideration. Jarvis v. Binkley, 206 Ill. 541, 69 N. E. 582. May be assigned by one having an interest in it as collateral security for his debt or obligation. Contingent interest of beneficiary in policy on life of his father held sufficient to support assignment. Coleman v. Anderson [Tex. Civ. App.] 82 S. W. 1057. A third person may, by contract with a member and his beneficiary, whereby they agree to surrender the certificate to him in consideration of his paying all dues and assessments and providing a home for the insured, acquire a vested interest in the fund designated therein, provided such agreement is not contrary to public policy as a wagering contract. Agreement with cousin of member held to give him entire interest. Brett v. Warnick, 44 Or. 511, 75 P. 1061. Where the beneficiary assigned her interest to her son who, with her approval, made a will disposing of the policy in which he directed that a certain part thereof be used

curity for a debt or obligation, the assignee has a lien on the proceeds to the amount secured, especially when the debt is for premiums or dues paid by him at the request of the assignor to keep the policy alive,[9] and the assignor cannot deprive him of possession thereof until the debt, with interest, is fully paid off and discharged.[10] The assignee may maintain an action for specific performance and to prevent payment being made to the original beneficiaries and to require payment to be made to him.[11] The fact that the assignee was not substituted as beneficiary in accordance with the by-laws of the association does not affect his rights as against the beneficiary.[12] Provisions in the by-laws prohibiting the assignment of the certificate are for the benefit of the society and can only be taken advantage of by it;[13] so also the beneficiary is estopped from making the objection that the assignee does not belong to the class of persons who may be made beneficiaries.[14] Certificates are non-negotiable, and an assignee cannot claim protection as a bona fide holder.[15]

Status of beneficiary.[16]—The fund accumulated by an association from the contributions of its members for beneficial or protective purposes is a trust fund.[17] A beneficiary suing after the death of a member is a creditor of the order,[18] and in case of its insolvency is entitled to a fund belonging to it in preference to a foreign receiver.[19]

Exemption of benefits from liability for debts.[20]—Statutes generally provide that the proceeds of the policy shall not be liable for the debts of the member or the beneficiary, and shall not be subject to attachment, garnishment or other process.[21] It is held that such provisions are not designed to protect the certificate or the proceeds thereof from the voluntary act of the member or the beneficiary.[22] Hence they do not prevent an assignment thereof to secure a debt of the beneficiary.[23] It is the duty of the association, when garnished, to appear and interpose such exemption, and if it fails to do so, it cannot set off a sum paid by it to the creditor.[24]

§ 9. *Maturity and accrual of benefits. Incontestable clauses.*[25]—A provision that the policy shall be incontestable after a certain time is binding,[26] and

by the legatees in caring for her, which was done, held that the contract was binding on her and her representatives, irrespective of whether the assignment was made in accordance with the constitution and by-laws of the society, and that the legatees were entitled to collect the policy. Kendall v. Morrison [Tex. Civ. App.] 77 S. W. 31. Evidence insufficient to show contract whereby insurance money was pledged to member's deceased first wife in consideration of money loaned by her to him. Supreme Council Royal Arcanum v. Bevis [Mo. App.] 80 S. W. 739.

9, 10. Coleman v. Anderson [Tex. Civ. App.] 82 S. W. 1057.

11. Brett v. Warnick, 44 Or. 511, 75 P. 1061.

12. Association made no objection and paid money into court. Brett v. Warnick, 44 Or. 511, 75 P. 1061.

13. Coleman v. Anderson [Tex. Civ. App.] 82 S. W. 1057.

14. Available to society alone. Dexter v. Supreme Council Royal Templars, 90 N. Y. S. 292. The fact that the transferee is not a member of decedent's family is immaterial, though the constitution provides that the object of the association is to provide for members and their families. Jarvis v. Binkley, 206 541, 69 N. E. 582.

15. Dexter v. Supreme Council Royal Templars, 90 N. Y. S. 292.

16. See 2 Curr. L. 93.

17. Blair v. Supreme Council, A. L. H., 208 Pa. 262, 57 A. 564.

18. Allegation that plaintiff's claim was based on and grew out of a membership certificate in a benevolent association amounts to an admission that he was a creditor. Lackmann v. Supreme Council of Order of Chosen Friends, 142 Cal. 22, 75 P. 583.

19. Lackmann v. Supreme Council of Order of Chosen Friends, 142 Cal. 22, 75 P. 583.

20. See 2 Curr. L. 96.

21. Hurd's Rev. St. Ill. 1901, c. 73, par. 266. Jarvis v. Binkley, 206 Ill. 541, 69 N. E. 582; Rumbold v. Supreme Council Royal League, 206 Ill. 513, 69 N. E. 590.

22, 23. Jarvis v. Binkley, 206 Ill. 541, 69 N. E. 582.

24. Provision enacted for benefit of beneficiary and not merely to protect society against harassing suits. Rumbold v. Supreme Council Royal League, 206 Ill. 513, 69 N. E. 590.

25. See 2 Curr. L. 96.

26, 27. Supreme Court of Honor v. Updegraff [Kan.] 75 P. 477.

in such case suicide after that time is no defense to an action thereon, though the policy refers to a section of the constitution relieving the association from liability in such case.[27]

Suicide[28] as used in by-laws limiting liability means voluntary and intentional self-destruction.[29] It does not include accidental self-destruction.[30] Voluntary self-destruction means only the taking of one's life purposely and intentionally.[31] Involuntary self-destruction includes cases where one, without intending to accomplish his own death, does acts which may naturally and probably result, and do in fact result, in death.[32] The terms "suicide," "self-destruction," and "death by his own hand" are held to be synonymous.[33] There is a conflict of authority in regard to the effect of suicide on the liability of the association. Some courts hold that, in the absence of any provision to the contrary in the policy, the suicide of the insured while sane releases the insurer,[34] but suicide while insane does not.[35] Others hold that where the policy is silent on the subject, the association is liable in case the assured commits suicide while sane or insane.[36] Where such liability is provided against in general terms, the association is not liable in the event of intentional self-destruction while sane, but is liable in case the assured was insane.[37] In most states, the association may, by a provision in the contract to that effect, exempt itself from liability in case the assured commits suicide while sane or insane.[38] In such case no degree of insanity whatever will justify a recovery.[39] In Kentucky, however, it is held that, notwithstanding a provision that the policy shall be void in case of suicide while sane or insane, the beneficiary may recover if the mind of the insured was suffi-

28. See 2 Curr. L. 97.

29. Supreme Council Royal Arcanum v. Pels, 209 Ill. 33, 70 N. E. 697. It is only where death results from an express design on the part of the deceased, or from some act which, though performed with no intention of producing death, is of itself culpably negligent that deceased can be charged with the responsibility of self-destruction. Courtemanche v. Supreme Court I. O. F. [Mich.] 98 N. W. 749. Evidence held to show suicide. Sovereign Camp Woodmen of the World v. Hruby [Neb.] 96 N. W. 998. Evidence held to show an intention to commit suicide or such a reckless use of morphine as the assured knew or must have known would produce death. Clement v. Clement [Tenn.] 81 S. W. 1249. Evidence in regard to return of borrowed money, the owing of which was claimed to be motive of insurer's suicide held properly excluded. Rumbold v. Supreme Council Royal League, 206 Ill. 513, 69 N. E. 590.

30. Courtemanche v. Supreme Court I. O. F. [Mich.] 98 N. W. 749. It has been held that recovery may be had on a policy excepting "assurance against self-destruction or suicide," though insured's death was caused by his voluntarily taking carbolic acid with intent to frighten his wife into giving him money. Id. A provision exempting the association from liability in case of the self-destruction of the insured, "whether voluntary or involuntary, sane or insane," does not apply to a case where the insured accidentally shoots himself while cleaning a gun. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066. Evidence sufficient to support verdict that insured accidentally killed himself and did not commit suicide. Hunt v. Ancient Order of Pyramids [Mo. App.] 78 S. W. 649.

31, 32, 33. Courtemanche v. Supreme Court I. O. F. [Mich.] 98 N. W. 749.

34. Is breach of implied condition and would also be contrary to public policy to enforce contract in such cases. Hunziker v. Supreme Lodge K. P., 25 Ky. L. R. 1510, 78 S. W. 201.

35. Hunziker v. Supreme Lodge K. P., 25 Ky. L. R. 1510, 78 S. W. 201.

36. Robson v. United Order of Foresters [Minn.] 100 N. W. 381, and cases there cited.

37. Association held liable where assured committed suicide while insane. Robson v. United Order of Foresters [Minn.] 100 N. W. 381. Does not exonerate the association from liability where the assured was incapable, by reason of unsoundness of mind, of resisting an insane impulse to take his own life, or of understanding the moral character, general nature, consequences and effect of the fatal act. By-law providing that in case of suicide, no benefit should be paid unless the beneficiary should prove that prior thereto deceased had been judicially declared insane or was then under treatment for insanity, or was in the delirium of other illness, held not to bar proof of insanity in case none of such conditions existed. Supreme Council Royal Arcanum v. Pels, 209 Ill. 33, 70 N. E. 697.

38. Illinois: Seitzinger v. Modern Woodmen, 204 Ill. 58, 68 N. E. 478.

Minnesota: Robson v. United Order of Foresters, 100 N. W. 381.

Georgia: Jenkins v. National Union, 118 Ga. 587, 45 S. E. 449; Protected Home Circle v. Tisch, 24 Ohio Circ. R. 489.

39. Seitzinger v. Modern Woodmen, 204 Ill. 58, 68 N. E. 478.

ciently gone when he took his life to render him unconscious that he was doing so at the time he committed the act.[40] Provisions that in case of suicide only a certain proportion of the insurance shall be paid,[41] and that no recovery may be had if a member comes to his death while violating the law of the land have been held to be reasonable and valid.[42]

The burden of proving intentional self-destruction is on the association.[43] In the absence of proof, natural or accidental causes will be presumed,[44] and if the jury cannot determine the cause of death they cannot find that it was due to suicide.[45] The fact that the proofs of death tend to show suicide does not shift the burden.[46] The verdict of the coroner's jury is admissible for the purpose of showing the cause of death,[47] but the testimony of witnesses at the inquest is not, except for purposes of contradiction or impeachment.[48]

§ 10. *Proofs of death or right to benefits.*[49]—A provision that the claimant shall make satisfactory proof of death requires only reasonable proof of that fact and of the cause of death.[50] Such proof is not, however, binding on the person making it when the cause of death is called in question.[51]

Proofs of death need not be made where the association denies all liability.[52]

It is generally provided that claims under a certificate or policy do not mature until the expiration of a certain time after the serving of proofs of death.[53]

§ 11. *Payment of benefits.*[54]—In the absence of fraud or mistake, the surrender of the policy for cancellation operates in law as a release and discharge of the association's liability.[55] A receipt stating that the amount was received under protest is insufficient to support a plea of accord and satisfaction.[56] A settle-

40. Evidence sufficient to sustain finding for plaintiff. Supreme Council Knights of Equity v. Heineman, 25 Ky. L. R. 1604, 78 S. W. 406.

41. Sum in such proportion to whole amount as the matured life expectancy is to the entire life espectancy at the date of admission. Clement v. Clement [Tenn.] 81 S. W. 1249.

42. Instructions as to violating law by provoking assault approved. Payne v. Union Life Guards [Mich.] 99 N. W. 376.

43. Court held justified in refusing peremptory instruction for defendant on account of suicide. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066. Must establish it by preponderance of evidence. Evidence held to show suicide by hanging and to present no issue of fact for the jury. Seybold v. Supreme Tent of Knights of Maccabees, 86 App. Div. 195, 83 N. Y. S. 149.

44. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066. Presumption of law against suicide. Clement v. Clement [Tenn.] 81 S. W. 1249.

45, 46, 47, 48. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066.

49. See 2 Curr. L. 98.

50. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066.

51. Fact that proof states cause as probably suicide does not estop him to show contrary. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066. In no event are admissions of the guardian of minor beneficiaries as to the cause of death admissible against them. Id.

52. Weber v. Ancient Order of Pyramids [Mo. App.] 78 S. W. 650.

53. Proofs of death held to have been sent within such time as that action on certificate was not prematurely brought. Thornberg v. Farmers' Life Ass'n, 122 Iowa, 260, 98 N. W. 105.

54. See 2 Curr. L. 99.

55. Simons v. Supreme Council A. L. H., 178 N. Y. 263, 70 N. E. 776. A beneficiary surrendering his policy under a mistake as to his rights may recover the same. Blair v. Supreme Council A. L. H., 208 Pa. 362, 57 A. 564. Where there is a dispute as to the amount due the acceptance of a draft for the amount tendered and the signing and delivery of a certificate acknowledging payment of the policy and surrendering it for cancellation amounts to an accord and satisfaction and, in the absence of fraud or mistake, is a bar to an action for the balance. Amount payable was reduced by amendment to by-laws, but court had not then decided that such action was invalid. Beneficiary had full knowledge of facts and was informed that sum would be paid only on his signing. Simons v. Supreme Council A. L. H., 178 N. Y. 263, 70 N. E. 776. A settlement induced by the association's representation that it had enacted a by-law reducing the amount of insurance payable under the policy, when it knew that such by-law had been declared invalid by the courts, will be set aside as fraudulent. Simon v. Supreme Council A. L. H., 91 App. Div. 390, 86 N. Y. S. 866.

Remedy is in equity to cancel settlement and recover balance. Stephenson v. Supreme Council A. L. H., 130 F. 491.

56. Mitterwallner v. Supreme Lodge Knights & Ladies of Golden Star, 86 N. Y.

ment made with the association by the guardian of minor beneficiaries whereby they receive less than the full amount of the policy is not ordinarily binding on them unless approved by the proper court.[57] The receipt of one of two sums due the beneficiary is no consideration for an agreement to release the association from the other.[58]

Payments of funeral benefits to the holder of a canceled certificate, under the mistaken belief that they were claimed under a duplicate issued in lieu thereof, do not operate to estop the association from denying a right to recover thereon.[59]

Claims are generally required to be made within a specified time after the right to benefits accrues.[60]

Interest.[61]—Where the policy is complete in all its parts, designating specifically the sums to be paid and the beneficiaries, and providing that payment shall be made within a specified time after proofs of death, it will, in the absence of a provision to the contrary, be deemed a contract for the payment of money, and the beneficiary will be allowed interest from the time specified.[62]

§ 12. *Procedure to enforce right to benefits.*[63]—Equity has jurisdiction of a suit by a beneficiary to recover the amount of the certificate where his remedy at law would not be an adequate one.[64] Where the by-laws provide for the payment of a death benefit fund to a deceased member's next of kin they, and not his executor or administrator, are entitled to maintain an action for its recovery.[65] An action on a benefit certificate or insurance policy is transitory and not local in its nature, and may be brought in any state where the company issuing it may be found, without regard to where the contract was made, or the subject thereof was located.[66] An unincorporated fraternal beneficiary order may be sued in the name by which it is commonly known without joining the individual members.[67] Where an association is sued, answers, and assigns error as a corporation, it will be so considered, though the record contains no evidence of that fact.[68]

S. 785. Fact that beneficiary wrote over his signature on certificate, "Receipt below given for $1,900 only," held not to constitute protest or alter legal effect thereof. Simons v. Supreme Council A. L. H., 178 N. Y. 263, 70 N. E. 776.

57. In Illinois by probate court [Starr & C. Ann. St. 1895, c. 54, par. 7]. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066. Where there was no consideration for an invalid release by the guardian of minor beneficiaries, their acceptance from him after majority of the amount received by him is no bar to a suit by them for the balance. Where guardian accepted amount of premiums in full. Id.

58. Receipt of premiums paid no consideration for release from payment of amount of policy where contract required payment of both. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1065.

59. Dexter v. Supreme Council Royal Templars, 97 App. Div. 545, 90 N. Y. S. 292.

60. Provision that all claims should be made within specified time held sufficiently complied with. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066.

61. See 2 Curr. L. 100.

62. Instructions approved. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1056.

63. For trial of claims and disputes before tribunals of the order, see ante, § 4. See, also, 2 Curr. L. 100.

64. Where, after certificate for $5,000 had been in force for some time, by-law was passed reducing amount of death benefits to $2,000, but providing face value should be paid if emergency fund was not exhausted, and on death of member, widow was informed that she was only entitled to $1,900 on surrender of certificate, held that she could maintain bill for return of certificate surrendered by her, for discovery as to condition of emergency fund, and for payment to her of full amount to which she was entitled. Blair v. Supreme Council A. L. H., 208 Pa. 362, 57 A. 564.

65. Is not assets of estate, and executrix cannot sue even where no next of kin. Should be noted that in Rhode Island that one for whose benefit a contract is made can sue on it. Gould v. United Traction Employes' Mut. Aid Ass'n [R. I.] 58 A. 624.

66. Jurisdiction waived by appearance. Perrine v. Knights Templars' & Masons' Life Indemnity Co. [Neb.] 98 N. W. 841.

67. Md. Code, art. 23, §§ 301, 143e. Littleton v. Wells & McComas Council, No. 14, J. O. U. A. M. [Md.] 56 A. 798. Voluntary unincorporated association [Conn. Gen. St. 1902, § 588]. Lahiff v. St. Joseph's Total Abstinence & Benevolent Soc., 76 Conn. 648, 57 A. 692.

68. United Brotherhood of Carpenters & Joiners v. Dinkle, 82 Ind. App. 273, 69 N. E. 707.

The members of an unincorporated mutual benefit association are not personally liable to a beneficiary where the contract merely provides that the secretary shall receive and pay to the members the amount realized from an assessment, and the only provision for compelling payment of assessments is forfeiture of membership for nonpayment.[69] In such case the assessment cannot be collected by a suit against the members refusing to pay the same.[70] The question of whether beneficiaries should be made parties cannot be raised by general demurrer.[71] Pendency of a suit by the executrix of the insured in which it is claimed that his children are entitled to all the insurance and in which others named as beneficiaries are joined as defendants does not prevent a suit by the other beneficiaries on the certificate.[72] Suits by different persons on the same certificate are properly consolidated.[73]

Pleading.[74]—The defense of ultra vires is an affirmative matter which should be specially pleaded.[75] Where noncompliance with provisions in regard to the payment of premiums is relied on as a defense, the answer must allege wherein it consisted, a mere general allegation of noncompliance being insufficient.[76] The beneficiary need not allege that he had an insurable interest in the life of the member,[77] but it devolves on the society relying on the defense of no insurable interest to plead and prove it.[78]

Evidence.—The member's condition of health at the time of his application cannot be proved by general reputation,[79] but witnesses may state from their own knowledge that he was emaciated, was unable to speak above a whisper, and that his father stated that he had consumption.[80] The general custom of the society in accepting members not in good health may be shown for the purpose of proving a waiver of a requirement that applicants must be in good health.[81] A baptismal record of the church at which deceased was baptized is admissible on the question of his age.[82] Where the certificate provides in case of accident for the payment of such sum as the member was entitled to receive under the terms and conditions of the rate book, it is incumbent on one suing for indemnity to establish the nonexistence of such book before he can prove an oral agreement to pay a certain indemnity made by the officers at the time the certificate was issued.[83] Having introduced the rate book on his own account, he is bound by its provisions respecting the amount of his insurance.[84] The burden is on the association to show that an assessment would not have yielded the full amount named in the certificate.[85]

Judgments.—The beneficiary is ordinarily entitled to a money judgment and not merely to a mandatory order requiring the levy of an assessment.[86]

69, 70. Cochran v. Boleman [Ind.] 71 N. E. 47.

71. Should be raised by special demurrer. Plant System Relief & Hospital Dept. v. Dickerson, 118 Ga. 647, 45 S. E. 483.

72. Especially where they had assigned a part of the amount due to a third person. Clement v. Clement [Tenn.] 81 S. W. 1249.

73. Clement v. Clement [Tenn.] 81 S. W. 1249.

74. See 2 Curr. L. 101.

75. That defendant had no power to receive plaintiff as transferee from another association and to issue rider contract assuming obligations of original certificate. Weber v. Ancient Order of Pyramids [Mo. App.] 78 S. W. 650.

76. Weber v. Ancient Order of Pyramids [Mo. App.] 78 S. W. 650.

77, 78. Foresters of America v. Hollis [Kan.] 78 P. 160.

79. Such evidence hearsay. Home Circle Soc. No. I. v. Shelton [Tex. Civ. App.] 81 S. W. 84.

80. Home Circle Soc. No. I. v. Shelton [Tex. Cic. App.] 81 S. W. 84.

81. Court should not allow parties to go into unnecessary details to show whether particular member, when accepted, was afflicted with malady liable to terminate fatally. Home Circle Soc. No. I. v. Shelton [Tex. Civ. App.] 81 S. W. 84.

82. Meehan v. Supreme Council Catholic Benev. Legion, 88 N. Y. S. 821.

83, 84. National Benev. Soc. v. Oldham [Kan.] 78 P. 163.

85. Thornberg v. Farmers' Life Ass'n, 122 Iowa, 260, 98 N. W. 105.

The general rules as to pleading,[87] instructions[88] and variance apply.[89]

A mutual life association acts as trustee for the beneficiaries of its policies in the collection of assessments levied on its members.[90] Hence either the association or a receiver thereof may, for the benefit of such beneficiaries, follow and recover funds so collected which have been wrongfully diverted to another purpose by the association's officers.[91] Neither, however, can recover more than the damages actually suffered by the beneficiaries.[92]

FRAUD AND UNDUE INFLUENCE.

§ 1. Actual Fraud (1520). Legal Fraud (1523).
§ 2. Inferences From Circumstances and Condition of Parties (1524).
§ 3. Remedies (1526).

Scope of topic.—Only principles of general application are treated in this topic,[93] as to fraud and undue influence in the execution of contracts and conveyances arising between the parties to the transaction.[94] The right of action for damages for fraud is also specifically treated elsewhere.[95]

§ 1. *Actual fraud.*[96]—Fraud consists of any deception or artifice used to circumvent, cheat or deceive another.[97] A false promise,[98] if damage results,[99]

86. Where the articles provide that the beneficiary shall receive a sum equal to what would be realized from an assessment upon all members as shown by the books at the time of death, in no case to exceed the amount named in the certificate, and also provide for a mortuary fund to be raised by assessment, from which such losses shall be paid, and the certificate provides for payment of a definite sum to be so raised. Thornberg v. Farmers' Life Ass'n, 122 Iowa, 260, 98 N. W. 105.

87. Judgment for less amount than face of certificate held within the issues raised by the pleadings. Evans v. Southern Tier Masonic Relief Ass'n, 94 App. Div. 541, 88 N. Y. S. 162. Complaint in action or certificate held sufficient to support judgment. Hyatt v. Loyal Protective Ass'n [Mo. App.] 81 S. W. 470. In Texas, where the answer sets up the execution of the application, a further pleading by him not purporting to be a plea of non est factum need not be verified. Home Circle Soc. No. I. v. Shelton [Tex. Civ. App.] 81 S. W. 84.

88. **Instructions approved:** As to interest. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066. As to burden of proving suicide. Id. As to effect of proofs of loss. Id. As to effect of verdict of coroner's jury. Id. As to forfeiture for nonpayment of dues and failure to furnish health certificate. Boyce v. Royal Circle [Mo. App.] 79 S. W. 495.

Instructions disapproved: Instructions held erroneous as giving undue prominence to weight of verdict of coroner's jury assigning suicide as cause of death of insured, and as giving the jury the idea that a presumption of suicide arose from circumstances surrounding finding of insured. Rumbold v. Supreme Council Royal League, 206 Ill. 513, 69 N. E. 590.

89. Variance in dates of certificate described in petition and that offered in evidence held not to warrant its exclusion. Hyatt v. Loyal Protective Ass'n [Mo. App.] 81 S. W. 470.

90. Organized under Iowa Code, tit. 9, c. 7, 8. Sherman v. Harbin [Iowa] 100 N. W. 622.

91. Sherman v. Harbin [Iowa] 100 N. W. 622.

92. Cannot recover on bond of president for payment to one beneficiary of funds belonging to another, where latter was paid in full from funds subsequently accruing. Sherman v. Harbin [Iowa] 100 N. W. 622, 629. Where assessments were insufficient to pay policies for which they were levied in full and president made excessive payments thereon from other assessments, and after association's insolvency, certain benefit claims were filed with the receiver which had not been paid, held that president was liable on his bond only for such sum as beneficiaries were entitled to receive from the association. Id. [Iowa] 100 N. W. 622. Can only recover moneys erroneously withdrawn from benefit fund to pay expenses of litigation and investigation of claims for benefit of unpaid beneficiaries. Id. [Iowa] 100 N. W. 622, 629.

93. See subjects Agency, 3 Curr. L. 68; Attachment, 3 Curr. L. 353; Contracts, 3 Curr. L. 805; Corporations, 3 Curr. L. 880; Insurance, 2 Curr. L. 479; Fraudulent Conveyances, 2 Curr. L. 116; Judgments, 2 Curr. L. 581; Vendors and Purchasers, 2 Curr. L. 1976; Sales, 2 Curr. L. 1527; Chattel Mortgages, 3 Curr. L. 682; Deeds of Conveyance, 3 Curr. L. 1056; Mortgages, 2 Curr. L. 905; Releases, 2 Curr. L. 1498; Wills, 2 Curr. L. 2076; Husband and Wife, 2 Curr. L. 246; Guardian and Ward, 2 Curr. L. 148; Parent and Child, 2 Curr. L. 1089; Trusts, 2 Curr. L. 1924; Suretyship, 2 Curr. L. 1776.

94. See Fraudulent Conveyances, 2 Curr. L. 116; Negotiable Instruments, 2 Curr. L. 1013, as to rights of bona fide holders.

95. See exhaustive monograph on Deceit, 1 Curr. L. 873. See Deceit, 3 Curr. L. 1045.

96. See 2 Curr. L. 105.

97. Cyc. Law Dict. Where a grantee after delivery of a deed inserted therein the description of other land owned by the grantor and made a voluntary conveyance to one who relied on his word as to the title, the original grantor was entitled to relief.

misrepresentation[1] of a material,[2] existing fact,[3] known to be false,[4] or made

Gill v. Fugate, 25 Ky. L. R. 1367, 78 S. W. 188. That the grantee holds a mortgage on other property of the grantor does not raise a presumption of fraud in a deed. Hart v. Cannon, 133 N. C. 10, 45 S. E. 351. Procuring the execution of a contract without having inserted a material clause according to oral stipulations. Davy v. Davy, 90 N. Y. S. 242. Where one signed a release of conditions in a deed, thinking he was signing a receipt, evidence held to show fraud. Monnett v. Columbus, S. & H. R. Co., 4 Ohio C. C. (N. S.) 369. To show that plaintiff was induced to pay greater sum for third interest in patent rights than sellers asked for entire interest, by false representations of defendant. No defense that he was willing to pay and obtained such interest. Felt v. Bell, 205 Ill. 213, 68 N. E. 794. Sale of property by an executor held fraudulent, 1 Starr & C. Ann. St. 1896, pp. 336, 337, not having been complied with. Heppe v. Szczepanski, 209 Ill. 88, 70 N. E. 737.

Held not to constitute fraud: There was no fraud in the insertion of a certain clause in a mortgage, when it had been discussed by the mortgagor's attorney and was inserted prior to the execution of the mortgage. Anderson v. Anderson Food Co. [N. J. Eq.] 57 A. 489. In a suit to quiet title, an allegation of ownership of the property constituting a false deduction from the facts pleaded is not such a false statement as to constitute fraud on the court. Ruppin v. McLachlan, 122 Iowa, 343, 98 N. W. 153. Where one was induced to become a stockholder in a corporation by false representations in a pamphlet issued under the sanction of the directors who relied on the fidelity of the secretary, held, they were not guilty of fraud, but of neglect of duty. Lyon v. James, 97 App. Div. 385, 90 N. Y. S. 28.

98. Where a mortgagee procured his mortgage by promising that he would take up other mortgages against the land. Hill v. Gettys, 135 N. C. 373, 47 S. E. 449. False promise to marry grantor and false representations that promisor was unmarried held to vitiate conveyance. Harris v. Dumont, 207 Ill. 583, 69 N. E. 811. Deed procured by wife from husband by false representations that she would return and live with him. Jones v. Jones, 40 Misc. 360, 82 N. Y. S. 325. Where a wife procured a deed from her husband by promising to live with him and be a faithful wife and three days later abandoned him without cause. Hursen v. Hursen [Ill.] 72 N. E. 391.

99. No fraud authorizing relief is shown where one was induced to put improvements on land under promise that at the promisor's death it should belong to the wife of the person to whom the promisee was made, where the promisor by his will devised the land to the wife for life, remainder to her children. Taylor v. Brinkley, 131 N. C. 8, 42 S. E. 336.

1. Misrepresentation as to the run of oil wells. Jones v. Draper, 4 Ohio C. C. (N. S.) 105. Misrepresentation that land was covered with valuable timber and underlaid with coal. Right to recover damages therefor not defeated because purchaser took title in his wife's name. Haldeman v. Schuh, 109 Ill. App. 259. That land abounded in minerals and that a corporation composed of good business men was operating mines on the premises. Cooper v. Maggard [Tex. Civ. App.] 79 S. W. 607. Where one induced a conveyance to himself by representations that he would make improvements on the land purchased and such fact would enhance the value of the remainder of grantor's land. Troxler v. New Era Bldg. Co. [N. C.] 49 S. E. 58. Fraudulent representation made by an agent to induce one to refrain from having an abstract examined. Riley v. Bell, 120 Iowa, 618, 95 N. W. 170. Misrepresentations by vendor as to depth of building lots and as to opening of streets. Slingluff v. Dugan [Md.] 56 A. 837. False representations of unprofitable condition of mines. Morrison v. Snow, 26 Utah, 247, 72 P. 924. Misrepresentation that discovery shaft was within the exterior boundaries of a claim. Connell v. El Paso Gold Min. & Mill. Co. [Colo.] 78 P. 677. Fraudulent statements in prospectus. Mulholland v. Washington Match Co. [Wash.] 77 P. 497. False representations as to profits of a certain business, made to induce a sale thereof. McCrary v. Pritchard, 119 Ga. 876, 47 S. E. 341. Falsely reading to an illiterate person a promissory note to procure his signature. Broyles v. Absher [Mo. App.] 80 S. W. 703. False representations in a sale of stock that the company issuing it was incorporated. Bolton v. Prather [Tex. Civ. App.] 80 S. W. 666. Fraudulent representations as to the number of acres conveyed entitles the vendee to an abatement of the purchase price. Ludwick v. Petrie, 32 Ind. App. 550, 70 N. E. 280. As to number of shares in pool of stock and arrangements made for their disposal. Spier v. Hyde, 92 App. Div. 467, 87 N. Y. S. 285. When two joint owners induced a third to sell his interest in a mine by representations that the entire property was to be sold for a certain amount. Upton v. Weisling [Ariz.] 71 P. 917. One procured a note from the owner of land by falsely representing that he held a lien on the land which antedated the deed under which the person to whom the representations were made claimed. Farkas v. Monk, 119 Ga. 515, 46 S. E. 670. Where one is induced by false representations to enter into a contract and is damaged thereby, all the elements of fraud are shown. Blumenfield v. Stine, 96 App. Div. 160, 89 N. Y. S. 85. Misrepresentation as to title in a sale of land. Campbell v. Spears, 120 Iowa, 670, 94 N. W. 1126.

As to financial standing: Representations made to a mercantile agency to establish a firm's credit constitute a fraud on one deceived by them. Tennent Shoe Co. v. Stovall, 25 Ky. L. R. 1615, 78 S. W. 417. False statements as to the solvency of a corporation by the president thereof to induce a sale thereto of certain property, though the president had no intention of acquiring the property without paying for it. Fitchard v. Doheny, 93 App. Div. 9, 86 N. Y. S. 964. Misrepresentations as to financial condition of a building and loan association made by the association and its agents to induce a sale of stock. Dunn v. Candee, 90 N. Y. S. 674.

As to value made by vendee who was familiar with the property to vendors who

recklessly without knowledge of its truth or falsity,[5] and relied on as an inducement to conduct resulting in injury,[6] constitute fraud; but mere expression of opinion,[7] or false representation as to the law does not,[8] though the contra of the latter proposition has been held.[9] The intent with which false representations are made is immaterial.[10]

had no knowledge and were unacquainted with business. Chess & Wymond Co. v. Simpson [Ky.] 82 S. W. 601. As to the value of securities made to induce a sale of mortgages. Simonds v. Cash [Mich.] 99 N. W. 754.

That a traveling salesman falsely represented that he had made sales of similar articles to several firms. Wilson, Close & Co. v. Pritchett [Md.] 58 A. 360. One having such control over land that he can compel a conveyance of it may contract for its sale without disclosing the actual state of the title. Provident Loan Trust Co. v. McIntosh [Kan.] 75 P. 498. That a corporation organized to take title to property purchased was not organized according to law is evidence that the sale was induced by fraudulent representations that improvements would be erected on the land purchased which would enhance the remainder of the seller's land in that vicinity. Troxler v. New Era Bldg. Co. [N. C.] 49 S. E. 58.

2. Misrepresentation as to priority of one mortgage over another is a misrepresentation of fact. Kehl v. Aram, 210 Ill. 218, 71 N. E. 347. Where one falsely represented that he was an unmarried man and procured conveyances by promising to marry the grantee, misrepresentations held sufficient to entitle the grantee to have the deeds set aside. Harris v. Dumont, 207 Ill. 583, 69 N. E. 811. In an action for goods sold, where rescission because of misrepresentation of fact was pleaded, but there was a failure to prove that the representation was false, or if false, material, it was error to refuse a peremptory instruction for plaintiff. Brenard Mfg. Co. v. Citronelle Mercantile Co. [Ala.] 37 So. 509. False statement by officers of a corporation on selling shares of stock that none of it had been sold for less than par. Hubbard v. International Mercantile Ag. [N. J. Eq.] 59 A. 24. Sale of bonds, statement that attorney general of state had declared act under which bonds were issued constitutional, held immaterial. First Nat. Bank v. Columbus Sav. & T. Co., 2 Ohio N. P. (N. S.) 525.

3. An alleged false statement made by petitioners for a dramshop license, to the effect that some other person intended to sign the petition, is no ground for equitable relief against the action of the authorities in granting the license. Cooper v. Hunt, 103 Mo. App. 9, 77 S. W. 483.

4. Defense of fraud requires proof of plaintiff's knowledge of the falsity of representations. Halliwell Cement Co. v. Stewart, 103 Mo. App. 182, 77 S. W. 124.

5. Miller v. John, 208 Ill. 173, 70 N. E. 27. A partner who makes false representations to a mercantile agency to establish the credit of the firm will not be heard to say that he did not know the true condition of the firm when the statements were made. Tennent Shoe Co. v. Stovall, 25 Ky. L. R. 1615, 78 S. W. 417. Misrepresentations as to suitability of premises for the purposes of the lessee, made without knowing whether such statements were false or true. Prahar v. Tousey, 93 App. Div. 507, 87 N. Y. S. 845. An agent who without knowledge makes positive affirmation as of his own knowledge concerning the quality of land his principal is to purchase. Miller v. John, 111 Ill. App. 55.

6. Brenard Mfg. Co. v. Citronelle Mercantile Co. [Ala.] 37 So. 509. That an applicant for a liquor license promised to withdraw the application affords no ground of equitable relief against the action of the authorities, there being no averment that plaintiff thereby neglected to take any proceedings against it. Cooper v. Hunt, 103 Mo. App. 9, 77 S. W. 483. The fraud must be directly connected with the execution of the deed. Pittenger v. Pittinger, 208 Ill. 582, 70 N. E. 699. Where a debtor represented to his creditor that he was financially embarrassed and contemplated making an assignment unless the creditor would compromise his claim for less than the amount due, the fact that in some minor details his representations did not correspond to his financial condition, held not to effect the validity of the transaction. Rotan Grocery Co. v. Noble [Tex. Civ. App.] 81 S. W. 586; Provident Loan Trust Co. v. McIntosh [Kan.] 75 P. 498. As between the original parties to a promissory note, fraud is a good defense, and it being introduced, it was error for the court to overrule it and direct a verdict. Mueller v. Buch [N. J. Law] 58 A. 1092. An allegation that a purchaser was deceived by false representatione as to the article purchased held not to state a defense. Butte Hardware Co. v. Knox, 28 Mont. 111, 72 P. 301.

7. Representations that a payment of 60 instalments would be sufficient to mature the stock of a borrowing member of a building and loan association and pay off his indebtedness. Wayne International Bldg. & Loan Ass'n v. Gilmore [Ind. App.] 72 N. E. 190. Statements by secretary of building and loan association as to how much a borrower would be obliged to pay back held false representations and not an expression of opinion. Stoddard v. Saginaw Bldg. & Loan Ass'n [Mich.] 101 N. W. 50. Note given as purchase price for saloon, seller stated that "it was a good business stand." Consumers' Brew. Co. v. Tobin, 19 App. D. C. 353.

8. Misrepresentations as to legal effect of instrument. Rutter v. Hanover Fire Ins. Co., 138 Ala. 202, 35 So. 33. Opinions of a layman upon matters of law expressed during the negotiations leading to an agreement, though erroneous. Frankfort Marine, Acc. & Plate Glass Ins. Co. v. Witty, 208 Pa. 569, 57 A. 990.

9. As to measure of liability one would incur by signing a note secured by a mortgage. Merchants & Farmers' Bank v. Cleland, 25 Ky. L. R. 1169, 77 S. W. 176.

10. Standard Mfg. Co. v. Slot [Wis.] 98 N. W. 923.

Fraud is personal between the parties to the transaction.[11]

Legal fraud.—Acts though not amounting to actual may constitute legal fraud.[12]

Ordinarily, one has no right to rely upon statements as to the character or contents of a written instrument,[13] but unless such reliance was negligent, relief will not be denied.[14]

Fraud in business transactions is never presumed,[15] and if one disregards his own knowledge,[16] or means of ascertaining the truth of representations, he will not be heard to say that he was deceived,[17] unless the representations concern subject-matter of a complicated nature with which he is unfamiliar.[18]

The evidence must be sufficient to preponderate over the presumption of good faith in business transactions;[19] but it is sufficient if the facts and circum-

11. If committed in the inception of a debt, it does not follow an assignment thereof. Thwing v. Winkler, 13 Okl. 643, 75 P. 1126.

12. Misrepresentation as to title constitutes legal if not actual fraud. Singleton v. Houston [Tex. Civ. App.] 79 S. W. 98. Where one procured a conveyance from a relative for an inadequate consideration intending to preserve it for her, but died without making reference to the property in his will, it amounted to legal fraud. Turner's Trustee v. Washburn, 25 Ky. L. R. 2198, 80 S. W. 460.

13. Wood v. Wack, 31 Ind. App. 252, 67 N. E. 662.

One who signs writing at the instance of a person with whom he had had no previous business or acquaintance. Wood v. Wack, 31 Ind. App. 252, 67 N. E. 562. Where a wife signed a deed without reading it on representations of her husband that it related to property in which she had no interest. Hyatt v. Zion [Va.] 48 S. E. 1. An illiterate party cannot avoid a contract where he was negligent in being ignorant of its contents, but he may show that he was induced to sign it by fraud. Wilson, Close & Co. v. Pritchett [Md.] 58 A. 360. One whose only excuse for signing papers without reading them was that he was busy and was not in the habit of reading papers before signing them. Standard Mfg. Co. v. Slot [Wis.] 98 N. W. 923. Where one signs a written instrument without reading it, he will not be relieved from its effect by his want of knowledge of its contents, unless such want of knowledge was the result of fraud. Chicago, etc., R. Co. v. Williams [Tex. Civ. App.] 83 S. W. 248.

NOTE: The diligence required of one to whom statements are made is that degree exercised by the ordinarily prudent man. Gee v. Mass, 68 Iowa, 318; Wheeler v. Robinson, 86 Hun [N. Y.] 561; Page v. Parker, 40 N. H. 47; Hutchinson Furnace & S. Consuming Co. v. Lyford, 123 Ill. 300; Newson v. Jackson, 26 Ga. 241, 71 Am. Dec. 206; Belfast v. Boone, 41 Ala. 50. The law does not require the exercise of caution, but only the absence of negligence (Hoitt v. Holcomb, 32 N. H. 202), and the mere fact that a party has means of learning the truth is not fatal to his right of recovery (Arthur v. Wheeler & W. Mfg. Co., 12 Mo. App. 335). But one cannot rely on statements in circulars sent out by unknown dealers. Berman v. Woods, 38 Ark. 351.—Note to Fargo Gaslight & Coke Co. v. Fargo Gas & Elec. Co. [N. D.] 37 L. R. A. 601.

14. Where signature was obtained to an order for goods by misrepresentations as to the nature of the paper, the signor was not chargeable with negligence in signing without reading, the agent having at the time represented that he was in a hurry to catch a train. American Fine Art Co. v. Reeves Pulley Co. [C. C. A.] 127 F. 808. Where it is shown that it was falsely read to him. Monnett v. Columbus, etc., R. Co., 4 Ohio C. C. (N. S.) 369; Strauss & Co. v. Welsbach Gas Lamp Co., 42 Misc. 184, 85 N. Y. S. 367.

15. Refusal of one to sign a statement containing his representations is not sufficient to put one to whom they were made on inquiry. Ettlinger v. Weil, 94 App. Div. 291, 87 N. Y. S. 1049. An allegation that the person from whom the truth as to representation could be obtained was conducting business in a different city shows as against demurrer that means for ascertaining the truth were not immediately at hand. O'Connor v. Lighthizer, 34 Wash. 152, 76 P. 643. Where the fact of incorporation was not questioned by any one, purchasers of stock were not charged with the duty of investigating whether it was incorporated or not. Bolton v. Prather [Tex. Civ. App.] 80 S. W. 666. Notice that the subject-matter of a contract fell short of the vendor's description does not charge the vendee with knowledge as of that date of all defects subsequently discovered. Montgomery v. McLaury, 143 Cal. 83, 76 P. 964; Barrie & Son v. Frost, 105 Ill. App. 187.

16. One who has personally inspected timber land with a view to purchasing cannot assert that he relied on false representations. Zilke v. Woodley [Wash.] 78 P. 299. One who draws a contract himself cannot defend an action thereon on the ground of fraud or mistake. Bessling & Co. v. Houston, etc., R. Co. [Tex. Civ. App.] 80 S. W. 639.

17. Mulholland v. Washington Match Co. [Wash.] 77 P. 497.

18. A machine. Mulholland v. Washington Match Co. [Wash.] 77 P. 497.

19. Evidence held insufficient to show that false representations were made in a sale of bonds or that they were relied on, or that the person making them knew they were false. O'Day v. Bennett [Ky.] 82 S. W. 442. In a sale of corporate stock. Guase v. Com. Trust Co., 44 Misc. 46, 89 N. Y. S.

stances concerning the transaction satisfy the mind that fraud was committed.[20] Whether fraud exists in any given case,[21] or whether ordinary diligence to discover fraud has been exercised,[22] and as to what were and what were not material inducements for the transaction, are questions for the jury.[23]

§ 2. *Inferences from circumstances and condition of parties.*[24]—Influence to be undue must be unlawful,[25] and be such as to destroy or at least impair or prevent free agency,[26] and have been exerted in inducing the transaction complained of.[27] Transactions between persons sustaining confidential relations,[28]

723. Evidence held insufficient to prove fraud clear enough to warrant the cancellation of a deed which had remained unchallenged for four years and the conduct of the defendant during such period was inconsistent with rights of plaintiff. Treat v. Russell [C. C. A.] 128 F. 847. The fact that a horse was sick at the time it was sold does not establish fraud. Citizens' State Bank v. Cowles, 89 App. Div. 281, 86 N. Y. S. 38. That representations made to secure the assignment of a judgment were false. Rickards & Co. v. Bemis & Co. [Tex. Civ. App.] 78 S. W. 239.

Clear and satisfactory evidence (Harrigan v. Gilchrist [Wis.] 99 N. W. 909), to show that a person's signature to a deed was procured by fraud (Pittenger v. Pittenger, 208 Ill. 582, 70 N. E. 699). To cause deed to be set aside. Burnham v. Burnham, 119 Wis. 509, 97 N. W. 176. Not sustained by proof of breach of warranty (Halliwell Cement Co. v. Stewart, 103 Mo. App. 182, 77 S. W. 124), or mutual mistake (Connell v. El Paso Gold Min. & Mill. Co. [Colo.] 78 P. 677). Proof must be clear and satisfactory and superior to that adduced to controvert it. Edwards v. Story, 105 Ill. App. 433. Objection to admission of evidence as to habits and condition of a grantor 12 to 17 years prior to the date of a transaction goes to its weight rather than to its admissibility. Donnelly v. Rees, 141 Cal. 56, 74 P. 433.

20. McNaughton v. Smith [Mich.] 99 N. W. 382. Instruction that inference of fraud could only be drawn from strong presumptive circumstances which must amount to clear proof properly refused as requiring too high a degree of proof. Id.

21. Nichols v. Coleman, 96 App. Div. 353, 89 N. Y. S. 234. Where there is a substantial conflict in the evidence. McMillan v. Reaume [Mich.] 100 N. W. 166. Procuring one to sign a release for personal injuries by misrepresenting that no action had been brought, and that if plaintiff's attorney settled, plaintiff would get nothing. Hidden v. Exeter, etc., R., 72 N. H. 422, 57 A. 333. Evidence of fraud in a sale of corporate stock held for the jury. McNaughton v. Smith [Mich.] 99 N. W. 382. Whether a release of damages for personal injuries was procured by fraud. Chicago City R. Co. v. McClain, 211 Ill. 589, 71 N. E. 1103.

22. Davis Sew. Mach. Co. v. Crutchfield, 117 Ga. 873, 45 S. E. 228. Whether one was negligent in signing a release of damages for personal injuries without reading it. Whether he was justified in relying on representations that it was a receipt. Chicago, etc., R. Co. v. Williams [Tex. Civ. App.] 83 S. W. 248.

23. Kehl v. Abram, 210 Ill. 218, 71 N. E. 347.

24. See 2 Curr. L. 107.

25. The affection and confidence of a parent to a child is a natural and lawful influence and will not render void a deed inspired thereby, unless the will of the grantor was confused or controlled. Sawyer v. White [C. C. A.] 122 F. 223.

26. **Not shown** where a father executed to one child who lived with and cared for him, a mortgage and deed of his property, such instruments having been of record for several years. Drinkwine v. Gruelle [Wis.] 98 N. W. 534. Where a mother 77 years old conveyed all her property to one child to the prejudice of the others. Schwingle v. Anthes [Neb.] 98 N. W. 676. That a grantor, an old man, wept before signing a deed does not prove undue influence. Crooks v. Smith-Peterson, 123 Iowa, 439, 99 N. W. 112. Where an aged man deeded his property to a foster child who had cared for him. Id. Deeds by mentally weak man 70 years of age to his second wife and children by her. Nowlen v. Nowlen, 122 Iowa, 541, 98 N. W. 383. Where a frail old man who had shown symptoms of dementia deeded all his property to his housekeeper. Aldrich v. Steen [Neb.] 98 N. W. 445. Deed from sister to brother in consideration of support held not procured by undue influence. Erwin v. Hedrick, 52 W. Va. 537, 44 S. E. 165. Such as controls the will of the grantor. Sawyer v. White [C. C. A.] 122 F. 223. Evidence held insufficient. Watts v. Vansant [Md.] 58 A. 433.

Undue influence shown where a mentally weak person executed a deed at the instance of his brother in whom he reposed the utmost confidence. Winn v. Winn [Tex. Civ. App.] 80 S. W. 110. Where a father 80 years old, totally blind and helpless, and entirely dependent on his daughter, deeded to her, without condition or reservation, all his property. White v. Daly [N. J. Eq.] 58 A. 929. Deed from a mother to one child. Douglass v. Longcor [Mich.] 100 N. W. 1004. Mere fact that grantee was not in the room when the deed was executed was insufficient to show that the influence of a confidential relationship which existed did not continue during that period. White v. Daly [N. J. Eq.] 58 A. 929.

27. Curtis v. Kirkpatrick [Idaho] 75 P. 760.

28. Where one occupies toward another the position of joint purchaser, failure to disclose material facts relative to the property purchased constitutes fraud. Hinton v. Ring, 111 Ill. App. 369.

NOTE. If fiduciary relations exist between the parties, one may rely on the statements of the other (Smith v. Patterson, 33 Ohio St. 70; Bradner v. Strang, 23 Hun, [N. Y.] 445); thus, intimate friends (Nolte v. Reichelm, 96 Ill. 425), principal and agent (Cheney v.

such as parent and child,[29] guardian and ward,[30] husband and wife,[31] attorney and client,[32] partners,[33] one standing in a position of trust,[34] will be carefully scrutinized by the courts; yet if the evidence shows that the transaction was voluntarily entered into and fully understood, it will be sustained.[35] Fraud may be inferred from the conditions surrounding a transaction.[36] A principal is responsible for the misrepresentations of his agent.[37] Gross inadequacy of consideration becomes actual fraud when the parties do not deal with each other at arm's length;[38] otherwise where the circumstances surrounding the transaction are shown to be reasonable in other respects.[39]

Gleason, 125 Mass. 166) where one occupies a position of trust (Wells v. McGeoch, 71 Wis. 196). See, also, Teachout v. Van Hoesen, 76 Iowa, 113, 14 Am. St. Rep. 206; Hauk v. Brownell, 120 Ill. 163; Davenport v. Buchanan, 6 S. D. 376.—Note to Fargo Gaslight & Coke Co. v. Fargo Gas & Elec. Co. [N. D.] 37 L. R. A. 613.

29. Evidence held insufficient to show fraud where a parent threatened with legal proceeding by his second wife from whom he was separated, transferred all his property to his children. James v. Aller [N. J. Eq.] 57 A. 476. Deed from a father, a paralytic 88 years of age, to his son, of land worth $20,000, for no valuable consideration, held valid. Sawyer v. White [C. C. A.] 122 F. 223. Deed from son to mother held valid. It was based on a nominal consideration but the son testified that it was executed in consideration of natural love and affection. Marsh v. Marsh, 32 Wash. 623, 73 P. 676. Conveyance by parent 70 years old to one son held to have been resorted to in order to defeat the other children of their legitime. Barras v. Barras, 111 La. 284, 35 So. 553. Prevailing on enfeebled and susceptible mother to convey property on consideration of promised support. Tomlinson v. Tomlinson, 162 Ind. 530, 70 N. E. 881. Complaint to annul held sufficient. Id.

30. The burden is on a guardian to show that transactions were fair. That the guardian held a mortgage on other property of the ward at the time of a deed from ward to guardian was a circumstanee to be considered. Hart v. Cannon, 133 N. C. 10, 45 S. E. 351.

31. The burden is on the party claiming under it to show that it is just, fair, and equitable in every respect. Harraway v. Harraway, 136 Ala. 499, 34 So. 836. Evidence held insufficient to show fraud where one conveyed to his wife through his stepson. Smith v. Trefz, 202 Ill. 587, 67 N. E. 393.

32. An attorney took an advantage of his client in the redemption of mortgage foreclosure. Carson v. Fogg, 34 Wash. 448, 76 P. 112. Where the relation of attorney and client does not exist between an attorney and a layman, the burden is on the layman to show fraud in transactions between them. Jinks v. Moppin [Tex. Civ. App.] 80 S. W. 390.

33. Speir v. Hyde, 92 App. Div. 467, 87 N. Y. S. 285.

34. A lawyer who procured from his feeble minded foster sister conveyances of land for a grossly inadequate consideration and by means of false representations. Walker v. Shepard, 210 Ill. 100, 71 N. E. 422. Where an administrator informed an heir (his cousin) that he had taken charge of the estate for her benefit, evidence held to show a fiduciary relationship. Schneider v. Schneider [Iowa] 98 N. W. 159. Fraud on the part of an executor in concealing a remainderman's interest from him cannot be charged to the life tenant unless he is shown to have participated in the fraud. Ruppin v. McLachlan, 122 Iowa, 343, 98 N. W. 153. It is not a fraud upon a remainderman where a life tenant asserts absolute title as against him. Id. Evidence held to show that a fiduciary relation did not exist. Gray v. Hafer, 2 Ohio N. P. (N. S.) 341.

35. Evidence held to rebut the presumption of undue influenee in a deed from son to father. Ferns v. Chapman, 211 Ill. 597, 71 N. E. 1106. Evidence held insufficient to show that a physician by fraudulent representations induced his patient to purchase land from a third person. Torpey v. Murray [Minn.] 101 N. W. 609. Evidence held to show that there was no abuse of confidence in a conveyance from brother to sister. Lozier v. Hill [N. J. Eq.] 59 A. 234.

36. Release of damages for personal injuries obtalned while the injured party was suffering great pain, and after he had been given intoxicating liquor, held obtained by fraud. St. Louis, etc., R. Co. v. Brown [Ark.] 83 S. W. 332. Conveyances for an inadequate consideration procured from an aged and illiterate woman. Obst v. Unnerstall [Mo.] 83 S. W. 450. Evidence that she had been defrauded by others is admissible. Id. Deed obtained by two strong willed men, one of whom was married to a favorite granddaughter of the grantor, from an infirm and illiterate old woman. Threats to deprive her of her granddaughter's society were resorted to. The price paid was about one-half the value. Held fraudulent. Combs v. Davidson, 24 Ky. L. R. 2528, 74 S. W. 261.

37. See Agency, 3 Curr. L. 68. In transfer of land. Sudworth v. Morton [Mich.] 100 N. W. 769.

38. Where vendee procured a sale of trees from aged spinsters who were unfamiliar with the value of their property. Chess & Wymond Co. v. Simpson [Ky.] 82 S. W. 601. Inadequacy of consideration where the person is of unsound mind and the contract executory. Wilkie v. Sassen, 123 Iowa, 421, 99 N. W. 124. Deed obtained by one from his foster sister. Walker v. Shepard, 210 Ill. 100, 71 N. E. 422. Where deed was procured from aged and illiterate people. Shea v. Teufert, 207 Ill. 222, 69 N. E. 872. Administrator procured the transfer to himself of a part of the estate of a decedent. Schneider v. Schneider [Iowa] 98 N. W. 159.

§ 3. *Remedies.*[40]—One who has been guilty of fraud cannot claim the aid of the courts to place him in statu quo.[41] Where the release of a cause of action is procured by fraud, a tender back of the consideration received is not a condition precedent to maintaining an action on the cause released.[42] A defrauded party must assert his rights without unnecessary delay[43] after the fraud is discovered,[44] unless by statute it is provided that a transferee who acquires property by fraud holds as trustee.[45] Affirmance or ratification of the transaction is a bar to rescission,[46] but not to an action for damages.[47]

Equity has jurisdiction to administer complete relief after having set aside a contract for fraud.[48]

39. Payment of $5,000 for an inheritance valued at $25,000 held not conclusive of fraud where the seller's right was contested and a counsel's opinion was that his share was but one-fourth of the estate. Davis v. Thornley, 204 Ill. 266, 68 N. E. 482.

40. See 2 Curr. L. 108.

41. With an intention to defraud a party, another gave him money. When the scheme fell through he attempted to recover it. Bauer v. Sawyer & B. Land Co., 90 Minn. 536, 97 N. W. 428. A grantor cannot impeach a deed executed for the purpose of defrauding his creditors. Watts v. Vansant [Md.] 58 A. 433.

See Fraudulent Conveyances, § 3, Who may attack, etc., 2 Curr. L. 125. Neither a grantor nor his privies can have set aside a deed executed for a fraudulent purpose, though it is without consideration and the grantor remained in possession of the land. Castellow v. Brown, 119 Ga. 461, 46 S. E. 632. Specific performance will be denied where there is any trace of fraud. Schneider v. Schneider [Iowa] 98 N. W. 159. The fraud of one partner in securing commissions is no defense to an action by the other for an accounting thereof, though such other did not participate in the fraudulent transactions. Van Tine v. Hilands, 131 F. 124.

42. Release of damages for personal injuries. St. Louis, etc., R. Co. v. Brown [Ark.] 83 S. W. 332. An offer to return the consideration is not a condition precedent to the maintenance of an action to set aside a deed because of mental incapacity of the grantor and fraud and undue influence of the grantee. Sheehan v. Allen, 67 Kan. 712, 74 P. 245.

43. See Contracts, 1 Curr. L. 626; 3 Curr. L. 805. Relief cannot be had three years after the transaction. Dunn v. Columbia Nat. Bank, 204 Pa. 53, 53 A. 519. Deed from son to father. Son did not sue for cancellation on the ground of undue influence for 10 years; two years after the father's death. Ferns v. Chapman, 211 Ill. 597, 71 N. E. 1106. A claim of fraud is barred both as stale and by limitations after 40 years. Adams v. Hopkins [Cal.] 77 P. 712; Provident Loan Trust Co. v. McIntosh [Kan.] 75 P. 498. Where a purchaser of stock in a corporation was induced to make the purchase by misrepresentations as to the financial condition of the concern, an action to rescind within three months after learning of the falsity of the representations and before damage had been caused to third persons was sufficientiy prompt. Dunn v. Candee, 90 N. Y. S. 674. Where one discovered the fraud in May and brought action to rescind in June, he acted with sufficient diligence. Mulholland v. Washington Match Co. [Wash.] 77 Pac. 497.

44. He is under no duty to exercise diligence in discovering it. Slayback v. Raymond, 40 Misc. 601, 83 N. Y. S. 15.

45. Civ. Code, § 3406 et seq. Failure of a grantor to rescind promptly is no bar to an action by his heir. Donnelly v. Rees, 141 Cal. 56, 74 P. 433.

46. Chicago Trust & Sav. Bank v. Bail, 208 Ill. 256, 70 N. E. 305. Where a deed was procured by undue influence, evidence held to show that it was ratified by subsequent acts. Lee v. Hamby, 101 Ga. 49, 45 S. E. 689. Where for three months after the execution of a deed of settlement the matter was treated as satisfactorily arranged. Burnham v. Burnham, 119 Wis. 509, 97 N. W. 176. One after learning of the fraud continued in executing the scheme induced thereby. Carlock v. Sweeney [Tex. Civ. App.] 82 S. W. 469. Where purchasers of land continued to call on the vendor for performance after they learned that it was liable to overflow. Hawes v. Swanzey, 123 Iowa, 51, 98 N. W. 586. Bringing an action based on the theory of affirmance. Montgomery v. McLaury, 143 Cal. 83, 76 P. 964. See, also, Contracts, 3 Curr. L. 805. Where the seller with knowledge filled part of an order for goods without objection, he waived the right to rescind the order because the agent who took it for him was interested in the firm to which it was sold. Columbia Mfg. Co. v. Hastings [C. C. A.] 121 F. 328. Actual knowledge of fraud or lack of diligence in discovering it is essential to the ratification of a contract procured thereby. Davis Sew. Mach. Co. v. Crutchfield, 117 Ga. 873, 45 S. E. 228.

Evidence insufficient to show ratification of fraudulent sale of patent rights. Felt v. Bell, 205 Ill. 213, 68 N. E. 794. Accepting a new deed perfecting some defects misrepresented does not amount to a condonation of fraud. Montgomery v. McLaury, 143 Cal. 83, 76 P. 964.

47. Retaining and using an article after discovery of the fraud. Hallwood Cash Register Co. v. Berry [Tex. Civ. App.] 80 S. W. 857. Where vendee did not elect to rescind a purchase of land because of fraudulent representations as to its location. Guinn v. Ames [Tex. Civ. App.] 83 S. W. 232.

48. Compel restitution of money obtained thereunder. Hubbard v. International Mercantile Ag. [N. J. Eq.] 59 A. 24.

Pleading.[49]—Facts constituting fraud must be specifically alleged[50] and proved.[51]

To show that a written instrument is void for fraud is not a violation of the parol evidence rule.[52]

FRAUDS, STATUTE OF.

§ 1. Agreements not to be Performed Within One Year (1527).
§ 2. Promise to Answer for Debt or Default of Another (1528).
§ 3. Agreements in Consideration of Marriage (1528).
§ 4. Representations as to Character or Credit of Another (1528).
§ 5. Agreements with Real Estate Brokers (1528).
§ 6. Agreements with Executors or Administrators (1529).
§ 7. Agreements Respecting Real Property or an Estate or Interest Therein (1529).
§ 8. Sale of Goods (1530).
§ 9. Trusts (1530).
§ 10. The Surrender of a Written Instrument (1531).
§ 11. What Will Satisfy the Statute (1531).
A. Writing (1531).
B. Delivery and Acceptance (1532).
C. Part Payment and Earnest Money (1532).
§ 12. Operation and Effect of Statute (1532).
§ 13. Pleading and Proof (1534).

§ 1. *Agreements not to be performed within one year.*[53]—No action may be maintained on any contract not to be performed within a year unless it be in writing;[54] but the statute of frauds has no application where the contract could be performed within that time,[55] though it was not in fact so performed;[56] nor where it runs for an indefinite time,[57] though such performance was not contemplated by the parties.[58] The statute has no application to cases where the contract has been fully performed by one of the parties,[59] or the payment of the consideration alone is necessary to complete the transaction.[60]

49. See 2 Curr. L. 108.

50. To rescind an executed contract on the ground of fraud. Wilson v. Maxon [W. Va.] 49 S. E. 123. It is not sufficient to allege fraud in general terms. Mortimer v. McMullen, 102 Ill. App. 593; McPeck's Heirs v. Graham's Heirs [W. Va.] 49 S. E. 125. General allegations are insufficient to authorize the granting of equitable relief. Gould v. Glass, 120 Ga. 50, 47 S. E. 505. Plea setting up fraud **held sufficient.** Brenard Mfg. Co. v. Citronelle Mercantile Co. [Ala.] 37 So. 509. An allegation in a complaint that defendant by fraud procured a conveyance from plaintiff is sufficiently definite. Motion to make more specific will be denied, though complainant may intend to prove forgery or undue influence. Day v. Day, 90 N. Y. S. 680. Complaint to set aside a deed on the ground of fraud and incapacity was not demurrable on the ground that it was impossible to ascertain on which ground plaintiff would rely. Murphy v. Crowley, 140 Cal. 141, 73 P. 820. General averments in an answer setting up fraud held sufficient. First Nat. Bank v. Beach [Ind. App.] 72 N. E. 287.

51. Mortimer v. McMullen, 102 Ill. App. 593. An executor brought action against his attorney for money received by him from sale of land. The attorney set up that the plaintiff consented to his retention of the money as compensation for services. Held, plaintiff could show that this consent was induced by fraud. Reilly v. Provost, 90 N. Y. S. 591. False representations alleged and not denied by the plea must be taken to be confessed. Phillips v. Crosby [N. J. Err. & App.] 59 A. 142.

52. See Evidence, 3 Curr. L. 1334.

53. See 2 Curr. L. 108.

54. "By its terms not to be performed," etc., in Ala., Ariz., Cal., Colo., Idaho, Mich., Minn., Mont., Neb., Nev., N. Y., N. D., Or., S. D., Utah, Wash., Wis., Wyo.

Not capable of complete performance in one year. Akins v. Hicks [Mo. App.] 83 S. W. 75. The contract is not void, but merely not enforceable. Michels v. West, 109 Ill. App. 418. By performance within one year is meant not partial, but complete performance. Akins v. Hicks [Mo. App.] 83 S. W. 75.

55. Neal v. Parker [Md.] 57 A. 213; Degman v. Nowlin [Ind. T.] 82 S. W. 758; Janney Mfg. Co. v. Banta [Ky.] 83 S. W. 130. When by its terms a parol contract is to be performed within a year, but by an unforeseen contingency, performance was delayed it is not within the statute. Osgood v. Skinner, 111 Ill. App. 606.

56. Thomas v. South Haven, etc., R. Co. [Mich.] 100 N. W. 1009; Neal v. Parker [Md.] 57 A. 213.

57. Janney Mfg. Co. v. Banta [Ky.] 83 S. W. 130. Parol contract for support during lifetime. Whitley v. Whitley's Adm'r [Ky.] 80 S. W. 825. And see, Jones v. Comer, 25 Ky. L. R. 773, 76 S. W. 392. But held to be for more than a year when there was a permanent agreement for all time. Metropolitan Trust Co. v. Topeka Water Co., 132 F. 702.

58. Degman v. Nowlin [Ind. T.] 82 S. W. 758.

59. Sathre v. Rolfe [Mont.] 77 P. 431; Mitchell v. Branham [Mo. App.] 79 S. W. 739. When a mother gives a third party her child in consideration of his caring for it, the contract has been fully performed on

§ 2. *Promise to answer for debt or default of another.*[61]—A collateral agreement to answer for the debt, default or miscarriage[62] of another must be in writing,[63] but not where the promise is based on a new and substantial consideration,[64] or is given to the debtor and not a third party,[65] or where the debt to be paid is that of the promisor,[66] or the promise is not collateral to the debt of another.[67] It is not within the statute.

§ 3. *Agreements in consideration of marriage.*[68]—A parol promise in consideration of marriage may not be enforced,[69] unless wholly executed on one side.[70]

§ 4. *Representations as to character or credit of another.*[71]—In states where representations concerning the character, conduct, credit, ability, trade or dealings of any person must be in writing to give ground for an action for false representations, the phrase is limited to representations made to induce the plaintiff to become a creditor and not such as induce him to buy shares in a corporation.[72]

§ 5. *Agreements with real estate brokers.*[73]—In New York, New Jersey, Nebraska, and some other states, a real estate agent has no right to recover commission for his services unless authorized in writing,[74] and such contract being void, he cannot recover in quantum meruit;[75] but apart from such statutes, an

her part. Jones v. Comer, 25 Ky. L. R. 773, 76 S. W. 392. Where a lease was accepted by a lessee who occupied the premises, he could not later avoid his liability on the ground that he had not signed and the contract was not to be performed within a year. Noland v. Cincinnati Cooperage Co. [Ky.] 82 S. W. 627.

60. Stock subscription where title passes at once, though issue of certificate and payment therefor is deferred till after a year. Reed v. Gold, 102 Va. 37, 45 S. E. 868.

61. See 2 Curr. L. 109.

62. "Misdoing" in Kentucky, Massachusetts, Michigan, Minnesota, Nebraska, New York, Vermont, Virginia and Washington.

63. Ruhl v. Helntze, 97 App. Div. 442, 89 N. Y. S. 1031; Scudder & Co. v. Morris [Mo. App.] 82 S. W. 217; Texas Southern R. Co. v. Pyle [Tex. Civ. App.] 83 S. W. 234; Helios-Upton Co. v. Thomas, 96 App. Div. 401, 89 N. Y. S. 222; Ruhl v. Heintze, 89 N. Y. S. 1031; Haines v. Cox Bros., 109 Ill. App. 15; Netterstrom v. Gallistel, 110 Ill. App. 352.

As to the nature of indemnity, guaranty and suretyship agreements and their original or secondary character, see Indemnity, 2 Curr. L. 298; Guaranty, 2 Curr. L. 144; Suretyship, 2 Curr. L. 1776.

64. Turner v. Lyles [S. C.] 48 S. E. 301; McCormick v. Johnson [Mont.] 78 P. 500. Where one has a complete and enforceable lien on property of his debtor, the promise of a third person to pay the debt upon forbearance to enforce the same is not within the statute where the release is a benefit to the promisor. Ellis & Co. v. Carroll [S. C.] 47 S. E. 679. Promise by a contractor to pay for materials furnished a subcontractor. Wilson v. Dietrich [N. J. Eq.] 59 A. 251.

65. Wear & B. Dry Goods Co. v. Kelly [Miss.] 36 So. 258; Moore v. First Nat. Bank, 139 Ala. 595, 36 So. 777.

Parol assumption of a debt upon assignment of property is good: Bartlett v. Smith [Neb.] 98 N. W. 687; Deaver v. Deaver [N. C.] 49 S. E. 113; Lyon v. Clochessy, 43 Misc. 67, 86 N. Y. S. 245.

66. Pizzi v. Nardello [Pa.] 57 A. 1100; Potter v. Greenberg, 24 Pa. Super. Ct. 505; Crawford v. Steel [Mich.] 100 N. W. 902; Pizzie v. Nardello, 23 Pa. Super. Ct. 535. A promise to a debtor to pay his outstanding debts as part of the consideration for the transfer of a stock of goods is not within the statute. Wear & Boogher Dry Goods Co. v. Kelly [Miss.] 36 So. 258.

67. The promise of an unauthorized agent that his alleged principal will pay the debt. Groeltz v. Armstrong [Iowa] 99 N. W. 128; East Baltimore Lumber Co. v. K'nessett Israel Anshe S'phard Congregation [Me.] 59 A. 180.

Credit given to the promisor alone: Newton Grain Co. v. Pierce [Mo. App.] 80 S. W. 268; Andresen v. Upham Mfg. Co. [Wis.] 98 N. W. 518; Stevenson v. Sterling [Mich.] 101 N. W. 523; Reisler v. Silbermintz, 90 N. Y. S. 967.

Novation: Simpson v. Carr, 25 Ky. L. R. 849, 76 S. W. 346; Berg v. Spitz, 87 App. Div. 632, 84 N. Y. S. 532; American Wire & Steel Bed Co. v. Schultz, 43 Misc. 637, 88 N. Y. S. 396.

68. See 2 Curr. L. 110.

69. Austin v. Kuehn, 111 Ill. App. 506; Id., 211 Ill. 113, 71 N. E. 841.

70. Kramer v. Kramer, 90 App. Div. 176, 86 N. Y. S. 129; Allen v. Moore, 30 Colo. 307, 70 P. 682.

71. See 2 Curr. L. 110.

72. Walker v. Russell [Mass.] 71 N. E. 86.

73. See 2 Curr. L. 110.

74. General Statutes of New Jersey, p. 1640, § 10. " * * * no broker or real estate agent shall be entitled to any commissions unless authorized in writing and the rate of commission therein stated * * *." N. Y. Laws of 1901, c. 128, p. 312, § 640d. "In cities of the first and second class, any person who shall offer for sale any real estate without written authority of the owner * * * shall be guilty of a misdemeanor." Cohen v. Boccuzzi, 42 Misc. 544, 86 N. Y. S. 187; David Bradley v. Bower [Neb.] 99 N. W. 490; Leimbach v. Regner [N. J. Law] 57 A. 138. Where such act is made a crime, no recovery of compensation is allowable. Davis v. Kidansky, 86 N. Y. S. 6.

75. Blair v. Austin [Neb.] 98 N. W. 1040.

agreement to pay an agent one-half of proceeds received from sale of real estate in consideration for his services in negotiating sale is not a contract concerning lands within the statute of frauds.[76]

§ 6. *Agreements with executors or administrators.*[77]—The statute applies to the special promise of an executor or an administrator to answer damages out of his own estate.[78] This clause refers to promises to pay claims against the estate for which the representative would not otherwise be personally liable. It excludes promises made by the representative as original obligations.[79]

§ 7. *Agreements respecting real property or an estate or interest therein.*[80] —Other than lease for not more than one year,[81] no estate or interest in land or in any way relating thereto may be created, granted, assigned, surrendered, or declared, unless by act or operation of law,[82] or by deed or conveyance in writing subscribed by the parties thereto.[83] To be within the statute, the contract must

76. Huff v. Hardwick [Colo. App.] 75 P. 593; Gwinnup v. Sibert [Mo. App.] 80 S. W. 589.

77. See 2 Curr. L. 110, n. 7.

78. NOTE: "The liabilities of an executor or administrator in respect of the estate of a deceased person are of two kinds," says Sir William Anson. "At common law, he may sue and be sued upon obligations devolving upon him as representative of the deceased. In equity, he may be compelled to carry out the directions of the deceased in respect of legacies, or to give effect to the rules of law relating to the division of the estate of an intestate. In neither case is he bound to pay anything out of his own pocket. His liabilities are limited by the assets of the deceased. But if, in order to save the credit of the deceased, or for any other reason, he chooses to promise to answer damages out of his own estate, that promise must be in writing, together with the consideration for it, and must be signed by him or his agent." Anson, Cont. [8th Ed.] 60; Crews v. Williams, 2 Bibb [Ky.] 262, 4 Am. Dec. 701; Silsbee v. Ingalls, 10 Pick. [Mass.] 525; Smithwick v. Shepherd, 49 N. C. 196; Okeson's Appeal, 59 Pa. 99; Sidle v. Anderson, 45 Pa. 464; Ciples v. Alexander's Adm'r, 3 Brev. [S. C.] 558, 2 Tread. Const. [S. C.] 767; Harrington v. Rich, 6 Vt. 565.—From Hammon, Cont. § 283.

79. NOTE: The clause of the statute of frauds which relates to a special promise of an executor or administrator to answer out of his own estate **has reference to claims against the estate for which the executor or administrator is liable only as the representative** of the decedent, and which, but for the promise, he would be liable to discharge only in due course of administration, and to the extent of the property that might come into his hands. Dillaby v. Wilcox, 60 Conn. 71, 25 Am. St. Rep. 299. It does not apply to a promise to pay a debt of the decedent out of the assets of the estate. Greening v. Brown, Minor [Ala.] 353; Piper v. Goodwin, 23 Me. 251; Stebbins v. Smith, 4 Pick. [Mass.] 97. "Executors and administrators," says Mr. Bishop, "in the discharge of their duties, enter into various original obligations, as well as incur responsibilities for torts, which are personal in their inception, binding them, and not the estate, though sometimes they may charge over to the estate what they thus pay out. With these, the statute has nothing to do." Bishop, Cont. § 1254; Stoudenmeier v. Williamson, 29 Ala. 558; Chambers v. Robbins, 28 Conn. 544; Bott v. Barr, 95 Ind. 243; Farrelly v. Ladd, 10 Allen [Mass.] 127; Wales v. Stout, 115 N. Y. 638; Beaty v. Gingles, 53 N. C. 302; Kershaw's Ex'rs v. Whitaker, 1 Brev. [S. C.] 9; McGloin's Ex'rs v. Vanderlip, 27 Tex. 366; Collins v. Row, 10 Leigh [Va.] 114. This clause of the statute does not apply to a promise made by a man before he became administrator, although he afterwards becomes such. Tomlinson v. Gill, 1 Amb. 330. It does not apply where the representative's promise to pay money out of his own estate, not as damages for which the decedent's estate is liable, but to subserve some end of his own. Britton v. Angier, 48 N. H. 420; Wales v. Stout, 115 N. Y. 638; Fehlinger v. Wood, 134 Pa. 517; Bellows v. Sowles, 57 Vt. 164, 52 Am. Rep. 118; Huffcut & W. Am. Cas. Cont. 110. If a contract by an executor or an administrator is founded upon a consideration accruing after the decedent's death, it is deemed his individual contract, and is not within the statute, although it may relate to, and be connected with, matters growing out of the administration of the estate. Holderbaugh v. Turpin, 75 Ind. 84, 39 Am. Rep. 124; Fehlinger v. Wood, 134 Pa. 517.—From Hammon, Cont. § 283.

80. See 2 Curr. L. 110.

81. Two years in Fla.; three years in Ind.; N. H.; N. J.; N. C.; Pa.; Tenn; five years in Va.; W. Va. The lessee under a five-year contract is a tenant from year to year. Humphrey Hardware Co. v. Herrick [Neb.] 99 N. W. 233.

82. See Resulting Trusts, infra § 9; Surrender of Instruments, infra § 10.

83. Oral agreement is void for all purposes. Rodgers v. Lamb's Estate [Mich.] 100 N. W. 440. Contracts for sale of lands. Weigold v. Pittsburg, etc., R. Co., 208 Pa. 81, 57 A. 188; Penn. v. Tex. Yellow Pine Lumber Co. [Tex. Civ. App.] 79 S. W. 842; Commins v. Perry, 44 Misc. 458, 90 N. Y. S. 92. A contract for purchase of an oil lease. Wilhite v. Skelton [Ind. T.] 82 S. W. 932. Contract that land shall be held in equal shares and partitioned. McKinley v. Lloyd, 128 F. 519. An oral agreement by purchaser of real estate at a judicial sale to take a deed in his own name and convey to another is void as a conveyance of real estate.

be one which transfers or creates some interest in land.[84] Thus an agreement to divide profits derived from land,[85] or to enter into a partnership to deal in lands, is not within the statute.[86] A parol exchange, where some interest in land is transferred, is within the statute;[87] but not an oral agreement establishing a boundary line, for it assumes the parties merely decide what was the true line,[88] and on the same principle the parol compromise of a suit involving a devise of real estate is good,[89] though a promise to devise realty must be in writing.[90] The sale of standing timber,[91] or assignment of an oil lease,[92] is of an interest in realty, but emblements may pass by parol if personalty.[93] An enforceable easement cannot be created by parol,[94] but the parol permission to use the land of another amounts to a mere license which may be revoked at any time.[95]

§ 8. *Sale of goods.*[96]—By the terms of the statute, all sales of goods, wares and merchandise,[97] above the value of $50,[98] are void unless the buyer shall accept part of the goods so sold and the seller actually receive the same or give something in earnest in part payment to bind the bargain.[99] The statute has nothing to do with contracts for manufacture,[1] or for the installation of devices in buildings;[2] but a contract for the supply of water is clearly within the terms of the statute.[3] Where in a joint undertaking, parties agree by parol to act as partners in the purchase and handling of goods, it is not within the statute.[4]

§ 9. *Trusts.*—An express trust is not generally enforceable unless it is in

Largey v. Leggat [Mont.] 75 P. 950. Antenuptial parol contract as to the rights of the parties in the real estate of the other is void. Steen v. Kirkpatrick [Miss.] 36 So. 140. Creation of lien. Clark v. Elmendorf [Tex. Civ. App.] 78 S. W. 538. Leases for more than one year unenforceable. Humphrey Hardware Co. v. Herrick [Neb.] 99 N. W. 233; York v. Washburn [C. C. A.] 129 F. 564; Dechenbach v. Rima [Or.] 78 P. 666; Sorrells v. Goldberg [Tex. Civ. App.] 78 S. W. 711. A lease for one year is not within the statute. Yule v. Fell, 123 Iowa, 662, 99 N. W. 559. An oral agreement for a lease for a year to commence in future is good. Paulton v. Kreiser [S. D.] 101 N. W. 46. But see Booker v. Heffner, 88 N. Y. S. 499.

84. An agreement to have money in readiness to loan the plaintiff on mortgage security creates no interest in lands. Ehlen v. Selden [Md.] 59 A. 120. An option since it vests no estate in the holder need not be in writing. Hughes v. Antill, 23 Pa. Super. Ct. 290. Extension of option. Cummins v. Beavers [Va.] 48 S. E. 891. Contract for insurance of realty is not within statute. Mattingly v. Springfield Fire & Marine Ins. Co. [Ky.] 83 S. W. 577.

85. Wilhite v. Skelton [Ind. T.] 82 S. W. 932.

86. Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195; Mason v. Spiller [Mass.] 71 N. E. 779.

87. Newlin v. Hoyt, 91 Minn. 409, 98 N. W. 323.

88. Steinhilber v. Holmes [Kan.] 75 P. 1019.

89. Clawson v. Brewer [N. J. Eq.] 58 A. 598.

90. Lozier v. Hill [N. J. Eq.] 59 A. 234. A written contract to dispose of property by will may be enforced against heirs, devisees or personal representatives. Austin v. Kuehn, 211 Ill. 113, 71 N. E. 841. A parol gift in causa mortis is bad. In re Sproule's Estate, 42 Misc. 448, 87 N. Y. S. 432.

91. Mine La Motte Lead & Smelting Co. v. White [Mo. App.] 80 S. W. 356.

92. Wilhite v. Skelton [Ind. T.] 82 S. W. 932.

93. The parol release of a landlord's lease on growing crops is valid, since they are regarded as personalty. Wimp v. Early [Mo. App.] 78 S. W. 343.

94. Easement of light and air. Hutchins v. Munn, 22 App. D. C. 88. Easement of passage for a railway. Atlanta, etc., R. Co. v. Southern R. Co. [C. C. A.] 131 F. 657. An agreement for location of a pipe line. Nesmith v. Martin [Colo.] 75 P. 590. Permission for passage. Peer v. Wadsworth [N. J. Eq.] 58 A. 379.

95. Entwhistle v. Henke, 211 Ill. 273, 71 N. E. 990.

96. See 2 Curr. L. 111.

97. "Goods, wares and things in action" in some states.

98. $100 in Ariz.; $130 in Ark., Mo., N. J.; $200 in Cal., Idaho; $300 in Mont., Utah; $33 in N. H.; and $40 in Vt.; all sales in Fla., and Iowa and all sales of moveables in La.

99. Johnson v. Holland [Iowa] 99 N. W. 708; Nebraska Bridge Supply & Lumber Co. v. Conway & Son [Iowa] 98 N. W. 1024; Daytona Bridge Co. v. Bond [Fla.] 36 So. 445.

1. Where a manufacturer is habitually making shoes, his contract to make and deliver those of the same style is a contract of sale, not of manufacture. Yoe v. Newcomb [Ind. App.] 71 N. E. 256.

2. Steam Heating plant. Putnam Foundry & Mach. Co. v. Canfield [R. I.] 56 A. 1033.

3. Jersey City v. Harrison [N. J. Law] 58 A. 100.

4. Bogigian v. Hassanoff [Mass.] 71 N. E. 789.

writing,[5] but the statute does not apply to constructive or resulting trusts which are created by operation of law.[6]

§ 10. *The surrender of a written instrument,* coupled with an intention to extinguish the interest of the holder, is a surrender by operation of law and not within the statute.[7]

§ 11. *What will satisfy the statute. A. Writing.*[8]—A written agreement which will satisfy the statute of frauds may be gathered from letters, telegrams and writings concerning the subject-matter so connected as to fairly constitute one paper,[9] but the memorandum must be complete in itself and leave nothing to rest in parol,[10] and describe the parties and the subject-matter so that it can be identified with reasonable certainty.[11] Where the entire contract must be in writing, the acceptance as well as the offer must be written.[12] In some states, the consideration need not be expressed in the instrument.[13] The minutes of a cor-

5. Brennaman v. Schell [Ill.] 72 N. E. 412; Kuteman v. Carroll [Tex. Civ. App.] 80 S. W. 842.

6. Resulting trusts. Brennaman v. Schell [Ill.] 72 N. E. 412; McMurray v. McMurray [Mo.] 79 S. W. 701. Constructive trust. Phillips v. Hardenburg [Ky.] 80 S. W. 891; Markham v. Katzenstein, 209 Ill. 607, 70 N. E. 1071.

7. Marsh v. Despard [W. Va.] 49 S. E. 24; Yule v. Fell, 123 Iowa, 662, 99 N. W. 559. The abandonment of a mining claim and locating thereon by another with permission of former occupant. Conn v. Oberto [Colo.] 76 P. 369.

8. See 2 Curr. L. 112.

9. Halsell v. Renfrow [Okl.] 78 P. 118; Helios-Upton Co. v. Thomas, 96 App. Div. 401, 89 N. Y. S. 222. Though the same paper was not signed by both. David Bradley v. Bower [Neb.] 99 N. W. 490. Composed of letters written subsequent to the transaction. Cooper v. Bay State Gas Co., 127 F. 482. A copy of a written order for goods written to the vendor by his agent, and a letter of the vendor to the vendee "cancelling your order given our Mr. R" are not a sufficient memorandum. Nebraska Bridge Supply & Lumber Co. v. Conway & Son [Iowa] 98 N. W. 1024. An executory contract for the sale of goods is evidenced by a letter written in response to a bill sent by seller. Huguenot Mills v. Jempson & Co. [S. C.] 47 S. E. 687.

10. Halsell v. Renfrow [Okl.] 78 P. 118.

11. **Descriptions held to satisfy the statute:** Where the contract for the sale of lands by an administrator contains a sufficient description of the property for identification, together with price and names of parties and is made subject to confirmation of the court. In re Robinson's Estate, 142 Cal. 152, 75 P. 777. "Copy of order placed by A., successor to B. for account of C. To be delivered Jany., Feby., March, 1903. Terms ——— all prices based on gold ——— and subject to any alteration in the tariff ———" and signed by A. Blum v. Blum, 90 N. Y. S. 445. Reference to property by the street numbers. Gage v. Cameron [Ill.] 72 N. E. 204. "¼ Sc. 7, T. 13, R. 4." Ruzicka v. Hotovy [Neb.] 101 N. W. 328.

Descriptions held not to satisfy the statute: A card bearing on one side name of promisor and on other $7,500 as evidencing a promise in consideration of marriage. Austin v. Kuehn, 111 Ill. App. 506; Id., 211 Ill. 113, 71 N. E. 841. "Property 76 Mangin St. $9,000, no less" and signed. Cohen v. Boccuzzi, 42 Misc. 544, 86 N. Y. S. 187. "6,100 acres under consideration in Tyler County." Penn v. Tex. Yellow Pine Lumber Co. [Tex. Civ. App.] 79 S. W. 842. "South-east of twenty-five, nine, Kingman, Kansas." Hartshorn v. Smart, 67 Kan. 543, 73 P. 73.

12. Butterfield v. Commercial Cattle Co. [Neb.] 101 N. W. 250; Newlin v. Hoyt, 91 Minn. 409, 98 N. W. 323.

Held to be a sufficient acceptance: Where the secretary of a corporation wrote a memorandum of a sale of land under the printed name of the corporation, and also wrote a letter to the president, requesting him to pay the vendor, signing the letter, it was held that there was a sufficient signing of the corporation under the statute of frauds. Anderson v. Wallace Lumber & Mfg. Co., 30 Wash. 147, 70 P. 247. The writing the word "accepted" over his signature by the vendor on the back of a letter of the vendee proposing terms of sale. Gough v. Loomis, 123 Iowa, 642, 99 N. W. 295. A receipt of payment of an instalment of purchase price of lands describing the same and signed by the vendor. Hall v. Misenheimer [N. C.] 49 S. E. 104.

Held not to be a sufficient acceptance: The endorsement of the name of the owner of property on the check given by prospective purchaser for earnest money. Koenig v. Dohm, 209 Ill. 468, 70 N. E. 1061. Where correspondence which purported to ratify an oral agreement omits certain important parts thereof. Brauer v. Oceanic Steam Nav. Co., 178 N. Y. 339, 70 N. E. 863. Signing of a deed and sending it to one's attorney do not constitute a sufficient memorandum within the statute. Morrow v. Moore, 98 Me. 573, 57 A. 81. The indorsement by the principal of a check for earnest money attached to a written contract for the sale of lands, the check does not describe the lands. Thompson v. New South Coal Co., 135 Ala. 630, 34 So. 31.

13. Ruzicka v. Hotovy [Neb.] 101 N. W. 328. The true consideration may be proved by parol irrespective of the statute. Brumback v. Chowning [Ky.] 82 S. W. 974.

poration do not constitute a sufficient memorandum to satisfy the statute.[14] In many states by statute or decision the authority of an agent to execute an unsealed instrument must be in writing;[15] but in others the common law rule prevails.[16] Since an option creates no estate in land, an agent need not have written authority to procure the same,[17] nor need an agent to accept the delivery of a deed,[18] nor where, because of his implied agency, he binds his partner;[19] and the lack of such written authority cannot be pleaded against an assignee where the principal personally executed the assignment.[20]

(§ 11) *B. Delivery and acceptance.*[21]—By its terms, where there is a delivery and acceptance of goods sold, the case is without the statute, and these need not be concurrent with purchase.[22] Moreover, the acceptance and receipt of goods sold by one who assumes the contract from the vendee is sufficient,[23] but the exception applies only to the single contract and not those concurrent with it.[24]

(§ 11) *C. Part payment and earnest money.*[25]—Part payment for goods sold takes the sale out the statute.[26]

§ 12. *Operation and effect of statute.*[27]—Noncompliance with the statute of frauds save in the case of sales of goods does not make the transaction void, but merely unenforceable,[28] nor where fully executed, may it be set saide,[29] nor is the statute any bar to an action for recovery of the consideration, when the contract is otherwise fully executed,[30] nor to a suit on the common counts for the part fully executed,[31] except where by the terms of the statute it is illegal. Where a parol agreement is invalid because of the statute, it cannot be cured by a parol promise to execute the principal agreement in writing.[32] Moreover, a court of equity will not permit the statute to be used as an instrument

14. A resolution adopted by a corporation declaring a willingness to sell the corporate property at a certain figure and empowering the president to execute and deliver the necessary deed is not a contract of sale so that its record will satisfy the statute of frauds. Cumberland, etc., R. Co. v. Shelbyville, etc., R. Co., 25 Ky. L. R. 1265, 77 S. W. 690.

15. Cohen v. Boccuzzia, 42 Misc. 544, 86 N. Y. S. 187; Landt v. Schneider [Mont.] 77 P. 307; Power v. Immigration Land Co. [Minn.] 101 N. W. 161; Covey v. Henry [Neb.] 98 N. W. 434; Mine La Motte Lead & Smelting Co. v. White [Mo. App.] 80 S. W. 356; Thompson v. New South Coal Co., 135 Ala. 630, 34 So. 31; Koenig v. Dohm, 209 Ill. 468, 70 N. E. 1061. Authority to fill out blanks left in a deed must be written. Lund v. Thackery [S. D.] 99 N. W. 856.

16. Kreutzer v. Lynch [Wis.] 100 N. W. 887.

17. Hughes v. Antill, 23 Pa. Super. Ct. 290.

18. Dorr Cattle Co. v. Des Moines Nat. Bank [Iowa] 98 N. E. 918.

19. Kreutzer v. Lynch [Wis.] 100 N. W. 887.

20. Gleadall v. Kenney, 23 Pa. Super. Ct. 576.

21. See 2 Curr. L. 114.

22, 23. Slater Brick Co. v. Shackleton [Mont.] 76 P. 805.

24. Where there was a parol agreement for the sale of two kinds of corporate stock which as to one was reduced to writing, the court held on the question of whether the delivery of this stock constituted part performance of the whole contract, that in the absence of evidence showing that the written contract did not restate the parol agreement, the delivery did not satisfy the statute of frauds as to the other stock. Koewing v. Wilder [C. C. A.] 128 F. 558.

25. See 2 Curr. L. 114.

26. Cooper v. Bay State Gas Co., 127 F. 482.

27. See 2 Curr. L. 114.

28. Michels v. West, 109 Ill. App. 418; Mott v. Ferguson [Minn.] 99 N. W. 804; Atlanta, etc., R. Co. v. Southern R. Co. [C. C. A.] 131 F. 657; Michels v. West, 109 Ill. App. 418; Koenig v. Dohm, 209 Ill. 468, 70 N. E. 1061. But see Seymour v. Warren, 86 App. Div. 403, 83 N. Y. S. 871. Where one party is ready, willing and anxious to perform, the other party cannot recover back the consideration. York v. Washburn [C. C. A.] 129 F. 564.

29, 30. See v. Mallonee [Mo. App.] 82 S. W. 557.

31. Booker v. Heffner, 95 App. Div. 84, 88 N. Y. S. 499. A real estate firm in writing offered to take entire charge of property of plaintiff and pay a certain sum monthly and commenced to perform under their offer. Though the contract was not accepted in writing, they can be held for the period of their possession according to the terms of the agreement. Seymour v. Warren [N. Y.] 71 N. E. 260.

32. McKinley v. Lloyd, 128 F. 519; Blair v. Austin [Neb.] 98 N. W. 1040.

for fraud, and in some cases where the parties have so altered their position that damages will not give any adequate remedy, specific performance or a constructive trust will be decreed,[33] though in some jurisdictions where the doctrine of specific performance is not recognized,[34] and by other courts the same result is reached on the doctrine of equitable estoppel.[35] Courts of equity will enforce the doctrine of specific performance on the ground of part performance when the agreement is certain and definite[36] and not subject to a conflict of evidence[37] and the acts relied on refer to and result from the agreement alone and are evidence thereof,[38] and the contract is so far executed as to render damages an insufficient remedy,[39] and offer is timely and not barred by laches,[40] but specific performance will not be allowed where there is an ample remedy at law.[41] There must also be a change of possession which must be new, absolute and yielded to by the other party.[42] While the part payment of a land contract without possession does not take a contract for the sale of lands out of the statute of frauds,[43] yet specific performance cannot be had on a wholly voluntary promise.[44] A stranger cannot avail himself of the unenforceability of a contract, since the defense is personal to the parties[45] who may waive it.[46]

33. Elsbury v. Shull, 32 Ind. App. 556, 70 N. E. 287; Platt v. Seif, 207 Pa. 614, 57 A. 68. One who marries in reliance upon an oral promise to convey land as a consideration therefor may have such contract enforced as the frand takes it out of the statute of frauds. Allen v. Moore, 30 Colo. 307, 70 P. 682.

34. Doty's Adm'rs v. Doty's Guardian [Ky.] 80 S. W. 803.

35. Thompson v. New South Coal Co., 135 Ala. 630, 34 So. 31.

36, 37. Halsell v. Renfrow [Okl.] 78 P. 118. To take a case out of the Statute of Frauds and establish a trust by parol evidence, the contract must be shown by clear, certain and conclusive proof unequivocal in all its terms. Nesmith v. Martin [Colo.] 75 P. 590. A parol contract will not be enforced by specific performance unless certain and definite in its terms and established by uncontradicted evidence. Seitman v. Seitman, 204 Ill. 504, 68 N. E. 461.

38. To justify specific performance, the possession of land must be connected with the contract and not referable to any other cause. Hartshorn v. Smart, 67 Kan. 543, 73 P. 73. To take a case out of the statute by specific performance, all acts done thereunder must refer exclusively to the contract. Seitman v. Seitman, 204 Ill. 504, 68 N. E. 461.

39. Halsell v. Renfrow [Okl.] 78 P. 118.

40. Where a landowner agrees orally with a railroad to sell land and acting thereon it extends its line and after twenty months demands a deed, it has no cause for complaint at his refusal. Weigold v. Pittsburg, etc., R. Co., 208 Pa. 81, 57 A. 188.

41. Neal v. Parker [Md.] 57 A. 213; Pattat v. Pattat, 93 App. Div. 102, 87 N. Y. S. 140.

42. Possession to take an oral contract out of the statute of frands must be actual, notorious and exclusive and taken and held in pursuance of such contract. O'Brien v. Foulke [Kan.] 77 P. 103; Sorrells v. Goldberg [Tex. Civ. App.] 78 S. W. 711. A parol gift accompanied by possession and valuable improvements will be enforced. Shannon v. Marchbanks [Tex. Civ. App.] 80 S. W. 860. A constructive trust will not be decreed on a parol agreement when neither party had any interest in the property. Largey v. Leggat [Mont.] 75 P. 950. Where in reliance on a parol easement to overflow land a mill and dam were constructed, specific performance was allowed. Johnson v. Sherman County Irr., Water Power & Imp. Co. [Neb.] 98 N. W. 1096. Where co-tenants have consented to a parol partition of real estate followed by exclusive possession, payment of taxes, and permanent improvements, they are estopped to question it as void under the statute of frauds. McCullough v. Finley [Kan.] 77 P. 696. Where a purchaser under a parol contract has been placed in possession and held under the contract and made valuable and permanent improvements, and such possession has been actual and exclusive and not as tenant, specific performance will be enforced. Ratliff v. Sommers [W. Va.] 46 S. E. 712; Peery's Adm'r v. Elliott, 101 Va. 709; 44 S. E. 919. Possession forceably resisted is insufficient. Baxter v. Doane, 208 Pa. 585, 57 A. 1062. Persons not sui juris are not competent to yield possession. Kuteman v. Carroll [Tex. Civ. App.] 80 S. W. 842.

43. Thompson v. New South Coal Co., 135 Ala. 630, 34 So. 31.

44. Hutchins v. Munn, 22 App. D. C. 88; Commins v. Perry, 44 Misc. 458, 90 N. Y. S. 458.

45. Mott v. Ferguson [Minn.] 99 N. W. 804; Atlanta, etc., R. Co. v. Southern R. Co. [C. C. A.] 131 F. 657.

NOTE: No one but the party to be charged, or some one in privity with him, may urge the statute of frauds either as a defense or as ground for affirmative relief. The benefits of the statute are personal. A stranger can neither himself set up noncompliance with the statute, nor compel the contracting party to do so. Cooper v. Hornsby, 71 Ala. 62; Simpson v. Hall, 47 Conn. 217; King v. Bushnell, 121 Ill. 656; Dixon v. Duke, 85 Ind. 434; Bohannon v. Pace, 6 Dana [Ky.] 194; Beal v. Brown, 13 Allen [Mass.] 114; Cresswell v. McCalg, 11 Neb. 222; Tibbetts v. Flanders, 18 N. H. 284;

On a question of conflicting laws, it is generally held that the statute reaches only the remedy and not the validity of the contract.[47] The statute of frauds is held by the Federal courts to be a rule of property in which the state law governs and not a matter of general common and commercial law.[48]

§ 13. *Pleading and proof.*[49]—The complaint need not set up that the contract is in writing,[50] for till the contrary is shown, it is presumed to be valid and enforceable;[51] but when the complaint shows that the contract is not in writing when so required to be by the statute, demurrer is the appropriate remedy.[52] Where it appears at the trial for the first time that the contract was oral, objection may be then taken.[53] Generally, to take advantage of the statute of frauds, it must be pleaded,[54] though where by the terms of the statute the contract is void, a general denial would seem sufficient;[55] but in any event, the enforceability of the contract for this reason cannot be raised for the first time upon appeal.[56]

Livermore v. Northrup, 44 N. Y. 107; Davis v. Inscoe, 84 N. C. 396; Lefferson v. Dallas, 20 Ohio St. 68; Houser v. Lamont, 55 Pa. 311; 93 Am. Dec. 755; First Nat. Bank of Appleton v. Bertschy, 52 Wis. 438. Thus, an administrator who, by verbal agreements with the creditors of the estate, has induced them not to commence actions against the estate within the two years allowed by statute, cannot be required, for the benefit of the next of kin, to set up the defense of the statute of frauds in personal actions against himself upon his promises. Ames v. Jackson, 115 Mass. 508.—From Hammon, Cont. § 310.

46. NOTE. The benefit of the statute of frauds may be waived by the party to be charged. Godden v. Pierson, 42 Ala. 370; Nunez v. Morgan, 77 Cal. 427; Kirksey v. Kirksey, 30 Ga. 156; Doe d. Whitney v. Cochran, 2 Ill. 209; Jacob v. Smith, 5 J. J. Marsh [Ky.] 380; Cahill v. Bigelow, 18 Pick. [Mass.] 369; Montgomery v. Edwards, 46 Vt. 151, 14 Am. Rep. 618. The defense that a contract is within the statute of frauds is waived by allowing it to be proved by parol evidence without objection. Sartwell v. Sowles, 72 Vt. 270, 82 Am. St. Rep. 943 and this may be done even as against his creditors. Brown v. Rawlings, 72 Ind. 505; Goff v. Rogers, 71 Ind. 459; Livermore v. Northrup, 44 N. Y. 107. This question of waiver **usually arises upon the pleadings,** and in this respect presents a conflict of opinion. In some jurisdictions, the statute of frauds must be specially pleaded as a defense unless the declaration or complaint alleges a writing, in which case a general denial is sufficient to admit of the defense of noncompliance with the statute. Skinner v. McDouall, 2 De Gex & S. 265; McClure v. Otrich, 118 Ill. 320; Graham v. Pierce, 143 Mass. 386; Hamer v. Sidway, 124 N. Y. 538; 21 Am. St. Rep. 693; Huffcut & W. Am. Cas. Cont. 143; Wells v. Monihan, 129 N. Y. 161; Crane v. Powell, 139 N. Y. 379; Lauer v. Richmond Co-operative Mercantile Inst., 8 Utah, 305. Contra, Harris v. Frank, 81 Cal. 280; Suman v. Springate, 67 Ind. 115; Semmes v. Worthington, 38 Md. 298; Fontaine v. Bush, 40 Minn. 141, 12 Am. St. Rep. 722. If a bill shows on its face that the contract is obnoxious to the statute of frauds, the objection may be urged by demurrer. Phillips v. Adams, 70 Ala. 373; Bolling v. Munchus, 65 Ala. 558. Unless the complaint shows on its face that the agreement sued on is not in writing, the defense of the statute of frauds must be specially pleaded, else it is waived. Bailey v. Irwin, 72 Ala. 505. When the contract is denied, it is not necessary to plead the statute as a bar. It is as fully raised by a general denial as by special plea. Feeney v. Howard, 79 Cal. 525; 12 Am. St. Rep. 162; Hurt v. Ford, 142 Mo. 283; Barrett v. McAllister, 33 W. Va. 738. But if the complaint alleges a contract and the answer admits it, the defense of the statute is waived unless specially set forth in the answer. Iverson v. Cirkel, 56 Minn. 299; Maybee v. Moore, 90 Mo. 340; Barrett v. McAllister, 33 W. Va. 738.—From Hammon Cont. § 311.

47. Hammon, Cont. § 312, citing numerous leading cases pro and con.

48. York v. Washburn [C. C. A.] 129 F. 564.

49. See 2 Curr. L. 115.

50. Ansley v. Hightower [Ga.] 48 S. E. 197.

Where the complaint pleading a lease which must be written is silent the defendant may move to have it made more definite. Rockey v. Haslett, 91 App. Div. 181, 86 N. Y. S. 320.

51. Laybourn v. Zinnis [Minn.] 99 N. W. 798; Ansley v. Hightower [Ga.] 48 S. E. 197; Phillips v. Hardenburg [Mo.] 80 S. W. 891.

52. Wilhite v. Skelton [Ind. T.] 82 S. W. 932. Where a contract is void for lack of written authority of the agent executing it, the appropriate way of taking advantage of it is by demurrer. Thompson v. New South Coal Co., 135 Ala. 630, 34 So. 31.

53. Brauer v. Oceanic Steam Nav. Co., 178 N. Y. 339, 70 N. E. 863; Booker v. Heffner, 95 App. Div. 84, 88 N. Y. S. 499.

54. Kramer v. Kramer, 90 App. Div. 176, 86 N. Y. S. 129; Missouri Real Estate Syndicate v. Sims, 179 Mo. 679, 78 S. W. 1006; Christiansen v. Aldrich [Mont.] 76 P. 1007; Koenig v. Dohm, 209 Ill. 468, 70 N. E. 1061; Howell v. Parker [N. C.] 48 S. E. 762. When pleaded, the statute is an affirmative defense and under Civ. Code. Proc. § 1528 is taken as denied without reply. Duane v. Molinak [Mont.] 78 P. 588; Pattat v. Pattat, 93 App. Div. 102, 87 N. Y. S. 140.

55. Lozier v. Hill [N. J. Eq.] 59 A. 234.

56. Appeal from report of referee. Holt v. Howard [Vt.] 58 A. 797.

When pleaded, the burden is on the plaintiff to establish a contract within exceptions to statute.[57] Evidence of a custom to treat parol licenses as binding is not sufficient to controvert the effect of the statute.[58]

FRAUDULENT CONVEYANCES.

§ 1. **The Fraud and Its Elements (1535).** Sales by a Retailer of His Entire Stock at a Single Transaction (1537). Consideration (1537). Retention of Possession or Apparent Title (1538). Reservation of Benefits and Resulting Trusts (1539). Intent (1539). Fraud of Grantee or Notice to Him of Fraud (1540). Relationship of Parties (1541). Preference to Creditors (1542).
§ 2. **Validity and Effect (1543).**
§ 3. **Who May Attack (1543).**
§ 4. **Rights and Liabilities of Persons Claiming Under Fraudulent Grantees (1545).**
§ 5. **Extent of Grantee's Liability (1545).**
§ 6. **Remedies of Creditors (1545).**

§ 1. *The fraud and its elements.*[1]—A conveyance, the object, tendency or effect of which is to defraud another,[2] or the intent of which is to avoid some duty or debt due by or incumbent on the party making it,[3] is fraudulent. There must be a creditor to be defrauded,[4] but subsequent creditors under certain circumstances may impeach,[5] and if a conveyance is constructively fraudulent as

57. Brophy v. Idaho Produce & Provision Co. [Mont.] 78 P. 493.

58. Entwhistle v. Henke, 211 Ill. 273, 71 N. E. 990.

1. See 2 Curr. L. 115.

2. Where an insolvent purchased property, took title in the name of a third party and conveyed to another who had notice. Gilmour v. Colcord, 96 App. Div. 358, 89 N. Y. S. 589. Evidence held to show that a mortgage was executed for the purpose of defrauding creditors and without consideration. Zimmerman v. McMasters, 25 Ky. L. R. 455, 76 S. W. 5. Where a parent orally gave land to her son and after incurring a large indebtedness formally deeded it to him without his knowledge. Bank of Willows v. Small [Cal.] 78 P. 263. Transfer to a corporation of which the debtor and his family owned all the stock held fraudulent. Bradshaw v. Halpin [Mo.] 79 S. W. 685. Proof of foreclosure of a mortgage, entry of a deficiency judgment and transfer of property in question just prior to foreclosure establishes a prima facie case. Wise v. Pfaff [Md.] 56 A. 815. Where an officer of an insolvent corporation transferred a part of its assets to one who had notice of its financial condition. The consideration was to be property transferred to the officer for his personal use. Mott v. Edwards, 90 N. Y. S. 303.

3. A voluntary conveyance made on the eve of marriage with intent to defeat marital rights. Collins v. Collins [Md.] 57 A. 597. A partner of an insolvent firm giving a chattel mortgage on all the property of the firm within four months prior to its bankruptcy to secure a single creditor, the fact not being disclosed at the time nor afterward to his partner must be held to have given the mortgage with intent to hinder, delay, or defraud his creditors, and is void under § 67e, Act 1898. Pollock v. Jones [C. C. A.] 124 F. 163. Where contractors were given a certificate of deposit to be paid when the county was relieved from liability for mechanics' liens against a court house constructed and the contractors negotiated such certificates under the belief that mechanics' liens could not be enforced, evidence held to show the transfer fraudulent. Looney v. Bartlett [Mo. App.] 81 S. W. 481. A chattel mortgage to one creditor under a secret agreement that the debtor shall receive it back. Adams v. Dempsey, 35 Wash. 80, 76 P. 538. Where principal in a bond transferred his property pending suit thereon by his sureties. Archer v. Laidlaw [Mich.] 97 N. W. 159. Bankrupt's mother was gratuitously taken care of by bankrupt and her husband; the mother deeded property to bankrupt, before bankruptcy proceedings, for a nominal consideration, bankrupt voluntarily deeded the property to her husband and shortly after applied for a discharge in bankruptcy; held a fraudulent conveyance and not in execution of a trust to convey the property to the husband in satisfaction of the expenses incurred in caring for bankrupt's mother. Breschemier v. Houston [Iowa] 96 N. W. 755.

4. A deed which merely ratifies one previously executed is not fraudulent as to one who was not a creditor at the time the first was executed. Searcy v. Gwaltney Bros. [Tex. Civ. App.] 81 S. W. 576.

5. Where actual fraud or an intent to defeat their rights is shown. See post, § 3, Who may attack. In the absence of intent to defraud, a conveyance is not fraudulent as to subsequent creditors. Searcy v. Gwaltney Bros. [Tex. Civ. App.] 81 S. W. 576. Fraud is to be inferred from circumstances when they are such as to lead a reasonable man to the conclusion that there was an intent to defraud creditors. Miller v. Gillispie, 54 W. Va. 450, 46 S. E. 451. Evidence held to show that a mortgage was executed with the intent on the part of the mortgagor to defraud future creditors, which intent was shared by the mortgagee. Levy v. Levy [N. J. Eq.] 57 A. 1011. A husband made a voluntary conveyance to his wife prior to incurring indebtedness. In subsequent divorce proceedings, the wife conveyed the property to a son on the theory that the land still belonged to the husband. This conveyance was made to defraud the husband's creditors. Held, the original conveyance fraudulent and not a reasonable provision for the wife which the husband

to existing creditors, it might be so also as to subsequent creditors.[6] There must be a conveyance[7] of property of value[8] out of which the creditor could have satisfied a portion of his claim;[9] therefore there can be no fraudulent conveyance of exemptions,[10] except for a liability incurred prior to the time the property was declared exempt,[11] or as to a debt for its purchase price.[12]

A mortgage to cover after-acquired property,[13] or to secure future indebtedness,[14] or on its face purporting to secure an unconditional debt, yet in fact to secure a contingent liability, is not fraudulent.[15] If one be insolvent or if he contemplate insolvency, he cannot secure a pre-existing debt, whether the mortgagee have notice or not;[16] but if money be advanced to an insolvent person, or to one contemplating insolvency by one who has no notice, security taken at the time will stand.[17]

could make as against subsequent creditors. Scott v. Aultman Co., 211 Ill. 612, 71 N. E. 1112.

6. State v. Martin [Conn.] 58 A. 745.

7. Evidence held to show that property levied on was property of the execution debtor and that he had not conveyed it fraudulently or otherwise. Lackner v. Sawyer [Neb.] 98 N. W. 49. Evidence held to show that a wife was the owner and that there had been no conveyance. Rachofsky & Co. v. Benson [Colo. App.] 74 P. 655. An instrument not conveying the legal title is not fraudulent. Meeker v. Warren [N. J. Eq.] 57 A. 421. Evidence held to show that a debtor did not own the property which is sought to be made the subject of a fraudulent conveyance. Thayer v. Usher, 98 Me. 468, 57 A. 839.

8. Farm lease transferred from husband to wife was of no value. McCormick Harvesting Mach. Co. v. Ponder, 123 Iowa, 17, 98 N. W. 303. It is not a fraudulent conveyance for one to attempt to prevent property coming to him, especially where the attempt would have proven futile. Marshall v. U. S. Trust Co., 93 App. Div. 252, 87 N. Y. S. 747. Where an heir's share of an estate would not cancel his indebtedness to it, his assignment thereof to his mother to save administration was not fraudulent. Trabue v. Henderson [Mo.] 79 S. W. 451. Under Ky. St. 1903, § 4203, a liquor license is not transferrable, and an assignment thereof by an insolvent licensee did not render his assignee liable to pay anything to the trustee in bankruptcy. Bonnie & Co. v. Perry's Trustee, 25 Ky. L. R. 1560, 78 S. W. 208.

9. Not of property held in trust. Citizens' Nat. Bank v. Sturgis Nat. Bank [Tex. Civ. App.] 81 S. W. 550. Property paid for with a wife's money was taken in the name of the husband. After he became indebted, he deeded it to her. Held, in the absence of evidence, that credit was extended to him because of this property, the conveyance could not be assailed. Torrey v. Dickinson, 111 Ill. App. 524. It is not a fraud on the husband, as to his curtesy, for a wife to purchase land with her separate funds and take title in the name of a third person. Brennaman v. Schell [Ill.] 72 N. E. 412.

10. See 2 Curr. L. 117, N. 55. Statutory exemptions. McClelland v. Barnard [Tex. Civ. App.] 81 S. W. 591. Money used for family **living expenses**. Gray v. Arnold, 140 Cal. 615, 74 P. 303. Creditors have no right to redeem from a mortgage foreclosure, the equity of redemption of which constituted a homestead and which had been transferred by the debtor. Palmer v. Bray [Mich.] 98 N. W. 849.

Homestead is not a subject of fraudulent conveyance (National Bank of Commerce v. Chamberlain [Neb.] 100 N. W. 943; Baxter v. Avery [Neb.] 98 N. W. 667; Stam v. Smith [Mo.] 81 S. W. 1217; Baxter v. Avery [Neb.] 98 N. W. 667; Heidelbach Friedlander & Co. v. Carter [Tex. Civ. App.] 79 S. W. 346), nor is an equity of redemption therein (Palmer v. Bray [Mich.] 98 N. W. 849), nor proceeds of sale thereof (Harris v. Meredith [Mo. App.] 81 S. W. 203), but the interest in a parent's homestead descending to an adult child not occupying it is (Hollinger v. Boatman's Bank [Kan.] 77 P. 263).

11. Walker v. Harold, 44 Or. 205, 74 P. 705.

12. Set up that the money borrowed was all he had which was less than the exemption law allows. Bass v. Citizens' Trust Co., 32 Ind. App. 583, 70 N. E. 400.

13. Future rents and profits; cattle to be acquired; future crops. Melton v. Williams Co. [Miss.] 36 So. 152.

14. Made to secure advances during the existence of business relations. Melton v. Williams Co. [Miss.] 36 So. 152. Provision in a mortgage to secure notes and balance on an open account is not rendered void by a provision that payments by mortgagor should first be applied to unsecured indebtedness. Id.

15. Given to secure the mortgagee as surety of the mortgagor on another debt. Gee v. Van-Natta-Lynds Drug Co. [Mo. App.] 78 S. W. 288.

16. A mortgage executed in contemplation of insolvency to secure an existing debt is fraudulent as to creditors. Miller v. Jourley [N. J. Eq.] 55 A. 1083.

17. Regina Music Box Co. v. Otto & Sons [N. J. Eq.] 56 A. 715. If a corporation mortgage to trustees to secure an antecedent debt pursuant to an agreement with a creditor to whom such mortgage is to be given and the mortgage covers property then owned and afterwards to be acquired, and providing that the trustees may sell on default of payment, and a further provision that they shall deliver the bonds secured to or upon the order of the company, such mortgage is not fraudulent. Id.

[To be concluded.]

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FRAUDULENT CONVEYANCES—Cont'd.

Sales by a retailer of his entire stock at a single transaction.[18]—There is a conflict of authority as to whether statutes are constitutional which make a sale by a retailer of his entire stock at a single transaction fraudulent unless recorded. Such a statute was held void in Utah[19] and valid in Connecticut.[20] It is held in Indiana that in order to uphold such legislation, it is necessary that it be construed as giving the creditor a lien analogous to that of a vendor or materialman.[21] Any other construction would render it unconstitutional.[22] The provisions of such statutes are intended to prevent fraud and not to change the law as to the effect of retention of possession by vendor after sale.[23]

As a general rule, transfers of personal property are to be construed according to the laws of the place of contract,[24] but not a transaction consummated outside a state for the express purpose of evading its laws.[25]

Consideration.[26]—A voluntary conveyance made in good faith by a solvent debtor is not fraudulent,[27] unless so declared by statute,[28] and will not be rendered so by subsequent insolvency not produced by causes existing at the time of the conveyance,[29] nor is such a conveyance fraudulent as to a subsequent purchaser who has constructive notice;[30] but otherwise if the debtor was insolvent at the time,[31] or rendered so by such conveyance.[32] In determining whether a con-

18. See 2 Curr. L. 117, n. 41.

19. Act March 14, 1901, c. 67, deprives a merchant owing debts of his liberty to contract, is class legislation and cannot be sustained as within the police power. Block v. Schwartz, 27 Utah, 387, 76 P. 22.

20. Gen. St. 1902, § 4868. Walp v. Mooar, 76 Conn. 515, 57 A. 277.

21. Sellers v. Hayes [Ind.] 72 N. E. 119. Such a sale cannot be impeached by a trustee in bankruptcy. Id.

22. If such a statute is construed so as to give a creditor whose claim arises from the sale of any part of the stock a right to subject the whole stock to liability for his indebtedness, it is unconstitutional as depriving creditors of the equal protection of the laws. Sellers v. Hayes [Ind.] 72 N. E. 119.

23. Spencer v. Broughton [Conn.] 58 A. 236.

24. See Conflict of laws, 3 Curr. L. 720.

25. Goods taken to New York, sold there, and brought back to Connecticut the next day for the purpose of avoiding a Connecticut statute relative to the sale of stocks of merchandise at a single transaction. Walp v. Mooar, 76 Conn. 515, 57 A. 277.

26. See 2 Curr. L. 117.

27. From husband to wife for the purpose of making reasonable provision for her. Johnson v. Murphy [Mo.] 79 S. W. 909. Grantor must make himself insolvent by gifts before they can be attacked by general creditors. Rogers v. Dimon, 106 Ill. App. 201; by a solvent debtor to his wife. White v. Besse [Cal.] 78 P. 649. Where no fraudulent intent is shown. Polk County Nat. Bank v. Scott [C. C. A.] 132 F. 897. An assignment of an insurance policy on the assignor's life, while solvent and with no intent to defraud creditors. King v. Cram, 185 Mass. 103, 69 N. E. 1049; State v. Martin [Conn.] 58 A. 745.

28. Under Code 1896, § 2156, a voluntary conveyance is void as to existing creditors, whatever the intent or financial condition of the grantor. Wood v. Potts [Ala.] 37 So. 253. Creditors may attack regardless of the sufficiency of grantor's assets. Id.

29. Insolvency caused by conversion of a trustee on whose bond he was surety. Johnson v. Murphy [Mo.] 79 S. W. 909. The happening of disaster subsequently, not contemplated at the time, does not affect validity. State v. Martin [Conn.] 58 A. 745.

30. A voluntary conveyance by an entryman before patent issued is not void as to the patentee's mortgagee after patent issued, the deed having been recorded as soon as executed. Bernardy v. Colonial & U. S. Mortg. Co. [S. D.] 98 N. W. 166.

31. Made by member of an insolvent partnership. Gray v. Brunold, 140 Cal. 615, 74 P. 303. Voluntary conveyance by debtor to one who conveyed in consideration of one dollar and marriage and a voluntary conveyance from the married couple held fraudulent. Bayley v. Bayley [N. J. Eq.] 57 A. 271. A delivery of a written assignment of shares of stock while the donor retained the use of the certificates to control the stock did not complete a valid gift, and a transfer by surrender of the certificates after becoming insolvent is fraudulent. Allen-West Commission Co. v. Grumbles [C. C. A.] 129 F. 287. A vendor retained the title after receiving the purchase price. The vendee when insolvent conveyed to another, no consideration being passed. Sievers v. Martin [Ky.] 82 S. W. 631.

32. Under Code, § 1547, where the assets exceeded liabilities by $125, but the grantor was entitled to $1,500 exemptions. Williams v. Hughes [N. C.] 48 S. E. 518. A voluntary conveyance by wife to husband. Multz v. Price, 91 App. Div. 116, 86 N. Y. S. 480. After verdict rendered in a tort action, the defendant conveyed all his property without consideration. Goothye v. Delatour, 111 La. 766, 35 So. 896. In Louisiana, the date of a debt for tort is the date of verdict rendered. Id.

sideration was passed, the transaction is to be considered in the light of surrounding circumstances.[33] A conveyance, pursuant to a promise the grantor was not legally obliged to fullfil, is not without consideration.[34] Mere inadequacy of consideration does not render a conveyance fraudulent,[35] but such fact may be considered in determining the good faith of the transaction,[36] and whether the consideration was adequate is a question for the jury.[37]

Retention of possession or apparent title.[38]—Retention of possession by the grantor raises a presumption of fraud,[39] but such presumption is not conclusive if the deed be of record.[40] In most states, it is provided by statute that a sale of personal property not followed by immediate delivery and continued change of possession is void[41] as to creditors and subsequent purchasers in good faith,[42] unless recorded,[43] though in Oklahoma, such a sale, though recorded, was held void as to existing creditors, regardless of statute,[44] and in Colorado, that creditors have actual knowledge of such sale is of no consequence.[45] Such a sale is fradulent as to subsequent creditors,[46] but a subsequent incumbrancer must show that he became such in good faith.[47] Words "immediate delivery" will be given a reasonable construction,[48] and what constitutes a change of posssession is purely a question of fact.[49] The delivery must, if possible, be real and ex-

33. An insolvent debtor executed to his brother a mortgage on all his property, though he had repeatedly declared that he owed him nothing. Adams v. Dempsey, 35 Wash. 80, 76 P. 538. Where evidence showed the improbability of the purchaser having the money and he was preparing to ship the goods out of the state to a place of which he had no knowledge, sale held fraudulent. Jordan v. Crickett, 123 Iowa, 576, 99 N. W. 163. Complaint alleging that a debtor paid to the purchaser at an execution sale the amount of his bid and took an assignment of the certificate of sale to a third party who held for his benefit as volunteer to prevent a resale in satisfaction of an unpaid portion of the judgment alleges that the debtor paid for the certificate with his own money. Balph v. Magaw [Ind. App.] 70 N. E. 188. Declaration in the deed that the price was paid is insufficient. Goothye v. Delatour, 111 La. 766, 35 So. 896.

34. Where a parent, pursuant to an oral promise, conveyed property to her daughter to save her harmless as surety on the mother's notes. Scudder & Co. v. Morris [Mo. App.] 82 S. W. 217.

35. Urdangen & G. Bros. v. Doner, 122 Iowa, 533, 98 N. W. 317; Mueller v. Renkes [Mont.] 77 P. 512.

36. Urdangen & G. Bros. v. Doner, 122 Iowa, 533, 98 N. W. 317. Where grantor was hopelessly insolvent of which grantee had notice when he took a conveyance for an inadequate consideration. Doxsee v. Waddick [Iowa] 98 N. W. 110.

37. Southern Loan & Trust Co. v. Benbow, 135 N. C. 303, 47 S. E. 435. An antenuptial agreement to pay an affianced wife $10,000 in case she was the survivor is a sufficient consideration for a postnuptial conveyance. Clow v. Brown [Ind. App.] 72 N. E. 534.

38. See 2 Curr. L. 118.

39. Casts the burden on the parties to show that it is consistent with the deed. Colston v. Miller [W. Va.] 47 S. E. 268. Whenever the owner of personal property puts another in possession and clothes him with the indicia of ownership, he loses his right thereto as against subsequent purchasers and creditors of that person. Judy v. Evans, 109 Ill. App. 154. It is fraudulent per se. Morris v. Coombs, 109 Ill. App. 176. To sustain a claim of payment of consideration on the testimony of a grantee, where the grantor remains in possession, it must be clear, positive, consistent with other evidence and free from self-contradiction. Colston v. Miller [W. Va.] 47 S. E. 268.

40. Stam v. Smith [Mo.] 81 S. W. 1217.

41. Transfer of possession 14 months after sale, held void. Stewart v. Hoffman [Mont.] 77 P. 689. In Illinois, secret liens are constructively fraudulent as to creditors. In re Rodgers [C. C. A.] 125 F. 169.

42. Burns' Rev. St. 1901, § 6636. Warner v. Warner, 30 Ind. App. 578, 66 N. E. 760.

43. Under Iowa Code, 1897, § 2906, a sale or mortgage is void as to existing creditors. In re Tweed, 131 F. 355.

44. Washburn v. Oates [Okl.] 76 P. 151.

45. Under Mill's Ann. St. § 2027. Helgert v. Stewart [Colo. App.] 77 P. 1091.

46. Comp. Laws, § 9520, relative to sale of goods unaccompanied by immediate delivery. Williams v. Brown [Mich.] 100 N. W. 786.

47. After sale without change of possession, vendor mortgaged the property. First Nat. Bank v. Yeoman [Okl.] 78 P. 388.

48. Under Civ. Code, § 3440, where the vendee went into possession the day after the sale, it was sufficient, though the sheriff levied an attachment against the goods in the meantime after being informed that they had been sold. Feeley v. Boyd, 143 Cal. 282, 76 P. 1029. Where a bill of sale of the property was executed and delivered to an agent of the creditor and the goods moved into a separate room of the debtor's warehouse, there was a sufficient delivery to pass the property as against a trustee in bankruptcy proceedings instituted more than four months thereafter. Allen v. Hollander, 128 F. 159.

49. Ranch employe moving goods purchased from his employer into his room

clusive in the vendee.[50] The change of possession must be actual and not in trust, continued, instead of transient.[51] A mortgage of a stock of goods, under which the mortgagor is permitted to sell them in the usual course of business without accounting for the proceeds, is fraudulent;[52] but the mere withholding a mortgage from record is not.[53]

Reservation of benefits and resulting trusts.[54]—Secret trusts created to hinder, delay and defraud creditors are fraudulent.[55] A debtor cannot provide for his future support.[56]

Intent.[57]—Neither insolvency nor financial embarrassment taint a debtor's commercial transactions with fraud,[58] and no legal presumption of fraud arises from the fact that debts are subsequently created;[59] but unless otherwise provided by statute,[60] the transfer must have been made with intent to hinder, delay and defraud creditors.[61] Fraud is never presumed,[62] but must be established by a

held sufficient. Rapple v. Hughes [Idaho] 77 P. 722. Whether a statute requiring sales to be accompanied by delivery and change of possession has in a given instance been complied with is, where the evidence is undisputed as to the permanence of the statutory requirements, a question for the court, otherwise for the jury. Reynolds v. Beck [Mo. App.] 83 S. W. 292.

50. Reynolds v. Beck [Mo. App.] 83 S. W. 292.

51. Under Rev. St. 1899, § 3410, providing that sales must be accompanied by delivery and followed by a continued change of possession. Reynolds v. Beck [Mo. App.] 83 S. W. 292. Where one purchased a team and wagon from a liveryman, kept it in his possession two months and then sent it back to be boarded at the barn. The liveryman let the team out and kept the proceeds, but accounted to the purchaser. Held not void under the statute. Id. Improper to strike out "and continued" from an instruction. Gallick v. Bordeaux [Mont.] 78 P. 583. Change of possession should be by actual, open and visible signs, such as can be seen by the public. Morris v. Coombs, 109 Ill. App. 176.

52. Gee v. Van Natta-Lynds Drug Co. [Mo. App.] 78 S. W. 288. Which allows the mortgagor to retain possession and "use and enjoy" the same. Wilson v. Jones [Colo. App.] 78 P. 622. Otherwise specific articles which may be used by the mortgagor and where such clause cannot be construed as an authority to sell. Id. Agreement that mortgagor may sell goods mortgaged in the usual course of business, if made without fraudulent intent does not render mortgage void as to good unsold. In re Ball, 123 F. 164.

53. Subsequent mortgagee must have extended credit without notice thereof. First Nat. Bank v. Reid, 122 Iowa, 280, 98 N. W. 107.

54. See 2 Curr. L. 120.

55. Where insolvent husband's earnings were used for purchase of property taken in wife's name. Wolfsberger v. Mort [Mo. App.] 78 S. W. 817. Where a grantor's evidence was conflicting as to the consideration he received and the grantee received none of the rents and profits for several months after the conveyance, evidence held sufficient to show that it was fraudulent. Wise v. Pfaff [Md.] 56 A. 815. Conveyance from parent to child. Grantor still receiving rents and profits. Le Herisse v. Hess [N. J. Eq.] 57 A. 808.

56. Evidence held insufficient to show that a transfer was made for the consideration of future support. McCormick Harvesting Mach. Co. v. Pouder, 123 Iowa, 17, 98 N. W. 303. Such a deed is voidable at the instance of creditors. Flaherty v. Stephenson [W. Va.] 49 S. E. 131. One cannot create a trust of his property for the benefit of himself and family and thereby protect his property from his creditors. Wenzel v. Powder [Md.] 59 A. 194. Conveyance to trustees under an agreement that they will reconvey at grantor's request to use the proceeds of any sale made by them for his support. New York Public Library v. Tilden, 39 Misc. 169, 79 N. Y. S. 161. Conveyance to children reserving condition against alienation without grantor's consent and to grantor support for life out of property. Hanna v. Charleston Nat. Bank [W. Va.] 46 S. E. 920.

57. See 2 Curr. L. 120.

58. Mears v. Gage [Mo. App.] 80 S. W. 712. A conveyance by an assignee for the benefit of creditors for the best price obtainable at the time was held not fraudulent as to creditors, though the purchaser realized an immense profit on turning over the goods. Curnen v. Reilly, 90 N. Y. S. 974.

59. Searcy v. Gwaltney Bros. [Tex. Civ. App.] 81 S. W. 576.

60. Under Civ. Code, § 3442, providing that a conveyance by an insolvent without consideration is deemed fraudulent. Gray v. Brunold, 140 Cal. 615, 74 P. 303.

61. Where one a resident of New York engaged in business in Pennsylvania and in Montana, being unsuccessful in the latter state, desired to close out his business there, his attorney sold his stock for him, telling the purchaser that the seller desired to withdraw from business by reason of ill health; there was at the time no suspicion but that the seller was prosperous. Prior to the sale, the goods had been falsely inventoried at $28,000; they had become shop worn since then and were sold for $7,500; held not a fraudulent conveyance. Gans v. Weinstein, 83 App. Div. 358, 82 N. Y. S. 280. A conveyance by one who was not insolvent aside from partnership liabilities and who did not consider himself nor was he a member of the firm under the decisions of the state of his residence, but was so adjudged by the bankruptcy court after the contest,

preponderance of evidence,[63] and the fact that the parties to the transaction were relatives does not change this rule.[64] It is ordinarily a question of fact whether a transfer of property was made with fraudulent intent,[65] especially where the fraud depends on a variety of circumstances arising from motive and inferences from circumstantial evidence;[66] but in considering such cases, the principle is applied that one intends the natural and probable consequences of his acts.[67] Intent to defraud may be proved by circumstances surrounding the transaction,[68] but must be determined from all the evidence.[69]

Fraud of grantee or notice to him of fraud.[70]—Where the grantee has notice of the fraudulent intent of the grantor,[71] or has failed to comply with statu-

held not fraudulent. Jacobs v. Van Sickle [C. C. A.] 127 F. 62. Where in an action to foreclose a mortgage against an estate of a decedent, the fact that the widow did not set up a technical defense is not evidence of fraudulent purpose to conceal her mortgaged property. Burnside v. Mealer [Ky.] 80 S. W. 785. Where, after a conveyance, a mortgagor released his mortgage. Mueller v. Renkes [Mont.] 77 P. 512. A conveyance by husband to wife for a valuable consideration and with consent of his creditors is not fraudulent. Budlong v. Budlong, 32 Wash. 672, 73 P. 783.

62. Where, in a suit to avoid a mortgage as fraudulent, both the grantor and grantee answered under oath and testified that the conveyance was to secure a bona fide indebtedness, a canceled note representing the indebtedness at its date was introduced, that the grantor received a salary from $2,500 to $4,000 and was engaged in outside ventures, that during the years his deposits had amounted to over $47,000, held no fraud shown. Jacobs v. Van Sickel, 123 F. 340. That a preferred creditor prosecuted rapidly without defense a suit in equity to subject the debtor's land to a confessed judgment does not show fraud as to other creditors. Johnson v. Lucas [Va.] 48 S. E. 497.

63. Where a creditor called the fraudulent grantee as his witness and such grantee testified that the conveyance was not fraudulent, it would not be set aside on the ground that such testimony was suspicious and not entitled to credit. American Hoist & Derrick Co. v. Hall, 208 Ill. 597, 70 N. E. 581. A judgment setting aside a transfer of property by a bankrupt on the ground of fraud cannot be sustained on the theory of actual fraud when the trial court excluded over exception, evidence of good faith of the transferee or where the trial judge's opinion shows that there was no fraudulent intent on the part of the parties and the evidence would not justify a finding that such fraud existed. Joseph v. Raff, 82 App. Div. 47, 81 N. Y. S. 546.

64. It is merely a circumstance tending to excite suspicion. American Hoist & Derrick Co. v. Hall, 208 Ill. 597, 70 N. E. 581.

65. State v. Martin [Conn.] 58 A. 745. Where a merchant transferred his business to his wife for a nominal consideration, the good faith of such transaction and whether it was a mere pretense. Mazioroff v. Commercial Bank [Mich.] 97 N. W. 763.

66. Evidence as to whether one acted as agent in purchase and sale of stock. Brown v. Bayer, 91 Minn. 140, 97 N. W. 736.

67. Transfer by an insolvent corporation to another corporation organized of the same persons. Bean-Chamberlain Mfg. Co. v. Standard Spoke & Nipple Co. [C. C. A.] 131 F. 215.

68. Circulating reports that he did not intend to sell and issuing checks he had no funds to meet. New York Store Mercantile Co. v. West [Mo. App.] 80 S. W. 923. Evidence held to show fraudulent intent. Id. Evidence sufficient to show fraudulent intent. Parker v. Parker [Neb.] 96 N. W. 208.

69. Error to give undue emphasis to certain facts. Mears v. Gage [Mo. App.] 80 S. W. 712.

70. See 2 Curr. L. 121.

71. Where shortly before failure, a debtor transferred to his sister for an inadequate consideration and gave her an order for money due him for which no reason was assigned. Smith v. Bigelow [Iowa] 99 N. W. 590. Where one accepted the assignment of a certificate of deposit bearing on its face notice of the likelihood of claims against the assignors, evidence held to show that he had notice of the fraudulent intent. Looney v. Bartlett [Mo. App.] 81 S. W. 481. Complaint charging a fraudulent grantee with notice of the fraud and that she did not pay a valuable consideration is sufficient. Bass v. Citizens' Trust Co., 32 Ind. App. 583, 70 N. E. 400.

Note: A purchaser for a good consideration without notice of the fraud will be protected against his vendor's creditors, though the conveyance was made with intent to defraud them. Crawford v. Kirksey, 55 Ala. 282, 28 Am. Rep. 704; Galbreath v. Cook, 30 Ark. 417; Fishel v. Lockard, 52 Ga. 632; Spicer v. Robinson, 73 Ill. 519; Studabaker v. Langard, 79 Ind. 320; Durkee v. Chambers, 57 Mo. 575; State v. Mason, 112 Mo. 378, 34 Am. St. Rep. 390; Crabb v. Morrissey, 31 Neb. 161; Holmes v. Clark, 48 Barb. [N. Y.] 237; Leman v. Borden, 83 Tex. 620; Hinds v. Keith, 57 F. 10; Prewit v. Wilson, 103 U. S. 22. **Contra,** Hildreth v. Sands, 2 Johns. Ch. [N. Y.] 35. But where a purchaser has knowledge of the fraudulent intent of the vendor, the transaction is invalid as to creditors, though a full and valuable consideration was given. Smith v. Collins, 94 Ala. 394; Christain v. Greenwood, 23 Ark. 258, 79 Am. Dec. 104; Ruffling v. Tilton, 12 Ind. 260; Howe v. Ward, 4 Me. 195; Biddinger v. Wiland, 67 Md. 359; Burley v. Marsh, 11 Neb. 291; Robinson v. Holt, 39 N. H. 557, 75 Am. Dec. 233; Fullerton v. Viall, 42 How. Pr. [N. Y.], 294; Roeber v. Bowe, 26 Hun. [N. Y.] 554; Mills v. Howeth, 19 Tex. 257; Traylor v. Townsend, 61 Tex. 144; O'Leary v. Duvall, 10 Wash. 666; Livesay v. Beard, 22 W. Va.

tory requirements, the tranfer is void as to creditors,[72] irrespective of the fact that the transaction was based on valuable consideration,[73] unless full value was paid,[74] and he is a mere trustee in respect to them;[75] but if he has no notice of the fraudulent intent,[76] or of facts sufficient to put a reasonably prudent man on inquiry, he acquires a good title.[77] One who assails a transfer must prove the fraud and the grantee's notice thereof;[78] but where the grantor purposed a fraud and the consideration was only nominal;[79] a prima facie case is established and the burden shifts to the grantee to show himself a bona fide purchaser. Suspicion of fraud is not notice,[80] and notice received after the transaction was consummated does not affect his rights.[81] Relationship of parties and circumstances under which the transaction was carried out may be considered,[82] and the debtor's reputation for paying his debts in the place where the sale was made is evidence of the vendee's notice;[83] but where the facts are not such that fraud could be presumed, the parties are not required to explain suspicious transactions.[84]

Relationship of parties.[85]—The mere fact that a transaction is between rela-

585; Clements v. Nicholson, 6 Wall. [U. S.] 299, 18 Law Ed. 786.—From note to Kansas Moline Plow Co. v. Sherman [Okl.] 32 L. R. A. 33.

72. One who purchased the entire stock of a retailer at a single transaction and did not see that the purchase price was applied to the payment of claims of creditors as required by statute. Kohn v. Fishbach [Wash.] 78 P. 199. Immaterial that he had disposed of the goods. Id.

73. A fortiori one without consideration. Davis v. Culp [Tex. Civ. App.] 78 S. W. 554.

74. A sale is not presumptively fraudulent, though the grantee knows of the grantor's insolvency when he pays full cash value but does not arrange for its application to payment of debts. Meyer Bros. Drug Co. v. Durham [Tex. Civ. App.] 79 S. W. 860. That the debtor did not turn the proceeds of a sale to his trustee in bankruptcy does not affect the rights of a bona fide vendee. Urdangen & G. Bros. v. Doner, 122 Iowa, 533, 98 N. W. 317.

75. Grantee of partnership property cannot claim rents while firm debts remain unpaid. Lawson v. Dunn [N. J. Eq.] 57 A. 415.

76. Where a bank took a conveyance, evidence held insufficient to show notice of the fraudulent intent. Grandin v. First Nat. Bank [Neb.] 98 N. W. 70. Both vendor and vendee must be shown to have intended to commit a fraud. Edwards v. Story, 105 Ill. App. 433. Where grantee had paid part of the purchase price and taxes and put up valuable improvements, but had not received title bond until after grantor became insolvent, evidence held to show that he was a bona fide purchaser in good faith. Williamson v. Blackburn [Ky.] 82 S. W. 600. Where a grantee has promised to hold the property in trust for the grantor's children, his subsequent failure to keep his promise did not constitute fraud sufficient to convert the deed into an instrument creating a trust. Willis v. Robertson, 121 Iowa, 380, 96 N. W. 900.

77. Though a sale is made to defraud creditors. Urdangen & G. Bros. v. Doner, 122 Iowa, 533, 98 N. W. 317. That the seller is known by the buyer to be deeply indebted or insolvent is not sufficient to charge the buyer with want of good faith. Sellers v. Hayes [Ind.] 72 N. E. 119.

78. Where a cestui qui trust assigned his interest to the trustee, evidence held insufficient to show that the trustee knew of or shared the purpose to defraud creditors. Bronson v. Thompson [Conn.] 58 A. 692. The fact that action is pending against the debtor at the time of conveyance is insufficient to show that the grantee had notice of the fraud. Graham v. Morgan [Miss.] 35 So. 874. Evidence insufficient to show that a grantee had notice of the fraudulent intent. Wheby v. Moir, 102 Va. 875, 47 S. E. 1005. Evidence held for the jury. Mears v. Gage [Mo. App.] 80 S. W. 712.

79. Heyman v. Swift, 91 App. Div. 352, 86 N. Y. S. 584. A grantee who purchases subsequent to issue of execution levy must prove that his purchase was for value to bring him within the protection of Ky. St. 1903, § 2358, providing that he shall not be affected unless memorandum was filed in the county where the land lies. Gorman v. Glenn, 25 Ky. L. R. 1755, 78 S. W. 873.

80. Urdangen & G. Bros. v. Doner, 122 Iowa, 533, 98 N. W. 317; Hooks v. Pafford [Tex. Civ. App.] 78 S. W. 991. Insolvency is not to be inferred from suspicious circumstances but must be proved. Doxsee v. Waddick, 122 Iowa, 599, 98 N. W. 483. That purchaser knew this vendor contemplated winding up his business is insufficient. Id. Other suspicious transactions are inadmissible as against a grantee without evidence that he had notice of them. Id.

81. Urdangen & G. Bros. v. Doner, 122 Iowa, 533, 98 N. W. 317.

82. One conveyed to his brother for an inadequate consideration, taking back a mortgage for the price which was never recorded. Noble v. Laidlaw [Mich.] 100 N. W. 179.

83. Hooks v. Pafford [Tex. Civ. App.] 78 S. W. 991.

84. Johnson v. Lucas [Va.] 48 S. E. 497.

85. See 2 Curr. L. 122.

Note: The mere existence of the relation of husband and wife between grantor and grantee does not of itself create a prima facie presumption of fraud (Droop v. Ridenour, 11

tives does not stamp it with fraud,[86] but where such transfers effect the defeat of rights of creditors, they will be carefully scrutinized.[87] The burden is on the parties to establish good faith,[88] and if the known conditions are such that the effect of the transaction will be fraudulent, such an intent will be inferred as a matter of law.[89] If a parol trust in lands can be created by a husband in favor of the wife, the declaration should be explicit and unequivocal and established by clear and convincing testimony.[90]

Preference to creditors.[91]—In the absence of a statute prohibiting it, the giving of a preference is not fraudulent, though the debtor is insolvent and the creditor is aware that it will defeat other claims.[92] A debt created jointly by the debtor and another cannot be preferred.[93] The transfer by a solvent debtor is

App. D. C. 224; Gottlieb v. Thatcher, 151 U. S. 271; Teller v. Bishop, 8 Minn. 226), and if the transaction is based on a sufficient consideration, the existence of the relationship will not invalidate the transaction (Grant v. Ward, 64 Me. 239; Wauser v. Lucas, 44 Neb. 769; Allen v. Perry, 66 Wis. 178). So in transactions between husband and wife in relation to her separate estate, the same principles apply as are applicable between strangers. Lipscomb v. Lyon, 19 Neb. 611; Williams v. Harris, 4 S. D. 22, 46 Am. St. Rep. 753. The relation is, however, an important to be considered in weighing the evidence relating to good faith. McTeers v. Perkins, 106 Ala. 411. The mere existence of the relationship stamps the transaction as one which should be closely scrutinized. Kelley v. Simmons, 73 Ga. 616; Hoxie v. Price, 31 Wis. 82; Kennedy v. Powell, 34 Kan. 22; Kaufman v. Whitney, 60 Miss. 103.—From note to Adoue v. Spencer [N. J. Eq.] 90 Am. St. Rep. 499.

86. Conveyance from parent to child. Mueller v. Renkes [Mont.] 77 P. 512. Insufficient to show fraud in a conveyance from one to his son-in-law. Johnson v. Lucas [Va.] 48 S. E. 497. Evidence held to show that a conveyance from husband to wife was not in fraud of creditors. Graham v. Morgan [Miss.] 35 So. 874. An insolvent debtor cannot give his earnings to his wife and allow her to accumulate property in her own name (Wolfsberger v. Mort [Mo. App.] 78 S. W. 817), but the fact that one-third the price of a house and lot taken in the wife's name was paid for out of his earnings did not render the conveyance fraudulent. Such amount was no more than he should have contributed to the support of the family (Eversole v. Bullock [Ky.] 83 S. W. 556).

87. From mother to son and daughter-in-law. Penn v. Trompen [Neb.] 100 N. W. 312. Between husband and wife. Multz v. Price, 91 App. Div. 16, 86 N. Y. S. 480. Where a husband transferred, while insolvent, property to his wife for an inadequate consideration, and did not relinquish possession but a short time thereafter was adjudged a bankrupt. Saxton v. Sebring, 96 App. Div. 670, 89 N. Y. S. 372. Transfer from husband to wife. Powell v. Neal Loan & Banking Co., 119 Ga. 696, 46 S. E. 847. Conveyance from husband to wife and from the wife to others was fraudulent. Scott v. Powers, Little & Co., 25 Ky. L. R. 1640, 78 S. W. 408. Assignment of notes by husband to wife. Planters' Bank & Trust Co. v. Major, 25 Ky. L. R. 1969, 79 S. W. 264. Evidence insufficient to establish resulting trust in wife's favor. Id. Money used by a debtor's wife to purchase property, title to which was taken in her name, was received from the husband. Wolfsberger v. Mort [Mo. App.] 78 S. W. 817. Deed from father to son where consideration was services rendered three years prior to its execution. Mason v. Perkins [Mo.] 79 S. W. 683.

88. A wife has the burden of proving by clear and satisfactory evidence that property taken in her name was paid for by her with money derived from some source other than her husband. Miller v. Gillispie, 54 W. Va. 450, 46 S. E. 461. A wife has the burden of proving that she is an innocent purchaser for a valuable consideraton. Walker v. Harold, 44 Or. 205, 74 P. 705. The burden is on a wife to show that a purchase from her husband was in good faith and for a consideration paid out of her separate estate. Rankin v. Goodwin [Va.] 48 S. E. 521. Mere holding of a bond by wife is not sufficient evidence that at the time it was executed it was recognized as a debt. Kline v. Kline's Creditors [Va.] 48 S. E. 882. Their testimony is to be considered in the light of their relationship. Colston v. Miller [W. Va.] 47 S. E. 268.

89. One with no motive to defraud conveyed all his property in trust. Matthews v. Thompson [Mass.] 71 N. E. 93.

90. Kline v. Kline's Creditors [Va.] 48 S. E. 882.

91. See 2 Curr. L. 122.

92. Johnson v. Lucas [Va.] 48 S. E. 497. The wife of a debtor may be preferred (Graham v. Morgan [Miss.] 36 So. 874), though the consideration for the preference be contingent on her surviving him (Clow v. Brown [Ind. App.] 72 N. E. 534). A parent may prefer his child. Id. A manufacturing corporation may prefer creditors who are directors or officers, though the vote of one or more of such officers is requred to pass the resolution authorizing the preference. City Nat. Bank v. Goshen Woolen Mills Co. [Ind.] 71 N. E. 652. Where a merchant allowed a creditor to take goods in payment, the fact that such creditor held a fraudulent unrecorded chattel mortgage on such goods is immaterial, the goods not being taken by virtue of it. Crusoe Bros. Co. v. Kudner [Mich.] 99 N. W. 788. Conveyance to creditor for an indebtedness incurred prior to the indebtedness for which the judgment was rendered amounts to a preference, but is not illegal. Thompson v. Williamson [N. J. Eq.] 58 A. 602. As to preferences under Nat. Bankruptcy Act 1898, see Bankruptcy, 3 Curr. L. 434.

93. Debt created by the debtor and his

not a preference.[94] In West Virginia, a mortgage not executed simultaneously with the creation of the debt is not a good preference.[95] After filing a petition in bankruptcy, a debtor is powerless to prefer.[96] A statute prohibiting preferences is not a bankruptcy law.[97]

§ 2. *Validity and effect.*[98]—The transfer passes all the grantor's interest subject to the rights of his creditors.[99] The transaction is binding as between the parties[1] and those claiming under them,[2] unless the party seeking relief was not in pari delicto,[3] or the debtor retained sufficient property to satisfy his liabilities.[4] It has been held, however, that such property may be recovered by the grantor.[5]

In North Dakota, a fraudulent transfer is void as to creditors, though made through the agency of a judicial sale.[6]

§ 3. *Who may attack.*[7]—The transfer cannot be impeached by the grantor,[8] his privies,[9] his heirs,[10] or administrator,[11] unless he acts as representative of creditors.[12] A conveyance made to defeat marital rights may be assailed by the widow of the grantor after his death, and her notice thereof at the time of marriage is immaterial if the grantor had promised to procure a reconveyance.[13] Creditors of the grantor may avoid the transfer.[14] There is a conflict of authority

wife. Caswell v. Pilkinton [Mich.] 101 N. W. 212.

94. An agreement between a solvent debtor and some of his creditors for the sale of certain of his property and a pro rata distribution of the proceeds among such creditors. Cumberland Valley Bank's Assignee v. Citizens' Nat. Bank, 25 Ky. L. R. 1807, 78 S. W. 889.

95. Under Code 1899, c. 74, § 2. Feely v. Bryan [W. Va.] 47 S. E. 307. A transfer to a creditor without fraudulent intent is not as to debts subsequently contracted a preference contrary to Code 1899, c. 74, § 2. Feely v. Bryan [W. Va.] 47 S. E. 307.

96. Evidence held insufficient to show that a debtor intended a preference as to collections by a factor prior to bankruptcy, and as to collections thereafter he has no title to property with which he could prefer. Ryttenberg v. Schefer, 131 F. 313. As to what constitutes reasonable cause to believe a preference was intended, see Bankruptcy, 3 Curr. L. 453, n. 2.

97. Session Laws 1889, c. 67, was not suspended by the National Bankruptcy Act. Grunsfeld Bros. v. Brownell [N. M.] 76 Pac. 310.

98. See 2 Curr. L. 123.

99. Poling v. Williams [W. Va.] 46 S. E. 704. Grantor is not thereafter seised thereof "in law or equity" within the meaning of Mansf. Dig. § 3001. Parrott v. Crawford [Ind. T.] 82 S. W. 688.

1. An assignment of personal property by way of mortgage need not be recorded as between the parties [Burns' Rev. St. 1901, § 6638]. Warner v. Warner, 30 Ind. App. 578, 66 N. E. 760. Where husband deeds to wife in fraud of creditors. Hays v. Marsh, 123 Iowa, 81, 98 N. W. 604; Chantler v. Hubbell [Wash.] 75 P. 802; Ackerman v. Peters [La.] 36 So. 923; Looney v. Bartlett [Mo. App.] 81 S. W. 481. So far as it is executory, it cannot be enforced; so far as executed, the law leaves the parties where it finds them. Rich v. Hayes [Me.] 58 A. 62. Goods were sold to a fraudulent vendee on representations by the grantor that he owned the land. The vendee then transferred the land back to the grantor who set up that the original conveyance was fraudulent. Trent v. Edmonds [Ind. App.] 70 N. E. 169. One not a party to a fraudulent conveyance and in no way concerned in it cannot be affected by it. Cook v. Landrum [Ky.] 82 S. W. 585.

2. A devisee. Davidson v. Dockery, 179 Mo. 687, 78 S. W. 624. Binding on grantor's heirs and devisees. Willis v. Robertson, 121 Iowa, 380, 96 N. W. 900.

3. Conveyance procured from ignorant negroes by fraud of the grantee. Hutchinson v. Park [Ark.] 82 S. W. 843.

4. First Nat. Bank v. Moor [Tex. Civ. App.] 79 S. W. 53.

5. Property transferred by husband to wife recovered by him after divorce. Buttlar v. Buttlar [N. J. Eq.] 56 A. 722.

6. Under Rev. Code N. D., 1899, §§ 5541, 5052, 5080. Lynch v. Burt [C. C. A.] 132 F. 417.

7. See 2 Curr. L. 125.

8. Watts v. Vansant [Md.] 58 A. 433. Equity will not aid a person to profit by his fraudulent act. Poling v. Williams [W. Va.] 46 S. E. 704. Grantor is estopped to deny the validity of the conveyance. Ratliff v. Ratliff, 102 Va. 880, 47 S. E. 1007.

9. Grantor or one claiming under him cannot have it set aside. Poling v. Williams [W. Va.] 46 S. E. 704.

10. Heirs of grantor cannot attack. Neal v. Neal [Ky.] 82 S. W. 981. Guardian of heir may not do so. Cook v. Lee, 72 N. H. 569, 58 A. 511.

11. Stam v. Smith [Mo.] 81 S. W. 1217.

12, 13. Cook v. Lee, 72 N. H. 569, 58 A. 511.

14. Under Rev. St. 1889, §§ 3398, 3399, a complaint to set aside a fraudulent conveyance which does not allege that plaintiff is a creditor does not state a cause of action. Reynolds v. Faust, 179 Mo. 21, 77 S. W. 855. The plaintiff in a suit to set aside a fraudulent conveyance must prove that he is a creditor of the grantor. First Nat. Bank v. Eastman [Cal.] 77 P. 1043. One whose claim arises from a tort is a creditor from the date of the injury. Banks v. McCandless, 119 Ga. 793, 47 S. E. 332. A surety on a bail bond in trover who pays the judgment recovered is

as to whether a general creditor may attack, some courts holding that he can,[15] and others that he cannot,[16] unless he has no adequate remedy at law,[17] or unless the conveyance was by a nonresident debtor of property within the jurisdiction of the court;[18] but the better and prevailing opinion seems to be that he must first reduce his claim to judgment.[19] It may not be challenged by one holding an illegal claim,[20] nor by one who has ratified a transaction[21] or assisted therein,[22] nor by one whose debt is not due.[23] One who has received a part of the proceeds of a fraudulent conveyance cannot assail it until he returns the money received.[24] An assignment of a right to set aside a fraudulent conveyance is not enforceable.[25] A conveyance voidable as to existing creditors is not therefore fraudulent as to a subsequent creditor,[26] and in the absence of actual fraud[27] entertained toward him,[28] the burden of which is on him to prove,[29] he cannot challenge it, especially if at the time he gave credit he knew of the facts regarding the conveyance.[30] One claiming title cannot maintain proceedings in equity to have the cloud of a fraudulent conveyance removed unless he is in possession.[31]

a creditor. Id. Under Mill's Ann. St. § 2030, an indorsee of the claim after the conveyance may attack. House v. Johnson [Colo. App.] 76 P. 743.

15. Creditor does not have to reduce his claim to judgment. Grunsfeld Bros. v. Brownell [N. M.] 76 P. 310.

16. Cannot maintain a creditor's bill against a debtor and his fraudulent grantee. Miller v. Drane [Wis.] 99 N. W. 1017. A simple contract creditor cannot challenge a fraudulent conveyance in a Federal court. Viquesney v. Allen [C. C. A.] 131 F. 21. Nor can he under the National Bankruptcy Act, 1898, § 23a. Id.

17. Davidson v. Dockery, 179 Mo. 687, 78 S. W. 624.

18. First Nat. Bank v. Eastman [Cal.] 77 P. 1043. Jurisdiction of a nonresident grantor of real estate situated within the jurisdiction of the court may be obtained by constructive service of summons. Id.

19. One who does not prosecute his claim to judgment cannot attack the validity of a delivery under Mill's Ann. St. § 2027. Hugus & Co. v. Hardenburg [Colo. App.] 76 P. 543. An attachment cannot be sustained where the claim asserted has not been reduced to judgment. Aigeltinger v. Einstein [Cal.] 77 P. 669. Must either have reduced his claim to judgment or have a legal, equitable or attachment lien on the property. Davidson v. Dockery, 179 Mo. 687, 78 S. W. 624. Creditor who has not reduced his claim to judgment cannot enjoin disposal of property. Meyers v. Wedel [N. J. Eq.] 57 A. 1008. In New York, an unfiled chattel mortgage is void only as to judgment creditors. In re Beede, 126 F. 853. "Creditor" under Rev. St. 1895, art. 3328, means one who has a legal lien. Does not include a general creditor. Eason v. Garrison [Tex. Civ. App.] 82 S. W. 800.

20. Gambling debt. Thompson v. Williamson [N. J. Eq.] 58 A. 602.

21. Where he accepts money from the debtor with notice that its source was the purchaser. Torreyson v. Turnbaugh [Mo. App.] 79 S. W. 1002. See Thompson v. Cohen, 127 Mo. 215, 28 S. W. 984, 29 S. W. 885, for an elaborate review of authorities.

22. An attorney who advised and assisted cannot thereafter purchase an outstanding judgment and challenge such conveyance. Garlinger v. Palmer [C. C. A.] 126 F. 906.

23. Though statutes allow general creditors to attack. Frye v. Miley, 54 W. Va. 324, 46 S. E. 135.

24. Willis v. Robertson, 121 Iowa, 380, 96 N. W. 900.

25. Assignee in bankruptcy assigned right to creditor. Annis v. Butterfield [Me.] 58 A. 898.

26. A husband not in debt nor contemplating entering business conveyed property to his wife. Westmoreland Guarantee Bldg. & Loan Ass'n v. Thomas, 207 Pa. 513, 56 A. 1072. One who after the conveyance accepts renewal notes and new security is a subsequent creditor. State Bank of Chase v. Chatten [Kan.] 77 P. 96.

27. A voluntary conveyance by husband to wife made in good faith for the purpose of making a reasonable provision for her. Johnson v. Murphy [Mo.] 79 S. W. 909.

28. Under Rev. St. 1899, § 3398. Davidson v. Dockery, 179 Mo. 687, 78 S. W. 624.

29. Under Gen. St. 1901, § 7881. State Bank of Chase v. Chatten [Kan.] 77 P. 96. That at the time of conveyance the debtor had not sufficient property to pay his debts. State v. Martin [Conn.] 58 A. 745. To entitle one to have a conveyance canceled as fraudulent, it should appear that the indebtedness antedated the conveyance and that legal remedies for satisfaction of the debt have been exhausted. Parrott v. Crawford [Ind. T.] 82 S. W. 688. Lack of valuable consideration is evidence of actual fraud when a conveyance is attacked by a subsequent creditor. Miller v. Gillispie, 54 W. Va. 450, 46 S. E. 451.

30. Knew that the debtor had paid the consideration for property taken in his wife's name. State Bank of Chase v. Chatten [Kan.] 77 P. 96.

31. Assignee of a trustee in bankruptcy. Annis v. Butterfield [Me.] 58 A. 898. Remedy given by Rev. St. c. 79, § 6, by which a court of equity may apply in payment of a debt, property transferred in fraud of creditors is not applicable. Plaintiff stands as a purchaser. Id. A grantee from purchasers at an execution sale may attack a previous fraudulent conveyance by the judgment debtor as a cloud on his title. Wood v. Fisk [Or.] 77 P. 738.

§ 4. *Rights and liabilities of persons claiming under fraudulent grantees.*[32] —A bona fide vendee can convey his title to one with notice of the fraudulent character of the original conveyance,[33] but a purchaser from a fraudulent grantee, with notice of the fraud, takes the title subject to all the infirmities with which it is affected in the hands of such fraudulent grantee.[34]

§ 5. *Extent of grantee's liability.*[35]—A grantee cannot question the validity of the debt on which the judgment against the grantor was founded,[36] unless such judgment was rendered in a foreign state on a claim void under the public policy of the state where the judgment is questioned.[37] The grantee in an innocent voluntary conveyance may require subsequent fraudulent conveyances to be set aside before the deed under which he claims is challenged.[38] A fraudulent grantee acquires no rights;[39] he is not entitled to recover expenditures made to protect his title,[40] nor to be reimbursed for the consideration paid,[41] and to be entitled to retain exemptions of the grantor, he must make the selection;[42] but it has been held that he is entitled to be reimbursed for taxes paid.[43] The grantee in a deed executed in consideration of future support for the grantor and his family is not personally liable for the grantor's debts nor for the rents and profits of the property until the same have been sequestered.[44]

§ 6. *Remedies of creditors.*[45]—The creditor may secure his rights by garnishment,[46] attachment,[47] an action to have the instrument of conveyance canceled,[48] or by special statutory proceeding in equity.[49] The proceeding to set aside a fraudulent conveyance is in every essential aspect equitable in character.[50]

32. See 2 Curr. L. 126.

33. Walp v. Mooar, 76 Conn. 515, 57 A. 277. A subsequent grantee with notice of the fraud is protected by his grantee's good faith. Witham v. Blood [Iowa] 100 N. W. 558. Under the National Bankruptcy Act, a preference can be recovered from the preferred creditor, but not from his bona fide transferee. Hackney v. First Nat. Bank [Neb.] 98 N. W. 412. A bona fide purchaser from a fraudulent grantee, though constructively chargeable with notice, is entitled to be reimbursed for expenditures. Lynch v. Burt [C. C. A.] 132 F. 417.

34. Creditors of the original grantor come within this rule. Hoff v. Larimore, 106 Ill. App. 589; Walp v. Mooar, 76 Conn. 515, 57 A. 277. When one with notice of a fraudulent conveyance to another for a nominal consideration procured a conveyance to herself without consideration, she acquired no rights. Leary v. Corvin, 92 App. Div. 544, 88 N. Y. S. 109.

35. See 2 Curr. L. 126.

36. Le Herisse v. Hess [N. J. Eq.] 57 A. 808.

37. Judgment for debt contracted in a gambling transaction. Thompson v. Williamson [N. J. Eq.] 58 A. 602.

38. Walker v. Bank of Manchester, 25 Ky. L. R. 1950, 79 S. W. 222.

39. Conveyance may be set aside. Trent v. Edmonds [Ind. App.] 70 N. E. 169. Where the grantee has notice of the fraud, did not have her deed recorded, knew of buildings being erected on the premises and gave orders concerning the work, she was liable therefor. Gilmore v. Colcord, 96 App. Div. 358, 89 N. Y. S. 689.

40. Lynch v. Burt [C. C. A.] 132 F. 417.

41. Not entitled to credit for his account against the insolvent nor for the inadequate consideration paid. Holloway v. Brame [Miss.] 36 So. 1.

42. Comp. Laws, § 10,326. Williams v. Brown [Mich.] 100 N. W. 786.

43. Hutchinson v. Park [Ark.] 82 S. W. 843.

44. Flaherty v. Stephenson [W. Va.] 49 S. E. 131.

45. See 2 Curr. L. 127.

46. See Garnishment, 2 Curr. L. 130.

47. Garnishment not the only remedy under Code, § 3896. Jordan v. Crickett, 123 Iowa, 576, 99 N. W. 163. See Attachment, 3 Curr. L. 353. Under Burns' Rev. St. 1901, § 925, a creditor may attach land fraudulently conveyed, whether the debt is due or not. Trent v. Edmonds [Ind. App.] 70 N. E. 169. The attachment properly issued against the grantee with notice of the fraud. Id.

48. A deed void for indefiniteness in description creates an equity in the grantee which a creditor of the grantor may remove by cancellation. Levy v. Royston [Miss.] 36 So. 69. See Cancellation of Instruments, 3 Curr. L. 584.

49. Under Rev. Laws, c. 159, § 3, authorizing relief in equity, it is immaterial that a corporation which participates in a fraudulent conveyance to it was not created solely for the purpose of committing the fraud. Krower v. Felz [Mass.] 71 N. E. 800; Hillyer v. LeRoy [N. Y.] 72 N. E. 237. A bill in equity assailing a fraudulent conveyance may be amended by adding an allegation that it was made with intent to hinder, delay and defraud. Kinney v. Craig [Va.] 48 S. E. 864.

50. The surrogate court of New York has no jurisdiction to entertain proceedings to set aside as fraudulent a conveyance by a deceased insolvent debtor. In re Bunting's Estate, 90 N. Y. S. 786.

It is not necessary that execution should have been issued on the judgment and returned nulla bona prior to the commencement of the suit.[51] A suit in equity to remove a fraudulent conveyance is not a waiver of rights under the judgment.[52] All vendors and vendees are necessary parties,[53] but not intermediate grantees whose rights will be protected,[54] nor a purchaser pendente lite,[55] nor the grantor for the determination of the issue of fraud,[56] and a fraudulent grantee who has conveyed the property away is not an indispensable party if he will be protected from liability from the outcome of the action.[57] Every person who has dishonestly obtained possession of the property may be made a party, though each may have acted independently of his co-defendants;[58] but separate creditors cannot join unless there be a joint interest in the thing demanded or a privity of contract.[59] The action must be brought within the statutory period,[60] but laches in prosecuting a pending action is no defense.[61] The action may be maintained in any jurisdiction where the guilty parties may be found.[62] Only parties to the action are bound by the judgment.[63] A wife's release of dower in a fraudulent conveyance is nullified when the deed is declared void.[64]

GAMBLING CONTRACTS.

§ 1. What Constitutes a Wagering Contract (1546).
§ 2. Rights and Remedies of Parties and Their Privies (1549).
§ 3. Effect of Illegality on Substituted or Collateral Contracts or Securities (1550).

§ 1. *What constitutes a wagering contract.*[65]—A contract is wagering which in effect stipulates that the parties shall gain or lose by the happening of an uncertain event[66] in which they have no interest[67] save the prospect of such gain or

51. Stephens v. Parvin [Colo.] 78 P. 688; Grandin v. First Nat. Bank [Neb.] 98 N. W. 70; Scott v. Aultman Co., 211 Ill. 612, 71 N. E. 1112.

52. Hillyer v. Leroy [N. Y.] 72 N. E. 237.

53. Blum & Co. v. Wyly [La.] 36 So. 202. All parties to the conveyance are necessary. Sinclair v. Auxiliary Realty Co. [Md.] 57 A. 664.

54. Firm holding by fraudulent conveyance organized a corporation and transferred to it. Holloway v. Brame [Miss.] 36 So. 1.

55. Sinclair v. Auxiliary Realty Co. [Md.] 57 A. 664.

56. Clark v. Knox [Colo.] 76 P. 372.

57. Where his grantee had notice of the fraud in the original deed and was not in a position to bring action on the covenants. Scott v. Aultman Co., 211 Ill. 612, 71 N. E. 1112.

58. Saxton v. Sebring, 96 App. Div. 570, 89 N. Y. S. 372.

59. A common interest in having the conveyance annulled is insufficient. Blum & Co. v. Wyly [La.] 36 So. 202.

60. Must show ignorance of the fraud until a time within the period of limitations. Fuller v. Horner [Kan.] 77 P. 88. Assignee is charged with the notice of fraud that his assignor had. Id. Plaintiff must show that his assignors did not discover the fraud within the statutory period. Hooker v. Worthington, 134 N. C. 283, 46 S. E. 726. Code, § 2929 [2 Code 1904, p. 1551], providing that a voluntary conveyance must be assailed within five years, does not apply where a conveyance is assailed for actual fraud. Kinney v. Craig [Va.] 48 S. E. 864.

61. That the action has been pending several years during which time the holder of the legal title has made valuable improvements under belief that the action would be abandoned. Grandin v. First Nat. Bank [Neb.] 98 N. W. 70.

62. Court acts upon the fraud not on the land. Fuller v. Horner [Kan.] 77 P. 88.

63. An insurance company not made a party to an action to set aside a fraudulent conveyance cannot be enjoined from paying insurance loss to the party to whom conveyance was made. Meyars v. Wedel [N. J. Eq.] 57 A. 1008.

64. Matthews v. Thompson [Mass.] 71 N. E. 93.

65. This title includes only the effect of gambling transactions on contracts made in connection therewith. Gambling as a crime and statutory penalties therefor, are treated in the title, Betting and Gaming, 3 Curr. L. 499. See, also, Lotteries, 2 Curr. L. 764. See 2 Curr. L. 129.

66. The giving of trading stamps redeemable in goods to be selected by the party holding them in accordance with the number presented contains no element of chance and is not gambling. Vt. Acts 1898, p. 93, no. 123, prohibiting such transactions, is unconstitutional. State v. Dodge [Vt.] 56 A. 983.

67. Insurance taken out by one having no insurable interest is a wagering contract and void. Must be reasonable ground, founded upon the relation of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the as-

loss.[68] The essence of a wager is that each party stands to win or lose on the result, and the gains depend on the event.[69] A put is a privilege to deliver or not deliver some commodity.[70] Contracts for the purchase and sale of merchandise for future delivery at a fixed price are generally regarded as valid if the parties contemplate the actual delivery of the subject of the contract.[71] But when they do not in fact intend such delivery, and their real purpose is to adjust the matter at some future time by the payment of the difference between the price named therein and the market price at such time, such contracts are, irrespective of the language used, mere wagers, and are null and void.[72] An arrangement between the customer and the broker for bona fide purchases by the latter with third persons becomes a wagering contract only by a further agreement that the bona fide deliveries contemplated shall not be carried into effect between the broker and the customer, and that there is to be no other liability on either side than a settlement of differences.[73] In the absence of proof of such further agreement, the fact that actual sales or purchases by the broker and deliveries to him are contemplated is decisive against the transaction being a wagering contract on the part of both parties.[74] The intention of both parties that the broker should carry the stock until other arrangements were made and that while so carried the customer should be liable only for the differences does not show illegality.[75] The burden of proving such agreement is on the party alleging the illegality.[76] Statutes in some states prohibit and declare void all option contracts for the future delivery of stocks, grain and other commodities.[77]

Lawful contracts may be lawfully canceled and settled in advance of the time of performance.[78] Hence the mere fact that contracts for the sale or purchase of commodities for future delivery, which are lawful in form, are settled daily by the payment of differences or by canceling out or substituting other contracts, does not render them gambling transactions.[79] Speculation,[80] buy-

sured. Brett v. Warnick, 44 Or. 511, 75 P. 1061.

See, also Insurance, § 5, 4 Curr. L. —, and 3 Curr. L. 490.

68. Cyc. Law Dict. "Gambling Contracts."

69. Thompson v. Williamson [N. J. Eq.] 58 A. 602. Conspiracy to defraud by means of fake foot race held not a wager. Wright v. Stewart, 130 F. 905.

70. E. g. grain. Lane v. Logan Grain Co. [Mo. App.] 79 S. W. 722.

71. Wheeler v. Metropolitan Stock Exch., 72 N. H. 315, 56 A. 754.; Lane v. Logan Grain Co. [Mo. App.] 79 S. W. 722. May buy any sort of property to hold for a rise or buy or sell property not in possession or existence. Board of Trade v. Kinsey Co. [C. C. A.] 130 F. 507. South Carolina Code 1902, § 2310. Parker & Co. v. Moore, 125 F. 807.

72. Within N. H. Pub. St. 1901, c. 270, §§ 16, 17, 18, defining wagers. Purchase and sale of stock on margins. Wheeler v. Metropolitan Stock Exch., 72 N. H. 315, 56 A. 754; Paducah Commission Co. v. Boswell [Ky.] 83 S. W. 144. Evidence sufficient to support finding that parties were gambling in wheat. Askegaard v. Dalen [Minn.] 101 N. W. 503; Corn Exch. Nat. Bank v. Jansen [Neb.] 97 N. W. 814. N. C. Laws 1899, p. 233, c. 221, § 1. Garseed v. Sternberger, 135 N. C. 501, 47 S. E. 603. Must be shown that the parties intended merely to deal in differences. Insufficient, in action on checks, to show that stocks were bought on margin, that defendant was speculating, that stocks were never assigned to him, and that he bought options on cotton. Kendall v. Fries [N. J. Law] 58 A. 1090; Baxter v. Deneen [Md.] 57 A. 601. Purchase of puts illegal. [Mo. Rev. St. 1899, §§ 2337, 2342]. Lane v. Logan Grain Co. [Mo. App.] 79 S. W. 722. Mo. Rev. St. 1899, §§ 2221-2225, 2237-2342. See v. Runzl [Mo. App.] 79 S. W. 992. In South Carolina, all contracts for sale of cotton for future delivery are void unless at the time when made it was the bona fide intention of both parties that it should be delivered and received [Cods 1902, § 2310]. Parker & Co. v. Moore, 125 F. 807.

73. Thompson v. Williamson [N. J. Eq.] 58 A. 602.

74. Evidence held not to show illegality. Thompson v. Williamson [N. J. Eq.] 58 A. 602.

75. Thompson v. Williamson [N. J. Eq.] 58 A. 602.

76. Must be made out of proof of express contract or by circumstances clearly indicating that there were to be no deliveries. Thompson v. Williamson [N. J. Eq.] 58 A. 602.

77. Contract to repurchase stock transferred as part of purchase price of other property, at the option of the transferees, to be exercised at a future time, held not invalid [1 Starr. & C. Ann. St. 1896, p. 1295, c. 38, par. 253]. Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869.

78. Board of Trade of Chicago v. Kinsey Co. [C. C. A.] 130 F. 507.

79. Whether settlement is by "direct" or

ing options, and buying on margins, are not in themselves illegal,[81] the test of illegality being the intention of the parties,[82] to be gathered from all the attending facts and circumstances as disclosed by the evidence.[83] The intention to gamble must be shown to be mutual.[84]

Under the South Carolina statute in regard to sales of cotton for future delivery, the burden is on plaintiff to show that it was the bona fide intention of both parties that there should be an actual delivery and receipt.[85] The statute, however, does not prevent a recovery, though defendant intended merely to gamble, if he did not communicate that fact to plaintiff, but, by his conduct, led him to believe that he contemplated an actual sale.[86]

Evidence of any facts having probative force upon the issue is competent,[87] and the parties themselves may testify thereto.[88] It is immaterial that the rules under which the transactions were carried on provide for legitimate business,[89] or that the contract itself states that an actual delivery and acceptance of the commodities is intended.[90] The actual intention may be proved by oral testimony, irrespective of the terms of the written instrument.[91] The nature of the transaction, the mode and method of carrying on the business, the occupation and pecuniary ability of the purchaser, the fact that the broker never calls for the purchase money but only for margins, and that the purchaser may at any time close out his deal and adjust it on the basis of the difference in price may all be considered.[92] There can be no intention to deliver when there is an option to do so or not.[93] Where the understanding is that the commodities are not to be delivered, the fact that the purchaser could have had them delivered had he so desired is immaterial.[94] Evidence that plaintiff runs a "bucket shop" and that his customers simply gamble in stocks and never intend to purchase them outright is inadmissible in an action on a due bill given for margins.[95]

It is not necessary that one asserting that the contract is unenforceable as a gambling contract give notice to the other party of his intention to repudiate it.[96]

"ring" methods. Board of Trade of Chicago v. Kinsey Co. [C. C. A.] 130 F. 507.

80. Board of Trade of Chicago v. Kinsey Co. [C. C. A.] 130 F. 507; Kendall v. Fries [N. J. Law] 58 A. 1090.

81. Kendall v. Fries [N. J. Law] 58 A. 1090.

82. Evidence held to show that purchase of puts was gambling contract. Lane v. Logan Grain Co. [Mo. App.] 79 S. W. 722. Intention controls rather than form of contract. Corn Exch. Nat. Bank v. Jansen [Neb.] 97 N. W. 814.

83. Lane v. Logan Grain Co. [Mo. App.] 79 S. W. 722; Wheeler v. Metropolitan Stock Exch., 72 N. H. 315, 56 A. 754. Question for the jury on all the evidence. Weare Commission Co. v. People, 209 Ill. 528, 70 N. E. 1076.

84. Purchase and sale of stocks on margin not gambling transaction where broker shows that he understood other party wanted stocks purchased outright, and that he was ready to deliver them when demanded. Evidence that defendant did not intend to pay full price and outright properly rejected. MacDonald v. Gessler, 208 Pa. 177, 57 A. 361; Thompson v. Williamson [N. J. Eq.] 58 A. 602; Board of Trade v. Kinsey Co. [C. C. A.] 130 F. 507.

85. Code 1902, § 2311. Parker & Co. v. Moore, 125 F. 807.

86. As where plaintiff advanced margins to protect contracts for purchase of cotton on exchange by rules of which parties are bound to deliver and receive it, and defendant was notified that purchase was made in conformity to such rules and did not object. Parker & Co. v. Moore, 125 F. 807.

87, 88. Wheeler v. Metropolitan Stock Exch., 72 N. H. 315, 56 A. 754.

89, 90. Weare Commission Co. v. People, 209 Ill. 528, 70 N. E. 1076.

91. Wheeler v. Metropolitan Stock Exch., 72 N. H. 315, 56 A. 754.

92. Weare Commission Co. v. People, 209 Ill. 528, 70 N. E. 1076. Evidence that purchaser of 20,000 bushels was an engineer of small means, that he was not a miller or grain dealer, and had no use for, or means of handling it, and that the agent with whom he dealt had reason to know that he could not pay for it. Merrill v. Garver [Neb.] 96 N. W. 619.

93. As in case of "puts." Lane v. Logan Grain Co. [Mo. App.] 79 S. W. 722.

94. Wheeler v. Metropolitan Stock Exch., 72 N. H. 315, 56 A. 754.

95. MacDonald v. Gessler, 208 Pa. 177, 57 A. 361.

§ 2. *Rights and remedies of parties and their privies.*[97]—At common law, gambling contracts were usually valid and enforceable.[98] This rule has, however, been done away with by statute in practically all the states, and such contracts are now regarded as void.[99] No action can be maintained on them either in law or in equity,[1] nor do they constitute a legal consideration for the payment of money.[2] A broker or other agent employed to carry out the illegal design, who is privy thereto, has no remedy against his principal for disbursements made, or losses suffered, or liabilities incurred by him in furtherance thereof.[3]

In the absence of statute, the loser voluntarily paying to the winner the stake lost cannot recover it.[4] Statutes, however, generally provide that any money or property deposited, paid, or delivered by any person upon a wager or its loss may be recovered by him, and that any person receiving any money or property won by him upon any wager is liable to the person losing the same in the proper action.[5] The right to recover in such cases is absolute, and the forfeiture takes place at once.[6] No demand is necessary.[7] The intention of the bettor other than to make a bet is immaterial.[8] Fictitious contracts for the purchase and sale of grain are not games or gambling devices within the meaning of the Missouri statute authorizing the recovery of money lost at any game or gambling device.[9]

Equity will not ordinarily lend its aid in the recovery of money wagered.[10]

Either party to a bet may, at any time prior to the actual payment of the money to the other party, by notice to the stakeholder, withdraw the bet,[11]

96. Merrill v. Garver [Neb.] 96 N. W. 619.

97. See 2 Curr. L. 129.

98. See v. Runzi [Mo. App.] 79 S. W. 992.

99. Lane v. Logan Grain Co. [Mo. App.] 79 S. W. 722. See § 1, ante. Particularly true of betting on election. McLennan v. Whiddon [Ga.] 48 S. E. 201. N. J. Gen. St. p. 1606, § 2. Thompson v. Williamson [N. J. Eq.] 58 A. 602.

1. Contract for fictitious purchases and sales of stock. Equity will not enforce contract with bucket-shop dealer, whereby he agreed to keep enough money in bank to liquidate claims, by enjoining him from withdrawing it, though he thereby intends to cheat plaintiff. Baxter v. Deneen [Md.] 57 A. 601. N. C. Laws 1899, p. 233, c. 221, §§ 1, 3, 4. Garseed v. Sternberger, 135 N. C. 501, 47 S. E. 603.

2. Lane v. Logan Grain Co. [Mo. App.] 79 S. W. 722.

3. Cannot recover losses incurred in buying cotton futures [Law 1899, p. 234, c. 221, § 3]. Garseed v. Sternberger, 135 N. C. 501, 47 S. E. 603.

4. See v. Runzi [Mo. App.] 79 S. W. 992.

5. N. H. Pub. St. 1901, c. 270, §§ 16, 17. Wheeler v. Metropolitan Stock Exch., 72 N. H. 315, 56 A. 754. Margins. Ky. St. 1903, §§ 1955, 1956. Instructions approved. Paducah Commission Co. v. Boswell [Ky.] 83 S. W. 144. N. J. Gen. St. p. 1606, § 2. Thompson v. Williamson [N. J. Eq.] 58 A. 602. In a suit to set aside conveyances as fraudulent against brokers who are judgment creditors of the grantee where defendants seek equitable relief on the ground that the judgment was based on a gambling transaction, equity will make such statutes effective by discarding from the illegal transactions on both sides all rights or liabilities that arise or are enforceable only as claims under the illegal contract. Id. Under N. Y. Laws 1895, p. 377, c. 570, § 17, relating to horse racing. Evidence sufficient to justify submission to jury of question whether plaintiff owned money bet on horse race. Moulton v. Westchester Racing Ass'n, 95 App. Div. 276, 88 N. Y. S. 695. May also be recovered in action for money had and received under 1 Rev. St. p. 662, §§ 8, 9. The recovery authorized by 1895 statute is in nature of penalty and that act does not repeal the above by implication. Mendoza v. Levy, 90 N. Y. S. 748.

As to the right to recover money lost in betting. See Betting and Gaming, 3 Curr. L. 499.

6. Moulton v. Westchester Racing Ass'n, 95 App. Div. 276, 88 N. Y. S. 695.

7. Mendoza v. Levy, 90 N. Y. 748.

8. Immaterial whether intended to sue for money if he lost. Moulton v. Westchester Racing Ass'n, 95 App. Div. 276, 88 N. Y. S. 695.

9. See v. Runzi [Mo. App.] 79 S. W. 992.

10. Stock margins. Baxter v. Deneen [Md.] 57 A. 601.

11. McLennan v. Whiddon [Ga.] 48 S. E. 201.

NOTE. Distinction Between In Delicto and In Pari Delicto: The plaintiff, on the fraudulent representations that a foot race had been "fixed" and that he would be allowed to share in the winnings, was induced to bet money of the defendants, as though it was his own. He was also persuaded to put up $5,000 of his own with the stakeholder "to make a showing," as he was informed, in the event a count of the state money was demanded. As a matter of fact all the money on both sides belonged to the defendants, who had thus conspired to swindle the plaintiff.

and if the latter disregards the notice and pays the money, he is liable to the party giving it.[12] In such case no further demand is necessary before bringing suit.[13]

A judgment recovered in one state is conclusive as to the parties thereto in an action thereon in another state, and hence the defense that it was based on a gambling transaction is not open to the judgment debtor, in the absence of proof that a contrary rule prevails in such former state.[14] His grantees may, however, set up such defense.[15]

§ 3. *Effect of illegality on substituted or collateral contracts or securities.*[16] —The right of property in market quotations and the right to be protected therein are not affected by the fact that such quotations may be used for unlawful purposes,[17] or by the fact that a large percentage of the contracts made on the floor of the exchange owning them are gambling transactions.[18]

A banking institution may legitimately receive on deposit the money of a gambler with reason to believe that it was won at gaming, or by other questionable means, without accountability to anyone save the depositor.[19]

Notes given for money lost at gambling are void.[20] The burden of showing that he is a bona fide holder is on plaintiff.[21] Statutes making such notes void in the hands of bona fide holders have been held not to impair contract obligations.[22]

GARNISHMENT.

§ 1. Definition and Nature of Remedy in General (1550).
§ 2. Grounds for Garnishment and Choses and Properties Subject (1551).
§ 3. Persons Liable to Garnishment (1551).
§ 4. Rights, Defenses and Liabilities Between Plaintiff and Garnishee (1552).
§ 5. Rights, Defenses and Liabilities Between Defendant and Garnishee (1553).
§ 6. Conflicting and Hostile Claims and Liens (1554).
§ 7. Jurisdiction and Venue (1554).
§ 8. Affidavit or Application for Writ (1555).
§ 9. Writ or Process to Garnishee and Return (1555).
§ 10. Answer or Disclosure and Later Pleadings or Traverse (1555).
§ 11. Claims or Interventions (1556).
§ 12. Dissolution of Writ (1556).
§ 13. Effect of Pendency of Other Proceedings; Stay, etc. (1556).
§ 14. Trial, Verdict and Judgments, Costs and Execution (1556).

§ 1. *Definition and nature of remedy in general.*[23]—Garnishment is a mode

Held, although the plaintiff was in delicto, he was not in pari delicto with the conspirators, and where plaintiff demanded back his money before the pretended race was run, the plea of moral turpitude constituted no defense. Wright v. Stewart, 130 F. 905. The law encourages a repudiation of an illegal contract and allows a locus penitentiae to the guilty participator as long as it remains an executory contract and the illegal purpose is not put into execution. Bernard v. Taylor, 23 Or. 416, 37 Am. St. Rep. 693. It has been held otherwise after the delictum has been consummated. Abbe v. Marr, 14 Cal. 210; Anonymous, 10 Ohio Dec. 649. There is a decided tendency among courts and text writers that the deliberate swindler should not be able to protect himself by the legal maxim "In pari delicto potior est conditio possidentis." Pomeroy, Eq. II, § 942; Smith v. Blachley, 188 Pa. 550, 68 Am. St. Rep. 887; Timmerman v. Bidwell, 62 Mich. 205.—IV. Colum. L. R. 604.

12. Ga. Civ. Code 1895, § 3721. MeLennan v. Whiddon [Ga.] 48 S. E. 201.

13. McLennan v. Whiddon [Ga.] 48 S. E. 201.

14, 15. Thompson v. Williamson [N. J. Eq.] 58 A. 602.

16. See 2 Curr. L. 130.

17, 18. Board of Trade v. Kinsey Co. [C. C. A.] 130 F. 507.

19. Does not apply where joined in conspiracy to defraud. Wright v. Stewart, 130 F. 905.

20. Wheat option. Askegaard v. Dalen [Minn.] 101 N. W. 503. Indorsement of notes to take up other notes given for margins held void in hands of bona fide holder. Corn Exch. Nat. Bank v. Jansen [Neb.] 97 N. W. 814. Mo. Rev. St. 1899, § 3426. Higginbotham v. McGready [Mo.] 81 S. W. 883. Notes given in settlement for matured bonds, executed in pursuance of, and as a part of, an unlawful scheme in the nature of a lottery. Not a loan. Siver v. Guarantee Inv. Co. [Mo.] 81 S. W. 1098.

21. Askegaard v. Dalen [Minn.] 101 N. W. 503.

22. Statute held not to invalidate note in hands of bona fide purchaser given to take up checks given by maker to obtain money to enable him to continue in game of poker

of attachment or execution,[24] and is always ancillary to,[25] though in a way distinct from,[26] a principal suit which is either pending or determined.

§ 2. *Grounds for garnishment and choses and properties subject.*[27]—The garnishee must be presently indebted[28] in an ascertainable amount[29] upon a valid obligation[30] to the defendant.[31] It is generally held to be against public policy to allow the garnishment of the salary of a public officer,[32] though the legislature has the power to determine its own policy on this subject with respect to the offices, officers, and employes within its control.[33] A private watchman is not such a public officer.[34] In some states, the proceeds of a sale of a homestead are exempt from garnishment for a limited period.[35] One doing mental rather than physical work is not a laborer whose wages are exempt from process of garnishment.[36] The maker of a note which has ceased to be current negotiable paper is subject to garnishment.[37] A bank holding a draft for collection, the fund is subject to garnishment at any time before the draft is collected and the proceeds mingled with the general funds of the bank.[38]

§ 3. *Persons liable to garnishment.*[39]—The state is not subject to garnishment without its consent,[40] nor is a town in the absence of statutory provisions.[41] An administrator may be.[42]

[Mo. Rev. St. 1899, § 3427]. Higginbotham v. McGready [Mo.] 81 S. W. 883.

23. See 2 Curr. L. 130.

24. Davis Bros. v. Choctaw, etc., R. Co. [Ark.] 83 S. W. 318. See 2 Curr. L. 130, n. 29.

25. Heller v. People's Sav. Bank [Mich.] 101 N. W. 226; Wilson v. Pennoyer [Minn.] 101 N. W. 502.

26. A declaration in attachment and the judgment rendered in such suit constitute no part of the record or pleadings in a garnishment proceeding based on the attachment. Leffler & Son v. Union Compress Co. [Ga.] 48 S. E. 710. Hence a motion in arrest of a judgment rendered in such a proceeding against a garnishee cannot be properly based on the alleged invalidity of the judgment against the defendant in attachment. Id.

27. See 2 Curr. L. 131.

28. At the time the writ was served and the answer filed. Darlington Miller Lumber Co. v. National Surety Co. [Tex. Civ. App.] 80 S. W. 238. Part of the debt in suit not being due at the time garnisheed, it is not available as a defense to the whole debt. Bailey v. Pennsylvania R. Co. [N. J. Err. & App.] 58 A. 83. The fact that a subcontractor's claim is outstanding does not postpone the maturity of the contractor's debt, under a contract providing that the building is to be delivered "free from any lien for work done or material furnished." Swearingen Lumber Co. v. Washington School Tp. [Iowa] 99 N. W. 730. See 2 Curr. L. 131, n. 37.

29. Darlington Miller Lumber Co. v. National Surety Co. [Tex. Civ. App.] 80 S. W. 238. Must be one which defendant could recover by suit against the garnishee. Grimm v. Ryan [Mo. App.] 80 S. W. 313 [advance sheets only].

30. A contract with a city for work being void, the city is not liable to trustee process. O'Neil v. Flannagan, 98 Me. 426, 57 A. 591. See 2 Curr. L. 131, n. 36.

31. A customer depositing a draft in a bank to his credit, title passes, and the proceeds are not subject to garnishment by a creditor of the drawer. Akers v. Jefferson County Sav. Bank [Ga.] 48 S. E. 424. Fund is not liable to garnishment after bona fide assignment by debtor. Assignment of fund in bank by check. New York Life Ins. Co. v. Patterson [Tex. Civ. App.] 80 S. W. 1058. Title to notes held not to pass by delivery to maker before maturity for sale to third person. Hutcheson v. King [Tex. Civ. App.] 83 S. W. 215.

32. Ruperich v. Baehr, 142 Cal. 190, 75 P. 782. Repeal of B. & C. Comp. § 259 held not to authorize garnishment of state officers. Keene v. Smith, 44 Or. 525, 75 P. 1065.

33. Ruperich v. Baehr, 142 Cal. 190, 75 P. 782. Code Civ. Proc. § 710 applies to legislative officers, making their salaries subject to the payment of their debts. Id. This section authorizes the city auditor to pay the money into court or he may draw a warrant necessary to satisfy the judgment. Id.

34. Though clothed with the power to make arrests and subject to the supervision and control of the police department of the city. Tabb v. Mallette, 120 Ga. 97, 47 S. E. 587.

35. Laws 1897, p. 131, c. 101, exempting the proceeds of a voluntary sale of a homestead from garnishment for six months after the sale applies to debts which existed prior to the passage of the law, and to a homestead acquired after the contraction of a debt to the payment of which it is sought to subject the proceeds. Lewis v. Goldthwaite Nat. Bank [Tex. Civ. App.] 81 S. W. 797.

36. Private watchman's wages held subject to garnishment. Tabb v. Mallette, 120 Ga. 97, 47 S. E. 587.

37. Note placed in hands of maker to sell to third person, held not current negotiable paper. Hutcheson v. King [Tex. Civ. App.] 83 S. W. 215. See 2 Curr. L. 132, n. 43, 44.

38. The draft was drawn by a nonresident creditor on a resident debtor. Nashville Produce Co. v. Sewell [Ga.] 48 S. E. 945. As to effect of Acts 1904, p. 100, quaere. Id.

39. See 2 Curr. L. 132.

40. Const. art. 4, § 24, contains no authority to sue the state. Keene v. Smith, 44 Or. 525, 75 P. 1065.

41. Code Civ. Proc. § 1391, as amended,

§ 4. *Rights, defenses and liabilities between plaintiff and garnishee.*[43]—Plaintiff has no greater rights against the garnishee than defendant has.[44] After the service of a garnishment, the garnishee cannot, as against the plaintiff, pay off his indebtedness to defendant.[45] The securing of a judgment against the garnishee vests in plaintiff the complete right to the indebtedness, together with all the rights and remedies possessed by the defendant for the collection of the same.[46] In some states, a judgment having been recovered against the defendant, an action may be maintained directly against the garnishee.[47]

The garnishee may set up the invalidity of the garnishment proceeding because

providing for execution against the wages of a judgment debtor, does not apply to municipal corporations. Emes v. Fowler, 43 Misc. 603, 89 N. Y. S. 685. See 2 Curr. L. 132, n. 51.

NOTE. Garnishment of municipalities: It makes no difference whether the city or town is sued in foreign or execution attachment, it cannot be made a garnishee in either case. Erie v. Knapp, 29 Pa. 173; Hadley v. Peabody, 13 Gray [Mass.] 200; Brown v. Heath, 45 N. H. 168. The treasurer of a municipal corporation, being a mere agent thereof, is not liable to the process of garnishment to reach money held by him for the city. Smith v. Woolsey, 22 Ill. App. 185; Triebel v. Colburn, 64 Ill. 376. Nor will such process reach funds of the corporation accruing to it by taxation either while in the course of collection by suit, or after they have been paid into its treasury. Underhill v. Calhoun, 63 Ala. 216, overruling Smoot v. Hart, 33 Ala. 69. It has even been held, where a public officer deposits money in a bank in his individual name, but such funds belong, in equity, to the municipal corporation of which he is an officer, that such funds cannot be garnished at the suit of his individual creditors. Marx v. Parker, 9 Wash. 473, 43 Am. St. Rep. 849. Most of the cases above cited are those in which some creditor of an officer or employe of the city has invoked the process; but the rule is not limited to such cases. The municipality cannot be garnished for a debt due from it to a citizen, as shown by county orders for money. Merrell v. Campbell, 49 Wis. 535, 35 Am. Rep. 785. So where it is invested by statute with power to establish and maintain public schools, it is not subject to garnishment in respect to a debt which it owes for work done on a municipal school house. Barn v. Williams, 81 Ga. 796; Bank v. Mayor, 92 Ga. 361.

There are a few cases, however, which hold that, as a city or town is as much liable to suit for what it owes as a private individual, it is subject to garnishment. Newark v. Funk, 15 Ohio St. 462; Bray v. Wallingford, 20 Conn. 416; Wilson v. Lewis, 10 R. I. 285; Rodman v. Musselman, 12 Bush. [Ky.] 354, 23 Am. Rep. 724; Mayor v. Horton, 38 N. J. Law, 88; Denver v. Brown, 11 Colo. 337; Laredo v. Nalle, 65 Tex. 359; Speed v. Brown, 10 B. Mon. [Ky.] 108, 111.—From note to Leake v. Lacey [Ga.] 51 Am. St. Rep. 112, 114.

42. In a suit in attachment on a promissory note where it appears, on filing of the final account, that the legacy or a part thereof will probably be paid. Orlopp v. Schueller, 4 Ohio C. C. (N. S.) 611. But see 2 Curr. L. 132, n. 50.

NOTE. Garnishment of executor or administrator: The rule has been stated broadly and generally to be that in the absence of statutory provisions on the subject expressly subjecting an executor or administrator to garnishment, he could not be summoned as a garnishee or trustee with reference to the funds in his hands. Thorn v. Woodruff, 5 Ark. 55; Sime's Estate, Myrick, Prob. Ct. Rep. 100; Brown v. Wiley, 107 Ga. 85, 32 S. E. 905; Boyer v. Hawkins, 86 Iowa, 40, 52 N. W. 659; Brooks v. Cook, 8 Mass. 246; Wheeler v. Bowen, 20 Pick. [Mass.] 563; Curling v. Hyde, 10 Mo. 374; Harrington v. La Rocque, 13 Or. 344, 10 P. 498; Ryan v. Marcy, 1 Kulp. 360; Parks v. Cushman, 9 Vt. 320; Brewer v. Hutton, 45 W. Va. 106, 30 S. E. 81, 72 Am. St. Rep. 804; Pringle v. Black, 2 Dall. 97, 1 Law. Ed. 305. The reason for the above rule, as shown by the above cases, is because executors and administrators derive their authority from the law, and it is their duty to exercise it according to the rules of the law, and they must account to the probate court for all the funds coming into their hands, and that it would be against public policy to permit another court to interfere with the administration.

While prior to a decree of distribution, money in the hands of an executor or administrator cannot be reached by garnishment against the creditors, heirs or devisees of the estate, the rule does not hold good after the decree of distribution has been made as by such decree each share is finally and definitely ascertained, and a cause of action exists, therefore, against the representative in his individual capacity in favor of the distributee. In re Narac, 35 Cal. 392, 95 Am. Dec. 111; Fitchett v. Dolbee, 3 Har. [Del.] 267; Bartell v. Bauman, 12 Ill. App. 450; Boyer v. Hawkins, 86 Iowa, 40, 52 N. W. 659; Hoyt v. Christie, 51 Vt. 48.—From note to Hudson v. Wilber [Mich.] 47 L. R. A. 345.

43. See 2 Curr. L. 133.

44. Seitz v. Starks [Mich.] 98 N. W. 852; Keene v. Smith, 44 Or. 525, 75 P. 1065. Cannot garnish funds assigned without fraud by his debtor. Mack Mfg. Co. v. Smoot & Co., 102 Va. 724, 47 S. E. 859. See 2 Curr. L. 133, n. 56.

45. Maggard v. Asher [Ky.] 82 S. W. 1002. See 2 Curr. L. 133, n. 55.

46. May enforce lien reserved in deeds to land given as security for note garnished. Smith v. Butler [Ark.] 80 S. W. 580.

47. Cannot be maintained in the absence of proceedings supplementary to execution, as authorized by Code Civ. Proc. § 714 et seq. Matteson & W. Mfg. Co. v. Conley [Cal.] 77 P. 1042.

of the defendant's bankruptcy,[48] but as to whether or not he can raise the question that the fund is exempt, there is a conflict.[49] A former adjudication deciding that the garnishee was not indebted to defendant decides that fact simply as to the time of the service of the writ, the time of filing the answer, or at any period of time between those dates.[50] The general appearance and disclosures of a garnishee, the court not having jurisdiction over defendant, is not a waiver of his rights.[51] Under the Arkansas statutes, a garnishee appearing only by affidavit, the plaintiff is not entitled to an order that he deliver the property of defendant in his possession or pay the money which he owes defendant into court.[52] In Pennsylvania, in an action of foreign attachment, the writ being served by garnishment and the defendant making default, the garnishee is not entitled to be heard on a defense going to his own liability until judgment has been entered and a writ of scire facias issued against him.[53]

A levy by garnishment upon the corporation stock of a debtor will impound dividends upon the stock declared while the proceedings are pending.[54]

§ 5. *Rights, defenses and liabilities between defendant and garnishee.*[55]—The garnishee may be relieved of responsibility as to defendant by paying the money into court.[56] Defendant, setting up as a defense that the debt has been attached in his hands as garnishee in another state, must show that the very debt for which the suit is brought was attached.[57] Garnishee, paying judgment against another than his debtor, is still liable to the latter.[58]

48. Armour Packing Co. v. Wynn, 119 Ga. 683, 46 S. E. 865.

49. That he can do so. Armour Packing Co. v. Wynn, 119 Ga. 683, 46 S. E. 865. **Contra.** Seitz v. Starks [Mich.] 98 N. W. 852. See 2 Curr. L. 133, n. 66.

NOTE. Duty of garnishee to set up exemption of principal debtor: In two cases it has been held that a garnishee could not set up the exemption of the principal debtor as that was a personal privilege which no one but the debtor himself could claim. Conley v. Chilcote, 25 Ohio St. 320; Osborne v. Schutt, 67 Mo. 712. And in other cases it has been held that a garnishee was not bound to set up the exemption of the principal debtor under the laws of another state when garnisbed for a debt due a nonresident. Moore v. Chicago, etc., R. Co., 43 Iowa, 385; East Tennessee, etc., R. Co. v. Kennedy, 83 Ala. 462, 3 Am. St. Rep. 755. At least where the principal debtor has actual knowledge of the garnishment and fails to make a defense, although the garnishment is in another state, the garnishee need not set up any exemption for him. Carson v. Memphis & C. R. Co., 88 Tenn. 646, 8 L. R. A. 412. Or where the principal debtor makes his own affidavit, claiming an exemption which is presented by the attorneys for the garnishee, the latter is not bound to set up any defense for him. Chicago, etc., R. Co. v. Meyer, 117 Ind. 563. But the clear weight of authority permits a garnishee, if it does not require him, to set up such exemption. Winterfield v. Milwaukee, etc., R. Co., 29 Wis. 589; Clark v. Averill, 31 Vt. 512, 76 Am. Dec. 131; Davenport v. Swan, 9 Humph. [Tenn.] 186; Muil v. Jones, 33 Kan. 112. Other cases expressly hold that the garnishee must set up the exemption if he has knowledge of it. Wright v. Chicago, etc., R. Co., 19 Neb. 175, 56 Am. Rep. 747; Chicago & A. R. Co. v. Ragland, 84 Ill. 373; Smith v. Dickson, 58 Iowa, 444; Terre Haute & I. R. Co. v. Baker, 122 Ind. 433; Turner v. Sioux City, etc., R. Co., 19 Neb. 241; Lock v. Johnson, 36 Me. 464; Daniels v. Marr, 75 Me. 397; Chicago, etc., R. Co. v. Mason, 11 Ill. App. 525; Welker v. Hinze, 16 Ill. App. 326; Parker v. Wilson, 61 Vt. 116. At least where the principal debtor is not notified of the proceeding. Peirce v. Chicago, etc., R. Co., 36 Wis. 283; Missouri Pac. R. Co. v. Whipsker, 77 Tex. 14, 19 Am. St. Rep. 734, 8 L. R. A. 321. And the exemption may be set up after judgment against the garnishee at any time before payment of the money. Union Pac. R. Co. v. Smersh, 22 Neb. 751, 3 Am. St. Rep. 290.—From note to Illinois Cent. R. Co. v. Smith [Miss.] 19 L. R. A. 577, 580.

50. Fulton v. Gesterding [Fla.] 36 So. 56.

51. Northwestern Life & Sav. Co. v. Gippe [Minn.] 99 N. W. 364.

52. His remedy is by compelling an examination under oath or by an action under Sand. & H. Dig. § 360. Allen-West Commission Co. v. Grumbles [C. C. A.] 129 F. 287.

53. Greevy v. Jacob Tome Institute, 132 F. 408.

54. Farmers' & Merchants' Nat. Bank v. Mosher [Neb.] 100 N. W. 133.

55. See 2 Curr. L. 133.

56. Though he colluded with the defendant's creditors to institute the proceedings, and prior to the garnishment the defendant had brought trover for the money. Bryant v. Wilcox [Mich.] 100 N. W. 918.

57. Bailey v. Pennsylvania R. Co. [N. J. Err. & App.] 58 A. 83; Naylor v. Pennsylvania R. Co. [N. J. Err. & App.] 58 A. 84.

58. Garnishee paying fund to plaintiff suing certain individuals trading under the firm name of W. C. T. & Co. is liable to his debtor, a corporation of the name of W. C. T. Co. Tapp v. Dibrell, 134 N. C. 546, 47 S. E. 51.

§ 6. *Conflicting and hostile claims and liens.*[59]—The garnishment lien is fixed by the service of the writ of garnishment,[60] and the garnishment proceedings do not affect the rights of bona fide purchasers before such time.[61] Payment by a garnishee does not render him liable to a transferee of a claim unless he has notice of such party's rights,[62] but having such notice, he must set up such party's claim in his answer.[63] On being sued by such transferee, the garnishee must allege that he did not have such notice.[64] The claimant having knowledge of the garnishment proceedings to the garnishee's knowledge, the latter is under no obligation to notify the former.[65] In some states, assignments must be recorded to be valid against garnishment proceedings.[66] A garnishee sustains the relation of a witness to the action, but, when ordered to pay, he may make any defense he has to the action.[67] The garnishee paying his indebtedness to defendant after service of writ, the plaintiff is entitled to have his debt paid from such fund before the claims of subsequent attaching creditors.[68] Bankruptcy of the defendant renders all garnishment liens obtained within four months prior to the filing of the petition in bankruptcy void.[69]

§ 7. *Jurisdiction and venue.*[70]—The court does not acquire jurisdiction by service of the garnishee alone.[71] The ancillary nature of the proceeding is often important in determining the question of jurisdiction.[72] A garnishee is not a defendant within the meaning of statutes providing that actions may be brought in a county wherein defendant resides.[73] Defendant cannot object to a change of venue because the garnishee might do so.[74] Statutory provisions govern.[75]

59. See 2 Curr. L. 134.

60. Fixes lien on note which cannot be defeated by a subsequent transfer made after maturity. Smith v. Butler [Ark.] 80 S. W. 580. Lien is not created by judgment. Armour Packing Co. v. Wynn, 119 Ga. 683, 46 S. E. 866. Under Code, §§ 3095, 3102, a subcontractor's claim on a public building is not prior to a garnishment of the money due the principal contractor to which the public corporation has answered, before receiving notice of his claim, though the filing of such notice was not delayed beyond the 30 days allowed by the latter section. Swearingen Lumber Co. v. Washington School Tp. [Iowa] 99 N. W. 730.

61. Will not affect the rights of bona fide purchasers or pledgors of stock acquired before the levy is made, though, by the books of the corporation, the stock appears to be the property of the debtor and is so regarded by the corporation. Farmers' & M. Nat. Banks v. Mosher [Neb.] 100 N. W. 133. See ante, § 2, 2 Curr. L. 134, n. 70.

62. Paid the money into court. Plymouth State Bank v. Milligan, 2 Ohio N. P. (N. S.) 274; Milligan v. Plymouth State Bank, 4 Ohio C. C. (N. S.) 685.

63. Defendant had assigned his interest in insurance. Frels v. Little Black Farmers' Mut. Ins. Co. [Wis.] 98 N. W. 522.

64. Plymouth State Bank v. Milligan, 2 Ohio N. P. (N. S.) 274.

65. A school district, garnished at suit of a creditor of the contractor who has erected a school building, is not under obligation to notify a subcontractor thereof, where he has knowledge of the garnishment and intervenes in the action. Swearingen Lumber Co. v. Washington School Tp. [Iowa] 99 N. W. 730.

66. A maker of monuments contracting to furnish and furnishing a monument, his skill and personal services not being engaged, and not entering into the contract, the price to be paid therefor is not his "future earnings," within the meaning of Rev. Laws, c. 189, § 34. Chester v. McDonald, 183 Mass. 64, 69 N. E. 1075. Public corporation, garnishee, paying garnishment judgment out of money due to contractor of public building, held a defense to subcontractor's claim which was not filed according to law. Swearingen Lumber Co. v. Washington School Tp. [Iowa] 99 N. W. 730.

67. He may by amended answer set up a complete defense by alleging an assignment of the claim without notice to him. Milligan v. Plymouth State Bank, 4 Ohio C. C. (N. S.) 585; Plymouth State Bank v. Milligan, 2 Ohio N. P. (N. S.) 274.

68. Maggard v. Asher [Ky.] 82 S. W. 1002.

69. Bankruptcy Act of 1898, § 67. Armour Packing Co. v. Wynn, 119 Ga. 683, 46 S. E. 865. See 2 Curr. L. 134, n. 74.

70. See 2 Curr. L. 134.

71. No jurisdiction where all the parties to an action were nonresidents, and none of them were in the state of the forum, process being served on the garnishee, a nonresident corporation. Northwestern Life & Sav. Co. v. Gippe [Minn.] 99 N. W. 364.

72. A justice is not deprived of jurisdiction of a claim within his jurisdiction merely because a garnishee in the proceeding owes defendant a sum in excess of his jurisdiction. Davis Bros. v. Choctaw, etc., R. Co. [Ark.] 83 S. W. 318. Under Gen. St. 1894, §§ 6308, 6322, the district court in which judgment is originally entered has sole jurisdiction in garnishment proceedings. Wilson v. Pennoyer [Minn.] 101 N. W. 502.

73. Construing Code Prac. § 31 (Sand. & H. Dig. § 6630) and Code Prac. § 96 (Sand. & H. Dig. § 6696). Hancock v. Gibson [Ark.] 79 S. W. 1061.

74. So stated in McCloud v. McCullers [Miss.] 36 So. 65, in which case not even the

§ 8. *Affidavit or application for writ.*[76]—Though the statute contemplates an affidavit separate from the application, the combining of the two in one paper will not vitiate them if the essentials of the statute are included therein.[77] The affidavit should state whether the principal suit is pending or determined,[78] and defendant has a right to rely on the accuracy of such statement.[79] The affidavit and application claiming interest must state the rate thereof and the date from which it began to run;[80] if attorney's fees are claimed, the amount must be stated.[81] Material changes in the affidavit cannot be made by amendment.[82] The affidavit and application being quashed, the garnishee is released from liability,[83] and at the same time the liability of defendant on his replevy bond ceases.[84]

§ 9. *Writ or process to garnishee and return.*[85]—A writ[86] and service thereof[87] are essential to jurisdiction. It is not necessary that the writ describe the debt.[88] There should be in the record a return by the officer showing that the process has been served, and that thereby the court has acquired jurisdiction of the garnishee.[89] The return, being only evidence of service, is not jurisdictional,[90] and if there has been a good service, but an irregular or incomplete return, the defect may be cured by an entry making the return conform to the facts.[91] The officer seeking to amend, the garnishee may raise an issue as to the validity of the service, and on satisfactory evidence may prevent the amendment, or on similar proof in a direct attack thereon, may have the judgment set aside.[92] In such case, it appearing affirmatively that valid service was made, it is unnecessary to amend the return.[93]

§ 10. *Answer or disclosure and later pleadings or traverse.*[94]—Ignorance of the time to answer is not a legal excuse for failure to answer at the time fixed by law.[95] In Georgia, the garnishee is required to answer by the first term.[96] The traverse must form an issue.[97] The answer denying indebtedness to and possession

garnishee was entitled to a change of venue under Rev. Code 1892, § 2147.

75. Civ. Code § 223 (Sand. & H. Dig. § 332), providing that an action may be prosecuted in any county in which a garnishee who is indebted to defendant is served with process, applies only to grounds enumerated in Civ. Code § 216 (Sand. & H. Dig. § 325), relating to nonresidence or fraud of defendant. Hancock v. Gibson [Ark.] 79 S. W. 1061.

76. See 2 Curr. L. 135.

77. Construing Rev. St. 1895, arts. 217, 219. Sullivan & Co. v. King [Tex. Civ. App.] 80 S. W. 1048.

78, 79. Heller v. People's Sav. Bank [Mich:] 101 N. W. 226.

80, 81. Sullivan & Co. v. King [Tex. Civ. App.] 80 S. W. 1048.

82. Affidavit cannot be amended so as to render another suit than the one stated therein the principal action. Heller v. People's Sav. Bank [Mich.] 101 N. W. 226.

83. Sullivan & Co. v. King [Tex. Civ. App.] 80 S. W. 1048.

84. Considering Rev. St. 1895, art. 225. Sullivan & Co. v. King [Tex. Civ. App.] 80 S. W. 1048.

85. See 2 Curr. L. 135.

86. Jones v. Bibb Brick Co. [Ga.] 48 S. E. 25. Voluntary appearance of the garnishee without the statutory service upon him, does not attach the funds of the principal defendant in his hands. Hathorn v. Robinson, 98 Me. 334, 56 A. 1057. See 2 Curr. L. 135, n. 82.

87. Jones v. Bibb Brick Co. [Ga.] 48 S. E. 25.

88. Smith v. Butler [Ark.] 80 S. W. 580.

89. Jones v. Bibb Brick Co. [Ga.] 48 S. E. 25. If there has been in fact a valid service, and no return, or a void return, no default judgment should be entered. Id. See 2 Curr. L. 135, n. 87.

90. Jones v. Bibb Brick Co [Ga.] 48 S. E. 25. See 2 Curr. L. 135, n. 88.

91. Jones v. Bibb Brick Co. [Ga.] 48 S. E. 25. Such amendment may be made by the officer voluntarily while he remains in commission, or nunc pro tunc by order of the court [Civ. Code 1895, §§ 5116, 5117]. Id.

92. Jones v. Bibb Brick Co. [Ga.] 48 S. E. 25. The garnishee in such case cannot rely on the incompleteness of the return, but must affirmatively show that no valid service was made. Id.

93. Jones v. Bibb Brick Co. [Ga.] 48 S. E. 25.

94. See 2 Curr. L. 136.

95. Jones v. Bibb Brick Co. [Ga.] 48 S. E. 25.

96. After the second term, the court has no discretion, and can only allow the answer to be filed for some reason legally sufficient to excuse the failure. Jones v. Bibb Brick Co. [Ga.] 48 S. E. 25.

97. Answer of garnishee denying indebtedness to defendant, traverse declaring this statement to be untrue, held to present an issue of fact. Russell v. Brunswick Grocery Co., 120 Ga. 38, 47 S. E. 528.

of property of the defendant is sufficient upon a trial of the issues raised by a traverse thereof to sustain the defense of res judicata.[96]

§ 11. *Claims or interventions.*[99]—A claimant not being a party to the garnishment proceedings, he is not bound thereby.[1]

§ 12. *Dissolution of writ.*[2]—The same particularity of statement is not required in a motion to dismiss garnishment proceedings as in a pleading.[3] A bond to dissolve the garnishment must follow the statute,[4] but being in the exact language of the statute, it is sufficient.[5]

§ 13. *Effect of pendency of other proceedings; stay, etc.*[6]—A garnishee being sued by defendant prior to the garnishment proceedings, the court having acquired jurisdiction of the parties and the subject-matter, payment of defendant's judgment bars recovery in the garnishment proceedings.[7]

§ 14. *Trial, verdict and judgments, costs and execution.*[8]—The answer of the garnishee being indeterminate and not conclusive, the proper practice is to summon the garnishee for a new examination,[9] and in some states the appellate court may conduct such examination through the instrumentality of its clerk.[10] The general rules as to burden of proof apply.[11]

A judgment rendered against a garnishee before judgment is rendered against the principal defendant is void.[12] A judgment against a garnishee duly entered is conclusive, as to him, that every jurisdictional allegation in the affidavit to obtain garnishment is true.[13]

The allowance to a garnishee of attorney's fees cannot exceed the amount prayed for.[14]

A demand by an execution plaintiff is not a demand "by force of the execution."[15]

GAS.

§ 1. Gas Franchises; Powers and Duties of Corporations Exercising Them (1556). Obligation to Supply Consumers (1557). Contracts with Consumers (1558). Public Contracts (1558).
§ 2. Public Regulation (1558).
§ 3. Torts and Crimes (1559).

§ 1. *Gas franchises;*[16] *powers and duties of corporations exercising them.*—The production and distribution of gas for fuel, light and power is a business of a public nature, control of which is in the state,[17] and which may be franchised by the

98. Considering Rev. St. 1892, § 1673. Fulton v. Gesterding [Fla.] 36 So. 56.

99. See 2 Curr. L. 136.

1. Wingo, Ellett & Crump Shoe Co. v. Johnson, 119 Ga. 486, 46 S. E. 669.

2. See 2 Curr. L. 137.

3. Proof of consideration of contract to pay part of judgment in full satisfaction thereof is admissible, though not alleged. Hanson v. McCann [Colo. App.] 76 P. 983.

4. Such bond is no obstacle to the entering of a judgment against a garnishee. Warlick v. Neal Loan & Banking Co. [Ga.] 48 S. E. 402. See 2 Curr. L. 137, n. 13.

5. Russell v. Brunswick Grocery Co., 120 Ga. 38, 47 S. E. 528.

6. See 2 Curr. L. 137.

7. Though garnishment proceedings were instituted prior to the filing of the garnishee's plea in defendant's suit. Grimm v. Ryan [Mo. App.] 80 S. W. 313 [Advance Sheets only].

8. See 2 Curr. L. 137.

9. In which case other evidence than the answer may be introduced. Considering Shannon's Code, § 4831. Wyler, Ackerland & Co. v. Blevins [Tenn.] 82 S. W. 829.

10. Construing Shannon's Code, § 6336. Wyler, Ackerland & Co. v. Blevins [Tenn.] 82 S. W. 829.

11. Plaintiff must prove by a preponderance of evidence that the garnishee was liable to the defendant in a sum certain, which defendant could recover by suit against the garnishee. Grimm v. Ryan [Mo. App.] 80 S. W. 313 [advance sheets only]. That assignment to himself was executed by defendant's authority. Darlington Miller Lumber Co. v. National Surety Co. [Tex. Civ. App.] 80 S. W. 238.

12. Justice's judgment. Burton v. Frame [Del.] 58 A. 804.

13. Warlick v. Neal Loan & Banking Co. [Ga.] 48 S. E. 402.

14. Fields v. Rust [Tex. Civ. App.] 82 S. W. 331.

15. Within the meaning of Rev. Laws, c. 189, § 40; such demand, to be effective, must be made by the officer in whose hands the execution has been placed. Barnes v. Shelburne Falls Sav. Bank [Mass.] 72 N. E. 85.

16. See Franchises, 3 Curr. L. 1495.

17. So held of natural gas. City of La

state or its proper delegates.[18] A legislative grant of use of streets is valid,[19] and the right may be exercised without the further consent of the municipality concerned,[20] or any compensation to it for use of the streets.[21]

A gas franchise to lay mains in the streets must be understood to have been granted subject to the use of the streets for other purposes and public works.[22] A franchise in a particular locality will not prevent the granting of a subsequent franchise to another party if the statute does not so provide.[23]

Corporations organized in Kansas to produce and supply natural gas may exercise the right of eminent domain.[24]

Obligation to supply consumers.[25]—A corporation enjoying a gas franchise, and a complete or partial monopoly in consequence, may be compelled to serve the public on reasonable terms.[26] But it cannot be compelled to furnish a city with gas for public lighting without its being measured,[27] nor to supply gas to a foreign corporation, which is not a householder or resident,[28] to enable it to perform a contract with the city.[29]

A refusal to furnish gas to a private consumer cannot be excused on the ground

Harpe v. Elm Tp. Gas, Light, Fuel & Power Co. [Kan.] 76 P. 448.

18. County Commissioners of Baltimore county have power, under Act 1902, c. 368, p. 525, to grant a franchise to lay and maintain for 25 years gas pipes and mains for public and private lighting in streets in certain towns. Consolidated Gas Co. v. Baltimore County Com'rs [Md.] 58 A. 214. County commissioners of Baltimore county, Maryland, have no power to require from gas companies a written permit before laying its mains in highways; and such a company will not be enjoined from excavating for the purpose without a written permit. Construing Laws 1900, c. 685, p. 1080, and Laws 1902, c. 524, p. 764. Consolidated Gas Co. v. Baltimore County Com'rs [Md.] 57 A. 29.

19. City of La Harpe v. Elm Tp. Gas, Light, Fuel & Power Co. [Kan.] 76 P. 448.

20. Gen. St. 1901, § 1366. City of La Harpe v. Elm Tp. Gas, Light, Fuel & Power Co. [Kan.] 76 P. 448. Interference by municipality may be enjoined. City prevented workmen from excavating in streets to lay gas mains. Id.

21. The granting of rights in public streets is wholly discretionary with the legislature. City of La Harpe v. Elm Tp. Gas, Light, Fuel & Power Co. [Kan.] 76 P. 448.

22. New Orleans Gaslight Co. v. Drainage Commission, 111 La. 838, 35 So. 929. Hence the owner of the franchise is not entitled to reimbursement for the expense of moving its mains, caused by the city's constructing sewers or drainage canals in the streets. Id.

23. Under Maine laws, where one company is authorized to supply a town with light by electricity, whether or not it is exercising its franchise, another company cannot lawfully supply gas to that town for lighting purposes without special legislative authority. Construing Pub. Laws 1885, c. 378, p. 318; 1895, c. 102, p. 111. Twin Village Water Co. v. Damariscotta Gas Light Co., 98 Me. 325, 56 A. 1112. Acts Md. 1886, c.c. 384, 395, pp. 623, 625, effecting the formation of certain gas companies, and prohibiting formation of others in same counties, held not to preclude the granting of a franchise to a private individual. Consolidated Gas Co. v. County Com'rs [Md.] 58 A. 214. Acts 1902, p. 525, c. 368, protecting vested rights in streets and highways, does not mean that a subsequent grant of a franchise to lay and maintain gas mains in certain localities affects private rights previously granted to another. Id.

24. City of La Harpe v. Elm Tp. Gas, Light, Fuel & Power Co. [Kan.] 76 P. 448.

25. **Note:** A gas company, especially if it has a monopoly of the business, must furnish gas to any applicant on reasonable terms. Shepard v. Milwaukee Gas Light Co., 6 Wis. 539, 70 Am. Dec. 479; Baltimore Gas Light Co. v. Calliday, 25 Md. 1. **Contra,** McCune v. Norwich City Gas Co., 30 Conn. 521, 79 Am. Dec. 278. A gas company may be compelled by mandamus to furnish gas as required by its charter to a person demanding it. People v. Manhattan Gas Light Co., 45 Barb. [N. Y.] 136. See note on "Compulsory service by party whose business it is to serve the public," appended to Rushville v. Rushville Nat. Gas Co. [Ind.] in 15 L. R. A. 321.

26. A city may obtain a mandamus to compel furnishing of gas at a reasonable price, or restrain furnishing it at an unreasonable figure. Public Service Corp. v. American Lighting Co. [N. J. Eq.] 57 A. 482. Where a gas company had been accustomed to furnish gas by the lamp, and another company was awarded a contract of furnishing lamps and light, it was held that to compel the former to furnish meters and sell gas to the latter by the cubic foot would be unreasonable. Id.

27. As at a price of so much per lamp. Public Service Corp. v. American Lighting Co. [N. J. Eq.] 57 A. 482.

28. Hence such foreign corporation is not entitled to an injunction to prevent the supply of gas being cut off. Public Service Corp. v. American Lighting Co. [N. J. Eq.] 57 A. 482. Especially when it appears that to grant it would be detrimental to the city concerned. American Lighting Co. v. Public Service Corporation, 132 F. 794.

29. Corporation contracting to light a city with a new patent lamp is charged with notice of its disability to procure gas from a company controlling the supply. Public Service Corp. v. American Lighting Co. [N. J. Eq.] 57 A. 482.

that there is not a sufficient supply to furnish him without depriving prior consumers of reasonable requirements,[30] nor on the ground that he may procure gas from another company, supplied by the former.[31] The obligation to lay mains to supply private consumers does not require an expenditure without reasonable expectation that the amount of gas consumed will warrant it.[32]

The remedy, if any, to prevent a natural gas company from taking up a pipe line on certain premises is by injunction and not mandamus.[33] The penalty for failure to supply gas to a consumer who has paid what is due from him, provided by statute in California, cannot be enforced unless the consumer has made a tender of the amount due, accompanied by a deposit of the sum to the credit of the company.[34]

Contracts with consumers.—A solicitor and collector for a gas company who is its ostensible, if not its actual, agent for the purpose, may bind the company by his contracts.[35] But if made without authority, the company becomes bound when it accepts and acts upon a contract, with implied notice of its terms.[36] A gas contract is binding on a company, though it does not expressly agree to furnish gas, since the law imposes that duty, when the consumer performs his part of the agreement.[37] In such case an injunction will lie to restrain the company from cutting off a supply of gas to the consumer.[38]

Public contracts.—The rights of the parties to contracts for public lighting are governed by the terms of such contracts;[39] performance must be by legal means.[40]

§ 2. *Public regulation.*—While a reasonable regulation of the manufacture of gas is a proper exercise of the police power, an attempted exercise of the power by prohibiting its manufacture in a certain district where a company already has an established business,[41] or limiting a district wherein it may lawfully be manufactured, so as to exclude land where a company has expended money in construction, under a license from fire commissioners,[42] is an unlawful interference with property rights, and cannot be upheld.

30. Inhabitants entitled to equality of right. Indiana Nat. Gas & Oil Co. v. State [Ind.] 71 N. E. 133.

31. Indiana Nat. Gas & Oil Co. v. State [Ind.] 71 N. E. 133.

32. Public Service Corp. v. American Lighting Co. [N. J. Eq.] 57 A. 482.

33. State v. Connersville Natural Gas Co. [Ind.] 71 N. E. 483.

34. Construing Civ. Code § 629 (penalty) and § 1500 (what is sufficient tender). Baker v. San Francisco Gas & Electric Co., 141 Cal. 710, 75 P. 342.

35. Agency [Civ. Code, §§ 2316, 2317, 2330]. Gallagher v. Equitable Gaslight Co., 141 Cal. 699, 75 P. 329.

36. Secretary filed contract without seeing a special provision therein. Company held bound thereby. Gallagher v. Equitable Gaslight Co., 141 Cal. 699, 75 P. 329.

37. A contract is not unenforceable for want of mutuality because the term during which gas is to be supplied is not definitely fixed. Gallagher v. Equitable Gaslight Co., 141 Cal. 699, 75 P. 329.

38. Gallagher v. Equitable Gaslight Co., 141 Cal. 699, 75 P. 329.

39. Under Baltimore City Code, §§ 10, 11, 12, the city may charge a fee only for the original inspection of new meters and not for the reinspection of discontinued meters. City of Baltimore v. Consolidated Gas Co. [Md.] 58 A. 216. A gas company may be required to pay a municipality a reasonable sum for supervision and inspection to guard the public against dangers resulting from the manufacture of gas when such condition is stipulated in the franchise. City of Columbus v. Columbus Gas Co., 2 Ohio N. P. (N. S.) 37. Under Minn. Laws 1856, p. 87, c. 53, § 9, the city of St. Paul became obligated to pay to the St. Paul Gaslight Co. 8% annually on the cost of erection of posts, lamps and equipment to light the city, the obligation to continue as long as the lamps remain in actual service. St. Paul Gaslight Co. v. St. Paul, 91 Minn. 521, 98 N. W. 868. See Public Contracts, 2 Curr. L. 1280.

40. A corporation having a contract to supply light to a city by the use of a new patent lamp, and intending to obtain gas from a corporation controlling the supply and which formerly furnished light for the city, cannot summarily remove the latter company's lamps from the city's posts, but must obtain lawful authority. Public Service Corp. v. American Lighting Co. [N. J. Eq.] 57 A. 482.

41. Ordinance of Los Angeles county making it a penal offense to maintain gas works in a thinly settled district, apart from residences, held void. In re Smith [Cal.] 77 P. 180.

A municipal corporation has no power to regulate prices charged consumers of gas unless that power has been expressly delegated, or may be implied from other powers expressly granted.[43] Under the Illinois statute permitting consolidation of gas companies, a contract exemption of a corporation, absorbing others, from state regulation of rates, does not extend to the business of the companies absorbed, which do not possess such immunity in their own right.[44]

§ 3. *Torts and crimes.*[45]—Gas companies are liable in tort for negligence resulting in explosions[46] or escape[47] of gas.[48] A complaint alleging that an explosion of gas on plaintiff's premises was caused by the negligent manner in which gas mains and pipes were there laid is sufficient without a bill of particulars showing the particular act or acts causing the explosion.[49] Under a contract between a gas company and consumers, providing for free access to the meter and discontinuance of service on default, an agent of the company committed no trespass in entering on the premises without the consent of the owner or occupant and removing the meter without force or unnecessary damage.[50]

Allowing natural gas to escape from wells into the air, needlessly, is made an offense in Indiana.[51]

42. After a gas company had expended over $2,500 in construction, having a permit from fire commissioners, the Los Angeles city council amended the law limiting the territory where gas works could lawfully be maintained, so as to cut off the land where the company had started to build. The motive seemed to be to preserve the monopoly of another company. Ordinance held invalid, and criminal proceedings based thereon enjoined. Dobbins v. Los Angeles, 25 S. Ct. 18, 49 Law. Ed. —; Daly v. Elton, 25 S. Ct. 22, 49 Law. Ed.—.

43. Chicago has no such power under § 66 of Ill. city and village act (Hurd's Rev. St. 1901, c. 24). Mills v. Chicago, 127 F. 731. Equity has jurisdiction to enjoin enforcement of an invalid ordinance fixing prices charged for gas, and providing a penalty for each violation, to avoid multiplicity of suits. Id.

NOTE. State regulation of rates: The business of supplying gas to the public is one subject to state regulation under the principles laid down in Munn v. Illinois, 94 U. S. 113. Thus it is held that a natural gas company contracting with a city to supply its inhabitants devotes its property to public use to such a degree as to warrant statutory regulation of its charges, if such regulation does not result in any impairment of the obligation of its contract. Toledo v. Northwestern Ohio Nat. Gas Co., 5 Ohio C. C. 557. See, also, State v. Columbus Gaslight & C. Co., 34 Ohio St. 572, 32 Am. Rep. 390; Zanesville v. Zanesville Gaslight Co., 47 Ohio St. 1; Spring Valley W. W. v. Schottler, 110 U. S. 347; Wheeler v. Northern, etc., Co., 10 Colo. 582, 3 Am. St. Rep. 603; American W. W. v. State, 46 Neb. 194, 50 Am. St. Rep. 610.

But an ordinance regulating the price of natural gas is not authorized by general statutory authority to provide reasonable regulations for the safe supply, distribution, and consumption of such gas. Lewisville Nat. Gas Co. v. State, 135 Ind. 49, 21 L. R. A. 734; overruling on this point Rushville v. Rushville Nat. Gas Co., 132 Ind. 575, 15 L. R. A. 321. A similar ordinance was held invalid where the statute permitted "such regulation" as municipal authorities might prescribe, and the company had obtained the right to use the streets without any provision in the franchise as to prices to be charged private consumers. In re Pryor, 55 Kan. 724, 49 Am. St. Rep. 280, 29 L. R. A. 398.

See on the general subject New Memphis Gas & L. Co. v. Memphis, 72 F. 952; Capital City Gaslight Co. v. Des Moines, 72 F. 829; and other cases cited in notes in 33 L. R. A. 181, and 62 Am. St. Rep. 290.

44. Act June 5, 1897, which provides also that the consolidated corporation should be subject to the legal obligations of the companies absorbed. People's Gaslight & Coke Co. v. Chicago, 194 U. S. 1, 48 Law. Ed. 851. Section 11 of act of June 5, 1897, providing that a corporation which absorbed others should not charge a higher rate than that charged the year previous to consolidation, did not fix a rate so as to preclude a reduction thereof by the state; but it simply fixed a maximum charge. Id.

45. See 2 Curr. L. 139, 140.

46. Evidence insufficient to show negligence of gas company in action for damages for injuries caused by explosion of gas while a stove was being lighted. Lodge v. United Gas Imp. Co. [Pa.] 58 A. 925.

47. In an action for damages caused by explosion of gas in plaintiff's cellar, evidence that defendant maintained a gas well within fifty feet and that three water wells within a radius of 200 feet from the gas well were rendered useless by gas, was insufficient to prove defendant negligent or that the gas in question came from defendant's well. Maxwell v. Coffeyville Min. & Gas Co. [Kan.] 75 P. 1047.

48. For extended note on this subject, see 29 L. R. A. 337.

49. Neuwelt v. Consolidated Gas Co., 94 App. Div. 312, 87 N. Y. S. 1003.

50. Hitchcock v. Essex & H. Gas Co. [N. J. Eq.] 57 A. 135.

51. Burns' Ann. St. 1894, § 7510, construed to mean that offense may be committed three ways: (1) Allowing gas to escape from new well more than two days after gas is struck; (2) failing to properly confine flowing gas;

GIFTS.

§ 1. Definition and Distinctions (1560).
§ 2. Validity and Requisites (1560).
§ 3. Fraud, Undue Influence, Mistake or Incapacity (1562).

§ 1. *Definition and distinctions.*[52]—A gift is a transfer of personal property, made voluntarily and without consideration.[53] Gifts causa mortis are distinguishable from gifts inter vivos in this: the former are made in contemplation of death,[54] and may be revoked during the lifetime of the donor,[55] while the latter are absolute.[56] Again, the former are subject to the debts of the deceased donor,[57] while this is true of the latter only in certain cases. In either case, the gift must be complete and the property delivered and accepted.[58]

§ 2. *Validity and requisites.*[59]—To constitute a valid donation, either causa mortis or inter vivos, it is indispensable that the property be such as may be the subject of a gift,[60] and a disclosed present intention of the donor to divest himself of the title and dominion,[61] a delivery, which must be absolute in case of a gift inter vivos,[62] and conditional in case of a gift causa mortis,[63] and acceptance by the donee,[64] are necessary. "Attributes of a gift causa mortis are that it must be of

(3) failing to plug abandoned wells. Bailey v. State [Ind.] 71 N. E. 655.

GIFTS.

52. See 2 Curr. L. 140.

53. Cal. Civ. Code, § 1146. Collins v. Maude [Cal.] 77 P. 945.

54. Driscoll v. Driscoll [Cal.] 77 P. 471; Harrell v. Nicholson, 119 Ga. 458, 46 S. E. 623; Rosenthal v. People, 211 Ill. 306, 71 N. E. 1121.

55. Peck v. Scofield [Mass.] 71 N. E. 109.

56. The requisites of both are practically the same, the principal distinction being that in one case the gift is absolute and irrevocable, whereas in the other it is a conditional gift, taking effect only upon the death of the donor, who in the meantime has the power of revocation. Davis v. Kuck [Minn.] 101 N. W. 165. See 2 Curr. L. 140, n. 54.

57. Rosenthal v. People, 211 Ill. 306, 71 N. E. 1121.

58. The question of delivery and acceptance is for the jury. Davis v. Kuck [Minn.] 101 N. W. 165. Whether a mother by indorsement and delivery to a son of a note executed to her by the son made a gift thereof to him, or whether the note belonged to the father, who had possession of it at the time of his death, was a question for the jury. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784. Where a note from a son to his father was put in judgment, and the father thereafter endorsed a release upon such judgment, this was evidence of a completed gift. Boblett v. Barlow [Ky.] 83 S. W. 145.

59. See 2 Curr. L. 140.

60. The donor's promissory note cannot be the subject of a valid gift causa mortis. Mason v. Gardiner [Mass.] 71 N. E. 952. Cattle on a range, though actual physical delivery be impossible, may still be the subject of a completed gift. McMullen v. Stripling [Ga.] 48 S. E. 115.

61. Allen-West Commission Co. v. Grumbles [C. C. A.] 129 F. 287; Sprague v. Walton [Cal.] 78 P. 645; Harrell v. Nicholson, 119 Ga. 458, 46 S. E. 623. Retention of pass books to a savings bank account negatives an intent to give. Taylor v. Coriell [N. J. Eq.] 57 A. 810. So a husband's sale of corporate stock held by himself and wife as tenants by the entirety, the wife's interest having come from him as a gratuity, will be presumed to be rightful, negativing the idea of a completed gift. Bauernschmidt v. Bauernschmidt, 97 Md. 35, 54 A. 637.

62. Harrell v. Nicholson, 119 Ga. 458, 46 S. E. 623. The intent of the donor in delivering the property is a material inquiry. Stroup v. Bridger [Iowa] 100 N. W. 113. There is not such relinquishment of control as is essential, where the donor retains possession of pass book. Kelly v. Home Sav. Bank, 44 Misc. 102, 89 N. Y. S. 776; Hallenbeck v. Hallenbeck, 44 Misc. 109, 89 N. Y. S. 780. Cal. Civ. Code, § 1147, making delivery essential to the validity of a gift, is limited to verbal gifts. Driscoll v. Driscoll [Cal.] 77 P. 471. Where a father, holding a note against his son, indorsed on the note that it was not to draw interest, and during his last illness procured an indorsement to be made in a memorandum book that the note was not to be paid, but there was never any delivery of the note to the son, there was no valid gift inter vivos. Burge v. Burge's Adm'r, 25 Ky. L. R. 979, 76 S. W. 873.

63. Hawn v. Stoler, 208 Pa. 610, 57 A. 1115. The handing of bank books by one who is critically ill to another accompanied by the instruction "Bury me out of this, and whatever is left is yours" constitutes a valid gift causa mortis. Mahon v. Dime Sav. Bank, 92 App. Div. 506, 87 N. Y. S. 258. So delivery to the donee of a written receipt for money deposited with another for safe keeping is sufficient. Claytor v. Pierson [W. Va.] 46 S. E. 935. But the loan of a sum of money and taking a receipt therefor in which it is stated to be agreed that "in case of the death of W. M. R. (the donor), that B. C. R. (the alleged donee) is to take charge of this money" does not amount to a delivery. Ragan v. Hill [Ark.] 80 S. W. 150.

64. Hooper v. Vanstrum [Minn.] 100 N. W. 229; Davis v. Kuck [Minn.] 101 N. W. 165. When the possession of the conveyance is retained by the record owner, without a present intention to part with the absolute dominion of the property, and the grantee has no notice thereof, the record of such conveyance is ineffective to transfer title.

personal property and made in the last illness of the donor while the apprehension of death is imminent, and subject to the implied condition that if he recovers or if the donee die first, the gift shall be void; and possession of the property must be delivered at the time of the gift to the donee or to some one for him; and the gift must be accepted by the donee."[65] A gift need not be in writing, unless it be of land,[66] but where a writing is employed to effectuate a gift, it should contain words apt to effect the transfer.[67]

The delivery need only be such as the nature of the property reasonably admits.[68] Where a mother by indorsement and delivery of a note executed to her by a son made a gift of it to him, the fact that the father at the time of his death had possession of the note would not defeat the gift.[69]

In every case of an alleged gift the burden is upon the donee to establish a complete and valid donation.[70] The prima facie inference of a gift arising from the deposit of money of the husband in the wife's name may be rebutted,[71] and declarations of a donor made at some considerable time after a transfer of property are incompetent, either to establish,[72] or to defeat a gift.[73]

Delivery of a note of donor[74] does not constitute a gift causa mortis.[75]

Hooper v. Vanstrum [Minn.] 100 N. W. 229. See 2 Curr. L. 140, n. 58.

65. Johnson v. Colley, 101 Va. 414, 44 S. E. 721, 99 Am. St. Rep. 884, with extensive note, "Gifts causa mortis," in 99 Am. St. Rep. 890-918, citing notes 23 Am. Dec. 603, 51 Am. Dec. 362, 48 Am. Rep. 506.

66. In re Sproule's Estate, 42 Misc. 448, 87 N. Y. S. 432. A gift of land need not be in writing but may be evidenced entirely by parol, and will become an equitable title if possession be taken on the faith of the parol gift. Shannon v. Marchbanks [Tex. Civ. App.] 80 S. W. 860. See 2 Curr. L. 141.

67. An instrument reciting: "I am leaving for S. and before I start I write this to certify that it is my wish that M. shall not be asked for the money she borrowed from me or the interest on it. She and I have a perfect understanding about my business" does not on its face import a gift. Collins v. Maude [Cal.] 77 P. 945.

68. If the subject of a gift is a chose in action, the delivery of the most effectual means of reducing the chose to possession or use, such as the delivery of the writing representing the chose, if present and capable of delivery, is indispensable. Allen-West Commission Co. v. Grumbles [C. C. A.] 129 F. 287. Where this is not possible, the law requires an assignment or some equivalent instrument. Driscoll v. Driscoll [Cal.] 77 P. 471; Hawn v. Stoler, 208 Pa. 610, 57 A. 1115. As title to a promissory note may pass by delivery, it needs no written assignment. Harrell v. Nicholson, 119 Ga. 458, 46 S. E. 623. Since the interest in a partnership is incapable of manual delivery, the execution and delivery of a written conveyance thereof is a sufficient delivery. Driscoll v. Driscoll [Cal.] 77 P. 471. But the delivery of a written assignment of stock in a corporation is ineffectual where the donor retains the certificates. Allen-West Commission Co. v. Grumbles [C. C. A.] 129 F. 287. That certificates of stock were not indorsed by the donor does not render the gift incomplete as matter of law. Bond v. Bean, 72 N. H. 444, 57 A. 340. The delivery of keys is not always conclusive. Belknap v. Belknap [Iowa] 100 N. W. 115. Delivery of bank pass books. Peck v. Scofield [Mass.] 71 N. E. 109; Weatherbee v. Litchfield [Mass.] 71 N. E. 796. Where a deposit in a bank was re-deposited in the names of the original depositor and his brother, and the brother, though not present at the time, was afterward given the book by the depositor, and told that it was his, the gift was complete. Industrial Trust Co. v. Scanlon [R. I.] 58 A. 786. Likewise where a husband, having money, the community property of himself and wife, deposited in his name, gave the wife an order on the bank authorizing it to allow her to draw the money, and she thereafter drew it and deposited it in her own name. Sprague v. Walton [Cal.] 78 P. 645. So, where a mother who had deposited money in a savings bank in her own name, delivered the bank book to the daughter, with a written order directing the bank to pay the amount of the deposit to the daughter who thereafter had exclusive possession of the book for 14 years, such facts support a finding of title in the daughter by gift. In re Barefield, 177 N. Y. 387, 69 N. E. 732. The agreement of brothers and sisters of an unmarried decedent to give their interest in the personalty of decedent to their mother, accompanied by an actual division and transfer of the personalty, makes a valid gift. In re Sproule's Estate, 42 Misc. 448, 87 N. Y. S. 432.

69. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784.

70. Allen-West Commission Co. v. Grumbles [C. C. A.] 129 F. 287.

71. Monahan v. Monahan [Vt.] 59 A. 169.

72. Johnson v. Cole, 178 N. Y. 364, 70 N. E. 873.

73. Scheps v. Bowery Sav. Bank, 97 App. Div. 434, 90 N. Y. S. 26. Where a declaration, deposed to by a witness, was not a mere claim of ownership, such as might have been admissible as res gestae, but was a declaration respecting the source of donee's title, its admission was error. Couch v. Couch [Ala.] 37 So. 405.

74. See 2 Curr. L. 141.

75. Mason v. Gardiner [Mass.] 71 N. E. 952.

§ 3. *Fraud, undue influence, mistake or incapacity.*[76]—To be valid, a gift must be free from fraud,[77] undue influence,[78] or mistake,[79] and the donor must be competent to contract.[80]

GOOD WILL.

A sale of the good will with a covenant not to engage in similar business is valid if not in restraint of trade,[81] and the seller may be enjoined from breaking his covenant,[82] or from holding himself out as the manager of a similar business,[83] and strangers to the sale may be enjoined from holding him out as their superintendent,[84] but the sale does not prevent the seller's wife from using her own name in a similar business[85] with her husband as agent.[86]

GRAND JURY.

Qualification and challenge—Effect of disqualification.[87]—The competency of Federal grand jurors in Porto Rico is to be determined by the local statute.[88]

Disqualification of grand jurors is usually regarded as fatal to the indictment,[89] but as to disqualification of a single juror, the cases are in conflict;[90] where the objection is allowed, it must be timely made.[91] The objection may be made by challenge[92] or plea in abatement.[93] The plea must allege facts showing prejudice, a general averment being insufficient.[94] It is discretionary to summon a grand juror to be examined as to his literacy on challenge to the indictment,[95] and the fact that a juror signed by mark in several instances is not sufficient to prove him illiterate.[96]

76. See 2 Curr. L. 141.

77. A voluntary gift of land may be upheld if no fraud is practiced by or for the grantee, where the relationship of the parties and the beneficial character of the gift are such as would naturally justify the belief that the grantor intended to make and complete the same. Hooper v. Vanstrum [Minn.] 100 N. W. 229. To avoid gift of negotiable instrument by father to son, widow should aver fraud and not merely that she was prejudiced by the gift. Burge v. Burge's Adm'r, 25 Ky. L. R. 979, 76 S. W. 873. A gift by a father to his children of his entire property, made without any advice, when his second wife, who had separated from him, was threatening him with legal proceedings, and containing no power of revocation, may be revoked, though executed without any undue influence of the children. James v. Aller [N. J. Eq.] 57 A. 476.

78. See Fraud and Undue Influence, 3 Curr. L. 1520. Gift from wife to husband will be closely scrutinized, and will be sustained only when established by satisfactory and competent evidence. Buckel v. Smith's Adm'r [Ky.] 82 S. W. 235. Evidence held not sufficient to require instruction that burden was on donee to show absence of undue influence. Davis v. Kuck [Minn.] 101 N. W. 165.

79. See 2 Curr. L. 141, n. 65. See, also, Mistake and Accident, 2 Curr. L. 903.

80. See 2 Curr. L. 141, n. 66. See, also, Incompetency, 2 Curr. L. 295.

81. See 2 Curr. L. 142; Contracts, 3 Curr. L. 823.

82. Eugene Dietzgen Co. v. Kokosky [La.] 37 So. 24. Where one transferred his business and good will and agreed not to engage in similar business in three named states for five years, he was enjoined from acting as president of a corporation engaged in a similar business. Pittsburg Stove & Range Co. v. Pennsylvania Stove Co., 208 Pa. 37, 57 A. 77.

83, 84, 85. Fleckenstein Bros. Co. v. Fleckenstein [N. J. Eq.] 57 A. 1025.

86. Vinall v. Hendricks [Ind. App.] 71 N. E. 682.

87. See 2 Curr. L. 142.

88. Crowley v. U. S., 194 U. S. 461, 48 Law. Ed. 1075.

89. It is not a "defect or imperfection of form" within U. S. Rev. St. § 1025. Crowley v. U. S., 194 U. S. 461, 48 Law. Ed. 1075.

90. That a juror is disqualified is ground for challenge but not for quashing an indictment. State v. Hoffman [N. J. Err. & App.] 58 A. 1012; People v. Borgstrom, 178 N. Y. 254, 70 N. E. 780. That a grand juror was illiterate vitiates an indictment. State v. Greenland [Iowa] 100 N. W. 341.

91. Cannot be made after verdict when facts might have been learned before arraignment. Davis v. State [Ga.] 48 S. E. 305. Motion to dismiss indictment not proper, but remedy is by challenge to individual grand juror. People v. Borgstrom, 178 N. Y. 254, 70 N. E. 780.

92. One held to await indictment may challenge an individual grand juror, and the fact that he is confined in jail does not impair such right. People v. Borgstrom, 178 N. Y. 254, 70 N. E. 780.

93. Crowley v. U. S., 194 U. S. 461, 48 Law. Ed. 1075.

94. United States v. Cobban, 127 F. 713.

95. Discretion held not abused where request was delayed. State v. Greenland [Iowa] 100 N. W. 341.

96. There was evidence explaining such signatures as made on account of illness. State v. Greenland [Iowa] 100 N. W. 341.

A contention that the court in selecting grand jurors acted under the Federal instead of the local statute presents a question reviewable in the United States supreme court on error to the United States district court in Porto Rico.[97]

Summoning and impanelling.[98]—A court with common law powers may invoke common law methods of summoning a grand jury if the statute be inadequate.[99] Discharge of a grand juror and substitution of another is at most an irregularity, and the grand jury is a defacto body whose acts cannot be questioned.[1] That the order for summoning the grand jurors was made under a law which had not yet taken effect is no ground for quashing an indictment where the jurors summoned were those who had already been selected under the law in force.[2] An unsworn statement is insufficient to overcome the presumption that a special grand jury was properly ordered.[3]

Proceedings.[4]—A grand jury cannot investigate on suspicion, but must have some information that a crime has been committed.[5] The grand jury may not examine a witness on matter irrelevant to the inquiry before it.[6] If the accused is summoned, he must be apprised of the charge and of his privilege to refuse to testify.[7] After presenting an indictment, the jury cannot inquire further merely to obtain further testimony in support of it.[8] Presence of an unauthorized person in the grand jury room while testimony is being taken is no objection to the indictment.[9] Special assistant United States District attorneys may appear before the grand jury.[10] The prosecuting attorney may explain to the grand jury both the law and the facts in presenting cases.[11] A witness is not guilty of contempt in refusing to answer incriminating[12] or degrading[13] questions, or questions not pertinent to the matter under investigation,[14] and whether the question is material is reviewable on certiorari to bring up contempt proceedings.[15] An affidavit not showing the charge under investigation is insufficient as basis for a charge of contempt.[16]

Appointment of committee.—A statute of Georgia authorizes the grand jury to appoint a committee of citizens to investigate the accounts of public officers, and this statute has been held valid,[17] and does not impair the "original and exclusive" auditing power of the county commissioners.[18] The compensation of the committee is to be fixed by the judge of the superior court and paid from the contingent fund of that court.[19] The committee can act only during the term of court at which it was appointed.[20]

Disclosure of secrets.—Wilfulness is not an element of the offense of divulging the secrets of the grand jury.[21] An instruction defining the offense in the language of the statute is sufficient.[22] An instruction to convict if defendant disclosed the

97. Crowley v. U. S., 194 U. S. 461, 48 Law. Ed. 1075.

98. See 2 Curr. L. 142.

99. No jury list prepared because county organization was not complete. Court ordered open venire. Moran v. Territory [Okl.] 78 P. 111.

1. In re Davies [Kan.] 75 P. 1048.

2. State v. Berry, 179 Mo. 377, 78 S. W. 611.

3. Howard v. State [Ark.] 82 S. W. 196.

4. See 2 Curr. L. 143.

5, 6, 7. In re Morse, 42 Misc. 664, 87 N. Y. S. 721.

8. In re Morse, 42 Misc. 664, 87 N. Y. S. 721. And see Rogers v. Superior Court [Cal.] 78 P. 344.

9. Mason v. State [Tex. Cr. App.] 81 S. W. 718.

10. United States v. Cobban, 127 F. 713.

11. Conduct of prosecuting attorney held not improper. United States v. Cobban, 127 F. 713.

12. In re Morse, 42 Misc. 664, 87 N. Y. S. 721.

13. Rogers v. Superior Court [Cal.] 78 P. 344.

14. Rogers v. Superior Court [Cal.] 78 P. 344. And see In re Morse, 42 Misc. 664, 87 Y. S. 721. Questions tending to show crime by witness held immaterial on investigation of different crime by another. Rogers v. Superior Court [Cal.] 78 P. 344.

15, 16. Rogers v. Superior Court [Cal.] 78 P. 344.

17, 18, 19, 20. Pen. Code 1895, § 837. Chatham County v. Gaudry, 120 Ga. 121, 47 S. E. 634.

21, 22, 23, 24. Higdon v. State [Tex. Cr App.] 79 S. W. 546.

matters about which he was interrogated is not on the weight of evidence,[23] and in the absence of a request, is sufficient without stating the matters alleged to be disclosed.[24]

GUARANTY.

§ 1. What Constitutes Guaranty (1564).
§ 2. Form and Requisites of the Contract (1564).
§ 3. Operation and Effect of Guaranty (1566).
A. Interpretation in General (1566).
B. Fixing Default and Liability of the Guarantor (1566).
C. Defenses and Discharge of Guaranty (1566).
§ 4. Rights and Remedies Between Guarantor and Principal Debtor (1567).
§ 5. Action on Guaranty (1567).

§ 1. *What constitutes guaranty.*[25]—A guaranty may be defined as an undertaking by one person that another shall perform his contract or fulfill his obligation or that if he does not, the guarantor will do it for him.[26] The promise must be collateral and the promisor liable only on default of the principal debtor, for otherwise if both principal and guarantor are liable, it ceases to be a contract of true guaranty, and is suretyship.[27] There must be a subsisting and contemplated debt,[28] otherwise it is a contract of indemnity[29] or a novation,[30] or a primary debt on part of the alleged guarantor, often termed an "original promise."[31] The promise must be to the creditor and not the debtor.[32] The debt must be of another and not of the promisor, and not be founded on some consideration which subserves some purpose of his own,[33] and where he obtains some substantial consideration or benefit for his promise on a quasi contractual theory, he is held to be absolutely liable and his promise original.[34]

§ 2. *Form and requisites of the contract.*[35]—To bind the guarantor, his prom-

25. See 2 Curr. L. 144.

26. Pfaelzer v. Kau, 207 Ill. 116, 69 N. E. 914. A guarantor of a bill or note is said to be one who engages that the note shall be paid, but he is not an indorser or surety. Pfaelzer v. Kau, 207 Ill. 116, 69 N. E. 914. Ewen v. Wilbor, 208 Ill. 492, 70 N. E. 575.

27. Often called an "absolute guaranty." Fales & J. Mach. Co. v. Browning [S. C.] 46 S. E. 545. A guaranty of payment is an "absolute guaranty." Providence Mach. Co. v. Browning [S. C.] 46 S. E. 550. An acceptance of an order is an original promise. Ragsdale v. Gresham [Ala.] 37 So. 367.

28. Where an unauthorized agent promises that his alleged principal will pay the debt, it is not a guaranty, since the agent's promise is not collateral. Groeltz v. Armstrong [Iowa] 99 N. W. 128; East Baltimore Lumber Co. v. K'nessett Israel Anshe S'phard Congregation [Md.] 59 A. 180.

29. See 2 Curr. L. 145, n. 11. See, also, Indemnity, 2 Curr. L. 298.

30. Netterstrom v. Gallistel, 110 Ill. App. 352; American Wire & Steel Bed Co. v. Schultz, 43 Misc. 637, 88 N. Y. S. 396; Berg v. Spitz, 87 App. Div. 632, 84 N. Y. S. 532; Simpson v. Carr, 25 Ky. L. R. 849, 76 S. W. 346. Assumption of debts of a firm on purchase of its stock of goods. Voorhees v. Porter, 134 N. C. 591, 47 S. E. 31. Forbearance to enforce a lien. Ellis & Co. v. Carroll [S. C.] 47 S. E. 679. That one owns the greater part of the stock of a corporation whose debt he guarantees does not make his promise original as founded on a new consideration. Turner v. Lyles [S. C.] 48 S. E. 301. A promise to pay a contractor's debt if he would abandon work and allow another to fulfill his contract. Moore v. First Nat. Bank, 139 Ala. 595, 36 So. 777; Berg v. Spitz, 87 App. Div. 632, 84 N. Y. S. 532; Reisler v. Silbermintz, 90 N. Y. S. 967.

31. Andresen v. Upham Mfg. Co. [Wis.] 98 N. W. 518. Advertising agent of a corporation has contract made to him and not his principals. Lewis v. Worrell [Mass.] 71 N. E. 73. When credit is extended to the promisor alone, it is not a contract of guaranty. Newton Grain Co. v. Pierce [Mo. App.] 80 S. W. 268. Where an employer agrees to pay the expenses of the employe and this is known to his creditors, and credit is given solely to the employer it is not a guaranty. Stevenson v. Sterling [Mich.] 101 N. W. 523.

32. Incoming partner assuming liabilities of firm. Bartlett v. Smith [Neb.] 98 N. W. 687. Assumption of mortgage debt. Lyon v. Clochessy, 43 Misc. 67, 86 N. Y. S. 245; Deaver v. Deaver [N. C.] 49 S. E. 113.

33. Promise of contractor to pay materialman for debt of subcontractor for which he is liable. Wilson v. Dietrich [N. J. Eq.] 59 A. 251; Potter v. Greenberg, 24 Pa. Super. Ct. 505. Where a surety on a building contract guarantees payment to a subcontractor if he will continue with the work, it is not a contract of guaranty. Pizzi v. Nardello [Pa.] 57 A. 1100; Id., 23 Pa. Super. Ct. 535.

34. Promise of a firm to pay certain outstanding amounts in consideration of being made selling agents. McCormick v. Johnson [Mont.] 78 P. 500. "If the promisor is to receive some substantial benefit, a benefit he did not enjoy before, for which his promise is exchangeable, it is wholly immaterial whether the original debtor remains liable or not." Id.

ise made after the execution of the contract to which it is collateral must be supported by a good and valuable consideration,[36] except where the guaranty is under seal.[37] Acceptance of the contract is necessary to render it binding,[38] and notice thereof must be communicated to the promisee,[39] except when the giving of such

35. See 2 Curr. L. 145.

36. **Held to be good consideration.** A promise on the part of a creditor to present his claim against an estate without costs is sufficient consideration to hold administratrix and her attorney to a promise to pay the same within a year. Wiggenhorn v. Fitzgerald [Neb.] 98 N. W. 1079. A written contract of guaranty subsequent to the shipment of goods has ample consideration if prior thereto a parol promise had been made. Helios-Upton Co. v. Thomas, 96 App. Div. 401, 89 N. Y. S. 222. Promise to pay a guest's hotel bill in consideration of the release of his baggage. McKee v. Needles, 123 Iowa, 195, 98 N. W. 618. Allowing a vessel to leave port after installation of new machinery. Washington Iron Works v. McNaught, 35 Wash. 10, 76 P. 301. Delivery of goods already contracted for is sufficient consideration to hold guarantor of the contract. Fales & J. Mach. Co. v. Browning [S. C.] 46 S. E. 545; Providence Mach. Co. v. Browning [S. C.] 46 S. E. 550. Extension of additional credit is good consideration for guaranty of past due debts. Cowan v. Roberts, 134 N. C. 415, 46 S. E. 979. Forbearance to bring suit against the debtor. Ellis & Co. v. Carroll [S. C.] 47 S. E. 679.

37. Roth v. Adams, 185 Mass. 341, 70 N. E. 445.

38. Stewart v. Knight & J. Co. [Ind. App.] 71 N. E. 182.

39. McKee v. Needles, 123 Iowa, 195, 98 N. W. 618; Pearsell Mfg. Co. v. Jeffreys [Mo.] 81 S. W. 901. Where a guaranty bond recites a consideration, no notice of acceptance is necessary to bind the guarantor. Buhrer v. Baldwin [Mich.] 100 N. W. 468.

NOTE. Notice of acceptance: The doctrine of necessity of notice of acceptance was well stated and the cases collated in the leading Iowa case of German Sav. Bank v. Drake Roofing Co., 112 Iowa, 184, 83 N. W. 960, 84 Am. St. Rep. 335, 51 L. R. A. 758, in which the court held that notice was necessary in case of a continuing guaranty of all indebtedness to a certain amount. In the opinion by Judge Deemer it was said:

"When the guaranty is a letter of credit, or an effort to become responsible for a credit that may or may not be given to another, at the option of the party to whom the application for credit is made, the decided weight of authority is that the guarantor must within a reasonable time be notified of the acceptance of the guaranty. But they differ more or less in determining what is a guaranty and what an offer to guarantee. Two very satisfactory and conclusive reasons are given for this general rule. The first is that the so-called guaranty is a mere offer or proposition, and is not complete until the party making the offer is notified of its acceptance, when the minds of the parties meet, and the contract is completed. The second is that the party making the offer is entitled to know whether or not his offer has been accepted, that he may know his responsibility, and so regulate his course of conduct towards the principal debtor that he may not suffer loss. See, as supporting the rule, Edmondston v. Drake, 5 Pet. 624, 8 Law. Ed. 251; Douglass v. Reynolds, 7 Pet. 113, 8 Law. Ed. 626; Lee v. Dick, 10 Pet. 482, 9 Law. Ed. 503; Adams v. Jones, 12 Pet. 207, 9 Law. Ed. 1058; Davis v. Wells, 104 U. S. 159, 26 Law. Ed. 686; Davis Sew. Mach. Co. v. Richards, 115 U. S. 524, 29 Law. Ed. 480; Claflin v. Briant, 58 Ga. 414; Taylor v. McClung, 2 Houst. [Del.] 24; Tuckerman v. French, 7 Me. 115; Kellogg v. Stockton, 29 Pa. 460; Kincheloe v. Holmes, 7 B. Mon. [Ky.] 5, 45 Am. Dec. 41; Allen v. Pike, 3 Cush. [Mass.] 238; Mussey v. Rayner, 22 Pick. [Mass.] 223; Rankin v. Childs, 9 Mo. 673; Mayfield v. Wheeler, 37 Tex. 256; McCollum v. Cushing, 22 Ark. 540; Geiger v. Clark, 13 Cal. 579; Cooke v. Orne, 37 Ill. 186; Oaks v. Weller, 13 Vt. 106, 37 Am. Dec. 583; Steadman v. Guthrie, 4 Metc. [Ky.] 147; Kay v. Allen, 9 Pa. 320; Beebe v. Dudley, 26 N. H. 249, 59 Am. Dec. 341. In Douglass v. Howland, 24 Wend. [N. Y.] 35, Justice Cowen wrote an elaborate opinion entirely repudiating the doctrine of notice as necessary to the consummation of the contract; but that case has not been generally followed, and has been doubted, if not overruled, by Jackson v. Griswold, 4 Hill [N. Y.] 522. See, also, Beekman v. Hale, 17 Johns. [N. Y.] 140. There are a few cases that seem to hold a guaranty relating to future advances binding, although no notice of acceptance is given the guarantor. These decisions are opposed to the great weight of authority, and we are not inclined to follow them. See Whitney v. Groot, 24 Wend. [N. Y.] 82; Wright v. Griffith, 121 Ind. 478, 23 N. E. 281, 6 L. R. A. 639; Union Bank v. Coster, 3 N. Y. 303; Lonsdale v. Lafayette Bank, 18 Ohio, 126; Yancey v. Brown, 3 Sneed [Tenn.] 89. But even here the conflict is more in the application of principles to particular facts, than in the principles themselves. The difficulty seems to be in distinguishing between an absolute guaranty and a mere offer to, or proposal of, guaranty. In some cases it is held that notice of acceptance must be given the guarantor, even though his promise be absolute in terms. Chief Justice Marshall so held in Russell v. Clarke, 7 Cranch, 69, 3 Law. Ed. 271. Judge Story appears to have been of the same opinion. See Cremer v. Higginson, 1 Mason, 323, Fed. Cas. No. 3,383. See, also, Allen v. Pike, 3 Cush. [Mass.] 238; Talbot v. Gay, 18 Pick. [Mass.] 534; and Craft v. Isham, 13 Conn. 28. But New York and some other states hold to the contrary. See cases already cited. But here, again, the conflict seems to be founded primarily on the construction of the contract, and on the divergent views as to what constitutes an absolute guaranty. Conceding for the purposes of the case that no notice of acceptance of an absolute guaranty is required, and holding, as we do, that a mere offer or proposal of guaranty requires notice of acceptance by the other party, we are to determine to which class the instrument in suit

notice is waived.[40] By the statute of frauds no action may be maintained on a contract of guaranty unless it be in writing.[41]

§ 3. *Operation and effect of guaranty. A. Interpretation in general.*[42]—A guarantor like a surety is bound only by the strict letter and precise terms of his contract, and that claim against him is strictissimi juris.[43]

(§ 3) *B. Fixing default and liability of the guarantor.*[44]—A prerequisite to liability of the guarantor is that there must be a demand of payment on default of a principal debtor,[45] but where the liability is primary,[46] this notice is unnecessary,[47] and notice of default may be impliedly[48] or expressly waived.[49] When the guaranty is contingent, the promisor is liable only on the happening of the contingency and on default of the principal debtor.[50]

(§ 3) *C. Defenses and discharge of guaranty.*[51]—A guarantor may offer as a defense to suit upon the collateral contract any personal or real defense,[52] or that

belongs. The best statement of the rule we have been able to find is that announced in Davis Sew. Mach. Co. v. Richards, 115 U. S. 524, 29 Law. Ed. 480, where Gray, J., speaking for the court says: 'A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved and the delivery of the guaranty to him or for his use, completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them, except future advances to be made to the principal debtor, the guaranty is, in legal effect, an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.' See, also, De Cremer v. Anderson, 113 Mich. 578, 71 N. W. 1090."

40. Sands v. Marchionda [Mass.] 71 N. E. 546.

41. See Frauds, Statute of, 2 Curr. L. 108.

42. See 2 Curr. L. 146.

43. McAfee v. Wyckoff, 44 Misc. 380, 89 N. Y. S. 996. A writing stating that "I hereby guaranty" any debts due or to become due up to $2,000 and "this obligation to remain in full force" and effect till debt discharged and the agreement terminated by writing binds guarantor as to past due debts as well as those arising in the future. Cowan v. Roberts, 134 N. C. 415, 46 S. E. 979. A guaranty of payment for castings delivered does not include damages for refusal to accept under contract. McAfee v. Wyckoff, 44 Misc. 380, 89 N. Y. S. 996. A promise to pay $100 for "loss sustained by a servant's leaving employment" does not include his defalcations. Freeman v. Waxman, 43 Misc. 656, 88 N. Y. S. 129. A new guaranty bond executed to cover defects in a prior one construed to cover liability arising under the first. Harvard Brew. Co. v. Sperber, 90 App. Div. 417, 86 N. Y. S. 289. Where a lumber company and builder jointly promise to complete contract on time and the latter is under no obligation to obtain lumber of the former, it is a contract of guaranty. In re Smith Lumber Co., 132 F. 620.

44. See 2 Curr. L. 146.

45. Stewart v. Knight & J. Co. [Ind. App.] 71 N. E. 182. Notice of liability of principal debtor before default unnecessary. Goff v. Janeway [Ky.] 82 S. W. 267. Unless otherwise provided, the neglect of the principal debtor to pay constitutes a default. Roth v. Adams, 185 Mass. 341, 70 N. E. 445. And the burden is on the guarantor to plead and prove an omission to give notice of default and that he was damaged thereby. Closson v. Billman, 161 Ind. 610, 69 N. E. 449.

46. Frequently called an "absolute guaranty."

47. McKee v. Needles, 123 Iowa, 195, 98 N. W. 618; Fales & J. Mach. Co. v. Browning [S. C.] 46 S. E. 545. One who has made an absolute guaranty of payment of a note is primarily liable and it is not necessary for the creditor to give him notice of default to charge him with the amount due. Pleasantville Mut. Loan & Bldg. Soc. v. Moore [N. J. Err. & App.] 57 A. 1034. In Illinois, where one guarantees the payment of a promissory note at its maturity by writing his name across the back thereof, he is not entitled to notice of default to fix his liability and the guarantor is not discharged, though at the time of default principal was solvent, though later he fails. Pfaelzer v. Kau, 207 Ill. 116, 69 N. E. 914.

48. Where by terms of a guaranty to pay rent, it is made the duty of the guarantor to ascertain whether the lessee has kept his covenants, notice of default is waived. Roth v. Adams, 185 Mass. 341, 70 N. E. 445.

49. Sands v. Marchionda [Mass.] 71 N. E. 546.

50. McKee v. Needles, 123 Iowa, 195, 98 N. W. 618.

51. See 2 Curr. L. 147.

52. A corporation buying and selling lumber and building material has no power to guaranty the contract of another and on default of the principal debtor his creditors so guaranteed have no rights against the trustee in bankruptcy of the corporation. In re Smith Lumber Co., 132 F. 620. Where a written guaranty is given to his agent with instructions to deliver only on obtaining other signatures which he fails to obtain, the guarantor is liable. Cowan v. Roberts, 134 N. C. 415, 46 S. E. 979. The accommodation guaranty of payment by one corporation for materials furnished another is ultra vires and even where such action re-

the primary contract is paid,[53] or conditions thereof violated,[54] or has been altered,[55] or that time has been given thereon,[56] or the creditor has fraudulently withheld or misstated facts concerning principal material to the transaction,[57] or there has been lack of diligence on part of the creditor in pursuing debtor,[58] except where the liability is primary, when the diligence of the creditor is immaterial.[59]

§ 4. *Rights and remedies between guarantor and principal debtor.*[60]—When a guarantor pays the principal debt, he becomes subrogated thereto and may set off this indebtedness against claims brought against him by the debtor.[61]

§ 5. *Action on guaranty.*[62]—The notice of acceptance of the contract of guaranty must be alleged in the complaint.[63]

GUARDIANS AD LITEM AND NEXT FRIENDS.

• § 1. Necessity or Occasion for a Guardian Ad Litem or Next Friend (1567).
§ 2. Qualification and Appointment (1568).
§ 3. Powers and Duties, Rights and Liabilities (1568).
§ 4. Procedure by or Against Guardian Ad Litem or Next Friend (1569).

§ 1. *Necessity or occasion for a guardian ad litem or next friend*[64] exists whenever an infant is a party litigant, in order that the court may take jurisdiction,[65] even where there is a general guardian, if the ward's interests require.[66] By

ceives the unanimous consent of the stockholders, no obligation is created on which the creditors of the latter concern may recover. In re Prospect Worsted Mills, 126 F. 1011.

53. In Massachusetts, the delivery of a promissory note by the principal debtor to the creditor only is prima facie evidence of payment of the liability and discharge of the surety, the matter resting on the intention of the parties. Paddock & F. Co. v. Simmons [Mass.] 71 N. E. 298.

54. Where a contract stipulates the liability as contingent upon the good condition of goods sixty days after delivery, their bad condition is no defense to the guarantor if caused by the principal. Helios-Upton Co. v. Thomas, 96 App. Div. 401, 89 N. Y. S. 222.

55. Providence Mach. Co. v. Browning [S. C.] 46 S. E. 550. A change in quality and grade of goods provided for in contract is sufficient to discharge the guarantor thereof. Stafford v. Christian [Tex. Civ. App.] 79 S. W. 595. The acceptance of goods returned as defective does not operate as an alteration of the contract. Groendyke v. Musgrave, 123 Iowa, 535, 99 N. W. 144. Where machinery shipped to a corporation of same name and of same members as a partnership whose contract had been guaranteed by the defendant, the question of alteration is one for the jury. Providence Mach. Co. v. Browning [S. C.] 46 S. E. 550. An increase of amount of discount and reduction in price no ground for discharge. Stafford v. Christian [Tex. Civ. App.] 79 S. W. 595.

56. Extension of time no defense when authorized by the guarantor. Groendyke v. Musgrave, 123 Iowa, 535, 99 N. W. 144.

57. Question of whether employer knew that his employes speculated in stocks is for jury. United States Fidelity & Guaranty Co. v. Blackley, Hurst Co., 25 Ky. L. R. 1271, 77 S. W. 709. Suit on fidelity bond. Whether employer negligent in not discovering shortage of accounts a question for jury. Id.

58. In a suit against guarantor, the record of a suit against the corporate principal and appointment of a receiver thereof is admissible on question of diligence. Fales & J. Mach. Co. v. Browning [S. C.] 46 S. E. 545. A delay after default pending attempted settlement of dispute not a ground for discharge. McFarland v. Parr & Co. [Tex. Civ. App.] 79 S. W. 76.

59. Providence Mach. Co. v. Browning [S. C.] 46 S. E. 550. Where officers of a corporation endorse its note as follows: "For value received we hereby guarantee the prompt payment of the within note," with their signatures following, they are liable as sureties, irrespective of whether note could be collected for the principal debtor. Iron City Nat. Bank v. Rafferty, 207 Pa. 238, 56 A. 445; Cowan v. Roberts, 134 N. C. 416, 46 S. E. 979.

60. See 2 Curr. L. 147.

61. Brommer Lumber Co. v. Hickman, 71 Ark. 549, 76 S. W. 559.

62. See 2 Curr. L. 147.

63. Goff v. Janeway [Ky.] 82 S. W. 267.

64. See 2 Curr. L. 148.

65. It must be in addition to service on the infant. Turner v. Barraud, 102 Va. 324, 46 S. E. 318. A suit against an infant in which no guardian ad litem was appointed, the fact of infancy not appearing in the record, may be vacated or modified in the common pleas after the term [Rev. St. § 5354, par. 5]. Palmer v. Palmer, 5 Ohio C. C. (N. S.) 242. Where infant appellees are not represented by guardian ad litem or next friend, costs of appeal will be taxed to the appellant, though the cause is reversed. Ex parte Cooper [N. C.] 48 S. E. 581.

66. In an action by a statutory guardian to sell his ward's real estate, where interests were adverse. Siler v. Archer's Guardian [Ky.] 82 S. W. 266. Not required when general guardian sues sureties of deceased guardian for default. Van Zandt v. Grant, 175 N. Y. 160, 67 N. E. 221.

the better rule, the appointment must follow upon regular service of the infant,[67] but some courts hold that of itself it confers jurisdiction.[68] In Louisiana, a curator ad hoc may be appointed at the instance of one who forecloses a mortgagee who is supposed to be an absentee.[69] An infant may sue by next friend, though he has also a general guardian.[70]

§ 2. *Qualification and appointment.*[71]—The power to appoint a guardian ad litem is without any statute inherent in the courts of general chancery powers.[72] The appointment must in terms be for the very infant impleaded,[73] and the fact that one assumes to act as guardian ad litem in an answer filed does not make him such,[74] unless the court afterwards so treats him.[75] Such facts must appear of record,[76] but recognition does not appear from the use of general terms well applicable to others.[77] In Louisiana, in mortgage foreclosure proceedings, a curator ad hoc may be appointed on an allegation that the mortgagor resides in another state[78] without absolute proof of that fact.[79] Errors in the petition for appointment may be corrected nunc pro tunc after final judgment entered in the suit in which the infant was a party,[80] but irregularities cannot be complained of by minors after they have adopted the proceedings had under it[81] or where their rights have been duly protected.[82]

Under a statute requiring a next friend to give a bond if the court require it, failure to exact the bond does not invalidate the appointment.[83] In some states it is not necessary that a next friend should receive authority from the court in order to enable him to commence an action.[84] It is not the province of a probate court to decide whether the next friend who moved for an appeal was a suitable person.[85]

§ 3. *Powers and duties, rights and liabilities.*[86]—The guardian ad litem should prepare and conduct the cause with the same care and skill as though acting under a retainer.[87]

67, 68. Boden v. Mier [Neb.] 98 N. W. 701, citing New York L. Ins. Co. v. Bangs, 103 U. S. 435, 26 Law. Ed. 580, and other cases.

69. Huber v. Jennings-Heywood Oil Syndicate, 111 La. 747, 35 So. 889.

70. Guardian declined. Williams v. Cleaveland, 79 Conn. 426, 66 A. 860. Shannon's Code, §§ 4272, 4273, authorizing a guardian to recover personal property of the ward, does not preclude the ward from maintaining an action in his own name through his guardian who becomes for the time being a next friend. Stewart v. Sims [Tenn.] 79 S. W. 386.

71. See 2 Curr. L. 148.

72. Minors being made parties to a will contest, by scire facias. Vaile v. Sprague, 179 Mo. 393, 78 S. W. 609.

73. Appointment for "infant defendants" held to include only such as were then in court and not others for whom answer was put in. Turner v. Barraud, 102 Va. 324, 46 S. E. 318.

74. Turner v. Barraud, 102 Va. 324, 46 S. E. 318.

75. Where the trial court accepted the offices and approved the conduct of a party who bore to an infant the relation of next friend, the judgment will not be overturned for lack of formality. Abbott v. Abbott [Kan.] 75 P. 1041.

76. Turner v. Barraud, 102 Va. 324, 46 S. E. 318.

77. Where the only mention of that infant was in the bill and in the caption of an answer filed by a guardian ad litem appointed for other infant defendants whose interests were adverse to his, the use of the court in its decrees of "infant defendants" is not a recognition of the infant as a party. Turner v. Barraud, 102 Va. 324, 46 S. E. 318.

78, 79. Subsequent grantees are not entitled to notice and can attack the proceeding only by showing that the mortgagor was not absent or that he was represented in the state to the knowledge of the plaintiff in the proceedings. Huber v. Jennings-Heywood Oil Syndicate, 111 La. 747, 35 So. 889.

80. Code Civ. Proc. § 722. Baumeister v. Demuth, 84 App. Div. 394, 82 N. Y. S. 831.

81, 82. Vaile v. Sprague, 179 Mo. 393, 78 S. W. 609.

83. Henderson v. Kansas City, 177 Mo. 477, 76 S. W. 1045.

84. In Connecticut. Williams v. Cleaveland, 76 Conn. 426, 66 A. 850.

85. Williams v. Cleaveland, 76 Conn. 426, 56 A. 850.

86. See 2 Curr. L. 148.

87. Boden v. Mier [Neb.] 98 N. W. 701.

Note: A guardian ad litem will not be permitted to do any act to prejudice or compromise an infant's rights. Revely v. Skinner, 33 Mo. 98. He cannot settle an action without the express authority of the court. Edsall v. Vandermark, 39 Barb. [N. Y.] 589; Isaacs v. Boyd, 6 Port. [Ala.] 388; Clark v. Grout, 34 S. C. 417. He cannot submit matters in litigation to arbitration. Fort v. Battle, 13 Smedes & M. [Miss.] 133; Tucker v. Dabbs, 12 Heisk. [Tenn.] 18. He cannot

He is not entitled to compensation in excess of the amount provided by statute,[88] and in presenting his claim to the court he acts for himself and does not represent his wards.[89]

A next friend's duties are not inconsistent with those of a general guardian.[90] In some states the next friend is liable for costs.[91]

§ 4. *Procedure by or against guardian ad litem or next friend.*—Next friend and guardian ad litem are representatives, not the real parties to the actions which they may prosecute or defend,[92] but where their interests are adverse to the infant, the representative capacity ceases.[93] That one was designated "attorney" instead of guardian has been held technical error.[94] Under a statute requiring a guardian ad litem to file a general denial, his omission to file such pleading is not a jurisdictional defect.[95]

GUARDIANSHIP.

§ 1. The Occasion for Guardianship (1569).
§ 2. The Person of the Guardian; His Appointment, Qualification and Tenure (1569). Removal (1571).
§ 3. General Powers, Duties and Liabilities (1571).
§ 4. Custody, Support and Education of the Ward (1571).
§ 5. The Ward's Property and Administration Thereof (1572).
§ 6. Presentment and Allowance of Claims (1573).
§ 7. Judicial Proceedings to Sell Property of Ward (1573).
§ 8. Actions and Legal Proceedings by and Against Guardians (1574).
§ 9. Accounting and Settlement (1574).
§ 10. Rights and Liabilities Between Guardian and Ward (1574).
§ 11. Compensation of Guardian (1575).
§ 12. Guardianship Bonds (1575).

§ 1. *The occasion for guardianship.*[96]—The very conditions prescribed by a statute must exist to support a guardianship under it.[97]

§ 2. *The person of the guardian; his appointment, qualification and tenure.*[98]—The person to be selected as guardian is within the discretion of the court,[99] unless it is provided by statute that particular persons, like parents, if competent, are to be preferred.[1] Relatives of a minor have no legal right to his custody,[2]

bind the infant by a contract for attorneys' fees. Houck v. Bridwell, 28 Mo. App. 644; Cole v. Superior Court, 63 Cal. 86, 49 Am. Rep. 78. He cannot waive the production of legal proof nor consent to judgment without it, nor can he consent to the use as evidence of that which the law does not recognize as such. Crotty v. Eagle, 35 W. Va. 143. —From note to Eidam v. Finnegan [Minn.] 16 L. R. A. 507.

88. In re O'Keeffe, 80 App. Div. 513, 81 N. Y. S. 118.

89. A settlement for such services by the executor of one will does not estop the wards from appealing from a judgment denying probate of a different will. Stutsman v. Sharpless [Iowa] 101 N. W. 105.

90. An infant may sue by his next friend, though he has a general guardian. Where the guardian declined to take an appeal from the probate court but did not forbid it to be taken by a next friend. Williams v. Cleaveland, 76 Conn. 426, 56 A. 850. Construing Shannon's Code, §§ 4272, 4273. Stewart v. Sims [Tenn.] 79 S. W. 385.

91. Rauche v. Blumenthal [Del.] 57 A. 368. See Costs, 3 Curr. L. 940.

92. Williams v. Cleaveland, 76 Conn. 426, 56 Atl. 850.

93. Not representative when presenting claim for services. Stutsman v. Sharpless [Iowa] 101 N. W. 105.

Notice of the minor's appeal from a judgment for costs entered against both need not be served on the next friend. Douglass v. Agne [Iowa] 99 N. W. 550.

94. Where the intention to join the minors and guardian ad litem in an appeal was manifest, the fact that the notice of appeal was signed as "Attorney" instead of as "guardian ad litem" is not sufficient upon which to dismiss the appeal. Noble v. Whitten, 34 Wash. 507, 76 P. 95.

95. Code Civ. Proc. § 101. Swartwood v. Sage [Kan.] 75 P. 508.

96. The reader should also consult Infants, 2 Curr. L. 392; Insane Persons, 2 Curr. L. 454; Guardians ad Litem, etc., 2 Curr. L. 148; Incompetency, 2 Curr. L. 295.

97. "Insane" as used in Gen. St. 1901, § 6570, does not mean mere feebleness of mind. Caple v. Drew [Kan.] 78 P. 427.

98. See 2 Curr. L. 148.

99. Where an infant possessed a large estate and it was not agreed as to the competency of the minor's sister to manage the estate, it was not an abuse of discretion to appoint the sister guardian of his person and a trust company guardian of his estate. In re Buckler, 96 App. Div. 396, 89 N. Y. S. 206. The state has a right to provide for the custody of children under Code Civ. Proc. § 203, though the child have living parents. In re Lundberg [Cal.] 77 P. 156.

1. Under Code Civ. Proc. § 1751, on a finding that a parent is competent, the court is without authority to award guardianship to a stranger. In re Salter, 142 Cal. 412, 76 P.

but consideration will be given to keeping the children with the surviving members of the family.[3] The main consideration is the welfare of the child.[4] The infant's choice may be considered,[5] and in some states nomination is a right after a specified age.[6] In Louisiana, a father cannot be excused from the obligation of accepting the tutorship of his own children,[7] nor can he abdicate his tutorship and permit another person to be appointed.[8] A mother by remarrying in that state forfeits the right to be tutrix of her children, unless retained.[9] Comity will not require retention of a foreign guardian of a child before the forum.[10]

That court in the ward's domicile[11] to which chancery power over the ward pertains must make the appointment. In Texas, the county court of its own motion may appoint a guardian.[12] The matter of notice to parents is purely a matter of statutory regulation,[13] but a decree appointing a guardian against a parent's wish and without his knowledge will be set aside.[14]

The decree of the proper court appointing a guardian cannot be collaterally attacked,[15] unless for a jurisdictional defect,[16] which if resting in fact must be well pleaded.[17] And the presumption that the court had jurisdiction does not prevail where a petition for appointment is insufficient on its face.[18]

51. And the fact that the court intended the appointment to be temporary and in interest of the ward's health does not affect the case. Id.

2. Willet v. Warren, 34 Wash. 647, 76 P. 273.

3. Jones v. Bowman [Wyo.] 77 P. 439.

4. Guardianship awarded to strangers to whom the child had become attached and who afforded him the privileges of school, church and society as against a worthy nonresident relative. Willet v. Warren, 34 Wash. 647, 76 P. 273. In Wyoming, difference of religious belief is immaterial. Jones v. Bowman [Wyo.] 77 P. 439.

5. The child's choice, though he is not of choosing age, is to be considered. Willet v. Warren, 34 Wash. 647, 76 P. 273.

6. Rev. St. 1899, § 299, authorizing public administrators to take charge of estates of minors under 14 years of age where other provision is not made and to continue until discharged does not deprive the minor of this right when she attains the age of 14. State v. Mast [Mo. App.] 78 S. W. 833.

7. Succession of Watt [La.] 36 So. 31.

8. Such an appointment is void. Succession of Watt [La.] 36 So. 31.

9. Favorable action by the family meeting is indispensable to the retention, as tutrix, of a mother in the event of her marrying again, but such action is subject to review by the courts. Succession of Carbajal [La.] 36 So. 41.

10. A guardian appointed by a sister state may be deposed from his right of custody by the appointment of another guardian in a different state of which the child has become a resident. Jones v. Bowman [Wyo.] 77 P. 439.

11. Deed by a guardian appointed out of such county is void. Connell v. Moore [Kan.] 78 P. 164.

The **domicile** of a parent is the domicile of his minor child. Boyle v. Griffin [Miss.] 36 So. 141. One's residence is not changed by the fact that she is confined in an insane asylum of another county. Flynn v. Hancock [Tex. Civ. App.] 80 S. W. 245.

12. Under Rev. St. 1895, art. 2566, providing that when the necessity therefor shall come to his knowledge. Flynn v. Hancock [Tex. Civ. App.] 80 S. W. 245.

13. Code Civ. Proc. § 1747, authorizing the appointment without notice, does not deprive the parent of a valuable right without due process of law. In re Lundberg [Cal.] 77 P. 156.

Note: If a statute requires notice to the parents, it must be given. Seaverns v Gerke, 3 Sawy. 353, Fed. Cas. No. 12,595; Redman v. Chance, 32 Md. 42; In re Reynolds, 8 N. Y. S. 172; Waldron v. Woodman, 58 N. H. 15. Otherwise if no provision is made therefor. Case of Gibson, 154 Mass. 378; Spears v. Snell, 74 N. C. 210; People v. Wilcox, 22 Barb. [N. Y.] 178; Peacock v. Peacock, 61 Me. 211. See In re Lundberg [Cal.] 77 P. 159.

14. A husband and wife were living apart. They had agreed that each should have custody of the child for alternate periods. While the father had custody, he instituted proceedings and had a guardian appointed. In re Van Loan, 142 Cal. 423, 76 P. 37. In such a case it was proper to refuse evidence as to the competency of the parent to care for the child. Id.

15. A judgment of the county court appointing a guardian for a person of unsound mind. Flynn v. Hancock [Tex. Civ. App.] 80 S. W. 245. Where probate court making is a court of record with original jurisdiction in the matter of appointment. Clark v. Rossier [Idaho] 78 P. 358. In habeas corpus proceedings. In re Lundberg [Cal.] 77 P. 156.

16. Petition for appointment did not state facts sufficient to warrant the appointment. Providence County Sav. Bank v. Hughes [R. I.] 58 A. 254. Under Pub. St. 1882, c. 168, a petition stating that petitioner is incompetent to manage his estate is insufficient. Id. Where a statute fixes the grounds and prescribes the method, compliance therewith is essential to the validity of the appointment. Appointment on an insufficient finding by the jury of inquest is void. Caple v. Drew [Kan.] 78 P. 427.

17. Positively verified denial of the truth of jurisdictional allegations in record of guardianship raises the issue necessary to a

One who enters on the estate of an infant will be treated as a guardian de facto,[19] and one who acts as committee of an insane person under a void appointment is liable for moneys received by him as such.[20]

Removal.[21]—He may be removed only in the manner prescribed by law.[22] Pending an appeal from an order removing a guardian, he stands suspended from his office without any of the powers thereof,[23] and the fact that no provision is made for the custody of the ward during such suspension is immaterial;[24] but where a statute authorizes an appeal from an order removing him and provides that on the perfecting of the appeal and giving of a bond a supersedeas shall issue, he is entitled until the decision of the appeal to act as guardian,[25] during which period the sureties are liable.[26] The effect of an appeal from an order removing him is to stay further proceedings in the matter of the appointment of his successor.[27]

§ 3. *General powers, duties and liabilities.*[28]—Powers of guardians depend on the character of the guardianship,[29] the nature of the subject-matter of their doings, and the terms of the statutes,[30] and in case of testamentary powers, on the terms of the will.[31]

They cannot make admissions against the interest of wards,[32] and the ward is not bound by admissions or promises made by him prior to appointment.[33]

He is personally liable to those he employs to aid him in the management of the estate.[34] When it is known to the other party that the contract is relative to property of his ward, he is not personally liable.[35] A foreign guardian may defend his title as such[36] and need not file his letters before taking property pertaining to his guardianship.[37]

§ 4. *Custody, support and education of the ward.*[38]—A guardian is entitled to the custody of his ward,[39] and the right cannot be collaterally attacked in habeas corpus proceedings,[40] but he is not entitled to the control of his ward's person to the exclusion of the ward's wife.[41] Where a guardian advises his ward to sever marital relations, it is presumed the advise was given in good faith.[42]

collateral attack. Caple v. Drew [Kan.] 78 P. 427, distinguishing Kimble v. Bunny, 61 Kan. 665, 60 P. 746, wherein the denial was bad because no facts were well pleaded in denial.

18. Providence County Sav. Bank v. Hughes [R. I.] 58 A. 254.

19. Liable to the infant for rents and profits. Anderson's Adm'r v. Smith [Va.] 48 S. E. 29.

20. Straight v. Ice [W. Va.] 48 S. E. 837.

21. See 2 Curr. L. 150.

22. Under Ky. St. 1903, § 2039, authorizing courts of chancery to remove for neglect or breach of trust, does not authorize a removal without proceedings in which the guardian has a chance to be heard, pending which he should be required to give bond. Phillips v. Williams [Ky.] 82 S. W. 379.

23, 24. In re Van Loan, 142 Cal. 423, 76 P. 37.

25, 26. Clay v. Cunningham [Ky.] 82 S. W. 973.

27. In re Van Loan, 142 Cal. 423, 76 P. 37.

28. See 2 Curr. L. 151.

29. See 15 Am. & Eng. Enc. Law [2d Ed.] 50 et seq.

30. See succeeding sections.

31. See Wills, 2 Curr. L. 2076.

32. See 2 Curr. L. 152, n. 46. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066.

33. Johnston v. Coney [Ga.] 48 S. E. 373.

34. Neither the minor nor his estate is liable for the value of legal services rendered the guardian for this purpose. McKee v. Hunt, 142 Cal. 526, 77 P. 1103.

35. Where a guardian as tenant in common with his wards signed the contract personally and in his representative capacity. Le Roy v. Jacobosky [N. C.] 48 S. E. 796.

36, 37. It is sufficient for a foreign testamentary guardian in defense of a suit by a resident guardian for a check payable to the former to produce his appointment as testamentary guardian. Boyle v. Griffin [Miss.] 36 So. 141.

38. See 2 Curr. L. 150.

39. Under Code Civ. Proc. §§ 204, 247, 248, 1763. In re Lundberg [Cal.] 77 P. 156.

40. In re Lundberg [Cal.] 77 P. 156.

41. Guardian appointed on statutory ground that ward is likely, from lack of discretion to bring himself to want cannot deprive the ward's wife of his society. Ex parte Chace [R. I.] 58 A. 978.

42. Trumball v. Trumball [Neb.] 98 N. W. 683. It is a good defense to an action by the spouse of the ward for alienation of affections that the guardian advised from honest motives. Id.

A statute declaring void, contracts of wards entered into without the consent of the guardian does not apply to a marriage solemnized in another state,[43] if not entered into in evasion of the laws of the domicile.[44]

§ 5. *The ward's property and administration thereof.*—Natural guardians have no control or right to possession of the ward's property,[45] unless otherwise provided by statute,[46] and may not sue respecting it as guardians,[47] but they may as next friends sue in proper cases.[48] At common law a general guardian might sell the ward's personal property[49] and lease the realty[50] for the term of his guardianship,[51] but he cannot sell[52] or contract to sell land without authority of court,[53] and by statute this may be necessary as to personalty.[54] Even judicial sanction can warrant incumbering the property only for purposes prescribed by statute.[55] He does not succeed to executorial powers,[56] wherefore his liability for assuming such power cannot be determined on a construction of the will.[57] The ward cannot ratify such a contract after attaining his majority.[58]

A guardian of a minor may not, on the strength of the ward's heirship, sue to set aside as fraudulent a conveyance made by the ward's ancestor.[59] Statutory guardians have only the title given by statute.[60]

43. See Marriage, 2 Curr. L. 794; Conflict of Laws, 3 Curr. L. 720. Ex parte Chace [R. I.] 58 A. 978.

44. Ex parte Chace [R. I.] 58 A. 978.

45. Either at common law or by statute. Williams v. Cleaveland, 76 Conn. 426, 56 A. 850.

NOTE: A natural guardian has no control over the estate, real or personal, of his ward (Nelson v. Grover, 34 Ala. 565; Kendall v. Miller, 9 Cal. 591; May v. Calder, 2 Mass. 55; Kinney v. Harrett, 46 Mich. 87; Sherwood v. Neal, 41 Mo. App. 416; People v. Kearney, 31 Barb. [N. Y.] 430), therefore he cannot sell (Porter v. Tuder, 9 Conn. 411; McCarty v. Rountree, 19 Mo. 355), nor bring ejectment to recover his ward's estate (Kinney v. Harrett, 46 Mich. 87), nor lease it (Darby v. Anderson, 1 Nott & McC. [S. C.] 369). If however he deals with the estate, he may be made to account for the profits received. Linton v. Walker, 8 Fla. 144, 71 Am. Dec. 105; Van Epps v. Van Deusen, 4 Paige [N. Y.] 64, 25 Am. Dec. 516.—From note to Schmidt v. Shaver [Ill.] 89 Am. St. Rep. 268.

46. Under the statutes of Indian Territory neither the natural or general guardian can lease his ward's lands without an order from the court. Indian Land & Trust Co. v. Shoenfelt [Ind. T.] 79 S. W. 134.

47. As such he has no right to appeal from an order of the probate court affecting an estate to which his son is heir. Williams v. Cleaveland, 76 Conn. 426, 56 A. 850.

48. Williams v. Cleaveland, 76 Conn. 426, 56 A. 850.

49. Schmidt v. Shaver, 196 Ill. 108, 63 N. E. 655, 89 Am. St. Rep. 250, with an extensive note on "The Common Law Powers of Guardians," pp. 257-316.

NOTE. Nature of powers of guardian: As to whether the office of guardian is a mere naked power or a power coupled with an interest, there is a conflict of authority (Freeman v. Bradford, 5 Port. [Ala.] 270; Lee v. Lee, 55 Ala. 590; De Greaves v. Superior Court, 117 Cal. 640, 59 Am. St. Rep. 220; Van Doren v. Everett, 5 N. J. Law, 460, 8 Am. Dec. 615; People v. Byron, 3 Johns. Cas. [N. Y.] 53; Carskadden v. McGhee, 7 Watts & S. [Pa.] 140; Pepper v. Stone, 10 Vt. 427; Kevan v. Waller, 11 Leigh [Va.] 414, 36 Am. Dec. 391; Truss v. Old, 6 Rand. [Va.] 556, 18 Am. Dec. 748; Ware v. Ware, 28 Grat. [Va.] 670; King v. Inhabitants of Oakley, 10 East, 491; Palmer v. Oakley, 2 Doug. [Mich.] 433, 47 Am. Dec. 41), holding that he has a power coupled with an interest while the opposite view is maintained in Welles v. Cowles, 4 Conn. 182, 10 Am. Dec. 115; Wallis v. Bardwell, 126 Mass. 366; Humphrey v. Buisson, 19 Minn. 221; Newton v. Nutt, 58 N. H. 599; Hardy v. Citizen's Nat. Bank, 61 N. H. 34.—From note to Schmidt v. Shaver [Ill.] 89 Am. St. Rep. 269.

50. Leases. Indian Land & Trust Co. v. Shoenfelt [Ind. T.] 79 S. W. 134.

51. The excess will be void at the election of the ward on attaining his majority. Jackson v. O'Rorke [Neb.] 98 N. W. 1068.

52, 53. Where he does the contract is void. Le Roy v. Jacobosky [N. C.] 48 S. E. 796.

54. In Texas, under Rev. St. 1895, arts. 2113 and 2558, a guardian cannot assign promissory notes of the estate of the ward without authority of the court. Browne v. Fidelity & Deposit Co. [Tex.] 80 S. W. 593.

55. In Kentucky, the circuit court has no jurisdiction to authorize a guardian to mortgage his ward's real estate. Connor v. Home & Sav. Fund Co. Bldg. Ass'n [Ky.] 80 S. W. 797.

56. The authority given by will to an executor to apply the property of testator to the support and education of a minor child and to sell and convey property for that purpose does not, on his death, pass to the minor or his guardian, in the absence of an express provision to that effect. Sale by guardian is void. Burroughs v. Cutter, 98 Me. 178, 56 A. 649.

57. What a guardian shall do with money received under a void sale of what he supposed was his ward's estate cannot be determined in a suit to construe the will. Burroughs v. Cutter, 98 Me. 178, 56 A. 649.

58. It being void. Le Roy v. Jacobosky [N. C.] 48 S. E. 796.

The right to remove property from the jurisdiction may be granted despite the pendency of a suit.[61]

A guardian has power to collect debts due the ward[62] and moneys accruing to the ward,[63] but unless by authority of court, he is often disabled by statute to compromise a claim or make settlement for less than full payment;[64] and if he does, such settlement is not binding on his wards,[65] except to the extent of the amount actually received,[66] nor are they estopped by accepting the amount received by him.[67] A fraudulent settlement, though made under the direction of a probate court, will be set aside.[68]

Judicial sanction to contract will not be unnecessarily inferred.[69]

It is his duty to keep funds invested.[70]

A special guardian will not be credited for expenditures for unnecessary improvements.[71]

§ 6. *Presentment and allowance of claims.*[72]

§ 7. *Judicial proceedings to sell property of ward.*—The ward's real estate cannot be ordered sold unless his best interests would be thereby subserved.[73] A guardian's authority to supervise and conduct a sale cannot be delegated.[74] The provisions of statutes requiring a guardian to take an oath before fixing the time and place of sale that he will exert his best endeavors to sell in such manner as will be most advantageous to all parties interested is mandatory,[75] and such oath

59. Since the heir takes through, not from, the ancestor. Cook v. Lee, 72 N. H. 569, 58 A. 511.

60. A guardian of property of a nonresident ward acquires no title to the property but only a naked power. [Appointed under Gen. St. 1902, § 224.] Williams v. Cleaveland, 76 Conn. 426, 56 A. 850.

61. Under a statute allowing personal property of a nonresident minor to be removed upon order of the county court, such order may be issued after suit brought for the property [Ky. St. 1903, § 2041]. Woolridge v. Woolridge [Ky.] 80 S. W. 775.

62. A balance due the ward on the death of a tutor, becomes a debt of his succession, and may be settled as any other debt due the ward. Succession of Begue, 112 La. 1046, 36 So. 849.

63. In Texas, he is the only person who has a right to receive moneys awarded them in an action for the unlawful death of their parent. Under Rev. St. 1895, arts. 2626, 2627, making it his duty to collect and take into possession all their personal property and claims due them. Shippers' Compress & Warehouse Co. v. Davidson [Tex. Civ. App.] 80 S. W. 1032. The guardian of an infant beneficiary of a life policy may receive the amount due his ward. The company is not held to the strict letter of the contract as to making payment to the beneficiary. Brooks v. Metropolitan Life Ins. Co. [N. J. Law.] 56 A. 168.

64. Guardian of beneficiaries of a life insurance policy settled for less than face of policy [Starr & C. Ann. St. 1896, c. 64]. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066. Under Rev. St. 1895, art. 1987, abrogating the common law in this respect. Browne v. Fidelity & Deposit Co. [Tex.] 80 S. W. 593.

65. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066.

66. Browne v. Fidelity & Deposit Co. [Tex.] 80 S. W. 593.

67. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066.

68. Settlement on life insurance policy. Berdan v. Milwaukee Mut. Life Ins. Co. [Mich.] 99 N. W. 411.

69. An order for the substitution of attorneys for the guardian does not authorize a contract with a new attorney affecting the property of the ward. McKee v. Hunt, 142 Cal. 526, 77 P. 1103.

70. A guardian who fails to deposit money as directed should be charged with interest only at the rate it would have earned if so deposited. In re Smith, 97 App. Div. 157, 89 N. Y. S. 639. If he makes no effort to invest funds, he is chargeable with interest on balances in his hands at the beginning of each year. Jones v. Nolan [Ga.] 48 S. E. 166. A guardian of the estate of minors, within the limitations of the trust, stands in the same relation to them as guardians of the person, with respect to provisions for their care and education. Security Trust Co. v. Merchants' Sav. Bank, 4 Ohio C. C. (N. S.) 616.

71. In re Smith, 97 App. Div. 157, 89 N. Y. S. 639.

72. 2 Curr. L. 153.

73. No averment or proof to this effect. Siler v. Archer's Guardian [Ky.] 82 S. W. 256.

74. Levara v. McNeny [Neb.] 98 N. W. 679.

75. Sale made without compliance therewith is void. Levara v. Neny [Neb.] 98 N. W. 679.

Note: Every guardian before fixing time and place of sale is required to take and subscribe an oath in substance like that required of an administrator or executor on sales for payment of debts. This provision is mandatory. Dame on Probate and Administration, § 470, citing Bachelor v. Korb,

cannot be taken by an attorney employed by the guardian to make the sale.[76] One claiming under an adjudication in which an under tutor appeared takes subject to the presumption that his appointment was regular.[77]

§ 8. *Actions and legal proceedings by and against guardians.*[78]—Generally he is the proper person to represent his ward in an action brought by or against him.[79] Suit may be by next friend or by property guardian where a nonresident infant sues, unless the statute provides which must sue,[80] but in West Virginia, a committee of an insane person may vindicate his ward's rights by an action in his own name;[81] and in Louisiana, in urgent cases, an under tutor can stand in court in place of the tutrix.[82] It must appear that the ward sues by her guardian.[83] The filing of foreign letters to enable one as suitor may be done when the suit is brought.[84]

§ 9. *Accounting and settlement.*[85]—It is his duty to regularly report.[86] When, after the ward's death, he procures another to obtain letters of administration and makes returns for the purpose of final settlement with the administrator, and the latter files objections to such returns, the proceeding is properly treated as a citation for final settlement.[87] The final account may be contested by interested parties,[88] and the right to set aside the allowance of an account may be barred by limitations.[89] An order of the probate court denying a petition to require a guardian to account is an appealable order.[90] The report of a guardian affirmed by a nisi prius court will be presumed correct on appeal.[91]

§ 10. *Rights and liabilities between guardian and ward.*—A cause of action against his ward may be barred by limitations.[92]

In dealings with the ward's property, he is bound to look only to the ward's interest.[93] He will not be permitted to occupy a position hostile to the ward nor pursue personal interests antagonistic to him.[94] If there has been an opportunity

58 Neb. 122, 76 Am. St. Rep. 70; Blackman v. Baumann, 22 Wis. 611; Campbell v. Knights, 26 Me. 224, 45 Am. Dec. 107.

76. Levara v. McNeny [Neb.] 98 N. W. 679.

77. Succession of Keppel [La.] 36 So. 955.

78. See 2 Curr. L. 153.

79. His duties, however, are not inconsistent with those of a guardian ad litem. Williams v. Cleaveland, 76 Conn. 426, 56 A. 850. In an action prosecuted by a next friend, the fact that the infant has a general guardian is only pleadable in abatement in the superior court [Gen. St. 1902, §§ 621-623]. Id.

80. Williams v. Cleaveland, 76 Conn. 426, 56 A. 850, collecting the cases and explaining the history of the doctrines.

81. Action by a second committee against the estate of a deceased committee. Straight v. Ice [W. Va.] 48 S. E. 837. A suit in the name of the committee of an insane person may be revived in the name of the administrator of the insane person upon his death. Id.

82. Where the tutrix did not take proper steps to protect the interests of the minors. Alba v. Provident Sav. Life Assur. Soc., 112 La. 550, 36 So. 587.

83. A complaint reciting that H. H., of unsound mind who sues by her guardian J. P. M. and a judgment that H. H. by her guardian do recover, etc., held sufficient. Flynn v. Hancock [Tex. Civ. App.] 80 S. W. 245.

84. Under Rev. Code 1892, § 2211, giving foreign guardians power to sue by filing copies of the record of their appointment, does not require a foreign guardian to file letters of guardianship before receiving a check payable to himself. Boyle v. Griffin [Miss.] 36 So. 141.

85, 86. See 2 Curr. L. 154.

87. Jones v. Nolan [Ga.] 48 S. E. 166.

88. Cannot be contested by a general creditor of the ward. Divorced wife with claim for alimony is not a party aggrieved so as to be entitled to appeal from a probate decree settling the account. Leyland v. Leyland [Mass.] 71 N. E. 794.

89. Scoville v. Brock [Vt.] 57 A. 967.

90. Comp. Laws, § 669, providing that in all cases not otherwise provided for a person aggrieved by an order of the probate court may appeal. Hopper v. Stowe [Mich.] 100 N. W. 266.

91. Lowe v. Smith [Colo. App.] 78 P. 310.

92. In Indiana the action must be brought within two years after disability is removed. Wilkinson v. Wilkinson [Ind. App.] 71 N. E. 169.

93. After property has been placed on an inventory as property of minors, a tutor cannot recognize title thereto in another, no matter how complete that title may be. Ingram v. Heintz, 112 La. 496, 36 So. 507.

94. A tutor cannot by failing to pay taxes on property of his ward permit it to be sold as property of another, and acquire the same at the tax sale adversely to the ward's either for himself or as agent for

to perpetrate fraud, the law is extremely watchful of transactions immediately prior to the settling of his account.[95] The burden is on him to show fairness in dealings with ward.[96] Where a guardian mingles his own funds with funds of his ward, there is a presumption that all moneys in the account are property of the ward,[97] and if he mingles with his own, funds which he has a right to hold uninvested, he is liable for interest thereon.[98] A guardian who wrongfully uses his ward's funds in his own business may be charged the highest rate of interest allowed by law,[99] and in some states compound interest may be allowed.[1] Where a ward's estate has suffered no financial injury from unauthorized or illegal acts of the gurdian, the ward cannot recover damages.[2]

The penalty imposed on a guardian for failure to render an annual report cannot be recovered by the ward in an action on the bond for damages for failure to account for the ward's money.[3]

It is a crime in Texas if the guardian converts the funds of his ward.[4]

§ 11. *Compensation of guardian.*[5]—He is not entitled to compensation for services rendered for his own benefit.[6] When he has made regular reports, he is entitled to his commissions, though he has made unlawful use of the ward's money.[7] His acquiescence in a judgment of the probate court allowing him a certain amount is conclusive upon him.[8]

§ 12. *Guardianship bonds.*[9]—In South Carolina, a guardian may be required to give a new bond when he is about to receive funds not in contemplation when the original bond was executed.[10]

Sureties are not liable for defalcations occurring prior to the execution of the bonds.[11] Sureties may pay the amount for which they are liable as soon as liability which the guardian fails to meet is found to exist,[12] but that they may hold the guardian liable, they must show their legal liability for the sums paid by them.[13] A surety for a defaulting guardian who settles with his successor is subrogated to the rights of the wards.[14]

As a general rule, limitations begin to run against the maintenance of an action by the ward against his guardian and his bond at his majority; this, how-

another. Ingram v. Heintz, 112 La. 496, 36 So. 507.

95. Fraud in procuring the ward to approve his account. Scoville v. Brock [Vt.] 57 A. 967.

96. Fact that guardian held mortgage on ward's land bears on good faith of conveyance of other lands of ward to guardian. Hart v. Cannon, 133 N. C., 10, 45 S. E. 351.

97. Where the guardian checked against the fund in his representative capacity to pay his personal debts, the ward can recover from the payee. Cohnfeld v. Tanenbaum, 176 N. Y. 126, 68 N. E. 141.

98. Funds for the paying off of a judgment as to which there is pending litigation. Jones v. Nolan [Ga.] 48 S. E. 166.

99. Special rate may be charged during time allowed by law to be provided by written contracts. Fisher v. Brown, 135 N. C. 198, 47 S. E. 398.

1. In Tennessee not after the guardian has been discharged. Stewart v. Sims [Tenn.] 79 S. W. 385.

2. Guardian made loans without authority of the court and took commissions in violation of law. Townsend v. Stern [Iowa] 99 N. W. 570.

3. Townsend v. Stern [Iowa] 99 N. W. 570.

4. It is "swindling," notwithstanding statutes defining swindling require the property in the first instance to be acquired by fraudulent pretense. Walls v. State [Tex. Cr. App.] 77 S. W. 8.

5. See 2 Curr. L. 154.

6. Robards v. Bryan [Mo. App.] 79 S. W. 979.

7. Used it in his own business. Fisher v. Brown, 135 N. C. 198, 47 S. E. 398.

8. Robards v. Bryan [Mo. App.] 79 S. W. 979.

9. See 2 Curr. L. 154.

10. If the probate court accepts a worthless bond, he is liable on his bond. Williams v. Weeks [S. C.] 48 S. E. 619.

11. Howe v. White, 162 Ind. 74, 69 N. E. 684.

12. Need not wait until judgment is recovered. Howe v. White, 162 Ind. 74, 69 N. E. 684.

13. Where several bonds were executed by different sureties and on breach the sureties apportioned the liability among themselves. Howe v. White, 162 Ind. 74, 69 N. E. 684.

14. Browne v. Fidelity & Deposit Co. [Tex.] 80 S. W. 593.

ever, is subject to statutory regulation.[15] In California, an action on a guardian's bond cannot be brought until the amount of his liability has been determined by an order of the probate court.[16]

HABEAS CORPUS (AND REPLEGIANDO).

§ 1. Nature of the Remedy and Occasion and Propriety of It (1576).
§ 2. Jurisdiction (1578).
§ 3. Petition (1578).
§ 4. Hearing on Petition and Issuance of Writ (1578).
§ 5. The Writ; Service Thereof; Effect of Writ (1578).
§ 6. Certiorari in Aid of Habeas Corpus (1578).
§ 7. Hearing and Determination on Return; Judgment; Costs (1578).
§ 8. Review (1579).

§ 1. *Nature of the remedy and occasion and propriety of it.*[17]—Habeas corpus is a writ of right,[18] and is civil in its nature.[19] It may be used to test the legality of any confinement of the person, including confinement in a state insane asylum,[20] imprisonment for contempt,[21] the right to bail of one charged with a capital offense,[22] the restraint of a ward by his guardian,[23] the custody of a minor,[24] or the legality of his restraint by the officers of the United States army.[25] The writ is grantable only in extraordinary cases where the ordinary legal remedy is insufficient,[26] and will not serve to review mere errors and irregularities,[27] the only questions brought up being the fact of commitment,[28] the jurisdiction of the person, the

15. In North Carolina, the ward's right of action for failure of the guardian to settle with him does not accrue, and limitations do not begin to run against it until six months from the ward's majority. Seif v. Shugart, 135 N. C. 185, 47 S. E. 484. Under a statute requiring an action on his bond to be commenced within three years after his discharge or removal, "discharge or removal" means by action of the court. Termination of authority by the ward attaining majority is not included [Code Civ. Proc. § 1805]. Cook v. Ceas [Cal.] 77 P. 65.

16. An action brought before the expiration of the time within which an appeal from an order of the probate court settling his account would lie is premature. Cook v. Ceas [Cal.] 77 P. 65.

17. See 2 Curr. L. 155.

18. People v. New York Catholic Protectory, 93 App. Div. 196, 89 N. Y. S. 557.

19. In re Greaser [Neb.] 101 N. W. 235.

20. Gen. Laws 1896, c. 82, § 19. In re Palmer [R. I.] 58 A. 660; Hughes v. Applegate, 123 Iowa, 230, 98 N. W. 645.

21. Rogers v. Superior Court of San Francisco [Cal.] 78 P. 344. In failing to turn over property to a receiver. Release not allowed. In re Spies, 92 App. Div. 175, 86 N. Y. S. 1043.

22. State v. Hartzell [N. D.] 100 N. W. 745; Ex parte Martinez [Tex. Cr. App.] 81 S. W. 728.

23. Petition by wife of the ward. Ex parte Chace [R. I.] 58 A. 978.

24. Natural parents held entitled, adoption proceedings being invalid. Monk v. McDaniel, 120 Ga. 480, 47 S. E. 931. That the grandmother, the defendant, could give the child more comforts and better education than the father is not a controlling consideration. Dunkin v. Seifert, 123 Iowa, 64, 98 N. W. 558. Best interests of the child must be considered with the rights and interests of the parents or those in loco parentis. Miller v. Miller, 123 Iowa, 165, 98 N. W. 631. Best interests of child will control, but the court will not consider the religious beliefs of those contending for its custody. Jones v. Bowman [Wyo.] 77 P. 439. Financial ability of father held not controlling in case of girl 5½ years old and of delicate constitution. Kirkbride v. Harvey, 139 Ala. 231, 35 So. 848.

25. Minor enlisting without consent of parents. Ex parte Houghton, 129 F. 239.

26. Claim that under the agreed facts relator was guilty of no crime can be litigated in the ordinary way. Ex parte Windsor [Tex. Cr. App.] 78 S. W. 510.

27. One serving an illegal sentence pronounced by a court having jurisdiction of the case has a remedy in a writ of error. In re Seliers [Mass.] 71 N. E. 542. Upon a commitment in the nature of a final judgment, it will not serve as a writ of error nor as an appeal. People v. Warden of City Prison, 44 Misc. 149, 89 N. Y. S. 830. Alleged defect in the sentence. In re Nolan [Kan.] 75 P. 1025. Alleged defect in the information. Ex parte Stacey [Or.] 75 P. 1060. Alleged defect in an indeterminate sentence. In re O'Neill [Cal.] 77 P. 660. Court will not consider the sufficiency of the evidence to warrant the indictment found by a grand jury. In re Kennedy [Cal.] 78 P. 34. Mere irregularities are not inquirable. Bray v. State [Ala.] 37 So. 250; Dimmick v. Tompkins, 194 U. S. 540, 48 Law. Ed. 1110; State v. Jones, 128 F. 626; Ex parte Powers, 129 F. 985. Legality of a de facto grand jury cannot be attacked on habeas corpus for release of one held under commitment on its indictment. In re Davies [Kan.] 75 P. 1048. Alleged error was in drawing and summoning of jury. Younger v. Hehn [Wyo.] 75 P. 443.

28. People v. New York Catholic Protectory, 93 App. Div. 196, 87 N. Y. S. 557.

offense and to pronounce the judgment imposed.[29] The petitioner in these proceedings may test the constitutionality of the statute for the infringement of which he is imprisoned,[30] though that question will not be examined if the case can be decided on other grounds.[31] Where a judgment for contempt is void as in excess of the court's jurisdiction,[32] and where it appears affirmatively from the return that relators are imprisoned under a final sentence on a state of facts constituting no offense, habeas corpus is the proper remedy to procure discharge.[33]

Only under exceptional circumstances will the Federal courts interfere by habeas corpus with the imprisonment of one held upon process from a state court, on the ground of violation of the United States laws or constitution,[34] and ordinarily will leave the prisoner to his remedy by direct proceedings for review in the state courts, and by writ of error from the supreme court of the United States if his claims should there be decided adversely;[35] but where the remedy for review afforded by the state is insufficient by reason of the delay attendant upon it, the writ should be granted.[36] Chinese alleging citizenship and restrained pending an investigation are not entitled to the writ until after a final adverse decision by the secretary of commerce and labor.[37] The judge of the district to which a Federal prisoner is removed for trial will not examine into the legality and competency of the evidence on which the warrant of removal was issued.[38] The court will not review the technical sufficiency of an indictment of one held for interstate extradition,[39] but will only ascertain if the extradition papers prima facie charge a criminal act,[40] and investigate the identity of the prisoner and within certain limits the question of flight.[41]

The petitioner must be in custody.[42]

Neither an order dismissing the petition,[43] nor a judgment remanding the prisoner is a bar to a subsequent application of the same kind to the same or

29. People v. Warden of City Prison, 44 Misc. 149, 89 N. Y. S. 830; Ex parte Stacey [Or.] 75 P. 1060; Bray v. State [Ala.] 37 So. 250. One held, without jurisdiction, as for contempt, may first raise that question in an independent proceeding in habeas corpus. In re Jewett [Kan.] 77 P. 567. One arrested on a capias to answer an indictment improperly placed on the trial docket is entitled to a discharge on habeas corpus. Dudley v. State [W. Va.] 47 S. E. 285.

30. Ex parte Gerino [Cal.] 77 P. 166.

31. Bray v. State [Ala.] 37 So. 250.

32. Cuyler v. Atlantic, etc., R. Co., 131 F. 95.

33. Mackey v. Miller [C. C. A.] 126 F. 161.

34. United States v. Sing Tuck, 194 U. S. 161, 48 Law. Ed. 917; In re Wyman, 132 F. 708. Not where statute provides for an appeal and bail or stay pending its decision. In re Reeves, 123 F. 343.

35. Ex parte Powers, 129 F. 985; In re Ammon, 132 F. 714.

36. Jamison v. Wimbish, 130 F. 351.

NOTE. Power of Federal courts: The powers of Federal courts by writ of habeas corpus are limited to cases where the custody is in violation of the Federal constitution or laws. U. S. Comp. St. 1901, p. 592. The sole injury in such case is whether the judgment is a nullity, having been rendered by a court not having constitutional power or authority. In re Friederich, 149 U. S. 70. The petition in the principal case raises no question of jurisdiction, but addresses itself merely to irregularities of procedure and erroneous rulings of the court. Upon a writ of habeas corpus, the judgment and proceedings of a State court should not be reviewed by a Federal court, even though it be claimed that the petitioner was denied some constitutional right. Marhuson v. Boucher, 175 U. S. 184. Such matters are properly cognizable only upon writ of error. In re Schneider, 148 U. S. 162. Since the petitioner has open to him an appeal to a state court, it is improper for a Federal court to interfere on writ of habeas corpus. Tavis v. Burke, 179 U. S. 399. If after a hearing before the state court of last resort the petitioner still deems his constitutional rights denied him, he may have a writ of error to the U. S. supreme court.—IV. Columbia L. R. 598.

37. United States v. Sing Tuck, 194 U. S. 161, 48 Law. Ed. 917. Discussion of Justice Brewer's strong dissenting opinion in this case in 111 Michigan Law Review 57.

38. United States v. Robinson, 126 F. 1016.

39. In re Renshaw [S. D.] 99 N. W. 83.

40. Discharge refused on an alleged alibi. In re Palmer [Mich.] 100 N. W. 996.

41. In re Palmer [Mich.] 100 N. W. 996.

42. Refusal of sheriff to take petitioner into custody defeats the writ, though refusal was for that express purpose. Ex parte Lawrence [Tex. Cr. App.] 78 S. W. 346. One is not in custody who is allowed to go about without apparent restraint. In re O'Brien, 29 Mont. 530, 75 P. 196.

43. Ex parte Martinez [Tex. Cr. App.] 81 S. W. 728.

another court,[44] and discharge on habeas corpus does not prevent a further detention upon other lawful proceedings.[45]

§ 2. *Jurisdiction.*[46]—The writ will not issue to one outside the court's territorial jurisdiction.[47]

The Federal court has jurisdiction to review the legality of the restraint of a citizen by the authority of a state whenever it is alleged that he is restrained in violation of the constitution of the United States or for violating a Federal law,[48] and may inquire into the detention of petitioner by a state court on a charge of murder, where the killing is alleged to have been in attempting to arrest by virtue of a warrant of the Federal court;[49] but where the evidence is conflicting as to whether defendants, soldiers of the United States army, shot deceased while he was attempting to escape, or after he had surrendered, the state court has jurisdiction.[50] The Federal courts have no jurisdiction of habeas corpus to obtain the custody of an infant solely on diversity of citizenship of the rival claimants of its custody;[51] but jurisdiction of the proceeding on behalf of the parents of a minor enlisting in the army without their consent is not ousted by subsequent arrest of the minor for fraudulent enlistment.[52]

§ 3. *Petition.*[53]—Petitioner must make out a prima facie case,[54] and the writ does not issue if the petition on its face shows that relator is not entitled to it.[55] The husband or wife of one illegally restrained is a proper person to petition.[56]

§ 4. *Hearing on petition and issuance of writ.*[57]

§ 5. *The writ; service thereof; effect of writ.*[58]

§ 6. *Certiorari in aid of habeas corpus.*[59]—Where certiorari is allowed in aid, it will not serve as a writ of error nor as an appeal,[60] the court considering only the jurisdiction of the person, the offense and to pronounce the judgment imposed.[61] There is no authority for combining habeas corpus and certiorari in one writ.[62]

§ 7. *Hearing and determination on return; judgment; costs.*[63]—Ordinarily, the return is conclusive unless traversed,[64] but under the California practice, the petition is treated as a traverse,[65] and in the absence of issue joined thereon by the respondent, the facts set forth in the petition will be taken as true.[66]

The return must be verified,[67] but an amendment setting up formal averments of legal conclusions need not,[68] and return may be amended at any time before final disposition of the case.[69] On motion to quash the return, the question of illegal imprisonment is tried as a matter of law on the facts stated in the petition.[70]

A traverse of the return, and the presentation of the evidence upon which a magistrate acted, properly presents, on habeas corpus, the question of jurisdiction of the magistrate, and on certiorari, the cause of detention.[71] Where relator is con-

44. Rogers v. Superior Court of San Francisco [Cal.] 78 P. 344. See 2 Curr. L. 157, n. 33.

45. People v. Crane, 94 App. Div. 397, 88 N. Y. S. 343.

46. See 2 Curr. L. 157.

47. In re Jewett [Kan.] 77 P. 567.

48. United States v. Lewis, 129 F. 823.

49. In re Laing, 127 F. 213.

50. United States v. Lewis, 129 F. 823.

51. Clifford v. Williams, 131 F. 100.

52. Ex parte Houghton, 129 F. 239.

53. See 2 Curr. L. 157.

54. United States v. Sing Tuck, 194 U. S. 161, 48 Law. Ed. 917.

55. State v. Jones, 128 F. 626.

56. Ex parte Chace [R. I.] 58 A. 978.

57, 58, 59. See 2 Curr. L. 158.

60, 61. People v. Warden of City Prison, 44 Misc. 149, 89 N. Y. S. 830.

62. Form for habeas corpus Code Civ. Proc. 2021. Form for certiorari Code Civ. Proc. 2022. People v. Crane, 94 App. Div. 397, 88 N. Y. S. 343.

63. See 2 Curr. L. 158.

64. People v. New York Catholic Protectory, 93 App. Div. 196, 87 N. Y. S. 557; Bray v. State [Ala.] 37 So. 250. And remandment should be ordered where the return showing a proper commitment is not traversed. People v. New York Catholic Protectory, 93 App. Div. 196, 87 N. Y. S. 557.

65, 66. In re Smith [Cal.] 77 P. 180.

67, 68, 69. Wright v. Davis [Ga.] 48 S. E. 170.

70. Bray v. State [Ala.] 37 So. 250.

71. People v. Crane, 94 App. Div. 397, 88 N. Y. S. 343.

fined for contempt, the court will look to the moving papers and the whole judgment to ascertain of what the alleged contempt consisted.[72] A petitioner cannot deny the existence of the court and judge to which the writ, according to the prayer of his petition, runs.[73] In Rhode Island, the court may in its discretion call a jury to determine the sanity of a petitioner confined in the state asylum.[74]

The effect of a decision favorable to the relator is a discharge of the prisoner,[75] but in Iowa, the plaintiff may at the discretion of the court be held to bail for the offense charged or any other not triable in justice court, though the commitment may have been irregular.[76]

In Iowa, the county from which one is illegally sent to the state insane asylum is liable for the costs of habeas corpus proceedings resulting in the discharge of the petitioner.[77]

§ 8. *Review.*[78]—Review is by error in Nebraska,[79] and by appeal in Alabama.[80] In Iowa the issues are tried as in ordinary civil proceedings,[81] and cannot be heard de novo on appeal.[82] An appeal will not lie from an order dismissing the petition, the remedy in such case being by application to another judge,[83] but habeas corpus to be admitted to bail and appeal therefrom on denial are proper, notwithstanding the pendency of relator's motion for new trial after mistrial.[84]

An appeal lies direct to the supreme court of the United States where the petition in the circuit court claims the protection of the constitution.[85]

The reviewing court will not pass upon questions not proper to be raised in the proceeding, irrespective of the action of the court from which the proceeding comes.[86] Discretionary orders of the lower court are not reviewable,[87] and findings of fact on conflicting evidence are conclusive.[88]

HARMLESS AND PREJUDICIAL ERROR.

§ 1. The General Doctrine (1579).
§ 2. Triviality Constituting Harmlessness (1581).
§ 3. Errors Cured or Made Harmless by Other Matters (1588).

§ 1. *The general doctrine.*[89]—Generally speaking, a judgment will not be reversed or a verdict set aside or other proceeding overthrown because of error of which it can be said that no harm resulted to the complaining party,[90] even though

72. Ex parte Latham [Tex. Cr. App.] 82 S. W. 1046.

73. Wright v. Davis [Ga.] 48 S. E. 170.

74. But a jury will not be summoned in the absence of a special cause therefor [Gen. Laws 1896, c. 82, § 19]. In re Palmer [R. I.] 58 A. 660.

75. People v. Crane, 94 App. Div. 397, 88 N. Y. S. 343.

76. Code, § 4453. Meyers v. Clearman [Iowa] 101 N. W. 193.

77. Superintendent of the asylum is an officer exempt from liability for costs in such proceedings [Code, § 4459]. Hughes v. Applegate, 123 Iowa, 230, 98 N. W. 645.

78. See 2 Curr. L. 158.

79. The proceeding is civil in its nature. In re Greaser [Neb.] 101 N. W. 235.

80. Smotherman v. State [Ala.] 37 So. 376.

81. Dunkin v. Seifert, 123 Iowa, 64, 98 N. W. 558.

82. Finding of the trial court as to facts is given the effect of a verdict. Dunkin v. Seifert, 123 Iowa, 64, 98 N. W. 558.

83. Ex parte Martinez [Tex. Cr. App.] 81 S. W. 728.

84. Ex parte Yerwood [Tex. Cr. App.] 81 S. W. 708.

85. Dimmick v. Tompkins, 194 U. S. 540, 48 Law. Ed. 1110.

86. Question petitioner was estopped to raise. Wright v. Davis [Ga.] 48 S. E. 170.

87. Holding accused to bail for another offense, commitment being irregular. Meyers v. Clearman [Iowa] 101 N. W. 193.

88. Meyers v. Clearman [Iowa] 101 N. W. 193.

89. See 2 Curr. L. 159.

90. Showers v. Caddo County [Okl.] 77 P. 189; Hartford Fire Ins. Co. v. Redding [Fla.] 37 So. 62. Defects in a motion for new trial are not available after grant of motion. Balph v. Magaw [Ind. App.] 70 N. E. 188. Disposition of rents and profits of property sold under foreclosure held not prejudicial to purchaser. Haigh v. Carroll, 209 Ill. 576, 71 N. E. 317. Only those errors which affect the substantial rights of parties who are in a position to complain of them will work reversal. Redinger v. Jones [Kan.] 75 P. 997. Technical error not affecting substantial rights. Lawson v. Robinson [Kan.] 75 P. 1012.

So provided by statute: Davis v. Case Threshing Mach. Co. [Ky.] 80 S. W. 1145.

he has properly saved his objection and excepted to the ruling,[91] and has regularly preserved it in the "record."[92] The policy of courts is against so doing.[93]

The party must affirmatively show error apparent on the "record."[94] It must harm him rather than a co-party,[95] and must be one which he has not invited,[96] and which he can assail without inconsistency to his contentions made on the trial.[97]

Burns' Rev. St. 1901, §§ 401, 670. Trent v. Edmonds [Ind. App.] 70 N. E. 169. Rev. St. 1899, § 865. Woody v. St. Louis & S. F. R. Co. [Mo. App.] 78 S. W. 658. Proceedings for appointment of guardian ad litem. Vaile v. Sprague, 179 Mo. 393, 78 S. W. 609. Shannon's Code, § 6351. Pennsylvania R. Co. v. Naive [Tenn.] 79 S. W. 124. Failure to take order pro confesso before final decree. Sewell v. Tuthill [Tenn.] 79 S. W. 376.

Right decision on wrong ground: Inhabitants of Freeman v. Dodge, 98 Me. 531, 57 A. 884; Barksdale v. Security Inv. Co., 120 Ga. 388, 47 S. E. 943.

Result reached was the only one sustainable: Woody v. St. Louis & S. F. R. Co. [Mo. App.] 78 S. W. 658; Pennsylvania R. Co. v. Naive [Tenn.] 79 S. W. 124; State v. St. Louis & S. F. R. Co. [Mo. App.] 79 S. W. 714; Liles v. Liles [Mo.] 81 S. W. 1101. Error of leaving question of law to jury not available. Goodson v. Embleton [Mo. App.] 80 S. W. 22. Where verdict rendered might have been directed, no error in instructions will avail. Taylor v. McCumber, 105 Ill. App. 87; Southern R. Co. v. Oliver, 102 Va. 710, 47 S. E. 862. Refusal of instruction. Clarke v. New York, etc., R. Co. [R. I.] 58 A. 245. Exceptions will not be sustained in any event if the excepting party must ultimately fail upon the undisputed facts. Orr v. Oldtown [Me.] 58 A. 914. Adjudication of bankruptcy founded on sufficient averment and proof not set aside for insufficient averment and proof of other acts. In re Lynan [C. C. A.] 127 F. 123. Improper remarks of court, as to counsel's conduct of case. McKnight v. U. S. [C. C. A.] 130 F. 659. Substantial justice on controlling issue, error as to others immaterial. Roberge v. Bonner, 94 App. Div. 342, 88 N. Y. S. 91. Where one party clearly establishes his right to the subject-matter of the action, and the other fails to establish any right thereto whatever, he cannot upon appeal complain of errors that did not prejudice him. McCroskey v. Mills [Colo.] 75 P. 910. Admission of evidence. Gaskin v. Courson [Ga.] 48 S. E. 379. Error in instruction. Magrane v. St. Louis & S. R. Co. [Mo.] 81 S. W. 1158.

91. See Saving Questions for Review, 2 Curr. L. 1590, as to necessity for so doing.

92. See Appeal and Review, § 9, 1 Curr. L. 127; 3 Curr. L. 204 (perpetuation of proceedings for reviewing court).

93. See 2 Curr. L. 160, n. 69.

94. The "record" must show the error; hence the party objecting must preserve therein enough to show it. See Appeal and Review, §§ 9, 13E, 1 Curr. L. 127, et seq., 162, et seq., and 3 Curr. L. 204, et seq., 250, et seq. Stroh v. South Covington & C. St. R. Co., 25 Ky. L. R. 1868, 78 S. W. 1120; Metropolitan Life Ins. Co. v. Gibbs [Tex. Civ. App.] 78 S. W. 398. Record must show basis for finding prejudice. Guthrie v. Carpenter, 162 Ind. 417, 70 N. E. 486; First Nat. Bank v. American Sugar Refining Co. [Ga.] 48 S. E. 326.

95. He only may assign error who is injured by it. See Appeal and Review, 1 Curr. L. 140; 3 Curr. L. 222. Harris v. Dumont, 207 Ill. 583, 69 N. E. 811; Troy v. Brown [S. D.] 99 N. W. 76; Penn v. Trompen [Neb.] 100 N. W. 312. Plaintiff without right to recover cannot complain that rights of a part of defendants are left unadjudicated. Emanuel v. Barnard [Neb.] 99 N. W. 666. Errors in rulings as to subsequent lienors are harmless as to prior lienors. Weed v. Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885. Plaintiff is not prejudiced by irregularities in appointment of guardian ad litem for infants whom he has made co-plaintiffs. Vaile v. Sprague, 179 Mo. 393, 78 S. W. 609.

96. See Saving Questions for Review, 2 Curr. L. 1590. German Nat. Bank v. Best & Co. [Colo.] 75 P. 398. Party objecting to evidence on certain issue cannot complain of rejection of his own evidence on same issue. Murray v. Butte [Mont.] 77 P. 527. Admitting evidence similar to that of objector. Eastland v. Maney [Tex. Civ. App.] 81 S. W. 574; Miller v. Shumway [Mich.] 98 N. W. 385. Redirect examination as to inadmissible matters brought out on cross. Strebin v. Lavengood [Ind.] 71 N. E. 494. Evidence offered (Pierpont v. Buchanan [Tex. Civ. App.] 79 S. W. 610), or brought out by party complaining (Griebel v. Brooklyn Heights R. Co., 95 App. Div. 214, 88 N. Y. S. 767).

Instructions: Kinney v. McFane, 122 Iowa, 452, 98 N. W. 276; Conant v. Jones [Ga.] 48 S. E. 234; Gould v. Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896; McKinstry v. St. Louis Transit Co. [Mo. App.] 82 S. W. 1108; Marquette Third Vein Coal Co. v. Dielie, 208 Ill. 116, 70 N. E. 17; City of Aledo v. Honeyman, 208 Ill. 415, 70 N. E. 338; Farnsworth v. Fraser [Mich.] 100 N. W. 400. On measure of damages. St. John v. German-American Ins. Co. [Mo. App.] 82 S. W. 543. Issue submitted by appellant. Walker v. Robertson [Mo. App.] 81 S. W. 1183; Creeman Lumber Co. v. De Lisle [Mo. App.] 82 S. W. 205. Held not invited. St. Louis, etc., R. Co. v. Smith [Tex. Civ. App.] 79 S. W. 340.

97. This is a form of "invited error." See 2 Curr. L. 1590. Dismissal as to one defendant in accordance with plaintiff's contention. Patterson v. Farmington St. R. Co., 76 Conn. 628, 57 A. 853. Cannot complain if court adopts theory advanced by both parties. Spring Valley Coal Co. v. Robizas, 207 Ill. 226, 69 N. E. 925. Where defendant's theory is that plaintiff has made a case, he cannot complain of failure to submit his own theory to the jury. Milliken v. St. Clair [Mich.] 99 N. W. 7. Appellee cannot claim affirmance on theory differing from that submitted below. Kath v. Wisconsin Cent. R. Co. [Wis.] 99 N. W. 217. Instructions to jury cannot be assailed as prejudicial by one who contends that the suit is in equity.

The majority of courts presume prejudice from error once it is shown to exist, and require the party defending against errors to show that no harm resulted.[98]

Errors which favor the party objecting are of course not ground for reversal,[99] nor are such as may be corrected without resort to a new trial.[1] Errors in favor of both parties, both bringing error, require reversal.[2]

§ 2. *Triviality constituting harmlessness.*[3]—An error is harmless if too trivial in its nature or consequences to have substantially influenced the result.[4] The weakness of the evidence may augment,[5] or its strength diminish, the importance of error.[6]

Hendrickson v. Wallace, 29 Mont. 504, 75 P. 355.

98. Carter v. Wakeman [Or.] 78 P. 362; People v. Wells, 178 N. Y. 411, 70 N. E. 926; Gerber v. Kansas City [Mo. App.] 79 S. W. 717. Erroneous admission of evidence in jury trial. United States v. Honolulu Plantation Co. [C. C. A.] 122 F. 581; Creelman Lumber Co. v. De Lisle [Mo. App.] 82 S. W. 205; Whitson v. Farber Bank [Mo. App.] 80 S. W. 327; Carpenter v. New York Evening Journal Pub. Co., 96 App. Div. 376, 89 N. Y. S. 263; Norfolk & W. R. Co. v. Briggs [Va.] 48 S. E. 521. Improper limitation of cross-examination. Resurrection Gold Min. Co. [C. C. A.] 129 F. 668. Misconduct of counsel. Cleveland, etc., R. Co. v. Pritschau, 69 Ohio St. 438, 69 N. E. 663. Submission of special interrogatory to jury without submitting to counsel for adversary. Pittsburg, etc., R. Co. v. Smith, 207 Ill. 486, 69 N. E. 873. Appellee invoking statute requiring disregard of harmless error must show its harmlessness. American Car & Foundry Co. v. Clark, 32 Ind. App. 644, 70 N. E. 828. Instruction regarding exempt property. Parkelton v. Pugsley [Mo. App.] 82 S. W. 555.

The contrary presumption obtains in Georgia. First Nat. Bank v. American Sugar Refining Co. [Ga.] 48 S. E. 326. Where seemingly immaterial evidence is admitted, the burden is on the excepting party to show prejudice. McGonigle v. Belleisle Co. [Mass.] 71 N. E. 569.

99. O'Neill v. Everham, 123 Iowa, 709, 99 N. W. 580; Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 75 P. 564; Buzanes v. Frost [Colo. App.] 75 P. 594. Defendant cannot complain that the verdict against him was less than the pleadings and evidence authorized. Harrison v. Murphy [Mo. App.] 80 S. W. 724. One erroneously adjudged to have title to land cannot complain that the person who in fact had title was adjudged to have a lien on it. Miller v. Wireman, 25 Ky. L. R. 2300, 80 S. W. 517. Order compelling remittitur of portion of plaintiff's recovery is harmless to defendant. Columbia R. Co. v. Cruit, 20 App. D. C. 521. Favorable answer to prejudicial question. Fredrick Mfg. Co. v. Devlin [C. C. A.] 127 F. 71. Evidence which, though objected to by defendant, was favorable to him. Rooney v. Southern Bldg. & Loan Ass'n, 119 Ga. 941, 47 S. E. 345. Judgment on a verdict clearly referable to an invalid count must be reversed, though a verdict for a larger amount might have been sustained under the valid count. Illinois Cent. R. Co. v. Harper [Miss.] 35 So. 764.

Instructions favorable to party complaining. Lillie v. American Car & Foundry Co. [Pa.] 58 A. 272; Vincent v. Willis [Ky.] 82 S. W. 583; East Jellico Coal Co. v. Golden, 25 Ky. L. R. 2056, 79 S. W. 291; Heyert v. Reubman, 86 N. Y. S. 797; Memphis St. R. Co. v. Haynes [Tenn.] 81 S. W. 374. Placing too great a burden on adversary. Tyler v. Bowen [Iowa] 100 N. W. 505; York v. Farmers' Bank [Mo. App.] 79 S. W. 968; Shippers' Compress & Warehouse Co. v. Davidson [Tex. Civ. App.] 80 S. W. 1032. Weight to be given testimony. Delaware, etc., R. Co. v. Devore [C. C. A.] 122 F. 791. Allowing jury to construe by-laws of fraternal society cannot harm society who makes its defense thereon. Mitchell v. Leech [S. C.] 48 S. E. 290. Defendant cannot complain of instructions on contributory negligence where no issue thereon arises from the evidence. Louisville & E. Mail Co. v. Barnes' Adm'r, 25 Ky. L. R. 2036, 79 S. W. 261. Instruction submitting fact that should have been determined adversely to appellant as matter of law. Central Tex., etc., R. Co. v. Gibson [Tex. Civ. App.] 79 S. W. 351; Gulf, etc., R. Co. v. Elmore [Tex. Civ. App.] 79 S. W. 891. Instruction allowing inference that pedestrian was trespasser on railway track held harmless to railway company. Murrell v. Missouri Pac. R. Co. [Mo. App.] 79 S. W. 505. Definition of insolvency held not prejudicial to insolvent. Owen v. American Nat. Bank [Tex. Civ. App.] 81 S. W. 988. Contradictory instruction held not prejudicial to defendant who would be liable under either branch of the instruction. Barton v. Odessa [Mo. App.] 82 S. W. 1119. Instruction given more favorable to appellant than the one requested by him. Gooding v. Watkins [Ind. T.] 82 S. W. 913.

1. See Appeal and Review, § 15; 1 Curr. L. 191; 3 Curr. L. 286. Clerical error in judgment. Broll v. Wishert [Tex. Civ. App.] 79 S. W. 1089. Improper division of judgment among plaintiffs will be corrected on defendant's appeal, though defendant will not be permitted to profit therefrom. Shippers' Compress & Warehouse Co. v. Davidson [Tex. Civ. App.] 80 S. W. 1032.

2. Kuhlman v. Cole [Neb.] 98 N. W. 419.

3. See 2 Curr. L. 162.

4. Erroneous measure of damages resulting in error of 87 cents. Chicago, etc., R. Co. v. McEwen [Ind. App.] 71 N. E. 926.

5. Where the evidence is such as would sustain a verdict for either party, errors in the instructions cannot be said to be harmless. Brister & Co. v. Illinois Cent. R. Co. [Miss.] 36 So. 142.

6. Thus the wrongful admission or exclusion of evidence relating to facts otherwise abundantly proven or the giving of charges on issues whereon the evidence was

Cases applying these principles to errors or irregularities in process or appearance,[7] parties,[8] pleadings and formation of issues,[9] provisional and interlocutory proceedings,[10] continuances, adjournments, dismissals before trial, and the like,[11] the trial and course and conduct of the same,[12] formation and selection of the jury,[13] are cited below.

overwhelming, see post, this section. See. also, post, § 3, as to cure of errors by findings, etc. Instructions become immaterial where the facts established clearly entitle plaintiff to his verdict. Bonner v. Bonner [Tex. Civ. App.] 78 S. W. 535; Magrane v. St. Louis & S. R. Co. [Mo.] 81 S. W. 1158. Instruction making it the duty of a city to provide "safe" streets instead of "reasonably safe" is harmless where negligence is clear. City of Covington v. Jones, 25 Ky. L. R. 1983, 79 S. W. 243.

7. Where the court properly set aside the service of process as fraudulent. any error in rulings on other issues is immaterial. Saveland v. Connors [Wis.] 98 N. W. 933. A party cannot complain of an order to produce books which was never complied with or enforced. Southern Car & Foundry Co. v. Calhoun County [Ala.] 37 So. 425.

8. Bernard v. Pittsburgh Coal Co. [Mich.] 100 N. W. 396. Error in joining husband and wife in suit for injuries to her. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 81 S. W. 580. Amendment in foreclosure substituting ad interim purchaser without notice to defendant. Carroll Imp. Co. v. Engleman [Iowa] 99 N. W. 574. Discharge of plaintiff as administrator and reappointment d. b. n. is improper, but harmless to defendant in action for damages. Union Pac. R. Co. v. Smith [Neb.] 99 N. W. 813. Plaintiff's partner having sold his interest in a contract with defendant to plaintiff, the failure to make him a party plaintiff did not prejudice defendant. Degnan v. Nowlin [Ind. T.] 82 S. W. 758.

9. Guthrie v. Carpenter, 162 Ind. 417, 70 N. E. 486; Muncie-Pulp Co. v. Koontz [Ind. App.] 70 N. E. 999; Bickerdike v. State [Cal.] 78 P. 270.

Variance not called to attention of trial court, and curable by amendment. Neutze v. Atlantic City R. Co. [N. J. Law] 58 A. 1083.

Failure of the complaint to aver a necessary fact amply proved is harmless. Standard Oil Co. v. Wakefield's Adm'r, 102 Va. 824, 47 S. E. 830.

Failure to require answer to amended plea setting up unavailable matters. Home Ins. Co. v. Lowenthal [Miss.] 36 So. 1042.

Erroneous ruling on demurrer to defenses on which the judgment was not founded. Jones v. Herrick [Wash.] 77 P. 798. Failure to pass on demurrer until after trial begins is harmless where no evidence on the point has been admitted. Osteen v. Stovall [Ind. T.] 82 S. W. 710. It is error where impossible to state what count judgment was founded on. Bohler v. Hicks [Ga.] 48 S. E. 306.

Sustaining demurrer to pleading stating facts provable under general issue. Citizens' Gas & Oil Min. Co. v. Whipple, 32 Ind. App. 203, 69 N. E. 557; Coulter v. Bradley [Ind.] 71 N. E. 903; Karter v. Fields [Ala.] 37 So. 204; Northern Alabama R. Co. v. Mansell [Ala.] 36 So. 459; Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395; Southern R. Co. v. Bunnell [Ala.] 36 So. 380; Kendall v. Hardebeck [Ind.] 71 N. E. 957; Martin v. Platte Valley Sheep Co. [Wyo.] 76 P. 571; Matthews v. Farrell [Ala.] 37 So. 325.

Overruling demurrer to petition where it is stipulated that plaintiff has a good cause of action except in so far as a good defense is pleaded. Galloway v. Floyd [Tex. Civ. App.] 81 S. W. 805. The fact that special damages could have been recovered under a count in the petition if alleged therein does not render harmless the error in overruling a proper count alleging such damages. Groeltz v. Armstrong [Iowa] 99 N. W. 128.

Denial of plea setting up uncontroverted fact. Glos v. Patterson, 209 Ill. 448, 70 N. E. 911.

Refusal to strike count not submitted to jury. Bolton v. Prather [Tex. Civ. App.] 80 S. W. 666. Refusal to strike plea of set-off and counterclaim on which nothing was found. Owen v. American Nat. Bank [Tex. Civ. App.] 81 S. W. 988.

Striking out further allegation in answer presenting complete defense. Zorn v. Livesley, 44 Or. 501, 75 P. 1057. Striking out plea substantially covered by others. Meyer Bros. Drug Co. v. Puckett, 139 Ala. 331, 35 So. 1019.

Amendment to conform to proof. Blankenship v. Whaley, 142 Cal. 566, 76 P. 235. Refusal during argument of amendment which there was no evidence to support. Cone v. City Council of Augusta, 120 Ga. 80, 47 S. E. 633. Allowance during trial of amendment merely adding general denial of facts already specifically denied. Bergman v. London & L. Fire Ins. Co., 34 Wash. 398, 75 P. 989. Refusal of amendment setting up facts provable under original pleading. Kroetch v. Empire Mill Co. [Idaho] 74 P. 868; Kansas City, etc., R. Co. v. Thornhill [Ala.] 37 So. 412. Allowing answer to amended petition out of time is harmless where no evidence in support of the amendment is offered. McElmurray v. Blodgett, 120 Ga. 9, 47 S. E. 531. Amendment of pleading after submission of case on proper pleading and theory is harmless. Boardman v. Louis Drach Const. Co., 123 Iowa, 603, 99 N. W. 176.

Denial of motion for more specific allegation (Mulligan v. Smith [Colo.] 76 P. 1063) harmless where allegation is not proved (Brown v. Incorporated Town of Chillicothe, 122 Iowa, 640, 98 N. W. 502).

Election: Failure to compel election where case was tried on one count. Lewis v. Utah Const. Co. [Idaho] 77 P. 336. For the purpose of determining whether error in requiring defendant to elect between defenses was prejudicial, it cannot be presumed he had no evidence to support one of them. Horton v. Driskell [Wyo.] 77 P. 354.

10. Failure to take order pro confesso before final decree. Sewell v. Tuthill [Tenn.] 79 S. W. 376.

11. Where plaintiff was absent when case was reached, defendant's statement that he did not believe plaintiff intended to prose-

The admission[14] or exclusion[15] of evidence which cannot have been efficient to the result is harmless; for example, evidence which tended to prove a fact not necessary to the party's case,[16] or one conclusively disproved by other evidence,[17]

cute was immaterial. Stewart v. Gorham, 122 Iowa, 669, 98 N. W. 512. Dismissal without formal motion is not prejudicial to plaintiff whose complaint cannot be amended to state a cause of action. Justice v. Robinson, 142 Cal. 199, 75 P. 776.

12. Overruling motion for trial by court without jury, only law questions presented. Muncie Pulp Co. v. Koontz [Ind. App.] 70 N. E. 999. Failure to transfer law case to law side of court. Gilchrist v. Collopy [Ky.] 82 S. W. 1018. Erroneous transfer of law case to equity docket is harmless where the result reached is the only one which could have been sustained had the trial been to a jury. Rattray v. Talcott [Iowa] 100 N. W. 36. Refusal to excuse from rule witness who was defendant's only representative aside from counsel. American Cent. Ins. Co. v. Nunn [Tex. Civ. App.] 79 S. W. 88. Error in refusal to transfer case to common-law docket is harmless where evidence on the jury issue is insufficient to warrant its submission. Davis v. Case Threshing Mach. Co. [Ky.] 80 S. W. 1145.

13. Allowance of too many peremptory challenges. Stevens v. Union R. Co. [R. I.] 58 A. 492. Overruling challenge for cause, juror peremptorily challenged and use of all challenges not apparent. Terre Haute Elec. Co. v. Watson [Ind. App.] 70 N. E. 993; Indianapolis St. R. Co. v. Bordenchecker [Ind. App.] 70 N. E. 995; Simonds v. Cash [Mich.] 99 N. W. 754.

Held prejudicial overruling challenge for cause, evidence being in conflict. Texas Cent. R. Co. v. Blanton [Tex. Civ. App.] 81 S. W. 537. Error in overruling challenge for cause is not prejudicial unless it results in the party's being forced to accept an unsatisfactory juror. National Bank v. Schufelt [Ind. T.] 82 S. W. 927.

14. Immaterial evidence: City of Baltimore v. Walker [Md.] 57 A. 4; Blanchard-Hamilton Furniture Co. v. Colvin, 32 Ind. App. 398, 69 N. E. 1032; Fisk Min. & Mill. Co. v. Reed [Colo.] 77 P. 240; Central of Georgia R. Co. v. Weathers, 120 Ga. 475, 47 S. E. 956; McCartney v. Washington [Iowa] 100 N. W. 80; Gilleland v. Louisville & N. R. Co., 119 Ga. 789, 47 S. E. 336; Proper v. Lake Shore, etc., R. Co. [Mich.] 99 N. W. 283; Camp v. Chicago Great W. R. Co. [Iowa] 99 N. W. 735; McKnight v. Newell, 207 Pa. 562, 57 A. 39; Seigle v. Badger Lumber Co. [Mo. App.] 80 S. W. 4; Young v. Prentice [Mo. App.] 80 S. W. 10; Chicago, etc., R. Co. v. Carroll [Tex. Civ. App.] 81 S. W. 1020; Davis v. Alexander [Me.] 58 A. 55; Joseph Joseph Bros. Co. v. Schonthal Iron & Steel Co. [Md.] 58 A. 205; Hunting & Co. v. Quarterman, 120 Ga. 344, 47 S. E. 928; Chicago City R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28; Indianapolis St. R. Co. v. Schmidt [Ind.] 71 N. E. 201; McGonigle v. Belleisle Co. [Mass.] 71 N. E. 569; Arabian Horse Co. v. Bivens [Neb.] 96 N. W. 621; Campbell v. Upson [Tex. Civ. App.] 81 S. W. 358; Ingram v. Wishkah Boom Co. [Wash.] 77 P. 34; Hunt v. Desloge Consol. Lead Co. [Mo. App.] 79 S. W. 710; Vedder v. Delaney, 122 Iowa, 583, 98 N. W. 373; Kinney v. McFaul, 122 Iowa, 452, 98 N. W. 276; Rathbun v. Allen [Mich.] 98 N. W. 735; Dodge v. Reynolds [Mich.] 98 N. W. 737; Duryea v. Duryea, 91 App. Div. 101, 86 N. Y. S. 337. Deposition. Snowden v. Loree [C. C. A.] 128 F. 419. Model of machine. Healy v. Patterson, 123 Iowa, 73, 98 N. W. 576. Improper evidence as to damages where no cause of action exists. Kennedy v. Mineola, H. & F. Traction Co., 178 N. Y. 508, 71 N. E. 102. Where the question of damages is the only one open, rulings as to evidence of other matters are harmless. Stearns v. Shepard & M. Lumber Co., 91 App. Div. 49, 86 N. Y. S. 391. Letters not affecting court's construction of contract. Wilson v. Alcatraz Asphalt Co., 142 Cal. 182, 75 P. 787. Plaintiff's character. Travelers' Ins. Co. v. Thornton, 119 Ga. 455, 46 S. E. 678. Evidence to show principal guaranteed to protect surety, as showing inducement to become surety is harmless where it did not enter into judgment. Markham v. Cover, 99 Mo. App. 83, 72 S. W. 474. Incompetent evidence not detrimental to objector's interest. Illinois Cent. R. Co. v. Crockett, 25 Ky. L. R. 1989, 79 S. W. 235. Presumption as to effect of introduction of immaterial exhibit. Missouri, etc., R. Co. v. Flood [Tex. Civ. App.] 79 S. W. 1106. Parol evidence of written contract is harmless where it neither contradicts nor varies. Alexander v. Wade [Mo. App.] 80 S. W. 19. Incompetent evidence of filing of recognizance sued on. State v. Ballentine [Mo. App.] 80 S. W. 317. Interpleader's testimony held harmless to attachment plaintiff. Lafferty v. Hilliker [Mo. App.] 81 S. W. 910. Evidence of plaintiff's wages held not prejudicial in view of amount of verdict. Cole v. St. Louis Transit Co. [Mo.] 81 S. W. 1138.

15. Crowley v. Fitchburg, etc., R. Co., 185 Mass. 279, 70 N. E. 56; Chicago, W. & V. Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38; Pennsylvania R. Co. v. Naive [Tenn.] 79 S. W. 124; Johnston v. Coney [Ga.] 48 S. E. 373; Miller v. Shumway [Mich.] 98 N. W. 385; Jordan v. Grand Rapids & I. R. Co., 162 Ind. 464, 70 N. E. 524; Weller v. Wagner [Mo.] 79 S. W. 941; Downing v. Buck [Mich.] 98 N. W. 388; McMillan v. American Exp. Co., 123 Iowa, 236, 98 N. W. 629; Gasquet v. Pechin [Cal.] 77 P. 481. Restriction of cross-examination. Mulligan v. Smith [Colo.] 76 P. 1064. Evidence applicable only to abandoned theory. Graham v. Hatch Storage Battery Co. [Mass.] 71 N. E. 532. To dispute immaterial evidence. Campion v. Lattimer [Neb.] 97 N. W. 290. Judgment not sustainable for objector in any event. State v. St. Louis, etc., R. Co. [Mo. App.] 79 S. W. 714. Reversal will follow only when court can see that prejudice resulted. Boyce v. Augusta Camp, No. 7,429 [Okl.] 78 P. 322.

16. Evidence admitted: Congregational Church v. Cutler [Vt.] 57 A. 387; Metropolitan Life Ins. Co. v. Gibbs [Tex. Civ. App.] 78 S. W. 398; Robinson v. Northwestern Nat. Ins. Co. [Minn.] 100 N. W. 226; Ogden Lumber Co. v. Busse, 92 App. Div. 143, 86 N. Y. S. 1098; St. Louis, etc., R. Co. v. Smith [Tex. Civ. App.] 79 S. W. 340; Walker v. Cooper, 97 Mo. App. 441, 71 S. W. 370. Evidence on

or evidence erroneously admitted, tending to prove a fact admitted or sufficiently proved by other competent evidence.[18] Likewise the rejection of evidence of facts otherwise established,[19] unless prejudice plainly appears.[20] Error in evidence is innocuous in a trial of facts by the court, as in equitable actions, where it may be supposed he founded his decision solely on proper proofs.[21] Likewise where,

issue on which there is no finding or request for finding. Jamison v. Dooley [Tex. Civ. App.] 79 S. W. 91. Mere preponderance of evidence will not show issue to be immaterial. Texas & P. R. Co. v. Owens [Tex. Civ. App.] 81 S. W. 62. Where the right of the principal to sue for an accounting did not depend on a power of attorney to another, objected to as improperly acknowledged in a foreign country, its admission in evidence over objection is harmless. Jordan v. Underhill, 91 App. Div. 124, 86 N. Y. S. 620.

Evidence rejected: Boyd v. Liefer [Cal.] 77 P. 953.

17. Schaefer v. Anchor Mut. Fire Ins. Co. [Iowa] 100 N. W. 857; Texas & P. Tel. Co. v. Prince [Tex. Civ. App.] 82 S. W. 327.

18. Rulison v. Collins [Ind. T.] 82 S. W. 748; Daly v. Falk Co. [Mo. App.] 82 S. W. 1114; Citizens' Gas & Oil Min. Co. v. Whipple, 32 Ind. App. 203, 69 N. E. 557; Dick v. Zimmerman, 207 Ill. 636, 69 N. E. 754; Wilcox v. Snyder, 22 Pa. Super. Ct. 451; Liles v. Liles [Mo.] 81 S. W. 1101; Ver Steeg v. Becker-Moore Paint Co. [Mo. App.] 80 S. W. 346; Oliver v. Oregon Sugar Co. [Or.] 76 P. 1086; Ingram v. Wishkah Boom Co. [Wash.] 77 P. 34; Cogdell v. Western Union Tel. Co., 135 N. C. 431, 47 S. E. 490; San Antonio, etc., R. Co. v. Kiersey [Tex. Civ. App.] 81 S. W. 1045; St. Louis S. W. R. Co. v. Burke [Tex. Civ. App.] 81 S. W. 774; Metcalfe v. Lowenstein [Tex. Civ. App.] 81 S. W. 362; Pescia v. Societa Co-operativa Corleonese Francesco Bentivegna, 91 App. Div. 506, 86 N. Y. S. 952; Fisher v. Brown, 135 N. C. 198, 47 S. E. 398; Hunt v. Desloge Consol. Lead Co. [Mo. App.] 79 S. W. 710; Shane v. Shearsmith's Estate [Mich.] 100 N. W. 123; Fowler v. Iowa Land Co. [S. D.] 99 N. W. 1095; Shultz v. Seibel [Pa.] 57 A. 1120; North Pac. Lumber Co. v. Spore, 44 Or. 462, 75 P. 890; Handy & Co. v. Smith [Conn.] 58 A. 694; First Nat. Bank v. Wells Fargo & Co. [C. C. A.] 127 F. 818; Pennsylvania R. Co. v. Naive [Tenn.] 79 S. W. 124; City of Alton v. Foster, 207 Ill. 150, 69 N. E. 783; Kemp v. Briard [Neb.] 98 N. W. 1048; Buckley v. Westchester Lighting Co., 93 App. Div. 436, 87 N. Y. S. 763; Gaskin v. Courson [Ga.] 48 S. E. 379. Same facts shown by other testimony without objection. Steele v. Faris, 25 Ky. L. R. 1749, 78 S. W. 868; Texas & P. R. Co. v. Murtishaw [Tex. Civ. App.] 78 S. W. 953. Other inadmissible evidence admitted without objection. Pennsylvania R. Co. v. Palmer [C. C. A.] 127 F. 956; Equitable Life Assur. Soc. v. Maverick [Tex. Civ. App.] 78 S. W. 560; Missouri, etc., R. Co. v. Baker [Tex. Civ. App.] 81 S. W. 67. Evidence of agent's authority. Agency admitted as to party complaining. Union Hosiery Co. v. Hodgson, 72 N. H. 427, 57 A. 384. Party present at trial or his co-parties cannot object to reading of his deposition where he is called as a witness and testifies to the same facts. Hetzel v. Easterly, 96 App. Div. 517, 89 N. Y. S. 154. No amount of proper evidence cures error of admitting prejudicial and improper testimony in jury trial. Carpenter v. New York Evening Journal Pub. Co., 96 App. Div. 376, 89 N. Y. S. 263; Norfolk & W. R. Co. v. Briggs [Va.] 48 S. E. 521. Where the competency of certain evidence to prove a particular fact cannot be considered on appeal because of lack of reasonable objection, and the proof of that fact is unsatisfactory, the court will attach great importance to any other evidence of that fact improperly admitted. Williams v. Hawley [Cal.] 77 P. 762. Party voluntarily tesifying to fact is not harmed by permitting his attorney to testify to same fact. Becker v. Shaw [Ga.] 48 S. E. 408. Erroneous evidence of title from which both parties claim. Rhodus v. Heffernan [Fla.] 36 So. 572. Objectionable testimony in chief also brought out on cross. Gammel-Statesman Pub. Co. v. Monfort [Tex. Civ. App.] 81 S. W. 1029. Depositions erroneously admitted cannot be presumed harmless because only corroborative of other testimony. Carter v. Wakeman [Or.] 78 P. 362.

19. Blanchard-Hamilton Furniture Co. v. Colvin, 32 Ind. App. 398, 69 N. E. 1032; Christensen v. Thompson, 123 Iowa, 717, 99 N. W. 591; Lewis v. Utah Const. Co. [Idaho] 77 P. 336; Bollinger v. Wright, 143 Cal. 292, 76 P. 1108; Miller v. Shumway [Mich.] 98 N. W. 385; Hefferlin v. Karlman [Mont.] 76 P. 757; Abbott v. Stiff [Tex. Civ. App.] 81 S. W. 562; Fey v. I. O. O. F. Mut. Life Ins. Soc. [Wis.] 98 N. W. 206; Vedder v. Delaney, 122 Iowa, 583, 98 N. W. 373; Nielsen v. Cedar County [Neb.] 98 N. W. 1090; Pauly v. Pauly [Okl.] 76 P. 148; Leggat v. Carroll [Mont.] 76 P. 805. Refusal of question which in effect has been answered. Denison & S. R. Co. v. Powell [Tex. Civ. App.] 80 S. W. 1054. Rejection of testimony in previous case is not prejudicial where the witness is fully cross-examined. Beamer v. Morrison, 210 Ill. 443, 71 N. E. 402. Erroneous exclusion of question on cross-examination. Beaudrot v. Southern R. Co. [S. C.] 48 S. E. 106. Exclusion of the opinion of a qualified expert is harmless where he testified to the same matter as a fact. Bath v. Houston & T. C. R. Co. [Tex. Civ. App.] 78 S. W. 993.

20. Apparent that improper evidence controlled finding. Johnson v. Johnson [Minn.] 99 N. W. 803. In considering findings of the trial court on appeal, it will be presumed, unless the contrary clearly appears, that evidence taken under objection was given no weight. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

21. Way v. Sherman [Mont.] 76 P. 942; Jones v. Robb [Tex. Civ. App.] 80 S. W. 395; Alexander v. Wade [Mo. App.] 80 S. W. 19; Wood v. Potts [Ala.] 37 So. 253; Greenway v. De Young [Tex. Civ. App.] 79 S. W. 603; Pierpont v. Buchanan [Tex. Civ. App.] 79 S. W. 610; Clithero v. Fenner [Wis.] 99 N. W. 1027; Dobbins v. Humphreys, 171 Mo. 198, 70 S. W. 815; Board of Com'rs of Kearny County v. Irvine [C. C. A.] 126 F. 689; Pit-

as in equitable actions, the verdict of the jury is merely advisory.[22] An improper mode of questioning or an erroneous ruling on a proper question may be harmless because of the answer given,[23] or the lack of an answer. Application of these doctrines to direct,[24] and cross-examination,[25] and to the order of taking proof,[26]—all of which are largely controlled by the discretion of the court,[27]—and the reception of affidavits and depositions, and to the admission of secondary evidence,[28] and to the rulings on motions to strike evidence,[29] are cited below. A few illustrative cases wherein errors respecting evidence have been held prejudicial are collected.[30]

Improper argument,[31] or conduct of counsel,[32] or interference with the right

tenger v. Pittenger, 208 Ill. 582, 70 N. E. 699; Bowdle v. Jencks [S. D.] 99 N. W. 98; Lane v. Bailey, 29 Mont. 548, 75 P. 191. The admission of improper evidence is to be deemed immaterial on appeal unless it clearly appears that but for such evidence the finding of the trial court would probably have been different. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. Incompetent evidence, where the case is tried without a jury, may be disregarded, though not objected to. Oppenheimer v. Kruckman, 84 N. Y. S. 129. Declarations claimed to be self-serving. Jamieson v. Dooley [Tex.] 82 S. W. 780.

Where the appeal is de novo on all the evidence. Jefferson County v. Trumbull, 34 Wash. 276, 75 P. 876; Hunt v. Phillips, 34 Wash. 362, 75 P. 970; City of Port Townsend v. Lewis, 34 Wash. 413, 75 P. 982; Hayes v. Buzard [Mont.] 77 P. 423.

22. California Elec. Light Co. v. California Safe Deposit & Trust Co. [Cal.] 78 P. 372.

23. Answer not harmful to questioner's adversary. Joseph Joseph Bros. Co. v. Schontal Iron & Steel Co. [Md.] 58 A. 205; City of San Antonio v. Potter, 31 Tex. Civ. App. 263, 71 S. W. 764; Southern R. Co. v. Crowder, 135 Ala. 417, 33 So. 335; Higgins v. Shepard [Mass.] 70 N. E. 1014; Mullin v. Boston El. R. Co., 185 Mass. 522, 70 N. E. 1021; Christensen v. Thompson, 123 Iowa, 717, 99 N. W. 591; Saunders v. Miller, 119 Ga. 873, 47 S. E. 338; Butts v. Fox [Mo. App.] 81 S. W. 493. Proper answer to improper question. Jones v. Shelby County [Iowa] 100 N. W. 520.

24. Rowe v. Northport Smelting & Refining Co., 35 Wash. 101, 76 P. 529; Orscheln v. Scott [Mo. App.] 80 S. W. 982. Use by witness of paper not marked as exhibit. Neal v. Heying [Iowa] 98 N. W. 603. Indefinite question as to damages. Clark v. San Francisco, etc., R. Co., 142 Cal. 614, 76 P. 507. Error in allowing leading question is harmless where witness has already testified to same fact (Richmond & P. Elec. R. Co. v. Rubin, 102 Va. 809, 47 S. E. 834), or full opportunity for cross-examination is given (Norfolk & W. R. Co. v. Briggs [Va.] 48 S. E. 521).

25. Martin v. Moore [Md.] 57 A. 671; Mulligan v. Smith [Colo.] 76 P. 1063; Wynn v. Followill, 98 Mo. App. 463, 72 S. W. 140; Hefferlin v. Karlman [Mont.] 76 P. 767. Restriction of cross-examination of plaintiff held prejudicial. Baker v. Griffin, 43 Misc. 1, 86 N. Y. S. 579.

26. Siegle v. Phoenix Ins. Co. [Mo. App.] 81 S. W. 637; Western Mattress Co. v. Potter, 1 Neb. Unoff. 627, 631, 95 N. W. 841. Examination of witness for defense before plaintiff opens case. Conant v. Jones [Ga.] 18 S. E. 234.

27. Order of proof. Siegle v. Phoenix Ins. Co. [Mo. App.] 81 S. W. 637; Logan v. Metropolitan St. R. Co. [Mo.] 82 S. W. 126.

28. Liles v. Liles [Mo.] 81 S. W. 1101.

29. Indianapolis St. R. Co. v. Schmidt [Ind.] 71 N. E. 201; Murray v. Butte [Mont.] 77 P. 527; Galloway v. Floyd [Tex. Civ. App.] 81 S. W. 805; O'Brien v. Higley, 162 Ind. 316, 70 N. E. 242.

30. Held prejudicial: Other evidence of fact held not sufficient to cure admission of hearsay. Whether note was forged. Wilmington Sav. Bank v. Waste [Vt.] 57 A. 241. Improper restriction of cross-examination. Resurrection Gold Min. Co. v. Fortune Gold Min. Co. [C. C. A.] 129 F. 668. Question held improper as establishing by unfair means a fact previously ruled out. Connolly v. Brooklyn Heights R. Co. [N. Y.] 71 N. E. 265. Evidence as to sufficiency of scaffold as place to work held improperly rejected. Jenks v. Thompson [N. Y.] 71 N. E. 266. It is prejudicial error to admit irrelevant evidence which tends to excite the sympathy of the jury, and to prevent a dispassionate review of the questions of fact, uninfluenced by sentimental considerations. Chicago, etc., R. Co. v. Holmes [Neb.] 94 N. W. 1007. Exclusion of competent evidence is prejudicial, though cumulative where the conflict is sharp. Crago v. Cedar Rapids, 123 Iowa, 48, 98 N. W. 354. The intent with which false representations were made being immaterial on the question of fraud, allowing evidence of transactions entirely independent of that in question to show guilty intent is prejudicial. Standard Mfg. Co. v. Slot [Wis.] 98 N. W. 923. The admission of a note necessary to plaintiff's case without proof of its execution, which is denied, is not harmless. Stoddard v. Lyon [S. D.] 99 N. W. 1116. Allowing contradiction of party's own witness, and self-serving declarations held prejudicial. Wimmer v. Metropolitan St. R. Co., 92 App. Div. 258, 86 N. Y. S. 1052. Exclusion of evidence as to how much expert had been paid for testifying held not harmless in view of the verdict. Brown v. Interurban St. R. Co., 94 App. Div. 374, 87 N. Y. S. 461. Admission of evidence that defendant is indemnified against recovery. Blumberg v. Marks, 87 N. Y. S. 514. Action for libel in charging plaintiff with insufficiently providing for his family. Opinion evidence held prejudicial. McCloskey v. Pulitzer Pub. Co. [Mo. App.] 80 S. W. 723.

31. The Fair v. Hoffmann, 209 Ill. 330, 70

to open and close may be disregarded if without material effect on the result. The same is true of remarks by the court.[33]

Error in instructing the jury or refusing to do so is ground for reversal when the jury has been misled or it was efficient to the result declared in the verdict,[34] and not otherwise.[35] The verdict or findings may indicate whether an erroneous

N. E. 622; Adams Exp. Co. v. Aldridge [Colo. App.] 77 P. 6; Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395; Hartley v. Pennsylvania Fire Ins. Co., 91 Minn. 382, 98 N. W. 198. Reference to fact that physicians testifying to plaintiff's injuries were appointed by court. Stroh v. South Covington, etc., R. Co., 25 Ky. L. R. 1868, 78 S. W. 1120.

Held prejudicial: Reference to excluded testimony. Potter v. Cave, 123 Iowa, 98, 98 N. W. 569; Chowning v. Parker [Mo. App.] 78 S. W. 677. Reference to result of another trial. Underwriters' Fire Ass'n v. Henry [Tex. Civ. App.] 79 S. W. 1072. Reference to plaintiff's discharge by railroad company defendant. Houston, etc., R. Co. v. Rehm [Tex. Civ. App.] 82 S. W. 526. Statement that defendant corporation was no better than other corporations, that all had swindled the people. Colorado Canal Co. v. Sims [Tex. Civ. App.] 82 S. W. 531. Smallness of verdict will not cure prejudicial argument directed against right of recovery. Chicago, etc., R. Co. v. Jones [Tex. Civ. App.] 81 S. W. 60.

32. Statement that defendant was insured against recovery. Tanner v. Harper [Colo.] 75 P. 404. Remarks of counsel. Thompson v. Purdy [Or.] 77 P. 113. Exception to remark of plaintiff's attorney, constituting expression of opinion, not statement of fact not in evidence, may be overruled. Brown v. Johnson Bros., 135 Ala. 608, 33 So. 683. Opening statement of immaterial matters is not reversible. Potter v. Cave, 123 Iowa, 98, 98 N. W. 569; Miller v. John, 208 Ill. 173, 70 N. E. 27.

Held prejudicial: Remarks of counsel. Benoit v. New York, etc., R. Co., 94 App. Div. 24, 87 N. Y. S. 951. Failure of court to reprimand counsel in sufficiently strong terms to remove effect of impropriety. Leu v. St. Louis Transit Co. [Mo. App.] 80 S. W. 273.

33. Remarks stating reasons for refusing proof of certain experiments. Halverson v. Seattle Elec. Co. [Wash.] 77 P. 1058.

34. Womble v. Merchants' Grocery Co., 135 N. C. 474, 47 S. E. 493; Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 71 N. E. 660; Dawson v. Falls City Boat Club [Mich.] 99 N. W. 17; McAdams v. McCook [Neb.] 99 N. W. 656; Thomas v. Northwestern Mut. Life Ins. Co., 142 Cal. 79, 75 P. 665. Instruction embodying correct abstract principle, inapplicable to issues and evidence in case. Parker v. National Mut. Bldg. & Loan Ass'n [W. Va.] 46 S. E. 811. Failure to instruct for defendant on a count lacking support is not cured by the fact that the jury could find for plaintiff on other counts. Mansfield v. Morgan [Ala.] 37 So. 393. Error cannot be treated as harmless where party requested and court refused a correct instruction on same point. St. Louis S. W. R. Co. v. Crabb [Tex. Civ. App.] 80 S. W. 408. Statement that plaintiff should not have brought action in supreme court, but should have sued in city or municipal court, where the supreme court had concurrent jurisdiction. McMahon v. Metropolitan St. R. Co., 97 App. Div. 466, 89 N. Y. S. 1062.

35. Zellers v. White, 208 Ill. 618, 70 N. E. 669; Chicago, W. & V. Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38; Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899; Bonner v. Bonner [Tex. Civ. App.] 78 S. W. 535; Southern R. Co. in Kentucky v. Otis' Adm'r, 25 Ky. L. R. 1686, 78 S. W. 480; Missouri, etc., R. Co. v. Hammer [Tex. Civ. App.] 78 S. W. 708; Wilson v. Wilson [Tex. Civ. App.] 79 S. W. 839; Gaston v. Gainesville & D. Elec. R. Co. [Ga.] 48 S. E. 188; Riska v. Union Depot R. Co. [Mo.] 79 S. W. 445; San Antonio, etc., R. Co. v. Votaw [Tex. Civ. App.] 81 S. W. 130; Werner Co. v. Calhoun [W. Va.] 46 S. E. 1024; Indianapolis St. R. Co. v. Schmidt [Ind.] 71 N. E. 201; Southern Ind. R. Co. v. McCarrell [Ind.] 71 N. E. 156; City of South Omaha v. Ruthjen [Neb.] 99 N. W. 240; Texas Portland Cement & Lime Co. v. Lee [Tex. Civ. App.] 82 S. W. 306; Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435; Faubion v. Western Union Tel. Co. [Tex. Civ. App.] 81 S. W. 56; Guffey Petroleum Co. v. Oliver [Tex. Civ. App.] 79 S. W. 884; Ingram v. Wishkah Boom Co. [Wash.] 77 P. 34; Farrell v. Chicago, etc., R. Co., 123 Iowa, 690, 99 N. W. 578; First Nat. Bank v. Moor [Tex. Civ. App.] 79 S. W. 53; Camp v. Chicago G. W. R. Co. [Iowa] 99 N. W. 735; Crutcher's Adm'r v. Stuart [Ky.] 82 S. W. 421; Crooker v. Pacific Lounge & Mattress Co., 34 Wash. 191, 75 P. 632. Failure to give charge in writing. Schwartzlose v. Mehlitz [Tex. Civ. App.] 81 S. W. 68. Inadvertent misuse of terms. Bowick v. American Pipe Mfg. Co. [S. C.] 48 S. E. 276; Southern R. Co. v. Merritt, 120 Ga. 409, 47 S. E. 908. Instructions on immaterial issue. McMillan v. Frank [Mont.] 75 P. 685. Unwarranted instruction on discovered peril is harmless where the litigated question is contributory negligence. Reed v. St. Louis, etc., R. Co. [Mo. App.] 80 S. W. 919. Refusal to instruct as to immaterial matter, assumption of risk. Spring Valley Coal Co. v. Patting, 210 Ill. 342, 71 N. E. 371. Limitation of number of requests. Cobb Chocolate Co. v. Knudson, 207 Ill. 452, 69 N. E. 816; Chicago City R. Co. v. O'Donnell, 208 Ill. 267, 70 N. E. 294; The Fair v. Hoffman, 209 Ill. 330, 70 N. E. 622. Emphasis of instruction by repetition. Gould v. Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896; Southern K. R. Co. v. Sage [Tex. Civ. App.] 80 S. W. 1038; Chicago, W. & V. Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38; Bartlett v. Smith, 1 Neb. Unoff. 328, 95 N. W. 661. Assumption of right of way as appurtenant to wrong parcel. McKenzie v. Gleason, 184 Mass. 452, 69 N. E. 1076. Instruction allowing interest eo nomine is harmless where damages for delay are recoverable. Atwood v. Boston Forwarding & Transfer Co. [Mass.] 71 N. E. 72. Instruction on burden of proof. Ball v. Marquis, 122 Iowa, 665, 98 N. W. 496. A vague instruction on a point not neces-

instruction was effective.[36] If, as in equitable issues, the verdict is merely advisory, such error is presumably harmless.[37] The fact that improper papers were before the jury while deliberating,[38] or that it was improperly recalled,[39] or that other irregularities occurred during the trial, are not reversible if no harm resulted;[40] nor are defects and irregularities in the verdict, findings and conclusions of law,[41] or in judgment and record,[42] of which the like is true. Thus a wrong

sarily involved is harmless. Jackson v. Lalicker [Neb.] 99 N. W. 32. Refusal of specific instructions is not error where the issues are not involved and there is a fair general charge. Lee v. Longwell [Mich.] 99 N. W. 379. A verdict will not be disturbed because of an inaccurate statement of the law in an instruction, where it appears that the verdict must have been the same had the instruction been correct. Henry v. Dussell [Neb.] 99 N. W. 484; Brewer v. St. Louis Transit Co. [Mo. App.] 79 S. W. 1021. Instruction as to matter conclusively proved. Lima v. County Bank, 142 Cal. 245, 75 P. 846; Ruth v. St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055; Coffee v. Coffee, 119 Ga. 633, 46 S. E. 620. Refusal to charge on illegality of quotient verdict is not reversible where no prejudice is shown. Reeves v. Southern R. Co. [S. C.] 46 S. E. 543. A charge stating facts admitted to be true by appellant. Bedenbaugh v. Southern R. Co. [S. C.] 48 S. E. 53; Turner v. Lyles [S. C.] 48 S. E. 301. Charge ignoring three-fourths value clause in fire insurance policy is harmless where that proportion of loss was greater than total insurance. Malin v. Mercantile Town Mut. Ins. Co. [Mo. App.] 80 S. W. 56. Incorrect measure of damages for injury to cattle in transit held not prejudicial in view of evidence. St. Louis, etc., R. Co. v. Burns [Tex. Civ. App.] 80 S. W. 104. Error in instructions as to defendant held liable is not available to plaintiff. Taylor v. Houston & T. C. R. Co. [Tex. Civ. App.] 80 S. W. 260. Error in charging certain language to be libelous is harmless where other language in same writing is libelous. Cranfill v. Hayden [Tex.] 80 S. W. 609. Failure to submit an issue on which the jury must have passed to find their verdict is harmless. Limitations. Campbell v. Upson [Tex. Civ. App.] 81 S. W. 358. An erroneous instruction on a matter not submitted to the jury is not prejudicial. Texas & P. R. Co. v. Whitaker [Tex. Civ. App.] 82 S. W. 1051. Dividing issues so that two general verdicts are rendered against defendant does not harm him. Rapid Transit R. Co. v. Smith [Tex. Civ. App.] 82 S. W. 788. An instruction to find for defendant if a certain fellow-servant was the cause of plaintiff's injury cannot harm defendant where there was no evidence on which to base it. Kentucky Lumber Co. v. Smith [Ky.] 82 S. W. 977. An instruction as to the weight to be given a deposition is harmless where the testimony was merely cumulative. City of Covington v. Bostwick [Ky.] 82 S. W. 569.

36. Avery v. Nordyke & Marmon Co. [Ind. App.] 70 N. E. 888; Chicago, W. & V. Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38; Coine v. Chicago & N. W. R. Co., 123 Iowa, 458, 99 N. W. 134; McCartney v. Washington [Iowa] 100 N. W. 80; Muncie Pulp Co. v. Koontz [Ind. App.] 70 N. E. 999; Abbitt v. St. Louis Transit Co. [Mo. App.] 81 S. W. 484; Henry v. Dussell [Neb.] 99 N. W. 484. Verdict only one proper under evidence. Southern R. Co. v. Oliver, 102 Va. 710, 47 S. E. 862; Nichols v. Gulf, etc., R. Co. [Miss.] 36 So. 192. Measure of damages, American Car & Foundry Co. v. Clark, 32 Ind. 644, 70 N. E. 828; Orscheln v. Scott [Mo. App.] 80 S. W. 982; Dady v. Condit, 209 Ill. 488, 70 N. E. 1088; Quinn v. Baldwin Star Coal Co. [Colo. App.] 76 P. 562; Conant v. Jones [Ga.] 48 S. E. 234; Texas & P. R. Co. v. Bratcher [Tex. Civ. App.] 78 S. W. 531. Damages recovered for less than plaintiff entitled to. Erroneous charge on measure not prejudicial to defendant. McKinstry v. St. Louis Transit Co. [Mo. App.] 82 S. W. 1108.

37. Pittenger v. Pittenger, 208 Ill. 582, 70 N. E. 699; Hendrickson v. Wallace, 29 Mont. 504, 75 P. 365.

38. Pleadings. Redinger v. Jones [Kan.] 75 P. 997.

39. Slack v. Stephens [Colo. App.] 76 P. 741.

40. Misconduct of juror. Supreme Forest of Woodman Circle v. Stratton [Kan.] 75 P. 472. Recalling jury and reading stenographer's report of evidence in absence of appellant's counsel. Slack v. Stephens [Colo. App.] 76 P. 741.

41. Heagney v. Case Threshing Mach. Co. [Neb.] 99 N. W. 260. Erroneous construction of contract held harmless by reason of undisputed facts. King v. Cisco Compress Co. [Tex. Civ. App.] 81 S. W. 114. Reception of verdict by court in absence of clerk. Names of jurors not read, jury not polled. State v. Patterson [S. D.] 100 N. W. 162. Use of wrong rate of interest not prejudicial to defendant where verdict is for less than a proper rate would have given. Hoffman v. Loud & Sons Lumber Co. [Mich.] 100 N. W. 1010; Thompson v. Purdy [Or.] 77 P. 113. Immaterial "Claims of law" overruled. Sloan v. Smith [Conn.] 58 A. 712. Clerical error in finding as to the number of cattle involved in a replevin suit is not prejudicial to defendant. Olson v. Peabody [Wis.] 99 N. W. 458. Failure in equity case to find specifically on each material fact alleged. Chippewa Bridge Co. v. Durand [Wis.] 99 N. W. 603. Failure to find as to matter rendered immaterial by other findings. Milford v. Milford [S. C.] 46 S. E. 479. Failure to make special findings in equity case, appeal being de novo. Gaines & Co. v. Whyte Grocery Fruit & Wine Co. [Mo. App.] 81 S. W. 648. A properly supported verdict will not be set aside because in conflict with an erroneous instruction which was unobjected to below. Collins v. George, 102 Va. 509, 46 S. E. 684. Defective presentation of special issues. Hunter v. Western Union Tel. Co., 135 N. C. 459, 47 S. E. 745; Roper Lumber Co. v. Elizabeth City Lumber Co., 135 N. C. 744, 47 S. E. 757. Direction of verdict in favor of all defendants where only two answered is harmless

decision when no substantial right exists,[43] or when substantially equivalent to a right decision,[44] or error respecting matters immaterial to the cause of action,[45] is harmless.

Erroneous proceedings after judgment,[46] or on proceedings for new trial,[47] or preparatory to review,[48] or on an intermediate review, are discussed in the notes, all being governed by the rule that there will be no reversal if no prejudice.

§ 3. *Errors cured or made harmless by other matters.*[49]—Error is also harmless if some subsequent condition has rectified it or has averted the prejudicial effect of it.[50] This may be done by the admission of evidence,[51] by striking out

where no relief was demanded or recoverable against defaulters. Johnston v. Coney [Ga.] 48 S. E. 373. Verdict finding interpleader entitled to attached property and erroneously stating the extent of his interest therein is harmless to plaintiff. Lafferty v. Hilliker [Mo. App.] 81 S. W. 910. Omission to fix value of property in verdict for replevin defendant. Walker v. Robertson [Mo. App.] 81 S. W. 1183. A finding cannot be objected to as unsupported by the evidence, where the immateriality of the finding has been stipulated. Kent v. Richardson [Idaho] 71 P. 117.

42. Correct judgment on wrong reason. Samberg v. American Exp. Co. [Mich.] 99 N. W. 879. Failure to enter judgment for party entitled only to nominal damages. Milligan v. Owen, 123 Iowa, 285, 98 N. W. 792. Judgment for defendant where plaintiff entitled to nominal damages. Ladd v. Redle [Wyo.] 75 P. 691. Directed verdict. United States v. Withers [C. C. A.] 130 F. 696. Demurrer sustained generally on several grounds instead of specifying ground as required by Gen. St. 1902, § 765. Patterson v. Farmington St. R. Co., 76 Conn. 628, 57 A. 853. Failure to rule as to rights of subsequent lienors is harmless where there is insufficient to satisfy lienors whose claims are properly adjudicated. Summerville v. Kelliher [Cal.] 77 P. 889. Lienor complaining that others are given priority must show prejudice. First Nat. Bank v. American Sugar Refining Co. [Ga.] 48 S. E. 326. Allowance of credit fully litigated is not prejudicial, though not claimed in cross bill. Pollard v. American Freehold Land Mortg. Co., 139 Ala. 183, 35 So. 767. Failure of judgment in sequestration proceedings to state value of each article separately. Lynch v. Burns [Tex. Civ. App.] 79 S. W. 1084. Allowance to a stenographer of 25 cents per page instead of the legal rate of 15 cents per folio of 100 words is harmless to the county in the absence of a claim that the allowance exceeds the legal rate. Polsgrove v. Walker [Ky.] 82 S. W. 979.

43. An unsupported holding that a tax deed is void is harmless where the proof of title bars recovery under it. Glos v. Mickow, 211 Ill. 117, 71 N. E. 830.

44. Boyce v. Augusta Camp [Okl.] 78 P. 322; Boothe v. Squaw Springs Water Co., 142 Cal. 573, 76 P. 385. Error in finding that a deed was executed on a certain date where under the facts admitted it was executed on a different date was harmless. Grogan v. Valley Trading Co. [Mont.] 76 P. 211. Erroneous refusal to consider second application for compulsory reference on ground that prior application had been denied by another judge cannot be regarded as harmless on the ground that reference was not allowable. Hart v. Godkin [Wis.] 100 N. W. 1057.

45. Home Ins. Co. v. Lowenthal [Miss.] 36 So. 1042. Opening case after argument for proof of immaterial fact. Western Union Tel. Co. v. Roberts [Tex. Civ. App.] 78 S. W. 522.

46. Surplusage in order entered on remittitur after reversal. In re Hopkins' Will, 93 App. Div. 618, 87 N. Y. S. 793. A writ of possession which is inoperative as to the party in actual possession of land is harmless to an execution plaintiff in a suit against such possessor. Stone v. McClellan [Tex. Civ. App.] 81 S. W. 751.

47. Denial of a motion for new trial on an erroneous ground is harmless where the same result must be reached if the new trial is granted. Garofalo v. Prividi, 43 Misc. 359, 87 N. Y. S. 467.

48. Where a full statement of facts is agreed upon by the attorneys for both parties and approved by the court, appellant is not prejudiced by a refusal to require the stenographer to transcribe his notes. Davis v. Pullman Co. [Tex. Civ. App.] 79 S. W. 635.

49. See 2 Curr. L. 170.

50. Refusal of nonsuit cured by later testimony. Esler v. Camden & S. R. Co. [N. J. Law] 58 A. 113. Direction of verdict on one count harmless where another presenting same issue is submitted to jury. Johnson v. Holland [Iowa] 99 N. W. 708. An objection to the admission of the papers in an accounting by an administrator held to have been overcome by the subsequent conduct of the party making it. Magee v. Magee, 80 App. Div. 637, 80 N. Y. S. 757. Irregularity in an order leaving it to the discretion of the notary to take any five out of nine persons appointed to compose a family meeting is cured by the act of the notary in calling all nine of such persons to the meeting. Succession of Carbajal [La.] 36 So. 41.

51. Excluded evidence afterwards admitted: Dick v. Zimmerman, 207 Ill. 636, 69 N. E. 754; Mulligan v. Smith [Colo.] 76 P. 1063; Buckalew v. Quincy, etc., R. Co. [Mo. App.] 81 S. W. 1176; Kelly v. Johnson, 135 N. C. 650, 47 S. E. 672; Haney-Campbell Co. v. Preston Creamery Ass'n, 119 Iowa, 188, 93 N. W. 297. Sustaining objections to cross interrogatories afterwards permitted. First Nat. Bank v. Leech, 207 Ill. 215, 69 N. E. 890.

Admitted testimony cured by later evidence: Immaterial evidence made material by subsequent evidence. Central of Georgia R. Co. v. Martin [Ala.] 36 So. 426. A party cannot complain of the admission of evidence over his objection where he after-

or excluding evidence[52] by reinstating it,[53] by withdrawal of objections to competency of witness,[54] by proceeding with trial of issues of fact after denial of demurrer to evidence,[55] by instructions,[56] by taking the case or question from the jury,[57] by other corrective rulings or proceedings,[58] by verdict or findings,[59] by

wards permits similar evidence to be introduced without objection. City of San Antonio v. Potter, 31 Tex. Civ. App. 263, 71 S. W. 764; Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 80 S. W. 1038; Ruth v. St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055.

52. Brown v. Illinois, etc., R. Co., 209 Ill. 402, 70 N. E. 905; Logan v. Metropolitan St. R. Co. [Mo.] 82 S. W. 126; Western Union Tel. Co. v. Hamilton [Tex. Civ. App.] 81 S. W. 1052; Fox v. Metropolitan St. R. Co., 93 App. Div. 229, 87 N. Y. S. 754; Bauer v. Dubuque, 122 Iowa, 500, 98 N. W. 355; Hess v. Lucas, 122 Iowa, 517, 98 N. W. 466; McNaughton v. Smith [Mich.] 99 N. W. 382; Cowles v. Lovin, 135 N. C. 488, 47 S. E. 610.

53. Crane v. Bennett, 77 App. Div. 102, 79 N. Y. S. 66.

54. Carpenter v. Coats [Mo.] 81 S. W. 1089. Objection to competency of witness to transactions with deceased held waived by cross-examination. Edwards v. Latimer [Mo.] 82 S. W. 109.

55. Supreme Forest of Woodman Circle v. Stratton [Kan.] 75 P. 472; City of Port Townsend v. Lewis, 34 Wash. 413, 75 P. 982. Weakness of plaintiff's evidence held supplied by defendant. City of Covington v. Jones, 25 Ky. L. R. 1983, 79 S. W. 243.

56. Curing refusal to strike pleadings. Urdangen & Greenberg Bros. v. Doner, 122 Iowa, 533, 98 N. W. 317; Turner v. Faubion [Tex. Civ. App.] 81 S. W. 810. Overruling demurrer to plea. Fuqua v. Gambill [Ala.] 37 So. 235. An affirmative charge for defendant on certain counts cures errors arising on the pleadings and trial as to those counts. Louisville & N. R. Co. v. Sullivan Timber Co., 138 Ala. 379, 35 So. 327. Refusal to submit issue held cured by instruction. National Cash Register Co. v. Hill [N. C.] 48 S. E. 637.

Curing erroneous evidence: Lazier Gas Engine Co. v. Du Bois [C. C. A.] 130 F. 834; Choctaw, etc., R. Co. v. True [Tex. Civ. App.] 80 S. W. 120; Texas Portland Cement & Lime Co. v. Ross [Tex. Civ. App.] 81 S. W. 94; Cheek v. Oak Grove Lumber Co., 134 N. C. 225, 46 S. E. 488; Chicago, etc., R. Co. v. Longbottom [Tex. Civ. App.] 80 S. W. 542; McCartney v. Washington [Iowa] 100 N. W. 80; Muller v. Parcel [Neb.] 99 N. W. 684. Withdrawing improper evidence from jury. Coine v. Chicago, etc., R. Co., 123 Iowa, 458, 99 N. W. 134; Groh's Sons v. Groh, 80 App. Div. 85, 80 N. Y. S. 438; St. Paul Fire & Marine Ins. Co. v. Haskin [Kan.] 77 P. 106. It is not error to refuse to strike out evidence as not responsive where it was given in good faith and was responsive to the questions as the witness understood them, when the court subsequently instructed the jury to disregard it. Palmer v. Smith, 76 Conn. 210, 56 A. 516. Prejudicial testimony of malice in libel suit held not cured by instruction to disregard it. Illinois Cent. R. Co. v. Ely [Miss.] 35 So. 873.

Rejection of evidence: Held aggravated by charge. Guinn v. Iowa & St. L. R. Co. [Iowa] 101 N. W. 94. Erroneous exclusion of contradictory evidence cured by instruction withdrawing the evidence sought to be contradicted. Shoup v. Marks [C. C. A.] 128 F. 32.

Curing other parts of charge: Baker v. Independence [Mo. App.] 81 S. W. 501; Nelson v. Young, 91 App. Div. 457, 87 N. Y. S. 69; International, etc., R. Co. v. Villareal [Tex. Civ. App.] 82 S. W. 1063; Galveston, etc., R. Co. v. Perry [Tex. Civ. App.] 82 S. W. 343; Schaefer v. Anchor Mut. Fire Ins. Co. [Iowa] 100 N. W. 857; Texas Portland Cement & Lime Co. v. Lee [Tex. Civ. App.] 82 S. W. 306; Logan v. Metropolitan St. R. Co. [Mo.] 82 S. W. 126; Abbott v. Stiff [Tex. Civ. App.] 81 S. W. 562; Gulf, etc., R. Co. v. French [Tex. Civ. App.] 82 S. W. 1050.

Not cured by subsequent charge in conflict therewith. Citizens' R. Co. v. Sinclair [Tex. Civ. App.] 81 S. W. 329; Lane v. Calby, 95 App. Div. 11, 88 N. Y. S. 465; In re Knox's Will, 123 Iowa, 24, 98 N. W. 468; Missouri, etc., R. Co. v. Huff [Tex.] 81 S. W. 525; Johnson v. Guld, etc., R. Co. [Tex. Civ. App.] 81 S. W. 1197.

Curing erroneous remarks of counsel. Weeks v. Scharer [C. C. A.] 129 F. 333. Not cured by admonition of court or by instructions. Hillman v. Detroit United R. Co. [Mich.] 100 N. W. 399. If the court over proper objection erroneously permits counsel to persist in prejudicial argument, an instruction to disregard or not consider the improper remarks will not as a general rule cure the error. Rulison v. Collins [Ind. T.] 82 S. W. 748.

57. Withdrawal of issue heals admission of improper evidence thereon. Howard v. Lamoni [Iowa] 100 N. W. 62; Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395.

58. Abandonment of theory set up by pleading cures refusal to strike. Urdangen & Greenberg Bros. v. Doner, 122 Iowa, 533, 98 N. W. 317. An erroneous ruling overruling a demurrer is error without prejudice where the pleading is afterward amended and the case tried and submitted on the amended pleading. Brown v. Brown [Neb.] 98 N. W. 718. Refusal to allow one counsel to argue certain question is cured by reconsideration and allowing other counsel to argue it. Farnsworth v. Fraser [Mich.] 100 N. W. 400. Granting new trial cures erroneous admission of evidence. Fox v. Metropolitan St. R. Co., 93 App. Div. 229, 87 N. Y. S. 754. Amending clerical misprision in name of defendant in decree. Fay v. Stubenrauch, 141 Cal. 573, 75 P. 174. Reconsideration of ruling on objection to cross-examination. Wynn v. Followill, 98 Mo. App. 463, 72 S. W. 140.

59. Hess v. Lucas, 122 Iowa, 517, 98 N. W. 466. Verdict for less than plaintiff was entitled to recover under evidence held corrective of error in overruling challenge to juror. Choctaw, etc., R. Co. v. True [Tex. Civ. App.] 80 S. W. 120. Will not cure prejudicial argument directed against right to recover. Chicago, etc., R. Co. v. Jones [Tex. Civ. App.] 81 S. W. 60.

Cure of rulings on pleadings: Demurrer

judgment,[60] or by a remittitur of damages.[61] Even where the jury are the judges of the law and the evidence, instructions prejudicial to plaintiff may cause reversal, though a verdict for defendant has been rendered.[62]

HEALTH.[63]

§ 1. Validity and Construction of Health Regulations (1590).
§ 2. Health Boards and Officers (1591).
§ 3. Care and Control of Contagious or Infectious Diseases (1592). Reimbursement (1592). Allowance of Claims (1593). Negligence (1593).

§ 1. *Validity and construction of health regulations.*[64]—If statutes purporting to have been enacted to protect the public health have a substantial relation to that object, they are a valid exercise of the police power, though seemingly unreasonable or unwise,[65] if otherwise inoffensive to the constitution.[66] Such are

to answer. Guthrie v. Carpenter, 162 Ind. 417, 70 N. E. 486. Refusal to strike plea of set-off and counterclaim. Owen v. American Nat. Bank [Tex. Civ. App.] 81 S. W. 988. Where facts found support and the judgment rests on the second paragraph of a complaint, it was harmless error to overrule a demurrer to the first paragraph. Connor v. Andrews Land Home & Improvement Co., 162 Ind. 338, 70 N. E. 376. Error in assuming jurisdiction of a counterclaim setting up claim beyond the jurisdiction of the court is immaterial where jury fail to allow anything on it. Rylie v. Elam [Tex. Civ. App.] 79 S. W. 326.

Curing exclusion of evidence: Spink v. New York, etc., R. Co. [R. I.] 58 A. 499; Southern Ind. R. Co. v. Moore [Ind. App.] 71 N. E. 516. Verdict of no cause of action cures rejection of evidence of damages. Nielsen v. Cedar County [Neb.] 98 N. W. 1090. Evidence as to benefits cured by verdict denying damages and benefits. Marks v. Bradshaw Mountain R. Co. [Ariz.] 76 P. 470.

Admitted evidence cured: Proper v. Lake Shore, etc., R. Co. [Mich.] 99 N. W. 283. Findings opposed to erroneous evidence. Head v. Selleck, 76 Conn. 706, 57 A. 281. Verdict for less than proper evidence shows plaintiff entitled to. Choctaw, etc., R. Co. v. True [Tex. Civ. App.] 80 S. W. 120; Abbitt v. St. Louis Transit Co. [Mo. App.] 79 S. W. 496. Verdict for one-twentieth of amount estimated by improper conclusion. Ramsey v. Flowers [Ark.] 80 S. W. 147. Error in allowing a hypothetical question as to whether an iron safe clause in a fire insurance policy was material to the risk is harmless where the jury find that the clause was waived. Hanna & Co. v. Orient Ins. Co. [Mo. App.] 82 S. W. 1115.

Curing errors in charge: Butler v. Barret, 130 F. 944; Fuqua v. Gambill [Ala.] 37 So. 235; Hurst v. Benson [Tex. Civ. App.] 71 S. W. 417; Reed v. St. Louis, I. M. & S. R. Co. [Mo. App.] 80 S. W. 919; Eastland v. Maney [Tex. Civ. App.] 81 S. W. 574; Cornell v. Standard Oil Co., 91 App. Div. 345, 86 N. Y. S. 633; Chicago, etc., R. Co. v. Linn, 30 Ind. App. 88, 65 N. E. 552; Emerson v. Metropolitan Life Ins. Co., 185 Mass. 316, 70 N. E. 200. Verdict of no injury cures charge on failure to procure proper treatment for injury. Robertson v. Texas & P. R. Co. [Tex. Civ. App.] 79 S. W. 96. Verdict only one proper under evidence. Fred Krug Brew. Co. v. Healey [Neb.] 99 N. W. 489. Measure of damages, error cured by verdict for defendant. Proper v. Lake Shore, etc., R. Co. [Mich.] 99 N. W. 283; Wofford v. Buchel Power & Irrigation Co. [Tex. Civ. App.] 80 S. W. 1078; Douglass v. Agne [Iowa] 99 N. W. 660; Wilhelm v. Donegan, 143 Cal. 60, 76 P. 713. Instruction giving wrong rate of interest. Change of law. Verdict for less than proper rate. Thompson v. Purdy [Or.] 77 P. 113. Cf. Hoffman v. Loud & Sons Lumber Co. [Mich.] 100 N. W. 1010. Withdrawal of issue of malice in an assault is harmless where no actual damage is found. Robinson v. Halley [Iowa] 100 N. W. 328. An instruction authorizing a verdict by three-fourths of the jury in accordance with an invalid statute is harmless where the verdict rendered was unanimous. Adams Exp. Co. v. Aldridge [Colo. App.] 77 P. 6.

Curing refusal to charge: Pearl v. Benton Tp. [Mich.] 100 N. W. 188.

Curing special interrogatories: Hebbe v. Maple Creek [Wis.] 99 N. W. 442. Refusal of instruction to find for defendant if they find a certain fact is harmless where the jury fail to find that fact. Brown v. McNair [Ind. T.] 82 S. W. 677.

60. Conner v. Andrews Land, Home & Improvement Co., 162 Ind. 338, 70 N. E. 376. Judgment appeared to be based only on counts as to which there was no dispute. Rulings on others not material. Bickerdike v. State [Cal.] 78 P. 270. Where plaintiff comes of age pending suit, failure to amend before trial by striking out the next friend is not prejudicial where plaintiff has judgment including costs. Bernard v. Pittsburg Coal Co. [Mich.] 100 N. W. 396.

61. Vedder v. Delaney, 122 Iowa, 583, 98 N. W. 373; Redinger v. Jones [Kan.] 75 P. 997; Howell & Co. v. Dickerson [Mo. App.] 78 S. W. 665; Lynch v. Burns [Tex. Civ. App.] 79 S. W. 1084.

62. Paxton v. Woodward [Mont.] 78 P. 215.

63. Compare titles Adulteration, 3 Curr. L. 47; Food, 3 Curr. L. 1433; Cemeteries, 3 Curr. L. 665; Medicine and Surgery, 2 Curr. L. 887; Nuisances, 2 Curr. L. 1062.

64. See 2 Curr. L. 173.

65. State v. Hyman [Md.] 57 A. 6. Acts 1902, p. 121, c. 101, relating to the manufacture of clothing in sweatshops, held to have a substantial relation to the public health; not invalid as clothing officials with arbitrary power; and a valid exercise of the po-

statutes providing for vaccination of all school children,[67] or to compel the filling or clearing and drainage of swamp lands liable to breed malaria or other diseases,[68] or to compel installation of sanitary plumbing in tenement houses.[69] The fact that a statute providing for the exercise of that power compensates the owner of the land does not make it an exercise of the right of eminent domain rather than of the police power.[70] While the physical condition of a pupil, rendering vaccination dangerous, may be a good defense as against a general order of compulsory vaccination,[71] it is no reason for excepting such pupil from a resolution of a school board excluding from attendance all pupils who have not been vaccinated.[72]

§ 2. *Health boards and officers.*[73]—In New Hampshire, the councils of cities exercise powers of town boards of health,[74] whence they may commit care of contagious diseases to the poor officer and the city physician. In Indiana, delay in choosing a subofficer was held not fatal.[75]

Powers and duties.—Powers conferred by statute on local boards for the preservation of the public health should be liberally construed, so that they may be rendered effective.[76] Accordingly they have been upheld in making rules to be observed in barber shops, to prevent the spread of contagious skin diseases, and in requiring the payment of license fees.[77] A town board of health is not authorized to take steps relative to a nuisance until it has ascertained that a nuisance exists.[78]

lice power of the state. Id. The laws apply only to the manufacture of clothing intended for sale. Id. In passing on the validity of a statute, courts may take judicial notice that the manufacture of clothing in sweatshops under unsanitary conditions is likely to breed and spread disease. Id.

66. Vaccination laws applying to all school children are uniform in operation, are not class legislation, and do not conflict with the fourteenth amendment to the Federal constitution. French v. Davidson [Cal.] 77 P. 663. "School sink" provision of Tenement House act does not deny equal protection of the laws by being applicable only to cities of the first class. Tenement House Department of New York v. Moeschen [N. Y.] 72 N. E. 231. Nor does it provide for a taking of property without compensation, though it necessitates changes, involving more or less expense, in existing buildings. Id.

67. Cal. St. 1889, p. 32. French v. Davidson [Cal.] 77 P. 663. Abeel v. Clark, 84 Cal. 226, 24 P. 383, approved and followed. See note on Vaccination, 2 Curr. L. 176.

68. Rude v. St. Marie [Wis.] 99 N. W. 460.

69. That part of the New York tenement house act requiring all school sinks in existing tenement houses to be removed and water closets substituted is a valid exercise of the police power [Laws 1901, p. 912, c. 334, § 100, as amended by Laws 1902, p. 937, c. 352, § 47]. Tenement House Department of New York v. Moeschen [N. Y.] 72 N. E. 231.

70. Rude v. St. Marie [Wis.] 99 N. W. 460.

71, 72. Hutchins v. School Committee of Durham [N. C.] 49 S. E. 46.

73. See 2 Curr. L. 176.

74. Under N. H. Pub. St. 1901, c. 50, § 9, vesting in city councils the powers of town boards of health, the council of Nashua had power to place control of contagious diseases in the overseers of the poor and the city physician. Congdon v. Nashua, 72 N. H. 468, 57 A. 686. Laws N. H. 1897, p. 37, c. 45, substituting in towns boards of health for health officers, to be appointed by selectmen instead of being elected, does not apply to cities. Id.

75. Election of secretary: A board of health commissioners failed to elect a secretary at their December, 1903, meeting, as required by law, but elected one on January 5th following. Held, election valid and secretary was entitled to serve during 1904 [Acts 1891, p. 15, c. 15, § 8 construed]. Hendershot v. State, 162 Ind. 69, 69 N. E. 679.

76. La Porta v. Board of Health of Hoboken [N. J. Law] 58 A. 115.

77. Under powers conferred by Gen. St. §§ 49, 39, pp. 1644, 1642. La Porta v. Board of Health of Hoboken [N. J. Law] 58 A. 115.

78. Could not levy a fine for obstructing a private drain until it was shown that a nuisance resulted, and until they had complied with provisions of Laws 1893, pp. 1502, 1506, c. 661, §§ 21, 25. Town of Fayette v. Greenleaf, 44 Misc. 352, 89 N. Y. S. 1093.

NOTE. Abatement of nuisances: A board of health may abate a nuisance per se, even though not empowered to do so by ordinance. State v. Henzler [N. J.] 41 A. 228. A board may order destruction of property if a nuisance can be abated in no other way. City of Savannah v. Mulligan, 95 Ga. 323, 22 S. E. 621, 51 Am. St. Rep. 86. But it must be clear that destruction is necessary. Health Department v. Dassari, 21 App. Div. 348, 47 N. Y. Supp. 641.

Notice must usually be given the owner of property before a nuisance is abated. People v. Board of Health, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522. And failure to give notice may render action of the board void. Watuppa Reservoir Co. v. MacKenzie, 132 Mass. 71; Hall v. Staples, 166 Mass. 399, 44 N. E. 351.

By great weight of authority a board of health has no power to conclusively determine whether a nuisance exists or not. People v. Board of Health, 140 N. Y. 1, 35 N. E. 320, 37 Am. St. Rep. 522; Hutton v. Camden, 39 N. J. Law, 122, 23 Am. Rep. 203; Salem v. Eastern R. Co., 98 Mass. 431, 96 Am. Dec.

The power of a health board to erect a pest house must be so exercised, and the pest house so located, as not to destroy private rights to property, unless the particular act in question is expressly or impliedly authorized by statute.[79]

School boards may require vaccination as a prerequisite to attendance at schools.[80]

A city physician is bound to attend to patients afflicted with a contagious disease who are "under the care of the city authorities."[81]

Proceedings of health officers and the review of them are statutory.[82]

§ 3. *Care and control of contagious or infectious diseases. Liability for expense.*—Personal expenses of a person are first chargeable to him[83] and if he be pauper, then to the public according to the statutes.[84] Under present Minnesota laws, the county in which a town, village or borough which has incurred expense in dealing with diseases dangerous to the public health is located, is solely liable for such expense.[85] A county is not, however, liable for the expense incurred in caring for a particular individual.[86] The statutes making the county instead of the town, village, or borough concerned, liable, did not affect rights vested by contract before their passage.[87]

In Maine, a person suffering from a contagious disease and cared for by the local health board is not chargeable with any part of the expense incurred unless he can pay the entire amount; nor can he be charged with the amount unless he is "able" to pay at the time of his discharge; the fact that he subsequently became able to pay does not make him liable.[88]

In Kentucky, county physicians cannot recover from the county for services rendered, during an epidemic, to persons able to pay for such services.[89] The burden is upon a physician presenting a claim to show that persons attended were unable to pay; also to show to what extent charges represent services in enforcement of necessary sanitary regulations.[90]

Reimbursement.—Reimbursement of the public should be sought primarily from the person cared for, and if he is not solvent, then from the place where his

650; Health Department v. Rector of Trinity Church, 145 N. Y. 32, 39 N. E. 833, 45 Am. St. Rep. 579. The fact that the legislature has conferred power to declare and abate nuisances does not make a board's decisions any more conclusive. Sawyer v. State Board of Health, 125 Mass. 182. See note to Blue v. Beach [Ind.] 80 Am. St. Rep. 212.

79. A complaint alleging that a pest house for smallpox patients had been erected close to land of the plaintiff, whereby such land, formerly suitable for residence purposes, could no longer be so used, so that the value and enjoyment of the land was destroyed, is not demurrable. Anable v. Montgomery County Com'rs [Ind. App.] 71 N. E. 272.

80. So held under charter of Durham, prescribing general powers of board. Hutchins v. School Committee of Durham [N. C.] 49 S. E. 46.

81. Laws 1899, p. 335, c. 100, § 1, and ordinances of Nashua. Congdon v. Nashua, 72 N. H. 468, 57 A. 686.

82. Appeals from board of health orders: Under St. 1897, p. 539, c. 510, the appeal to a jury from the board of health is only from the quasi judicial orders authorized by § 3 of the act, not from the rules and regulations authorized by § 1, which are intended to be published for general information. Nelson v. State Board of Health [Mass.] 71 N. E. 693.

83, 84. Town of Iosco v. Waseca County Com'rs [Minn.] 100 N. W. 734; Board of Com'rs of Marshall County v. Roseau County [Minn.] 101 N. W. 64; Laurel County Court v. Pennington [Ky.] 80 S. W. 820. He is liable only when he can pay all at time of his discharge. Inhabitants of Greenville v. Beauto [Me.] 58 A. 1026.

85 Gen. Laws 1883, p. 185, c. 132, § 29, making towns, boroughs or villages primarily liable, has been repealed. See Laws 1901, p. 378, c. 238. Comstock v. Le Sueur County Com'rs [Minn.] 99 N. W. 427.

86. Distinction drawn between Gen. St. 1894, § 7073, as amended in 1901 and 1902, and Gen. St. 1894, § 7059. Board of Com'rs of Marshall County v. Roseau County Com'rs [Minn.] 101 N. W. 164.

87. Comstock v. Le Sueur County Com'rs [Minn.] 100 N. W. 652, on reargument overruling 99 N. W. 427. Cases of Village of Buffalo Lake v. Renville County Com'rs, 89 Minn. 402, 95 N. W. 221, and Village of Lake Crystal v. Blue Earth County Com'rs, 91 Minn. 247, 97 N. W. 888, distinguished.

88. Construing Rev. St. c. 18, § 51. Inhabitants of Greenville v. Beauto [Me.] 58 A. 1026.

89, 90. Laurel County Court v. Pennington [Ky.] 80 S. W. 820.

settlement is.[91] An expenditure illegal for want of authority may after ratification[92] be reimbursed.[93]

Allowance of claims.—In Michigan, the decision of the county board of supervisors as to the allowance of bills incurred by local boards of health is, if made after legal investigation, final.[94] But the county board cannot, by deferring action, defeat contract rights under a former law.[95] A bill, not on its face improper, cannot be rejected without giving the claimant an opportunity to be heard as to the reasonableness and propriety of the claim.[96] In an action to recover for services from the county, evidence of plaintiff's appointment as a member of the county board of health is competent.[97] One who as part of his official duty has attended sick persons[98] cannot recover beyond his salary,[99] except under a special contract.[100]

Negligence.—A city is not liable for negligent acts of its officers in carrying out ordinances relating to the care of persons suffering from a contagious disease.[101]

HIGHWAYS AND STREETS.

§ 1. Definitions and Classifications (1594).
§ 2. Establishment by Dedication, Prescription, or User (1594). To Establish a Highway by Prescription (1595).
§ 3. Establishment by Statutory Proceedings (1596). Occasion or Necessity for Road; Objections (1596). Location (1597). Taking and Compensation (1599). Property Acquired (1599).
§ 4. Ascertainment and Resurvey (1600).

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91. One county which has reimbursed a village for expenses incurred in caring for an individual cannot be reimbursed by the county in which such individual has a legal settlement, if he was solvent at the time [construing Gen. St. 1894, § 7059]. Board of Com'rs of Marshall County v. Roseau County Com'rs [Minn.] 101 N. W. 164. Personal expenses of a person whose residence is quarantined are not a proper town charge, subject to reimbursement by the county. Town of Iosco v. Waseca County Com'rs [Minn.] 100 N. W. 734.

92, 93. Where the chairman of a town board incurs expense, in an emergency, without specific authority from the board, the subsequent allowance and auditing of the bills by that body is a sufficient ratification to authorize reimbursement by the county. Secretary of state board of health informed chairman that smallpox was prevalent; latter immediately employed physician and established quarantine. Town of Iosco v. Waseca County Com'rs [Minn.] 100 N. W. 734.

94. Under Pub. Acts 1903, p. 6, No. 7. City of Monroe v. Monroe County Com'rs [Mich.] 100 N. W. 896.

95. A town board made a contract with a physician to care for certain indigent persons in the town affected by contagious diseases, at a time when the county was liable for such services, on allowance of bills therefor by the local board. After services were performed, a law was passed permitting county supervisors to pass on the reasonableness of such claims. Held, physician could recover under his contract, though the allowance by supervisors was deferred until after the passage of the act mentioned. Kapp v. Washtenaw County Auditors [Mich.] 100 N. W. 603.

96. Bill for services of "special policeman" in "smallpox cases" not improper on its face. City of Monroe v. Monroe County Sup'rs [Mich.] 100 N. W. 896.

97. Laurel County Court v. Pennington [Ky.] 80 S. W. 820.

98, 99. City physician. Congdon v. Nashua, 72 N. H. 468, 57 A. 686.

100. Health officers of Nashua, N. H., have no such power to contract. Congdon v. Nashua, 72 N. H. 468, 57 A. 686.

101. Action does not lie against a city for alleged wrongful death resulting from removal to smallpox pest house. Ky. St. 1903, § 6, does not apply. Twyman's Adm'r v. Board of Councilmen of Frankfort, 25 Ky. L. R. 1620, 78 S. W. 446. The fact that the acts, alleged to be negligent, were directed by the city, does not make the city a participant therein. Id. City is not liable for injuries alleged to have been received from the condition of the pest house to which plaintiff had been forcibly removed. Having v. Covington, 25 Ky. L. R. 1617, 78 S. W. 431.

Note: In so far as a municipality undertakes the duty of making and enforcing quarantine regulations and other laws for the promotion of the public health, it is in the performance of governmental functions, and its officers are not agents for whose action or inaction it is answerable. Bryant v. St. Paul, 33 Minn. 289, 53 Am. Rep. 31; Ogg v. Lansing, 35 Iowa, 495, 14 Am. Rep. 499; Barbour v. Ellsworth, 67 Me. 294; James v. Harrodsburg, 85 Ky. 191, 7 Am. St. Rep. 589. If, however, the municipality, acting through its health officers or otherwise, creates a nuisance injurious to private property, it is answerable for the damages resulting, and this rule has been applied in favor of a person whose property was damaged by the erection and maintenance of a pest house in close proximity to his dwelling (Haag v. Board of Com'rs, 60 Ind. 511, 28 Am. Rep. 654); or by discharge on his premises of foul contents of a sewer (Franklin Wharf Co. v. Portland, 67 Me. 46, 24 Am. Rep. 1).—From note to Hurst v. Warner, 102 Mich. 328, at p. 548. And see Anable v. Board of Com'rs [Ind. App.] 71 N. E. 272; cited above, in § 2.

§ 5. Alterations and Extensions (1601).
§ 6. Change of Grade (1601).
§ 7. Improvement and Repair (1603).
§ 8. Abandonment and Diminution (1605).
§ 9. Vocation (1605).
§ 10. Street and Highway Officers and Districts (1607).
§ 11. Fiscal Affairs (1607).
§ 12. Control by Public, and Public Regulations (1608).
§ 13. Rights of Public Use, Law of the Road (1610).
§ 14. Rights of Abutters (1613). Ownership of Fee (1614).
§ 15. Defective or Unsafe Streets or Highways (1615).
A. Liability of Municipalities in General (1615).
B. Notice of Defect (1618).
C. Sidewalks (1619).
D. Barriers, Railings, and Signals (1620).
E. Snow and Ice (1620).
F. Defects Created or Permitted by Abutting Owners and Others (1621).
G. Persons Entitled to Protection (1622).
H. Remote and Proximate Cause of Injury (1623).
I. Contributory Negligence of Person Injured (1623).
J. Notice of Claim for Injury and Intent to Sue (1625).
K. Actions (1626).
§ 16. Injury to, Obstructions of, or Encroachment on, Street or Highway (1628).

§ 1. *Definitions and classifications.*[1]—A highway is a thoroughfare by which people in different places may reach and communicate with each other,[2] but public highways within a statute are such only as come within its express provisions.[3]

To become a public road, all obstructions need not be removed,[4] and if free and common to all, it is a public road, though it be of exceptional advantage to some.[5] All public streets are highways, but all highways are not streets,[6] and in the absence of a showing to the contrary, all streets in a city are presumed to be public streets,[7] but an alley is not necessarily a street.[8] The term street, in its broad sense, includes both the roadway for vehicles and the sidewalk for pedestrians.[9]

§ 2. *Establishment by dedication, prescription, or user.*[10]—Dedication[11] and lawful acceptance[12] are necessary,[13] but when these concur, no definite time of user is requisite.[14] A dedication of streets, to be effectual, must be by the owner of the

1. See 2 Curr. L. 177.

2. McCann v. Johnson County Tel. Co. [Kan.] 76 P. 870. A cul-de-sac is not a thoroughfare. By some authorities it may be a highway. Gilfillan v. Shattuck, 142 Cal. 27, 75 P. 646.

3. Distinguished from private ways. Roads not coming within the statute declared vacated by Rev. St. 1901, par. 3956. Territory v. Richardson [Ariz.] 76 P. 456. Roads established without authority for the convenience of individuals are neither public nor private roads. Id. Under the colonial laws, a county road was one which was for the common use of the country as a whole, as a nation. Townsend v. Trustees of Freeholders and Commonalty of Brookhaven, 97 App. Div. 316, 89 N. Y. S. 982. A bridge connecting city streets, purchased by the city and transferred to the county under legislative enactment, is not thereby a "legal county road." Schroeder v. Multnomah County [Or.] 76 P. 772.

4. Kelly v. State [Tex. Cr. App.] 80 S. W. 382.

5. Heninger v. Peery, 102 Va. 896, 47 S. E. 1013.

6. The term highway in Code, § 919 means a traveled street as distinguished from a mere space laid out between lots and blocks, which may sometimes become such. Chrisman v. Omaha & C. B. R. & Bridge Co. [Iowa] 100 N. W. 63. Under Code, § 919, a street means a space left between the lots of a plat, for public travel. Id. Until acceptance, a street of a dedicated plat is not deemed a road or a public thoroughfare. Id. See 2 Curr. L. 177, n. 71, also, 3 Curr. L. 1052.

7. Gallamore v. Olympia, 34 Wash. 379, 75 P. 978. Evidence held to show a certain way to be a public street. Darrell v. St. Joseph [Mo. App.] 82 S. W. 1130.

8. Milliken v. Denny, 135 N. C. 19, 47 S. E. 132.

9. Gallaher v. Jefferson [Iowa] 101 N. W. 124. A footway does not necessarily have to be entirely improved to be a sidewalk. A sidewalk may be a space left on the side of a street and usually along its borders and inside the curbing for foot passengers. Asphalt Granitold Const. Co. v. Haeussler [Mo. App.] 80 S. W. 5.

10. See 2 Curr. L. 177.

11. Bill to establish existence of highway not alleging dedication is demurrable. Clancy v. Coy [R. I.] 57 A. 1055; Kelsoe v. Town Council of Oglethorpe [Ga.] 48 S. E. 366; People v. Myring [Cal.] 77 P. 975.

12. Bill to establish existence of highway, not alleging acceptance, is demurrable. Clancy v. Coy [R. I.] 57 A. 1055; Kelsoe v. Town Council of Oglethorpe [Ga.] 48 S. E. 366; Culmer v. Salt Lake City, 27 Utah, 252, 75 P. 620; Owen v. Brookport, 208 Ill. 35, 69 N. E. 952. Title to a platted street does not vest in the public until acceptance of such dedication. Chrisman v. Omaha & C. B. R. & Bridge Co. [Iowa] 100 N. W. 63.

13. See 2 Curr. L. 177, n. 75; Dedication, 3 Curr. L. 1050.

14. Seidschlag v. Antioch, 207 Ill. 280, 69 N. E. 949. Having accepted dedicated streets, a town may proceed with their use and occupation as public convenience may require. Hall v. Breyfogle, 162 Ind. 494, 70 N. E. 883.

land, and his intent to dedicate is absolutely essential and must clearly appear.[15] There must be an intent.[16]

Dedication may be express,[17] or may be implied from any acts of the owner indicating an intention so to appropriate it,[18] as the filing and recording of a plat, and the selling of lots in relation thereto.[19] A road will not be regarded as dedicated in the place traveled, where it is a "section line" road which by mistake departs from the true line.[20] If a plat expressly reserves a strip, acquiescence will not be inferred from grading and improving by the public,[21] neither does it show prescription.[22]

Acceptance may be shown by proof that the municipal authorities exercised acts of control over the street,[23] but failure to open part of a new street does not operate as a rejection of such part.[24] By statutory proceedings to lay a road, the county becomes estopped to say as to one whose land was taken that there had already been a dedication of the public domain.[25]

As to whether the public has acquired a given right of way by dedication, user or otherwise is a question of law, and is not within the jurisdiction of a court of equity.[26]

To establish a highway by prescription,[27] there must have been a continuous,[28]

15. Klug v. Jeffers, 88 App. Div. 246, 85 N. Y. S. 423.

16. Strip between two blocks reserved for private use but permissively used for travel. Mitchell v. Denver [Colo.] 78 P. 686.

17. Definition. People v. Myring [Cal.] 77 P. 975. The dedication of a street to the use of a purchaser as a public way may be complete before the street has been opened. Smith v. Beloit [Wis.] 100 N. W. 877. The deed need not express the object of the use to be public, as contradistinguished from that of private. Schlemmer Co. v. Steinman Co., 2 Ohio N. P. (N. S.) 293. Unless forbidden by charter, a railroad company may dedicate as a highway land conveyed to it for railroad purposes. Company held bound by the dedication of a street by its agent permitted to apparently possess authority to so act. Southern Pac. Co. v. Pomona [Cal.] 77 P. 929.

18. Owen v. Brookport, 208 Ill. 35, 69 N. E. 952; Seidschlag v. Antioch, 207 Ill. 280, 69 N. E. 949; Bonne v. Security Sav. Soc. [Wash.] 78 P. 38; People v. Myring [Cal.] 77 P. 975. See 2 Curr. L. 177, n. 77.

19. No statutory dedication because of failure to acknowledge the plat. Owen v. Brookport, 208 Ill. 35, 69 N. E. 952; Hall v. Breyfogle, 162 Ind. 494, 70 N. E. 883; Leggett v. Detroit [Mich.] 100 N. W. 566; Mann v. Bergmann, 203 Ill. 406, 67 N. E. 814. A plat representing the dedication of streets, though not following the statute, is a sufficient common-law plat to estop the grantor or his privies from denying such dedication, though it was not accepted by the municipality. Corning & Co. v. Woolner, 206 Ill. 190, 69 N. E. 53; Smith v. Beloit [Wis.] 100 N. W. 877. Describing a strip of land in the plat as an alley, its acceptance by the city as an alley, and a designating in a deed by the grantor as an alley, clearly indicates a dedication for the benefit of the public. Schlemmer Co. v. Steinman Co., 2 Ohio N. P. (N. S.) 293. See 2 Curr. L. 177, n. 77.

Dedication not shown by mere reference for description to a strip of land, alleged to be a street (Gilfillan v. Shattuck, 142 Cal. 27, 75 P. 646). nor does a conveyance subject to a right of way for owners on that block and the restricted use of an alley [Comp. Laws 1888, § 2066] (Culmer v. Salt Lake City, 27 Utah, 252, 75 P. 620). A street with reference to which abutting land has been sold by the owner of the fee will be protected, though the dedication was never accepted by the public. Edwards v. Moundsville Land Co. [W. Va.] 48 S. E. 754. Landowner held not precluded from disputing plat which showed existence on street through his land. Sheridan v. Empire City [Or.] 77 P. 393.

20. Shanline v. Wiltsie [Kan.] 78 P. 436.

21, 22. Mitchell v. Denver [Colo.] 78 P. 686.

23. Kelsoe v. Town Council of Oglethorpe [Ga.] 48 S. E. 366. As the keeping in repair for a number of years (Hall v. Breyfogle, 162 Ind. 494, 70 N. E. 883), the construction of a roadway and the issuing of bond therefor (Lowery v. Pekin, 210 Ill. 575, 71 N. E. 626), the granting of track, wharf and ferry privileges thereon (Owen v. Brookport, 208 Ill. 35, 69 N. E. 952), an extension of the corporation limits to include the platted district (Hall v. Breyfogle, 162 Ind. 494, 70 N. E. 883), or the subsequent use by the public (People v. Myring [Cal.] 77 P. 975). Use of a street to the full width for 30 years and for a greater part of the width for 40 years shows an acceptance. Smith v. Beloit [Wis.] 100 N. W. 877.

24. Hall v. Breyfogle, 162 Ind. 494, 70 N. E. 883.

25. Howard v. Hooker [Kan.] 78 P. 847, citing Waubansee County Com'rs v. Bisby, 37 Kan. 253, 15 P. 241.

26. Scanlin v. Conshohocken Borough [Pa.] 58 A. 122.

27. See 2 Curr. L. 178.

28. Gilfillan v. Shattuck, 142 Cal. 27, 75 P. 646; Jones v. Bright [Ala.] 37 So. 79; Town of Rolling v. Emrich [Wis.] 99 N. W. 464. Title to a road over private property was not obtained by twenty years' user where during that period it had been blocked for months and sometimes years at a time. Occasional use by private persons of a logging road over public land does not constitute the road a highway under a statute

adverse[29] user by the public[30] for the full statutory period;[31] but where the evidence shows an intention to dedicate, a user for a much shorter time will suffice.[32] Except as so provided by statute,[33] the mere use of land for the purpose of a road carries with it no presumption of adverse claim or claim of right so to use it.[34] The filing of declaration of homestead does not prevent a dedication through adverse user.[35] Its width is to be determined as a question of fact by the character and extent of the user.[36]

§ 3. *Establishment by statutory proceedings.*[37]—The power of public officers to establish new roads must be found in the statutes,[38] the directions of which must be strictly pursued.[39] Proceedings will not be restrained on the assumption that the opening of a street will be improperly conducted.[40]

An appeal from an order establishing a road upon certain conditions as to payment of costs, and a subsequent dismissal of the appeal, do not constitute a bar to proceedings to condemn a way along the same line.[41]

In New Jersey a road may not be laid out through a dwelling.[42]

A railroad company is estopped from denying the existence of a street as such, where it had been laid out in the statutory manner and the company had secured the city's permission to its use thereof.[43]

Occasion or necessity for road; objections.[44]—The road must be of public utility.[45]

granting a right of way over public lands for construction of highways. U. S. Rev. St. § 2477. Such a grant does not become operative until accepted by the public. Town of Rolling v. Emrich [Wis.] 99 N. W. 464. Evidence held insufficient to support a village's claim of property by prescription. Village of Watkins v. Welch Grape Juice Co., 96 App. Div. 114, 89 N. Y. S. 47.

29. Coward v. Llewellyn [Pa.] 58 A. 1026; Jones v. Bright [Ala.] 37 So. 79. The public right to an alleged street must be clearly established to dispossess a private person who has exercised ownership thereof for a number of years. Town of Mt. Vernon v. Young [Iowa] 100 N. W. 694. Use of an alleged street, a cul-de-sac, by license of the abutters. Gilfillan v. Shattuck, 142 Cal. 27, 75 P. 646.

30. There is no common law dedication where the land was neither thrown open to nor used by the public for a highway, nor an offering for sale of bordering lots on a representation that it was a street. Town of Mt. Vernon v. Young [Iowa] 100 N. W. 694.

31. Coward v. Llewellyn [Pa.] 58 A. 1066. The use of a roadway by the public since 1853 implies a grant of the land used. Lowery v. Pekin, 210 Ill. 575, 71 N. E. 626.

32. Coward v. Llewellyn [Pa.] 58 A. 1066.

33. St. 1877-78, p. 6, c. 10. Southern Pac. Co. v. Pomona [Cal.] 77 P. 929.

34. Jones v. Bright [Ala.] 37 So. 79; Lawson v. Shreveport Waterworks Co., 111 La. 73, 35 So. 390. Evidence held to show acquirement of street by user. Sheridan v. Empire City [Or.] 77 P. 393.

35. People v. Myring [Cal.] 77 P. 975.

36. Arndt v. Thomas [Minn.] 100 N. W. 378. Where the public followe a given course with no authority for the statutory period, a wider strip is acquired than the mere ground over which the wheels pass. Kondel v. Pella [Wis.] 99 N. W. 453. The use of land for twenty years a little to one side of an attempted laid-out road does not by prescription give a road of the attempted width with the usually traveled course as its center. Id. A street located along a river front extends to the middle of the river. Owen v. Brookport, 208 Ill. 35, 69 N. E. 952.

37. See 2 Curr. L. 179.

38. 2 Curr. L. 179, n. 95. The new road law of Tennessee is constitutional [Laws 1901, p. 80, c. 55]. Archibald v. Clark [Tenn.] 82 S. W. 310. Acts 1899, p. 128, c. 97, contemplates the laying of new roads as part of improvement of existing ones. Davern v. Decatur County Com'rs [Ind. App.] 72 N. E. 268. Original jurisdiction to establish roads is in the county court. Bennett v. Hall [Mo.] 83 S. W. 439.

39. Whittingham v. Hopkins [N. J. Err. & App.] 57 A. 402; Anderson v. Supervisors of San Francisco [Minn.] 99 N. W. 420; Spurlock v. Dornan [Mo.] 81 S. W. 412. In Missouri, the legislature is free to prescribe the procedure for taking private property. Shively v. Lankford, 174 Mo. 535, 74 S. W. 835. In Indiana the board of commissioners have no authority to designate upon what date the viewers of a proposed road shall meet [Burns' Rev. St. 1901, §§ 6742, 6745]. Schepman v. Buhner, 32 Ind. App. 562, 70 N. E. 390.

40. Allegation that the undertaking as proposed would not properly care for the surface water. Hall v. Breyfogle, 162 Ind. 494, 70 N. E. 883.

41. Code, title 8, c. 1. Kirkhart v. Roberts, 123 Iowa, 137, 98 N. W. 562.

42. Uncompleted buildings not reasonably adaptable for dwellings are not to be considered dwellings [Gen. St. p. 2838]. Whittingham v. Hopkins [N. J. Err. & App.] 57 A. 402.

43. Bedenbaugh v. Southern R. Co. [S. C.] 48 S. E. 53.

44. See 2 Curr. L. 179.

45. In Texas the commissioner's court has some latitude and discretion in determining the necessity of a road. Howe v. Rose [Tex. Civ. App.] 80 S. W. 1019. No formal resolution that the public convenience required

Interested parties are entitled to a hearing.[46] A proposition to remit nearly all the damages due in laying out a proposed road, if it be located differently than reported, may be treated as an objection to the establishment of the road;[47] and a statement, in a report of proceedings to widen a road, that a landowner asked a certain sum as damages, sufficiently shows that he refused to relinquish his land.[48] A railroad company cannot defeat the opening of a street on the ground that part of the company's land will be taken.[49]

Location.[50]—Jurisdictional prerequisites must be strictly observed;[51] but when jurisdiction has been clearly established, subsequent proceedings will be liberally construed, and a substantial compliance with the statutes will be sufficient.[52]

Application or petition in the statutory form,[53] describing the proposed road,[54] is necessary;[55] but omissions therein may be supplied by amendment,[56] and a petition defective in not definitely stating termini may be aided by a report of viewers.[57]

Failure of commissioners to take the statutory oath renders the proceedings void.[58] The commissioners have no authority to materially depart from the route designated in the petition,[59] and a material variation is ground for setting aside

the opening of the street is necessary [Burns Rev. St. 1901, § 4405]. Pittsburg, etc., R. Co. v. Wolcott, 162 Ind. 399, 69 N. E. 451. Where the only remonstrance to the laying out of a road was as to its public utility, the court may properly refuse to submit other questions to the jury. Merom Gravel Co. v. Pearson [Ind. App.] 69 N. E. 694. In Indiana one aggrieved by the report of viewers, as to public utility, should file a bond and present a new petition [Burns Rev. St. 1901, § 6753]. Schepman v. Buhner, 32 Ind. App. 562, 70 N. E. 390. A "private" road may be laid by right of eminent domain. In re Dickinson Tp. Road, 23 Pa. Super. Ct. 34. Compare Eminent Domain, 3 Curr. L. 1189; Easements, 3 Curr. L. 1148.

46. As to length of road. In re King, 42 Misc. 480, 87 N. Y. S. 236. In Indiana parties to a proceeding before road commissioners need not file an affidavit of interest [Burns Ann. St. 1901, § 7859]. Strebin v. Lavengood [Ind.] 71 N. E. 494.

47. Rev. St. 1895, art. 4695. Howe v. Rose [Tex. Civ. App.] 80 S. W. 1019.

48. Wilhite v. Wolfe, 179 Mo. 472, 78 S. W. 793.

49. Pittsburg, etc., R. Co. v. Wolcott, 162 Ind. 399, 69 N. E. 451.

50. See 2 Curr. L. 179.

51. Whittingham v. Hopkins [N. J. Err. & App.] 57 A. 402; Anderson v. Supervisors of San Francisco [Minn.] 99 N. W. 420; Spurlock v. Dornan [Mo.] 81 S. W. 412; Canyon County v. Toole [Idaho] 75 P. 609. Essential facts conferring jurisdiction to establish a designated road must affirmatively appear upon the face of the proceedings. Wilhite v. Wolf, 179 Mo. 472, 78 S. W. 793.

52. Sanford v. Board of County Com'rs [Neb.] 98 N. W. 822. In Mississippi proceedings for laying out a road are not invalidated by the fact that three commissioners were appointed instead of two. Illinois Cent. R. Co. v. Swaim [Miss.] 36 So. 147. Errors in proceedings do not deprive the county court of jurisdiction. Bennett v. Hall [Mo.] 83 S. W. 439.

53. If the petition for a public road does not contain substantially the facts required by the statute, the board acquires no jurisdiction unless the nonconsenting owners appear and proceed as though the petition were not defective [Rev. St. 1887, §§ 920, 921]. Canyon County v. Toole [Idaho] 75 P. 609.

54. The designation in the petition of the terminus of the proposed road at a marked stake near a certain house is sufficient. In re Ralph [Del. Gen. Sess.] 58 A. 1036. A petition for a road "commencing at a stake * * * on the line between the land of * * * M. and C." is too indefinite. In re Mills [Del. Gen. Sess.] 58 A. 825. Calling a road by an incorrect but not misleading name is not fatal. Alleged as "Toylsome Road" when there was but one sometimes so called and sometimes "Toylsome Lane." People v. Van Brunt, 90 N. Y. S. 845.

55. Several copies of a petition, so drawn for purposes of circulation, may be considered as one petition. Brown v. Miller [Ind.] 71 N. E. 122. Where a petition for a road is signed by 50 freeholders of the taxing district, it is immaterial whether such district consists of one township or more. Brown v. Miller [Ind.] 71 N. E. 122.

56. A certificate of counsel required by rule of court to be appended to a petition for viewers may be made nunc pro tunc. Certificate of regularity added where petition was in fact regular. In re Dickinson Tp. Road, 23 Pa. Super. Ct. 34. Failure of the petition to state names of landowners may be cured by amendment before commissioners. Sisson v. Carithers [Ind. App.] 72 N. E. 267.

57. Their draft showed them. In re Sewickley Tp. Road, 23 Pa. Super. Ct. 170.

58. Laws 1890, p. 1193, c. 568. In re David, 44 Misc. 192, 89 N. Y. S. 812.

59. Establishment for about one-half of the distance petitioned for. In re King, 42 Misc. 480, 87 N. Y. S. 236. See 2 Curr. L. 179, n. 2. Viewers have authority only to lay out a way in conformity with the petition. Under B. & C. Comp. §§ 4966, 4967, it is not optional with the viewers to locate either a road or gateway. Lesley v. Klamath County, 44 Or. 491, 75 P. 709.

the proceeding.[60] Failure of the record to show that the commissioners were not of kin to the parties is immaterial when damages were assessed by jury.[61]

Notice conformable to the statute, if any is required, is essential,[62] but may be waived.[63]

A report of viewers, or commissioners, containing jurisdictional findings,[64] is necessary,[65] but it need not state the value of the land appropriated or what property would be benefited.[66] A specification as to width of the proposed road is an essential requisite,[67] except where the width is prescribed by statute.[68] The time "within" which determination of a petition must be made excludes the day it was heard.[69] Where the facts reported are reviewable on motion to confirm,[70] new testimony may be received on the exceptions made.[71]

An order laying out a road is not void because it calls for a maintenance for three years;[72] and a preliminary order declaring that the prayer of the petition was granted is not necessary.[73] Under an order for the establishment of an easement of way from a residence to a road, it is sufficient if the way laid out gives convenient entrance to the premises in proximity to the residence.[74] A report confirmed in court without appeal becomes conclusive unless the report be defective jurisdictionally,[75] then a refusal to quash the entire proceeding including confirmation, and order to open the road may be reviewed by certiorari.[76] They

60. Road as actually laid out began at a point 300 feet from that designated in the petition. Norton v. Truitt [N. J. Law] 57 A. 130. A variance of a distance exceeding the width of the road is material. Whittingham v. Hopkins [N. J. Err. & App.] 57 A. 402. A variation of a foot or two is not fatal. Sanford v. Board of County Com'rs [Neb.] 98 N. W. 822.

61. Bennett v. Hall [Mo.] 83 S. W. 439.

62. Under Gen. St. 1894, § 1808, the notice of hearing may be given by the board any time within the thirty days after the expiration of the twenty-day period. Anderson v. Supervisors of San Francisco [Minn.] 99 N. W. 420. It is sufficient that the petition was served on one of several trustees having control of land. In re Ralph [Del. Gen. Sess.] 58 A. 1036. Where the notices required were duly posted, commissioners to determine the necessity of a highway need not give personal notice to the town highway commissioner under the New York highway law [Laws 1890, p. 1193, c. 568]. In re David, 44 Misc. 192, 89 N. Y. S. 812. The statute requiring three posted notices in the "township or townships" through which the proposed road is to run is satisfied by three notices though the road runs through two townships if at least one be posted in each. Bennett v. Hall [Mo.] 83 S. W. 439.

63. A petition to change a road is a waiver of notice from the jury of review. Kelly v. State [Tex. Cr. App.] 80 S. W. 382. General appearance in proceedings to widen a way dispenses with personal service of notice [Laws 1897, p. 416, c. 414]. People v. Van Brunt, 90 N. Y. S. 845.

64. Failure of commission to take the names of persons whose land is desired is fatal [Rev. St. 1899, § 9416]. Spurlock v. Dornan [Mo.] 81 S. W. 412. Description of road in the viewer's report held sufficient. Merom Gravel Co. v. Pearson [Ind. App.] 69 N. E. 694. Under a statute requiring the viewers' report to give a full description of the road, a detailed description "in the order attached hereto" (the report) held sufficient [Burns Ann. St. 1901, § 6744]. Lake Erie & W. R. Co. v. Shelley [Ind.] 71 N. E. 151.

65. Under Gen. St. p. 2804, § 5, the surveyors laying out a road must make a return, as a body, of their doings. Whittingham v. Hopkins [N. J. Err. & App.] 57 A. 402.

66. Pittsburg, etc., R. Co. v. Wolcott, 162 Ind. 399, 69 N. E. 451.

67. In re King, 42 Misc. 480, 87 N. Y. S. 236.

68. In re Rickards [Del.] 58 A. 946. Where a statute provides that highways shall be of a certain width, it will be conclusively presumed that the highway was laid out in accordance therewith, unless the return of the county commissioners shows otherwise [Terr. Laws 1840, p. 33, n. 24, § 5]. McGarry v. Runkel, 118 Wis. 1, 94 N. W. 662.

69. May 11, after hearing on April 21, is within twenty days. Construing L. 1897, p. 416, c. 414. People v. Van Brunt, 90 N. Y. S. 845.

70. They are reviewable. In re Walnut St., 24 Pa. Super. Ct. 114.

71. In re Walnut St., 24 Pa. Super. Ct. 114. On motion to confirm the court may review all the proceedings, whether relating to the merits of the application or otherwise. In re David, 44 Misc. 192, 89 N. Y. S. 812.

72. Illinois Cent. R. Co. v. Swalm [Miss.] 36 So. 147.

73. Burns' Rev. St. 1901, § 4405. Pittsburg, etc., R. Co. v. Wolcott, 162 Ind. 399, 69 N. E. 451.

74. B. & C. Comp. §§ 4966, 4967. Lesley v. Klamath County, 44 Or. 491, 75 P. 709. Record held to show that mayor and aldermen, the council concurring, accepted and allowed a street as laid out and not merely that the "report" without the "lay-out" was accepted. Construing many statutes. Baker v. Fall River [Mass.] 72 N. E. 336.

75. An order laying out a road is not open to collateral attack. Illinois Cent. R. Co. v. Swalm [Miss.] 36 So. 147.

76. In re Sewickley Tp. Road, 23 Pa. Super. Ct. 170. An appeal in such case is substan-

should not be quashed for one who having notice failed to appeal.[77] And generally lapse of time and user for the statutory period raises a presumption of regularity in the proceedings.[78]

In Indiana gravel road elections need not be by ballot.[79]

Proceedings may be discontinued at any time before the compensation is determined.[80] A new view may be ordered when the former one was vitally defective,[81] and to that end no exceptions are necessary.[82]

On confirmation, costs are properly allowed the petitioner.[83]

Taking and compensation.[84]—Private property cannot be taken for public use without just compensation.[85] But one who accepts the allowance of the board for the construction of a county road cannot thereafter maintain an action for damages caused by the opening of the road unless it be negligently and unskillfully constructed and maintained.[88] No damages should be allowed to one whose land was taken for a street opening and was actually benefited by such opening.[87] And under a statute requiring railroads constructing tracks across a highway to restore the way to its former state, the company cannot recover the cost of constructing and maintaining such crossings.[88] The procedure authorized by the statute to assess damages must be followed,[89] and the award must be made within the statutory period.[90] Where the awards are several and independent, the claimants cannot join in a proceeding to compel the payment by mandamus.[91] When both damages and benefits were assessed on street-opening proceedings, and the city was liable for interest on the damages, interest should also be charged on the unpaid benefits.[92]

For land tortiously taken, the owner may sue for payment, and need not look to the particular fund provided for such purposes.[93]

Property acquired.[94]—Generally, the taking and accepting of land for a high-

tially certiorari. Id. The establishment of a road by commissioners' court cannot be attacked collaterally by showing a want of notice from the review jury. Kelly v. State [Tex. Cr. App.] 80 S. W. 382.

77. In re Winter Ave., 23 Pa. Super. Ct. 353.

78. Such presumption is not conclusive except in case of ten years' user. Peterson v. Fisher [Neb.] 98 N. W. 660.

79. A witness may be compelled to testify as to how he voted upon such election. Strebin v. Lavengood [Ind.] 71 N. E. 494.

80. Burns' Ann. St. 1901, § 3629. Sowers v. Cincinnati, etc., R. Co. [Ind.] 71 N. E. 134.

81. Under act of 1836 review is of right if seasonably asked and re-review is discretionary. In re Overfield Tp. Road, 25 Pa. Super. Ct. 5. Second review ordered where viewers did not all go over route. Id.

82. In re Overfield Tp. Road, 25 Pa. Super. Ct. 5.

83. Code Civ. Proc. § 3240, in excess of $50. In re Peterson, 94 App. Div. 143, 87 N. Y. S. 1014.

84. See 2 Curr. L. 181.

85. City of Houston v. Bartels [Tex. Civ. App.] 82 S. W. 323. An award not even equivalent to the cost of erecting the required fences is not a just compensation, there being no benefits derived. Heninger v. Peery, 102 Va. 896, 47 S. E. 1013.

86. Stocker v. Nemaha County [Neb.] 100 N. W. 308.

87. Pittsburg, etc., R. Co. v. Wolcott, 162 Ind. 399, 69 N. E. 451.

88. Burns' Ann. St. 1901, § 5153, cl. 5. Lake Erie & W. R. Co. v. Shelley [Ind.] 71 N. E. 151.

89. In Massachusetts a petition for the assessment of damages should be brought against the county or town liable under the statute. In case of establishment under Rev. Laws, c. 48, § 1, against the county and in case of relocation under § 12 against the town ordered to pay the expense. Livermore v. Norfolk County [Mass.] 71 N. E. 305. Such a petition not stating a cause of action against the town, which was a party, but stating a cause of action against defendant county, is not demurrable at the instance of the county on the ground of misjoinder of parties. Id. Under the Texas statute for assessment of damages in laying out county seat roads, notice to the owners of land to be taken is not essential to the validity of the proceedings [Sayles Ann. Civ. St. 1897, arts. 4674, 4675]. Morgan v. Oliver [Tex. Civ. App.] 80 S. W. 111. In New York an objector to the preliminary abstract of estimates and assessments may support his objection by evidence, but is not entitled as a matter of right to further cross-examine the city's witnesses whom he had cross-examined at the original hearing before the commissioners [New York City Charter, §§ 979, 980, 983, 984]. In re Opening of Cromwell Ave., 95 App. Div. 514, 88 N. Y. S. 947.

90. State v. Graves [Wis.] 98 N. W. 516.

91. People v. Morgan, 97 App. Div. 267, 89 N. Y. S. 832.

92. In re City of New York, 91 App. Div. 553, 87 N. Y. S. 123.

93. City of Omaha v. State [Neb.] 94 N. W. 979.

94. See 2 Curr. L. 181.

way gives the public only a right of way and the incidents necessary to enjoying and maintaining such way.[95] Possession by a city while proceedings are pending, is as a statutory license, and the city is liable for injuries if the proceedings be defeated or discontinued.[96]

An appeal or other review,[97] may be taken by any person interested as a taxpayer or otherwise,[98] under such conditions and restrictions as the statutes prescribe.[99] Unless one is aggrieved, he cannot have review by certiorari. One cannot question legality of road proceedings on the ground that land described and for which he is to be paid is not within the location of the road.[1] One who contests defendant's appearance on the ground that the latter had not signed the petition cannot urge that defendant was barred from the proceedings by instituting a suit to condemn a way along the same line.[2] On appeal by one who has not made a motion to set aside the report of commissions taking his land for a street, the only question to be considered is the damage sustained.[3] The judgment may be amended on appeal by inserting a specification as to the width of the road.[4] Ordinary rules of review prevail.[5] A map accompanying the petition and used at the trial may be considered on appeal, though not filed at the trial.[6] It cannot, on appeal to certiorari, be urged that the return was pregnant with an admission respecting the fee simple title alleged in the petition.[7]

§ 4. *Ascertainment and resurvey.*[8]—The true public road is the one actually laid out on the ground,[9] a road record being evidence only of what was therein legally done;[10] defects in the survey or plat being immaterial,[11] and supervisors have no

95. Boring city wells in the street not authorized [Pol. Code, § 2631]. Wright v. Austin, 143 Cal. 236, 76 P. 1023. A municipal corporation cannot take the fee of a street which belongs to a private proprietor without paying therefor. Constitution provides that private property shall not be taken without compensation. Mott v. Eno, 97 App. Div. 580, 90 N. Y. S. 608. Condemnation proceedings, opening a street, cannot be construed to adjudicate that title to the fee is in the city. No determination of the value of the fee nor an award therefor. Id. Where commissioners for opening a street did not assume to estimate the value of the fee and made no award therefor, the final confirmation of their report did not divest the owners of the fee. Id.

96. Sowers v. Cincinnati, etc., R. Co. [Ind.] 71 N. E. 134.

97. See 2 Curr. L. 181.

98. Any person interested as a taxpayer or otherwise may contest a road election and appeal such contest. Strebin v. Lavengood [Ind.] 71 N. E. 494.

99. Failure of a county auditor to properly make a transcript of proceedings does not affect appellant's rights. Strebin v. Lavengood [Ind.] 71 N. E. 494. Failure to verify a petition contesting a road election is not jurisdictional. Id. The requirement that a properly certified transcript of the proceedings be annexed to the petition has been held jurisdictional. Weaver v. Lyton County Com'rs [Kan.] 76 P. 407. An appeal from the order of county commissioners in altering a road must be to the next term of the superior court though it is a criminal term. Blair v. Coakley [N. C.] 48 S. E. 804. In order to appeal in Indiana, notified persons need not have attended hearing before county board. Scherer v. Bailey [Ind. App.] 72 N. E. 472, citing many precedents.

1. If it is outside, he is not harmed and if inside he will be paid. People v. Van Brunt, 90 N. Y. S. 845.

2. Kirkhart v. Roberts, 123 Iowa, 137, 98 N. W. 562.

3. Pittsburg, etc., R. Co. v. Wolcott, 162 Ind. 399, 69 N. E. 451.

4. Merom Gravel Co. v. Pearson [Ind. App.] 71 N. E. 54.

5. The burden of proof is on those objecting to the report of viewers to overcome the prima facie case made by such report [Code 1887, § 949]. Heninger v. Peery, 102 Va. 896, 47 S. E. 1013. An order overruling a motion to strike out a viewer's report will be presumed correct on appeal in the absence of a bill of exceptions showing the evidence in support of the motion. Merom Gravel Co. v. Pearson [Ind. App.] 69 N. E. 694. Where the gravamen of a petition contesting a road election was that more legal votes were cast for than against the proposition, an alleged conspiracy need not be proven. Strebin v. Lavengood [Ind.] 71 N. E. 494. In Missouri a finding by the township board and the county court that all other property owners had relinquished the right of way for a proposed road is binding upon an appeal to the circuit [Rev. St. 1889, § 8556]. Shively v. Lankford, 174 Mo. 535, 74 S. W. 835. Appeal to the superior court in highway proceedings, the rules governing appeals from justice court are applicable. Record and return should be filed within ten days. Blair v. Coakley [N. C.] 48 S. E. 804. Facts founded on inspection and individual knowledge will not be reviewed. People v. Van Brunt, 90 N. Y. S. 845.

6. Bennett v. Hall [Mo.] 83 S. W. 439.

7. People v. Van Brunt, 90 N. Y. S. 845.

8. See 2 Curr. L. 182.

9. Kelly v. State [Tex. Cr. App.] 80 S. W. 382.

10. Width cannot be shown by record of report of commissioners fixing it under Act Feb. 27, 1822; that was duty of court. Maus v. Mahoning Tp., 24 Pa. Super. Ct. 624. Resolutions of a city council ordering a road to be widened do not prove that proceedings

authority to relocate a road on what might be supposed its recorded location.[12] A tax deed is prima facie that the locus is not a street.[13] An ordinance providing that on streets sixty feet wide there shall be walks twelve feet wide, thereby prescribes the width of the roadway.[14] A city not a party to a suit to quiet title is not bound by any determination therein as to the lines of a street.[15]

§ 5. *Alterations and extensions.*[16]—All essential facts conferring jurisdiction to widen a designated road must affirmatively appear upon the face of the proceedings,[17] and provision must be made for compensation for property taken.[18] Both the old and the proposed route should be described.[19] A grant of power to alter a street does not apply to changes of grade but only to changes of location,[20] and power to locate and define street lines does not authorize the taking of private property for widening a street.[21] A contract for lowering of the curbstones does not authorize a tampering with the adjacent flagstones.[22] One cannot enjoin the widening of a sidewalk where the only rights invaded are those held in common with other residents of the street and the public,[23] and the judgment of an ordinary, making or establishing an alteration in a road, cannot be collaterally attacked.[24] On appeal from the commissioner on alteration of a highway, the county court should not modify the commissioner's decision of its own motion.[25] Where the route of a public road is changed by ordinance, the old road continues to be the public road until the new road is laid out, opened, and made practicable.[26]

§ 6. *Change of grade.*[27]—Statutory proceedings as to change of grade must be strictly followed.[28] A petition for change of grade by a majority of the persons

have been taken to acquire title to the lands which might be necessary for the purpose of widening the road. Mott v. Eno, 97 App. Div. 580, 90 N. Y. S. 608.

11. Use of a street for 40 years according to a plat and with the acquiescence of the abutting owners will take precedence in the establishment of the street lines, over a subsequent survey, though the original survey was defective. Smith v. Beloit [Wis.] 100 N. W. 877. A street boundary accepted by the parties at the time of conveyance and for ten years thereafter without objection will be considered as established by acquiescence as to the contracting parties. Dows Real Estate & Trust Co. v. Emerson [Iowa] 99 N. W. 724.

12. When once a highway has been located, laid out and used by the public, its location cannot be changed except by statutory proceedings. Gray v. North Versailles Tp., 208 Pa. 77, 57 A. 190. An order of the supervisors relocating street lines and accepting a strip narrower than the street as originally dedicated and accepted by use of the public was effectual only to limit the duty to keep in repair the strip described in the order. Smith v. Beloit [Wis.] 100 N. W. 877.

13. Mitchell v. Denver [Colo.] 78 P. 686.

14. Asphalt & Granitoid Const. Co. v. Haeussler [Mo. App.] 80 S. W. 5.

15. Dows Real Estate & Trust Co. v. Emerson [Iowa] 99 N. W. 724.

16. See 2 Curr. L. 182.

17. Wilhite v. Wolf, 179 Mo. 472, 78 S. W. 793. A petition for laying out a public road does not give jurisdiction to alter and widen an already existing public road. Such a widening and altering must have the assent of three-fourths of the abutting owners. Norton v. Truitt [N. J. Law] 57 A. 130. A petition for the alteration, widening, straightening and relocation of a street sufficiently charged an alteration of a highway [Rev. Laws, c. 48, § 1] (Livermore v. Norfolk County [Mass.] 71 N. E. 305), and a petition for widening a public highway established for twenty-five years sufficiently discloses a purpose to widen an existing road (Wilhite v. Wolf, 179 Mo. 472, 78 S. W. 793). Proceedings to vacate and supply a road reciting "due notice of view" suffice to show notice unless it is directly denied. In re Sewickley Tp. Road, 23 Pa. Super. Ct. 170.

18. Village of Watkins v. Welch Grape Juice Co., 96 App. Div. 114, 89 N. Y. S. 47.

19. Burns' Ann. St. 1901, § 6742. Scherer v. Bailey [Ind. App.] 72 N. E. 472. Petition bad for lack of description of old road. Id.

20. Manufacturers' Land & Improvement Co. v. Camden [N. J. Law] 59 A. 1.

21. Village of Watkins v. Welch Grape Juice Co., 96 App. Div. 114, 89 N. Y. S. 47. Curbing and grading held to show unauthorized change in location of street. City of Latonia v. Hall [Ky.] 83 S. W. 556.

22. Schan v. Uvalde Asphalt Pav. Co., 88 N. Y. S. 1045.

23. Mitchell v. Peru [Ind.] 71 N. E. 132.

24. Crum v. Hargrove, 119 Ga. 471, 46 S. E. 626.

25. Laws 1890, p. 1177, c. 568. In re Sly, 177 N. Y. 465, 69 N. E. 1104.

26. Lawson v. Shreveport Waterworks Co., 111 La. 73, 35 So. 390. A private easement serving two abutting lot owners, closed by the city with intent to open a substitute road parallel thereto, cannot be fenced in by either lot owner, so as to debar the other from access to his lot over it, until the opening of the substitute road. Johnson & Co. v. Cox, 42 Misc. 301, 86 N. Y. S. 601.

27. See 2 Curr. L. 182.

28. Appointment of twelve commissioners (one for each ward) is not authorized under power to appoint "nine commissioners, at least one for each ward." Manufacturers' Land & Improvement Co. v. Camden [N. J.

affected is not invalidated by the fact that the council subsequently created a larger district for assessment purposes.[29] Statutory judicial remedies to assess damages for change of grade lie only where all the statutory conditions exist.[30] If on petition for such relief any of such conditions be denied there must be a trial of the issues so made.[31] Such methods are not exclusive as to award of damages.[32] Conformation of inequalities of surface to grade is not "change of grade."[33] The authority to establish sidewalk grades is not controllable by the courts.[34] In Pennsylvania municipalities may at one proceeding open a street, fix the grade, and assess benefits and damages resulting.[35] Statutes usually provide[36] that, on change of grade of a street or highway,[37] the property owner is entitled to compensation[38] to the extent of the damage to his real property,[39] for which the change of grade is the proximate cause,[40] without diminution for general benefits.[41] For damages arising from bringing a street to the originally established grade, there is generally no redress. A city is liable for cutting down a street except to bring it to a grade established by a legal ordinance.[42] A failure to give notice of claim for damages by change of grade within statutory period must be pleaded in abatement.[43] The common council of Camden has power to appoint commissioners to assess damages by change of grade,[44] but can appoint no more than nine.[45] The damages

Law] 59 A. 1. Revised eminent domain act (P. L. 1900, p. 79) does not refer to damage arising from a change of grade. Id. A township ordinance as to change of street grade cannot be attacked collaterally because of lack of notice to abutting owners. Ackerman v. Nutley [N. J. Law] 57 A. 150. A statute requiring notice to abutting owners as to a raising of a grade is not limited in its application to grades established by formal proceedings [P. L. 1899, p. 380, § 21]. Id.

29. O'Dea v. Mitchell [Cal.] 77 P. 1020.

30. Under Laws 1897, p. 420, c. 414, § 159, village must have exclusive control of street, must have injuriously changed grade and claim must have been presented. Comesky v. Suffern [N. Y.] 72 N. E. 320.

31. Comesky v. Suffern [N. Y.] 72 N. E. 320. Appointment of commissioners is error. Id.

32. May be awarded in jury trial awarded on injunction suit. Swope v. Seattle [Wash.] 78 P. 607.

33. Comesky v. Suffern [N. Y.] 72 N. E. 320.

34. It is legislative. Injunction will not lie. Kemp v. Des Moines [Iowa] 101 N. W. 474.

35. Act May 16, 1891, does not require opening of street to precede grading assessment. In re Winter Ave., 23 Pa. Super. Ct. 353.

36. Under a statute giving a right of action for change of grade "in any town in which a highway has been or hereafter shall be repaired," one may not recover for a change of grade two years before the passage of such act [Laws 1903, p. 1396, c. 610]. In re Anderson, 91 App. Div. 563, 87 N. Y. S. 24.

37. A statute allowing damages for change of grade of a public highway refers only to a highway that has been worked and used as such, and not to a mere tract of land taken for highway purposes but not improved [Revision 1902, § 2051]. Gorham v. New Haven [Conn.] 58 A. 1.

38. Swope v. Seattle, 35 Wash. 69, 76 P. 517. Sharp v. Cincinnati, 4 Ohio C. C. (N. S.) 19; City of South Omaha v. Ruthjen [Neb.] 99 N. W. 240. A city may be enjoined where no provision is made for compensating damaged property owners. Swope v. Seattle, 35 Wash. 69, 76 P. 517. A city is liable for damages to abutting property by changing the grade of a street. Schrodt v. St. Joseph [Mo. App.] 83 S. W. 543.

39. Attempted recovery for resulting sickness in plaintiff's family. Taylor v. Houston & T. C. R. Co. [Tex. Civ. App.] 80 S. W. 260. The measure of damages for allowing earth to fall and spread upon private property is the cost of removal and the erection of a retaining wall. But one who is awarded and accepts damages under this rule must construct a safe support for the roadway. Bunker v. Hudson [Wis.] 99 N. W. 448. A city may remove shade trees or any other obstructions to put the street in condition for the use of the public. Colston v. St. Joseph [Mo. App.] 80 S. W. 590.

40. Accumulation of water as an incident of the low location of the property held to have been proximately caused by the act of God. Sharp v. Cincinnati, 4 Ohio C. C. (N. S.) 19. Upon a change of grade by irregular proceedings the measure of damages to the abutting owner is the loss occasioned by the inconvenience up to beginning of suit. Ackerman v. Nutley [N. J. Law] 57 A. 150. Where an ordinance amounts to a mere regulation of the construction of a wharf and is not a grant of any right or privilege to appropriate the street for wharfage purposes, the owners take no rights because of the expenditure of moneys in constructing the wharf of which they cannot be deprived by a change of grade of the street. Mead v. Portland [Or.] 76 P. 347.

41. City of South Omaha v. Ruthjen [Neb.] 99 N. W. 240.

42. Markham v. Anamosa, 122 Iowa, 689, 98 N. W. 493.

43. Bunker v. Hudson [Wis.] 99 N. W. 448.

44. Manufacturers' Land & Improvement Co. v. Camden [N. J. Law] 59 A. 1.

45. The power being to appoint nine "one from each ward" is not enlarged by an increase in the number of wards. Manufacturers' Land & Improvement Co. v. Camden [N. J. Law] 59 A. 1.

having been left to a jury it was harmless to tell them that grading was not a "taking."[46] Mortality tables are not admissible to show how long inconvenience will last to plaintiff.[47]

§ 7. *Improvement and repair.*[48]—"Improvement" of roads includes opening new ones in connection with those already established,[49] but "repairs" do not include improvements.[50] Authority to lay a sidewalk includes authority to grade, curb, and drain.[51]

It is discretionary with the public authorities to determine to what extent improvements, such as are authorized by law, shall be made and the time of making them,[52] but the courts will interfere in case of fraud or manifest abuse of discretion,[53] and property owner has a right to insist that provisions intended for his security shall be observed.[54] Proceedings for the opening of a street and for the improvement thereof cannot be joined.[55] A petition of a certain number from any

46, 47. Swope v. Seattle [Wash.] 78 P. 607.

48. See 2 Curr. L. 183. The constitutional amendment of 1896 making the Los Angeles charter supreme in municipal affairs did not affect the street improvement act. Duncan v. Ramish, 142 Cal. 686, 76 P. 661.

49. Acts 1899, pp. 128-130, c. 97. Brown v. Miller [Ind.] 71 N. E. 122. Under Acts 1899, p. 128, c. 97, improvement may include laying new road in part. Davern v. Board of Com'rs of Decatur County [Ind. App.] 72 N. E. 268.

50. Draper v. Fall River, 185 Mass. 142, 69 N. E. 1068. The substituting of another kind of pavement for the one already laid is a specific rather than an ordinary repair, though no change of grade be contemplated. Id. Repair of a turnpike means a filling up of holes and an evening of the surface in such a manner that the ordinary and expected travel of the locality may pass with reasonable care and safety. Village of Milford v. Cincinnati, M. & L. Traction Co., 4 Ohio C. C. (N. S.) 191.

51. Redersheimer v. Bruning [La.] 36 So. 990. Act No. 114 of 1886, p. 211, refers only to repairing or regrading sidewalks in existence. Act No. 119 of 1886, p. 217, as amended by Act No. 142 of 1894, p. 179, refers to the construction of walks where there had been none. Redersheimer v. Bruning [La.] 36 So. 990. A street commissioner in North Carolina cannot establish a sidewalk. Cannady v. Durham [N. C.] 49 S. E. 50. Refusal to compel building of sidewalks by city and adjoiners at a grade is not an adjudication on right to have existing ones remain on natural grade. Kemp v. Des Moines [Iowa] 101 N. W. 474.

52. Clay City v. Abner [Ky.] 82 S. W. 276; House v. Covington [Ky.] 82 S. W. 374; Gallaher v. Jefferson [Iowa] 101 N. W. 124. Paving nearer to the lot line on one side than on the other. McGrew v. Kansas City [Kan.] 77 P. 698. But if the plan adopted is one palpably unsafe to travelers the city would be liable. Ely v. St. Louis [Mo.] 81 S. W. 168; Carroll's Adm'r v. Louisville, 25 Ky. L. R. 1888, 78 S. W. 1117. In Iowa a city may provide for a street improvement by a resolution of the council (Shelby v. Burlington [Iowa] 101 N. W. 101), and under its power to improve streets may divide the drive way by a strip of parking along the center line [Code § 72] (Downing v. Des Moines [Iowa] 99 N. W. 1066).

53. Gallaher v. Jefferson [Iowa] 101 N. W. 124.

54. Notwithstanding that in a particular case he may have suffered no harm by the failure of the officials to comply with them. In re Locust Ave., 93 App. Div. 416, 87 N. Y. S. 798.

NOTE: Duty to repair sidewalks. A city ordinance required owners or occupants of real property to keep the sidewalks in front of their premises in repair. The plaintiff, having been injured by a defect in the sidewalk in front of the premises of which he was tenant, brought suit against the city. The city set up the defense of contributory negligence. Held, the statute in so far as it applied to mere tenants of property was unconstitutional and the plaintiff, not being under a duty to repair, was not chargeable with contributory negligence. Ford v. Kansas City [Mo.] 79 S. W. 923.

The courts have usually upheld ordinance imposing upon property owners the duty of constructing and keeping in repair the sidewalks adjoining their premises, or of removing snow and ice therefrom as a just exercise of the police power, on the ground that owners are peculiarly interested in the improvement and are peculiarly fitted by their situation to perform the work promptly. Cooley's Cons. Lim. (7th Ed.) p. 860; Paxson v. Sweet, 13 N. J. Law, 196; Bonsall v. Mayor, 19 Ohio, 418. The duty of removing snow and ice has been extended to the case of tenants or occupants. Dillon's Mun. Corp. § 394. In re Goddard, 16 Pick. [Mass.] 504, 28 Am. Dec. 259; Inhabitants of Clinton v. Welch, 166 Mass. 133.

No authority can be found as to the right to impose upon a mere occupant the duty to repair the sidewalk. This duty would seem as great as that of constructing them in the first instance. Indeed, some courts repudiate ordinances requiring owners to repair the sidewalks or remove snow and ice. Gridley v. Bloomington, 88 Ill. 554, 30 Am. Rep. 566; State v. Jackman, 69 N. H. 318. The principal case seems correct in not imposing the duty of repairing upon the tenant.—IV. Colum. L. R. 599.

55. Commissioners appointed to estimate benefits in opening proceedings cannot assess the expense of grading [Laws 1868, p. 1869, c. 818, tit. 5, §§ 1-14]. In re Locust Ave., 93 App. Div. 416, 87 N. Y. S. 798.

township "or townships" does not require the full number from each township.[56] The filing of statutory remonstrance on street improvements does not preclude a common council from passing subsequent improvement ordinances on substantially different specifications.[57]

Damages occasioned by improvements are recoverable by abutting owners,[58] and benefits may be set off against damages to abutting owners whose lands are taken to widen a street,[59] but advantages in common with other property should not be included.[60] No action accrues for damage resulting from an authorized diversion of surface water.[61]

Ordinarily no special proceedings are necessary to authorize the repair of streets or highways,[62] and where required a petition for the repair of a road need not locate the road by specific descriptions.[63] An approval after completion of the work does not fulfill a statutory requirement of repairs with the "consent" of a board.[64] Orders are liberally construed.[65] Mandamus will not lie to compel repair when an appropriation for that purpose would under the circumstances be illegal.[66] County commissioners have no implied power to accept the resignation of a bidder who has been duly awarded the contract for the care of the roads.[67] Continuous use by the public shows its acceptance of a stipulation between individuals for the public benefit, as to the care of an easement of way,[68] and a street railway which has agreed as part of its franchise to repair highways may be compelled in equity to do so.[69] A railroad changing its grade may be required to restore the highway to its former state or to such state as not to necessarily impair its usefulness,[70] or to build a bridge over its road on grade approaches thereto for a highway crossing it, though the railroad was in operation for many years before the highway was laid out.[71]

56. Construing Acts 1899, p. 128, c. 97. Davern v. Decatur County Com'rs [Ind. App.] 72 N. E. 268.

57. Town of Greendale v. Suit [Ind.] 71 N. E. 658.

58. A city may lawfully agree with a landowner as to his damages without recourse to an arbitration tribunal. Shelby v. Burlington [Iowa] 101 N. W. 101. A failure to claim damages as provided by statute is a waiver thereof [St. 1891, p. 461, c. 244; St. 1893, p. 89, c. 79]. Duncan v. Ramish, 142 Cal. 686, 76 P. 661. A deed of land for street purposes does not bar a claim for damages from an improvement where at the time of conveyance the grantor was not aware that after the improvement she would not be able to construct approaches to her land from the street. City of Houston v. Bartels [Tex. Civ. App.] 82 S. W. 323.

59. Notwithstanding the proceedings were irregular and that the owner dedicated the land for the original street. Bailey v. Pittsburg, 207 Pa. 553, 56 A. 1085. The benefits are to be determined by the increase in market value. Chicago Union Traction Co. v. Chicago, 207 Ill. 544, 69 N. E. 849.

60. City of Houston v. Bartels [Tex. Civ. App.] 82 S. W. 323.

61. For the purpose of improving its highways, a town has the same right to divert or obstruct the natural flow of mere surface water that owners of private property have in improving their lands. Merkel v. Germantown [Wis.] 98 N. W. 210; Gunnerus v. Spring Prairie, 91 Minn. 473, 98 N. W. 340.

62. In general, a mayor may order ordinary repairs, which are necessary to keep the streets reasonably safe and convenient for travel (Draper v. Fall River, 185 Mass. 142, 69 N. E. 1068), and in New Jersey it is the statutory duty of townships to repair the highways within their respective limits (Justice v. Township Committee of Logan Tp. [N. J. Law] 58 A. 74).

63. The certainty of description requisite in the location of a new road is not necessary in proceedings for repair. Cincinnati, etc., R. Co. v. People, 206 Ill. 565, 69 N. E. 628.

64. Laws 1899, p. 108, c. 84, § 10. People v. Studwell, 91 App. Div. 469, 86 N. Y. S. 967.

65. After sixty years of acquiescence and usage by the public of a road with a narrowing jog in it, an order requiring the whole road to be repaired, 40 feet in width, will not be construed literally. Attorney General v. Collins [Mass.] 71 N. E. 574.

66. Justice v. Township Committee of Logan Tp. [N. J. Law] 58 A. 74.

67. Corker v. Elmore County Com'rs [Idaho] 77 P. 633.

68. Lawson v. Shreveport Waterworks Co., 111 La. 73, 35 So. 390.

69. Village of Milford v. Cincinnati, M. & L. Traction Co., 4 Ohio C. C. (N. S.) 191.

70. People v. Delaware & H. Co., 177 N. Y. 337, 69 N. E. 651.

71. Illinois Cent. R. Co. v. Swalm [Miss.] 36 So. 147.

An indictment will lie in some states for failure to perform the statutory duty to repair.[72]

§ 8. *Abandonment and diminution.*[73]—The right of the public to the use of the streets is absolute and paramount to any others.[74] A municipality holds the streets and alleys as trustee for the public and cannot surrender the grant except as the statute provides,[75] nor will mere nonuser or laches,[76] or obstruction of a highway,[77] or adverse possession by individuals,[78] defeat the public rights; but where private rights have grown up, founded on the action or nonaction of the city, the principles of estoppel may be invoked against the public right,[79] and a statute legalizing defective proceedings of supervisors in the establishment of a number of highways does not destroy the effect of an abandonment.[80]

In New York a highway which has not been traveled or used as such for six years is declared abandoned,[81] but the wrongful filing of the certificate of abandonment does not discontinue it.[82] There is no abandonment by mistaken use of a road because of a departure from the true location.[83] One claiming title to a street by right of adverse possession is not entitled to notice as a tenant at will or by sufferance.[84]

§ 9. *Vacation.*[85]—A highway may be vacated for public welfare,[86] proper

72. See 2 Curr. L. 184, n. 72-75. In Mississippi a complaint for failure to perform a contract for the care of the roads must allege that the general law in relation thereto has been put in operation in the county by vote. State v. Burkett [Miss.] 35 So. 689.

73. See 2 Curr. L. 184.

74. There can be no rightful permanent possession of any part of a street for private purposes unless by virtue of authorized permission of the city. Deshong v. New York, 176 N. Y. 475, 68 N. E. 880.

75. Hall v. Breyfogle, 162 Ind. 494, 70 N. E. 883. Municipal corporations cannot sell the streets. Arnold v. Volkman [Wis.] 101 N. W. 158. Evidence held to show abandonment of a private way and not vacation of public road. Lesley v. Klamath County, 44 Or. 491, 75 P. 709.

Contra: A city may by voluntary abandonment relinquish its control over streets dedicated to the use of the public. Kelsoe v. Oglethorpe [Ga.] 48 S. E. 366.

76. Arnold v. Volkman [Wis.] 101 N. W. 158. Ceasing to use a portion of a road does not destroy its character as a public highway [Pol. Code, § 2619]. People v. Myring [Cal.] 77 P. 975. But nonuser of a street for forty years raises a strong presumption of abandonment. Kelsoe v. Council of Oglethorpe [Ga.] 48 S. E. 366.

77. Chrisman v. Omaha & C. B. R. & Bridge Co. [Iowa] 100 N. W. 63.

78. Kelsoe v. Oglethorpe [Ga.] 48 S. E. 366. The Washington statute allowing title upon the prescribed adverse possession does not extend to land held for public purposes. City of Port Townsend v. Lewis, 34 Wash. 413, 75 P. 982. Adverse user for ten years of a strip beyond the lot line gives one no title therein. Markham v. Anamosa, 122 Iowa, 689, 98 N. W. 493. As a general rule, limitations do not run against a municipal corporation in respect to streets or property held for public use, and adverse possession of such property, for however long continued, is of no effect. Owen v. Brookport, 208 Ill. 35, 69 N. E. 952. By statute in Kentucky limitation for the recovery of public ways occupied by private persons do not begin to run against the city until written notice that such holding is adverse [Ky. St. 1903, § 2546]. In the absence of such notice claimant must show adverse possession for fifteen years prior to the enactment of the statute in 1873. Davis v. Clinton, 25 Ky. L. R. 2021, 79 S. W. 259.

79. Street held not to have been abandoned. Arnold v. Volkman [Wis.] 101 N. W. 158. Where land has been transferred, improved and occupied for a number of years without reference to an alleged highway thereon, the county will be deemed to have abandoned its rights. Hatch v. Barnes [Iowa] 99 N. W. 1072.

80. Acts 29th Gen. Assem. p. 184, c. 233. Hatch v. Barnes [Iowa] 99 N. W. 1072.

81. Laws 1890, p. 1198, c. 568, as amended by Laws 1899, p. 1364, c. 622. People v. Marlette, 94 App. Div. 592, 88 N. Y. S. 379. See 2 Curr. L. 185, n. 94.

82. People v. Marlette, 94 App. Div. 592, 88 N. Y. S. 379.

83. Shanline v. Wiltsie [Kan.] 78 P. 436.

84. Davis v. Clinton, 25 Ky. L. R. 2021, 79 S. W. 259.

85. See 2 Curr. L. 185.

86. In Michigan the city councils and the courts have concurrent jurisdiction in the matter of vacating streets; and may in their discretion refuse to vacate a street except on specified conditions (Detroit Real Estate Inv. Co. v. Frazer [Mich.] 100 N. W. 271), and in Kansas county commissioners may vacate streets and alleys within the corporate limits of cities of the first, second and third class [Gen. St. 1901, c. 115] (City of Eudora v. Hartig [Kan.] 75 P. 1113). Power to designate grades of railroads and establish grades for streets and walks does not authorize a city to in effect vacate part of a street by allowing a railroad to cross it on an embankment above the street grade. Dean v. Ann Arbor R. Co. [Mich.] 100 N. W. 773. An application may properly be made to discontinue a highway which is useless, though such highway was never opened or

compensation to abutting owners being made;[87] and it has been said that the court cannot inquire into the motives of a council in vacating a street for private use, under statutory authority, there being no charged fraud.[88]

The discontinuance of a street does not affect the private rights of light, air, and access, appurtenant to a lot abutting on a highway,[89] and the vacation of a county road, depriving a street of its only outside communication, does not destroy the street as a highway.[90] In Iowa vacation of a street dedicated under the statute does not cause a reversion to the original owner.[91] Vacating a street does not destroy concurrent private easements.[92] Under the laws of Iowa it is only when a road across or along a county line is concurrently established that concurrent action must be had to vacate it;[93] and it makes no difference that the petition recites a contemporaneous petition in the other county.[94]

That the incorporation of a town accepting a plat is declared illegal does not increase the right of the platters to vacate the streets of such plat.[95] One who executes a plat dedicating certain lands as streets and subsequently joins in a petition to vacate said streets cannot deny the right of a city to vacate them.[96]

Upon an application in good faith and in conformity with the statute, for the discontinuance of a road, the county court should appoint commissioners.[97]

Vacation of a street for want of acceptance by a town cannot be made where private rights have been acquired which would be sacrificed by such vacation,[98] and an injunction to restrain vacation of an alley will lie on the part of one who is individually affected.[99] Petition for vacation of road must show that signers constitute a majority of the residents of the district.[1] To give county commissioners jurisdiction to adjudge a way unsafe, it must appear that the way is one which the town is bound to maintain.[2] The Nevada statute that the county commissioners "shall" vacate a road on petition of a majority of the residents of the district is not mandatory.[3]

An appeal from an order vacating a road is perfected when bond and notice of appeal are properly executed, served, and filed.[4]

worked [Laws 1890, p. 1193, c. 568]. In re McFadden, 96 App. Div. 58, 89 N. Y. S. 104. It is not sufficient that it is "becoming" useless; it must have become so. Act June 13, 1836, § 18. Viewers' report held bad. In re Sewickley Tp. Road, 23 Pa. Super. Ct. 170.

87. An ordinance closing an established street without compensation to the abutting owners is invalid. Laurel Imp. Co. v. Rowell [Miss.] 36 So. 543. One cannot maintain an action for injuries to his means of egress and ingress to a street, unless his relation was such as to entitle him to notice of vacation proceedings. Beutel v. West Bay City Sugar Co. [Mich.] 94 N. W. 202. An action at law and not of mandamus is the proper method to enforce a claim for damages. Jones v. Fonda, 85 App. Div. 265, 83 N. Y. S. 1012.

88. Laws 1891, p. 199, c. 40, § 64. Tilly v. Mitchell & Lewis Co. [Wis.] 98 N. W. 969.

89. New York statutes on discontinuing of streets discussed and construed. In re City of New York, 95 App. Div. 533, 88 N. Y. S. 769.

90. Chrisman v. Omaha & C. B. R. & Bridge Co. [Iowa] 100 N. W. 63.

91. Lake City v. Fulkerson, 122 Iowa, 569, 98 N. W. 376.

92. Wickham v. Twaddell, 25 Pa. Super. Ct. 188. An abutter who conveys his property bounding on the street subjects his interest in the street to an easement in favor of the property conveyed, and the servient estate cannot be discharged from the easement by legislative action. Act providing for closing the street. Mott v. Eno, 97 App. Div. 580, 90 N. Y. S. 608.

93. Road terminating at line [Code §§ 1482, 1510]. Lamansky v. Williams [Iowa] 101 N. W. 445.

94. Lamansky v. Williams [Iowa] 101 N. W. 445.

95. Chrisman v. Omaha & C. B. R. & Bridge Co. [Iowa] 100 N. W. 63.

96. Lake City v. Fulkerson, 122 Iowa, 569, 98 N. W. 376.

97. Laws 1890, p. 1193, c. 568. In re McFadden, 96 App. Div. 58, 89 N. Y. S. 104.

98. Corning & Co. v. Woolner, 206 Ill. 190, 69 N. E. 53.

99. Schiemmer Co. v. Steinman Co., 2 Ohio N. P. (N. S.) 293.

1. State v. Douglas County Com'rs [Nev.] 77 P. 984.

2. Inhabitants of South Berwick v. County Com'rs, 98 Me. 108, 56 A. 623.

3 State v. Douglas County Com'rs [Nev.] 77 P. 984.

4. Laws 1897, § 14, c. 199, p. 366. Appeal of McElrath [Minn.] 99 N. W. 895.

§ 10. *Street and highway officers and districts.*[5]—In Kentucky the fiscal court cannot adopt an order providing that magistrates shall be supervisors of roads in their respective districts.[6] Where a street cleaning contract provided that the work should be subject to the approval and under the direction of the city surveyor, such official was empowered to prohibit the doing of work not within the contract.[7] Parol evidence is inadmissible to show an error in the minutes of highway commissioners.[8]

A town is liable for the acts of its surveyor of highways done in good faith in compliance with the orders of its selectmen,[9] and a sheriff and his bondsmen are personally responsible for his cutting fences not on the line of the route opened by order of the court.[10]

§ 11. *Fiscal affairs.*[11]—As in other tax proceedings, assessments for highway and street purposes must conform strictly to the statute authorizing them;[12] and express authority to construct the particular improvement,[13] and charge the cost upon the particular land, must appear.[14] A railroad right of way is liable to assessment for a street improvement.[15]

Exemptions are construed strictly against the exemption,[16] and a city in ac-

5. See 2 Curr. L. 186.

6. Ky. St. 1903, §§ 4313, 4336, 1844. Boyd County v. Arthur [Ky.] 82 S. W. 613.

7. Mott v. Utica, 96 App. Div. 496, 89 N. Y. S. 168.

8. Cincinnati, I. & W. R. Co. v. People, 207 Ill. 666, 69 N. E. 938.

9. Ratification of town held for jury. Improvements causing flowage of land. Willoughby v. Allen [R. I.] 56 A. 1109. A city is liable for negligently regrading street in causing stagnant water to accumulate. Taylor v. Houston & T. C. R. Co. [Tex. Civ. App.] 80 S. W. 260.

10. The county, county commissioners, and county judge are not liable. Morgan v. Oliver [Tex. Civ. App.] 80 S. W. 111.

11. See 2 Curr. L. 187.

12. See Public Works and Improvements, 2 Curr. L. 1328; Taxes, 2 Curr. L. 1786. Laws on compulsory grading, paving, and construction of sidewalks are to be strictly construed [Burns' Ann. St. 1901, § 4394 et seq.]. Town of Greendale v. Suit [Ind.] 71 N. E. 658. Where an ordinance for paving streets and intersections repealed a former ordinance for paving of the same intersections, the court could not confirm an assessment roll after deducting the cost of paving of the intersections (Chicago Union Traction Co. v. Chicago, 208 Ill. 187, 70 N. E. 234), but in Kentucky the court having acquired jurisdiction of apportionment proceedings may amend the apportionment to conform with the statute [Ky. St. 1899, §§ 2833, 2834] (Orth v. Park & Co., 26 Ky. L. R. 1910, 79 S. W. 206). A constitutional requirement of equal taxation within the territorial limits of the levying power does not relate to turnpike bonds previously contracted [Const. § 171 (Acts 1889-90, p. 657, c. 1491)]. Carpenter v. Central Covington [Ky.] 81 S. W. 919. An authorized deviation from the contract for construction or a failure of a clerk to enter an order for a change of the crossing after the letting of the contract will not relieve a railroad in Kentucky. Orth v. Park & Co., 26 Ky. L. R. 1910, 79 S. W. 206. The New Jersey "act concerning townships" does not repeal "an act concerning roads and parks and creating boards for the control and management of the same" [P. L. 1899, p. 372; P. L. 1893, p. 69]. Brant v. Tracey [N. J. Law] 57 A. 126. Under the Illinois statute, highway commissioners need not "mest" to ascertain the road tax to be levied [Rev. St. 1901, c. 121, § 119]. Cincinnati, I. & W. R. Co. v. People, 206 Ill. 565, 69 N. E. 628. A statute requiring highway commissioners to ascertain as near as practicable the road tax necessary is sufficiently complied with by a report giving an enumeration of the sums needed. Id., 207 Ill. 566, 69 N. E. 938.

13. In Kansas a city may construct and collect for sidewalks under the general law or under their powers existing at the passage of such law [Gen. St. 1901, § 728]. City of Leavenworth v. Jones [Kan.] 77 P. 273. A street cleaning contract including cross walks to the outer lines of the streets does not relate to parts of cross walks on a level with the sidewalks and between the curbs and margin of the street. Contractor entitled to extra compensation for removal of material in the street. Mott v. Utica, 96 App. Div. 495, 89 N. Y. S. 168.

14. In Indiana back-lying lots are liable for special assessments if the abutting property be not sufficient. Burns' Rev. St. 1894, § 4290. The owner of such back-lying lands is entitled to appear and be heard on the special benefits (Voris v. Pittsburg Plate Glass Co. [Ind.] 70 N. E. 249), but a waiver of illegalities in consideration of the privilege of paying in instalments does not release such back-lying owners from the lien of an assessment (Id.). A statute providing a lien on town lots for paving and construction of sidewalks does not allow a lien on tracts of land not platted into lots. Town of Greendale v. Suit [Ind.] 71 N. E. 658.

15. Orth v. Park & Co., 25 Ky. L. R. 1910, 79 S. W. 206.

16. A statute providing for the adoption by townships of road systems and exempting townships adopting such systems from taxes without their consent for county road systems, though acted upon by a township, does not constitute an irrevocable contract

cepting land for street purposes has no authority to exempt other land of the grantor from assessment for the extending of such street.[17] A statute transferring to a town, all of a road district embraced within the town, does not preclude the levying of a county road tax on the portion of the district not included in the town,[18] and does not release the county from liability for road warrants issued prior to such transfer.[19]

Conviction for failure to pay a road tax cannot be sustained where the county commissioner failed to comply with the statutes in relation thereto.[20] It is the duty of a town clerk in Illinois to make tax lists for road labor,[21] and he is to be compensated per diem for it.[22]

§ 12. *Control by public, and public regulations.*[23]—Municipalities possess only such control of streets as is delegated by the legislature,[24] and the state at any time may resume control of so much of the streets and alleys as it deems best, without consent of the officers or inhabitants of a city,[25] or may grant a franchise in the streets without providing for the payment of compensation;[26] it is the mode only of such use that is subject to agreement with the municipal authorities or of judicial determination.[27] Municipalities, however, have power as a rule to make and enforce reasonable police regulations.[28] Toll in the form of a license may be legally imposed by a municipality for the use of its streets by vehicles,[29] and such power is not only a continuing one but an inalienable

[Sess. Laws 1895, p. 522, Act No. 230, §§ 26, 27, repealed by Loc. Acts 1899, pp. 229, 230, No. 419, as amended by Loc. Acts 1901, p. 115, No. 335, § 24]. Board of Sup'rs of Saginaw County v. Hubinger [Mich.] 100 N. W. 261. Property annexed to a city exempt from specified taxation by statute is not liable for taxes for pikes undertaken after such annexation. But is liable for pikes built theretofore. Carpenter v. Central Covington [Ky.] 81 S. W. 919.

17. Leggett v. Detroit [Mich.] 100 N. W. 566.

18. Custer County Bank v. Custer County [S. D.] 100 N. W. 424.

19. The statute transferring such district made no provision for payment of the indebtedness. Custer County Bank v. Custer County [S. D.] 100 N. W. 424.

20. Laws 1900, p. 153. State v. Edwards, 81 Miss. 399, 33 So. 172.

21, 22. Not to be paid by fees [Rev. St. c. 139, art. 15, § 1, construed]. Town of Ross v. Collins, 106 Ill. App. 396.

23. See 2 Curr. L. 187.

24. State v. Red Lodge [Mont.] 76 P. 758; Rhinehart v. Redfield, 93 App. Div. 410, 87 N. Y. S. 789. The legislature may empower a municipality to grant the exclusive use of a street to a railroad. But Rev. St. § 3283, does not authorize a city to grant to a railroad company a permanent right to place abutments in a street. Lake Shore & M. S. R. Co. v. Elyria, 69 Ohio St. 414, 69 N. E. 738. Township commissioners in township of first class may regulate highways [Act April 28, 1899 (P. L. 104)]. Lower Merion Tp. v. Postal Tel. Cable Co., 25 Pa. Super. Ct. 306.

25. City of La Harpe v. Elm Tp. Gas, Light, Fuel & Power Co. [Kan.] 76 P. 448; United R. & Canal Co. v. Jersey City [N. J. Law] 58 A. 71; Rochester & L. A. Water Co. v. Rochester, 176 N. Y. 36, 68 N. E. 117.

26. Laying of gas mains in a city by legislative permit. City of La Harpe v. Elm Tp. Gas, Light, Fuel & Power Co. [Kan.] 76 P. 448. A legislative grant to a telephone company to use any of the public roads includes city streets [Pol. Code § 2600; Laws 1903, p. 66, c. 44]. State v. Red Lodge [Mont.] 76 P. 758.

27. Fitzsimmons Telephone Co. v. Cincinnati, 2 Ohio N. P. (N. S.) 51. A legislative grant to lay gas pipes in city streets confers only a license subject to modification as the public necessities or convenience might require. Gas company required to move its pipes to make place for a sewer system. New Orleans Gaslight Co. v. Drainage Commission of New Orleans, 111 La. 838, 35 So. 929.

28. Under its charter powers, a city may require each omnibus driver to wear, in a permanent position on his clothing, a number the same as that of his omnibus (Atlantic City v. Frerotti [N. J. Law] 57 A. 259), and may revoke the license to use the streets for a failure to comply [Laws 1902, p. 1216, c. 503, § 40] (People v. Sewer, Water & Street Commission, 90 App. Div. 555, 86 N. Y. S. 445). A conviction for using a string of bells upon a horse and wagon cannot be sustained under an ordinance prohibiting junkmen and others from using noisy devices for attracting trade. Bray v. Damato [N. J. Law] 57 A. 394. A municipality has the right in the exercise of its police power to require a railroad company to elevate its tracks so as to avoid grade crossings over public streets. Osburn v. Chicago, 105 Ill. App. 217.

29. An ordinance imposing a fee graduated according to the number of horses, the use of the streets, etc., and which ordinance with reference to nonresidents applies only to those hauling heavy vehicles, or peddling is not unconstitutional for interfering with rights of citizens, nor for unfair discrimination between residents and nonresidents. Sterling v. Bowling Green, 5 Ohio C. C. [N. S.] 217. The words "vehicles" as used in §

one.[30] The use of a street for moving houses thereon is an extraordinary use subject to municipal restrictions,[31] and neither regular license nor special permit will relieve a house mover for damage to the property of others.[32] It is competent for a council to prescribe different rates of speed for different portions of the municipality, or for different classes of vehicles.[33] Road commissioners charged to keep highways clear and fit for travel may regulate telephone lines[34] though the road is a "post" road.[35] Such power is not exhausted by a single exercise,[36] and the courts will not interfere except for an abuse of discretion.[37] Municipalities cannot put a street[38] or a public common to any use inconsistent with its public purpose,[39] nor be estopped from using streets for public purposes, by reason of the fact that such use destroys private privileges previously attempted to be granted.[40]

Assent by a town to use of the streets by a railroad company is not a franchise but merely an easement;[41] but a grant to a use of a public street for a public purpose, by a municipality under legislative authority, accepted and acted upon by the grantee, confers an interest which may only be taken away upon proper compensation,[42] and the city may question any transfer thereof.[43] An ordinance providing that a street car company may use such other streets and public places as the city council might from time to time designate by resolution is not void for uncertainty.[44] It will not be presumed that a street car company will violate

1536-100, Rev. St., providing for the payment of a license fee for the use of a street for vehicles, includes all classes of vehicles whether used for hire or not. Id. Ordinances and by-laws should tend in some degree to safe keeping of highways. Imposition of license tax on telephone poles is valid. Lower Merion Tp. v. Postal Tel. Cable Co., 25 Pa. Super. Ct. 306. In action for same affidavit of defense suffices which states that amount exacted exceeds reasonable cost of supervision. Id.

30. New Orleans Gaslight Co. v. Drainage Commission of New Orleans, 111 La. 838, 35 So. 929.

31. Northwestern Tel. Exch. Co. v. Anderson, 12 N. D. 585, 98 N. W. 706.

32. Damage to the property of an authorized telephone company. Northwestern Tel. Exch. Co. v. Anderson, 12 N. D. 585, 98 N. W. 706.

33. Chittenden v. Columbus, 5 Ohio C. C. [N. S.] 84. An ordinance limiting the speed of all vehicles to seven miles an hour within certain municipal limits is not unreasonable (Id.), and in the absence of express regulation, a speed of 8 or 10 miles an hour for a street car is not of itself a violation of law (Reid Ice Cream Co. v. Interurban St. R. Co., 97 App. Div. 303, 89 N. Y. S. 968).

34. Act Cong. July 24, 1866.

35. American Tel. & T. Co. v. Harborcreek Tp., 23 Pa. Super. Ct. 437.

36. Poles set on curb line may be removed to property line. American Tel. & T. Co. v. Harborcreek Tp., 23 Pa. Super. Ct. 437. Such a rule means that every part of pole shall be in street but as near as may be to property line. Id.

37. American Tel. & T. Co. v. Harborcreek Tp., 23 Pa. Super. Ct. 437.

38. Bennett v. Incorporated Town of Mt. Vernon [Iowa] 100 N. W. 349; O'Hanlin v. Carter Oil Co., 54 W. Va. 510, 46 S. E. 565; Lake Shore & M. S. R. Co. v. Elyria, 69 Ohio St. 414, 69 N. E. 738. A municipal board of estimates cannot authorize the obstruction of a sidewalk by a permanent platform of a private corporation. Brauer v. Baltimore Refrigerating & Heating Co. [Md.] 58 A. 21. Permission by a city to occupy a street with a railroad switch to be used in the private business of the grantee is void. Swift v. Delaware, etc., R. Co. [N. J. Eq.] 57 A. 456.

39. Whether a use of a common as a ball park was unreasonable was for the jury. Sherburne v. Portsmouth [N. H.] 58 A. 38.

40. Laying of water pipes which interfered with a private drain crossing a street. Bennett v. Incorporated Town of Mt. Vernon [Iowa] 100 N. W. 349. Pipes for refrigerating purposes. Rhinehart v. Redfield, 93 App. Div. 410, 87 N. Y. S. 789. Grant of an elevated railroad franchise does not debar the city from such use of the street as does not interfere unreasonably with the railroad. Interborough Rapid Transit Co. v. Gallagher, 44 Misc. 536, 90 N. Y. S. 104.

41. Acts 1901, p. 82, c. 29. Belington & N. R. Co. v. Alston, 54 W. Va. 597, 46 S. E. 612. A permit to lay railroad tracks in a street, subject to a revocation of such consent by the city, authorizes a city to revoke such permission though such tracks have been laid and used for some years. Laws 1848, p. 163, c. 116, § 14. Plaintiff company held to have abandoned its rights under former permits. Delaware, etc., R. Co. v. Oswego, 92 App. Div. 551, 86 N. Y. S. 1027. An unauthorized abandonment of the use of a street by the receiver of a street railway does not terminate the company's easement. Paige v. Schenectady R. Co., 178 N. Y. 102, 70 N. E. 213.

42. Mead v. Portland [Or.] 76 P. 347.

43. Cumberland Tel. & T. Co. v. Evansville, 127 F. 187.

44. Thurston v. Huston, 123 Iowa, 157, 98 N. W. 637.

its contract in its methods of construction and operation.[45] Where the contract between a city and one erecting a structure in the street requires him in excavating to protect the works of an elevated railway therein, the duty of the railway company to protect its own structure is not open to the contractor as a defense to a suit by the company to compel him to protect it.[46] The federal statute granting a right of way to telegraph companies over military and post roads does not confer a right upon a telephone company to the use of city streets without consent of the city.[47] A town may terminate the divided authority over a bridge or street and assume exclusive control, and release a railway from the care thereof.[48] An injunction will lie to prevent a town from removing tracks lawfully laid in the streets,[49] but courts cannot review a discretionary removal of tracks at any specific grade-crossing by a municipality acting under statutory powers.[50] A private water company will not be enjoined from laying its pipes through a city, on the ground that it may become a competitor of the municipal water system.[51] A railroad company must keep its track in a public street in a reasonably safe condition,[52] and under a statute requiring companies having tracks upon or intersecting public streets to so maintain them as to not unnecessarily impair the street's usefulness, ordinary care as to such maintenance is not sufficient.[53]

§ 13. *Rights of public use. Law of the road.*[54]—A city may by ordinance provide that vehicles going north or south shall have the right of way over vehicles going east or west,[55] but an ordinance requiring persons to drive on the right side of the street does not forbid one so driving from crossing the street to avoid danger.[56] One is not required to yield any portion of the road being used in order to let another pass him,[57] except to avoid a collision to be reasonably apprehended.[58] Where two or more vehicles are approaching a street crossing the first to reach the crossing, traveling at a reasonable rate of speed, has the right to pass over first.[59] Teamsters and pedestrians have equal rights in the street.[60]

The rights of the public, and car companies, to the street, are equal and concurrent and to be used with reasonable regard to common safety and to avoid injury;[61] it being the duty of a motorman to use every means consistent with

45. Mordhurst v. Ft. Wayne & S. W. Traction Co. [Ind.] 71 N. E. 642.

46. The lower court was justified in finding that a contractor intended to properly support an elevated railroad during certain excavations in the street. Interborough Rapid Transit Co. v. Gallagher, 96 App. Div. 632, 89 N. Y. S. 152.

47. Rev. St. §§ 5263, 5268. Cumberland Tel. & T. Co. v. Evansville, 127 F. 187. See 2 Curr. L. 189, n. 46.

48. Hicks v. Chesapeake & O. R. Co., 102 Va. 197, 45 S. E. 888.

49. Belington & N. R. Co. v. Alston, 54 W. Va. 597, 46 S. E. 612.

50. Gen. St. p. 2689, par. 221. Swift v. Delaware, etc., R. Co. [N. J. Eq.] 57 A. 456.

51. Rochester & L. O. Water Co. v. Rochester, 176 N. Y. 36, 68 N. E. 117.

52. Rev. St. 1895, § 4426. International, etc., R. Co. v. Haddox [Tex. Civ. App.] 81 S. W. 1036.

53. Rev. St. 1895, § 4426. International, etc., R. Co. v. Haddox [Tex. Civ. App.] 81 S. W. 1036.

54. See 2 Curr. L. 189. See, also, Street Railways, 2 Curr. L. 1742, for a full discussion of negligent injury by street cars.

55. Cushing v. Metropolitan St. R. Co., 92 App. Div. 510, 87 N. Y. S. 314.

56. Question for the jury as to whether the crossing to avoid apparent danger was contributory negligence. Streeter v. Marshalltown, 123 Iowa, 449, 99 N. W. 114.

57. Elenz v. Conrad, 123 Iowa, 522, 99 N. W. 138; Adams Exp. Co. v. Aldridge [Colo. App.] 77 P. 6.

58. Elenz v. Conrad, 123 Iowa, 522, 99 N. W. 138.

59. Knox v. North Jersey St. R. Co. [N. J. Law] 57 A. 423. Two persons approaching a street crossing have equal rights, and each is bound to use reasonable care to avoid a collision. Defendant negligent in attempting to drive into a narrow space. Gilbert v. Burque, 72 N. H. 521, 57 A. 927.

60. Driver's negligence and pedestrian's contributory negligence held a question for the jury. Schwartz v. London, 90 N. Y. S. 449.

61. Hanheide v. St. Louis Transit Co. [Mo. App.] 78 S. W. 820. A motorman has no right to assume the track will be clear and propel the car at the extreme limit allowed by law. Rouse v. Detroit Elec. R. Co. [Mich.] 98 N. W. 258. See 2 Curr. L. 190, n. 61. In the interests of the public, the general right of a street railway company, over that portion of the street where its tracks lie, is superior to that of other persons using the

the safety of those on his car, to avoid injury to a person upon the tracks,[62] though a city may by ordinance prescribe the care to be exercised by motormen.[63]

In the absence of a showing of custom, statute, or ordinance, a fire patrol has no superior right to the street.[64]

One who uses a highway must use reasonable care,[66] under the attending circumstances,[66] to avoid injury both to himself and others, and as in other cases negligence of the person injured will bar recovery,[67] as will the fact that he is

street. Chicago City R. Co. v. Mauger, 105 Ill. App. 579.

62. Galveston City R. Co. v. Hanna [Tex. Civ. App.] 79 S. W. 639. An electric car company is not liable for a collision unless its motorman by strict watchfulness could have seen and avoided the accident. Under the evidence, the last fair chance doctrine held not to apply. Asphalt G. C. Co. v. St. Louis Transit Co. [Mo. App.] 80 S. W. 741. Company not liable if plaintiff drove over the track when the car was so near that by the exercise of ordinary care the motorman could not have stopped the car. Cushing v. Metropolitan St. R. Co., 92 App. Div. 510, 87 N. Y. S. 314. A motorman should use ordinary care under the surrounding circumstances. Extraordinary care is not required in crossing a narrow bridge. Lockwood v. Troy City R. Co., 92 App. Div. 112, 87 N. Y. S. 311. Evidence held to show no negligence on the part of the motorman. Summerman v. Interurban St. R. Co., 87 N. Y. S. 427. Evidence held insufficient to go to the jury on the question of negligence on the part of the motorman. Csatlos v. Metropolitan St. R. Co., 92 App. Div. 620, 87 N. Y. S. 302. Mere negligence of plaintiff in approaching and crossing a track would not justify the infliction of an injury if it could be avoided by the exercise of reasonable care and caution. A motorman must if possible avoid a collision with a person upon the tracks, though negligently so. Hanheide v. St. Louis Transit Co. [Mo. App.] 78 S. W. 820.

63. "Shall keep a vigilant watch for all vehicles and persons on foot, especially children, either on its track or moving towards it, and on the first appearance of danger to such persons or vehicles the car shall be stopped in the shortest time and space possible." Roenfeldt v. St. Louis & S. R. Co. [Mo.] 79 S. W. 706.

64. Knox v. North Jersey St. R. Co. [N. J. Law] 57 A. 423. See 1 Curr. L. 190, n. 62, 63.

65. Reckless and rapid driving. Freel v. Wanamaker, 208 Pa. 279, 57 A. 563; Chicago City R. Co. v. O'Donnell, 208 Ill. 267, 70 N. E. 294. Those who drive in the street should drive carefully. Douglas v. Faust, 112 La. 1050, 36 So. 850. One must exercise ordinary care in driving past another's wagon, and it is immaterial whether the other wagon be moving or stationery. Elenz v. Conrad, 123 Iowa, 522, 99 N. W. 138; Adams Exp. Co. v. Aldridge [Colo. App.] 77 P. 6. A driver is guilty of negligence who runs into and injures a person standing upon a walk and near the curb. Drew v. Farnsworth [Mass.] 71 N. E. 783. Driver is negligent who releases control of his team even temporarily, knowing that firecrackers are being exploded throughout the city. Houston Transfer Co. v. Renard [Tex. Civ. App.] 79 S. W. 838. Allowing an ice wagon team to proceed along a street without guidance authorizes a finding of negligence. Turtenwald v. Wisconsin L. Ice & Cartage Co. [Wis.] 98 N. W. 948. A jury may properly find that one might by the exercise of reasonable care drive safely between two excavations having 12 feet of road between them. Action for injuries to one working in the trench by reason of defendant's horse falling therein. Boston v. Abraham, 91 App. Div. 417, 86 N. Y. S. 863. Evidence held sufficient to sustain a verdict based on negligent rapid driving. Wathen v. Pool, 25 Ky. L. R. 2294, 80 S. W. 439. Declaration of a driver of a horse made shortly after the horse has run away having been left unhitched are not part of the res gestae nor receivable as admissions against the owner. Haywood v. Hamm [Conn.] 58 A. 695. The owner of a horse, who negligently leaves it unhitched in the street is liable for resulting injuries. Proof that the horse was in the habit of running away was not essential. Id. Negligence may be inferred from the fact that a wagon is partly on the sidewalk. Franolich v. Metropolitan Exp. Co., 90 N. Y. S. 386. Suddenly swerving to side of road and striking plaintiff riding bicycle. Hershinger v. Pennsylvania R. Co., 25 Pa. Super. Ct. 147. In using crossways railroads must exercise such care as is required to safeguard users of the street. See Railroads, 2 Curr. L. 1382. The motorman of a street car is bound to control his car if possible when he sees a frightened horse ahead in a narrow place. McVean v. Detroit United R. Co. [Mich.] 101 N. W. 527. Evidence held insufficient to sustain a verdict for a pedestrian, injured by a street car while attempting to cross the track. Lamm v. Metropolitan St. R. Co., 90 N. Y. S. 390.

66. But one driving on a highway need not give notice of his intention to turn a corner. Osterheldt v. Peoples, 208 Pa. 310, 57 A. 703. Must maintain a general observation of the way. Adams Exp. Co. v. Aldridge [Colo. App.] 77 P. 6. A road roller propelled by steam is not a "traction or road engine" of which warning must be given. City of New Albany v. Stirr [Ind. App.] 72 N. E. 275. Request held insufficient to call for charge on evidence as to previous habits of horses in case of injury by runaway. Turner v. Page [Mass.] 72 N. E. 329. Collision from driving on wrong side of street. Johnson v. Duncan, 90 N. Y. S. 660.

67. As to whether one may attempt to walk his horse across a street car track, he being ten or fifteen feet from the crossing and fifty feet from the car is a question for the jury. Binsell v. Interurban St. R. Co., 91 App. Div. 402, 86 N. Y. S. 913. A street cleaner injured by an unguided team is not negligent in stepping to one side from a direct course, in the discharge of his duties. Turtenwald v. Wisconsin L. Ice & Cartage

himself committing a nuisance.[68] Negligence, however, cannot be attributed to a child of tender years.[69] A bus driver is negligent in needlessly trying to pull around another vehicle whereby he strikes a person on the footboard of a car.[70] A person is not a wrongdoer who rides on footboard of summer car under an ordinance which contemplated only horse cars.[71]

It is the duty of one to desist in an operation which he knows, or by the use of ordinary care could know, is frightening a team;[72] but where the driver of a buggy was guilty of contributory negligence, one who jumped from the buggy, fearing a collision, is not entitled to recover for personal injuries resulting from the jump.[73] The probability that some one may in an imprudent manner try to stop a runaway and avert its course is a natural consequence.[74] Care must be taken not to drive extraordinary loads over manhole covers if there is room to pass by,[75] but they must be strong enough to sustain any probable traffic.[76] The owner of them may recover for such negligence.[77]

Pedestrians are not bound in all cases to look and listen before crossing a street,[78] but they should not attempt to cross a thoroughfare, ahead of a vehicle upon nice calculation of chances of injury,[79] and one who is negligent in attempting to cross in front of an approaching street car cannot recover for a resulting injury.[80] The burden of showing freedom from contributory negligence[81] does not

Co. [Wis.] 98 N. W. 948. Negligence will not be presumed on the part of bicyclist from the mere fact of a collision with another person. Lee v. Jones [Mo.] 79 S. W. 927. A street car conductor who uses the street to go from the front to the rear end of his car is not negligent in failing to anticipate that persons using the street will not exercise due care. Caesar v. Fifth Ave. Coach Co., 90 N. Y. S. 359. Where an automobile collided with a street car conductor just as he alighted from his car, evidence held to show that the chauffeur was negligent in failing to halt or deviate from his course. Id. A pedestrian has a right to presume that a teamster will slacken his speed as an alternative to a collision. One indulging in this presumption is not guilty of contributory negligence. Schwartz v. London, 90 N. Y. S. 449.

68. Rapid coasting. Reusch v. Licking Rolling Mill Co. [Ky.] 80 S. W. 1168. Collision with wagon left unattended in street.

69. Child of four years run over by wagon (Freel v. Wanamaker, 208 Pa. 279, 57 A. 563), and that plaintiff was a child and defendant a man does not shift the burden of proof as to negligence in a collision (Lee v. Jones [Mo.] 79 S. W. 927). Where the act of a child, without negligence by defendant, causes an injury, the child cannot recover, irrespective of whether he can be held responsible for contributory negligence. Id.

70, 71. Frank Bird Transfer Co. v. Morrow [Ind. App.] 72 N. E. 189.

72. Riding a bicycle. Meek v. Barton, 123 Iowa, 601, 99 N. W. 177.

73. Hogan v. Winnebago Traction Co. [Wis.] 98 N. W. 928.

74. Turner v. Page [Mass.] 72 N. E. 329. Citing many cases. Charge refused for assuming contrary. Id.

75, 76. Missouri-Edison Elec. Co. v. Weber, 102 Mo. App. 95, 76 S. W. 736.

77. Owner of subway has title. Missouri-Edison Elec. Co. v. Weber, 102 Mo. App. 95, 76 S. W. 736.

78. But he must exercise some care. Douglas v. Faust, 112 La. 1050, 36 So. 850. One fails to prove herself free from contributory negligence where the proofs are that she did not look to see whether she could safely cross the street and that had she done so, she would have seen the horse and wagon. Lieberman v. Stanley, 88 N. Y. S. 360.

79. Douglas v. Faust, 112 La. 1050, 36 So. 850. Defendant not liable under the doctrine of discovered peril where conflicting evidence showed its car to be from fifty to one hundred and eight feet from plaintiff's wagon, and running at a speed of eight or nine miles an hour. Roenfeldt v. St. Louis & S. R. Co. [Mo.] 79 S. W. 706.

80. One is guilty of contributory negligence who seeing an approaching car, and being able to stop his team, attempts to cross ahead of the car. Roenfeldt v. St. Louis & S. R. Co. [Mo.] 79 S. W. 706. Where a person is killed in crossing a street by a car running at a high rate of speed, on request of the conductor of another car, to hurry, the question is for the jury. Stillings v. Metropolitan St. R. Co., 177 N. Y. 344, 69 N. E. 641. A traveler may assume that street cars are run in compliance with the local ordinance. Kansas City-Leavenworth R. Co. v. Gallagher [Kan.] 75 P. 469. He may rightfully cross in front of an approaching electric car which he plainly sees and distinctly hears, and not be negligent. But he must estimate the distance and speed, with reasonable accuracy. Id. In the absence of proof to the contrary, a jury may infer that a person about to cross a railroad track both looked and listened before attempting to do so. Such presumption arises from the natural instinct of self preservation. Id.

Under the general rule it is negligence per se for one about to cross a railroad track to not look and listen according to his opportunities. He should exercise reasonable care. Asphalt Granitoid Const. Co. v. St. Louis Transit Co. [Mo. App.] 80 S. W. 741; Harpham v. Northern T. Co., 4 Ohio C. C. (N. S.) 257.

Contra: Rouse v. Detroit Elec. R. Co. [Mich.] 98 N. W. 258; Chicago City R. Co. v.

always require proof of looking and listening before crossing a surface street car track.[82] That precaution is not strictly required as in the case of steam railways,[83] and its omission is not negligent when the situation is such as to warrant an assumption of safety in crossing.[84]

§ 14. *Rights of abutters.*[85]—The dedication of a street must be presumed to have been for all public purposes, present and prospective, consistent with its use as a highway and not actually detrimental to the abutting real estate.[86] The right of abutters to use them for other purposes is a permissive and subordinate one,[87] and must not unreasonably interfere with the rights of the public.[88] Abutters may temporarily make reasonable use of sidewalks for loading and unloading goods,[89] but are liable for injuries from an unreasonable occupation thereof.[90]

Having an interest not shared by the general public,[91] an abutter may en-

O'Donnell, 208 Ill. 267, 70 N. E. 294. Driving on street car track after seeing approaching car half block away. Levy v. Metropolitan St. R. Co., 86 N. Y. S. 102. Contributory negligence of a teamster who attempted to cross a street car track in front of an approaching car, forty feet distant, held a question for the jury. Robinson v. New York City R. Co., 90 N. Y. S. 368. A teamster has a right to presume that street car operatives will use due care to avoid a collision. Id. Imminent danger may excuse one who imprudently remains in a vehicle while a car approaches uncontrolled. Horse had fallen while crossing to pass other teams and driver tried to "pull him up" on his feet. Kansas City-Leavenworth R. Co. v. Langley [Kan.] 78 P. 858. Crossing before a car is not contributory negligence unless it was not the act of an ordinarily prudent mind under the circumstances. It is negligent in law to wait in full light and then try to cross but ten feet before a car exceeding lawful speed. Wolf v. City & S. R. Co. [Or.] 78 P. 668. Alighting to hold frightened horse while car approached which struck plaintiff because of narrowness of way is not in law contributory negligence. McVean v. Detroit United R. Co. [Mich.] 101 N. W. 527.

81. See statement of rule in Woodworth v. New York, etc., R. Co., 170 N. Y. 589, 63 N. E. 1123, with the cases collated for New York.

82. Monck v. Brooklyn Heights R. Co., 90 N. Y. S. 818, also citing the New York cases. Evidence held sufficient (Woodward and Jenks, JJ., dissenting). Crossing only ten feet from cross walk behind car from which plaintiff had just alighted without looking and listening while car one hundred and fifty feet distant on other track approached at fifteen to eighteen miles an hour. Id.

83, 84. Monck v. Brooklyn Heights R. Co., 90 N. Y. S. 818.

85. See 2 Curr. L. 192.

86. Mordhurst v. Ft. Wayne & S. W. Traction Co. [Ind.] 71 N. E. 642. The public has a paramount right to employ the streets for travel and transportation. Brauer v. Baltimore Refrigerating & Heating Co. [Md.] 58 A. 21. The owners of lots abutting upon a street in a municipality hold them subject to the right of the public to use the street for street purposes, of which the construction and operation of a street railway is one. Abutting warehouseman cannot object to construction of such road unless grade of street is changed. Ireton Bros. v. Ft. Wayne Traction Co., 2 Ohio N. P. (N. S.) 317. In Indiana an electric street railway is not an additional burden upon the street and the abutting owner holding title to the center of the street is not entitled to compensation except for any special injury. Mordhurst v. Ft. Wayne & S. W. Traction Co. [Ind.] 71 N. E. 642. So also of a telephone line upon a rural highway (McCann v. Johnson County Tel. Co. [Kan.] 76 P. 870), but otherwise of a common passenger and freight railroad (Mordhurst v. Ft. Wayne & S. W. Traction Co. [Ind.] 71 N. E. 642), involving an exclusive use of the street. Construction of a railroad on arches or pillars. De Geofroy v. Merchants' B. T. R. Co., 179 Mo. 698, 79 S. W. 386. The owner of land subject to an easement of a highway may maintain ejectment against one wrongfully appropriating it to a purpose wholly foreign to the easement, recovery being subject to the servitude in question. Laying of a steam railroad longitudinally in a street. Bork v. United N. J. R. & C. Co. [N. J. Err. & App.] 57 A. 412. In Missouri a steam railroad constructed at the street grade is not an increase of servitude. Such a use is within the use contemplated when the street was laid out. De Geofroy v. Merchants' B. T. R. Co., 179 Mo. 698, 79 S. W. 386. Whether holding the fee to the street or not, an abutting owner in Mississippi is entitled to compensation for an additional servitude not incidental or necessary to a full enjoyment of the street by the public. Town of Hazlehurst v. Mayes [Miss.] 36 So. 33.

87. Brauer v. Baltimore Refrigerating & Heating Co. [Md.] 58 A. 21.

88. Use of portion of sidewalk for permanent platform and regular use of balance of walk by teams held unreasonable. Brauer v. Baltimore Refrigerating & Heating Co. [Md.] 58 A. 21. The owner of the fee to the center of a highway is not entitled to permanently pile lumber on any portion of the highway. Busse v. Rogers [Wis.] 98 N. W. 219.

89. Garibaldi v. O'Connor, 210 Ill. 284, 71 N. E. 379.

90. Walk practically monopolized by bananas, one of which plaintiff stepped upon. Garibaldi v. O'Connor, 210 Ill. 284, 71 N. E. 379.

91. An owner (Laurel Imp. Co. v. Rowell [Miss.] 36 So. 543), or occupant of land abutting on a street has a valuable property

join interference therewith by another.[92] Unless a ditch increases the natural discharge of surface water through a stream, lower owners are not harmed.[93]

A city does not lose control of its streets by acquiescence in the planting of shade trees within the limits thereof,[94] and trees interfering with the wires of a municipal lighting plant may be trimmed without compensation;[95] but it may not destroy shade trees belonging to an abutting owner without reasonable cause.[96] Trees in the parkway of a street may be destroyed in improving the street,[97] but if it be not necessary the city must use reasonable care to avoid removal or injury.[98]

An action for damage to an abutter must be brought within the statutory period of limitations after the action accrues.[99] Charter power to a city to allow partial obstructions is as broad as the power of the legislature respecting state roads which have become city streets.[1] If the title to the fee is in the public, one abutter has no complaint, in the absence of special injury, of the action of a city in allowing nonobstructive uses of the sidewalk.[2]

Ownership of fee.[3]—At common law the conveyance of a lot bounded upon

interest in the adjacent street (Slattery v. McCaw, 44 Misc. 426, 90 N. Y. S. 52), and all other streets in the platted district (Hall v. Breyfogle, 162 Ind. 494, 70 N. E. 383); he is entitled to light and air in the street (De Geofroy v. Merchants' B. T. R. Co., 179 Mo. 698, 79 S. W. 386), and free ingress and egress to and from his property (Cleveland, etc., R. Co. v. Cincinnati, etc., R. Co., 2 Ohio N. P. (N. S.) 237; De Geofroy v. Merchants' B. T. R. Co., 179 Mo. 698, 79 S. W. 386; Attorney General v. Collins [Mass.] 71 N. E. 574), though his title extends only to the edge of the street (Schlemmer Co. v. Steinman & M. Furniture Co., 2 Ohio N. P. [N. S.] 293); but cities are not required to construct approaches from abutting property or to grade the way up to the abutting property (Attorney General v. Collins [Mass.] 71 N. E. 574). An abutter assessed for abutting improvements is entitled to special and peculiar rights in the adjoining alley not common to the people at large, amounting to an easement or right of access. Schlemmer Co. v. Steinman & M. Furniture Co., 2 Ohio N. P. (N. S.) 293.

92. May obtain an injunction to prevent interference with railway tracks. Cleveland Burial Case Co. v. Erie R. Co., 4 Ohio C. C. (N. S.) 365. One may enjoin the use of the street in front of his property as a public hack stand, where the street is not a part of such a stand (Odell v. Bretney, 93 App. Div. 607, 87 N. Y. S. 665), and a nonconsenting abutter may enjoin construction of a street railway when majority of foot frontage have not consented as required by statute (Ireton Bros. & Eckenberg v. Ft. Wayne, V. W. & L. Traction Co., 2 Ohio N. P. [N. S.] 317). A departure from the original route by a street car company to avoid curves is not fraud per se upon consenting abutters (Id.), but not the building of a railway trestle in the street without showing material injury, the city having given a permit for its construction (Cleveland, etc., R. Co. v. Cincinnati, etc., R. Co., 2 Ohio N. P. [N. S.] 237). A disputed claim as to dedication of property as a street is not sufficient to enjoin the erection of a building thereon at the suit of an abutter. Northrop v. Simpson [S. C.] 48 S. E. 613. One whose frontage will be lessened and whose cost of truckage will be increased, by a change of grade, suffers a special damage different from the public and may maintain a suit for an injunction. Dean v. Ann Arbor R. Co. [Mich.] 100 N. W. 773.

93. Baldwin v. Ohio Tp. [Kan.] 78 P. 424.

94. Gallaher v. Jefferson [Iowa] 101 N. W. 124.

95. City operating under Rev. Code 1892, § 2947. Town of Hazlehurst v. Mayes [Miss.] 36 So. 33.

96. Gallaher v. Jefferson [Iowa] 101 N. W. 124.

97. Grading down sidewalk. Kemp v. Des Moines [Iowa] 101 N. W. 474.

98. Kemp v. Des Moines [Iowa] 101 N. W. 474.

99. Action against a railroad company held to accrue when its permanent structures in the street were completed. De Geofroy v. Merchants' Bridge Terminal R. Co., 179 Mo. 698, 79 S. W. 386.

1. Sautter v. Utica City Nat. Bank, 45 Misc. 15, 90 N. Y. S. 838.

2. Pillars of building 24 inches in sidewalk. Sautter v. Utica City Nat. Bank, 46 Misc. 15, 90 N. Y. S. 838, enumerating various things held not to have been obstructions.

3. See 2 Curr. L. 192.

NOTE. The fee ownership in highways is presumptively in the abutter: White v. Northwestern N. C. R. Co., 113 N. C. 610, 37 Am. St. Rep. 639, 22 L. R. A. 627. Citing Elliot Roads and Streets, 110; Rich v. Minneapolis, 37 Minn. 423, 3 Kent, Com. 432.

It remains in the abutter when roads are taken by right of eminent domain. Western Union Tel. Co. v. Williams [Va.] 8 L. R. A. 429, reviewing the leading American and English authorities. Note to 8 L. R. A. 429, citing Suffield v. Hathaway, 44 Conn. 521, 26 Am. Rep. 483; Old Town v. Dooley, 81 Ill. 256; Cox v. Louisville, etc., R. Co., 48 Ind. 178; Terre Haute, etc., R. Co. v. Scott, 74 Ind. 29; Vaughn v. Stuzaker, 16 Ind. 338; Overman v. May, 35 Iowa, 89; Small v. Pennell, 31 Me. 267; Thomas v. Ford, 63 Md. 346, 52 Am. Rep. 513; Nicholson v. Stockett, Walker [Miss.] 67; Williams v. Natural Br. Pl. R. Co., 21 Mo. 580; Copp v. Neal, 7 N. H. 276; Higbee v. Camden & A. R. Co., 19 N. J. Eq. 276; Gidney v. Earl, 12 Wend. [N. Y.] 98; Rogers

a street,[4] or sold according to a plat showing a street adjoining the lot, in the absence of a reservation, gives title to the center of the street,[5] whence a conveyance to the public for highway purposes creates only an easement, the fee remaining in the grantor and his successors in title.[6] Where lots on both sides of a road are set apart to one co-tenant, he becomes seised of the fee of the road.[7] An abutter who expressly excludes the fee of the street from a conveyance of his lot retains title thereto.[8] Where the public makes no claim to the fee adverse to the proprietor, it does not acquire title by adverse possession.[9]

A purchaser under a plat cannot claim title to the center of the street and at the same time deny that it is a street.[10]

§ 15. *Defective or unsafe streets or highways. A. Liability of municipalities in general.*[11]—In determining what part of a street will be improved, a city acts in its delegated governmental capacity and is not answerable for a neglect of duty,[12] unless the plans be palpably dangerous to travelers.[13] And towns are bound only to provide wrought ways of reasonable width and smoothness;[14] but where a portion only of a street is open for travel, the city should render it

v. Bradshaw, 20 Johns. [N. Y.] 735; State v. Hewell, 90 N. C. 705, and numerous other cases.

The fee remains in the dedicator or the abutter when a common law dedication is made for street or highway purposes. See 3 Curr. L. 1054, n. 26 et seq. Note to 46 Am. St. Rep. 495, citing Indianapolis, etc., R. Co. v. Hartley, 67 Ill. 439, 16 Am. Rep. 624; Gosselin v. Chicago, 103 Ill. 623; Thomsen v. McCormick, 136 Ill. 135; Banks v. Ogden, 2 Wall. [U. S.] 57. If a fee or greater estate than a mere easement is essential to the purpose of a dedication, one may be implied but only when it is essential. Halley v. Scott County Fiscal Court, 25 Ky. L. R. 1459, 78 S. W. 149. See 3 Curr. L. 1055, n. 37.

A statutory dedication vests the fee in the public when the statute so intends. See 3 Curr. L. 1054, n. 25, citing City of Lake City v. Fulkerson, 122 Iowa, 569. Note to 46 Am. St. Rep. 495, citing Indianapolis, etc., R. Co. v. Hartley, 67 Ill. 439, 16 Am. Rep. 624; Gosselin v. Chicago, 103 Ill. 623; Hunter v. Middleton, 13 Ill. 50; Canal Trustees v. Haven, 11 Ill. 554; City of La Salle v. Matthiessen, 16 Ill. App. 69. See, also, Ill. Cyc. Digest "Dedication." A statute declaring it shall vest the fee in the county for the "public use * * * in trust for [the purpose indicated] and for no other purpose" has been construed as intending no more than an easement in the public and the bare fee in the county. Thomas v. Hunt [Mo.] 32 L. R. A. 857. See, also, 3 Curr. L. 1054, n. 27. Since the policy of the law is to let the fee follow the abutting ownership (Thomas v. Hunt [Mo.] 32 L. R. A. 857), a statutory dedication for rural highways should with greater reason than one for urban streets be construed as conveying only an easement. The more diversified purposes of city streets might well require a fee which the country road would not.

It may be stated as a **general rule** that the fee remains in the abutter howsoever the highway be acquired except (a) when the fee is condemned for a highway purpose requiring a fee, (b) when a fee is clearly dedicated, (c) when the legislature has clearly provided that a statutory dedication carries a fee.

The ownership of the fee servient to a highway **is substantial property.** Buffalo v. Pratt [N. Y.] 15 L. R. A. 413.

4. No distinction between city streets and country highways. Paige v. Schenectady R. Co., 178 N. Y. 102, 70 N. E. 213. A deed of lots bounded "easterly in front by the Bloomingdale Road" conveys the road to its center. Another description, of some length, in the same instrument held not to convey to the road center. Mitchell v. Einstein, 42 Misc. 358, 86 N. Y. S. 759. The Dutch law placed the title of the street in the public, while under the English law the public held only an easement. Paige v. Schenectady R. Co., 178 N. Y. 102, 70 N. E. 213.

5. Smith v. Beloit [Wis.] 100 N. W. 877.

6. Under the recitals of a deed conveying certain lands to the City of New York, "for the sole and only use of a public road forever," the fee remained in the grantors. Bloomingdale Road. Mitchell v. Einstein, 42 Misc. 358, 86 N. Y. S. 759. But in Iowa the acknowledgment and recording of a plat conveys to the public an estate in fee simple of lands therein set apart for street or other public use [McClain's Code, § 996]. City of Lake City v. Fulkerson, 122 Iowa, 569, 98 N. W. 376. The fee of a road opened under the common law is presumed to remain in the owner of the property. Mott v. Eno, 97 App. Div. 580, 90 N. Y. S. 608. An act providing for the widening of a street and reciting that if such street was ever closed abutters might acquire exclusive right to so much as lay in front of their premises did not divest owners of the fee of the street of their title. Id.

7, 8, 9. Mott v. Eno, 97 App. Div. 580, 90 N. Y. S. 608.

10. Hall v. Breyfogle, 162 Ind. 494, 70 N. E. 883.

11. See 2 Curr. L. 194.

12. Ely v. St. Louis [Mo.] 81 S. W. 168.

13. Whether a step in a sidewalk was dangerous was for the jury. House v. Covington [Ky.] 82 S. W. 374.

14. One who drives outside of such a way without reasonable cause does so at his own risk. Orr v. Oldtown [Me.] 58 A. 914; Hutchinson v. Clarke [R. I.] 58 A. 948; Lynch v. Boston [Mass.] 71 N. E. 301.

safe and guard against accident.[15] A street unsafe during repairs should be closed to travel.[16] A town may be liable for a defect adjoining and so connected with the traveled track as to make traveling unsafe.[17]

Where a municipality is empowered to control and keep its streets in order, it is charged with a positive duty to do so,[18] which duty is a primary one of which the city cannot relieve itself by any act of its own.[19]

A city is not an insurer of the safety of travelers upon the highway,[20] is not bound to anticipate every emergency,[21] and is not guilty of negligence for every act or omission which would constitute negligence on the part of an individual;[22] but is required to exercise ordinary care and diligence[23] to keep its streets in a reasonably safe condition for the ordinary travel[24] of those who have occasion to

15. Hyde v. Boston [Mass.] 71 N. E. 118.

16. Beattie v. Detroit [Mich.] 100 N. W. 574.

17. Unguarded hole near a culvert. Jenewein v. Irving [Wis.] 99 N. W. 346. See 2 Curr. L. 195, n. 34. Stone between two well traveled tracks of road. Hebbe v. Maple Creek [Wis.] 99 N. W. 442. An exposed electric wire so near the beaten path as to endanger one deviating a few feet from the path. It is no defense that the wires were used as a part of the city's police instruments. Emery v. Philadelphia, 208 Pa. 492, 57 A. 977. A city permitting a wire to remain about a grass plot may be answerable for its existence there, though so placed by a resident. But the city may set aside portions of a street for grass plots and protect them. Martin v. Williamsport, 208 Pa. 590, 57 A. 1063.

18. Board of Councilmen of Frankfort v. Allen [Ky.] 82 S. W. 292; Hicks v. Chesapeake & O. R. Co., 102 Va. 197, 45 S. E. 888. When organized under the general laws, and not by special charter, there is no distinction between the liability of cities and that of villages. Moreton v. St. Anthony [Idaho] 75 P. 262.

Contra: Unless made so by statute, a county is not liable for defects in a public road or highway, though law requires the county to keep the road in repair. Schroeder v. Multnomah County [Or.] 76 P. 772.

19. City liable for negligence of contractor in leaving dangerous stones where children played on them. Board of Councilmen of Frankfort v. Allen [Ky.] 82 S. W. 292; Hicks v. Chesapeake & O. R. Co., 102 Va. 197, 45 S. E. 888; Kleopfert v. Minneapolis [Minn.] 100 N. W. 669.

20. Clay City v. Abner [Ky.] 82 S. W. 276; O'Shaughnessey v. Middleport, 93 App. Div. 93, 86 N. Y. S. 945; Martin v. Williamsport, 208 Pa. 590, 57 A. 1063. City not liable for injury from stepping on mound of ashes in the street, covered with ice and snow. Kelchner v. Nanticoke Borough [Pa.] 58 A. 851. As to sidewalks. Harden v. Jackson [Mich.] 100 N. W. 389; Jones v. Sioux Falls [S. D.] 101 N. W. 43. Need only make and keep reasonably safe for ordinary day and night travel by persons exercising ordinary care. City of Vincennes v. Spees [Ind. App.] 72 N. E. 531.

21. Beattie v. Detroit [Mich.] 100 N. W. 574. For the jury where an unusual thaw excused the town. Jenewein v. Irving [Wis.] 99 N. W. 346. Officers are not bound to guard against all that might frighten horses. Curry v. Luzerne Borough, 24 Pa. Super. Ct. 514.

22. Moreton v. St. Anthony [Idaho] 75 P. 262.

23. O'Shaughnessey v. Middleport, 93 App. Div. 93, 86 N. Y. S. 945. A municipality must use reasonable skill and diligence in making the streets and walks safe and convenient for travelers. Jones v. Sioux Falls [S. D.] 101 N. W. 43; Clay City v. Abner [Ky.] 82 S. W. 276. A city knowing of a dangerous obstruction in the street must use ordinary care to protect the traveling public. City of Louisville v. Keher, 25 Ky. L. R. 2003, 79 S. W. 270. A municipality is not liable for defects in a walk not due to the city's negligence and not discoverable by ordinary care and diligence. City of Columbus v. Anglin [Ga.] 48 S. E. 318.

24. Bradner v. Warwick, 91 App. Div. 408, 86 N. Y. S. 935. Comp. Laws 1897, § 3441. Caldwell v. Detroit [Mich.] 100 N. W. 897; City of Louisville v. Keher, 25 Ky. L. R. 2003, 79 S. W. 270; Carroll's Adm'r v. Louisville, 25 Ky. L. R. 1888, 78 S. W. 1117; City of Muncie v. Spence [Ind. App.] 71 N. E. 907; Leary v. Yonkers, 95 App. Div. 126, 88 N. Y. S. 829; Jones v. Sioux Falls [S. D.] 101 N. W. 43; Clay City v. Abner [Ky.] 82 S. W. 276; Baker v. Independence [Mo. App.] 81 S. W. 501; Caldwell v. Detroit [Mich.] 100 N. W. 897. Under a statute requiring the way to be kept "safe and convenient for travelers" imposes a liability to keep the way reasonably safe and convenient in view of the circumstances of each particular case [Rev. St. 1903, c. 23, § 56]. Moriarty v. Lewiston, 98 Me. 482, 57 A. 790. The way must be safe and convenient in view of such casualties as might reasonably be expected to happen to travelers. City held liable when a plank set edgewise across a brick sidewalk rose vertically three inches above the walk. Id. Evidence tending to prove the existence of a rut twenty-three inches deep will sustain a finding that the highway was not reasonably safe. Kennedy v. Lincoln [Wis.] 99 N. W. 1038. It is duty of cities and towns to keep their streets and sidewalks in proper repair. Cresler v. Asheville, 134 N. C. 311, 46 S. E. 738. In an action for injuries from a hole two feet deep and three feet wide across a pavement, an instruction that the city should keep its walks in a "safe" condition for travel instead of "reasonably safe" is not prejudicial error. City of Covington v. Jones, 25 Ky. L. R. 1983, 79 S. W. 243. Municipal employes should exercise the care of an ordinarily prudent and careful person in felling a tree into the street. City of Colorado Springs v. May [Colo. App.] 77 P. 1093. Evidence of hole in street and repairs by city near held sufficient to warrant find-

use them by day or night.[25] Lighting streets is governmental function and for failure to provide lights the city is not negligent.[26] The statutory duty in Massachusetts covers defects which being dangerous to ordinary vehicles result in injury to an automobile.[27] This duty applies to a portion of the street used by a street railway,[28] but not that used by a steam road.[29]

In general a municipality is liable to persons exercising ordinary care for injuries by reason of obstacles permitted by it to remain in the street,[30] though not at common law.[31]

That it was originally the duty of an abutting owner to construct a sidewalk does not relieve a city which has undertaken the work and is negligent therein.[32]

Under a statute requiring cities to keep their streets in fit condition for travel, a municipality is not liable for injuries caused by permitting horse racing in a street.[33]

It is no defense in an action for injuries from a defective sidewalk that the city had no funds to repair the walks.[34]

Plaintiff need not show the cause of a fall, if under the existing conditions such a fall was rendered more dangerous by the negligence of the city.[35]

Where the facts are undisputed, the question of negligence is for the court,[36] but upon conflicting evidence it is a question for the jury.[37]

ing of notice to city. City of Dallas v. Muncton [Tex. Civ. App.] 83 S. W. 431. Negligently refilling excavation so that hole remained. Id. Hole in street indicated only by small pile of earth. Block v. Worcester [Mass.] 72 N. E. 77.

25. Johnson v. Philadelphia, 208 Pa. 182, 57 A. 363; Kelchner v. Nanticoke Borough [Pa.] 58 A. 851; Pewonka v. Stewart [N. D.] 99 N. W. 1080.

26. City of Vincennes v. Spees [Ind. App.] 72 N. E. 531.

27. Construing Rev. Laws, c. 51, § 1, and the Acts of 1902, 1903, regulating use of automobiles. Baker v. Fall River [Mass.] 72 N. E. 336.

28, 29. Hyde v. Boston [Mass.] 71 N. E. 118.

30. Buggies left in the street after dark. Radichel v. Kendall [Wis.] 99 N. W. 348. A municipality owes its citizens the duty of protecting them against obstructions in the highway. City of Ft. Smith v. Hunt [Ark.] 82 S. W. 163. In Michigan a municipal liability exists for obstructions negligently allowed to remain in the street whether placed there by license or not [Acts 1879, p. 223, No. 244; Comp. Laws 1897, § 3442; Pub. Acts 1887, p. 345, No. 264, adopted the judicial construction placed upon the Act of 1879]. McEvoy v. Sault St. Marie [Mich.] 98 N. W. 1006. A municipality is liable for injuries from a projecting sign, etc., where it has actual notice of the defective condition or should have known it by reasonable care. Evidence held to show defects which could not have been discovered by reasonable care. Leary v. Yonkers, 95 App. Div. 126, 88 N. Y. S. 829. Leaving a ridge sixteen inches high and four or five feet wide at the base, in the middle of a street, constitutes negligence on the part of the city. Streeter v. Marshalltown, 123 Iowa, 449, 99 N. W. 114. An open ditch three hundred feet long in the body of the highway tends to make travel upon the highway unsafe. That there had been no accidents from such ditch though existing for forty years does not show as a matter of law that no peril was reasonably to be expected therefrom. Bradner v. Warwick, 91 App. Div. 408, 86 N. Y. S. 935. A municipality owes its citizens the duty of protecting them from electrically charged wires and poles. City of Ft. Smith v. Hunt [Ark.] 82 S. W. 163. A city is liable if it knows or ought to know that a dangerous electric wire, erected by private persons under an ordinance, is left unguarded. Wilbert v. Sheboygan [Wis.] 99 N. W. 330. A pile of stones, within seven or nine feet of the sidewalk, is not necessarily dangerous. Hesselbach v. St. Louis, 179 Mo. 505, 78 S. W. 1009. A pile of granite partly within and partly without the wrought portion of a highway may constitute a defect as a whole. York v. Inhabitants of Athens [Me.] 58 A. 418. A city is not negligent in allowing a two inch timber ten feet long to be nailed to electric light poles, four and one-half feet from the ground and not interfering with a proper use of the street or walk. Injury to a blind man by reason of a hitching rack. Foy v. Winston [N. C.] 47 S. E. 466.

31. McEvoy v. Sault Ste. Marie [Mich.] 98 N. W. 1006.

32. City of Lancaster v. Walter, 25 Ky. L. R. 2189, 80 S. W. 189. It is no defense for a city that it was not obliged to construct a walk at the place of injury, it having once constructed a walk there and later allowed it to be torn up, leaving a dangerous place. Belyea v. Port Huron [Mich.] 99 N. W. 740.

33. Such racing held not to render the street in improper condition and unsafe for travel. McCarthy v. Munising [Mich.] 99 N. W. 865.

34. City of McKinney v. Brown [Tex. Civ. App.] 81 S. W. 88.

35. Schnee v. Dubuque, 122 Iowa, 459, 98 N. W. 298.

36. Foy v. Winston [N. C.] 47 S. E. 466.

37. Sutherland v. Council Bluffs [Iowa] 99

No municipal responsibility arises for injuries to a pedestrian by a bicyclist riding upon a sidewalk contrary to ordinance, nor to one injured while walking upon a regular bicycle path.[38]

(§ 15) *B. Notice of defect.*[39]—It is a general rule that the liability of a city for damages occasioned by a defective sidewalk arises only upon notice, express or implied, and that proof of such notice must appear before the liability is established,[40] though notice of the defect is not per se sufficient to show liability.[41] Generally, constructive notice[42] accompanied by reasonable opportunity to repair and a refusal to do so is sufficient,[43] but by statute in some states actual notice is necessary, independent of the care used.[44]

Whether a city had notice of a defect or should have known of it, is generally for the jury,[45] but notice is conclusively presumed where defective original construction is shown,[46] or where defects in a sidewalk existed for such length of time as to have become known to travelers, the evidence showing that by ordinary

N. W. 572; Darrell v. St. Joseph [Mo. App.] 82 S. W. 1130. Where the testimony offered by plaintiff makes out a prima facie case, the question of negligence is one for the jury. Rauch v. Smedley, 208 Pa. 175, 57 A. 359. Where one is thrown from her bicycle by a depression in a pavement, the question of negligence is for the jury. Curry v. Erie City [Pa.] 58 A. 476. Unless it clearly appears as a matter of law that defendant was not negligent or that plaintiff was guilty of contributory negligence, it should be left to the jury as to whether a road was reasonably safe and convenient for travelers. Huchinson v. Clarke [R. I.] 58 A. 948.

38. McCarroll v. Spokane, 34 Wash. 344, 75 P. 973. See 2 Curr. L. 196, n. 54.

39. See 2 Curr. L. 196.

40. City of Guthrie v. Finch, 13 Okl. 496, 75 P. 288.

41. Gerber v. Kansas City [Mo. App.] 79 S. W. 717.

42. Gallamore v. Olympia, 34 Wash. 379, 75 P. 978. Either actual or constructive notice must be shown in an action based upon an alleged want of repair. Evans v. Iowa City [Iowa] 100 N. W. 1112. As proof of constructive notice of defects it is sufficient to allege a constructive notice. Gallamore v. Olympia, 34 Wash. 379, 75 P. 978. The city of Rochester is now liable for injuries from defects of which it should have known. The White charter for cities of second class (Laws 1898, p. 438, c. 182, § 461, as amended by Laws 1899, p. 1290, c. 581) repealed Rochester city charter relative to notice. Cahill v. Rochester, 97 App. Div. 557, 89 N. Y. S. 67.

43. As to what would be sufficient time depends on the surrounding circumstances. Gerber v. Kansas City [Mo. App.] 79 S. W. 717; Hallum v. Omro [Wis.] 99 N. W. 1051; Baker v. Independence [Mo. App.] 81 S. W. 501. When there is evidence that a defect had not long existed, failure to charge that the city must have had notice or a sufficient time have elapsed so that the city by use of ordinary care could have known of the defect is reversible error. Doherty v. Kansas City [Mo. App.] 79 S. W. 716.

44. Gen. St. 1901, § 579. Cunningham v. Clay Tp. [Kan.] 76 P. 907. Under the Kansas statute requiring actual notice, the proofs must show that the municipality had notice that an object which was of a not unusual character was a menace to travel. Stone in a highway but not upon the beaten track [Gen. St. 1901, § 579]. Id.

45. Hyde v. Boston [Mass.] 71 N. E. 118; City of Covington v. Jones, 25 Ky. L. R. 1983, 79 S. W. 243; Johnson v. Park City, 27 Utah, 420, 76 P. 216; City of Huntington v. Lusch [Ind. App.] 70 N. E. 402; Kennedy v. Lincoln [Wis.] 99 N. W. 1038. Evidence that a hole in a walk, previously well guarded, was left without barriers for an hour and a half, the town being of only four or five hundred inhabitants, was insufficient to go to the jury. Bender v. Incorporated Town of Minden [Iowa] 100 N. W. 352. Where a defect in a sidewalk had existed for six months, a jury is warranted in finding that such defect was known to the city authorities. Brown v. Incorporated Town of Chillicothe, 122 Iowa, 640, 98 N. W. 502. Evidence held sufficient to sustain a finding that the defects in a sidewalk had existed such a length of time that the city should have known of them. Gasink v. New Ulm [Minn.] 99 N. W. 624. That a hole in a walk had existed two or three months and was generally known warranted a finding of negligence on the part of the municipality. Hunter v. Durand [Mich.] 100 N. W. 191. Where a sidewalk was under repair, and loose planks were insecurely laid over an excavation, the city should have known of the dangerous conditions. City of Garnett v. Hamilton [Kan.] 77 P. 583. City held chargeable with notice of defective board crossing over a sewer trench. City of Jackson v. Carver [Miss.] 35 So. 167. City held not to have constructive notice under the evidence. Jones v. Sioux Falls [S. D.] 101 N. W. 43.

46. Evans v. Iowa City [Iowa] 100 N. W. 1112. Where the municipality is the original wrongdoer and its negligence caused the injury, it is not necessary to submit to the jury the question of notice of such defect. City of Baltimore v. Walker [Md.] 57 A. 4. A city is not entitled to notice of its failure to refill a sewer trench dug in the street. Hutchinson v. Clarke [R. I.] 58 A. 948. Rope stretched across a boulevard by policeman. Kleopfert v. Minneapolis [Minn.] 100 N. W. 669. In an action for injuries from a defective crossing constructed by a railroad company upon specifications furnished by the city, the question of notice and knowledge of the plan of such crossing is immaterial. Carroll's Adm'r v. Louisville, 25 Ky. L. R. 1888, 78 S. W. 1117.

care the city should have known of the defects,[47] and knowledge of a policeman of a defect in a sidewalk, which it is his duty to report, is knowledge of the city.[48]

(§ 15) *C. Sidewalks.*[49]—A municipality is not guilty of negligence for a failure to build sidewalks on all its streets,[50] but where it has constructed a walk[51] or required one to be built,[52] or allowed it to be built for and used by the public,[53] or has assumed jurisdiction thereof by maintaining and supervising it,[54] a liability arises from a failure to use ordinary care and watchfulness,[55] to keep it in a reasonably safe condition,[56] for a sufficient width for the safe passage thereon by those exercising reasonable care[57] whether the walk be on a public street or not.[58]

47. Michigan City v. Phillips [Ind. App.] 69 N. E. 700. Where a dangerous obstruction in the street existed for several weeks to the knowledge of the city's officials, the city is estopped to deny a notice of such defect. City of Louisville v. Keher, 25 Ky. L. R. 2003, 79 S. W. 270. Defective general condition of walk is evidence of notice. City of Elgin v. Nofs [Ill.] 72 N. E. 43. Should be so limited in admitting it. Id.

48. Payne v. Cleveland, 4 Ohio C. C. (N. S.) 37.

49. See 2 Curr. L. 198.

50, 51. Moreton v. St. Anthony [Idaho] 75 P. 262.

52. Stealey v. Kansas City, 179 Mo. 400, 78 S. W. 599. Whether a sidewalk was ever established is for the jury. Cannady v. Durham [N. C.] 49 S. E. 50. Mere directions by a street commissioner do not establish one. Id.

53. Brown v. Incorporated Town of Chillicothe, 122 Iowa, 640, 98 N. W. 502. A city is not liable for injuries by slipping from a board placed in an unpaved street by citizens to walk upon. Such a situation held not to be dangerous. McConway v. Philadelphia [Pa.] 58 A. 358.

54. Gallamore v. Olympia, 34 Wash. 379, 75 P. 978. A town is liable for defects in a sidewalk built under its direction, inspected by it and used by the public for five years, though the ground on which it stood had never been dedicated to the public. Harrison v. Incorporated Town of Ayrshire, 123 Iowa, 528, 99 N. W. 132. Where for a term of years, there is a general use by pedestrians of the part of a public street lying outside the improved portion, the city may be deemed to have recognized such use and assumed the responsibility for its being safe though no artificial sidewalk has been constructed. City of Atchison v. Mayhood [Kan.] 77 P. 549.

55. City of McKinney v. Brown [Tex. Civ. App.] 81 S. W. 88. A city must exercise reasonable care, prudence and watchfulness in the discovery of defects in walks. Hill v. Glenwood [Iowa] 100 N. W. 522; Belken v. Iowa Falls, 123 Iowa, 430, 98 N. W. 296; Ford v. Kansas City [Mo.] 79 S. W. 923. A city is not an insurer of a traveler on the sidewalks. City not liable to one injured by his cane going through a crack between decaying boards where the walk was in a reasonably safe condition. Harden v. Jackson [Mich.] 100 N. W. 389; Jones v. Sioux Falls [S. D.] 101 N. W. 43.

56. Harden v. Jackson [Mich.] 100 N. W. 389; Michigan City v. Phillips [Ind.] 71 N. E. 205; Bauer v. City of Dubuque, 122 Iowa, 500, 98 N. W. 355; Ruscher v. Stanley [Wis.] 98 N. W. 223; Leggett v. Watertown, 93 App. Div. 80, 86 N. Y. S. 982; City of Aledo v. Honeyman, 208 Ill. 415, 70 N. E. 338; Foley v. New York, 95 App. Div. 374, 88 N. Y. S. 690; City of McKinney v. Brown [Tex. Civ. App.] 81 S. W. 88. A city constructing a sidewalk thereby invites its use by the public and must maintain it in a reasonably safe condition. Ely v. St. Louis [Mo.] 81 S. W. 168. City liable to one injured on a steep incline from the graded street to the sidewalk at the original grade. City of Muncie v. Spence [Ind. App.] 71 N. E. 907. It is the duty of a municipality to maintain in a safe condition the sidewalk of a public street, as well as all other parts of the highway. City of Baltimore v. Walker [Md.] 57 A. 4. Abrupt step up of six inches from crossing to walk at unlighted corner. Achey v. Marion [Iowa] 101 N. W. 435. Broken board in sidewalk two months out of repair. City of Minden v. Vedene [Neb.] 101 N. W. 330. Abrupt difference in elevation between pavement and intersecting unpaved walk like a step held not an obstruction. Burke v. Haverhill [Mass.] 72 N. E. 256. Evidence of injury by sunken flagging held for jury. Yates v. Covington [Ky.] 83 S. W. 592.

57. Morton v. Kramer [Mo.] 79 S. W. 699. Walks must be kept in a reasonably safe condition for use by travelers in the usual modes (Moreton v. St. Anthony [Idaho] 75 P. 262), but in Washington one having no notice to the contrary and exercising due care, may presume a walk to be reasonably safe throughout its entire width (Gallamore v. Olympia, 34 Wash. 379, 75 P. 978).

NOTE. Injuries from defects due to use of space under sidewalks: The city is liable for its own default which may consist in permitting a dangerous condition of the vault or cover thereof or a negligent use by the abutter. Even for defects not apparent if it should have found them the city may be liable, but it must be charged with knowledge or notice in all cases. See the exhaustive note to Beall v. Seattle, 28 Wash. 593, 61 L. R. A. 583, where are discussed these doctrines and the cases, also the questions of law and fact in such negligence and the right of the city to a remedy over against the negligent property owner. The annotator of Beall v. Seattle, 28 Wash. 593, 61 L. R. A. 583, lays down the rule that the city is liable if the condition though caused by the abutting tenant is one which the city or any of its officers charged with such matters knew or should have known. The following cases apply the rule: Vault or cellar openings, covers and gratings. Peoria v. Simpson, 110 Ill. 294, 51 Am. Rep. 683; Abilene v. Cowperthwait, 52 Kan 324; Reinhard v. New York, 2 Daly [N. Y.] 243;

This duty is not a police regulation but a governmental duty resting upon the municipality,[59] which may also be imposed upon the abutting owner but cannot be extended to mere tenants.[60] A city is under no obligation to see that abutters maintain safe structures or approaches to the highway.[61]

(§ 15) *D. Barriers, railings, and signals.*[62]—In the absence of statute or ordinance, a failure to guard or light dangerous places in a street has been held not to be negligence per se,[63] but ordinarily a city must use ordinary prudence to protect persons lawfully using the street and exercising ordinary care from falling into dangerous places along the side of the street;[64] and where the law requires barriers, they should be in condition to withstand any reasonable pressure it may be presumed will be brought against them in the ordinary conduct of people lawfully using the highway.[65] The rule as to railings along a road bed designed for the passage of vehicles applies also to sidewalks;[66] and private individuals[67] as well as municipalities are charged with the duty of protecting dangerous places for which they are responsible.[68]

Where the evidence is conflicting, the sufficiency of lights and barricade about alterations in the street is a question for the jury,[69] as also the question of a city's liability, under a statute for failure to erect a railing along a sidewalk some distance above the ground.[70] Whether frightening of horses by bicycles at an unguarded place should have been foreseen is for the jury.[71]

(§ 15) *E. Snow and ice.*[72]—A city is not liable for the slippery condition of its streets caused by ice upon its sidewalks,[73] unless the ice be so rough and uneven,

Smith v. Leavenworth, 15 Kan. 81; Mancuso v. Kansas City, 74 Mo. App. 138; McSherry v. Canandaigua, 35 N. Y. St. Rep. 432; Canandaigua v. Foster, 156 N. Y. 354, 41 L. R. A. 554; Johnston v. Charleston, 3 S. C. 232, 16 Am. Rep. 721; Woodbury v. Dist. of Columbia, 5 Mackey [D. C.] 127; Harriman v. Boston, 114 Mass. 241; Crosby v. Boston, 118 Mass. 71; Chicago v. Babcock, 143 Ill. 358. Defectively constructed vault: Jansen v. Atchison, 16 Kan. 358; Atchison v. Jansen, 21 Kan. 560; Burt v. Boston, 122 Mass. 223.

58. City of Atchison v. Mayhood [Kan.] 77 P. 549; Gallamore v. Olympia, 34 Wash. 379, 75 P. 978; Harrison v. Incorporated Town of Ayrshire, 123 Iowa, 528, 99 N. W. 132. In Missouri where a city had never improved the part of a street ordinarily used for sidewalk purposes, it is not liable for injuries from defects in a path in such place. Ely v. St. Louis [Mo.] 81 S. W. 168. Power to improve roads leading to a city does not authorize construction of a sidewalk beyond the city limits, and a city is not liable for injuries thereon. Stealy v. Kansas City, 179 Mo. 400, 78 S. W. 599.

59, 60. Ford v. Kansas City [Mo.] 79 S. W. 923.

61. Platform connected with the sidewalk. Leggett v. Watertown, 93 App. Div. 80, 86 N. Y. S. 982.

62. See 2 Curr. L. 199.

63. Gerber v. Kansas City [Mo. App.] 79 S. W. 717; Jackson v. Kansas City [Mo. App.] 79 S. W. 1174.

64. City of Huntington v. Lusch [Ind. App.] 70 N. E. 402. Obstructions or excavations near a highway and separated therefrom by no visible mark to assist the traveler may charge a municipality with liability for neglecting to guard against accidents. Sweet v. Poughkeepsie, 97 App. Div. 82, 89 N. Y. S. 618. Where a street is torn up in the course of improvements, proper guards and warnings should be provided. Delaplain v. Kansas City [Mo. App.] 83 S. W. 71.

65. Should be inspected and repaired. Devine v. National Wall Paper Co., 88 N. Y. S. 704. See 2 Curr. L. 199, n. 88.

66. Hannon v. Gladstone [Mich.] 99 N. W. 790.

67. Kaiser v. Detroit, etc., R. Co. [Mich.] 99 N. W. 743. One who maintains a coal hole in a sidewalk must use ordinary care to properly guard it. Ray v. Manhattan Light, Heat & Power Co. [Minn.] 99 N. W. 782. One maintaining manhole need not use the best possible means of guarding it. Van Vechten v. New York & New Jersey Tel. & T. Co. [N. J. Law] 58 A. 1096. Absence of lights on lumber piled in street held not shown. Palacis v. Gardiner, 112 La. 489, 36 So. 504.

68. Must provide guard rail at point where road would be unsafe even with a frightened horse. Curry v. Luzerne Borough, 24 Pa. Super. Ct. 514. The care required is greater if there are permanent conditions likely to cause fright. Id. Fences and barriers not required to keep travelers from going out of road but only to guard them from excavations and defects. City of Vincennes v. Spees [Ind. App.] 72 N. E. 531. Large stone beside walk is such. Id.

69. Sutherland v. Council Bluffs [Iowa] 99 N. W. 572.

70. Hannon v. Gladstone [Mich.] 99 N. W. 790.

71. Maus v. Mahoning Tp., 24 Pa. Super. Ct. 624.

72. See 2 Curr. L. 199.

73, 74. Quinlan v. Kansas City [Mo. App.] 78 S. W. 660.

or so rounded up, or at such an incline, as to make it an obstruction and to cause it to be unsafe for travel with the exercise of ordinary care,[74] and the city has notice of such condition,[75] or the ice and snow have been allowed to remain in unusual quantities for a longer period than was necessary and could have been removed without greater expense than could reasonably be incurred.[76] The city may assume for a reasonable time that the abutting owners will perform their duty and remove the snow or ice.[77] A municipality is not liable for injuries from stepping on a pile of ashes in the street covered with ice and snow.[78]

(§ 15) *F. Defects created or permitted by abutting owners and others. Joint and several liability.*[79]—A city is not liable for the acts of an independent contractor,[80] except where the work done is one of positive duty to the individual[81] or is under the control of the city,[82] or where the city fails to take precaution within a reasonable time after notice.[83]

It is primarily the duty of a company using electricity to use ordinary care to keep its poles and wires in repair and from becoming dangerous to travelers,[84] but in case it does not use such care, a city may be jointly liable for negligently allowing its streets to be unsafe.[85]

The municipality has no right of recovery against the negligent abutter until its liability has become fixed,[86] but judgment against the city in an action of which

75. O'Shaughnessey v. Middleport, 93 App. Div. 93, 86 N. Y. S. 944.

76. Instruction as to ice formed by water from a private hydrant held erroneous. Cresler v. Asheville, 134 N. C. 311, 46 S. E. 738. Failure to remove snow from a crosswalk, after heavy snowfalls, remaining on the ground is not negligence on the part of a city. O'Shaughnessey v. Middleport, 93 App. Div. 93, 86 N. Y. S. 944. A city is not bound to remove ice and snow under any and all circumstances. City not negligent in leaving an icy ridge, sloping one-half inch to the foot, upon a walk, well sprinkled with sawdust and ashes. Rogers v. Rome, 96 App. Div. 427, 89 N. Y. S. 130. A city is not negligent in failing to remove a ten-inch fall of snow and sleet from cross walk over an alley within 48 hours. Moran v. New York, 90 N. Y. S. 596.

77. Foley v. New York, 95 App. Div. 374, 88 N. Y. S. 690. A city is not liable for injuries from ice which it had no opportunity to remove. City had a right to await a thaw to remove sleet from the walk. City of Charlottesville v. Failes [Va.] 48 S. E. 511. A city is not negligent in failing to immediately clear the walks after a heavy snowfall. Foley v. New York, 95 App. Div. 374, 88 N. Y. S. 690. Municipal negligence for the jury. City of Denver v. Strobridge [Colo. App.] 75 P. 1076. The walk in front of an alley way is a crosswalk. Ordinance requiring persons to remove snow and ice from the sidewalk in front of their premises does not apply. Moran v. New York, 90 N. Y. S. 596.

78. Kelchner v. Nanticoke Borough [Pa.] 58 A. 851.

79. See 2 Curr. L. 200.

80. Bennett v. Incorporated Town of Mt. Vernon [Iowa] 100 N. W. 349; Dunston v. New York, 91 App. Div. 355, 86 N. Y. S. 562. A city is not liable for the negligence of a contractor in failing to place a proper barrier about a walk in course of construction. under a contract with the abutter, though such work be under the supervision of the city and a portion of the cost was to be paid by it. Thompson v. West Bay City [Mich.] 100 N. W. 280.

81. Bennett v. Incorporated Town of Mt. Vernon [Iowa] 100 N. W. 349.

82. Jewell v. Mt. Vernon, 91 App. Div. 578, 87 N. Y. S. 120.

83. Flooding plaintiff's cellar through break in water mains caused by negligence of the contractor operating under a permit. Dunstan v. New York, 91 App. Div. 355, 86 N. Y. S. 562. A city is liable for negligently allowing a street to fall into bad repair, though the work was done by an independent contractor who was not fully paid. Accidents at the place of injury to plaintiff were of daily occurrence. Rimby v. Philadelphia, 208 Pa. 119, 57 A. 347.

84. West Kentucky Tel. Co. v. Pharis, 25 Ky. L. R. 1838, 78 S. W. 917. Where one rightfully upon a highway is injured by a broken telegraph wire the burden is upon the telegraph company to show that the peril arose through no fault of theirs. Burton Telephone Co. v. Gordon, 4 Ohio C. C. (N. S.) 1. A statute permitting an electric line to pass through a township on terms agreeable to such township does not relieve the company from its negligence. Kaiser v. Detroit, etc., R. Co. [Mich.] 99 N. W. 743. That township authorities do not protest against negligence in the construction of a car line along a highway is not a ratification relieving the company. Id.

85. West Kentucky Tel. Co. v. Pharis, 25 Ky. L. R. 1838, 78 S. W. 917. Private corporations, through whose negligence a highway becomes charged with electricity, and a city which negligently suffers the highway to remain thus charged, are not joint tort feasors. Mooney v. Edison Elec. Illuminating Light Co., 185 Mass. 547, 70 N. E. 933.

86, 87. City of Lincoln v. First Nat. Bank [Neb.] 93 N. W. 698.

the lot owner has notice is conclusive upon the latter as to the fact, cause, and extent of the injury.[87] In Texas the city may implead the abutting owner responsible for the defect.[88] Payment in full for a contractor's claim for paving does not operate as a satisfaction of a contract and bond whereby he was to save the city harmless from liability for personal injuries.[89] A contractor who is made co-defendant but who secured a discontinuance as to himself is not entitled to notice of the pendency of the action to fix his liability.[90]

An abutting owner is liable for any negligent act creating a dangerous defect or obstruction in a street or highway.[91]

Highways are for the convenience of the public and those using them for other purposes than ordinary travel must use a reasonable care proportionate to the danger of such use to protect travelers,[92] but it is sufficient to see that the street is in the proper condition at the close of each business day.[93] Where a trench was dug by others under a street railway, the railway company's duty to keep the street in repair does not begin until the trench is filled even with the street.[94] One obstructing a publicly traveled way and causing injury to a traveler cannot defend on the ground that the way was never legally established as a highway.[95]

(§ 15) *G. Persons entitled to protection.*[96]—Only those properly using the highways for ordinary travel are protected by the law[97] though a city's duty as to sidewalks extends to any one who was lawfully upon the walk and using it for any purpose for which said walk was designed,[98] and a child may be a traveler on the highway, who is in fact traveling over it in a proper manner, though that traveling includes play or pastime.[99]

One has a right to ride a bicycle in the street,[1] but he must use ordinary

88. City of San Antonio v. Talerico [Tex.] 81 S. W. 518.

89, 90. City of Detroit v. Grant [Mich.] 98 N. W. 405.

91. Sheriff's sale purchaser held not liable for defect existing when he purchased. City of Lincoln v. First Nat. Bank [Neb.] 93 N. W. 698. One is responsible for the negligence of an independent contractor employed by him, when the work itself creates the danger or injury. Sidewalk rendered defective by a contractor drawing heavy loads thereon for defendant. Mullins v. Siegel-Cooper Co., 95 App. Div. 234, 88 N. Y. S. 737. Coal hole negligently left open. Ray v. Manhattan Light, Heat & Power Co. [Minn.] 99 N. W. 782.

92. Burton Telephone Co. v. Gordon, 4 Ohio C. C. (N. S.) 1. Steam pipe crossing a street. O'Hanlin v. Carter Oil Co., 54 W. Va. 510, 46 S. E. 555. It seems that one using a street in an unusual manner under a permit is liable to the city for damages recovered against it by reason of failure to comply with the permit. City of Louisville v. Keher, 25 Ky. L. R. 2003, 79 S. W. 270. A continuing duty to use reasonable care rests upon one who tears up a street with the city's permission. To keep paving stones safely piled and excavations properly guarded. Hesselbach v. St. Louis, 179 Mo. 505, 78 S. W. 1009.

93. Change of such condition by third parties during the night creates no liability upon the city nor the contractor. Hesselbach v. St. Louis, 179 Mo. 505, 78 S. W. 1009.

94. Hyde v. Boston [Mass.] 71 N. E. 118.

95. Pewonka v. Stewart [N. D.] 99 N. W. 1080.

96. See 2 Curr. L. 202.

97. Under the Wisconsin statute, municipalities are made liable only to those using the highway in the ordinary manner for purposes of travel. Rev. St. 1898, § 1339. A runaway team is not within that use except where the failure of control is only momentary. Ehleitter v. Milwaukee [Wis.] 98 N. W. 934. A town is not liable to one injured in using the road to pass to or from his own land though such injury be caused within the limits of the highway but outside the part of the road used for public travel. Lynch v. Boston [Mass.] 71 N. E. 301.

98. City of Columbus v. Anglin [Ga.] 48 S. E. 318. One who goes upon the regular sidewalk from one entrance of a building occupied by him to another entrance may recover for injuries under a statute relating to "travelers" upon the highway [Rev. St. 1898, § 1339]. Strack v. Milwaukee [Wis.] 98 N. W. 947.

99. An ordinance prohibiting the playing of games in the street does not prohibit boys from merely running on the sidewalk [Comp. Laws, § 3441]. Beaudin v. Bay City [Mich.] 99 N. W. 285. See 2 Curr. L. 202, n. 40. A child five years of age, traveling upon a highway, who turned aside to play upon timbers negligently in the highway is not barred from recovery for injuries on the ground that she was a trespasser. Busse v. Rogers [Wis.] 98 N. W. 219.

1. Lee v. Jones [Mo.] 79 S. W. 927; City of Louisville v. Keher, 25 Ky. L. R. 2003,

care to avoid a collision,[2] and may recover only for injuries from a defect which would have caused injury to the ordinary traveler.[3]

(§ 15) *H. Remote and proximate cause of injury.*[4]—The failure of duty which constitutes negligence must be the proximate cause of the injury to create a liability therefor,[5] but such a case is not necessarily the one nearest to the event.[6] In Maine a town is liable only if its fault is the sole cause of the injury.[7] The statutory liability in Massachusetts admits of concurring causes innocently and not negligently set in motion by third persons.[8] Upon conflicting evidence question of proximate cause is for the jury.[9]

(§ 15) *I. Contributory negligence of person injured.*[10]—As in negligence cases generally, any negligence of the plaintiff contributing to the injury will bar recovery,[11] the question being, on a conflict of the evidence, one of fact for the jury,[12] though where the evidence be undisputed, it is for the court.[13] Several specific instances are considered in the note.[14]

79 S. W. 270; Kleopfert v. Minneapolis [Minn.] 100 N. W. 669. A statute requiring roads to be kept safe and convenient "for travelers with their teams, carts, and carriages" does not apply to a person on a bicycle [Gen. Laws 1896, c. 72, § 1]. Fox v. Clarke [R. I.] 57 A. 305.

2. Lee v. Jones [Mo.] 79 S. W. 927.

3. Fox v. Clarke [R. I.] 57 A. 305; Rimby v. Philadelphia, 208 Pa. 119, 57 A. 347.

4. See 2 Curr. L. 202.

5. Nichols v. Pittsfield Tp. [Pa.] 58 A. 283. In a statutory action for personal injuries there can be no recovery if any efficient cause for which neither the plaintiff nor the municipality is responsible contributes to produce the injury. Whitman v. Fisher, 98 Me. 575, 57 A. 895. Running away of plaintiff's horse. Nichols v. Pittsfield Tp. [Pa.] 58 A. 283.

6. Discussion of primary, proximate, and intervening causes. Shippers' Compress & Warehouse Co. v. Davidson [Tex. Civ. App.] 80 S. W. 1032.

7. Orr v. Oldtown [Me.] 58 A. 914.

8. Block v. Worcester [Mass.] 72 N. E. 77. Inviting plaintiff to board car near hole in street held not to be concurring negligence of street railway. Id.

9. City of Omaha v. Houlihan [Neb.] 100 N. W. 415. Action for injuries to one who attempted to step around the hole. Brown v. Incorporated Town of Chillicothe, 122 Iowa, 640, 98 N. W. 502. Deep rut in the highway. Kennedy v. Lincoln [Wis.] 99 N. W. 1038. Obstruction of a walk. Garibaldi v. O'Connor, 210 Ill. 284, 71 N. E. 379. Sudden rise of water. Jenewein v. Irving [Wis.] 99 N. W. 346. It is for the jury whether an unlighted barricaded ditch was the proximate cause of injury to plaintiff who in alighting fell because the wagon seat by which she held had been jolted loose by driving into the ditch. Snowden v. Somerset, 90 N. Y. S. 885. Want of guard rail and not engine which frightened horse held proximate cause. Curry v. Borough of Luzerne, 24 Pa. Super. Ct. 514.

10. See 2 Curr. L. 203.

11. Shippers' Compress & Warehouse Co. v. Davidson [Tex. Civ. App.] 80 S. W. 1032. One is not entitled to recover who is guilty of a slight failure to exercise ordinary care which contributed to produce the injury. Lyon v. Grand Rapids [Wis.] 99 N. W. 311. If an accident be caused by the joint and concurring negligence of both plaintiff and defendant agents, and the negligence of neither without the concurring negligence of the other would have caused the injury, the plaintiff is not entitled to recover. Hanheide v. St. Louis Transit Co. [Mo. App.] 78 S. W. 820.

Contra: In Georgia contributory negligence does not necessarily bar a recovery. City of Columbus v. Anglin [Ga.] 48 S. E. 318.

Negligence of one person is **imputable** to another where both are jointly in care of the situation. Wife riding with her husband and exercising reasonable care is not legally responsible for negligence of her husband in acts over which she had no control. Whitman v. Fisher, 98 Me. 575, 57 A. 895. A woman cannot recover if there was negligence on the part of her husband who was driving with her, unless the relations existing between them were such that she was responsible for his acts. Nielsen v. Cedar County [Neb.] 98 N. W. 1090. One is not relieved of all care because another is driving. But must assist in avoiding danger if practicable. Whitman v. Fisher, 98 Me. 575, 57 A. 895.

12. Evans v. Iowa City [Iowa] 100 N. W. 1112; Darrell v. St. Joseph [Mo. App.] 82 S. W. 1130; City of Omaha v. Houlihan [Neb.] 100 N. W. 415; Herring v. St. Joseph [Mich.] 100 N. W. 747; Bradner v. Warwick, 91 App. Div. 408, 86 N. Y. S. 935; Kansas City-L. R. Co. v. Gallagher [Kan.] 75 P. 469; City of Denver v. Strobridge [Colo. App.] 75 P. 1076; Hyde v. Boston [Mass.] 71 N. E. 118.

13. City of Lancaster v. Walter, 25 Ky. L. R. 2189, 80 S. W. 189. It is not error to refuse to submit to the jury the question of contributory negligence, where an injury is caused by the tipping up of a loose plank by a companion stepping on the other end thereof, such defect being unknown to plaintiff. Ruscher v. Stanley [Wis.] 98 N. W. 223; Jones v. Sioux Falls [S. D.] 101 N. W. 43.

14. **Contributory negligence:** Plaintiff in daylight walked into a hole after standing and conversing for fifteen or twenty minutes within eighteen inches thereof. Bender v. Incorporated Town of Minden [Iowa] 100 N. W. 352. Rapid riding. Car-

Travelers must use reasonable care[15] in view of all the circumstances;[16] and in the absence of direct evidence it will be presumed that a person used reasonable care for the preservation of his life.[17]

In the absence of knowledge or warning to the contrary, one may assume that a street is safe or reasonably so.[18] Knowledge of a defect may constitute con-

roll's Adm'r v. Louisville, 25 Ky. L. R. 1888, 78 S. W. 1117. Stepping upon a slippery clay ridge six or eight inches high across a walk, in broad daylight (Sickels v. Philadelphia [Pa.] 58 A. 128); walking upon an icy ridge in the center of a wide walk without attempting to ascertain whether a like condition existed over the entire walk (Rogers v. Rome, 96 App. Div. 427, 89 N. Y. S. 130). An instruction that one is guilty of contributory negligence who is injured by falling into a ditch in a street while walking at night, absorbed in thought and not looking where he was going, but might have seen the excavation and avoided it, if he had looked, was properly refused. Huachuca Water Co. v. Swain [Ariz.] 77 P. 619.

No contributory negligence: Driving upon a pile of stones in the street (McEvoy v. Sault Ste. Marie [Mich.] 98 N. W. 1006), crossing a flooded culvert directly after others have crossed (Jenewein v. Irving [Wis.] 99 N. W. 346), conversing while in traveling on a walk not known to be dangerous but only "teetery" (Duncan v. Grand Rapids [Wis.] 99 N. W. 317). A court cannot say as a matter of law that one is guilty of contributory negligence, where the evidence showed that she was walking carefully on a dark night on a cinder walk of whose condition she was ignorant, and was injured by stepping into a hole eighteen inches deep. Johnson v. Philadelphia, 208 Pa. 182, 57 A. 363. Mere fact of a stallion being out of his pasture does not amount to contributory negligence on the part of the owner where the horse falls into a hole in the street and is killed. Kittredge v. Cincinnati, 2 Ohio N. P. (N. S.) 6. Evidence held to show no contributory negligence. Drew v. Farnsworth [Mass.] 71 N. E. 783; Oesterreich v. Detroit [Mich.] 100 N. W. 593; City of McKinney v. Brown [Tex. Civ. App.] 81 S. W. 88; Holloway v. Kansas City [Mo.] 82 S. W. 89. One is not negligent as a matter of law, in leaving a sidewalk on a dark night to cross a street, or upon seeing a ditch on one side of a street in failing to take notice that it runs under a car track and to the other side of the street, or in stopping in the middle of a street to ascertain the cause of the gathering of a crowd. Pate v. Atlanta, 119 Ga. 671, 46 S. E. 827. Falling into hole while walking with car to board it. Block v. Worcester [Mass.] 72 N. E. 77. Not supported by special finding that one might have known when she was off the walk without proof that she was off; where it is also specially found that injury might have happened without first stepping off. [Large stone beside walk.] City of Vincennes v. Spees [Ind. App.] 72 N. E. 531. Facts showing inattention of plaintiff while driving to approach of car held not to show contributory negligence in face of general verdict for plaintiff. Indianapolis St. R. Co. v. Johnson [Ind.] 72 N. E. 571. Person riding in carriage driven by another and inattentive to approach of car. Id. Choosing dangerous side of street where was a washout and boulders, other ways also being dangerous. Hollingsworth v. Ft. Dodge [Iowa] 101 N. W. 455.

15. Hunter v. Durand [Mich.] 100 N. W. 191; Carroll's Adm'r v. Louisville, 25 Ky. L. R. 1888, 78 S. W. 1117. An instruction that it was plaintiff's duty to use ordinary care and to use her eyes or other senses to avoid defects, was properly modified by striking the words "to use her eyes or other senses." Jackson v. Kansas City [Mo. App.] 79 S. W. 1174. One who drives outside of the regular wrought way without reasonable cause does so at his own risk. Orr v. Oldtown [Me.] 58 A. 914. A blind person is not bound to exercise any higher degree of care to avoid a defective portion of a street than a person having the full sense of sight. The jury may properly consider plaintiff's blindness relative to his exercise of due care. Hill v. Glenwood [Iowa] 100 N. W. 522. See 2 Curr. L. 205, n. 70. An allegation that "without fault or negligence upon her part or that of the driver, the horse became frightened and unmanageable" sufficiently avers due care on the part of the plaintiff. Jury was instructed that plaintiff must show herself free from contributory negligence. Hobbs v. Marion, 123 Iowa, 726, 99 N. W. 577.

16. Vocke v. Chicago, 208 Ill. 192, 70 N. E. 325. Evidence held insufficient to warrant a finding that plaintiff's intestate was using due care. Wood v. Westport, 185 Mass. 567, 70 N. E. 1018. Driving a milk wagon without looking. Wheat v. St. Louis, 179 Mo. 572, 78 S. W. 790. One injured while driving, by the felling of a tree into the street, need not show that the horse was ordinarily gentle. City of Colorado Springs v. May [Colo. App.] 77 P. 1093. In an action for injuries while driving in a so-called side track, the court properly submitted to the jury the questions whether the side track was "reasonably accessible" whether it "appeared to have been traveled to a considerable extent as a part of the public highway." Hebbe v. Maple Creek [Wis.] 99 N. W. 442. Care in choosing a route may be shown by the more dangerous condition of surrounding streets to the same destination. Hollingsworth v. Ft. Dodge [Iowa] 101 N. W. 455. The rule to turn to the right may be considered in justifying one's taking a narrower space on that side of a trench. Automobile driver collided with rope stretched across. Baker v. Fall River [Mass.] 72 N. E. 336.

17. Schnee v. Dubuque, 122 Iowa, 459, 98 N. W. 298.

18. City of Louisville v. Keher, 25 Ky. L. R. 2003, 79 S. W. 270; Hill v. Glenwood [Iowa] 100 N. W. 522. In the absence of knowledge of defects, a failure to select and travel over safe walks is not contributory negligence. Evans v. Iowa City [Iowa]

tributory negligence,[19] but is not such per se,[20] and a traveler is not precluded from traveling a highway in which he knows there are obstructions or defects and on which he has business[21] where he is justified in believing and does believe that by ordinary care he can pass in safety and he in fact does use such care.[22] Apart from imprudence in choosing a way and the existence of a safer way, mere knowledge of danger or defect does not suffice.[23] A wife riding with her husband who alone undertakes to look out for safety is not imputed with his negligence.[24]

(§ 15) *J. Notice of claim for injury and intent to sue.*[25]—In general, statutes requiring notice of claim for injuries are not strictly construed,[26] a notice giv-

100 N. W. 1112. One attempting to cross a ditch, three feet wide, without emergency requiring it, assumes the ordinary risks thereof but not those arising from latent defects such as undermining of the bank. Kent v. Southern Bell Tel. & T. Co. [Ga.] 48 S. E. 399. A court will not presume that plaintiff knew the defective condition of a walk apparently sound. Village of Wilmette v. Brachle, 209 Ill. 621, 71 N. E. 41.

19. Lyon v. Grand Rapids [Wis.] 99 N. W. 311. Whether one having general knowledge of a defective walk, was guilty of contributory negligence, was a question for the jury. Wiens v. Ebel [Kan.] 77 P. 553; Strack v. Milwaukee [Wis.] 98 N. W. 947; Hunter v. Durand [Mich.] 100 N. W. 191; Houseman v. Belle Plaine [Iowa] 100 N. W. 343. Rapid walking upon an icy but otherwise safe sidewalk may constitute contributory negligence. City of Charlottesville v. Failes [Va.] 48 S. E. 511.

20. Plaintiff was excusable in forgetting the defects, she hastening for medical aid for her husband who had been taken suddenly ill. City of Lancaster v. Walter, 25 Ky. L. R. 2189, 80 S. W. 189; City of Guthrie v. Finch, 13 Okl. 496, 75 P. 288; Oesterreich v. Detroit [Mich.] 100 N. W. 593. Plaintiff had many times been over the walk where she was injured. Benson v. Hamilton, 34 Wash. 201, 75 P. 805. Evidence held to warrant a finding that plaintiff was excusable for not remembering the defect. Lyon v. Grand Rapids [Wis.] 99 N. W. 311. General knowledge of an obstruction by which one is injured is not necessarily contributory negligence. Such knowledge should be considered by the jury and may constitute contributory negligence. West Kentucky Tel. Co. v. Pharis, 25 Ky. L. R. 1838, 78 S. W. 917.

21. Wheat v. St. Louis, 179 Mo. 572, 78 S. W. 790; Houseman v. Belle Plaine [Iowa] 100 N. W. 343; Wiens v. Ebel [Kan.] 77 P. 553; Jennings v. Kansas City [Mo. App.] 78 S. W. 1041. It is not incumbent upon him to commit a trespass to avoid use of a bridge apparently open to public travel. Jones v. Shelby County [Iowa] 100 N. W. 520; City of Dallas v. Muncton [Tex. Civ. App.] 83 S. W. 431.

22. Evans v. Iowa City [Iowa] 100 N. W. 1112; Belyea v. Port Huron [Mich.] 99 N. W. 740; Wheat v. St. Louis, 179 Mo. 572, 78 S. W. 790; Cunningham v. Clay Tp. [Kan.] 76 P. 907. Walk obstructed by debris but with a clear path; plaintiff injured by stepping to one side toward a wall, to allow his companion to precede him on the path. Swift & Co. v. Langbein [C. C. A.] 127 F. 111. Planks laid for travel over an excavation, the sidewalk being under repair. City of Garnett v. Hamilton [Kan.] 77 P. 583. Plaintiff's knowledge of a posted notice as to the unsafety of a bridge is not conclusive as to his negligence in his use thereof, he having been personally advised by the road officials that it had been repaired and was safe. The test is whether plaintiff acted as a reasonably prudent man. Jones v. Shelby County [Iowa] 100 N. W. 520. Every excavation in a street is not of such a character as to make it negligence per se to attempt to cross it. Kent v. Southern Bell Tel. & T. Co. [Ga.] 48 S. E. 399. In Missouri one is guilty of contributory negligence in not passing around an obvious and dangerous defect in a sidewalk. Jennings v. Kansas City [Mo. App.] 78 S. W. 1041. It is not material what plaintiff believed about the safety of a place about the defective condition of which he knew not. Gutter apron. Keim v. Ft. Dodge [Iowa] 101 N. W. 443. Length of residence is admissible to show knowledge of dangerous nature of gutter apron, it being like others used in the city. Id.

23. Hollingsworth v. Ft. Dodge [Iowa] 101 N. W. 455.

24. Indianapolis St. R. Co. v. Johnson [Ind.] 72 N. E. 571.

25. See 2 Curr. L. 205.

26. Joy v. Inhabitants of York [Me.] 58 A. 1059. A requirement of notice of personal injury "within sixty days next after such injury" allows sixty days after the day of the injury. McEvoy v. Sault Ste. Marie [Mich.] 98 N. W. 1006. Under a statute requiring notice within thirty days after injury, the giving of a notice within thirty days after plaintiff is mentally and physically able to do so is sufficient [Laws 1894, p. 1570, c. 623]. Williams v. Port Chester, 97 App. Div. 84, 89 N. Y. S. 671. A notice from plaintiff as soon as she was able to transact business, though seventy-two houre after the injury, is a substantial compliance with a charter requirement of notice within forty-eight hours. Walden v. Jamestown, 178 N. Y. 213, 70 N. E. 466. In Iowa notice of demand must be given within thirty days of injury and suit may be brought only after thirty days' notice and within three months of the injury [Code, §§ 1050, 1051]. Kenyon v. Cedar Rapids [Iowa] 99 N. W. 692. A statute regulating the presentation of all accounts and demands against a city does not apply to a claim for damages for personal injuries [Pol. Code, §§ 4811, 4812]. Dawes v. Great Falls [Mont.] 77 P. 309. Failure to properly present a claim is not a bar to the maintenance of an action, where the penalty for such fail-

ing such information as enables the city to investigate the cause of the injuries being generally sufficient,[27] but in New York a failure to offer proof of a compliance with the statute is fatal to recovery.[28] Substantial compliance is necessary,[29] but may be waived,[30] though not by an assistant of the officer to be served.[31] A mayor may acknowledge service of notice,[32] and actual notice to a city superintendent of streets is notice to the city.[33]

(§ 15) *K. Actions.*[34]—Suit must be timely brought,[35] and an action barred by the statute cannot be revived by either an express or implied agreement with the city.[36] In Wisconsin limitations do not begin to run until service of statutory notice of nonallowance of the claim by the city,[37] but need not negative contributory negligence.[38] Plaintiff should allege notice on the part of the city, or facts under which the city should have had notice,[39] though a defect in this respect, being amendable, is not available after judgment.[40] The general rules as to vari-

ure is an inability to recover costs. City of Garnett v. Hamilton [Kan.] 77 P. 683.

27. Notice gave date and place of injury and that the cause was a pitfall. City of Denver v. Bradbury [Colo. App.] 76 P. 1077. A notice of sufficient particularity to enable the municipality to inquire into and ascertain the facts of the injury is a substantial compliance with the statute [Rev. St. 623, § 76]. Joy v. Inhabitants of York [Me.] 58 A. 1059; Schnee v. Dubuque, 122 Iowa, 459, 98 N. W. 298; Oesterreich v. Detroit [Mich.] 100 N. W. 593; McCarthy v. Syracuse, 96 App. Div. 566, 89 N. Y. S. 89. A notice is sufficient which by a fair construction alleges an injury caused by a defect due to the negligence of a city and its employes. Cronan v. Woburn, 185 Mass. 91, 70 N. E. 38. Evidence held insufficient to show notice of claim for injuries as required by city charter. Cresler v. Asheville, 134 N. C. 311, 46 S. E. 738. If the notice be not misleading, a lack of particularity of the place and cause of the injury may be immaterial. At "First West between Seventh and Eighth South" streets from a "fence on the walk" held sufficient. Connor v. Salt Lake City [Utah] 78 P. 479.

28. Notice must be filed with each claim [Laws 1886, p. 801, c. 572]. Seliger v. New York, 88 N. Y. S. 1003.

29. Oral notice to the assistant of one on whom written notice should be served, held insufficient [Laws of 1895, p. 724]. Holtham v. Detroit [Mich.] 98 N. W. 754. Evidence raised a presumption of proper service of notice. Beattie v. Detroit [Mich.] 100 N. W. 574. It must describe the nature and location of the defect with sufficient accuracy to warrant a submission to the jury of the question whether what is described is a defect and the defect claimed. Notice sufficient which alleges a pile of stone partly within the wrought portion of a highway and partly without. York v. Inhabitants of Athens [Me.] 58 A. 418. A notice may be sufficient under the statute though it alleges more than one defect in a walk [Code § 1051]. Bauer v. Dubuque, 122 Iowa, 500, 98 N. W. 355. Description of defect in a sidewalk held sufficiently definite. Brown v. Incorporated Town of Chillicothe, 122 Iowa, 640, 98 N. W. 502. Notice held to sufficiently describe the place of defect. Ruscher v. Stanley [Wis.] 98 N. W. 223. In Iowa it should advise the municipality of the nature and cause of the injury, the time and place when and where it occurred, and the particular defect or negligence which it is claimed caused or contributed to it [Code, § 1051]. Bauer v. Dubuque, 122 Iowa, 500, 98 N. W. 355.

30. Failure to give the statutory notice is waived by a failure to plead the limitation. Such notice is not essential to recovery [Code, § 3447]. Belken v. Iowa Falls, 122 Iowa, 430, 98 N. W. 296. City held not to have waived the statutory notice required by Loc. Acts 1895, p. 724, No. 463, § 46. Wilton v. Detroit [Mich.] 100 N. W. 1020. Failure to verify a notice may be considered waived by lack of objection and by medical examination on behalf of the city. Hunter v. Durand [Mich.] 100 N. W. 191. Not waived by an order to appear before a committee and produce witnesses, unless the order issued with knowledge of lack of notice. Holtman v. Detroit [Mich.] 98 N. W. 754.

31. Holtman v. Detroit [Mich.] 98 N. W. 754.

32. McCartney v. Washington [Iowa] 100 N. W. 80.

33. McEvoy v. Sault Ste. Marie [Mich.] 98 N. W. 1006.

34. See 2 Curr. L. 206.

35. Under a Michigan statute requiring actions for injuries to be begun in one year, an action begun by filing of declaration is barred where such declaration is not properly served within one year. Wilton v. Detroit [Mich.] 100 N. W. 1020.

36. Holtham v. Detroit [Mich.] 98 N. W. 754.

37. Laws 1901, c. 68, p. 88. Lyon v. Grand Rapids [Wis.] 99 N. W. 311. Appeal more than eighty days after filing of claim but before notice of disallowance by the city held not barred by lapse of time. Duncan v. Grand Rapids [Wis.] 99 N. W. 317. The complaint must allege the city's negligence to be the proximate cause of the injury. City of Hammond v. Winslow [Ind. App.] 70 N. E. 819. See 2 Curr. L. 206, n. 88.

38. City of Lancaster v. Walter, 25 Ky. L. R. 2189, 80 S. W. 189. An answer charging contributory negligence in that plaintiff was not careful, prudent, or watchful, is sufficiently specific. Durham v. Bolivar [Mo. App.] 81 S. W. 463.

39. City of Huntington v. Lusch [Ind. App.] 70 N. E. 402.

40. Gerber v. Kansas City [Mo. App.] 79

ance[41] and amendment of pleadings apply.[42] Several cases in which the pleadings are attacked for insufficient allegation of facts are mentioned in the note.[43]

An action for injuries from obstructions in a highway contrary to statute does not involve the question of negligence,[44] but in an action for injuries from obstructions not forbidden by statute, they must be shown to have arisen from defendant's negligence.[45]

Evidence that a walk had been in a generally defective condition for some time previous to the injuries complained of is admissible,[46] likewise of evidence as to repairs,[47] and as to the ordinary duration of such a walk.[48] Declarations as to the condition of a walk, by persons examining it directly after an accident are admissible,[49] but it is error to allow a question to the plaintiff as to what was the effect on her attention, as to the walk, of objects she was carrying.[50] Evidence of

S. W. 717; Doherty v. Kansas City [Mo. App.] 79 S. W. 716.

41. There is no variance between the declaration that plaintiff was riding in a wagon and proof that the vehicle had but two wheels. Luce v. Hassam [Vt.] 58 A. 725. A slight departure from an accurate description is not fatal. Failure to allege the splintering of boards. Duncan v. Grand Rapids [Wis.] 99 N. W. 317. A finding that plaintiff was crossing the junction of two streets is authorized where the evidence showed that he stood on the sidewalk for a few seconds. Drew v. Farnsworth [Mass.] 71 N. E. 783. One who predicates her right to recovery upon the negligent obstruction of a walk by a contractor cannot recover from the city where she fails to prove such negligence on the part of the contractor. Hesselbach v. St. Louis, 179 Mo. 505, 78 S. W. 1009. In an action for wanton injury, there can be no recovery for mere negligence if seasonable objection be made. Turtenwald v. Wisconsin Lakes Ice & Cartage Co. [Wis.] 98 N. W. 948.

42. Where a petition alleges injuries resulting from a defective bridge and that "petitioner's horse while being ridden carefully over said bridge fell through said bridge," an amendment "that said horse became frightened and that the rider upon said horse was unable to manage him," etc., should have been allowed. Brackin v. Bainbridge, 119 Ga. 603, 46 S. E. 828. Plaintiff allowed to amend a complaint alleging an injury at the side of a stone bridge, substituting therefor an embankment over a culvert. Northrop v. Sidney, 97 App. Div. 271, 90 N. Y. S. 23. In a substituted petition plaintiff may allege for the first time that a certain walk was improperly constructed. McCartney v. Washington [Iowa] 100 N. W. 80.

43. An allegation of a defective walk "at the time of the commission of the grievances hereinafter alleged" is sufficient as to the date where the only date thereafter alleged was the date of the injury. City of Hammond v. Winslow [Ind. App.] 70 N. E. 819. Allegations as to defective condition of the walk held sufficient. City of Guthrie v. Finch, 13 Okl. 496, 75 P. 288. Allegations held sufficient to cover the manner in which an injury was received. Village of Wilmette v. Brachle [Ill.] 71 N. E. 41. A complaint against a city for negligently allowing a private electric wire erected under an ordinance to be left unguarded is not demurrable on the theory that the defect could only be discovered by inspection. Plaintiff's evidence on the trial might show the defect was discoverable without inspection. Wilbert v. Sheboygan [Wis.] 99 N. W. 330. A declaration for injuries from a defect in a street need not allege the duty of the city to keep the street in repair, that being a statutory obligation. Cronan v. Woburn, 185 Mass. 91, 70 N. E. 38. A complaint alleging that a city "negligently and carelessly" maintained blocks in the street need not also aver that the blocks were not useful and necessary. City of Alexandria v. Liebler, 162 Ind. 438, 70 N. E. 512. A complaint need not allege the depth of hole causing injury. Lyon v. Grand Rapids [Wis.] 99 N. W. 311. Allegation that obstacle was alongside of walk regarded as one that city was negligent in not having barrier there. City of Vincennes v. Spees [Ind. App.] 72 N. E. 531. Allegation that stone was "along" the edge of walk not equivalent to one that it was "on" the walk. Id. It is not necessary to allege the cause which frightened a horse if lack of a guard rail be alleged as cause of the injury. Curry v. Borough of Luzerne, 24 Pa. Super. Ct. 514.

44, 45. Private telephone wire. Smith v. Gilreath [S. C.] 48 S. E. 262.

46. McCartney v. Washington [Iowa] 100 N. W. 80; Hallum v. Omro [Wis.] 99 N. W. 1051; Norton v. Kramer [Mo.] 79 S. W. 699. Records of a city council tending to show that the city had knowledge of the general condition of a sidewalk are admissible in evidence. Bauer v. Dubuque, 122 Iowa, 500, 98 N. W. 355. Evidence as to the general condition of a walk and existence of other hole is admissible where it is shown that the walk was old, badly worn, and rotted away. Duncan v. Grand Rapids [Wis.] 99 N. W. 317.

Contra: Lyon v. Grand Rapids [Wis.] 99 N. W. 311.

47. McCartney v. Washington [Iowa] 100 N. W. 80; City of Baltimore v. Walker [Md.] 57 A. 4. Changes after accident may be shown to prove pre-existence of dangerous condition but not to show negligence. Achey v. Marion [Iowa] 101 N. W. 435.

48. McCartney v. Washington [Iowa] 100 N. W. 80.

49. Harrison v. Incorporated Town of Ayrshire, 123 Iowa, 528, 99 N. W. 132.

50. Lyon v. Grand Rapids [Wis.] 99 N. W. 311.

prior accidents at the same place is admissible.[51] Evidence of a previous habit of plaintiff to ride her bicycle on the sidewalk near the place of accident is competent,[52] but the court should exclude testimony that plaintiff was in the habit of becoming intoxicated.[53] If there is doubt whether lights were burning it may be shown that even so they shed an insufficient light.[54] In an action for injuries based upon negligence in leaving cakes of ice in the highway, evidence that other horses passing in a similar manner were not frightened is admissible, unless too remote as a matter of fact.[55] In an action for injury to plaintiff while driving, by defendant's negligent placing of stones in the highway, a question as to the use of the locality by persons with teams, where they had gone, is not excluded by a claim of defendant that there was a sidewalk at the place in question.[56] A defendant town is not conclusively bound by the testimony of the town chairman.[57] Cases involving the sufficiency of the evidence are collected below.[58]

Instructions are considered in the note.[59]

§ 16. *Injury to, obstructions of, or encroachment on, street or highway.*[60]— There can be no rightful permanent use of a public highway by individuals for private purposes,[61] though a temporary and reasonable use of the streets and walks for construction purposes is lawful,[62] in which case the city must see that

51. Yates v. Covington [Ky.] 83 S. W. 592; Gregory v. Detroit United R. Co. [Mich.] 101 N. W. 546. Evidence as to the condition of a sidewalk subsequent to an injury caused thereby, or as to injuries subsequent to the one in suit, is not admissible to show knowledge. City of Chicago v. Vesey, 105 Ill. App. 191.

52. To show she was occupying that part of the highway when injured. Kenney v. Hampton [N. H.] 58 A. 1046.

53. Hunter v. Durand [Mich.] 100 N. W. 191.

54. Keim v. Ft. Dodge [Iowa] 101 N. W. 443.

55. Gould v. Hutchins [N. H.] 58 A. 1046.

56. Luce v. Hassam [Vt.] 58 A. 725.

57. Kennedy v. Lincoln [Wis.] 99 N. W. 1038.

58. A case may properly go to the jury upon the uncorroborated testimony of the plaintiff as to the place of accident. Benson v. Hamilton, 34 Wash. 201, 75 P. 805. Where a passenger alighting from a street car, and carrying a sleeping child, tripped over a stake in the street projecting fourteen inches above ground and having been there six months, it was for the jury to decide whether plaintiff exercised due care, whether the way was reasonably safe, whether the defect might have been remedied by reasonable care and whether the city should have known of the defect. Stanford v. Inhabitants of Hyde Park, 185 Mass. 253, 70 N. E. 51. Evidence that a sidewalk had been out of repair for several weeks, though flatly contradicted, was sufficient to take the case to the jury. Norton v. Kramer [Mo.] 79 S. W. 699.

59. An instruction that a boy running on a sidewalk should use such care as boys of his age and discretion usually exercise on like occasions and such care and discretion as the jury think he ought to have used is not misleading. Beaudin v. Bay City [Mich.] 99 N. W. 285. An instruction that actual notice or a sufficient length of time to imply notice, was necessary where a walk had been repaired but ten days previously was properly refused where the evidence showed the walk to be in the same condition after injury as before the repair. Village of Wilmette v. Brachle [Ill.] 71 N. E. 41. In an action for injuries received upon a street never accepted by the city, an instruction assuming an acceptance is erroneous. Clay City v. Abner [Ky.] 82 S. W. 276. An instruction limiting the damages to the diminished earning capacity of plaintiff is not open to objection. Beaudin v. Bay City [Mich.] 99 N. W. 285. Charge on duration of unsafe condition is inapplicable to accident from bad construction. Achey v. Marion [Iowa] 101 N. W. 435. Charge held to state proper degree of care and hence not to harm plaintiff even if it assumed his knowledge. Cannady v. Durham [N. C.] 49 S. E. 50. Having charged the necessity of ordinary care it was error to charge the "greater degree of care" required by reason of the plaintiff's possible knowledge or the dim light. Keim v. Ft. Dodge [Iowa] 101 N. W. 443. Charge held not to mislead jury into excluding driver's contributory negligence as imputable to occupant of carriage. Indianapolis St. R. Co. v. Johnson [Ind.] 72 N. E. 571. Where the negligence sued on is failure to guard an excavation incident to repairs, the giving of an instruction as to the duty of the city to keep the streets in good condition for travel is error. Delaplain v. Kansas City [Mo. App.] 83 S. W. 71.

60. See 2 Curr. L. 207.

61. Steam pipe crossing a street. O'Hanlin v. Carter Oil Co., 54 W. Va. 510, 46 S. E. 565. A general permit to occupy a street will not authorize a railroad company to erect and maintain permanent abutments therein. Lake Shore, etc., R. Co. v. Elyria, 69 Ohio St. 414, 69 N. E. 738.

62. Hesselbach v. St. Louis, 179 Mo. 505, 78 S. W. 1009. A city may grant franchises authorizing a railroad company to make reasonable use of a street and the laying of a switch track thereon. Stockdale v. Rio Grande Western R. Co. [Utah] 77 P. 849.

the work is properly conducted.[63] Municipal councils cannot authorize a private party to bridge over a portion of a street not vacated.[64]

Long continued encroachments in the highway cannot destroy the public right or take away the authority of the public to remove and abate them.[65] Under power to sue and be sued and to establish highways, a city may maintain ejectment for possession of a street,[66] and in such an action, the city need not allege its ownership of the street.[67]

An unauthorized coal hole in a sidewalk[68] or any unsafe and improperly secured authorized excavation is a nuisance per se,[69] but an authorized railway track is not,[70] and an abutting owner cannot complain of obstruction of street from the building of a street railway where there is no change of grade.[71] A fence is an obstruction,[72] and electric wires may be.[73]

A material obstruction to a public street is per se a public nuisance,[74] but only one whose injury is of a different character than that sustained by the general public may maintain an action therefor.[75] A proposed unreasonable obstruction of a sidewalk may be enjoined before the actual commission of the act,[76] but the obstruction of an alleged alley will not be restrained where the complaint fails to allege a dedication.[77] The power of the county court to order removal of gates across roads extends only to gates originally erected by permission of such court,[78] but denial of the petition on such ground is no bar to a subsequent application, if it be ascertained that the gate was in fact erected by such permission.[79] Parol

63. City of Louisville v. Keher, 25 Ky. L. R. 2003, 79 S. W. 270.
Contra: Thompson v. West Bay City [Mich.] 100 N. W. 280.

64. The attempted action would leave merely a tunnel for passage on the street. Tilly v. Mitchell & Lewis Co. [Wis.] 98 N. W. 969.

65. Slattery v. McCaw, 44 Misc. 426, 90 N. Y. S. 52.

66, 67. City of Port Townsend v. Lewis, 34 Wash. 413, 75 P. 982.

68. City of Lincoln v. First Nat. Bank [Neb.] 93 N. W. 698. A property owner has no right to maintain a vault under the street after a revocation of such privilege by the city. A city may lawfully remove property abandoned in a vault for which the permit has been revoked. Lincoln Safe-Deposit Co. v. New York, 96 App. Div. 624, 88 N. Y. S. 912.

69. City of Lincoln v. First Nat. Bank [Neb.] 93 N. W. 698. But a jury may properly find that excavations in a street for the laying of water mains do not constitute a common-law nuisance. Boston v. Abraham, 91 App. Div. 417, 86 N. Y. S. 863. A gas company authorized to lay pipes upon roads, subject to orders of the county commissioners, cannot be restrained from so doing as violating an order of the commissioners relative to water mains. Consolidated Gas Co. v. Baltimore County Com'rs [Md.] 57 A. 29.

70. A switch track in a street, designed for all who may have occasion to ship freight over it is not a nuisance. Stockdale v. Rio Grande W. R. Co. [Utah] 77 P. 849.

71. Ireton Bros. & Eckenberg v. Ft. Wayne, V. & L. Traction Co., 2 Ohio N. P. (N. S.) 317.

72. Building a fence within the limits of a public highway is an obstruction. Whether the fence is built across the road or longitudinally therewith and within the road [2 Starr & C. Ann. St. 1896, c. 121, § 71]. Seidschlag v. Antioch, 207 Ill. 280, 69 N. E. 949. A fence not nearer than two and one-half feet from a traveled track, which was also outside the highway is not an obstruction subject to summary removal (Konkel v. Pella [Wis.] 99 N. W. 453), and there being evidence to that effect, it was for the jury to say whether a wire placed by defendant about parking in a public street obstructed the sidewalk and was of a dangerous character (Snyder v. Ward [Iowa] 100 N. W. 348). Maintenance of a gate for thirty years creates a presumption that the landowner retained a right thereto in granting the right of way. Allen v. Hopson [Ky.] 83 S. W. 575.

73. The question of notice is an important element in determining whether one permitted a private telephone wire to remain upon a highway so as to obstruct it. Smith v. Gilreath [S. C.] 48 S. E. 262.

74. Hall v. Breyfogle, 162 Ind. 494, 70 N. E. 883. A plank and cinder crossing is not a nuisance merely because a freight car stood by it. Hohman v. New York, etc., R. Co., 90 N. Y. S. 882. Rope stretched across one side of street from curb to center where was a trench held an "obstruction." Baker v. Fall River [Mass.] 72 N. E. 336.

75. One whose lot fronts upon a block next to the obstructed one and whose property will be greatly depreciated in value may maintain such an action. Tilly v. Mitchell & Lewis Co. [Wis.] 98 N. W. 969; Jones v. Bright [Ala.] 37 So. 79; Parsons v. Hunt [Tex. Civ. App.] 81 S. W. 120.

76. Brauer v. Baltimore Refrigerating & Heating Co. [Md.] 58 A. 21.

77. Milliken v. Denny, 135 N. C. 19, 47 S. E. 132.

78. In such case, compensation must be made. Allen v. Hopson [Ky.] 83 S. W. 575.

79, 80. Allen v. Hopson [Ky.] 83 S. W. 575.

evidence of an agreement at the time of laying out a road as to right of the landowner to maintain a gate is not admissible without proof that the report of the viewers is lost or silent thereon.[80]

Persons unlawfully obstructing streets are liable for damages arising therefrom to travelers lawfully using the street,[81] but not to one who is himself committing a nuisance.[82]

An indictment will lie for obstructing a public road,[83] though defendant leaves enough open way for public travel,[84] but the act of maliciously digging up a private way is not necessarily a criminal act.[85] Every obstruction of a highway is a separate offense.[86] One who obstructs a road contrary to statute is not entitled to notice to remove the obstruction as a prerequisite to the right to an action under the statute,[87] and the owners of swinging signs projecting over a sidewalk are not entitled to any other than the general public notice of the passage of an ordinance prohibiting such signs.[88] Whether the statute requires the removal of certain obstructions in a highway is a question of law for the court.[89]

HOLIDAYS.

A statute relating to legal holidays includes without express mention all days set apart as such by law.[90] Unless a legal holiday is declared dies non, judicial proceedings on such days are valid.[91]

HOMESTEADS.[92]

§ 1. The Right to Homestead in General (1631).
§ 2. Persons Entitled (1631).
§ 3. Properties and Estates in Which

81. Immaterial that the horse took fright at an act of defendant's employe, such act being upon the obstructing gangway. Shipper's Compress & Warehouse Co. v. Davidson [Tex. Civ. App.] 80 S. W. 1032. One whose hogs are lawfully upon the highway is not liable for injuries to another thrown from a buggy by his horse being frightened by the hogs. Laws 1875, p. 190, does not relate to highways. Heist v. Jacoby [Neb.] 98 N. W. 1058.

82. One is not liable for leaving a wagon in the street, from which injuries result to a member of a coasting party, such use of the street not being known by defendant. Reusch v. Licking Rolling Mill Co. [Ky.] 80 S. W. 1168.

83. For so constructing a dam as to cause water to back upon a highway and sand to be there deposited (Indictment considered and held sufficient—Richardson v. State [Tex. Cr. App.] 79 S. W. 536), or for obstructing by planking a lawfully constructed bicycle path [Ball. Ann. Codes & St. §§ 3767-3770, 3887, 3888, 7293] (Miller v. Pierce County, 34 Wash. 592, 76 P. 103), or for the intentional destruction of a bridge on a highway though done in the belief that it was not upon a highway (People v. Myring [Cal.] 77 P. 975), or for fastening a gate across a road known to be established as public; a failure of the authorities to remove a fence within the bounds of a road does not relieve one for subsequently closing the road (Kelly v. State [Tex. Cr. App.] 80 S. W. 382). In Washington it is a misdemeanor to in any manner obstruct a highway [2 Ball. Ann Codes & St. § 7293]. Miller v. Pierce County, 34 Wash. 592, 76 P. 103.

84. Kelly v. State [Tex. Cr. App.] 80 S. W. 382.

85. Territory v. Richardson [Ariz.] 76 P. 456.

86. Commonwealth must elect on which of several offenses it will proceed. Commonwealth v. Illinois Cent. R. Co. [Ky. 82 S. W. 381.

87. But notice is necessary before a liability will accrue for permitting the obstruction to remain [2 Starr & C. Ann. St., 1896, c. 121, § 71]. Seidschlag v. Antiosh, 207 Ill. 280, 69 N. E. 949.

88. Sands v. Inhabitants of Trenton [N. J. Law] 57 A. 267.

89. Private telephone wire. Smith v. Gilreath [S. C.] 48 S. E. 262.

90. A statute forbidding the sale of intoxicants on legal holidays need not expressly designate July Fourth. It was apparent that this statute when considered in connection with other statutes relative to holidays included July Fourth. Brennan v. Roberts [Iowa] 101 N. W. 460. See 2 Curr. L. 209, n. 45.

Note: As fully sustaining this view. Reithmiller v. People, 44 Mich. 280, 6 N. W. 667; People v. Ackerman, 80 Mich. 588, 46 N. W. 367. **Contra,** Ruge v. State, 62 Ind. 388; State v. Atkinson, 139 Ind. 426, 39 N. E. 51.

91. Not prohibited by P. L. 1895, p. 779. Atlantic City v. Freretti [N. J. Law] 57 A. 259. See 2 Curr. L. 210.

92. The doctrine of exemptions has already been treated. See Exemptions, 3 Curr. L. 1408. The present title has no relation to devises of the "homestead" (see Wills, 2 Curr. L. 2076), nor to the widow's quarantine (see Descent and Distribution, 3

Homestead may be Claimed (1631). As Dependent on Use of Premises (1632). As Dependent on Whether Lands are Rural or Urban (1632). As Dependent on Whether Land is Realty or Personalty (1633). Amount Exempt (1633).

§ 4. Claiming, Selecting, and Setting Apart of Homesteads (1633). Failure to Claim Exemption (1636).

§ 5. Liabilities Superior or Inferior to Homestead (1635). Judicial and Execution Sales (1637).

§ 6. Alienation and Incumbrance (1637). Necessity of Consent of Wife to Conveyance or Joinder Therein (1638). Acknowledgment of Conveyance (1639). Contracts to Convey (1639).

§ 7. Loss or Relinquishment (1639).

§ 8. Rights of Surviving Spouse, Children, Heirs or Dependents of Homestead Tenant (1640). Rights of Divorced Parties (1642). Claim to Reimbursement for Expenditures (1642).

§ 9. Exemption of Proceeds of Homestead or of Substituted Properties (1642).

§ 10. Remedies and Procedure. Remedies by Suit or Action (1643).

§ 1. *The right to homestead in general.*[93]—The right of a widow to a homestead is in many states an independent right and is not dependent upon whether or not she has other property fit to live in.[94]

Statutes authorizing homestead exemptions.[95]—Homestead exemptions have been held not to exist as against the state,[96] but otherwise are to be liberally construed in favor of the homestead right.[97]

Constitutionality.[98]—That a law rendering the proceeds of a sale of a homestead exempt applies to previously incurred indebtedness does not impair the obligation of contracts.[99]

§ 2. *Persons entitled.*[1]—In most states the head of a family is entitled to claim a homestead, and whether or not one is the head of a family is a question of fact.[2] A wife,[3] or minors living with and being morally dependent upon another,[4] constitute members of the latter's family within the meaning of the homestead laws.

An abandoned wife[5] may claim it.[6] But if she remarries on the presumption that her absent husband is dead, she cannot claim a homestead out of his property, he dying subsequent to the second marriage, the latter never being annulled.[7]

§ 3. *Properties and estates in which homestead may be claimed. As dependent on nature of claimant's title.*[8]—The right to a homestead may be based on

Curr. L. 1081; Estates of Decedents, 3 Curr. L. 1238).

93. See 2 Curr. L. 210.

94. Code Civ. Proc. § 1465. In re Firth's Estate [Cal.] 78 P. 683. The right is statutory. See 2 Curr. L. 210, n. 53.

95. See 2 Curr. L. 211.

96. State purchasing homestead at execution sale to satisfy judgment in its favor, held homestead right of judgment debtor and family extinguished. Fields' Heirs v. Napier [Ky.] 80 S. W. 1110.

97. Walt v. Walt [Tenn.] 81 S. W. 228; Edmonds v. Davis, 122 Iowa, 561, 98 N. W. 375; Lindberg v. Peterson [Minn.] 101 N. W. 74. A statutory or constitutional exception to the homestead exemption is to be strictly construed. Wilhelm v. Locklar [Fla.] 36 So. 6. See 2 Curr. L. 211, n. 59.

98. See 2 Curr. L. 211.

99. Considering Laws 1897, p. 131, c. 101. Lewis v. Goldthwaite Nat. Bank [Tex. Civ. App.] 81 S. W. 797. See 2 Curr. L. 211, n. 60, 61.

NOTE. Homestead statutes impairing the obligation of a contract: It has been held that if the effect of an exemption statute is to withdraw from execution or other final process property of the debtor which was liable to execution when the debt was contracted, leaving insufficient for the payment of his prior debts, the statute is in violation of the Federal Constitution, in that it impairs the effectiveness of the creditor's remedy to the extent of the property withdrawn, and to that extent impairs the obligation of the debtor's contract. Edwards v. Kearzey, 96 U. S. 595, 24 Law. Ed. 793; Gunn v. Barry, 15 Wall. [U. S.] 610, 21 Law. Ed. 212.—From Lewis v. Goldthwaite Nat. Bank [Tex. Civ. App.] 81 S. W. 797.

1. See 2 Curr. L. 211.

2. Mathewson v. Kilburn [Mo.] 81 S. W. 1096. That father paid bills and gave son land held sufficient to disprove son's claim to homestead as head of family. Id. See 2 Curr. L. 211, n. 66-67.

3. Cross v. Benson [Kan.] 75 P. 558; Aultman, Miller & Co. v. Price [Kan.] 75 P. 1019.

4. Grandchild, held member of family though never formally adopted, and though her father, who was divorced from her mother, was still living and had a decree of court awarding the child's custody to him. Cross v. Benson [Kan.] 75 P. 558. [See this case for short discussion of subject.]

5. See 2 Curr. L. 212.

6. National Bank of Commerce v. Chamberlain [Neb.] 100 N. W. 943. See 2 Curr. L. 212, n. 71.

7. In re Harrington's Estate, 140 Cal. 244, 73 P. 1000.

8. See 2 Curr. L. 212.

an equitable,[9] leasehold,[10] or undivided[11] interest in land, but the party claiming the homestead must have the right to possession.[12] The exemption extends to an ungathered crop.[13] That one acquires different portions of a tract at different times,[14] or that his estate in each portion is different in degree,[15] does not affect the homestead character of the entire tract. That the property is not paid for does not affect one's homestead rights as against subsequent creditors.[16]

As dependent on use of premises.[17]—The use made of land may determine its character as a homestead.[18] That part of the building is rented[19] or used for business purposes[20] does not necessarily destroy its character as a homestead.

As dependent on whether lands are rural or urban.[21]—The extent of one's homestead rights is often dependent upon the rural or urban character of the property.[22] Its character in this regard is determined largely by the use to which it is put,[23] and the surrounding circumstances.[24] In order to constitute land urban property it is sufficient that it is recognized as a part of the plat or plan of a city,[25] and it is unimportant that the lots of which it is composed do not conform to the

9. Vendee in executory contract for the sale of lands. Hook v. Northwest Thresher Co., 91 Minn. 482, 98 N. W. 463. Right of vendee having possession under oral contract of sale. Helgehye v. Dammen [N. D.] 100 N. W. 245. See 2 Curr. L. 212, n. 75.

10. Code 1896, § 2033. Bailey v. Dunlap Mercantile Co., 138 Ala. 415, 35 So. 451. When subject to sale on execution. White v. Danforth, 122 Iowa, 403, 98 N. W. 136.

11. Land occupied in joint tenancy. Gorman v. Hale [Mo. App.] 82 S. W. 1110. But see 2 Curr. L. 212, n. 77. One owning a one-third interest in a lot and using it in connection with another lot on which the main part of his residence is situated, held such lot and such one-third interest, not exceeding the statutory exemption in value, could be held as a homestead. Emrich v. Gilbert Mfg. Co., 138 Ala. 316, 35 So. 322.

12. Remainderman has no homestead in premises during continuance of life estate. Roach v. Dance [Ky.] 80 S. W. 1097.

13. Parker v. Hale [Tex. Civ. App.] 78 S. W. 555. See 2 Curr. L. 212, n. 78.

14. Bailey v. Dunlap Mercantile Co., 138 Ala. 415, 35 So. 451.

15. One a fee, the other a leasehold interest. Bailey v. Dunlap Mercantile Co., 138 Ala. 415, 35 So. 451.

16. Powars v. Palmer [Tex. Civ. App.] 81 S. W. 817.

17. See 2 Curr. L. 213.

18. Harris v. Matthews [Tex. Civ. App.] 81 S. W. 1198.

19. Flat building. One flat was occupied as the family residence. This under Civ. Code, § 1237, providing that the homestead should consist of "the dwelling house in which the claimant resides, and the land on which the same is situated." In re Levy's Estate, 141 Cal. 646, 75 P. 301. House constructed with two separate living apartments, one of which was rented. Adams v. Adams [Mo.] 82 S. W. 66. A building being an entirety, homestead occupancy sufficient to exempt any part of it exempts the whole. Billings v. Matlage [Tex. Civ. App.] 82 S. W. 805.

NOTE. Effect of renting portion of building: The renting of rooms does not destroy the homestead right of exemption even as to the portion so rented. Goldman v. Clark, 1 Nev. 608; Mercier v. Chace, 93 Mass. 194. Thus the right of homestead may exist in the whole of a hotel. Lazell v. Lazell, 90 Mass. 575; Ackley v. Chamberlain, 18 Cal. 183. But it has been held that property being primarily and principally used for hotel purposes it cannot be made subject to a homestead exemption. Laughlin v. Wright, 63 Cal. 116. Nor is the homestead character of the premises destroyed by the fact that the building is partially used for business purposes. In re Tertelling, 2 Dill. 339; Hogan v. Manners, 23 Kan. 559, 33 Am. Rep. 199; Orr v. Siuaft, 22 Mich. 264; Rush v. Gordon, 38 Kan. 535. See the hotel cases, supra.

Double houses: As a general rule, the rented portion of a double house cannot be claimed as exempt. It has been so held under a statute defining a homestead to be the dwelling-house in which the claimant resides and the land on which the same is situated (Tiernan v. His Creditors, 62 Cal. 289), also under provisions exempting premises "owned and occupied" by the claimant (Dyson v. Sheley, 11 Mich. 528).—From note to Cass County Bank v. Weber [Iowa] 12 L. R. A. 477.

20. Front windows and a portion of the room on the lower floor. Edmonds v. Davis, 122 Iowa, 561, 98 N. W. 375. See supra, note on effect of renting premises.

21. See 2 Curr. L. 212.

22. In a contest between the widow and the heirs at law as to the extent of her homestead in suburban lands, she is entitled to a homestead, not exceeding 160 acres in area, and $2,000 in value. Tyson v. Tyson [Neb.] 98 N. W. 1076. See 2 Curr. L. 212, n. 79.

23. The land being within the corporate limits of a city, the establishment of golf links upon the same is not a rural use of the land. Harris v. Matthews [Tex. Civ. App.] 81 S. W. 1198.

24. Control by the city is an important element. Harris v. Matthews [Tex. Civ. App.] 81 S. W. 1198. The absence of police in the neighborhood does not render property rural in character. Id.

25. It is not necessary that it should have been originally surveyed or platted by the city. Harris v. Matthews [Tex. Civ. App.] 81 S. W. 1198.

dimensions or shape of lots in the platted portion of the city.[26] A rural homestead may consist of contiguous parts of different governmental subdivisions,[27] and in Texas of one or more noncontiguous parcels of land.[28] If noncontiguous tracts are used as a whole and in connection, the homestead exemption may be selected and claimed from any portion.[29]

As dependent on whether land is realty or personalty.[30]—In Georgia the statute providing for what is known as "the short homestead" does not allow the exemption of cash or the investment of cash for the use of a family.[31]

Amount exempt.[32]—In some states the homestead right is measured by the value of the property,[33] and one's interest not exceeding this amount the homestead embraces his entire title and interest.[34] One's dwelling house being exempt without regard to value, the fact that it comprises the larger part of one's estate does not impair the homestead right.[35] In some states and in certain cases one's homestead exemption depreciating in value, it may be brought up to the full amount allowed.[36]

§ 4. *Claiming, selecting, and setting apart of homesteads.*[37]—It is a general rule subject to statutory exceptions[38] that an unexecuted intention to occupy land as a homestead does not create a homestead right therein.[39] One may, however, for a reasonable time, claim a vacant lot as a homestead, he having the intention and apparent means to improve and occupy the same.[40] A party cannot have two

26. Harris v. Matthews [Tex. Civ. App.] 81 S. W. 1198.

27. Tindall v. Peterson [Neb.] 98 N. W. 688.

28. Where one claimed two noncontiguous parcels of land as a homestead, and sold the one on which he lived, buying a parcel contiguous to the other piece and erected a dwelling house thereon, held the unsold original tract was a homestead. Heidelbach, Friedlander & Co. v. Carter [Tex. Civ. App.] 79 S. W. 346.

29. That farm was divided by stream held not to destroy the right to claim a homestead in any portion. Meyer Bros. Drug Co. v. Bybee, 179 Mo. 354, 78 S. W. 579.

30. See 2 Curr. L. 212, n. 78.

31. Civil Code 1895, § 2867. Rosser v. Florence, 119 Ga. 250, 45 S. E. 975.

32. See 2 Curr. L. 213.

33. Evidence examined and held sufficient to support a finding that lots other than the one levied on were of sufficient value to exhaust plaintiff's exemption. Harris v. Matthews [Tex. Civ. App.] 81 S. W. 1198.

34. Householder's estate under homestead act of 1873. Roberson v. Tippie, 209 Ill. 38, 70 N. E. 584.

35. In re Levy's Estate, 141 Cal. 646, 75 P. 301.

36. In Georgia a bankrupt being allowed his statutory exemption prior to his bankruptcy but in property which is of little value at the date of bankruptcy, the bankruptcy court may supplement the same up to the full value of that allowed by statute. [Code, § 2865]. In re Reinhart, 129 F. 510.

NOTE. Revaluation or reassignment of homestead: The right to a reassignment of a homestead for a change in value can only arise under statutes limiting homesteads to a certain value and depends largely upon the language of the particular statute in question. The prevailing rule seems to be that an increase in value of a homestead will authorize a revaluation and reassignment. Stubblefield v. Graves, 50 Ill. 103; Mooney v. Moriarty, 36 Ill. App. 175; Estate of Delaney, 37 Cal. 176; Helfenstein v. Cave, 3 Iowa, 287; Beckner v. Rule, 91 Mo. 62; Beecher v. Baldy, 7 Mich. 488. In the following cases the reassignment has been refused: Vanstory v. Thorton, 110 N. C. 10; Hardy v. Lane, 6 Lea [Tenn.] 380; Baylor v. San Antonio Nat. Bank, 38 Tex. 448. While in Gowdy v. Johnson [Ky.] 44 L. R. A. 400, the court took a middle ground holding that an increase in value would not authorize a revaluation and reassignment, at least when there has been no rapid or extraordinary increase of value, or any unreasonable outlay on the premises.

A homestead being set out of a decedent's estate, that it afterward increases in value is not ground for a new assignment. Kenley v. Bryan, 110 Ill. 652.—From note to Gowdy v. Johnson [Ky.] 44 L. R. A. 400.

37. See 2 Curr. L. 222.

38. Occupancy is not essential under Acts 1879, p. 213, c. 171. Walt v. Walt [Tenn.] 81 S. W. 228.

39. White v. Danforth, 122 Iowa, 403, 98 N. W. 136; Ware v. Hall [Mich.] 101 N. W. 47; Higgins v. Higgins, 25 Ky. L. R. 919, 78 S. W. 1124. In such case the widow has no homestead right in the property [Ky. St. 1903, §§ 1702, 1707]. Id. Unimproved land obtained in exchange for land on which the owner had not resided for five years held not a homestead though owner intended to build as soon as able. Zollinger v. Dunnaway [Mo. App.] 78 S. W. 666.

40. Ware v. Hall [Mich.] 101 N. W. 47. One utterly insolvent, without any ability to earn money sufficient to support herself, and without any prospect of getting money to erect a building thereon, cannot hold land for three years and a half and then claim it as a homestead. Id.

rights of homestead at the same time,[41] nor will he be allowed to use the right to perpetrate a fraud.[42]

Where an assignment or allotment of homestead is necessary,[43] it must be set out in the manner prescribed by law.[44]

In some states in order to claim property as a homestead, a declaration to that effect must be filed[45] before the death of either spouse,[46] and it must, generally, contain a description of the premises claimed, and a statement that the person making it is residing on the premises described,[47] and is the head of a family.[48] It is sufficient, however, if it contain a statement of probative facts from which the ultimate fact may be judicially inferred.[49] In California a husband cannot select a homestead from the wife's separate property without her joining in the declaration of homestead.[50] The use of the property at the time of the filing of the declaration determines whether or not it is a homestead.[51] In Georgia a petition must be filed describing the property out of which the exemption is claimed,[52] and containing a list of all the property owned by the applicant,[53] and being made by a married woman must affirmatively show that the husband refused to make the application.[54]

An order of a court of competent jurisdiction[55] is essential to a judicial selection. That a court has jurisdiction to set out a homestead does not give it jurisdiction to try title to the property.[56] Neither the entry[57] nor recordation[58] of the order is essential to its validity unless so declared. The award is, in some states, to a certain degree discretionary,[59] and the determination of the court can-

41. Powars v. Palmer [Tex. Civ. App.] 81 S. W. 817. Widow by remarrying held to abandon right to homestead in first husband's property. Kloss v. Wylezalek, 207 Ill. 328, 69 N. E. 863; Stickley v. Widle, 122 Iowa, 400, 98 N. W. 135.

42. Where levy was made on debtor's farm, and he moved on it claiming it as a homestead and the levy was released, and a levy made on his town property which he had just vacated, whereupon he sold the farm and moved back to his town property, held sale of the latter would not be enjoined. Brantley v. Batson [Miss.] 36 So. 524.

43. It is not necessary where the widow has already a legal homestead. In re Firth's Estate [Cal.] 78 P. 643. See 2 Curr. L. 221, n. 62.

44. A widow's homestead, in a part of a tract of land, not being set out, the sheriff cannot sell a specific portion of the tract as such homestead. Simpson v. Scroggins [Mo.] 81 S. W. 1129.

45. If not it descends subject to the claims of creditors. Lloyd v. Lloyd, 34 Wash. 84, 74 P. 1061.

46. Ballinger's Ann. Codes & St. § 5246. Lloyd v. Lloyd, 34 Wash. 84, 74 P. 1061.

47. Civ. Code § 1263. A declaration that by mistake does not properly describe the land is of no protection. Harris v. Duarte, 141 Cal. 497, 75 P. 58.

48. Rev. St. 1887, § 3071. Mellen v. McMannis [Idaho] 75 P. 98.

49. That he is the head of a family. Mellen v. McMannis [Idaho] 75 P. 98.

50. Civ. Code, § 1239. Arkle v. Beedie, 141 Cal. 459, 74 P. 1033.

51. That it was previously used as a store and then for a hotel makes no difference. Lima v. County Bank, 142 Cal. 245, 75 P. 846.

52. Blackstone v. Kritzer, 120 Ga. 78, 47 S. E. 585. The approval of the schedule does not operate to set aside as exempt, property described therein, but omitted from that part of the petition stating out of what property the exemption is claimed. Id.

53. Whether the applicant owns more or less in value than $1,600, and whether all or only a part of his estate is to be exempt, the schedule must contain a list of all the property owned by him. Blackstone v. Kritzer, 120 Ga. 78, 47 S. E. 585.

54. Application was for homestead out of husband's property. Construing Civ. Code § 2866. Homestead recorded under application not showing such fact is void. Batson v. Benford, 119 Ga. 256, 46 S. E. 93. Order of court authorizing sale of such property as a homestead is inadmissible in evidence as a muniment of title. Id.

55. A court having general jurisdiction in matters of probate and the settlement of estates, it has jurisdiction to set aside a homestead. County court has such jurisdiction. Tyson v. Tyson [Neb.] 98 N. W. 1076. In order to oust the county court of such jurisdiction, the right of the widow must be disputed by presenting an issue of fact, which, if established by proof, would defeat her claim, and such issue must be one which the county court, by its organization, is unable to try. Id.

56. James v. James [Ark.] 80 S. W. 148.

57. Mortgage given by widow who took the absolute title, held valid, being made subsequent to the homestead order but prior to its entry. Otto v. Long [Cal.] 77 P. 885.

58. Code Civ. Proc. § 1465 does not require its recordation. Otto v. Long [Cal.] 77 P. 885.

59. The court cannot be held to have abused its discretion though the homestead awarded is much less in value than the wife's

not be inquired into collaterally.[60] Courts generally have the power to vacate or modify an order setting apart a homestead,[61] but the right to petition the court to so do may be lost by laches.[62] In some states the order is reviewable on appeal,[63] and in others it is not.[64]

After the proceedings have been recorded they become the private papers of those interested in the homestead estate,[65] and as such may, if lost, be judicially established.[66]

Failure to claim exemption.[67]—It has been held that the owner of an equitable interest not designating his homestead therein, the latter may be set apart for his benefit by an officer selling his interest on execution.[68]

A homestead claim being disputed within the statutory time, lack of diligence cannot be imputed to the contestant.[69] An issue, in a homestead contest, is sufficient if broad enough to admit any competent evidence tending to show whether or not the property is exempt.[70] There being a dispute as to whether or not a homestead is rural or urban, one's claim to the homestead should be broad enough to include both.[71]

§ 5. *Liabilities superior or inferior to homestead.*[72]—The homestead exemption is to be determined by the laws in force when the debt was contracted.[73] In no state is the homestead exemption absolute, antecedent debts being generally superior to the right,[74] though this is not universally true.[75] Debts contracted subsequent to the acquisition of the homestead are not a lien thereon,[76] even in the hands of a grantee of the homestead claimant,[77] unless incurred for an improvement of the homestead[78] or charged thereon.[79] In Minnesota the homestead is

interest would have been under the dower law. In re Firth's Estate [Cal.] 78 P. 643.

60. Otto v. Long [Cal.] 77 P. 885. The pleadings laying no foundation for a direct attack, the existence of a homestead in the lifetime of a husband is immaterial. Id.

61. Under Code Civ. Proc. § 473, the superior court has such power. Cahill v. Superior Court of San Francisco [Cal.] 78 P. 467. Where order was unjust and neglect excusable, held, it would be set aside [Code Civ. Proc. § 473]. Levy v. Superior Court of San Francisco, 139 Cal. 590, 73 P. 417.

62. Not lost by taking an appeal from the order. Cahill v. Superior Court of San Francisco [Cal.] 78 P. 467.

63. In Georgia an appeal from an order setting apart a homestead is allowable only on the grounds provided in Civ. Code 1895, § 2836. Other objections being specified the judgment is reviewable by certiorari. Fontano v. Mozley & Co. [Ga.] 48 S. E. 707.

64. See Cahill v. Superior Court of San Francisco [Cal.] 78 P. 467.

65, 66. Superior court cannot establish copies of a lost schedule and plat of a homestead proceeding which has never been recorded. Paschal v. Hutchinson, 119 Ga. 243, 46 S. E. 103.

67. See 2 Curr. L. 218.

68. Cook v. Northwestern Thresher Co., 91 Minn. 482, 98 N. W. 463.

69. Emrich v. Gilbert Mfg. Co., 138 Ala. 316, 35 So. 322.

70. Under Code 1896, § 2052, such issues are framed under the direction of the court. Emrich v. Gilbert Mfg. Co., 138 Ala. 316, 35 So. 322.

71. Harris v. Matthews [Tex. Civ. App.] 81 S. W. 1198.

72. See 2 Curr. L. 214.

73. Ex parte Goldsmith [S. C.] 47 S. E. 984.

74. A husband cannot claim a homestead, in land devised to him by his wife as against a debt of the testatrix. Dearing v. Moran, 25 Ky. L. R. 1545, 78 S. W. 217. Homestead held subject to the sale of a mortgage subject to the lien of certain judgments. Fidelity Loan & Investment Ass'n v. Lash, 135 N. C. 405, 47 S. E. 479. See 2 Curr. L. 214, n. 92.

75. Laws 1897, p. 131, c. 101, exempting proceeds of voluntary sale of homestead applies to a homestead acquired after the contraction of a debt to the payment of which it is sought to subject the proceeds. Lewis v. Goldthwaite Nat. Bank [Tex. Civ. App.] 81 S. W. 797. See 2 Curr. L. 214, n. 90, 91.

76. A homestead is not the subject of fraudulent alienation. National Bank of Commerce v. Chamberlain [Neb.] 100 N. W. 943; Heidelbach, Friedlander & Co. v. Carter [Tex. Civ. App.] 79 S. W. 346. See 2 Curr. L. 215, n. 9. Mortgage must contain waiver of homestead exemption. Steger v. Traveling Men's Bldg. & Loan Ass'n, 208 Ill. 236, 70 N. E. 236. See 2 Curr. L. 214, n. 93, 94.

77. Homestead property being sold it is not subject to the lien of a judgment obtained against the grantor prior to the sale. Genell v. Hirons [Ohio] 71 N. E. 709.

78. Loan by building association, which the association retained and paid directly to contractors and subcontractors held not such a debt. Steger v. Traveling Men's Bldg. & Loan Ass'n, 208 Ill. 236, 70 N. E. 236. Painting of house is not an improvement rendering the homestead liable for the payment thereof. Weber v. Gardner [Ky.] 80 S. W. 481. Erecting a small shed

subject to sale on execution for the payment of any debt incurred to any laborer or servant for labor or services.[80] Purchase money indebtedness is superior to the homestead exemption.[81] That the homestead is only partially paid for does not change the situation as to debts created after the last payment.[82] The homestead exemption is superior to the rights of a bona fide purchaser, as such.[83] The order of the court setting apart the homestead cannot impair the validity of any lien on the property,[84] but it may render the homestead exempt from all claims not filed in such proceedings.[85]

The state as a creditor is, unless the statute clearly intends otherwise, superior to the exemption.[86] The homestead is generally subject to a lien for taxes[87] and special assessments;[88] this includes interest, and the cost of assessment and collection,[89] but not penalties,[90] nor is it liable for taxes due on other property of the owner.[91] It is exempt, however, from the payment of fines imposed for the violation of federal statutes.[92]

Limitations do not run against a creditor as to a homestead until it has ceased to be a homestead.[93]

Occupancy of land as a homestead by one entitled to occupy it does not add to his antecedent interest therein.[94]

on premises, the person building it having the right of removal at any time, not an improvement rendering the property liable for the cost thereof. Id. A contract by a husband to purchase fruit trees to be paid for by their produce, the contract to constitute a lien on the homestead until paid, is not a contract for improvements, so as to create a lien superior to the rights of the wife. At the time of this contract the husband had the right to incumber the homestead without the consent of the wife. Stark v. Anderson [Mo. App.] 78 S. W. 340.

79. Is not liable for the debts of the head of the family other than charged thereon by him. Burroughs v. Howell County [Mo.] 79 S. W. 682.

80. Constitution art. 1, § 12. Such liability extends to a debt incurred by a copartnership, of which the debtor is a member, for such labor or services. Lindberg v. Peterson [Minn.] 101 N. W. 74.

81. Torbitt v. Jackson [Ky.] 80 S. W. 1123; Wilhelm v. Locklar [Fla.] 35 So. 6. Loaning money to pay purchase money mortgage on homestead, and taking a note with indorsers thereon to whom lender looks for security held not an obligation contracted for the purchase of a homestead. Id.

NOTE: Lien of third party loaning purchase price: As to whether or not one loaning money to purchase a homestead, or to complete payments thereon is entitled to be subrogated to the rights of the grantor of the property, and to enforce the lien against the homestead is a question upon which there is an irreconcilable conflict of opinion. The weight of authority sustains what seems to be the more equitable rule that such third party is entitled to all the rights of the first mortgagee or the vendor. Van Sandt v. Alvis, 109 Cal. 165, 41 P. 1014, 50 Am. St. Rep. 25; Middlebrooks v. Warren, 59 Ga. 230; Beal v. Harrington, 116 Ill. 113, 4 N. E. 664; Nichols v. Overacker, 16 Kan. 54; Coleman v. Parrott, 17 Ky. L. R. 814, 32 S. W. 679; Washmund v. Merritt, 60 Tex. 24; Lennox v. Sanders [Tex. Civ. App.] 54 S. W. 1076. There is however abundant authority sustaining the opposite rule. Parrott v. Kumpf, 102 Ill. 423; Lear v. Heffner, 28 La. Ann. 829; Skaggs v. Nelson, 25 Miss. 88; Brodie v. Batchelor, 75 N. C. 51; Stansell v. Roberts, 13 Ohio, 149, 42 Am. Dec. 193; Notte's Appeal, 45 Pa. 361; Amick v. Amick, 59 S. C. 70, 37 S. E. 39; Loftis v. Loftis, 94 Tenn. 232, 28 S. W. 1091; Carey v. Boyle, 53 Wis. 574, 11 N. W. 47.—From note to Brown v. Ennis [Ark.] 86 Am. St. Rep. 171, 180.

82. Torbitt v. Jackson [Ky.] 80 S. W. 1123.

83. A bona fide purchaser of notes secured by a lien on a homestead is in no better position as regards such lien, than the payees thereof. Peaslee v. Walker [Tex. Civ. App.] 78 S. W. 980.

84. King v. Summerville [Tex. Civ. App.] 80 S. W. 1050.

85. Claim of grantee in a deed of trust of the land so set aside. Tiboldi v. Palms [Tex. Civ. App.] 78 S. W. 726.

86. Field's Heirs v. Napier [Ky.] 80 S. W. 1110.

87. City of Marlin v. Green [Tex. Civ. App.] 78 S. W. 704.

88. Assessment for street improvement. Kettle v. Dallas [Tex. Civ. App.] 80 S. W. 874.

89. Including costs of suit. City of Marlin v. Green [Tex. Civ. App.] 78 S. W. 704.

90. Considering the penalty imposed by Laws 1897, p. 132, c. 102. City of Marlin v. Green [Tex. Civ. App.] 78 S. W. 704.

91. City of Marlin v. Green [Tex. Civ. App.] 78 S. W. 704.

92. An execution on a judgment for a fine in favor of the United States cannot be levied on defendant's homestead in Virginia, although under the state laws such homestead is only exempt from contract debts. Considering U. S. Rev. St. §§ 1041, 1042. Allen v. Clark [C. C. A.] 126 F. 738.

93. Anderson v. Baughman [S. C.] 48 S. E. 38.

94. One joint tenant occupying land as a homestead does not affect the right of his joint owner to convey his title to the land. Ennis v. Loveman, 138 Ala. 465, 35 So. 414.

Judicial and execution sales.—The homestead is subject to sale on execution for debts superior to the exemption,[95] but a sale for debt inferior thereto is generally held to be absolutely void,[96] though the purchaser has been held to take the title in fee subject to the homestead right,[97] and to any excess over the amount of the statutory exemption.[98] An execution purchaser redeeming property subject to a mortgaged homestead right, acquires no right against the homesteader to contribution to the mortgage indebtedness, or to subrogation to the benefits of the foreclosure.[1] The right to take advantage of the void sale may be lost by laches.[2] Statutory provisions should be strictly followed.[3] In a suit to sell the homestead of a deceased person, his administrator and heirs should be made parties.[4] The homestead being subject to judicial sale a sale in gross is not improper where it does not exceed the amount of the statutory exemption.[5] Cases in which application for a sale of the homestead may be made,[6] and the determination of a stay of the sale,[7] are governed largely by the facts of the case and statutory provisions.

§ 6. *Alienation and incumbrance.*[8]—A homestead is not the subject of fraudulent alienation.[9] A married woman dealing with her homestead is not exempt from the ordinary rules as to mistake.[10] In Texas the homestead cannot be encumbered except for the purchase money.[11]

Property being devised to husband and wife in trust for their children, and they occupying it as a homestead, the widow remarrying after the death of her first husband, her second husband has no homestead interest in the property. Rivers v. Morris [Ky.] 78 S. W. 196. A wife claiming a homestead under her husband's contract for the purchase of land, has no greater rights to such land as a homestead than her husband would have had under such contract. Helgebye v. Dammen [N. D.] 100 N. W. 245.

95. For debts contracted prior to its acquisition. Edinger v. Bain [Iowa] 98 N. W. 568.

96. Johnson v. Twichell [N. D.] 101 N. W. 318. The officer making such sale is not liable to the owner in an action for damages, except, perhaps, for costs incurred in removing the apparent cloud upon the title. Id. Where homestead was sold on execution and reconveyed to wife, held her deed signed by husband as agent, could prevent latter from enjoining interference with homestead estate. American Freehold Land Mortg. Co. v. Walker, 119 Ga. 341, 46 S. E. 426.

97. Upon the extinguishment of such right by death or otherwise, the fee vests absolutely in him. Strong v. Peters [Ill.] 72 N. E. 369.

98. In the absence of proceedings to set aside the homestead right under Hurd's Rev. St. 1901, p. 868, c. 52, §§ 10, 11. Butler v. Brown, 205 Ill. 606, 69 N. E. 44.

1. Butler v. Brown, 205 Ill. 606, 69 N. E. 44. Nor can he enforce his claim against the homestead by paying the homesteaders the value thereof, or having the same set off to them by a bill praying for contribution or subrogation. Id.

2. A homestead being sold under a void sale and the proceeds used in acquiring other property in another county in the wife's name, which was in turn sold by her, the purchaser taking without notice of the husband's homestead rights, held the children could not, eleven years thereafter, claim the homestead property either as beneficiaries thereof or as heirs of the father. Batson v. Benford, 119 Ga. 256, 46 S. E. 93.

3. Lewis v. Mauerman, 35 Wash. 156, 76 P. 737.

4. Fidelity Loan & Investment Ass'n v. Lash, 135 N. C. 405, 47 S. E. 479.

5. Edinger v. Bain [Iowa] 101 N. W. 119.

6. All the parties interested being in court held proper in proceedings by a mortgagee to move for a sale of a homestead under the judgment lien, the judgment debtor and owner of the homestead being dead. Fidelity Loan & Investment Ass'n v. Lash, 135 N. C. 405, 47 S. E. 479.

7. Rev. St. 1895, art. 2996, providing that the determination of injunctions to stay proceedings under execution shall be in the court where the original suit was brought, held not to apply to a suit to enjoin an execution sale of real estate, as constituting the debtor's homestead. Cooper Grocery Co. v. Peter [Tex. Civ. App.] 80 S. W. 108.

8. See 2 Curr. L. 215.

9. National Bank of Commerce v. Chamberlain [Neb.] 100 N. W. 943; Heidelbach, Friedlander & Co. v. Carter [Tex. Civ. App.] 79 S. W. 346. Where the equity of redemption in a mortgaged homestead is worth less than the statutory amount, and the mortgagor conveys this to his son, the mortgagor's administrator, as representative of his creditors, has no right to obtain the homestead on payment of the amount of the mortgage and the value of the equity. Palmer v. Bray [Mich.] 98 N. W. 849. See 2 Curr. L. 215, n. 9.

10. That she believed deed to be a mortgage does not warrant its cancellation, the grantee having no knowledge of her mistaken belief. Wilson v. Lewis [Tex. Civ. App.] 81 S. W. 834.

11. Under Const. art. 16, § 50, execution of vendor's lien notes on homestead creates no lien thereon. Peaslee v. Walker [Tex. Civ. App.] 78 S. W. 980. A mortgage on the homestead is void though given by the husband and wife at a time when they had formed the intention of abandoning the homestead. Delaney v. Walker [Tex. Civ. App.] 79 S. W. 601.

Necessity of consent of wife to conveyance or joinder therein.[12]—It is an almost universal rule that the wife must join[13] in a deed or incumbrance[14] of the homestead, though in a few states her signature is unnecessary.[15] Her signature being required, her failure to join in the instrument renders the same absolutely void,[16] and hence it is not subject to ratification,[17] nor can she by waiver affect the rights of third parties.[18] The deed being to the wife direct there is a conflict as to the necessity of her joining therein.[19] It is generally held that a lease of homestead lands when not interfering with their use and occupancy as such may be made by the husband alone.[20] Mortgaged separate property of the wife being subsequently declared a homestead, the husband must be made a party in a suit to foreclose.[21] One may become estopped to deny that an incumbrance on a homestead is void for failure of his wife to consent thereto.[22] The wife not joining, the grantee may recover the money paid.[23] Failure of the wife to join in the conveyance must be specially pleaded to be available as a defense.[24] The burden is on those claiming under the deed to show that the property exceeded the statutory exemption.[25]

12. See 2 Curr. L. 216.

13. Helgebye v. Dammen [N. D.] 100 N. W. 245; Mellen v. McMannis [Idaho] 75 P. 98; Monroe v. Price [Ky.] 80 S. W. 1184. Comp. St. 1903, c. 36, § 4. Teske v. Dittherner [Neb.] 98 N. W. 57 [see this case for discussion of the matter, pro and con]. Grantor remained in possession until his death. Hogue v. Steel, 207 Ill. 340, 69 N. E. 931. Where patent had been granted by the United States, and land had become a homestead under state laws. Collins v. Bounds [Miss.] 36 So. 689. Where real estate was occupied under contract to purchase. Attempt at relinquishment. Duffield v. Dosh [Iowa] 99 N. W. 1074. See 2 Curr. L. 216, n. 20.

Construction of mortgage as to whether wife joined therein: The mortgage being signed by both, the fact that the pronouns "I" and "my" were used in the body of the instrument does not affect the sufficiency of the mortgage to cover the grantor's homestead. Bray v. Ellison [Ky.] 83 S. W. 96.

14. A contract to convey, though reserving the use and occupancy of the homestead until the death of the parties or until abandonment is an incumbrance on the title. Considering Comp. St. 1903, c. 36, § 4. Teske v. Dittberner [Neb.] 98 N. W. 57. The wife not joining in such agreement it cannot be specifically enforced as to the land embraced in the homestead even though substantial performance of the contract by the promisee may have taken place. Id.

15. In Kentucky under St. 1903, § 1706, a debtor can sell his homestead without his wife joining, but he cannot so mortgage it. Hanna's Assignees v. Gay, 25 Ky. L. R. 1794, 78 S. W. 915. Prior to 1895, if the wife had not filed a claim of homestead, the husband could incumber the same without her consent. Stark v. Anderson [Mo. App.] 78 S. W. 340. In foreclosure sale, under a mortgage in which the wife did not join, the land being sold subject to the mortgagor's homestead right, held the purchaser got no interest in the homestead no claim being made in the foreclosure suit that the mortgagor was only entitled to occupy the land during life as a homestead. Monroe v. Price [Ky.] 80 S. W. 1184.

16. Alvis v. Alvis, 123 Iowa, 546, 99 N. W. 166. Deed is void as to her homestead rights. Penn v. Case [Tex. Civ. App.] 81 S. W. 349. Deed cannot be construed as a quitclaim of the husband's interest [Comp. Laws, § 10,363]. Stern, Jr. & Bros. Co. v. Wing [Mich.] 97 N. W. 791. See 2 Curr. L. 216, n. 20; Id., 217, n. 35.

17. Construing Rev. St. 1860, § 2279; Code, § 2974. Alvis v. Alvis, 123 Iowa, 546, 99 N. W. 166. Where wife signed deed thirty years after its execution by husband, held not to amount to a conveyance by her. Id. See 2 Curr. L. 216, n. 21.

18. Failed to sign first mortgage, signed second, held could not, by waiving exemption, give first mortgagee priority over second [St. 1893, § 1706]. Mattingly's Adm'r v. Hazel, 25 Ky. L. R. 1483, 78 S. W. 178.

19. That she must. Roberson v. Tipple, 209 Ill. 38, 70 N. E. 584. Karsten v. Winkelman, 209 Ill. 547, 71 N. E. 45.

That she need not. Kindley v. Spraker [Ark.] 79 S. W. 766; Cizek v. Cizek [Neb.] 96 N. W. 657. The district court of Nebraska may quiet title to homestead in one spouse without concurrence of the other. Id.

20. Lease of turpentine privileges [Construing Code 1896, § 2034]. Millikin & Co. v. Carmichael, 139 Ala. 226, 35 So. 706. Consent of wife is sufficient. Johnson v. Samuelson [Kan.] 76 P. 867. Acquiescence is competent evidence of consent. Id.

21. Ludwig v. Murphy [Cal.] 77 P. 150.

22. Mortgage on homestead; mortgagor held estopped to deny validity of mortgage, wife being dead and sons having homesteads of their own, and the latter never having resided on property mortgaged. Pitman v. Mann [Neb.] 98 N. W. 821.

23. In an action for money had and received. Stern, Jr. & Bros. Co. v. Wing [Mich.] 97 N. W. 791. The money being deposited in the hands of a third person, the grantee is entitled to follow the fund, and on notice to the holder raise a constructive trust thereof in his, the grantee's, favor. Id.

24. Ejectment. Jasper County v. Sparham [Iowa] 101 N. W. 134.

25. Karsten v. Winkelman, 209 Ill. 547, 71 N. E. 45.

Acknowledgment of conveyance.[26]—The instrument must be acknowledged by both husband and wife,[27] which fact must appear in the certificate of the officer before whom the acknowledgment was taken,[28] and such officer should not be interested in the transaction.[29] In some states the wife's acknowledgment must be separate.[30] A wife not acknowledging the deed may maintain a suit to cancel the same.[31]

Contracts to convey.[32]—Generally a written[33] contract to sell the homestead is valid as against the husband though signed by him alone.[34] The wife cannot by ratifying such contract affect the rights of third parties.[35] A married woman having a separate interest in land occupied as a community homestead, joining with her husband in a contract for the sale of the homestead does not thereby affect her separate interest in the property.[36]

§ 7. *Loss or relinquishment.*[37]—The homestead exemption ceases with an abandonment of the property as a homestead.[38] There is a strong presumption against any such abandonment;[39] a discontinuance of the use, coupled with an intention to abandon the use of the property as a homestead being required,[40] the question in every case being one of fact.[41] An equivocal intention to return is not

26. See 2 Curr. L. 217.

27. Solt v. Anderson [Neb.] 99 N. W. 678; Mellen v. McMannis [Idaho] 75 P. 98; Helgebye v. Dammen [N. D.] 100 N. W. 245. Comp. St. 1903, c. 36, § 4. Teske v. Dittberner [Neb.] 98 N. W. 57. [See this case for discussion of the matter pro and con.]

28. Cannot be shown by parol. Solt v. Anderson [Neb.] 99 N. W. 678. But see 2 Curr. L. 218, n. 38.

29. Acknowledgment before stockholder and officer of corporation mortgagee held invalid. Jenkins v. Jonas Schwab Co., 138 Ala. 664, 35 So. 649. See, also, Acknowledgments, 3 Curr. L. 32.

30. Deed of trust to homestead held void, the certificate of acknowledgment being void [Code 1896, § 2034]. Shook v. Southern Bldg. & Loan Ass'n [Ala.] 37 So. 409. See 2 Curr. L. 218, n. 37.

31. Where she was the equitable owner of the land. Shook v. Southern Bldg. & Loan Ass'n [Ala.] 37 So. 409.

32. See 2 Curr. L. 218.

33. Oral contract, made by husband alone, held void. Stickley v. Widle, 122 Iowa, 400, 98 N. W. 135. Oral contract made by husband and wife held not binding. Alvis v. Alvis, 123 Iowa, 546, 99 N. W. 166.

34. Purchaser of machinery agreed to give mechanic's lien on homestead, held might be liable in damages. Wolf Co. v. Galbraith [Tex. Civ. App.] 80 S. W. 648. Homestead was community property. Held contract could be enforced either upon the abandonment of the homestead or on the death of the wife. Ley v. Hahn [Tex. Civ. App.] 81 S. W. 354. In such case, the deed executed under the contract being void by reason of the wife's incapacity, on her death the purchaser takes the husband's interest in the property and the life interest of the husband in the portion of the property owned by the wife in her separate right. Id. Where wife's consent was not essential, held to divest husband and privies of title. Hanna's Assignees v. Gay, 25 Ky. L. R. 1794, 78 S. W. 915.

35. Wife failing to ratify until after abandonment of homestead, her doing so will not prejudice the rights of creditors attaching the property subsequent to the abandonment and prior to her ratification. Stickley v. Widle, 122 Iowa, 400, 98 N. W. 135.

36. Ley v. Hahn [Tex. Civ. App.] 81 S. W. 354.

37. See 2 Curr. L. 218.

38. Genell v. Hirons [Ohio] 71 N. E. 709. See 2 Curr. L. 220, n. 56.

39. Walt v. Walt [Tenn.] 81 S. W. 228.

40. Powars v. Palmer [Tex. Civ. App.] 81 S. W. 817; National Bank of Commerce v. Chamberlain [Neb.] 100 N. W. 943. See 2 Curr. L. 219, n. 52.

41. Mathewson v. Kilburn [Mo.] 81 S. W. 1096.

Facts Constituting an Abandonment: Failure to fulfill terms of contract of purchase and abandonment of contract. Helgebye v. Dammen [N. D.] 100 N. W. 245.

Moving from premises: Renting premises. Anderson v. Baughman [S. C.] 48 S. E. 38. That one moved from land into another state, and sold all personal property, held to show an abandonment, though plaintiff claimed absence was temporary. Mathewson v. Kilburn [Mo.] 81 S. W. 1096. A wife voluntarily abandoning her homestead, she cannot thereafter claim it as a homestead although the ownership thereof is awarded to her absolutely by a decree in which she is granted a divorce. Helgebye v. Dammen [N. D.] 100 N. W. 245.

Selling homestead: McAndrew v. Hollingsworth [Ark.] 81 S. W. 610. Even though he again acquire title. Jasper County v. Sparham [Iowa] 101 N. W. 134. Moving from land and conveying same held abandonment though a purchase-money mortgage was taken thereon and a portion of the land was subsequently reconveyed to him. Ex parte Goldsmith [S. C.] 47 S. E. 984.

Business homestead: See 2 Curr. L. 220, n. 55. One carrying on his business indiscriminately in either of two places cannot claim a homestead in one of them unless at time of levy thereon he is using it. Gibbs v. Hartenstein [Tex. Civ. App.] 81 S. W. 59. Evidence as to use of building as a

sufficient to retain the homestead.[42] A statutory method of abandonment or waiver is generally exclusive,[43] and the homestead ordinarily cannot be waived by the head of a family,[44] though there being no minor children the wife may generally by agreement with her husband relinquish her interest therein.[45] One being in the actual possession of property and using the same as a homestead, no representations of himself or his wife will defeat the exemption,[46] but where the claimant is not in such actual possession representations amounting to fraud will estop him from setting up the claim as against parties acting on such representations in ignorance of the homestead claim.[47] An antenuptial contract by which the wife relinquishes all claim to the property of her husband does not preclude her, after their marriage, from filing a declaration of homestead on property of his.[48] The wife does not lose it by being abandoned.[49] It remains to her.[50]

§ 8. *Rights of surviving spouse, children, heirs, or dependents of homestead tenant.*[51]—The homestead rights of the husband[52] in most states survive to his

bakery held insufficient to render the property exempt. Id.

Facts not Constituting an Abandonment: One occupying land as a homestead under contract of purchase. Acceptance of lease from owner held not to work an abandonment. Duffield v. Dosh [Iowa] 99 N. W. 1074. Erection of small church on corner of homestead lot, owner using same in his vocation as preacher, the premises were not leased, held not to affect homestead right. Wilkins v. Fremaux, 112 La. 921, 36 So. 805. That one left homestead in care of his parents, whom he supported as part of his family, and temporarily resided in town, held not to show an abandonment. Meyer Bros. Drug Co. v. Bybee, 179 Mo. 354, 78 S. W. 579. Conveying the property but continuing to reside on homestead and operate it as a farm, held no abandonment. Alvis v. Alvis, 123 Iowa, 546, 99 N. W. 166.

Conditional sale: Where a widow agreed to sell her homestead if she had the legal right to do so, and executed a deed under such agreement, held not to constitute an abandonment of the homestead. Moore v. Moore [Ky.] 78 S. W. 141.

Involuntary detention: The detention of a widow in an insane asylum. Flynn v. Hancock [Tex. Civ. App.] 80 S. W. 245.

Renting premises: Renting a portion does not subject such portion to payment of debts. Bailey v. Dunlap Mercantile Co., 138 Ala. 415, 35 So. 451. Refusal to rent building for a longer term than by the month, and the retention of office room, etc., therein held to show an intention to retain one's business homestead. Cooper Grocery Co. v. Peter [Tex. Civ. App.] 80 S. W. 108. Where one left farm and rented it, but kept a few cattle on it, moved to town and lived and voted there, and at different times stated that he intended to abandon, and that he did not intend to abandon it as his homestead, he denying the former statement held, there being a house on the farm, that it could not be said as a matter of law that he had abandoned the same as his homestead. Zettlemoyer v. Mears [Tex. Civ. App.] 80 S. W. 1047.

Business homestead: Where one was unable to pursue his occupation with regularity because of ill health. Gibbs v. Hartenstein [Tex. Civ. App.] 81 S. W. 59. One renting building for a year, reserving a portion for his own use, and on renewing lease reserving the right to terminate it on sixty days' notice, he intending to resume his former mercantile business therein held not an abandonment. Billings v. Matlage [Tex. Civ. App.] 82 S. W. 805.

42. Widow remarrying and moving from homestead with intention of returning if she could not get along with her new husband, held abandonment. Kloss v. Wylezalek, 207 Ill. 328, 69 N. E. 863.

43. A declaration being essential, that the claimant conveyed his homestead is immaterial. Lewis v. Mauerman, 35 Wash. 156, 76 P. 737. Under Const. 1898, art. 246, a waiver must be in writing and recorded. Wilkins v. Fremaux, 112 La. 921, 36 So. 805.

44. Homestead not waived by a financial statement of husband wherein homestead was listed as an asset and not claimed as exempt. Meyer Bros. Drug Co. v. Bybee, 179 Mo. 354, 78 S. W. 579. In Georgia such power of waiver relates exclusively to the exemption provided by the constitution of 1877. In re Reinhart, 129 F. 510.

45. Merki v. Merki [Ill.] 72 N. E. 9.

46. Thompson Sav. Bank v. Gregory [Tex. Civ. App.] 82 S. W. 802. Declaration was in mortgage. There had been no designation of the homestead under the statute. Temple v. Walkins Land Co. [Tex. Civ. App.] 81 S. W. 1188.

47. Mortgagor living in Nebraska mortgaged farm in Texas, stating that it was occupied by farm help, held estopped to claim homestead in such farm. Thompson Sav. Bank v. Gregory [Tex. Civ. App.] 82 S. W. 802.

48. Warner v. Warner [Cal.] 78 P. 24. The only effect of her declaring a homestead thereon is to exempt it from execution sale, and to restrain him from alienating the property without her consent. Id. She has no right of survivorship in the property, but on his death it will vest in his heirs, discharged of all claim or interest on her part by virtue of such declaration. Id.

49, 50. National Bank of Commerce v. Chamberlain [Neb.] 100 N. W. 943.

51. See 2 Curr. L. 220.

52. Generally a widow has no homestead rights in property of which her husband died seized but which he never occupied as a homestead [Ky. St. 1903, §§ 1702, 1707]. Harris v. Howard [Ky.] 81 S. W. 275.

widow and children.[53] The rights of the latter in the same are almost wholly statutory.[54] It does not survive to her who has remarried supposing the husband dead.[55] The homestead exceeding the statutory exemption in value and being practically indivisible, the widow and heirs only take, as a homestead, an equitable interest therein to the value of the statutory exemption,[56] and in such case the court may order the sale of the entire property, setting aside from the proceeds the amount of the statutory exemption,[57] and the widow being entitled to a life estate, such money should be invested and the income paid her during her life, and at her death the principal should descend as in the case of other exemptions.[58] The fee vesting in the husband's heirs, the widow has no claim on the homestead for money which she invested therein during the husband's life.[59]

A widow electing in favor of a distributive share, the homestead right is extinguished,[60] except as to minor children.[61] That a widower elects to take a home-

53. Cross v. Benson [Kan.] 75 P. 558; Burroughs v. Howell County [Mo.] 79 S. W. 682.

54. Arkansas: Under Const. 1874, art. 9, § 6, after death of widow and the minority of the children, or, there being no minor children, after the abandonment of the homestead, the latter becomes an asset in the husband's estate. McAndrew v. Hollingsworth [Ark.] 81 S. W. 610.

California: Under Code Civ. Proc. § 1468, community property being set apart to widow as probate homestead, on death of husband leaving no minor child, the widow takes the absolute title. Otto v. Long [Cal.] 77 P. 885.

Florida: The Constitution of 1885 provides that the homestead shall inure to the widow and heirs and compels intestacy so far as the homestead is concerned. Palmer v. Palmer [Fla.] 35 So. 983.

Illinois: On the death of the householder the homestead by operation of law devolves upon the surviving spouse for life, and upon the children during the minority of the youngest, and the heirs at law take only a reversionary interest, expectant upon the termination of the estate for life and for years created by the statute. Roberson v. Tippie, 209 Ill. 38, 70 N. E. 584. There being children living the widow does not take a fee to the property. Hogue v. Steel, 207 Ill. 340, 69 N. E. 931. The abandonment of the homestead by the mother on the death of the father deprives the minor children of their homestead rights. Kloss v. Wylezalek, 207 Ill. 328, 69 N. E. 863.

Kansas: The title to a homestead does not descend to its occupants to the exclusion of children residing elsewhere. Mitchell v. Mitchell [Kan.] 77 P. 98. To make a devise of a homestead subject to the payment of the testator's debts, the language employed must be unequivocal and imperative. Cross v. Benson [Kan.] 75 P. 558.

Mississippi: [See 2 Curr. L. 220, n. 57.] Under Code 1892, §§ 1551-1553, and Acts 1900, p. 129, c. 89, children of decedent cannot compel the latter's widow to partition or account for use of exempt property, including homestead, so long as it is occupied or used by her. Martin v. Martin [Miss.] 36 So. 523.

Missouri: [See 2 Curr. L. 220, n. 57.] A homestead passing to the widow and minor children, the children's interest continues only until their majority. But the widow cannot deprive them of this interest [construing Gen. St. 1865, p. 449, c. 111]. Simpson v. Scroggins [Mo.] 81 S. W. 1129. The rights of minors in a homestead of their deceased father begin before the homestead is set off, there being only sixty-three acres of the land in question, and only one-half of that being claimed as homestead. Gorman v. Hale [Mo. App.] 82 S. W. 1110.

Nebraska: [See 2 Curr. L. 220, n. 57.] An administrator has neither title to, nor right of possession of the homestead. License purporting to authorize administrator's sale held void. Tindall v. Peterson [Neb.] 98 N. W. 688.

Ohio: Where a widow and heirs join in a sale of the homestead to pay off a mortgage and other indebtedness, held the widow was entitled to receive from the fund her dower interest and the statutory $500 in lieu of the homestead. Bretz v. Moore, 4 Ohio C. C. (N. S.) 556.

55. In re Harrington's Estate, 140 Cal. 244, 73 P. 1000.

56. Wardell v. Wardell [Neb.] 99 N. W. 674.

57. Wardell v. Wardell [Neb.] 99 N. W. 674; Hawpe v. Bumgardner [Va.] 48 S. E. 554.

58. Wardell v. Wardell [Neb.] 99 N. W. 674.

59. She may have a claim against her husband's estate. Roberson v. Tippie, 209 Ill. 38, 70 N. E. 584.

60. Edinger v. Bain [Iowa] 98 N. W. 568.

What constitutes an election: See Election and Waiver, 3 Curr. L. 1177. Exclusive occupancy by widow for seventeen years, held election not to take distributive share. Huit v. Huit, 122 Iowa, 338, 98 N. W. 123. A widow does not, by qualifying as executrix of her deceased husband, waive her right to a homestead. In re Firth's Estate [Cal.] 78 P. 643. Widow, as executrix, obtaining order for sale of homestead and retaining one-third of proceeds, held to elect to take a distributive share. Edinger v. Bain [Iowa] 98 N. W. 568. The fact that the widow is insane and confined in an asylum does not have any bearing upon the question as to whether she took a homestead or dower interest in the property. Higgins v. Higgins, 25 Ky. L. R. 919, 78 S. W. 1124. A widow continuing to occupy the homestead may elect to take title under her husband's will without subjecting it to the payment of her husband's debts. Cross v. Benson [Kan.] 75 P. 558.

stead right in the land does not prevent his taking an interest in the property as heir of his wife.[62]

Rights of divorced parties.[63]—In most states a decree of divorce being silent as to the homestead it remains in the possession of the party holding the record title, discharged of all homestead rights and claims of the other party.[64] After decree of divorce the husband has no right of possession in the wife's separate property merely because such property was occupied as a homestead while the marriage relation subsisted.[65] On divorce, the homestead being community property, and the custody of minor children being awarded to the wife, the husband's homestead rights revive on her death.[66]

Claim to reimbursement for expenditures.—A life tenant in a homestead, who, in order to preserve the estate, has paid off and discharged an incumbrance upon the fee, is entitled to reimbursement from the reversioners or remaindermen.[67]

§ 9. *Exemption of proceeds of homestead or of substituted properties.*[68]—A debtor may sell his homestead, and reinvest the money in another, and the latter will not be subject to general debts to which the former was not,[69] though in some states it is subject to debts contracted in the interim.[70] In some states the exemption follows the fund.[71] A waiver of homestead being good against the land, it is good against the proceeds thereof.[72] While statutes generally permit the acquirement of a new homestead in the place and stead of the old one, still that acquired must be such as the law authorizes when the change is made.[73]

61. Under Ky. St. 1903, § 1707, where the widow elects to take dower in lieu of homestead, the infant children's right to a homestead attaches to the land set apart for dower. Hanna's Assignees v. Gay, 25 Ky. L. R. 1794, 78 S. W. 915.

62. Hays v. Marsh, 123 Iowa, 81, 98 N. W. 604.

63. See 2 Curr. L. 220, n. 58.

64. Considering Hurd's Rev. St. 1901, c. 52, § 5. Barkman v. Barkman, 209 Ill. 269, 70 N. E. 652.

NOTE. Effect of divorce on homestead rights: A husband liable for the support of his children does not lose his homestead rights in his land by reason of a divorce. Redfern v. Renfern, 38 Ill. 509; Byers v. Byers, 21 Iowa, 268; Biffle v. Pullam, 114 Mo. 50. This is so though the custody of the children be awarded to the wife. Woods v. Davis, 34 Iowa, 264. And in Doyle v. Coburn, 6 Allen [Mass.] 71, it was held that a husband does not lose his homestead rights even where the custody of the child is awarded to the mother, as he may adopt other members of his household; and it is not lost by death or absence of wife and children, and it is for the benefit of the husband as well as the wife.

But where the homestead is given to a "head of a family," and the husband has no family of his own dependent on him residing on the land, and the wife has the care and support of the children, a finding that he has abandoned the idea of having a homestead for a family, and had ceased to be the head of a family after his divorce, will be sustained. Cooper v. Cooper, 24 Ohio St. 488.

After divorce, a husband may convey to his former wife his interest in the homestead, and a mortgage made by her on the same after such conveyance will be valid. Grupe v. Byers, 73 Cal. 271.

Generally the court in rendering the decree of divorce may make an equitable distribution of the property, and may award the homestead to one of the parties. Lowell v. Lowell, 55 Cal. 316; Snodgrass v. Snodgrass, 40 Kan. 494; Cole v. Cole, 27 Wis. 531; Harran v. Harran, 85 Wis. 299; Cole v. Cole, 23 Iowa, 433; Brandon v. Brandon, 14 Kan. 342; Webster v. Webster, 64 Wis. 438. But the decree of divorce making no disposition of the husband's homestead the divorced wife has no claim thereto. Heaton v. Sawyer, 60 Vt. 495; Stahl v. Stahl, 114 Ill. 375. From note to Rosholt v. Mehus [N. D.] 23 L. R. A. 239.

65. Cizek v. Cizek [Neb.] 96 N. W. 657.

66. Stone v. McClellan [Tex. Civ. App.] 81 S. W. 751.

67. Tindall v. Peterson [Neb.] 98 N. W. 688.

68. See 2 Curr. L. 221.

69. Fitch v. Duckwall, 25 Ky. L. R. 1535, 78 S. W. 185. But he cannot sell his homestead, and convert it into personalty, and use the funds in trading for an indefinite time, and then invest them in another homestead, and claim it as exempt from his antecedent debts. Fitch v. Duckwall, 25 Ky. L. R. 1535, 78 S. W. 185; Bohannon v. Clark, 25 Ky. L. R. 1710, 78 S. W. 479. May give the money to his wife and allow her to take title to second homestead in her own name. Id. See 2 Curr. L. 221, n. 66.

70. Code 1897, § 2976. Edinger v. Bain [Iowa] 98 N. W. 568.

71. Where wife invested proceeds in land not a homestead, taking title in her own and her husband's names, held his share liable to be taken by creditors after allowing the statutory homestead to the wife out of the entire tract, and after reimbursing her for money paid by her for her husband in the purchase of the land. Bohannon v. Clark, 25 Ky. L. R. 1710, 78 S. W. 479.

72. Rosser v. Florence, 119 Ga. 250, 45 S. E. 975.

73. Construing Code 1873, § 1995, and Code

§ 10. *Remedies and procedure. Remedies by suit or action.*[74]—In actions to foreclose a lien on,[75] or enjoin the sale of,[76] the homestead, the general rules as to burden of proof and preponderance of evidence prevail.

Remedies of creditors against excess.[77]—The homestead exceeding the statutory amount, the creditors are entitled to the excess,[78] and it being indivisible they may, under some of the statutes, enforce a sale thereof,[79] but the homestead exemption must be set out from the proceeds before the latter are distributed.[80] Statutory provisions must be followed.[81]

HOMICIDE.

§ 1. Elements of Crime in General and Parties Thereto (1643).
§ 2. Murder (1644).
§ 3. Manslaughter (1645).
§ 4. Assault with Intent to Kill or do Great Bodily Harm (1646).
§ 5. Justification and Excuse (1647).
§ 6. Indictment or Information (1649).
§ 7. Evidence (1651).
A. Presumptions and Burden of Proof (1651).
B. Admissibility in General (1651). Justification (1656).
C. Dying Declarations (1658).
D. Sufficiency (1659).
§ 8. Trial and Punishment (1661).
A. Conduct of Trial in General (1661).
B. Instructions (1661). Harmless Error (1668).
C. Verdict (1669).
D. Punishment (1669).

§ 1. *Elements of crime in general and parties thereto.*[82]—Responsibility for homicide exists though the injury inflicted be not the sole cause of death if it proximately contribute thereto.[83] That the injury was intended for another than deceased is immaterial.[84] General rules governing principals and accessories[85] and the responsibility of conspirators apply.[86] It is murder to aid or abet a suicide.[87]

1897, § 2977, as to contiguous and noncontiguous lots. White v. Danforth, 122 Iowa, 403, 98 N. W. 136.

74. See 2 Curr. L. 222, 223.

75. In an action to foreclose a mechanic's lien on a homestead, the wife setting up the defense that she did not join in the acknowledgment, must prove the same by a preponderance of evidence. Moreno v. Spencer & Bro. [Tex. Civ. App.] 82 S. W. 1054.

76. Plaintiff seeking to enjoin sale of homestead on the ground that the property is rural in its character, must prove the same. Harris v. Matthews [Tex. Civ. App.] 81 S. W. 1198.

77. See 2 Curr. L. 223.

78. A bankrupt occupying land as a homestead under a contract to purchase, his trustee in bankruptcy may redeem the land and subject such portion of it as does not constitute the bankrupt's homestead to the payment of his debts. Duffield v. Dosh [Iowa] 99 N. W. 1074.

79, 80. Weber v. Gardner [Ky.] 80 S. W. 481.

81. There being a surplus, the property cannot be levied and sold on execution or attachment after notice of its homestead character has been duly served on the sheriff. The proceeding must be under §§ 6204-6212 of Cobbey's Ann. St. National Bank of Commerce v. Chamberlain [Neb.] 100 N. W. 943.

82. See 2 Curr. L. 223.

83. If one unlawfully wounds another and thereby hastens or accelerates his death by reason of some previously existing disorder, he is guilty of homicide. Hopkins v. Com., 25 Ky. L. R. 2117, 80 S. W. 156. Where the wound inflicted is in itself dangerous to life, mere erroneous treatment of it affords no protection against a charge of unlawful homicide. Thomas v. State, 139 Ala. 80, 36 So. 734.

84. See 2 Curr. L. 224, n. 10. To point a loaded pistol at another within shooting distance with threats is to assault with a deadly weapon, though the person assaulted is mistaken for another person. People v. Wells [Cal.] 78 P. 470. One who strikes at a person in self-defense but in so doing wounds another is not guilty of malicious stabbing with intent to kill. O'Rear v. Com., 25 Ky. L. R. 1537, 78 S. W. 407. In determining the degree of the homicide it is immaterial whether defendant intended to kill the person actually slain or another. The degree will be the same that it would have been had the blow taken effect as intended or defendant not been mistaken as to the identity of his victim. People v. Suesser, 142 Cal. 354, 75 P. 1093. Where an uninterested by-stander is killed by a blow intended for another, the degree of the crime is the same that it would have been had the blow taken effect on the person intended. Wheatley v. Com. [Ky.] 81 S. W. 687. Defendant shot at paramour and killed wife. Rowland v. State [Miss.] 35 So. 826. Murder in first degree. State v. Bectsa [N. J. Err. & App.] 58 A. 933. If a person, while maliciously attempting to kill another, unintentionally kills a third person, towards whom he entertains no malice, it is murder. Wheatley v. Com. [Ky.] 81 S. W. 687.

85. Evidence held to authorize a charge on the doctrine of principals. Collins v. State [Tex. Cr. App.] 81 S. W. 300. Where defendant was present at the scene of the homicide, but did not aid or participate therein, the mere fact that he concealed the offense for a time, or failed to report it

§ 2. *Murder* is the unlawful killing of a human being with malice aforethought,[88] express or implied.[89] An actual intent to take life is not a necessary ingredient in murder any more than it is in manslaughter,[90] but a person so drunk as to be unable to entertain a design to kill cannot be convicted of murder.[91] If an escaped misdemeanor convict slay an officer to prevent capture, he is guilty of murder whether the officer had a warrant or not.[92]

Degrees.[93]—In nearly all the states murder is now divided by statute into two degrees, including in the first or more heinous degree all forms of premeditated or deliberate murder in general and specifically such murders as from their nature show deliberation and premeditation,[94] and all murder committed in the commission or attempting to commit certain felonies.[95]

Murder in the second degree is variously defined in different states, the intention being to include therein all murder not denounced as of the first degree.[96]

would not make him guilty of any offense. Monroe v. State [Tex. Cr. App.] 81 S. W. 726. Where one person inflicts a mortal wound, but another is present and aids and assists, the latter may be convicted [Rev. Code 1852, c. 133, § 1]. State v. Brinte [Del.] 58 A. 258; State v. Nargashian [R. I.] 58 A. 953. An accomplice may aid and abet without taking physical part in the actual violence. People v. Moran [Cal.] 77 P. 777. One who takes part in a fight preceding a homicide and calls on others to kill deceased may be convicted as a principal. United States v. Densmore [N. M.] 75 P. 31. Abandonment of the conflict by one aiding and abetting, before the actual killing will not entitle the aider to an acquittal unless his principal had knowledge of the abandonment. Wilson v. U. S. [Ind. T.] 82 S. W. 924.

86. Where it appears that defendant and others acted with a common purpose in concert with one another to take deceased's life, each is guilty no matter which did the killing. Pen. Code, § 29, makes each a principal and responsible for acts of the other (People v. Lagroppo, 90 App. Div. 219, 86 N. Y. S. 116), and where both are charged with the murder, both may be convicted on evidence that shows that either of them struck the fatal blow (Morgan v. State [Ga.] 48 S. E. 9). Where two persons shoot at another and only one shot takes effect, both cannot be convicted of his murder unless there is evidence of a conspiracy between them. Anderson v. State, 119 Ga. 441, 46 S. E. 639.

87. An accessory before the fact to suicide may be prosecuted as a principal in the second degree in murder under the statute providing for the prosecution of accessories as principals. Com. v. Hicks [Ky.] 82 S. W. 265; State v. Brinte [Del.] 58 A. 258; State v. Scott [Del.] 57 A. 534.

88. See 2 Curr. L. 224. Which is a condition of the mind which shows a heart regardless of social duty and feeling and bent on mischief, the exercise of which is inferred from acts done or words spoken. Connell v. State [Tex. Cr. App.] 81 S. W. 746. Malice aforethought, either express or implied, is manifested by the doing of an unlawful and felonious act intentionally and without legal cause or excuse; and does not imply a pre-existing hatred or enmity toward the individual injured. People v. Balkwell, 143 Cal. 259, 76 P. 1017. A deliberate purpose to kill another may be shown from the circumstances attending the act, such as the use of a deadly weapon, knowing it to be such, lying in wait, preconcerted plans, or the preparation of instruments. State v. Brinte [Del.] 58 A. 258; People v. Koepping, 178 N. Y. 247, 70 N. E. 778; State v. Capps, 134 N. C. 622, 46 S. E. 730. Use of deadly weapon is not conclusive as to malice, but its intentional use in a manner to effect death may raise the inference. Coolman v. State [Ind.] 72 N. E. 568.

89. State v. Scott [Del.] 57 A. 534; State v. Brinte [Del.] 58 A. 258. Implied malice must be defined in cases where presented. Connell v. State [Tex. Cr. App.] 81 S. W. 746. Malice against the particular person killed is not necessary. Bell v. State [Ala.] 37 So. 281. Express malice is shown by evidence of a sedate, deliberate purpose and a formed design to kill another. State v. Brinte [Del.] 58 A. 258. Implied malice is an inference or conclusion of law from the facts found by the jury. Id. Is implied when an act dangerous to others is done so recklessly or wantonly as to evince depravity of mind and a disregard of human life, and, if the death of any person is caused by such an act it is murder. State v. Capps, 134 N. C. 622, 46 S. E. 730.

90. 2 Bishop Cr. Law, §§ 676, 679; State v. Halliday, 112 La. 846, 36 So. 753; State v. Capps, 134 N. C. 622, 46 S. E. 730. Murder by abortion. People v. Balkwell, 143 Cal. 259, 76 P. 1017. "Drugging" man to rob him. State v. Burns [Iowa] 99 N. W. 721.

91. State v. Corrivau [Minn.] 100 N. W. 638. Voluntary intoxication, not resulting in a fixed or settled frenzy or insanity, either permanent or intermittent, does not excuse or mitigate any degree of unlawful homicide below murder in the first degree. Thomas v. State [Fla.] 36 So. 161.

92. Williford v. State [Ga.] 48 S. E. 962.

93. See 2 Curr. L. 224.

94. Such as poison, torture, lying in wait, etc. In Delaware murder in the first degree is where the crime of murder is committed with express malice aforethought or in perpetrating or attempting to perpetrate any crime punishable with death [Rev. Code 1852, c. 127, §§ 1, 2]. State v. Brinte [Del.] 58 A. 258; State v. Emory [Del.] 58 A. 1036.

95. Attempt to rob. Lindsay v. State, 4 Ohio C. C. (N. S.) 409.

96. Murder in the second degree is the wrongful killing of a human being with malice aforethought, but without delibera-

In those forms of murder which are specifically denounced as murder in the first degree no actual intent to take life, is necessary,[97] but ordinarily there must be deliberation and premeditation, though there need be no appreciable time between the formation of the intent to kill and the killing.[98] No motive is necessary if the fact of deliberate murder otherwise appears.[99]

Attempts.[1]

§ 3. *Manslaughter.*[2]—Manslaughter embraces all forms of criminal homicide from which malice or an intent to kill is absent.[3] Thus, it is manslaughter if the homicide is committed unintentionally in the commission of an unlawful act,[4] or in sudden combat,[5] or in the heat of passion[6] produced by reasonable provocation,[7] and before the lapse of reasonable cooling time.[8] Voluntary manslaughter is the

tion. State v. Robertson, 178 Mo. 496, 77 S. W. 528. In Delaware murder in the second degree is where the crime is committed otherwise than with express malice aforethought, or in perpetrating or attempting to perpetrate a capital offense, but with malice aforethought implied by law [Rev. Code 1852, c. 127, §§ 1, 2]. State v. Brinte [Del.] 58 A. 258. Without a deliberate design to take life. State v. Emory [Del.] 58 A. 1036.

97. All murder perpetrated by means of poison administered with a bad motive or intent is murder in the first degree whether or not there was a specific intent to kill. Deceased was "drugged" probably for purpose of robbery. State v. Burns [Iowa] 99 N. W. 721. In murder, in attempt to commit felony, the element of intent to kill is not necessary. It is murder in the first degree though accidental. People v. Milton [Cal.] 78 P. 549; Lindsay v. State, 4 Ohio C. C. [N. S.] 409.

98. People v. Suesser, 142 Cal. 354, 75 P. 1093; State v. Emory [Del.] 58 A. 1036; People v. Boggiano [N. Y.] 72 N. E. 101. Defendant approached deceased with intention of killing him if he did not sign a note. State v. Robertson, 178 Mo. 496, 77 S. W. 528. Instruction defining degrees based on the existence of express and implied malice held a proper definition. Smith v. State [Tex. Cr. App.] 78 S. W. 694. That defendant seized the club with which he slew deceased from the hand of another is sufficient evidence of premeditation to authorize an instruction on first degree murder. State v. Fuller [Iowa] 100 N. W. 1114. One so drunk as to be unable to form a specific intent to take life cannot be guilty of murder in the first degree. State v. Hertzog [W. Va.] 46 S. E. 792. Deliberation and premeditation may be inferred from such circumstances as ill will, previous difficulty between the parties, and declarations of intent to kill before or after the killing. State v. Hunt, 134 N. C. 684, 47 S. E. 49.

99. State v. Jaggers [N. J. Err. & App.] 58 A. 1014; Robinson v. State [Neb.] 98 N. W. 694; Lillie v. State [Neb.] 100 N. W. 316; People v. Koepping, 178 N. Y. 247, 70 N. E. 778.

1. See 2 Curr. L. 224.

2. See 2 Curr. L. 225.

3. State v. Brinte [Del.] 58 A. 258. The unlawful killing of another without malice, express or implied. State v. Emory [Del.] 58 A. 1036. Where one having an imperfect right of self defense assaults another without intending to kill him, he is guilty only of manslaughter, not of murder in the second degree. Chambers v. State [Tex. Cr. App.] 79 S. W. 572. By statute in Texas no presumption of intent to kill exists where the instrument used is one not likely to produce death unless the manner of use shows such intent [Pen. Code 1895, art. 717]. Posey v. State [Tex. Cr. App.] 78 S. W. 689. Where a wife slays her husband because she believes he is unfaithful she is guilty at least of manslaughter. Scott v. State [Tex. Cr. App.] 81 S. W. 47.

4. Pointing loaded pistol at another. Ford v. State [Neb.] 98 N. W. 807.

5. Reynolds v. Com. [Ky.] 82 S. W. 233, 978; Williams v. State [Ala.] 37 So. 228. Defendant went to deceased's house for unlawful purpose and killed him in self-defense. Nicks v. State [Tex. Cr. App.] 79 S. W. 35. Provocation of difficulty on casual meeting and seeking for purpose. Bearden v. State [Tex. Cr. App.] 79 S. W. 37. Defendant followed up one who had attacked him and then withdrawn from the fight. McMahon v. State [Tex. Cr. App.] 81 S. W. 296.

6. Ray v. State [Tex. Cr. App.] 81 S. W. 737; Thomas v. State, 139 Ala. 80, 36 So. 734; Bowles v. Com. [Va.] 48 S. E. 527.

7. Adultery with defendant's wife. Canister v. State [Tex. Cr. App.] 79 S. W. 24; Rowland v. State [Miss.] 35 So. 826. Outrage on defendant's daughter. State v. Cooper, 112 La. 281, 36 So. 350. Indecent advances to defendant's sister held not shown. Flores v. State [Tex. Cr. App.] 79 S. W. 808. Calling defendant a son of a b—h held no slander of his mother. Hayman v. State [Tex. Cr. App.] 83 S. W. 204. No mere words however insulting will reduce a homicide below the degree of murder. Wilson v. State [Ala.] 37 So. 93. Where committed with a deadly weapon. State v. Emory [Del.] 58 A. 1036. Deceased's refusal to sign note with defendant, his son-in-law, to relieve great financial distress which deceased was in no way responsible for, is no mitigation or extenuation. State v. Robertson, 178 Mo. 496, 77 S. W. 528. Circumstances of murder of wife held to present no issue of manslaughter. Smith v. State [Tex. Cr. App.] 78 S. W. 694. Statements by deceased about defendant's daughter but never communicated to defendant cannot be shown. McVey v. State [Tex. Cr. App.] 81 S. W. 740.

8. That deceased had accused defendant and wife of having a venereal disease is no extenuation, the words being spoken directly to defendant and the killing not occurring until after lapse of ten days. Townsell v. State [Tex. Cr. App.] 78 S. W. 938. Shooting on first meeting after information of adultery with wife. Canister v. State [Tex. Cr.

unlawful intentional killing of another without malice,[9] and involuntary manslaughter is the killing of another in doing some unlawful act but without intention to kill.[10] To constitute manslaughter in Texas there must be an intent to kill or inflict serious bodily injury, and if the weapon used is not of itself a deadly one, the jury must gather the intent from the manner of its use.[11] Fear of death at the hands of another is no mitigation.[12] Degrees of manslaughter in several states are referred to in the note.[13]

Second degree includes all culpable homicides not murder nor manslaughter in the first degree.[14]

§ 4. *Assault with intent to kill or do great bodily harm.*[15]—To constitute an assault with intent to murder, the circumstances must have been such that had the one assaulted died from the injuries, the assailant would have been guilty of murder.[16] Conversely, circumstances that will reduce the assault below the grade of assault with intent to murder must be such as had death ensued the crime would have been manslaughter merely.[17] It is immaterial whether the murder would have been of the first or second degree,[18] and hence premeditation is not a necessary element,[19] but malice must be shown.[20] The legal presumption of intent to

App.] 79 S. W. 24. Lapse of month after learning of advances to sister. Flores v. State [Tex. Cr. App.] 79 S. W. 808. Question of time is one of fact. State v. Cooper, 112 La. 281, 36 So. 350. Killing fifteen or twenty minutes after blow on head, defendant in meantime loading gun. Hayman v. State [Tex. Cr. App.] 83 S. W. 204.

9. Montgomery v. Com. [Ky.] 81 S. W. 264; State v. Cooper, 112 La. 281, 36 So. 350. The killing must be willful or intentional. Wheatley v. Com. [Ky.] 81 S. W. 687.

10. And this may be either where the act is directed against the person killed or where it is directed against another person or thing and kills one not intended to be hurt. Montgomery v. Com. [Ky.] 81 S. W. 264. Repelling assault with unnecessary force causing death. People v. Taylor, 92 App. Div. 29, 86 N. Y. S. 996. Involuntary manslaughter is where one doing an unlawful act not felonious nor tending to great bodily harm, or doing a lawful act without proper caution or requisite skill, undesignedly kills another. An intoxicated man carelessly flourishing a pistol who shoots a bystander during an attempt to disarm him is not entitled to a charge on involuntary manslaughter. Selby v. Com., 25 Ky. L. R. 2209, 80 S. W. 221. The mere fact that the pistol which, accidentally discharged, killed deceased, was being carried by defendant concealed contrary to law does not make a case of manslaughter. Potter v. State, 162 Ind. 213, 70 N. E. 129.

11. Posey v. State [Tex. Cr. App.] 78 S. W. 689; Connell v. State [Tex. Cr. App.] 81 S. W. 746; Perrin v. State [Tex. Cr. App.] 78 S. W. 930. Knife held deadly. Connell v. State [Tex. Cr. App.] 81 S. W. 746; Baker v. State [Tex. Cr. App.] 81 S. W. 1215.

12. State v. Nargashian [R. I.] 58 A. 953.

13. First degree: Manslaughter is the unlawful killing of a human being without malice; that is the unpremeditated result of passion, heated blood caused by a sudden, sufficient provocation. Thomas v. State [Ala.] 36 So. 734; Williams v. State [Ala.] 37 So. 228.

14. Parker v. Territory [Okl.] 78 P. 81.

Third degree cannot exist where the killing was intentional. State v. Robertson, 178 Mo. 496, 77 S. W. 528.

Fourth degree includes every homicide not justifiable or excusable which was manslaughter at the common law and which is not declared to be manslaughter in some other degree [Rev. St. 1889, § 3477]. State v. Weakley, 178 Mo. 413, 77 S. W. 525.

15. See 2 Curr. L. 225.

16. State v. Scott [Del.] 57 A. 534. Evidence held to raise issue of self-defense and aggravated assault. Robertson v. State [Tex. Cr. App.] 80 S. W. 1000. Adultery with wife. Canister v. State [Tex. Cr. App.] 79 S. W. 24; Loyd v. State [Tex. Cr. App.] 81 S. W. 293; Davis v. State [Ark.] 82 S. W. 167. Aggravated assault. Lozano v. State [Tex. Cr. App.] 81 S. W. 37. One accused of crime seeking his accuser and provoking difficulty not for purpose of killing or inflicting serious bodily injury is guilty only of aggravated aseault. Beard v. State [Tex. Cr. App.] 81 S. W. 33. No intent to kill can exist where a house was between defendant and prosecutor when the shots were fired. Lott v. State [Miss.] 36 So. 11.

17. Indecent overtures to defendant's sister held not shown, nor that assault was made on first meeting. Flores v. State [Tex. Cr. App.] 79 S. W. 808. Defendant committed assault some time after hearing of intimacy with wife but at first meeting after becoming convinced of its truthfulness. Loyd v. State [Tex. Cr. App.] 81 S. W. 293. A wounding with a dangerous weapon not resulting in death when on sufficient provocation is but an aggravated assault. Palmer v. State [Tex. Cr. App.] 83 S. W. 202.

18. Griffin v. State [Fla.] 37 So. 209; Pyke v. State [Fla.] 36 So. 577.

19. Smith v. State [Ala.] 37 So. 423; Griffin v. State [Fla.] 37 So. 209; Pyke v. State [Fla.] 36 So. 577.

20. As to existence of malice, jury may consider the character of the assault, the kind of weapon used, the danger of producing death, the means used to avoid or cause death and all the acts and conduct of the defendant. State v. Scott [Del.] 57 A. 534.

kill, arising where death ensues from the use of a deadly weapon, does not arise where death does not ensue, the question of intent being one for the jury.[21]

§ 5. *Justification and excuse.*[22]—Homicide is justifiable as committed in self-defense, where the accused without having provoked the difficulty,[23] and without justification,[24] is assaulted in such manner that he in good faith believes,[25] and has reasonable ground to believe,[26] that he is in imminent danger[27] of death or great bodily harm,[28] and that no safe means of avoiding the same is open to him

21. Where an assault and battery is committed with a deadly weapon such as a knife, which is deliberately used in such a manner as to be reasonably calculated to destroy life, the intent to kill may be inferred from the act itself. Larkin v. State [Ind.] 71 N. E. 959. Where death results from the unlawful use of a deadly weapon the law by presumption imputes to the slayer an intention to kill, but where death does not result, intention to kill is not matter of legal presumption, but matter of inference for the jury (Harris v. State, 120 Ga. 167, 47 S. E. 520); and hence it is error to charge in such a case that if the crime would have been murder had the person assaulted died, the assaulter would be guilty of assault with intent to murder (Harris v. State, 120 Ga. 167, 47 S. E. 520; Smith v. State, 119 Ga. 564, 46 S. E. 846, citing Gallery v. State, 92 Ga. 463, 17 S. E. 863).

22. See 2 Curr. L. 226.

23. One who purposely provokes the difficulty resulting in a homicide cannot set up self-defense. Harbour v. State [Ala.] 37 So. 330; Bearden v. State [Tex. Cr. App.] 79 S. W. 37; State v. Sharp [Mo.] 82 S. W. 134; Burton v. State [Ala.] 37 So. 435; Williams v. State [Ala.] 37 So. 228; State v. Jones [Iowa] 99 N. W. 179. Before instruction on that point can be given there must be testimony to support it (Dent v. State [Tex. Cr. App.] 79 S. W. 525; McMahon v. State [Tex. Cr. App.] 81 S. W. 296; Wilson v. State [Tex. Cr. App.] 81 S. W. 34; Arthur v. State [Tex. Cr. App.] 80 S. W. 1017), but mere intent and purpose do not deprive the slayer of the right of self-defense, if he does no act at the time of the difficulty which provokes it (Tardy v. State [Tex. Cr. App.] 78 S. W. 1076; Hjeronymus v. State [Tex. Cr. App.] 79 S. W. 313). Circumstances held to authorize charge on self-defense, provocation of difficulty, mutual combat, and abandonment thereof. Hellard v. Com. [Ky.] 80 S. W. 482. One accused of crime may seek his accuser with a view to securing a retraction in a peaceable manner, and may arm himself for protection. Beard v. State [Tex. Cr. App.] 81 S. W. 33. The doctrine of provoking difficulty is not applicable where the person doing the killing made the first assault. McMahon v. State [Tex. Cr. App.] 81 S. W. 296. Law of self-defense does not imply right of attack. Wells v. Territory [Okl.] 78 P. 124. Lawful interference in behalf of another whom deceased is about to kill is not a provocation depriving the interferer of his right of self-defense. State v. Clark, 134 N. C. 698, 47 S. E. 36.

24. That one accused of crime seeks his accuser for an interview and a retraction does not justify an attack. Beard v. State [Tex. Cr. App.] 81 S. W. 33. One who goes to another's house for an unlawful purpose has not an unqualified right of self-defense from attack by that other. Nicks v. State [Tex. Cr. App.] 79 S. W. 35. Defendant taking property he believes he has a right to is not deprived of his right of self-defense. Arthur v. State [Tex. Cr. App.] 80 S. W. 1017. Where deceased made a desperate assault on defendant in defense of a brother, who was in no danger of death or great bodily harm, the killing of deceased by defendant was justifiable. Taber v. Com. [Ky.] 82 S. W. 443. Where to save his brother from unlawful assault, deceased interfered and was killed by defendant, such killing was not justifiable. Id.

25. State v. Halliday, 112 La. 846, 36 So. 753; Wilson v. State [Ala.] 37 So. 93; Beard v. State [Tex. Cr. App.] 81 S. W. 33. One's right of self-defense may exist without reference to his belief in the danger. McKinney v. Com. [Ky.] 82 S. W. 263. Instruction directing jury to substitute their belief of necessity for defendant's reasonable belief is error. Adkins v. Com. [Ky.] 82 S. W. 242.

26. Wilson v. State [Ala.] 37 So. 93; Wells v. Territory [Okl.] 78 P. 124; Pettis v. State [Tex. Cr. App.] 81 S. W. 312; Logan v. State [Tex. Cr. App.] 81 S. W. 721; State v. Thompson [S. C.] 46 S. E. 941; Dyer v. State [Tex. Cr. App.] 83 S. W. 192. A reasonable appearance of danger is sufficient. There need not be an actual existence of the facts which defendant believed. Dodson v. State [Tex. Cr. App.] 78 S. W. 940; Chism v. State [Tex. Cr. App.] 949. Danger may be real or apparent. Martin v. Com., 25 Ky. L. R. 1928, 78 S. W. 1104; Beard v. State [Tex. Cr. App.] 81 S. W. 33; McKinney v. Com. [Ky.] 82 S. W. 263; McClellan v. State [Ala.] 37 So. 239; Owens v. United States [C. C. A.] 130 F. 279. Instruction held not erroneous in this respect. Tardy v. State [Tex. Cr. App.] 78 S. W. 1076. Erroneous. State v. Clark, 134 N. C. 698, 47 S. E. 36. Actual physical attack or hostile demonstration of such nature as to afford reasonable ground to believe that the design is to destroy life or inflict great bodily harm is necessary. State v. Halliday, 112 La. 846, 36 So. 753; McClellan v. State [Ala.] 37 So. 239; State v. Stockhammer, 34 Wash. 262, 75 P. 810. Attempt to arrest accompanied by intimidation. People v. Morales [Cal.] 77 P. 470.

27. Harbour v. State [Ala.] 37 So. 330; State v. Jones [Iowa] 99 N. W. 179; State v. Emory [Del.] 58 A. 1036; State v. Thompson [S. C.] 46 S. E. 941. Instruction omitting element of imminent danger may be refused. People v. Rodawald [N. Y.] 70 N. E. 1. A person must be in great danger or in apprehension of it to justify his use of a deadly weapon. State v. Raymo [Vt.] 57 A. 993.

28. Harbour v. State [Ala.] 37 So. 330; State v. Emory [Del.] 58 A. 1036. Defendant need not first ascertain whether attack is willful; it is enough that it appears to be

except the killing of his assailant.[29] Similarly a woman may kill in defense of her chastity,[30] and under the same limitations the right is extended to the defense of others,[31] and to the defense of one's habitation.[32] A mutual combat to deprive accused of the right of self-defense must have been entered upon by him willingly[33] and knowingly;[34] and one who has voluntarily engaged in combat or who has provoked a difficulty may regain his right of self-defense by withdrawing from the fight in good faith,[35] and if his adversary then follows him and kills him not in necessary self-defense the offense is at least manslaughter.[36] Compulsion under fear of death is no excuse for the killing of an innocent third person,[37] and that defendant furnished evidence to indict deceased for fornication is no excuse, extenuation, or mitigation of the killing.[38] The religious belief or doctrine of a person cannot be recognized or accepted as a justification or excuse for his committing an act which is a criminal offense under the law of the land.[39] The defense of self-defense if available to the person who fires the fatal shot is also available to all who participate on his side of the affray, though unlawfully.[40] That deceased had a warrant for defendant's arrest when he assaulted defendant does not limit defendant's right of self-defense where deceased was a private person without authority to serve the warrant;[41] but the mere fact that deceased attempting to arrest defendant was a private person without authority to arrest him does not justify defendant in resisting to the extent of taking life.[42] An officer cannot use

violent, and endangers life or limb. McKinney v. Com. [Ky.] 82 S. W. 263. Assault on defendant need not be felonious or made with felonious intent. State v. Clark, 134 N. C. 698, 47 S. E. 36. An officer is not justified in killing one resisting lawful arrest unless a serious injury is threatened. State v. Hickey [N. J. Law] 57 A. 264; State v. Raymo [Vt.] 57 A. 993; People v. Romero [Cal.] 77 P. 163. An assault with a knife is not justified by the fact alone that the person so assaulted first struck defendant with his fist. Larkin v. State [Ind.] 71 N. E. 959. Fear of great bodily harm is sufficient. State v. Singleton, 67 Kan. 803, 74 P. 243. Unless there be great superiority in physical strength of an assailant who strikes another a blow with his fist, or ill health in the assailed at the time, or other circumstances producing relatively great inequality between them in combat, the assailed cannot justifiably resent the blow by stabbing his assailant. Morgan v. State, 119 Ga. 566, 46 S. E. 836.

29. Must be unable to retreat without increasing peril. Harbour v. State [Ala.] 37 So. 330; People v. Koepping, 178 N. Y. 247, 70 N. E. 778; State v. Emory [Del.] 58 A. 1036. One may kill in self-defense only when there is no other means of escape. Com. v. Mitchka [Pa.] 58 A. 474. When the attack is made with murderous intent with sufficient overt act, no duty to retreat arises. State v. Kellison [W. Va.] 47 S. E. 166. Defendant on his own premises is not bound to further retreat. Adkins v. Com. [Ky.] 82 S. W. 242; McKinney v. Com. [Ky.] 82 S. W. 263; State v. Kellison [W. Va.] 47 S. E. 166. Nor wait until his assailant has reached a place of protection from which he can better execute his attack. McKinney v. Com. [Ky.] 82 S. W. 263. Duty to retreat where possible is not released by freedom from fault and imminence of danger. Kirkland v. State [Ala.] 37 So. 352. Cannot kill unless apparently necessary. Id. Bondsman attempting surrender of deceased to sheriff in exoneration of bail is not obliged to retreat. Finney v. Com. [Ky.] 82 S. W. 636. The common-law doctrine of retreat to the wall is applicable only where defendant voluntarily enters a fight, or the parties engage in mutual combat, or where defendant was the assailant and had not declined further combat. Harris v. People [Colo.] 75 P. 427.

30. Osborne v. State [Ala.] 37 So. 105.

31. Taber v. Com. [Ky.] 82 S. W. 443; Palmer v. State [Tex. Cr. App.] 83 S. W. 202. If deceased brought on the difficulty with defendant's brother and having an unfair advantage was about to kill him, or if defendant had no knowledge as to who was the aggressor, and slew deceased to save his brother's life, the killing would be justifiable. Chambers v. State [Tex. Cr. App.] 79 S. W. 572.

32. McKinney v. Com. [Ky.] 82 S. W. 263.

33. Christian v. State [Tex. Cr. App.] 79 S. W. 562; Williams v. State [Ala.] 37 So. 228.

34. Brown v. Com., 25 Ky. L. R. 2076, 79 S. W. 1193.

35. Jones v. State [Miss.] 36 So. 243; Hellard v. Com. [Ky.] 80 S. W. 482. Where there is no evidence of abandonment of difficulty an instruction on self-defense is not required. Wheatley v. Com. [Ky.] 81 S. W. 687. Withdrawal and endeavor to avoid further conflict must exist to restore defendant's right. State v. Smith [Iowa] 99 N. W. 579.

36. McMahon v. State [Tex. Cr. App.] 81 S. W. 296.

37. Brewer v. State [Ark.] 78 S. W. 773; State v. Nargashian [R. I.] 58 A. 953.

38. Townsell v. State [Tex. Cr. App.] 78 S. W. 938.

39. Failure to provide medical attendance for sick child who dies. State v. Chenoweth [Ind.] 71 N. E. 197.

40. McMahon v. State [Tex. Cr. App.] 81 S. W. 296.

41. Mann v. Com. [Ky.] 82 S. W. 438.

42. Dryer v. State, 139 Ala. 117, 36 So. 38.

a deadly weapon or take human life in enforcing the arrest of a misdemeanant, though without such force the wrongdoer may[43] escape. In Utah a homicide is justifiable when committed in a sudden heat of passion caused by an attempt by deceased to defile the wife or other female relative of accused, or when the defilement has actually been committed.[44]

Accidental homicide[45] does not occur where deceased was killed by a shot following the intentional snapping of a pistol in deceased's face though the accused had some reason to believe it not loaded.[46]

§ 6. *Indictment or information.*[47]—At the common law, the verdict of a coroner's jury is equivalent to the finding of a grand jury, and one accused of the homicide thereby may be arraigned and tried thereon;[48] but the modern practice is to require an indictment by the grand jury or an information based on sufficient evidence to justify holding for trial.[49] Except in those states where statutory forms are prescribed,[50] indictments for homicide and murderous assault must be direct and certain[51] as regards the offense charged,[52] the weapon or means used,[53] the manner of its use,[54] the intent,[55] malice,[56] the assault,[57] the person killed or

43. State v. Smith [Iowa] 101 N. W. 110.

44. Rev. St. 1898, § 4168, applies only to sudden passion, not to deliberate killing, the result of mere rumors or appearances. State v. Botha, 27 Utah, 289, 75 P. 731.

45. See 2 Curr. L. 227.

46. Ford v. State [Neb.] 98 N. W. 807.

47. See 2 Curr. L. 227.

48. State v. Jackson, 111 La. 343, 35 So. 593; In re Sly [Idaho] 76 P. 766.

49. In re Sly [Idaho] 76 P. 766.

50. An indictment for murder plainly and accurately drawn in the statutory form is sufficient [Code 1892, § 1356]. Coleman v. State [Miss.] 35 So. 937.

51. Use of words "then and there being" held consistent with certainty. State v. Riddle, 179 Mo. 287, 78 S. W. 606. Indictment held not objectionable as charging that deceased killed himself. State v. Nelson [Mo.] 80 S. W. 947; Cooper v. State [Fla.] 36 So. 53; Ewert v. State [Fla.] 37 So. 334.

52. A charge of "assault with intent to murder" is sufficiently definite [Cr. Code 1896, p. 403, c. 178, art. 1, §§ 5204-5208]. Spraggins v. State, 139 Ala. 93, 35 So. 1000. An indictment for manslaughter in Indiana must show that the accused was engaged in the commission of some unlawful act from which the homicide resulted. Pointing of gun must be alleged to have been done purposely [Burns' Ann. St. 1901, § 2073]. Eaton v. State, 162 Ind. 554, 70 N. E. 814. An indictment for manslaughter in the first degree in Oklahoma must allege that the injury was inflicted either in a heat of passion and in a cruel and unusual manner, or in a heat of passion and by means of a dangerous weapon. Barker v. Territory [Okl.] 78 P. 81. An indictment charging that defendant shot and mortally wounded deceased with a pistol and that deceased died of the wound is sufficient though it does not formally charge murder, nor that defendant held the firearm in his hand, nor that he discharged the contents thereof into the body of deceased, or state what part of the body was wounded. State v. Swenson [S. D.] 99 N. W. 1114. The class of acts described as "assault and battery" with any deadly weapon in Cr. Code 1899, § 7115, and by the term "assault or assault and battery" with any sharp or dangerous weapon in section 7145 does not include an assault or an assault and battery with firearms for the purpose of shooting. State v. Cruikshank [N. D.] 100 N. W. 697.

53. An indictment for assault with intent to commit murder sufficiently names the deadly weapon by charging, "a deadly weapon, to wit, a firearm commonly known as a musket, which said musket was then and there loaded with gunpowder and leaden shot." Sumpter v. State [Fla.] 33 So. 981. Need not state that pistol was loaded, that it was a deadly weapon, or so used as to constitute it a deadly weapon. Pyke v. State [Fla.] 36 So. 577; cf. State v. Swenson [S. D.] 99 N. W. 1114; Heatley v. Territory [Okl.] 78 P. 79. A count alleging the murder to have been committed with a weapon or by some means to the grand jury unknown is not demurrable. Eatman v. State, 139 Ala. 67, 36 So. 16.

54. An indictment for murder by administering morphine need not state how it was administered, the particular way in which it affected deceased, that it was poison, or the quantity administered. Scott v. State [Ala.] 37 So. 357. An indictment charging that defendant shot the prosecuting witness with a firearm, to-wit, a shotgun, with intent to kill, is sufficient without charging how the gun was loaded, how held by defendant, that it was against the body of prosecutor, etc. Heatley v. Territory [Okl.] 78 P. 79. Where the assault was charged to have been committed with a pistol had and held by defendant, it need not be alleged that he had and held it in his hand, that the pistol was loaded, that defendant fired it, that prosecutor was struck or shot with it, that it was a deadly weapon, that the intent was to murder with a deadly weapon, nor that the pistol was so used as to constitute it a deadly weapon. Pyke v. State [Fla.] 36 So. 577. Cf. State v. Swenson [S. D.] 99 N. W. 1114.

55. It is not necessary to charge in terms that an assault with intent to murder was an assault with intent to commit a felony, though the statutory crime is so described; murder being a felony, the intent to commit

assaulted,[56] and death as the result of defendant's act or negligence.[59] The authorities are not agreed as to the necessity of charging the distinctive features of murder in the first degree, some holding that an indictment charging murder in the language of the statute, as with malice aforethought, includes both degrees, and that deliberation and premeditation need not be alleged,[60] while others take the contrary view.[61] Premeditation, however, is not an essential element of an indictment for murder in the first degree when the homicide was committed in an attempt to rob.[62] The sufficiency of several indictments is noted below.[63]

Variance[64] to be fatal must be material.[65] Where the indictment charges murder in the county in which the indictment was found, evidence that death occurred in another county is admissible,[66] but where the indictment alleges the means by which the homicide was committed, the state is restricted to proof of that means.[67]

Included offenses are sufficiently charged by an indictment for murder in the first degree,[68] or for assault with intent to murder,[69] and such an indictment will support a conviction of any degree of unlawful homicide or assault,[70] except that in New York a conviction of assault cannot be sustained on an indictment for homicide where it is undisputed that deceased died of the wound inflicted.[71]

a felony sufficiently appears. Pyke v. State [Fla.] 36 So. 577. Nor that intent was to murder with a deadly weapon. Id. An information for murder in Montana need not contain an express averment of intent to kill. State v. Keerl, 29 Mont. 508, 75 P. 362.

56. An indictment for murder in the second as well as in the first degree must allege malice aforethought. Etheridge v. State [Ala.] 37 So. 337.

57. Where assault with pistol is alleged it need not be charged that defendant fired it into the body of deceased, or state what part of the body was wounded. State v. Swenson [S. D.] 99 N. W. 1114; Pyke v. State [Fla.] 36 So. 577. Cf. Heatley v. Territory [Okl.] 78 P. 79.

58. An indictment charging the killing of deceased, designating him by name, need not further charge that he was a "person" or a "human being." Bowers v. State [Wis.] 99 N. W. 447.

59. Indictment for manslaughter by negligent interference with electric light held not objectionable for failure to allege causal connection between defendant's act and decedent's death. People v. Murphy, 93 App. Div. 383, 87 N. Y. S. 786. Must directly allege that death resulted from the mortal wounds inflicted by defendant. State v. Keerl, 29 Mont. 508, 75 P. 362. The concluding averments in an indictment "And so the said (defendant) did kill and murder the said (deceased), are merely the conclusions of the pleader and cannot help out a defective allegation of cause of death. Id. Omission of word "thereby" from charge that deceased died of the wound is not fatal. State v. Robertson, 178 Mo. 496, 77 S. W. 528.

60. People v. Ung Ting Bow, 142 Cal. 341, 75 P. 899. Omission of "unlawfully" is not fatal. People v. Suesser, 142 Cal. 354, 75 P. 1093.

61. An indictment for murder in the first degree must charge that the injury to deceased was inflicted by defendant with a premeditated design to effect his death. Barker v. Territory [Okl.] 78 P. 81.

62. Lindsay v. State, 4 Ohio C. C. (N. S.) 409.

63. Information held sufficient as charging attempt to shoot with intent to kill [Rev. Code 1899, § 7115], though not using language of statute. State v. Cruikshank [N. D.] 100 N. W. 697. Indictment under Ky. St. 1903, § 1166, for maliciously shooting at another without wounding, held sufficient. Commonwealth v. Ayers, 25 Ky. L. R. 2086, 80 S. W. 153. An information held sufficient to charge manslaughter by procuring an abortion. Weightnovel v. State [Fla.] 35 So. 856. Information for murder in first degree by shooting with pistol set out and held sufficient. State v. Yandell, 34 Wash. 409, 75 P. 988.

64. See 2 Curr. L. 229.

65. Averment that defendant killed deceased with an axe which he "then and there held in his hands" is not variant from proof that he threw it a distance of five feet at him. Webster v. State [Fla.] 36 So. 584. A charge that defendant's pistol was loaded with "a" leaden bullet is not insufficient on the theory that the pistol contained at least two loads, the second of which did the killing. State v. Robertson, 178 Mo. 496, 77 S. W. 528.

66. Code 1892, § 1335, provides that where the blow is struck in one county and death occurs in another, either county shall have jurisdiction of the prosecution. Coleman v. State [Miss.] 35 So. 937.

67. Becknell v. State [Tex. Cr. App.] 82 S. W. 1039.

68. See 2 Curr. L. 229. State v. Brinte [Del.] 58 A. 258; United States v. Densmore [N. M.] 75 P. 31.

69. Pyke v. State [Fla.] 36 So. 577. Indictment for assault by wilfully shooting supports conviction of assault. State v. Matthews [La.] 36 So. 48. On a trial for assault with intent to murder, the evidence showing an assault only, there may be a conviction of such latter offense. Maiming is not included in the statutory offense of shooting with intent to kill. State v. Mattison [N. D.] 100 N. W. 1091.

70. See Indictment and Prosecution, 2 Curr. L. 325. Conviction of lesser degrees and included offenses.

Though the evidence suggests the theories only of murder in the first degree and not guilty, defendant convicted of murder in the second degree cannot complain that there was not evidence to support his conviction.[72]

§ 7. *Evidence.*[73] *A. Presumptions and burden of proof.*[74]—Guilt must be proved beyond a reasonable doubt,[75] as to every essential ingredient of the crime,[76] including the causal relation between injury and death,[77] and the degree of the homicide.[78] Homicide, when proved, is presumptively murder,[79] but only of the second degree;[80] the burden being on the state to prove premeditation and deliberation,[81] and on the defendant of proving facts in extenuation, justification or excuse.[82] The law presumes a loaded firearm to be a deadly weapon.[83] The authorities are in conflict as to the burden of proof when insanity or other irresponsibility is pleaded, some holding that defendant has the burden of establishing his defense by a preponderance of the evidence;[84] while others hold that the presumption of innocence, attending the accused throughout the trial, overthrows the presumption of sanity and puts upon the state the burden of proving responsibility as an element of the offense, beyond a reasonable doubt.[85] In South Carolina where the defense is accident, the state must overcome the plea beyond a reasonable doubt.[86]

(§ 7) *B. Admissibility in general.*[87]—Proffered testimony must have a legitimate tendency to prove some material fact in issue.[88] Where it has such tendency it

71. Code Cr. Proc. § 444, as amended. People v. Schiavi, 96 App. Div. 479, 89 N. Y. S. 564.

72. State v. Underwood [Wash.] 77 P. 853.

73, 74. See 2 Curr. L. 229.

75. People v. Lagroppo, 90 App. Div. 219, 86 N. Y. S. 115; State v. Scott [Del.] 67 A. 534; People v. Taylor, 92 App. Div. 29, 86 N. Y. S. 996; State v. Levy [Idaho] 75 P. 227; State v. Emory [Del.] 58 A. 1036.

76. State v. Brinte [Del.] 58 A. 258; People v. Muste [Mich.] 100 N. W. 455.

77. Where defendant used unnecessary force in repelling an attack by deceased, but it does not appear that the unnecessary force caused death, conviction of manslaughter cannot be sustained. People v. Taylor, 92 App. Div. 29, 86 N. Y. S. 995.

78. A reasonable doubt acquits of the degree as to which the doubt is entertained. Wells v. Territory [Okl.] 78 P. 124; Galloway v. State [Fla.] 36 So. 168.

79. State v. Emory [Del.] 58 A. 1036; Cook v. State [Fla.] 35 So. 665; State v. Quigley [R. I.] 58 A. 905; State v. Brinte [Del.] 58 A. 258; Williford v. State [Ga.] 48 S. E. 962. Where the killing was with a deadly weapon. State v. Capps, 134 N. C. 622, 46 S. E. 730; State v. Lipscomb, 134 N. C. 689, 47 S. E. 44.

80. Cook v. State [Fla.] 35 So. 655; State v. Capps, 134 N. C. 622, 46 S. E. 730; State v. Hertzog [W. Va.] 46 S. E. 792; State v. Lipscomb, 134 N. C. 689, 47 S. E. 44. Every homicide, unaccompanied by circumstances of excuse, justification or mitigation is presumed to have been committed with malice, unless the contrary is shown, but the presumption goes no further than that the killing was murder in the second degree [Code 1852, c. 127, §§ 1, 2]. State v. Brinte [Del.] 58 A. 258.

81. State v. Hunt, 134 N. C. 684, 47 S. E. 49; State v. Capps, 134 N. C. 622, 46 S. E. 730; State v. Hertzog [W. Va.] 46 S. E. 792; State v. Lipscomb, 134 N. C. 689, 47 S. E. 44.

82. State v. Capps, 134 N. C. 622, 46 S. E. 730; State v. Hertzog [W. Va.] 46 S. E. 792; State v. Lipscomb, 134 N. C. 689, 47 S. E. 44. Where deadly weapon was intentionally used in a manner such as to effect death. Coolman v. State [Ind.] 72 N. E. 568.

83. Territory v. Watson [N. M.] 78 P. 504.

84. State v. Clark, 34 Wash. 485, 76 P. 98. Collecting many cases pro and con. State v. Quigley [R. I.] 58 A. 905, citing many cases and other authorities. State v. Corrivau [Minn.] 100 N. W. 538; People v. Zeigler, 142 Cal. 337, 75 P. 1090; People v. Suesser, 142 Cal. 354, 75 P. 1093. The statute of Arizona, adapted from California, placing the burden on defendant in homicide to prove circumstances of mitigation or justification, unless shown by the state's evidence, is construed to require him to raise only a reasonable doubt, and not to prove such circumstances by a preponderance of the evidence [Pen. Code, § 933]. Anderson v. Territory [Ariz.] 76 P. 636; Porter v. State [Ala.] 37 So. 81. Where the dazed condition of defendant arises from a blow, part of the res gestae, he need not establish his irresponsibility by a preponderance of the evidence. Dent v. State [Tex. Cr. App.] 79 S. W. 525.

85. Cases cited in State v. Clark, 34 Wash. 485, 76 P. 98, and State v. Quigley [R. I.] 58 A. 905; People v. Muste [Mich.] 100 N. W. 455.

86. State v. McDaniel [S. C.] 47 S. E. 384.

87. See 2 Curr. L. 229.

88. Expulsion of wife from church is immaterial on her religious character, the issue being whether she was killed in her home while at prayer or by accident in the attempt of her husband to kill her paramour. Washington v. State [Tex. Cr. App.] 79 S. W. 811. The details of defendant's prior arrest for disturbing the peace cannot be shown on redirect though first brought out on cross. State v. Brown [Mo.] 79 S. W. 1111. A witness who states that he warned deceased who paid no attention to him may not state whether deceased always paid attention be-

is not to be rejected because remote or unconvincing,[89] except where circumstantial evidence is resorted to, in which case a wide range is allowed.[90] The evidence is generally confined to matters which are part of the res gestae,[91] and except as to

fore. Hendrickson v. Com. [Ky.] 81 S. W. 266. Defendant cannot show that when he went armed it was to some lodge, church or public meeting. Pettis v. State [Tex. Cr. App.] 81 S. W. 312. Hearsay and suspicion testimony in poisoning case. Boyd v. State [Miss.] 36 So. 525. Evidence that deceased stated on the day he was killed that he did not feel well is impertinent though defendant defends on the ground of self-defense. Kennedy v. State [Ala.] 37 So. 90. Whether witness, deceased's son, had been throwing rocks at defendant's house, is immaterial though that is what defendant and deceased quarreled about. Gregory v. State [Ala.] 37 So. 259. Even where deceased's intoxication is relevant, evidence that he had a jug of whisky at home on the day he was killed or had carried one home is irrelevant. Id. Testimony that many good shots shoot from the hip, defendant having lowered his gun to that position. Baldwin v. State, 120 Ga. 188, 47 S. E. 558. Defendant cannot show on cross-examination of a state witness that relatives of deceased had tried to bribe him to poison deceased's wife in order to prevent her testifying in the case. Nicks v. State [Tex. Cr. App.] 79 S. W. 35. Where the defense is accidental killing, evidence that defendant did not pay the funeral expenses of deceased, his wife, is incompetent. Washington v. State [Tex. Cr. App.] 79 S. W. 811. Where the defense is that defendant did not kill deceased, the fact that deceased was a fugitive from justice when killed is immaterial. State v. Gosey, 111 La. 616, 35 So. 786. Where defendant deliberately shot into the open door of a house and killed an inmate, evidence that he was on friendly terms with the family is immaterial. State v. Capps, 134 N. C. 622, 46 S. E. 730. That deceased was a drinking man is immaterial and irrelevant. Seaborn v. Com., 25 Ky. L. R. 2203, 80 S. W. 223. That defendant and others furnished evidence to the grand jury relative to deceased's living in adultery is irrelevant. Townsell v. State [Tex. Cr. App.] 78 S. W. 938. Whether deceased, defendant's stepdaughter, had prior to the killing and on separate occasions called him opprobrious names is immaterial. State v. Brown [Mo.] 79 S. W. 1111.

89. Weaver v. State [Tex. Cr. App.] 81 S. W. 39. The uncertainty of testimony as to defendant's identity goes rather to its weight than its admissibility. Statement of witness that he met a person resembling defendant the morning after the homicide. Alanis v. State [Tex. Cr. App.] 81 S. W. 709. Evidence that shortly prior to the homicide defendant's daughter told him of an outrage committed on her by deceased some days before is not to be rejected because of its remoteness, the question of reasonable cooling time being one of fact. State v. Cooper, 112 La. 281, 36 So. 350. The fact of finding empty gun shells and wadding on the scene the next day after an affray is not inadmissible on the ground of its remoteness if it tends to support an issue in the case. Nickles v. State [Fla.] 37 So. 312. Where to a charge of murder by poison the defense is suicide, previous threats of deceased to take his own life are admissible if not too remote. Nordgren v. People, 211 Ill. 425, 71 N. E. 1042; State v. Kelly [Conn.] 58 A. 705. Remoteness has regard for other factors than mere lapse of time, and generally speaking depends upon all the considerations, including time, character of the evidence, and all the surrounding circumstances. State v. Kelly [Conn.] 58 A. 705.

90. State v. Coleman [S. D.] 98 N. W. 175; Walker v. State, 139 Ala. 56, 35 So. 1011. Where the assault was committed by shooting from ambush defendant's prior declarations that if he ever had trouble with prosecutor he would not fight him fair are admissible. Spraggins v. State, 139 Ala. 93, 35 So. 1000. That defendant and deceased were driving together on the afternoon of her death and engaged in excited conversation may be shown. Bess v. Com. [Ky.] 82 S. W. 576.

91. Statements by defendant ten or fifteen minutes after. Scott v. State [Tex. Cr. App.] 81 S. W. 294; Johnson v. State [Tex. Cr. App.] 81 S. W. 945; Bateson v. State [Tex. Cr. App.] 80 S. W. 88. Conversation between defendant and his companion also killed in the affray immediately after its cessation held admissible. McMahon v. State [Tex. Cr. App.] 81 S. W. 296. Testimony as to insulting remark made by defendant to a woman in presence of deceased, is admissible as part of the res gestae. Elmore v. State [Tex. Cr. App.] 78 S. W. 520. Shots at prosecutor's wife immediately after the assault held admissible. Scott v. State [Tex. Cr. App.] 81 S. W. 950. Evidence of defendant's disorderly conduct and of assaults committed by him on other persons just prior to the attack on deceased, was admissible as res gestae and also for the purpose of showing defendant's reckless and violent disposition on the occasion in question. Havens v. Com. [Ky.] 82 S. W. 369. Declarations of woman as to purpose to have abortion performed held admissible as res gestae. Weightnovel v. State [Fla.] 35 So. 856. Answer to physician's question, "Before I touch you, who did the shooting?" not res gestae. State v. Charles [La.] 36 So. 29. Declarations of defendant held admissible as res gestae. Bateson v. State [Tex. Cr. App.] 80 S. W. 88; Ferguson v. State [Ala.] 37 So. 448. Whether it was light enough for defendant to see deceased is part of res gestae. Gordon v. State [Ala.] 36 So. 1009. Statement of defendant after walking ¼ mile is not admissible. Pitts v. State [Ala.] 37 So. 101. Prior statement of woman poisoned, that chickens were dead from strychnine laid for rats held not res gestae. State v. Kelly [Conn.] 58 A. 705. Robbery and the incidents thereof occurring as a part of the murder and immediately following it are admissible. Moran v. Territory [Okl.] 78 P. 111. Statement of deceased to first person to reach him after being shot, held admissible, but later ones not. Bowles v. Com. [Va.] 48 S. E. 527. Conversation between defendant and another prior to killing, relative to defendant's duty to protect himself, held not admissible. Jones v. State [Tex. Cr. App.] 83 S. W. 198.

acts tending to show intent,[92] malice[93] or motive,[94] or admissions or confessions of guilt,[95] evidence of prior,[96] or subsequent acts or declarations, is generally inad-

92. Where accused shot deceased, ran about twelve feet and turned and shot witness, the second shooting is admissible as showing intent whether or not strictly a part of the res gestae. State v. Robinson, 112 La. 939, 36 So. 811. Previous quarrels between defendant and deceased, his wife, and his threats to kill her if she tried to leave him are admissible, the defense being accidental killing. Id. It may be shown that defendant stated that deceased hurt her on a prior occasion and asked witness, a physician, if he would stand by her in a suit. Smith v. State [Tex. Cr. App.] 81 S. W. 936. A written designation of homestead describing other lands is admissible against defendant killing an officer attempting to dispossess him of land on which he lives. Id.

93. Prior threats, quarrels, and difficulties are provable to show malice. State v. Nix, 111 La. 812, 35 So. 917. Testimony that defendant borrowed a pistol ten months before and declared that if he met deceased that day he would be ready for him, in connection with proof of ill feeling from thence to the killing is admissible. Sloan v. State [Tex. Cr. App.] 76 S. W. 922. Accused's intoxication is admissible on the question of malice (Seaborn v. Com., 25 Ky. L. R. 2203, 80 S. W. 223), deliberation, and premeditation (State v. Hertzog [W. Va.] 46 S. E. 792). Previous difficulty and threats by defendant. Pitts v. State [Ala.] 37 So. 101. That a third person had told defendant of a statement deceased had made concerning him, and defendant's threat to kill deceased, may be proved to show animus. Tipton v. State [Ala.] 37 So. 231. A warrant for the arrest of defendant sworn out by the person assaulted is admissible for the state to show grudge and malice on defendant's part. State v. Sullivan [W. Va.] 47 S. E. 267.

94. Defendant procured marriage of deceased with defendant's wife's sister to cover illicit relations with her and then killed him to renew such relations. Weaver v. State [Tex. Cr. App.] 81 S. W. 39. Where a man is tried for the murder of an illegitimate infant, his relations with its mother and conversations with her beforehand are admissible. Lax v. State [Tex. Cr. App.] 79 S. W. 578. Relations of deceased and defendant's daughter. Kennedy v. State [Ala.] 37 So. 90. A previous difficulty may be shown but not the particulars. Taber v. Com. [Ky.] 82 S. W. 443; Gordon v. State [Ala.] 36 So. 1009. Evidence of previous fight between decedent and another whose cause defendant espoused is admissible to show defendant's motive in provoking difficulty. Schrader v. State [Miss.] 36 So. 385. That a watch which deceased had prior to the killing won from defendant at gambling, was gone from his body is admissible. Bowen v. State [Ala.] 37 So. 233. Where the killing occurred during the attempt of a posse to arrest defendant for burglarizing a bank, and on his subsequent arrest a gun taken from one of the posse and money taken from the bank were found upon him, evidence of the burglary was admissible both to show motive and identify defendant. State v. Lewis [Mo.] 79 S. W. 671. Where evidence of prior acts and relations tend to supply a motive for the killing, its remoteness goes not to its admissibility but to the weight and credit to be given to it. Weaver v. State [Tex. Cr. App.] 81 S. W. 39. Antecedent threats by deceased communicated to defendant are admissible not only on the question of who was the aggressor but as tending to show motive. Lee v. State [Ark.] 81 S. W. 385. That evidence disclosing intent, knowledge or motive incidentally shows another offense is no objection to it. Goodman v. State [Tex. Cr. App.] 83 S. W. 196; State v. Levy [Idaho] 75 P. 227; State v. Coleman [S. D.] 98 N. W. 175. Proof of motive is always competent in murder trials. That it is out of proportion to the crime is not ground for excluding evidence of it. Lillie v. State [Neb.] 100 N. W. 316. Speculations on board of trade and financial stringency of woman accused of killing husband whose life was insured. Id. Life insurance policies and letters and papers concerning and connected with them are admissible where the state's theory is that defendant killed deceased, his brother, to obtain the life insurance. State v. Coleman [S. D.] 98 N. W. 175. Where self-defense is relied on, improper relations between defendant and deceased's divorced wife are not admissible to show motive nor on any other grounds. People v. Wright [Cal.] 77 P. 877. Ill treatment and previous assaults are admissible to prove motive. Wells v. Territory [Okl.] 78 P. 124. Previous trouble between defendant and others which he supposed deceased to be interfering in. People v. Suesser, 142 Cal. 354, 75 P. 1093. That deceased's wife and accused slept together at her house after the killing may be shown. Gardner v. U. S. [Ind. T.] 82 S. W. 704.

95. Confessions are admissible (Nicks v. State [Tex. Cr. App.] 79 S. W. 35), though made while defendant is in custody (Hathaway v. Com. [Ky.] 82 S. W. 400; Plant v. State [Ala.] 37 So. 159), but only when voluntary (State v. Brinte [Del.] 58 A. 258; Parker v. State [Tex. Cr. App.] 80 S. W. 1008), and made without threat or inducement (State v. Brinte [Del.] 58 A. 258; State v. Gianfala [La.] 37 So. 30; Brewer v. State [Ark.] 78 S. W. 773). Where defendant is in custody he must, in some states, be warned that whatever he says may be used against him (Moore v. State [Tex. Cr. App.] 79 S. W. 565; Alanis v. State [Tex. Cr. App.] 81 S. W. 709), but the warning need not be exactly contemporaneous with the confession (Nicks v. State [Tex. Cr. App.] 79 S. W. 35; Black v. State [Tex. Cr. App.] 81 S. W. 302), nor be made by an officer (Black v. State [Tex. Cr. App.] 81 S. W. 302). That defendant disputed a witness who testified at the preliminary examination to selling him poison may be shown where the state's theory is that defendant poisoned deceased. Boyd v. State [Miss.] 36 So. 525. Defendant's admission of the killing coupled with justification is not a confession. "We had to do it to save ourselves." Owens v. State [Ga.] 48 S. E. 21.

96. Defendant cannot show that on a prior occasion deceased said that when he used certain language about defendant's

missible. Self-serving declarations whether made before[97] or after the homicide are inadmissible.[98] The acts and declarations of defendant on being charged with the murder are always a pertinent subject of inquiry,[99] but the subsequent acts and declarations of deceased, not res gestae nor dying declarations,[1] and the acts and declarations of third persons made in defendant's absence, no conspiracy being shown, should not be admitted.[2] Prior threats of deceased to take his own life are admissible, the defense being suicide.[3] Though the evidence connecting defendant

wife he expected defendant to hit him right between the eyes. Pettis v. State [Tex. Cr. App.] 81 S. W. 312. Advice of counsel to woman killing officer in legal attempt to eject her from land cannot be shown. Smith v. State [Tex. Cr. App.] 81 S. W. 936. Details of previous difficulties between defendant and deceased and defendant and his wife, deceased's daughter, are inadmissible. Thompson v. State [Miss.] 36 So. 389. Declarations to a neighbor of fear of further assault are not admissible in one's own favor. State v. Raymo [Vt.] 57 A. 993. Proof of a conversation between defendant and the person assaulted three hours before held inadmissible. Territory v. Dooley [Ariz.] 78 P. 138. Prior conduct and acts of defendant can be shown where defense is insanity. People v. Manoogian, 141 Cal. 592, 75 P. 177.

97. Defendant's husband, party to conspiracy to kill deceased attempting to eject them from home, stated that he had rights and would abide by decision of courts. Smith v. State [Tex. Cr. App.] 81 S. W. 936. Conversation as to defendant's duty to protect himself. Jones v. State [Tex. Cr. App.] 83 S. W. 198.

98. Foster v. State [Tex. Cr. App.] 74 S. W. 29. That defendant asked to be taken before deceased before she died, and refused to flee from the scene, are inadmissible. Walker v. State, 139 Ala. 56, 35 So. 1011.

99. Hanna v. State [Tex. Cr. App.] 79 S. W. 544. Defendant need not deny the accusations of every idle straggler who chooses to accuse him. Statements of third person in defendant's presence held incompetent. Merriweather v. Com. [Ky.] 82 S. W. 592.

1. Wilson v. State [Ala.] 37 So. 93. Identification of defendant by deceased, not shown to have been res gestae or a dying declaration is inadmissible. Bowen v. State [Tex. Cr. App.] 82 S. W. 520.

2. A statement by defendant's son just before the killing, not shown to have been heard by defendant, that deceased was the cause of the trouble and he ought to go and kill him, is inadmissible. Freeman v. State [Tex. Cr. App.] 81 S. W. 953. Witnesses cannot state what they did or thought in the absence of both parties during the interim between the preliminary quarrel and the homicide. Chambers v. State [Tex. Cr. App.] 79 S. W. 572. Where defendant killed a person attempting to arrest him under order of the mayor, testimony by the mayor that he ordered the arrest is not objectionable as hearsay and made out of defendant's presence. Black v. State [Tex. Cr. App.] 81 S. W. 302. Where there is no evidence of a conspiracy, the presence and acts of others prior to the crime should not be admitted. Pulpus v. State [Miss.] 36 So. 190.

3. Nordgren v. People, 211 Ill. 425, 71 N. E. 1042. Where the defense to a charge of murder by poison is suicide, and defendant shows threats by deceased to take her own life, and the state shows that the week before she died deceased was in good health and spirits, defendant cannot show in rebuttal that at other times during the week she was despondent and threatened to take her own life. State v. Kelly [Conn.] 58 A. 705.

NOTE. Suicidal declarations: On this question there is considerable conflict. Some courts have excluded the evidence as hearsay, not coming within any of the exceptions to the rule as to res gestae dying declarations, or statements made in the presence of the defendant so as to influence his conduct (Siebert v. People, 143 Ill. 571; State v. Fitzgerald, 130 Mo. 407), or as to exclamations of pain or statements concerning health (State v. Punshon, 124 Mo. 448. See 2 Bishop, Cr. Proc. § 623). It is clear that the excluded declarations do not come within any of these exceptions, or even within the expanded res gestae rule (15 Am. L. R. 71; State v. Hayward, 62 Minn. 474), though similar statements may constitute res gestae (2 Bishop, Cr. Proc. § 626). So far the cases are sound. But is it always essential that, to be admitted, declarations of a deceased person must fall within one of the exceptions named? Entirely aside from any proper application of the res gestae rule (1 Greenleaf [16th Ed.] § 162), threats either of the defendant or of the deceased, are admitted where they tend to establish a design or plan (Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492; Rex v. Hagan, 12 Cox, C. C. 357), and this principle is extended to include expressions of a mere hostile desire to see a person (State v. Horne, 9 Kan. 123). The real object of such evidence is to show, as an evidential fact, the existence of a design. Where this fact is to be proved the declarations of a person, living or dead, should always be evidence (Insurance Co. v. Hillman, 145 U. S. 285; Jacobs v. Whitman, 10 Cush. [Mass.] 255), and whether regarded as entirely outside the hearsay rule (McKelvey, Ev. § 140), or within one of its exceptions (1 Greenleaf [16th Ed.] §§ 162a, 162c), they should be admitted (1 Wigmore, Treatise, Ev. §§ 113, 143, 144). As pointed out in Insurance Co. v. Moseley, 8 Wall. [U. S.] 397, "Whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Such declarations are regarded as acts and are as competent as any other testimony when relevant to the issue. Their truth or falsity is an inquiry for the jury." Expressly overruling an earlier case (Com. v. Felch, 132 Mass. 22) on the authority of which Siebert v. People, 143 Ill. 571, was decided, this view was adopted in a leading Massachusetts case,

with the homicide is circumstantial, it is not competent to prove that deceased had certain enemies of whom he stood in fear,[4] or that another than defendant had a motive for killing him,[5] and evidence as to the movements of a third person whom defendant claims is the guilty party is generally inadmissible.[6] Possession and familiarity with the weapon or other means of death is competent.[7] The physical conditions existing in the vicinity,[8] and the conduct, appearance, actions, and condition of accused[9] and deceased at the time, may be shown.[10] The attending physician may state his opinion that deceased's wound was fatal.[11] Defendant's general reputation for peace or violence may be shown in his defense.[12] Deceased's clothes[13] and the weapon used may be introduced,[14] and testimony as to blood

and expressions showing a suicidal intention were admitted (Com. v. Trefethen, 157 Mass. 180).

In the Connecticut case cited in the footnote above, the court admitted such evidence but it failed to agree with the Ohio court as to what declarations might be shown. Blackburn v. State, 23 Ohio St. 146; State v. Kelly [Conn.] 58 A. 704. This is a question of relevancy. In the Connecticut case the court made the recent character of the declaration the test of admissibility. But the intention to commit suicide might be of so long standing as to amount to a suicidal mania, and the excluded expressions might best establish it. Such a plan would be relevant evidence. 1 Wigmore, Treatise, Ev. § 102. Of course, if the declarations are to establish the ultimate fact, or are introduced with some evidential fact, as part of the res gestae (2 Bishop, Cr. Proc. §§ 626, 627), time may be vital (3 Colum. L. R. 351); but in dealing with declarations showing a plan or design, time alone has little or no value. (State v. Adams, 76 Mo. 358). The courts have admitted threats made from one to nine years before the crime charged was committed (Abbott v. Com. [Ky.] 68 S. W. 124; Com. v. Holmes, 157 Mass. 233, 34 Am. St. Rep. 270), and mere statements, not threats, made three years prior to the act, have been allowed (Com. v. Robinson, 146 Mass. 571). So, while the exclusion of such declarations must be left to the sound discretion of the court (Com. v. Trefethen, 157 Mass. 180; Com. v. Holmes, 157 Mass. 233, 34 Am. St. Rep. 270), the exclusion should be made with the understanding that lapse of time goes only to the weight and not to the relevancy of the evidence (State v. Bradley, 64 Vt. 466; Redd v. State, 68 Ala. 492). This was the holding as to suicidal declarations in the Blackurn case, and in so far as the Connecticut court overlooks this principle, its decision seems unsound.—V. Colum. L. R. 157.

4. Wallace v. State [Tex. Cr. App.] 81 S. W. 966; Bowen v. State [Ala.] 37 So. 233.

5. Walker v. State, 139 Ala. 56, 35 So. 1011; Bowen v. State [Ala.] 37 So. 233.

6. That party having motive to kill was in the town, there being no evidence to connect him with the killing. Walker v. State, 139 Ala. 56, 35 So. 1011.

7. Possession of weapons and skill in marksmanship of defendants held admissible. Allen v. Com. [Ky.] 82 S. W. 589. A woman on trial for murder with firearms may be shown to have been familiar with them for years. Lillie v. State [Neb.] 100 N. W. 316. Preparation of arms and remarks by defendant as to what he would do if deceased should be killed are admissible. Ferguson v. State [Ala.] 37 So. 448. Evidence tending to show a criminal intent in procuring arms may be met by defendant by a showing why he procured them and explaining what he intended to do with them. Smith v. State [Tex. Cr. App.] 81 S. W. 936. Defendant may not testify why he had a pistol on the occasion of the difficulty. Gregory v. State [Ala.] 37 So. 259. On a trial for murder by giving poisoned whisky, evidence that deceased kept whisky and poison in her room and had threatened to suicide is admissible. Nordgren v. People, 211 Ill. 425, 71 N. E. 1042. Statements of deceased that he "had the stuff to do it with" are hearsay and are not admissible either on the theory that they show possession of the poison, or show a knowledge of the effect of strychnine. State v. Kelly [Conn.] 58 A. 705.

8. Such as the finding of unusual articles on the floor of the house,—pepper, matches, a boot heel. Lillie v. State [Neb.] 100 N. W. 316. Tracks. Parker v. State [Tex. Cr. App.] 80 S. W. 1008. Evidence of footprints is admissible though not shown to be similar to accused's. State v. Daniels, 134 N. C. 641, 46 S. E. 743. Where deceased was killed in attempting to eject defendant from her home, the fact that the house was barricaded but not the resisting power of the barricade may be shown. Smith v. State [Tex. Cr. App.] 81 S. W. 936.

9. The conduct, appearance, and actions of accused immediately after the crime may be shown, as well as his statements tending to connect him with the transactions being investigated. Lillie v. State [Neb.] 100 N. W. 316. Opinion of nonexpert that defendant was insane at the time held properly rejected. Freeman v. State [Tex. Cr. App.] 81 S. W. 953.

10. The advanced pregnancy of a deceased wife is material where the defense of her husband charged with killing her is that he did it accidentally in attempting to kill a man in the act of adultery with her. Washington v. State [Tex. Cr. App.] 79 S. W. 811.

11. Sims v. State, 139 Ala. 74, 36 So. 138.

12. Though the facts have been proved by direct testimony, though the judge deems the fact of guilt clearly established, and though defendant relies on defense of insanity; especially in view of the jury's function of fixing the penalty. Maston v. State [Miss.] 36 So. 70.

13. To show location of wounds (Seaborn v. Commonwealth, 25 Ky. L. R. 2203, 80 S. W. 223), but not unless they illustrate and

stains is competent.[15] On trial for assault, evidence that defendant discharged the pistol shortly after is pertinent as showing that it was loaded,[16] and where a killing occurs in a dispute over some abandoned wood claimed by defendant and another, evidence that the foreman of the railroad company owning the wood gave it to defendant's adversary is admissible to show some foundation for her claim.[17] In a prosecution for assault with intent to murder, committed in resisting arrest by a private person, it is proper to admit evidence that defendant had stolen goods, which he had at the time of the arrest partly concealed under his coat.[18]

Justification.[19]—Previous altercations between defendant and deceased,[20] and their threats and statements of intentions in regard to each other, are admissible, the plea being self-defense;[21] and there being evidence that deceased's threats were heard by or communicated to defendant;[22] likewise where the defense is accident in the struggle for possession of a revolver with which defendant believed deceased was about to kill her.[23] But the particulars of former difficulties cannot be shown,[24] nor can defendant show his declarations of fear of deceased subsequent to such difficulties and prior to the killing,[25] nor that deceased had stated of him that he was an old coward and would not fight.[26] Indefinite and impersonal threats by a party to a homicide are not admissible in the absence of evidence connecting them with his adversary.[27] Evidence of attempts of deceased, after a prior difficulty, to borrow a pistol, is properly rejected where connected in no other way with defendant.[28] Previous relations of deceased and defendant's wife or daughter may be shown when illustrative of their attitude toward each other.[29]

make pertinent some phase of the oral testimony (Christian v. State [Tex. Cr. App.] 79 S. W. 562).

14. People v. Lagroppo, 90 App. Div. 219, 86 N. Y. S. 116.

15. Evidence that blood was found on a box in defendant's room is admissible. Walker v. State, 139 Ala. 56, 35 So. 1011.

16. People v. Wells [Cal.] 78 P. 470.

17. People v. Rodawald [N. Y.] 70 N. E. 1.

18. Dryer v. State, 139 Ala. 117, 36 So. 38.

19. See 2 Curr. L. 233.

20. Bateson v. State [Tex. Cr. App.] 80 S. W. 88. Testimony as to prior difficulties between the parties and efforts of deceased to make peace is proper. Pettis v. State [Tex. Cr. App.] 81 S. W. 312. Where bad blood and quarrels have existed for years between defendant and deceased it is immaterial who was responsible for the origin of the ill feeling. Id.

21. Threats by defendant. Bateson v. State [Tex. Cr. App.] 80 S. W. 88. Statements by defendant that he wanted "to get a gun and go to killing" and wanted "to kill somebody" held not too general to be admissible. Friday v. State [Tex. Cr. App.] 79 S. W. 815.

Threats by deceased. People v. Taylor, 177 N. Y. 237, 69 N. E. 534. As bearing on defendant's state of mind, a witness may state that he delivered a pacific message to him from deceased. Rush v. State [Tex. Cr. App.] 76 S. W. 927. Threats by deceased are not admissible where under the undisputed evidence defendant is not entitled to avail himself of the plea of self-defense. Gilmore v. State [Ala.] 37 So. 359. In order that threats should be part of the res gestae, something more must be shown than that they were made recently; whether they are offered in mitigation or as justification proof of some overt act is necessary as a predicate for their admission. State v. Thomas, 111 La. 804, 35 So. 914.

22. Declarations of deceased between the preliminary quarrel and the killing, not brought to defendant's notice in the interim, cannot be shown. Though the purpose was to show the time elapsing rather than that deceased had abandoned his intention of killing defendant. Burnett v. State [Tex. Cr. App.] 79 S. W. 550. Threats by deceased are not admissible except where communicated to defendant, or there is a question as to who was the aggressor, or deceased made a hostile demonstration. Wilson v. State [Ala.] 37 So. 93.

23. People v. Taylor, 177 N. Y. 237, 69 N. E. 534.

24. Gordon v. State [Ala.] 36 So. 1009; Taber v. Com. [Ky.] 82 S. W. 443; State v. Adams [S. C.] 47 S. E. 676. Defendant cannot show that in a prior difficulty deceased cursed him. Pitts v. State [Ala.] 37 So. 101. A question to a witness for the state whether he knew anything of a previous difficulty between defendant and deceased is not objectionable on its face. Plant v. State [Ala.] 37 So. 159.

25. State v. Raymo [Vt.] 57 A. 993.

26. Pettis v. State [Tex. Cr. App.] 81 S. W. 312.

27. McMahon v. State [Tex. Cr. App.] 81 S. W. 296; Pitts v. State [Ala.] 37 So. 101; Harbour v. State [Ala.] 37 So. 330.

28. Pitts v. State [Ala.] 37 So. 101. Testimony that on the occasion of a prior difficulty deceased borrowed a gun and stated that he wanted it to kill a dog is irrelevant. Pettis v. State [Tex. Cr. App.] 81 S. W. 312.

The general reputation of deceased for violence may be shown where defendant had knowledge of it,[30] but specific facts in regard to his character[31] such as acts of violence towards third persons,[32] in no way connected with or observed by defendant,[33] or that he had been imprisoned for particular offenses,[34] cannot, especially where defendant is not shown to have had knowledge thereof, further than that he had been in prison.[35] Deceased's habit of carrying weapons not known to defendant cannot be shown.[36] The character of deceased cannot be supported by the state until it has been attacked by defendant,[37] but where defendant puts the character of deceased in issue as a violent and dangerous man, the state may prove that he is a peaceable and law-abiding man.[38] Where the defense is accident, the reputation of deceased for drunkenness is incompetent on the issue of his violence when drunk.[39] General good character and church membership of deceased and his lack of profanity is not admissible to rebut defendant's testimony that he approached using violent profane language.[40] Decedent's intoxication is irrelevant when offered before any showing of necessity to kill him and when the state of the proof is that defendant was the aggressor.[41] Defendant is entitled to prove by deceased's widow that he was a man of ungovernable temper.[42]

Defendant having given evidence of his general character for peace and quiet cannot further show that his general disposition is gentle and kind and that he would not hurt anybody.[43]

The possession of weapons by deceased is material,[44] but opinions of witnesses whether a stick was a deadly weapon are inadmissible where it was produced be-

29. Previous relations of deceased and defendant's daughter may be shown as bearing on who was the aggressor; and the reasonableness of defendant's belief that deceased would shoot. Kennedy v. State [Ala.] 37 So. 90. Where the defense is self-defense, prior declarations of deceased as to improper relations with defendant's wife are not admissible on the theory that they furnish a motive for an attack on defendant by deceased, there being no evidence that the declarations had reached defendant or that deceased thought they had. State v. Brown, 111 La. 696, 35 So. 818.

30. People v. Rodawald [N. Y.] 70 N. E. 1; People v. Farrell [Mich.] 100 N. W. 264. The reputation of decedent is inadmissible where he and defendant lived in distant communities and were unacquainted. Long v. State [Ark.] 81 S. W. 387. Testimony as to deceased's reputation is properly excluded where defendant's knowledge of his character is based more on personal knowledge of his escapades than on what people thought of him. Dean v. Com., 25 Ky. L. R. 1449, 78 S. W. 1112.

31. People v. Rodawald [N. Y.] 70 N. E. 1; State v. Ronk, 91 Minn. 419, 98 N. W. 334.

32. People v. Rodawald [N. Y.] 70 N. E. 1; State v. Ronk, 91 Minn. 419, 98 N. W. 334; People v. Farrell [Mich.] 100 N. W. 264; United States v. Densmore [N. M.] 75 P. 31.

33. People v. Farrell [Mich.] 100 N. W. 264.

34, 35. People v. Rodawald [N. Y.] 70 N. E. 1.

36. Sims v. State, 139 Ala. 74, 36 So. 138.

37. Moore v. State [Tex. Cr. App.] 79 S. W. 565. Testimony that deceased had assaulted defendant's daughter and threatened to kill him furnish no predicate. Kennedy v. State [Ala.] 37 So. 90.

38. Pettis v. State [Tex. Cr. App.] 81 S. W. 312.

39. State v. McDaniel [S. C.] 47 S. E. 384.

40. Bowles v. Com. [Va.] 48 S. E. 527.

41. Gregory v. State [Ala.] 37 So. 259.

42. Habeas corpus. Ex parte McCoy [Tex. Cr. App.] 82 S. W. 1044.

43. Demaree v. Com. [Ky.] 82 S. W. 231.

44. Where there is a conflict as to whether defendant was cut by deceased or by himself in trying to cut deceased, and as to whose hand the knife was in, evidence that deceased had lent his knife just before the killing is proper. Dean v. Com., 25 Ky. L. R. 1449, 78 S. W. 1112. Where defendant claims that deceased's weapons may have been clandestinely removed from his body the state may show by his wife that he never owned nor carried any. Pettis v. State [Tex. Cr. App.] 81 S. W. 312. Where defendant's witnesses testify that as deceased fell he threw a pistol into a neighboring field, rebuttal is admissible to the effect that witnesses sought there and found no pistol. Gregory v. State [Ala.] 37 So. 259. That one of a party to which defendant thought prosecutor belonged and which was searching for him was armed with a pistol is admissible. State v. Evans, 122 Iowa, 174, 97 N. W. 1008. That deceased's gun was not in working order as to its second barrel is inadmissible in the absence of proof that defendant knew it. People v. Wright [Cal.] 77 P. 877.

fore the jury and evidence as to the relative size and strength of the parties was shown.[45]

Evidence that deceased, in the hearing of accused, stated as he approached him, just before he was shot, that he intended to bid accused "good night" is admissible.[46]

To rebut evidence that deceased had hold of defendant's pistol when shot, it may be shown that there were no powder burns on his hands.[47]

Harmless error, in the admission and exclusion of evidence is discussed below.[48]

(§ 7) *C. Dying declarations*[49] are admissible on the trial of a legal inquiry into the death of the person making them[50] as to such facts relative to the cause and extent of the injury received,[51] as deceased would have been permitted to testify to had he lived,[52] if made under a sense of impending dissolution,[53] though

45. Majors v. State [Miss.] 35 So. 825; Moran v. State [Ga.] 48 S. E. 324.

46. People v. Farrell [Mich.] 100 N. W. 264.

47. State v. McDaniel [S. C.] 47 S. E. 384.

48. The admission of evidence that defendant resisting arrest by a private person had stolen goods partly concealed under his coat at the time is harmless since he would not be justified in resisting illegal arrest to the extent of taking life. Dryer v. State, 139 Ala. 117, 36 So. 38. Bad character of defendant's female companion while immaterial is not prejudicial. Foster v. State [Tex. Cr. App.] 74 S. W. 29. Whether or not evidence of deceased's having lent his knife just before the killing is admissible, its admission cannot harm defendant where the undisputed evidence shows that defendant pursued and slew deceased with a pistol at a time when no apparent danger existed. Dean v. Com., 25 Ky. L. R. 1449, 78 S. W. 1112. Experiments with Winchester as to how far it would throw shells held harmless. Pettis v. State [Tex. Cr. App.] 81 S. W. 312. No harm results from asking a witness whether he heard defendant make any other threats against deceased, conceding it calls for a conclusion, where the witness answers by repeating a declaration which is a threat. Wilson v. State [Ala.] 37 So. 93. Sustaining objections to the cross-examination of a state's witness as to matters material only on the question of self-defense is not prejudicial where there is no issue of self-defense in the case. People v. Manoogian, 141 Cal. 592, 75 P. 177.

Error cured by other evidence or striking out. Brock v. Com. [Ky.] 82 S. W. 638. Error in refusing to strike out testimony of a witness relating his exclamation at the time of the assault "There goes on murder here" is not cause for reversal where no exception was taken to the ruling and it is undisputed that murder did go on. People v. Lagroppo, 90 App. Div. 219, 86 N. Y. S. 116. Where there is no possible doubt as to the cause of death, the admission of immaterial evidence on that point is harmless. Bowers v. State [Wis.] 99 N. W. 447. Refusal to permit evidence that the person assaulted was of a quarrelsome disposition when intoxicated is immaterial where the same witness subsequently testified to the fact without objection. Meehan v. State, 119 Wis. 621, 97 N. W. 173. Error in introducing evidence that defendant, who claims he killed deceased, his wife, accidentally, did not pay her funeral expenses, is cured by permitting him to prove that he offered to pay but was not permitted. Washington v. State [Tex. Cr. App.] 79 S. W. 811. Admission of evidence of a fight between the deceased and the accused about a year before the killing was harmless error where there was evidence of a similar fight shortly before the death. Williams v. Com., 25 Ky. L. R. 1504, 78 S. W. 134.

49. See 2 Curr. L. 235.

50. Although two persons killed were shot in the same fight, the dying declarations of one are not admissible on the trial of the slayer for the murder of the other. Taylor v. State [Ga.] 48 S. E. 361. Dying declarations are admissible only on the principle that the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the declarations. Hence they cannot be considered in support of a conviction of assault. People v. Schiavi, 96 App. Div. 479, 89 N. Y. S. 564.

51. Witness should not state that half an hour before deceased declared her husband had poisoned her, and before presumably the poison had been taken, that she stated that a person heard going out of the house was her husband. Nordgren v. People, 211 Ill. 425, 71 N. E. 1042.

52. Connell v. State [Tex. Cr. App.] 81 S. W. 746. "That's all right; Bill Harris is my friend, and I don't want nothing done to him" is inadmissible. State v. Harris, 112 La. 937, 36 So. 810. A declaration that "They murdered me without cause" is inadmissible. Bateson v. State [Tex. Cr. App.] 80 S. W. 88. But such a statement is innocuous where all the circumstances are fully shown by other witnesses. Connell v. State [Tex. Cr. App.] 81 S. W. 746. Statement of deceased who was poisoned that she had taken nothing but what the doctor gave her. Boyd v. State [Miss.] 36 So. 525. Statement of deceased shot in the leg that his bowels hurt him and that if he could get over that he would be all right is not admissible. Pitts v. State [Ala.] 37 So. 101.

53. Their admissibility is for the trial court with whose decision the appellate court will not interfere except in clear cases. Martin v. Com., 25 Ky. L. R. 1928, 78 S. W.

immediate dissolution did not follow;[54] they are admissible because of reasons of necessity, and because it is supposed that a realization on the part of declarant of the certain and speedy approach of death affords as powerful incentive to tell the truth as does the administration of an oath.[55] Declarations made while deceased entertained hope of recovery are admissible where he afterwards reaffirmed them after hope had been abandoned,[56] and declarations admissible against the person doing the killing are also admissible against conspirators and accomplices.[57] Their admission does not violate the constitutional guaranty of confrontation of witnesses.[58] It is no objection that the declaration was written down and so shown instead of being testified to orally by persons who heard it,[59] but such a writing not signed by decedent nor read over to him or in any way recognized by him is not admissible,[60] whence the fact that such a writing is in the hands of the prosecuting attorney does not render oral evidence of the declaration incompetent.[61] Where deceased was dying of poison a statement to her by the physician that as her husband was under suspicion she should disclose whether she had taken anything should not be admitted in connection with her statement that she had not.[62] Witness may state that deceased asked him to take down his testimony as showing his connection with the statement.[63]

The weight of dying declarations as evidence,[64] and the credibility of testimony of a medical witness as to deceased's condition, is for the jury;[65] and in case of conflict as to whether any declaration was in fact made, the evidence thereof should be admitted and the question submitted to the jury.[66] The declarant may be impeached in the same manner as other witnesses,[67] as by showing that his character was bad,[68] or that when making the declaration he was in a reckless, irreverent state of mind and entertained feelings of malice and hostility towards accused;[69] and statements at variance with the dying declaration are admissible for that purpose though not of themselves res gestae or dying declarations.[70]

(§ 7) *D. Sufficiency.*[71]—In the footnotes are grouped cases on the sufficiency of the evidence to support conviction of murder generally,[72] murder in

1104. Whether deceased was conscious of approaching death is a question of law for the court. Bateson v. State [Tex. Cr. App.] 80 S. W. 88. Evidence that deceased told witness to tell his wife goodbye is inadmissible when there is no issue as to his consciousness of approaching death. Id.

Predicate held sufficient. Connell v. State [Tex. Cr. App.] 81 S. W. 746; Fuqua v. Com. [Ky.] 81 S. W. 923; Davis v. State [Ga.] 48 S. E. 305; Kimberlain v. State [Tex. Cr. App.] 82 S. W. 1043; Pitte v. State [Ala.] 37 So. 101; Gregory v. State [Ala.] 37 So. 259; Hawkins v. State [Md.] 57 A. 27. Deceased somewhat under influence of morphine. Walker v. State, 139 Ala. 56, 35 So. 1011. Deceased on advice of physician made journey to city for operation. State v. Gianfala [La.] 37 So. 30. Deceased sent for physician. Pitts v. State [Ala.] 37 So. 101. Request that the doctor in attendance give some relief held not to indicate hope of recovery. Hawkins v. State [Md.] 57 A. 27.

Predicate held not sufficient. State v. Knoll [Kan.] 77 P. 580. Deceased expressed confidence he would soon recover. Bowles v. Com. [Va.] 48 S. E. 527.

54. State v. Brown, 111 La. 696, 35 So. 818; Hawkins v. State [Md.] 57 A. 27.

55. State v. Knoll [Kan.] 77 P. 580; Nordgren v. People, 211 Ill. 425, 71 N. E. 1042; Hawkins v. State [Md.] 57 A. 27.

56. Sims v. State, 139 Ala. 74, 36 So. 138; Hawkins v. State [Md.] 57 A. 27.

57. People v. Moran [Cal.] 77 P. 777.

58. Art. 1, § 10. Payne v. State [Tex. Cr. App.] 78 S. W. 934.

59. Bennett v. State [Tex. Cr. App.] 81 S. W. 30.

60. Fuqua v. Com. [Ky.] 81 S. W. 923.

61. Sims v. State, 139 Ala. 74, 36 So. 138.

62. Boyd v. State [Miss.] 36 So. 525.

63. Pitts v. State [Ala.] 37 So. 101.

64, 65. State v. Davis, 134 N. C. 633, 46 S. E. 722.

66. Commonwealth v. Lawson, 25 Ky. L. R. 2187, 80 S. W. 206.

67. Pardon of crime cannot be shown in rebuttal. Martin v. Com., 25 Ky. L. R. 1928, 78 S. W. 1104.

68, 69. Nordgren v. People, 211 Ill. 425, 71 N. E. 1042.

70. State v. Charles [La.] 36 So. 29; Gregory v. State [Ala.] 37 So. 259.

71. See 2 Curr. L. 236.

72. Conviction of murder in killing infant child held supported. Austin v. State, 139 Ala. 14, 35 So. 879. Evidence held sufficient to sustain conviction of murder. State v. Quigley [R. I.] 58 A. 905; State v. Nargashian [R. I.] 58 A. 953; State v. Coleman [S. D.] 98 N. W. 175; Turner v. Com., 25 Ky. L. R. 2161, 80 S. W. 197; Sampson v. Com. [Ky.] 82 S. W. 384; Hathaway v. Com. [Ky.]

the first degree,[73] second degree,[74] manslaughter,[75] attempt to murder,[76] assault with intent to kill or murder,[77] to prove the corpus delicti,[78] cause of death,[79] defendant's participation,[80] identity,[81] insanity,[82] and accident.[83]

82 S. W. 400; Holland v. Com. [Ky.] 82 S. W. 596, 598; Merriweather v. Com. [Ky.] 82 S. W. 592; Gaines v. State, 119 Ga. 568, 46 S. E. 840. Requested charge not to convict of murder held properly refused, and one not to acquit properly given. Gilmore v. State [Ala.] 37 So. 359. Killing on slight provocation held brutal and murder. State v. Hunt, 134 N. C. 684, 47 S. E. 49. Where accused deliberately shot into a house through an open door and killed an inmate evidence held insufficient to rebut presumption of malice arising from the reckless act. State v. Capps, 134 N. C. 622, 46 S. E. 730. Claim of justification for defilement of wife held untenable. State v. Botha, 27 Utah, 289, 75 P. 731. New trial held properly granted on the ground that the testimony of an accomplice was not sufficiently corroborated to sustain a conviction. People v. Kennedy [Cal.] 75 P. 845.

Circumstantial evidence. Edwards v. Territory [Ariz.] 76 P. 458. The fact that deceased came to his death in the manner described in the indictment, and within the county, and that the prisoner aided and participated in the fatal act, may be shown by circumstantial evidence. State v. Brinte [Del.] 58 A. 258.

Self-defense. Waller v. People, 209 Ill. 284, 70 N. E. 681. Evidence held to show that killing was not done in self-defense. Territory v. Shankland, 3 Ariz. 403, 77 P. 492. Evidence held insufficient to sustain conviction of murder and to make a case of self-defense. Clarkston v. State [Tex. Cr. App.] 79 S. W. 304.

Murder by **poison.** Howland v. Territory, 13 Okl. 575, 76 P. 143. Affirmative charge for defendant in poisoning case held properly refused. Scott v. State [Ala.] 37 So. 357. Evidence held insufficient to prove wife poisoning. Nordgren v. People, 211 Ill. 425, 71 N. E. 1042. Infant poisoning. Young v. State [Tex. Cr. App.] 82 S. W. 1035.

Conspiracy. Allen v. Com. [Ky.] 82 S. W. 589. Evidence held sufficient to sustain conviction on theory that defendant participated in conspiracy to kill deceased. People v. Donnolly [Cal.] 77 P. 177; People v. Moran [Cal.] 77 P. 777. Evidence held to sustain finding of conspiracy to rob deceased and participation of defendant in killing. People v. Lawrence, 143 Cal. 148, 76 P. 893. Evidence held sufficient to show that one of defendants shot deceased and that there was a conspiracy between them all to do an unlawful act. State v. Norton [S. C.] 48 S. E. 464. Evidence independent of the declarations of an alleged conspirator held insufficient to establish a prima facie case of conspiracy to commit murder. State v. Walker [Iowa] 100 N. W. 354.

73. Evidence held to sustain a conviction of murder in the first degree. Brown v. State [Tex. Cr. App.] 78 S. W. 507; People v. Rodawald [N. Y.] 70 N. E. 1; Spaulding v. State, 162 Ind. 297, 70 N. E. 243; State v. Clark, 34 Wash. 485, 76 P. 98; Black v. State [Tex. Cr. App.] 81 S. W. 302; Schwartz v. State [Tex. Cr. App.] 83 S. W. 195; People v. Burness, 178 N. Y. 429, 70 N. E. 966; People v. Mooney, 178 N. Y. 91, 70 N. E. 97; People v. Koepping, 178 N. Y. 247, 70 N. E. 778; Elias v. Territory [Ariz.] 76 P. 605; Eddy v. State [Tex. Cr. App.] 82 S. W. 513.

Circumstantial evidence. Commonwealth v. Kovovic [Pa.] 58 A. 857; Lillie v. State [Neb.] 100 N. W. 316; State v. Levy [Idaho] 75 P. 227. Premeditation and deliberation held sufficiently shown. State v. Lipscomb, 134 N. C. 689, 47 S. E. 44. Evidence held to support conviction of first degree murder and exclude second degree. Hernandez v. State [Tex. Cr. App.] 81 S. W. 1210. Evidence held to justify charge that if defendant approached deceased with the intention of killing him if he did not sign a certain note, he was guilty of murder in the first degree. State v. Robertson, 178 Mo. 496, 77 S. W. 528.

74. Conviction of second degree murder held proper. Baker v. State [Tex. Cr. App.] 81 S. W. 1215; People v. Lagroppo [N. Y.] 71 N. E. 737; Id., 90 App. Div. 219, 86 N. Y. S. 116; Taylor v. State [Ark.] 82 S. W. 495. Abortion. People v. Balkwell, 143 Cal. 259, 76 P. 1017. Cause of death. Hamby v. State [Ark.] 83 S. W. 322.

75. Conviction of manslaughter held supported. Buchanan v. State [Miss.] 36 So. 388. Evidence held sufficient to sustain conviction of voluntary manslaughter. Dean v. Com., 25 Ky. L. R. 1449, 78 S. W. 1112; Havens v. Com. [Ky.] 82 S. W. 369. Issues of murder and self-defense, but not manslaughter, held raised by the evidence. Hjeronymus v. State [Tex. Cr. App.] 79 S. W. 313.

76. Evidence held insufficient to convict of attempt to murder. Self-defense. State v. Ballard [W. Va.] 47 S. E. 148.

77. Conviction of assault with intent to murder held proper. Use of pistol. Franklin v. State [Tex. Cr. App.] 82 S. W. 514. Evidence held sufficient to sustain a conviction for willfully and maliciously shooting at and wounding another with intent to kill. Knuckles v. Com., 25 Ky. L. R. 1693, 78 S. W. 469. Evidence that defendant fired into a house in which four were living and that one shot nearly hit A and another B, supports a conviction of assault with intent to murder A. Tipton v. State, 119 Ga. 304, 46 S. E. 436. Verdict of assault with intent to murder held justified by defendant's statement alone. Wood v. State, 119 Ga. 426, 46 S. E. 658.

78. Evidence held sufficient to show the corpus delicti and defendant's agency. Deceased shot in crowd. Patton v. State [Tex. Cr. App.] 80 S. W. 86. Evidence held sufficient to show that abortion was not necessary to save life of deceased. People v. Balkwell, 143 Cal. 259, 76 P. 1017.

79. Where the physician attending deceased described a wound that any person of average intelligence would know was fatal, it is not necessary, in proof of cause of death, that he state his opinion that it was fatal. Waller v. People, 209 Ill. 284, 70 N. E. 681. A contention that decedent's death was caused not by the wound but by

Proof of the corpus delicti is always necessary,[84] but is fully established when it is shown that a human being has been deprived of life by criminal agency.[85]

There must be other evidence of the corpus delicti besides the confession,[86] but proof of the finding of the body with marks of violence upon it is sufficient.[87] Where the corpus delicti is shown, the confession alone may be received to establish the manner and means of death and defendant's guilty agency in the crime.[88]

Proof of a motive is not necessary,[89] though it is a strong circumstance which the jury ought to consider.[90]

The weight to be given dying declarations is for the jury alone.[91]

Evidence that defendant had access to a weapon, such as the crime was committed with, is important but not essential where ample opportunity of concealment after the murder was shown.[92]

§ 8. *Trial and punishment. A. Conduct of trial in general.*[93]—Evidence tending to show death and the means of it is admissible before any evidence is offered tending to identify defendant as the guilty agent,[94] and the state may show in chief that defendant at the examination voluntarily testified that he shot and killed deceased.[95]

A view of the premises is discretionary.[96]

Where a dying declaration was sufficiently shown but a paper purporting to contain it was not admitted, incidental reference to the paper by the prosecuting attorney as "the dying declaration" is not prejudicial.[97]

(§ 8) *B. Instructions.*[98]—Instructions on matters of defense,[99] matters

improper care is not sustained by testimony of an attending physician that he learned of such improper care, as his testimony was hearsay. People v. Farrell [Mich.] 100 N. W. 264.

80. Evidence held insufficient to show defendant's participation in killing by another. Monroe v. State [Tex. Cr. App.] 81 S. W. 726.

81. Identity of accused held sufficiently shown. People v. Buckley [Cal.] 77 P. 169. Testimony as to accused being perpetrator held sufficient to go to jury. State v. Adams [N. C.] 48 S. E. 589.

82. Evidence held insufficient to raise a doubt as to defendant's sanity. State v. Clark, 34 Wash. 485, 76 P. 98.

83. Claim of accident held untenable. Defendant killed his wife and another. State v. Botha, 27 Utah, 289, 75 P. 731.

84. Where both parties assume during the trial that the person defendant was charged with killing was the same person who was dead and buried, direct proof of the corpus delicti is not necessary. People v. Lagroppo, 90 App. Div. 219, 86 N. Y. S. 116.

85. People v. Moran [Cal.] 77 P. 777. The corpus delicti is sufficiently shown by evidence that tends to show that deceased died from a gunshot wound inflicted by defendant. Wilson v. State [Ala.] 37 So. 93.

86. People v. Burness, 178 N. Y. 429, 70 N. E. 966; State v. Knapp [Ohio] 71 N. E. 705.

87. People v. Burness, 178 N. Y. 429, 70 N. E. 966.

88. State v. Knapp [Ohio] 71 N. E. 705. Admissions of defendant that he went with the perpetrators to the scene of the crime are admissible to show his participation. People v. Moran [Cal.] 77 P. 777. There must be other evidence than the confession of the manner and means of death in Texas. Follis v. State [Tex. Cr. App.] 78 S. W. 1069. Confessions alone are not sufficient to convict one of being accessory before the fact to suicide. Commonwealth v. Hicks [Ky.] 82 S. W. 265.

89. State v. Adams [N. C.] 48 S. E. 589; State v. Brown [Mo.] 79 S. W. 1111; State v. Jaggers [N. J. Err. & App.] 58 A. 1014; Robinson v. State [Neb.] 98 N. W. 694; Lillie v. State [Neb.] 100 N. W. 316.

90. State v. Levy [Idaho] 75 P. 227. Small life insurance on deceased's life which defendant, her husband, was inclined to let lapse because of separation and intended divorce, held no sufficient motive. Nordgren v. People, 211 Ill. 425, 71 N. E. 1042.

91. Sims v. State, 139 Ala. 74, 36 So. 138. Should not be instructed that they are entitled to the same weight as the testimony of a witness. Nordgren v. People, 211 Ill. 425, 71 N. E. 1042.

92. Lillie v. State [Neb.] 100 N. W. 316.

93. See 2 Curr. L. 238.

94. Scott v. State [Ala.] 37 So. 357.

95. Seaborn v. Com., 25 Ky. L. R. 2203, 80 S. W. 223.

96. Mise v. Com., 25 Ky. L. R. 2207, 80 S. W. 457; Elias v. Territory [Ariz.] 76 P. 605.

97. Fuqua v. Com. [Ky.] 81 S. W. 923.

98. See 2 Curr. L. 238.

99. Plant v. State [Ala.] 37 So. 159. Failure to charge on the law of maiming where it does not appear that the blow deceased struck defendant brought blood or pain is not error. Perrin v. State [Tex. Cr. App.] 78 S. W. 930. Improvidence in money matters does not call for charge on insanity.

limiting defenses,[1] theories of guilt,[2] or degrees of the offense not comprehended by the evidence should not be presented.[3] Such defenses,[4] and included offenses

Tidwell v. State [Miss.] 36 So. 393. Occasional intoxication does not call for charge on insanity. State v. Brown [Mo.] 79 S. W. 1111. Aggressor is not entitled to charge on right to act upon appearances. Burton v. State [Ala.] 37 So. 435. Instruction on self-defense is not required where defendant began the difficulty and there is no evidence that he abandoned it. Wheatley v. Com. [Ky.] 81 S. W. 687. Self-defense and defense of sister held not within the issues where deceased was unarmed and had retreated to the wall on attack by defendant's sister. Spaulding v. State, 162 Ind. 297, 70 N. E. 243. Excessive force on part of deceased officer attempting to eject defendant from home held not shown. Smith v. State [Tex. Cr. App.] 81 S. W. 936. Accident held not within issues. Leal v. State [Tex. Cr. App.] 81 S. W. 961. Former acquittal. Spraggins v. State, 139 Ala. 93, 35 So. 1000. Self-defense held not within issues. State v. Halliday, 112 La. 846, 36 So. 753; People v. Manoogian, 141 Cal. 592, 76 P. 177. Instructions as to self-defense are properly refused where defendant denies the killing and attempts to establish an alibi. Commonwealth v. Mitchka [Pa.] 58 A. 474. Defendant held not entitled under the evidence to an instruction on the doctrine of retreat. Hughes v. State [Tex. Cr. App.] 82 S. W. 1037.

1. Provocation of difficulty. Wilson v. State [Tex. Cr. App.] 81 S. W. 34; Dent v. State [Tex. Cr. App.] 79 S. W. 625; Arthur v. State [Tex. Cr. App.] 80 S. W. 1017; McMahon v. State [Tex. Cr. App.] 81 S. W. 296. Charge on abandonment of difficulty is uncalled for where the fight was continuous. Wilson v. State [Tex. Cr. App.] 81 S. W. 34. Where the fight was with pistols from the beginning, a charge on the use of excessive force by one attacked is error. Scott v. State [Tex. Cr. App.] 81 S. W. 950.

2. Whether defendant administered poison or procured it to be done, there being no evidence of the latter. Boyd v. State [Miss.] 36 So. 525. That deceased had a right to protect his sister, and what he had a right to do could not justify killing him. Rooks v. State, 119 Ga. 431, 46 S. E. 631. Charge on confessions is improper where a mere admission of killing coupled with justification is shown. Owens v. State [Ga.] 48 S. E. 21. In a poisoning case, an instruction on the theory that defendant was guilty if he was accessory before the fact to deceased's suicide is error where all the evidence negatives the theory of deceased's consent, and the case was tried on the theory of surreptitious administering. Nordgren v. People, 211 Ill. 425, 71 N. E. 1042. That if defendant encouraged or assisted he would be guilty, there being no evidence of concert between him and another participant in the fight whom he claims struck the fatal blow. State v. Fuller [Iowa] 100 N. W. 1114.

3. Hjeronymus v. State [Tex. Cr. App.] 79 S. W. 313; State v. Matthews [La.] 36 So. 48; Tolbirt v. State, 119 Ga. 970, 47 S. E. 544. Third degree murder held not presented by evidence. Cook v. State [Fla.] 35 So. 665. Even where the defendant has pleaded guilty and the verdict is for murder in the first degree. Murray v. State [Tex. Cr. App.] 78 S. W. 927. Instruction on manslaughter in second degree held not required not being requested, and charges on second degree murder and first degree manslaughter being given. State v. Ronk, 91 Minn. 419, 98 N. W. 334. All the evidence tending to prove a murder, the court did not err in omitting to instruct as to manslaughter. Brown v. State [Tex. Cr. App.] 78 S. W. 507; State v. Adams [S. C.] 47 S. E. 676. Instructions comprehending first and second degree murder, first degree manslaughter and not guilty, held proper. Thomas v. State, 139 Ala. 80, 36 So. 734. Instruction on manslaughter where defendant provoked the encounter held not necessary defendant either being guilty of murder or not guilty on the ground of self-defense. Chism v. State [Tex. Cr. App.] 78 S. W. 949. Malice and deliberation being shown instructions on degrees other than first are unnecessary. Murder in resisting arrest. State v. Lewis [Mo.] 79 S. W. 671. Negligent homicide in first degree held not presented where deceased's gun if fired negligently went off while he was flourishing it to frighten deceased. Friday v. State [Tex. Cr. App.] 79 S. W. 815. Charge on second degree because of diseased condition of mind preventing deliberation held not required. State v. Brown [Mo.] 79 S. W. 1111. Charge on negligent homicide held not required. Patton v. State [Tex. Cr. App.] 80 S. W. 86. Charge on manslaughter held not required where defendant "drugged" deceased to rob him. State v. Burns [Iowa] 99 N. W. 721. The mere fact that accused drank liquor shortly before killing does not require an instruction on intoxication. State v. Busse [Iowa] 100 N. W. 536. Knife used held a deadly weapon so as to avoid the necessity of a charge on the law where a weapon not deadly in its character is used. Connell v. State [Tex. Cr. App.] 81 S. W. 746. Involuntary manslaughter held not within issues. Selby v. Com., 25 Ky. L. R. 2209, 80 S. W. 221. Circumstances of defendant's murder of his wife held to present no issue of manslaughter. Smith v. State [Tex. Cr. App.] 78 S. W. 694. In Washington, though the evidence suggests the theories only of murder in the first degree and not guilty, instructions on the lesser degrees may be given. State v. Underwood [Wash.] 77 P. 863. Instruction on combat held properly refused. Coolman v. State [Ind.] 72 N. E. 568.

4. Right to follow up difficulty until all danger is passed. Wilson v. State [Tex. Cr. App.] 81 S. W. 34. Defendant held entitled to charge on self-defense. McVey v. State [Tex. Cr. App.] 81 S. W. 740; Bowles v. Com. [Va.] 48 S. E. 527; Territory v. Watson [N. M.] 78 P. 604. Apprehension of danger. Kennedy v. State [Ala.] 37 So. 90. Specific instructions on intoxication and insanity from use of drugs held required. Burton v. State [Tex. Cr. App.] 81 S. W. 742. Insanity. State v. Keerl, 29 Mont. 508, 75

as might be found under the evidence must be submitted,[5] whether specially requested or not,[6] and where the evidence is wholly circumstantial this rule requires the submission of every grade of homicide to the jury.[7] Defendant's theory must be presented, when supported by the evidence,[8] but he cannot complain of the presentation of the state's theory supported by evidence.[9] An instruction

P. 362; People v. Muste [Mich.] 100 N. W. 465. "Adequate cause" should be defined. Connell v. State [Tex. Cr. App.] 81 S. W. 746. Presumption that prosecutor using deadly weapon meant to kill. Scott v. State [Tex. Cr. App.] 81 S. W. 950. Right to kill in defense of chastity held within issues and request on that theory improperly refused. Osborne v. State [Ala.] 37 So. 105. Effect of good character of defendant. People v. Bonier [N. Y.] 72 N. E. 226.

5. State v. Robertson, 178 Mo. 496, 77 S. W. 528; Demaree v. Com. [Ky.] 82 S. W. 231; Wells v. Territory [Okl.] 78 P. 124; People v. Young, 96 App. Div. 33, 88 N. Y. S. 1063.

Charge on manslaughter held necessary,—deceased struck defendant with rock. Dodson v. State [Tex. Cr. App.] 78 S. W. 940. Defendant went to deceased's house for unlawful purpose and was set upon by deceased. Nicks v. State [Tex. Cr. App.] 79 S. W. 35. Voluntary and involuntary manslaughter held both presented by evidence. Montgomery v. Com. [Ky.] 81 S. W. 266; Chapman v. State [Ga.] 48 S. E. 350. Manslaughter held within issues. Riley v. State [Tex. Cr. App.] 81 S. W. 711; Williams v. State [Ga.] 48 S. E. 368. Where defendant and decedent were fighting with pistols and defendant's father came up and killed deceased, there being no evidence of conspiracy, an instruction on assault with intent to murder was proper. Loyd v. State [Tex. Cr. App.] 81 S. W. 293. Where by reason of a former trial the issue of first degree murder is eliminated from the case, there is no error in failure to distinguish between the degrees of murder, since defendant could be found guilty of the second degree on evidence sufficient to convict of the first degree. Connell v. State [Tex. Cr. App.] 81 S. W. 746. The distinction between second degree murder and manslaughter must be defined where presented by the evidence. Id. To justify refusal to charge on second degree murder, the evidence must clearly exclude it and clearly show murder in the first degree. Hernandez v. State [Tex. Cr. App.] 81 S. W. 1210. Presumption arising from use of nondeadly weapon need not be stated where knife was used, blade 2⅝ inches long. Baker v. State [Tex. Cr. App.] 81 S. W. 1215; Connell v. State [Tex. Cr. App.] 81 S. W. 746. Effect of intoxication on power to form intent or premeditate should be given when evidence warrants. Cook v. State [Fla.] 36 So. 665. Assault and assault by willfully shooting. State v. Matthews [La.] 36 So. 48. Unsupported testimony of defendant is sufficient to demand charge on lower grades. State v. Clark [Kan.] 77 P. 287. The fact that testimony on behalf of defendant tended to support his theory of self-defense is not inconsistent with his claim that if guilty his crime was manslaughter, not murder. Id. Charge on assault and battery held necessary on indictment for shooting with intent to kill. State v. Kittle [Kan.] 78 P. 407. Necessity of charging on aggravated assault is not relieved by use of greater force than necessary in resisting assault. Palmer v. State [Tex. Cr. App.] 83 S. W. 202.

6. Brown v. Com., 25 Ky. L. R. 1896, 78 S. W. 1126; Territory v. Watson [N. M.] 78 P. 504; State v. Clark [Kan.] 77 P. 287. Argument of counsel to jury that there is no manslaughter in the case does not dispense with charge thereon if evidence demands it. Horton v. State, 120 Ga. 307, 47 S. E. 969; Moran v. State [Ga.] 48 S. E. 325. Requests not couched in perfectly correct formula. State v. Robertson, 178 Mo. 496, 77 S. W. 528.

Contra: Where not asked. Territory v. Dooley [Okl.] 78 P. 138.

7. Brown v. Com., 25 Ky. L. R. 1896, 78 S. W. 1126; Williams v. Com., 25 Ky. L. R. 1504, 78 S. W. 134.

8. Williams v. State [Tex. Cr. App.] 79 S. W. 521; Arthur v. State [Tex. Cr. App.] 80 S. W. 1017; Ford v. State [Neb.] 98 N. W. 807. Claim of defense of another held to call for charge on rape and assault with intent to commit rape. Scott v. State [Tex. Cr. App.] 79 S. W. 543. Converse of mutual combat theory, where defense is self-defense, should be given, where charge on mutual combat is given. Christian v. State [Tex. Cr. App.] 79 S. W. 562. Defendant held entitled to charge on self-defense untrammeled by language on effect of provoking difficulty. Beard v. State [Tex. Cr. App.] 81 S. W. 33. Theory of aggravated assault held necessary where defendant acted on first meeting after becoming convinced of his wife's infidelity with deceased. Loyd v. State [Tex. Cr. App.] 81 S. W. 293. Defendant held entitled to an instruction on his right to follow up his adversary who had retreated but continued to use his pistol. McMahon v. State [Tex. Cr. App.] 81 S. W. 296. Responsibility of another and defendant's nonparticipation. Id. It is erroneous to state abstract propositions of law, each applicable to a different state of facts, and apply one doctrine to a given claim and say nothing about contrary claims. Harris v. People [Colo.] 75 P. 427. Where a billy picked up at the scene of the homicide immediately thereafter, and identified by defendant as exactly like one he saw deceased have, is admitted in evidence, defendant is entitled to a charge that the jury cannot disregard it if they find it to be the identical one or substantially like the one deceased attempted to use. People v. Childs, 90 App. Div. 58, 85 N. Y. S. 627. Where defendant shot deceased during a struggle alleging self-defense, he was entitled to a favorable charge on his failure to run away. Id. Error to refuse instruction that defendant could not be convicted if another killed deceased without defendant's knowledge, connivance, or consent. Ferguson v. State [Ala.] 37 So. 448. Defendant held entitled to a charge on self-

withdrawing degrees or defenses of which there is no evidence may be proper,[10] and one submitting a defense which there is no evidence to support is not necessarily erroneous,[11] but in North Carolina a charge that certain facts show premeditation as a matter of law is error.[12] A positive declaration by deceased that defendant killed her, whether admitted as a dying declaration or as res gestae renders a charge on circumstantial evidence unnecessary.[13] Instructions predicating guilt on theories inconsistent with that suggested by the evidence and on which the evidence was admitted are prejudicial.[14] Beyond defining the material issues in the case, instructions more fully developing particular phases of the evidence if desired must be requested.[15] In the footnotes are grouped holdings as to the correctness and propriety of instructions relating to the burden and degree of proof,[16] participation by defendant in the crime,[17] weight and effect of evidence,[18]

defense untrammeled by the effect of provoking difficulty. Goodman v. State [Tex. Cr. App.] 83 S. W. 196.

9. Instruction on provoking difficulty held properly given. Bateson v. State [Tex. Cr. App.] 80 S. W. 88. Charge on defendant's guilt by reason of aiding another by acts and words held proper. McMahon v. State [Tex. Cr. App.] 81 S. W. 296. Charge that personal animosity towards deceased was not necessary, held proper. Smith v. State [Tex. Cr. App.] 81 S. W. 936. A peremptory instruction not to find a verdict of murder in the first degree is properly refused where there is evidence from which a formed design to take life might be found. Eatman v. State, 139 Ala. 67, 36 So. 16. Duty to retrial held within issues. Gordon v. State [Ala.] 36 So. 1009. Murder in perpetration of robbery held properly charged upon. Murder of watchman in silk mill. State v. Lyons [N. J. Err. & App.] 58 A. 398. Charge on offense of shooting at another held proper on indictment for assault with intent to kill. Harris v. State, 120 Ga. 167, 47 S. E. 520; Baldwin v. State, 120 Ga. 188, 47 S. E. 558. Instruction on circumstantial evidence held properly modified by adding clause on principals and accessories. Becknell v. State [Tex. Cr. App.] 82 S. W. 1039.

10. Instruction that killing was neither justifiable or excusable held proper under evidence. State v. Corrivau [Minn.] 100 N. W. 638. Statement that "no circumstances were shown that would mitigate this crime from murder to manslaughter" held proper under the evidence. State v. Bectsa [N. J.] 58 A. 933; State v. Capps, 134 N. C. 622, 46 S. E. 730; State v. Lipscomb, 134 N. C. 689, 47 S. E. 44. An instruction that there is no evidence authorizing a conviction for a certain degree violates the spirit of a statute that the charge shall be upon the law of the case only. Thomas v. State [Fla.] 36 So. 161.

Contra: People v. Young, 96 App. Div. 33, 88 N. Y. S. 1063.

11. Self-defense. People v. Lagroppo, 90 App. Div. 219, 86 N. Y. S. 116. Where the evidence is that another killed deceased in defendant's presence, it is error to charge on the theory that defendant did it in self-defense. Monroe v. State [Tex. Cr. App.] 81 S. W. 726.

12. State v. Daniels, 134 N. C. 671, 46 S. E. 991. Cf. State v. Lipscomb, 134 N. C. 689, 47 S. E. 44.

13. Hernandez v. State [Tex. Cr. App.] 81 S. W. 1210.

14. Where the evidence is exclusive that defendant gave deceased poisoned whisky which she drank not knowing it to be poisoned, evidence predicating guilt on defendant's participation in her suicide, or on his leaving the whisky where she would use it, are erroneous. Nordgren v. People, 211 Ill. 425, 71 N. E. 1042. Where the issue of assault with intent to murder and aggravated assault are both suggested by the evidence, but self-defense is not, a charge on provoking the difficulty is harmful. Ross v. State [Tex. Cr. App.] 80 S. W. 1004.

15. In a prosecution for assault with intent to murder, failure to give instructions on murder and manslaughter not requested is not error. Adcock v. State [Ark.] 83 S. W. 318.

16. People v. Taylor, 92 App. Div. 29, 86 N. Y. S. 996; Bell v. State [Ala.] 37 So. 281; State v. Knapp [Ohio] 71 N. E. 705; People v. Lagroppo, 90 App. Div. 219, 86 N. Y. S. 116. Several instructions where evidence was circumstantial held argumentative and misleading. Spraggins v. State, 139 Ala. 93, 35 So. 1000; Bowen v. State [Ala.] 37 So. 233. Putting burden on defendant of proving mitigation beyond reasonable doubt. State v. Clark, 134 N. C. 698, 47 S. E. 36. That jury must convict of higher degree unless "satisfied" that only lower degree was committed. Galloway v. State [Fla.] 36 So. 168. Burden of proving irresponsibility. Porter v. State [Ala.] 37 So. 81; Bell v. State [Ala.] 37 So. 281; State v. Corrivau [Minn.] 100 N. W. 638; State v. Clark, 34 Wash. 485, 76 P. 98; State v. Quigley [R. I.] 58 A. 905. Charge that only burden on defendant is that of going forward with the evidence is properly refused. Smith v. State [Ala.] 37 So. 423. Not at liberty to disbelieve as jurors if they believe as men. Lillie v. State [Neb.] 100 N. W. 316. Charge on necessity that evidence be consistent only with theory of guilt and necessity of satisfying jurors to the extent that each would venture to act upon it with reference to matters of highest concern. Pitts v. State [Ala.] 37 So. 101; Gregory v. State [Ala.] 37 So. 259. Pretermitting consideration of incriminating evidence introduced by defendant. Wilson v. State [Ala.] 37 So. 93.

17. Several instructions where the evidence was circumstantial held properly refused as argumentative and misleading.

motive,[19] malice and premeditation,[20] intent to kill,[21] degree and included offenses,[22] murder,[23] manslaughter,[24] assault with intent to kill or murder,[25] self-

Spraggins v. State, 139 Ala. 93, 35. So. 1000. An instruction that though the jury find that "deceased was unlawfully killed as alleged" they should acquit if the evidence raised a reasonable doubt as to defendant's presence at the scene of the crime, is not objectionable, the quoted words not implying that defendant did the killing. Weaver v. State [Tex. Cr. App.] 81 S. W. 39. An instruction containing the statement that it is no crime for one to go and see a fist fight or a crime committed is properly refused. People v. Buckley [Cal.] 77 P. 169.

18. Circumstantial evidence. Spraggins v. State, 139 Ala. 93, 35 So. 1000; State v. Coleman [S. D.] 98 N. W. 175. Admissions. People v. Buckley [Cal.] 77 P. 169. Defendant's statement. Walker v. State [Ga.] 48 S. E. 184. Instruction as to the effect of the statute requiring the testimony of two witnesses or its equivalent to convict of a capital crime held not misleading. State v. Kelly [Conn.] 58 A. 705. An instruction in the language of the Code that an inference must be founded on a fact legally proved, and on such a deduction from the fact as is warranted by a consideration of the usual propensities or passions of men, etc., is unobjectionable [Code Civ. Proc. § 1960]. People v. Balkwell, 143 Cal. 259, 76 P. 1017. Effect of character evidence. People v. Bonier [N. Y.] 72 N. E. 226; People v. Childs, 90 App. Div. 58, 85 N. Y. S. 627. Instruction not required where defendant's good character was not disputed by prosecution. State v. Underwood [Wash.] 77 P. 863. Charge that dying declarations "should be received with caution and care" is properly modified by substituting, "should be carefully weighed and considered." State v. Davis, 134 N. C. 633, 46 S. E. 722. Error to state that dying declarations are entitled to the weight that the evidence of "one witness" is entitled to. Nordgren v. People, 211 Ill. 425, 71 N. E. 1042. Presumption arising from failure to use deadly weapon, opportunity being offered. State v. Hunt, 134 N. C. 684, 47 S. E. 49. Instructions that assume that defendants struck in self-defense where they claim they did not strike at all are erroneous as on the weight of the evidence. State v. Lindsey [S. C.] 47 S. E. 389.

19. Charge on lack of motive held not required. State v. Brown [Mo.] 79 S. W. 1111. Charge that no motive is necessary held not error. State v. Jaggers [N. J.] 58 A. 1014. That testimony as to previous difficulty is important only as showing motive. People v. Lagroppo, 90 App. Div. 219, 86 N. Y. S. 116. Charge so framed as to exclude consideration of evidence of accused tending to show different state of facts is error. Bowles v. Com. [Va.] 48 S. E. 527. Instruction on robbery as motive where there is no evidence to connect accused with the robbery is error, where the evidence as to defendant's perpetration of the murder is circumstantial. State v. Adams [N. C.] 48 S. E. 589.

20. Bell v. State [Ala.] 37 So. 281. Express malice. Henderson v. State [Ga.] 48 S. E. 167. Implied malice inferred from the act of killing. Friday v. State [Tex. Cr. App.] 79 S. W. 815; State v. Kellison [W. Va.] 47 S. E. 166; Coolman v. State [Ind.] 72 N. E. 568. Implied malice must be defined when presented by the evidence. Connell v. State [Tex. Cr. App.] 81 S. W. 746. Need not exist for any length of time. Robinson v. State [Neb.] 98 N. W. 694. The elements of malice aforethought and premeditation having been fully developed in one instruction need not be repeated in the others. Brewer v. State [Ark.] 78 S. W. 773. Where defendant wantonly killed an old man with whom he claimed to be on friendly terms, failure to define malice aforethought was not prejudicial to him. Sampson v. Com. [Ky.] 82 S. W. 384. Instruction on insult and provocation as affecting premeditation held bad as argumentative. Eatman v. State, 139 Ala. 67, 36 So. 16. Charge that formed design to take life cannot be presumed from use of deadly weapon is properly refused. Wilson v. State [Ala.] 37 So. 93. Effect of intoxication. State v. Corrivau [Minn.] 100 N. W. 638. Requested instruction requiring a fixed "and deep rooted" purpose with "actual" premeditation held properly modified by striking quoted words. State v. Hunt, 134 N. C. 684, 47 S. E. 49.

21. Perrin v. State [Tex. Cr. App.] 78 S. W. 930. Effect of intoxication and insanity. Bell v. State [Ala.] 37 So. 281; State v. Corrivau [Minn.] 100 N. W. 638; State v. Keerl, 29 Mont. 508, 75 P. 362. An instruction to consider the weapon on the question of intent is error where the killing was with a pistol, and self-defense is claimed. Burnett v. State [Tex. Cr. App.] 79 S. W. 550.

22. Held error to interpolate or substitute words in statutory definition of various degrees. Cook v. State [Fla.] 35 So. 665. An instruction to consider murder in the first degree and if the jury find a reasonable doubt of guilt they may then consider the second degree is not erroneous for precluding them from finding a verdict of not guilty on their reasonable doubt of guilt in the first degree. Smith v. State [Tex. Cr. App.] 78 S. W. 694. Similar instructions on second degree and manslaughter held not bad as eliminating manslaughter in earlier part. Nelson v. State [Tex. Cr. App.] 81 S. W. 713. Instruction held erroneous as authorizing conviction of second degree murder on facts justifying conviction of manslaughter only. Ray v. State [Tex. Cr. App.] 81 S. W. 737. Second degree murder and manslaughter held properly distinguished. Connell v. State [Tex. Cr. App.] 81 S. W. 746. Instruction that verdict of higher degree would be proper unless jury were "satisfied" from the evidence that only the lower degree was committed. Galloway v. State [Fla.] 36 So. 168. Instruction to acquit on facts that would support conviction of manslaughter in second degree or assault and battery if defendant entered fight willingly or provoked it is properly refused. Williams v. State [Ala.] 37 So. 228. Several instructions on degrees in case where defense was

defense,[26] defense of another,[27] provocation of difficulty,[28] apprehension of dan-

insanity and intoxication. Bell v. State [Ala.] 37 So. 281. A charge that takes from the jury the right to ascertain the degree is erroneous, but one which merely points out to them their duty under the law and leaves them free to act is not. Com. v. Kovovic [Pa.] 58 A. 857. An instruction permitting a conviction of manslaughter is properly refused where homicide is committed by abortion. People v. Balkwell [Cal.] 76 P. 1017. Degree where death ensues from assault with intent to do great bodily harm. State v. Hunt, 134 N. C. 684, 47 S. E. 49.

23. An instruction drawn under the statute should use all the statutory elements. Omission of "without authority of law." Ivy v. State [Miss.] 36 So. 265. Where defendant was on trial for second degree murder, it is error to charge, using terms deliberation and premeditation, there having been some evidence of such condition. Hans v. State [Neb.] 100 N. W. 419. Statement that if defendant intentionally and wrongfully, killed deceased, without any justification, or without excuse, then he killed him with malice and it was murder, is proper. State v. McDaniel [W. Va.] 47 S. E. 384. Second degree murder held sufficiently defined where the defense was accident and negligence. Becknell v. State [Tex. Cr. App.] 82 S. W. 1039.

24. Perrin v. State [Tex. Cr. App.] 78 S. W. 930; Dodson v. State [Tex. Cr. App.] 78 S. W. 940; Connell v. State [Tex. Cr. App.] 81 S. W. 746; State v. Sharp [Mo.] 82 S. W. 134; Finney v. Com. [Ky.] 82 S. W. 636. Sudden combat. Reynolds v. Com. [Ky.] 82 S. W. 233; Id. [Ky.] 82 S. W. 978. Sudden passion. Sheperd v. Com. [Ky.] 82 S. W. 378. Condition of defendant's mind, cooling time, etc. Chism v. State [Tex. Cr. App.] 78 S. W. 949. Held faulty as excluding certain elements. Martin v. Com., 25 Ky. L. R. 1928, 78 S. W. 1104. Instruction against first degree held properly refused. Willams v. State [Ala.] 37 So. 228. Instruction on voluntary manslaughter held prejudicial in view of evidence that the killing was unintentional. Montgomery v. Com. [Ky.] 81 S. W. 264. Where deceased was killed in defendant's attempt to kill a third person, a charge that voluntary manslaughter could be found only in case defendant had a sudden affray with deceased and killed him as the result of sudden heat and passion entertained towards him, is error. Wheatley v. Com. [Ky.] 81 S. W. 687. Instruction on adequate cause eliminating previous difficulty held erroneous. Johnson v. State [Tex. Cr. App.] 81 S. W. 945; Freeman v. State [Tex. Cr. App.] 81 S. W. 954. Failure to charge separately on insults to wife and daughter is not objectionable. McComas v. State [Tex. Cr. App.] 81 S. W. 1212. What constitutes willful killing under Rev. St. U. S. § 5341. Roberts v. U. S. [C. C. A.] 126 F. 897. Failure to more specifically instruct on manslaughter where defendant killed his wife and the evidence was circumstantial other than his own confession which alone was depended upon to raise the issue of manslaughter, held not error. State v. Busse [Iowa] 100 N. W. 536. Instruction predicating manslaughter on facts constituting self-defense. State v. Crea [Idaho] 76 P. 1013. Giving common-law definition of manslaughter is not reversible error where the evidence shows that statutory manslaughter was committed and that also is defined. United States v. Densmore [N. M.] 75 P. 31. Instruction that manslaughter is the killing of another without malice is not prejudicial where other instructions clearly show the necessity that it must be unlawful. State v. Adams [S. C.] 47 S. E. 676.

25. Brown v. Com., 25 Ky. L. R. 2076, 79 S. W. 1193; Davis v. State [Ark.] 82 S. W. 167; Griffin v. State [Fla.] 37 So. 209; Lozano v. State [Tex. Cr. App.] 81 S. W. 37; Adcock v. State [Ark.] 83 S. W. 318. Reference to "instrument reasonably calculated to produce death or serious bodily injury" is not objectionable on the ground that serious bodily injury is not an element of the offense charged. Leal v. State [Tex. Cr. App.] 81 S. W. 961. Charge confusing "assault with intent to murder," with "assault to commit murder" is properly refused. Smith v. State [Ala.] 37 So. 423. Instruction placing mitigation on facts that would justify. State v. Banks [W. Va.] 47 S. E. 142.

26. Chism v. State [Tex. Cr. App.] 78 S. W. 949; Havens v. Com. [Ky.] 82 S. W. 369; State v. Clark, 134 N. C. 698, 47 S. E. 36; Dyer v. State [Tex. Cr. App.] 83 S. W. 192; Williams v. State [Ga.] 48 S. E. 368; Connor v. Com. [Ky.] 81 S. W. 259; State v. Appleton [Kan.] 78 P. 445; State v. Sharp [Mo.] 82 S. W. 134. Charge allowing use of greater force than necessary is bad. Kirkland v. State [Ala.] 37 So. 352. Charges referring question to jury without setting out its elements and failing to hypothesize some of the elements. Plant v. State [Ala.] 37 So. 159; Harbour v. State [Ala.] 37 So. 330; Johnson v. State [Ala.] 37 So. 456. An instruction for acquittal as for self-defense, if the jury find that certain acts of deceased accompanied certain threatening words, is erroneous as defendant might have been justified without such words being spoken. Nix v. State [Tex. Cr. App.] 78 S. W. 227. An instruction so worded as to impress upon the jury the court's disbelief of the defense should be avoided. Id. A charge on defendant's right to carry a pistol to defend himself should not be modified by requiring a negation of hostile intentions. Id. An instruction that a reasonable doubt whether the killing was in self-defense requires an acquittal is proper. Perrin v. State [Tex. Cr. App.] 78 S. W. 930. Distinct matters should not be so coupled as to necessitate the finding of the existence of all of them to acquit. Dodson v. State [Tex. Cr. App.] 78 S. W. 940. Defendant's belief that deceased's wife sent for him for a proper purpose need be only "reasonable" not "actual." Nicks v. State [Tex. Cr. App.] 79 S. W. 35. Charge on relative strength of parties and disposition of deceased held proper. Bearden v. State [Tex. Cr. App.] 79 S. W. 37. Bare reference to subsequent charge on sudden combat is not bad. Christian v. State [Tex. Cr. App.] 79 S. W. 562. Where the court mentions the means used by deceased in the attack, he should men-

ger,[29] imminence of danger,[30] duty to retreat, or avoid danger,[31] insanity,[32] intoxication,[33] accident,[34] fear of death from another,[35] punishment.[36]

tion all the means used. Wilson v. State [Tex. Cr. App.] 81 S. W. 34; Hayman v. State [Tex. Cr. App.] 83 S. W. 204. Instruction on actual attack as distinguished from threatened attack, held proper. Logan v. State [Tex. Cr. App.] 81 S. W. 721. Several argumentative charges held properly refused. Gordon v. State [Ala.] 36 So. 1009; Wilson v. State [Ala.] 37 So. 93. Request held erroneous as pretermitting inquiry as to whether defendant provoked difficulty. Wilson v. State [Ala.] 37 So. 93. Instruction limiting right to one in lawful pursuit of his business. Hans v. State [Neb.] 100 N. W. 419. Elimination of fear of great bodily harm and placing right solely on ground of fear of death. State v. Singleton, 67 Kan. 803, 74 P. 243. Instruction as to threats of deceased otherwise correct is not bad for failure to mention communication to defendant where such mention was not requested. State v. Nelson [Kan.] 75 P. 505. The law of self-defense as applied to one who is not the aggressor, and to one who is, but is endeavoring to withdraw, should not be confused. Smith v. State, 119 Ga. 564, 46 S. E. 846.

27. Havens v. Com. [Ky.] 82 S. W. 369. Charge held bad as confusing self-defense. Scott v. State [Tex. Cr. App.] 79 S. W. 543. Charge on provoking difficulty held inapplicable. Defense of brother. Chambers v. State [Tex. Cr. App.] 79 S. W. 572.

28. Dent v. State [Tex. Cr. App.] 79 S. W. 525; Drake v. State [Tex. Cr. App.] 80 S. W. 1005. Requested instruction where defendant went to deceased's house to find his child held proper. Hjeronymus v. State [Tex. Cr. App.] 79 S. W. 313. An instruction that if defendant provoked the difficulty he could not set up self-defense is incomplete. Bearden v. State [Tex. Cr. App.] 79 S. W. 37. Instruction on estoppel to plead self-defense held improper. Jones v. State [Miss.] 36 So. 243. Instruction held properly refused as failing to negative state's theory of provocation of difficulty. Schrader v. State [Miss.] 36 So. 385. Request on self-defense should assume defendant's freedom from fault. McClellan v. State [Ala.] 37 So. 239. Instruction putting burden on state to show beyond reasonable doubt that defendant was not free from fault is misleading. Etheridge v. State [Ala.] 37 So. 337. Charge ignoring element of withdrawal from conflict held not erroneous under the evidence. State v. Jones [Iowa] 99 N. W. 179. Whole law need not be recharged in each instruction on the several qualifications of the right, such as provocation of difficulty, abandonment thereof, etc. State v. Smith [Iowa] 99 N. W. 579; Harris v. People [Colo.] 75 P. 427. Instruction on rights arising from declination of further combat held erroneous as outside the evidence. Harris v. People [Colo.] 75 P. 427.

29. Instruction held to sufficiently present theory of apparent as distinguished from real necessity. Lee v. State [Ark.] 81 S. W. 385. "Reasonable" or "rational" fear. Christian v. State [Tex. Cr. App.] 79 S. W. 552. Charge on appearance of danger "at the time" held not too indefinite though there was evidence of a previous difficulty. Williams v. Com., 25 Ky. L. R. 1809, 78 S. W. 134. Where demanded by the evidence, an instruction on "apparent" danger must be given. Chism v. State [Tex. Cr. App.] 78 S. W. 949; Dodson v. State [Tex. Cr. App.] 78 S. W. 940. Instruction held faulty in this respect. Martin v. Com., 25 Ky. L. R. 1928, 78 S. W. 1104; Finney v. Com. [Ky.] 82 S. W. 636. Instruction on reasonable cause to apprehend danger held not abstract and to be within the issues. Kennedy v. State [Ala.] 37 So. 90. Where there is no dispute as to the reality of the attack, no charge on "apparent" danger is necesary. Bearden v. State [Tex. Cr. App.] 79 S. W. 37. Instruction may state that danger must be reasonably apparent. Logan v. State [Tex. Cr. App.] 81 S. W. 721. Request bad in not postulating on reasonable apprehension of danger. McClellan v. State [Ala.] 37 So. 239. Charge held erroneous as requiring actual instead of apparent danger. Owens v. U. S. [C. C. A.] 130 F. 279; State v. Clark [N. C.] 47 S. E. 36. Charge ignoring apparent danger held cured by further correct one. Waller v. People, 209 Ill. 284, 70 N. E. 681. Instruction held not erroneous as denying the right of acting from appearances. Harris v. People [Colo.] 75 P. 427.

30. Instruction omitting element of imminence of danger may be refused. People v. Rodawald [N. Y.] 70 N. E. 1. Misuse of "eminent" for "imminent" held not prejudicial. State v. Jones [Iowa] 99 N. W. 179.

31. Pitts v. State [Ala.] 37 So. 101; Kirkland v. State [Ala.] 37 So. 352. Instruction that law of retreat does not require a man to run from a knife or pistol in striking distance, because to do so would increase his peril, is properly refused. Sims v. State, 139 Ala. 74, 36 So. 138. Instruction on right of defendant to stand his ground held properly qualified by statement as to necessity of warning deceased if possible. State v. Stockhammer, 34 Wash. 262, 75 P. 810. Surety attempting to surrender principal in exoneration of bond need not retreat. Finney v. Com. [Ky.] 82 S. W. 635.

32. Temporary. Dent v. State [Tex. Cr. App.] 79 S. W. 525; State v. Brown [Mo.] 79 S. W. 1111; Bell v. State [Ala.] 37 So. 281; People v. Muste [Mich.] 100 N. W. 456; State v. Clark, 34 Wash. 485, 76 P. 98. Charge on present sanity is not error where not in issue. People v. Zeigler, 142 Cal. 337, 75 P. 1090. An instruction distinguishing between capacity to deliberate and premeditate and authorizing a verdict of second degree murder in case premeditation but not deliberation is found is error. State v. Speyer [Mo.] 81 S. W. 430. Charge on purpose of receiving evidence held bad as on weight of evidence. Maston v. State [Miss.] 36 So. 70. Delusion magnifying danger of attack from deceased. Tidwell v. State [Miss.] 36 So. 393. Instructions held misleading. Porter v. State [Ala.] 37 So. 81. Caution not to be imposed upon by an "ingenious counterfeit" is not approved but is not reversible. People v. Manoogian, 141 Cal. 592, 75 P. 177. Instructions on insane delusions, right and wrong test, irresistible

Harmless error.[37]—An instruction more favorable to defendant than the law warrants cannot be complained of,[38] and erroneous instructions on the law of degrees greater than that of which defendant was convicted are harmless.[39] Erroneous instructions on a defense as to which no issue is raised are harmless.[40] No prejudice results from an erroneous charge on a lower degree than the evidence suggests,[41] or a charge that there is no evidence on which to found a verdict of a certain degree when in fact there is none.[42] The charge is to be construed as a whole and error in one instruction may be corrected by another,[43] though an instruction clearly wrong is not rendered innocuous by a proper one contradictory thereof.[44] Errors may be cured by verdict.[45]

impulse test, criminal intent. State v. Keerl, 29 Mont. 508, 75 P. 362.

33. Bell v. State [Ala.] 37 So. 281; State v. Corrivau [Minn.] 100 N. W. 638; People v. Ochoa, 142 Cal. 268, 75 P. 847.

34. Scott v. State [Tex. Cr. App.] 81 S. W. 294. An instruction that "if the blow inadvertently or accidentally resulted in death," etc., is not of the same purport as "if the blow was inadvertently and incidentally struck." Williams v. State [Ala.] 37 So. 228. Killing while intentionally pointing pistol at another is not accidental. Ford v. State [Neb.] 98 Mo. 807.

35. State v. Nargashian [R. I.] 58 A. 953.

36. Stating less penalty than law provides is not prejudicial. Leal v. State [Tex. Cr. App.] 81 S. W. 961. Charge on effect of recommendation to mercy held proper and not bad for failure to amplify with regard to pardon [Rev. St. § 6808]. State v. Schiller, 70 Ohio St. 1, 70 N. E. 505. Failure to charge on effect of recommending to mercy held not error where not requested. State v. Adams [S. C.] 47 S. E. 676.

37. See 2 Curr. L. 244.

38. Brown v. Com., 25 Ky. L. R. 2076, 79 S. W. 1193. Instruction to assess punishment at less than the statute provides. Leal v. State [Tex. Cr. App.] 81 S. W. 961. Instruction requiring the jury to be convinced beyond a reasonable doubt of facts limiting the right of self-defense. Adkins v. Com. [Ky.] 82 S. W. 242. Failure to define "with malice" and "aforethought." Hathaway v. Com. [Ky.] 82 S. W. 400. Submission of case on theory of murder in second degree where evidence would warrant conviction of murder in first degree. People v. Lagroppo, 90 App. Div. 219, 86 N. Y. S. 116. Where the jury are charged to acquit if the killing was negligent defendant has no ground of complaint on failure to charge on negligent homicide. Becknell v. State [Tex. Cr. App.] 82 S. W. 1039. Defendant cannot complain of any action of the court in not limiting his right of self-defense. Baker v. State [Tex. Cr. App.] 81 S. W. 1215. One convicted of second degree murder cannot complain that an instruction unduly enlarged the defense of negligent homicide and eliminated that of accidental killing altogether. Friday v. State [Tex. Cr. App.] 79 S. W. 815. An instruction predicating manslaughter on the existence of two facts of which one is sufficient, becomes, in view of a verdict of manslaughter, error favorable, rather than unfavorable to defendant. Sheperd v. Com. [Ky.] 82 S. W. 378.

39. Thomas v. State [Fla.] 36 So. 161; State v. Gianfala [La.] 37 So. 30; State v. Underwood [Wash.] 77 P. 863. An erroneous instruction as to murder in the first degree cannot harm one convicted of the second degree. State v. Riddle, 179 Mo. 287, 78 S. W. 606. One acquitted of murder in the first degree cannot complain of failure to define express malice. Connell v. State [Tex. Cr. App.] 81 S. W. 746. Erroneous charge on malice is harmless to one convicted of manslaughter. May v. State, 120 Ga. 135, 47 S. E. 548. Where defendant killed a third person while maliciously attempting to kill another, an instruction that the killing was not murder unless defendant entertained malice towards deceased, is harmless to defendant convicted of manslaughter. Wheatley v. Com. [Ky.] 81 S. W. 687. An instruction that under certain circumstances described defendant would be guilty of murder is not prejudicial if erroneous where a verdict of manslaughter is found. Hendrickson v. Com. [Ky.] 81 S. W. 266. Refusal of instructions on degrees greater than that of which defendant is convicted. Williams v. State [Ala.] 37 So. 228. Charge on voluntary manslaughter harmless to one convicted of involuntary. Chapman v. State [Ga.] 48 S. E. 350.

40. Where no issue is raised as to the right of a person to interfere when he sees a felony about to be committed, a charge on such right, if erroneous, is harmless. State v. Edwards [S. C.] 47 S. E. 395. Where actual attack was made by deceased, defendant is not prejudiced by vague instruction on the right to act upon the mere appearance of danger. Tardy v. State [Tex. Cr. App.] 78 S. W. 1076. An instruction on a theory of self-defense not warranted by the evidence is harmless to defendant. Elmore v. State [Tex. Cr. App.] 78 S. W. 520.

41. Lounder v. State [Tex. Cr. App.] 79 S. W. 552.

42. Thomas v. State [Fla.] 36 So. 161.

43. Waller v. People, 209 Ill. 284, 70 N. E. 681; Foster v. State [Tex. Cr. App.] 74 S. W. 29; Connor v. Com. [Ky.] 81 S. W. 259. Instruction failing to include self-defense and defense of another held nonprejudicial in presence of others properly stating such defenses. Havens v. Com. [Ky.] 82 S. W. 369.

44. Posey v. State [Tex. Cr. App.] 78 S. W. 689.

45. An instruction that defendant is guilty at least of murder in the second degree is harmless to one convicted of murder in the first degree. State v. Lipscomb, 134 N. C. 689, 47 S. E. 44. Any error in instructions on mitigation below murder in the second degree is harmless to defendant convicted

(§ 8) *C. Verdict.*[46]—Where the jury are required, by statute, to find the degree, a verdict of guilty as charged is bad,[47] but such error is not effective to discharge the prisoner, he being only entitled to a new trial.[48] Where a conviction of manslaughter is had upon an indictment for murder, and is set aside and a new trial had, a verdict of "guilty as charged" is responsive to the included charge of manslaughter and is not a conviction of murder of which an acquittal has been had.[49] A verdict finding defendant guilty of "assault with a dangerous weapon with intent to do bodily harm" does not warrant a judgment and sentence for the felony defined by statute as an attempt to shoot with intent to do bodily harm, but is good as a conviction of a simple assault.[50] A verdict of not guilty of murder or manslaughter, but guilty of intentionally pointing a gun, is proper under the Mississippi statute.[51]

(§ 8) *D. Punishment.*[52]—Cases discussing excessiveness of punishment are mentioned below.[53]

HUSBAND AND WIFE.[54]

§ 1. Disabilities of Coverture in General; Statutory Relaxations (1669).
§ 2. Mutual Duties, Obligations, and Privileges (1670).
A. Inherent in the Relationship (1670).
B. Contracts or Other Dealings (1670). Gifts (1671). Antenuptial Contracts (1671). Agreements for Separation and Separate Support (1672). Conveyances; Mortgages; Contracts to Convey (1672).
§ 3. Property Rights Inter Se (1673).
A. In General (1673).
B. Of Husband in Wife's Property (1673).
C. Of Wife in Husband's Property (1674).
D. Estates in Common, Jointly and as an Entirety (1674).
E. Wife's Separate Property (1675).
§ 4. Property Rights Under the Community System (1676).
A. What Law Governs (1676).
B. What Property is Community and What Separate (1676).
C. Rights and Powers as to Community Property (1677).
D. Rights and Powers as to Separate Property (1678).
E. Succession to, and Administration of, the Community (1678). Custody, Control, Disposal, and Distribution (1678). Accountability to Heirs and Creditors (1679). Community Debts and Claims (1679).
F. Dissolution of Community (1679).
§ 5. Liability for Necessaries (1680).
§ 6. Contract Rights and Liabilities of Husband as to Third Persons (1680).
§ 7. Contract and Property Rights and Liabilities of Wife as to Third Persons (1681).
A. Agency of Husband for Wife (1681).
B. Contracts in General (1681).
C. Contracts of Suretyship (1682).
D. Conveyances, Mortgages, Contracts to Convey, Powers (1684).
E. Fraudulent Conveyances (1685).
§ 8. Torts by Husband or Wife or Both (1685).
§ 9. Torts against Husband or Wife or Both (1686).
A. Wrongs to the Person (1686).
B. Criminal Conversation and Alienation of Affections (1686). Pleading and Proof (1687). Evidence (1687). Damages (1687). Instructions (1688).
§ 10. Remedies and Procedure Generally as Affected by Coverture (1688).
§ 11. Proceedings to Compel Support of Wife [Civil and Criminal] (1688).
§ 12. Crimes and Criminal Responsibility (1689).

§ 1. *Disabilities of coverture in general; statutory relaxations.*[55]—The common-law rule that a married woman could not make a valid executory con-

of murder in the first degree on proper instructions as to what constitutes murder in the first and second degrees. State v. Munn, 134 N, C. 680, 47 S. E. 15. Defendant is not prejudiced by failure to present his theory where by his own theory coupled with the undisputed facts he is guilty of the degree of which he stands convicted. Ford v. State [Neb.] 98 N. W. 807. See, also, ante, n. 39.

46. See 2 Curr. L. 246. "Guilty of assault with intent to murder in the first degree" is not bad for the omission of "commit." Nickles v. State [Fla.] 37 So. 312.

47, 48. Waddle v. State [Tenn.] 82 S. W. 827.

49. State v. Halliday, 112 La. 846, 36 So. 753.

50. Rev. Code 1899, § 7145. State v. Cruikshank [N. D.] 100 N. W. 697; State v. Mattison [N. D.] 100 N. W. 1091. See 2 Curr. L. 246, n. 55.

51. Code 1892, § 969. Goolsby v. State [Miss.] 35 So. 212.

52. See 2 Curr. L. 246.

53. Sentence for manslaughter by pointing pistol reduced from 7 to 4 years. Ford v. State [Neb.] 98 N. W. 807. Twenty years for second degree murder is not excessive. State v. Capps, 134 N. C. 622, 46 S. E. 730.

54. This topic treats of the relationship of marriage. It excludes the formation of that relation (Marriage, 2 Curr. L. 794), its dissolution (Divorce, 3 Curr. L. 1127), annulment (Marriage, 2 Curr. L. 794), and suit money in such proceedings or support by way of alimony (Alimony, 3 Curr. L. 146).

55. See 2 Curr. L. 246.

tract[56] is now much relaxed; likewise the rule that she could not sue[57] or own personal property.[58]

Contracts of wife with third persons.[59]—It is frequently provided wife may dispose of property as if single,[60] and contract and incur liabilities as if unmarried.[61]

§ 2. *Mutual duties, obligations, and privileges. A. Inherent in the relationship.*[62]—Antenuptial contracts may alter property interests but cannot vary the terms of the conjugal relation itself.[63] It is the duty of the husband to support his wife in the absence of a valid agreement to the contrary,[64] and the wife is entitled to dwell with her husband.[65]

(§ 2) *B. Contracts or other dealings.*[66]—At common law and now in Massachusetts a wife cannot contract with her husband.[67] Where a married woman may contract with her husband she may become his partner in business,[68] or may contract to render services to him in his business, and the claim therefor may be proved in bankruptcy.[69] Where a husband pays taxes on his wife's land, he being under no legal obligation to do so, there is no implied promise to repay him.[70] A wife's payment to her husband of a debt due the firm of which he was a member is good though he misappropriates the money.[71]

56. Const. art. 10, § 6, allowing a married woman to dispose of her property, does not remove the disability. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784.

California: Husband and wife may contract with each other as if unmarried [Civ. Code, § 158]. Alferitz v. Arrivillaga [Cal.] 77 P. 657.

In Florida a wife is only bound by agreements in writing made for the benefit of her separate property. Equitable Bldg. & Loan Ass'n v. King [Fla.] 37 So. 181.

Kentucky: May contract with reference to personal property as if unmarried, and with reference to real property when her husband joins, and contracts with husband binding if recorded [Ky. St. 1903, § 2128]. Stroud v. Ross [Ky.] 82 S. W. 254.

New Jersey: Wife loaned money to husband and with the profits he bought real estate and had it conveyed to them as tenants by the entirety and an agreement to employ the rents therefrom when they amounted to $5,000 to paying off a mortgage could be enforced. Collins v. Babbitt [N. J. Eq.] 58 A. 481.

New York: Laws 1896, p. 220, c. 272, § 21, allowing a married woman to contract with reference to her property does not permit her to contract with her husband for her support. Carling v. Carling, 42 Misc. 492, 86 N. Y. S. 46.

In Tennessee a wife is bound when her husband assents. Brundige v. Nashville, etc., R. Co. [Tenn.] 81 S. W. 1248. A married woman may disaffirm her contract to purchase land. Edwards v. Stacey [Tenn.] 82 S. W. 470. A married woman may elect as to whether she will be bound by her contract. Watkins Land Mortg. Co. v. Campbell [Tex. Civ. App.] 81 S. W. 560.

57. Coverture at common law prevented a woman from suing. Southworth v. Brownlow [Miss.] 36 So. 522. A wife may sue her husband. Parker v. Parker, 25 Ky. L. R. 2193, 80 S. W. 209.

58. Personal property acquired by wife belongs to her. Gordon v. Gordon [Mo.] 82 S. W. 11.

59. See 2 Curr. L. 247.

60. But this does not mean that either can so dispose of their personal property as to commit a fraud on the other, and where she had joined in a mortgage on his lands she was entitled to have proceeds of life insurance policy applied so as to protect her dower interest [Ky. St. 1903, §§ 2127, 2128]. Bickel v. Bickel, 25 Ky. L. R. 1945, 79 S. W. 215.

61. May contract and incur liabilities as if unmarried. Hill's Ann. Laws Or. 1892, § 2997, in force in Alaska. Elliott v. Hawley, 34 Wash. 585, 76 P. 93.

62. See 2 Curr. L. 248.

63. Agreement to reside in a particular state cannot be enforced. Isaacs v. Isaacs [Neb.] 99 N. W. 268.

64. Evidence held not to show such an agreement and husband compelled to account to his wife's representatives of money he had drawn from her separate estate. Young v. Valentine, 177 N. Y. 247, 69 N. E. 643.

65. But the marriage of a Chinese woman to one entitled to dwell in this country is no defense to deportation proceedings, unless it was bona fide. United States v. Ah Sou, 132 F. 878.

66. See 2 Curr. L. 248.

67. She cannot be liable either as indorsee or maker, to her husband on a note. National Bank of the Republic v. Delano, 185 Mass. 424, 70 N. E. 444.

68. Her separate property will become liable for partnership debts. Vizard v. Moody, 119 Ga. 918, 47 S. E. 348.

69. Pa. St. 1893 (P. L. 345, § 3), providing that woman cannot sue her husband does not apply to proving claim in bankruptcy. In re Domenig, 128 F. 146.

70. Husband was executor under will in which wife was residuary legatee. Bean v. Bean, 135 N. C. 92, 47 S. E. 232.

71. Collins v. Collins [Ky.] 83 S. W. 99.

Gifts.[72]—A husband may make a valid gift to his wife without her knowledge at the time,[73] and as to third persons acceptance is presumed,[74] but it is not completed until delivery.[75] Gifts between husband and wife are void in Massachusetts unless special conditions are complied with.[76] A postnuptial settlement is not valid as a contract,[77] but it may be good as a gift from a husband to a wife.[78] Where property which a wife inherited was deeded to her husband, it will be presumed to have been for her use, and not a gift,[79] so of a wife's advances made to her husband;[80] but where a husband sold his property and took a mortgage back to himself and wife, the presumption was that he had given her a half interest therein.[81]

Antenuptial contracts.[82]—Antenuptial contracts, where there is no fraud or concealment, are valid,[83] as one to transfer a benefit certificate, after marriage, to his wife.[84] An antenuptial contract may be altered by another contract if made before the marriage,[85] and the two should be construed together.[86] It may be binding though the intended wife was an infant.[87] One will not be sustained where the husband fraudulently concealed from his intended wife the amount of his property,[88] or where the provision for the wife is grossly disproportionate, the presumption being that it was procured by fraud and concealment, and the burden resting on those who would profit by it to show the contrary.[89] A note given in an antenuptial contract can be enforced by the wife.[90] An antenuptial contract by which a woman releases all her rights to the property of the man does not

72. See 2 Curr. L. 248.

73, 74. A husband transferred an account with stockbrokers to his wife's name, and they so entered it on their books, but later sold the stock for the husband's debt and were held guilty of conversion. Sparks v. Hurley, 208 Pa. 166, 57 A. 364.

75. Husband was allowed to recover for loss of cow, though he himself testified that he had given it to his wife, and the wife had accepted the gift. Davis v. Seaboard Air Line R. Co., 134 N. C. 300, 46 S. E. 515.

76. Consequently a loan to husband of property so given will give no claim provable in bankruptcy. In re Tucker, 131 F. 647.

77. After marriage, the marriage is not a valuable consideration. Clow v. Brown [Ind. App.] 72 N. E. 534.

78. The husband released all his rights in certain land to his wife, saving that of survivorship, and the settlement was operative though the wife did not join. Walt v. Walt [Tenn.] 81 S. W. 228.

79. The wife was one of several heirs and the property was amicably divided by the exchange of deeds, it subsequently appearing that the deeds to her share were made to her husband, it was a question of fact for jury if a gift was intended. Carter v. Becker [Kan.] 77 P. 264.

80. Wife advanced money from her separate estate which the husband used in improving his lands. Brady v. Brady [N. J. Eq.] 58 A. 931.

81. Presumption may be repelled by showing husband exercised acts of dominion over property, or that the wife recognized the husband's ownership. Gould v. Glass, 120 Ga. 50, 47 S. E. 505.

82. See 2 Curr. L. 249.

83. The woman was 24, consulted her uncle, a lawyer, and knowing that the man, who was 52 and had seven children, had $14,000 of property, she contracted to accept a life interest in 50 acres and $500, in lieu of dower. Brown v. Brown's Adm'r, 25 Ky. L. R. 2264, 80 S. W. 470. Antenuptial contract to pay wife $500 in return for release of dower valid, and husband's estate liable though wife died first. Barlow's Adm'r v. Comstock's Adm'r, 25 Ky. L. R. 1680, 78 S. W. 475. By antenuptial agreement wife surrendered all rights of $500 paid at the time and at her death any money remaining was to be paid back to husband, her creditors at her death were entitled to the money before the husband. Palmer v. Hallock, 94 App. Div. 485, 88 N. Y. S. 17.

84. In an action on a benefit certificate, where defendant set up a subsequent certificate, a reply setting up an antenuptial contract was proper. Carter v. Carter [Ind. App.] 72 N. E. 187.

85, 86. Second contract protected the then existing rights of the husband's creditors. South Carolina Loan & Trust Co. v. Lawton [S. C.] 48 S. E. 282.

87. Husband bound to join in conveyance of her land to her mother when she became of age. Wood v. Reamer [Ky.] 82 S. W. 572. See, also, Infants, 2 Curr. L. 392.

88. Where a husband with considerable property cut the wife off from it all, it will be presumed that he designedly concealed from her the value of his estate. In re Warner's Estate, 207 Pa. 580, 57 A. 35.

89. Agreement allowed wife $5,000 and what husband might give her by will. He bequeathed her stocks to value of $1,500 and left an estate valued at over $200,000. Russell v. Russell, 129 F. 434.

90. Though the contract was void because parol, and note was not delivered until after marriage. Kramer v. Kramer, 90 App. Div. 176, 86 N. Y. S. 129.

after marriage prevent her from filing a declaration of homestead on his property.[91] Under an antenuptial agreement that a wife might will her property as she chose, the husband could not after her death elect to take his share under the law.[92] Antenuptial contracts respecting property rights do not bar an allowance to the wife on a divorce of the parties.[93]

Agreements for separation and separate support.[94]—A contract between husband and wife to promote a separation is void; but a contract made after separation or after one has been determined on, providing for a wife's maintenance,[95] or for a division of property, is valid if there is consideration.[96] A contract between husband and wife for the latter's support is not valid where the common-law rule preventing contracts inter sese has not been relaxed.[97] A separation agreement between husband and wife made through the intervention of a trustee is valid where fair and free from coercion and it was entered into understandingly by her.[98] The contract will be canceled where one of the parties was incompetent because of mental weakness to make a contract,[99] and the deed executed in fulfillment of it will be declared void.[1]

Conveyances; mortgages; contracts to convey.[2]—Conveyances or contracts to convey between husband and wife are valid in some jurisdictions if recorded.[3] In Minnesota contracts between a husband and wife relative to the real estate of either are invalid.[4] In Iowa a contract of husband founded on valuable consideration that a wife should be entitled to one-half of all his property, real or personal, was enforced.[5] In Arkansas a husband can convey the homestead to his wife without her joining in the deed.[6] Where wife obtains a conveyance from her husband by fraud it will be set aside, she being liable for defrauding him, as well as for defrauding third persons.[7] To avoid making the invalidity of their contract with each other respecting lands a fraud, the courts may, on a contract executed on one side, decree the other party a trustee ex maleficio.[8]

91. The only effect of declaration is to exempt property from execution and to prevent its transfer without her consent. Warner v. Warner [Cal.] 78 P. 24.

92. Evidence insufficient to show that this provision was fraudulently inserted. Watson v. Duncan [Miss.] 37 So. 125.

93. Did not contemplate a divorce on account of the husband's fault. Carter v. Carter [Vt.] 56 A. 989.

94. See 2 Curr. L. 249.

95. Gross inadequacy of provision is indicative of fraud, but the mere fact the wife received less property than she might have been legally entitled to, where it was adequate for her support, will not authorize the setting aside of the contract. Sumner v. Sumner [Ga.] 48 S. E. 727.

96. That wife relinquished all rights of dower and interest in her husband's property did not release her right to collect a note of his which he had given her for borrowed money. Price v. Price, 25 Ky. L. R. 1803, 78 S. W. 888.

97. Laws 1896, p. 220, c. 272, § 221, granting a married woman power to contract with reference to her property as if unmarried, does not apply to such a contract. Carling v. Carling, 42 Misc. 492, 86 N. Y. S. 46.

98. Wife was suing for separate support. Bailey v. Dillon [Mass.] 71 N. E. 538.

99. Evidence showed husband executed contract under threats of his wife's brother and father. Ice v. Ice [Ky.] 83 S. W. 135.

1. But husband will have to repay the wife the expenses for sickness and death of child. Ice v. Ice [Ky.] 83 S. W. 135.

2. See 2 Curr. L. 250.

3. An agreement that the property of the one who died first should go to the survivor was unenforceable where not recorded, but the survivor was entitled to reimbursement for money expended in the purchase or improvement of such property [Ky. St. 1903, § 2128]. Stroud v. Ross [Ky.] 82 S. W. 254.

4. Gen. St. 1894, § 5534. But where a husband was induced to devise property to his wife by her promise to devise to certain persons, the latter's promise will be enforced as she took the property ex maleficio. Laird v. Vila [Minn.] 100 N. W. 656.

5. Under Code § 3155, providing that where husband or wife obtained control of property belonging to the other, the owner may sue therefor, or for any right growing out of the same. McElhaney v. McElhaney [Iowa] 101 N. W. 90.

6. Notwithstanding act March 18, 1857, which provides that a husband cannot convey the homestead without the wife's joining therein. Kindley v. Spraker [Ark.] 79 S. W. 766.

7. Conveyance obtained under threats of refusal to live with him, and when obtained she abandoned him. Hursen v. Hursen [Ill.] 72 N. E. 391.

8. In consideration of his wife's promise to bequeath certain property to designated persons, a man agreed to and did devise his

§ 3. *Property rights inter se. A. In general.*[9]—The possession of husband and wife is the possession of the one in whom is the legal title,[10] and the husband cannot acquire an easement by prescription in his wife's adjoining premises where she could not have made a valid grant to him.[11] At common law a married woman's will was not valid unless specifically assented to by her husband, but this is now generally changed by statute.[12]

A voluntary conveyance on the eve of marriage of all one's property without the knowledge of the other party, and with the intent of defeating his or her marital rights, will be set aside for fraud.[13] A widow may avoid a fraudulent conveyance where she married the man on his promise to procure a reconveyance which he failed to do.[14]

On the death of the husband or wife, the customary life estates of dower and curtesy or their statutory substitutes are vested.[15] Certain rights of succession as survivor result; usually a right to share as heir or at least as next of kin[16] or by virtue of a will.[17]

(§ 3) *B. Of husband in wife's property.*[18]—Under the common law, the husband has a freehold estate for the joint lives of himself and his wife in her lands, which she held at the time of her marriage, not for her sole and separate use, and which he cannot be deprived of except by due process of law;[19] and whatever title or estate the tenant by curtesy acquires inures to his wife's heirs.[20] A husband acquires no greater interest in his wife's property where it is conveyed to them jointly by a deed in partition.[21] A wife's property is not generally liable for hus-

estate to her; but the wife failed to perform her agreement. Held, that she takes the property ex maleficio in trust for the parties beneficially interested. Laird v. Vila [Minn.] 100 N. W. 656.

Note: It is well settled that equity will compel the conveyance of an estate, pursuant to an oral agreement, after such part performance by the promisee as would make failure to convey a fraud in law. Earl of Aylesford's Case, 2 Strange, 783; Johnson v. Hubbell, 10 N. J. Eq. 332. The theory commonly advanced is that the Statute of Frauds cannot be invoked in aid of fraud. See Montacute v. Maxwell, 1 P. Wms. 618; Maddison v. Alderson, L. R. 8 App. Cas. 467. It would, however, seem more accurate to say that the fraud upon the promisee who has changed his position in consequence of the promisor's representations raises a constructive trust in favor of the former. Such a trust, not being within the statute, may be enforced in equity without regard to the original agreement. See Maddison v. Alderson, supra. The situation in the principal case seems analogous. The breach of a promise to hold property for a third person's benefit, given as the inducement for a will in favor of the promisor, is such fraud as will convert the devisee into a constructive trustee. Thynn v. Thynn, 1 Vern. 296. Hence though, by statute, the original contract is unenforceable, yet equity should compel the execution of this constructive obligation. Ahrens v. Jones, 169 N. Y. 555. XVIII Harv. L. R. 67.

9. See 2 Curr. L. 251, 252.

10. Where they occupy the land jointly as a homestead, the husband cannot claim that his possession is adverse as to his wife. Hays v. March, 123 Iowa, 81, 98 N. W. 604.

11. Graves v. Broughton, 185 Mass. 174, 69 N. E. 1083.

12. Pub. St. 1882, c. 147, § 6, providing that married woman may make a will as if sole, except that it shall not be valid, without the written consent of her husband, to deprive him of real estate not exceeding $5,000 in value, or of more than one-half of her personal estate, requires that the husband's consent shall be to the last will and not to a former and substantially different one. Kelley v. Snow, 185 Mass. 288, 70 N. E. 89.

13. Evidence insufficient to show that the conveyance was made to carry out an oral trust. Collins v. Collins [Md.] 57 A. 597.

Note: In this case the court states the rule as well settled that a conveyance by the wife is under such circumstances fraud on the husband, and collates the authorities. Regarding as more doubtful the question involved in the text, the court goes extensively and critically into both English and American authorities laying down the rule as above. [Editor.]

14. The woman had procured a judgment for breach of promise and then dismissed her suit to recover realty. Cook v. Lee [N. H.] 58 A. 511.

15. See those titles: Curtesy, 3 Curr. L. 987; Dower, 3 Curr. L. 1144.

16. See Descent and Distribution, 3 Curr. L. 1091.

17. See Wills, 2 Curr. L. 2076.

18. See 2 Curr. L. 252.

19. Acts 1896, p. 42, No. 49, authorizing the court in its discretion on her petition, to authorize her to convey her real estate by separate deed, is unconstitutional. Hubbard v. Hubbard [Vt.] 58 A. 969.

20. Husband acquired a tax title. Manning v. Kansas & T. Coal Co. [Mo.] 81 S. W. 140.

21. Such deeds carry no title, but merely sever the unity of possession. Harrington v. Rawls [N. C.] 48 S. E. 571.

band's debts,[22] and is exempt from attachment therefor.[23] A husband may have such an interest in his wife's property as to make it his property for the purposes of an indictment for larceny.[24] The right of a married woman is now generally absolute over her personal estate, and she may convey it away on such terms as she pleases, if the conveyance is to take effect during her lifetime;[25] but where the common law prevails, money earned by a wife in absence of agreement belongs to the husband,[26] and the wife's choses in action are subject to the husband's power of appropriation by reducing them to possession.[27] Where a wife loaned money to a firm of which her husband was a member, he did not reduce it to his possession, and so she still could assert her claim to it.[28] A husband who murders his wife does not become the owner of her choses in action.[29]

(§ 3) *C. Of wife in husband's property.*[30]—The wife's right of dower[31] will not prevent specific performance of a husband's contract to convey.[32] In Indiana where a creditor has secured the husband's interest in land, the wife may have her one-third interest partitioned off.[33] The court will consider the fact that the wife's earnings have been used by husband to purchase property in his name in making a division of their property.[34]

(§ 3) *D. Estates in common, jointly and as an entirety.*[35]—Where the common law prevails unmodified, a conveyance to a husband and wife creates an estate by the entirety, and the survivor becomes the sole owner of the land.[36] A wife has no right to a share of the crops growing on land held by her and her husband as tenants by the entirety.[37] Though land, the title to which is in the husband and wife as an entirety, was bought with the proceeds of the sale of the husband's

22. In Montana Civ. Code § 227, there is no liability if wife files an inventory of her separate property. Clark v. Eltinge, 84 Wash. 323, 75 P. 866.

23. Rev. St. 1899, § 4339, providing that the husband's interest in real estate acquired by the wife during coverture is exempt from attachment during coverture for the husband's sole debts. Ball v. Woolfolk, 175 Mo. 278, 76 S. W. 410.

24. Instruction that if jury had a reasonable doubt as to the property belonging to the husband, they should acquit, was properly refused. Kirby v. State, 139 Ala. 87, 36 So. 721.

25. A conveyance to a trustee for herself for life and then to others subject to her right to vary the trust on written notice to the trustee and made for the express purpose of defeating her husband's rights. Kelley v. Snow, 185 Mass. 288, 70 N. E. 89.

26. Deposits in a bank in her name which was the usual way of doing business did not show ownership in wife, and any presumption that it belonged to her could be rebutted by parol evidence. Monahan v. Monahan [Vt.] 59 A. 169.

27. Where a wife assigned and delivered the certificate of bank stock to her husband though there was no transfer on the books of the bank, and then he sold the stock to another, the husband had reduced the stock to his possession. Johnson v. Hume [Ala.] 36 So. 421. Where husband has reduced his wife's property to his possession, as by repeated purchases and sales of land all in his name, the court will not interpose in her favor against his creditors. Scott v. Powers, Little & Co., 26 Ky. L. R. 1640, 78 S. W. 408. Land certificates are choses in action and a husband's sale of them is such a reduction to possession as to bar her rights where the common law prevails. Ward v. Cameron [Tex.] 80 S. W. 69.

28. Parker v. Parker, 25 Ky. L. R. 2193, 80 S. W. 209.

29. A life insurance policy on his life payable to her. Box v. Lanier [Tenn.] 79 S. W. 1042, 64 L. R. A. 458. See, also, Holdom v. A. O. U. W., 159 Ill. 619, 31 L. R. A. 67, and Schmidt v. Northern Life Ass'n, 112 Iowa, 41, 51 L. R. A. 141.

30. See 2 Curr. L. 253.

31. See Dower, 3 Curr. L. 1144.

32. The conveyance can have no effect on the contingent right of dower. Rodman v. Robinson, 134 N. C. 503, 47 S. E. 19.

33. And in a foreclosure sale it was proper for the court to decree that the two-thirds interest vested in the husband's creditor should be sold first and separately [Acts 1875, p. 178, c. 123]. Smith v. Sparks, 162 Ind. 270, 70 N. E. 253.

34. Award of permanent alimony. Champion v. Myers, 207 Ill. 308, 69 N. E. 815.

35. See 2 Curr. L. 254.

36. Under Gen. St. 1860, c. 89, §§ 13, 14, parol evidence admissible to show that the grantees were husband and wife though they were not so described in the deed. McLaughlin v. Rice, 185 Mass. 212, 70 N. E. 52.

37. Effect of such tenancy not altered by Comp. Laws 1897, § 8690, securing to married women their property, with right of transfer, free from debts of husbands, nor by a parol agreement between husband and wife for an equal share of the profits of the land. Morrill v. Morrill [Mich.] 101 N. W. 209

land, it is not held in trust so as to subject it to an execution against the husband,[38] and the proceeds from the condemnation of the land will be held by them as tenants by the entireties.[39] Married women's acts have been construed as striking down all rights of survivorship in joint property, so that estates by entireties may no longer be recognized.[40]

(§ 3) *E. Wife's separate property.*[41]—Property that a wife acquires from her husband under an execution is not her separate property,[42] but what her husband either voluntarily,[43] or in pursuance of an agreement, conveys to her, is separate property.[44] Land bought with wife's money is her separate property though the title was taken in her husband's name, but without her consent.[45] Proceeds from sale in partition of separate estate are treated as real estate so far as rights of husband are concerned.[46] Where land owned by the wife and others was conveyed to her and her husband by partition deeds, the latter acquired no title thereto.[47] In Missouri property acquired by the wife remains her separate property unless she assents in writing to its reduction to possession by her husband.[48] In North Carolina the separate estate of a married woman is defined by the constitution and her right to dispose of it guaranteed.[49] Where, after the separate property of the wife has been sold, it is reacquired on foreclosure of a trust deed given for the purchase price, it remains separate property.[50]

A loan made by wife from separate estate to husband is provable in bankruptcy, though the wife could have had no relief at law,[51] but the wife cannot recover her money which the husband used in paying his debts where defendant had no notice it was her money.[52] The widow is entitled to a lien on her deceased husband's property for advances out of her separate estate made to him.[53]

A married woman may borrow money and render her separate estate liable

38. On a judgment for the breach of his covenant of warranty. Mercer v. Coomler, 32 Ind. App. 533, 69 N. E. 202.

39. The forcible application of the proceeds to pay the debts of the husband was prevented. Mercer v. Coomler, 32 Ind. App. 533, 69 N. E. 202.

40. Though the title to a note does not survive, still the right of action thereon does survive, and may be transferred. Semper v. Coates [Minn.] 100 N. W. 662.

41. See 2 Curr. L. 255.

42. Wife does not take property in her own right which she purchases from one who had bought at an execution sale of her husband's property. Saunders v. Hamilton [Ky.] 82 S. W. 630.

43. By parol evidence that there was no consideration, a husband cannot establish a trust in his wife of land he had conveyed to her by deed reciting a valuable consideration. Hays v. Marsh, 123 Iowa, 81, 98 N. W. 604.

44. Antenuptial contract between an infant and her intended husband to convey all of her property to her mother for her separate use when she was of age, and which subsequently was so conveyed sufficed to create a separate estate in the wife. Wood v. Reamer [Ky.] 82 S. W. 572.

45. The resulting trust is good against husband's creditors. Cresap v. Cresap, 54 W. Va. 581, 46 S. E. 582.

46. Husband has no right to receive proceeds [Civ. Code Prac. § 494, subsec. 6; Id. § 497, subsec. 3]. Terrell v. Maupin [Ky.] 83 S. W. 591.

47. Where the land was mortgaged for the husband's debt and any surplus on foreclosure was to be paid to "husband and wife," that did not constitute a conveyance to him of any interest in the surplus. Harrington v. Rawls [N. C.] 48 S. E. 571.

48. Proceeds of real estate bought before the act but sold afterwards are separate property [Rev. St. 1879, § 3296]. Gordon v. Gordon [Mo.] 82 S. W. 11.

49. Code § 1826, providing that she cannot dispose of her personal estate except for necessaries without the consent of her husband is unconstitutional [Const. art. 10, § 6]. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784.

50. Property was settled on wife by husband by a post nuptial settlement. Walt v. Walt [Tenn.] 81 S. W. 228.

51. No distinction between wife's statutory separate estate, and such as is recognized in chancery courts. James v. Gray [C. C. A.] 131 F. 401.

52. Paul v. Thompson, 118 Ga. 358, 45 S. E. 387. Where husband gave money to his creditor who was also a creditor of his wife, with instructions to apply to his debt, the creditor had a right to presume it was the husband's money, and the wife cannot have it applied to her debt though it in fact belonged to her. Chason v. Anderson, 119 Ga. 495, 46 S. E. 629.

53. Advances made by a widow from her separate estate to improve the husband's lands will be presumed to be a loan as against volunteers claiming under the husband. Brady v. Brady [N. J. Eq.] 58 A. 931.

therefor,[54] and in some states it may be sold to pay debts charged on it.[55] She may dispose of her personal property by gift without the assent of her husband.[56]

A married woman may be barred by her laches in a suit as to her separate estate.[57]

§ 4. *Property rights under the community system.*[58] *A. What law governs.*[59]—The community laws of the domicile of the parties will not operate on real estate owned by one of them in another jurisdiction.[60] The liability of the wife on her husband's contract is determined by the law of the place where it was made.[61]

(§ 4) *B. What property is community and what separate.*[62]—The statutes generally enumerate what shall be separate and what community property. All property accumulated[63] or received,[64] or acquired by either during marriage, is presumed to be community property,[65] except what is given, bequeathed, devised, or has descended to one of them.[66] The burden is on the wife to show that property purchased during coverture was her separate property,[67] and evidence of husband and wife that property was the separate property of the wife should be very carefully scrutinized.[68] In Texas all property which either might bring into the marriage, except land and the wife's paraphernalia, is community property.[69]

Property conveyed by deed reciting a consideration, to husband and wife is community property.[70] But in California where a husband and wife may hold

54. Lender knew that the money was borrowed to build a house on lot purchased with money from her separate estate, and he supposed that the title to the lot was in the married woman and not in her and her husband jointly. June v. Labadie [Mich.] 100 N. W. 996.

55. Equity could not sell the fee simple of a married woman's land to pay her debts, but could only subject the issues and profits during coverture to the debt [Acts 1893, p. 6, c. 3]. Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603.

56. Except where a written instrument is required by law. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784.

57. Suit delayed for seven years. McPeck's Heirs v. Graham's Heirs [W. Va.] 49 S. E. 125. Where wife made no claim in answer to suit in partition that return of service was false, or that she was a married woman when the debt was contracted and waited over a year before suing to set aside the judgment. Smoot v. Judd [Mo.] 83 S. W. 481.

58. See 2 Curr. L. 257. An exhaustive monograph on "Community property" will be found in 96 Am. St. Rep. 916, appended to Ahern v. Ahern [Wash.] 96 Am. St. Rep. 912.

59. See 2 Curr. L. 257.

60. Suit for separation of property in Louisiana in which real estate in the Hawaiian Islands was involved, and case remanded for further evidence as to the laws of the situs. Nott v. Nott [La.] 36 So. 109.

Note: In Nuhn v. Miller, 5 Wash. 405, 34 Am. St. Rep. 868; Sadler v. Niesz, 5 Wash. 182, it was held that a bona fide conveyance by the husband living in the state apart from the wife and apparently single was valid as against the nonresident wife.

61. Clark v. Eltinge, 34 Wash. 323, 75 P. 866.

62. See 2 Curr. L. 257-260.

63. Evidence insufficient to show it was purchased by earnings of wife before marriage. O'Sullivan v. O'Sullivan [Wash.] 77 P. 806.

64. Evidence that the wife received money thirty years ago and that after many investments the horses in question were purchased, not sufficient to show separate property. Hill v. Gardner [Wash.] 77 P. 808.

65. But the presumption is not conclusive [Civ. Code § 164]. Hoeck v. Greif, 142 Cal. 119, 75 P. 670. But property held by adverse possession under an unrecorded tax deed is not acquired until the limitation period has run, and where the wife died before, her children acquired no interest by inheritance from her [Sayles' Ann. Civ. St. 1897, art. 2852]. Gafford v. Foster [Tex. Civ. App.] 81 S. W. 63. A land certificate transferred to a husband is community property. Booth v. Clark [Tex. Civ. App.] 78 S. W. 392.

66. Property purchased by a wife with the proceeds of a death certificate assigned to her by a third person in consideration of her caring for his children was community property. Bollinger v. Wright, 143 Cal. 292, 76 P. 1108.

67. She must show that she had funds which were reasonably sufficient to make the purchase and to meet the deferred payments. Property of over $5,000 purchased where wife had only $2,000 was liable to be seized as community property. Fortier v. Barry, 111 La. 776, 35 So. 900.

68. Evidence sufficient to show that property levied on for husband's debt, was the separate property of the wife. Richey v. Haley, 138 Cal. 441, 71 P. 499.

69. Act Jan. 20, 1840, § 4. Whisler v. Cornelius [Tex. Civ. App.] 79 S. W. 360.

70. But if it is shown that the deed was a gift, an undivided half belongs to the separate estate of each. King v. Summerville [Tex. Civ. App.] 80 S. W. 1050.

property either as joint tenants, or as tenants in common, or as community property, there is no presumption either way.[71] In that state, property conveyed to a married woman by an instrument in writing, whether from her husband or a third person, is presumed to be her separate property.[72] The presumption that property conveyed to a wife is community property may be overcome.[73]

Damages recovered for personal injury of the husband[74] or of the wife are community property.[75] But in Washington only the special damages belong to the community.[76]

Improvements made with community funds on land owned by husband and wife in severalty are community property.[77]

Whether the property is separate or community depends on how it was acquired and is not affected by the opinion of the parties or any declaration in the will of one of them.[78] A wife is not estopped to assert her interest though the record title of community property was in her husband.[79]

(§ 4) *C. Rights and powers as to community property.*[80]—The husband may sell community real estate, though his wife does not join in the contract, provided she assents, or subsequently ratifies it.[81] A lease of community property made by the husband in which the wife does not join is invalid.[82] The husband and wife may make any agreement as to their property as if they were unmarried, and it will be binding as to all except their creditors.[83] The husband is the proper party to sue to recover damages which will belong to the community.[84] A child may surrender to a parent his expectant interest in the community property in return for an advancement.[85] One who procures a divorce and forms a new

71. Civ. Code § 164. Property purchased with proceeds of community property was community property, but the rest which was conveyed to them jointly they held as tenants in common [Civ. Code, § 164]. Bollinger v. Wright, 143 Cal. 292, 76 P. 1108. Under Civ. Code § 161, may hold property as cotenants. Wagoner v. Silva, 139 Cal. 559, 73 P. 433. Evidence that they had built and occupied the house was sufficient evidence of joint ownership to sustain the action. Harlow v. Standard Imp. Co. [Cal.] 78 P. 1045.

72. Evidence insufficient to overcome the presumption [Civ. Code, §§ 158, 164]. Alferitz v. Arrivillaga [Cal.] 77 P. 657.

73. Hames v. State [Tex. Cr. App.] 81 S. W. 708.

74. Query: if one can recover for services of wife as nurse. Lawson v. Seattle & R. R. Co., 34 Wash. 500, 76 P. 71.

75. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 81 S. W. 580. Both should join in action and judgment properly rendered in favor of both. Paine v. San Bernardino Valley Traction Co. [Cal.] 77 P. 659. Damages for injury to wife during coverture are community property for which the husband alone can bring action unless he has abandoned her without her fault. Vaughn v. St. Louis S. W. R. Co. [Tex. Civ. App.] 79 S. W. 345.

76. Special damages on account of medical attendance, or wages paid another to do the wife's work, consequently the husband, or his representative, may join in the action. O'Toole v. Faulkner, 34 Wash. 371, 75 P. 975.

77. King v. Summerville [Tex. Civ. App.] 80 S. W. 1050.

78. Under Civ. Code § 163, property acquired by a husband after marriage by gift, bequest, devise, or descent and the profits thereof is separate property and would pass under a residuary devise though considered by the testator as community property. Granniss' Estate v. Center, 142 Cal. 1, 75 P. 324.

79. Failed to give notice of her interest by filing instrument [Pierce's Code, § 3892]. McNair v. Ingebrigtsen [Wash.] 78 P. 789.

80. See 2 Curr. L. 260.

81. Ratification shown by wife joining in deed in fulfillment thereof. Washington State Bank v. Dickson [Wash.] 77 P. 1067.

Note: Whatever power the husband has to dispose of community property without his wife's consent is a vested right as to whatever community property there is. It cannot be taken from him retroactively. The wife's interest in the community is said to be inchoate or nominal until death of one of the spouses except in Washington, where she has, while living, a vested interest, and in Texas an equitable interest.—From Spreckels v. Spreckels, 116 Cal. 339, 36 L. R. A. 497. The opinion goes exhaustively into the history of the husband's disposable right over the community.

82. Husband and wife may join in action to quiet title to community property, and where another owns jointly with them, he may join in the action. Snyder v. Harding, 34 Wash. 286, 75 P. 812.

83. Stipulation in mortgage that any surplus should be paid to the wife, held to show her separate property [Civ. Code, § 158]. Hoeck v. Greif, 142 Cal. 119, 75 P. 670.

84. Unless he has abandoned her without her fault. Vaughn v. St. Louis S. W. R. Co. [Tex. Civ. App.] 79 S. W. 345.

85. Such interest cannot be then reached

community may thereby abandon all claim in the old.[86] The general rule is that removal to another state does not forfeit community rights even though it be to a state where that system does not prevail.[87] In an indictment, property may be alleged to be the property of the husband though it belongs to the wife, and that may be shown at the trial.[88]

(§ 4) *D. Rights and powers as to separate property.*[89]—Where a wife has been separated in property from her husband, she may buy property for her separate account.[90] A lease of the wife's separate property is void unless she joins therein.[91] A wife can only sell her separate property when the husband joins in the conveyance.[92] A sale of the wife's land to pay the debts of the husband is void.[93]

(§ 4) *E. Succession to, and administration of, the community.*[94]—On death of one, the survivor acquires one-half of the community property if there are descendants, if there are none the survivor acquires the whole.[95] The interests of the heirs of the deceased attach at once.[96] The heirs of the husband during the wife's life are entitled to homestead in only the husband's share of land which was the separate property of the husband and wife, and not to improvements made by community funds.[97] In Louisiana the survivor is entitled to one-half of the community property and to the usufruct of the other half, which cannot be partitioned by the heirs during the life of the survivor.[98] The husband's separate estate will pass under a general residuary devise though he thought it was community.[99]

Custody, control, disposal, and distribution.[1]—The survivor is entitled to custody and control of community property only for the reasonable time necessary to pay community debts.[2] In California community property belongs to the husband as survivor without administration.[3]

The surviving husband cannot sell[4] or mortgage more than his share of the community property, except for a community debt.[5] The transfer of community property by the survivor does not pass the interest therein of children.[6] The

by a creditor. Everett v. Kemp [Tex. Civ. App.] 80 S. W. 534.

86. Bedal v. Sake [Idaho] 77 P. 638.

87. Note to Locke v. McPherson [Mo.] 85 Am. St. Rep. 565, citing Succession of Packwood, 9 Roh. [La.] 438, 41 Am. Dec. 341; Routh v. Routh, 9 Rob. [La.] 224, 41 Am. Dec. 326; Succession of Packwood, 12 Rob. [La.] 334, 43 Am. Dec. 230; Saul v. Creditors, 5 Mart. N. S. [La.] 569, 16 Am. Dec. 212.

88. Code Cr. Proc. 1895, art. 445. Hames v. State [Tex. Cr. App.] 81 S. W. 708.

89. See 2 Curr. L. 257-259.

90. The husband had conveyed property to a sister on understanding that it should be conveyed to his wife in settlement of the judgment. Nuss v. Nuss, 112 La. 265, 36 So. 345.

91. But it may be rendered valid by her consenting to an assignment thereof. Ascarete v. Pfaff [Tex. Civ. App.] 78 S. W. 974.

92. But where the purchaser consumes the property, he is estopped from interposing the defense which was for the protection of the wife, and was not to be used to defraud her [Rev. St. 1887, § 2498]. Karlson v. Hanson & K. Saw Mill Co. [Idaho] 78 P. 1080.

93. Though voluntary, but action barred by prescription. Munhoiland v. Fakes, 111 La. 931, 35 So. 983.

94. See 2 Curr. L. 261 et seq.

95. Act Jan. 20, 1840, § 4. Whisler v. Cornelius [Tex. Civ. App.] 79 S. W. 360.

96. The fact that there are community debts does not make the interests conditional or contingent. Bossier v. Herwig, 112 La. 539, 36 So. 557.

97. King v. Summerville [Tex. Civ. App.] 80 S. W. 1050.

98. Notwithstanding Civil Code, art. 1289, which provides that no one can be compelled to hold property with another. Succession of Glancey, 112 La. 430, 36 So. 483.

99. Granniss' Estate v. Center, 142 Cal. 1, 75 P. 324.

1. See 2 Curr. L. 261.

2. Statute of limitations will run against the heirs of the deceased without the survivors having expressly repudiated their claim. Miller v. Miller [Tex. Civ. App.] 78 S. W. 1085.

3. Civ. Code, § 1401. Bollinger v. Wright, 143 Cal. 292, 76 P. 1108.

4. The purchaser is not bound to see to the application of the proceeds. Linson v. Poindexter [Tex. Civ. App.] 80 S. W. 237.

5. In a suit to recover property so alienated, the insolvency of the community is no defense. Levy v. Robson, 112 La. 398, 36 So. 472.

6. Even though made to obtain necessaries for herself and her children. Booth

husband, without administration or qualification as survivor, has no power over the interest of the children.[7] The survivor, who has qualified as such, may convey community property to another for value, and who has no notice of other interests,[8] and such bona fide purchaser will prevail over the equitable claims of heirs of the deceased member of the community.[9]

The wife's right to administer community property ceases on her marriage to another,[10] but it is restored on her divorce from her second husband.[11] A dative tutor may administer the widow's rights in the community.[12]

Accountability to heirs and creditors.[13]—Where a widow used community property to pay debts contracted for improving her separate property, the money so used was still community property in her hands.[14] Community property, sold after the death of the husband for taxes and reconveyed to widow, is still in equity community property, but an innocent purchaser from the widow at a judicial sale is protected except against minor heirs of the husband.[15] The heirs of a married woman are entitled to be reimbursed for one-half of the cost of improvements made by her on her husband's property out of community funds and are not liable for its rental value.[16] The surviving wife is liable to creditors of the community only to the extent of the estate in her hands.[17]

Community debts and claims.[18]—Debts for improvements on land which belonged equally to the separate estates of the husband and wife, were community debts.[19] Where the community property is insufficient to pay the claims of both spouses, the charges in favor of the wife are entitled to a preference.[20]

(§ 4) *F. Dissolution of community.*[21]—One who voluntarily leaves the jurisdiction and obtains a divorce in another state, by suit wherein was no jurisdiction to divide property, cannot on returning sue for a division of the community property.[22]

v. Clark [Tex. Civ. App.] 78 S. W. 392. Sale by husband purporting to convey the whole conveys only his interest, as an undivided half-interest vests in the heirs of the wife. George v. Delaney, 111 La. 760, 35 So. 894. Wife's deed does not convey the children's interests. Summerville v. King [Tex.] 83 S. W. 680.

7. Wiess v. Goodhue [Tex.] 83 S. W. 178.

8. As between the survivor and children, a part conveyance will operate as a partition. Eddy v. Bosley [Tex. Civ. App.] 78 S. W. 565.

9. That one boarded on the premises where legal title was in one who kept them, is not notice of equitable interests of the boarder. Derrett v. Britton [Tex. Civ. App.] 80 S. W. 562.

10. But after divorce she might sell the community property to pay a community debt. King v. Summerville [Tex. Civ. App.] 80 S. W. 1050.

11. Summerville v. King [Tex.] 83 S. W. 680.

12. Where the widow acquiesces. Succession of Keppel [La.] 36 So. 955.

13. See 2 Curr. L. 263.

14. The sureties on her bond were liable therefor. Neaves v. Griffin [Tex. Civ. App.] 80 S. W. 420.

15. Property sold at the instance of a creditor of the widow. Sicard v. Gumbel, 112 La. 483, 36 So. 502.

16. Where husband abandoned wife. Cervantes v. Cervantes [Tex. Civ. App.] 76 S. W. 790.

17. Fact that she was administratrix neither adds to nor abridges her power to administer the community property as to creditors of the community. Carpenter v. Lindauer [N. M.] 78 P. 57.

18. See 2 Curr. L. 261.

19. King v. Summerville [Tex. Civ. App.] 80 S. W. 1050.

20. Wife paid funeral expenses. Bergey v. Labat, 112 La. 992, 36 So. 829.

21. See 2 Curr. L. 261.

22. Duty of plaintiff to sue in jurisdiction where property was. Bedal v. Sake [Idaho] 77 P. 638. The former community was abandoned. Id.

Note: This question being without precedent in Idaho, the court reviews the cases showing that it is without exact precedent in other states. The decision is based on the policy of the law against multiplied suits, which does not seem quite applicable where as in this case the foreign suit lacked personal jurisdiction as well as jurisdiction of the property sought to be divided. There is a strong dissent by Sullivan, C. J., who says the granting of the foreign decree presumptively determined the rectitude of the wife's position and that therefore equity should relieve her. It is difficult to harmonize the majority opinion with the now settled doctrine respecting foreign divorces. See Divorce, 1 Curr. L. 952; 3 Curr. L. 1139; Atherton v. Atherton, 181 U. S. 155, 45 Law. Ed. 794.

§ 5. *Liability for necessaries. Liability of husband.*[23]—The liability for necessaries furnished the family is presumptively the husband's, as on a contract made by a married woman for board[24] or for wearing apparel.[25] At common law the husband is primarily liable for the funeral expenses of his wife,[26] but in New York he can recover them from her estate.[27] That the husband has made suitable provision for his wife does not relieve him from one who has no notice thereof.[28] The common-law liability as to necessaries is frequently defined by statutes.[29]

Where the parties are living apart and the husband was making a suitable allowance for her,[30] or where under decree of court he is providing for wife's support, he is not liable for necessaries.[31] The husband is liable to wife for support of minor children after divorce where the decree fails to provide for their maintenance.[32] Where the parties are living apart, the husband's liability depends on whether he was at fault or not;[33] if his wife has left him without just cause he is not liable.[34]

The widow cannot bind her late husband's estate for necessaries.[35]

An affidavit in attachment positively sworn to was sufficient which stated a claim to be for "necessaries, to wit, groceries."[36]

Liability of wife.[37]—The wife is not liable for family necessaries supplied by a merchant where it is not shown that she agreed to pay for them.[38] But in some states the family expenses are chargeable against the property of both husband and wife,[39] and a wife may be liable on a note of her husband if given for necessaries for her.[40]

§ 6. *Contract rights and liabilities of husband as to third persons.*[41]—A husband's covenant on selling his business not to engage in it as agent or otherwise will not prevent his wife from engaging in the same business in her own name.[42] A husband may become liable as surety for his wife.[43]

23. See 2 Curr. L. 264.

24. Wife may by express agreement charge herself, but burden on plaintiff to show this. Ruhl v. Heintze, 97 App. Div. 442, 89 N. Y. S. 1031.

Note: See Special Article Agency from Relation, 3 Curr. L. 115, treating exhaustively of the wife's right to charge her husband for necessaries.

25. In a suit for wearing apparel furnished wife, plaintiff was required to give a bill of particulars showing whether the alleged marriage was a ceremonial one. Oatman v. Watrous, 90 N. Y. S. 940. Watch not a necessary for the wife, who was living with her husband who had not refused to provide for her. Johnson v. Briscoe [Mo. App.] 79 S. W. 498.

26. Grows out of obligation to provide necessaries. Kenyon v. Brightwell [Ga.] 48 S. E. 124. Husband is liable for expenses of last illness of wife, of burial and for cost of tombstone. Stonesifer v. Shriver [Md.] 59 A. 139.

27. But notwithstanding he is liable in the first instance. Pache v. Oppenheim, 93 App. Div. 221, 87 N. Y. S. 704; Id., 84 N. Y. S. 926.

28. Fitzmaurice v. Buck [Conn.] 59 A. 415.

29. Gen. St. 1902, § 4546, making husband liable for articles purchased by wife and used by family, or for her reasonable wearing apparel. Fitzmaurice v. Buck [Conn.] 59 A. 415.

30. Though defendant had no notice that they were living apart. Meyer v. Jewell, 88 N. Y. S. 972.

31. Attorney's fees for bringing action to recover wife's property. Damman v. Bancroft, 43 Misc. 678, 88 N. Y. S. 386.

32. She may recover from his estate. Lukowski v. Lukowski [Mo. App.] 83 S. W. 274.

33. Suit for medical services rendered wife. Wolf v. Schulman, 90 N. Y. S. 363.

34. Husband had offered to support her at his home. Ogle v. Dershem, 91 App. Div. 551, 86 N. Y. S. 1101.

35. Booth v. Clark [Tex. Civ. App.] 78 S. W. 392.

36. McLane v. Colburn, 2 Ohio N. P. [N. S.] 257.

37. See 2 Curr. L. 265.

38. The husband is under legal duty to support the family. Anderson v. Davis [W. Va.] 47 S. E. 157. Wife not liable for sale of goods to husband for use in family, where no evidence of agency, or of claim made on wife until after it was found that debt could not be collected of husband. Dillon v. Mandelbaum, 97 App. Div. 107, 89 N. Y. S. 646.

39. Personal judgment may be rendered against both for wearing apparel purchased by the husband [3 Mills' Ann. St. 1891 (2nd Ed.) § 3021a]. Gilman v. Matthews [Colo. App.] 77 P. 366.

40. Not clear without proof that building of house on husband's lot was not a necessary expenditure. Clark v. Eltinge, 34 Wash. 323, 75 P. 866.

41. See 2 Curr. L. 265.

42. But the husband would be enjoined from acting as superintendent of the busi-

Agency of wife for husband.[44]—A husband may be bound by his wife acting as his agent, when her acts are within the scope of her ostensible or actual agency,[45] but after quarrels and separation any agency ceases.[46]

§ 7. *Contract and property rights and liabilities of wife as to third persons. A. Agency of husband for wife.*[47]—The agency of the husband for the wife is not established by the mere fact of marriage,[48] but it may be inferred from all the facts of the case,[49] and the wife may be liable as the undisclosed principal of her husband.[50] A husband who is the general agent of his wife may pledge her securities for his own benefit, so as to bind her,[51] and where a husband was the wife's agent to deliver her note she was bound by his representations.[52] A husband may act as the attorney at law of his wife.[53] In some states, wife may authorize her husband to sell her interest in land,[54] but in Missouri a husband cannot act as the agent of the wife in regard to her land,[55] and in California oral authority is insufficient to enable a husband to contract for the exchange of his wife's property.[56]

(§ 7) *B. Contracts in general.*[57]—At present by statute married women have in many states complete power to contract with relation to their own property,[58] and

ness carried on in his wife's name, and the wife and third parties would be enjoined from employing him. Fleckenstein Bros. Co. v. Fleckenstein [N. J. Eq.] 57 A. 1025.

43. The husband joined in a mortgage securing his wife's notes in which "the mortgagors expressly agreed to pay the money secured." Vanseil v. Carithers [Ind. App.] 71 N. E. 158.

44. See 2 Curr. L. 266.

45. Whether the husband is bound by her purchase of a watch is a question for the jury considering the condition of the parties and the previous conduct of the husband. Evidence that daughter of a neighbor had watches, or that the wife milked cows, was irrelevant. Johnson v. Briscoe [Mo. App.] 79 S. W. 498.

46. Wife no authority to authorize a third person to enter her husband's dwelling and remove his furniture. Heyert v. Reubman, 86 N. Y. S. 797. See special article Agency from Relation, 3 Curr. L. 101.

47. See 2 Curr. L. 266.

48. Husband cannot be presumed to be agent of wife as to her interest in lands held in common. Wagoner v. Silva, 139 Cal. 559, 73 P. 433. See special article Agency from Relation, 3 Curr. L. 101.

49. Contracts for hardware for houses on land of wife were made in husband's name, plaintiff believing that he was the owner, but the wife made selections and agreed on prices and was chargeable under the contract. Popp v. Connery [Mich.] 101 N. W. 54. Wife did business under a firm name consisting of the names of her husband and an employe, and the husband as agent of the firm could make contracts binding on her. Taylor v. Angel [Ind.] 71 N. E. 49. A husband who removed doors and windows from a house owned by his wife will be presumed to have been authorized by his wife as against a holder of a tax lien, and so not to be guilty of maliciously injuring the house of another. Adkin v. Phillen [Mich.] 100 N. W. 176. Evidence sufficient to show that husband was wife's agent in ordering extra work on house that was being built for her, and that she acquiesced therein. Mitchell v. Jodon, 22 Pa. Super. Ct. 304.

50. Husband ordered materials for house built on lot of his wife, and wife directed alterations during progress of the work. Whipple v. Webb, 44 Misc. 332, 89 N. Y. S. 900. Oats were furnished for cattle of which a married woman was the owner, and that they were charged to the husband, or he gave his notes therefor, did not preclude recovery from her. Mollineaux v. Clapp, 90 N. Y. S. 880. Where the agency of husband was unknown until after judgment against him, the third party may elect to hold and sue the wife, unless she satisfies the judgment. Greenberg v. Palmieri [N. J. Law] 58 A. 297.

51. Husband pledged wife's notes and trust deed. Brosseau v. Lowry, 209 Ill. 405, 70 N. E. 901.

52. He represented that she was a principal when she was in fact a surety, and she was bound though the time had passed in which limitations run as to a surety. Wm. Deering & Co. v. Veal, 25 Ky. L. R. 1809, 78 S. W. 886.

53. He may bind her by a settlement of the case. Wilkie v. Reynolds [Ind. App.] 72 N. E. 179.

54. Wife told husband to go ahead and sell on such terms as he thought best. Meylink v. Rhea, 123 Iowa, 310, 98 N. W. 779. Where the boundary of wife's land was in dispute and the husband with her assent purchased an adjoining strip but failed to pay for it, the vendor could enforce his vendor's lien. Cavin v. Wichita Val. Townsite Co. [Tex. Civ. App.] 82 S. W. 342.

55. He cannot bind her by his deed, so he cannot by word of mouth. Spurlock v. Dornan [Mo.] 81 S. W. 412.

56. Civ. Code § 1624, subd. 5, provides agent's authority must be in writing. Nason v. Lingle [Cal.] 77 P. 71.

57. See 2 Curr. L. 267.

58. An agreement for what amounts to a common-law arbitration of a will contest is binding on a married woman notwithstanding § 10924, expressly excepts married

to incur liabilities as if unmarried.[59] A wife may be liable to an attorney for services rendered in a divorce suit.[60] Though under statute, the married woman may be liable on her contracts, she will not be liable on her mere promise to pay.[61] Where a married woman may contract as if single, the contract may be specifically enforced;[62] but in many states a married woman's bonds and notes are not binding on her,[63] though a default judgment thereon is not a nullity.[64] In some states a wife is only liable for debts contracted with the consent of her husband.[65] In Illinois a wife cannot enter into a partnership without the consent of her husband.[66] In Tennessee a married woman is not bound by her contract to purchase land.[67] In some states a married woman may elect as to whether she shall be bound by her contract.[68] In Ohio a wife's contracts do not charge her separate property subsequently acquired.[69] In North Carolina a married woman is not liable on her contracts unless she is a free trader,[70] and a note signed with her husband will not bind her separate real estate in equity without a privy examination.[71]

(§ 7) *C. Contracts of suretyship.*[72]—A wife who joins with her husband in giving a trust deed of her land,[73] or who gives her note and mortgage for her husband's debt,[74] or contracts to assume the obligation of another, is a surety,[75] and in many states is bound thereby.[76] A married woman will be released where the primary security was released without her consent,[77] or even where additional security

women from entering into a statutory arbitration [Comp. Laws 1897, § 8690]. Hoste v. Dalton [Mich.] 100 N. W. 750.

59. Could contract to work an Alaska mining claim on shares [Hills' Ann. Laws Or. 1892, § 2997]. Elliott v. Hawley, 34 Wash. 585, 76 P. 93.

60. Though the contract providing for a contingent fee was void, the attorney could recover what his services were reasonably worth. McCurdy v. Dillon [Mich.] 98 N. W. 746.

61. Husband and wife gave mortgage and note on property of both, but no deficiency personal judgment could be entered against the wife. Loizeaux v. Fremder [Wis.] 101 N. W. 423. A promise of wife to pay for board furnished her under a contract made by her husband is without consideration. Ruhl v. Heintze, 89 N. Y. S. 1031.

62. Agreed to assume at maturity a mortgage given by a corporation if an assignment thereof was tendered her. Law v. Smith [N. J. Eq.] 59 A. 327.

63. Rev. St. 1892, § 2208, makes those given to building associations valid when joined in by husband. Equitable Bldg. & Loan Ass'n v. King [Fla.] 37 So. 181.

64. Coverture is an affirmative defense which must be pleaded. Smoot v. Judd [Mo.] 83 S. W. 481.

65. Code 1886, §§ 2345, 2350, provided that husband might file a general consent in probate court, but a subsequent acknowledgment with the consent of husband but without any new consideration will not be binding. Horton v. Hill [Ala.] 36 So. 465. A conveyance of land to her in consideration of her promise to support the grantor, in absence of showing of her husband's assent, was without consideration, and therefore void as to existing creditors. Wood v. Potts [Ala.] 37 So. 253. But the accord and satisfaction for injuries to wife may be set aside for fraud. Brundige v. Nashville, etc., R. Co. [Tenn.] 79 S. W. 1027; Brundige v. Nashville, etc., R. Co. [Tenn.] 81 S. W. 1248.

66. But she may enter into a partnership with her husband [Hurd's Rev. St. 1903, c. 68, § 6]. Heyman v. Heyman [Ill.] 71 N. E. 591.

67. Neither can she recover the money already paid thereon. Edwards v. Stacey [Tenn.] 82 S. W. 470.

68. But the other party cannot refuse to perform because the contract is with a married woman. Watkins Land Mortg. Co. v. Campbell [Tex. Civ. App.] 81 S. W. 560.

69. But a judgment against her may be enforced out of property acquired after coverture had ceased. Hart v. Manahan [Ohio] 71 N. E. 696.

70. So an action to enforce an equitable charge against her separate estate cannot be brought before a justice of the peace. Harvey v. Johnson, 133 N. C. 352, 45 S. E. 644.

71. Money was advanced for benefit of her separate estate. Harvey v. Johnson, 133 N. C. 352, 45 S. E. 644.

72. See 2 Curr. L. 269.

73. In a suit to foreclose the husband's representative is a necessary party. McGowan v. Davenport, 134 N. C. 526, 47 S. E. 27.

74. Though the mortgagee knew it was given for her husband's debt and was an accommodation. Sigel-Campion Live Stock Commission Co. v. Haston [Kan.] 75 P. 1028.

75. Contract to assume a mortgage of a corporation in which her husband was interested was enforceable. Law v. Smith [N. J. Eq.] 59 A. 327.

76. The husband was not the agent of the creditor so as to charge the creditor with his false representations. Hyatt v. Zion [Va.] 48 S. E. 1.

77. A married woman hypothecated her land for a debt of her husband and cattle belonging to him were included and were subsequently released, and a condition in the deed that the money raised should be

is procured without the wife's knowledge.[78] In some states the wife is only bound where the third person had no notice that she was a surety,[79] and a married woman is not estopped to sue for cancellation where the mortgagee knew the mortgage was given for the husband's debt, though the wife signed an affidavit that the consideration was for her sole use.[80] Where a note is assigned by the payee to an innocent holder for value, so that the maker, a married woman, has to pay the same, she may recover from the payee in an action for money had and received.[81] The plea of the statute of frauds is not available to a stranger.[82] A married woman in many jurisdictions is prohibited from becoming an accommodation indorser, maker, guarantor, or surety for another,[83] or from becoming liable on any promise to answer for the debt of another.[84] In some states such statutes have been held to prohibit them from mortgaging their separate property or property held with husband by the entirety, as security for another,[85] but in other states they may pledge specific property to secure the debt of her husband.[86] That is a married woman may not be liable personally on a mortgage given for her husband's debt, though the mortgage itself will bind the specific property.[87] In other states a wife cannot directly or indirectly become a surety for her husband,[88] and such mortgages are void.[89] The fact as to whether a mar-

used to buy cattle was not complied with. Schneider v. Sellers [Tex. Civ. App.] 81 S. W. 126.

78. Wife executed a trust deed to defendant of her land to secure a note given for her husband's debt, and the payee's procuring a third person to sign the note was such an alteration as to discharge the land. Higgins v. Deering Harvester Co. [Mo.] 79 S. W. 959.

79. Where a wife's signature was on the second line and there was no other, it was not notice that she signed as surety to one who accepted it in settlement of her husband's notes. Deering & Co. v. Veal, 25 Ky. L. R. 1809, 78 S. W. 886. Under Burns' Ann. St. 1901, § 6964, making surety contracts void, there can be no recovery except where person making contract was justified in supposing and did suppose the married woman was principal in fact as well as in name, where the facts are undisputed this is a question of law, and here there was a want of care. Field v. Campbell [Ind.] 72 N. E. 260.

80. And though estoppel runs against a married woman [Burns' Ann. St. 1901, § 6962], and though the property was situated in another state, the foreclosure would be enjoined. Ft. Wayne Trust Co. v. Sihler [Ind. App.] 72 N. E. 494.

81. It is unnecessary to plead the specific facts as to the suretyship of the married woman. Harbaugh v. Tanner [Ind.] 71 N. E. 145.

82. Wife was surety of husband for money borrowed of daughter, and a conveyance of her land to daughter in satisfaction was not fraudulent though the surety contract was parol. Scudder & Co. v. Morris [Mo. App.] 82 S. W. 217.

83. Act June 8, 1893 (P. L. 344). Herr v. Reinoehl [Pa.] 58 A. 862. An acknowledgment of liability of a married woman for advances to her husband invalid [Code 1896, § 2529]. Horton v. Hill [Ala.] 36 So. 465.

84. But this does not prevent her from being liable on a mortgage, though she gives the proceeds to her husband who pays his debts, or though the mortgage was given in part payment of debt of husband [Act 1891 (20 Stat. 1121)]. McGee v. Cunningham [S. C.] 48 S. E. 473. But if she buys property she may assume to pay off any debts of her husband which are a lien on the property [Civ. Code 1895, § 2488]. Vizard v. Moody, 119 Ga. 918, 47 S. E. 348.

85. The transfer of property held by the entirety to a third party, and then immediately back to the husband who mortgaged it, was an evasion, and the mortgagee was put on inquiry, and though the mortgage had been renewed, the mortgage was not valid. Webb v. Hancock Mut. Life Ins. Co., 162 Ind. 616, 69 N. E. 1006.

86. Assigned her interest in life insurance policy on life of her husband. Herr v. Reinoehl [Pa.] 58 A. 862.

87. Not liable on any contract to answer for debt of husband, unless a conveyance or mortgage of specific property; and under Ky. St. 1903, § 3760, where she was privately examined by officer she cannot claim she executed the mortgage under duress of her husband [Ky. St. 1903, § 2129]. Hall v. Hall [Ky.] 82 S. W. 269. Husband and wife joined in mortgage to third person who was a surety for husband's debt [Ky. St. 1903, § 2127]. Cook v. Landrum [Ky.] 82 S. W. 585. Mortgage given by married woman on her property good, though no deficiency judgment could be entered against her on her note which was given for her husband's debt. Loizeaux v. Fremder [Wis.] 101 N. W. 423.

88. She may sue to have a deed on her land canceled, which she executed in order to secure a debt of her husband [Code 1896, § 2529]. Henderson v. Brunson [Ala.] 37 So. 549.

89. A mortgage of the wife's property by a sale and a contract of retrocession for a debt of the husband is void. Voiers v. Atkins Bros. [La.] 36 So. 974. Evidence held to show mortgage was given to secure mules to cultivate the mortgaged land, and not for

ried woman received in person or in benefit to her separate estate the consideration and not the form of the contract determines the question as to whether she is a surety.[90] Where the contract of suretyship is not binding on a married woman, a mere technical evasion will not validate the contract where the other party had notice.[91]

(§ 7) *D. Conveyances, mortgages, contracts to convey, powers.*[92]—A married woman cannot generally convey her own real estate unless the husband joins in the conveyance[93] except where she has been abandoned,[94] unless there is an estoppel;[95] but she may execute an appointment without her husband joining therein.[96] A married woman is bound by a deed executed by another at her request, for her and in her presence, which she afterwards acknowledged.[97] A wife may make a valid power of attorney to convey her lands, where her husband joins therein.[98] A married woman may make contracts for the improvement of her own land, but cannot create a lien unless the husband joins therein.[99] She can only make an executory contract for sale of land by complying with provisions of the statute.[1] Where the statute prescribes a special form of acknowledgment for married women, it must be carefully followed,[2] as a deed not acknowledged in accordance with the statute is a nullity.[3] A wife joining with her husband in a conveyance releases her dower and homestead rights.[4] Leases under three years are not conveyances and may be made by a married woman without the consent of her husband.[5] A mortgage on a married woman's separate property may be enforced for the loan, though the bond which the mortgage secured was void,[6] but not where

the husband's debt. Hanna v. Cox [S. C.] 48 S. E. 274.

90. Where note signed by wife alone, the burden is on her to prove her suretyship. Harbaugh v. Tanner [Ind.] 71 N. E. 145. A wife who for a consideration executes a mortgage on her property to pay her husband's debts is not a surety but a principal. Hamilton v. Hamilton, 162 Ind. 430, 70 N. E. 535.

91. Woman signed a note first and bank paid the money to her, she giving a check to the real debtor, all with knowledge of the bank that she was a mere surety. Hines & Co. v. Hays [Ky.] 82 S. W. 1007.

92. See 2 Curr. L. 271.

93. The signing by the wife thirty-five years after the husband had signed and without his knowledge, was of no validity, nor was there any trust though the grantees had paid off a mortgage on the parol agreement to convey the land to them [Rev. St. 1860, §§ 2279, 2974]. Alvis v. Alvis, 123 Iowa, 546, 99 N. W. 166.

94. But that her husband was a citizen of Arizona was not sufficient evidence of abandonment to authorize her without the consent of her husband to submit the question of her title to lands to arbitration [Code, § 1832]. Smith v. Bruton [N. C.] 49 S. E. 64.

95. The wife gave a deed to her children, and after her husband's death, urged another to purchase at a guardian's sale. Morrison v. Baizer [Tex. Civ. App.] 80 S. W. 248.

96. But she could not convey her life estate without the joinder of her husband [Rev. Code 1867, § 2373]. Young v. Sheldon, 139 Ala. 444, 36 So. 27.

97. Can only be attacked against one who had notice of false acknowledgment [Ky. St. 1903, § 507]. Godsey v. Virginia Iron, Coal & Coke Co. [Ky.] 82 S. W. 386.

98. Its validity depends on law of place where land lies. Linton v. Moorhead [Pa.] 59 A. 264.

99. Contract to give one the fruit crops in consideration of planting fruit trees was void as against a subsequent purchaser, as she did not own the land [Ky. St. 1903, § 2128]. Thompson v. Stark, 25 Ky. L. R. 1882, 79 S. W. 202.

1. Husband must join in instrument, and wife must acknowledge and be privily examined [Code, § 1256]. Tillery v. Land [N. C.] 48 S. E. 824.

2. Rev. St. 1895, art. 4621, requires a married woman to acknowledge that she willingly signed and sealed it and wishes not to retract; and an acknowledgment that it was her own act and deed and that she did not wish to retract, was fatally defective. Tiemann v. Cobb [Tex. Civ. App.] 80 S. W. 250. But a deed which she acknowledges merely as wife and not as owner will not pass her then existing or after-acquired rights in land. Hendricks v. Musgrove [Mo.] 81 S. W. 1265. See Acknowledgments, 3 Curr. L. 31.

3. "Consent that the same be recorded" is substantially the same as "that she did not wish to retract it." Masterson v. Harris [Tex. Civ. App.] 83 S. W. 428.

4. The words "Homestead and dower being released" after an acknowledgment in due form to a mortgage did not affect it. Burnside v. Mealer [Ky.] 80 S. W. 785. See Dower, 3 Curr. L. 1144; Homesteads, 3 Curr. L. 1630.

5. But if the married woman is an infant she may disaffirm them on attaining majority. Shipley v. Smith, 162 Ind. 526, 70 N. E. 803.

the consideration was illegal.[7] And it is utterly void where not separately acknowledged, though the legal title was in the husband.[8] A deed of a married woman, in the nature of a mortgage though void at law is valid in equity and charges the wife's separate estate.[9] Where married woman signs deeds of trust of her property authorizing the grantee to pay off incumbrances on the land, she is estopped to claim that she did not in writing authorize their payment.[10]

(§ 7) *E. Fraudulent conveyances.*[11]—A husband can forego his right to his wife's earnings unless done in fraud of creditors,[12] and a conveyance is not fraudulent where made in fulfillment of an invalid parol contract,[13] or in settlement of a contingent liability.[14] The husband cannot repudiate a conveyance to his wife where it was not fraudulent as to creditors.[15] But the burden is on the wife to show that a parol trust in her favor is bona fide,[16] for the presumption is that property conveyed to a wife is still liable for the husband's debts.[17] A voluntary conveyance to wife made in good faith by a grantor who retains sufficient property to pay his debts is valid as against creditors.[18] But a conveyance of husband to wife is fraudulent when made without consideration after beginning of action by creditor.[19] So one by a wife to her husband which leaves her insolvent is fraudulent.[20] Where money is loaned to a husband who uses it in benefiting his wife's property, the lender cannot recover from her directly.[21]

§ 8. *Torts by husband or wife or both.*[22]—The common-law rule that a husband is jointly liable with his wife for torts committed by her in his presence does not exist in Nebraska, as the old idea of the oneness of husband and wife has

6. The mortgage was signed by both husband and wife, but the bond was only signed by the wife. Equitable Bldg. & Loan Ass'n v. King [Fla.] 37 So. 181.

7. A married woman's mortgage to raise money to pay her husband's debts and to compromise a criminal prosecution against him is invalid as to the amount used for the last purpose. Pierson v. Green [S. C.] 48 S. E. 624. A married woman may mortgage her land, unless it is to secure her husband's debt. Hanna v. Cox [S. C.] 48 S. E. 274.

8. Code 1896, § 2034, in regard to homesteads. Here the certificate of separate acknowledgment was held to be false. Shook v. Southern Bldg. & Loan Ass'n [Ala.] 37 So. 409.

9. Pape v. Ludeman [N. J. Eq.] 59 A. 9.

10. Married woman had taken part personally in securing the payment of the incumbrances [Civ. Code, § 2424]. Continental Bldg. & Loan Ass'n v. Wilson [Cal.] 78 P. 254.

11. See 2 Curr. L. 274. Voluntary conveyances between husband and wife as defrauding creditors and subsequent transferees for value are also fully discussed in Fraudulent Conveyances, 3 Curr. L. 1535.

12. In re Dalley's Estate, 43 Misc. 552, 89 N. Y. S. 538.

13. Daughter's signature obtained to note on promise to save her harmless or else convey land to her. Scudder & Co. v. Morris [Mo. App.] 82 S. W. 217.

14. The liability on an antenuptial contract though contingent was sufficient to prevent a conveyance to wife in abrogation thereof from being fraudulent. Clow v. Brown [Ind. App.] 72 N. E. 534.

15. Husband bought land and took a deed to himself which he did not record, but procured another deed to his wife which he did record, ten years later after separation he recorded the deed to himself, but it was ordered canceled. Ball v. Ball, 89 N. Y. S. 1046.

16. Her mere possession of a bond against the husband is not sufficient evidence, and to show a parol trust in her favor, the evidence must be clear and convincing. Kline v. Kline's Creditors [Va.] 48 S. E. 882.

17. Where no evidence that it was a gift to her or was paid for out of her separate estate. Hunter v. Baxter [Pa.] 59 A. 429.

18. Burden on a subsequent creditor to show that at the time of the conveyance debtor had insufficient property to pay his debts. State v. Martin [Conn.] 58 A. 745. There was no fraudulent intent in fact, as the husband was solvent at the time. Polk County Nat. Bank v. Scott [C. C. A.] 132 F. 897. That a third of cost of home, and not exceeding amount he should have paid for support of family, was paid by husband, did not render the conveyance to wife fraudulent. Eversole v. Bullock [Ky.] 83 S. W. 556.

19. This though the property may have been originally purchased with the wife's money, but the husband had long since reduced it to possession. Scott v. Powers, Little & Co., 25 Ky. L. R. 1640, 78 S. W. 408.

20. Where the wife was held out as the owner of property and induced another to perform labor thereon, the husband and wife cannot deny her ownership because of any secret agreement. Multz v. Price, 91 App. Div. 116, 86 N. Y. S. 480.

21. Voiers v. Atkins Bros. [La.] 36 So. 974.

22. See 2 Curr. L. 274.

disappeared.[23] An action against husband and wife for injuries inflicted by a dog was dismissed as to the wife where there was no proof that she owned the dog.[24]

§ 9. *Torts against husband or wife or both. A. Wrongs to the person.*[25]—In an action for personal injuries, a married woman is not entitled to recover the value of medical services rendered,[26] nor for her diminished earning capacity, where she never worked out.[27] A judgment against a wife in a suit for personal injuries will not bar her husband from suing for the loss of her services.[28] In Texas an action for personal injuries to a wife should be brought by the husband alone.[29] The right to recover for the wrongful killing of a husband has been fully treated elsewhere.[30]

(§ 9) *B. Criminal conversation and alienation of affections.*[31]—A husband may sue for the alienation of the affections of his wife by whch he was deprived of her companionship and assistance, though there is no evidence of her adultery with defendant,[32] or he may join such an action with an action for criminal conversation.[33] An action may be maintained in some states by a married woman against another woman for the alienation of her husband's affections and his consequent abandonment of her.[34] An agreement for a consideration of a wife with her divorced husband to release all claims against any and all persons for the alienation of his affections is valid.[35] The fact that the husband has forgiven the adulterous wife, or has recovered from another for the same offense is no bar.[36] Plaintiff is not barred from suing for criminal conversation because he did not as defendant to the divorce suit plead adultery in defense.[37] Where advice is given by guardian which leads to a separation by the ward from husband or wife, the presumption is that, unlike advice given by a stranger, it was given in good faith.[38] An action cannot be maintained to recover damages for harboring plaintiff's wife, where defendants were relatives of wife and did not procure the separation.[39] Defendant may be found guilty if his unlawful persuasions or entice-

23. Wife assaulted another in disobedience to husband's expressed wishes. Goken v. Dallugge [Neb.] 99 N. W. 818.

24. Boler v. Sorgenfrei, 86 N. Y. S. 180.

25. See 2 Curr. L. 275.

26. In absence of proof that she had paid for them, or had a separate estate that would be chargeable therefor. Pomerine Co. v. White [Neb.] 98 N. W. 1040. A married woman living with husband can only recover for pain and suffering and not for medical services. Kimmel v. Interurban St. R. Co., 87 N. Y. S. 466.

Contra: She may recover whether paid by her or not, as she was liable. Adams Exp. Co. v. Aldridge [Colo. App.] 77 P. 6.

27. The husband can recover for loss of services. Kroner v. St. Louis Transit Co. [Mo. App.] 80 S. W. 915. In action by husband for injury to wife, admission of evidence as to loss of wages by a daughter, not shown to be an infant, was error. Dundon v. Interurban St. R. Co., 87 N. Y. S. 460.

28. Wife thrown from an open street car by shock of striking a curve. Brierly v. Union R. Co. [R. I.] 58 A. 451.

29. But error in joining wife in an action against a telegraph company for failure to deliver a message by reason of which her husband did not meet her at the station is not ground for reversal. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 81 S. W. 580.

30. Death by Wrongful Act, 3 Curr. L. 1034.

31. See 2 Curr. L. 277.

32. Callis v. Merrieweather [Md.] 57 A. 201.

33. But it was prejudicial error not to direct a verdict for defendant on first count where there was no evidence of criminal intercourse. Belcher v. Ballou [Iowa] 100 N. W. 474.

34. Statutes have removed the disabilities which caused a denial of the remedy at common law. King v. Hanson [N. D.] 99 N. W. 1085.

35. The husband may intervene and set it up as a defense in an action brought by her against third persons. McAllen v. Hodge [Minn.] 99 N. W. 424.

36. Judgment of $1,000 recovered from a brother of defendant who was guilty of same offense. Shannon v. Swanson, 208 Ill. 52, 69 N. E. 869. By continuing to live with his wife, plaintiff condoned her offense, but he did not condone the offense of her paramour. Smith v. Hockenberry [Mich.] 101 N. W. 207.

37. He made a bona fide defense to divorce suit. Knickerbocker v. Worthing [Mich.] 101 N. W. 540.

38. A good defense that guardian advised ward from honest motives for his moral and social good. Trumbull v. Trumbull [Neb.] 98 N. W. 683.

ments were a contributing, but not necessarily the sole cause, of the injury to plaintiff.[40]

Pleading and proof.[41]—It is only necessary to plead the ultimate facts, and not the artifices used to accomplish the alienation.[42] In action for harboring plaintiff's wife, burden of showing justification is not on defendants.[43]

Evidence.[44]—In an action for criminal conversation, plaintiff is only required to prove his case by a "preponderance of evidence."[45] Testimony to show the motive of defendant in interfering and declarations of husband as to his estrangement will be received though he is not a party to the action.[46] Evidence of intimacy long before the separation is admissible.[47] Material evidence is not to be excluded because it also tends to prove a graver offense.[48] Connivance is not shown by evidence of the condonement of his wife, or by plaintiff's silence on learning of her infidelity, or by her intimacy, unknown to him, with other men.[49] Neither husband nor wife can in Michigan testify even with consent of all parties where adultery is charged.[50]

Damages.[51]—Substantial damages may be recovered though there is no proof of resulting loss of services.[52] A wife is entitled to damages for mental anguish and mortification,[53] and for the disgrace and injury to her character.[54] If defendant wantonly and maliciously alienates the affections of plaintiff's wife,[55] or where the conduct of defendant in a suit for unlawfully persuading plaintiff's wife to refuse marital intercourse with plaintiff was shameful, the jury may assess heavy punitive damages,[56] and in such case evidence of defendant's wealth is admissible.[57] That plaintiff's husband has been improperly familiar with other women the same time that he was maintaining illicit relations with defendant, may be shown by the latter in mitigation of damages.[58]

39. Defendants were sister and brother-in-law of plaintiff's wife, and their relationship is relevant on the question of motive. Powell v. Benthall [N. C.] 48 S. E. 598.

40. Action for unlawfully enticing wife to refuse intercourse. Plourd v. Jarvis [Me.] 58 A. 779. Enough if they were the controlling cause. Nevins v. Nevins [Kan.] 75 P. 492.

41. See 2 Curr. L. 277.

42. Allowing the petition to be amended so as to state that defendant had told her husband that plaintiff had been unchaste before marriage was not prejudicial error as it was merely pleading matter of evidence. Nevins v. Nevins [Kan.] 75 P. 492.

43. Powell v. Benthall [N. C.] 48 S. E. 598.

44. See 2 Curr. L. 278.

45. An instruction that by such term is meant that greater "weight of testimony as reasonably satisfies your minds" is not to be commended. Ball v. Marquis, 122 Iowa, 665, 98 N. W. 496. Evidence sufficient irrespective of the testimony of seven year old son. Shannon v. Swanson, 208 Ill. 52, 69 N. E. 869. Evidence sufficient to sustain verdict for husband against a cousin of his wife's. Christensen v. Thompson, 123 Iowa, 717, 99 N. W. 591.

46. Tend to show the effect of the wrongful interference. Nevins v. Nevins [Kan.] 75 P. 492.

47. Evidence of intimacy existing between defendant and plaintiff's husband two years prior to separation admissible. Linck v. Linck [Mo. App.] 79 S. W. 478.

48. In a suit for enticing plaintiff's wife to refuse intercourse with him, evidence of meetings between defendant and plaintiff's wife from which adultery could be inferred was admissible. Plourd v. Jarvis [Me.] 58 A. 774.

49. Her declarations that he knew of her infidelity were inadmissible in the absence of proof that they were co-conspirators. Smith v. Hockenberry [Mich.] 101 N. W. 207.

50. Evidence could not be restricted to count for alienating affections [Comp. Laws, § 10,213]. Knickerbocker v. Worthing [Mich.] 101 N. W. 540.

51. See 2 Curr. L. 278.

52. Adultery proved. Shannon v. Swanson, 208 Ill. 52, 69 N. E. 869.

53. They may be recovered though no special averment of damage. Nevins v. Nevins [Kan.] 75 P. 492.

54. Statute does not run against wife's right of action for alienating affections until after termination of coverture. Linck v. Linck [Mo. App.] 79 S. W. 478.

55. Defendant was pastor of church of which plaintiff's wife was organist. Callis v. Merrieweather [Md.] 57 A. 201.

56. Verdict for $2,333.33. Plourd v. Jarvis [Me.] 58 A. 774.

57. Action for alienation of husband's affections. King v. Hanson [N. D.] 99 N. W. 1085.

58. Even though plaintiff was ignorant of such conduct. Angell v. Reynolds [R. I.] 58 A. 625. But not evidence of subsequent intimacy. Smith v. Hockenberry [Mich.] 101 N. W. 207.

Instructions.[59]—A charge that the mere opportunity to commit adultery was not sufficient to establish the offense, but that there must be evidence of facts showing disposition to commit the offense is correct.[60]

§ 10. *Remedies and procedure generally as affected by coverture. Right of action; joint or separate; parties.*[61]—The husband alone has the right of action to recover money belonging to himself and his wife which is on deposit with another in his name,[62] or to sue for money which belongs to the community.[63] A wife is a necessary party in suits as to land,[64] as a suit for trespass on lands held in common,[65] or a suit to foreclose a city assessment lien on community property.[66] In actions concerning the wife's land, the husband is not a proper party until the birth of issue, and then the proper practice is to make him a defendant.[67] A married woman must join her husband as a party unless the action concerns her separate property,[68] or is a suit for wages due her.[69] Defendant in setting up an equitable defense may be entitled to have plaintiff's wife made a party.[70]

Limitations.[71]—The statute of limitations will not run in favor of one spouse against the other and his or her heirs,[72] and it does not run against a wife's right of action during coverture.[73] Where the disability of a married woman to bring an action is removed, there is a conflict of decisions as to whether the statute will run against her during coverture.[74]

§ 11. *Proceedings to compel support of wife (civil and criminal).*[75]—A wife may, in some states, sue for separate maintenance,[76] and this right is independent of the right to a divorce.[77] In Kansas a suit for divorce and division of property may be allowed as to the latter the divorce being refused[78] and the divi-

59. See 2 Curr. L. 278.

60. Charge properly refused which was calculated to lead the jury to think that the various elements must be established by separate testimony. Knickerbocker v. Worthing [Mich.] 101 N. W. 540.

61. See 2 Curr. L. 279.

62. He is trustee of an express trust [Code Civ. Proc. § 449]. Meinhardt v. Excelsior Brew. Co., 90 N. Y. S. 642.

63. Action for personal injury to wife. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 81 S. W. 580.

64. A wife, who was not a party, is not bound by decree in a partition suit awarding land to her husband which he had previously deeded to her. Hays v. Marsh, 123 Iowa, 81, 98 N. W. 604.

65. Code Civ. Proc. § 384. Wagoner v. Silva, 139 Cal. 559, 73 P. 433.

66. McNair v. Ingebrigtsen [Wash.] 78 P. 789.

67. Demurrer sustained to bill of husband and wife for injury to her land by pollution of water, but which failed to allege that there was issue. Doremus v. Paterson [N. J. Eq.] 57 A. 548.

68. Joinder unnecessary in action for specific performance of contract to bequeath property to the wife. Earnhardt v. Clement [N. C.] 49 S. E. 49. Husband joined with wife in suit for her injuries. Brundige v. Nashville, etc., R. Co. [Tenn.] 81 S. W. 1248.

69. Where services were rendered substantially all by the wife, she should sue alone [Rev. St. 1889, § 6869]. Lillard v. Wilson, 178 Mo. 145, 77 S. W. 74. Husband had waived his right to the same. Now under Laws 1902, c. 289, p. 844, the wife alone has the right to sue. In re Dailey's Estate, 43 Misc. 552, 89 N. Y. S. 538.

70. He was sued for failure to furnish materials for house that plaintiff was building on his wife's land, and he was entitled to his counterclaim for unpaid balance, and to have that decreed a lien on the land. Crosby v. Scott-Graff Lumber Co. [Minn.] 101 N. W. 610.

71. See 2 Curr. L. 280.

72. Manning v. Kansas & T. Coal Co. [Mo.] 81 S. W. 140. Wife had loaned money to her husband more than six months previously. Collins v. Babbitt [N. J. Eq.] 58 A. 481. Wife cannot acquire title by adverse possession to her husband's land, though she was abandoned without just cause. Cervantes v. Cervantes [Tex. Civ. App.] 76 S. W. 790.

73. Suit for alienating her husband's affections. Linck v. Linck [Mo. App.] 79 S. W. 478. Statute of limitations does not run against a wife's estate during her coverture. Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603.

74. Statute will run. Southworth v. Brownlow [Miss.] 36 So. 522. Ky. St. 1903, § 2525, is constitutional as applying to all of a class, and statute will not run. Terrell v. Maupin [Ky.] 83 S. W. 591.

75. See 2 Curr. L. 283.

76. By filing a cross petition in a divorce suit. Goldie v. Goldie, 123 Iowa, 175, 98 N. W. 630.

77. Might sue for support, though plaintiff had not resided in state long enough to sue for divorce. Roshniakorski v. Roshniakorski [Ind. App.] 72 N. E. 485.

78, 79. Gen. St. 1901, § 5136. Bowers v. Bowers [Kan.] 78 P. 430.

sion of property is not limited to the same grounds as alimony.[79] She may compel her husband to support herself and child where he left her without justifiable cause.[80] A valid separation agreement is an equitable defense to the wife's right to sue for separate maintenance,[81] but she may sue for support as provided for in the agreement.[82]

Verdicts and findings; judgment or decree.[83]—Question of fact may be submitted to a jury by a chancellor who may accept or reject their advice.[84] It is not necessary that the decree should make an absolute division of the property, but may provide for annual payments until the marriage relation ceases.[85] A court may consult its own experience and exercise its own judgment as to what is reasonable in the allowance of attorney's fees.[86] Statutes making it a crime to willfully neglect to support a wife are constitutional.[87] If the wife has left him it must be shown she was justified in so doing.[88]

§ 12. *Crimes and criminal responsibility.*[89]—By statute, wife desertion has been made a crime in Iowa.[90] Neglect of the wife wherefrom her death has resulted has in several cases been held to be homicide.[91]

80. Husband was living in adultery with another woman, and it was presumed that the decree in another state giving the wife $5,000 alimony was not in final settlement. Fred v. Fred [N. J. Eq.] 58 A. 611.

81. The trustee of such an agreement cannot in a separate suit have the wife enjoined from suing. Bailey v. Dillon [Mass.] 71 N. E. 538.

82. Bill was filed in accordance with Laws 1902, p. 608, c. 157, and did not allege that complainant had repudiated the contract. Patton v. Patton [N. J. Eq.] 58 A. 1019.

83. See 2 Curr. L. 284.

84. Found defendant guilty of desertion and that plaintiff was not at fault. Applies in suit for separate maintenance. Kozacek v. Kozacek, 105 Ill. App. 180.

85. $160 a year from a husband worth $5,300, with provision that in case of default he should pay her $2,500 absolutely. Goldie v. Goldie, 123 Iowa, 179, 98 N. W. 630. Wife allowed one-third of defendant's estimated income. Bennett v. Bennett [N. J. Eq.] 59 A. 245.

86. $2,000 upheld in suit for separate maintenance where husband's estate was from $250,000 to $500,000 and his income $10,000 to $16,000. Hutchinson v. Hutchinson, 105 Ill. App. 349.

87. Act No. 32, p. 42 of 1902. Proviso allowing judge to suspend sentence on accused paying a sum weekly to wife does not impose an additional penalty. State v. Baker, 112 La. 801, 36 So. 703.

88. Evidence sufficient: Wife with four minor children left house as being unsuitable and went to live with her parents, and defendant failed to continue his payment of $5 a week. State v. Beers [Conn.] 58 A. 745.

89. See 2 Curr. L. 285.

90. Evidence insufficient to show that the wife had committed adultery, and her testimony that her husband married her to escape prosecution for seduction was harmless error. State v. Wagner, 123 Iowa, 271, 98 N. W. 763.

91. 1 Clark & M. Crimes, p. 575 et seq. Note to Johnson v. State [Ohio] 61 L. R. A. 292.

NOTE. It is manslaughter if the negligence is gross but not willful, and murder if it is willful. In either case the natural consequence to cause death is essential: Clark & M. Crimes, 575. Neglect is cause of death though it merely accelerates fatal disease. Reg. v. Plummer, 1 Car. & K. 600, cited 61 L. R. A. 293. Her voluntarily leaving house and needlessly remaining out and not husband's ill-treatment was held the cause of death. People v. Preslar, 48 N. C. [3 Jones L.] 421, cited 61 L. R. A. 293.

Negligence neither gross nor willful nor in criminal disregard of life though it results in death is excusable: Clark & M. Crimes, 593, 597.

These principles make a husband guilty who by negligence of the kinds mentioned causes the death of a sick or helpless wife: Reg. v. Plummer, 1 Car. & K. 600; State v. Smith, 65 Me. 257.

Manslaughter: Willful refusal and neglect to provide clothing, shelter and protection resulting in sickness and ensuing death. State v. Smith, 65 Me. 257.

Murder in second degree: Permitting wife to remain out-doors in freezing weather, she being probably helpless from drink, whereby she froze to death (Territory v. Manton, 8 Mont. 95); helplessness and incapability of self-protection and the subsistence of an obligation to protect being material (Clark & M. Crimes, 579). Intoxication of wife making her helpless is no defense. Territory v. Manton, 8 Mont. 96. Duty was not withdrawn by mutual separation, to protect sick and unprotected wife specially needing help, of which husband was notified. Reg. v. Plummer, 1 Car. & K. 600, cited 61 L. R. A. 293.

Query: In the absence of statute, what if any crime is committed by a husband who so neglects his wife that physical injury results where had she died it would have been manslaughter or murder? The question is academic but very pertinent to the doctrine of Territory v. Manton, 8 Mont. 95, that by passive inactivity in the presence of duty the husband makes the violence of the elements his instrument. Could he by the same reasoning be made guilty of an assault?

IMPLIED CONTRACTS.

§ 1. **Definitions and Distinctions (1690).**
§ 2. **Work and Labor or Services and Material Furnished (1690).** Under Express Contract (1690). Under Unfinished Contract (1691). Services by Member of Family (1691). Under Contracts Within the Statute of Frauds (1691). Unconscionable Contract (1691). Amount of Recovery (1691).
§ 3. **Moneys Had and Received and Money Paid (1692).** Money Paid on a Contract Subsequently Broken (1693). By Mistake (1693). Illegal Contracts (1694). Loans (1694).
§ 4. **Use and Occupation (1694).**
§ 5. **Torts Which may be Waived and Sued as Implied Contracts (1695).**
§ 6. **Remedies and Procedure (1695).**

This article treats only of the so called quasi contracts or contracts implied in law. Contracts implied in fact and therefore real contracts are treated under the appropriate head.[92]

§ 1. *Definitions and distinctions.*[93]—An implied contract is such a one as reason and justice dictate and which, therefore, the law presumes that every man undertakes to perform.[94]

§ 2. *Work and labor or services and material furnished.*[95]—Where one performs services[96] or furnishes goods[97] to another at his request without any agreement as to remuneration or price, the law implies a promise to pay a just and reasonable compensation therefor; so also an implied contract arises where one requests another to perform services for the benefit of a third person,[98] but not where services are rendered under circumstances indicating that no compensation was intended or expected.[99] Where a person receiving attendance under an express contract becomes insane, the agreement ceases, ipso facto, but the law implies a liability for the value of subsequent care as well as for additional services necessitated by the changed conditions.[1]

Under express contract.[2]—Since a party cannot sue on one cause of action and recover on another, a recovery on a quantum meruit cannot be had for services rendered under an express contract,[3] unless the proof fails to establish the express contract but shows the rendition of services[4] which were beneficial to and

In Clark & M. Crimes, 415, it is said that assault may be committed by exposure of an "infant or other helpless person" to inclemency of the weather. Citing Reg. v. March, 1 Car. & K. 496, where an infant was so exposed.

92. See Contracts, 3 Curr. L. 805.

93. See 2 Curr. L. 285.

94. Cyc. Law Dict. See 2 Curr. L. 285, citing Hammon, Contracts.

95. See 2 Curr. L. 286.

96. Implied contract by a mistress to pay a domestic servant for extra services rendered. Elwell v. Roper [N. H.] 58 A. 507; Strong v. Eggert [Neb.] 99 N. W. 647. Where services are rendered for one's benefit at his request, there is an implied contract to pay what they are reasonably worth. Oliver v. Jessup's Estate [Mich.] 100 N. W. 900. Evidence held sufficient to entitle an architect to recover for plans and specifications of a building submitted but not used because the proposed builder did not have the money to build. Adamo v. Blohm, 89 N. Y. S. 644.

97. In assumpsit on a quantum valebat, a finding that goods were sold and delivered to defendant is a sufficient finding of a promise to pay. Andresen v. Upham Mfg. Co. [Wis.] 98 N. W. 518. Labor and materials in a plumbing job. Hurley v. Macey, 94 App. Div. 9, 87 N. Y. S. 924.

98. Where one ordered another to repair a machine belonging to a third person, the party giving the orders is liable for the services rendered. Brinkley Car Works Mfg. Co. v. Farrell [Ark.] 80 S. W. 749.

99. Where an old friend unsolicited rendered services during a last illness while deceased was surrounded by his relatives. Teawalt v. Ramey's Ex'x [Va.] 48 S. E. 505.

1. Waldron v. Davis [N. J. Err. & App.] 58 A. 293.

2. See 2 Curr. L. 287.

3. Promoters of a scheme to consolidate certain corporations rendered services under an agreement that their compensation was contingent on performance of certain conditions not performed. Fry v. Miles [N. J. Err. & App.] 59 A. 246. Where evidence as to the terms of an express contract was conflicting, it was error to submit the right to recover under a quasi contract. Williamson v. Smith & Co. [Tex. Civ. App.] 79 S. W. 51. Evidence held to show that one had a cause of action as assignee of a mortgage and not for money paid for the benefit of a decedent at his request. In re Devries' Estate [Neb.] 97 N. W. 590. In an action for the value of steam furnished, evidence held to show that there was an express contract under which it was furnished. Union Hosiery Co. v. Hodgson, 72 N. H. 427, 57 A. 384.

4. Baumann v. Manhattan Consumers' Brew. Co., 97 App. Div. 470, 89 N. Y. S. 1088.

accepted by the defendant;[5] and where an express contract is fully executed, except the payment of the stipulated price, assumpsit can be maintained to recover it.[6] There is no implied promise to pay for extra labor and materials furnished under an express contract.[7]

Under unfinished contract.[8]—Where services are rendered under an express contract and the person receiving the benefit fails to comply with its terms[9] or terminates it by wrongful discharge[10] or by revocation of authority to act under it,[11] the law implies a promise to pay the reasonable value of services rendered providing such services were to have been compensated.[12] Where an express contract is terminated by death, only the reasonable value of services rendered under it can be recovered.[13]

Services by member of family.[14]—The law does not imply a contract to pay for services rendered to each other by members of a family living as one household,[15] unless the presumption that such services are gratuitous is rebutted by the character of previous transactions between the parties.[16]

Under contracts within the statute of frauds.[17]—The reasonable value of services rendered under an oral contract, within the statute of frauds may be recovered,[18] unless the right, in the specific instance, is denied by the statute.[19]

Unconscionable contract.—The law implies a promise to pay the reasonable value of services rendered under an unconscionable contract.[20]

Amount of recovery.[21]—Only what the services were reasonably worth can be recovered.[22] There can be no recovery without proof of the reasonable value[23] and

5. In an action on a contract where a complaint contains the common counts, if it appear that the defendant accepted the work and it was beneficial, a recovery may be had for the value of the work and materials furnished even though it appear that the contract was not performed. Matthews v. Farrell [Ala.] 37 So. 325.

6. Wilson v. Wilson [Mo. App.] 80 S. W. 711.

7. Where the defendant testified that he had not authorized extra work nor agreed to pay for it, an instruction that recovery therefor could be had was erroneous. Williamson v. Smith & Co. [Tex. Civ. App.] 79 S. W. 51.

8. See 2 Curr. L. 288.

9. Breach of contract to provide for an adopted child by will. Clark v. West, 96 Tex. 437, 73 S. W. 797. Where contrary to her promise a testatrix failed to make provision in her will for services rendered. Bair v. Hager, 97 App. Div. 358, 90 N. Y. S. 27.

10. James v. Parsons, Rich & Co. [Kan.] 78 P. 438.

11. Real estate brokers were to have commissions on rents collected for premises rented. After they rented the premises the owner revoked their authority. New Kanawha Coal & Min. Co. v. Wright [Ind.] 72 N. E. 550. Complaint held sufficient. Id.

12. On breach of a contract by the terms of which one was to do certain work for nothing in consideration of being allowed to do other work for the prestige it would give his business, a recovery on a quantum meruit cannot be had for the first work performed without proof that the prestige to be gained would be of value. Kaufman Advertising Agency v. Snellenburgh, 43 Misc. 317, 88 N. Y. S. 199.

13. Attorney died before completing the contract under which he was employed. Johnston v. Bernalillo County Com'rs [N. M.] 78 P. 43.

14. See 2 Curr. L. 289.

15. Between parent and child there can be no recovery by the child for services rendered in the absence of an express contract. Meyers v. Meyers [Ala.] 37 So. 451.

16. Parties always dealt with each other as debtor and creditor. Waldron v. Davis [N. J. Err. & App.] 58 A. 293. Where a son contracted to care for his father during the last years of his life, the son's wife can recover from the father's estate for extra services, made necessary by his weakness. Durr v. Durr [Ky.] 82 S. W. 581.

17. See 2 Curr. L. 287, n. 11.

18. Booker v. Heffner, 95 App. Div. 84, 88 N. Y. S. 499.

19. Broker's commissions for selling land under parol authority cannot be recovered in New Jersey. Leimbach v. Regner [N. J. Law] 57 A. 138.

20. Haskell v. Smith, 86 N. Y. S. 779.

21. See 2 Curr. L. 289.

22. $930 held excessive for services rendered an invalid morning and evening for 16 months. Oliver v. Jessup's Estate [Mich.] 100 N. W. 900. Where no price for the work was agreed upon a contractor cannot by employing inexperienced men run up an excessive bill. Lozier Motor Co. v. MacIntosh, 88 N. Y. S. 382. Where the price of services is not agreed upon, the law implies that the promisor will pay what they are reasonably worth. Elwell v. Roper [N. H.] 58 A. 507.

23. Salzstein v. Kleinberg, 88 N. Y. S. 1011.

character of the services rendered,[24] the burden of which must be sustained by one seeking to recover.[25]

§ 3. *Moneys had and received and money paid.*[26]—Where one has in his possession money which belongs to another[27] and which in equity and good conscience he has no right to retain,[28] it may be recovered by the owner. The manner in which it was received by him is immaterial,[29] but there must be such a privity that the law will imply a promise,[30] and where he received it from a third person, such third person must have stood, toward the party entitled, in a fiduciary capacity.[31] Where one pays money for the use of another[32] or at his request,[33] there is an implied promise that it will be repaid, but not where money is expended for another's benefit without his request.[34] A subsequent promise to repay money paid by another for one's benefit is not equivalent to a previous request.[35]

24. Sayers v. Crane [Mo. App.], 81 S. W. 473. Evidence that testatrix wore silk tea gowns and dresses that required a great deal of laundering is admissible to show the character and extent of services rendered. Id.

25. Value of labor performed. La Cagnina v. Kelly, 88 N. Y. S. 389. Amount of work done. McKnight v. Newell, 207 Pa. 562, 57 A. 39. Where plaintiff introduced no evidence of the value of his services, he was entitled to judgment for the amount defendant suggested was the reasonable value. Mulligan v. Tobin, 87 N. Y. S. 406. One suing for labor and material must show that they were furnished under a contract requiring the defendant to pay for them. Morrill & W. Const. Co. v. Boston [Mass.] 71 N. E. 550.

26. See 2 Curr. L. 290.

27. Baltimore & O. R. Co. v. Burke, 102 Va. 643, 47 S. E. 824. Money forwarded to a purchasing factor not used by him in purchasing goods. Carsey & Co. v. Farmer, 25 Ky. L. R. 1965, 79 S. W. 245. Where money was given to a woman as a wedding present and she returned it to the donor under an agreement that it should be returned to her on demand. Kaufman v. Rosenshine, 97 App. Div. 514, 90 N. Y. S. 205. Where a trustee of a partnership paid to a creditor an amount in excess of his claim, a partner who had made payments on such claim from personal funds could recover. Langhorne v. McGhee [Va.] 49 S. E. 44. Where a debtor gave his creditor's agent a check for an amount exceeding the debt and accepted the agent's personal check for the difference and such check was dishonored. Rines v. New York & B. Brew. Co., 90 N. Y. S. 362. Money paid to another for a certain purpose and by him used to promote his own interests. Empire Mill. & Min. Co. v. Tombstone Mill. & Min. Co., 131 F. 339. Where a receiver pays an attorney the sum allowed by the court for his services, there is an implied promise to repay any excess should the allowance be reduced by a subsequent adjudication, and hence interest on such excess runs from the time of payment. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. Where one indorsed a check payable to himself because of representations that it had been made payable to him by mistake, he can recover in assumpsit for money had and received without first instituting criminal proceedings though he states in his bill of particulars that the claim was for "cash obtained by false pretenses." Hazard v. Hazard [R. I.] 57 A. 1056. Where a clerk of court paid money in his hands to the attorney of a party to whom it did not belong and the attorney paid it to his client, all three are liable to the true owner whether the act was the result of intention or ignorance of law. Story v. Robertson [Neb.] 98 N. W. 825. Where a taxpayer paid a double assessment he may recover after the abatement. Penobscot Chemical Fibre Co. v. Inhabitants of Bradley [Me.] 59 A. 83.

28. It need not be alleged that one so receiving money agreed to receive it in trust for the true owner. Boos v. Lang [Ind.] 71 N. E. 120.

29. Where a bank credited deposits to an indebted depositor with notice that the funds belonged to another. York v. Farmers' Bank [Mo. App.] 79 S. W. 968. If it can be traced into his hands, it is immaterial that it was not received by him in the first instance. Cole v. Bates [Mass.] 72 N. E. 333.

30. There is no privity where one's agent without his authority indorses his checks which are cashed by a banker who receives the money from the banks on which the checks were drawn. Baltimore & O. R. Co. v. Burke, 102 Va. 643, 47 S. E. 824. Money paid on a judicial order or judgment subsequently set aside cannot be recovered from a third party to whom it has been paid in settlement of a debt. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. A claim due one sentenced to life imprisonment was paid to the guardian of his children. Held, he could not recover from the guardian. Finn v. Adams [Mich.] 101 N. W. 533.

31. One entitled to a bank deposit could not recover where the bank made an invalid payment to the administrator of her husband's estate and he paid it to a legatee. Cole v. Bates [Mass.] 72 N. E. 333.

32. Where one agreed to assume a mortgage on a farm purchased and the incumbrance was larger than that specified in the contract. Wilson v. Wilson [Mo. App.] 80 S. W. 711.

33. McNerney v. Barnes [Conn.] 58 A. 714. The consideration received by the person for whose benefit the money was paid is immaterial. Id. In an action by one for money paid for the use of another, proof that payment was made by giving a receipt for a debt owed him by the creditor of the

The burden throughout the trial is on one seeking to recover to establish his case,[36] and where a general denial is pleaded, he must show that defendant has received the money.[37]

Money paid on a contract subsequently broken.[38]—There is an implied contract to repay money paid on a contract subsequently rescinded,[39] or broken by the vendor,[40] or terminated by mutual consent of the parties.[41] And where the vendee is not in default, tender of the unpaid purchase price is not a condition precedent to the commencement of the action,[42] but forfeit money paid on a contract[43] or money paid for an option[44] cannot be recovered where the party receiving it is not in default.

A voluntary payment of an illegal claim[45] made with full knowledge of all the facts[46] cannot be recovered, unless so provided by statute.[47] This rule does not apply to a payment made to the court through the hand of its officer.[48]

By mistake.[49]—An implied contract arises to repay money paid under a mutual mistake of fact.[50] Municipal corporations come within the operation of this rule,[51]

person for whose benefit the money was paid is not a variance from the bill which alleged payment of cash. Id.

34. Where one who was to take title to land in trust for another paid for an abstract and advice of counsel. Lucia v. Adams [Tex. Civ. App.] 82 S. W. 335.

35. Massachusetts Mut. Life Ins. Co. v. Green, 185 Mass. 306, 70 N. E. 202.

36. Though indorsements show overpayment of a note, the burden is on one seeking to recover such overpayment to establish his case. Gibbs v. Farmers' & M. State Bank, 123 Iowa, 736, 99 N. W. 703.

37. Where a wife had authorized her husband to discount notes, evidence that defendant discounted such notes would not authorize the jury to believe that the husband after receiving the money had deposited with the defendant. Nelson v. First Nat. Bank, 139 Ala. 578, 36 So. 707.

38. See 2 Curr. L. 291.

39. Goods returned because not as warranted. Weil v. Stone [Ind. App.] 69 N. E. 698. Evidence of the market value of the goods at time and place of delivery was immaterial. Id.

40. On vendor's breach of contract to convey, purchase money paid can be recovered. Kicks v. State Bank of Lisbon, 12 N. D. 576, 98 N. W. 408.

41. Defendant held not entitled to credit for timber left on land, under a contract whereby plaintiff was to be reimbursed for payment of defendant's debt by timber from such land, in action for difference between amount paid and value of timber cut, it appearing that timber so left was of greater value than that at which it had been placed by the contract. Bennett v. Ryan, 25 Ky. L. R. 1774, 78 S. W. 892.

42. Kicks v. State Bank of Lisbon, 12 N. D. 576, 98 N. W. 408.

43. Contract to deliver cattle. Eager v. Mathewson [Nev.] 74 P. 404.

44. Bunch v. Elizabeth City Lumber Co., 134 N. C. 116, 46 S. E. 24.

45. See 2 Curr. L. 291.

Payment of an invalid lien so that a loan could be negotiated is voluntary. Neufeld v. New York, 93 App. Div. 591, 87 N. Y. S. 900. Money paid for excessive publication of an election proclamation. Vindicator Printing Co. v. State, 68 Ohio St. 362, 67 N. E. 733. Where payment for medical services was made to one who was not a physician, it could not be recovered back without proof that the payee falsely represented himself to be a physician and had thereby induced his employment. Gaither v. Lindsey [Tex. Civ. App.] 83 S. W. 225. Payment for a permit to construct a vault, such permit not being required. Wolff v. New York, 92 App. Div. 449, 87 N. Y. S. 214.

Note: Illegal taxes if paid under protest may be recovered back (Gebhart v. East Saginaw, 40 Mich. 336; Stephens v. Danials, 27 Ohio St. 527; Hersey v. Barron, 37 Wis. 75; North Carolina R. Co. v. Alamance, 77 N. C. 4), or if payment is made in ignorance of their illegality (Newport v. Ringo [Ky.] 10 S. W. 2).—From note to State v. Nelson [Minn.] 4 L. R. A. 300.

46. Payment of usurious interest. Beach v. Guaranty Sav. & Loan Ass'n, 44 Or. 530, 76 P. 16. Where there is no evidence of an usurious agreement, interest in excess of the legal rate, voluntarily paid by a borrower cannot be credited on the principal, but payment of notes can be resisted until the question of usury is determined. Bosworth v. Kinghorn, 94 App. Div. 187, 87 N. Y. S. 983. Payment of void assessment cannot be recovered until assessment is set aside. McCall v. Rochester, 44 Misc. 129, 89 N. Y. S. 766.

47. 93 Ohio Laws, p. 408, clothes the prosecuting attorney with power to recover money illegally drawn from the treasurer. Vindicator Print. Co. v. State, 68 Ohio St. 362, 67 N. E. 733.

48. Borrowing member of an insolvent building association paid an amount in excess of his debt to the receiver. People v. New York Bldg. Loan Banking Co., 45 Misc. 4, 90 N. Y. S. 809. Expenses of proceedings to recover should be borne by the borrowing member. Id.

49. See 2 Curr. L. 291.

50. Where one made a double payment for services rendered without knowing at the time of the second payment that payment had already been made. Phelps, Dodge & Co. v. Miller [Tex. Civ. App.] 83 S. W. 218. Where the only question was whether money sought

but the rule has no application where money of a municipality has been paid out in violation of law of which the payee had full notice;[52] for payments made under a mistake of law cannot be recovered back[53] unless otherwise provided by statute.[54] This rule is not followed in Kentucky where one receiving money cannot, in good conscience, retain it.[55]

Illegal contracts.[56]—Money placed in the hands of another for an illegal purpose cannot be recovered,[57] but otherwise where the party repents of his unlawful design before it is carried into effect.[58]

Loans.[59]—Where money is loaned, an express promise for its repayment is necessarily inferred from the nature of the transaction.[60]

§ 4. *Use and occupation.*[61]—Where one occupies lands of another, the owner is entitled to recover for their use,[62] and the occupant for the value of his improvements.[63] An action for use and occupation cannot be maintained unless the rela-

to be recovered was a duplicate payment or had been paid for services not covered by the prior payment, it was immaterial whether defendant had been paid too much or too little. Id. Where debtor made a double payment to his creditor it is only necessary for him to demand the repayment before bringing action. Johnson v. Saum, 123 Iowa, 145, 98 N. W. 599. Overpayment as result of mutual mistake as to the quantity of land conveyed at a certain price per acre, though the deed recited a lump sum as the consideration. Butt v. Smith [Wis.] 99 N. W. 328. Neither the doctrine of voluntary payment (Civ. Code 1895, § 3732), nor the rule of caveat emptor, is applicable in case of overpayment due to a mistake as to the weight of cotton purchased. McRae Oil & Fertilizer Co. v. Stone, 119 Ga. 516, 46 S. E. 668. Evidence that the vendor did not consent that the cotton bought should be reweighed was irrelevant. Id. A payment of a subscription prior to the performance of conditions on which it was to become due raises an implied promise to repay if such conditions are never performed. This is not a payment under a mistake of law. Larrimer v. Murphy [Ark.] 82 S. W. 168. Bank cashed a draft on an incorrect advice slip from its New York correspondent. First Nat. Bank v. Edwards [Tex. Civ. App.] 81 S. W. 541.

51. Painter v. Polk County, 81 Iowa, 242.

52. Claims not audited nor allowed. Heath v. Albrook, 123 Iowa, 559, 98 N. W. 619.

53. Obligation which one was morally but not legally bound to pay. Ruppel v. Kissel, 24 Ky. L. R. 2371, 74 S. W. 230. Where both parties to the transfer of a lease of school lands supposed it was valid, recovery of the price paid could not be had where the lease was subsequently shown to be void. Scott v. Slaughter [Tex. Civ. App.] 80 S. W. 643. One who takes a void assignment of a life insurance policy cannot recover premiums paid thereon by him, where the insurance company accepted them under belief that the assignment was valid. Bruer v. Kansas Mut. Life Ins. Co., 100 Mo. App. 540, 75 S. W. 380.

54. Where relief from a mistake of law is granted by statute the proof must conform to the statute under which the action is brought. Bottego v. Carroll [Mont.] 77 P. 430.

55. Diversion of taxes under an unconstitutional statute may be recovered. Board of Trustees of Public Library of Covington v. Board of Education of Covington, 25 Ky. L. R. 341, 75 S. W. 225.

56. See 2 Curr. L. 291.

Note: Money paid on an illegal contract may, while the contract remains executory, be recovered back. Vescher v. Yates, 11 Johns. [N. Y.] 29; Morgan v. Groff, 4 Barb. [N. Y.] 524; Edgar v. Fowler, 3 East, 225; Utica Ins. Co. v. Kip, 8 Cow. [N. Y.] 20.—From note to Adams v. Irving Nat. Bank [N. Y.] 6 L. R. A. 493.

57. Where one placed money in the hands of another for the purpose of effectuating a fraud on the creditors of a third person. Bryant v. Wilcox [Mich.] 100 N. W. 918.

58. Money staked as a wager may be recovered where it is demanded before the event on which it was wagered is decided. Wright v. Stewart, 130 F. 905.

59. See 2 Curr. L. 293.

60. Evidence held to show that money given by a wife to her husband was a loan and not a gift. Cox v. Cox [N. H.] 58 A. 504. Evidence held to show a loan made to one through the intermediary of another. Bacome v. Black [Cal.] 70 P. 620. Evidence that one's bank account did not show a deposit corresponding to the alleged loan is admissible. Wright v. Davis, 72 N. H. 448, 57 A. 335.

61. See 2 Curr. L. 293.

62. A possessor in good faith is entitled to recover his improvements and taxes paid and the owner is entitled to recover rents and revenues. George v. Delaney, 111 La. 760, 35 So. 894. Under Laws 1899, c. 53, § 13, providing that a purchaser at execution sale is entitled to the rents which shall be a credit on the redemption money to be paid. In regard to agricultural land, the judgment debtor is entitled to possession. Held that a purchaser who had not received the rents was not liable therefor when the land was redeemed. Kennedy v. Trumble, 32 Wash. 614, 73 P. 698.

63. Where a son had cultivated his mother's lands under an agreement for part of the crops, it was error to charge him for the rental value of the lands after his mother's death without giving him a chance to show what charges he was entitled to have set off for taxes paid and other charges. Burwell v. Burwell [Va.] 49 S. E. 68.

tion of landlord and tenant exists between owner and occupant.[64] Recovery cannot be had for use and occupation the right to which was expressly reserved in a conveyance of the premises.[65] Only the reasonable value of the use and occupation can be recovered.[66]

§ 5. *Torts which may be waived and sued as implied contracts.*[67]—Where one's property has been converted by another, he may waive the tort and maintain an action on the implied contract,[68] but where the only wrongful act is a direct and forcible intrusion, the tort cannot be waived.[69]

§ 6. *Remedies and procedure.*[70]—Recovery on an implied contract cannot be had in an action for tort.[71] A count for money paid must allege that it was paid at defendant's request.[72] In an action to recover on an express promise, evidence of the reasonable value of services is admissible against the event of failure to prove the promise.[73] Limitations do not commence to run until the right to recover has accrued,[74] and where by mutual agreement payment for services was to be deferred until the death of the employer, limitations did not commence to run until his death.[75]

INCEST.

Though the statute defines incest as "fornication or adultery" by persons related within the specified degree, it is incest if the intercourse be accomplished by force.[76] A statute not requiring that the parties know of the relationship is valid.[77]

An information alleging "sexual intercourse" instead of the statutory words "fornication or adultery" is good.[78] Knowledge of the relationship by the parties when not required by statute need not be alleged.[79]

Evidence.[80]—If the intercourse be accomplished by force, the female is not an accomplice,[81] but if she consents, conviction cannot be had on her uncorroborated testimony,[82] and it is enough that she made no objection, though she was not actu-

64. Cambridge Lodge No. 9, K. P., v. Routh [Ind.] 71 N. E. 148.

65. Becker v. Davis, 87 N. Y. S. 422.

66. Accounting between parties who had made an oral exchange of lands. Cooper v. Cooper [Ky.] 82 S. W. 375.

67. See 2 Curr. L. 293.

68. Crops converted. Goodwin v. Clover, 91 Minn. 438, 98 N. W. 322. An action for money had and received may be maintained though the defendant is also guilty of conversion. York v. Farmers' Bank [Mo. App.] 79 S. W. 968.

69. Niles v. Brown [R. I.] 56 A. 1030.

70. See 2 Curr. L. 294.

71. In an action for personal injuries, recovery for medical care and nursing was sought to be recovered under an implied maritime contract. Sanders v. Stimson Mill Co., 34 Wash. 357, 75 P. 974.

72. Massachusetts Mut. Life Ins. Co. v. Green, 185 Mass. 305, 70 N. E. 202.

73. No error to refuse to instruct that plaintiff could not recover unless he proved an express promise to pay. Bertelson v. Hoffman [Wash.] 77 P. 801. Evidence of the value of services rendered is admissible under a count in indebitatus assumpsit. City of Newport News v. Potter [C. C. A.] 122 F. 321.

74. Statute of Limitations does not begin to run against right of accommodation maker to recover from the co-maker accommodated until payment of note by such accommodation maker. Leonard v. Leonard, 138 Cal. xix, 70 P. 1071.

75. Bair v. Hager, 97 App. Div. 358, 90 N. Y. S. 27.

76. People v. Stratton, 141 Cal. 604, 75 P. 166. To the contrary, see State v. Jarvis, 20 Or. 437, 26 P. 302, 23 Am. St. Rep. 141.

77. Does not deny due process by creating a crime without criminal intent. State v. Glindemann, 34 Wash. 221, 75 P. 800.

Note: See a similar holding in respect to a statute making it a felony to live on the earnings of a prostitute. State v. Zenner [Wash.] 77 P. 191.

78. People v. Stratton, 141 Cal. 604, 75 P. 166.

79. State v. Glindemann, 34 Wash. 221, 75 P. 800; People v. Koller, 142 Cal. 621, 76 P. 500.

80. See 2 Curr. L. 295, n. 93-96.

81. People v. Stratton, 141 Cal. 604, 75 P. 166.

Note: To the same effect, see Schwartz v. State [Neb.] 91 N. W. 190; Porath v. State, 90 Wis. 527, 47 Am. St. Rep. 954; State v. Kouhus, 103 Iowa, 720; Smith v. State, 103 Ala. 1, 54 Am. St. Rep. 140.

82. Yother v. State, 120 Ga. 204, 47 S. E. 555; Durden v. State [Ga.] 48 S. E. 315.

Note: To the same effect, see State v. Keller, 8 N. D. 563, 73 Am. St. Rep. 775; Ratliff v. State [Tex. Cr. App.] 60 S. W. 655;

ated by the same intent as defendant.[83] Other acts of intercourse may be shown by way of corroboration,[84] but subsequent acts on which indictments are pending are inadmissible.[85] Intercourse by the woman with other than defendant is inadmissible except to rebut the inference from proof that her physical condition shows that she has had intercourse with some one.[86] Evidence of violence not connected with any sexual act is inadmissible where it does not appear that the woman yielded from fear.[87] The proof of relationship need not be direct.[88]

INCOMPETENCY.

§ 1. Mental Weakness Sufficient to Constitute Incapacity (1696).
§ 2. Effect of Incompetency on Contracts (1697).
§ 3. Remedies and Procedure (1697).

Scope of topic.—This topic treats only of incompetency to contract. Competency to execute a will is treated elsewhere.[89]

§ 1. *Mental weakness sufficient to constitute incapacity*[90] must be such that one is rendered incapable of understanding in a reasonable degree the nature and consequences of his acts.[91] Mere mental weakness,[92] excessive use of intoxicating liquors,[93] or old age,[94] does not per se render one incompetent, unless his mind is in such condition that he does not comprehend the nature or effect of his acts.[95] The fact that a party's mind was impaired by drugs does not invalidate the contract if it be not inequitable,[96] but one in a confused and stupid

Shelly v. State, 95 Tenn. 152, 49 Am. St. Rep. 926. In Whittaker v. Com., 95 Ky. 632, it seems to be held that a minor daughter is so far under her father's influence that she is regarded as a victim rather than an accomplice though she in fact consented.

83. Instruction requiring that she engage in the act with the same intent as defendant held error. Clifton v. State [Tex. Cr. App.] 79 S. W. 824.

84. People v. Stratton, 141 Cal. 604, 75 P. 166; People v. Koller, 142 Cal. 621, 76 P. 500, citing many cases.

85. Clifton v. State [Tex. Cr. App.] 79 S. W. 824.

86. People v. Stratton, 141 Cal. 604, 75 P. 166.

87. Clifton v. State [Tex. Cr. App.] 79 S. W. 824.

88. Prima facie case that woman was defendant's daughter. People v. Koller, 142 Cal. 621, 76 P. 500.

89. See Wills, 2 Curr. L. 2076.

90. See 2 Curr. L. 295. See, also, Deeds, 3 Curr. L. 1056.

91. Nowlen v. Nowlen, 122 Iowa, 541, 98 N. W. 383. If a grantor understands the nature and effect of a deed, he is not incompetent to execute it. Curtis v. Kirkpatrick [Idaho] 75 P. 760.

Sufficiency of evidence: Evidence held to show that grantor was mentally incompetent. Collins v. Toppin [N. J. Eq.] 55 A. 124. Evidence held to sustain finding of capacity to convey in one religiously insane. Griesy v. Veldhouse [Iowa] 101 N. W. 741. Evidence held to show a grantor of feeble mind. Walker v. Shepard, 210 Ill. 100, 71 N. E. 422. Evidence held insufficient to show that a grantor though not of strong mind was incompetent. Ice v. Ice [Ky.] 83 S. W. 135. It is sufficient to show a mental deficiency justifying a conclusion that the grantor did not exercise deliberate judgment. Paulus v. Reed, 121 Iowa, 224, 96 N. W. 757. The test is, did the grantor have sufficient capacity to understand the nature and consequences of his act. Sawyer v. White [C. C. A.] 122 F. 223. Epileptic held incompetent. Chaslavka v. Mechalek [Iowa] 99 N. W. 154. Evidence held sufficient where decrepit old woman allowed filth to accumulate in her house and was careless as to her personal appearance. She had formerly been neat. Osborn v. Osborn [Iowa] 101 N. W. 83.

92. Nowlen v. Nowlen, 122 Iowa, 541, 98 N. W. 383. Mere weakness of mind is insufficient. Tichy v. Simicek [Neb.] 95 N. W. 629.

93. It must be shown that the person did not at the time comprehend the nature of the transaction. Curtis v. Kirkpatrick [Idaho] 75 P. 760. Evidence held insufficient to show that a person who was sick and drank to some extent was incompetent. Downey v. Owen, 90 N. Y. S. 280. Deed from feeble man 74 years of age to his second wife whom he married two years before held valid. Hayman v. Wakeham [Mich.] 94 N. W. 1062. Intoxication of grantor held insufficient to invalidate. Watts v. Vansant [Md.] 58 A. 433.

94. Deed by man 75 years of age who was feeble and relied considerably on his wife for assistance held valid. Nowlen v. Nowlen, 122 Iowa, 541, 98 N. W. 383. Evidence held insufficient to show lack of capacity in old man with symptoms of dementia. Aldrich v. Steen [Neb.] 98 N. W. 445. Deed by aged and infirm man held not void for want of mental capacity. Beamer v. Morrison, 210 Ill. 443, 71 N. E. 402.

95. Evidence held to show that one was mentally incompetent from extreme old age to have the control of her person or property. Ziegler v. Bark [Wis.] 99 N. W. 224. Deed by a man 70 years of age set aside on ground of his incompetency. Bodelsen v. Swensen, 206 Ill. 68, 68 N. E. 1074.

mental condition may be incompetent.[97] The question as to whether a person is competent is generally for the jury.[98] That a contract entered into was inequitable is evidence of incompetency.[99] Certificate of acknowledgment is no evidence of grantor's mental capacity.[1]

§ 2. *Effect of incompetency on contracts.*[2]—A contract entered into by an incompetent is void.[3]

§ 3. *Remedies and procedure.*[4]—Until one is finally adjudged incompetent, he may maintain an action in his own name.[5] An incompetent suing to avoid a deed made to one without notice of his incapacity, must as a condition precedent to relief, return the consideration.[6] One who was a party when an incompetent executed a deed is estopped from questioning its validity.[7]

INDECENCY, LEWDNESS AND OBSCENITY.[8]

Prostitution.[9]—"Living a life of prostitution" means habitually engaging in such occupation.[10] To authorize commitment to the reformatory as a prostitute, the woman must be charged as such and not as a vagrant,[11] and a city magistrate has no jurisdiction.[12] Statutes in several states make criminal connivance at prostitution or living off the earnings of a prostitute, and such statutes are valid.[13] An indictment in the language of the statute is sufficient.[14]

Obscene words or publications.[15]—Words not obscene in their ordinary acceptation will not sustain a conviction where no secondary meaning is alleged and proved.[16] An indictment for use of obscene words is not demurrable because it sets forth additional words not obscene used in the same conversation.[17] Proof of posting obscene pictures on an outhouse near a dwelling is fatally variant from an allegation that they were posted on the dwelling.[18]

Indecent exposure.[19]—It is not necessary that the exposure be in fact seen by any one if it be made in a public place.[20] That the female in whose presence the

96. Oxford v. Hopson [Ark.] 83 S. W. 942.
97. Release for personal injuries procured shortly after the injury and after drugs had been administered. Bertrand v. St. Louis Transit Co. [Mo. App.] 82 S. W. 1089.
98. On conflicting evidence. In re Alexander [Mich.] 99 N. W. 746.
99. Where one transferred property worth $2,700 for a life estate in property worth $2,000. Sterling v. Sterling, 90 N. Y. S. 306.
1. Walker v. Shepard, 210 Ill. 100, 71 N. E. 422.
2. See 2 Curr. L. 296.
3. Evidence held to show that one executing a lease was incompetent. Barlow v. Strange [Ga.] 48 S. E. 344. From intoxication. Waldron v. Angleman [N. J. Law] 58 A. 568. The deed of a person of unsound mind is not void but merely voidable. Allred v. Smith, 135 N. C. 443, 47 S. E. 597.
4. See 2 Curr. L. 297.
5. To set aside a contract. Zeigler v. Bark [Wis.] 99 N. W. 224.
6. Evidence held to show that mortgagees had no notice of incapacity. Coburn v. Raymond, 76 Conn. 484, 57 A. 116.
7. A mother was present when an incompetent child executed a deed. As heir of the child she sued to avoid it. Coburn v. Raymond, 76 Conn. 484, 57 A. 116.
8. See, also, Disorderly Houses, 3 Curr. L. 1111; Disorderly Conduct, 3 Curr. L. 1111.
9. See 2 Curr. L. 297.
10. Code § 4943, providing for the conviction of one "leading a life of prostitution" the defendant need not be found in the act of illicit sexual intercourse in order to be convicted. State v. Shaw [Iowa] 101 N. W. 109.
11. People v. Crane, 44 Misc. 122, 89 N. Y. S. 87. See, also, a similar holding as to commitment for disorderly conduct. People v. Keeper, 176 N. Y. 465, 68 N. E. 884.
12. People v. Keeper of State Reformatory for Women, 44 Misc. 488, 89 N. Y. S. 770.
13. State v. Graham, 34 Wash. 81, 74 P. 1058. The statute making it a felony for a male person to subsist on the earnings of a prostitute is not invalid because not requiring guilty knowledge. State v. Zenner [Wash.] 77 P. 191.
14. State v. Zenner [Wash.] 77 P. 191.
15. See 2 Curr. L. 297.
16. The words "Look me in the eye! Are you satisfied with the man you married?" are not of themselves obscene. Roberts v. State, 120 Ga. 177, 47 S. E. 511.
17. Roberts v. State, 120 Ga. 177, 47 S. E. 511.
18. Gober v. State [Ala.] 37 So. 78.
19. See 2 Curr. L. 297.
20, 21, 22. State v. Martin [Iowa] 101 N. W. 637.

exposure was made consented thereto is no defense.[21] An indictment alleging an indecent exposure in a public place in the presence of a certain female is sufficient.[22]

Lascivious conduct.[23]—One may be guilty of attempting the crime of lewd acts on the body of a child.[24] The offense of lascivious cohabitation requires not only a cohabitation apparently matrimonial but lewd and lascivious intercourse between the parties.[25]

INDEMNITY.

§ 1. Definition and Distinctions (1698).
§ 2. The Contract. Requisites and Validity (1698).
§ 3. Interpretation and Effect of Contract (1699).
§ 4. Actions on Contract (1700).
§ 5. Defenses (1701).
§ 6. Measure of Recovery (1702).

§ 1. *Definition and distinctions.*[26]—A contract of indemnity is an independent and not a collateral undertaking[27] and may thus be distinguished from guaranty.[28] A contract of indemnity is to reimburse one for a loss; a contract of warranty asserts the existence of certain conditions.[29] Where the indemnity is given against a class of casualties or for protection of specific property, it is generally called insurance.[30] The cases treating of the equitable right of indemnity as between co-obligors will be found in their appropriate titles.[31] Forthcoming and other bonds, though closely allied to indemnity, are treated elsewhere.[32]

§ 2. *The contract. Requisites and validity.*[33]—Generally a statutory bond of indemnity is sufficient if it is a valid common-law obligation.[34] A valuable consideration[35] and a legal object[36] are essential to the validity of the contract.

23. See 2 Curr. L. 297.

24. People v. Stouter, 142 Cal. 145, 75 P. 780.

25. Whitehead v. State [Fla.] 37 So. 302.

26. See 2 Curr. L. 298.

27. Payment of contractor's claim for work done held not to operate as a satisfaction of a bond executed to indemnify the city from liability for his negligence. City of Detroit v. Grant [Mich.] 98 N. W. 405. See 2 Curr. L. 298, n. 4.

28. Cyc. Law Dict. "Guaranty."

29. A contract whereby the vendor of sausages agreed to make good any claim for too much fat, held a contract of indemnity and not one of warranty. James v. Libby, 44 Misc. 210, 88 N. Y. S. 812.

30. See Insurance, 2 Curr. L. 479.

31. See Contribution, 3 Curr. L. 855; Suretyship, 2 Curr. L. 1775; Torts, 2 Curr. L. 1875.

32. See Attachment, 3 Curr. L. 353; Bonds, 3 Curr. L. 507; Executions, 3 Curr. L. 1397; Injunction, 2 Curr. L. 397; Replevin, 2 Curr. L. 1514, and the like.

33. See 2 Curr. L. 298.

Laws regulating casualty and indemnity companies are discussed in the title Insurance, 2 Curr. L. 479; 4 Curr. L. —.

Penalty for refusing statement of reasons for not renewing bond. See Davis v. Pullman Co. [Tex. Civ. App.] 79 S. W. 635.

34. Local Acts 1879, p. 217, No. 393, requiring bond of bank in which county funds are deposited to run to the county, it is sufficient if it runs to the county treasurer for the county. Buhrer v. Baldwin [Mich.] 100 N. W. 468.

35. An agreement by one of two co-owners of personalty to indemnify the other from loss if he refused an offer to purchase, held without consideration, the promisee having no right to sell without the consent of the co-owner. Chase v. Soule [Vt.] 57 A. 754. Vendee waiving objections to goods and accepting the same held sufficient consideration. James v. Libby, 44 Misc. 210, 88 N. Y. S. 812. Bond executed by clerk of public board pending a contest for his office, to secure immediate payment of his salary, held supported by a consideration. McLaughlin v. Board of Education of Covington [Ky.] 83 S. W. 568. Obligation of lessor of a mine to protect the lessee against the suit of an adjoining owner, held not binding unless supported by some other consideration than the covenants of the lease. McMillan v. Frank [Mont.] 75 P. 684.

36. See 2 Curr. L. 299, n. 18, 19.

NOTE. Validity of object: If the act threatened or agreed to be done is known at the time to be wrongful or unlawful, any promise of indemnity, whether express or implied, is illegal, but if this is not known at the time and the act is seemingly lawful, the bond of indemnity is valid, or, in other words, if the act indemnified against is apparently right and in furtherance of a legal claim, and the officer is ignorant of the fact that he is committing a wrong, the indemnity is valid. Indemnity for acts apparently right, or not apparently wrong, is valid, where the means employed are not in themselves criminal and are not known by the officer employed to be wrongful, though they work a trespass on the rights of a third person. Ives v. Jones, 25 N. C. (3 Ired.) 538, 40 Am. Dec. 421.—From note to Ray v. McDevitt [Mich.] 85 Am. St. Rep. 548, 554.

An indemnity bond given an officer after an illegal levy is enforceable against the sureties.[37] Where the bond recites a consideration, no notice of its acceptance is necessary in order to bind the indemnitor.[38] An indemnitor assenting to the assignment of an unassignable indemnity contract is bound to the assignee.[39] One having no knowledge of a private agreement has a right to rely on the bond as it is given to him by an agent of the indemnitor.[40]

§ 3. *Interpretation and effect of contract.*[41]—In the construction of the contract, the intention of the parties governs,[42] and in order to ascertain this intention, the contract should be construed in connection with recitals of its purpose and object,[43] with the correspondence between the parties,[44] and, being given under order of a court, with such order.[45] The contract being prepared by the indemnitor it should be most strongly construed against him.[46] A qualifying phrase is to be confined to the last antecedent unless there is something in the instrument which requires a different construction.[47] Renewals are generally held to be separate and distinct contracts.[48] The bond of an officer of a corporation is a continuing obligation only so long as he legally holds under his election. Reelection does not keep the bond alive.[49] In order that recovery may be had on

37. Hines v. Norris [Tex. Civ. App.] 81 S. W. 791.

38. Bond given by bank, in which public moneys were deposited, to county. Court terms transaction, one of guaranty. Buhrer v. Baldwin [Mich.] 100 N. W. 468.

39. Hall v. Chitwood [Mo. App.] 81 S. W. 208.

40. Graham v. Middleby, 185 Mass. 349, 70 N. E. 416.

41. See 2 Curr. L. 299.

42. Union Cent. Life Ins. Co. v. United States Fidelity & Guaranty Co. [Md.] 58 A. 437; Westfall v. Albert [Ill.] 72 N. E. 4. That contracts were separate at the time of signing held of no effect if the indemnitor understood that the bond was to secure all the contracts. Graham v. Middleby, 185 Mass. 349, 70 N. E. 416. See 2 Curr. L. 299, n. 21.

ILLUSTRATIONS. **Contracts construed:** Bond to secure payment "of any salary now due him as clerk," held to include all unpaid salary up to date of executing the bond. McLaughlin v. Board of Education of Covington [Ky.] 83 S. W. 568. A subsequent lessee paying rent due on prior lease to a firm, held within the condition of a bond indemnifying him against any liabilities of the first lessee. Shea v. McCauliff [Mass.] 72 N. E. 69. In a bond to indemnify against such damages as the court might determine had been sustained, held the words "as the court might determine" should be construed as referring to the court then having jurisdiction of the case. Baer v. Fidelity & Deposit Co. [C. C. A.] 130 F. 94.

43. Bond for indemnity against a judgment held not to secure a settlement made without the obligor's consent. City of New York v. Sexton, 89 N. Y. S. 190.

44. Correspondence between the parties relative to renewal premiums, held to show that the intent was that the bond should cover acts of the secretary one year from its date. North St. Louis Bldg. & Loan Ass'n v. Obert [Mo.] 69 S. W. 1044.

45. As to conditions. Baer v. Fidelity & Deposit Co. [C. C. A.] 130 F. 94.

46. City Trust, Safe-Deposit & Security Co. v. Lee, 204 Ill. 69, 68 N. E. 485; American Bonding Co. v. Spokane Bldg. & Loan Soc. [C. C. A.] 130 F. 737. Statement in application that employe was not to the president's knowledge in arrears to the corporation, held not a warranty that he was not in arrears at the time as a fact. Id.

47. In a bond to indemnify for loss sustained through "the dishonesty or any act of fraud" of the employe "amounting to larceny or embezzlement," held last phrase did not qualify word "dishonesty." City Trust, Safe-Deposit & Security Co. v. Lee, 204 Ill. 69, 68 N. E. 485.

48. So held where the bond read: the indemnitor will make good any loss "occurring during the continuance of this bond or any renewal thereof." Proctor Coal Co. v. United States Fidelity & Guaranty Co., 124 F. 424.

49. Defendant was elected cashier of bank for one year, and gave a bond reciting that he had been "chosen and appointed," without any reference to the time or term for which he had been chosen. The condition of the bond was that he should fulfill the duties of the office "during his continuance in office." Held bond did not cover a second term of office, he being re-elected. Blades v. Dewey [N. C.] 48 S. E. 627. Bond for faithful performance of his duty by an officer of a corporation whose term of office was prescribed, construed to cover only such term. North St. Louis Bldg. & Loan Ass'n v. Obert, 169 Mo. 507, 69 S. W. 1044.

Note: A bond running "during continuance in office" of a cashier of a bank elected for one year was held to be restricted by a recital in the by-laws of the bank, referring to the appointment for one year and that the sureties were not liable for the eleven succeeding years of his office. Blades v. Dewey [N. C.] 48 S. E. 627. In a note in V Colum. L. R. 169, it is said: "A fidelity bond is to be interpreted by the same rules as are applicable to any other written agreements. Ulster Sav. Inst. v. Young, 161 N. Y. 23. General words in the obligation may be limited by the recital, by the subject, or by acts of the parties which tend to show their inten-

a contract of indemnity, actual loss must be shown,[50] and the contingency against which one is indemnified must occur.[51] An agreement between a defaulting employe and his employer as to the application of money surreptitiously redeposited by the former is binding on the sureties on his bond.[52]

§ 4. *Actions on contract.*—Formal notice of the default is not generally necessary before bringing suit on the bond,[53] and the principal being sued he need not notify his indemnitor if the latter has knowledge of the pendency of the action.[54] Action on a bond running to a county may generally be brought in the county treasurer's name.[55] The indemnitor and his sureties may be joined in one action.[56] The complaint should allege all necessary and material facts tending to show that plaintiff's cause of action is on the bond in suit, and has accrued.[57] As a general rule a release must be specially pleaded.[58]

The proof must show a liability within the terms of the indemnity agreement.[59] Evidence of amount passed is admissible if it tends to show the real

tion. Amherst Bank v. Root, 2 Metc. [Mass.] 522; Michigan St. Bank v. Peck, 28 Vt. 200, 65 Am. Dec. 234. The unexpected conclusion is reached that the expression 'during continuance in office' is to be interpreted in the light of the term of service prescribed in the by-laws. Only in the application of the contract after its construction has been ascertained is the obligation of the surety strictissimi juris. Gamble v. Cuneo, 21 App. Div. 413, affirmed 162 N. Y. 634. The principal case seems to be in line with the weight of authority."

50. O'Connor v. Aetna Life Ins. Co. [Neb.] 99 N. W. 845; Westfall v. Albert [Ill.] 72 N. E. 4. Bond held not such an absolute obligation as to preclude defendant from showing it one of indemnity. Id. Voluntary bond to cover damages arising out of certain orders of the court, held recovery could not be had unless the damages were saved to the parties by some protecting order specially given by the court. Baer v. Fidelity & Deposit Co. [C. C. A.] 130 F. 94. Company held not liable on bond to indemnify mortgagee for any deficiency in his security resulting from failure of mortgagor to comply with conditions. Weightman v. Union Trust Co., 208 Pa. 449, 57 A. 879. See 2 Curr. L. 300, n. 30-36.

Failure to give notice as a defense, see post, § 5.

51. Vendor of sausages agreed to indemnify vendee for any claim for too much fat made by foreign purchaser, held could not recover on such contract, the sausages being denied entrance into the foreign country, but on what ground it did not appear. James v. Libby, 44 Misc. 210, 88 N. Y. S. 812.

52. Grant County Bldg. Loan & Sav. Ass'n v. Lemmon, 25 Ky. L. R. 1725, 78 S. W. 874.

53. Graham v. Middleby, 185 Mass. 349, 70 N. E. 416.

54. Where indemnitor was made a party to the suit, but procured a discontinuance as to himself, held written notice of pendency of action need not be given him by his indemnitee. City of Detroit v. Grant [Mich.] 98 N. W. 405.

NOTE. Where notice of suit is not given judgment prima facie evidence only: Where a person enters into a covenant of general indemnity merely against claims and suits, a want of notice to him of the suit brought against his principal does not go to the cause of action, but the judgment rendered therein is prima facie evidence only in an action against such indemnitor, and he may be let in to show that the principal had a good defense which he neglected to make. Duffield v. Scott, 3 Term R. 374; Smith v. Compton, 3 Barn. & Adol. 407; Lyon v. Northrup, 17 Iowa, 314; Train v. Gold, 5 Pick. [Mass.] 379; Stewart v. Thomas, 45 Mo. 42; Lee v. Clark, 1 Hill [N. Y.] 56; Thomas v. Hubbell, 15 N. Y. 405, 69 Am. Dec. 619; Bridgeport F. & M. Ins. Co. v. Wilson, 34 N. Y. 275; State v. Colerick, 3 Ohio, 487; Huzzard v. Nagle, 40 Pa. 178; Stephens v. Shafer, 48 Wis. 54, 33 Am. Rep. 793.—From note to Robinson v. Baskins [Ark.] 22 Am. St. Rep. 202, 207.

55. Action on bond given under Local Acts 1879, p. 217, No. 393, requiring bank to give bond covering county funds deposited. Buhrer v. Baldwin [Mich.] 100 N. W. 468.

56. Petition is not subject to demurrer upon the ground of improper joinder of causes of action. Omaha Gas Co. v. Omaha [Neb.] 98 N. W. 437.

57. A claimant of property levied on cannot recover against the sureties on the constable's indemnity bond in the absence of an allegation that the levy was induced by the giving of such bond. Unsell v. Sisk [Tex. Civ. App.] 83 S. W. 34. On appeal the case should be dismissed as to such sureties. Id. Complaint setting out officer's appointment, the execution of the bond, the default, the amount of damages, and the refusal of the indemnitor to pay, and also setting out the renewal of the bond, and identifying the covenants in the renewal with those of the first bond, held to state a good cause of action. American Bonding & Trust Co. v. Milstead, 102 Va. 683, 47 S. E. 853.

58. Considering Code 1896, § 3295. Leader v. Mattingly [Ala.] 37 So. 270. In refusing to allow release, not so pleaded, to be set up, held court acted within its discretion. Id.

59. Loosening and bending of expansion plates at abutment of bridge sufficiently raise inference of neglect "to repair" within terms of indemnity bond against liability of public for injuries to travelers. City of St. Paul v. St. Paul City R. Co. [Minn.] 100 N. W. 972.

terms of the agreement.[60] The books of a bank are competent to show its cashier's embezzlement, and the amount thereof.[61] Testimony not dealing with the default in question is immaterial.[62]

§ 5. *Defenses.*[63]—Payment[64] or fraudulent misrepresentations in the application[65] are good defenses. In the absence of an estoppel,[66] any material change in the principal's contract, made without the indemnitor's consent, releases the latter from liability.[67] The assignment[68] or failure to demand performance[69] of the contract secured by the bond is no defense to the obligee's action, no prejudice being shown. The indemnitee having knowledge of the wrongful acts of the bonded party must notify the indemnitor,[70] but good faith is all that is required of the indemnitee.[71] Immediate notice means within a reasonable time, and what is a reasonable time is a question for the jury.[72] An indemnitor being released by act of the parties he is under no obligation to speak in order to take advantage of the release.[73] All reasonable and legal conditions in the contract must be complied with,[74] though an indemnitor may waive those inserted for his protection.[75] Neither the contingent liability of a principal on an indemnity bond[76] nor the liabilities of the sureties thereon[77] are affected by the principal's

60. Suit by lessees of a mining claim on an alleged agreement by the owner to pay them $8,000 in case he sold the claim, lessor's testimony that he sold the claim, together with other mining property, for $2,500, held admissible. McMillan v. Frank [Mont.] 75 P. 685.

61. It being shown that all the entries which the evidence indicates were false were made by him. State Bank of Pike v. Brown, 89 N. Y. S. 381.

62. Testimony as to loan by witness held immaterial, it being shown that loan to bonded officer was not because of any default in the discharge of his public duties. American Bonding & Trust Co. v. Milstead, 102 Va. 683, 47 S. E. 853. Intoxication of bonded public officer held immaterial. Id.

63. See 2 Curr. L. 300.

64. Delivery of check by treasurer to his successor held not a payment by the bank relieving it from liability on the bond. Buhrer v. Baldwin [Mich.] 100 N. W. 468.

65. Where in answer to a question as to the compensation to be paid the employe, it was stated that he was to receive $85 per month, while in fact he was to receive $10 per week, the use of a flat worth $20 per month and 2½ per cent. commission for collecting rents amounting to about $1,000 per month. Held that the answer was a fair statement of the applicant's earnings, and not evasive or fraudulent. City Trust, Safe-Deposit & Security Co. v. Lee, 204 Ill. 69, 68 N. E. 485. See 2 Curr. L. 300, n. 49; Id., 301, n. 59.

66. Where a surety defends an action on the contractor's bond on the ground that deviations were ordered by the architect, he is estopped to deny the authority of the architect to order changes and claim a release because of such changes in the contract. Snoqualmi Realty Co. v. Moynihan, 179 Mo. 629, 78 S. W. 1014.

67. Change in a contract for construction of a tunnel around a hill so that the tunnel was put through the hill instead, involving a difference in the distance of about 2,000 feet, held to release surety. City of Middletown v. Aetna Indemnity Co., 97 App. Div. 344, 90 N. Y. S. 16.

68, 69. Graham v. Middleby, 185 Mass. 349, 70 N. E. 416.

70. American Bonding & Trust Co. v. Milstead, 102 Va. 683, 47 S. E. 853. Questions tending to show that indemnitee had knowledge that embezzlement was going on held proper. Id. See 2 Curr. L. 302, n. 69.

71. Negligence on his part will not avoid the bond. American Bonding & Trust Co. v. Milstead, 102 Va. 683, 47 S. E. 853. In the absence of a stipulation a sergeant of a city does not owe it to the surety on his deputy's bond to make continuous and diligent search into each levy made by the deputy, and the payment of money collected thereunder. Id.

72. Fidelity & Deposit Co. v. Robertson, 136 Ala. 379, 34 So. 933. See 2 Curr. L. 302, n. 70.

73. That officer of a corporate indemnitor on bond of contractor had knowledge of change in latter's contract, held to devolve no duty on indemnitor to speak. City of Middletown v. Aetna Indemnity Co., 97 App. Div. 344, 90 N. Y. S. 16.

74. Condition, in bond insuring fidelity of an employe, requiring the employe's signature held reasonable and noncompliance rendered the bond void. Union Cent. Life Ins. Co. v. United States Fidelity & Guaranty Co. [Md.] 58 A. 437. This is true though there is nothing in the bond to indicate that the insured, and not the insurer, was to procure the employe to sign the bond. Adelberg v. United States Fidelity & Guaranty Co., 90 N. Y. S. 465.

75. Renewals by renewal receipts explicitly declared to be subject to all covenants and conditions contained in the original bond, held not a waiver of any of the conditions therein. Union Cent. Life Ins. Co. v. United States Fidelity & Guaranty Co. [Md.] 58 A. 437; Adelberg v. United States Fidelity & Guaranty Co., 90 N. Y. S. 465.

76. Bankr. Act 1898, § 63. Leader v. Mattingly [Ala.] 37 So. 270.

77. Bankr. Act 1898, § 63. Leader v. Mat-

discharge in bankruptcy. Acts of ordinary agents or employes of the indemnified corporation, conniving at or co-operating with the wrongful act of the bonded employe, will not be imputed to the corporation.[78] A public service corporation giving a bond to indemnify city for any loss sustained through the operations of the former, the question of the company's negligence is immaterial.[79] A street railway company agreeing to indemnify city for injuries resulting from the former's failure to repair, the fact that the tracks were constructed according to requirements is no defense.[80] A surety upon the bond of an officer is not liable for a wrong done by the latter under circumstances where the law does not impose upon him a duty to act.[81] That public money is illegally deposited in a bank is no defense to an action on the bond of the latter.[82] Estoppel may bar one's recovery.[83] Limitation begins to run against the sureties on a fidelity bond the instant a fraudulent misappropriation of funds is made by the principal.[84]

§ 6. *Measure of recovery.*[85]—A marshal's indemnity bond does not generally secure to the marshal fees of custodians who take charge of the attached property,[86] but if it does the custodians may pursue their action separately or in connection with the marshal.[87]

INDEPENDENT CONTRACTORS.

One who undertakes to perform work at his own discretion and control and to be answerable only for the result is independent and the principal is not liable[88] for an injury unless it was referable to some breach of duty on the principal's part[89] such as results from the failure to afford protection against inherent dan-

tingly [Ala.] 37 So. 270. The action is one ex contractu. Id.

78. Knowledge of president that bonded employe was in arrears held not imputable to board of trustees. American Bonding Co. v. Spokane Bldg. & Loan Soc. [C. C. A.] 130 F. 737.

79. A bond given to indemnify city for any loss sustained through recovery of judgment for injuries occasioned by open trenches dug by the company. Omaha Gas Co. v. Omaha [Neb.] 98 N. W. 437.

80. City of St. Paul v. St. Paul City R. Co. [Minn.] 100 N. W. 472.

81. Hence it is necessary to allege in an action upon an official bond, the existence of conditions and circumstances requiring some official action on the part of the officer, in this case a constable. Felonicher v. Stingley, 142 Cal. 630, 76 P. 504.

82. Buhrer v. Baldwin [Mich.] 100 N. W. 468.

83. Board of education continuing to employ clerk whose right to office was contested does not thereby become estopped to sue on clerk's bond to secure salary paid him. McLaughlin v. Board of Education of Covington [Ky.] 83 S. W. 568.

84. And not at the end of his term of office. Grant County Bldg., Loan & Sav. Ass'n v. Lemmon, 25 Ky. L. R. 1725, 78 S. W. 874. See 2 Curr. L. 302, n. 77-79.

85. See 2 Curr. L. 302.

86. Bond was conditioned to protect the marshal, his deputies, and persons acting with him from all actions, costs, damages, and expense. Tully v. Cutler [Ind. T.] 82 S. W. 714.

87. Who may be made a party by amendment under Mansf. Dig. §§ 4933, 4936. Tully v. Cutler [Ind. T.] 82 S. W. 714.

88. A subcontractor hiring his own men but occupying part of the principal's factory and using his machinery while doing one operation in the principal's manufacturing business was held independently liable for injury from bad repairing by him of the principal's machine so used. Kelleher v. Schmitt & H. Mfg. Co., 122 Iowa, 635, 98 N. W. 482. One who purchases beer and vends it from a wagon is independent of the brewer. Bryson v. Philadelphia Brew. Co. [Pa.] 57 A. 1105. Injuries to adjoining building by building contractor. Korn v. Weir, 88 N. Y. S. 976. Bridge company contracting for trestle work. Injury from defective tool. Omaha Bridge & Terminal Co. v. Hargadine [Neb.] 98 N. W. 1071. Contractor to move building who left post stand in highway is alone liable. Wilbur v. White, 98 Me. 191, 56 A. 657. Subcontractor for plastering held independent of builder. Green v. Soule [Cal.] 78 P. 337. Firm employed to do work on vessel lying at dock was independent. Nelson v. Richardson, 108 Ill. App. 121. Employe in charge of mill hiring workmen and manufacturing principal's materials at employe's expense for a per quantum price of finished product held independent. Ziebell v. Eclipse Lumber Co., 33 Wash. 591, 74 P. 680.

Who are independent contractors and extent of liability for acts of independent contractor. See note to City of Richmond v. Sitterding [Va.] 65 L. R. A. 445-885.

89. House owner not liable for builder's failure to protect passers-by on street. Hoff v. Shockley, 122 Iowa, 720, 98 N. W. 573, distinguishing and explaining the cases and the

gers,[90] or to exercise care in employing workmen.[91] There must be "personal negligence on part of principal which caused the accident independent of all other causes."[92] A wooden arch used in forming a masonry arch is not a "scaffold" which a principal is obliged to keep safe[93] and the principal is not liable unless he had notice of the danger.[94] A municipality may be liable if the work be such as must be done under its direction.[95] The duty of affording lateral support cannot be thrown upon another by contract.[96]

Owning and operating companies having a common manager and the same stock ownership are identical so far as liability for servants of the operating company goes.[97] The owning company is liable for negligence of repairers operating under immediate supervision of one of the officers of the operating company[98] charged to inspect and know about the particular machinery.[99]

If the principal bear a duty to guard against the thing which happened, both are liable.[1]

Mere supervision[2] or a reservation of the right of inspection[3] or of the right to demand the dismissal of objectionable employes[4] does not make the relation dependent. The principal is liable if he assumes control of operations,[5] or if he

several qualifications of this rule. Failure to guard portion of streets adjacent to house while building makes owner liable if it amounts to nuisance. Young v. Trapp [Ky.] 82 S. W. 429. Not principal's duty to provide safe scaffolding for independent contractor. Wingert v. Krakauer, 92 App. Div. 223, 87 N. Y. S. 261.

NOTE. An exception to the general rule of nonliability exists whenever an absolute duty is imposed on the principal from the breach of which the injury results: See cases collated in exhaustive note to City of Anderson v. Fleming, 66 L. R. A. 119 [officially reported 160 Ind. 597]. In this case the duty of the city to keep the street safe was held to be absolute but the contractor having agreed to keep it so, a judgment in his favor was held conclusive in favor of the city.

A purveyor of electricity has an absolute and nonassignable duty to see that electric wiring and installation by an independent contractor is safe before turning on the current. Hoboken Land & Improvement Co. v. United Elec. Co. [N. J. Law] 58 A. 1082.

Note: See, also, as to this duty in respect to electric currents, Alexander v. Nanticoke Light Co. [Pa.] 58 A. 1068; Gilbert v. Duluth General Elec. Co. [Minn.] 100 N. W. 653.

90. Tunnel work under buildings by means of dynamite. City of Chicago v. Murdoch [Ill.] 72 N. E. 46. Evidence held to show city's consent to use. Id. Excavations weakening lateral support. Samuel v. Novak [Md.] 58 A. 19. Duty to shore up is on contractor rather than subcontractor. Nelson v. Young, 91 App. Div. 457, 87 N. Y. S. 69.

Evidence admissible to show notice: Report by building inspector. Nelson v. Young, 91 App. Div. 457, 87 N. Y. S. 69. Condition of building six weeks before. Id.

Charge held bad as misleading jury as to duty toward strangers. Nelson v. Young, 91 App. Div. 457, 87 N. Y. S. 69.

91. Injury by fall of house due to imperfect plans of architect, an independent contractor, who was engaged by principal duly careful in selecting competent man. White v. Green [Tex. Civ. App.] 82 S. W. 329.

92. Approved charge in Nelson v. Young, 91 App. Div. 457, 87 N. Y. S. 69.

93, 94. It was placed by subcontractor, and workmen stood on it to set masonry work [Laws 1897, c. 415, § 18]. Haughey v. Thatcher, 89 App. Div. 375, 85 N. Y. S. 935.

95. Curb stones carelessly left in street by contractor doing work under "immediate supervision" of city officers [Ky. St. 1903, § 3451]. Board of Councilmen of Frankfort v. Allen [Ky.] 82 S. W. 292.

96. Davis v. Summerfield, 133 N. C. 325, 63 L. R. A. 492, with note.

97. James McNeil & Bro. Co. v. Crucible Steel Co., 207 Pa. 493, 56 A. 1067.

98. James McNeil & Bro. Co. v. Crucible Steel Co., 207 Pa. 493, 56 A. 1067.

Note: A like principle was applied in Chicago Economic F. Gas. Co. v. Myers, 168 Ill. 139, cited 16 Am. & Eng. Enc. Law [2nd Ed.] 187. In that case the accident occurred by the negligence of a construction company whose corporate existence was wholly within and subsidiary to a gas company. The construction company was held not to be independent.

99. Chief engineer in charge of boilers negligently repaired by contractor. McNeil & Bro. Co. v. Crucible Steel Co., 207 Pa. 493, 56 A. 1067.

1. Pit in street not guarded. Delaplain v. Kansas City [Mo. App.] 83 S. W. 71; Cameron Mill & Elevator Co. v. Anderson [Tex. Civ. App.] 78 S. W. 8.

2. Sewer contractor under supervision merely to see that proper construction was done is independent. Lenderink v. Rockford [Mich.] 98 N. W. 4. Subcontractor for plastering held independent of principal contractor though under architect's supervision. Green v. Soule [Cal.] 78 P. 337, citing 16 Am. & Eng. Enc. Law [2nd Ed.] 187; Frassi v. McDonald, 122 Cal. 402.

3, 4. Omaha Bridge & Terminal Co. v. Hargadine [Neb.] 98 N. W. 1071.

5. Evidence held not to show that foreman merely directing that scaffold should be

supplies defective means for doing work.[6] Stipulations in the contract against the use of dangerous means may be neutralized by provisions for supervision,[7] the latter provision operating to take away the contractor's independence[8] and imposing a duty to see that they are not used except as agreed.[9]

An independent contractor may be paid by the day or week.[10] It is not necessary that the principal be liable on the contractor's contracts in order to become a master.[11] By substituting a contractual for a legal duty the principal may be discharged except from breach of the contract.[12] When a principal and his contractor are sued for negligently undermining lateral support and the proof is that the injury was due to the contractor's breach of contract with the injured person to "shore up," the contractor is not liable.[13]

It is for the court to say what effect the contract has,[14] and for the jury to say what should have been anticipated,[15] and what caused injury.[16] If there is any evidence that the injury might have been due to an independent contractor's default, it must properly charge the jury.[17]

INDEPENDENT CONTRACTORS UNDER EMPLOYERS' LIABILITY ACTS.*

[Special Article.]

An independent contractor is a person employed to do certain work for another according to his own methods and discretion, being accountable to his employer only for the results.

He is not a servant to whom the act applies.

An independent contractor is one who, having generally an independent trade or employment of his own, enters into a contract with another to do a certain piece of work under specified conditions, but according to his own methods and under his own direction, being responsible to his employer only for the results. The line which distinguishes him from the servant is that the details of the work are not subject to his employer's direction and control.[18] The relation of master and

built controlled the building of it. Wingert v. Krakauer, 92 App. Div. 223, 87 N. Y. S. 261.

6. Not obliged to keep appliances furnished and originally good in good repair. Rope wore out in use. Central Coal & Iron Co. v. Bailey's Adm'r, 25 Ky. L. R. 973, 76 S. W. 842.

7, 8, 9. City of Chicago v. Murdoch [Ill.] 72 N. E. 46.

10. Delivery contractor paid weekly. John's Adm'r v. McKnight & Co., 25 Ky. L. R. 1758, 78 S. W. 862. See 2 Curr. L. 303, n. 2.

11. Omaha Bridge & Terminal Co. v. Hargadine [Neb.] 98 N. W. 1071.

12. License to enter and shore up is no consideration for agreement to protect pipes. Korn v. Weir, 88 N. Y. S. 976.

13. Samuel v. Novak [Md.] 58 A. 19.

14. Green v. Soule [Cal.] 78 P. 337.

15. Excavating lateral support. Samuels v. Novak [Md.] 58 A. 19.

16. Failure to shore up. Samuel v. Novak [Md.] 58 A. 19. Charge held to assume it. Id.

17. Part of obstructions in street causing accident were there by his fault, part by another's. Green v. Soule [Cal.] 78 P. 337.

18. "If the person employed to do the work carries on an independent employment and acts in pursuance of a contract with his employer by which he has agreed to do the work on certain specified terms, in a particular manner, and for a specified price, then the employer is not liable. The relation of master and servant does not subsist between the parties, but only that of contractor and contractee. The power of directing and controlling the work is parted with by the employer, and given to the contractor. But on the other hand, if work is done under a general employment, and is to be performed for a reasonable compensation or for a stipulated price, the employer remains liable, because he retains the right and power of directing and controlling the time and manner of executing the work, or of refraining from doing it, if he deems it necessary or expedient." Conners v. Hennessey, 112 Mass. 96; Hexamer v. Webb, 101 N. Y. 377, 54 Am. Rep. 703; Atlantic Transport Co. v. Conveys [C. C. A.] 82 F. 177; Casement v. Brown, 148 U. S. 615; Lawrence v. Shipman, 39 Conn. 586; Wahash, etc., R. Co. v. Farver, 111 Ind. 195, 60 Am. Rep. 696; Stephen v. Thurso Police Com'rs, 3 Rettie, Ct. Sess. Cas. (4th Ser.) 535, 542.

"If there is a contract between them so that the person doing the work or doing

*From Dresser, Employers' Liability, § 9, with recent decisions added.

servant does not exist between them, and the employer consequently is not liable for the acts of his contractor, unless he personally interferes in the conduct of the work, or has employed an incompetent contractor, or the nature of the work to be done is unlawful or creates a nuisance,[19] or entails a specific duty.[20]

The servants of an independent contractor are not servants of the employer nor fellow-servants of those engaged by him; and this is true although the employer in his contract may have stipulated for the right to discharge the servants of the contractor. The employer is not liable for any negligence of the contractor or of any of his servants.[21] But he owes to the servants of the contractor the same duty that he owes to persons rightfully on his premises, and for an injury caused by his negligence or the negligence of his servants in regard to the premises or appliances furnished by him they may hold him responsible.[22]

Since the independent contractor or his servants are not at common law the servants of the employer, the latter is not liable for the negligence of any of them under the acts of England, Alabama, or Indiana.[23] The acts of Massachusetts and Colorado contain the special provision that whenever an employer enters into a written or verbal contract with an independent contractor to do part of the employer's work, or such contractor makes a subcontract, such contract or subcontract shall not bar the liability of the employer for injuries to the employes of such contractor or subcontractor by reason of any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer or furnished by him, and if such defect arose or had not been discovered or remedied through the negligence of the employer, or of some person intrusted by him with the duty of seeing that they were in proper condition.[24]

Under this section the servant of an independent contractor may recover from the employer for injuries received through the instrumentalities furnished by

the act complained of has a right to say to the employer, 'I will agree to do it, but I shall do it after my own fashion; I shall begin the wall at this end and not at the other,' then the relation of master and servant does not exist, and the employer is not liable. But if the employer has a right to say to the person employed, 'You shall do it in this way; that is to say, not only shall you do it by virtue of your agreement with me, but you shall do it as I direct you to do it,' then the law of master and servant applies, and the master is responsible." Bramwell, L. J., Evidence on Employers' Liability, Parliamentary Papers 1876, vol. 10, p. 58.

"The method of payment is not the test, but the test is whether Smith was in the exercise of a distinct and independent employment, using his own means and methods for accomplishing his work, and not being under the immediate supervision and control of his employer." Morgan v. Smith, 159 Mass. 570, 574. See, also, Eldred v. Mackie, 178 Mass. 1; City of Ft. Wayne v. Christie, 156 Ind. 172. Truckman employed to remove paper from one floor of warehouse to another by a hoist. Keuckel v. Ryder, 170 N. Y. 562, 62 N. E. 1096.

19. See cases above cited, and Staldter v. Huntington, 153 Ind. 354. Servant of independent contractor agreeing to be bound by regulations of employer is not latter's servant. Fitzpatrick v. Evans [1901] 1 K. B. 756; Harding v. Boston, 163 Mass. 14.

20. Work entailing obstruction of a street. Johnston v. Phoenix Bridge Co., 169 N. Y. 581.

21. Knight v. Fox, 5 Exch. 721; Johnson v. Lindsay [1891] App. Cas. 371; Cameron v. Nystrom [1893] App. Cas. 308; Rome & D. R. Co. v. Chasteen, 88 Ala. 591; Vincennes Water Supply Co. v. White, 124 Ind. 376; Staldter v. Huntington, 153 Ind. 354; Harkins v. Standard Sugar Refinery, 122 Mass. 400; Burrill v. Eddy, 160 Mass. 198. Failure to guard excavation. Murphy v. Perlstein, 73 App. Div. 256, 76 N. Y. S. 257.

22. Mulchey v. Methodist Religious Soc., 125 Mass. 487; Conlon v. Eastern R. Co., 135 Mass. 195; Toomey v. Donovan, 158 Mass. 232; Perkins v. Furness, 167 Mass. 403; Toledo, B. & M. Co. v. Bosch [C. C. A.] 101 F. 530.

23. Nicolson v. Macandrew, 15 Rettie, Ct. Sess. Cas. (4th Ser.) 854; Sweeney v. Robert Duncan & Co., 19 Rettie, Ct. Sess. Cas. (4th Ser.) 870; McGinn v. Pilling [1881] 72 Law T. 156; Scarborough v. Alabama Midland R. Co., 94 Ala. 497. See Dane v. Cochrane Chemical Co., 164 Mass. 463.

The coal mines regulation act, requiring owners to supervise all persons employed by them, does not have the effect of extending the employers' liability act to the case of a servant of an independent contractor injured by the latter's negligence in sinking a shaft, so that he may sue the owner. Marrow v. Flimby & B. M. C. & F. B. Co. [1898] 2 Q. B. 588.

24. Acts Mass. 1887, c. 270, § 4; Rev. Laws, c. 106, § 76; Sess. Laws Colo. 1893, c. 77, § 3;

the employer for the contractor's use.[25] It does not enlarge the liability of the employer at common law in such a case. It has not given the servant of an independent contractor the right to recover against the employer for the negligence of the contractor himself or of his other servants.[26] It has not made the servant of the contractor a servant of the employer or treated him as such, and therefore such a one cannot have the benefit of any of the other provisions of the act, either those relating to the action in case of the death of a servant or to damages, since the act applies only to whom the common law has said are servants.[27]

INDIANS.

§ 1. Who are Indians and What is Their Legal Status (1706).
§ 2. Federal and State Government of Indians and Their Habitat (1706).
§ 3. Tribal Government Subject to Federal Dominion (1706).
§ 4. Indian Lands and Properties (1707). Allotments (1707). Leases (1708). Actions against Intruders (1708). Descent of Title (1709).
§ 5. Rights and Liabilities of Other Persons in Indian Country Dealing with Indians (1709).
§ 6. Crimes and Offenses by or Relating to Indians (1709).

§ 1. *Who are Indians and what is their legal status.*[28]—A finding by a special examiner as to the fact of membership in a tribe, which has been adopted in two lower courts, will not be disturbed by the Federal supreme court.[29]

§ 2. *Federal and state government of Indians and their habitat.*[30]—Notwithstanding statutes declaring all mineral deposits on public lands open to exploration and purchase, the President has power by proclamation to reserve a portion of the public domain for an Indian reservation.[31]

§ 3. *Tribal government subject to Federal dominion.*[32]—The Choctaw council cannot, without authority of congress or treaty, forfeit improvements of an intruder on lands of the nation.[33] The United States courts in the Indian Territory have no jurisdiction to collect taxes for the Creek Nation.[34] By Act of July 1, 1902, the citizenship court has exclusive jurisdiction to settle all claims of citizenship in the Choctaw and Chickasaw Nations.[35] The Indian Appropriation Act of June 10, 1896, providing for proceedings to determine rights of citizenship in the Five Tribes is not unconstitutional because not providing for notice to the Indians.[36] Under the contract of April 8, 1867, between the Delaware and Cherokee Nations, the registered Delawares acquired in the land only the right of occupancy for life, with the right upon allotment to 160 acres and their improvements, and the descendants of such Delawares took only the rights of other citizens of the Cherokee Nation as regulated by its laws.[37] The Act of June 28, 1898, em-

Mills' Ann. St. 1891-96, § 1511c. See infra, c. 4.

25. Toomey v. Donovan, 158 Mass. 232.

26. Dane v. Cochrane Chemical Co., 164 Mass. 453.

27. Decedent's employer, an independent contractor, erected the staging which fell and the principal employer who did not undertake to supply it was exonerated. Callahan v. Trustees of Phillips Academy, 180 Mass. 183, 62 N. E. 260.

28. See 2 Curr. L. 304.

29. Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401, 48 Law. Ed. 1039.

30. See 2 Curr. L. 304.

31. Entry of a mining location on such land after such proclamation confers no rights. Gibson v. Anderson [C. C. A.] 131 F. 39.

32. See 2 Curr. L. 304.

33. Ansley v. McLoud [Ind. T.] 82 S. W. 908.

34. Buster v. Wright [Ind. T.] 82 S. W. 855.

35. Dawes v. Cundiff [Ind. T.] 82 S. W. 228.

36. Does not deprive them of their property without due process. Dukes v. Goodall [Ind. T.] 82 S. W. 702. Lands apportioned to the members of the Chickasaw and Choctaw Nations remain public lands; therefore prior allottees are not necessary parties to an action to determine citizenship rights of others. As allottees they could be deprived of no rights. Id.

37. Delaware Indians v. Cherokee Nation, 193 U. S. 127, 48 Law. Ed. 646. The agreement of April 18, 1867, between the Delaware and Cherokee Nations cannot be contradicted by parol evidence. Id.

powering Delaware Indians residing in the Cherokee Nation to bring suits in the court of claims to determine their contractual rights in Cherokee Nation lands and funds did not authorize inquiry into legislation of the Cherokee Nation.[38] Chickasaw freedmen whom the United States has not removed from the Chickasaw Nation in compliance with the treaty of July 10, 1866, are not entitled to share as beneficiaries in the fund held in trust by the United States under such treaty.[39]

§ 4. *Indian lands and properties.*[40] *Nature of title.*[41]—Generally they acquire only a qualified interest in property allotted to them and the fact that they subsequently become citizens does not alter the character of their title,[42] but so long as they fulfill the conditions under which they acquired their rights, the property is not subject to the control of congress or the executive branch of the government.[43] Reservation to Indians in a treaty, unless qualified or impliedly restricted, is equivalent to a grant in fee simple.[44] Lands held with full power of alienation are taxable.[45] The United States has a right to protect the conditional ownership of Indians in property allotted to them,[46] and this right cannot be affected by state laws.[47]

Allotments.[48]—Under the Curtis bill, a citizen in possession of only such amount of land as would be his just share of the lands of his nation may continue to use it or receive the rents thereof until allotment.[49] Actual residence on the Umatilla reservation at the time of the passage of the allotment act of March 3, 1885, is not essential to the right to an allotment by a member of one of the confederated tribes enumerated in the act.[50] After the right to an allotment has attached, the act of the allotting commissioners in wrongfully allotting the lands to another does not cut off the rights of the Indian entitled,[51] and the right to an original selection cannot be lost by making another selection under the advice of the Indian agent that rights of the first would not be affected;[52] but where land to which the husband is entitled is allotted to him and his squaw in severalty because of her false representation that she is not his wife, he cannot after obtaining a divorce recover the tract allotted to her.[53]

The jurisdiction conferred on the circuit courts by the act of August 15, 1894, relative to suits by Indians involving their rights to lands allotted to them under

38. Delaware Indians v. Cherokee Nation, 193 U. S. 127, 48 Law. Ed. 646.

39. United States v. Choctaw Nation, 193 U. S. 115, 48 Law. Ed. 640. The Chickasaw freedmen were not adopted into the nation by the congressional approval given by Act of Congress, August 15, 1894, to the Chickasaw legislation of January 10, 1873, where the Chickasaw legislature prior to this approval had refused to adopt the freedmen. Id.

40, 41. See 2 Curr. L. 305.

42. Cattle issued under 25 Stat. 114, for stock raising purposes and not to be sold or slaughtered except by permission of the Indian agent do not become the absolute property of an Indian woman when she marries a white citizen. 25 Stat. 392, provides that such marriage shall not affect the title of tribal property. McKnight v. U. S. [C. C. A.] 130 F. 659. A Creek Indian citizen cannot sell tribal lands to a United States citizen. Denton v. Capital Townsite Co. [Ind. T.] 82 S. W. 852.

43. State courts have no jurisdiction over the land. Indian agent cannot lease it. Bird v. Terry, 129 F. 472.

44. Francis v. Francis [Mich.] 99 N. W. 14.

45. Lands of Pueblo Indians of New Mexico. Territory v. Delinquent Tax List of Bernalillo County [N. M.] 76 P. 307.

46. McKnight v. U. S. [C. C. A.] 130 F. 659.

47. Relative to demand and notice prior to suit brought. McKnight v. U. S. [C. C. A.] 130 F. 659.

48. See 2 Curr. L. 305.

49. The complaint in an action to recover rent must show that plaintiff is a citizen and the land for which he seeks to recover rent is that provided in the act. Hubbard v. Chism [Ind. T.] 82 S. W. 686.

50. Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401, 48 Law. Ed. 1039.

51. Smith v. Bonifer, 132 F. 889.

52. The land department denied the right to an allotment under the first selection. The land was allotted to another after which the department corrected its mistake in not allowing the right. Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401, 48 Law. Ed. 1039.

53. Morrisett v. U. S., 132 F. 891.

any law or treaty, is exclusive, but the United States must be made a party.[54] Under the Act of August 15, 1885, providing that a decree in favor of any claimant to an allotment should have the same effect as an allotment allowed by the secretary of the interior the United States is not a necessary party to an action to determine the respective rights of two Indians to an allotment under this act.[55] Under the Act of August 15, 1894, authorizing Indians claiming to be entitled to an allotment to prosecute an action relative to their right in the Federal court, an Indian claiming the right to an allotment under the Act of March 3, 1885, may maintain an action to have canceled an improper allotment.[56]

Leases.[57]—Unless the privilege is accorded by the terms of the appropriation act,[58] Indian lands cannot be leased without the consent of the Indian agent or congressional authority,[59] and where the lessee was not in possession of the land or crops at the time they were taken by the allottee, he was not entitled to them on the ground of possessory title.[60] The natural guardian of a minor Indian has no power without an order from the court to lease land allotted to his ward.[61] Leases of agricultural Indian land being declared void by the Act of June 28, 1898, a lessee could not, after such act went into effect, maintain unlawful detainer against his subtenant holding over.[62] After the passage of this act, a sublessee may deny the title of the person under whom he entered.[63]

Actions against intruders.[64]—The United States courts in the Indian Territory have jurisdiction of an action of ejectment by an Indian to recover land from an intruder.[65] Under the act giving the commission of the five civilized tribes jurisdiction to determine all matters relating to the allotment of land, the courts of Indian Territory have jurisdiction of ejectment by an Indian to recover lands not allotted.[66] Act June 28, 1898, requires notice to be given an intruder before action commenced to dispossess him. Notice given by a member of the tribe who originally brought the action is sufficient though the nation afterward joined and was made a party.[67] Such an action is primarily based on the right of the tribe and it may be substituted as plaintiff and the original plaintiff stricken out.[68] A complaint under this act is a "sworn complaint" if verified by the authorized attorney of the plaintiff tribe.[69] The intruder must plead the value of his improvements or it cannot be set off against the damages awarded.[70] Where a member of a tribe dispossesses an intruder under Act June 28, 1898, and wrongfully

54. Parr v. U. S., 132 F. 1004.

55. Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401, 48 Law. Ed. 1039.

56. This is not giving the act an invalid retrospective effect. Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401, 48 Law. Ed. 1039.

57. See 2 Curr. L. 305, 306.

58. Under the appropriation act of 1895, the Quapaw Indians may lease their lands. Moore v. Girten [Ind. T.] 82 S. W. 848. Lands allotted under the treaty with the Choctaws and Chickasaws in 1885 may by virtue of subsequent legislation be leased by the Indians for their tribal or individual benefit [Laws Chickasaw Nation, p. 139-190 (30 U. S. Stat. 498)]. McBride v. Farrington, 131 F. 797.

59. The lessee is not entitled as against the allottee to crops. Coey v. Low [Wash.] 77 P. 1077.

60. Coey v. Low [Wash.] 77 P. 1077.

61. Under Indian Territory statutes. Indian Land & Trust Co. v. Shoenfelt [Ind. T.] 79 S. W. 134. The Indian agent has power under the Creek Agreement Act, June 30, 1902, to remove the lessee from lands so leased and put the minor allottee in possession. Id.

62. Owens v. Eaton [Ind. T.] 82 S. W. 746.

63. See 2 Curr. L. 305, n. 32 et seq. Owens v. Eaton [Ind. T.] 82 S. W. 746.

64. See 2 Curr. L. 305, 307.

65. Price v. Cherokee Nation [Ind. T.] 82 S. W. 893. Complaint in an action of ejectment by a Cherokee Indian citizen against an intruder held sufficient. Id.

66. Gooding v. Watkins [Ind. T.] 82 S. W. 913. An Indian suing in ejectment need not allege that he does not possess more than 320 acres. This is matter of defense (32 Stat. 643), making it unlawful for a Chickasaw to hold more than 320 acres. Gooding v. Watkins [Ind. T.] 82 S. W. 913.

67. Hargrove v. Cherokee Nation [C. C. A.] 129 F. 186; Price v. Cherokee Nation [Ind. T.] 82 S. W. 893.

68, 69, 70. Brought v. Cherokee Nation [C. C. A.] 129 F. 192.

withholds possession from the tribe, judgment for damages and for possession may be recovered.[71]

Descent of title.—The title of an allottee descends according to the law prescribed.[72] Land allotted under the Act of March 3, 1885, descends according to the state laws from the time the first patent is issued.[73] On the death of an allottee after issuance of the first patent the state courts have jurisdiction to determine who are his heirs.[74] Under the Act of 1894, the United States circuit court has jurisdiction of a suit involving the descent of an allotment under an act providing that the lands allotted should be held in trust by the United States.[75]

§ 5. *Rights and liabilities of other persons in Indian country dealing with Indians.*[76]—An Indian nation has the right to control the presence within its territory of persons who might otherwise be regarded as intruders.[77] Under the Choctaw and Chickasaw treaty of 1855, these nations are authorized to require a license of traders doing business within their territory.[78] Under the treaty of 1856 with the Creek Indians, a tax collector for the Creek Nation, acting under the direction of the secretary of the interior may close the places of business of intruders within the nation who are trading without a license.[79] The executive department has power to enforce the terms of a treaty and it is not within the jurisdiction of the courts to enjoin the discharge of such duty.[80]

§ 6. *Crimes and offenses by or relating to Indians.*[81]—Though congress put in force in Indian Territory and made it exclusive of all other laws the provisions of Mansfield's Digest relative to criminal law and procedure, yet where the laws of the United States define and provide for the punishment of an offense they will govern.[82] The district courts of Oklahoma when sitting with and exercising the powers of a United States court have exclusive jurisdiction of all crimes punishable by the laws of the United States when committed by persons other than

71. Hargrove v. Cherokee Nation [C. C. A.] 129 F. 186.

72. By act of congress (24 Stat. 389), providing that certain land of allottees in Indian Territory shall descend according to the law of Kansas, the word "children" in the Kansas statute means "kindred" and a half brother takes to the exclusion of uncles and cousins. Finley v. Abner [C. C. A.] 129 F. 734.

73. United States was to hold this land in trust for twenty-five years after first patent issued and then patent it in fee to the allottee. Kalyton v. Kalyton [Or.] 78 P. 332.

74. United States is not a necessary party. Kalyton v. Kalyton [Or.] 78 P. 332.

75. Patawa v. U. S., 132 F. 893.

76. See 2 Curr. L. 306.

77. Chickasaw legislation imposing an annual privilege tax on live stock held by noncitizens within the limits of the nation is constitutional, such legislation having been approved by the president. Morris v. Hitchcock, 194 U. S. 384, 48 Law. Ed. 1030. The Federal constitution is not violated by regulations promulgated by the secretary of the interior for the enforcement and collection of this tax. Id.

78. This right was not taken away by Act of Congress May 27, 1902. Zevely v. Weimer [Ind. T.] 82 S. W. 941.

79. Buster v. Wright [Ind. T.] 82 S. W. 855.

80. Ejecting merchants who refuse to take out a license as required by legislation of the Indian council. Zevely v. Weimer [Ind. T.] 82 S. W. 941. An order of the Department of the Interior that persons trading in Indian country and refusing to take out a license shall close up their place of business is a legal writ of process. Id.

81. See 2 Curr. L. 307.

NOTE. United States or territorial courts: Under Rev. St. § 145, the district court in a territory will take jurisdiction of a homicide committed by an Indian on a white man on a reservation within the territory to the exclusion of the territorial court. United States v. Monte, 3 N. M. 126; United States v. Kan-gi-shanci, 27 Int. Rev. Rec. 394.

The Act of 1885, did not take away the jurisdiction of United States courts over crimes committed by persons other than Indians upon reservations. Ex parte Wilson, 140 U. S. 575, 35 Law. Ed. 513. Murder committed in a territory on a reservation is within the jurisdiction of the United States courts (Shapoonmash v. U. S., 1 Wash. T. 189), but for crimes committed by Indians within a territory, suit must be brought in a territorial court (Re-Gon-Shay-ee, 130 U. S. 343, 32 Law. Ed. 973.—From note to State v. Campbell [Minn.] 21 L. R. A. 173.

82. Indictment for receiving stolen goods held sufficient under Rev. St. U. S. § 5357 [U. S. Comp. St. 1901, p. 3625]. Bise v. U. S. [Ind. T.] 82 S. W. 921.

Indians upon a reservation, the Indian title to which has not been extinguished,[83] but an Indian allottee under an allotment which confers upon him the rights of citizenship is also subject to the jurisdiction of the state court for an offense committed on the reservation.[84] A state court has no jurisdiction to prosecute an Indian for a violation of state game laws committed on a reservation.[85] Under an act making it an offense to sell liquor to an Indian, the fact that the seller did not know the person to whom he sold was an Indian is no defense.[86] Federal legislation forbidding the sale of intoxicants to any Indian, a ward of the nation, applies to students at Carlisle.[87]

83. It is not necessary to charge in the indictment that the defendant was not an Indian under Act March 3, 1885 [23 Stat. 385]. Herd v. U. S., 13 Okl. 512, 75 P. 291. Murder committed by a white man on the reservation. Welty v. U. S. [Okl.] 76 P. 121.

84. Act of Congress Feb. 8, 1887 [24 Stat. 388]. In re Now-Ge-Zhuck [Kan.] 76 P. 877.

85. Act Cong. Oct. 1, 1890 (26 Stat. 658), providing for a reduction of Round Valley Reservation, authorizing a survey of the lands and an allotment of them to Indians residing on the reservation did not exclude the land from the reservation. In re Lincoln, 129 F. 247.

86. Act Congress Jan. 30, 1897 [29 Stat. 506]. United States v. Stofello [Ariz.] 76 P. 611.

87. Act Jan. 30, 1897, c. 109 [29 Stat. 506]. United States v. Belt, 128 F. 168.